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Current Legal Forms for Real Estate

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Current Legal Forms for Real Estate
Chapter 20 REAL ESTATE ENTITIES

24-20 Current Legal Forms for Real Estate 20.syn

AUTHOR: by Stephen E. Pigott and Harold O. Maxfield, Jr.

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by Stephen E. Pigott and Harold O. Maxfield, Jr.n*

FOOTNOTES:

(n1)Footnote *. Stephen E. Pigott (Tax Background) and Harold O. Maxfield, Jr. (Practice Background; Drafting Guidelines and Forms) are members of the Ohio law firm of Cavitch, Familo, Durkin & Frutkin.



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Current Legal Forms for Real Estate
Chapter 20 REAL ESTATE ENTITIES
Part I. The Tax Background

24-20 Current Legal Forms for Real Estate § 20.01

AUTHOR: by Stephen E. Pigott and Harold O. Maxfield, Jr.

§ 20.01 Summary of the Tax Background

§ 20.02 Introduction: Choosing an Entity for Real Estate Ownership. Tax and nontax considerations affect taxpayer's choice for form of ownership of real estate used for business or investment purposes. Each form of ownership has a specific tax pattern recognized by Code, resulting in varying advantages and disadvantages in different situations.

§ 20.03 Sole Proprietorships. Because a sole proprietorship is not a separate legal entity, title to such property is held in proprietor's name and property is operated, for legal and tax purposes, as that of owner. Under certain circumstances, an entity may be disregarded for federal income tax purposes and shall be taxed as a sole proprietorship.

§ 20.04 Co-ownership and Joint Venture. Real estate joint venture is not a partnership for tax purposes if it is mere joint undertaking to share expenses, or if it involves mere co-ownership of property which is maintained, kept in repair, and rented or leased. Under investing partnership exception, organization which fits definition of a partnership may elect to be excluded from partnership provisions if formed or used for investment purposes only and not for active conduct of business.

§ 20.05 Partnerships and Limited Liability Companies: Characteristics and Classification. Partnerships and limited liability companies offer tax advantages over corporations. Under check-the-box Regulations, partnership tax classification is assured for all partnerships and limited liability companies, regardless of entity characteristics.

§ 20.06 Partnerships and Limited Liability Companies: Tax Treatment. Partnership or limited liability company entity is disregarded for tax purposes, so that only partners or members in individual capacities are liable for payment of income tax. All partnership items of income, gain, deduction, loss, and credit are allocated to partners in proportion to their respective interests in partnership.

§ 20.07 Corporations. Transfer of property to new or existing corporation solely in exchange for its stock or securities is tax-free, but nonrecognition provision applies only if transferors are in control of transferee corporation immediately after exchange. Corporations, other than closely-held or personal service corporations, are exempt from passive activity

loss limitations.

§ 20.08 Real Estate Investment Trusts (REITs): Qualification Requirements. A corporation, trust, or association may qualify for status as a real estate investment trust (REIT) if it meets Code requirements for organization, asset ownership, sources and distribution of income, and reporting, and makes a valid election. REIT status permits entity to be treated as a conduit for tax purposes, so that its income is passed through to shareholders without tax at entity level.

§ 20.09 Real Estate Investment Trusts (REITs): Taxation of a REIT and Its Shareholders. Real estate investment trust, although taxable at regular corporate rates, may avoid taxation by taking deduction for dividends distributed to shareholders in computing its taxable income. Shareholders treat such distributions as ordinary income, except for those attributable to capital gains.

§ 20.10 Cooperative Housing Corporations. Tenant-stockholders of a qualified cooperative housing corporation may deduct their proportionate share of real estate taxes and mortgage interest paid by the corporation. If cooperative apartment is used in trade or business or for production of income, tenant-stockholder may also take depreciation deduction for cost of stock attributable pro rata to proprietary lease or tenancy. Although cooperative corporation is taxpaying entity which must file an income tax return, it generally can avoid tax liability.

§ 20.11 Condominium and Homeowners Associations. Organization may qualify for tax-exempt status as homeowners association if it makes proper election and meets tests as to its function, income, and expenditures. Homeowners association is not taxed on its "exempt function income," but all other income is taxed at 30 percent rate. Individual unit owners are entitled to same deductions for taxes, interest, and other items relating to ownership of real property as are other individual owners of real property.

§ 20.12 Sale of a Residential Cooperative or Condominium Unit. Sale of a residential cooperative or condominium unit involves essentially same rules as apply to sale of any other personal residence. Thus, general Code provisions relating to exclusion of gain on disposition of principal residence apply equally to owners of residential cooperative apartments and condominium units.

§ 20.13 Time Sharing. Time sharing arrangement is a form of coownership, accompanied by agreement as to periods when coowners may use the property. When time share property is rented to others, rules limiting deductibility of rental deductions are applied to all owners in the aggregate.

Legal Topics:

For related research and practice materials, see the following legal topics:

Business & Corporate LawGeneral PartnershipsGeneral OverviewBusiness & Corporate LawLimited Liability CompaniesGeneral OverviewBusiness & Corporate LawSole ProprietorshipsReal Property LawCommon Interest CommunitiesTimesharesReal Property LawOwnership & TransferBusiness & Corporate EntitiesReal Property LawTrustsHolding TrustsReal Property LawTrustsReal Estate Investment Trusts (REITs)Tax LawFederal Income Tax ComputationSales & ExchangesBusiness Property (IRC secs. 1031, 1221, 1231)Property Held for Productive Use & InvestmentTax LawState & Local TaxesIncome TaxPartnerships



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Current Legal Forms for Real Estate
Chapter 20 REAL ESTATE ENTITIES
Part I. The Tax Background

24-20 Current Legal Forms for Real Estate § 20.02

AUTHOR: by Stephen E. Pigott and Harold O. Maxfield, Jr.

§ 20.02 Introduction: Choosing an Entity for Real Estate Ownership

Real estate owned for business use or investment is owned in many different forms. The most common forms of ownership for real estate are sole proprietorships, tenancies in common, joint ventures, partnerships, limited liability companies, and corporations (including S corporations). More specialized types of ownership include real estate investment trusts, cooperatives, condominiums, and time sharing.

In deciding what form of ownership to choose when investing in real estate for business or investment purposes, the taxpayer must be guided by both tax and nontax considerations. The nontax factors relate to conveniences in operation, marketability, liability, transferability of interests, and the like. Whatever the form of ownership, each falls into a specific tax pattern recognized by the Code with varying advantages and disadvantages in different situations.ⁿ¹

Planning Note

Choice of Entity Not Important for Ownership of Personal Residence

The tax and nontax considerations that affect the owner's choice of an entity to own business or investment real estate usually have little relevance when property is held for personal use, such as a residence. Title to a personal residence is almost always taken in the individual's name alone. If there is more than one owner, title is in some form of joint ownership, such as tenants by the entirety if the owners are married.

Legal Topics:

For related research and practice materials, see the following legal topics:

Real Property Law Estates Concurrent Ownership Tenancies by Entireties Real Property Law Ownership & Transfer General Overview Real Property Law Ownership & Transfer Business & Corporate Entities Real Property Law Trusts Real Estate Investment Trusts (REITs) Tax Law Federal Income Tax Computation Sales & Exchanges Business Property (IRC secs. 1031, 1221, 1231) Property Held for Productive Use & Investment Tax Law Federal Taxpayer

GroupsC CorporationsREITs, REMICs, RITs & FASITs (IRC secs. 851-860L, 4981-4982, 6697)

FOOTNOTES:

(n1)Footnote 1. The various tax and nontax considerations relating to the ownership and operation of business or investment real estate, as well as the specific Code provisions applicable to the different forms and techniques of real estate ownership, are discussed in the following sections of this chapter.



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Current Legal Forms for Real Estate
Chapter 20 REAL ESTATE ENTITIES
Part I. The Tax Background

24-20 Current Legal Forms for Real Estate § 20.03

AUTHOR: by Stephen E. Pigott and Harold O. Maxfield, Jr.

§ 20.03 Sole Proprietorships

Real estate may be held by a business operated as a sole proprietorship. Because a sole proprietorship is not a separate legal entity, title to the property is held in the proprietor's name, so that it is owned and operated, for legal and tax purposes, as that of the owner. The proprietor, in effect, is treated like any other individual who owns and operates business or investment real estate.

A sole proprietorship has several important advantages and disadvantages. From the nontax standpoint, an important advantage is simplicity and ease of operation. When property is owned in the individual proprietor's name and no separate legal entity is involved, the recordkeeping requirements (and related costs) for the business are less. Another important nontax advantage is the exclusive control that the proprietor, as the sole owner, has over the management of the property. On the other hand, because title to the property is held in the owner's name, the owner is subject to unlimited personal liability for all debts or claims (e.g., tort) that may arise from ownership or operation of the property. It should be noted, however, that many claims may be covered by insurance.

From the tax standpoint, the principal advantage of a sole proprietorship is that it is not subject to double taxation, as in the case of a regular C corporation. Because the sole proprietorship is not a separate legal entity, only the individual owner is taxed.ⁿ¹ Depending upon whether the property is expected to be income producing and amount of income that is anticipated, the owner might prefer to own it as proprietor and have the income be subject to individual income tax rates, rather than corporate rates, which tend to rise more steeply and top out at a higher rate.ⁿ² When tax losses are anticipated, it may be advantageous to own the property in proprietorship form, so that the losses can be applied against and reduce the owner's other income on his or her individual income tax return.ⁿ³

In most states, a sole proprietor has the option of obtaining complete protection from any liabilities arising out of the business, without incurring the significant administrative costs usually associated with forming and operating a separate business entity. That option is available in those states that allow a limited liability company (LLC) to be formed and owned by a single member. The insulation from liability that is lacking in the usual sole proprietorship is afforded by the state statute under which the LLC is formed. Ordinarily, an LLC is treated as a partnership for tax purposes,ⁿ⁴ and

although it does not itself have to pay tax on the earnings that flow through to, and are taxable to, the partners, the entity must nonetheless file an annual information return on Form 1065 and otherwise meet a number of compliance and recordkeeping requirements. Those requirements do not apply to a single-member LLC because it is treated as a proprietorship for tax purposes,ⁿ⁵ and the earnings from the business will still be reported on Schedule C of the member's personal Form 1040. So that option allows the proprietor limited liability without significant administrative costs. Additionally, the IRS has even stated in several private letter rulings that a party which purchases a disregarded entity that owns real estate will be treated as though such party purchased the real estate and not the entity. [PLRs 9751012, 985001, and 9807013]. This can be useful in the context of a like-kind exchange under *Section 1031 of the Internal Revenue Code*. Normally, Section 1031 would not apply to a transaction where real estate is exchanged for a membership interest in a limited liability company, because the exchanged assets would not be of Alike-kind.[@] However, a sole member limited liability company is disregarded for federal income tax purposes. As a result, a taxpayer may accomplish a like-kind exchange under Section 1031 by acquiring a sole member limited liability company that owns real estate as its exclusive asset, because the taxpayer will be deemed to have acquired the underlying real estate as the replacement property for the real estate being relinquished [PLRs 9751012, 985001 and 9507013].

Legal Topics:

For related research and practice materials, see the following legal topics:

Business & Corporate Law Limited Liability Companies Members & Other Constituents Business & Corporate Law Sole Proprietorships Tax Law Federal Taxpayer Groups Limited Liability Companies & Partnerships Tax Accounting (IRC secs. 701-703, 706) General Overview

FOOTNOTES:

(n1)Footnote 1. See § 20.07, *infra*, for a discussion of double taxation where a C corporation distributes its profits to the shareholder.

(n2)Footnote 2. *IRC §§ 1 and 11.*

(n3)Footnote 3. Profits and losses from a sole proprietorship are reported by the individual owner on Schedule C of Form 1040. Thus, any profit from the proprietorship business must be added to the owner's income and any losses from the business may be used to reduce the owner's other income. It should be noted, however, that the owner's ability to claim losses is limited both by the at-risk rules under *IRC § 465*, which generally allow an owner to deduct losses only up to the amount of the owner's tax basis in the business, and by the passive activity rules under *IRC § 469*, which provides that losses arising from so-called "passive activities" (those in which the owner does not "materially participate") cannot be used to offset nonpassive income.

(n4)Footnote 4. *See § 20.05, supra.*

(n5)Footnote 5. *Treas. Reg. § 301.7701-3(b)(ii)*. Under the check-the-box Regulations, discussed in detail in § 20.05, *supra*, the default classification for a single member LLC is a disregarded entity (i.e., a sole proprietorship). An affirmative election can be made to have the LLC treated as a corporation for tax purposes. It would be rare for such an election to be made because it would give rise to several tax disadvantages and gain no nontax benefits for the owner. A single member LLC cannot qualify as a partnership for tax purposes because it does not have the requisite two or more persons engaging in a joint enterprise for profit.



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Current Legal Forms for Real Estate
Chapter 20 REAL ESTATE ENTITIES
Part I. The Tax Background

24-20 Current Legal Forms for Real Estate § 20.04

AUTHOR: by Stephen E. Pigott and Harold O. Maxfield, Jr.

§ 20.04 Co-ownership and Joint Venture

[1] In General

Generally, a joint venture is an unincorporated union of two or more persons or entities in a business enterprise with well-defined restrictions on its scope, duration, or activities. An example would be two businesses that unite to work collaboratively on the construction of a building and that no longer have any business ties upon the completion of that project. If the joint venture involves the acquisition or holding of real estate, one of the first questions that arises is the form in which title to the property should be taken by the joint venturers. Often, title is taken in the name of all of the participants as tenants in common. Sometimes, title is taken in the name of the joint venture.ⁿ¹ This technical problem of how title should be held often depends upon the number of participants in the joint venture and the extent and duration of the proposed real estate activity; it is governed by rules of local real estate law, considerations of title, control, and the practice of title insurance companies.

[2] Tax Classification: Co-ownership vs. Partnership Tax Status

An important tax issue is whether a real estate joint venture or similar venture for the co-ownership of real property is subject to the Code's partnership provisions,ⁿ² or whether the co-owners can compute and report their respective shares of income or losses separately and without reference to those provisions. If the venture is classified as a mere co-ownership, the partnership provisions are not applicable. Moreover, even if a venture has the technical characteristics of a partnership, it may be excluded from the partnership provisions if it qualifies as an "investing partnership."ⁿ³ If a venture does not fall into either of these two categories, i.e., as a mere coownership or an investing partnership, then the Code's partnership provisions will be applicable. Neither the characterization of the relationship in the joint venture agreement nor its status under state law is determinative for income tax purposes. For these purposes, the tax classification of the venture depends upon the applicable provisions of the Code and the regulations.ⁿ⁴

The Code defines a partnership to include "a syndicate, group, pool, joint venture or other unincorporated organization through or by means of which any business, financial operation, or venture is carried on, and which is not, within the meaning of [the Code], a corporation or a trust or estate."ⁿ⁵ Neither a joint undertaking merely to share expenses nor

the mere co-ownership of property which is maintained, repaired and leased constitutes a partnership for tax purposes.ⁿ⁶

Thus, each co-owner treats his own interest in the property separately, without concern for the rules of partnership taxation. Tenants in common, however, can become partners if they actively carry on a trade, business, financial operation, or venture and divide the profits. For example, co-owners of an apartment building may be deemed partners for tax purposes if they not only lease space but also provide services to the occupants directly or through an agent.ⁿ⁷ On the other hand, no partnership is created where co-owners agree to appoint an agent to manage, collect rent, and sell property.ⁿ⁸ Similarly, no partnership exists where corporate co-owners of an apartment project retain an unrelated corporation to manage the project.ⁿ⁹

[3] Limited Election to be Excluded from Partnership Taxation

The Code excludes from partnership status certain borderline business relationships even though they technically could come within the definition of a partnership. An unincorporated group of real estate owners may elect to be excluded from the operation of all or part of the partnership provisions if the organization is organized and used for investment purposes only and not for the active conduct of a business, and if the income of the members can be adequately determined without the computation of partnership taxable income.ⁿ¹⁰

[a] Investing Partnership Exclusion

An organization may elect to qualify as an "investing partnership," and thus not be governed by the partnership tax rules, if the members are participants in the joint purchase, retention, sale, or exchange of investment property, and meet the following requirements:

- (1) They own the property as co-owners;
- (2) They reserve the right separately to take or dispose of their shares of the property; and
- (3) They do not actively conduct business or irrevocably authorize other persons acting in a representative capacity to purchase, sell, or exchange the property (although each separate participant may delegate authority to purchase, sell, or exchange his share of the investment property for the time being for his account, but not for a period of more than one year).ⁿ¹¹

For example, a syndicate for investment in land or in improved real estate subject to a lease under which the lessee incurs all of the operating expenses would be eligible as an investing partnership. The "active conduct of business" restriction, however, would seem to exclude a syndicate which operates an office building or an apartment house, whether directly or through an agent.

[b] Election Procedure

The election to be excluded from treatment as a partnership is made by filing a properly executed partnership return containing the name and address of the organization, together with a statement containing the names and addresses of all members, and statements that the organization qualifies for the election and that all its members so elect. The return should also have a statement attached which shows the identification number of all members and indicates where a copy of the organization's operating agreement is available.ⁿ¹² The Service will not question the statement that all of the members have elected investing partnership status.ⁿ¹³ The election is not effective, however, if any member notifies the Commissioner that he desires the partnership provisions to apply. This notice must be filed within 90 days after the organization is formed, and must state that the member has so notified all other members by registered mail.ⁿ¹⁴ The election is irrevocable so long as the organization remains qualified, except with the consent of the Commissioner.ⁿ¹⁵ It is not affected by the sale of a member's interest.ⁿ¹⁶ After the first year, the organization is not required to file a

partnership return.

A qualified organization which wishes to be excluded from the operation of only certain partnership rules may request partial exclusion by filing an application with the Commissioner within 90 days after the beginning of the first taxable year for which such treatment is desired. The request for partial exclusion must set forth certain specified information, and is effective only upon approval by the Commissioner and subject to whatever conditions are imposed by the Commissioner.ⁿ¹⁷

Planning Note

Extent of Business Activities Determine Tax Status.

Determination of whether a venture is a coownership arrangement or a partnership in any given case usually depends upon the extent of the venture's business activities. If the relationship is solely for the co-ownership of property and not for the active conduct of a business, the characteristics of a partnership are absent.

Legal Topics:

For related research and practice materials, see the following legal topics:

Business & Corporate LawJoint VenturesGeneral OverviewBusiness & Corporate LawJoint VenturesFormationReal Property LawOwnership & TransferBusiness & Corporate EntitiesTax LawFederal Tax Administration & ProcedureAdministrationIdentification Numbers & Information Returns (IRC secs. 6031-6065)Partnership Income ReturnsTax LawFederal Taxpayer GroupsLimited Liability Companies & PartnershipsDefinitionsGeneral OverviewTax LawFederal Taxpayer GroupsLimited Liability Companies & PartnershipsDefinitionsPartners & PartnershipsTax LawFederal Taxpayer GroupsLimited Liability Companies & PartnershipsPartnership Tax Returns (IRC sec. 6031)General Overview

FOOTNOTES:

(n1)Footnote 1. In some cases, a nominee is designated to hold title for the benefit of the joint venture.

(n2)Footnote 2. The partnership provisions are contained in subchapter K of chapter 1 of the Code, *IRC § 701, et seq.*

(n3)Footnote 3. *IRC § 761(a); Treas. Reg. § 1.761-1* and 2.

(n4)Footnote 4. *Treas. Reg. §§ 1.761-1(a); 301.7701-1; 301.7701-2; and 301.7701-3.* For tax classification of an entity as a partnership or an association taxable as a corporation, see § 20.05[4], *infra*; see also The Tax Background to Chapter 1, Volume 1.

(n5)Footnote 5. *IRC §§ 761(a), 7701(a)(2); Treas. Reg. §§ 761-1(a), 301.7701-3(a).*

(n6)Footnote 6. *Treas. Reg. § 1.761-1(a).*

(n7)Footnote 7. *Treas. Reg. § 1.761-1(a).*

(n8)Footnote 8. *Gilford v. Comm'r*, 201 F.2d 735 (2nd Cir. 1953) ; *Powell v. Comm'r*, TC Memo 1967-32 ; cf. *Estate of Langer v. Comm'r*, 16 TC 41 (1951) , *aff'd sub nom. Lindsey v. Comm'r*, 194 F.2d 288 (9th Cir. 1952) ; *Lichtenberg v. Comm'r*, TC Memo 1966-189 .

(n9)Footnote 9. *Rev. Rul. 75-374, 1975-2 C.B. 261 .*

(n10)Footnote 10. *IRC § 761(a)*.

(n11)Footnote 11. *Treas. Reg. § 1.761-2(a)(2)*.

(n12)Footnote 12. *Treas. Reg. § 1.761-2(b)(1)* (time for making election) and (b)(2) (method of making election). For requirements with respect to the filing of a return on Form 1065 by a partnership, see *Treas. Reg. § 1.6031-1*, and discussion in The Tax Background to Chapter 1, Volume 1.

(n13)Footnote 13. *Rev. Rul. 56-500, 1956-2 C.B. 464* .

(n14)Footnote 14. *Treas. Reg. § 1.761-2(b)(3)(1)* (effect of election: in general). As to circumstances under which an election is deemed to have been made, see *Treas. Reg. § 1.761-2(b)(2)(ii)*.

(n15)Footnote 15. Application for permission to revoke the election must be submitted to the Commissioner of Internal Revenue, Attention: T:1, Washington, D.C. 20224, no later than 30 days after the beginning of the first taxable year to which the revocation is to apply. *Treas. Reg. § 1.761-2(b)(3)(i)*.

(n16)Footnote 16. *Rev. Rul. 56-500, 1956-2 C.B. 464* .

(n17)Footnote 17. *Treas. Reg. § 1.761-2 (c)*.



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Current Legal Forms for Real Estate
Chapter 20 REAL ESTATE ENTITIES
Part I. The Tax Background

24-20 Current Legal Forms for Real Estate § 20.05

AUTHOR: by Stephen E. Pigott and Harold O. Maxfield, Jr.

§ 20.05 Partnerships and Limited Liability Companies: Characteristics and Classification

[1] General vs. Limited Partnership; Nontax Considerations

The choice of a partnership as the form for carrying on a real estate business depends upon a combination of nontax and tax considerations. The principal nontax factor is the unlimited personal liability of general partners for all of the partnership debts and obligations. This could be a deterrent to the use of the general partnership form in any business enterprise. The problem of unlimited liability has been resolved, particularly in the area of ownership and operation of real estate, by the use of the limited partnership and insurance. Limited partners, unlike general partners in a general or limited partnership, are not liable for the partnership's obligations or the other partners' wrongful acts except to the extent of their agreed-upon capital contribution. In order to qualify as a limited partnership, however, the enterprise must meet the organizational requirements of the particular state in which it is formed, such as the filing of a proper certificate of limited partnership. In addition, the enterprise must comply with the particular state's substantive requirements for limited partnership status. For example, there must be at least one general partner with unlimited liability for partnership obligations, and none of the limited partners can participate in the management of the partnership or otherwise take an active part in the control of its business. Failure to satisfy these various organizational and substantive requirements will result either in the denial of limited partnership status or in the particular limited partner being held liable to partnership creditors as a general partner.ⁿ¹

[2] Partnership vs. Corporation; Nontax Considerations

Several major nontax characteristics distinguish a partnership from a corporation, and all must be weighed carefully when considering whether to hold real property in the partnership or corporate form. The most important nontax consideration, as in the case of the general partnership versus limited partnership distinction, is that of unlimited liability. Partners in a general partnership and general partners in a limited partnership have unlimited personal liability. On the other hand, the liability of corporate shareholders, as in the case of limited partners, is limited to the amount of their agreed-upon capital contribution to the organization.

A partnership has several other important nontax disadvantages, as compared to the corporate form. For example, the

death or withdrawal of a partner results in dissolution of the partnership unless the partners agree otherwise in the partnership agreement; on the other hand, a corporation has perpetual continuity of life. Also, a partnership does not have the ease of interest transferability that exists with respect to a corporation, because a general partner must usually obtain the consent of all other partners to transfer his partnership interest and substitute the transferee for himself. Often, a corporate shareholder may transfer his interest without restrictions.ⁿ²

[3] Limited Liability Company vs. Partnership and Corporation; Nontax Considerations

It can fairly be said that a limited liability company combines the most important nontax benefit of a corporation, limited liability for all of the owners, with the tax benefits of a partnership, which are discussed below. The liability of members of a limited liability company for the entity's obligations or the other members' wrongful acts is, like that of corporate shareholders, limited to their respective agreed-upon capital contributions. But for tax purposes, a limited liability company is taxable as a partnership. Therefore, it is the preferred choice over a general partnership or a limited partnership for most real estate ventures.

[4] Comparison of Partnership and Corporate Taxation

The choice of organizing as a partnership (or a limited liability company which, as noted above, is treated as a partnership for tax purposes) or a corporation often depends upon various tax considerations, which may be more important than the nontax factors discussed above. One such tax consideration that is important is the fact that partnerships are not taxed as such. Rather, each partner is taxed on his share of partnership earnings, regardless of whether those earnings are distributed to him. Under this conduit or pass-through theory, all items of income, deduction, loss, and credit are allocated to the partners in proportion to their respective interests in the partnership.ⁿ³ By contrast, a regular C corporation (i.e., one with respect to which an election to be an S corporation is not in effect) is itself subject to tax on its net earnings, and those earnings are again taxable to the shareholders if and when they are distributed as dividends to the shareholders.ⁿ⁴

There are many situations in which the pass-through nature of a limited liability company and partnership taxation make one of those forms desirable in order to secure for the members or partners, in proportion to their respective interests in the entity, the pass-through tax benefit of depreciation, operating losses, or other deductions. This consideration is especially important in the context of real estate, where depreciation or cost recovery taken on partnership property often results in losses which may be passed through to the partners and used to offset their personal income from other sources.ⁿ⁵ Thus, where such pass-through of losses is an important consideration, the taxpayer should consider organizing in the limited liability company or partnership form.

An S corporation also is a pass-through entity for tax purposes. It is not subject to tax on its income.ⁿ⁶ Instead, its income flows through to its shareholders and is included on their individual income tax returns, regardless of whether any of the corporation's earnings are actually distributed to the shareholders.ⁿ⁷ S corporations, however, are much less flexible entities taxwise than are limited liability companies and partnerships. S corporations may only have up to 75 shareholders,ⁿ⁸ and are subject to numerous restrictions on who is permitted to be a shareholder. Generally, only individuals and certain estates and trusts are eligible.ⁿ⁹ And none of the shareholders may be a nonresident alien.ⁿ¹⁰ Also, an S corporation may only have one class of stock, unless the only distinguishing feature of the second class is that it is nonvoting stock.ⁿ¹¹ So, it is not possible, for example, to offer some of the investing shareholders a preferred return over other owners as an inducement to invest.

Another important difference between partnership and S corporation tax treatment is that a partner's basis in his partnership interest includes not only the amount he contributed to the partnership and his proportionate share of the undistributed earnings of the partnership, but also his proportionate share of the partnership's liabilities.ⁿ¹² The liabilities of an S corporation are not part of an S corporation shareholder's stock basis. That difference can be significant if substantial tax losses are anticipated because the at-risk rules in the Code limit a partner's and an S

corporation shareholder's opportunity to claim those losses on his personal tax return and offset other income, by allowing the losses to be taken only to the extent of the partner's or shareholder's tax basis in his ownership interest.ⁿ¹³ Thus, having a greater basis because of the inclusion of partnership liabilities is a potentially great advantage to a partner that is not afforded to an S corporation shareholder.

[5] Tax Classification as Partnership or Corporation

As indicated above, a significant tax consideration in determining whether an entity should be organized as a limited liability company or partnership, on the one hand, or a corporation, on the other hand, is the single tax on partnership income and the double tax on corporation-shareholder income. Ultimately, this factor often operates to the disadvantage of the corporation, so that there is usually a benefit to qualifying as a partnership for tax purposes.

Under the check-the-box regulations, a partnership may choose between being classified as an association (taxable as a corporation) or its "default" classification as a partnership.ⁿ¹⁴ In the absence of an affirmative election otherwise, the "default" classification will control. Thus, absent the rare circumstance of filing an election to be treated otherwise, all partnerships, both general and limited, and all limited liability companies will automatically be classified as a partnership for tax purposes. Although, under the Regulations, the default classification of a partnership is likely to be the tax classification desired by its owners, the rules provide that a partnership may elect out of its default status by electing to be classified as an association taxable as a corporation.ⁿ¹⁵ Likewise, an entity which has elected out of its default status may elect to return to its default classification.ⁿ¹⁶ The election is made on Treasury Form 8832 and cannot be effective any earlier than 75 days prior to the date the election is filed or more than 12 months after the date of filing. Absent consent from the Commissioner, an election to change an entity's classification is not allowed if a change in classification has occurred within the prior five years. Such consent generally will be granted only where a more-than-50% change of ownership has occurred with respect to the entity.ⁿ¹⁷

Planning Note

Be cautious about changing entity classifications.

Although the Regulations permit an entity to convert back and forth from corporation to partnership or non-entity status, a careful analysis of the tax consequences of such a conversion should be made prior to making the election. Such a conversion could have substantial adverse tax consequences. For example, the conversion of an entity from "corporation" status to "partnership" status could have immediate tax consequences to the entity and/or its owners in the event the conversion is treated as a deemed liquidation of the old "corporation."

[6] Publicly Traded Partnerships Taxed as Corporations

A publicly traded partnership (including a master limited partnership) is treated as a corporation for federal income tax purposes unless 90 percent or more of its gross income is qualifying (passive-type) income.ⁿ¹⁸ A publicly traded partnership that is registered under the Investment Company Act of 1940 is generally treated as a corporation. A publicly traded partnership is defined as a partnership the interests of which are (1) traded on an established securities market, or (2) readily tradable on a secondary market (or the substantial equivalent).ⁿ¹⁹ Relief from classification as a corporation is provided for a partnership that inadvertently fails to meet the 90 percent requirement that its gross income be passive-type income.ⁿ²⁰ Relief is available if the Treasury Secretary determines that the failure was inadvertent, if within a reasonable time after the discovery of such failure steps are taken so that the partnership once more meets the 90 percent gross income requirements, and if the partnership agrees to make adjustments (including adjustments with respect to the partners) or to pay amounts as required by the Secretary. The Treasury is authorized to withhold the relief allowances if the publicly traded partnership inadvertently fails to meet the 90 percent test in each of several successive years, or in several years within a longer period, thus causing the partnership to be treated as a corporation in these

circumstances.n21

Legal Topics:

For related research and practice materials, see the following legal topics:

Business & Corporate LawGeneral PartnershipsGeneral OverviewBusiness & Corporate LawGeneral PartnershipsManagement Duties & LiabilitiesRights of PartnersGeneral OverviewBusiness & Corporate LawLimited PartnershipsManagement Duties & LiabilitiesContracts LawTypes of ContractsPartnership AgreementsTax LawFederal Income Tax ComputationDeductions for LossesPassive Activity Loss (IRC sec. 469)Tax LawFederal Taxpayer GroupsC CorporationsDividends (IRC secs. 316, 561-565)Tax LawFederal Taxpayer GroupsLimited Liability Companies & PartnershipsGeneral OverviewTax LawFederal Taxpayer GroupsS CorporationsElections (IRC secs. 1362-1363)EffectsTax LawFederal Taxpayer GroupsS CorporationsShareholders (IRC secs. 1361, 1362, 1366, 1377)General OverviewTax LawFederal Taxpayer GroupsS CorporationsShareholders (IRC secs. 1361, 1362, 1366, 1377)Determination of Tax LiabilityTax LawState & Local TaxesIncome TaxPartnerships

FOOTNOTES:

(n1)Footnote 1. The formation and operation of limited partnerships, including the relationship between the general and limited partners and the rights and liabilities of the partners as between themselves and outside parties, are generally governed by the Uniform Limited Partnership Act (ULPA), which has been adopted, in whole or in part, by most jurisdictions.

(n2)Footnote 2. For a further discussion of the nontax aspects of partnerships (both general and limited), including the governing provisions of the Uniform Partnership Act and the Uniform Limited Partnership Act, see The Tax Background to Chapter 1, in Volume 1.

(n3)Footnote 3. *IRC* §§ 701 and 702. For further discussion of taxation of partnership and individual partner's income, see § 20.06, *infra*.

(n4)Footnote 4. *IRC* §§ 11, 301 and 316. The income of an S corporation, however, is subject only to a single tax at the shareholder level. *IRC* §§ 1361-1379.

(n5)Footnote 5. The ability of owners to offset income from other sources with losses arising from a real estate venture are limited both by the "at risk" rules under *IRC* § 465 and the passive activity rules under *IRC* § 469. Both are discussed in § 20.07, *infra*.

(n6)Footnote 6. *IRC* § 1363.

(n7)Footnote 7. *IRC* § 1366.

(n8)Footnote 8. *IRC* § 1361(b)(1)(A).

(n9)Footnote 9. *IRC* § 1361(b)(1)(B).

(n10)Footnote 10. *IRC* § 1361(b)(1)(C).

(n11)Footnote 11. *IRC* §§ 1361(b)(1)(D) and 1361(c)(4).

(n12)Footnote 12. *IRC* § 752.

(n13)Footnote 13. *IRC* § 465.

(n14)Footnote 14. *Treas. Reg.* § 301-7701-3(a).

(n15)Footnote 15. *Treas. Reg. § 301-7701-3(a)*.

(n16)Footnote 16. *Treas. Reg. § 301-7701-3(a)*.

(n17)Footnote 17. *Treas. Reg. § 301-7701-3(c)*.

(n18)Footnote 18. *IRC § 7704*.

(N19)Footnote 19. *IRC § 7704(b)*.

(n20)Footnote 20. *IRC § 7704(e)*.

(n21)Footnote 21. *IRC § 7704(e)*.



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Current Legal Forms for Real Estate
Chapter 20 REAL ESTATE ENTITIES
Part I. The Tax Background

24-20 Current Legal Forms for Real Estate § 20.06

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§ 20.06 Partnerships and Limited Liability Companies: Tax Treatment

[1] Taxation of Partnerships and Partners

[a] Partnership Income and Deductions

As discussed above in § 20.05[3], a limited liability company is treated as a partnership for tax purposes. For that reason, all of the discussion that follows in this § 20.06[1] applies not only to partnerships and their partners, but also to limited liability companies and their members. However, to avoid redundancy, the discussion that follows makes reference only to partnerships and partners. It is, however, intended to apply to both partnerships and limited liability companies.

A partnership as such is not subject to income tax. The partnership, as a pass-through entity, is disregarded and only the partners in their individual capacities are liable for the payment of income tax.ⁿ¹ The tax computation involves two steps: first, determination of the partnership's own items of income, gain, loss, deduction, and credit; second, the inclusion of those items in the individual returns of the partners. The partnership is the basic accounting unit and must file an annual information return, Form 1065, which discloses the partnership's profits and distributive shares of income.ⁿ² The taxable income of the partnership is computed in the same manner as that of an individual, with the following two exceptions: (1) income and loss must be itemized according to derivation; and (2) certain deductions are not allowed to the partnership.ⁿ³ Although a partnership generally is free to select the accounting method it will use, even if it is a method not used by any of its partners, a partnership with a C corporation as a partner may not use the cash method.ⁿ⁴ A cash basis partner must report his distributive share of the partnership's accrued income if the partnership is on the accrual basis.

[b] Partner's Distributive Share; Tax Year

The partnership return contains a computation of "taxable income," but segregated into the various classifications of income, gain, loss, deduction, or credit which may be relevant to the partners' own computations. The partnership return also contains a separate schedule for the division of these various classes of items among the partners in accordance

with their "distributive shares." Each partner must report his distributive share (whether or not distribution is actually made) for the taxable year of the partnership ending with or within the partner's own taxable year.

The timing of when income, gain or loss must be reported, can have as great an effect on a partner's tax as the character of that income, gain or loss. Unless a business purpose can be substantiated for using a different taxable year, a partnership's taxable year must be the same as that of one or more partners owning an aggregate interest in partnership profits and capital of more than 50 percent.ⁿ⁵ A partnership may adopt, retain or change to a natural business fiscal year if it can be shown that 25 percent or more of the partnership's gross receipts for the preceding 12 month period are recognized in the last two months of the requested year.ⁿ⁶

An election is available to a partnership to adopt or change to a taxable year with a limited deferral period. This election is only available if the deferral period of the taxable year elected is not longer than the shorter of three months or the deferral period of the taxable year being changed.ⁿ⁷ The electing partnership must make a "required payment," generally an enhanced estimated tax payment, for any taxable year for which an election is in effect. The required payment is generally due on the April 15 following the beginning of the partnership's elected taxable year, unless the Service provides for a later date.ⁿ⁸

The character of each item of income, gain, loss, deduction, or credit retains the same character as it had for the partnership.ⁿ⁹ A distributive share of loss, however, is not allowable to the extent that it exceeds the partner's basis for his partnership interest; but any disallowed loss is carried over to a subsequent year if the partner's basis is increased by earnings or contributions.ⁿ¹⁰

Each partner is required to treat partnership items on his return consistently with the treatment on the partnership return.ⁿ¹¹ If, however, the treatment is, or may be, inconsistent, or no partnership return is filed, the consistency requirement is waived provided the partner files a statement identifying the inconsistency.ⁿ¹² Under a corresponding procedural provision of the Code, the tax treatment of items of partnership income, loss, deduction, and credit is determined at the partnership level in a unified proceeding rather than in separate proceedings with partners.ⁿ¹³ The consistency and related rules do not apply, however, to "small partnerships." These are partnerships consisting of no more than ten partners, each of whom is a natural person (other than a nonresident alien) or an estate, and in which each partner's share of any partnership item is the same as his share of every other item.ⁿ¹⁴

A partner's distributive share of partnership, income, gain, loss, deduction, or credit is determined by the partnership agreement.ⁿ¹⁵ In the case of a limited liability company, that share is determined by reference to the operating agreement. If the agreement does not make an allocation, or if the allocation does not have "substantial economic effect," the partner's distributive share is determined in accordance with his interest in the partnership, taking into account all facts and circumstances.ⁿ¹⁶ In order for an allocation to have substantial economic effect, it must be reflected in the partners' capital accounts, liquidating distributions must be made in accordance with positive capital account balances, and either the partnership agreement or state law must require the repayment of deficit capital account balances.ⁿ¹⁷

Partnership losses are apportioned among partners based upon the respective part of the year that each partner was a member of the partnership, despite an agreement to the contrary. A partner admitted on the last day of the year cannot deduct a share of losses that were incurred prior to his admission to the partnership.ⁿ¹⁸

[c] Contributions to the Partnership

One of the most intricate aspects of partnership taxation involves the treatment of contributions in kind made to the partnership. The difficulty in this area stems from the possible difference between the value of property at the time of its contribution to the partnership and its tax basis in the hands of the contributing partner. The Code contains specific directives for all the consequences of the contribution, with alternative directives to accommodate the parties' intent in

different situations. A partner who contributes property for an interest in the partnership (instead of selling it to the partnership in a taxable transaction) generally recognizes no gain or loss.ⁿ¹⁹ The basis of the property, with one exception, is the same as in the hands of the partner at the time of the contribution. Under the exception, the partnership's basis is increased by any gain recognized by a partner who contributes property to a partnership that would be treated as an investment company if it were incorporated.ⁿ²⁰

When services, rather than property, are contributed one must look to the nature of the interest received by the service provider to determine the appropriate tax treatment. If the interest received is either an interest in both the partnership's capital and profits or an interest in just partnership capital, then the contributing partner is required to recognize compensation income to the extent of the value of the interest received. If, however, the interest is only a profits interest (i.e., it gives the recipient no right to share in the value of the partnership's assets upon liquidation), then the recipient does not recognize compensation income until he receives actual distributions of the profits.ⁿ²¹

When a partner contributes property to a partnership, all income, gain, loss and deductions with respect to that property are shared among the partners under a method which takes into account the difference between the basis of the property to the partnership (i.e., the contributing partner's adjusted basis) and the property's fair market value at the time of the contribution.ⁿ²² If property contributed to a partnership is distributed to someone other than the contributing partner within seven years after the original contribution, the contributing partner is required to recognize any gain or loss he would have had to recognize under the foregoing rule had the distributed property been sold for its fair market value on the date of the distribution.ⁿ²³ The character of the recognized gain or loss to the contributing partner is the same as the character to the partnership had the partnership sold the property to the distributee at the time of the distribution. The contributing partner's adjusted basis for his partnership interest is increased or decreased to reflect any gain or loss he recognized upon the distribution of the property to another partner (or partners). Similarly, the partnership's adjusted basis for the distributed property is increased or decreased to reflect any gain or loss the contributor recognized upon the distribution, and this increase or decrease is taken into account in determining the distributee's adjusted basis for the distributed property.ⁿ²⁴

Frequently, a contributing partner's adjusted basis in real property for which depreciation or cost recovery has been taken will be lower than its fair market value. In such cases, any gain to be realized under the recapture rulesⁿ²⁵ upon the sale or other disposition of the depreciated real estate, i.e., as ordinary income or capital gain, will be allocated to the contributing partner to the extent of the difference between its fair market value and the adjusted basis at the time of the contribution.

Example:

A, an equal partner in Partnership AB, contributes property with a fair market value of \$1,000 and an adjusted basis of \$400. The difference between the fair market value and AB's carryover basis is \$600. When AB sells the property, A will be taxed upon the entire \$600 partnership gain, because that gain is entirely attributable to the difference between the carryover basis of the property and its fair market value at the time of the contribution. If, instead, AB sells the property for \$1,200, its gain would be \$800: the first \$600 would be allocated to A, and the remaining \$200 would be divided equally; as a result, A's gain is \$700, and B's is \$100.

[d] Sale or Lease to the Partnership

Taxable gain or loss results when a partner sells or exchanges rather than contributes property to the partnership.ⁿ²⁶ One limitation on this rule is the disallowance of loss on a sale or exchange of property (other than an interest in the partnership) by a person who owns, directly or indirectly, more than a 50 percent interest in the partnership.ⁿ²⁷ Also, the sale of a capital asset to a partnership by a partner owning more than a 50 percent interest in the partnership will generate ordinary income, rather than capital gain to the selling partner.ⁿ²⁸ Thus, the parties usually can determine in advance which set of tax consequences will be more beneficial--a nontaxable contribution or a taxable sale. The "sale"

technique may involve the simpler tax picture and may result in the more equitable tax treatment of the partners.

An alternative method for simplifying the tax structure is for the partner to retain ownership of the property and to lease it to the partnership, with rent approximating the depreciation. This technique enables the partner to offset their income by the depreciation allowance, and the partnership to take a deduction for the rent.ⁿ²⁹

[e] Effect of Liabilities on Basis

If a partner contributes property to a partnership, the property is subject to a liability, such as a mortgage, and the partnership will assume the liability, then the tax treatment to the contributing partner is determined by netting three different adjustments to the basis of the contributing partner's partnership interest.ⁿ³⁰ That basis is increased by the partner's basis in the property at the time of the contribution, increased by the partner's share of the liability to which the property is subject, and decreased by the full amount of the liability. If the effect of netting those three adjustments yields a positive basis, then the contributing partner recognizes no gain or loss. If, however, there is insufficient basis to allow for the full decrease, then the contributing partner must recognize gain to the extent of the excess.

A partner may deduct partnership losses only up to the adjusted basis of his partnership interest, subject to the at risk limitations.ⁿ³¹ A partner may increase his basis to the extent that he assumes liability for partnership debt, because the assumption is treated as a contribution of money by the partner to the partnership.ⁿ³² However, if none of the partners is personally liable for a partnership debt (i.e., the liability is nonrecourse), the amount of that debt is nonetheless includible in the partners' bases in their partnership interests, with the apportionment thereof being based upon an assessment of how much gain each partner would have to recognize if the property were to be surrendered back to the lender.ⁿ³³

[f] Sale of Property by the Partnership

When a partnership sells or otherwise disposes of property contributed to it by a partner, the capital or noncapital character of gain or loss realized by the partnership is determined by the character of the property in its hands, with three exceptions for inventory items, unrealized receivables, and capital loss property. In the case of contributed unrealized receivables, any gain or loss recognized by the partnership upon the property's disposition is treated as ordinary income or ordinary loss.ⁿ³⁴ A similar rule applies to the disposition of contributed inventory items if the disposition occurs within five years after the contribution by the partner.ⁿ³⁵ If a partner contributes property that was a capital asset in the partner's hands immediately before the contribution, and if at the time of the contribution the property's fair market value was less than its tax basis (i.e., it had a "built-in" capital loss), and if the partnership sells that property at a loss within five years after it was contributed, then the partnership's loss will be a capital loss to the extent of the built-in capital loss that existed when the property was contributed.ⁿ³⁶

The partnership's holding period for contributed property includes the period during which the contributing partner held the property before contribution, whether or not it was a capital asset in his hands.ⁿ³⁷ Of course, the holding period is relevant only when the contributed property would result in capital gain or loss when disposed of by the partnership. For example, if a partner contributes inventory assets to a partnership, the holding period is immaterial because any gain or loss that the partnership realizes upon disposition will be ordinary income or ordinary loss.

[g] Death of a Partner

Upon the death of a partner, the partnership does not terminate for tax purposes. The deceased partner's estate or other successor is considered a continuing partner until the deceased partner's interest in the partnership is liquidated, exchanged or sold.ⁿ³⁸ There are three types of payments that may be made by a partnership when liquidating a partner's interest. The tax treatment of payments made by a partnership in liquidation of a partner's interest is controlled by the purpose for which the payment is made. To the extent that the payment is made for the partner's interest in partnership

property, it generally will result in capital gain or loss treatment for the seller.ⁿ³⁹ To the extent that the payment is either a distributive share of partnership income or a guaranteed payment, it will result in ordinary income to the recipient.ⁿ⁴⁰ A "guaranteed payment" is a payment, the amount of which is determined without regard to the income of the partnership, made to a partner for services or the use of capital.ⁿ⁴¹ Examples of guaranteed payments would be payments made to a retired partner in the nature of a pension or deferred compensation, if the amounts thereof were determined without regard to the partnership's income, such as if the amounts were fixed monthly payments. Payments made for a partner's interest in partnership property do not result in any gain or loss being recognized by the partnership.ⁿ⁴² Such payments are not deductible by the partnership, and they do not reduce the other partners' shares of partnership income. Payments made for a deceased partner's share of partnership income are not deductible, but they do reduce the continuing partners' shares of partnership income. Guaranteed payments are deductible by the partnership to the extent they are in payment for services. The differing tax treatments for the various types of payments a partnership might make to a deceased partner give a partnership and its partners the opportunity, by agreement, to allocate payments among the three categories of payments in order to achieve desired economic and tax results.

[2] Real Estate--"At Risk" Loss Deduction Limitation

To curb the purchase of tax loss deductions through the use of nonrecourse financing, the Code contains an "at risk" loss deduction limitation, which applies to most types of business activities.ⁿ³⁸ Unless specifically excluded, certain classes of taxpayers (including individuals, partners, shareholders of S corporations, and closely-held C corporations) engaged in a trade or business or other activity for the production of income can deduct losses only to the extent that the taxpayer is at risk. The taxpayer is at risk to the extent that he contributes money or property to the enterprise or is personally liable on borrowings used to finance the enterprise. Also at risk is the value of the taxpayer's interest in property which is not used in the enterprise but which secures loans to finance the loss generating activity.ⁿ³⁹

If a taxpayer is engaged in the activity of holding real property and if debt meeting the statutory requirements of "qualified nonrecourse financing" ("QNF") is borrowed to finance the activity, then the taxpayer will be considered at risk with respect to such debt.ⁿ⁴⁰ Qualified nonrecourse financing must be borrowed from an organization in the business of lending, a governmental entity, or guaranteed by a governmental entity. A loan from a related person will satisfy the QNF requirements only if it is commercially reasonable and lent on substantially the same terms as loans to unrelated persons. Commercially reasonable terms require a written unconditional promise to pay an ascertainable sum, on demand or on a fixed date, at a reasonable market interest rate.ⁿ⁴¹ A related person generally includes family members and controlled corporations or partnerships (10 percent ownership interest).ⁿ⁴² Additionally, the QNF must be nonconvertible debt, secured by the real property used in the activity and generally without personal liability.ⁿ⁴³

Planning Note

Qualified Nonrecourse Financing Tested at Partnership Level.

Monies borrowed by partnerships to finance the activities of holding real property are tested at the partnership level for compliance with the Qualified Nonrecourse Financing (QNF) requirements. The individual partner's share of the at risk amount generated by the QNF is calculated pursuant to the general partnership allocation rules.

[3] Real Estate--Passive Loss Limitations

[a] In General

The passive loss limitations generally prohibit current deduction of passive losses or credits in excess of aggregate passive activity income. The disallowed deductions are carried forward indefinitely. A trade or business in which the taxpayer does not materially participate constitutes a passive activity.ⁿ⁴⁴ "Material participation" is defined in the Code with the subjective terms of regular, continuous, and substantial, but the Regulations establish safe harbors that are more

objective.ⁿ⁴⁵

[b] Offset of Net Passive Losses from Rental Real Estate Activity

Generally speaking, rental activity (i.e., any activity where payments are principally made for the use of tangible property) is considered to be a passive activity.ⁿ⁴⁶ Therefore, deductions and credits from rental activities can only offset income from other passive activities, generally. Such deductions and credits cannot be deducted from nonpassive income, such as wages, dividends, interest, etc. However, there are two major exceptions to this general rule.

First, certain eligible taxpayers who materially participate in rental real estate activities can deduct losses from such activities against nonpassive income. These eligible taxpayers include individuals and closely-held C corporations that meet special eligibility requirements. An individual taxpayer meets the eligibility requirements if:

- (1) more than half of the personal services the taxpayer performs during the tax year are performed in real property trades or businesses in which the taxpayer materially participates; and
- (2) such taxpayer performs more than 750 hours of service during the tax year in the real property trades or businesses in which the taxpayer materially participates.ⁿ⁴⁷

A closely-held C corporation meets the eligibility requirements if more than 50 percent of its gross receipts for the tax year are derived from real property trades or businesses in which the corporation materially participates.ⁿ⁴⁸

"Real property trade or business" means any real property development, redevelopment, construction, reconstruction, acquisition, conversion, rental, operation, management, leasing or brokerage trade or business.ⁿ⁴⁹

A second exception to the general rule disallowing deduction of passive losses and credits in excess of passive income is provided for natural persons actively participating in a rental real estate activity.ⁿ⁵⁰ Up to \$25,000 of net losses and deduction-equivalent credits generated by rental real estate activities may be used to offset nonpassive income of the taxpayer if he actively participates in the activity. The active participation requirement applies both to the year when the loss or credit arose and the year in which the loss or credit is taken. Active participation is defined in negative terms by the statute. An individual holding less than a 10 percent interest in the value of the activity or a limited partnership interest may not be treated as actively participating in that activity. Beyond this the only illumination is in the Senate Reports indicating that "active" is less extensive than "material" participation. Congress intends the making of management decisions (i.e., approval of tenants and expenditures) to fulfill the active participation standard.ⁿ⁵¹

The \$25,000 exemption is phased-out at adjusted gross income levels between \$100,000 and \$150,000. The allowance is reduced by 50 percent of the amount by which adjusted gross income exceeds \$100,000.ⁿ⁵² The amounts of the exemption and adjusted gross income are halved in the case of married individuals filing separately. However, if the separately filing couple has not lived apart during the taxable year, the exemption is not available.ⁿ⁵³

Legal Topics:

For related research and practice materials, see the following legal topics:

Real Property Law
Ownership & Transfer
Business & Corporate Entities
Tax Law
Federal Income Tax
Computation
Deductions for Amortization, Depletion & Depreciation
General Overview
Tax Law
Federal Income Tax
Computation
Deductions for Amortization, Depletion & Depreciation
Amortization, Cost Recovery & Depreciation (IRC secs. 167-169, 171, 178, 194-195, 197, 216, 248, 280F)
General Overview
Tax Law
Federal Income Tax
Computation
Deductions for Losses
Passive Activity Loss (IRC sec. 469)
Tax Law
Federal Income Tax
Computation
Sales & Exchanges
Capital Gains & Losses (IRC secs. 1201-1202, 1211-1212, 1221-1223, 1231-1260, 1271-1278, 1281-1288, 1291-1298)
General Overview
Tax Law
Federal Tax Administration & Procedure
Administration
Identification Numbers & Information Returns (IRC secs. 6031-6065)
Partnership Income

ReturnsTax LawFederal Tax Administration & ProcedureAdministrationTax Payment & Tax Return Requirements (IRC secs. 6071-6091, 6151-6167)General OverviewTax LawFederal Tax Administration & ProcedureAdministrationTax Payment & Tax Return Requirements (IRC secs. 6071-6091, 6151-6167)Time to File ReturnsTax LawFederal Taxpayer GroupsLimited Liability Companies & PartnershipsAllocations of Basis (IRC secs. 704, 755)Tax LawFederal Taxpayer GroupsLimited Liability Companies & PartnershipsBasis (IRC secs. 704, 705, 722-724, 731-735, 737, 742, 751, 754, 755)General OverviewTax LawFederal Taxpayer GroupsLimited Liability Companies & PartnershipsContributions to Partnerships (IRC secs. 721-724)General OverviewTax LawFederal Taxpayer GroupsLimited Liability Companies & PartnershipsDistributions by Partnerships (IRC secs. 731-737)Recognition of Gains & LossesTax LawFederal Taxpayer GroupsLimited Liability Companies & PartnershipsIncome (IRC secs. 701-703)Partner Distributive SharesTax LawFederal Taxpayer GroupsLimited Liability Companies & PartnershipsPartnership Tax Returns (IRC sec. 6031)Information ReturnsTax LawFederal Taxpayer GroupsLimited Liability Companies & PartnershipsTax Accounting (IRC secs. 701-703, 706)General OverviewTax LawFederal Taxpayer GroupsLimited Liability Companies & PartnershipsTax Accounting (IRC secs. 701-703, 706)Taxable Year of PartnersTax LawFederal Taxpayer GroupsLimited Liability Companies & PartnershipsTransactions Between Partner & Partnership (IRC sec. 707)

FOOTNOTES:

(n1)Footnote 1. *IRC* §§ 701, 702. For further discussion of partnership taxation, see The Tax Background to Chapter 1, in Volume 1.

(n2)Footnote 2. *IRC* § 6031(a); Treas. Reg. § 1.6031-1. As to the time for filing, see *IRC* §§ 6063 and 6072(a); Treas. Reg. § 1.6031-1(e)(2). As to the penalties for failure to file on time, see *IRC* § 6698.

(n3)Footnote 3. *IRC* § 703(a).

(n4)Footnote 4. *IRC* §§ 446(c) and 448(a).

(n5)Footnote 5. *IRC* § 706(b).

(n6)Footnote 6. *Rev. Proc.* 87-32, 1987-2 C.B. 396 .

(n7)Footnote 7. *IRC* § 444.

(n8)Footnote 8. *IRC* § 7519.

(n9)Footnote 9. *IRC* § 702.

(n10)Footnote 10. *IRC* § 704(d).

(n11)Footnote 11. *IRC* § 6222(a).

(n12)Footnote 12. *IRC* § 6222(b).

(n13)Footnote 13. *IRC* § 6221.

(n14)Footnote 14. *IRC* § 6231(a)(1)(B).

(n15)Footnote 15. *IRC* § 704(a).

(n16)Footnote 16. *IRC* § 704(b); Treas. Reg. § 1.704-1(b).

(n17)Footnote 17. Treas. Reg. § 1.704-1(b)(2)(ii)(b).

(n18)Footnote 18. *IRC § 706(d)(2)*.

(n19)Footnote 19. *IRC § 721(a)*.

(n20)Footnote 20. *IRC §§ 723 and 721(b)*.

(n21)Footnote 21. *Treas. Reg. § 721-1(b)(1)*.

(n22)Footnote 22. *IRC § 704(c)(1)(A)*.

(n23)Footnote 23. *IRC § 704(c)(1)(B)*.

(n24)Footnote 24. *IRC §§ 704(c)(1)(B) and 732*.

(n25)Footnote 25. For discussion of depreciation recapture upon disposition of real property, see *The Tax Background to Chapter 21*, in Volume 25.

(n26)Footnote 26. *IRC § 707(a)(1)*.

(n27)Footnote 27. *IRC § 707(b)(1)*.

(n28)Footnote 28. *IRC § 707(b)(2)*.

(n29)Footnote 29. *Treas. Reg. § 1.707-1(a)*.

(n30)Footnote 30. *IRC § 752; Treas. Reg. 1.752-1(f)*.

(n31)Footnote 31. *IRC §§ 704(d) and 465*.

(n32)Footnote 32. *IRC § 752(a); Treas. Reg. § 1.752-1(a)*.

(n33)Footnote 33. *Treas. Reg. § 1.752-3*.

(n34)Footnote 34. *IRC § 724(a)*. For a definition of "unrealized receivables," see *IRC §§ 724(d)(1) and 751(c)*.

(n35)Footnote 35. *IRC § 724(b)*. For a definition of "inventory items," see *IRC §§ 724(d)(2) and 751(d)*.

(n36)Footnote 36. *IRC § 724(c)*.

(n37)Footnote 37. *IRC § 1223(2); Treas. Reg. § 1.723-1*.

(n38)Footnote 38. *Treas. Reg. § 1.706-1(c)*.

(n39)Footnote 39. *IRC § 736(b)*. It should be noted that the liquidating payment will be treated as ordinary income to the extent that it is received for the partner's interest in unrealized receivables of the partnership. *IRC § 736(b)(2)(A)*.

(n40)Footnote 40. *IRC § 736(a)*.

(n41)Footnote 41. *IRC § 707(c)*.

(n42)Footnote 42. *IRC §§ 736(b) and 731(b)*.

(n43)Footnote 38. *IRC § 465*.

(n44)Footnote 39. *IRC § 465(b)*.

(n45)Footnote 40. *IRC* § 465(b)(6).

(n46)Footnote 41. *IRC* § 465(b)(6)(D).

(n47)Footnote 42. *IRC* §§ 465(b)(6)(D); 49(a)(1)(D)(iv); 465(b)(3)(C).

(n48)Footnote 43. *IRC* § 465(b)(6)(B).

(n49)Footnote 44. *IRC* § 469(c)(1).

(n50)Footnote 45. *IRC* § 469(h)(1); Treas. Reg. § 1.469-5T.

(n51)Footnote 46. *IRC* § 469(c)(2).

(n52)Footnote 47. *IRC* § 469(c)(7)(B).

(n53)Footnote 48. *IRC* § 469(c)(7)(D)(i).

(n54)Footnote 49. *IRC* § 469(c)(7)(C).

(n55)Footnote 50. *IRC* § 469(i).

(n56)Footnote 51. S. Rep. No. 99-313, 99[th] Cong., 2d Sess. 737-738 (1986).

(n57)Footnote 52. *IRC* § 469(i)(3).

(n58)Footnote 53. *IRC* § 469(i)(5).



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Current Legal Forms for Real Estate
Chapter 20 REAL ESTATE ENTITIES
Part I. The Tax Background

24-20 Current Legal Forms for Real Estate § 20.07

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§ 20.07 Corporations

[1] Nontax Considerations

Historically, and prior to the advent of limited liability companies, real estate developers, syndicators and dealers who planned to conduct a business or a venture through an entity most often narrowed their choices down to either corporations or limited partnerships. A corporation had the attractive nontax attribute of complete insulation for shareholders against liability for corporate debts. That benefit was available to the limited partners, but not to the general partner, in a limited partnership. To be able to gain the benefit of that limited liability, the entrepreneur had to tolerate some tax disadvantages of the corporate form. If the corporation was to be a C corporation, its earnings would be subject to one tax imposed on the corporation, and then a second level of tax would be imposed on the shareholders when the earnings were paid out as dividends. If instead the corporation was to be an S corporation, it avoided the double tax problem, but it was severely limited by its qualification rules, such as that it could have no corporate, partnership, or nonresident alien shareholders, it could have no more than 75 shareholders, and it could not have more than one class of stock. So, faced with those tax disadvantages, the entrepreneur frequently opted to use a limited partnership with a newly formed corporate general partner that had as little net worth at risk as was possible. In that way, although the general partner did not enjoy complete limited liability, at least the liability was capped at its net worth.

With the advent of limited liability companies, corporations are rarely given much consideration as the entity of choice for new real estate ventures. That is because a limited liability company offers complete limited liability to its members, and it is taxable as a partnership, which like an S corporation is a pass-through entity whose earnings are taxable only once. Moreover, a limited liability is not subject to any of the qualification rules imposed on S corporations, so that a limited liability company may have any number and any type of owners, and its equity can be comprised of many different classes with widely varying rights.

[2] Tax Treatment of Corporations

[a] Corporations

Maximum tax efficiency is more difficult to achieve if an entity is organized as a corporation. The privilege of earning income through a corporate entity is usually subject to a double tax. The corporation, as a separate legal entity, must pay a corporate income tax when it realizes income;ⁿ¹ the shareholders must pay an individual income tax when the corporation's income is distributed to them in the form of dividends (to the extent of the corporation's earnings and profits).ⁿ² If the corporation's earnings may be withdrawn as compensation for personal services rendered by the shareholders, the corporate tax disadvantage is, of course, lessened. The corporation, however, must be prepared to justify salaries paid as "reasonable compensation;" otherwise, the payments will constitute nondeductible dividends.ⁿ³ On the other hand, compensation received by the shareholder is fully taxable to him, even though the corporation has a net loss of which no tax advantage may be taken by the shareholder.ⁿ⁴

The close corporation is sometimes used as a tax shelter device by high bracket individual taxpayers. This is because the close corporation acts as a temporary receptacle for income, which can be distributed advantageously as dividends over a period of years or as a liquidating distribution taxable as long term gain, or which can be realized as gain on the sale of the corporate stock. There are tax disadvantages, however, because the close corporation is particularly vulnerable to the personal holding company surtaxⁿ⁵, as well as the accumulated earnings surtax for unreasonable accumulations.ⁿ⁶ No equivalent accumulated earnings penalty is imposed upon limited liability companies or partnerships; the members or partners individually pay tax on the LLC or partnership earnings whether or not those earnings are distributed.ⁿ⁷

Another occasion on which a double tax is imposed is upon the liquidation of a C corporation. If the assets of the corporation are sold and the sale proceeds distributed to shareholders or if the assets are distributed in kind to the shareholders, two levels of tax will be imposed. In the sale scenario, tax will be imposed on gain resulting from the asset sales, and then the shareholders will recognize capital gain on the liquidation if the proceeds they receive are greater than their stock basis. In the alternative, if assets are distributed to shareholders in kind, the corporation is deemed to have sold them to the shareholders at the assets' then fair market values,ⁿ⁸ and again the shareholders will have capital gain upon their receipt of the net liquidation proceeds.

[b] S Corporations

In an attempt to remove tax penalties incurred solely by reason of the form of entity chosen for doing business, Code provisions enable certain corporations, known as S corporations, to elect to be taxed somewhat as partnerships, i.e., the shareholders take into account their pro rata shares of items of income, loss, deduction, or credit to the corporation.ⁿ⁹ The main feature of this election is that the shareholders, rather than the corporation, immediately realize taxable income from the corporate earnings (in proportion to their holdings), so that corporate income tax is avoided. Also, S corporations pass through losses, such as from the depreciation of real estate, to their shareholders.ⁿ¹⁰

A corporation that began as a C corporation and then makes the S election is subject to special rules designed to prevent it from avoiding the corporate level tax inherent in any assets that it owned when the S election became effective. If for any tax year beginning in the "recognition period" an S corporation that was originally a C corporation has a "net recognized built-in gain," a tax is imposed on such gain. The "recognition period" is the ten-year period beginning with the first tax year for which the corporation was an S corporation. The tax is computed by multiplying the highest corporate tax rate (as set forth in *IRC Section 11(b)*) by the corporation's net recognized built-in gain for the year. "Net recognized built-in gain" is the lesser of (1) recognized built-in gains for the tax year, minus recognized built-in losses for the year, or (2) the S corporation's taxable income for the year computed as if it were a regular C corporation.

A "recognized built-in gain" is any gain recognized during the recognition period on the disposition (by sale, exchange, etc.) of any asset, except to the extent that:

- (1) the S corporation did not hold the asset at the beginning of the first tax year for which it was an S corporation, or

(2) the gain exceeds the excess (if any) of the fair market value of the asset as of the beginning of the first tax year, over the adjusted basis of the asset at that time.

Similarly, a "recognized built-in loss" is any loss recognized during the recognition period on the disposition of any asset to the extent that the corporation establishes that it held the asset at the beginning of the first tax year, and the loss does not exceed the excess of:

(1) the adjusted basis of the asset at the beginning of the first tax year, over

(2) the fair market value of the asset at that time.ⁿ¹¹

If an S corporation qualifies for the S corporation election (e.g., it is an "eligible" domestic corporation with no more than 100 noncorporate shareholders),ⁿ¹² it may be an advantageous vehicle for use in the real estate area because of the pass-through of tax attributes and limited liability features. On the other hand, several factors may restrict the use of S corporations in real estate transactions. The principal disadvantage is the provision that allows an S corporation shareholder to deduct losses only to the extent of the adjusted basis of the shareholder's stock in the S corporation plus the shareholder's adjusted basis of the corporation's indebtedness to the shareholder.ⁿ¹³ Thus, mortgage liabilities on real property owned by an S corporation cannot be added to the shareholder's basis. The effect of this provision is to limit the amount of losses that an S corporation can pass through to its shareholders.ⁿ¹⁴

[3] Tax-Free Transfer to a Controlled Corporation

No gain or loss is recognized when one or more persons transfer property to a corporation solely in exchange for the corporation's stock, and immediately thereafter such person or persons are in control of the corporation.

Formerly, nonrecognition of gain and loss also was permitted when, in exchange for the transferred property, the person(s) received the corporation's stock or securities, and immediately thereafter the person(s) were in control of the corporation. Accordingly, a transferor could transfer appreciated property to a corporation in exchange for stock and a debt obligation of the corporation that was a security, without recognizing gain.

Debt obligations that were not considered to be securities under *IRC Section 351* were treated as "boot." (A transferor who receives boot is taxed on the lesser of the amount of the boot or the gain realized on the exchange.) Now, for purposes of the nonrecognition provisions of *IRC Section 351*, if a transferor receives any securities, they are treated as boot in all cases.ⁿ¹⁵

Control for purposes of the statute means the ownership of stock possessing at least 80 percent of (1) the total combined voting power of all classes of stock entitled to vote, and (2) the total number of shares of all other classes of stock of the corporation.ⁿ¹⁶ In determining control for purposes of this provision, the fact that a corporate transferor distributes all or part of the stock which it receives in the exchange to its shareholders is not taken into account.ⁿ¹⁷

The nonrecognition provision applies even where the shares of the transferee corporation are issued to one or more of the transferors for cash. For purposes of this section, money is the same as any other property transferred to the corporation for its shares.ⁿ¹⁸ But stock issued for (1) services, (2) indebtedness of the transferee corporation which is not evidenced by a security, or (3) interest on indebtedness of the transferee corporation which accrued on or after the beginning of the transferor's holding period for the debt, is not considered as issued in return for property.ⁿ¹⁹

Thus, the issuance of stock or securities to a broker, a rental agent or attorney, or a promoter for services rendered in connection with the organization or initial activities of a corporation does not qualify as a nontaxable exchange for property. For example, stock issued to a promoter in return for his arranging financing for a construction project or for a contract right which represented unrealized compensation for services was taxable as compensation.ⁿ²⁰

The nonrecognition rule applies only to the extent that property is transferred "solely" in exchange for the transferee corporation's stock.ⁿ²¹ Note, however, that the receipt of money or other property (generally referred to as "boot") does not destroy an otherwise tax-free exchange. In such a case, gain (but not loss) is recognized only to the extent of the money and the fair market value of the other property received in the exchange.ⁿ²² The statute does not define the type of "gain" that is realized where boot is received by a transferor. Moreover, it is unclear whether money received in this type of tax-free exchange is taxable only as a capital gain or may be taxed as a dividend.ⁿ²³

Since the tax-free provision is designed merely to postpone the recognition of gain or loss until the stock is ultimately disposed of, the Code attributes to the stock the same basis as that of the property transferred in exchange. Moreover, the transferred property retains its basis in the hands of the corporation.ⁿ²⁴ Thus, if the property has appreciated in value during the time it was held by the individual, the required carryover of his basis to the corporation will result in the recognition of gain to the corporation when it sells the property.

Legal Topics:

For related research and practice materials, see the following legal topics:

Business & Corporate Law Corporations Formation Corporate Existence, Powers & Purpose Purpose Business & Corporate Law Limited Liability Companies Formation Business & Corporate Law Limited Liability Companies Members & Other Constituents Real Property Law Ownership & Transfer Business & Corporate Entities Tax Law Federal Income Tax Computation Compensation & Welfare Benefits Tips, Wages & Other Compensation (IRC secs. 61, 3121, 3231) Compensation for Services Tax Law Federal Taxpayer Groups C Corporations Reorganizations (IRC secs. 351-368, 381-384) Tax Law Federal Taxpayer Groups Limited Liability Companies & Partnerships Basis (IRC secs. 704, 705, 722-724, 731-735, 737, 742, 751, 754, 755) General Overview Tax Law Federal Taxpayer Groups S Corporations Computation of Income & Loss (IRC secs. 1366, 1371-1375) Tax Law Federal Taxpayer Groups S Corporations Elections (IRC secs. 1362-1363) Requirements Tax Law Federal Taxpayer Groups S Corporations Shareholders (IRC secs. 1361, 1362, 1366, 1377) Adjustments to Basis of Shareholder Stock Tax Law Federal Taxpayer Groups S Corporations Shareholders (IRC secs. 1361, 1362, 1366, 1377) Determination of Tax Liability

FOOTNOTES:

(n1)Footnote 1. *IRC* §§ 11(a).

(n2)Footnote 2. *IRC* §§ 1 (tax imposed on individuals), 61(a)(7) (individual's gross income includes dividends), 301 (portion of corporate distribution which constitutes dividend is included in shareholder's gross income), and 316 dividend defined to mean distribution to shareholders out of corporations earnings and profits).

(n3)Footnote 3. For discussion of deduction of reasonable salary, including denial of deduction for salary disguised as dividend payment, see The Tax Background to Chapter 12, in Volume 13.

(n4)Footnote 4. *IRC* § 61(a)(1).

(n5)Footnote 5. *IRC* § 541.

(n6)Footnote 6. *IRC* § 531.

(n7)Footnote 7. See §§ 20.05 and 20.06, *supra*.

(n8)Footnote 8. *IRC* § 336(a).

(n9)Footnote 9. The pertinent provisions are contained in subchapter S of Chapter 1 of the Code, *IRC* §§ 1361-1379.

(n10)Footnote 10. *IRC §§ 1363(a)* (S corporation exempt from income tax), 1363(b) (computation of S corporation's taxable income), 1366-1368 (tax treatment of shareholders, including pass-through of items of income, loss, deduction, or credit to shareholders).

(n11)Footnote 11. *IRC § 1374*.

(n12)Footnote 12. The definition of an S corporation, and requirements of S corporation status, are contained in *IRC § 1361(a)* and *(b)*.

(n13)Footnote 13. *IRC § 1366(d)(1)*.

(n14)Footnote 14. Moreover, the at risk limitation rules of *IRC § 465* limit the amount of losses that can be passed through.

(n15)Footnote 15. *IRC § 351(a)*.

(n16)Footnote 16. *IRC § 368(c)*.

(n17)Footnote 17. *IRC § 351(c)*.

(n18)Footnote 18. See *Halliburton v. Comm'r*, 78 F.2d 265 (9[th] Cir. 1935) ; *Portland Oil Co. v. Comm'r*, 109 F.2d 479 (1[st] Cir. 1940) , cert. denied, 310 U.S. 650 ; *Holstein v. Comm'r*, 23 TC 923 (1955) ; Rev. Rul. 69-357, 1969-1 C.B. 101 .

(n19)Footnote 19. *IRC § 351(d)*.

(n20)Footnote 20. *James v. Comm'r*, 53 T.C. 63 (1969) ; *U.S. v. Frazell*, 335 F.2d 487 (5[th] Cir. 1964) .

(n21)Footnote 21. *IRC § 351(a)*.

(n22)Footnote 22. *IRC § 351(b)*.

(n23)Footnote 23. See *Treas. Reg. § 1.351-2(d)*; *Weaver v. Comm'r*, 32 T.C. 411 (1959) , aff'd sub nom. *Byran v. Comm'r*, 281 F.2d 238 (4[th] Cir. 1960) , cert. denied, 364 U.S. 931 ; see also *Davis v. U.S.*, 255 F.2d 48 (6[th] Cir. 1958) .

(n24)Footnote 24. *IRC §§ 358* (basis to distributees) and 362 (basis to transferee corporations).



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Current Legal Forms for Real Estate
Chapter 20 REAL ESTATE ENTITIES
Part I. The Tax Background

24-20 Current Legal Forms for Real Estate § 20.08

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§ 20.08 Real Estate Investment Trusts (REITs): Qualification Requirements

[1] Qualification for Conduit Tax Status

Real estate investment trusts, or REITs, are organizations which invest in real estate and distribute most of the earnings to their shareholders-investors. REITs receive the same general conduit treatment that is applied to a regulated investment company, although the latter's income consists largely of dividends which represent previously taxed corporate income.ⁿ¹ Accordingly, if an organization meets the Code qualification for REIT status, the income of the REIT which is distributed to the investors each year generally is taxed to them without being subjected to a tax at the REIT level.ⁿ²

In order to qualify for conduit treatment, a REIT must satisfy four tests on a year-by-year basis: organizational structure, nature of assets (asset ownership requirements), source of income (income requirements), and distribution of income. These tests are intended to allow special tax treatment for a REIT only if there actually is a pooling of investment arrangement which is evidenced by its organizational structure, if its investments are basically (at least 75 percent) in the real estate field, and if its income is clearly passive income for real estate investment (as contrasted with income from the operation of business involving real estate). Also, substantially all (at least 95 percent) of the REIT's income must be passed through to its shareholders on a current basis.

In addition to meeting these enumerated requirements and operational tests, the REIT must make a valid election of such status in order to qualify; moreover, the election must not be revoked or the REIT status terminated for failure to meet one or more of the statutory requirements. If the REIT qualifies, it is exempt from corporate taxes, and the shareholders are taxed only once, at the personal rate.ⁿ³

[2] Organizational Requirements: Corporate Characteristics

In order to qualify as a REIT, an organization must meet certain organizational requirements specified in the Code.ⁿ⁴ These requirements must be met during the entire taxable year, except that the requirement for a minimum of 100 shareholders (discussed below) must be complied with for at least 335 days during the year (not necessarily

consecutively), or during a proportionate number of days during a shorter taxable year. However, the REIT need not meet the minimumshareholder requirement during the first tax year of the election.ⁿ⁵ A REIT must be a corporation, trust, or association which is managed by one or more trustees or directors.ⁿ⁶

In order for a trust or association to qualify for REIT status, it must possess those characteristics which would require it to be taxed as a domestic corporation if it were not for the REIT provisions of the Code.ⁿ⁷

A "trustee" refers to a person who holds legal title to property and has continuing exclusive authority over the management of the trust, the conduct of its affairs, and the management and disposition of the trust property.ⁿ⁸ Nevertheless, title to the property may be held in the name of one or more of the trustees, or in the name of a nominee for the exclusive benefit of the trust. A trust may qualify even if the shareholders have the rights to elect or remove trustees, to terminate the trust, and to ratify amendments proposed by the trustees.ⁿ⁹

Regardless of the entity used, the beneficial ownership must be evidenced by transferable shares or transferable certificates of beneficial interest and be held by 100 or more persons (shareholders).ⁿ¹⁰ Shares are considered "transferable" even though the trustee has the power to redeem shares or to refuse to transfer shares whenever it believes in good faith that such action is required to maintain the trust's status as a REIT.ⁿ¹¹ Ownership is determined without reference to any stock attribution rules.ⁿ¹² For purpose of the "100 or more persons" requirement, a person includes a natural person and legal entities.ⁿ¹³ A second class of beneficial interest shares granting dividend and liquidation preference is permissible.ⁿ¹⁴

An entity which is deemed a closely-held corporation by virtue of meeting the stock ownership requirements of *IRC* § 542(a)(2) cannot qualify as a REIT. Thus, no group of five or fewer persons can own more than 50 percent of the beneficial interest of the REIT at any time during the last half of the taxable year.ⁿ¹⁵ Also, banks and insurance companies subject to specified provisions of the Code are disqualified from REIT status.ⁿ¹⁶

[3] Real Estate Assets Requirement

In order to maintain its qualification, a REIT must satisfy certain diversification of investment requirements on a quarterly basis. At the end of each quarter of any taxable year, at least 75 percent of the value of a REIT's total assets must be represented by "real estate assets," cash and cash items (including receivables), and government securities. A limitation is that not more than 25 percent of the value of the trust's total assets may be invested in other securities.ⁿ¹⁷ Moreover, the nonqualifying securities of a single issuer may not exceed 5 percent of the REIT's total assets, and the REIT cannot own nonqualifying securities which total more than 10 percent of the outstanding voting securities of the issuer.ⁿ¹⁸

REITs may have subsidiaries. If the REIT owns 100 percent of the corporation's stock, the formation and existence of the subsidiary is overlooked for tax purposes and all assets, liabilities, income and deductions of the subsidiary are treated as belonging to the REIT. Should the REIT cease to own 100 percent of the stock or to satisfy the REIT status requirements, the subsidiary is treated as a newly created corporation receiving assets from the parent in exchange for stock.ⁿ¹⁹

[a] Real Estate Assets

The term "real estate assets," for purposes of the 75 percent asset test, means real property, interests in real property, interests in mortgages on real property, and shares (or transferable certificate of beneficial interest) in other qualified REITs. Equity capital derived from stock offerings (other than dividend reinvestment plans) is treated as within the definition of "real estate assets" for a period of one year from the date of receipt by the REIT.ⁿ²⁰ "Interests in real property" include fee ownership and coownership of land or leaseholds, options to acquire land or leaseholds, and improvements with respect to any of the preceding, but do not include mineral, oil, or gas royalty interests.ⁿ²¹

"Real property" is defined to mean land or improvements of an inherently permanent nature, including structural components such as plumbing systems, elevators, and the like. State law is not controlling in determining whether an asset comes within the definition of real property.ⁿ²²

Foreign land and improvements qualify as real property assets. Security interests in foreign real property, which are legally equivalent to mortgages or deeds of trust, qualify as "mortgages on real property."ⁿ²³ Air rights over real property may also qualify as a real property asset or an interest in real property.ⁿ²⁴

An asset is not disqualified for REIT treatment if it consists of both real and personal property. In such a case, however, an allocation of value must be made for purposes of the 75 percent asset test.ⁿ²⁵

[b] Cash and Cash Items

The term "cash and cash items" includes time or demand deposits and certificates of deposit.ⁿ²⁶ It also includes receivables arising in the ordinary course of business, but not receivables purchased from third persons.ⁿ²⁷

[c] Government Securities

The term "government securities," for purposes of the 75 percent asset test, includes securities of the Federal Housing Administration, Federal National Mortgage Association, Federal Home Loan Bank, Federal Land Bank, Federal Intermediate Credit Bank, Banks for Cooperatives, and Public Housing Administrations.ⁿ²⁸ A participation certificate evidencing an undivided interest in an unsecured federal government obligation to pay the purchase price of a building and land, although not a real estate asset, is a qualified government security.ⁿ²⁹ On the other hand, straight pass-through mortgage-backed certificates guaranteed by the Government National Mortgage Association are considered real estate assets.ⁿ³⁰

[4] Income Percentage Requirements; the 100 Percent Tax

In order to eliminate "active" trusts from REIT status, the Code sets forth three income percentage limitations on various types of income realized by a trust in any one tax year. These three tests, which are discussed below, generally are that: (1) 75 percent of the trust's gross income must consist of qualified real estate income; (2) 95 percent of the trust's gross income must consist of qualified real estate income and passive source income; and (3) only less than 30 percent of the trust's gross income can be derived from the sale or other disposition of certain business or investment property.ⁿ³¹

A trust will not necessarily lose its REIT status if it fails to meet either or both the 95 percent and 75 percent income source tests. The trust may still qualify if three conditions are met: (1) the nature and amount of each item of its gross income is itemized in a schedule filed with its income tax return; (2) incorrect information on the schedule is not due to fraud with intent to evade taxes; and (3) the failure to meet either or both tests is due to reasonable cause and not to willful neglect.ⁿ³² An additional tax is imposed, however, on the gross income, i.e., the net amount by which the trust fails to meet either or both income source tests.ⁿ³³ If the trust fails to meet the conditions under this statutory exception, it cannot qualify as a REIT unless it meets all three income source tests.

[a] 75 Percent Gross Income Test; Qualified Real Estate Income

At least 75 percent of the trust's gross income, excluding gross income from prohibited transactions,ⁿ³⁴ must be derived from the following items:ⁿ³⁵

- (1) rents from all real property (see below);

- (2) real property mortgage interest, i.e., interest or obligations secured by mortgages on real property or on interests in real property;ⁿ³⁶
- (3) gain from the sale or other disposition of real property (including interests in real property and in mortgages on real property) which is not *IRC Section 1221(1)* property;
- (4) dividends or other distributions (and gain on the sale of) shares in other REITs (unless such shares were held primarily for sale in the ordinary course of business);
- (5) abatements and refunds of taxes on real property;
- (6) income and gain derived from foreclosure property (see below);
- (7) commitment fees received under agreements to make loans secured by mortgages on or interests in real property, or to enter into purchase or lease transactions with respect to real property;
- (8) gain from the sale or other disposition of a real estate asset which is not a prohibited transaction solely by reason of *IRC Section 857(b)(6)*; and
- (9) qualified temporary investment income.

For purposes of the above provisions, as well as the 95 percent and 30 percent income source tests, gross income has the same meaning as under *IRC Section 61*. Thus, the computation of gross income includes the gross profit from the sale or other disposition of stock, securities, real property, or the like, but does not take into account any loss attributable to such transactions.ⁿ³⁷ Income derived from shared appreciation mortgages is considered to be gain from the sale of the property for the purpose of satisfying the qualified real estate income requirements. This characterization permits the REIT to enter such arrangements and to avoid generating nonqualified income.ⁿ³⁸

[i] Rents from Real Property

"Rents from real property" are included in the sources of income which satisfy the 75 percent test (as well as the 95 percent test, discussed below).ⁿ³⁹ Except for nonqualifying rent (defined below), "rents" include: rents from interests in real property; charges for services customarily furnished in connection with the rental of real property (whether or not they are separately stated); and rent attributable to personal property which is leased in connection with a lease of real property, provided that the amount allocable to the personal property is less than 15 percent of total rent.ⁿ⁴⁰

The rent attributable to personal property is that amount which bears the same ratio to total rent for the taxable year as the average of the aggregate adjusted bases of both the real and the personal property at the beginning and end of such year.ⁿ⁴¹

[ii] Nonqualified Rent

To ensure that only "passive" rent is included in gross income for purposes of the 75 percent test (and the 95 percent test), rents received under three specified circumstances are specifically excluded by the Code from the "rents from real property" category. The three circumstances involve the sharing of profits, the relationship of the parties, and the active conduct of a business.ⁿ⁴²

The first category of nonqualified rent is an amount received or accrued which depends on the income or profits derived from the leased property. However, rent based on a fixed percentage of receipts or sales is excepted and deemed qualified rent.ⁿ⁴³

An example of qualified "percentage rent" is the rent equal to a percentage of gross sales over a base amount, a provision customary at shopping centers.ⁿ⁴⁴ The distinction between rent based on a percentage of gross receipts and sales (generally qualified) and net profits or net income (generally nonqualified) is significant. For example, if a prime tenant pays a percentage of his gross rental receipts to a REIT landlord, that part of the tenant's gross receipts attributable to a subtenant's net income or profits is not qualified as "rents from real property."ⁿ⁴⁵ If a REIT receives or accrues (with respect to real or personal property) amounts from a tenant who derives substantially all of its income with respect to the property from the subleasing of substantially all of the property, and a portion of the amount which the tenant receives or accrues from subtenants consists of "qualified rents," then the amounts which the REIT receives or accrues from the tenant are included in the term "rents from real property" by reason of being based on the income or profits of the tenant, to the extent that the amounts so received or accrued are attributable to qualified rents received or accrued by the tenant. "Qualified rents" are amounts which would be treated as rents from real property if the REIT had received them.ⁿ⁴⁶

The second source of nonqualifying rent involves rent received from a lessee in which the trust has at least a 10 percent interest. For this purpose, if the lessee is a corporation, the requisite control exists if the trust has 10 percent of the voting power or of the total number of shares. If the lessee is not a corporation, the trust may not have a 10 percent interest in either the assets or the net profits.ⁿ⁴⁷ The rent is disqualified even if it is received only indirectly. If an "uncontrolled" tenant subleases part of the leased property to an entity "controlled" by the trust, a proportionate part of the rent received by the trust is disqualified.ⁿ⁴⁸

The third source of nonqualifying rent income relates to the active conduct of business by the trust. Rent is disqualified if the trust furnishes services to tenants, or manages or operates the property "other than through an independent contractor from whom the trust itself does not derive or receive any income."ⁿ⁴⁹

Services directly performed by the REIT which, if performed by a tax-exempt entity, do not generate "unrelated business income," are excepted from the independent contractor requirement. Therefore, amounts received from sale of such services are treated as qualified rent.ⁿ⁵⁰ Qualified rent, therefore, includes charges for services which are customarily furnished or rendered in connection with the rental of real property, provided the services are rendered by an independent contractor (defined below) or do not generate unrelated business income. A separate charge may be made for the services or they may be included in the rent.ⁿ⁵¹ An example of a customary service is the submetering of electricity to tenants.ⁿ⁵²

A contractor is deemed not to be independent if it owns more than a 35 percent interest in the trust or if more than a 35 percent interest in the contractor is owned by one or more persons owning a 35 percent or more interest in the trust.ⁿ⁵³ In order to be considered independent, the contractor cannot be an employee of the trust or otherwise be subject to its control in carrying out his duties.ⁿ⁵⁴ In some circumstances, if a partner or other co-owner of the REIT property renders the services and has the exclusive right to the income, the rent received by the REIT should qualify as "rents from real property."ⁿ⁵⁵

[iii] Foreclosure Property

A REIT is not disqualified because it receives income from "foreclosure property" which fails to meet the income source test.ⁿ⁵⁶ Foreclosure property is defined generally as real property acquired by the trust after default of a mortgagor or lessee. The definition, however, does not include property that is acquired by the trust as a result of indebtedness arising from the sale or other disposition of property held by the trust primarily for sale to customers in the ordinary course of its business, unless the property was originally acquired as foreclosure property. Formal default is not necessary; whatever satisfies state and local law suffices for tax purposes.ⁿ⁵⁷ For example, where state law gives the mortgagor one year to redeem the foreclosed property, the property will not be deemed "acquired" by the foreclosing REIT until expiration of the one-year redemption period.ⁿ⁵⁸

The trust is allowed an elective two-year grace period, from the date the foreclosed property was acquired, within which to dispose of the property or negotiate new leases so as to qualify the income received.ⁿ⁵⁹ Such election must be made by the filing date (including extensions) of the trust's tax return for the taxable year in which the foreclosure property is acquired. Once made, the election is irrevocable.ⁿ⁶⁰ The grace period may be extended for up to six years by the Service if the trust can establish that an extension is necessary for the orderly liquidation of the property.ⁿ⁶¹ During the grace period, the trust must pay corporate tax on the nonqualified income received from the property.ⁿ⁶²

Real property will lose its status as foreclosure property if, after its acquisition, the trust enters into a lease that does not qualify for the 75 percent income test or operates the property as a business more than 90 days after the acquisition. (An independent contractor must be hired to operate business property after the 90th day.) The trust is allowed to complete construction on foreclosure property where more than 10 percent of the structure was completed before default became imminent.ⁿ⁶³

[b] 95 Percent Gross Income Test; Passive Source Income

At least 95 percent of the REIT's gross income, excluding gross income from prohibited transactions, must be derived from qualified real estate income (i.e., from items under the 75 percent income source test, discussed above), plus passive source income, such as dividends, interest, and gain on stock or securities.ⁿ⁶⁴ Status as a REIT will not be lost for failure to meet the 95 percent test, assuming the other requirements for REIT qualifications are met, if a return was filed and the failure was due to reasonable cause and not to willful neglect.ⁿ⁶⁵ In such a case, however, the REIT must pay an additional tax on the excess income.ⁿ⁶⁶

Note that dividends and interest are defined more broadly under the 95 percent passive source income test than under the 75 percent qualified real estate income test. The 95 percent test permits the inclusion of dividends and interest generally, while the 75 percent test refers to dividends from qualified REITs and interest derived from obligations secured by mortgages on or interests in real property.ⁿ⁶⁷ Moreover, capital gain qualifies under the 95 percent test even if it is derived from the sale or other disposition of stock or securities, but capital gain from such sources is not included under the 75 percent test.ⁿ⁶⁸ Other items of income, however, such as rents from real property and income from foreclosure property, are treated the same under both tests.

[c] 30 Percent Gross Income Test; Property Held Primarily for Sale

An organization cannot qualify for REIT status if 30 percent or more of its gross income is derived from the sale or other disposition of (1) stock or securities held for less than six months, (2) property in a prohibited transaction, or (3) real property (including interests in, or mortgages on, real property) held for less than four years, other than property that is involuntarily converted and foreclosure property.ⁿ⁶⁹ Losses from the sale or other disposition of such property are not netted with gains.ⁿ⁷⁰

A 100 percent tax is imposed on REIT net income derived from property, other than "foreclosure property," held primarily for sale to customers in the ordinary course of its trade or business.ⁿ⁷¹ This 100 percent tax on net income derived from prohibited transactions is not assessed against net income derived from the sale of "real estate assets"ⁿ⁷² if four conditions are met:

- (1) the REIT has held the property for at least four years;
- (2) aggregate expenditures made by the REIT within the preceding four years, which are includable in the property's basis, do not exceed 30 percent of the property's net selling price;
- (3) during the taxable year the trust does not sell more than seven properties (excluding sales of "foreclosure property")

or the aggregate adjusted basis of sold property does not exceed 10 percent of the REIT's total assets at the beginning of the tax year and marketing and development of the sold properties were handled by an independent contractor; and

(4) the REIT has held the subject property and improvements for at least four years for rental income. (This requirement is not applicable to property acquired by foreclosure, deed in lieu of foreclosure, or lease termination.)ⁿ⁷³

[5] Distribution of Income and Deficiency Dividends

[a] Distribution of Income

A REIT must distribute 90 percent of the sum of its annual real estate investment trust taxable income and net after tax income derived from foreclosure property minus any "excess noncash income."ⁿ⁷⁴ Excess noncash income is essentially the amount of imputed income, which the REIT was required to recognize before receipt, in excess of 5 percent of the REIT's taxable income. Three types of imputed income are added to produce the gross amount of noncash income: (1) income from deferred rental agreements required to be recognized under *IRC Section 467*; (2) amounts includable in gross income with respect to instruments to which *IRC Section 1274* applies (relating to certain debt instruments issued for property); and (3) gain recognized on disposition of a real estate asset due to inadvertent failure to qualify as a like-kind-exchange under *IRC Section 1031*.ⁿ⁷⁵ Excess noncash income only reduces the amount required to be distributed in order to maintain REIT status and does not reduce REIT taxable income for other purposes. The term "real estate investment trust taxable income" is defined as the taxable income of the trust, subject to certain adjustments that are specified by the Code.ⁿ⁷⁶ The required percentage of income must be distributed in the taxable year during which such income is earned or in the next succeeding year.ⁿ⁷⁷

An excise tax is imposed on REITs that make excessive use of the right to satisfy the 90 percent-of-taxable-income distribution requirement by deferring some or all of that distribution obligation into the year succeeding the year during which the income was earned. The excise tax is equal to four percent of the excess, if any, of the "required distribution" for the taxable year, over the "distributed amount" for such taxable year.ⁿ⁷⁸ The "required distribution" is equal to the sum of:

- (1) 85 percent of the REIT's ordinary income for the year;
- (2) 95 percent of the REIT's capital gain net income for the year; and
- (3) the excess, if any, of the "grossed up required distribution" for the previous year, over the distributed for the previous year.ⁿ⁷⁹

The "grossed up required distribution" is equal to 100 percent of the REIT's ordinary income and capital gain net income for the previous year.ⁿ⁸⁰ Thus, if the REIT did not distribute all of its ordinary income and capital gain net income for prior years, then to avoid the excise tax for the current year it must gross up its distribution to cover the shortfall.

The "distributed amount" for a given calendar year is equal to the sum of:

- (1) the deduction for dividends paid during the year, and
- (2) any amount of REIT taxable income and net capital gain income of the REIT for the year.ⁿ⁸¹

[b] Deficiency Dividend

In order to avoid inadvertent disqualification of a REIT because of an insufficient income distribution, a deficiency

dividend procedure is used.ⁿ⁸² This procedure permits distributions of income qualifying for a deduction to be made in subsequent years if a "determination" results in an adjustment that either increases the amount of income which the trust is required to distribute in order to meet the distribution requirement for a prior year in question, or decreases the amount of the deduction for dividends previously paid for that year.ⁿ⁸³ A "determination" means a final decision of the tax court or any other court of competent jurisdiction, a closing agreement made under *IRC Section 7121*, or an agreement relating to the tax liability of the REIT.ⁿ⁸⁴

In order to qualify for a deduction, the deficiency dividend must be paid within 90 days after the determination, and a claim for its deduction must be filed after its payment, but within 120 days after the date of the determination. Also, the payment of the dividend must qualify for a deduction as if it had been distributed during the prior taxable year in question.ⁿ⁸⁵ No deduction is allowed if the determination contains a finding that any part of the adjustment is due to fraud with intent to evade tax or to willful failure to file a timely income tax return.ⁿ⁸⁶ In order to assure that a trust is operated as a conduit of income to its shareholders and that it will not reduce its distributions of income in reliance upon the deficiency dividend procedure, the trust is required to pay penalties with respect to such procedure.ⁿ⁸⁷

[6] Election and Termination of REIT Status; Recordkeeping

[a] Election; Termination

Even though all the organizational requirements and the asset ownership and income source tests discussed above are satisfied, a taxpayer will not qualify for REIT status unless he or she files a valid election to be a real estate investment trust.ⁿ⁸⁸ The election is made by computing taxable income as a REIT for the first taxable year for which such status is desired.ⁿ⁸⁹ The election may terminate by failure to maintain REIT status, or by revocation. Termination by failure to qualify occurs if the trust fails, either intentionally or inadvertently, to meet the various requirements for REIT status during the taxable year.ⁿ⁹⁰ Termination by revocation may occur if the trust revokes the election after the first taxable year for which the election is effective. The revocation must be made within the first 90 days of the first taxable year for which the revocation is to be effective, and it continues in effect until a new election is made and qualified.ⁿ⁹¹

A new election cannot be made for five years after the termination (because of failure to qualify) is effective.ⁿ⁹² The waiting period does not apply, however, if the termination was due to reasonable cause and not to willful failure to file a timely return, fraud in the return, or willful neglect.ⁿ⁹³

A REIT must adopt a calendar year as its fiscal year.ⁿ⁹⁴

[b] Recordkeeping Requirements

REITs are required to keep certain records. These recordkeeping requirements are intended to ensure that the REIT complies with all the asset ownership and income source tests discussed above.ⁿ⁹⁵ In addition, the shareholders must submit sufficient information to the REIT to enable it to comply with the recordkeeping requirements, and must file their own information returns.ⁿ⁹⁶

Planning Note

Advantages of Qualifying as a REIT

Classification as a REIT permits a large group of investor-shareholders to organize a real estate entity with most of the characteristics of a traditional corporation, but which pays little or no corporate tax, so that the shareholders are taxed only once, i.e., at the personal rate. Moreover, since most REITs today are income-oriented, they are not likely to be challenged by the Service as an abusive real estate tax shelter.

Local Law and Securities Problems

The formation of a REIT may pose local law and securities problems. In the absence of a state statute which recognizes REITs, there may be questions connected with the rule against perpetuities, personal liability of the trustees or beneficial owners, and the permissible uses of a trust. Consideration must also be given to federal and state regulations governing the sale of securities.

Legal Topics:

For related research and practice materials, see the following legal topics:

Real Property Law Estates Future Interests Invalid Restraints & Rule Against Perpetuities Real Property Law Ownership & Transfer Business & Corporate Entities Real Property Law Trusts Real Estate Investment Trusts (REITs) Tax Law Federal Taxpayer Groups C Corporations REITs, REMICs, RITs & FASITs (IRC secs. 851-860L, 4981-4982, 6697) Tax Law State & Local Taxes Income Tax Individuals, Estates & Trusts General Overview

FOOTNOTES:

(n1)Footnote 1. H.R. Rep. No. 2020, 86th Cong., 2d Sess. (1960). The taxation of regulated investment companies is governed by *IRC §§ 851-855, 860*.

(n2)Footnote 2. The taxation of real estate investment trusts is governed by *IRC §§ 856-859, 860*.

(n3)Footnote 3. The REIT qualification requirements, including those for the election and recordkeeping, are discussed in § 20.08[2]-[6], *infra*.

(n4)Footnote 4. *IRC § 856(a); Treas. Reg. § 1.856-1(a), (b)*.

(n5)Footnote 5. *IRC § 856(a), (b) and (h)(2). See also Treas. Reg. § 1.856-1(c)*.

(n6)Footnote 6. *IRC § 856(a)(1); Treas. Reg. § 1.856-1(b)(1)*.

(n7)Footnote 7. *IRC § 856(a)(3); Treas. Reg. § 1.856-1(d)(3). See IRC § 7701(a)(3) and (4) (definition of domestic corporation); Treas. Reg. § 301.7701-2*.

(n8)Footnote 8. *Treas. Reg. § 1.856-1(d)(1)*.

(n9)Footnote 9. *Treas. Reg. § 1.856-1(d)(1)*.

(n10)Footnote 10. *IRC § 856(a)(2) and (5); Treas. Reg. § 1.856-1(d)(2)*.

(n11)Footnote 11. *Treas. Reg. § 1.856-1(d)(2)*.

(n12)Footnote 12. *Treas. Reg. § 1.856-1(d)(2). See IRC § 318 for stock attribution rules*.

(n13)Footnote 13. See *IRC § 856(c)(6)(F)*, which provides that, for purposes of the REIT qualification rules in *IRC § 856*, all terms not defined therein will have the same meaning ascribed to them in the Investment Company Act of 1940. The Investment Company Act of 1940 defines "person" to be a "natural person or a company," and a "company" as including a corporation, a partnership, an association, and a trust. 15 U.S.C. §§ 80(a)-2(a)(28) and 80(a)-2(a)(8).

(n14)Footnote 14. *Rev. Rul. 69-610, 1969-2 C.B. 149*.

(n15)Footnote 15. *IRC § 856(a)(6), (h); Treas. Reg. § 1.856-1(b)(7)*.

(n16)Footnote 16. *IRC § 856(a)(4)*.

(n17)Footnote 17. *IRC § 856(c)(4).*

(n18)Footnote 18. *IRC § 856(c)(5); Treas. Reg. § 1.856-2(d).*

(n19)Footnote 19. *IRC § 856(i).*

(n20)Footnote 20. *IRC § 856(c)(5)(B); Treas. Reg. § 1.856-3(b).*

(n21)Footnote 21. *IRC § 856(c)(5)(C); Treas. Reg. § 1.856-3(c).*

(n22)Footnote 22. *Treas. Reg. § 1.856-3(d).*

(n23)Footnote 23. *Rev. Rul. 74-191, 1974-1 C.B. 170 .*

(n24)Footnote 24. *Rev. Rul. 71-286, 1971-1 C.B. 263 .*

(n25)Footnote 25. Where such allocation is required, income derived from the asset must be apportioned also for purposes of the income tests, discussed at § 20.08[4], *infra*.

(n26)Footnote 26. *Rev. Rul. 72-171, 1972-1 C.B. 208 ; Rev. Rul. 77-199, 1977-1 C.B. 195 .*

(n27)Footnote 27. *Treas. Reg. § 1.856-2(d)(1).*

(n28)Footnote 28. *Rev. Rul. 64-85, 1964-1 C.B. 230 .*

(n29)Footnote 29. *Rev. Rul. 77-342, 1977-2 C.B. 238 .*

(n30)Footnote 30. *Rev. Rul. 70-498, 1970-2 C.B. 6 .*

(n31)Footnote 31. *IRC §§ 856(c)(2), (3).*

(n32)Footnote 32. *IRC § 856(c)(6).*

(n33)Footnote 33. *IRC § 857(b)(5).*

(n34)Footnote 34. Income from prohibited transactions is taxed separately at 100 percent. *IRC § 857(b)(6).*

(n35)Footnote 35. *IRC § 856(c)(3).*

(n36)Footnote 36. Interest from mortgages originated and owned by the trust as investment constitutes "interest on obligations secured by mortgages." *Rev. Rul. 65-57, 1965-1 C.B. 56 .*

(n37)Footnote 37. *Treas. Reg. §§ 1.856-2(c)(1); 1.61-6(a), (b).*

(n38)Footnote 38. *IRC § 856(j).*

(n39)Footnote 39. *IRC § 856(c)(3)(A).*

(n40)Footnote 40. *IRC § 856(d)(1); Treas. Reg. § 1.856-4(a).*

(n41)Footnote 41. *IRC § 856(d)(1).*

(n42)Footnote 42. *IRC § 856(d)(2).*

(n43)Footnote 43. *IRC § 856(d)(2)(A); Treas. Reg. § 1.856-4(b)(3).*

(n44)Footnote 44. *Rev. Rul. 74-198, 1974-1 C.B. 171 ; see also Rev. Rul. 74-134, 1974-1 C.B. 170 .*

(n45)Footnote 45. *IRC § 856(d)(4)* contains a special rule for contingent rents in such cases by providing that "only a proportionate part ... of the amount received or accrued" by the REIT from the tenant will be excluded as "rents from real property."

(n46)Footnote 46. *IRC § 856(d)(6).*

(n47)Footnote 47. *IRC § 856(d)(2)(B); Treas. Reg. § 1.856-4(b)(4).*

(n48)Footnote 48. *Treas. Reg. § 1.856-4(b)(4).* See also *IRC § 856(d)(5)* for stock attribution rules.

(n49)Footnote 49. *IRC §§ 856(d)(2)(C) and 856(d)(7)(C)(i); Treas. Reg. § 1.856-4(b)(5).*

(n50)Footnote 50. *IRC §§ 856(d)(2) and 856(d)(7)(C)(ii).*

(n51)Footnote 51. *IRC § 856(d)(1).*

(n52)Footnote 52. *Treas. Reg. § 1.856-4(b)(1).*

(n53)Footnote 53. *IRC § 856(d)(3).*

(n54)Footnote 54. *Treas. Reg. § 1.856-4(b)(5)(i).*

(n55)Footnote 55. See *Rev. Rul. 73-194, 1973-1 C.B. 335* (services provided by a company related to the REIT's partner, a construction company); *Rev. Rul. 74-383, 1974-2 C.B. 146* (services provided by co-owner).

(n56)Footnote 56. *IRC § 856(c)(3)(F).*

(n57)Footnote 57. *IRC § 856(e)(1). See generally Treas. Reg. § 1.856-6.*

(n58)Footnote 58. *Rev. Rul. 78-3, 1978-1 C.B. 218 .*

(n59)Footnote 59. *IRC § 856(e)(2).*

(n60)Footnote 60. *IRC § 856(e)(5).*

(n61)Footnote 61. *IRC § 856(e)(3).* One or more extensions may be granted, provided they do not extend the grace period beyond the date which is six years after the date the trust acquired the property. *IRC § 1.856(e)(3); Treas. Reg. § 1.856-6(g).*

(n62)Footnote 62. *IRC § 857(b)(4).* No surtax exemption is allowed.

(n63)Footnote 63. *IRC § 856(e)(4); Treas. Reg. §§ 1.856-6(d)* (subsequent leases), *(e)* (completion of construction), and *(f)* (use of foreclosure property in a trade or business).

(n64)Footnote 64. *IRC § 856(c)(2).*

(n65)Footnote 65. *IRC § 856(c)(7).* The same rule applies for failure to meet the 75 percent test.

(n66)Footnote 66. *IRC § 857(b)(5).* A similar rule applies where there is a failure to meet the 75 percent test.

(n67)Footnote 67. *IRC §§ 856(c)(2)(A) and (B), (3)(B) and (D).*

(n68)Footnote 68. *IRC §§ 856(c)(2)(D), (3)(C).*

(n69)Footnote 69. *IRC § 856(c)(4)*.

(n70)Footnote 70. *Treas. Reg. § 1.856-2(c)(1)*.

(n71)Footnote 71. *IRC § 856(b)(6)* (100 percent tax imposed on net income from "prohibited transactions").

(n72)Footnote 72. *IRC § 857(b)(6)(C)*. "Real estate assets," for purposes of this rule, are defined in *IRC § 856(c)(5)(B)*.

(n73)Footnote 73. *IRC § 857(b)(6)(C)*.

(n74)Footnote 74. *IRC § 857(a)(1)(A), (B)*. The Service may waive the requirements of paragraph (1) for any tax year if the REIT establishes to the satisfaction of the Service that it was unable to meet such requirements because of distributions previously made to meet the requirements of *IRC § 4981* (excise tax on undistributed income of REIT). *IRC § 857(a)*. For definition of "real estate investment trust taxable income," see *IRC § 857(b)(2)*.

(n75)Footnote 75. *IRC § 857(e)*.

(n76)Footnote 76. *IRC § 857(b)(2)*.

(n77)Footnote 77. *IRC § 858(a)*.

(n78)Footnote 78. *IRC § 4981(a)*.

(n79)Footnote 79. *IRC §§ 4981(b)(1) and (2)*.

(n80)Footnote 80. *IRC § 4981(b)(3)*.

(n81)Footnote 81. *IRC § 4981(c)*. For the definition of "real estate investment trust taxable income," see *IRC § 857(b)(2)*.

(n82)Footnote 82. *IRC § 860*.

(n83)Footnote 83. *IRC § 860*.

(n84)Footnote 84. *IRC § 860(e)*.

(n85)Footnote 85. *IRC §§ 860(f) and (g)*.

(n86)Footnote 86. *IRC § 860(i)*.

(n87)Footnote 87. *IRC § 6697*.

(n88)Footnote 88. *IRC § 856(c)(1)*.

(n89)Footnote 89. *IRC § 856(c)(1); Treas. Reg. § 1.856-2(b)*. This computation is made on Form 1120-REIT.

(n90)Footnote 90. *IRC § 856(g)(1); Treas. Reg. § 1.856-8(b)*.

(n91)Footnote 91. *IRC § 856(g)(2); Treas. Reg. § 1.856-8(a)*.

(n92)Footnote 92. *IRC § 856(g)(3)*.

(n93)Footnote 93. *IRC § 856(g)(4)*.

(n94)Footnote 94. *IRC § 859*. REITs in existence on October 4, 1976 that had a taxable year other than a calendar year are not required to change to the calendar year.

(n95)Footnote 95. *Treas. Reg. § 1.857-8*. *See also* *Treas. Reg. § 1.857-10*.

(n96)Footnote 96. *Treas. Reg. §§ 1.857-9 and 1.857-10*.



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Current Legal Forms for Real Estate
Chapter 20 REAL ESTATE ENTITIES
Part I. The Tax Background

24-20 Current Legal Forms for Real Estate § 20.09

AUTHOR: by Stephen E. Pigott and Harold O. Maxfield, Jr.

§ 20.09 Real Estate Investment Trusts (REITs): Taxation of a REIT and Its Shareholders

[1] Taxation of REITs

Although a qualified REIT is taxable at regular corporate rates, it is entitled to a deduction for the amount of dividends distributed in computing its taxable income for the year.ⁿ¹ The tax on undistributed capital gains income is computed and determined under whichever of two methods produces the lower tax liability. Under one method, the normal corporate tax rates are applied to the REIT's real estate investment trust taxable income (REITTI),ⁿ² including its capital gains income. Under the other method, the tax computation is the sum of: (i) the tax computed by applying the normal corporate tax rates to REITTI excluding net capital gain and by excluding capital gain dividends from the dividends paid deduction, and (ii) the tax computed by applying the maximum corporate tax rate to the net capital gain income that was not distributed by the REIT.ⁿ³

A REIT is entitled to a net operating loss (NOL) carryover of 20 taxable years following the taxable year of loss (but no carryback to any year of qualified REIT status).ⁿ⁴

The alternative minimum tax on tax preference items applies to REITs.ⁿ⁵ Tax preference items are allocated between the REIT and its shareholders based on the amount of REIT distributions.ⁿ⁶

[2] Taxation of REIT Shareholder

As discussed above, a REIT is a conduit that passes through items of income (but not losses) to its shareholders, who are taxed as if they had received those items directly. Most distributions from a REIT are treated by the shareholders as ordinary income.ⁿ⁷ A distribution, however, from the REIT's capital gain income which is designated as a capital gain dividend is treated as capital gain by the shareholder.ⁿ⁸ Such capital gain dividends are treated by the shareholders as long term capital gains, even if the REIT interest was not held for the required holding period.ⁿ⁹ However, if a shareholder holds REIT stock for six months or less, any loss recognized on a sale of the stock is treated as long term capital loss to the extent of any capital gain distributions he received while he owned the stock.ⁿ¹⁰ This long term capital loss treatment does not apply, however, to losses on dispositions of REIT stock pursuant to a periodic liquidation

plan.ⁿ¹¹ REIT dividends do not qualify for the 70 percent or 100 percent dividend received deduction for corporations under *IRC Section 243*.ⁿ¹¹ REIT dividends may not offset passive activity losses of the recipient taxpayer under the passive loss rules because they constitute portfolio income.ⁿ¹² To the extent that a distribution exceeds the REIT's earnings and profits (i.e., it is not a dividend under *IRC Section 316*), the shareholder's basis in the shares is reduced,ⁿ¹³ and to the extent that the distribution exceeds the shareholder's basis, it is a capital gain.ⁿ¹⁴

Planning Note

Make Sure Statutory Tests Are Being Met.

The trust must constantly be on guard to ensure that the detailed statutory requirements for organization, asset ownership, sources and distribution of income, and reporting are being met at all times. Failure to meet any of these tests may result in loss of REIT status and of the accompanying special tax treatment.

REIT's Losses Not Deductible by Shareholders.

Remember that the losses of a REIT cannot be passed through to the shareholders (as is allowed in the case of a partnership). Thus, a shareholder may not include in his individual tax return any operating or extraordinary losses of the trust, whether ordinary or capital losses.

Legal Topics:

For related research and practice materials, see the following legal topics:

Real Property Law Trusts Real Estate Investment Trusts (REITs) Tax Law Federal Income Tax Computation Alternative Minimum Tax (IRC secs. 55-59) Tax Law Federal Income Tax Computation Deductions for Losses Net Operating Loss (IRC secs. 172, 382) General Overview Tax Law Federal Income Tax Computation Deductions for Losses Passive Activity Loss (IRC sec. 469) Tax Law Federal Taxpayer Groups C Corporations REITs, REMICs, RITs & FASITs (IRC secs. 851-860L, 4981-4982, 6697)

FOOTNOTES:

(n1)Footnote 1. *IRC §§ 857(b)(1) and (b)(2)(B)*.

(n2)Footnote 2. *IRC § 357(b)(3)(A)*. For the definition of REITTI, see *IRC § 37(b)(2)*.

(n3)Footnote 3. *IRC § 357(b)(3)(A)*.

(n4)Footnote 4. *IRC § 172(b)(1)(B)*.

(n5)Footnote 5. *IRC §§ 56-58*.

(n6)Footnote 6. *IRC § 59(d)(1)(A)*.

(n7)Footnote 7. *Treas. Reg. § 1.857-6(a)*. Only that portion of dividends received from a REIT that was subject to corporate tax to the REIT or that is attributable to "qualified dividend income" received by the REIT will be "qualified dividend income" in the hands of a REIT shareholder. *IRC § 857(c)(2)*.

(n8)Footnote 8. *IRC § 857(b)(3)(B); Treas. Reg. §§ 1.857-6(b) and (e)*.

(n9)Footnote 9. *IRC § 857(b)(3)(B); Treas. Reg. § 1.857-6(b)*.

(n10)Footnote 10. *IRC § 857(b)(8)*.

(n11)Footnote 11. *IRC § 857(c)(1)*.

(n12)Footnote 11. *IRC § 857(c)(1)*.

(n13)Footnote 12. *IRC § 469(e)(1)*.

(n14)Footnote 13. *IRC § 301(c)(2)*.

(n15)Footnote 14. *IRC § 301(c)(3)*.



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Current Legal Forms for Real Estate
Chapter 20 REAL ESTATE ENTITIES
Part I. The Tax Background

24-20 Current Legal Forms for Real Estate § 20.10

AUTHOR: by Stephen E. Pigott and Harold O. Maxfield, Jr.

§ 20.10 Cooperative Housing Corporations

[1] Tax Consequences to Tenant-Stockholders and Cooperative Corporation: General and Special Provisions

A cooperative corporation generally is a corporation which owns or leases a building or other real estate and leases apartments in the building (or units in the real estate) to individuals, who pay a rental fee (usually referred to as maintenance) to the cooperative. The tax consequences to the owners of the corporation, generally referred to as tenant-stockholders, are in many respects similar to those applicable to other individual taxpayers who own and operate real estate. For example, the general Code provisions relating to rollover of gain on the sale of a principal residence is available to the "tenant-stockholders" in a "cooperative housing corporation" (as those terms are defined below).ⁿ¹

A special Code provision allows the deduction of taxes, interest, and business depreciation by the "tenant-stockholders" of a "cooperative housing corporation."ⁿ² Under this provision, owners who qualify as "tenant-stockholders" may deduct their proportionate share of real estate taxes and interest paid by the corporation if such taxes and interest are otherwise allowable to the corporation under Code Sections 164 (deductibility of taxes) and 163 (deductibility of interest). The deductions are for the portion of the tenant-stockholder's rent (i.e., maintenance charges) that is allocable to real estate taxes on the property (including the land) and to interest on indebtedness incurred in acquiring, constructing, altering, rehabilitating or maintaining the property (or in acquiring the land).ⁿ³

In addition, if the tenant-stockholder in a cooperative housing corporation owns property used in a trade or business or for the production of income, stock in that corporation may be treated as property subject to an allowance for depreciation under Code Section 167 if the stock is allocable to a proprietary lease or right of tenancy and the property is subject to the depreciation allowance.ⁿ⁴ This provision allows the tenant-stockholder to treat his proportionate share of stock as depreciable property.

The deduction for depreciation is limited to the portion of the stock's adjusted basis allocable to the depreciable property.ⁿ⁵ Any deduction disallowed by the basis limitation carries forward to the succeeding taxable year.ⁿ⁶ However, shareholders may not deduct amounts paid or accrued to the corporation in excess of allocable interest and

real estate taxes and properly chargeable to the capital account. Disallowed deductions are added to the stock's adjusted basis.ⁿ⁷

The cooperative corporation is itself a taxpaying entity which must file an income tax return.ⁿ⁸ The cooperative can avoid tax liability, however, by means of the following principles:

- (1) Annual payments by tenant-stockholders which are earmarked for amortization of mortgage indebtedness are treated as contributions to capital and are not included in the cooperative's gross income.ⁿ⁹
- (2) The corporation does not pay tax on amounts received for interest, taxes, and maintenance to the extent it:
 - (a) actually expends the funds for those purposes; or
 - (b) refunds all amounts not so expended to the tenant-stockholders in the year it receives them.ⁿ¹⁰

A cooperative housing corporation and its stockholders do not recognize gain or loss when the corporation distributes dwelling units to the stockholders if (1) the distribution is in exchange for the stockholder's stock in the corporation, and (2) the exchange qualifies for nonrecognition treatment.ⁿ¹¹

[2] Requirements for Qualification as "Cooperative Housing Corporation"

A "cooperative housing corporation," for purposes of the special deduction provision for tenant-stockholders, is a corporation that meets the following four requirements:ⁿ¹²

- (1) it must have only one class of stock outstanding;
- (2) all of its owners must be entitled, solely by reason of their ownership of such stock, to occupy a house or an apartment in a building that is either owned or leased by the corporation;
- (3) none of the stockholders may be entitled (either conditionally or unconditionally) to any distribution, other than from earnings and profits of the corporation, except on its complete or partial liquidation; and
- (4) 80 percent or more of the corporation's gross income for the taxable year in which the taxes and interest are paid or incurred must be derived from tenant-stockholders.

[a] One Class of Stock

A cooperative housing corporation is allowed to have only one class of stock outstanding.ⁿ¹³ Stock held as security for a note is not a disqualifying second class of stock.ⁿ¹⁴ Similarly, stock owned by a federal, state, or local governmental unit or one of its agencies or instrumentalities for the purpose of providing housing facilities is not taken into account for purposes of this requirement, i.e., it is not a disqualifying second class of stock.ⁿ¹⁵

[b] Tenant-Stockholder's Right of Occupancy

All the tenant-stockholders of a cooperative housing corporation must, by reason of their stock ownership, have the right to occupy either a house or an apartment in a building for dwelling purposes.ⁿ¹⁶ A tenant-stockholder is not required actually to occupy the premises in order to obtain the deduction; having the right to occupy the premises is sufficient.ⁿ¹⁷ A person is not disqualified as a tenant-stockholder merely because proprietary leases give him the right to occupy more than one dwelling.ⁿ¹⁸ But a "cooperative housing corporation" with only one stockholder does not qualify under the Code.ⁿ¹⁹ Stock held by and apartments leased to federal, state, or local governmental units or their agencies or instrumentalities is not taken into account for purposes of qualification.ⁿ²⁰ Presumably, however, a

corporation would be disqualified as a cooperative housing corporation if any nongovernmental stockholders did not have an occupancy right, e.g., where commercial tenants had no right to occupy the premises as their residence.

The cooperative housing corporation is not required to own the entire building. If the corporation otherwise meets the qualifications for cooperative status, it only has to own those apartments within the building which the tenant-stockholders occupy.ⁿ²¹ A corporation qualifies as a cooperative housing corporation even though the stockholders are unable to occupy the allocated apartment units because the units are occupied by tenants under protective rent control laws.ⁿ²²

[c] 80 Percent of Gross Income from Tenant-Stockholders

A cooperative housing corporation must pass one of three tests in order to qualify as a cooperative housing corporation under the Internal Revenue Code. The first test requires that a cooperative housing corporation receive 80% or more of its gross income from tenant-stockholders during the taxable year. This test was the only test until the passage of the Mortgage Debt Relief Act of 2007, which amended the law in favor of the corporation by adding two additional tests which could be met to qualify.ⁿ²³ The second test requires that a cooperative housing corporation use 80% or more of its total square footage for residential purposes or purposes ancillary to such residential use by its tenant-shareholders.ⁿ²⁴ The third test requires that a cooperative housing corporation spend 90% or more of the expenditures paid or incurred during the taxable year be paid for the acquisition, construction, management, maintenance or care of the corporation's property for the benefit of its tenant-stockholders.ⁿ²⁵ These requirements must be satisfied for the entire taxable year, even though status as a cooperative housing corporation occurred during the year.ⁿ²⁶ For purposes of the first test, gross income attributable to any house or apartment which a governmental unit is entitled to occupy, pursuant to a lease or stock ownership, is disregarded.ⁿ²⁷

Where a portion of the annual maintenance charges paid by the tenant-stockholders is used to amortize the mortgage incurred to finance acquisition of the property, the amortization payments have been held to be contributions to capital, rather than income, for purposes of the first test.ⁿ²⁸ On the other hand, income earned by a cooperative housing corporation and applied to recurring operating expenses, from real estate brokerage services rendered exclusively to tenant-stockholders selling their apartments, has been ruled to be income derived from tenant-stockholders.ⁿ²⁹ Another ruling was to the effect that income includes amounts received from tenant-stockholders to defray the expenses relating to their occupancy, such as utilities, maid and secretarial services, rubbish space, cleaning services, and the like.ⁿ³⁰

[3] Requirements for Qualification as "Tenant-Stockholder"

In order to qualify for the special Code deduction for real estate taxes and interest, the cooperative owner must be a "tenant-stockholder."ⁿ³¹ A tenant-stockholder must be (1) a person, (2) who is a stockholder in a cooperative housing corporation (as defined above), and (3) whose stock is fully paid-up in an amount not less than that which is shown to bear a reasonable relationship to the portion of the value of the corporation's equity in its property which is attributable to the house or apartment building which such individual is entitled to occupy.ⁿ³² Note, however, that although the stock must be "fully paid-up," this does not prevent the purchaser of a particular apartment in the cooperative from borrowing money to finance his acquisition of stock in the issuing corporation.

A person is not disqualified as a tenant-stockholder because he may not occupy the house or apartment without the corporation's prior approval, if either:

- (1) the person acquires the cooperative's stock by operation of law (i.e., foreclosure); or
- (2) a person other than an individual acquires stock of the corporation; or
- (3) the person is the original seller (the person from whom the corporation acquired the property), and he or it acquires

stock from the cooperative corporation within one year after transferring the property to the cooperative.ⁿ³³

[4] Tenant-Stockholder Deductions

A principal benefit of qualification as a cooperative housing corporation is that the tenant-stockholders are allowed to take deductions for real estate taxes and mortgage interest paid by the corporation. A tenant-stockholder of a qualified cooperative corporation may deduct from his gross income amounts paid or accrued to the corporation within the taxable year to the extent such amounts represent the "tenant-stockholder's proportionate share" of:ⁿ³⁴

(1) real estate taxes allowable as a deduction to the corporation under Code Section 164, which are paid or incurred by it on the houses or apartment building and on the land on which that property is situated; and

(2) interest allowable as a deduction to the corporation under Code Section 163, which is paid or incurred by the corporation on indebtedness contracted in the (a) acquisition, construction, alteration, rehabilitation, or maintenance of the houses or apartment building, or (b) acquisition of the land on which such property is situated.

A "tenant-stockholder's proportionate share" of taxes and interest paid or accrued by the cooperative corporation is measured by the ratio of the tenant-stockholder's own stock to the entire amount of outstanding stock (including any stock owned by the corporation).ⁿ³⁵ The cooperative corporation may elect to use an alternate measure of the "tenant-stockholder's proportionate share." Where the cooperative bills each tenant-stockholder with a separately allocated share of corporate interest and real estate taxes and the amount reasonably reflects the cost of those items attributable to the tenant-stockholder's unit, then the "tenant-stockholder's proportionate share" is equal to the amount separately allocated and charged by the cooperative.ⁿ³⁶

The proportion of a membership fee paid by a tenant stockholder, allocated to the expense of permanent financing (points) of the corporation, may be deducted by the tenant-stockholder as interest.ⁿ³⁷ A deduction is also permitted for the proportionate share of interest or indebtedness to acquire stock of a corporation which owned the cooperative's apartment building prior to merger with the cooperative corporation; the acquisition of the stock is substantially the same as the purchase of the land and building.ⁿ³⁸

The requirement that a corporation's qualification as a cooperative housing corporation must be determined for each year, at the end of its taxable year, can cause difficulty when the corporation is on a fiscal year basis. For example, the Service has ruled that where a cooperative corporation's fiscal year ends on September 30, the calendar year stockholders cannot deduct their pro rata share of taxes and interest paid for the last three months of the calendar year in their returns for that year.ⁿ³⁹

Tenant-stockholders of a cooperative housing corporation cannot take a deduction for real estate taxes paid by the cooperative on an apartment building which it leases from others, because the corporation's payment is for rent rather than for taxes imposed upon it.ⁿ⁴⁰

Planning Note

Make Sure Both Corporation and Unit Owner Qualify.

Remember that in order for the unit owner of a cooperative apartment to receive the deduction for taxes and interest paid by the corporation, the unit owner must qualify as a "tenant-stockholder" and the corporation must qualify as a "cooperative housing corporation." Thus, it is important to make sure that the qualification requirements for both are met.

Calendar Year Tenant-Stockholders of Fiscal Year Cooperative Should File Refund Claim.

Although the calendar year tenant-stockholders of a fiscal year cooperative corporation cannot deduct their pro rata share of taxes and interest paid for part of the calendar year in their returns for that year,ⁿ⁴¹ this does not necessarily cause them to lose those deductions. After the corporation qualifies in the following fiscal year, they should file claims for refunds or amended returns.ⁿ⁴²

Legal Topics:

For related research and practice materials, see the following legal topics:

Real Property LawCommon Interest CommunitiesCooperativesGeneral OverviewReal Property LawCommon Interest CommunitiesCooperativesCooperative Housing AssociationsReal Property LawCommon Interest CommunitiesCooperativesLeasesReal Property LawCommon Interest CommunitiesCooperativesPurchase & SaleTax LawFederal Income Tax ComputationDeductions for Amortization, Depletion & DepreciationAmortization, Cost Recovery & Depreciation (IRC secs. 167-169, 171, 178, 194-195, 197, 216, 248, 280F)General OverviewTax LawFederal Income Tax ComputationDeductions for Amortization, Depletion & DepreciationAmortization, Cost Recovery & Depreciation (IRC secs. 167-169, 171, 178, 194-195, 197, 216, 248, 280F)Property Held for Income ProductionTax LawFederal Income Tax ComputationDeductions for Amortization, Depletion & DepreciationAmortization, Cost Recovery & Depreciation (IRC secs. 167-169, 171, 178, 194-195, 197, 216, 248, 280F)Property Used in Business & Trade

FOOTNOTES:

(n1)Footnote 1. *IRC § 121 (a).*

(n2)Footnote 2. *IRC § 216.*

(n3)Footnote 3. *IRC § 216(a); Treas. Reg. § 1.216-1(a).*

(n4)Footnote 4. *IRC § 216(c)(1).*

(n5)Footnote 5. *IRC § 216(c)(2)(A).*

(n6)Footnote 6. *IRC § 216(c)(2)(B).*

(n7)Footnote 7. *IRC § 216(d).*

(n8)Footnote 8. *Amalgamated Housing Corp. v. Comm'r*, 37 B.T.A. 817 (1938) , *aff'd*, 108 F.2d 1010 (2d Cir. 1940) ; *see IRC § 6012(a)(2).*

(n9)Footnote 9. *874 Park Ave. Corp. v. Comm'r*, 23 B.T.A. 400 (1931) ; *cf.* *Rev. Rul. 75-371, 1975-2 C.B. 52* (involving condominium management corporation).

(n10)Footnote 10. *See Rev. Rul. 75-370, 1975-2 C.B. 25* (special assessments collected by nonexempt condominium management corporation from its owner-stockholders and accumulated in separate bank account for replacement of roof and elevators in condominium are not includable in corporation's gross income).

(n11)Footnote 11. *IRC § 216(e).*

(n12)Footnote 12. *IRC § 216(b)(1).*

(n13)Footnote 13. *IRC § 216(b)(1)(A).*

(n14)Footnote 14. *Rev. Rul. 72-404, 1972 -C.B. 180.*

(n15)Footnote 15. *IRC § 216(b)(4)*; *Treas. Reg. § 1.216(d)(1)*. A nominal issue of preferred stock to the FHA Commissioner does not preclude qualification. *Rev. Rul. 120, 1953-2 C.B. 130* .

(n16)Footnote 16. *IRC § 216(b)(1)(B)*. The term "apartment in a building" means an independent housekeeping unit consisting of one or more rooms which contain facilities for cooking, sleeping, and sanitation normally found in a principal residence. *Rev. Rul. 74-241, 1974-1 C.B. 68* .

(n17)Footnote 17. *Treas. Reg. § 1.216-1(d)(2)*.

(n18)Footnote 18. *Rev. Rul. 66-341, 1966-2 C.B. 101* .

(n19)Footnote 19. *Rev. Rul. 70-431, 1970-2 C.B. 66* .

(n20)Footnote 20. *IRC § 216(b)(4)*.

(n21)Footnote 21. *Rev. Rul. 78-3, 1978-1 C.B. 218* . See *Rev. Rul. 78-31, 1978-1 C.B. 76* (cooperative housing corporation which purchased the residential units of a commercial-residential condominium qualified for cooperative status).

(n22)Footnote 22. *Rev. Rul. 80-299, 1980-2 C.B. 82* (rights of the rent control-protected tenants to renew their leases prior to termination does not affect the qualification).

(n23)Footnote 23. *IRC § 216(b)(1)(D)(i)*.

(n24)Footnote 24. *IRC § 216(b)(1)(D)(ii)*.

(n25)Footnote 25. *IRC § 216(b)(1)(D)(iii)*.

(n26)Footnote 26. *Rev. Rul. 55-556, 1955-2 C.B. 57* .

(n27)Footnote 27. *Treas. Reg. § 1.216-1(d)(4)*.

(n28)Footnote 28. *Eckstein v. U.S., 452 F.2d 1036 (Ct. Cl. 1971)* (payments allocated to condominium's amortization payments were stated in tenant-stockholder's contract to be "paid in surplus" and not "income."

(n29)Footnote 29. *Rev. Rul. 79-137, 1979-1 C.B. 118* .

(n30)Footnote 30. *Rev. Rul. 68-387, 1968-2 C.B. 112* .

(n31)Footnote 31. *IRC § 216(a)*.

(n32)Footnote 32. *IRC § 216(b)(2)*.

(n33)Footnote 33. *IRC §§ 216(b)(5) and (6)*.

(n34)Footnote 34. *IRC § 216(a)*; *Treas. Reg. § 1.216-1(a)*.

(n35)Footnote 35. *IRC § 216(b)(3)*; *Treas. Reg. IRC § 1-216-1(d)*.

(n36)Footnote 36. *IRC § 216(b)(3)(B)*.

(n37)Footnote 37. *Rev. Rul. 73-15, 1973-1 C.B. 141* .

(n38)Footnote 38. *Rev. Rul. 76-397, 1976-2 C.B. 85* .

(n39)Footnote 39. *Rev. Rul. 59-257, 1959-2 C.B. 101 .*

(n40)Footnote 40. *Rev. Rul. 62-117, 1962-2 C.B. 89 .*

(n41)Footnote 41. *Rev. Rul. 59-257, 1959-2 C.B. 101 .*

(n42)Footnote 42. *Rev. Rul. 59-257, 1959-2 C.B. 101 .*



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Chapter 20 REAL ESTATE ENTITIES
Part I. The Tax Background

24-20 Current Legal Forms for Real Estate § 20.11

AUTHOR: by Stephen E. Pigott and Harold O. Maxfield, Jr.

§ 20.11 Condominium and Homeowners Associations

[1] Tax Consequences for Condominium Associations and Unit Owners Generally

[a] Unit Owners' Deductions

Basically, a condominium is a system of separate ownership of individual units in multi-unit projects. A purchaser of a condominium unit receives fee title to that unit, as if it were a separate unit of property. In contrast, the owner of a cooperative owns an equity interest (i.e., stock) in a corporation that in turn owns or leases the real estate. The condominium unit owner also has an undivided interest in the common elements of the project, which consist generally of the land, hallways, parking areas, recreational facilities, heating plant, and the like. The cost of maintaining the common elements is generally allocated to the condominium owners on the basis of the value of the unit to the value of the entire project.

Each condominium owner pays the real estate taxes on his unit and arranges and pays for its financing. The owner can purchase his unit outright if he wishes and not be bothered with mortgage financing. The condominium owner is personally liable only for his own mortgage indebtedness and is not responsible for the defaults of other unit owners on their mortgages.

For tax purposes, the condominium owner and the cooperative owner are for all practical purposes treated alike, and both are taxed in a manner similar to any other owner of real property.ⁿ¹ For example, an individual unit owner is entitled to deduct his real estate taxes and mortgage interest, just as in the case of the fee simple ownership of an individual home.ⁿ² The unit owner may also take a depreciation deduction if the particular unit is maintained as a business or investment property, e.g., for rental purposes.ⁿ³ The same rules concerning gain on sale or other disposition of a capital asset and exclusion of gain on sale of a principal residence apply to condominium owners as in the case of any personal residence.ⁿ⁴

[b] Condominiums and Homeowners Associations

A homeowners association (i.e., a residential real estate management association) is frequently formed to preserve the architecture and appearance of a real estate development, to own and maintain common areas, streets, and sidewalks, and to maintain and repair the exteriors of property owned by its members. A homeowners association is generally formed by a real estate developer as part of an overall plan for a housing development that requires membership in the association as a condition of ownership of a lot, house, or dwelling unit. The organization is supported by periodic assessments of its members, and an unpaid assessment may constitute a lien on the property of the owner-member.

Tax-exempt status is granted to organizations that qualify as "homeowners associations" by meeting certain statutory requirements.ⁿ⁵ The requirements for a condominium management association, a residential real estate management association and a timeshare association, for purposes of the tax exempt provision, are substantially the same. Although the term "homeowners association" in a non-tax exempt context generally also refers to a residential real estate management association, in the tax context it also includes a condominium management association and timeshare association.ⁿ⁶

[2] Requirements for Qualification as Tax-Exempt "Homeowners Association"

A homeowners association (including a condominium management association) is treated generally as a tax-exempt organization, provided that an election is made and certain tests are met as to the function, income, and expenditures of the association.ⁿ⁷ In order to qualify for homeowners association status, the organization must meet the following requirements:

- (1) It must be a "condominium management association" or a "residential real estate management association." Under these definitions, substantially all of the units of the condominium project must be used by individuals for residential purposes.ⁿ⁸
- (2) The association must be organized and operated to provide for the acquisition, construction, management, maintenance, and care of "association property."ⁿ⁹
- (3) At least 60 percent of the association's annual gross income must be derived solely from membership dues, fees, or assessments.ⁿ¹⁰
- (4) At least 90 percent of the association's annual expenditures must be for the purposes for which it was organized and operated.ⁿ¹¹
- (5) The net earnings of the organization may not inure to the benefit of any private shareholder or individual, except to the extent that the organization performs its required functions; however, the member may receive a rebate of excess dues, fees, and assessments.ⁿ¹²
- (6) The organization must make a proper election to have the homeowners association provisions apply for the taxable year.ⁿ¹³

[3] Taxation as Homeowners Association

If an organization complies with all of the above requirements, including the making of a proper election, it will not be taxed on its "exempt function income" (as defined below), but all other income will be taxed at 30 percent.ⁿ¹⁴

[a] Homeowners Association Taxable Income

The Code allows the homeowner association to reduce its gross income by the amount of its "exempt function income" (and the deductions related to it). The resulting "homeowners association taxable income" is then taxed at a flat rate of

30 percent.ⁿ¹⁵ The allowable deductions do not include the net operating loss deduction (under *IRC Section 172*) or the special deductions for corporations under part VIII of subchapter B of the Code.ⁿ¹⁶ Any net capital gain is taxed at the 30 percent rate.ⁿ¹⁷

[b] Exempt Function Income

"Exempt function income" is defined to mean any amount received as membership dues, fees, or assessments from owners of condominium housing units in the case of a condominium management association, or owners of real property in the case of a residential real estate management association.ⁿ¹⁸ It is not necessary that the source of income be labeled as membership fees, dues, or assessments. What is important is that such income must be derived from owners of residential units or residential lots in their capacity as owner-members, rather than in some other capacity, such as customers for services.ⁿ¹⁹

Assessments which are considered more in the nature of a fee for common activity than for the providing of services, and which will therefore generally be treated as exempt function income, include assessments made for the purpose of:

- (1) paying the principal and interest on debts incurred for the acquisition of association property;
- (2) paying real estate taxes on association property;
- (3) maintaining association property; and
- (4) removing trash or snow from public areas.ⁿ²⁰

Exempt function income does not include:

- (1) amounts which are not includable in the organization's gross income other than by reason of *IRC Section 528* (e.g., tax exempt interest);
- (2) amounts received from nonmembers of the association;
- (3) amounts received from members for special use of the organization's facilities, the use of which is not available to all paid-up members;
- (4) interest earned on amounts set aside in a sinking fund;
- (5) amounts received for work done on privately owned nonassociation property; or
- (6) amounts received from members in return for their transportation to and from shopping areas, work location, or the like.ⁿ²¹

Planning Note

Make Separate Election For Each Taxable Year.

Remember that a separate election is required for each taxable year for which an organization elects to be treated as a homeowners association under *IRC Section 528*. This election is made by filing a properly completed Form 1120-H.ⁿ²²

Make Sure Applicable State and Local Requirements Are Met.

In order to be sure that the homeowners association qualifies for tax exempt status, the taxpayer should check that it meets the applicable state and local law requirements relating to condominiums or horizontal property regimes.ⁿ²³ Most jurisdictions require the filing, with the formalities of a deed, of a declaration submitting specified land and the improvements to be erected thereon, to condominium ownership (the "declaration of condominium"). Additional documentation may be required in some states.

Legal Topics:

For related research and practice materials, see the following legal topics:

Business & Corporate Law Nonprofit Corporations & Organizations Formation Real Property Law Common Interest Communities Condominiums Condominium Associations Real Property Law Common Interest Communities Condominiums Purchase & Sale Real Property Law Common Interest Communities Cooperatives Cooperative Housing Associations Real Property Law Common Interest Communities Cooperatives Purchase & Sale

FOOTNOTES:

(n1)Footnote 1. For taxation of tenant-stockholders of a cooperative housing corporation, see § 20.10, *supra*.

(n2)Footnote 2. *Rev. Rul. 64-31, 1964-1 C.B. 300*.

(n3)Footnote 3. *IRC § 167(a)*.

(n4)Footnote 4. *IRC §§ 1001* (determination of amount of and recognition of gain or loss), *1221* (capital asset defined) and *121* (exclusion of gain on sale of a personal residence). See § 20.12, *infra*.

(n5)Footnote 5. *IRC § 528*.

(n6)Footnote 6. *IRC §§ 528(c)(2), (3), and (4)*.

(n7)Footnote 7. *IRC § 528; Treas. Reg. § 1.528-1 et seq.*

(n8)Footnote 8. *IRC §§ 528(c)(1), (2), and (3)*. A project is considered to meet the "substantially" test if at least 85 percent of the total square footage of all units within the project is used by individuals for residential purposes. *Treas. Reg. § 1.528-4*.

(n9)Footnote 9. *IRC § 528(c)(1)(A); Treas. Reg. § 1.528-2*. "Association property" means property owned by the organization or its members, either privately or in common with other members, as well as property owned by a governmental unit and used for the unit residents' benefit. *IRC § 528(C)(4); Treas. Reg. § 1.528-3*.

(n10)Footnote 10. *IRC § 528(c)(1)(B); Treas. Reg. § 1.528-5* (source of income test).

(n11)Footnote 11. *IRC § 528(c)(1)(C); Treas. Reg. § 1.528-6* (expenditure test).

(n12)Footnote 12. *IRC § 528(c)(1)(D); Treas. Reg. § 1.528-7* (inurement test).

(n13)Footnote 13. *IRC § 528(c)(1)(E); Treas. Reg. § 1.528-8* (election to be treated as a homeowners association; revocation of exempt status).

(n14)Footnote 14. *IRC §§ 528(a), (b) and (d)*.

(n15)Footnote 15. *IRC §§ 528(b) and (d); Treas. Reg. §§ 1.528-9 and 1.528-10*.

(n16)Footnote 16. *IRC § 528(d)(2)(B) and (C)*. Examples of the special deductions for corporations that are not available to an exempt homeowners association are the dividends received deduction under *IRC § 243*, and the organizational expenses deduction under *IRC § 248*.

(n17)Footnote 17. *IRC § 528(b)*. A homeowners association is not entitled to an investment credit. *Treas. Reg. § 1.528-10(d)*.

(n18)Footnote 18. *IRC § 528(d)(3)*.

(n19)Footnote 19. *Treas. Reg. § 1.528-9(a)*.

(n20)Footnote 20. *Treas. Reg. § 1.528-9(b)*.

(n21)Footnote 21. *Treas. Reg. § 1.528-9(c)*. The exclusion from exempt function income category for special use of the organization's facilities does not apply to amounts paid by members only once in any 12-month period, e.g., a yearly fee for use of tennis courts or a swimming pool. But amounts received for the use of a building for an evening, weekend, or week, are not considered exempt function income. *Treas. Reg. § 1.528-9(d)*.

(n22)Footnote 22. *Treas. Reg. § 1.528-8(a)*.

(n23)Footnote 23. *Treas. Reg. § 1-528-1(b)*.



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Current Legal Forms for Real Estate
Chapter 20 REAL ESTATE ENTITIES
Part I. The Tax Background

24-20 Current Legal Forms for Real Estate § 20.12

AUTHOR: by Stephen E. Pigott and Harold O. Maxfield, Jr.

§ 20.12 Sale of a Residential Cooperative or Condominium Unit

The sale of a cooperative apartment is completed by the transfer of the shares of the cooperative housing corporation allocated to the apartment and by an assignment of the related proprietary lease. The sale of a condominium unit is completed in the same manner as the sale of an individual home, i.e., by deed. The income tax consequences on the sale of a cooperative apartment or a condominium unit are the same as those applicable upon the sale of any other personal residence. Thus, the sale usually results in the realization of gain or loss to the seller, which is the difference between the adjusted basis of the property sold and the consideration received by the seller. The nature of the property determines whether capital gain (or loss) or ordinary income (or loss) is realized by the seller.ⁿ¹ Not all of the realized gain will be recognized in most instances.

Up to \$250,000 of gain (and generally \$500,000 for a joint return) may be excluded from income upon the sale of a dwelling that was the taxpayer's principal residence for two of the five years preceding the date of sale.ⁿ² Thus, the sale of a cooperative apartment or condominium unit that was the owner's principal residence for the required time period will qualify for that exclusion. The exclusion may not be claimed more frequently than every two years.ⁿ³ If, due to a change in place of employment, health problems, or "unforeseen circumstances," a taxpayer is unable to meet the ownership and use requirements of Code Section 121, relief may be granted.ⁿ⁴

Legal Topics:

For related research and practice materials, see the following legal topics:

Real Property LawCommon Interest CommunitiesCondominiumsPurchase & SaleReal Property LawCommon Interest CommunitiesCooperativesPurchase & SaleTax LawFederal Taxpayer GroupsIndividualsExclusions From Gross Income (IRC secs. 101-112, 115, 117-123, 125-139)General Overview

FOOTNOTES:

(n1)Footnote 1. *IRC § 1001 et seq.*

(n2)Footnote 2. *IRC §§ 121(a) and (b).*

(n3)Footnote 3. *IRC § 121(b)(3)*.

(n4)Footnote 4. *IRC § 121(c)*. The relief prorates the exclusion, based upon the degree to which the taxpayer satisfies the failed requirement. *IRC § 121(c)(1)*. For example, a single taxpayer who has lived in a condominium for only one year before a job transfer necessitates a move will qualify for one-half (\$125,000) of the exclusion because only one-half of the two-year residency requirement was satisfied.



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Chapter 20 REAL ESTATE ENTITIES
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24-20 Current Legal Forms for Real Estate § 20.13

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§ 20.13 Time Sharing

A time sharing arrangement occurs when two or more persons have interests in the same property and agree that each will have the right to use the property during some portion of the year. Very often, and particularly in popular vacation areas, the owners lease the property during some of the time allotted to them. If the property qualifies as a rental property, the owners would be able to claim depreciation and other business deductions arising from the ownership and maintenance of the property.

Under the general rules that apply to the rental of a vacation home owned by just one person:

- (1) If the property is rented for fewer than 15 days during the year, no rental deductions may be claimed and no rental income is includible in the owner's gross income.ⁿ¹
- (2) If the property is not used by the owner for personal purposes for the greater of (a) more than 14 days during the year, or (b) more than ten percent of the number of days during the year the property is rented at a fair market rental, the owner will be able to claim the rental deductions.ⁿ²
- (3) If the property is rented more than 15 days during the year, but owner's personal use of the property exceeds the applicable threshold under (2) above, then the rental deductions will be limited.ⁿ³ The limitation caps the amount of rental deductions other than real estate taxes and interest that may be claimed to the amount of rental income earned, less the amount of taxes and interest deducted.

In a time sharing arrangement, the foregoing rules are applied to each owner by aggregating the number of rental days and the number of personal use days for all owners.ⁿ⁴ For example, in determining whether rental deductions for the owners will be limited, the threshold in (2) above is applied to all of the property's owners (so that the inquiry becomes, in the aggregate, did the owners' personal use of the property exceed the greater of 14 days or ten percent of the days it was rented at a fair rental value?). If the answer to that is affirmative, then the rental deductions will be limited for all of the owners.

Legal Topics:

For related research and practice materials, see the following legal topics:

Real Property LawCommon Interest CommunitiesTimesharesTax LawFederal Income Tax ComputationDeductions for Business ExpensesGeneral OverviewTax LawFederal Income Tax ComputationDeductions for Business ExpensesResidential Property Used for Business (IRC sec. 280A)

FOOTNOTES:

(n1)Footnote 1. *IRC § 280A(g)*.

(n2)Footnote 2. *IRC § 280A(d)(1)*. Note, however, that the deductibility of expenses might still be precluded under the hobby loss rules of Code Section 183 if the rental activity is not engaged in for "profit."

(n3)Footnote 3. *IRC § 280A(c)(5)*.

(n4)Footnote 4. Prop. Treas. Reg. §§ 1.280A-3(f)(5) and (6).



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§§ 20.14[Reserved]



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Chapter 20 REAL ESTATE ENTITIES
Part II. The Practice Background

24-20 Current Legal Forms for Real Estate § 20.21

AUTHOR: by Stephen E. Pigott and Harold O. Maxfield, Jr.

§ 20.21 Introduction

[1] The Attorney's Role

In most circumstances, the consideration as to how the real estate will be titled is secondary to whether the property is feasible for the buyer's purpose. However, once the decision has been made to proceed with the purchase, it will be the practitioner's job to determine the best way for the client to own and operate the property. The determination as to the type of entity in which to take title or even as to whether an entity will be used involves many different non-tax and tax considerations. If the decision has been made to use an entity, the practitioner must ensure that all necessary action has been taken to form the entity under the applicable state law where the entity is to be formed. In most cases, a public filing must be made and an agreement among the owners of the entity should be negotiated, drafted and executed before title to the property is conveyed to the entity. If financing is involved, the lender will require all details to be finalized before it will fund the loan.

If the transaction involves the purchase of real estate using an existing entity, then the job of the practitioner will be to advise the client as to the use of, or revision of the current owners agreement and governing documents for the existing entity, and to advise the client as the tax implications.

[2] Reason for Ownership of Real Property

The analysis relating to the selection of an entity to own and operate real estate normally involves real property that is being purchased for investment or for the production of income (i.e., used in connection with an operating business). However, there are cases when a buyer of a residence will consider using an entity or a trust, although the typical residential transaction involves the purchase by individuals. An individual may use a trust or an entity to hold a residence for creditor protection, probate avoidance or ease of dividing the beneficial ownership of the property without dividing the legal ownership of the property.

In circumstances involving the purchase of a cooperative, condominium, residence subject to a homeowners' association, or a time share, the developer of the property decided the nature of the property, and the type of ownership

entity long before the purchaser decided to buy the property. In fact, in these cases, it is often the nature of the entity which owns the property that attracts the purchaser to it.

[3] Selection of the Entity

After the investigation of the viability of the property to determine if it is suitable for the purpose for which it is being purchased (see generally, Chapter 21 in Volume 25, Sales and Exchanges), the main focus (other than financing issues) will be the selection and formation of the entity to take legal title. Many non-tax factors drive the entity selection process. Some of the general factors to consider are:

- (1) The owners may want to limit their liability to their investment in the entity;
- (2) The owners may want to separate the ownership of the property from the management and operation of the property;
- (3) The owners may want to limit the ability of one or more owners to be involved in management;
- (4) The lender which is involved in the financing of the purchase price for the property may require a particular entity and/or a single purpose entity (i.e., the entity cannot own any other assets);
- (5) The investors may desire a specific tax attribute (i.e., pass-through of losses); and
- (6) There may be securities law implications which the parties are attempting to avoid in order to reduce start-up costs.

[4] Types of Entities

There are quite a number of entities to consider when the owner of real estate has elected to purchase a property. The basic entities that one would typically consider are:

- (1) Sole proprietorship and/or individual ownership
- (2) Tenancies in Common
- (3) Joint Venture
- (4) General Partnership
- (5) Limited Partnership
- (6) S Corporation
- (7) C Corporation
- (8) Limited Liability Company
- (9) Trust (including a REIT)

Condominiums, cooperatives, time shares are description of types of real estate projects. They are designed to subdivide property and are not really separate and distinct entities. They each describe a type of real estate ownership, and really

are not capable of separately owning property. In most cases, development or ownership of a condominium, cooperative or time share probably involves one or more of the entities set forth above. For example, after the units of a condominium are sold to the public, the property that is subject to the declaration, are often governed by a non-profit corporation commonly referred to as the association. In addition, the developer of the condominium project may have used a limited liability company to purchase the land, subdivide it into units and sell the units to the public. Absent a very specific need to have a unique characteristic of another entity, most practitioners are drawn to the limited liability company. It is one of the most flexible entities; it has the limited liability feature of the corporation and can be taxed as a partnership (See TB § 20.05).

Legal Topics:

For related research and practice materials, see the following legal topics:

Business & Corporate Law Limited Partnerships General Overview Real Property Law Common Interest
 Communities Condominiums Condominium Associations Real Property Law Common Interest
 Communities Timeshares Real Property Law Estates Concurrent Ownership General Overview Real Property
 Law Estates Concurrent Ownership Tenancies in Common Real Property Law Ownership & Transfer General
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 Transfer Natural Persons



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Chapter 20 REAL ESTATE ENTITIES
Part II. The Practice Background

24-20 Current Legal Forms for Real Estate § 20.22

AUTHOR: by Stephen E. Pigott and Harold O. Maxfield, Jr.

§ 20.22 Entity Comparison Summary

[1] Executive Entity Comparison Summary

As a practical matter, most real estate transactions and developments will involve a limited liability company, a S corporation, a C corporation, a general partnership or a limited partnership. The following summary is a helpful comparison of many of the tax and non-tax characteristics of each of those entities.

[Click here to view image.](#)

Legal Topics:

For related research and practice materials, see the following legal topics:

Business & Corporate LawCorporationsFormationCorporate Existence, Powers & PurposePurposeBusiness & Corporate LawGeneral PartnershipsManagement Duties & LiabilitiesGeneral OverviewBusiness & Corporate LawJoint VenturesFormationBusiness & Corporate LawLimited Liability CompaniesFormationBusiness & Corporate LawLimited PartnershipsFormationReal Property LawOwnership & TransferBusiness & Corporate Entities



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Chapter 20 REAL ESTATE ENTITIES
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24-20 Current Legal Forms for Real Estate § 20.23

AUTHOR: by Stephen E. Pigott and Harold O. Maxfield, Jr.

§ 20.23 Discussion of Provisions for an Entity or Joint Ownership Agreement

[1] Forming the Entity

If the parties have decided to use an entity to own and operate the property, the first step will be to form the entity. Most of the entities which are best suited for the ownership of real estate require a filing with the designated state agency. Additionally, the filing process will require the entity to appoint an agent for service of process. In most circumstances, the entity is formed in the jurisdiction where the property is located. However, this does not have to be the case, and the entity can be formed in any jurisdiction. If the entity is not formed in the jurisdiction where the property is located, the entity should qualify to do business in the state where the property is located. After the formation of the entity, the practitioner should formalize the relationship of the parties pursuant to a written agreement.

[2] Drafting the Agreement

Considerable care should go into drafting the agreement for the entity's owners. The practitioner will want to make specific recommendations to the clients as to the different provisions that should go into the agreement. In order to do this, the practitioner must know the nature of the property being purchased, and the understanding between the parties as to their specific rights and obligations to each other and to the entity. Additionally, while these provisions are designed to be used in connection with the formation of an entity, most of the provision must be considered for a joint ownership arrangement. The following provides a fairly comprehensive list of topics which should be addressed in an agreement among the owners of an entity which owns and operates real property. However, the practitioner must keep in mind that there is no limitation on the types of issues that could be addressed in such an agreement. For an additional discussion of ownership agreements, see Chapter 1 in Volume 1, Partnerships; Chapter 15 in Volume 18, Shareholder Agreements; and Chapter 18A in Volume 22, Limited Liability Companies.

[a] Name, State of Incorporation, Statutory Agent and Type of Entity

Obviously, the name, state of formation, statutory agent and type of the entity should be reflected in the Agreement. Most of the time, these decisions will be made prior to the time that the agreement is being drafted. Almost every state

has a web site that allows you to check on the availability of the name. These sites can be located by a simple Internet search. A significant number of links are provided at the home site of the National Association of Secretaries of State. Also, if the agreement is to be governed by a specific statute within the state of its organization, than the agreement should refer to that statute.

[b] Effective Date

The agreement should reflect the effective date of the agreement. Usually, it is the date of formation, or the date that property is acquired.

[c] Names and Addresses of the Owners

The agreement should clearly set forth the names and addresses of the owners. Often, a practitioner will also obtain their telephone and fax numbers as well as e-mail addresses. Further, if the entity is a corporation, and it intends to make an S-election, it would be helpful for the agreement to set forth the Social Security Numbers for each of the owners.

[d] Capital Structure

The capital structure of the entity is one of the most important provisions in the agreement. It should set forth what it is that each owner is contributing to the entity. Some owners may be contributing cash, while others are contributing property or services. It is critical that the contributions be adequately described. With respect to property or services, a value for each should be assigned. However, owners which contribute property or services may be subject to immediate taxation. After the contributions have been determined and valued, the agreement should clearly define the ownership interest of each owner in the entity. With respect to a joint ownership arrangement, the Deed should set forth each party's interest in the real estate.

[e] Loans

If the parties are loaning any of the start-up capital to the entity, the agreement should reflect the amount and the terms of the loan. Typical terms which should be included are the interest rate, period of repayment, collateral pledged to secure the loan, default provisions and conversion rights. If one owner is going to personally guarantee the repayment of the loan of another owner, the guarantee should be set forth in the agreement.

[f] Number and Type of Authorized Shares or Units

The agreement should reflect the number of units that each owner will own. If additional ownership units are to be available at a later time, the agreement should authorize this and set forth the terms under which the units will be issued. If the agreement does not provide for authorization, then it may be necessary to get the owners to amend the agreement at a later time. Further, it may be appropriate to issue different types of units for some of the owners. For example, if the owners decide to form a limited liability company, but like the feature of a limited partnership which does not allow limited partners to have a say in management, these owners can be issued non-voting units.

[g] Management Structure

This is another critical provision. The owners should set forth in very clear fashion their agreement as to the management of the company. They should decide if the entity will be managed by one or more owners, by employees or by an outside management company. The owners may decide to delegate management. Accordingly, each will be responsible for a separate part of the management of the entity. For example, one owner may be responsible for the construction of the improvements and another owner responsible for obtaining tenants. Further, the agreement may require regular meetings of the owners.

[h] Securities Compliance (Federal and State)

In most cases, the issuance of an interest in an entity is subject to state and federal securities laws. These laws vary from state to state, and greatly depend on the nature of the offering and the amount of consideration being conveyed. Additional factors are the wealth and sophistication of the investor/owner. Compliance with these laws is critical. Failure to comply may give an owner a right of rescission against a promoter/owner. In some states, failure to comply may be a crime. As a result, the practitioner should investigate the securities law implications before the agreement is signed. Additionally, such laws may require the entity to make various disclosures to the owners and may require the owners to acknowledge the disclosures or to make representations to the entity/issuer about the owner's financial status. The agreement is a great place to address these types of requirements.

[i] Transfer Restrictions and Buy-Out Rights

The owners may want to address the transferability of the ownership interests. The owners may allow the interests to be freely transferable. However, this is not likely given the closely held nature of most real estate entities. Typically, the owners will not want others brought into ownership of the entity. The owners may want to provide for an absolute restriction against the transfer of an interest. The owners may want to allow limited transfers to a spouse, trust (for the benefit of the owner or the owner's family) or lineal descendent of the owner. The owners should consider what happens to an owner's interest in the event of the death or disability of any owner. Does the interest get redeemed, or can it be passed along pursuant to a will? In the event of a sale triggered by the death or disability of one of the owners, the parties must address the purchase price, terms of payment of the purchase price and whether the seller will be entitled to security. Lastly, the owners may want to provide for rights of first refusal in the event an owner receives a bona fide offer to purchase his or her interest and the owner wants to accept the offer.

[j] Dispute Resolution Procedures

Many ventures end up with a dispute. The owners can prepare for this day by placing dispute resolution procedures in the agreement. The agreement can provide for business counseling, mediation or arbitration. The agreement can provide for any combination of these resolution procedures. For example, the dispute may first be submitted to mediation. If the mediation does not resolve the dispute, the parties must then submit the dispute to arbitration.

[k] Dividends and Distributions

The owners will want to address ways to get a return of their investment. Most real estate entities will be flow through entities. This means that the income will not be taxed at the entity level, but rather will flow through to the owners, and be taxed on their individual returns. The owners may want to require or restrict the payment dividends or distributions. It depends on the nature of the property and the personal wealth of the owners. The owners may be at odds on this issue. If one owner has significant wealth, and does not need cash distributions from the entity, and the other owner has modest wealth, there could be a dispute over the distribution of the cash flow from the entity. At the very least, if it is a pass through entity, the owners should consider an annual distribution sufficient to cover any annual tax liability that they will have from the entity.

[l] Percentage of Owners Approval to Take Specific Actions

There may be minority owners or non-voting owners that can be protected from being oppressed by the majority and/or voting owners. These provisions vary greatly. The practitioner may not be concerned with the oppression of the minority owners if the practitioner represents the majority owners of the company. If the practitioner represents the company, the practitioner may want to advise the owners to obtain separate legal counsel. The following is a general list of actions that the practitioner should review when such a concern is present to determine what percentage of the ownership interests in the company require approval to take such action.

- Sell or issue additional ownership interests or grant options to buy additional interests
- Approve a reorganization, merger, or consolidation
- Creation of subsidiary
- Acquisition of any asset in excess of specified amount
- Expend money in excess of specified amount
- Diversification of the business
- Obtain credit in excess of a specified amount
- Pledge assets as security for credit
- Amend any agreement
- Amend Articles, By-laws or Code of Regulations
- Declare dividends or other distributions
- Enter into contract with an owner or a party related to an owner
- Enter into an agreement to buy, sell or lease real estate or enter into a capital lease in excess of a specified dollar amount or specified number of years
- Guaranty another party's performance
- Hire any employee with salary above specified level or salary or terminate a senior level employee
- Modify the salary or benefits of an owner or of an individual related to an owner

Legal Topics:

For related research and practice materials, see the following legal topics:

Real Property LawOwnership & TransferGeneral OverviewReal Property LawOwnership & TransferBusiness & Corporate EntitiesReal Property LawSecurities RegulationTransactions Subject to RegulationReal Property LawTrustsReal Estate Investment Trusts (REITs)



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Current Legal Forms for Real Estate
Chapter 20 REAL ESTATE ENTITIES
Part II. The Practice Background

24-20 Current Legal Forms for Real Estate § 20.24

AUTHOR: by Stephen E. Pigott and Harold O. Maxfield, Jr.

§ 20.24 Sole Proprietorship and Individual Ownership

[1] Description of a Sole Proprietorship

A sole proprietorship is simply an individual that owns and operates the property. However, there is a rather large exception to this rule. A single member limited liability company that has elected to be treated as a partnership is taxed as a sole proprietor for federal income tax purposes, but is treated a limited liability company for non-tax purposes. (See Chapter 18A, in Volume 22 and see TB § 20.05) Also, under *Rev. Proc. 2002-69 2002-2 C.B. 831*, in a community property state an entity owned by a husband and a wife may be treated as a disregarded entity.

[2] Personal Liability and Identity of Owner

If a person owns real estate individually, he or she will have personal liability for all debts and liabilities associated with the real estate. Some risks such as environmental liability could be significant. As a result, the individual's other assets and wages will be at risk for the debts and claims associated with the real estate. Use of an S-corporation or limited liability company should avoid this problem.

[3] Continuity of Existence and Transferability

The death of the sole proprietor is usually a significant problem for a sole proprietorship operating a business. This factor is not as big as a concern for the individual owner of real estate. Unlike an operating business, the property will not disappear if the sole proprietor dies. The individual executor or administrator will take over for the deceased individual. There may be interim issues until the legal representative is designated. Examples of these problems include access to bank accounts, negotiating rent checks and evicting tenants. If an entity owns the property and the principal dies, generally court approval is not needed to have someone act as representative of the entity. Business owned sole proprietorships can be difficult to sell. This is certainly not the case for a real estate sole proprietorship or individual ownership. In fact, the opposite is probably true. (See generally, Chapter 7A in Volume 11, Estate Planning/Business). Another factor with owning real estate individually is that all real estate ownership is part of the public record. If an individual owns the property his or her name will be public. In most cases, owning property with an entity will allow

the beneficial owners to remain anonymous.

[4] Avoidance of Legal and Operating Formalities

A sole proprietorship does not require any legal filings in order to be in existence. It is essentially the existence of its owner. No separate corporate actions, meetings or tax returns are required. Many people operate as a sole proprietorship for this very reason. There are no start up costs, lawyers with which to deal, and no on-going administrative burdens such as annual corporate minutes, appointment of officers or complicated tax laws. Further, the issuance of ownership interests in some entities may require compliance with the federal and state securities laws. (See Chapter 19 in Volume 23, Corporate Securities.) There are no such requirements for individual ownership of real estate. There may be some compliance which is necessary in connection with the issuance of an interest in a single member limited liability company which is treated as a sole proprietorship for tax purposes. (See Chapter 18A in Volume 22.)

[5] Spousal Property Rights

Some states provide that a spouse of an individual who owns real property has an inchoate right of dower. Dower is a common law concept, which generally applied to a widow. However, there are a number of states which have not abolished dower or which have codified it. States that have codified dower, typically apply it to husbands. Dower rights give the spouse a life estate in all lands that their spouse owned during his or her lifetime. In practical terms, it requires an individual that owns real property to obtain the consent of his or her spouse in order to convey an interest in the property. Owning property with an entity will normally avoid dower claims. Consideration should also be given to the community property rights of a spouse, although, the spouse would also have an interest in the ownership of the entity. (See generally, Chapter 7B, in Volume 11, Estate Planning/Community Property).

Legal Topics:

For related research and practice materials, see the following legal topics:

Business & Corporate Law
Sole Proprietorships
Real Property Law
Homestead Exemptions
Real Property Law
Ownership & Transfer
Business & Corporate Entities
Real Property Law
Ownership & Transfer
Natural Persons
Real Property Law
Ownership & Transfer
Death & Incapacity
General Overview



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Chapter 20 REAL ESTATE ENTITIES
Part II. The Practice Background

24-20 Current Legal Forms for Real Estate § 20.25

AUTHOR: by Stephen E. Pigott and Harold O. Maxfield, Jr.

§ 20.25 Tenancies in Common and Joint Ventures

[1] Description of Tenants in Common and Joint Venture

When two or more individuals or companies own real estate they are tenants in common. If the individuals are not treated as a partnership for federal income tax purposes, then the consequences of ownership are no different than if one person owned the entire fee simple interest in the property. (See TB § 20.03). A joint venture is generally considered a partnership. The only difference is that parties organize together for a very specific purpose. Most joint ventures are limited in duration. That is, the parties jointly acquire the real estate for a very specific reason and for a limited time frame. Joint venture parties can be other entities. For example, two corporations may decide to purchase property. The corporations can take title in their respective names or may form another entity to complete the venture. If the venture is limited in scope and duration, it would be considered a joint venture.

[2] Owning Land as Tenants in Common

Tenants in common each own an undivided interest in the property. Absent an agreement, each tenant has a legal right to occupy the entire property jointly with the other tenants. Additionally, all of the issues discussed above associated with owning property individually are present with respect to owning property as joint tenants. However, there is an additional problem. The additional problem is that the joint owner's problems can also affect the property. For example, if you own an undivided one half interest in a property, and the other half is owned by another, and that individual gets divorced or gets a judgment lien against him or her, then such party's interest in the property will be subject to the marital claim or levy. In either case, it is easy to see how the property can be affected.

In most states, property owned jointly is subject to partition rights. That is, if one party wants to sell, and the other party does not, the party seeking to sell may request a court to subdivide the property so that he or she can take his or her share of the property free of the interest of the other joint tenant. In most states, if a property cannot be properly or fairly partitioned (i.e., a shopping mall), the court has the authority to order the property sold.

Additionally, there are operational issues associated with the joint ownership of property. These issues are similar to the

issue facing the owners of an entity. Who will manage the property? Who will decide when it is the right time to sell? The list is potentially exhausting. As a result, if the parties do not want to organize an entity to own the real estate, the seasoned practitioner will advise the parties to enter into a joint ownership agreement setting forth a framework wherein the parties can memorialize their agreements respecting the property. The agreement will look very similar to a general partnership agreement. Obviously, if the parties are related, and there is an element of trust between them, the need for such an agreement may be mitigated.

[3] Forming the Joint Venture

A joint venture will almost certainly involve an agreement. However, no governmental filing is typically required, unless the joint venture takes the form of another entity. As stated above, a joint venture is normally considered a general partnership, but it may take the form of another entity. For example, two individuals could agree to form a corporation to purchase, develop and resell a plot of land. This is a joint venture. Consequently, the joint venture agreement will take the form of the entity selected. The primary difference will be that the purpose clause set forth in the joint venture agreement will be limited.

[4] Securities Law Compliance

Unless the parties to a joint venture are forming an entity to operate the joint venture, there should not be any securities compliance necessary. However, if the parties are forming a venture to complete the joint venture, then the practitioner must review the federal and state securities laws applicable to the entity and the investor/owners.

Legal Topics:

For related research and practice materials, see the following legal topics:

Business & Corporate LawJoint VenturesGeneral OverviewBusiness & Corporate LawJoint VenturesFormationReal Property LawEstatesConcurrent OwnershipTenancies in CommonReal Property LawOwnership & TransferBusiness & Corporate EntitiesReal Property LawSecurities RegulationTransactions Subject to Regulation



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Chapter 20 REAL ESTATE ENTITIES
Part II. The Practice Background

24-20 Current Legal Forms for Real Estate § 20.26

AUTHOR: by Stephen E. Pigott and Harold O. Maxfield, Jr.

§ 20.26 Partnerships

[1] Description of a Partnership

A partnership is an association of two or more parties who organize together in a common enterprise to make a profit. There are two basic types of partnerships, general partnerships and limited partnerships. (See TB § 20.06 for a detailed discussion of the tax implications of a partnership). Additionally, Chapter 1 in Volume 1 contains a detailed discussion of both the tax and the non-tax characteristics of general and limited partnerships.

[2] Formation of a General Partnership and a Limited Partnership

There is no filing or declaration necessary to form a general partnership. The partnership is essentially formed by intent and actions of the partners. In order to form a limited partnership, however, the partners must file a Certificate of Limited Partnership with the appropriate governmental state agency. Most states have promulgated forms that can be filled out by the practitioner and filed. Some states require the use of their forms, other states just recommend it. An appointment of a statutory agent must be filed with the Certificate.

[a] Evidence of Ownership

General partnerships do not usually issue certificates or any other evidence of ownership, although there is no prohibition against it. Limited partnerships, however, regularly issue Limited Partnership Certificates as evidence of ownership.

[b] Organizational Meetings

General partnership or limited partnerships do not normally have organizational meetings. Most partnerships are formed and begin doing business when the partnership agreement is executed. With respect to general partnerships, each partner is authorized to act on behalf of the partnership and no formal designation is necessary. With respect to a limited partnership, by its very nature, its general partners are authorized to act on its behalf and the limited partners are

expressly prohibited from taking any action on behalf of the limited partnership. These concepts are codified in the partnership laws adopted by most states and are normally repeated in the partnership agreement.

[3] The Partnership Agreement

There is no requirement that a general partnership have a partnership agreement. However, most states require that a limited partnership have a written limited partnership agreement. The practitioner must review and become familiar with the laws in the jurisdiction where the limited partnership is being formed to make sure that the limited partnership is properly formed. (See Chapter 1 in Volume 1, Partnerships.)

[4] Perpetual Existence

A general partnership does not have a perpetual existence, and it will dissolve upon the death or withdrawing of a partner. Limited partnerships do have a form of perpetual existence. The limited partnership agreement can provide that the limited partnership will carry on upon the death of limited partner. However, upon the death of the last general partner, the partnership will dissolve unless a substitute general partner is put in the partnership. (See TB § 20.06[1][g] for a discussion of the tax consequences to a partnership upon the death of a partner).

[5] Transferability of Interests and Centralized Management

General partnership interests are not freely transferable. Limited partnership interests may be transferred if the transfer is permitted under the limited partnership agreement. A transferee that does not become a full substituted partner will only receive an economic interest in the partnership, and will have no rights under the agreement. A general partnership does not have centralized management and each partner is permitted to participate in the management of the partnership. A limited partnership does have centralized management. The ability to manage is vested only in the general partners and the limited partners have no authority to manage the affairs of the limited partnership.

[6] Liability of Partners

General partners have unlimited liability for the liabilities and debts of the partnership. However, an exception to this rule is a general partnership that has made an election to be treated as a limited liability partnership. Many states now provide for such an election. The election has the effect of insulating a partner from liability associated with the wrongful acts of his or her partner. It does not insulate the partner from the partner's own liability, or from liability of the wrongful acts of a partner that was under the supervision of the partner or from the general contractual debts and obligations of the partnership. Of course, limited partners do not have personal liability for the debts or liabilities of the partnership. Since the advent of the check the box regulations it is no longer a problem to have a corporate general partner. Therefore, a limited partnership that has a corporate general partner will have the effect of insulating all beneficial owners of the partnership from liability. The assets of the corporate general partner would still be at risk; therefore the common practice is to thinly capitalize it.

[7] Securities Law Compliance

General partnership interests are not normally considered securities. However, a general partnership interest may be considered a security under federal law if it can be described as an "investment contract." The leading case on the meaning of an investment contract is *SEC v. W.J. Howey Co.*, 328 US 293 (1946). Under the *Howey* test, an investment contract is an investment in a common enterprise with an expectation of profits to be derived from the managerial efforts of others. It is the second part of the test, whether the profits are to be derived through the efforts of others, on which the security classification will turn. Based on this test and cases interpreting it, whether a general partnership interest will be considered a security will largely turn on the Partnership Agreement, and the actual working of the entity. When management is vested in its partners, it is less likely the interest will be a security. If the management is vested in a small number partners, it is more likely to be a security. The practitioner must review the

state's blue sky laws to determine if any compliance is required. In most circumstances, a general partnership interest will not be a security.

Legal Topics:

For related research and practice materials, see the following legal topics:

Business & Corporate LawGeneral PartnershipsFormationPartnership AgreementsBusiness & Corporate LawGeneral PartnershipsManagement Duties & LiabilitiesRights of PartnersPartnership PropertyBusiness & Corporate LawGeneral PartnershipsManagement Duties & LiabilitiesRights of PartnersTransfers of InterestsBusiness & Corporate LawLimited PartnershipsFormationBusiness & Corporate LawLimited PartnershipsManagement Duties & LiabilitiesReal Property LawOwnership & TransferBusiness & Corporate EntitiesReal Property LawSecurities RegulationTransactions Subject to Regulation



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Chapter 20 REAL ESTATE ENTITIES
Part II. The Practice Background

24-20 Current Legal Forms for Real Estate § 20.27

AUTHOR: by Stephen E. Pigott and Harold O. Maxfield, Jr.

§ 20.27 Corporations

[1] Description of a Corporation

A corporation is an entity that is created by statute. It offers its shareholders limited liability. Further, a S-corporation has federal tax treatment that is very similar to that of a partnership. (See TB § 20.07[2] for a detailed discussion of the tax implications of an S corporation.) Additionally, Chapter 18 in Volume 22, Corporate Organization contains a detailed discussion of both the tax and the non-tax characteristics of a corporation.

[2] Formation of the Corporation

In order to form a corporation, Articles of Incorporation must be filed with the appropriate governmental state agency. Most states have promulgated forms that can be filled out by the practitioner and filed. Some states require the use of their forms, other states just recommend it. An appointment of a statutory agent must be filed with the Articles.

[a] Evidence of Ownership

An ownership interest in a corporation is almost always evidenced by a stock certificate. Many modern close corporation statutes which have been adopted by numerous states do not require the issuance of certificates, although very few practitioners follow that practice, even if there is only one member.

[b] Organizational Meetings

In connection with the formation of a corporation it is necessary to have an organizational meeting or to have a written action in lieu of a meeting to complete the formation of the corporation. These post incorporation actions typically include the appointment of officers and directors and adoption of by-laws. The corporation may also elect to be taxed as an S corporation.

[3] The Shareholder Agreement

Most states provide that the shareholders of the corporation can enter into an agreement to give each other certain rights and bind each other with certain obligations. These are typically called close corporation statutes. There is no requirement to have such an agreement, but it is a common practice with corporations that have two or more unrelated parties. Contained in this Chapter at § 20.23 are a number of provisions that the practitioner should consider when drafting a shareholder agreement.

[4] Perpetual Existence

Corporations will have a perpetual existence, unless a stated term is set forth in its Articles of Incorporation.

[5] Transferability of Interests and Centralized Management

Under most states, absent a provision in the articles, by-laws or a close corporation agreement the ownership interests in a corporation are freely transferable. Also, absent an agreement to the contrary, a corporation will have centralized management, and its shareholder will not have the power to bind the corporation. A corporation acts through its officers and other authorized representatives.

[6] C Corporation versus S Corporation

C corporations and S corporations are formed in the same manner. The only difference is how the corporations are taxed. A C corporation is subject to federal income taxation separate and apart from its owners. It is liable for the tax, not its shareholders. Any profit that it makes or losses that it incurs remain at the corporate level. Profits are distributed to its shareholders by way of the declaration and payment of dividends. S corporations are generally not subject to federal income tax. The shareholder is deemed to have received his or her pro-rata of the profit or loss of the corporation. Such profit or loss flows through to the shareholder's federal income tax return and the shareholder is liable for the tax thereon. In order to be an S corporation, the corporations and its shareholders must make an election. (See TB § 20.07[2]).

[7] Securities Laws Compliance

The offering and sale of stock in a company will almost always be considered a regulated security and the practitioner must either register the stock under the applicable state and federal securities laws or find an exemption from registration. Most real estate corporations which involve a small number of owners will be subject to an exception from registration.

Legal Topics:

For related research and practice materials, see the following legal topics:

Business & Corporate LawCorporationsDirectors & OfficersManagement Duties & LiabilitiesGeneral OverviewBusiness & Corporate LawCorporationsFinanceInitial Capitalization & Stock SubscriptionsStock CertificatesBusiness & Corporate LawCorporationsFormationGeneral OverviewBusiness & Corporate LawCorporationsShareholdersGeneral OverviewReal Property LawOwnership & TransferBusiness & Corporate EntitiesTax LawFederal Taxpayer GroupsS CorporationsGeneral OverviewTax LawFederal Taxpayer GroupsS CorporationsShareholders (IRC secs. 1361, 1362, 1366, 1377)Determination of Tax Liability



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Chapter 20 REAL ESTATE ENTITIES
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24-20 Current Legal Forms for Real Estate § 20.28

AUTHOR: by Stephen E. Pigott and Harold O. Maxfield, Jr.

§ 20.28 Limited Liability Companies

[1] Description of a Limited Liability Company

A limited liability company is an entity that is created by statute. It has the corporate characteristics of limited liability to its owners and the federal tax treatment as a partnership. Today, it is the entity used most by practitioners in connection with the formation of a business real estate transaction. (See TB § 20.06 for a detailed discussion of the tax implications of a limited liability company). Additionally, Chapter 18 in Volume 22, *Limited Liability Companies*, contains a detailed discussion of both the tax and the non-tax characteristics of a limited liability company.

[2] Formation of the Limited Liability Company

In order to form a limited liability company, Articles of Organization must be filed with the appropriate governmental state agency. Most states have promulgated forms that can be filled out by the practitioner and filed. Some states require the use of their forms, other states just recommend it. An appointment of a statutory agent must be filed with the Articles.

[a] Evidence of Ownership

Many limited liability company statutes do not require the issuance of a certificate in order to evidence ownership. However, other than their signature on the Operating Agreement, and being named in some tax returns, it may be the only evidence that they have any ownership in the entity, therefore it is advisable for a limited liability company having more than one member.

[b] Organizational Meetings

Many limited liability company statutes do not require an organizational meeting. However, having an organizational meeting and annual meetings will help bolster the separate and distinct nature of the limited liability company. As a result, it is recommended. In addition, most states allow the members to approve actions in writing. This type of written

action can be undertaken in lieu of a meeting.

[c] Other Post Organizational Matters

Many practitioners are forming limited liability companies to resemble corporations. In many circumstances, they appoint officers and directors and adopt by-laws. Since many businesses are accustomed to dealing with officers when making agreements, opening bank accounts etc., it is probably a good idea to appoint officers and directors.

[3] The Operating Agreement

In most states, there is no statutory requirement to have an operating agreement. However, if there is more than one member, a written operating agreement should be used. Also, when dealing with a one person "single purpose entity," it may also be helpful to have an operating agreement. The use of a single purpose entity may be required when the limited liability company obtains bank financing. The lender does not want the operation of the real estate on which it is taking a mortgage to be commingled with the owner's other assets. In addition, the lender does not want any losses with respect to the owner on other property to affect the mortgage property. In any event, a lender may require a one member limited liability company to approve an operating agreement. The lender would obviously be a third party beneficiary to such agreement. Contained in this Chapter at 20 are a number of provisions that the practitioner should consider when drafting an operating agreement.

[4] Perpetual Existence

In most states a limited liability company has perpetual existence, unless a stated term is set forth in its Articles of Organization. The existence of the limited liability company does not need to coincide with that of its members. As a result, a limited liability company can generally be organized in such a manner so that the death of a member does not affect its existence for state law purposes.

[5] Transferability of Interests and Centralized Management

Under most states, absent a provision in the Articles or the operating agreement, the ownership interest is not freely transferable. The transferee will only receive an economic interest in the limited liability company. A limited liability company generally does not have centralized management. The ability to manage is vested in each member. However, the limited liability company has great flexibility and the parties may agree to almost any management structure that the creative practitioner can invent.

[6] Securities Law Considerations

Unless there are specific statutory or regulatory provisions, the issue as to whether interests will be treated as securities will depend on the same standards as are applied to determine whether general partnership interests are securities. A limited liability company interest will be treated as a security under federal law if it can be described as an "investment contract." The leading case on the meaning of an investment contract is *SEC v. W.J. Howey Co.*, 328 US 293 (1946). Under the *Howey* test, an investment contract is an investment in a common enterprise with an expectation of profits to be derived from the managerial efforts of others. It is the second part of the test, whether the profits are to be derived through the efforts of others, on which the security classification will turn. Based on this test and cases interpreting it, whether a membership interest will be considered a security will largely turn on the Articles of Organization and the Operating Agreement, and the actual structure of the entity. When management is vested in its members, it is less likely the interest will be a security. If management is vested in non-member managers, the risk of creating a security is increased. Even if a limited liability company interest is not a security for federal securities law purposes, it may or may not be a security under state law, so counsel must check the state blue sky laws where the entity will be formed and where its investors are located. If it is a security under federal law, counsel must either register the security or find an exemption from registration.

Legal Topics:

For related research and practice materials, see the following legal topics:

Business & Corporate Law Limited Liability Companies Formation Business & Corporate Law Limited Liability Companies Management Duties & Liabilities Business & Corporate Law Limited Liability Companies Members & Other Constituents Real Property Law Ownership & Transfer Business & Corporate Entities Real Property Law Securities Regulation Transactions Subject to Regulation Securities Law Blue Sky Laws Joint Ventures & Partnerships Securities Law Blue Sky Laws Securities Exempt From Registration



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Chapter 20 REAL ESTATE ENTITIES
Part II. The Practice Background

24-20 Current Legal Forms for Real Estate § 20.29

AUTHOR: by Stephen E. Pigott and Harold O. Maxfield, Jr.

§ 20.29 Real Estate Trusts

[1] Description of a Trust

A trust is a relationship between parties where the legal title to the property is held for the benefit of another. A trust can be formed by a written declaration or pursuant to an agreement. In the declaration, the grantor or sponsor of the trust sets forth the terms and conditions of the trusts, including the beneficiaries. The other way to create a trust is pursuant to an agreement. Under the common law in most states, a trust can be created by an oral agreement. It is not advisable to use a trust created by an oral agreement to own and operate real estate. The trust agreement is usually between the grantor or sponsor of the trust and the trustee. In addition to the obligations of the trustee set forth in the trust document, the trustee owes the beneficiaries of the trust a fiduciary duty. The use of trusts for business transactions is becoming somewhat obsolete. Most sophisticated business owners, including real property owners, understand that limited liability companies, corporations and limited partnerships have the flexibility to incorporate any features of a trust that the parties may desire. One benefit to a trust that is commonly recited as a reason to utilize a trust in business is that there is not governmental filing required to bring it into existence. However, with the ease of the Internet, faxes and overnight priority mail it is very easy to form an entity. Further, as trusts are used less and less, and the business community becomes less familiar with its use, it will be more difficult to conduct business with them. Trusts are still widely used for estate planning, probate avoidance and creditor protection purposes.

[2] Common Real Estate Trusts

[a] Real Estate Investment Trusts

A REIT is an entity that is formed to hold real estate investments. It must have at least 100 owners. However, a REIT does not need to be a trust. A REIT can also be organized as a corporation or as an association. A REIT is a creature of the federal income tax laws. The important features of a REIT are not how it is organized, but rather what type of property it owns and how it is taxed. (See TB § 20.08 for a general discussion of the taxation of a REIT). If the REIT does not comply with the highly technical requirements of *Section 128 of the Internal Revenue Code*, it will be taxed as a C corporation.

[b] Qualified Personal Residence Trust

A Qualified Personal Residence Trust is essentially used as an estate planning tool. It provides for the transfer of the full value of a residence to the trust, and the grantor will only be required to pay gift taxes for the cost value of the remainder interest. The appreciation, if any, after the transfer to the Trust, inures to the benefit of the remainder beneficiary if the residence is not sold during the grantor's lifetime and the proceeds of the sale are converted to the grantor retain annuity trust (GRAT). For a complete discussion of Qualified Personal Residence Trusts, see Chapter 9, in Volume 11, § 9.23[1].

[c] Business Trust

Business trusts are trusts that are created to own or operate a business. Business trusts are commonly referred to a "Massachusetts Trusts." A business trust is sometimes used because the organizers of the trust do not have to undertake any filings with a governmental agency to form a business trust. A business trust is formed pursuant to the terms and conditions of a declaration of trust or a trust agreement. Interests in the trust are given or sold to beneficiaries who hold a beneficial interest in the trust. Typically, the beneficial interest can be sold or transferred without the consent of the trustees. The beneficiaries have no right to control, manage or operate the business of the trust. These rights are exclusively vested in the trustee.

[d] Estate Planning, Probate Avoidance or Creditor Avoidance Trusts

In connection with estate planning, probate avoidance and creditor protection of assets, individuals will sometimes convey real property to a trust. The provisions of the trust are geared for the reason that the trust was set up, and not for the ownership of real estate. It should be noted that these types of trusts are generally not arms-length and the grantor of the trust usually has a pre-existing relationship with the trustee and the beneficiaries. In many cases, the grantor of the trust may be the trustee or the trust may be revocable. In these circumstances, as a practical matter, the terms of the trust will not be important until the grantor dies and the trust is terminated.

[3] Securities Law Compliance

The issuance of ownership interests in a trust may be subject to securities regulation. As with a general partnership discussed above (see § 20.26[7]), if the interest in the trust is considered an investment contract under *SEC v. W.J. Howey Co.*, 328 U.S. 293 (1946), then compliance with the securities laws is required. Most large business trusts must comply with the applicable securities rules and regulations because they are issuing investment contracts. In fact, large Massachusetts Trusts may be publicly traded. Obviously, given the nature of a REIT, compliance with the applicable securities laws is critical. A REIT almost always involves a public offering. Lastly, there are no securities laws implications with respect to a Qualified Personal Residence Trust or the estate planning, probate avoidance or creditor avoidance trusts.

Legal Topics:

For related research and practice materials, see the following legal topics:

Real Property Law Securities Regulation Transactions Subject to Regulation Real Property Law Trusts General Overview Real Property Law Trusts Real Estate Investment Trusts (REITs) Tax Law Federal Taxpayer Groups Corporations REITs, REMICs, RITs & FASITs (IRC secs. 851-860L, 4981-4982, 6697)



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24-20 Current Legal Forms for Real Estate § 20.30

AUTHOR: by Stephen E. Pigott and Harold O. Maxfield, Jr.

§ 20.30 Cooperatives

[1] Description of a Cooperative

A cooperative is a corporation or other entity that owns a multi-tenant property, usually residential in nature. The shareholders of the corporation have a proprietary lease to occupy a specific apartment and have an undivided right to use the common facilities. The lease payments of the shareholders are designed to cover the cash flow needs of the facility. The shareholders are owners of personal property and do not own the real property. (For a comprehensive discussion of all aspects of cooperatives, see Rohan & Reskin, *Cooperative Housing*, Matthew Bender).

[a] Types of Cooperatives

The most common type of cooperative is when the corporation owns the real estate. As referred to above, in a corporate owned cooperative, the fee simple interest in the property is owned by the corporation. The shareholders of the corporation have a right to occupy their apartments by virtue of a proprietary lease. Similar to a corporate owned cooperative is a trust. Instead of the corporation owning the property, the trust owns the property. The beneficial interests in the trust are given to the tenants. Again, each tenant has a proprietary lease to occupy a specific apartment at the property. The last type of cooperative is the co-ownership cooperative. In a co-ownership cooperative, the owners of the real estate are tenants in common. Each tenant in common has a proprietary lease for a specific apartment. Because of the decentralized nature of the ownership of a co-ownership cooperative, they are difficult to manage and are seldom used.

[2] Developing a Cooperative

A significant number of states have statutes which authorize the formation of cooperatives. In many cases, it is covered by the same legislation as condominiums. The offering of cooperative is highly technical and regulated. Great care must be given to the applicable laws in the jurisdiction where the property is located. The first step in creating a cooperative is to purchase or control the real estate that will be owned by the cooperative. If it is vacant land, the buildings should be completed, or must be in a position to provide the shareholders with a completion date.

[a] Organization of the Cooperative

The developer will typically prepare and file a declaration subjecting the real estate to the cooperative. The requirement of the filing of a declaration depends on the law in the jurisdiction which the cooperative is being developed. Under the Uniform Common Interest Ownership Act, the developer is required to file the declaration. The Developer will then convey the improved land to the corporation. The corporation will typically serve as the association. The shares in the association will be sold to individuals who intend to occupy the building. The individuals will receive a proprietary lease. In most circumstances, the association will be a non-profit corporation. The corporation must be incorporated and organized in accordance with the law of the jurisdiction where it is being formed. Generally, the corporation would have trustees or directors and have officers appointed. There may also be a set of rules and regulations relating to the use and occupancy of the improvements.

[b] Sale of the Shares

After the conveyance of the property to the association, the association or the developer will sell the shares to individuals that want to live at the building. The sales proceeds are given to the developer, and the shareholders enter into their lease. Thereafter, if a unit is to be sold, the shareholder will convey his or her shares.

[c] The Disclosure Statement

In most states, the sale of shares in a cooperative requires the developer to prepare a disclosure statement, and provide a copy to the purchaser. The statement is designed to provide sufficient information to the purchaser so that the purchaser can make an informed decision regarding the purchase. While the specific requirements vary from jurisdiction to jurisdiction, most states and most uniform acts require several key items. The disclosure statement must describe the general terms and conditions of the offer and the details of the property. It should include a description of the developer, copies of all corporate documents concerning the association, copies of all title documents, a copy of the proposed purchase agreement and include financial statement and proposed operating budgets. The rule of thumb is that the statement should provide the buyer with all material information regarding the transaction which a prudent purchaser would want to know prior to making the purchase.

Legal Topics:

For related research and practice materials, see the following legal topics:

Real Property LawCommon Interest CommunitiesCooperativesGeneral OverviewReal Property LawCommon Interest CommunitiesCooperativesCooperative Housing AssociationsReal Property LawCommon Interest CommunitiesCooperativesFormationReal Property LawCommon Interest CommunitiesCooperativesLeasesReal Property LawCommon Interest CommunitiesCooperativesPurchase & Sale



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Chapter 20 REAL ESTATE ENTITIES
Part II. The Practice Background

24-20 Current Legal Forms for Real Estate § 20.31

AUTHOR: by Stephen E. Pigott and Harold O. Maxfield, Jr.

§ 20.31 Condominiums and Homeowner Associations

[1] Description of Condominium and Homeowner Associations

Condominium and homeowner associations are typically characterized as common interest communities. Unlike cooperatives, the individuals actually own their interest in the real estate and have an undivided interest in the common areas. While condominiums and homeowner associations may own real estate, they are not considered entities. Typically they are corporations formed for the purpose of managing common property, although it would not be unusual for a homeowners association to be unincorporated. The use of condominium and homeowner's associations allow property to be subdivided for individual ownership, but provide for the owners of the individual units to work together to share facilities and costs. Condominiums do not have to be dwelling units. Many condominium projects involve commercial property such as office buildings and marinas.

[2] Developing a Condominium

All states have adopted a condominium act. Approximately a dozen states have adopted the Uniform Condominium Act drafted by the Uniform Law Commissioners. However, most states and the all the uniform acts follow the same basic structure. The first step in developing a condominium is acquiring the land. Under the Uniform Condominium Act, the declaration may not be filed unless all structural components and mechanical systems of the complex are substantially completed. For this reason, the developer may develop the complex in phases. Once the land is acquired, the developer will dedicate the land by filing a declaration. The declaration is the document that declares the property to be a condominium. It is filed in the same manner as a deed conveying property. A condominium declaration must include a detailed set of drawings showing the design, layout, dimensions, etc., of the property. It must also include a legal description of the property that is subject to the declaration and a legal description of any property to which the condominium may expand. Generally, the declarations will include a copy of the by-laws.

[3] The Condominium Association

A condominium association has jurisdiction over the use of the common property, as well as most of the structural

improvements (*i.e.*, roof, foundations, *etc.*). Condominium associations have a duty to enforce the rules, easements, covenants and restrictions set forth in the declaration. The operation of a condominium association is very complicated, and many condominium associations hire outside management companies. Condominium associations have the right to lien a unit for failure to pay assessments, and have the power to take any and all actions, including foreclosure actions. The powers are usually set forth in the applicable statute as well as the declaration.

[4] The Disclosure Statement

In most states, the sale of condominium units by a developer requires the developer to prepare a disclosure statement, and provide a copy to the prospective purchaser. The statement is designed to provide sufficient information to the purchaser so that the purchaser can make an informed decision regarding the purchase. While the specific requirements vary from jurisdiction to jurisdiction, most states and most uniform acts require several key items. The disclosure statement must describe the general terms and conditions of the offer and the details of the property. It would include a description of the developer, copies of all corporate documents concerning the association, copies of all title documents, a copy of the proposed purchase agreement and include financial statement and proposed operating budgets, including projected monthly assessments. The rule of thumb is that the statement should provide the buyer with all material information regarding the transaction that a prudent purchaser would want to know prior to making the purchase.

[5] The Homeowners Association

Once the land is acquired, the developer will dedicate the land by filing a declaration and a plot plan describing each lot of the subdivision. The declaration is the document that declares that the property will be subject to the rules, easements, covenants and restrictions of the homeowners association. It is filed in the same manner as a deed conveying property. A plot plan showing the subdivided lots is usually attached to the declaration. Homeowners associations are formed to manage the common property and to oversee the compliance with the declarations. A homeowners association only has jurisdiction over the use of the common property and the exterior of a residence. Homeowners associations have a duty to enforce the rules, easements, covenants and restrictions set forth in the declaration. Consumers buy residences subject to declarations and homeowners associations because the restrictions are designed to keep up the neighborhood. The organization and operation of a homeowners association is relatively simple when compared to a condominium association. There is significantly less oversight required in connection with the management of a homeowners association. However, homeowners associations normally have the right to lien property for failure to pay assessments, and have the power to take the necessary action to collect assessments including the filing of a foreclosure action. These powers must be set forth in the declaration. Unlike condominiums, cooperatives or time sharing arrangements, the sale of lots in a homeowners association is not regulated and does not require the preparation of a disclosure statement.

Legal Topics:

For related research and practice materials, see the following legal topics:

Real Property LawCommon Interest CommunitiesCondominiumsGeneral OverviewReal Property LawCommon Interest CommunitiesCondominiumsCondominium AssociationsReal Property LawCommon Interest CommunitiesCondominiumsFormationReal Property LawCommon Interest CommunitiesCondominiumsManagementReal Property LawCommon Interest CommunitiesCondominiumsPurchase & Sale



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24-20 Current Legal Forms for Real Estate § 20.32

AUTHOR: by Stephen E. Pigott and Harold O. Maxfield, Jr.

§ 20.32 Time Sharing

[1] Description of a Time Sharing Arrangement

Time sharing is simply a way for two or more people to own or have an interest in the same dwelling. There are two types of time sharing arrangements. Under the Uniform Real Estate Time Sharing Act, the types are described as a time share estate and a time share license. A time share estate does not use a separate real estate entity to own the real estate. The individual owner of the time share owns real estate. This concept is similar to that of a condominium. The unit owners are tenants in common and have a right to use the common facilities. A time share license uses a separate association to own the real estate. The holder of the license has the right to occupy the unit for the agreed interval during a specified period.

Usually, the unit is located at a resort or at a very attractive vacation area. It is attractive to consumers because they can acquire the right to use a luxurious home for a specific period at a fraction of the cost than if they had to purchase the entire dwelling. It is attractive to the developer because that can sell fractional interests in the property, typically at a much higher cost than if the developer had to sell the entire interest. Many developers also have affiliated companies that may operate one or more amenities at the time share property. Many developers also have management companies which provide on-going management services to the time share complex. In addition to the purchase price, unit owners normally pay a management or association fee. The unit is generally divided into fifty-two weeks and the weeks are sold as units to the consumer. For tax purposes, the owner's interest is deemed to be a residence if the owner's use does not exceed the rules applicable to rental dwellings.

[2] Trading of Units

It is a fairly common practice for owners of time shares to trade their existing time share units for other time share units at a different resort. In fact, a number of exchanges have been set up for this purpose. These exchanges assign value to an owner's units. The owner can then take his or her credits, and trade for other weeks or other locations. The ability of time share owners to trade is also a factor in making time shares more attractive to consumers. For example, if an owner has a time share in Cancun, Mexico for September, they have the ability to trade their units for a villa in Colorado in

December to ski.

[3] Developing a Time Share

Many states have adopted a legislation which governs the offering of time sharing arrangements. Many states regulate the offering of time share arrangements in conjunction with the states regulation of condominiums. As an example, the Uniform Condominium Act proposed by the Uniform Law Commissioners also covers time sharing arrangements. The offering of a time sharing arrangement is highly technical, and the practitioner must review and become familiar with the requirement of the jurisdiction where the time share arrangement is being offered and where the project is located. However, the laws in most states have the same basic concepts and structure.

The first step in developing a time share complex and offering a time share is to acquire the real estate and develop the property. After the acquisition of the real estate and development of the property, the developer will generally dedicate the property by the filing a declaration. Under the Uniform Condominium Act, the declaration may not be filed unless all structural components and mechanical systems of complex are substantially completed. For this reason, the developer may develop the complex in phases. The declaration is the document that declares the property to be a time sharing property, and sets forth various restrictions regarding the future use of the property. It is filed in the same manner as a deed conveying property.

[4] The Disclosure Statement

As with condominiums, the sale of time sharing arrangements by a developer requires the developer to prepare a disclosure statement, and provide a copy to the prospective purchaser. The statement is designed to provide sufficient information to the purchaser so that the purchaser can make an informed decision regarding the purchase. While the specific requirements vary from jurisdiction to jurisdiction, most states and most uniform acts require several key items. The disclosure statement must describe the general terms and conditions of the offer and the details of the property. It would include a description of the developer, copies of all corporate documents concerning the association, copies of all title documents, a copy of the proposed purchase agreement and include financial statement and proposed operating budgets, including projected monthly assessments. The rule of thumb is that the statement should provide the buyer with all material information regarding the transaction that a prudent purchaser would want to know prior to making the purchase.

Legal Topics:

For related research and practice materials, see the following legal topics:

Real Property LawCommon Interest CommunitiesGeneral OverviewReal Property LawCommon Interest CommunitiesCondominiumsGeneral OverviewReal Property LawCommon Interest CommunitiesHomeowners AssociationsReal Property LawCommon Interest CommunitiesTimeshares



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[Reserved]

§§ 20.33[Reserved]



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AUTHOR: by Stephen E. Pigott and Harold O. Maxfield, Jr.

§ 20.44 Research Checklist

A. Model Acts

- Model Business Corporation Act (1984) ☐
- Uniform Condominium Act (1980) ☐
- Uniform Condominium Act (1980) ☐
- Uniform Limited Partnership Act (2001) ☐
- Uniform Partnership Act ☐
- Uniform Real Estate Time Share Act ☐

B. Annotations

- "Construction and Application of Limited Liability Company Acts," 79 ALR5th 689 (2002) ☐
- "Liability of Owner of Unit in Cadmium, Recreational Development, Time-Share

Property, or the Like, for Assessment in Support of Common Facilities Levied Against and Unpaid by Prior Owner," 39 ALR4th 114 (1985) ☐

-- "Personal Liability of Owner of Condominium Unit to One Sustaining Personal Injuries or Property Damage by Condition of Common Areas," 39 ALR4th 98 (1985) ☐

-- "Property Taxation of Residential Time-Share or Internal-Ownership Units," 80 ALR4th 950 (1990) ☐

-- "Real Estate Taxation of Condominiums," 71 ARL3rd 952 (1976) ☐

-- "Regulation of Time-Share or Internal Ownership Interests in Real Estate," 6 ALR4th 1288 (1981) ☐

-- "Validity, Construction, and Application of Statutes, or of Condominium Association's Bylaws or Regulations, Restricting Number of Units That May Be Owned by Single Individual or Entity," 39 ALR4th 88 (1985) ☐

C. Law Reviews and Periodicals

-- August Snow "S Corporation vs. Partnership for Real Estate Ventures," Journal of Taxation of Investments Vol. 1, p. 91 (1984) ☐

-- Bath, "Form and Function in Business Organizations," The Business Lawyer, Vol. 58, N.4, p. 1433 (2003) ☐

-- Bath, "Entity Rationalization" What Can or Should be Done About the Proliferation of Business Organization," 58 Bus. Law 1003(2003) ☐

-- Bath, "Entity Rationalization" What Can or Should be Done About the Proliferation of Business Organization Part II," 58 Bus. Law 1003 (2003) ☐

-- Brode, "Structuring Real Estate Entities in View of the New Limitation on Loss Rules," The Journal of Taxation, November, p. 290 (1986) ☐

-- Brennan, "The Next Step in the Evolution of the Implied Warranty of Habitability: Applying the Warranty to Condominiums," 67 Fordham L. Rev. 3041 (1999) ☐

-- Collison, "Changed Circumstances: Eliminating the Williamson Presumptions the General Partnership Interests Are Not Securities," The Business Lawyer Vol. 58, N.4, p. 1373 (2003) ☐

-- Eriks, "Treatment Of Time-Share Interests Under The Bankruptcy Code," *59 Ind. L.J.* 223 (1983) ☐

-- Fleischer, " 'If It Looks Like a Duck': Corporate Resemblance and Check-The-Box Elective Tax Classification," *96 Colum. L. Rev.* 518 (1996) ☐

-- Ginocchi and Taylor, "How 'Limited' Is Pennsylvania's Limited Liability Company Act?," *33 Duq. L. Rev.* 613 (1995) ☐

-- Grassmick, "Minding The Neighbor's Business: Just How Far Can Condominium Owners' Associations Go In Deciding Who Can Move Into The Building?," *2002 U. Ill. L. Rev.* 185 (2002) ☐

-- Greene, "Planning to Use Closely Held Corporation Real Estate for the Benefit of Family Members," Vol. 40, p. 22 (1988) ☐

-- Huss, "Revamping Veil Piercing for All Limited Liability Entities: Forcing the Common Law Doctrine Into the Statutory Age," *70 U. Cin. L. Rev.* 95 (2001) ☐

-- Lackey, "Piercing the Veil of Limited Liability in the Non-Corporate Setting," *55 Ark. L. Rev.* 553 (2002) ☐

-- Matthews, "The Arkansas Limited Liability Company: A New Business Entity Is Born," *46 Ark. L. Rev.* 791 (1994) ☐

-- McGaughey, "Limited Liability Partnerships: Need Only Professionals Apply?," *30 Creighton L. Rev.* 105 (1996) ☐

-- Peirce and Mann, "Time-Share Interests in Real Estate: A Critical Evaluation of the Regulatory Environment," *59 Notre Dame L. Rev.* 9 (1983) ☐

-- Rosenberry and Sproul, "Common Interest Development Communities: Part I: A Comparison of California Common Interest Development Law and the Uniform Common Interest Ownership Act," *38 Santa Clara L. Rev.* 1009 (1998) ☐

-- Scavo, "Marketing Resort Timeshares: The Rules of the Game," *73 St. John's L. Rev.* 217 (1999) ☐

-- Silverman, "Tiptoeing Through the Minefield of the Uniform Planned Community Act," *71 PA Bar Ass'n Quarterly* 131 (2000) ☐

-- Snyder and Gonick, "Affiliated Corporate Groups for Real Estate Investments: The Syndication Vehicle for the Future?," Vol. 14, *The Journal of Taxation* 15 (1987)

..... ☐

-- Schlesinger and Ball, "Estate Planning for Real Estate Interests," Vol. 11, *Tax Management Real Estate Journal* 153 (1995) ☐

-- Thiessen, "Some Compelling Reals for Investing in Real Estate," 13 *Estates & Trusts* 10 (1991) ☐

-- Utz, "Common Interest Ownership in Pennsylvania: An Examination of Statutory Reform and Implications for Practitioners," 37 *Duq. L. Rev.* 465 (1999) ☐

-- Van der Merwe, "A Comparative Study of the Distribution of Ownership Rights in Property in an Apartment or Condominium Scheme in Common Law, Civil Law and Mixed Law Systems," 31 *Ga. J. Int'l & Comp. L.* 101 (2002) ☐

-- Welch, "Practical Guide to Forming a Partnership in Utah," 12 *BYU J. Pub. L.* 111 (1997) ☐

Legal Topics:

For related research and practice materials, see the following legal topics:

Business & Corporate LawCorporationsGeneral OverviewBusiness & Corporate LawGeneral PartnershipsGeneral OverviewBusiness & Corporate LawLimited Liability CompaniesGeneral OverviewBusiness & Corporate LawLimited PartnershipsGeneral OverviewReal Property LawCommon Interest CommunitiesCondominiumsGeneral OverviewReal Property LawCommon Interest CommunitiesTimesharesReal Property LawOwnership & TransferBusiness & Corporate Entities



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Part III. Drafting Guidelines

24-20 Current Legal Forms for Real Estate § 20.45

AUTHOR: by Stephen E. Pigott and Harold O. Maxfield, Jr.

§ 20.45 Overview of Drafting Guidelines

After the principal or principals decide that the property is suitable, the parties will usually concentrate on the nature of the ownership, the choice of entity, and the relationship (i.e., rights and obligations) of the owners of the enterprise. However, in many cases, the practitioner may be asked to provide advice on the feasibility of the purchase and the selection of the entity simultaneously. If the latter is the case, the client may be incurring legal fees in connection with the formation of the enterprise, before the client actually determines that the property is suitable. If the client wishes to avoid this scenario, a purchase agreement may provide that it is assignable to new entity to be formed by the buyer, or that the property may be purchased by buyer's nominee. If the purchase agreement contains such a provision, then there should be no problem waiting until the buyer has completed its due diligence regarding the viability of the purchase, before it proceeds to address the type of entity that will complete the purchase.

If the real estate is being purchased in connection with an existing business, the choice of entity analysis may start with determining if an existing entity will be used, or if a new entity will be formed. Obviously, if an existing entity is to be used, a review of the governing documents and ownership structure should be completed to determine that everything is in order. In this regard, if a determination is made that the existing entity's documentation needs to be updated, the documentation can easily be amended or modified to incorporate the new concepts or agreements that are being introduced by the parties. Furthermore, after the choice of entity has been made, most of the concepts and drafting guidelines contained in this chapter are applicable to all types of entities, and can be modified to fit almost any entity with a minor amount of effort. In the case of an entity with one owner, the practitioner will not likely pay significant attention to the formation documents or operating agreements because they can be changed at any time. However, an exception to this rule is if an outside party, such as a bank, requires an agreement to ensure that the entity is a single purpose enterprise. In this scenario, the outside party will generally dictate the substantive provision of the agreement. Regardless, even if the client deems the formation documents unimportant, the practitioner should recommend the adoption of an operating statement, by-laws or code of regulations so that the corporate formalities are in place. This will help to avoid an argument that the entity's creditors can "pierce the corporate veil."

Finally, after the type of the entity is selected, the practitioner must review and become familiar with the state statutes

under which the entity will be formed. Most states require a filing in order to form an entity. Additionally, most states have laws that govern the operation of an entity that has been formed in its jurisdiction. As a general matter, these laws are considered default provisions and will govern the operation of the entity unless the operative agreement entered into by the owners requires a different result.

In the typical real estate purchase, the trend has been to use a limited liability company. As discussed above, the owners of this type of entity generally have limited liability and receive favorable tax treatment. See TB § 20.05. Another common entity for the ownership of an interest in real estate is a corporation that has made an S-election for federal income tax purposes. The S corporation parallels the limited liability company with respect to the limitation of liability on its owners. Also, an S corporation's tax treatment is very similar to that of a limited liability company, however the practitioner should be aware that there are some subtle differences. (See TB § 20.06 and § 20.07).

Legal Topics:

For related research and practice materials, see the following legal topics:

Business & Corporate Law Limited Liability Companies General Overview Business & Corporate Law Limited Liability Companies Formation Real Property Law Ownership & Transfer Business & Corporate Entities Real Property Law Purchase & Sale Contracts of Sale General Overview



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AUTHOR: by Stephen E. Pigott and Harold O. Maxfield, Jr.

§ 20.46 Drafting the Agreement

In order to provide the practitioner with a broad base of typical provisions these drafting guidelines include three basic agreements. The first agreement is an operating agreement for a limited liability company with only one member. For federal income tax purposes, the entity will be ignored and the owner will be deemed to be a sole proprietorship. The primary reason to use an operating agreement for a limited liability company with one member is because a lender is requiring that it be a single purpose entity for as long as it has a loan outstanding. The second agreement is an operating agreement involving a limited liability company that has several members. For the purposes of this agreement, the members are employees of a separate corporation. The limited liability company was formed to purchase the property and lease it to the corporation. The third agreement is a simple shareholder agreement involving a corporation that has elected S corporation status.

[1] Operating Agreement for Single Purpose Single Member Limited Liability Company

Drafting the Agreement

CONTRACT

OPERATING AGREEMENT OF

(a(n)) _____ [state] Limited Liability Company)

THIS OPERATING AGREEMENT ("Agreement") is entered into as of the _____ [day] day of _____, [month] _____ [year], by and between _____ [name] (the "Company") and _____ [name] ("Member").

WHEREAS, the Member has caused Articles of Organization to be filed with the _____ Secretary of State's office forming a(n) _____ [state] limited liability company under the name " _____;" [name] and

WHEREAS, currently there is only one (1) Member, and in the event additional Members are admitted, this Operating Agreement will be applicable to all Members;

NOW, THEREFORE, in consideration of the mutual covenants and promises set forth herein, the parties hereby agree as follows:

ARTICLE 1 FORMATION OF THE COMPANY

1.1 Formation of Limited Liability Company. The Member has organized the Company pursuant to the provisions of Sections _____ to _____, both inclusive, of the _____ Revised Code (the "LLC Act") under the name " _____."

1.2 Principal Office. The principal office of the Company shall be _____, [address] or at such other place in the State of _____ [state] as may be designated by the Member.

1.3 Purposes of the Company. The sole purpose of the Company shall be as follows:

(a) The Company is, and at all times that the loan identified on Exhibit 1 attached hereto (the "Loan") is outstanding will be, organized for the limited purpose of acquiring, owning, holding, selling, leasing, transferring, exchanging, operating and managing the property described on Exhibit 2 attached hereto (the "Property"), assuming the Loan, and entering into and performing its obligations under all documents and instruments pertaining thereto; refinancing the Property in connection with a permitted repayment of the Loan; and transacting any and all lawful business for which a limited liability company may be organized under _____ [state] law that is incident, necessary and appropriate to accomplish the foregoing special purposes. (n1)COMMENT

(b) The Company is prohibited from taking any of the following actions for so long as the Loan is outstanding:

1. engaging in any dissolution, liquidation, consolidation, merger or sale of assets;
2. amending its Operating Agreement and/or its Articles of Organization without the prior written consent of _____ [name of lender] (the "Lender") (provided, however, any amendment of the Company's Operating Agreement and/or its Articles of Organization after the assumption of the Loan, additionally shall require: (i) confirmation from each of the applicable rating agencies that such amendment would not result in the qualification, withdrawal or downgrade of any securities rating (unless Lender shall otherwise, in its sole discretion, waive such requirement); and (ii) approval of such amendment by the Lender or its assigns); and
3. incurring indebtedness other than the Loan except for incurring liabilities in the ordinary course of business that are related to the ownership and operation of the Property.

(c) The Company shall be prohibited from taking, and the Company will not take, any Bankruptcy Action (hereinafter defined) for so long as the Loan is outstanding without the unanimous and affirmative vote of all members of the Company. "Bankruptcy Action" means any of the following:

1. taking any action that might cause the Company to become insolvent;

2. commencing any case, proceeding or other action on behalf of the Company, or otherwise seeking any relief, under any existing or future law of any jurisdiction relating to bankruptcy, insolvency, reorganization or relief from debts or the protection of debtors generally;
3. consenting to the institution of bankruptcy or insolvency proceedings against the Company;
4. filing a petition or consent to a petition seeking reorganization, arrangement, adjustment, winding-up, composition, or other relief on behalf of the Company of its debts under any federal or state law relating to bankruptcy;
5. seeking or consenting to the appointment of a receiver, liquidator, assignee, trustee, sequestrator, custodian or any similar official for the Company or a substantial portion of its assets;
6. making any assignment for the benefit of the Company's creditors; or
7. taking any action in furtherance of any of the foregoing. (n2)COMMENT

(d) In order to preserve and ensure its separate and distinct identity, the Company at all times in conducting its affairs, shall:

1. Maintain its books and records separate from any other person or entity;
2. Maintain its bank accounts separate from any other person or entity;
3. Not commingle its assets with those of any other person or entity and shall hold all of its assets in its own name;
4. Conduct its own business in its own name;
5. Maintain separate financial statements showing its assets and liabilities separate and apart from those of any other person or entity and not to have its assets listed on the financial statement of any other entity;
6. File its tax returns separate from those of any other entity and shall not file a consolidated tax return with any other entity;
7. Pay its own liabilities and expenses only out of its own funds;
8. Observe all _____ [state] limited liability company and other organizational formalities;
9. Maintain an arm's length relationship with its affiliates and to enter into transactions with affiliates only on a commercially reasonable basis;
10. Pay salaries of its own employees (if any) from its own funds;
11. Maintain a sufficient number of employees (if any) in light of its contemplated business operations;
12. Not guarantee or become obligated for the debts of any other person or entity;
13. Not hold out its credit as being available to satisfy the obligations of any other person or entity;
14. Not acquire the obligations or securities of its affiliates or owners, including partners, members or shareholders, as appropriate;

15. Not make loans to any other person or entity or buy or hold evidence of indebtedness issued by any other person or entity (except for cash and investment-grade securities);
16. Allocate fairly and reasonably any overhead expenses that are shared with an affiliate, including paying for office space and services performed by any employee of an affiliate;
17. Use separate stationery, invoices, and checks bearing its own name;
18. Not pledge its assets for the benefit of any other person or entity (other than with respect to the Loan);
19. Hold itself out as a separate entity;
20. Correct any known misunderstanding regarding its separate identity;
21. Not identify itself as a division of any other person or entity; and
22. Maintain adequate capital in light of its contemplated business operations.

1.4 Duration of the Company. The Company shall commence on the date on which its Articles of Organization were filed with the _____ [state] Secretary of State's Office, and shall continue thereafter until terminated and dissolved in accordance with the terms of this Agreement. (n3)COMMENT

ARTICLE 2

MEMBERS, CAPITAL CONTRIBUTIONS, CAPITAL ACCOUNTS

2.1 Members. The name and address of the Member is set forth on the signature page attached hereto.

2.2 Membership Units; Initial Capital Contributions. The Member's interest in the capital of the Company is represented by membership units ("Membership Units"). Each Membership Unit shall represent an interest in the capital of the Company and shall be identical in all respects with every other Membership Unit. The Membership Units shall not be certificated. The Company shall be capitalized by the Member contributing Ten Dollars (\$10) in exchange for ten (10) Membership Units ("Membership Interest"). The Member shall not have the right to demand or receive the return of his capital contribution except as otherwise expressly provided herein.

2.3 Voting of Members. On any matter presented to the Members for their vote, each Member shall have one vote for each Membership Unit owned by him.

2.4 Capital Accounts. An individual capital account shall be established and maintained for each Member and has been or shall be credited with the amount of each Member's initial capital contribution to the Company. Each Member's capital account shall be determined and maintained throughout the term of the Company in accordance with the requirements of *Section 704(b) of the Internal Revenue Code of 1986* (the "Code") or its counterpart in any subsequently enacted Internal Revenue Code, the applicable Treasury Regulations (the "Regulations") thereunder and the provisions of the Bylaws, if any, of the Company. (n4)COMMENT

2.5 Continuation of Membership. None of the following events will result in the termination of a Member's membership in the Company:

- (i) The Member files a voluntary petition in bankruptcy;

(ii) The Member is adjudicated a bankrupt or insolvent; or

(iii) The member who is an individual dies or is adjudicated an incompetent.

(n5)COMMENT

ARTICLE 3

ALLOCATIONS OF PROFITS AND LOSSES, CASH FLOW AND DISTRIBUTIONS

3.1 Profits and Losses. Except as required by the Code, the net profits and net losses of the Company shall be allocated among, or borne by, each Member in proportion to the Membership Units owned by each of them.

3.2 Cash Flow. The cash flow of the Company shall be the net profits and losses of the Company, plus depreciation and other noncash charges deducted in determining such profits and losses, minus principal payments on all mortgages, and any other cash expenditures which have not been deducted in determining the net profits and losses of the Company, and minus the amount reasonably determined by the Company to be necessary to maintain, for the Company, sufficient working capital and a reasonable reserve for repairs and/or replacements. The cash flow of the Company shall be determined separately for each fiscal year and not cumulatively.

3.3 Distribution or Retention of Cash Flow. Cash flow, as determined in accordance with Section 3.2, shall be distributed in proportion to the number of Membership Units held by each Member, which distributions shall be made at such time or times as may be determined by the Company.

ARTICLE 4

MANAGEMENT

4.1 Manager. The business and the affairs of the Company shall be managed by _____ [name] who will be the Managing Member. In the event there is more than one (1) Member, the Managing Member shall be elected by the Members at a meeting held for such purpose, with the candidates receiving the greatest number of votes being elected. A Manager need not be a resident of the State of _____ [state] . (n6)COMMENT

4.2 Powers of Manager. In addition to all other rights and powers, the Managing Member shall have the specific rights and powers required or appropriate for his supervision of the day-to-day business. Such rights and powers shall include, but not be limited to, the following:

(i) to engage personnel, attorneys, accountants or such other persons as may be deemed necessary or advisable;

(ii) to open, maintain and close bank accounts and to draw checks and other orders for the payment of money;

(iii) to take such actions and incur such expenses on behalf of the Company as maybe necessary or advisable in connection with the conduct of the affairs of the Company; and

(iv) to enter into, make and perform such contracts, agreements and other undertaking as may be deemed necessary or advisable for the conduct of the affairs of the Company.

4.3 Liability of a Manager. No Manager shall have any liability to the Company or to any Member for any mistakes

or errors in judgment, or for any act or omission believed in good faith to be within the scope of authority conferred by this Agreement. A Manager shall be liable only for acts and/or omissions involving intentional wrongdoing. Actions or omissions taken in reliance upon the advice of legal counsel that they are within the scope of a Manager's authority hereunder shall be conclusive evidence of good faith; provided, however, a Manager shall not be required to procure such advice to be entitled to the benefit of this subparagraph. (n7)COMMENT

4.4 Books and Records. The Manager shall maintain or cause to be maintained complete and accurate records of all properties owned or leased by the Company and complete and accurate books of account (containing such information as shall be necessary to record allocations and distributions), and make such records and books of account available for inspection by any Member, or his duly authorized representative during regular business hours and at the principal office of the Company. Within sixty (60) days after the end of each calendar year, there shall be prepared and distributed to each Member reasonable tax-reporting information, in sufficient detail to enable such Member to prepare his federal, state and local income tax returns. In addition, within ninety (90) days after the end of each calendar year, there shall be prepared and distributed to each Member, a balance sheet, and a report of the receipts, disbursements, net profits and losses, and cash flow of the Company, and the share of the net profits and losses and cash flow of each Member for such calendar year. Such balance sheet and report shall be prepared by a certified public accountant in accordance with the method of accounting used by the Company for tax purposes.

4.5 Taxable Year; Accounting Method. The taxable year of the Company shall be a calendar year, and the first taxable year shall end on December 31st of the year in which the Company is formed. The books and records of the Company shall be maintained on the cash method of accounting.

ARTICLE 5

DISCLOSURES AND REPRESENTATIONS

5.1 Disclosure by Corporation. In connection with the sale of the Membership Units to the Member hereunder, the Company hereby discloses the following information to the Member:

(a) the Membership Units have not been registered under the federal Securities Act of 1933, as amended (the "Federal Act"), and are being offered and sold by the Corporation pursuant to a registration exemption contained in Section 3(a)(11) of the Federal Act and/or Securities and Exchange Commission Rule 147, promulgated thereunder.

(b) during the period the Membership Units are being offered and sold by the Company, and for a further period of nine (9) months from the date of the last sale of the Membership Units that are part of the offering that is being so offered and sold by the Company, all resales, pledges, hypothecations, or other transfers of the Membership Units by any person or business organization shall, subject to the further terms of this Agreement, including the provisions of the legend set forth in subparagraph (c) below, be made only to persons or business organizations having a principal residence or principal office, respectively, within the State of _____ [state] .

(c) a legend has been, or will be, placed on each certificate or other document evidencing any of the Membership Units in substantially the following form:

THE MEMBERSHIP UNITS EVIDENCED HEREBY HAVE NOT BEEN REGISTERED UNDER THE SECURITIES ACT OF 1933, AS AMENDED, AND, FOR A PERIOD OF AT LEAST NINE (9) MONTHS FROM THE DATE OF THE LAST SALE BY THE COMPANY OF THE MEMBERSHIP UNITS IN THE OFFERING OF WHICH THE MEMBERSHIP UNITS ARE A PART, ALL RESALES, PLEDGES, HYPOTHECATIONS, OR OTHER TRANSFERS OF THESE SECURITIES BY ANY PERSON OR BUSINESS ORGANIZATION SHALL BE MADE ONLY TO PERSONS OR BUSINESS ORGANIZATIONS WHO ARE RESIDENT WITHIN THE STATE OF _____ [state] .

(d) Stop transfer instructions to the appropriate officers of the Company have been, or will be, placed in the Company's records with respect to the Membership Units so as to restrict the resale, pledge, hypothecation, or other transfer thereof, subject to the further terms of this Agreement, including the provisions of the legend set forth in subparagraph (c) above, during the nine-month period described in subparagraph (b) above.

(e) Prior to the expiration of the nine-month period described in subparagraph (b) above, the legend and stop transfer instructions described in subparagraphs (c) and (d) above will be placed on any new certificate(s) or other document(s) issued by the Company upon presentment by a Member to the Corporation of any certificate(s) or other document(s) for transfer of any of any of the Membership Units to a person or business organization having a principal residence or principal office, respectively, within the State of _____ [state] .

(f) The Membership Units have not been registered under the _____ [state] Securities Act, set forth in Chapter _____ of the _____ [state] Revised Code, as amended (the "_____ [state] Act"), and are being offered and sold by the Company pursuant to a registration exemption contained in Section _____ of the _____ [state] Act.

(g) The Company reasonably believes that the Member is acquiring the Membership Units hereunder for investment, has no information to the contrary, and through Section 5.2 below is hereby obtaining a signed statement to that effect from the Member prior to the purchase of any of the Membership Units hereunder.

5.2 Representations and Warranties of the Members. In connection with the Member's purchase of the Membership Units hereunder, the Member represents and warrants, which representations and warranties shall survive the consummation of the Member's purchase of his interest hereunder, as follows:

(a) The Member's principal residence or principal office, as the case may be, is located within the State of _____ [state] .

(b) The Member is aware that no market may exist for the resale of a Membership Unit purchased under this Agreement.

(c) The Member is purchasing for investment and not for the distribution of any of the Membership Units purchased under this Agreement.

(d) The Member is aware of any and all restrictions imposed by the Company on the further distribution of the Membership Units, including, but not limited to, any restrictive legends appearing on the certificate(s) and/or other document(s) evidencing any interest, required holding periods, stop transfer orders, or buy-back rights of the Company.

ARTICLE 6 DISSOLUTION

6.1 Termination of the Company. The Company shall be terminated and dissolved upon the first to occur of the following, provided such termination and dissolution does not interfere with the provisions of Article 1.3 (b) above:

(a) upon the affirmative vote of at least two-thirds (2/3) of the Membership Units; or

(b) upon the sale of all or substantially all the assets of the Company.

ARTICLE 7

WINDING UP

7.1 Winding Up. Upon the termination of the Company pursuant to Article 6.1 above, a full and general accounting shall be taken of the Company's business, and the affairs of the Company shall be wound up. Any profits earned or losses incurred since the last previous accounting shall be allocated among, or borne by, the Member in accordance with the provisions of Section 3.1 above. The Managing Member shall wind up and liquidate the Company by selling the Company's assets, or by distributing such assets in kind, subject to the Company's liabilities, or by a combination thereof, as determined by the Managing Member. The proceeds of such liquidation shall be applied and distributed in the following order of priority, by the end of the taxable year during which the liquidation occurs (or, if later, within ninety (90) days after the date of the liquidation):

(a) to the payment of any debts and liabilities of the Company;

(b) to the setting up of any reserve which the Managing Member shall reasonably deem necessary to provide for any contingent or unforeseen liabilities or obligations of the Company, with any excess in such reserve remaining after such liabilities are satisfied to be distributed as soon as practicable in the manner hereinafter set forth; and

(c) thereafter, the balance of the proceeds, if any, shall be distributed in accordance with the positive capital account balances of the Members, as determined after taking into account all capital account adjustments for the Company's taxable year during which such liquidation occurs. For purposes of this subsection, a liquidation of the Company shall mean a liquidation as defined in Section 1.704-1(b)(2)(ii)(g) of the Regulations.

7.2 Statement. Each Member shall be furnished with a statement prepared by the Company's accountants, which shall set forth the assets and liabilities of the Company as of the date of complete liquidation.

7.3 Return of Capital Contributions. Notwithstanding anything in this Agreement to the contrary, neither the Managing Member nor any Member shall be personally liable for the return of the capital contributions of the Members, or any portion thereof, it being expressly understood that any such return of the capital contributions of the Members shall be made solely from Company assets.

ARTICLE 8 MISCELLANEOUS

8.1 Tax Matters Member. _____ [name] shall serve as the Tax Matters Member of the Company, as provided in Regulations issued pursuant to Section 6231 of the Code. Each Member, by the execution of this Agreement, consents to such designation of the Tax Matters Member. The Company shall indemnify and reimburse the Tax Matters Member for all expenses, including legal and accounting fees, claims, liabilities, losses and damages incurred in connection with any administrative or judicial proceeding with respect to the tax liability of the Members. The payment of all such expenses shall be made before any distributions to Members are made by the Company. The taking of any action and the incurring of any expense by the Tax Matters Member in connection with any such proceeding, except to the extent required by law, is a matter in the sole discretion of the Tax Matters Member.

8.2 Amendments. This Agreement may be amended only with the written approval of all of the Members.

8.3 Actions. Members may take and adopt actions in writing, without a meeting, only if such actions are approved by all of the Members.

8.4 Notices. All notices, consents or other instruments hereunder shall be in writing and mailed by United States mail, postage prepaid, and shall be directed to the parties hereto at the last addresses of the parties furnished by them in

writing to the Company, and to the Company at its principal office. The Company and/or any Member shall have the right to designate a new address for receipt of notices by notice addressed to the Members and the Company and mailed as aforesaid. Such notices shall be made a permanent part of the Company records.

8.5 Obligations and Rights of Transferees. Any person who acquires in any manner whatsoever any Membership Unit in the Company, irrespective of whether such person has accepted and assumed in writing the terms and provisions of this Agreement, shall be deemed by the acceptance of the benefit of the acquisition thereof to have agreed to be subject to, and to be bound by, all the obligations of this Agreement with the same force and effect as any predecessor in interest of such person. Such assignee shall, immediately upon the assignment of the Membership Unit(s), be a Member of the Company.

8.6 Benefit and Binding Effect. This Agreement shall inure to the benefit of, and be binding upon, the parties hereto and their respective next of kin, legatees, administrators, executors, legal representatives, nominees, successors and permitted assigns.

8.7 Integration. This Agreement constitutes the entire agreement among the parties hereto pertaining to the subject matter hereof, and supersedes all prior and contemporaneous agreements and understandings of the parties in connection therewith.

8.8 Governing Law. This Agreement and the rights of all parties hereunder shall be governed by, and construed in accordance with, the laws of the State of _____ [state] .

8.9 Counterparts. This Agreement may be executed in several counterparts, each of which shall be considered an original when executed by one or more of the Members.

Each party has executed this Operating Agreement on the day and year first written above.

COMPANY:

By: _____
[name and title]

MEMBER:

[name]

[2] Operating Agreement for Limited Liability Company with More than One Member

OPERATING AGREEMENT OF

(a(n) _____ [state] Limited Liability Company)

THIS OPERATING AGREEMENT ("Agreement") is entered into as of the _____ [day] day of _____, [month] _____, [year] by and among _____, [name] _____, [name] _____, and _____, [name] such parties being sometimes hereinafter referred to collectively as the "Members," and individually as a "Member."

WHEREAS, the Members have caused Articles of Organization to filed with the _____ Secretary of State's office forming a(n) _____ [state] Limited Liability Company under the name _____ [name] (the "Company"); and

WHEREAS, the Members desire to set forth the understandings and agreements among them with respect to the affairs of the Company and the conduct of its business;

NOW, THEREFORE, in consideration of the mutual covenants and promises set forth herein, the parties hereby agree as follows: (n8)COMMENT

ARTICLE 1 FORMATION OF THE COMPANY

1.1 Formation of Limited Liability Company. The Members have organized the Company pursuant to the provisions of Sections _____ to _____, both inclusive, of the _____ [state] Revised Code (the "LLC Act") under the name " _____." Except as otherwise provided herein, all rights, liabilities and obligations of the Members, both as among themselves and as to persons not parties to this Agreement, shall be as provided in the LLC Act.

1.2 Principal Office. The principal office of the Company shall be _____, [address] or at such other place in the State of _____ [state] as may be designated by the Members.

1.3 Purposes of the Company. The purpose of the Company shall be to engage in such other lawful acts or activities for which limited liability companies may be formed under the LLC Act. (n9)COMMENT

1.4 Duration of the Company. The Company shall commence on the date on which its Articles of Organization were filed with the _____ [state] Secretary of State's Office, and shall continue thereafter until terminated and dissolved in accordance with the terms of this Agreement. (n10)COMMENT

ARTICLE 2 MEMBERS, CAPITAL CONTRIBUTIONS, CAPITAL ACCOUNTS

2.1 Members. The names and addresses of the Members are set forth on the signature pages attached hereto.

2.2 Membership Units; Initial Capital Contributions. Each Member's undivided interest in the capital of the Company shall be represented by Membership units ("Membership Units"). Each Membership Unit shall represent an interest in the capital of the Company and shall be identical in all respects with every other Membership Unit. The Membership Units shall be certificated. Each Member shall own the number of Membership Units set forth on Exhibit A. A Member shall not have the right to demand or receive the return of his capital contribution except as otherwise expressly provided herein.

2.3 Voting of Members. On any matter presented to the Members for their vote, each Member shall have one (1) vote for each Membership Unit. (n11)COMMENT

2.4 Capital Accounts. An individual capital account shall be established and maintained for each Member and has been or shall be credited with the amount of each Member's initial capital contribution to the Company. Each Member's capital account shall be determined and maintained throughout the term of the Company in accordance with the requirements of *Section 704(b) of the Internal Revenue Code of 1986* (the "Code") or its counterpart in any subsequently enacted Internal Revenue Code, the applicable Treasury Regulations (the "Regulations") thereunder and the provisions of the Bylaws of the Company.

2.5 Capital Calls. The Members recognize that the income produced by the Company may be insufficient to pay the cost of operating the Company. The term "cost of operating the Company" shall include, without limiting the generality of said term, all real estate taxes and assessments and other state and governmental charges, insurance premiums, costs of repair and maintenance, and the principal and interest payments required to be made on any loans or mortgages of the Company. If, in the opinion of the Board of Managers, additional funds are required to pay the cost of operating the Company, such additional funds shall be contributed by the Members in proportion to their ownership of Membership Units in the Company. (n12)COMMENT

2.6 Defaulting Members. If any Member is unwilling or unable to make, within thirty (30) days, any or all of his proportionate contribution upon a capital call, then the other Members shall each have the right to make up such deficit amount in any proportion that they decide. If the other Members, or any one of them, make a contribution pursuant to the foregoing, such Members shall have the option to treat the contribution as additional capital of the Company, or to treat the contribution as a loan to the defaulting Member. Such election shall be made, in writing, at the time the contribution is made.

2.6.1 If the contributing Members elect to treat their contribution as additional capital, after such contributions are made, each Member's percentage capital interest in the Company (and their respective interests in the net profits, net losses and cash flow) shall be adjusted and determined by dividing the total amount of capital contributed to the Company by such Members since the Company's inception by the total amount of capital contributed to the Company since its inception by all Members. The resulting quotient, with respect to each Member, shall be the adjusted percentage interest of such Member in the capital of the Company (and in the net profits, net losses and cash flow). In accordance with such increased capital interest, the Company shall issue to the contributing Members such additional Membership Units as are necessary to properly reflect their increased capital interest in the Company.

2.6.2 If the contributing Members elect to treat their contributions as a loan to the defaulting Member, then no adjustment shall be made to the percentage capital interest of the contributing Members because of such loan and each Member's share in the profits and losses and cash flow of the Company shall remain the same. The defaulting Member's capital account shall be increased in the same amount as would occur if the defaulting Member had made the additional capital contribution in the amount of the loan. In addition, the defaulting Member's share in the net profits, net losses and cash flow of the Company shall be adjusted, if necessary, as if he or she had made a contribution to the capital of the Company in the amount of such loan. The amount advanced by the Members on behalf of the defaulting Member shall be a debt of the defaulting Member to the contributing Members and shall bear interest at the prime rate or base lending rate of _____ [bank] of _____, [city] _____, [state] or its corporate successor, then in effect. Thereafter, all distributions of cash from the Company due to the defaulting Member shall be paid to the Members who elected to treat their contribution as loan until such time as the principal and interest of the loan is paid in full. (n13)COMMENT

ARTICLE 3

ALLOCATIONS OF PROFITS AND LOSSES, CASH FLOW AND DISTRIBUTIONS

3.1 Profits and Losses. The Company's "net profits" and "net losses," are computed in accordance with the provisions of

the Bylaws of the Company. Except as provided in such Bylaws, the net profits and net losses of the Company shall be allocated among, or borne by, the Members in proportion to the Membership Units owned by each of them.

(n14)COMMENT

3.2 Cash Flow. The cash flow of the Company shall be the net profits and losses of the Company, computed as provided in the Bylaws of the Company, plus depreciation and other noncash charges deducted in determining such profits and losses, minus principal payments on all mortgages, and any other cash expenditures which have not been deducted in determining the net profits and losses of the Company, and minus the amount reasonably determined by the Board of Managers to be necessary to maintain for the Company sufficient working capital and a reasonable reserve for repairs, replacements and/or capital improvements. The cash flow of the Company shall be determined separately for each fiscal year and not cumulatively. (n15)COMMENT

3.3 Distribution or Retention of Cash Flow. Cash flow, as determined in accordance with Subparagraph 3.2, shall be distributed to the Members in proportion to the number of Membership Units held by each Member, which distributions shall be made at such time or times as may be determined by the Board of Managers. (n16)COMMENT

ARTICLE 4 MANAGEMENT

4.1 Board of Managers. The business and the affairs of the Company shall be exclusively managed by a Board of Managers consisting of four (4) Members. The Board of Managers shall be elected by the Members in accordance with the

By-laws attached hereto as Exhibit B. A Manager need not be a resident of the State of _____ [state] or a Member. Notwithstanding the foregoing to the contrary, a sale or lease of a substantial portion of the Company's assets shall require the affirmative vote of the Members holding at least sixty percent (60%) of the outstanding Membership Units. (n17)COMMENT

4.2 Liability of a Manager. A Manager shall not have any liability to the Company or to any Member for any mistakes or errors in judgment, or for any act or omission believed in good faith to be within the scope of authority conferred by this Agreement. A Manager shall be liable only for acts and/or omissions involving intentional wrongdoing. Actions or omissions taken in reliance upon the advice of legal counsel that they are within the scope of a Manager's authority hereunder shall be conclusive evidence of good faith; provided, however, a Manager shall not be required to procure such advice to be entitled to the benefit of this subparagraph. (n18)COMMENT

4.3 Books and Records. The Board of Managers shall maintain or cause to be maintained complete and accurate records of all properties owned or leased by the Company and complete and accurate books of account (containing such information as shall be necessary to record allocations and distributions), and make such records and books of account available for inspection by any Member, or his duly authorized representative during regular business hours and at the principal office of the Company. Within sixty (60) days after the end of each calendar year, there shall be prepared and distributed to all Members reasonable tax-reporting information, in sufficient detail to enable such Member to prepare his federal, state and local income tax returns. In addition, within ninety (90) days after the end of each calendar year, there shall be prepared and distributed to each Member, a balance sheet, and a report of the receipts, disbursements, net profits and losses, and cash flow of the Company, and the share of the net profits and losses and cash flow of each Member for such calendar year. Such balance sheet and report shall be prepared by a certified public accountant in accordance with the method of accounting used by the Company for tax purposes.

4.4 Taxable Year; Accounting Method. The taxable year of the Company shall be a calendar year, and the first taxable year shall end on December 31 of the year in which the Company is formed. The books and records of the Company shall be maintained on the cash method of accounting.

4.5 Status of Members. Unless authorized by the Managing Members, or expressly set forth herein or in the By-laws, the Members shall have no authority to conduct or control the Company's business and the Members will have no authority to bind the Company in any way.

ARTICLE 5

DISCLOSURES AND REPRESENTATIONS

5.1 Disclosure by Company. In connection with the sale of the Membership Units to the Members hereunder, the Company hereby discloses the following information to the Members:

(a) the Membership Units have not been registered under the federal Securities Act of 1933, as amended (the "Federal Act"), and are being offered and sold by the Company pursuant to a registration exemption contained in Section 3(a)(11) of the Federal Act and/or Securities and Exchange Commission Rule 147, promulgated thereunder.

(b) during the period the Membership Units are being offered and sold by the Company, and for a further period of nine (9) months from the date of the last sale of the Membership Units that are part of the offering that is being so offered and sold by the Company, all resales, pledges, hypothecations, or other transfers of the Membership Units by any person or business organization shall, subject to the further terms of this Agreement, including the provisions of the legend set forth in subparagraph (c) below, be made only to persons or business organizations having a principal residence or principal office, respectively, within the State of _____ [state]. (n19)COMMENT

(c) a legend has been, or will be, placed on each certificate or other document evidencing any of the Membership Units in substantially the following form:

THESE SECURITIES HAVE NOT BEEN REGISTERED UNDER THE SECURITIES ACT OF 1933, AS AMENDED, AND, FOR A PERIOD OF AT LEAST NINE (9) MONTHS FROM THE DATE OF THE LAST SALE BY THE COMPANY OF THE SECURITIES IN THE OFFERING OF WHICH THESE SECURITIES ARE A PART, ALL REALES, PLEDGES, HYPOTHECATIONS, OR OTHER TRANSFERS OF THESE SECURITIES BY ANY PERSON OR BUSINESS ORGANIZATION SHALL BE MADE ONLY TO PERSONS OR BUSINESS ORGANIZATIONS WHO ARE RESIDENT WITHIN THE STATE OF _____ [state] .
(n20)COMMENT

(d) Stop transfer instructions to the appropriate officers of the Company have been, or will be, placed in the Company's records with respect to the Membership Units so as to restrict the resale, pledge, hypothecation, or other transfer thereof, subject to the further terms of this Agreement, including the provisions of the legend set forth in subparagraph (c) above, during the nine-month period described in subparagraph (b) above.

(e) Prior to the expiration of the nine-month period described in subparagraph (b) above, the legend and stop transfer instructions described in subparagraphs (c) and (d) above will be placed on any new certificate(s) or other document(s) issued by the Company upon presentment by a Member to the Company of any certificate(s) or other document(s) for transfer of any of the Membership Units to a person or business organization having a principal residence or principal office, respectively, within the State of _____ [state].

(f) The Membership Units have not been registered under the _____ [state] Securities Act, set forth in Chapter _____ of the _____ [state] Revised Code, as amended (the "_____ [state] Act"), and are being offered and sold by the Company pursuant to a registration exemption contained in Section _____ of the _____ [state] Act.

(g) The Company reasonably believesthat the Members are acquiring the Membership Units hereunder for investment,

has no information to the contrary, and through subparagraph 5.2 below is hereby obtaining a signed statement to that effect from the Members prior to the purchase of any of the Membership Units hereunder.

5.2 Representations and Warranties of the Members. In connection with the Members' purchase of the Membership Units hereunder, each of the Members represents and warrants, which representations and warranties shall survive the consummation of the Member's purchase of his or its interest hereunder, as follows:

- (a) The Member's principal residence is located within the State of _____ [state].
- (b) The Member is aware that no market may exist for the resale of a Membership Unit purchased under this Agreement.
- (c) The Member is purchasing for investment and not for the distribution of any of the Membership Units purchased under this Agreement.
- (d) The Member is aware of any and all restrictions imposed by the Company on the further distribution of the Membership Units, including, but not limited to, any restrictive legends appearing on the certificate(s) and/or other document(s) evidencing any of the Units, required holding periods, stop transfer orders, or buy-back rights of the Company. (n21)COMMENT

ARTICLE 6

ASSIGNMENT, TRANSFER OR SALE OF MEMBERSHIP UNITS

6.1 Assignment. The Membership Units of a Member may be assigned, transferred or sold only as provided in this Article 6. With respect to any such permitted assignment, transfer or sale, the assignee, transferee or purchaser of a Membership Unit may, upon compliance with the conditions set forth in subparagraph 6.7 below, become a substituted Member. (n22)COMMENT

6.2 Transfer. A Member may pledge his or her Units(s) as security for a debt owing to _____ [name] resulting from a loan from _____ [name] to such Member to enable the Member to make his or her capital contribution(s) to the Company. Other than this permitted pledge, no Member shall pledge, cause a lien to be placed against, or encumber his or her Units, or transfer, sell, alienate, sign, or otherwise dispose of all or any part of his or her Units, whether voluntarily, involuntarily, by operation of law, at judicial sale, or otherwise, without the prior written consent of a majority of the Board of Managers.

However, a Member may freely transfer his or her Units, in whole or in part, to or for the benefit of (i) the Member or his or her spouse; and/or (ii) one or more of the Member's lineal descendants.

6.3 Securities Compliance. Notwithstanding the preceding provisions of this Paragraph 6., no proposed or intended assignment, transfer or sale of a Unit shall be effective, unless and until it appears, to the satisfaction of a majority of the Board of Members, that such assignment, transfer or sale will not be in violation of, or otherwise render the Company and/or the Manager liable under, the Securities Act of 1933, as amended, and the rules and regulations promulgated thereunder, or under the applicable state securities laws of any state or states.

6.4 No Termination. Notwithstanding the preceding provisions of this Paragraph 6., no sale or exchange of a Unit may be made if the Unit sought to be sold or exchanged, when added to the total of all Unit(s) sold or exchanged within the period of twelve (12) months prior thereto, would result in the termination of the Company under Section 708 of the Code, or any successor section thereto.

6.5 Distributions. Subsequent to the permitted assignment, transfer or sale of a Unit, the Company shall remit

directly to the assignee, transferee or purchaser all distributions to which such person may be entitled pursuant to the provisions of this Agreement. An assignee, transferor or purchaser who does not become a substituted Member pursuant to the provisions of subparagraph 6.7 below shall be entitled to receive only the distributions to which his or her assignor, transferor or seller would otherwise have been entitled with respect to the Units assigned, transferred or sold, but such assignee, transferee or purchaser shall have no right to vote, to approve amendments hereof, to obtain information concerning Company transactions, to inspect the Company books, or to exercise any other rights of Member conferred hereunder or under applicable law.

6.6 Substitute Member. A Member who has assigned, transferred or sold all of his or her Units as permitted in subparagraph 6.2 above shall have no further right or interest in the Company.

6.7 Substitution of a Member. The transferee of a deceased, bankrupt or incompetent Member's Units shall become a substituted Member only upon: (a) the written consent of a majority of the Board of Managers; (b) the transferee's execution and acknowledgment of such instruments, in form and substance reasonably satisfactory to a majority of the Board of Managers; and (c) the transferee's payment of any expenses arising in connection with the substituted Member's admission to the Company. Notwithstanding the foregoing sentence, a transferee under subparagraph 6.2 above shall automatically become a substituted Member.

6.8 Obligations and Rights of Transferees. Any person who acquires in any manner whatsoever any Unit in the Company, irrespective of whether such person has accepted and assumed in writing the terms and provision of this Agreement, shall be deemed by the acceptance of the benefit of the acquisition thereof to have agreed to be subject to, and to be bound by, all the obligations of this Agreement with the same force and effect as any predecessor in interest of such person.

6.9 Sale Upon Termination of Employment. Upon the termination of employment from _____ for any reason whatsoever (including resignation, retirement, resignation, being fired, death, disability or any other type of voluntary or involuntary termination) of any Member (a "Triggering Event") the affected Member or the deceased Member's estate, shall sell the Membership Units presently owned by the affected Member under the mandatory purchase provisions of this subparagraph 6.9. This subparagraph 6.9 shall not apply to the units owned by _____ [name] and/or his wife, _____ [name] . (n23)COMMENT

6.9.1 Mandatory Purchase. In the event of a Triggering Event, the Company shall purchase all the Membership Units presently owned by the affected Member. The price to be paid for the purchase of the Units shall be the price provided in subparagraph 6.9.5 herein, below.

6.9.2 Transfer of Units. Any and all units purchased by the Company under subparagraphs 6.9 and 6.9.1 above shall be made within sixty (60) days after a Triggering Event. However, if the Triggering Event is the death of a Member, the Units shall be purchased sixty (60) days after the appointment of a legal representative for the deceased Member's estate. If a determination of fair market value is required under subparagraph 6.9.5 then the units shall be purchased sixty (60) days after the delivery of such determination to the affected parties.

Within such periods of time, the respective seller shall endorse and deliver to the purchaser (the Company and/or the remaining Members, as the case may be) the Membership certificate or certificates representing the Units to be purchased and sold under this Agreement, and the purchase price shall be paid in accordance with subparagraph 6.9.3 herein, below.

6.9.3 Manner of Payment. Concurrently with the delivery of the Membership certificate or certificates to the Company, the purchaser of such Units shall pay to each such Seller twenty percent (20%) of the Seller's purchase price. In the event that the Triggering Event is the death of a Member, the Company shall pay to each such Seller the greater of (i) twenty percent (20%) of the purchase price; or (ii) such Seller's pro rata portion of the insurance proceeds (if any) payable as a result of such Member's death.

The balance of said purchase price shall be paid in forty-eight (48) equal, monthly payments commencing one (1) month from the date of such sale, together with interest at the lowest rate required, under *Section 483 of the Internal Revenue Code of 1986*, or its counterpart under any subsequently enacted Internal Revenue Code, in order to avoid the creation of "total unstated interest," within the meaning of such Section.

Upon default of any payment of principal or interest required to be made pursuant to this Subparagraph, which default is not cured within thirty (30) days after notice of default is given by the Seller, or his successor or successors in interest, to the purchaser, the entire unpaid balance owing to any and all persons by the purchaser on account of the aforesaid purchase of Units shall become due and payable on the expiration of such thirty (30) day period. (n24)COMMENT

6.9.4 Prepayment. The purchaser shall have the right to prepay, in whole or in part, the balance owing by it as set forth in subparagraph 6.9.3 herein, above; provided, however, that if the Company shall make a prepayment at a time when such Company owes an amount pursuant to this Agreement to two (2) or more persons, such prepayment shall be made to all such persons in the proportion which the balance owing to each person bears to the aggregate balance owing hereunder pursuant to this Agreement; provided further that any such prepayment shall be applied to the installments due under subparagraph 6.9.3 herein, above, in reverse chronological order of their due dates.

6.9.5 Purchase Price. If the Triggering Event (other than death) occurs during the first five (5) years of the Company's existence, the purchase price to be paid to the selling Member shall be such Member's initial contribution plus such Member's initial Contribution multiplied by five percent (5%).

If the Triggering Event is on account of the death of a Member at any time, or it occurs any time after the first five (5) years of the Company's existence, the purchase price paid to the selling Member shall be the fair market value thereof, as of the close of business on the date of the Triggering Event. The fair market value of each Unit shall be determined by substituting the fair market value as of such date, in place of the book value, of all assets owned by the Company, subtracting from the total assets, as redetermined, all liabilities of the Company as of such date, and dividing the resulting figure (representing the net fair market value of all Units of the Company) by the total number of Membership Units. To the extent possible, the determination of the fair market value of the Membership Units shall be made by the certified public accountant who is then servicing the Company.

In making the adjustment for the fair market value of any asset without a readily ascertainable value, and the fair market value of which is not agreed upon by the Company and selling Member, the Company shall rely on and use the written appraisal of a qualified appraiser of such asset, selected by the Company for that purpose at the expense of the Company. All such determinations of fair market value shall be made within ninety (90) days after the Triggering Event. (n25)COMMENT

ARTICLE 7

WITHDRAWAL; DISSOLUTION

7.1 Withdrawal. A Member shall not be permitted to withdraw or resign from the Company. The death, incompetency, adjudication of bankruptcy, whether voluntary or involuntary, or the bankruptcy or dissolution of a Member during the term of this Agreement, shall not effect the Company or its business. The executor, administrator, trustee or other legal representative of the deceased, bankrupt, incompetent or dissolved Member shall succeed to all of the rights of such Member, subject to the provisions of this Agreement or any other Agreement between the parties.

7.2 Termination of the Company. The Company shall be terminated and dissolved upon the first to occur of the following:

- (a) upon the affirmative vote of at least fifty-one percent (51%) of the Membership Units; or
- (b) upon the sale of all or substantially all the assets of the Company.

ARTICLE 8

WINDING UP

8.1 Winding Up. Upon the termination of the Company pursuant to subparagraph 7.2, above, a full and general accounting shall be taken of the Company's business, and the affairs of the Company shall be wound up. Any profits earned or losses incurred since the last previous accounting shall be allocated among, or borne by, the Members in accordance with the provisions of subparagraph 3.1, above. The Board of Managers shall wind up and liquidate the Company by selling the Company's assets, or by distributing such assets in kind, subject to the Company's liabilities, or by a combination thereof, as determined by the Board of Managers. The proceeds of such liquidation shall be applied and distributed in the following order of priority, by the end of the taxable year during which the liquidation occurs (or, if later, within ninety (90) days after the date of the liquidation):

- (a) to the payment of any debts and liabilities of the Company;
- (b) to the setting up of any reserve which the Board of Managers shall reasonably deem necessary to provide for any contingent or unforeseen liabilities or obligations of the Company, with any excess in such reserve remaining after such liabilities are satisfied to be distributed as soon as practicable in the manner hereinafter set forth; and
- (c) thereafter, the balance of the proceeds, if any, shall be distributed in accordance with the positive capital account balances of the Members, as determined after taking into account all capital account adjustments for the Company's taxable year during which such liquidation occurs. For purposes of this subparagraph, a liquidation of the Company shall mean a liquidation as defined in Section 1.704-1(b)(2)(ii)(g) of the Regulations.

8.2 Statement. The Members shall be furnished with a statement prepared by the Company's accountants, which shall set forth the assets and liabilities of the Company as of the date of complete liquidation.

8.3 Return of Capital Contributions. Notwithstanding anything in this Agreement to the contrary, neither the Board of Managers nor any Member shall be personally liable for the return of the capital contributions of the Members, or any portion thereof, it being expressly understood that any such return of the capital contributions of the Members shall be made solely from Company assets.

ARTICLE 9

MISCELLANEOUS

9.1 Adoption of Bylaws. The Members hereby adopt and approve the Bylaws of the Company, a copy of such Bylaws being attached hereto as Exhibit B. (n26)COMMENT

9.2 Endorsement. Upon the execution of this Agreement, the certificate or certificates evidencing the Membership Units in the Company shall be endorsed, as follows:

"THE MEMBERSHIP UNITS REPRESENTED BY THIS CERTIFICATE ARE SUBJECT TO THE TERMS AND CONDITIONS OF AN OPERATING AGREEMENT DATED AS OF _____ [month] _____, [day] _____, [year] AMONG THE ORIGINAL OWNER OF RECORD AND THE OTHER MEMBERS OF THE COMPANY. ANY PURCHASER OR TRANSFEREE OF THESE MEMBERSHIP UNITS IS BOUND BY

THE AGREEMENT AND SHALL BE CONSIDERED A PARTY TO THE AGREEMENT. THE COMPANY WILL MAIL TO THE HOLDER OF THIS CERTIFICATE, WITHOUT CHARGE, A COPY OF SUCH AGREEMENT WITHIN FIVE (5) DAYS AFTER RECEIVING A WRITTEN REQUEST THEREFOR."

After endorsement, the certificate or certificates shall be delivered to the Members who shall, subject to the terms of this Agreement, be entitled to exercise all rights of ownership of such Membership Units. The Company agrees that it will cause a similar endorsement to be placed on all certificates hereafter issued by it and which are subject to the provisions of this Agreement.

9.3 Tax Matters Member. _____ [name] shall serve as the Tax Matters Member of the Company, as provided in Regulations issued pursuant to Section 6231 of the Code. Each Member, by the execution of this Agreement, consents to such designation of the Tax Matters Member and agrees to execute, certify, acknowledge, deliver, swear to, file and record at the appropriate public offices such documents as may be necessary or appropriate to evidence such consent. The Company shall indemnify and reimburse the Tax Matters Member for all expenses, including legal and accounting fees, claims, liabilities, losses and damages incurred in connection with any administrative or judicial proceeding with respect to the tax liability of the Members. The payment of all such expenses shall be made before any distributions to Members are made by the Company. The taking of any action and the incurring of any expense by the Tax Matters Member in connection with any such proceeding, except to the extent required by law, is a matter in the sole discretion of the Tax Matters Member. (n27)COMMENT

9.4 Amendments. This Agreement may be amended only with the written approval of Members owning two-thirds (2/3) or more of the units in the Company.

9.5 Notices. All notices, consents or other instruments hereunder shall be in writing and mailed by United States mail, postage prepaid, and shall be directed to the parties hereto at the last addresses of the parties furnished by them in writing to the Company, and to the Company at its principal office. The Company and/or any Member shall have the right to designate a new address for receipt of notices by notice addressed to the Members and the Company and mailed as aforesaid. Such notices shall be made a permanent part of the Company records.

9.6 Obligations and Rights of Transferees. Any person who acquires in any manner whatsoever any Membership Unit in the Company, irrespective of whether such person has accepted and assumed in writing the terms and provisions of this Agreement, shall be deemed by the acceptance of the benefit of the acquisition thereof to have agreed to be subject to, and to be bound by, all the obligations of this Agreement with the same force and effect as any predecessor in interest of such person.

9.7 Ownership of Company Property. Title to assets of the Company may be held in the name of a nominee at the discretion of the Board of Managers.

9.8 Benefit and Binding Effect. This Agreement shall inure to the benefit of, and be binding upon, the parties hereto and their respective next of kin, legatees, administrators, executors, legal representatives, nominees, and permitted successors and assigns.

9.9 Integration. This Agreement constitutes the entire agreement among the parties hereto pertaining to the subject matter hereof, and supersedes all prior and contemporaneous agreements and understandings of the parties in connection therewith.

9.10 Governing Law. This Agreement and the rights of all parties hereunder shall be governed by, and construed in accordance with, the laws of the State of _____ [state] .

9.11 Counterparts. This Agreement may be executed in several counterparts, each of which shall be considered an original when executed by one or more of the Members.

IN WITNESS WHEREOF, each party has executed this Operating Agreement on the day and year first written above.

MEMBERS:

[name]

[name]

[name]

[name]

EXHIBIT A

Member.....No. of Units

Total Outstanding Units _____ (n28)COMMENT

Certificate

CONTRACT

[3] Close Corporation Agreement

CLOSE CORPORATION AGREEMENT

THIS CLOSE CORPORATION AGREEMENT is entered into on the ____ [day] day of _____, [month] _____, [year] by and between _____, a(n) _____ [state] corporation (the "Corporation"), _____ ("_____") and _____ ("_____"). _____ and _____ are sometimes hereinafter referred to individually as a "Shareholder" and collectively as the "Shareholders."

WHEREAS, the Shareholders are the owners of all of the issued and outstanding shares of the Corporation, and wish to promote their mutual interests by regulating certain aspects of the internal affairs of the Corporation and the relations of

the Shareholders between themselves;

NOW, THEREFORE, in consideration of the mutual covenants and agreements contained herein, the parties hereto agree as follows:

1. Governing Law. This Agreement is executed pursuant to, and shall be governed under and in accordance with, _____ [state] Revised Code Section _____, the _____ [state] Close Corporation Agreement Statute. (n29)COMMENT

2. Non-Voting Stock. Upon the death of the first Shareholder to die, all shares owned by such Shareholder at the time of his death, shall be deemed to be non-voting shares, irrespective of the designation appearing on the certificates representing such shares. Upon the death of such Shareholder, the legal representative of such Shareholder's estate shall deliver to the Corporation the certificates representing the shares owned by such Shareholder at the time of his death and the Corporation shall issue to such legal representative new non-voting stock certificates therefor. (n30)COMMENT

3. Amendment of Corporation's Articles. Simultaneously with the execution hereof, the Shareholders' agree that they will take the necessary action to Amend the Corporation's Articles of Incorporation to provide that the Corporation shall have three hundred seventy-five (375) voting shares and three hundred seventy five (375) non-voting shares authorized. Notwithstanding anything herein to the contrary, the following actions shall only be taken by the Corporation with the unanimous consent of all of the Shareholders:

- (a) a reorganization, including a merger or consolidation to which the Corporation is a party;
- (b) the distribution or payment of any dividend (in cash or property) by the Corporation (except as is authorized or required by Paragraph 6 herein);
- (c) diversification of or a change in the Corporation's business purposes;
- (d) the issuance of any shares by the Corporation (except an issuance required by Paragraph 2. herein); and
- (e) amendment of the Corporation's Articles of Incorporation, Code of Regulations and/or this Agreement.

Except as is expressly set forth herein, or is required by law, the holder of the non-voting shares shall have no right to vote for Directors, or have a voice in the operations of the Corporation. (n31)COMMENT

4. Forced Sale. If any Shareholder desires to sell all, but not part, of his shares, then the Shareholder desiring to sell such shares shall establish a price per share and terms upon which the selling Shareholder is willing to sell such shares. The selling Shareholder shall then present such proposal to the other Shareholder. The other Shareholder shall have thirty (30) days to either accept or reject such offer. If the other Shareholder shall accept such offer, then the stock will be purchased pursuant to such terms. If the other Shareholder rejects such offer, then the selling Shareholder shall be required to purchase and the rejecting Shareholder shall be required to sell, the rejecting Shareholder's shares upon the same terms and conditions of the original proposal. Such purchase shall take place within thirty (30) days of the rejection of the original offer. (n32)COMMENT

5. S Corporation Status. The Shareholders acknowledge that the Corporation is an "S corporation" within the meaning of *Section 1361, et seq., of the Internal Revenue Code of 1986*, as amended. The Shareholders agree that they will not take any action that would terminate the election of the Corporation to be treated as a S corporation without the consent of the other Shareholder. Any unilateral action by a Shareholder which may have the effect of terminating the

election shall not be valid as it relates to the Corporation, and the Corporation shall not recognize such purported transfer or action. (n33)COMMENT

6. Distributions. With respect to each calendar year, prior to the date on which a Shareholder is required to pay such Shareholder's federal income tax to the Internal Revenue Service, the Corporation shall distribute to such Shareholder an amount equal to the maximum federal income tax rate for individuals multiplied by the amount of income allocable to such Shareholder attributable to the operations of the Corporation. After the death of the first Shareholder, either Shareholder shall have the right to require the Corporation to distribute, not less than semi-annually, all of the cash flow of the Corporation, less the sums which should be retained by the Corporation in the reasonable judgment of the Corporation's Board of Directors for working capital and replacement reserves. The cash flow of the Corporation shall be determined on an annual basis. (n34)COMMENT

7. Restrictions on Stock Transfers. Each of the Shareholders agree not to sell or encumber the stock presently owned by him in the Corporation (including, without limitation, pledge, mortgage or transfer the stock presently owned by him), except with the express written consent of the other Shareholder. (n35)COMMENT

8. Legend on Certificates. Upon the execution of this Agreement, the certificates evidencing the Shareholders' ownership of stock in the Corporation shall be surrendered to the Corporation and shall be endorsed with the following legend:

"The shares represented by this certificate were issued subject to a statutory close corporation agreement under _____ [state] Revised Code Section _____. Any purchaser or transferee of these shares is bound by said agreement and shall be considered a party to said agreement. Said Close Corporation Agreement was entered into on the _____ [day] day of _____, [month] _____, [year] by and among the Corporation, _____, [shareholder] and _____ [shareholder]. The corporation will mail to the holder of this certificate, without charge, a copy of such agreement within five (5) days after receiving a written request therefor."

After endorsement, the certificates shall be returned to the Shareholders who shall, subject to the terms of this Agreement, be entitled to exercise all rights of ownership respecting the shares evidenced thereby. The Corporation agrees that it will cause a similar legend to be endorsed on all certificates hereafter issued by it which are subject to the provisions of this Agreement.

9. Necessary Acts. Each of the parties hereto agrees that it or he will do any act or thing and will execute any and all instruments necessary and/or proper to make effective the provisions of the Agreement.

10. Definitions. References in this Agreement to stock presently owned by a Shareholder in the Corporation, shall include not only the stock currently owned by a Shareholder, but also any Shares hereafter acquired by the Shareholders, whether by way of purchase, stock dividend, recapitalization, reorganization or otherwise.

11. Controlling Effect. If and to the extent that the terms and conditions of this Agreement conflict with the Articles of Incorporation or the Code of Regulations of the Corporation, as currently in effect or subsequently amended, the terms and conditions hereof shall be deemed controlling, and such conflicting provisions shall be disregarded. To the extent, however, that this Agreement and those documents can reasonably be construed as to give effect to both, such reasonable construction shall be adopted.

12. Binding Effect. This Agreement shall inure to the benefit of and be binding upon the parties hereto and their respective next of kin, legatees, administrators, executors, legal representatives, successors and permitted assigns (including remote, as well as immediate, successors to and assignees of said parties).

13. Assignment. The rights and obligations of the parties hereunder may not be assigned without the written

consent of the non-assigning party.

14. **Amendment and Waiver.** This Agreement may be amended or modified at any time and in any respect in a writing signed by both parties. Any provision hereof may be waived, by an instrument in writing executed by the party against which the waiver is sought to be enforced.

15. **Counterparts.** This Agreement may be executed in two (2) or more identical counterparts, each of which, when each party has executed at least one (1) such counterpart, shall be deemed to be an original and fully-executed Agreement.

16. **Entire Agreement.** This Agreement constitutes the entire agreement among the parties with respect to the subject matter contained herein and supersede all prior agreements, representations, and understandings of the parties.

17. **Severability.** In case one or more of the provisions contained in this Agreement shall, for any reason, be unenforceable, invalid, or illegal in any respect, such unenforceability, invalidity or illegality shall not affect any other provision of this Agreement, this Agreement shall be construed as if such unenforceable, invalid or illegal provisions had not been contained herein or, if it is equitable under the circumstances, such unenforceable, invalid or illegal provision shall be reformed, amended and/or construed so as to be enforceable, valid or legal.

18. **Headings and Construction of Terms.** The headings of the various paragraphs and subparagraphs hereinabove are for convenience of reference only, and shall in no way effect or modify any of the terms or provisions hereof. Where the context herein requires, the singular number shall include the plural.

IN WITNESS WHEREOF, this Close Corporation Agreement is executed by the parties hereto on the day and year first above written.

CORPORATION:

_____, a(n) _____ [state] corporation

By: _____
..... [name and title]

And: _____
..... [name and title]

(Shareholder) (n36)COMMENT

Legal Topics:

For related research and practice materials, see the following legal topics:

Business & Corporate LawCorporationsFormationGeneral OverviewBusiness & Corporate LawLimited Liability CompaniesFormationReal Property LawOwnership & TransferBusiness & Corporate EntitiesTax LawFederal Taxpayer GroupsLimited Liability Companies & PartnershipsGeneral OverviewTax LawFederal Taxpayer GroupsS CorporationsGeneral Overview

FOOTNOTES:

(n1)COMMENT(n1) In most circumstances, the purpose of the Company will be as broad as possible. If the purpose clause is written very broadly, the Members do not have to worry that they may take some future action which is outside the stated purpose of the Company. With respect to this Agreement, the purpose clause is very specific. Also, the

Lender has made itself an intended third party beneficiary and the purpose of the Company cannot be modified without the express written consent of the Lender. In addition to limiting the purposes of the Company, these provisions prevent the Company from taking certain action. The single purpose entity provisions are applicable without regard to the number of Members.

(n2)COMMENT(n2) As is typical with a single purpose entity set up for a loan transaction, the Operating Agreement, in part, looks very similar to a loan agreement. Unless the Member(s) are also personal guarantor(s), they are usually not a party to the loan agreement, and therefore, the lender obtains their agreement by putting it into the Operating Agreement.

(n3)COMMENT(n3) In a single Member company many, if not most, of the remaining provisions are not relevant or important. However, most practitioners will include these types of provisions for ease of bringing in additional investors in the future.

(n4)COMMENT(n4) This provision is another provision that a lender may require. This provision provides that, notwithstanding the typical reasons that a single member Limited Liability Company would automatically terminate under state law, the Company will remain in existence, and not be commingled with the other assets of the sole Member.

(n5)COMMENT(n5) Again, in a single person Limited Liability Company, these "tax" provisions are irrelevant, and are included for ease of addition of new partners in the future.

(n6)COMMENT(n6) In a single member Limited Liability Company the management provisions are irrelevant unless an outside manager is hired, or a third party dealing with the Company wants some assurance as to the power of the Manager.

(n7)COMMENT(n7) This clause limits the liability of the Manager and is useful even in a single Member Limited Liability Company. This clause will help the Manager escape a claim for personal liability for actions taken on behalf of the Company.

(n8)COMMENT(n8) This operating agreement may be used in connection with the formation of a Limited Liability Company that has more than one Member. In this agreement, the minority Members are employees of a related corporation and they must give up their interest in this company when their employment with the corporation terminated.

(n9)COMMENT(n9) Unlike a single purpose entity, the purpose of this company is very broad, and is not specifically stated. Even though the stated purpose is very broad, as a practical matter, the purpose may be limited by a majority of the Members. For example, this entity is being formed to purchase a building where the related employer will operate.

(n10)COMMENT(n10) Typically, a Limited Liability Company can have a perpetual duration or may have a specific term. If a term is desired, this can be set out in its Articles of Organization.

(n11)COMMENT(n11) Each Member has the opportunity to vote. However, this does not have to be the case, and Members can be given non-voting units.

(n12)COMMENT(n12) As with many real estate deals, a property may have negative cash flow. This provision allows the Board of Managers to require the Members to make additional contributions of capital to cover operating costs.

(n13)COMMENT(n13) This provision 2.6 sets forth the rights of the Company and the contributing Members in the event a Member fails to meet a capital call.

(n14)COMMENT(n14) The allocation of profits and losses, cash flow and cash flow distributions is very important. These provisions set forth how the Members will receive a return from the Company.

(n15)COMMENT(n15) This provision while defining "cash flow" allows the Board of Managers to retain funds for very specific reasons.

(n16)COMMENT(n16) This provision makes the distribution of cash flow to ultimately be within the discretion of the Board of Managers.

(n17)COMMENT(n17) This Company is to be managed by a Board of Managers, similar to a Board of Directors. The Board is elected by the Members, but does not need to be Members.

(n18)COMMENT(n18) This provision is important to the manager. It relieves the manager of liability in the event that the manager is negligent. It should not relieve the manager of intentional misconduct.

(n19)COMMENT(n19) These provisions are included for the purpose of compliance with the applicable securities laws. The securities laws are very specific and their application depends on many factors including type of investment, how much money is being invested, the sophistication of the investor and the residence of the investor. It is critical that the practitioner review the securities laws of the jurisdiction where the investor is located and where the offeror is located. These provisions are sometimes not included in the operating agreement, but rather, in a separate subscription agreement.

(n20)COMMENT(n20) In most states a certificate is not required to represent the ownership interest in a Limited Liability Company and the agreement itself needs to contain the legend. However, with limited liability companies having multiple Members, it is a good practice to issue certificates, much like the practitioner would if he or she were organizing a corporation.

(n21)COMMENT(n21) Again, these representations are sometimes required by the applicable securities laws in order for the Company to rely upon various exemptions which may be available in order to avoid filing a registration statement.

(n22)COMMENT(n22) Similar to that of a closely held corporation, a Limited Liability Company may want to limit ownership of interest to the original Members or to a class of individuals. This provision limits the transferability of an interest and sets forth the rights and obligations of the Company and the rights and obligations of the transferee. Also, Section 6.9 provides that upon the termination of employment by the Minority Members, they are required to sell their interest to the Company.

(n23)COMMENT(n23) This provision provides that the majority owner of the affiliated company is not subject to the buyback provisions.

(n24)COMMENT(n24) As with most real estate enterprises, there usually is not sufficient cash on hand upon a Triggering Event to fund the entire purchase price in the event of a mandatory purchase. This provision allows the purchase price to be paid over time. The Company has the right to prepay.

(n25)COMMENT(n25) This provision provides for a vesting of the purchase price. If the separation happens during the first five (5) years, the price is a return of capital, plus a five percent (5%) return. If the five (5) years pass and the Member becomes vested, the purchase price is fair market value.

(n26)COMMENT(n26) This Limited Liability Company is set up similarly to a corporation with bylaws. The Bylaws provide for the appointment of directors and officers.

(n27)COMMENT(n27) A Tax Matters partner is a partner that is designated to deal with the Internal Revenue

Service in the event of an audit.

(n28)COMMENT(n28)

(n29)COMMENT(n29) In many states in order to be a Close Corporation, the Agreement must expressly refer to the state statute which authorizes the existence of the Close Corporation.

(n30)COMMENT(n30) This provision converts the interest of the Shareholders upon the first to die. With this provision, the Shareholders do not need to worry about a future buyout or having the deal with the medley spouse and/or children. A corporation which has voting and non-voting stock will not violate the S Corporation requirement against having two classes.

(n31)COMMENT(n31) Since a Shareholder's interest will become non-voting upon his/her death, it may be necessary to restrict the power of the remaining voting Shareholders. This provision places types of limitations on such powers in order to protect the interests of the non-voting Shareholder. The practitioner should also review Paragraphs 5 and 6 of this Agreement for additional restrictions which would likely benefit the non-voting Shareholder.

(n32)COMMENT(n32) In many cases, with respect to a closely held corporation, the parties will be concerned as to what happens if they can't get along. A common method is arbitration of disputes. Another method is to force a Shareholder to set a price. The other Shareholder can buy out the disgruntled Shareholder at the price. If the other Shareholder believes the price is fair, he/she will normally agree to purchase the interest. However, if such Shareholder believes that the price is unfair (or too favorable to the disgruntled Shareholder), then he/she can force the disgruntled Shareholder to buy him/her out. The mechanism, while quite simple, requires the party initiating the process to act in a reasonable fashion, or the disgruntled Shareholder risks losing a portion of his/her value in the enterprise.

(n33)COMMENT(n33) This provision contractually binds the Shareholder to keep the corporation as an S corporation.

(n34)COMMENT(n34) Because this is a real estate enterprise, the Shareholders will be interested in getting the cash flow distributed to them. Further, this requires the Corporation to annually distribute enough money for the Shareholder to cover their portion of the income taxes for which they will be responsible. Additionally, after the death of the first Shareholder, the Corporation is required to make at least semi-annual cash flow distributions.

(n35)COMMENT(n35) This provision places an absolute restriction upon the transfer of shares to a Shareholder.

(n36)COMMENT(n36)



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Current Legal Forms for Real Estate
Chapter 20 REAL ESTATE ENTITIES
Part III. Drafting Guidelines

24-20 Current Legal Forms for Real Estate §§ 20.47 through 20.50

AUTHOR: by Stephen E. Pigott and Harold O. Maxfield, Jr.

[Reserved]

§§ 20.47[Reserved]



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Current Legal Forms for Real Estate
Chapter 20 REAL ESTATE ENTITIES
Part III. Drafting Guidelines

24-20 Current Legal Forms for Real Estate § 20.51

AUTHOR: by Stephen E. Pigott and Harold O. Maxfield, Jr.

§ 20.51 Checklist for Entity Selection

Entity Selection Organizational Checklist

1. Name of Entity ☐
2. Type of Entity ☐
3. State of Incorporation or Organization ☐
4. Name of Statutory Agent and Address ☐
5. Effective Date ☐
6. Names and Address of Shareholders/Members/Partners ☐
7. Amount and Description of Capital Contributions
(i.e., cash/property)..... ☐
8. Shareholder/Member/Partner Loans ☐
9. Number of Shares/Units Authorized
10. Number and Type of Shares/Units to be Issued

(i.e., Voting/Nonvoting, Different Classes) ☐

11. Directors /Managing Members..... ☐

12. Officers/Managers/General Partners..... ☐

13. S-Election (If yes, Social Security Numbers of Shareholders) ☐

14. Securities Compliance (Federal) ☐

15. Securities Compliance (State) ☐

16. Agreement Among Owners ☐

a) Delegation of Operations/Authority ☐

b) Employment Provisions/Non-Compete/Full-Time ☐

c) Buy out upon Deadlock, Death, Disability, etc. ☐

d) Options/Right of First Refusal/Restrictions upon
Transfer ☐

e) Purchase Price /Payment Provisions/Security ☐

f) Drag Along/Tag Along Rights ☐

g) Dispute Resolution Procedures ☐

h) Mediation/Arbitration/Lawsuit ☐

i) Percentage of Owners to approve certain actions (simple
majority, super majority, etc.) ☐

-- Sell or issue stock units or grant options to buy
stock/unit ☐

-- Reorganization, merger, consolidation of Entity ☐

-- Creation of Subsidiary ☐

- Acquisition of any asset in excess of specified amount ☐
- Expenditure in excess of specified amount ☐
- Diversification of the business ☐
- Obtain credit in excess of specified amount by Corp. or Sub. ☐
- Pledge assets as security for credit ☐
- Amend any agreement with an Owner as party ☐
- Amend Governing Documents ☐
- Declare dividends or other distributions to the Owners ☐
- Modify salary or benefits of an employee shareholder/member/partner or one of their relatives ☐
- Transfer existing interest by Owner to anyone ☐
- Enter real estate leases or capital leases in excess of a specified amount for specified number of years ☐
- Guaranty another party's performance ☐
- Hire any employee with salary above specified amount, or terminate or hire any senior level officer ☐

Legal Topics:

For related research and practice materials, see the following legal topics:

Real Property LawOwnership & TransferBusiness & Corporate EntitiesReal Property LawSecurities RegulationGeneral OverviewReal Property LawSecurities RegulationTransactions Subject to RegulationTax LawFederal Taxpayer GroupsS CorporationsElections (IRC secs. 1362-1363)General Overview



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Chapter 20 REAL ESTATE ENTITIES
Part III. Drafting Guidelines

24-20 Current Legal Forms for Real Estate § 20.52

AUTHOR: by Stephen E. Pigott and Harold O. Maxfield, Jr.

§ 20.52 Checklist for Joint Ownership and Joint Ventures

Joint Ownership and Joint Venture Checklist

1. Purpose ☐
2. Amount of Investment by each Owner ☐
3. Percentage of Ownership of Each Owner ☐
4. Appointment of Manager; Day-to-Day Management ☐
5. Removal of Management ☐
6. Compensation of Manager ☐
7. Control relating to Major Issues ☐
8. Roles with respect to Construction
of Addition: (i.e., approval of contracts, finances etc.)
9. Compensation for oversight of Construction ☐
10. Cash Flow Retention and Distribution ☐

11. Cash Call ☐

12. Waiver Partition of Property ☐

13. Dispute Resolution ☐

a) Mediation ☐

b) Arbitration ☐

14. Sale or Liquidation of Interest in Property ☐

a) Right of First Refusal ☐

b) Put/Option ☐

c) Sale of Property ☐

Legal Topics:

For related research and practice materials, see the following legal topics:

Business & Corporate LawJoint VenturesDissolution & Winding UpBusiness & Corporate LawJoint
VenturesFormationBusiness & Corporate LawJoint VenturesManagement Duties & LiabilitiesReal Property
LawEstatesConcurrent OwnershipGeneral OverviewReal Property LawOwnership & TransferBusiness & Corporate
Entities



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Chapter 20 REAL ESTATE ENTITIES
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24-20 Current Legal Forms for Real Estate § 20.53

AUTHOR: by Stephen E. Pigott and Harold O. Maxfield, Jr.

§ 20.53 Checklist for Condominiums and Cooperatives

1. Form of Purchase Agreement ☐
2. Form of Deed and Stock Certificates ☐
3. Offering Circular/Public Report/Disclosure Statement ☐
4. Receipt for Offering Circular/Public Report/Disclosure
Statement ☐
5. Financial Statement and Budget for Operations ☐
6. Title Report (i.e., Declaration and other title restrictions) ☐
7. Articles of Incorporation for Association ☐
8. By-laws for Association ☐
9. Appointment of Board of Managers ☐

10. Management Agreement ☐

Legal Topics:

For related research and practice materials, see the following legal topics:

Real Property LawCommon Interest CommunitiesCondominiumsCondominium AssociationsReal Property
LawCommon Interest CommunitiesCondominiumsFormationReal Property LawCommon Interest
CommunitiesCondominiumsManagementReal Property LawCommon Interest CommunitiesCondominiumsPurchase &
SaleReal Property LawCommon Interest CommunitiesCooperativesCooperative Housing AssociationsReal Property
LawCommon Interest CommunitiesCooperativesFormationReal Property LawCommon Interest
CommunitiesCooperativesManagementReal Property LawCommon Interest CommunitiesCooperativesPurchase &
SaleReal Property LawSecurities RegulationPublic Offerings of Condominiums



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24-20 Current Legal Forms for Real Estate § 20.54

AUTHOR: by Stephen E. Pigott and Harold O. Maxfield, Jr.

§ 20.54 Checklist for Time Sharing

Time Sharing Checklist

1. Form of Purchase Agreement ☐
2. Form of Deed of Trust (if financed) ☐
3. Form of Promissory Note (if financed) ☐
4. Form of Deed ☐
5. Disclosure Statement/Public Report ☐
6. Receipt for Disclosure Report ☐
7. Pro-forma Operating Budget and Financial Statement ☐
8. Title Report (i.e., Declaration and other title restrictions) ☐
9. Articles of Incorporation for Unit Owner's Association ☐
10. By-laws for Unit Owner's Association ☐

11. Management Agreement/Association Managed ☐

12. Escrow Agreement ☐

13. HUD Settlement Statement ☐

14. Good Faith Estimates of Closing Costs ☐

15. Resort Club Documentation ☐

Legal Topics:

For related research and practice materials, see the following legal topics:

Real Property LawCommon Interest CommunitiesGeneral OverviewReal Property LawCommon Interest
CommunitiesHomeowners AssociationsReal Property LawCommon Interest CommunitiesTimesharesReal Property
LawOwnership & TransferBusiness & Corporate Entities



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24-20 Current Legal Forms for Real Estate FORM 20.01

AUTHOR: by Stephen E. Pigott and Harold O. Maxfield, Jr.

FORM 20.01 Declaration in Lieu of Operating Agreement

COMMENT

As discussed previously, a single member limited liability company will be treated as a sole proprietorship for tax purposes. (See TB § 20.05). It will be treated as a limited liability company for all other purposes. The following is a simple declaration that can be used by a single member limited liability company.

FORM

DECLARATION IN LIEU OF OPERATING AGREEMENT

_____ [month] _____ [day], _____ [year]

Pursuant to the authority contained in Sections _____ to _____, both inclusive, of the _____ [state] Revised Code (the "LLC Act"), the undersigned, being the sole member of _____ [name], a(n) _____ [state] limited liability company, does hereby take and adopt the following Declaration in Lieu of Operating Agreement in writing:

1. Election of Officer. The following persons are hereby designated as officers of the company, to serve until their respective successors are duly designated or elected:

_____ - President and Treasurer

____ [name]
 _____ - Vice President and Secretary
 ____ [name]

2. Purpose of the Company. The purpose of the Company shall be to engage in any lawful acts or activities for which limited liability companies may be formed.

3. Principal Office. The principal office of the Company shall be located in _____ [city],
 _____ [state], or at such other place in the State of _____ [state] as may be
 designated by the Member.

4. Duration of the Company. The Company shall commence on the date on which its Articles of Organization were filed with the _____ [state] Secretary of State's Office, and shall continue thereafter until terminated and dissolved.

5. Disregarded Entity. The Company shall be treated for federal tax purposes as a disregarded entity.

_____ [name]

By: _____

[name and title]



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24-20 Current Legal Forms for Real Estate FORM 20.02

AUTHOR: by Stephen E. Pigott and Harold O. Maxfield, Jr.

FORM 20.02 Operating agreement for sole member limited liability

COMMENT

As discussed previously, a single member limited liability company will be treated as a sole proprietorship for tax purposes. (See TB § 20.05). Absent extenuating circumstances, it is unusual to have a complicated Operating Agreement with a single member limited liability company. However, in order to maintain the "corporate existence" and to avoid an argument that creditors might pursue to pierce the corporate veil, it is advised to maintain the organization documentation in order to ensure the company has a separate and distinct entity apart from its sole member. There are ways to approach this issue.

One way is for the member to do a declaration, and another way is to adopt and maintain a Code of Regulations and/or By-laws for the company. Of course once adopted, the Code of Regulations and/or By-laws should be followed, that is annual minutes, etc. should be prepared.

Another way is to prepare an Operating Agreement between the sole member and the company. The typical circumstance to use an Operating Agreement with a single member limited liability company is when a lender makes, as a condition of its loan, that the company be a single purpose enterprise. A single purpose enterprise may own and operate only one property. The lender does not want any other properties of the lender to be operated with its collateral and it does not want cash flow, expenses, etc. co-mingled.

The following Operating Agreement is designed for such a circumstance. In connection with its loan, the lender required an Operating Agreement. Additionally, the lender required the Operating Agreement to contain numerous provisions which ran to its benefit and which had to

remain in place as long as the loan was outstanding. Many of the lender's concerns could have been addressed in the loan documents, but in order to bind the sole member, the lender preferred to have its provisions in the Operating Agreement.

FORM

OPERATING AGREEMENT OF

(a(n)) _____ [state] Limited Liability Company)

THIS OPERATING AGREEMENT ("Agreement") is entered into as of the _____ [day] day of _____, [month _____] [year] , by and between _____ [name] (the "Company") and _____ [name] ("Member").

WHEREAS, the Member has caused Articles of Organization to be filed with the _____ Secretary of State's office forming a(n) _____ [state] limited liability company under the name " _____"; [name] and

WHEREAS, currently there is only one (1) Member, and in the event additional Members are admitted, this Operating Agreement will be applicable to all Members;

NOW, THEREFORE, in consideration of the mutual covenants and promises set forth herein, the parties hereby agree as follows:

ARTICLE 1 FORMATION OF THE COMPANY

1.1 Formation of Limited Liability Company. The Member has organized the Company pursuant to the provisions of Sections _____ to _____, both inclusive, of the _____ [state] Revised Code (the "LLC Act") under the name " _____."

1.2 Principal Office. The principal office of the Company shall be _____, [address] or at such other place in the State of _____ [state] as may be designated by the Member.

1.3 Purposes of the Company. The sole purpose of the Company shall be as follows:

(a) The Company is, and at all times that the loan identified on Exhibit 1 attached hereto (the "Loan") is outstanding will be, organized for the limited purpose of acquiring, owning, holding, selling, leasing, transferring, exchanging, operating and managing the property described on Exhibit 2 attached hereto (the "Property"), assuming the Loan, and entering into and performing its obligations under all documents and instruments pertaining thereto; refinancing the Property in connection with a permitted repayment of the Loan; and transacting any and all lawful business for which a limited liability company may be organized under _____ [state] law that is incident, necessary and appropriate to accomplish the foregoing special purposes.

(b) The Company is prohibited from taking any of the following actions for so long as the Loan is outstanding:

1. engaging in any dissolution, liquidation, consolidation, merger or sale of assets;
2. amending its Operating Agreement and/or its Articles of Organization without the prior written consent of _____ *[name of lender]* (the "Lender") (provided, however, any amendment of the Company's Operating Agreement and/or its Articles of Organization after the assumption of the Loan, additionally shall require: (i) confirmation from each of the applicable rating agencies that such amendment would not result in the qualification, withdrawal or downgrade of any securities rating (unless Lender shall otherwise, in its sole discretion, waive such requirement); and (ii) approval of such amendment by the Lender or its assigns); and
3. incurring indebtedness other than the Loan except for incurring liabilities in the ordinary course of business that are related to the ownership and operation of the Property.

(c) The Company shall be prohibited from taking, and the Company will not take, any Bankruptcy Action (hereinafter defined) for so long as the Loan is outstanding without the unanimous and affirmative vote of all members of the Company. "Bankruptcy Action" means any of the following:

1. taking any action that might cause the Company to become insolvent;
2. commencing any case, proceeding or other action on behalf of the Company, or otherwise seeking any relief, under any existing or future law of any jurisdiction relating to bankruptcy, insolvency, reorganization or relief from debts or the protection of debtors generally;
3. consenting to the institution of bankruptcy or insolvency proceedings against the Company;
4. filing a petition or consent to a petition seeking reorganization, arrangement, adjustment, winding-up, composition, or other relief on behalf of the Company of its debts under any federal or state law relating to bankruptcy;
5. seeking or consenting to the appointment of a receiver, liquidator, assignee, trustee, sequestrator, custodian or any similar official for the Company or a substantial portion of its assets;
6. making any assignment for the benefit of the Company's creditors; or
7. taking any action in furtherance of any of the foregoing.

(d) In order to preserve and ensure its separate and distinct identity, the Company at all times in conducting its affairs, shall:

1. Maintain its books and records separate from any other person or entity;
2. Maintain its bank accounts separate from any other person or entity;
3. Not commingle its assets with those of any other person or entity and hold all of its assets in its own name;
4. Conduct its own business in its own name;
5. Maintain separate financial statements showing its assets and liabilities separate and apart from those of any other person or entity and not have its assets listed on the financial statement of any other entity;
6. File its tax returns separate from those of any other entity and shall not file a consolidated tax return with any other entity;

7. Pay its own liabilities and expenses only out of its own funds;
8. Observe all _____ [state] limited liability company and other organizational formalities;
9. Maintain an arm's length relationship with its affiliates and enter into transactions with affiliates only on a commercially reasonable basis;
10. Pay salaries of its own employees (if any) from its own funds;
11. Maintain a sufficient number of employees (if any) in light of its contemplated business operations;
12. Not guarantee or become obligated for the debts of any other person or entity;
13. Not hold out its credit as being available to satisfy the obligations of any other person or entity;
14. Not acquire the obligations or securities of its affiliates or owners, including partners, members or shareholders, as appropriate;
15. Not make loans to any other person or entity or buy or hold evidence of indebtedness issued by any other person or entity (except for cash and investment-grade securities);
16. Allocate fairly and reasonably any overhead expenses that are shared with an affiliate, including paying for office space and services performed by any employee of an affiliate;
17. Use separate stationery, invoices, and checks bearing its own name;
18. Not pledge its assets for the benefit of any other person or entity (other than with respect to the Loan);
19. Hold itself out as a separate entity;
20. Correct any known misunderstanding regarding its separate identity;
21. Not identify itself as a division of any other person or entity; and
22. Maintain adequate capital in light of its contemplated business operations.

1.4 Duration of the Company. The Company shall commence on the date on which its Articles of Organization were filed with the _____ [state] Secretary of State's Office, and shall continue thereafter until terminated and dissolved in accordance with the terms of this Agreement.

ARTICLE 2

MEMBERS, CAPITAL CONTRIBUTIONS, CAPITAL ACCOUNTS

2.1 Members. The name and address of the Member is set forth on the signature page attached hereto.

2.2 Membership Units; Initial Capital Contributions. The Member's interest in the capital of the Company is represented by membership units ("Membership Units"). Each Membership Unit shall represent an interest in the capital of the Company and shall be identical in all respects with every other Membership Unit. The Membership Units shall not be certificated. The Company shall be capitalized by the Member contributing Ten Dollars (\$10) in exchange for ten (10)

Membership Units ("Membership Interest"). The Member shall not have the right to demand or receive the return of his capital contribution except as otherwise expressly provided herein.

2.3 Voting of Members. On any matter presented to the Members for their vote, each Member shall have one vote for each Membership Unit owned by him.

2.4 Capital Accounts. An individual capital account shall be established and maintained for each Member and has been or shall be credited with the amount of each Member's initial capital contribution to the Company. Each Member's capital account shall be determined and maintained throughout the term of the Company in accordance with the requirements of *Section 704(b) of the Internal Revenue Code of 1986* (the "Code") or its counterpart in any subsequently enacted Internal Revenue Code, the applicable Treasury Regulations (the "Regulations") thereunder and the provisions of the Bylaws, if any, of the Company.

2.5 Continuation of Membership. None of the following events will result in the termination of a Member's membership in the Company:

- (i) The Member files a voluntary petition in bankruptcy;
- (ii) The Member is adjudicated a bankrupt or insolvent; or
- (iii) The member who is an individual dies or is adjudicated an incompetent.

ARTICLE 3

ALLOCATIONS OF PROFITS AND LOSSES, CASH FLOW AND DISTRIBUTIONS

3.1 Profits and Losses. Except as is required by the Code, the net profits and net losses of the Company shall be allocated among, or borne by, each Member in proportion to the Membership Units owned by each of them.

3.2 Cash Flow. The cash flow of the Company shall be the net profits and losses of the Company, plus depreciation and other noncash charges deducted in determining such profits and losses, minus principal payments on all mortgages, and any other cash expenditures which have not been deducted in determining the net profits and losses of the Company, and minus the amount reasonably determined by the Company to be necessary to maintain for the Company sufficient working capital and a reasonable reserve for repairs and/or replacements. The cash flow of the Company shall be determined separately for each fiscal year and not cumulatively.

3.3 Distribution or Retention of Cash Flow. Cash flow, as determined in accordance with Section 3.2, shall be distributed in proportion to the number of Membership Units held by each Member, which distributions shall be made at such time or times as may be determined by the Company.

ARTICLE 4

MANAGEMENT

4.1 Manager. The business and the affairs of the Company shall be managed by _____ [name] who will be the Managing Member. In the event there is more than one (1) Member, the Managing Member shall be elected by the Members at a meeting held for such purpose, with the candidates receiving the greatest number of votes being elected. A Manager need not be a resident of the State of _____ [state] .

4.2 Powers of Manager. In addition to all other rights and powers, the Managing Member shall have the specific rights and powers required or appropriate for his supervision of the day-to-day business. Such rights and powers shall include,

but not be limited to, the following:

- (i) to engage personnel, attorneys, accountants or such other persons as may be deemed necessary or advisable;
- (ii) to open, maintain and close bank accounts and to draw checks and other orders for the payment of money;
- (iii) to take such actions and incur such expenses on behalf of the Company as may be necessary or advisable in connection with the conduct of the affairs of the Company; and
- (iv) to enter into, make and perform such contracts, agreements and other undertaking as may be deemed necessary or advisable for the conduct of the affairs of the Company

4.3 Liability of a Manager. No Manager shall have any liability to the Company or to any Member for any mistakes or errors in judgment, or for any act or omission believed in good faith to be within the scope of authority conferred by this Agreement. A Manager shall be liable only for acts and/or omissions involving intentional wrongdoing. Actions or omissions taken in reliance upon the advice of legal counsel that they are within the scope of a Manager's authority hereunder shall be conclusive evidence of good faith; provided, however, a Manager shall not be required to procure such advice to be entitled to the benefit of this subparagraph.

4.4 Books and Records. The Manager shall maintain or cause to be maintained complete and accurate records of all properties owned or leased by the Company and complete and accurate books of account (containing such information as shall be necessary to record allocations and distributions), and make such records and books of account available for inspection by any Member, or his duly authorized representative during regular business hours and at the principal office of the Company. Within sixty (60) days after the end of each calendar year, there shall be prepared and distributed to each Member reasonable tax-reporting information, in sufficient detail to enable such Member to prepare his federal, state and local income tax returns. In addition, within ninety (90) days after the end of each calendar year, there shall be prepared and distributed to each Member, a balance sheet, and a report of the receipts, disbursements, net profits and losses, and cash flow of the Company, and the share of the net profits and losses and cash flow of each Member for such calendar year. Such balance sheet and report shall be prepared by a certified public accountant in accordance with the method of accounting used by the Company for tax purposes.

4.5 Taxable Year; Accounting Method. The taxable year of the Company shall be a calendar year, and the first taxable year shall end on December 31st of the year in which the Company is formed. The books and records of the Company shall be maintained on the cash method of accounting.

ARTICLE 5

DISCLOSURES AND REPRESENTATIONS

5.1 Disclosure by Corporation. In connection with the sale of the Membership Units to the Member hereunder, the Company hereby discloses the following information to the Member:

- (a) the Membership Units have not been registered under the Federal Securities Act of 1933, as amended (the "Federal Act"), and are being offered and sold by the Corporation pursuant to a registration exemption contained in Section 3(a)(11) of the Federal Act and/or Securities and Exchange Commission Rule 147, promulgated thereunder.
- (b) during the period the Membership Units are being offered and sold by the Company, and for a further period of nine (9) months from the date of the last sale of the Membership Units that are part of the offering that is being so offered and sold by the Company, all resales, pledges, hypothecations, or other transfers of the Membership Units by any person or business organization shall, subject to the further terms of this Agreement, including the provisions of the legend set forth in subparagraph (c) below, be made only to persons or business organizations having a principal

residence or principal office, respectively, within the State of _____ [state] .

(c) a legend has been, or will be, placed on each certificate or other document evidencing any of the Membership Units in substantially the following form:

THE MEMBERSHIP UNITS EVIDENCED HEREBY HAVE NOT BEEN REGISTERED UNDER THE SECURITIES ACT OF 1933, AS AMENDED, AND, FOR A PERIOD OF AT LEAST NINE (9) MONTHS FROM THE DATE OF THE LAST SALE BY THE COMPANY OF THE MEMBERSHIP UNITS IN THE OFFERING OF WHICH THE MEMBERSHIP UNITS ARE A PART, ALL RESALES, PLEDGES, HYPOTHECATIONS, OR OTHER TRANSFERS OF THESE SECURITIES BY ANY PERSON OR BUSINESS ORGANIZATION SHALL BE MADE ONLY TO PERSONS OR BUSINESS ORGANIZATIONS WHO ARE RESIDENT WITHIN THE STATE OF _____ [state].

(d) Stop transfer instructions to the appropriate officers of the Company have been, or will be, placed in the Company's records with respect to the Membership Units so as to restrict the resale, pledge, hypothecation, or other transfer thereof, subject to the further terms of this Agreement, including the provisions of the legend set forth in subparagraph (c) above, during the nine-month period described in subparagraph (b) above.

(e) Prior to the expiration of the nine-month period described in subparagraph (b) above, the legend and stop transfer instructions described in subparagraphs (c) and (d) above will be placed on any new certificate(s) or other document(s) issued by the Company upon presentment by a Member to the Corporation of any certificate(s) or other document(s) for transfer of any of any of the Membership Units to a person or business organization having a principal residence or principal office, respectively, within the State of _____ [state] .

(f) The Membership Units have not been registered under the _____ [state] Securities Act, set forth in Chapter _____ of the _____ [state] Revised Code, as amended (the "_____ [state] Act"), and are being offered and sold by the Company pursuant to a registration exemption contained in Section _____ of the _____ [state] Act.

(g) The Company reasonably believes that the Member is acquiring the Membership Units hereunder for investment, has no information to the contrary, and through Section 5.2 below is hereby obtaining a signed statement to that effect from the Member prior to the purchase of any of the Membership Units hereunder.

5.2 Representations and Warranties of the Members. In connection with the Member's purchase of the Membership Units hereunder, the Member represents and warrants, which representations and warranties shall survive the consummation of the Member's purchase of his interest hereunder, as follows:

(a) The Member's principal residence or principal office, as the case may be, is located within the State of _____ [state] .

(b) The Member is aware that no market may exist for the resale of a Membership Unit purchased under this Agreement.

(c) The Member is purchasing for investment and not for the distribution of any of the Membership Units purchased under this Agreement.

(d) The Member is aware of any and all restrictions imposed by the Company on the further distribution of the Membership Units, including, but not limited to, any restrictive legends appearing on the certificate(s) and/or other document(s) evidencing any interest, required holding periods, stop transfer orders, or buy-back rights of the Company.

ARTICLE 6 DISSOLUTION

6.1 Termination of the Company. The Company shall be terminated and dissolved upon the first to occur of the following, provided such termination and dissolution does not interfere with the provisions of Article 1.3 (b) above:

- (a) upon the affirmative vote of at least two-thirds (2/3) of the Membership Units; or
- (b) upon the sale of all or substantially all the assets of the Company.

ARTICLE 7 WINDING UP

7.1 Winding Up. Upon the termination of the Company pursuant to Article 6.1, above, a full and general accounting shall be taken of the Company's business, and the affairs of the Company shall be wound up. Any profits earned or losses incurred since the last previous accounting shall be allocated among, or borne by, the Member in accordance with the provisions of Section 3.1, above. The Managing Member shall wind up and liquidate the Company by selling the Company's assets, or by distributing such assets in kind, subject to the Company's liabilities, or by a combination thereof, as determined by the Managing Member. The proceeds of such liquidation shall be applied and distributed in the following order of priority, by the end of the taxable year during which the liquidation occurs (or, if later, within ninety (90) days after the date of the liquidation):

- (a) to the payment of any debts and liabilities of the Company;
- (b) to the setting up of any reserve which the Managing Member shall reasonably deem necessary to provide for any contingent or unforeseen liabilities or obligations of the Company, with any excess in such reserve remaining after such liabilities are satisfied to be distributed as soon as practicable in the manner hereinafter set forth; and
- (c) thereafter, the balance of the proceeds, if any, shall be distributed in accordance with the positive capital account balances of the Members, as determined after taking into account all capital account adjustments for the Company's taxable year during which such liquidation occurs. For purposes of this subsection, a liquidation of the Company shall mean a liquidation as defined in Section 1.704-1(b)(2)(ii)(g) of the Regulations.

7.2 Statement. Each Member shall be furnished with a statement prepared by the Company's accountants, which shall set forth the assets and liabilities of the Company as of the date of complete liquidation.

7.3 Return of Capital Contributions. Notwithstanding anything in this Agreement to the contrary, neither the Managing Member nor any Member shall be personally liable for the return of the capital contributions of the Members, or any portion thereof, it being expressly understood that any such return of the capital contributions of the Members shall be made solely from Company assets.

ARTICLE 8 MISCELLANEOUS

8.1 Tax Matters Member. _____ [name] shall serve as the Tax Matters Member of the Company, as provided in Regulations issued pursuant to Section 6231 of the Code. Each Member, by the execution of this Agreement, consents to such designation of the Tax Matters Member. The Company shall indemnify and reimburse the Tax Matters Member for all expenses, including legal and accounting fees, claims, liabilities, losses and damages incurred in connection with any administrative or judicial proceeding with respect to the tax liability of the Members. The payment of all such expenses shall be made before any distributions to Members are made by the Company. The

taking of any action and the incurring of any expense by the Tax Matters Member in connection with any such proceeding, except to the extent required by law, is a matter in the sole discretion of the Tax Matters Member.

8.2 Amendments. This Agreement may be amended only with the written approval of all of the Members.

8.3 Actions. Members may take and adopt actions in writing, without a meeting, only if such actions are approved by all of the Members.

8.4 Notices. All notices, consents or other instruments hereunder shall be in writing and mailed by United States mail, postage prepaid, and shall be directed to the parties hereto at the last addresses of the parties furnished by them in writing to the Company, and to the Company at its principal office. The Company and/or any Member shall have the right to designate a new address for receipt of notices by notice addressed to the Members and the Company and mailed as aforesaid. Such notices shall be made a permanent part of the Company records.

8.5 Obligations and Rights of Transferees. Any person who acquires in any manner whatsoever any Membership Unit in the Company, irrespective of whether such person has accepted and assumed in writing the terms and provisions of this Agreement, shall be deemed by the acceptance of the benefit of the acquisition thereof to have agreed to be subject to, and to be bound by, all the obligations of this Agreement with the same force and effect as any predecessor in interest of such person. Such assignee shall, immediately upon the assignment of the Membership Unit(s), be a Member of the Company.

8.6 Benefit and Binding Effect. This Agreement shall inure to the benefit of, and be binding upon, the parties hereto and their respective next of kin, legatees, administrators, executors, legal representatives, nominees, successors and permitted assigns.

8.7 Integration. This Agreement constitutes the entire agreement among the parties hereto pertaining to the subject matter hereof, and supersedes all prior and contemporaneous agreements and understandings of the parties in connection therewith.

8.8 Governing Law. This Agreement and the rights of all parties hereunder shall be governed by, and construed in accordance with, the laws of the State of _____ [state] .

8.9 Counterparts. This Agreement may be executed in several counterparts, each of which shall be considered an original when executed by one or more of the Members.

Each party has executed this Operating Agreement on the day and year first written above.

COMPANY:

By: _____

MEMBER:



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24-20 Current Legal Forms for Real Estate FORM 20.03

AUTHOR: by Stephen E. Pigott and Harold O. Maxfield, Jr.

FORM 20.03 Articles of Organization for Single Membership and Single Purpose Limited Liability Company

COMMENT

Many states have promulgated forms that may be utilized for any required state filing. Articles of Organization are no exception to this trend. In fact, some states require that its form be used, and any unique provisions which the practitioner desires to use must be separately attached as an addendum. As always, the practitioner must review the local requirements before any filing is attempted. The following is a simple Articles of Organization which does not utilize a form promulgated by any state. Attached to the Articles as Addendum A is a single purpose clause which was required to be utilized by a lender for as long as a loan secured by the company's real estate remained outstanding. The addendum may be easily adopted to be attached to any state required form.

FORM

ARTICLES OF ORGANIZATION OF

(Under Section _____ [number] of the _____ [state] Revised Code)
Limited Liability Company

The undersigned, desiring to form a limited liability company under Chapter _____ [number] of the

_____ [state] Revised Code, hereby states the following:

FIRST: The name of the limited liability company shall be

[name].

SECOND: The duration of the limited liability company shall be perpetual.

THIRD: The address to which interested persons may direct requests for copies of any operating agreement and any bylaws of this limited liability company is:

—

—

FOURTH: The business of the limited liability company is limited to the purposes set forth on Addendum A.

IN WITNESS WHEREOF, I have hereunto subscribed my name, this _____ [day]
_____ day of _____ [month] , _____ [year] .

, Authorized Representative

ORIGINAL APPOINTMENT OF AGENT

The undersigned, being the Authorized Representative of _____ [name] , hereby appoints _____ [name] to be the agent upon whom any process, notice or demand required or permitted by statute to be served upon the limited liability company may be served. The complete address of the agent is:

AUTHORIZED REPRESENTATIVE:

ACCEPTANCE OF APPOINTMENT

The undersigned, _____ [name] named herein as the Statutory Agent for _____
[name] hereby acknowledges and accepts the appointment of agent for said limited liability company.

ADDENDUM A

PURPOSE

(a) The Company is, and at all times that the loan identified on Exhibit 1 attached hereto (the "Loan") is outstanding, will be organized for the limited purpose of acquiring, owning, holding, selling, leasing, transferring, exchanging, operating and managing the property described on Exhibit 2 attached hereto (the "Property"), assuming the Loan, and entering into and performing its obligations under all documents and instruments pertaining thereto; refinancing the Property in connection with a permitted repayment of the Loan; and transacting any and all lawful business for which a limited liability company may be organized under _____ [state] law that is incident, necessary and appropriate to accomplish the foregoing special purposes.

(b) The Company is prohibited from taking any of the following actions for so long as the Loan is outstanding:

1. engaging in any dissolution, liquidation, consolidation, merger or sale of assets;
2. amending its Operating Agreement and/or its Articles of Organization without the prior written consent of _____ [name of lender] (the "Lender") (provided, however, any amendment of the Company's Operating Agreement and/or its Articles of Organization after the assumption of the Loan, additionally shall require: (i) confirmation from each of the applicable rating agencies that such amendment would not result in the qualification, withdrawal or downgrade of any securities rating (unless Lender shall otherwise, in its sole discretion, waive such requirement); and (ii) approval of such amendment by the Lender or its assigns); and
3. incurring indebtedness other than the Loan except for incurring liabilities in the ordinary course of business that are related to the ownership and operation of the Property.

(c) The Company shall be prohibited from taking, and the Company will not take, any Bankruptcy Action (hereinafter defined) for so long as the Loan is outstanding without the unanimous and affirmative vote of all members of the Company. "Bankruptcy Action" means any of the following:

1. taking any action that might cause the Company to become insolvent;
2. commencing any case, proceeding or other action on behalf of the Company, or otherwise seeking any relief, under any existing or future law of any jurisdiction relating to bankruptcy, insolvency, reorganization or relief from debts or the protection of debtors generally;
3. consenting to the institution of bankruptcy or insolvency proceedings against the Company;
4. filing a petition or consent to a petition seeking reorganization, arrangement, adjustment, winding-up, composition, or

other relief on behalf of the Company of its debts under any federal or state law relating to bankruptcy;

5. seeking or consenting to the appointment of a receiver, liquidator, assignee, trustee, sequestrator, custodian or any similar official for the Company or a substantial portion of its assets;

6. making any assignment for the benefit of the Company's creditors; or

7. taking any action in furtherance of any of the foregoing.

(d) In order to preserve and ensure its separate and distinct identity, the Company at all times in conducting its affairs, shall:

1. Maintain its books and records separate from any other person or entity;

2. Maintain its bank accounts separate from any other person or entity;

3. Not commingle its assets with those of any other person or entity and shall hold all of its assets in its own name;

4. Conduct its own business in its own name;

5. Maintain separate financial statements showing its assets and liabilities separate and apart from those of any other person or entity and not to have its assets listed on the financial statement of any other entity;

6. File its tax returns separate from those of any other entity and shall not file a consolidated tax return with any other entity;

7. Pay its own liabilities and expenses only out of its own funds;

8. Observe all _____ [state] limited liability company and other organizational formalities;

9. Maintain an arm's length relationship with its affiliates and to enter into transactions with affiliates only on a commercially reasonable basis;

10. Pay salaries of its own employees (if any) from its own funds;

11. Maintain a sufficient number of employees (if any) in light of its contemplated business operations;

12. Not guarantee or become obligated for the debts of any other person or entity;

13. Not hold out its credit as being available to satisfy the obligations of any other person or entity;

14. Not acquire the obligations or securities of its affiliates or owners, including partners, members or shareholders, as appropriate;

15. Not make loans to any other person or entity or buy or hold evidence of indebtedness issued by any other person or entity (except for cash and investment-grade securities);

16. Allocate fairly and reasonably any overhead expenses that are shared with an affiliate, including paying for office space and services performed by any employee of an affiliate;

17. Use separate stationery, invoices, and checks bearing its own name;
18. Not pledge its assets for the benefit of any other person or entity (other than with respect to the Loan);
19. Hold itself out as a separate entity;
20. Correct any known misunderstanding regarding its separate identity;
21. Not identify itself as a division of any other person or entity; and
22. Maintain adequate capital in light of its contemplated business operations.



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24-20 Current Legal Forms for Real Estate FORM 20.04

AUTHOR: by Stephen E. Pigott and Harold O. Maxfield, Jr.

FORM 20.04 Action by Written Consent of Sole Member

COMMENT

In order to preserve the formalities of being a separate and distinct enterprise, the company should maintain its existence. This is a little harder to do with a single member limited liability company because with only one owner, the tendency is to operate it in a fairly loose fashion. The temptation is even greater with an entity which owns real estate because in many circumstances, the real estate entity is not an active day-to-day business. After the initial purchase and financing (if any), the company will have little business activity which will require written approval. The practitioner should advise his/her client to avoid operating in this fashion. One way to do this is to make sure that the single member limited liability company does annual minutes. The practitioner should put the company in its tickler system to annually notify the member of the need to adopt minutes. The following are Sole Member Minutes which address the initial purchase of the property and assumption of a loan. The minutes also include provisions which can be used by the company in connection with its annual minutes. Obviously, any extra-ordinary actions of the company should be approved and adopted in writing.

FORM

ACTION BY WRITTEN CONSENT OF SOLE MEMBER

_____ [date]

Pursuant to the authority contained in Article _____ [number] of the limited liability company's Operating Agreement, the undersigned, being the Sole Member of _____, [name] a(n) _____ [state] limited liability company (the "Company"), does hereby take and adopt the following actions in writing, without meeting:

1. Purchase of Property. The Company hereby authorizes _____, [name] the Managing Member of the Company, to execute a certain Assignment Agreement, which transfers all of _____'s [name] rights and interest in and to a certain Real Estate Purchase Agreement dated _____, [date] attached hereto as Exhibit A, to the Company. The Managing Member of the Company is also authorized to take all other necessary and appropriate actions in connection with the Company purchasing the property described in such Real Estate Purchase Agreement.

2. Assumption of Loan. The Company hereby authorizes the Managing Member of the Company to take any necessary or appropriate actions in order for the Company to assume the loan described on Exhibit B, attached hereto, and to execute and deliver, on behalf of the Company, the Assumption Agreement between the Company and _____ [lender] (the "Lender"), and to execute and deliver such other documents and take such other actions as the Lender may require.

3. Ratification. The Company hereby ratifies and approves all actions taken by the Managing Member during the past calendar year.

4. Election of Managing Member. _____ [name] is hereby appointed as the Managing Member for the calendar year starting _____ [month] _____, [day] _____ [year]. The Managing Member will serve for a period of one (1) year or until his successor is appointed.

5. Approval of Management Contract. The Company hereby authorizes the Managing Member to execute and deliver the Management Contract attached hereto as Exhibit _____, and to take any and all other necessary or appropriate action in connection therewith.

Sole Member



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24-20 Current Legal Forms for Real Estate FORM 20.05

AUTHOR: by Stephen E. Pigott and Harold O. Maxfield, Jr.

FORM 20.05 Waiver of Community Property/Interest

COMMENT

Community property statutes and dower rights provide a unique challenge to the individual ownership of real estate. If a spouse owns property individually, various states have community property laws (i.e., California) or so-called "Dower/Curtesy Rights" (i.e., Ohio) which may give a spouse an interest in the real estate even though they are not in legal title. The community property laws and dower rights are very complex and are widely varied from state to state. In fact, in some states (i.e., Florida), a spouse has no community property or dower/curtesy rights have been abolished. If a married person desires to take title individually to real estate, and such person does not want his/her spouse to have any interest in real estate, then the practitioner must be very careful to structure the transaction in such a way as to avoid the spouse's interest. In order to so structure the ownership interest, it is absolutely critical that the practitioner becomes very knowledgeable on the laws of the state where the individual resides and where the real estate is located. The following form is a waiver of community interest and/or dower rights, but the practitioner must be aware that this waiver may not be enforceable in some states. In some states, it may be necessary to provide consideration for such waiver.

FORM

The undersigned does hereby: (1) certify that she is the spouse of _____ [husband] ; (2) Husband is purchasing the property described on Exhibit A; (3) it is their intention that the property is being purchased as separate property of the husband and that she agrees that it is his separate property and that she does not have a community interest and dower rights therein; (4) waives any community interest and/or dower right to which she may be entitled in

the property and income thereof; (5) that she will execute any and all reasonable additional documents and/or agreements to evidence the agreement and/or waiver contained herein; and (6) acknowledge that absent the waiver and agreement contained herein that the husband would not have purchased the property.

Witnessed this _____ [month] _____, [day] _____ [year] .



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24-B Current Legal Forms for Real Estate Scope

AUTHOR: by Stephen E. Pigott and Harold O. Maxfield, Jr.

Scope

Note: Please refer to Chapter 2 in Volume 2 of Current Legal Forms with Tax Analysis for an additional discussion of Joint Ventures



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24-20 Current Legal Forms for Real Estate FORM 20.06

AUTHOR: by Stephen E. Pigott and Harold O. Maxfield, Jr.

FORM 20.06 Joint Ownership Agreement

COMMENT

In connection with the joint ownership of residential property, the parties may want to obligate themselves to various rights and obligations respecting their ownership. This is especially true if expenses such as utilities or taxes are not being paid in accordance with each parties' ownership interest. Typically, joint ownership agreements involve related parties, or co-habitants.

FORM

JOINT OWNERSHIP AGREEMENT

THIS JOINT OWNERSHIP AGREEMENT ("Agreement") is made this _____ [day] day of _____, [month] _____ [year] by and among MAX PEPPER ("Pepper"), AMANDA SMITH ("Smith") and JACK JONES ("Jones").

WHEREAS, Smith and Jones are Pepper's daughter and son-in-law, respectively, and the three of them desire to reside together in a home located at _____ [address] (the "Residence"); and

WHEREAS, Pepper owned in fee simple the Residence and has transferred a remainder interest by deed to Smith and Jones, retaining for herself a life estate in the Residence; and

WHEREAS, Pepper has loaned Smith and Jones One Hundred Thousand Dollars (\$100,000) for the sole purpose of

repairing and improving the Residence;

NOW THEREFORE, in consideration of the mutual covenants and agreements contained herein, the parties hereto agree as follows:

1. Joint Occupancy. Pepper shall permit Smith and Jones to reside in the Residence with her during the term of her life estate. No party to this Agreement shall be obligated to pay rent.

2. Term. The term of this Agreement shall begin on the date set forth above and shall terminate upon the death of Pepper, unless sooner terminated as provided in Paragraph 11, below.

3. Real Estate Taxes. Smith and Jones shall pay, prior to the same becoming past due, all real estate taxes and assessments (both general and special), all charges and other taxes, duties and charges, fees or payments imposed by any governmental, quasi-governmental or public authority, which shall be imposed, assessed, levied and become due and payable as of the date of this Agreement or which arise during the term of this Agreement. Smith and Jones shall have the right to deduct, for federal income tax purposes, the full amount of any and all real estate taxes and assessments paid by them. Smith and Jones, however, shall not be responsible for payment of real estate taxes and assessments which were due and payable before they occupied the Residence, or which may become due and payable following termination of this Agreement.

4. Improvements. Smith and Jones shall be responsible for making, and/or employing contractors to make, substantial improvements to the Residence. The improvements described on Exhibit A shall be made to the Residence at the sole cost and expense of Smith and Jones (the "Improvements"). The Improvements will be completed lien free, in a good and workmanlike manner by _____ [month] _____ [day] , _____ [year] . Any loan proceeds that remain following completion of the Improvements listed on Exhibit A shall be used to make additional improvements to the Residence as reasonably determined by Smith and Jones.

5. Sale of Residence. The parties agree that if the Residence is sold during the term of this Agreement that the net sales proceeds after payment of all expenses shall be distributed as follows:

Smith	_____	_____ %
Jones	_____	_____ %
Pepper	_____	_____ %

6. Insurance. Smith and Jones shall pay the entire cost to maintain hazard casualty insurance in the amount of the full replacement value of the Residence to protect the Residence against fire, theft, and related casualty losses. In the event of damage to the Residence by any cause whatsoever, the parties to this Agreement shall use any and all insurance proceeds received as a consequence of such damage to rebuild the Residence. In addition, the parties to this Agreement shall maintain liability insurance, which insurance policy shall be in the amount of \$1 million, to protect the parties against personal liability as a result of injury or death to third persons who may enter the Residence, the cost of which insurance shall be borne by Smith and Jones. The insurance policies shall designate specifically that Pepper, Smith and Jones are the named insureds. Each Party will be responsible for insuring his or her own personality.

7. Utilities. Smith and Jones shall pay for all utilities used or consumed at the Residence, together with all other taxes or charges on such utilities and government charges based on utility consumption.

8. Maintenance and Repairs. Smith and Jones shall keep and maintain the interior and exterior of the Residence, and any fixtures and facilities therein, in good condition and repair, including, without limitation, all servicing, repairs and replacements required to the wiring, plumbing, heating and air conditioning units, kitchen appliances, windows, doors, the roof, siding, driveway, garage, landscaping, and shed, if any.

9. Alterations. Subject to Paragraph 4, above, the parties to this Agreement shall not undertake any major alteration to the Residence without the prior written consent of the other party, such consent not to be unreasonably withheld, conditioned or delayed. The alteration shall be undertaken at the sole cost and expense of the party desiring the alteration.

10. Waste. The parties to this Agreement agree that they will not commit waste in or upon the Residence. Should any party commit waste, that party shall be solely responsible for the cost of repair, which shall be performed with all reasonable diligence and in a workmanlike manner.

11. Assignment. The terms of the Agreement shall not be construed to give Smith and Jones the right to assign their rights to reside in the Residence to any other person(s). In addition, Pepper agrees not to assign her life estate during the pendency of this Agreement.

12. Termination of Agreement. Upon the occurrence of any of the following events, Pepper shall be permitted to terminate this Agreement and gain sole possession of the Residence; provided, however, that Pepper first give Smith and Jones written notice of the default and ten (10) days within which to cure such default:

(a) Failure by Smith and/or Jones to timely pay any real property taxes or assessments (both general and special) assessed on the Residence.

(b) Failure by Smith and/or Jones to fulfill any of the requirements imposed upon them pursuant to the terms of this Agreement.

(c) Default by Smith and/or Jones under the terms of a certain Promissory Note executed by them on

_____ [month]

_____ [day],

_____ [year], a copy of which Note is attached hereto as Exhibit B.

(d) Breach by Smith and/or Jones of any provision of a certain Mortgage Deed executed by them on

_____ [month]

_____ [day],

_____ [year], a copy of which Mortgage is attached hereto as Exhibit C.

13. Entire Agreement. This Agreement supersedes any and all other agreements, either oral or written, between the parties relating to any matter described in this Agreement.

14. Severability. If any provision of this Agreement is held by a court of competent jurisdiction to be invalid, void, or unenforceable, the remaining portions shall nevertheless continue in full force and effect without being impaired or

invalidated in any way.

15. Modification. This Agreement may be amended or modified only by a written instrument signed by all parties.

IN WITNESS WHEREOF, this Agreement is executed by the parties hereto on the day and year first above written.

Max Pepper

Amanda Smith

Jack Jones



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24-20 Current Legal Forms for Real Estate FORM 20.07

AUTHOR: by Stephen E. Pigott and Harold O. Maxfield, Jr.

FORM 20.07 Conversion of community property into tenancy in common

COMMENT

There may be an occasion when a husband and wife desire to terminate their community property rights as to certain property and convert their ownership to tenancy in common. Community property status may be dissolved by converting the community assets into property held in a tenancy in common. Each spouse becomes a tenant in common, owning an undivided one-half interest in the property. This makes each spouse individually entitled to the income from that one-half interest. Either spouse may dispose of his or her interest while alive or at death without the approval of the other spouse. The conversion from community ownership to tenancy in common does not involve any physical division of the property. Such a conversion does not result in any income taxation. No gift tax is incurred because of the gift tax marital deduction, which covers separate and community property.

FORM

This Agreement is entered into by _____ [name] and _____ [name] who are husband and wife and reside together at _____ [address] _____ [city] , _____ [state] .

WHEREAS, the parties have acquired since their marriage the property described on Exhibit A (the "Property");

WHEREAS, it is the desire of the parties to divide and separate the Property and to hold it as tenants in common, with each holding an undivided one-half (1/2) interest in the Property.

NOW, THEREFORE, it is agreed as follows:

1. The parties agree that they will convey all of the Property to themselves as tenants in common, so that each may have an undivided one-half (1/2) interest therein, and each will execute and deliver to the other such bills of sale, deeds of conveyance, and other papers and instruments necessary to convey title to each of them as tenants in common.
2. Each of the parties may, upon the death of the other, hold and retain his or her interest in the Property without any disturbance of the title thereto, each may convey, devise, transfer, or otherwise dispose of his or her interest in the Property at any time without interference or consent from the other and without any instruments from the other, and each may receive and retain the income from his or her interest in the Property without any requirement to account to the other.

IN WITNESS WHEREOF, the parties have signed this agreement this _____ [day] day of _____, [month] _____ [year] .

[name]

[name]



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B. TENANCIES IN COMMON AND JOINT VENTURES

24-20 Current Legal Forms for Real Estate FORM 20.08

AUTHOR: by Stephen E. Pigott and Harold O. Maxfield, Jr.

FORM 20.08 Joint Tenants with a Right of Survivorship

COMMENT

Occasionally, individuals will want to own property as joint tenants, but will desire that upon the death of a tenant, such deceased person's interest will automatically pass by operation of law to the remaining owners. The most typical circumstance involves relatives (i.e., husband and wife, or parent and child). Each state's laws must be reviewed in order to make sure the technical requirements are strictly complied with. The following Survivorship Deed has been prepared in accordance with Ohio law (*See* § 5302.17 of the Ohio Revised Code). If the survivorship requirements are not met, then under most jurisdictions, the ownership will be treated as tenants in common.

FORM

SURVIVORSHIP DEED

KNOW ALL MEN BY THESE PRESENTS, That _____ [name] _____ [marital status] (the "Grantor") of _____ [county], _____ [state], for valuable consideration paid, Grants, with general warranty covenants to _____ [name] and _____ [name] [marital status] (the "Grantees") for **their joint lives, remainder to the survivor of them**, whose tax mailing address is _____ [address], _____ [city], _____ [state] the real property described on Exhibit A attached hereto.

Prior Instrument Reference: Vol. _____, Page _____ of the Deed Records of

_____[*county*], _____[*state*].

Subject to zoning ordinances, taxes and assessments, both general and special, which are a lien but are not yet due and payable, and restrictions, reservations, limitations, covenants, easements and conditions of record.

The undersigned have executed this Survivorship Deed this _____[*day*] day of, _____[*month*]
_____[*year*].

GRANTOR:

[*name*]



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24-20 Current Legal Forms for Real Estate FORM 20.09

AUTHOR: by Stephen E. Pigott and Harold O. Maxfield, Jr.

FORM 20.09 Tenancy in common--equal ownership by two individuals--unimproved property

COMMENT

This group of forms illustrates various joint ventures for the co-ownership of property. Generally, a joint venture is a union of two or more persons or corporations in an enterprise with well-defined restrictions on its activities. If the joint venture is involved in real estate, one of the first questions that arises is the form in which title to the real estate is to be held by the joint venturers. In many instances, title is taken in the name of all of the participants as tenants in common. In other cases title is taken in the name of the joint venture. In some cases a nominee is designated to hold title for the benefit of the joint venture. This technical problem as to how title is to be held will often depend upon the number of participants in the joint venture and the extent of the proposed real estate activity, and must be governed by rules of local real estate law, considerations of title, control, and the practice of title insurance companies.

Tax classification:

From the viewpoint of the income tax law, the first problem with respect to a real estate joint venture is to determine whether it is subject to the partnership provisions of the Code, or whether the coowners can compute and report their respective shares of income or losses separately and without reference to those provisions. The venture may be classified as a mere coownership, in which event the partnership provisions will not be applicable. Neither the denomination of the relationship in the joint venture agreement nor its status under state law is determinative for income tax purposes. (See TB § 20.04), at the beginning of this chapter.

Co-ownership vs. partnership tax status:

The Regulations define a partnership as including "a syndicate, group, pool, joint venture, or other unincorporated organization through or by means of which any business, financial operation, or venture is carried on, and which is not a corporation or a trust or estate within the meaning of the Code." The Regulations also provide that the mere ownership of property which is maintained, kept in repair, and rented or leased does not constitute a partnership. Tenants in common, however, may be partners if they actively carry on a trade, business, financial operation, or venture and divide the profits thereof. For example, a partnership may exist if coowners of an apartment building lease space and in addition provide service to the occupants either directly or through an agent. It has been held, however, that cotenants do not become partners by reason of an agreement to appoint an agent for management, collection of rents, and sale. The result in any given case seems to depend upon the extent of the business activities of the venture. If the relationship is solely for the coownership of property, the characteristics of a partnership are absent. As to coownership versus partnership tax status, see TB § 20.04[2].

FORM

THIS AGREEMENT entered into on _____[month] _____[day],
_____ [year], between Harold Stern, a married man dealing with his sole and separate property (Stern),
and Frank Realty Corporation (Frank).

WHEREAS, the parties are purchasing as tenants in common the property described in Exhibit A attached hereto (the "Property").

WHEREAS, each of the parties has an individual one-half interest in the Property.

WHEREAS, the parties desire to provide for the management and disposition of such Property.

IT IS, THEREFORE, AGREED AS FOLLOWS:

1. Down Payment and Title . The down payment, including closing costs with respect to the purchase of the Property shall be contributed equally by the parties in accordance with their respective ownership interest. Title to the Property shall be conveyed to each party as tenants in common.
2. Subsequent Contributions . Subsequent contributions of principal, interest, taxes, and all other costs or expenses on such Property shall be paid equally by each party.
3. Special Contribution . Frank shall contribute amounts not exceeding an aggregate of Nine Thousand Dollars (\$9,000), for the surveying and plotting thereof, and for the improvement of the access road thereon. Expenditures for such work in excess of Nine Thousand Dollars (\$9,000), if any, shall be authorized only with the consent of and shall be paid equally by both parties.
4. Sale of Property . Any decision to sell all or part of such Property shall be made by both parties. Except as hereinafter otherwise provided, the net proceeds of any sale or sales shall be distributed equally between both parties.
5. Default . Each party shall promptly contribute, when and as the same becomes due, his equal share of all future payments required to be made pursuant to the trust agreement under which the Property is being purchased, including principal, interest, taxes, and all other costs with respect to such Property. If either party is unable to pay his share of such costs, the other party is authorized to make such payment or payments so as to avoid a default under the trust

agreement. All amounts so advanced by either party on behalf of the other party shall bear interest at the rate of _____ percent (_____) per year from the date of advance, and shall be due immediately upon written demand for payment in the manner hereinafter provided. If the full amount of such advance or advances, together with interest thereon is not paid by the party for whom such advance was made, within ten days after receipt of such notice of demand for payment, then such party shall be a defaulting party hereunder. In the event of any sale of such Property, the proceeds shall be distributed equally between both parties, but a defaulting party shall in no event be entitled to receive an amount in excess of the total contributions made by such party, without interest. All other proceeds of sale shall belong to the nondefaulting party. In the event of a sale at a loss such defaulting party shall bear his one-half (1/2) share of such loss.

6. Management . All matters relating to the management and sale of the Property shall be decided by both parties, except that if either of the parties becomes a defaulting party, the other party shall have full power to make all decisions relating to the management and sale of such Property.

7. Restrictions. Neither party shall sell, transfer, mortgage, or otherwise dispose of, or encumber his undivided interest in such Property without first giving written notice to the other party of his intention to do so. The notice shall set forth the terms on which the offering party proposes to sell, transfer, mortgage, or otherwise dispose of or encumber his interest, and the identity of the person or persons to whom it is proposed to sell, transfer, or encumber such interest. The other party shall have ten (10) days after the giving of notice in which to elect to acquire the interest on the same terms and conditions that offering party desires to purchase. The purchase price shall be paid on the same terms as the original price paid by the parties pursuant to the escrow referred to in Paragraph 1, including percentage of down payment, amortization of principal balance, and interest rate. If the party to whom the notice is given does not elect to acquire the interest on the terms provided herein within the ten-day period, then the party giving the notice shall have the right to sell, transfer, mortgage, or otherwise dispose of, or encumber his interest, on the same terms as provided in the notice, for a period of thirty (30) days after the expiration of the ten-day period. After the expiration of the 30-day period, the party giving the notice shall not sell, transfer, mortgage, or otherwise dispose of, or encumber his interest without again complying with the terms of this paragraph. If the party to whom notice is given elects to purchase, an escrow shall be established forthwith with a title company having an office in Flagstaff, Arizona, for the purpose of consummating the purchase. The escrow shall, by its terms, provide for a closing not more than thirty (30) days after its establishment.

8. Notices. Any and all notices and demands given under this agreement shall be given by registered or certified mail, return receipt requested, postage prepaid, addressed to the parties at the following addresses or at such other addresses as either or both may designate on written notice:

9. Binding Effect. This agreement shall be binding upon and shall inure to the benefit of each of the parties, and their respective heirs, executors, administrators, legal representatives, successors, and assigns.

10. Entire Agreement. This agreement supersedes all agreements previously made between the parties relating to its subject matter. There are no other understandings or agreements between them.

11. Non-waiver . No delay or failure by either party to exercise any right under this agreement, and no partial or single exercise of that right, shall constitute a waiver of that or any other right, unless otherwise expressly provided herein.

12. Headings. Headings in this agreement are for convenience only and shall not be used to interpret or construe its provisions.

13. Governing Law. This agreement shall be construed in accordance with and governed by the laws of the State of _____.

14. Counterparts. This agreement may be executed in two or more counterparts, each of which shall be deemed an original but all of which together shall constitute one and the same instrument.

Howard Stern

FRANK REALTY CORP.

By: _____



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Chapter 20 REAL ESTATE ENTITIES

Part IV. Forms

B. TENANCIES IN COMMON AND JOINT VENTURES

24-20 Current Legal Forms for Real Estate FORM 20.10

AUTHOR: by Stephen E. Pigott and Harold O. Maxfield, Jr.

FORM 20.10 Tenancy in common--ownership by two entities--income--producing property

COMMENT

This form is an agreement between two entities. This agreement provides that each owner shall have an equal say in management without regard to the percentage of ownership which each owner has in the enterprise. Given this management structure, the agreement contains dispute resolution provisions. This agreement also provides for a forced buy-out in the event the parties cannot get along. Furthermore, this agreement provides one of the owners with a development fee in connection with certain improvements which are anticipated at the property.

Tax classification:

The classification of an entity for income tax purposes will depend upon the nature of its real estate activities. If the property is under net lease to a single tenant, the coowners could elect to be excluded from the operation of the partnership provisions. In that case, the coowners would separately report their share of income or loss. On the other hand, if the property is to be leased out to a number of tenants and managed jointly by the coowners as an office building or apartment house, then the venture itself would be required to file its own partnership return. The goal of the following agreement is to not be taxed as a partnership, but rather as joint owners. The practitioner must be very careful, because if there is too much commonality, the venture will likely be classified as a partnership by the IRS. If the result is to not be deemed a partnership, each party could have a separate triple net lease with tenant. The parties could hire a separate outside manager, and separate checks could be written by each owner for any expenses. For a further discussion of the tax classification of real estate joint ventures and partnerships under the Code, see TB § 20.40[2], at the beginning of this chapter.

FORM**JOINT OWNERSHIP AGREEMENT**

THIS JOINT OWNERSHIP AGREEMENT is entered into this _____ [day] day of _____, [month] _____ [year] by and between ATLAS PARTNERS, a(n) _____ [state] partnership ("Atlas") and ABC COMPANY, LLC, a(n) _____ [state] limited liability company ("ABC"). Atlas and ABC are hereinafter sometimes referred to singularly as an "Owner" and collectively as the "Owners."

WHEREAS, the Owners are in the process of jointly purchasing certain real estate located at _____ [address] , _____ [city] , _____ [state] (the "Property"); and

WHEREAS, the Owners desire to set forth their agreements, including their joint obligations and responsibilities with respect to the Property;

NOW, THEREFORE, in consideration of the mutual covenants hereinafter set forth, the parties hereby agree as follows:

1. Purchase of Property. The Owners acknowledge that they are in the process of jointly purchasing the Property pursuant to a Purchase Agreement dated _____ [month] _____, [day] _____ [year] , and they agree to take all action which is necessary and/or appropriate to complete the purchase in accordance with the foregoing agreement.

2. Principal Place of Business and Office. The principal place of business and the office of Atlas is _____ [address] , _____ [city] , _____ [state] or such other place as may be designated by Atlas written notice to the ABC. The principal place of business and the office of the ABC is _____ [address] , _____ [city] , _____ [state] or such other place as may be designated by the ABC by written notice to Atlas.

3. Lease with XYZ Company. The Owners agree to enter into the lease (or separate leases) with XYZ Company (the "Tenant"), a copy of which is attached hereto as **Exhibit A** (the "Lease"). The Owners agree that the Lease(s) will not be amended, modified, extended or terminated without the express written consent of each of the Owners. Further, each Owner agrees that when dealing with the Tenant that they will require strict adherence to the terms and conditions of the Lease.

4. Purposes of the Relationship; Powers. The sole purpose of the Owners' relationship and this Agreement is to own, develop, maintain, operate, manage, lease and otherwise deal with the Property. The parties' joint ownership of the Property is not to be construed as a partnership. Except as is specifically set forth herein, an Owner shall not have the right with respect to their interest in the Property to enter into contracts, borrow money, issue evidences of indebtedness, mortgage, pledge or otherwise grant a security interest in their interest in the Property or to sell, refinance, lease, exchange or otherwise dispose of their interest in the Property, or to bind the other owner in any way.

5. Initial Contributions. Each Owner will initially contribute towards the purchase, ownership, construction and/or maintenance of the Property the amount set forth below:

Atlas \$ _____

ABC \$ _____

6. Cash Calls. The Owners recognize that income produced from the Property may be insufficient to pay the costs of operating the Property. If, in the reasonable judgment of the Manager (as defined below), additional funds are required in connection with the ownership of the Property, such funds shall be called for by the Manager and shall be contributed by the Owners, in proportion to their ownership interests in the Property. All funds called for by the Manager shall be due on the date prescribed in the notice of the call; provided, however, that the due date shall be not less than fifteen (15) days after the call date. If any Owner fails to timely make any or all of its proportionate contribution, then the other Owner will have the option, but not the obligation, to contribute the funds in excess of its ownership interest. The Owner who makes such additional contribution in response to a call shall be a creditor of the other non-contributing Owner in the amount of the excess. The amount outstanding will be payable on demand, and will bear interest at the rate of two percent (2%) in excess of the prime lending rate as published in the Wall Street Journal.

7. Percentage of Ownership. Each Owner will initially own in fee simple the percentage of the Property set forth below, which interest will be reflected on the Deed which conveys the Property to the Owners:

Atlas	_____

	_____ %
ABC	_____

	_____ %

8. Cash Flow. Subject to the cash flow preference described in Paragraph 9. below, the joint cash flow generated by the Property (if any), less any cash reserves which the Manager reasonably determines should be maintained with respect to the Property, will be distributed to the Owners at least annually, in proportion to their fee simple ownership interest in the Property. The cash flow will be computed by the Certified Public Accounting firm engaged by the Owners to maintain the books and records relating to the Property.

9 Control and Operation of the Company; Voting.

A. Except as is specifically set forth herein, the Owners will each own, control and manage their interest in their portion of the Property, however any action taken by either Owner which will affect the entire Property must be expressly approved by the other Owner.

B. The day-to-day ministerial management of the Property will be the responsibility of _____ [name] (the "Manager"). The Manager shall not be paid any compensation, but shall be reimbursed from the income from the Property for all reasonable out-of-pocket expenses incurred on behalf of the Property. The rights and duties of the Manager are as follows:

(i) to take any action with respect to the Property on an emergency basis; provided time does not permit consultation with the other Owner;

(ii) to open, maintain and close bank accounts and to draw checks and other orders for the payment of money;

(iii) to collect rent and to pay expenses of the Property (provided that the Manager will not pay any expense relating to the Property in excess of \$ _____ without the consent of the other Owner);

(iv) to make the cash flow distributions described in Paragraph 8, *above*; and

(v) to maintain or cause to be maintained complete and accurate records, and to make such records and books of account available for inspection at any reasonable time by the Owners.

C. The Manager will not have any liability to the other Owner for any mistakes or errors in judgment, or for any act or omission believed in good faith to be within the scope of authority conferred by this Agreement. The Manager shall be liable only for acts and/or omissions involving intentional wrongdoing or gross neglect. Actions or omissions taken in reliance upon the advice of legal counsel approved by the Manager as being within the scope conferred by this Agreement shall be conclusive evidence of good faith; provided, however, the Manager will not be required to procure such advice to be entitled to the benefit of this and the preceding sentences.

10. Development and Development Fee. Atlas will supervise the improvements to the existing building on the Property, and construction of the addition (collectively, the "Development"), which are required by the Lease. The Owners will jointly approve all budgets, contracts and financing, but Atlas will be responsible for the implementation and supervision thereof. For its services hereunder, Atlas will be entitled to receive a development fee equal to _____ percent (_____) of the cost of the Development, which development fee will be paid from the rents of the Property prior to the distribution of any cash flow to the Owners. In addition, Atlas is hereby authorized to engage _____ [name] as the inspection and supervising agent for the Development, whose fee will be paid for by the Owners from the initial contributions, financing proceeds, or rents.

11. Dispute Resolution.

A. Generally. In the event that a dispute of any kind arises in connection with this Agreement or the operation or management of the Property (including, without limitation, an allegation by one of the Owners that they are deadlocked because they are unable to reach a unanimous decision on an issue), the Owners will attempt to resolve the dispute as set forth in Paragraph B, below before proceeding to arbitration as provided in Paragraph C, below. The Owners waive all rights to seek remedies in any court (except to enforce the decision or award of the Arbitrators) and the right to jury trial. All documents, discovery and other information related to any such dispute, and the attempts to resolve or arbitrate such dispute, shall be kept confidential to the fullest extent possible.

B. Notice of Desire for Arbitration. If a dispute arises, an Owner may give written notice to the other Owner of its desire to have the dispute resolved by arbitration. After such notice has been given, the Owners, in good faith, shall attempt to negotiate a resolution of the dispute through an independent mediator selected by the parties, or if no agreement can be reached, by an independent mediator selected by _____ [name] .

C. Arbitration. If, within twenty (20) days after the notice provided in Paragraph B, above has been given, the dispute is not resolved through negotiation or mediation, the dispute shall be arbitrated. The Owners agree to settle the dispute exclusively by binding arbitration in accordance with the following provisions:

1. Selection of Arbitrator. The Owners shall unanimously agree to the selection of one arbitrator. If no such agreement is reached within thirty (30) days after the notice provided in Paragraph B, above has been given, the Owners shall request that the American Arbitration Association submit a panel of ten arbitrators who are qualified in such matters from which the choice shall be made. The Owners shall draw straws and the Owner drawing the shortest straw shall strike first, then each Owner will alternatively strike. Each Owner shall strike a name until one name remains. The Owners may, by unanimous agreement, reject one entire list and request a second list. If selection by the above method is not completed within forty-five (45) days after the notice provided in Paragraph B, above, has been made, then an arbitrator shall be selected by the American Arbitration Association. That arbitrator shall then arbitrate the dispute in _____, [city] _____ [state], and issue a decision.

2. Rules for, and Effect of, Arbitration. The arbitration shall be conducted under the Commercial Arbitration Rules of the American Arbitration Association. The arbitrator shall have no ability to add, change or delete provisions of this Agreement, and shall be required to interpret the terms of this Agreement as they exist. The decision of the arbitrator shall be final, binding and non-appealable, absent fraud or manifest error on the part of the arbitrator. Judgment on the decision may be entered in, and enforced by, any court, state or federal, having jurisdiction.

3. Costs. The cost of any arbitration, including the fees and expenses of the arbitrator, shall be shared equally by the Owners. Each Owner shall bear its own costs, expenses and attorney's fees.

12. Forced Sale. If an Owner desires to sell any portion of its interest in the Property, then the Owner desiring to sell such interest will establish a price and terms upon which the selling Owner is willing to sell such interest. The selling Owner shall then present such proposal to the other Owner. The other Owner will have thirty (30) days to either accept or reject such offer. Failure to respond to a notice hereunder will be deemed to be a rejection of such offer. If the other Owner accepts such offer, then the interest will be purchased pursuant to such terms. If the other Owner rejects such offer, then the selling Owner will be required to purchase and the rejecting Owner will be required to sell, the rejecting Owner's interest on the same terms and conditions of the original proposal, save and except any adjustment which must be made to the purchase price in order to reflect the differing ownership percentages, if any, in the Property. In addition, any money owed to an Owner pursuant to Paragraph 6, above, will be paid at the closing of the sale of the interest hereunder. Such purchase shall take place within thirty (30) days of the rejection of the original offer. The provisions of this Paragraph constitute the only method or means under which an Owner may sell or convey such Owner's interest in the Property without obtaining the express written consent of the other Owner. The provisions of this Paragraph 12 may not be invoked before the two (2) year anniversary hereof. In addition, the Owners acknowledge that the Lease contains a Right of First Refusal in favor of the Tenant, and that the operation of this Paragraph 12 is not subject to the Right of First Refusal contained in the Lease.

13. Prohibition Against Liens and Encumbrances. Each Owner agrees that they will not allow their interest in the Property to become subject to any lien or encumbrance, without the express written consent of the other Owner. In the event that an interest in the Property becomes encumbered, including, without limitation, becomes subject to a judgment lien, the Owner whose interest becomes so encumbered, will within thirty (30) days from the perfection of such encumbrance, take whatever action is necessary to have such encumbrance released with respect to the Property.

14. Amendments. This Agreement may be amended only with the written approval of the Owners. Any such amendment shall be set forth in a writing, signed by all of the Owners.

15. Notices. All notices, consents or other instruments hereunder shall be in writing and mailed by United States mail, postage prepaid, and shall be directed to the parties hereto at the last addresses of the parties furnished by them. The Owners shall have the right to designate a new address for receipt of notices by notice addressed to the Owner and mailed as aforesaid.

16. Other Activities of the Owners. The Owners may engage in or possess an interest in any other business venture of any nature and description, independently or with others, including, but not limited to, the real estate business in all its phases, which shall include, without limitation, ownership, operation, management and development of real property. Neither party shall have any rights in and to such independent ventures or the income or profits derived therefrom.

17. Obligations and Rights of Transferees. Any person who acquires in any manner whatsoever any interest in the Property, irrespective of whether such person has accepted and assumed in writing the terms and provisions of this Agreement, shall be deemed by the acceptance of the ownership of their interest in the Property to have agreed to be subject to, and to be bound by, all the obligations of this Agreement with the same force and effect as any predecessor in interest of such person. The parties may prepare a Memoranda of this Agreement and file it with the _____ [name] County Recorder's Office in order to give any transferee of any interest in the

Property constructive notice of the terms hereof.

18. Binding Effect. This Agreement shall inure to the benefit of, and be binding upon, the parties hereto and their respective next of kin, legatees, administrators, executors, legal representatives, nominees, successors and permitted assigns.

19. Integration; Terminology. This Agreement constitutes the entire agreement among the parties hereto pertaining to the subject matter hereof, and supersedes all prior and contemporaneous agreements and understandings of the parties in connection therewith. All of the terms and provisions used in this Agreement shall be deemed and construed to include any other number, singular or plural, or any other gender, masculine, feminine or neuter, as the context or sense of this Agreement may require, unless specifically stated otherwise.

20. Governing Law. This Agreement and the rights of all parties hereunder shall be construed in accordance with the laws of the State of _____ [state] .

21. Waiver of Partition. Each of the Owners hereby waive any right that such Owner may have to cause the Property to be partitioned or to file a complaint at law or in equity to cause the Property to be partitioned, sold or otherwise divided.

22. Execution. This Agreement may be executed in several counterparts, each of which shall be considered an original when executed by the Owners.

IN WITNESS WHEREOF, each party has executed this Joint Ownership Agreement or a counterpart hereof as of the day first written above.

ATLAS PARTNERS

By: _____

[name and title]

And: _____

[name and title]

ABC COMPANY, LLC

By: _____

[name and title]

And: _____

[name and title]



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Part IV. Forms

B. TENANCIES IN COMMON AND JOINT VENTURES

24-20 Current Legal Forms for Real Estate FORM 20.11

AUTHOR: by Stephen E. Pigott and Harold O. Maxfield, Jr.

FORM 20.11 Tenancy in common--between owner and purchaser of half interest--provisions for buy-out

COMMENT

The transaction illustrated in this form involves the sale of a half interest in property with the understanding that the seller and purchaser will hold title to the entire parcel as tenants in common. The sale by the original owner will result in the realization of gain or loss, measured by the difference between one half of his adjusted basis and the purchase price received by him. The other half of his adjusted basis will be applicable to his remaining interest in the parcel. The basis to the new owner will be his cost in acquiring his half interest.

Buy-out arrangement:

One of the most important aspects of a joint ownership agreement is the arrangement for the disposition by one of the parties of his interest in the venture. Generally, a prerequisite to any such disposition is an option to purchase in favor of the other party. One of several methods may be used. Sometimes this purchase option is established in terms of a predetermined price. Generally, the option imposes an obligation to meet a bona fide offer made by a third party. This agreement approaches the buy-out problem from a different viewpoint. It gives either party the right to buy the interest of the other, but it establishes a procedure which is designed to insure a fair price. Either party may make an offer to purchase the other party's interest, provided the offer meets certain minimum conditions. The offeree has two choices: he may accept the offer; or, if he thinks the price proposed is not sufficient, he may purchase the interest of the offeror at that price. Thus, if one of the parties offers to purchase the interest of the other he runs the risk that he may become a seller, not a purchaser, if the price he proposes is too low.

Investment in unimproved land:

Since the property involved in this transaction is unimproved acreage and the apparent intention is to hold it for resale, no provisions have been included to cover problems of management or questions relating to profit distributions. So long as the parties do not engage in any development activities, it would seem that the venture would be classified as a mere coownership in which each coowner may report his share of income or loss without reference to the partnership provisions of the Revenue Code. For a discussion of the tax classification of real estate joint ventures as partnerships under the Code, see TB § 20.04[2], at the beginning of this chapter.

FORM

THIS AGREEMENT is made _____ [month] _____ [day] ,
 _____ [year] , between CHARLES NORMAN, of _____ [address] ,
 _____ [city] , _____ [state] ("Norman"), and WILLIAM STANTION, of
 _____ [address] , _____ [city] , _____ [state] ("Stanton").

WHEREAS, Norman is about to purchase from Stanton an undivided one-half interest in a parcel of land consisting of 500 acres, more or less, situated in the County of _____, [name] State of _____ [state] (the "premises"), and more particularly described on Exhibit A attached hereto.

WHEREAS, the parties desire to establish certain provisions, conditions, and limitations with reference to their rights and privileges in the ownership of the premises.

IT IS THEREFORE AGREED AS FOLLOWS:

1. Declaration of Intention. Upon the closing of the transaction between them, in accordance with the terms of the Purchase Agreement, the relationship of the parties in the premises shall be as tenants in common with all the rights and privileges of such relationship in accordance with the laws of the State of _____, [state] subject, however, to the terms and conditions in this agreement.

2. Appointment of Agent. The parties hereby appoint _____ [name] , _____ [address] , _____ [city] , _____ [state] , their agent in order to accept service of process, to receive all notices from the various governmental agencies, and for such other purposes as the parties hereto may from time to time designate.

3. Indemnity. Each party shall indemnify and hold harmless the other against all debts, liens, judgments, or charges of any nature accruing against the premises by reason of any act of the indemnifying party.

4. Payment of Taxes. Each party shall deposit his proportionate share of all taxes and other assessments that may be levied against the premises with their agent at least thirty (30) days before the due date. If either party shall fail to deposit his proportionate share of the taxes and assessments within the time specified, the other party may make the payment in full, and the amount of such payment shall then become a lien upon the share of the premises owned by the defaulting party.

5. Options to Purchase. Each party shall have the right to purchase the interest of the other party in the premises on the following terms and conditions:

(a) If either party desires to purchase the interest of the other, he may offer to do so at any time during

the tenancy in common, provided the offer to purchase is based upon a minimum price of at least

_____ Dollars (\$

_____) per acre.

(b) The offer to purchase shall provide for a down payment of at least twenty percent (20%) of the total purchase price, with the balance payable in equal annual installments over a five-year period, with interest on unpaid balances at

_____ percent (

_____ %) per annum payable annually.

(c) If such an offer is made, the party receiving the offer shall, within thirty (30) days, either accept the offer, or make a counter-offer on the same terms and conditions as the offer.

(d) If such counter-offer is made, the party to whom it is made shall accept the counter-offer immediately.

(e) The party making an offer or counter-offer shall simultaneously deposit with

_____, [name], their agent, as a condition to the offer or counter-offer, an amount equal to ten percent (10%) of the proposed purchase price as earnest money for the consummation of the offer or counter-offer. If the offer or counter-offer is consummated, the earnest money shall be applied against the down payment. If either party fails to consummate his offer or counter-offer, the earnest money deposited by him shall be paid to the other party as liquidated damages.

6. Entire Agreement. This agreement supersedes all agreements previously made between the parties relating to its subject matter. There are no other understandings or agreements between them.

7. Notices. All notices under this agreement shall be in writing and delivered personally or mailed by certified mail, postage prepaid, addressed to the parties at their last known addresses.

8. Non-waiver. No delay or failure by either party to exercise any right under this agreement, and no partial or single exercise of that right, shall constitute a waiver of that or any other right, unless otherwise expressly provided herein.

9. Headings. Headings in this agreement are for convenience only and shall not be used to interpret or construe its provisions.

10. Governing Law. This agreement shall be construed in accordance with and governed by the laws of the State of _____ [state] .

11. Counterparts. This agreement may be executed in two or more counterparts, each of which shall be deemed an original but all of which together shall constitute one and the same instrument.

12. Binding Effect. The provisions of this agreement shall be binding upon and inure to the benefit of each of the parties and their respective heirs, executors, administrators, and assigns.

In witness whereof the parties have signed and sealed this agreement _____ [month]
_____, [day] _____ [year] .

Charles Norman

William Stanton



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B. TENANCIES IN COMMON AND JOINT VENTURES

24-20 Current Legal Forms for Real Estate FORM 20.12

AUTHOR: by Stephen E. Pigott and Harold O. Maxfield, Jr.

FORM 20.12 Tenancy in common--acquisition of leasehold by a group--operation of property--provisions for sale by owner

COMMENT

The basic purpose of this agreement is to control the relationship of a group of unrelated individuals who are involved in the common ownership of property that may continue over an extended period of time. In this situation, it becomes essential to set out numerous operating details. This agreement includes restrictive provisions on transfers and on sales, a provision setting up a technique for the sale of the entire property, a provision permitting a participant to borrow against his ownership interest, and a provision to take care of the possibility that an owner's interest may become subject to an involuntary lien. These provisions are designed to define the rights of the participants in certain prescribed contingent circumstances.

Partnership taxation:

In this agreement the ownership of the leasehold interest is to be taken by the participants as tenants in common. This in itself does not qualify the enterprise as an organization "for investment purposes only and not for the active conduct of business," permitting an election to be exempt from the operation of the partnership provisions of the Internal Revenue Code. (See TB § 20.04[3]). Generally, the exemption is available to a joint venture which owns land subject to a lease under which the lessee incurs all operating expense. But the "active conduct of a business" requirement would generally exclude ventures which are organized to operate a building, whether directly or through an agent. Under this agreement, the leasehold is to be operated by subleasing portions of the premises to various subtenants. While all this is to be done through an agent, it nevertheless involves the active operation of property with all the risks attached to such a

"business." This enterprise would, therefore, most likely be classified as a partnership, so that all the income tax requirements applicable to general partnerships would apply. For a further discussion of partnership taxation, see TB § 20.05, at the beginning of this chapter.

FORM

THIS AGREEMENT made _____ [month] _____ [day] ,
 _____ [year] , among JOHN RICHMOND and LESTER FRANKLIN, partners trading as
 Richmond & Franklin, _____ [address] , _____ [city] , _____
 [state] ; BENJAMIN WHITE, _____ [address] , _____ [city] ,
 _____ [state] ; FRANCIS BUSH, _____ [address] , _____
 [city] , _____ [state] ; ARTHUR ABELES and VICTOR YOUNG, partners trading as The Abeles
 Company, _____ [address] , _____ [city] , _____ [state] ;
 HERMAN HAHN, _____ [address] , _____ [city] , _____
 [state] ; CHARLES KING, _____ [address] , _____ [city] ,
 _____ [state] ; and HARRY GORDON, _____ [address] , _____
 [city] , _____ [state] (collectively the "Owners").

WHEREAS, the Owners are about to acquire a leasehold interest (the "Leasehold"), on the property more fully described in Schedule A, subject to the mortgage and other encumbrances recited in such Schedule A.

WHEREAS, the Owners desire to provide for the holding of title to the Leasehold, division of the profits and losses thereon, restrictions upon disposition, management of the property, and other matters relating to their common ownership.

IT IS THEREFORE AGREED:

1. Ownership. Title to the Leasehold shall be taken in the names of the Owners as tenants in common, and the instrument of conveyance shall be duly recorded in the appropriate recording office.

2. Profits and Losses. The interests of the Owners in the Leasehold and in its profits and losses shall be as follows:

(a) Capital. The capital interest of each of the Owners in the Leasehold is the amount of his investment in this joint venture as set opposite his name under the heading Capital Investment in Schedule B.

(b) Profit and Loss Share. All profits and losses in the operation of the leasehold shall be shared and borne by the Owners in the percentages set opposite their respective names under the heading Share of Profits in Schedule B. In the event that there is a deficit at any time in the operations of the Leasehold and it becomes necessary to obtain contributions from the Owners, each Owner shall be required, within five days after receipt of notice of such deficit, to pay an amount equivalent to his pro rata share of the deficit based upon his share of profits.

(c) Distribution on Sale. In the event of the sale of the Leasehold, the net proceeds of sale shall be distributed as follows:

(1) Adjusted Capital Investment. Each of the Owners shall first receive a return equal to his adjusted Capital Investment. For all other purposes of this agreement, the adjusted Capital Investment of each Owner shall be the amount set opposite his name under the heading Capital Investment in Schedule B, as reduced, at any given time, by his proportionate share of amortization as reflected on the books of the joint venture. Amortization shall be allocated to each Owner on the basis of his proportionate interest in the total Capital Investments of all the Owners. If the net

proceeds of sale are less than the adjusted Capital Investments of all the Owners, distribution shall be made among the Owners on the basis of their proportionate interests in the total adjusted Capital Investments.

(2) Special Payment. All additional net proceeds of sale, but in no event in excess of Fifty Thousand Dollars (\$50,000), shall then be paid to Harry Gordon (in addition to all net proceeds of sale distributable to him as an Owner under subdivision (1) above).

(3) Profits. All remaining net proceeds of sale shall then be shared by the Owners, including Harry Gordon, in the proportions set opposite their respective names under the heading Share of Profits in Schedule B.

3. Restrictions on Transfer. Except as hereinafter set forth, none of the Owners shall sell, dispose of, transfer, or encumber the Leasehold or any interest therein. Notwithstanding the foregoing:

(a) Any partnership which is a party to this agreement may at any time dissolve such partnership and distribute its interest in kind to the individuals who comprise it.

(b) Any partnership which is a party to this agreement may transfer all of its interest to a successor partnership in which its present members have more than a 50 percent interest in capital and profits.

(c) Each individual Owner may, during his lifetime, transfer all or any part of his interest to his spouse, his adult issue, or the adult spouses of his issue.

(d) Each individual Owner may, at death, either by will or by operation of law, transfer his interest to one or more persons, provided that if a fiduciary, including but not limited to a testamentary trustee, guardian, executor, or administrator, shall be the holder of legal title to such interest, such fiduciary shall be subject to all of the terms of this agreement.

4. Sale of Interest of Owner. In the event that any Owner shall receive an acceptable offer from a competent adult, who is not a fiduciary, for the purchase of all of such Owner's interest in the Leasehold, such Owner shall have the right to sell his interest only after complying with the following requirements:

(a) Notice. Such Owner shall procure and deposit with the Mailing Agent, as designated in Paragraph 7, a certified check for 10 percent of the amount of the offer and the written offer signed by the prospective purchaser.

(b) Option to Purchase. The Mailing Agent shall forthwith notify all of the Owners of the terms of the offer. Each of the other Owners shall then have the option to purchase the interest of the offering Owner upon the same terms set forth in the offer, provided notice of purchase in writing is mailed to the Mailing Agent within 20 days after the initial receipt by the Mailing Agent of the offer. Each Owner who exercises his option to purchase shall set forth in his letter of acceptance the amount of the interest he is willing to purchase. If the total interests which the Owners offer to purchase are in excess of the interest offered, each Owner shall then purchase that proportion of the offered interest which that acceptor's offer to purchase bears to the total offers of all the acceptors. If the total interests which the acceptors have offered to purchase shall be less than the interest offered, the Mailing Agent shall immediately give notice in writing to the acceptors of the amount of the difference. If within 30 days after the initial receipt by the Mailing Agent of the offer, the acceptors do not make satisfactory arrangements for the purchase of the difference, then the offer of the entire interest shall be deemed to have been rejected. In the latter event, the Owner offering his interest shall have the right to sell to the person named in the offer, provided that the sale is concluded within 30 days of the date upon which he is notified by the Mailing Agent that his offer has been rejected, and provided further that the sale is made strictly in accordance with the terms of the offer and at no less favorable terms.

(c) Purchase. If the interest of the offering Owner is purchased pursuant to the option referred to in subparagraph (b) of

this paragraph, payment for the interest shall be made by certified check to the order of the Owner within 30 days after the initial receipt by the Mailing Agent of the offer, against the delivery to the purchasers of appropriate instruments transferring title to the interest of the Owner.

5. Assumption by Assignee. All permitted transferees or other persons to whom an interest in the Leasehold may be transferred by the terms of this agreement, and any assignee receiving an interest pursuant to the terms of this agreement, shall automatically take that interest subject to all of the terms and conditions of this agreement, and shall not be considered to have title to that interest until they and each of them have signified their acceptance and assumption of the terms and conditions of this agreement in writing.

6. Sale of Leasehold.

(a) Offers to Purchase. If any Owner acting individually or jointly with other Owners (the "offering party"), shall receive a bona fide offer in writing acceptable to him to purchase the Leasehold, he shall obtain from the prospective customer and deposit with the Mailing Agent, designated in this agreement, a certified check in the amount of One Hundred Fifty Thousand (\$150,000), an agreement to hold all Owners of the Leasehold harmless in respect to any brokerage commissions in the event that the sale is not consummated, and an executed contract for the purchase of the Leasehold providing for the payment of the purchase price in the form of all cash above mortgages and conditioned upon the acceptance of the offer within forty-five (45) days by all of the Owners of the Leasehold.

(b) Option to Purchase. The Mailing Agent shall forthwith notify all of the Owners of the terms of the offer. The offering party and any Owner accepting the offer (the "offerors") shall be deemed to have offered their interests for sale to the other Owners upon the same terms set forth in the offer. (Any Owners rejecting the offer shall be referred to as rejectors).

(c) Acceptance of Offer. Each Owner other than the offering party shall notify the Mailing Agent in writing, within twenty (20) days after the initial receipt of the offer by the Mailing Agent, whether he accepts or rejects the offer. If the Mailing Agent does not receive any notice within the 20-day period, the Owner shall be deemed to have accepted the offer. If no Owner shall reject the offer, then it shall be deemed accepted by all of the Owners. In such event, the Owners shall take any and all steps necessary and proper to pass title pursuant to the offer.

(d) Rejection of Offer. Any rejector shall set forth in his letter of rejection, the amount of the interest of the offerors that the rejector is willing to purchase if available, provided, however, that in any case any rejector shall be obligated to purchase, if available, from the offerors an interest equal to a percentage of the interest then held by the rejector. If the total interests which the rejectors offer to purchase are in excess of the total interests of the offerors, each rejector shall then purchase that proportion of the interests offered that the total interests which the rejector has offered to purchase bears to the total offers to purchase made by all rejectors. If the total interests which the rejectors have offered to purchase shall be less than the total interests of the offerors, the Mailing Agent shall immediately give written notice to the rejectors of the amount of the difference. If within thirty-five (35) days after the initial receipt by the Mailing Agent of the offer, the rejectors do not make satisfactory arrangements for the purchase of the difference, then the offer shall be deemed accepted by all of the parties, and they shall take all of the steps necessary and proper to pass title pursuant to the offer.

(e) Sale. In the event of a sale of the Leasehold pursuant to the offer, each Owner shall share in the net proceeds of the sale in accordance with the terms of Paragraph 2(c). In the event that, pursuant to the provisions of subparagraph (d) above, any rejectors shall purchase the interests of any offeror, the price to be paid to each offeror shall be such offeror's pro rata share of the difference between the selling price (less brokerage) set forth in the offer and the outstanding principal of any mortgages, plus or minus all usual real estate adjustments, in accordance with the interest of each offeror. Payment for the interest shall be made by certified check to the order of the offeror within sixty (60) days after the initial receipt of the offer by the Mailing Agent, against the delivery to the purchasers of appropriate instruments

transferring title to the interests of the offerors.

7. Mailing Agent. _____ [name] is designated Mailing Agent, and all notices to him shall be sent to _____ [address] , _____ [city] , _____ [state] , or to such other address as he shall, from time to time, designate in a notice given to all the Owners. The Mailing Agent or such other Owner or Owners as may be required to give notice under the terms of this agreement shall mail all notices required herein by registered or certified mail to the addresses of the Owners set forth in this agreement, or to the last address as the Owners or any of their transferees shall, from time to time, give in writing to the Mailing Agent. The Mailing Agent hereby is relieved of all liability by virtue of his undertaking herein, except for malfeasance or fraud.

8. Loan to Owners. Any Owner may borrow money on his interest in the Leasehold on the following terms and conditions:

(a) The amount of the loan may be no more than seventy-five percent (75%) of the Owner's investment in the Leasehold, less any capital returned to the Owner.

(b) The hypothecation of the Owner's interest in the Leasehold, whether in the form of a mortgage or pledge, shall provide for prepayment of the loan without penalty.

(c) The Owner's pro rata share of the proceeds on any new mortgage placed upon the Leasehold may be applied toward the payment of the loan made to the Owner, and any payment may be made directly to the lender.

(d) The unpaid balance of any mortgage or pledge by an Owner shall be subordinate to any mortgage placed upon the entire Leasehold, and the lender shall undertake to execute all documents necessary and proper to effectuate the subordination of his loan to any mortgage on the entire Leasehold.

(e) The Owner's pro rata share of the proceeds of the sale of the Leasehold may be applied towards the payment of the loan made by an Owner, and any proceeds may be paid directly to the lender.

(f) The terms of any mortgage or pledge shall in no manner prevent or unreasonably delay the sale or mortgage of the entire Leasehold.

(g) The lender shall undertake to be bound by the terms and conditions of this agreement whenever required to carry out the purposes of this agreement.

(h) Any owner's mortgage or pledge shall provide that, in the event there is any default in the mortgage or pledge (provided the default is not a default on the part of the Owners as lessees under the terms of the Leasehold) the lender, his successors, heirs, and assigns, shall give immediate notice of the default to the Mailing Agent. The notice shall constitute an irrevocable offer for a period of thirty (30) days, on the part of the lender and the Owner to sell the Owner's interest in the Leasehold, and any interest of the lender in the Owner's leasehold, to all other Owners for the amount of the loan then outstanding plus interest to the date of payment.

9. Partition. No Owner shall, either directly or indirectly, make application to or petition any court for a partition of the Leasehold.

10. Managing Agent.

(a) Commission and statements. The Owners appoint Enterprises, Inc., as agent to supervise and manage the Leasehold. Enterprises, Inc., shall pay all employees engaged in the operation of the Leasehold out of the sums paid to it by the Owners. In full consideration of its services, Enterprises, Inc., shall be paid a yearly sum not to exceed

_____ percent (_____) of the collected rents, the sums to be paid monthly within 20 days after the end of each month. Brokerage payable to outside brokers shall not be deemed included in the _____ percent (_____) item payable to Enterprises, Inc. Monthly statements of the Leasehold's operation shall be submitted by Enterprises, Inc., to each of the Owners within twenty (20) days after the end of each month, and the statements shall include an itemized list of all income and expenses in connection with the Leasehold.

(b) Term. Enterprises, Inc., shall be employed for a term of one (1) year from the date of the execution of this agreement. Such term shall be automatically extended from year to year thereafter unless written notice of termination signed on behalf of the Owners is served upon Enterprises, Inc., at least sixty (60) days prior to the termination of any yearly period.

(c) Profit Payments. Enterprises, Inc. shall from time to time during the year, but at intervals of no more than three months, distribute to the various Owners their share of all profits earned from the operation of the Leasehold.

11. Meetings. Meetings of the Owners may be called, upon five days notice, by the Mailing Agent or by Owners who have a ten percent (10%) or greater interest in the capital of the Leasehold as set out under the heading Capital Investment in Schedule B. Meetings shall be held in New York, New York, at the office of the Mailing Agent, or at the office of any Owner who has a five percent (5%) or greater interest in the capital of the Leasehold. The power to make all decisions with respect to the management of the Leasehold is vested in the Owners. The decisions of the Owners shall be binding upon all the Owners if made by Owners who have a 50 percent or greater interest in the capital of the Leasehold, at a meeting called pursuant to the provisions of this paragraph.

12. Separability. If any part or provision of this agreement shall be determined to be invalid or unenforceable under the laws of the State of _____, [state] the remaining portions of this agreement which can be separated from the invalid, unenforceable provisions shall nevertheless continue in full force and effect.

13. Arbitration. Any dispute or controversy arising under or as a result of this agreement shall be settled and determined by arbitration held in New York, New York, in accordance with the governing rules of the American Arbitration Association. Any award pursuant to such arbitration may be entered in any court of competent jurisdiction.

14. Modification. This agreement embodies the full understanding of the Owners. This agreement may not be changed orally. Any modifications of this agreement must be in writing signed by all of the parties hereto.

15. Binding Effect. Except as herein otherwise specifically stated, this agreement shall bind and inure to the benefit of the parties to this agreement, their legal representatives, successors, and assigns.

16. Entire Agreement. This agreement supersedes all agreements previously made between the parties relating to its subject matter. There are no other understandings or agreements between them.

17. Notices. All notices under this agreement shall be in writing and delivered personally or mailed by certified mail, postage prepaid, addressed to the parties at their last known addresses.

18. Non-waiver. No delay or failure by a party to exercise any right under this agreement, and no partial or single exercise of that right, shall constitute a waiver of that or any other right, unless otherwise expressly provided herein.

19. Headings. Headings in this agreement are for convenience only and shall not be used to interpret or construe its provisions.

20. Governing Law. This agreement shall be construed in accordance with and governed by the laws of the State of

_____ [state] .

21. Counterparts. This agreement may be executed in two or more counterparts, each of which shall be deemed an original but all of which together shall constitute one and the same instrument.

In witness whereof the parties hereto have signed and sealed this agreement.

Richmond & Franklin

By: _____

John Richmond, Partner

By: _____

Lester Franklin, Partner

Benjamin White

Francis Bush

The Abeles Company

By: _____

Arthur Abeles, Partner

By: _____

Victor Young, Partner

Herman Hahn

Charles King

Harry Gordon



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Current Legal Forms for Real Estate
Chapter 20 REAL ESTATE ENTITIES

Part IV. Forms

B. TENANCIES IN COMMON AND JOINT VENTURES

24-20 Current Legal Forms for Real Estate FORM 20.13

AUTHOR: by Stephen E. Pigott and Harold O. Maxfield, Jr.

FORM 20.13 Joint venture--acquisition of leasehold--sublease of entire premises--provisions for disposition by joint venturer

COMMENT

This form illustrates a joint venture between a real estate investment trust and an individual for the acquisition of a leasehold interest on improved property. In this agreement the joint venturers do not contemplate the actual operation of the property. The entire property is already under sublease to a third party, and the activities of the joint venture will be to collect and distribute the periodic rent check received from the operating sublessee.

Title and transfer:

Under this agreement title is to be taken in the name of the joint venture, rather than in the names of the venturers as tenants in common. One of the reasons for this is to permit either or both of the venturers to assign to third parties participating interests in their respective shares of the profits and losses of the venture. The objective is to permit such assignments without any disturbance of the legal title. In addition, either party may dispose of his entire interest in the venture without first offering it to the other venturer, provided certain basic safeguards are satisfied.

FORM

THIS JOINT VENTURE AGREEMENT made _____ [month] _____, [day]
_____ [year] , by and between CENTRAL REALTY TRUST, a real estate investment trust
organized in the State of _____ [state] ("Central"), and JAMES SMITH, of _____,

[city] _____ [state] ("Smith").

WHEREAS, by an agreement of sale intended to be executed on this date, Harrison Company, a general partnership organized under the laws of the State of _____ [state] , is agreeing to sell, and Central and Smith, acting jointly and severally, are agreeing to purchase, the lease and leasehold estate under which Builders, Inc., is Landlord and Harrison Company is Tenant, which affects that certain parcel of land in the City of _____ [city] designated as 100 Broadway (the "Property"). The agreement of sale between Harrison Company, as Seller, and Central and Smith, as Purchasers (the "Sales Contract"), is attached hereto as Exhibit 1, and is made a part of this agreement. The lease between Builders, Inc., as Landlord and Harrison Company as Tenant (the "Main Lease"), is more particularly described in the Sales Contract.

WHEREAS, the Property is subject to a certain mortgage lien, which is more particularly described in the Sales Contract (the "Leasehold Mortgage"); and

WHEREAS, by agreement intended to be executed on this date, Central and Smith are agreeing to sublease the Property to William Bacon on the date of the closing under the Sales Contract in accordance with the terms of a sublease which is attached to and made a part of the Sales Contract. The sublease with William Bacon (the "Operating Sublease"), is attached hereto as Exhibit 2, and is made a part of this agreement; and

WHEREAS, the parties desire to enter into this agreement for the purpose of defining their respective rights and obligations with respect to the Joint Venture and the Property,

NOW, THEREFORE, in consideration of the mutual covenants herein contained, the parties hereto agree as follows:

1. Name and Office. Central and Smith (the "Venturers"), do hereby form a Joint Venture under the name "100 Broadway Associates" (the "Joint Venture"). The principal office shall be c/o _____ [name] , _____ [address] , _____, [city] _____ [state] , or at such other place or places as the Venturers may from time to time agree upon.

2. Purposes. The purposes of the Joint Venture shall be to enter into and consummate the Sales Contract, to enter into and consummate the contract for the Operating Sublease, to own the Property and, upon termination of the Operating Sublease, to provide for the operation or management of the Property. So long as Central is one of the Venturers, the Property shall never be operated directly by the Joint Venture, but shall at all times be operated by an operating sublessee, or, in the event there is no operating sublease, by a management agent selected by both Joint Venturers.

3. Term. The term of the Joint Venture shall commence upon the execution of this agreement and shall continue until the Property has been entirely disposed of, and shall not be terminated by the act, bankruptcy, death, retirement, dissolution, or other legal disability of either Joint Venturer, the assignment (whether by operation of law or otherwise) of the interest of any Joint Venturer, or any other cause whatsoever.

4. Capital contributions.

(a) Deposit. Simultaneously with the execution of this agreement, Central and Smith have each contributed One Hundred Thousand Dollars (\$100,000) toward the capital of the Joint Venture to enable it to make the deposit on account of the purchase price required under the Sales Contract.

(b) Down payment balance. At time of the closing under the Sales Contract (or any adjournment thereof), Central and Smith shall each contribute an additional Four Hundred Thousand Dollars (\$400,000) toward the capital of the Joint Venture to enable it to close the Sales Contract in accordance with its terms, and to pay closing costs and closing attorneys' fees.

(c) Additional Capital. In addition, each Joint Venturer shall contribute such additional capital as may be necessary, at any time during the continuance of the Joint Venture, to enable the Joint Venture to meet its obligations. All additional contributions shall be made one-half by Central and one-half by Smith.

5. Percentages of Ownership. The percentage shown after the name of each Venturer shall represent the proportionate interest of the respective Venturer in the Joint Venture, its assets, and in all its profits and losses.

Name	Percentage of Joint Venture Interest
Central	50%
Smith	50%

6. Collection of Income.

(a) Collection and Expense Payments. Upon the execution of the Operating Sublease, the Joint Venture will direct the Tenant to make all rental payments under the Operating Sublease until further notice to Central. Central shall regularly deposit all rental payments in a special account maintained in its name in a bank or trust company doing business under the laws of the State of New York, and shall regularly pay out of the rental payments all sums necessary to make timely payments of rentals under the Main Lease and all payments required under the Leasehold Mortgage. The balance remaining shall be distributed to the Joint Venturers, on a monthly basis, promptly after Central's receipt of the rent, in proportion to their respective percentage of interest in the Joint Venture. Central shall collect the rentals from the Operating Sublessee and make the payments and distributions without cost to the Joint Venture.

(b) Collection Agent. Central shall have the right to designate a bank or trust company doing business under the laws of the State of _____ [state] and to authorize it to make the collections, payments, and distributions for and on behalf of the Joint Venture. Any compensation of such bank or trust company, however, shall be paid by Central.

(c) Statements. Central shall cause Smith to be notified in writing at the end of each month of all the disbursements from the aforementioned special account.

(d) Substitution. If at any time Central does not wish to continue to collect the rentals from the Operating Sublessee and to make the payments and distributions, or if Central transfers its entire legal interest in the Property then, in either event, Central shall notify Smith and the Operating Sublessee, and commencing with the first rental payments due under the Operating Sublease following the date of the notice, all rentals under the Operating Sublease shall be paid in full to Smith. Thereafter, Smith shall collect all such rentals, and do all other things required to be done by Central as provided in this paragraph.

7. Legal Title. The legal title to the Property shall be held in the names of Central and Smith, as Joint Venturers doing business under the name of 100 Broadway Associates.

8. Disposition of Interest in Joint Venture.

(a) Consent. Except as provided in subparagraphs (b), (c), and (d) of this paragraph, neither Joint Venturer shall sell, transfer, assign, convey, or otherwise dispose of its or his legal interest in the Joint Venture or in the Property without the other Joint Venturer's express written consent. Should any sale, transfer, assignment, conveyance, or other disposition be made without consent, or not as otherwise permitted herein, neither the Joint Venture nor the other Joint Venturer shall be required to recognize the party to whom the sale, transfer, assignment, conveyance, or other

disposition was made.

(b) Transfer of Entire Interest. Notwithstanding the provisions of subparagraph (a) this paragraph, either Joint Venturer may sell, assign, or transfer its entire (but not less than the entire) legal interest in the Property and in the Joint Venture, without the consent of the other Joint Venturer, provided: (1) the transferee is an individual of full legal age or a single trust, corporation, firm, or other entity; (2) the transferor delivers to the other Joint Venturer within ten days after the effective date of the transfer an executed assignment in recordable form assigning to the transferee the entire interest of the transferor in and to the Property, the Joint Venture, and this agreement; and (3) the transferee delivers to the other Joint Venturer within ten days after the effective date of the transfer an appropriate written instrument accepting the assignment, agreeing to assume all obligations and liabilities of the transferor under this agreement and under the Operating Sublease and Main Lease from and after the effective date of the assignment, and expressly acknowledging that it has been furnished a copy of this agreement, together with all exhibits thereto.

(c) Testamentary Disposition. Notwithstanding the provisions of subparagraph (a) of this paragraph, any Joint Venturer who is an individual may designate any individual of full legal age or any trust, corporation, firm, or entity to succeed to his entire (but not less than his entire) legal interest in the Joint Venture upon his death. The designation may be made in an appropriate written instrument executed by the individual Joint Venturer during his lifetime and delivered to the other Joint Venturer or the designation may be made in the will of the deceased Joint Venturer. If a designation is not made, the executor or administrator of the deceased Joint Venturer's estates shall make and deliver a designation to the other Joint Venturer within ninety (90) days after the death of the deceased Joint Venturer. Any designee shall qualify as a successor to the interest of the deceased Joint Venturer only by delivering to the other Joint Venturer within the 90-day period the following: (1) an executed assignment in recordable form from the legal representative of deceased Joint Venturer assigning to the designee the entire interest of the decedent in and to the Joint Venture and the Property; and (2) an agreement in writing by which the designee assumes and agrees to perform all obligations of the deceased Joint Venturer from and after the date of his death under this agreement and under the Operating Sublease and Main Lease and acknowledging the fact that the designee has been furnished a copy of this agreement and all exhibits thereto. Any successor so qualifying shall be accepted by the other Joint Venturer and this agreement shall continue in full force and effect.

(d) Interest in Profits and Losses. Nothing contained in this agreement shall prohibit either Joint Venturer from entering into agreements by which a Joint Venturer agrees to permit other parties to share in a portion of the Joint Venturer's rights to any profits and obligations to pay any losses with respect to the interest of the Joint Venturer provided: (1) the Joint Venturer entering into any agreement of this nature retains legal title to his or its interest in the Joint Venture; (2) notwithstanding any agreement of this nature, the other Joint Venturer shall have no obligation to deal with or recognize the party entitled to any share in profits and losses; and (3) all decisions and actions by or on behalf of the interest of the Joint Venturer entering into any agreement of this nature shall continue to be made by the Joint Venturer and not by the party or parties entitled to share in the profits and losses.

(e) If at any time the legal ownership of the interest of either Joint Venturer becomes vested in more than one person, trust, corporation, firm, or other entity, the parties ("Interested Parties"), then comprising the entire ownership of the interest of that Joint Venturer shall immediately designate an agent or attorney-in-fact who shall be given full power and authority to receive all payments to be made to all Interested Parties and to take all actions and make all decisions for and on behalf of all Interested Parties for all purposes pursuant to this agreement. The other Joint Venturer shall have the right to rely on any action or decision taken or made by the agent or attorney-in-fact as fully and to the same extent as if the action or decision had been taken or made by all of the Interested Parties represented by the agent or attorney-in-fact.

9. Joint Action. No sale, assignment, transfer, or other disposition of the Property, nor any modification of the Operating Sublease, the Leasehold Mortgage, or the Main Lease, nor the execution of any new operating sublease, or mortgage, shall be valid unless authorized in writing by both Venturers. Except as expressly provided in this agreement, neither

Joint Venturer shall incur any obligation of any kind or make any decision or take any action by or on behalf of the Joint Venture or with respect to the Property unless the obligation, decision, or action is first expressly authorized in writing by the other Joint Venturer.

10. Default. Notwithstanding any provision of this agreement to the contrary, in case of any default under the Operating Sublease, either Joint Venturer shall have the right, without the further authorization or approval of the other Joint Venturer, to enforce, or give notice of intention to enforce, any rights or remedies of the Joint Venturers, as Landlord, against the Tenant under the Operating Sublease including, but not limited to: (a) the giving of any default notice; (b) the commencement and prosecution of legal action against the Tenant; (c) the termination of the Operating Sublease; and (d) the application, payment, or use of any security moneys or deposits which may be given by the Tenant under the Operating Sublease so long as any payments of such security are made ratably to or for the benefit of both Joint Venturers in proportion to their respective interests in the Joint Venture. For the purpose of taking any action against the Tenant upon default under the Operating Sublease, each Joint Venturer hereby appoints the other Joint Venturer as attorney-in-fact to represent the Joint Venture with full power and authority to act on behalf of the Joint Venture, provided, however, that notwithstanding the foregoing: (a) neither Joint Venturer shall take any unilateral action without giving prior notice to the other Joint Venturer; (b) neither Joint Venturer shall have authority to settle or compromise any claim against the Tenant under the Operating Sublease without the prior written approval of the other Joint Venturer; and (c) if either Joint Venturer incurs any costs or expenses in bringing any action or enforcing any claim without the prior written authority of the other Joint Venturer, and the other Joint Venturer disputes the propriety of the expenditure or its reasonableness, the dispute may be referred to arbitration pursuant to Paragraph 12 of this agreement.

11. Books. The books and records of the Joint Venture shall be audited annually by a certified public accountant employed by the Joint Venture for that purpose. The certified public accountant shall prepare an annual statement and shall submit the statement to each of the Joint Venturers. The designation of the certified public accountant and the compensation to be paid him by the Joint Venture shall be subject to the agreement of both Joint Venturers. The method of depreciation with reference to the fixed assets belonging to the Joint Venture shall be determined jointly by the Joint Venturers. The fiscal year of the Joint Venture shall be determined by mutual agreement of the Joint Venturers.

12. Arbitration. Any dispute arising out of or regarding this agreement or the Property shall be determined by arbitration in the City of New York, in accordance with the governing rules of the American Arbitration Association. The decision of the arbitrators shall be binding upon all of the parties, and judgment upon the award may be entered in any court of competent jurisdiction.

13. Governing Law. This agreement and the Joint Venture created thereunder shall be construed in accordance with and governed by the laws of the State of _____ [state] .

14. Notices. All notices required or permitted under the terms of this agreement shall be in writing and shall be deemed to have been properly given if served personally, or if sent by United States registered or certified mail, postage prepaid, properly addressed. All such notices to Central shall be addressed to _____ [address] , _____ [city] , _____ [state] , or at any other address (and addressed to the attention of the officer or other person) as Central may from time to time designate by written notice to Smith. All notices mailed to Smith shall be addressed to Smith at _____ [address] , _____ [city] , _____ [state] , or at any other address (and addressed to the attention of any person) as Smith may from time to time designate by written notice to Central.

15. Limitation on Agreement. It is the purpose of this agreement to limit the joint operations of the Joint Venturers solely to the Property and to the matters specifically enumerated in this agreement. This agreement has no relation to any other operations conducted by either of the parties.

16. Binding Effect. This agreement shall inure to the benefit of and be binding upon the parties and their respective executors, administrators, successors, and assigns. Except as provided in Paragraph 8, however, neither party shall sell, transfer, assign, or otherwise dispose of its or his interest in the Joint Venture or any part of it.

17. Modification. This agreement may not be modified or amended except by the written agreement of both Joint Venturers.

18. Limitation on Liability. During any period in which Central shall be the owner of any interest in the Joint Venture, there shall be no personal liability under this agreement against any holder of a certificate of beneficial interest in Central or against any one or more of its trustees. Smith agrees to look solely to the properties of Central for the payment of any obligation of Central under this agreement.

19. Invalid Provision. If any term or provision of this agreement or its application to any person or circumstance shall, to any extent, be invalid or unenforceable, the remainder of this agreement or the application of any term or provision to persons or circumstances other than those as to which it is held invalid or unenforceable shall not be affected, and each term and provision of this agreement shall be valid and be enforced to the fullest extent permitted by law.

20. Entire Agreement. This agreement supersedes all agreements previously made between the parties relating to its subject matter. There are no other understandings or agreements between them.

21. Non-waiver. No delay or failure by either party to exercise any right under this agreement, and no partial or single exercise of that right, shall constitute a waiver of that or any other right, unless otherwise expressly provided herein.

22. Headings. Headings in this agreement are for convenience only and shall not be used to interpret or construe its provisions.

23. Counterparts. This agreement may be executed in two or more counterparts, each of which shall be deemed an original but all of which together shall constitute one and the same instrument.

In witness whereof the parties have duly executed this agreement the day and year first above written.

CENTRAL REALTY TRUST

By _____

Trustee

Trustee

The shareholders of Central Realty Trust and the Trustees are not personally liable under this agreement. All parties concerned must look solely to the property of the Trust for the satisfaction of any claim hereunder. Resort cannot be had to the private property of any shareholder or of any Trustee for the satisfaction of any debt, claim, demand, judgment, decree, or obligation of Central Realty Trust.

James Smith



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Chapter 20 REAL ESTATE ENTITIES

Part IV. Forms

B. TENANCIES IN COMMON AND JOINT VENTURES

24-20 Current Legal Forms for Real Estate FORM 20.14

AUTHOR: by Stephen E. Pigott and Harold O. Maxfield, Jr.

FORM 20.14 Joint venture--acquisition of improved property--periodic contributions of purchase price--followed by limited partnership

COMMENT

The purpose of this joint venture is to acquire the fee title to a group of properties, and then to reorganize the enterprise into a limited liability company. The proposed contract requires that the purchase price be paid in three lump-sum cash installments--one on the signing of the contract, a second on the closing of title, and a third 60 days after the closing of title--and that the balance of the purchase price be secured by a purchase money mortgage. The funds for this venture are to be paid in by the venturers substantially as required by the purchase contract. The chief concern of each venturer is with the possibility that other venturers may default on subsequent installments. The agreement therefore outlines the procedure to be followed if any joint venturer defaults.

Managing agent:

Since this joint venture is to terminate on the acquisition of title to the properties (at which time the parties undertake to enter into an operating agreement in the form annexed to the joint venture agreement), there would in the normal course be no income or expense arising out of this joint venture. Nevertheless, against the possibility that some unexpected event may delay or interfere with the program of the parties, extensive powers have been given to the manager of the venture. But these powers are all subject to the right of the joint venturers themselves to control the affairs of their enterprise. This includes the right to modify the powers of the manager or to replace him.

Tax returns:

So long as this venture is engaged solely in the effort of acquiring title to the properties, with no operating income or expenses, there will be no need to file any income tax return for the venture. But once the venture takes title under the proposed operating agreement, the usual partnership return will be required. For requirement that partnership must file an annual information return, Form 1065, which discloses its profits and distributive shares of income, see TB § 20.06[1][b], at the beginning of this chapter.

FORM

THIS AGREEMENT made _____ [month] _____ [day] , _____ [year] , by and between the subscribers that are listed on Exhibit and that executed this Agreement on the signature page attached hereto or have executed a counterpart signature page to this agreement (collectively, the "subscribers").

The parties agree as follows:

1. Joint Venture. The subscribers hereby create a joint venture for the purchase of a parcel of land, together with all buildings and improvements thereon (collectively, the "property"), more fully described on Exhibit B annexed. No representations are made to any subscriber with respect to the physical condition, prospective income, prospective selling price, cost of operation, or any other matters relating to or affecting the property.

2. Purchase Price and Contract of Purchase. The purchase price for the property is Three Million Eight Hundred Ninety-seven Thousand Five Hundred Dollars (\$3,897,500), of which One Million One Hundred Forty-seven Thousand Five Hundred Dollars (\$1,147,500) will be paid in cash as follows: Two Hundred Fifty Thousand Dollars (\$250,000) on signing of contracts; Six Hundred Forty-seven Five Hundred Dollars (\$647,500) on closing of title; Two Hundred Fifty Thousand Dollars (\$250,000) sixty (60) days after closing of title. The balance of the purchase price Two Million Seven Hundred Fifty Thousand Dollars (\$2,750,000) shall be paid by purchase money mortgage for ten years, and shall bear yearly interest of twelve and one-half percent (12.5%). The contract of sale shall contain such other provisions as the joint venture managers deem appropriate.

3. Risk of Default. None of the parties are desirous of subscribing for a greater portion of the joint venture than they have obligated themselves to take under the terms of this agreement. The successful conclusion of the joint venture requires that each of the parties shall pay his contribution into the joint venture in cash at the times and in the amounts set forth in this agreement in order to prevent the forfeiture by the joint venture of the moneys previously paid to the seller. The subscribers understand that if after paying the initial installment on the purchase price due on the signing of the contract, the joint venture should fail to take title to the property in accordance with the terms of the contract, such installment would be forfeited, and that in the event of failure to pay the Two Hundred Fifty Thousand Dollars (\$250,000) payable on account of the mortgage indebtedness sixty (60) days after taking title, the seller or holder of the mortgage will be in a position to declare the mortgage in default. Each of the parties acknowledges that a failure to pay any installment of the contributions agreed to be made by him will cause substantial damage to all the other parties.

4. Contributions. The subscribers shall contribute to the joint venture the amounts set opposite their signatures at the foot hereof and shall be entitled to share in the profits and losses in the percentage or proportions set opposite their names. Such contributions shall be paid as follows:

twenty-four percent (24%) on the signing of this agreement,

fifty-six percent (56%) on or before _____ [month] _____ [day],

_____ [year], and

twenty percent (20) on or before _____ [month] _____ [day],
_____ [year].

Time is of the essence with respect to the payment by each subscriber of the installments of his contribution. All installments of contributions shall be paid by certified checks drawn on a national bank to the order of _____ [name] , as attorney, _____ [address] , _____ [city] , _____ [state] , on or before the dates specified. No notice or demand for payment of the installments of each subscriber's contribution to the capital of the joint venture need be given.

5. Default.

(a) Forfeiture. If any subscriber defaults in the payment of any installment of his subscription as required by this agreement, all previous payments made on his account and his share in the joint venture shall be completely forfeited. The share in the joint venture so forfeited may be reoffered for subscription to the remaining subscribers, without any obligation on their part to account to or pay over to the defaulting subscriber any portion of the profits, or any part of the capital, of the joint venture. The defaulting subscriber hereby acknowledges that by reason of the nature of the venture upon which the joint venture is about to embark, the amount paid on account of his subscription shall constitute liquidated damages for his failure to complete payment of his subscription. In consideration of the foregoing, the defaulting subscriber shall not be liable for the payment of the unpaid balance of his subscription.

(b) Subscribers' Purchase Option. Upon the failure of any one or more subscribers to pay an installment of a subscription becoming due, the remaining subscribers or any one or more of them may elect to subscribe for the defaulted share of the joint venture at a meeting called for that purpose which is set for _____ [month] _____ [day], _____ [year], at 2 p.m. with respect to the second installment, and on _____ [month] _____ [day], _____ [year], at 2 p.m. with respect to the third installment, at the office of _____ [name], as attorney, _____ [address], _____ [city], _____ [state]. The remaining subscribers or any one or more of them may elect to subscribe to the share of the defaulting subscriber. In the event that more than one of the remaining subscribers shall elect to subscribe to such share, the defaulted share shall be apportioned among the subscribers desiring to subscribe, in accordance with their respective proportions of the total joint venture. A subscriber who acquires any interest in the share of a defaulting subscriber shall be required to pay his proportionate share of the defaulted contribution immediately upon his acquisition of such interest.

(c) Power of Attorney. To implement the mechanics of this paragraph 5, each of the parties to this agreement and any party who may subsequently acquire an interest in the joint venture hereby grants an irrevocable power of attorney to _____ [name], as attorney, _____ [address], _____ [city], _____ [state], empowering him to execute, in the name of the defaulting party, an assignment of the defaulting party's entire interest in the joint venture and in all property of the joint venture. Such assignment shall run to the other parties who may acquire the defaulting party's interest. In the event of the death of _____ [name], the power granted to him by this subparagraph shall vest in _____ [name], as attorney, _____ [address], _____ [city], _____ [state], as successor attorney-in-fact. This power of attorney shall not be affected by the subsequent disability or incompetence of any principal.

(d) Dispute Arbitration. Any dispute existing as to the rights of a defaulting party shall in no way impede the execution of the assignment by _____ [name] or by his successor. Any dispute shall be resolved by arbitration under the provisions of Paragraph 14 of this agreement. A defaulting subscriber shall not have any right to question the party to whom the assignment of his share in the joint venture is made.

(e) No Release. The failure of any subscriber to perform any part of his obligation hereunder shall not release any other subscriber.

6. Transferability. Except as otherwise provided in this agreement, no subscriber shall sell, transfer, encumber, or otherwise dispose of his interest in the joint venture (except to another subscriber) until the acquisition of title to the property. The interest of a subscriber in the joint venture may be (a) transferred or disposed of by will or intestacy to the deceased subscriber's immediate family, but the heirs, beneficiaries, or legal representatives of the deceased subscriber shall hold such interest subject to all the terms and provisions in this agreement, or (b) may be transferred during his lifetime to his immediate family, but such interest shall remain subject to all the terms and provisions of this agreement. For the purpose of this paragraph, "immediate family" is defined, in the case of a will or intestacy, as the husband, wife, child, brother, sister, father, or mother of a subscriber; and is defined, in the case of transfer during lifetime, as the husband, wife, adult child, brother, sister, father, or mother of a subscriber.

7. Management of Venture. The subscribers shall have control of the joint venture and all of its affairs.

_____[name]_____, or any other subscriber or subscribers who have a ten percent (10%) or larger interest in the profits and losses of the joint venture, may call meetings of the subscribers by sending them five days' notice. Such meetings shall be held at the office of _____[name]_____, as attorney, _____[address]_____, _____[city]_____, _____[state]_____ (or at any other place in _____[city]_____ designated in the notice of meeting). At such meetings all matters relating to the joint venture (including the substitution of the joint venture manager) shall be decided by avote of those subscribers who have a majority interest in the profits and losses of the joint venture, but no action shall be taken to modify the rights or obligations of the subscribers as set forth in this agreement except upon the unanimous vote of all the subscribers. Until further action by the subscribers at any meeting, the subscribers designate _____[name]_____ as joint venture manager to do all things proper, necessary, or expedient in his discretion to carry out the purposes of the joint venture.

8. Powers of Manager. To implement the provisions of Paragraph 7, but subject to the reservation of control in the subscribers as stated therein, the subscribers irrevocably nominate, constitute, and appoint _____[name]_____ their true and lawful attorney for them and in their place, and name and stead to do the following, either in his own name, or in the name of a nominee or agent:

(a) Contract. To enter into the contract of purchase with Jones Mfg. Co.;

(b) Possession. To enter upon and take possession of any property belonging to the joint venture;

(c) Collection. To ask, collect, and receive all rents, issues, profits, or income of any property of the joint venture or any part or parts thereof;

(d) Taxes. To pay any and all taxes, charges, and assessments that may be levied, assessed, or imposed upon any of the property of the joint venture;

(e) Alienation. To sell or lease any land, building, or other property, or any part or parts thereof, at such prices and upon such terms as he may determine, and in payment for such property or lease to accept any mortgage or mortgages affecting the property sold or any other property, and to make, execute, and deliver any deed, mortgage, or lease, whether with or without covenant and warranties in respect of any lands, buildings, or other property, or any part or parts of them, and to extend, renew, replace, or increase any mortgage or mortgages now or subsequently affecting any lands, buildings, or other property belonging to the joint venture;

(f) Maintenance. To manage, repair, rebuild, alter, or reconstruct any building or property belonging to the joint venture,

including facilities for heating or lighting and the supply of heat, steam, gas, hot and cold water, and sewers, and to rearrange the means of furnishing power, electric, gas, steam, hot and cold water, and sewer facilities to any buildings or properties of the joint venture;

(g) Insurance. To obtain insurance of any kind, nature, or description upon or in connection with the management, use, or operation of any of the land or property belonging to the joint venture, including personal property, or in respect of the rents, issues, and profits arising therefrom, and to make, execute, and to file proof or proofs of all loss or losses sustained or claimable thereunder, and all other instruments in or about the same, and to make, execute, and deliver receipts, releases, or other discharges therefor;

(h) Legal Action. To demand, sue for, collect, recover, and receive all goods, claims, debts, moneys, interest, and demands now due or that may subsequently become due or belong to the joint venture, including the right to institute any action, suit, or other legal proceeding for the recovery of any land, buildings, other property, or any part or parts thereof to the possession of which the joint venture may be entitled, and to make, execute, and deliver receipts, releases, or other discharges therefor under seal or otherwise;

(i) Commercial Paper. To make, execute, endorse, accept, collect, and deliver any and all bills of exchange, checks, drafts, notes, and trade acceptances, and open and pay into and draw from a bank account or accounts of the joint venture;

(j) Debt payment. To pay all sums of money at any time or times that may subsequently be owing by the joint venture upon any bill of exchange, check, draft, note, or trade acceptance made, executed, endorsed, accepted, or delivered by or for the joint venture;

(k) Sale of Paper. To sell, mortgage, or hypothecate any and all mortgages, notes, or other evidences of indebtedness owned by the joint venture;

(l) Settlement. To defend, settle, adjust, compound, submit to arbitration, and compromise all actions, suits, accounts, reckonings, claims, and demands that now are or hereafter shall be pending between the joint venture and any person, firm, association, or corporation, in such manner and in all respects as he shall think fit;

(m) Proof of Claim. To file any proof of debt or take any other proceedings under the Bankruptcy Act or any law of any state in the United States in connection with any claim, debt, money, or demand due to the joint venture, including the election of any trustee or trustees or the designation of assignee or assignees, and to demand, receive, and accept any dividend or dividends or distribution or distributions that may be or become payable thereon;

(n) Employment. To hire accountants, attorneys, clerks, workmen, and others, and to remove them and appoint others in their place, and to pay and allow to the persons to be so employed, such salaries, wages, or remunerations as he shall think fit;

(o) Substitution. To constitute and appoint in his place and stead and as a substitute one or more attorneys for the undersigned subscribers with full power of revocation;

(p) Nominee. To cause to be organized a corporation to enter into the contract of sale on behalf of the joint venture and to cause such corporation for and on behalf of the joint venture to enter into a contract or contracts of resale conditioned upon the acquisition of title to the property, the corporation to be merely the nominee of the joint venture;

(q) Title. To cause title to the property or any part thereof to be taken and held for the joint venture in the name of such nominee or nominees as he may designate; and

(r) Discretion. Without in any way limiting the foregoing, generally to do, execute, and perform any other act, deed, matter, or thing, that ought to be done, executed, and performed, or that in his opinion ought to be done, executed, or performed in and about the premises, of every nature and kind, as fully and effectually as the subscribers to this agreement could do if personally present. This power of attorney shall not be affected by the subsequent disability or incompetence of any subscriber.

9. Services of Manager. The joint venture manager shall render his personal services to the joint venture and devote thereto only such time as he, in his uncontrolled judgment, deems necessary, which judgment shall not be subject to review in any court or place. The joint venture manager may engage in other businesses, including the ownership, operation, and management of real estate, and the practice of any profession.

10. Dealings with Others. The fact that the joint venture manager or a subscriber, or any member of their families, is directly or indirectly interested in or connected with any person, firm, or corporation employed by the joint venture to render or perform a service, or is a person, firm, or corporation with whom the joint venture manager enters into agreements, shall not prevent the joint venture manager from employing such person, firm, or corporation or from dealing with him or it and paying for services rendered.

11. Operating Agreement. Upon the acquisition of title to the property, the subscribers shall enter into an operating agreement in the form annexed hereto. Simultaneously herewith the subscribers have executed counterparts of the operating agreement and have deposited the same in escrow with _____ [name] . The joint venture manager is empowered to strike from the operating agreement the name of any defaulting subscriber and add the name of any substituted or new subscribers. In the event that the joint venture manager elects to do so, the subscribers shall execute a new operating agreement in the form hereto annexed omitting the defaulting subscribers and substituting new subscribers in their place.

12. Broker. The joint venture manager is authorized and empowered for and on behalf of the joint venture to enter into a written agreement with Harry Williams to act as a real estate broker for the joint venture, to sell or lease any of the property belonging to the joint venture, and to pay to him a commission or commissions on sales or leases as may be consummated by him at the rates customarily charged by _____ [name] upon similar sales or leases. He may act as a co-broker and participate with any other co-broker in the division of one regular commission.

13. Partition. No subscriber shall, either directly or indirectly, make any application for dissolution or take any action to obtain a partition of the joint venture. Each subscriber waives any right to file a notice of pendency of action against the property.

14. Arbitration. In the event any controversy or dispute arises with respect to this agreement or any of its terms or conditions, or with respect to any rights arising from or under this agreement, or with respect to any alleged breach of this agreement, the controversy or dispute shall be settled by arbitration in _____ [city] in accordance with the governing rules of the American Arbitration Association. Judgment upon the award rendered may be entered in any court of competent jurisdiction.

15. Notices. All notices required to be given hereunder shall be sent by registered mail, return receipt requested, addressed to the parties at the respective addresses set forth in this agreement or at such other place or places as the parties may in writing designate.

16. Binding Effect. Except as otherwise herein specifically provided, this agreement shall be binding upon and inure to the benefit of the parties hereto, their heirs, distributees, legal representatives, transferees, and assigns. This agreement may not be changed orally and no modification thereof shall be valid unless in writing, signed by all the parties hereto.

17. Entire Agreement. This agreement supersedes all agreements previously made between the parties relating to its

subject matter. There are no other understandings or agreements between them.

18. Non-waiver. No delay or failure by a party to exercise any right under this agreement, and no partial or single exercise of that right, shall constitute a waiver of that or any other right, unless otherwise expressly provided herein.

19. Headings. Headings in this agreement are for convenience only and shall not be used to interpret or construe its provisions.

20. Governing Law. This agreement shall be construed in accordance with and governed by the laws of the State of _____ [state] .

21. Counterparts. This agreement may be executed in two or more counterparts, each of which shall be deemed an original but all of which together shall constitute one and the same instrument.

In witness whereof the undersigned subscribers have duly executed this agreement the day and year first above written.

[Subscriber]

[Subscriber]

[Subscriber]



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Current Legal Forms for Real Estate
Chapter 20 REAL ESTATE ENTITIES

Part IV. Forms

B. TENANCIES IN COMMON AND JOINT VENTURES

24-20 Current Legal Forms for Real Estate FORM 20.15

AUTHOR: by Stephen E. Pigott and Harold O. Maxfield, Jr.

FORM 20.15 Joint venture--between two corporations--acquisition of land and buildings--additional capital to be furnished by one venturer

COMMENT

The participants in this joint venture are two corporations. A singular feature of this agreement is the obligation of one of the venturers to make or arrange all loans required by the venture. In consideration for this, special protections are provided for the potential creditor, including a special termination provision. The venture is to continue at least until all of its properties are sold or until a specified date, whichever is earlier. If the venture is in operation and has not repaid its loans by the termination date, the lending venturer may elect either (1) an immediate termination of the venture, the sale of assets, and the payment of outstanding debts, or (2) a continuation of the venture from year to year until the repayment of its loans. Capital contributions of the venturers are not to be returned until debts are satisfied, and upon final dissolution each venturer is to bear equally the cost of repaying outstanding debts in excess of the proceeds from the sale of assets.

FORM

THIS AGREEMENT made and entered into _____ [month] _____ [day] ,
_____ [year] , by and between ARNOLD REALTY, INC., a Delaware corporation ("Arnold"), and
WARREN INVESTMENT CORP., an Illinois corporation ("Warren").

WHEREAS, The parties have agreed to form a joint venture for the purpose of acquiring and owning, as an investment, certain property located in Santa Clara County, California, consisting of approximately 100 acres of land and certain buildings and other improvements thereon (the "Baker Property").

WHEREAS, the Baker Property is described in and forms the subject matter of an Agreement for Sale and Purchase of Real Property, dated _____ [month] _____ [day] , _____ [year] , entered into by William Arnold, as buyer, and as nominee for the joint venture.

NOW, THEREFORE IT IS HEREBY AGREED AS FOLLOWS:

1. Formation of Joint Venture. The parties hereby form a joint venture upon the terms and conditions herein set forth (the "Venture").

2. Name of Venture. The name of the Venture shall be the Baker Venture.

3. Purpose of Venture. The purpose of the Venture shall be to acquire, own, operate, maintain, and lease the Baker Property as an investment.

4. Initial Capital. The initial capital of the Venture shall be Two Hundred Fifty Thousand Dollars (\$250,000) to be contributed by the parties in equal shares. An individual capital account shall be maintained for each party to the Venture, and no interest shall be paid or shall accrue on the capital account of either party.

5. Percentages of Interest. The respective interests of the parties in and to the Venture, and in and to the net profits and losses shall be as follows:

Arnold	50%
Warren	50%

6. Loans to Venture. Arnold shall lend or cause to be lent to the Venture all additional funds necessary or required in connection with the acquisition, ownership, operation, maintenance, and leasing of the Baker Property, as and when required. (Each of such loans is herein referred to as a "Venture Loan" and all of such loans are herein collectively referred to as "Venture Loans".) Simultaneously with the making of each such loan to the Venture, the Venture shall execute and deliver to Arnold or to the entity making such loan a promissory note in the principal amount of the loan, payable to the order of the entity making such loan. Each of the notes shall be in the form and contain the provisions of the form of note attached hereto, marked Exhibit A, and made a part hereof.

7. Title to Property. The title to the Baker Property shall be acquired and held in the name of the Joint Venture. The Venture will file a fictitious name certificate with the Santa Clara County Recorder's Office indicating that Arnold and Warren are "doing business" in the name of the Joint Venture. The parties may, from time to time, jointly designate other persons and entities to act as nominee for the Venture.

8. Assignment. The respective interests of the parties in the Venture shall not be transferred or assigned in whole or in part.

9. Books of Account. Accurate books and accounts shall be kept by the Venture, showing all of its assets, liabilities, operations, transactions, and financial condition. Arnold shall keep or cause to be kept such books and accounts. As soon as practicable after the end of each fiscal year of the Venture (but in no event later than one hundred twenty (120) days after the end of such fiscal year), a general accounting and audit shall be taken and made by certified public accountants, covering the assets, properties, liabilities, and net worth of the Venture, and its transactions and operations during the preceding fiscal year. All matters and things customarily included in such accounts and audits, and a full detailed statement shall be furnished to each party to the Venture, showing such assets, properties, and net worth and the profits and losses of the Venture, for the preceding fiscal year. Each party to the Venture shall have the right to object to

such statement by giving written notice to the other party within sixty (60) days after such statement is received, setting forth in reasonable detail the objections of such party and the basis for such objections. If either party shall fail to give notice within the 60-day period, such statement and the contents thereof shall be deemed conclusive and binding upon the party so failing to give written notice. Each party to the Venture shall have the right to examine, at any and all reasonable times, its books, records, and accounts. The fiscal year of the Venture shall end on December 31 of each year.

10. Repayment of Venture Loans. All receipts, income, and proceeds of and from the Baker Property and the Venture, except funds required for the operation and maintenance of the Baker Property, shall be paid by the Venture in repayment of the Venture Loans. So long as any part of the Venture Loans shall remain unpaid, Warren shall not be entitled to any distributions or loans from the Venture, except with the express written consent of Arnold.

11. Term of Venture. This venture shall continue until all of the Baker Property shall have been sold or otherwise disposed of or until _____ [month] _____ [day] , _____ [year] , whichever is sooner, unless sooner terminated by mutual agreement in writing of both of the parties. If, by _____ [month] _____ [day] , _____ [year] , all of the Venture Loans shall not have been fully repaid by the Venture, Arnold shall have the exclusive right to exercise either of the following options within thirty (30) days thereafter:

(a) To require the termination and dissolution of the Venture. Within ninety (90) days after any exercise of such option, all of the Venture's then noncash assets shall be sold for cash at the highest cash prices then available. If after such sale the cash assets shall not be sufficient to pay all of the Venture's liabilities, Arnold and Warren shall each contribute, as capital contributions, one half of the aggregate cash amount required to pay and discharge in full all of such liabilities. The Venture shall thereupon fully pay all of its liabilities, including without limitation all unpaid amounts on the Venture Loans. All remaining assets of the Venture shall be distributed as provided in paragraph 12; or

(b) To continue the Venture from fiscal year to fiscal year until such time as the Venture shall have fully repaid all of the Venture Loans. If Arnold shall exercise the option provided for in this subparagraph (b) to continue the Venture, the maturity date of all then unpaid Venture Loans shall be deemed extended to the end of such fiscal year.

12. Distribution Upon Dissolution. Upon the dissolution of the Venture, the assets of the Venture, after full payment of all liabilities, including the repayment of all Venture Loans, shall be distributed to the parties as follows: first, in discharge and to return the respective capital contributions of the parties, and second, in proportion to the respective rights of the parties to share net profits and losses of the Venture, as set forth in Paragraph 5. In the event the assets of the Venture are insufficient to return to the parties all or any part of their respective capital contributions (including the contributions made under the provisions of subparagraph (a) of Paragraph 11), neither party shall have any claim or recourse against the other therefor. In the event that upon such dissolution the assets of the Venture are insufficient to pay and discharge all of its obligations and liabilities (including without limitations all of the obligations of the Venture under the Venture Loans), each of the parties shall forthwith contribute as capital contributions one half of the aggregate amount required to pay and discharge in full all of such obligations and liabilities.

13. Compensation. No salary, fees, commissions, or other compensation shall be paid by the Venture to either party or to any of the officers or employees of either party, for any services rendered to the Venture, or in connection with any of its business or property, except as may be expressly agreed to in writing by both of the parties.

14. Management. All questions relating to activities and operations of the Venture, and all questions relating to the sale or other disposition of its property, shall be determined by mutual agreement of the parties.

15. Notice. All notices and demands hereunder shall be in writing, and shall be deemed to have been given and received forty-eight (48) hours after the same shall have been deposited in the United States Registered or Certified Mail,

postage prepaid, addressed to the parties hereto as follows:

To: Arnold, at 100 West Monroe Street
Chicago, Illinois 60646

To: Warren, at 200 Michigan Blvd.
Chicago, Illinois 60646

Arnold and Warren shall each have the right by notice in writing given to the other pursuant to the provisions of this Paragraph 15 to change, from time to time, the respective addresses at which such notices hereunder shall be given.

16. Office. The principal office of the Venture shall be at _____ [address] , _____ [city] , _____ [state] .

17. Governing Law. This agreement and the Joint Venture created hereunder shall be construed in accordance with and governed by the laws of the State of _____ [state]

18. Grace Periods. The parties shall be deemed to have the following grace periods with respect to defaults in their respective obligations hereunder:

(a) With respect to any default in any other obligation to pay any sum of money, there shall be a grace period of ten days after written notice of such default.

(b) With respect to any default in any other obligation, there shall be a grace period of thirty (30) days after written notice of such default; provided, however, that (1) if such default cannot with due diligence and in good faith be cured within such thirty (30) days, and (2) if the defaulting party forthwith upon notice of such default commences and proceeds with due diligence and good faith to cure such default, the grace period with respect to such default shall be extended for only such period as may be necessary for the curing of such default with due diligence and in good faith.

19. Entire Agreement. This agreement supersedes all agreements previously made between the parties relating to its subject matter. There are no other understandings or agreements between them.

20. Non-waiver. No delay or failure by either party to exercise any right under this agreement, and no partial or single exercise of that right, shall constitute a waiver of that or any other right, unless otherwise expressly provided herein.

21. Headings. Headings in this agreement are for convenience only and shall not be used to interpret or construe its provisions.

22. Counterparts. This agreement may be executed in two or more counterparts, each of which shall be deemed an original but all of which together shall constitute one and the same instrument.

23. Binding Effect. Except as herein otherwise provided, the terms and conditions of this agreement shall be binding upon, and inure to the benefit of, both parties and their respective successors and assigns.

In witness whereof the parties hereto have executed this Joint Venture Agreement the day and year first above written.

ARNOLD REALTY, INC.

By _____

[name and title]

WARREN INVESTMENT CORP.

By _____

[name and title]



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Chapter 20 REAL ESTATE ENTITIES

Part IV. Forms

B. TENANCIES IN COMMON AND JOINT VENTURES

24-20 Current Legal Forms for Real Estate FORM 20.16

AUTHOR: by Stephen E. Pigott and Harold O. Maxfield, Jr.

FORM 20.16 Joint venture--between partnership and corporation--contribution in kind by one venturer

COMMENT

Because one of the participants in this joint venture is a partnership, the agreement must cover the possibility that the partnership may be dissolved by reason of the death, incapacity, bankruptcy, or default of any one of its partners. The problem is to preserve the continuity of the joint venture. To achieve this continuity, the agreement obligates each member of the partnership to continue the partnership if a dissolution does in fact occur. Restrictions are imposed upon the transfer of a partner's interest in the partnership. In addition, a member of the partnership is irrevocably authorized to act for the partnership in matters relating to the joint venture. All of this is designed to insulate the corporate joint venturer from the internal problems of the partnership joint venturer.

FORM

THIS AGREEMENT made and entered into _____ [month] _____ [day] ,
_____ [year] , by and between CAMDEN REALITIES, INC., a Delaware corporation ("Camden"),
and DAVID WOHL, HARVEY LORINS, JAMES BURNES, and FRANK MASON, individually and as copartners and
members of the general partnership created under a general partnership agreement dated _____
[month] _____ [day] , _____ [year] , between all of the such persons (the
"Wohl Partnership").

WHEREAS, Camden owns certain real and personal property described in Exhibit A, which is attached hereto and
made a part hereof (the "Camden Property").

WHEREAS, the legal title to the real property described in Exhibit A is held in a real estate land holding trust, under which Central Title Guarantee & Trust Company is Trustee, and all of the beneficial interest is owned by Camden.

WHEREAS, the parties desire to form a joint venture to operate, lease, and exploit the Camden Property,

NOW, THEREFORE IT IS AGREED AS FOLLOWS:

1. Joint Venture. The parties hereby form a joint venture (the "Venture"), upon the terms and conditions herein set forth.

2. Name of Venture. The name of the Venture shall be the Camden Venture.

3. Purpose. The purpose of the Venture shall be to maintain, lease, and exploit the Camden Property and to engage in such operations and business as may be deemed necessary or appropriate to such purposes.

4. Capital. Simultaneously, with the execution of this agreement, the parties shall contribute the following:

Camden The Camden Property.

Wohl Partnership \$750,000.

5. Interests of Parties in Venture. The respective interests of the parties in the Venture, and in the assets, property, profits, and losses of the Venture, shall be as follows:

Camden 50%

Wohl Partnership 50%

6. Additional Funds. All further funds required in connection with the ownership, maintenance, leasing, and exploitation of the Camden Property shall be contributed by the parties in proportion to their respective interests as set forth in Paragraph 5.

7. Title. The legal title to the real property described in Exhibit A shall continue to be held in the real estate land holding trust, with Central Title Guarantee & Trust Company as Trustee. The remainder of the Camden Property and all other property of any kind which shall be owned, held, or operated by the Venture shall be owned, held, or operated in the name of the person or entity which shall be designated for that purpose by the parties, as nominee solely for the Venture.

8. Term. This agreement shall continue in full force and effect until _____ [month] _____ [day] , _____ [year] , unless sooner terminated as provided in this agreement. Unless at least three months prior to _____ [month] _____ [day] , _____ [year] , either party gives notice to the other electing that the Venture shall terminate as of _____ [month] _____ [day] , _____ [year] , the Venture and this agreement shall be renewed and continue until _____ [month] _____ [day] , _____ [year] . Thereafter, this agreement shall be renewed and continued from fiscal year to fiscal year unless at least three months prior to _____ [month] _____ [day] , _____ [year] , or to the end of any such other fiscal year, either party gives written notice to the other terminating the Venture as of the end of the then fiscal year. The Venture shall terminate as of the end of any fiscal year in which all of its property and assets are sold or otherwise disposed of. In the event of the dissolution of the Wohl Partnership for any reason, it shall not wind up or terminate until the end of the term of this Venture, as such term is herein provided, it being the parties' intention that this Venture shall not be terminated or affected on account of any dissolution of the Wohl Partnership.

9. Assignment. The respective interests in the Venture of the parties hereto shall not be transferred or assigned in whole or in part.

10. Books of Account. The Venture shall keep accurate books and accounts. As soon as practicable after the end of each fiscal year of the Venture (but in no event later than one hundred twenty (120) days after the end of any fiscal year), a general accounting and audit shall be made by certified public accountants, covering all matters and things customarily included in such accounts and audits. In addition, a full and detailed statement shall be furnished to each party to the Venture, showing its assets, properties, net worth, and profits and losses for the preceding fiscal year. Each party shall have the right to object to such statement by giving written notice to the other party within sixty (60) days after the statement is received by the objecting party, setting forth in reasonable detail the objections and the basis for the objections. If either party shall fail to give such notice within the 60-day period, such statement and its contents shall be deemed conclusive and binding upon the party failing to give such written notice. Each party to the Venture shall have the right to examine, at all reasonable times, its books, records, and accounts. The fiscal year of the Venture shall end on December 31 of each year.

11. Distributions. Until otherwise determined in accordance with the provisions of Paragraph 14, except for a working capital balance in the aggregate amount of Fifteen Thousand Dollars (\$15,000) which shall be retained in the Venture, there shall be paid to each of the parties, in proportion to their respective interests in the Venture as set forth in Paragraph 5, all moneys and funds at any time held by the Venture, as and when received.

12. Salaries. The Venture shall pay no salary, fees, commissions, or other compensation to either party or to any of the persons comprising the Wohl Partnership, for any services rendered to the Venture, or in connection with any of its business or property, except as both parties may expressly agree to in writing.

13. Provisions Affecting Partnership Member . Each of the persons comprising the Wohl Partnership warrant and represent to, and agree with, each other and Camden, as follows:

(a) Buy-out. In the event of the dissolution of the Wohl Partnership because of the death, incapacity, bankruptcy, default, other act or omission of any partner (the "Retiring Partner"), the other partners ("Surviving Partners"), shall forthwith:

(1) acquire, in the same proportions as their present interests in the Wohl Partnership, the interest of the Retiring Partner at a price and upon terms which are and shall be specified in definitive and ascertainable terms in the Wohl Partnership agreement, and in connection with the acquisition, the Surviving Partners shall assume all of the liabilities and obligations of the Retiring Partner in, under, and in connection with the Wohl Partnership; or in the alternative, in the event of the dissolution of the Wohl Partnership because of the death or incapacity of any such partner, the Surviving Partners shall continue the Wohl Partnership with the heirs, executors, administrators, or guardian of the deceased or incapacitated partner succeeding to the interest of such deceased or incapacitated partner, upon the same terms and conditions as set forth in the Wohl Partnership agreement; and

(2) in the case of either alternative set forth in (1) above, continue the Wohl Partnership, its affairs and business, upon the same terms and conditions as set forth in the Wohl Partnership agreement; and

(3) cause the general partnership continuing the affairs and business of the Wohl Partnership to continue as a member of this Joint Venture upon the same terms and conditions as set forth in this agreement.

(b) No Assignment. The interests of the members of the Wohl Partnership shall not be assigned or transferred, without Camden's prior written consent, except as follows: (1) the transfers provided for in subparagraph (a) of this Paragraph 13, and (2) the transfer by one member of the Wohl Partnership to one or more of its other members.

(c) No Release. Nothing in this agreement, including, without limitation, the provision of subparagraphs (a) and (b) of this Paragraph 13, and any assumption by any one or more members of the Wohl Partnership ("Assumption Member"), of the obligations and liabilities of any other members of the Wohl Partnership ("Transferring Member"), in, under, or in connection with the Wohl Partnership (as provided in subparagraph (a) of this Paragraph 13, or otherwise), shall be deemed to release or relieve any of the obligations or liabilities (individual, personal, or as a member of the Wohl Partnership) of such Transferring Member (or of his estate) to Camden, whether the obligations or liabilities are incurred or arise under this agreement or under any other agreement, lease, note, or instrument to which the Wohl Partnership is or shall be a party.

(d) Partnership Agent.

(1) Appointment and Powers. Any provisions in this agreement or in the Wohl Partnership agreement to the contrary notwithstanding, David Wohl (or in the event of his death, incapacity, failure, or refusal to act, then Harvey Lorins), shall have, and is irrevocably granted, full and complete power and authority, for and on behalf of the Wohl Partnership, and for and on behalf of all the members of and the persons comprising the Wohl Partnership to make, consent, and agree to any and all determinations and decisions (including, without limitation, all of the decisions and determinations referred to and provided for in Paragraph 14) with respect to any and all questions relating to the management, operation, and conduct of any and all affairs and activities of the Venture and to any and all of its assets or properties; to execute and deliver any and all instruments and documents under, in connection with or with respect to this agreement and the Venture; and to give or to receive any and all notices and demands, given or received, in, under, or in connection with, or with respect to this agreement or the Venture.

(2) Effect. All of the determinations, decisions, notices, demands, instruments, and documents which may or shall be made, executed, or delivered (at any time and from time to time during the entire period until the Venture shall terminate, and whether before or after any dissolution of the Wohl Partnership) by David Wohl or Harvey Lorins, as the case may be, are irrevocably authorized, approved, confirmed, and ratified, and shall be binding and conclusive upon the Wohl Partnership and upon each and all of the persons comprising the Wohl Partnership, with the same force and effect as though made, executed, or delivered by each and all of such persons themselves.

(e) Partnership Agreement. The Wohl Partnership agreement dated _____ [month] _____ [day], _____ [year], and all agreements amending or supplementing the general partnership agreement, shall contain provisions consistent with, and implement, all the provisions and undertakings set forth above in this Paragraph 13.

14. Management. All questions relating to the conduct, management, or operation of the affairs, activities, or business of the Venture, and all questions relating to any or all of its assets or property, shall be determined by mutual agreement of both members. All determinations made in accordance with this paragraph shall be deemed to be the determinations of the Venture and of all its members and parties.

15. Notices. All notices and demands shall be in writing, and shall be deemed to have been given and received forty-eight (48) hours after it shall have been deposited in a United States Post Office depository by Registered or Certified Mail, postage prepaid, addressed to the parties hereto as follows:

To: Wohl Partnership
c/o David Wohl
500 East Pine Street
Newark, New Jersey

To: Camden Realities, Inc.
200 River Road
Camden, New Jersey

Each party shall have the right by written notice given to the other pursuant to the provisions of this Paragraph 15 to change, from time to time, the respective addresses at which notices shall be given.

16. Office. The principal office of the Venture shall be at _____ [address] , _____
[city] , _____, [state]

17. Governing Law. This agreement shall be construed in accordance with and governed by the laws of the State of _____ [state] .

18. Personal Liability of Partnership Members. Each and all of the obligations and liabilities provided in this agreement as the obligations or liabilities of the Wohl Partnership shall be the obligations and liabilities of the Wohl Partnership as a general partnership, and the obligations and liabilities of each and all of the persons comprising the Wohl Partnership as members and copartners, and shall also be the separate, individual, and personal obligations and liabilities, jointly and severally, of each and all of the persons comprising the Wohl Partnership. All references to the Wohl Partnership herein shall be deemed to include each and all of the copartners and members thereof, not only as members and copartners, but also individually and personally.

19. Binding Effect. The terms and conditions of this agreement shall be binding upon, and inure to the benefit of the parties, and all of the persons comprising the Wohl Partnership, and their respective heirs, executors, administrators, successors, and (except as herein otherwise provided) assigns.

20. Entire Agreement. This agreement supersedes all agreements previously made between the parties relating to its subject matter. There are no other understandings or agreements between them.

21. Non-waiver. No delay or failure by a party to exercise any right under this agreement, and no partial or single exercise of that right, shall constitute a waiver of that or any other right, unless otherwise expressly provided herein.

22. Headings. Headings in this agreement are for convenience only and shall not be used to interpret or construe its provisions.

23. Counterparts. This agreement may be executed in two or more counterparts, each of which shall be deemed an original but all of which together shall constitute one and the same instrument.

In witness whereof the parties have executed this joint venture agreement the day and year first above written.

CAMDEN REALTY, INC.,

By _____

[name and title]

David Wohl

Harvey Lorins

James Burnes

Frank Mason

Personally, and as members of the Wohl

Partnership, a general partnership.



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Current Legal Forms for Real Estate

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Current Legal Forms for Real Estate
Chapter 20 REAL ESTATE ENTITIES

Part IV. Forms

B. TENANCIES IN COMMON AND JOINT VENTURES

24-20 Current Legal Forms for Real Estate FORM 20.17

AUTHOR: by Stephen E. Pigott and Harold O. Maxfield, Jr.

FORM 20.17 Joint venture syndicate--provision for additional capital--treated as partnership

COMMENT

This form is similar to a real estate syndication utilizing a limited partnership form of organization which allows additional participants to come into the syndicate but, in this case, the liability of an incoming venturer is not limited. Each joint venturer is liable for the debts and obligations of the joint venture. The death or incompetency of a joint venturer does not terminate the joint venture. The original joint venturers are to receive a fee for organizing the venture made contingent upon the successful sale of 100 percent of the joint venture interests. The number of venturers involved assumes that the property will be professionally managed and the form so provides.

Sale of venture interests:

The form provides for registration of the joint venture under the relevant securities' acts. Provision is made for additional capital in the form of operating and special contributions by the joint venturers. For the protection of the purchaser, all amounts paid for joint venture interests are kept in escrow until 100 percent of the interests have been sold. If not sold prior to the expiration of the escrow agreement, the purchase price is to be refunded without interest with the original joint venturers remaining liable for the costs incurred. When 100 percent of the joint interests are sold, the original joint venturers cease to be members of the joint venture unless they have purchased joint venture interests.

FORM

THIS AGREEMENT made _____ [month] _____ [day] ,
 _____ [year] , by and among the subscribers hereafter named:

1. Venture. The subscribers hereby create a joint venture under the terms and conditions hereinafter set forth.

2. Name. The name of the joint venture shall be the Renard Venture.

3. Purpose. The purpose of the Renard Venture is to acquire for investment certain real property situated in the Borough of Brooklyn, City and State of New York, known as _____ [address] , consisting of approximately six acres of land together with the buildings and improvements thereon (the "Property").

4. Representations. No representation is made to any subscriber with respect to the physical condition, prospective income, prospective selling price, cost of operation, or any other matters relating to or affecting the Property.

5. Subscribers. The subscribers to this agreement on the date of its execution are Mark Renard and Walter Spear (the "Original Joint Venturers"). Those persons who shall subsequently subscribe to the Renard Venture are called the "Joint Venturers."

6. Office. The principal office of the Renard Venture shall be at _____ [address] ,
 _____ [city] , _____ [state] , but additional offices may be maintained and action taken for accomplishing the purposes of the joint venture at any other appropriate location.

7. Organizational Plan. The Original Joint Venturers hereby create the Renard Venture, which will offer and sell interests therein to the Joint Venturers. When one hundred percent (100%) of the joint venture interests have been sold, each of the Original Joint Venturers shall cease being a member of the joint venture, except that he may become a Joint Venturer by purchasing a joint venture interest. All organizational expenses of the Renard Venture and of registering its joint venture interests will be borne by the Original Joint Venturers, who will be entitled to an organizational fee of Three Hundred Thousand Dollars (\$300,000) should one hundred percent (100%) of the joint venture interests be sold. The fee is to be in full payment for all services and expenses of the Original Joint Venturers.

8. Interests and Registration. The Original Joint Venturers shall register the Renard Venture under state and federal laws, consisting of six hundred (600) joint venture interests, each unit valued at Fifteen Thousand Dollars (\$15,000), for an initial total capitalization of Nine Million Dollars (\$9,000,000), representing the purchase price of the Property amounting to Eight Million Seven Hundred Thousand Dollars (\$8,700,000) and the organization fee of Three Hundred Thousand Dollars (\$300,000).

9. Payment for Interests. Each purchaser of an interest shall pay the full amount of his purchase upon becoming a signatory of this agreement by executing a conformed counterpart at the foot thereof. Payment is to be made to the Federal National Bank of New York as escrow agent of the Renard Venture. The proceeds are to be held in trust under an escrow agreement which will expire on _____ [month] _____ [day] ,
 _____ [year] .

10. Liability. Until one hundred percent (100%) of the joint venture interests in the Renard Venture have been sold, the joint venture shall not acquire assets of any kind or incur any liabilities, but the Original Joint Venturers shall pay and discharge all organizational expenses, including attorneys' fees, accountants' fees, printing costs, recording and filing fees, and costs and expenses of the registration and sale of joint venture interests.

11. Completion of Sale of Joint Venture Interests. If one hundred percent (100%) of the registered joint venture interests shall have been sold prior to the expiration of the escrow agreement, then the following shall occur:

- (a) The escrow agreement shall terminate and the amount deposited in trust shall be paid to the Renard Venture.
- (b) The Renard Venture shall purchase the Property and assume all liability as purchaser, and the Original Joint Venturers shall be relieved of all further liability.
- (c) The Renard Venture shall pay the Original Joint Venturers the organizational fee of Three Hundred Thousand Dollars (\$300,000).
- (d) The Joint Venturers shall be admitted to membership in the Renard Venture and shall become the only Joint Venturers.
- (e) The initial capital contribution of each Joint Venturer shall be the amount paid by him as the purchase price of his joint venture interest in the Renard Venture.
- (f) Each Original Joint Venturer shall cease to be a member of the Renard Venture unless he has become a Joint Venturer by purchasing a joint venture interest.

12. Consent and Continuation. Each Joint Venturer shall be deemed to consent to the admission to the Renard Venture of himself and every other purchaser of joint venture interests and to the withdrawal of the Original Joint Venturers. The admission of the Joint Venturers and the withdrawal of the Original Joint Venturers shall not terminate the Renard Venture which shall continue in full force and effect without interruption.

13. Return of Funds. If one hundred percent (100%) of the joint venture interests of the Renard Venture have not been sold prior to the expiration of the escrow agreement, the escrow agent shall forthwith refund to each purchaser of a joint venture interest all amounts paid by such purchaser, without interest, and such purchaser shall have no further liability or obligation under this agreement.

14. Term of Joint Venture. The term of the Renard Venture shall continue until its interest in the Property shall have been disposed of and all proceeds from the disposition shall have been collected and distributed, or until the Joint Venturers shall by the vote of the owners of at least 75 percent of the total joint venture capital elect to terminate the Renard Venture.

15. Capital Contributions. The capital contributions of the Renard Venture shall be as follows:

- (a) Each Joint Venturer shall contribute in cash the amount set forth next to his signature on the counterpart of this agreement.
- (b) Not later than the first day of every year beginning in 1988, and continuing during the life of the Renard Venture, each Joint Venturer shall annually contribute in cash his proportionate share, as computed in Paragraph 18 below, of the total amount estimated as being required for the operation of the Renard Venture during the year then beginning.

16. Special Contributions. In addition to the operating contributions, each Joint Venturer shall contribute to the Renard Venture, from time to time, his proportionate share, as computed in Paragraph 18 below, of any additional sum which may be required for the operation of the Renard Venture. The total amount of any such special contribution shall be fixed by the majority vote of all of the Joint Venturers.

17. Individual Accounts. A separate capital account and income account shall be maintained for each Joint Venturer. A Joint Venturer's capital account shall consist of his total contributions to the Renard Venture, including initial, operating, and special contributions.

18. Computation of Capital Contributions.

(a) The share of each Joint Venturer of each operating or special contribution shall be in proportion to the percentage the amount of his capital account then bears to the then total amount of all capital accounts of the Renard Venture.

(b) If prior to the due date of any contribution any Joint Venturer shall have been adjudicated a bankrupt or shall have been expelled from the Renard Venture, the contributions of the remaining Joint Venturers shall be computed exclusive of any interest of the bankrupt or expelled Joint Venturer.

19. Joint Venture Interest. Each joint venture interest shall be deemed to be an indivisible unit, and the owner or owners of each joint venture interest shall collectively be obligated to make operating and special contributions in the amount determined applicable to such interest under Paragraph 18 above, regardless of the number of its owners and regardless of whether such ownership is as tenants in common, joint tenants, community property, or otherwise. Failure to pay any required contribution in full shall subject the owners of the joint venture interest to expulsion as provided in Paragraph 24 below. Each joint venture interest shall remain indivisible regardless of division by operation of law or otherwise.

20. Contribution Notices. The Renard Venture shall notify each Joint Venturer not less than thirty (30) days prior to the date any operating or special contribution is to be made, specifying the aggregate amount required as well as the amount to be contributed by such Joint Venturer. However, failure to give such notice shall not relieve any Joint Venturer from his obligation to make operating and special contributions.

21. Profits and Losses.

(a) The net profits of the Renard Venture shall be allocated and credited to the individual income account of each Joint Venturer in proportion to the percentage the amount of his capital account then bears to the total amount of all of the capital accounts of the joint venture then existing, but no profits shall be allocated or credited to the account of any bankrupt or expelled Joint Venturer.

(b) The net losses of the Renard Venture shall be allocated and debited to the income account of each Joint Venturer in proportion to the percentage the amount of his capital account then bears to the total amount of all of the capital accounts of the joint venture then existing, but no losses shall be allocated or debited to the account of any bankrupt or expelled Joint Venturer. If there is no balance in the income account of any Joint Venturer, his share of the loss shall be debited to his capital account, which shall be reduced accordingly. Subsequent profits shall be credited to his capital account until the reduction has been restored and shall thereafter be again credited to his income account.

22. Management.

(a) Each Joint Venturer shall have a vote in the management of the Renard Venture in direct proportion to his interest in the joint venture as reflected in his capital account, and the determination of all matters concerning the business affairs of the Renard Venture, including but not limited to the disposition of the Joint Venturer's interest in the Property, or any part of such interest, shall be made by Joint Venturers owning a sixty percent (60%) majority in interest of the Renard Venture. Such determination shall be effective whether votes are cast at a meeting of all or some of the Joint Venturers, or by informal or formal, oral or written instructions of the Joint Venturers constituting a sixty percent (60%) interest, and any determination shall be effective regardless of the number of Joint Venturers who may actually vote on the issue, or have notice of the proposed determination.

(b) The Renard Venture may appoint such agents, attorneys-in-fact, managers, and employees as shall be appropriate.

23. Withdrawals by Joint Venturers. Neither the capital contributions nor the amounts contained in the individual

income accounts shall be withdrawn except upon the termination of the Joint Venture on the agreement of Joint Venturers owning seventy percent (75%) of the joint venture interests.

24. Bankruptcy or Expulsion of Joint Venturers.

(a) Should a Joint Venturer fail to make an operating or special contribution when due or breach any other term of this agreement, the Renard Venture shall give him written notice by certified mail specifying the default or breach. The Joint Venturer shall have 15 days to cure the default or remedy the breach. Should he fail to do so, he shall be expelled from the Renard Venture. Such expulsion shall be effective without further notice and shall be retroactive to the date of the default or breach.

(b) Upon the bankruptcy or expulsion of a Joint Venturer, neither he nor his trustee or other representative shall have the right to participate in the management of the Renard Venture nor to make any further contribution or share in any subsequent profits, except that upon termination of the joint venture he will be treated in the same manner as any other Joint Venturer as far as profits and losses are concerned.

25. Death or Incompetency of Joint Venturer. The executor or administrator of a deceased Joint Venturer or the guardian or committee of an incompetent Joint Venturer shall succeed to the interest of such Joint Venturer in the Renard Venture, as an assignee, and shall be required to make operating and special contributions to the joint venture to the same extent as such Joint Venturer would have been required to make if not deceased or incompetent. Failure to do so shall subject the executor, administrator, guardian, or committee to expulsion from the joint venture under the provisions of Paragraph 24 above.

26. Liability of Joint Venturers.

(a) All Joint Venturers are liable jointly and severally to third persons.

(b) Bankrupt or expelled Joint Venturers and the representatives of deceased and incompetent Joint Venturers shall be liable, as Joint Venturers, for those debts and obligations of the Renard Venture incurred prior to the bankruptcy, expulsion, death, or incompetency, as the case may be, but shall not be liable for debts and obligations incurred by the joint venture thereafter.

27. Distribution Upon Liquidation. Upon the liquidation of the Renard Venture after its termination and after the debts of the joint venture have been paid, the net proceeds will be distributed as follows:

(a) Each Joint Venturer shall be paid the then balance of his capital account. Should the net proceeds be less than the total of the capital accounts then existing, such proceeds shall be distributed in proportion to the percentage the amount of his capital account then bears to the total amount of all the capital accounts then existing.

(b) If there is a balance remaining after the payment of all the capital accounts, each Joint Venturer shall be paid the then balance of his income account. If such balance is less than the total of the income accounts then existing, such balance shall be distributed in proportion to the percentage the amount of his income account then bears to the total of all the income accounts then existing.

(c) If there is a balance still remaining after the payment of all of the capital and income accounts, each Joint Venturer shall be paid from such balance a sum in proportion to the percentage the amount of his capital account on the date of liquidation bears to the total of all capital accounts on that date.

28. Arbitration. Any controversy or dispute arising out of or regarding this agreement, or with respect to its alleged breach, shall be determined by arbitration in the City and State of _____ [city] in accordance with

the governing rules of the American Arbitration Association. The decision of the arbitrators shall be binding upon all of the parties, and judgment upon the award may be entered in any court of competent jurisdiction.

29. Entire Agreement. This agreement supersedes all agreements previously made between the parties relating to its subject matter. There are no other understandings or agreements between them.

30. Notices. All notices under this agreement shall be in writing and delivered personally or mailed by certified mail, postage prepaid, addressed to the parties at their last known addresses.

31. Non-waiver. No delay or failure by a party to exercise any right under this agreement, and no partial or single exercise of that right, shall constitute a waiver of that or any other right, unless otherwise expressly provided herein.

32. Headings. Headings in this agreement are for convenience only and shall not be used to interpret or construe its provisions.

33. Governing Law. This agreement and the joint venture created under it shall be construed in accordance with and governed by the laws of the State of _____ [state] .

34. Counterparts. This agreement may be executed in two or more counterparts, each of which shall be deemed an original but all of which together shall constitute one and the same instrument.

35. Binding Effect. Except as herein otherwise provided, the terms and conditions of this agreement shall be binding upon, and inure to the benefit of, the parties and their respective heirs, executors, administrators, successors, and assigns.

In witness whereof the parties hereto have executed this agreement as of the day and year first above written.

[Subscriber]

[Subscriber]

[Subscriber]



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Current Legal Forms for Real Estate
Chapter 20 REAL ESTATE ENTITIES

Part IV. Forms

B. TENANCIES IN COMMON AND JOINT VENTURES

24-20 Current Legal Forms for Real Estate FORM 20.18

AUTHOR: by Stephen E. Pigott and Harold O. Maxfield, Jr.

FORM 20.18 Joint venture--syndication of general partner's partnership interest

COMMENT

This form illustrates a joint venture which allows investors to purchase from a general partner fractional shares of the general partner's interest in the partnership. Each general partner can thus acquire a number of investors in his partnership interest. By this method, the general partners can raise money to pay for the property owned by the general partnership and the investors are in a position to share in partnership profits.

Taxation as partnership:

For tax purposes, the general partnership and each joint venture of a share of a general partner's interest presumably would be treated as a separate partnership entity. Even if the investors are treated as members of the general partnership, they would be taxed as members of a partnership rather than as shareholders in a corporation. Under the "Check the Box" regulations a partnership or joint venture will be treated as a partnership unless it chooses to be an association taxed as a corporation. (See TB § 20.05).

Fractional shares of partnership interest:

Participation in a general partner's interest is effected by an investor offering to purchase a fractional share of such partner's interest. This form includes an illustration of such an offer.

FORMS

(1) Agreement of Joint Venture

AGREEMENT made _____ [month] _____ [day] _____ [year] , among Joseph Weiss, residing at _____ [address] , _____ [city] , _____ [state] (the "Partner"), and William Clark, residing at _____ [address] , _____ [city] , _____ [state] , James Spear, residing at _____ [address] , _____ [city] , _____ [state] , and Harold Leeds residing at _____ [address] , _____ [city] , _____ [state] (the "Members").

WHEREAS, Marlboro Associates, a general partnership, owns the real property and improvements thereon known as the Marlboro Motel located at Saddlebrook, New Jersey (the "Property"); and

WHEREAS, the Partner owns a one-third interest in Marlboro Associates (the "Interest"); and

WHEREAS, The parties wish to establish a joint venture in the Interest and to define their respective rights and obligations with respect to this joint venture;

NOW, THEREFORE, it is mutually agreed as follows:

1. Venture. The parties form a joint venture for the ownership of the Interest.
2. Contributions. The contribution of each Member to the capital of the joint venture and his fractional share in the Interest are as set forth opposite his signature below.
3. Profits and Losses. All profits and losses arising from their ownership of the Interest shall be shared by the Members in proportion to their respective contributions.
4. Term. The joint venture shall continue until the Property has been disposed of. It shall not be interrupted by any act, or the bankruptcy, incompetency, or death of any Member, the assignment of his share by any Member, or any other cause.
5. Duties and Liability of Partner. The Partner, without compensation, shall serve as agent for the joint venture and any action taken by him shall bind the joint venture, subject to the provisions of this agreement. He shall not be personally liable for any act performed by him in good faith as agent, or for anything except gross negligence or willful misconduct. The Members shall indemnify him in proportion to their respective shares in the Interest against any liability to which the Partner may be subject by reason of his acting as agent of the joint venture.
6. Termination of Agency. The Partner may resign as agent or be removed as agent by the affirmative vote of Members owning at least sixty-six and 23/100 percent (66.23%) of the Interest. In the event of such resignation or removal or the incompetency or other disability of the Partner, his successor shall be designated by the Members owning a majority of the Interest.
7. Assignment of Interest. Simultaneously with the execution of this agreement, the Partner shall execute an assignment of the Interest in the joint venture together with a quitclaim deed of his interest in the Property which shall be deposited in escrow, together with a copy of this agreement, with _____ [name] of _____ [address] , _____ [city] , _____ [state] .
8. Transferability. The sale or transfer, in whole or in part, of the interest of any Member, except pursuant to the provisions of Paragraph 10 below, shall not be valid unless:

(a) The transferee is an individual of full age.

(b) Duplicate originals of the instruments effectuating the sale or transfer are delivered to the Partner for filing with this agreement.

(c) The transferee accepts the sale or transfer in writing.

Upon compliance with the provisions of subdivisions (a), (b), and (c) of this paragraph, the transferee shall become a Member of the joint venture with the same rights and obligations as the transferring Member.

9. Death of Member. Any Member may designate an individual to succeed to his interest upon his death. Such designation shall be by will or, if not so made, shall be governed by the laws of intestacy of the state in which the deceased Member was domiciled. In either event, the executor or administrator of the deceased Member shall deliver to the Partner all instruments as may be required to effectuate the transfer of the Member's interest to his designee or successor in interest, who shall then become a Member of the joint venture with the same rights and obligations as the deceased Member.

10. Disposition by Partner.

(a) The Partner shall not sell, mortgage, or transfer the Interest or the Property or make or modify any mortgage or lease on the Property without the consent of all Members.

(b) If the consent of Members owning seventy-five percent (75%) of the Interest is obtained, the Partner or his designee shall have the right to purchase the fractional share in the Interest of any Member who has not given his consent within 30 days after the Partner has given written request by registered or certified mail.

(c) The mailing of a certified check to the nonconsenting Member for the purchase price at any time within fifteen (15) days after the 30-day period shall effectuate the sale and transfer to the purchaser of the Member's share in the Interest.

(d) The purchase price shall be the amount of the selling Member's capital contribution, less all repayments of his contribution to the date of sale.

(e) The Partner is hereby irrevocably appointed as attorney-in-fact for such Member to execute the necessary instruments and take all other steps necessary to effectuate the sale and transfer.

(f) Upon the purchaser's accepting the transfer in writing, he shall become a Member of the joint venture with the same rights and obligations of the selling Member.

11. Arbitration. Any dispute regarding this agreement, or arising out of its performance, shall be submitted to arbitration in the City of _____ [city] , in accordance with the governing rules and regulations of the American Arbitration Association. The decision of the arbitrator shall be final and binding upon all of the parties, and judgment upon the award may be entered in any court of competent jurisdiction.

12. Governing Law. This agreement shall be construed in accordance with and governed by the laws of the State of _____ [city] .

13. Binding Effect. This agreement shall inure to the benefit of and be binding upon the parties hereto, their heirs, legal representatives, successors, and assigns.

14. Entire Agreement. This agreement supersedes all agreements previously made between the parties relating to its

subject matter. There are no other understandings or agreements between them.

15. Notices. All notices under this agreement shall be in writing and delivered personally or mailed by certified mail, postage prepaid, addressed to the parties at their last known addresses.

16. Non-waiver. No delay or failure by a party to exercise any right under this agreement, and no partial or single exercise of that right, shall constitute a waiver of that or any other right, unless otherwise expressly provided herein.

17. Headings. Headings in this agreement are for convenience only and shall not be used to interpret or construe its provisions.

18. Counterparts. This agreement may be executed in two or more counterparts, each of which shall be deemed an original but all of which together shall constitute one and the same instrument.

In witness whereof the parties have executed this agreement as of the day and year first above written.

PARTNER

Joseph Weiss

William Clark

Samuel Butler

James Spear

David Cohn

Harold Leeds

(2) Offer to buy shares of partnership interest

Joseph Weiss
100 Seventh Avenue
New York, New York 10011

Dear Mr. Weiss:

I hereby offer to purchase a _____ percent (_____%) fractional share of your one-third partnership interest in Marlboro Associates on the following terms and conditions:

1. Purchase Price. The purchase price shall be _____ Dollars (\$_____).
2. Acceptance. The offer shall not be valid until accepted by you in writing.
3. Deposit. A deposit of _____ Dollars (\$_____) is enclosed, which shall be held by you in a special account.
4. Payment of Balance. The balance of \$_____ shall be payable to you upon demand after offers to purchase shares of your partnership interest aggregating \$_____ have been accepted, and your demand shall contain notice to that effect.
5. Return of Deposit. If offers aggregating _____ Dollars (\$_____) shall not have been accepted within six (6) months from this date, this offer shall become null and void, my deposit shall be promptly returned to me without interest, and there shall be no further obligation on my part.
6. Representations of Offeror. I represent that I have received the prospectus of Marlboro Associates dated _____ [month] _____ [day] _____ [year] , and that I have read and am familiar with its contents. I further represent that, in executing this offer, I am relying solely on the contents of such prospectus and upon no other written or oral statements or representations. I am over the age of 21 years.

Very truly yours,

[name]

[address]

Accepted:

Joseph Weiss



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B. TENANCIES IN COMMON AND JOINT VENTURES

24-20 Current Legal Forms for Real Estate FORM 20.19

AUTHOR: by Stephen E. Pigott and Harold O. Maxfield, Jr.

FORM 20.19 Joint venture--division of proceeds of new mortgage--provisions for repayment

COMMENT

Any number of events during the course of a joint venture may make it desirable for the parties to enter into a new agreement. In this case, a new agreement is precipitated by the refinancing of the mortgage debt on the real estate owned by the joint venture. The proceeds of this refinancing are divided between the joint venturers, who at the same time define their respective obligations for the repayment of the new mortgage loan.

Owners of real property do not realize taxable gain or loss as a result of refinancing transactions, nor do such transactions affect the tax basis of the mortgaged property. However, if the mortgage debt exceeds the adjusted basis of the property, gain or loss may be realized in the debt transaction when the owners are relieved from repayment either upon a sale of the property or otherwise.

This agreement contains various provisions customarily found in real estate joint ventures. Apart from general management, the agreement specifically covers the collection of rents, the sharing of income, the payment of expenses, the division of future mortgage proceeds, and the buy-out of the interest of one of the venturers.

FORM

THIS AGREEMENT made _____ [month] _____ [day]
_____ [year] , by and between James C. Morris, of full age and a resident of
_____ [city] , _____ [state] ("Morris"), and Delta Land Company, Inc., a

corporation organized under the laws of the State of _____ [state] with its principal offices in _____ [city] , _____ [state] ("Delta").

WHEREAS, the parties are the joint owners, in division of a certain tract of land in _____ [city] , _____ [state] of real estate described on Exhibit A (the "tract of land"); and

WHEREAS, the parties own the tract of land in the proportions of an undivided one-quarter by Morris and an undivided three-quarters by Delta; and

WHEREAS, the parties desire to make a loan on the tract of land secured by a mortgage in favor of the Eastern Life Insurance Company; and

WHEREAS; the parties desire to cancel any and all previous agreements of joint venture or similar agreements between them with reference to the tract of land, and to substitute this agreement which sets forth fully their agreement.

NOW THEREFORE, the parties agree with each other as follows:

1. Termination of Prior Agreements. Upon the execution of this agreement all prior agreements between the parties with reference to the tract of land shall be null and void, and the joint ownership of the tract of land shall be governed by the terms of this agreement.

2. Percentages of Ownership. The parties own the tract of land in the proportions of an undivided one-quarter by Morris and an undivided three-quarters by Delta, irrespective of the fact that the title thereto may be registered in the name of one or both of the parties, or in the name of a joint venture composed of the parties.

3. Division of Mortgage Proceeds . One-fourth (1/4) of the proceeds from the mortgage loan being made by the Eastern Life Insurance Company shall be paid to Morris and the other three-fourths shall be paid to Delta. All expenses of procuring such loan, including closing costs and title insurance cost, shall be paid by the parties in the same proportion.

4. Repayment of Loan. The repayment of the mortgage loan shall be made by the parties in the same proportion in which the proceeds of the loan were received by each party, i.e., one-fourth (1/4) by Morris and three-fourths by Delta. Each party shall promptly pay his or its proportion of the repayment as the payments become due and payable in accordance with the terms of the loan.

5. Default in Repayment. Should either party fail to make his or its payment in repayment of the mortgage loan as the payment falls due, the other party shall have the right to make such payment on behalf of the defaulting party. In such event the party making the payment on behalf of the defaulting party shall be subrogated to all of the rights of the mortgage holder and shall have the right to bring suit or foreclosure proceedings, or both, against the defaulting party in the same manner in which the holder of the mortgage loan could do.

6. Management. The parties shall consult together with respect to the management, operation, maintenance, development, leasing, or other disposition of the tract of land. Morris shall act on behalf of the joint owners (the parties hereto) in collecting the rents and other proceeds of the tract of land and in paying all expenses incurred.

7. Collection of Rents. All rents and other proceeds from the tract of land shall be deposited for the account of the parties and disposed of in accordance with the terms of this agreement. The deposits may be kept in a special account in the name of Morris, who shall furnish an account of all receipts and expenditures to Delta annually, or more frequently, as requested by Delta.

8. Sharing of Income and Expenses. Each party shall share in the rents and other proceeds of the tract of land, arising

out of its management, operation, maintenance, development, leasing or other disposition (subject to the conditions set forth in Paragraph 9), and shall bear all expenses (which term shall include losses) incurred, in proportion to their respective interests in the tract of land.

9. Application of Rents and Other Proceeds. All rents and issues and other proceeds from the tract of land, to the extent available, shall be applied:

(a) to the payment of all current expenses of operation and maintenance, taxes, insurance, mortgage interest, amortization, reserves for all other expenses or liabilities that may arise, and other reserves as the parties may agree upon. Reserves shall be applied to the payment of liabilities for which they were set up; and

(b) any remaining balance, including reserves never utilized, to the parties in proportion to their respective interests in the tract of land.

10. Sharing Proceeds of New Loan or Sale. In the event that a loan (subject to the provisions of Paragraph 11) is obtained on the security of the tract of land in substitution or in addition to the loan being made by Eastern Life Insurance Company, or in the event of the sale or other disposition of the tract of land in whole or in part, then, upon the consummation of any loan or the sale or other disposition, as the case may be, the proceeds shall be applied as follows:

(a) to the discharge of any existing loan, if necessary;

(b) to the payment of the expenses incidental to the loan or the expenses of sale, and all unpaid expenses of operation or maintenance, as the case may be; and

(c) any remaining balance to the parties in proportion to their respective interests. If the proceeds of a sale or other disposition shall be in the form of a mortgage, securities, or other property, other than cash, such proceeds shall be divided between the parties in the same proportion as herein provided, whether by separate distributions of such mortgage, securities, or other property or by undivided interests therein, as they may agree upon.

11. Consent to Mortgage. Neither of the parties shall have the right to mortgage his or its undivided interest in the tract of land without the other party's written consent.

12. Tax Obligations. Each of the parties shall pay all taxes as may be applicable to moneys or proceeds paid or credited to him or it pursuant to this agreement, and neither of the parties shall be liable to any extent for such taxes of the other party.

13. Receipt of Offer of Sale. In the event that a bona fide offer is received for the purchase of all or any portion of the tract of land, and one party (the "selling party") desires that the offer be accepted and requests in writing that the other party (the "objecting party") join in the execution of a written acceptance of the offer, and the objecting party does not join in the written acceptance for a period of ten days after receipt of the written request, then the selling party shall have the right, at its or his sole election, during the period of thirty (30) days next following the expiration of the ten-day period, by written notice to the objecting party given within the thirty (30) days, to require the objecting party to purchase from the selling party the latter's entire interest in the tract of land, or the portion thereof, as the case may be, covered by the offer, at a price which shall be that proportion of the price contained in the offer as is equal to the selling party's proportionate interest in the tract of land, and upon the other terms covered by the offer, at a date ninety (90) days after the giving of the written notice. In the event that the selling party shall give notice requiring the objecting party to purchase, the objecting party shall be obligated to and shall purchase from the selling party the latter's entire interest in the tract of land or the portion thereof, as the case may be, covered by the offer, within the time limit, at the price and upon the other terms as provided in this agreement. If the purchase by the objecting party shall cover the selling party's entire interest in the tract of land, then upon the consummation of the purchase by the objecting party this

agreement shall terminate, except as to the distribution of any funds on hand belonging to the parties to this agreement and as to the payment of any liabilities and expenses payable under this agreement. If the purchase by the objecting party shall cover the selling party's interest in a portion of the tract of land, then upon the consummation of the purchase by the objecting party this agreement shall terminate only with respect to that portion, but shall continue in full force and effect in accordance with the terms of this agreement with respect to the remaining portion of the tract of land.

14. **Liability on Mortgage.** Since the tract of land is presently registered in the name of Morris, the note and the accompanying mortgage in favor of the Eastern Life Insurance Company has been or will be executed solely by Morris. Delta does hereby recognize and acknowledge that as joint owner of the tract of land it is liable for its proportionate share of the mortgage and for the repayment of the proportionate share, and Delta does hereby especially indemnify and agree to hold Morris harmless from any loss suffered by him by reason of his having legally assumed the responsibility for the repayment of the entire mortgage loan to the Eastern Life Insurance Company. Delta's liability, however, shall be limited to seventy-five percent (75%) of any loss so suffered by Morris.

15. **Notices.** All notices shall be given by registered or certified mail addressed to the parties at their respective addresses as shown below their respective signatures to this agreement. Either party may change the address by written notice sent by registered or certified mail to the other party.

16. **Assignment.** The interest of each party under this agreement shall not be assignable without the other party's written consent.

17. **Arbitration.** Any controversy or claim arising under Paragraphs 6, 7, 8, 9, or 13 of this agreement shall, upon the request of either party, be settled by arbitration. Any arbitration shall be carried out in accordance with the provisions of the Louisiana Arbitration Law, and any arbitration shall be had and determined within the _____ [city] , _____ [state] .

18. **Entire Agreement.** This agreement supersedes all agreements previously made between the parties relating to its subject matter. There are no other understandings or agreements between them.

19. **Non-waiver.** No delay or failure by either party to exercise any right under this agreement, and no partial or single exercise of that right, shall constitute a waiver of that or any other right, unless otherwise expressly provided herein.

20. **Headings.** Headings in this agreement are for convenience only and shall not be used to interpret or construe its provisions.

21. **Governing Law.** This agreement shall be construed in accordance with and governed by the laws of the _____ [state] .

22. **Counterparts.** This agreement may be executed in two or more counterparts, each of which shall be deemed an original but all of which together shall constitute one and the same instrument.

23. **Binding Effect.** The provisions of this agreement shall be binding upon and inure to the benefit of each of the parties and their respective heirs, legal representatives, successors, and assigns.

In witness whereof the parties have executed this agreement in duplicate original in _____ [city] , _____ [state] , on the day and date first hereinabove written.

James C. Morris

[*address*]

DELTA LAND COMPANY, INC.

By: _____

[*name and title*]

[*address*]



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B. TENANCIES IN COMMON AND JOINT VENTURES

24-20 Current Legal Forms for Real Estate FORM 20.20

AUTHOR: by Stephen E. Pigott and Harold O. Maxfield, Jr.

FORM 20.20 Joint venture--simple joint venture agreement to construct a model home

COMMENT

This joint venture agreement is designed to be very simple agreement. It specifically sets forth the role of each party. As the venture is very limited in scope and duration, and each party has a very specific roll, it is unlikely that the joint venture would be considered a partnership for federal income tax purposes.

FORM

_____ [month] _____ [day], _____ [year]

Mr. Gillian Smith, President
Smith Design & Construction, Inc.

_____ [address]
_____ [city] , _____ [state]

Dear Mr. Smith:

This letter is intended to set forth the agreement between Smith Design & Construction, Inc. ("Smith") and Dream Builders, Inc. ("Dream") relating to the construction of a model home. The model home will be constructed on a joint venture basis consisting of the following terms:

1. Purpose. Smith and Dream shall be joint venturers for the purpose of constructing and selling a model home on lot No. 1 (the "Lot") in the _____ subdivision located in the City of _____ [city] , _____ [county] County, _____ [state] .

2. Name. The joint venture will be conducted in the name of "Dream Builders." Smith acknowledges that Dream has a propriety interest in the use of the name "Dream Builders" and that Dream is granting to the joint venture a limited license to use the name in the conduct of the joint venture's business, and that Smith shall have no right to use the name "Dream Builders" except in connection with the joint venture.

3. Duties of Smith. Smith shall perform the following duties in connection with the joint venture:

A. Supervise and manage the day-to-day activities associated with the construction of the model home, including, without limitation, the scheduling of delivery of materials and subcontractors required to construct the model home, supervising the activities of the subcontractors and obtaining the necessary permits and consents.

B. Provide the construction and design expertise necessary for the construction of the model home.

4. Duties of Dream. Dream shall perform the following duties in connection with the joint venture:

A. Maintain the books and records of the joint venture. Such books and records shall be available at all reasonable times for inspection and copying by Smith at the principal place of business of Dream (which shall also be the principal place of business of the joint venture).

B. Pay on behalf of the joint venture (from the proceeds of the sale of the home or from funds advanced to the joint venture by Dream) all reasonable costs and expenses incurred by the joint venture in furtherance of the purpose of the joint venture.

C. Enter into contracts on behalf of the joint venture including, without limitation, contracts for subcontractors and materials, contracts for the sale of the model home and contracts with real estate brokers for listing the model home for sale. Prior to entering into a contract on behalf of the joint venture, Dream shall consult with Smith regarding the advisability or necessity of such contract.

D. Use its best efforts to acquire the Lot for the benefit of the joint venture. If Dream shall not be able to acquire the lot within one (1) month after the date hereof, then this joint venture shall terminate. The lot shall be purchased in the name of Dream.

5. Division of Profits. Upon sale of the model home, the net profits of the joint venture shall be divided equally between Smith and Dream. For purposes of this joint venture, the term net profits shall mean the gross sales price received for the model home, less the costs and expenses incurred in constructing and selling the model home. Included in the costs and expenses shall be the cost of the Lot, plus an interest factor of ten percent (10%) per annum from the date of acquisition payable to Dream until the lot is sold.

6. Division of Losses. If the computation described in Paragraph 5 results in a negative balance, each party shall be responsible for an equal share of the loss.

7. Limits of the Venture. The relationship between Smith and Dream is limited to the undertaking described herein. Nothing herein shall be construed to create a general partnership between the parties or to authorize either party to act as general agent for the other.

8. Non-assignability. Neither party shall have the right to assign their interest hereunder (including their right to receive

the net profit hereunder).

9. Miscellaneous

A. The parties acknowledge that it is their present intention to enter into a more permanent relationship for the construction of additional homes in the event this venture is successful and the parties establish a satisfactory working relationship.

B. The parties acknowledge that the model home will be used as a model home for a period of at least six (6) months following the completion of its construction and that as a result, any profit from the joint venture may be delayed for that period.

C. All leads received by either party for the construction of a new home as a result of the joint venture shall be the property of the joint venture and upon termination of the joint venture shall become the sole property of Dream.

D. The parties will use their best efforts to complete the model home within sixty (60) days of the acquisition of the Lot.

E. The parties agree that they will jointly determine the design of the model home; however, if the parties cannot agree prior to the time that the Lot is acquired, then this joint venture shall terminate, and the Lot shall belong solely to Dream.

If our agreement is accurately set forth in this letter, please have an authorized officer of Smith execute the enclosed copy of the letter and return it to the undersigned.

Very truly yours,

DREAM BUILDERS, INC.

By: _____

[name and title]

Accepted and agreed to this _____ [day] day of _____ [month],
_____ [year].

SMITH DESIGN & CONSTRUCTION, INC.

By: _____

[name and title]



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B. TENANCIES IN COMMON AND JOINT VENTURES

24-20 Current Legal Forms for Real Estate FORM 20.20A

AUTHOR: by Stephen E. Pigott and Harold O. Maxfield, Jr.

FORM 20.20A Tenant in Common Agreement (TIC)

COMMENT

This agreement is a simple tenant-in-common (TIC) agreement designed to comply with the IRS's requirements regarding TIC ownership. Generally, a TIC is a syndicated tenant-in-common real estate investment. In the typical scenario, an investor sells real estate and wants to find replacement property to a complete like kind exchange in accordance with *Section 1031 of the Internal Revenue Code*. Instead of purchasing one hundred percent of the replacement property, the investor purchases a small percentage of the replacement property. The investor defers the tax impact of the sale and does not have the implications of being the sole landlord. Most TIC offerings involve strong national tenants, include prearrange financing, if necessary, and/or include a management contract. The purchase of a TIC interest closely represents the purchase of a limited partnership interest in a typical real estate syndication. The main difference is that the investor owns his or her interest in the property. Also, there may be a securities law implication to the offering of a TIC as it has the look and feel of a security.

Additionally, the IRS in *Rev. Proc. 2002-22* sets forth numerous requirements with which a TIC must comply in order to not be classified as a partnership. The property must not have more than 35 owners. The owners must own legal title to the property. Most TICs utilize a single member entity that is disregarded for tax purposes. That is, the investor uses a single member limited liability company to own the investment. There cannot be any special allocations. The sponsor, organizer, and/or manager cannot participate in the success of the venture or receive a bonus. The manage agreement must be renewable at least annually and it must be approved by the owners. The management agreement must, at a minimum, disburse revenue quarterly. The management fees must not be contingent upon the success of the venture or upon a percentage of the rents. The

investors cannot waive their right to file a partition action, except as may be required by the lender. The lender cannot be affiliated with an owner, manager or a tenant. The parties cannot file a partnership return. Generally, TIC agreements with run with the land and will be binding upon subsequent owners. The following joint ownership agreement is intended to be used in a simple TIC arrangement.

FORM

THIS AGREEMENT entered into on _____ [month] _____ [day], _____ [year], between those parties which became signatories by executing a counter part of the agreement.

WHEREAS, the parties are purchasing as tenants in common the property described in Exhibit A attached hereto (the "Property").

WHEREAS, each of the parties is purchasing the interest set forth below their signature.

WHEREAS, the parties desire to provide for the management and disposition of such Property.

IT IS, THEREFORE, AGREED AS FOLLOWS:

1. Down Payment and Title. The down payment, including closing costs with respect to the purchase of the Property shall be contributed equally by the parties in accordance with their respective ownership interest. Title to the Property shall be conveyed to each party as tenants in common.
2. Subsequent Contributions. Subsequent contributions of principal, interest, taxes, and all other costs or expenses on such Property shall be paid equally by each party in accordance with their ownership interest.
3. Sale of Property. Each owner shall have the right to sell his or her interest in the property at any time, subject to the terms and conditions of this Agreement. Such sale must be for the entire interest and to only one purchaser. Upon a sale of an interest in the property, the seller and buyer shall notify the management company and the other owners.
4. Management. All matters relating to the management and sale of the Property shall be decided by the owners. The owners agree to cooperate and reasonably designate a manager of the property at least annually.
5. Ownership and Restrictions. There shall be no more than thirty-five (35) owners of the property and in no event shall an owner subdivide or sell any interest in the property other than the entire interest. No party shall sell, transfer, mortgage, or otherwise dispose of, or encumber his undivided interest in such Property without first giving written notice to the other parties of his intention to do so. The notice shall set forth the terms on which the offering party proposes to sell, transfer, mortgage, or otherwise dispose of or encumber his interest, and the identity of the person or persons to whom it is proposed to sell, transfer, or encumber such interest. The other party shall have ten (10) days after the giving of notice in which to elect to acquire the interest on the same terms and conditions that offering party desires to purchase. If the party to whom the notice is given does not elect to acquire the interest on the terms provided herein within the ten-day period, then the party giving the notice shall have the right to sell, transfer, mortgage, or otherwise dispose of, or encumber his interest, on the same terms as provided in the notice, for a period of thirty (30) days after the expiration of the ten-day period. After the expiration of the 30-day period, the party giving the notice shall not sell, transfer, mortgage, or otherwise dispose of, or encumber his interest without again complying with the terms of this paragraph.
6. Notices. Any and all notices and demands given under this agreement shall be given by registered or certified mail,

return receipt requested, postage prepaid, addressed to the parties at the last known address of such party.

7. Binding Effect. This agreement shall be binding upon and shall inure to the benefit of each of the parties, and their respective heirs, executors, administrators, legal representatives, successors, and assigns.

8. Entire Agreement. This agreement supersedes all agreements previously made between the parties relating to its subject matter. There are no other understandings or agreements between them.

9. Non-waiver. No delay or failure by either party to exercise any right under this agreement, and no partial or single exercise of that right, shall constitute a waiver of that or any other right, unless otherwise expressly provided herein.

10. Headings. Headings in this agreement are for convenience only and shall not be used to interpret or construe its provisions.

11. Governing Law. This agreement shall be construed in accordance with and governed by the laws of the State of _____.

12. Counterparts. This agreement may be executed in two or more counterparts, each of which shall be deemed an original but all of which together shall constitute one and the same instrument.

Date

By: _____

Title: _____

Printed Name: _____

Mailing Address: _____

Email Address: _____

Telephone No.: _____

Representative Contact information, if any



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B. TENANCIES IN COMMON AND JOINT VENTURES

24-20 Current Legal Forms for Real Estate FORM 20.20B

AUTHOR: by Stephen E. Pigott and Harold O. Maxfield, Jr.

FORM 20.20B TIC Deed

COMMENT

This is a simple deed intended to be used to create a TIC interest in a property.

FORM

[Insert Name/Grantor], a limited liability company ("**Grantor**"), for the consideration of Ten and 00/100 Dollars (\$10.00) received to the full satisfaction of:

[Insert Name/Grantee], a limited liability company, as to an undivided 3% interest;

[Insert Name/Grantee], a limited liability company, as to an undivided 3% interest;

[Insert Name/Grantee], a limited liability company, as to an undivided 3% interest;

[Insert Name/Grantee], a limited liability company, as to an undivided 3% interest;

[Insert Name/Grantee], a limited liability company, as to an undivided 3% interest;

[Insert Name/Grantee], a limited liability company, as to an undivided 3% interest;

[Insert Name/Grantee], a limited liability company, as to an undivided 3% interest;

[Insert Name/Grantee], a limited liability company, as to an undivided 2% interest:

[Insert Name/Grantee], a limited liability company, as to an undivided 2% interest;

[Insert Name/Grantee], a limited liability company, as to an undivided 2% interest;

[Insert Name/Grantee], a limited liability company, as to an undivided 2% interest;

(collectively, "**Grantee**"), hereby grant, with limited warranty covenants, unto the said Grantee, its successors and assigns, all as tenants in common in the percentages set forth above, the real property described on **Exhibit A** attached hereto and made a part hereof (the "**Property**").

TO HAVE AND TO HOLD the above granted Property, with the appurtenances thereunto belonging, unto the said Grantee, its successors and assigns forever, subject to the following: (a) real estate taxes and assessments that are a lien but not yet due and payable; (b) applicable zoning laws, codes, and rulings; and (c) those matters set forth on **Exhibit B** attached hereto and made a part hereof.

Prior Deed Reference: _____

Tax Mailing Address: _____

Permanent Parcel Numbers: _____

IN WITNESS WHEREOF, Grantors have executed this Limited Warranty Deed this _____ day of _____, ____.

_____,
a limited liability company

By:

Printed Name: _____

Title:

Printed Name:

Printed Name: _____

[Comply with execution and recording standards of location of property]



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C. PARTNERSHIPS

24-C Current Legal Forms for Real Estate Scope

AUTHOR: by Stephen E. Pigott and Harold O. Maxfield, Jr.

Scope

Note: Please refer to Chapter 1 in Volume 1 of Current Legal Forms with Tax Analysis for an additional discussion of partnerships and for a number of other forms.



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C. PARTNERSHIPS

24-20 Current Legal Forms for Real Estate FORM 20.21

AUTHOR: by Stephen E. Pigott and Harold O. Maxfield, Jr.

FORM 20.21 General partnership--real estate operation

COMMENT

The choice of the partnership as the form in which to carry on a real estate business depends upon a combination of tax and nontax factors. The principal nontax factor is the rule which imposes individual responsibility upon each of the partners for all of the liabilities of the partnership. This is a major deterrent to the use of the partnership in any business enterprise. However, the ownership of real estate is one of the areas in which this problem of unlimited liability has frequently been solved by the use of the limited liability company. A limited liability company may be treated as a partnership for federal income tax purposes, but has the corporate characteristic of a limited liability for its owners. That is, absent extraordinary circumstances, the owners of a limited liability company are not personally liable for the debts of the company. Furthermore, a number of states allow a partnership to make an election to be treated as a partnership to make an election to be treated as a partnership having limited liability. The laws in each state vary widely on this issue. However, the typical statute requires the partnership to file an election with the Secretary of State's office. The partners of a partnership having limited liability do not have personal liability for acts or omissions of the other parties unless the partner has direct supervision or control over the negligent partner. However, under the typical statutory scheme, a partner would still be liable for the contractual debts and obligations of the partnership.

Comparison of partnership and corporate taxation:

The problem of unlimited liability may be solved by the use of the corporate form. The choice will often depend upon the potential impact of the income tax, by comparing the rate of tax levied upon corporations with the rate of tax on individual partners. A partner is taxed each year on his share of

partnership earnings, whether or not distributed to him; a shareholder is taxed only when corporate income is distributed to him. A corporation may offer advantages if the shareholders are high bracket taxpayers or if the income is to be retained for further expansion, especially if it will not be distributed until liquidation of the corporation. On the other hand, corporate income faces a double tax: the corporate rate plus the tax at individual rates on dividend distributions. Thus, if corporate income is to be frequently distributed the partnership form may be preferable. The shareholders and the corporation make an S-election, then this difference between a corporation and a partnership is somewhat mitigated. For further discussion of comparison of partnership and corporate taxation, see TB § 20.05[4], at the beginning of this chapter.

Passive activity loss limitation:

Individuals, including partners or limited partners, are limited in the tax use of losses and expenses from passive activities. Passive activity losses (including expenses) can only be used to offset income from other passive activities of the taxpayer. Unused passive activity losses are carried forward indefinitely to offset future passive activity income or are allowed on a complete taxable disposition of the passive activity. Passive activities include a trade or business, or activity for the production of income, in which the taxpayer does not materially participate.

Generally speaking, rental real estate activity is considered to be a passive activity. IRC § 469(c)(2). Therefore, deductions and credits from rental activities can only offset income from other passive activities. Such deductions and credits *cannot* be deducted from nonpassive income, such as wages, dividends, interest, etc. However, there are two major exceptions to this general rule.

Certain eligible taxpayers who *materially* participate in rental real estate activities can deduct losses from such activities against nonpassive income. These eligible taxpayers include individuals and closely-held C corporations that meet special eligibility requirements. IRC § 469(c)(7). Second, an individual who owns at least a 10-percent interest and *actively* participates in rental real estate activity is permitted to offset up to \$25,000 of passive activity losses against his nonpassive income. IRC § 469(i). For an in-depth discussion of the passive loss rules, see TB § 20.06[3].

Elements of agreement:

In general, a partnership agreement should cover at least the following points: (1) name and business; (2) term; (3) capital; (4) profit and loss; (5) distribution of positive cash flow; (6) salaries and drawings; (7) interest on capital; (8) management, duties, and restrictions; (9) banking; (10) books; (11) voluntary liquidation; (12) retirement; and (13) death. The forms in this group are designed to illustrate the special problems encountered in drafting partnership and limited partnership agreements in the real estate area.

Partnership tax aspects:

A partnership as such is not subject to the income tax. Fundamentally, the partnership entity is disregarded and only the partners in their individual capacities are liable for the payment of income tax. However, the partnership is the basic accounting unit and must file an annual information return. The taxable income of the partnership is computed in the same manner as that of an individual, except that certain items of income and deduction must be separately itemized, and except that the standard deduction, the deduction for personal exemptions, the deduction for foreign taxes, the charitable contribution deduction, the net operating loss deduction, and other

itemized deductions applicable only to individuals, such as child care and medical expenses, are not allowed to the partnership. For tax treatment of partnerships, see TB § 20.05.

Partnership and partner tax returns:

The partnership, in its return, must separately state, and the partner must separately take into account on his return, his distributive shares of certain items including gains and losses from the sale or exchange of property; charitable contributions; dividend income; partially tax-exempt interest; and miscellaneous items required by the regulations.

Each partner's share of income is derived from the partnership return, with the character of each item of income, gain, loss, deduction, or credit retaining the same character as it had for the partnership. However, the tax treatment of items of partnership income, loss, deductions, and credits are determined at the partnership level on a unified basis rather than on the basis of individual partner treatment. In addition, each partner is required to treat partnership items on his return consistently with the treatment of the items on the partnership return. If the treatment is inconsistent and the consistency requirement is requested to be waived, the partner must file a statement identifying the inconsistency. Unless the consistency requirement is waived, adjustments will be made to conform the partner's treatment of the items with the treatment on the partnership return. The consistency rules do not apply to small partnerships, i.e., a partnership of ten or fewer partners who are individuals or estates, provided that each partner's share of any partnership item is the same as his distributive share of every other partnership item. A husband and wife are treated as one partner in a small partnership. For taxation of partnerships and partners, see TB § 20.06[1].

Partner's distributive share:

Each partner must include in his individual return his distributive share of each item of partnership income, gain, loss, deduction, or credit. The partner's distributive share is determined by the partnership agreement. If the agreement does not make such an allocation, or if the allocation does not have a "substantial economic effect," the partner's distributive share is determined in accordance with his interest in the partnership, taking into account all facts and circumstances. See TB § 20.06[1].

Real estate subject to "at risk" rules:

Holding real property is an activity which is not exempt from the "at risk" loss deduction limitations. A taxpayer cannot deduct losses derived from an activity which exceed the amount at risk by the taxpayer. The amount at risk is the amount of money and property contributed by the taxpayer to the activity, and borrowed amount for which the taxpayer is personally liable or has pledged property, other than property used in the subject activity, as security for the loan. The amount of nonrecourse financing is not at risk. Qualified nonrecourse financing however is treated as an amount at risk. Generally, qualified nonrecourse financing is amounts borrowed from an institutional lender, government entity, or an amount insured by a government entity. For further discussion of the "at risk" loss deduction limitation with respect to real estate, see TB § 20.06[2]. For a detailed discussion of the "at risk" rules, see The Tax Background to Chapter 1, "Partnerships," in Volume 1.

Partnership provisions:

This form contains the basic provisions of a general partnership agreement. The real estate activity of the partnership is principally reflected in the provisions dealing with the character of the business, the capital, and problems of management. Initially the partnership capital will consist of a contract to purchase real property which is to be contributed to the partnership by the partners. The partners will also contribute the cash required to close the contract. Additional funds, as required, will be provided equally by the partners.

All decisions with respect to management of the property require the consent of both partners. The partnership may be terminated by mutual consent. The death or retirement of a partner will terminate the partnership business, unless the remaining partner exercises an option to purchase the deceased or retiring partner's interest. However, a partnership having only one member will be considered a sole proprietorship for federal income tax purposes.

FORM

THIS AGREEMENT made _____ [month] _____ [day] , _____ [year] , by and between Harry James have a mailing address of _____ [address] , _____ [city] , _____ [state] , and John Gable having a mailing address of _____ [address] , _____ [city] , _____ [state] .

1. Name and Business. The parties hereby form a partnership under the name of Smith Realty Co. to own, build upon, alter, repair, rent, lease, and otherwise deal with real and personal property, of any kind or description, including the lands and premises known as _____ [address] , _____ [city] , _____ [state] (the "Property"). The principal office of the business shall be in _____ [city] , _____ [state] .

2. Term. The partnership shall begin on as of the date hereof, and shall continue until terminated as herein provided.

3. Capital.

(a) Contract and Closing Costs. The capital of the partnership shall consist initially of a contract to purchase the Property which the partners have entered into and which they agree to contribute to the partnership. The contract is dated _____ [month] _____ [day], _____ [year], and is to be closed _____ [month] _____ [day], _____ [year]. A copy of the contract is attached as Exhibit A. The partners agree to contribute equally Forty Thousand Dollars (\$40,000) in cash required at the closing. Title to the Property shall be taken in the name of the partnership.

(b) Additional Contributions. If at any time or times the partners determine that the partnership capital should be increased, the additional capital required shall be contributed by the partners equally.

(c) Capital Accounts. A separate capital account shall be maintained for each partner. Neither partner shall withdraw any part of his capital account. If the capital account of a partner becomes impaired, his share of subsequent partnership profits shall be first credited to his capital account until that account has been restored, before such profits are credited to his income account.

4. Profit and Loss. The net profits and losses of the partnership shall be divided and borne equally between the partners. A separate income account shall be maintained for each partner. Partnership profits and losses shall be charged or credited to the separate income account of each partner. If a partner has no credit balance in his income account, losses shall be charged to his capital account.

5. Salaries and Drawings. Neither partner shall receive any salary for services rendered to the partnership. Each partner may, from time to time, withdraw the credit balance in his income account. No additional share of profits shall inure to either partner by reason of his capital or income account being in excess of the capital or income account of the other.

6. Interest. No interest shall be paid on the initial contributions to the capital of the partnership or on any subsequent contributions of capital.

7. Management, Duties, and Restrictions.

(a) Authority. The consent of both partners shall be required with respect to the management, conduct, and operation of the partnership business and in all matters, including, but not limited to, full power to sell and convey the Property on such terms as they may determine, to lease the Property or any part of it on such terms and for such periods as they may determine, to mortgage the Property, whether the mortgage is a first or second mortgage lien, to make all agreements modifying any lease or mortgage, and to borrow or lend money on behalf of the partnership.

(b) Competition. Each partner may have other business interests and may engage in any other business or trade, profession, or employment whatsoever, for his own account, and shall not be required to devote his full time effort to the business of the partnership.

8. Banking. All funds of the partnership shall be deposited in its name in any checking account or accounts as the partners shall designate. All withdrawals shall be made upon checks signed by either partner.

9. Books. The partnership books shall be maintained at its principal office, and each partner shall at all times have access thereto. The fiscal year of the partnership shall be the calendar year. The books shall be closed and balanced at the end of each fiscal year. An annual audit shall be made as of the closing date.

10. Voluntary Termination. The partnership may be dissolved at any time by agreement of the partners, in which event the partners shall proceed with reasonable promptness to sell the real and personal property owned by the partnership and to liquidate its business. The partnership shall be dissolved also by the sale of all real property owned by it. Upon dissolution, the assets of the partnership business shall be used and distributed in the following order: (a) to pay or provide for the payment of all partnership liabilities and liquidating expenses and obligations (the partners may establish a reserve for contingent liabilities); (b) to equalize the partners' income accounts; (c) to discharge the balance of the partners' income accounts; (d) to equalize the partners' capital accounts; and (e) to discharge the balance of the partners' capital accounts.

11. Withdrawal.

(a) Notice, purchase option. Either partner shall have the right to withdraw from the partnership at the end of any fiscal year. Written notice of intention to retire shall be served upon the other partner at the office of the partnership at least three months before the end of the fiscal year. The withdrawal of either partner shall have no effect upon the continuance of the partnership business. The remaining partner shall have the right either to purchase the withdrawing partner's interest in the partnership or to terminate and liquidate the partnership business. If the remaining partner elects to purchase the interest of the retiring partner, he shall serve notice in writing of such election upon the withdrawing partner at the office of the partnership within two (2) months after receipt of his notice of intention to retire.

(b) Purchase Price. If the remaining partner elects to purchase the interest of the retiring partner, the purchase price and method of payment shall be the same as stated in Section 12 with reference to the purchase of a decedent's interest in the partnership.

(c) Liquidation. If the remaining partner does not elect to purchase the interest of the withdrawing partner, the partners shall proceed with reasonable promptness to sell the real and personal property owned by the partnership and to liquidate its business. The procedure as to liquidation and distribution of the assets of the partnership business shall be the same as stated in Section 10 with reference to voluntary termination.

12. Death.

(a) Purchase Option. Upon the death of a partner, the surviving partner shall have the right either to purchase the interest of the decedent in the partnership or to terminate and liquidate the partnership business. If the surviving partner elects to purchase the decedent's interest, he shall serve notice in writing of such election, within three months after the death of the decedent, upon the decedent's executor or administrator, or, if at the time of such election no legal representative has been appointed, upon any one of the decedent's known legal heirs at such heir's last known address.

(b) Purchase Price. If the surviving partner elects to purchase the decedent's interest in the partnership, the purchase price shall be equal to the decedent's capital account at the date of his death plus his income account as at the end of the prior fiscal year, increased by his share of partnership profits or decreased by his share of partnership losses for the period from the beginning of the fiscal year in which his death occurred until the end of the calendar month in which his death occurred, and decreased by withdrawals charged to his income account during such period. The purchase price, with interest at _____ percent (_____ %) shall be paid in four semiannual installments beginning six months after the end of the calendar month in which the decedent's death occurred.

(c) Liquidation. If the surviving partner does not elect to purchase the decedent's interest in the partnership, he shall proceed with reasonable promptness to sell the real and personal property owned by the partnership and to liquidate its business. The surviving partner and the estate of the deceased partner shall share equally in the profits and losses of the business during the period of liquidation, except that the decedent's estate shall not be liable for losses in excess of the decedent's interest in the partnership at the time of his death. No compensation shall be paid to the surviving partner for his services in liquidation. Except as otherwise stated in this agreement, the procedure for liquidation and distribution of the assets of the partnership shall be the same as stated in Section 10 with reference to voluntary termination.

13. Arbitration. Any controversy or claim arising out of or relating to this contract, or any breach thereof, shall be settled by arbitration in the _____ [city] , _____ [state] accordance with the governing rules of the American Arbitration Association. Judgment upon the award rendered may be entered in any court of competent jurisdiction.

14. Entire Agreement. This agreement supersedes all agreements previously made between the parties relating to its subject matter. There are no other understandings or agreements between them.

15. Notices. All notices under this agreement shall be in writing and delivered personally or mailed by certified mail, postage prepaid, addressed to the parties at their last known addresses.

16. Non-waiver. No delay or failure by either party to exercise any right under this agreement, and no partial or single exercise of that right, shall constitute a waiver of that or any other right, unless otherwise expressly provided herein.

17. Headings. Headings in this agreement are for convenience only and shall not be used to interpret or construe its provisions.

18. Governing Law. This agreement shall be construed in accordance with and governed by the laws of the State of _____ [state] .

19. Counterparts. This agreement may be executed in two or more counterparts, each of which shall be deemed an

original but all of which together shall constitute one and the same instrument.

20. Binding Effect. Except as otherwise expressly provided herein, the provisions of this agreement shall be binding upon and inure to the benefit of each of the parties and their respective legal representatives, successors, and assigns.

In witness whereof the parties have signed this agreement.

Harry James

John Gable



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Current Legal Forms for Real Estate
Chapter 20 REAL ESTATE ENTITIES
Part IV. Forms
C. PARTNERSHIPS

24-20 Current Legal Forms for Real Estate FORM 20.22

AUTHOR: by Stephen E. Pigott and Harold O. Maxfield, Jr.

FORM 20.22 General partnership--contribution of asset in kind

COMMENT

The contribution to a partnership of real property by one partner and cash by another presents a number of tax ramifications which must be clearly understood before an agreement can be drafted that will accurately accommodate the intention of the partners. Aside from the necessity of assigning a value to the real property to be contributed, the partners may find it desirable to make special provisions with respect to the allocation of depreciation between themselves and with respect to the distribution of gain or loss on any disposition of such property. Allocation of partnership items, however, must satisfy the requirement that they have substantial economic effect. Allocations lacking substantial economic effect or established primarily for tax avoidance purposes generally will not be recognized for tax purposes. For discussion of contributions to the partnership, including the partner's tax basis of contributed property, see TB § 20.06[1][c] at the beginning of this chapter.

Tax basis of contributed property:

The tax aspects can be best presented by a simple illustration. Suppose in the formation of a 50-50 partnership, partner A contributes a building which has an adjusted tax basis to him of \$100,000, but has a value at the time of the contribution of \$150,000. Partner B is willing to accept the asset at the value of \$150,000, and makes a matching contribution of \$150,000 in cash. The statute provides that no gain or loss is to be recognized to a partnership or to any of its partners in the case of a contribution of property to the partnership in exchange for an interest in the partnership. It provides also (a) that the tax basis of the partnership interest acquired by the contributing partner is the adjusted tax basis of the contributed property, and (b) that the tax basis of a

contributed asset in the hands of the partnership is the adjusted tax basis in the hands of the contributing partner. So far as the partnership is concerned, this will require that cost recovery or depreciation and gain or loss be computed on the tax basis of \$100,000, although the partners as between themselves have agreed that the contributing partner shall be credited with \$150,000 as a capital contribution.

Economic effect of tax basis carryover:

In the computation of cost recovery in this example, the allowable tax basis will be \$100,000. Partner B's share of the cost recovery deduction will not be as large as it would have been if the partnership had itself purchased the asset for \$150,000. Should partner A compensate partner B for this "loss" of cost recovery allowances? The same type of problem arises on a sale. Suppose the asset is sold for \$160,000 at a time when its tax basis after cost recovery allowances is \$90,000 (\$100,000 basis to the partnership minus \$10,000 cost recovery allowance). How is the \$70,000 gain to be allocated between the partners? Generally, the first \$50,000 of gain should be reported by partner A, and the balance allocated between the partners in the ratio in which they share gains. Suppose, on the other hand, the asset is sold for \$80,000 at a time when its tax basis after cost recovery is \$90,000. Here, partner B's entire share of his "loss" is not deductible, since the partnership has sustained a loss of only \$10,000. Should partner A compensate partner B for the unavailable portion of the latter's tax loss? Similar problems exist where the asset has a tax basis in the hands of the contributing partner which is more than the value at which it is accepted as a capital contribution.

Allocation of gain on sale of property:

Income, gain, loss, and deductions for property contributed to the partnership by a partner is shared among the partners under a method which takes into account the difference between the basis of the property contributed to the partnership, i.e., the contributing partner's adjusted basis, and its fair market value at the time of contribution.

Inaccurate basis calculations:

It is conceivable that the basis of an asset may, upon examination by the Service, turn out to be different than that represented by the contributing partner, thus altering the cost recovery or depreciation deduction available to the partnership and gain or loss on any disposition. It may be wise to include an indemnification by the contributing partner to cover the possibility that the adjusted basis will be found to be less than represented. Another alternative is a provision that if the basis of the property turns out to be less than represented, any resulting increase in the taxable income of the partnership is to be allocated to the partner who contributed the property.

Alternate sale or lease of property to partnership:

If a partner sells property to the partnership instead of contributing it, he has taxable gain or loss. Normally, the parties have it within their own control to determine which set of tax consequences will follow. The "sale" technique creates the simplest tax picture and may result in the most equitable tax distribution between the partners. However, where the contribution of real property to a partnership is utilized as a means of obtaining mortgage loans or other funds for further operations without incurring tax, the sale device may not be attractive. Another alternative is for the partner to retain title to the property under a lease with the partnership, with rent approximating the cost recovery or depreciation. This, too, is a method for simplifying the tax

structure. The partner's rent income would be offset by the cost recovery or depreciation, and the partnership would take a deduction for the rent. For sale or lease of property by a partner to a partnership, see TB § 20.06[1][d].

Passive activity loss limitations:

Individuals, including partners, are limited in the tax use of losses, including expenses, from passive activities. Generally, passive activity losses can only offset income from the same or other passive activities. Unused losses are carried forward indefinitely to offset passive activity income in the following years, or until the activity is completely disposed of in a taxable disposition.

Generally speaking, rental real estate activity is considered to be a passive activity. IRC § 469(c)(2). Therefore, deductions and credits from rental activities can only offset income from other passive activities. Such deductions and credits *cannot* be deducted from nonpassive income, such as wages, dividends, interest, etc. However, there are two major exceptions to this general rule.

Certain eligible taxpayers who *materially* participate in rental real estate activities can deduct losses from such activities against nonpassive income. These eligible taxpayers include individuals and closely-held C corporations that meet special eligibility requirements. IRC § 469(c)(7). Second, an individual who owns at least a 10-percent interest and *actively* participates in rental real estate activity is permitted to offset up to \$25,000 of passive activity losses against his nonpassive income. IRC § 469(i). (See the TB § 20.06[3]).

Fiscal year and tax year:

This agreement provides that the partnership's taxable year will be the calendar year. A partner's income is his distributive share of the partnership income for the taxable year of the partnership ending with or within his own taxable year. A partnership's taxable year must be the calendar year unless the Service is satisfied that there is a business purpose for a different taxable year. The deferral of income to partners is not considered a business purpose. An election is available to a partnership to adopt or change to a taxable year with a limited deferral period. This election is only available if the deferral period of the taxable year elected is not longer than the shorter of three months or the deferral period of the taxable year being changed.

FORM

THIS AGREEMENT made _____ [month] _____ [day] ,
_____ [year] , among James Adams, Charles Stone, and George Brown.

1. Name and Business. The parties hereby organize a partnership to own, build upon, alter, repair, rent, lease, subdivide, sell, and otherwise deal with real and personal property, particularly the real property to be contributed as capital, as described in Paragraph 3.

2. Term. The partnership shall begin on _____ [month] _____ [day] ,
_____ [year] , and continue until _____ [month] _____ [day] ,
_____ [year] , unless sooner terminated by unanimous decision of the partners or by the sale of the real property to be contributed as capital, as described in Paragraph 3.

3. Capital.

(a) The original capital of the partnership shall consist of One Million Eight Hundred Thousand Dollars (\$1,800,000) cash, to be contributed equally by Adams and Stone, and a fee interest in the land and a building at _____ [address], _____ [city], _____ [state], (the "property"), to be contributed by Brown, and to be deemed to have a value of Nine Hundred Thousand Dollars (\$900,000) for purposes of this agreement. The partners, by mutual agreement, may at the end of any partnership year transfer a portion of partnership profits to the capital of the partnership. No partner shall withdraw any part of his original or additional capital account without the written consent of the other partners. The capital accounts of the partners shall be maintained in the proportions in which they share in the partnership profits and losses.

(b) Brown warrants that he has full power to convey the property and that it is free and clear of all liens and encumbrances except those set forth in Schedule A annexed hereto and made a part hereof. The following items shall be apportioned between Brown and the partnership as of _____ [month] _____ [day], _____ [year]: rents, interest on mortgages, premiums on existing transferable insurance policies, taxes, sewer rents, and water charges.

4. Profit and Loss. The net profits or net losses of the partnership shall be distributed or charged to the partners in equal proportions, and shall be credited or charged, as the case may be, to the drawing account of each partner.

5. Salaries and Drawings. No partner shall receive any salary for services rendered to the partnership. The partners shall have equal drawings in such amounts as they may agree upon. If at the end of any partnership year, there is a debit balance in the drawing account of any partner, such partner shall, within a reasonable time, clear such debit balance by a payment to the partnership.

6. Interest. No interest shall be paid to any partner on his original capital, his additional capital, or his credit balance in his drawing account.

7. Management, Duties, and Restrictions. Each partner shall have an equal voice in the management of the partnership. No partner shall, without the consent of the others, borrow or lend money on behalf of the partnership; enter into a contract to sell the property; sell, assign, or pledge his interest in the partnership; or execute any lease or mortgage with respect to the property. In all other matters relating to the business of the partnership, a decision of two of the partners shall be controlling.

8. Banking. All funds of the partnership shall be deposited in partnership bank accounts, as designated from time to time by the partners. All withdrawals from partnership accounts shall be made upon checks signed by two of the partners.

9. Books. The partnership books shall be maintained on the accrual basis, and shall be closed and balanced at the end of each calendar year.

10. Retirement.

(a) Notice, Purchase Option. Any partner may retire from the partnership at the end of a calendar year, provided he has given two months' advance written notice of his intention to the other partners. A retirement shall cause a dissolution of the partnership, but the remaining partners shall have the right to continue the partnership business, provided the continuing partnership pays to the retiring partner the value of his interest in the partnership.

(b) Valuation. For this purpose, the value of the interest of a retiring partner shall be the amount of his capital account, plus or minus any credit or debit balance in his drawing account, all determined at the end of such calendar year in accordance with the accounting methods regularly used by the partnership.

(c) Payment. Payment of the amount due to the retiring partner shall be made in cash in two equal installments, the first within sixty (60) days and the second within one hundred twenty (120) days after the end of the calendar year. Upon payment, the retiring partner shall have no further interest in the partnership or in its business or assets.

(d) Liquidation. If the continuing partnership does not elect to purchase the interest of the retiring partner, the partnership shall promptly sell the property and commence to wind up its affairs and shall distribute its assets in liquidation under the supervision of all of the partners. All profits and losses in liquidation shall be allocated equally to the partners. In liquidation, the partnership shall first pay all its debts, then pay credit balances in the drawing accounts of the partners, and finally distribute all other proceeds against the capital accounts of the partners.

11. Death.

(a) Purchase Option. The death of any partner shall cause a dissolution of the partnership, but the surviving partners shall have the right to continue the partnership business, provided the continuing partnership pays to the estate of the deceased partner the value of his interest in the partnership.

(b) Valuation. For this purpose, the value of the interest of a deceased partner shall be the amount of his capital account, plus or minus any credit or debit balance in his drawing account, all determined as at the end of the month in which his death occurs in accordance with the accounting methods regularly used by the partnership.

(c) Payment. Payment for the interest of a deceased partner shall be made to his estate in cash in three (3) equal installments, the first within sixty (60) days, the second within one hundred twenty (120) days, and the third within one hundred eighty (180) days after the end of the month in which death occurs. Upon such payment, the estate of the deceased partner shall have no further interest in the partnership or in its business or assets.

(d) Liquidation. If the continuing partnership does not elect to purchase the interest of the deceased partner, the partnership shall promptly sell the property and commence to wind up its affairs and shall distribute its assets in liquidation under the supervision of the surviving partners and a representative of the deceased partner's estate. All profits and losses in liquidation shall be allocated equally among the surviving partners and the deceased partner's estate. In liquidation, the partnership shall first pay all its debts, then pay credit balances in the partners' drawing accounts, and finally distribute all other proceeds against the partners' capital accounts.

12. Entire Agreement. This agreement supersedes all agreements previously made between the parties relating to its subject matter. There are no other understandings or agreements between them.

13. Notices. All notices under this agreement shall be in writing and delivered personally or mailed by certified mail, postage prepaid, addressed to the parties at their last known addresses.

14. Non-waiver. No delay or failure by a party to exercise any right under this agreement, and no partial or single exercise of that right, shall constitute a waiver of that or any other right, unless otherwise expressly provided herein.

15. Headings. Headings in this agreement are for convenience only and shall not be used to interpret or construe its provisions.

16. Governing Law. This agreement shall be construed in accordance with and governed by the laws of the State of _____ [state] .

17. Counterparts. This agreement may be executed in two or more counterparts, each of which shall be deemed an original but all of which together shall constitute one and the same instrument.

18. Binding Effect. Except as otherwise expressly provided herein, the provisions of this agreement shall be binding upon and inure to the benefit of each of the parties and their respective legal representatives, successors, and assigns.

In witness whereof the parties have signed this agreement.

James Adams

Charles Stone

George Brown



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Current Legal Forms for Real Estate
Chapter 20 REAL ESTATE ENTITIES
Part IV. Forms
C. PARTNERSHIPS

24-20 Current Legal Forms for Real Estate FORM 20.23

AUTHOR: by Stephen E. Pigott and Harold O. Maxfield, Jr.

FORM 20.23 General partnership--managing partner--retirement at book value--option in decedent's estate to continue as limited partner

COMMENT

The ownership of real estate in noncorporate form by groups of individuals may require management of the property and of the business by a skilled person or organization. This can be addressed by having a managing partner or by the hiring of a qualified management company.

In this partnership the managing partner is a corporation which owns a 50 percent interest in the enterprise. Final responsibility for the day-to-day affairs of the partnership rests with the managing partner. For these services the managing partner is to receive as compensation 10 percent of the net profits of the partnership. Since this compensation is computed wholly on the basis of partnership income, it will be treated as part of the share of partnership income distributable to the managing partner.

Partner retirement:

Provisions in a partnership agreement deal with the retirement and death of a partner. Under this agreement a partner may retire upon notice; but such a notice operates to give the remaining partners an option to purchase the interest of the retiring partner. If the retiring partner's interest is not purchased, the partnership is dissolved and must proceed to liquidate. In this agreement the price to be paid to the retiring partner is the book value of his partnership interest. Generally, a retiring partner realizes capital gain or loss measured by the difference between the amount realized and the adjusted basis of his partnership interest. Since book value in most cases is the same as the partner's adjusted basis for his partnership interest, no gain or loss is realized in such

case by a retirement payment measured by book value. For a detailed discussion of partner retirement, see The Tax Background to Chapter 1, "Partnerships," in Volume 1.

Close of tax year upon liquidation:

The taxable year of a partnership closes as to a partner whose interest in the partnership is completely liquidated. In a two-man partnership the retirement of one partner and the liquidation of his interest closes the partnership taxable year for both partners, since the partnership itself is terminated. In a multiple-member partnership, the retirement of a partner and the complete liquidation of his partnership interest will result in the closing of the taxable year of the partnership for the retiring member, but it will not affect the partnership taxable year for the remaining partners who continue to carry on the partnership business. If the partnership's taxable year closes for any partner, that partner must pick up his share of partnership income (or loss) for the closed partnership year. This may result in the "bunching" of partnership income, if the partnership's taxable year differs from the taxable year of the retiring partner. For a complete discussion of the close of the partnership tax year upon its liquidation, see The Tax Background to Chapter 1, "Partnerships," in Volume 1.

Continuation on death of partner:

Upon the death of a partner under this agreement, his personal representative has the option to continue the partnership business but with the decedent's interest converted into a limited partner's interest. The Revenue Code provides that the taxable year of a partnership, with respect to a partner who dies, does not close prior to the end of the partnership year. Under this provision, the partnership income for the year of death is not precipitated in the decedent's return. Instead, the partnership income for the year of death is carried over to his estate or to his successor's income tax return. An exception to this provision obtains in the case of a partnership agreement which provides that the sale of a deceased partner's interest occurs upon the date of his death. In such case, the taxable year of the partnership with respect to the deceased partner closes upon his death, and the final return of the deceased partner will include his share of partnership income (or loss) for the period ending with his death. For continuation of the partnership on the death of a partner, see The Tax Background to Chapter 1, "Partnerships," in Volume 1.

Over-depreciation:

It should be noted that the special statutory provisions relating to "over-depreciated" property may produce some ordinary income on the buy-out of the partnership interest of a retiring partner or of the estate of a deceased partner. These provisions treat over-depreciated property as "unrealized receivables" to the extent that the partnership would have had ordinary income upon a sale for fair market value at the time of the distribution in question. See The Tax Background to Chapter 1, "Partnerships," in Volume 1.

FORM

_____ [month] _____ [day], _____ [year]

Illinois 60646

Gentlemen:

Reference is made to the parcel of land located in Cook County, Illinois, currently being acquired by you (the "property"). The property consists of approximately 2,000 acres, and is commonly known as the Village of Woodbriar. We understand that title to the property is being taken in the name of Woodbriar Development Corporation, an Illinois corporation, for purposes of convenience, so that such corporation may execute the purchase money mortgage and promissory note representing the balance of the purchase price. We acknowledge that you have expended considerable effort, time, and funds in connection with the acquisition of the property, and that it is your intention to manage and develop it into residential housing, commercial areas, and the like, all in accordance with a general master plan. You have indicated your willingness, and by this letter we indicate our desire to join with you in the acquisition and development of the property, and to that end to create hereby a partnership for these purposes. Accordingly, it is our agreement as follows:

1. Partners. You shall be referred to herein as the Managing Partner and as the Original Partner, and shall own fifty percent (50%) of the partnership. The remainder of the parties shall be referred to as the Other Partners. The Original Partner (the Managing Partner), together with the Other Partners, shall collectively be referred to as the Partners.
2. Capital. The capital of the partnership shall be the sum of Six Hundred Thousand Dollars (\$600,000). The names of the Partners and their respective interests and capital contributions shall be as set forth on Exhibit A attached hereto and made a part hereof.

Each of the Other Partners, forthwith, shall contribute, in cash, the amount of the capital contribution set forth after his name, provided, however, that the Original Partner shall advance the balance of its contribution as and when, in the discretion of the Managing Partner, it is required. When the outstanding capital contribution of the Original Partner equals the aggregate of the outstanding capital contributions of the Other Partners, whether by virtue of additional contributions by the Original Partner or distributions to the Other Partners under the provisions of Paragraph 8, the Partners shall contribute all additional funds required for the partnership in proportion to their respective interests in the partnership. Additional contributions shall be made upon call and demand by the Managing Partner, provided that the Other Partners shall at no time be required to increase their outstanding capital contributions over the amount of their original capital contributions. In the event of the failure of a Partner to respond to such call by the Managing Partner, his percentage interest shall be decreased in the proportion which his default bears to the entire capitalization of the partnership.

3. Percentages of Interest. Each Partner shall own an undivided interest in and to the partnership in proportion to his respective percentage set forth after his name on Exhibit A, and each shall be entitled to share in the net profits of the partnership and in any distribution of funds available for distribution, whether arising out of profits or not, in the same proportion, and shall be liable, as between themselves, for the net losses, if any, in the same proportion. No interest shall be paid on contributions of capital to the partnership or upon any undrawn profits of any Partner which are credited to his capital account.

4. Partnership Business. The business to be conducted by the partnership shall be that of acquiring the property for investment and for exploitation.

5. Term. The term for which the partnership is organized shall commence on _____ [month] _____ [day] , _____ [year] , and shall continue until _____ [month] _____ [day] , _____ [year] , or until dissolved upon the occurrence of the death of a Partner, by operation of law, or by and upon the mutual agreement and consent of the Partners.

6. Management. The general management and final determination of all questions relating to the daily business affairs and business policies of the partnership shall rest in the Managing Partner. The Managing Partner is authorized and empowered to execute (without requiring the signature and execution by the Other Partners) any and all escrow instructions, contracts, deeds, promissory notes, trust deeds, subdivision maps, etc., for and on behalf and in the name of the Partners in connection with the acquisition, sale, and hypothecation of any and all of the property.

The management, operation, and development of the business affairs of the partnership shall be at the risk of the partnership and not at the risk of the Managing Partner, except to the extent of the Managing Partner's interest in the partnership. The Partners shall hold and save the Managing Partner free and harmless of and from any and all claims, demands, and charges of every kind and character, whatsoever, arising out of its management, except as to those arising out of its willful misconduct.

In consideration of all services to be rendered, the Managing Partner shall receive a sum equal to 10 percent of all the partnership's net profits, and shall draw such compensation out of funds available for distribution to the Partners.

7. Assignment. No Partner may sell, assign, transfer, mortgage, grant a security interest, or hypothecate his interest in the partnership or its assets to any person, firm, or corporation, other than the other parties hereto. In addition, no interest of any Partner in the partnership or its assets shall be transferred by operation of law or by any assignment by operation of law, except upon the death of a Partner, as provided in Paragraph 13 below.

8. Distributions. The funds of the partnership shall be distributed to the Partners in proportion to the outstanding capital contributions, at the time and in the amounts as the Managing Partner may see fit. All net distributions, however, shall be made to the Other Partners (provided their then outstanding capital contributions exceed those of the Original Partner) until such time as their outstanding capital contributions equal the outstanding capital contributions of the Original Partner. Net profits shall augment the individual capital accounts of each Partner and net losses shall diminish the capital accounts in accordance with the respective interests set forth in Exhibit A.

9. Books. Complete records and books of account shall be kept and maintained in the office of the partnership according to the best standard accounting practices. Each of the Partners shall be entitled at any time to examine the books and records personally, or by agent, and to make copies or excerpts.

10. Banking. All partnership moneys shall be deposited in the name of the partnership at the bank or banks which the Managing Partner shall select. All sums withdrawn therefrom shall be withdrawn by check signed by the Managing Partner.

11. Fiscal Year. The fiscal year and the accounting period of the partnership shall be the calendar year. A complete statement of the condition of the partnership and an accounting between the Partners shall be prepared and made at the end of each fiscal year of the partnership.

12. Withdrawal.

(a) Notice. Any partner who desires to withdraw from the partnership shall give written notice to the remaining Partners of such intention. The notice shall contain the date of withdrawal. If the notice is given four months or more before the close of the partnership's current accounting period, the retirement shall be effective at the close thereof. If the notice is given less than four months before the close of the current accounting period, the retirement shall be effective at the close of the succeeding accounting period.

(b) Purchase Option. Upon receipt of notice from a retiring Partner, the remaining Partners shall have the option to purchase the retiring Partner's interest as of the effective date of the retirement. The option shall be exercised by written notice given to the retiring Partner before the effective date of retirement. If all the remaining Partners elect to purchase

the retiring Partner's interest, such interest shall be acquired by the remaining Partners in the same proportions as their respective interests in the partnership. If all remaining Partners do not desire to acquire their proportionate shares of the retiring Partner's interest, the remaining Partner who does desire to acquire such interest shall be entitled to acquire the proportionate share of the retiring Partner's interest as the percentage of his respective interest in the partnership bears to the total percentage of the interests in the partnership held by all of the Partners desiring to acquire the retiring Partner's interest. Immediately following the effective date, the retiring Partner's interest shall automatically vest in and become the property of those remaining Partners who have elected to acquire such interest.

(c) Purchase Price. The price to be paid for a retiring Partner's interest shall be the book value of the interest at the effective date of retirement. The purchasing Partners shall pay the price in cash to the retiring Partner within 90 days after the effective date of retirement.

(d) Dissolution. If none of the remaining Partners shall purchase the retiring Partner's interest, the partnership shall be deemed dissolved as of the effective date of retirement, and all the Partners shall proceed with reasonable promptness to liquidate the partnership in an orderly fashion and pursuant to the laws of the State of _____ [state].

13. Death of Partner. If any Partner shall die and bequeath his partnership interest to a third person or persons or to a testamentary trust in which a third person or persons is a beneficiary, or if any Partner shall die intestate, and if, within 60 days after the death of the deceased Partner, his personal representative shall instruct the remaining Partners in writing to continue the partnership business, then the decedent's personal representative shall succeed to the decedent's interest and the partnership business shall continue among the remaining Partners and the decedent's personal representative upon the following terms and conditions:

(a) Limited Partnership. The partnership business shall be continued by the decedent's personal representative and the remaining Partners as a limited partnership in which the decedent's personal representative shall be the limited partner. The limited partnership shall continue until the death or withdrawal of any general Partner or until the consent of a majority in interest of the general Partners to dissolve the partnership. The Partnership and the Partners agree to make any and all filings and elections and to execute and deliver any and all documents and amendments hereto in order to effectuate the conversion of the interest to a limited partnership. Each Partner hereby appoints the Managing Partner as its attorney in fact to execute on such Partner's behalf any such filings, documents or amendments.

(b) Capital Contributions. Each Partner shall contribute to the capital of the new limited partnership the book value of his interest in the Partnership as at the date of the deceased Partner's death.

(c) Profits and Losses. Each general or limited Partner, as the case may be, shall be entitled to receive the proportion of the partnership profits which he or the decedent from whom he acquired his partnership interest was entitled to receive prior to the decedent's death. No limited Partner shall be liable for any partnership losses in excess of his contribution to the capital of the partnership, and the amount, if any, by which his proportionate share of such losses shall exceed his capital contribution shall be borne by the general Partners.

(d) Probate Transfers. Upon the entry of any order of distribution by the court having probate jurisdiction of the estate of the decedent distributing his partnership interest to his devisees, legatees, heirs, or to the trustee of a testamentary trust of which a third person or persons is the beneficiary, such devisee, legatee, heir, or trustee shall become a limited Partner and shall be admitted to all the rights of the decedent's personal representative in the limited partnership. If any trustee, who is a limited Partner, shall at any time distribute the decedent's partnership interest to the decedent's spouse, issue, or beneficiary, such spouse, issue, or beneficiary shall likewise become a limited Partner in the place and stead of the trustee.

(e) Withdrawal. Any general or limited Partner of the limited partnership shall have the right to withdraw therefrom upon the terms and conditions set forth in Paragraph 12, except that the option to purchase the retiring Partner's interest

shall rest only in the general Partners.

(f) Purchase Alternative. If any Partner shall die and bequeath his partnership interest to a third person or persons or to a testamentary trust in which a third person or persons is a beneficiary, or if any Partners shall die intestate, and if, within sixty (60) days after the death of the deceased Partner, his personal representative shall not instruct the remaining Partners in writing to continue the partnership business, the decedent's interest shall automatically vest in the remaining Partners as of the last day of the month in which the death occurs. In such event, the deceased Partner's personal representative shall be treated as if he were a retiring Partner whose interest has been purchased proportionately by all the remaining Partners, effective as of the last day of the month in which the death occurs, pursuant to the terms and conditions set forth in Paragraph 12.

(g) Terms and Conditions. All of the terms and conditions of this agreement shall apply to the limited partnership, except that the death of a limited Partner shall not dissolve or terminate the limited partnership.

14. Waiver of Right of Partition. Each of the Partners waives any and all rights to partition the Partnership property or any part thereof.

15. Governing Law. The partnership agreement, the relations, rights, and duties of the Partners among themselves, and all matters pertaining to the partnership and the partnership property shall be governed by the Illinois law applicable to partnerships.

16. Arbitration. Any controversy or claim arising out of or in connection with this agreement, or any breach thereof, shall be settled by arbitration in Chicago, Illinois, in accordance with the governing rules of the American Arbitration Association. The decision of the arbitrators shall be final, and judgment upon the award rendered may be entered in any court of competent jurisdiction.

17. Entire Agreement. This agreement supersedes all agreements previously made between the parties relating to its subject matter. There are no other understandings or agreements between them.

18. Notices. All notices under this agreement shall be in writing and delivered personally or mailed by certified mail, postage prepaid, addressed to the parties at their last known addresses.

19. Non-waiver. No delay or failure by a party to exercise any right under this agreement, and no partial or single exercise of that right, shall constitute a waiver of that or any other right, unless otherwise expressly provided herein.

20. Headings. Headings in this agreement are for convenience only and shall not be used to interpret or construe its provisions.

21. Counterparts. This agreement may be executed in two or more counterparts, each of which shall be deemed an original but all of which together shall constitute one and the same instrument.

22. Binding Effect. Except as otherwise expressly provided herein, the provisions of this agreement shall be binding upon and inure to the benefit of each of the parties and their respective legal representatives, successors, and assigns.

Kindly indicate your acceptance and approval of the terms of this agreement on the copies provided for our records.

Very truly yours,

[name]

Accepted and agreed to:

Lawrence Realty Corporation

By _____

[name and title]



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Current Legal Forms for Real Estate

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Current Legal Forms for Real Estate
Chapter 20 REAL ESTATE ENTITIES
Part IV. Forms
C. PARTNERSHIPS

24-20 Current Legal Forms for Real Estate FORM 20.24

AUTHOR: by Stephen E. Pigott and Harold O. Maxfield, Jr.

FORM 20.24 General partnership--organized upon liquidation of corporation--managing partners--revaluation upon death or retirement of partner

COMMENT

There are situations in which it is advisable to convert a business enterprise from the corporate form to the partnership form. The tax consequence of the corporate liquidation may by itself be a significant factor, because generally the liquidating distribution, whether distributed to the shareholders or to the partnership for the account of the shareholders, is a taxable transaction in which gain or loss is realized. The gain or loss is the difference between the fair market value of the assets received by each shareholder and the cost or other basis to him of his shares. If a going corporate business is liquidated and thereafter continued by the former shareholders, there is the question of the existence of goodwill as an element of value in the distributed assets. As to the comparison of partnership and corporate taxation, see TB § 20.05[4] at the beginning of this chapter. As to tax treatment of partnerships, see TB § 20.06. As to tax treatment of corporations, see TB § 20.07.

Revaluation on death or retirement:

In this agreement, the retirement or death of a partner operates to give the remaining or surviving partners an option to acquire the interest of the retiring or deceased partner. If an election is made, the assets of the partnership are to be revalued for the purpose of fixing the buy-out price. Since the values of partnership assets may reflect substantial appreciation or depreciation, an agreement to pay for a partner's interest measured by book value may be unfair to one of the parties. This agreement sets up an initial valuation procedure to be used by the partnership's accountant, and an arbitration procedure for settling the valuation problem if either party refuses

to accept the initial valuation. A retiring partner will, of course, realize gain or loss upon his buy-out. The estate of a deceased partner, however, is entitled to a tax-free recovery of the value of the decedent's interest in the partnership. In either case, it should be noted, the share of partnership income for the period up to retirement or death is not reportable by the continuing or surviving partners. For a full discussion of the reevaluation of a partnership's assets on the death or retirement of a partner, see The Tax Background to Chapter 1, "Partnerships," in Volume 1.

Effect of buy-out on basis:

The amounts paid by partners for the retiring or deceased partner's interest are not deductible but are added to the bases of their partnership interests. As a general rule, the death of a partner has no effect on the basis to the partnership of partnership property. However, the surviving partners may elect to increase the bases of the partnership assets by the difference between the amount paid the estate and the decedent's pro rata share of the partnership's bases for its assets. This election is afforded by the statute in the case of a transfer of an interest in a partnership by sale or exchange or upon the death of a partner. A different problem exists where payments are made by the continuing partnership, as distinguished from payments by partners, in liquidation of the interest of a deceased partner (or retiring partner). In such case, if an election to adjust basis is in effect, the partnership is required to adjust the bases of its remaining assets to the extent gain or loss is recognized to the decedent's successor (or to the retiring partner). For a detailed discussion of the effect of a buy-out on the surviving partners' bases of their partnership interests, see The Tax Background to Chapter 1.

FORM

THIS AGREEMENT made _____ [month] _____ [day] ,
 _____ [year] , among WILLIAM HARRIS of _____ [address] ,
 _____ [city] , _____ [state] , DANIEL EHRLICH of _____
 [address] , _____ [city] , _____ [state] , ARNOLD GATES of
 _____ [address] , _____ [city] , _____ [state] (hereinafter
 collectively called the "managing partners"), and JAMES BARTLETT of _____ [address] ,
 _____ [city] , _____ [state] , BERNARD KUHL of _____
 [address] , _____ [city] , _____ [state] , DAVID MANNIS of
 _____ [address] , _____ [city] , _____ [state] , and HARHOLD
 BUTLER of _____ [address] , _____ [city] , _____ [state]
 (hereinafter collectively called the "investing partners").

1. Name and Business. The parties hereby form a partnership under the name of Forty-First Company, to carry on the business of owning, building upon, altering, repairing, renting, leasing, and otherwise dealing with real and personal property, whether tangible or intangible, of any kind or description, including the real estate business previously conducted by Forty-First Corp., a(n) _____ [state] corporation, now in the process of being liquidated.

2. Office. The office of the partnership shall be located at _____ [address] , _____
 [city] , _____ [state] , or at such other location or locations as the managing partners may from
 time to time designate.

3. Term. The term of the partnership shall begin _____ [month] _____ [day] ,
 _____ [year] , and shall continue until _____ [month] _____ [day] , _____ [year] .

day] , _____ [year] , unless sooner terminated as provided in this agreement.

4. Capital. The capital of the partnership shall consist of all the assets (including particularly, but without limitation, the lands and premises known as _____ [address] , _____ [city] , _____ [state]) subject to all the liabilities, of Forty-First Corp., to be transferred to the partnership on _____ [month] _____ [day] , _____ [year] , as set forth in balance sheet to be made by the accountant for the corporation and this partnership as of _____ [month] _____ [day] , _____ [year] , and to be attached as Exhibit A. The initial capital accounts of the partners shall be equivalent to their respective percentages in the capital of the partnership set forth in Paragraph 6. If the managing partners should unanimously determine that further capital is required and that the capital of the partnership should be increased, the additional capital shall be contributed by the partners in the respective percentages set forth in Paragraph 6. No interest shall be paid on the initial or on any subsequent contributions to the capital of the partnership.

5. Profit and Loss. The net profits of the partnership shall be divided among the partners, and the net losses of the partnership shall be borne by the partners in the respective percentages set out in Paragraph 6.

6. Partners' Percentages. The respective percentages referred to in preceding paragraphs 4 and 5 are as follows:

Name	Respective Percentages
William Harris	10
Daniel Ehrlich	20
Arnold Gates	20
James Bartlett	20
Bernard Kuhl	10
David Mannis	10
Harold Butler	10

7. Management, Duties, and Restrictions.

(a) Business Operations. William Harris, Daniel Ehrlich, and Arnold Gates shall be the managing partners. The managing partners shall have full charge of the management, conduct, and operation of the partnership business in all respects and in all matters. Such management and duties shall include, but not be limited to, full power to sell and convey the personal and real property owned by the partnership on any terms as they may determine, to lease property or any parts of the property on any terms and for any period as they may determine, and to mortgage property, whether the mortgage be a first or second mortgage lien, as well as to make all agreements modifying any lease or mortgage. The investing partners shall have no voice in the management of the partnership and need devote no time to management.

(b) Authority. A majority of the managing partners shall be authorized and empowered to determine all questions relating to the conduct and management of the partnership business, and the determination of a majority of the managing partners on any such question shall be binding on all partners. None of the managing partners shall be authorized or empowered without the consent of a majority of the managing partners, on behalf of the partnership, to borrow or lend money, or make, deliver, or accept any commercial paper, or execute any mortgage, bond, lease, deed, release, or agreement, or purchase or contract to purchase, or sell or contract to sell any property, or compromise or release any of its claims or debts, or hire any person for a period in excess of two weeks or discharge any person who shall have been hired for a period in excess of two weeks, or obligate the partnership in an amount in excess of or

withdraw any money of the partnership having a value or being in excess of Five Thousand Dollars (\$5,000).

(c) No Assignment. No partner shall, except with the consent of all other partners, withdraw his capital contribution, in whole or in part, or assign, create a security interest in, or sell his share in the partnership or in its capital, assets, or property, or enter into any agreement as a result of which any other person, firm, or corporation shall become interested with him in the partnership, or do any act detrimental to the best interests of the partnership, or which would make it impossible to carry on the ordinary business of the partnership.

(d) Duties, Restrictions. Each managing partner may have other business interests and may engage in any other business or trade, profession, or employment whatsoever, on his own account, or in partnership with or as an employee of or as an officer, director, or shareholder of any other person, firm, or corporation, and he shall not be required to devote his entire time to the business of the partnership. Without the consent of the other managing partners, no managing partner shall receive any salary or other special compensation for services to be rendered by him, except that William Harris or any business entity with which he may be associated shall be entitled to receive compensation for all services rendered by him or such business entity in negotiating leases, mortgages, or sales for the partnership, if and to the extent agreed upon by a majority of the managing partners other than William Harris.

8. Banking. All funds of the partnership shall be deposited and kept in its name in such partnership bank account or accounts as the managing partners shall designate. All withdrawals therefrom shall be made upon checks signed by any two of the managing partners, or by the managing partner which shall be designated by a majority of them.

9. Books. The partnership shall maintain full and accurate books of account, which shall be kept at the principal partnership office. Each managing partner shall cause to be entered in the books all transactions of or relating to the partnership or its business. Each partner shall have access to and the right to inspect and copy the books and all other partnership records.

10. Annual accounting.

(a) Annual reports. As of the last day of December of each year during the continuance of the partnership, commencing _____ [month] _____ [day], _____ [year], a full, true, and accurate account shall be made in writing of all of the assets and liabilities of the partnership, and of all of its receipts and disbursements, and the assets, liabilities, and income, both gross and net, shall be ascertained, and the net profits or net losses shall be fixed and determined; and the account of each partner shall be credited or debited as the case may be, with his share (as specified in Paragraph 6) of the net profits or losses. In preparing the account, there shall be charged all expenses of the business, and also, all losses and other charges incident or necessary to the carrying on of the business.

(b) Withdrawals. Any partner may withdraw his share of the net profits, at the end of each or any fiscal year. The period commencing _____ [month] _____ [day], _____ [year], and ending _____ [month] _____ [day], _____ [year], and each succeeding 12-month period ending on December 31 of each year thereafter, shall be deemed a fiscal year of the partnership for this purpose and for all other purposes of this agreement. No partner shall be entitled to receive any interest upon undrawn profits, without the express written consent of all other partners. Moreover, such undrawn profits shall not be deemed an increase of the partner's capital, and he shall not be entitled to an increase in the share of the partnership's profits, without all the other partners' express written consent.

11. Death.

(a) Purchase, Liquidation. Upon the death of any partner, the surviving partners shall have the right either to purchase the decedent's entire interest or share in the partnership ("entire partnership interest"), or to terminate and liquidate the

partnership business.

(b) Election to Purchase. If the surviving partners (or one or more of them) elect to purchase the decedent's entire partnership interest, they shall give written notice of the election to the decedent's executor or administrator, within the period of three months after decedent's death, or within the period of two (2) months after the qualification of his executor or administrator, whichever period expires later (the "acceptance period"). In that event, the decedent's entire partnership interest shall be purchased at the price and in the manner hereinafter provided, and the partnership business shall be continued by the successor partnership comprising the surviving partners.

(c) Adjusted Book Value. If the surviving partners elect to purchase decedent's entire partnership interest, the purchase price shall be its book value, as it appears upon the books and records of the partnership as of the close of business on the date of the decedent's death, as adjusted by substituting the fair market value as of that date, in place of the book value, of any real estate owned by the partnership. The adjusted book value shall be computed by the partnership's regular certified public accountant, in accordance with the accounting practices regularly followed by the partnership, and in cases not covered by such practices, in accordance with generally accepted accounting practices. No allowance shall be made for goodwill, trade name, patents, or other intangible assets, except as those assets have been reflected on the partnership books immediately prior to the decedent's death. Such book value shall include and reflect the decedent's capital account as at the end of the last accounting year as shown on the partnership books, increased by the decedent's share of partnership profits or decreased by his share of partnership losses for the period from the beginning of the accounting year in which his death occurred until the date of his death, and increased by contributions and decreased by withdrawals during such period. In making the adjustment for the fair market value of real estate, the accountant shall rely on and use the written appraisal of a licensed real estate appraiser, selected by the accountant for that purpose at the expense of the partnership. A statement showing the adjusted book value and the supporting items and computations (including, without limitation, a copy of the real estate appraisal relied on), shall be completed by the accountant and copies delivered to the legal representatives of the deceased partner's estate and to the surviving partners, before the expiration of the acceptance period. The adjusted book value, as set out in the accountant's statement, shall constitute and be deemed to be the purchase price for the decedent's entire partnership interest, binding upon all parties, unless and until changed by the parties' written agreement or by arbitration award, as hereinafter provided.

(d) Purchase Rights. Each surviving partner shall have the primary right to purchase that portion of the decedent's entire partnership interest computed by the proportion which such survivor's percentage interest in the profits of the partnership bears to the percentage interests of the other surviving partners in the profits, and also a secondary right to purchase any remaining portion of the decedent's partnership interest not desired for purchase by any other surviving partner in the exercise of his primary right; if there is more than one surviving partner desiring to exercise secondary rights to purchase any remaining portion, they shall be entitled to purchase the same in equal parts. Notwithstanding the foregoing, the election of the surviving partners to purchase portions not aggregating the decedent's entire partnership interest shall be of no effect.

(e) Proportionate Purchase Price. If two (2) or more surviving partners shall accept for purchase the decedent's entire partnership interest, the portion of the purchase price payable by each surviving partner shall be the sum determined by multiplying the purchase price for the entire partnership interest by the fraction representing the portion purchased by the respective surviving partner.

(f) Purchase Terms. The purchase price due from each purchasing surviving partner ("Purchaser") shall be paid by the Purchaser to the decedent's personal representatives, as follows: thirty percent (30%) in cash, on the Closing Date (as defined in subparagraph (g) below); and the balance by the Purchaser's execution and delivery of twelve (12) promissory notes. Each promissory note shall be dated as of the Closing Date, be in the principal amount of one-twelfth (1/12) of the balance of the purchase price, and be payable with interest at the rate of nine percent (9%) per annum to the order of the decedent's personal representatives at a New York City bank. The first note shall be payable on the 30th day of January following the calendar year in which the Closing Date falls, and the remaining eleven (11) notes shall be

payable successively, one every three months thereafter. The notes shall provide for the privilege of prepayment at any time without premium or penalty, and shall recite that all the notes shall become due at the holder's option if all or any part of the principal or interest due on any note remains unpaid for thirty (30) days after the date on which the same becomes due by the terms of such note.

(g) Closing Date. The Closing Date shall be the 30th day after the expiration of the acceptance period, provided, however, that the Purchaser shall have the right to advance the date of closing on five (5) days' written notice to the decedent's personal representatives. The closing shall be held at the then principal office of the partnership or at any other place agreed to by the parties.

(h) Transfer of Interest. The Purchaser(s) shall deliver the purchase price notes and initial cash payments to the decedent's personal representatives in exchange for their delivering to the Purchasers, appropriate instruments of transfer and assignment, duly executed, which transfers and assigns to the respective Purchasers all of the decedent's rights, title and interests so purchased in the Partnership, free and clear of all liens or encumbrances of any nature or kind. Such sale shall not include any debts and liabilities of the partnership to the decedent for loans and advances (other than by way of capital contribution) made by him, which shall be repaid by the partnership as required by the terms of the loans and advances and by law. The percentage of each Purchaser in the profits and losses of the partnership shall be increased by that portion of the decedent's percentage therein equal to the fraction of the decedent's entire partnership interest purchased by such Purchaser.

(i) Valuation disputes. The adjusted book value (purchase price) as determined by the accountant pursuant to the preceding subparagraph (c) shall be subject to increase or decrease as follows: If either the decedent's legal representatives (as one party) or any of the surviving partners (as the other party) should dispute the adjusted book value shown on the accountant's statement, such party shall give to the other party and to all other surviving partners, written notice of the dispute, containing a specification of the reasons therefor, within twenty (20) days after the expiration of the acceptance period. If the dispute is not settled within twenty (20) days thereafter by written agreement between the decedent's legal representatives and the surviving partners (the agreement of all except one of the surviving partners shall constitute the agreement of and shall be binding upon all surviving partners), then the book value of the decedent's entire partnership interest as of the date of his death, as adjusted, and the dispute respecting the same, shall be settled and determined by arbitration as provided in Paragraph 15. If the amount of such adjusted book value as found by the accountant is changed by the agreement of the parties or by the arbitration award, the new amount shall govern and shall be the purchase price of the decedent's entire partnership interest.

(j) Payment of Adjusted Purchase Price. If the new amount is not fixed and determined until after the Closing Date, then (1) any increase in the purchase price shall be paid in cash by the purchasing surviving partners to the decedent's personal representatives, either six months after the date of the agreement or the arbitration award, or on the 30th day of January following the calendar year in which the Closing Date occurs, whichever date is later; and (2) any decrease in the purchase price shall be credited against the promissory notes of the respective purchasing surviving partners, in the inverse order of maturity.

(k) Liquidation. If the surviving partners do not elect, before the expiration of the acceptance period and in the manner herein provided, to purchase the decedent's entire partnership interest, the surviving managing partners shall proceed with reasonable promptness to liquidate the business of the partnership. The procedure as to liquidation and distribution of the partnership assets shall be as provided in Paragraph 14.

12. Incompetency of partner.

(a) Purchase Option. If any partner shall be adjudicated to be incompetent in an appropriate judicial proceeding, the remaining partners shall have the right either to purchase the entire interest or share of the incompetent partner in the partnership ("entire partnership interest"), or to terminate and liquidate the partnership business.

(b) Notice. If the remaining partners (or one (1) or more of them) elect to purchase an incompetent partner's entire partnership interest, they shall give written notice of the election to the incompetent partner's judicially appointed guardian, committee, or other personal representative. Such notice shall be given within three months after the adjudication of the partner's incompetency, or within two months after the appointment and qualification of his personal representative, whichever period expires later (the "acceptance period").

(c) Valuation and Purchase. In the event the option to purchase is exercised, the amount of the purchase price and the method of computing it, the percentages and manner of purchase of the incompetent partner's entire partnership interest, the method of payment, and the other rights and obligations of the incompetent partner's personal representatives and the remaining partners, and incidental consequences, shall be the same as stated in subparagraphs (c) through (j) inclusive of Paragraph 11, with respect to the purchase of a decedent's entire partnership interest. Wherever appearing in those subparagraphs, however, the words "decedent" or "deceased partner" shall be replaced by "incompetent partner"; the words "surviving partners" or "surviving partner" shall be replaced by "remaining partners" or "remaining partner"; the words "decedent's personal representatives" shall be replaced by "incompetent partner's personal representatives"; the words "date of death of decedent" shall be replaced by "date of adjudication of incompetency of the incompetent partner."

(d) Liquidation. If the remaining partners do not elect, before the expiration of the acceptance period and in the manner specified, to purchase the incompetent partner's entire partnership interest, the remaining managing partners shall proceed with reasonable promptness to liquidate the business of the partnership. The procedure as to liquidation and distribution of the partnership assets shall be pursuant to Paragraph 14.

13. Retirement.

(a) Notice, Purchase Option. Any partner shall have the right to retire and withdraw from the partnership before the end of the term fixed for its duration. The retiring partner shall exercise his election by serving written notice thereof upon all of the remaining partners, as provided in Paragraph 16. Upon the mailing of the notices of election to retire, the remaining partners shall have the right either to purchase the entire interest or share of the retiring partner in the partnership ("entire partnership interest"), or to terminate and liquidate the partnership business.

(b) Election to Purchase. If the remaining partners (or one (1) or more of them) elect to purchase the retiring partner's entire partnership interest, they shall give written notice of their election to the retiring partner before the expiration of the period (the "acceptance period") of six (6) months from the date of their receipt of his notice of intention to retire, or if the notices are received by the remaining partners on different dates, then from the latest date of receipt by a remaining partner of the retiring partner's notice of intention to retire.

(c) Valuation and Purchase. In the event the option to purchase is exercised, the amount of the purchase price and the method of computing it, the percentages and manner of purchase of the retiring partner's entire partnership interest, the method of payment, and the other rights and obligations of the retiring partner and the remaining partners, and incidental consequences, shall be the same as stated in subparagraphs (c) through (j) inclusive of Paragraph 11, with respect to the purchase of a decedent's entire partnership interest. Wherever appearing in those subparagraphs, however, the words "decedent" or "deceased partner" or "deceased partner's personal representatives" shall be replaced by "retiring partner"; the words "surviving partners" or "surviving partner" shall be replaced by "remaining partners" or "remaining partner"; the words "date of death of decedent" shall be replaced by "date of mailing by such retiring partner to the remaining partners of written notice of his election to retire, or if such notices be mailed on different dates, then the latest of such dates."

14. Procedure on Liquidation.

(a) Liquidation. At the termination of this partnership by the expiration of its term, and whenever liquidation of the partnership business is otherwise provided, the managing partners (or the surviving or remaining managing partners) shall proceed with reasonable promptness to liquidate the business of the partnership.

(b) Profits and Losses. The profits and losses of the business during the period of liquidation shall be divided among or be borne by the partners (or the then remaining or surviving partners, as the case may be), including the estate of any deceased partner, in the respective percentages in which they shared in profits and losses prior to the event which resulted in liquidation. The estate of a deceased partner, however, shall not be liable for losses in excess of the deceased partner's interest in the partnership at the time of his death.

(c) Priorities. After the payment of partnership debts, expenses of liquidation, and all loans by partners to the partnership, the proceeds of liquidation, as realized, shall be distributed, first, in discharge of the undrawn profits of the partners and of the estate of any deceased partner, and then proportionately in discharge of the respective capital accounts. Any excess shall be distributed among the surviving partners and the estate of any deceased partner in the respective percentages in which they shared partnership profits immediately prior to the event which resulted in such liquidation.

(d) Sale and Distribution. In connection with such liquidation, the managing partners shall have the sole discretion as to whether to sell any partnership asset, including but not limited to real estate, and if so, whether at public or private sale and for what amount and on what terms. The managing partners shall also have the sole discretion whether (if sale is not required to enable payment of debts, expenses of liquidation, loans by partners, and undrawn profits of the partners) to distribute and transfer the same to and among the partners and the estate of any deceased partner, in kind, by transferring interests in any assets in the respective percentages in which profits and losses were shared immediately prior to the event which resulted in the liquidation. In the event that the managing partners determine to sell any real property, they shall not be required to sell the same promptly, but they shall have full right and discretion to determine the time when and manner in which any sale or sales shall be had, having due regard to the activity and condition of the real estate market and general financial and economic conditions.

15. Arbitration. Any controversy or claim arising out of or relating to this agreement, or to its interpretation, breach, or enforcement, shall be submitted to three arbitrators and settled by arbitration in the City of _____ [city] in accordance with the governing rules of the American Arbitration Association. Notwithstanding any other provision of those rules, however, if the matter submitted to arbitration shall involve a dispute as to the adjusted book value of a deceased, incompetent, or retiring partner's entire partnership interest, the arbitration shall be held before three arbitrators, of whom one shall be a certified public accountant and the other two licensed real estate appraisers. Any award made by a majority of the arbitrators shall be final, binding, and conclusive on all parties for all purposes, and judgment may be entered on the award in any court of competent jurisdiction.

16. Notices. Wherever provision is made in this agreement for the giving, service, or delivery of any notice, statement, or other instrument, the notice shall be deemed given, served, and delivered, if mailed by United States registered or certified mail, addressed to the party entitled to receive it at his address written at the head of this agreement. Each party, however, may change his mailing address by giving to each other party, by United States registered or certified mail, written notice of election to change his address and of the new address. Except where otherwise specified in this agreement, any notice, statement, or other instrument shall be deemed given, served, and delivered on the date on which it was mailed.

17. Entire Agreement. This agreement contains the entire agreement and understanding of the parties with respect to its entire subject matter. Any and all prior discussions, negotiations, commitments, and understandings relating to matters covered by this agreement are merged into it. This agreement cannot be changed or terminated orally.

18. Non-waiver. No delay or failure by a party to exercise any right under this agreement, and no partial or single

exercise of that right, shall constitute a waiver of that or any other right, unless otherwise expressly provided herein.

19. Headings. Headings in this agreement are for convenience only and shall not be used to interpret or construe its provisions.

20. Governing Law. This agreement shall be construed in accordance with and governed by the laws of the State of _____ [city] .

21. Counterparts. This agreement may be executed in two (2) or more counterparts, each of which shall be deemed an original but all of which together shall constitute one and the same instrument.

22. Binding Effect. Except as otherwise expressly provided herein, the provisions of this agreement shall be binding upon and inure to the benefit of each of the parties and their respective executors, administrators, and assigns.

In witness whereof the parties have set their names and seals to this agreement, all as of the day and year first above written.

William Harris

Daniel Ehrlich

Arnold Gates

James Bartlett

Bernard Kuhl

David Mannis

Harold Butler



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Current Legal Forms for Real Estate
Chapter 20 REAL ESTATE ENTITIES
Part IV. Forms
C. PARTNERSHIPS

24-20 Current Legal Forms for Real Estate FORM 20.25

AUTHOR: by Stephen E. Pigott and Harold O. Maxfield, Jr.

FORM 20.25 Limited partnership--small group of investors

COMMENT

The distinctive feature of a limited partnership is the restriction of the liability of the limited partners to the amount of their contributions to the capital of the partnership. Generally, a limited partnership may be formed by two or more persons to carry on any business which might be carried on by a general partnership. At least one of the partners must be a general partner. The partnership name must not contain the surname of a limited partner unless it is also the surname of a general partner or unless the partnership was conducted under that name prior to the time when the limited partner became associated with the firm. Violation of this provision will result in the named limited partner being held liable to partnership creditors as a general partner. The same consequence follows if the limited partner takes an active part in the control of the partnership business; a limited partner may contribute cash or property to the partnership, but he may not contribute services.

Limited partnership agreement:

The basic provisions of a general partnership agreement should be covered in a limited partnership agreement. In addition, the agreement may contain provisions regulating the assignment of a limited partner's interest in the partnership, the withdrawal or reduction of his contribution to capital, the priority of any limited partner in the distribution of profits or upon dissolution, and the admission of new limited partners. In this agreement limited partners have no priority as to distributions upon dissolution. Limited partners possess no right to withdraw any part of their contribution until termination of the partnership, and then only after all liabilities have been paid (except liabilities to partners for contributions) or until the partnership has

sufficient assets to pay them. Death of a limited partner does not dissolve the partnership.

Partnership vs. association tax status:

From the income tax viewpoint, a limited partnership is treated in the same way as a general partnership. In light of the "Check the Box" regulations, the analysis as to whether limited partnerships will be taxed as a partnership or as an association is largely, if not entirely, irrelevant. (See Chapter 1, Volume 1 Partnerships § 1.07[2].)

Passive activity loss limitation:

Individuals, including partners and limited partners, are limited in the tax use of losses, including expenses, from passive activities. Generally, passive activity losses can only offset income from the same or other passive activities. Unused losses are carried forward indefinitely to offset passive activity income in the following years, or until the activity is completely disposed of in a taxable disposition. Material participation by the taxpayer in the activity will take it out of the passive activity classification.

Generally speaking, rental real estate activity is considered to be a passive activity. IRC § 469(c)(2). Therefore, deductions and credits from rental activities can only offset income from other passive activities. Such deductions and credits *cannot* be deducted from nonpassive income, such as wages, dividends, interest, etc. However, there are two major exceptions to this general rule.

Certain eligible taxpayers who *materially* participate in rental real estate activities can deduct losses from such activities against nonpassive income. These eligible taxpayers include individuals and closely-held C Corporations that meet special eligibility requirements. IRC § 469(c)(7). Second, an individual who owns at least a 10-percent interest and *actively* participates in rental real estate activity is permitted to offset up to \$25,000 of passive activity losses against his nonpassive income. IRC § 469(i).

For other forms of limited partnership agreements, and for forms of certificates of limited partnerships, assignments, etc., see Chapter 1 in Volume 1.

FORM

THIS AGREEMENT made as of the _____ [day] day of _____, [month] _____ [year], by and among SAM HARRIS, residing at _____ [address], _____ [city], _____ [state], JOHN BAKER, residing at _____ [address], _____ [city], _____ [state], and MYRON LOWE, residing at _____ [address], _____ [city], _____ [state] (the "General Partners"), and MARTIN BROWN, residing at _____ [address], _____ [city], _____ [state], ADAM PAINE, residing at _____ [address], _____ [city], _____ [state], EDWARD BERGER, residing at _____ [address], _____ [city], _____ [state], GORDON GRAY, residing at _____ [address], _____ [city], _____ [state], and MARY STERN, residing at _____ [address], _____ [city], _____ [state] (the "Limited Partners").

WHEREAS, the parties desire to form a limited partnership in accordance with the laws of the State of _____ [state] and acquire for the partnership the ownership of certain property situated in _____ [city] , _____ [state] , and generally known as _____ [address] (the "property"), which property is under contract of sale dated _____ [month] _____ [day] , _____ [year] , between Central Properties, Inc., as Seller, and Palmetto Road, Inc., nominee for the partnership, as Purchaser.

NOW THEREFORE, it is mutually agreed as follows:

1. Formation. The parties by this agreement form a limited partnership pursuant to the laws of the State of _____ [state] .
2. Name. The partnership shall be conducted under the name of Palmetto Road Company.
3. Purpose. The purpose of the partnership is to acquire for investment the property situate in _____ [city] , _____ [state] , and commonly known as _____ [address] , and to own, manage, mortgage, lease, exchange, sell, or otherwise transfer or dispose of the property. The partnership is empowered to accept an assignment of the contract of sale for the property from Palmetto Road, Inc., its nominee, and to do all things necessary to acquire title to the property. The General Partners are directed and empowered to take any action on behalf of the partnership as may be necessary to accomplish the acquisition, and to repay out of partnership funds the sum of Forty-two Thousand Five Hundred Dollars (\$42,500) deposited by Palmetto Road, Inc., upon the signing of the aforementioned contract of sale, either to Palmetto Road, Inc., or to any partners who advanced funds to Palmetto Road, Inc., for the purpose of making the deposit or, in the discretion of the General Partners, to apply all advances made by any of the partners toward the capital contributions required to be made by them under Paragraph 8.
4. Term. The term of the partnership shall be from the date of the filing of the Certificate of Limited Partnership with the _____ [state] Secretary of State's Office or _____ [month] _____ [day] , _____ [year] , whichever is later, and shall terminate on _____ [month] _____ [day] , _____ [year] , unless earlier terminated in accordance with the terms of this Agreement. The partnership, however, shall be dissolved prior to such date upon: (a) any disposition by the partnership of its entire interest in all of the property described above, including any mortgage or leasehold interest which the partnership may acquire in exchange therefor; (b) the desire of a majority of General Partners to dissolve the partnership as set forth in Paragraph 20; or (c) the death, retirement, resignation, bankruptcy, expulsion, or insanity of any General Partner as provided in Paragraph 18.
5. Principal Office. The principal office of the partnership shall be maintained _____ [name] _____ [address] _____ [city] _____ [state] , or at any other place as the General Partners from time to time may determine.
6. General Partners. Sam Harris, John Baker, and Myron Lowe shall be the General Partners.
7. Limited Partners. Martin Brown, Edward Berger, Adam Paine, Gordon Gray, and Mary Stern shall be the Limited Partners.
8. Capital Contributions. Each partner shall contribute to the capital of the partnership the cash amount set opposite his or her respective name:

Partner	Contribution
Sam Harris	\$ 60,000
John Baker	30,000

Myron Lowe	30,000
Martin Brown	120,000
Edward Berger	90,000
Adam Paine	90,000
Gordon Gray	90,000
Mary Stern	90,000

9. Profits, Losses, and Cash Proceeds.

(a) Percentage Interest. The net profits of the partnership, and net proceeds resulting from the sale, mortgage, refinancing, and condemnation of any property held by it shall be divided among, and any losses shall be borne by, each of the partners in the following proportions, subject, however, insofar as the Limited Partners are concerned, to the limitation of their liability to the amount of their individual investment, as hereinafter provided:

Partner	Percentage
Sam Harris	10
John Baker	5
Myron Lowe	5
Martin Brown	20
Edward Berger	15
Adam Paine	15
Gordon Gray	15
Mary Stern	15

(b) Net profits Defined. The term "net profits" of the partnership shall mean net profits derived from the property owned by the partnership as ascertained through the use of generally accepted accounting practices. The following exceptions, however, shall apply: (a) depreciation of building, improvements, furniture, fixtures, furnishings, and equipment shall not be taken into account; (b) mortgage amortization paid by the partnership shall be considered a deduction; (c) all amounts expended by the partnership in the discretion of the General Partners for capital improvements shall be considered a deduction; and (d) if the General Partners shall so determine, a reasonable reserve shall be deducted to provide funds for improvements or for any other contingencies of the partnership.

(c) Net profit Distributions. The net profits of the partnership shall be distributed quarterly or at other more frequent or less frequent intervals as the General Partners in their sole discretion may determine. Distribution shall commence three months after the acquisition by the partnership of the aforementioned property, or at such earlier or later date as the General Partners in their sole discretion may deem advisable.

10. Losses of Limited Partners. Notwithstanding anything to the contrary in this agreement, the liability of any of the Limited Partners for the losses of the partnership shall in no event exceed in the aggregate the amount of his or her contribution to the capital of the partnership. All losses in excess of the contributed amount shall be borne solely by the General Partners in the proportion that their respective percentage shares of profits, as set forth in paragraph 9, bear to each other.

11. General Partners' Fee. At or prior to the acquisition of title by the partnership to the property, the partnership shall

pay to the General Partners the aggregate sum of _____ Dollars (\$_____) for their services in negotiating the contract for the purchase of the property. Such sum shall constitute full payment to the General Partners of their fee and all expenses and disbursements incurred by them in connection with the negotiations.

12. Salaries, Drawings, and Interest on Capital Contributions. Except as otherwise provided in Paragraph 11 and in this Paragraph 12, none of the partners, General or Limited, shall receive any salary or drawings for services rendered on behalf of the partnership in their capacity as partners, nor shall any partner receive any interest on his contributions to the capital of the partnership. Notwithstanding anything to the contrary in this agreement and in addition to the authorizations and consents herein contained, the partners consent to the employment by the partnership of Sam Harris and John Baker as Supervisory Managing Agents for the purpose of supervising the management of the partnership property. Sam Harris and John Baker shall be paid _____ Dollars (\$_____) per year in the aggregate, payable monthly (or at less frequent intervals if the General Partners shall so determine) as and for their supervisory management fee. This sum shall include all traveling expenses incurred by them in the performance of their duties.

13. Management, Duties, and Restrictions.

(a) General Partners. The General Partners shall have equal rights in the management of the partnership business, and shall devote such time to the partnership as shall be reasonably required for its welfare and success. Without the consent of a majority of the General Partners, no General Partner shall, on behalf of the Partnership: borrow or lend money, or make, deliver, or accept any commercial paper or execute any mortgage, security interest, or bond, or lease, purchase, or contract to purchase or sell any property for or of the partnership; or assign, create a security interest in, or sell his interest as a General Partner in the partnership.

(b) Limited Partner Withdrawals. No Limited Partner shall participate in the management of the partnership business. A Limited Partner shall have the right to withdraw his capital contribution upon the termination of the partnership, provided, however, that no part of the capital contribution of any Limited Partner shall be withdrawn unless all liabilities of the partnership, except liabilities to partners on account of their contributions, have been paid or unless the partnership has assets sufficient to pay them. Except as otherwise provided in Paragraph 21, no Limited Partner shall have the right to demand or receive property other than cash in return for his contribution. No Limited Partner shall have priority over any other Limited Partner either as to contribution to capital or as to compensation by way of income.

(c) Agents. The Limited Partners hereby consent to the employment, when and if required, of any brokers, managing and other agents, accountants, and attorneys as the General Partners may from time to time determine. The fact that a General or Limited partner, or a member of such partner's family, is employed by, or directly or indirectly interested in or connected with, any person, firm, or corporation employed by the partnership to render or perform a service, or from which the partnership may purchase any property, shall not prohibit the General Partners from employing such person, firm, or corporation, or from otherwise dealing with him or it. Neither the partnership nor any of the partners herein shall have any rights in or to any income or profits derived therefrom as a consequence of the partnership relationship herein created.

(d) Other Business Ventures. Any of the General or Limited Partners may engage in or possess an interest in other business ventures of every nature and description, independently or with others. Such other interest may include, but not be limited to, the ownership, financing, leasing, operation, management, or development of real property. Neither the partnership nor any of the partners shall have any rights by virtue of this agreement in and to any independent ventures or the income or profits derived therefrom.

14. Banking. All funds of the partnership shall be deposited in such bank account or accounts as the General Partners shall designate. Withdrawals from any such bank account or accounts shall be made upon such signature or signatures as the General Partners may designate.

15. Conveyances. Any deed, bill of sale, mortgage, security agreement, lease, contract of sale, or other commitment purporting to convey or encumber the interest of the partnership in all or any portion of any real or personal property at any time held in its name shall be signed by two of the General Partners. Notwithstanding anything contained in this agreement, occupancy leases for individual apartments may be signed by any one of the General Partners or by the resident Managing Agent. No person shall be required to inquire into the authority of any individual to sign any document pursuant to the provisions of this paragraph.

16. Books. The partnership shall maintain full and accurate books in its principal office or such other office as the General Partners shall designate for such purpose. All partners shall have the right to inspect and examine the books at reasonable times. The books shall be closed and balanced at the end of each calendar year. The accountants for the partnership shall prepare annual statements showing its profits and losses for the fiscal year and indicating each partner's share of profit or loss for income tax purposes, and shall distribute such statements to all the partners within a reasonable time after the close of each fiscal year.

17. Assignability. No Limited Partner shall have the right to substitute an assignee as contributor or substituted Limited Partner in his place. Any Limited Partner may assign his interest in the partnership without the consent of the General Partners, provided that the Limited Partner and his assignee shall execute such instruments as the General Partners may reasonably deem necessary to effectuate an assignment and shall furnish the General Partners with duplicate original copies thereof.

18. Death, Retirement, and Resignation. In the event of the death, retirement, resignation, bankruptcy, expulsion, or adjudication of insanity or incompetency of any General Partner, the partnership shall be dissolved and terminated. In the event, however, of the death, retirement, or insanity of a General Partner, the partnership may be continued if all of the surviving or remaining competent General Partners so elect. If the surviving or remaining competent General Partners shall determine to continue the partnership, the withdrawing General Partner or his personal representative shall become a Limited Partner in the partnership with the same relative percentage interest, as set forth in Paragraph 9, in partnership profits, losses, and distributions of all kinds, including (but not limited to) liquidating distributions and distributions of proceeds from the sale or condemnation of partnership property and proceeds resulting from any mortgage or refinancing, as previously possessed by the General Partner in this partnership, subject, however, to the limitation of liability to an amount equal to the share of the partner in the total net assets of the partnership at the date that the partner became a Limited Partner under this paragraph. The percentage share of such partner in the total assets of the partnership shall be the same as his percentage share of partnership profits and losses as set forth in Paragraph 9. The surviving or remaining competent General Partners shall determine whether to continue the partnership no later than ninety (90) days following the death, retirement, or adjudication of insanity of any General Partner, and shall within such ninety (90) days give written notice of such determination to the then Limited Partners.

19. Death of Limited Partner. The death of a Limited Partner shall not dissolve or terminate the partnership. In the event of death, the deceased Limited Partner's personal representative shall have all the rights of a Limited Partner in the partnership to the extent of the deceased's interest therein, subject to the terms and conditions of this agreement.

20. Termination Prior to End of Term . A majority of the General Partners may terminate the partnership prior to the end of its term by giving at least 30 days' prior written notice to each of the Limited Partners.

21. Distributions on Termination. In the event of the dissolution and termination of the partnership, the then General Partners shall proceed to the liquidation of the partnership. The proceeds of the liquidation shall be applied and distributed in the following order of priority:

(a) Debts. To the payment of the partnership's debts and liabilities (other than any loans or advances that may have been made by the partners to the partnership) and the expenses of liquidation.

(b) Reserves. To the setting up of all reserves which the General Partners may deem reasonably necessary for any contingent or unforeseen liabilities or obligations of the partnership or of the General Partners arising out of or in connection with the partnership. Any reserves shall be paid over by the General Partners to an attorney-at-law of the State of _____ [state], as Escrowee, to be held by him for the purpose of disbursing the reserves in payment of any of the contingencies, and, at the expiration of the period as the General Partners shall deem advisable, to distribute the balance thereafter remaining in the manner hereinafter provided.

(c) Partner Loans. To the repayment of all loans or advances that may have been made by any of the partners to the partnership, but if the amount available for such repayment shall be insufficient, then pro rata on account thereof.

(d) Balance. Any balance remaining shall be distributed among all General and Limited Partners, as follows:

(1) Cash. In the event that the partnership assets shall have been sold, the net proceeds shall be distributed to each partner in satisfaction of his interest in the partnership in the manner provided in Paragraph 9.

(2) In kind. In lieu of sale, the partnership assets may be distributed in kind, each partner accepting an undivided interest in the partnership's assets subject to its liabilities in satisfaction of his interest in the partnership.

(e) Valuation. In the event of a liquidating distribution of the partnership's property in kind, the fair market value of such property shall be determined by averaging the appraisals of two appraisers reasonably selected by the General Partners, and each partner shall receive an undivided interest in the property equal to the portion of the proceeds to which he would be entitled under Paragraph 9 if the property were sold. The appraisers shall be members of the Appraisal Institute familiar with the type of property owned by the Partnership.

22. Procedure on Termination. A reasonable time shall be allowed for the orderly liquidation of the partnership's assets and the discharge of liabilities to creditors so as to enable the General Partners to minimize the normal losses attendant upon a liquidation. Each of the partners shall be furnished with a statement prepared by the partnership's then Certified Public Accountants, which shall set forth the assets and liabilities of the partnership as at the date of complete liquidation. Upon the General Partners complying with the distribution plan set forth in Paragraph 21 (including payment over to the Attorney-Escrowee if there are sufficient funds), the Limited Partners shall cease to be Limited Partners, and the General Partners, as the sole remaining partners of the partnership, shall execute, acknowledge, and cause to be filed a Certificate of Cancellation of the Partnership.

23. Limit on General Partners' Liability. Anything in this agreement to the contrary notwithstanding, the General Partners shall not be personally liable for the return of the capital contributions of Limited Partners, or any portion thereof, it being expressly understood that any return shall be made solely from partnership assets.

24. Opinion of Counsel. Any act or failure to act by any General Partner which may cause or result in loss or damage to the partnership, if pursuant to opinion of legal counsel employed by the General Partners on behalf of the partnership, shall not subject the General Partners to any liability.

25. Indemnity. The partnership shall indemnify and hold harmless any General Partner from any loss or damage incurred by him by reason of any act performed by him for and on behalf of the partnership and in furtherance of its interests. The foregoing shall not relieve the General Partners of liability for gross negligence or willful malfeasance.

26. Notices. All notices provided for in this agreement shall be directed to the parties at the addresses herein set forth in this agreement and to the partnership at its principal office by Registered or Certified Mail.

27. Entire Agreement. This agreement supersedes all agreements previously made between the parties relating to its

subject matter. There are no other understandings or agreements between them.

28. Non-waiver. No delay or failure by a party to exercise any right under this agreement, and no partial or single exercise of that right, shall constitute a waiver of that or any other right, unless otherwise expressly provided herein.

29. Headings. Headings in this agreement are for convenience only and shall not be used to interpret or construe its provisions.

30. Governing Law. This agreement and the rights of the parties shall be construed in accordance with and governed by the laws of the State of _____ [state] .

31. Counterparts. This agreement may be executed in two or more counterparts, and all so executed shall constitute one agreement, binding on all the parties, notwithstanding that all the parties are not signatory to the original or the same counterpart.

32. Binding Effect. The provisions of this agreement shall be binding upon and inure to the benefit of each of the parties and their respective estates, heirs, legatees, successors, and assigns.

In witness whereof the parties have executed this agreement as of the day and year first above written.

General Partners:

Sam Harris

John Baker

Myron Lowe

Limited Partners:

Martin Brown

Edward Berger

Adam Paine

Gordon Gray

Mary Stern



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Current Legal Forms for Real Estate
Chapter 20 REAL ESTATE ENTITIES
Part IV. Forms
C. PARTNERSHIPS

24-20 Current Legal Forms for Real Estate FORM 20.26

AUTHOR: by Stephen E. Pigott and Harold O. Maxfield, Jr.

FORM 20.26 Limited partnership--corporation as general partner--priority of general partner--cross options to purchase

COMMENT

This form illustrates the variety of special provisions that may be introduced into a limited partnership agreement. Here, the ownership is divided between a corporation acting as the general partner and two individuals as limited partners. In contrast to many limited partnerships, the major capital contribution under this form is being made by the general partner. Moreover, the general partner is given a prior claim on the profits of the partnership. The agreement requires that a specific amount of the profits be first distributed to the general partner, that additional profits up to a specific amount be then distributed to the limited partners, and that all remaining profits be shared in stated proportions. It should be noted that these stated proportions are not the same as the proportions in which the capital has been contributed to the partnership. As in most small real estate investing ventures, the definition of profits is expressed in terms of "cash flow."

Cross option to purchase:

Another special provision in this agreement is the cross option to purchase. The general partner is not free to sell its partnership interest without first offering it to the limited partners on the terms offered by any third party. A similar restriction is imposed on the limited partners in favor of the general partner. In addition, a restriction is imposed on the management powers of the general partner. The partnership property may not be sold without offering it to the limited partners on terms comparable to those offered by a prospective outside purchaser. All these provisions are designed to protect the partners from becoming involuntarily associated in business with strangers.

Passive activity limitations:

Generally speaking, rental real estate activity is considered to be a passive activity. IRC § 469(c)(2). Therefore, deductions and credits from rental activities can only offset income from other passive activities. Such deductions and credits *cannot* be deducted from nonpassive income, such as wages, dividends, interest, etc. However, there are two major exceptions to this general rule.

Certain eligible taxpayers who *materially* participate in rental real estate activities can deduct losses from such activities against nonpassive income. These eligible taxpayers include individuals and closely-held C corporations that meet special eligibility requirements. IRC § 469(c)(7). Second, an individual who owns at least a 10-percent interest and *actively* participates in rental real estate activity is permitted to offset up to \$25,000 of passive activity losses against his nonpassive income. IRC § 469(i).

FORM

THIS AGREEMENT made _____ [month] _____ [day] , _____ [year] , by and among SMITH PROPERTIES CORPORATION, a Delaware corporation, with offices at _____ [address] , _____ [city] , _____ [state] (the "General Partner"), and BERNARD ALLEN, residing at _____ [address] , _____ [city] , _____ [state] , and CHARLES GREEN, residing at _____ [address] , _____ [city] , _____ [state] (the "Limited Partners").

WHEREAS, Bernard Allen, Charles Green, and Smith Properties Corporation, have entered into a contract to purchase the real property hereinafter described.

WHEREAS, Bernard Allen has assigned the contract to purchase the real property (together with the sum of _____ Dollars (\$ _____) deposited under the contract by the Smith Properties Corporation upon its execution) to the limited partnership known as the Plaza Realty Company being organized pursuant to this agreement; and

WHEREAS, the General Partner and the Limited Partners have agreed to contribute to the limited partnership the sums set forth in this agreement, and the Limited Partners have also agreed to subordinate their interest in the profits to be derived from the real property to the return of certain sums to the General Partner as hereinafter specifically set forth;

IT IS THEREFORE AGREED:

1. Name and Business. The parties hereby form a limited partnership (the "partnership"), pursuant to the provisions of the Uniform Limited Partnership Act, to acquire the property described in the attached Exhibit (the "property"), to hold the property for investment, to operate and lease the property, and to mortgage, sell, transfer, and exchange or otherwise convey and encumber the property and the improvements thereon at any time and from time to time in the discretion of the General Partner. The name of the partnership shall be Plaza Realty Company and the principal office of the business shall be at 100 Cadillac Towers Building, Detroit, Michigan.

2. Term. The term of the partnership shall begin the date of the filing of the Certificate of Limited Partnership with the Secretary of State's Office, and shall continue until _____ [month] _____ [day] , _____ [year] , unless terminated as set forth in Paragraphs 12 and 13. The partnership,

however, shall be terminated at any earlier date on which it disposes of its entire interest (including any purchase money mortgage held by it thereon at any time) in all of the property to be acquired by it.

3. Cash capital Contributions.

(a) General Partner. Smith Properties Corporation shall be the General Partner and shall contribute to the capital of the partnership the sum of _____ Dollars (\$ _____) cash. The sum of _____ Dollars (\$ _____) deposited by Smith Properties Corporation under the contract to purchase the property shall be credited toward its agreed cash contribution to the partnership capital.

(b) Limited Partners. The following persons shall be the Limited Partners and shall contribute to the capital of the partnership the cash amounts set opposite their respective names:

Limited Partners	Contribution
Bernard Allen	\$30,000
Charles Green	30,000

(c) Future Capital. The partners shall contribute any future capital required by the partnership in the proportions in which they share the profits as set forth in subparagraph (a) in Paragraph 4 below.

4. Profits and Losses.

(a) Percentage Interest. Net income of the partnership shall be divided among the partners, and the net losses shall be borne by them, in the proportions set forth below opposite their respective names, except as modified by subparagraph

(b) of this paragraph, provided, however, that the Limited Partners' liability for partnership losses shall be limited to the amount of their contributions to the capital thereof:

General Partner	Percentage
Smith Property Corporation	75%
Limited Partners	Percentage
Bernard Allen	12.5%
Charles Green	23.5%

(b) Profit Distributions. Notwithstanding anything herein to the contrary contained, the first _____ Dollars (\$ _____) of the partnership's net operating profits during each calendar month shall be distributed to the General Partner; up to the next _____ Dollars (\$ _____) of the net operating profits for each calendar month shall be distributed between the Limited Partners equally; and any excess of the net operating profits shall be divided among all of the partners, General and Limited, in the proportions set opposite their respective names in subparagraph (a) of this paragraph.

(c) Net Operating Profits. For purpose of this paragraph, the term "net operating profits" shall mean the partnership's net income as determined for income tax purposes in accordance with generally accepted accounting principles, with the following adjustments:

(1) There shall be added to such net income the amount charged for depreciation or any other deduction not involving a

cash expenditure, and

(2) There shall be subtracted from such net income the amount of payments made on account of principal upon mortgages against the property, all amounts paid for nondeductible capital expenditures, and all other cash sums expended for otherwise nondeductible items except distributions to partners.

5. Sale or Condemnation. In the event that the property held by the partnership is sold or condemned, then in either event, the net sale or condemnation proceeds (including net cash proceeds derived from any purchase money mortgage by amortization, sale, assignment, or otherwise) shall be distributed as follows:

(a) The first _____ Dollars (\$_____) shall be divided among the General and Limited Partners in direct proportion to their cash capital contributions as set forth in subparagraphs (a) and (b) of Paragraph 3;

(b) All excess proceeds shall be distributed among the General and Limited partners in the proportions set forth in subparagraph (a) of Paragraph 4.

6. Salaries, Drawings, and Interest on Capital Contributions. No General or Limited partner shall receive any salary or drawings for services rendered on behalf of the partnership in his capacity as a partner, and no partner shall receive any interest on his contributions to the partnership capital.

7. Management, Duties, and Restrictions. During the continuance of this partnership, the rights and liabilities of the General Partner and Limited Partners, respectively, shall be as follows:

(a) General Partner. The General Partner shall manage the partnership business and shall devote such time thereto as shall be reasonably required for its welfare and success. The General Partner shall not sell its share in the partnership or in its capital assets or property without first offering to sell such share to the Limited Partners at the price and upon the terms offered to the General Partner by any third party in the same manner provided with respect to a sale of the partnership's property as set forth in subparagraph (c) of this paragraph. Nothing contained herein, however, shall prevent any General or Limited Partner from continued engagement in real estate activities other than this partnership, and none of the parties shall have any interest in such other activities by virtue of this partnership.

(b) Limited Partners. No Limited Partner shall participate in, or interfere in any manner whatsoever with, the management of the partnership business and the sale or refinancing of its assets. A Limited Partner shall have the right to withdraw his capital contribution upon the termination of the partnership, as set forth in Paragraphs 12 and 13. No part of any Limited Partner's capital contribution, however, shall be withdrawn unless all of the partnership's liabilities, except liabilities to partners on account of their contributions, have been paid, or unless the partnership has assets sufficient to pay them. Except as otherwise provided in Paragraph 12, no Limited Partner shall have the right to demand or receive property other than cash in return for his contribution. No Limited Partner shall have priority over any other Limited Partner either as to contributions to capital or as to compensation by way of income.

(c) Partnership Assets. The Limited Partners consent to any sale or other disposition, encumbrance, mortgage, or lease or any modification, extension, surrender, or cancellation of them, as the case may be, by the General Partner on behalf of the partnership, of any or all of the partnership's assets, now or hereafter acquired, on such terms and conditions as the General Partner may determine. The Limited Partners also consent to the employment, when and if required, of such real estate brokers, managing agents, and attorneys as the General Partner may determine, notwithstanding that any party may have an interest in any employed agent, provided that the amount paid to any broker or managing agents shall not exceed the regular rates prevailing in the locality in which the property is located.

(d) Notice of Proposed Sale. Notwithstanding anything to the contrary herein contained, the General Partner shall not

sell, convey, or mortgage the real property held by the partnership without first giving notice thereof to Bernard Allen, or in the event that Bernard Allen shall not then be living, to the other Limited Partner. The General Partner shall consult with Bernard Allen as to the advisability of any sale, conveyance, or mortgage prior to its consummation. The decision of the General Partner shall prevail, however, in the event of any difference of opinion as between it and Bernard Allen.

(e) Right of First Refusal. Prior to the sale of any property owned by the partnership, it shall first offer to sell the property to the Limited Partners at the price and upon the terms offered to the partnership by any third party, and the Limited Partners shall have the first option to purchase the property upon such terms and conditions. In the event that the Limited Partners do not exercise such option within 30 days after written receipt of the proposed terms and conditions from the partnership, all rights under this provision shall lapse, and the partnership shall be free to sell the property to the third party free of all rights of first refusal granted to the Limited Partners hereunder.

(f) Notice, Deposit. Exercise of the option by the Limited Partners shall be effectuated by written notice of the exercise by both Limited Partners, or the survivor of them, mailed to the partnership within such 30-day period, together with a certified check for no less than twenty percent (20%) of that portion of the total purchase price exceeding the then unpaid principal balances of all mortgages then constituting liens against the property. The partnership shall retain such certified check, made payable to it, as liquidated damages in the event of any subsequent default by the Limited Partners in consummating the purchase.

(g) Terms of Sale. Notice of exercise of the option shall obligate the Limited Partners, jointly and severally, to purchase the property, on the terms and conditions set forth in the notice from the partnership to the Limited Partners, within sixty (60) days after the date of exercise of such option. The closing of title shall be held on such date at the principal office of the partnership, and conveyance of the property shall be made upon payment therefor subject to such conditions of title and physical state as shall exist on that date. In no event shall any inability of the partnership to convey marketable title to the property to the Limited Partners result in any claim or liability against the partnership. But in the event that the partnership shall be unable to convey title in accordance with the terms and conditions set forth in the proposed sale to the third party (which terms and conditions the Limited Partners have accepted by virtue of their exercise of the option), the partnership shall return to the Limited Partners the moneys deposited by them with the partnership upon exercise of the option.

8. Banking. All funds of the partnership shall be deposited in its name in such checking account or accounts as the General Partner shall designate. All withdrawals therefrom shall be made upon checks signed by the General Partner or any of its designees.

9. Conveyances. The General Partner shall sign any deed, mortgage, lease, contract of sale, or other commitment purporting to convey or encumber the interest of the partnership in all or any portion of its property. No other signatures shall be required.

10. Books. The partnership shall maintain complete and accurate books in its principal office, or in any other office as the General Partner shall designate for that purpose. All partners shall have the right to inspect and examine such books at reasonable times. The books shall be closed and balanced at the end of each calendar year, and an audit by a certified public accountant shall be made as of the closing date.

11. Nonassignability.

(a) Prior Approval. No Limited Partner shall have the right to substitute an assignee as contributor in his place unless the General Partner shall give its prior written consent. Such consent or failure to give the same shall be in the General Partner's absolute discretion, and its decision shall be binding and conclusive upon all of the parties.

(b) Right of First Refusal. No Limited Partner shall assign his interest in this partnership unless he shall first grant the General Partner an option to purchase his interest at the price and upon the terms offered to the Limited Partner by the proposed assignee of the partnership interest. The Limited Partner shall give to the General Partner this right of first refusal in the same manner as is set forth in subparagraph (d) of Paragraph 7, with respect to a proposed sale of the partnership's real property.

12. Termination. The General Partner may, in its sole discretion, dissolve the partnership prior to the end of the partnership term by giving thirty (30) days' prior written notice to each of the Limited Partners. In liquidating the partnership, the General Partner may sell the partnership's assets subject to the provisions of subparagraph (d) of Paragraph 7. In such case, the General Partner shall distribute the sales proceeds to each partner in satisfaction of its interest in the partnership. Or, in its discretion, the General Partner may distribute the partnership's assets to the partners in cash and in kind, each partner accepting a proportionate share of the cash and an undivided interest in the partnership's other assets, subject to its liabilities, in satisfaction of his or its interest in the partnership.

13. Dissolution, Withdrawal, or Bankruptcy of General Partner. In the event of the dissolution, withdrawal, or bankruptcy of the General Partner, the partnership shall be dissolved, wound up, and terminated over such period as may be reasonable under the circumstances.

14. Death or Insanity of Limited Partner. The death or insanity of a Limited Partner shall not dissolve the partnership or terminate its business.

15. Distribution of Proceeds in Liquidation. The proceeds of liquidation shall be distributed as realized in payment of the partnership's liabilities in the following order:

(a) To creditors of the partnership;

(b) To all partners in the percentages and manner set forth in subparagraphs (a) and (b) of Paragraph 5.

The General Partner shall not be personally liable to the Limited Partners for any deficit in the Limited Partners' capital accounts.

16. Indemnity. The partnership shall indemnify and save harmless the General Partner from any loss or damage incurred by it by reason of any act performed by it for and on behalf of the partnership and in furtherance of its interests.

17. Notices. All notices provided for in this agreement shall be directed to the parties at the addresses herein set forth and to the partnership at its principal office by registered or certified mail.

18. Entire Agreement. This agreement supersedes all agreements previously made between the parties relating to its subject matter. There are no other understandings or agreements between them.

19. Non-waiver. No delay or failure by a party to exercise any right under this agreement, and no partial or single exercise of that right, shall constitute a waiver of that or any other right, unless otherwise expressly provided herein.

20. Headings. Headings in this agreement are for convenience only and shall not be used to interpret or construe its provisions.

21. Governing Law. This agreement and the rights of the parties thereunder shall be construed in accordance with and governed by the laws of the State of Michigan.

22. Counterparts. This agreement may be executed in two or more counterparts, each of which shall be deemed an

original but all of which together shall constitute one and the same instrument.

23. Binding Effect. The provisions of this agreement shall be binding upon and inure to the benefit of each of the parties and their respective estates, heirs, legatees, successors, and assigns.

In witness whereof the parties hereto have executed this agreement as of the day and year first above written.

General Partner:

Smith Properties Corporation

By: _____

[name and title]

Limited Partners:

Bernard Allen

Charles Green



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Current Legal Forms for Real Estate

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Current Legal Forms for Real Estate
Chapter 20 REAL ESTATE ENTITIES
Part IV. Forms
C. PARTNERSHIPS

24-20 Current Legal Forms for Real Estate FORM 20.27

AUTHOR: by Stephen E. Pigott and Harold O. Maxfield, Jr.

FORM 20.27 Limited partnership--provision for additional capital--hotel renovation

COMMENT

Insufficient capital can become a problem in any business venture. In the agreement illustrated here, a limited partnership is in the process of acquiring a hotel property which requires substantial alterations and improvements. The right to make these capital expenditures is vested in the general partner, together with the collateral right to demand additional proportionate capital contributions from the limited partners. If any of the limited partners fails to make his additional contribution, the general partner undertakes to provide all the additional financing. In that event, a priority is established in favor of the general partner, for the additional capital contributions, in the net profits of the partnership, in the proceeds of any mortgage refinancing, and in distributions from the proceeds of liquidation.

The requirement that all limited partners contribute their proportionate shares of additional capital is designed to preserve the initial ownership percentages among the various partners. Under the Uniform Limited Partnership Act, if a priority is to be given a limited partner over other limited partners in respect of income, return of contributions, or any other matter, that priority must be set forth in the filed certificate of limited partnership.

FORM

THIS AGREEMENT made _____ [month] _____ [day] ,
_____ [year] , among SANFORD CORPORATION, a Delaware corporation with offices at
_____ [address] , _____ [city] , _____ [state] (the "General

Partner"), and JAMES MEYER, residing at _____ [address] , _____ [city] , _____ [state] , PERRY BARNES, residing at _____ [address] , _____ [city] , _____ [state] , and GEORGE ROBERTS, residing at _____ [address] , _____ [city] , _____ [state] (the "Limited Partners").

WHEREAS, the General Partner on behalf of itself and of the Limited Partners has entered into a contract dated _____ [month] _____ [day] , _____ [year] , to acquire the premises known as the Skyline Hotel in New York, New York, together with certain furniture, furnishings, and personal property located in the premises ("property"); and

WHEREAS, the parties desire to form a Limited Partnership under the laws of the State of _____ [state] for the purposes and on the terms and conditions set forth in this agreement; and

WHEREAS, the General Partner has simultaneously herewith assigned the purchase contract to the Limited Partnership organized pursuant to this agreement.

NOW THEREFORE, it is mutually agreed as follows:

1. Formation. The parties hereby form a Limited Partnership pursuant to the provisions of the Partnership Law of the State of _____ [state] .
2. Name. The Partnership shall be conducted under the name of Skyline Hotel Company, L.P.
3. Purpose. The purpose of the Partnership is to acquire pursuant to a certain contract of purchase dated _____ [month] _____ [day] , _____ [year] , and to hold for investment the premises known as the Skyline Hotel in New York, New York, and certain furniture, furnishings, and personal property located therein, and to own, manage, mortgage, create security interests in, lease, improve, exchange, sell, or otherwise transfer or dispose of such property.
4. Term. The term of the Partnership shall begin on the filing of the Certificate of Filing with the State of _____ [state] , and shall continue until _____ [month] _____ [day] , _____ [year] . The Partnership shall be dissolved prior to such date, however, if any of the following events shall occur: (a) any disposition by the Partnership of its entire interest in the real and personal property, including all mortgages or leasehold interests which it may acquire in exchange therefor; (b) the desire of the General Partner to dissolve the Partnership as set forth in Paragraph 21; or (c) the bankruptcy, receivership, or liquidation of the General Partner as provided in Paragraph 19. Further, the general partners agree to publish weekly notices required by the Act in two newspapers located in the Partnership's county of principal business.
5. Principal Office. The principal office of the Partnership shall be maintained in care of Sanford Corporation, _____ [address] , _____ [city] , _____ [state] , or at such other place as the General Partner from time to time may determine.
6. General and Limited Partners. Sanford Corporation shall be the General Partner. James Meyer, Perry Barnes, and George Roberts shall be the Limited Partners.
7. Capital Contribution of General Partner. The General Partner shall contribute to the capital of the Partnership the sum of _____ Dollars (\$_____). The General Partner warrants and represents that it has full power and authority to enter into this agreement and to make its contribution to the capital of the Partnership, and that this agreement and its execution by the General Partner have been ratified, approved, and confirmed by resolution

of its Board of Directors.

8. Capital Contributions of Limited Partners. Each Limited Partner shall contribute to the capital of the Partnership the sum of _____ Dollars (\$_____) in cash.

9. Profits and Losses. Except as otherwise provided in paragraph 11(b), the net profits of the Partnership shall be divided and any losses shall be borne by each of the Partners in the following proportions (subject, however, insofar as the Limited Partners are concerned, to the limitation of their liability to the amount of their individual investment as hereinafter provided):

Partner	Percentage
Sanford Corporations	50%
James Meyer	16-2/3 %
Perry Barnes	16 2/3 %
George Roberts	16 2/3 %

10. Losses of Limited Partners. Notwithstanding anything to the contrary contained in this agreement, the liability of any Limited Partner for the losses of the Partnership shall in no event exceed in the aggregate the value of his original contributions to the Partnership's capital. The General Partner shall solely bear all losses in excess of the contributed amount.

11. Alterations and Additional Capital Contributions.

(a) Proportionate Contributions. The Partnership shall cause all alterations, additions, improvements, repairs, and replacements to or of the Partnership property that the General Partner in its sole discretion shall deem advisable, notwithstanding the same may substantially alter the character or use of the premises. If in the sole judgment of the General Partner the Partnership requires additional capital contributions from the Partners for such work, the Limited Partners shall be notified in writing and shall have the option, to be exercised unanimously within thirty (30) days after such notification, to make additional contributions in cash to the Partnership equal to sixteen and 2/3 percent (16-2/3%) each of the estimated net cost to the Partnership of the work. The exercise of such option by a Limited Partner shall not be deemed effective unless all of the Limited Partners exercise the option in accordance with the terms of this paragraph. If the option is exercised by all of the Limited Partners, they shall make their additional capital contributions at such time or times as the General Partner shall direct, and the General Partner shall make an additional contribution in cash to the Partnership equal to fifty percent (50%) of the estimated net cost to the Partnership of such work, and in such event the Partners' shares of profits and losses shall remain unchanged, i.e., shall be in the proportions set forth in Paragraph 9.

(b) Contribution by General Partner. If any Limited Partner fails to exercise such option, the General Partner shall, in lieu of the foregoing, make an additional contribution of cash to the Partnership equal to the Partnership's entire estimated net cost of the work. In such event, the net losses of the Partnership shall continue to be apportioned by the Partners in the proportions set forth in Paragraph 9 (subject, however, insofar as the Limited Partners are concerned, to the limitation of their liability to the amount of their individual investment as hereinabove provided), but effective as of the date of the making of such additional capital contribution by the General Partner, the net profits of the Partnership shall be divided among the Partners as follows:

(1) Preferred Share of Profits. The General Partner shall first be entitled, before any allocation to the Limited Partners, to a portion of the net cash receipts of the Partnership from the operation of the Partnership property equal to ten percent (10%) per annum of the amount of the additional capital contribution made by it to the Partnership pursuant to this

Paragraph 11(b), subject, however, to the following provisos: (a) in the event that the additional contribution made by the General Partner pursuant to this paragraph 11(b) is repaid in part or in whole to the General Partner from the proceeds of any mortgage refinancing or from the sale or condemnation of any partnership property, at any time or from time to time, as provided in paragraph 12(b), then, effective as of the date of such repayment or repayments, the preferred share of profits to which the General Partner shall be entitled pursuant to this subdivision (1) shall be reduced to an amount equal to 10 percent of the unreturned portion of the General Partner's additional capital contribution; and if the entire additional contribution made by the General Partner pursuant to this Paragraph 11(b) shall have been so repaid to the General Partner, then effective as of the date of the repayment the General Partner shall no longer be entitled to a preferred share of profits as provided in this subdivision (1), and all profits shall thereafter be divided among the General and Limited Partners in the proportions set forth in Paragraph 9.

(2) Balance of Profits. The balance of Partnership net profits over and above the amount allocable to the General Partner, pursuant to subdivision (1) above, shall be divided among the General and Limited Partners in the proportions set forth in Paragraph 9.

(c) All additional capital contributions to the Partnership and the rights of the Partners and the Partnership with respect thereto shall be governed by the provisions of this agreement pertaining to original capital contributions to the Partnership.

12. Partnership Cash Receipts.

(a) Net Cash Receipts. The net cash receipts of the Partnership derived from operation of the Partnership property, in excess of operating expenses and such reasonable reserves as may be established at the sole discretion of the General Partner for alterations, repairs, or other contingencies, shall be distributed to the Partners quarterly or at such other more frequent intervals as the General Partner shall determine. Distributions to the Partners of such net cash receipts shall be made to the Partners in the same proportions in which they then share profits and losses pursuant to Paragraph 9 or Paragraph 11(b), as the case may be. No Partner shall be obligated to repay to the Partnership any such cash distributions received by him or by any other Partner.

(b) Mortgage, Sale, or Condemnation Proceeds. Notwithstanding anything herein contained to the contrary, in the event that the Limited Partners are given the option of making additional contributions to the capital of the Partnership, as provided in Paragraph 11(b), and fail to exercise such option, and if the General Partner then makes an additional capital contribution as provided for in Paragraph 11(b), the net proceeds (after payment of all expenses) subsequently received by the Partnership from the refinancing of any mortgage constituting a lien against the Partnership property or from the sale or condemnation of any Partnership property shall be first applied to the repayment to the General Partner of the additional contribution made by it pursuant to Paragraph 11(b), and shall be distributed to the General Partner accordingly. The Limited Partners shall have no right to such sale, mortgage, or condemnation proceeds or to the proceeds of any successive mortgage refinancing or sale or condemnation of Partnership property until the additional contribution of the General Partner shall have been repaid to it in full by the Partnership. All such distributions to the General Partner shall be charged against the General Partner's capital account, and the General Partner shall not be obligated to repay such distributions to the Partnership.

13. Salaries, Drawings, and Interest on Capital Contributions. None of the Partners (General or Limited) shall receive any salary or drawings for services rendered on behalf of the Partnership in their capacity as Partners, nor shall any Partner receive any interest on his contribution to the capital of the Partnership.

14. Management, Duties, and Restrictions.

(a) General Partner. The General Partner shall manage the Partnership business and shall devote such time to the Partnership as shall be reasonably required for its welfare and success. The General Partner shall have the right, in its

discretion, on behalf of the Partnership, to borrow or lend money, to make, deliver, or accept any commercial paper and execute any mortgage, security agreement, bond, or lease, and to purchase or contract to purchase or sell or contract to sell any property for or of the Partnership.

(b) Limited Partners. No Limited Partner shall participate in the management of the Partnership business. A Limited Partner shall have the right to withdraw his capital contribution upon the termination of the Partnership as provided herein. No part of the capital contribution of any Limited Partner shall be withdrawn, however, unless all liabilities of the Partnership (except liabilities to partners on account of their contributions) have been paid or unless the Partnership has assets sufficient to pay them. No Limited Partner shall have the right to demand or receive property other than cash in return for his contribution. No Limited Partner shall have priority over any other Limited Partner either as to contributions to capital or as to compensation by way of income.

(c) Limited Partners' Consent. The Limited Partners consent to any sale or other disposition, encumbrance, mortgage, security agreement or lease (or modification, cancellation, or replacement of any existing mortgage or lease) by the General Partner on behalf of the Partnership, of any or all of the Partnership's assets on such terms and conditions as the General Partner may determine in its sole discretion, and to the employment, when and if required, of such brokers, accountants, managing, and other agents and attorneys as the General Partner may from time to time determine. The fact that a Partner, General or Limited, or an officer, director, or shareholder of the General Partner, or a member of the family of a Limited Partner or of an officer, director, or shareholder of the General Partner, is employed by, or directly or indirectly interested in or connected with, any person, firm, or corporation employed by the Partnership to render or perform a service, or from which the Partnership may purchase any property, shall not prohibit the General Partner from employing such person, firm, or corporation, or from otherwise dealing with him or it, and neither the Partnership nor any of the Partners shall have any rights in or to any income or profits derived therefrom as a consequence of the Partnership relationship herein created.

(d) Other Activities. Any General or Limited Partner, may engage in and possess an interest in other business ventures of every nature and description, independently or with others, including but not limited to the ownership, financing, leasing, operation, management, or development of real property. Neither the Partnership nor any of its Partners shall have any rights by virtue of this agreement in and to such independent ventures or the income or profits derived therefrom.

15. Banking. All funds of the Partnership shall be deposited in such bank account or accounts as the General Partner shall designate. Withdrawals from any such bank account or accounts shall be made upon such signature or signatures as the General Partner may designate.

16. Conveyance. Any deed, bill of sale, mortgage, security agreement, lease, contract of sale, or other commitment purporting to convey or encumber the interest of the Partnership in all or any portion of any real or personal property at any time held in its name, shall be signed by the General Partner, and no other signature shall be required. No person shall be required to inquire into the authority to sign any document pursuant to the provisions of this paragraph.

17. Assignability. With the consent of the General Partner only, any Limited Partner may assign his interest in the Partnership. No Limited Partner shall have the right to substitute an assignee as a contributor or substituted Limited Partner in his place.

18. Power of Attorney. Each of the Limited Partners hereby irrevocably constitutes and appoints the General Partner his true and lawful attorney, in his name, place, and stead, to make, execute, acknowledge, and file:

(a) A certificate of limited partnership under the laws of the State of _____ [state];

(b) Any certificate or other instrument which may be required to be filed by the Partnership under the laws of the State

of _____ [state] or which the General Partner shall deem it advisable to file;

(c) Any and all amendments or modifications of the instruments described in the preceding subdivisions (a) and (b); and

(d) All documents which may be required to effectuate the dissolution and termination of the Partnership;

It is expressly understood and intended by each of the Limited Partners that the grant of the foregoing power of attorney is coupled with an interest.

19. Bankruptcy, Receivership, or Liquidation of General Partner. In the event of the bankruptcy, receivership, or liquidation of the General Partner, the Partnership shall be dissolved and terminated.

20. Death of Limited Partner. The death of a Limited Partner shall not dissolve or terminate the Partnership. In the event of such death, the personal representative of the deceased Limited Partner shall have all the rights of a Limited Partner in the Partnership to the extent of the deceased's interest therein, subject to the terms and conditions of this agreement.

21. Termination Prior to End of Term. The General Partner may, in its sole discretion, terminate the Partnership prior to the end of the partnership term by giving at least thirty (30) days' prior written notice to each of the Limited Partners.

22. Distributions on Termination. In the event of the dissolution and termination of the Partnership, the General Partner shall proceed to the liquidation of the Partnership. The proceeds of such liquidation shall be applied and distributed first in payment of Partnership liabilities, then to the repayment of the additional capital contribution (if any) made by the General Partner pursuant to paragraph 11(b) or so much thereof as shall not theretofore have been returned to the General Partner in accordance with the provisions of Paragraph 12(b), and finally to each Partner in proportion to the percentages as set forth in Paragraph 9. Anything in this agreement to the contrary notwithstanding, the General Partner shall not be personally liable for the return of the capital contributions of Limited Partners, or any portion thereof, it being expressly understood that any such return shall be made solely from Partnership assets.

23. Notices. All notices provided for in this agreement shall be directed to the parties at the addresses herein set forth and to the Partnership at its principal office by registered or certified mail.

24. Entire Agreement. This agreement supersedes all agreements previously made between the parties relating to its subject matter. There are no other understandings or agreements between them.

25. Non-waiver. No delay or failure by a party to exercise any right under this agreement, and no partial or single exercise of that right, shall constitute a waiver of that or any other right, unless otherwise expressly provided herein.

26. Headings. Headings in this agreement are for convenience only and shall not be used to interpret or construe its provisions.

27. Governing Law. This agreement and the rights of the parties hereunder shall be construed in accordance with and governed by the laws of the State of _____ [state] .

28. Counterparts. This agreement may be executed in two or more counterparts, each of which shall be deemed an original but all of which together shall constitute one and the same instrument.

29. Binding Effect. The provisions of this agreement shall be binding upon and inure to the benefit of each of the parties and their respective estates, heirs, legatees, successors, and assigns.

In witness whereof the parties hereto have executed this agreement as of the day and year first above written.

General Partner:

SANFORD CORPORATION

By: _____

[name and title]

Limited Partners:

James Meyer

Perry Barnes

George Roberts



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Current Legal Forms for Real Estate

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Current Legal Forms for Real Estate
Chapter 20 REAL ESTATE ENTITIES
Part IV. Forms
C. PARTNERSHIPS

24-20 Current Legal Forms for Real Estate FORM 20.28

AUTHOR: by Stephen E. Pigott and Harold O. Maxfield, Jr.

FORM 20.28 Syndication--limited partnership agreement--provision for continuance of partnership upon death of general partner

COMMENT

This form illustrates a limited partnership agreement which might be used by a substantial real estate syndication. Participating interests purchased by limited partners in a syndication have been recognized as "securities." This requires compliance with state and federal securities laws, which require filing statements, prospectus materials and other items.

Partnership vs. publicly traded partnership:

A newly formed partnership that is publicly traded is treated as a corporation for tax purposes. Publicly traded means that the partnership interests either are traded on an established securities market, or are readily tradable on a secondary market or its substantial equivalent. If 90 percent or more of its gross income is qualifying passive-type income, including real property rents, and gains from the sale or other disposition of real property, the partnership is excluded from corporate tax treatment. Net income from a publicly traded partnership is not treated as passive income for purposes of the passive loss rules. Losses are not allowed against other passive income or even against income from another publicly traded partnership.

If the partnership is not publicly traded, its tax status will depend upon whether it is classified as a partnership or an association.

Partnership vs. "association" tax status:

A syndicate is treated as a partnership unless it is an association taxable as a corporation (or it is publicly traded). In light of the "Check the Box" regulations, the analysis as to whether a limited partnership will be taxed as a partnership is largely, if not entirely, irrelevant. (See Chapter 1, Volume 1, Partnerships § 1.07[2]).

Partnership tax status:

A partnership is not subject to any federal income taxes. The partnership files federal partnership information tax returns reporting its operations on a cash basis for each calendar year. Each unit holder will be required to report on his own federal income tax return his share of partnership items of income, gain, loss, deduction, or credit and, accordingly, may be subject to tax on his distributive share of partnership income whether or not any cash distribution is made to him. As to the taxation of partnerships and partners, see TB § 20.05.

Passive activity limitations:

Generally speaking, rental real estate activity is considered to be a passive activity. IRC § 469(c)(2). Therefore, deductions and credits from rental activities can only offset income from other passive activities. Such deductions and credits *cannot* be deducted from nonpassive income, such as wages, dividends, interest, etc. However, there are two major exceptions to this general rule.

Certain eligible taxpayers who *materially* participate in rental real estate activities can deduct losses from such activities against nonpassive income. These eligible taxpayers include individuals and closely-held C corporations that meet specialeligibility requirements. IRC § 469(c)(7). Second, an individual who owns at least a 10-percent interest and *actively* participates in rental real estate activity is permitted to offset up to \$25,000 of passive activity losses against his nonpassive income. IRC § 469(i).

Allocation of partnership tax items:

Items of partnership income, gain, loss, deductions, credits, or other items are allocated to a partner only if realized, paid, or incurred by the partnership during the portion of the year in which the partner is a member of the partnership and not retroactively to periods prior to entry. If any partner's interest in a partnership changes during the partnership tax year, each partner's share of partnership income, gain, loss, deduction, or credit is to be determined by using any method prescribed by regulations which takes into account the varying interests of the partners in the partnership during the tax year. For partnerships using the cash method of accounting, specific cash method items are required to be assigned to each day in the period to which they are attributable. The assigned amounts are then apportioned among the partners in proportion to their interests in the partnership at the close of each day. This allocation is similar to the accrual method and applies specifically to interest, taxes, payments for services, or for the use of property and other items prescribed by regulation to avoid retroactive allocation.

Generally, allocation of partnership tax items among partners is controlled by the partnership agreement, provided that the allocation has substantial economic effect. If the allocation is set aside, a partner's share of partnership items will be determined in accordance with the partner's interest in the partnership. For a more detailed discussion of this subject, see The Tax Background to Chapter 1, "Partnerships," in Volume 1.

Partnership taxation:

For a further discussion of partnership taxation, see TB § 20.05 at the beginning of this chapter, or The Tax Background to Chapter 1 in Volume 1, for more detailed coverage.

FORM

THIS PARTNERSHIP AGREEMENT made _____ [month] _____ [day] ,
 _____ [year] , among JOHN BAKER, MARVIN HARRIS, ALVIN JOHNSON, WILLIAM
 MINTON, OSCAR KINDLER, and DONALD ENRIGHT.

WHEREAS, a contract of sale, dated _____ [month] _____ [day] ,
 _____ [year] , was entered into between John Baker, Marvin Harris, and Alvin Johnson, as
 purchasers, and Central Realty Co., Inc., as seller (the "Purchase Agreement"), covering the sale of the improved real
 property situated in New York County known as the Blackacre Building (the "Real Property").

WHEREAS, the Purchase Agreement provides, among other things, that contemporaneously with the acquisition of the
 fee title to the Real Property, the purchaser will enter into a Net Lease with the seller of the fee title as lessee, covering
 the entire Real Property for an initial term of twenty-one (21) years with options in the lessee to renew for four
 additional terms of twenty-one (21) years each, upon the terms more particularly provided in the form of Net Lease
 attached to the Purchase Agreement.

WHEREAS, the parties desire to form a limited partnership for the purpose of acquiring the Real Property pursuant to
 the Purchase Agreement.

IT IS THEREFORE AGREED:

1. Formation. The parties hereby form a Limited Partnership (the "Partnership"), pursuant to the provisions of the
 Partnership Law of the State of _____ [state] .
2. Name. The Partnership shall be conducted under the firm name and style of Blackacre Realty Company.
3. Purpose. The purpose of the Partnership is to acquire and hold the Real Property for investment and to lease the same
 to another for operation, and if future circumstances require it, to again lease the real property or operate the same on
 such terms and conditions as a majority of the General Partners shall determine.
4. Term. The term of the Partnership shall begin on the filing of the Certificate of Filing with the State of
 _____ [state] , and shall continue until [month] _____ [day] ,
 _____ [year] . The Partnership shall be dissolved and terminated prior to such date, however, if any
 of the following events shall occur:
 - (a) Any disposition by the Partnership of its entire interest in the Real Property, including any mortgage, leasehold,
 securities, or other interest which it may acquire upon a transfer of the Real Property.
 - (b) The death, retirement, or adjudication of bankruptcy, insanity, or incompetency of any General Partner, unless the
 remaining General Partners elect to continue the Partnership pursuant to the provisions of Paragraph 20.
 - (c) The happening of the events described in Paragraph 8(b) of this agreement.

(d) The decision of all of the General Partners to terminate the Partnership.

5. Capital. The capital of the Partnership shall be \$3,500,000, consisting of

(a) _____ Dollars (\$ _____) in cash; and

(b) Other property consisting of the Purchase Agreement at an agreed value of _____ Dollars (\$ _____).

6. General Partners and Their Contributions. The following parties shall be the General Partners of the Partnership. The General Partners shall contribute to the partnership capital undivided interests aggregating one hundred percent(100%) in the Purchase Agreement, in the amounts set forth alongside their respective names as follows:

John Baker \$ _____

Marvin Harris \$ _____

Alvin Johnson \$ _____

These contributions shall be accomplished by the execution and delivery by the General Partners, concurrently with the execution of this Partnership Agreement, of an instrument assigning to the Partnership their undivided one hundred percent (100%) interest in the Purchase Agreement. The assignment shall include the interest of the General Partners in the _____ Dollars (\$ _____) which they paid on account of the purchase price under the Purchase Agreement. However, the Partnership shall reimburse the assignors for their payment under the Purchase Agreement by delivering to them a noninterest-bearing note or notes in the amount of _____ Dollars (\$ _____). Such note or notes shall be payable at the time and in the event of the closing of the Partnership's acquisition of the Real Property.

7. Original Limited Partners and Their Contributions. The following parties shall be the Original Limited Partners of the Partnership. The Limited Partners shall contribute to the partnership capital, in cash, concurrently with the execution of this Partnership Agreement, the amounts set forth alongside their respective names as follows:

William Minton \$ _____

Oscar Kindler \$ _____

Donald Enright \$ _____

8. Additional Limited Partners and Their Contributions.

(a) Admission of Limited Partners. The General Partners are authorized to admit Additional Limited Partners to the Partnership, who shall contribute, in cash, to the partnership capital sums aggregating _____ Dollars (\$ _____). Upon the admission of such additional Limited Partners an amendment to the certificate of limited partnership of the Partnership, reflecting such admissions, shall be filed. The cash contributions of each additional Limited Partner shall be in the amount of _____ Dollars (\$ _____) or multiples thereof, or in lesser fractional amounts if the General Partners so determine. To accomplish the purposes of

this paragraph, the General Partners are authorized to do all things necessary to effectuate the admission of such Additional Limited Partners. Each Additional Limited Partner shall become signatory to this agreement by executing a conformed counterpart of the agreement at the foot thereof, and each Additional Limited Partner shall be deemed to have adopted and agreed to be bound by all of the provisions of this agreement. However, each executed counterpart shall not become binding and effective until it has been attested by the signature of one of the General Partners. The original of this agreement, executed by the General Partners and the Original Limited Partners, and the duly executed and attested counterparts, taken together, shall constitute a single instrument.

(b) Preconditions. If for any reason whatsoever (1) additional contributions to the Partnership of _____ Dollars (\$_____) are not made by Additional Limited Partners by _____ [month] _____ [day], _____ [year], or any adjourned date for the closing of title to the Real Property, or (2) the acquisition of the Real Property shall not close by _____ [month] _____ [day], _____ [year], or any adjourned date for the closing of title to the Real Property, then the cash contributions of the Original Limited Partners and the Proposed Limited Partners shall be repaid to them without interest; and the Partnership shall pay over to the General Partners, as their interests may appear, the deposit of _____ Dollars (\$_____) under the Purchase Agreement, in the event that the deposit is returnable to the Partnership by the seller on the occasion of the termination of the Partnership in the circumstances described in this subparagraph. Upon such payments being made, this Partnership Agreement shall be of no further force and effect, and the Partnership shall terminate, with the authority in the General Partners, or any of them, to execute a Certificate of Cancellation of the Partnership, as well as any and all other documents required to effectuate the Partnership dissolution.

9. Acquisition of Real Property, etc. Upon the admission of Additional Limited Partners whose cash contributions to the Partnership shall aggregate _____ Dollars (\$_____), the Partnership shall proceed to acquire fee title to the Real Property and enter into the Net Lease pursuant to the terms of the Purchase Agreement, and the General Partners shall take all steps which they shall deem necessary or proper to effectuate such transactions. Any of the General Partners, acting on behalf of the Partnership, may execute any or all of the instruments required to accomplish the foregoing.

10. Principal Office. The principal office of the Partnership shall be maintained at _____ [address] , _____ [city] , _____ [state] , or at such other place or places as the General Partners may from time to time determine, notice of which shall be given to the Limited Partners.

11. Profits and Losses.

(a) Allocation. The net cash receipts of the Partnership shall be apportioned among the General Partners and the Limited Partners (collectively the "Partners"), and net losses shall be borne by them pro rata in accordance with the amounts of their respective original cash and agreed value of other property contributions to the Partnership capital, as the case may be. In any event, however, the liability of any Limited Partner (except one who is also a General Partner) for the losses of the Partnership shall be limited to the actual cash or property originally contributed by him to the Partnership capital.

(b) Net Cash Receipts Defined. The term "net cash receipts of the Partnership" shall mean net profits derived from the ownership of the Real Property as ascertained through the use of generally accepted accounting practices, except that (1) depreciation of buildings, improvements, and personalty shall not be considered as a deduction, (2) mortgage amortization shall be considered as a deduction, (3) all amounts expended by the Partnership in the discretion of the General Partners for capital improvements shall be considered a deduction, and (4) if the General Partners shall so determine, a reasonable reserve shall be deducted for working capital needs or to provide funds for improvements or for any other contingencies of the Partnership.

(c) Effect. The foregoing provisions for the apportionment of net cash receipts shall remain effective irrespective of

whether all or any portion of the Partners' capital contributions shall have been returned to them pursuant to the provisions of Paragraph 12.

12. Distributions of Profits and Capital.

(a) Time. The net cash receipts of the Partnership, apportioned in the manner provided in Paragraph 11, shall be distributed at reasonable intervals as determined by the General Partners in their absolute discretion.

(b) Refinance Proceeds. In the event that moneys shall be available for distribution among the Partners as a return of capital by reason of mortgage refinancing, all such moneys shall be divided among the General Partners and Limited Partners, pro rata, in accordance with their respective original cash and agreed value of other property contributions to the Partnership capital, as the case may be.

(c) The respective amounts of the Partners' contributions to the Partnership capital in cash or the agreed value of other property may be returned to them, in whole or in part, in cash, at any time in the absolute discretion of the General Partners. Such returns of contributions shall be pro rata to all Partners in accordance with the amounts of their respective cash or agreed value of other property contributions to Partnership capital, as the case may be. No Partner shall have the right to demand or receive property other than cash in return for his contribution.

13. Advances. If any Partner shall, in excess of his contribution to the capital of the Partnership, advance any moneys to the Partnership, the amount of any such advance shall not be an increase of his capital contribution or entitle him to any increase in his share of the distributions of the Partnership. The amount of any such advance shall be an obligation of the Partnership to the Partner and, unless otherwise provided and agreed, shall be repaid to him without interest, except that such advances shall be payable or collectible only out of the Partnership assets, and the General Partners shall not be personally obligated to repay any part thereof.

14. Books, Records, and Reports.

(a) Maintenance. At all times during the continuance of the Partnership, the General Partners shall keep or cause to be kept complete and true books of account, in which shall be entered fully and accurately each transaction of the Partnership. The books of account, together with a certified copy of the certificate of limited partnership and all amendments thereto, shall at all times be maintained at the Partnership's principal office and shall be open to the reasonable inspection of the Partners or their duly authorized representatives.

(b) Annual statements. Annual statements of Partnership gross receipts and operating expense, as prepared by the Partnership's accountants, shall be transmitted to each of the Partners. Within a reasonable period after the close of each year, a report shall be transmitted to each Partner indicating his share of the Partnership's profits or loss for such year for federal income tax purposes.

15. Bank Accounts. All funds of the Partnership shall be deposited in the Partnership name, in such bank account or accounts as the General Partners shall designate. Withdrawals from any bank account or accounts shall be made upon such signature or signatures as the General Partners may designate.

16. Powers and Rights of General Partners.

(a) Management. Except as otherwise provided in subparagraph (b), the General Partners shall have equal rights in the management and conduct of the Partnership business.

(b) Authority. A majority of the General Partners in their absolute discretion shall have the power on behalf of the Partnership:

- (1) to sell, exchange, or convey title to, and to grant an option for the sale of all or any portion of the Real Property, including any mortgage or leasehold interest or other property which may be acquired by the Partnership upon a transfer of the Real Property; to lease all or any portion of the Real Property without limit as to the term, whether or not such term (including renewal terms) shall extend beyond the date of the termination of the Partnership and whether or not the space so leased is to be occupied by the lessee or, in turn, subleased in whole or in part to others; to borrow money and as security therefor to mortgage all or any part of the Real Property, and to prepay, in whole or in part, refinance, recast, increase, modify, consolidate, correlate, or extend all mortgages affecting the Real Property; all of the foregoing at the price, rental, or amount, for cash, securities, or other property and upon such terms as they deem proper;
- (2) to place record title to the Real Property in the name or names of a nominee or nominees for the purpose of mortgage financing or any other convenience or benefit of the Partnership;
- (3) to employ from time to time persons, firms, or corporations for the operation and management of the Real Property, including, without limitation, a supervisory managing agent, a building management agent, accountants, and attorneys on such terms and for such compensation as they shall determine;
- (4) to change and reorganize the Partnership into any other legal form; and
- (5) to execute, acknowledge, and deliver any and all instruments to effectuate the foregoing.

By way of extension of the foregoing and not in limitation thereof, the General Partners shall possess all of the powers and rights of partners in a partnership without limited partners under the Partnership Law of the State of New York. However, whenever a decision shall have been made by a majority of the General Partners in respect of any of the foregoing matters, such majority decisions shall be binding upon all General Partners, and any action taken thereunder shall constitute the act of all General Partners.

(c) Approval of Sale. Notwithstanding the unqualified power and right of a majority of the General Partners to sell, exchange, or convey title to the Real Property, or any part thereof, the General Partners represent that it is not their intention to sell, exchange, or convey the Real Property unless written approval of a majority in interest of the Limited Partners is first obtained. Each of the Limited Partners agrees that such written approval, if given, shall be irrevocable and upon receipt by the General Partners of such approval of a majority in interest of the Limited Partners to any such sale, the express irrevocable approval and consent of all Limited Partners shall be deemed conclusively to have been given to the General Partners. Each of the Limited Partners hereby irrevocably constitutes and appoints the General Partners, or any one of them, jointly and severally, his true and lawful attorney, in his name, place, and stead, in such event, to execute his consent to confirm and adopt such unanimous approval. The foregoing power of attorney is coupled with an interest and shall survive delivery of an assignment of limited partnership interest in the same manner as in Paragraph 23 provided. A transfer of record title to a nominee for the Partnership for the purpose of mortgage financing or any other convenience or benefit of the Partnership shall not be construed as a sale, exchange, or conveyance within the meaning of this subparagraph (c) or of Paragraph 4(a) hereof. Nothing herein contained shall require any assignee or grantee to investigate the General Partners' authority to sell, exchange, or convey all or any portion of the Real Property or any other property of the Partnership, or to grant any option therefor, nor require any assignee or grantee to inquire as to whether the approval of the Limited Partners for any sale, exchange, or conveyance, if executed by a majority of the General Partners, shall bind the Partnership.

(d) Other activities. The General Partners shall devote so much of their time as they in their absolute discretion deem necessary to the affairs of the Partnership business, and they shall receive no compensation therefor from the Partnership. Any General or Limited Partner may engage in or possess an interest in other business ventures of every nature and description, independently or with others. Such other activities may include, but shall not be limited to, the ownership, financing, leasing, operation, management, syndication, brokerage, and development of real property.

Neither the Partnership nor the Partners shall have any right by virtue of this agreement in and to such independent ventures or to the income or profits derived therefrom. The fact that a General or Limited Partner, or a member of his family, is employed by, or is directly or indirectly interested in or connected with, any person, firm, or corporation employed by the Partnership to render or perform a service, or from whom or which the Partnership may buy merchandise or other property, or to or from whom or which the Partnership shall lease the Real Property, shall not prohibit the General Partners from executing a lease with or employing such person, firm, or corporation or from otherwise dealing with him or it. Neither the Partnership nor any of the Partners, as such, shall have any rights in or to any income or profits derived therefrom.

(e) Reliance on Counsel. Any act or failure to act by a General Partner, the effect of which may cause or result in loss or damage to the Partnership, if pursuant to opinion of legal counsel employed by the General Partners on behalf of the Partnership, shall not subject the General Partners to any liability.

17. Activities of Limited Partners. The Limited Partners shall take no part in, or interfere in any manner with, the conduct or control of the Partnership business or the sale, leasing, or refinancing of its assets, and shall have no right or authority to act for or bind the Partnership.

18. Substituted Limited Partners.

(a) Consent. Anything in this agreement to the contrary notwithstanding, no assignee of the whole or any portion of a Limited Partner's interest in the Partnership shall have the right to become a Substituted Limited Partner in place of his assignor, unless (1) his assignor shall designate such intention in the instrument of assignment, and (2) the written consent of all the General Partners to such substitution shall be obtained. The General Partners shall have the sole and absolute discretion to grant or deny such substitution. Their failure or refusal to grant consent, however, shall not affect the validity of any such instrument as an assignment of the right to receive Partnership distributions applicable to such interest under this agreement, provided such instrument is in form satisfactory to the General Partners, a duly executed and acknowledged counterpart is filed with the Partnership, and the terms thereof are not in contravention of the provisions of subparagraph (c) of this Paragraph 18. In no event, shall the consent of any other Limited Partner be required to effectuate such substitution.

(b) Preconditions. Notwithstanding the granting of consent by the General Partners, the admission of an assignee as a Substituted Limited Partner shall be further conditioned on (1) the assignment instrument being in form and substance satisfactory to the General Partners, (2) the assignor and assignee named in the assignment executing and acknowledging such other instrument or instruments as the General Partners may deem necessary or desirable to effectuate the admission, (3) the assignee's written acceptance and adoption of all of the terms and provisions of this agreement, as the same may have been amended, and (4) the assignee paying or obligating himself to pay, as the General Partners may determine, all reasonable expenses connected with the admission.

(c) In no event shall a limited partnership interest, or any portion thereof, be assigned or transferred to a minor or incompetent. Any such attempted assignment or transfer shall be void and ineffectual and shall not bind the Partnership.

19. Death of Limited Partner. The death of a Limited Partner shall not dissolve or terminate the Partnership. In the event of death, the personal representative of the deceased Limited Partner shall have all the rights of a Limited Partner in the Partnership to the extent of the deceased's interest therein, subject to the terms and conditions of this agreement; and his estate shall be liable for all his liabilities as a Limited Partner.

20. Right of Surviving or Remaining General Partner to Continue Business of Partnership.

(a) Election. In the event of the death, retirement, or adjudication of bankruptcy, insanity, or incompetency of any of the General Partners, such retiring partner, or personal representative of the deceased partner, or the trustee of the bankrupt

partner, or the committee or other representative of the insane or incompetent partner, as the case may be (the "Withdrawing General Partner"), the surviving or remaining General Partners, as the case may be (the "Remaining General Partners," which shall denote the singular if there is only one remaining or surviving General Partner), acting unanimously, shall have the right, but not the obligation, to elect to continue the business of the Partnership for the balance of the term as specified in Paragraph 4. The election may be exercised by notice to the Limited Partners stating in substance that the Remaining General Partners have elected to continue the business of the Partnership.

(b) Purchase Options. In the event that the election is exercised upon the death or adjudication of insanity or incompetency of a General Partner, the Remaining General Partners shall have the option to purchase (pro rata, or as they may otherwise agree among themselves) the entire interest of the Withdrawing General Partner for a cash price equal to the original contribution of the Withdrawing General Partner plus his proportionate share of mortgage amortization payments made by the Partnership less any distributions of capital made to him from the proceeds of any mortgage refinancing.

(c) Bankruptcy or Retirement. In the event that the election is exercised upon the adjudication of bankruptcy or retirement of a General Partner, the Remaining General Partners shall have the option to purchase (pro rata, or as they may otherwise agree among themselves) the entire interest of the Withdrawing General Partner for a cash price equal to the original contribution of such Withdrawing General Partner, less all distributions of capital theretofore made to him from the proceeds of any mortgage refinancing.

(d) Exercise of Purchase Option. Any of the foregoing options may be exercised by notice thereof to the Withdrawing General Partner, within 60 days after the remaining General Partners shall have elected to continue the business of the Partnership or the appointment of the legal representative of the deceased, bankrupt, insane, or incompetent General Partner, as the case may be, whichever is the later. Until such option is exercised and payment made thereunder, the Withdrawing General Partner shall be entitled to receive distributions applicable to his interest.

(e) Limited Partner Alternative. In the event the Remaining General Partners do not exercise their option to purchase, the Withdrawing General Partner shall become a Limited Partner of the Partnership with the same interest in the Partnership capital and profits as the Withdrawing General Partner had.

21. Distribution on Dissolution.

(a) Liquidation Priority. Upon the dissolution and termination of the Partnership, the then General Partners shall proceed to the liquidation of the Partnership. The proceeds of liquidation shall be applied and distributed in the following order of priority:

(1) To the payment of the Partnership's debts and liabilities (other than any loans or advances that may have been made by any of the Partners to the Partnership) and the expenses of liquidation.

(2) To the setting up of any reserves which the General Partners may deem reasonably necessary for any contingent or unforeseen liabilities or obligations of the Partnership or of the General Partners, arising out of or in connection with the Partnership. The General Partners shall pay over the reserves to a New York State attorney-at-law, as escrowee, to be

held by him for the purpose of disbursing them in payment of any of the contingencies. At the expiration of a period that the General Partners shall deem advisable, the escrowee shall distribute the balance remaining in the manner provided in subparagraphs (3) and (4) of this Paragraph 21.

(3) To the repayment of all loans or advances that any of the Partners may have made to the Partnership, but if the amount available for repayment shall be insufficient, then pro rata on account thereof.

(4) Any balance then remaining shall be distributed among all General and Limited Partners, pro rata, in accordance with the amounts of their respective original contributions to the Partnership capital.

(b) Liquidation Period. A reasonable time shall be allowed for the orderly liquidation of the Partnership assets and the discharge of liabilities to creditors so as to enable the General Partners to minimize the normal losses attendant upon a liquidation.

(c) Financial Statement, Termination. Each of the Partners shall be furnished with a statement prepared by the Partnership's then accountants, which shall set forth the Partnership assets and liabilities as at the date of complete liquidation. Upon the General Partners complying with the distribution plan (including payment over to the attorney escrowee if there are sufficient funds therefor), the Limited Partners shall cease to be such, and the General Partners, as the sole remaining partners of the Partnership, shall execute, acknowledge and cause to be filed a certificate of cancellation of the Partnership.

(d) Return of Capital Contribution. The General Partners shall not be personally liable for the return of the capital contributions of Limited Partners, or any portion thereof. Any such return shall be made solely from Partnership assets.

22. Withdrawal by Limited Partners. No Limited Partner shall at any time withdraw from the Partnership, except as hereinbefore provided.

23. Power of Attorney.

(a) Partnership Documents. In addition to the powers of attorney contained in Paragraph 16, each of the Limited Partners irrevocably constitutes and appoints the General Partners, or any one of them, jointly and severally, his true and lawful attorney, in his name, place, and stead, to make, execute, acknowledge, and file:

(1) a certificate of limited partnership under the laws of the State of _____ [state];

(2) any certificate or other instrument which may be required to be filed by the Partnership under the laws of the State of _____ [state] which the General Partners shall deem it advisable to file;

(3) any and all amendments or modifications of the instruments described in the preceding subdivisions (1) and (2); and

(4) all documents which may be required to effectuate the dissolution and termination of the Partnership;

It is expressly intended by each of the Limited Partners that the foregoing power of attorney is coupled with an interest.

(b) Survival. The foregoing power of attorney, as well as the powers contained in Paragraph 16, shall survive the delivery of an assignment by any of the Limited Partners of the whole or any portion of his limited partnership interest. Where, however, the General Partners have approved an assignee of a limited partnership interest as a Substituted Limited Partner, then the foregoing power of attorney of the assignor Limited Partner shall survive the delivery of the assignment for the sole purpose of enabling the General Partners to execute, acknowledge, and file any and all instruments necessary to effectuate the substitution.

(c) Substitute Limited Partners. A similar power of attorney shall be one of the instruments which the General Partners, under Paragraph 18, shall require an assignee of a Limited Partner to execute as a condition of his admission as a substituted Limited Partner.

(d) Tax Election. In the discretion of the General Partners, the Partnership may, but shall not be obliged to, make or revoke the election referred to in Section 754 of the Internal Revenue Code of 1954 or any similar provision enacted in lieu of Section 754. Each of the Partners shall supply to the Partnership the information necessary, properly to give effect to such election.

(e) Disability. This power of attorney, and any other power of attorney granted by this agreement, shall not be affected by the subsequent disability or incompetence of the principal.

24. Acknowledgment of Limited Partners.

(a) Other Instruments. Each of the Additional Limited Partners acknowledges that statements contained in this agreement as to the contents of any agreement or other instrument are not necessarily complete. In each instance reference is made to the copies of such instruments which have been available for inspection by the Additional Limited Partners as hereinafter set forth.

(b) Prospectus. Each of the Additional Limited Partners further acknowledges that prior to the date of execution of a counterpart of this agreement he received and examined a copy of the Prospectus filed with the Securities and Exchange Commission, as amended to the execution date.

(c) Inspection. True copies of the Purchase Agreements and exhibits annexed thereto, the Registration Statement filed with the Securities and Exchange Commission, and all other instruments related to this transaction shall be available for inspection by each of the Additional Limited Partners prior to the submission of a counterpart hereof for his signature. Such availability for inspection shall be at the Partnership's principal office.

25. Notice. All notices under this agreement shall be in writing, and shall be given to the parties at the addresses herein set forth and to the Partnership at its principal office, or at such other address as any of the parties may hereafter specify in the same manner.

26. General Partners' Option. If all the General Partners deem it to be in the best interests of the Partnership, they may treat an assignee, who has not become a Substituted Limited Partner, as a Substituted Limited Partner in the place and stead of his assignor.

27. Captions. Paragraph titles or captions contained in this agreement are inserted only as a matter of convenience and for reference, and in no way define, limit, extend, or describe the scope of this agreement or the intent of any provision hereof.

28. Variations in Pronouns. All pronouns and variations thereof shall be deemed to refer to the masculine, feminine, singular, or plural as the identity of the person or persons may require.

29. Arbitration. Any dispute or controversy arising under, out of, in connection with, or in relation to this agreement, and any amendment thereof, or the breach thereof, or in connection with the formation, operation, or dissolution of the Partnership, shall be determined and settled by arbitration in _____ [city] in accordance with the rules of the American Arbitration Association. Any award rendered therein shall be final and binding on each and all of the Partners, and judgment may be entered thereon in any court of competent jurisdiction.

30. Conversion. Notwithstanding the foregoing, nothing in Paragraph 29 shall affect the right of any Partner to bring an action for conversion in the event of violation of the trust provisions of the General Business Law of the State of _____ [state] .

31. Agreement in Counterparts. This agreement may be executed in several counterparts, and all so executed shall constitute one agreement, binding on all the parties, notwithstanding that all the parties are not signatory to the original or the same counterpart.

32. Partners' Representation. Each of the Partners represents and warrants that he is over the age of 21 years, and that the residence address set forth opposite or below his name, as the case may be, at the end of this agreement is his bona fide residence.

33. Cash Contributions. At the election of the General Partners, cash contributions by Limited Partners to the Partnership capital may be in the form of cash, bank draft, certified check, or uncertified check subject to collection.

34. Entire Agreement. This agreement supersedes all agreements previously made between the parties relating to its subject matter. There are no other understandings or agreements between them.

35. Non-waiver. No delay or failure by a party to exercise any right under this agreement, and no partial or single exercise of that right, shall constitute a waiver of that or any other right, unless otherwise expressly provided herein.

36. Governing Law. This agreement and the rights of the parties hereunder shall be construed in accordance with and governed by the laws of the State of _____ [state] .

37. Binding Effect. Except as otherwise expressly provided herein, the provisions of this agreement shall be binding upon and inure to the benefit of each of the parties and their respective personal representatives, successors, and assigns.

In witness whereof the parties have executed this agreement.

General Partners

John Baker

[address]

Marvin Harris

[address]

Alvin Johnson

[address]

William Minton

[address]

Oscar Kindler

[address]

Donald Enright

Additional Limited Partner

Confirmed, Approved, and Adopted:

(1) _____
(Additional Limited Partner--Signature)

(2) _____
(Print residence address here)

(3) Capital Contributions \$ _____
(If by check, subject to collection)

(4) _____
(Additional Limited Partner--Print full name here)

(Agreement Authentic Only if Signed by a General Partner)

Attested and Accepted on _____ [month] _____ [day]
 _____ [year]

General Partner



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Current Legal Forms for Real Estate

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Current Legal Forms for Real Estate
Chapter 20 REAL ESTATE ENTITIES
Part IV. Forms
C. PARTNERSHIPS

24-20 Current Legal Forms for Real Estate FORM 20.29

AUTHOR: by Stephen E. Pigott and Harold O. Maxfield, Jr.

FORM 20.29 Limited partnership--corporate general partner--sale of limited partnership units to the public--detailed provisions concerning the general partner's fees, powers, and duties

COMMENT

One of the principal features of this limited partnership agreement is that a corporation is the sole general partner. The Uniform Limited Partnership Act ("ULPA") has been modified in most states to specifically permit a corporation to act as general partner in a partnership. A major benefit of this arrangement is to permit the possibility of limited liability for the persons holding shares in the corporate general partner, as well as limited liability for the limited partners. There is some conflict of authority, however, as to whether a limited partner, who is also a director, officer and/or principal shareholder of the corporate general partner, exercises sufficient "control" so as to be personally liable as a general partner under the ULPA. Local law on these issues should be consulted.

Publicly traded partnerships taxed as corporations:

A partnership first publicly traded after December 17, 1987 is treated as a corporation for tax purposes. A partnership is publicly traded if its partnership interests are either traded on an established securities market, or readily tradable on a secondary market or the substantial equivalent of a secondary market. An exception to corporate tax treatment applies to certain partnerships if 90 percent or more of their gross income is qualifying passive-type income, including real property rents, and gains from the sale or other disposition of real property.

Net income from a publicly traded partnership is not treated as passive income for purposes of the passive loss rules. Each partner in a publicly traded partnership treats loss, if any, from the

partnership as separate from income and loss from any other publicly traded partnership, and separate from any income or loss from passive activities. Under the passive loss rules net income from publicly traded partnerships is treated as portfolio income.

If the partnership is not publicly traded, its tax status will depend upon whether it is classified as a partnership or an association.

Partnership and association characteristics:

In light of the "Check the Box regulations, the analysis as to whether a limited partnership will be treated as a partnership is largely, if not entirely, irrelevant. (See Chapter 1, Volume 1, Partnerships § 1.07(2)).

Partnership taxation:

For a further discussion of partnership taxation, see TB § 20.05 and § 20.06 at the beginning of this chapter, or The Tax Background to Chapter 1 in Volume 1, for more detailed coverage.

FORM

THIS PARTNERSHIP AGREEMENT ("Partnership Agreement") entered into as of _____ [month] _____ [day] , _____ [year] , by and between NWP Management Corp., a Delaware corporation ("General Partner"), as General Partner, and Arthur D. Smith, as the original Limited Partner, all of whom hereby form a limited partnership pursuant to the Uniform Limited Partnership Act of the State of California, upon the following terms and conditions:

1. Name and Place of Business

The name of the Partnership is New World Property Investors. Its principal place of business is _____ [address] , _____ [city] , _____ [state] , or such other place or places as the General Partner may hereafter determine.

2. Definitions and Glossary of Terms

2.1 The following terms used in this Partnership Agreement shall (unless otherwise expressly provided herein or unless the context otherwise requires) have the following respective meanings:

2.1.1 "Acquisition Fees" shall mean the total of all fees and commissions paid by any person to any person, including any Sponsor, in connection with the selection, purchase, or initial operation of any Property by the Partnership, whether designated as real estate commission, selection fee, management fee, nonrecurring start-up fee, development fee, construction fee, or any fee of a similar nature, however designated, but not any loan fee ("points"), independent appraisal fees, engineering fees or architectural fees in connection with the selection, purchase or initial operation of any Property by the Partnership.

2.1.2 "Adjusted Cash from Operations" shall mean the excess of cash revenue from operation of Partnership Property (including lease payments on net leases) over cash disbursements without deduction for depreciation and amortization of intangibles such as organization, underwriting and debt placement costs but after a reasonable allowance for cash reserves for repairs, replacements, contingencies and anticipated obligations (including debt service), as determined by the General Partner. Adjusted Cash from Operations shall not include Cash from Sales or Refinancings, Cash from

Initial Financings, or Cash From Property Reserve Account.

2.1.3 "Adjusted Invested Capital" of a Holder shall be the Original Invested Capital paid for or attributable to his Units reduced by the total of cash distributed to him and prior Holders of his Units from Cash from Sales or Refinancings and from Cash from Property Reserve Account (to the extent such cash distributed came from Net Proceeds).

2.1.4 "Affiliate" shall refer to: (i) any person directly or indirectly controlling, controlled by or under common control with another person, (ii) a person owning or controlling ten percent (10%) or more of the outstanding voting securities of such other person, (iii) any officer, director or partner of such person, and (iv) if such other person is an officer, director or partner, any company for which such person acts in any such capacity.

2.1.5 "Assignee" shall mean a person who has acquired a beneficial interest in one or more Units from a third party but who is neither a substituted Limited Partner nor an Assignee of Record.

2.1.6 "Assignee of Record" shall mean an Assignee who has acquired a beneficial interest in one or more Units whose ownership of such Units has been recorded on the books of the Partnership and which ownership is the subject of a written instrument of assignment, the effective date of which assignment has passed.

2.1.7 "Cash from Initial Financing" shall mean the net cash realized by the Partnership during that portion of the term of the Partnership ending 24 months after the effective date of the Prospectus from the initial financing of any Partnership Property purchased for all cash.

2.1.8 "Cash from Property Reserve Account" shall mean that portion of the Net Proceeds not utilized in the acquisition of Partnership Properties including cash maintained according to the provisions of Paragraph 3.2.

2.1.9 "Cash from Sales or Refinancing" shall mean the net cash realized by the Partnership from the sale, refinancing or other disposition of any Partnership Property after retirement of applicable mortgage debt and all expenses related to the transaction; however, Cash from Sales or Refinancing shall not include Cash from Initial Financing or Cash from Property Reserve Account.

2.1.10 "Closing Date" shall mean such date designated by the General Partner, but not later than _____ [month] _____ [day], _____ [year].

2.1.11 "Code" shall mean the Internal Revenue Code of 1986, as amended, or corresponding provisions of subsequent revenue laws.

2.1.12 "Cost of Partnership Property" with respect to each Partnership Property means the total consideration paid for federal income tax purposes by the Partnership in connection with the purchase of such Property, whether paid to the seller, the General Partner or any other person, either in cash or by way of promissory notes, including payments for Acquisition Fees paid by the Partnership, if any, and financing charges. Reference to "Cost of All Partnership Properties" shall be the total of such consideration paid by the Partnership for all Partnership Properties.

2.1.13 "Distributions" shall refer to any cash or other property distributed to Holders and the General Partner arising from their interests in the Partnership, but shall not include any payments to the General Partner under the provisions of Paragraph 9 or Paragraph 10.

2.1.14 "General Partner" shall refer to NWP Management Corp., a Delaware corporation, or to any other person or corporation who succeeds it in such capacity.

2.1.15 "Gross Proceeds" shall mean the aggregate total of the Original Invested Capital of the original and all of the

additional Limited Partners.

2.1.16 "Gross Revenues" shall mean revenues from the operation of real property owned by the Partnership other than from security deposits paid by lessees thereof. The term "Gross Revenues" shall not include revenues from sale, refinancing or other disposition of Partnership Properties.

2.1.17 "Holders" shall refer to owners of Units who are either Partners or Assignees of Record, and reference to a "Holder" shall be to any one of them. The General Partner shall be considered to be a Holder.

2.1.18 "Limited Partners" shall refer to the original Limited Partner, and to any other persons who are admitted to the Partnership as additional or substituted Limited Partners. Reference to a "Limited Partner" shall refer to any one of them.

2.1.19 "Majority Vote" shall mean the vote of Limited Partners who own more than fifty percent (50%) of the Total Outstanding Units.

2.1.20 "Net Income" or "Net Loss" shall mean the net income or net loss of the Partnership, as determined in accordance with the cash method of accounting.

2.1.21 "Net Proceeds" shall mean the total Gross Proceeds less expenses incurred and to be paid by the Partnership in organizing the Partnership and in offering Units to the public.

2.1.22 "Original Invested Capital" shall mean the amount in cash contributed by the original and each additional Limited Partner to the capital of the Partnership for his Units, which amount shall be attributed to such Units in the hands of a subsequent Holder.

2.1.23 "Partners" shall refer collectively to the General Partner and to the Limited Partners, and reference to a "Partner" shall be to any one of the Partners.

2.1.24 "Partnership" shall refer to the Limited Partnership created under this Partnership Agreement.

2.1.25 "Partnership Properties" or "Properties" shall refer to all properties or any interest therein acquired directly or indirectly by the Partnership, in whole or in part, with Net Proceeds or Cash from Initial Financing. Reference to "Partnership Property" or "Property" shall be to any one of them.

2.1.26 "Prospectus" shall mean the final prospectus in the registration of Units filed with the Securities and Exchange Commission on Form S-11, as amended.

2.1.27 "Sponsor" shall mean any person directly or indirectly instrumental in organizing, wholly or in part, the Partnership or who will manage or participate in the management of the Partnership including the General Partner and its Affiliates, but excluding (i) any nonaffiliated person whose only relationship with the Partnership or the General Partner is that of an independent property manager whose only compensation from the Partnership is as such, and (ii) nonaffiliated third parties such as attorneys, accountants, and underwriters whose only compensation from the Partnership is for professional services rendered in connection with the offering of Units or the operations of the Partnership.

2.1.28 "Subordinated Incentive Fee" shall refer to the fee payable to the General Partner and its Affiliates under the provisions of Paragraph 9.5.1 of this Partnership Agreement.

2.1.29 "Total Outstanding Units" shall mean all Units issued at or before the Closing Date.

2.1.30 A "Unit" shall represent a capital contribution of _____ Dollars (\$_____) to the Partnership and shall entitle the Holder thereof to an interest in the Net Income, Net Loss, and Distributions of the Partnership, without regard to capital accounts.

3. Business and Purpose

3.1 The primary purpose (character of business) of the Partnership is to invest in, hold and manage income-producing real estate which is improved or which will be improved within a reasonable period after acquisition, with emphasis planned to be upon the acquisition of existing apartment complexes, shopping centers, industrial buildings and commercial properties located in the United States. The Partnership may enter into ventures, partnerships, and other business arrangements with respect to real estate deemed prudent by the General Partner in order to achieve successful operations for the Partnership; subject, however, to the provisions of Paragraph 15.3.8.

3.2 For the Partnership Properties, the Partnership shall initially endeavor to maintain a cash reserve for normal repairs, replacements, contingencies and accruals required by mortgages for insurance, real estate taxes and related items in an amount equal to at least five percent (5%) in the aggregate of the Gross Proceeds applicable to the acquisition of such Properties. Upon the disposition of each Partnership Property, any cash reserve for that Property need not be maintained thereafter, but may be applied as reserves for other Properties. Any cash reserve used as aforesaid need not be restored and if restored, shall be restored from cash generated from Partnership Properties.

3.3 Subject to the provisions of Paragraphs 11.10 and 11.11, during that part of the Partnership term which ends twenty-four (24) months after the effective date of the Prospectus, the Partnership may obtain initial financing on any Partnership Property purchased for all cash, and may reinvest all proceeds therefrom. The Partnership may also reinvest proceeds from any financing effected during the period commencing twenty-four (24) months and ending sixty (60) months after the Closing Date. Thereafter, proceeds from any financing or refinancing shall not be reinvested but shall be available for and used in Distributions.

4. Term

The Partnership commenced _____ [month] _____ [day] ,
 _____ [year] , and shall continue until _____ [month] _____
 [day] , _____ [year] , unless sooner terminated in accordance with the provisions of this Agreement.

5. General Partner

5.1 NWP Management Corp., as the General Partner, has contributed _____ Dollars (\$_____) in cash to the Partnership. The General Partner shall on the Closing Date contribute additional cash in the sum of _____ Dollars (\$_____) as a Limited Partner, and shall receive two hundred (200) Units for such additional cash contributions, and at all times during the existence of the Partnership, have a present and continuing interest in Net Income, Net Loss and Distributions according to the provisions of Paragraph 11.

5.2 In the event that, immediately prior to the dissolution of the Partnership referred to in Paragraph 19.2, the General Partner shall have a deficiency, if any, in its capital account, and if the assets available for distribution upon the dissolution and termination of the Partnership are insufficient to allow Distributions to the Holders of Units of amounts equal to the then balances in their capital accounts, then, the General Partner shall contribute in cash to the capital of the Partnership an amount equal to whichever is less of (a) the deficiency in the General Partner's capital account, or (b) the amount needed so that the Distributions may be made to the Holders of Units is an amount equal to the then balances in

their respective capital accounts.

6. Original and Additional Limited Partners

6.1 The original Limited Partner has contributed the sum of _____ Dollars (\$ _____) to the capital of the Partnership, and has received five Units for such contribution.

6.2 The Partnership intends to sell and issue not less than six thousand two hundred (6,200) nor more than twenty thousand (20,000) additional Units, and to admit as additional Limited Partners the persons who contribute cash to the Partnership capital for such Units.

6.3 Each person who acquires any such additional Units shall become a Limited Partner in the Partnership at such time as he has: (i) purchased five or more Units, (ii) contributed the sum of _____ Dollars (\$ _____) in cash for each Unit purchased, and (iii) executed and filed with the Partnership a written instrument which sets forth an intention to become a Limited Partner and requests admission to the Partnership in that capacity, together with such other instruments as the General Partner may deem necessary or desirable to effect such admission, including the written acceptance and adoption of such person of the provisions of this Partnership Agreement, and the execution, acknowledgement and delivery to the General Partner of a special power of attorney, the form, style and content of which are more fully described in Paragraph 20.

6.4 The General Partner shall in timely fashion amend (but not later than the last day of the calendar month following the date of acceptance of the additional Limited Partner's subscription) this Partnership Agreement and any separate certificate of limited partnership filed for record to reflect the admission of a person as an additional Limited Partner.

6.5 The Partnership shall not issue any additional Units after the Closing Date.

6.6 All Original Invested Capital of Holders shall be received by the Partnership in trust, and shall be deposited in an escrow account in any branch of the Bank of America National Trust and Savings Association or in any other banking institution designated by the General Partner as escrow holder for the Original Invested Capital. Upon receipt of a minimum of _____ Dollars (\$ _____) in Original Invested Capital from purchasers of Units, the Partnership shall admit such purchasers into the Partnership as additional Limited Partners not later than fifteen (15) days after the receipt of such minimum. At the time the purchaser is admitted as a Limited Partner, the escrow holders shall transfer such person's Original Invested Capital to the Partnership. If the _____ Dollars (\$ _____) minimum amount is not obtained within one hundred eighty (180) days from the effective date of the Prospectus, all Original Invested Capital shall be promptly refunded to the purchasers with any interest earned thereon.

7. Status of Limited Partners

Limited Partners shall not be bound by, or be personally liable for, the expenses, liabilities or obligations of the Partnership.

8. Status of Units

Each Unit shall be fully paid and nonassessable.

9. Compensation to General Partner and its Affiliates

9.1 The General Partner and its Affiliates shall receive compensation only as specified by this Partnership Agreement.

9.2 Limitation on Compensation

9.2.1 The aggregate amount of the Acquisition Fees shall not exceed the lesser of: (i) sixteen percent (16%) of Gross Proceeds, (ii) the normal and competitive rate for similar services in the locations where the services are performed, or (iii) six percent (6%) of the Cost of all Partnership Properties.

9.2.2 The amount of the Acquisition Fees with respect to a particular Partnership Property shall not exceed the lesser of: (i) sixteen percent (16%) of that portion of the Gross Proceeds applicable to the Partnership Property which is the subject of the acquisition, (ii) the normal and competitive rate for similar services in the location where the services are performed, or (iii) six percent (6%) of the Cost of such Partnership Property.

9.2.3 The Partnership shall pay no Acquisition Fee to any of its Affiliates, nor shall any of its Affiliates receive a fee, commission, or other benefit from any person, upon any reinvestment of the Cash from Sales or Refinancing of Property by the Partnership other than any Acquisition Fees in connection with the investment of Cash from Initial Financing.

9.2.4 Except as set forth in Paragraph 9, no other real estate commission, property purchase fee, or finder's fee shall be paid or payable by the Partnership to the General Partner or to any other person in connection with the acquisition of specific real properties. However, if such commissions or fees exceed the limitations in this Paragraph 9.2, the General Partner may cause Acquisition Fees to be paid to other persons, without cost to the Partnership.

9.3 Acquisition Stage

9.3.1 Acquisition Fee. The General Partner or its Affiliates or any person shall receive an Acquisition Fee not greater than sixteen percent (16%) of that portion of the Gross Proceeds applicable to each Partnership Property purchased through the services of the General Partner or its Affiliates. Such fee shall be paid by the seller of the Partnership Property acquired and not by the Partnership.

9.4 Operating Stage (Operating Compensation)

9.4.1 Property Management Fee. The General Partner or an Affiliate shall be entitled to a Property Management Fee for services in providing continuing professional property management or supervision of professional property managers of the Partnership Properties. Such fee shall be paid monthly and shall be equal to five percent (5%) of Gross Revenues for the preceding month (but not to exceed rates prevailing for comparable services in the localities where the Properties are located). In the event the General Partner retains third parties to perform a portion or all of the services set forth below, it shall be solely responsible for all fees charged by such persons and shall pay such fees without cost to the Partnership. Property management services shall include, but not be limited to: (i) review of the maintenance, repair, remodeling and refurbishing of all Partnership Properties, (ii) review of rental schedules and recommendations with respect to changes thereto, (iii) supervision of on-site property managers and other employees together with the establishment of procedures regarding the management of Partnership Properties, (iv) preparation and review of rental surveys, (v) preparation and review of historical and projected performance, (vi) preparation and review of leases, management agreements and maintenance agreements, and (vii) review of replacement reserves and working capital and recommendations with respect to changes thereto. Property management services to be rendered by the General Partner or by third parties retained by it do not include the leasing or releasing of Partnership Properties or the salaries of on-site property managers for which separate fees may be paid.

9.5. Liquidating Stage (Final Compensation)

9.5.1 Subordinated incentive fee. The General Partner shall be entitled to receive the Subordinated Incentive Fee as compensation for the services rendered in: evaluating and selecting Properties for the Partnership; making decisions as

to the nature and terms of the acquisition and disposition of such Properties; selecting, retaining, and supervising consultants, contractors, architects, engineers, lenders, borrowers, and others; and otherwise generally managing the Partnership's day-to-day operations. The Subordinated Incentive Fee shall be an amount equal to fifteen percent (15%) of the remaining Cash from Sales or Refinancings in excess of the Cost of All Partnership properties, and shall be paid when such Cash From Sales or Refinancings is distributed. Payment of fifty percent (50%) thereof, however, shall be computed on the remainder after the Partnership has distributed to Holders an aggregate amount in cash which is equal to (i) the total of Original Invested Capital, and (ii) a sum equal to six percent (6%) per year cumulative on their Adjusted Invested Capital, commencing with the third full fiscal quarter following the Closing Date. Payment of fifty percent (50%) thereof shall be computed on the remainder after the Partnership has distributed to Holders an aggregate amount in cash which is equal to (i) the total of Original Invested Capital, and (ii) a sum equal to ten percent (10%) per year cumulative on their Adjusted Invested Capital, commencing with the third full fiscal quarter following the Closing Date.

9.6 If the General Partner is expelled from the Partnership, such Partner shall be entitled to interest on all loans so made subject to the provisions of this Partnership Agreement.

9.7 Should the General Partner be expelled from the Partnership according to provisions of Paragraph 17, any portion of the Acquisition Fee, Property Management Fee, Subordinated Incentive Fee, or any other fee or commission payable according to the provisions of this Paragraph 9 which is then accrued and due, but not yet paid, shall be paid by the Partnership to the General Partner in cash within 30 days of the date of expulsion as stated in the written notice of expulsion.

10. Partnership Expenses

10.1 Reimbursement (other than for organization and offering expenses) to the General Partner or its Affiliates shall not be made, except for reimbursement of the actual cost to the General Partner or its Affiliates of goods and materials used for or by the Partnership. Reimbursement of the actual costs to the General Partner and its Affiliates of travel expenses shall be limited as follows: the amount of such reimbursement plus the amount of Acquisition Fees paid to any party in connection with the acquisition of Partnership Properties and the amounts payable to the General Partner under Paragraph 11.4 shall not exceed (a) eighteen percent (18%) of the Gross Proceeds of the offering (or, if less, the real estate commissions or Acquisition Fees customarily charged in arm's length transactions by others in the same geographical location for comparable property to that acquired by the Partnership), and (b) ten percent (10%) of the total amount of Adjusted Cash from Operations. In addition, such reimbursement as to expenses relating to the acquisition of the Partnership Properties shall not be made if and to the extent that such expenses, when combined with the Acquisition Fees payable to any party in connection with the acquisition of the Partnership Properties, exceed six percent (6%) of the Cost of all Partnership Properties acquired. The reimbursement for expenses provided for in this Paragraph 10.1 shall be made to the General Partner regardless of whether any Distributions are made to the Limited Partners under the provisions of Paragraph 11.4.

10.2 The General Partner shall pay: (i) salaries and other compensation of its officers and directors incidental to the organization of the Partnership, the sale of Units and the acquisition of Partnership Properties, (ii) expenses incurred by the General Partner or its Affiliates in connection with the administration of the Partnership, including the overhead expenses of the General Partner or its Affiliates, (iii) expenses incidental to the organization of the Partnership and marketing of Units (exclusive of sales commissions payable in connection with the sale of Units to those persons who are admitted to the Partnership as additional Limited Partners therein), which expenses are in excess of two and 25/100 percent (2.25%) of Gross Proceeds, (iv) expenses related to the performance of those services for which the General Partner or its Affiliates are entitled to compensation by way of the Acquisition Fee, Property Management Fee and Subordinated Incentive Fee, and (v) all other expenses which are unrelated to the business of the Partnership.

10.3 Subject to Paragraphs 10.1 and 10.2, the Partnership shall pay all of its expenses. Such expenses may include, but

shall not be limited to: (i) all costs of personnel employed by the Partnership and involved in its business, including persons who may also be officers or employees of the General Partner; (ii) all costs of borrowed money, taxes and assessments on Partnership Properties and other taxes applicable to the Partnership; (iii) legal, audit, accounting, brokerage and other fees; (iv) printing, engraving and other expenses and taxes incurred in connection with the issuance, distribution, transfer, registration and recording of documents evidencing ownership of an interest in the Partnership or in connection with its business; (v) fees and expenses paid to independent contractors, mortgage bankers, brokers and servicers, leasing agents, consultants, on-site managers, real estate brokers, insurance brokers and other agents; (vi) expenses in connection with the disposition, replacement, alteration, repair, remodeling, refurbishment, leasing, refinancing and operation of Partnership Properties (including the costs and expenses of foreclosures, insurance premiums, real estate brokerage and leasing commissions and of maintenance of such Property); (vii) the cost of insurance as required in connection with the business of the Partnership; (viii) expenses of organizing, revising, amending, converting, modifying or terminating the Partnership; (ix) expenses in connection with Distributions made by the Partnership to, and communications and bookkeeping and clerical work necessary in maintaining relations with Unit Holders, including the cost of printing and mailing to such persons certificates for Units and reports of meetings of the Partnership, and of preparation of proxy statements and solicitations of proxies in connection therewith; (x) expenses in connection with preparing and mailing reports required to be furnished to Unit Holders for investor, tax reporting or other purposes, or which reports the General Partner deems the furnishing thereof to Unit Holders to be in the best interests of the Partnership; (xi) costs of any accounting, statistical or bookkeeping equipment necessary for the maintenance of the books and records of the Partnership; and (xii) the cost of preparation and dissemination of the informational material and documentation relating to potential sale, refinancing or other disposition of Partnership Property.

11. Allocation of Income, Loss, and Distributions

11.1 That portion of Net Income, Net Loss and Distributions of the Partnership allocated to the Unit Holders shall be apportioned among the Holders, in the ratio in which the number of Units owned by each of them on the last day of each calendar quarter bears to the total number of Units owned by all of them as of that date, without regard to capital accounts or the number of days during such quarter in which a person was a Holder.

11.2 Allocation of Net Loss . Except as provided in Section 11.9 of this Partnership Agreement, Net Loss shall be allocated as follows:

11.2.1 One percent (1%) shall be allocated to the General Partner.

11.2.2 Ninety-nine percent (99%) shall be allocated to the Unit Holders.

11.3 Allocation of Net Income. Net Income shall be allocated as follows:

11.3.1 One percent (1%) shall be allocated to the General Partner.

11.3.2 Ninety-nine percent (99%) shall be allocated to the Unit Holders.

11.4 Distribution of Adjusted Cash from Operations. Adjusted Cash from Operations shall be distributed as follows:

11.4.1 One percent (1%) shall be distributed to the General Partner.

11.4.2 Ninety-nine percent (99%) shall be distributed to the Unit Holders.

11.5 Distributions of Cash from Sales and Refinancings and Cash from Property Reserve Account. Cash from Sales and Refinancings and Cash from Property Reserve Account shall be distributed in the following order of priority (for

purposes of this Paragraph 11.5, Adjusted Invested Capital shall not be reduced by the amount of Distributions of Cash from Sales and Refinancings and Cash from Property Reserve Account that is applied toward the preference to Unit Holders pursuant to Paragraph 11.5.1(i)):

11.5.1 First, to the Unit Holders, in an amount equal to: (i) the amount, when added to all prior Distributions to the Unit Holders, that shall be equal to six percent (6%) per annum cumulative on their Adjusted Invested Capital commencing with the third full fiscal quarter following the Closing Date, and (ii) the Original Invested Capital.

11.5.2 Second, to the General Partner, in an amount equal to the initial portion of the Subordinated Incentive Fee, it is entitled to under Paragraph 9.5.1.

11.5.3 Third, to the Unit Holders, in an amount equal to four percent (4%) per annum cumulative on their Adjusted Invested Capital commencing with the third full fiscal quarter following the Closing Date.

11.5.4 Fourth, to the General Partner, in an amount equal to the remaining portion of the Subordinated Incentive Fee it is entitled to under Paragraph 9.5.1.

11.5.5 Fifth, with respect to the remainder, one hundred percent (100%) thereof to the Unit Holders.

11.6 The Partnership may be restricted from making Distributions under the terms of notes, mortgages or other types of debt obligation which it may issue or assume in conjunction with borrowed funds, and Distributions may also be restricted or suspended in circumstances when the General Partner determines, in its absolute discretion, that such action is in the best interests of the Partnership.

11.7 The methods hereinabove set forth by which Distributions and allocations of Net Income and Net Loss are made and apportioned are hereby expressly consented to by each Partner as an express condition to becoming a Partner.

11.8 All Distributions are subject to the payment of Partnership expenses, and to the maintenance of reasonable reserves for alterations, repairs, improvements, maintenance, and replacement of furniture and fixtures.

11.9 To the extent that the Partnership shall be entitled to any deduction for federal income tax purposes as a result of any interest in Net Income and Net Loss granted to the General Partner, such deduction shall be allocated for federal income tax purposes to the General Partner.

11.10 During the first sixty (60) months after the Closing Date, the General Partner shall also distribute after the completion of each calendar year such amounts of Cash from Sales or Refinancings (when considered with prior distributions of Adjusted Cash from Operations) sufficient to allow a Holder in a highest applicable federal, income tax bracket to pay the income taxes due with respect to Net Income derived by him from the operations of the Partnership.

11.11 In the event that any portion of the Net Proceeds are not invested or committed for investment within twenty-four (24) months from the effective date of the Prospectus (except for any amounts utilized to pay Partnership operating expenses, including amounts set aside for reserves as set forth in Paragraph 3.2 of this Partnership Agreement), such portion of the Net Proceeds shall be distributed to the Unit Holders by the Partnership as a return of capital. For the purposes of this Paragraph 11.11, funds will be deemed to have been committed to investment and will not be returned to the Unit Holders to the extent written agreements in principle or letters of understanding were at any time executed, regardless of whether any such investment may or may not be consummated, and to the extent any funds have been reserved to make contingent payments in connection with any Property, regardless of whether any such payments may or may not be made.

12. Assignment of Partnership Units

12.1 Holders shall have the right to assign five or more whole Units by a written instrument of assignment. The terms of such instrument shall not be in contravention of any provision of this Partnership Agreement, and the instrument shall have been duly executed by the assignor of such Units. A Limited Partner shall, within 30 days after assignment, notify the General Partner of any assignment of a beneficial interest in any Units which occurs without a transfer of record ownership.

12.2 An Assignee of Record shall be entitled to receive distributions of cash or other property from the Partnership attributable to the Units acquired by reason of such assignment from and after the effective date of the assignment of such Units to him. Anything herein to the contrary notwithstanding, however, the Partnership and the General Partner shall be entitled to treat the assignor of such Units as the absolute owner thereof in all respects, and shall incur no liability for allocations of Net Income, Net Loss, or Distributions, or transmittal of reports and notices required to be given to Holders hereunder which are made in good faith to such assignor until such time as the written instrument of assignment has been received by the Partnership and recorded on its books and the effective date of the assignment has passed. Provided the Partnership has actual notice of an assignment of Units, the effective date of such assignment on which the Assignee shall be deemed as Assignee of Record shall be the first day of the month set forth on the written instrument of assignment.

12.3 Except as provided in this Paragraph 12.3, no assignment of any Units by a Holder may be made if the Units sought to be assigned, when added to the total of all other Units assigned within the period of 12 consecutive months prior to the proposed date of assignment would, in the opinion of counsel for the Partnership, result in the termination of the Partnership under Section 708 of the Code. Such assignment may be made, however, if, upon the application and at the expense of the Holder desiring to assign his Units in the Partnership, the Internal Revenue Service shall have granted to the transferring Holder and the Partnership a private ruling that the proposed assignment will not cause such termination.

12.4 No assignment, sale, transfer, exchange or other disposition of any Units in the Partnership may be made except in compliance with the then applicable rules of any other applicable governmental authority.

12.5 Any assignment, sale, exchange, or other transfer in contravention of any provision of this Paragraph 12 shall be void and ineffectual, and shall not bind or be recognized by the Partnership.

13. Substituted Limited Partners

13.1 No Assignee shall have the right to become a substituted Limited Partner in place of his assignor unless all of the following conditions are first satisfied:

13.1.1 A duly executed and acknowledged written instrument of assignment covering no less than five Units shall have been filed with the Partnership. Such instrument shall specify the number of Units being assigned and set forth the intention of the assignor that the Assignee succeed to the assignor's interest as a substituted Limited Partner in his place;

13.1.2 The Assignor and Assignee shall have executed and acknowledged such other instruments as the General Partner may deem necessary or desirable to effect such substitution, including the written acceptance and adoption by the Assignee of the provisions of this Partnership Agreement, as the same may be amended and his execution, acknowledgement and delivery to the General Partner of a special power of attorney, the form and content of which are described herein;

13.1.3 The written consent of the General Partner to such substitution shall have been obtained, the granting or denial of which shall be within its absolute discretion;

13.1.4 A transfer fee shall have been paid to the Partnership which is sufficient to cover all reasonable expenses connected with such substitution; and

13.1.5 The provisions of Paragraphs 12.3 and 12.4 of this Partnership Agreement are complied with.

13.2 By executing or adopting this Partnership Agreement, each Limited Partner hereby consents to the admission of additional or substituted Limited Partners by the General Partner and to any Assignee of his Units becoming a substituted Limited Partner.

13.3 The General Partner shall cause the Partnership Agreement or any separate certificate of limited partnership to be amended to reflect the substitution of Limited Partners at least once in each calendar quarter.

14. Books, Records, Accountings and Reports

14.1 The Partnership's books and records, the Partnership Agreement and all amendments thereto, all separate certificates of limited partnership, and copies of each appraisal on Partnership Property shall be maintained at the Partnership's principal office or such other place as the General Partner may determine. All such materials shall be open to inspection and examination of Limited Partners or their duly authorized representatives at all reasonable times. Upon written request, a Limited Partner or his duly authorized representative shall be provided with a copy of the certificate or certificates of limited partnership containing the most recent listing of Partners' names, addresses and capital contributions. Each appraisal on Partnership Property shall be maintained by the General Partner and available for such inspection and examination by any Limited Partner or his duly authorized representative for a period of at least five years following the date of acquisition of the Property subject to such appraisal.

14.2 The General Partner shall have prepared at least annually, at Partnership expense, financial statements (balance sheet, statement of income or loss, partners' equity, and changes in financial position) prepared in accordance with generally accepted accounting principles and accompanied by a report thereon containing an opinion of an independent certified public accounting firm. Copies of such statements and report shall be distributed to each Limited Partner within 90 days after the close of each taxable year of the Partnership.

14.3 The General Partner shall have prepared at least annually, at Partnership expense: (i) a statement of cash flow, (ii) Partnership information necessary in the preparation of the Limited Partners' federal income tax returns, (iii) a report of the Partnership business, (iv) a statement as to the compensation received by the General Partner during the year from the Partnership, setting forth the services rendered or to be rendered by the General Partner and the amount of fees received, and (v) a report identifying distributions from: (a) Adjusted Cash from Operations of that year, (b) Adjusted Cash from Operations of prior years, (c) Cash from Sales or Refinancings, and (d) Cash from Property Reserve Accounts and other sources. Copies of such report shall be distributed to each Limited Partner within 90 days after the close of each taxable year of the Partnership provided, however, all Partnership information necessary in the preparation of the Limited Partners' federal income tax returns shall be distributed to each Limited Partner within 45 days, but not later than 75 days, after the close of each taxable year of the Partnership.

14.4 The General Partner shall have prepared quarterly, at Partnership expense, commencing with the first calendar quarter after the Closing Date: (i) a statement as to the compensation received by the General Partner during such quarter from the Partnership, setting forth the services rendered or to be rendered by the General Partner and the amount of fees received, and (ii) other relevant information. Copies of such statements shall be distributed to each Limited Partner within 60 days after the end of each quarterly period.

14.5 Until such time as the Partnership is registered under Section 12(g) of the Securities Exchange Act of 1934, the General Partner shall have prepared, at Partnership expense, a semi-annual report covering the first six months of Partnership operations in each calendar year, commencing with the first six-month period after the Closing Date and

semi-annually thereafter, unaudited financial statements (balance sheet, statement of income or loss for said first six-month period and statement of Adjusted Cash from Operations for said first six-month period), and a statement of other pertinent information regarding the Partnership and its activities during the six-month period covered by the report. Copies of such statements and other pertinent information shall be distributed to each Limited Partner within sixty (60) days after the close of the six-month period covered by the Partnership report.

14.6 At such time as the Partnership is registered under Section 12(g) of the Securities Exchange Act of 1934, the General Partner shall have prepared, at Partnership expense, a quarterly report covering the first three quarterly calendar year periods of Partnership operations in each calendar year, commencing with the first quarterly period required after Section 12(g) registration is effective, unaudited financial statements (balance sheet, statement of income or loss for said quarterly period and Statement of Adjusted Cash From Operations for said quarterly period) and a statement of other pertinent information regarding the Partnership and its activities during the quarterly period covered by the report. Copies of such statements and other pertinent information shall be distributed to each Limited Partner within sixty (60) days after the close of the quarterly period covered by the report of the Partnership.

14.7 The General Partner shall have prepared, at Partnership expense, no later than the end of each quarter in which Partnership Properties are acquired, a notice which shall describe therein: (i) each real property so acquired, (ii) the geographic area in which such Property is located, and (iii) such other relevant information with respect to the acquisition of such Property as the General Partner deems appropriate (including by way of illustration the date and appraised value of the real property, its purchase price, including the terms of purchase, the total cash expended by the Partnership for the property, and the amount of Net Proceeds remaining uncommitted, in terms of dollars and percentage of Gross Proceeds). Copies of such notice shall be distributed to each Limited Partner within 60 days after the end of such quarter. If deemed appropriate by the General Partner, such notice may be prepared and distributed to each Limited Partner more frequently than quarterly.

14.8 The General Partner, at Partnership expense, shall cause income tax returns for the Partnership to be prepared and timely filed with the appropriate authorities.

14.9 The General Partner, at Partnership expense, shall cause to be prepared and timely filed, with appropriate federal and state regulatory and administrative bodies, all reports required to be filed with such entities under then current applicable laws, rules and regulations. Such reports shall be prepared on the accounting or reporting basis required by such regulatory bodies. Any Limited Partner shall be provided with a copy of any such report upon request without expense to him.

14.10 The General Partner, at Partnership expense, shall maintain for a period of at least four years a record of the information obtained to indicate that a Limited Partner meets with the suitability standards set forth in the Prospectus.

15. Rights, Authority, Powers, Responsibilities and Duties of the General Partner

15.1 The General Partner shall have all authority, rights and powers conferred by law and those required or appropriate to the management of the Partnership business which, by way of illustration but not by way of limitation, shall, subject only to the provisions of Paragraph 15.3, include the right, authority and power:

15.1.1 To acquire, develop, hold and dispose of real property, interests therein or appurtenances thereto, as well as personal or mixed property connected therewith, including the purchase, lease, development, improvement, maintenance, exchange, trade or sale of such properties, at such price, rental or amount, for cash, securities (in compliance with appropriate securities regulations), or other property, and upon terms as the General Partner deems, in its sole discretion, to be in the best interests of the Partnership;

15.1.2 To borrow money and, if security is required therefor, to mortgage or subject any Partnership investment to any

other security device, to obtain replacements of any mortgage or other security device, and to prepay, in whole or in part, refinance, increase, modify, consolidate or extend any mortgage or other security device, all of the foregoing at such terms and in such amounts as the General Partner, in its sole discretion, deems to be in the best interests of the Partnership;

15.1.3 To place record title to, or the right to use, Partnership assets in, the name or names of a nominee or nominees, trustee or trustees for any purpose convenient or beneficial to the Partnership;

15.1.4 To acquire and enter into any contract of insurance which the General Partner deems necessary or appropriate for the protection of the Partnership and the General Partner for the conservation of Partnership assets, or for any purpose convenient or beneficial to the Partnership;

15.1.5 To employ persons in the operation and management of the business of the Partnership including, but not limited to, supervisory managing agents, building management agents, insurance brokers, real estate brokers and loan brokers, on such terms and for such compensation as the General Partner shall determine, subject, however, to the limitations with respect thereto as set forth in Paragraph 9, and also subject to the following provisos: agreements with the General Partner or its Affiliates for the services set forth in Paragraph 9 shall contain the terms and limitations as to fees and expenses as set forth therein, and any such agreement shall be terminated immediately upon the Partnership's dissolution under Paragraph 19.1;

15.1.6 To prepare or cause to be prepared reports, statements, and other relevant information for distribution to Holders, including annual and quarterly interim reports;

15.1.7 To open accounts and deposit and maintain funds in the name of the Partnership in banks or savings and loan associations, provided, however, that the Partnership funds shall not be commingled with the funds of any other person;

15.1.8 To cause the Partnership to make or revoke any of the elections referred to in Sections 108, 754, or 1017 of the Internal Revenue Code of 1986, or any similar provisions enacted in lieu thereof;

15.1.9 To select as its accounting year a calendar year or such fiscal year as approved by the Internal Revenue Service;

15.1.10 To determine the appropriate accounting method or methods to be used by the Partnership (the Partnership intends initially to utilize the accrual method of accounting in maintaining its books and records);

15.1.11 To offer and sell Units in the Partnership to the public directly or through any licensed Affiliate of the General Partner and to employ personnel, agents and dealers for such purpose;

15.1.12 To amend this Partnership Agreement to reflect the addition or substitution of Limited Partners or the reduction of capital accounts upon the return of capital to Partners;

15.1.13 To require in all Partnership obligations that the General Partner shall not have any personal liability thereon but that the person or entity contracting with the Partnership is to look solely to the Partnership and its assets for satisfaction. In the event that any such obligations have personal liability, the General Partner may require their satisfaction prior to contracts without such personal liability;

15.1.14 To execute, acknowledge, and deliver any and all instruments to effectuate the foregoing, and to take all such action in connection therewith as the General Partner shall deem necessary or appropriate;

15.1.15 To reinvest all Cash from Initial Financing; and

15.1.16 To purchase Property in its own name or in the name of a nominee, a trust or a corporate "nominee" or otherwise (and assume loans in connection therewith), and temporarily hold title thereto for the purpose of facilitating the acquisition of such Property or the borrowing of money or obtaining of financing for the Partnership, or completion of construction of the Property, or any other purpose related to the business of the Partnership. The Partnership, however, shall not purchase the Property for a price greater than the cost thereof to the General Partner, except for compensation in accordance with Paragraph 9 of this Partnership Agreement. In addition, there shall be no difference in interest rates of the loans secured by the Property at the times acquired by the General Partner and by the Partnership, nor any other benefit arising out of such transaction of the General Partner apart from the compensation otherwise permitted by this Partnership Agreement.

15.2 The General Partner shall, except as otherwise provided in this Partnership Agreement, have all the rights and powers and shall be subject to all the restrictions and liabilities of a partner in a partnership without limited partners.

15.3 Neither the General Partner nor any Affiliate shall have the authority to:

15.3.1 Enter into contracts with the Partnership which would bind the Partnership after the expulsion, adjudication of bankruptcy or insolvency of the General Partner, or continue the business with Partnership assets after the occurrence of such event;

15.3.2 Grant to it or any Affiliate an exclusive listing for the sale of Partnership assets, including Partnership Properties;

15.3.3 Sell substantially all of the assets of the Partnership in a single sale, or in multiple sales in the same twelve (12) month period, except in the orderly liquidation and winding up of the business of the Partnership upon its termination and dissolution;

15.3.4 Pledge or encumber substantially all of the assets of the Partnership at one time, other than in connection with the acquisition or improvement of assets or the refinancing of previous obligations;

15.3.5 Alter the primary purpose of the Partnership as set forth in Paragraph 3;

15.3.6 Receive from the Partnership a rebate or give-up or participate in any reciprocal business arrangements which would enable it or an Affiliate to do so;

15.3.7 Sell or lease property to any entity in which the General Partner or any Affiliate has an interest;

15.3.8 Cause the Partnership to invest in any program, partnership or other venture unless: (i) it is a general partnership or a joint venture; (ii) the other partner or joint owner is not the General Partner or an Affiliate; (iii) such general partnership or venture owns and operates a particular property and the Partnership acquires the controlling interest in such venture or general partnership; (iv) the Partnership, as a result of such joint ownership or partnership ownership of a property, is not charged directly or indirectly, more than once for the same service; and (v) the agreement of partnership or joint venture does not authorize the Partnership to do anything as a Partner or joint venturer with respect to the property which the Partnership, or the General Partner, could not do directly because of the policies set forth in this Partnership Agreement; and (vi) the General Partner and its Affiliates are prohibited from receiving any compensation, fees or expenses which are not permitted to be paid under the terms of this Partnership Agreement.

15.3.9 Purchase or lease real property from the Partnership, or sell or lease real property to it;

15.3.10 Purchase Partnership Property without first having obtained an appraisal with respect to the value thereof, rendered by an independent appraiser who is a member of a nationally recognized society of appraisers, which provides that the Cost of such Partnership Property and all Acquisition Fees paid with respect to such Property by any person

equals or is less than the appraised value;

15.3.11 Cause the Partnership to exchange Units for real property;

15.3.12 Make long-term secured loans to the Partnership, and on short-term unsecured loans made to the Partnership, receive interest or other financing charges or fees in excess of those amounts which would be charged by third party financing institutions on comparable loans for the same purpose in the same geographic area but in no event in excess of two percent (2%) above the prime rate as announced from time to time in the Wall Street Journal;

15.3.13 Cause the Partnership to finance the purchase of Partnership Property by use of a wrap-around note and mortgage ("all-inclusive" note and deed of trust) unless: (i) neither the General Partner nor any Affiliate thereof shall receive interest in excess of that payable to the lender on such underlying encumbrances; (ii) all payments on the underlying obligation shall be made by the Partnership or, in the alternative, payments by the Partnership on the wrap-around note are made to a third party collecting agent which in turn disburses such payment, first to the holder of such underlying obligation, and thereafter to the holder of the wrap-around note; and (iii) the Partnership receives credit on its all-inclusive note for payments made directly on the underlying obligations;

15.3.14 Redeem or repurchase Units on behalf of the Partnership;

15.3.15 Do any act in contravention of this Partnership Agreement or which would make it impossible to carry on the ordinary business of the Partnership;

15.3.16 Confess a judgment against the Partnership in connection with any threatened or pending legal action;

15.3.17 Possess any Partnership property or assign its rights in specific Partnership property for other than a Partnership purpose;

15.3.18 Admit a person as a General Partner except with the consent of the Limited Partners as provided for in this Partnership Agreement;

15.3.19 Perform any act (other than an act required by this Agreement or any act taken in good faith reliance upon counsel's opinion) which would, at the time such act occurred, subject any Limited Partner to liability as a general partner in any jurisdiction;

15.3.20 Reinvest any Adjusted Cash from Operations, or after five years from the Closing Date, Cash from Sales or Refinancings;

15.3.21 Invest any Gross Proceeds in nonincome-producing Properties except in amounts and upon terms which can be financed by the Partnership's Gross Proceeds or Adjusted Cash from Operations.

15.3.22 Receive any insurance brokerage fee or write any insurance policy covering the General Partner on any of the Partnership Properties;

15.3.23 Employ, or permit to employ, the funds or assets of the Partnership in any manner except for its exclusive benefit;

15.3.24 Incur any nonrecourse indebtedness wherein the lender will have or acquire, at any time as a result of making the loan, any direct or indirect interest in the Partnership's profit, capital or property other than as a secured creditor;

15.3.25 Incur aggregate borrowings of the Partnership in excess of eighty percent (80%) of the purchase price of all

Partnership Properties on a combined basis. Purchase price for purposes of this subparagraph 15.3.25 shall mean the sum of the price paid for a property by the Partnership, including Acquisition Fees plus all costs of improvements, if any, reasonably and properly allocable to all the Partnership Properties made at the time of the acquisition or within sixty (60) days thereafter, but does not include loan points, prepaid interest, or other prepaid expenses;

15.3.26 Commingle the Partnership funds with those of any other person or entity;

15.3.27 Cause the Partnership to enter into any transactions with any other partnership in which the General Partner or any Affiliates have an interest, including, but not limited to, any transaction involving the sale, lease or purchase of any property to or from the Partnership, or the lending of any moneys or other property to or from the Partnership;

15.3.28 Receive any commission or fee for the placement of mortgage loans or trust deed loans on the Partnership Property or otherwise act as a finance broker on its behalf;

15.3.29 Directly or indirectly pay or award any finder's fees, commissions, or other compensation to any person engaged by a potential investor for investment advice as an inducement to such advisor to advise the purchaser regarding the purchase of Units. The General Partner, however, shall not be prohibited from paying the normal sales commissions payable to a registered broker-dealer or other properly licensed person for selling Units;

15.3.30 Operate the Partnership in such a manner as to have the Partnership classified as an "investment company" for purposes of the Federal Investment Company Act;

15.3.31 Invest any Gross Proceeds in junior mortgages, deeds of trust, or other similar obligations;

15.3.32 Incur short term borrowings, except for Partnership short term construction loans, repairs, replacements of working capital;

15.3.33 Use any Gross Proceeds to prepay interest on Partnership mortgages, deeds of trust or other similar obligations. The General Partner, however, may cause the Partnership to pay "points" to prospective lenders as a condition to obtaining financing;

15.3.34 Cause the Partnership to enter into any agreements with the General Partner or its Affiliates which shall not be subject to termination without penalty by either party upon not more than sixty (60) days' written notice;

15.3.35 Cause the Partnership to enter into any contracts with the General Partner or with any Affiliate to construct or develop Partnership Properties or to render any services in connection with such construction or development; or

15.3.36 Cause the Partnership to enter into any contracts to construct or develop Partnership Property without such contract being guaranteed at the price contracted by an adequate completion bond or other satisfactory arrangements.

15.4 Within ninety (90) days after the Limited Partners have voted to remove the General Partner, the General Partner shall have prepared, at Partnership expense, a financial statement (balance sheet, statement of income or loss, partners' equity, and changes in financial position) prepared in accordance with generally accepted accounting principles and accompanied by a report thereon containing an opinion of a recognized independent certified public accounting firm. The General Partner shall cause such statement to be mailed to the Limited Partners as soon as possible after its receipt.

15.5 The General Partner or any Affiliate may acquire and resell Units from time to time on its or their own behalf and for its or their own benefit.

15.6 The General Partner shall have the duty and responsibility to provide continuing administrative and executive

support, advice, consultation, analysis and supervision with respect to the functions of the Partnership as an owner of Partnership Property, including decisions regarding adjustments to rental schedules, the sale or refinancing or other disposition of property, and compliance with federal, state and local regulatory requirements and procedures.

16. Rights, Powers and Voting Rights of the Limited Partners

16.1 Limited Partners shall take no part in or interfere in any manner with the control, conduct or operation of the Partnership, and shall have no right or authority to act for or bind the Partnership.

16.2 Limited Partners shall have the right, by Majority Vote, to vote only upon the following matters affecting the basic structure of the Partnership;

16.2.1 Removal of the General Partner;

16.2.2 Election of a successor General Partner;

16.2.3 Termination and dissolution of the Partnership;

16.2.4 Amendment of the Partnership Agreement, provided such amendment is not for the purpose of reflecting the addition or substitution of Limited Partners or the reduction of capital accounts upon the return of capital to Partners;

16.2.5 The sale of all or substantially all of the Partnership assets in a single sale, or in multiple sales in the same twelve (12) month period, except in the liquidation and winding up of the Partnership business upon its termination and dissolution;

16.2.6 The pledge or encumbrance of all or substantially all of the Partnership assets at one time, other than in connection with the acquisition or improvement of assets, initial financing of a Partnership Property, or the refinancing of previous obligations; and

16.2.7 The extension of the term of the Partnership.

16.3 In any such vote each Holder shall be entitled to cast one vote for each Unit which he owns, and the procedures set forth in Paragraph 16.5 of this Partnership Agreement shall be applicable.

16.4 The General Partner may at any time call a meeting of the Limited Partners or for a vote, without a meeting, of the Limited Partners on matters which they are entitled to vote, and shall call for such meeting or vote following receipt of written request therefor of Limited Partners holding ten percent (10%) or more of the Units held by all Limited Partners as of the date of receipt of such written request ("notice date"). Within ten days of such notice date, the General Partner shall notify all Limited Partners of record as of the notice date as to the time and place of the Partnership meeting, if called, and the general nature of the business to be transacted thereat, or if no such meeting has been called, of the matter or matters to be voted upon and the date upon which the votes will be counted. Any Partnership meeting or the date upon which such votes, without a meeting, will be counted (regardless of whether the General Partner has called for such meeting or vote upon the request of Limited Partners or has initiated such event without such request) shall be no less than fifteen (15) nor more than sixty (60) days following mailing of the notice thereof by the General Partner. All expenses of the voting and such notification shall be borne by the Partnership.

16.5 A Limited Partner shall be entitled to cast one vote for each unit which he owns: (i) at a meeting, in person, by written proxy or by a signed writing directing the manner in which he desires that his vote be cast; or (ii) without a meeting, by a signed writing directing the manner in which he desires that his vote be cast. The General Partner must receive such writing prior to the meeting, or, if there is no meeting, prior to the date upon which the votes of the Limited

Partners are to be counted. Only the votes of Limited Partners of record on the notice date, whether at a meeting or otherwise, shall be counted. The General Partner shall not be entitled to vote. The laws of the State of California pertaining to the validity and use of corporate proxies shall govern the validity and use of proxies given by Limited Partners.

16.6 No Limited Partner shall have the right or power to: (i) withdraw or reduce his contribution to the capital of the Partnership except as a result of its dissolution or as otherwise provided by law, (ii) bring an action for partition against the Partnership, (iii) cause the termination and dissolution of the Partnership by court decree or otherwise, except as set forth in this Partnership Agreement, or (iv) demand or receive property other than cash in return for his contribution. No Limited Partner shall have priority over any other Limited Partner either as to the return of contributions of capital or as to Net Income, Net Loss or Distributions. Other than upon the termination and dissolution of the Partnership as provided by this Partnership Agreement, there has been no time agreed upon when the contribution of each Limited Partner may be returned.

16.7 In addition to any amendments otherwise authorized herein, the General Partner may amend this Agreement from time to time, without the consent of any Limited Partner, (i) to add to the representations, duties, or obligations of the General Partner or its Affiliates or surrender any right or power granted to the General Partner or its Affiliates herein, for the benefit of the Limited Partners; (ii) to cure any ambiguity, to correct or supplement any provision herein which may be inconsistent with any other provision herein, or to make any other provisions with respect to matters or questions arising under this Agreement which will not be inconsistent with the provisions of this Agreement; and (iii) to delete or add any provision of this Agreement required to be so deleted or added by the Staff of the Securities and Exchange Commission or by a State "Blue Sky" Commissioner or similar such official, which addition or deletion is deemed by such Commissioner or official to be for the benefit or protection of the Limited Partners. Notwithstanding anything to the contrary contained in this Partnership Agreement, this Agreement may not be amended without the consent of the Partners to be adversely affected by an amendment that:

16.7.1 Converts a Limited Partner into a general partner;

16.7.2 Modifies the limited liability of a Limited Partner;

16.7.3 Alters the interest of the General or Limited Partners in Net Income or Net Loss or Distributions from the Partnership; or

16.7.4 Affects the status of the Partnership as a partnership for federal income tax purposes;

17. Expulsion, Bankruptcy or Dissolution of the General Partner

17.1 The General Partner may be expelled from the Partnership upon a Majority Vote.

17.2 Written notice of the expulsion of the General Partner shall be served upon it either by certified or by registered mail, return receipt requested, or by personal service. Such notice shall set forth the date upon which the expulsion is to become effective.

17.3 Upon the retirement, expulsion, adjudication of bankruptcy or dissolution of the General Partner ("Terminated Partner"), the Partnership shall purchase the Terminated Partner's interest in the Net Income, Net Loss and Distributions of the Partnership for a purchase price determined according to the provisions of Paragraph 17.4.

17.4 The Terminated Partner shall receive from the new general partner or partners ("acquiring partner") the fair market value of its interest in the Partnership, determined by agreement between the Terminated Partner and the acquiring partner, or if they cannot agree, by arbitration in accordance with the then current rules of the American Arbitration

Association. For this purpose, the fair market value of the interest of the Terminated Partner shall be deemed to be the amount it would receive upon the Partnership's dissolution and termination under Paragraph 19.2, assuming such dissolution or termination occurred on the date of the dissolving event and that the Partnership assets were sold for their then fair market value without compulsion of the Partnership to sell such assets. Payment shall be made by a promissory note bearing eight percent (8%) simple interest per year on such note's unpaid principal amount, secured by the acquiring partner's assignment to the Terminated Partner of the Partnership's future Distributions to the acquiring partner. The principal amount, together with accrued interest, shall be payable at the times and in the amounts equal to seventy-five percent (75%) of such Distributions until such time as the principal amount, together with accrued interest, is paid in full, but shall become due and payable in full by the acquiring partner at such time as the Partnership is finally wound up and liquidated. If the Terminated Partner requests, however, the sale and payment shall be made, to the extent required, on terms and conditions that will allow such sale to qualify for the installment method as provided in Section 453 of the Internal Revenue Code. The Terminated Partner shall be required to sell, and the acquiring partner shall be required to purchase, the Terminated Partner's interest in the Partnership no later than the sixtieth (60th) day after the occurrence of one of the events specified in Paragraph 19.1, or the election of a new General Partner under Paragraph 16.2, whichever occurs later.

18. Certain Transactions

The General Partner, any Holder, any Affiliates, any shareholder, officer, director or employee thereof, or any person owning a legal or beneficial interest therein, may engage in or possess an interest in any other business or venture of every nature and description, independently or with others including, but not limited to, the ownership, financing, leasing, operation, management, brokerage and development of real property.

19. Termination and Dissolution of the Partnership

19.1 The Partnership shall be terminated and dissolved upon the earlier to occur of the following:

19.1.1 The General Partner's retirement (provided there has been ninety (90) days prior written notice to the Limited Partners), expulsion, adjudication of bankruptcy, insolvency, dissolution or other cessation to exist as a legal entity, unless the General Partner in place thereof within one hundred twenty (120) days of the date of such event by Majority Vote elects to continue the business of the Partnership. Expenses incurred in the reformation, or attempted reformation, of the Partnership shall be deemed expenses of the Partnership;

19.1.2 A Majority Vote in favor of the Partnership's dissolution and termination;

19.1.3 The expiration of the term of the Partnership; or

19.1.4 The disposition of all interests in the Partnership's real property and other assets.

19.2 Upon a dissolution and termination of the Partnership for any reason, the General Partner shall take full account of the Partnership assets and liabilities, shall liquidate the assets as promptly as is consistent with obtaining the fair value thereof, and shall apply and distribute the proceeds therefrom in the following order.

19.2.1 To the payment of the Partnership's creditors, but excluding secured creditors whose obligations will be assumed or otherwise transferred on the liquidation of Partnership assets;

19.2.2 To the repayment of all outstanding loans made by the General Partner to the Partnership; and

19.2.3 To the General Partner and Holders pursuant to the provisions of Paragraph 11.5, "Allocation of Income, Loss and Distributions," of this Partnership Agreement.

20. Special Power of Attorney

20.1 Concurrently with the execution of written acceptance and adoption of the provisions of this Partnership Agreement, each Limited Partner shall execute, acknowledge, and deliver to the General Partner a special power of attorney in form acceptable to the General Partner. Each such special power of attorney shall constitute and appoint the General Partner as the attorney-in-fact for the Limited Partner, with power and authority to act in his name and on his behalf to execute, acknowledge, and swear to in the execution, acknowledgement, and filing of documents. Such powers shall include, by way of illustration but not of limitation, the following:

20.1.1 The Partnership Agreement, all separate certificates of limited partnership, as well as all amendments to the foregoing which, under the laws of the State of California or of any other state, are required to be filed or which the General Partner deems to be advisable to file;

20.1.2 Any other instrument or document which the Partnership may be required to file under the laws of any state or by any governmental agency, or which the General Partner deems advisable to file; and

20.1.3 Any instrument or document which may be required to effect the continuation of the Partnership, the admission of an additional or substituted Limited Partner, or the dissolution and termination of the Partnership (provided such continuation, admission or dissolution and termination are in accordance with the terms of this Partnership Agreement), or to reflect any reductions in amount of contributions of Partners.

20.2 The special power of attorney to be concurrently granted by each Limited Partner:

20.2.1 Is a special power of attorney coupled with an interest, is irrevocable, shall survive the death or legal incapacity of the granting Limited Partner, and is limited to those matters herein set forth;

20.2.2 May be exercised by the General Partner acting alone for each Limited Partner by a facsimile signature of the General Partner or by any one of its officers, or by listing all of the Limited Partners executing any instrument with a signature of the General Partner or one of its officers acting as its attorney-in-fact; and

20.3.3 Shall survive an assignment by a Limited Partner of all or any portion of his Units except that, where the Assignee of the Units owned by a Limited Partner has been approved by the General Partner for admission to the Partnership as a substituted Limited Partner, the special power of attorney shall survive such assignment for the sole purpose of enabling the General Partner to execute, acknowledge and file any instrument or document necessary to effect such substitution.

21. Indemnification

21.1 The Partnership, its receiver or its trustee, shall indemnify, save harmless and pay all judgments and claims against the General Partner, from any liability or damage incurred by reason of any act performed or omitted to be performed by them in connection with the business of the Partnership, including attorneys' fees incurred by them in connection with the defense of any action based on any such act or omission, which attorneys' fees may be paid as incurred, including all such liabilities under federal and state securities acts (including the Securities Act of 1933) as permitted by law. If a claim for indemnification (other than for expenses incurred in a successful defense) is asserted against the Partnership by the General Partner under this Partnership Agreement or otherwise, the Partnership will, unless in the opinion of its counsel the matter has been settled by controlling precedent, submit to a court of appropriate jurisdiction the question whether such indemnification by it is against public policy and will be governed by the final adjudication of such issue.

21.2 In the event of any action by a Holder against the General Partner including a Partnership derivative suit, the Partnership shall indemnify, save harmless and pay all expenses of the General Partner including attorneys' fees incurred in the defense of said action, if (a) the General Partner is successful in said action, or (b) in the opinion of the Partnership's counsel the matter has been settled by controlling precedent, or (c) if the matter has not been settled by controlling precedent, it will be submitted to a court of appropriate jurisdiction as to whether such indemnification by the Partnership is against public policy and all parties will be governed by the final adjudication of such issue.

21.3 Notwithstanding the provisions of Paragraph 21.1 and 21.2, the General Partner shall not be relieved from any liability imposed by law, including liability for fraud, bad faith, willful neglect or negligence. All judgments against the Partnership and the General Partner, wherein the General Partner is entitled to indemnification, must first be satisfied from Partnership assets before the General Partner is responsible for these obligations.

21.4 The General Partner shall have the right and authority to require in all Partnership contracts that it will not be personally liable thereon and that the person or entity contracting with the Partnership is to look solely to the Partnership and its assets for satisfaction.

22. Miscellaneous

22.1 This Partnership Agreement may be executed in several counterparts and all so executed shall constitute one Partnership Agreement, binding on all of the parties hereto, notwithstanding that all of the parties are not signatory to the original or the same counterpart.

22.2 The terms and provisions of this Partnership Agreement shall be binding upon and shall inure to the benefit of each of the Partners and their respective legal representatives, successors, and assigns.

22.3 In the event any sentence or paragraph of this Partnership Agreement is declared by a court of competent jurisdiction to be void, such sentence or paragraph shall be deemed severed from the remainder of the Partnership Agreement and the balance of the Partnership Agreement shall remain in effect.

22.4 All notices under this Partnership Agreement shall be in writing and shall be given to the Holder entitled thereto, by personal service or by mail, posted to the address maintained by the Partnership for such person or at such other address as he may specify in writing.

22.5 Paragraph titles or captions contained in this Partnership Agreement are inserted only as a matter of convenience and for reference. Such titles and captions in no way define, limit, extend or describe the scope of this Partnership Agreement nor the intent of any provision hereof.

22.6 Whenever required by the context hereof, the singular shall include the plural, and vice-versa; the masculine gender shall include the feminine and neuter genders, and vice-versa; and the word "person" shall include a corporation, partnership, firm or other form of association.

22.7 The name and address of the General Partner is:

NWP Management
Corp.

[*address*]

22.8 The names, addresses and capital contributions of the Limited Partners are set forth on Exhibit I attached hereto, which exhibit shall be maintained at the principal place of business of the Partnership.

22.9 This Partnership Agreement supersedes all agreements previously made between the parties relating to its subject matter. There are no other understandings or agreements between them.

22.10 No delay or failure by a party to exercise any right under this agreement, and no partial or single exercise of that right, shall constitute a waiver of that or any other right, unless otherwise expressly provided herein.

22.11 This Partnership Agreement shall be construed in accordance with and governed by the laws of the State of _____ [*state*].

General Partner

NWP Management Corp.

By: _____

[*name and title*]

Original Limited Partner

[*name and title*]



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Current Legal Forms for Real Estate

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Current Legal Forms for Real Estate
Chapter 20 REAL ESTATE ENTITIES
Part IV. Forms
C. PARTNERSHIPS

24-20 Current Legal Forms for Real Estate FORM 20.30

AUTHOR: by Stephen E. Pigott and Harold O. Maxfield, Jr.

FORM 20.30 Syndication--subscription agreement to limited partnership--compensation to general partners in capital units--liquidated damages upon default of subscriber--articles of limited partnership

COMMENT

Prior to the actual formal organization of a limited partnership syndicate, the general partners can proceed by obtaining subscription agreements from prospective limited partners to make certain that sufficient capital can be raised. Typically, the subscription agreement will show the amount of capital to be invested, the general nature of the transaction, and the date when the contribution must be paid in full. Prior to offering limited partnership interests to the "public," the practitioner should exercise caution in determining whether and to what extent it may be necessary to comply with applicable federal and state securities laws. The agreement illustrated here provides that, upon default, any amount paid by a subscriber will be retained by the partnership as liquidated damages. The amount so retained would become an asset of the partnership and be considered as income.

FORMS

(1) Subscription agreement

THIS AGREEMENT made _____ [month] _____ [day] _____ [year] , 1987, between JOHN SHAW, residing at _____ [address] , _____ [city] , _____ [state] , and DANIEL SHAW, residing at _____ [address] , _____ [city] , _____ [state] (the "Shaws"), and all the parties whose signatures appear at the end of this agreement (the "Subscribers").

WHEREAS, the Shaws, as Purchasers, entered into an agreement dated _____ [month] _____ [day] , _____ [year] , with Harold James, as seller, for the purchase of certain premises known as _____ [address] , _____ [city] , [state] (the "Property"), all upon the terms and conditions set forth therein (the "Contract of Purchase").

WHEREAS, the Shaws and the Subscribers, all being residents of the State of _____ [state] , have subscribed to the formation of a Limited Partnership to be formed under the laws of the State of _____ [state] , which partnership shall acquire title to the Property as assignee of the purchaser in the Contract of Purchase.

WHEREAS, the parties wish to define their respective rights and obligations with respect to this subscription agreement and the Limited Partnership which will acquire the Property under the Contract of Purchase.

WHEREAS, the Subscribers have read and are familiar with the Contract of Purchase.

WHEREAS, the Subscribers desire to subscribe for the units of interest in the Limited Partnership set forth opposite their respective names and be parties to the Limited Partnership upon the terms and subject to the conditions hereinafter set forth.

IT IS THEREFORE AGREED:

1. Organization of Partnership. The parties hereby subscribe and shall be parties to a Limited Partnership to be organized under the laws of the State of _____ [state] . The Articles of Limited Partnership are annexed hereto.

2. Capital Units. The Partnership interest shall be divided into one thousand (1,000) units, each unit being defined as a unit of interest in the entire Partnership and referred to as a Capital Unit, representing one-tenth (1/10) of one percent (1%) of the entire capital interest of the Partnership.

3. Contributions.

(a) Each of the Subscribers shall contribute to the Partnership as his contribution for the Capital Unit or Units set forth alongside his respective name a sum equivalent to _____ Dollars (\$ _____) for each Capital Unit, except as set forth in subparagraph (b) hereof.

(b) The Shaws paid the deposit of _____ Dollars (\$ _____) pursuant to the Contract of Purchase and will be entitled to receive for their total contribution thirty (30) Capital Units valued at _____ Dollars (\$ _____).

(c) All of the contributions, other than such deposits, shall be payable in full at the time of the execution of this Subscription Agreement, or in installments in such amounts as the Shaws and the Subscriber may mutually agree upon. In no event, however, shall payment in full be made later than _____ [month] _____ [day], _____ [year].

4. Damages. The Subscribers understand that time is of the essence in connection with the payments to be made hereunder. In the event that a subscriber defaults in making the payments required to be made on or before their due dates, all payments theretofore made by a Subscriber pursuant to Paragraph 3 shall immediately upon such default belong to the Partnership as liquidated damages by reason of the Subscriber's breach of this agreement inasmuch as the damages cannot be readily ascertained. Each Subscriber is relying upon every other Subscriber to make up the funds necessary in connection with this transaction.

5. Deposit of Funds. All the funds contributed by the Subscribers under the terms of this agreement shall be deposited in a special bank account. The signatories on this account shall be the Shaws or their designee. All such funds, provided this agreement is not cancelled as hereinafter provided, shall be used as and when required for the purpose of consummating the transaction under the Contract of Purchase and for the payment of all expenses incurred in connection therewith. Such expenses shall include, but not be limited to, attorney's fees, accountant's fees, tax consultant's fees, title insurance fees, recording fees, printing costs, commissions, and the reimbursement of the Shaws or their nominees for all expenses made, incurred, or to be incurred by them in connection with the negotiation and consummation of this transaction, and any and all further payments required to be made pursuant to the Contract of Purchase, as well as all expenses and disbursements relating to or arising out of such transaction. Upon the commencement of the Partnership as provided in the Articles of Limited Partnership, the Shaws shall assign, or cause to be assigned, the Contract of Purchase to the Partnership, and title to the premises shall be taken in the name of the Partnership. Upon such assignment the Partnership shall thereupon assume, in writing, all the obligations of the Shaws under the Contract of Purchase. Notwithstanding the provisions of this paragraph, the Shaws are authorized as soon as there shall be received any moneys, pursuant to this Subscription Agreement, to withdraw and pay the same pursuant to the provisions of the Contract of Purchase. In the event the Subscription is not completed as provided for in Paragraph 6, the Shaws shall refund all sums so withdrawn.

6. Termination. In the event that two hundred fifty (250) Capital Units have not been subscribed for under the terms of this agreement on or before _____ [month] _____ [day] , _____ [year] , or if for any reason, the transaction under the Contract of Purchase is not consummated on the date provided therein, or on any adjourned date, the Shaws shall forthwith cause the return to each Subscriber of any sums deposited by such Subscriber under this agreement. Upon such return this Subscription Agreement and the Articles of Limited Partnership shall be of no further force and effect, and no Subscriber nor the Shaws shall have any further rights under this Subscription Agreement nor shall any Subscriber have any rights in or under the Contract of Purchase, and the Shaws shall have the right to proceed under the Contract of Purchase as if this agreement or the Articles of Limited Partnership had never been entered into.

7. Assignability. Unless this agreement is cancelled, the Shaws shall not assign or adversely change any term or provision of the Contract of Purchase, except for extensions or acceleration of the date or dates for consummating any transaction thereunder, without the consent of each of the Subscribers. In the event that the Shaws are able to negotiate extensions or accelerations, they shall be entitled to withdraw from the funds deposited by the Subscribers such amounts as they deem necessary as additional payments under the Contract of Purchase. If the transaction is not consummated for any reason whatsoever, the Shaws shall be obligated to the Subscribers for the return in full of all sums deposited as provided for in Paragraph 6.

8. Acknowledgments of Subscribers. The Subscribers acknowledge that:

(a) They are entering into this agreement relying solely on the representations and warranties made by the seller in the Contract of Purchase, and that a copy of the Purchase Agreement has been exhibited to them and that they have examined and approved and fully understand the same.

(b) The Shaws have made no representations or warranties of any kind to induce the Subscribers to enter into this agreement except as herein specifically set forth.

(c) Any statements, brochures, information, data, and figures describing or relating in any way to the Property are based upon information obtained by the Shaws from sources which they deem reliable and are not made or intended as representations, warranties, guaranties, promises, or inducements by the Shaws.

(d) Any projected or estimated figures of income, expense, depreciation, and expenses of operation are estimates and opinions only and are not warranted, represented, or guaranteed.

(e) The Shaws are not liable or bound in any manner by statements, representations, or information, pertaining to the physical condition, income, or operation of, or by any matters affecting or relating to, the Property, or by any information or data furnished by any real estate broker, agent, servant, employee, or other person unless specifically set forth in the Subscription Agreement.

(f) The Subscribers have made an investigation of the pertinent facts relating to the purchase and fiscal operation of the Property to the extent which they deem necessary in order to be fully informed with respect thereto.

9. Broker. The Subscribers represent that they have not dealt with, nor were matters relating to this agreement brought to them by, any broker. This provision, and all other representations made in this agreement by the Subscribers, shall survive the closing of title.

10. Entire Agreement. This agreement supersedes all agreements previously made between the parties relating to its subject matter. There are no other understandings or agreements between them.

11. Notices. All notices under this agreement shall be in writing and delivered personally or mailed by certified mail, postage prepaid, addressed to the parties at their last known addresses.

12. Non-waiver. No delay or failure by a party to exercise any right under this agreement, and no partial or single exercise of that right, shall constitute a waiver of that or any other right, unless otherwise expressly provided herein.

13. Headings. Headings in this agreement are for convenience only and shall not be used to interpret or construe its provisions.

14. Governing Law. This agreement shall be construed in accordance with and governed by the laws of the State of _____ [state] .

15. Counterparts. This agreement may be executed in two or more counterparts, each of which shall be deemed an original but all of which together shall constitute one and the same instrument.

16. Binding Effect. The provisions of this agreement shall be binding upon and inure to the benefit of the Shaws, their heirs, legal representatives, nominees, and assigns, and the Subscribers, their heirs, legal representatives, successors, and assigns.

In witness whereof the parties have executed this agreement the day and year first above mentioned.

John Shaw

Daniel Shaw

Subscribers' Signatures

Name and Address	Capital Units	Cash To Be Paid for Contributions

(2) Articles of Limited Partnership

THIS AGREEMENT made _____ [month] _____ [day] ,
_____ [year] , between JOHN SHAW, residing at _____ [address] ,
_____ [city] , _____ [state] , DANIEL SHAW, residing at _____
[address] , _____ [city] , [state] (the "General Partners"), and all the other parties who shall
execute this agreement (the "Limited Partners").

1. Formation. The parties hereby form a Limited Partnership pursuant to the provisions of the Partnership Law of the
State of _____ [state] .

2. Name. The Partnership shall be conducted under the name of the Shaw Investment Company.

3. Term. The Partnership shall commence on the day upon which the Certificate of Limited Partnership is filed in the
office of the Clerk of _____ [county] County, and shall continue until terminated, as provided in this
agreement. Such Certificate of Limited Partnership shall be filed as soon as feasible after and in no event prior to the
date on which twenty-five percent (25%) of the total cash contributions shall have been actually paid as provided for in
the Subscription Agreement.

4. Capital. The Partnership shall commence business with capital of _____ Dollars
(\$ _____). Such capital shall consist of cash contributions of _____ Dollars
(\$ _____), together with the contribution of a certain Contract of Purchase, dated
_____ [month] _____ [day] , _____ [year] , under which
_____ Dollars (\$ _____) has been paid as a deposit and which is valued at
_____ Dollars (\$ _____) for the purposes of this agreement. Each of the Limited
Partners has contributed or shall contribute to the Partnership capital in cash the sum set forth as his contribution
opposite his signature hereto, which sum includes the share allocated to the General Partners of _____
Dollars (\$ _____) referred to above. No Limited Partner shall be required to contribute to the
Partnership capital any sum in excess of the sum set forth as his contribution opposite his signature.

5. Purpose. The purposes of this Limited Partnership are (a) to acquire for investment, title to the land and buildings
known as _____ [address] , _____ [city] , [state] (the "Property"), the same being
more particularly described in the Contract of Purchase, and (b) to operate, manage, and service such Property. In the
event that the Partnership does not consummate the purchase of the Property on or before [month]
_____ [day] , _____ [year] , it shall terminate and each of the Limited Partner's
total cash contributions to the Partnership shall be returned to each of them without interest and without further liability
to any party hereto.

6. Units. The Partnership shall be divided into one thousand (1,000) Units, each Unit being valued at
_____ Dollars (\$ _____). Each Unit shall be defined as a unit of capital interest in
the entire Partnership, representing one tenth of 1 percent of the Partnership's entire capital interest (a "Capital Unit").

7. Office. The principal office of the Partnership shall be maintained at _____ [address] ,
_____ [city] , _____ [state] , or at such other place or places as the General
Partners may from time to time designate by notice to the Limited Partners.

8. Distribution of Funds. All funds available for distribution, arising or realized from the following sources shall be

allocated and distributed as provided in Paragraph 9:

(a) Economic profits earned through the activities of the Partnership in the operation of the Property. Economic profits, as used in these Articles, shall mean net profits as ascertained through the use of generally accepted accounting practice, except that: (1) depreciation shall not be considered as a deduction, and (2) amortization on mortgages shall be considered as a deduction.

(b) The sale of any part or all of the Property owned by the Partnership.

(c) The placement or refinancing of any mortgage or mortgages, or the pledging or encumbrancing of the Property in any manner, resulting in a surplus of funds.

(d) All funds including but not limited to surplus funds deemed available for distribution by the General Partners.

9. Allocation. The funds described in items (a), (b), (c), and (d) of paragraph 8 shall be allocated and distributed to each of the Partners in the ratio that each Partner's number of Capital Units bears to the aggregate total of the original one thousand (1,000) Capital Units.

10. Losses.

(a) All losses or deficiencies suffered or incurred in or about the business of the Partnership shall be allocated to and borne by each Partner in the ratio that his number of Capital Units owned bears to the aggregate total of the original 1,000 Capital Units.

(b) All losses in excess of the total contribution of the Limited Partners as of the date of the termination of this Partnership shall be borne solely by the General Partners, and no recourse thereto shall be had against any Limited Partner.

11. Time of Distribution. As funds are available in the Partnership bank account and, to the extent that the General Partners deem it unnecessary for such funds to be retained by the Partnership, such funds shall, upon the direction of the General Partners, be distributed to all of the Partners in the manner set forth in Paragraphs 8 and 9. All distributions as provided for herein shall be made to the Partners monthly during the term of the Partnership, if available.

12. Books and Records. At all times during the continuance of the Partnership, the General Partners shall keep or cause to be kept full and true books of account, in which shall be entered fully and accurately the transactions of the Partnership.

(a) All of such books of account, together with an executed copy of the Certificate of Limited Partnership and of the Certificate of Conducting Business Under an Assumed Name, as required by Section 130 of the General Business Law of the State of New York, and of any Certificate amending either of such Certificates or any Certificate that may be required to be filed in the State of New York, shall at all times be maintained at the principal office of the Partnership and shall be open to the inspection of the Partners or their representatives. o

(b) The General Partners shall deliver to the Partners within sixty (60) days after the expiration of each calendar year, beginning with the year 1988, a statement of gross receipts and operating expenses as prepared by the Partnership's accountants. In addition, the General Partners shall deliver to the Limited Partners so-called "information returns" prior to their filing with the federal and state governments, showing the Partnership's profit and loss and the distribution thereof to each Partner.

(c) All such statements shall be prepared by such firm of certified public accountants as the General Partners shall, in

their sole judgment, employ for the purpose of auditing the Partnership's accounts.

(d) For accounting and tax reporting purposes only, and without affecting any of the Partners' rights under Paragraphs 8, 9, and 10, which paragraphs shall prevail and govern the rights of the parties as to any and all distributions, the net profits as ascertained through the use of generally accepted accounting practice, and in accordance with the Internal Revenue Code of 1986 and Regulations of the Commissioner of Internal Revenue, shall be credited to the individual Partner's capital accounts in accordance with the following formula:

(1) Net profits shall be credited to each of the Partner's capital accounts in the ratio that each Partner's number of Capital Units owned bears to the aggregate total of the original one thousand (1,000) Capital Units.

(2) Net losses shall be debited to the capital account of each Partner in the ratio that each Partner's number of Capital Units owned bears to the aggregate total of the original one thousand (1,000) Capital Units owned by all the Partners.

13. Bank Accounts.

(a) The General Partners shall, in the name of the Partnership, open and maintain a bank account or accounts, in which shall be deposited all contributions of the Partners, and all other Partnership income, and shall use such funds solely for the business of the Partnership, and as provided for in the Subscription Agreement.

(b) Withdrawals from any Partnership bank account shall be made only upon the signature of both General Partners or of such other person as they may from time to time designate.

14. Advances. If any General or Limited Partner shall advance any money to the Partnership in excess of his agreed contribution to the Partnership's capital (Capital Units), the amount of such advance shall not be considered an increase of his capital contribution or entitle him to any increase in his share of the Partnership distributions, or subject him to any greater proportion of the losses which it may sustain. The amount of any such advance shall be a debt due from the Partnership to such Partner and, unless otherwise provided, shall be repaid to him without interest.

15. Rights, Duties, and Obligations of General Partners.

(a) The General Partners shall render their personal services to the Partnership, devoting thereto such time as they in their sole discretion may deem necessary. However, the General Partners or any of them may engage in other business ventures exclusively for their own account, including the ownership, operation, and management of other real estate.

(b) The General Partners are authorized to negotiate, enter into, and execute leases and to incur obligations for and on behalf of the Partnership in connection with its business; to borrow moneys for and on behalf of the Partnership which may be necessary, upon such terms and conditions as they may deem advisable and proper, and to pledge the credit of the Partnership for such purpose; to employ brokers for the purpose of leasing the Property; to prepay in whole or in part, refinance, recast, modify, or extend any of the mortgages affecting the Property owned by the Partnership, and in connection therewith to execute for and on behalf of the Partnership any and all extensions, renewals, or modifications of such mortgages, or to execute new mortgages on the Property in lieu of any or all of such mortgages, and to execute any and all instruments to carry out the intentions and the purposes thereof. Their signatures or the signatures of their designees for and in behalf of the Partnership shall be binding on the Partnership.

(c) The General Partners are authorized and empowered for and on behalf of the Partnership at any time to enter into a supervisory management agreement with Floyd Management Company or with such persons, firms, or corporations as the General Partners, in their sole judgment, shall deem advisable and for such compensation as they in their sole judgment shall determine, but in no event to exceed _____ Dollars (\$_____) per year. All of the Partners recognize any such management agreement as an irrevocable agency coupled with an interest

and an obligation.

(d) The fact that a General Partner or a member of his family is directly or indirectly interested in or connected with any person, firm, or corporation employed by the Partnership to render or perform a service, or from which or whom the Partnership may buy merchandise or other property, shall not prohibit the General Partners from employing such person, firm, or corporation or from otherwise dealing with him or it.

(e) In addition to the specific rights and powers herein granted to the General Partners, the General Partners shall possess, enjoy, and exercise all of the rights and powers of General Partners as more particularly provided, and limited by, the Partnership Law of the State of _____ [state].

(f) A General Partner may retire from the Partnership without affecting his share and interests, if any, as a Limited Partner in the Partnership.

(g) The General Partners are authorized to transfer the assets of the Partnership to a corporation or corporations to be formed, if in their sole judgment the corporate organization would best serve the interest of all of the partners hereto. Each Partner shall have the same proportionate interest in the shares of the corporation as he had with respect to the Limited Partnership, and each Partner shall participate, in the same ratio, in the share of distributions, as this Limited Partnership Agreement provides. Officers and directors of such corporation shall be elected upon such terms and conditions as the General Partners in their sole discretion deem advisable.

(h) No General Partner shall be liable or accountable in damages or otherwise to any of the Partners for any acts performed by him within the scope of the authority conferred on him by this agreement, except for acts of malfeasance or misfeasance.

16. Assignability. No assignee of a Partner shall have a right to become a substitute Partner in place of his assignor unless such assignee receives the written consent of at least fifty-one percent (51%) of the total units of capital contributions (Capital Units) of the Limited Partners in the Partnership, or at a meeting of the Partnership such consent be received by an affirmative vote of a majority of the General Partners and at least fifty-one percent (51%) of the Capital Units voting by the Limited Partners present at such meeting, except as hereinafter provided. No consent shall be required, however, for the transfer of a Limited Partner's interest to any other Partner.

(a) No Partner shall sell, transfer, encumber, or otherwise dispose of the whole or any part of his interest in the Partnership except in the manner hereinafter set forth.

(b) In the event that any Partner shall desire to sell and shall receive an acceptable bona fide offer for the purchase of all or any part of his interest in the Partnership from a competent adult or adults not then a Partner, such Partner (the "Selling Party") shall have the right to sell all or any part of such interest, as the case may be, only after complying with the following requirements:

(1) The Selling Party shall send a copy of such bona fide offer received from an outside purchasing party, by certified mail, to all of the Partners, other than the Selling Party. Such offer shall be deemed to be an offer by the Selling Party to sell to the other Partners (the "Purchasing Parties"), the interest offered upon the same terms and conditions as contained in such outside offer. Thereupon, each of the Purchasing Parties shall notify the General Partners by certified mail within seven (7) days after receipt of the offer whether he rejects or accepts such offer. If no such notice of acceptance or rejection is received from any of the Purchasing Parties within such time, they shall be deemed to have rejected the offer. Any Purchasing Party accepting such offer shall set forth in his letter of acceptance the amount of the interest of the Selling Party that such acceptor shall be willing to purchase if available.

(2) The General Partners shall have the absolute right and authority to allocate among the Purchasing Parties the

respective interests to be purchased by each of such parties in the allocable amounts so determined by the General Partners. The decision of the General Partners shall be binding and conclusive upon all the parties as to such allocation. The General Partners shall then notify the Purchasing Parties of their determination within 15 business days from the date of the receipt of the offer by the Selling Party. The transaction shall be consummated at the office of the General Partners by the payment of the full purchase price for the entire interest offered not later than thirty (30) days from the date of the mailing of the original offer by the Selling Party.

(3) If the entire interest offered by the Selling Party shall have been partially or totally rejected, he shall have the right to sell his interest so offered to the person or persons named in the offer communicated to the Purchasing Parties within sixty (60) days from the date of the mailing of the original offer to the Partners. Such sale, however, must be made strictly in accordance with the terms of the offer originally submitted to the Purchasing Parties and at no more favorable terms, to the outside purchasing party.

(4) In the event of a rejection after compliance with all of the terms and conditions as hereinabove set forth, the Selling Party shall be deemed to have received the consent of more than fifty-one percent (51%) of the Limited Partners for such sale or transfer as provided in this Paragraph 16, and no further consent of any Limited Partner shall be required for such sale or transfer.

(c) Notwithstanding the provisions of this paragraph, the interest of each Partner may be (1) transferred or disposed of by will or intestacy to the deceased Partner's immediate family, but the deceased Partner's heirs, beneficiaries, or legal representatives shall hold such interest subject to all the terms and provisions of this agreement, or (2) transferred during his lifetime to his immediate family or by inter vivos or testamentary trust, provided the trustee or trustees or the beneficiary or beneficiaries is or are a member or members of the Partner's immediate family, but such interest shall remain subject to all the terms and provisions of this agreement. For the purpose of this paragraph, "immediate family" is defined as the husband, wife, adult child, father, mother, adult sister, or adult brother of a Partner.

(d) Notwithstanding the provision of this paragraph, the General Partners are authorized to permit the consummation of a sale or transfer of all or a part of any Partner's interest herein if in their sole discretion the Partnership and other Partners would not be injured by the waiver of the procedure set forth in subparagraph (b) of this paragraph.

(e) Immediately upon the consummation of any permitted sale or transfer of a Partner's interest, the assignee or transferee of such Partner's interest shall forward to the General Partners a duplicate original of such assignment or transfer, at the bottom of which there shall be endorsed the following legend:

"The undersigned assignee or transferee of the above interest (Capital Units) does hereby accept such interest and agrees to be bound by all of the terms, covenants, and conditions of the Limited Partnership Agreement dated _____ [month] _____ [day], _____ [year], with the same force and effect as if the assignee or transferee herein were a signatory thereto."

(1) The assignee shall thereupon sign his name under such legend, and have his signature witnessed.

(2) No assignment shall be valid or effective unless in compliance with the foregoing conditions and unless the Partnership shall in writing acknowledge the recordation of the transfer on the Partnership books.

17. Death of General Partner.

(a) In the event of the death, retirement, adjudication of incompetency, or inability to serve of one of the General Partners, this Partnership shall not thereby be dissolved, but may be continued by the surviving General Partner, if he so elects, within thirty (30) days from the death, retirement, adjudication of incompetency, or inability to serve of a General Partner. If such General Partner so elects to continue the business of the Partnership, he shall cause the

Certificate of Limited Partnership to be amended, indicating the continuation of the Partnership by the surviving General Partner. The amendment of the Certificate shall constitute the election by the surviving General Partner to continue the business of the Partnership. Upon the failure of the surviving General Partner to so elect within the time hereinbefore provided, or in the event of the death, retirement, adjudication of incompetency, or inability to serve of the survivor of the General Partner, this Partnership shall terminate, and the then remaining Limited Partners shall, within a reasonable time, but not later than two (2) months following such termination, elect one of the following options:

(1) Reconstitute and form a new limited partnership and transfer the assets of this Partnership to such new limited partnership, and appoint a general partner or partners upon such terms as the remaining Limited Partners shall agree, and do everything requisite to the formation of a limited partnership under the laws of the State of _____ [state].

(2) Transfer the assets of the Partnership to a corporation to be formed. Each Partner shall have the same proportionate interest in the shares of such corporation as he had with respect to the Limited Partnership, and each Partner shall participate in the same ratio in the share of distribution as this Limited Partnership provides, and have the privilege to elect officers and directors of such corporation upon such terms and conditions as they in their judgment deem advisable.

(3) Transfer the assets of the Partnership to one or more of the Partners as trustees for the benefit of all of the remaining Partners.

(b) One of the elections above mentioned shall be deemed to be adopted if sixty-six and 2/3 percent (66.67%) of the Capital Units of the then Limited Partners so elect in writing or at a meeting of the Limited Partners. If sixty-six and 2/3 percent (66.67%) of the Capital Units of the then Limited Partners do not elect under subdivisions (1), (2), or (3) above, in the time hereinbefore provided, then the Partnership shall be dissolved and a full account of the assets and liabilities shall be taken, and the assets shall be liquidated as promptly as possible, and the proceeds thereof distributed to the Partners as provided in paragraph 21. Pending the transfer as provided in subdivisions (1), (2), or (3) or if the Limited Partners do not elect under subdivisions (1), (2), or (3), they shall act or name the liquidator or trustee as the case may require.

18. Death of Limited Partner. If a Limited Partner shall die, his executors or administrators, or if he shall become incompetent, his committee or representative, shall have the same rights that such Limited Partner would have had if he had not died or become incompetent. The share of such Limited Partner in the Partnership assets shall, until the termination of the Partnership, be subject to the terms, provisions, and conditions of this agreement as if such Limited Partner had not died or become incompetent.

19. Termination. The Partnership shall terminate if any of the following events shall occur: (a) the sale of all the Partnership Property; (b) the mutual consent of the General Partners; (c) the death, retirement, or incompetency of the surviving General Partner; or (d) the failure of the surviving General Partner to exercise his election to continue the Partnership business as provided for in paragraph 17.

20. Dissolution Statement. Upon the dissolution of the Partnership, its accountants shall prepare a statement and furnish a copy thereof to each Partner within sixty (60) days after such dissolution setting forth the assets and liabilities of the Partnership.

21. Distribution Upon Termination. Upon the termination of the Partnership, except where the change of the entity of the Partnership may be made, a full account of the Partnership's assets and liabilities shall be taken, and the assets shall be liquidated as promptly as possible. The proceeds of such liquidation shall be applied as follows:

(a) To the payment of all debts and liabilities of the Partnership and the expenses of liquidation.

(b) To the repayment of cash contributions as capital of the Limited Partners to the extent that they shall not have received the same from the distributions as hereinbefore provided.

(c) To the repayment of cash contributions as capital of the General Partners to the extent that they shall not have received the same from the distributions as hereinbefore provided.

(d) Surplus, if any, of the assets remaining shall be divided among the Partners, in the same ratio as provided in paragraphs 8 and 9.

22. Withdrawal. The Limited Partners shall not at any time withdraw from the Partnership, except as hereinbefore provided.

23. Power of Attorney. Each of the Limited Partners constitutes and appoints the General Partners, or either of them, his true and lawful attorney, and in his name, place, and stead to make, execute, sign, acknowledge, and file a Certificate of Limited Partnership under the laws of the State of _____ [state] , and to include therein all the information required by the laws of that state, and also to make, execute, sign, acknowledge, and file a Certificate of Conducting Business under an Assumed Name, and to execute such other instruments as may be required under the laws of the State of _____ [state] .

24. Notices. Unless otherwise specified in a writing sent to the Partnership, the address of each General Partner and Limited Partner for all purposes shall be as set forth next to his signature at the end of this agreement. All notices and demands required to be given hereunder shall be sent by certified mail to such addresses.

25. Arbitration. Any dispute or controversy arising under, out of, in connection with, or in relation to this agreement or any breach thereof shall be determined and settled by arbitration pursuant to the governing rules of the American Arbitration Association. Any award rendered therein shall be final and binding on all of the Partners, and judgment may be entered thereon in any court of competent jurisdiction.

26. Entire Agreement. This agreement contains the entire understanding between the parties and supersedes all prior understandings and agreements between them respecting the within subject matter. The Subscription Agreement dated _____ [month] _____ [day] , _____ [year] , between John Shaw and Daniel Shaw and the Partners herein is hereby incorporated by reference into this agreement and made a part hereof.

27. Non-waiver. No delay or failure by a party to exercise any right under this agreement, and no partial or single exercise of that right, shall constitute a waiver of that or any other right, unless otherwise expressly provided herein.

28. Headings. Headings in this agreement are for convenience only and shall not be used to interpret or construe its provisions.

29. Governing Law. This agreement shall be construed in accordance with and governed by the laws of the State of _____ [state] .

30. Validity. In the event that any provision of this agreement shall be held to be invalid, the same shall not affect in any respect whatsoever the validity of the remainder of this agreement.

31. Counterparts. This agreement may be executed in two or more counterparts, each of which shall be deemed an original but all of which together shall constitute one and the same instrument.

32. Binding Effect. Unless otherwise expressly provided herein, the provisions of this agreement shall be binding upon and inure to the benefit of each of the parties and their respective legal representatives, successors, and assigns.

In witness whereof the parties have executed this agreement the day and year first above mentioned.

Partners' Signatures

Name and Ad- dress	Capital Units	Cash To Be Paid for Contributions
_____	_____	
_____	_____	



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Current Legal Forms for Real Estate
Chapter 20 REAL ESTATE ENTITIES
Part IV. Forms
D. CORPORATIONS

24-D Current Legal Forms for Real Estate Scope

AUTHOR: by Stephen E. Pigott and Harold O. Maxfield, Jr.

Scope

Note: Please refer to Chapters 17 and 18 of Current Legal Forms with Tax Analysis for an additional discussion of corporations and for a number of other forms.



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Current Legal Forms for Real Estate
Chapter 20 REAL ESTATE ENTITIES
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D. CORPORATIONS

24-20 Current Legal Forms for Real Estate FORM 20.31

AUTHOR: by Stephen E. Pigott and Harold O. Maxfield, Jr.

FORM 20.31 Transfer to controlled corporation--single transferor

COMMENT

The choice between the corporate form and the noncorporate form is as difficult to make in real estate area as it is in any other area. Investors or dealers in real estate are concerned with insulation against personal liability, and are therefore attracted to the corporate entity. But a corporation may be a costly double tax vehicle in comparison with the sole proprietorship, the limited liability company, or the partnership. The popularity of the limited liability company or the limited partnership lies in its ability to furnish protection against personal liability to its member or its limited partners, without subjecting the entity to the burden of double taxation. Nevertheless, the ease with which the modern corporation can be organized and operated is a strong practical reason for its use. Even the problem of double taxation is not often a deterrent.

S corporation alternative:

The principal advantage of a corporation achieving subchapter S qualification is that double taxation is avoided. Generally, many of the tax items, such as income, deductions, capital gains and losses, etc., are passed through directly to the shareholders without taxation at the corporate level. Qualification for subchapter S status allows the shareholder to obtain protection from personal liability without paying the price of double taxation.

An S corporation may have up to 75 shareholders. The S corporation rules and changes are discussed in more detail in Chapter 15, Volume 18. Individual S corporation shareholders, however, are subject to the passive activity loss limitations.

FORM*(1) Offer of real estate owner to corporation*

_____ [month] _____ [day], _____ [year]

To the Board of Directors of
Smith Real Estate Corporation

Dear Sirs:

I am the sole owner of real estate, subject only to restrictions, easements, covenants and conditions of record, any condition that would be disclosed by an survey, zoning and building codes, and to current real estate taxes and assessments (collectively, the "Permitted Exceptions"), located in _____ [city]
_____, [state], more particularly described as follows:

(insert description)

I hereby offer to transfer this property to your company in its "AS IS," "WHERE IS" CONDITION WITH ALL FAULTS, on the following conditions:

- (a) The transfer shall be made by General Warranty Deed, subject only to the Permitted Exceptions.
- (b) Taxes, interest, insurance, and rents shall all be apportioned as of the date of transfer, in accordance with the custom in the real estate industry in _____ [city], _____ [state].
- (c) Your Company shall issue to me, fully paid and nonassessable, all the authorized shares of your Company, to wit: one hundred (100) common shares, no par value.
- (d) We enter into a shareholder's agreement in substantially the same form as is set forth on Exhibit _____, attached hereto.
- (e) All costs and expenses associated with the transfer shall be the responsibility of the Company.
- (f) I am not making any representations or warranties (either express or implied) regarding the fitness, condition or use of the property, all of the foregoing are hereby disclaimed by me.

Upon the delivery to me, within fifteen (15) days from the date of this letter, of a certified copy of a resolution of your Company accepting this offer, and upon the performance of the terms of this offer, I shall execute, acknowledge, and deliver to your Company a bargain and sale deed transferring this property to your Company.

Very truly yours,

By: _____

[name]

(2) Resolution of incorporators and subscribers

*authorizing directors to purchase real
property by issuing
corporate shares*

The Chairman submitted the following report:

John Smith, owner of real property in _____ [city] , _____ [state] , has offered to sell such property to this Company, as more particularly described in the offer attached hereto, for the issuance to him, as fully paid and nonassessable, of all the authorized shares of this Company. Such property is necessary for the use and lawful purposes of this Company.

After full discussion, upon motion made and seconded, the following resolution was unanimously adopted:

Resolved that the Board of Directors of this Company is hereby authorized to accept the offer of John Smith, and upon receipt of the deed transferring such property to this Company to issue to John Smith, fully paid and nonassessable, all the authorized shares of this Company in full payment thereof.

(3) Resolution of directors authorizing issuance of
shares for real property

The Chairman submitted the following report:

At a meeting of the incorporators and subscribers of this Company it was resolved that the Board of Directors accept the offer made by John Smith, and issue to him, as fully paid and nonassessable, all the authorized shares of this Company.

Mr. Smith, sole owner of real property in _____ [city] , _____ [state] , offered to sell to this Company the property, as more fully described in the offer attached hereto, in return for all the authorized shares of this Company. Such property is necessary for the use and lawful purposes of this Company.

After full discussion, upon motion made and seconded, the following resolutions were unanimously adopted:

Resolved that the offer made by John Smith is hereby accepted.

Further Resolved that the Secretary shall promptly deliver to John Smith a certified copy of the minutes of this meeting.

Further Resolved that the President or Vice President and the Secretary or Treasurer shall execute and deliver to John Smith certificates for 100 shares, representing all the authorized shares of this Company, as fully paid and nonassessable, upon receipt from John Smith of a deed transferring such property to this Company.

Further Resolved that all adjustments for taxes, interest, insurance, and rents shall be made as of the date of transfer in accordance with the custom in the real estate industry in _____ [city], _____ [state].



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Current Legal Forms for Real Estate
Chapter 20 REAL ESTATE ENTITIES
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D. CORPORATIONS

24-20 Current Legal Forms for Real Estate FORM 20.32

AUTHOR: by Stephen E. Pigott and Harold O. Maxfield, Jr.

FORM 20.32 Agreement to organize corporation--between builder and managing agent--accompanying shareholders' agreement

COMMENT

This is an agreement between two corporations, one a builder and the other a management company, for the erection of a building and for its management after its completion. Basically, the builder undertakes to complete the projected structure at a predetermined price; the management company undertakes to operate the structure in accordance with the terms of a detailed management agreement. Both the building contract and the management agreement are to be made with a new corporation, whose shares and notes are to be held by each of the participants in the venture. The agreement contains in addition a program for financing the venture, and provides for the execution of a shareholders' agreement. This shareholders' agreement grants each party the right of "first refusal" if the other decides to retire from the venture, and sets up various criteria requiring the sale of the property and the liquidation of the corporation.

Debt and equity financing:

If this project is to proceed in corporate form, the financing furnished by each of the venturers is to be partly through the issuance of shares and partly through promissory notes, and the amounts in each category are to be on a pro rata basis. The issuance of a combination of stock and debt to the shareholders of a corporation, particularly a close corporation, inevitably raises the question as to whether the debt portion of the financing will be recognized as true debt or whether it will be classified as stock. The distinction is important in various areas, including the interest deduction of the corporation, the character of the loss on the worthlessness of the debt, and the treatment on the repayment of the debt.

FORM

THIS AGREEMENT made _____ [month] _____ [day] ,
 _____ [year] , between EVANS CONSTRUCTION CORPORATION, a(n) _____
 [state] corporation having an office at _____ [city] _____ [state] ("Evans"),
 and SMITH MANAGEMENT CORPORATION, a(n) _____ [state] , having an office
 _____ [city] _____ [state] at _____ [city]
 _____ [state] ("Smith").

WHEREAS, Evans and Smith have caused E. & S. Co., Inc., to obtain on their behalf an option to purchase from the owner thereof, a plot of land located in the _____ [city] , _____ [state] (the "property") for the price of _____ Dollars (\$_____).

WHEREAS, the price for the purchase option was _____ Dollars (\$_____) all of which was advanced by Evans.

WHEREAS, the parties intend to exercise the option and acquire the property in the name of a corporation which they shall form.

WHEREAS, the parties also intend to cause the corporation to construct an office building on the property, generally in accordance with the BenderSchematic Plans of _____ [month] _____ [day] ,
 _____ [year] and the memorandum specifications attached to such Plans, both of which are initialed by the parties hereto.

WHEREAS, the parties wish to provide for their participation in the financing, construction, ownership, and operation of the office building, as set forth below. As used herein, the term "office building" shall include the property upon which it is to be constructed.

NOW THEREFORE, it is agreed as follows:

1. Formation of Corporation. Evans and Smith agree to form a corporation under the laws of the State of New York (the "Company"), which shall be authorized to own, manage, and operate an office building therein whereby:

(a) The Corporation shall be authorized to issue two thousand (2,000) shares, all of one class and without par value;

(b) The number of directors shall be fixed at six (6);

(c) Cumulative voting rights shall be provided for the election of directors, with appropriate provision for maintaining equal representation as between Evans and Smith in the event of vacancies in the Board of Directors;

(d) A quorum for directors' meetings shall be prescribed at not less than four, and a quorum for shareholders' meetings shall be prescribed as the holders of at least a majority of all outstanding shares;

(e) The affirmative vote of at least four directors shall be required for the taking of any directorate action;

(f) Cash dividends upon the common shares of the Company shall be prohibited so long as any of its six and one-half percent (6 1/2 %) Notes (described below) remain outstanding;

(g) No amendment of items (a) through (f) above, or this item (g), can be effected without the affirmative vote of the holders of at least a majority of all outstanding shares, and the share certificates shall contain an appropriate reference thereto;

(h) The Bylaws of the Company shall in all other respects be subject to the approval of Evans and Smith; and

(i) The name of the Company shall be a name mutually approved by Evans and Smith.

2. Acquisition of Property. Evans and Smith shall cause the Company to acquire title to the property in accordance with the option and thereupon to refund the amount advanced to acquire the option. Pending a determination by Evans and Smith as to whether they intend to proceed with the project in the corporate form provided for in Paragraph 1 above or as a joint venture as provided for in Paragraph 10 above, title to the property shall be taken in the name of a nominee acceptable to both Evans and Smith.

3. Design, Construction, and Operation of Building.

(a) Evans and Smith shall cause Harvey Bender to promptly prepare and submit for their approval further schematic plans for the office building and after their approval by the parties hereto, to cause Harvey Bender to prepare detailed plans and detailed specifications (which detailed specifications shall conform with the memorandum specification attached to the Bender Schematic Plans of July 8, 1987). Evans and Smith each for itself agrees that it shall not unreasonably withhold approval for such plan.

(b) Evans shall enter into a Construction Contract with the Company, in form mutually satisfactory to Evans and Smith, whereby Evans shall construct the office building in accordance with such detailed plans and specifications at a guaranteed total cost to the Company in the amount hereinafter mentioned for all construction cost items constituting field costs. The term "field costs," for all purposes hereof, shall be deemed to mean all of the following costs:

(1) fees of all architects and engineers, including consulting architects and consulting engineers;

(2) cost of all surveys, borings, permits, and certificates;

(3) demolition, excavation, and foundation costs;

(4) cost of field offices, including temporary buildings, or rental for premises used as field offices;

(5) cost of street cuts and curb crossings;

(6) cost of all labor, equipment, and material for the construction of the office building;

(7) cost of job supervision and inspection and materials testing;

(8) workmen's compensation, employers' liability, comprehensive general liability, and automobile liability insurance; and

(9) premiums payable in respect of any completion or performance bonds required to be furnished to comply with the terms of any temporary building loan financing during the construction of the office building.

The guaranteed total cost to the Company for all construction cost items constituting field costs, as above defined, shall be the sum of _____ Dollars (\$_____). Such total cost shall be adjusted to reflect any substantial change in cubical content, design, or specifications of the office building from the Bender Schematic

Plans of _____ [month] _____ [day], _____ [year], and the memorandum specification attached to such Plans.

(c) Simultaneously with the execution of the Stockholders Agreement hereinafter provided for, Smith and the Company will enter into a management contract (the "Management Contract"), a copy of which has been initialed by Evans and Smith, providing for the management of the office building by Smith.

4. Financing of Company.

(a) The permanent financing of the Company, to the extent of \$4,100,000, shall be accomplished as follows:

(1) Permanent mortgage financing under Central Life Insurance Company commitment (maximum).	\$ _____ _____
(2) 1,000 common shares of the Company to be purchased by Evans at \$50 per share.	\$ _____ _____
(3) Principal amount of 6 1/2 % Notes (described below) of the Company to be issued to Evans in consideration of a cash advance of an equal amount.	\$ _____ _____
(4) 1,000 common shares of the Company to be purchased by Smith at \$50 per share.	\$ _____ _____
(5) Principal amount of 6 1/2 % Notes of the Company to be issued to Smith in consideration of a cash advance of an equal amount.	\$ _____ _____

(b) Subject to the provisions of subparagraph 6(b), all amounts needed by the Company on account of any of the following shall (to the extent not otherwise made available to it through borrowings on terms mutually approved by Evans and Smith) be made available to it by means of cash advances to be made by Evans and Smith, respectively:

(1) the failure for any reason of the available amount of the Central Life Insurance Company permanent mortgage financing to reach the maximum figure of _____ Dollars (\$ _____) mentioned above,

(2) the costs for the purchase of the property, the construction and equipping of the office building, the development of the property, all carrying charges, all preopening expenses, and working capital up to but not exceeding _____ Dollars (\$ _____), exceed _____ Dollars (\$ _____), or

(3) all other costs mutually approved by Evans and Smith.

Evans and Smith shall make the above cash advances in equal amounts, to be evidenced by six and 50/100 percent (61/2 %) Notes described below.

(c) The respective acquisitions of shares by Evans and Smith (as contemplated by clauses (2) and (4) of subparagraph (a) of this paragraph) shall be consummated within thirty (30) days from the date hereof; their respective acquisitions of

six and 50/100 percent (61/2 %) Notes of the Company (as contemplated by clauses (3) and (5) of subparagraph (a) of this paragraph) to the extent necessary to acquire the property, to refund the amount advanced to acquire the option, and to meet the immediate requirements of the project, shall likewise be consummated within 30 days from the date hereof; and the respective acquisitions of the remaining 61/2 % percent Notes of the Company (as contemplated by clauses (3) and (5) of subparagraph (a) of this paragraph), and the respective advances to be made by them (as contemplated by subparagraph (b) of this paragraph), shall be made from time to time thereafter, as required, upon not less than 20 days' notice. All of the respective acquisitions of shares and 61/2 % percent Notes of the Company shall be made in equal amounts in each case. Pending a determination by Evans and Smith as to whether they intend to proceed with the project in the corporate form provided for in paragraph 1, or as a joint venture, as provided for in paragraph 10, the sums to be advanced by them to the Company for shares and 61/2 % percent Notes so as to enable title to the property to be taken, shall be advanced instead to the nominee mentioned in Paragraph 2, with adjustment between Evans and Smith in such payments for the amount advanced by Evans for the option.

(d) The six and 50/100 percent (61/2 %) Notes to be issued by the Company to Evans and Smith as hereinabove provided shall be dated as of their respective dates of issue, shall bear interest from their respective dates at the rate of six and 50/100 percent (61/2 %) per year, payable semiannually, shall mature on _____ [month] _____ [day], _____ [year], and shall be prepayable at the Company's option at any time, in whole or in part, without premium or penalty. However, if less than the entire unpaid principal amount of all the Company's outstanding six and 50/100 percent (61/2 %) Notes is to be prepaid, such prepayment shall be made pro rata upon such outstanding Notes in accordance with their unpaid principal amounts. The six and 50/100 percent (61/2 %) Notes shall expressly provide that by acceptance thereof the holders thereof agree that they shall not accept prepayment of any principal of any such Note except on a pro rata basis as herein provided.

(e) Evans and Smith shall use their best efforts to arrange for the temporary financing during construction of the office building in an amount not less than _____ Dollars (\$ _____), all upon terms mutually approved by Evans and Smith and not inconsistent with the Central Life Insurance Company commitment.

5. Shareholders' Agreement. Evans and Smith shall enter into an agreement with respect to the shares and the Company's six and 50/100 percent (61/2 %) Notes, in the form annexed hereto as Exhibit A (the "Shareholders Agreement"), whereby Evans and Smith shall agree:

(a) not to sell or otherwise dispose of any of such shares or Notes of the Company prior to the completion of the office building;

(b) that grant to the other, so long as such other shall remain the holder of any of such shares or Notes, a right of first refusal (exercisable in whole but not in part) with respect to the purchase of any such shares or Notes owned by such granting party which are proposed to be sold, whether privately or by public offering or by the enforcement of any pledge or otherwise. It is understood, however, that such first refusal shall cease to be applicable to any of such shares or Notes which, consistently with such first refusal requirements, shall have been acquired by any nonaffiliated third person in an arm's length transaction for value, notwithstanding that any of the shares or Notes so acquired by such a third person may thereafter be owned by one of the parties hereto;

(c) that any pledge made by either of them of any of such shares or Notes shall be made expressly subject to the provisions to be included in such Shareholders' Agreement pursuant to the foregoing clauses (a) and (b);

(d) that if in any two successive years, after the third year of the operation of the office building, the free and clear earnings (as the same is defined in the Management Contract) of the office building are less than _____ Dollars (\$ _____), then, and at Evans' express request, Smith shall, at a shareholders' meeting called for that purpose, vote its shares in favor of the liquidation of the Company and the sale of the office building free of the Management Contract. Smith, however, shall have the right to purchase the shares and the

Company's six and 50/100 percent (61/2 %) Notes owned by Evans at a price which shall be at least equal to the amount Evans would be entitled to receive from the Company for its shares and notes upon its immediate liquidation, valuing the office building at the best offer made for it, and without deduction for any brokerage fee or tax upon profit which the Company might have been required to pay if the sale had been made in other than a liquidation of the Company;

(e) agree that from after the fifth year through the tenth year of the operation of the office building, if either Evans or Smith can effect a sale of the office building for _____ Dollars (\$ _____) or more, all cash over the mortgage, the other will at a shareholders' meeting called for that purpose, vote its shares in favor of a liquidation of the Company and a sale of the office building at the price offered, free of the Management Contract, but such other shall have the right to purchase the shares and six and 50/100 percent (61/2 %) Notes of the one requesting the sale at a price which shall be at least equal to the amount the one requesting the sale would be entitled to receive from the Company for its shares and six and 50/100 percent (61/2 %) Notes upon an immediate liquidation of the Company, valuing the office building at the price for which the sale could have been effected, and without deduction for any brokerage fee or tax upon profit which the Company might have been required to pay if the sale had been made in other than a liquidation of the Company;

(f) agree that after the tenth (10th) year of the operation of the office building, if either Evans or Smith desires to sell the office building the other will at a shareholders' meeting called for that purpose, vote its shares in favor of a liquidation of the Company and a sale of the office building free of the Management Contract at a price offered by a third party which is acceptable to the one requesting the liquidation and sale, But such other shall have the right to purchase the shares and six and 50/100 percent (61/2 %) Notes of the one requesting the sale at a price which shall be at least equal to the amount the one requesting the sale would be entitled to receive from the Company for its shares and six and 50/100 percent (61/2 %) Notes upon an immediate liquidation of the Company, valuing the office building at the price acceptable to the one requesting the sale, and without deduction for any brokerage fee or tax upon profit which the Company might have been required to pay if the sale had been made in other than a liquidation of the Company;

(g) agree that if Smith sells all or substantially all of its shares in the Company, as permitted by this agreement, at the request of Evans all of the shares of a then Company will be voted at a shareholders' meeting called for that purpose in favor of the termination of the Management Agreement;

(h) agree that all six and 50/100 percent (61/2 %) Notes and all share certificates representing shares of the Company shall be inscribed with an appropriate legend referring to the Shareholders' Agreement; and

(i) agree that if the Company is to sell the office building, free of the Management Contract, as provided in (d), (e), and (f) above, the Company may, and at the request of Evans will cancel the Management Contract upon notice to Smith Which notice shall fix a date of termination not less than ninety (90) nor more than one hundred twenty (120) days after the date of the giving of such notice.

6. Conditions to Financing Obligations.

(a) The obligations of Evans and Smith to make the cash advances to the Company in excess of the amount necessary to acquire the property, to refund the amount advanced to acquire the option, and to meet the immediate requirements of the project as specified in subparagraph 4(c) hereof shall be subject to the following conditions precedent:

(1) The Certificate of Incorporation and Bylaws of the Company shall be as provided in Paragraph 1 hereof.

(2) The property shall have been acquired as provided in Paragraph 2 hereof.

(3) The Shareholders' Agreement, the Management Agreement, and the Construction Contract shall have been executed and delivered.

(4) Evans and Smith shall have theretofore or concurrently acquired the number of shares and the principal amount of six and 50/100 percent (61/2 %) Notes of the Company specified in subparagraph 4(c) hereof to the extent necessary to acquire the property, to refund the amount advanced to acquire the option, and to meet the immediate requirements of the project.

(5) Counsel for Evans and Smith shall be satisfied as to all legal matters in connection with the foregoing.

(6) The satisfaction of the foregoing conditions precedent shall occur on or before _____ [month]
_____ [day], _____ [year].

(b) The obligations of Evans and Smith to make from time to time the cash advances to the Company required by subparagraph 4(b) hereof shall be subject to the following conditions precedent:

(1) All shares and all six and 50/100 percent (61/2 %) Notes of the Company required by subparagraph 4(a) hereof to be acquired by Evans and Smith, respectively, shall have been so acquired by them.

(2) All legal matters in connection with such cash advances shall be satisfactory to counsel for Evans and to counsel for Smith.

7. Oral Modification. This agreement may not be modified or terminated orally, but only by an agreement in writing executed by both parties hereto.

8. Binding Effect. The covenants and agreements herein contained shall be binding upon and shall inure to the benefit of each party hereto and any successor of such party by consolidation or merger or through acquisition of all or substantially all of its property and assets and the assumption of all or substantially all of its liabilities. The rights of the parties hereto may not be assigned except to any such successor of either party.

9. Notices. Any notice, request, or demand hereunder to either party shall be in writing and shall be deemed to have been duly given when either delivered personally or mailed in a postpaid envelope addressed to such party as its address above set forth, or addressed to such party at such other address as such party shall hereafter furnish to the other party in writing.

10. Entire Agreement. This agreement supersedes all agreements previously made between the parties relating to its subject matter. There are no other understandings or agreements between them.

11. Non-waiver. No delay or failure by either party to exercise any right under this agreement, and not partial or single exercise of that right, shall constitute a waiver of that or any other right, unless otherwise expressly provided herein.

12. Headings. Headings in this agreement are for convenience only and shall not be used to interpret or construe its provisions.

13. Governing Law. This agreement shall be construed in accordance with and governed by the laws of the State of _____ [state] .

14. Counterparts. This agreement may be executed in two or more counterparts, each of which shall be deemed an original but all of which together shall constitute one and the same instrument.

15. Joint Venture. If the parties hereto jointly determine to engage in the office building project described in this agreement as a joint venture instead of in corporate form, then:

(a) The Management Contract and the Construction Contract shall be amended to the extent required thereby.

(b) The provisions of Paragraph 1 hereof shall be deleted, the financing to be furnished by the parties shall be as set forth in Paragraph 4 hereof, but the method of financing shall be adjusted to reflect the ownership of the property instead of the ownership of shares, an agreement embodying the understandings of the parties as to the sale of the office building (which shall conform to the understandings set forth in Paragraph 5 hereof) shall be entered into by the parties in lieu of the Shareholders' Agreement mentioned in such Paragraph 5, and to the extent required thereby, all of the provisions of this agreement shall be adjusted to reflect the change in the method of ownership of the property conforming, however, to the basic understandings of the parties as in this agreement contained.

(c) The parties may, if jointly satisfactory to them, at any time thereafter change the method of the ownership and operation of the office building from a joint venture into a single corporate form, with each owning fifty percent(50%) of the shares. In such event, all of the provisions of Paragraph 1 hereof shall apply.

In witness whereof the parties hereto have caused this agreement to be duly executed, all as of the day and year first above written.

EVANS CONSTRUCTION CORPORATION

By: _____

[name and title]

SMITH MANAGEMENT CORPORATION

By: _____

[name and title]

Exhibit A

Shareholders' Agreement

THIS AGREEMENT made _____ [month] _____ [day] ,
 _____ [year] , among EVANS CONSTRUCTION CORPORATION, a(n) _____
 [state] corporation having an office at _____ [city] _____ [state] ("Evans"),
 and SMITH MANAGEMENT CORPORATION, a(n) _____ [state] , having an office
 _____ [city] _____ [state] at _____ [city]
 _____ [state] ("Smith"), and EVANS-SMITH, INC., a(n) _____ [state]
 corporation having an office at _____ [city] _____ [state] ("Company"). Evans
 and Smith are hereinafter sometimes collectively called the "Investors."

WHEREAS, the Investors entered into an agreement dated _____ [month] _____
 [day] , _____ [year] (the "Basic Agreement"), relating to the Company's construction,
 furnishing, and equipping of a fireproof, fully air-conditioned office building, as more fully set forth in the Basic
 Agreement;

WHEREAS, the Investors are to become holders of the Company's no par value common shares (the "Shares") and six and 50/100 percent (61/2 %) Notes (the "Notes"), pursuant to and more particularly described in the Basic Agreement, and the parties wish to provide for, among other things, the sale or other disposition of the Shares and Notes.

WHEREAS, simultaneously herewith, Smith and the Company entered into a Management Contract which provides for Smith's management of the office building. As used herein the term "office building" includes the land upon which it is to be constructed.

NOW THEREFORE, in consideration of the mutual covenants herein contained it is hereby agreed as follows:

1. First Refusals.

(a) While either Investor owns any of the Notes, or any interest therein, unless such Investor (the "selling party"), shall have first offered to sell them to the other Investor (the "nonselling party").

(b) While either Investor is the owner of any Shares, the other Investor shall not at any time make any disposition of any Shares, or any interest therein, unless such Investor shall have first offered to sell to the other Investor the Shares which it proposes to dispose.

(c) Each offer under this Paragraph 1 shall be in writing, shall be made at a price not exceeding the price currently being offered to the selling party by a responsible purchaser (other than an affiliate, as hereinafter defined, of the selling party), and on terms not more favorable to the selling party than the terms currently being offered by such purchaser, shall be limited to Notes or Shares, shall specify the kind and amount of Notes or Shares which the selling party desires to dispose of, and the name and address of the prospective purchaser, and (in the case of Shares) shall provide that all transfer taxes shall be for the account of the selling party. The Investor receiving any such offer shall within thirty (30) days after the receipt thereof accept the offer for the entire amount of the Notes or Shares, as the case may be, which are the subject of such offer, at such price and on such terms, or notify the selling party of its refusal to accept such offer. In case any such offer shall not be accepted for the entire amount of the Notes or Shares which are the subject of such offer, the selling party may, within the period of 45 days from the date of expiration of such 30-day period, or from the date of its receipt of such notice of refusal, whichever shall first occur, dispose of the Notes or Shares so offered and not accepted, at a price not less than the price and on terms not less favorable to the selling party than the terms at which such Notes or Shares shall have been offered hereunder. If such Notes or Shares are not so disposed of within such period of forty-five (45) days they shall again become subject to the restrictions of this Paragraph 1.

(d) The restrictions contained in this Paragraph 1 shall not apply to any of the following:

(1) The transfer of all Notes and Shares owned by either Investor to another corporation as a result of a merger, consolidation, reorganization, or sale of all its assets, or the transfer of any Notes or Shares by either Investor to another corporation which is an affiliate of such Investor, provided that no Investor shall be permitted under this subdivision (1) to transfer Shares to more than one such affiliate corporation and provided further that every transfer of Notes or Shares made pursuant to this subdivision (1) shall be made expressly subject to this agreement and shall require the transferee to assume all obligations of the transferor under this agreement with respect to the Notes or Shares so transferred. Upon making any such transfer, the transferor shall notify the other parties hereto of the kind and amount of Note or Shares so transferred and the name and address of the transferee. In case either Investor shall so transfer all its Notes and Shares to a single transferee, such transferee shall succeed to all rights of, and shall be bound by all obligations of and restrictions upon, such Investor under this agreement, and any references in this agreement to an "Investor" or the "Investors" shall thereafter be deemed to include such transferee rather than its transferor; provided, however, that no such transfer of all its Notes and Shares to a single transferee which is an affiliate corporation shall operate to relieve Evans or Smith from any of their respective obligations under Paragraphs 3, 4, or 5 of this agreement. In case either Investor shall so transfer

less than all its Notes and Shares to a single transferee, or shall so transfer any or all its Notes and Shares to more than one transferee, each such transferee shall severally be bound by the obligations of and restrictions upon such Investor under this agreement, but all subsequent offers to be made to such Investor under this Paragraph 1 shall be made only to such Investor and not to any of its transferees.

(2) The pledging of Notes or Shares by either Investor, but any such pledge shall be made expressly subject to this agreement and shall require the pledgee to acknowledge that in enforcing or foreclosing such pledge it will offer the pledged Notes or Shares to the other Investor as provided in this Paragraph 1. Upon making any such pledge, such Investor shall notify the other parties hereto of the kind and amount of Notes or Shares so pledged and the name and address of the pledgee. Upon any such pledge the pledgee shall be bound by all obligations of and restrictions upon such Investor under this agreement, but all subsequent offers to be made to such Investor under this Paragraph 1 shall be made only to such Investor and not to its pledgee.

(3) Any Shares or Notes which, consistently with this Paragraph 1, shall be acquired by any person (other than an Investor or the Company or an affiliate of any thereof) in an arm's-length transaction and for value, notwithstanding that any such Shares or any such Notes so acquired by such other person may thereafter be controlled by an Investor.

(e) The obligations and restrictions contained in this Paragraph 1 shall terminate whenever any of the Investors shall no longer control any Notes or Shares (other than Notes or Shares to which this Paragraph 1 shall not be applicable by reason of the provisions of subdivision (3) of subparagraph (d) above).

2. Restrictions on Transfers. Neither of the Investors shall make any disposition of any Notes or Shares prior to the date of issuance of a temporary certificate or certificates of occupancy for substantially all of the office building hereinafter called the completion date. The restrictions of this paragraph shall not apply to the pledging of Notes or Shares but any pledge made prior to the completion date shall be made expressly subject to this agreement and shall require the pledgee to acknowledge, in addition to the matters stated in Paragraph 1(d)(2) above, it will not enforce or foreclose such pledge by selling or taking title to the pledged Notes or Shares prior to the completion date.

3. Dividends. No cash dividends shall be declared or paid upon any Shares from time to time outstanding, so long as any Notes shall remain outstanding and unpaid.

4. Sale of Office Building.

(a) If, in each of any two successive years, after the third year of the operation of the office building, the free and clear earnings, as defined in the Management Contract, of the office building are less than _____ Dollars (\$_____), then, and at the request of Evans for it to do so, Smith shall at a shareholder's meeting called for that purpose, vote its Shares in favor of the liquidation of the Company and the sale of the office building free of the Management Contract in pursuance of the liquidation. In such event, and before the office building is sold, Smith shall have the option to purchase all (but not part) of the Notes and Shares owned by Evans at a price which shall be at least equal to the amount Evans would be entitled to receive from the Company for the Notes and Shares owned by it upon an immediate liquidation of the Company valuing the office building at the best written offer (cash over existing mortgage indebtedness) made for it to the Company by a responsible purchaser (other than an Investor or an affiliate of an Investor) but without computing or deducting (1) any brokerage fee or other cost of sale which might have been incurred by the Company if the hotel had been sold, or (2) any tax upon profit which the Company might have been required to pay if the sale had been made in other than a liquidation of the Company. Evans shall give Smith notice of the intended sale by the Company of the office building which notice shall contain the name of the responsible purchaser and the amount of the offer. At any time within twenty (20) days after receipt of such notice Smith shall have the right to elect to purchase such Notes and Shares owned by Evans, by giving notice of such election to Evans and the Company, which notice shall state (1) the price which Smith will pay for the Notes and Shares held by Evans; (2) the date and hour (the date being a business day and the hour being during usual business hours) for the delivery of the

Notes and Shares and the payment of the purchase price (by cash or certified check) which date shall be no earlier than ten days and no later than thirty (30) days from the date of the giving of such notice of election; and (3) the place in the City of _____ [city] for the closing of the transaction. All transfer taxes with respect to the Shares shall be for the account of Evans.

(b) If at any time during the sixth through tenth years of the office building's operation either of the Investors, (the "First Investor") is able and desires to effect a sale of the office building to a responsible purchaser (other than an Investor or an affiliate thereof), for at least _____ Dollars (\$_____) all cash in excess of the mortgage indebtedness, then, at the request of the First Investor, the other Investor, (the "Second Investor") shall vote its shares in favor of a liquidation of the Company and a sale of the office building free of the Management Contract at the price offered. The ability to effect a sale of the office building for the price above mentioned shall be evidenced by a written offer to the Company signed by the purchaser, accompanied by a certified check made payable to the order of the Company for not less than _____ Dollars (\$_____). Such offer shall give the Company sixty (60) days within which it may accept the same. The First Investor shall send notice of the receipt of the offer to the Second Investor, together with a copy of such offer. The Second Investor shall have the right to purchase the First Investor's Notes and Shares for a period of twenty (20) days after the receipt of such notice and copy of offer. The purchase price which shall be at least equal to the amount the First Investor would be entitled to receive from the Company for the Notes and Shares upon its immediate liquidation, valuing the office building at the price for which the sale thereof can be effected as evidenced by the offer, but without computing or deducting (1) any brokerage fee or other cost of the sale which might have been incurred by the Company if the office building had been sold; or (2) any tax upon profit which the Company might have been required to pay if the sale had been made in other than its liquidation. The election by the Second Investor to purchase the Notes and Shares of the First Investor shall be evidenced to the Company and the First Investor by sending to them notice of such election. The notice shall state: (1) the price which the Second Investor will pay for the Notes and Shares held by the First Investor; (2) the date and hour (the date being a business day and the hour being during usual business hours) for the delivery of the Notes and Shares and the payment of the purchase price (by cash or certified check), which date shall be no earlier than ten (10) days and no later than thirty (30) days from the date of the mailing of such notice of election; and (3) a place in the City of _____ [city] for the closing of the transaction. All transfer taxes with respect to the Shares shall be for the account of the First Investor.

(c) If, after the office building is operated for a period of ten (10) years, the Company receives an offer for its sale, and either Investor (the "First Investor") desires that the Company liquidate and sell the office building at the price contained in the offer, the other Investor (the "Second Investor") shall vote its shares in favor of a liquidation of the Company and the sale of the office building at the price offered, free of the Management Contract, at a shareholders' meeting called for that purpose; provided that the price shall be for all cash in excess of the mortgage indebtedness and the purchase has been offered by a responsible purchaser other than an Investor or an affiliate thereof. The offer must be made in writing to the Company, signed by the offeror, and accompanied by a certified check made payable to the order of the Company for not less than _____ Dollars (\$_____). The offer must give the Company sixty (60) days within which it may accept the same. The First Investor shall send a copy of the offer by mail to the Second Investor, who shall have twenty (20) days after the mailing of the offer to purchase the First Investor's Notes and Shares. The purchase price which shall be at least equal to the amount the First Investor would be entitled to receive from the Company for its Notes and Shares upon an immediate liquidation of the Company, valuing the office building at the price for which the sale thereof can be effected as evidenced by the offer, but without computing or deducting (1) any brokerage fee or other cost of sale which might have been incurred by the Company if the office building had been sold; or (2) any tax upon profit which the Company might have been required to pay if the sale had been made in other than its liquidation. The election by the Second Investor to purchase the Notes and Shares of the First Investor shall be evidenced to the Company and the First Investor by sending to them notice of such election. The notice shall state: (1) the price which the Second Investor will pay for the Notes and Shares held by the First Investor; (2) the date and hour (the date being a business day and the hour being during usual business hours) for the delivery of the Notes and Shares and the payment of the purchase price (by cash or certified check), such date to be no earlier than

ten days and no later than thirty (30) days from the date of the giving of such notice of election; and (3) a place in the City of _____ [city] for the closing of the transaction. All transfer taxes with respect to the Shares shall be for the account of the First Investor.

5. Termination of Management Contract. In addition to, and without in any manner limiting the rights of cancellation specifically provided for in the Management Contract, the parties agree that the Company may and, at the request of Evans, shall cancel the Management Contract, and Smith shall consent thereto (and to the extent requested by Evans, Smith shall vote its shares in favor of such cancellation at a shareholders' meeting of the Company called for that purpose), if:

(a) Smith sells all or substantially all, more than fifty percent (50%) of its original shareholding in the Company shall be deemed substantially all, as permitted by this agreement; or

(b) the Company has agreed to sell the office building free of the Management Contract, in accordance with the contract of sale to be entered into by it, as provided for in subparagraphs (a), (b), and (c) of Paragraph 4 of this agreement;

Such cancellation shall be by notice to Smith, and shall fix a date of termination not less than ninety (90) nor more than one hundred twenty (120) days after such notice has been given. The notice shall be given no later than 60 days after entering into the agreement of sale of the office building.

6. Notice to Third Parties. An executed copy of this agreement shall be filed with the Secretary of the Company. The Company shall cause to be placed on all certificates of Shares and on all Notes (other than Shares and Notes to which Paragraph 1 hereof shall not be applicable by reason of the provisions of subdivision (3) of subparagraph (d)) a legend, stating as follows:

The sale, assignment, transfer, pledge, or other disposition of this certificate and the shares represented thereby (alternative for Notes: of this Note and the obligation evidenced thereby) is subject to all terms, conditions, and restrictions contained in a certain Shareholders' Agreement dated _____ [month] _____ [day], _____ [year], between Evans Construction Corporation, Smith Management Corporation, and Evans-Smith, Inc. to all of which the holder hereof, by acceptance hereof, assents. A copy of such Shareholders' Agreement, to which reference is hereby made, is on file in the office of the Secretary of Evans-Smith, Inc.

7. Definitions. As used herein:

(a) The term "disposition" (including, with correlative meaning, the term "dispose"), means any sale, assignment, transfer, distribution to shareholders, or other conveyance, by private sale or by public offering or by enforcement of any pledge or by gift or for value, or otherwise.

(b) The term "pledge" includes the creation of any lien, charge, or encumbrance.

(c) The term "affiliate" of any corporation means any person which, directly or indirectly, controls or is controlled by or is under common control with such corporation. For the purposes of this definition, "control" (including, with correlative meanings, the terms "controlling," "controlled by," and "under common control with"), as used with respect to any person, means the possession, directly or indirectly, of the power to direct or cause the direction of the management and policies of such person, whether through the ownership of voting securities or by contract or otherwise.

8. Notices. Any notice or other communication to any of the parties hereto shall be sufficiently given if in writing sent by registered or certified mail in a postpaid envelope addressed to such party at its address above set forth or at such

other address as such party shall hereafter furnish to the other parties in writing.

9. Binding Effect. The covenants and agreements herein contained shall be binding upon and shall inure to the benefit of each party hereto and any successor of any such party by consolidation or merger or through acquisition of all or substantially all of its property and assets; and any such successor to Evans or Smith shall be deemed to be included in any reference herein to an "Investor" or the "Investors."

In witness whereof the parties hereto have executed this agreement as of the day and year first above written.

EVANS CONSTRUCTION CORPORATION

By: _____

[name and title]

SMITH MANAGEMENT CORPORATION

By: _____

[name and title]

EVANS-SMITH, INC.

By: _____

[name and title]



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Current Legal Forms for Real Estate

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Current Legal Forms for Real Estate
Chapter 20 REAL ESTATE ENTITIES
Part IV. Forms
D. CORPORATIONS

24-20 Current Legal Forms for Real Estate FORM 20.33

AUTHOR: by Stephen E. Pigott and Harold O. Maxfield, Jr.

FORM 20.33 Agreement to organize corporation--between builder and renting agent

COMMENT

This agreement sets forth the terms of a venture in which two corporations undertake the construction and operation of a commercial building. The venturers are not on a par in terms of their rights to receive corporate stock. While each of the venturers undertakes to subscribe in cash for its proportionate share of the stock of the new corporation, the shares intended for the renting agent are to be held in escrow. The builder undertakes to erect the improvement. The intention is to transfer the completed building to this new corporation, at which time the shares subscribed for by the renting agent will be issued, but only if the renting agent has procured for the building a prescribed number of tenants on certain minimum terms. The difficult question raised under these circumstances, particularly in the light of collateral provisions in the agreement, is whether the shares of the new corporation issued to the renting agent have to some extent been issued for services. On the other hand, assuming the success of the venture as envisioned by the parties, there is a question as to whether the contribution to the project by the renting agent can be considered to be qualitatively different than the contribution of the builder.

FORM

THIS AGREEMENT made _____ [month] _____ [day] ,
_____ [year] , by and between JONES CONSTRUCTION CORPORATION, a(n)
_____ [state] corporation ("Jones"), and ACE DEVELOPMENT CORPORATION, a(n)
_____ [state] corporation ("Ace").

WHEREAS, Jones proposes to develop certain premises in Baltimore, Maryland, more particularly described in Schedule A annexed hereto, such development to include the construction of an office building (the "Mercantile Office Building").

WHEREAS, Jones proposes to finance all or part of such construction by sale-leaseback or other arrangements with Atlantic Life Insurance Company and other lenders. Ace is willing to find desirable tenants for the Mercantile Office Building in exchange for an interest therein, as herein provided for:

NOW THEREFORE, the parties hereto agree as follows:

1. Obligations of Builder. Jones shall use its best efforts to:

(a) Conclude necessary agreements by which it will obtain fee simple title, or a long-term lease with or without an option to purchase fee simple title, to the land on which the Mercantile Office Building is to be constructed.

(b) Conclude necessary agreements with Atlantic Life Insurance Company or other lenders to obtain financing to enable Jones to construct the Mercantile Office Building.

(c) Construct the Mercantile Office Building at its own expense and without expense to Ace. The Mercantile Office Building shall contain approximately 200,000 square feet of gross floor area.

2. Obligation of Renting Agent. Ace shall use its best efforts to obtain leases, commitments to lease, or letters of intent from corporations, associations, or persons for all the rentable space in the Mercantile Office Building. So long as Ace shall not be in default under this agreement, it shall have during the term of this agreement an exclusive agency to obtain tenants for the Mercantile Office Building. All such leases, commitments, and letters of intent shall provide (a) for a rental of not less than _____ Dollars (\$_____) per square foot of rentable floor area for air conditioned space above ground, and not less than _____ Dollars (\$_____) per square foot of rentable floor area for air conditioned space below ground, and (b) for a term of not less than ten years. All proposed tenants shall be subject to Jones' approval. A proposed tenant shall be deemed acceptable to Jones, however, if it does not reject the tenant by written notice thereof given to Ace within thirty (30) days after receipt of the lease commitment or letter of intent signed by the proposed tenant.

3. Organization of Corporation. The parties shall cause a joint management and leasing corporation (the "Corporation") to be formed, with an initial capital and surplus of _____ Dollars (\$_____). Ace shall contribute thirty percent (30%) of such initial capital and surplus, and Jones shall contribute the remainder. Seventy percent of the common shares to be issued with respect to the initial capital of the Corporation shall be issued to Jones, and the remainder of such shares shall be retained by the Corporation in escrow to be issued to Ace or Jones as and to the extent provided in Paragraph 4. The Corporation shall not issue additional shares except with the consent of the parties and except preferred shares as provided in Paragraph 10.

4. Release of Escrowed Shares. If Ace has obtained leases of the type described in Paragraph 2 for all the rentable floor area in the Mercantile Office Building by the end of one year after construction is completed (as evidenced by the issuance of a certificate of occupancy), it shall be entitled to receive all the common shares of the Corporation held in escrow pursuant to Paragraph 3. If by the end of such year Ace has obtained leases of such type for more than two-thirds (2/3), but less than all, of such rentable floor area, it shall be entitled to receive that fraction of all the escrowed shares which is formed by taking as the numerator the number of square feet or rentable floor area for which leases have been obtained by Ace, and as the denominator the number of square feet of rentable floor area in the Mercantile Office Building. Jones shall be entitled to receive all escrowed shares which Ace is not entitled to receive pursuant to the preceding sentence.

5. Option to Builder to Purchase Shares of Renting Agent. Ace hereby grants to Jones an option to purchase the common shares of the Corporation owned by it. The price for such shares shall be _____ Dollars (\$_____) for each one percent (1%) of the total shares of the Corporation owned by Ace. Such option may be exercised as to all of the common shares owned by Ace at any time from one year after construction of the Mercantile Office Building is completed (as evidenced by the issuance of a certificate of occupancy) to four years thereafter, or partially and from time to time during the period of this option.

6. Remuneration to Rental Manager. All leases, commitments to lease, or letters of intent shall be taken in the name of the Corporation. Commencing with the effective date of this agreement and continuing for six months thereafter, or for such longer period as the Corporation may determine, Ace shall be, or shall nominate a person to be, project manager for rental purposes at a remuneration of _____ Dollars (\$_____) per month. Such remuneration shall accrue from the effective date of this agreement but the Corporation shall not be obligated to pay any such remuneration unless and until letters of intent (or leases or binding commitments to lease) of the type described in paragraph 2 shall have been obtained for at least fifty percent (50%) of the rentable floor area in the Mercantile Office Building. The Corporation may also employ an assistant to the project manager to assist with leasing and promotion. The compensation of such assistant shall be determined by the Corporation.

7. Brokerage and Other Leasing Expenses. The project manager, his assistant, nor Ace shall not charge or receive, directly or indirectly, or pay any brokerage fee or commission for obtaining tenants for the Corporation; provided, however, that this paragraph shall not prohibit the negotiation of a lease through an independent broker employed by a tenant who arranges for a brokerage fee or commission to be paid to such broker, and provided, further, that the assistant to the project manager may serve as a compensated consultant or architect to tenants in space layout and similar matters. The project manager and his assistant shall be permitted to charge to the Corporation out-of-pocket expenses for telephone, postage, and transportation to the extent necessary to obtain suitable tenants for the Mercantile Office Building.

8. Publicity. The Mercantile Office Building shall be publicized as a project designed, constructed, and developed by Jones. However, the interest and role of Ace and the Corporation in connection with the Mercantile Office Building shall be given suitable recognition in all publicity.

9. Transfer of Property to Corporation. At the time construction of the Mercantile Office Building is substantially completed, Jones shall transfer to the Corporation, subject to all liens and encumbrances, all its right, title, and interest in the Mercantile Office Building and the land on which it is constructed. Any income accruing to such land or building during the course of construction shall inure to the benefit of the Corporation.

10. Financing Construction. It is contemplated that Jones will obtain financing for the construction of the Mercantile Office Building equal to one hundred percent (100%) of the cost of the Mercantile Office Building, including land, construction, architectural, and engineering fees, carrying charges until completion of construction on the land if the land is leased, real estate taxes until completion of construction, interest until completion of construction, preplanning costs of Jones (incurred prior to the date of this agreement) in an amount equal to _____ Dollars (\$_____), preplanning costs of Ace (incurred prior to the date of this agreement) in the amount of _____ Dollars (\$_____), and other applicable costs. In the event such financing is not sufficient to cover all such costs, and Jones provides funds to permit completion of construction, or in the case of such preplanning costs, Jones or Ace has not been reimbursed for the amounts specified in the preceding sentence, the amount so provided by Jones (or in the case of preplanning costs, the portions of such specified amounts for which Jones or Ace shall not have been reimbursed) shall be reflected by the issuance of preferred shares to Jones (or Ace), the par value of which shall equal such amount (or amounts). Such preferred shares shall be entitled to dividends at the rate of ten percent (10%) per year of the par value thereof, such a dividends to be cumulative. Such preferred shares shall be redeemable at par at any time. The dividends on the preferred shares shall accrue from the date of issuance but shall not be paid until after completion of construction as hereinafter provided.

11. Management of Corporation and Property. The affairs of the Corporation and the management of the Mercantile Office Building after it has been transferred to the Corporation shall be governed by the following principles:

(a) Ace shall appoint a project manager of recognized standing in _____ [city], _____ [state], to manage the day-to-day affairs of the Mercantile Office Building upon terms approved by Jones. The employment of such project manager shall be subject to the approval of Jones if such project manager is employed or affiliated with Ace, or any subsidiary, parent, or affiliate of Ace, or is a director or shareholder of Ace or its parent, or is affiliated with or employed by any officer, director, or shareholder of Ace or its parent, or by any corporation, partnership, proprietorship, or other enterprise which is owned or controlled, directly or indirectly, by any such officer, director, or shareholder, or by several of them.

(b) After determination of the percentage of the common shares of the Corporation Ace is entitled to receive under Paragraph 4, Ace shall be entitled to designate approximately the same percentage of the directors of the Corporation as its percentage interest in the common shares of the Corporation; prior to such time, if Ace is not in default under this agreement, it shall be entitled to designate approximately thirty percent (30%) of the directors of the Corporation.

(c) All officers, directors, and employees of the Corporation who are employed by, or affiliated with, Jones, or Ace, or any subsidiary, parent or affiliate of either of them, or who are directors or shareholders of either of them, or who are affiliated with or employed by any officer, director, or shareholder of either of them or the parent of either of them, or by any corporation, partnership, proprietorship, or other enterprise which is owned or controlled, directly or indirectly, by any such officer, director, or shareholder, or by several of them, shall serve without compensation, except as provided in Paragraph 6 and in subparagraphs (a) and (d) of this Paragraph 11.

(d) Jones may employ as consultants architectural, engineering, and other consultants employed by the Corporation may be consultants also employed by Jones, but fees for such consulting services shall be reasonable in amount, and Jones shall not charge or receive, directly or indirectly, any portion of such fees.

(e) Receipts by the Corporation arising out of the ownership of the Mercantile Office Building shall first be used to pay rent, service debts of the Corporation owned to persons other than Jones and Ace, pay real estate taxes, expenses of maintenance and upkeep (exclusive of depreciation), insurance premiums, other charges or expenses incurred in the course of operating the Mercantile Office Building, all applicable federal and state income, franchise, license, and other taxes. The surplus shall:

(1) To the extent required by any contract, commitment, or agreement of the Corporation, or by prudent business judgment, be credited to a reserve or reserves.

(2) Be used to pay current and accrued dividends on the preferred shares issued pursuant to Paragraph 10, and to redeem such preferred shares. Payment of dividends, accrued dividends, and redemption of the shares shall be pro rata.

(3) To the extent there is a surplus remaining, be paid out as dividends on the common shares.

12. Inspection of Books. Ace shall have the right at any time during normal business hours to inspect the books of the Corporation to determine whether expenses charged to the Corporation conform with this agreement. If Ace believes particular charges paid by the Corporation do not conform with this agreement, or that certain charges should be reimbursed by the Corporation and the Corporation does not agree, and the matter cannot be settled by agreement, then any such question shall be settled by arbitration in accordance with the rules then obtaining of the American Arbitration Association. The determination of any such board of arbitrators shall be final and conclusive as to the propriety of such charge or such right of reimbursement.

13. Minimum Achievement of Renting Agent. If Ace fails to obtain leases for two-thirds (2/3) of the rentable floor area in the Mercantile Office Building prior to the time the Mercantile Office Building is topped out, this agreement shall terminate. Upon such termination, Jones or the Corporation shall repay to Ace the sum of _____ Dollars (\$_____) contributed by Ace pursuant to Paragraph 3 in full and complete discharge of all claims of Ace arising out of this agreement or out of actions taken hereunder of any nature whatsoever, provided, however, that if upon termination, Ace has obtained tenants for more than fifty percent (50%) of the rentable floor area but less than two-thirds (2/3) of such floor area, Ace shall be entitled to receive a standard real estate commission with respect to the tenants it has obtained, but such commission shall be reduced by the amount the corporation has paid in salaries pursuant to Paragraph 6 hereof. Upon termination pursuant to this paragraph, Ace shall not be liable to Jones for any claim arising out of its failure to fulfill its obligations under this agreement.

14. Failure to Complete Building. This agreement is expressly conditioned on Jones' constructing the Mercantile Office Building, and should Jones withdraw from the Mercantile Office Building project prior to the time title to the Mercantile Office Building is vested in the Corporation, the Corporation shall be liquidated as follows:

(a) All debts and obligations of the Corporation to persons other than Ace and Jones shall be satisfied, or adequate provision therefor made.

(b) Any salary which has accrued but is not payable pursuant to Paragraph 6 shall be paid.

(c) From the assets remaining, Ace shall be repaid the _____ Dollars (\$_____) it has contributed pursuant to Paragraph 3, and Jones shall be entitled to whatever remains.

Upon such liquidation this agreement shall terminate and Jones shall not be liable for any claim of Ace arising out of this agreement or out of actions taken hereunder of any nature whatsoever.

15. Entire Agreement. This agreement supersedes all agreements previously made between the parties relating to its subject matter. There are no other understandings or agreements between them.

16. Notices. All notices under this agreement shall be in writing and delivered personally or mailed by certified mail, postage prepaid, addressed to the parties at their last known addresses.

17. Non-waiver. No delay or failure by either party to exercise any right under this agreement, and no partial or single exercise of that right, shall constitute a waiver of that or any other right, unless otherwise expressly provided herein.

18. Headings. Headings in this agreement are for convenience only and shall not be used to interpret or construe its provisions.

19. Governing Law. This agreement shall be construed in accordance with and governed by the laws of the State of _____ [state] .

20. Counterparts. This agreement may be executed in two or more counterparts, each of which shall be deemed an original but all of which together shall constitute one and the same instrument.

21. Binding Effect. The provisions of this agreement shall be binding upon and inure to the benefit of both parties and their respective successors and assigns.

In witness whereof the parties hereto have executed this agreement.

ACE DEVELOPMENT CORPORATION

By: _____

[name and title]

JONES CONSTRUCTION CORPORATION

By: _____

[name and title]



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Current Legal Forms for Real Estate
Chapter 20 REAL ESTATE ENTITIES
Part IV. Forms
D. CORPORATIONS

24-20 Current Legal Forms for Real Estate FORM 20.34

AUTHOR: by Stephen E. Pigott and Harold O. Maxfield, Jr.

FORM 20.34 Close Corporation Agreement having two shareholders

COMMENT

Owning and operating real estate using an entity has all of the same concerns that an entity has which operates a business. Even in the case of the most simple corporation which owns investment property, the shareholders may have concerns regarding their rights and obligations. The following agreement is directed at an S-corporation that has two shareholders. The corporation owns strictly rental property, and it is not anticipated that the corporation will acquire other property. Further, this agreement contains a conversion of voting stock to non-voting stock upon the death of a shareholder and dispute resolution consisting of a forced sale in the event the shareholders not longer get along.

FORM

THIS CLOSE CORPORATION AGREEMENT is entered into on the _____ [day] day of _____, [month] _____, [year] by and between AMANDA PROPERTY, INC., a(n) _____ [state] corporation (the "Corporation"), SAM SMITH ("Smith") and JOHN JONES ("Jones"). Smith and Jones are sometimes hereinafter referred to individually as a "Shareholder" and collectively as the "Shareholders."

WHEREAS, the Shareholders are the owners of all of the issued and outstanding shares of the Corporation, and wish to promote their mutual interests by regulating certain aspects of the internal affairs of the Corporation and the relations of the Shareholders between themselves;

NOW, THEREFORE, in consideration of the mutual covenants and agreements contained herein, the parties hereto agree as follows:

1. Governing Law. This Agreement is executed pursuant to, and shall be governed under and in accordance with, _____ [state] Revised Code Section _____, the _____ [state] Close Corporation Agreement Statute.

2. Non-Voting Stock. Upon the death of the first Shareholder to die, all shares owned by such Shareholder at the time of his death, shall be deemed to be non-voting shares, irrespective of the designation appearing on the certificates representing such shares. Upon the death of such Shareholder, the legal representative of such Shareholder's estate shall deliver to the Corporation the certificates representing the shares owned by such Shareholder at the time of his death and the Corporation shall issue to such legal representative new non-voting stock certificates therefor.

3. Amendment of Corporation's Articles. Simultaneously with the execution hereof, the Shareholders' agree that they will take the necessary action to Amend the Corporation's Articles of Incorporation to provide that the Corporation shall have three hundred seventy-five (375) voting shares and three hundred seventy five (375) non-voting shares authorized. Notwithstanding anything herein to the contrary, the following actions shall only be taken by the Corporation with the unanimous consent of all of the Shareholders:

- (a) a reorganization, including a merger or consolidation to which the Corporation is a party;
- (b) the distribution or payment of any dividend (in cash or property) by the Corporation (except as is authorized or required by Paragraph 6, herein);
- (c) diversification of or a change in the Corporation's business purposes;
- (d) the issuance of any shares by the Corporation (except an issuance required by Paragraph 2, herein); and
- (e) amendment of the Corporation's Articles of Incorporation, Code of Regulations and/or this Agreement.

Except as is expressly set forth herein, or is required by law, the holder of the non-voting shares shall have no right to vote for Directors, or have a voice in the operations of the Corporation.

4. Forced Sale. If any Shareholder desires to sell all, but not part, of his shares, then the Shareholder desiring to sell such shares shall establish a price per share and terms upon which the selling Shareholder is willing to sell such shares. The selling Shareholder shall then present such proposal to the other Shareholder. The other Shareholder shall have thirty (30) days to either accept or reject such offer. If the other Shareholder shall accept such offer, then the stock will be purchased pursuant to such terms. If the other Shareholder rejects such offer, then the selling Shareholder shall be required to purchase and the rejecting Shareholder shall be required to sell, the rejecting Shareholder's shares upon the same terms and conditions of the original proposal. Such purchase shall take place within thirty (30) days of the rejection of the original offer.

5. S Corporation Status. The Shareholders acknowledge that the Corporation is an "S Corporation" within the meaning of Section 1361, et seq., of the Internal Revenue Code of 1986, as amended. The Shareholders agree that they will not take any action that would terminate the election of the Corporation to be treated as a S Corporation without the consent of the other Shareholder. Any unilateral action by a Shareholder which may have the effect of terminating the election shall not be valid as it relates to the Corporation, and the Corporation shall not recognize such purported transfer or action.

6. Distributions. With respect to each calendar year, prior to the date on which a Shareholder is required to pay such

Shareholder's federal income tax to the Internal Revenue Service, the Corporation shall distribute to such Shareholder an amount equal to the maximum federal income tax rate for individuals multiplied by the amount of income allocable to such Shareholder attributable to the operations of the Corporation. After the death of the first Shareholder, either Shareholder shall have the right to require the Corporation to distribute, not less than semi-annually, all of the cash flow of the Corporation, less the sums which should be retained by the Corporation in the reasonable judgment of the Corporation's Board of Directors for working capital and replacement reserves. The cash flow of the Corporation shall be determined on an annual basis.

7. Restrictions on Stock Transfers. Each of the Shareholders agree not to sell or encumber the stock presently owned by him in the Corporation (including, without limitation, pledge, mortgage or transfer the stock presently owned by him), except with the express written consent of the other Shareholder.

8. Legend on Certificates. Upon the execution of this Agreement, the certificates evidencing the Shareholders' ownership of stock in the Corporation shall be surrendered to the Corporation and shall be endorsed with the following legend:

The shares represented by this certificate were issued subject to a statutory close corporation agreement under _____ [state] Revised Code Section _____. Any purchaser or transferee of these shares is bound by said agreement and shall be considered a party to said agreement. Said Close Corporation Agreement was entered into on the _____ [day] day of _____, [month] _____, [year] by and among the Corporation, Sam Smith, and John Jones. The corporation will mail to the holder of this certificate, without charge, a copy of such agreement within five (5) days after receiving a written request therefor.

After endorsement, the certificates shall be returned to the Shareholders who shall, subject to the terms of this Agreement, be entitled to exercise all rights of ownership respecting the shares evidenced thereby. The Corporation agrees that it will cause a similar legend to be endorsed on all certificates hereafter issued by it which are subject to the provisions of this Agreement.

9. Necessary Acts. Each of the parties hereto agrees that it or he will do any act or thing and will execute any and all instruments necessary and/or proper to make effective the provisions of the Agreement.

10. Definitions. References in this Agreement to stock presently owned by a Shareholder in the Corporation, shall include not only the stock currently owned by a Shareholder, but also any Shares hereafter acquired by the Shareholders, whether by way of purchase, stock dividend, recapitalization, reorganization or otherwise.

11. Controlling Effect. If and to the extent that the terms and conditions of this Agreement conflict with the Articles of Incorporation or the Code of Regulations of the Corporation, as currently in effect or subsequently amended, the terms and conditions hereof shall be deemed controlling, and such conflicting provisions shall be disregarded. To the extent, however, that this Agreement and those documents can reasonably be construed as to give effect to both, such reasonable construction shall be adopted.

12. Binding Effect. This Agreement shall inure to the benefit of and be binding upon the parties hereto and their respective next of kin, legatees, administrators, executors, legal representatives, successors and permitted assigns (including remote, as well as immediate, successors to and assignees of said parties).

13. Assignment. The rights and obligations of the parties hereunder may not be assigned without the written consent of the non-assigning party.

14. Amendment and Waiver. This Agreement may be amended or modified at any time and in any respect in a writing signed by both parties. Any provision hereof may be waived, by an instrument in writing executed by the party against

which the waiver is sought to be enforced.

15. Counterparts. This Agreement may be executed in two (2) or more identical counterparts, each of which, when each party has executed at least one (1) such counterpart, shall be deemed to be an original and fully-executed Agreement.

16. Entire Agreement. This Agreement constitutes the entire agreement among the parties with respect to the subject matter contained herein and supersede all prior agreements, representations, and understandings of the parties.

17. Severability. In case one or more of the provisions contained in this Agreement shall, for any reason, be unenforceable, invalid, or illegal in any respect, such unenforceability, invalidity or illegality shall not affect any other provision of this Agreement, this Agreement shall be construed as if such unenforceable, invalid or illegal provisions had not been contained herein or, if it is equitable under the circumstances, such unenforceable, invalid or illegal provision shall be reformed, amended and/or construed so as to be enforceable, valid or legal.

18. Headings and Construction of Terms. The headings of the various paragraphs and subparagraphs hereinabove are for convenience of reference only, and shall in no way effect or modify any of the terms or provisions hereof. Where the context herein requires, the singular number shall include the plural.

IN WITNESS WHEREOF, this Close Corporation Agreement is executed by the parties hereto on the day and year first above written.

AMANDA CORPORATION, a(n) _____ [state] corporation

By: _____

[name and title]

And: _____

[name and title]

Sam Smith

John Jones



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Chapter 20 REAL ESTATE ENTITIES
Part IV. Forms
D. CORPORATIONS

24-20 Current Legal Forms for Real Estate FORM 20.35

AUTHOR: by Stephen E. Pigott and Harold O. Maxfield, Jr.

FORM 20.35 Code of Regulations/Bylaws

COMMENT

The following form is a very generic form of a Code of Regulations for use in connection with the formation of a corporation that will own and operate investment real estate. For a more detailed discussion of corporate organizations and corporate operations and management and the related forms and provisions see Chapters 17 and 18 of Volume 22, of Current Legal Forms with Tax Analysis. The practitioner should keep in mind that observance of the corporate formalities is critical in order for the corporation to maintain its separate legal existence. This form provides that no officer or director will be prevented from serving in such capacity by virtue of such person's ownership of other property.

FORM

[name of corporation]

CODE OF REGULATIONS

ARTICLE I
SHAREHOLDERS

Section 1. Annual Meeting. The annual meeting of shareholders of the corporation for the election of directors, the consideration of reports to be laid before such meeting, and the transaction of such other business as may properly be brought before such meeting, shall be held at the principal office of the corporation in the City of _____, [city] in _____ County, [county] or at such other place either within or without the State of _____ [state] as may be designated by the Board of Directors, by the Chairman of the Board, or by the President, and specified in the notice of such meeting, at _____ o'clock a.m., or at such other time as may be designated by the Board of Directors, by the Chairman of the Board, or by the President, and specified in the notice of the meeting, on the second Monday of _____ [month] each year, if not a legal holiday, and, if a legal holiday, then on the next succeeding business day.

Section 2. Special Meetings. Special meetings of the shareholders of the corporation may be held on any business day, when called by the Chairman of the Board, or by the President, or by a Vice President, or by the Board of Directors acting at a meeting, or by a majority of the directors acting without a meeting, or by the persons who hold twenty-five percent (25%) of all the shares outstanding and entitled to vote thereat. Upon request in writing delivered either in person or by registered mail to the President or the Secretary by any persons entitled to call a meeting of shareholders, such officer shall forthwith cause to be given to the shareholders entitled thereto notice of a meeting to be held on a date not less than seven or more than sixty days after the receipt of such request, as such officer may fix. If such notice is not given within twenty (20) days after the delivery or mailing of such request, the persons calling the meeting may fix the time of the meeting and give notice thereof in the manner provided by law or as provided in these Regulations, or cause such notice to be given by any designated representative. Each special meeting shall be called to convene between 9:00 a.m. and 4:00 p.m., and shall be held at the principal office of the corporation, unless the same is called by the directors, acting with or without a meeting, in which case such meeting may be held at any place either within or without the State of _____ [state] designated by the Board of Directors and specified in the notice of such meeting.

Section 3. Notice of Meetings. Not less than seven or more than sixty days before the date fixed for a meeting of shareholders, written notice stating the time and place of the meeting, and in the case of a special meeting the purposes of such meeting, shall be given by or at the direction of the Secretary or Assistant Secretary, or any other person or persons required or permitted by these Regulations to give such notice. The notice shall be given by personal delivery or by mail to each shareholder entitled to notice of the meeting who is of record as of the day next preceding the day on which notice is given or, if a record date therefor is duly fixed, of record as of said date; if mailed, the notice shall be addressed to the shareholders at their respective addresses as they appear on the records of the corporation. Notice of the time, place and purposes of any meeting of shareholders may be waived in writing, either before or after the holding of such meeting, by any shareholders, which writing shall be filed with or entered upon the records of the meeting. The attendance of any shareholder at any such meeting without protesting, prior to or at the commencement of the meeting, the lack of proper notice shall be deemed to be a waiver by him of notice of such meeting.

Section 4. Quorum; Adjournment. Except as may be otherwise provided by law or by the Articles of Incorporation, at any meeting of the shareholders the holders of shares entitling them to exercise a majority of the voting power of the corporation present in person or by proxy shall constitute a quorum for such meeting; provided, however, that no action required by law, by the Articles, or by these Regulations, to be authorized or taken by a designated proportion of the shares of any particular class of each class of the corporation may be authorized or taken by a lesser proportion; and provided, further, that the holders of a majority of the voting shares represented thereat, whether or not a quorum is present, may adjourn such meeting from time to time; if any meeting is adjourned, notice of such adjournment need not be given if the time and place to which such meeting is adjourned are fixed and announced at such meeting.

Section 5. Proxies. Persons entitled to vote shares or to act with respect to shares may vote or act in person or by proxy. The person appointed as proxy need not be a shareholder. Unless the writing appointing a proxy otherwise provides, the presence at a meeting of the person having appointed a proxy shall not operate to revoke the appointment. Notice to the corporation, in writing or in open meeting, of the revocation of the appointment of a proxy shall not affect any vote or

act previously taken or authorized.

Section 6. Action Without a Meeting. Any action which may be authorized or taken at a meeting of the shareholders may be authorized or taken without a meeting in a writing or writings signed by all of the shareholders entitled to vote on such matter, which writing or writings shall be filed with or entered upon the records of the corporation.

ARTICLE II BOARD OF DIRECTORS

Section 1. Number. The number of members of the Board of Directors shall be determined by resolution of the shareholders entitled to vote, but shall not be less than three (3) members, unless the number of shareholders is less than three (3), in which latter event the number of directors may be less than three (3), but shall not be less than the number of shareholders.

Section 2. Election of Directors; Vacancies. The directors shall be elected at each annual meeting of shareholders, or at a special meeting called for the purpose of electing directors, or the directors may be designated at any time by the unanimous written action of the shareholders. In the event of the occurrence of any vacancy or vacancies in the Board of Directors, however caused, the remaining directors, though less than a majority of the whole authorized number of directors, may, by the vote of a majority of their number, fill any vacancy for the unexpired term.

Section 3. Term of Office; Resignation. Each director shall hold office until the next annual meeting of the shareholders and until his successor is elected, or until his earlier resignation, removal from office, or death. Any director may resign at any time by oral statement to that effect made at a meeting of the Board of Directors or in a writing to that effect delivered to the Secretary, such resignation to take effect immediately or at such other time as the director may specify.

Section 4. Regular Meetings. Regular meetings of the Board of Directors may be held at such times and places within or without the State of _____ [state] as may be provided for in bylaws or resolutions adopted by the Board of Directors and upon such notice, if any, as shall be so provided.

Section 5. Special Meetings. Special meetings of the Board of Directors may be held at any time upon call by the Chairman of the Board or the President or a Vice President or any two directors. Written notice of the time and place of each such meeting shall be given to each director, either by personal delivery or by mail, telegram, or cablegram, at least two days before the meeting, which notice need not specify the purposes of the meeting.

Section 6. Quorum; Adjournment. A quorum of the Board of Directors shall consist of a majority of the directors then in office.

Section 7. Action Without a Meeting. Any action which may be authorized or taken at a meeting of the Board of Directors may be authorized or taken without a meeting in a writing or writings signed by all of the directors, which writing or writings shall be filed with or entered upon the records of the corporation.

Section 8. Conflict of Interest. No person shall be prevented from serving as a Director of the Corporation by reason that such Director has an interest in any other venture that owns and operates real estate investment property.

ARTICLE III OFFICERS

Section 1. Election and Designation of Officers. The Board of Directors shall elect a President, a Secretary, a Treasurer, and, in its discretion, may elect a Chairman of the Board, one or more Vice Presidents, one or more Assistant Secretaries, one or more Assistant Treasurers, and such other officers as the Board of Directors may deem necessary. The Chairman of the Board and the President shall be directors, but no one of the other officers need be a director. Any two or more of such offices may be held by the same person, but no officer shall execute, acknowledge or verify any instrument in more than one capacity, if such instrument is required to be executed, acknowledged or verified by two or more officers.

Section 2. Term of Office; Vacancies. The officers of the corporation shall hold office until the next annual meeting of the Board of Directors and until their successors are elected, except in case of resignation, removal from office or death. The Board of Directors may remove any officer at any time with or without cause by a majority vote of the directors then in office. Any vacancy in any office may be filled by the Board of Directors.

Section 3. Chairman of the Board. The Chairman of the Board, if any, shall preside at all meetings of the Board of Directors, shall, unless such duty has been delegated by the Board of Directors to the President or another officer, preside at all meetings of the shareholders, and shall have such authority and shall perform such other duties as may be determined by the Board of Directors.

Section 4. President. The President shall preside at all meetings of the shareholders and at all meetings of the Board of Directors, except for meetings at which the Chairman of the Board, if any, presides in accordance with the preceding section. Subject to directions of the Board of Directors, the President shall have general executive supervision over the property, business and affairs of the corporation. He may execute all authorized deeds, mortgages, bonds, contracts, and other obligations in the name of the corporation and shall have such other authority and shall perform such other duties as may be determined by the Board of Directors.

Section 5. Vice Presidents. The Vice Presidents shall, respectively, have such authority and perform such duties as may be determined by the Board of Directors.

Section 6. Secretary. The Secretary shall keep the minutes of meetings of the shareholders and of the Board of Directors. He shall keep such books as may be required by the Board of Directors, shall give notices of shareholders' meetings and of Board meetings required by law, or by these Regulations, or otherwise, and shall have such authority and shall perform such other duties as may be determined by the Board of Directors.

Section 7. Treasurer. The Treasurer shall receive and have in charge all money, bills, notes, bonds, stocks in other corporations, and similar property belonging to the corporation, and shall do with the same as may be ordered by the Board of Directors. He shall keep accurate financial accounts and hold the same open for the inspection and examination of the directors and shall have such authority and shall perform such other duties as may be determined by the Board of Directors.

Section 8. Other Officers. The Assistant Secretaries and Assistant Treasurers, if any, and any other officers whom the Board of Directors may elect shall, respectively, have such authority and perform such duties as may be determined by the Board of Directors.

Section 9. Delegation of Authority and Duties. The Board of Directors is authorized to delegate the authority and duties of any officer to any other officer and generally to control the action of the officers and to require the performance of duties in addition to those mentioned herein.

Section 10. Conflict of Interest. No person shall be prevented from serving as a officer of the Corporation by reason that such officer has an interest in any other venture that owns and operates real estate investment property.

ARTICLE IV COMPENSATION

Section 1. Directors and Members of Committees. Directors, as such, shall not receive any stated salary for their services, but, on resolution of the Board, a fixed sum for expenses of attendance, if any, may be allowed for attendance at each meeting, regular or special, provided that nothing herein contained shall be construed to preclude any director from serving the corporation in any other capacity and receiving compensation therefor. Members of either executive or special committees may be allowed such compensation as the Board of Directors may determine for attending committee hearings.

Section 2. Officers and Employees. The compensation of officers and employees of the corporation, or the method of fixing such compensation, shall be determined by or pursuant to authority conferred by the Board of Directors or any committee of the Board of Directors. Such compensation may include pension, disability and death benefits, and may be by way of fixed salary, or on the basis of earnings of the corporation, or any combination thereof, or otherwise, as determined or authorized from time to time by the Board of Directors or any committee of the Board of Directors.

ARTICLE V INDEMNIFICATION

Section 1. Third Party Actions. The corporation shall indemnify any person who was or is a party or is threatened to be made a party to any threatened, pending or completed action, suit or proceeding, whether civil, criminal, administrative, or investigative, including all appeals (other than an action, suit or proceeding by or in the right of the corporation) by reason of the fact that he is or was a director, officer or employee of the corporation, or is or was serving at the request of the corporation as a director, trustee, officer or employee of another corporation, limited liability company, joint venture, trust or other enterprise, against expenses (including attorneys' fees), judgments, decrees, fines, penalties and amounts paid in settlement actually and reasonably incurred by him in connection with such action, suit or proceeding if he acted in good faith and in a manner which he reasonably believed to be in or not opposed to the best interests of the corporation and, with respect to any criminal action or proceeding, had no reasonable cause to believe his conduct was unlawful. The termination of any action, suit or proceeding by judgment, order, settlement, conviction, or upon a plea of nolo contendere or its equivalent, shall not, of itself, create a presumption that the person did not act in good faith and in a manner which he reasonably believed to be in or not opposed to the best interest of the corporation and, with respect to any criminal action or proceeding, had reasonable cause to believe that his conduct was unlawful.

Section 2. Derivative Actions. The corporation shall indemnify any person who was or is a party or is threatened to be made a party to any threatened, pending or completed action or suit, including all appeals, by or in the right of the corporation to procure a judgment in its favor by reason of the fact that he is or was a director, officer or employee of the corporation, or is or was serving at the request of the corporation as a director, trustee, officer or employee of another corporation, limited liability company, joint venture, trust or other enterprise, against expenses (including attorneys' fees) actually and reasonably incurred by him in connection with the defense or settlement of such action or suit if he acted in good faith and in a manner he reasonably believed to be in or not opposed to the best interests of the corporation, except that no indemnification shall be made in respect of any claim, issue or matter as to which such person shall have been finally adjudged to be liable for negligence or misconduct in the performance of his duty to the corporation unless and only to the extent that the Court of Common Pleas or the court in which such action or suit was brought shall determine upon application that, despite the adjudication of liability but in view of all the circumstances of the case, such person is fairly and reasonably entitled to indemnity for such expenses as the Court of Common Pleas or such other court shall deem proper.

Section 3. Rights After Successful Defense. To the extent that a director, trustee, officer or employee has been

successful on the merits or otherwise in defense of any action, suit or proceeding referred to in Section 1 or 2, or in defense of any claim, issue or matter therein, he shall be indemnified against expenses (including attorneys' fees) actually and reasonably incurred by him in connection therewith.

Section 4. Other Determination of Rights. Except in a situation governed by Section 3, any indemnification under Section 1 or 2 (unless ordered by a court) shall be made by the corporation only as authorized in the specific case upon a determination that indemnification of the director, trustee, officer or employee is proper in the circumstances because he has met the applicable standard of conduct set forth in Section 1 or 2. Such determination shall be made (a) by a majority vote of directors acting at a meeting at which a quorum consisting of directors who were not parties to such action, suit or proceeding is present, or (b) if such a quorum is not obtainable (or even if obtainable), and a majority of disinterested directors so directs, by independent legal counsel (compensated by the corporation) in a written opinion, or (c) by the affirmative vote in person or by proxy of the holders of a majority of the shares entitled to vote in the election of directors, without regard to voting power which may thereafter exist upon a default, failure or other contingency.

Section 5. Advances of Expenses. Expenses of each person indemnified hereunder incurred in defending a civil, criminal, administrative or investigative action, suit or proceeding (including all appeals), or threat thereof, may be paid by the corporation in advance of the final disposition of such action, suit or proceeding as authorized by the Board of Directors, whether a disinterested quorum exists or not, upon receipt of an undertaking by or on behalf of the director, trustee, officer or employee, to repay such amount unless it shall ultimately be determined that he is entitled to be indemnified by the corporation.

Section 6. Nonexclusiveness; Heirs. The indemnification provided by this Article shall not be deemed exclusive of any other rights to which those seeking indemnification may be entitled as a matter of law or under the Articles, these Regulations, any agreement, vote of shareholders, any insurance purchased by the corporation, or otherwise, both as to action in his official capacity and as to action in another capacity while holding such office, and shall continue as to a person who has ceased to be director, trustee, officer or employee and shall inure to the benefit of the heirs, executors and administrators of such a person.

Section 7. Purchase of Insurance. The corporation may purchase and maintain insurance on behalf of any person who is or was a director, officer or employee of the corporation, or is or was serving at the request of the corporation as a director, trustee, officer or employee of another corporation, limited liability company, joint venture, trust or other enterprise against any liability asserted against him and incurred by him in any such capacity, or arising out of his status as such, whether or not the corporation would have the power to indemnify him against such liability under the provisions of this Article or of the

_____ [state] General Corporation Law.

ARTICLE VI CERTIFICATES FOR SHARES

Section 1. Form of Certificates and Signatures. Each holder of shares shall be entitled to one or more certificates, signed by the Chairman of the Board or the President or a Vice President and by the Secretary, an Assistant Secretary, the Treasurer, or an Assistant Treasurer of the corporation, which shall certify the number and class of shares held by him in the corporation, but no certificate for shares shall be executed or delivered until such shares are fully paid. When such a certificate is countersigned by an incorporated transfer agent or registrar, the signature of any of said officers of the corporation may be facsimile, engraved, stamped or printed.

Section 2. Transfer of Shares. Shares of the corporation shall be transferable upon the books of the corporation by the holders thereof, in person, or by a duly authorized attorney, upon surrender and cancellation of certificates for a like number of shares of the same class or series, with duly executed assignment and power of transfer endorsed thereon or

attached thereto, and with such proof of the authenticity of the signatures to such assignment and power of transfer as the corporation or its agents may reasonably require.

Section 3. Lost, Stolen or Destroyed Certificates. The corporation may issue a new certificate for shares in place of any certificate theretofore issued by it and alleged to have been lost, stolen or destroyed, and the Board of Directors may, in its discretion, require the owner, or his legal representatives, to give the corporation a bond containing such terms as the Board of Directors may require to protect the corporation or any person injured by the execution and delivery of a new certificate.

Section 4. Transfer Agent and Registrar. The Board of Directors may appoint, or revoke the appointment of, transfer agents or registrars and may require all certificates for shares to bear the signatures of such transfer agents and registrars or any of them.

ARTICLE VII AMENDMENTS

The Regulations of the corporation may be amended, or new Regulations may be adopted, by the shareholders at a meeting held for such purpose, by the affirmative vote of the holders of shares entitling them to exercise a majority of the voting power of the corporation on such proposal, or without a meeting by the written consent of the holders of shares entitling them to exercise two-thirds of the voting power on such proposal.



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Current Legal Forms for Real Estate
Chapter 20 REAL ESTATE ENTITIES
Part IV. Forms
E. LIMITED LIABILITY COMPANIES

24-E Current Legal Forms for Real Estate Scope

AUTHOR: by Stephen E. Pigott and Harold O. Maxfield, Jr.

Scope

Note: Please refer to Chapter 18A, in Volume 22, of Current Legal Forms with Tax Analysis for an additional discussion of Limited Liability Companies and for a number of other forms.



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Chapter 20 REAL ESTATE ENTITIES
Part IV. Forms
E. LIMITED LIABILITY COMPANIES

24-20 Current Legal Forms for Real Estate FORM 20.36

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FORM 20.36 Operating agreement--non-equity members as managers

COMMENT

The choice between the corporate form and the non-corporate form has been made much easier by the wide spread use of limited liability companies. Virtually every state has laws permitting the formation and operation of limited liability companies. A limited liability company can be formed to have the look and feel of a corporation, but have the federal income tax attributes of a sole proprietorship or partnership. Also, like a shareholder of a corporation, the members of a limited liability company have limited liability. That is, absent extraordinary circumstances, the owners of a limited liability company are not personally liable for the debts of the company.

Comparison of limited liability company and corporate taxation:

A member is taxed each year on his share of membership earnings, whether or not distributed to him; a shareholder is taxed only when corporate income is distributed to him. A corporation may offer advantages if the shareholders are high bracket taxpayers or if the income is to be retained for further expansion, especially if it will not be distributed until liquidation of the corporation. On the other hand, corporate income faces a double tax: the corporate rate plus the tax at individual rates on dividend distributions. Thus, if corporate income is to be frequently distributed the limited liability company form may be preferable. The shareholders and the corporation make an S election, then this difference between a corporation and a limited liability company is somewhat mitigated. For further discussion of comparison of limited liability companies and corporate taxation, see TB § 20.05.

Passive activity loss limitation:

Members are limited in the tax use of losses and expenses from passive activities. Passive activity losses (including expenses) can only be used to offset income from other passive activities of the taxpayer. Unused passive activity losses are carried forward indefinitely to offset future passive activity income or are allowed on a complete taxable disposition of the passive activity. Passive activities include a trade or business, or activity for the production of income, in which the taxpayer does not materially participate.

Generally speaking, rental real estate activity is considered to be a passive activity. *IRC* § 469(c)(2). Therefore, deductions and credits from rental activities can only offset income from other passive activities. Such deductions and credits *cannot* be deducted from nonpassive income, such as wages, dividends, interest, etc. However, there are two major exceptions to this general rule.

Certain eligible taxpayers who *materially* participate in rental real estate activities can deduct losses from such activities against nonpassive income. These eligible taxpayers include individuals and closely-held C Corporations that meet special eligibility requirements. *IRC* § 469(c)(7). Second, an individual who owns at least a 10-percent interest and *actively* participates in rental real estate activity is permitted to offset up to \$25,000 of passive activity losses against his nonpassive income. *IRC* § 469(i). For an in-depth discussion of the passive loss rules, see TB § 20.06[3].

Limited liability company tax aspects:

A limited liability company as such is not subject to the income tax. Fundamentally, the limited liability company is disregarded and only the members in their individual capacities are liable for the payment of income tax. However, the limited liability company is the basic accounting unit and must file an annual information return. The taxable income of the limited liability company is computed in the same manner as that of an individual, except that certain items of income and deduction must be separately itemized, and except that the standard deduction, the deduction for personal exemptions, the deduction for foreign taxes, the charitable contribution deduction, the net operating loss deduction, and other itemized deductions applicable only to individuals, such as child care and medical expenses, are not allowed to the limited liability company.

Limited liability company and member tax returns:

The limited liability company, in its return, must separately state, and the member must separately take into account on his return, his distributive shares of certain items including gains and losses from the sale or exchange of property; charitable contributions; dividend income; partially tax-exempt interest; and miscellaneous items required by the regulations.

Each member's share of income is derived from the limited liability company return, with the character of each item of income, gain, loss, deduction, or credit retaining the same character as it had for the limited liability company. However, the tax treatment of items of limited liability company income, loss, deductions, and credits are determined at the limited liability company level on a unified basis rather than on the basis of individual member treatment. In addition, each member is required to treat limited liability company items on his return consistently with the treatment of the items on the limited liability company return. If the treatment is inconsistent and the consistency requirement is requested to be waived, the member must file a statement identifying the inconsistency. Unless the consistency requirement is waived, adjustments will be

made to conform the member's treatment of the items with the treatment on the limited liability company return. The consistency rules do not apply to small limited liability companies, i.e., a limited liability company of ten or fewer members who are individuals or estates, provided that each member's share of any limited liability company item is the same as his distributive share of every other limited liability company item. A husband and wife are treated as one member in a small limited liability company. For taxation of limited liability companies and members, see TB § 20.05. Member's distributive share: Each member must thus include in his individual return his distributive share of each item of limited liability company income, gain, loss, deduction, or credit. The member's distributive share is determined by the limited liability company agreement. If the agreement does not make such an allocation, or if the allocation does not have a "substantial economic effect," the member's distributive share is determined in accordance with his interest in the limited liability company, taking into account all facts and circumstances.

Real estate subject to "at risk" rules:

Holding real property is an activity which is not exempt from the "at risk" loss deduction limitations. A taxpayer cannot deduct losses derived from an activity which exceed the amount at risk by the taxpayer. The amount at risk is the amount of money and property contributed by the taxpayer to the activity, and borrowed amount for which the taxpayer is personally liable or has pledged property, other than property used in the subject activity, as security for the loan. The amount of nonrecourse financing is not at risk. Qualified nonrecourse financing, however, is treated as an amount at risk. Generally, qualified nonrecourse financing is amounts borrowed from an institutional lender, government entity, or an amount insured by a government entity. For further discussion of the "at risk" loss deduction limitation with respect to real estate, see TB § 20.06[2]. For a detailed discussion of the "at risk" rules, see The Tax Background to Chapter 1, Partnerships, in Volume 1.

The following form operating agreement is for a real estate operating company formed under Delaware law which is a single purpose limited liability company. Typically, a single purpose limited liability company is required if the limited liability company is financing investment real property and the lender does not want the ownership and operation of real estate investments to be commingled with other investments.

This agreement provides for special members who will have no economic ownership interest in the company, but will act as independent managers for the company and the management of the investment property.

FORM

LIMITED LIABILITY COMPANY AGREEMENT

OF

[name]

THIS LIMITED LIABILITY COMPANY AGREEMENT (together with any schedules attached hereto as such agreement and schedules may be amended, restated or otherwise revised from time to time, this "Agreement") of _____, [name] (the "Company") is entered into by _____, [name] a _____, as the sole equity member (the "Member") and by _____, [name] and _____, [name] each a Special Member ("Special Member" as defined herein).

WHEREAS, there was filed a Certificate of Formation under the Delaware Limited Liability Company Act (6 Del. C. § 18-101, *et seq.*), as amended from time to time (the "Act"), by which _____ was formed on _____ [month] _____ [day], _____ [year]. The Member and Special Members enter into this Agreement to set forth the purposes of the Company and provide for its organization and administration.

The Member and the Special Members agree as follows:

1. Formation. The limited liability company was formed pursuant to and in accordance with the provisions of the Act and this Agreement. The authority of the Member, as "authorized person" within the meaning of the Act, to execute, deliver and file the Certificate of Formation of the Company with the Delaware Secretary of State is hereby confirmed and such filing is hereby ratified and approved. The rights, duties and liabilities of the Member and Special Members shall be as provided in the Act except as provided herein. The parties hereto intend that this Agreement constitute a limited liability company agreement within the meaning of Section 18-101(7) of the Act.

2. Name. The name of the Company shall be " _____ " [name].

3. Principal Business Office. The principal business office address of the Company shall be _____ [address] _____ [city] _____ [state], or such other place as may hereafter be determined by the Member.

4. Registered Office. The address of the registered office of the Company in the State of Delaware is _____ [name].

5. Registered Agent. The name and address of the registered agent of the Company for service of process on the Company in the State of Delaware is _____ [name].

6. Member.

(a) The name and mailing address of the Member is set forth on Schedule A attached hereto. The Member was admitted to the Company as a member of the Company upon its execution of a counterpart signature page of this Agreement.

(b) Subject to Section 11(j), the Member may act by written consent.

(c) Except for this Agreement, no limited liability company interests shall now or hereafter be evidenced by any certificates, instruments or writings or in any manner be "certificated."

(d) Upon the occurrence of any event that causes the Member to cease to be a member of the Company (other than upon an assignment by the Member of all of its limited liability company interest in the Company and the admission of the transferee pursuant to Sections 23 and 24), each person acting as an Independent Manager pursuant to Section 12 shall, without any action of any Person and simultaneously with the Member ceasing to be a member of the Company, automatically be admitted to the Company as a Special Member and shall continue the Company without dissolution.

Upon the death, resignation, dissolution or other event that causes the Special Member to be unable to fulfill its obligations under this Agreement, a new Special Member shall be appointed and sign a counterpart to this Agreement acknowledging its appointment. No Special Member may resign from the Company or transfer its rights as Special Member unless (i) a successor Special Member has been admitted to the Company as Special Member by executing a counterpart of this Agreement, and (ii) such successor has also accepted its appointment as Independent Manager pursuant to Section 12; provided, however, the Special Members shall automatically cease to be the members of the Company upon the admission to the Company of a substitute member ("Substitute Member"). Each Special Member shall be a member of the Company that has no interest in the profits, losses and capital of the Company and has no right to receive any distributions of Company assets. Pursuant to Section 18-301 of the Act, a Special Member shall not be required to make any capital contributions to the Company and shall not receive a limited liability company interest in the Company. Except as required by any mandatory provision of the Act, each Special Member, in its capacity as Special Member, shall have no right to vote on, approve or otherwise consent to any action by, or matter relating to, the Company, including, without limitation, the merger, consolidation or conversion of the Company. In order to implement the admission to the Company of each Special Member, each person acting as an Independent Manager pursuant to Section 12 shall execute a counterpart to this Agreement. Prior to its admission to the Company as Special Member, each person acting as an Independent Manager pursuant to Section 12 shall not be a member of the Company. "Special Member" means, upon such person's admission to the Company as a member of the Company pursuant to this Section 6(d) a person acting as an Independent Manager, in such person's capacity as a member of the Company. A Special Member shall only have the rights and duties expressly set forth in this Agreement. At all times while the Indebtedness (as defined herein) remains outstanding, the Company shall have two Independent Managers pursuant to Section 12 that are willing to serve as Special Members, and each of whom shall have executed a counterpart of this Agreement. Notwithstanding any other provision of this Agreement to the contrary, the Bankruptcy (as defined herein) of any Member or Special Member shall not cause such Member or Special Member to cease to be a Member of the Company and upon the occurrence of such an event, the business of the Company shall continue without dissolution.

7. Certificates. The Member, as an "authorized person" within the meaning of the Act, has executed, delivered and filed the Certificate of Formation of the Company with the Secretary of State of the State of Delaware. The Member shall continue as the designated "authorized person" within the meaning of the Act. The Member shall execute, deliver and file any other certificates, and any amendments and/or restatements thereof, necessary for the Company to do business in the State of _____ [state] and in any other jurisdiction in which the Company may wish to conduct business. The existence of the Company as a separate legal entity shall continue until the cancellation of the Certificate of Formation as provided in the Act.

8. Purposes.

(a) Subject to Section 11(j), the purposes of the Company are to engage in the following activities:

(i) to own, hold, administer, service or enter into agreements for the servicing of, finance, manage, sell, assign, pledge, collect amounts due on, lease, operate and otherwise deal with the real property and improvements thereon located in _____, [city] _____, [state] known as _____, [address] as more particularly described in the Mortgage (as defined below) (the "Property") and any proceeds or rights associated therewith, to be subject to or assigned or encumbered pursuant to the Loan Documents (as defined below);

(ii) to incur indebtedness (the "Indebtedness") secured by that certain _____, Assignment of Leases and Rents, Security Agreement and Fixture Filing (the "Mortgage") given by the Company for the benefit of _____ [bank] (including its successors and assigns, "Lender") as evidenced by that certain promissory note (the "Promissory Note") by the Company payable to Lender;

(iii) to execute, deliver and perform the following:

- (a) the Promissory Note;
- (b) the Mortgage;
- (c) the Assignment of Leases and Rents by the Company in favor of Lender;
- (d) the Environmental Indemnity Agreement by the Company in favor of Lender;
- (e) the Replacement Reserve Escrow and Security Agreement by and between the Company and Lender;
- (f) the Assignment of Agreements by the Company in favor of Lender;
- (g) the Borrower's Certificate by the Company in favor of Lender;
- (h) UCC Financing Statements in favor of Lender;
- (i) such other agreements, documents, instruments or papers required by Lender (or any successors or assigns of Lender or in furtherance of the foregoing) (such documents collectively referred to herein as the "Loan Documents");
- (iv) to invest or direct the investment of, proceeds from the Property and its other assets and any capital and income of the Company in accordance with the Loan Documents or as otherwise determined by the Board (as defined below) and not inconsistent with this Section 8, Section 11(j) or the Loan Documents;
- (v) to do such other things and carry on any other activities which the Board determines to be necessary, convenient or incidental to any of the foregoing purposes, and have and exercise all of the power and rights conferred upon limited liability companies formed pursuant to the Act in furtherance of the foregoing stated purposes.
- (b) The Company, by or through the Member or any Manager (other than an Independent Manager) on behalf of the Company, may enter into and perform the Loan Documents and all documents, agreements, certificates, or financing statements contemplated thereby or related thereto, all without any further act, vote or approval of the Member or any Manager notwithstanding any other provision of this Agreement, the Act or applicable law, rule or regulation. The foregoing authorization shall not be deemed a restriction on the powers of the Member or any Manager (other than an Independent Manager) to enter into any other agreements on behalf of the Company. All actions taken by the Member or any Manager (other than an Independent Manager) on behalf of the Company or on behalf of any of its affiliates prior to the date hereof, to effect the transactions contemplated by the Loan Documents, is hereby ratified, approved, and confirmed in all respects.

9. REOC Status. The Company is intended to be a "real estate operating company" (a "REOC") as that term is defined in 29 C.F.R. Section 2510.3-101(e). The Member will conduct the affairs and operations of the Company in such a manner that the Company will qualify as an REOC.

10. Powers. Subject to Section 11(j), the Company and the Board on behalf of the Company (i) shall have and exercise all powers necessary, convenient or incidental to accomplish its purposes as set forth in Section 8; and (ii) shall have and exercise all of the powers and rights conferred upon limited liability companies formed pursuant to the Act.

11. Management.

(a) Board of Managers. Subject to Section 11(j), the business and affairs of the Company shall be managed by or under the direction of a board of one or more Managers (the "Board"). Subject to Section 12, the Member, by unanimous vote or unanimous written consent, shall appoint the Managers. Subject to Section 12, the Member, by unanimous vote or

unanimous written consent, may determine at any time in its sole and absolute discretion the number of Managers to constitute the Board. The authorized number of Managers may be increased or decreased by the unanimous vote or unanimous written consent of the Member at any time in its sole and absolute discretion, subject in all cases to Section 12. The initial number of Managers shall be three (3), two of which shall be Independent Managers pursuant to Section 12 and the third Manager being the Member. Each Manager elected, designated or appointed shall hold office until a successor is elected and qualified or until such Manager's earlier death, resignation or removal. Managers need not be Members. The names of the initial Managers are set forth on Schedule B attached hereto. Each Manager shall be a "manager" within the meaning of the Act.

(b) Powers. Subject to this Section 11, the Board shall have the power to do any and all acts necessary, convenient or incidental to or for the furtherance of the purposes described herein, including all powers, statutory or otherwise. Subject to Section 110), the Board has the authority to bind the Company by a majority of the votes held by the Managers. For purposes of voting, the Member which is a Manager shall have a total of three (3) votes and the Independent Managers shall each have one vote.

(c) Meeting of the Board of Managers. The Board may hold meetings, both regular and special, within or outside the State of Delaware. Regular meetings of the Board may be held without notice at such time and at such place as shall from time to time be determined by the Board. Special meetings of the Board may be called by the Member on not less than one day's notice to each Manager by telephone, facsimile, mail, telegram, or any other means of communication, and special meetings shall be called by the Member in like manner and with like notice upon the written request of any one or more of the Managers.

(d) Quorum; Acts of the Board. At all meetings of the Board, a majority of the votes held by the Managers shall constitute a quorum for the transaction of business and, except as otherwise provided in any other provision of this Agreement, the act of a majority of the votes held by the Managers present at any meeting at which there is a quorum shall be the act of the Board. In the case of an act which requires the unanimous vote of the Managers and/or the vote of the Independent Managers, only the presence at the subject meeting of all of the Managers, including the Independent Managers, shall constitute a quorum. If a quorum shall not be present at any meeting of the Board, the Managers present at such meeting may adjourn the meeting from time to time, without notice other than announcement at the meeting, until a quorum shall be present. Any action required or permitted to be taken at any meeting of the Board or of any committee thereof may be taken without a meeting if all members of the Board or committee, as the case may be, consent thereto in writing, and the writing or writings are filed with the minutes of proceedings of the Board or committee.

(e) Electronic Communications. Members of the Board, or any committee designated by the Board, may participate in meetings of the Board, or any committee, by means of telephone conference or similar communications equipment that allows all persons participating in the meeting to hear each other, and such participation in a meeting shall constitute presence in person at the meeting. If all the participants are participating by telephone conference or similar communications equipment, the meeting shall be deemed to be held at the principal place of business of the Company.

(f) Committees of Managers.

(i) The Board may, by resolution passed by a majority of the votes held by the Managers, designate one or more committees, each committee to consist of one or more of the Managers of the Company. The Board may designate one or more Managers as alternate members of any committee, who may replace any absent or disqualified member at any meeting of the committee. In no event shall the Board delegate any power or authority to a committee, the exercise of which would result in a transaction or act requiring the unanimous consent of the Board or the affirmative vote of the Independent Managers as provided herein.

(ii) In the absence or disqualification of a member of a committee, the member or members thereof present at any

committee meeting and not disqualified from voting, whether or not such members constitute a quorum, may unanimously appoint another member of the Board to act at the meeting in the place of any such absent or disqualified member.

(iii) Any such committee, to the extent provided in the resolution of the Board, shall have and may exercise all the powers and authority of the Board in the management of the business and affairs of the Company, excepting those transactions or acts requiring the unanimous consent of the Board or the affirmative vote of the Independent Managers as provided herein. Such committee or committees shall have such name or names as may be determined from time to time by resolution adopted by the Board. Each committee shall keep regular minutes of its meetings and report the same to the Board when required.

(g) Compensation of Managers; Expenses. The Board shall have the authority to fix the compensation of Managers. The Managers may be paid their expenses, if any, of attendance at meetings of the Board, which may be a reasonable fixed sum for attendance at each meeting of the Board or a stated salary as Manager. No such payment shall preclude any Manager from serving the Company in any other capacity and receiving compensation therefor. Members of special or standing committees may be allowed like compensation for attending committee meetings.

(h) Removal of Managers. Unless otherwise restricted by law, any Manager or the entire Board may be removed, with or without cause, by the Member, and subject to Section 12, any vacancy caused by any such removal may be filled by action of the Member. In the event of the removal of an Independent Manager or other event that causes an Independent Manager to cease to be an Independent Manager on the Board, no action requiring the vote of the Independent Managers shall take place until such time as two Independent Managers are present on the Board.

(i) Managers as Agents. To the extent of their powers set forth in this Agreement and subject to Section 11(j), the Managers are agents of the Company for the purpose of the Company's business, and the actions of the Managers taken in accordance with such powers set forth in this Agreement shall bind the Company. Notwithstanding the last sentence of Section 18-402 of the Act, except as provided in this Agreement or in a resolution of all the Managers, a Manager may not bind the Company.

(j) Limitations on the Company's Activities.

(i) This Section 11(j) is being adopted in order to comply with certain provisions required in order to qualify the Company as a "special purpose entity" for the purpose of the Indebtedness and so long as the Indebtedness is outstanding, this Section 11(j) shall govern the activities of the Company notwithstanding any other provision of this Agreement.

(ii) The Member and the Board shall not, so long as any Indebtedness is outstanding, amend, alter, change or repeal the definitions of "Independent Manager", "Indebtedness", "Special Member", "Loan Documents", "Property", "Deed of Trust/Mortgage", "Bankruptcy", "Loan Documents" or Section 6(d), 8, 10, 11, 12, 22, 23, 24, 25, 26, 27, 31 or 34 of this Agreement. Subject to this Section 11(j), the Member reserves the right to amend, alter, change or repeal any provisions contained in this Agreement in accordance with Section 31.

(iii) Notwithstanding any other provision of this Agreement and any provision of law that otherwise so empowers the Company, so long as any Indebtedness is outstanding, none of the Company, the Member or the Board shall be authorized or empowered, nor shall they permit the Company, without the prior unanimous written consent of the Member and all of the Managers on the Board, including the Independent Managers, to take any Bankruptcy Action (as hereinafter defined), provided, however, that the Board may not vote on, or authorize the taking of, any of the foregoing actions unless there are two Independent Managers then serving in such capacity. To the fullest extent permitted by law, for so long as any Indebtedness is outstanding, none of the Company, the Member or the Board shall be authorized or empowered, nor shall they permit the Company to consolidate, merge, dissolve, liquidate or sell all or substantially all

of the Company's assets (other than such sales as may be permitted under the Loan Documents). As used herein, the term "Bankruptcy Action" shall mean (1) taking any action that might cause the Company to become insolvent; (2) commencing any case, proceeding or other action on behalf of the Company or otherwise seek relief under any existing or future law of any jurisdiction relating to bankruptcy, insolvency, reorganization or relief of debtors; (3) instituting proceedings to have the Company adjudicated as bankrupt or insolvent; (4) consenting to the institution of bankruptcy or insolvency proceedings against the Company; (5) filing a petition or consenting to a petition seeking reorganization, arrangement, adjustment, winding-up, dissolution, composition, liquidation or other relief of its debts on behalf of the Company under any federal or state law relating to bankruptcy; (6) seeking or consenting to the appointment of a receiver, liquidator, assignee, trustee, sequestrator, custodian or any similar official for the Company or a substantial portion of its assets or properties; (7) admitting in writing the Company's inability to pay debts generally as they become due; (8) making any assignment for the benefit of the Company's creditors; or (9) taking any action in furtherance of the foregoing.

(iv) So long as any Indebtedness is outstanding, the Board and the Member shall cause the Company to do or cause to be done all things necessary to preserve and keep in full force and effect its existence, rights (charter and statutory) and franchises. The Board and Member also shall cause the Company to:

- (1) not commingle its assets with those of any other entity;
- (2) hold its assets in its own name;
- (3) conduct its own business in its own name;
- (4) maintain its bank accounts, books, records and financial statements in accordance with generally accepted accounting principles ("GAAP"), keep such bank accounts, books, records and financial statements separate from those of any other person or entity, and not permit the listing of its assets on the financial statements of any other person or entity;
- (5) maintain its books, records, resolutions and agreements as official records;
- (6) pay its own liabilities out of its own funds;
- (7) maintain adequate capital in light of its contemplated business operations;
- (8) observe all limited liability company and other organizational formalities;
- (9) maintain an arm's-length relationship with Affiliates (as hereinafter defined) and enter into transactions with Affiliates only on a commercially reasonable basis;
- (10) pay the salaries of only its own employees and maintain a sufficient number of employees in light of contemplated business operations;
- (11) not guarantee or become obligated for the debts of any other entity or hold out its credit as being available to satisfy the obligations of others;
- (12) not acquire the obligations or securities of its Affiliates or owners, including partners, members or shareholders;
- (13) not make loans to any other person or entity;
- (14) allocate fairly and reasonably any overhead for shared office space;

- (15) use separate stationery, invoices and checks;
- (16) file its own tax returns if any, as may be required under applicable law, to the extent not treated as a disregarded entity, and pay taxes required to be paid under applicable law;
- (17) not pledge its assets for the benefit of any other person or entity;
- (18) not make loans or advances to any person or entity;
- (19) hold itself out as a separate entity, and not fail to correct any known misunderstanding regarding its separate identity;
- (20) not identify itself as a division or subsidiary of any other entity;
- (21) observe the single purpose entity and separateness covenants and requirements set forth in the Mortgage; and
- (22) not maintain its assets in such a manner that it will be costly or difficult to segregate, ascertain or identify its individual assets from those of any other person or entity.

Subject to Section 11(j)(ii), the Member shall be prohibited from amending this Agreement with respect to the foregoing covenants, without the consent of Lender or its successors and assigns, or, after the securitization contemplated by the Loan Agreement only if the Company receives (i) confirmation from each of the applicable rating agencies that such amendment would not result in the qualification, withdrawal or downgrade of any securities rating and (ii) approval of such amendment by Lender or its successors and assigns. Failure of the Company, or the Member or a Manager on behalf of the Company, to comply with any of the foregoing covenants or any of the other covenants contained in this Agreement shall not affect the status of the Company as a separate legal entity or the limited liability of the Member or the Managers.

(v) So long as any Indebtedness is outstanding, the Board and the Members shall not cause or permit the Company to:

- (1) grant or permit to exist any lien, encumbrance, claim, security interest, pledge or other right in favor of any person or entity with respect to the Property, except as contemplated by the Loan Documents;
- (2) engage, directly or indirectly, in any business other than owning the Property or the actions required or permitted to be performed under Section 8, the Loan Documents, or this Section 11(j);
- (3) incur, create or assume any indebtedness other than (i) the Indebtedness and (ii) unsecured indebtedness that represents trade payables or accrued expenses occurring in the normal course of business of owning and operating the Property that are due and payable within thirty (30) days after the date incurred and in no event exceeds one percent (1%) of the outstanding principal balance of the Indebtedness;
- (4) enter into, or be a party to, any transaction with any of its Affiliates, except (i) the transactions contemplated by the Loan Documents, and (ii) any other transactions that are consistent with market terms of any such transactions entered into by unaffiliated parties and that are (A) in the ordinary course of business; (B) pursuant to the reasonable requirements and purposes of its business; and (C) upon fair and reasonable terms (and, to the extent material, pursuant to written agreements);
- (5) transfer ownership interests other than such activities that are expressly permitted pursuant to Sections 23 and 24 hereof;

- (6) form, acquire or hold any subsidiary (whether corporate, partnership, limited liability company or other);
 - (7) subject to Section 31, amend, modify, supplement, restate, replace or, to the extent permitted by applicable law, terminate, or consent to the amendment, modification, supplementing, restatement, replacement or termination of this Agreement;
 - (8) fail to preserve its existence as an entity duly organized, validly existing and in good standing (if required) under the applicable laws of the jurisdiction of its organization or formation; or
 - (9) terminate or fail to comply with the provisions of its organizational documents.
- (k) Actions Requiring the Consent of the Member. Without the express written approval of the Member, but expressly subject to the additional limitations on and obligations of the Member, and the resulting rights of the Board (and the Independent Managers and any Committee appointed by the Board) under Section 11(j) of this Agreement, the Company shall not:
- (i) do any act in contravention of this Agreement;
 - (ii) do any act which would make it impossible to carry on the ordinary business of the Company or the Member;
 - (iii) sell, assign or transfer in whole or any portions the Property except as permitted in this Agreement;
 - (iv) confess a judgment against the Company or the Member;
 - (v) possess property or assign rights in specific Company property for other than a purpose described herein;
 - (vi) except as otherwise provided in this Agreement, admit a person or entity as a Member of the Company or Manager; or
 - (vii) pay any fee or other compensation, take any action or grant any consent which pursuant to the Articles require the consent of the partners of Member or which is otherwise prohibited by this Agreement.

12. Independent Managers. As long as any Indebtedness is outstanding, the Member shall cause the Company at all times to have at least two Independent Managers who will be appointed by the Member. To the fullest extent permitted by law, including Section 18-1101(c) of the Act, the Independent Managers shall consider only the interests of the Company, including its respective creditors, in acting or otherwise voting on the matters referred to in Section 11(j)(iii). No resignation or removal of an Independent Manager, and no appointment of a successor Independent Manager, shall be effective until the successor Independent Manager (i) shall have accepted his or her appointment by a written instrument and (ii) shall have executed a counterpart of this Agreement as required by Section 6(d). In the event of a vacancy in the position of Independent Manager the Member shall, as soon as practicable, appoint a new Independent Manager. All right, power and authority of the Independent Managers shall be limited to the extent necessary to exercise those rights and perform those duties specifically set forth in this Agreement. Except as provided in the second sentence of this Section 12, in exercising their rights and performing their duties under this Agreement the Independent Managers shall have a fiduciary duty of loyalty and care similar to that of a director of a business corporation organized under the General Corporation Law of the State of Delaware. No Independent Manager shall at any time serve as trustee in bankruptcy for any Affiliate of the Company. As used in this Agreement, "Affiliate" shall mean, with respect to any Person, any other Person, directly or indirectly, Controlling or Controlled by or under direct or indirect common Control with such Person. As used in this Agreement, "Control", "Controlled" or "Controlling" shall mean the possession, directly or indirectly, of the power to direct or cause the direction of the management or policies of a Person, whether

through the ownership of voting securities or general partnership or managing member interests, by contract or otherwise. Without limiting the generality of the foregoing, a Person shall be deemed to Control any other Person in which it owns, directly or indirectly, a majority of the ownership interests. As used in this Agreement, "Person" shall mean any individual, corporation, partnership, joint venture, limited liability company, limited liability partnership, associate, joint stock company, trust, unincorporated organization or other organization, whether or not a legal entity, and any governmental authority.

13. An "Independent Manager" shall mean a member of the Board who is not at the time of initial appointment, or at any time while serving on the Board, and has not been at any time during the preceding five (5) years: (a) a stockholder (or other equity owner), member, director, officer, employee, partner, attorney or counsel of the Company or any Affiliate (other than his or her service as an Independent Manager or Special Member of the Company); (b) a customer, supplier or other Person who derives more than 1 % of its purchases or revenues from its activities with the Company or any Affiliate; (c) a Person or other entity Controlling or under common Control with any such stockholder, partner, member, customer, supplier or Affiliates; or (d) a member of the immediate family of any such stockholder, member, director, officer, employee, partner, customer, supplier or Affiliates.

14. Limited Liability. Except as otherwise expressly provided in the Act, the debts, obligations and liabilities of the Company, whether arising in contract, tort, or otherwise, shall be the debts, obligations and liabilities solely of the Company, and none of the Member nor any partner thereof, any Special Member or any Manager shall be obligated personally for any such debt, obligation or liability of the Company solely by reason of being a Member, Special Member or Manager of the Company.

15. Capital Contributions. The Member has a one-hundred percent (100%) interest in the Company. The Member shall, within ten (10) days following its execution of this Agreement, make a capital contribution to the Company of _____ Dollars (\$_____).

16. Additional Contributions. The Member is not required to make any additional capital contributions to the Company. However, the Member may make additional capital contributions to the Company at any time. The provisions of this Section 16 are intended solely to benefit the Member and, to the fullest extent permitted by law, shall not be construed as conferring any benefit upon any creditor of the Company (and no such creditor of the Company shall be a third-party beneficiary of this Agreement) and the Member shall not have any duty or obligation to any creditor of the Company to make any contribution to the Company or to issue any call for capital pursuant to this Agreement.

17. Tax Status. It is intended that the Company, solely for tax purposes, shall be disregarded as an entity separate from its Member for federal, state and local income tax purposes.

18. Distributions. Distributions shall be made to the Member at the times and in the aggregate amounts determined by the Member. Notwithstanding any provision to the contrary contained in this Agreement, the Company shall not be required to make a distribution to the Member on account of its interest in the Company if such distribution would violate Section 18-607 of the Act or any other applicable law, or constitute a default under the Loan Documents.

19. Books and Records. The Board shall keep or cause to be kept complete and accurate books of account and records with respect to the Company's business. The books of the Company shall at all times be maintained by the Board. The Member and its duly authorized representatives shall have the right to examine the Company books, records and documents during normal business hours. The Company, and the Board on behalf of the Company, shall not have the right to keep confidential from the Member any information that the Board would otherwise be permitted to keep confidential from the Member pursuant to Section 18-305(c) of the Act. The Company's books of account shall be kept using the method of accounting determined by the Member. The Company's independent auditor shall be an independent public accounting firm selected by the Member.

20. Reports.

(a) The Company shall cause to be prepared, at the Company's expense, such financial reports and other information as the Member may determine are appropriate or necessary.

(b) If required, the Member shall cause the accountants of the Company to prepare all federal, state and local tax returns required of the Company, submit those returns to the Member for its approval no later than thirty (30) calendar days prior to the date required for the filing thereof (including any extensions granted) and will cause the tax returns to be filed after they have been approved by the Member.

(c) All decisions as to accounting principles shall be made by the Member, subject to the provisions of this Agreement.

21. Other Business. Any Affiliate of the Member, but not the Member, and the Special Members may engage in or possess an interest in other business ventures (unconnected with the Company) of every kind and description, independently or with others. The Company shall not have any rights in or to such independent ventures or the income or profits therefrom by virtue of this Agreement. Neither the Member nor any Special Member nor any Manager shall have the right, power or authority to bind the Company, the Member or any partner in Member in connection with any other business or transaction which is not within the scope of the purpose of the Company as set forth herein.

22. Exculpation and Indemnification.

(a) No Member, Special Member, Manager, employee, agent or Affiliate of the Company and no direct or indirect employee, representative, partner, agent or Affiliate of the Member (collectively, the "Covered Persons") shall be liable to the Company or any other Person who has an interest in or claim against the Company for any loss, damage or claim incurred by reason of any act or omission performed or omitted by such Covered Person in good faith on behalf of the Company and in a manner reasonably believed to be within the scope of the authority conferred on such Covered Person by this Agreement excepting a Covered Person shall be liable for any such loss, damage or claim incurred by reason of such Covered Person's gross negligence or willful misconduct.

(b) To the fullest extent permitted by applicable law, a Covered Person shall be entitled to indemnification from the Company for any loss, damage or claim incurred by such Covered Person by reason of any act or omission performed or omitted by such Covered Person in good faith on behalf of the Company and in a manner reasonably believed to be within the scope of the authority conferred on such Covered Person by this Agreement, except that no Covered Person shall be entitled to be indemnified in respect of any loss, damage or claim incurred by such Covered Person by reason of such Covered Person's gross negligence or willful misconduct with respect to such acts or omissions; provided, however, that any indemnity under this Section 22 shall be provided out of and to the extent of the Company assets only, and no Member shall have personal liability on account thereof, and provided further, that so long as any Indebtedness is outstanding, no indemnity payment from funds of the Company (as distinct from funds from other sources, such as insurance) of any indemnity under this Section 22 shall be payable from amounts allocable to any other Person pursuant to the Loan Documents.

(c) To the fullest extent permitted by applicable law and subject to Section 22(b) above, expenses (including legal fees) incurred by a Covered Person defending any claim, demand, action, suit or proceeding shall, from time to time, be advanced by the Company prior to the final disposition of such claim, demand, action, suit or proceeding upon receipt by the Company of an undertaking by or on behalf of the Covered Person to repay such amount if it shall be determined that the Covered Person is not entitled to be indemnified as authorized by this Section 22.

(d) A Covered Person shall be fully protected in relying in good faith upon the records of the Company and upon such information, opinions, reports or statements presented to the Company by any Person as to matters the Covered Person reasonably believes are within such other Person's professional or expert competence and who has been selected with

reasonable care by or on behalf of the Company, including information, opinions, reports or statements as to the value and amount of the assets, liabilities, or any other facts pertinent to the existence and amount of assets from which distributions to the Member might properly be paid.

(e) To the extent that, at law or in equity, a Covered Person has duties, including fiduciary duties, and liabilities relating thereto to the Company or to any other Covered Person, a Covered Person acting under this Agreement shall not be liable to the Company or to any other Covered Person for its good faith reliance on the provisions of this Agreement or any approval or authorization granted by the Company or any other Covered Person. The provisions of this Agreement, to the extent that they restrict the duties and liabilities of a Covered Person otherwise existing at law or in equity, are agreed by the Member and the Special Members to replace such other duties and liabilities of such Covered Person.

(f) The foregoing provisions of this Section 22 shall survive any termination of this Agreement.

23. Transfers. The transfer of any direct or indirect ownership interest in the Company must be made in accordance with the Loan Documents. Any such transfer in violation of the terms of this Agreement or the Loan Documents shall be void and of no effect. If the Member transfers all of its limited liability company interest in the Company pursuant to this Section 23 and in accordance with the Loan Documents, the transferee shall be admitted to the Company as a member of the Company upon its execution of an instrument signifying its agreement to be bound by the terms and conditions of this Agreement, which instrument may be a counterpart signature page to this Agreement. Such admission shall be deemed effective immediately prior to the transfer and, immediately following such admission, the transferor Member shall cease to be a member of the Company.

24. Admission of Additional Members. Subject to the terms of Section 23, one or more additional members of the Company may be admitted to the Company with the written consent of the Member; provided that, notwithstanding the foregoing, so long as any Indebtedness remains outstanding, no additional members may be admitted to the Company, other than the Substitute Member or the Special Members, unless there is a transfer of 100% of the limited liability company interest to a single entity.

25. Dissolution.

(a) Subject to Section 11(j), the Company shall be dissolved, and its affairs shall be wound up upon the first to occur of the following: (i) the termination of the legal existence of the last remaining member of the Company or the occurrence of any other event which terminates the continued membership of the last remaining Member of the Company in the Company unless the business of the Company is continued in a manner permitted by this Agreement or the Act; or (ii) the entry of a decree of judicial dissolution under Section 18-802 of the Act. Upon the occurrence of any event that causes the last remaining member of the Company to cease to be a member of the Company, to the fullest extent permitted by law, the personal representative of such Member is hereby authorized to, and shall, within 90 days after the occurrence of the event that terminated the continued membership of such member of the Company, agree in writing (i) to continue the Company; and (ii) to the admission of the personal representative or its nominee or designee, as the case may be, as a Substitute Member of the Company, effective as of the occurrence of the event that terminated the continued membership of the last remaining member of the Company in the Company.

(b) Notwithstanding any other provision of this Agreement, the Bankruptcy of the Member or any Special Member shall not cause the Member or such Special Member to cease to be a member of the Company and upon the occurrence of such an event, the business of the Company shall continue without dissolution. Notwithstanding any other provision of this Agreement, the Member waives any right it might have to agree in writing to dissolve the Company upon the Bankruptcy of the Member or the occurrence of any other event that causes such Member to cease to be a member of the Company. "Bankruptcy" means, with respect to the Member or any Special Member, if the Member or a Special Member (i) makes an assignment for the benefit of creditors; (ii) files a voluntary petition in bankruptcy; (iii) is adjudged a bankrupt or insolvent, or has entered against itself an order for relief, in any bankruptcy or insolvency

proceeding; (iv) files a petition or answer seeking for itself any reorganization, arrangement, composition, readjustment, liquidation, dissolution or similar relief under any statute, law or regulation; (v) files an answer or other pleading admitting or failing to contest the material allegations of a petition filed against it in any proceeding of this nature; (vi) seeks, consents to or acquiesces in the appointment of a trustee, receiver or liquidator of the Person or of all or any substantial part of its properties; or (vii) 120 days after the commencement of any proceeding against the Person seeking reorganization, arrangement, composition, readjustment, liquidation, dissolution, or similar relief under any statute, law or regulation, if the proceedings has not been dismissed, or if within 90 days after the appointment, without the Person's consent or acquiescence, of a trustee, receiver or liquidator of the Person or of all or any substantial part of its properties, the appointment is not vacated or stayed, or within 90 days after the expiration of any such stay, the appointment is not vacated. With respect to any Person, the foregoing definition of "Bankruptcy" is intended to replace and shall supersede the definition of "bankruptcy" set forth in Sections 18-101(1) and 18-304 of the Act.

(c) In the event of dissolution, the Company shall conduct only such activities as are necessary to wind up its affairs (including the sale of the assets of the Company in an orderly manner), and the assets of the Company shall be applied in the manner, and in the order of priority, set forth in Section 18-804 of the Act.

(d) The Company shall terminate when (i) all of the assets of the Company, after payment of or due provision for all debts, liabilities and obligations of the Company shall have been distributed to the Member in the manner provided for in this Agreement; and (ii) the Certificate of Formation shall have been canceled in the manner required by the Act.

26. Waiver of Partition; Nature of Interest. Except as otherwise expressly provided in this Agreement, to the fullest extent permitted by law, the Member and the Special Members hereby irrevocably waive any right or power that such Member or the Special Member might have to cause the Company or any of its assets to be partitioned, to cause the appointment of a receiver for all or any portion of the assets of the Company, to compel any sale of all or any portion of the assets of the Company pursuant to any applicable law or to file a complaint or to institute any proceeding at law or in equity to cause the dissolution, liquidation, winding up or termination of the Company. No Member shall have any interest in any specific asset of the Company, and no Member shall have the status of a creditor with respect to any distribution pursuant to Section 18 hereof. The interest of the Member in the Company is personal property.

27. Benefits of Agreement; No Third-Party Rights. None of the provisions of this Agreement shall be for the benefit of or enforceable by any creditor of the Company or by any creditor of the Member other than (i) Section 11(j) and Section 25 which shall be for the benefit of Lender and its successors and assigns; and (ii) Section 34 which shall be for the benefit of each Independent Manager. Subject to Sections 11(j), 25 and 34, nothing in this Agreement shall be deemed to create any right in any Person (other than Covered Persons) not a party hereto, and this Agreement shall not be construed in any respect to be a contract in whole or in part for the benefit of any third Person.

28. Severability of Provisions. Each provision of this Agreement shall be considered severable and if for any reason any provision or provisions herein are determined to be invalid, unenforceable or illegal under any existing or future law, such invalidity, unenforceability or illegality shall not impair the operation of or affect those portions of this Agreement which are valid, enforceable and legal.

29. Entire Agreement. This Agreement constitutes the entire agreement of the parties with respect to the subject matter hereof.

30. Governing Law. This Agreement shall be governed by and construed under the laws of the State of Delaware (without regard to conflict of laws principles), all rights and remedies being governed by said laws.

31. Amendments. Subject to Sections 11(j) and 11(k), this Agreement may not be modified, altered, supplemented or amended except pursuant to a written agreement executed and delivered by the Member. Subject to Sections 11(j) and 11(k), so long as any Indebtedness is outstanding, this Agreement may not be modified, altered, supplemented or

amended unless the Lender under the Loan Documents consents and, to the extent the Indebtedness has been securitized, the related rating agencies have delivered written confirmation that such changes will not result in the qualification, downgrade or withdrawal of any ratings assigned to the related securities, except: (i) to cure any ambiguity; or (ii) to convert or supplement any provision in a manner consistent with the intent of this Agreement.

32. Counterparts. This Agreement may be executed in any number of counterparts, each of which shall be deemed an original of this Agreement and all of which together shall constitute one and the same instrument.

33. Notices. Any notices required to be delivered hereunder shall be in writing and personally delivered, mailed or sent by telecopy, electronic mail, or other similar form of rapid transmission, and shall be deemed to have been duly given upon receipt (a) in the case of the Company, to the Company at its address set forth in Section 3; (b) in the case of the Member, to the Member at its address as listed on Schedule A attached hereto; and (c) in the case of either of the foregoing, at such other address as may be designated by written notice to the other party.

34. Enforcement by Independent Managers. Notwithstanding any other provision of this Agreement, the Members and the Special Members agree that this Agreement constitutes a legal, valid and binding agreement of the Members and the Special Members, and is enforceable against the them by the Independent Managers, in accordance with its terms. In addition, each Independent Manager shall be an intended beneficiary of this Agreement.

35. Effectiveness. Pursuant to Section 18-201(d) of the Act, this Agreement shall be effective as of the time of the filing of the Certificate of Formation with the office of the Delaware Secretary of State on _____ [month] _____ [day] , _____ [year] .

IN WITNESS WHEREOF, the undersigned, intending to be legally bound hereby, has duly executed this Agreement as of the _____ [day] day of _____, [month] _____. [year]

[name of limited liability company]

By: _____

[name and title]

SPECIAL MEMBERS:

[name]

[name]



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Current Legal Forms for Real Estate

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Current Legal Forms for Real Estate
Chapter 20 REAL ESTATE ENTITIES
Part IV. Forms
E. LIMITED LIABILITY COMPANIES

24-20 Current Legal Forms for Real Estate FORM 20.37

AUTHOR: by Stephen E. Pigott and Harold O. Maxfield, Jr.

FORM 20.37 Operating agreement--equity member as sole manager

COMMENT

The following form is a basic operating agreement for a real estate limited liability company formed under Ohio law. Unlike the previous form operating agreement set forth at Form 20.36 *supra*, all members are equity owners, and day to day management and operation of the company and its real estate has been delegated to a single managing member. This management structure may be desirable where one member is experienced in real estate management and the remaining members are passive investors and either are not interested in participating in the management of the real estate or lack the requisite experience and knowledge to do so. The scope of the managing member's authority may be broad or limited depending on the desires of the members when entering into the agreement and depending on the respective ownership percentages and relative bargaining powers of the members. The authority granted the managing member under this agreement is broad and best suited for an arrangement involving a trusted individual requiring minimal oversight by the other members.

The agreement contains capital call provisions for the purpose of raising capital in the event revenues generated by the real estate are insufficient to cover expenses. The agreement also imposes a mandatory distribution of cash flow in excess of an agreed amount.

FORM

OPERATING AGREEMENT

OF

REALCO, LLC

AN OHIO LIMITED LIABILITY COMPANY

THIS OPERATING AGREEMENT ("Agreement") is entered into this _____ day of _____, _____ by and among _____ or his nominee(s), _____ or his nominee(s), _____ or her nominee(s), and _____ (individually, a "Member" and collectively, the "Members").

WHEREAS, the Members desire to, and hereby do, form an Ohio limited liability company known as "REALCO, LLC (the "Company"), upon the terms and conditions set forth in this Agreement;

NOW, THEREFORE, in consideration of the mutual covenants set forth herein, the parties hereby agree as follows:

1. Formation and Name of Limited Liability Company. The Members hereby agree to form the Company pursuant to the provisions of Sections 1705.01 to 1705.58, both inclusive, of the Ohio Revised Code, as it may be amended (the "LLC Act") under the name REALCO, LLC. All rights, liabilities and obligations of the Members, both as between themselves and as to persons not parties to this Agreement, shall be as provided in the LLC Act, except as otherwise provided herein.

2. Principal Place of Business. The principal place of business of the Company shall be _____, or at such other place as may be determined from time to time by the Members.

3. Purposes of the Company. The purposes of the Company shall be to jointly own and operate the real property located at _____ (the "Property") and to engage in all other lawful acts for which limited liability companies may be formed under Section 1705.04 of the Ohio Revised Code.

4. Duration of the Company. The Company shall commence on the date on which its Articles of Organization are filed with the Ohio Secretary of State's office, and shall continue until terminated or dissolved in accordance with the terms of this Agreement.

5. Members. The names and addresses of the Members are as follows:

.....

.....

.....

6. A. Capitalization. Each Member's interest in the capital of the Company shall be represented by membership units ("Units"). Each Unit shall represent an interest in the capital of the Company and shall be identical in all respects with every other Unit. The Units shall be issued in proportion to the money contributed to the Company, as hereafter described. The Company shall issue a total of one thousand (1,000) Units, hereinafter referred to singularly as a "Unit" and collectively as "Units," which shall initially be valued at _____ Dollars (\$_____) per Unit. Each of the Members shall, upon the execution hereof, contribute to the capital of the Company, cash in the amount set opposite the Member's name, as set forth on Exhibit A, attached hereto and made a part hereof, in exchange for the Units set forth on Exhibit A opposite the Member's name. A Member shall not have the right to demand or receive the return of the Member's capital contribution except as otherwise expressly provided herein.

B. Capital Accounts. An individual capital account shall be established and maintained for each Member and shall be credited with the amount of each Member's capital contribution to the Company. Each Member's capital account shall be determined and maintained throughout the term of the Company in accordance with the requirements of Section 704(b) of the Internal Revenue Code of 1986 (the "Code") or its counterpart in any subsequently enacted Internal Revenue Code, the applicable Treasury Regulations (the "Regulations") thereunder and the provisions of Exhibit B,

attached hereto and made a part hereof.

C. Capital Calls. The Members recognize that the income produced by the Company may be insufficient to pay the cost of operating the Company. The term "cost of operating the Company" shall include, without limiting the generality of said term, all real estate taxes and assessments and other state and governmental charges, insurance premiums, costs of repair and maintenance, cost of improvements to the Property, and the principal and interest payments required to be made on any loans or mortgages of the Company. If, in the opinion of the Managing Member hereafter designated, additional funds are required to pay the cost of operating the Company, such additional funds shall be contributed by the Members in proportion to their Units owned by them in the Company.

D. Disproportionate Contributions. If any Member is unable or unwilling to make any or all of such Member's proportionate contribution within thirty (30) days after demand, then the remaining Members in the Company who are able and willing to do so may make a contribution in excess of their proportionate share, in such amounts as they may agree among themselves, and if they cannot agree then each such Member who is able and willing to make a contribution shall have the primary right to contribute that portion of such excess amount computed by the proportion which such contributor's Units in the Company bears to the aggregate Units of all such contributors, and shall have the secondary right to contribute any remaining portion of such excess which is not desired to be contributed by any other Member in the exercise of such Member's primary right. If there is more than one Member desiring to exercise secondary rights, they shall be entitled to contribute the said remaining portion of such excess in equal parts.

E. Treatment of Contributions by Non-Defaulting Members. Any Member who makes a contribution to the Company pursuant to Paragraph 6.D. above shall have the option to (1) treat the contribution as additional capital of the Company, or (2) treat the contribution as a loan to the Company, provided all of the Members agree to treat their contributions made for themselves (and for other Members) as a loan to the Company, or (3) treat the contribution as a loan to the defaulting Member, which election shall be made in writing by notice to all other Members at the time the contribution is made, as follows:

(1) If the contributing Member or Members elect to treat their contribution as additional capital, the funds shall be allocated to such Member's capital account and shall be considered as contributed in exchange for additional Units issued by the Company at the same price per Unit as referred to in Paragraph 6.A. above and set forth on Exhibit A attached hereto. Fractional Units may be issued. After such contributions are made, each Member's percentage interest in the net profits, net losses and cash flow of the Company shall be adjusted and determined by dividing the total Units issued by the Company since the inception of the Company, by the total Units then held by each Member. The resulting quotient, with respect to each Member, shall be the adjusted percentage interest of such Member in the net profits, net losses and cash flow of the Company. Such percentage interest of each Member shall supersede the percentage interest of such Member as set forth in Paragraph 6.A. above. However, it is understood that under this option, in the event a Member makes his proportionate contributions, his or her interest in the Company cannot be reduced.

(2) If the contributing Member or Members elect to treat their contributions as a loan to the Company, and provided all of the other Members making contributions on behalf of themselves agree to treat their contributions as a loan to the Company, then no adjustments shall be made to the number of Units held by the Members, and the share of the cash flow and net profits and net losses of the Members shall remain the same. The amount of the loan shall be a debt of the Company and shall bear interest at the prime or base lending rate of _____ Bank (or its successor) then in effect. All distributions to the Members made with respect to their capital interests, due to the defaulting Member or Members shall be paid pro rata to the contributing Members who treated their contributions to the Company made on behalf of the defaulting Member or Members as loans, until such time as the principal and interest of the loan(s) are paid in full.

(3) If the contributing Member or Members elect to treat their contributions as a loan to the defaulting Member or Members, then no adjustment shall be made to the number of Units held by the contributing Member or Members because of such loan and such Member's share in the net profits and net losses and cash flow of the Company shall remain the same. The number of Units held by the defaulting Member or Members shall be increased in the same amount as would occur if the defaulting Member had made the additional capital contribution in the amount of the loan. In addition, the share in the net profits, net losses and cash flow of the Company of the Member or Members in default shall be adjusted as if the defaulting Member or Members had made a contribution to the capital of the Company in the amount of the loan. The amount advanced by the contributing Members on behalf of a defaulting Member or Members shall be a debt of the defaulting Member or Members to the contributing Members and shall bear interest at the prime rate or base lending rate of _____ Bank (or its successors) then in effect. The terms of repayment of the loan (principal and interest) shall be as agreed upon by the contributing Member or Members. Thereafter, all distributions of cash from cash flow or other distributions due to a defaulting Member with respect to such Member's capital interests, shall be paid to the Member or pro rata to the Members who have elected to treat their contributions as a loan to the defaulting Member(s) in payment of principal and interest, until such time as the principal and interest of the loan(s) are paid in full.

7. Division of Profits, Losses, and Cash Flow.

A. Profits and Losses. The Company's "net profits" and "net losses," computed in accordance with Exhibit C, attached hereto and made a part hereof, shall be allocated between, or borne by, the Members in proportion to the amount of the respective Units held by them in the Company.

B. Cash Flow. The cash flow of the Company for each fiscal year shall be the net profits and net losses of the Company, computed as provided in Exhibit C, plus depreciation and other noncash charges deducted in determining such profits and losses and the net proceeds resulting from any refinancing of Company property or the sale of any Company property received during such year, minus principal payments on all mortgages and any other cash expenditures which have not been deducted in determining the net profits and net losses of the Company, and minus any amount reasonably determined by the Managing Member to be required to maintain sufficient working capital and/or a reserve for repairs and/or replacements. The cash flow of the Company shall be determined separately for each fiscal year and not cumulatively.

C. Distribution or Retention of Cash Flow. Cash flow, as so determined, shall be distributed to the Members in proportion to the respective Units held by them in the Company, at such time or times as may be determined by the Managing Member, but not less often than annually. Unless otherwise determined by the Managing Member and agreed by the Members owning a majority of the Units then outstanding, all cash flow in excess of _____ Dollars (\$_____) shall be distributed to the Members during each fiscal year.

8. Control and Operation of the Company.

A. Managing Member. The management and control of the day-to-day operations of the Company shall be handled by _____ hereinafter called the "Managing Member." The Managing Member shall not be compensated for managing the Company's business, but shall be reimbursed by the Company for all reasonable out-of-pocket expenses incurred by him in his performance of acts on behalf of the Company.

The Managing Member shall be responsible for the day-to-day operation of the Company's business and the management of the Property and shall keep all Members informed of material information that shall come to the Managing Member's attention concerning the business of the Company. In addition to all other rights and powers, the Managing Member shall have the specific rights and powers required or appropriate for the supervision of the

day-to-day business of the Company and management and operation of the Property. Such rights and powers shall include, but not be limited to, the right and power to:

- (ii) open, maintain and close bank accounts and to draw checks and other orders for the payment of money;
- (iii) take such actions and incur such expenses on behalf of the Company as may be necessary or advisable in connection with the conduct of the affairs of the Company; and
- (iv) enter into, make and perform such contracts, agreements and other undertaking as may be necessary or advisable for the conduct of the affairs of the Company.

B. Books and Records. The Managing Member shall maintain or cause to be maintained complete and accurate records of the assets owned or leased by the Company and complete and accurate books of account (containing such information as shall be necessary to record allocations and distributions), and make such records and books of account available for inspection by any Member, or such Member's duly authorized representative, during regular business hours and at the principal office of the Company. Within sixty (60) days after the end of each calendar year, there shall be prepared and distributed to all Members reasonable tax-reporting information, in sufficient detail to enable each Member to prepare such Member's federal, state and local income tax returns. In addition, within ninety (90) days after the end of each calendar year, the Managing Member shall cause to be prepared and distributed to each Member, a balance sheet, and a report of the receipts, disbursements, net profits and losses, and cash flow of the Company, and the share of the net profits and losses and cash flow of each Member for such calendar year. Such balance sheet and report shall be prepared by a certified public accountant in accordance with the method of accounting used by the Company for tax purposes.

C. Taxable Year. The taxable year of the Company shall be a calendar year, and the first taxable year shall end on December 31st of the year in which the Company is formed.

D. Conflicts. Nothing herein shall be construed to prevent a Member, or any entity in which a Member has an interest, from engaging, or owning an interest, in any other business venture of any nature, including a venture which is competitive with the Company's business. The Company may engage a Member for specific purposes and may otherwise deal with such individual on terms and for compensation to be agreed upon by the Company and such individual or entity.

E. Liability of Members. The Managing Member and the other Members shall not have any liability to the Company or to any other Member for any mistakes or errors in judgment, or for any act or omission believed in good faith to be within the scope of authority conferred by this Agreement. The Managing Member and the other Members shall be liable only for acts and/or omissions involving intentional wrongdoing. Actions or omissions taken in reliance upon the advice of legal counsel that are within the scope of the Member's authority hereunder shall be conclusive evidence of good faith; provided, however, the Members shall not be required to procure such advice to be entitled to the benefit of this Paragraph 8.E.

The Company shall indemnify and hold each of the Managing Member and the other Members harmless from any threatened, pending, or completed action, suit or proceeding to which the Member was or is a party or is threatened to be made a party by reason of the fact that such Member is or was a Member of the Company (other than an action by or in the right of the Company), involving an alleged cause of action for damages arising from the performance of activities on behalf of the Company, including activities relating to the management and disposition of the assets of the Company. The Company shall indemnify each Member against all expenses, including reasonable attorneys' fees, judgments and amounts paid in settlement, actually and reasonably incurred by each Member in connection with such action, suit or proceeding if the Member acted in good faith and in a manner such Member reasonably believed to be in,

or not opposed to, the best interests of the Company, provided that the Member's conduct does not constitute willful misconduct or gross negligence, breach of this Agreement or breach of any fiduciary duty.

F. Voting. Each Member shall have one (1) vote for each Unit in the Company held by him or her at the time such vote is to occur. Each Member may exercise such Member's vote by written or oral notification to the Managing Member.

G. Consent to Operations. Notwithstanding the foregoing provisions of this Paragraph 8., the following actions shall require the vote and approval, by written notification to the Managing Member, of Members of the Company holding not less than eighty percent (80%) of the total outstanding Units in the Company:

(i) any single purchase or sale in excess of _____ Thousand Dollars (\$ _____) and any series of related purchases and sales that together exceed _____ Thousand Dollars (\$ _____);

(ii) the admission of new Members to the Company, whether by the sale of existing Units or other interests or the issuance of one or more Units or interests to any party making a contribution to the Company;

(iii) the transfer or issuance of one or more Units or interests in the Company to any existing Member, except as described in Paragraphs 6.D. and 6.E. above;

(iv) the amendment of this Agreement, other than to correct non-substantive technical errors or to comply with the Ohio Revised Code; and

(v) all other actions to be taken by the Members, except for the day-to-day operations delegated to the Managing Member under Paragraph 8.A. above, unless specifically stated otherwise in this Agreement.

H. Holding of Property and Reliance by Third Parties. Property owned by the Company shall be held in the name of the Company. Third parties dealing with the Company shall be entitled to rely conclusively upon the power and authority of the Managing Member. Any corporation, trust, partnership or other business entity called upon to transfer any property to or from the name or account of the Company shall be entitled to rely on instructions or assignments signed or purporting to be signed by the Managing Member without inquiry as to the authority of the persons signing or purporting to sign such instructions or assignments, and without inquiry as to the validity of any transfer to or from the name of the Company. At the time of transfer, the corporation, trust, partnership or other business entity shall be entitled to assume that (i) the Company continues in existence under the laws of the State of Ohio, and (ii) this Agreement continues in full force and effect without amendment; provided, however, that such corporation, trust, partnership or other business entity has received no actual notice to the contrary.

I. Banking. All funds of the Company shall be deposited and kept in the Company's name in such company bank account or accounts as shall be designated by the Managing Member. All withdrawals therefrom shall be made upon checks signed by the Managing Member or those authorized by the Managing Member.

J. Removal of Managing Member. The Managing Member shall be removed as Managing Member upon the occurrence of any of the following:

(i) the affirmative vote of the Members holding at least eighty percent (80%) of the total outstanding Units;

(ii) an act or omission that constitutes cause for removal, and for purposes hereof, the word "cause" shall specifically mean acts of disloyalty to the Company; falsification of the Company's books or

records; embezzlement or other acts of dishonesty with respect to the Company's funds or assets; and any act which results in conviction of a felony.

Upon the removal of the Managing Member, a new Managing Member shall be appointed by the affirmative vote of the Members holding at least eighty percent (80%) of the total outstanding Units. In the event a new Managing Member is not appointed within sixty (60) days after the removal of the existing Managing Member, the Company shall be dissolved pursuant to Paragraph 15. below.

9. Assignment, Transfer or Sale of Units.

A. General. The Units of a Member may be assigned, transferred or sold only upon the prior written consent of all other Members, or as otherwise permitted in this Paragraph 9. With respect to any such permitted assignment, transfer or sale, the assignee, transferee or purchaser of such Units may, upon compliance with the conditions set forth in Paragraph 13. below, become a substituted Member.

B. Permitted Transfers During Life of a Member. During the life of a Member, such Member may transfer part or all of such Member's Units in the Company by gift, either in trust or outright, to or for the benefit of such Member's spouse, parent, or sibling and/or any of such Member's descendants, including step-children and any descendant whose relationship to the Member is created by birth or adoption. Thereafter, the transferee shall hold such interest with all of the economic rights previously held by the transferor, but shall not become a Member except in accordance with the terms of Paragraph 13. below.

C. No Pledges. No Member shall pledge, cause a lien to be placed against, or encumber such Member's Units, or transfer, sell, alienate, assign, or otherwise dispose of all or any part of such Member's Units, whether voluntarily, involuntarily, by operation of law, at judicial sale, or otherwise, without the prior written consent of the other Members.

D. Securities Laws. Notwithstanding the preceding provisions of this Paragraph 9., no proposed or intended assignment, transfer or sale of any Unit shall be effective unless and until it appears, to the satisfaction of the other Members, that such assignment, transfer or sale will not be in violation of, or otherwise render the Company and/or the other Members liable under, the Securities Act of 1933, as amended, and the rules and regulations promulgated thereunder, or under the applicable state securities laws of any state or states.

E. Tax Restriction. Notwithstanding the preceding provisions of this Paragraph 9., no sale or exchange of Units may be made if the Units sought to be sold or exchanged, when added to the total of all Units sold or exchanged within the period of twelve (12) months prior thereto, would result in the termination of the Company under Section 708 of the Code, or any successor section thereto.

F. Rights of Assignee. Subsequent to the permitted assignment, transfer or sale of Units, the Company shall remit directly to the assignee, transferee or purchaser all distributions to which such person may be entitled pursuant to the provisions of this Agreement. An assignee, transferor or purchaser who does not become a substituted Member pursuant to the provisions of Paragraph 13. below shall be entitled to receive only the distributions to which the assignor, transferor or seller would otherwise have been entitled with respect to the Units assigned, transferred or sold, but such assignee, transferee or purchaser shall have no right to vote, to approve amendments hereof, to obtain information concerning Company transactions, to inspect the Company books, or to exercise any other rights of a member conferred hereunder or under applicable law.

A Member who has assigned, transferred or sold all of such Member's Units as permitted above, whether or not the assignee, transferee or purchaser has become a substituted Member, shall have no further right or interest in the Company.

11. Withdrawal of a Member. A Member may not voluntarily withdraw or resign from the Company without the prior written consent of all the other Members.

12. Death, Bankruptcy or Incompetency of a Member.

A. In the event of the death, adjudication of bankruptcy, whether voluntary or involuntary, or adjudication of incompetency of a Member who is an individual, or the bankruptcy or dissolution of a Member that is a corporation, partnership, limited liability company, or trust, during the term of this Agreement, the Company shall be dissolved and its business shall terminate unless a majority of the other Members elect in writing to continue the Company and its business. If the other Members so elect, the executor, administrator, trustee or other legal representative of the deceased, bankrupt, incompetent or dissolved Member shall succeed to the rights of such Member, subject to the provisions of this Agreement. If the Units of a deceased Member shall pass by bequest or distribution, the transferee of the deceased Member's Units may be admitted to the Company as a substituted Member to the extent of the Units which shall have passed to the transferee, subject to and in compliance with the provisions of Paragraph 13. below. Similarly, a trustee or other legal representative of a bankrupt or incompetent Member may be admitted to the Company as a substituted Member to the extent of the Units of such bankrupt or incompetent Member, subject to and in compliance with the provisions of Paragraph 13. below.

B. If the transferee of a deceased, bankrupt, incompetent or dissolved Member's Units is not admitted as a substituted Member, such transferee shall have only such rights as an assignee of such Units would have if such assignee had not been admitted as a substitute Member.

C. If the other Members deem it to be in the best interest of the Company, they may treat, in their discretion, for any of the purposes of this Agreement, any transferee of a deceased, bankrupt, incompetent or dissolved Member who has not become a substituted Member, as a Member in the place and stead of said deceased, bankrupt, incompetent or dissolved Member.

13. Substitution of a Member. The transferee of a deceased, bankrupt, incompetent or dissolved Member's Units shall become a substituted Member only upon: (a) the written consent of all the other Members; (b) the transferee's execution and acknowledgment of such instruments in form and substance reasonably satisfactory to the other Members, as other Members may deem necessary or desirable to effect such admission and to confirm the agreement of the transferee to be bound by all the covenants, terms and conditions of this Agreement, as the same may have been amended; and (c) the transferee's payment of any expenses arising in connection with the substituted Member's admission to the Company.

14. Termination of the Company. The Company shall be terminated and dissolved upon the first to occur of the following:

(a) upon the death, bankruptcy, incompetency or dissolution of a Member, unless the Company's business is continued by the other Member or Members, as provided in Paragraph 12. above;

(b) upon the sale of all or substantially all the assets of the Company;

(c) upon the written consent of all of the Members; or

(d) upon the removal of the Managing Member under Paragraph 8.J. above, unless the Members timely appoint a new Managing Member in accordance with Paragraph 8.J.

15. Dissolution and Liquidation of the Company.

A. Upon the termination of the Company pursuant to Paragraph 14. above, a full and general accounting shall be taken

of the Company's business, and the affairs of the Company shall be wound up. Any profits earned or losses incurred since the last previous accounting shall be allocated between, or borne by, the Members in accordance with the provisions of Paragraph 7.A. above. The Members shall wind up and liquidate the Company by selling the Company's assets, or by distributing such assets in kind, subject to the Company's liabilities, or by a combination thereof, as determined by the Members. The proceeds of such liquidation shall be applied and distributed in the following order of priority, by the end of the taxable year during which the liquidation occurs (or, if later, within ninety (90) days after the date of the liquidation):

(i) to the payment of any debts and liabilities of the Company;

(ii) to the setting up of any reserve which the Members shall reasonably deem necessary to provide for any contingent or unforeseen liabilities or obligations of the Company, with any excess in such reserve remaining after such liabilities are satisfied to be distributed as soon as practicable in the manner hereinafter set forth; and

(iii) thereafter, the balance of the proceeds, if any, shall be distributed in accordance with the positive capital account balances of the Members, as determined after taking into account all capital account adjustments for the Company taxable year during which such liquidation occurs. For purposes of this subparagraph, a liquidation of the Company shall mean a liquidation as defined in Section 1.704-1(b)(2)(ii)(g) of the Regulations.

B. The Members shall be furnished with a statement prepared by the Company's accountants, which shall set forth the assets and liabilities of the Company as of the date of complete liquidation.

C. Notwithstanding anything in this Agreement to the contrary, the Members, or either one of them, shall not be personally liable for the return of the capital contributions of the other Member, or any portion thereof, it being expressly understood that any such return of the capital contributions of the Members shall be made solely from Company assets.

16. Waiver of Partition. Each of the Members hereby waives any right that such Member may have to cause the Company's property to be partitioned or divided among the Members, or to file a complaint or institute any proceeding at law or in equity to cause the property of the Company to be partitioned, sold, or otherwise divided among the Members.

17. Amendments. This Agreement may be amended only with the written approval of Members owning all of the Units in the Company, unless such amendment is merely to correct non-substantive technical errors or to comply with the Ohio Revised Code.

18. Notices. All notices, consents or other instruments hereunder shall be in writing and mailed by United States mail, postage prepaid, and shall be directed to the parties hereto at the last addresses of the parties furnished by them in writing to the Company, and to the Company at its principal office. The Company and/or any Member shall have the right to designate a new address for receipt of notices by notice addressed to the Members and the Company and mailed as aforesaid. Such notices shall be made a permanent part of the Company records.

19. Obligations and Rights of Transferees. Any person who acquires in any manner whatsoever any Units in the Company, irrespective of whether such person has accepted and assumed in writing the terms and provisions of this Agreement, shall be deemed by the acceptance of the benefit of the acquisition thereof to have agreed to be subject to, and to be bound by, all the obligations of this Agreement with the same force and effect as any predecessor in interest of such person.

20. **Benefit and Binding Effect.** This Agreement shall inure to the benefit of, and be binding upon, the parties hereto and their respective next of kin, legatees, administrators, executors, legal representatives, nominees, successors and permitted assigns.

21. **Integration.** This Agreement constitutes the entire agreement among the parties hereto pertaining to the subject matter hereof, and supersedes all prior and contemporaneous agreements and understandings of the parties in connection therewith.

22. **Governing Law.** This Agreement and the rights of all parties hereunder shall be governed by, and construed in accordance with, the laws of the State of Ohio.

23. **Power of Attorney.** Each Member hereby irrevocably designates the Managing Member, including the Manager's successors-in-interest, as such Member's true and lawful attorney in such Member's name, place and stead to execute and acknowledge (i) any certificate or other instruction required to be filed by the Company; (ii) any and all documents appropriate or necessary in connection with the continuation, termination or dissolution of the Company; (iii) articles of organization or any amendments thereto which are consistent with the provisions of this Agreement; (iv) all documents which the attorney-in-fact deems appropriate to reflect any amendment of this Agreement. The creation of the foregoing power of attorney is coupled with an interest and is irrevocable, and shall survive the disability of a Member. It also shall survive the transfer of a Unit by a Member, except that if the transferee is approved for admission as a Member, this power of attorney shall survive the delivery of the assignment for the sole purpose of enabling the attorney-in-fact to execute, acknowledge and file any documents needed to effectuate the substitution. Each Member shall be bound by any representations made by the attorney-in-fact in good faith pursuant to this power of attorney, and each Member hereby waives any and all defenses which may be available to contest, negate, or disaffirm the action of the attorney-in-fact taken in good faith under this power of attorney.

24. **Execution.** This Agreement may be executed in several counterparts, each of which shall be considered an original when executed by one or more of the Members.

Each party has executed this Agreement or a counterpart hereof as of the day first written above.

Units and Value of Capital Contribution

Name	Units	Value of Initial Contribution
_____	_____	_____
—	—	\$
		\$
		\$
		\$
<i>Total</i>		\$

EXHIBIT B**Capital Account Accounting Principles**

Section 1. Income/Loss. For purposes of computing the amount of any item of income, gain, deduction or loss to be reflected in the members' capital accounts, the determination, recognition and classification of any such item shall be the same as its determination, recognition and classification for federal income tax purposes; provided, however, that:

(a) any deductions for depreciation, cost recovery or amortization (other than depletion under Section 611 of the Code) attributable to a Contributed Property (as defined below) shall be determined as if the adjusted basis of such property on the date it was acquired by the company was equal to the Agreed Value (as defined below) of such property. Upon an adjustment to the Carrying Value (as defined below) of any company property subject to depletion under Section 611 of the Internal Revenue Code of 1986, as amended (the "Code"), any further deductions for such depreciation, cost recovery or amortization attributable to such property shall be determined as if the adjusted basis of such property were equal to the Carrying Value of such property immediately following such adjustment;

(b) any income, gain or loss attributable to the taxable disposition of any property (including any property subject to depletion under Section 611 of the Code) shall be determined by the company as if the adjusted basis of such property as of such date of disposition were equal in amount to the company's Carrying Value with respect to such property as of such date; and

(c) the computation of all items of income, gain, loss and deduction shall be made by the company and, as to those items described in Section 705(a)(1)(B) or Section 705(a)(2)(B) of the Code, without regard to the fact that such items are not includable in gross income or are neither currently deductible nor capitalizable for federal income tax purposes.

Section 2. Transfers. A transferee of a membership unit in the company will succeed to the capital account relating to the membership unit transferred; provided, however, that if the transfer causes a termination of the company under Section 708(b)(1)(B) of the Code, the company's properties shall be deemed to have been distributed in liquidation of the company to the members (including the transferee of the membership unit) and recontributed by such members and transferees in reconstitution of the company. The capital accounts of such reconstituted partnership shall be maintained in accordance with the principles set forth herein.

Section 3. Unrealized Gain/Loss. Upon an issuance of additional membership units in the company for cash or Contributed Property, the capital accounts of all members (and the Carrying Values of all company properties) shall, immediately prior to such issuance, be adjusted (consistent with the provisions hereof) upward or downward to reflect any unrealized gain or unrealized loss attributable to each company property (as if such unrealized gain or unrealized loss had been recognized upon an actual sale of such property at the fair market value thereof, immediately prior to such issuance, and had been allocated to the members, at such time). In determining such unrealized gain or unrealized loss attributable to the properties, the fair market value of company properties shall be determined by the Board of Directors using such reasonable methods of valuation as they may adopt.

Section 4. Liquidating Adjustments. Immediately prior to the distribution of any company property in liquidation of the company, the capital accounts of all members (and the Carrying Values of all company properties) shall, immediately prior to any such distribution, be adjusted (consistent with the provisions hereof and of Section 704 of the Code) upward or downward to reflect any unrealized gain or unrealized loss attributable to each company property (as if such unrealized gain or unrealized loss had been recognized upon an actual sale of each such property, immediately prior to

such distribution, and had been allocated to the members, at such time). In determining such unrealized gain or unrealized loss attributable to the properties, the fair market value of company properties shall be determined by the Board of Directors using such reasonable methods of valuation as they may adopt.

Section 5. Definitions. For the purposes of this Article VII, the following terms shall have the meanings indicated unless the context clearly indicates otherwise:

"Agreed Value" means the fair market value of a Contributed Property as agreed to by the contributing member and the company, using such reasonable method of valuation as they may adopt.

"Carrying Value" means: (a) with respect to Contributed Property, the Agreed Value of such property, reduced (but not below zero) by all amortization, depreciation and cost recovery deductions charged to the members' capital accounts with respect to such property, as well as any other charges for sales, retirements and other dispositions of assets included in a Contributed Property, as of the time of determination; and (b) with respect to any other property, the adjusted basis of such property for federal income tax purposes as of the time of determination. The Carrying Value of any property shall be adjusted in accordance with the principles set forth herein.

"Contributed Property" means each member's interest in property or other consideration (excluding services and cash) contributed to the company by such member.

EXHIBIT C

Allocations of Profits and Losses

Section 1. Determination of Net Profits/Losses. The terms "net profits" and "net losses," as used herein, shall mean the net amount of the company's profits and losses, as determined for federal income tax purposes, and shall also include each member's share of income described in Section 705(a)(1)(B) of the Code, any expenditures described in Section 705(a)(2)(B) of the Code, any expenditures described in Section 709(a) of the Code which are not deducted or amortized in accordance with Section 709(b) of the Code and losses not deductible pursuant to Section 267(a) or 707(b) of the Code.

Section 2. Allocation of Gain on Contributed Property. Notwithstanding any provision of the Operating Agreement to the contrary, to the extent required by law, income, gain, loss and deduction attributable to property contributed to the company by a member shall be allocated among the members so as to take into account any variation between the tax basis of the property and the fair market value thereof at the time of contribution, in accordance with the requirements of Section 704(c) of the Code.

Section 3. Ratable Allocation. Company income, gain, loss and deduction shall be allocated to the members in accordance with the portion of the year during which the members have held their respective membership Units. All items of income and loss shall be considered to have been earned ratably over the fiscal year of the company, except that gains and losses arising from the disposition of assets shall be taken into account as of the date thereof.

Section 4. Minimum Percentage. Notwithstanding any provision of the Operating Agreement to the contrary, at all times during the existence of the company, the interest of each member in each material item of company income, gain, loss, deduction or credit will be equal to at least one percent (1%) of each such item.

Section 5. Special Rules. Notwithstanding any provision of the Operating Agreement to the contrary:

- (a) in the event the company is entitled to a deduction for imputed interest under any provision of the Code on any loan or advance from a member, such deduction shall be allocated solely to such member;
- (b) losses allocated pursuant to the Operating Agreement shall not exceed the maximum amount of losses that can be so allocated without causing the member receiving such allocation to have an Adjusted Deficit Capital Account Balance (as defined below) at the end of any fiscal year of the company;
- (c) if there is a net decrease in company Minimum Gain during any company fiscal year, members who would otherwise have an Adjusted Deficit Capital Account Balance at the end of such year shall be specially allocated items of company income and gain for such year (and, if necessary, subsequent years) in an amount and manner sufficient to eliminate such Adjusted Deficit Capital Account Balance as quickly as possible. The items to be so allocated shall be determined in accordance with Section 1.704-2 of the Regulations. This subsection is intended to comply with the minimum gain chargeback requirement in such section of the Regulations and shall be interpreted consistently therewith. Company "Minimum Gain" shall be computed in the manner described in Section 1.704-2(d)(1) of the Regulations. "Adjusted Deficit Capital Account Balance" shall mean the deficit capital account balance of a member, if any, as of the end of the relevant fiscal year of the company, after giving effect to the following: (A) credit to such capital account any amounts the member is obligated to restore pursuant to the penultimate sentence of Section 1.704-2 of the Regulations; and (B) debit to such capital account the items described in Sections 1.704-1(b)(2)(ii)(d)(4), (5) and (6) of the Regulations;
- (d) to the extent the payment of any expenditure by the company is treated as a distribution to a member for federal income tax purposes, there will be a gross income allocation to such member in the amount of such distribution;
- (e) if items of income or gain to be allocated include income or gain treated as ordinary income for federal income tax purposes because it is attributable to the recapture of depreciation under Section 1245 or 1250 of the Code, such income or gain, to the extent treated as ordinary income, shall be allocated to and reported by the members in proportion to their then respective cumulative allocations of depreciation; and
- (f) except as provided in subsection (c) above, in the event any member unexpectedly receives any adjustments, allocations, or distributions described in Sections 1.704-1(b)(2)(ii)(d)(4), (5) or (6) of the Regulations, items of company income and gain shall be specially allocated to such member in an amount and manner sufficient to eliminate the Adjusted Deficit Capital Account Balance in the member's capital account created by such adjustments, allocations, or distributions as quickly as possible. Any special allocations of items of income or gain pursuant to this subsection shall be taken into account in computing subsequent allocations of other net profits, net losses and items thereof pursuant to the foregoing Operating Agreement (including the exhibits attached thereto), so that the net amount of any items so specially allocated pursuant to this subsection and the other net profits, net losses and all other items allocated to the member pursuant to the Operating Agreement, to the extent possible, be equal to the net amount that would have been allocated to the member had such unexpected adjustments, allocations or distributions not occurred.

Section 6. Special Allocations. Except as provided in Section 5(c) above, in the event a member has an Adjusted Deficit Capital Account Balance at the end of any company fiscal year which is in excess of the sum of (i) the amount the member is obligated to restore pursuant to any provision of this Agreement, and (ii) the amount the member is deemed to be obligated to restore pursuant to the penultimate sentence of Section 1.704-2 of the Regulations, such member shall be specially allocated items of company income and gain in the amount of such excess as quickly as possible.



80 of 141 DOCUMENTS

Current Legal Forms for Real Estate

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Current Legal Forms for Real Estate
Chapter 20 REAL ESTATE ENTITIES
Part IV. Forms
E. LIMITED LIABILITY COMPANIES

24-20 Current Legal Forms for Real Estate FORM 20.37A

AUTHOR: by Stephen E. Pigott and Harold O. Maxfield, Jr.

FORM 20.37A Basic formation documents for a simple two person limited liability company

COMMENT

The following series of forms are designed to provide practitioners with a complete list of formation documentation in order to form a basic two person limited liability company to look like a corporation. The practitioner must review and become familiar with the requirements in the jurisdiction in which the limited liability company is being formed and where it will operate.

FORM

ARTICLES OF ORGANIZATION

STRESS PROPERTIES, LLC

(Under Section _____ of the _____ [state] Revised Code)
Limited Liability Company

The undersigned, desiring to form a limited liability company under Chapter _____ of the _____ [state] Revised Code, hereby states the following:

FIRST: The name of said limited liability company shall be Stress Properties, LLC.

SECOND: The limited liability company shall exist for a period of perpetual duration.

THIRD: The address to which interested persons may direct requests for copies of any operating agreement and any bylaws of this limited liability company is:

 —
 [address]

 —
 [city, state]

FOURTH: The purpose for which the limited liability company is formed is to engage in any lawful acts or activities for which limited liability companies may be formed under Sections _____ to _____, inclusive, of the _____ [state] Revised Code.

IN WITNESS WHEREOF, I have hereunder subscribed my name, this _____ [day] day of _____ [month], _____ [year].

 [name], Legal Representative

ORIGINAL APPOINTMENT OF AGENT (for limited liability company)

The undersigned, being the legal representative of Stress Properties, LLC, hereby appoints _____ [name] to be the agent upon whom any process, notice or demand required or permitted by statute to be served upon the limited liability company may be served. The complete address of the agent is:

 —
 [address]

 —
 [city, state]

 [name], Legal Representative

ACCEPTANCE OF APPOINTMENT

The undersigned, _____ [name], named herein as the statutory agent for Stress Properties, LLC hereby

acknowledges and accepts the appointment of agent for said limited liability company.

[name], Legal Representative

OPERATING AGREEMENT

OF

STRESS PROPERTIES, LLC

A(n) _____ [state] Limited Liability Company

THIS OPERATING AGREEMENT ("Agreement") is entered into this _____ [day] day of _____ [month], _____ [year], by and between WILLIAM SMITH ("Smith") and BOBBY JONES ("Jones"), such parties being sometimes hereinafter referred to collectively as the "Members," and individually as a "Member."

WHEREAS, the Members have formed a(n) _____ [state] limited liability company under the name "STRESS PROPERTIES, LLC" (the "Company"); and

WHEREAS, the Members desire to set forth the understandings and agreements between them with respect to the affairs of the Company and the conduct of its business;

NOW, THEREFORE, in consideration of the mutual covenants and promises set forth herein, the parties hereby agree as follows:

1. Formation of Limited Liability Company. The Company was formed pursuant to the provisions of Sections _____ to _____, both inclusive, of the _____ [state] Revised Code (the "LLC Act") under the name "STRESS PROPERTIES, LLC." Except as otherwise provided herein, all rights, liabilities and obligations of the Members, both as between themselves and as to persons not parties to this Agreement, shall be as provided in the LLC Act.

2. Principal Office. The principal office of the Company shall be in _____ [city], _____ [state], or at such other place in the State of _____ [state] as may be designated by the Members.

3. Purposes of the Company. The purposes of the Company shall be to engage in any lawful act or activity for which a limited liability company may be formed under the LLC Act.

4. Duration of the Company. The existence of the Company commenced on the date on which its Articles of Organization were filed with the _____ [state] Secretary of State's office, and shall continue thereafter until terminated and dissolved in accordance with the terms of this Agreement.

5. Members. The names and addresses of the Members are as follows:

Member	Address
William Smith	_____ _____
Bobby Jones	_____ _____

6. Initial Capital Contributions. Each Member's undivided interest in the capital of the Company shall be represented by membership units ("Membership Units"). Each Membership Unit shall represent an interest in the capital of the Company and shall be identical in all respects with every other Membership Unit. The Membership Units shall be certificated in accordance with the Bylaws of the Company. The Company shall be capitalized by each Member contributing the amount of cash indicated opposite such Member's name below, with such Member receiving, in exchange therefor, the number of Membership Units set forth below:

Member	Contribution	Units
Smith	\$ _____	_____
	—	—
Jones	\$ _____	_____
	—	—

A Member shall not have the right to demand or receive the return of his or her capital contribution except as otherwise expressly provided herein.

7. Voting of Members. On any matter presented to the Members for their vote, the Members shall have one vote for each Membership Unit owned by them.

8. Non-Voting Units. Upon the death of the first Member to die, all Membership Units owned by such Member at the time of his death, shall be deemed non-voting Units, irrespective of the designation appearing on any certificates representing such Units. Upon the death of such Member, the legal representative of such Member's estate shall deliver to the Company any certificates representing the Units owned by such Member at the time of his death and the Company shall issue to such legal representative new non-voting certificates therefor.

9. Capital Accounts. An individual capital account shall be established and maintained for each Member and shall be credited with the amount of each Member's initial capital contribution to the Company. Each Member's capital account shall be determined and maintained throughout the term of the Company in accordance with the requirements of *Section 704(b) of the Internal Revenue Code of 1986* (the "Code") or its counterpart in any subsequently enacted Internal Revenue Code, the applicable Treasury Regulations (the "Regulations") thereunder and the provisions of the Bylaws of the Company.

10. Profits and Losses. The Company's "net profits" and "net losses" shall be computed in accordance with the provisions of the Bylaws of the Company. Except as otherwise provided in such Bylaws, the net profits and net losses of the Company shall be allocated between, or borne by, the Members in proportion to the Membership Units owned by each of them.

11. Cash Flow. The cash flow of the Company shall be the net profits and losses of the Company, computed as provided in the Bylaws of the Company, plus depreciation and other noncash charges deducted in determining such profits and losses, minus principal payments on all mortgages, and any other cash expenditures which have not been deducted in determining the net profits and losses of the Company, and minus the amount reasonably determined by the Board of Directors to be necessary to maintain for the Company sufficient working capital and a reasonable reserve for repairs and/or replacements. The cash flow of the Company shall be determined separately for each fiscal year and not cumulatively.

12. Distribution or Retention of Cash Flow. Cash flow, as determined in accordance with Paragraph 11, shall be

distributed to the Members in accordance with the following provisions. All distributions of cash flow shall be made in proportion to the number of Membership Units held by each Member.

(a) The Company shall make mandatory pro-rata distributions to the Members for the payment of taxes in accordance with the following:

(1) The amount distributable with respect to any year shall be equal to the aggregate amount of federal, state and local income taxes payable by the Members with respect to the taxable income of the Company, assuming, for purposes of determining the amount of such distribution, that each Member will be taxed on the net amount set forth in the Member's respective Treasury Form K-1 at the highest marginal individual federal income tax rate for such year, and at the highest marginal individual state and local income tax rates applicable to any Member for each such taxable year; and

(2) such distributions shall be payable at such time or times and in such amounts as will enable the Members to avoid penalties and interest that would be imposed for a failure to pay a sufficient amount of estimated taxes.

(b) The balance of the cash flow remaining, if any, following the tax distributions described above, shall be distributed pro-rata to the Members at such times and in such amounts as the Board of Directors in its reasonable discretion shall determine.

13. Books and Records. The Board of Directors shall maintain or cause to be maintained complete and accurate records of all properties owned or leased by the Company and complete and accurate books of account (containing such information as shall be necessary to record allocations and distributions), and make such records and books of account available for inspection by any Member or his or her duly authorized representative during regular business hours and at the principal office of the Company. Within sixty (60) days after the end of each calendar year, there shall be prepared and distributed to all Members reasonable tax-reporting information, in sufficient detail to enable such Member to prepare his or her federal, state and local income tax returns. In addition, within ninety (90) days after the end of each calendar year, there shall be prepared and distributed to each Member a balance sheet and a report of the receipts, disbursements, net profits and losses, and cash flow of the Company, and the share of the net profits and losses and cash flow of each Member for such calendar year. Such balance sheet and report shall be prepared by a certified public accountant, in accordance with the method of accounting used by the Company for tax purposes.

14. Taxable Year; Accounting Method. The taxable year of the Company shall be a calendar year, and the first taxable year shall end on December 31st of the year in which the Company is formed. The books and records of the Company shall be maintained on the cash method of accounting.

15. Assignment, Transfer or Sale of Membership Units.

(a) Substitute Member. A Membership Unit of a Member may be assigned, transferred or sold only as provided in this Paragraph 15. With respect to any such permitted assignment, transfer or sale, the assignee, transferee or purchaser of a Membership Unit shall be treated and considered as a "Member" hereunder for all purposes.

(b) Restrictions on Transfer. No Member shall pledge, cause a lien to be placed against, or encumber his or her Membership Units, or transfer, sell, alienate, assign, or otherwise dispose of all or any part of his or her Membership Units, whether voluntarily, involuntarily, by operation of law, at judicial sale, or otherwise, except in accordance with the terms of this Agreement. Notwithstanding the foregoing sentence, (i) a Member who is an individual may freely transfer his or her Membership Units, in whole or in part, to or for the benefit of one or more of his or her lineal descendants; and (ii) a Member that is a trust may freely transfer its Membership Units, in whole or in part, to or for the benefit of the grantor, the grantor's spouse, and/or the grantor's lineal descendants.

(c) Securities Laws. Notwithstanding the preceding provisions of this Paragraph 15, no proposed or intended assignment, transfer or sale of Membership Units shall be effective, unless and until it appears, to the satisfaction of counsel for the Company, that such assignment, transfer or sale will not be in violation of, or otherwise render the Company and/or any Member liable under, the Securities Act of 1933, as amended, and the rules and regulations promulgated thereunder, or under the applicable state securities laws of any state or states.

(d) Terminating Transfers. Notwithstanding the preceding provisions of this Paragraph 15, no sale or exchange of Membership Units may be made if the Membership Units sought to be sold or exchanged, when added to the total of all Membership Units sold or exchanged within the period of twelve (12) months prior thereto, would result in the termination of the Company under Section 708 of the Code, or any successor section thereto.

(e) Improper Transfers. Any attempted transfer or encumbrance by a Member of the Membership Units owned (or hereafter acquired) by such Member, which is not in compliance with the terms of this Agreement, shall be void and shall not be reflected on the records of the Company.

(f) Right to Purchase upon Death or Disability. Upon a Member's death or permanent disability, the Company shall have the right to purchase all of such Member's Membership Units owned by him at the time of his death or permanent disability. The Company shall exercise their right to purchase by giving notice thereof to the Selling Member and/or his legal representative. The Company shall have sixty (60) days from the date of such Member's death or permanent disability to give notice of its intent to purchase. The notice shall specify the date of closing the purchase, which shall not be more than sixty (60) days after the date of giving notice.

(g) Purchase Price. The purchase price of the deceased or permanently disabled Member's Membership Units shall be the fair market value of said Membership Units as determined by two (2) appraisers with experience in appraising similar companies. The Company shall select one appraiser, and the selling Member or his legal representative shall select one appraiser. If the two appraisers fail to agree on the fair market value of the Membership Units of the selling Member within thirty (30) days after their selection, then they shall designate a third appraiser within fifteen (15) days thereafter. In the latter event, the third appraiser shall determine the fair market value within thirty (30) days of his selection and his determination shall be conclusive. Each party shall pay the fees for the appraisers selected by him, and one-half of the fees of the third appraiser if necessary.

16. Withdrawal. A Member shall not be permitted to withdraw or resign from the Company. The death, adjudication of bankruptcy, whether voluntary or involuntary, incompetency or dissolution of a Member during the term of this Agreement shall not affect the Company or its business. The executor, administrator, trustee or other legal representative of the deceased, bankrupt, incompetent or dissolved Member shall succeed to all of the rights of such Member, subject to the provisions of this Agreement.

17. Termination of the Company. The Company shall be terminated and dissolved upon the first to occur of the following:

- (a) the affirmative vote of all the Members; or
- (b) the sale of all or substantially all the assets of the Company.

18. Dissolution and Liquidation of the Company.

(a) Winding Up. Upon the termination of the Company pursuant to Paragraph 17, above, a full and general accounting shall be taken of the Company's business, and the affairs of the Company shall be wound up. Any profits earned or losses incurred since the last previous accounting shall be allocated between, or borne by, the Members in accordance with the provisions of Paragraph 10, above. The Board of Directors shall wind up and liquidate the Company by selling

the Company's assets, or by distributing such assets in kind, subject to the Company's liabilities, or by a combination thereof, as determined by the Board of Directors. The proceeds of such liquidation shall be applied and distributed in the following order of priority, by the end of the taxable year during which the liquidation occurs (or, if later, within ninety (90) days after the date of the liquidation):

- (1) to the payment of any debts and liabilities of the Company;
 - (2) to the setting up of any reserve which the Board of Directors shall reasonably deem necessary to provide for any contingent or unforeseen liabilities or obligations of the Company, with any excess in such reserve remaining after such liabilities are satisfied to be distributed as soon as practicable in the manner hereinafter set forth; and
 - (3) thereafter, the balance of the proceeds, if any, shall be distributed in accordance with the positive capital account balances of the Members, as determined after taking into account all capital account adjustments for the Company's taxable year during which such liquidation occurs. For purposes of this subsection, a liquidation of the Company shall mean a liquidation as defined in Section 1.704-1(b)(2)(ii)(g) of the Regulations.
- (b) Statement. The Members shall be furnished with a statement prepared by the Company's accountants, which shall set forth the assets and liabilities of the Company as of the date of complete liquidation.
- (c) Return of Capital Contributions. Notwithstanding anything in this Agreement to the contrary, no Member or Director shall not be personally liable for the return of the capital contributions of the Members, or any portion thereof, it being expressly understood that any such return of the capital contributions of the Members shall be made solely from Company assets.

19. Dispute Resolution Remedies.

(a) In the event a dispute of any kind arises in connection with this Agreement, including any dispute concerning its construction, performance or breach, the Members will attempt to resolve the dispute as set forth in this Paragraph. The Members waive all rights to seek remedies in any court (except to enforce the provisions of this Agreement in circumstances in which subsection D applied) and the right to jury trial. All documents, discovery and other information related to any such dispute, and the attempts to resolve or arbitrate such dispute will be kept confidential to the fullest extent possible.

(b) If a dispute arises, the Member will give notice to the other Member. After notice has been given, the Members in good faith will attempt to negotiate a resolution to the dispute.

(c) If, within twenty (20) days after the notice provided in subsection B, a dispute is not resolved through negotiation or mediation, the dispute will be arbitrated. The Members agree to be bound by the selection of an arbitrator, and to settle the dispute exclusive by binding arbitration in accordance with the following provisions:

(1) The Members will collectively select one arbitrator. If they fail to do so within thirty (30) days after the notice provided in subsection B, the Members will request the American Arbitration Association to submit a panel of ten arbitrators who are qualified in such matters from which the choice will be made. The Members will flip a coin and the loser will strike first, followed by alternative striking until one name remains. The Members may by agreement reject one entire list and request a second list. If selection by the above method is not completed within sixty (60) days after the notice provided in subsection B, then an arbitrator will be selected by the American Arbitration Association. That arbitrator will then arbitrate the dispute in _____ [city], _____ [state], and issue an award.

(2) The arbitration will be conducted under the Commercial Arbitration Rules of the American Arbitration Association.

The arbitrator shall have no ability to add, change or delete provisions of this Agreement and shall be required to interpret the terms of this Agreement as they exist. The award of the arbitrator will be final, binding and non-appealable. Judgment on the award may be entered in any court, state or federal, having jurisdiction.

(3) The cost of any arbitration including fees and expenses of the arbitrator, will be shared by the Members of the dispute in equal proportions. Each member will bear his own costs, expenses and attorney's fees.

(d) The Members agree and acknowledge that money damages may not be an adequate remedy for any breach of the provisions of this Agreement and that either Member, in his sole discretion, may apply to the court for specific performance and/or injunctive relief in order to enforce or prevent any violations of the provisions of this Agreement.

20. Adoption of Bylaws. The Members hereby adopt and approve the Bylaws of the Company, a copy of such Bylaws being attached hereto as Exhibit A.

21. Tax Matters Member. The President shall serve as the Tax Matters Member of the Company, as provided in Regulations issued pursuant to Section 6231 of the Code. Each Member, by the execution of this Agreement, consents to such designation of the Tax Matters Member and agrees to execute, certify, acknowledge, deliver, swear to, file and record at the appropriate public offices such documents as may be necessary or appropriate to evidence such consent. The Company shall indemnify and reimburse the Tax Matters Member for all expenses, including legal and accounting fees, claims, liabilities, losses and damages incurred in connection with any administrative or judicial proceeding with respect to the tax liability of the Members. The payment of all such expenses shall be made before any distributions to Members are made by the Company. The Tax Matters Member shall consult with the other Member with respect to all decisions relating to tax matters prior to making a determination with respect thereto.

22. Amendments. This Agreement may be amended only with the written approval of all of the Members.

23. Notices. All notices, consents or other instruments hereunder shall be in writing and mailed by United States mail, postage prepaid, and shall be directed to the parties hereto at the last addresses of the parties furnished by them in writing to the Company, and to the Company at its principal office. The Company and/or any Member shall have the right to designate a new address for receipt of notices by notice addressed to the Members and the Company and mailed as aforesaid. Such notices shall be made a permanent part of the Company records.

24. Obligations and Rights of Transferees. Any person who acquires in any manner whatsoever any Membership Unit in the Company, irrespective of whether such person has accepted and assumed in writing the terms and provisions of this Agreement, shall be deemed by the acceptance of the benefit of the acquisition thereof to have agreed to be subject to, and to be bound by, all the obligations of this Agreement with the same force and effect as any predecessor in interest of such person.

25. Benefit and Binding Effect. This Agreement shall inure to the benefit of, and be binding upon, the parties hereto and their respective next of kin, legatees, administrators, executors, legal representatives, nominees, successors and permitted assigns.

26. Integration. This Agreement constitutes the entire agreement among the parties hereto pertaining to the subject matter hereof, and supersedes all prior and contemporaneous agreements and understandings of the parties in connection therewith.

27. Governing Law. This Agreement and the rights of all parties hereunder shall be governed by, and construed in accordance with, the laws of the State of _____ [state] .

IN WITNESS WHEREOF, each party has executed this Operating Agreement on the day and year first written above.

MEMBERS:

William Smith

Bobby Jones

EXHIBIT A**STRESS PROPERTIES, LLC
BYLAWS****ARTICLE I
MEMBERS**

Section 1. Annual Meeting. There shall be an annual meeting of members of the company for the election of directors, the consideration of reports to be laid before such meeting, and the transaction of such other business as may properly be brought before such meeting. Such annual meeting shall be held at the principal office of the company in the City of _____ [city], in _____ [county] County, or at such other place either within or without the State of _____ [state] as may be designated by the Board of Directors or by the President, and specified in the notice of such meeting, at 10:00 o'clock a.m., or at such other time as may be designated by the Board of Directors or by the President, and specified in the notice of the meeting, on the second Monday of _____ [month] in _____ [year] and in each year thereafter, if not a legal holiday, and, if a legal holiday, then on the next succeeding business day.

Section 2. Special Meetings. Special meetings of the members of the company may be called by the President, or the Board of Directors acting at a meeting, or by majority of directors acting without a meeting, or by members holding at least twenty-five percent (25%) of the capital interests of the company. Special meetings may be held on any business day. Upon request in writing delivered either in person or by registered mail to the President or the Secretary by any persons entitled to call a meeting of members, such officer shall forthwith cause to be given to the members entitled thereto notice of a meeting to be held on a date not less than seven or more than sixty days after the receipt of such request, as such officer may fix. If such notice is not given within twenty (20) days after the delivery or mailing of such request, the persons calling the meeting may fix the time of the meeting and give notice thereof as provided in these Bylaws, or cause such notice to be given by any designated representative. Each special meeting shall be called to convene between 9:00 a.m. and 4:00 p.m., and shall be held at the principal office of the company, unless the same is called by the directors, acting with or without a meeting, in which case such meeting may be held at any place either within or without the State of _____ [state] designated by the Board of Directors and specified in the notice of such meeting.

Section 3. Notice of Meetings. Not less than seven or more than sixty days before the date fixed for a meeting of members, written notice stating the time and place of the meeting, and in the case of a special meeting the purposes of such meeting, shall be given by or at the direction of the Secretary or Assistant Secretary, or any other person or persons required or permitted by these Bylaws to give such notice. The notice shall be given by personal delivery or by mail to each member entitled to notice of the meeting who is of record as of the day next preceding the day on which notice is

given or, if a record date therefor is duly fixed, of record as of said date; if mailed, the notice shall be addressed to the members at their respective addresses as they appear on the records of the company. Notice of the time, place and purposes of any meeting of members may be waived in writing, either before or after the holding of such meeting, by any members, which writing shall be filed with or entered upon the records of the meeting. The attendance of any members at any such meeting without protesting the lack of proper notice, prior to or at the commencement of the meeting, shall be deemed to have waived notice of such meeting.

Section 4. Quorum; Adjournment. At any meeting of the members the holders of capital interests in the company entitling them to exercise a majority of the voting power of the company present in person or by proxy shall constitute a quorum for such meeting; provided, however, that no action required by law, by the Articles of Organization, or by these Bylaws, to be authorized or taken by a designated proportion of the capital interests of the company, or a particular class thereof, may be authorized or taken by a lesser proportion; and provided, further, that the holders of a majority of the capital interests represented thereat, whether or not a quorum is present, may adjourn such meeting from time to time; if any meeting is adjourned, notice of such adjournment need not be given if the time and place to which such meeting is adjourned are fixed and announced at such meeting.

Section 5. Proxies. Members entitled to vote or to act with respect to capital interests in the company may vote or act in person or by proxy. The person appointed as proxy need not be a member. Unless the writing appointing a proxy otherwise provides, the presence at a meeting of the person having appointed a proxy shall not operate to revoke the appointment. Notice to the company, in writing or in open meeting, of the revocation of the appointment of a proxy shall not affect any vote or act previously taken or authorized.

Section 6. Action Without a Meeting. Any action which may be authorized or taken at a meeting of the members may be authorized or taken without a meeting in a writing or writings signed by all of the members entitled to vote on such matter, which writing or writings shall be filed with or entered upon the records of the company. A telegram, telex, cablegram, or similar transmission by a member, or a photographic, photostatic, facsimile or similar reproduction of a writing signed by a member, shall be regarded as signed by the member for purposes of this Section.

Section 7. Telephonic Participation in Meetings. Members may participate in any meeting through telephonic or similar communications equipment by means of which all persons participating in the meeting can hear one another, and such participation shall constitute presence in person at such meeting.

ARTICLE II BOARD OF DIRECTORS

Section 1. Number. The number of members of the Board of Directors shall be determined by resolution of the members entitled to vote.

Section 2. Election of Directors; Vacancies. The directors shall be elected at each annual meeting of members, or at a special meeting called for the purpose of electing directors, or the directors may be designated at any time by the unanimous written action of the members. In the event of the occurrence of any vacancy or vacancies in the Board of Directors, however caused, the remaining directors, though less than a majority of the whole authorized number of directors, may, by the vote of a majority of their number, fill any vacancy for the unexpired term.

Section 3. Term of Office; Resignation. Each manager shall hold office until the next annual meeting of the members and until his successor is elected, or until his earlier resignation, removal from office, or death. Any manager may resign at any time by oral statement to that effect made at a meeting of the Board of Directors or in a writing to that effect delivered to the Secretary, such resignation to take effect immediately or at such other time as the manager may specify.

Section 4. Regular Meetings. Regular meetings of the Board of Directors may be held at such times and places within or without the State of _____ [state] as may be provided for in rules or resolutions adopted by the Board of Directors and upon such notice, if any, as shall be so provided.

Section 5. Special Meetings. Special meetings of the Board of Directors may be held at any time upon call by the President or a Vice President or any two directors. Written notice of the time and place of each such meeting shall be given to each manager, either by personal delivery or by mail, telegram, or cablegram, at least two (2) days before the meeting, which notice need not specify the purposes of the meeting.

Section 6. Quorum; Adjournment. A quorum of the Board of Directors shall consist of a majority of the directors then in office.

Section 7. Action Without a Meeting. Any action which may be authorized or taken at a meeting of the Board of Directors may be authorized or taken without a meeting in a writing or writings signed by all of the directors, which writing or writings shall be filed with or entered upon the records of the company. A telegram, telex, cablegram, or similar transmission by a member, or a photographic, photostatic, facsimile or similar reproduction of a writing signed by a manager, shall be regarded as signed by the manager for purposes of this Section.

Section 8. Telephonic Participation in Meetings. Directors may participate in any meeting through telephonic or similar communications equipment by means of which all persons participating in the meeting can hear one another, and such participation shall constitute presence in person at such meeting.

ARTICLE III OFFICERS

Section 1. Election and Designation of Officers. The Board of Directors shall elect a President, a Secretary, a Treasurer, and, in its discretion, may elect one or more Vice Presidents, one or more Assistant Secretaries, one or more Assistant Treasurers, and such other officers as the Board of Directors may deem necessary. The President shall be a manager, but no one of the other officers need be a manager. Any two or more of such offices may be held by the same person, but no officer shall execute, acknowledge or verify any instrument in more than one capacity, if such instrument is required to be executed, acknowledged or verified by two or more officers.

Section 2. Term of Office; Vacancies. The officers of the company shall hold office until the next annual meeting of the Board of Directors and until their successors are elected, except in case of resignation, removal from office or death. The Board of Directors may remove any officer at any time with or without cause by a majority vote of the directors then in office. Any vacancy in any office may be filled by the Board of Directors.

Section 3. President. The President shall preside at all meetings of the members and at all meetings of the Board of Directors. Subject to directions of the Board of Directors, the President shall have general executive supervision over the property, business and affairs of the company. He may execute all authorized deeds, mortgages, bonds, contracts, and other obligations in the name of the company and shall have such other authority and shall perform such other duties as may be determined by the Board of Directors.

Section 4. Vice Presidents. The Vice President(s), if any, shall have such authority and perform such duties as may be determined by the Board of Directors.

Section 5. Secretary. The Secretary shall keep the minutes of meetings of the members and of the Board of Directors. He shall keep such books as may be required by the Board of Directors, shall give notices of members' meetings and of

Board meetings required by these Bylaws, or otherwise, and shall have such authority and shall perform such other duties as may be determined by the Board of Directors.

Section 6. Treasurer. The Treasurer shall receive and have in charge all money, bills, notes, bonds, stocks in other companies, and similar property belonging to the company, and shall do with the same as may be ordered by the Board of Directors. He shall keep accurate financial accounts and hold the same open for the inspection and examination of the directors and shall have such authority and shall perform such other duties as may be determined by the Board of Directors.

Section 7. Other Officers. The Assistant Secretaries and Assistant Treasurers, if any, and any other officers whom the Board of Directors may elect shall, respectively, have such authority and perform such duties as may be determined by the Board of Directors.

Section 8. Delegation of Authority and Duties. The Board of Directors is authorized to delegate the authority and duties of any officer to any other officer and generally to control the action of the officers and to require the performance of duties in addition to those mentioned herein.

ARTICLE IV COMPENSATION

Section 1. Directors and Members of Committees. Directors, as such, shall not receive any stated salary for their services, but, on resolution of the Board of Directors, a fixed sum for expenses of attendance, if any, may be allowed for attendance at each meeting, regular or special, provided that nothing herein contained shall be construed to preclude any manager from serving the company in any other capacity and receiving compensation therefor. Members of either executive or special committees may be allowed such compensation as the Board of Directors may determine for attending committee hearings.

Section 2. Officers and Employees. The compensation of officers and employees of the company, or the method of fixing such compensation, shall be determined by or pursuant to authority conferred by the Board of Directors or any committee of the Board of Directors. Such compensation may include pension, disability and death benefits, and may be by way of fixed salary, or on the basis of earnings of the company, or any combination thereof, or otherwise, as determined or authorized from time to time by the Board of Directors or any committee of the Board of Directors.

ARTICLE V INDEMNIFICATION

Section 1. Third Party Actions. The company shall indemnify any person who was or is a party or is threatened to be made a party to any threatened, pending or completed action, suit or proceeding, whether civil, criminal, administrative, or investigative, including all appeals (other than an action, suit or proceeding by or in the right of the company) by reason of the fact that he is or was a manager, officer or employee of the company, or is or was serving at the request of the company as a manager, trustee, officer or employee of another company, partnership, joint venture, trust or other enterprise, against expenses (including attorneys' fees), judgments, decrees, fines, penalties and amounts paid in settlement actually and reasonably incurred by him in connection with such action, suit or proceeding if he acted in good faith and in a manner which he reasonably believed to be in or not opposed to the best interests of the company and, with respect to any criminal action or proceeding, had no reasonable cause to believe his conduct was unlawful. The termination of any action, suit or proceeding by judgment, order, settlement, conviction, or upon a plea of nolo contendere or its equivalent, shall not, of itself, create a presumption that the person did not act in good faith and in a manner which he reasonably believed to be in or not opposed to the best interest of the company and, with respect to

any criminal action or proceeding, had reasonable cause to believe that his conduct was unlawful.

Section 2. Derivative Actions. The company shall indemnify any person who was or is a party or is threatened to be made a party to any threatened, pending or completed action or suit, including all appeals, by or in the right of the company to procure a judgment in its favor by reason of the fact that he is or was a manager, officer or employee of the company, or is or was serving at the request of the company as a manager, trustee, officer or employee of another company, partnership, joint venture, trust or other enterprise, against expenses (including attorneys' fees) actually and reasonably incurred by him in connection with the defense or settlement of such action or suit if he acted in good faith and in a manner he reasonably believed to be in or not opposed to the best interests of the company, except that no indemnification shall be made in respect of any claim, issue or matter as to which such person shall have been finally adjudged to be liable for negligence or misconduct in the performance of his duty to the company unless and only to the extent that the Court of Common Pleas or the court in which such action or suit was brought shall determine upon application that, despite the adjudication of liability but in view of all the circumstances of the case, such person is fairly and reasonably entitled to indemnity for such expenses as the Court of Common Pleas or such other court shall deem proper.

Section 3. Rights After Successful Defense. To the extent that a manager, officer or employee has been successful on the merits or otherwise in defense of any action, suit or proceeding referred to in Section 1 or 2, or in defense of any claim, issue or matter therein, he shall be indemnified against expenses (including attorneys' fees) actually and reasonably incurred by him in connection therewith.

Section 4. Other Determination of Rights. Except in a situation governed by Section 3, any indemnification under Section 1 or 2 (unless ordered by a court) shall be made by the company only as authorized in the specific case upon a determination that indemnification of the manager, officer or employee is proper in the circumstances because he has met the applicable standard of conduct set forth in Section 1 or 2. Such determination shall be made (a) by a majority vote of directors acting at a meeting at which a quorum consisting of directors who were not parties to such action, suit or proceeding is present, or (b) if such a quorum is not obtainable (or even if obtainable), and a majority of disinterested directors so directs, by independent legal counsel (compensated by the company) in a written opinion, or (c) by the affirmative vote in person or by proxy of the holders of a majority of the capital interests of the company entitled to vote in the election of directors, without regard to voting power which may thereafter exist upon a default, failure or other contingency.

Section 5. Advances of Expenses. Expenses of each person indemnified hereunder incurred in defending a civil, criminal, administrative or investigative action, suit or proceeding (including all appeals), or threat thereof, may be paid by the company in advance of the final disposition of such action, suit or proceeding as authorized by the Board of Directors, whether a disinterested quorum exists or not, upon receipt of an undertaking by or on behalf of the manager, officer or employee, to repay such amount unless it shall ultimately be determined that he is entitled to be indemnified by the company.

Section 6. Nonexclusiveness; Heirs. The indemnification provided by this Article shall not be deemed exclusive of any other rights to which those seeking indemnification may be entitled as a matter of law or under the Articles of Organization, these Bylaws, any agreement, vote of members, any insurance purchased by the company, or otherwise, both as to action in his official capacity and as to action in another capacity while holding such office, and shall continue as to a person who has ceased to be manager, officer or employee and shall inure to the benefit of the heirs, executors and administrators of such a person.

Section 7. Purchase of Insurance. The company may purchase and maintain insurance on behalf of any person who is or was a manager, officer or employee of the company, or is or was serving at the request of the company as a manager, officer or employee of another company, partnership, joint venture, trust or other enterprise against any liability asserted against him and incurred by him in any such capacity, or arising out of his status as such, whether or not the company

would have the power to indemnify him against such liability under the provisions of this Article or of the _____ [state] Limited Liability Company Act.

ARTICLE VI

CAPITAL ACCOUNT ACCOUNTING PRINCIPLES

Section 1. Income/Loss. For purposes of computing the amount of any item of income, gain, deduction or loss to be reflected in the members' capital accounts, the determination, recognition and classification of any such item shall be the same as its determination, recognition and classification for federal income tax purposes; provided, however, that:

(a) any deductions for depreciation, cost recovery or amortization (other than depletion under Section 611 of the Code) attributable to a Contributed Property (as defined below) shall be determined as if the adjusted basis of such property on the date it was acquired by the company was equal to the Agreed Value (as defined below) of such property. Upon an adjustment to the Carrying Value (as defined below) of any company property subject to depletion under *Section 611 of the Internal Revenue Code of 1986*, as amended (the "Code"), any further deductions for such depreciation, cost recovery or amortization attributable to such property shall be determined as if the adjusted basis of such property were equal to the Carrying Value of such property immediately following such adjustment;

(b) any income, gain or loss attributable to the taxable disposition of any property (including any property subject to depletion under Section 611 of the Code) shall be determined by the company as if the adjusted basis of such property as of such date of disposition were equal in amount to the company's Carrying Value with respect to such property as of such date;

(c) if the company's adjusted basis in a depreciable or cost recovery property is reduced for federal income tax purposes pursuant to Section 48(q)(1) of the Code, the amount of such reduction shall, solely for purposes hereof, be deemed to be an additional depreciation or cost recovery deduction in the year such property is placed in service and shall be allocated among the members in accordance with the Operating Agreement. Any restoration of such basis pursuant to Section 48(q)(2) of the Code shall be allocated in the same manner to the members to whom such deemed deduction was allocated; and

(d) the computation of all items of income, gain, loss and deduction shall be made by the company and, as to those items described in Section 705(a)(1)(B) or Section 705(a)(2)(B) of the Code, without regard to the fact that such items are not includable in gross income or are neither currently deductible nor capitalizable for federal income tax purposes.

Section 2. Transfers. A transferee of a membership unit in the company will succeed to the capital account relating to the membership unit transferred; provided, however, that if the transfer causes a termination of the company under Section 708(b)(1)(B) of the Code, the company's properties shall be deemed to have been distributed in liquidation of the company to the members (including the transferee of the membership unit) and recontributed by such members and transferees in reconstitution of the company. The capital accounts of such reconstituted partnership shall be maintained in accordance with the principles set forth herein.

Section 3. Unrealized Gain/Loss. Upon an issuance of additional membership units in the company for cash or Contributed Property, the capital accounts of all members (and the Carrying Values of all company properties) shall, immediately prior to such issuance, be adjusted (consistent with the provisions hereof) upward or downward to reflect any unrealized gain or unrealized loss attributable to each company property (as if such unrealized gain or unrealized loss had been recognized upon an actual sale of such property at the fair market value thereof, immediately prior to such issuance, and had been allocated to the members, at such time). In determining such unrealized gain or unrealized loss attributable to the properties, the fair market value of company properties shall be determined by the members using such reasonable methods of valuation as they may adopt.

Section 4. Liquidating Adjustments. Immediately prior to the distribution of any company property in liquidation of the company, the capital accounts of all members (and the Carrying Values of all company properties) shall, immediately prior to any such distribution, be adjusted (consistent with the provisions hereof and of Section 704 of the Code) upward or downward to reflect any unrealized gain or unrealized loss attributable to each company property (as if such unrealized gain or unrealized loss had been recognized upon an actual sale of each such property, immediately prior to such distribution, and had been allocated to the members, at such time). In determining such unrealized gain or unrealized loss attributable to the properties, the fair market value of company properties shall be determined by the members using such reasonable methods of valuation as they may adopt.

Section 5. Definitions. For the purposes of this Article VII, the following terms shall have the meanings indicated unless the context clearly indicates otherwise:

"Agreed Value" means the fair market value of a Contributed Property as agreed to by the contributing member and the company, using such reasonable method of valuation as they may adopt.

"Carrying Value" means: (a) with respect to Contributed Property, the Agreed Value of such property, reduced (but not below zero) by all amortization, depreciation and cost recovery deductions charged to the members' capital accounts with respect to such property, as well as any other charges for sales, retirements and other dispositions of assets included in a Contributed Property, as of the time of determination; and (b) with respect to any other property, the adjusted basis of such property for federal income tax purposes as of the time of determination. The Carrying Value of any property shall be adjusted in accordance with the principles set forth herein.

"Contributed Property" means each member's interest in property or other consideration (excluding services and cash) contributed to the company by such member.

ARTICLE VII

ALLOCATIONS OF PROFITS AND LOSSES

Section 1. Determination of Net Profits/Losses. The terms "net profits" and "net losses," as used herein, shall mean the net amount of the company's profits and losses, as determined for federal income tax purposes, and shall also include each member's share of income described in Section 705(a)(1)(B) of the Code, any expenditures described in Section 705(a)(2)(B) of the Code, any expenditures described in Section 709(a) of the Code which are not deducted or amortized in accordance with Section 709(b) of the Code, basis adjustments required pursuant to Section 48(q) of the Code and losses not deductible pursuant to Section 267(a) or 707(b) of the Code.

Section 2. Allocation of Gain on Contributed Property. Notwithstanding any provision of the Operating Agreement to the contrary, to the extent required by law, income, gain, loss and deduction attributable to property contributed to the company by a member shall be allocated among the members so as to take into account any variation between the tax basis of the property and the fair market value thereof at the time of contribution, in accordance with the requirements of Section 704(c) of the Code.

Section 3. Ratable Allocation. Company income, gain, loss and deduction shall be allocated to the members in accordance with the portion of the year during which the members have held their respective membership Units. All items of income and loss shall be considered to have been earned ratably over the fiscal year of the company, except that gains and losses arising from the disposition of assets shall be taken into account as of the date thereof.

Section 4. Minimum Percentage. Notwithstanding any provision of the Operating Agreement to the contrary, at all times during the existence of the company, the interest of each member in each material item of company income, gain,

loss, deduction or credit will be equal to at least one percent (1%) of each such item.

Section 5. Special Rules. Notwithstanding any provision of the Operating Agreement to the contrary:

(a) in the event the company is entitled to a deduction for imputed interest under any provision of the Code on any loan or advance from a member, such deduction shall be allocated solely to such member;

(b) losses allocated pursuant to the Operating Agreement shall not exceed the maximum amount of losses that can be so allocated without causing the member receiving such allocation to have an Adjusted Deficit Capital Account Balance (as defined below) at the end of any fiscal year of the company;

(c) if there is a net decrease in company Minimum Gain during any company fiscal year, members who would otherwise have an Adjusted Deficit Capital Account Balance at the end of such year shall be specially allocated items of company income and gain for such year (and, if necessary, subsequent years) in an amount and manner sufficient to eliminate such Adjusted Deficit Capital Account Balance as quickly as possible. The items to be so allocated shall be determined in accordance with Section 1.704-2 of the Regulations. This subsection is intended to comply with the minimum gain chargeback requirement in such section of the Regulations and shall be interpreted consistently therewith. "Company Minimum Gain" shall be computed in the manner described in Section 1.704-2(d)(1) of the Regulations. "Adjusted Deficit Capital Account Balance" shall mean the deficit capital account balance of a member, if any, as of the end of the relevant fiscal year of the company, after giving effect to the following: (A) credit to such capital account any amounts the member is obligated to restore pursuant to the penultimate sentence of Section 1.704-2 of the Regulations; and (B) debit to such capital account the items described in Sections 1.704-1(b)(2)(ii)(d)(4), (5) and (6) of the Regulations;

(d) to the extent the payment of any expenditure by the company is treated as a distribution to a member for federal income tax purposes, there will be a gross income allocation to such member in the amount of such distribution;

(e) if items of income or gain to be allocated include income or gain treated as ordinary income for federal income tax purposes because it is attributable to the recapture of depreciation under Section 1245 or 1250 of the Code, such income or gain, to the extent treated as ordinary income, shall be allocated to and reported by the members in proportion to their then respective cumulative allocations of depreciation; and

(f) except as provided in subsection (c) above, in the event any member unexpectedly receives any adjustments, allocations, or distributions described in Sections 1.704-1(b)(2)(ii)(d)(4), (5) or (6) of the Regulations, items of company income and gain shall be specially allocated to such member in an amount and manner sufficient to eliminate the Adjusted Deficit Capital Account Balance in the member's capital account created by such adjustments, allocations, or distributions as quickly as possible. Any special allocations of items of income or gain pursuant to this subsection shall be taken into account in computing subsequent allocations of other net profits, net losses and items thereof pursuant to the foregoing Operating Agreement (including the exhibits attached thereto), so that the net amount of any items so specially allocated pursuant to this subsection and the other net profits, net losses and all other items allocated to the member pursuant to the Operating Agreement, to the extent possible, be equal to the net amount that would have been allocated to the member had such unexpected adjustments, allocations or distributions not occurred.

Section 6. Special Allocations. Except as provided in Section 5(c) above, in the event a member has an Adjusted Deficit Capital Account Balance at the end of any company fiscal year which is in excess of the sum of (i) the amount the member is obligated to restore pursuant to any provision of this Agreement, and (ii) the amount the member is deemed to be obligated to restore pursuant to the penultimate sentence of Section 1.704-2 of the Regulations, such member shall be specially allocated items of company income and gain in the amount of such excess as quickly as possible.

ARTICLE VIII CERTIFICATES FOR UNITS

Section 1. Form of Certificates and Signatures. Upon request of a Member, the Company shall issue Certificates, which shall certify the number and class of membership units held by such Member in the company, but no certificate for membership units shall be executed or delivered until such units are fully paid. When such a certificate is countersigned by a transfer agent or registrar, the signature of any of said officers of the company may be facsimile, engraved, stamped or printed.

Section 2. Transfer of Units. Membership units in the company shall be transferable upon the books of the company by the holders thereof, in person, or by a duly authorized attorney, upon surrender and cancellation of certificates for a like number of units of the same class, with duly executed assignment and power of transfer endorsed thereon or attached thereto, and with such proof of the authenticity of the signatures to such assignment and power of transfer as the company or its agents may reasonably require.

Section 3. Lost, Stolen or Destroyed Certificates. The company may issue a new certificate for membership units in place of any certificate theretofore issued by it and alleged to have been lost, stolen or destroyed, and the Board of Directors may, in its discretion, require the owner, or his legal representatives, to give the company a bond containing such terms as the Board of Directors may require to protect the company or any person injured by the execution and delivery of a new certificate.

Section 4. Transfer Agent and Registrar. The Board of Directors may appoint, or revoke the appointment of, transfer agents or registrars and may require all certificates for membership units to bear the signatures of such transfer agents and registrars or any of them.

ARTICLE IX AMENDMENTS

The Bylaws of the company may be amended, or new Bylaws may be adopted, by the members at a meeting held for such purpose, by the affirmative vote of the holders of capital interests of the company entitling them to exercise a majority of the voting power of the company on such proposal, or without a meeting by the written consent of the holders of capital interests of the company units entitling them to exercise two-thirds of the voting power on such proposal.

ACTION BY WRITTEN CONSENT OF MEMBERS

_____ [month] _____ [day], _____ [year]

The undersigned, being all of the Members of STRESS PROPERTIES, LLC, a(n) _____ [state] limited liability company, do hereby take and adopt the following action in writing, without meeting:

1. Election of Directors. The following persons have been elected to serve as Directors of the Company until they resign or their successors are appointed by the Members:

William Smith
Bobby Jones

2. Approval of Purchase of Property. The Company hereby approves the purchase of the property located at _____ [address], _____ [city], _____ [state] under such terms and conditions as the Members shall determine in their sole absolute discretion.

William Smith

Bobby Jones

ACTION BY WRITTEN CONSENT OF MEMBERS

_____ [month] _____ [day], _____ [year]

The undersigned, being all of the Directors of STRESS PROPERTIES, LLC, a(n) _____ [state] limited liability company, do hereby take and adopt the following action in writing, without meeting:

Election of Officers. The following persons have been elected to serve as Officers of the Company until they resign or until their successors have been designated by the Company:

William Smith	-	President
Bobby Jones	-	Secretary and Treasurer

William Smith

Bobby Jones



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Current Legal Forms for Real Estate

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Current Legal Forms for Real Estate
Chapter 20 REAL ESTATE ENTITIES
Part IV. Forms
E. LIMITED LIABILITY COMPANIES

24-20 Current Legal Forms for Real Estate FORM 20.38

AUTHOR: by Stephen E. Pigott and Harold O. Maxfield, Jr.

FORM 20.38 Operating Agreement involving a related operating corporation

COMMENT

In many circumstances, the majority owner of a business will want to give its employees a piece of the action as an incentive to stay with the business. However, given the nature of an operating business, and the many business decisions that must be made with respect thereto, a business owner may be reluctant to give an employee a portion of the operating business. One way to avoid these problems is to give the key employees a portion of the non-operating assets (i.e., real estate) which are connected to the business, but which do not have day-to-day operations. In this way, the employee is tied to the business, but cannot get in the way of the owner's operations of the business. The following agreement involves key employees of an operating company. The operating company is relocating to a new location, and the new location will be owned by a separate limited liability company. In this Operating Agreement, the member (excluding the owner of the operating business) will be required to sell their interest in the limited liability company in the event that they are no longer employed by the operating company. Also, this form provides that the owner of the operating business is lending each member the money necessary to purchase their interest in the limited liability company. This form has Bylaws attached to it which supplement the Operating Agreement. Last, the Bylaws are designed to have the limited liability company resemble a corporation. The company will have a Board of Managers, much like a Board of Directors. The Board of Managers is authorized to designate officers that have similar duties as to officers of a corporation.

FORM

**OPERATING AGREEMENT
OF**

[name]

(a(n) _____ [state] Limited Liability Company)

THIS OPERATING AGREEMENT ("Agreement") is entered into as of the _____ [day] day of _____, [month] _____, [year] by and among _____, [name] _____, [name] _____, and _____, [name] such parties being sometimes hereinafter referred to collectively as the "Members," and individually as a "Member."

WHEREAS, the Members have caused Articles of Organization to be filed with the _____ Secretary of State's office forming a(n) _____ [state] limited liability company under the name _____ [name] (the "Company"); and

WHEREAS, the Members desire to set forth the understandings and agreements among them with respect to the affairs of the Company and the conduct of its business;

NOW, THEREFORE, in consideration of the mutual covenants and promises set forth herein, the parties hereby agree as follows:

**ARTICLE 1
FORMATION OF THE COMPANY**

1.1 Formation of Limited Liability Company. The Members have organized the Company pursuant to the provisions of Sections _____ to _____, both inclusive, of the _____ [state] Revised Code (the "LLC Act") under the name "_____." Except as otherwise provided herein, all rights, liabilities and obligations of the Members, both as among themselves and as to persons not parties to this Agreement, shall be as provided in the LLC Act.

1.2 Principal Office. The principal office of the Company shall be _____, [address] or at such other place in the State of _____ [state] as may be designated by the Members.

1.3 Purposes of the Company. The purpose of the Company shall be to engage in such other lawful acts or activities for which limited liability companies may be formed under the LLC Act.

1.4 Duration of the Company. The Company shall commence on the date on which its Articles of Organization were filed with the _____ [state] Secretary of State's Office, and shall continue thereafter until terminated and dissolved in accordance with the terms of this Agreement.

**ARTICLE 2
MEMBERS, CAPITAL CONTRIBUTIONS, CAPITAL ACCOUNTS**

2.1 Members. The names and addresses of the Members are set forth on the signature pages attached hereto.

2.2 Membership Units; Initial Capital Contributions. Each Member's undivided interest in the capital of the Company

shall be represented by membership units ("Membership Units"). Each Membership Unit shall represent an interest in the capital of the Company and shall be identical in all respects with every other Membership Unit. The Membership Units shall be certificated. Each Member shall own the number of Membership Units set forth on Exhibit A. A Member shall not have the right to demand or receive the return of his capital contribution except as otherwise expressly provided herein.

2.3 Voting of Members. On any matter presented to the Members for their vote, each Member shall have one (1) vote for each Membership Unit.

2.4 Capital Accounts. An individual capital account shall be established and maintained for each Member and has been or shall be credited with the amount of each Member's initial capital contribution to the Company. Each Member's capital account shall be determined and maintained throughout the term of the Company in accordance with the requirements of *Section 704(b) of the Internal Revenue Code of 1986* (the "Code") or its counterpart in any subsequently enacted Internal Revenue Code, the applicable Treasury Regulations (the "Regulations") thereunder and the provisions of the Bylaws of the Company.

2.5 Capital Calls. The Members recognize that the income produced by the Company may be insufficient to pay the cost of operating the Company. The term "cost of operating the Company" shall include, without limiting the generality of said term, all real estate taxes and assessments and other state and governmental charges, insurance premiums, costs of repair and maintenance, and the principal and interest payments required to be made on any loans or mortgages of the Company. If, in the opinion of the Board of Managers, additional funds are required to pay the cost of operating the Company, such additional funds shall be contributed by the Members in proportion to their ownership of Membership Units in the Company.

2.6 Defaulting Members. If any Member is unwilling or unable to make, within thirty (30) days, any or all of his proportionate contribution upon a capital call, then the other Members shall each have the right to make up such deficit amount in any proportion that they decide. If the other Members, or any one of them, make a contribution pursuant to the foregoing, such Members shall have the option to treat the contribution as additional capital of the Company, or to treat the contribution as a loan to the defaulting Member. Such election shall be made, in writing, at the time the contribution is made.

2.6.1 If the contributing Members elect to treat their contribution as additional capital, after such contributions are made, each Member's percentage capital interest in the Company (and their respective interests in the net profits, net losses and cash flow) shall be adjusted and determined by dividing the total amount of capital contributed to the Company by such Members since the Company's inception by the total amount of capital contributed to the Company since its inception by all Members. The resulting quotient, with respect to each Member, shall be the adjusted percentage interest of such Member in the capital of the Company (and in the net profits, net losses and cash flow). In accordance with such increased capital interest, the Company shall issue to the contributing Members such additional Membership Units as are necessary to properly reflect their increased capital interest in the Company.

2.6.2 If the contributing Members elect to treat their contributions as a loan to the defaulting Member, then no adjustment shall be made to the percentage capital interest of the contributing Members because of such loan and each Member's share in the profits and losses and cash flow of the Company shall remain the same. The defaulting Member's capital account shall be increased in the same amount as would occur if the defaulting Member had made the additional capital contribution in the amount of the loan. In addition, the defaulting Member's share in the net profits, net losses and cash flow of the Company shall be adjusted, if necessary, as if he or she had made a contribution to the capital of the Company in the amount of such loan. The amount advanced by the Members on behalf of the defaulting Member shall be a debt of the defaulting Member to the contributing Members and shall bear interest at the prime rate or base lending rate of _____ [bank] of _____, [city] _____, [state] or its corporate successor, then in effect. Thereafter, all distributions of cash from the Company due to the defaulting Member

shall be paid to the Members who elected to treat their contribution as loan until such time as the principal and interest of the loan is paid in full.

ARTICLE 3
ALLOCATIONS OF PROFITS AND LOSSES,
CASH FLOW AND DISTRIBUTIONS

3.1 Profits and Losses. The Company's "net profits" and "net losses," computed in accordance with the provisions of the Bylaws of the Company. Except as provided in such Bylaws, the net profits and net losses of the Company shall be allocated among, or borne by, the Members in proportion to the Membership Units owned by each of them.

3.2 Cash Flow. The cash flow of the Company shall be the net profits and losses of the Company, computed as provided in the Bylaws of the Company, plus depreciation and other noncash charges deducted in determining such profits and losses, minus principal payments on all mortgages, and any other cash expenditures which have not been deducted in determining the net profits and losses of the Company, and minus the amount reasonably determined by the Board of Managers to be necessary to maintain for the Company sufficient working capital and a reasonable reserve for repairs, replacements and/or capital improvements. The cash flow of the Company shall be determined separately for each fiscal year and not cumulatively.

3.3 Distribution or Retention of Cash Flow. Cash flow, as determined in accordance with Subparagraph 3.2, shall be distributed to the Members in proportion to the number of Membership Units held by each Member, which distributions shall be made at such time or times as may be determined by the Board of Managers.

ARTICLE 4
MANAGEMENT

4.1 Board of Managers. The business and the affairs of the Company shall be exclusively managed by a Board of Managers consisting of four (4) Members. The Board of Managers shall be elected by the Members in accordance with the By-laws attached hereto as Exhibit B. A Manager need not be a resident of the State of _____ [state] . Notwithstanding the foregoing to the contrary, a sale or lease of a substantial portion of the Company's assets shall require the affirmative vote of the Members holding at least sixty percent (60%) of the outstanding Membership Units.

4.2 Liability of a Manager. A Manager shall not have any liability to the Company or to any Member for any mistakes or errors in judgment, or for any act or omission believed in good faith to be within the scope of authority conferred by this Agreement. A Manager shall be liable only for acts and/or omissions involving intentional wrongdoing. Actions or omissions taken in reliance upon the advice of legal counsel that they are within the scope of a Manager's authority hereunder shall be conclusive evidence of good faith; provided, however, a Manager shall not be required to procure such advice to be entitled to the benefit of this subparagraph.

4.3 Books and Records. The Board of Managers shall maintain or cause to be maintained complete and accurate records of all properties owned or leased by the Company and complete and accurate books of account (containing such information as shall be necessary to record allocations and distributions), and make such records and books of account available for inspection by any Member, or his duly authorized representative during regular business hours and at the principal office of the Company. Within sixty (60) days after the end of each calendar year, there shall be prepared and distributed to all Members reasonable tax-reporting information, in sufficient detail to enable such Member to prepare his federal, state and local income tax returns. In addition, within ninety (90) days after the end of each calendar year, there shall be prepared and distributed to each Member, a balance sheet, and a report of the receipts, disbursements, net profits and losses, and cash flow of the Company, and the share of the net profits and losses and cash flow of each Member for such calendar year. Such balance sheet and report shall be prepared by a certified public accountant in

accordance with the method of accounting used by the Company for tax purposes.

4.4 Taxable Year; Accounting Method. The taxable year of the Company shall be a calendar year, and the first taxable year shall end on December 31 of the year in which the Company is formed. The books and records of the Company shall be maintained on the cash method of accounting.

4.5 Status of Members. Unless authorized by the Managing Members, or expressly set forth herein or in the By-laws, the Members shall have no authority to conduct or control the Company's business and the Members will have no authority to bind the Company in any way.

ARTICLE 5 DISCLOSURES AND REPRESENTATIONS

5.1 Disclosure by Company. In connection with the sale of the Membership Units to the Members hereunder, the Company hereby discloses the following information to the Members:

(a) the Membership Units have not been registered under the federal Securities Act of 1933, as amended (the "Federal Act"), and are being offered and sold by the Company pursuant to a registration exemption contained in Section 3(a)(11) of the Federal Act and/or Securities and Exchange Commission Rule 147, promulgated thereunder.

(b) during the period the Membership Units are being offered and sold by the Company, and for a further period of nine (9) months from the date of the last sale of the Membership Units that are part of the offering that is being so offered and sold by the Company, all resales, pledges, hypothecations, or other transfers of the Membership Units by any person or business organization shall, subject to the further terms of this Agreement, including the provisions of the legend set forth in subparagraph (c) below, be made only to persons or business organizations having a principal residence or principal office, respectively, within the State of _____ [state].

(c) a legend has been, or will be, placed on each certificate or other document evidencing any of the Membership Units in substantially the following form:

THESE SECURITIES HAVE NOT BEEN REGISTERED UNDER THE SECURITIES ACT OF 1933, AS AMENDED, AND, FOR A PERIOD OF AT LEAST NINE (9) MONTHS FROM THE DATE OF THE LAST SALE BY THE COMPANY OF THE SECURITIES IN THE OFFERING OF WHICH THESE SECURITIES ARE A PART, ALL REALES, PLEDGES, HYPOTHECATIONS, OR OTHER TRANSFERS OF THESE SECURITIES BY ANY PERSON OR BUSINESS ORGANIZATION SHALL BE MADE ONLY TO PERSONS OR BUSINESS ORGANIZATIONS WHO ARE RESIDENT WITHIN THE STATE OF _____ [state].

(d) Stop transfer instructions to the appropriate officers of the Company have been, or will be, placed in the Company's records with respect to the Membership Units so as to restrict the resale, pledge, hypothecation, or other transfer thereof, subject to the further terms of this Agreement, including the provisions of the legend set forth in subparagraph (c), above, during the nine-month period described in subparagraph (b), above.

(e) Prior to the expiration of the nine-month period described in subparagraph (b), above, the legend and stop transfer instructions described in subparagraphs (c) and (d), above, will be placed on any new certificate(s) or other document(s) issued by the Company upon presentment by a Member to the Company of any certificate(s) or other document(s) for transfer of any of any of the Membership Units to a person or business organization having a principal residence or principal office, respectively, within the State of _____ [state].

(f) The Membership Units have not been registered under the _____ [state] Securities Act, set forth in Chapter _____ of the _____ [state] Revised Code, as amended (the

"_____ [state] Act"), and are being offered and sold by the Company pursuant to a registration exemption contained in Section _____ of the _____ [state] Act.

(g) The Company reasonably believes that the Members are acquiring the Membership Units hereunder for investment, has no information to the contrary, and through subparagraph 5.2, below, is hereby obtaining a signed statement to that effect from the Members prior to the purchase of any of the Membership Units hereunder.

5.2 Representations and Warranties of the Members. In connection with the Members' purchase of the Membership Units hereunder, each of the Members represents and warrants, which representations and warranties shall survive the consummation of the Member's purchase of his or its interest hereunder, as follows:

(a) The Member's principal residence is located within the State of _____ [state].

(b) The Member is aware that no market may exist for the resale of a Membership Unit purchased under this Agreement.

(c) The Member is purchasing for investment and not for the distribution of any of the Membership Units purchased under this Agreement.

(d) The Member is aware of any and all restrictions imposed by the Company on the further distribution of the Membership Units, including, but not limited to, any restrictive legends appearing on the certificate(s) and/or other document(s) evidencing any of the Units, required holding periods, stop transfer orders, or buy-back rights of the Company.

ARTICLE 6

ASSIGNMENT, TRANSFER OR SALE OF MEMBERSHIP UNITS

6.1 Assignment. The Membership Units of a Member may be assigned, transferred or sold only as provided in this Article 6. With respect to any such permitted assignment, transfer or sale, the assignee, transferee or purchaser of a Membership Unit may, upon compliance with the conditions set forth in subparagraph 6.7 below, become a substituted Member.

6.2 Transfer. A Member may pledge his or her Units(s) as security for a debt owing to _____ [name] resulting from a loan from _____ [name] to such Member to enable the Member to make his or her capital contribution(s) to the Company. Other than this permitted pledge, no Member shall pledge, cause a lien to be placed against, or encumber his or her Units, or transfer, sell, alienate, sign, or otherwise dispose of all or any part of his or her Units, whether voluntarily, involuntarily, by operation of law, at judicial sale, or otherwise, without the prior written consent of a majority of the Board of Managers.

However, a Member may freely transfer his or her Units, in whole or in part, to or for the benefit of (i) the Member or his or her spouse; and/or (ii) one or more of the Member's lineal descendants.

6.3 Securities Compliance. Notwithstanding the preceding provisions of this Paragraph 6., no proposed or intended assignment, transfer or sale of a Unit shall be effective, unless and until it appears, to the satisfaction of a majority of the Board of Members, that such assignment, transfer or sale will not be in violation of, or otherwise render the Company and/or the Manager liable under, the Securities Act of 1933, as amended, and the rules and regulations promulgated thereunder, or under the applicable state securities laws of any state or states.

6.4 No Termination. Notwithstanding the preceding provisions of this Paragraph 6., no sale or exchange of a Unit may be made if the Unit sought to be sold or exchanged, when added to the total of all Unit(s) sold or exchanged within the

period of twelve (12) months prior thereto, would result in the termination of the Company under Section 708 of the Code, or any successor section thereto.

6.5 Distributions. Subsequent to the permitted assignment, transfer or sale of a Unit, the Company shall remit directly to the assignee, transferee or purchaser all distributions to which such person may be entitled pursuant to the provisions of this Agreement. An assignee, transferor or purchaser who does not become a substituted Member pursuant to the provisions of subparagraph 6.7 below shall be entitled to receive only the distributions to which his or her assignor, transferor or seller would otherwise have been entitled with respect to the Units assigned, transferred or sold, but such assignee, transferee or purchaser shall have no right to vote, to approve amendments hereof, to obtain information concerning Company transactions, to inspect the Company books, or to exercise any other rights of member conferred hereunder or under applicable law.

6.6 Substitute Member. A Member who has assigned, transferred or sold all of his or her Units as permitted in subparagraph 6.2 above shall have no further right or interest in the Company.

6.7 Substitution of a Member. The transferee of a deceased, bankrupt or incompetent Member's Units shall become a substituted Member only upon: (a) the written consent of a majority of the Board of Managers; (b) the transferee's execution and acknowledgment of such instruments, in form and substance reasonably satisfactory to a majority of the Board of Managers; and (c) the transferee's payment of any expenses arising in connection with the substituted Member's admission to the Company. Notwithstanding the foregoing sentence, a transferee under subparagraph 6.2, above, shall automatically become a substituted Member.

6.8 Obligations and Rights of Transferees. Any person who acquires in any manner whatsoever any Unit in the Company, irrespective of whether such person has accepted and assumed in writing the terms and provision of this Agreement, shall be deemed by the acceptance of the benefit of the acquisition thereof to have agreed to be subject to, and to be bound by, all the obligations of this Agreement with the same force and effect as any predecessor in interest of such person.

6.9 Sale Upon Termination of Employment. Upon the termination of employment by a member from _____ [company] (the "Employer") for any reason whatsoever (including resignation, retirement, resignation, being fired, death, disability or any other type of voluntary or involuntary termination) of any Member (a "Triggering Event") the affected Member or the deceased Member's estate, shall sell the Membership Units presently owned by the affected Member under the mandatory purchase provisions of subparagraph 6.9.1. This subparagraph 6.9 shall not apply to the units owned by _____ [name] and/or his wife, _____ [name] .

6.9.1 Mandatory Purchase. In the event of a Triggering Event, the Company shall purchase all the Membership Units presently owned by the affected Member. The price to be paid for the purchase of the Units shall be the price provided in subparagraph 6.9.5 hereinbelow.

6.9.2 Transfer of Units. Any and all units purchased by the Company under subparagraphs 6.9 and 6.9.1 above shall be made within sixty (60) days after a Triggering Event. However, if the Triggering Event is the death of a Member, the Units shall be purchased sixty (60) days after the appointment of a legal representative for the deceased Member's estate. If a determination of fair market value is required under subparagraph 6.9.5 then the units shall be purchased sixty (60) days after the delivery of such determination to the affected parties.

Within such periods of time, the respective seller shall endorse and deliver to the purchaser (the Company and/or the remaining Members, as the case may be) the membership certificate or certificates representing the Units to be purchased and sold under this Agreement, and the purchase price shall be paid in accordance with subparagraph 6.9.3 hereinbelow.

6.9.3 Manner of Payment. Concurrently with the delivery of the membership certificate or certificates to the Company, the purchaser of such Units shall pay to each such Seller twenty percent (20%) of the Seller's purchase price. In the event that the Triggering Event is the death of a Member, the Company shall pay to each such Seller the greater of (i) twenty percent (20%) of the purchase price; or (ii) such Seller's pro rata portion of the insurance proceeds (if any) payable as a result of such Member's death.

The balance of said purchase price shall be paid in forty-eight (48) equal, monthly payments commencing one (1) month from the date of such sale, together with interest at the lowest rate required, under *Section 483 of the Internal Revenue Code of 1986*, or its counterpart under any subsequently enacted Internal Revenue Code, in order to avoid the creation of "total unstated interest," within the meaning of such Section.

Upon default of any payment of principal or interest required to be made pursuant to this Subparagraph, which default is not cured within thirty (30) days after notice of default is given by the Seller, or his successor or successors in interest, to the purchaser, the entire unpaid balance owing to any and all persons by the purchaser on account of the aforesaid purchase of Units shall become due and payable on the expiration of such thirty (30) day period.

6.9.4 Prepayment. The purchaser shall have the right to prepay, in whole or in part, the balance owing by it as set forth in subparagraph 6.9.3 hereinabove; provided, however, that if the Company shall make a prepayment at a time when such Company owes an amount pursuant to this Agreement to two (2) or more persons, such prepayment shall be made to all such persons in the proportion which the balance owing to each person bears to the aggregate balance owing hereunder pursuant to this Agreement; provided further that any such prepayment shall be applied to the installments due under subparagraph 6.9.3 hereinabove in reverse chronological order of their due dates.

6.9.5 Purchase Price. If the Triggering Event (other than death) occurs during the first five (5) years of the Company's existence, the purchase price to be paid to the selling Member shall be such Member's initial contribution plus such Member's initial Contribution multiplied by five percent (5%).

If the Triggering Event is on account of the death of a Member at any time, or it occurs any time after the first five (5) years of the Company's existence, the purchase price paid to the selling Member shall be the fair market value thereof, as of the close of business on the date of the Triggering Event. The fair market value of each Unit shall be determined by substituting the fair market value as of such date, in place of the book value, of all assets owned by the Company, subtracting from the total assets, as redetermined, all liabilities of the Company as of such date, and dividing the resulting figure (representing the net fair market value of all Units of the Company) by the total number of Membership Units. To the extent possible, the determination of the fair market value of the Membership Units shall be made by the certified public accountant who is then servicing the Company.

In making the adjustment for the fair market value of any asset without a readily ascertainable value, and the fair market value of which is not agreed upon by the Company and selling Member, the Company shall rely on and use the written appraisal of a qualified appraiser of such asset, selected by the Company for that purpose at the expense of the Company. All such determinations of fair market value shall be made within ninety (90) days after the Triggering Event.

ARTICLE 7

WITHDRAWAL; DISSOLUTION

7.1 Withdrawal. A Member shall not be permitted to withdraw or resign from the Company. The death, incompetency, adjudication of bankruptcy, whether voluntary or involuntary, or the bankruptcy or dissolution of a Member during the term of this Agreement, shall not effect the Company or its business. The executor, administrator, trustee or other legal representative of the deceased, bankrupt, incompetent or dissolved Member shall succeed to all of the rights of such

Member, subject to the provisions of this Agreement or any other Agreement between the parties.

7.2 Termination of the Company. The Company shall be terminated and dissolved upon the first to occur of the following:

- (a) upon the affirmative vote of at least fifty-one percent (51%) of the Membership Units; or
- (b) upon the sale of all or substantially all the assets of the Company.

ARTICLE 8 WINDING UP

8.1 Winding Up. Upon the termination of the Company pursuant to subparagraph 7.2 above, a full and general accounting shall be taken of the Company's business, and the affairs of the Company shall be wound up. Any profits earned or losses incurred since the last previous accounting shall be allocated among, or borne by, the Members in accordance with the provisions of subparagraph 3.1 above. The Board of Managers shall wind up and liquidate the Company by selling the Company's assets, or by distributing such assets in kind, subject to the Company's liabilities, or by a combination thereof, as determined by the Board of Managers. The proceeds of such liquidation shall be applied and distributed in the following order of priority, by the end of the taxable year during which the liquidation occurs (or, if later, within ninety (90) days after the date of the liquidation):

- (a) to the payment of any debts and liabilities of the Company;
- (b) to the setting up of any reserve which the Board of Managers shall reasonably deem necessary to provide for any contingent or unforeseen liabilities or obligations of the Company, with any excess in such reserve remaining after such liabilities are satisfied to be distributed as soon as practicable in the manner hereinafter set forth; and
- (c) thereafter, the balance of the proceeds, if any, shall be distributed in accordance with the positive capital account balances of the Members, as determined after taking into account all capital account adjustments for the Company's taxable year during which such liquidation occurs. For purposes of this subparagraph, a liquidation of the Company shall mean a liquidation as defined in Section 1.704-1(b)(2)(ii)(g) of the Regulations.

8.2 Statement. The Members shall be furnished with a statement prepared by the Company's accountants, which shall set forth the assets and liabilities of the Company as of the date of complete liquidation.

8.3 Return of Capital Contributions. Notwithstanding anything in this Agreement to the contrary, neither the Board of Managers nor any Member shall be personally liable for the return of the capital contributions of the Members, or any portion thereof, it being expressly understood that any such return of the capital contributions of the Members shall be made solely from Company assets.

ARTICLE 9 MISCELLANEOUS

9.1 Adoption of Bylaws. The Members hereby adopt and approve the Bylaws of the Company, a copy of such Bylaws being attached hereto as Exhibit B.

9.2 Endorsement. Upon the execution of this Agreement, the certificate or certificates evidencing the Membership Units in the Company shall be endorsed, as follows:

THE MEMBERSHIP UNITS REPRESENTED BY THIS CERTIFICATE ARE SUBJECT TO THE TERMS AND

CONDITIONS OF AN OPERATING AGREEMENT DATED AS OF _____ [month]
_____, [day]_____, [year] AMONG THE ORIGINAL OWNER OF RECORD AND
THE OTHER MEMBERS OF THE COMPANY. ANY PURCHASER OR TRANSFEREE OF THESE
MEMBERSHIP UNITS IS BOUND BY THE AGREEMENT AND SHALL BE CONSIDERED A PARTY TO THE
AGREEMENT. THE COMPANY WILL MAIL TO THE HOLDER OF THIS CERTIFICATE, WITHOUT CHARGE,
A COPY OF SUCH AGREEMENT WITHIN FIVE (5) DAYS AFTER RECEIVING A WRITTEN REQUEST
THEREFOR.

After endorsement, the certificate or certificates shall be delivered to the Members who shall, subject to the terms of this Agreement, be entitled to exercise all rights of ownership of such Membership Units. The Company agrees that it will cause a similar endorsement to be placed on all certificates hereafter issued by it and which are subject to the provisions of this Agreement.

9.3 Tax Matters Member. _____ [name] shall serve as the Tax Matters Member of the Company, as provided in Regulations issued pursuant to Section 6231 of the Code. Each Member, by the execution of this Agreement, consents to such designation of the Tax Matters Member and agrees to execute, certify, acknowledge, deliver, swear to, file and record at the appropriate public offices such documents as may be necessary or appropriate to evidence such consent. The Company shall indemnify and reimburse the Tax Matters Member for all expenses, including legal and accounting fees, claims, liabilities, losses and damages incurred in connection with any administrative or judicial proceeding with respect to the tax liability of the Members. The payment of all such expenses shall be made before any distributions to Members are made by the Company. The taking of any action and the incurring of any expense by the Tax Matters Member in connection with any such proceeding, except to the extent required by law, is a matter in the sole discretion of the Tax Matters Member.

9.4 Amendments. This Agreement may be amended only with the written approval of members owning two-thirds (2/3) or more of the units in the Company.

9.5 Notices. All notices, consents or other instruments hereunder shall be in writing and mailed by United States mail, postage prepaid, and shall be directed to the parties hereto at the last addresses of the parties furnished by them in writing to the Company, and to the Company at its principal office. The Company and/or any Member shall have the right to designate a new address for receipt of notices by notice addressed to the Members and the Company and mailed as aforesaid. Such notices shall be made a permanent part of the Company records.

9.6 Obligations and Rights of Transferees. Any person who acquires in any manner whatsoever any Membership Unit in the Company, irrespective of whether such person has accepted and assumed in writing the terms and provisions of this Agreement, shall be deemed by the acceptance of the benefit of the acquisition thereof to have agreed to be subject to, and to be bound by, all the obligations of this Agreement with the same force and effect as any predecessor in interest of such person.

9.7 Ownership of Company Property. Title to assets of the Company may be held in the name of a nominee at the discretion of the Board of Managers.

9.8 Benefit and Binding Effect. This Agreement shall inure to the benefit of, and be binding upon, the parties hereto and their respective next of kin, legatees, administrators, executors, legal representatives, nominees, and permitted successors and assigns.

9.9 Integration. This Agreement constitutes the entire agreement among the parties hereto pertaining to the subject matter hereof, and supersedes all prior and contemporaneous agreements and understandings of the parties in connection therewith.

9.10 Governing Law. This Agreement and the rights of all parties hereunder shall be governed by, and construed in accordance with, the laws of the State of _____ [state] .

9.11 Counterparts. This Agreement may be executed in several counterparts, each of which shall be considered an original when executed by one or more of the Members.

IN WITNESS WHEREOF, each party has executed this Operating Agreement on the day and year first written above.

MEMBERS:

[name]

[name]

[name]

EXHIBIT A

Member	No. of Units
_____	_____
_____	_____
_____	_____

Total Outstanding Units	_____

EXHIBIT B

BYLAWS



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Current Legal Forms for Real Estate
Chapter 20 REAL ESTATE ENTITIES
Part IV. Forms
F. REAL ESTATE TRUSTS

24-20 Current Legal Forms for Real Estate FORM 20.39

AUTHOR: by Stephen E. Pigott and Harold O. Maxfield, Jr.

FORM 20.39 Affidavit of Successor Trustee

COMMENT

It may become necessary to provide a third party with some verification as to the identity of a successor trustee. In most circumstances, the Trustee will not want to provide the third party with a copy of the entire trust. The following Affidavit may be used to establish the name of the successor trustee.

FORM

AFFIDAVIT OF TRUSTEE

STATE OF _____ [state])
COUNTY OF _____ [county]) SS:

Re: Disclosure of Successor Trustee
William Smith Trust

I, _____ [name] , being first duly sworn according to law, depose and state that:

1. Affiant is the Trustee of the Trust discussed herein;
2. The name of the prior Trustee that previously served was _____ [name] ;

3. The prior Trustee has ceased to be a Trustee of the Trust by reason of death. A certified copy of the death certificate is attached hereto and incorporated herein as Exhibit A;
4. There are no other Trustees. A copy of an excerpt from the Trust Agreement setting forth the successor trustee is attached hereto as Exhibit B.
5. The description of the property subject to the Trust is attached hereto and incorporated herein as Exhibit C.

FURTHER AFFIANT SAYETH NAUGHT.

[*name*]

SWORN TO BEFORE ME and subscribed in my presence, this _____ [day] day of
_____ [month] , _____ [year] .

[*notary public*]

THIS INSTRUMENT PREPARED BY:



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Current Legal Forms for Real Estate
Chapter 20 REAL ESTATE ENTITIES
Part IV. Forms
F. REAL ESTATE TRUSTS

24-20 Current Legal Forms for Real Estate FORM 20.40

AUTHOR: by Stephen E. Pigott and Harold O. Maxfield, Jr.

FORM 20.40 Simple Trust Agreement for Holding Real Estate

COMMENT

Real estate is owned and operated by a trust for many reasons. Most of the same reasons that a person may place other assets in trust are applicable to the ownership of real estate. Some of the more common reasons are creditor protection, estate planning and probate avoidance, and the desire to keep the entity of the legal owner hidden. The transfer of a property to a trust has numerous income and gift tax implications. These issues are more fully addressed in other chapters of Current Legal Forms with Tax Analysis. See Chapters 7A, 7B, 8 and 9 of Volume 11 for estate planning discussions and forms, and Chapter 2 in Volume 2 for basic trusts.

Generally speaking, there are two types of personal trusts. They are revocable (i.e., the grantor has the right to terminate or change the trust), or irrevocable (i.e., the grantor does not have the right to terminate or change trust).

The following form is the most basic form of trust. This form can be used when the owner and the trustee have a trusting relationship and the owner does not want his or her identity to be disclosed as the beneficial owner of the property.

FORM

William Smith, Trustee

[address]

Re: [Property described on Exhibit]

Dear Mr. Smith:

This letter describes the agreement with respect to the above-referenced property (the "Property"). As you know, Atlas Land Corporation has entered into a purchase agreement to purchase the Property. The undersigned is the nominee of Atlas Land Corporation. However, at this time the undersigned prefers not to hold legal title to the Property. As a result, you agree to hold the property in trust for the undersigned, pursuant to the terms and conditions of this letter. This letter constitutes the trust agreement and the Property will constitute the only asset in the Trust.

A. Title to the Property will be transferred to you by the sellers under the purchase agreement as follows "William Smith, Trustee."

B. The undersigned will be the beneficial owner of the Property and beneficiary of the Trust. You as Trustee will be the legal owner of the Property.

C. Upon receipt of written notice from the undersigned, you will convey legal title of the Property to the undersigned by General Warranty Deed.

D. The undersigned will be responsible for all costs and expenses relative to the Property, including, without limitation, all costs associated with the purchase or finance of the Property, real estate taxes and assessments, insurance and maintenance. You will have no obligation with respect to the Property, except for the obligation to reconvey the Property to the undersigned.

E. The undersigned agrees to indemnify, defend and hold you harmless from any and all claims, costs, damages, expenses or fees (including reasonable attorney's fees) that you may incur or become subject to as a result of your acting as Trustee hereunder.

F. This Agreement shall inure to the benefit of and is binding upon our respective legal representatives, successors and assigns. For purposes of the Trust, in the event that after the date hereof, you are unable or unwilling to act as Trustee, the undersigned shall appoint the successor Trustee.

Please sign and date the enclosed copy of this letter acknowledging the Trust as set forth herein and return a fully executed copy to us.

[name]

By: _____

[name and title]

Acknowledged and Agreed this _____ [day] day of _____ [month] ,
_____ [year] .

[Trustee]



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Current Legal Forms for Real Estate
Chapter 20 REAL ESTATE ENTITIES
Part IV. Forms
F. REAL ESTATE TRUSTS

24-20 Current Legal Forms for Real Estate FORM 20.41

AUTHOR: by Stephen E. Pigott and Harold O. Maxfield, Jr.

FORM 20.41 Qualified Personal Residence Trust

COMMENT

A Qualified Personal Residence Trust is essentially used as an estate planning tool. It provides for the transfer of the full value of a residence to the trust, and the grantor will only be required to pay gift taxes for the cost value of the remainder interest. The appreciation, if any, after the transfer to the Trust, inures to the benefit of the remainder beneficiary if the residence is not sold during the grantor's lifetime and the proceeds of the sale are converted to the grantor retain annuity trust (GRAT). For a complete discussion of Qualified Personal Residence Trusts see Chapter 9, in Volume 11, § 9.23[1].

FORM

TRUST AGREEMENT

(The William Smith Qualified Personal Residence Trust)

I, WILLIAM SMITH, sometimes hereinafter referred to in the first person, do hereby declare that on this _____ [day] day of _____ [month] , _____ [year] , I desire to create a trust that is described in *Section 2702(a)(3)(A)(ii) of the Internal Revenue Code of 1986* (the "Code") and that meets the requirements of a qualified personal residence trust ("QPRT") as defined in *Section 25.2702-5(c) of the Treasury Regulations* under the Code (the "Regulations" or "Treas. Regs."); and

WHEREAS, the Trustee is willing to accept the trust hereby created and covenant to faithfully discharge the duties of a trustee hereunder;

NOW, THEREFORE, I intend to transfer property to the Trustee IN TRUST, and the Trustee agrees to accept the property and to hold, manage and distribute the property under the terms of this Trust Agreement.

SECTION 1. NAME OF TRUST

This Trust Agreement and the trust hereunder may be referred to as "The William Smith Qualified Personal Residence Trust."

SECTION 2. INITIAL TERM

The "Initial Term" shall begin on the first day property is transferred to the Trustee and shall expire upon the first to occur of (i) the sixth anniversary of that date, or (ii) my death.

SECTION 3. PERMITTED ASSETS

During the Initial Term, the Trustee shall hold only assets permitted by *Treas. Regs. Section 25.2702-5(c)* and, therefore, shall not hold any asset in the trust other than:

A. One Residence. One residence (or an undivided fractional interest in one residence), which shall be used or held for use as a personal residence of mine ("the Residence"). The Residence shall comprise only real property or a type of personal property (such as a cooperative apartment) that can meet the definition of a residence under the Regulations, and during the Initial Term no tangible personal property shall be held in the trust. Whether the Residence is used or held for use as a personal residence of mine at any time shall be determined under the applicable provisions of the Regulations, including relevant examples. I direct the Trustee to follow the requirements of the Regulations in administering the trust during the Initial Term so that the Residence shall at all times be used or held for use as a personal residence of mine. No person shall be permitted to occupy the Residence and the Residence shall not be put to any use except as permitted by *Treas. Regs. Section 25.2702-5(c)* for a residence used or held for use as a personal residence of mine. A residence used or held for use as a personal residence of mine is hereinafter referred to as a "personal residence."

B. Additions of Cash. Additions of cash (which shall be held in a separate account), but only in an amount which, when added to the cash already held in the account for such purposes, does not exceed the amount required:

- (1) for payment of trust expenses (including mortgage payments) already incurred or reasonably expected to be paid by the trust within six (6) months from the date the addition is made;
- (2) for improvements to the Residence to be paid by the trust within six (6) months from the date the addition is made;
- (3) for purchase by the trust of the initial residence, within three (3) months of the date the trust is created, provided that no addition may be made for this purpose, and the trust may not hold any such addition, unless the Trustee has previously entered into a contract to purchase that residence; and
- (4) for purchase by the trust of a personal residence to replace the Residence, within three (3) months of the date the addition is made, provided that no addition may be made for this purpose, and the trust may not hold any such addition, unless the Trustee has previously entered into a contract to purchase the replacement residence.

The Trustee shall determine, at least quarter-annually, the amounts held by the trust for payment of expenses in excess

of the amounts permitted by the terms of this Paragraph B The Trustee shall distribute any such excess amounts to me immediately after such determination.

C. Improvements. Improvements to the Residence, provided that the Residence as improved meets the requirements of a personal residence.

D. Proceeds of Sale. Proceeds from the sale of the Residence, which shall be held in a separate account. However, the trust shall cease to be a qualified personal residence trust as to such proceeds on the date described in Section 6.

E. Insurance Policies. Policies of insurance on the Residence.

F. Insurance Proceeds. The proceeds of insurance (which shall be held in a separate account) payable to the trust as a result of damage to, or destruction of, the Residence. However, the trust shall cease to be a qualified personal residence trust as to such proceeds on the date described below in Section 6. Amounts received as a result of the involuntary conversion (within the meaning of Section 1033 of the Code) of the Residence shall be treated as proceeds of insurance held under this Paragraph F.

G. Annuity Interest. A qualified annuity interest into which assets have been converted under circumstances described in Section 6.

SECTION 4. DISTRIBUTIONS DURING INITIAL TERM

The Trustee shall make distributions during the Initial Term as follows:

A. Net Income. The Trustee shall distribute all the net income of the trust to me, at least annually.

B. Cash. The Trustee shall distribute cash to me or to my estate to the extent required by Section 3.

C. Assets When Trust Not a QPRT. The Trustee shall distribute any assets as to which the trust has ceased to be a qualified personal residence trust in the manner required by Section 6 and, thereafter, the terms of this Section 4 shall cease to apply to such property, which shall be disposed of under the terms of Section 6.

D. No Other Distributions. The Trustee shall not distribute any trust property to any beneficiary other than me prior to the expiration of the Initial Term, but this shall not be construed to prevent the payment of expenses properly chargeable to the Trust.

SECTION 5. COMMUTATION PROHIBITED

My interest in the trust during the Initial Term shall not be commuted.

SECTION 6. CESSATION OF QUALIFIED STATUS

The trust shall cease to be a qualified personal residence trust (wholly or with respect to particular assets) upon the occurrence of any of the following:

A. Change in Use. If the Residence ceases to be used or held for use as a personal residence of mine, the entire trust thereupon shall cease to be a qualified personal residence trust, unless the cause is a sale of the Residence or damage or destruction that renders the Residence unusable as a personal residence.

B. Sale. If the Residence is sold, the trust shall cease to be a qualified personal residence trust with respect to all

proceeds of sale upon the first to occur of (i) the date that is two (2) years after the date of sale, (ii) the date of expiration of the Initial Term, or (iii) the date on which a new personal residence is acquired by the trust.

C. Damage. If damage or destruction renders the Residence unusable as a personal residence, the trust shall cease to be a qualified personal residence trust upon the first to occur of (i) the date that is two (2) years after the date of damage or destruction, or (ii) the date of expiration of the Initial Term, unless, prior to such date, (a) replacement of, or repairs to, the Residence is or are completed, or (b) a new residence is acquired by the trust.

D. Insurance Proceeds. If the trust receives proceeds of insurance (or involuntary conversion proceeds treated as proceeds of insurance) as a result of damage to, or destruction or involuntary conversion of, the Residence, the trust shall cease to be a qualified personal residence trust with respect to all such proceeds upon the first to occur of (i) the date that is two (2) years after the date of damage, destruction, or involuntary conversion, (ii) the date of the expiration of the Initial Term, or (iii) the date on which replacement of, or repairs to, the Residence is or are completed or a new personal residence is acquired by the trust.

E. Conversion to Grantor Retained Annuity Trust ("GRAT"). Within thirty (30) days after the date on which the trust has ceased to be a qualified personal residence trust or has ceased to be a qualified personal residence trust with respect to particular assets, the trust property (or such assets) shall be converted to a qualified annuity interest meeting the requirements of *Treas. Regs. Section 25.2702-5(c)(8)(ii)* and shall be held in a separate share of the trust. The separate share shall be disposed of under the terms of Section 7. With respect to the annuity payable from such share, "cessation date" means the date of the sale of the Residence, or the date of damage to, or destruction of, the Residence, or the date on which the Residence ceases to be used, or held for use, as a personal residence, as the case may be. "Conversion date" means the date that the assets comprised in such share are converted to a qualified annuity interest pursuant to the terms of this Paragraph E.

SECTION 7. PAYMENT OF ANNUITY AMOUNT

A. Pay Annuity. From assets converted to a qualified annuity interest and held in a separate share pursuant to this Section 7, the Trustee shall pay to me the annuity amount defined in Paragraph B, below for the period from the cessation date for such assets to the expiration of the Initial Term. My right to receive the annuity amount shall begin on the cessation date for such assets, but the Trustee may defer payment of any annuity amount otherwise payable until the date that is thirty (30) days after the conversion date for such assets, provided that any such deferred payment shall bear interest from the cessation date at a rate not less than the rate in effect under Section 7520 of the Code on the cessation date. The Trustee may reduce the aggregate deferred annuity payments to me by the amount of income actually distributed to me during the deferral period. Subject to these deferral provisions, the annuity amount shall be paid in each taxable year of the trust.

B. Determining Annuity. The annuity amount shall be determined as follows. If, on the conversion date, the assets of the trust do not include a personal residence, the annuity amount shall be the amount determined by dividing the lesser of (i) the value of all interests retained by me (as of the date of the original transfer or transfers), or (ii) the value of all the trust assets as of the conversion date, by an annuity factor determined for the original Initial Term at the rate used in valuing my retained interest at the time of the original transfer. If, on the conversion date, the assets of the trust include a personal residence, the annuity amount shall be the amount determined under the preceding sentence multiplied by a fraction. The numerator of the fraction shall be the excess of the fair market value of the trust assets on the conversion date over the fair market value of the assets as to which the trust continues as a qualified personal residence trust, and the denominator of the fraction shall be the fair market value of the trust assets on the conversion date. The Trustee shall follow the principles of Example 6 of *Treas. Regs. Section 25.2702-5(d)* to the extent relevant in applying the provisions of this Paragraph B.

C. Paying Annuity Amount. The annuity amount shall be paid quarter-annually from income and, to the extent income

is not sufficient, from principal. Final payment for a taxable year may be deferred if necessary for administrative reasons, but shall always be made no later than the due date (before extensions) of the trust's federal income tax return for that year.

D. Income. Any income of the separate share for a taxable year not otherwise disposed of pursuant to the terms of this Trust Agreement shall be paid to me at least annually.

E. Incorrect Valuation. If the net value determining the annuity amount is incorrectly determined, then within a reasonable period after the value is finally determined for federal tax purposes, the Trustee shall pay to me (in the case of an undervaluation) or receive from me (in the case of an overvaluation) an amount equal to the difference between the annuity amounts properly payable and the annuity amounts actually paid.

F. No Payments to Others. No payment of the annuity amount shall be made to any person other than me. My interest in the annuity amount shall not be commuted.

G. Income Taxes. For each taxable year of the trust, the Trustee (excluding, however, any Interested Trustee, as hereinafter defined) may, but shall not be required to, reimburse me out of income or principal of the separate share for my income tax (federal, state, local, or foreign) on the amount (if any) by which the gross income of the separate share that is reportable directly on my return under Code Section 671, reduced by the deductions of the separate share also reportable, exceeds the annuity amount for that year.

H. Proration. In determining the annuity amount, the Trustee shall prorate the same on a daily basis for a short taxable year and for the taxable year of the expiration of the Initial Term and for the taxable year in which the cessation date occurs if the cessation date does not occur on the first day of the taxable year.

I. Additions. No additional contributions shall be made to a separate share pursuant to this Section 7 after the conversion of the assets initially comprising the share. If the trust ceases to be a qualified personal residence trust as to different assets at different times, there may be more than one separate share under this Section 7.

J. No Payment with Notes, Etc. The Trustee may in no event issue a note, other debt instrument, option or other similar financial arrangement in satisfaction of the annuity payment obligation under this Section 7.

SECTION 8. TAXABLE YEAR

The taxable year of the trust shall be the calendar year.

SECTION 9. DISTRIBUTION UPON EXPIRATION OF INITIAL TERM

Upon the expiration of the Initial Term, the Trustee shall distribute the trust property as follows:

A. Expiration at Death. If the Initial Term expires upon my death, the Trustee shall first distribute the trust property to such person or persons as I may appoint by a Will specifically referring to this power, or in default of appointment, or insofar as it is not effective, to my estate to be disposed of as part thereof.

B. Expiration of Term. If I am living upon the expiration of the Initial Term, the Trustee shall distribute the trust property to my children then living, in equal shares, or if no children of mine are then living, to my descendants then living, per stirpes.

SECTION 10. DEFAULT REMAINDER BENEFICIARY

The Trustee shall distribute any property that is not otherwise disposed of under this Trust Agreement to the persons and in the proportions that my personal estate would be distributed if I died at the same time as the expiration of the interest of the last beneficiary of the property hereunder, without a will, unmarried, a resident of _____ [state] , owning only that property, under the law then in effect.

SECTION 11. TRUSTEE

A. Trustee Appointments. A trustee who is a party to this Trust Agreement shall serve as trustee of each trust under this Trust Agreement, except where any provision of this Section 11 or some other provision of this Trust Agreement specifically provides otherwise. I appoint myself, WILLIAM SMITH, as the initial Trustee hereunder. If, at any time, I am unable to serve as Trustee, I appoint as successor Trustee under this instrument, and as substitute or successor Trustee, as the case may be, to fill any vacancy thereafter occurring in such office, the first in the order named who is able and willing to serve of the following:

My wife, _____ [name];

My daughter, _____ [name];

My son, _____ [name];

My daughter, _____ [name].

Except as otherwise expressly indicated, each successor Trustee shall have all the powers and immunities herein given to me as original Trustee.

B. Trustee Must Not Disqualify Trust. The Trustee is prohibited from exercising any power or discretion granted by law or by this Trust Agreement that would be inconsistent with the qualification of the Residence as a personal residence during the Initial Term or the qualification of the trust as a qualified personal residence trust within the meaning of *Treas. Regs. Section 25.2702-5(c)*. In particular, the Trustee is prohibited from selling or otherwise transferring the Residence, directly or indirectly, to me or my husband, or to any entity controlled by me or my husband during the Initial Term, or at any time after the Initial Term if the trust holding the Residence is then a grantor trust deemed owned by me or my husband for federal income tax purposes, provided that such a sale or transfer may be made if and when it becomes permissible under the Regulations.

C. Governing Law and Trustee Powers. The interpretation and operation of the trust shall be governed by the laws of the State of _____ [state]. The Trustee may, without prior authority from any court, exercise all powers conferred by this Trust Agreement or by law, including without limitation any fiduciary powers act or other statute of the State of _____ [state] or any other jurisdiction whose law applies to the trust. The Trustee shall have absolute discretion in exercising these powers. Except as specifically limited by this Trust Agreement, these powers shall extend to all property held by the Trustee until actual distribution of the property. These powers, however, shall not apply during the Initial Term except to the extent consistent with qualification of the trust as a qualified personal residence trust described in *Treas. Regs. Section 25.2702-5(c)*.

(1) The Trustee may distribute trust property in cash or in kind.

(2) The Trustee may make any election available under the tax laws in such manner as the Trustee shall determine, even though a Trustee may have an interest affected by the election, except where a Trustee is prohibited from participating in the election by another provision of this Trust Agreement.

(3) The Trustee may retain any property originally owned by me, and invest and reinvest in all forms of real and

personal property, whether inside or outside the United States, including without limitation, common trust funds of a corporate Trustee, mutual funds, partnerships (including a partnership in which a Trustee is a partner), and other forms of joint investment (which may be, but need not be, managed by, advised by, or affiliated with, a Trustee), without regard to any principal of law limiting delegation of investment responsibility by the Trustee.

(4) The Trustee may compromise claims or debts and abandon or demolish any property which the Trustee shall determine to be of little or no value.

(5) The Trustee may sell property at public or private sale, for cash or upon credit, exchange property for other property, lease property for any period of time, and give options of any duration for sales, exchanges, or leases.

(6) The Trustee may join in any merger, reorganization, voting-trust plan, or other concerted action of security holders, and delegate discretionary powers (including investment powers) in entering into the arrangement.

(7) The Trustee may borrow from anyone, even if the lender is a Trustee under this Trust Agreement, and may pledge property as security for repayment of the funds borrowed, including the establishment of a margin account. No Trustee shall be personally liable for any such loan, and such loan shall be payable only out of the assets of the trust.

(8) The Trustee may apply to the use of any individual, any property, whether principal or income, that otherwise would or could be distributed directly to such individual.

(9) The Trustee may, with respect to any real property: (i) partition, subdivide, or improve such property, enter into agreements concerning the partition, subdivision, improvement, zoning, or management of any real estate in which the trust has an interest, impose or extinguish restrictions on any such real estate; and (ii) sell, exchange, lease for any period, alter, or otherwise dispose of such property and execute any instrument necessary to do that.

(10) The Trustee may employ a custodian, hold property unregistered or in the name of a nominee (including the nominee of any bank, trust company, brokerage house, or other institution employed as custodian), and pay reasonable compensation to a custodian in addition to any fees otherwise payable to the Trustee, notwithstanding any rule of law otherwise prohibiting such dual compensation.

(11) The Trustee may hold two or more trusts hereunder as a combined fund (allocating ratably to such trusts all receipts from, and expenses of, the combined fund) for convenience in investment and administration, but no combination of trusts for this purpose may alter their status as separate trusts.

(12) The Trustee may employ and rely on advice given by accountants, attorneys, investment bankers, and other expert advisers, and employ agents, clerks, and other employees, and pay reasonable compensation to such advisors or employees in addition to fees otherwise payable to the Trustee, notwithstanding any rule of law otherwise prohibiting such dual compensation.

(13) The Trustee shall have the power to allocate receipts, disbursements and losses to principal or to income, in accordance with generally accepted accounting practices. The provisions of Section _____ through _____ of the _____ [state] Revised Code shall not apply to any receipt or expense received or incurred by the Trustee.

D. Irrevocability and Trustee's Power to Amend.

(1) This trust is irrevocable and I shall have no power to amend any of the trust terms.

(2) The Trustee, however, shall have the fiduciary power, acting alone, to amend the trust in any manner required for

the sole purpose of ensuring that the trust is at all times a qualified personal residence trust described in *Treas. Regs. Section 25-2702-5(c)*. Reference to the Code and Regulations shall be deemed to incorporate changes enacted or promulgated after the date of this Trust Agreement to whatever extent is necessary to ensure such continuing qualification.

E. Various Provisions Regarding Trustee.

(1) "Interested Trustee" means for any trust a Trustee who is (i) me, (ii) a transferor of property to the trust, including a person whose qualified disclaimer resulted in property passing to the trust, or (iii) a person who is or in the future may be eligible to receive income or principal pursuant to the terms of the trust. A Trustee described in item (ii) is an Interested Trustee only with respect to the transferred property (including income and gain on, and reinvestment of, such property). A person is described in (iii) even if the person's only interest is a remote contingent remainder interest, but is not described in (iii) if the person's only interest is as a potential appointee under a nonfiduciary power of appointment held by another person the exercise of which will take effect only in the future, such as a testamentary power held by a living person. A Trustee who is not an Interested Trustee is a "Disinterested Trustee."

(2) Under this Trust Agreement, if two or more separate trusts with the same beneficiaries and same terms are created, either by direction or pursuant to the exercise of discretion, I intend that the separate trusts may have, but need not have, the same investments and may follow, but need not follow, the same pattern of distributions. The Trustee's powers shall be exercisable separately with respect to each trust.

(3) Except to the extent specifically provided otherwise in this Trust Agreement, references to the Trustee shall, in their application to a trust hereunder, refer to all those from time to time acting as Trustees of that trust and if two or more Trustees are eligible to act on a given matter they shall act by a majority. In the exercise of discretion over distributions, if this Trust Agreement provides that certain Trustees may participate in distributions limited by an ascertainable standard, while a different set of Trustees may participate in distributions for any purpose, if the two sets of Trustees (each acting by its own majority) want to distribute the same item of income or principal to different recipients, the distribution desired by the set of Trustees participating in distributions for any purpose shall prevail.

(4) Individual Trustees shall receive reasonable compensation for their services, unless the Trustee waives compensation. A corporate trustee shall be compensated in accordance with its fee schedule as in effect at the time of payment. I authorize a corporate trustee to charge additional fees for services it provides to a trust hereunder that are not comprised within its duties as Trustee, for example a fee charged by a mutual fund it administers in which a trust hereunder invests, or a fee for providing an appraisal, or a fee for providing corporate finance or investment banking services. I also recognize that a corporate trustee may charge separately for some services comprised within its duties as Trustee, for example a separate fee for investing cash balances or preparing tax returns. Such separate or "additional" charges shall not be treated as improper or excessive merely because they are added on to a basic fee in calculating total compensation for service as Trustee.

(5) No Trustee shall be liable to anyone for anything done or not done by any other Trustee or by any beneficiary.

(6) The fact that a Trustee is active in the investment business shall not be deemed a conflict of interest, and purchases and sales of investments may be made through a corporate trustee or through any firm of which a corporate or individual Trustee is a partner, shareholder, proprietor, associate, employee, owner, subsidiary, affiliate or the like, and property of a trust hereunder may be invested in individual securities, mutual funds, partnerships, private placements, or other forms of investment promoted, underwritten, managed, or advised by a Trustee or such a firm.

(7) I authorize the Trustee to employ and rely on advice given by investment counsel, to delegate discretionary investment authority over investments to investment counsel, and to pay investment counsel reasonable compensation in addition to fees otherwise payable to the Trustee, notwithstanding any rule of law otherwise prohibiting such dual

compensation. The Trustee may favor, but need not favor, retention of assets originally owned by me.

(8) The fact that a Trustee (or a firm of which a Trustee is a member or with which a Trustee is otherwise affiliated) renders legal or other professional services to a trust hereunder shall not be deemed a conflict of interest, and I authorize the Trustee to pay fees for such services to such Trustee or firm without prior approval of any court or any beneficiary and whether or not there is a co-trustee to approve such payment.

(9) If I have given the Trustee discretion concerning distributions of income or principal, I intend that discretion to be absolute and uncontrolled, and subject to correction by a court only if the Trustee should act utterly without reason, or in bad faith, or in violation of specific provisions of this Trust Agreement. If I have set forth general guidelines (as opposed to directions or dollar limits) for the Trustee in making distributions, I intend those guidelines to be merely suggestive and not to create an enforceable standard whereby a distribution could be criticized or compelled. It is my strong belief that the Trustee will be in the best position to interpret and carry out the intentions expressed herein under changing circumstances. This subparagraph E.(9) shall not, however, apply to any standards framed in terms of health, education, support (including support in an accustomed manner of living), or maintenance as I intend those words to create an ascertainable standard for federal tax purposes when applied to a Trustee's power or a power held individually, although even in those cases I want the holder of the power to have as much discretion as is consistent with that intent.

(10) Notwithstanding any other provision of this Trust Agreement, each Trustee is prohibited from making, voting on, or otherwise participating in any discretionary distribution of income or principal from a trust that would discharge, or substitute for, a legal obligation of that Trustee, including the obligation to support a beneficiary of the trust. Subject to that, in exercising discretion over distributions, the Trustee may consider, or may disregard, other resources available to any beneficiary.

(11) Unless I have specifically provided otherwise, and subject to any ascertainable standard governing its exercise, the Trustee's discretionary power to distribute income or principal includes the power to distribute all of such income and/or principal to one or more members of a class to the exclusion of others whether or not the terms of the trust specifically mention that possibility.

(12) A Trustee may irrevocably release one or more powers held by the Trustee while retaining other powers.

(13) Any Trustee may delegate to a co-trustee any power held by the delegating Trustee, but only if the co-trustee is authorized to exercise the power delegated. A delegation may be revocable, but while it is in effect the delegating Trustee shall have no responsibility concerning the exercise of the delegated power.

F. Alternate or Successor Trustee.

(1) During the Initial Term, I shall have the right to dismiss any Trustee and to appoint a successor to such dismissed Trustee.

(2) Any Trustee may resign at any time without court approval and whether or not a successor has been appointed.

(3) Each individual Trustee (including successors) shall have the right to appoint a successor individual Trustee by an instrument in writing, such appointment to take effect upon the death, resignation or incapacity of the appointing Trustee. An appointment may be changed or revoked until it takes effect. If I have named an alternate or alternates to the appointing Trustee in this Trust Agreement, the appointment of a successor under this paragraph shall take effect only if and when those alternates fail to qualify or cease to act.

(4) The individuals (and any corporation) acting as the Trustees may at any time acting unanimously by written instrument appoint an individual or corporation with fiduciary powers as a Co-Trustee.

(5) If the office of Trustee of a trust is vacant, and no successor takes office pursuant to any other provision of this Trust Agreement, an individual or corporation with fiduciary powers may be appointed as Trustee by a majority of my adult descendants then living and competent.

(6) The separate trusts hereunder may have different Trustees pursuant to these provisions.

(7) In the event that the sole Trustee of a trust is a beneficiary of the trust, I intend that the Trustee may, but shall not be required to, appoint a co-trustee as provided herein. I do not intend that a beneficiary's interest be merged or converted into a legal life estate or estate for years because the beneficiary is the sole Trustee, but if despite this expression of intent that would happen under applicable law, then a co-trustee shall be appointed in preference to such merger or conversion.

(8) A Trustee may be appointed pursuant to this Section 11 for a limited purpose or to hold only specified powers.

G. Accountings and Other Proceedings.

(1) I direct that a trust hereunder be subject to independent administration with as little court supervision as allowed by law. The Trustee shall not be required to render to any court annual or other periodic accounts, or any inventory, appraisal, or other returns or reports, whether required by statute or otherwise. The Trustee shall take such action for the settlement or approval of accounts at such times and before such courts or without court proceedings as the Trustee shall determine. The Trustee shall pay the costs and expenses of any such action or proceeding, including, but not limited, to the compensation and expenses of attorneys and guardians, out of the property of the trust. The Trustee shall not be required to register any trust hereunder.

(2) I direct that in any proceeding relating to a trust hereunder service upon any person under a legal disability need not be made when another person not under a disability is a party to the proceeding and has the same interest as the person under the disability. The person under the disability shall nevertheless be bound by the results of the proceeding. The same rule shall apply to nonjudicial settlements, releases, exonerations, and indemnities.

H. Exemption from Security. No Trustee shall be required to give bond or other security in any jurisdiction, and if despite this exoneration a bond is nevertheless required, no sureties shall be required.

SECTION 12. MAXIMUM DURATION FOR TRUSTS

The maximum duration for trusts means the longest period that property may be held in trust under this Trust Agreement under the applicable rules governing perpetuities, vesting, accumulations, the suspension of alienation, and the like (including any applicable period in gross such as twenty-one (21) years or ninety (90) years). If under those rules the maximum duration may be determined (or alternatively determined) with reference to the death of the last survivor of a group of individuals alive on the date of this Trust Agreement, those individuals shall consist of me, all of my descendants living on the date of this Trust Agreement, and any surviving spouse of a descendant of mine if both the descendant and the spouse were living on the date of this Trust Agreement.

SECTION 13. MISCELLANEOUS AND DEFINITIONS

A. Children and Descendants. "Children" and "descendants" shall include children and descendants whenever born or adopted.

B. Minor. Whether an individual is a minor or an adult shall be determined under the laws of the individual's domicile at the time in question.

C. Tax Related Terms. References to the "Internal Revenue Code" or "Code" or to provisions thereof are to the Internal Revenue Code of 1986, as amended at the time in question. References to the "Regulations" or "Treas. Regs." are to the Treasury Regulations under the Code. If, by the time in question, a particular provision of the Code has been renumbered, or the Code has been superseded by a subsequent federal tax law, the reference shall be deemed to be to the renumbered provision or the corresponding provision of the subsequent law, unless to do so would clearly be contrary to my intent as expressed in this Trust Agreement, and a similar rule shall apply to references to the Regulations.

D. Gross Estate. "Gross estate" means my gross estate as determined for federal estate tax purposes (or for state death tax purposes where relevant).

E. Disabled Trustee. A Trustee is "disabled," and while disabled shall be unable to serve or to continue serving, if the next successor Trustee receives written certification that the examined Trustee is physically or mentally incapable of managing the affairs of the trust, whether or not there is an adjudication of the Trustee's incompetence.

(1) This certification shall be valid only if it is signed by at least two (2) physicians, each of whom has personally examined the Trustee and at least one (1) of whom is board certified in the specialty most closely associated with the alleged disability.

(2) This certification need not indicate any cause for the Trustee's disability.

(3) A certification of disability shall be rescinded when a serving Trustee receives a certification the former Trustee is capable of managing the trust's affairs. This certification, too, shall be valid only if it is signed by at least two (2) physicians, each of whom has personally examined the Trustee and at least one (1) of whom is board certified in the specialty most closely associated with the former disability.

(4) No person is liable to anyone for actions taken in reliance on the certifications under this Paragraph E, or for dealing with a Trustee other than the one removed for disability based on these certifications.

IN WITNESS WHEREOF, the Trustee and I have signed this Trust Agreement, in duplicate, on the day and year first above written.

Witnesses:

_____ William Smith
 ____ [name]

_____ William Smith, Trustee
 ____ [name]



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Current Legal Forms for Real Estate
Chapter 20 REAL ESTATE ENTITIES
Part IV. Forms
F. REAL ESTATE TRUSTS

24-20 Current Legal Forms for Real Estate FORM 20.42

AUTHOR: by Stephen E. Pigott and Harold O. Maxfield, Jr.

FORM 20.42 Affidavit of Trustee as to Powers

COMMENT

It may be necessary to provide a third party with some verification as to the powers of the Trustee of a trust that owns real estate. In most circumstances, the Trustee will not want to disclose the entire trust. The following Affidavit is designed to use as an excerpt from the Trust Agreement setting forth the powers.

FORM

AFFIDAVIT OF TRUSTEE

STATE OF _____ [state])
COUNTY OF _____ [county]) SS:

Re: Disclosure of Power
William Smith Trust

I, _____ [name] , being first duly sworn according to law, depose and state that:

1. Affiant is the Trustee of the Trust discussed herein;
2. The original Trust Instrument is located at:

 [address]

3. The powers of the Trustee with respect to the transfer of real property include, but are not limited to, the following:

See Exhibit A attached hereto which is an excerpt from the Trust Agreement.

4. The name of the person who transferred the real property to the Trust is _____ [name] , by or through instrument(s) recorded in Volume _____, Page _____, _____ [county] County Recorder's office.

FURTHER AFFIANT SAYETH NAUGHT.

 [name]

SWORN TO BEFORE ME and subscribed in my presence, this _____ [day] day of _____ [month] , _____ [year] .

 [notary public]

THIS INSTRUMENT PREPARED BY:



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Current Legal Forms for Real Estate
Chapter 20 REAL ESTATE ENTITIES
Part IV. Forms
F. REAL ESTATE TRUSTS

24-20 Current Legal Forms for Real Estate FORM 20.43

AUTHOR: by Stephen E. Pigott and Harold O. Maxfield, Jr.

FORM 20.43 Real estate investment trust--general investments--declaration of trust

COMMENT

A real estate investment trust (REIT) is a pass through entity used for investment in real estate by holders of beneficial interests. If specific requirements are met, the REIT will not be required to pay tax. The requirements are designed to insure that (1) the organization is a trust or corporation with widely held beneficial interests, (2) its principal assets are real estate, (3) it is engaged only in passive investment, and (4) it distributes its income currently to its beneficiaries. For more detailed discussion of specific requirements that a corporation, trust, or association must meet in order to qualify as a REIT, see TB § 20.08, at the beginning of this chapter.

Form of organization:

The organization must be either a corporation, a trust, or an association that is managed by one or more directors or trustees. In order for a trust or an association to qualify for REIT status, it must possess those characteristics that would require it to be taxed as a corporation, but for the real estate investment trust provisions of the Code. Thus, the trustee must have the rights and powers which would meet the "centralization of management" test for the taxability of an association as a corporation. This includes exclusive authority to manage the trust. A trust may qualify despite the shareholders' rights to elect or remove trustees, to terminate the trust, and to ratify amendments proposed by the trustees.

Beneficial ownership of the trust must be evidenced by transferable shares, or by transferable certificates of beneficial interest, and must be held by 100 or more persons. This 100-person ownership must exist during at least 335 days of a taxable year of 12 months, or during a

proportionate part of a taxable year of less than 12 months. This requirement does not apply for the first tax year of the REIT. Shares are considered "transferable" even though the trustee has the power to redeem shares or to refuse to transfer shares whenever he believes in good faith that such action is required to maintain the trust's status as a real estate investment trust. A second class of beneficial interest shares granting dividend and liquidation preference is permissible.

Real estate assets:

Under the first asset qualification test, at least 75 percent of the value of the organization's total assets must consist of real estate assets, cash and cash items (including receivables) and government securities. This test must generally be met at the close of each quarter of the taxable year. Not more than 25 percent of the value of the trust's total assets may be invested in other securities. "Real estate assets" means real property (including "interests in real property" and interests in mortgages on real property) and shares in other qualified real estate investment trusts. "Interests in real property" include fee ownership and coownership of land or leaseholds, options to acquire land or leaseholds, or improvements with respect to any of the foregoing, but exclude mineral, oil, or gas royalty interests. Real property includes land or improvements of an inherently permanent nature, including structural components such as plumbing systems, etc. (See TB § 20.08).

Sources of income:

In order to insure that the trust will engage in primarily "passive" real estate investment, the Code requires that at least 75 percent of its gross income must consist of real estate items, and at least 95 percent must consist of those real estate items plus other investment items. A trust is disqualified if 30 percent or more of its gross income is derived from the sale of certain property. (See TB § 20.08).

Rents from real property:

Rents from real property are included in the sources of income that must satisfy the 75 percent and 95 percent income-source tests. Rents include rent from interests in real property; charges for services customarily furnished in connection with the rental of real property, whether or not they are separately stated; and rent attributable to personal property which is leased in connection with a lease of real property, provided that the amount allocable to the personal property (in accordance with a prescribed formula) is less than 15 percent of total rent. To ensure that such rent is "passive" in nature, the Code excludes rent received under circumstances that are based upon sharing of profits, the trust's equity interest in the lessee, and the active conduct of business. Rents include rents based on the net income of a tenant, but only if the tenant itself receives substantially all of its income from subleasing the property, and these sublease rents would qualify as rents if received by the REIT. Rents derived in connection with providing services, unless provided by an independent contractor, will not qualify as rents from real property. Certain services, such as providing parking facilities on an unreserved basis to tenants, do not require an independent contractor. (See TB § 20.08).

Failure to meet income-source tests:

A trust is not deprived of its status as a qualified trust if it fails to meet the income-source tests, provided that such failure is due to reasonable cause and not willful neglect. The trust must report the nature and amount of each item of its gross income in a separate schedule attached to its

income tax return. Even if the trust complies with these requirements, it must still pay a 100 percent tax on the greater of the amount by which it fails to meet the 75 percent or 95 percent income-source test. (See TB § 20.08).

Current distribution of income:

In order to retain its qualified status, a trust must distribute to its shareholders at least 90 percent of its annual real estate investment trust taxable income and net income derived from foreclosure property, less the amount of any net loss sustained from prohibited transactions and any penalties paid with respect to deficiency dividends. The required percentage of income must be distributed in the taxable year during which it is earned or in the next succeeding year. However, if a trust fails to distribute at least 85 percent of its ordinary income and 95 percent of its capital gain net income during the year in which it is earned, it must pay a 4 percent nondeductible excise tax on the difference between such amount and the amount actually distributed. (See TB § 20.08).

Deficiency dividend procedure:

A trust is not deprived of its qualified status for failure to distribute the required percentage of income provided that it complies with a deficiency dividend procedure. This procedure permits distributions of income, qualifying for a deduction, to be made in subsequent years if a "determination" results in an adjustment that either increases that amount of income which the trust is required to distribute in order to meet the distribution requirement for a prior year in question, or decreases the amount of the deduction for dividends previously paid for that year. A "determination" refers to a decision of the Tax Court or any other court of competent jurisdiction which has become final, a closing agreement, or an agreement relating to the tax liability of the trust. The deficiency dividend must be paid within 90 days after the determination and a claim for its deduction must be filed after its payment, but not later than 120 days after the date of the determination. The trust pays interest and penalties in conjunction with this procedure. (See TB § 20.08).

Taxation of REITs and shareholders:

Although a qualified trust is taxable at regular corporate rates, it is entitled to a deduction for the amount of dividends paid in computing its taxable income for the year. In this connection, a trust must distribute most of its income as dividends in order to obtain qualified trust status.

Beneficiaries of a trust are taxed in essentially the same manner as any corporate shareholder, except that no exclusion or deduction for dividends received is allowable to either an individual or corporate beneficiary. Thus, distributions out of "earnings and profits" are fully taxable ordinary income when received. The portion of any distribution designated by the trust as a "capital gain dividend" is treated by the beneficiary as long-term capital gain. Distributions out of depreciation reserves by a trust without earnings or profits are treated as a return of capital upon the shares, and thereafter as capital gain. For further discussion of taxation of a REIT and its shareholders, see TB § 20.09.

Since the real estate investment trust is a creature of the tax law, this form for a trust which intends to engage in general real estate investments follows closely the specifications of the Revenue Code and the Regulations. There are provisions for transferable shares and for the exercise of broad powers by the trustees. In addition, there are provisions insuring continuity of life, and limited liability on the part of shareholders. Thus, it is clear that the trust would be

taxable as a corporation if it did not qualify as a real estate investment trust. Several special powers are given to the shareholders. They may elect and remove trustees, terminate the trust, and approve amendments to the basic declaration of trust. These rights may be granted to the shareholders without reducing the powers of the trustees below the minimum required by the statute.

It should be noted that local law may pose problems. In the absence of a state statute which recognizes a real estate investment trust, there may be questions connected with the rule against perpetuities, personal liability of the trustees or beneficial owners, and the permissible uses of a trust. In addition, consideration must be given to federal and state regulations relating to the sale of securities. As to the rule against perpetuities, this instrument provides that in any jurisdiction where it is found that the holding of property by the trust violates the local rule against perpetuities the trust is to continue only for specified lives in being plus 21 years.

FORM

THIS DECLARATION OF TRUST made _____ [month]
 _____ [day] , _____ [year] , by the Trustees of Queensbrook Real Estate
 Investment Trust, creating a trust primarily to invest and reinvest in real estate, interests in real estate, leasehold
 interests, mortgages, and interests in mortgages secured by real estate. All funds contributed to or invested in the Trust
 by those who have acquired and who will acquire beneficial interests herein as hereinafter provided are referred to
 herein as the "Shareholders."

WHEREAS, the Trustees hereunder have acknowledged the receipt of valid consideration and have agreed to hold and
 manage the same and any property added thereto; and

WHEREAS, the Trustees for the purpose of defining the respective interests of the Shareholders in the Trust, have
 agreed to issue to each Shareholder negotiable certificates of beneficial interest or shares ("Shares"), in the respective
 amounts and with the designations and form as hereinafter provided.

NOW, THEREFORE, the Trustees hereby declare that they assume the duties of Trustees hereunder and will hold all
 assets of the Trust, including those received as above recited and those to be received as hereinafter provided, and all
 rents, income, profits, and gains therefrom, from whatever source derived, in trust for the Shareholders in accordance
 with the terms and conditions hereinafter in this instrument provided and all amendments thereto, hereinafter called the
 Declaration.

Article 1

The Trust

Section 1. Name. The Trust shall be designated as "Queensbrook Real Estate Investment Trust," in which name the
 Trustees may conduct business, sue and be sued, and otherwise do all things and take all action they may deem
 appropriate to carry out the business and preserve the assets of the Trust except as is provided in Article IV, Section 6,
 with respect to the holding of title to property owned by the Trust.

Section 2. Location. The Trust's principal office shall be in such city, town, or locality in the United States of America
 as the Trustees shall from time to time determine. The Trust may have such other offices or places of business as the
 Trustees may from time to time determine.

Section 3. Nature of Trust. The Trust shall be of the type commonly termed a business trust, and shall not be a general partnership, limited partnership, partnership association, or corporation. The Shareholders are cestuis que trustent hereunder. No Trustee or Shareholder shall ever be, in any way whatsoever, liable or responsible hereunder as a partner. This Trust is intended to have the status of a "real estate investment trust" as that term is defined in Part II, Subchapter M of Chapter 1 of the Internal Revenue Code of 1986, as now enacted and as it may be hereafter amended, and the Declaration and all actions of the Trustees shall be construed in accordance with such intent.

Section 4. Purposes. The Trust shall be primarily engaged in the investment and reinvestment of its funds and other assets in real property, interests in real property, mortgages secured by real property, leasehold interests in real property, and interests in mortgages on real property. If, however, the Trustees are of the opinion that investment in real estate assets at any particular time is not prudent because of market or economic conditions, the Trust's assets may be maintained in cash or government securities, or both or any other investments which will not result in the Trust losing its status as a "real estate investment trust" under *Section 856 of the Internal Revenue Code of 1986* as now enacted or hereinafter amended. The Trust shall not be primarily engaged in investing, reinvesting, or trading in securities. It is the express purpose and objective of the Trust to have invested from time to time such percentages of the value of its total assets in real property, leaseholds thereof, mortgages on real property, or interests therein, cash, cash items, and government securities, and to follow such investment policies, as may be required in order that the Trust qualify (so long as such qualification, in the opinion of the Trustees, is advantageous to its Shareholders) as a "real estate investment trust."

Section 5. Particular Policies. The Trust shall follow such policies as are required to maintain its qualification as a "real estate investment trust." If the Trust shall desire to issue or sell Shares or other securities in any state or jurisdiction in which there shall be in force and effect a law, rule, or regulation of the governmental body having jurisdiction over any such sale requiring that this Declaration contain one or more particular limitations or restrictions on the Trust's policies or operations, then anything else in this Declaration contained to the contrary notwithstanding, the Trustees may, without the Shareholders' prior approval, amend this Declaration to incorporate herein any such limitations or restrictions. These shall include, without affecting the generality of the foregoing, limitations or restrictions on the issuance of senior securities, borrowing money, requiring appraisals in particular circumstances, making loans, underwriting securities of others, investing in unimproved real estate, investing in mortgages, investing in securities of other real estate companies, investing in real estate contracts of sale and commodities, issuing different classes of shares or options or redeemable securities, and on the amount of operating expenses that may be incurred. The Trustees shall also have the power to provide that no further amendments of this Declaration may be made without the Shareholders' consent.

Section 6. Definitions. The terms "value," "real estate assets," and "interests in real property" as used in this Declaration of Trust shall have the same meaning as the definitions of these words contained in Part II of Subchapter M of the Internal Revenue Code of 1986, as now enacted, and as hereafter amended.

The terms "mortgage" or "mortgages" as used herein shall mean and include all forms of liens on real estate and all transfers of real estate for security purposes, including deeds of trust and all other forms of security transfers.

Article II

Shares

Section 1. Shares: Certificates of Beneficial Interest. The units into which the beneficial interests in the Trust will be divided shall be designated as Shares. The certificates evidencing ownership of shares in the Trust will be designated as Certificates of Beneficial Interest or Shares, and shall be in such form as the Trustees may from time to time prescribe. The registered holders thereof shall be designated as Shareholders. The number of Shares authorized hereunder shall be unlimited. There shall be no limit upon the number of Shares to be issued. All Shares shall be without par value, shall

be of the same class, shall have equal voting, distribution, liquidation, and other rights, and shall be fully paid and nonassessable.

The Shareholders shall have no legal title or interest in the Trust property and no right to a partition thereof or to an accounting during the continuance of the Trust but only the rights expressly provided in the Declaration.

Section 2. Sale of Shares. The Trustees may from time to time issue, sell by private or public offering, or exchange Trust shares in such number or for such sums of money, real estate assets, or other considerations, and on such terms as they deem proper. The Shareholders shall have no preemptive rights of any kind whatsoever. Preemptive rights are hereby defined to include, but not be limited to, the right to purchase or subscribe for or otherwise acquire any Trust shares of any class, whether now or hereafter authorized, or any securities or obligations convertible into or exchangeable for, or any right, warrant, or option to purchase such shares, whether or not they are issued or disposed of for cash, property, or other consideration of any kind. The Trustees shall cause to be issued certificates of beneficial interest to evidence the ownership of Shares. Shares when issued for consideration in accordance with the provisions of this Section 2 shall be fully paid and nonassessable.

Section 3. Offering of Shares. The Trustees may cause to be made from time to time offerings of the Trust Shares to the public at public offering prices deemed appropriate. For this purpose, the Trustees may enter into a contract with an underwriter upon such terms and with such commissions for its services as the parties may agree upon.

Section 4. Shares Purchased by Trust. The Trust may repurchase or otherwise acquire its own shares on such terms and conditions as the Trustees deem appropriate. For this purpose the Trust may create and maintain such reserves as are deemed necessary and proper.

Shares issued hereunder and purchased or otherwise acquired for the account of the Trust shall not, so long as they belong to the Trust, either receive distributions (except that they shall be entitled to receive distributions payable in Trust Shares) or be voted at any meeting of the Shareholders. Such Shares may, in the Trustees' discretion, be cancelled and the number of Shares authorized by thereby reduced or be held in the treasury and be disposed of by the Trustees at such time or times, to such party or parties, and for such consideration, as the Trustees may deem appropriate.

Section 5. Transferability of Shares. Shares in the Trust shall be transferable in accordance with the procedure prescribed from time to time in the Trustees' Regulations. The persons in whose names the Shares are registered on the Trust's books shall be deemed the absolute owners thereof and, until a transfer is effected on such books, the Trustees shall not be affected by any notice, actual or constructive, of any transfer.

Section 6. Ownership, Stop-transfer, and Redemption. The Shareholders, upon request, shall furnish to the Trustees, in writing, such particulars as to the direct and indirect ownership of the Shares as the Trustees deem necessary for compliance with the provisions of the Internal Revenue Code of 1986 and the Regulations thereunder regarding beneficial ownership in a real estate investment trust, as those provisions and the Regulations may be amended from time to time. If the Trustees, at any time, in good faith, shall be of the opinion that beneficial ownership of Trust Shares has or may become so concentrated as to prevent the Trust from continuing to qualify as a real estate investment trust under the applicable provisions of the Internal Revenue Code, the Trustees may prevent the transfer of such Shares by means deemed equitable to them or to call such number of Shares for redemption as will be sufficient to maintain or bring the beneficial ownership of Shares in conformity with the applicable provisions of the Internal Revenue Code. The price to be paid for the redeemed Shares shall be (a) the sale price on the securities exchange on which the Shares are traded, as reported at the close of the last business day prior to the date of redemption, or (b) if the Shares are not traded on any securities exchange, the last bid quotation on such business day as reported by the National Association of Security Dealers or a similar organization selected by the Trustees, or (c) if not determined as above, the book value of the Shares. From the date of redemption, the holder of any Shares called for redemption shall no longer be entitled to any dividends, distributions, voting rights, or any other benefits of Shareholders, except the right to the redemption

price.

Section 7. Effect of Transfer of Shares or Death, Insolvency, or Incapacity of Shareholders. Neither the transfer of Shares nor the death, insolvency or incapacity of any Shareholder shall operate to dissolve or terminate the Trust, nor shall it entitle any transferee, legal representative, or other person to a partition of the Trust property or to an accounting.

Article III Shareholders

Section 1. Meetings of Shareholders.

(a) Annual meetings. Annual meetings of the Shareholders shall be called upon not less than thirty (30) nor more than sixty (60) days' prior written notice, and at such times and places as the Trustees' Regulations shall prescribe, for the election of all Trustees, the transaction of such other business as Shareholders may be entitled to vote upon as hereinafter provided in this Article III, or as the Trustees may determine. At such meeting the Trustees shall make a report of the business and operations of the Trust. The holders of a majority of Shares in the Trust, present in person or by proxy, shall constitute a quorum at any meeting.

(b) Special meetings. Special meetings of the Shareholders may be called at any time upon not less than thirty (30) nor more than sixty (60) days' prior written notice, at such places as the Trustees' Regulations shall prescribe for annual meetings, by the Chairman of the Trustees or by a majority of the Trustees. A special meeting shall be called by any Trustee upon written request of Shareholders holding in the aggregate not less than twenty percent (20%) of the issued and outstanding Shares entitled to vote at such meeting. The call shall state the nature of the business to be transacted, and no other business shall be considered.

Section 2. Voting Rights of Shareholders. The Shareholders shall be entitled to vote only upon the following matters:

(a) Election of Trustees. Trustees shall be elected annually by vote of Shareholders. Each Shareholder shall be entitled to one vote in person or by proxy for each Share registered in his name. The candidates receiving the highest respective numbers of votes up to the number of trusteeships to be filled in the election shall be elected.

(b) Removal of Trustees. Any Trustee who willfully violates any provision of the Declaration or willfully acts contrary to the Shareholders' interests may be removed at any time as Trustee by the vote or written consent of the holders of a majority of the issued and outstanding Shares so declaring. Such vote or written consent shall be conclusive evidence of such willful violation or contrary action so far as such removal is concerned.

(c) Termination of Trust. The Trust may be terminated as provided in Article V, Section 1 hereof.

(d) Amendment of Declaration of Trust. No change in or amendment of the Declaration shall be made without the vote or written consent of the holders of a majority of the issued and outstanding Shares, except as otherwise provided in Section 5 of Article I hereof.

(e) Creation of Corporation to Acquire Assets of Trust. Any action on the part of the Trustees creating a corporation to acquire the Trust assets shall be subject to the approval of the holders of a majority of the issued and outstanding Shares.

(f) General. Anything in Section 8, paragraph (u) of Article IV, or in Articles V and VI of the Declaration to the contrary notwithstanding, any action taken by the Trustees to merge or consolidate or otherwise amalgamate the Trust

with any other trust or corporation, to terminate the Trust, to reorganize the Trust as a corporation, or to amend the Declaration shall not become effective until such action is first approved by the vote or written consent of the holders of a majority of the issued and outstanding Shares.

Section 3. Distributions. It is the declared policy of the Trust that the Trustees shall (and may more frequently) declare and pay, within thirty (30) days after the end of each three calendar-month period in each calendar year after the calendar year in which the Trust is created, to the Shareholders as near to all of the net income of the Trust as shall be available therefor. No distribution shall be made, however, if the Trustees deem it imprudent to do so. Net income for the purpose of this Section shall mean net income for tax purposes adding back deductions for depreciation and similar noncash charges. In any event, however, the Trustees shall, from time to time, declare and pay to the Shareholders all distributions that may be necessary to continue to qualify the Trust as a "real estate investment trust" (provided that such qualification, in the opinion of the Trustees, is in the best interest of the Shareholders), as well as all additional distributions that the Trustees may in their discretion declare. Each distribution shall be accompanied by a written statement indicating, to the fullest extent practicable, its sources.

Section 4. Reports to Shareholders. The Trust shall transmit to the Shareholders annually, within two calendar months following the close of its fiscal year, a report which shall contain:

- (a) A statement by the Trustees as to the course of the Trust's operations during the fiscal year covered by such report, including a schedule of the funds distributed to the Shareholders during such fiscal year and the respective sources thereof;
- (b) A description of the major real estate assets and mortgages owned by the Trust at the close of such fiscal year, and other disclosures of material interest to the Shareholders; and
- (c) Financial statements consisting of a balance sheet, a profit and loss statement, and an analysis of surplus, all prepared in accordance with generally accepted accounting principles, and generally conforming to the requirements for financial statements to be included in annual reports filed with the Securities and Exchange Commission by companies subject to its jurisdiction. Such statements shall be audited and certified by an independent certified public accountant.

As promptly as possible after the close of each quarterly period in each fiscal year, the Trustees shall transmit an income and expense statement to the Shareholders for such three-month period. Such statement need not be audited or certified by an independent certified public accountant.

Section 5. Books and Records. The Trust's books and records shall be open to inspection upon the written demand of a Shareholder at any reasonable time for a good faith purpose reasonably related to the interests of such Shareholder as a Shareholder, and shall be exhibited at any time when required by the demand at any Shareholders' meeting of 10% of the Shares represented at the meeting.

Such inspection by a Shareholder may be made in person or by agent or attorney, and the right of inspection includes the right to make extracts.

Demand of inspection other than at a Shareholders' meeting shall be made in writing upon the Chairman of the Trustees, or the Trust's Secretary or Chief Executive Officer.

The duly authorized officials of any state shall have the same right of inspection as a Shareholder.

Section 6. Nonliability of Shareholders. The Shareholders shall not be liable to assessment and the Trustees shall have no power to bind the Shareholders personally. Upon any debt, claim, demand, judgment, decree, or obligation of any nature whatsoever against or incurred by the Trust or by the Trustees or by a representative or agent of the Trust, in their

respective capacities, whether founded upon contract, tort, or otherwise, resort shall be had solely to the Trust property and the Shareholders shall not be personally liable therefor. Any Shareholder held so personally liable shall be entitled to exoneration from the Trust's assets.

Section 7. Notice of Nonliability. In each written order, contract, bond, note, mortgage instrument, or obligation given or executed by the Trustees or with their authority, the Trustees shall cause to be inserted a provision that the Shareholders shall not be personally liable and that the other party shall look solely to the Trust property for the payment of any claim thereunder, and reference shall be made to the Declaration.

Section 8. Insurance. The Trust shall use its best efforts to obtain or cause to be obtained all customary types of insurance against liabilities or hazards.

Article IV

Trustees

Section 1. Number, Term of Office, Qualification, and Compensation of Trustees. There shall be not less than three nor more than five Trustees, as fixed in the Trustees' Regulations, all of whom shall be United States citizens. The term of office of each Trustee shall be from the date of his election or appointment until the next annual meeting of Shareholders and shall continue until the election and qualification of his successor by the Shareholders. The Trustees shall be individuals of full age. No person shall qualify as a Trustee until he shall have either signed the Declaration or agreed in writing to be bound in all respects by the Declaration. The Trustees shall be entitled to receive compensation for their services as Trustees, in amounts, and in the manner fixed by them, but not in any event to exceed one and one-half percent (1 1/2 %) annually of the Trust's gross income. There shall be no requirement that each Trustee receive compensation in the same amount.

Section 2. Resignation. A trustee may resign at any time by giving written notice to the Trustees at the Trust's principal office. Such resignation shall take effect on the date it is received or any later time specified therein. Unless otherwise specified therein, the acceptance of a resignation shall not be necessary to make it effective.

Section 3. Vacancies. The resignation, incompetency, or death of any or all of the Trustees shall not terminate the Trust or affect its continuity. During a vacancy, the remaining Trustee or Trustees may exercise the powers of the Trustees hereunder. Vacancies among the Trustees may be filled by a written designation signed by a majority of the remaining Trustees and entered in the Trust's records. The determination of a vacancy among the Trustees by reason of resignation, incompetency, or death, or for any other reason, when made by a majority of the remaining Trustees and stated in the instrument filling such vacancy, shall be final and conclusive for all purposes. If at any time, by reason of resignations, incompetencies, or deaths, there shall be no remaining Trustees, a meeting of the Shareholders shall be forthwith called for the election of successor Trustees. Any Shareholder or Shareholders owning of record an aggregate of 10% of the issued and outstanding Trust Shares shall be entitled to call such meeting and to nominate candidates for election as successor Trustees at any such election.

Section 4. Successor Trustees. Title to the Trust property shall vest in successor Trustees, upon written acceptance of their election or appointment without any further act. They shall thereupon have the same powers, duties, and exemptions as though originally named as Trustees in this Declaration. Such written acceptance shall be filed with the records of the Trust. A certificate signed by a majority of the Trustees as to who are or were Trustees at any time shall be conclusive and binding for all purposes.

Section 5. Actions by Trustees. The Trustees may act with or without a meeting. Any action of a majority of Trustees in office shall be conclusive and binding as an action of the Trustees. All agreements, deeds, and other instruments executed by a majority of the Trustees or executed by one Trustee pursuant to authorization of a majority of the

Trustees given either at a meeting or in writing shall be effective and binding as if executed by all the Trustees.

Section 6. Title and Authority of Trustees. The Trustees, as joint tenants, shall hold the legal title to all property belonging to the Trust in its name, or in the name of one or more of the Trustees, as Trustees for the Trust, or in the name of one or more nominees for the Trust provided that each such nominee shall execute an instrument in recordable form recognizing the interest of the Trust in the property so held. The Trustees shall have absolute and exclusive control, management, and disposition thereof, and absolute and exclusive control over the management and conduct of the business affairs of the Trust, free from any power or control on the part of the Shareholders, in the same manner as if they were the absolute owners thereof, subject only to the express limitations in the Declaration.

Section 7. Advisor and Independent Contractor. In their exercise of the absolute control and management of all the Trust assets, the Trustees may contract for the services of an advisory firm or corporation, (the Advisor), to advise them in respect of investing and reinvesting the Trust funds in real property assets, interests in real property, mortgages secured by real property, leasehold interests in real property, interests in mortgages, or other assets. The total compensation to be paid to the Advisor and to be provided in such contract shall not exceed one-half ($61/2$) of one percent (1%) annually, of the Trust's gross income. Such contract may provide that the Advisor shall act as agent of the Trust in the purchase and sale of real estate, leaseholds, or real estate mortgages, or any interest therein, but without any independent compensation, direct or indirect, for such service. Such contract may also provide that the Advisor shall act as agent of the Trust in the management of real estate, leaseholds or real estate mortgages, or any interest therein, and receive commissions or other compensation for such management services at rates not in excess of those prescribed by real estate boards or similar organizations in the area in which the real estate is located, or the Trustees may employ a different firm or corporation to perform these functions for all or some of the Trust's properties and to receive such commissions and compensations. Such contracts shall provide that they shall not be assignable without the Trust's written consent. No employee or officer of the Trust, nor any investment advisor, shall receive a commission or other remuneration, directly or indirectly, in connection with the disposition or acquisition of Trust assets.

Section 8. Powers of Trustees. The Trustees shall have all the powers necessary, convenient, or appropriate to effectuate the purposes of the Trust and may take any action which they deem necessary or desirable and proper to carry out such purposes. Any determination of the purposes of the Trust made by the Trustees in good faith shall be conclusive. In construing the provisions of the Declaration, the presumption shall be in favor of the grant of powers to the Trustees.

Subject to the limitations contained in Article I hereof, the Trustees' powers shall include the following:

- (a) To purchase, acquire through the issuance of Shares in the Trust, obligations of the Trust, or otherwise, and to mortgage, sell, acquire on lease, hold, manage, improve, lease to others (without limitation as to the term of such lease, which may extend beyond the termination of the Trust), option, exchange for real or personal property, release, and partition interests in personal property and real estate interests of every nature, including freehold, leasehold, mortgage, ground rent, and other interests therein, and to erect, construct, alter, repair, demolish, or otherwise change buildings and structures of every nature.
- (b) To purchase, acquire through the issuance of Shares in the Trust, obligations of the Trust, or otherwise, option, sell, and exchange shares, bonds, notes, certificates of indebtedness, and securities of every nature.
- (c) To purchase, acquire through the issuance of Shares in the Trust, obligations of the Trust, or otherwise, grant security interests in, sell, acquire on lease, hold, manage, improve, lease to others, option, and exchange personal property of every nature.
- (d) To hold title to the property of the Trust as is provided in Article IV, Section 6, hereof.
- (e) To borrow money for the purposes of the Trust and to give notes, debentures, including debentures convertible into

Shares, bonds, and other negotiable or nonnegotiable instruments of the Trust therefor; to enter into other obligations on behalf of and for the purposes of the Trust; and to mortgage, create security interests in, or pledge or cause to be mortgaged, have security interests created in, or pledged real and personal property of the Trust to secure such notes, debentures, bonds, instruments, or other obligations; and to subordinate the interests of the Trust in real and personal property, or interests therein to such other persons and on such conditions as is deemed desirable.

(f) To lend money on behalf of the Trust and to invest its funds.

(g) To create reserve funds for such purposes as they deem advisable.

(h) To deposit Trust funds in banks and other depositories without regard to whether such accounts will draw interest.

(i) To pay taxes and assessments imposed upon or chargeable against the Trust or the Trustees by virtue of or arising out of the Trust's existence, property, business, or activities.

(j) To purchase, issue, sell, or exchange Shares of the Trust as provided in Article II hereof. The good faith determination of the value of the consideration received by the Trust shall be within the Trustees' absolute discretion.

(k) To adopt and, from time to time, amend Trustees' Regulations which may include but shall not be limited to provisions relating to the time, place, and notice of meetings of the Trustees and of the Shareholders; record dates and other matters relating to voting and the use of proxies; designation, appointment, and compensation of representatives and agents and their number, duties, powers, authorities, and qualifications; the conditions for replacing lost, mutilated, or stolen Shares; and the procedure for amendment of the Trustees' Regulations.

(l) To exercise with respect to Trust property all options, privileges and rights, whether to vote, assent, subscribe, or convert, or of any other nature; to grant proxies; and to participate in and accept securities issued under any voting trust agreement.

(m) To participate in any reorganization, readjustment, consolidation, merger, dissolution, sale, or purchase of assets, lease, or similar proceedings of any corporation, partnership, or other organization in which the Trust shall have an interest, and in connection therewith to delegate discretionary powers to any reorganization, protective, or similar committee and to pay assessments and other expenses in connection therewith.

(n) To engage or employ agents, representatives, and employees of any nature, or independent contractors, including, without limiting the generality of the foregoing, Transfer Agents for the transfer of Trust Shares, Registrars, underwriters for the sale of Trust Shares, independent certified public accountants, attorneys at law, appraisers, and real estate agents and brokers; and to delegate to one or more Trustees, agents, representatives, employees, independent contractors, or other persons such powers and duties as the Trustees deem appropriate. The same persons may be employed in multiple capacities and may receive compensation from the Trust in as many capacities as they may be engaged or employed by the Trust. Any Trustee who serves in such capacities may receive compensation in addition to that provided in Article IV, Section 1 hereof.

(o) To determine conclusively the allocation between capital and income of the Trust's receipts, holdings, expenses, and disbursements, regardless of the allocation which might be considered appropriate in the absence of this provision.

(p) To determine conclusively the value from time to time and to revalue the Trust's real estate, securities, and other property, in accordance with such appraisals or other information as they deem satisfactory.

(q) To compromise or settle claims, questions, disputes, and controversies by, against, or affecting the Trust.

- (r) To solicit Shareholders' proxies.
- (s) To adopt a fiscal year for the Trust and to change such fiscal year.
- (t) To adopt and use a seal.
- (u) To merge or consolidate or otherwise amalgamate the Trust or any successor thereto with or into any other trust or corporation engaged or to be engaged in business activities substantially similar to those engaged in by the Trust, subject to the provisions of Article III, Section 2, paragraph (f).
- (v) To deal with the Trust property in every way, including the entering into joint ventures, partnerships, and all other combinations or associations, that it would be lawful for an individual to deal with the same, whether similar to or different from the ways herein and hereinabove specified.

Section 9. Trustees' Right to Own Shares in Trust. A Trustee may acquire, hold, and dispose of Trust Shares for his individual account and may exercise all rights of a Shareholder to the same extent and in the same manner as if he were not a Trustee. After the commencement of any public offering of the Trust Shares, the Trustees may purchase Shares only at the current offering price then prevailing in connection with such public offering, less all or any part of the selling or other commission as may be agreed with the Distributor.

Section 10. Transactions Between Trustees and Their Affiliates. No trustee shall receive a commission or other remuneration in connection with the acquisition or disposition of Trust assets. Nothing herein, however, shall prohibit any Trustee who is a lawyer, or any law firm with which he may be affiliated, from performing legal services for the Trust and receiving reasonable compensation for such services, nor shall anything herein prohibit any person who is a Trustee from performing services for the Trust, in addition to services as a Trustee, and being separately compensated therefor.

Section 11. Nonliability of Trustees. No Trustee shall be liable individually for any act or omission of any other Trustee or agent or representative of the Trust, or for negligence, error in judgment, or any act or omission except his own willful misfeasance, bad faith, or gross negligence in the conduct of his duties.

Every act or thing done or omitted, and every power exercised or obligation incurred by any of the Trustees in the administration of the Trust or in connection with its business or property, whether ostensibly in their own names or in their trust capacity, shall be deemed done, omitted, exercised, or incurred by them as Trustees and not as individuals. Upon any debt, claim, demand, judgment, decree, or obligation of any nature whatsoever against or incurred by the Trustees in their capacities as such, whether founded upon contract, tort or otherwise, resort shall be had solely to the Trust property.

Nothing contained in the Declaration shall protect a Trustee or agent or representative of the Trust against liability to the Trust or to the Shareholders for willful misfeasance, gross negligence, or bad faith in the conduct of his duties.

Section 12. Indemnification. The Trust shall indemnify and hold harmless each Trustee from and against all claims and liabilities, whether they proceed to judgment or are settled, to which such Trustee may become subject by reason of his being or having been a Trustee, or by reason of any action alleged to have been taken or omitted by him as Trustee, and shall reimburse him for all legal and other expenses reasonably incurred by him in connection with any such claim or liability. No Trustee, however, shall be indemnified or reimbursed under the foregoing provisions in relation to any matter unless it shall have been adjudicated that his action or omission did not constitute willful misfeasance, bad faith, or gross negligence in the conduct of his duties, or, unless, in the absence of such an adjudication, the Trust shall have received a written opinion from independent counsel, approved by the Trustees, to the effect that if the matter of willful misfeasance, bad faith, or gross negligence in the conduct of duties had been adjudicated, it would have been

adjudicated in favor of such Trustee. The rights accruing to a Trustee under these provisions shall not exclude any other right to which he may be lawfully entitled, nor shall anything herein contained restrict the right of the Trust to indemnify or reimburse such Trustee in any proper cause even though not specifically provided for herein. No Trustee, however, may satisfy any right of indemnity or reimbursement granted herein or to which he may be otherwise entitled except out of the Trust property and no Shareholder shall be personally liable with respect to any claim of a Trustee for indemnity or reimbursement. Notwithstanding any of the provisions hereof, however, no Trustee shall be indemnified for any liability which he personally may have under the provisions of the Securities Act of 1933, as amended.

Section 13. Persons Dealing with Trustees. Any act of the Trustees purporting to be done in their capacity as such, or by their agents or representatives under their authority shall, as to other persons dealing with such Trustees, agents, or representatives be conclusively deemed to be within the purposes of the Trust and within the powers of the Trustees. No person dealing with the Trustees or any of them, or with their authorized agents or representatives, shall be bound to see to the application of any funds or property passing into their hands or control.

The receipt of the Trustees or any of them, or of their authorized agents or representatives, for moneys or other consideration paid or delivered to any of them shall be effectual discharges to persons paying or delivering the same.

Section 14. Administrative Powers of Trustees. The Trustees may pay the expenses of the Trust's organization and administration, including all legal and other expenses in connection with the preparation and carrying out of the plan for its formation, the acquisition of properties thereunder and the issuance of Shares thereunder; and may employ such officers, experts, counsel, managers, salesmen, agents, workmen, clerks and other persons as they think best, and fix their compensation and define their duties. Any Trustee so employed may receive special or additional compensation therefor.

Article V

Duration and Termination of Trust

Section 1. Termination of Trust. The Trust shall, unless sooner terminated as provided hereinafter, continue in existence until all of its assets have been liquidated and distributed to the Shareholders. The Trust may be terminated at any time by the Trustees (subject to the requirements of Article III, Section 2, paragraph (f) hereof) or, if the Trustees have not so terminated the Trust, by the affirmative vote of the holders of a majority of the issued and outstanding Shares.

If a court of competent jurisdiction in any state in which the Trust owns property shall finally determine that the holding of such property is or shall be in violation of any statutory or other law that is similar to the common law "rule against perpetuity," then with respect to property affected thereby, unless this Trust is terminated earlier as provided in this Section, it shall continue only until the expiration of 21 years after the death of the last survivor of the following named persons:

[Insert list of names of persons in being on the date of the execution of this Declaration whose lives will govern the duration of the Trust]

In connection with any termination of the Trust, the Trustees, upon receipt of such releases or indemnity as they deem necessary for their protection, may

(a) Sell and convert into cash the Trust property and distribute the net proceeds among the Shareholders ratably; or

(b) Convey the Trust property to one or more persons, entities, trusts, or corporations for consideration consisting in whole or in part of cash, shares of stock, or other property of any kind, and distribute the net proceeds among the Shareholders ratably, at valuations fixed by the Trustees, in cash or in kind, or partly in cash and partly in kind;

provided that the proposal to proceed as described in this paragraph (b) shall have been set forth in the written approval of the Shareholders holding a majority of the Shares issued and outstanding.

Upon termination of the Trust and distribution to the Shareholders as herein provided, a majority of the Trustees shall execute and enter in the Trust's records an instrument setting forth the fact of such termination, and the Trustees shall thereupon be discharged from all further liabilities and duties hereunder, and the right, title, and interest of all Shareholders shall cease and be cancelled and discharged.

Section 2. Organization as a Corporation. Whenever the Trustees deem it for the best interests of the Shareholders that the Trust be organized as a corporation and such action shall have been approved as provided in Article III, Section 2, paragraph (e), the Trustees shall have full power to organize such corporation, under the laws of such State as they may consider appropriate, in the place and stead of the Trust without procuring the further consent of any Shareholder. In that event the capital stock of the corporation shall be and remain the same as fixed under this agreement and Declaration, and the Shareholders shall receive and accept stock in such corporation on the same basis as they hold Shares in the Trust.

Article VI Amendments

Section 1. When no Shares Outstanding. At any time when no shares in the Trust are outstanding, the Trustees may amend any provision of the Declaration. A certificate signed by a majority of the Trustees, setting forth such amendment and reciting that it was duly adopted by them, shall be lodged among the Trust records and shall be conclusive evidence of such amendment.

Section 2. When Shares Outstanding. At any time when Shares in the Trust are outstanding, except as provided in Article I, Section 5, the Declaration may be amended by the Trustees then in office only with the consent of Shareholders owning a majority of the issued and outstanding Shares. A certificate signed by a majority of the Trustees setting forth an amendment and reciting that it was duly adopted shall be lodged among the Trust records and recorded or filed in each public office or registry in which the Declaration shall be recorded or filed and shall be conclusive evidence of such amendment, and any restatement of any provision of the Declaration purported to be contained therein.

Article VII Miscellaneous

Section 1. Applicable Law. The Declaration is executed and delivered in _____ [city] , _____ [state] , and the laws of the State of _____ [state] shall govern the construction, validity, and effect of the Declaration and the administration of the Trust hereby created.

Section 2. Headings for Reference Only. Headings preceding the text, articles, and sections of this Declaration have been inserted solely for convenience and reference, and shall not be construed to affect its meaning, construction, or effect.

In witness whereof this Declaration of Trust is being executed by the Trustees on _____ [month] _____ [day] , _____ [year] .

[Trustee]

_____ [*Trustee*]

_____ [*Trustee*]

_____ [*Trustee*]

(Acknowledgments)



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Current Legal Forms for Real Estate

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Current Legal Forms for Real Estate
Chapter 20 REAL ESTATE ENTITIES
Part IV. Forms
F. REAL ESTATE TRUSTS

24-20 Current Legal Forms for Real Estate FORM 20.44

AUTHOR: by Stephen E. Pigott and Harold O. Maxfield, Jr.

FORM 20.44 Real estate investment trust: trustee's regulations

COMMENT

The basic declaration for a real estate investment trust will rarely set out the various mechanics for operating the entity. As in the case of the corporation, these details are reserved for a code of regulations (or bylaws) which can be amended if necessary by the trustees without going back to the individual beneficiaries for their consent. The declaration of trust typically therefore provides that the trustees may adopt and, from time to time, amend regulations, which may include provisions covering meetings of trustees and of beneficiaries, voting procedures, appointment of agents, issuance and transfer of certificates of beneficial interest, and methods for amending the regulations. This set of regulations includes provisions for these and other matters generally covered in corporate bylaws.

FORM

TRUSTEES' REGULATIONS

Article I
Office, Seal, and Records

Section 1. The Trust's principal office shall be in _____ [city] , _____ [state] .
The Trust may also have offices at such other places as the Trustees may from time to time designate.

Section 2. The seal of this Trust shall be circular in form and have inscribed thereon the name of the Trust and the year and place of its formation (_____ [year]).

Section 3. The original or a certified copy of these regulations, including all amendments, shall be kept at the Trust's principal office and be available during usual business hours for inspection and copying.

Section 4. The Trust shall keep correct and complete books and records of accounts of its transactions, and minutes and other records of the proceedings or other actions of its Trustees and of their committees.

Section 5. The Trust shall maintain at its principal office, or at such other of its offices or agencies as the Trustees may specify, the original Certificate of Beneficial Interest or Share Ledger containing the names and addresses of all Shareholders and the number of Shares held by each Shareholder.

Article II Trustees

Section 1. There shall be initially five (5) Trustees. The Trustees in their sole discretion may increase the number of Trustees; provided, however, in all events the new Trustees shall be elected in accordance with the provisions of the Declaration of Trust.

Section 2. The Trustees shall elect one Trustee as Chairman of the Trustees, who shall act as chairman at all of the Trustees' meetings. The Chairman may appoint committees of the Trustees and perform all administrative acts on the Trustees' behalf, except to the extent that the Declaration of Trust specifically requires such acts to be performed by a majority of the Trustees. The Chairman shall be entitled to receive twenty-five (25) percent greater compensation than the other Trustees.

The Trustees may elect one or more of their number as Alternate Chairman of the Trustees. The Alternate Chairman shall, in order of election, exercise the powers and duties of the Chairman, in case of the Chairman's absence, or until a new Chairman shall be elected, in case of a vacancy in that office.

Section 3. Meetings of the Trustees shall be held at the Trust's principal office, or at such other place or places as the Trustees may fix from time to time.

Section 4. Regular meetings of the Trustees shall be held at such times as the Trustees shall determine, but not less frequently than quarter-annually.

Section 5. Special meetings of the Trustees shall be held whenever called by the Chairman or by any two other Trustees at such time and place as may be designated in the notice of the meeting.

Section 6. At least three (3) days' written notice shall be given of the time and place of any regular or special meeting of the Trustees. If the notice is sent by mail or telegraph, it shall be deemed to have been given when deposited in the mail or with the telegraph office for transmission. Notice of an adjourned meeting need not be given if the time and place of the adjourned meeting are announced at the meeting at which such adjournment action is taken.

Section 7. A majority of the Trustees in office shall constitute a quorum for the transaction of business. The acts of a majority of the Trustees present at a meeting at which a quorum is present shall be the acts of the Trustees. The Trustees may, in lieu of a meeting, take any action which would be lawful if done at a meeting by having a certificate describing such action signed by the number of Trustees which would be required to vote for such action at a meeting and

depositing such certificate in the minute book of the Trust.

Article III

Beneficiaries or Shareholders

Section 1. Meetings of the Shareholders shall be held at such place in _____ [city] or elsewhere as the Trustees may fix.

Section 2. The Annual Meeting of Shareholders for the election of Trustees shall be held at the Trust's principal office at 10 a.m., E.S.T., on the fourth Tuesday of _____ [month] in each year, unless the Trustees shall, by resolution, from time to time fix some other place, hour, or date.

Section 3. Written notice setting forth the time, place, and purpose of each such Annual Meeting shall be given to each Shareholder of record not less than twenty (20) nor more than fifty (50) days prior to the date fixed for the meeting. Notice sent by mail shall be deemed given when it is deposited in the mail addressed to the Shareholder at the address appearing on the Trust's records. Notice of an adjourned meeting need not be given if the time and place of the adjourned meeting is announced at the meeting at which such adjournment action is taken.

Section 4. If all of the Trustees shall resign, die, or become incompetent, a special meeting of Shareholders shall be called with the same requirements as to notice, time, place, and record date as herein provided for Annual Meetings to elect successor Trustees, except that the meeting may be called and nominations of Trustees may be made by any person or persons owning not less than ten percent (10%) of the Shares of record as of the record date fixed for such meeting.

Section 5. The Chairman of the Trustees, or such other person as the Trustees may designate, shall preside and the Secretary shall take the minutes at every Shareholders' meeting. In the absence of the Secretary, the Trustees shall appoint one of themselves, or such other person as they may select, to act as Secretary of the meeting.

Section 6. A majority of the Shares in the Trust present in person or by proxy shall constitute a quorum at a Shareholders' meeting.

Section 7. Proxies shall be executed in writing and filed with the Chairman of the Trustees or such other officer or office of the Trust as may be designated in the notice of the meeting. No revocation of a proxy, whether by voluntary action, death, or incapacity of the Shareholder granting it or otherwise, shall be effective until notice thereof has been received by the Trust or one of the Trustees. No proxy shall be valid more than one (1) year after its execution.

Section 8. Shares may be voted at the Shareholders' Annual Meeting as follows:

(a) Shares in the Trust registered in the name of a corporation may be voted by one of its officers or by a proxy appointed by an officer, unless the Trust's Trustees has, by resolution, appointed a general or special proxy, and notice thereof has been given to the Chairman of the Trustees, in which case such other proxy may vote such shares.

(b) Except as otherwise provided by law and as hereinafter provided in the case of certain fiduciaries, shares in the Trust registered in the name of two or more persons jointly, or as tenants in common, or in partnership may be voted by any one or more of such persons, either in person or by proxy.

(c) Shares of the Trust registered in the names of executors of an estate, trustees, or guardians may be voted by a majority of such fiduciaries, either in person or by proxy.

Section 9. The Trustees may appoint one or more Judges of Election, who need not be Shareholders, to act at Shareholders' meetings. If a Judge of Election fails to appear or refuses to act at a meeting, the Chairman of the Trustees or other person designated to preside at the Shareholders' meeting shall appoint a substitute Judge of Election. The Judge of Election shall determine the number of Shares in the Trust as of the applicable record date, the number of Shares represented at the meeting, the existence of a quorum, and all questions relating to voting, and shall count the votes and shall determine the results of any voting.

Section 10. For any lawful purpose, including but without being limited thereto, the determination of the Shareholders who are entitled to (a) receive notice of and vote at a meeting of the Shareholders, (b) receive payment of a distribution, and (c) participate in the execution of written approvals, the Trustees may fix a record date which shall not be earlier than the date on which the record date is fixed, and shall not be more than 60 days preceding the meeting, payment, final date of written approvals or waivers, or other event to which the record date relates. If no record date is fixed, the record date for determining the Shareholders who are entitled to receive notice of or to vote at a Shareholders' meeting shall be the close of business on the twentieth day prior to the date of the meeting.

Article IV Officers

Section 1. The Trustees may appoint a Chief Executive Officer, a Chief Financial Officer, and a Secretary. Each appointee shall have all of the authority and duties prescribed in these regulations and as may be prescribed by the Trustees. The Trustees may also appoint other agents and representatives to perform the business of the Trust. Each of these other agents and representatives shall have such authority and duties as the Trustees may prescribe.

Section 2. The Chief Executive Officer shall administer the affairs of the Trust. Except as otherwise directed by the Trustees, he may execute all contracts, leases, and other documents requiring execution by the Trust.

Section 3. In the event of the death, resignation, absence, or disability of the Chief Executive Officer then, except as otherwise directed by the Trustees, the Financial Officer shall perform the duties of the Chief Executive Officer until such time as a new Chief Executive Officer shall be appointed by the Trustees.

Section 4. The Chief Financial Officer shall have or provide for custody of the Trust's funds and securities which may come into his possession.

Section 5. The Secretary shall keep the minutes of all meetings of the Trustees and the Shareholders in appropriate minute books, and shall give all notices on behalf of the Trust including notice of the meetings of the Trustees and the Shareholders. Except as otherwise directed by the Trustees, he shall perform all of the customary duties of a Secretary.

Section 6. The Trustees may fix any compensation they deem appropriate for the services rendered by agents and representatives appointed under the authority of this Article 4.

Article V Shares

Section 1. Each Certificate of Beneficial Interest or Share shall state (a) that it represents units of Beneficial Interest in the Trust; (b) the name of the registered owner of the units of Beneficial Interest represented thereby; and (c) the number of Shares or units of Beneficial Interest which the certificate represents.

Section 2. Each Share certificate shall be signed by the Chief Executive Officer or other duly authorized agent of the

Trust. The signature, however, may be a facsimile signature on any certificate which contains the manual signature of a person authorized to sign on behalf of a Transfer Agent acting for the Trust. If the Chief Executive Officer shall cease to be such prior to the issuance of a certificate signed by him, such certificate may, nevertheless, be issued by the Trustees with the same effect as if the Chief Executive Officer had not ceased to be such at the date of its issuance.

Section 3. Transfer of Shares may be made on the Share Ledger of the Trust only by the registered owner thereof or by an attorney duly authorized in writing and upon surrender of the Share certificate properly endorsed. The certificate shall be cancelled at the time of transfer. The Trustees may prescribe the requirements for any transfer of Shares otherwise than by an assignment validly executed by the registered owner or his attorney duly authorized as herein provided.

Section 4. The Trustees may establish transfer offices each in the charge of a Transfer Agent appointed by the Trustees, where the Shares of the Trust shall be transferable, and a Registry Office in the charge of a Registrar appointed by the Trustees, where the Shares shall be registered. If a Transfer Agent is appointed, no certificate for a Share shall be valid unless countersigned by him.

Section 5. If any Share or Certificate of Beneficial Interest is mutilated, lost, or destroyed, the holder thereof shall immediately notify the Trust or its Transfer Agent of that fact. The Trustees shall then cause one or more new certificates for the same number of shares or units in the aggregate to be issued to such beneficiary. The new certificate or certificates shall be issued, in the case of mutilation, upon surrender of the mutilated certificate, or in the case of loss or destruction, upon satisfactory proof of such loss or destruction. A deposit of indemnity shall be made by way of a bond or otherwise in such form and amount and with such surety as the Trustees may require, to indemnify the Trust against loss or liability by reason of the issuance of the new certificate or certificates.

Section 6. The Certificates of Beneficial Interest issued by the Trustees hereunder shall be in substantially the following form:

SHARE OR CERTIFICATE OF BENEFICIAL INTEREST

_____ [number] Shares

QUEENSBROOK REAL ESTATE INVESTMENT TRUST

This certifies that _____ [name] is the owner of _____ [number] fully paid Shares in Queensbrook Real Estate Investment Trust, a _____ [state] trust, which are held subject to a Declaration of Trust made on _____ [month] _____ [day] , _____ [year] , which, together with any subsequent amendments thereto, is hereby incorporated in and made a part of this certificate.

The holder hereof has no legal or equitable interest, in any specific property of the Trust. No transfer of this certificate will affect Queensbrook Real Estate Investment Trust until this certificate has been surrendered at the offices of the Trust, or Transfer Agent, and the transfer recorded on the books of the Trust. This certificate is not valid until countersigned by the Transfer Agent and Registrar.

In witness whereof the Trustees have caused this certificate to be signed by the signatures of their duly authorized agents and a seal of the Trust to be imprinted thereon.

Dated:

[Chairman of Trustees]

[Secretary]

Countersigned by

[Transfer Agent and Registrar]

Article VI

Indemnification

Section 1. The Trust shall indemnify any person who was or is a party or is threatened to be made a party to any threatened, pending or completed action, suit or proceeding, whether civil, criminal, administrative, or investigative, including all appeals (other than an action, suit or proceeding by or in the right of the corporation) by reason of the fact that he is or was a trustee, director, officer or employee of the Trust, or is or was serving at the request of the Trust as a trustee, director, trustee, officer or employee of another corporation, partnership, joint venture, trust or other enterprise, against expenses (including attorneys' fees), judgments, decrees, fines, penalties and amounts paid in settlement actually and reasonably incurred by him in connection with such action, suit or proceeding if he acted in good faith and in a manner which he reasonably believed to be in or not opposed to the best interests of the Trust and, with respect to any criminal action or proceeding, had no reasonable cause to believe his conduct was unlawful. The termination of any action, suit or proceeding by judgment, order, settlement, conviction, or upon a plea of nolo contendere or its equivalent, shall not, of itself, create a presumption that the person did not act in good faith and in a manner which he reasonably believed to be in or not opposed to the best interest of the Trust and, with respect to any criminal action or proceeding, had reasonable cause to believe that his conduct was unlawful.

Section 2. The Trust shall indemnify any person who was or is a party or is threatened to be made a party to any threatened, pending or completed action or suit, including all appeals, by or in the right of the Trust to procure a judgment in its favor by reason of the fact that he is or was a trustee, director, officer or employee of the Trust, or is or was serving at the request of the Trust as a trustee, director, officer or employee of another Trust, partnership, joint venture, trust or other enterprise, against expenses (including attorneys' fees) actually and reasonably incurred by him in connection with the defense or settlement of such action or suit if he acted in good faith and in a manner he reasonably believed to be in or not opposed to the best interests of the Trust, except that no indemnification shall be made in respect of any claim, issue or matter as to which such person shall have been finally adjudged to be liable for negligence or misconduct in the performance of his duty to the Trust unless and only to the extent that the Court of Common Pleas or the court in which such action or suit was brought shall determine upon application that, despite the adjudication of liability but in view of all the circumstances of the case, such person is fairly and reasonably entitled to indemnity for such expenses as the Court of Common Pleas or such other court shall deem proper.

Section 3. To the extent that a director, trustee, officer or employee has been successful on the merits or otherwise in

defense of any action, suit or proceeding referred to in Section 1 or 2, or in defense of any claim, issue or matter therein, he shall be indemnified against expenses (including attorneys' fees) actually and reasonably incurred by him in connection therewith.

Section 4. Except in a situation governed by Section 3, any indemnification under Section 1 or 2 (unless ordered by a court) shall be made by the Trust only as authorized in the specific case upon a determination that indemnification of the director, trustee, officer or employee is proper in the circumstances because he has met the applicable standard of conduct set forth in Section 1 or 2. Such determination shall be made (a) by a majority vote of Trustees acting at a meeting at which a quorum consisting of Trustees who were not parties to such action, suit or proceeding is present, or (b) if such a quorum is not obtainable (or even if obtainable), and a majority of disinterested Trustees so directs, by independent legal counsel (compensated by the Trust) in a written opinion, or (c) by the affirmative vote in person or by proxy of the holders of a majority of the shares entitled to vote in the election of Trustees, without regard to voting power which may thereafter exist upon a default, failure or other contingency.

Section 5. Expenses of each person indemnified hereunder incurred in defending a civil, criminal, administrative or investigative action, suit or proceeding (including all appeals), or threat thereof, may be paid by the Trust in advance of the final disposition of such action, suit or proceeding as authorized by the Trustees, whether a disinterested quorum exists or not, upon receipt of an undertaking by or on behalf of the director, trustee, officer or employee, to repay such amount unless it shall ultimately be determined that he is entitled to be indemnified by the Trust.

Section 6. The indemnification provided by this Article shall not be deemed exclusive of any other rights to which those seeking indemnification may be entitled as a matter of law or under the Articles, these Regulations, any agreement, vote of shareholders, any insurance purchased by the Trust, or otherwise, both as to action in his official capacity and as to action in another capacity while holding such office, and shall continue as to a person who has ceased to be director, trustee, officer or employee and shall inure to the benefit of the heirs, executors and administrators of such a person.

Section 7. The Trust may purchase and maintain insurance on behalf of any person who is or was a trustee, director, officer or employee of the Trust, or is or was serving at the request of the Trust as a director, trustee, officer or employee of another Trust, partnership, joint venture, trust or other enterprise against any liability asserted against him and incurred by him in any such capacity, or arising out of his status as such, whether or not the Trust would have the power to indemnify him against such liability under the provisions of this Article or of the laws of _____
[state] .

Article VII

Miscellaneous

Section 1. The fiscal year of the Trust shall be the calendar year.

Section 2. No Trustee, representative, or agent of the Trust shall have power or authority to borrow money in the Trust's behalf, to pledge its credit or to buy, sell, or mortgage its real property or securities except within the scope and to the extent of authority expressly delegated by resolution of the Trustees. Authority given by the Trustees for any of the above purposes may be general in scope or limited to specific instances.

Section 3. The Trustees may, by resolution, designate the Trust's representative or representatives who shall be authorized to act as signatory or signatories on the Trust's bank accounts and shall designate the number of signatures required. Any such signatory may, but need not, be a Trustee.

Section 4. Whenever any written notice must be given to the Trustees or the Shareholders, a waiver thereof in writing signed by a person entitled to such notice, whether before or after the time stated therein, shall be deemed equivalent to

the giving of such notice. Attendance of a person either in person or by proxy at a meeting shall constitute a waiver of notice of the meeting unless such person attends it for the express purpose of objecting to the transaction of any business because the meeting was not lawfully called or convened.

Section 5. If any provision in these regulations shall be construed to be inconsistent with the provision of the Declaration of Trust, the provisions of the Declaration of Trust shall control.

Article VIII Amendments

These regulations may be amended at any regular or special meeting of the Trustees if notice of the proposed amendment is contained in the notice of meeting. The Trustees may make amendments to these regulations, with or without a meeting, by executing an instrument, which must be signed by all of them and entered in the records of the Trust.



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Current Legal Forms for Real Estate

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Current Legal Forms for Real Estate
Chapter 20 REAL ESTATE ENTITIES
Part IV. Forms
F. REAL ESTATE TRUSTS

24-20 Current Legal Forms for Real Estate FORM 20.45

AUTHOR: by Stephen E. Pigott and Harold O. Maxfield, Jr.

FORM 20.45 Real estate investment trust: agreement with independent contractor

COMMENT

One of the basic requirements of a qualified real estate investment trust is that it be engaged only in "passive" investment. To insure that rent income will not represent profits from active operations, the statute "disqualifies" rent which is based upon profits of a tenant, or which is paid by a tenant in which the trust has at least a 10% interest, or which is received by a trust which owns property and which "furnishes or renders services to the tenants of such property, or manages or operates such property, other than through an independent contractor from whom the trust itself does not derive or receive any income." It is this last requirement which gives considerable significance to the role of the independent contractor in the scheme of operating a real estate investment trust. It should be noted that this function of the independent contractor is in respect of those services "usually or customarily furnished or rendered in connection with the mere rental of property." Payments attributable to "unusual" services do not qualify as "rent" even if such services are rendered through an independent contractor. If unusual services are to be rendered, the independent contractor should make a separate adequate charge for such services, and should retain the payment himself.

In the case of permissible services which are furnished through an independent contractor, the cost of such services may be borne by the trust. Nevertheless, any facilities through which the services are rendered (e.g., a heating plant located in the building) must be maintained and operated by the independent contractor.

The Regulations state, "The supplying of water, heat, and light; the cleaning of windows, public entrances, exits, and lobbies; the collection of trash; and the furnishing of elevator service,

telephone answering service, unattended parking lots, and watchman or guard services are examples of services which may or may not (depending upon the circumstances) be customary or incidental to the mere rental of multiple-occupancy real estate ... The furnishing of hotel, maid, boarding house, motel, attended parking lot, warehouse, or storage services are examples of services which are not usually or customarily furnished or rendered in connection with the mere rental of real estate. Furthermore, where electric current is purchased and then sold to the tenants at a price in excess of the purchase price (for example, submetered), such purchase and sale must be made by the independent contractor and no income therefrom may inure, directly or indirectly, to the trust."

This agreement sets up the relationship between an independent contractor and a real estate investment trust. The intention is to give the independent contractor full authority to perform all the usual services with respect to the property owned by the trust, so that the trustees are completely free of any duties relating to management of the property itself. Among the services to be performed by the independent contractor are negotiating leases, collecting rents, making repairs, providing utilities, and purchasing insurance. The net income from the property is to be remitted regularly by the independent contractor to the trustees.

The Regulations emphasize the statutory requirement for an "independent contractor" rather than an "employee": "the manner in which he carries out his duties as independent contractor must not be subject to the control of the trust." The Regulations have eliminated the prohibition against the trustee's interest in the independent contractor. As to the requirement that the trust not derive any income from the contractor, the Regulations state that the trust may not receive income even in the form of dividends on stock in the contractor. There must be an arm's-length relationship between the trust and the contractor, with adequate compensation for all services. Such compensation may be a percentage of gross rent at the going rate for similar property in the same locality. Although the trust must delegate the management and operation of the property and the rendering of services to the tenants, the trust may retain its fiduciary duty to manage the trust itself. This latter function includes establishing rental terms, choosing tenants, entering into and renewing leases, dealing with taxes, interest, and insurance, making capital expenditures, and making decisions as to repairs.

A trustee may be an officer or employee of a corporation servicing real estate mortgages owned by a trust, because the prohibition against a trustee's interest in an independent contractor furnishing services to the trust property relates to real property owned by the trust rather than to property in which the trust holds a security interest. Similarly, a trust will not be disqualified if a trustee is a stockholder, officer, or employee of an organization rendering legal or investment advice to trustees.

Since the primary purpose of the arrangement with the independent contractor is to assure the trust's qualification, this agreement provides that it will terminate if counsel for the trust determines that its existence threatens classification as a real estate investment trust.

For a more detailed discussion of specific requirements that a corporation, trust, or association must meet in order to qualify as a REIT, including the requirement that the REIT be engaged only in a "passive" investment, see TB § 20.08.

THIS AGREEMENT made _____ [month] _____ [day] ,
 _____ [year] , between Queensbrook Real Estate Investment Trust (the "Trust"), a
 _____ [state] business trust, and Realty Management, Inc. (the "Manager"), a
 _____ [state] corporation.

WHEREAS, the Trust owns a number of real estate properties in the United States, intends to acquire more, and desires the services of an independent contractor capable of managing and operating such properties, and

WHEREAS, the Manager has the experience and staff necessary and suitable for the management and operation of real estate properties in the United States, is completely independent of the Trust, and desires to undertake the management and operation of the real estate properties of the Trust,

NOW, THEREFORE, in consideration of the foregoing and the mutual covenants hereinafter set forth, the parties hereto do agree as follows:

1. Exclusive Appointment. The Manager shall serve, as an independent contractor, as the Trust's exclusive agent for the management of some or all of the real estate interests owned by the Trust, which shall be identified from time to time by the Trust in writing in the form attached hereto as Exhibit A.

2. Services of Manager. Subject to such express restrictions or limitations on its authority and to such written instructions as the Trustees may from time to time impose or give, the Manager shall, on behalf and for the account of the Trustees:

(a) Use its best efforts to lease and keep leased to desirable tenants all space held for lease.

(b) Promote such leasing by the use of any advertising, floor plans, circulars, promotional aids, and economic survey that it deems appropriate.

(c) Deal appropriately with all inquiries relating to leases and lease renewals referred to it by the Trust. All negotiations connected therewith shall be conducted by the Manager or under its direction.

(d) Use its best efforts to collect rent and other income from the real estate interests of the Trust. The Manager may, in its discretion, compromise claims for such rent and other income and, at the Trust's expense and with its approval, may institute legal proceedings in its own name or in the name of the Trust to collect the same, to oust or dispossess tenants or others occupying such real estate interests, and otherwise to enforce the rights of the Trust with respect thereto, and in its discretion may compromise or settle any such proceedings.

(e) At the expense of the Trust, cause to be made such ordinary repairs, alterations, and improvements to the real estate interests of the Trust and purchase such supplies and equipment for the maintenance and operation of such real estate interests as it deems advisable or necessary. In connection therewith the Manager may, at the expense of the Trust, engage architects, engineers, or similar experts acceptable to the Trust.

(f) Control, and arrange for the payment of the cost of maintenance and repairs. The Manager, however, shall not incur extraordinary expenditures of over _____ Dollars (\$ _____) for any one item without the approval of the Trust except in those cases when, in its opinion, an emergency requires the expenditure before the Trust's approval can reasonably be obtained. In all such cases, however, the Manager shall notify the Trust of its action with all reasonable promptness.

(g) Contract on behalf of the Trust and pay for gas, electricity, steam, telephone, elevator, window cleaning, vermin extermination, and other services it deems appropriate in the operation and maintenance of the real estate interests of the

Trust.

(h) Employ or discharge any employee when it deems such action necessary for the operation and maintenance of the real estate interests of the Trust. This authority shall extend to employees who are employed by the Manager or to any local agent that it may retain, and not to employees employed by the Trust. The Manager shall at its expense maintain adequate fidelity insurance on any of its home office employees who handle the Trust's funds or assets.

(i) On behalf of the Trust, pay mortgage interest and amortization, real estate taxes, water and sewer rents, and other charges or assessments of every nature with respect to the real estate interests of the Trust. The Manager may, in its discretion, defend against and seek revision of, or appeal from, any assessment or charge which it deems improper. All such actions may be taken in its name or in the name of the Trust as the Trust shall decide. In connection with such actions the Manager may, if it deems it advisable, employ real estate experts for appraisals and testimony and may also in its discretion pay any such charges or assessments under protest and seek refunds thereof, and compromise or settle any proceeding or claim with respect thereto.

(j) Purchase any type or kind of insurance that it may deem advisable to protect the real estate interests of the Trust, including but not limited to fire insurance, with extended coverage, boiler, elevator, public liability, and workmen's compensation insurance. The Trust, the Trustees, and the Manager shall be named as parties in interest in such policies of insurance, and the policies or certificates of insurance shall be delivered to the Trust. The Manager may receive from others and retain its customary compensation for its services as an insurance agent or broker in placing such insurance.

(k) Use its best efforts to comply with all building codes, zoning and licensing requirements, and other federal, state, and local requirements with respect to the real estate interests of the Trust. The Manager may, in its discretion, appeal from any requirement it deems unwarranted and it may compromise or settle any dispute regarding such requirements.

(l) Act on behalf of the Trust in any eminent domain proceedings for the condemnation of the real estate interests of the Trust and may, if the Manager deems it advisable, employ independent real estate experts for appraisal and testimony in connection with any such proceedings. The Manager will make recommendations as to the advisability of compromise or settlement of any such proceedings.

(m) Enlist the services of other real estate brokers or agents in the performance of its duties hereunder, to the extent deemed necessary or appropriate.

(n) In its discretion, engage counsel acceptable to the Trust who may also be counsel to the Trust to advise on legal matters and conduct legal proceedings arising in the performance of the Manager's duties hereunder.

(o) Insert in all documents and agreements prepared or executed by it on behalf of the Trust a provision that the Trustees and the Beneficiaries shall not be personally liable thereunder and that all other parties shall look solely to the Trust's property for the payment of any claim thereunder, and reference shall be made to the Declaration of Trust by which the Trust is constituted.

(p) Maintain complete and accurate records of all transactions relating to the Trust's real estate interests and make such records available for inspection by the Trust or its representatives at reasonable times.

(q) Render to the Trust a monthly statement of receipts and disbursements and of its compensation hereunder with respect to each separate real estate interest of the Trust which the Manager may manage. If the Manager shall make disbursements attributable to more than one real estate interest, including one or more real estate interests of the Trust, it shall make a reasonable allocation of such expenses among the several real estate interests benefited thereby.

(r) Remit to the Trust, together with such monthly statements, the net balance due to the Trust as reflected on a

summary of such statements. In case of a debit balance, the Trust shall forthwith pay the amount thereof to the Manager. Nothing herein contained shall obligate the Manager to advance its own funds on behalf of the Trust.

3. Liability of Manager. The Manager shall give the Trust the benefit of its best judgment and efforts in rendering the foregoing services to the Trust. The Manager shall not be liable for any act or omission whatsoever of any agent or representative or for the Manager's negligence or error in judgment, except its willful misfeasance, bad faith, or gross negligence in the conduct of its duties. The Trust shall indemnify and save harmless the Manager from and against any and all liabilities, claims, damages, costs, and expenses (including reasonable counsel fees) to which the Manager may become subject by reason of or arising out of the performance or nonperformance of its duties as Manager. No such right of indemnity shall exist, however, with respect to any liabilities, claims, damages, costs, or expenses which the Manager may incur by reason of its willful malfeasance, bad faith, or gross negligence in the conduct of its duties. The foregoing provisions of this Paragraph 3 shall survive the termination of this agreement, but this shall not be construed to mean that the Trust's liabilities or obligations hereunder do not survive as to the other provisions of this agreement.

4. Compensation of Manager. The Manager shall be compensated for all its services to the Trust for the management of the Trust's properties as provided above. The Manager's compensation shall not exceed the applicable rate of returns set forth in the prevailing Recommended Schedule of Commissions and Charges for such services as adopted by the _____ [city] Real Estate Board or as set forth in the schedule adopted by the corresponding real estate board in the area where the property may be located. The precise compensation to the Manager for its services hereunder shall, in respect of each property unit or each service, as may be appropriate, be such amount as the Trust and Manager may agree is fair and reasonable under all circumstances.

5. Liability of Trust. The Manager shall not make any claim under this agreement against the Trustees personally or against the Trust's Shareholders but shall look solely to the Trust's property for the payment of any claim hereunder.

6. Term of Agreement. This agreement shall continue in effect for a period of one year commencing on _____ [month] _____ [day] , _____ [year] . Thereafter, either party may terminate this agreement at any time without penalty by giving sixty (60) days' prior written notice to the other party.

7. Status of Trust. If the terms of this agreement, at any time, shall, in the opinion of counsel for the Trust, impair the status of the Trust as a "real estate investment trust" within the meaning of Part II, Subchapter M of the Internal Revenue Code of 1986, as now enacted or hereafter amended, this agreement shall immediately terminate. This agreement shall not be terminated, however, if the Trustees shall give to the Manager written notice of such impairment and within thirty (30) days thereafter the parties negotiate such amendments as may be necessary, in the opinion of counsel for the Trust, to restore its status as a real estate investment trust under the Code.

8. Rights of Manager Upon Termination. Upon termination of this agreement under the provisions of either Paragraph 6 or Paragraph 7, the Manager shall be entitled to the following compensation in addition to any unpaid management fees: deferred leasing brokerage commissions, if any, as agreed upon with the Trustees. No other additional compensation shall be allowed.

9. Limitation on Assignment. This agreement shall not be transferred, assigned, sold, or in any manner hypothecated or pledged by the Manager and shall terminate automatically in the event of any such transfer, assignment, sale, hypothecation, or pledge. This agreement shall not be terminated, however, in the event of any sale or merger of the Manager, provided that the presently controlling interests of the Manager continue in control of the purchaser or the resulting company after such sale or merger, as the case may be.

10. Dealing with Manager. The Trust shall not convey directly or indirectly any interest in any real property to or through the Manager or any of its officers, directors, employees, or affiliates, nor shall the Trust acquire directly or

indirectly any interest in real property from or through the Manager or any of its officers, directors, employees, or affiliates or in which the Manager or any of its officers, directors, employees, or affiliates have any direct or indirect proprietary interest, unless it first obtains prior written waiver of this provision from the Trustees.

11. Governing Law. This agreement is executed and delivered in the _____ [city] , _____ [state] , and the laws of _____ [state] shall govern its construction, validity, and effect.

12. Headings for Reference Only. Headings preceding the text, articles, and sections of this agreement have been inserted solely for convenience and reference, and shall not be construed to affect its meaning, construction, or effect.

13. Entire Agreement. This agreement supersedes all agreements previously made between the parties relating to its subject matter. There are no other understandings or agreements between them.

14. Notices. All notices or other documents under this agreement shall be in writing and delivered personally or mailed by certified mail, postage prepaid, addressed to the parties at their last known addresses.

15. Non-waiver. No delay or failure by either party to exercise any right under this agreement, and no partial or single exercise of that right, shall constitute a waiver of that or any other right, unless otherwise expressly provided herein.

16. Counterparts. This agreement may be executed in two or more counterparts, each of which shall be deemed an original but all of which together shall constitute one and the same instrument.

17. Binding Effect. The provisions of this agreement shall be binding upon and inure to the benefit of the parties and their respective successors, administrators, assigns, and legal representatives.

In witness whereof the parties hereto have caused this agreement to be signed in their respective behalf by their proper officers and their respective seals to be affixed hereto

QUEENSBROOK REAL ESTATE INVESTMENT TRUST

By: _____

[name and title]

[trustee]

[trustee]

[trustee]



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Chapter 20 REAL ESTATE ENTITIES
Part IV. Forms
F. REAL ESTATE TRUSTS

24-20 Current Legal Forms for Real Estate FORM 20.46

AUTHOR: by Stephen E. Pigott and Harold O. Maxfield, Jr.

FORM 20.46 General real estate trust: business operations

COMMENT

Unless a trust can qualify as a real estate investment trust, its status for tax purposes will depend primarily upon the nature of its activities. Generally, the trust status will be respected if the activities are confined to the passive preservation of property. But if the trust is involved in some active business undertaking, it will be classified as an "association" taxable as a corporation. The Regulations state: "There are other arrangements which are known as trusts because the legal title to property is conveyed to trustees for the benefit of beneficiaries, but which are not classified as trusts for purposes of the Internal Revenue Code because they are not simply arrangements to protect or conserve the property for the beneficiaries. These trusts, which are often known as business or commercial trusts, generally are created by the beneficiaries simply as a device to carry on a profit-making business which normally would have been carried on through business organizations that are classified as corporations or partnerships under the Internal Revenue Code." For a more detailed discussion of the specific requirements that a corporation, trust, or association must satisfy in order to qualify as a real estate investment trust, see TB § 20.08, at the beginning of this chapter.

As indicated in the comment to Form 20.16, an unincorporated association is not taxed as a corporation unless it has more corporate characteristics than noncorporate characteristics. The Regulations list six characteristics which distinguish a corporation: (1) associates, (2) an objective to carry on business and divide the gains therefrom, (3) continuity of life, (4) centralization of management, (5) limited liability, and (6) free transferability of interests. The Regulations state that the last four characteristics generally exist in all trusts; therefore, the only significant characteristics for distinguishing between an association and a trust are the other two, viz.,

associates and business objective. If a trust has beneficiaries and is engaged in a profit-making business activity, it will be taxed as a corporation.

It is generally held that the powers recited in the trust agreement are controlling even though the activities are in fact narrower. (See Current Legal Forms with Tax Analysis, Chapter 2, Joint Ventures/Business Trusts-Comment to Form 2.13). Where a business purpose is evident from the trust instrument, a trust will be determined to be an association taxable as a corporation even though the trust instrument contains a clause disavowing a profit motive. If a trust holds real property merely for the purpose of collecting and distributing the income, with only incidental powers to maintain the property, no association is generally recognized. On the other hand, if the activities consist of the improvement, management, and sale of property, it will be taxed as a corporation.

The terms of this agreement would clearly cause the trust to be taxed as a corporation. The trustees are granted powers to manage, lease, and sell property, to grant easements, and to do everything any individual owner of property could do. These powers exceed the mere collection and distribution of income, and plainly extend into the area of business activity.

FORM

THIS AGREEMENT AND DECLARATION OF TRUST made _____ [month]
 _____ [day] , _____ [year] , among JOSEPH GRAY, of _____
 [address] , _____ [city] , _____ [state] , HOWARD SALMON, of
 _____ [address] , _____ [city] , _____ [state] , and ROBERT
 QUINN, of _____ [address] , _____ [city] , _____ [state] , (the
 "Subscribers"), VIRGIL LANE of _____ [address] , _____ [city] ,
 _____ [state] , and HERBERT ARBACH, of _____ [address] ,
 _____ [city] , _____ [state] , (the "Trustees"), and such persons as may become
 parties to this agreement by acceptance of shares of beneficial interest issued hereunder (the "Beneficiaries").

WHEREAS, the Subscribers have conveyed to the Trustees cash and certain real property described in the attached Exhibit A (the "trust property"), and

WHEREAS, the Trustees acknowledge that legal title to the trust property and any additional property which may be acquired by them or their successors, as Trustees, and all income and profits therefrom, shall be held by them in trust and shall be managed, administered, leased, mortgaged, and disposed of by them for the benefit of the Beneficiaries, under the terms of this agreement,

IT IS THEREFORE AGREED:

1. Name and address. The Trustees shall be collectively designated as the 3200 Castleton Avenue Trust, and under that name shall perform all acts and execute all instruments necessary to accomplish the purposes of this trust, according to the terms of this agreement. The principal office of the trust shall be _____ [address] ,
 _____ [city] , _____ [state] .

2. Appointment of Trustees and Successors. There shall be two (2) Trustees. Both shall serve for the entire term of the trust, unless their tenure shall be terminated by death, resignation, or incapacity to serve. The death, resignation, or incapacity of either or both of the Trustees shall not terminate the trust or in any way affect its continuity. If either Trustee shall die, resign, or be unable to serve, the other Trustee shall fill his vacancy. Upon his appointment the

successor Trustee shall execute a written acceptance of the trust. This acceptance, together with a certificate of such appointment signed by the continuing Trustee, shall be filed with the Register of Deeds, _____ [state] , as ancillary to this trust agreement. Upon such acceptance, the successor Trustee shall succeed to all the rights and duties of his predecessor. If both trusteeships shall become vacant, any Beneficiary shall have the right to apply to the presiding judge of the District Court of the District of _____ [state] for the appointment of two (2) successor Trustees. The appointees shall be citizens of the United States and residents of the _____ [state] , and shall be men of good standing in the community and competent in the discharge of business matters. All Trustees so appointed shall administer the trust subject to the court's supervision. The court may require such Trustees to furnish a sufficient bond, and to make such reports and distributions to the Beneficiaries as it may direct.

3. Meetings. The Trustees shall hold a meeting on the first Tuesday of every month. Additional meetings may be held when deemed advisable by either Trustee. The concurrence of both Trustees shall be necessary to validate any action taken by them.

4. Compensation. Each Trustee shall be paid _____ Dollars (\$ _____) annually for his services, in equal monthly installments, except that any Trustee appointed by the court under the provisions of Paragraph 2 shall receive such compensation as the court may approve.

5. Trustees' Powers. The Trustees shall have full and absolute power, control, and authority over the trust property held by them at any time hereunder and over the business of the trust to the same extent as if the Trustees were the sole owners of such property and business in their own right, exercisable without the consent of the Beneficiaries, and subject only to the limitations expressly stated in this agreement. These powers shall include, but shall not in any way be limited to or by, the following powers:

(a) to purchase or otherwise acquire real property, and to sell, exchange, lease, mortgage, grant easements, pledge, or in any manner dispose of, encumber, improve, or deal with the property of the trust or any part thereof or any interest therein, upon such terms and for such consideration as they deem proper;

(b) to incur indebtedness, borrow, or lend money with or without security; enter into contracts of all kinds; execute, accept, discount, negotiate, and deal in commercial paper and evidences of indebtedness; and execute conveyances, mortgages, security agreements, leases, and all other instruments;

(c) to compromise or settle all suits, claims, or demands, or waive or release all rights relating to the trust property;

(d) to employ officers, agents, attorneys, and servants;

(e) to sue and be sued and prosecute and defend any and all actions affecting the trust or its business or property; and

(f) to adopt and enforce such Bylaws or regulations, not inconsistent with this agreement, as they may from time to time deem proper.

6. Protection of Persons Dealing with Trustees. A resolution of the Trustees authorizing a particular act shall be conclusive evidence that such act is within the Trustees' powers. No purchaser from the Trustees shall be bound to see to the application of the money or other consideration paid by the purchaser to the Trustees.

7. Liability. The Trustees shall not be personally liable for any error of judgment or for any loss arising out of any act or omission to act in the execution of any of the powers conferred by this agreement, so long as they act in good faith. Neither Trustee shall be personally liable for the acts or omissions of the other, nor for the acts or omissions of any persons appointed by either of them to assist in the execution of the trust. All persons dealing with the Trustees shall look only to the trust property for the payment of their claims, and every instrument to which the Trustees shall be

parties or on account of which any liability may be chargeable against the trust property shall in substance so provide.

8. Indemnification. Each Trustee shall be indemnified by and receive reimbursement from the trust property against and from any and all loss, liability, expense, or damage arising out of any action or omission to act as a Trustee hereunder, except to the extent that such loss, liability, expense, or damage shall result from his own willful misconduct. Such indemnity or reimbursement shall be limited to the trust property, and no Beneficiary shall be personally liable therefor to any extent.

9. Shares of Beneficial Interest.

(a) The beneficial interest in the trust shall be divided into 1,000 shares, which shall have such stated par value, or shall be shares of no par value, as the Trustees may determine. The Trustees shall issue certificates to the purchasers of such shares, in such form as the Trustees deem proper, evidencing the purchasers' beneficial interests. Such purchasers shall be the Beneficiaries of the trust. The shares shall entitle the Beneficiaries to participate in all dividends and other distributions of income or principal, as the Trustees in their discretion from time to time shall deem advisable. Each Beneficiary shall share in dividends or other distributions in the proportion which the number of shares owned by him bears to the total number of shares issued and outstanding. No Beneficiary shall have the right to ask for partition of the trust property during the continuance of this trust. No Beneficiary shall have any interest in any portion of the trust property as such, and shall have only an interest in dividends and other distributions as hereinabove provided.

(b) A certificate of beneficial interest may be transferred by the holder thereof in person, or by a duly authorized attorney. The transferee shall surrender such certificate, duly endorsed for transfer, to the Trustees, who shall execute a new certificate representing the share or shares so transferred. The acceptance by the transferee of a certificate transferred to him, or of any certificate issued in place thereof, shall constitute such transferee a party to this agreement and shall bind him to the provisions hereof. No such transfer shall be binding upon the Trustees until it has been recorded on the trust's transfer books.

(c) The death, insolvency, or incompetency of one or more Beneficiary, or the transfer of shares, shall not terminate the trust nor entitle the legal representative of the Beneficiary, or of the transferee, to any accounting, or to any action in the courts, or to any right against the trust property or the Trustees not provided for in this agreement. The Beneficiary's or transferee's legal representative shall succeed to the Beneficiary as a shareholder of the trust.

(d) If a share certificate shall be lost or destroyed the Trustees may issue a new certificate upon such conditions as they may deem expedient.

10. Personal Liability of Beneficiaries. The Trustees shall have no power to bind the Beneficiaries personally. All persons dealing with the Trustees or with any of their agents shall look only to the trust property for the payment of any sum due as a result of such dealing. In every instrument executed by the Trustees and creating an obligation of any kind, the Trustees shall in substance provide that no Beneficiary shall be held to any personal liability under such instrument.

11. Meetings. The Trustees shall call meetings of the Beneficiaries at such times as they may deem advisable in the best interest of the trust. Written notice of such meetings (specifying the time, place, and purpose thereof) shall be sent by registered mail to the Beneficiaries at least fifteen (15) days before it is held. A notice addressed to a Beneficiary at the address listed in the register of the Trustees shall be sufficient notice under this paragraph. The owners of one-half (1/2) of the issued and outstanding shares, or their proxies, shall constitute a quorum for the purposes of any meeting, and a majority of the shares represented and voting at any meeting shall control any action at such meeting.

12. Inspection of Records. Each Beneficiary or his duly authorized agent shall have the right during reasonable hours to examine, inspect, and make audits of the trust property and the records of the Trustees in respect thereto, and to examine the annual reports of the Trustees and the stock books of the trust showing the ownership of all shares of the trust and

all transfers thereof.

13. Trustees' Reports. As soon as possible after the close of each calendar year the Trustees shall make a written report of the operations of the preceding year showing the trust's receipts, disbursements, and earnings, and the condition of the trust property. Such report shall be retained on file in the trust's principal office, and a summary thereof shall be mailed to every Beneficiary within two (2) months after the end of each calendar year.

14. Term. This trust shall continue until _____ [month] _____ [day] , _____ [year] , unless sooner terminated as hereinafter provided. Upon termination of the trust, the Trustees shall liquidate all trust property, and distribute the proceeds among the Beneficiaries according to their beneficial interests in the trust. The Trustees may terminate the trust at any time prior to the above date, but only with the assent of Beneficiaries, or their proxies, owning at least two-thirds of the outstanding shares. Such assent shall be given only at a meeting of Beneficiaries called pursuant to a notice given as hereinabove provided, in which the purpose of the meeting is specified.

15. Amendment. This agreement may be amended in any particular, except that no change may be made in the provisions governing the liability of the Trustees, of their agents, or of the Beneficiaries. Amendments may be considered at any meeting of the Beneficiaries provided notice of the proposed amendment is included in the call for the meeting. The consent of the holders of two-thirds (2/3) in value of the outstanding shares shall be necessary to adopt any amendment. The amendment shall become effective when certified by the chairman of the meeting which voted it, countersigned by the Trustees, attached to this agreement, and a copy thereof filed with the Register of Deeds of the _____ [state] .

In witness whereof the parties have signed and sealed this agreement.

Subscribers:

Joseph Gray

Howard Salmon

Robert Quinn

Trustees:

Virgil Lane

Herbert Arbach

(Acknowledgments)



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Chapter 20 REAL ESTATE ENTITIES
Part IV. Forms
F. REAL ESTATE TRUSTS

24-20 Current Legal Forms for Real Estate FORM 20.47

AUTHOR: by Stephen E. Pigott and Harold O. Maxfield, Jr.

FORM 20.47 General real estate trust: investment purposes

COMMENT

A trust will be taxable as a corporation if it has two characteristics, viz., associates and a business objective. Except in the rare case where there is only one beneficiary, a trust will be taxed as a corporation if it is a device to carry on a profit-making business. It will escape such classification if it is simply an arrangement to protect or conserve the property of the beneficiaries. (See the Tax Background § 20.08), at the beginning of this chapter. There are obviously many situations in which it becomes difficult to draw the line between the business and nonbusiness trust, especially since the powers recited in the trust instrument are given as much weight as the actual activities of the trust in deciding this question.

As to the special tax status of a "real estate investment trust," see the Tax Background § 20.08.

FORM

THIS DECLARATION OF TRUST made _____ [month] _____ [day] ,
_____ [year] , by STATE BANKING & TRUST COMPANY (the "Trustee"), of
_____ [city] , _____ [state] .

1. Declaration of Trust. The Trustee declares that it holds in trust, for the benefit of all present and future holders of the certificates of equitable ownership issued hereunder, the title of the property known as Gilbert's Corner (the "trust estate"), more specifically described in Schedule A annexed hereto. The premises are subject to an indenture of lease made this day, a copy of which is annexed hereto as Schedule B.

2. Income. The Trustee, after deducting its compensation, as hereinafter provided, and all expenses incurred by it to protect and administer the trust estate, shall pay over quarterly to the record holders of the certificates of equitable ownership (the "Beneficiaries") their proportionate shares of rents or other income derived from the trust estate.

3. Beneficial Interest. The beneficial interest in the trust estate shall be divided into _____ (_____) shares, evidenced by certificates of equitable ownership. Such certificates shall give the holders thereof only an equitable interest in the trust property. The rights of a holder shall be limited to those specifically set forth in the certificate and in this instrument. No certificate holder shall have the right to ask for partition of the trust estate during the continuance of this trust. No transfer by operation of law of the interest of a Beneficiary during the continuance of the trust shall terminate the trust, nor entitle the legal representative of a deceased Beneficiary to an accounting, or to any action in the courts, or otherwise against the trust estate or the Trustee; but the executors, administrators, or assigns of a deceased Beneficiary shall succeed to the rights and be subject to the decedent's liabilities.

4. Transfer of Certificates. The holders of certificates of equitable ownership may transfer them in person or by duly authorized attorney. Upon presentation to the Trustee of any such certificate duly endorsed for transfer, the Trustee shall execute to the transferee a new certificate representing the share or shares so transferred. The transferee shall, by accepting a certificate so assigned or any new certificate issued in place thereof, become a party to this declaration and be bound hereby. No such transfer shall be binding upon the Trustee until the new certificate is issued and notation of the transfer made upon its books.

5. Lost Certificate. If a certificate shall be lost or destroyed, the Trustee may, in its discretion, issue a new certificate representing the interest evidenced by the lost or destroyed certificate upon satisfactory proof of its loss or destruction and the furnishing of a sufficient indemnity bond for the benefit of all interested parties.

6. Records. The Trustee shall keep a register of the names and interests of the Beneficiaries hereunder, and proper transfer books and books of account showing the receipts and disbursements of the trust estate.

7. Powers of Trustee. The Trustee shall have the following powers in the administration of the trust:

(a) To manage and control the trust estate as it may deem for the best interests of the Beneficiaries, as fully as though the Trustee were the sole legal and equitable owner of the estate;

(b) To make agreements modifying, amending, or supplementing the lease;

(c) To incur necessary expenses in connection with the printing of the trust instrument, the certificates of equitable ownership, and all books and records that are essential to the proper administration of the trust;

(d) To borrow funds, if necessary, to meet a temporary exigency in connection with the ownership of the trust estate, and to give notes or other security therefor binding the assets of the trust but not the Trustee or Beneficiaries personally;

(e) To compromise and settle claims either in contract or tort made against it or against the proceeds of the trust estate.

8. Representations by Trustee. The Trustee does not warrant its title to the premises described as the trust estate, nor does it warrant the validity of the lease hereinbefore mentioned, nor guarantee the lessee's performance of the covenants thereof. It undertakes to exercise only ordinary care in collecting the rentals derived from the premises and in distributing the net proceeds therefrom, or in carrying out any sale thereof and distributing the proceeds among the Beneficiaries.

9. Liability of Trustee. The Trustee shall not be liable for any error of judgment or for any loss arising out of any act of commission or omission in the execution of the trust so long as it acts in good faith, nor shall the Trustee be personally liable for any such acts or omissions by any officer, agent, servant, or employee provided reasonable care is used in their selection. The Trustee shall not be required to give any bond to secure the performance of the trust, and shall not be subject to any obligation to the Beneficiaries other than those expressly assumed hereunder. Whenever the Trustee is required hereunder to pay money to any Beneficiary, such obligation is imposed upon the Trustee only in its trust capacity and not personally, and such payments are to be made only out of such funds as the Trustee has in its hands available therefor.

10. Indemnity. The trust estate shall indemnify the Trustee against any personal liability which it may incur in the proper administration of the trust. The Trustee may secure advice from legal counsel and shall be protected as to any action taken in good faith and consistent with such advice. The Trustee shall also be protected in acting on any document signed by the proper party and believed by it to be genuine.

11. Termination of Lease. If the lessee shall default in any provision of the lease, so that in the opinion of the Trustee it may be necessary or advisable to terminate the lease, the Trustee shall give not less than thirty (30) days' notice to the registered holders of certificates of equitable ownership, by registered letter mailed to their last addresses as shown on the transfer books of the Trustee. The letter shall request the holder to advise the Trustee within ten (10) days after the period of notice provided above expires as to whether the property should be offered for sale or whether another lease should be made, if possible. If a majority in interest of the certificate holders shall fail to so advise the Trustee within the ten-day period, or if the Trustee finds, after making reasonable efforts, that it is impractical to comply with the majority decision, then it shall have full authority to sell, lease, manages, operate, or otherwise dispose of the premises as it may deem advisable for the best interests of the certificate holders.

12. Sale of Trust Property. Upon the lessee's exercise of its option to purchase the trust property, as provided in a copy of the lease annexed hereto as Schedule B, or upon any sale of the property made by the Trustee, the Trustee shall distribute the net proceeds thereof to the record certificate holders, after deducting all necessary expenses, including reasonable compensation for the Trustee's services in connection with the completion of the sale and the distribution of the net proceeds to the certificate holders.

13. Compensation of Trustee. The Trustees shall receive out of the proceeds of the trust estate for its services in discharge of such trust _____ Dollars (\$_____) annually.

14. Successor Trustee. If the Trustee, or any successor hereafter appointed, shall desire to relinquish the trust evidenced by this agreement, the Trustee shall give thirty (30) days' notice thereof to all of the Beneficiaries by registered letter mailed to their last addresses as shown on its transfer books. If the holders of two-thirds (2/3) in interest of the outstanding certificates shall, within twenty (20) days after the expiration of the period of notice above provided, request the Trustee in writing to convey the trust estate to a specified trustee who is willing to accept the trust, the Trustee shall upon making such conveyance and accounting for all funds which have previously come into its possession, be discharged from further liability. If the holders of two-thirds (2/3) in interest of the outstanding certificates shall fail to choose a successor within the period above provided, the Trustee shall select any qualified bank or trust company, situated in _____ [state] , as successor trustee. Upon conveying the trust estate to a successor trustee and accounting for all funds which have previously come into its possession, the Trustee shall be discharged from further liability.

15. Construction. The term "Trustee" shall be deemed to include State Banking & Trust Company, Trustee, or any successor which may hereafter be appointed. By the acceptance of any certificate issued hereunder, the original and any successive holder shall be deemed to assent to all of the provisions contained in this trust agreement.

In witness whereof the State Banking & Trust Company has signed and sealed this instrument.

STATE BANKING & TRUST COMPANY

By: _____

[name and title]

And: _____

[name and title]



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Chapter 20 REAL ESTATE ENTITIES
Part IV. Forms
F. REAL ESTATE TRUSTS

24-20 Current Legal Forms for Real Estate FORM 20.48

AUTHOR: by Stephen E. Pigott and Harold O. Maxfield, Jr.

FORM 20.48 General real estate trust: investment on installment basis

COMMENT

Illustrated here is a typical Massachusetts trust-type agreement. The powers of the trustees recited in the declaration of trust are controlling and include the authority to purchase, mortgage, sell, develop, and manage real property. Since these powers demonstrate that the trust was created to carry on a profit-making business, it will be treated as an association and will be taxed as a corporation. Contributions of capital are set up on a monthly basis, thus providing a vehicle for the small subscriber to invest.

FORM

THIS AGREEMENT AND DECLARATION OF TRUST made _____ [month]
_____ [day] , _____ [year] , by and among BENJAMIN WEINER of
_____ [address] , _____ [city] , _____ [state] , JOSEPH BURNS
of _____ [address] , _____ [city] , _____ [state] , and PAUL
SLOAN of _____ [address] , _____ [city] , _____ [state] , (the
"Trustees"), and EDWARD WEST of _____ [address] , _____ [city] ,
_____ [state] , SAMUEL WHITE of _____ [address] , _____
[city] , _____ [state] , PHILIP BRADHURST of _____ [address] ,
_____ [city] , _____ [state] , BENEDICT POWERS of _____
[address] , _____ [city] , _____ [state] , and LESTER STONE of
_____ [address] , _____ [city] , _____ [state] , and such other
persons as may become parties to this agreement by purchasing shares representing beneficial interests in the Trust and

signing a copy of this agreement (collectively the "Subscribers"). It is mutually agreed as follows:

1. Trustees. The title of the Trustees and of their successors as Trustees under this agreement shall be the Commonwealth Trust (the "Trust"), and any property conveyed or sold to them or their successors in the Trust shall be held by them in trust under the terms of this agreement.

2. Powers of Trustees.

(a) The Trustees may issue notes or bonds and may secure the payment thereof by mortgaging the whole or any part of the Trust property. The Trustees may borrow money for temporary purposes giving notes therefor signed by them in their capacity as Trustees. The Trustees may also invest such part of the capital and the profits therefrom and the proceeds of the sale of bonds and notes in such real estate, equities in real estate, and mortgages in real estate in the United States of America as they may deem advisable.

(b) The Trustees may hold the legal title to all of the Trust property, and shall have the exclusive management and control of the property as if they were its absolute owners. The Trustees are hereby given full power to do all things and perform all acts which in their judgment are necessary and proper for the protection of the Trust property and for the interest of the Subscribers in such property, subject to the restrictions, terms, and conditions herein set forth.

(c) Without prejudice to the general powers conferred on the Trustees hereunder, it is hereby declared that the Trustees shall have the following powers:

(1) To purchase any real property for the Trust at such times and on such terms as may seem advisable, and to assume mortgages upon the property without the written or oral consent of the Subscribers or the Board of Directors.

(2) To sell at public auction or private sale, to barter, to exchange, or to dispose of otherwise, any part, or the whole of the Trust property which may, from time to time form part of the Trust estate, subject to such restrictions and for such consideration for cash or for credit, and generally upon such terms and conditions as may seem judicious without the written or oral consent of the Subscribers or the Board of Directors; to secure payment upon any loan or loans of the Trust, by mortgage with or without power of sale, and to include such provisions, terms, and conditions as may seem desirable without the consent of the Subscribers or the Board of Directors.

(3) To rent or lease the whole or any part of the Trust property for long or short terms, but not for terms exceeding the term of the Trust then remaining.

(4) To repair, alter, tear down, add to, or erect any building or buildings upon land belonging to the Trust; to fill, grade, drain, improve, and otherwise develop any land belonging to the Trust; and to carry on, operate, or manage any building, apartment house, or hotel belonging to the Trust.

(5) To make, execute, acknowledge, and deliver all deeds, releases, mortgages, leases, contracts, agreements, instruments, and other obligations of whatsoever nature relating to the Trust property, and generally to have full power to do all things and perform all acts necessary to make the instruments proper and legal.

(6) To collect notes, obligations, dividends, and all other payments that may be due and payable to the Trust; to deposit the proceeds thereof, as well as all other moneys from whatsoever source they may be derived, in any suitable bank or depository, and to draw the same from time to time for the purposes herein provided.

(7) To pay all lawful taxes and assessments and the necessary expenses of the Trust; to employ such officers, brokers, engineers, architects, carpenters, contractors, agents, counsel, and such other persons as may seem expedient, and to designate their duties and fix their compensation; and to fix a reasonable compensation for their own services to the

Trust, as its organizers.

(8) To represent the Trust and the Subscribers in all suits and legal proceedings relating to the Trust property in any court of law or equity, or before any other bodies or tribunals; to begin suits and to prosecute them to final judgment or decree; to compromise claims or suits, and to submit the same to arbitration when, in their judgment, such course is necessary or proper.

3. Duties of Trustees. In addition to the other duties herein imposed upon the Trustees, they shall:

(a) Keep a careful and complete record of all the issues or shares of beneficial interest in the Trust property with the name and residence of the person or persons to whom shares are issued, the date of issue, and such other items as they may deem important or as the Subscribers may require, and also a transfer book in which all the transfers of the shares shall be recorded.

(b) Keep careful and accurate books showing the receipts and disbursements of the Trust and also of the Trust property, and such other items as they may deem important or as the Subscribers hereunder may require.

(c) Keep books of the Trust open to the inspection of the Subscribers at such reasonable times at the main office of the Trust as they may determine.

(d) Furnish the Subscribers at special meetings at which the same shall be requested a careful, accurate, written report of their transactions as Trustees hereunder, of the financial standing of the Trust, and of such other information concerning the affairs of the Trust as they shall request.

4. Compensation of Trustees. Each Trustee shall receive the sum of _____ Dollars (\$_____) per month for his services as Trustee hereunder.

5. Liability of Trustees. The Trustees and their successors as Trustees shall not be required to give a bond. Each Trustee shall be liable only for his own acts, and then only for the result of his own gross negligence or bad faith.

6. Removal of Trustees. The Subscribers may not remove a Trustee from his office or appoint a successor to succeed him, but any Subscriber desiring to have a Trustee removed shall have his recourse to any proper court of law or equity.

7. Resignation and Successors.

(a) Any Trustee may resign his office at any special meeting of the Subscribers, provided that the call has stated the purpose of the meeting. Immediately thereafter the Subscribers at the meeting shall proceed to elect, by a majority vote of those present, a new Trustee to take the place of the resigned Trustee. The resignation, however, shall not take effect until a certificate thereof, signed, sealed, and acknowledged by the Trustees, and a certificate of the election of the new Trustee, signed and sworn to by the officers of the special meeting and containing an acceptance of the office, signed and acknowledged by the new Trustee, shall have been recorded in the registries of deeds of all the counties in which properties held under this instrument are situated. If the Subscribers shall fail to elect a new Trustee within thirty (30) days after the resignation, the Trustee may petition any appropriate court in the State of _____ [state] to accept his resignation and appoint a new Trustee.

(b) Any vacancy in the office of Trustee, whether arising from death or from any other cause not herein provided for, shall be filled within 30 days from the date of the vacancy at a special meeting of the Subscribers called by any Subscriber, provided that the call has stated the purpose of the meeting and has been signed by the Subscribers calling the meeting. At this special meeting the Subscribers shall proceed to elect, by a majority vote of those present, a new Trustee to fill the vacancy. Immediately thereafter the Subscribers shall cause to be prepared a certificate of the election,

including an affidavit of the required notice of the meeting, signed and sworn to by the officers of the meeting, and containing an acceptance of the office, signed, sealed, and acknowledged by the new Trustee. The certificate of election shall be recorded in the registries of deeds of all the counties in which properties held under this instrument are situated.

(c) Whenever a new Trustee shall have been elected or appointed to the office of Trustee and shall have assumed the duties of office, he shall succeed to the title of all the Trust properties and shall have all the powers and be subject to all the restrictions granted to or imposed upon the Trustees by this agreement. Every Trustee shall have the same powers, rights, and interests regarding the Trust property, and shall be subject to the same restrictions and duties as the original Trustees, except as the same shall have been modified by amendment, as herein provided for. But in case of vacancy in the trusteeship, the surviving or remaining Trustees shall be vested with the trustand estate and may execute and perform the duties thereof as fully as the entire Board of Trustees could do until the vacancy shall be filled.

8. Exculpation. The Trustees may not bind the Subscribers personally and, in every contract they may enter into, written reference shall be made to this declaration. Any person or corporation contracting with the Trustees, as well as any beneficiary, shall look to the funds and the Trust property for payment under such contract, or for the payment of any debt, mortgage, judgment, or decree, or for any money that may otherwise become due or payable whether by reason or failure of the Trustees to perform the contract, or for any other reason, and neither the Trustees nor the Subscribers shall be liable personally therefor.

9. Board of Directors.

(a) The Trustees may appoint a Board of Directors, consisting of five (5) directors, who may or may not be Subscribers or Trustees.

(b) The directors shall hold office for the term of one (1) year from their appointment, and until their successors shall have been appointed. The Trustees, however, may terminate the term of office of any director sooner by a simple written notice of termination, delivered to him, or mailed to him postage prepaid, at his last and usual place of residence.

(c) The duties of the Board of Directors shall be to advise and to assist the Trustees, as requested by them in carrying on the affairs of the Trust, and in their investment of its money and in such other matters as the Trustees may require.

(d) The Trustees shall pay the directors a reasonable compensation for their services.

10. Advisory Committee. The Trustees may appoint advisory committees to serve for such term as they may appoint and to perform such duties as they may designate. The Trustees shall pay the members of the advisory committees a reasonable compensation for their services.

11. Capital. Capital shall be accumulated by fixed monthly payments to be paid by the Subscribers as hereinafter provided. The beneficial interest in such capital and in the property acquired by the Trust shall be divided into 500 no par value shares. Each Subscriber shall be entitled to participate in all dividends and other distributions of income or principal as the Trustees shall from time to time deem advisable in the proportion which the number of shares owned by a Subscriber bears to the total number of shares issued and outstanding.

12. Certificates. The Trustees shall issue to each Subscriber a certificate of his beneficial interest in the trust property in such form as they may determine. This certificate shall be transferable only on the books of the Trust, upon its surrender. Upon such transfer a new certificate shall be issued to the transferee, who shall thereupon become subject to the terms of this agreement, and entitled to its benefits. No shares shall be transferable until all monthly payments have been paid.

13. Transfer on Death. Shares shall be personal property. For the purpose of ascertaining who are the Subscribers and their addresses, the records as shown by the Trust's books shall be controlling.

14. Payments of Capital. Each Subscriber shall pay to the Trustees on the second Monday of each month the sum of _____ Dollars (\$ _____) for each share held by him. The payments shall continue for a period of at least five (5) years, and thereafter until such time as two-thirds of the Subscribers entitled to vote shall vote to discontinue the payments, or until this Trust is terminated. The Trustees shall keep the payments and invest or dispose of them in such manner as they may from time to time determine.

15. Default in Payment.

(a) A Subscriber who shall default in his monthly payment shall be charged a fine of _____ Dollars (\$ _____) a month or fraction of a month on each share held by him to be paid to the Trustees while the default continues. If the default continues for a period of six (6) months each share defaulted on shall be deemed surrendered and its fair value, as determined by the Trustees after deducting fines due thereon, shall be paid to the owner within three months from such surrender, upon the surrender of his certificate. Shares so surrendered shall be cancelled or sold as the Trustees may determine.

(b) The fines may be invested or disposed of in such manner as the Trustees may from time to time determine.

(c) Subscribers shall not, on account of their agreement to make monthly payments, be liable to creditors or to persons dealing with the Trust. They shall, however, indemnify and save the Trustees harmless from any loss sustained by the Trustees, individually on account of any liability properly incurred hereunder by the Trustees prior to their ceasing to be Subscribers.

(d) The Trustees shall be liable to Subscribers for the value of their shares on their surrender only to the extent of the property held in Trust by them hereunder. The Subscribers shall enforce such liability only against the Trust property, and not against the Trustees personally.

16. Trustees. The term "Trustees," wherever it is used herein, shall mean the Trustees for the time being acting.

17. Records. The record of Subscribers' meetings shall be kept by a Secretary, who shall also be a Secretary of the Trustees. The Secretary shall hold office at the pleasure of the Trustees, who shall determine his salary and choose his successors. If the Secretary shall be absent or disabled, the Trustees may appoint a Secretary pro tempore.

18. Meetings. Meetings of the Subscribers, other than a meeting to fill a vacancy in the office of Trustee as provided for in paragraph 7(b), shall be called by the Secretary when requested in writing so to do by a majority of Trustees or by twenty percent (20%) of the Subscribers of record. Notices of meetings shall be in writing and mailed to the post office address of each Subscriber, as shown by the books of the Trust, at least five days prior to the meeting. In case of absence or disability of the Secretary, or his refusal to act, or a vacancy in his office, the Trustees may call and give notice of meetings in the manner above set forth.

19. Annual Statements. There shall be no annual meeting of the Subscribers, but the Trustees shall prepare an annual report of their receipts and disbursements for the preceding fiscal year, which shall coincide with the calendar year. A copy of the report shall be sent by mail to each Subscriber not later than _____ [month] _____ [day] of each year.

20. Authority to Act. A copy of the record of the Trustees' vote authorizing or directing a sale, mortgage, or pledge, attested by the Secretary appended to such deed, mortgage, or pledge, shall be conclusive evidence in any court or elsewhere of the Trustees' authority to execute such deed, mortgage, or pledge.

21. New Subscribers. The Trustees may admit new Subscribers from time to time under such terms and conditions as the Trustees may deem beneficial to the Trust.

22. Termination. At the expiration of twenty-one (21) years after the death of the last survivor of the Subscribers of this instrument the Trustees shall forthwith proceed to dispose of all the Trust property, and account to the surviving Subscribers for the proceeds thereof, and this Trust shall thereupon terminate. The Subscribers, subject to a vote of approval of the Trustees may, at any time after five years by a vote of two-thirds (2/3) of the Subscribers entitled to vote, vote to terminate the Trust, and thereupon the Trustees shall proceed to carry the vote into effect.

In witness whereof the parties hereto have executed this agreement as of the day and year first above written.

Trustees

Benjamin Weiner

Joseph Burns

Paul Sloan

Original Subscribers

No. of
Shares _____
_____ Edward West

No. of
Shares _____
_____ Samuel White

No. of
Shares _____
_____ Philip Bradhurst

No. of
Shares _____
_____ Benedict Powers

No. of
Shares _____
_____ Lester Stone

Additional Subscribers Approved

No. of
Shares _____
_____ [name]

No. of
Shares _____
_____ [name]



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Current Legal Forms for Real Estate
Chapter 20 REAL ESTATE ENTITIES
Part IV. Forms
F. REAL ESTATE TRUSTS

24-20 Current Legal Forms for Real Estate FORM 20.49

AUTHOR: by Stephen E. Pigott and Harold O. Maxfield, Jr.

FORM 20.49 Termination of REIT--reversion to operating corporate status--transfer agreement

COMMENT

A stockholder vote is typically necessary to permit a REIT to change its tax status from REIT to operating corporation. Such a move results in the elimination of the Code requirement that the required percentage of the trust's profits be distributed annually to its shareholders. An ancillary advantage of return to corporate status is the trust's ability then to sell off some of its real property holdings in order to pay off outstanding loans, rather than being compelled to distribute the proceeds of such sales to the stockholders. For discussion of the election to qualify for REIT status, see TB § 20.08, at the beginning of this chapter.

Exchange of assets for debt:

One consequence of exchanges of real property for debt--as contrasted with use of cash proceeds to liquidate debt--is that the Securities and Exchange Commission then exercises surveillance over such maneuvers. The S.E.C. has advised bank lenders to substantiate the value of real property--or other assets--which they take from REIT's in exchange for cancellation of debt. Banks must be wary of overvaluing real estate or mortgages which they acquire from REIT's. In other words, the amount of money exchange, or the face amount of debt reduction, cannot necessarily be viewed as indicative of the value of assets exchanged.

Termination of REIT status--ancillary matters:

In connection with ceasing to qualify as a REIT, the trust should submit proposals to stockholders for approval of

(1) Fee-payment provisions of outstanding agreements with investment advisers.

(2) Elimination of provisions in the declaration of trust limiting the trust's borrowing power to a fixed percentage of its net assets.

(3) Restructuring of borrowing agreements and lines of credit.

Transfer agreement drafting:

Because the original declaration of trust contains the provisions pursuant to which the REIT may terminate its status, the requisite transfer of assets can be accomplished via this relatively brief agreement.

FORM

TRANSFER AGREEMENT

THIS AGREEMENT, made _____ [month] _____ [day] ,
 _____ [year] , by and between ABC INDUSTRIES, INC., a(n)
 _____ [state] corporation ("ABC Corp."), and ABC REALTY AND MORTGAGE INVESTORS,
 a(n) _____ [state] business trust ("ABC").

WHEREAS, ABC Corp. is a corporation organized and existing under the laws of the State of Delaware with its
 registered office at _____ [address] , _____ [city] , _____
 [state] , having been incorporated on _____ [month] _____ [day] ,
 _____ [year] ; and

WHEREAS, the authorized capital stock of ABC Corp. consists of ten million (10,000,000) shares of common stock,
 par value _____ Dollars (\$ _____) per share, and one million (1,000,000) shares of
 preferred stock, par value _____ Dollars (\$ _____) per share, of which only one (1)
 share of common stock has been issued and is held by ABC; and

WHEREAS, the Board of Directors of ABC Corp. and the Board of Trustees of ABC deem desirable and in the best
 interest of ABC and ABC Corp. and their respective security holders that all of the assets and properties of ABC be
 transferred to ABC Corp. simultaneously with the termination of ABC, in consideration of the assumption by ABC
 Corp. of all of the liabilities and obligations of ABC and the transfer to the shareholders of ABC of one million
 seven-five thousand one hundred thirty-nine (1,075,139) shares of the authorized common stock of ABC Corp., so that
 each shareholder of ABC will receive one share of ABC Corp. common stock for each ABC share held by him on the
 date of transfer, all in conformity with the ABC Declaration of Trust; and

WHEREAS, the ABC Declaration of Trust provides that ABC's assets may so be transferred in exchange for securities
 of a corporation, subject to approval of the holders of fifty percent (50%) of ABC's outstanding shares;

NOW, THEREFORE, ABC and ABC Corp., in consideration of the premises and of the mutual provisions, agreements,
 covenants and conditions herein contained, hereby agree as follows:

Article 1

Acquisition of ABC's Business, Property, and Assets

Subject to the terms and conditions hereof and in reliance upon the representations and warranties herein made by each party to the other:

1. **Transfer of Assets.** ABC shall sell, transfer, assign, convey and deliver to ABC Corp., on the Transfer Date (hereinafter defined), all of the property and assets of ABC of every kind and wherever situated, in which it has any right or interest as of the Transfer Date, including, without limiting the generality of the foregoing, its business as a going concern, its good will, franchises and all of its right, title and interest in and to the use of its name or any similar name; lands, leaseholds and other interests in land; plants, buildings, machinery, equipment, tools, motor vehicles, transportation and packing and delivery equipment and supplies; bonds, stocks, mortgages or other investments, notes, accounts and drafts receivables; policies of insurance, fidelity and contract bonds; causes of action, judgments, claims and demands of whatsoever nature; memberships, agencies and permits; tangible and intangible personal property of all kinds; deferred charges, advance payments, prepaid items, claims for refunds, carrybacks and carryforwards, rights of offset and credits of all kinds, tax and otherwise; contracts for the sale of goods, employment contracts, restrictive covenants and obligations of present and former officers and employees and of individuals and corporations, and all other contracts, books of account, files, papers and records relating to the aforesaid business, property and assets; and all cash on hand and in banks. All of the foregoing business, property and assets to be transferred hereunder shall be subject to all the liabilities, claims, liens and encumbrances of ABC. ABC Corp., on the Transfer Date, shall accept and acquire the aforesaid business, property and assets of ABC, subject to all of ABC's liabilities. ABC Corp. hereby agrees to assume such liabilities and obligations of ABC, including the obligations to indemnify its trustees, officers, agents and shareholders for liability to the full extent set forth in ABC's Declaration of Trust.

2. **Consideration.** Upon the terms and subject to the conditions set forth in this agreement and in exchange for the business, property and assets of ABC to be transferred hereunder, ABC Corp. shall issue and deliver or cause to be issued and delivered to the shareholders of ABC on the Transfer Date one million seven-five thousand one hundred thirty-nine (1,075,139) shares of the common stock, par value _____ Dollars (\$_____) per share, of ABC Corp. ABC Corp. shall assume and pay or discharge all liabilities and obligations of ABC, absolute or contingent, vested or otherwise.

3. **Instruments of Transfer.** On the Transfer Date, ABC shall deliver to ABC Corp. such instrument or instruments of transfer and conveyance as shall be necessary to vest in ABC Corp. good and marketable title to the business, property and assets to be transferred, assigned, conveyed and delivered to ABC Corp.

4. **Termination of ABC.** Immediately after the distribution of its assets, ABC will terminate and the trustees shall file instruments setting forth the facts of the termination of ABC as required by the Declaration of Trust and the laws of the State of _____ [state] .

Article 2

Representations and Warranties of ABC

ABC warrants and represents that:

1. **Status.** ABC is a _____ [state] business trust duly organized, validly existing and in good standing under the laws of the _____ [state].

2. **Powers.** ABC has complete and unrestricted power to sell, assign, transfer, convey and deliver all of its assets and business as contemplated by this agreement, subject to the approval of the holders of a majority of the shares of ABC.

3. Validity. Neither the execution and delivery of this agreement nor compliance with the terms and provisions of this agreement on the part of ABC will breach any statute or regulation of any domestic or foreign governmental authority, or will at the Transfer Date conflict with or result in a breach of any of the terms, conditions or provisions of any judgment, order, injunction, degree or any agreement or instrument to which ABC is a party, or by which ABC may be bound, or constitute a default thereunder, or result in the creation or imposition of any lien, charge, encumbrance or restriction of any nature whatsoever upon, or give to others any interests or rights, including rights of termination or cancellation, in, or with respect to, any of the properties, assets, contracts or business of ABC.

4. Authorization. The execution, delivery and performance of this agreement, including the transfer of the business, property and assets of ABC, as hereby contemplated, have been duly and validly authorized and approved by its Board of Trustees.

Article 3

Representations and Warranties of ABC Corp.

ABC Corp. warrants and represents that:

1. Status. ABC Corp. is a corporation duly organized, validly existing and in good standing under the laws of the State of _____ [state] .
2. Authorization. The execution, delivery and performance of this agreement, including the issuance and delivery of the stock contemplated hereby, has been authorized by the Board of Directors of ABC Corp.

Article 4

Conditions Precedent to ABC Corp.'s Obligations

Each and every obligation to be performed by ABC on the Transfer Date or thereafter, as the case may be, shall be subject to the satisfaction prior thereto of the following conditions, any of which may be waived in writing by ABC Corp.:

1. Validity. The representations and warranties made by ABC in this agreement or given on its behalf hereunder shall be true on and as of the Transfer Date with the same effect as though such representations and warranties had been or given on and as of the Transfer Date.
2. Shareholders' Consent. Before the execution, delivery, and performance of this agreement and the termination of ABC, the holders of a majority of its outstanding shares shall, at a meeting of shareholders duly held and called in accordance with Article III of the Declaration of Trust of ABC, consent to such termination.
3. No Actions Pending. No investigation, suit, action or other proceeding shall be threatened or pending before any court or governmental agency which in the opinion of ABC Corp's counsel is likely to result in the restraint, prohibition or the obtaining of damages or other relief in connection with this agreement or the consummation of the transactions contemplated hereby, or in connection with any claim against ABC or its shareholders.
4. Compliance. There shall have been full compliance with all statutory requirements for the valid consummation by the parties hereto of the transaction contemplated herein.

Article 5

Conditions Precedent to ABC's Obligations

Each and every obligation to be performed by ABC Corp. on the Transfer Date or thereafter, as the case may be, shall

be subject to the satisfaction prior thereto of the following conditions, any of which may be waived in writing by ABC:

1. **Validity.** The representations and warranties made by ABC Corp. in this agreement or given on its behalf hereunder shall be true on and as of the Transfer Date with the same effect as though such representations and warranties had been made or given on and as of the Transfer Date.
2. **Shareholders' Authorization.** The execution, delivery, and performance of this agreement shall have been authorized by the shareholders of ABC.
3. **No Actions Pending.** No investigation, suit, action, or other proceeding shall be threatened or pending before any court or governmental agency which in the opinion of ABC's counsel is likely to result in the restraint, prohibition or the obtaining of damages or other relief in connection with this agreement or the consummation of the transaction contemplated hereby, or in connection with any claim against ABC Corp. or ABC or their respective shareholders.
4. **Compliance.** There shall have been full compliance with all statutory requirements for the valid consummation by the parties hereto of the transaction contemplated herein.
5. **Exchange Listing.** Shares of ABC Corp. common stock shall have been accepted for listing on the American Stock Exchange, subject to notice of issuance. ABC Corp. shall qualify to do business in all states in which ABC is presently qualified to do business.
6. **Best Efforts.** ABC Corp. shall use its best efforts to obtain all necessary consents of third parties to this transaction.

Article 6

Termination and Abandonment

On or before the Transfer Date, notwithstanding shareholder approval of the transaction, this agreement may be terminated and the sale and exchange provided by this agreement may be abandoned without liability of either party to the other:

1. **Consent.** By mutual consent of the Board of Directors of ABC Corp. and the Board of Trustees of ABC;
2. **Unilateral.** By ABC Corp. if any condition provided for in Article 4 of this agreement has not been met and has not been waived by ABC Corp. in writing; or
3. **Unilateral.** By ABC if any condition provided for in Article 5 of this agreement has not been met and has not been waived by ABC in writing.

In the event of termination and abandonment by either party as above provided in this Article 6, prompt written notice shall be given to the other party.

Article 7

Transfer Date

The Transfer Date shall be _____ [month] _____ [day] ,
 _____ [year] , or such other date agreed upon by the parties. The transfer shall be consummated at
 the offices of _____ [name] , _____ [address] , _____ [city] ,
 _____ [state] , at 10 a.m., local _____ [state] time.

Article 8

Miscellaneous

1. Warranties. All statements contained in any certificate, instrument or document delivered by or on behalf of any of the parties pursuant to this agreement and the transactions contemplated hereby shall be deemed representations and warranties by the respective parties hereunder.
2. Amendment. This agreement may not be modified or terminated except by a writing signed by both parties hereto.
3. Notices. All notices hereunder shall be in writing and shall be deemed to have been duly given when mailed, certified mail, return receipt requested, if to ABC, to _____ [address] , _____ [city] , _____ [state] Attention: President, and if to ABC Corp. to _____ [address] , _____ [city] , _____ [state] , Attention: President. Any party may change its address by written notice of such change to the other in the manner herein provided for giving notice.
4. Further Assurances. ABC shall on the Transfer Date or such other date as ABC Corp. may request, without cost or expense to ABC Corp., execute and deliver or cause to be executed and delivered to ABC Corp. such further instruments of transfer and conveyance and shall take such other action as ABC Corp. may reasonably request to more effectively carry out the transfer property, assets and business contemplated by this agreement and confirm and assure ABC Corp. title thereto.
5. Exculpatory Clause. This agreement is entered into between ABC and ABC Corp. only and no trustee, officer, or shareholder of ABC or director, officer, or shareholder of ABC Corp. shall be liable with respect thereto.
6. Headings for Reference Only. Headings preceding the text, articles, and sections of this agreement have been inserted solely for convenience and reference, and shall not be construed to affect its meaning, construction, or effect.
7. Entire Agreement. This agreement supersedes all agreements previously made between the parties relating to its subject matter. There are no other understandings or agreements between them.
8. Non-waiver. No delay or failure by a party to exercise any right under this agreement, and no partial or single exercise of that right, shall constitute a waiver of that or any other right, unless otherwise expressly provided herein.
9. Governing Law. This agreement shall be construed and interpreted according to the law of the State of _____ [state] , except where otherwise provided herein.
10. Counterparts. This agreement may be executed in two or more counterparts, each of which shall be deemed an original but all of which together shall constitute one and the same instrument.
11. Binding Effect. The provisions of this agreement shall be binding upon and inure to the benefit of the parties and their respective successors, administrators, heirs, assigns, and legal representatives.

In witness whereof the parties hereto have caused this agreement to be duly executed as of the day and year first above written.

ABC Industries, Inc.

By _____

[name and title]

ABC Realty and Mortgage Investors

By _____

[name and title]



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Chapter 20 REAL ESTATE ENTITIES
Part IV. Forms
G. COOPERATIVES

24-20 Current Legal Forms for Real Estate FORM 20.50

AUTHOR: by Stephen E. Pigott and Harold O. Maxfield, Jr.

FORM 20.50 Plan of organization for cooperative apartment house

COMMENT

Cooperative housing is primarily utilized in multiple dwellings. The typical venture is one in which a corporation is organized to hold fee title to real estate and to lease apartments to its shareholders.

Organizing a cooperative:

The organization of a cooperative corporation is usually initiated by a "sponsor" who, apart from arranging the preliminary corporate matters, undertakes to provide improved real estate for acquisition by the cooperative corporation. All the details of the program of acquisition, improvement, and sale are usually set forth in a plan of cooperative organization which is made available to prospective tenant-shareholders. A copy of the stock purchase agreement and the proprietary lease is also provided with the plan. The forms included in this group are those required in the various stages of the organization of a particular cooperative, including (1) the plan of organization, (2) the certificate of incorporation, (3) the bylaws, (4) the contract with an agent to sell the corporation's stock, (5) the stock purchase agreement, and (6) the proprietary lease. Also included is a contract for the sale by a tenant-shareholder of his stock and the accompanying lease.

In the plan of cooperative organization illustrated, the sponsor sets forth in complete detail a description of the building which he undertakes to make available to the cooperative corporation and all aspects of the cooperative organization. Among the elements to be described are: (1) the property, (2) financing of the purchase of the fee, (3) proprietary lease, (4) conditions for the purchase of stock, (5) estimated completion date, (6) procedure for occupancy, (7) arrangement for

management of the property, (8) parties involved in the enterprise, (9) corporate charter, and (10) corporate bylaws and other relevant information.

Appended are schedules of estimated income and expenses for the cooperative corporation, the selling price of the stock of the cooperative corporation, and estimated charges and income tax deductions attributable to each apartment. (In some states, such as New York, special statutes prescribe strict procedures and disclosures in the sale of cooperative real estate ventures.)

The plan of organization is intended to incorporate every essential detail of the venture. Its significance is evident from the fact that it is incorporated by reference in the purchase agreement with every prospective tenant-shareholder.

Cooperative plans may provide that, unless a minimum percentage of shares are contracted for sale by a given date, the plan will not become operative, but that, after a certain percentage of shares are contracted for sale, the plan must be declared operative.

The sponsor's obligation to provide responsible individuals to purchase the shares which are unsold at the time the premises are ready for occupancy, and to enter into proprietary leases for all apartments to which the unsold shares are allocated is a vital element. This insures that each tenant-shareholder will bear only his expected proportionate share of the operating and other expenses of the property. In addition, it insures compliance with the requirement that at least 80% of the gross income of the cooperative corporation be from individual tenant-shareholders. The cooperative corporation may merely hold a long-term lease on the real property, in which case the shareholders merely receive subleases to their respective apartments.

The cooperative ownership technique has also been applied to a group of houses. In this type of cooperative, each shareholder executes a lease on a specific house in the group development. The common denominator in all cooperatives is the so-called "proprietary" lease which can be held only by the owner of a specific number of shares in the cooperative corporation. Generally, the tenant-shareholder may sublet his apartment or may sell the unit consisting of the lease and the related corporate stock to a person approved by the cooperative corporation. The term "tenant-shareholder" means an individual whose stock is fully paid-up in an amount which bears a reasonable relationship to his portion of the cooperative corporation's equity in the property.

Tenant's rights and duties:

As a shareholder in the owning corporation, the tenant has a voice in the management of the cooperative building. But under the proprietary lease, the tenant is further obligated to make periodic rent payments in amounts established annually by the directors of the cooperative corporation. These payments are designed to cover the tenant's proportionate share of the following recurring expenses:

- (1) Interest;
- (2) Taxes;
- (3) Maintenance;
- (4) Special assessments;

(5) Operating expenses; and

(6) Mortgage amortization.

Income tax impact:

Tenant-shareholders may deduct that portion of their rent which is attributable to real estate taxes of the cooperative corporation and to its interest incurred on an indebtedness contracted in the acquisition, construction, alteration, rehabilitation, or maintenance of the land, houses, or apartment building. Each tenant-shareholder may deduct a portion of the taxes and interest paid or accrued by the corporation, measured by the proportion that his own stock bears to the entire amount of stock outstanding, including that owned by the corporation itself. (See *IRC § 216*).

If the tenant-shareholder uses a cooperative apartment in his trade or business or for the production of income, he may take a depreciation deduction on the cost of his stock attributable pro rata to the proprietary lease or tenancy. The allowable depreciation to the shareholder is determined by a three-step formula:

(1) Total depreciation which would be allowed to the cooperative is computed.

(2) This amount is then reduced by the ratio that the space rented to nonshareholders bears to the total rentable space.

(3) The shareholder's proportionate share of this reduced depreciation is the ratio that the number of his shares bears to the total number outstanding, including any held by the cooperative.

The depreciation allowed to a shareholder may not exceed his adjusted basis for the stock, reduced by the above ratio for space rented to nonshareholders. When the tenant-shareholder uses only a portion of the property for business or income production, he is allowed a proportionate deduction for such portion. For a further discussion of the tax consequences to the tenant-shareholders of a cooperative housing corporation, see TB § 20.10, at the beginning of this chapter. As to requirements for qualification as a tenant-shareholder, see TB § 20.10[3].

Real estate taxes:

If a cooperative corporation pays real estate taxes on a leased apartment building, generally, no deduction for taxes is available to the tenant-shareholders because the corporation's payment is for rent rather than for taxes imposed on it.

If a cooperative corporation builds an apartment building on leased land, with a useful life less than that of the term of the lease, the real estate taxes on the building are treated as taxes on its own property because the entire use of the building rests in the cooperative lessee; therefore, the tenant-shareholders may deduct both their proportionate shares of the taxes and their proportionate shares of interest paid by the corporation in financing the construction. As to tenant-shareholder deductions, see TB § 20.10[4].

Conditions precedent to pro rata deduction:

For the purpose of the tenant-shareholder's deduction, the following conditions must be satisfied:

- (1) The corporation must have only one class of stock outstanding;**
- (2) The corporation must have shareholders who are entitled to possession only by reason of their ownership of stock of a house or apartment in a building owned or leased by the corporation;**
- (3) None of the corporation's shareholders may be entitled (either conditionally or unconditionally) to any distribution, other than from earnings and profits of the corporation, except on its complete or partial liquidation; and**
- (4) The corporation must receive at least 80 percent of its gross income from tenant-shareholders.**

Tax impact on cooperative corporation:

The cooperative corporation is itself a taxpaying entity which must file an income tax return but it can avoid tax liability by means of the following principles:

- (1) Annual payments by tenant-shareholders which are earmarked for amortization of mortgage indebtedness are treated as contributions to capital and are not included in gross income.**
 - (2) The corporation will pay no tax on amounts received for interest, taxes, and maintenance if**
 - (a) It actually expends these funds for the purposes; or**
 - (b) It refunds any amounts not so expended to the tenant-shareholders in the year it receives them.**
- For the tax impact on cooperative corporations, see TB § 20.10.

The undertaking by the sponsor to provide responsible individuals to purchase the shares which are unsold at the time the premises are ready for occupancy, and to enter into proprietary leases for all apartments to which the unsold shares are allocated is a vital element. This insures that each tenant-shareholder will bear only his expected proportionate share of the operating and other expenses of the property. In addition, it insures compliance with the requirement that 80% of the gross income of the cooperative corporation be from individual tenant-shareholders.

A cooperative housing association recognizes neither gain nor loss on its distribution of a dwelling unit to a stockholder if such distribution is in exchange for the stockholder's stock in the corporation, and the exchange qualifies for nonrecognition of gain. The following form is based upon new construction. Because of the widespread use of condominiums, the use of a cooperative to develop and own real estate is not as widespread as it has been historically. In most states, the disclosure requirements relating to the development and sale of a cooperative are very similar to identical to those relating to a condominium. The practitioner should review and become familiar with the applicable laws where the cooperative is being created before advising a client to proceed with a cooperative. For example, the State of New York has different filing requirements based upon the population of the city where the cooperative is to be located.

FORM

PLAN OF COOPERATIVE ORGANIZATION

Ace Realty Corp., (the "Sponsor") submits through Harris & Co., Inc., (the "Agent"), this Plan of Cooperative Organization with respect to premises _____ [address] , _____ [city] , _____ [state] (the "Building"), and the new apartment building to be erected thereon (the "Skyline").

Skyline Apartments, Inc., hereinafter called the Apartment Corporation, has been organized for the purpose of acquiring the fee ownership of the land and completed Building. The land is presently owned by Ace Builders, Inc., hereinafter called the Builder, which will erect the Building from plans prepared by James Hoe & Associates, Inc., hereinafter called the Architect, which plans have been filed with the Department of Buildings in the _____ [city] . The Apartment Corporation has retained William Bender, hereinafter called the Consulting Architect, to check on the construction of the Building and to certify as to stages of and completion of construction. The shares of the Apartment Corporation are being offered for sale through the Agent on the terms and conditions herein set forth. The Sponsor will guarantee to the Apartment Corporation the completion of the Building and the payment of costs of construction.

As hereinafter set forth the Sponsor is a publicly owned corporation and is the holder of all of the stock of the Builder.

1. Property and Improvements. The property is located on the southerly side of 68th Street at the East River Drive. It has a frontage on 68th Street of approximately one hundred thirty-two (132) feet and a depth of approximately one hundred two (102) feet irregular and contains approximately thirteen thousand (13,000) square feet. The Building will have 20 floors and Penthouse containing one hundred twenty-eight (128) residential apartments, a superintendent's apartment, nine separate servants' rooms, each with its own bath. The apartments will range in size from three and one-half (3 1/2) to seven (7) rooms. There will be a garage in the basement which will accommodate about thirty-five (35) automobiles and there will also be an area on the ground floor, west of the main entrance, which will be leased as an office. No shares are being allocated to this space. The Building will be centrally air-conditioned and will be heated by steam. The entrance and lobby as well as the public portions of the Building will be decorated and furnished under the supervision of Allen Hart, designer. There will be twenty-four (24) hour doorman service and the passenger elevators will be operated by tenant owners but a day and evening hall man will be available to assist tenant owners. The plan anticipates thirteen (13) employees including superintendent, doorman, service elevator, porter, and handyman.

As set forth in Schedule B, sixty thousand eighty (60,080) shares of the Apartment Corporation have been allocated to the one hundred twenty-eight (128) residential apartments plus nine separate servants' rooms. No shares are being allocated to the superintendent's apartment, the garage, or the rentable space on the ground floor. A lease has been entered into by the Sponsor with a garage operator to rent the garage space for a ten-year term at _____ Dollars (\$ _____) per annum. The garage operator in turn will rent space in the garage to the tenant-shareholders and others, with priority to the tenant-shareholders at prevailing rates. The garage may be closed between the hours of 2 a.m. and 7 a.m. It is also proposed to lease the rentable space on the ground floor at not less than _____ Dollars (\$ _____) per annum. Copies of these leases when executed will be on file with the Agent and the income therefrom will be received by the Apartment Corporation. The Sponsor will pay or cause to be paid the estimated income from the garage and the doctor's office for the first year starting from the time the plan is put into full force and effect. There will be a laundry on the service level, which is leased for ten years to a concessionaire, and the laundry equipment is to be coin-operated by the tenant-shareholders. The concessionaire is a wholly owned subsidiary of the Sponsor.

A general description of the Building is attached hereto. This description is for information purposes only and to assist in the examination of the Building plans and specifications. A copy of the plans and specifications are on file with the Agent. The Sponsor and Builder reserve the right, up to the time of the completion of the Building, to make such changes or amendments in the plans and specifications, construction contract, equipment, materials, furnishings, and

supplies, as any governmental department or bureau or as may be deemed necessary or advisable by the Architect and Consulting Architect, or such may deem necessary or advisable, or such as may only affect particular apartments and are contracted for by the individual purchasers or such as are minor. Where alternatives are specified or where a particular practice or method of construction or equipment, material, or supplies is not specified, the choice and decision of the Architect and Consulting Architect shall be final.

Construction was started in _____ [month] of _____ [year]. It is anticipated that the Building will be substantially completed on or about _____ [month] _____ [day], _____ [year], unless delayed by strikes or other causes over which the Sponsor, the Builder, or the Apartment Corporation have no control.

2. Cooperative Organization. The aggregate number of shares which the Apartment Corporation shall have authority to issue is sixty-five thousand (65,000) shares of the par value of _____ Dollars (\$_____) each, of which sixty thousand eighty (60,080) shares have been allocated to the residential apartments and separate servants rooms. The balance of the shares will be authorized and unissued. Ownership of the respective blocks of shares will entitle the purchasers to proprietary leases of the apartments and servants' rooms to which such blocks of shares are allocated.

The Apartment Corporation proposes to offer its shares to suitable purchasers, hereinafter called The Purchasers. In order to meet possible demands for greater or less space than is shown on any floor plan, the Apartment Corporation reserves the right to change the size and number of apartments and to vary the amount of shares to accompany each proprietary lease. No change, however, will be made with respect to shares allocated to any apartment for which a purchase agreement has been accepted, nor will any such change have the effect of increasing or decreasing the total number of shares allocated to the residential apartments and separate servants' rooms.

The proceeds from the sale of shares will be used for the acquisition of the land with the completed Building thereon, on the terms and conditions hereinafter outlined.

If, when the Plan is put into full force and effect, any shares are unsold, the Sponsor guarantees to provide responsible individuals to take over such unsold shares and to enter into proprietary leases for all the apartments in the Building to which the unsold shares are allocated. These purchasers may not be purchasing for personal occupancy and may assign the shares and proprietary leases or sublet the apartments, subject only to the approval of the Agent, but such purchasers will be responsible for the maintenance and carrying charges thereunder until any such shares and proprietary leases are resold, and the Sponsor will guarantee the same. Thus, when the Plan is put into full force and effect proprietary leases outstanding for all the apartments and separate servants' rooms in the Building to which shares are allocated.

An estimate of the Apartment Corporation as prepared by the Agent and approved by the Sponsor is set forth in Schedule A hereto attached. The location of the respective units, the allocation and purchase price of the shares, the estimated annual maintenance charges, and the estimated income tax deductions are set forth in Schedule B attached hereto.

Financial Plan

The financial plan under which the land and completed Building will be acquired by the Apartment Corporation is as follows:

Acquisition of the land and completed Building	\$ _____
Working Capital	\$ _____

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Sub-Total	_____	\$ _____
Mortgage Indebtedness	_____	\$ _____
_____ shares @	_____	\$ _____
\$ _____ per share	_____	_____

The mortgage indebtedness of _____ Dollars (\$ _____) above referred to, will have constant annual charges to the Apartment Corporation of _____ Dollars (\$ _____), payable in equal monthly installments to be applied to the interest at the effective rate of _____ percent (_____ %) per annum and the balance to the reduction of principal. The total mortgage indebtedness will be self-liquidating and will be fully paid in approximately forty-one (41) years or sooner. On the maturity of the mortgage indebtedness, the Apartment Corporation will have no further obligations with respect thereto and will be relieved of the annual charges thereon.

A mortgage commitment has been obtained from the _____ [lender] in the City of _____ [city] for a first mortgage loan on the land and completed building of _____ Dollars (\$ _____), with constant quarter-annual charges of _____ Dollars (\$ _____) or a total annual payment of _____ Dollars (\$ _____), to be applied first to interest at the rate of _____ percent (_____ %) per annum and the balance to reduction of principal, which will fully liquidate the loan within a period of twenty-five and one-half (25 1/2) years. There will be a prepayment privilege after the tenth (10th) year with a _____ percent (_____ %) penalty declining one-quarter (1/4) of one percent (1%) annually to a minimum penalty of _____ percent (_____ %) of the then outstanding amount of the first mortgage. The Builder will take back a second purchase money mortgage in the amount of _____ Dollars (\$ _____) providing for interest at the average rate of _____ percent (_____ %) per annum until the first mortgage is fully paid or refinanced as hereinafter provided. Thereafter, the interest on the purchase money second mortgage will be at the rate of _____ percent (_____ %) per annum.

As previously stated, the total amount of interest and amortization payment that the Apartment Corporation will be obligated to pay in any one year is _____ Dollars (\$ _____). This sum is insufficient to pay all of the interest accruing on the second purchase money mortgage. Such mortgage will provide that the difference between the amount accruing and the amount annually paid will be added to the principal of the second mortgage. After the first mortgage is fully paid, then the sum of _____ Dollars (\$ _____) per year will be applied towards payment of interest and amortization on the second mortgage and it will be fully liquidated in forty-one (41) years from the date of the mortgages. The purchase money second mortgage may be prepaid at any time without penalty.

The holder of the second mortgage, so long as all or part of such indebtedness is unpaid, shall have the right at its expense to refinance the entire mortgage indebtedness provided the then unpaid principal is not increased, the annual interest or amortization charges are not increased, and the mortgage indebtedness remains self-liquidating within forty-one (41) years. Such refinancing may be in the form of one mortgage with senior or junior interests or in the form of two or more mortgages.

The Builder has obtained from the _____ [lender] a commitment for a building loan in the principal amount of _____ Dollars (\$ _____). This will be fully paid before the Plan becomes

effective, and no other mortgage indebtedness will be placed on such property in excess of _____ Dollars (\$_____) before the Plan becomes effective. Up to the time the Plan is put into full force and effect and when the rent commences to accrue under the proprietary leases, hereinafter called Effective Date, the Sponsor has agreed to pay all expenses of the Apartment Corporation, other than the principal of the mortgage indebtedness, including mortgage fees and taxes, legal fees, architect's charges, fee equity title policy, organization expenses, original issue stamps, advertising, printing, sales commissions, and all other expenses or debts and liabilities of the Apartment Corporation. It is estimated that these expenses will be not less than _____ Dollars (\$_____). The Apartment Corporation will retain _____ Dollars (\$_____) as working capital in the form of cash or prepaid expenses such as real estate taxes and insurance.

As a consideration for having transferred to the Apartment Corporation title to the land and completed Building, the Sponsors will be entitled to receive and retain the proceeds of the permanent mortgage financing of _____ Dollars (\$_____) as well as the balance of the proceeds from the sale of the shares of the Apartment Corporation, which is _____ Dollars (\$_____), as set forth in Schedule B. The Apartment Corporation has entered into a contract of sale with the Sponsor and Builder embodying the provision of the Plan and copy thereof is on file with the Agent.

3. Ownership. After the land and completed Building have been transferred to the Apartment Corporation and upon the Effective Date, the Apartment Corporation will have:

(a) Good and marketable title to the land and completed Building thereon and all equipment therein free and clear of all liens and encumbrances (and all of its debts will have been paid or provided for) except:

- (1) Mortgage indebtedness above described;
- (2) Accrued interest on such mortgage indebtedness, subject to an apportionment on closing;
- (3) Accrued real estate taxes, water charges, and sewer rent and prepaid insurance, subject to apportionment on closing;
- (4) Proprietary leases made to its shareholders;
- (5) Leases, if any, for garage, ground floor rentable space, and laundry space;
- (6) Restrictive covenants and agreements of record and such state of facts which an accurate survey would show, provided that neither prevents the proposed use of the land and Building;
- (7) Zoning regulations;
- (8) Service contracts.

(b) Title policy insuring the fee equity in the Apartment Corporation in an amount of not less than _____ Dollars (\$_____), subject to normal title exceptions which will not prevent the proposed use of the land and Building.

(c) Working capital of _____ Dollars (\$_____) in cash or prepaid expenses.

(d) All of the authorized shares of the Apartment Corporation allocated to residential units and separate servants' rooms will be issued and outstanding and proprietary leases will have been executed with respect to each such apartment and separate servants' room.

(e) Assignment to the Apartment Corporation of all assignable guarantees.

(f) Guaranty by the Sponsor that if within one year from the date of the issuance of the permanent Certificate of Occupancy, it shall be notified in writing by registered or certified mail and addressed to the Sponsor by the Apartment Corporation of the existence of then known defects in the construction of the Building or in the installation or operation of the Building's mechanical equipment, which shall be due to improper workmanship or materials supplied by the Builder, the Sponsor, at its own cost and expense, shall repair and correct such defects.

(g) Certificate by the Architect and Consulting Architect that the Building has been erected and completed generally in accordance with the plans filed with the Agent, subject to such changes or omissions as may be permitted.

(h) Temporary Certificate of Occupancy for the Building and a _____ Dollars (\$_____) escrow fund pending issuance of permanent Certificate of Occupancy.

(i) Management contract with Harris & Co., Inc., hereinafter described.

4. Corporate Details. The Certificate of Incorporation of the Apartment Corporation provides among other things that its primary purpose is to provide homes for its shareholders, and that its shareholders, solely by reason of their ownership of shares in it, shall be entitled to proprietary leases entitling them to occupancy of apartment or servants' rooms in the Building to which their shares have been allocated. The Apartment Corporation shall have not less than three nor more than eleven (11) directors.

The Bylaws of the Apartment Corporation provide among other things that the shares accompanying each proprietary lease shall be in the amount allocated to the particular apartment or servants' rooms described in such proprietary lease as shown in Schedule B; that the shares accompanying each proprietary lease shall be represented by a single certificate; that such shares shall not be sold or transferred except as an entirety to a person who has acquired such proprietary lease or new lease in place thereof with proper approval; and that the Apartment Corporation shall at all times have a lien upon the shares owned by each shareholder to secure his payment of all rent and maintenance charges to become payable by him under the provisions of the proprietary lease issued by the Apartment Corporation and at any time held by him and to secure his performance of all the covenants and conditions of the proprietary lease. Each share certificate issued by the Apartment Corporation will contain reference to such restrictions upon the sale and transfer of shares and to such lien.

All shares shall have equal voting privileges of one vote per share. The Apartment Corporation will submit annual reports to all of its shareholders including an annual balance sheet and profit and loss statement, certified by an independent certified public accountant. Even if less than fifty-one (51%) of the shares are sold at the time the Plan is put into full force and effect, the Purchasers will have the right to elect a majority of the Apartment Corporation's directors.

5. Proprietary Lease. The printed form of proprietary lease intended to be used has been prepared and is on file with the Agent. All proprietary leases of apartments and servants rooms in the Building will be in the same form, subject to the provisions of the proprietary lease regarding possible future changes therein. The term and accrual of rent under the proprietary lease will begin when the Building has been completed as hereinafter described. The term of the proprietary lease will expire _____ [month] _____ [day] in the year _____ [year] unless sooner terminated as provided in the proprietary lease. The Lessee may not sublet the apartment or assign the proprietary lease or sell the accompanying shares at any time, unless the terms and conditions of such sublease or assignment and the sublessee or the purchaser-assignee are first approved by the Board of Directors or shareholders of the Apartment Corporation. The proprietary lessee may pledge his shares and lease with the seller thereof or a bank or lending institution, but no assignment of the shares or lease shall be made on the Apartment

Corporation's books except as above provided in the proprietary lease. The proprietary lease also gives each lessee the right to cancel the lease on _____ [month] _____ [day] , _____ [year] , or on any _____ [month] _____ [day] thereafter by giving at least six (6) months' prior written notice and by surrendering to the Apartment Corporation the shares accompanying such proprietary lease and complying with the other provisions of the proprietary lease respecting cancellation. In the event of such cancellation the lessee shall have no further rights or liabilities in or to the shares and proprietary lease and will receive no cash payment. Rent under the proprietary lease will be determined by apportioning among the proprietary lessees the cash requirements of the Apartment Corporation in amounts proportionate to the number of shares held. The shares and leases allocated to apartments taken by persons provided by the Sponsor may be assigned or such apartments may be sublet, subdivided, or combined without the Apartment Corporation's consent. Gas will be included in the annual maintenance charges, but electricity will be separately metered and charged to each proprietary lessee. This charge will include electricity for the fans in the units in the apartments which will circulate the warm or cooled air. Reference should, of course, be made to the printed form of the proprietary lease for the details of the features above mentioned and the other provisions thereof. As provided in the purchase agreement each Purchaser shall sign two copies of such lease after the Plan has been declared operative, one copy of which is to be for the Purchaser.

As more specifically set forth in the description of the Building, attached hereto, the apartments and servants' rooms will be delivered in white plaster and the painting, decorating, and installation of additional fixtures and equipment will be the obligation of the proprietary lessee to be performed by a contractor or contractors to be approved by the Sponsor. The Lessee shall continue to do his own painting and decorating and maintain the equipment in the apartment at his expense, as provided in the proprietary lease.

6. Income Tax Deductions. *Section 216 of the Internal Revenue Code* and Section _____ of the _____ [state] Tax Law allow certain income tax deductions to tenant-shareholders of cooperative housing corporations. The Apartment Corporation has been advised by counsel that the tenant-shareholders entitled to occupancy may deduct from their gross income for federal and _____ [state] income tax purposes, their proportionate share of the interest with respect to the mortgage indebtedness and of the real estate taxes on the land and Building and paid by the Apartment Corporation, when _____ [percent] (_____ %) of the Apartment Corporation's gross income is derived from qualified tenant-shareholders. The estimated deduction at the inception of the Plan is as set forth in Schedule B. The exact amount of the actual tax savings to each individual will depend on the amount allowable by the Treasury Department and the _____ [state] Department of Taxation and Finance, and will further depend upon the tenant-shareholder's own income tax bracket. The Apartment Corporation, the Sponsor, the Agent, and counsel can make no warranties or representations that the United States Treasury Department or the _____ [state] Department of Taxation and Finance will allow the deductions, and they shall not be liable, if, for any reason, it is held that the Apartment Corporation does not meet, or at any future date ceases to meet, the requirements of the sections above enumerated, or any amendments thereof.

7. Completion of Building. It is estimated that the Building will be completed and ready for occupancy on or about _____ [month] _____ [day] , _____ [year] , subject, of course, to delays by strikes, lockouts, government restrictions on operations or materials, or other causes beyond the control of the Sponsor, the Apartment Corporation, or the Builder. This Plan and all agreements shall continue in effect notwithstanding any such delays. The Building will be deemed completed as soon as all the following conditions are met:

(a) The Department of Buildings of the City of _____ [city] has issued a temporary or permanent Certificate of Occupancy permitting the use for residential purposes of all of the apartments and servants' rooms to which shares are allocated, except for unsold apartments or where delayed for special work in individual apartments.

(b) The financing has been completed as provided herein.

(c) The Architect and Consulting Architect have certified to the Apartment Corporation and the Sponsor that the Building has been erected and completed substantially in accordance with the plans and specifications filed with the Agent and the general description of the Building, subject to such modifications and changes as may be permitted under this Plan, and the Building is ready for occupancy, except for special work in individual or unsold apartments, or such work in the public portions or rentable area of the Building as is customarily left uncompleted until after its occupancy.

(d) Certification from the Sponsor to the Apartment Corporation that the completed Building has been fully paid for or adequate reserves have been made by the Sponsor for all unpaid items.

When the four (4) events above mentioned have occurred, this shall be deemed and considered by all parties as conclusive proof that the Building has been fully completed in accordance with the provisions of any agreement or obligation of the Builder or the Sponsor, subject to their obligations as otherwise herein specifically provided. The sole obligation of the Builder or Sponsor is to complete the Building in accordance with the plans and specifications, as amended or modified, and as approved by the Architect and Consulting Architect. If title is transferred to the Apartment Corporation prior to the issuance of a permanent Certificate of Occupancy, the Apartment Corporation shall retain _____ Dollars (\$ _____) pending the issuance thereof.

8. Plan in Operation. In order that the Purchasers as well as the Sponsor and the Apartment Corporation may have assurance that this Plan will be truly cooperative, the following safeguards have been established:

(a) The Sponsor will not declare the Plan operative unless and until contracts for the sale to Purchasers of at least thirty percent (30%) of the shares have been procured.

(b) The Sponsor agrees to declare the Plan operative when contracts for the sale to Purchasers of at least sixty-five (65%) of the shares have been procured.

(c) The Sponsor reserves the right to declare the Plan abandoned prior to the time the sixty-five (65%) quota described in subparagraph (b) above has been reached and the Plan has not previously been declared operative.

If the Plan is abandoned, all Purchasers will be promptly notified and all moneys paid by them under their purchase agreements will be promptly returned by the Escrow Agent, without interest. The Sponsor has agreed that all such moneys will be repaid in full to the Purchasers in the event of abandonment.

If the Plan is declared operative, all Purchasers will be promptly notified. The Apartment Corporation shall call a meeting of all Purchasers in ample time before the completion of the Building so that they can receive a report on the estimated date of the Building's completion, select a Board of Directors in preparation for the passing of title, and attend to other organization matters.

9. Purchase Agreement and Payments to Sponsor. A form of purchase agreement is annexed hereto as Exhibit I. When a prospective purchaser has indicated his decision to purchase the shares allocated to an apartment or servants' room, a form of purchase agreement in similar form will be prepared in duplicate for his signature. Such agreement will not be binding on the Apartment Corporation until accepted by it and approved by the Sponsor, in writing at the end thereof.

The Purchase Agreement will provide for the following payments:

(a) a down payment of _____ percent (_____ %) of the purchase price of the shares as specified in Schedule B;

(b) _____ percent (_____%) thereof after the Plan has been declared operative and the Architect and Consulting Architect certify that the outside brick work has been completed, except such portions thereof as are customarily left to be completed after the interior portions are erected;

(c) _____ percent (_____%) thereof when the Architect and Consulting Architect certify that the white plaster in the apartments above the ground floor has been completed (except such portions thereof as are left incomplete due to individual tenant changes); and (d) the balance of _____ percent (_____%) thereof when the Department of Buildings has issued a temporary certificate of occupancy. The Apartment Corporation or the Agent shall give purchasers not less than fifteen (15) days' prior written notice of the anticipated date for such payments. Prices of the several blocks of shares as shown on Schedule B, are subject to change or withdrawal at the Sponsor's direction without notice at any time, before acceptance by the Apartment Corporation of a purchase agreement for any such block of shares.

All payments are to be made by the Purchaser's personal check to the order of the _____ [name] , as Escrow Agent. The proceeds are to be held in trust as required by law. The Sponsor and the Apartment Corporation have entered into an Escrow Agreement with the Trust Bank, a copy of which is attached hereto as Exhibit II, which provides that if the Plan is abandoned all moneys so deposited will be returned by the Escrow Agent to the several purchasers, without interest. After the Plan has been declared operative, the moneys received by the Escrow Agent from purchasers will be paid in the following installments:

(a) To the Sponsor, _____ percent (_____%) of the moneys then or thereafter received by the Escrow Agent after the Architect and Consulting Architect have certified to the Apartment Corporation that the outside brickwork has been completed, except such portions as are customarily left to be completed after the interior partitions are erected.

If, after any such payments provided for above have been made, additional shares shall be sold and additional payments shall be received by the Escrow Agent, it shall pay to the Sponsor _____ percent (_____%) of such additional funds.

(b) When the Architect and the Consulting Architect have certified to the Apartment Corporation that the Building has been erected and completed substantially in accordance with the plans and specifications, subject to such modifications and changes as may be permitted under the Plan, and all of the apartments and servants' rooms to which shares are allocated are ready for occupancy except for unsold apartments and special work in individual apartments, or such work in the public portions or rentable area of the Building as is customarily left uncompleted until after occupancy of the Building. Upon transfer of the land and completed Building to the Apartment Corporation, as acknowledged by it, the Escrow Agent shall pay the balance of the moneys received by it from Purchasers as follows:

(1) _____ Dollars (\$_____) to the Apartment Corporation for its working capital.

(2) _____ Dollars (\$_____) to the Apartment Corporation if the permanent Certificate of Occupancy has not then been issued.

(3) The balance of all moneys to the Sponsor.

The Apartment Corporation shall pay the Sponsor the _____ Dollars (\$_____) referred to in (2) above when the permanent Certificate of Occupancy has been issued.

If the Plan is not declared operative by _____ [month] _____ [day], _____ [year], any Purchaser may, within fifteen (15) days thereafter, elect to cancel the purchase agreement by giving written notice to the Apartment Corporation. In the event of any such cancellation, the Purchaser

shall receive back all moneys paid under any such purchaser agreement, without interest.

10. Attorneys and Architects. The law firm of _____ has been retained to represent the Apartment Corporation in connection with the Plan and at the closing.

The Sponsors are being represented by Arnold Josephs, Esq.

James Hoe and Associates have been retained as the Architect for the Building.

William Bender has been retained as Consulting Architect for the Apartment Corporation to check on the construction of the Building and to certify as to its completion.

If the Architect, Consulting Architect, or Agent above named shall cease to act in such capacity the Sponsor and the Apartment Corporation may appoint a substitute or substitutes.

11. Management. The Apartment Corporation will enter into an agreement with Harris & Co., Inc., for it to act as Managing Agent of the Building for a period of five (5) years commencing from the date on which it is completed and ready for occupancy. The Agent may not cancel, renew, or assign the management contract except with the Apartment Corporation's written consent. The Agent will receive an annual fee of _____ Dollars (\$_____). The Managing Agent's services shall include the billing and collection of rent, the hiring of help, and the operation of the Building, all under the supervision of the Apartment Corporation's Board of Directors, and the other usual services rendered by managing agents of cooperative apartment house buildings. The officers and employees of the Agent who will handle the moneys received from purchasers are bonded.

The only interest of Harris & Co., Inc. in the successful consummation of this Plan is as follows:

If the Plan is put into effect it will receive from the Sponsors a commission of 4% of the funds paid by Purchasers for the purchase of shares under this Plan and a management fee from the Apartment Corporation as above provided.

It has no other financial interest and acts merely as Agent under this Plan, which has been formulated and issued by the Sponsor and Apartment Corporation.

The Agent has been in the real estate business since 1930 and manages many buildings in the area.

12. Parties and Agreements. As hereinbefore stated the Sponsor is Ace Realty Corp., with its principal office at _____ [address] , _____ [city] , _____ [state] . It is a publicly owned corporation which has shares listed on the American Stock Exchange. Harvey Price is President and a Director, William Price is a Director, and Benjamin Green is Vice President and a Director. The Sponsor owns all of the shares of Ace Builders, Inc., the Builder named in the Plan. The Sponsor or its subsidiaries or predecessor companies have been in the building business for over twenty (25) years, and they have built or caused to be built many residential apartment house buildings.

The land was acquired in _____ [month] , _____ [year] , by the Builder at a cost of _____ Dollars (\$_____) plus accrued expenses, and the construction work is on an actual cost basis plus the builder's fee of _____ Dollars (\$_____). The Builder will receive a profit in the form of a _____ Dollars (\$_____) second mortgage or junior participation, previously described. This mortgage is self-liquidating in approximately 41 years.

The Apartment Corporation was organized on _____ [month] _____ [day] , _____ [year] , and the incorporators and directors are: James Ferris, William Meyers, and Allen

Pace. They are partners or employees of the law firm of Ferris & Meyers. They are only acting temporarily as nominees of the Sponsor and upon transfer of title of the land and completed Building to the Apartment Corporation will resign in favor of directors to be elected by the tenant-shareholders who in turn will elect officers. James Ferris, William Meyers, and Allen Pace have no financial interest in the Sponsor or the Cooperative Plan, and will receive no compensation for acting as the Apartment Corporation's officers and directors. The Apartment Corporation will be under the Sponsor's control up until the time the plan is put into full force and effect.

The Sponsor, as Seller, and the Apartment Corporation, as Buyer, have entered into a contract of sale which embodies the provisions of this Cooperative Plan, and the Sponsor agrees to comply with all of their obligations as set forth herein or therein. The Sponsor will cause the Building to be erected and will pay the full cost thereof.

13. Schedules and Exhibits. Annexed hereto are the following:

- General description of Building
- Schedule A Estimated annual income and expenses
- Schedule B Description of apartments, share
 allocations, selling prices and
 additional equity payments, estimated
 annual maintenance charges, estimated
 annual tax deductions, and other data
- Exhibit I Purchase Agreement
- Exhibit II Escrow Letter

Copies of the contract of sale between the Sponsor and the Apartment Corporation, plans and specifications, the management contract, the proprietary lease, the Certificate of Incorporation and Bylaws of the Apartment Corporation are on file with the Agent and may be examined by prospective purchasers.

The estimates in Schedules A and B have been prepared by the Agent based on past experience with cooperative buildings of a substantially similar type. The estimates are believed to be correct and dependable. However, they are not intended to be representations, guaranties, or warranties of any kind whatsoever, including, without limitation, that the actual expenses or income for any period of operation may not vary from the amounts shown or that the Apartment Corporation may not incur additional expenses, or its Board of Directors may not provide for reserves not reflected in such schedules, or that the annual maintenance charges for any period of the proprietary leases may not vary from the amounts shown on Schedules A and B due to economic conditions, increased taxes or wages, or other causes. The Agent is not a builder, engineer, or architect, and assumes no responsibility with respect to the building plans or specifications, the general description thereof as hereinafter set forth, the equipment, materials, decoration, workmanship, or completion of the Building.

Any information, data, or representation not referred to in this plan or contained in the various documents mentioned herein must not be relied upon. There are no suits pending or judgments outstanding against any party mentioned herein which might become a lien against the property.

No person has been authorized to make any representations other than those set forth herein. This Plan may not be modified orally. This offer is made only to individuals over the age of twenty-one (21) years who are residents of the State of _____ [state] .

This plan does not omit any material fact or contain any untrue statement of a material fact.

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Dated: _____ [month] _____ [day] , _____ [year]
 _____ [city]

ACE REALTY CORP., Sponsor

By _____

[name and title]

General Description of Building to Assist in the
 Examination of Plans and Specifications

The Skyline will be a 20-story and penthouse apartment building. It will be of fireproof construction, having reinforced concrete floors, columns, and beams. The exterior walls will be of glazed brick, backed up with cinder block, forming a cavity wall as shown on plans. The exterior of the building will be so designed as to create a pleasing architectural effect. The first floor of the 68th Street facade will be treated with granite plus other ornamentation as designed by the Architect. (Here follows detailed description of important features of the building including: entrances, basement, plumbing, heating, ventilating, cooling, electrical work, plastering, partitions, roofing, gas, electricity, elevators, telephone system, windows, railings, floors, bathrooms, kitchens, doors, trim, closets, painting, mail chute, venetian blinds, and laundry.)

Schedule A

Estimated Annual Income and Expenses
 for First Year of Operation

Estimated Maintenance (_____ Shares at \$_____ per share)	\$_____
Estimated Rent from Garage and Ground Floor Space (West of Entrance).	\$_____
Total	\$_____

ESTIMATED EXPENSES:

Operating:

Wag	\$_____
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Sup- plies	\$ _____ _____	
, Ser- vice s, and Re- pairs		
El- evat- or Mai nten ance Cont ract	\$ _____ _____	
Wa- ter and Sew er	\$ _____ _____	
Fran chis e Tax and Aud it	\$ _____ _____	
In- sur- ance - -Fire and Li- abil- ity	\$ _____ _____	
Man age- men t	\$ _____ _____	
Es- tim- ated Op- erat- ing		\$ _____ _____ _____

	Ex- pens es			
Real Estate Taxes (based				\$ _____
on an estimated				_____
assessed valuation at				_____
present (tax rate)				n**
Mortgage Indebtedness:				
	In- teres t:			\$ _____

	1st			\$ _____
	Mor			_____
	tgag			
	e			
	2nd			\$ _____
	Mor			_____
	tgag			
	e			
	Paid	\$ _____		

		—		
	Accrued	\$ _____	\$ _____	\$ _____
		_____	_____	_____
		—	—	
	Am ort- iza- tion:			
	1st			\$ _____
	Mor			_____
	tgag			
	e			
	Less	\$ _____	\$ _____	\$ _____
	Ac- crued	_____	_____	_____
	d In- teres t	—		n***
	Ad- ded to			
	2nd			
	Mor			
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	e			

Estimated Contingency Reserve	\$ _____

TOTAL ESTIMATED EXPENSES	\$ _____

Click here to view image.

SUMMARY

Breakdown of Purchase Price and Estimated Maintenance

Apartment	Shares	Purchase Price @ \$ _____ per Share	Estimated Maintenance @ \$ _____ per Share	Estimated Total Monthly Charges (inc. Gas) @ \$ _____ per share	Estimated Initial Amount Deduction For Income Tax Purpose @ \$ _____ — per share
A	_____	_____	_____	_____	_____
	_____	_____	_____	_____	_____
B	_____	_____	_____	_____	_____
	_____	_____	_____	_____	_____
C	_____	_____	_____	_____	_____
	_____	_____	_____	_____	_____
D	_____	_____	_____	_____	_____
	_____	_____	_____	_____	_____
E	_____	_____	_____	_____	_____
	_____	_____	_____	_____	_____
F	_____	_____	_____	_____	_____
	_____	_____	_____	_____	_____
G	_____	_____	_____	_____	_____
	_____	_____	_____	_____	_____

FOOTNOTES:

(n1)Footnote *. There will be 24-hour doorman service. Passenger elevators to be operated by tenant-owners but a day and evening hallman will be available to assist tenant-owners. Service car is to be manned during operation--Monday through Saturday.

(n2)Footnote **. The figure given above is an estimate of real estate taxes for a full year after both the land and the completed building have been assessed. The full assessment of the land and building will probably not be determined by the Tax Commission of the City of _____ [city] until after the consummation of the Plan.

(n3)Footnote ***. This payment remains constant during term of mortgage, but portion allocable to interest decreases and amortization increases as mortgage is reduced.



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Current Legal Forms for Real Estate

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Current Legal Forms for Real Estate
Chapter 20 REAL ESTATE ENTITIES
Part IV. Forms
G. COOPERATIVES

24-20 Current Legal Forms for Real Estate FORM 20.51

AUTHOR: by Stephen E. Pigott and Harold O. Maxfield, Jr.

FORM 20.51 Conversion of rental building to cooperative--offering statement with plan of cooperative organization

COMMENT

The following form is based on converting an existing apartment building into a cooperative. As always, the practitioner must review and become familiar with the applicable laws there the cooperative is being created. For example, the State of New York has different filing requirements based upon the population of the City where the cooperative will be located.

FORM

16 East 72nd Street

Offering Statement
Plan of Cooperative Organization

Total Offering \$ _____

Mortgage Indebtedness \$ _____

Apartment Corporation
16 East 72nd Apartment Corporation
c/o Douglas Ives, Inc.
45 Fifth Avenue
New York, New York 10016

Sponsor:
Byrd, Inc.
74 Madison Avenue
New York, New York 10022

(The prices of these apartments may be changed, and the shares may be reallocated, by the Sponsors from time to time during this offering, so that prior or subsequent purchasers may pay or may have paid less or more than present subscribers for similar apartments.

Douglas Ives, Inc.
Selling and Managing Agent
45 Fifth Avenue
New York, New York 10022
Plaza 0-0000

THE FILING OF THIS PLAN WITH THE DEPARTMENT OF LAW OF THE STATE OF NEW YORK DOES NOT CONSTITUTE APPROVAL OF THE ISSUE OR THE SALE THEREOF BY THE DEPARTMENT OF LAW OR THE ATTORNEY GENERAL OF THE STATE OF NEW YORK. ANY REPRESENTATION TO THE CONTRARY IS UNLAWFUL.

Apartment Corporation

16 East 72nd Apartment Corporation
c/o Douglas Ives, Inc.
45 Fifth Avenue
New York, New York 10022

Attorney for Apartment Corporation

Roger R. Roe
80 Fifth Avenue
New York, New York 10036
000-0000

Sponsor

Byrd, Inc.

74 Madison Avenue
New York, New York 10016

Attorneys for Sponsor

Hays & Adams

111 Broadway
New York, New York 10004
00-0000

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Plan of Cooperative Organization
16 East 72nd Street

1. Introductory. The Sponsor of this Plan of Cooperative Organization (the "Plan") is Byrd, Inc., a New York corporation, which owns the land and the existing apartment building (the "building"), known as 16 East 72nd Street,

Manhattan, New York. Through the Selling Agent, Douglas Ives, Inc. (the "Agent"), the Sponsor offers this Plan to the tenants of said property and other individuals who reside in the State of New York. If the Plan becomes operative and is consummated, as herein provided, 16 East 72nd Apartment Corporation (the "Apartment Corporation") will acquire from the Sponsor the fee title to the land and the building. Under cooperative ownership of the property through the Apartment Corporation, the individuals who purchase the shares allocated to the respective apartments will become the shareholders of the Apartment Corporation and the proprietary lessees of their respective apartments.

Under this form of cooperative ownership of the property, the shareholders, through the Apartment Corporation's Board of Directors, who will be elected by the shareholders, will control the management of the premises and the affairs of the Apartment Corporation. As proprietary lessees, their landlord will be the Apartment Corporation, and, by abiding by the terms of their proprietary leases, shareholders will have long-term security of possession.

The Apartment Corporation's primary purpose is to provide homes for its shareholders in the corporation's property. The proprietary lessees' maintenance charges (rents) will be established by the Board of Directors on the basis of estimated costs and a reasonable surplus for contingencies, without regard to a profit which an investing landlord would normally seek. Moreover, under the cooperative form of ownership, proprietary lessees may be entitled to federal, state, and city income tax deductions.

Proprietary lessees may install their own decorations in their respective apartments, although structural improvements will require approval of the Apartment Corporation's Board of Directors. A proprietary lessee may sell his shares and proprietary lease, or sublet his apartment, with the approval of the Board of Directors. The lessee may cancel the proprietary lease, without further liability, after _____ [month] _____ [day] , _____ [year] , under the "escape clause."

Details of these and other provisions of this cooperative offering are fully set forth in this Plan. Interested purchasers should read the Plan for further details as to all aspects of the operation of the property and the rights and obligations of proprietary lessees.

The shares of stock will be sold through the Agent, Douglas Ives, Inc. The following Schedules and Exhibit are attached hereto as part of this Plan:

SCHEDULE A--Estimated income and expenses of the Apartment Corporation for the first year of its operation;
SCHEDULE A-1--Comparative Operating Statement;

SCHEDULE B--Description of each apartment, shares of stock allocated, selling price of each block of shares, mortgage allocations, estimated annual maintenance charges, and estimated initial annual income tax deduction for each apartment;

SCHEDULE--Form of Purchase Agreement;

SCHEDULE C--Architects' Report (containing general description of the building);

EXHIBIT--Escrow Agreement with Irving Trust Company.

A copy of the Contract of Sale (the "Contract"), under which the Apartment Corporation will acquire the land and building, is on file, and may be examined, in the Agent's office. In the Contract, the Sponsor may also be referred to as the Seller.

The time of the closing and consummation of this transaction under said Contract and this Plan (when the Apartment Corporation will acquire title to the property) is herein referred to as the closing or closing date. As used herein,

"effective date" is the date when this Plan shall be declared effective by the Sponsor or become effective, and "operative date" is the date of closing hereunder. This Plan shall be deemed operative upon its consummation on the closing date.

2. Property. The property consists of land, fronting one hundred (100) feet on East 72nd and East 73rd Streets and 204 feet 4 inches on Madison Avenue, comprising approximately twenty thousand four hundred thirty-three (20,433) square feet, improved by a 20-story and penthouse fireproof apartment building, completed in _____ [year], containing one hundred eighty-three (183) apartments, a superintendent's apartment, four (4) servants' rooms, one doctor's office, bank space, five stores and a basement garage authorized to accommodate fifty-nine (59) cars, as stated in the Certificate of Occupancy. The garage space is leased to Byrd Garage Corp., a wholly owned subsidiary of the Sponsor, but is subleased to a garage operator, to provide storage and parking of passenger motor vehicles of occupants of the apartment building, 166 East 72nd Street, and others, in accordance with the provisions of Section 60 of the Multiple Dwelling Law of the State of New York. (For details as to income from the garage, bank space, stores, servants' rooms, doctor's office, valet space, and laundry machines.

An Architects' Report, describing the building and reporting on its physical condition, is included in this Plan as SCHEDULE C.

The assessed valuations and tax rates of this property for the past three tax years and currently are:

_____ [month] _____ [day], _____ [year]	\$ _____ @ \$ _____ _____ per \$ _____ _____
_____ [month] _____ [day], _____ [year]	\$ _____ @ \$ _____ _____ per \$ _____ _____
_____ [month] _____ [day], _____ [year]	\$ _____ @ \$ _____ _____ per \$ _____ _____
_____ [month] _____ [day], _____ [year]	\$ _____ @ \$ _____ _____ per \$ _____ _____

The Contract provides that if the Sponsor shall apply for reduction of the _____ [year] or _____ [year] assessed valuations or institute certiorari proceedings with respect to them, there will be proportionate sharing (according to the portion of the tax year remaining after the title closing) by the Sponsor and the Apartment Corporation of any tax savings resulting therefrom and the legal expense thereof. An application by the Sponsor is pending to reduce the _____ [year] assessed valuation.

The building is presently serviced by sixteen (16) employees and a resident superintendent. However, the payroll estimated in Schedule A contemplates that, under cooperative operation of the building, there will be twenty-three (23) employees and the superintendent.

Bus lines run on Madison Avenue and on East 72nd Street, at the property. Other bus lines and the Lexington Avenue IRT subway station are nearby.

The building has no lot line windows which would be blocked by construction on adjacent sites. The electricity service is adequate for all existing and reasonably foreseeable purposes.

All of the refrigerators, stoves, dishwashers and cabinets presently in the apartments were furnished and are owned by the Sponsor and will become the property of the Apartment Corporation at the closing. Each apartment rented under a proprietary lease will contain the kitchen, bathroom and electrical appliances, and all other equipment and fixtures, furnished and owned by the Sponsor and existing in the apartment and not the property of the occupying tenant.

The building and the apartments are being offered and sold in the condition in which they now exist, subject to normal wear and tear, and neither the Apartment Corporation nor the Sponsor shall have any obligation to make any repairs or improvements except as may be specifically set forth in this Plan. The Sponsor will, in any event, maintain the building in a good state of repair until the closing hereunder.

3. Apartment Leases and Possession. The apartments offered for sale under this Plan are identified and described in Schedule B. The unexpired lease of any apartment purchased by the tenant thereof will terminate on the date the Apartment Corporation acquires title to the property, and the term of his proprietary lease will begin on that date. None of the apartments, servants' rooms or commercial space in this building is subject to rent control laws or regulations.

All presently occupied apartments are rented under term leases. The leases of 107 apartments will expire on _____ [month] _____ [day] , _____ [year] and seventy-six (76) other leases will expire on _____ [month] _____ [day] , _____ [year] . There are no renewal or cancellation clauses in any of the apartment leases, except that the lease of Apt. _____ may be renewed until _____ [month] _____ [day] , _____ [year] , at the tenant's option. Apartments vacant when this Plan is offered, or which may become vacant thereafter, may be retained vacant or may be rented under interim leases, discussed below, in the Sponsor's discretion.

(a) Interim Leases to Purchasers. A purchaser who is the lessee of an apartment under a lease which may terminate before the operative date shall, upon the Sponsor's request, at the time of execution of the Purchase Agreement, enter into an interim agreement with the Sponsor, as landlord, extending his lease upon the same terms but only until the operative date or the date of abandonment of the Plan, as the case may be, at the rental payable under the existing lease.

At the Sponsor's discretion, arrangements may also be made by any purchaser, whether or not the lessee of the apartment purchased, to enter into an interim lease with the landlord for a fixed term of years at a rental to be negotiated. Such lease will be binding on the purchaser and the landlord and remain in effect until its expiration date if this Plan should be abandoned. However, when the Plan becomes operative all interim agreements and interim leases will be terminated automatically as of the operative date, when the proprietary lease takes effect and supersedes the purchaser's then existing lease or agreement.

(b) Possession. A Purchaser, other than the tenant in occupancy of any apartment, of the shares allocated to such apartment, will obtain the proprietary lease of the apartment subject to the occupant's tenancy and lease. If the occupant does not voluntarily remove from the apartment when his lease expires or is cancelled by reason of his default, the Purchaser who wishes to occupy the apartment will be required, at his expense, to obtain possession. Since no apartments in this property are governed or controlled by any rent regulations, the Purchaser need not comply with any rent control requirements but will be required to institute summary dispossession proceedings in court. Such proceedings may be instituted immediately following the expiration or cancellation of the tenant's lease. If the Sponsor permits a

tenant to remain in possession after the expiration or cancellation of his lease with no renewal lease, or to continue in occupancy under a lease for a monthly term, he will be a month-to-month tenant. The Purchaser will be required to terminate such tenancy by a thirty (30) day statutory notice, when he desires to remove the tenant, and thereafter to institute dispossession proceedings in court, if the tenant does not vacate voluntarily. While this Plan is being offered, a month-to-month tenancy can be terminated by the Landlord only by giving such written thirty (30) day notice after this Plan has been declared effective. However, such tenancy may be sooner terminated if the tenant's conduct shall be considered objectionable, or if he shall be in default.

4. Preference to Occupants. The Sponsor makes the following offer to tenants now in occupancy of the affected apartments:

To those tenants whose leases expire on or prior to _____ [month] _____ [day] , _____ [year] , and to the tenants of apartments occupied on a monthly or month-to-month basis: Each such tenant has the exclusive right, until _____ [month] _____ [day] , _____ [year] , to purchase the shares allocated to his apartment at an allowance of _____ percent (_____ %) in reduction of the price for such shares stated in Schedule B. To all other tenants: Each such tenant has the exclusive right, until _____ [month] _____ [day] , _____ [year] , to purchase the shares allocated to his apartment at the price stated in Schedule B. Any such tenant, however, who shall purchase such shares prior to _____ [month] _____ [day] , _____ [year] , shall also be entitled to an allowance of _____ percent (_____ %) in reduction of the price for such shares stated in Schedule B.

Notwithstanding the foregoing exclusive rights to purchase, the Sponsor reserves its rights, if any, under existing leases, to show all apartments to other interested prospective purchasers prior to the above-stated dates. After the expiration of the foregoing applicable "exclusive" date, or sooner if any tenant waives such exclusive rights, the shares allocated to his apartment will be offered to nonoccupants. Thereafter, the tenant will be promptly notified in writing when his apartment has been sold.

Any purchase made under this offer shall be upon the Purchase Agreement (Schedule) and be accompanied by the down payment of ten percent (_____ %) of the reduced price. The purchase by an occupant-tenant shall be subject to the approval of the Agent and acceptance by the Apartment Corporation. The credit and character references of the applicant are factors to be taken into consideration.

5. Commercial Space and Income. The garage, stores, doctor's office, servants' rooms and valet space, ("commercial space") are presently leased as follows:

Space	Lease Expiration	Annual Rent	Security
Garage (1) (Byrd Garage Corp.)	[date]	\$ _____	None
Bank (2)-cor. 72 St. & Madison Ave. (First City Bank)	[date]	\$ _____	None
Store 1 (3)- cor. 72 St. & Madison Ave. (coffee shop)	[date]	\$ _____	None
Store 2 (4) 1264 Madison	[date]	\$ _____	None

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Ave. (gift baskets,
groceries, etc.)

Store 3 (5) 1262 Madis- [date] \$ _____ None
on

Ave. (tobacco,
stationery, etc.)

Store 4 (6) 1260 Madis- [date] \$ _____ None
on

Ave. (candy shop)

Store 5 (7) 1258 Madis- [date] \$ _____ None
on

Ave. (florist)

Doctor's Office (8) 1st [date] \$ _____ None
fl

No. wing (nurses re-
gistry)

Servants Room A-3d fl [date] \$ _____ None

Servants Room B-3d fl [date] \$ _____ None

Servants Room C-3d fl [date] \$ _____ None

Valet Space [date] \$ _____ None
(9)-basement

(valet service)

Washing machines [date] \$ _____ None
(10) basement

(coin laundry facilities)

(1) See "Garage Facilities," below. Rent remains constant during term of lease. No renewal or cancellation options.

(2) Tenant's options: To terminate lease on _____ [month] _____ [day] ,
_____ [year] , on at least twelve (12) months notice. To renew lease, on at least twelve (12)
months notice, ten years _____ [month] _____ [day] ,
_____ [year] to _____ [month] _____ [day] ,
_____ [year] , ten (10) years _____ [month] _____ [day] ,
_____ [year] to _____ [month] _____ [day] ,
_____ [year] , ten (10) years _____ [month] _____ [day] ,
_____ [year] to _____ [month] _____ [day] ,
_____ [year] , at _____ Dollars (\$ _____) 27,500 per annum
during each renewal term.

(3) Additional rent (or credit) equal to _____ percent (_____ %) of increase (or
decrease) of real estate taxes based on _____ [year] taxes. (For _____
[year] , _____ Dollars (\$ _____)).

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(4) Tenant's option to renew lease for five (5) years at _____ Dollars (\$ _____) per annum. Additional rent equal to _____ percent (_____%) of increase of real estate taxes based on _____ [year] taxes. (For _____ [year] , _____ Dollars (\$ _____)).

(5) Additional rent equal to _____ percent (_____%) of increase of real estate taxes based on _____ [year] taxes. (For _____ [year] , _____ Dollars (\$ _____)).

(6) Tenant's option to terminate lease after _____ [month] _____ [day] , _____ [year] on payment of _____ Dollars (\$ _____) fee.

(7) Additional rent equal to _____ percent (_____%) of increase in real estate taxes based on _____ [year] taxes, but not to exceed _____ Dollars (\$ _____) multiplied by number of years following _____ [year] tax year. Security deposit _____ Dollars (\$ _____) bears savings bank interest, payable annually to tenant. (Escalation for taxes for _____ [year] , _____ Dollars (\$ _____)).

(8) Doctor's office: presently leased to registry for nurses and employment agency.

(9) Valet space concession: renders package room service, no rent, but pays _____ Dollars (\$ _____) per month for steam; electricity and gas may be charged at a mutually satisfactory rate; Contract expires _____ [month] _____ [day] , _____ [year] , but concessionaire has renewal options for three (3) years from _____ [month] _____ [day] , _____ [year] and three (3) additional years from _____ [month] _____ [day] , _____ [year] ; and building owner has right to cancel on sixty (60) days notice, for cause. Contract was renewed by concessionaire to _____ [month] _____ [day] , _____ [year].

(10) Washing machines concession: operated by Coin Industries Corp., indefinite term; concessionaire now pays _____ percent (_____%) commission against _____ Dollars (\$ _____) p.a. minimum; amounts paid: _____ [year] _____ Dollars (\$ _____); _____ [year] _____ Dollars (\$ _____) _____ [year] _____ Dollars (\$ _____); average for three (3) years _____ Dollars (\$ _____).

6. Commercial Income Summary. At the time of the issuance of this Plan, the estimated total annual commercial income, based upon the foregoing tenants' and concessionaires' current rents and payments (including the rental value of vacant space, if any), is _____ (\$ _____). However, taking into consideration the rent increases shown above, as of [month] _____ [day] , _____ [year] , the estimated total annual commercial income from such tenants and concessionaires should be _____ Dollars (\$ _____), the amount of "Rent From Commercial Space" as stated in Schedule A. That amount includes all rents from tenants and payments by concessionaires, as estimated. It does not include any of the additional rents (tax escalations) shown in notes 3, 4, 5 and 7, above, in Paragraph 5.

The Apartment Corporation will take title to the property subject to the existing commercial leases and tenancies and concession agreements and will receive from the Sponsor, at the closing, the security deposits held under the commercial leases. All of said leases and agreements may be examined in the Agent's office.

Upon the expiration or cancellation of any of the aforesaid commercial leases and concession agreements, the responsibility for either negotiating a renewal lease or obtaining another lessee for the affected space, or another concessionaire, is solely that of the Apartment Corporation. The Sponsor has the responsibility for brokerage commissions incurred with respect to any such leaseings negotiated prior to the closing date, and the Apartment Corporation shall be responsible for brokerage commissions for such leaseings negotiated thereafter. The Sponsor does not warrant that the rent or income obtainable upon a renewal of any lease or from a successor lessee, or concessionaire, will be in the same amount as the current (or anticipated) rent or income for the affected space or facility. However, three of Sponsor's shareholders have obligated themselves to make good, for two years from the closing date, any deficit in the commercial rent income below _____ Dollars (\$_____) for such two (2) year period.

7. Garage Facilities.

(a) Garage in Building "Byrd Garage." The garage lease with Byrd Garage Corp., which is a wholly owned subsidiary of the Sponsor, provides for space preference to tenants of the building at rates competitive with the charges for similar services in other comparable garages in the vicinity. The Sponsor and the Apartment Corporation have no responsibility for the reservation of space in the garage (the "Byrd Garage") for any tenant, other than that the Apartment Corporation will, upon the determination of its Board of Directors, seek to enforce the lease in the interests of tenant-owners. No representation is made herein that an apartment purchaser is assured of parking space or when such space will become available. The Byrd Garage lease may be assigned by Byrd Garage Corp. at any time to an experienced garage operator of good reputation and financial responsibility, whereupon Byrd Garage Corp. will be released of further responsibility under the lease.

(b) "Jo-Ben Garage" at 18 East 73rd Street, Byrd Garage Corp. is also the lessee, under a net lease expiring [month] _____ [day], _____ [year], of the five (5) story garage building at 18 East 73rd Street (the "Jo-Ben Garage"), which adjoins the Sponsor's property on the west. Byrd Garage Corp. has subleased both the Jo-Ben Garage and the Byrd Garage to Rent-a-Car, Inc. (RC), a wholly owned subsidiary of Ney Service Corporation, a publicly owned corporation, which has guaranteed the sublease. The sublease to RC is at rents which exceed the rents payable by Byrd Garage Corp. by _____ Dollars (\$_____) to _____ Dollars (\$_____) per year, and is for a term ending [month] _____ [day], _____ [year], but may be terminated by RC on payment of a specified penalty on [month] _____ [day], _____ [year] or [month] _____ [day], _____ [year]. If RC terminates the sublease on either of such dates, Byrd Garage Corp. will have either to operate the Byrd Garage itself, in conjunction with or separately from the Jo-Ben Garage, or to procure another operator to do so as sublessee or agent. Byrd Garage Corp. heretofore operated both garages from _____ [month] _____ [year] to _____ [month], [year]. The sublease expressly requires RC (the garage operator) to give parking space preference in the Byrd Garage to tenants of the building at rates competitive with the charges for similar services in other comparable garages in the vicinity. No such preference is required to be given in the Jo-Ben Garage. As long as the Byrd Garage and the Jo-Ben Garage are in the possession of the same garage operator or lessee and the net lease of the Jo-Ben Garage is in effect, there will exist an easement for exit of personnel from the Jo-Ben Garage through the basement of the Byrd Garage, by means of a fireproof door between both buildings.

No representation is made that the Byrd Garage "Jo-Ben Garage" at 18 and the Jo-Ben Garage will continue to be operated by the same garage operator or be operated together as one garage operation, or be leased or subleased to the same entity. The Byrd Garage (in the building) can be operated independently of the Jo-Ben Garage.

So long as the above mentioned net lease of the "Jo-Ben Garage" at 18 Jo-Ben Garage is in effect the east wall and roof of the Jo-Ben Garage building may continue to be used to support the range exhaust flue from the coffee shop in the 73rd Street corner of the building, which is now attached to said wall and roof by metal stand-off brackets. On the

expiration or earlier termination of the Jo-Ben Garage lease, the owner of the Jo-Ben Garage may require the Apartment Corporation (if it is then the owner of the building), at its expense, to remove said support brackets and the portions of said flue that extend over the roof of the Jo-Ben Garage building. The Apartment Corporation may, at such time, negotiate for the continuance of the attached flue, if it shall be required for the then tenant of the coffee shop store, or may arrange for a structurally free-standing flue, detached from the Jo-Ben Garage building, or may carry the flue attached to the Apartment Corporation's building.

8. Plan Effective; Consummation of Plan. The "Jo-Ben Garage" at 18 Plan will become and be declared effective when agreements for the purchase of _____ percent (_____) of the shares of stock allocated to all the apartments, accompanied by the down payments required by the Purchase Agreement, have been procured by the Agent. However, the Sponsor has the option of declaring the Plan effective when agreements for the purchase of _____ percent (_____) or more of such shares, accompanied by such down payments, have been procured by the Agent. The Sponsor also reserves the right to declare the Plan abandoned after _____ [month] _____ [day] , _____ [year] , if it has not become or been declared effective under either of the foregoing conditions. In any event, the Plan shall be deemed abandoned if it has not become or been declared effective by [month] _____ [day] , _____ [year] . However, the Sponsor has reserved the right, at its sole option, to extend the above-stated abandonment cut-off date ([month] _____ [day] , _____ [year]) to a date not later than [month] _____ [day] , _____ [year] , and may exercise such option by written notice to the attorney for the Apartment Corporation and all apartment purchasers given prior to [month] _____ [day] , _____ [year] .

The Plan will be declared effective by written "Jo-Ben Garage" at 18 notice by the Sponsor to the Agent, the attorney for the Apartment Corporation, all shares subscribers, and all tenants, identifying all sold apartments. If the Plan shall be abandoned, the Sponsor will give prompt written notice thereof to said persons.

9. Closing. The Plan shall be operative and "Jo-Ben Garage" at 18 title to the property will be conveyed to the Apartment Corporation on a date to be designated by the Sponsor's attorneys, but not earlier than thirty (30) days after the date that the Plan is declared or becomes effective, nor later than [month] _____ [day] , _____ [year] . However, the Sponsor has reserved the right, at its sole option, to extend the aforesaid [month] _____ [day] , _____ [year] , date to a date not later than [month] _____ [day] , _____ [year] , if it exercises its above-stated option to extend the abandonment date.

10. Share Offering; Purchase Agreement. Schedule B hereof contains the prices of the shares allocated to all apartments. The terms of sale of the shares are set forth in the Purchase Agreement, Schedule C hereof. A down payment of _____ percent (_____) of the price of the individual block of shares (or as the same may be reduced or increased) is required upon the execution of the Purchase Agreement, and the balance is to be paid after the Plan has been declared effective, and upon fifteen (15) days written notice by the Agent. It is proposed to obtain such Purchase Agreements from occupants of the building, or other qualified individuals, who are residents in the State of New York and desire to acquire the specified number of shares allocated to the selected apartments and who may be approved and accepted as proprietary lessees. The Sponsor does not make any offer to finance any purchases.

No shares have been allocated to, or offered for, the superintendent's apartment, servants' rooms, doctor's office, garage, bank space, stores or valet space.

11. Escrow. The Sponsor will hold all moneys received by it, directly or indirectly through its agents or employees, in trust until actually employed in connection with the consummation of this transaction. As provided in the Purchase Agreement, all such moneys will be deposited with and held in trust by Irving Trust Company, the Escrow Agent, pursuant to the Escrow Agreement, Exhibit 1 hereof, in the Account designated "16 East 72nd Street--Shares Purchase

Account," or similar name. It provides that the Escrow Agent shall deposit the payments in individual savings accounts in one of its branches, in the names of the shares Purchasers for identification purposes. All interest earned in such savings accounts (less the Escrow Agent's charges) will accrue to the benefit of the Sponsor upon the consummation of the Plan and will be paid to it as its property at the time of the closing (except as provided in Paragraph 7 of the Purchase Agreement and in the Escrow Agreement with respect to Purchasers in default), but the Sponsor will contribute an amount equal to such amount of earned and accrued interest to the Apartment Corporation at the closing, as the Apartment Corporation's additional working capital.

12. Refunds. If insufficient funds shall be raised through this offering of shares for the consummation of the transaction described in this Plan, or if the Plan shall not become operative or shall not be consummated, or if the intended acquisition of the property shall not be completed for any other reason, by [month] _____ [day] _____, _____ [year] _____, then, not later than forty-five (45) days after notification thereof by the Sponsor or Apartment Corporation, all moneys received for shares purchased will be fully returned by the Escrow Agent, together with the accrued interest earned upon the funds deposited with the Escrow Agent, to each purchaser of shares who shall not be in default under his Purchase Agreement. In that event, the Sponsor will pay the Escrow Agent's charges.

13. Purchase Procedure. Sales of shares will be made through the Agent's authorized representatives. Tenants or others who desire to purchase apartments will be given copies of the Purchase Agreement and requested to sign and return same to the Agent, together with a check drawn to the order of Irving Trust Company for _____ percent (_____ %) of the purchase price of the shares allocated to the selected apartment. Upon approval by the Agent and acceptance by the Apartment Corporation, a fully signed copy of the Purchase Agreement will be returned to the Purchaser. After the Plan has been declared effective, two filled-out copies of the Proprietary Lease will be submitted to the Purchaser for signature and prompt return to the Agent. After they are signed and returned to the Agent, they will be held for execution by the Apartment Corporation as of the closing date (see paragraph 4 of the Purchase Agreement) and, thereafter, a fully signed copy of the Proprietary Lease will be delivered to the Purchaser, together with his certificate for his shares of stock. The commencement date of the Proprietary Lease will be the closing date

14. Changes in Prices and Terms of Sale. Subject to the exclusive rights of tenants in occupancy to purchase their apartments at the reduced prices set forth in "Preference to Occupants," the Sponsor reserves the right, until the closing date and from time to time, to change the prices of the several blocks of shares of stock as shown in Schedule B hereof and the terms of sale thereof, to reallocate any of the shares, to change the number of apartments by increasing or decreasing their sizes, or to change the size, layout and identification of any apartment and to reallocate the shares allocated to them. The Sponsor, however, may not change the prices, terms of sale or size of any apartment or reallocate any block of shares for which a Purchase Agreement shall have been approved and accepted and in respect to which the purchaser is not in default, and may not reallocate any shares without the consent of the Agent and Apartment Corporation. As the result of any such change, the sales of the shares allocated to those individual apartments for which the shares prices or terms may be changed may be for prices higher or lower than those stated in Schedule B for such individual apartments, or upon different terms, without affecting any previous or later sale of the shares allocated to any other or similar apartment. However, no such change shall result in any change in the total number of the shares allocated to all apartments in Schedule B, namely, fifty-six thousand five hundred (56,500) shares. If there shall be any such change in the price of any block of shares, the total purchase price of the property as stated in "Financial Features," below, shall be increased or decreased by the net difference resulting from all such changes in prices, and the total amount payable to the Sponsor at the closing shall be changed by the amount of such net difference; and, the total shares equity will be correspondingly changed.

15. Unsold Shares--Sponsor's Obligations. The Sponsor has agreed that, if at the time of title closing all of the shares of stock allocated to all apartments have not theretofore been sold and fully paid for ("Unsold Shares"), it will produce a financially responsible individual purchaser, or purchasers, for all of the Unsold Shares. Such purchaser, or purchasers,

will enter into proprietary leases for the apartments to which such shares and leases are allocated, so that when the Plan is consummated all of the shares will have been subscribed and fully paid for and proprietary leases will have been entered into with respect to all apartments in the building. The Sponsor intends that "a financially responsible individual purchaser" shall be a person who, in the opinion of the Sponsor's officers, has sufficient financial capacity to meet the maintenance payments as a lessee.

Three (3) of the Sponsor's principals, Jesse J. Jacobs, Louis E. Gold, and Mandel M. Kramer, have contracted and obligated themselves for the full performance by each purchaser of the Unsold Shares as the lessee of each proprietary lease accompanying the Unsold Shares, including the payment of all rents thereunder, until same shall be assigned to a purchaser for occupancy, or until such purchaser becomes the occupant thereof. Any purchaser produced by the Sponsor may sell or assign all such shares and leases so acquired by him, or may sublet such apartments, provided that the assignee or sublessee shall have been approved only by the building's Managing Agent. A holder of Unsold Shares who owns shares allocated to any apartment may elect to become the occupant thereof (subject only to the Managing Agent's approval) and, upon becoming such occupant, shall no longer be regarded as the holder of Unsold Shares with respect to the shares allocated to such apartment. All sales of Unsold Shares by the holders thereof will be pursuant to this Plan, as it may be amended. The Sponsor may enter into agreements with the individuals produced by it to require them to pay over to it any profits, or to charge it with any losses, resulting from the resale or subletting of any apartment held by them. Such individuals and others may enter into agreements with each other for the pooling and division of such profits or losses.

16. Income Tax Deductions. The Plan has been designed to give to each proprietary lessee the benefit of the income tax deductions allowed to tenant-shareholders of cooperative housing corporations under the present provisions of *Section 216 of the Internal Revenue Code*, *Section 615 of the New York State Income Tax Law* and *Section _____ of the New York City Administrative Code*. Under the applicable provisions of those laws, the price paid for each block of shares under the Plan must bear a reasonable relationship to the portion of the value of the equity of the Apartment Corporation in the property attributable to the apartment to which the block of shares is allocated. The Agent has advised the Apartment Corporation that, in its opinion, such a reasonable relationship exists under the prices set forth in Schedule B, notwithstanding that some of said prices may be discounted as provided in this Plan. On the basis of the Agent's opinion, the Apartment Corporation has been advised by its attorney, Roger R. Roe, that, in his opinion, if the Plan becomes operative under its terms, so long as _____ percent (_____%) or more of the Apartment Corporation's gross income is derived from qualified tenant-shareholders (including purchasers of Unsold Shares) the Apartment Corporation will qualify as a cooperative housing corporation under the present applicable state, federal, and city tax laws. It is the opinion of Roger R. Roe, based on the calculations of the Agent shown in Schedule A hereof, that more than _____ percent (_____%) of the Apartment Corporation's gross income during the first year of its operation will be derived from tenant-shareholders, and that the tenant-shareholders will be entitled to deduct from their gross income their proportionate shares of real estate taxes on the land and building and the mortgage interest paid by the Apartment Corporation.

The estimated amounts which will be deductible for income tax purposes for the first year of cooperative operation are set forth in Schedule B. Such amounts, however, may increase or decrease by reason of changes in the amounts paid by the Apartment Corporation for interest on any outstanding mortgage or for real estate taxes. The amount of actual tax savings will depend upon the individual taxpayer's tax bracket. Neither the Sponsor nor the attorney for the Apartment Corporation has passed upon computations for estimated tax deductions made by the Agent as set forth in Schedule B. No warranty or representation is made by the Sponsor, the Agent, or any attorney for the Apartment Corporation as to the allowability by any taxing authority of the income tax deductions, at any time in the future. None of them shall be responsible for the discontinuance or disallowance of any part or all of said deductions at any time, whether by reason of a change in the applicable law, administrative regulations, error in calculations, or otherwise.

17. Income, Expenses and Services. An itemized estimate of the Apartment Corporation's income and expenses for the

first operating year is set forth in Schedule A. The figures and estimates in Schedules A and B have been prepared by the Agent and they are believed to be correct and dependable. The estimates are based upon over seven years of actual experience in the management of this property by the Agent, who has also organized and managed many other cooperatively owned apartment buildings in New York City. Nothing in Schedules A and B is intended or should be taken as a representation or guarantee that actual income or actual expenses for any period of the Apartment Corporation's operation will not be different from the estimated amounts shown or that, after it has acquired title to the property, the Apartment Corporation will not incur, or its Board of Directors will not include in the cash requirements, maintenance charges or items of expense or reserves not anticipated in such Schedules.

A comparative statement of the operating expenses of the property for three prior years, is attached to this Plan as Schedule A-1.

The estimate of income for the first year of cooperative operation (Schedule A), is based upon the total of maintenance charges to be derived from the proprietary lessees and income from the commercial tenants (including income from laundry machines and steam supplied to the valet).

The estimate of expenses for "payroll" (Schedule A) contemplates the following: The building service staff will consist of a superintendent and twenty-three (23) employees, seven more than are employed at present. There are two (2) passenger elevators and two service elevators, all designed for both manual and automatic operation. The passenger elevators will be manually attended and operated twenty-four (24) hours a day, every day of the week, and the service elevators will be manually attended and operated between 7 a.m. and 11 p.m. every day except Saturday and Sunday, when they will be closed at 3 p.m. There will be doorman service in both lobbies (72nd and 73rd Streets) from 8 a.m. until midnight every day of the week, and from midnight until 8 a.m. they will both be covered by the elevator operators. The lobby doors will be locked at midnight and a bell button is available at each lobby vestibule to call the night attendant.

The Package Room is attended by the valet concessionaire Monday through Friday, from 8:30 a.m. to 5:30 p.m., and until 2 p.m. on Saturday, except that the Package Room will be closed on Saturdays during the months of July and August and on specified holidays. The use of garage space is not included in the maintenance charges. Gas for cooking is not separately metered or charged and the estimated cost thereof for all apartments is shown in Schedule A and is included in the maintenance charges. Electricity is separately metered to each apartment and charged to the individual tenants by Con Edison. The garage, bank space, stores, doctor's office and servants' rooms are individually metered for electric current and the lessees of such space pay Con Edison therefor. The laundry and valet concessions are not metered for gas and electricity, which are supplied without any additional charge. The Agent has issued to the Sponsor its letter to the effect that the projected maintenance charges and commercial income (Schedule A hereof) are adequate to meet the estimated expenses and reserve contingencies for the Apartment Corporation's first year of operation after closing, as enumerated in said Schedule A.

The mortgage expenses are calculated upon the stipulated terms set forth in the Contract (see "FINANCIAL FEATURES" -- "MORTGAGE," below). The real estate taxes are based on the _____ [year] tentatively assessed valuation of _____ Dollars (\$ _____) for the entire property, at the anticipated rate for fiscal _____ [year] of _____ Dollars (\$ _____) per hundred. Other estimated items of income and expenses shown in Schedule A are based upon the judgment of the Agent in the light of its actual management experience in the building and its experience in formulating budgets for, and in the management of, comparable cooperative structures and other apartment buildings.

18. Improvements.

(a) Air conditioners. Promptly after the issuance of this Plan, the Sponsor will install new through-the-wall air conditioning units (which may be Remington or American Standard or equal and may include new or altered sleeves,

where necessary) in a sample apartment to be selected by it. After the Plan is declared effective and before title closing, the Sponsor will obtain from a reputable contractor (who may be J. J. Jacobs, Inc., a corporation owned by Jesse J. Jacobs, one of the principal shareholders of the Sponsor) a firm offer to furnish and install in all of the other apartments in the building air conditioning units which shall be the same as or substantially similar to those installed in the above-mentioned sample apartment, and to assign to the Apartment Corporation the customary manufacturer's guarantee of such units. Such units will be fan coil units which will both cool and heat. Those to be installed in living rooms will operate at 208 volts and have capacities of 11,000 BTU's for cooling and 15,600 BTU's for heating. Those to be installed in bedrooms will operate at 115 volts and have capacities of 8,800 BTU's for cooling and 12,700 BTU's for heating. The Sponsor represents that such capacities are adequate for the stated functions. At the closing, such offer shall be accepted by the Apartment Corporation and become a contract between it and the contractor. At the same time, at the closing, the Agent will receive for the account of the Apartment Corporation, from the proceeds of shares sales held by the Escrow Agent, an amount equal to the price of the work, as stated in such contract, as a contribution to the Apartment Corporation's working capital, to be used for the purpose of paying such price. The Agent shall disburse the money received in accordance with the terms of such contract, subject only to its approval of the work. Until such money is fully disbursed, the Agent may deposit it in an interest bearing account or invest it in short term government securities, as the Apartment Corporation's Board of Directors may direct. The Board (the "Post-Closing Board of Directors") shall be elected at the shareholders' meeting to be held shortly after title closing. The interest earned on such money shall belong and be paid over to the Apartment Corporation, and may be used for its general purposes, as its Post-Closing Board of Directors may determine.

If a proprietary lessee shall refuse to permit any such new air conditioning unit (and necessary sleeve) to be installed in his apartment he shall not be entitled to any allowance, credit or other compensation for such refusal or omission. If a proprietary lessee shall fail to permit such a new air conditioning unit (and necessary sleeve) to be installed in his apartment when it is scheduled by the contractor or the Agent to be installed, such unit need not then be installed if the Apartment Corporation's Post-Closing Board of Directors so determines, unless the proprietary lessee shall agree to pay the additional expense incurred by the Apartment Corporation as a result of the unit's out-of-schedule installation. The proprietary lease provides that each proprietary lessee will be responsible for the maintenance and repair of all air conditioning units within his apartment.

(b) Public Halls Above Ground Floor. After the issuance of this Plan, the Sponsor will install new carpeting and new vinyl wall covering in a public hall above the ground floor of one wing of the building, to be selected by it, and also repaint the ceiling and door bucks of such sample public hall. After the Plan is declared effective and before title closing, the Sponsor will obtain from a reputable contractor (who may be J. J. Jacobs, Inc., above described), a firm offer which shall be approved by the Agent, for new coverings for the floors and walls and repainting the ceilings and door bucks of all of the other public halls in the building above the ground floor in substantially the same manner as the above-mentioned sample public hall. At the closing, the Apartment Corporation shall accept such offer, which will become a contract between it and the contractor. At the same time, at the closing, the Agent will receive, for the account of the Apartment Corporation, from the proceeds of the shares sales held by the Escrow Agent, an amount equal to the contract price of such work, as a contribution to the Apartment Corporation's working capital, to be used for the purpose of paying such price. The Agent shall deposit or invest these proceeds in the same manner and subject to the same conditions as apply to the fund referred to above under "AIR CONDITIONERS."

(c) Incinerators. At any time prior to the closing, the Sponsor will have completed or contracted for the upgrading or improving of the two incinerators in the building, as may be required or permitted by then applicable laws and regulations. If at the closing the Sponsor shall have not completed and fully paid for such work, the Apartment Corporation will assume the contract, to the extent that the work shall not have been fully performed. The Agent shall receive at the closing, for the Apartment Corporation's account, from the proceeds of the sales of shares held by the Escrow Agent, an amount to be certified by the Agent as equal to the balance of the contract price then remaining unpaid under the contract for such work, whether for work done or to be done. Such amount shall constitute a contribution to the Apartment Corporation's working capital, to be used for the purpose of paying the balance of the

contract price. The Agent shall hold this amount, and may deposit or invest it, and shall disburse it, in the same manner and subject to the same conditions as apply to the fund referred to above under "AIR CONDITIONERS."

(d) Miscellaneous Work. After the Plan is declared effective, the Sponsor will obtain a firm offer or offers from a reputable contractor or contractors (who may be J. J. Jacobs, Inc., above-described), to be approved by the Agent, for refinishing the building's four elevator cabs and the entrance doors to the 72nd Street lobby, and installing a new canopy in front of the 73rd Street entrance to the building and new hollow metal exterior service doors to the 73rd Street cellar level. At the closing such offer or offers will be accepted by and become a contract or contracts of the Apartment Corporation. An amount equal to the aggregate contract prices of such work shall be paid over to the Agent from the proceeds of shares sales, as a contribution to the Apartment Corporation's working capital. The Agent shall deposit or invest and disburse this amount in the same manner and subject to the same conditions as apply to the fund referred to above under "AIR CONDITIONERS."

19. Working Capital. At the title closing, the Sponsor shall contribute the following sums and deposit them with the Agent, which the Agent shall hold for the account of the Apartment Corporation, subject only to the control of its Board of Directors (who shall be elected by the shareholders shortly after the closing), except as stated below:

(a) the sum of _____ Dollars (\$ _____);

(b) a sum equal to the full amount of the interest to be earned by the Sponsor on the savings accounts to be opened by the Escrow Agent with shares purchasers' payments, as provided in the Escrow Agreement;

(c) a sum equal to the aggregate of the amounts of money above provided, under the heading "IMPROVEMENTS," to be paid over at the title closing from the shares purchase moneys.

The Contract provides, however, that if, on the closing date, the adjustments in favor of the Sponsor for prepaid items shall result in reduction of the aggregate amount of items (a) and (b) above (_____ Dollars (\$ _____) plus the interest on shares purchase funds) to less than (_____ Dollars (\$ _____), payment to the Sponsor or its designee(s) of the amount of such reduction below (_____ Dollars (\$ _____) shall be deferred at the closing, at the Apartment Corporation's option, for up to six months from the closing, and, if not sooner paid, shall become due and payable to the Sponsor or its designee(s) six (6) months from the closing.

20. Corporate Organization of the Apartment Corporation. The Apartment Corporation has been authorized to issue sixty thousand (60,000) shares, of one class and of the par value of _____ Dollars (\$ _____) each, fifty-six thousand five hundred (56,500) of which have been allocated to the apartments as shown on Schedule B hereof. All shares are voting shares, and nonassessable. All shareholders are entitled to one vote for each share. The three thousand five hundred (3,500) unissued shares have not been allocated to any apartments, will not be issued unless allocated to space in the building, and are subject to future disposition by the Apartment Corporation's permanent Board of Directors. No shares have been allocated to the Superintendent's apartment or to the servants rooms or any commercial space. Upon the consummation of this Plan at the time of title closing, all of the Apartment Corporation's fifty-six thousand five hundred (56,500) shares will be issued and outstanding and fully paid for. The Certificate of Incorporation provides, among other things, that it is the primary purpose of this corporation to provide homes in the building for its shareholders under leases of apartments commonly known as proprietary leases, and that each of the shareholders shall be entitled, solely by reason of his ownership of shares in the corporation, to occupy an apartment in the building for dwelling purposes pursuant to such proprietary lease.

At the Sponsor's request, the Apartment Corporation was organized on _____ [month]
_____ [day] , _____ [year] , by Roger R. Roe as a single incorporator, as

permitted by the New York Business Corporation Law. He is and will be the sole shareholder and director until this Plan is consummated, and is and will be the President and Treasurer, and his secretary, Eleanor Stevens, will be the Vice President and Secretary. When the Plan is consummated and title is acquired by the Apartment Corporation, Mr. Roe and Mrs. Stevens will resign the directorship and such offices, effective at the first shareholders meeting of the Apartment Corporation, and Mr. Roe will then transfer his shares to the Apartment Corporation without consideration and cease to be a shareholder. At such meeting the shareholders will elect their Board of Directors. If Mr. Roe or Mrs. Stevens shall resign, or Mr. Roe shall surrender his shares, before the Plan is consummated, the Sponsor reserves the right to designate their replacements to perform their limited functions under the Plan.

21. Bylaws; Directors. After title closes the number of directors will be increased to nine pursuant to the Bylaws. Any holder or holders of three thousand (3,000) or more Unsold Shares may, either individually or collectively, designate and have elected not more than two of the nine directors. Within thirty (30) days after the closing, the Agent shall call a meeting of all the Purchasers to elect the directors, by giving at least seven days' notice thereof. At the meeting, the Purchasers (other than those who hold Unsold Shares) who are not then in default shall have the right, as shareholders, to elect such number of directors, but not less than seven in any event, as shall be determined in accordance with the foregoing provisions. The directors who may be named by the holder or holders of the Unsold Shares will be elected at the same meeting and need not be residents of the building. If the shareholder or shareholders holding Unsold Shares shall fail to name their allotted number of directors, the vacant directorships shall be filled by the other shareholders. After all Purchasers shall have elected directors, all of the directors shall choose the officers of the Apartment Corporation from among the directors elected by shareholders other than the holders of Unsold Shares. Directors need not be building residents or shareholders. A majority of the Board, including not less than four directors elected by shareholders other than those holding Unsold Shares, shall be necessary to constitute a quorum at any meeting of directors.

The Bylaws of the Corporation provide that no salary or other compensation shall be paid to any director or officer of the Corporation for his services as such without prior approval of the holders of two-thirds of the outstanding shares.

The Bylaws further provide, among other things, that unless and until all proprietary leases executed by the Apartment Corporation shall have been terminated, the shares which accompany each proprietary lease shall be represented by a single certificate and shall not be sold or transferred except to the Apartment Corporation or as an entirety to a person who has acquired such lease, or a new one in place thereof, after complying with and satisfying the requirements of such lease in respect to its assignment; that the Apartment Corporation may refuse to consent to a transfer of the shares of any shareholder who is indebted to it, until the debt shall be paid, and, that the Apartment Corporation shall at all times have a lien upon each shareholder's shares to secure the payment of rent to become payable by such shareholder under the provisions of any proprietary lease issued by the Apartment Corporation and to secure the shareholder's performance of all the covenants and conditions of the proprietary lease. The shares certificates to be issued by the Apartment Corporation will contain a reference to such restrictions upon the sale and transfer of shares and to such lien.

Copies of the Certificate of Incorporation, the Bylaws and the shares certificate are on file with the Agent and are available for inspection.

22. Proprietary Lease. The form of the proprietary lease to be issued to shares purchasers is deemed part of this Plan and bears imprint identification date(_____ [month] _____ [day] , _____ [year]). A copy may be obtained at the Agent's office. All proprietary leases of apartments in the building will be in that form, subject to the provisions of the lease respecting such possible future changes therein as may be approved by the Lessees holding at least two-thirds of the Lessor's shares, excluding the holders of Unsold Shares. Terms under proprietary leases and the accrual of rent thereunder will begin on the operative date and will expire _____ [month] _____ [day] , _____ [year] unless sooner terminated as provided in the lease. The lease gives the Lessee, excluding Lessees holding Unsold Shares, the following privileges:

(a) To cancel the lease on _____ [month] _____ [day], _____ [year], or on any _____ [month] _____ [day] thereafter, by giving not less than seven months' written notice and upon transferring the accompanying shares to the Apartment Corporation and compliance with other pertinent provisions of the lease. (In such event, the Apartment Corporation is not obligated to purchase the Lessee's shares or reimburse him for any part of his purchase price, but the Lessee may sell his shares and assign his lease, in lieu of cancellation, in accordance with the lease provisions relating to assignments);

(b) To assign the lease and transfer the accompanying shares, or to sublet the apartment, upon the written consent to the proposed assignment or sublease by a majority of the Apartment Corporation's directors or by the owners of a majority of its outstanding shares. A holder of Unsold Shares, however, will require only the consent of the Managing Agent to any assignment of his lease and transfer of his shares or subletting of his apartment. Such consent shall not be unreasonably withheld. In the case of any assignment, specified instruments of assignment, assumption of obligations by the assignee and surrender of lease shall be delivered in exchange for a new proprietary lease and the accompanying shares shall be transferred in a block to the assignee, and the assignor shall pay all sums due the Apartment Corporation.

The lease provides that a proprietary Lessee may mortgage or pledge his lease and his shares in the Apartment Corporation, provided that the rights of any such mortgagee or pledgee shall be subject to its terms. The lease also provides that it may be terminated because of certain acts of default by the Lessee or if at least two-thirds (2/3) of the shares, including Unsold Shares, are voted to terminate all of the leases.

The main events of default provided for in the lease are as follows: the Lessee shall cease to be the owner of the shares allocated to the apartment or the lease shall pass or be assigned to anyone who is not then the owner of said shares; the Lessee shall become a bankrupt; there shall be any assignment of the lease or any subletting thereunder without full compliance with the requirements of the lease relating to assignment and subletting; the Lessee shall be in default for a period of one month in the payment of any rent or additional rent and shall fail to cure such default after five days written notice; the Lessee shall default in the performance of any other covenant or provision of the lease for thirty (30) days after written notice; or two-thirds of the Apartment Corporation's full Board of Directors shall determine to terminate a Lessee's lease because of its objectionable conduct. Each proprietary lease provides that, upon such a termination, the Lessee's shares shall be surrendered and cancelled and the Lessee must surrender the lease and possession of the apartment. In such case, however, the Lessee will remain liable for all charges under the lease until the Apartment Corporation shall resell such shares to a new proprietary lessee.

The proprietary lease also provides that it is subordinate to present and future mortgages and, also, that if any mortgage affecting the Apartment Corporation's property shall contain any provisions affecting or pertaining to the Lessee's right to make structural changes in the apartment or to remove any of the fixtures, appliances and enumerated installations and articles, the proprietary Lessee shall be required to comply with such requirements of any mortgage relating thereto, in addition to the other requirements contained in the proprietary lease relating thereto.

The Apartment Corporation's directors will determine the amount of proprietary rent (maintenance charges) payable under all proprietary leases, by apportioning among all proprietary Lessees its total net cash requirements in amounts proportionate to the number of shares held. The Board of Directors will determine such total net cash requirements annually, subject to any limitations contained in the Proprietary Lease and the Bylaws. Proprietary rent so determined will be payable monthly. Each purchaser of Unsold Shares, produced by the Sponsor, will be fully liable for the performance of the proprietary lease issued to him, including payment of the proprietary rent for the apartment covered thereby, commencing on the closing date and until such shares shall be resold and the proprietary lease accompanying same shall be assigned to the purchaser. In addition, three of the Sponsor's principals have unconditionally contracted and obligated themselves to the Apartment Corporation for the full performance of all Lessee's covenants of the proprietary lease by each purchaser of the Unsold Shares as the Lessee of such lease.

The proprietary lease supersedes any existing lease or tenancy of the apartment in respect of which the apartment purchaser is the occupying tenant. Each proprietary Lessee will be responsible for keeping the interior of his apartment in good repair, and the repair, maintenance or replacement of any plumbing fixtures, air conditioning units, lighting fixtures, refrigerators and cooking and other equipment (excluding repair and maintenance of the heating system) within, and the decoration of, the Lessee's apartment. Certain structural changes within the apartment and changes in apartment areas may require the approval of the Board of Directors after the proprietary lease term begins.

Reference should, of course, be made to a copy of the proprietary lease for the details of the foregoing features and its other provisions.

23. Financial Features. The basic financial plan of this cooperative project is as follows:

Purchase price of land and building	\$ _____
Mortgage indebtedness	\$ _____
Shares equity (56,500 shares)-- proceeds of shares sales	\$ _____

(a) Application of proceeds. At title closing, upon the consummation of this Plan, the sum of _____ Dollars (\$ _____) (or the total actual amount paid for the shares) will have been paid for all the purchases of shares, including the moneys paid to and held by the Escrow Agent and the payments for Unsold Shares (see below). This total actual amount shall be paid to the Sponsor at the closing, less the following which shall be paid to the Agent: the entire working capital then payable to the Apartment Corporation which the Agent shall hold for the account of the Apartment Corporation; and, the balance of commission due to the Agent from the Sponsor for sales of shares; and, the amount due to the Agent from the Sponsor for reimbursement of authorized expenses.

At the closing, the Escrow Agent shall pay the interest earned upon the moneys held and invested by it (less its charges) to the Sponsor. The Sponsor shall deliver an equal amount to the Agent for the account of the Apartment Corporation, as the Apartment Corporation's additional working capital.

(b) Payments for Unsold Shares. Payments in full for all blocks of Unsold Shares may be made shortly prior to or at the closing. At the Sponsor's option, the purchaser's checks for such shares may either be payable to the order of and deposited with the Escrow Agent or be payable to the order of the Apartment Corporation, which will endorse them to the order of the Sponsor as part of the consideration for the sale of the property.

(c) Mortgage. The Apartment Corporation will take title to the property, on the closing date, subject to a total mortgage indebtedness thereon of _____ Dollars (\$ _____) consisting of a first mortgage in that amount, hereinafter described.

The existing first mortgage on the property is held by The Prudential Company of America ("Prudential"). Under the provisions of an extension agreement executed by the Sponsor and Prudential on _____ [month]

_____, [day], _____ [year] _____ Dollars (\$ _____), _____ [month] _____ [day], _____ [year], it will mature and become payable on _____ [month] _____ [day], _____ [year]. The principal amount of this mortgage on _____ [month] _____ [day], _____ [year], was _____ Dollars (\$ _____), and it provides for constant payments applicable to interest and amortization. It provides, however, that on the first day of the calendar month in which the premises commence to be operated as a cooperative apartment building, or on _____ [month] _____ [day], _____ [year], whichever date is sooner, the principal of the mortgage is to be reduced to _____ Dollars

(\$ _____), the amount subject to which the Apartment Corporation will take title, as stated above. After this Plan becomes effective, the Sponsor unconditionally undertakes to make the required principal payment, at or before the closing, to effect such reduction to _____ Dollars (\$ _____), and may employ a portion of the shares purchase funds for that purpose. The Apartment Corporation will not be required to close title hereunder if such reduction shall not be effected by the Sponsor. Title will close hereunder prior to _____ [month] _____ [day], _____ [year], unless the Sponsor elects to extend the closing date. The Sponsor reserves the right to arrange with the holder of said mortgage for changes in the mortgage terms so as to provide that, if title shall close after _____ [month] _____ [day], _____ [year], and the unpaid balance of principal shall be less than _____ Dollars (\$ _____), at the time of closing the unpaid principal balance shall be restored to _____ Dollars (\$ _____) with the same rate of interest and the same constant monthly payments as stated below.

Commencing on the closing date, when the principal of this mortgage will be so reduced to _____ Dollars (\$ _____), the mortgage extension agreement provides for constant monthly payments of _____ Dollars (\$ _____) (annually _____ Dollars (\$ _____)), applicable first to interest on the principal and declining balance of principal at the rate of _____ percent (_____ %) per annum and then to reduction of the principal, until _____ [month] _____ [day], _____ [year], when the entire unpaid balance of principal will become due and payable, in the amount of approximately _____ Dollars (\$ _____), assuming that title closes on _____ [month] _____ [day], _____ [year]. On _____ [month] _____ [day], _____ [year], if the mortgage shall not have been prepaid, the Apartment Corporation shall be solely responsible either to pay the principal balance plus accrued interest then due, by assessing the tenant-shareholders proportionately, or to arrange for the refinancing of such balance. No representation is made regarding the availability of funds for such purpose, or the terms or cost thereof.

Prepayment privileges, contained in this mortgage, are: after _____ [month] _____ [day], _____ [year], the entire balance of principal may be paid in full (not in part) on any installment payment date, upon payment of an additional charge of _____ percent (_____ %) of the balance so paid, if paid within the first year from said date, _____ percent (_____ %) if paid within the second year, _____ percent (_____ %) if paid within the third year, and _____ percent (_____ %) if paid after _____ [month] _____ [day], _____ [year].

A copy of the above-mentioned mortgage extension agreement may be examined in the Agent's office.

24. Contract of Sale. The Contract of Sale between the Sponsor and the Apartment Corporation contains provisions customarily included in an agreement for the sale of a quality apartment property under a plan of cooperative organization.

Features of the contract, not previously mentioned or fully discussed, include the following:

(a) At the closing the Apartment Corporation will receive the usual bargain and sale deed with covenants against grantor's acts, in statutory form for recording. At that time, the Sponsor will also provide a title insurance policy, insuring to the Apartment Corporation the fee title to the land and building based on the Purchase Price or as the same may be changed pursuant to the privilege reserved to the Sponsor to change prices.

(b) The sale to the Apartment Corporation includes all lobby and hall furniture and furnishings and all other personal

property, fixtures, appliances and equipment of the Sponsor attached to or used in the operation of the premises and the apartments.

(c) Conflicts between the Contract and this Plan shall be resolved in favor of the provisions in the Plan. The provisions of the Contract shall prevail to the extent that they enlarge upon, deal in greater detail with, or impose greater obligations upon the Sponsor than, the related provisions and contents of this Plan.

(d) If the Sponsor shall be unable to convey marketable title to the Apartment Corporation, subject to the conditions referred to in item (g) below, or if the Plan is not declared effective, or if it shall be abandoned, the Sponsor may terminate the Contract. In such case, its sole obligation shall be to require the Escrow Agent to refund all deposit moneys to shares purchasers, with interest accrued thereon as invested by the Escrow Agent, by distribution through the Agent, and no party shall have any further obligation to or claim against any other party, the Escrow Agent, or the Agent.

(e) The Apartment Corporation has no liability for any cost or expense, including mortgage placement and incidental charges, related to the promulgation and consummation of the Plan. All expenses and costs relating to the promulgation and consummation of the Plan and the transfer of title, including commissions, legal and recording fees, incorporation costs, title insurance, survey, mortgage and conveyance taxes, Escrow Agent's charges (if the Plan is not consummated), printing and advertising expenses, and shares issuance or transfer stamps, if any, are the obligation of and will be paid by the Sponsor. The Sponsor estimates the expenses for discounts, commissions (assuming all shares are sold by the Agent to tenants), title insurance, legal fees, printing and incidental expenses, exclusive of advertising, at approximately _____ Dollars (\$_____).

(f) When the Apartment Corporation acquires the title, it will have no debts, liabilities or obligations except the aforesaid mortgage debt, accrued mortgage interest, taxes, water charges and sewer rent, vault charge, and wages (including vacation pay), subject to the usual title closing adjustments, service and maintenance contracts, the contracts for the Improvements, and the Management Agreement with Douglas Ives, Inc. At such time, the Apartment Corporation will have standing to its credit and held for its account by the Agent the net working capital consisting of _____ Dollars (\$_____) and the amount of the interest earned on shares purchase funds, plus or minus only such net title closing adjustments, but not less than _____ Dollars (\$_____), and the amounts contributed for the "IMPROVEMENTS" (air conditioner replacements and other work. Promptly after the closing, the Sponsor will refund to tenants who purchase the shares allocated to their apartments all their security deposits held by it. All security deposits of tenants who do not purchase will be transferred to the outside purchasers or the purchasers produced by the Sponsor, who purchase the specific apartments. Security deposits of the commercial tenants will be transferred to the Apartment Corporation.

(g) The premises are to be sold and conveyed to the Apartment Corporation subject to:

(1) The mortgage indebtedness described above.

(2) Leases and/or monthly tenancies of all apartments in said premises and the leases of the stores, bank space, garage space, office and servants' rooms. Leases of tenants who purchase the shares allocated to their apartments will be terminated by the issuance of proprietary leases.

(3) Survey conditions revealed by the existing survey of the premises and subject, further, to any changes appearing since said survey was prepared, provided such changes do not render title to the premises unmarketable.

(4) Covenants, restrictions, agreements, reservations, or easements, if any, of record, and zoning and building laws, restrictions and regulations, as of the title closing date, which are not violated by the existing building or by its present use and which do not prevent the present maintenance or use of the premises. The foregoing includes, without limitation

thereto, the easement and the agreement referred to above.

(5) Service or maintenance contracts, if any, and the Managing Agents' and concessionaires agreements.

(6) Other customary special conditions usually found in a contract of this character.

(h) The following are to be apportioned at the closing:

(1) Interest on the mortgage.

(2) Premiums on existing transferable insurance policies or renewals of those expiring prior to the closing.

(3) Taxes and sewer rents, and vault charges, if any, on the basis of the fiscal year for which assessed.

(4) Water charges on the basis of the calendar year.

(5) Wages and payroll expenses, including vacation accruals.

(6) Charges in connection with any and all service or maintenance contracts.

(7) Moneys paid into the Realty Advisory Board Local 32B Welfare Trust Fund.

(8) Dues paid to the Realty Advisory Board on Labor Relations, Inc.

(9) Supplies at Sponsor's cost.

As stated above, the working capital item of \$50,000 (plus the interest) will be either added to or diminished by the net title closing adjustments, as the case may be.

(i) If title closing adjustments shall be otherwise than as of the close of business on the last day of a month, prepaid rents of apartment tenants will be apportioned as of the day before the closing date. The apportioned amounts shall, as to those who purchase their apartments, be refunded to them, and, as to those who do not purchase, be turned over to outside purchasers or purchasers of the Unsold Shares produced by the Sponsors.

(j) Regardless of the actual closing date, the Sponsor and the Apartment Corporation may agree that closing adjustments may be computed as of the close of business on the last day of a month. In that case the Sponsor shall be responsible for all expenses related to the operation of the building, and mortgage interest, through that day.

(k) Jesse J. Jacobs, Louis E. Gold and Mandel M. Kramer, three of the Sponsor's principals, have contracted and obligated themselves to make good to the Apartment Corporation any deficit in the aggregate commercial rent income of _____ Dollars (\$_____) per annum, for a period of two years starting on the closing date. They will make good any deficit semi-annually. At the end of the two-year period, the account will be computed on the basis of _____ Dollars (\$_____) for such period and concluded by either a final adjustment payment by them or a refund to them, as the case may be. The Sponsor's principals shall not be entitled to receive any amount by which the commercial rents for such two-year period exceed _____ Dollars (\$_____).

The foregoing are only intended as summaries of provisions in the Contract and, together with other rights and obligations of the parties, are set forth with greater particularity in the Contract.

25. Parties and Their Interests. The 16 East 72nd Apartment Corporation, the Apartment Corporation, was organized on _____ [month] _____ [day] , _____ [year] , by Roger R. Roe, as a single incorporator, as now permitted by the Business Corporation Law of the State of New York. He will be the sole shareholder and director until the Plan is consummated, and the President and Treasurer of the Apartment Corporation. His secretary, Eleanor Stevens, will be the Vice President and Secretary. After the Plan is consummated and title is acquired by the Apartment Corporation, Mr. Roe and Mrs. Stevens will resign the directorship and such offices and Mr. Roe will cease to be a shareholder. The Apartment Corporation's directors will then be elected by the shareholders, as provided in the Plan, and they, in turn, will elect its officers. Mr. Roe and Mrs. Stevens have no past, present, or future financial interest in the property, and are not in any way associated with the Sponsor or the Agent except that Mr. Roe is the attorney representing the Apartment Corporation until the first meeting of the shareholders shortly after title is acquired. Neither Mr. Roe or Mrs. Stevens will receive any compensation for acting as incorporator, shareholder, director or officer of the Apartment Corporation. Mr. Roe's fees and disbursements, for all services rendered under the Plan, are the responsibility of and will be paid by the Sponsor. Mr. Roe rendered legal services for the Sponsor, in one litigated matter, several years ago, but has not otherwise represented the Sponsor.

Douglas Ives, Inc., the Agent and Managing Agent, a licensed real estate broker, is a New York corporation formed in _____ [year] by merger of Douglas & Co., Inc. and Ives, Inc., has been in the real estate business since _____ [year] and has organized and managed many cooperatively owned apartment buildings. Except for the commissions to be earned under this Plan and its agreement with the Sponsor, its existing Management Agreement with the Sponsor and the superseding Management Agreement with the Apartment Corporation to take effect when title is conveyed under this Plan, the Agent has no past, present, or future financial interest in the property or in any association with the Seller.

The Sponsor, Byrd, Inc., was organized in _____ [year] and constructed 16 East 72nd Street. None of the Sponsor's principals has heretofore been a sponsor of, or has been interested in any manner in the sponsorship of, any cooperative offering other than of the offering described herein, except that Jesse J. Jacobs, President of Byrd, Inc., and Harry Freed (now deceased, but whose estate is a shareholder of Byrd, Inc.) in _____ [year] were the sponsors of the cooperative offering for premises 86 Fifth Avenue, New York, N.Y., which was successfully consummated in November _____ [year] .

Byrd, Inc., is authorized to issue one thousand (1,000) shares of _____ Dollars (\$ _____) par value stock, all of which have been issued to its shareholders as follows:

Name and Address	Number of Shares	Percentage of Shares	Office

There are no existing lawsuits or other proceedings against the Sponsor relating to the property to be conveyed hereunder, and there are no existing lawsuits or other proceedings against the Apartment Corporation.

26. Sales and Management Agreements. Douglas Ives, Inc., is the sole broker involved in the Plan, and will receive from the Sponsor for acting as Agent for the sale of the shares under the Plan, a commission of _____ percent (_____ %) on sales to residents and _____ percent (_____ %) on sales to nonresidents. If any outside broker (or broker in the Agent's organization) makes a sale, his commission on such sale will be as aforesaid, and the Agent will receive overriding commissions of _____ percent (_____ %) on sales to residents and _____ percent (_____ %) on sales to nonresidents, but not more than _____ Dollars (\$ _____) total overriding commissions. The same rates apply to Unsold Shares, but only upon their resales by the original holders.

The Agent will enter into a three-year Management Agreement with the Apartment Corporation, in the Standard

Management Agreement form issued by the Real Estate Board of New York, Inc., at an annual management fee of _____ Dollars (\$ _____), payable _____ Dollars (\$ _____) per month, commencing on the date of closing of title. Such fee amounts to less than _____ percent (_____%) of the total estimated income stated in Schedule A. The Agreement will continue in effect after its three-year term unless terminated by either party on written notice of at least sixty (60) days, and it is nonassignable and noncancellable. A copy is annexed to the Contract and may be examined at the Agent's office.

27. Reports to Shareholders. All shareholders of the Apartment Corporation will be entitled to receive, annually, from it, copies of each of the following:

- (a) Income tax deduction statements;
- (b) Annual report of total corporate affairs, including a balance sheet and profit and loss statement certified by an independent certified public accountant; and
- (c) A notice of the holding of an annual shareholders meeting for the purpose of electing a Board of Directors.

28. Counsel. Roger R. Roe organized the Apartment Corporation and, with Hays & Adams, attorneys for the Sponsor, prepared the Contract, the Offering Statement-Plan of Cooperative Organization, Purchase Agreement, Escrow Agreement and proprietary lease. Mr. Roe will also attend to the closing of title on behalf of the Apartment Corporation and will organize the meetings of the shareholders and directors to be held thereafter.

29. Miscellaneous. This Plan contains a fair summary of all of the material provisions of the various documents referred to herein. Copies of the entire documents are on file with the Agent for inspection purposes. Any information, data or representation not referred to in this Plan or contained in the various documents mentioned herein must not be relied upon. This Plan does not knowingly omit any material fact or contain any untrue statement of a material fact.

In accordance with the provisions of the laws of the State and City of New York, the Sponsor represents that the Sponsor, the Apartment Corporation and the Agent will not discriminate against any person because of his race, creed, color, national origin or ancestry in the sale of the shares offered by the Plan.

No person has been authorized to make any representation which is not expressly contained herein. This Plan may not be changed or modified orally.

Dated: _____ [month] _____ [day] , _____ [year]

BYRD, INC.

(Sponsor)

SCHEDULE A
16 EAST 72nd STREET

**ESTIMATED INCOME AND EXPENSES OF THE APARTMENT CORPORATION
 FOR THE FIRST YEAR OF ITS OPERATION**

INCOME:

MAINTENANCE CHARGES--Proprietary rents of apartments (56,500 shares at \$13 per share)	\$734,500
RENT FROM COMMERCIAL SPACE (see page 20-3028.16)	118,115

TOTAL ESTIMATED INCOME		\$852,615

EXPENSES:

OPERATING CHARGES

Wages and payroll costs at estim- ated rates in effect after April 1989, including welfare benefits, payroll taxes, vacations and workmen's compensation (23 men and superin- tendentn*)		\$162,640
Steam for heat and hot water		27,000
Insurance--fire and liability, etc.n**		5,000
Electricity for public light and powern***	\$12,000	
Gas for tenants and laundry	5,000	17,000
Repairs and replacements		21,000
Supplies and uniforms		10,000
Water and sewer charges		7,700
Painting public areas		2,000
Franchise and City taxes and audit		7,100
Management		15,000
Vault tax; miscellaneous		7,000

TOTAL ESTIMATED OPERATING CHARGES	\$281,440
Real estate taxes (based on 1988-89 assessment at the estimated rate of \$5.20)	262,600
Mortgage interest and amortization****	290,625
Reserve for contingencies	17,950
TOTAL ESTIMATED EXPENSES	\$852,615

SCHEDULE A-1**S. D. DORFMAN & CO.**

Certified Public Accountants
 25 Park Avenue, New York, N.Y. 10017
 Area Code 212 000-0000

PREMISES: 16 EAST 72ND STREET, NEW YORK, NEW YORK
STATEMENT OF COMPARATIVE OPERATING EXPENSES
FOR THE YEARS ENDED

December 31, _____

	1987	1986	1985
Building operating expenses:			
Payroll charges (salaries, payroll taxes,	\$103,631.35	\$ 98,713.70	\$ 92,421.35
union welfare costs and workmen's compensation insurance)..	21,787.46	25,587.26	23,421.81
Fuel (steam for heat and hot water)... .			
Insurance.....	5,255.35	5,368.16	5,684.31
Electric and gas	15,156.48	16,317.34	14,918.85

Repairs and replacements	15,345.94	7,173.44	12,391.22
Supplies and services	6,839.40	7,419.92	6,644.61
Water and sewer	7,876.00	5,907.00	3,938.00
Metered water	593.94	1,098.80	1,100.40
Painting.....	4,043.12	972.14	674.00
Legal and audit	5,390.35	11,473.34	5,442.48
Management.....	12,000.00	12,000.00	12,000.00
Vault tax and miscellaneous	5,674.77	7,214.49	5,725.60
	203,594.16	199,245.59	184,362.63
Fixed and other charges:			
Real estate taxes	243,941.88	231,328.96	218,186.44
Mortgage interest	242,805.17	247,708.50	251,869.00
Total expense applicable to operations by a cooperative apartment corporation..	690,341.21	678,283.05	654,418.07
Other expenses incurred not applicable to operations by a cooperative apartment corporation:			
Office services, supplies, advert- ising and contributions..	4,104.28	5,156.59	5,069.05
Painting	10,937.10	13,383.72	14,210.82
Leasing commissions	16,472.29	16,368.25	14,870.69
Plumbing repairs, supplies and ser- vices	24,271.41	22,003.81	18,325.38
State and city franchise tax	10,466.66	9,466.67	7,033.34
Interest on debenture bonds	37,365.00	37,365.00	37,365.00
Other interest	8,797.63	9,164.87	10,636.21
Provision for doubtful accounts	10,180.00	520.00	--
Amortization of mortgage expense	6,341.28	6,341.28	6,341.28
	128,935.65	119,770.19	113,851.77
Total operating expenses exclusive of depreciation..	\$819,276.86	\$798,053.24	\$768,269.84

To the Board of Directors
 BYRD, INC.

We have examined the financial statements of Byrd, Inc., owners of the premises known as 16 East 72nd Street, New York, N.Y., for the years ended _____ [month] _____ [day] , _____ [year] , and _____ [month] _____ [day] , _____ [year] . Our examinations were made in accordance with generally accepted auditing standards, and accordingly included such tests of the accounting records and such other auditing procedures as we considered necessary in the circumstances.

In our opinion, the foregoing statement of comparative operating expenses for the premises known as 16 East 72nd Street, New York, N.Y., for the years ended _____ [month] _____ [day] , _____ [year] , _____ [month] _____ [day] , _____ [year] and _____ [month] _____ [day] , _____ [year] , presents fairly the expenses incurred in the operation of the premises for those years in conformity with generally accepted accounting principles applied on a consistent basis.

New York, N.Y.,
 _____ [month] _____ [day] , _____ [year]

/s/

S. D. DORFMAN & CO.

SCHEDULE B

16 EAST 72nd STREET

See page 20-3028.22 for conditions applicable to these prices

ITEMIZED SCHEDULE OF SHARES ALLOCATIONS, SELLING PRICES, MORTGAGE ALLOCATIONS, ESTIMATED PROPRIETARY RENTALS AND INCOME TAX DEDUCTIONS

Apt.	Estimated Rooms	Shares Allocations	Cash Sales Prices of Shares	Mortgage Allocations (\$66.3716814 per share)n(1)	Estimated Annual Maintenance Charges (\$13.00 per share)n(2)	Initial Annual Deductions for Income Tax Purposes (\$7.62)

24-20 Current Legal Forms for Real Estate FORM 20.51

						per share)n(3)
3-A	3 1/2	235	\$ 23,500	\$ 15,597.40	\$ 3,055	\$ 1,790.70
4-A	3 1/2	240	24,000	15,929.20	3,120	1,828.80
5-A	3 1/2	245	24,500	16,261.06	3,185	1,866.90
6-A	3 1/2	250	25,000	16,592.91	3,250	1,905.00
7-A	5	385	38,500	25,553.10	5,005	2,933.70
8-A	5	390	39,000	25,884.95	5,070	2,971.80
9-A	5	395	39,500	26,216.80	5,135	3,009.90
10-A	5	400	40,000	26,548.67	5,200	3,048.00
11-A	5	405	40,500	26,880.52	5,265	3,086.10
12-A	5	410	41,000	27,212.38	5,330	3,124.20
14-A	5	415	41,500	27,544.30	5,395	3,162.30
15-A	5	420	42,000	27,876.11	5,460	3,200.40
(T)						
16-A	6	535	53,500	35,508.84	6,955	4,076.70
(T)						

T = Terrace

SCHEDULE B
16 EAST 72nd STREET

See page 20-3028.22 for conditions applicable to these prices

ITEMIZED SCHEDULE OF SHARES ALLOCATIONS, SELLING PRICES,
MORTGAGE ALLOCATIONS, ESTIMATED PROPRIETARY RENTALS
AND INCOME TAX DEDUCTIONS

Apt.	Estim- ated Rooms	Shares Allocations	Cash Sales Prices of Shares	Mortgage Allocations (\$66.3716814 per share)n(1)	Estimated Annual Maintenance Charges (\$13.00 per share)n(2)	Initial Annual Deductions for Income Tax Purposes (\$7.62 per share)n(3)
17-A	6	510	\$ 51,000	\$ 33,849.55	\$ 6,630	\$ 3,886.20
18-A (T)	4 1/2	465	46,500	30,862.82	6,045	3,543.30
19-A	4 1/2	440	44,000	29,203.54	5,720	3,352.80

24-20 Current Legal Forms for Real Estate FORM 20.51

20-A	4	375	37,500	24,889.37	4,875	2,857.50
PH-A (T)	4	385	38,500	25,553.10	5,005	2,933.70
3-B	2	120	12,000	7,964.60	1,560	914.40
4-B	2	125	12,500	8,296.46	1,625	952.50
5-B	2	130	13,000	8,628.31	1,690	990.60
6-B	2	135	13,500	8,960.18	1,755	1,028.70
3-C	5	395	39,500	26,216.80	5,135	3,009.90
4-C	5	400	40,000	26,548.66	5,200	3,048.00
5-C	5	405	40,500	26,880.52	5,265	3,086.10
6-C	5	410	41,000	27,212.38	5,330	3,124.20
7-C	5	415	41,500	27,544.30	5,395	3,162.30
8-C	5	420	42,000	27,876.11	5,460	3,200.40
9-C	5	425	42,500	28,207.95	5,525	3,238.50
10-C	5	430	43,000	28,539.81	5,590	3,276.60
11-C	5	435	43,500	28,871.67	5,655	3,314.70
12-C	5	440	44,000	29,203.54	5,720	3,352.80
14-C	5	445	44,500	29,535.39	5,785	3,390.90
15-C (T)	5	450	45,000	29,867.26	5,850	3,429.00
16-C (T)	4 1/2	490	49,000	32,522.11	6,370	3,733.80
17-C	4 1/2	460	46,000	30,530.96	5,980	3,505.20
18-C (T)	5	495	49,500	32,853.97	6,435	3,771.90
19-C	5	475	47,500	31,526.54	6,175	3,619.50
20-C (T)	4	400	40,000	26,548.67	5,200	3,048.00
PH-C (T)	4	385	38,500	25,533.10	5,005	2,933.70
3-D	4 1/2	337	33,700	22,367.26	4,381	2,567.90
4-D	4 1/2	341	34,100	22,632.75	4,433	2,598.42

T = Terrace

SCHEDULE B
16 EAST 72nd STREET

See page 20-3028.22 for conditions applicable to these prices

ITEMIZED SCHEDULE OF SHARES ALLOCATIONS, SELLING PRICES,
MORTGAGE ALLOCATIONS, ESTIMATED PROPRIETARY RENTALS

24-20 Current Legal Forms for Real Estate FORM 20.51

AND INCOME TAX DEDUCTIONS

Apt.	Estimated Rooms	Shares Allocations	Cash Sales Prices of Shares	Mortgage Allocations (\$66.3716814 per share)n(1)	Estimated Annual Maintenance Charges (\$13.00 per share)n(2)	Initial Annual Deductions for Income Tax Purposes (\$7.62 per share)n(3)
5-D	4 1/2	345	\$ 34,500	\$ 22,898.23	\$ 4,485	\$ 2,628.90
6-D	4 1/2	349	34,900	23,163.72	4,537	2,659.38
7-D	4 1/2	353	35,300	23,429.20	4,589	2,689.86
8-D	4 1/2	357	35,700	23,694.69	4,641	2,720.34
9-D	4 1/2	361	36,100	23,960.18	4,693	2,750.82
10-D	4 1/2	365	36,500	24,225.66	4,745	2,781.30
11-D	4 1/2	369	36,900	24,491.20	4,797	2,811.78
12-D	4 1/2	373	37,300	24,756.65	4,849	2,842.26
14-D	4 1/2	377	37,700	25,022.12	4,901	2,872.74
15-D	4 1/2	381	38,100	25,287.61	4,953	2,903.22
16-D (T)	3 1/2	330	33,000	21,902.70	4,290	2,514.60
17-D	3 1/2	315	31,500	20,907.08	4,095	2,400.30
4-E	6	450	45,000	29,867.25	5,850	3,429.00
5-E	6	455	45,500	30,199.11	5,915	3,467.10
6-E	6	460	46,000	30,530.96	5,980	3,505.20
7-E	6	465	46,500	30,862.82	6,045	3,543.30
8-E	6	470	47,000	31,194.68	6,110	3,581.40
9-E	6	475	47,500	31,526.54	6,175	3,619.50
10-E	6	480	48,000	31,858.40	6,240	3,657.60
11-E	6	485	48,500	32,190.26	6,305	3,695.70
12-E	6	490	49,000	32,522.11	6,370	3,733.80
14-E	6	495	49,500	32,853.97	6,435	3,771.90
15-E	6	500	50,000	33,185.85	6,500	3,810.00
16-E (T)	6	520	52,000	34,513.26	6,760	3,962.40
17-E	6	500	50,000	33,185.83	6,500	3,810.00
18-E (T)	6	545	54,500	36,172.56	7,085	4,152.90
19-E	6	520	52,000	34,513.26	6,760	3,962.40
20-E	6	545	54,500	36,172.56	7,085	4,152.90

24-20 Current Legal Forms for Real Estate FORM 20.51

4-F	2	108	\$ 10,800	\$ 7,168.15	\$ 1,404	\$ 822.96
5-F	2	110	11,000	7,300.88	1,430	838.20
6-F	2	112	11,200	7,433.63	1,456	853.44

T = Terrace

SCHEDULE B
16 EAST 72nd STREET

See page 20-3028.22 for conditions applicable to these prices

**ITEMIZED SCHEDULE OF SHARES ALLOCATIONS, SELLING PRICES,
MORTGAGE ALLOCATIONS, ESTIMATED PROPRIETARY RENTALS
AND INCOME TAX DEDUCTIONS**

Apt.	Estim- ated Rooms	Shares Allocations	Cash Sales Prices of Shares	Mortgage Allocations (\$66.3716814 per share)n(1)	Estimated Annual Maintenance Charges (\$13.00 per share)n(2)	Initial Annual Deductions for Income Tax Purposes (\$7.62 per share)n(3)
7-F	2	114	\$ 11,400	\$ 7,566.37	\$ 1,482	\$ 868.68
8-F	2	116	11,600	7,699.12	1,508	883.92
9-F	2	118	11,800	7,831.86	1,534	899.16
10-F	2	120	12,000	7,964.60	1,560	914.40
11-F	2	122	12,200	8,097.35	1,586	929.64
12-F	2	124	12,400	8,230.09	1,612	944.88
14-F	2	126	12,600	3,362.83	1,638	960.12
15-F	2	128	12,800	8,495.58	1,664	975.36
2-G	3 1/2	200	20,000	13,274.34	2,600	1,524.00
3-G	3 1/2	209	20,900	13,871.68	2,717	1,592.58
4-G	3 1/2	211	21,100	14,004.42	2,743	1,607.82
5-G	3 1/2	213	21,300	14,137.17	2,769	1,623.06
6-G	3 1/2	215	21,500	14,269.91	2,795	1,638.30
7-G	5	335	33,500	22,234.51	4,355	2,552.70
8-G	5	340	34,000	22,566.37	4,420	2,590.80
9-G	5	345	34,500	22,898.23	4,485	2,628.90
10-G	5	350	35,000	23,230.09	4,550	2,667.00

24-20 Current Legal Forms for Real Estate FORM 20.51

11-G	5	355	35,500	23,561.95	4,615	2,705.10
12-G	5	360	36,000	23,893.81	4,680	2,743.20
14-G	5	365	36,500	24,225.66	4,745	2,781.30
15-G	5	370	37,000	24,557.52	4,810	2,819.40
16-G (T)	6	490	49,000	32,522.11	6,370	3,733.80
17-G	6	465	46,500	30,862.82	6,045	3,543.30
18-G (T)	4 1/2	420	42,000	27,876.11	5,460	3,200.40
19-G	4 1/2	395	39,500	26,216.80	5,135	3,009.90
20-G	4	330	33,000	21,902.70	4,290	2,514.60
PH-G (T)	4	340	34,000	22,566.37	4,420	2,590.80
2-H	2	107	10,700	7,101.77	1,391	815.34
3-H	2	108	10,800	7,168.15	1,404	822.96
4-H	2	109	10,900	7,234.51	1,417	830.58

T = Terrace

SCHEDULE B
16 EAST 72nd STREET

See page 20-3028.22 for conditions applicable to these prices

**ITEMIZED SCHEDULE OF SHARES ALLOCATIONS, SELLING PRICES,
MORTGAGE ALLOCATIONS, ESTIMATED PROPRIETARY RENTALS
AND INCOME TAX DEDUCTIONS**

Apt.	Estim- ated Rooms	Shares Allocations	Cash Sales Prices of Shares	Mortgage Allocations (\$66.3716814 per share)n(1)	Estimated Annual Maintenance Charges (\$13.00 per share)n(2)	Initial Annual Deductions for Income Tax Purposes (\$7.62 per share)n(3)
5-H	2	110	\$ 11,000	\$ 7,300.88	\$ 1,430	\$ 838.20
6-H	2	111	11,100	7,367.26	1,443	845.82
2-J	5	330	33,000	21,902.70	4,290	2,514.60
3-J	5	335	33,500	22,234.51	4,355	2,552.70
4-J	5	340	34,000	22,566.37	4,420	2,590.80
5-J	5	345	34,500	22,898.23	4,485	2,628.90

24-20 Current Legal Forms for Real Estate FORM 20.51

6-J	5	350	35,000	23,230.09	4,550	2,667.00
7-J	5	355	35,500	23,561.95	4,615	2,705.10
8-J	5	360	36,000	23,893.81	4,680	2,743.20
9-J	5	365	36,500	24,225.66	4,745	2,781.30
10-J	5	370	37,000	24,557.52	4,810	2,819.40
11-J	5	375	37,500	24,889.37	4,875	2,857.50
12-J	5	380	38,000	25,221.25	4,940	2,895.60
14-J	5	385	38,500	25,553.10	5,005	2,933.70
15-J (T)	5	390	39,000	25,884.95	5,070	2,971.80
16-J (T)	5	430	43,000	28,539.81	5,590	3,276.60
17-J	5	400	40,000	26,548.66	5,200	3,048.00
18-J (T)	5	440	44,000	29,203.54	5,720	3,352.80
19-J	5	415	41,500	27,544.30	5,395	3,162.30
20-J (T)	4	340	34,000	22,566.37	4,420	2,590.80
PH-J (T)	4	325	32,500	21,570.80	4,225	2,476.50
2-K	4 1/2	283	28,300	18,783.19	3,679	2,156.46
3-K	4 1/2	287	28,700	19,048.67	3,731	2,186.94
4-K	4 1/2	291	29,100	19,314.16	3,783	2,217.42
5-K	4 1/2	295	29,500	19,579.65	3,835	2,247.90
6-K	4 1/2	299	29,900	19,845.13	3,887	2,278.38
7-K	4 1/2	303	30,300	20,110.62	3,939	2,308.86
8-K	4 1/2	307	30,700	20,376.11	3,991	2,339.34
9-K	4 1/2	311	31,100	20,641.59	4,043	2,369.82
10-K	4 1/2	315	31,500	20,907.08	4,095	2,400.30

T = Terrace

SCHEDULE B
16 EAST 72nd STREET

See page 20-3028.22 for conditions applicable to these prices

ITEMIZED SCHEDULE OF SHARES ALLOCATIONS, SELLING PRICES,
MORTGAGE ALLOCATIONS, ESTIMATED PROPRIETARY RENTALS
AND INCOME TAX DEDUCTIONS

Apt.	Estim- ated Rooms	Shares Allocations	Cash Sales Prices of	Mortgage Allocations (\$66.3716814 per share)n(1)	Estimated Annual Maintenance Charges	Initial Annual Deductions for

		Shares		(\$13.00 per share)n(2)		Income Tax Purposes (\$7.62 per share)n(3)
11-K	4 1/2	319	\$ 31,900	\$ 21,172.57	\$ 4,147	\$ 2,430.78
12-K	4 1/2	323	32,300	21,438.05	4,199	2,461.26
14-K	4 1/2	327	32,700	21,703.54	4,251	2,491.74
15-K	4 1/2	331	33,100	21,969.03	4,303	2,522.22
16-K (T)	3 1/2	290	29,000	19,247.79	3,770	2,209.80
17-K	3 1/2	270	27,000	17,920.34	3,510	2,057.40
2-L	3 1/2	206	20,600	13,672.57	2,678	1,569.72
3-L	3 1/2	209	20,900	13,871.68	2,717	1,592.58
4-L	3 1/2	212	21,200	14,070.80	2,756	1,615.44
5-L	3 1/2	215	21,500	14,269.91	2,795	1,638.30
6-L	3 1/2	218	21,800	14,469.03	2,834	1,661.16
7-L	3 1/2	221	22,100	14,668.14	2,873	1,684.02
8-L	3 1/2	224	22,400	14,867.26	2,912	1,706.88
9-L	3 1/2	227	22,700	15,066.37	2,951	1,729.74
10-L	3 1/2	230	23,000	15,265.48	2,990	1,752.60
11-L	3 1/2	233	23,300	15,464.60	3,029	1,775.46
12-L	3 1/2	236	23,600	15,663.72	3,068	1,798.32
14-L	3 1/2	239	23,900	15,862.83	3,107	1,821.18
15-L	3 1/2	242	24,200	16,061.95	3,146	1,844.04
16-L (T)	6	485	48,500	32,190.26	6,305	3,695.70
17-L	6	460	46,000	30,530.96	5,980	3,505.20
18-L (T)	6	485	48,500	32,190.26	6,305	3,695.70
19-L	6	460	46,000	30,530.96	5,980	3,505.20
20-L (T)	6	485	48,500	32,190.26	6,305	3,695.70
2-M	2 1/2	154	15,400	10,221.24	2,002	1,173.48
3-M	2 1/2	156	15,600	10,353.98	2,028	1,188.72
4-M	2 1/2	158	15,800	10,486.73	2,054	1,203.96
5-M	2 1/2	160	16,000	10,619.47	2,080	1,219.20
6-M	2 1/2	162	16,200	10,752.21	2,106	1,234.44
7-M	2 1/2	164	16,400	10,884.96	2,132	1,249.68

T = Terrace

SCHEDULE B

16 EAST 72nd STREET

See page 20-3028.22 for conditions applicable to these prices

**ITEMIZED SCHEDULE OF SHARES ALLOCATIONS, SELLING PRICES
MORTGAGE ALLOCATIONS, ESTIMATED PROPRIETARY RENTALS
AND INCOME TAX DEDUCTIONS**

Apt.	Estim- ated Rooms	Shares Allocations	Cash Sales Prices of Shares	Mortgage Allocations (\$66.3716814 per share)n(1)	Estimated Annual Maintenance Charges (\$13.00 per share)n(2)	Initial Annual Deductions for Income Tax Purposes (\$7.62 per share)n(3)
8-M	2 1/2	166	\$ 16,600	\$ 11,017.70	\$ 2,158	\$ 1,264.92
9-M	2 1/2	168	16,800	11,150.44	2,184	1,280.16
10-M	2 1/2	170	17,000	11,283.19	2,210	1,295.40
11-M	2 1/2	172	17,200	11,415.93	2,236	1,310.64
12-M	2 1/2	174	17,400	11,548.67	2,262	1,325.88
14-M	2 1/2	176	17,600	11,681.42	2,288	1,341.12
15-M	2 1/2	178	17,800	11,814.16	2,314	1,356.36
2-N	1	50	5,000	3,318.52	650	367.50
3-N	2	96	9,600	6,371.68	1,248	731.52
4-N	2	98	9,800	6,504.42	1,274	746.76
5-N	2	100	10,000	6,637.17	1,300	762.00
6-N	2	102	10,200	6,769.91	1,326	777.24
7-N	2	104	10,400	6,902.65	1,352	792.48
8-N	2	106	10,600	7,035.40	1,378	807.72
9-N	2	108	10,800	7,168.15	1,404	822.96
10-N	2	110	11,000	7,300.88	1,430	838.20
11-N	2	112	11,200	7,433.63	1,456	853.44
12-N	2	114	11,400	7,566.37	1,482	868.68
14-N	2	115	11,500	7,632.74	1,495	876.30
15-N	2	115	11,500	7,632.74	1,495	876.30

24-20 Current Legal Forms for Real Estate FORM 20.51

183	745	56,500	\$5,650,000	\$3,750,000.00	\$734,500	\$430,530.00
TOTAL						
S						

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-	-					

T = Terrace

SCHEDULE C**HARRIS & ABRAMS ASSOCIATES**

Architects

1 East 44th Street

New York, N.Y. 10017

_____ [month] _____ [day], _____ [year]

MEMORANDUM

RE: APARTMENT HOUSE

16 EAST 72ND STREET

18 EAST 73RD STREET

NEW YORK, N.Y.

REPORT OF INSPECTION

Work #1493

We have carefully inspected the fireproof apartment building which occupies the block front on Madison Avenue from East 72nd Street to East 73rd Street known as 16 East 72nd Street and are pleased to submit the following report of our findings:

BUILDING BULK

The building consists of a north and a south unit, the southerly unit of 19 stories and the northerly unit of 20 stories, built on a plot fronting 204.4 on the westerly side of Madison Avenue for a depth of 100.0 on both East 72nd and East 73rd Street, known as lot #33 of Block #1407 in the Borough of Manhattan, in the City of New York.

The building was erected from plans by Brent and Rhodes under New Building application number NB11-56, in an area now zoned R10 for the southerly unit and C1-9 for the northerly unit; the R10 being strictly residential and the C1-9 being commercial and permitting residential as well as local retail and service establishments.

The variation in the number of stories is attributable to the difference of some 9 feet in grades between East 72nd Street and East 73rd Street and to the fact that the bank now occupying the ground floor of the southerly unit is 1 1/2 stories high, eliminating the second floor in the south wing.

OCCUPANCY

There are at present 183 apartments totaling 745 rooms above the first floor; and a restaurant, four retail establishments, one doctor's office, superintendent's apartment and a branch of the First National Bank on the first floor of the building. In addition to the above, there are four servants' rooms and a garage with a capacity of 59 cars.

SUBCELLAR

A subcellar occupying the north end of the plot is occupied as part of the garage.

CELLAR

The cellar contains a common steam room, electric service entrance and distribution rooms, tenant storage areas, help's locker room and toilet, laundry room and toilet, shop and superintendent's office, paint shop, and storage areas for the stores and the vault, bookkeeping and personal loan department of the bank. In addition there is a valet shop and the entrance level of the garage with a mezzanine above which is also used part of the garage. Garage areas on the mezzanine and in the subcellar are reached by a hydraulic automobile elevator.

FIRST FLOOR

The building has two entrances, the main entrance being on East 72nd Street and the other on East 73rd Street.

There is a through lobby extending from 72nd to 73rd Street, with a mail room off the 72nd Street end, and a professional office off the 73rd Street end. In addition, the Branch bank, the restaurant and four retail shops occupy the balance of the floor for the entire Madison Avenue front.

UPPER FLOORS

The floors above from the second of the north unit and from the third of the south unit to the 20th floor and penthouse level consisting of living apartments ranging from one to six rooms, with four individual maid's rooms on the third floor.

SERVICES

Each building unit is served by a battery of two elevators, one of which is a passenger elevator and the other a combination passenger and service elevator. Cars are arranged for operator and automatic control.

Each unit has two totally enclosed fireproof stairways constructed with steel undercarriages and cement treads and platforms.

Standpipe lines are provided in stairs of each unit.
Each unit has its own incinerator.
There is a mail chute and mail box in each unit.

There are service entrances on both the 72nd and 73rd Street fronts, the most used is the one on 73rd Street, the one on 72nd Street being used mostly in tenant moves into or out of the southerly unit.

LEGAL

The building is now legally occupied under Certificate of Occupancy 62294 issued _____ [month] _____ [day] , _____ [year] , and the Department of Buildings registration number 138146.

The incinerators do not conform to the revised Air Pollution Control Board requirements but are used under authority of a "Special Continued Use" application approved _____ [month] _____ [day] , _____ [year] .

As of the date of inspection there were no violations pending.

There is a kitchen range exhaust flue from the restaurant at the northerly end of the building which is carried over the roof of the one story extension at the rear of the building and up on the wall of the adjoining building at #18 East 73rd Street. The easement for this installation will expire on _____ [month] _____ [day] , _____ [year] , at which time a new easement may be negotiated or application may be made in the Department of Buildings of the City of New York either to convert the flue to free-standing or for carrying the flue up on the walls of the apartment house.

STRUCTURE

The structure is completely fireproof and consists of a steel skeleton frame with concrete arches and masonry walls supported on the frame at every floor. The exterior walls are of jumbo size red face brick backed by lightweight masonry units. There is a dark granite base approximately 2 feet high along the street fronts, and white marble sills and copings and ornamental bands as accents.

The main entrance on East 72nd Street is flanked by granite faced planters, white marble trim around bronze entrance doors and sidelights and is protected by a marquee with a luminous ceiling which is trimmed with a granite and stainless steel band.

The East 73rd Street entrance has bronze door and sidelight and is trimmed with white marble.

There are painted steel and glass railings above the masonry parapets at terraces where setbacks occur.

Window frames and sash, except in the roof houses, are of Reynolds aluminum with ventilating sections double hung. Sash appeared weathertight.

Walls of roof houses and water tank enclosure and the inside faces of parapet walls are of brick which matches the building face brick. Some of these bricks have minor or hairline cracks which are kiln shrinkage cracks. These are not detrimental to the safety or appearance of the building.

There is an exterior service stair at the 72nd Street front leading from the street to the cellar level and to the level of the roof over the lobby extension. The stair requires painting. Interior partitions are masonry units around stairs, elevator hoistways and shafts and are plastered in public and tenant areas; unplastered in work, storage and mechanical equipment areas.

The entrance vestibule has glazed bronze doors and sidelights, transom, trim, etc., terrazzo floor with metal divider strips, with marble walls and contrasting marble base.

The lobby is tastefully decorated, has a dark terrazzo floor with brass divider strips and inlays; fabric covered plaster walls, white marble base, and pilasters, mirrored sections, tile panels, lighted shadow boxes to simulate windows and marble steps between different levels. There are attractive sconces and pictures on the walls and area rugs which lend warmth on the floor.

The ceiling is painted plaster, with recessed domes and cove lighting and additional light from crystal chandeliers which match the wall sconces.

The mail room has terrazzo floor, marble base and painted plaster walls and ceiling, stainless steel faced letter boxes with continuous fluorescent border lighting.

The entrances to the elevators in the lobbies have enameled doors and bucks, with marble wall facing framing them.

Elevator lobbies on the upper floors have wall-to-wall carpet on cement floors, rubber base, papered walls, painted plaster ceilings and surface-mounted ceiling lights.

Elevator hoistway doors and frames are enameled in one color, entrances to apartments and stairs in varying colors. Entrance doors are equipped with electric door gong and peep holes.

Stair sides of stair enclosures have painted ceilings and walls. The walls have a darker dado approximately 4' 0" high with a dado stripe above. Steps and platforms are painted.

Incinerator rooms have asphalt tile floors, rubber base, painted plaster walls, ceiling, etc.

Six apartments were inspected. The living rooms, dining rooms or dining alcoves, bedrooms and foyers have oak wood block floors. Walls and ceilings are painted plaster. Interior trim is painted wood. Apartment entrance doors and their trims are hollow metal. Interior doors are hardboard surfaced grid core doors. Closets are of good size, have wood shelving and dividers; some have hinged doors, others have sliding doors.

Bathrooms have ceramic tile floors, glazed tile wainscots approximately 4 feet high except around bathtubs where tile on walls is 6' high for shower enclosure. Bathrooms have white enameled cast iron built-in tubs with shower heads and curtain rods, vitreous china wash basins and water closets. Water closets have low down tanks. Bathrooms are equipped with medicine cabinets with mirror doors and built-in soiled clothes hampers.

Kitchens have vinyl asbestos tile floors, plastered walls and ceilings. All apartments except the B, F, H, M and N apartments have built-in ovens and all apartments have gas ranges, electric refrigerators and with few exceptions, dishwashers. Generally, they are interior rooms and are mechanically ventilated. Cabinets are of metal with laminated plastic counter tops.

ROOFING

The main and penthouse roofs and the roofs of the extension over the entrance lobby are of bituminous built-up type, with slag covering. Flashings at intersections between roof surfaces and vertical surfaces are of standard weight and temper copper.

Roofs of apartment terraces at setbacks are covered with standard red roofing quarry tile.

All roofing was reported weathertight. There were no evidences of leaks past or present in areas to which access was possible.

The exhaust fans for kitchens, interior bathrooms, etc., are located on the roofs in painted metal enclosures.

There are cooling towers for air conditioning for the restaurant and lobby on the roof over the lobby extension.

INTERIOR FINISHES

The entire subcellar and cellar areas except a shower stall in the men's locker room and toilet in laundry have exposed concrete walls or masonry block units. Surfaces of corridor partitions are painted with a cold glazed paint. The laundry room has painted cement floors, cold glaze painted concrete and masonry unit walls, painted concrete ceilings, fluorescent lights and mechanical ventilation in addition to a window to the outer air.

It is equipped with six electric washers, four dryers, two light service extractors and a larger one on order.

There are four laundry trays, two service sinks and three wood ironing boards, with outlets on an opposite wall for three additional ironing boards.

There is a toilet room with ceramic tile floor, glazed tile base, painted walls and ceiling. The room has a vitreous china water closet with flush valve and a porcelain enameled basin.

The floor, walls and ceiling of the combination shop and office in the cellar are painted as are the entrances to cellar and cellar corridors.

Elevator Machine Rooms and water tank enclosures above the main roof have concrete floors and ceilings and partially painted masonry unit walls.

PLUMBING

The systems are in good operating condition. Main drainage lines, stacks, leaders and main branch lines are of cast iron; vents, branch vents and runouts are of galvanized steel. Water lines are of brass and gas lines of black steel. Exposed piping and fittings are chrome plated.

Drainage, both sanitary and storm, which is above the city sewer mains is by gravity. Where areas are below the city sewer mains drainage is to sumps from which it is lifted to the house drain by pumps. Each of the sump pits is equipped with two pumps.

Domestic water is lifted to a house tank above the roof from which it is distributed to all fixtures through a down feed system which insures adequate pressure and volume.

Fixtures consist of enameled cast iron bathtubs and kitchen sinks, vitreous china basins and water closet bowls with low

down tanks except those in the laundry and locker rooms which have flush valves. Sinks in service closets and laundry, and the laundry trays are of enameled cast iron.

There are fire standpipe lines in the stairways of each building which are in good working condition and have recently been inspected and approved by the City inspectors.

The subcellar and cellar storage areas and garage are provided with an approved automatic sprinkler system for protection in the event of fire.

Hot water is provided by means of two Patterson Kelly hot water generators of an estimated 5,000 gallon capacity. These tanks have recently been cement lined to insure rust proof and clean water.

Gas is furnished to the tenants by the house.

HEATING, VENTILATING AND AIR CONDITIONING

The building is heated and air conditioned by means of convectors and cooling units, respectively, under the windows in each room. These are to be replaced with fan coil units which will both heat and air condition.

Bathrooms are equipped with fin tube radiators.

Steam is furnished by Con Edison Company and each unit is equipped with dual vacuum pump.

Fans for ventilation of bathrooms and kitchens are on the main roof in sheet metal enclosures.

There is a Morse Boulger incinerator with its own charging chute and feed hoppers in a closet on each floor of each of the two building units.

The incinerators were installed prior to enactment of the present air pollution control law and are not now equipped with scrubbers as required by the said law, but are operated under a special "continued use" application #2340/67 and approved _____ [month] _____ [day] , _____ [year] .

Ventilating fans on the roof over the lobby and the main roof are equipped with pilot lights in the superintendent's office to insure prompt attention in the event of breakdown at any time.

ELEVATORS

Each unit is equipped with two Otis elevators of 2000 lb. capacity, one of which is a passenger car and one a combination passenger and service car.

They are arranged for operator or automatic push button service.

The cabs are flush wood paneled with stainless steel trim, strip cove reflected lighting and have vinyl asbestos tile floors.

The cab walls have been mutilated with sharp cutting instruments and have gouges which indicate the use of hooked type can openers.

The elevators have been inspected by the City authorities and approved as of _____ [month]
_____ [day] , _____ [year] .

The garage elevator is of 7000 lb. capacity, Otis manufacture, with steel body and bears the approval of the City Inspector dated _____ [month] _____ [day] , _____ [year] .

ELECTRIC SYSTEM

Each building unit has its own house service switch with separate distribution panels for the tenants and for the public portions of the building. In addition, each store, including the bank, has a separate electric service.

Electric current is carried to tenant meters located in the incinerator closets on the upper floors from whence it is run to the apartments.

House service panels are of 3500 amperes with distribution through vertical feeders to tenant panels located in incinerator rooms at varying floors.

Current is available at 108/115, 208/265 and 440 volts, three phase, 60 cycle a.c.

SUMMARY

The building is ten years old, substantially built, sound and on a structural steel skeleton, with concrete arch floor construction, and masonry curtain walls. The windows have aluminum frames, with stationary glass panels flanked by double hung units for ventilation during the in-between seasons when heating and air conditioning are not essential. It is thoroughly fireproof and built in accordance with the zoning ordinance in effect at the time it was constructed.

It is well planned, has good sized rooms, ample and spacious closets and sanitary facilities.

Kitchens are equipped with built-in wall ovens, except as noted, gas ranges, electric refrigerators and, except in the smallest apartments, they have dishwashers. Kitchen cabinets are of metal with laminated plastic counter tops.

Living room, dining area, bedrooms, and foyers have wood block floors, generally in good condition. Kitchens have vinyl asbestos tile floors.

Bathrooms have tile floors and wainscots with the wainscot raised to shower height around the built-in tubs.

Walls, except where tiled, are painted or paper or fabric covered in good condition. Ample wall outlets are provided for electric lighting and other appliances.

Public spaces are inviting, tastefully decorated and well kept, except that walls of the elevator lobbies are subjected to abuse by delivery personnel. This is particularly true of the cabs in the combination passenger and service cars where deep cuts and gouges have been made on the wood paneling.

The stairs are clean and fire standpipes, racks and hoses are in good working order and only recently inspected.

The exterior of the building is well preserved except for the mortar joints in marble copings which require caulking.

There is one brick pier on the west wall of the south unit which extends from the low area level to the second floor on which the cap flashing has been provided but the base flashing has been omitted.

Except for those areas in the cellar and subcellar which are occupied by the garage and by the valet shop all space is devoted to house services. These include electric and gas meter rooms, steam and hot water generator room, laundry and locker rooms with their toilet rooms, paint room, superintendent's office and shop, and a general storage area without divisions which is used for tenant and house storage. Except for areas herein previously noted as painted, wall and ceiling surfaces are unpainted, dusty and in spots damaged.

The cold glazed finish in the laundry especially and in the corridors requires some repair.

The Owner of the apartment building will undertake to make the repairs noted above as required as soon as weather and other conditions permit.

HARRIS & ABRAMS ASSOCIATES

FOOTNOTES:

(n1)Footnote *. 7 more men than presently employed.

(n2)Footnote **. Package policy: coverage, fire--\$4,800,000; rents--\$520,000; liability--\$1,000,000; elevator collision--\$5,000; water damage--\$50,000; burglary--\$1,000.

(n3)Footnote ***. For elevators, public areas, superintendent's apartment, and building equipment. Electricity used in apartments is not included. (See page 20-3028.5.)

(n4)Footnote ****. See page 20-3028.38 for explanation of mortgage indebtedness and related provisions. The mortgage payment of \$24,218.75 per month remains constant, but the portions allocable to interest decrease and to amortization increase as the mortgage principal is reduced.

(n5)Footnote (1). Based on mortgage indebtedness of \$3,750,000 (see page 20-3028.38). The allocations shown are for information only and do not imply that any apartment is separately mortgaged or that any shareholder is individually or personally liable to any mortgagee for mortgage payments.

(n6)Footnote (2). Estimated for first year. Includes gas; does not include electricity.

(n7)Footnote (3). Estimated for first year. Amount may later vary in accordance with the amount of interest payable on mortgage debt and amount of real estate taxes.

(n8)Footnote (1). Based on mortgage indebtedness of \$3,750,000 (see page 20-3028.38). The allocations shown are for information only and do not imply that any apartment is separately mortgaged or that any shareholder is individually or personally liable to any mortgagee for mortgage payments.

(n9)Footnote (2). Estimated for first year. Includes gas; does not include electricity.

(n10)Footnote (3). Estimated for first year. Amount may later vary in accordance with the amount of interest payable on mortgage debt and amount of real estate taxes.

(n11)Footnote (1). Based on mortgage indebtedness of \$3,750,000 (see page 20-3028.38). The allocations shown are for information only and do not imply that any apartment is separately mortgaged or that any shareholder is individually or personally liable to any mortgagee for mortgage payments.

(n12)Footnote (2). Estimated for first year. Includes gas; does not include electricity.

(n13)Footnote (3). Estimated for first year. Amount may later vary in accordance with the amount of interest payable on mortgage debt and amount of real estate taxes.

(n14)Footnote (1). Based on mortgage indebtedness of \$3,750,000 (see page 20-3028.38). The allocations shown are for information only and do not imply that any apartment is separately mortgaged or that any shareholder is individually or personally liable to any mortgagee for mortgage payments.

(n15)Footnote (2). Estimated for first year. Includes gas; does not include electricity.

(n16)Footnote (3). Estimated for first year. Amount may later vary in accordance with the amount of interest payable on mortgage debt and amount of real estate taxes.

(n17)Footnote (1). Based on mortgage indebtedness of \$3,750,000 (see page 20-3028.38). The allocations shown are for information only and do not imply that any apartment is separately mortgaged or that any shareholder is individually or personally liable to any mortgagee for mortgage payments.

(n18)Footnote (2). Estimated for first year. Includes gas; does not include electricity.

(n19)Footnote (3). Estimated for first year. Amount may later vary in accordance with the amount of interest payable on mortgage debt and amount of real estate taxes.

(n20)Footnote (1). Based on mortgage indebtedness of \$3,750,000 (see page 20-3028.38). The allocations shown are for information only and do not imply that any apartment is separately mortgaged or that any shareholder is individually or personally liable to any mortgagee for mortgage payments.

(n21)Footnote (2). Estimated for first year. Includes gas; does not include electricity.

(n22)Footnote (3). Estimated for first year. Amount may later vary in accordance with the amount of interest payable on mortgage debt and amount of real estate taxes.

(n23)Footnote (1). Based on mortgage indebtedness of \$3,750,000 (see page 20-3028.38). The allocations shown are for information only and do not imply that any apartment is separately mortgaged or that any shareholder is individually or personally liable to any mortgagee for mortgage payments.

(n24)Footnote (2). Estimated for first year. Includes gas; does not include electricity.

(n25)Footnote (3). Estimated for first year. Amount may later vary in accordance with the amount of interest payable on mortgage debt and amount of real estate taxes.



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Current Legal Forms for Real Estate

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Current Legal Forms for Real Estate
Chapter 20 REAL ESTATE ENTITIES
Part IV. Forms
G. COOPERATIVES

24-20 Current Legal Forms for Real Estate FORM 20.52

AUTHOR: by Stephen E. Pigott and Harold O. Maxfield, Jr.

FORM 20.52 Certificate of incorporation -- New York corporation

COMMENT

This form illustrates a certificate of incorporation for a cooperative corporation organized under the Business Corporation Law of New York. The information to be included in any certificate of incorporation will, of course, vary with the requirements of local law. However, the particular characteristics of a real estate cooperative corporation will dictate the inclusion of certain provisions regardless of the state of incorporation. The practitioner should be aware that most states have promulgated forms that are available on line for use to form a corporation. The State of New York is one such state. The Secretary of State's Office for the State of New York has a form Certificate of Incorporation which may be used to form an entity. Currently, a corporation may be formed without using the New York Secretary of State's form. However, some states, such as Ohio require the use of the Secretary of State's promulgated form. As always the practitioner must review and become familiar with the laws of the jurisdiction where the entity is to be formed.

This certificate, therefore, provides for only one class of shares. In addition, the purpose clause makes it clear that shareholders shall be entitled solely by reason of their ownership of shares to proprietary leases permitting them to occupy the dwelling units of the cooperative. The statutory requirement prohibiting distributions to shareholders is taken care of in the corporate bylaws. Certain other provisions in the certificate are indigenous to the cooperative corporation: a statement that the primary purpose is to provide homes for shareholders under proprietary leases; a broad statement of purposes with respect to the purchase of land, construction of buildings, and acquisition of personal property necessary to the operation of apartments; and a provision that the corporation may withhold its consent to a transfer of shares by a shareholder if he is in default on any indebtedness to the corporation.

For the tax aspects of cooperative housing corporations, see TB § 20.10.

FORM

Certificate of Incorporation

of
Skyline Apartments, Inc.

Under Section 402 of the Business Corporation
Law of the State of New York

We, the undersigned, for the purpose of forming a business corporation pursuant to the provisions of the Business Corporation Law of the State of New York, do hereby certify:

1. Name. The name of the Corporation shall be Skyline Apartments, Inc.

2. Purposes. The purposes for which it is to be formed are:

(a) To acquire by purchase, lease, or otherwise the land and building or buildings erected or to be erected thereon at 500 East 68th Street, New York, New York; to demolish existing building or buildings; to erect a new building or buildings; to hold, operate, manage, sell, or exchange and lease the same and the several parts and apartments in any building thereon, and in any replacement thereof, or additions thereto; to do and transact all other lawful business incident to, necessary, and suitable or advisable for, or in any way connected with, such purposes for which the Corporation is formed as above set forth. The primary purpose of this Corporation is to provide homes for its shareholders by leasing to them, under leases now commonly known as proprietary leases, apartments in the building or buildings on such premises, and all of its shareholders shall be entitled solely by reason of their ownership of shares in the Corporation to proprietary leases, entitling them to occupy for dwelling purposes apartments in the building or buildings.

(b) To acquire, by purchase, lease, or otherwise, own and possess any other lands and premises and any interest or rights therein or thereto appertaining, with the buildings and improvements thereon erected to be used incidental and appurtenant to such premises, 500 East 68th Street, New York, New York, and to improve, rebuild, manage, and operate any such property or properties; to rent, lease, and sublease apartments to its shareholders and to others upon such terms and for such periods as any individual might or could; to procure the necessary permits or licenses from municipal authorities for the operation of apartment houses and to do and perform every act required by law to be done or performed in the maintenance and operation of any type of apartment house; to maintain and operate the necessary conveniences, such as elevators, lighting, and heating, as may be required in the proper operation of any apartment house; to mortgage or otherwise encumber its real property and improvements thereon and equipment thereof; to sell, exchange, or otherwise transfer, convey, or dispose of real estate, in whole or in part, or lease the same in whole or in part, for cash or by taking purchase money bonds and mortgages in payment therefor or for valuable consideration of any character; to buy, sell, and deal in bonds and loans secured by mortgages; and generally to deal with and act in relation to such real estate and any and every part thereof and to the fullest extent that a corporation organized under the Business Corporation Law is lawfully empowered to do.

(c) To acquire by purchase, or lease, or by way of a secured transaction or otherwise, any personal property necessary or proper or useful in the equipment, furnishing, improvement, development, operation, or management of any such buildings and to trade and deal in any personal property beneficial to the Corporation, and to enter into security

agreements in connection with, pledge, sell, let, or otherwise dispose of any personal property at any time owned or held by the Corporation.

(d) To purchase, acquire, hold, and dispose of corporate shares of rights to subscribe thereto, bonds and other evidences of indebtedness of any corporation, domestic or foreign, and to issue in exchange therefor its shares, bonds, or other obligations; to possess and exercise in respect thereto all the rights, powers, and privileges of individual holders or owners thereof; and to exercise any and all voting power thereon, to purchase, hold, and reissue its own shares, insofar as permitted by law, and to purchase and hold its own bonds and to take and acquire, and hold or sell and dispose of bonds and mortgages and assignments thereof.

(e) To borrow money, to make and issue promissory notes, bills of exchange, bonds, debentures, and obligations and evidences of indebtedness of all kinds, whether secured by mortgage, pledge, security agreement, or otherwise, without limit as to amount and to secure the same by mortgage, security agreement, or pledge of its property or otherwise, provided the same is permitted by the Business Corporation Law of the State of New York.

(f) To compromise or settle all claims, debts, leases, tenancies, or occupancies asserted by or against the Corporation.

(g) To do all and everything necessary, suitable, convenient, or proper for the accomplishment of any one or more of the objects herein enumerated, or incidental to the powers herein named, or which at any time appear conducive or expedient for the protection or benefit of the Corporation, either as holders of, or as interested in any property or otherwise, with all the powers now or hereafter conferred by the laws of the State of New York upon corporations incorporated under the Business Corporation Law.

(h) The foregoing clauses shall be construed both as objects and powers. It is hereby expressly provided that the foregoing enumerations of specific powers shall not be held to limit or restrict in any manner the powers of the Corporation.

3. Authorized Shares. The Corporation may issue a total of sixty-five thousand (65,000) shares, each with a par value of _____ Dollars (\$ _____), all of which shall be common shares. These shares shall be issued only in connection with the purchaser's and Corporation's execution and delivery of a proprietary lease of an apartment or apartments in a building owned or leased by the Corporation.

4. Office. The office of the Corporation shall be located at 500 East 68th Street, City, County, and State of New York.

5. Agent for Service of Process. The Secretary of State of the State of New York is hereby designated as the agent of the Corporation upon whom process in any action or proceeding against it may be served. The address within the State to which the Secretary of State shall mail a copy of process in any action or proceeding against the Corporation which may be served upon him is 500 East 68th Street, New York, New York.

6. Restriction on Transfer of Shares. If a shareholder shall be indebted to the Corporation, the directors may refuse to consent to a transfer of his shares until such indebtedness is paid, provided a copy of this section or the substance thereof is written or printed upon the share certificate.

7. Salaries. No salary or other compensation shall be paid to any director or officer of the Corporation for services rendered in that capacity unless and until it shall have been approved in writing or by affirmative vote taken at a duly held shareholders' meeting by the record holders of at least two-thirds (2/3) of the Corporation's then outstanding shares.

8. Contracts. No contract or other transaction between the Corporation and any other corporation shall be affected by the fact that the Corporation's directors are interested in or are directors or officers of such other corporation, and any director individually may be a party to or may be interested in any contract or transaction of the Corporation. No

contract or other transaction of the Corporation with any person or persons, firm, or association shall be affected by the fact that any of its directors may be a party or parties to or interested in any contract or transaction with such person or persons, firm, or association; provided that the director's interest in any such transaction or other contract shall be fully disclosed. Each and every person who may become a director of the Corporation is hereby relieved from any liability which might otherwise exist from contracting with the Corporation for his benefit or that of any firm, association, or corporation in which he may in any way be interested.

9. Subscription for Unissued Shares. No holder of any shares now or hereafter issued by the Corporation shall be entitled as a matter of right to subscribe for or purchase any part of its unissued shares of any class whatsoever or to subscribe for or purchase any additional shares, whether common, preferred, or of any other class, to be issued by reason of any increase in its authorized shares, or to subscribe for or purchase any bonds, certificates or indebtedness, debentures, or other securities, convertible into shares of the Corporation. Any and all such unissued shares and such additional authorized issuance of new shares and such securities convertible into shares may be issued, allotted, and disposed of to such persons, firms, corporations, or associations and for such lawful consideration, and upon such terms, as the Board of Directors may deem advisable and for the best interests of the Corporation.

10. Incorporators. All of the incorporators are natural persons over the age of 21 years.

In witness whereof the incorporators have signed and acknowledged this Certificate this _____
[day] of _____ [month] , _____ [year] .

[name]

[address]

[name]

[address]

[name]

[address]



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Current Legal Forms for Real Estate
Chapter 20 REAL ESTATE ENTITIES
Part IV. Forms
G. COOPERATIVES

24-20 Current Legal Forms for Real Estate FORM 20.53

AUTHOR: by Stephen E. Pigott and Harold O. Maxfield, Jr.

FORM 20.53 Bylaws of cooperative corporation

COMMENT

In addition to defining the intracorporate procedures found in the usual corporate bylaws, those of a cooperative corporation must contain special provisions relating to the problems inherent in the cooperative purpose of the organization. Thus, the board of directors is granted the power to fix the annual cash requirements of the cooperative which in turn will establish the rental payments to be made by the tenant-shareholders; the power to adopt a form of proprietary lease; the power to determine the number of shares to be allocated to each apartment; and the power to subdivide and regroup space at the request of one or more owners. Corporate shares may be issued only in connection with the execution of proprietary leases, and the ownership of the shares entitles the shareholder to occupy a specified apartment for dwelling purposes. No shareholder is entitled, either conditionally or unconditionally, except upon a complete or partial liquidation of the corporation, to receive any distribution not out of the earnings and profits of the corporation. These latter provisions are designed to secure the tax benefit for the tenant-shareholders. The corporation is given a lien on its shares to secure the payment of rent and compliance with the terms of the proprietary leases, but this lien is subordinate to any lien to secure payment of the purchase price of the shares.

FORM

Bylaws of Skyline Apartments, Inc.

Article I

Meetings of Shareholders

1. Annual Meeting. The annual meeting of the Corporation's shareholders, for the election of directors and for such other business as may properly come before such meeting, shall be held in the Borough of Manhattan, at 5 p.m. on the first Monday of May of each year commencing with the year _____ [year] . If that day is a legal holiday, however, the meeting shall be held on the first day thereafter not a legal holiday. The notice of the meeting shall be in writing and signed by the President or a Vice President or the Secretary or an Assistant Secretary. Such notice shall state the purpose or purposes for which the meeting is called and the time when and the place within the state where it is to be held. A copy thereof shall be served, either personally or by mail, upon each shareholder of record entitled to vote at such meeting, not less than ten nor more than 40 days before the meeting.

2. Special Meetings. The President or Secretary, or a majority of the Board of Directors, may at any time call special meetings of shareholders, other than those regulated by statute. The Secretary shall also call a special meeting whenever so requested in writing by shareholders of record of at least one-quarter of the outstanding shares. A notice of each special meeting, stating its time, place, and purpose and the officer or other person or persons by whom the meeting is called, shall be served, either personally or by mail, on each shareholder of record, at least ten days before such meeting. No business other than that stated in the notice shall be transacted at any special meeting unless the holders of record of all the Corporation's outstanding shares are present in person or by proxy.

3. Waiver of Mailing of Notice. The notice provided for in the two foregoing sections is not indispensable. Any shareholders' meeting whatever shall be valid for all purposes if the shareholders of record of all the Corporation's outstanding shares are present in person or by proxy, or if a quorum is present as provided in the next succeeding section and notice of the time, place, and purpose of such meeting has been duly waived in writing by all shareholders not so present. Any notice to be served upon a shareholder by mail shall be directed to him at his address as it appears on the Corporation's books unless the shareholder shall have filed with the Secretary of the Corporation a written request that notices intended for him be mailed to some other address, in which case it shall be mailed to the address designated in such request.

4. Quorum. At all meetings of shareholders, in order to constitute a quorum and to permit the transaction of any business, except to adjourn a meeting, there shall be present, either in person or by proxy, holders of record of a majority of the Corporation's outstanding shares.

5. Voting. Each shareholder of record shall be entitled at each shareholders' meeting to one vote, in person or by proxy, for each share standing in his name on the Corporation's books at the time of the meeting. All proxies shall be in writing and shall be filed with the Secretary at or before the time of the meeting. All voting shall be viva voce, except that any qualified voter may demand a ballot vote, in which case the voting shall be by ballot. Each ballot shall state the name of the shareholder voting and the number of shares owned by him, and in addition the name of the proxy, if such ballot is cast by a proxy.

6. Inspectors of Election. Inspectors of election shall not be required to be appointed at any meeting of shareholders unless requested by a shareholder present (in person or by proxy) and entitled to vote at such meeting. Upon the making of such request inspectors shall be appointed or elected as provided in the applicable statute.

7. Order of Business. The regular order of business for the annual meeting of shareholders, and for each special meeting to the extent such order is applicable, shall be as follows:

(a) Roll call.

- (b) Presentation of notice of the meeting and proof of service, or waiver of notice.
- (c) Reading of minutes of preceding shareholders' meeting.
- (d) Reports of officers.
- (e) Reports of committees.
- (f) Appointment or election of inspectors of election, if requested.
- (g) Election of directors for ensuing year.
- (h) Miscellaneous business.

Article II Directors

1. Election and Term. Directors shall be elected at the annual meeting of shareholders, or at a special meeting called for that purpose as provided by law, by a plurality of the votes cast at such election. Directors shall serve until the date herein fixed for the next annual meeting of shareholders and until the election of their respective successors. Directors need not be shareholders.

2. Vacancies. Vacancies in the Board of Directors resulting from death, resignation, or removal may be filled without notice to any of the shareholders by a vote of a majority of the remaining directors present at the meeting at which such election is held even though no quorum is present. Such vote may be at any regular meeting of the Board of Directors or any special meeting thereof called for such purpose. Vacancies in the Board of Directors resulting from an increase in its size shall be filled in the manner provided in the resolution increasing its size. If all the directors die or resign, any shareholder may call a special meeting of the shareholders as provided herein, at which directors for the unexpired term may be elected in the manner provided for their election at annual meetings. If any director, by ceasing to be a resident of the State of New York, reduces the number of such residents remaining on the Board to less than one, he shall be deemed to have resigned and his place shall be vacant.

3. Removal. Any director may be removed from office without cause by the Corporation's shareholders at a meeting duly called for that purpose.

4. Meetings. The Board of Directors shall hold its annual meeting immediately after the annual meeting of shareholders, without notice. It shall hold a special meeting whenever called together by the President or by a Vice President, or, after written request of any two directors then holding office, by any other officer, upon two days' written notice to each director served in person or by mailing the same to him at the last address furnished by him to the Corporation. Any meeting of the Board at which all the directors are present, or of which notice has been duly waived by all absentees, shall be valid for all purposes provided a quorum is present. A majority of the directors shall constitute a quorum. Meetings of the Board shall be held at such place within the City of New York as is specified in the notice calling the meeting. At meetings of the Board, each director shall be entitled to one vote.

5. Annual Budget. In furtherance of the definitions and provisions of the proprietary leases entered into by the Corporation with its shareholders, the Board of Directors shall determine the cash requirements, as defined therein, and shall likewise fix the terms and times of payment of the rent due from shareholders who are lessees under such proprietary leases to meet such cash requirements. The Board of Directors shall have discretionary power to prescribe the manner of maintaining and operating the Corporation's apartment building, and any other premises acquired by the Corporation by purchase or otherwise, and to determine the foregoing cash requirements. Every such determination by

the Board shall be final and conclusive as to all shareholders who are lessees under proprietary leases. All expenditures made by the Corporation's officers or agents under the direction or with the approval of the Board shall, as against such shareholders, be deemed necessarily and properly made for such purposes. The operating year of the Corporation shall be the calendar year.

6. Distributions. The Board of Directors shall by vote declare dividends from the surplus profits of the Corporation whenever in their opinion the condition of its affairs will render it expedient for such dividends to be declared. The shareholder shall not, either conditionally or unconditionally, except upon a complete or partial liquidation of the Corporation, receive any distribution not out of the Corporation's earnings and profits.

7. House Rules. The Board of Directors may make and change the house rules applicable to the Corporation's apartment building whenever the Board deems it advisable so to do. All house rules shall be binding upon all tenants and occupants of the apartment building.

8. Executive Committee. The Board of Directors may by resolution appoint an executive committee to consist of three or more Directors of the Corporation. Such committee shall have and may exercise all of the powers of the Board in the management of the Corporation's business and affairs during the intervals between the meetings of the Board, so far as may be permitted by law. The Executive Committee, however, shall not have power to determine the cash requirements defined in the proprietary leases, to fix the rent to be paid under the proprietary leases, or to vary the terms of payment thereof as fixed by the Board.

Article III Officers

1. Election and Removal. The Board of Directors at its first meeting and at each annual meeting shall elect by a majority vote, a President and one or more Vice Presidents, a Secretary, and a Treasurer. The Board may also at any time appoint one or more Assistant Secretaries or Assistant Treasurers and accord to such assistant officers such powers as it deems proper. Any person otherwise qualified may hold any two offices. Each officer shall serve until the next annual meeting of the Board and until the election or appointment of his respective successor. Any officer, however, may be removed from office at any time, and a successor chosen, at the Board's pleasure, upon affirmative vote, taken at any meeting, by a majority of the then total authorized number of directors.

2. President and Vice President. The President shall preside at meetings of shareholders and of the Board of Directors. He shall, subject to the control of the Board: have general management of the Corporation's affairs; perform all the duties incidental to his office or prescribed for him by these Bylaws or the Board; and make and sign in the Corporation's name all contracts, leases, and other instruments that the Board may from time to time authorize. If the President shall be absent or unable to perform these duties, any Vice President shall have his powers and perform his duties. A Vice President shall at all times have power to make and sign proprietary leases in the Corporation's name.

3. Secretary. The Secretary shall keep and record, in proper books provided for the purpose, the minutes of meetings of the Board of Directors and of the shareholders, record all transfers of stock and cancel and preserve certificates of the shares so transferred, and keep such other records as the Board shall require. He shall attend to the giving and serving of notices of the Corporation, have custody of the corporate seal, and affix the same to the share certificates and to instruments required by law or by these Bylaws or authorized by the Board. He shall also perform all other duties incidental to his office. He shall keep a book, to be known as the share book, containing the names, alphabetically arranged, of all persons who are shareholders of the Corporation, showing their places of residence, the number of shares held by them respectively, the time when they respectively became the owners thereof, the amount paid thereon, and the denomination and amount of all transfer stamps affixed thereto. The share book shall be open daily, during at least three business hours, for inspection by any judgment creditor of the Corporation, by any person who shall have

been a shareholder of record for at least six months immediately preceding his demand, or by any person holding, or thereunto in writing authorized by the holders of, at least 5% of all the outstanding shares. Persons so entitled to inspect the share book may make extracts therefrom. If the Secretary shall be absent or unable to perform these duties, the Assistant Secretary shall have all his powers and perform all his duties.

4. Treasurer. The Treasurer shall, subject to the Board's control, have the care and custody of, and be responsible for, all funds and securities of the Corporation and shall keep the same in its name in such banks, trust companies, or safe deposit companies as the Board shall designate, and shall perform all other duties incidental to his office, or prescribed for him by these Bylaws or by the Board. If so required by the Board, he shall, before receiving any such funds or securities, furnish to the Corporation a bond with a surety company as surety, in such form and amount as the Board from time to time shall determine. The premium upon such bond shall be paid by the Corporation. Within a reasonable time after the close of each year ending December 31st, the Treasurer shall furnish to each shareholder who is a lessee under a proprietary lease then in force a statement of the Corporation's income, expenses, and paid-in surplus during such year. The statement shall indicate the portions of the rent paid by such shareholder under his proprietary lease during such year which the Corporation has used to pay real estate taxes and interest on its mortgage or other indebtedness. If the Treasurer shall be absent or unable to perform these duties, the Assistant Treasurer shall have all his powers and perform all his duties.

5. Salaries. No director or officer of the Corporation shall be paid a salary or other compensation for his services in that capacity unless and until such payment shall have been authorized in writing or by affirmative vote, taken at a duly held shareholders' meeting, by the record holders of at least two-thirds of the Corporation's then outstanding shares.

Article IV

Proprietary Leases

1. Form. The Board of Directors shall adopt a form of proprietary lease to be used by the Corporation for the leasing of all apartments and extra servants' rooms, if any, in the apartment building to be leased to shareholders under proprietary leases. Such proprietary leases shall be for such terms, with or without provisions for renewals, and shall contain such restrictions, limitations, and provisions in respect to the assignment thereof, the subletting of the premises demised thereby, and the sale or transfer of the shares of the Corporation accompanying the same, and such other terms, provisions, conditions, and covenants, as the Board deems advisable. After the Corporation has executed and delivered a proprietary lease in the form so adopted by the Board of Directors, all proprietary leases subsequently executed and delivered shall be in the same form (except with respect to the statement as to the number of shares owned by the lessee), unless the variation is approved by lessees owning at least two-thirds of the Corporation's shares then owned by all lessees under proprietary leases then in force.

2. Assignment. Proprietary leases shall be assigned or transferred only in compliance with, and shall never be assigned or transferred in violation of the terms, conditions, and provisions of, such proprietary leases. A duplicate original of each proprietary lease shall always be kept on file in the office of the Corporation or with the managing agent of the apartment building.

3. Accompanying Shares. The Board of Directors shall allocate to each apartment or extra servant's room to be leased under a proprietary lease the number of the Corporation's shares that must be owned by the proprietary lessee thereof. If the size of any such apartment or extra servant's room is changed from that shown on the typical plan thereof, the number of shares so allocated to such apartment or extra servant's room and to any other apartment or extra servant's room affected by such change shall be ratably and correspondingly changed by the Board.

4. Regrouping of Space. The Board of Directors, upon the written request of the owner or owners of one or more proprietary leases covering one or more apartments or extra servants' rooms in the apartment building and of the shares

issued to accompanying the same, may in its discretion, at any time, permit such owner or owners, at his or her own expense: (1) to subdivide or combine all or any portions of any such apartment or apartments or extra servants' rooms into one or any desired number of apartments or extra servants' rooms, (2) to convert all or any portion of any such apartment into extra servants' rooms or into a suite or suites of extra servants' rooms, and (3) to reallocate the shares issued to accompany the proprietary leases, in such proportions as such owners request and the Board approves, provided only that (a) the total number of the shares so reallocated is not less than the shares previously allocated, and (b) the proprietary leases so affected and the accompanying share certificates are surrendered, and that there are executed and delivered in place thereof, respectively, a new proprietary lease for each separate apartment, extra servant's room, or suite of extra servants' rooms so created and a new share certificate for the number of shares so reallocated to each such new proprietary lease.

5. Fees on Assignment. The Board of Directors may fix by resolution and collect, before any assignment of a proprietary lease or any reallocation of shares takes effect as against the Corporation as lessor, reasonable fees to cover the Corporation's expenses and attorneys' fees in connection with such proposed assignment or reallocation, or both, as the case may be.

6. Lost Proprietary Leases. If any proprietary lease in full force and effect shall be lost, stolen, destroyed, or mutilated, the Board of Directors may authorize the issuance of a new proprietary lease in lieu thereof, in the same form and with the same terms, provisions, conditions, and limitations. The Board may, in its discretion, before the issuance of such new proprietary lease, require the owner of the lost, stolen, destroyed, or mutilated proprietary lease, or the owner's legal representative, to make an affidavit or affirmation setting forth such facts as to the loss, destruction, or mutilation as it deems necessary, and to give the Corporation a bond in such reasonable sum as it directs, to indemnify the Corporation.

Article V Corporate Shares

1. Issuance of Shares. Shares of the Corporation shall be issued only in connection with the execution and delivery by the lessee and the Corporation of a proprietary lease of an apartment in the building owned or leased by the Corporation. The ownership of the shares so issued shall entitle the holder thereof to occupy for dwelling purposes the apartment specified in the proprietary lease so executed and delivered in connection with the issuance of such shares, subject to the covenants and agreements contained in such proprietary lease.

2. Share Certificates. Certificates for the Corporation's shares shall be in the form prescribed by the Board of Directors. Such certificates shall be signed by the President or a Vice President and the Secretary or an Assistant Secretary or the Treasurer or an Assistant Treasurer, and sealed with the seal of the Corporation, and shall be numbered in the order in which issued. Certificates shall be bound in a book and issued in consecutive order therefrom, and in the margin or stub thereof shall be entered the name of the person holding the shares therein represented, the number of shares, and the date of issue. Each certificate exchanged or returned to the Corporation shall be cancelled, and the Secretary shall indicate the date of cancellation thereon. Such certificate shall be immediately pasted in the certificate book opposite the memorandum of its issue.

3. Transfer. Transfers of shares shall be made only upon the books of the Corporation by the holder in person or by power of attorney, duly executed and witnessed and filed with the Secretary, and on the surrender of the certificate of such shares, except that shares sold by the Corporation to satisfy any lien which it holds thereon may be transferred without the surrender of such certificate. No transfer of shares shall be valid as against the Corporation, its shareholders, and creditors for any purpose until it shall have been entered in the share book by an entry showing from whom and to whom transferred.

4. Units of Issuance. Shares issued to accompany each proprietary lease shall be issued in the amount allocated by the Board of Directors to the apartment or extra servant's room or suite of extra servants' rooms described in such proprietary lease. Unless and until all proprietary leases which have been executed by the Corporation shall have been terminated, the shares which accompany each proprietary lease shall be represented by a single certificate. These shares shall not be sold or transferred except to the Corporation or as an entirety to a person who has acquired such proprietary lease, or a new one in place thereof, after complying with and satisfying the requirements of such proprietary lease in respect to its assignment.

5. Fees on Transfer. The Board of Directors may fix by resolution and collect, before the transfer of any shares, reasonable fees to cover the Corporation's expenses and attorneys' fees in connection with such proposed transfer.

6. Corporation Lien. The Corporation shall at all times have a lien upon the shares owned by each shareholder to secure the payment of all rent to become payable by such shareholder under the provisions of any proprietary lease issued by the Corporation and at any time held by such shareholder and for all other indebtedness from such shareholder to the Corporation, and to secure the performance of all the covenants and conditions of such proprietary lease to be performed or complied with by the shareholder. Unless and until such shareholder or lessee makes default in the payment of any such rent or other indebtedness or in the performance of any such covenant or condition, such shares shall continue to stand in the name of the shareholder upon the Corporation's books and the shareholder shall be entitled to exercise the right to vote thereon. The Corporation may issue to any purchaser of such shares upon its enforcement of such lien, or to the nominee of such purchaser, a certificate of the shares so purchased substantially of the tenor of the certificate issued to such defaulting shareholder. Thereupon the certificate for such shares issued to such defaulting shareholder shall become void and such defaulting shareholder shall surrender the same to the Corporation on demand. The defaulting shareholder's failure so to surrender such certificate, however, shall not affect the validity of the certificate issued in replacement thereof.

7. Lost Certificates. If any share certificate shall be lost, stolen, destroyed, or mutilated, the Board of Directors may authorize the issuance of a new certificate of the same tenor and for the same number of shares in lieu thereof. The Board may in its discretion, before the issuance of such new certificate, require the owner of the lost, stolen, destroyed, or mutilated certificate, or the owner's legal representative, to make an affidavit or affirmation setting forth such facts as to the loss, destruction, or mutilation as it deems necessary, and to give the Corporation a bond in such reasonable sum as it directs, to indemnify the Corporation.

Article VI

Seal

The seal of the Corporation shall be in the form of a circle, and shall bear its name, the year of its incorporation, and the words "Corporate Seal, New York."

Article VII

Checks, Notes, Etc.

1. Signatures on Checks. Checks drawn against the Corporation's deposit accounts with banks or trust companies shall be signed by such officer or officers, or employee or employees, as the Board of Directors may from time to time prescribe.

2. Signatures on Notes and Bonds. The Corporation's promissory notes and bonds shall be signed by any two officers who the Board of Directors shall from time to time designate for that purpose.

3. Safe Deposit Boxes. Any officer or officers who, from time to time, the Board of Directors shall designate for that purpose shall have access to any safe deposit box of the Corporation in the vault of any safe deposit company.

4. Securities. Any officer or officers who, from time to time, the Board of Directors shall designate for that purpose shall have power to control and direct the disposition of any bond or other security or property of the Corporation deposited in the custody of any bank, trust company, or other custodian.

Article VIII Amendments

These Bylaws may be amended at any shareholders' meeting provided that the proposed amendment has been inserted in the notice of meeting or that all of the shareholders are present in person or by proxy. These Bylaws may also be amended at any directors' meeting provided that the proposed amendment has been inserted in the notice of the meeting and that at least two-thirds of the then authorized total number of directors shall be present at such meeting. The shareholders, however, may at any time rescind, repeal, or amend any Bylaw adopted by the Board of Directors.



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Current Legal Forms for Real Estate
 Chapter 20 REAL ESTATE ENTITIES
 Part IV. Forms
 G. COOPERATIVES

24-20 Current Legal Forms for Real Estate FORM 20.54

AUTHOR: by Stephen E. Pigott and Harold O. Maxfield, Jr.

FORM 20.54 Agreement with agent for sale of cooperative's shares--appointment as managing agent

COMMENT

The traditional real estate agent serves two functions in a cooperative venture--the sale of shares to prospective cooperative owners, and the management of the property after the cooperative plan becomes effective. In this agreement the sponsor of the venture and the cooperative corporation appoint a real estate company to perform both of these functions under an exclusive agency arrangement. Here, the terms of the sales agency including the duties of the agent, commission rates, selling procedures, etc., are spelled out. As compensation for sales to tenant-shareholders, the agent is to receive a percentage of the sales price. As manager of the building, the agent is to receive a fixed annual fee. The sponsor reserves the right, at the cost of an overriding commission, to direct the agent to list a block of the shares for sale with an outside broker. Special arrangements are included in the agreement for commissions for negotiating leases on any store and on the garage in the building, and for commissions if the cooperative venture is abandoned by the sponsor.

When the cooperative plan is put into effect the sponsor may have to provide individual purchasers for unsold apartments. As to any such sales, the agent is to receive no compensation until the "nominee" purchaser has in turn sold the shares to another purchaser. A similar arrangement is made for any store or garage space leased to an affiliate of the sponsor. In this latter case, the commission will become payable only when any such space is first subleased to a third party.

FORM

AGREEMENT made _____ [month] _____ [day] , _____ [

year] , among Ace Realty Corporation (the "Sponsor"), Skyline Apartments, Inc. (the "Apartment Corporation"), and Harris & Co., Inc. (the "Agent").

Whereas the Sponsor is promulgating a proposed cooperative plan (the "Plan") with respect to the new apartment building being erected on the southerly side of _____ [address] , _____ [city] , _____ [state] , and proposes to transfer the land and completed building to the Apartment Corporation pursuant to the contract containing the terms and conditions outlined in the Plan; and

WHEREAS, the Sponsor wishes to employ the Agent to act as Sales Agent in connection with the sales of blocks of the Apartment Corporation's shares to be respectively allocated to apartments in the building and the ownership of such blocks would entitle the respective purchasers to proprietary leases on the respective apartments; and

WHEREAS, the Apartment Corporation wishes to employ the Agent as managing agent if the Plan shall be consummated; and

WHEREAS, the Agent is willing to accept such employment on the terms and conditions hereinafter contained;

NOW, THEREFORE, the parties hereto agree as follows:

1. Employment. The Sponsor hereby employs the Agent, and the Agent hereby accepts such employment, as the Sponsor's Selling Agent to offer for sale the shares of the Apartment Corporation and the proprietary leases allocated thereto as provided for under the provisions of the Plan and the form of Purchase Agreement attached to and forming part thereof.

2. Duties of Agent. The Agent, in conjunction with the Sponsor, the Apartment Corporation, and their respective attorneys, will prepare the Plan with respect to the building, which upon adoption the parties shall initial for identification. As soon as the Plan has been prepared in final form and approved by the parties, the Agent will carry out all actions and duties imposed upon it under the terms of the Plan and of the Contract of Sale between the Sponsor and the Apartment Corporation, and will use its best efforts to sell the blocks of shares of the Apartment Corporation and leases allocated to apartments at the prices set forth in the schedules to be annexed to the Plan. There will be no variations in the Plan or in the Purchase Agreements except those first approved in writing by the Sponsor.

3. Compensation. The Sponsor shall pay to the Agent for its services hereunder commissions as follows:

(a) The Sponsor shall pay to the Agent for services in negotiating and closing the sale of any block of the Apartment Corporation's shares, and the proprietary lease allocated to such block, a commission of _____ percent (_____ %) of the actual sales price realized on each such block of shares. Twenty-five percent (25%) of such commission shall be payable when, and only if, the Purchase Agreement signed by the prospective purchaser and accompanied by the required down payment has been received by the Agent and the Purchase Agreement has been approved by the Agent and accepted by the Apartment Corporation; twenty-five percent (25%) five (5) days after, and only if, the Plan is declared effective; and the other fifty percent (50%) thereof within five days after, and only if, the balance of the purchase price for the shares has been paid by the individual purchaser. During the term of this agreement, the Agent shall be the Sponsor's exclusive Agent in connection with the sales of shares of the Apartment Corporation. All such sales shall be negotiated through the Agent and all inquiries with respect thereto shall be referred to it. However, the Sponsor may, at any time after three months from the date the Plan is accepted for filing by the Attorney General of the State of _____ [state], direct the Agent to list for sale any block of shares of the Apartment Corporation with a broker not in the Agent's employ or, at any time, may direct the Agent to recognize any such outside broker in connection with any sale of shares. If the sale is consummated by the outside broker, the Sponsor shall pay to the Agent a commission and one-quarter (1/4) (at the rate hereinabove provided), of which the

Agent shall pay the full commission of _____ percent (_____%) to the outside broker and retain the one-quarter (1/4) thereof as an overriding commission. Such commission shall be payable to the outside broker and such overriding commission shall be payable to the Agent in such proportions, at such times, and subject to such conditions as the commission would have been payable to the Agent, as hereinabove provided, if it were the sole procuring broker involved in connection with the sale.

(b) The Sponsor shall pay to the Agent for services in negotiating and closing the lease of any store or of the garage in the building a full commission of _____ percent (_____%) of each lease payment received by the Sponsor or by the Apartment Corporation, payable annually in arrears. Twenty-five percent (25%) of such commissions shall be payable when, and only if, such lease is executed and delivered by the proposed tenant and the Apartment Corporation and the tenant has paid the first month's rent thereunder, and the balance of such commission within five days after the tenant takes possession of the space demised under such lease. During the term of this agreement, the Agent shall be the Sponsor's exclusive Agent in connection with the leasing of the doctor's office and garage in the building, and all such leases shall be negotiated through the Agent and all inquiries with respect thereto shall be referred to the Agent. However, the Sponsor may at any time after the expiration of one year from the date the building is topped out direct the Agent to list for leasing the garage or the doctor's office in the building with a broker not in the Agent's employ or, at any time, may direct the Agent to recognize any such outside broker in connection with any leasing of the garage or such doctor's office. If the lease is consummated by the outside broker, then the Sponsor shall pay to the Agent a commission and one-quarter (1/4) based on present Real Estate Board of _____ [state] rates, of which the Agent shall pay the full commission to the outside broker and retain the one-quarter (1/4) thereof as an overriding commission. Such commission shall be payable to the outside broker and such overriding commission shall be payable to the Agent in such proportions, at such times, and subject to such conditions as the commission would have been payable to the Agent, as hereinabove provided, if it were the sole procuring broker involved in connection with the sale. The Agent shall have no liability to pay any part of such commission to the outside broker, and the broker shall have no claim against it therefor unless and until the Agent shall have received from the Sponsor the commission due and payable to the outside broker. Any commission payable hereunder upon the exercise of any renewal option shall be the sole liability of the Apartment Corporation, which hereby agrees to assume and pay the same.

(c) If any shares of the Apartment Corporation are purchased by a person produced by the Sponsor at the time the Plan is put into effect, then and in that event no commission shall be payable to the Agent on any such sale. The Agent, however, shall continue (but only so long as it is the Managing Agent under contract with the Apartment Corporation to be made pursuant to Paragraph 7 hereof) to act as Selling Agent for such shares subject to the terms and conditions of this agreement and upon the same commission rates as are provided herein. The Agent's commissions shall not become due and payable in connection therewith until the initial purchaser of any such shares has transferred them and the accompanying lease to another purchaser, at which time the full commission will be payable. Similarly, no commission shall be due and payable upon any lease of the garage and the doctor's office to an affiliate of the Sponsor, but the Sponsor shall cause commissions, subject to the terms and conditions of this agreement and at the same rates as are provided herein, to be paid by such affiliate upon the first sublease of such space (but only so long as the Agent is the Managing Agent under contract with the Apartment Corporation to be made pursuant to Paragraph 7 hereof).

(d) Notwithstanding the above, the total commissions payable to the Agent under this agreement as overriding commissions, where full commissions are payable by Sponsor to other brokers, shall in no event exceed _____ Dollars (\$_____).

4. Indemnity of Agent. The Sponsor will indemnify and hold the Agent harmless from any liability that the Agent may have to prospective purchasers, the Apartment Corporation, or others that may arise because of the Sponsor's failure to comply with any of its obligations as contained herein and in the Plan and other agreements referred to therein, including any written literature or advertising in connection therewith which the Sponsor shall have prepared or approved in writing. The Agent shall notify the Sponsor promptly in writing of any such claim asserted against the

Agent and of any subsequent developments in connection with such claim. The Sponsor may defend any action or proceeding resulting therefrom at its sole cost and expense in the Agent's name and use counsel of its own choice in such connection. The Agent shall cooperate fully with the Sponsor and its counsel in all stages of any such claim, action, or proceeding and in such connection shall make available all evidence and shall produce all witnesses under its control as the Sponsor or its counsel may request. If the Sponsor does not exercise its right to defend any such action or proceeding, the Agent shall defend the same with due diligence at the Sponsor's expense.

5. Doctor's Office and Garage Leases. The Sponsor may in its absolute discretion, and for any reason whatsoever, reject and refuse to accept any lease for the doctor's office and garage space. In that event no commission shall be payable on such transaction.

6. Selling Procedures. The Sponsor, at its expense, will provide and furnish an adequate selling office on the premises and the Agent will supply a selling agent or agents at reasonable hours, on all seven days of the week including holidays (except on New Year's Day, July 4th, Labor Day, Thanksgiving, and Christmas), to handle all inquiries at the building. If such selling agent or agents assigned to the sales office at the building are unsatisfactory to the Sponsor, the Sponsor may require the Agent to assign other satisfactory employees and the Agent shall have a reasonable time within which to make such assignment. All publicity, advertising, signs, books, pamphlets, and other literature will be subject to the approval of the Sponsor and the Agent and will be paid for by the Sponsor. The Agent will not incur any expense for such purposes except with the Seller's prior consent. All of the foregoing shall also contain the name of the Agent as exclusive selling and managing agent.

7. Employment as Managing Agent. The contract between the Sponsor and the Apartment Corporation and the Plan, will provide that if and when the building is completed, the property is conveyed to the Apartment Corporation, and the Plan is consummated in accordance with its terms, the Agent will be employed as the Managing Agent for a period of five years from the date of completion at an annual fee of _____ Dollars (\$_____) in accordance with the Management Agreement attached hereto. Notwithstanding the above, the Agent shall not be employed or continued as the Apartment Corporation's Managing Agent if it shall have been replaced by another selling agent as provided in Paragraph 9.

8. Abandonment of Cooperative Plan. The Sponsor reserves the right at any time to declare the Plan abandoned. Subject to the Sponsor's rights as set forth in Paragraph 9, the Agent in such event shall be continued as Renting and Managing Agent for the building, which is to be conventionally rented. In such event, the Agent shall receive forthwith from the Sponsor _____ Dollars (\$_____) (or such lesser amount as does not exceed the expenses incurred by the Agent under this agreement to the date of abandonment of the Plan) plus fifty percent (50%) of the full commissions (subject to credit for amounts previously paid on account) theretofore earned by the Agent on sales of shares in the Apartment Corporation prior to such abandonment. Each outside broker entitled to receive any commissions under Paragraph 3 shall also in such event be entitled to receive and retain such commissions up to fifty percent (50%) of the full commissions payable (subject to credit for amounts previously paid on account). The Agent shall be the Renting and Managing Agent for a term of three years from the date the Plan is declared abandoned, subject to the Sponsor's right to terminate such renting and managing agency at any time upon or after the expiration of the second year of such term on at least sixty (60) days' prior notice given in writing. (Upon any such termination by the Sponsor, the provisions of Paragraph 9 shall have no application.) The other terms of the Management Agreement will be identical with those in the agreement annexed hereto. During the period of such agency, the Sponsor shall pay the Agent for its services commissions as follows:

(a) The Sponsor shall pay the Agent for services in negotiating and closing the lease of any apartment in the building a commission equal to _____ percent (_____) of the first year's rental or any fraction thereof, _____ percent (_____) of the second year's rental or any fraction thereof, and _____ percent (_____) of the aggregate rental for the balance of the term, provided that no commission shall be deemed payable upon the period of any rental allowance or concession.

(b) The Sponsor shall pay the Agent for services in negotiating and closing the lease of any store or of the garage in the building a full commission of _____ percent (_____) of each lease payment received by the Sponsor or by the Apartment Corporation, payable annually in arrears.

(c) During the term of such Renting and Management Agreement, the Agent shall be the Sponsor's exclusive agent in connection with the leasing of apartments and of garage and store space. The Sponsor, however, may at any time direct the Agent to list for leasing any apartment, garage, or store space with a broker not in the Agent's employ, or to recognize any such outside broker in connection with any such leasing. If the leasing is consummated by the outside broker, the Sponsor shall pay to the Agent a commission and one-quarter (1/4) (at the rates hereinabove provided), of which the Agent shall pay the full commission to the outside broker and retain one-quarter (1/4) hereof as an overriding commission.

(d) Any commission hereunder shall be payable when and only if the lease is executed and delivered by the proposed tenant and accepted by the landlord. The Sponsor, as such landlord, may in its absolute discretion and for any reason whatsoever reject and refuse to accept any lease. In that event no commission shall be payable on such transaction.

(e) If any apartment shall be leased to a person who had previously executed and delivered a Purchase Agreement in respect of which a commission was paid to the Agent or an outside broker, the Agent will give and will cause any such outside broker to give full credit to the Sponsor against the amount of the commission due under this paragraph for the amount of the commission previously paid or payable to the Agent and such outside broker in respect of such sale.

9. Replacement of Agent. The Sponsor may replace the Agent with another selling or renting agent at any time after the later of (a) the expiration of sevenfull calendar months from the date the Plan is promulgated, copies of the Plan are available for distribution, and a sales office is established at the premises, and (b) _____ [date] . In such event, the Sponsor will pay to the Agent the sum of (a) the full commissions theretofore earned by it (subject to credit for amounts previously paid on account), and (b) the cost to the Agent of the services hereunder from the date the Plan is promulgated but not to exceed _____ Dollars (\$_____). The "cost to the Agent of the services hereunder" shall for all purposes hereunder consist of direct payments for salaries to, or the guaranteed drawings by, sales agents employed by the Agent full-time at the premises (or, in the case of a sales agent employed by the Agent part-time at the premises, that proportion thereof which is fairly allocable to the time spent by him at the premises), including their share of commissions earned from the sale of shares of the Apartment Corporation or from the renting of apartments, plus a fair share of the Agent's expense for supervision allocable to such employees and for reasonable services by other members of the Agent's firm in promulgating the Plan. If, however, the sum hereinabove payable to the Agent under this paragraph shall exceed _____ Dollars (\$_____), then, notwithstanding the above, the total amount payable to the Agent in the event of its replacement pursuant to this paragraph shall not exceed the greater of (1) the sum of _____ Dollars (\$_____), or (2) the full commissions theretofore earned by it (including amounts previously paid on account). If the Sponsor exercises its right to replace the Agent pursuant to the provisions of this paragraph, the Agent shall forthwith deliver to the Sponsor a list of persons with whom negotiations are pending by the Agent for the sale of shares or the lease of apartments, garage, or doctor's office space and the state of such negotiations. If sales of shares or leases of such space are thereafter made to such persons, the Agent shall be treated as if its activities with respect to such persons constituted those of an outside broker.

10. Assignment. This contract shall not be assignable by the Agent. If this contract is assigned by either of the other parties hereto, (a) such party shall not be discharged of its liability hereunder, and (b) the Agent may, by giving notice within 30 days after notice to it of such assignment, elect by notice in writing to resign as the Agent hereunder. Such resignation shall not affect the Agent's right thereafter to receive and retain all commissions earned hereunder to the date of such resignation.

11. Entire Agreement. This agreement embodies the entire understanding and agreement of the parties hereto in relation to the subject matter hereof and supersedes any and all prior agreements with respect to the subject matter hereof. No promise, condition, representation, or warranty, express or implied, not herein set forth shall bind any party hereto. No term or condition of this agreement may be changed orally but only by a written agreement signed by the respective parties hereto.

12. Binding Effect. This agreement shall inure to the benefit of and be binding upon the respective parties hereto, their successors and, to the extent permitted, their assigns.

13. Governing Law. This agreement shall be construed in accordance with and governed by the laws of the State of _____ [state] .

14. Headings for Reference Only. Headings preceding the text and sections of this agreement have been inserted solely for convenience and reference, and shall not be construed to affect its meaning, construction, or effect.

15. Notices. All notices or other documents under this agreement shall be in writing and delivered personally or mailed by certified mail, postage prepaid, addressed to the parties at their last known addresses.

16. Non-waiver. No delay or failure by a party to exercise any right under this agreement, and no partial or single exercise of that right, shall constitute a waiver of that or any other right, unless otherwise expressly provided herein.

17. Counterparts. This agreement may be executed in two or more counterparts, each of which shall be deemed an original but all of which together shall constitute one and the same instrument.

In witness whereof the parties have hereunto signed and sealed this agreement the day and year first above written.

ACE REALTY CORP.

By: _____

[name and title]

And: _____

[name and title]

HARRIS & CO., INC.

By: _____

[name and title]

And: _____

[name and title]



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Current Legal Forms for Real Estate
Chapter 20 REAL ESTATE ENTITIES
Part IV. Forms
G. COOPERATIVES

24-20 Current Legal Forms for Real Estate FORM 20.55

AUTHOR: by Stephen E. Pigott and Harold O. Maxfield, Jr.

FORM 20.55 Cooperative apartment management agreement

COMMENT

This form is a management agreement for a cooperative apartment. The agreement is contemplated by the preceding form. The services that will be performed by the agent are comprehensive and constitute the agent a general building management agent. This is to say that he is authorized to do all acts related to the business for which he was engaged, i.e., the management of the cooperative apartment.

FORM

THIS AGREEMENT made _____ [month] _____ [day] ,
_____ [year] , between Skyline Apartments, Inc., (the "Owner") and Harris & Co., Inc. (the
"Agent").

The parties hereto mutually agree as follows:

1. Employment. The Owner hereby appoints the Agent, and the Agent hereby accepts appointment, on the terms and conditions hereinafter provided, as managing agent of the cooperative apartment house located at 500 East 68th Street, New York, New York (the "Building").

2. Duties of Agent. The Agent shall perform the following services with due diligence and care:

(a) Cause to be hired, paid, and supervised all persons necessary to be employed in order to properly maintain and operate the Building who, in each instance, shall be the Owner's and not the Agent's employees, and cause to be

discharged all unnecessary or undesirable persons, except that no person presently employed at the Building shall be discharged without the Owner's prior written consent.

(b) Cause the Building to be maintained in such condition as the Owner may deem advisable, including interior and exterior cleaning, and cause repairs and alterations of the Building to be made, including, but not limited to, electrical, plumbing, steamfitting, carpentry, masonry, elevator, decorating, and such other incidental alterations or changes therein as may be proper, subject only to the limitations contained in this agreement or in any proprietary lease or other agreement with any tenant-shareholder or other tenant. Ordinary repairs or alterations involving an expenditure of over _____ Dollars (\$ _____) for any one item shall be made only with the Owner's prior approval, but emergency repairs, i.e., those immediately necessary for the preservation or safety of the Building or for the safety of tenant-shareholders, or other persons, or required to avoid the suspension of any necessary service in the Building, may be made by the Agent regardless of the cost thereof, without the Owner's prior approval, after consultation with the Owner's President or Vice President.

(c) Recommend, and, with the Owner's approval, cause all such acts and things to be done in or about the Building as shall be necessary or desirable to comply with any and all orders or violations affecting the Building, placed thereon by any federal, state, or municipal authority having jurisdiction thereover. If, however, failure promptly to comply with any such order or violation would or might expose the Owner or the Agent to criminal liability, the Agent may cause such order or violation to be complied with after consultation with the Owner's President or Vice President or, if either officer shall not be available to the Agent, after consultation with the Owner's attorneys. The Agent shall notify the Owner's attorneys promptly after receipt of any order or violation.

(d) Enter into contracts for electricity, gas, steam, air conditioning, water treatment, elevator, telephone, window cleaning, rubbish removal, fuel oil, detective agency protection, vermin extermination, and other services or such of them as shall be advisable. Any such contract, however, having a term longer than two (2) years or requiring annual payments in excess of _____ Dollars (\$ _____) must be authorized by the Owner.

(e) Purchase all supplies which shall be necessary to properly maintain and operate the Building; make all such contracts and purchases in either the Owner's or the Agent's name, as the Agent shall elect; and credit to the Owner any discounts or commissions obtained for purchases or otherwise (except any insurance and other commissions payable to the Agent under the terms of this agreement).

(f) Advise the Owner with respect to proper insurance coverage of the Building, its employees, and tenant-shareholders; if the Owner shall request, cause to be effected and maintained, in such amounts and through such carriers as the Owner shall designate or approve, fire, rent, plate glass, boiler, water damage, liability, workmen's compensation, employer's liability, disability, and any other insurance the Owner may elect to carry; and to cooperate with any independent insurance broker or consultant that the Owner may designate or approve and engage for the purpose of effecting insurance and protecting its interests with respect thereto.

(g) Check all bills received for services, work, and supplies ordered in connection with maintaining and operating the Building, pay or cause to be paid all such bills, mortgage interest, mortgage amortization, water charges, sewer rent, assessments, real estate taxes, and corporate income and other taxes assessed against the Owner or the Building as and when the same shall become due and payable.

(h) If the Owner shall request, list and offer for sale, lease, or sublease through its own organization and, if the Owner shall deem it advisable, through other brokers, space reserved, acquired, or reacquired by the Owner in the Building, and use its best efforts to effect sales, leases, or subleases thereof, and to renew leases and subleases of space reserved, acquired, or reacquired by the Owner in the Building, including the preparation and execution of lease and sublease documents under the supervision of the Owner's attorneys.

(i) Accept applications and references from all prospective tenant-shareholders, tenants, and subtenants, obtain credit reports relating to prospective tenant-shareholders, tenants, and subtenants of space being leased or subleased by the Owner (and, at its request, for any other space in the Building), obtain from tenant-shareholders proposing to assign their proprietary leases such record searches as the Owner may require, and submit same to the Owner; and facilitate transfers of the Owner's shares and proprietary leases held by its tenant-shareholders.

(j) Supervise the moving in and out of tenant-shareholders, tenants, and subtenants, and, as far as possible, arrange the dates thereof so that there shall be a minimum of disturbance to the Building's operation and of inconvenience to other tenant-shareholders and tenants.

(k) Bill or cause to be billed tenant-shareholders, tenants, and subtenants for maintenance charges, rent, and other charges, use its best efforts to collect such maintenance charges, rent, and other charges, and, when and if directed by the Owner, serve notices upon tenant-shareholders, tenants, or subtenants to quit and surrender the space they occupy. When directed by the Owner, and on its behalf, sue for maintenance charges, rent, and other charges which may at any time be or become due to it from any tenant-shareholder, tenant, or subtenant in respect of space in the Building, institute summary proceedings to recover possession thereof and, with the consent of the Owner's attorneys, employ and pay special counsel, if necessary, for any such purposes. No suit or summary proceedings shall be instituted, however, unless the Owner's written authorization is first obtained.

(l) Consider and, when reasonable, attend to complaints of tenant-shareholders, tenants and subtenants. If the Agent shall deem any such complaint unreasonable, it shall advise the Owner of the complaint and the reason for its opinion that the complaint is unreasonable.

(m) Cause to be prepared and filed the necessary forms for unemployment insurance, withholding, and social security taxes and all other tax and other forms relating to employment of Building employees and maintenance and operation of the Building required by any federal, state, or municipal authority.

(n) If the Owner shall request, not later than the 20th day of each month, render or cause to be rendered regular monthly statements, supported by disbursement vouchers, to the Owner, with remittance of amounts collected during the previous month less disbursements made on behalf and for the account of the Owner and less all such amounts as in the judgment of the Owner's accountants it may be necessary or advisable to reserve or withhold to meet obligations due or which will or may become due thereafter and for which current income will not or may not be adequate. The Agent shall send a copy of each such monthly statement to the Owner's President and Treasurer.

(o) Establish and keep in good order a separate, accurate, and full set of books, other than books of account maintained by the Owner's accountants, for the Owner, and maintain orderly files containing rent records, insurance policies, proprietary and other leases and subleases, correspondence, receipted bills and vouchers, and all other documents and papers pertaining to the building or the operation thereof. Such books, records, and other documents shall be and at all times remain the Owner's property. The Agent shall upon the Owner's request make them available to the Owner and to its officers, accountants, attorneys, or other representatives, and upon the Owner's demand shall deliver them to the Owner or its agents.

(p) Cooperate with the Owner's accountants in regard to the annual audit of the Owner's books of account, including the annual report of the Owner's operations for the year then ended. The Agent shall send a copy of each such annual report to all the Owner's tenant-shareholders.

(q) Cooperate with the Owner's accountants in regard to the preparation and filing on its behalf of federal, state, city, and all other income and other tax returns required by any governmental authority.

(r) Send to all tenant-shareholders of the Owner each year copies of a statement furnished by the Owner's accountants

which sets forth the deductions available to tenant-shareholders for income tax purposes by reason of their ownership of its shares and other relevant tax data with respect thereto provided by the Owner's accountants.

(s) Prepare and submit annually to the Owner's Board of Directors, prior to its last meeting held in each calendar year, an operating budget setting forth the Owner's anticipated income and expenses for the ensuing year, a comparison of such budget to the income and expenses of the preceding and current years, and all required explanations with respect thereto.

(t) When requested, provide a suitable place for, send notices to directors and shareholders of, prepare agendas for, and cause a representative of its organization to attend meetings of the tenant-shareholders and of the Owner's Board of Directors and, if requested by the Board of Directors, have its representative act as Secretary, and record and keep the minutes of such meetings.

(u) Prepare and send out all letters and reports that the Owner's Board of Directors may request.

(v) When the books of tentatively assessed valuations of the City of New York are opened for public inspection in each year, ascertain the assessment of the land on which the Building is located and the assessment of the Building and report such assessments to the Owner. If the Owner shall consider such assessments excessive, the Agent will, if requested by the Owner, cooperate with the Owner's attorneys to prepare an application for correction of the assessed valuation to be filed with the Tax Commission of the City of New York and, if the Owner shall not have any regular attorneys, retain special counsel to prepare such application and to institute tax certiorari proceedings.

(w) Use its best efforts to keep any commercial or nonproprietary space in the Building rented to desirable tenants on such terms as the Owner may approve. The Agent may enlist the services of other real estate brokers on the Owner's behalf in connection with the rental of such space. The Agent, however, shall not receive any additional commissions by reason of any other broker's services.

(x) Generally, do all things reasonably deemed necessary or desirable by the Owner's Board of Directors for the proper management of the Building.

The Agent may, for the Owner's account and on its behalf, perform any act or do anything necessary or desirable in order to carry out the Agent's agreements contained in this Paragraph 2. Everything done by the Agent under the provisions hereof shall be done as Agent of the Owner. All obligations or expenses incurred thereunder, for which the Agent is not compensated as provided in Paragraph 5, shall be at the Owner's expense.

All payments made by the Agent hereunder shall be made out of such funds as the Agent may from time to time hold for the Owner's account or as the Owner may provide. The Agent shall not be obliged to make any advance to or for the Owner's account or to pay any amount except out of funds held or provided as above set forth, nor shall it be obliged to incur any extraordinary liability or obligation unless the Owner shall furnish the Agent with the necessary funds for the discharge thereof. If the Agent shall voluntarily advance for the Owner's account any amount for the payment of any obligation or necessary expense connected with the maintenance or operation of the Building or otherwise, the Owner shall reimburse the Agent therefor on demand.

3. Deposit of Funds. The Agent shall deposit in a bank or trust company in the City of _____ [city] , to be designated from time to time by the Owner, all funds which the Agent shall collect for the Owner's account. The Agent shall hold such funds in trust in a special account and shall not commingle the same with other funds that the Agent may receive, whether for its own account or as agent for others. The Agent shall not be liable for any loss resulting from the insolvency of such depository.

4. Liability of Agent. The Agent shall not be liable to the Owner for any loss or damage not caused by the Agent's

negligence or failure to comply with its obligations hereunder. The Owner shall indemnify the Agent against and hold the Agent harmless from (a) any liability, damages, costs, and expenses including reasonable attorney's fees, sustained or incurred for injury to any person or property in, about, and in connection with the Building, from any cause whatsoever, unless such injury shall be caused by the Agent's negligence or failure to comply with its obligations hereunder, and (b) any liability, damages, penalties, costs, and expenses, statutory or otherwise, for all acts properly performed by the Agent pursuant to the Owner's instructions; provided, in each of the foregoing instances, that the Agent promptly advises the Owner of its receipt of information concerning any such injury and the amount of any such liability, damages, penalties, costs, and expenses. The Owner will carry liability insurance, workmen's compensation, and employer's liability insurance, will include the Agent as a party insured under the liability policy, and will deliver a copy of such liability policy to the Agent or a certificate evidencing the same.

5. Compensation. The Owner shall pay the Agent as full compensation for its services hereunder the sum of _____ Dollars (\$ _____) per annum, payable in equal monthly installments, plus:

(a) Commissions as set forth in Paragraph 3 of the agreement among the Owner, the Agent, and Ace Realty Corp. dated _____ [month] _____ [day], _____ [year].

(b) For services in connection with unemployment insurance and social security taxes, a fee based upon an hourly rate of _____ Dollars (\$ _____).

(c) For services in connection with labor union relations, withholding taxes, hospitalization, group life insurance, disability insurance, and the like, a fee based upon an hourly rate of _____ Dollars (\$ _____).

6. Bond. If requested, the Agent, at the Owner's expense, shall forthwith procure a fidelity bond satisfactory in form to the Owner, and issued by a bonding, insurance, or casualty company satisfactory to the Owner. Pursuant to this bond the surety shall hold the Owner harmless in an amount up to _____ Dollars (\$ _____) from any loss of money or other personal property belonging to the Owner or for which the Owner is legally liable, caused by larceny, embezzlement, forgery, misappropriation, wrongful abstraction, or any dishonest or fraudulent acts committed on or after the date hereof, by the Agent, its directors, officers, or employees. The Agent shall keep such bond in full force and effect throughout the term of this agreement.

7. Brokerage. The Agent shall not receive any brokerage commissions for the sale of any shares of the Owner by a tenant-shareholder together with the proprietary lease appurtenant thereto, or for the subletting of any apartment by a tenant-shareholder unless such tenant-shareholder shall directly engage the services of Agent as broker. In no event shall the Owner be liable for any such commissions. Notwithstanding the foregoing, however, the Agent may notify the tenant-shareholders of its willingness to act as broker on their behalf, and, if engaged by any tenant-shareholder for such purpose, the Agent shall exercise its best efforts in such tenant-shareholder's behalf.

8. Representation by Agent. The Agent represents to the Owner that it is duly licensed by the Department of State of the State of _____ [state] as a real estate broker and also by the Department of Law of the State of _____ [state] as a broker-dealer insofar as broker-dealer licensing is required in order to enable it to lawfully perform its duties hereunder.

9. Effective Date. This agreement shall take effect on _____ [month] _____ [day], _____ [year], and shall continue in force until _____ [month] _____ [day], _____ [year]. In the event of a sale, lease, or demolition of the Building, the Owner may terminate this agreement at the end of any calendar month by giving not less than thirty (30) days' prior written notice to the Agent. Upon termination, the parties shall account to each other with respect to all uncompleted business, and the Agent shall deliver to the Owner all proprietary and other leases, subleases, corporate

files, books, and records, and other instruments relating to the Building and the Owner that may be in the Agent's possession. The Owner shall furnish the Agent with reasonable security against all outstanding obligations or liabilities which the Agent may have incurred hereunder.

10. Modification. This agreement may not be changed orally but only in writing signed by both parties.

11. Binding Effect. The provisions of this agreement shall be binding upon and inure to the benefit of both parties and their respective successors and assigns, unless otherwise expressly provided herein.

12. Non-assignment. This agreement may not be assigned by either party.

13. Notices. All notices or other documents under this agreement shall be in writing and delivered personally or mailed by certified mail, postage prepaid, addressed to the parties at their last known addresses.

14. Governing Law. This agreement shall be construed in accordance with and governed by the laws of the State of _____ [state] .

15. Entire Agreement. This agreement contains the entire understanding between the parties and supersedes all prior understandings and agreements between them respecting the within subject matter.

16. Non-waiver. No delay or failure by either party to exercise any right under this agreement, and no partial or single exercise of that right, shall constitute a waiver of that or any other right, unless otherwise expressly provided herein.

17. Headings. Headings in this agreement are for convenience only and shall not be used to interpret or construe its provisions.

18. Counterparts. This agreement may be executed in two or more counterparts, each of which shall be deemed an original but all of which together shall constitute one and the same instrument.

In witness whereof the parties hereto have executed this agreement the day and year first above written.

SKYLINE APARTMENTS, INC.

By: _____

[name and title]

And: _____

[name and title]

HARRIS & CO., INC.

By: _____

[name and title]

And: _____

[name and title]



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24-20 Current Legal Forms for Real Estate FORM 20.56

AUTHOR: by Stephen E. Pigott and Harold O. Maxfield, Jr.

FORM 20.56 Purchase agreement with tenant--shareholder

COMMENT

This is an agreement by which a prospective tenant-shareholder commits himself to purchase the cooperative's shares allocated to a specific apartment. It is in the form of an offer to be accepted by the sponsor and the cooperative corporation. It provides for the payment of the purchase price in installments as various stages in the completion of the building are achieved, with the final installment due after the architect and consulting architect have certified that a temporary certificate of occupancy for the building has been issued. For purposes of the requirement in the Revenue Code that 80% of the cooperative's income must be received from tenant-shareholders, see TB § 20.10, at the beginning of this chapter. A shareholder does not qualify until his shares are fully paid for. This does not preclude payment in the form of a promissory note. Nor does it prevent a tenant-shareholder from borrowing money from outside sources and pledging his shares and proprietary lease as collateral security.

All payments made on account of the purchase price are to be held in escrow. At the time of the completion of the building, the purchaser will receive the proprietary lease for the designated apartment, provided he is not in default in his required payments. It should be noted that the basic plan of cooperative organization is incorporated by reference into this purchase agreement. This assures the purchaser that the various representations in the plan are part of his contract to purchase, and that he can hold the sponsor to those representations.

For a discussion of the requirements for qualification as a tenant-stockholder, see TB § 20.10 at the beginning of this chapter. As to tax deductions available to such a stockholder, see TB § 20.10[4].

FORM

1. Approval of Plan. The undersigned (the "Purchaser") has read and hereby approves the Plan of Cooperative Organization dated _____ [month] _____ [day] , _____ [year] , and the Schedules and Exhibits attached thereto and the documents referred to therein (collectively the "Plan"), and on file with Harris & Co., Inc. (the "Agent"), and made a part hereof with respect to the land and building ("The Skyline") and by the street number 500 East 68th Street, New York, New York (the "Building").

2. Desire to Participate. The Purchaser desires (a) to obtain a proprietary lease for Apartment 4E (the "Apartment") in the Building, and (b) to purchase five hundred fifty-three (553) common shares of Skyline Apartments, Inc. (the "Apartment Corporation"), which shares have been allocated to the Apartment.

3. Purchase Price. The Purchaser hereby irrevocably offers to purchase from the Apartment Corporation five hundred fifty-three (553) of its common shares with a par value of _____ Dollars (\$ _____) per share for a total purchase price of _____ Dollars (\$ _____) per share payable by good checks drawn to the order of Trust Bank of New York (the "Escrow Agent") and delivered to the Agent as follows:

(a) Ten percent (10%) thereof at the time of execution of this agreement;

(b) Forty percent (40%) thereof after the Plan has been declared operative and the Architect and Consulting Architect have certified that the outside brickwork has been completed (except such portions thereof as are customarily left to be completed after the interior portions are erected) and upon at least fifteen (15) days' prior written notice to the Purchaser;

(c) Thirty percent (30%) thereof when the Architect and Consulting Architect have certified that the white plaster in the apartments above the ground floor has been completed (except such portions thereof as are left uncompleted due to individual purchasers' changes) and upon at least fifteen (15) days' prior written notice to the Purchaser; and

(d) the balance of twenty percent (20%) thereof when the Architect and the Consulting Architect have certified that a temporary certificate of occupancy for the Building has been issued and upon at least fifteen (15) days' prior written notice to the Purchaser.

The time of each payment is hereby made the essence of this agreement. The shares shall not be issued and delivered nor shall the Purchaser acquire any rights therein or pertinent thereto until the full payment of all the amounts above provided have been duly made.

The Escrow Agent shall hold and dispose of all such payments made hereunder as provided in an Escrow Agreement in the form of an Exhibit attached to the Plan, and the Purchaser agrees to be bound thereby.

4. Proprietary Lease. At the time of the completion of the Building, as referred to in the Plan, or as soon thereafter as may be practicable, if the Purchaser shall have made the full payments provided for herein, then the Purchaser shall be entitled to receive a proprietary lease from the Apartment Corporation for the Apartment in the form adopted by the Apartment Corporation as well as a share certificate for the Apartment Corporation's fully paid and nonassessable common shares hereby purchased. The Purchaser shall at the request of the Apartment Corporation, before or after the time of closing, execute such proprietary lease in duplicate. The Purchaser hereby authorizes the Apartment Corporation or the Agent to insert in the proprietary lease the date of the Building's completion as the date of the commencement of the term of such proprietary lease.

5. Abandonment of Plan. If the Plan is declared abandoned, the Purchaser shall be entitled thereupon to receive back all

moneys paid pursuant hereto, without interest, and this agreement shall be deemed terminated and of no further force and effect, and no party shall have any claim against any other party with respect hereto.

6. Escrow. All moneys paid hereunder are to be paid by good checks to the order of the Escrow Agent, which shall hold the proceeds until paid out as provided in this agreement, the Plan, and the Escrow Agreement.

7. Default by Purchaser. If the Purchaser shall fail to perform any provision of this agreement that he is required to perform, the Apartment Corporation may elect to cancel this agreement by giving the Purchaser written notice of such proposed cancellation. Such notice shall contain the effective date (not less than ten days after the giving of such notice) of such cancellation. If the Purchaser shall cure his default prior to the effective cancellation date the cancellation notice shall be deemed withdrawn. If the Purchaser shall fail to cure his default prior to the cancellation date, then the cancellation shall be effective and the Sponsor named in the Plan shall be entitled to receive all payments made by the Purchaser hereunder and all of the parties hereto shall be relieved and discharged of any further liability and obligation hereunder, except as herein provided. The Sponsor shall then have the right to list the Apartment and to sell the shares and lease covered hereby to any other person at public or private sale, and shall only account to the Purchaser for the net proceeds after payment of all expenses including repairs, decorations, commissions, legal fees, loss of rent, and purchase price.

8. Default by Others. If the Apartment Corporation, the Sponsor, or the Builder shall have failed to substantially perform their obligations hereunder or under the Plan, the Purchaser's sole rights and remedy shall be to proceed within 12 months from the date of the issuance of the permanent Certificate of Occupancy for the Building against the Apartment Corporation for the return of the moneys paid by the Purchaser for the purchase price of his shares, upon the surrender to the Apartment Corporation of such shares and the accompanying proprietary lease, and possession of the Apartment. The parties hereto waive trial by jury in any action or proceeding hereunder or arising by reason of this agreement or the Plan.

9. Outside of Effective Date. If the Plan is not declared operative by _____ [month] _____ [day] , _____ [year] , then the Purchaser may within fifteen (15) days thereafter elect to cancel this agreement by giving written notice to the Apartment Corporation. In that event the Purchaser shall be entitled to receive back all moneys paid hereunder, without interest.

10. Acceptance of Agreement. This agreement shall not be effective or binding on the Apartment Corporation until it accepts in writing a duplicate hereof, which is approved by the Agent and delivered to the Purchaser.

11. Notices. Any notice to be given hereunder shall be made to the Purchaser, in writing, at the address given below, and to the Apartment Corporation, care of Harris & Co., Inc., 500 Fifth Avenue, New York, New York. The date of mailing shall be deemed the date of the giving of such notice.

12. Errors. The statements contained in the Plan are believed by the Apartment Corporation, the Sponsor, and the Agent to be correct, and the expressions of opinion therein are likewise believed to be well founded, but no liability shall attach in the event of error.

13. Assignment. The Purchaser shall not assign this agreement or the Purchaser's rights hereunder, without the Apartment Corporation's prior written consent.

14. Examination of Facts. The Purchaser acknowledges that he has had full and free opportunity to investigate and examine all of the facts and documents referred to herein and in the Plan of Organization; and that he has not relied on any representations, warranties, or statements of any nature or kind, including but not limited to estimated date of completion, general description attached to Plan, maintenance charges, or right to any tax deduction, whether contained in any advertisement, selling brochure, or made orally.

15. Binding Effect. Subject to the provisions hereof, this agreement shall bind and apply to the parties hereto and their respective personal representatives, successors, and permissible assigns.

16. Entire Agreement. This agreement contains the full understanding and agreement of the parties and may not be amended, altered, or discharged except by another agreement, in writing, signed by the party sought to be charged therewith.

17. Purchaser's Residence. The Purchaser represents that he is a resident of the State of _____
[state] .

18. Governing Law. This agreement shall be construed in accordance with and governed by the laws of the State of _____
[state] .

19. Non-waiver. No delay or failure by a party to exercise any right under this agreement, and no partial or single exercise of that right, shall constitute a waiver of that or any other right, unless otherwise expressly provided herein.

20. Headings. Headings in this agreement are for convenience only and shall not be used to interpret or construe its provisions.

21. Counterparts. This agreement may be executed in two or more counterparts, each of which shall be deemed an original but all of which together shall constitute one and the same instrument.

Dated: _____ [month] _____ [day] , _____ [year]

[Purchaser]

[address]

[Purchaser]

[address]

ACCEPTED:

SKYLINE APARTMENTS, INC.

By: _____

[name and title]

And: _____

[name and title]

APPROVED:

ACE REALTY CORP.

By: _____

[name and title]

And: _____

[name and title]



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24-20 Current Legal Forms for Real Estate FORM 20.57

AUTHOR: by Stephen E. Pigott and Harold O. Maxfield, Jr.

FORM 20.57

COMMENT

This form is an informal variation on the preceding agreement. Psychologically, it is often preferable to draft the proposal in this manner so that the offering appears less formidable to the layman.

FORM

Purchaser(s)	Robert L. Alexander
Apartment	7-L
Shares	1,332
Purchase Price	\$119,890
Down Payment-10%	\$11,989 (herewith)
Balance	\$107,901

Douglas Ives, Inc.
45 Fifth Avenue
New York, New York 10022

Re: 16 East 72nd Street

Gentlemen:

1. As Purchaser, I have received, read, and approved the Offering Statement-Plan of Cooperative Organization hereinafter referred to as the Plan, with respect to premises 16 East 72nd Street, New York, N.Y., dated _____ [month] _____ [day] , _____ [year] , your Transmittal Letter and a copy of the proprietary lease, which are made part hereof.

2. I hereby irrevocably offer to become the proprietary lessee of the above-described apartment in said premises, and to purchase the shares of stock of 16 East 72nd Apartment Corporation (the "Apartment Corporation"), allocated to said apartment, for the Purchase Price stated above. This offer shall remain open for acceptance by the Apartment Corporation until it acquires title to said premises pursuant to the Plan and shall be irrevocable until such time or until the Plan shall be abandoned or terminated as therein provided. I understand that the Agent will give me prompt written notice thereof when the Plan either becomes effective or is abandoned.

3. Enclosed herewith is my check drawn on a New York bank payable to the order of Irving Trust Company (the "Escrow Agent"), for the amount of the above-stated Down Payment of 10% of the Purchase Price. I agree that, if and after the Plan becomes effective, as therein provided, I will pay the above-stated Balance of said Purchase Price within fifteen (15) days after the mailing of written notice and demand by you or the Apartment Corporation, which shall specify a date for closing title not earlier than thirty (30) days nor later than sixty (60) days after its mailing date. Such payment shall be by certified or official check to the order of Irving Trust Company, delivered to you. I will sign the proprietary lease for said apartment promptly upon presentation to me in the form adopted by the Apartment Corporation. I agree that time is of the essence with respect to payment of said Balance.

4. The date of commencement of the term of said proprietary lease, and the date of issuance of the certificate for the aforesaid shares, which may be inserted by either you or the Apartment Corporation, shall be the date when it acquires title to said premises. I agree that my present lease (if any) of said apartment shall be deemed terminated and cancelled as of such date. Provided that I shall have paid the full Purchase Price for said shares, as provided for herein, I am to receive the certificate for the aforesaid shares, together with my executed copy of said proprietary lease promptly after the Apartment Corporation acquires such title.

5. All moneys paid hereunder shall be deposited with and held by Irving Trust Company, as Escrow Agent, in trust in a special account as provided in the Escrow Agreement (Exhibit 1 of the Plan) and, if the Plan becomes effective and is consummated, are to be used only for the purchase of said premises and the related purposes specified and described in the Plan. The net interest, if any, earned and accrued on such moneys shall be disbursed by the Escrow Agent to the Sponsor, and by it to the Apartment Corporation, as provided in the Escrow Agreement and the Plan. The payment of the final installment of said Purchase Price shall be deemed to have been made after my inspection of said apartment and shall constitute my acceptance of said apartment in the condition in which it shall appear at such time.

6. If the Plan is abandoned or does not become effective, as therein provided, or, if after becoming effective, the Plan shall not be consummated for any reason by _____ [month] _____ [day] , _____ [year] , this agreement shall be deemed cancelled and the Plan terminated. In such event I am to receive back from the Escrow Agent, not later than forty-five (45) days after notification to it, pursuant to paragraph 5 of the Escrow Agreement, Exhibit 1 of the Plan, in full, all moneys paid by me thereunder, together with interest, if any, actually earned and accrued on said moneys (except as provided in Paragraph 7 hereof). Upon such repayment, no party shall have any claim against any other party or person, the Sponsor, the Agent or the Escrow Agent.

7. If I shall fail to pay the Balance of the Purchase Price when due, as herein provided, the Sponsor or the Apartment Corporation may elect to cancel this agreement by written notice to me at my residence or at the address stated below,

by registered or certified mail. At the expiration of five (5) days after the date of mailing thereof said notice shall be effective and this agreement shall be deemed cancelled and all rights of the parties thereunder shall terminate, except that the Escrow Agent shall pay over to the Sponsor the amount of said Down Payment, with the interest earned or accrued thereon, as liquidated damages. In the event of such cancellation, the Sponsor or Apartment Corporation may sell said shares and proprietary lease to others as though this agreement had never been made. Such right of cancellation shall be in addition to all other rights and remedies the Apartment Corporation or the Sponsor may have against the Purchaser for breach of this agreement.

8. The entire contract between the parties hereto is set forth herein and in the Plan. The only representations made to me are those contained in the Plan and said Transmittal Letter. This agreement is not assignable by me without the Apartment Corporation's prior written consent, and shall bind and apply to the parties hereto and their personal and legal representatives, successors and assigns. It may not be changed orally.

9. This agreement shall not be binding on me, the Apartment Corporation or the Sponsor until I, as Purchaser, shall be approved, by endorsement hereon by the Agent and this agreement shall be accepted, by endorsement hereon by the Apartment Corporation, and a fully signed copy thereof shall have been delivered promptly to me.

10. I represent that I am a person resident in the State of New York and that I am over 18 years of age. The term "I" shall be read as "we" and "Purchaser" shall be read as "Purchasers" if more than one person are subscribers, in which case our obligations shall be deemed joint and several.

Dated: _____ [month] _____ [day] , _____ [year]

[Purchaser]

[address]

Approved:

Dated: _____ [month] _____ [day] , _____ [year]

Douglas Ives, Inc., (Agent)

By: _____

[name and title]

Accepted:

Dated: _____ [month] _____ [day] , _____ [year]

16 East 72nd Apartment Corporation

(Apartment Corporation)

By: _____

[name and title]



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24-20 Current Legal Forms for Real Estate FORM 20.58

AUTHOR: by Stephen E. Pigott and Harold O. Maxfield, Jr.

FORM 20.58 Lease extension agreement--subsequent to execution of cooperative purchase agreement by tenant-in-residence

COMMENT

In conjunction with the preceding cooperative agreements, a tenant-in-residence whose prior lease has not yet expired will seek continuance of the lease rental during the hiatus period between execution of the share purchase contract and commencement of the proprietary lease term. This agreement also assures the tenant of continued right to occupancy of the subject accommodation in case the cooperative plan does not take effect. The latter case may hinge upon inability of the sponsor to obtain the requisite consents (35% in New York State, for example). The proprietary lease would then also be inoperative. The extension below, therefore, performs the dual function of covering the proprietary lease period and providing for possible holdover tenancy problems.

FORM

The tenant herein below named having, on _____ [month] _____ [day] ,
_____ [year] , executed a lease for Apartment 7-L with the owner of premises 16 East 72nd Street,
New York, New York, the lease to terminate on _____ [month] _____ [day] ,
_____ [year] , and the tenant having purchased the apartment pursuant to a Plan of Cooperative
Organization and having executed a proprietary lease for it which shall become effective on the date of title closing;

It is now therefore understood and agreed as follows:

That the termination date of the lease is hereby extended from _____ [month]

_____ [day] , _____ [year] , to the date of the closing of the Plan of Cooperative Organization, dated _____ [month] _____ [day] , _____ [year] , relating to 16 East 72nd Street, New York, New York, or _____ [month] _____ [day] , _____ [year] , whichever is earlier, as though such date were the original termination date mentioned in said lease. All other terms and conditions of the lease shall remain effective up to and including the new termination date, except that the rent shall be at the rate of _____ Dollars (\$800) per month from _____ [month] _____ [day] , _____ [year] .

[Tenant]

Dated: _____ [month] _____ [day] , _____ [year]

Douglas Ives, Inc. (Agent)

By: _____

[name and title]



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G. COOPERATIVES

24-20 Current Legal Forms for Real Estate FORM 20.59

AUTHOR: by Stephen E. Pigott and Harold O. Maxfield, Jr.

FORM 20.59 Resale of shares in cooperative corporation--estate sale by executor

COMMENT

The following form is a contract of sale of shares in a cooperative. As such, it deals with the transfer of personal property, i.e., the interest in the shares, and is not a closing of real estate. However, there are ancillary real estate-related documents which must be executed by the parties, such as an assignment and assumption of a proprietary lease referred to in this agreement. Although persons are frequently said to be "owners" of cooperative apartments this is not in fact the case. Purchasers of cooperatives acquire ownership of stock in the corporation that owns the building in which the apartment is located. As stockholders, the purchasers are entitled to lease an apartment to which the stock is allocated.

FORM

THIS AGREEMENT, made _____ [month] _____ [day] ,
_____ [year] , between PAUL RICHARDS, as Executor under the Last Will and Testament of
Ralph Richards, Deceased, residing at 115 Park Avenue, Rye, New York (the "Seller"), and MORRIS MONK and
MARY MONK, his wife, both residing at 26 West 72nd Street, New York, New York (the "Purchasers").

WHEREAS, the Seller was designated as the Executor under the Last Will and Testament of Paul Richards, Deceased,
dated _____ [month] _____ [day] , _____ [year] , who
died _____ [month] _____ [day] , _____ [year] ; and

WHEREAS, Letters Testamentary were duly issued to the Seller on _____ [month]
_____ [day] , _____ [year] , by the Honorable Millard Midonick, a Surrogate

of the County of New York, State of New York, authorizing the Seller to administer the estate of the Decedent and such Letters Testamentary have not been revoked; and

WHEREAS, the Decedent at the time of his death was the owner of two hundred twenty-one (221) shares of the capital stock of 165 East End Avenue Corporation (the "Corporation"), of the par value of _____ Dollars (\$ _____) per share (the "Stock"), which Stock was allocated to Apartment 17-L (the "Apartment"), in the building owned by the Corporation known as and by the street number 165 East End Avenue, New York, New York, and was the lessee under that certain proprietary lease dated _____ [month] _____ [day] , _____ [year] , between the Corporation, as Lessor, and the Decedent, as Lessee, covering the Apartment for a term commencing on _____ [month] _____ [day] , _____ [year] , and expiring on _____ [month] _____ [day] , _____ [year] (the "Lease"); and

WHEREAS, the Seller, as Executor under the Last Will and Testament of Ralph Richards, Deceased, has succeeded to the ownership of the Stock and the Lease; and

WHEREAS, the Purchasers desire to purchase the Stock and acquire the Lease from the Seller, and the Seller is willing to sell same to them, for a purchase price of _____ Dollars (\$ _____), as hereinafter provided.

NOW, THEREFORE, in consideration of the premises and mutual covenants hereinafter contained, the Seller and Purchasers mutually covenant and agree as follows:

1. Sale and Purchase. The Seller shall sell to the Purchasers and the Purchasers shall purchase from the Seller, the Stock and Lease for a purchase price of _____ Dollars (\$ _____).

2. Seller's Representations. The Seller represents and warrants that, as the Executor under the Last Will and Testament of Ralph Richards, Deceased:

(a) He is the owner of the Stock and Lease;

(b) The Stock is fully paid and nonassessable;

(c) The Stock and Lease are free and clear of all liens, encumbrances, or adverse interests (subject, however, to any liens and mortgages on the underlying real property of which the Apartment forms a part); and

(d) He has the full right and authority to enter into this agreement with the Purchasers and to sell the Stock and Lease to them.

3. Price. The purchase price of _____ Dollars (\$ _____) is payable as follows:

(a) _____ Dollars (\$ _____) on the execution of this agreement, by check of Purchasers drawn to the order of the Seller, the receipt of which check, subject to collection, the Seller hereby acknowledges; and

(b) _____ Dollars (\$ _____) at the Closing in cash or by cashier's check of a New York City bank or by duly certified check of Purchasers drawn to the order of Seller on a bank or trust company which is a member in good standing of the New York City Clearing House Corporation.

4. Closing. The closing under this agreement shall take place at 10 a.m. on _____ [month]

_____, [day] _____, [year] _____, at the offices of Good and Mann, Esqs., the Seller's attorneys, 53rd Floor, 70 Pine Street, New York, New York (the "Closing").

5. Closing Documents; Seller. At the Closing the Seller shall deliver to the Purchasers (against their delivery to the Seller of the balance of the purchase price payable at the Closing and the instrument provided for in paragraph 6 hereof) the following:

(a) Stock Certificate. Stock Certificate No. 145 of the Corporation issued to the Decedent for the Stock, duly endorsed by the Seller for transfer with all necessary stock transfer stamps duly affixed thereto to cover the transfer to the Purchasers (or, in the alternative, the Seller may at his option deliver to the Purchasers at the Closing cash or his check in the amount necessary to purchase such stamps); and

(b) Proprietary Lease. A fully executed copy of the Lease and an assignment of proprietary lease in triplicate, duly signed and acknowledged by the Seller, in the form and content of Exhibit A attached hereto and hereby made part hereof; and

(c) Consents. A written consent to the transfer of the Stock and assignment of the Lease by the Seller to Purchasers, as provided for in Paragraph 5 of Section 6 of Article II of the Proprietary Lease therein.

6. Closing Documents; Purchaser. At the Closing, the Purchasers shall deliver to the Seller (against delivery by the Seller to them of the items provided for in Paragraph 5 of this agreement) the following:

(a) Balance. The balance of the purchase price payable pursuant to subparagraph (b) of Section 3 hereof; and

(b) Lease. An acceptance of assignment and assumption of proprietary lease in triplicate, duly signed and acknowledged by the Purchasers, in the form and content of Exhibit B attached hereto and hereby made part hereof.

On the day of the Closing the Seller shall hand deliver to Brett, Wyckoff and Rudnick, Inc., Managing Agent for the Corporation, fully executed copies of such assignment of proprietary lease and such acceptance of assignment and assumption of proprietary lease.

7. Effective Date; Apportionment. The effective date of the assignment of the Lease by the Seller to the Purchasers shall be the date of the Closing. Rent under the Lease and other charges which have or shall become due and payable under the Lease shall be apportioned as of the date of the Closing, so that the Seller shall bear and pay the portion thereof applicable to the period up to the date of the Closing and the Purchasers shall bear and pay the portion applicable to the period commencing 12:01 a.m. on the date of the Closing. The net amount payable by the Seller to Purchasers, or by the Purchasers to Seller, as the case may be, shall be paid in cash or by check at the Closing.

8. Subject to Board of Directors' Consent. This sale is expressly made subject to the granting of written consent by the Corporation, and its Board of Directors, as provided in the Corporation's Bylaws and in the Lease, to the transfer of the Stock and assignment of the Lease by the Seller to the Purchasers. The Purchasers shall submit to the Managing Agent for Corporation and its Board of Directors, in writing, within three (3) days from the date hereof, the names and addresses of persons to whom, and corporations and other entities to which, reference may be had as to Purchasers' social and financial standing. The Purchasers shall also cooperate fully with the Managing Agent and submit to an interview by it or by the Corporation's representatives and provide all such information as may be reasonably requested in order for a determination to be made as to the Purchasers' social and financial standing.

If the Seller does not procure the Corporation's written consent provided for in this Section 8 and in Section 5 paragraph (c) hereof at or before the Closing, the down payment received by the Seller from the Purchasers upon the execution of this agreement shall be returned to the Purchasers and this agreement shall wholly cease and terminate without further

liability on either party. In such event neither party shall have any further claim against the other by reason of this agreement.

9. Acceptance; Discharge. The acceptance by the Purchasers of the instruments referred to in paragraphs (a), (b), and (c) of Section 5 hereof shall be deemed to be full performance and discharge of every agreement and obligation of the Seller to be performed under this agreement or otherwise.

10. Execution of New Proprietary Lease. The Purchasers shall, if the Corporation so requests, surrender the Lease assigned to them and in place thereof enter into a new proprietary lease with the Corporation for the Apartment for the remainder of the term thereof, as more particularly provided in Article II, Paragraph 6 of the Proprietary Lease.

11. Property Conveyed. This sale includes all of the Seller's right, title, and interest, if any, in and to such fixtures, equipment, and items of personal property, including but not limited to kitchen appliances, as may now be contained in the Apartment.

12. Disclosure and Inspection. The Purchasers represent and warrant to the Seller that they have examined and initialed changes, where appropriate, in the Lease and that they are familiar with the terms, provisions, and conditions contained in the Certificate of Incorporation and Bylaws of the Corporation. The Purchasers further warrant and represent to the Seller that they have inspected the Apartment and the building of which it forms a part, and that they are fully familiar with the condition of the Apartment and of the building. They agree that they are purchasing the Stock and acquiring the Lease for the Apartment in the Apartment's condition "AS IS," "WHERE IS" WITH ALL FAULTS on the date hereof and on the date of the Closing (subject to the provisions of Section 14, paragraph (b) hereof). The Purchasers further represent and warrant to the Seller that in the making and execution of this agreement they have not relied upon or been induced by any statements or representations other than those expressly set forth in this agreement, of any person in respect of the Stock, Lease, Apartment, Corporation, or the building, the income, expenses, profit or loss from the operation of the building by the Corporation, or any other matter affecting the building or this sale transaction which might be pertinent in considering the purchase of the Stock and Lease from the Seller or the execution of this agreement. The Purchasers expressly acknowledge that no such representations have been made except as expressly made herein, and they have relied only on such investigations, examinations and inspections, financial and otherwise, as they have chosen to make or have made.

13. No Broker or Finder's Fee. The Purchasers warrant and represent to the Seller that they have not negotiated for the purchase of the Stock and Lease with or through any person, firm, or corporation. The Purchasers agree that should any claim be made by anyone for a brokerage commission or finder's fee in connection with this sale transaction by reason of any affirmative act on their part, they will indemnify and hold the Seller free and harmless from any and all liability and expense of any nature in connection therewith.

14. Events of Termination. This agreement shall terminate forthwith and neither party shall have any rights against the other, except that the Seller shall return to Purchasers the down payment paid on the execution hereof, if any of the following conditions shall occur prior to the Closing:

(a) The Seller shall be unable, except for his willful default, to comply with each of paragraphs (a), (b), and (c) of Section 5 hereof;

(b) The Apartment shall be damaged or injured by fire prior to the Closing so as to render it untenable; or

(c) Prior to the Closing, the Corporation shall have elected to cancel and terminate the Lease under any option or privilege reserved or contained therein;

(d) Prior to the Closing, the Purchasers shall have complied with the provisions of the second sentence of the first

paragraph of Section 8 hereof but the Seller shall have been unable to obtain the issuance of the Corporation's written consent to the transfer of the Stock and assignment of the Lease to the Purchasers.

15. Default; Liquidated Damages. If the Purchasers shall fail to take title to the Lease and Stock on the Closing and pay to the Seller the balance of the purchase price and adjustments (if any) for any reason other than one of those set forth in Section 14 hereof, the down payment paid on the execution of this agreement, and all other sum or sums which may be paid by the Purchasers to the Seller prior to the Closing, may, at the Seller's option, be retained by the Seller as liquidated and agreed damages for the Purchasers' failure to comply with this agreement. In such event, neither party shall have any further rights against the other with respect to this agreement. The foregoing liquidated and agreed damage privilege shall not, however, unless so specifically exercised by the Seller, be exclusive of any other right or claim which the Seller shall have against the Purchasers because of any such default.

16. Joint and Several Liability. The Purchasers' liability under this agreement shall be both joint and several.

17. Time of the Essence. Time shall be of the essence of this agreement with respect to all of the terms hereof. Any delay, however, that shall occur in obtaining the Corporation's written consent to this sale transaction shall permit a reasonable postponement of the Closing until such written consent is obtained. If, however, it is ascertained that no written consent shall be forthcoming, the down payment shall be returned to the Purchasers.

18. Corporation Consent not Unreasonably Withheld. The Purchasers warrant and represent to the Seller that they know of no reason why the Corporation should not consent to their acquiring the Stock and Lease from the Seller.

19. Notices. Any notice which either party is required to or desires to give to the other party shall be deemed duly given when mailed by certified mail, return receipt requested, postage charges prepaid, enclosed in an envelope and addressed to the other party at the last address which shall have been designated in writing by the other party as its address for the purpose of receiving notices hereunder. The parties hereby designate for this purpose the following address which is set forth immediately below their name or names:

To Seller: Paul Richards, Executor
 c/o Good and Mann
 70 Pine Street,
 New York, New York

with a duplicate copy sent simultaneously to:

 Paul Richards
 115 Park Avenue
 Rye, New York

To Purchasers: Mr. and Mrs. Morris Monk
 c/o Louis Loeb, Esq.
 30 Wall Street
 New York, New York

20. Definition. Whenever the term "other party" is used in this agreement, it shall refer to the Seller or to the Purchasers, as the case may be.

21. Modification. This agreement may not be changed orally but only in writing signed by all the parties.

22. Transferability; Binding Effect. The Purchasers shall not assign this agreement or their rights hereunder. Subject to

the foregoing limitation, this agreement shall be binding upon and inure to the benefit of the parties, the successors and assigns of the Seller, and the heirs, executors, administrators, and personal representatives of the Purchasers.

23. Governing Law. This agreement shall be construed in accordance with and governed by the laws of the State of _____ [state] .

24. Entire Agreement. This agreement contains the entire understanding between the parties and supersedes all prior understandings and agreements between them respecting the within subject matter.

25. Non-waiver. No delay or failure by a party to exercise any right under this agreement, and no partial or single exercise of that right, shall constitute a waiver of that or any other right, unless otherwise expressly provided herein.

26. Headings. Headings in this agreement are for convenience only and shall not be used to interpret or construe its provisions.

27. Counterparts. This agreement may be executed in two or more counterparts, each of which shall be deemed an original but all of which together shall constitute one and the same instrument.

In witness whereof the parties hereto have signed this agreement as of the day and year first above written.

Paul Richards,

as Executor under the

L/W/T of Ralph Richards, Deceased,

and not individually.

_____ [witness]

_____ Morris
Monk

_____ Louis
Loeb



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Current Legal Forms for Real Estate

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Current Legal Forms for Real Estate
Chapter 20 REAL ESTATE ENTITIES
Part IV. Forms
G. COOPERATIVES

24-20 Current Legal Forms for Real Estate FORM 20.60

AUTHOR: by Stephen E. Pigott and Harold O. Maxfield, Jr.

FORM 20.60 Appointment of escrow agent--depository for funds of tenant-shareholders

COMMENT

Since the selling program in any cooperative venture begins almost as soon as the basic plans of the sponsor have been formalized, some protection must be afforded the prospective tenant-shareholders for funds deposited by them under their purchase agreements. This protection is generally supplied by the appointment of a bank as escrow agent. The letter of appointment contains alternative instructions for the disposition of those funds depending upon whether the cooperative plan is abandoned or becomes operative and whether the purchaser defaults in his own commitments.

FORM

Escrow Agreement

Re: 16 East 72nd Street

_____ [month] _____ [day], _____ [year]

Adams Trust Company

One Wall Street

New York, New York 10015

Gentlemen:

1. Agreement. This constitutes the Escrow Agreement described as Exhibit 1 of the Offering Statement--Plan of Cooperative Organization, (the "Plan"), under which 16 East 72nd Apartment Corporation (the "Apartment

Corporation") proposes to sell its shares and to issue proprietary leases allocated to the apartments in the building known as 16 East 72nd Street, New York, New York. In the Plan, Byrd, Inc., is referred to as the Sponsor and Douglas & Ives, Inc., is designated and referred to as the Agent or Selling Agent. In the Contract of Sale made by the Sponsor and the Apartment Corporation, (the "Contract"), and in the Plan, you are designated as the Escrow Agent.

This shall also constitute an agreement made for the benefit of and binding upon all purchasers of shares (singly the "Purchaser" and collectively the "Purchasers") who shall execute the form of Purchase Agreement annexed to said Plan as Schedule C thereof.

2. Deposit of checks. All payments by Purchasers required to be made to you pursuant to their Purchase Agreements will be made by checks drawn to your order and delivered to the Agent who will turn over the checks to you. You shall promptly deposit each such payment in a special account to be known as "16 East 72nd Street-Shares Purchase Account" (the "Shares Purchase Account") in the Plan, to be held in trust, in savings accounts (as stated below), and disbursed, including the interest earned thereon, only in accordance with the provisions of this Escrow Agreement. All references herein to "interest" shall include the interest earned and accrued upon all funds delivered to you hereunder.

3. Identification of Payments. Each payment the Agent turns over to you will be identified as to the Purchaser, his mailing address, the apartment purchased, the number of shares subscribed for by the Purchaser, the total amount payable therefor, and the amount of the payment.

4. Interest. You shall deposit promptly in savings accounts at any of your branches in New York City all payments received by you hereunder. The interest to be paid on all such savings accounts shall be at the rate or rates in effect for your savings depositors generally during the time of holding of the moneys delivered to you hereunder. You will notify us of the location of the branch office or offices in which such savings accounts will be maintained.

5. Segregation of Accounts. Each such savings account shall be identifiable in your records as containing the payments of the respective purchasers and the interest earned and accrued thereon.

6. Consummation or Abandonment of Plan. After the Plan becomes effective, or if the Plan shall be declared or deemed abandoned, you shall disburse the payments deposited as aforesaid and the interest earned and accrued thereon (subject to Paragraph 11 hereof) to the Sponsor, the Apartment Corporation, the Agent, the Purchasers, or otherwise, as hereinbelow prescribed, upon the receipt of the notices, requisitions, and certifications provided for.

7. Liability of Escrowee. You will be liable only for moneys you receive and do not disburse pursuant to the provisions of this Escrow Agreement. You may rely upon all written notices, requisitions, certifications, and instructions of the Sponsor, the Apartment Corporation or the Agent, in the disbursement of the moneys received by you hereunder, and you may require and receive from them, or other persons, additional certifications. You shall assume no liability as to the propriety, or legal sufficiency of any notice, requisition, certification, or instruction and you may, without liability, rely upon their sufficiency. You shall be protected in acting upon any written notice, requisition, certification, or instruction received by or which appears to be signed by the sponsor and the Apartment Corporation or such other persons.

8. Closing. After the Plan becomes effective you shall receive written notice thereof from the Sponsor and the Apartment Corporation jointly and, prior to title closing, written notice of the date when and place where title will be closed.

9. Accruals. If the Plan becomes effective, all interest earned and accrued on said deposited funds (except as provided in Paragraph 11 hereof) shall accrue for the Sponsor's account and benefit and shall be paid to it as its property, as hereinbelow provided, upon the consummation of the Plan (except as provided in paragraphs 12 and 13 hereof as to Purchasers in default).

10. Consummation and Payment. Upon the consummation of the Plan on the closing date (the "operative date"), provided that the Apartment Corporation and the Sponsor shall have given you prior written notice thereof, and upon their joint requisition, you shall pay to the Sponsor and/or its designee or designees and to the Apartment Corporation and the Agent, respectively, in accordance with said requisition, the balance of all moneys held by you in the Shares Purchase Account, together with all accrued interest (except as provided in Paragraph 11 hereof). All such payments shall be made in accordance with the direction contained in such written notice or requisition.

11. Fees. The fee for your services as Escrow Agent hereunder will be \$500 for the first year or any part thereof and, thereafter, _____ Dollars (\$_____) per annum, prorated on a quarter-annual basis. These fees may be retained from the aforesaid interest to be received and accrued by you and which shall become payable to the Sponsor as provided in Paragraphs 9 and 10 hereof. However, if all purchase moneys and accrued interest in the Shares Purchase Account shall be required to be refunded and paid by you to the Purchasers (and to the Sponsor) for any reason provided in this agreement, the Sponsor shall separately pay your fee for services hereunder plus your out-of-pocket expenses.

12. Abandonment or Termination. If you are notified in writing by either the Apartment Corporation or the Sponsor that the Plan has been declared or deemed abandoned or terminated, all moneys paid hereunder by the Purchasers, together with such earned and accrued interest, shall be returned severally to the Purchasers (except as provided in Paragraph 13 hereof). If, by _____ [month] _____ [day] , _____ [year] , the Plan shall not be consummated for any reason, and you are so notified in writing by the Sponsor or the Apartment Corporation, the Purchasers shall be entitled severally to refunds of their payments, with such earned and accrued interest. Not later than 45 days after receipt of such notification, you shall make such refunds to them to the extent of all such moneys in the Shares Purchase Account, except as provided in paragraph 13 hereof. Your checks for the refunds required to be made hereunder shall be delivered to the Agent for distribution to the several Purchasers and checks due to the Sponsor with respect to defaulted, and cancelled Purchase Agreements shall be delivered to the Sponsor, in accordance with written instructions from the Apartment Corporation or the Sponsor.

13. Cancellation of Purchase Agreements. If any Purchase Agreement shall be cancelled as the result of the Purchaser's default thereunder, or for any reason, you will receive a written certification of such fact and requisition from the Apartment Corporation or the Sponsor. You shall thereupon pay either (a) to the Sponsor the amount specified in such certification together with the interest earned and accrued thereon, or (b) to the Purchaser, without interest, the amount specified in said certification.

14. Hold Harmless. For all payments that you make as hereinbefore provided, you shall have full release, discharge, and acquittance and shall not be subject to claim or surcharge on the part of any persons beneficially interested therein. It is expressly understood and agreed by the parties to this agreement, and their respective successors and assigns, that you shall be free and harmless from any and all claims, disputes, or defenses which may arise between the parties hereto, their legal successors and assigns, or between the parties hereto and any Purchaser. The Sponsor hereby agrees to hold you harmless from and indemnify you for any liability or expense that you may incur by virtue of all such claims, disputes, or defenses. If any such claim is asserted against you, the Sponsor will either engage counsel of its choice, without cost or expense to you, or, at your election, engage counsel of your choice and shall pay reasonable fees to such counsel and the expenses, to defend you against such claim. If any claimant shall be successful in establishing his claim, the Sponsor will hold you harmless and make all payments required to be made by you pursuant to any final order or judgment that may be entered in a court of competent jurisdiction.

15. Miscellaneous. Your only duties and obligations are those specifically stated herein, and no other. You may consult with counsel and shall be fully protected with respect to any action taken or omitted by you in good faith on advice of counsel. You shall not be bound by any modification of this agreement unless it shall be in writing and signed by the other parties hereto and, if your duties as Escrow Agent hereunder are affected, unless you shall have given your prior

written consent thereto. If you shall be uncertain as to your duties or rights hereunder or shall receive instructions from either of the undersigned with respect to the moneys deposited hereunder which, in your opinion, are in conflict with any provision of this agreement, you shall be entitled to refrain from taking any action other than to keep safely the moneys deposited hereunder and the interest earned and accrued thereon, until you shall be directed otherwise in writing by the other parties hereto, or by final order or judgment of a court of competent jurisdiction.

Please signify your acceptance of the foregoing by signing the executed copy of this letter. Upon such signing, it will constitute an agreement between us.

Very truly yours,

16 EAST 72ND APARTMENT CORPORATION

(Apartment Corporation)

By: _____

[name and title]

The foregoing Escrow Agreement is accepted:

_____ *[month]* _____ *[day]* , _____ *[year]*

ADAMS TRUST COMPANY

(Escrow Agent)

By: _____

[name and title]



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Current Legal Forms for Real Estate
Chapter 20 REAL ESTATE ENTITIES
Part IV. Forms
G. COOPERATIVES

24-20 Current Legal Forms for Real Estate FORM 20.61

AUTHOR: by Stephen E. Pigott and Harold O. Maxfield, Jr.

FORM 20.61 Purchaser's note and pledge agreement

COMMENT

The purchaser of a cooperative apartment will frequently finance part of his investment by borrowing money against the security of his corporate shares and the accompanying proprietary lease. As security for the loan, the lender holds the proprietary lease and the borrower's shares in the cooperative.

The principal purpose of the collateral arrangement is to assure the lender that all of the tenant-shareholder's rights in his corporate shares and the accompanying lease will be foreclosed if a default occurs in the installment payments prescribed in the promissory note. The proceeds of any sale, in the event of any such default, are to be applied to the expenses of sale, to any remaining indebtedness on the note, to delinquencies due the cooperative corporation, and then to the equity of the tenant-shareholder. If a lending institution acquires the stock and proprietary lease of a tenant-stockholder by foreclosure, or by an instrument in lieu of foreclosure for tax purposes the lender is treated as a tenant-stockholder for up to three years from the date of acquisition, even if the lender may not occupy the apartment without the prior approval of the cooperative corporation. For discussion of federal tax consequences to tenant-stockholders of cooperative housing corporations, see TB § 20.10.

FORM

\$ _____ [city], _____ [state]

For value received, the undersigned (who, if two or more in number, shall be jointly and severally bound) promise(s) to pay to the order of Harris & Co., Inc. (the "Agent"), at its offices at 100 East 42d Street, New York, New York, or to such other payee and at such other place as the holder hereof shall designate by notice to the undersigned in writing, the sum of _____ Dollars (\$ _____), together with interest at _____ percent (_____ %) per annum, payable in _____ [number] equal monthly payments of _____ Dollars (\$ _____) (which includes interest at the rate of _____ percent (_____ %) per annum on the amount advanced) commencing on the _____ [day] day of _____ [month] , _____ [year] and an equal amount on the same date of each month thereafter until this Note is paid in full.

This Note may be prepaid, in whole or in part, but without penalty or other consideration, on any monthly payment date upon not less than ten days' prior written notice.

As collateral security for the payment of this Note, the undersigned has deposited with the Agent the following:

A. Certificate No. _____ of Skyline Apartments, Inc., for _____ (_____) shares, duly endorsed in blank.

B. Proprietary Lease covering such shares for Apartment _____ in the apartment building known as The Skyline, at 500 East 68th Street, New York, New York, together with the assignment of such Proprietary Lease duly executed by the undersigned.

If any of the following events shall occur, then at any time thereafter this Note shall at the holder's option become immediately due and payable without demand or notice: any default in the payment of any sum due under this Note; and default in the payment of the maintenance charges, rental, or assessment under the Proprietary Lease; default by the undersigned in performing any term, covenant, condition, or agreement that they are required to perform under the Proprietary Lease or this Note; the attempt of the undersigned to exercise the privilege to cancel the Proprietary Lease in any manner whatsoever; the insolvency or failure in business (including material impairment of ability to meet financial obligations) by any maker, endorser, or guarantor hereof; the commission of any act of bankruptcy by, or the entry of any judgment against, any maker, endorser, or guarantor hereof; or the occurrence with respect to any maker, endorser, or guarantor hereof of any event mentioned in *Section 151 of the New York Debtor and Creditor Law*. The holder of this Note shall have full power and authority to give notice of default to Skyline Apartments, Inc., and to cause the collateral securing this Note to be sold, assigned, and delivered at any brokers' board, or at public or private sale, either for cash or upon credit or for future delivery, at the holder's option, provided that the holder gives five days' written notice to the undersigned and the apartment corporation. All demand, advertisement, and publication of notice of sale is hereby waived. If such collateral is disposed of at private sale, the holder or any subsequent holder hereof is hereby relieved from all liability or claim for inadequacy of price. At any such sale, whether public or private, the holder may itself purchase the whole or any part of the collateral sold, free from any right of redemption on the part of the undersigned, which is hereby waived and released.

The number of shares, the name and state of incorporation of the issuer, and the number of the Apartment leased under the Proprietary Lease shall, for all purposes, be sufficient identification of the property to be sold.

In the event of any such sale on credit or for future delivery, the holder hereof may retain all rights to the property sold until the entire sale price is paid, but the holder shall incur no liability if the purchaser fails to take up and pay for the property sold.

In the event of any such failure, the property may again be sold. In the event of any sale, the proceeds thereof shall be applied: first, to the payment of all costs and expenses of every kind of collection, sale, and delivery of the collateral property sold, and all expenses or payments incidental thereto; second, to the payment of the entire remaining

indebtedness evidenced by this Note, or of the principal or of the interest thereof, whether or not then due, in such proportions and in such sequence or order as the holder shall in its sole discretion determine; third, to the payment of any indebtedness owing by the undersigned to Skyline Apartments, Inc., the cooperative corporation, to the date of such sale; and fourth, the over-plus, if any, to be paid to the undersigned who, if the proceeds are insufficient to pay such obligations, will remain liable for any deficiency. All of the foregoing shall be without prejudice to the rights of the holder hereof against any of the undersigned with respect to any and all amounts which may be or remain unpaid on this Note.

Each of the undersigned hereby waives all notices and demands in connection with the delivery, acceptance, performance, default, or enforcement of this Note and hereby consents to any and all extensions of time, renewals, releases, or substitutions of collateral, waivers, or modifications (expressly including but not limited to the issuance, after default by the undersigned, of new share certificates and new Proprietary Leases to a purchaser upon any such sale or resale) that may be consented to or granted by the holder to any party hereto. No delay by the holder hereof in exercising any power or right hereunder shall operate as a waiver of any power or right; nor shall any single or partial exercise of any right or power preclude other or further exercise thereof, or the exercise of any other power or right hereunder or otherwise. No waiver whatever or modification of the terms hereof shall be valid unless in writing signed by the holder of this Note and only to the extent therein set forth. The provisions hereof shall apply to and govern any and all substitutes or additional collateral given to secure this Note.

This Note is being delivered to the Agent as part payment for the shares and Proprietary Lease above described. All payments due hereunder shall be deemed additional rent under such lease, and if requested by the holder hereof, the Apartment Corporation shall avail itself of any remedies provided for in such lease in event of default, including dispossession. The undersigned, however, specifically agrees that if requested by the holder hereof, they will voluntarily surrender possession of the apartment. It is further understood that Harris & Co., Inc., the Agent, is accepting this Note as Agent, and that the same may be transferred to any third party, including Ace Realty Corp., as part of the consideration for the transfer of the land and building known as 500 East 68th Street, New York, New York. It is also anticipated that the holder hereof will discount this Note with a bank or other lender.

The holder of this Note may, at its sole discretion, freely assign or transfer this Note and deliver all or any of the property then held as collateral security therefor to the transferee(s), who shall thereupon become vested with all the powers and rights above given to the holder in respect thereto.

The holder and any mesne transferee shall thereafter be forever relieved and fully discharged from any liability or responsibility in relation thereto. The holder of this Note may, without further notice: (a) date this Note as of the date when the loan is made; (b) fill in any blank space according to the terms upon which it grants the loan relative thereto; (c) cause or permit one or more comakers, endorsers, or guarantors to be added, released, or withdrawn as parties hereto, either before or after the making of the loan; and (d) return the Note when paid to any of the signers thereof.

Any notice given hereunder shall be deemed given upon deposit thereof, securely enclosed in a postpaid wrapper in any post-office box regularly maintained by the United States government, and addressed to the undersigned at 500 East 68th Street, New York, New York.

[borrower]

[address]

[*co-maker*]

[*address*]



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Current Legal Forms for Real Estate

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Current Legal Forms for Real Estate
 Chapter 20 REAL ESTATE ENTITIES
 Part IV. Forms
 G. COOPERATIVES

24-20 Current Legal Forms for Real Estate FORM 20.62

AUTHOR: by Stephen E. Pigott and Harold O. Maxfield, Jr.

FORM 20.62 Proprietary lease

COMMENT

A distinctive feature of a proprietary lease for a cooperative apartment is that the lessee's "rent" consists of a proportionate share of the cash requirements as determined annually by the board of directors. The proportionate share of each lessee depends upon his percentage of ownership of the total outstanding shares of the cooperative corporation. Most proprietary leases extend for a long term, usually between 30 and 50 years. In this form the lessee may cancel the lease as of _____ [month] _____ [day] of any year after the second year by giving notice on or before the preceding _____ [month] _____ [day].

The tenant's responsibility for repairs is usually broader under proprietary leases than under other types of leases. Thus, the lessee is responsible under this lease for the maintenance or replacement in his apartment of plumbing fixtures, lighting fixtures, refrigerators, and ranges. Another unique feature of the proprietary lease is that its terms are virtually the same for all tenants and can be altered only by a vote of the shareholders at a meeting called for this purpose or by the written consent of at least two-thirds of the shareholders owning at least two-thirds of the corporation's stock. Subleasing is permitted only with the consent of the board of directors, except in the case of those tenants who are designated by the sponsor for the purpose of putting the plan into operation.

Except for the above features, this lease is basically similar to leases for the conventional type of apartment house.

FORM

INDENTURE OF LEASE, made the _____ [month] _____ [day] , _____ [year] , by and between SKYLINE APARTMENTS, INC., a corporation organized under the laws of the State of New York, (the "Lessor"), and _____ (the "Lessee").

WHEREAS, the Lessor is the owner of the land and the building erected thereon in the Borough of Manhattan, City of New York, known as The Skyline and by the street number 500 East 68th Street (the "building"); and

WHEREAS, the Lessor has leased or proposes to lease the apartments in the building to the several owners of its common shares by instruments known as proprietary leases; and Whereas the Lessee is the owner of _____ (_____) of the common shares of the Lessor, which have been allocated to the apartment;

NOW, THEREFORE, in consideration of the premises and of the rents, covenants, and agreements hereinafter provided and contained, the Lessor hereby leases to the Lessee, subject to the terms and conditions hereinafter expressed, and the Lessee hereby hires and takes from the Lessor, all that certain space on the _____ (_____) floor of the building, known as apartment _____ (the "apartment"),

To Have and To Hold the apartment, with the appurtenances, unto the Lessee and the executors, administrators, legal representatives, and authorized assigns of the Lessee, upon the terms and conditions herein set forth, from _____ [month] _____ [day] , _____ [year] , until the _____ [month] _____ [day] (unless the term shall sooner expire as hereinafter in this lease provided), at a rent for each year or portion of year during such term equal to the Lessee's proportionate share as hereinafter provided of the aggregate amount of the cash requirements of the Lessor, as hereinafter defined, for such year or portion of year, together with additional rent as hereinafter provided.

If at the time the Lessee executes this lease the date of the commencement of the term has not been inserted herein, then the Lessee hereby authorizes the Lessor to insert such date, which shall be the same date that title to the premises is transferred to the Lessor.

The cash requirements above referred to for each year or portion of year are hereby defined and shall be deemed to be such aggregate sum as the Lessor's Board of Directors from time to time, by a resolution or resolutions adopted during such year or portion of year or the preceding year, shall determine, in its judgment, is to be paid by all the lessees under proprietary leases then in force (after deducting all estimated rents or income to be received during such year other than rents under proprietary leases) on account of the Lessor's estimated expenses and out-lays to the close of such year, growing out of or connected with the ownership, maintenance, and operation of such land and building. Such sum may include among other things taxes, assessments, water rates, insurance premiums, operating expenses, legal and accounting fees, management fees, commissions, employees' gratuity fund, alterations, replacements and repairs, expenses and liabilities incurred by the Lessor under or by reason of this or other leases, interest on mortgage or other indebtedness, mortgage amortization payments, the payment of any other liens or charges, the payment of any deficit remaining from a previous period, the creation of a reasonable contingency or other reserve or surplus fund or capital contribution, and expenses for other corporate purposes.

The Lessor's Board of Directors may, from time to time, by resolution or resolutions duly adopted up to the close of the year for which such cash requirements have been so fixed or determined, increase or diminish the amount previously fixed or determined for such year. The Board of Directors may include in the cash requirements for any year all liabilities or items of expense which accrued or became payable in a previous year, or which might have been included in the cash requirements for a previous year but were not included therein, and also all sums which it may deem

necessary or prudent to provide as a reserve against liabilities or expenses then accrued or thereafter to accrue although not payable in that year.

The rent payable by the Lessee in and for each year or portion of year of such term shall be a sum (within the limits and on the conditions hereinabove provided) bearing to the aggregate amount of such cash requirements for such year or portion of year, determined as herein provided, the same ratio as that which the number of shares of the Lessor, owned by the Lessee at the time of the execution hereof as stated in the recitals of this proprietary lease, bears to the aggregate of the shares similarly specified in all the proprietary leases in effect at the time of the fixing and determination of such cash requirements. Such rent, together with any additional rent accruing under this lease, shall be payable monthly in advance or in such payments or installments as the Lessor's Board of Directors by resolution shall require, and at such times as such resolution shall provide. The Lessor's Board of Directors shall have discretionary power to prescribe the manner of maintaining and operating the building, and to determine the Lessor's cash requirements to be paid as herein provided by the lessees under proprietary leases. Every such determination by the Board of Directors, within the bounds of this agreement of lease, shall be final and conclusive as to all lessees. All expenditures made by the Lessor's officers or managing agent, under the direction or with the approval of the Lessor's Board of Directors, within the bounds of this agreement of lease, shall, as against the lessees, be deemed necessarily and properly made for such purposes.

The power and authority to determine and establish the amount of and to require payment of the rent above provided for shall be possessed only by the Board of Directors, as elected by the Lessor's shareholders, and shall not pass to or be exercised by:

(a) any creditor, receiver, or trustee of the Lessor or any of their representatives, except to the extent of actual cash requirements for operating the building and the payment of current real estate taxes and current interest and amortization on any mortgage that may then be a lien on the premises; or

(b) any Board of Directors elected by any such creditor, receiver, or trustee or by any of their representatives, except to the extent of actual cash requirements for operating the building and the payment of current real estate taxes and current interest and amortization on any mortgage that may then be a lien on the premises.

ARTICLE I

The Lessor hereby covenants with the Lessee, as follows:

1. Repairs. The Lessor shall keep in good repair the foundations, sidewalks, walls (except interior surfaces of all walls of apartments), supports, beams, roofs, terraces, gutters, fences, cellars, chimneys, entrances and street and court doorways, main halls, main stairways, windows, fire escapes, elevators, pumps and tanks, and all main and principal pipes for carrying water, gas, or steam through the building, and the main drain pipes and electrical conduits, together with all plumbing, heating, cooling, and other apparatus intended for the general service of the building, except those portions of any of the foregoing which it is the Lessee's duty to maintain and keep in good repair as provided in Paragraph 7 of Article II hereof and subject to the provisions of Paragraph 16 of Article II hereof. The Lessee shall give the Lessor prompt notice in writing of any accident or defect known to the Lessee and requiring repairs to be made. Subject to the foregoing limitations all such repairs shall be at the Lessor's expense. The Lessee, however, shall bear all expenses for such repairs that have been rendered necessary by the act, neglect, carelessness, or improper use of equipment either by Lessee or by any of Lessee's family, guests, employees, or subtenants.

2. Maintenance. The Lessor shall maintain and manage the building as a first-class apartment building, keep the elevators and the public halls, cellars, and stairways clean and properly lighted and heated, provide unattended passenger elevator service and the number of employees requisite in the judgment of the Board of Directors for the care and service of the building, and, without extra cost to the Lessee, provide the apartment with a proper and sufficient

supply of hot and cold water. The building will have a central heating and cooling system, and the unit fans for the circulation of warm or cooled air will be connected to the Lessee's meter and paid for by the Lessee. The replacement of filters in the heating and cooling units shall also be at the Lessee's expense.

The covenants by the Lessor herein contained are subject, however, to the discretionary power of its Board of Directors to prescribe the manner of maintaining and operating the building and to determine the cash requirements of the Lessor, as hereinabove stated. Such covenants are subject to the further proviso that there shall be no diminution or abatement of rent or other compensation accruing to the Lessor for its failure to perform the same or for interruption or curtailment of service, when such failure, interruption, or curtailment shall be due to accident or to alterations or repairs desirable or necessary to be made, or to inability or difficulty in securing supplies or labor, or to some other event not caused by the Lessor's gross negligence. All of the Lessor's covenants contained in this instrument are also subject to the provisions of Paragraph 16 of Article II hereof.

3. Damage to Building. If the building shall be partly damaged by fire or other cause, it shall be repaired as speedily as is reasonably possible, at the Lessor's expense, so as to conform substantially to the plans and specifications under which the building was completed. If the damage shall be so extensive as to render the apartment untenable, the rent hereunder shall cease until the apartment shall again be rendered tenable. If the building shall be totally destroyed by fire or otherwise, the rent shall be paid up to the time of such destruction, and thereupon this lease and all rights and obligations of the parties hereunder, and the tenancy hereby created shall wholly cease and expire. If, however, the Lessor or insurer shall elect to rebuild the building, this lease shall, at the option of the Lessee exercised within 30 days after the Lessor's or insurer's notice of election to rebuild, be reinstated at such time as the apartment may again be ready for occupancy.

4. Books. The Lessor shall keep full and correct books of account at the office of the managing agent or at such other place as the Board of Directors may from time to time determine. Such books shall be open during all reasonable hours to inspection by the Lessee or his representative.

5. Accompanying Shares. In every proprietary lease heretofore executed by the Lessor there has been specified, and in every proprietary lease hereafter executed by it there will be specified, the number of its shares issued therewith. Such number, in relation to the aggregate of all numbers of shares similarly specified in all the proprietary leases at the time in force, shall constitute the basis for fixing, as hereinbefore provided, the proportionate share of the aggregate amount of the Lessor's cash requirements, as hereinbefore defined, which shall be payable as rent by the Lessee. If after the fixing of the amounts payable as rent by the lessees under proprietary leases for any period of time, one or more additional proprietary leases are made, thus increasing the aggregate number of shares specified in all proprietary leases, the rent to be paid under such additional lease or leases, unless and until the Board of Directors shall otherwise fix the rent to be paid under all proprietary leases, shall be at the same rate per share specified in such additional lease or leases as applied to the shares specified in all other proprietary leases in effect at the time of the fixing and determination of such cash requirements. The rent payable for such period of time by lessees under such other proprietary leases shall not be modified or affected by any increase in the aggregate number of shares specified in all proprietary leases.

6. Changes in Leases. All proprietary leases of apartments in the building hereafter executed shall be in the form of this lease except with respect to statements as to the number of shares owned by the Lessee and his proposed use and occupancy. The Lessor will not make or consent to any change or alteration in the terms or conditions of any proprietary lease which the Lessor shall have executed (as distinct from the house rules) unless such change or alteration shall be made pursuant to the affirmative vote taken at a meeting called for that purpose, or written consent signed, by lessees owning at least two-thirds (2/3) in amount of the Lessor's shares then owned by all lessees under proprietary leases then in force, and being at least two-thirds in number of such lessees.

7. Penthouses, Balconies, and Terraces. A lessee of an apartment embracing a penthouse, balcony, or terrace or a portion thereof shall have and enjoy the exclusive use of the balcony or terrace (but not the roof above the penthouse)

appurtenant to such apartment as shown on the building plan, subject to all the applicable provisions of this lease and to the use of any penthouse roof by the Lessor to enable it to fulfill its obligations hereunder. The Lessor, on behalf of itself or other lessees, may erect on the roof of a penthouse radio or television aërials and antennas for its use and the use of the other lessees in the building and shall have the right of access thereto for such installations and for the repair thereof. The Lessor shall have no duty to keep such roof clean or free from ice or snow and this shall be the Lessee's obligation. The Lessee shall not install any walls, enclosures, awnings, or planting on any penthouse, balcony, or terrace, except with the prior written approval of the Lessor or its agent.

8. Quiet Enjoyment. The Lessee, upon paying the rent and performing the covenants and complying with the conditions that the Lessee is required to perform, as herein set forth, shall, at all times during the term hereby granted, quietly have, hold, and enjoy the apartment without any let, suit, trouble, or hindrance from the Lessor.

ARTICLE II

The Lessee hereby covenants with the Lessor, as follows:

1. Payment of Rent. The Lessee will pay to the Lessor, or to its managing agent, the rent upon the terms, at the times, and in the manner herein provided, without any deduction on account of any set-off or claim which the Lessee may have against the Lessor. If the Lessee shall fail to pay any installment of rent within one month from the time when it becomes due, the Lessee shall pay interest thereon at the rate of _____ percent (_____%) per annum from the due date of the installment to the date of the payment thereof, and such interest shall be deemed additional rent hereunder.

2. Default by Lessee. If the Lessor shall resume possession of the apartment, either by summary proceedings, action of ejectment, or otherwise, because of the Lessee's default in the payment of any rent or any part of the same, on or the expiration of the term pursuant to a notice given as provided in Article III hereof upon the happening of any event specified in subparagraphs (a), (b), (c), (d), (e), and (g) of Paragraph 1 of Article III, the Lessor may, at its option, either (1) relet the apartment for its own account, or (2) from time to time relet the apartment as the agent of or for the account of the Lessee. If the Lessor relets the apartment under its option in (2), it shall, after reimbursing itself for its reasonable expenses in connection therewith, including a reasonable amount for decorations, alterations, and repairs in and to the apartment, apply the remaining proceeds of such reletting to the payment of any and all sums then due to it from the Lessee and which would thereafter have become due from the Lessee under the provisions of this lease if the Lessor had not so resumed possession, accounting to the Lessee at the expiration of each of the several terms of such reletting for any surplus. If, at any time, or from time to time before the expiration of the term originally demised hereunder, there shall be a deficiency between the proceeds of such reletting and such sums as would have become due hereunder, the Lessee shall pay such deficiency upon demand. If the Lessee shall at any time sublet the apartment and shall default for a period of one month in the payment of any rent, the Lessor may, at its option, so long as such default shall continue, demand and receive from any subtenant of the Lessee occupying the apartment the rent due or becoming due from such subtenant to the Lessee, up to an amount sufficient to pay all sums due from the Lessee to the Lessor. Any payment of such rent to the Lessor shall be sufficient payment and discharge of such subtenant as between the subtenant and the Lessee, to the extent of the amount so paid. Any such demand or acceptance of rent from any subtenant, or from any assignee hereof, shall not be deemed the Lessee's consent or approval of any sublease or assignment.

3. Failure to Fix Rent. The failure of the Lessor's Board of Directors, before the expiration of any year of such term, to fix the rent hereunder for that or the next year, shall not be deemed a waiver or modification in any respect of the covenants or provisions of this lease, or a release of the Lessee from the obligation to pay the rent or any installment thereof for that or any subsequent year, provided such rent shall ultimately be fixed.

4. House Rules. The Lessor may from time to time establish such reasonable house rules as its Board of Directors may deem necessary for the management and control of the building, and may also from time to time alter, amend, and

repeal such rules. This lease shall be in all respects subject to such rules, which, when a copy thereof has been furnished to the Lessee, shall be taken to be part hereof. The Lessee shall obey all such rules and see that they are faithfully observed by his family, guests, employees, and subtenants. All such rules shall apply to and be binding upon all of the tenants of the building, whether shareholders of the Lessor or not, but the Lessor shall not be responsible to the Lessee for the nonobservance or violation of such rules by any other lessee or person other than the Lessor's employees. Without limiting the generality of the foregoing, such house rules may regulate and control the use of any roof or terrace appurtenant to the apartment.

5. Use of Premises. The Lessee shall not occupy or use the apartment, or permit the same or any part thereof to be occupied or used, for any purpose other than as a private dwelling apartment for the Lessee, and the Lessee's family and servants, except such portions of the building as the Lessor's Board of Directors may allocate as professional offices or servants' rooms. The Lessee shall not permit or suffer anything to be done or kept in the apartment which will increase the rate of fire insurance on the building or its contents, or which will interfere with the rights of other tenants or annoy them by unreasonable noises or otherwise, or which will obstruct the building's public halls or stairways. The Lessee shall comply with all the requirements of the Board of Health and other governmental authorities and with all laws, ordinances, rules, and regulations with respect to the occupancy or use of the apartment, and will not do anything or permit anything to be done which might increase the rate of fire insurance on the building, its contents or the individual apartments. If, however, by reason of the occupancy or use of the apartment by the Lessee, the rate of fire insurance on the building, its contents or the individual apartments shall be increased, the Lessee shall become personally liable to the Lessor or other lessees for the additional insurance premiums or payments caused by Lessee's use of the apartment.

6. Subletting and Assignment. The Lessee may sublet the apartment for any term to any person or persons subject to the Lessor's written consent to the sublessee and the terms of the sublease, authorized by a resolution of the Board of Directors, or signed by a majority of the directors, or by lessees owning of record at least a majority of the Lessor's capital stock accompanying proprietary leases then in force. Whenever the Lessee applies to the Lessor for a consent to a subletting, the Lessee may be required to deliver to the Lessor a copy of the sublease to which consent is requested. The Lessor reserves the right to adopt rules and regulations with respect to subletting.

Except as provided in Article IV of this lease, the Lessee shall not assign this lease, or any interest therein. No such assignment shall take effect as against the Lessor for any purpose, unless and until all of the following requirements have been complied with and satisfied:

(a) An instrument of assignment containing a covenant by the assignee to perform and comply with all the covenants and conditions of this lease to be performed or complied with by the Lessee on and after the effective date of such assignment must be executed and acknowledged by the assignee and delivered to the Lessor.

(b) All shares of the Lessor accompanying this lease must be transferred to the assignee.

(c) All sums due from the Lessee, together with a sum to be fixed by the Lessor's Board of Directors to cover the Lessor's reasonable legal and other expenses in connection with such assignment and transfer of the shares, must be paid to the Lessor.

(d) A written consent to such assignment, authorized by a resolution of the Board of Directors, or signed by a majority of the directors, or by lessees owning of record at least a majority of the Lessor's shares accompanying proprietary leases then in force, must be delivered to the Lessor. If the Lessee shall die during the term of this lease, the Board of Directors or the other lessees owning the Lessor's shares shall not unreasonably withhold the consent provided for in this paragraph to any assignment or transfer of the shares and the lease which the Lessee may make in his or her last will and testament, or through the acts of his or her administrator or executor, to a financially responsible member of his immediate family; provided, however, that the other conditions of this Paragraph 6 are complied with.

Whenever the Lessee shall, under the provisions of this lease, be permitted to assign and shall so assign the same, and the assignee shall deliver to the Lessor an instrument assuming all of the assignor's unfulfilled obligations hereunder, the assignor shall have no further liability on any covenant of this lease to be thereafter performed. Upon the making of any assignment of this lease, as herein provided and permitted, the same shall, at the Lessor's option, be surrendered. In such case, the Lessor and the assignee shall enter into a new lease, in the same form, for the remainder of the term of this lease.

No executor, administrator, personal representative, or successor of the Lessee, or trustee, or receiver of his property, or anyone to whom his interest hereunder shall pass by law, may assign this lease, or sublet the apartment, or any part thereof, except upon compliance with the requirements of this Paragraph 6. The character of and restriction upon the occupancy of the apartment, and upon assignment of this lease, as hereinbefore expressed, restricted, and limited, are an especial consideration and inducement for the granting of this lease by the Lessor to the Lessee. If the Lessee shall violate any restriction or covenant herein contained in respect to either subletting or assignment, this lease may be terminated and shall expire at the Lessor's option as hereinafter provided. In such case, the Lessor may cease performance of its covenants contained in Article I of this lease, and may restrain and prevent the occupancy of the apartment by any one other than the Lessee.

Notwithstanding the above, if an individual supplied by the Sponsor to purchase unsold shares pursuant to the Lessor's plan of organization is the Lessee under this lease then the apartment may be sublet or this lease and the accompanying shares assigned without requiring the Lessor's written consent, as provided herein, except that the sublessee or assignee shall be approved by the building's then managing agent. The foregoing exception shall apply only to an assignment by individuals supplied by the Sponsor and shall not apply to any subsequent assignment.

7. Interior Repairs. The Lessee shall keep the interior of the apartment in good repair, and the Lessor shall not be held answerable for any repairs in or to the same except as hereinbefore specifically provided. If the Lessee shall refuse or neglect, during ten days after the Lessor's written notice, to make such repairs or to restore the apartment to good condition, the Lessor may do so. The Lessor may, by its officers or authorized agents, enter the apartment for that purpose, and collect the cost of such repairs or restoration as additional rent for the apartment. In addition to decorating and keeping the interior of the apartment in good repair, the Lessee shall maintain or replace all its plumbing fixtures, lighting fixtures, refrigerators, and ranges.

8. Alterations. The Lessee shall not, without first obtaining the Lessor's written consent, make in the apartment, or on any penthouse, balcony, or terrace appurtenant thereto, any structural alteration or any alteration of the water, gas, or steam pipes, electrical conduits or plumbing, or, except as hereinafter authorized, remove any additions, improvements, or fixtures from the apartment. If the Lessee shall have heretofore or shall hereafter place in the apartment at his own expense any additions, improvements, or fixtures, such as mantels, lighting fixtures, refrigerators, ranges, woodwork, panelling, ceilings, doors, or decorations, which can be removed without structural alterations, then the Lessee may, prior to the termination of this lease, remove the same at his own expense, provided that: (a) the Lessee at the time of such removal shall not be in default in the payment of rent or in the performance of any other provision or condition of this lease; (b) upon any such removal, the Lessee shall give written notice thereof in advance to the Lessor; (c) the Lessee shall pay the cost of any such removal and shall repair any damage resulting therefrom; and (d) the Lessee shall replace and reinstall at his own expense any equipment that was in the apartment at the beginning of the term or shall replace and reinstall substitutes of a kind and quality customary in buildings of this type and satisfactory to the Lessor.

On the expiration of the term hereby granted, or upon a sooner termination of this lease, the Lessee shall surrender to the Lessor possession of the apartment with all additions, improvements, and fixtures then included therein except as hereinabove provided.

9. Lease Subordinate to Mortgages. This lease is and shall be subject and subordinate to all mortgages now a lien upon the land and building and to any and all extensions, modifications, renewals, and replacements thereof, and shall be

subject and subordinate to the lien of any other mortgage or mortgages which shall at any time be placed on the land and building. The Lessee shall at any time, and from time to time, on demand, execute all instruments that may be required by any mortgagee, or by the Lessor, for the purpose of more formally subjecting this lease to the lien of any such mortgage or mortgages. Each of the Lessor's duly elected officers, for the time being, is hereby irrevocably appointed the Lessee's attorney-in-fact and agent to execute the same upon such demand. The Lessee hereby ratifies any such instrument hereafter executed by virtue of the power of attorney hereby given.

10. Mechanics' Liens. In case a notice of mechanic's lien shall be filed against the building, for, or purporting to be for, labor or material alleged to have been furnished or delivered at the building or the apartment to or for the Lessee, or anyone claiming under him, the Lessee shall forthwith cause such lien to be discharged by payment, bonding, or otherwise. If the Lessee shall fail to cause such lien to be discharged within 20 days after the filing of such notice, the Lessor may cause such lien to be discharged by payment, bonding, or otherwise, without investigation as to the validity thereof or of any offsets or defenses thereto. The Lessor may collect, as additional rent, all amounts so paid and all costs and expenses paid or incurred in connection therewith, including reasonable attorneys' fees and disbursements, together with interest thereon from the time or times of payment.

11. Cooperation. The Lessee shall always in good faith endeavor to observe and promote the cooperative purposes for the accomplishment of which the Lessor was incorporated.

12. Right of Entry. The Lessor and its agents shall be permitted to visit and examine the apartment at any reasonable hour of the day, and workmen may enter at any time, when authorized by the Lessor or its agents to make or facilitate repairs in any part of the building and to remove such portions of the walls, floors, and ceilings of the apartment as may be required for the purpose of making such repairs. The Lessor, however, shall at its own cost and expense thereafter restore the premises to their proper and usual condition. If the Lessee shall not be personally present to open and permit an entry into the apartment, at any time when for any reason an entry therein shall be necessary or permissible hereunder, the Lessor or its agents may forcibly enter the apartment without rendering any of them liable to any claim or cause of action for damages by reason thereof (if during such entry the Lessor shall accord reasonable care to the Lessee's property), and without in any manner affecting the obligations and covenants of this lease. The right and authority hereby reserved do not impose, nor does the Lessor assume by reason thereof, any responsibility or liability whatsoever for the care or supervision of the apartment, or any of the pipes, fixtures, appliances, or appurtenances therein contained or therewith in any manner connected, except as may be herein specifically provided.

13. Waivers. The Lessor's failure to insist, in any one or more instances, upon a strict performance of any term, covenant, condition, or agreement of this lease, or to exercise any right or option herein contained, or to serve any notice, or to institute any action or summary proceeding, or otherwise to act as though this lease had expired pursuant to the provisions of Article III hereof, shall not be construed as a waiver, or a relinquishment for the future, of such covenant or option or right thereafter to serve notice and to have this lease expire under the provisions of Article III, but such covenant or option or right shall continue and remain in full force and effect. The Lessor's receipt of rent, with knowledge of the breach of any covenant hereof, shall not be deemed a waiver of such breach. No waiver by the Lessor of any provision hereof shall be deemed to have been made unless expressed in writing and signed by one of its officers pursuant to authority contained in a resolution of its Board of Directors; and even though a consent to an assignment hereof, or to any subletting, be given, no further assignment or subletting shall be made without express consent in writing given as hereinbefore provided.

14. Notices. Any notice by the Lessor to the Lessee shall be deemed to be duly given, and any demand by the Lessor upon the Lessee shall be deemed to have been duly made, if enclosed in a postpaid envelope addressed to the Lessee at 500 East 68th Street, New York, New York, or such other address as the Lessee may designate in writing, and mailed by registered mail in any general or branch post office. Any notice by the Lessee to the Lessor shall be deemed to be duly given, and any demand by the Lessee upon the Lessor shall be deemed to have been duly made, if enclosed in a postpaid envelope, addressed to the Lessor at 500 East 68th Street, New York, New York, or such other address as the

Lessor may designate in writing.

15. Attorneys' fees. If the Lessee shall at any time be in default hereunder, or if the Lessor shall institute an action or summary proceeding against the Lessee based upon such default, the Lessee will reimburse the Lessor for the reasonable expense of attorneys' fees and disbursements thereby incurred by the Lessor, and the Lessor shall have the right to collect the same as additional rent.

16. Lessor's Liabilities. The Lessor shall not be liable for any failure of heat, water supply, air conditioning, electric current, telephone, or elevator service, or other service to be supplied by it hereunder, or for injury or damage to person or property caused by the elements or by another tenant or person in the building, or resulting from steam, gas, electricity, water, rain, or snow which may leak or flow from outside or from any part of the building, or from any of its pipes, drains, conduits, radiators, boilers, tanks, appliances, or equipment, or from any other place, unless caused or due to its negligence. The Lessor shall not be liable for interference with light or other incorporeal hereditaments by anybody other than itself. The Lessor or its agent shall not be responsible for any damage to any automobile or other vehicle left in the care of any of its employees by the Lessee, and the Lessee shall hold the Lessor or its agent harmless from any liability arising from any injury to person or property caused by or with such automobile or other vehicle while in such employee's care. The Lessor or its agent shall not be responsible for any package or article left with or entrusted to any employee of the Lessor, or for the loss of any property within or without the apartment by theft or otherwise. If the Lessor shall, before, during, or after the term of this lease, furnish to the Lessee any storage space, use of laundry, or any other facility outside of the apartment, the same shall be furnished gratuitously by the Lessor. If any person shall use the same, such use shall be entirely at the risk of such person, and the Lessor or its agent shall not be liable for any loss of property therein, for any damage or injury whatever to person or property therein or in connection therewith. Storage space may only be used for the storage of empty trunks and bags. No diminution or abatement of rent, or other compensation, shall be claimed or allowed for inconvenience or discomfort arising from the making of repairs or improvements to the building or to its appliances.

ARTICLE III

It is hereby mutually agreed, as follows:

1. Expiration of Lease. If upon, or at any time after, the happening of any event mentioned in subparagraphs (a) to (h) inclusive of this Paragraph 1, the Lessor shall give to the Lessee a notice stating that the term hereof will expire on a date at least ten days thereafter, this lease shall expire on the date so fixed in such notice, and all right, title, and interest of the Lessee hereunder shall wholly cease and expire, it being the intention of the parties hereto to create hereby a conditional limitation. Thereupon, the Lessor shall have the right to reenter the apartment and to remove all persons and personal property therefrom, either by summary dispossession proceedings, or by any suitable action or proceeding at law or in equity, or by force or otherwise, and to repossess the apartment in its former estate as if this lease had not been made. No liability whatsoever shall attach to the Lessor by reason of the exercise of the right of reentry, repossession, and removal herein granted and reserved.

(a) If at any time during the term of this lease the Lessee shall cease to be the owner of all of the shares which are hereinbefore stated to be owned by him and allocated to this lease, or if this lease shall pass or be assigned to anyone who is not then the owner of all of such shares.

(b) If: (1) the Lessee shall be declared a bankrupt under United States law or adjudicated insolvent or take the benefit of any insolvency act; (2) a receiver or trustee of the Lessee's property shall be appointed by any court; (3) the Lessee shall make a general assignment for the benefit of creditors; (4) any of the Lessor's shares owned by the Lessee shall be duly levied upon under court process; or (5) this lease or any of the Lessor's shares owned by the Lessee shall be pledged, other than to the seller thereof, a bank, or other lending institution, except with the consent of the Lessor's Board of Directors.

(c) If at any time there is an assignment of this lease, or any subletting hereunder, without full compliance with the requirements of Paragraph 6 of Article II hereof.

(d) If the Lessee shall be in default for a period of one month in the payment of any rent or additional rent or of any installment thereof, hereinbefore provided for.

(e) If the Lessee shall default in the performance of any covenant or provision hereof, other than the covenant to pay rent, for thirty (30) days after the Lessor shall have given written notice of such default.

(f) If at any time the Lessor shall determine, upon the affirmative vote of two-thirds of its full Board of Directors and the affirmative vote of the record holders of at least two-thirds in amount of its shares then outstanding and owned by Lessees under proprietary leases then in force, at a shareholders' meeting duly called for that purpose, to terminate all proprietary leases or to sell the land and building above described.

(g) If at any time the Lessor shall determine, upon the affirmative vote of the holders of record of two-thirds (2/3) or more of its Board of Directors, that because of objectionable conduct on the part of the Lessee, or of a person dwelling in or visiting the apartment, the Lessee's tenancy is undesirable. Objectionable conduct shall be deemed to occur if the Lessee or such other person repeatedly violates or disregards the house rules and regulations hereunto attached or hereafter established in accordance with the provisions of this lease, or permits or tolerates a person of dissolute, loose, or immoral character to enter or remain in the building or apartment.

(h) If at any time the building or a substantial portion thereof shall be taken by condemnation proceedings.

2. Waiver of Right of Redemption. The Lessee hereby expressly waives any and all right of redemption in case he shall be dispossessed by judgment or warrant of any court or judge. The words "enter," "reenter," and "reentry" as used in this lease are not restricted to their technical legal meaning. If the Lessee shall breach or threaten to breach any covenant or provision hereof, the Lessor shall have the right of injunction, and the right to invoke any remedy allowed at law or in equity, as if reentry, summary proceedings, and other remedies were not herein provided for.

3. Surrender of Possession. Upon the termination of this lease under the provisions of subparagraphs (a), (b), (c), (d), (e), or (g) of Paragraph 1 of this Article, the Lessee shall remain liable as provided in Paragraph 2 of Article II here of. Upon the termination of this lease under the provisions of subparagraphs (f) or (h) of Paragraph 1 of this Article, or upon the expiration of this lease, the Lessee shall be and remain liable to pay all rent, additional rent, and other charges due or accrued and to perform all his covenants and agreements up to the date of such termination. On or before such termination the Lessee shall vacate the apartment and remove therefrom all of his property which upon such termination does not become the property of the Lessor under the provisions of Paragraph 8 of Article II hereof and surrender possession of the apartment to the Lessor or its assigns. Upon demand of the Lessor or its assigns the Lessee shall execute, acknowledge, and deliver to the Lessor or its assigns any instrument which may reasonably be required for surrendering all his estate and interest in the apartment, or in the building of which it is a part. The Lessee, however, may retain ownership of his shares in the Lessor, and shall continue to enjoy all rights of ownership of them other than the right to occupy any part of the building of which the apartment forms a part.

4. Sale of Shares. Upon the termination of this lease under the subparagraphs (a), (b), (c), (d), (e), or (g) of Paragraph 1 of this Article, the Lessee shall surrender to the Corporation his certificate or certificates for the shares of the Corporation owned by him and allocated to the apartment. Whether or not such certificate or certificates are surrendered, the Lessor may issue a new proprietary lease on the apartment and issue a new certificate for its shares owned by the Lessee and allocated thereto. In that event the certificate owned or held by the Lessee shall be automatically cancelled and rendered null and void. The Lessor may apply the proceeds received for the issuance of such shares towards the payment of the Lessee's indebtedness hereunder, including interest, attorneys' fees, and other

expenses incurred by the Lessor. If the proceeds are sufficient to pay the same, the Lessor shall pay over any surplus to the Lessee, but if insufficient the Lessee shall remain liable for the balance of the indebtedness. Upon the issuance of any such new proprietary lease and share certificate, the Lessee's continuing liability hereunder shall cease and he shall only be liable for rent and expenses accrued to that time.

ARTICLE IV

It is further mutually agreed, as follows:

1. Lessee's Option to Cancel. The Lessee may cancel this lease on _____ [month] _____ [day] , _____ [year] , or on any _____ [month] _____ [day] thereafter, upon complying with all the provisions of this Article IV. The Lessee must serve irrevocable written notice of intention to cancel upon the Lessor on or before April 1 in the calendar year in which such cancellation is to occur. At the time such notice is served the Lessee must deposit with the Lessor:

(a) a proper assignment of the Lessee's counterpart of this lease whereby the full and absolute right, title, and interest in and to this lease is assigned as the Lessor may direct, as of _____ [month] _____ [day] of the year of cancellation, free from all subleases, liens, encumbrances, and charges whatsoever;

(b) the Lessee's certificate for the shares of the Lessor which accompany this lease, duly stamped and endorsed in blank for transfer;

(c) a written statement setting forth in detail those additions, improvements, and fixtures, such as mantels, lighting fixtures, refrigerators, cooking ranges, woodwork, panelling, ceilings, doors, and decorations, placed in the apartment at the Lessee's expense which the Lessee has, under the terms of this lease, the right to remove, and which the Lessee desires to remove.

2. Additional Payments by Lessee. If the Lessee shall give such notice of intention to cancel, the Lessee shall:

(a) subject to the limitations and conditions embodied in Paragraph 8 of Article II hereof, replace all mantels, lighting fixtures, refrigerators, cooking ranges, woodwork (other than panelling), ceilings, doors, or other fixtures removed by the Lessee, with others of a kind and quality customary in buildings of this type, and pay the cost of such replacement; and

(b) pay the cost of repairing any damage resulting from Lessee's removal of any panelling or other additions, improvements, or fixtures, for which Lessee is not required to pay the cost of replacing.

3. Removal of Fixtures. The Lessee shall remove all additions, improvements and fixtures which are removable under the terms of this lease and which are enumerated in the statement made as provided in subparagraph (c) of Paragraph 1 of this Article IV prior to the 31st day of August next preceding the _____ [day] day of _____ [month] named in the notice of election to cancel as the date for the cancellation of this lease. On or before such _____ [day] day of _____ [month] the Lessee shall deliver possession of the apartment to the Lessor free from all subleases, liens, encumbrances, or other charges and remove therefrom all of Lessee's property which upon such cancellation does not become the Lessor's property under the provisions of Paragraph 8 of Article II hereof. The Lessee shall pay to the Lessor (a) all rent, additional rent, and other charges which shall be payable under this lease up to and including the 30th of September succeeding such 31st day of August, and (b) the amounts due under subparagraph (b) of Paragraph 2 of this Article IV. The requirements for delivery of possession to the Lessor shall be waived if, pursuant to the provisions of Paragraph 6 of Article II of this lease, the Lessor shall have on or before _____ [day] day of _____ [month] entered into an agreement with any sublessee whereby it permits such sublessee to remain in possession of the apartment.

4. Lessor's Entry. The Lessor and its agents may show the apartment to prospective or succeeding tenants at any time and from time to time after the Lessee gives notice of intention to cancel this lease as provided in this Article IV. After the 31st day of August next succeeding the date on which such notice the Lessor and its agents, employees, and tenants may enter the apartment, occupy the same, and make such alterations, additions, and repairs therein as it may deem necessary or desirable without diminution or abatement of the rent due hereunder.

5. Cancellation of Lease. If the Lessee is not otherwise in default hereunder and if the Lessee shall have done the things and made the payments at the times, in the amounts, and in the manner required by this Article IV, then upon the _____ [day] day of _____ [month] named in the notice of intention to cancel as the date for the cancellation of this lease, this lease shall be cancelled and all rights, duties, and obligations of the parties hereunder shall cease, terminate, and expire as of such date. The shares of Sky-line Apartments, Inc. shall then become the Lessor's absolute property. The Lessee, however, shall not be released or discharged from any indebtedness to the lessor on such last mentioned date. Moreover, if the Lessee shall fail to do anything or make any payment at the time, in the amounts, and in the manner required by this Article IV, the Lessor may (a) return to the Lessee this lease, the share certificate, and other documents deposited, and the sums paid by the Lessee under this Article IV, other than any sum paid as rent under this lease or as the cost of repairing any damage resulting from the Lessee's removal of additions, improvements, or fixtures, and thereupon the Lessee shall be deemed to have withdrawn the notice of intention to cancel this lease, or (b) treat this lease as cancelled as of the _____ [day] day of _____ [month] named in the notice of intention to cancel as the date for the cancellation of such lease, and bring such proceedings and actions as it deems best to enforce the covenants of the Lessee contained in this Article IV, and collect from the Lessee the payments which he is required to make under this Article IV, together with reasonable counsel fees and costs.

ARTICLE V

It is further mutually agreed, as follows:

1. Transfer of Shares. The Lessor's shares held by the Lessee and allocated to the apartment have been acquired and are owned subject to the following conditions agreed upon with the Lessor and with each of the other proprietary lessees for their mutual benefit:

(a) The shares represented by each certificate are transferable only as an entirety; and

(b) Neither the Lessee nor the Lessee's personal representatives shall sell or transfer such shares except to the Lessor, or to an assignee of this lease, after compliance with all of the provisions of Paragraph 6 of Article II of this lease relating to assignments.

2. Binding Effect. The references herein to the Lessor shall be deemed to include its successors and assigns, and the references herein to the Lessee or to a shareholder of the Lessor shall be deemed to include their respective executors, administrators, legal representatives, legatees, distributees, and assigns. The covenants herein contained shall apply to, bind, and inure to the benefit of the Lessor and its successors and assigns, and the Lessee and the executors and administrators, legal representatives, legatees, and assigns of the Lessee, except as hereinbefore stated.

3. Waiver of Jury Trial. The Lessor and the Lessee shall and they hereby do waive trial by jury in any action, proceeding, or counterclaim brought by either against the other on all matters whatsoever arising out of or in any way connected with this lease, the Lessee's use or occupancy of the apartment, or any claim of damage resulting from any act or omission of the parties in any way connected with this lease or the apartment.

4. Modification. This lease may not be changed orally but only in writing signed by both parties.

5. Non-assignment. This lease may not be assigned by either party, unless otherwise expressly provided herein.

6. Notices. All notices or other documents under this lease shall be executed and delivered as provided in Paragraph 14 of Article II hereof.

7. Governing Law. This lease shall be construed in accordance with and governed by the laws of the State of _____ [state] .

8. Entire Agreement. This lease contains the entire understanding between the parties and supersedes all prior understandings and agreements between them respecting its subject matter.

9. Non-waiver. No delay or failure by either party to exercise any right under this lease, and no partial or single exercise of that right, shall constitute a waiver of that or any other right, unless otherwise expressly provided herein.

10. Headings for Reference Only. Headings preceding the text and paragraphs of this lease are for convenience and reference only, and shall not be used to interpret or construe its meaning, construction, or effect.

11. Counterparts. This lease may be executed in two or more counterparts, each of which shall be deemed an original but all of which together shall constitute one and the same instrument.

In witness whereof, the Lessor has caused its corporate seal to be hereto affixed and this instrument to be signed by its President, and the Lessee has executed this instrument under seal, the day, and year first above written.

SKYLINE APARTMENTS, INC.

By: _____

[name and title]

And: _____

[name and title]

(Acknowledgments)

The Skyline
House Rules

1. The public halls and stairways of the building shall not be obstructed or used for any other purpose than ingress to and egress from the apartments in the building, and the fire towers and fire escapes shall not be obstructed in any way.

2. Children shall not play in the public halls, stairways, fire towers, or elevators, and shall not be permitted in the service elevator of the building.

3. No public hall above the ground floor of the building shall be decorated or furnished by any lessee in any manner without the prior consent of the Lessor and all of the Lessees to whose apartments such hall serves as a way of ingress and egress.

4. No lessee shall make or permit any disturbing noises in the building or do or permit anything to be done therein which will interfere with the rights, comforts, or conveniences of other Lessees. No Lessee shall play upon or cause to be played upon any musical instrument or permit to be operated a phonograph or a radio or television loud speaker in such lessee's apartment between the hours of 11 p.m. and the following nine a.m. if such action disturbs or annoys other occupants of the building, and in no event shall practice or cause to be practiced either vocal or instrumental music for more than two hours in any day or between the hours of six p.m. and the following nine a.m. All floor space in apartments, other than baths and kitchens, shall be adequately covered with carpeting or rugs with a view to minimizing noise transmission to the apartment below.

5. Each Lessee shall keep such Lessee's apartment in a good state of preservation and cleanliness and shall not sweep or throw or permit to be swept or thrown therefrom, or from the doors, windows, terraces, or balconies thereof, any dirt or other substance.

6. No article shall be placed in the halls or on the staircase landings, fire towers, or fire escapes, nor shall anything be hung or shaken from the doors, windows, terraces, or balconies or placed upon the window sills of the building.

7. No shades, awnings, window guards, ventilators, or air conditioning devices shall be placed or used in or about the building except such as the Lessor shall have approved.

8. No sign, signal, advertisement, or illumination shall be inscribed or exposed on or at any window or other part of the building, except such as the Lessor shall have approved in writing; nor shall anything be projected out of any window of the building without similar approval.

9. The passenger and service elevators in the building, unless of automatic type and intended for operation by a passenger, shall be operated only by the Lessor's employees, and there shall be no interference whatever with the same by Lessees or members of their families or their guests, employees, or undertenants.

10. No velocipedes, bicycles, scooters, or similar vehicles shall be allowed in the passenger elevators, and no baby carriages or any of the above-mentioned vehicles shall be allowed to stand in the public halls, passageways, areas, or courts of the building.

11. Servants, messengers, and tradespeople shall use the service elevators in the building for ingress and egress and shall not use the passenger elevators for any purpose, except that nurses in the employ of Lessees and of their guests or undertenants may use the passenger elevators when accompanying such children, guests, or undertenants.

12. Kitchen supplies, market goods, and packages of every kind are to be delivered only at the service entrance of the building and through the service elevators to the apartments.

13. Trunks and heavy baggage shall be taken in or out of the building through the service area.

14. Garbage and refuse from the apartments shall be sent to the basement of the building only at such times and in such manner as the superintendent of the building may direct. The incinerators in the building are to be used in connection with specific rules and instructions to be promulgated by the Lessor's Board of Directors.

15. Water closets and other water apparatus in the building shall not be used for any purpose other than those for which they were constructed, nor shall any sweepings, rubbish, rags, or any other article be thrown into the same. Any damage resulting from misuse of any water closets or other apparatus shall be paid for by the Lessee in whose apartment it shall have been caused.

16. No Lessee shall send any employee of the Lessor out of the building on the Lessee's private business.
17. No bird or animal shall be kept or harbored in the building unless the same in each instance is expressly permitted in writing by the Lessor and subject to such rules as the Board of Directors may promulgate.
18. If the Lessor supplies any storage space outside of the apartment to the Lessee, the same shall be deemed to be supplied gratuitously and the Lessor shall have no liability in connection therewith. Such space may only be used for the storage of empty trunks and bags.
19. No radio or television aerial shall be attached to or hung from the exterior of the building without the Lessor's written approval.
20. The agents of the Lessor, and any contractor or workman authorized by it, may enter any apartment at any reasonable hour of the day for the purposes of inspecting such apartment to ascertain whether measures are necessary or desirable to control or exterminate any vermin, insects, or other pests and taking such measures, at the Lessee's expense as may be necessary to control or exterminate all pests.
21. No vehicle belonging to a Lessee or to a member of the Lessee's family or guests, undertenant, or employee shall be parked in such manner as to impede or prevent ready access to the entrance canopy of the building by another vehicle.
22. Except where the Lessee has been granted the exclusive use of a laundry, the Lessee shall use the laundry facilities available only upon such days and during such hours as the Lessor not designate.
23. The Lessor may from time to time to curtail or relocate any space devoted to storage or laundry purposes.
24. No air conditioning or other electrical device shall be installed or used by the Lessee without the Lessor's prior written approval as to the type, location, and manner of installation or use of such device and provided sufficient electric current is available for its use.
25. Complaints regarding the service of the building shall be made in writing to the Lessor's managing agent.
26. Any consent or approval given under these house rules by the Lessor shall be revocable at any time.
27. These house rules may be added to, amended, or repealed at any time by resolution of the Lessor's Board of Directors.



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Current Legal Forms for Real Estate

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Current Legal Forms for Real Estate
Chapter 20 REAL ESTATE ENTITIES
Part IV. Forms
G. COOPERATIVES

24-20 Current Legal Forms for Real Estate FORM 20.63

AUTHOR: by Stephen E. Pigott and Harold O. Maxfield, Jr.

FORM 20.63 Plan of offering of cooperative apartment hotel--conversion from rental apartment hotel

COMMENT

Illustrated here is a plan of offering in connection with the conversion of an apartment hotel into a cooperative operation. Under this plan, the selling price of the shares of the cooperative corporation, which entitles the purchaser to a proprietary lease of the apartment to which the shares are allocated, is relatively low considering the accommodations being offered. This is because the cooperative corporation is acquiring the ground lease to the land and building--rather than the fee title which would obviously cost considerably more.

The maintenance charges are high since what is being featured are accommodations in a luxury apartment hotel providing customary hotel services. The determination of the maintenance charges in this type of conversion is not as difficult as in other types of conversions because this operation has been going on for some time and the operating costs are known. The estimated tax deductions are comparatively small due to the fact that no mortgage payments are involved and hence there are no interest payment deductions. For income tax purposes, the tenant-shareholder's deductions are limited to the portion of his rent (maintenance charges) allocable to real estate taxes on the building. For the tax consequences to tenant-shareholders of cooperative housing corporations, including the tenant-shareholders' allowable deductions, (See TB § 20.10[4]), at the beginning of this chapter. As to the requirements for qualification as a tenant-shareholder, see TB § 20.10[3].

Since commercial leases are involved, the corporation must be alert to the fact that the income derived from the tenant-shareholders does not fall below 80% of the cooperative's gross income in any taxable year. If the 80% figure is not attained, the corporation would cease to qualify as a

cooperative housing corporation and the tenant-shareholders would lose their proportionate deductions for real estate taxes. For the requirements that an organization must meet in order to qualify as a cooperative housing corporation, including the 80 percent requirement discussed above, see TB § 20.10[2].

In the plan illustrated here, there are subtenants in occupancy before the plan becomes effective. Any apartment subleased on the date of the plan is reserved for the subtenant of such apartment for a specific period of time. The plan must become effective when subscription agreements have been accepted for apartments to which 85% of the shares have been allocated. However, the sponsor may declare the plan effective at any time after subscription agreements have been accepted for apartments to which 50% of the shares have been allocated. Since many of the apartments are occupied by subtenants, a purchaser of shares allocated to an apartment will obtain the proprietary lease for the apartment subject to the sublease then in effect and subject to the existing occupancy. If the occupant does not voluntarily move when his sublease expires, the purchaser may be required to institute dispossess proceedings.

FORM

Cosmopolitan Apartment Hotel

10 Fifth Avenue

New York, New York

Plan of Cooperative Organization

Maximum Amount of Offering: \$4,000,000

(Price: \$100 per share)

The Cooperative Corporation will acquire a leasehold interest in the land and the building known as the Cosmopolitan Apartment Hotel. (See Section D.) The prices of the apartments available for sale are set forth in Schedule D. These prices may be changed by the Sponsor from time to time during this offering so that prior or subsequent purchasers may pay less or more than purchasers of other or similar apartments. The effect of this is set forth in Section I. The approximate date of the proposed first offer to the public is _____ [month] _____ [day] , _____ [year] .

Cooperative Corporation:

Cosmopolitan Tenants Corporation

10 Fifth Avenue

New York, New York 10003

Sponsor:

10 Fifth Avenue Corporation

10 Fifth Avenue

New York, New York 10003

Selling Agent

Mark & Co., Inc.
500 Fifth Avenue
New York, New York 10017

THE FILING OF THIS PLAN OF COOPERATIVE ORGANIZATION WITH THE DEPARTMENT OF LAW OF THE STATE OF NEW YORK DOES NOT CONSTITUTE APPROVAL OF THE SHARES TO BE ISSUED UNDER THE PLAN OF COOPERATIVE ORGANIZATION OF THE SALE THEREOF BY THE DEPARTMENT OF LAW OR THE ATTORNEY GENERAL OF THE STATE OF NEW YORK. ANY REPRESENTATION TO THE CONTRARY IS UNLAWFUL.

Plan of Cooperative Organization
Cosmopolitan Apartment Hotel
10 Fifth Avenue
New York, New York 10003

Introductory Statement

The 10 Fifth Avenue Corporation (the "Sponsor") submits herewith a plan (the "Plan") for the acquisition of two ground leases (described in Section B) covering the lands and building (the "Building") generally known as the Cosmopolitan Apartment Hotel and by the street address 10 Fifth Avenue (collectively the "Land") and the operation of the Building on a cooperative basis by the present subtenants of the Building and other persons who purchase shares of Cosmopolitan Tenants Corporation (the "Cooperative Corporation").

If this Plan is declared effective, each purchaser of the Cooperative Corporation's shares will receive, promptly after the closing under this Plan, a certificate for the number of shares allocated to the apartment he has selected and a proprietary lease for that apartment. See Section E.

Since the primary purpose of the Cooperative Corporation is to provide apartments for its shareholders, and since the term of each of the proprietary leases will be not less than fifty (50) years, a tenant-shareholder will have long-term security of possession. Moreover, the annual rent (maintenance charges) for each apartment will be determined by a Board of Directors (elected by the tenant-shareholders) solely on the basis of the rent payable under the aforementioned ground leases (as the same will be modified after the closing under this Plan), real estate taxes, and the actual cost of operating, improving, and maintaining the Building, and will not include any profit for the Cooperative Corporation.

A tenant-shareholder may be able to deduct from his federal, state, and city income taxes the portion of his rent (maintenance charges) allocable to real estate taxes on the Building, thereby reducing the effective rent for his apartment. See Section O.

A tenant-shareholder may make any nonstructural alteration or decoration in his apartment.

A tenant-shareholder may also make any structural alteration to an apartment with the consent of the Cooperative Corporation's Board of Directors, which it may not unreasonably withhold or delay. A tenant-shareholder, without the

Board of Directors' consent, may sublease his apartment on a daily, weekly, or monthly basis at any subrental that may be acceptable to him, provided that all other sublease terms and all sublease arrangements are made by or with the consent of a renting staff to be employed by the Cooperative Corporation, and provided further that such subletting is not for a period, or for successive periods in the aggregate, which exceeds eight months within any consecutive twelve (12) months. The Cooperative Corporation will be entitled to a commission equal to the greater of _____ percent (_____) of the proceeds of any such subletting, or _____ percent (_____) of the rent (maintenance charges) payable under the tenant-shareholder's proprietary lease.

In order to assure the Cooperative Corporation of a sound financial structure and to maintain the cooperative nature of the occupancy of the Building, all other subleases and all sales of shares by tenant-shareholders and assignments of proprietary leases will require approval by the Cooperative Corporation's Board of Directors. See Section E.

Section A

Brief Description of the Land and Building

The Building was constructed between _____ [year] and _____ [year] from plans drawn by Samuel White. Of fireproof construction, the Building has fifteen (15) stories and a basement, stands on two contiguous parcels of land (forming an L-shaped plot) and has a frontage of approximately 75 feet on Fifth Avenue and 150 feet on West 10th Street.

There are one hundred thirty (130) apartments in the Building which are being offered for sale under the Plan (consisting of three hundred fifty (350) rooms) plus manager's quarters (Apt. 200), a doctor's office, a restaurant, a record storage room (Apt. 100), two public rooms, and an office complex comprised of the reception desk, switchboard, and mailroom, manager's office, and bookkeeper's office. The Building always has been operated as a first-class apartment hotel providing customary hotel services, including room service, and it is anticipated that all such services will continue to be provided under this Plan. The main entrance to the Building is attended daily from seven a.m. to midnight. There is 24-hour reception desk (concierge) and switchboard service. Two of the three passenger elevators are attended 24 hours a day and the two service elevators are attended and operational daily between the hours of seven a.m. and nine p.m.

Located on the southwest corner of Fifth Avenue and West 10th Street in the Borough of Manhattan, the Building is situated in the midst of one of the most outstanding apartment house locations in _____ [city] .

Immediately to the north and south of the Building are distinguished cooperative and rental apartment houses and several first-class hotels. The side blocks contain well kept townhouses. Two blocks to the south, on Eighth Street, are many fine stores and specialty shops, including restaurants, grocery, bakery, and other service establishments.

Cultural facilities abound in the area, including many prominent art galleries, off-Broadway theaters, and motion picture houses.

Bus transportation between the Building and the mid-town shopping and office districts is available. The buses run north one block west of the Building on the Avenue of the Americas and south on Fifth Avenue. There are cross-town bus routes going west on 10th Street and east on 8th Street. The Independent Subway Line has a station at 8th Street and the Avenue of the Americas and the BMT Subway Line has a station at 8th Street and Broadway.

There are religious facilities of all faiths nearby as well as public and private schools. The downtown campus of New

York University, The New School for Social Research, and The Cooper Union are all located a short distance from the Building. Washington Square Park is within a few minutes' walk and St. Vincent's Hospital is not far away.

The Building and the apartments located therein have been well maintained and the Sponsor will continue to maintain the Building in its present state of good repair until the closing under this Plan. After the closing under this Plan, the Cooperative Corporation may undertake the specific improvements recommended by Walters Associates in the report made by that firm and set forth in Schedule A. For this purpose the Sponsor will make available to the Cooperative Corporation a fund in the amount of _____ Dollars (\$_____) which, in the opinion of the Selling Agent, is sufficient to cover the cost of the recommended work. This fund will be in addition to the _____ Dollars (\$_____) fund provided by the Sponsor for new uniforms described in Section N. The actual decision to proceed with the work, however, will be made by the Board of Directors to be elected by the tenant-shareholders, subject to the limitations set forth in Section N.

Section B

Ground Lease and Leasehold

The Land upon which the Building is constructed consists of two separately owned but contiguous parcels of land. The Sponsor acquired a leasehold interest in the parcels in _____ [year] when it took, by assignment, two leases, each covering one of the parcels. Originally made in _____ [year], each of the leases provided for twenty-one (21) year terms with renewal terms ultimately expiring _____ [month] _____ [day], _____ [year]. The landlord under the first lease is Warren Chapman. The landlord under the second lease is The Seaman's Institute. The two leases now contain substantially identical terms and provisions except with respect to the amount of the annual rental reserved by each of them.

The respective landlords of the leases and the Sponsor have entered into an agreement, dated _____ [month] _____ [day], _____ [year], which provides for substantial changes in the terms and provisions of such leases if certain conditions are met. The two leases, as they will be modified by the landlords and the Cooperative Corporation in accordance with this agreement, are collectively called the Ground Lease in this Plan, and the landlords under the Ground Lease, collectively, are hereinafter called the Landlord of the Ground Lease.

The principal provisions of the Ground Lease will be as follows:

Term: The Ground Lease will have a term of approximately fifty (50) years, expiring on _____ [month] _____ [day], _____ [year].

Rent: From and after the closing under this Plan and for a period of seven years thereafter, the annual rental under the Ground Lease will be _____ Dollars (\$_____) (_____ Dollars (\$_____) under the Chapman lease and _____ Dollars (\$_____) under the Seaman's lease). Beginning with the eighth year after the closing under this Plan, however, the annual rental is subject to adjustment each year based on changes that have occurred in the Consumer Price Index for Urban Wage Earners and Clerical Workers, U. S. City Average: All Items, published by the United States Department of Labor (the "Consumer Price Index"), as follows:

The Consumer Price Index in the first month of the eighth lease year after the closing under this Plan will be deemed the Base Price Index upon which all future changes in the Consumer Price Index will be measured. Thus, in the first month of the ninth lease year after the closing under this Plan and in the first month of each subsequent lease year, it will be

determined whether the Consumer Price Index at that time is higher or lower than the Base Price Index. If it is higher, the annual rental payable for the preceding lease year will be adjusted upwards by the same percentage that the then current Consumer Price Index is higher than the Base Price Index, provided, however, that no adjustment will be made unless the change exceeds _____ percent (_____%) of the then current rental. Payment of any additional rental for the preceding lease year and for the months that have elapsed in the current lease year shall be made within ten days after receipt of a notice from the Landlord stating that the additional rental is payable.

It should be noted that any increase in the annual rental would necessarily increase the cost of operating the Building. Unless the Cooperative Corporation were able to supplement its income (such as by collecting increased subrentals under the commercial subleases described in Section M or new commercial subleases) to offset the increased rental under the Ground Lease, it would be necessary for the Cooperative Corporation's Board of Directors, in due course, to increase the rent (maintenance charges) payable by its tenant-shareholders under their proprietary leases in order to meet the increased cost of operating the Building. It should be noted also that adjustments in the annual rental may be downward (as well as upward) but only after a previous upward adjustment and in no event will the annual rental fall below a floor of _____ Dollars (\$_____). If there is a downward adjustment in the annual rental, the Cooperative Corporation will be entitled to deduct an amount equal to the reduction in rental from the rental payments falling due after giving appropriate notice to the Landlord.

In addition to the yearly adjustment of the annual rental under the Ground Lease described above, the annual rental also may be changed if the New York City Zoning Resolution is hereafter amended to permit the construction and operation on the site of the Building of a building used predominantly for office or commercial purposes having a height of at least fifteen (15) stories. In the event of any such amendment, the Landlord under each lease constituting the Ground Lease may elect, at the expense of the Cooperative Corporation, after the commencement of the seventh lease year, to have an appraisal made of the portion of the Land covered by its respective lease. No subsequent request may be made, however, until ten years from the preceding request pursuant to which an appraisal is made. The appraisal shall be made by a board of three appraisers, who shall be real estate brokers having not less than ten years' experience. One appraiser shall be appointed by the Landlord requesting the appraisal, the second by the Cooperative Corporation, and the third by the other two appraisers. After the appraisal is made, the annual rental under the lease in question shall be set at a figure equal to _____ percent (_____%) of:

- (a) the value of the portion of the Land covered by that lease as if unencumbered, unimproved, and free of the Ground Lease, and
- (b) the assessed value of the portion of the Building covered by that lease (or if demolished its last assessed valuation).

Such rental shall be effective as of the beginning of the calendar year following that in which the request for an appraisal is made.

Any annual rental set by means of such an appraisal shall be subject to the following conditions:

- (1) it may not be less than the annual rental that would have been payable in the absence of an appraisal;
- (2) notwithstanding any increase in the annual rental by reason of the appraisal, the annual rental shall remain subject to annual adjustment based on changes in the Consumer Price Index, as described above, except that the Base Price Index will be the Consumer Price Index for the first month in which the new annual rental became effective and there can be no increase because of changes in the Consumer Price Index for the first calendar year following that in which the request for an appraisal is made; and
- (3) no decrease in the annual rental, because of downward changes in the Consumer Price Index which occur after an

appraisal, will reduce the annual rental to an amount below that set by the most recent appraisal.

The Sponsor has no knowledge of any pending change in the Zoning Resolution that would permit construction of an office building or commercial building on the site of the Building. If, however, such a change were made, and if an appraisal resulted in an increase in the annual rental payable under either or both of the ground leases comprising the Ground Lease, the cost of operating the Building would necessarily increase by a like amount.

Real Estate Taxes, etc.: The Ground Lease provides that the Cooperative Corporation must pay all real estate taxes and assessments, sewer and water rents, and other charges levied against the Land and the Building.

Fee Mortgages; Nondisturbance Provisions: The Landlord under the Ground Lease may place one or more mortgages on its fee interest in the Land, provided that the aggregate debt secured by such mortgages at any time shall not exceed a sum equal to ten times the annual rental then being paid to the Landlord. Thus, immediately after the closing under this Plan, the annual rental will be _____ Dollars (\$ _____), and the aggregate fee mortgage indebtedness will be limited to _____ Dollars (\$ _____). If, when, and as the annual rental is adjusted upwards (as provided above), the aggregate fee mortgage indebtedness may be increased by a sum equal to ten times the amount of the increase in the annual rental resulting from any such upward adjustment. With the exception of an existing fee mortgage on the parcel demised by the Chapman lease, presently having an unpaid balance of _____ Dollars (\$ _____), the Ground Lease will be subordinate to fee mortgages only if the following conditions are satisfied:

- (a) the fee mortgages contain so-called nondisturbance provisions to the effect that, as long as the Cooperative Corporation is not in default under the Ground Lease, the Ground Lease will not be terminated if the fee mortgages are foreclosed;
- (b) the fee mortgages contain provisions permitting insurance proceeds payable to the Landlord to be used for repair or restoration of the Building in accordance with the terms of the Ground Lease; and
- (c) the fee mortgages provide that, if there is a partial taking by eminent domain, the proceeds payable to the Landlord shall be used for repair and restoration of the Building in accordance with the terms of the Ground Lease.

If the owner of the parcel covered by the Chapman lease should fail to comply with the mortgagor's obligations under the existing fee mortgage, the Cooperative Corporation, in order to protect its interests, may be required to cause a refinancing or assumption of the mortgage indebtedness, and to recover all costs incurred in connection therewith from the Landlord under the Chapman lease.

Alterations; Demolition: The Cooperative Corporation shall keep the Building and the sidewalks adjoining it in good order and repair and make all improvements or alterations to the Building which may be required by law. The Cooperative Corporation may make nonstructural alterations and also any structural alteration or additions to the Building, except that in the case of structural alterations costing in excess of _____ Dollars (\$ _____) the Landlord's consent must first be obtained and an appropriate surety bond filed. The Cooperative Corporation also may, at its expense, demolish the Building and construct a new apartment hotel, apartment house, or office or commercial building of at least 15 stories. However, under the terms of the Cooperative Corporation's Certificate of Incorporation, Bylaws, and proprietary lease, any such action shall require the affirmative vote of the holders of two-thirds (2/3) of the Cooperative Corporation's then issued and outstanding shares and two-thirds of the full Board of Directors. See Section C. Alterations, replacements, and improvements to the Building or equipment, except trade fixtures which are removable without injury to the Building, become the property of the Landlord.

Fire Insurance; Fire Damage; Eminent Domain: The Cooperative Corporation must maintain fire and extended

coverage insurance on the Building. In addition, the general liability policies carried by the Cooperative Corporation must cover the Landlord's interest in the Building, and the Cooperative Corporation must carry boiler and pressure vessels insurance as well as workmen's compensation insurance covering persons employed by it to do work in the Building. If the Building shall be destroyed or damaged by fire or other casualty, the Cooperative Corporation, at its expense, must restore or replace the Building. The Cooperative Corporation may use any insurance proceeds received by the Landlord for such rebuilding or replacement. The Cooperative Corporation shall remain liable for the full rental payable under the Ground Lease notwithstanding any damage or destruction to the Building, and must, under the terms of the Ground Lease, carry rent insurance in the amount of the current annual rental under the Ground Lease.

Indemnity: The Cooperative Corporation shall indemnify the Landlord against all claims arising from the management of the Building or from the conduct of any work done therein.

Assignment of the Ground Lease: During the first seven years of the term of the Ground Lease following the closing under the Plan, the Cooperative Corporation may assign its interest in the Ground Lease after obtaining the Landlord's consent. The Landlord shall give its consent provided that the Cooperative Corporation has deposited satisfactory security with it to assure performance by the assignee. After the initial seven-year period, the Cooperative Corporation may assign its interest in the Ground Lease without the Landlord's consent and, in the event of any such assignment, it will be released from any future liability under the Ground Lease. Under the terms of the Cooperative Corporation's Bylaws and proprietary lease, any assignment of the Ground Lease shall require the affirmative vote of the holders of two-thirds of the Cooperative Corporation's then issued and outstanding shares and two-thirds of the full Board of Directors. See Section C.

Default; Termination of the Ground Lease: If the Cooperative Corporation defaults in the due performance of its obligations under the Ground Lease, and the default is not remedied within 30 days after the Landlord gives notice thereof, the Landlord may terminate the Ground Lease by giving five days' notice. If, however, the specified default cannot reasonably be cured within 30 days, the time within which the Cooperative Corporation may cure it shall be extended to allow a reasonable opportunity for performance of its obligations. Notwithstanding any such termination of the Ground Lease, the Cooperative Corporation shall remain liable for the difference between the Landlord's net receipts and the annual rental until the end of the Ground Lease's term. If the Cooperative Corporation becomes bankrupt, or the Land and Building is totally condemned or is condemned in part so as to require demolition of the Building, the Ground Lease shall terminate. The Landlord and the Cooperative Corporation shall divide the condemnation proceeds, as follows: the Landlord shall receive an amount equal to twelve and one-half (12-1/2) times the then current annual rental, and the Cooperative Corporation shall receive the remaining proceeds. If there is a partial condemnation, if a reasonable amount of reconstruction can make the Building a practical improvement for the remaining portion of the Land, the condemnation proceeds received by the Landlord, exclusive of any award for the value of the portion of the Land taken, may be used for such reconstruction. The annual rental for the reconstructed Building shall be reduced by a sum equal to _____ percent (_____%) of any part of the award, including the award for the value of the Land, retained by the Landlord and not used for reconstruction.

Use: The Land may be used for an apartment hotel or an apartment house, or if permitted by law for an office or commercial building or for such other purpose as may be suitable to the then building and the locality.

Mortgages on Ground Lease: The Cooperative Corporation may mortgage or pledge the Ground Lease. The Ground Lease contains provisions intended to safeguard the security of a leasehold mortgage and, upon notice to the Landlord, it also will make certain changes in the Ground Lease to further protect the interest of an institutional leasehold mortgagee. The proceeds of any such mortgage or pledge shall belong to the Cooperative Corporation and may be used for such corporate purpose as the Board of Directors may decide. If any such mortgage or pledge is made, the debt service payable on the loan secured thereby shall be payable by the tenant-shareholders and may result in increased rent (maintenance charges) under their proprietary leases.

Arbitration: Disputes between the Landlord and Cooperative Corporation arising under certain provisions of the Ground Lease are subject to arbitration in the manner set forth in the Ground Lease.

The _____ [month] _____ [day] , _____ [year] , agreement provides that, upon the making of the above described changes in the ground leases, the Sponsor will be released from any further liability thereafter accruing under the Ground Lease.

Section C

Cooperative Corporation

Cosmopolitan Tenants Corporation, a New York corporation, was organized by Weiss & Spear, special counsel to the Sponsor, on _____ [month] _____ [day] , _____ [year] .

The Cooperative Corporation has an authorized capital of forty thousand (40,000) shares, par value _____ Dollars (\$ _____) each. All of these shares are of the same class and are voting shares, and all but three thousand nine hundred fifty (3,950) shares have been allocated to apartments, as shown in Schedule D, so that upon consummation of this Plan thirty six thousand fifty (36,050) shares will be issued and outstanding. The remaining three thousand nine hundred fifty (3,950) shares will be available to the Cooperative Corporation if it decides to allocate all or part of the same to space not presently used for residential purposes. Holders of shares of the Cooperative Corporation will have no preemptive rights.

The Certificate of Incorporation of the Cooperative Corporation states that the Cooperative Corporation's primary purpose is to provide its shareholders with apartments in the Building under proprietary leases and that each of its shareholders is entitled, solely by reason of his ownership of such shares, to occupy an apartment in the Building for dwelling purposes pursuant to such a proprietary lease. The Certificate of Incorporation provides that no decision to purchase the Land and Building or to demolish or reconstruct the Building may be made without the affirmative vote of the holders of two-thirds of the Cooperative Corporation's then issued and outstanding shares and two-thirds of the full Board of Directors.

In order to comply with *Section 216 of the Internal Revenue Code* relating to cooperative housing corporations, the Cooperative Corporation's Certificate of Incorporation also provides that no shareholder shall, either conditionally or unconditionally, receive any distribution not out of its earnings and profits, except upon its complete or partial liquidation.

Provision has been made for cumulative voting consistent with the requirements of the _____ [state] Business Corporation Law.

The Cooperative Corporation's Certificate of Incorporation may be amended only by the affirmative vote of the holders of two-thirds of its then issued and outstanding shares.

The Bylaws of the Cooperative Corporation provide for a meeting of the tenant-shareholders within sixty (60) days after the closing under this Plan and annually thereafter. The tenant-shareholders may elect a Board of Directors which consists of five directors. Under the Bylaws, all decisions of the tenant-shareholders are made by a majority of a quorum except with respect to a decision to purchase the Land and Building, to assign the Ground Lease, or to demolish or reconstruct the Building, all of which require the affirmative vote of the holders of two-thirds of its then issued and outstanding shares.

Under the Bylaws, the directors and officers of the Cooperative Corporation need not be residents of the Building. No salary or other compensation may be paid to any of its directors or officers for services rendered in either capacity.

The Bylaws prohibit the sale or transfer of the Cooperative Corporation's shares except in conjunction with an assignment of the proprietary lease appurtenant thereto. The Bylaws also provide that the Cooperative Corporation shall have a lien on the shares owned by each tenant-shareholder to secure the payment of rent (maintenance charges) and other sums owed by the tenant-shareholder to the Cooperative Corporation, and that it shall not be required to consent to any transfer of shares until a tenant-shareholder shall pay all sums due in accordance with the terms of his proprietary lease.

The Bylaws may be amended by the holders of a majority of the shares represented at any shareholders' meeting or by the affirmative vote of two-thirds of the full Board of Directors. Until all proprietary leases are terminated, however, the provisions of the Bylaws prohibiting issuance or transfer of the Cooperative Corporation's shares to anyone other than tenants under proprietary leases and requiring the affirmative vote of the holders of two-thirds of its then issued and outstanding shares to assign the Ground Lease may not be amended.

At present, the directors of the Cooperative Corporation are Lester Spear, Frank Weiss, Roger Jason, Arnold Stern, and Bertram Smith. Its officers are Lester Spear, President, Frank Weiss, Vice President, Roger Jason, Secretary, and Arnold Stern, Treasurer. Messrs. Weiss and Spear are partners of Weiss & Spear, the Sponsor's special counsel. The remaining directors are lawyers associated with the same law firm. Within 60 days after the closing date under the Plan, a meeting of the shareholders will be held for the purpose of electing new directors who, at a special meeting of the Board of Directors to be held immediately thereafter, will elect new officers.

Section D

Assignment of Ground Leases to the Cooperative Corporation

The Sponsor has entered into an agreement with the Cooperative Corporation (the "Assignment Agreement"), wherein it has agreed to assign and transfer to the Cooperative Corporation all of its right, title, and interest in and to the ground leases and the _____ [month] _____ [day] , _____ [year] , agreement described in Section B and the property covered thereby if this Plan becomes or is declared effective. The Assignment Agreement contains provisions customarily included in a contract for the sale of a leasehold interest in an apartment hotel. Among others, the following provisions have particular applicability to this transaction:

(1) the consideration for the transfer is (a) an amount equal to the aggregate proceeds of the sale by the Cooperative Corporation of its shares under this Plan less _____ Dollars (\$ _____), the amount of the capital and other improvement fund and working capital to be made available by the Sponsor to the Cooperative Corporation as set forth in Section N, and (b) the shares which have not been purchased and paid for as of the date of the closing under this Plan and which are to be issued to individuals produced by the Sponsor (see Section F).

(2) the Cooperative Corporation will acquire the aforementioned ground leases and the property covered thereby free and clear of all liens and encumbrances subject, however, to (a) mortgages, not exceeding _____ Dollars (\$ _____), placed by the Landlords of the ground leases on their respective fee interests in the Land and Building, (b) the terms and provisions of the aforementioned ground leases and _____ [month] _____ [day], _____ [year], agreement, (c) the terms and provisions of this Plan and proprietary leases simultaneously entered into with tenant-shareholders, (d) the terms and provisions of then existing subleases, (e) any state of facts that would be shown on a current survey of the Land and the Building, and (f)

the provisions of the _____ [city] City Zoning Resolution;

(3) the assignment of the aforementioned ground leases shall be without warranty or covenant by the Sponsor, but the assignment will not be made unless the Sponsor is able to transfer good leasehold title to the Cooperative Corporation in accordance with the Assignment Agreement, which The Title Guaranty Company shall coinsure in the aggregate amount of _____ Dollars (\$ _____);

(4) the transfer includes all furniture, furnishings, and decorations owned by the Sponsor and presently located in the space in the Building subject to commercial subleases and in public areas of the Building and used in connection therewith;

(5) apportionments shall be made with respect to the items noted in Section N;

(6) in case of any conflict between the terms and provisions of the Assignment Agreement and those of this Plan, the terms and provisions of this Plan shall prevail to the extent that they enlarge upon, deal in greater length with, or impose greater obligations upon the Sponsor; and

(7) if any condition of the agreement, dated _____ [month] _____ [day], _____ [year], between the Landlord and the Sponsor, relating to changes in the aforementioned ground leases (see Section B) is not met, or if the Sponsor shall be unable to convey good leasehold title to the Land and Building in accordance with the provisions of the Assignment Agreement, or if this Plan shall not become or be declared effective or shall be abandoned, the Assignment Agreement shall terminate. In such event, the Sponsor shall cause a refund to be made of down payments received from persons who have executed Subscription Agreements and, upon such refund, neither the Cooperative Corporation nor the Sponsor nor any other person shall have any rights or obligations thereunder. The only conditions of the aforementioned _____ [month] _____ [day], _____ [year], agreement not otherwise covered by the provisions of this Plan or complied with prior to the date of this Plan are as follows: (a) the Sponsor must pay all rent owed to the Landlord for the period prior to the closing date under the Plan; (b) the Sponsor must not be in default under the aforementioned ground leases; and (c) the Sponsor must pay, on the Landlord's behalf, certain professional fees.

Section E

Proprietary Leases

The form of proprietary lease herein referred to and to be used by the Cooperative Corporation is a part of this Plan. Proprietary leases will commence on the closing date under the Plan, will have a term of approximately fifty (50) years, and will contain, among others, the following provisions:

(1) The tenant-shareholder may, at his option, cancel any proprietary lease on _____ [month] _____ [day], _____ [year], or any subsequent _____ [month] _____ [day]. The tenant-shareholder may exercise this option by giving a prescribed notice on or before _____ [month] _____ [day] in the calendar year in which such cancellation is to occur and by surrendering his shares, proprietary lease, and possession of the apartment to the Cooperative Corporation. A tenant who exercises this option loses his investment.

(2) (a) A tenant-shareholder may sublet an apartment from time to time on a daily, weekly, or monthly basis at any subrental that may be acceptable to him without the Board of Directors' consent. The tenant-shareholder's right to sublet is subject, however, to the following conditions: no apartment shall be sublet for a period, or for successive periods,

which, in the aggregate, will exceed eight months within any consecutive twelve (12) months; and all other terms of, and all arrangements for, any such subletting shall be made by, or with the consent of, the Cooperative Corporation's renting staff. If the tenant-shareholder so sublets, the Cooperative Corporation shall receive a commission equal to the greater of _____ percent (_____%) of the subletting proceeds or _____ percent (_____%) of the rent (maintenance charges) payable under the proprietary lease for the sublet apartment during the term of the sublease.

(b) Any apartment may be sublet without the consent of the Board of Directors by a tenant-shareholder to a member of the tenant-shareholder's family, or by a lessee of a proprietary lease who is the Sponsor, a successor to the Sponsor's right under this Plan, any individual produced by the Sponsor or such successor to acquire unsold shares, or the nominee or representative of any of them.

(c) Any apartment may be sublet other than as provided in (a) and (b) above with the consent of the Board of Directors or of a majority of the authorized total number of the Cooperative Corporation's directors or of the holders of two-thirds of its then issued and outstanding shares. In the case of any such subletting, the Cooperative Corporation shall be paid a commission equal to the greater of 15 percent of the subletting proceeds or _____ percent (_____%) of the rent (maintenance charges) payable under the proprietary lease for the sublet apartment during the term of the sublease. The Cooperative Corporation shall also be paid the expenses incurred by it and its shareholders in connection with such subletting.

(d) Any proprietary lease may be assigned without the consent of the Cooperative Corporation to a tenant-shareholder's spouse, or by the lessee of a proprietary lease who is the Sponsor, a successor to the Sponsor's rights under this Plan, any individual produced by the Sponsor or such successor to acquire unsold shares, or the nominee or representative of any of them. A proprietary lease may otherwise be assigned with the consent of the Cooperative Corporation's Board of Directors or of a majority of the then authorized total number of its directors or of the holders of two-thirds (2/3) of its then issued and outstanding shares. No consent of the Board of Directors is required for a devise or bequest of a proprietary lease to a tenant-shareholder's spouse. The Board of Directors may not unreasonably withhold consent to an assignment of a proprietary lease after the death of a tenant-shareholder provided such assignment is made to a financially responsible member of the tenant-shareholder's family.

(3) The Board of Directors will fix the annual rent (maintenance charges) to cover the tenant-shareholder's proportionate share of the rent payable under the Ground Lease, real estate taxes and the cost of operating, improving, and maintaining the Building.

(4) Subleases of persons purchasing the shares allocated to apartments occupied by them prior to the closing date under the Plan shall be superseded upon execution and delivery by the Cooperative Corporation of the proprietary leases for such apartments as of the commencement of the respective terms thereof. Security deposits, if any, under superseded subleases will be returned.

(5) Apartments are leased in their condition as of the commencement of the lease term, and each tenant-shareholder will be responsible for the decoration, repair, and maintenance of his own apartment. If a tenant-shareholder places any special additions, improvements, or fixtures in the apartment, such as refrigerators, hot plates, lighting fixtures, etc., he may remove them at his expense by giving notice to the Cooperative Corporation. The tenant-shareholder's right of removal is subject, however, to the following conditions: he must have complied with his obligations under the proprietary lease; he must repair any damage caused by such removal; and he must replace and reinstall at his own expense any equipment that was in the apartment at the beginning of the term of this proprietary lease, or, at his option, he must put the apartment in tenantable condition by installing standard equipment of the kind and quality customarily used in the Building and satisfactory to the Cooperative Corporation.

(6) A proprietary lease can be terminated because of the tenant-shareholder's failure to honor his obligations thereunder.

The various defaults are listed in Paragraph 18 of the proprietary lease, and include, *inter alia*, the following:

- (a) if the tenant-shareholder ceases to be the owner of all of the Cooperative Corporation's shares allocated to his apartment;
- (b) if the tenant-shareholder is adjudicated a bankrupt, a receiver of his property or the proprietary lease is appointed and not dismissed within thirty (30) days, the tenant-shareholder makes a general assignment for the benefit of creditors, or any of the tenant-shareholder's shares are levied upon by court process, unless such levy is discharged within ten (10) days;
- (c) if the proprietary lease is assigned or the apartment sublet without any consent required by the terms of the proprietary lease;
- (d) if the tenant-shareholder fails to pay any installment of rent within thirty (30) days of its due date; and
- (e) if the tenant-shareholder is deemed undesirable because of objectionable conduct. Termination of a proprietary lease on the ground of objectionable conduct, however, must be approved by the affirmative vote of two-thirds of the then authorized total number of the Cooperative Corporation's directors and the holders of two-thirds (2/3) of its then issued and outstanding shares.

If a proprietary lease is terminated because of a default, the tenant-shareholder may lose all or a part of his investment.

(7) All proprietary leases are subject and subordinate to all ground, underlying, and overriding leases of the Land or the Building, and all mortgages affecting such leases or constituting liens on the Land or the Building, and to all extensions, renewals, modifications, consolidations, replacements, and renewals thereof.

(8) No shares of the Cooperative Corporation may be sold except as an entirety and except to the Cooperative Corporation or to an assignee of a proprietary lease for an apartment to which such shares have been allocated. Such assignee must have been approved by the Cooperative Corporation's Board of Directors or a majority of the then authorized total number of its directors or the holders of two-thirds of its then issued and outstanding shares.

(9) Upon assignment of the proprietary lease, the shares allocated to the apartment covered thereby must be transferred to the assignee of the proprietary lease.

(10) The Board of Directors may require the assignor of the proprietary lease to pay the reasonable legal and other expenses incurred by the Cooperative Corporation and its managing agent, the fee of its managing agent and title search costs in connection with the assignment of the proprietary lease and transfer of shares allocated to the apartment covered thereby, unless the assignment is made by the Sponsor, a successor to the Sponsor's rights under this Plan, an individual produced by the Sponsor, or such successor to acquire unsold shares, or the nominee or representative of any of them.

(11) Upon assignment of the proprietary lease, the assignee, at the Cooperative Corporation's option, must either sign a new proprietary lease or assume all of the tenant-shareholder's obligations under the assigned proprietary lease.

(12) Upon assignment of the proprietary lease in accordance with the provisions thereof, the assignor is relieved of all liability on the covenants of the lease thereafter to be performed.

(13) Initially all proprietary leases will be identical to the form of proprietary lease now available for inspection, and must remain in the same form unless and until the form shall be amended for subsequent use by the affirmative vote of the holders of two-thirds (2/3) of the Cooperative Corporation's then issued and outstanding shares.

(14) All proprietary leases can be terminated by the affirmative vote of two-thirds of the Cooperative Corporation's then authorized total number of directors and the holders of two-thirds of its then issued and outstanding shares.

Section F

Shares and Proprietary Leases Allocated to Unsold Apartments

Any shares of the Cooperative Corporation which have not been purchased and paid for as of the date of the closing under this Plan will be acquired by financially responsible individuals produced by the Sponsor who, on the date of the closing under this Plan, will enter into proprietary leases for the apartments to which their respective shares are allocated. Consequently, when this Plan is consummated, all of the Cooperative Corporation's shares will have been acquired and proprietary leases will have been entered into with respect to all apartments in the Building.

The persons who acquire unsold shares, as provided above, are obligated to pay rent (maintenance charges) under their proprietary leases, subject, however, to the right shared with all other tenant-shareholders to terminate their proprietary leases as of _____ [month] _____ [day] , _____ [year] , or as of any _____ [month] _____ [day] thereafter upon prescribed notice. See Section E. While the Sponsor is not liable for the payment of the rent (maintenance charges) on these proprietary leases, the Cooperative Corporation may not invoke against the tenant-shareholders thereunder the usual remedies for nonpayment of rent including, if necessary, the cancellation of their proprietary leases, the sale of the apartments covered thereby, and the application of the net sale proceeds to the tenant-shareholders' indebtedness to the Cooperative Corporation.

Section G

Offer of Shares--Apartments; Subscription Agreement

Shares of the Cooperative Corporation and proprietary leases for all apartments are being offered to subtenants in occupancy and others (over the age of 21) who are residents of the State of _____ [state] , subject to prior sale, at the prices set forth in Schedule D. Prior to _____ [month] _____ [day] , _____ [year] , however, the shares allocated to, and the proprietary lease for, any apartment that is subleased on the date of this Plan will be reserved for the subtenant thereof. Until that date, the Sponsor will not accept a Subscription Agreement from any person, other than such subtenant, with respect to such apartment unless it is conditioned upon the failure of the existing subtenant to purchase the shares allocated to such apartment prior to _____ [month] _____ [day] , _____ [year] . Moreover, prior to _____ [month] _____ [day] , _____ [year] , the Sponsor will not show any apartment that is subleased on the date of this Plan to prospective purchasers, other than the existing subtenant thereof, unless it has received consent from the existing subtenant or advice from him that he does not wish to purchase his apartment. In such event the Sponsor may exercise whatever right it may have under the existing sublease to show such apartment to prospective purchasers and also to accept unconditionally a Subscription Agreement from any prospective purchaser of such apartment. Any subtenant who decides not to purchase the shares allocated to his apartment will be notified shortly after _____ [month] _____ [day] , _____ [year] , in writing, whether his apartment has been sold to another person.

Any existing subtenant or other person wishing to purchase shares allocated to an apartment shall execute, in duplicate, a Subscription Agreement in the form set forth as Schedule F, copies of which are available from the Selling Agent, and deliver both copies to Mark & Co., Inc., 500 Fifth Avenue, New York, New York, together with a check drawn on a New York City bank to the order of Weiss & Spear, Escrowee, in the amount of the required _____ percent (_____ %) down payment. The down payment will be held in escrow by Weiss & Spear, the Sponsor's, special counsel, in a special bank account until disbursed as provided in this Plan.

Section H

Plan to Become or to Be Declared Effective or Abandoned

This Plan will become effective when Subscription Agreements have been accepted for apartments to which are allocated _____ percent (_____ %) of the shares of the Cooperative Corporation to be issued under this Plan. The Sponsor, however, reserves the right to declare it effective at any time after Subscription Agreements have been accepted for apartments to which are allocated _____ percent (_____ %) of such shares. If this Plan becomes or is declared effective, notice of such fact will be sent, not later than _____ [month] _____ [day] , _____ [year] , to all persons who have signed Subscription Agreements which have been accepted by the Sponsor.

If the Plan has not become effective and has not been declared effective by that date (or if it becomes or is declared effective and if for any reason the Sponsor cannot transfer to the Cooperative Corporation good leasehold title to the Land and Building or meet the conditions precedent to the modification of the ground leases (see Section B)), this Plan shall be abandoned and all persons who have signed Subscription Agreements which have been accepted by the Sponsor will be notified of such fact. The closing under this Plan shall take place on a day to be designated by the Sponsor. Such day shall not be earlier than twenty (20) days after notice is given that this Plan has become or has been declared effective or, in any event, earlier than _____ [month] _____ [day] , _____ [year] , or later than _____ [month] _____ [day] , _____ [year] . If the Plan becomes or is declared effective, balances on Subscription Agreements will be payable by the purchasers' certified checks drawn on New York City banks to the order of Weiss & Spear, Escrowee, within ten days after the Sponsor gives the written notice described above. These moneys will be held by Weiss & Spear, in escrow, in the special bank account described in Section G until disbursed as provided herein.

Duplicate proprietary leases will be sent to each person who has signed a Subscription Agreement which has been accepted by the Sponsor with the notice declaring the Plan effective or shortly thereafter. Both copies of the proprietary lease shall then be executed by the purchaser and returned to the Sponsor's special counsel prior to the closing date under this Plan. Promptly after the closing date, a fully executed copy of the proprietary lease, together with a certificate for the number of shares allocated to the apartment covered thereby, will be delivered to each purchaser.

If this Plan becomes or is declared effective, Weiss & Spear will pay all of the sums theretofore held by it in escrow in its special account to, or pursuant to the directions of, the Cooperative Corporation at the closing under this Plan, thereby making the funds available to the Cooperative Corporation for the payment of the consideration to which the Sponsor is entitled for causing an assignment of the ground leases described in Section B, for the Cooperative Corporation's initial working capital and for the capital improvements proposed to be made (see Section N).

The Sponsor will hold all moneys received by it, directly or through its agents, employees, or escrow agent, in trust until actually employed in connection with the consummation of the Plan.

If an insufficient number of shares are sold through this offering to effect the consummation of the Plan or if the Plan is abandoned or withdrawn for any reason or the leasehold interest in the Land and Building is not acquired by the Cooperative Corporation on or before _____ [month] _____ [day] , _____ [year] , for any reason, then such moneys shall be fully returned to the subscribers without interest.

Section I

Sponsor's Right to Change Prices

The Sponsor may at any time change the number of shares allocated to the apartments and the prices thereof as shown in Schedule D. No such change will be made, however, in respect of any apartment for which a Subscription Agreement shall have been accepted or which will vary the total number of shares allocated to all of the apartments covered by this Plan. Moreover, no such change will be made prior to _____ [month] _____ [day] , _____ [year] . A sale of shares allocated to any apartment may be made at a price higher or lower than that stated in Schedule D without affecting any previous or later sale of the shares allocated to any other apartment. If there shall be any such change in the price of shares allocated to any apartment then, when the shares are sold, to the extent the price is increased the Sponsor will receive the amount of such increase, and to the extent the price is decreased it will receive a lesser amount.

Section J

Apartment Subleases and Possession

Many of the apartments being offered under this Plan are occupied by persons under subleases as indicated in Schedule D.

A purchaser of the shares allocated to an apartment will obtain the proprietary lease for the apartment subject to any sublease thereof then in effect, subject to any existing occupancy. If a subtenant or other occupant does not voluntarily remove from an apartment when his sublease or occupancy agreement, if any, expires, a purchaser, in order to occupy the apartment, may be required at his own expense to institute a summary dispossession proceeding in court. A summary dispossession proceeding can be instituted immediately following the expiration of a sublease. If a subtenant is permitted to remain in possession after the expiration of his sublease, however, or if the occupant of the apartment has no sublease, the purchaser may be required to serve a thirty (30) day statutory notice upon the subtenant or occupant before he institutes a dispossession proceeding in court. In any such dispossession proceeding, the court may have a discretionary power to stay the issuance of a warrant of eviction for not more than six months depending upon the availability of other suitable accommodations and upon other factors.

Section K

Interim Subleases and Occupancy

An existing subtenant or occupant of an apartment in the Building who signs a Subscription Agreement, as provided in Section G, which is accepted by the Sponsor shall have the right to continue to occupy his apartment until the later of

the closing date under this Plan, the last day of the month in which shall fall the sixtieth (60th) day after the day on which this Plan is abandoned, or the date set for the expiration of such person's sublease, as the case may be. Such occupancy shall be on the same terms and conditions applicable to such person's tenancy or occupancy as of the date of this Plan, except that if the term of a subtenant's sublease in effect on such date would otherwise expire before the closing under this Plan it shall be deemed automatically extended to the closing date under this Plan or the last day of the month in which shall fall the sixtieth (60th) day after the day on which this Plan is abandoned, as the case may be. Furthermore, the Sponsor shall not remove from occupancy prior to _____ [month] _____ [day] , _____ [year] , any person who occupies an apartment in the Building on the date of this Plan pursuant to a sublease, even if the sublease may expire prior to _____ [month] _____ [day] , _____ [year] , provided that such person shall continue to pay the rent applicable to his apartment on the date of this Plan and shall otherwise duly comply with all of his other obligations as subtenant under his expired sublease. Any such person who shall continue to occupy his apartment after the expiration of his sublease in accordance with the provisions of this Plan or otherwise shall be deemed a month-to-month subtenant subject to eviction on or after _____ [month] _____ [day] , _____ [year] , only if the Sponsor first shall serve upon such subtenant a thirty (30) day notice of its intention to terminate the month-to-month subtenancy and to obtain possession of the apartment.

Section L

Hotel Services--Sale of Furniture and Furnishings

The hotel services presently provided by the Cosmopolitan Apartment Hotel include doormen at the main entrance to the Building from seven a.m. to midnight, twenty-four (24) hour reception desk (concierge) and switchboard service, interior telephone, window cleaning, day and night maid service, linen service, and room service. Under this Plan, it is anticipated that the Cooperative Corporation will continue to provide or cause to be provided all of the aforementioned services. Separate charges will be made for linen service and also for room service, which is provided by the subtenant (a corporation presently owned by the Sponsor) under the restaurant sublease described in Section M, and which, after the closing under this Plan, may be provided by the Cooperative Corporation as set forth in Section M. The rent (maintenance charges) paid by tenant-shareholders under their proprietary leases will include the other services as well as electricity.

It is anticipated that the Cooperative Corporation will purchase new uniforms for all Building personnel, and the Sponsor has agreed to provide a fund of _____ Dollars (\$_____) for this purpose. See Section N.

The public room in the Building not presently subleased also will be available for use by tenant-shareholders under terms and conditions to be determined by the Cooperative Corporation's Board of Directors unless the space is subleased by the Sponsor or by the Cooperative Corporation.

Furniture, furnishings, and air conditioning units owned by the Sponsors and presently used in the operation of the Building as a residential hotel and located in the apartments will be made available by the Sponsor, at reasonable prices, to persons who purchase the Cooperative Corporation's shares. Existing subtenants of apartments whose Subscription Agreements are accepted by the Sponsor will have a prior right to purchase the furniture, furnishings, and air conditioning units located in their respective apartments at the time the Sponsor accepts their Subscription Agreements. An existing subtenant may exercise this right by giving notice to the Selling Agent, in the appropriate place in the Subscription Agreement, of the purchaser's interest in purchasing specified air conditioning units and items of furniture and furnishings. Within thirty (30) days after acceptance by the Sponsor of a Subscription Agreement containing such

notice the Selling Agent shall advise the purchaser of the prices for the air conditioning units and items of furniture and furnishings in which the purchaser has indicated an interest in the Subscription Agreement. The purchaser shall then have a period of thirty (30) days in which to agree to purchase any such items at the indicated prices. Such agreement shall be in writing and subject to the applicable provisions of the Subscription Agreement except for the requirement as to a 10% down payment. The Selling Agent may offer all furniture, furnishings, and air conditioning units not subject to a prior right of an existing subtenant to purchase, and all items thereof which existing subtenants do not agree to purchase, to other persons purchasing shares of the Corporation, with such priorities and at such prices (which may be more or less than the prices at which any such items were offered to existing subtenants) and on such terms as the Selling Agent in its sole discretion may determine. The Sponsor, however, may reserve such items for its own use. Each sale of furnishings, furniture, and air conditioning units shall be made subject to the requirement, imposed by law, that the purchaser pay the sales tax applicable to such sale. The sales tax, at the time of this Plan, is _____ percent (_____%) of the purchase price. All furniture, furnishings, and air conditioning units shall be sold as is as of the date of the closing under this Plan.

Section M

Commercial Subleases

If this Plan becomes or is declared effective, the Ground Lease will be subject to the commercial subleases existing on the date of closing under this Plan. The following is a summary of the principal provisions of the commercial subleases presently in effect.

(1) Apartment 1-A, on the ground floor, has been sublet for use as medical offices to Dr. Samuel Stone, by agreement of lease dated _____ [month] _____ [day], _____ [year], for a term of three years, commencing _____ [month] _____ [day], _____ [year], and ending _____ [month] _____ [day], _____ [year]. The current annual rent is _____ Dollars (\$ _____), which will be payable until the expiration of the term of the sublease.

The sublease includes, without additional charge, ordinary maid and house services (except the supply of linens) and switch-board services of the Building, although the switchboard is not required to take messages. Electricity also is provided, without additional charge, for lighting and for medical equipment installed at the commencement of the sublease. All additional electricity requirements must be paid for by the sublessees by separate meter. The sublessee may place a sign on the Building at the West 10th Street special entrance to the demised premises, subject to the sublessor's approval. The sublessees have deposited \$1,000, face value, coupon bonds with the sublessor as security. In all other important respects, this sublease is substantially identical to the Standard Form of Office Lease of The Real Estate Board of New York, Inc.

(2) The area known as The Blue Room, in the southeast corner of the first floor of the Building, was sublet to The Chess School, Inc., for use in instruction in chess games, by agreement of lease dated _____ [month] _____ [day], _____ [year]. The subtenancy was continued by additional agreements including one dated _____ [month] _____ [day], _____ [year], containing an option, since exercised, to extend the term of the sublease to _____ [month] _____ [day], _____ [year], at an annual rental of _____ Dollars (\$ _____). The sublet premises cannot be used for chess games or instruction on Sundays and cannot be used at all between 11:30 p.m. and 9 a.m. The sublessee may not permit any nuisance or unlawful activity upon the premises or endanger the sublessor's fire or other insurance, or allow its employees to loiter in or around the Building, and indemnifies the sublessor against the acts of its employees, guests, or

invitees. The sublessor provides, without additional charge, cleaning services and electricity for lighting. The sublessee is responsible for other electricity and water charges measured by meters. The sublessee also shall maintain the air conditioning apparatus installed in the demised premises which is acknowledged to be the sublessor's property.

(3) The Sponsor sublet the ground floor and basement restaurant space in the Building to Flambeau Restaurant, Inc., by agreement of lease, dated _____ [month] _____ [day], _____ [year], for a term of fifteen (15) years, commencing _____ [month] _____ [day], _____ [year], and ending _____ [month] _____ [day], _____ [year].

Under the terms of this sublease, as it is now in effect, no rental is to be payable by the subtenant thereunder until _____ [month] _____ [day], _____ [year], at which time (and for the balance of the term) a rental of _____ percent (_____%) of the sublessee's gross sales is payable, computed according to standards set forth in the sublease. The sublessee's books and records are available to the sublessor, and provision is made for audit and arbitration in case of disputes.

The specific uses to which the demised premises may be put, and the services which the sublessee must provide, are spelled out in detail in the sublease. They are basically those of a high-class dining room and restaurant, and the providing of room service for residents and guests in the Building. The nature of such uses, the charges therefor, and the hours of service are set forth in detail in the sublease.

Room service billing is made through the sublessor only. Employees of sublessor are entitled to a _____ percent (_____%) discount. The sublessee may not allow any nuisances or illegal activity to occur and shall do nothing to subject the sublessor's fire insurance to cancellation. Various provisions for insurance to be carried by sublessee are set forth in the sublease. They cover plate glass, comprehensive liability, food liability, and liability due to the sale of liquor. The sublessee is responsible for the ventilation and cleanliness of the demised premises and for keeping the waste sewerage lines free from grease stoppages. The sublessee pays for all utilities including electricity, telephone, water, gas, and steam. The sublessee may, subject to sublessor's right of reasonable refusal, make alterations, additions, or improvements to the demised premises, subject to various requirements set forth in the sublease with respect to insurance, liens, indemnification, and notice. The sublessee agrees that all deliveries and garbage removals shall be through the basement. The sublessee may not place signs on the building without the sublessor's consent, which may not be unreasonably withheld. The sublessor agrees that no other party shall be given permission to sell food or beverages to the public from the Building.

Under the sublease, the sublessor also leases to the sublessee various items of restaurant equipment and supplies. Then _____ percent (_____%) of the rent, as set forth above, is allocated to the lease of the personal property. The sublessee is required to maintain the equipment in good order and repair and to replace it as required.

The sublessee indemnifies the sublessor with respect to the actions and conduct of its employees, agrees to bond its employees, and to abide by the union contracts of both sublessor and sublessee.

If the Building is to be demolished or if the zoning of the area in which the Building is located is changed from residential to commercial, the sublessor may terminate the sublease upon payment to the sublessee of a sum ranging from _____ Dollars (\$ _____) (if exercised in the sixth sublease year) to _____ Dollars (\$ _____) (if exercised in the 13th sublease year) and without payment during the last two sublease years.

In all other important respects, this sublease contains terms and provisions similar to those usually found in leases of this type of restaurant.

By virtue of an ancillary stock option agreement entered into between the Sponsor and Flambeau Restaurant, Inc., in _____ [year], the Sponsor, in _____ [month] _____ [year], acquired all of the shares of Flambeau Restaurant, Inc. The Sponsor may resell these shares prior to the closing under this Plan to someone interested in operating the restaurant in the Building, and may make any changes in the aforementioned restaurant sublease terms it deems necessary or advisable to effect such resale. Alternatively, the Sponsor may terminate the existing restaurant sublease and enter into a new sublease with a person interested in operating the restaurant. The new sublease shall contain terms acceptable to the Sponsor and the new subtenant, which may or may not be similar to those in the existing sublease. If no such resale of the shares or new sublease transaction is effected before the closing under this Plan, however, Flambeau Restaurant, Inc., will operate the restaurant until such closing and the Sponsor will transfer the shares of Flambeau Restaurant, Inc., to the Cooperative Corporation simultaneously with the closing of this Plan. In such event, unless and until the Cooperative Corporation resells such shares or enters into a new restaurant sublease it may operate its own restaurant and, in effect, become entitled to all profits resulting from the restaurant operation or, as the case may be, be required to sustain all losses resulting therefrom, including possible loss of sublease rentals which would otherwise be payable by the subtenant after _____ [month] _____ [day], _____ [year].

If the Cooperative Corporation operates the restaurant, it will provide room service to tenant-shareholders directly. If it does not operate the restaurant, it shall be required to make other arrangements for room service until it transfers the responsibility therefor to someone interested in operating the restaurant and willing to provide room service. If the Cooperative Corporation shall sustain any loss in the operation of the restaurant or room service facilities, it may, in due course, have to increase the annual rent (maintenance charges) payable by its tenant-shareholders. It should be noted, however, that the estimate of operating income for the first year after the closing under the Plan set forth in Schedule B does not include any rental income payable under the restaurant sublease.

The Sponsor cannot represent that the subleases described in subsections (1) and (2) above will be in effect after the closing under this Plan, and has reserved the right to terminate either or both of these subleases in the event of a default by the respective subtenants thereafter. If either sublease is terminated, the Sponsor, under the terms of the Assignment Agreement, may (but is not obligated to) enter into a sublease with another person for the premises vacated by the defaulting subtenant, and may permit the new subtenant to make any use of the premises permitted by law in a residential hotel. If the Sponsor is unable or fails to make a new sublease, or if any new sublease is made on terms less favorable than those contained in the previous sublease for such space described above, the Cooperative Corporation may suffer a loss of all or part of the income attributable to such space and included in the estimated income for the first year of the Cooperative Corporation as set forth in Schedule B, which could increase the annual rent (maintenance charges) payable by tenant-shareholders. Conversely, if either of the subleases is terminated because of default of a subtenant prior to the closing under this Plan, and if the Sponsor enters into a new sublease on more favorable terms than those contained in the sublease that is terminated prior to the closing date, or if the Cooperative Corporation shall thereafter sublet the vacant space at more favorable terms than those contained in the sublease of the defaulting subtenant, any additional income derived from such sublease will, from and after the closing date under this Plan or subsequent date on which such sublease takes effect, benefit the Cooperative Corporation. This may result in an increase in the income referred to in the aforementioned Schedule and, if the Board of Directors so determines, a decrease in the annual rent (maintenance charges) payable by tenant-shareholders.

Section N

Working Capital, Expenses, and Estimated Rent
(Maintenance Charges)

At the closing under this Plan, the Sponsor will provide the Cooperative Corporation with a capital improvement fund of _____ Dollars (\$_____). Of this amount, \$60,000 is for the improvements recommended by Walters Associates and _____ Dollars (\$_____) is for new uniforms for Building personnel.

At the same time the Sponsor will provide the Cooperative Corporation with working capital of _____ Dollars (\$_____). Working capital shall be computed after giving effect to normal and regular real estate closing adjustments for real estate taxes, vault taxes, insurance premiums, utilities, rentals under commercial and residential subleases, wages and payroll expenses, charges under service and maintenance contracts, payments made to employee insurance, pension and medical funds, dues paid to the hotel association of which the Sponsor is a member, food, liquor, and other building supplies in unopened packages at cost, and other prepaid items and accrued charges.

All expenses of promulgating this Plan, of organizing the Cooperative Corporation, of issuing its shares, and for transferring the aforementioned ground leases to the Cooperative Corporation will be paid by the Sponsor. These expenses include Selling Agent's commissions, estimated at _____ Dollars (\$_____), title insurance premiums of _____ Dollars (\$_____), printing and the cost of operating, improving, and maintaining the fees, and similar charges incurred at or prior to the closing date, together estimated at approximately _____ Dollars (\$_____) inclusive of general overhead and administrative expenses the Sponsor's. As a result of the Sponsor's payment of these expenses, the initial working capital of the Cooperative Corporation will not be diminished by reason thereof.

Each tenant-shareholder pays a proportionate share of the rent payable under the Ground Lease, real estate taxes, and the cost of operating, improving, and maintaining the Building. An estimate of the Cooperative Corporation's income and expenses for the first year after the closing under the Plan, assuming such year commences no later than _____ [month] _____ [day] , _____ [year] , is set forth in Schedule B. The figures and estimates in Schedule B have been prepared by Mark & Co., Inc., after consultation with Charles Anderson, Inc., the firm of independent certified public accountants that has audited the books and records pertaining to the operation of the Building for the last twenty-five (25) years. These figures and estimates are based upon the experience of the Sponsor in operating and managing this Building since _____ [month] _____ [day] , _____ [year] , and upon the experience of Mark & Co., Inc., in managing other cooperative apartment buildings, and are believed to be correct and dependable. Nothing in Schedule B, however, is intended or should be taken as a representation or guarantee by anyone that the annual rent (maintenance charge) for the first or subsequent years of operation of the Building by the Cooperative Corporation will be as set forth in Schedule B. It is possible that such rent (maintenance charges) or costs may exceed the amount shown therein.

Section O

Tax Deductions

Weiss & Spear has advised the Cooperative Corporation that it will qualify as a cooperative housing corporation within the meaning of *Section 216(b)(1) of the Internal Revenue Code of 1986*, Section _____ of the Tax Law of the State of _____ [state] , and Section _____ of the _____ [city] Administrative Code, if: (1) the Plan is declared effective; (2) there is a closing under the Plan, as set forth herein; (3) the Building was erected by a predecessor in interest of the Cooperative Corporation under the Ground Lease; (4) the price of the shares allocated to each apartment in the Building bears a reasonable relationship to the portion of the value of the Cooperative Corporation's equity in the leasehold of the Land and Building attributable to each such apartment; and (5) at least 80% of the Cooperative Corporation's gross income for the taxable year is derived from tenant-shareholders, including individuals produced by the Sponsor who acquire unsold

shares. If the Cooperative Corporation so qualifies, the tenant-shareholders may deduct, for income tax purposes, their respective proportionate shares of real estate taxes attributable to the Building.

The Sponsor represents that the Building was erected by a predecessor in interest of the Cooperative Corporation under the Ground Lease. The Selling Agent represents that, in its opinion, there is a reasonable relationship between the share prices as set forth in Schedule D and the value of the several apartments, and that the computation of estimated amounts deductible for income tax purposes, as set forth in Schedule D annexed hereto, is accurate.

Under the Plan, tax deductions for the first year of operations are expected to amount to _____ percent (_____%) of the total annual maintenance charges, as shown in Schedule D. The actual income tax benefits to each tenant-shareholder will depend upon the amount (if any) allowed as a deduction by the taxing authorities and upon the individual's income tax bracket, and his actual cost of rent (maintenance charges) will be reduced accordingly. It should be noted, however, that since operating expenses and taxes may increase or decrease, there is no assurance that the aforementioned percentage may not change.

No warranties or representations are made that the Internal Revenue Service, the _____ [state] State Department of Taxation and Finance, or the _____ [city] Department of Finance will allow income tax deductions, or that the laws upon which the Sponsor's special counsel base their opinion to which reference is made above will not change. No warranties or representations are made by the Sponsor, its special counsel, the Selling Agent, or any other person with respect to the tax consequences of the Plan or the tax consequences of ownership of any shares offered under the Plan except as expressly set forth herein. No one has been authorized to make any representations other than those herein contained.

Section P

Annual Reports

The Cooperative Corporation will submit annual financial reports to all tenant-shareholders, including an annual balance sheet and a statement of operating expenses for the preceding calendar year, certified by its independent certified public accountant. All tenant-shareholders also will receive statements setting forth their respective tax deductions based upon the Cooperative Corporation's payment of real estate taxes on the Building during the previous year.

Section Q

Selling Agent and Management Contract

Mark & Co., Inc., is the Selling Agent. If this Plan becomes or is declared effective it will receive from the Sponsor a commission for the sale of the Cooperative Corporation's shares under this Plan calculated in accordance with the rates recommended by The Real Estate Board of New York, Inc., namely, _____ percent (_____%) of the aggregate selling price of all such shares. The aforementioned commission will be payable not only with respect to shares, other than unsold shares, sold prior to the closing under this Plan but also to unsold shares on their resale within two years of the date of closing under this Plan by the persons designated by the Sponsor to acquire them initially. If any such resale is effected by an outside agent, the Sponsor shall pay any brokerage commission due to that agent, as well as one-half of that amount to Mark & Co., Inc. If any resale is effected by the Sponsor itself, it shall pay to Mark & Co., Inc., one half the amount that would have been due to an agent who negotiated such sale.

As of the closing date under this Plan the Cooperative Corporation will enter into a one-year supervisory management agreement with Mark & Co., Inc., at an annual fee of _____ Dollars (\$_____).

Either party may cancel the management contract by giving thirty (30) days' written notice, except that only ten (10) days' written notice is required if there is a material breach of the agreement by the other party, and no notice is required if the other party files a petition in bankruptcy.

Mark & Co., Inc., is a large, well-known real estate concern doing business in the City of New York. It specializes in many phases of real estate including, specifically, the management of cooperative apartment buildings. At the present time, Mark & Co., Inc., manages a number of apartment buildings in the vicinity of the Building which are, or are in the process of becoming, cooperatives.

As supervising managing agent, Mark & Co., Inc., will, among other things, supervise Building personnel. Through such personnel, it will be responsible for the maintenance of the Building, the purchase of supplies, and the authorization and supervision of necessary repairs in and about the Building. Mark & Co., Inc., will be subject to the direction of the Cooperative Corporation's Board of Directors. Further, in cases where the cost of any one item of alteration or repair exceeds \$500, Mark & Co., Inc., will not, except in an emergency, proceed with such work without the authorization of the Board of Directors. The management contract requires the Cooperative Corporation to indemnify Mark & Co., Inc., for the actions of its employees.

Section R

Availability of Documents for Inspection

This Plan contains a fair summary of the material provisions of the various documents described herein, but copies of the actual documents are on file with the Selling Agent. These copies should be inspected by anyone wishing to know all of the terms and provisions of the documents. The office of the Selling Agent is located at 500 Fifth Avenue, New York, New York. The documents may be inspected by any interested party at any time during regular business hours.

Section S

Shareholder of Sponsor; Special Counsel

All shares of the 10 Fifth Avenue Corporation are held in the name of Carl Spitzer for the beneficial interest of the following persons, whose percentage of interest appears immediately after the name:

Name	Percent
Samuel Stone	_____

Michael Levin	_____

Alan Levi	_____

Anna Stern	_____

Marcus Feld	_____

Ruth Adams

Elia Marks

Weiss & Spear, special counsel to the Sponsor and counsel to the Cooperative Corporation, prepared this Plan as well as most of the documents referred to herein. That firm also will be responsible for the closing under the Plan, and will continue in its capacity as counsel to the Cooperative Corporation until a Board of Directors elected by the tenant-shareholders after the closing under the Plan shall determine otherwise.

Section T

Miscellaneous

The Sponsor has not knowingly omitted any material facts from this Plan, and it does not contain any untrue statements of any material facts.

Any information, data, or representation not referred to in this Plan and not contained in the various documents described herein should not be relied upon. No salesmen or representative of the Sponsor, the Cooperative Corporation, or the Selling Agent has been authorized to provide any such information or data or to make any such representation.

There are no lawsuits pending against the Sponsor or the Selling Agent or affecting the Building which, in any way, will materially affect this Plan.

Neither the Sponsor, the Cooperative Corporation, nor the Selling Agent will refuse to offer or sell shares of the Cooperative Corporation to any person, or will otherwise discriminate against any person with respect to the sale of such shares, because of such person's race, religion, color, or place of national origin.

This Plan may not be changed or modified orally.

Dated: _____ [month] _____ [day] , _____ [year]

10 Fifth Avenue Corporation

Sponsor

SCHEDULE A

Detailed Description of the Building

Walter Associates

_____ [month] _____ [day], _____ [year]

10 Fifth Avenue Corporation
10 Fifth Avenue
New York, New York 10003

Gentlemen:

We have carefully inspected the residential hotel building located at the southwest corner of Fifth Avenue and West 10th Street, which is known as 10 Fifth Avenue, and are pleased to submit the following report of our findings.

BUILDING BULK

The building is a 15-story structure built on a plot with a frontage of 75 3 on Fifth Avenue and 150 on West 10th Street. The plot is L-shaped and has an irregularly shaped extension 50 feet wide with sides of 60 and 57 6 1/4 extending southward at the westerly end of the portion of the lot fronting on West 10th Street. It is located in Block #1341 on Lot #70 in the Borough of Manhattan, City of New York.

The building was erected between 1962 and 1964 on New Building Application NB187/46 in an area now zoned R10 for a depth of 125 from Fifth Avenue and R7-2 for the remaining 25 of frontage on West 10th Street which are residential areas permitting certain accessory uses.

OCCUPANCY

The building is a residential hotel having a total of 134 suites ranging from one to five rooms above the first floor, with a registration desk, general office, manager's office, main lobby and lounge rooms, powder room, and men's lounge with accessory toilet rooms, a chess school, restaurant, kitchen, and service pantry on several levels of the first floor. There is a doctor's suite with private entrance on the first floor off West 10th Street.

CELLAR

The cellar is on several levels and contains a steam service and meter room, pump rooms, electric meter rooms, work and paint shops, engineer's office, male and female help's locker rooms with toilets, trunk rooms, house storage rooms, elevator machine rooms, and fan rooms. In addition the lower portion of the restaurant kitchen occupies part of the high level of the cellar.

FIRST FLOOR

Patrons' or tenants' entrance is from Fifth Avenue with an entrance to the restaurant as well as a service entrance on West 10th Street. The first floor lobby is the only access to two sets of elevators and stairs which serve separate areas of the floors above.

UPPER FLOORS

Floors above, from the second to the 15th inclusive, consist of living quarters for both permanent and transient guests and range in size from one room with bath and service pantry to apartments with three bedrooms, three baths, and service pantries.

SERVICES

The building is served by two passenger and one service elevator in the west area and one passenger and one service elevator in the east area. All cars are manually controlled and attendant operated. All cars stop at all floors from the cellar to the 15th floor inclusive. There are two totally enclosed stairs in each area, constructed with steel undercarriages and having cement treads and platforms.

One set of stairs in each of the areas has a fire standpipe line complete with racks and hoses. A mail chute with letter box and slots at each floor is located in the elevator corridors of each area.

There is a master T.V. antenna which will receive programs on VHF channels 2, 4, 5, 7, 9, 11, and 13 and all UHF channels available to all tenants. There is an incinerator for each area of the building. The incinerator for the west area is a flue-fed type with hoppers and doors at each floor. This is no longer used, all hopper doors have been padlocked. The incinerator which is located in the east area is now used for both areas of the building. It is a Morse Boulger, two-level installation with the charging room above and the fire box on the lower level and is used only for burning dry rubbish which is collected at each floor and brought down by hotel help.

LEGAL

The building is now legally occupied under Certificate of Occupancy 69702 and Department of Buildings Registration 217,342.

As of the date of inspection there were no violations pending in the municipal departments.

EXTERIOR

Structure

The structure is completely fireproof, consisting of a steel skeleton with concrete floor arches and masonry enclosing walls supported on the structural framework at every floor.

The exterior walls on both street fronts consist of a tooled granite base and limestone ashlar facing three stories high with buff colored face brick backed by masonry units above.

The design is enhanced by ornamental balconies, band courses, and a cornice at the roof level. Court and yard walls are of hard-pressed brick similar to front brick.

Window sills are of limestone and precast stone. All masonry is in sound condition.

Window frames and sash are of wood and in sound condition.

There are steel window guards at windows at grade level on the West 10th Street front, with steel area gratings at sidewalk level to provide light to the kitchen area below.

The sidewalks are in good condition.

Interior

Cellar

Enclosing walls generally are of concrete, dividing walls and partitions are of brick, floors are finished cement and ceilings are exposed concrete. Most wall surfaces have been plastered and painted. Some plaster requires patching and paint is soiled. Toilet rooms adjacent to male and female locker rooms have tile floors and wainscots. Toilet stall partitions are of marble with wood doors.

Steps between different levels of the cellar are of cement filled pan type with steel railings and wood handrails, or of diamond pattern steel plate on steel stringers with open risers.

First Floor

The entrance to the building consists of a revolving door with emergency vestibules flanking it on either side, all having bronze frames and plate glass panels.

The lobby extends from Fifth Avenue almost the entire length of the building, and has two levels, the first at grade and the next two risers up.

Floors, steps and risers are of marble, walls are plastered with marble base, painted in some areas and painted cement in others. Radiators are recessed behind ornamental plaster grills or in wood enclosures with metal grilles.

Ceilings are plaster, some with beam drops and ornamental plaster cornices.

Lighting is by crystal chandeliers and other type ceiling lighting with table lamps to provide additional light for reading as well as decoration.

Elevator hoistway entrances have ornamental bronze doors and trim and mail boxes are of bronze.

In addition and adjacent to the above there are lounges, writing rooms, and alcoves in matching mood and decor. There is a registration desk, a general and private office, and toilets for men and women. Two of the lounges have wood burning fireplaces.

The balance of the first floor is occupied by a restaurant on three levels and accessible from the lobby and a street entrance on West 10th Street. The spaces are nicely decorated, with banquettes, booths and tables, and a bar. Floors are carpeted, walls are plaster and covered with paper and damask, all in good condition.

There is one doctor's suite which has its private entrance on West 10th Street, a suite used by a chess school and a large, seldom used room for private parties.

Upper Floors

The floors from the second to the 15th inclusive are divided into east and west areas each served by a separate bank of elevators and two fire stairs.

Passenger elevator halls have carpeted floors; wood bases; painted plaster walls with applied wood moldings; plaster ceilings with beam drops. Doors to suites are of wood; doors to stairs and elevator hoistways are of fireproof steel.

Service halls have painted cement floors and bases, painted plaster walls and ceilings, and the westerly hall has the sealed rubbish chute. There is a service closet off the service elevator corridor at each floor.

Apartments vary in size from a single room with private bath to suites of five rooms having three bedrooms with a bath for each bedroom. Each apartment has a service pantry equipped with sink and drainboard, base and wallhung cabinets, refrigerator, and an outlet for an electric hot plate. A few apartments have electric stoves which are tenant owned.

Foyers and living rooms have oak parquet floors and private halls and bedrooms have oak strip flooring, most of which are covered with wall-to-wall carpet, with a few foyers having resilient flooring. Walls are plastered, have wood bases and mouldings, plaster ceilings with beam drops; radiator enclosures under windows are of wood with metal grilles. Some of the living rooms have wood burning fireplaces. Serving pantries have resilient flooring, plaster walls and ceilings, sinks and drainboards of enameled cast iron, or stainless steel and Formica, under-the-counter or full-height refrigerators; most have steel base and wall cabinets, others have wood cabinets. With few exceptions, service pantries have electric outlets for hot plates; the other have full ranges which have been installed by the tenants.

Bathrooms have ceramic tile floors, and glazed tile walls approximately seven feet high with field of one color and border of another. All bathrooms have showers over the tub, some are glass enclosed. Bathtubs are enameled cast iron, basins and water closets are vitreous china. Water closets have flushometers.

ROOF STRUCTURES

Roof houses are brick faced matching the building on the exterior with back-up block inside. Floors are of concrete, painted in open areas; window frames and sash are kalamein and glazed with wire glass. Doors are kalamein and set in metal bucks. Doors and windows require painting.

Parapet walls are faced on the inside with face brick matching the front brick and have precast stone copings. Some coping joints require recaulking.

There are two water tanks on exposed structural steel framing. Each tank is of 10,000-gallon nominal capacity, and each was installed some eight years ago.

Fan houses above the roofs are of copper and in good condition.

ROOFS

The main roof and the roofs of roof structures are of the built-up bituminous type with slag topping and have roof weight and temper copper base and cap flashings.

Roofs over cellar areas in court and yard have quarry tile surfaces, copper flashings, and cap flashings.

Skylights over the roof houses and court and yard are of metal and have wire guards over the glass.

STAIRS

Stairs have steel undercarriages with steel pans filled with cement to form the wearing surfaces for treads and intermediate platforms. The walls are of masonry units, plastered and painted in two shades with the darker shade

forming a dado below the lighter shade.

One set of stairs in each area is equipped with standpipe, rack, and hose.

ELEVATORS

There are five elevators in the building with two passenger and one service car serving the west area and one passenger and one service car serving the east area.

All elevators are of Otis Elevator Company manufacture, all of 2,000 pound capacity, and all travel at a speed of 350 feet per minute. They are of the traction type with machines in the cellar and overhead sheaves in bulkheads above the roof.

All cars have manual controls and are attendant operated, and serve all floors from the cellar to and including the top floor.

Three passenger cars and one service car have walnut paneled cabs, with gilded, carved ornament, bronze folding gates and trim. They have linoleum flooring and dome light.

The remaining service car walls and ceiling are of sheet steel, with a folding steel gate. It has a linoleum floor and dome light.

All cars are in good operating condition; the wood service car shows wear and tear. All cars were last inspected _____ [month] _____ [day] , _____ [year].

PLUMBING

The building has a combination sanitary and storm water drainage system which discharges into the City sewer system in the street for fixtures which are above the level of the City sewer. Waste water which is collected below the City sewer level is drained into two sump pits and lifted to the house drain by means of two pumps at each pit. Vertical soil and waste stacks, leaders, and main branches are of extra heavy cast iron; branch vents and runouts are of galvanized steel.

Cold water risers are of galvanized wrought iron with brass crotons; hot water risers, branches, and runouts are of brass.

Exposed pipe and fittings at fixtures are chrome plated. Fixtures in apartments consist of enameled cast iron bathtubs, vitreous china basins, and water closets with flushometers. Sinks in kitchens are of enameled cast iron with integral drainboards with some replacements of stainless steel with Formica drainboards.

Cold water is supplied to the building in a split system; the first four floors are upfeed under street pressure and all other floors are downfeed from the tanks above the roof.

Water is pumped to the tanks by means of pumps in the Mechanical Equipment Room in the cellar.

The building has a treatment installation for purifying the water.

Hot water is generated in two storage tanks, each of 5,000-gallon capacity by means of submerged coils.

Each area of the building has a 10,000-gallon (nominal) water storage tank, each with required reserve for fire standpipe use. The insulation of the piping between the roof and the tank of the easterly area is in need of repair.

Fire hoses are in good condition.

The shop areas in the cellar have sprinklers.

HEATING, VENTILATING, AIR CONDITIONING

The building is heated by means of a two-pipe steam system with wet return and Warren valves and traps. Radiators are of cast iron and are enclosed in wood enclosures with metal grilles under windows of all main rooms.

Steam is supplied to the building by _____ [name] at low pressure for heating purposes and at higher pressure for service to the restaurant kitchen.

Interior bathrooms and kitchens have exhaust ventilation by means of fans on the roof. The restaurant has a separate exhaust system and an individual air conditioning system.

Numerous apartments have window type air conditioning units, some of which are tenant owned. The building is wired from a new panel in the cellar to provide sufficient electric current for installing air conditioners in all apartments.

ELECTRIC

Electric services consist of switches supplying 5,200 amperes of A.C. current and 650 amperes of D.C. current.

All lighting and services consume A.C. current.

Sufficient current is provided at each apartment panel for installing air conditioners in each main room not now so equipped. Fuses for this wiring are in the service corridors.

A master T.V. antenna for UHF and VHF television reception has been installed and is available to all apartments.

A few apartments have been wired for major electric cooking ranges. Refrigerators are of the under-counter type in small kitchens and vertical six or seven cubic foot size in larger apartments. Refrigerators are G.E. and Frigidaire.

The restaurant has a separate electric service and is equipped with electric fire alarm system.

SUMMARY

The building is a completely fireproof structure built in accordance with requirements of the Building Code and Zoning Resolution of the City of New York which were in effect at the time of construction.

It is solidly built on a structural steel frame with concrete floor arch construction and skeleton enclosing walls of face brick, trimmed with granite and limestone with masonry unit back-up. It has ornamental terra cotta balconies, band courses, and cornice.

All exterior masonry work is sound.

The windows are of the double hung type with wood frames, sash, and trim except in roof houses and in other areas where legal requirements limit them to steel or kalamein.

The frames and sash are sound, except for scribe moldings at the sills which require replacement.

Metal windows and doors which are exposed to the elements also require painting.

The interior spaces are well laid out, rooms are large and well proportioned, have numerous and spacious closets and excellent sanitary facilities, with a bathroom for every bedroom.

Foyers and living rooms have oak parquet floors, bedrooms and communicating corridors have oak strip floors, most of which have been covered with carpet. Some of the foyer floors have been covered with resilient flooring. Those wood floors which were not covered were in sound condition and except for the expected normal shrinkage in heated areas had tight joints.

Wall surfaces in the above spaces are plaster board with painted finish, have wood base and door and window trim.

Ceilings have beam drops, are plastered and painted. Ceiling surfaces are satisfactory. Paint on the walls is peeling in some small areas. The paint on the interior trim is generally in good condition, except at lower rails of window sash where condensation has caused it to peel off. The arises of wood and metal moldings have lost some of their sharpness through continuous painting but are in no way objectionable.

Serving pantries have resilient flooring, cement base, and plaster board walls and ceilings. Walls and ceilings are painted where not covered with fixed cabinets or equipment. All are well kept and are ventilated by means of ducts connected to exhausters on the roof.

Cabinets are Formica, although some original wood cabinets remain. There are sink and drainboard combinations of porcelain enameled iron and some of stainless steel with Formica drainboards.

The mechanical installations (plumbing, heating and ventilating, electrical) are in good operating condition and, subject to normal maintenance and replacement of parts, they should not require any capital investment for several years.

Bathrooms have ceramic tile floors, glazed tile wainscots approximately seven feet high on walls, and balance of wall and ceiling plastered.

Bathtubs are of porcelain enameled cast iron, basins and water closets of vitreous china and in good condition. Water closets have flushometers, bathtubs have showers with curtains and in some instances glass enclosures. All exposed pipe and fittings are chrome plated.

The tile walls are in good condition. Paint in the bathrooms is generally good except where continued exposure to steaming is causing paint to peel at intersections between tile and plaster.

Some bathrooms have windows opening to the outer air, others are exhaust ventilated by means of ductwork to roof fans.

The cellar areas are enclosed in concrete, brick, and terra cotta with some areas plastered and are generally in sound condition. Painting of the walls and ceilings, floors, trim, and equipment would add considerably to the appearance of the entire area.

For purposes of long-range planning the following items should correct present deficiencies and update the building and equipment so that future maintenance costs would be reduced to a minimum:

Lobby redecorating	\$ _____
	—
Overhaul two water tanks and water to feeds building.	\$ _____
	—
Terra cotta cornice repairs	\$ _____
	—
Total	\$ _____
	—

Walter Associates

SCHEDULE B

(intentionally omitted)

SCHEDULE C

Comparative Operating Statement

Walter Anderson & Company

Certified Public Accountants
150 Broadway, New York, New York 10010

Board of Directors
10 Fifth Avenue Corporation
10 Fifth Avenue
New York, New York 10003

Gentlemen:

We have examined the balance sheets of 10 Fifth Avenue Corporation, leasing and operating the Cosmopolitan Apartment Hotel, New York, New York, as of _____ [month] _____ [day] , _____ [year] , _____ [year] , and _____ [year] , and the related statements of revenue and expenses for the years then ended. Our examinations were made in accordance with generally accepted auditing standards, and accordingly included such tests of the accounting records and such other auditing procedures as we considered necessary in the circumstances.

In our opinion, the balance sheets and statements of income, heretofore furnished to the Corporation, present fairly the financial position of 10 Fifth Avenue Corporation, leasing and operating the Cosmopolitan Apartment Hotel, New York, New York, at _____ [month] _____ [day] , _____ [year] [

year] , _____ [year] , and _____ [year] , and the results of its operations for the years then ended, in conformity with generally accepted accounting principles applied on a consistent basis.

The accompanying comparative statement of actual operating expenses of the Cosmopolitan Apartment Hotel for the three years ending _____ [month] _____ [day] , _____ [year] , has been rearranged to conform with the selling agent's summary of estimated expenses. In our opinion, this comparative statement of actual operating expenses, subject to the footnotes included thereon, is fairly stated.

Walter Anderson & Company

New York, New York

_____ [month] _____ [day] , _____ [year]

SCHEDULE D

(intentionally omitted)

SCHEDULE E

Subscription Agreement

Having read and approved the Plan of Cooperative Organization for the Cosmopolitan Apartment Hotel, 10 Fifth Avenue, New York, New York, dated _____ [month] _____ [day] , _____ [year] , and the Schedules annexed thereto, the undersigned hereby agrees with 10 Fifth Avenue Corporation, the Sponsor of the Plan, with Cosmopolitan Tenants Corporation, the Cooperative Corporation referred to in such Plan, and with the other subscribers for shares of the Cooperative Corporation, to purchase the shares of Cosmopolitan Tenants Corporation to be allocated to the apartment (the Apartment) in the Cosmopolitan Apartment Hotel (premises 10 Fifth Avenue) hereinafter specified, from the Cooperative Corporation, upon the terms and conditions set forth below, subject, however, to the terms and conditions of the aforementioned Plan:

_____ Apartment:

_____ Number of shares:

_____ Purchase price:

_____ Ten percent (10%) down payment:

The down payment being made herewith shall be by check(s) drawn by the undersigned on a _____ [city] bank to the order of Weiss & Spear, Escrowee (which law firm shall deposit such check(s) in a bank account maintained with Federal National Bank, entitled "Weiss & Spear--10 Fifth Avenue Special Account"). The proceeds of such check(s) shall be held in escrow by such law firm until the closing under the aforementioned Plan and the payment

of such proceeds to the Cooperative Corporation, or until the down payment is returned to the undersigned, without interest, either because this Subscription Agreement is not accepted by the Sponsor or because the Sponsor is unable to assign the ground leases to the Cooperative Corporation or because the Plan is abandoned, as the case may be.

The balance of the purchase price _____ [month] _____ [day] , _____ [year] shall be payable by certified check(s) drawn by the undersigned on a _____ [city] bank, to the order of Weiss & Spear, Escrowee, within ten (10) days after written notice is sent by the Sponsor to the undersigned stating that the Plan has become or has been declared effective. The proceeds of such check(s) also shall be held in escrow and applied or returned, as above set forth.

The undersigned shall sign duplicate proprietary leases for the Apartment on presentation thereof, which shall be in the form adopted by the Cooperative Corporation.

The undersigned has been advised that the Apartment is now occupied and that the purchase by the undersigned is subject to such occupancy.

The undersigned may be interested in purchasing such air conditioning units (owned by the Sponsor) and such items of furniture and furnishings presently located in the Apartment as are specifically described at the foot of this Subscription Agreement and requests price information with respect thereto from Mark & Co., Inc. (the Selling Agent).

The aforementioned Plan of Cooperative Organization is hereby incorporated herein as if set forth at length. The Sponsor hereby agrees to comply with and to perform all of the terms and conditions set forth therein which are applicable to the Sponsor, and to fulfill all of the obligations on the part of the Sponsor to be fulfilled as provided in such Plan. The Cooperative Corporation hereby agrees to comply with and to perform all of the terms and conditions set forth therein which are applicable to it, and to fulfill all of its obligations as provided in such Plan.

The undersigned has been offered full and free opportunity to investigate and examine all of the documents and facts to which reference is made in the Plan and represents and warrants to the Sponsor and to the Cooperative Corporation that no representations or warranties have been made to the undersigned except those specifically set forth in the Plan. The undersigned also acknowledges having been advised that no person has been authorized to make any representations or warranties not specifically set forth in the Plan.

The undersigned represents and warrants to the Sponsor, to the Cooperative Corporation, and to the Selling Agent that the undersigned has not negotiated or had any dealings with any broker other than the Selling Agent in connection with the Apartment. The undersigned represents that the undersigned is (are) over 21 years _____ of age, residing in the State of _____ [state] at _____ [city] , _____ [state] .

This agreement shall not be binding upon the Sponsor or the Cooperative Corporation until a copy hereof, signed by Mark & Co., Inc., as Selling Agent, is mailed or delivered to the undersigned.

Notices given hereunder shall be in writing and shall be sent to the Sponsor, the Cooperative Corporation, and the Selling Agent, respectively, at the address specified for each such party in the Plan, and to the undersigned at the residence address of the undersigned set forth herein.

This agreement contains the entire understanding and agreement of the parties hereto. This agreement may not be assigned by the undersigned without the Sponsor's written consent and may not be changed orally.

This agreement shall be construed in accordance with and governed by the laws of the State of _____ [state] .

References:

Personal: _____

[illegible]



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Current Legal Forms for Real Estate

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Current Legal Forms for Real Estate
Chapter 20 REAL ESTATE ENTITIES
Part IV. Forms
G. COOPERATIVES

24-20 Current Legal Forms for Real Estate FORM 20.64

AUTHOR: by Stephen E. Pigott and Harold O. Maxfield, Jr.

FORM 20.64 Contract for sale by tenant--shareholder of cooperative apartment

COMMENT

Under most cooperative plans, the sale of shares and the transfer of the accompanying lease cannot be accomplished without the consent of the cooperative corporation. In the agreement illustrated here, the closing of the contract is predicated upon the seller's obtaining this consent.

FORM

AGREEMENT made _____ [month] _____ [day] , _____
[year] , between JOHN OXMAN, residing at _____ [address] , _____ [city] ,
_____ [state] (the "Seller"), and ROBERT ROBBINS, residing at _____ [address] ,
_____ [city] , _____ [state] (the "Purchaser").

1. Sale. The Seller agrees to sell, transfer, and deliver to the Purchaser and the Purchaser agrees to purchase and take title from the Seller (all subject, however, to the further terms and conditions of this agreement), the following:

(a) One thousand one hundred (1,100) shares of 1000 Fifth Avenue, Inc. (the "Corporation"), which carry the privilege of receiving the proprietary lease hereinafter referred to in subparagraph (b) of this paragraph.

(b) The proprietary lease (the "Proprietary Lease") between the Corporation, as Lessor, and the Seller, as Lessee, covering apartment 5-F in the apartment building known as 1000 Fifth Avenue, New York, New York, with all necessary executed assignments or consents.

(c) The Seller's right, subject to the provisions of the Proprietary Lease, in and to the fixtures, equipment, and personal property now contained in the apartment, other than furniture, furnishings, and personal effects. Neither the Seller nor the Corporation are obligated to install any additional equipment in the apartment.

(d) The Purchaser has inspected the apartment and shall take it in its present condition, normal wear and tear and removal of fixtures and property not included in this sale excepted.

(e) The Purchaser also acknowledges that he has examined the Proprietary Lease covering the apartment, as well as the Corporation's Certificate of Incorporation and Bylaws, and that he is familiar with the terms of each such instrument.

2. Price. The purchase price is _____ Dollars (\$ _____), payable as follows:

(a) _____ Dollars (\$ _____) by check, subject to collection, when this agreement is signed; and

(b) _____ Dollars (\$ _____) in cash, certified check, or cashier's check, drawn on a New York bank or trust company, payable to the order of the Seller, and to be delivered at the closing.

3. Warranty of Seller. The Seller warrants and represents that he is the owner of the shares in the Corporation, the Proprietary Lease, and the fixtures, equipment, and personal property heretofore set forth; that the same are free and clear of all liens, encumbrances, and adverse interests, subject, however, to any liens or mortgages on the real property of which the apartment forms a part. The shares in the Corporation are duly paid for and are nonassessable.

4. Date of Transfer. The effective date of the assignment of the Proprietary Lease shall be _____ [month] _____ [day] , _____ [year] . Maintenance or rent and other charges which shall have become due and payable under the provisions of the Proprietary Lease shall be apportioned as of such effective date of the assignment, so that the Seller shall bear and shall have paid the portion thereof applicable to the period up to the effective date of the assignment and the Purchaser shall bear and pay the portion applicable to the period commencing with such effective date.

5. Closing. The transfer of title hereunder shall be closed and the papers delivered and payments or adjustments made at the office of Jones & Co., Inc., 10 East 42nd Street, New York, New York, on _____ [month] _____ [day] , _____ [year] , at 2 p.m., which date, time, and place are hereby designated as the closing.

6. Documents to be delivered to purchaser. At or before the closing the Seller shall deliver to the Purchaser:

(a) Certificate or certificates for the number of shares mentioned in subparagraph (a) of Paragraph 1. If the Seller shall be a fiduciary there shall also be delivered all documents necessary or required by the Corporation for the purpose of transferring such shares, including but not limited to wills, waivers by taxing authorities, and certificates of authority to act.

(b) Share transfer power or endorsements on such share certificate or certificates, together with all necessary transfer stamps duly affixed thereto to cover the transfer thereof into the name of the Purchaser.

(c) The Seller's original Proprietary Lease referred to in subparagraph (b) of Paragraph 1, together with all such assignments or consents as may have been necessary to transfer the interest of the Lessee named therein to the Seller.

(d) Assignment of the Proprietary Lease, in triplicate, duly executed for the purpose of conveying to the Purchaser all the Seller's right, title, and interest as Lessee in the Proprietary Lease. This assignment shall include a warranty to the

effect that good and valid title is being transferred to the Proprietary Lease and the corporate shares above described.

(e) The Corporation's consent to the transfer of such shares and the Proprietary Lease to the Purchaser, or in the alternative, a certificate by an officer of the Corporation that a consent to such assignment is on file with it.

7. Document to be Delivered by Purchaser. At or before the closing, the Purchaser, in addition to the payment of the balance of the sale price and adjustments, shall deliver the following:

(a) Agreement signed and acknowledged by the Purchaser in triplicate, in form approved by the Corporation, accepting the assignment of the Proprietary Lease and assuming and agreeing to perform and comply with all of its terms, covenants, and conditions, including observance of house rules and any special provisions with respect to such shares, on and after the effective date of the assignment. One of such executed agreements shall be delivered to the Seller and the other to the Corporation.

(b) If the Corporation so requests, the Purchaser shall surrender the assigned Proprietary Lease and in place thereof shall enter into and execute a new Proprietary Lease with the Corporation in substantially the same form and covering the same apartment as the Proprietary Lease so assigned and surrendered.

8. References. The Purchaser shall submit to the Corporation or its managing agent forthwith after the execution hereof adequate references as to the Purchaser's social and financial standing, and shall cooperate in any way reasonably required by the Corporation, including the appearance before any board or committee thereof.

9. Possession. The Seller agrees that as of the effective date of the closing the premises will be vacated and possession and keys made available to the Purchaser.

10. Termination of Agreement. This agreement shall become null and void and neither party shall have any rights against the other, except that the Seller shall return to the Purchaser the amount paid on the execution hereof, if any of the following conditions shall occur prior to the closing:

(a) The Seller shall be unable, except for his willful default, to comply with each of subparagraphs (a), (b), (c), (d), and (e) of Paragraph 6 of this agreement.

(b) The apartment covered by the Proprietary Lease is damaged or injured by fire between the date of the execution hereof and the date of the closing so as to render it untenable.

(c) Prior to the closing, the Corporation shall have elected to cancel and terminate the Proprietary Lease under any option or privilege reserved or contained therein.

(d) Prior to the closing, the Purchaser shall have complied with the provisions of Paragraph 8 of this agreement but the Seller shall have been unable to obtain the Corporation's consent to the transfer of the shares and the Proprietary Lease.

11. Default by Purchaser. If the Purchaser shall fail to take title to the Proprietary Lease and shares of the Corporation on the closing and pay to the Seller the balance of the sale price and adjustments for any reason other than those set forth in Paragraph 10, the amount paid on the execution hereof, and any other sum or sums paid by the Purchaser to the Seller prior to the closing, may at the Seller's option be retained by the Seller as liquidated damages. In such event neither party shall have any further rights against the other with respect to this agreement. The foregoing privilege shall not, however, unless so specifically exercised by the Seller, be exclusive of any right or claim which the Seller shall have against the Purchaser because of any such default.

12. Broker. The Purchaser represents to the Seller that Jones & Co., Inc., is the only broker who was instrumental in

bringing about this sale. Based upon such representations, the Seller agrees to pay to Jones & Co., Inc. commissions in accordance with a separate agreement made with it.

13. Annual Maintenance. The seller represents that the annual maintenance for the apartment at the present time is _____ Dollars (\$_____).

14. Time of the Essence. Time shall be of the essence with respect to all terms of this agreement, except that any delay which shall occur in obtaining the Corporation's approval shall permit a reasonable postponement of the closing until such approval is obtained. If it is ascertained, however, that no approval shall be forthcoming, the down payment shall be returned to the Purchaser.

15. Entire Agreement. This agreement contains the entire agreement between the parties hereto and cannot be changed orally.

16. Governing Law. This agreement shall be construed in accordance with and governed by the laws of the State of _____ [state] .

17. Non-assignment. The Purchaser shall not assign this agreement or his rights hereunder.

18. Binding Effect. Subject to the limitation in Paragraph 17, this agreement shall bind and apply to both parties and their respective personal representatives and successors in interest.

19. Non-waiver. No delay or failure by either party to exercise any right under this agreement, and no partial or single exercise of that right, shall constitute a waiver of that or any other right, unless otherwise expressly provided herein.

20. Headings for Reference Only. Headings preceding the text and sections of this agreement have been inserted solely for convenience and reference, and shall not be construed to affect its meaning, construction, or effect.

21. Notices. All notices or other documents under this agreement shall be in writing and delivered personally or mailed by certified mail, postage prepaid, addressed to the parties at their last known addresses.

22. Counterparts. This agreement may be executed in two or more counterparts, each of which shall be deemed an original but all of which together shall constitute one and the same instrument.

In witness whereof the parties hereto have signed this agreement the day and year first above written.

SELLER:

_____ John Oxman
 ____ [witness]

BUYER:

_____ Robert Robbins
 ____ [witness]

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Current Legal Forms for Real Estate

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Current Legal Forms for Real Estate
Chapter 20 REAL ESTATE ENTITIES
Part IV. Forms

H. CONDOMINIUMS AND HOMEOWNERS ASSOCIATION

24-20 Current Legal Forms for Real Estate FORM 20.65

AUTHOR: by Stephen E. Pigott and Harold O. Maxfield, Jr.

FORM 20.65 Declaration of condominium--Florida

COMMENT

A condominium is a system of separate ownership of individual units in multi-unit projects. A purchaser of a condominium unit receives fee title to that unit, as if it were a separate unit of property. In addition, there is appurtenant to each unit an undivided interest in the common areas. The ownership of these common elements, which consist generally of hallways, parking areas, recreation facilities, heating plants, etc., is generally allocated to the owners on the basis of the ratio of the value of the unit to the value of the entire project. The common elements are sometimes owned by a condominium association.

The cooperative form of ownership is quite different. There, ownership of the entire structure is lodged in the cooperative. The owner of the interest of the cooperative does not hold any interest in the property itself (other than as tenant under a fairly traditional form of lease).

It has been suggested that the condominium owner has greater freedom with respect to the disposition of his property. It is pointed out that a proprietary lease generally gives the cooperative corporation the right of first refusal if the tenant-shareholder wants to sell his interest in the cooperative venture. In some cases, the sale cannot be made without prior approval of the cooperative's board of directors which, by contractual or other stipulation, is not to be withheld unreasonably. In both the cooperative and condominium, there are restraints on transfer (such as by a right of first refusal). So long as such restraints are reasonable and not discriminatory, they are lawful.

For tax purposes, the condominium owner and the cooperative owner are for all practical

purposes treated alike. The deduction for taxes and interest for a cooperative owner depends upon compliance with certain special statutory requirements because the taxes and interest are in fact paid by the cooperative corporation. The condominium owner pays his own taxes and his own interest on his own property. His right to these deductions is as clear as the right of any private homeowner. The income tax consequences upon the sale of a condominium apartment are the same as those applicable upon the sale of any residence. (See TB § 20.12).

A condominium is established by filing, with the formalities of a deed, a declaration submitting specified land, and the improvements to be erected thereon, to condominium ownership. This document generally is called the "declaration of condominium." The information which must be included in the declaration is specified in the applicable statute. The form which follows is a declaration intended to comply with the Florida statute, which is fairly representative of condominium legislation. Under that statute, the following items are to be set forth in the declaration:

- (1) a statement submitting the property to condominium ownership;
- (2) the name by which the condominium is to be identified, which must include the word "condominium," or must be followed by the words "a condominium";
- (3) a legal description of the land on which the improvements are to be located;
- (4) a survey of the land and a graphic description of the improvements, certified by an engineer, architect, or surveyor, including the number of stories, number of units, unit boundaries, materials to be used in construction, and a description of the common elements, illustrated by floor plans, maps, building plans, or other means;
- (5) a designation of each unit by letter, name, or number;
- (6) the share of each owner in the common elements;
- (7) the share of common expenses and common surplus of each owner;
- (8) the voting rights;
- (9) the method of amending the declaration;
- (10) a provision for the enactment of by-laws, to be either included in or annexed to the declaration; and
- (11) the name of the association of owners which is to operate the condominium, and a statement as to whether or not it is to be incorporated. If the association is not incorporated, the name and address of the person designated as agent to receive service of process upon the association.

In addition to these required items, the declaration generally includes various limitations relating to the operation of the condominium. For example, as noted above, the declaration often sets forth the conditions under which unit may be sold, leased, or received by gift, inheritance, or devise. Under this declaration, an owner who wishes to sell his unit must notify the owners' association, and may demand that the association furnish a purchaser if it disapproves of the proposed sale. Other optional provisions customarily relate to restrictions on the use of the premises, the

maintenance of insurance, the responsibility for the common elements, and the reconstruction of the building after damage by fire or other causes.

In Florida, in addition to the declaration, the basic organization documents consist of the articles of incorporation of the owners' association, the bylaws of that association, the agreement of purchase between the builder and the prospective condominium owner, the agreement relating to the availability of a mortgage loan on each unit, and the form of warranty deed. In other jurisdictions, additional documentation may be required. Additionally, quite a few states have adopted versions of the Uniform Condominium Act. Copies of the Act can be obtained by contacting the National Conference of Commissioners of Uniform State Laws, 211 E. Ontario Street, Suite 1300, Chicago, Illinois 60611. Telephone (312) 915-0195; Fax (312) 915-0187; e-mail nccusl@nccusl.org.

FORM

DECLARATION OF CONDOMINIUM

OF

CASTELLE APARTMENTS, A CONDOMINIUM

3000 Seaview Road

Miami, Florida

THIS DECLARATION made _____ [month] _____ [day] ,
_____ [year] , by the Castelle Development Corporation, a Florida corporation, (the "Developer")
for itself, its successors, grantees, and assigns.

1. Submission to Condominium Ownership. The purpose of this Declaration is to submit the lands herein described and the improvements to be constructed thereon to the condominium form of ownership and use in the manner provided by Chapter 718, Florida Statutes, herein called the Condominium Act.

(a) The name by which this condominium is to be identified is Castelle Apartments, a condominium, herein called the condominium, and its address is 3000 Seaview Road, Miami, Florida.

(b) The lands owned by the Developer which are hereby submitted to the condominium form of ownership are the following:

[insert description]

which lands are herein called the land.

2. Definitions. The terms used herein and in the Bylaws (attached as Exhibit E) shall have the meanings stated in the Condominium Act and as follows:

(a) "Apartment" means unit as defined by the Condominium Act.

(b) "Apartment owner" means unit owner as defined by the Condominium Act.

(c) "Association" means the Castelle Association, Inc., and its successors.

(d) "Common elements" shall be all the parts of the condominium property not included within the apartment boundaries as described in Paragraph 4.

(e) "Common expenses" include (1) expenses of administration; expenses of maintenance, operation, repair, or replacement of the common elements, and of the portions of apartments to be maintained by the Association; (2) expenses declared common expenses by provisions of this Declaration or by the Bylaws; and (3) any valid charge against the condominium as a whole, such as ad valorem taxes for the year in which this Declaration is recorded.

(f) "Utility services" as used in the Condominium Act and construed with reference to the condominium, and as used in this Declaration and the Bylaws, shall include but not be limited to electric power, gas, hot and cold water, heating, refrigeration, air conditioning, and garbage and sewage disposal.

3. Development Plans. The condominium is being developed according to the following plans:

(a) A survey of the land to be developed is attached as Exhibit A.

(b) The improvements shall be constructed by the Developer substantially in accordance with the plans and specifications therefor prepared by Paul J. Fisch, A.I.A., which are attached hereto as Exhibit B. The condominium will include an apartment building consisting of a ground floor, a lobby floor, and fifteen (15) additional floors, making a total of seventeen (17) floors. The building will contain one hundred twenty-seven (127) owners' apartments and a manager's apartment. The condominium will also include storage space for each apartment, gardens and landscaping, a swimming pool, automobile parking areas, and other facilities located substantially as shown in the plans and specifications. Use of parking areas will be permitted according to regulations of the Association.

(c) This Declaration may be amended by filing such additional plans as may be required to describe adequately the completion of improvements. Such completion may be shown by a certificate of an architect, engineer, or surveyor certifying that the improvements have been constructed substantially as herein represented, or designating any changes made. Such plans or certificate when signed and acknowledged by the Developer shall in themselves constitute an amendment of this Declaration, notwithstanding the procedures for amendment described elsewhere in this Declaration.

(d) Easements are reserved through the condominium property as may be required for utility services.

4. Apartment Boundaries. Each apartment shall include that part of the building containing the apartment which lies within the boundaries of the apartment. The boundaries shall be determined in the following manner:

(a) The upper boundary shall be the plane of the lower surfaces of the ceiling slab.

(b) The lower boundary shall be the plane of the lower surfaces of the floor slab.

(c) The vertical boundaries of the apartment shall be (1) the exterior of the outside walls of the apartment building bounding an apartment except where there is attached to the building a balcony, loggia, terrace, canopy, stairway, or other portion of the building serving only the apartment being bounded, in which event the boundaries shall be such as will include all of such structures and fixtures thereon, and (2) the center line of the interior walls bounding an apartment.

5. Description of Apartments. The apartments of the condominium are more particularly described as follows:

(a) There are eight typical apartment floor plans which are designated by the capital letters A, B, C, D, E, F, G, and H. These apartments are generally described below and by the sketches attached hereto as the exhibits indicated in the

following schedule. Further details are illustrated by the building plans and specifications attached as Exhibit B.

Apartment	Containing	Exhibit
A	Living room, dining-room, kitchen, three bedrooms, three bathrooms, and balcony terrace	C-1
B	Living room, dining-room, kitchen, two bedrooms, two bathrooms, and balcony terrace	C-2
C	Living room, dining-room, kitchen, two bedrooms, two bathrooms, and balcony terrace	C-3
D	Living room, dining-room, kitchen, two bedrooms, two bathrooms, and balcony terrace	C-4
E	Living room, dining-room, kitchen, two bedrooms, two bathrooms, and balcony terrace	(Reverse of Apartment D)
F	Living room, dining-room, kitchen, two bedrooms, two bathrooms, and balcony terrace	(Reverse of Apartment A)
G	Living room, dining-room, kitchen, one bedroom, and one and one-half bathrooms	C-6
H	Living room, dining-room, kitchen, three bedrooms, three bathrooms, and balcony terrace	(Reverse of Apartment A)

(b) Each apartment is identified by the use of the capital letter designating the typical apartment floor plan utilized, preceded by the number designating the floor upon which the apartment is located, the initial "G" being used for the ground floor. Two apartments located on the ground floor are designated G C and G D. Terraces for these apartments are not balconies. Five apartments located on the lobby floor are designated 1 A, 1 B, 1 C, 1 D, and 1 E. There are one of each of the typical apartments A, B, C, D, E, F, G, and H upon each of the remaining fifteen floors. Such floors are numbered 2 through 16, both inclusive.

(c) The Developer reserves the right to change the interior design and arrangement of all apartments and to alter the boundaries between apartments, so long as the Developer owns the apartments so altered. Any such change shall be reflected by an amendment of this Declaration which may be executed by the Developer alone, notwithstanding the procedures for amendment described in Paragraph 21 of this Declaration. However, no such change shall increase the number of apartments nor alter the boundaries of the common elements without amendment of this Declaration in the manner described in Paragraph 21 of this Declaration. If more than one apartment is altered the Developer shall appropriately reapportion the shares in the common elements which are allocated to the altered apartments.

6. Shares of Common Elements and Expenses. Each apartment owner shall own a share in the common elements and in any surplus possessed by the Association, and be liable for common expenses as follows:

An undivided.92% share to each Apartment A (16 such apartments)	14.72
An undivided.81% share to each Apartment B (16 such apartments)	12.96

An undivided.76% share to each Apartment C (17 such apartments)	12.92
An undivided.78% share to each Apartment D (17 such apartments)	13.26
An undivided.78% share to each Apartment E (16 such apartments)	12.48
An undivided.75% share to each Apartment F (15 such apartments)	11.25
An undivided.574% share to each Apartment G (15 such apartments)	8.61
An undivided.92% share to each Apartment H (15 such apartments)	13.80
Total	100.00%

7. Maintenance and Alteration of Apartments.

(a) The Association shall maintain, repair, and replace

(1) all portions of an apartment, except interior surfaces, contributing to the support of the apartment building, which portions shall include but not be limited to the outside walls of the apartment building and all fixtures on the exterior thereof; boundary walls of apartments; floor and ceiling slabs; and load-bearing columns and load-bearing walls; and

(2) all conduits, ducts, plumbing, wiring, and other facilities for the furnishing of utility services which are contained in the portions of an apartment maintained by the Association; and all such facilities contained within an apartment which service part or parts of the condominium other than the apartment within which contained.

All incidental damage caused to an apartment by such work shall be promptly repaired at the expense of the Association.

(b) The responsibility of the apartment owner shall be

(1) to maintain, repair, and replace at his expense all portions of his apartment except the portions to be maintained, repaired, and replaced by the Association;

(2) not to paint or otherwise decorate or change the appearance of any portion of the exterior of the apartment building;

(3) to promptly report to the Association any defect or need for repairs the responsibility for which is that of the Association.

(c) Except as elsewhere reserved to the Developer, neither an apartment owner nor the Association shall make any alteration in the portions of an apartment or apartment building which are to be maintained by the Association, remove any portion thereof, make any additions thereto, do anything which would jeopardize the safety or soundness of the apartment building, or impair any easement, without first obtaining approval in writing of owners of all apartments in which such work is to be done and the approval of the Board of Directors of the Association. A copy of plans for all of such work prepared by an architect licensed to practice in this state shall be filed with the Association prior to the start of the work.

8. Maintenance and Alteration of Common Elements.

(a) The Association shall be responsible for the operation and maintenance of the common elements, and shall pay for the cost and expense thereof.

(b) After the completion of the improvements included in the common elements, contemplated by this Declaration,

there shall be no alteration or further improvement of the real property constituting the common elements without prior written approval by the owners of not less than _____ percent (_____%) of the common elements except as provided by the Bylaws, but no such alteration or improvement shall interfere with the rights of any apartment owner. The cost of such work shall not be assessed against a bank, life insurance company, or federal savings and loan association which acquires its title as the result of owning a mortgage upon an apartment unless such an owner shall approve the alteration or improvement, regardless of whether the title is acquired by deed from the mortgagor or through foreclosure proceedings. The share of any cost not so assessed shall be assessed to the other apartment owners in the proportions which their shares in the common elements bear to each other. There shall be no change in the shares and rights of an apartment owner in the common elements which are altered or further improved, whether or not the apartment owner contributes to the cost thereof.

9. Assessments.

(a) Assessments against apartment owners for common expenses shall be made pursuant to the Bylaws and shall be allocated as set forth in Paragraph 6 of this Declaration. However, if services are furnished to apartment owners beyond the maintenance and operation of the condominium property, such as operation of a restaurant or bar, no assessment on account of such services shall be made against a bank, life insurance company, or federal savings and loan association which acquires its title as a result of owning a first mortgage upon an apartment, unless the occupant of the apartment owned by such an institution voluntarily accepts such services. This shall be so whether the title is acquired by deed from the mortgagor or through foreclosure proceedings. The shares of any cost or loss not so assessed shall be assessed to the other apartment owners in the proportions which their shares in the common elements bear to each other.

(b) Assessments and installments thereon paid on or before ten days after the date when due shall not bear interest, but all sums not paid on or before ten days after the date when due shall bear interest at the rate of 10% per annum from the date when due until paid. All payments upon account shall be first applied to interest and then to the assessment payment first due.

(c) The lien for unpaid assessments provided by Florida law shall also secure reasonable attorneys' fees incurred by the Association incident to the collection of such assessment or enforcement of such lien.

(d) In any foreclosure of a lien for assessments the owner of the apartment subject to the lien shall be required to pay a reasonable rental for the apartment, and the Association shall be entitled to the appointment of a receiver to collect such rental.

10. Association. The operation of the condominium shall be by Castle Association, Inc., (the "Association") a corporation not for profit under the laws of Florida, which shall be organized and shall fulfill its functions pursuant to the following provisions:

(a) The members of the Association shall be the apartment owners.

(b) The Association shall be incorporated under Articles of Incorporation in the form attached as Exhibit D.

(c) The Bylaws of the Association shall be in the form attached as Exhibit E.

(d) Notwithstanding the duty of the Association to maintain and repair parts of the condominium property, the Association shall not be liable for injury or damage, other than the cost of maintenance and repair, caused by any latent condition of the property that it is required to maintain and repair, nor for injury or damage caused by the elements or other owners or persons.

(e) The share of a member in the funds and assets of the Association cannot be assigned, hypothecated, or transferred in

any manner except as an appurtenance to his apartment.

(f) Whenever the decision of an apartment owner is required upon any matter, whether or not the subject of an Association meeting, such decision shall be expressed by the same person who would cast the vote of such owner if in an Association meeting, unless the joinder of record owners is specifically required by this Declaration.

11. Insurance.

(a) The Association shall purchase insurance policies upon the condominium property covering the items described in subparagraph (b) of this paragraph, for the benefit of the Association and the apartment owners and their mortgagees as their interests may appear. Provision shall be made for the issuance of certificates of mortgage endorsements to the mortgagees of apartment owners. Such policies and endorsements shall be deposited with the Insurance Trustee, which shall hold them subject to the provisions of Paragraph 12.

(b) Insurance shall cover the following:

(1) all buildings and improvements upon the land and all personal property included in the common elements in an amount equal to the maximum insurable replacement value, excluding foundation and excavation costs, as determined annually by the Board of Directors of the Association. Such coverage shall afford protection against loss or damage by fire and other hazards covered by a standard extended coverage endorsement, and such other risks as are customarily covered with respect to buildings similar to the buildings on the land, such as vandalism and malicious mischief;

(2) public liability in such amounts and with such coverage as shall be required by the Board of Directors of the Association, including but not limited to hired automobile and nonowned automobile coverages, and with cross liability endorsement to cover liabilities of the apartment owners as a group to an apartment owner;

(3) workmen's compensation as required by law;

(4) such other insurance as the Board of Directors of the Association shall determine from time to time to be desirable.

(c) Premiums upon insurance policies purchased by the Association shall be paid by the Association as a common expense.

(d) The Association is hereby irrevocably appointed agent for each apartment owner to adjust all claims arising under insurance policies purchased by the Association, and to execute and deliver releases upon the payment of claims.

12. Responsibilities of Insurance Trustee.

(a) All insurance policies purchased by the Association shall provide that proceeds covering property losses shall be paid to any bank in Florida which is selected by the Board of Directors of the Association as a trustee, which bank is herein referred to as the Insurance Trustee. The Insurance Trustee shall not be liable for payment of premiums, for the renewal or the sufficiency of policies, or for the failure to collect any insurance proceeds.

(b) The Insurance Trustee shall receive such proceeds as are paid and hold them in trust for the benefit of the apartment owners and their mortgagees as follows. An undivided share of such proceeds on account of damage to common elements shall be allocated to the apartment owners according to their shares of the common elements set forth in Paragraph 6. Proceeds on account of apartments shall be held for the owners of damaged apartments in proportion to the cost of repairing the damage suffered by each apartment owner, which cost shall be determined by the Association. If a mortgagee endorsement is issued as to an apartment, the share of the apartment owner shall be held in trust for the mortgagee and the apartment owner as their respective interests may appear.

(c) Proceeds of insurance policies received by the Insurance Trustee shall be distributed as follows:

(1) All expenses of the Insurance Trustee shall be first paid.

(2) If the damage for which the proceeds are paid is to be repaired or reconstructed, the remaining proceeds shall be expended as provided in Paragraph 14. Any proceeds remaining after defraying such costs shall be distributed to the beneficial owners, remittances to apartment owners and their mortgagees being payable jointly to them. This is a covenant for the benefit of any mortgagee of an apartment and may be enforced by such mortgagee.

(3) If it is determined as provided in Paragraph 14 that the damage for which the proceeds are paid shall not be reconstructed or repaired, or if there are excess proceeds remaining after a reconstruction and repair, the remaining proceeds shall be distributed to the beneficial owners, remittances to apartment owners and their mortgagees being payable jointly to them. This is a covenant for the benefit of any mortgagee of an apartment and may be enforced by such mortgagee.

(4) In making distribution to apartment owners and their mortgagees, the Insurance Trustee may rely upon a certificate of the Association as to the names of the apartment owners and their respective shares of the distribution, and as to whether or not the building is to be reconstructed or repaired.

13. When Damaged Property is to be Reconstructed or Repaired.

(a) If common elements are damaged, they shall be reconstructed or repaired, unless it is determined under Paragraph 22 that the condominium shall be terminated.

(b) If the damaged property is the apartment building, and if apartments to which _____ percent (_____%) or more of the common elements are appurtenant are found by the Board of Directors of the Association to be tenantable, the damaged property shall be reconstructed or repaired unless within sixty (60) days after the casualty it is determined under Paragraph 22 that the condominium shall be terminated.

(c) If the damaged property is the apartment building, and if apartments to which more than _____ percent (_____%) or the common elements are appurtenant are found by the Board of Directors to be not tenantable, the damaged property will not be reconstructed or repaired and the condominium shall be terminated under Paragraph 22 unless within sixty (60) days after the casualty the owners of at least _____ percent (_____%) of the common elements agree in writing to such reconstruction or repair. No mortgagee shall have any right to participate in the determination as to whether damaged property shall be reconstructed or repaired.

(d) Any reconstruction or repair must be substantially in accordance with the plans and specifications for the original building prepared by Paul F. Fisch, A.I.A., or if not, then according to plans and specifications approved by the Board of Directors of the Association, and if the damaged property is the apartment building, by the owners of not less than _____ percent (_____%) of the common elements, including the owners of all damaged apartments, which approval shall not be unreasonably withheld.

14. Responsibilities and Procedures as to Payment for Repairs.

(a) If damage occurs only to those parts of an apartment for which the responsibility of maintenance and repair is that of the apartment owner, such owner shall be responsible for reconstruction and repair after casualty. In all other instances the responsibility of reconstruction and repair after casualty shall be that of the Association.

(b) Immediately after a casualty causing damage to property for which the Association has the responsibility of maintenance and repair, the Association shall obtain reliable and detailed estimates of the cost to rebuild or repair so as to place the damaged property in condition as good as that before the casualty.

(c) If the insurance proceeds are not sufficient to defray the estimated costs of reconstruction and repair, assessments shall be made against the apartment owners who own the damaged property, and against all apartment owners in the case of damage to common elements, in sufficient amounts to provide funds to pay the estimated costs. Additional assessments may be made at any time during, or following the completion of, construction. Such assessments against apartment owners for damage to apartments shall be in proportion to the cost of reconstruction and repair of their respective apartments. Such assessments on account of damage to common elements shall be in proportion to the owner's share in the common elements.

(d) If the amount of the estimated costs of reconstruction and repairs for which the Association is responsible is more than _____ Dollars (\$_____), the Association shall deposit the sums paid upon assessments to meet such costs with the Insurance Trustee. In all other cases the Association shall hold the sums paid upon such assessments and disburse them in payment of the costs of reconstruction and repair.

(e) The proceeds from assessments and insurance received by the Insurance Trustee shall be disbursed as follows:

(1) The portion of insurance proceeds representing damage, the reconstruction and repair of which is the responsibility of the apartment owner, shall be paid by the Insurance Trustee to the apartment owner or, if there is a mortgagee endorsement, then to the apartment owner and the mortgagee jointly, who may use such proceeds as they may be advised.

(2) The portion of insurance proceeds representing damage, the reconstruction and repair of which is the responsibility of the Association, shall be disbursed in payment of the costs of such repair and reconstruction in the manner required by the Board of Directors of the Association and upon approval of an architect qualified to practice in Florida and employed by the Association to supervise the work.

(3) The Insurance Trustee shall not be required to determine whether a disbursement is to be made, the identity of the payee, or the amount to be paid, but may rely upon a certificate of the Association stating such information.

15. Use Restrictions. The use of the property of the condominium shall be in accordance with the following provisions:

(a) Each of the apartments shall be occupied only by a family, its servants, and guests, as a residence and for no other purpose. Except as reserved to the Developer, no apartment may be divided or subdivided into a smaller unit nor any portion thereof sold or otherwise transferred without first amending this Declaration to show the changes in the apartments to be effected thereby.

(b) The common elements shall be used only for the purposes for which they are intended in the furnishing of services and facilities for the enjoyment of the apartments.

(c) No use or practice shall be permitted on the condominium property which is the source of annoyance to residents or which interferes with the peaceful possession and proper use of the property by its residents. All parts of the property shall be kept in a clean and sanitary condition, and no rubbish, refuse, or garbage allowed to accumulate nor any fire hazard allowed to exist. No apartment owner shall permit any use of his apartment or of the common elements which will increase the rate of insurance upon the condominium property. No immoral, improper, offensive, or unlawful use shall be made of the condominium property or any part thereof. All valid laws, zoning ordinances, and regulations of all governmental bodies having jurisdiction thereof shall be observed. The responsibility of meeting the requirements of governmental bodies which require maintenance, modification, or repair of the condominium property shall be the same

as the responsibility for the maintenance and repair of the property concerned. No rooms may be rented or transient guests accommodated.

(d) Neither the apartment owners nor the Association nor the use of the condominium property shall interfere with the completion of the contemplated improvements and the sale of the apartments until the Developer has completed and sold all of the apartments. The Developer may make such use of the unsold units and common areas as may facilitate such completion and sale, including but not limited to the maintenance of a sales office, the showing of the property, and the display of signs.

(e) The Association may make and amend, from time to time, reasonable regulations concerning the use of the condominium property. Such regulations shall be made and amended in the manner provided in the Association's Articles of Incorporation and Bylaws. The Association shall furnish copies of such regulations and amendments thereto to all apartment owners and residents of the condominium, upon their request.

16. Approval of Transfer or Lease.

(a) No apartment owner may effectively dispose of an apartment or any interest therein by sale or lease, except to another apartment owner in the condominium, without approval of the Association. If any apartment owner shall acquire his title by gift, devise, or inheritance, the continuance of his ownership of his apartment shall be subject to the approval of the Association.

(b) An apartment owner intending to make a bona fide sale or lease of his apartment or any interest therein shall give to the Association notice of such intention, together with the name and address of the intended purchaser or lessee, and such other information concerning the intended purchaser or lessee as the Association may reasonably require. In the case of a prospective sale, such notice may include the apartment owner's demand that the Association furnish a purchaser if the proposed purchaser is not approved; and if such demand is made, the notice shall be accompanied by an executed copy of the proposed contract to sell. An apartment owner who has obtained his title by gift, devise, or inheritance shall give to the Association notice of the acquisition of his title, together with such personal information as the Association may reasonably require, and a certified copy of the instrument evidencing his title. If the notice to the Association is not given, then at any time after receiving knowledge of a transaction or event transferring ownership or possession of an apartment, the Association at its election and without notice may approve or disapprove the transaction or ownership.

(c) Within thirty (30) days after receipt of the notice described in subparagraph (b) of this paragraph the Association must either approve or disapprove the proposed transaction or the continuance of ownership, as the case may be. If approved, the approval shall be stated in a certificate executed by the President and Secretary in recordable form, and shall be delivered to the purchaser, lessee, or new owner and shall be recorded in the public records of the county (except that a lease need not be recorded).

17. Disapproval of Transfer or Leases.

(a) If the Association disapproves a proposed sale and if the notice of sale given by the apartment owner shall so demand, within thirty (30) days after receipt of such notice and information the Association shall deliver or mail by registered mail to the apartment owner an offer to purchase by a purchaser approved by the Association who will purchase and to whom the apartment owner must sell the apartment. At the option of such purchaser, to be stated in his offer, the price to be paid shall be that stated in the disapproved contract to sell or shall be the fair market value determined by arbitration in accordance with the then existing rules of the American Arbitration Association, except that the arbitrators shall be two appraisers appointed by the American Arbitration Association who shall base their determination upon an average of their appraisals of the apartment; and a judgment of specific performance of the sale upon the award rendered by the arbitrators may be entered in any court of competent jurisdiction. The expense of the

arbitration shall be paid by the purchaser. The purchase price shall be paid in cash, and the sale shall be closed within thirty (30) days after the delivery or mailing of such offer to purchase, or within ten days after the determination of the sale price if such is by arbitration, whichever is the later.

(b) If the proposed transaction is a lease, the apartment owner shall be advised of the disapproval in writing, and the lease shall not be made.

(c) If the Association disapproves the acquisition of title by gift, devise, or inheritance, the provisions of subparagraph (a) of this paragraph shall apply (except that the purchase price shall be at fair market value determined by arbitration).

(d) If the Association shall fail to provide a purchaser as required in subparagraphs (a) and (c) of this paragraph, then notwithstanding the disapproval, the sale or ownership, as the case may be, shall be deemed to have been approved, and the Association shall furnish a certificate of approval as provided in Paragraph 16.

18. Mortgage and Acquisition by Mortgagees.

(a) No apartment owner may mortgage his apartment or any interest therein without the approval of the Association, except to a bank, life insurance company, or a federal savings and loan association. The approval of any other mortgagee shall be subject to conditions determined by the Association.

(b) The provisions of Paragraphs 16 and 17 shall not apply to a transfer to or purchase by a bank, life insurance company, or federal savings and loan association which acquires its title as the result of owning a mortgage upon the apartment concerned, whether the title is acquired by deed from the mortgagor or through foreclosure proceedings. Nor shall such provisions apply to a transfer, sale, or lease by a bank, life insurance company, or federal savings and loan association which so acquires its title. Neither shall such provisions require the approval of a purchaser who acquires title to an apartment at a duly advertised public sale with open bidding which is provided by law, such as, but not limited to, execution sale, foreclosure sale, judicial sale, or tax sale.

19. Notice of Lien or Suit.

(a) An apartment owner shall give notice to the Association of every lien upon his apartment, other than for permitted mortgages, taxes, and special assessments, within five days after the attaching of the lien. Failure to comply with this subparagraph will not affect the validity of any judicial sale.

(b) Notice shall be given to the Association of every suitor other proceeding which may affect the title to his apartment within five days after the apartment owner receives knowledge thereof.

20. Compliance and Default.

(a) Each apartment owner shall be governed by and shall comply with the terms of this Declaration, the Articles of Incorporation, Bylaws, and regulations adopted pursuant thereto, and by such documents and regulations as they may be amended from time to time. A default shall entitle the Association or other apartment owners to the relief described in subparagraph (b) of this paragraph in addition to the remedies provided by the Condominium Act.

(b) An apartment owner shall be liable for the expense of any maintenance, repair, or replacement rendered necessary by his act, neglect, or carelessness or by that of any member of his family or his or their guests, employees, agents, or lessees, but only to the extent that such expense is not met by the proceeds of insurance carried by the Association. Such liability shall include any increase in fire insurance rates occasioned by use, misuse, occupancy, or abandonment of an apartment or its appurtenances. In any proceeding arising out of an apartment owner's alleged default, the prevailing party shall be entitled to recover the costs of the proceeding and such reasonable attorneys' fees as may be awarded by

the court.

(c) The failure of the Association or any apartment owner to enforce any covenant, restriction, or other provision of the Condominium Act, this Declaration, the Articles of Incorporation, the Bylaws, or the regulations adopted pursuant thereto, shall not constitute a waiver of the right to do so thereafter.

21. Amendments. This Declaration may be amended in the following manner:

(a) Notice of the subject matter of a proposed amendment shall be included in the notice of any meeting at which a proposed amendment is considered.

(b) Either the Board of Directors or the members of the Association may propose a resolution adopting a proposed resolution. Directors and members not present in person or by proxy at the meetings considering the amendment may express their approval in writing, providing such approval is delivered to the Secretary at or prior to the meeting. Except as elsewhere provided, such approvals must be either by (1) not less than _____ percent (_____%) of the entire membership of the Board of Directors and by not less than _____ percent (_____%) of the votes of the entire membership of the Association; or (2) not less than _____ percent (_____%) of the votes of the entire membership of the Association; or (3) until the first election of directors, only by all of the directors, provided the amendment does not increase the number of apartments nor alter the boundaries of the common elements.

(c) No amendment shall discriminate against any apartment owner or against any apartment or class or group of apartments unless the apartment owners so affected shall consent. No amendment shall change any apartment nor the share in the common elements appurtenant to it, nor increase the owner's share of the common expenses, unless the record owner of the apartment and all record owners of liens thereon shall join in the execution of the amendment.

(d) A copy of each amendment shall be certified by the President and Secretary of the Association as having been duly adopted and shall be effective when recorded in the Public Records of _____ [county] County, _____ [state].

22. Termination. The condominium may be terminated in the following manner in addition to the manner provided by the Condominium Act:

(a) If it is determined under Paragraph 13(c) that the apartment building shall not be reconstructed because of major damage, the condominium plan of ownership will be thereby terminated without agreement.

(b) The condominium may be terminated at any time by the written approval of all of the owners of the condominium, and by all record owners of liens thereon. If the proposed termination is submitted to a meeting of the members of the Association, the notice of which meeting gives notice of the proposed termination, and if the approval of the owners of not less than _____ percent (_____%) of the common elements, and of the record owners of liens upon the same _____ percent (_____%) of the common elements, are obtained not later than thirty (30) days from the date of such meeting, then the approving owners shall have an option to buy all of the apartments of the other owners during the period ending on the 60th day from the date of such meeting.

(c) The option described in subparagraph (b) of this paragraph shall be exercised by delivery or mailing by registered mail to each of the record owners of the apartments to be purchased of an offer to purchase signed by the record owners of apartments who will participate in the purchase. Such offer shall indicate which apartments will be purchased by each participating owner and shall offer to purchase all of the apartments owned by owners not approving the termination, but the offer shall effect a separate contract between each seller and his purchaser.

(d) The sale price for each apartment shall be the fair market value determined by agreement between the seller and purchaser within thirty (30) days from the delivery or mailing of such offer, and in the absence of agreement by arbitration in accordance with the then existing rules of the American Arbitration Association, except that the arbitrators shall be two appraisers appointed by the American Arbitration Association who shall base their determination upon an average of their appraisals of the apartment; and a judgment of specific performance of the sale upon the award rendered by the arbitrators may be entered in any court of competent jurisdiction. The expense of the arbitration shall be paid by the purchaser. The purchase price shall be paid in cash, and the sale shall be closed within ten days following the determination of the sale price.

(e) The termination of the condominium shall be evidenced by a certificate of the Association executed by the President and Secretary certifying as to facts effecting the termination, which certificate shall become effective upon being recorded in the public records of _____ [county] County, _____ [state].

(f) After termination of the condominium the apartment owners shall own the condominium property and all assets of the Association as tenants in common in undivided shares, and their respective mortgagees and lienors shall have mortgages and liens upon the respective undivided shares of the apartment owners. Such undivided shares of the apartment owners shall be the same as the undivided shares in the common elements appurtenant to the owners' apartments prior to the termination.

23. Severability. The invalidity in whole or in part of any covenant or restriction, or any section, subsection, sentence, clause, phrase, or word, or other provision of this Declaration and the Articles of Incorporation, Bylaws, and regulations of the Association shall not affect the validity of the remaining portions thereof.

In witness whereof the Developer has executed this Declaration the day and year first above written.

CASTELLE DEVELOPMENT CORPORATION

_____ [witness] By: _____ [name and title]

(Acknowledgment)



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Current Legal Forms for Real Estate

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Current Legal Forms for Real Estate
Chapter 20 REAL ESTATE ENTITIES
Part IV. Forms

H. CONDOMINIUMS AND HOMEOWNERS ASSOCIATION

24-20 Current Legal Forms for Real Estate FORM 20.66

AUTHOR: by Stephen E. Pigott and Harold O. Maxfield, Jr.

FORM 20.66 Bylaws of condominium owners' association

COMMENT

To a great extent, the contents of the bylaws will depend upon what has been included in the declaration, since many essentials of condominium operation may be provided for in either instrument. In many cases, the bylaws will be attached as an exhibit to the declarations when they are filed.

Condominium statutes generally require that various matters be set forth in the bylaws. In general, these include matters relating to the organization of the owners' association, the meetings of members, the election of a board of directors, the election of officers, the procedure for collecting assessments against unit owners, the percentage of unit owners required to make decisions, and the procedure for amending the bylaws. Other subjects not required by statute to be included in the bylaws, or in the declaration of condominium, may be in the bylaws if they have not been covered in the declaration.

In drafting the documents for this condominium, the decision was made to treat in the declaration many of the problems which could be covered in either instrument. For example, the declaration deals with limitations on the transfer of a unit, limitations on the use of the premises, responsibility for maintenance of the property, and responsibility for reconstruction after damage. However, the bylaws do cover some matters with respect to the maintenance and operation of the condominium, in addition to the matters required to be included by statute. Thus, the bylaws prescribe certain accounting and budgetary practices, including the establishment of reserves for current operating expenses, for maintenance, and for replacement of improvements. With respect to the annual budget prepared by the board of directors, the bylaws specify certain limitations which cannot be

exceeded without approval of the owners. The bylaws also allocate to the owners the voting rights to be exercised at meetings of the association.

FORM

Bylaws

of the
Castelle Association, Inc.,
A Corporation Not for
Profit Under the Laws
of the State of Florida

1. Identity. These are the Bylaws of the Castelle Association, Inc., (the "Association"), a Corporation not for profit under the laws of the State of Florida, the Articles of Incorporation of which were filed in the office of the Secretary of State on _____ [month] _____ [day] , _____ [year] . The Association has been organized for the purpose of administering a condominium pursuant to Chapter 718, Florida Statutes, (the "Condominium Act"), which condominium is identified by the name Castelle Apartments, a Condominium, and is located upon the following land:

(Insert description)

The office of the Association shall be at 3000 Seaview Road, Miami, Florida. The fiscal year of the Association shall be the calendar year.

2. Members' Meetings

(a) The annual members' meeting shall be held at the office of the Corporation at three p.m., Eastern Standard Time, on the second Friday in February of each year for the purpose of electing directors and transacting any other business authorized to be transacted by the members. If that day is a legal holiday, the meeting shall be held at the same hour on the next day.

(b) Special members' meetings shall be held whenever called by the President or Vice President or by a majority of the Board of Directors, and must be called by such officers upon receipt of a written request from members entitled to cast one-third of the votes of the entire membership.

(c) Notice of all members' meetings, stating the time and place and the objects for which the meeting is called, shall be given by the President or Vice President or Secretary unless waived in writing. Such notice shall be in writing to each member at his address as it appears on the books of the Association and shall be mailed not less than ten days nor more than 60 days prior to the date of the meeting. Proof of such mailing shall be given by the affidavit of the person giving the notice. Notice of meeting may be waived before or after meetings.

(d) A quorum at members' meetings shall consist of persons entitled to cast a majority of the votes of the entire membership. If any meeting of the members cannot be organized because a quorum is not present, the members who are present, either in person or by proxy, may adjourn the meeting for at least ten days, and adequate notice of the new date shall be given as described in paragraph (c) of this Section.

(e) In any meeting of members the owners of apartments shall be entitled to cast the number of votes indicated in the

following schedule, unless the decision to be made is required to be by the owners of a stated percentage of the common elements:

Apartment bearing the designation	Number of for each of such apartments
A	3
B	2
C	2
D	2
E	2
F	2
G	1
H	3

If an apartment is owned by one person his right to vote shall be established by the record title to his apartment. If an apartment is owned by more than one person, or is under lease, the person entitled to cast the vote for the apartment shall be designated by a certificate signed by all of the record owners of the apartment and filed with the Secretary of the Association. If an apartment is owned by a corporation, the person entitled to cast the vote for the apartment shall be designated by a certificate of appointment signed by the President or Vice President and attested by the Secretary or Assistant Secretary of the Corporation and filed with the Secretary of the Association. Such certificates shall be valid until revoked, or until superseded by a subsequent certificate, or until a change in the ownership of the apartment concerned. A certificate designating the person entitled to cast the vote of an apartment may be revoked by any owner thereof.

(f) Votes may be cast in person or by proxy. Proxies may be made by any person entitled to vote. They shall be valid only for the particular meeting designated and must be filed with the Secretary before the appointed time of the meeting.

(g) The order of business at annual members' meetings, and as far as practical at all other members' meetings, shall be

- (1) election of chairman of the meeting;
- (2) calling of the roll and certifying of proxies;
- (3) proof of notice of meeting or waiver of notice;
- (4) reading and disposal of any unapproved minutes;
- (5) reports of officers;
- (6) reports of committees;
- (7) election of inspectors of election;
- (8) election of directors (if necessary);

(9) unfinished business;

(10) new business; and

(11) adjournment.

(h) Until the Developer of the condominium (the "Developer"), has completed and sold all of the apartments of the condominium, or until _____ [month] _____ [day], _____ [year], or until the Developer elects to terminate its control of the condominium, whichever shall first occur, there shall be no meeting of members of the Association unless a meeting is called by the Board of Directors.

3. Directors

(a) The affairs of the Association shall be managed by a board of not more than 11 directors, the exact number to be determined at the time of election. Directors' fees shall be determined by the members.

(b) Election of directors shall be conducted at the annual members' meeting. A nominating committee of five members shall be appointed by the Board of Directors not less than thirty (30) days prior to the annual members' meeting. The committee shall nominate one (1) person for each director then serving. Additional nominations for directorships and directors may be made from the floor. The election shall be by ballot (unless dispensed with by unanimous consent) and by a plurality of the votes cast, each person voting being entitled to cast his votes for each of as many nominees as there are vacancies to be filled. There shall be no cumulative voting.

(c) Except as to vacancies provided by removal of directors by members, vacancies in the Board of Directors occurring between annual meetings of members shall be filled by the remaining directors.

(d) Any director may be removed by concurrence of two-thirds (2/3) of the votes of the entire membership at a special meeting of the members called for that purpose. The vacancy in the Board of Directors so created shall be filled by the members of the Association at the same meeting.

(e) Until the Developer has completed and sold all of the apartments of the condominium, or until _____ [month] _____ [day], _____ [year], or until the Developer elects to terminate its control of the condominium, whichever shall first occur, the first directors of the Association shall serve, and in the event of vacancies the remaining directors shall fill the vacancies, and if there are no remaining directors the vacancies shall be filled by the Developer.

(f) The term of each director's service shall extend until the next annual meeting of the members and thereafter until his successor is duly elected and qualified or until he is removed in the manner elsewhere provided.

4. Directors' Meetings

(a) The organization meeting of a newly-elected Board of Directors shall be held within ten (10) days after its election at such place and time as shall be fixed by the directors at the meeting at which they were elected, and no further notice of the organization meeting shall be necessary providing a quorum shall be present.

(b) Regular meetings of the Board of Directors may be held at such time and place as shall be determined, from time to time, by a majority of the directors. Notice of regular meetings shall be given to each director, personally or by mail, telephone, or telegraph at least three days prior to the day named for such meeting.

(c) Special meetings of the directors may be called by the President and must be called by the Secretary at the written

request of one-third (1/3) of the directors. Notice of the meeting shall be given personally or by mail, telephone, or telegraph at least three (3) days prior to the day named for such meeting, which notice shall state the time, place, and purpose of the meeting.

(d) Any director may waive notice of a meeting before or after the meeting and such waiver shall be deemed equivalent to the giving of notice.

(e) A majority of the entire board of directors shall constitute a quorum at directors' meetings. The acts approved by a majority of those present at a meeting at which a quorum is present shall constitute the acts of the Board of Directors, except where approval by a greater number of directors is required by the Declaration of Condominium, (the "Declaration"), the Articles of Incorporation, or these Bylaws. If at any meeting of the Board of Directors less than a quorum is present, the majority of those present may adjourn the meeting from time to time until a quorum is present. At any adjourned meeting any business which might have been transacted at the meeting as originally called may be transacted without further notice. The joinder of a director in the action of a meeting by signing and concurring in the minutes thereof shall constitute the presence of such director for the purpose of determining a quorum.

(f) The Chairman of the Board, if such an officer has been elected, shall be the presiding officer at directors' meetings; otherwise, the President shall preside. In the absence of the presiding officer, the directors present shall designate one of their number to preside.

(g) The order of business at directors' meetings shall be

- (1) calling of roll;
- (2) proof of due notice of meeting;
- (3) reading and disposal of any unapproved minutes;
- (4) reports of officers and committees;
- (5) election of officers;
- (6) unfinished business;
- (7) new business; and
- (8) adjournment.

5. Powers and Duties of the Board of Directors. All of the powers and duties of the Association existing under the Condominium Act, the Declaration, the Articles of Incorporation, and these Bylaws shall be exercised exclusively by the Board of Directors, its agents, contractors, or employees, subject only to approval by apartment owners if such is specifically required. Compensation of employees of the Association shall be fixed by the directors. A director may be an employee of the Association, and a contract for management of the condominium may be entered into with a director.

6. Officers

(a) The executive officers of the Association shall be a President, who shall be a director, a Vice President, who shall be a director, a Treasurer, a Secretary, and an Assistant Secretary, all of whom shall be elected annually by the Board of Directors and who may be removed by vote of the directors at any meeting. Any person may hold two or more offices

except that the President shall not also be the Secretary or an Assistant Secretary. The Board of Directors may from time to time elect other officers to exercise such powers and duties as the Board shall deem necessary or appropriate to manage the affairs of the Association. Compensation of officers shall be fixed by the Board of Directors.

(b) The President shall be the chief executive officer of the Association. He shall have all of the powers and duties which are usually vested in the office of president of an association, in order to assist in the conduct of the affairs of the Association, including, without limitation, the power to appoint such committees as he may deem appropriate from time to time from among the members of the Board.

(c) The Vice President shall in the absence or disability of the President exercise the powers and perform the duties of the President. He shall also generally assist the President and exercise such other powers and perform such other duties as shall be prescribed by the directors.

(d) The Secretary shall keep the minutes of all proceedings of the directors and the members. He shall attend to the giving and serving of all notices to the members and directors and other notices required by law. He shall have custody of the seal of the Association and affix the same to instruments requiring a seal when duly signed. He shall keep the records of the Association, except those of the Treasurer, and shall perform all other duties incident to the office of Secretary of an association and as may be required by the directors or the President. The Assistant Secretary shall perform the duties of the Secretary when the Secretary is absent.

(e) The Treasurer shall have custody of all property of the Association, including funds, securities, and evidences of indebtedness. He shall keep the books of the Association in accordance with generally accepted accounting practices and shall perform all other duties incident to the office of Treasurer.

7. Accounting. The funds and expenditures of the Association shall be credited and charged to accounts under the following classifications as shall be appropriate, all of which expenditures shall be common expenses:

(a) "Current expenses," which shall include all funds and expenditures to be made within the year for which the funds are budgeted, including a reasonable allowance for contingencies and working funds, except expenditures chargeable to reserves, to additional improvements, or to operations. The balance in this fund at the end of each year shall be applied to reduce the assessments for current expense for the succeeding year.

(b) "Reserve for deferred maintenance," which shall include funds for maintenance items which occur less frequently than annually.

(c) "Reserve for replacement," which shall include funds for repair or replacement required because of damage, depreciation, or obsolescence.

(d) "Additional improvements," which shall include the funds to be used for capital expenditures for additional improvements or additional personal property which will be part of the common elements.

8. Budget. The Board of Directors shall adopt a budget for each calendar year which shall include the estimated funds required to defray common expenses and to provide funds for the accounts listed in Section 7 of these Bylaws. The budget shall take into account the following items:

(a) "Current expense," the amount for which shall not exceed _____ percent
(_____%) of the budget for this account for the prior year.

(b) "Reserve for deferred maintenance," the amount for which shall not exceed 105% of the budget for this account for the prior year.

(c) "Reserve for replacement," the amount for which shall not exceed _____ percent (_____%) of the budget for this account for the prior year.

(d) "Additional improvements," the amount for which shall not exceed _____ Dollars (\$_____); provided, however, that in the expenditure of this fund no sum in excess of _____ Dollars (\$_____) shall be expended for a single item or purpose without approval of the members of the Association.

(e) "Operations," the amount of which may be to provide a working fund or to meet losses.

The amount for each budgeted item may be increased over the foregoing limitations when approved by apartment owners entitled to cast not less than _____ percent (_____%) of the votes of the entire membership of the Association. Until the Developer has completed and sold all of the apartments of the condominium, or until _____ [month] _____ [day] , _____ [year] , or until the Developer elects to terminate its control of the condominium, whichever shall first occur, the Board of Directors may omit from the budget all allowances for contingencies and reserves. Copies of the budget and proposed assessments shall be transmitted to each member on or before _____ [month] _____ [day] preceding the year for which the budget is made. If the budget is subsequently amended, a copy of the amended budget shall be furnished to each member.

9. Assessments

(a) Assessments against the apartment owners for their shares of the items of the budget shall be made on or before _____ [month] _____ [day] preceding the year for which the assessments are made. Such assessments shall be due in two equal payments on the first day of January and July of the year for which the assessments are made. If an annual assessment is not made as required, it shall be presumed to have been made in the amount of the last prior assessment. If the annual assessment proves to be insufficient, the budget and assessments therefor may be amended at any time by the Board of Directors if the items of the amended budget do not exceed the limitations thereon for that year. Any item which does exceed such limitation shall be subject to the approval of the membership of the Association as provided in section 8 of these Bylaws. The unpaid assessment for the remaining portion of the calendar year for which the amended assessment is made shall be due upon the date of the assessment.

(b) If an apartment owner shall default in the payment of an installment upon an assessment, the Board of Directors may accelerate the remaining installments of the assessment upon notice thereof to the apartment owner, and thereupon the unpaid balance of the assessment shall come due upon the date stated in the notice, but not less than ten days after delivery thereof to the apartment owner, or not less than twenty (20) days after the mailing of such notice to him by registered or certified mail, whichever shall first occur.

(c) Assessments for common expenses of emergencies which cannot be paid from the annual assessments for common expenses shall be made only after notice of the need therefor to the apartment owners concerned. After such notice and upon approval in writing by persons entitled to cast more than one-half of the votes of the apartment owners concerned, the assessment shall become effective, and it shall be due after thirty (30) days' notice thereof in such manner as the Board of Directors may require.

(d) The depository of the Association shall be such bank or banks as shall be designated from time to time by the directors and in which the moneys of the Association shall be deposited. Withdrawal of moneys from such accounts shall be only by checks signed by such persons as are authorized by the directors.

(e) An audit of the accounts of the Association shall be made annually by a certified public accountant, and a copy of the report shall be furnished to each member not later than _____ [month] _____ [day] of the year following the year for which the report is made.

(f) Fidelity bonds shall be required by the Board of Directors from all persons handling or responsible for Association funds. The amount of such bonds shall be determined by the directors, but shall be at least one-half of the amount of the total annual assessments against members for common expenses. The premiums on such bonds shall be paid by the Association.

10. Parliamentary Rules. Roberts' Rules of Order (latest edition) shall govern the conduct of Association meetings when not in conflict with the Declaration, the Articles of Incorporation, or these Bylaws.

11. Amendments. These Bylaws may be amended in the following manner:

(a) Notice of the subject matter of a proposed amendment shall be included in the notice of any meeting at which a proposed amendment is considered.

(b) A resolution adopting a proposed amendment may be proposed by either the Board of Directors or by the members of the Association. Directors and members not present in person or by proxy at the meetings considering the amendment may express their approval in writing, provided such approval is delivered to the Secretary at or prior to the meeting. Except as elsewhere provided, such approvals must be by at least _____ percent (_____%) of the entire membership of the Board of Directors and by not less than _____ percent (_____%) of the votes of the entire membership of the Association; or by at least _____ percent (_____%) of the votes of the entire membership of the Association. Until the first election of directors, all directors must approve any amendment.

(c) No amendment shall discriminate against any apartment owner or against any apartment or class or group of apartments unless the apartment owners so affected shall consent. No amendment shall change any apartment nor the share in the common elements appurtenant to it, nor increase the owner's share of the common expenses, nor change the voting rights of members, unless the record owner of the apartment concerned and all record owners of liens thereon shall join in the execution of the amendment.

(d) A copy of each amendment shall be certified by the President and Secretary of the Association as having been duly adopted and shall be effective when recorded in the Public Records of Dade County, Florida.

The foregoing were adopted as the Bylaws of Castle Association, Inc., a corporation not for profit under the laws of the State of Florida, at the first meeting of the Board of Directors on _____ [month] _____ [day] , _____ [year] .

[Secretary]

Approved:

[President]



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Chapter 20 REAL ESTATE ENTITIES
Part IV. Forms

H. CONDOMINIUMS AND HOMEOWNERS ASSOCIATION

24-20 Current Legal Forms for Real Estate FORM 20.67

AUTHOR: by Stephen E. Pigott and Harold O. Maxfield, Jr.

FORM 20.67 Agreement to purchase condominium apartment

COMMENT

As soon as preliminary plans for construction have been completed and the declaration of condominium has been drafted, the developer will normally arrange for the sale of units. If the purchase contract is entered into during the early stage of the venture, both the seller and the purchaser are likely to require special protections. The developer may desire to avoid an ironclad commitment to build while he attempts to arrange sufficient sales to insure the profitability of the project. In addition, he may want to screen the various applications for units in order to sell only to potentially compatible residents. On the other hand, the purchaser needs protection against the possibility that the developer may abandon the project.

Several of the techniques which have been developed for satisfying these and other basic difficulties are illustrated by this form, which has been cast as an offer by a prospective owner to purchase an unit in the condominium. Upon acceptance by the developer, this document will serve as the purchase agreement. In the meanwhile, during the period allowed to the developer to consider the offer, it may investigate the personal information submitted by the offeror, and may further evaluate the desirability of completing the venture. If the developer should decide to abandon the project, even subsequent to accepting the offer, he is liable under the agreement only to return the amounts deposited by the purchaser.

As a protection to the purchaser under this agreement, his payments are to be held in trust and are not to be paid to the developer until the developer (1) accepts the offer; (2) gives the purchaser notice of the commencement of construction; (3) gives the purchaser an architect's certificate that he has entered into a general construction contract, and has received a performance bond; (4)

gives the purchaser a certificate of a mortgagee that sufficient loans have been extended to cover the general contract price; and (5) obtains commitments for title insurance. There are other protective features for the purchaser. During the initial period when units remain unsold, assessments levied upon the purchaser for operating expenses may not exceed a specified amount. All mortgages on the property are to be discharged or released at the closing unless assumed by the purchaser. This affords the purchaser the opportunity to make his own financial arrangements. The developer undertakes to organize an owners' association (as required by the statute), and to arrange for the management of the condominium property.

Dealer treatment:

The tax consequences of selling units in a condominium project constructed by a developer can probably be equated with the construction and sale of private homes. Thus, the developer who dedicates property to condominium ownership and sells the units to different purchasers is likely to be treated as if he had subdivided real property and developed and sold private homes in separate transactions. Such a developer would be considered a "dealer" in real property and gains realized would be treated as ordinary income. However, if the owner of an apartment building, after holding it several years for the production of income, liquidates his investment by converting it to condominium unit, there may be some basis for contending that such a liquidation is a capital transaction.

Unit owners' benefit:

Any loss realized from the sale of a condominium unit is nondeductible if the apartment was used solely as a personal residence. On the other hand, if the owner of the apartment had converted it to rental property, he could deduct loss realized upon its sale. But, in such case, the basis for determining loss is the value of the property at the date of the conversion to rental use (but not greater than cost), adjusted for depreciation subsequent to such appropriation. If the owner of a condominium unit leases it to a tenant, the owner is entitled to depreciation deductions. In computing the depreciation deductions, the basis is the cost of the property or its value at the time of conversion to rental use, whichever is less.

FORM

_____ [month] _____ [day] , _____ [year]

The undersigned (the "Purchaser"), herewith pays the sum of

_____ [month] _____ [day] , _____ [year] to Quinn Management Corp., a real estate broker, ("Quinn"), as earnest money to evidence the Purchaser's good faith, and hereby offers to purchase from Castle Development Corporation, 3000 Seaview Road, Miami, Florida, (the "Developer"), Apartment 4A of Castle Apartments, a condominium, (the "condominium"). The condominium is to be established by the filing of a Declaration of Condominium (the "declaration"). This apartment (the "apartment") is to be subject to the provisions of the declaration, which require the Purchaser to pay _____ percent (_____%) of the common expenses. The condominium is to be located upon the following land:

(Insert description)

This offer is subject to the following terms and conditions.

1. Price and Terms of Payment.

(a) The purchase price of the apartment is _____ Dollars (\$ _____),
 _____ Dollars (\$ _____) of which is paid herewith, _____ Dollars
 (\$ _____) of which is to be paid to Quinn within fifteen (15) days after the Developer has given notice
 to the Purchaser of the beginning of construction of the apartment building, and the balance of which amounting to
 _____ Dollars (\$ _____) is to be paid in cash at the time of closing.

(b) All payments made upon the purchase price shall be held in Quinn's Castelle Trust Account until:

(1) The Developer shall have complied with all of the requirements of Paragraph 2 of this agreement, and

(2) The Developer shall have entered into a sufficient number of contracts for the sale of apartments to assure satisfactory condominium operation. This condition shall be satisfied by the making of contracts for the sale of sixty-four (64) apartments at prices totaling not less than _____ Dollars (\$ _____), or by a determination made by the Developer in its sole discretion that the number of contracts for the sale of apartments which have been made are sufficient for this purpose, whichever shall first occur. The satisfaction of this condition shall be evidenced by the Developer's certificate which shall be delivered to Quinn.

If all of the foregoing conditions are not satisfied before completion of the Purchaser's apartment, or before _____ [month] _____ [day], _____ [year], whichever shall first occur, the sums held by Quinn shall be returned to the Purchaser upon demand, and all parties shall be released from all obligations under this agreement.

(c) This offer is conditioned upon the Purchaser's ability to obtain a mortgage loan upon the apartment in the amount and upon the terms set forth in the supplemental agreement attached hereto.

2. Performance by Developer. Quinn shall not deliver to the Developer any payments made by Purchaser until such time as the Developer shall have satisfied the following conditions:

(a) The Developer shall have accepted this offer by delivering or mailing to the Purchaser a counterpart of this agreement signed by the Developer.

(b) The Developer shall have given notice to the Purchaser of the start of construction of the apartment building.

(c) The Developer shall have given to the Purchaser a certificate by an architect qualified to practice in Florida certifying that the Developer has contracted with a general contractor for the construction and equipping of the condominium as herein required, and that the Developer has been supplied with a performance bond by the general contractor in the amount of the general contract price.

(d) The Developer shall have given to the Purchaser a certificate of a mortgagee that a construction fund, consisting of the proceeds of mortgage loans and such other funds as may be required for the constructing and equipping of the condominium, has been established in an amount not less than the amount of the general contract price, and that such fund will be disbursed only in a manner approved by the mortgagee.

(e) The Developer at its expense shall have furnished to the Purchaser a commitment by a title guarantor or insurer selected by the Developer and qualified to do business in Florida to guarantee or insure the title of the apartment to the Purchaser in the amount of the purchase price, subject only to the exceptions stated in Paragraph 6 hereof and the following exceptions: rights of persons in possession of the property; facts that an accurate survey or personal

inspection of the property will disclose; unrecorded labor, mechanic, or materialmen's liens; encumbrances, liens, or conveyances, other than a conveyance to the person to whom such commitment is made, which are recorded, or of which the Purchaser or his attorney acquires knowledge, between the effective date of the commitment and the date of issuance of the opinion and guarantee or insurance policy; and mortgages and liens of record. All mortgages and liens will be discharged or released at the closing unless assumed by the Purchaser.

3. Approval of Purchaser. The Purchaser understands that the Developer is attempting to create a community of congenial residents, that this offer will be screened with such purpose in view, and that this offer may be arbitrarily rejected. The Purchaser represents that the information he has submitted to the Developer concerning the Purchaser and his family are true. As part of the consideration for this agreement the Purchaser consents that the Developer may make such investigation of the Purchaser as may be deemed desirable, and the Purchaser shall hold the Developer harmless and releases the Developer from liability on account of such investigation and the Developer's decision thereon.

4. Disclosure. The Purchaser acknowledges having received copies of the following instruments:

- (a) the Developer's Declaration of Condominium;
- (b) the Developer's Articles of Incorporation;
- (c) the Developer's Bylaws;
- (d) the Developer's deed to the property on which the condominium will be situated;
- (e) the management contract for the condominium;
- (f) the projected operating budget for Apartment 4A; and
- (g) the sales brochure and floor plan for Apartment 4A.

5. Acceptance of Offer. If this offer is not accepted on or before sixty (60) days after the date hereof by delivery or mailing to the Purchaser of a copy of this agreement executed by the Developer, the Purchaser may elect to withdraw this offer at any time prior to its acceptance. Upon such withdrawal all sums paid hereunder will be paid to the Purchaser forthwith upon demand. If the Developer shall reject this offer, then all sums paid hereunder by the Purchaser shall be returned to the Purchaser forthwith with notice of such rejection. Upon return to the Purchaser of all sums paid hereunder, all parties shall be released from all obligations under this agreement.

6. The Condominium.

(a) The Developer will construct a multi-story apartment building and other improvements substantially in accordance with the plans and specifications therefor prepared by Paul J. Fisch, A.I.A., subject, however, to modifications approved by the Developer. Such plans and specifications are available for inspection by the Purchaser at the office of the Developer.

(b) The wood trim and doors in the Purchaser's apartment will be primed for painting but the apartment will not be otherwise decorated. The Purchaser's apartment is being sold unfurnished but will be equipped in the manner shown by the plans and specifications. The Purchaser will furnish all hanging lighting fixtures.

(c) The declaration will be recorded at or prior to the closing. The Developer reserves the right to make changes in the proposed declaration, a copy of which has been delivered to the Purchaser, providing such changes do not decrease the Purchaser's share in the common elements nor increase the Purchaser's share of the common expenses.

(d) Risk of loss prior to closing shall be borne by the Developer.

(e) The Developer shall cause Castle Association, Inc., a Florida nonprofit corporation, which will be responsible for the operation of the condominium, to contract with Quinn, a corporation owned by the same corporation that owns the Developer, for the furnishing of professional management in the operation of the condominium. This contract will be for the period beginning with the closing of the first sale of an apartment in the condominium and will continue until ninety (90) days after notice of cancellation given by either party to the contract.

(f) The Developer shall cause Castle Association, Inc., to make assessments so that the assessment against the apartment for common expenses for the period beginning with the closing of this sale and ending when the Developer has sold all of the apartments in the condominium, or on _____ [month] _____ [day], _____ [year], or when the Developer elects to pay assessments upon the apartments owned by it, whichever shall first occur, shall be at a rate of not more than _____ Dollars (\$ _____) per month and shall be payable semi-annually in advance on _____ [month] _____ [day] _____ [month] _____ [day] of each year. The Developer shall be assessed for only that part of the common expenses incurred during such period which in excess of the sums collected by assessments against apartments sold by the Developer. This clause shall survive the closing.

7. Title to be Conveyed. The Developer shall convey by warranty deed a marketable or insurable fee simple title to the apartment, subject only to the following exceptions:

(a) The provisions of the declaration, including such regulations and service contracts as shall be in force under the declaration.

(b) Taxes for the year in which the sale is closed, if not paid.

(c) Restrictions of record and such zoning or other restrictions upon the use of the property as may be imposed by governmental authorities having jurisdiction thereof.

(d) Liens for work done or materials furnished at the request of the Purchaser.

8. Closing.

(a) This sale shall be closed and the balance of the purchase price paid on or before fifteen (15) days after delivery or mailing to the Purchaser of a certificate evidencing the completion of construction. Such certificate shall be made by an architect qualified to practice in Florida and shall certify that the Purchaser's apartment has been completed and equipped substantially in accordance with the manner herein described, and that approval of the apartment for occupancy has been obtained from all governmental bodies of which such approval is required.

(b) The closing will be at the office of the Developer, and title to the apartment shall be conveyed by warranty deed subject only to the exceptions herein stated.

(c) The following expenses will be prorated to the date of closing:

(1) Ad valorem taxes. If the taxes for the year in which the sale is closed are assessed against the property as a whole, then the portion of such taxes apportioned to such apartment shall be the same share as the share in the common elements which is appurtenant to such apartment. Such taxes will be paid by Castle Association, Inc., as a common expense and the taxes apportioned to such apartment shall be assessed to the Developer and the Purchaser in the sums prorated to them. The Developer covenants that the assessment against it for such taxes shall be secured by a lien

against all apartments which the Developer then owns. If the Developer shall own less than three apartments at the time of closing, then at the closing the Developer will deposit in escrow with Castle Association, Inc., a sum which is 150% of the amount of the Developer's estimated share of such taxes on the entire condominium, which escrow shall be used for the payment of the Developer's share of the taxes, and the balance shall be paid to the Developer. This clause shall survive the closing.

(2) The costs of maintenance and operation of the condominium in the amount of the assessments last made against such apartment, or if none, then the assessments which would have been made if the sale had been closed prior to the last assessment date.

(d) The following expenses will be paid by the Purchaser:

(1) Documentary stamps required to be affixed to the deed.

(2) Recording of deed.

(3) Premium for title guarantee or insurance unless such guarantee or insurance is waived by the Purchaser.

(4) All costs required to be paid by the mortgagee if the Purchaser's apartment is to be mortgaged.

(5) Utility deposits apportioned to said apartment.

9. Default.

(a) If the Developer shall default in the performance of this agreement, the Purchaser may elect to cancel the same by giving written notice to the Developer of the specified default and of such election before the Developer tenders performance of the omitted act, whereupon all sums paid hereunder by the Purchaser shall be returned to him upon demand. Purchaser's failure to give such notice prior to the Developer's tender of performance shall constitute a waiver of Developer's default.

(b) If this offer is accepted by the Developer and the Purchaser defaults in the performance of the resulting contract, then the Developer, if the Developer is not in default, at its election may terminate this agreement, in which event the value of the option given to the Purchaser by this agreement and the amount of damages suffered by the Developer because of such default shall be liquidated and paid in the following manner: The liquidated sum to be due to the Developer shall be one-half (1/2) of all sums paid by the Purchaser upon the purchase price, but not more than _____ percent (_____) of the purchase price. All sums paid upon the purchase price in excess of such liquidated amount shall be paid forthwith to the Purchaser, together with a statement of the Developer's election to terminate the agreement and describing the Purchaser's default. If the liquidated sum is held by Quinn, it shall be paid forthwith to the Developer.

(c) Upon the making of the payments provided in the event of default, both parties shall thereby be released from all further obligations under this agreement.

10. Nonassignability. This contract cannot be assigned by the Purchaser without approval of the Developer in writing.

11. Notice. The delivery of any item and the giving of notice in compliance with this agreement shall be accomplished by delivery of the item or notice to the party intended to receive it, or by mailing the same within the continental United States by certified mail addressed to the address of the recipient herein stated. Notice or delivery by mail shall be effective when mailed.

12. Broker. The Purchaser represents that this sale was made by James Macrae of Miami, Florida, and that no other broker has been employed in this transaction.

In witness whereof this offer is signed this _____ [month] _____ [day] ,
 _____ [year] .

Advance Payments Made Pursuant

to This Contract May Be Used
 for Construction Purposes
 By The Developer.

 [Purchaser]

Dated: _____ [month] _____ [day], _____ [year]

Receipt

Receipt is acknowledged from the Purchaser of a check in amount of _____ Dollars
 (\$ _____), subject to the terms of the foregoing offer.

QUINN MANAGEMENT CORP.

By: _____

[name and title]

Dated: _____ [month] _____ [day] , _____ [year]

Acceptance of Offer

The undersigned, called the Developer in the foregoing offer, hereby accepts the foregoing Offer to Purchase and agrees to sell the apartment to the Purchaser at the price and on the terms and conditions therein set forth.

CASTELLE DEVELOPMENT CORPORATION

By: _____

[name and title]

And: _____

[name and title]

Dated: _____ *[month]* _____ *[day]* , _____ *[year]*



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Current Legal Forms for Real Estate

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Current Legal Forms for Real Estate
Chapter 20 REAL ESTATE ENTITIES

Part IV. Forms

H. CONDOMINIUMS AND HOMEOWNERS ASSOCIATION

24-20 Current Legal Forms for Real Estate FORM 20.68

AUTHOR: by Stephen E. Pigott and Harold O. Maxfield, Jr.

FORM 20.68 Condominium warranty deed

COMMENT

This form illustrates a deed conveying a unit in a condominium. The description of the unit is made only by reference to the condominium declaration, which is a document of public record. It should be noted that the grantee obligates himself to comply with the provisions of the condominium declaration, and especially to pay the assessments levied against his unit for the operation of the property. Typically, there is no distinction between a deed for a condominium and a deed for other property. The following form conveys a condominium in Florida. Florida, like many other states, has adopted a form of warranty deed, (see Florida Statutes Chapter 689, § 689.02). However, use of the statutory form is not required in Florida. Further, the practitioner should be aware of the recording requirements in the jurisdiction where the deed is to be recorded. For example, some states require notaries and witnesses.

FORM

THIS INDENTURE made _____ [month] _____ [day] ,
_____ [year] , between Castelle Development Corporation, a Florida corporation, hereinafter called the Developer, and Paul Nielsen, of 3000 Seaview Road, Miami, Florida (hereinafter called "Nielsen").

The Developer, for and in consideration of the sum of ten dollars and other good and valuable consideration to it in hand paid by Nielsen, the receipt and sufficiency of which is hereby acknowledged, has granted and sold to Nielsen, his successors, heirs, legal representatives, and assigns forever, the following described property:

Apartment 4A in Castle Apartments, a Condominium, hereinafter called the Condominium, according to a Declaration of Condominium dated _____ [month] _____ [day] , _____ [year] , filed for record on _____ [month] _____ [day] , _____ [year] , and recorded in the Public Records of Dade County, Florida; together with the undivided interest in common elements declared in the Declaration of Condominium to be appurtenant to such apartment.

Nielsen, by acceptance hereof and by agreement with the Developer hereby expressly assumes and agrees to be bound by and to comply with all of the covenants, terms, provisions, and conditions set forth in such Declaration of Condominium, including, but not limited to, the obligation to make payment of assessments for the maintenance and operation of the Condominium which may be levied against such apartment.

This conveyance is made subject to the following:

1. Real estate taxes for the year _____ [year] and subsequent years;
2. Applicable zoning regulations and ordinances;
3. All of the terms, provisions, conditions, rights, privileges, obligations, easements, and liens set forth in such Declaration of Condominium;
4. Such covenants, conditions, restrictions, and easements of record, if any, which may now affect the above described property; and
5. All facts which may be shown by an accurate survey of the above described property.

The Developer hereby fully warrants the title to the property, and will defend such title against the lawful claims of all persons.

In witness whereof the Developer has caused this warranty deed to be signed in its name by its President, and its corporate seal to be affixed, attested by its Secretary, the date first above written.

CASTELLE DEVELOPMENT CORPORATION

By: _____

[name and title]

By: _____

[name and title]

(Acknowledgment)



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Current Legal Forms for Real Estate
Chapter 20 REAL ESTATE ENTITIES

Part IV. Forms

H. CONDOMINIUMS AND HOMEOWNERS ASSOCIATION

24-20 Current Legal Forms for Real Estate FORM 20.69

AUTHOR: by Stephen E. Pigott and Harold O. Maxfield, Jr.

FORM 20.69 Medical office condominium--master deed, bylaws, and restrictive covenants

COMMENT

Use of the units in this condominium is restricted to office use. Although it is intended to be used as a medical office condominium, the restriction is limited to "use as an office" (Restrictive covenants and agreements, Paragraph 1). The office use restriction is not set forth in the master deed. There may be several reasons for this, one being that the restrictive covenants may be more easily amended than the master deed. Local and current law should be checked on these issues, as well as the client's wishes as to how limited and permanent the use restriction is intended to be. The construction of the buildings, as offices, and local zoning may provide sufficient protection in some circumstances.

Office and parking space units:

Units consist of two types: office units (Master Deed, Paragraph 3(a)), and parking space units (Master Deed, Paragraph 3(b)). Both office units and parking space units are owned as separate pieces of real estate. This is relatively unusual, as all of the parking spaces in many residential condominiums are common elements, the use of which is subject to the rules and regulations of the condominium board of directors. Here, parking space availability may increase the flow of patients or clients to the offices, putting a premium on parking. By holding fee title to the parking space itself, the unit owner or occupant does not need to look to the board of directors for more space. If necessary, the office unit owner can buy other parking spaces. An alternative approach would be to define "unit" as the office space and designated parking spaces. However, a unit owner may have more or less parking spaces than he needs, without the ability to buy or sell spaces to meet his requirements. In the plan presented here, the common elements contain additional parking spaces.

Therefore a purchaser of an office unit will have the use of at least a minimum number of spaces to be allocated, by the board of directors, to his unit (Restrictive covenants and agreements, Paragraph 3).

Exterior lighting and telephone wiring:

Common elements of particular concern to occupants of the office condominium may include the exterior lighting and the electric and telephone wiring network included here. Exterior lighting is particularly useful for evening office hours as well as security against nighttime vandalism and burglary. The telephone wiring system may permit the occupants to set up an independent telephone system, in either a separate building, or throughout the condominium (Master Deed, Paragraphs 4(d), (g)).

Project owner taxation:

The conduct of a trade or business in which the taxpayer does not materially participate is subject to the passive loss deduction limitation rules. Rental of real estate is a passive activity regardless of whether the taxpayer materially participates. Under the passive loss rules, losses and expenses are not currently deductible, but are carried forward indefinitely, unless other passive activity income is available to be offset by the passive activity losses or expenses. (See TB § 20.06[3]).

The sponsor of the condominium will realize ordinary income on the sale of the units unless he can qualify as an investor, rather than a "dealer." If the office buildings were held primarily for the receipt of rental income and realization of capital appreciation, this factor would tend to favor investor status. If, on the other hand, the sponsor purchased raw land and constructed the office buildings primarily for sale as condominium units, this tends to favor dealer status, resulting in the taxation of the gain as ordinary income. Just where the line is drawn between dealer and investor depends upon the intent and purposes of the property holder, which in turn depends, to a large extent, upon his actions. Resolution of this issue also requires an examination of the tax law.

FORMS

(1) MASTER DEED

THIS MASTER DEED, made _____ [month] _____ [day] ,
_____ [year] , by Blue Woods, Inc., a New Jersey Corporation, located at 1011 Maple Road, Maple Crest, New Jersey (hereinafter referred to as "Grantor");

WHEREAS, Grantor is the owner of the fee simple title to those lands and premises described in Exhibit "A" attached hereto and made a part hereof, which lands and premises are hereinafter referred to as the "Condominium"; and

WHEREAS, Grantor intends to develop the Condominium as an office and commercial condominium in accordance with the uses permitted under present zoning ordinances consisting of fourteen (14) units pursuant to the provisions of the New Jersey Statute Title 46 (The Condominium Act) under the name of the Medical Office Condominium at Maple Crest, A Condominium, and to that end to cause this Master Deed to be executed and recorded, together with all necessary exhibits thereto:

1. Dedication. Grantor does hereby submit, declare, and establish the Medical Office Condominium at Maple Crest, A Condominium, in accordance with The Condominium Act for that parcel of land described in Exhibit "A" aforesaid, all

as shown on that certain map entitled "Medical Office Condominium at Maple Crest, Survey and Easements situated in the Township of Maple Crest, Devon County, New Jersey," prepared by Survey Associates, attached hereto as Exhibit "B" and made a part hereof.

2. Buildings and Units. The Condominium will contain three buildings, containing fourteen (14) units as shown on that certain plat, entitled "Medical Office Condominium at Maple Crest," and attached hereto as Exhibit "C" and made a part hereof, it includes all rights, roads, and water privileges, and appurtenances thereto belonging or appertaining. Said buildings will each have a separate numerical designation and each will enclose either various numbers of units as shown on said Plan, each such unit being designated by a letter and by the number of the building of which each such unit is a part. The word "unit" when used throughout this instrument, shall be deemed to refer to each of the aforesaid units as herein described.

3. Units. The dimensions, area, and location of the units for the Condominium are as shown graphically on Exhibit "C" aforesaid, as same may be amended from time to time as herein provided. The plans for each of the model types are as shown on the drawings attached hereto as Exhibit "D," pages 1 through 4 and made a part hereof. Each unit is intended to contain all space within the area bounded by the interior surfaces of the exterior walls and interior unit dividing walls, the first floor and the roof of the building as follows:

(a) Office units. Each of the fourteen (14) units shall consist of:

(1) Enclosed Space. The volumes of cubicles of space enclosed by the unfinished inner surfaces of perimeter and interior walls, ceilings and floors thereof, including vents, doors, windows and such other structural elements that ordinarily are regarded as enclosures of space and,

(2) Interior Walls. All interior dividing walls and partitions (including the space occupied by such walls or partitions excepting load bearing interior walls and partitions) and,

(3) Fixtures and Furnishings. The decorated inner surface of the perimeter and interior walls (including decorated inner surfaces of all interior load bearing walls), floors, and ceilings consisting of wallpaper, paint, plaster, carpeting, tiles, and all other finishing materials affixed or installed as part of the physical structure of the unit and all immediately visible fixtures, complete heating and air conditioning system (including compressors), mechanical systems and equipment installed and for the sole and exclusive use of the unit, commencing at the point where the same extends from walls or floors into the interior space from the structural body of the building or from the utility lines, pipes, or systems serving the unit. No pipes, wires, conduits, or other public utility lines or installations constituting a part of the overall systems designed for the service of any particular unit or multi-unit building, nor any of the structural members or portions of any kind, including fixtures and appliances within the unit, which is not removable without jeopardizing the soundness, safety, or usefulness of the remainder of the building, shall be deemed to be a part of any unit.

(4) Exterior Items. Included also are all stoops, porches, patios, yards, and fences, if any.

(b) Parking Space Units. One hundred fourteen separate parcels of property, being the one hundred fourteen (114) "parking spaces" hereinafter more particularly described and as shown on the Schedules and plans attached hereto. Said Schedules and plans describe the locations of the several "parking spaces."

Each of the parking spaces consists of the real property, as delineated by markings thereupon, upward from the cover thereon. The word "parking space," when used throughout this instrument shall be deemed to refer to each of the aforesaid parking spaces as herein described.

4. Common Elements. All appurtenances and facilities and other items which are not part of the units or individual appurtenances as hereinbefore described in Section 3 shall comprise the common elements as graphically shown on

Exhibit "B" aforesaid. The common elements shall also include by way of description but not by way of limitation.

(a) Land. All lands described in Exhibit "A" aforesaid, whether or not occupied by buildings containing above-described units.

(b) Improvements. All streets, curbs, sidewalks, and parking spaces subject to the easements and provisions set forth in Section 7 of this Master Deed.

(c) Ornamentals and Utilities. Lawn areas, shrubbery, conduits, utility lines, and waterways, subject to the easements and provisions set forth in Section 6 hereof.

(d) Electric and Telephone. The electrical and telephone wiring network throughout the Condominium not owned by the public utilities providing such services.

(e) Utilities. Public connections for gas, electricity, light, telephone, and water not owned by the public utility or other agencies providing such services.

(f) Buildings. The foundations, main walls (including windows, doors, and chimneys therein), roofs, floors, load bearing interior walls, and partitions.

(g) Lighting. Exterior lighting and other facilities necessary to the upkeep and safety of the buildings and grounds.

(h) Easements. Any easement or other right hereafter granted for the benefit of the unit owner(s) for access to or use of recreational or other common elements not included within the lands which are part of the Condominium.

(i) After Constituted Improvements. All other structures which may be constructed on the premises.

(j) Other Elements. All other elements of the Condominium rationally of common use or necessary to the existence, upkeep, and safety thereof and, in general, all other devices or installations existing for common use.

5. Unit Ownership. The owners of a unit shall have such an estate therein as may be acquired by grant, by purchase, or by operation of law, including an estate in fee simple, and shall acquire as an appurtenance to each unit, an undivided interest in the common elements of the Condominium as set forth in Exhibit "G" attached hereto and made a part hereof, subject to any amendments as herein provided. The said appurtenant undivided interest in the common elements shall not be divisible from the unit to which it appertains. Said percentage shall be used to allocate the division of proceeds, if any, resulting from any casualty loss, any eminent domain proceedings, any common surplus, or from any other disposition of the Condominium property.

(a) Percentage Interest in Common Elements. Said percentage is expressed as a finite number to avoid an interminable series of digits. The fifth digit has been adjusted to that value which is most nearly correct. These percentages shall remain fixed.

(b) Voting and Common Expense Proportion. Anything to the contrary notwithstanding, voting rights of unit owners and their liability for common expenses shall be proportional and shall be based upon and be the same as the foregoing percentage. The same shall remain unchanged without regard to the purchase price of each unit.

6. Grantor's Reservation of Subdivision Rights. Grantor hereby reserves the specific right for itself to divide each unit which it has not conveyed into two or more units and may transfer, sell, or assign such new units without consent or approval of other unit owners or the Medical Office Condominium at Maple Crest Association, provided that such new units are first fully described and delineated in an amendment, duly filed, to this declaration, which said amendment

shall contain new floor plans and other requirements of the Condominium Statute and such amendment shall become part of this declaration. The new units shall expressly be subject to all terms and conditions of this declaration and the Association Bylaws including the obligation to pay common charges. In such a situation, the total of all new unit percentages of common interests in common elements and obligation for common charges shall be exactly the same as that applicable before division. The right to further subdivide shall remain in Grantor and shall be extinguished upon the conveyance by Grantor of any unit to a third party.

7. Easements.

(a) Unit Owners. Grantor, for itself, its successors and assigns, hereby declares that every unit owner shall have a perpetual easement in, upon, through, and over the land described in Exhibit "B" aforesaid, to keep, maintain, use, operate, repair, and replace his unit in its original position and in every subsequent position to which it changes by reason of the gradual forces of nature and the elements.

(b) Development Easements. Grantor hereby reserves unto itself, its successors and assigns an easement in, upon, through, and over the common elements for as long as the Grantor, its successors and assigns, shall be engaged in the construction, development, and sales of units, which easements shall be for the purpose of construction, installation, maintenance, and repair of existing buildings and appurtenances thereto, for ingress and egress to all units and all common elements, and other community facilities and for use of all roadways, parking lots, existing, and future model units for sales promotion and exhibition. In addition, Grantor hereby reserves the irrevocable right to enter into, upon, over, or under any unit for a period of one year after the date of delivery of the unit deed for such purposes as may be reasonably necessary for the Grantor or its agents to complete the Condominium or service any unit thereof.

(c) Limited Common Areas. Grantor, for itself, its successors and assigns, hereby declares that every unit owner shall have a perpetual and exclusive easement for possession and use of that portion of the area contiguous to the unit which is designated "Limited Common Areas" on Exhibit "B" aforesaid.

(d) Interior Surfaces. Grantor, for itself, its successors and assigns, further declares that every unit owner shall have perpetual and exclusive easement to use and enjoy the surfaces of the main walls (including windows, doors, and chimneys therein), ceilings and floors, but not the roof, contained within his unit.

(e) Utilities. Grantor reserves unto itself, its successors, assigns, and agents, an easement in, upon, through, and over the lands comprising the common elements for the purpose of installation, maintenance, repair, and replacement of all sewer, water, power and telephone, pipes, lines, mains, conduits, waters, poles, transformers, and any and all other equipment or machinery necessary or incidental to the proper functioning of any utility systems serving the Condominium.

(f) Encroachments. Grantor, for itself, its successors and assigns, hereby declares that every unit owner shall have a perpetual easement for the continuance of any encroachment by his unit or any adjoining unit or on any common element, now existing as a result of construction of the buildings or which may come into existence hereafter as a result of the reconstruction of the buildings or a unit after damage by fire or other casualty, or as a result of condemnation or eminent domain proceedings, so that any such encroachment may remain undisturbed so long as the buildings stand.

(g) Municipal Services. Grantor, for itself, its successors and assigns, hereby declares that the Township of Maple Crest, Devon County, New Jersey (but not the public in general), shall have a perpetual nonexclusive easement to enter upon all roadways, streams, lakes, parking areas, driveways, walkways, and sidewalks, for purposes of maintaining the safety, health, welfare, police, and fire protection of the citizens of said Township, including the residents of the Condominium.

8. Bylaws and Administration.

(a) Condominium Association. The administration of the common elements of the Condominium and the community and recreational facilities shall be by the Medical Office Condominium at Maple Crest. Association, in accordance with the provisions of the Condominium Act, this Master Deed, the Bylaws attached hereto as Exhibit "E" and the provisions, agreements, and restrictions of Exhibit "F," and made a part hereof, any other documents, amendments, or supplements to the foregoing which may subsequently be required by any institutional mortgage lender, or by any governmental agency having regulatory jurisdiction over the Condominium or by any title insurance company selected by Grantor to insure title to any unit(s).

(b) Amendments of Related Documents. Grantor hereby reserves for itself, its successors and assigns, for a period of five (5) years from the date hereof, the right to execute on behalf of all contract purchasers, unit owners, mortgagees, other lienholders or parties claiming a legal or equitable interest in the Condominium, any such agreements, documents, amendments, or supplements which may be so required.

(c) Power of Attorney. By acceptance of a deed to any unit or by the acceptance of any other legal or equitable interest in the Condominium, each and every contract purchaser, unit owner or occupant, or holder of any mortgage or other liens, does automatically and irrevocably name, constitute, appoint and confirm Grantor, its successors and assigns, as attorney-in-fact for the purpose of executing such amended Master Deed(s), or other instrument(s) necessary to effect the foregoing. The Power of Attorney aforesaid is expressly declared and acknowledged to be coupled with an interest in the subject matter hereof and the same shall run with the title to any and all condominium units and be binding upon the successors and assigns of any of the foregoing parties. Further, said Power of Attorney shall not be affected by the death or disability of any principal and is intended to deliver all right, title, and interest of the principal in and to said Power.

(d) Amendment of Master Deed. Except as herein provided, this Master Deed may not be modified or amended without the acquiescence of all unit owners. All amendments or modifications shall be evidenced by an Amendment to Master Deed which Amendment shall be recorded in the Devon County Clerk's Office.

9. Restrictions. This Master Deed is subject to all covenants, restrictions, and easements of record.

10. Obligations of Grantor. The Grantor covenants and agrees that for so long as it owns one or more of the condominium units, the Grantor shall be subject to the provisions of this Master Deed and of all exhibits attached hereto; and the Grantor shall take no action that will adversely affect the rights of the other owners of units and their successors in interest, as their interests may appear.

11. No partition. Subject to the provisions of the Master Deed, Bylaws of the Medical Office Condominium at Maple Crest Association, and the Condominium Act, the common elements shall remain undivided and no unit owner(s) shall bring any action of partition or division thereof. In addition, the undivided percentage interest in the common elements shall not be separated from the unit to which it appertains and shall be deemed conveyed or encumbered with the unit even though such interest is not expressly mentioned or described in the conveyance or other instrument.

12. Compliance by Owners. Each unit owner or occupant shall comply with the provisions of this Master Deed, the Bylaws and the rules and regulations of both the Medical Office Condominium at Maple Crest Association or their representatives, and with any other documents, amendments, or supplements to the foregoing which subsequently may be required by any governmental authority, as the same may be lawfully amended from time to time. Failure to comply with any such provisions, rules, or regulations shall be grounds for injunctive relief by the Grantor, the Association, and any other unit owner.

13. Leases. The unit owners shall have the absolute right to lease a unit provided that said lease is made subject to the covenants and restrictions contained in this Master Deed, the Bylaws of both the Condominium Association and other documents referred to herein, including the right of amendment reserved to Grantor herein.

14. Damage, Destruction, or Condemnation. If any building improvement or common element or any part thereof is damaged, or destroyed by fire, casualty, or eminent domain, the repair, restoration, or ultimate disposition shall be as provided in The Condominium Act.

15. Insurance. The Medical Office Condominium at Maple Crest Association shall obtain and continue in effect blanket property insurance in form and amount satisfactory to mortgagees holding first mortgages on the individual units but without prejudice to the right of the owners of any such unit to obtain individual unit insurance. In addition, the Condominium Association shall obtain and continue such other amounts of blanket property insurance as may be required by the provisions of its Bylaws. Premiums for any such blanket insurance coverage shall be a common expense to be included in the monthly assessment for common expenses and such premium charges shall be held in a separate escrow account of the Condominium Association to be used solely for the payment of said premiums as same become due.

16. Acceptance of Terms. The title of the Grantor which shall be hereafter conveyed or acquired in any manner is hereby expressly declared and made subject to the terms and provisions of this instrument, and the acquisition of title to a unit, by any person shall be conclusively deemed to mean that the acquirer approves, adopts, and ratifies the provisions of this instrument, the Bylaws and Rules and Regulations of the Condominium Association, and all exhibits attached hereto as set forth in Section 19. The covenants, agreements, and restrictions set forth herein shall run with the land and shall be binding upon Grantor, its successors and assigns.

17. Severability and Retrospective Application. It is the intention of the Grantor that the provisions of this instrument are severable so that if any provision, condition, covenant, or restriction thereof shall be invalid or void under any applicable federal, state, or local law, the remainder shall be unaffected thereby. In the event that any provision, condition, covenant, or restrictions thereof, is, at the time of recording of this instrument, void, voidable, or unenforceable as being contrary to any applicable federal, state, or local law, the Grantor, its successors and assigns and all persons claiming by, through or under the same, covenant and agree that any future amendments or supplements to the said laws having the effect of removing said invalidity, voidability, or unenforceability shall be deemed to apply retrospectively to this instrument, thereby operating to validate the provisions of this instrument which otherwise might be invalid, and it is covenanted and agreed that any such amendments and supplements to the said laws shall have the effect herein declared as fully as if they had been in effect at the time of the execution of this instrument.

18. Amendments. This Master Deed and exhibits attached hereto, may be amended or supplemented by the Grantor by recording said amendment or supplement in the same manner as this Master Deed shall be recorded. No amendment or supplement shall change a unit unless the owner thereof shall join in the execution of the amendment or execute a consent thereto with the formalities of a deed.

19. Conflicts. Any conflict between the provisions of this instrument and the Bylaws of the Condominium Association shall be resolved in favor hereof.

20. Exhibits. Exhibits attached hereto and made a part hereof are the following:

1.	Exhibit A	Metes and Bounds Description of Condominium Property consisting of one page.
2.	Exhibit B	Map known as "Plan of Survey and Easements of Medical Office Condominium at Maple Crest"
3.	Exhibit C	Plat known as "Medical Office Condominium at Maple Crest, Building Location situated in the Township of Maple Crest, Devon County, New Jersey."

4.	Exhibit D	Tri-Dimensional Drawings of the model types.
5.	Exhibit E	Bylaws of the Medical Office Condominium at Maple Crest Consisting of 31 pages and articles of incorporation.
6.	Exhibit F	Declaration of Restrictive covenants and agreements.
7.	Exhibit G	Schedule of percentage of interest in common elements.

21. Instrument. The words "instrument" or "this instrument" whether in the Master Deed or any of the Exhibits attached hereto shall be deemed to mean the Master Deed and all said Exhibits mentioned in Section 20 hereinabove.

In witness whereof the parties hereto have hereunto set their hands and seals, or caused these presents to be signed by their proper corporate officers and their proper corporate seal to be hereto affixed, the day and year first above written.

BLUE WOODS, INC.

By: _____

[name and title]

By: _____

[name and title]

(Acknowledgment)

[Land Description]

(2) *BYLAWS*

Exhibit E

Bylaws of

Medical Office Condominium at Maple Crest

ARTICLE I

Nature of Bylaws

These Bylaws are intended to govern the administration of the Medical Office Condominium at Maple Crest Association (hereinafter the "Association"), a nonprofit membership corporation organized under New Jersey Statutes, together with the management and administration of the common elements of the Medical Office Condominium at Maple Crest Association (hereinafter the "Association"), which has been established by a Master Deed to which these Bylaws are appended as Exhibit "E." Unless the context clearly indicates otherwise, all definitions set forth in Title 46 of the New Jersey Statutes are incorporated herein by reference.

ARTICLE II

Board of Directors

Section 1. Number and Qualifications. The affairs of the Association shall be governed by the Board of Directors (the "Board"). The Board shall consist of three persons designated by the Grantor, none of whom need be unit owners, until such time as two-thirds (2/3) of the condominium units shall have been sold by the Grantor and shall have been paid for and title closed, or until two (2) years after the date of the recording of the Master Deed, whichever shall first occur, and thereafter until their successors shall have been elected by the unit owners.

Section 2. General Powers. The property, affairs, and business of the Association shall be managed by the Board, which shall:

2.1. Managerial Personnel. Employ all managerial personnel necessary or enter into a managerial contract for the efficient discharge of the duties of the Board hereunder. Those employees who handle or are responsible for the handling of moneys shall be bonded by a fidelity bond.

2.2. Maintenance Personnel. Investigate, hire, pay, supervise, and discharge the personnel necessary to be employed in order to properly maintain and operate the condominium. Compensation for services of such employees (as evidenced by certified payroll) shall be considered an operating expense of the condominium.

2.3. Utilities and Up-keep. Contract for fuel oil or other forms of utilities, and arrange and be responsible for snow removal, painting building, repairing, renovating, remodeling.

2.4. Professional Services. Employ, if necessary, professional counsel to obtain advice from persons, firms, or corporations such as, but not limited to, landscape architects, architects, planners, biologists, lawyers, accountants, etc.

2.5. Moving Coordination. Coordinate the plans of owners and occupants of units for moving their personal effects into or out of the condominium, with a view towards scheduling such movements so that there shall be a minimum of inconvenience of other owners or occupants.

2.6. Unit Owner Relations. Maintain businesslike relations with owners or occupants whose service requests shall be received, considered, and recorded in systematic fashion, in order to show the action taken with respect to each. As part of a continuing program, secure full performance by such owners or occupants of all such items and maintenance for which they are responsible.

2.7. Interpretation. The powers herein granted or necessarily implied shall be construed to favor the broadest discretion of the Board, except that the Board of Directors shall have the duty to exercise all of such powers as required by law.

2.8. Fiscal Responsibility. The Board shall be governed by the following with respect to its fiscal duties and responsibilities.

(1) Common Expenses. The Board shall have the duty to collect as "common expenses" assessed against each unit owner, his, her, or their heirs, administrators, successors and assigns, a proportionate part of the common expense of the entire condominium as provided in the Master Deed and in accordance with applicable law. The Board shall have the power to estimate the cost in advance on an annual basis and to give notice thereof to the individual unit owners in the manner herein provided and the same shall be a lien against each unit.

(2) Notice of Annual Assessment. The Board shall give written notice by ordinary mail to each such unit owner of the

amount estimated by the Board to be the common expenses for the management of the Association for the ensuing period. Such notice shall be addressed to each owner at its last address known to the Board, and shall be conclusively presumed to have been delivered five days after deposit in the United States mails. If no objection is made by the unit owners on or before the twentieth day after receipt of such notice, the amount shall be deemed to be conclusive and binding. If an annual assessment is not made as required, an assessment shall be presumed to have been made in the amount of the last prior year's assessment, and monthly installments on such assessment shall be due upon each installment payment date until changed by an amended assessment. If the annual assessment proves to be insufficient, the budget and assessments may be amended at any time by the Board, provided, that nothing herein shall prohibit or prevent the Board from imposing a lump sum assessment in the case of an immediate need or emergency.

(3) Acceleration of Assessment Installments Upon Default. If a member shall be in default in the payment of an installment upon an assessment, the Board may accelerate the remaining installments of the assessment upon notice to the member, and the then unpaid balance of the assessment shall come due upon the date stated in the notice, but not less than five (5) days after delivery of the notice to the member, or not less than ten (10) days after the mailing of such notice to him by registered or certified mail, whichever shall first occur.

(4) Bank Accounts. The depository of the Association shall be such a bank or banks as shall be designated from time to time by the Board and in which the moneys of the Association shall be deposited. Withdrawal of moneys from such accounts shall be only by checks signed by such persons as are authorized by the Board, provided that a management agreement may include among its provisions authority for the manager to sign checks on behalf of the Association for payment of the obligations of the Association.

(5) Interest and Counsel Fees. The Board, at its option, shall have the right in connection with the collection of this or any other charge, to impose an interest charge at the legal maximum if such payment is made after a date certain stated in such notice. If the Board shall resort to Counsel for the collection of any charge, it may add to the aforesaid charge or charges a sum or sums of _____ percent (_____%) of the gross amount due as counsel fees, in addition to such costs as are allowable by law.

(6) Expenditure of Funds. The amount of moneys for common expenses deemed necessary by the Board and the manner of expenditure thereof, including but not limited to, the allocation thereof, shall be a matter for the sole discretion of the Board, until after the first annual meeting of the members.

(7) Disbursement. The Board shall take and hold the funds as collected and shall disburse the same for the purposes and in the manner set forth herein and as required by law.

(8) Reserves. The Board shall not be required to expend all of the revenues collected in any accounting period, but may maintain a reasonable reserve for, among other things, emergencies, contingencies of bad weather or uncollected accounts. Said reserve fund or funds shall, however, be kept in interest-bearing securities either short or long term, or in an insured, interest-bearing savings account(s). However, the Board may keep additional cash on hand, in a checking or petty cash account for the necessary discharge of its function.

(9) Annual Audit. The Board shall submit its books, records, and memoranda to an annual audit by a disinterested certified public accountant who shall audit the same and render a report thereon in writing to the Board and in summary form to the members and such other persons, firms, or corporations as may be entitled to same.

(10) Accounts. The receipts and expenditures of the Association shall be credited and charged to accounts under the following classifications as shall be appropriate, all of which expenditures shall be common expenses:

(i) Current Expenses. Current expenses, which shall include all receipts and expenditures within the year for which the budget is made, including a reasonable allowance for contingencies and working funds, except expenditures chargeable

to reserves, to additional improvement or to operations. The balance of this fund at the end of each year shall be applied to reduce the assessments for current expenses for the succeeding year, or may be distributed to the membership as the directors shall determine;

(ii) Deferred Maintenance Reserve. Reserve for deferred maintenance, which shall include funds for maintenance items that occur less frequently than annually;

(iii) Replacement Reserve. Reserve for replacement, which shall include funds for repair or replacement required because of damage, depreciation, or obsolescence;

(iv) Capital Expenditures. Capital expenditures, which shall include the funds to be used for capital expenditures for additional improvements or additional personal property that will be part of the common elements.

(v) Revenue Producing Operations. Operations, which shall include all the gross revenues. Only the additional direct expense required by any revenue-producing operation will be charged to this account, and any surplus from any operation shall be used to reduce the assessments for current expense for the year during which surplus is realized, or at the discretion of the Board of Directors, in the year following the year in which the surplus is realized, losses from the operations shall be met by special assessments against members, which assessments may be made in advance in order to provide a working fund.

Section 3. Election and Term of Office. The first meeting of the unit owners shall be held on call by the Board no more than (a) sixty (60) days after two-thirds (2/3) of the units have been sold, paid for, and title closed, or (b) no later than two (2) years after the date of the recording of the Master Deed, whichever shall first occur. Said meeting shall be considered to be the first annual meeting of the unit owners. At the first meeting, five (5) members of the Board shall be elected by unit owners from among the unit owners. Three members shall be elected for a one (1) year term and two (2) members shall be elected for a two (2) year term. The members of the Board shall hold office until their respective successors have been elected by the unit owners. The Board appointed by the sponsor shall act until the election has been completed at said first meeting. At any vote for membership on the Board, each unit owner, including the sponsor, to the extent that the sponsor is still a unit owner shall vote in accordance with the provisions of Section 3 hereof for each position to be filled. If at any meeting for election of membership to the Board more than twice the number of candidates to be elected at such meeting are nominated, there shall be two ballots for membership. At the end of the first ballot, the field of nominees shall be reduced so that there are no more than twice as many candidates running as there are positions to be filled, with the lowest vote getters being eliminated. A second ballot shall be held, and on the second ballot, the top vote getters on the basis of the votes will be elected. If there are no more than twice the number of nominees for the number of positions to be filled, then there shall be one ballot, with the top vote getters being elected to membership on the Board. If the candidates are being elected for varying periods of years, the candidate polling the highest vote will be considered elected for the longest period of years. After the first annual meeting of the unit owners, succeeding annual meetings shall be held during the same month of each succeeding year. At each annual meeting members of the Board shall be elected by ballot of the unit owners in accordance with these Bylaws. Notwithstanding any other provisions of these Bylaws to the contrary, so long as the grantor shall own _____ percent (_____%) or more of the units, the grantor shall be entitled to elect at least one member of the Board for a one-year term. At such time as the grantor no longer owns _____ percent (_____%) or more of the units, the member of the Board elected by the grantor shall vacate the Board and the place vacated shall be filled by the remaining members of the Board as herein provided for the unexpired portion of the term.

Section 4. Removal of Members of the Board. At any duly held regular or special meeting of the unit owners, any one or more members of the Board may be removed with or without cause by a majority of the unit owners present and voting, and a successor may then and there, or thereafter, be elected to fill the vacancy thus created. Any member of the Board whose removal has been proposed by the unit owners shall be given an opportunity to be heard at the meeting.

This provision shall not apply to Board members appointed by the sponsor under Article II, Section 3, nor to any of the three original directors appointed by the grantor as set forth in the Master Deed.

Section 5. Vacancies. Vacancies in the Board caused by any reason shall be filled by a vote of a majority of the remaining members of the Board at a special meeting of the Board held for that purpose promptly after the occurrence of any such vacancy, even though the members present at such meeting may constitute less than a quorum. Each person so elected shall be a member of the Board for the remainder of the term of the member whose term he is filling and until his successor shall be elected.

Section 6. Compensation. No member of the Board shall receive any compensation for acting as a Director. However, Directors may be reimbursed for out-of-pocket expenses and may be compensated for services rendered to or for the association in any other capacity.

Section 7. Meeting of Board. The first meeting of the Board following the first annual meeting of the unit owners shall be held within ten days thereafter at such time and place as shall be fixed by the unit owners at their annual meeting and no notice shall be necessary. Thereafter, regular meetings of the Board may be held at such time and place as shall be determined from time to time by a majority of the members of the Board, but at least two meetings shall be held each year. Notice of regular meetings of the Board shall be given to each member of the Board by mail or telegram at least three business days prior to the day of the meeting. Special meetings of the Board may be called by the President on three business days notice to each member of the Board given by mail or telegram, which notice shall state the time, place, and purpose of the meeting. Special meetings of the Board may be called by the President on three business days notice to each member of the Board given by mail or telegram, which notice shall state the time, place, and purpose of the meeting. Special meetings of the Board shall be called by the President or the Secretary in like manner and on like notice on the written request of at least three members of the Board. Any member of the Board may, at any time, waive notice of any meeting of the Board in writing and such waiver shall be deemed equivalent to the giving of notice. Actual attendance by members of the Board at any meeting of the Board shall constitute a waiver of notice by him of the time and place thereof.

Section 8. Quorum of Board. At all meetings of the Board, a majority of the members thereof shall constitute a quorum for the transaction of business and the votes of a majority of the members of the Board present and voting at a meeting at which a quorum is present shall constitute a valid decision. If at any meeting of the Board there shall be less than a quorum present, the majority of those present may adjourn the meeting to a new date. At any such adjourned meeting at which a quorum is present, any business which may have been transacted at the original meeting may be transacted without further notice.

Section 9. Nonwaiver. All the rights, duties, and privileges of the Board shall be deemed to be continuing and shall not be exhausted by the exercise of any single act or series of acts. To the same extent, the failure to use or employ any remedy or right hereunder or hereafter granted shall not preclude its exercise in the future nor shall any custom bind the Board.

ARTICLE III

Officers

Section 1. Designation. The principal officers of the Association shall be a President, a Vice-President, who shall be a member of the Board of Directors, and a Secretary and a Treasurer. The Board may also appoint such other assistant Treasurers and assistant Secretaries as in their judgment may be necessary. Any two offices, except that of President, Vice-President, Secretary, and Assistant Secretary may be held by one person.

Section 2. Election of Officers. The officers of the Association shall be elected annually by the Board of Directors at the

first Board of Directors meeting following each annual meeting and such officers shall hold office at the pleasure of the Board.

Section 3. Removal of Officers. Upon an affirmative vote of a two-thirds majority of the members of the Board of Directors, any officer may be removed, either with or without cause, and his successor elected at any regular meeting of the Board of Directors, or at any special meeting of the Board called for such purpose.

Section 4. President. The President shall be the chief executive officer of the Association. He shall preside at all meetings of the Association and of the Board of Directors. He shall have all of the general powers and duties which are usually vested in the office of President of an Association, including but not limited to the power to appoint committees from among the members of the Association from time to time as he may in his discretion deem appropriate to assist in the conduct of the affairs of the association.

Section 5. Vice-President. The Vice-President shall take the place of the President and perform his duties whenever the President shall be absent or unable to act. If neither the President nor the Vice-President is able to act, the Board of Directors shall appoint some other member to do so on an interim basis. The Vice-President shall also perform such other duties as shall from time to time be imposed upon him by the Board of Directors.

Section 6. Secretary. The Secretary shall keep the minutes of all meetings of the members of the Association; he shall have charge of such books and papers as the Board of Directors may direct; and he shall, in general, perform all the duties incident to the office of the Secretary. The Secretary need not be a member of the Board, but may be appointed by the Board.

Section 7. Treasurer. The Treasurer shall have the responsibility for Association funds and securities and shall be responsible for keeping full and accurate accounts of all receipts and disbursements in books belonging to the Association. He shall be responsible for the deposit of all moneys and other valuable effects in the same, and to the credit of the Association in such depositories as may from time to time be authorized by the Board of Directors.

Section 8. Other Duties and Powers. The officers shall have such other duties, powers, and responsibilities as shall, from time to time, be authorized by the Board of Directors.

Section 9. Fidelity Bonds. All officers and members of the Association having the responsibility for handling funds of the Association are to be bonded at the expense of the Association.

Section 10. Compensation of Officers. The President and Vice-President shall not receive any compensation for their services except reimbursement for out-of-pocket expenses but may be compensated for services rendered in any other capacity. The Secretary and Treasurer and may be compensated for their services if the Board determines that such compensation is appropriate.

Section 11. Eligibility of Directors. Nothing herein contained shall prohibit a director from being an officer.

ARTICLE IV

Fiscal Year

The fiscal year of the Association shall be on a calendar year basis.

ARTICLE V

Meeting of Unit Owners

Section 1. Time of Meeting. Annual meetings of the unit owners shall be held as hereinabove provided for. If the election of directors shall not be held on the day designated herein for any annual meeting or at any adjournment of such meeting, the Board of Directors shall cause the election to be held at a special meeting as soon thereafter as convenient. At such special meeting the members may elect the directors and transact other business with the same force and effect as at an annual meeting duly called and held.

Section 2. Place of Meeting. The meeting of the unit owners shall be held at the principal office of the Association or at such other suitable place convenient to the unit owners as may be designated by the Board.

Section 3. Special Meetings. After the first annual or special meeting, special meetings of members may be called by the President whenever he deems such a meeting advisable, and shall be called by the Secretary when so ordered by the Board of Directors or upon written request of members entitled to no less than _____ percent (_____%) of all the votes entitled to be cast at such meeting. Such request shall state the purpose or purposes of such meeting and the matter proposed to be acted on thereat. The Secretary shall give notice stating the purpose or purposes of the meeting to all members entitled to vote at such meeting. No special meeting need be called upon the request of members entitled to cast less than _____ percent (_____%) of all votes entitled to be cast at such meeting to consider any matter which is substantially the same as a matter voted upon at any meeting of the members held during the preceding twelve (12) months.

Section 4. Notice of Meeting. Except as otherwise provided by law, notice of each meeting of members, whether annual or special, shall be given not less than ten (10) days, nor more than ninety (90) days before the day on which the meeting is to be held, to the representative or each unit owner at the address of its unit, by delivering a written or printed notice thereof to him personally, or by mailing such notice, postage prepaid. Except where expressly required by law, no publication of any notice of a meeting of members shall be required. Every such notice shall state the time and place of the meeting and shall state briefly the purposes thereof. Notice of any meeting of members shall not be required to be given to any members who shall attend such meeting in person or by proxy. Notice of any adjourned meeting of the members shall not be required to be given, except when expressly required by law.

Section 5. Quorum. At each meeting of the members, one-third of the unit owners, present in person or represented by proxy, shall constitute a quorum for the transaction of business except where otherwise provided by law. In the absence of a quorum, the unit owners present in person or represented by proxy and entitled to vote, by majority vote, may adjourn the meeting from time to time, until a quorum shall be present or represented. At any such adjourned meeting at which a quorum may be present any business may be transacted which might have been transacted at a meeting originally called.

Section 6. Organization. At each meeting of the Association the President or, in his absence, the Vice-President, or in the absence of both of them, a Chairman chosen by a majority vote of the unit owners present in person or represented by proxy and entitled to vote thereat, shall act as Chairman, and the Secretary or in his absence, a person whom the Chairman shall appoint, shall act as Secretary of the meeting.

Section 7. Conduct of Meetings. The order of business at the annual meeting of the unit owners or at any special meeting as far as practicable shall be:

- (a) Calling of the roll and certifying the proxies.
- (b) Proof of notice of meeting or waiver of notice.
- (c) Reading and disposal of any unapproved minutes.

- (d) Receiving reports of officers.
- (e) Receiving reports of committees.
- (f) Appointment of judges of election, if necessary.
- (g) Election of Directors, if necessary.
- (h) Old Business.
- (i) New Business.
- (j) Adjournment.

Section 8. Voting. Except as otherwise required by law, or specifically required by the Master Deed:

- (a) The owner(s) of each unit shall have such vote as set forth in the Master Deed.
- (b) A quorum being present, a majority of all those voting in person or by proxy shall be sufficient on those matters which are to be voted on by the Unit Owners. All proxies shall be in writing, signed by all individual owners of each unit or by his or their duly authorized representative(s), and delivered to the Secretary of the Meeting, but no proxy shall be voted on after eleven (11) months from its date unless said proxy provides for a longer period. The election of directors shall be by ballot. The vote on any other question need not be by ballot unless demanded by at least _____ percent (_____%) of the members present in person or by proxy at such meeting and entitled to vote thereat, or determined by the Chairman of the Meeting to be advisable.

Section 9. Judges. If at any meeting of the members a vote by ballot shall be taken on any question, the Chairman of such meeting shall appoint two judges to act thereat with respect to such vote. Each judge so appointed shall first subscribe to an oath faithfully to execute the duties of a judge at such meeting with strict impartiality and according to the best of his ability. Such judges shall decide upon the qualifications of voters and shall report the number and value of shares represented at the meeting and entitled to vote on such question, shall conduct and accept the votes, and, when the voting is completed, shall ascertain and report the number of shares voted respectively for and against the question. Reports of judges shall be in writing and subscribed and delivered by them to the Secretary of the meeting. The judges need not be members of the Association, and any officer of the Association may be a judge on any question other than a vote for or against his election to any position with the Association or any other question in which he may be directly interested.

ARTICLE VI

Title to Units

Title to units may be taken in the name of an individual, or in the name of two or more persons as tenants in common or as joint tenants with right of survivorship, or in the name of a corporation or partnership, or in the name of a fiduciary. Any officer of a corporate unit owner shall be eligible to serve on the Board.

ARTICLE VII

Maintenance, Repair, and Alteration of Property

Section 1. Maintenance and Repair. Each member shall promptly perform at his own risk, cost, and expense all

maintenance and repair work with respect to the portion of each unit which he owns that does not comprise a part of the mutual easements, and which, if omitted, would adversely affect the safety of the building in which his unit is located or any part or parts thereof belonging in whole or in part to other members. Each member shall be liable for any damages, liabilities, costs, or expenses including attorneys' fees, caused by or arising out of his failure to promptly perform any such maintenance and repair work.

Section 2. Common Expense. All maintenance, repairs, and replacements to the common elements and facilities, whether located inside or outside of the units, (unless necessitated by the negligence, misuse, or neglect of a unit owner, in which case such expense shall be charged to such unit owner) shall be made by the Board and charged to all unit owners as a common expense. All payment vouchers are to be approved by either the President or Treasurer.

Section 3. Aesthetic Restrictions. Unit owners shall not have any right to paint or otherwise decorate or change the appearance of any portion of the exterior of the building in which a unit is located. The unit owner shall promptly report to the Board any defect or need for repairs, the responsibility for which is that of the Association. Except as herein provided, no member or group of members shall build, plant, or maintain any matter or thing upon, over or under the common elements, except with the express permission of the Board in writing first having been obtained, nor shall any member place trash, garbage, excess materials of any kind on or about the common elements, nor burn, chop, or cut anything on, over or above the common elements.

ARTICLE VIII

Insurance

Section 1. Insurance Trustee. The Board, as insurance trustee for each of the unit owners shall be required to obtain and maintain the insurance herein provided, to the extent obtainable, without prejudice to the right of each unit owner to insure his own unit for his own benefit.

Section 2. Broad Form Insurance.

2.1. Fire and Extended Coverage. Broad form insurance shall be maintained against loss by fire and against loss by lightning, windstorm, and other risks normally included within extended coverage, insuring all structural portions of the condominium property, together with all service machinery contained therein and covering the interest of the Association, the Board of Directors and all members and their mortgagees as their interests may appear, in an amount equal to the full replacement value of the buildings, without deduction for depreciation.

2.2. Mortgagee Clause. Each of said policies shall contain a standard mortgagee clause in favor of each mortgagee of a unit. Such clause shall provide that the loss, if any, thereunder shall be payable to such mortgagee as its interests may appear, subject, however, to the payment provisions in favor of the Board of Directors workmen's compensation insurance; and such other provisions as the Board of Directors may determine.

2.3. Loss Adjustment. All such policies shall provide that adjustment of loss shall be made by the Board of Directors.

2.4. Repair. In the event of fire or other disaster or casualty resulting in damage to or destruction of any improvements or any part thereof or to common elements in an amount less than two-thirds of the value of the condominium property, the net proceeds of any insurance carried by the Association shall be made available for the purpose of repair, reconstruction, restoration, or replacement. If the insurance proceeds are insufficient to cover the cost of repair, reconstruction, restoration, or replacement, the deficiency shall be paid by all of the owners directly affected by the damage in proportion to the value of their respective units. If any owner directly affected by the damage shall refuse to make payments, the Board of Directors shall levy an assessment in an amount proportionate to the value of the unit affected by the damage, the proceeds of such assessment being paid, together with the insurance proceeds to the

Association for the purpose of recovering the costs of repair, reconstruction, restoration, or replacement. If any owner shall fail to respond to the assessment by payment thereof within a reasonable time, the amount of said assessment shall constitute a lien against the unit of such owner, which lien may be enforced and collected in the same manner as any other liens as hereinabove provided. In the event any insurance proceeds remain after such repair, reconstruction, restoration, or replacement, the excess shall be shared by the unit owners directly affected. The provisions of this Section may be changed by the unanimous resolution of the unit owners adopted after the date upon which the fire or other disaster occurs.

2.5. Substantial Destruction.

(1) Sale. If such insurance proceeds shall be inadequate by a substantial amount to cover the estimated cost of repair, reconstruction, restoration, or replacement of an essential improvement or common element, or if such damage shall constitute substantially total destruction of the condominium property, or if 75% of the unit owners directly affected by such damage, together with all mortgagees holding bona fide first mortgages on the units directly affected, shall determine not to repair, or restore, the Association shall realize upon the salvage value of the portion of the condominium property so damaged or destroyed, either by sale or such other means as the Association may deem advisable, and shall collect any proceeds of any insurance.

(2) Partition. In the event the owners decide to repair or restore, the payment of the costs thereof shall be in accordance with the preceding paragraph. In the event the election is made to sell, the covenants against partition herein contained shall become null and void and the said owner or owners shall be entitled to convey their interest in the condominium and may invoke relief in a court of competent jurisdiction to compel such sale and partition against those owners who shall have refused to approve such a sale or partition.

(3) Surplus. All sums received from insurance shall be combined with the proceeds of sale of the condominium, after providing for all necessary costs and expenses including court costs and reasonable attorneys' fees in the event of any litigation necessary to compel any owner to join in a conveyance of his interest in the condominium. Distribution of the combined funds shall be made to the owners of the units in the said condominium in accordance with their respective undivided interest in the common elements as herein set forth or to mortgagees or other lien holders, as their interest shall appear.

2.6. Obsolescence. In the event that the Board of Directors shall deem that the multi-unit buildings in the condominium are obsolete, the Board of Directors, at a regular or special meeting of the owners, may call for a vote by said owners to determine whether the entire condominium should be sold. In the event that all of the unit owners, with the consent of all bona fide first mortgagees, determine that the premises should be sold, the applicable provisions of the preceding section shall become effective.

2.7. Public Liability Insurance. To the extent obtainable, public liability insurance in such limits as the Board of Directors may, from time to time, determine covering each member of the Board of Directors, the managing agent, the manager and each member. Such public liability coverage shall also cover gross liability claims on one insured against another. The Board of Directors shall review such limits once a year. Until the first meeting of the Board of Directors following the first annual meeting of the members, such public liability insurance shall be amounts not less than _____ Dollars(\$ _____) / _____ Dollars
 (\$ _____) for claims for bodily injury and _____ Dollars
 (\$ _____) for claims for property damage.

2.8. Unit Owner Insurance. Members shall not be prohibited from carrying other insurance for their own benefit provided that all such policies shall contain waivers of subrogation and further provided that the liability of the carriers issuing insurance obtained by the Board of Directors shall not be affected or diminished by reason of any such additional insurance carried by any member.

ARTICLE IX

Patios and Yards

Any patio, porch or yard to which there is an exclusive direct access from the interior of a unit shall constitute a limited common element for the exclusive use of the owner of such unit. The owners of a unit to which a patio, porch or yard is attached or connected shall repair all defects and damages thereto caused by their own negligence, misuse, or neglect and shall be responsible for all snow removal from said patio or yard. Any other repairs or maintenance to or with respect to the limited common elements shall be the responsibility of the Association.

ARTICLE X

Additions, Alterations, or Improvements by the Board

Whenever, in the judgment of the Board, common areas shall require additions, alterations, or improvements costing in excess of _____ Dollars (\$_____), said alterations and improvements shall not be made unless they have been approved by a majority of the unit owners present and voting at a meeting at which a quorum is present. When said approval has been obtained, all unit owners shall be assessed for the cost thereof as a common charge. In the event of any emergency which could cause damage to any building(s) or part(s) thereof, the Board may expend sums in excess of _____ Dollars (\$_____) to protect said building(s) or part(s) and the judgment of the Board shall be final.

ARTICLE XI

Additions, Alterations, Improvements by the Unit Owners

No unit owner shall make any structural additions, structural partition, wall change, or structural alteration or improvement in or to his unit without the prior written consent of the Board and the mortgagee of said unit. The Board shall answer any unit owner's request for such approval within sixty (60) days after receipt of such request. Failure to do so within the stipulated time shall constitute a consent by the Board to the proposed structural addition, alteration, or improvement. Any application to any municipal authority for a permit to make an addition, alteration, or improvement in or to any unit shall be executed only by or with the approval of the Board. The provisions of this Article shall not apply to units owned by the Grantor until such units have been initially sold by the Grantor.

ARTICLE XII

Right of Access

Each unit owner shall grant a right of access to his unit to the manager and/or the managing agent and/or any other person authorized by the Board for the purpose of making inspections, correcting any condition originating in his unit and threatening another unit or common element, or for the purpose of performing necessary installations, alterations, or repairs to the electrical or mechanical services or other common elements in his unit or elsewhere in the building within which the unit is located. The unit owner's obligations concerning grant of access are subject to the condition that requests for entry shall be made in advance and at a time reasonably convenient to the unit owner. In case of an emergency, such right of entry shall be immediate whether the unit owner is present at the time or not.

ARTICLE XIII

Common Expenses Payable by the Grantor

The unit owner shall be solely responsible for all common expenses only until the sale of the first unit in the condominium. Following the first closing, the unit owner to whom title shall have been vested shall be responsible for his proportionate share of common expenses as set forth in the Master Deed and the sponsor shall pay the common expenses attributable to completed and unsold units.

ARTICLE XIV

Electricity, Gas, Water, and Heating

Electricity shall be supplied by the public utility company serving the area directly to each unit through a separate meter for each unit, and each unit owner shall be required to pay the bills for electricity consumed or used by his unit and in any limited common areas serving his unit. The electricity serving the general common elements and grounds shall be metered and the Board shall pay all bills for electricity consumed therein as a common expense. The utility charges for water, sewerage, and trash removal shall be paid by the Board as a common expense.

ARTICLE XV

Miscellaneous

Section 1. Examination of Books. Each unit owner and each mortgagee of a unit shall be permitted to examine the books of account of the Board at a reasonable time on business days.

Section 2. Notices. All notices hereunder to the Association shall be sent by registered or certified mail to the Board in care of the President of the Association and/or to the managing agent if there be a managing agent. All notices to any unit owner shall be sent registered or certified mail to the building in which the unit is situated, or to such other address as may have been designated by him from time to time in writing to the Board. All notices shall be deemed to have been given when mailed except notice of change of address which shall be deemed to have been given when received.

Section 3. Invalidity. The invalidity of any part of these Bylaws shall not impair or affect in any manner the enforceability or affect the balance of these Bylaws.

Section 4. Waiver. No restriction, condition, obligation, or covenant contained in these Bylaws shall be deemed to have been abrogated or waived by reason of the failure to enforce the same irrespective of the number of violations or breaches thereof which may occur.

ARTICLE XVI

Amendments

These Bylaws, or any of them, may be altered or repealed, or new Bylaws may be made, at any meeting of the Association duly constituted for such purpose, a quorum being present, by an affirmative vote of _____ percent (_____) of the votes entitled to be cast in person or by proxy, except that the first annual meeting may not be advanced and the first Board of Directors (including replacements in case of vacancies) may not be removed by reason of any such amendment or repeal.

ARTICLE XVII

Enforcement

The Association may enforce the terms of this instrument or any rule or regulation promulgated pursuant hereto, by any or all of the following: self-help; by sending notice to the offending party to cause certain things to be done; by

restoring the Association to its original position and charging the breaching party with the entire cost or any part thereof; by taking any other action before any court, summary or otherwise, as may be provided by law; by complaint to the duly constituted authorities. The foregoing shall be construed to be in addition to all other powers granted herein and by the New Jersey Condominium Act, not in limitation thereof.

ARTICLE XVIII

Exculpability of Board and Officers

Neither the Board as a body nor any member thereof nor any officer of the Association shall be personally liable to any unit owner in any respect for any action or lack of action arising out of the execution of his office. Each unit owner shall be bound by the good faith actions of the Board and officers of the Association in the execution of the duties of said Directors and officers. Unless acting in bad faith, no director or officer of the Association shall be liable to any unit owner or other person for misfeasance or malfeasance in office.

ARTICLE XIX

Conflict

Anything to the contrary herein notwithstanding, if any provision of this instrument is in conflict with or contradiction of the New Jersey Condominium Act, or with the requirements of any other law, then the requirements of said Act or other law shall be deemed controlling.

(3) ARTICLES OF INCORPORATION

Articles of Incorporation

Medical Office Condominium at Maple Crest Association

In compliance with the requirements of Title 15, Chapter 1, *et seq.*, of the Revised Statutes of New Jersey, the undersigned, all of whom are of full age, have this day voluntarily associated themselves together for the purpose of forming a corporation not for profit and do hereby certify:

ARTICLE I

Name

The name of the corporation is Medical Office Condominium at Maple Crest association, hereinafter called the "Association."

ARTICLE II

Office

The principal office of the Association is located at 1011 Maple Road, Maple Crest, New Jersey.

ARTICLE III

Registered Agent

John R. DeLucia, Esq., whose address is 1011 Maple Road, Maple Crest, New Jersey, is hereby appointed the initial registered agent of this Association.

ARTICLE IV

Purpose and Power of the Association

This Association does not contemplate pecuniary gain or profit to the members thereof. The specific purposes for which it is formed are to provide for maintenance, preservation, and control of the common area easements within that certain tract of property described in Schedule "A" of a certain Master Deed dated _____ [month] _____ [day] , _____ [year] , recorded in the Office of the Clerk of Devon County and to promote the health, safety, and welfare of the owners within the above described property, and for these purposes:

- (a) Powers and Privileges. To exercise all of the powers and privileges and to perform all of the duties and obligations of the Association as set forth in that certain Master Deed as the same are applicable to the property described therein and as the same may be amended from time to time as therein provided, said Master Deed being incorporated herein as if set forth at length;
- (b) Assessments and Expenses. To fix, levy, collect, and enforce payment by any lawful means, of all charges or assessments pursuant to the terms of said Master Deed and the Bylaws of the Association; to pay all expenses in connection therewith and all office and other expenses in connection therewith and all other expenses incident to the conduct of the business of the Association, including all licenses, taxes, or governmental charges levied or imposed against the property of the Association;
- (c) Property. To acquire (by gift, purchase, or otherwise), own, hold, improve, build upon, operate, maintain, convey, sell, lease, transfer, dedicate for public use or otherwise dispose of real or personal property in connection with the affairs of the Association;
- (d) Debts. To borrow money, mortgage, pledge, deed in trust, or hypothecate any or all of its real or personal property as security for money borrowed or debts incurred; and
- (e) Laws. To have and execute any and all powers, rights, and privileges which a corporation organized under the Non-Profit Corporation Law of the State of New Jersey by law may now or hereafter have or exercise.

ARTICLE V

Membership

Every person or entity who is a record owner of a fee interest in any unit which is subject to the Master Deed aforesaid is subject to assessment by the Association, shall qualify in accordance with the Bylaws, and shall be a member of the Association. The foregoing is not intended to include persons or entities who hold an interest merely as security for the performance of an obligation. Ownership of any such unit shall be the sole qualification for membership.

ARTICLE VI

Board of Directors

The affairs of this Association shall be managed by a Board of Directors. The initial Board of Directors shall be composed of five persons who need not be members of the Association. The number of directors may be changed pursuant to the Bylaws of the Association. The names and addresses of the persons who are to act in the capacity of directors until the selection of their successors are:

Name

Address

ARTICLE VII

Duration

The corporation shall exist perpetually.

ARTICLE VIII

Annexation of Additional Properties

Additional properties may be annexed to the property subject to the terms and conditions of the Master Deed, Bylaws of this Association and rules and regulations promulgated thereunder and all such additional properties shall be governed thereby.

ARTICLE IX

Amendments

Amendment of these Articles shall require the assent of _____ percent (_____ %) of the members.

In witness whereof for the purpose of forming this nonprofit corporation under the laws of the State of New Jersey, we, the undersigned, constituting the incorporators of this Association, have executed these Articles of Incorporation on _____ [month] _____ [day] , _____ [year] .

[Acknowledgment]

(4) *RESTRICTIVE COVENANTS AND AGREEMENTS*

Exhibit F

Declaration of Restrictive Covenants and Agreements

To further implement this plan of ownership, to make feasible the ownership and sale of units in the Medical Arts Center at Maple Crest, to preserve the character of the development and to make possible the fulfillment of the purpose of the cooperative intended, the Grantor, its successors and assigns, by reason of this declaration, and all future owners of units in the Medical Office Condominium at Maple Crest Condominium by their acquisition of title thereto, covenant and agree as follows:

1. Office Use Restriction. Each unit shall be occupied, within the limitations set forth herein and in the Bylaws of Condominium Association, hereafter called "Association" attached hereto, and shall be used by the respective owners only as an office for the owner or owners, his or their tenants, and for no other reason.
2. Common Elements Use Limitations. Only owners, lessees of owners, and invitees of such owners or lessees, and Grantor or its successors may use the common areas, provided that, (a) use of the common elements shall be in accordance with and subject to limitations set forth in the Rules of the Association, and (b) use of the limited common elements shall be subject to the limitations set forth in Article IX of the Bylaws of the Association.
3. Parking Spaces. There shall be no obstruction of any common element. Nothing shall be stored in any common element without the approval of the Association. Parking spaces in the common element shall be regulated by the Rules of the Board, provided, however, that two parking spaces shall be assigned by the Association for use by the owners of

each unit.

4. Insurance. Nothing shall be done or kept in any unit, or in any common element, which will increase the rate of insurance on any common element without the approval of the Association. No owner shall permit anything to be done or kept in his unit, or in any common element which will result in the cancellation of insurance on any common element, or which would be in violation of any law. No waste will be permitted in any common element.

5. Signs. No sign of any kind shall be displayed to the public view on or from any unit, or any common element without the approval of the Association, except such signs as may be erected or used by Grantor in connection with the development of the Project and sale of Condominiums, except such signs of a design and reasonable dimensions as will be designated by Grantor to be displayed on the entrance door of each unit.

6. Nuisance. No noxious or offensive activity shall be carried on in any unit or in any common element, nor shall anything be done therein which will constitute a nuisance to the other owners.

7. Structural Integrity. Nothing shall be done in any unit or in, on, or to any building in any common element which would structurally change any such building, except as is otherwise provided herein.

8. Interference. Nothing shall be done either willfully or negligently, which may be or become an annoyance or nuisance to the other unit owners or occupants. No unit owner shall make or permit any disturbing noises in the buildings by himself, his employees, agents, visitors, and licensees, nor do or permit anything by such persons that will interfere with the rights, comforts, or conveniences of other unit owners. Each unit owner shall keep his unit in a good state of preservation and cleanliness and shall not sweep or throw or permit to be swept or thrown therefrom or from the doors, windows, yards, porches, or patios thereof, any dirt or other substance.

9. Electrical Equipment. All radio, television or other electrical equipment of any kind or nature installed or used in each unit shall fully comply with all rules, regulations, requirements, or recommendations of the Public Authorities having jurisdiction and the unit owner alone shall be liable for any damage or injury caused by any radio, television, or other electrical equipment in such unit.

10. Exterior. No garbage cans shall be placed on terrace landings, nor shall anything be hung from the windows or placed upon the window sills.

11. Flammable Substances. No unit owner or occupant or any of his agents, servants, employees, licensees, or visitors shall at any time, bring into or keep in his unit any flammable, combustible, or explosive fluid, material, chemical or substance.

12. Equipment Installation. The installation and use of any equipment in a unit shall conform to the generally accepted or recommended technical specifications for the equipment involved and shall not interfere with the use and enjoyment or create any danger to any other unit. Prior to the installation thereof, the owner shall submit to the Board of Directors all technical data regarding installation and use of such equipment for approval. The Board of Directors may at any time require the installation of insulation or detector machines or designate the hours of use of the equipment involved.

13. Interior Partitions. Each unit owner shall have the right to install partitions within the condominium unit and accordingly create a layout to suit the unitowner's requirements, provided however that there shall be no encroachment or attachment to or through any common element or any mechanical, plumbing, or electrical additions within the condominium unit without first obtaining approval of the Grantor or the Association and/or its Board of Directors.

There shall be no structural alteration, construction, or removal of any building, fence, or other structure in any common element other than repairs of rebuilding as provided in this instrument without the approval of the Association and/or its

Board of Directors. No building, fence, or other structure shall be constructed upon any portion of any common element other than such building and structures as shall be constructed by (a) the Grantor (or a person to whom Grantor assigns its rights as Developer), or (b) by the Association pursuant to this instrument.

14. Prohibited Uses. Except for usual office and professional use, no commercial or industrial operations of any kind shall be conducted in or upon any unit or the common element, except such temporary uses as shall be permitted by Grantor while the development is being constructed and Condominiums are being sold by the Grantor, or its successors in interest to the entire project prior to the sale of any Condominium units.

15. Vehicles. Except as permitted by the Rules of the Association, no trailer or vehicle of any type shall be stored in any common element. No vehicle shall be repaired or rebuilt in any common element.

16. Enforcement. All owners shall be members of the Association. There shall be no violation of the Bylaws or Rules of the Association for the use of units or the common elements, as these rules or Bylaws presently exist, or as they are hereinafter adopted or amended by the Association, as provided in its Bylaws. If any owner or resident of a unit, or any of their respective agents, employees, licensees or invitees, violates the Rules of the Association, the Association may impose a special assessment upon such owner of not more than _____ Dollars (\$ _____), and may also suspend the right of such owner or resident to use the properties of the Association for a period not to exceed thirty (30) days for each violation, and under such conditions as the Association shall specify. Before invoking any such assessment or suspension, the Association shall give the owner an opportunity to be heard, either in person or by counsel. Any assessment imposed hereunder, which remains unpaid for a period of ten days, shall become a lien upon the owner's Condominium unit if included in a notice of assessment duly recorded.

17. Anti-discrimination. The right to use or occupy a unit, or the sale, lease, or other transfer or conveyance of the right to use or occupy a unit shall not be based on race, religion, or place of national origin.

18. Maintenance. The buildings, grounds, and improvements shall be maintained by the Association to the following standards.

A. Exterior. Building exteriors shall be maintained in accordance with good housekeeping practices.

(a) Exterior appearance of buildings shall be kept as nearly as possible consistent with that when structures were new and ready for first occupancy.

(b) Painted surfaces shall be restored and repainted whenever spalling, alligator cracking, blistering, or chalking has exposed underlying materials or coats of paint.

(c) Masonry joints shall be repainted whenever mortar becomes loose and displaced.

(d) All stains on masonry shall be removed as soon as weather permits.

(e) Broken windows shall be replaced as soon as possible.

(f) Lights illuminating signs and buildings shall be replaced as soon as failure is noted.

(g) Windows shall be cleaned at least once each six (6) months.

(h) Cracks in masonry shall be pointed up within two weeks of first appearance.

(i) Gutters and leaders shall be maintained free of leaks.

B. Open areas. Surrounding areas shall be maintained equal to first ready-for-occupancy condition.

(a) Pavements shall be kept in good repair with all holes patched and surfaces kept smooth and water-tight.

(b) Signs shall be kept carefully finished and in good repair with all broken elements repaired or replaced.

(c) Grassed areas shall be kept carefully trimmed, free of weeds, free of bare spots.

(d) Shrubbery shall be fertilized and pruned so as to maintain a healthy, well cared for appearance.

(e) Curbs shall be repaired and maintained free of spalled areas, cracks, or displaced sections.

(f) Sidewalks shall be maintained level, and free from spalled or broken areas.

(g) Fences shall be kept upright, in line, and free of corrosion or decay.

(h) Lighting standards shall be maintained upright and free of corrosion or decay.

(i) Garbage or trash storage shall not be visible from any street.

(j) Garbage or trash shall be removed at least twice a week.

(k) No disabled vehicles or equipment shall be stored out-of-doors where it is visible from any street.

19. Development. Nothing in this instrument shall limit the right of Grantor to complete construction of improvements to the common elements and to units owned by Grantor, or to alter the foregoing or to construct such additional improvements as Grantor deems advisable prior to completion of the entire development.

20. Unit Locations. In interpreting the provisions of this instrument, the Schedules attached to the Master Deed, subsequent deeds, and mortgages to individual units, etc., the actual location of the unit shall be deemed conclusively to be the property intended to be conveyed, reserved, or encumbered, notwithstanding any minor deviations, either horizontally or vertically, from the locations as indicated on said Schedules. To the extent that such minor variations in location exist, a valid easement therefor and for the maintenance thereof shall exist.

21. Common Expenses. The owner or co-owners of each unit shall contribute to the Association pro rata in the percentage of his interest in the undivided "common elements," toward the expenses of administration and of maintenance and repair of the said "common elements," the expenses of administering and maintaining the Association and all of its real and personal property, in such amounts as shall from time to time be fixed by the Association. No owner may exempt himself from contributing toward such expenses by waiver of the use or enjoyment of the "common elements" or the community or recreational facilities of the Association or by abandonment of the unit owned by him.

22. Assessment Lien. All such common expenses chargeable to any unit shall constitute a lien against said unit in favor of the Association, which lien shall be prior to all other liens except (1) assessments, liens, and charges for taxes past due and unpaid on the unit, and (2) payments due under bonafide mortgage instruments of encumbrance, if any, duly recorded. The said charges and expenses attributable to each unit and represented in the usual monthly maintenance charge, shall become effective as a lien against each such unit on the first day of each month. Additional or added assessments, charges, and expenses, if any, chargeable to units and not covered by the usual monthly maintenance charge, shall become effective as a lien against each such unit as of the date if the expense or charge remains unpaid by the owner for more than ten days after the same shall have become due and payable. The lien may be foreclosed by the

Association in the manner provided by law for the foreclosure and sale of real estate mortgages, and in the event of foreclosure, the Association shall, in addition to the amount due, be entitled to recover reasonable expenses of the action including costs and attorney's fees. The right of the Association to foreclose the lien aforesaid shall be in addition to all other remedies which may be available to it at law or equity or as provided in the Bylaws for the collection of the monthly charges and expenses, including the right to proceed personally against any delinquent owner for the recovery of a personal judgment against him.

The title acquired by any purchaser following any such foreclosure sale shall be subject to all of the provisions of this instrument, by the Bylaws and Rules and Regulations of the Association and the Condominium Act of the State of New Jersey, and, by so acquiring title, said purchaser covenants and agrees to abide by and be bound thereby.

23. Payment Upon Unit Sale. Upon the sale, conveyance, or other lawful transfer of title to a unit all unpaid assessments, charges, and expenses chargeable thereto shall first be paid to the Association out of the sales price or shall be paid by the acquirer, in preference to all other assessments or charges of whatever nature except (1) municipal assessments, liens, and charges for taxes past due and unpaid on the unit and (2) payments due under bonafide mortgage instruments of encumbrance, if any, duly recorded.

24. Transferee Liability. The acquirer of title to a unit shall be jointly and severally liable with his predecessor in title thereto for the amounts (assessments, charges, and expenses) owing by the latter to the Association as of the time of the transfer of title, without prejudice to the acquirer's right to recover from his predecessor in title the amount paid by him (acquirer) as such joint debtor. The Association shall provide for and issue to every acquirer, upon his request, a statement of such amounts due, and the acquirer's liability under this covenant shall be limited to the amount as set forth in said statement. Liability for the payment of said amounts due to the Association shall not attach to the purchaser of the unit following a mortgage foreclosure sale thereof, provided the Association has been joined as a party to the foreclosure suit.



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Current Legal Forms for Real Estate

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Current Legal Forms for Real Estate
Chapter 20 REAL ESTATE ENTITIES

Part IV. Forms

H. CONDOMINIUMS AND HOMEOWNERS ASSOCIATION

24-20 Current Legal Forms for Real Estate FORM 20.70

AUTHOR: by Stephen E. Pigott and Harold O. Maxfield, Jr.

FORM 20.70 Declaration of expandable condominium--Ohio

COMMENT

The contents of a declaration of condominium are determined principally by two factors: the items required under the applicable condominium statute and the draftsman's decision as to whether other items should be covered in the declaration or in the bylaws. The following form is an expandable condominium under Ohio law. An expandable condominium is typically when an adjacent parcel is being held back to see if the project is successful. If the project is successful, the condominium declaration is expanded to cover the adjacent parcel.

FORM

SMITH COURT CONDOMINIUMS
Wadsworth, Ohio

DECLARATION OF CONDOMINIUM OWNERSHIP
AN EXPANDABLE CONDOMINIUM

This will certify that a copy of this Declaration, together with Bylaws, drawings, legal descriptions and other documents attached hereto as exhibits, have been filed in the Office of the County Auditor, _____ [county]
County, Ohio

Date: _____ [month] _____ [day], _____ [year]

COUNTY AUDITOR

By: _____

[name]

DECLARATION OF CONDOMINIUM OWNERSHIP
FOR
SMITH COURT CONDOMINIUMS

This Declaration of Condominium Ownership ("Declaration") is made this _____ day of _____ [month] _____ [day] , _____ [year] , by Smith Court, Ltd., the "Declarant," an Ohio limited liability company, for the purpose of submitting certain property to condominium use and ownership in accordance with the provisions of the Ohio Condominium Act, Ohio Revised Code Chapter 5311.

WHEREAS, Declarant is the owner in fee simple of the premises described on Exhibit A, attached hereto and made a part hereof.

WHEREAS, it is the desire and intention of Declarant to enable the premises described on Exhibit A, together with all buildings, structures, improvements, and other permanent fixtures of whatsoever kind situated or to be situated thereon, and all privileges belonging or in any way appertaining thereto (hereafter called the "Condominium Property"), to be owned under and pursuant to that certain type of ownership commonly known as "CONDOMINIUM" and to subject and submit such property to the provisions of Chapter 5311 of the Ohio Revised Code, as now in effect and as hereinafter amended.

WHEREAS, Declarant reserves the right and option to submit all or any part of the additional property described on Exhibit B, attached hereto and made a part hereof (the "Additional Property") to the Smith Court Condominiums in its sole discretion as set forth hereinbelow.

WHEREAS, Declarant is further desirous of establishing for the mutual benefit of all future owners, mortgagees or occupants of the Condominium Property or any part thereof, certain easements and rights in, over and upon such Condominium Property and certain mutually beneficial restrictions and obligations with respect to the use, conduct and maintenance thereof.

WHEREAS, Declarant desires and intends that several owners, mortgagees, occupants and other persons hereinafter acquiring any interest in the Condominium Property shall at all times enjoy the benefits of, and shall hold their interests therein subject to the terms of this Declaration, and all exhibits or other documents referred to herein, all of which are declared to be in furtherance of a plan to promote and protect the condominium aspect of ownership and to facilitate the proper administration of the Condominium Property and are established for the purpose of enhancing the value, desirability, financial stability, harmony and attractiveness of the Condominium Property.

NOW, THEREFORE, Declarant hereby makes the following Declaration as to the provisions, covenants, restrictions limitations, conditions and uses to which the Condominium Property may be put, hereby specifying that said

Declaration shall constitute covenants to run with the land and shall be binding on Declarant, its successors and assigns, and all subsequent owners of all or any part of the Condominium Property, together with their respective grantees, heirs, executors, administrators, devisees, successors and assigns:

ARTICLE I

A. Definitions. The following terms used herein are defined as follows.

1. "Act" means the Ohio Condominium Act as contained in Ohio Revised Code Chapter 5311, as the same may be amended or supplemented from time to time.
2. "Additional Property" means the parcels described on Exhibit B, attached hereto, or so much thereof as may hereafter be submitted to the provisions of the Act, the additional residential buildings and all other structures, improvements and facilities that may hereafter be constructed or installed on the parcel described on Exhibit B, all easements, rights and appurtenances thereto belonging, and all articles of personal property that may be owned by Declarant and may be located on the land described on Exhibit B, for the common use of the Unit Owners.
3. "Additional Drawings" means the drawings that shall accompany any Amendment of this Declaration pursuant to which the Additional Property or any portion thereof may be submitted to the provisions of the Act.
4. "Additional Residential Buildings" means the part of the Additional Property which will consist of such additional single-family residential buildings as may be constructed from time to time upon the land described on Exhibit B, pursuant to the provisions of Article XV hereof.
5. "Assessments" means regular and special assessments charged proportionately against all Units for accounting purposes.
6. "Association" means the Smith Court Condominium Unit Owners Association, Inc., a non-profit corporation to be formed under Chapter 1702 of the Ohio Revised Code, which shall be a unit owners' association as defined in Section 5311.01(L) of the Act.
7. "Board" means the Board of Managers of the Association as the same may be constituted from time to time.
8. "Bylaws" means the Bylaws of the Association, marked Exhibit C, attached hereto and made a part hereof.
9. "Common Areas and Facilities" or "Common Areas" means all parts of the Condominium Property except the Units.
10. "Common Surplus" means the amount by which common assessments collected during any period, exceed expenses.
11. "Common Expenses" means all costs, expenses and charges which the Association may charge against a Unit or a Unit Owner as Assessments, pursuant to this Declaration, Bylaws or the Act.
12. "Common Losses" means the amount by which the common expenses during any period of time exceeds Common Assessments and Common Profits during that period.
13. "Common Profits" means the amount by which the total income received from assessments charges for special benefits to specific Units, rents received from rentals of equipment or space in Common Areas, and any other fee,

charge or income other than Common Assessments, exceeds expenses allocable to the income, rental, fee or charge.

14. "Condominium Ownership Interest" means a fee simple estate in a Unit, together with its appurtenant, undivided interest in the Common Areas and Facilities.

15. "Condominium Property" means the land described on Exhibit A, attached hereto, and the appurtenant easement for ingress and egress and utilities described in Exhibit A, if any, the Single-Family Buildings located thereon, all other structures, improvements and facilities that have been or may hereafter be constructed or installed on the land described on Exhibit A, and all easements, rights and appurtenances thereto belonging, and all articles of personal property owned by Declarant or the Association and now or hereafter located on the land described on Exhibit A for the common use of the Unit Owners, provided, however, that if Declarant submits the Additional Property to the provisions of the Act by amending this Declaration, references herein to Condominium Property shall include the Additional Property or so much thereof as is added to the Condominium Property.

16. "Condominium Roadway" means the private roadway to be called Smith Court upon which the Single-Family Buildings front, and which roadway connects the driveways of the Units to the dedicated roadway known as Great Oaks Trail, and such private roadway is part of the Common Areas and Facilities.

17. "Declaration" means this instrument and all of the Exhibits hereto, as originally executed, or if amended, as so amended, by which the Condominium Property is submitted to the provisions of Chapter 5311 of the Act.

18. "Drawings" means the drawings prepared and certified a registered surveyor, in accordance with Section 5311.07 of the Act, which Drawings are to be filed with this Declaration; provided, however, that if the Additional Property is submitted to the provisions of the Act by amending this Declaration, reference herein to Drawings shall include the Additional Drawings.

19. "Expandable Condominium Property" means a Condominium Property in which this Declaration reserves the right to add Additional Property.

20. "General Provisions" means the covenants, restrictions and easements imposed pursuant to the documents identified in Exhibit E hereof.

21. "Limited Common Areas and Facilities" or "Limited Common Areas" means the Common Areas and Facilities reserved for the use of a certain Unit or Units to the exclusion of all other Units.

22. "Occupant" means the natural person or persons in possession of a Unit.

23. "Par Value" means a number expressed in points attached to a Unit by this Declaration; each Unit is assigned the equal par value of one (1).

24. "Single-Family Buildings" means that part of the Condominium Property consisting of the single-family residential buildings constructed on the land described on Exhibit A and further depicted on Exhibit B; provided, however, that if the Additional Property is submitted to the provisions of the Act by amending this Declaration, references herein to Single-Family Buildings shall include the Additional Single-Family Buildings.

25. "Rules" means such rules and regulations as the Association may periodically adopt relative to the use of all or any part of the Condominium Property.

26. "Special Charges" means all costs, expenses and charges (excluding Assessments) which the Association shall charge against a Unit or a Unit Owner pursuant to this Declaration, the Bylaws or the Act.

27. "Unit" means that part of the Condominium Property designated in Article II hereof and delineated on the Drawings, provided, however, that if Declarant submits the Additional Property or any portion thereof to the provisions of the Act, the references herein to "Unit" shall include each Unit comprised as part of the Additional Property.

28. "Unit Owner" or "Owner" means a person or persons, natural or artificial, owning the fee simple estate in a Unit, together with its appurtenant, undivided interest in the Common Areas and Facilities.

29. All other terms and/or words used herein that are defined in Chapter 5311 of the Ohio Revised Code have the same meaning as set forth therein.

B. Name. The Condominium Property shall be known as the SMITH COURT CONDOMINIUMS.

ARTICLE II

Establishment of Condominium Ownership,

Division and Declaration of Condominium Property

Declarant, in order to establish a plan of Condominium ownership for the Condominium Property, hereby submits the Condominium Property, hereinbefore described, to the provisions of Chapter 5311 of the Ohio Revised Code. The Condominium Property shall include the structures separately designed and legally described freehold estates, hereinafter described and referred to as "Units," and underlying freehold estate, hereinafter described and referred to as the "Common Areas and Facilities" (including Limited Common Areas and Facilities).

A. Units. The Condominium Property will initially be comprised of four (4) Single-Family Units (identified as Building Nos. 1, 2, 8 and 9 in the Drawings.) Each Unit bears the identifying number as shown on the Drawings. The addresses, type of Units, square footage of each Unit and description of the Units are set forth on Exhibit D, attached hereto and made a part hereof. Each such Unit has appurtenant to it a two-car attached garage.

Subject to the provisions of subparagraph B next following, each Single-Family Unit consists generally of the entire residential building (with attached garage) including the foundation, walls, and roof together with everything contained within the building such as heating, electrical and plumbing equipment and fixtures, appliances, and that portion of the utility systems as are located fully within and/or servicing solely that Unit, to which the same are appurtenant.

No Unit Owner shall, by deed, plat or otherwise, subdivide or by any other means cause his Unit to be separated into tracts or parcels as the whole Unit is shown on the Drawings. Each Unit Owner shall be entitled to the exclusive ownership and possession of his Unit, and to the ownership of an undivided interest in the Common Areas and Facilities, in the percentage designated on Exhibit D, attached hereto.

B. Common Area and Facilities.

1. (a) Description of Common Areas and Facilities. That part of the Condominium Property which comprises the Common Areas and Facilities consists of all parts of the Condominium Property which have not been designated nor delineated as part of the Units in this Declaration or in the Drawings, including the Limited Common Areas and Facilities described in subparagraph (b) next following, and the Condominium Roadway.

(b) Limited Common Areas and Facilities. The Limited Common Areas and Facilities consist of the following:

(i) The driveway and apron which is accessory to each Unit and which connects to the Condominium Roadway.

(ii) Any utility pipe, line or system connecting a single Unit to a main or trunk, which main or trunk serves more than a single Unit; and any sump pump serving a single Unit.

(iii) That portion of the real property (land) surrounding the foundation of the Unit as depicted on the Drawings.

(iv) That portion of the real property (land) upon which a Unit is situated.

2. Use of Common Areas and Facilities. Each owner of a Unit shall own an undivided interest in the Common Areas and Facilities as a tenant in common with all other such owners, and, except as otherwise limited in this Declaration and in the Bylaws attached hereto as Exhibit C, shall have the right to use the Common Areas and Facilities for all purposes incident to the use and occupancy of his Unit for the purposes described in Article V below, subject to the right of other Unit Owners to the use and enjoyment of the Common Areas and Facilities and for ingress and egress to and from the respective Units, which rights shall be appurtenant to and shall run with his Unit. The extent of such ownership in the Common Areas and Facilities is hereby deemed and expressed by the Par Value of the Unit and shall be filed for record. Each Unit is being assigned an equal par value of 1. The percentages in the Common Areas and Facilities applicable to a Unit set forth on Exhibit D, attached hereto, is based upon the par value of 1 assigned to each Unit divided by the total of the par values for all the Units. The procedures whereby the aforesaid percentage interest may be altered are set forth in Article XV, Section H below. Except as permitted by Article XV, the percentages of interest cannot be altered or amended except by an amendment to this Declaration unanimously approved by all the Unit Owners affected. Where a Unit is owned by more than one person, whether fiduciaries, tenants in common or otherwise, each shall be entitled to exercise the proportion of the voting power for such Unit as is equivalent to such person's proportionate interest in the Unit.

3. Ownership of Common Areas and Facilities. The percentage of ownership interest in the Common Areas and Facilities attributable to the ownership interest in each Unit, together with the percentage of interest in the division of common profits and expenses, as hereinafter described in Section B of Article VI of this Declaration, are set forth on Exhibit D, attached hereto. The voting rights of the Unit Owners shall be in accordance with their respective interests in the Common Areas and Facilities.

4. Parking Areas. A Unit Owner shall have the right to use the outdoor parking spaces within the Condominium Property as shown on the Drawings, which are not designated as Limited Common Areas and Facilities, on a non-exclusive basis in common with other Unit Owners, and their respective guests and invitees. Such use shall be subject to Rules from time to time established by the Association.

5. Regulation of Common Areas and Facilities.

(a) Regulation by Association. No person shall use the Common Areas and Facilities or any part thereof in any manner contrary to or not in accordance with such Rules pertaining thereto as from time to time may be adopted by the Association, which Rules shall not be in conflict with the provisions hereof. Without in any manner intending to limit the generality of the foregoing, the Association shall have the right, but not the obligation, to promulgate Rules limiting the use (subject to all easements) of the Common Areas and Facilities to members of the Association and their respective families, guests, invitees and servants, as well as to provide for the exclusive use by a Unit Owner and his guests for special occasions, of recreational areas and other similar facilities, if any. Such use may be conditioned upon, among other things, the payment by the Unit Owner of such assessment as may be established by the Association for the purposes of defraying costs thereof.

(b) Use of Common Areas and Facilities. Subject to the Rules from time to time promulgated by the Association, all owners may use the Common Areas and Facilities in such manner as will not restrict, interfere or impede the use thereof by the other Unit Owners.

ARTICLE III

General Provisions as to Units and Common Areas and Facilities

A. Maintenance of Units.

1. By the Association. Except as otherwise provided in Section 2 next following, the Association at all times, at its cost and expense, shall maintain the Common Areas and Facilities in good order, condition, replacement and repair, shall maintain, plant, seed, reseed, fertilize, cut and trim all of the lawns comprised as part of the Condominium Property, including the Limited Common Areas defined in Article II, Section B. 1.(b)(ii) above and shall edge and mulch all landscape beds and shall trim all shrubs, bushes and trees. The Association shall plow snow from the driveways and all front sidewalks, which sidewalks are on areas designated as Limited Common Areas in Article II, Section B. 1.(b) hereof, as well as from the Condominium Roadway.

2. By the Unit Owner. Each Unit Owner at all times shall:

(a) Except as set forth in subparagraph A. 1. immediately above, clean, maintain, repair and replace, at his cost and expense, his Unit and the Limited Common Areas and Facilities appurtenant to his Unit, in good order, condition, replacement and repair, subject however, to the provisions of Article VIII below.

(b) Maintain, repair and replace, at his cost and expense, that portion of the utility systems appurtenant to his Unit, designated as Limited Common Areas in Article II, Section B. 1. (b) above, as well as that portion of the utility systems located wholly within and/or servicing only his Unit, subject however to the provisions of Article VIII below.

(c) Perform his responsibilities in such a manner as shall not unreasonably disturb the Occupants of other Units.

(d) Pay all costs for utility services furnished to his Unit, and for the Limited Common Areas and Facilities appurtenant to his Unit.

(e) Promptly report to the Association (or the managing agent, if any) employed by it, the need for any repairs to any portion of the Condominium Property which are the obligations of the Association to maintain hereunder.

(f) Reimburse the Association for such costs, if any, in excess of proceeds of insurance, if any, as the Association shall incur for maintaining, repairing or replacing any portion of the Common Areas and Facilities (including those portions thereof designated in this Declaration as Limited Common Areas and Facilities) which may be damaged or destroyed by his act or negligence, or by the act or negligence of any of his tenants, invitees, licensees or guests.

3. No Contractual Liability of Association. Nothing herein contained, however, shall be construed so as to impose a contractual liability upon the Association for maintenance, repair and replacement, except to the extent funds shall be available and said maintenance, repair and replacement shall be deemed necessary by the Board of the Association.

B. Right to Correct. If any Unit Owner fails to perform any act required of such Owner by this Declaration, the Bylaws or the Rules of the Association, the Association may, but shall not be obligated to, undertake such performance or cure such violation, and shall charge and collect from the defaulting Unit Owner the entire cost and expense, including reasonable attorneys' fees incurred by the Association in effecting such performance or cure. Any such amount shall be deemed to be an additional assessment upon the Owner and such Owner's Unit, and shall be due and payable with the payment for Common Expenses which falls due next following notification by the Association of such assessments. The Association may obtain a lien for said amount against such Owner and such Owner's Unit, to the extent as if it were a lien for common expenses.

C. Construction Defects. The obligations of the Association and of Unit Owners to repair, maintain and replace the portions of the Condominium Property for which they are respectively responsible shall not be limited, discharged or postponed by reason of the fact that any maintenance, repair or replacement may be necessary to cure any latent or patent defects in material or workmanship in the construction of the Condominium Property.

D. Effect of Insurance or Construction Guarantees. Notwithstanding the fact that the Association and/or any Unit Owner may be entitled to the benefit of any guarantee of material and workmanship furnished by any construction trade responsible for any construction defects, or to benefits under any policies of insurance providing coverage for loss or damage for which they are respectively responsible, the existence of said construction guarantee or said insurance coverage shall not excuse any delay by the Association or any Unit Owner in performing the obligations hereunder. The undertaking of repair, maintenance or replacement by the Association or any Unit Owner shall not constitute a waiver of any rights against any warrantor, but such rights shall be specifically reserved. The Association shall have the right to enforce, on behalf of the Unit Owners, any warranty, oral or written, express or implied, or any other contractual obligation, arising from construction defects, if the Association shall repair the same. It may institute litigation in the name of the Unit Owners and a release executed by the Association shall be binding upon all Unit Owners.

E. No Severance of Ownership. No Unit Owner shall execute any deed, mortgage, lease or other instrument affecting title to his Condominium Ownership Interest without including therein both his interest in the Unit and his corresponding percentage of ownership in the Common Areas and Facilities, it being the intention hereof to prevent any severance of such combined ownership and rights. Any such deed, mortgage, lease or other instrument purporting to affect the one without including all shall be deemed and taken to include the interest so omitted, even though the latter is not expressly mentioned or described therein. For purposes of conveyance of title to a purchaser of a Unit, description by Unit number and reference to this Declaration and to the Drawings shall be adequate to convey the fee simple title thereto, together with the percentage interest in and to the Common Areas and Facilities and voting rights with respect thereto.

F. Easements

1. Encroachments. In the event that, by reason of the construction, settlement or shifting of any Single-Family Building, or by reason of the partial or total destruction and rebuilding of any Single-Family Building, any part of the Common Areas and Facilities presently encroaches or shall hereafter encroach upon any part of a Unit, or any part of a Unit presently encroaches or shall hereafter encroach upon any part of the Common Areas and Facilities, or another Unit or Units, or if by reason of the design or construction of any Units it shall be necessary or advantageous to an owner to use or occupy, for formal uses and purposes, any portion of the Common Areas and Facilities consisting of unoccupied space within the building and adjoining his Unit, or, if by reason of the design or construction of utility systems, any main pipes, ducts or conduits serving more than one Unit presently encroaches or shall hereafter encroach upon any part of any Unit, valid easements for the maintenance of such encroachment and for the use of such adjoining space are hereby established and shall exist for the benefit of such Unit and the Common Areas and Facilities, as the case may be, so long as all or any part of the Single-Family Building containing such Unit shall remain standing; provided, however, that in no event shall a valid easement for any encroachment be created in favor of the Unit Owner of any Unit or in favor of the Common Areas and Facilities if such encroachment occurred due to the willful conduct of said Owner.

2. Limited Common Areas. The owner of each Unit with respect to any Limited Common Area appurtenant to his Unit shall have, for himself, his heirs and successors in interest, an exclusive easement for his use and enjoyment of such Limited Common Area; provided, however, that no Unit Owner shall decorate, landscape, change the appearance of the exterior thereof or otherwise adorn such Limited Common Area in any manner contrary to the Rules as may be established therefor by the Association, unless he shall first obtain the written consent of the Association. In no event shall the appearance of said exterior area be changed except in accordance with the provisions hereof.

3. Maintenance Easements. The ownership of each Unit shall be subject to easements for access arising from necessity of maintenance or operation of the Common Areas and Facilities and the Single-Family Building in which his Unit is located. The Owner of each Unit shall have the permanent rights and easements to and through the Common Areas and Facilities to the use of utilities now or hereafter existing within the walls.

4. Easements for Certain Utilities. The Association may hereafter grant easements for utility purposes for the benefit of the Condominium Property, including the right to install, lay, maintain, repair and replace cable television wires and facilities, water mains and pipes, sewer lines, gas mains, telephone wires and equipment, and electrical conduits and wires over, under, along and on any portion of the Common Areas and Facilities, and each Unit Owner hereby grants the Association an irrevocable power of attorney to execute, acknowledge and record, for and in the name of such Unit Owner, such instruments as may be necessary to effectuate the foregoing. Said power of attorney is coupled with an interest.

5. Easements for Additional Property. Developer reserves to itself easements over such portions of the property described on Exhibit A, attached hereto, or over the property which then constitutes the Condominium Property, as shall be necessary for the purpose of providing means of ingress and egress to the Additional Property and utilities for the benefit of the Additional Property, or any portion thereof.

6. Easements to Run with Land. All easements and rights described herein are easements appurtenant, running with the land, perpetually in force and effect, and at all times shall inure to the benefit of and be binding upon the undersigned, its successors and assigns, and any Owner, purchaser, mortgagee and other person having an interest in said land, or any part or portion thereof.

7. Reference to Easements in Deed. Reference in the respective deeds of conveyance, or in any mortgage or trust deed or other evidence of obligation, to the easements and rights described in this Declaration, shall be sufficient to create and reserve such easements and rights to the respective grantees, mortgagees and trustees of such parcels as fully and completely as though such easements and rights were recited fully and set forth in their entirety in such document.

ARTICLE IV

Unit Owners' Association

A. Membership. Declarant shall cause to be formed an Ohio corporation not for profit to be called the SMITH COURT CONDOMINIUM UNIT OWNERS ASSOCIATION (herein called the "Association") which shall act as the manager of the Condominium Property. Each Unit Owner, upon acquisition of title to a Unit, shall automatically become a member of the Association. Such membership shall terminate upon the sale or other disposition by such member of his Condominium Ownership Interest, at which time the new Owner of such Unit shall automatically become a member of the Association. Any membership shall be terminable by the Association in accordance with the Association's Bylaws. The Board and officers of the Association elected as provided in the Bylaws of the Association attached hereto as Exhibit C shall exercise the powers, discharge the duties, and be vested with the rights conferred by operation of law, by the Bylaws, and by this Declaration upon the Association, except as otherwise set forth herein; provided, however, that in the event any such power, duty or right shall be deemed exercisable or dischargeable by, or vested in, an officer or member of the Board, solely in his capacity as an officer or a member of the Board, he shall be deemed to act in such capacity to the extent required to authenticate his acts and to carry out the purposes of this Declaration and the Bylaws attached hereto as Exhibit C.

B. Administration of Condominium Property. The administration of the Condominium Property shall be in accordance with the provisions of this Declaration and the Bylaws of the Association which are attached hereto as Exhibit C. Each Owner, tenant or occupant of a Unit shall comply with the provisions of this Declaration, the Bylaws, decisions and resolutions of the Association or its representative, as lawfully amended from time to time, and failure to comply with

any such provisions, decisions or resolutions shall be grounds for an action to recover sums due for damages, or for injunctive relief.

C. Service of Process. Service of summons or other process upon the Association may be made in accordance with the provisions of *Ohio Revised Code, Section 5311.20*. The statutory agent for service of summons or other process shall be _____ [name] , _____ [address] , _____ [city] , _____ [state] . Any successor statutory agents shall be designated by the Board and shall be the statutory agent of the Association. Such change may be effected by filing with the Ohio Secretary of State the appropriate forms for the subsequent appointment of a statutory agent for an Ohio corporation not for profit.

ARTICLE V

Covenants and Restrictions as to Use and Occupancy

The following covenants, restrictions, conditions and limitations as to the use and occupancy of a Unit or the Common Areas and Facilities which shall run with the land shall be binding upon each Unit Owner, his heirs, tenants, licensees, successors and assigns.

A. Purpose of Property. No part of the Condominium Property shall be used for other than residential housing and the common recreational purposes for which the Condominium Property was designed. Each Unit shall be used as a residence for a single family and for no other purpose; provided, however, the Declarant shall be allowed to utilize one or more Units together with such portion of the Common Areas and Facilities as it shall require as a place of business, construction office, sales office and for demonstration purposes so long as Declarant shall retain ownership of one or more Units or shall retain the right to add all or portions of the Additional Property to the Condominium Property, and further provided that a Unit Owner may incidentally use an immaterial portion of such Owner's Unit for such Owner's office or studio, provided the activities therein shall not interfere with the quiet enjoyment of any other Owner.

B. Obstruction of Common Areas and Facilities. There shall be no obstruction of the Common Areas and Facilities, nor shall anything be stored in the Common Areas and Facilities without the prior consent of the Association, except as hereafter expressly provided; provided, however, that during construction and for a reasonable period thereafter, the Declarant shall have the right to store construction equipment and material thereon so long as the same shall not unreasonably interfere with the rights of others.

C. Hazardous Uses and Waste. Nothing shall be done or kept in any Unit or in the Common Areas and Facilities which will increase the rate of insurance of the Single-Family Buildings, or contents thereof, without the prior written consent of the Association. No Unit Owner shall permit anything to be done or kept in his Unit or in the Common Areas and Facilities which will result in the cancellation of insurance on the Single-Family Buildings, or contents thereof, or which would be in violation of any law. No waste will be committed in the Common Areas or Facilities or in a Unit. Each Unit Owner shall abide by all rules and regulations of governmental authorities and rules and requirements of the issuer of all insurance policies with respect to the Common Areas and Facilities.

D. Exterior Surface of Buildings. Unit Owners shall not cause or permit anything to be hung or displayed in or on windows or placed on the outside walls of a Single-Family Building, and no sign, awning, canopy, or shutter shall be affixed to or placed upon the exterior walls or roof or any part thereof, or in the Common Areas and Facilities contrary to the Rules as may be established thereof by the Association, other than those originally provided by the Declarant, if any. Unit Owners may, at their sole cost and expense, install or affix radio or television antenna, or satellite dish, for their personal use only, upon the exterior walls or roof or any part thereof. No Unit Owner shall paint, decorate, remodel, or in any manner change or improve the appearance of the exterior of the Single-Family Buildings or other

structures, or the driveways, parking areas or walkways, or any other portions of the Common Areas and Facilities or any improvements thereto contrary to the Rules as may be established thereof by the Association, other than those originally provided by the Declarant, if any.

E. Animals and Pets. No animals, rabbits, livestock, fowl or poultry of any kind shall be raised, bred or kept in any Unit or in the Common Areas and Facilities, except that dogs, cats, or other household pets, not collectively to exceed three (3), may be kept in Units, subject to Rules regulating the number of pets per Unit and other matters adopted by the Association, provided that they are not kept, bred or maintained for any commercial purpose; and provided further that any such pet causing or creating a nuisance or disturbance shall be permanently removed from the Condominium Property subject to these restrictions upon seven (7) days prior written notice from the Board of the Association.

F. Nuisances. No noxious or offensive activity shall be carried on in any Unit or in the Common Areas and Facilities, nor shall anything be done therein, whether willfully or negligently or by omission, which may be or become an annoyance or nuisance to the other Unit Owners or occupants.

G. Impairment of Structural Integrity of Buildings. Nothing shall be done in any Unit or in, on or to the Common Areas and Facilities which will impair the structural integrity of the Single-Family Buildings, or which would structurally change same.

H. Laundry or Rubbish in Common Areas and Facilities. No clothes, sheets, blankets, laundry of any kind or other articles shall be hung out or exposed on any part of the Common Areas and Facilities. The Common Areas and Facilities shall be kept free and clear of rubbish, debris and other unsightly materials.

I. Lounging or Storage in Common Areas and Facilities. There shall be no playing, lounging, parking of baby carriages or playpens, bicycles, wagons, toys, vehicles, benches or chairs on any part of the Common Areas and Facilities except in accordance with the Rules therefor adopted by the Association.

J. Prohibited Business Activities. Except as provided in Article V, Section A, above, no industry, business, trade, occupation or profession of any kind, commercial, religious, educational, or otherwise, designated for profit, altruism, or otherwise shall be conducted, maintained or permitted on any part of the Condominium Property. The right is reserved by the Declarant, or its agent, to place "for sale" or "for rent" signs in Common Areas and Facilities and on any unsold or unoccupied Units for the purpose of selling unsold or unoccupied Units. In addition, the right is hereby given to the Association to establish Rules to place or authorize a Unit Owner or his agent to place "for sale" signs on any Unit or on the Condominium Property for the purpose of facilitating the disposal of Units by any Unit Owner, a mortgagee, or the Association.

K. Alteration of Common Areas and Facilities. Nothing shall be altered or constructed in or removed from the Common Areas and Facilities except as hereinafter provided and except upon the written consent of the Association. No decoration, placement of statuary or yard ornamentation of any kind shall be permitted in the Common Areas and Facilities unless done pursuant to prior written approval of the Board. No free-standing basketball sets, swing sets, slides, playground equipment, sheds, barns, tents, treehouses or other such structures or devices shall be permitted in the Common Areas without the prior written approval of the Board.

No change, alteration, construction or redecoration of any kind shall be permitted to the exterior of any Unit or its appurtenant deck, porch, patio, driveways or walks, including any change of color of the exterior of any Unit, unless done pursuant to prior written approval of the Board. Landscaping within Limited Common Areas shall be tastefully done and with the exception of lawns, shall be maintained by the Unit Owner of that Unit to which the Limited Common Area is appurtenant.

No natural, artificial or man-made fence or hedge, or natural, artificial or man-made wall (other than any wall which is

part of a Unit), trellis, arbor or any similar nature, artificial or man-made means of screening or physically separating one Unit from another shall be permitted without the prior written approval of the Board.

L. Rental of Units. The respective Units shall not be rented by the owners thereof for transient or hotel purposes, which shall be defined as (i) rental for any period less than twelve (12) months, or (ii) any rental if the occupants of the Units are provided customary hotel service, such as for food and beverage, or maid service, or furnishing of laundry and linen. The Owners of the respective Units may lease the same only in conformity with the terms and conditions set forth in Article XIV below and the Bylaws attached hereto as Exhibit C. Each lease shall be made subject to the covenants and restrictions in this Declaration and further subject to the Bylaws of the Association attached hereto as Exhibit C. Units which are unsold and which are owned by the Declarant may be leased by the Declarant, as determined by Declarant, and leases made by the Declarant shall not require the approval of the Board of the Association and shall not be subject to other provisions in the Bylaws of the Association relating to leasing and rental.

M. Use of Units by Declarant. During the period in which sales of Units by the Declarant or its agents are in progress, Declarant may occupy or grant permission to any person or entity to occupy, with or without rental, as determined by Declarant, one or more Units in such apportions of the Common Areas and Facilities as Declarant considers necessary, for business or promotional purposes, including clerical activities, sales offices and model units for display and the like.

N. Use of Parking Areas. Any unenclosed parking areas (being those parking areas designated on the Drawings other than the parking spaces in the garages) shall only be used for the periodic parking of automobiles and non-commercial trucks, not for the parking of any other kind of vehicle nor for the storage of any automobile or other vehicle or item. No boats, campers, mobile homes, trailers, commercial trucks, recreational vehicles or the like shall be parked or stored between the hours of 12:00 a.m. and 6:00 a.m. either (i) on any street or driveway within the Condominium Property, or (ii) otherwise outside of any Unit or any unenclosed parking area. The foregoing parking and storage restrictions shall not apply to the parking and storage of construction vehicles and equipment reasonably necessary to construct any Unit or other improvement in or to the Condominium Property. Any automobile (other than an automobile periodically parked, as permitted herein), vehicle or other item occupying such a space (or any portion thereof) may be removed and/or stored at the sole expense of the Unit Owner who shall have caused or permitted the improper use of said unenclosed parking area.

O. Motor Vehicles. There shall be no driving or riding of any motor vehicles upon any non-paved area of the Condominium Property, except for normal landscaping or maintenance purposes. Without limiting the generality of the foregoing, specifically prohibited within any non-paved area are motor vehicles such as motorcycles, motorbikes, minibikes, mopeds, all-terrain vehicles and snow mobiles.

P. Repair of Vehicles. No powered vehicle of any kind shall be constructed or repaired on the Condominium Property, except for normal maintenance performed by an Owner entirely within the garage that is appurtenant to the Unit of such Owner.

Q. Liquor. No spirits, vinous and/or fermented liquor shall be manufactured (except so-called "home manufacture" for on-premises consumption by the Owner) or sold, either at wholesale or retail, in any Unit or Common Area, and no place of public entertainment of any character shall be established, conducted or suffered to remain upon any part of the Condominium Property.

R. No Refuse Materials. No lumber, metals, bulk materials, refuse or trash shall be burned, whether in indoor incinerators or otherwise (excluding the burning of wood in a fireplace), kept, stored or allowed to accumulate on any portion of the Condominium Property, except normal residential accumulation pending pick-up, reasonable amounts of racked firewood for normal residential use and building materials during the course of construction or reconstruction of any approved building or structure.

S. Rules. The use of the Condominium Property shall be subject to such additional restrictions as may be set forth in the Rules.

ARTICLE VI

Assessments

A. General. Assessments for the maintenance, repair and insurance of the Common Areas and Facilities, together with the payment of the common expenses, shall be made in the manner provided herein and in the manner provided in the Bylaws. Assessments for renewals or renovations may be made by the Association as set forth in Article X below.

B. Division of Common Profits and Common Expenses. The percentage proportionate shares of the separate owners of the respective Units in the Common Profits and the Common Expenses of the operation of the Condominium Property, as well as their representation for voting purposes in the Association, shall be as referred to in Article II, Section B. 3.

C. Nonuse of Facilities. No owner of a Unit may exempt himself from any liability for his contribution toward the Common Expenses by waiver of the use or enjoyment of any of the Common Areas and Facilities, or by the abandonment of his Unit or by any other act whatsoever.

D. Lien of Association. The Association shall have a lien upon the estate or interest in any Unit of the then owner thereof and the percentage of interest of that owner in the Common Areas and Facilities for the payment of the portion of the common expenses chargeable against such Unit which remain unpaid for thirty (30) days after the same have become due and payable, together with the amount of any costs, including without limitation, reasonable attorneys' fees, court costs, title reports and recording costs incurred by the Association. A certificate therefor, subscribed by the President, Secretary or other officer of the Association, may be filed with the Recorder of _____ [county] County, Ohio, pursuant to authorization given by the Board. Such certificate shall contain a description of the Unit, the name or names of the record Owner or Owners thereof, and the amount of such unpaid portion of the common expenses. Upon the filing of such certificate, notification thereof shall be by regular mail to the Unit Owner and his mortgagee as shown on the books of the Association. Said lien shall be effective as of the date it is filed with the Recorder of _____ [county] County, Ohio. Such lien shall remain valid for a period of five (5) years from the time of filing thereof, unless sooner released or satisfied in the same manner provided by law for the release and satisfaction of mortgages on real property or discharged by the final judgment or order of the court in an action brought to discharge such lien, as hereinafter provided.

E. Priority of Association's Lien. The lien provided for in Section D of this Article VI shall take priority over any lien or encumbrance subsequently arising or created, except liens for real estate taxes and assessments and liens for bona fide first mortgages which have been filed for record, and may be foreclosed in the same manner as a mortgage on real property in an action brought by the Association. In any such foreclosure actions the owner or owners of the Unit affected shall be required to pay a reasonable rental for such Unit during the pendency of such action, and the plaintiff in such action is entitled to the appointment of a receiver to collect the same. In any such foreclosure action, the Association shall be entitled to become a purchaser at the foreclosure sale. The Unit Owner shall pay all costs of said proceedings, including the Association's reasonable legal fees. In addition, the Unit Owner and any occupant thereof shall be personally liable for the amount secured by such lien and any fees incurred to enforce such lien.

F. Dispute as to Common Expenses. Any Unit Owner who believes that the portion of common expenses chargeable to his Unit, for which a certificate of lien has been filed by the Association, has been improperly charged against him/her or his/her Unit, may bring an action in the Court of Common Pleas of _____ [county] County, Ohio, for the discharge of such lien, or may contest the same in a foreclosure action brought by the Association.

G. Nonliability of Judicial Sale Purchaser for Past Due Common Expenses. Where the holder of a first mortgage of

record or other purchaser of a Unit acquires title to the Unit as a result of a judicial sale resulting from litigation to which the Association has been made a party, or if the mortgagee accepts a deed in lieu of foreclosure, such person acquiring title, his successors and assigns, shall not be liable for the share of the Common Expenses or other assessments by the Association chargeable to such Unit which became due prior to the acquisition of title to such Unit by such person. Such unpaid share of Common Expenses or assessments shall be deemed to be Common Expenses collectible from all of the Units, including that of the person purchasing at the judicial sale, his successors or assigns.

H. Liability for Assessments Upon Conveyance. In the event of a conveyance of a Unit other than by judicial sale, the transferee of the Unit shall be jointly and severally liable with the transferor for all unpaid assessments, dues and other charges levied by the Association against the transferor and the Unit for his share of common expenses up to the time of the grant or conveyance attributable to that Unit. Such joint and several liability shall be without prejudice to the transferee's right to recover from the transferor the amounts paid by the transferee therefor. Any such transferee shall be entitled to a statement from the Board setting forth the amount of all unpaid assessments against the transferor due the Association as of the date of the transferee's acquisition, and such transferee shall not be liable for, nor shall the Unit conveyed be subject to a lien for, any unpaid assessments made by the Association against the transferor in excess of the amount set forth in such statement for the period reflected in such statement.

I. Common Profits. The Common Profits shall be distributed among the Unit Owners in accordance with their respective percentages of interest in the Common Areas and Facilities appurtenant to their respective Units.

J. Transfer of Funds to Grantee. Upon the conveyance or transfer of title to a Unit (whether voluntarily or involuntarily) all funds, credits and Common Profits then pertaining to such Unit shall automatically inure to the sole benefit of the Grantee or Transferee of such Unit.

ARTICLE VII

Insurance

A. Casualty Insurance. Each Unit Owner of a Single-Family Unit shall maintain at his own cost and expense, fire and extended coverage insurance with vandalism and malicious mischief endorsements (known commonly as "all risk" insurance) with respect to the Single-Family Unit he owns, with respect to Limited Common Areas and Facilities, and with respect to any patio, porch or deck accessory thereto. All such insurance shall be in an amount equal to the full replacement costs of the property covered thereby. The Association and each mortgagee in whose favor a mortgage with respect to such Single-Family Unit shall be named as insured parties in such policies as their interest may appear and such casualty insurance policies shall provide that all proceeds payable as a result of losses shall be paid jointly to the respective mortgagees and the Unit Owners as their interests may appear. Such insurance policies shall provide for the issuance of certificates of insurance to the Association and to the holders of mortgages on the Single-Family Units and shall further provide that coverage shall not be terminated, canceled or materially modified without ten (10) days prior written notice to the Association and the mortgagees.

The Association, as a Common Expense, shall maintain for the benefit of each Unit Owner, such insurance as it deems necessary for the buildings, if any, structures and improvements comprising the Common Areas and Facilities and the Limited Common Areas and Facilities of the Condominium Property.

In respect of all policies of insurance obtained by the Association and by the Unit Owners, the Association and each Unit Owner do hereby waive (to the extent permitted by such policy, but only the extent of the proceeds payable in connection therewith) all rights of recovery and causes of action against each other, the Owners of Units, the members of the family of each Owner of a Unit, and their tenants and other occupants of the Condominium Property, the Association, the Board, and the managing agent, if any, for any loss which may result from any of the perils insured against under any such policies; and each such policy shall provide for release by the insurance company issuing such

policy of such of its rights of subrogation thereunder as shall be coextensive with the foregoing waivers.

B. Public Liability Insurance. The Association shall insure itself, all Unit Owners and members of their respective families and other persons residing with them in the Condominium Property, their tenants, and all persons lawfully in possession or control of any part of the Condominium Property, against liability for bodily injury, disease, illness or death, and for any injury to or destruction of property occurring upon, in or about, or arising from, the Common Areas and Facilities, or from activities or acts or omissions of the Association, its agents and employees. Such insurance shall afford protection to a limit of not less than a combined single limit of _____ Dollars (\$_____) with respect to bodily injury, disease, illness, death or property damage. Such policy shall not insure against liability for personal injury or property damage arising out of or relating to ownership, maintenance or use of individual Units, and any automobiles or motor-driven vehicles driven by or on behalf of such individual Owner. All liability insurance shall contain cross-liability endorsements to cover liabilities of the Unit Owners as a group to a Unit Owner. The Association shall also obtain such other insurance as the Board in its discretion may determine.

In the event that the public liability insurance shall not fully protect and indemnify the Unit Owners from all cost and liability arising from a loss insured thereunder or other loss not insured against, or from a negligent act or omission of an employee or agent of the Association occurring in the course and scope of his employment or agency, there shall be a right of contribution amongst the Unit Owners with respect to such unprotected or unindemnified cost or liability. It is the intention of this paragraph that a Unit Owner paying or required to pay more than his respective percentage interest of said cost or liability shall have the right to cause the other Unit Owners to reimburse him for such excessive payment.

C. Insurance Premiums. Insurance premiums for the policies obtained by the Association shall be a common expense.

D. Unit Owner's Insurance. Each Unit Owner shall obtain insurance at his own expense, affording coverage upon his personal property, including any insurance not insured under the Association's policies described above, and for his personal liability as may be required by law or with respect to liability affecting his own Unit.

ARTICLE VIII

Damage or Destruction and Restoration of Buildings

A. Single Family Units. In the event a Single-Family Unit shall be damaged or destroyed, the Single-Family Unit Owner shall make all necessary repairs and restorations and shall apply in payments thereof the insurance proceeds received by him. In the event such damage or destruction results from any peril not insured against, or if the insurance proceeds shall not be available to pay the entire cost of such repairs and restoration, the entire cost of such repairs and restoration or the amount of the difference between the insurance proceeds available therefor and the cost for such repairs and restoration (as the case may be) shall be borne by the Single-Family Unit Owner. In the event the Single-Family Unit Owner fails or refuses to make the necessary repairs or restoration within a reasonable time, the Association may after reasonable notice, make such necessary repairs and restoration and shall apply in payment thereof the insurance proceeds made available to the Single-Family Unit Owner and in the event such damage or destruction results from any peril not insured against, or if the insurance proceeds shall not be available to pay the entire cost for such repairs and restoration, the entire cost for such repairs and restoration, or the amount of the difference between the insurance proceeds available therefor and the cost for such repairs and restoration (as the case may be) shall be borne by and assessed against the Single-Family Unit Owner. In the event a Single-Family Unit Owner shall refuse or fail after reasonable notice to pay such cost and assessments, the Association shall have a lien upon the estate or interest of such Unit Owner, enforceable to the same extent and the same manner as any other assessments made by the Association.

B. Nonrestoration of Damage or Destruction

1. Common Areas. If the damaged improvement is a part of the Common Areas and Facilities, the damaged improvement in the Common Areas and Facilities shall be reconstructed and repaired unless the Unit Owners entitled to exercise not less than _____ percent (_____) of the total voting power determine not to repair the damaged or destroyed improvement. Thereupon, the proceeds of any insurance shall be utilized to eliminate or remove the damaged or destroyed improvement. The balance of any proceeds shall be (i) utilized to construct or acquire additional common improvements, or (ii) distributed to the Unit Owners (subject to the rights of their respective lien holders) in proportion to their respective percentage interests in the common profits and expenses, all as determined by the Unit Owners entitled to exercise _____ percent (_____) of the total voting power.

2. Units. Notwithstanding the foregoing provisions of Article VIII, Section A, above, in the event that Single-Family Units and the buildings, structures and improvements comprising the Common Areas and Facilities of the Condominium Property shall be damaged or destroyed to the extent of _____ percent (_____) or more of the insurable replacement cost thereof, the Owners, by the affirmative vote of those entitled to exercise not less than _____ percent (_____) of the voting power, may elect not to repair or restore the Condominium Property. Upon such election, all of the Condominium Property shall be subject to an action for sale as upon partition at the suit of any Owner. In the event of any such sale, the net sales proceeds, the net insurance, if any, and any other indemnity arising because of such damage or destruction shall be considered as one fund and shall be distributed to all Owners of a Unit in proportion to their respective percentages of interest in the Common Areas and Facilities. No Unit Owner, however, shall receive any portion of his share of such proceeds until all liens and encumbrances on his Unit shall have been paid, released or discharged.

ARTICLE IX Condemnation

In the event that the entire Condominium Property is taken by eminent domain or condemned, or sold, or otherwise disposed of in lieu of or in avoidance thereof, the Condominium Property shall be withdrawn from the provisions of Chapter 5311 of the Ohio Revised Code. The condemnation award shall be apportioned among the Unit Owners in accordance with their respective percentage interests in the common profits and expenses, subject to the right of their respective lienholders. The Association shall as soon as practicable determine the share of the condemnation award to which each Unit Owner is entitled, and such share shall be paid into separate accounts and disbursed as soon as practicable to the Unit Owners entitled to same, subject to the right of their respective lienholders.

In the event that less than the entire Condominium Property is taken or condemned, or sold or otherwise disposed of in lieu of or in avoidance thereof, the Condominium Property hereunder shall not be terminated. Each Unit Owner shall be entitled to a share of the condemnation award to be determined in the following manner: As soon as practicable the Association shall, reasonably and in good faith, allocate the condemnation award between compensation, damages, or other proceeds, and shall apportion the amounts so allocated among the Unit Owners, as follows: (a) the total amount allocated to taking of or injury to the Common Areas and Facilities (excluding Limited Common Areas and Facilities) shall be apportioned among all Unit Owners in proportion to their respective percentages of interest in the Common Areas and Facilities, (b) the total amount allocated to severance damages shall be apportioned to those Units which were not taken or condemned, (c) the respective amounts allocated to the taking of or injury to a particular Unit and/or improvements a Unit Owner has made within his Unit or to the Limited Common Areas appurtenant to such Unit shall be apportioned to the particular Unit involved, and (d) the total amount allocated to consequential damages and any other takings or injuries shall be apportioned as the Association determines to be equitable under the circumstances. If an allocation of the condemnation award is already established in negotiation, judicial decree, or otherwise, then in allocating the condemnation award the Association shall employ such allocation to the extent it is relevant and applicable. Distribution of apportioned proceeds shall be made by checks payable jointly to the respective Unit Owners and the respective lienholders holding liens against their Units.

In the event a partial taking results in the taking of a complete Unit, the Owner thereof shall automatically cease to be a member of the Association. Thereafter the Association shall reallocate the ownership, voting rights and assessment ratio determined in accordance with this Declaration according to the same principles employed in this Declaration at its inception and shall submit such reallocation to the Owners of the remaining Units for amendment of this Declaration and the amended Declaration shall be filed as required by law.

Any reconstruction and repair necessitated by condemnation shall be governed by the procedures specified in Article VIII hereinabove.

ARTICLE X

Renovation and Subsequent Improvements of Existing Buildings, Structures and Other Improvements

The Association may, by the affirmative vote of the Single-Family Unit Owners entitled to exercise not less than _____ percent (_____) of the voting power of the Single Family Unit Owners, determine that the portion of the Condominium Property zoned for single-family homes is obsolete or in need of renovation, in whole or in part, and elect to have the same renewed and renovated. The Association shall thereupon proceed with such renewal and renovation and the cost thereof shall be a Special Charge of the Single-Family Unit Owners, subject to assessment in the same as set forth in Article VI above. Any Single-Family Unit Owner who does not vote for such renewal and renovation may elect, in a writing served by him on the Association within ten (10) days after receiving notice of such vote, to receive the fair market value of his Unit, less the amount of any liens and encumbrances thereon as of the date such vote is taken, in return for a conveyance of his Unit, subject to such liens and encumbrances, to the Association. In the event of such election, such conveyance and payment of the consideration therefor, which shall be a Special Charge to the Single-Family Unit Owners who have not so elected, shall be made within thirty (30) days thereafter, and if such owner and a majority of the Association cannot agree upon the fair market value of such Single-Family Unit within thirty (30) days after such election, such determination shall be made by the majority vote of three appraisers, one of which shall be appointed by such Single-Family Unit Owner, one of which shall be appointed by the Association, and the third of which shall be appointed by the first two appraisers. Each party shall pay for the cost of its own appraiser, and the cost of the third appraiser shall be split between the Single-Family Unit Owner and the Association.

ARTICLE XI

Removal from Condominium Ownership

To the extent the removal of the Condominium Property from the provisions of the Act shall not, in and of itself, violate the local zoning and building codes applicable thereto, the Unit Owners, by the affirmative vote of not less than _____ percent (_____) of the voting power, may elect to remove the Condominium Property from the provisions of Chapter 5311 of the Ohio Revised Code. In the event of such election, all liens and encumbrances, except taxes and assessments not then due and payable, upon all or any part of the Condominium Property, shall be paid, released, or discharged, and a certificate setting forth that such election was made shall be filed with the Recorder of

_____ [county] County, Ohio. Such certificate shall certify therein under oath that all liens, except taxes and assessments not then due and payable, upon all or any part of the Common Areas and Facilities, have been paid, released or discharged, and shall also be signed by the Unit Owners, each of whom shall certify therein under oath that all such liens on his Unit or Units have been paid, released or discharged. The Board may, at their discretion, require as a condition precedent to the filing of said certificate the issuance of a policy of title insurance evidencing the

nonexistence of any liens as aforesaid. The Board shall designate the amount and issuer of said title insurance, and the cost thereof shall be a common expense.

ARTICLE XII

Amendment of Declaration and Bylaws

A. **Reservation of Rights to Amend.** Declarant shall have the right, exercisable in its sole discretion at any time during the seven (7) year period following the date this Declaration is filed for record, and the Board shall have the right thereafter to amend, from time to time, this Declaration, the Bylaws and/or the Drawings in such respects as Declarant may consider necessary, convenient or appropriate for the purpose of (i) complying with any regulations of the Federal Home Loan Bank Board, the Federal National Mortgage Association, the Federal Housing Administration, the Federal Home Loan Mortgage Corporation, the Veteran's Administration, the Department of Housing and Urban Development and/or the Mortgage Guaranty Insurance Corporation (as such regulations may be amended periodically), (ii) complying with any regulations of any federal, state or local governmental agency or instrumentality (as such regulation may be amended periodically), (iii) correcting any scrivener's error or curing any ambiguity, inconsistency or form of defect or omission in this Declaration, the ByLaws and/or the Drawings, and/or (iv) effecting any other changes not adverse to the Unit Owners or to the holders of the mortgages encumbering the Units. Each Unit Owner, by accepting a Deed conveying title to his Unit, and each mortgagee accepting a mortgage encumbering any Unit, automatically consents and approves the provisions of this Section A and all Unit Owners and their respective mortgagees shall perform such actions and shall promptly execute and deliver to Declarant and/or the Board from time to time, as the Declarant and/or the Board shall request, all instruments as Declarant and/or the Board shall consider necessary, convenient or appropriate to effectuate the provisions of this Section A. In addition, each Unit Owner, by acceptance of a Deed in respect to his Unit, and each mortgagee, by accepting a mortgage encumbering any Unit, automatically hereby irrevocably appoints Declarant and/or the Board as the proxy of such Unit Owner and mortgagee coupled with an interest, to act and vote for on behalf of each such Unit Owner and each such mortgagee in such manner as shall enable Declarant and/or the Board to effectuate the rights reserved by Declarant and/or the Board pursuant to this Section A and to that end, each such Unit Owner and each such mortgagee hereby authorizes, directs and empowers Declarant and/or the Board, as the holder of such proxy, to execute, and to have witnessed, acknowledged and recorded, for and in the name of such Unit Owner and each such mortgagee, such amendments of the within Declaration, the Bylaws and/or the Drawings, together with such consents thereto as Declarant and/or the Board shall consider necessary, convenient or appropriate to comply with the provisions of this Section if Declarant shall exercise the rights reserved to it in this Section. Any documents requiring execution by any person, firm, corporation, or other entity (other than Declarant) shall be in full compliance if executed by Declarant and/or the Board on behalf of such person, firm, corporation or other entity.

B. **Procedure for Amendments.** This Declaration and the Bylaws attached hereto as Exhibit C may be amended upon the filing for record with the Recorder of _____ [county] County, _____ [state] , an instrument in writing setting forth specifically the item or items to be amended and any new matter to be added, which instrument shall have been duly executed by the Unit Owners entitled to exercise at least _____ percent (_____ %) of the voting power of the Association. Such amendment must be exercised with the same formalities as this instrument and must refer to the volume and page in which this instrument and its attached exhibits are recorded and must contain an affidavit by the Secretary of the Association that a copy of the amendment has been mailed by certified mail to all mortgagees having bona fide liens of record against any Unit. However, no amendment shall have any effect upon a bona fide first mortgagee until the written consent to such amendment of such mortgagee has been secured. No amendments may diminish or alter the security or rights of any existing lienholder. Such consents shall be retained by the Secretary of the Association and his certification in the instrument of amendment as to the names of the consenting and nonconsenting mortgagees of the various Units shall be sufficient for reliance by the general public. If less than all mortgagees consent to an amendment to the Declaration and/or the Bylaws, said amendment or modification shall nevertheless be valid among the Unit Owners, inter sese, provided that the rights of a

nonconsenting mortgagee shall not be abrogated thereby. No provision in this Declaration or Bylaws may be changed, modified or rescinded, however, which, after such change, modification or rescission, would conflict with the provisions of Chapter 5311 of the Ohio Revised Code, as now in effect or as hereafter amended.

Notwithstanding the above, no consent of any mortgagee shall be required with respect to an amendment by the Declarant, its successors and assigns, if said amendment shall be made pursuant to Article XV, irrespective of the fact that said amendment shall affect the Unit Owners' percentage interest in the Common Areas and Facilities and their voting representation.

C. Exceptions. Notwithstanding the foregoing, for purposes of amending this Declaration:

(i) to submit the Additional Property to the provisions of the Act, the Declarant need only comply with the provisions of the Act pertaining to theright to add "Additional Property" (as defined in the Act) in respect of an "Expandable Condominium Property" as defined in the Act; and

(ii) to effect the rights reserved to Declarant pursuant to Section A, above, Declarant need only comply with the provisions of such Section A and Section 5311.06 of the Act.

ARTICLE XIII

Remedies for Breach of Covenants and Regulations

Abatement and Enjoyment. The violation of any restriction or condition or regulation adopted by the Association or the breach of any covenant or provision contained in this Declaration or in the Bylaws of the Association shall give the Association the right, in addition to all other rights in law or in equity, to (i) enter upon the land or Unit or portion thereof upon which, or as to which, such violation or breach exists and to summarily abate and remove, at the expense of the defaulting Owner, any structure, thing or condition that may exist thereon contrary to the intent and meaning of the provisions of this Declaration and the Bylaws of the Association, and the Association or its agents shall not thereby be deemed guilty in any manner of trespass; or to (ii) enjoin, abate or remedy by appropriate legal proceedings, either at law or in equity, the continuance of any breach. All expense and costs thereof, including reasonable attorneys' fees, shall be paid by the Unit Owner guilty of the breach and constitute the basis for a lien upon his Unit and interest in accordance with Article VI thereof.

ARTICLE XIV

Expansion of Condominium Property by Declarant

A. This Condominium, as planned and envisioned by the Declarant, is intended to be an Expandable Condominium Property. Therefore, in accordance with Chapter 5311 of the Ohio Revised Code, Declarant reserves the right, at Declarant's exclusive option, to expand the Condominium Property by submitting all or a portion, as provided below, of the Additional Property to the provisions of Chapter 5311. Except as otherwise provided in this Section, there are no limitations on the exercise of said option, including, but not limited to, no limitation requiring the consent of any Unit Owner. Said option shall expire seven (7) years after the Declaration is filed for record unless said seven-year period is extended in accordance with the provisions of *Section 5311.05(C)(3) of the Ohio Revised Code*. There are no circumstances under which said option will terminate prior to the expiration of the above-described time limit, except that Declarant may elect at any time to terminate said option.

B. All or a portion of the Additional Property, as described in Exhibit B, may be added to the Condominium Property in connection with the complete development of the Condominium. Different portions of the Additional Property may be added to the Condominium Property at different times, in phases, so that the entire contemplated development may

proceed in an orderly fashion. However, the Declarant is under no legal obligation or duty to add any of such Additional Property to the Condominium Property and may add or decline to add any such portion of the Additional Property within the unrestricted and uncontrolled discretion of Declarant. There are no limitations with respect to the boundaries of portions of the Additional Property that may be added, or with respect to the order in which portions may be added; provided, however, that each portion added shall be contiguous, at some point, to what then constitutes the Condominium Property. There are no limitations as to the location of any improvements contemplated to be constructed on any portion of the Additional Property. Declarant reserves the right to change the design of structures and buildings to be constructed and the order of additions to the Condominium Property of portions of the Additional Property.

C. The Additional Property consisting of the real property set forth on Exhibit A, attached hereto, is owned by Declarant and zoned for single-family residences on which a total of fifteen (15) additional Single-Family Units may be constructed. The Additional Property described on Exhibit B, attached hereto, is zoned for single family-residences and an additional forty (40) Single-Family Units may be constructed. As stated in Article V, subparagraph A, above, all of the land and Units thereon which are added to the Condominium Property are restricted to residential use.

D. With respect to improvements, other than structures, to any portion of any of the Additional Property to be added to the Condominium Property, the Declarant reserves the right to make such improvements as Declarant deems necessary, if any. There are no restrictions or limitations upon improvements that may be made except that Declarant intends that such improvements, if made, will be of substantially the same kind, style and quality as exist with respect to the Condominium Property.

E. With respect to all Units to be constructed on any portion of the Additional Property, all such Single-Family Units are intended to be compatible with the Single-Family Units contained within the Condominium Property when and if initially constructed, as submitted to the provisions of Chapter 5311 of the Ohio Revised Code in accordance with this Declaration. Design shall not be deemed to be incompatible because of changes in the number of Units, changes in interior layout of Units, or variances in set-backs or relations of structures to other improvements.

F. All or any portion of the Common Areas and Facilities designated on any portion of the Additional Property may be assigned as Limited Common Areas and Facilities by the Declarant. It is anticipated that the type of Limited Common Areas will be substantially of the same type as those designated on the Condominium Property. The size and number of such newly created Limited Common Areas cannot be ascertained precisely because those facts will depend on how large each portion to the Additional Property added to the Condominium Property may be, the size and location of the buildings and other improvements on each portion, and other factors presently undetermined.

G. All or any portion of the Additional Property shall be submitted to the provisions of Chapter 5311 of the Ohio Revised Code, by the Declarant, by filing an amendment to this Declaration, which contains the information, Drawings and other items required by Section 5311.05(A) and (B) of the Ohio Revised Code, and which allocates and reallocates the fractions of undivided interest in the Common Areas and Facilities appurtenant to each Unit on the real estate previously submitted to provisions of Chapter 5311 and for each Unit constructed or to be constructed on a portion of the Additional Property being submitted to the provisions of Chapter 5311 by said amendment. Said amendment shall uniformly reallocate said undivided fractional interests in the Common Areas and Facilities pursuant to the formula described below.

H. The fractional interest of each Unit Owner in the Common Areas and Facilities shall be allocated and reallocated so that at all times the interest shall be based on the relative Par Values assigned to Units being added to the Condominium Property to the Par Value of all Units. It is intended that the Single-Family Units, once and if added to the Condominium Property, shall be assigned an equal par value of one (1). Such amendment shall be executed by the Declarant in recordable form and filed for record, and shall be effective on the date on which it is filed for record.

ARTICLE XV

Certain Disclosures Required by the Act

In accordance with *Section 5311.25 of the Ohio Revised Code* and in connection with the sale or offer to sell Condominium Ownership Interests by the Declarant, the Declarant agrees that:

A. Any deposit or down payment made in connection with the sale of a Unit will be held in trust or escrow until delivered at settlement or returned to or otherwise credited to the purchaser of a Unit or forfeited to the Declarant, and if a deposit or down payment of _____ Dollars (\$_____) or more is held for more than ninety (90) days, interest at the rate of at least _____ percent (_____%) per annum for any period exceeding ninety (90) days shall be credited to the purchaser of a Unit at settlement or upon return or other credit made to such purchaser, or added to any forfeiture to the Declarant. Deposits and down payments held in trust or escrow pursuant to this paragraph shall not be subject to attachment by creditors of the Declarant or a purchaser of a Unit.

B. Except in its capacity as a Unit Owner of unsold Condominium Ownership Interests, the Declarant will not retain a property interest in any of the Common Areas and Facilities after control of the Condominium Property is assumed by the Association, except that the Declarant may retain an interest consistent with this Declaration for the purpose of insuring a means of ingress and egress from and to the Common Areas and Facilities by the prospective Unit Owners in the Additional Property.

C. The owners of Condominium Ownership Interests that have been sold by the Declarant or his agent will assume control of the Common Areas and Facilities and of the Association in the following manner:

(1) The Association shall be established not later than the date the deed or other evidence of ownership is filed for record following the first sale of a Condominium Ownership Interest in the development. Membership in the Association shall be limited to Unit Owners, and all Unit Owners shall be members. Until the Association is established, the Declarant shall act in all instances where action of the Association or its officers is authorized or required by law or the Declaration.

(2) Not later than the time that Condominium Ownership Interests to which _____ percent (_____%) of the undivided interest in the Common Areas and Facilities appertain have been sold and conveyed by the Declarant, the Association shall meet and the Unit Owners, other than the Declarant shall elect not less than _____ percent (_____%) of the members of the Board. Not later than the time that Condominium Ownership Interests to which _____ percent (_____%) of the undivided interests appertain have been sold and conveyed, such Unit Owners shall elect not less than _____ percent (_____%) of the members of the Board. Since the Condominium is an Expandable Condominium, the percentage interest in the Common Areas and Facilities is to be computed by comparing the number of Units sold and conveyed to the maximum number of Units that may be created, as stated in the Declaration.

(3) Except as stated in subparagraph (2), above, the Declarant or person authorized by Declarant may appoint and remove members of the Board and other officers of the Association and exercise the powers and responsibilities otherwise assigned by law or the Declaration to the Association, the Board or other officers. Such authorization shall extend from the date of the establishment of the Association until the earlier of:

(a) five (5) years; or

(b) thirty (30) days after the sale and conveyance of Condominium Ownership Interests to which appertain _____ percent (_____%) of the undivided interests in the Common Areas and

Facilities to purchasers in good faith for value.

Within thirty (30) days of the expiration of control by the Declarant as aforesaid, the Association shall meet and elect all members of the Board and all other officers of the Association. The persons so elected shall take office upon election.

D. Neither the Association nor the Unit Owners will be subject to any management contract or agreement executed prior to the assumption of control as required by the preceding paragraph of this Article for more than one (1) year subsequent to the date of that assumption of control, unless such contract or agreement is renewed by a vote of the Unit Owners pursuant to the Bylaws of the Association.

E. Solely and only to the extent such warranties are or may be required by the provisions of *Section 5311.25(E) of the Ohio Revised Code*, Declarant will furnish a two-year warranty covering the full cost of labor and materials for any repair or replacement of roof and structural components and mechanical, electrical, plumbing and common service elements serving the Condominium Property, as a whole, occasioned or necessitated by a defect in material or workmanship and a one-year warranty covering the full cost of labor and materials for any repair or replacement of structural, mechanical and other elements pertaining to each Unit, occasioned or necessitated by a defect in material or workmanship commencing as follows:

(1) The two-year warranty shall commence on the date that the deed is filed for record following the first sale of the first Condominium Ownership Interest to a purchaser in good faith for value, except in the case of Expandable Condominium Property, the two-year warranty with respect to Units located on the Additional Property shall commence from the date the deed is filed for record following sale of the first Condominium Ownership Interest on the Additional Property.

(2) The one-year warranty shall commence on the date the deed is filed for record following the first sale of a Condominium Ownership Interest to a purchaser in good faith for value.

(3) In the case of ranges, refrigerators, washing machines, clothes dryers, hot water heaters and other similar appliances, if any, installed and furnished as part of the Unit by Declarant, the valid assignment, if permitted, of any express or implied warranties, if any, of the manufacturer satisfies the Declarant's warranty under this Section E with respect to such appliances, and the Declarant's warranty shall be limited to the installation of the appliances.

(4) All warranties made to the Declarant that exceed the time periods set forth hereinabove with respect to any part of the Units or Common Areas and Facilities shall be assigned to purchasers of Units, provided that such warranties are assignable.

None of the foregoing warranties shall cover repairs or replacements necessitated or occasioned by ordinary wear and tear or by the negligent or wanton acts of any Unit Owner or occupant or any tenant, guest or invitee of a Unit Owner or occupant or occasioned or necessitated for any reason whatsoever except by reason of defects in materials and workmanship. Any dispute in defining what constitutes a defect in materials and/or workmanship in the aforesaid items and the above warranties shall be mandatorily referred to the American Arbitration Association, and the determination thereby shall be final and binding.

F. The Declarant shall assume the rights and obligations of a Unit Owner with respect to Units not yet sold, including the obligation to pay common expenses attaching to such Units, from the date the Declaration is filed for record.

ARTICLE XVI

Special Declarant Rights

The Declarant hereby reserves unto itself, its successors and assigns, the following rights for the benefit of the Declarant:

(i) to complete all improvements that serve the Condominium Property, including without limitation, the right and easement through the Common Areas and Facilities for the purpose of making the improvements within the Condominium Property or within the Additional Property, if and when all or portions thereof are added to the Condominium Property; and

(ii) to maintain sales offices, management offices, signs, advertising and models at such places as Declarant shall determine.

ARTICLE XVII

Miscellaneous Provisions

A. Binding Effect. Each grantee of the Declarant, by acceptance of a deed of conveyance, accepts the same subject to all restrictions, conditions, covenants, reservations, liens and charges, and the jurisdiction, rights and powers created or reserved by this Declaration, and all rights, benefits and privileges of every character hereby granted, created, reserved or declared, and all impositions and obligations hereby imposed, shall be deemed and taken to be covenants running with the land, and shall bind any person having at any time any interest or estate in said real property, and shall inure to the benefit of such owner in like manner as though the provisions of the Declaration were recited and stipulated at length in each and every deed of conveyance. All of the provisions of this Declaration are in furtherance of a common plan to develop, promote and protect the desirability and value of the property described herein for the benefit of each owner thereof.

B. Nonwaiver. No covenants, restrictions, conditions, obligations or provisions contained in this Declaration shall be deemed to have been abrogated or waived by reason of any failure to enforce the same, irrespective of the number of violations or breaches which may occur.

C. Separability. The invalidity of any covenant, restrictions, condition, limitation or other provisions of this Declaration, or of any part of the same, shall not impair or affect in any manner the validity, enforceability or effect of the rest of this Declaration.

D. Statute of Perpetuities. If any of the privileges, covenants or rights created by this Declaration shall be unlawful or void for violation of (a) the rule against perpetuities or some analogous statutory provision, (b) the rule restricting restraints on alienation, or (c) any other statutory or common law rules imposing time limits, then such provision shall continue only until twenty-one (21) years after the death of the survivor of the now living descendants of the United States Senator representing the State of Ohio, the Honorable _____ [name] .

E. Sales by Declarant. So long as Declarant, its successors and assigns, own one or more of the Units established and described herein, the Declarant, its successors and assigns, shall be subject to the provisions of this Declaration and of the Drawings, except that Declarant may lease, sell, exchange and transfer Units owned by Declarant without approval of the Board.

F. Nonliability of Declarant. Neither Declarant nor its principals, members, shareholders, officers or other representatives, successors or assigns shall be liable for any claim whatsoever arising out of or by reason of any actions performed pursuant to any authorities granted or delegated to it by or pursuant to this Declaration in the management and operation of the Condominium and the Condominium Property and the Association, whether or not such claim (i) shall be asserted by a Unit Owner, occupant, the Association, or by any person or entity claiming through any of them; or (ii) shall be on account of injury to person or damage to or loss of property wherever located and however caused; or

(iii) shall arise ex contractu or (except in the case of gross neglect) ex delicto. Without limiting the generality of the foregoing, the foregoing enumeration includes all claims for, or arising by reason of, the Condominium Property or any part thereof being or becoming out of repair or containing any patent or latent defects, or by reason of any act or neglect of any Unit Owner, occupant, the Association, and their respective agents, employees, guests, invitees, or by reason of any neighboring property or personal property located on or about the Condominium Property, or by reason of the failure to function or disrepair of any utility services (heat, air conditioning, electricity, gas, water, sewage, etc.). The foregoing exculpatory language shall not include claims against the Declarant arising from Declarant's capacity as a developer, builder and seller.

G. Section Headings; Gender. The heading of each Article and to each Section hereto are inserted only as a matter of convenience and for reference and in no way define, limit or describe the scope or intent of this Declaration nor in any way affect this Declaration.

The use of the masculine gender herein or in the Bylaws shall be deemed to include the feminine and the neuter genders, as the case may be, and the use of the singular shall be deemed to include the plural, wherever the context so requires.

H. Uniform Plan. The provisions of this Declaration shall be liberally construed to effectuate its purpose of creating a uniform plan for the establishment and operation of a proper and harmonious condominium development.

I. Service of Notices. Any notice by the Association or by the Declarant to a Unit Owner shall be deemed to be duly given, and any demand upon him shall be deemed by him to have been duly made, if delivered in writing to him personally, or if sent to him by United States certified mail, return receipt requested, addressed to him at the Unit owned by him, and any notice by a Unit Owner to the Association shall be deemed to be duly given and made, if in writing and delivered to the Secretary of the Association.

Each Unit Owner shall furnish written notice to the Secretary of the Association of the name and address of such Unit Owner's first mortgagee and of any change in the name and address of such mortgagee.

THIS DECLARATION executed by the undersigned Declarant at _____, [city]
 _____ [state], on the _____ [day] of _____ [month]
 _____ [year].

SMITH COURT, LTD.

By: _____

[name and title]

STATE OF _____ [state])
 COUNTY OF _____ [county]) SS:

BEFORE ME, a Notary Public in and for said County and State, personally appeared SMITH COURT, an Ohio limited liability company, by _____ [name], its _____ [title], who acknowledged that he did sign the foregoing instrument for and on behalf of said limited liability company, being thereunto duly authorized, and that the same is his free act and deed individually and as such member and the free act and deed of said limited liability company.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed my official seal at _____
[city] , _____ [state] , this _____ [day] of _____ [month]
_____ [year] .

[Notary Public]

This Instrument Prepared by:



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Current Legal Forms for Real Estate

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Current Legal Forms for Real Estate
Chapter 20 REAL ESTATE ENTITIES

Part IV. Forms

H. CONDOMINIUMS AND HOMEOWNERS ASSOCIATION

24-20 Current Legal Forms for Real Estate FORM 20.71

AUTHOR: by Stephen E. Pigott and Harold O. Maxfield, Jr.

FORM 20.71 Bylaws for condominium--Ohio

COMMENT

The Ohio statute requires that bylaws governing the operation of a condominium must be filed with the declaration submitting the property to condominium ownership. The by-laws look very similar to the bylaws of a typical non-profit corporation; however, they contain many extra provisions relating to the operation of a condominium.

FORM

BYLAWS

OF

SMITH COURT CONDOMINIUM UNIT OWNERS ASSOCIATION

ARTICLE I

PURPOSE AND DEFINITIONS

The purpose of these Bylaws is to provide for the establishment of a Unit Owners Association for the government of the Condominium Property described in the Declaration in the manner provided by the Declaration and these Bylaws, all of which shall be subject to the covenants, provisions and/or regulations contained in the Declaration and these Bylaws and shall be further subject to any and all restrictions, conditions and/or regulations hereafter adopted by the Board of Managers of the Association.

The within Bylaws are executed and attached pursuant to the Declaration of Smith Court Condominiums pursuant to Chapter 5311 of the Ohio Revised Code. The principal office of the Association and the place of meeting of the Unit Owners, hereinafter sometimes called the "Members," and of the Board of Managers of the Association, hereinafter sometimes called the "Board" or the "Managers", shall be 10532 Cleveland Avenue, N.W., P.O. Box 1056, Uniontown, Ohio 44685, or at such place in _____ [county] County, _____ Ohio, as the Board may from time to time designate. For the purpose of these Bylaws, the definition of any and all words, terms and/or phrases which appear or are used in these Bylaws and are defined in the Declaration shall have the same meaning in these Bylaws as set forth in the Declaration. In the event any words, terms and/or phrases are not defined in the Declaration and are defined in Chapter 5311 of the Ohio Revised Code, hereinafter sometimes called the "Act," such words, terms and/or phrases shall have the same meaning herein as set forth in the Act.

ARTICLE II THE ASSOCIATION

Section 1. Name and Nature of Association. The Association shall be a corporation not for profit and shall be called the Smith Court Condominium Unit Owners Association, hereinafter sometimes called the "Association."

Section 2. Membership. Membership of the Association shall consist of all the Owners of Units in the Condominium Property. Each Member shall have voting rights equal to the respective percentage interest in the Common Areas and Facilities appurtenant to his Unit(s) as set forth in the Declaration. No purchaser of a Unit shall be deemed an Owner until the sale and purchase of such Unit has been consummated by the payment of the purchase price or such portion thereof as is required by the terms of the Purchase Agreement.

Section 3. Membership Not Transferable. Except as provided herein or in the Declaration, membership in the Association shall not be transferable separate and apart from a transfer of the Condominium Ownership Interest. The membership of each Owner in the Association shall terminate upon a sale, transfer or other disposition of the Owner's Condominium Ownership Interest accomplished in accordance with the provisions of the Declaration, and all rights and privileges of a Member in the Association, the Owner's Unit, and the Condominium Property shall cease on the termination of such membership, and thereupon the membership of such respective Owner in the Association shall automatically transfer to and vest in the new succeeding owner. The Association may, but shall not be required to, issue certificates or other evidence of membership therein.

Section 4. Proxies. Members may vote or act in person or by proxy. The person appointed as a proxy need not be a Member of the Association. Designation by a Member of a proxy to vote or act on the Owner's behalf shall be made in writing to the Board of Managers of the Association and shall be revocable at any time by actual notice to the Board of Managers by the Member or Members making such designation. Notice to the Board of Managers in writing or in open meeting of the revocation of the designation of a proxy shall not affect any vote or act previously taken or authorized.

Section 5. Voting. The percentage of the vote to which each Unit Owner is entitled is the voting percentage assigned to the Unit or Units the Unit owner owns as set forth in the Declaration. There shall be one voting Member for each Unit in the Condominium. Such voting Member may be the Owner or the group composed of all of the Owners of a Condominium Ownership Interest, or any person who is designated as a proxy in accordance with the section set forth above. Fiduciaries for minors who are owners of record of a Unit or Units may vote their respective interests as Unit Owners. If two or more persons, whether fiduciaries, tenants in common, or otherwise, own undivided interests in a Unit, each may exercise the proportion of the voting power of all the owners of his Unit that is equivalent to his proportionate interest in the Unit, provided that at or prior to the time of said vote notice is submitted to the Board of Managers, in writing, of his ownership interest and his desire to exercise his fractional share of the Unit's voting power separately from the rest of the voting power of the Unit.

Section 6. Majority of Owners. As used in these Bylaws, the term "majority of Owners" shall mean those Members owning at least _____ percent (_____%) of the percentage of total votes in accordance with the percentages assigned to the Declaration.

Section 7. Quorum. The presence at any meeting of the voting Members having _____ percent (_____%) of the total votes shall constitute a quorum sufficient to conduct business. Unless otherwise expressly provided herein or in the Declaration, any action may be taken at any meeting of the voting Members upon the affirmative vote of the voting Members having a majority of the quorum present at such meeting. Votes may be cast in person or by proxy. The percentage of votes present by proxy shall be counted in determining whether a quorum is present.

ARTICLE III BOARD OF MANAGERS

Section 1. Number and Qualification. The affairs of the Association shall be governed by the Board of Managers, which shall be composed of three (3) persons, all of whom must be owners of a Unit, the spouse of a Unit Owner, or occupiers of a Unit who have attained the age of eighteen.

Section 2. Election and Term of Office. The Declarant shall designate all of the Members of the Board of Managers to serve during the initial period during which the Declarant retains control of the Association, in accordance with the terms of Article IV, Section 1, set forth below. After the termination of such period of control, the Managers shall thereafter be elected at each annual meeting of the Members of the Association. Only persons nominated as candidates shall be eligible for election as Managers, and the candidates receiving the greatest number of votes shall be elected. Each Member may vote for as many candidates as there are authorized numbers of positions to be filled in the Board of Managers. The Managers shall hold office for the term of one (1) year from the date of their election and until the election and qualification of their successors. The Board of Managers shall hold office until their successors have been elected and hold their first meeting. As used in these Bylaws, the term Declarant means the developer or any successor or assign to whom the Declarant transfers the Declarant's rights under the Declaration, the Bylaws, the Condominium Act, or the other Condominium Instruments, which rights are over and above those rights which the Declarant has by reason of being a Unit Owner of Units to which the Declarant retains title. Notwithstanding Section I of this Article, or any other section of these Bylaws, the persons appointed by the Declarant to be Members of the Board of Managers during the initial period of control by the Declarant of the Association as set forth in this section, may, but need not be, Unit Owners, spouses of Unit Owners, or occupiers of Units.

Section 3. Vacancies. Vacancies in the Board of Managers caused by any reason other than the removal of a Manager by a vote of the Association shall be filled by vote of the majority of the remaining Managers, even though they may constitute less than a quorum; and each person so elected shall be a Manager until a successor is elected at the next annual meeting of the Association. In the event that a majority of the remaining Members of the Board do not agree upon the election of a successor within thirty (30) days of the occurrence of the vacancy, the successor shall be elected by a vote of the majority of the percentages of voting power of the Unit Owners at a meeting of the Association.

Section 4. Removal of Managers. At any regular or special meeting of Members of the Association duly called, at which a quorum shall be present any one or more of the Managers, except the Managers, if any, acting as a representative of the Declarant, may be removed with or without cause by the vote of Members entitled to exercise at least seventy-five (75%) of the voting power of the Association, and a successor or successors to such Manager so removed shall then and there be elected to fill the vacancy or vacancies thus created. Any Manager whose removal has been proposed by the Members of the Association shall be granted an opportunity to be heard at such meeting.

Section 5. Organizational Meeting. Immediately after each annual meeting of Members of the Association, the newly elected Managers and those Managers whose terms continue shall hold an organizational meeting for the purposes of electing officers and transacting any other business. Notice of such meeting need not be given.

Section 6. Regular Meetings. Regular meetings of the Board of Managers may be held at such time and place as shall be determined, from time to time, by a majority of the Managers, but at least one such meeting shall be held during each calendar year. Notice of regular meetings of the Board shall be given to each Manager, personally or by mail, telephone or telegraph, at least three (3) days prior to the day named for such meetings. At such meetings, any and all business within the power of the Board may be transacted. The Board may establish appropriate rules for the order and conduct of their meetings and consideration and transaction of business in accordance with the Declaration and these Bylaws.

Section 7. Special Meetings. Special meetings of the Board of Managers may be held at any time upon the request of the President or any two Managers. Notice of the time and place of each such meeting shall be given to each Manager either by personal delivery or by mail, telegram, or telephone at least two (2) days before the meeting, which notice need not specify the purposes of the meeting. Attendance of any Manager at any such meeting without protesting, prior to or at the commencement of the meeting, the lack of proper notice, shall be deemed to be a waiver by that Manager of notice of such meeting, and such notice may be waived in writing either before or after the holding of such meeting, by any Manager, which writing shall be filed with or entered upon the records of the meeting. Unless otherwise indicated in the notice thereof, any and all business may be transacted at any organizational, regular or special meeting.

Section 8. Waiver of Notice. Before or at any meeting of the Board, any Manager may, in writing, waive notice of such meeting, and such waiver shall be deemed equivalent to the giving of such notice. Attendance by a Manager at any meeting of the Board shall be a waiver of notice by him of the time and place thereof. If all the Managers are present at any meeting of the Board, no notice shall be required and any business may be transacted at such meeting.

Section 9. Board of Managers Quorum. At all meetings of the Board, a majority of the Managers shall constitute a quorum for the transaction of business and the acts of the majority of the Managers present at a meeting at which a quorum is present shall be the acts of the Board of Managers. If at any meeting of the Board there be less than a quorum present, the majority of those present may adjourn the meeting from time to time. At any such adjourned meeting, any business which might have been transacted at the meeting as originally called may be transacted without further notice.

Section 10. Action of Managers Without a Meeting. Any action required to be taken, or an action which may be taken, at a meeting of the Managers, may be taken without a meeting if a consent in writing, setting forth the action so taken, shall be signed by all of the Managers entitled to vote with respect to the subject matter thereof.

Section 11. Powers and Duties of the Board of Managers. The Board of Managers shall have the powers, authority and duties necessary for the administration of the affairs of the Association and the Condominium Property, and shall have all the powers, authorities and duties referred to in the Declaration, these Bylaws, and the Ohio Revised Code, as amended from time to time, and all other laws of the State of Ohio, and may do all acts and things provided by the Condominium Act to be done by the Board of Managers or by the Unit Owners collectively, except such acts or things as are by law, or the Bylaws, or the Declaration, directed to be exercised and done by the Members individually. The Board shall have the right, power and authority to:

- (a) elect the officers of the Association;
- (b) administer the affairs of the Association and the Condominium Property;
- (c) take all actions deemed necessary or desirable to comply with all requirements of law, and the Condominium Instruments;

- (d) obtain insurance coverage no less than that required pursuant to the Declaration, together with such additional insurance as they shall deem appropriate;
- (e) enforce the covenants, conditions and restrictions set forth in the Declaration;
- (f) repair, maintain and improve the Common Areas and Facilities;
- (g) establish, enforce, levy and collect assessments as provided in the Declaration;
- (h) adopt, amend and publish administrative rules and regulations governing the use of the Common Areas and Facilities and the personal conduct of Unit Owners, occupants, and their guests therein, and establish penalties for the infraction thereof;
- (i) to estimate and adopt budgets and provide for the maintenance of books and records of account;
- (j) to suspend the voting rights of a Unit Owner during any period in which such Unit Owner shall be in default in the payment of any assessments levied by the Association;
- (k) declare the office of a Member of the Board to be vacant in the event such Member shall be absent from three (3) consecutive regular meetings of the Board;
- (l) at their option to engage the services of a manager, managing agent or management company, and to fix the terms of such engagement and the compensation and authority of such manager, managing agent or management company in order to facilitate the efficient operation and maintenance of the Condominium Property, it being the primary purpose of such management agreements to provide for administration, management, repair and maintenance as provided in the Declaration and the receipt and disbursement of funds as may be authorized by the Board, and to facilitate the levy and collection of assessments, the payment of common expenses, and the distribution of common dividends;
- (m) to do all things and take all actions permitted to be taken by the Association by law, the Declaration or these Bylaws, or such other actions not specifically reserved by the same to others.

Section 12. Duties. It shall be the duty of the Board to:

- (a) cause to be kept a complete record of its acts and corporate affairs and to present the statement thereof to the Unit Owners at each annual meeting of Unit Owners, or at any special meeting when such statement is requested in writing by Unit Owners representing one-half (1/2) or more of the voting power of Unit Owners;
- (b) supervise all officers, agents and employees of the Association to the end that the duties delegated to said persons are properly performed;
- (c) as more fully provided in the Declaration, to:
 - (1) fix the amount of assessments against each Unit;
 - (2) provide written notice of each assessment to every Unit Owner subject thereto within the time limit set forth in the Declaration and according to the method set forth in the Declaration;
 - (3) foreclose the lien against any property for which assessments are not paid within a reasonable time after they are authorized by the Declaration to do so, or bring an action at law against the Unit Owners personally obligated to pay the same, or both;

- (d) issue, or cause an appropriate representative to issue, upon demand by any person, a certificate setting forth whether or not any assessment has been paid;
- (e) procure and maintain insurance as provided in the Declaration, and as the Board deems advisable;
- (f) cause all officers or employees who, from time to time, have the possession or responsibility for Association funds to be insured by adequate fidelity bonds, to the extent that the Board in its sole discretion deems such bonds advisable or necessary, and the premiums for such bonds shall be paid by the Association as a common expense;
- (g) cause the property subject to the Association's jurisdiction to be maintained within the scope of authority provided in the Declaration;
- (h) cause the restrictions created by the Declaration to be enforced; and
- (i) take all other actions required to comply with all requirements of law and the Condominium Instruments.

Section 13. Nonliability of the Board of Managers. The Members of the Board of Managers shall not be liable to the Owners or to the Association or its Members for any mistake of judgment or for any acts or omissions made in good faith as such Managers. The Owners and the Association and its Members shall indemnify and hold harmless each Member of the Board of Managers against all contractual liability to other persons or entities, arising out of contracts made by the Board of Managers on behalf of the Association, unless any such contract shall have been made in bad faith or contrary to the provisions of the Declaration applicable to the Units or the Condominium Property or contrary to the Bylaws of this Association. The liability of any Unit Owner or Member arising out of the aforesaid indemnity shall be limited to such proportion of the total liability as the Unit Owner's percentage of interest in the Common Areas and Facilities relates to the total percentage of interest of all Unit Owners in the Common Areas and Facilities.

The aforesaid provisions concerning liability, and the indemnification provisions shall likewise apply to members of the Councils.

ARTICLE IV ADMINISTRATION OF THE ASSOCIATION

Section 1. Annual Meeting. The annual meeting of the Members of the Association for the election of Members of the Board of Managers, the consideration of reports to be laid before such meeting, and transaction of such other business as may be properly brought before the meeting, shall be held at the principal office of the Condominium Property, if any, or such other suitable place, convenient to the Unit Owners, as may be designated by the Board of Managers and specified in the notice of such meeting. The first annual meeting of the Members of the Association shall be held as soon as practicable on the date selected by the Declarant and designated by notice to the Unit Owners. The annual meeting of the Association will be held each year on the third Tuesday of the month of April, unless such other time is designated by the affirmative vote of the majority of the Unit Owners, after due notice to all Members of the Association.

The Association shall be established not later than the date the deed or other evidence of ownership is filed for record following the first sale of a Condominium Ownership Interest. Until the Unit Owners Association is established, the Declarant shall act in all instances where action of the Association or its officers is authorized or required by law or the Declaration. Not later than the time that Condominium Ownership Interests to which _____ percent (_____%) of the undivided interest in the Common Areas and Facilities appertain have been sold and conveyed by the Declarant in the Condominium development, the Association shall meet, and the Unit Owners, other

than the Declarant, shall elect _____ percent (_____%) of the Members of the Board of Managers, whichever is greater. Not later than the time that Condominium Ownership interests to which _____ percent (_____%) of the undivided interest appertain have been sold and conveyed, such Unit Owners shall elect _____ percent (_____%) of the Members of the Board of Managers. When computing percentages of interest for purposes of this division, the percentage of interest to Common Areas and Facilities shall be computed by comparing the number of Units sold and conveyed to the maximum number of Units that may be created if all of the possible Additional Property is added to the Condominium.

Except for the limitations stated above in this section, the Declarant or persons designated by the Declarant, may appoint and remove the Members of Board of Managers and other officers of the Association, and exercise the powers and responsibilities otherwise assigned by law or the Declaration to the Association, the Board of Managers, or other officers during the period of initial control by the Declarant. Such authorization and period of control will extend from the date of the establishment of the Association until the earlier of:

(a) five (5) years; or

(b) thirty (30) days after the sale and conveyance of Condominium Ownership Interests to which appertain _____ percent (_____%) of the undivided interest in the Common Areas and Facilities to purchasers in good faith for value.

Within thirty (30) days of the expiration of the period during which the Declarant exercises powers under this section the Association shall meet and elect all of the Board of Managers and all other officers of the Association. The persons so elected shall take office upon election. Neither the Association nor the Unit Owners will be subject to any management contract or agreement executed prior to the assumption of control as set forth in this Section 1 for more than one year subsequent to that assumption of control, unless such a contract or agreement is renewed by a vote of the Unit Owners pursuant to the Bylaws. Whenever elected Members of the Board of Managers of the Association take control of the Association, the Declarant shall deliver to such officers correct and complete books and records of account, specifying the receipts and expenditures relating to the Common Areas and Facilities and other common receipts and expenses, together with records showing the allocation, distribution, and collection of the common profits, losses and expenses among and from the Unit Owners.

Section 2. Special Meetings. Special meetings of the Members of the Association may be held on any business day when called by the President of the Association or the Board of Managers of the Association, or by Members entitled to cast at least _____ percent (_____%) of the votes of the Association. Upon request in writing delivered either in person or by certified mail or registered mail to the President or Secretary of the Association by any person or persons entitled to call a meeting of members, such officer shall forthwith cause to be given to the members entitled thereto written notice by personal delivery, mail or telegram, of a meeting to be held on a date not less than seven (7) nor more than thirty (30) days after the receipt of such request, as such officer may fix. If such notice is not given within ten (10) days after the delivery or mailing of such request, the Members calling the meeting may fix the time of the meeting and give notice thereof. Each special meeting shall be called to convene at 8:00 p.m. and shall be held at the office of the Association or at such other place upon the Condominium Property or at such convenient place as shall be specified in the notice of such meeting. No business, except that business stated in the notice of such special meeting, shall be transacted at said meeting unless by a consent of two-thirds (2/3) of the Unit Owners present, either in person or by proxy.

Section 3. Quorum and Adjournment. Except as may be otherwise provided by Law or by the Declarant, at any meeting of the Members of the Association, the Members of the Association entitled to exercise a majority of the voting power of the Association, present in person or by proxy, shall constitute a quorum. No action may be authorized or taken by a lesser percentage than is required by law, by the Declaration, or by these Bylaws. The Members entitled to exercise a majority of the voting power represented at a meeting of Members, whether or not a quorum is present, may adjourn

such meeting from time to time. If any meeting is adjourned, notice of such adjournment need not be given if the time and place to which such meeting is adjourned are fixed and announced at such meeting.

Section 4. Order of Business. The order of business at all meetings of Members of the Association shall be as follows:

- (a) calling the meeting to order;
- (b) proof of notice of meeting or waiver of notice;
- (c) reading of minutes of preceding meeting;
- (d) reports of officers;
- (e) reports of Committees;
- (f) appointment of inspectors of election by the Chairman of the meeting;
- (g) election of Board of Managers;
- (h) unfinished and/or old business;
- (i) new business; and,
- (j) adjournment.

Section 5. Voting at Meetings. Unless a different vote is required by express statutory provisions of the State of Ohio, or by the Bylaws or the Declaration, each question presented at a meeting of Members shall be determined by a majority vote of the voting power of those present. With respect to all elections of the Board of Managers, each Member shall be entitled to cast his vote for each of the offices of Board of Managers to be elected at such meeting. Except as otherwise prohibited under the Condominium Act, the Declarant may exercise the voting rights with respect to any Units title to which is in the name of the Declarant.

Section 6. Vote by Business Entity. The vote of any corporate, partnership, limited liability company or trust Member may be cast on its behalf by any officer, partner, member or beneficiary of such Member. An individual Member may appoint a proxy. Each proxy must be filed prior to or at the time proxies are called for at a meeting.

ARTICLE V OFFICERS

Section 1. Election and Designation of Officers. The Board of Managers shall elect a President, a Vice President, a Secretary, and a Treasurer of the Association. The Managers may appoint such Assistant Treasurers or Assistant Secretaries or such other officers as in their judgment may be advisable. The officers may, but need not, be Members of the Board of Managers or of the Association. The same person may hold more than one office and may also be a Member of the Board of Managers. The Officers shall be elected by the affirmative vote of a majority of the Board of Managers.

Section 2. Term of Office; Removal; Vacancies. The officers of the Association shall be elected annually by the Board of Managers at the first meeting of each new Board. Each officer shall hold office during the pleasure of the Board and perform such duties as the Board may prescribe. Upon an affirmative vote of a majority of the Members of the Board of

Managers, any officer may be removed, either with or without cause, and his successor elected at any regular meeting of the Board of Managers, or at any special meeting of the Board called for such purpose. Any vacancy in any office may be filled by the Board of Managers by majority vote.

Section 3. President and Vice President. The President shall be the chief executive officer of the Association. The President shall preside at all meetings of Members of the Association and shall preside at all meetings of the Board of Managers. Subject to instructions of the Board of Managers, the President shall have general executive supervision over the business and affairs of the Association. The President may execute all authorized deeds, contracts and other obligations of the Association and shall have such other authority and shall perform such other duties as may be determined by the Board of Managers or otherwise provided for in the Declaration or these Bylaws. The Vice President shall perform the duties of the President whenever the President is unable to act and shall have such other authority and perform such other duties as may be determined by the Board of Managers.

Section 4. Secretary. The Secretary shall keep the minutes of all meetings of the Board of Managers and the minutes of all meetings of the Association; he shall have charge of such books and papers as the Board may direct, and he shall, in general, perform all the duties incident to the office of Secretary and such duties as the Board may prescribe. A copy of such minutes shall be posted in a place designated by the Board of Managers. The Secretary shall maintain records of the names and addresses of the Unit Owners and their respective percentages of interest in the Common Areas and Facilities.

Section 5. Treasurer. The Treasurer shall have responsibility, on behalf of the Association, to keep correct and complete books and records of account, specifying the receipts and expenditures relating to the Commons Areas and Facilities and other common receipts and expenses, together with records showing the allocation, distribution and collection of the common profits, losses and expenses among and from the Unit Owners. He shall be responsible for the deposit of all monies and other valuable effects in the name, and to the credit of, the Association in such depositories as may from time to time be designated by the Board, and he shall perform such other duties as from time to time may be assigned to him by the Board of Managers.

Section 6. Duties of Officers May Be Delegated. In the absence of any officer of the Association, or for any other reason the Board may deem sufficient, the Board of Managers may delegate all or part of the powers or duties of such officer to any Member of the Board or to the managing agent, if any.

ARTICLE VI

MAINTENANCE AND REPAIR

Section 1. Repairs by Board of Managers. The Board of Managers, or any agent or officer acting at the direction of the Board, shall have the authority either to hire permanent employees or to contract specifically for the performance of ordinary repairs and maintenance, or replacement necessary or incidental to the administration of the Common Area and Facilities, and to purchase the tools, implements and materials used in repair, maintenance, replacement, gardening and snow removal, and shall have authority to engage the services of a Manager, Management Company or Managing Agent. The Association shall assume responsibility for maintaining landscaping and for snow removal within Limited Common Areas.

Section 2. Repairs by Unit Owners. Each Unit Owner shall promptly perform all maintenance and repair work within his own Unit, and within some of the Limited Common Areas appertaining thereto as described in the Declaration.

ARTICLE VII

DETERMINATION AND PAYMENT OF COMMON EXPENSES AND ASSESSMENTS; BOOKS

Section 1. Obligation of Unit Owners to Pay Common Expenses and Assessments. It shall be the duty of every Unit Owner to pay the Unit Owner's proportionate share of common expenses and all assessments therefor. Such proportionate share of the common expenses shall be in the same ratio as the Unit Owner's percentage of ownership in the Common Areas and Facilities as set forth in the Declaration. Payment therefore shall be in such amounts and at such times as may be determined by the Board of Managers of the Association, as herein provided. A common expense shall include, without limitation, the cost of maintenance and repair of Common Areas and Facilities (excluding certain Limited Common Areas which are maintained by the Unit Owner to which the Limited Common Area pertains), landscaping, snow removal, hazard insurance and liability insurance, salaries and fees of a management company or agents and employees, if any, the cost of tools, materials and equipment, bonding fees, the establishment of reserve funds if deemed necessary, and all other charges by the Board deemed necessary or appropriate to the proper functioning of the Condominium Property.

Section 2. Preparation of Estimated Budget. Each year, on or before December 1, the Board shall estimate the total amount necessary to pay the cost of management fees, wages, materials, insurance, services and supplies which will be required during the ensuing calendar year for the rendering of all such services in connection with the Condominium Property, together with such reasonable reserves for contingencies and replacements, if any, as the Board of Managers shall deem to be necessary, and shall on or before December 15th notify each Unit Owner in writing as to the amount of such estimate, with reasonable itemization thereof. Said estimated cash requirements shall be assessed to the Unit Owners according to each Unit Owner's percentage of ownership in the Common Areas and Facilities as set forth in the Declaration. On or before January 1st of the ensuing year, and the first day of each and every month of said ensuing year, each Unit Owner shall be obligated to pay to the Association, or as it may direct, the monthly amount determined to be payable that month as the appropriate amount of the annual common expenses for that year as well as the amount of any other assessment made pursuant to the terms of the Bylaws and Declaration. On or before the date of the annual meeting in each calendar year, the Board shall supply to all Owners an itemized accounting of the maintenance expenses actually incurred in the preceding calendar year, together with a tabulation of the amounts collected pursuant to the estimates provided, and showing the net amount over or short of the actual expenditures plus reserves. Any amount accumulated in excess of the amount required for actual expenses and reserves shall be credited according to each Unit Owner's percentage of ownership in the Common Areas and Facilities to the next monthly installments for common expenses due from Unit Owners under the then current year's estimate, until exhausted, and any net shortage shall be added according to each Unit Owner's percentage of ownership in the Common Areas and Facilities to the installments due in the succeeding six (6) months after rendering of the accounting. The budget shall be established on an annual basis, but a different amount may be due for each month during the year in order that the common expenses per month, which each Unit Owner shall be required to pay, may be increased or decreased each month based on the annual budget and the amount then required for common expenses. Each Unit Owner recognizes that the initial costs for the maintenance and operation of the Condominium Property may be less for each particular month during the first two years after the filing of the Declaration.

Section 3. Reserve for Contingencies and Replacements. The Association shall accumulate and maintain a reasonable reserve for contingencies and replacements. Extraordinary expenditures not originally included in the annual budget shall be charged first against such reserve. If the estimated budget proves inaccurate for any reason, including nonpayment of any Unit Owner's assessment, the amount or amounts necessary to make it adequate shall be assessed to the Unit Owners according to each Unit Owner's percentage of ownership in the Common Areas and Facilities. The Association shall serve notice of such further assessment on all Owners by a statement in writing giving the amount and reasons therefor, and such further assessments shall become effective with the first monthly maintenance payment which occurs more than ten (10) days after the delivery or mailing of such notice of further assessment. All Unit Owners shall be obligated to pay the adjusted monthly assessment.

Section 4. Budget for the First Year. The Board of Managers of the Association, at the time the Declaration is filed for record, shall be composed of Members designated by the Declarant, as set forth hereinbefore and pursuant to the provisions of the Condominium Act. The Board of Managers designated by the Declarant shall promptly prepare an estimated budget which will be consistent with the projected budget disclosed in the Disclosure Statement, and which will be the basis for determining the amount of the monthly common expenses which each Unit Owner shall be obligated to pay. Each year thereafter, the Board of Managers, whether designated by the Declarant or elected partially by the Declarant or Unit Owners as provided in the Condominium Act, the Declaration, and these Bylaws, shall prepare, as set forth above, an estimated budget for the following year. The initial budget may be prepared for the first two (2) years of the operation, but thereafter the estimated budget shall be on an annual basis.

Section 5. Failure to Prepare Annual Budget. The failure or delay of the Association or Board to prepare or serve the annual or adjusted budget shall not constitute a waiver or release in any manner of any Unit Owner's obligation to pay the common expenses for maintenance costs and necessary reserves or any other charges herein provided, whenever the same shall be determined. In the absence of any annual budget, the Unit Owners shall continue to pay the monthly common expenses at the existing monthly rate or rates established for the previous period until the first monthly common expense payment date which occurs more than ten (10) days after such new annual budget shall have been mailed or delivered.

Section 6. Books and Records for the Association. The Association shall keep full and correct books, and the same shall be open for inspection by any Unit Owner or by any representative of a Unit Owner duly authorized in writing, at reasonable times and upon request of the Unit Owner. Upon ten (10) days' notice to the Board and upon payment of a reasonable fee, any Unit Owner shall be furnished a statement of his account, setting forth the amount of any unpaid assessments or other charges due and owing from such Unit Owner.

Section 7. Remedies for Failure to Pay Assessments. If a Unit Owner is in default in the monthly payment of any of the aforesaid charges or assessments for common expenses for thirty (30) days, the Members of the Board may bring suit for and on behalf of themselves and/or as representatives of all Unit Owners and/or on behalf of the Association, to enforce collection thereof or to foreclose the lien therefor as provided in the Declaration. There shall be added to the amount due the cost of said suit, together with interest at the highest permitted rate and reasonable attorneys' fees to be fixed by the court. To the extent permitted by the Declaration, any decision of the court or any statute or law now or hereafter effective, the amount of any delinquent and unpaid charges, common expenses, and/or assessments, interest, costs and fees as herein provided, shall be a lien and/or charge against the Unit involved when payable, and may be foreclosed by an action brought in the name of the Association and/or its Board of Managers as in the case of foreclosure of liens against real estate, as provided in the Declaration. As provided in the Declaration, the Members of the Board of Managers and their successors in office, acting on behalf of the Association and/or other Unit Owners, shall have the power to bid on the interest so foreclosed at foreclosure sale, and to acquire and hold, lease, mortgage and convey the same. Any holder of an encumbrance on a Unit may from time to time request in writing a written statement from the Board of Managers setting forth the unpaid common expenses and/or assessments with respect to the Unit covered by the Unit Owner's encumbrance, and said request shall be complied with promptly. Any holder of an encumbrance holding a lien on a Unit may pay any unpaid common expenses and/or assessments payable with respect to such Unit, and upon such payment such holder of said encumbrance shall have a lien on such Unit for the amounts paid at the same amount and with the same priority as the amount so paid.

Section 8. Original Monthly Assessments. The original monthly assessments, which shall be increased or decreased by the Board of Managers from time to time in accordance with the provisions of these Bylaws, the Declaration, and the Condominium Act, shall be established. The monthly assessment shall be a common expense divided among and assessed against the Unit Owners in the percentages set forth in the Declaration for division of common expenses and profits.

Section 9. Initial Reserve Fund. It is contemplated that a reserve fund may be created out of monthly assessments. This

amount shall be nonrefundable, except to the degree that other assessments are refunded or distributed to Members of the Association.

Section 10. Additions, Alterations or Improvements by the Board. Whenever, in the judgment of the Board, the Common Areas and Facilities shall require additions, alterations or improvements (as opposed to maintenance, repair and replacement as set forth in the Declaration), the cost of which exceeds _____ percent (_____%), the making of such additions, alterations or improvements shall be subject to the prior approval of Unit Owners entitled to exercise not less than a majority of the voting power prior to the Board proceeding with such additions, alterations or improvements and prior to the Board entering into any binding contracts for the same. If approved, the cost shall be assessed to all Unit Owners as a common expense. Any additions, alterations or improvements costing _____ Dollars (\$_____) or less may be made by the Board without approval of the Unit Owners, and the cost thereof shall constitute part of the common expenses.

Section 11. Special Services. The Board may arrange for special services and activities for such Unit Owners and occupants as may desire to pay for the same, including, without limitation, the cleaning, repair and maintenance of the Units. The cost of any such special services or facilities shall be determined by the Board and may be charged directly to participating Unit Owners. The cost of any such special services may be charged directly to the participating Unit Owners at the time the services are rendered, or may be charged as an addition to the monthly maintenance fee.

ARTICLE VIII

SALE OR WITHDRAWAL AND TERMINATION

Section 1. Sale or Withdrawal. Unless otherwise provided by any statute generally applicable to condominium properties, and applicable to this project, the Unit Owners by affirmative vote of at least _____ percent (_____%) of the total vote, at a meeting of Unit Owners duly called for such purpose, may elect to sell the Condominium Property, as a whole, or to withdraw the Condominium Property from the provisions of these Bylaws, and said Declaration, and to terminate the same. The interest of any Unit Owner of the minority of _____ percent (_____%) or less not voting in favor of such action shall be subject to the right of any of the Unit Owners voting in favor thereof, or of the Association on behalf of those Unit Owners voting in favor thereof, to purchase such dissenting Unit Owner's interest at its then fair market value as determined by an appraiser made by three (3) qualified real estate appraisers upon by the minority Unit Owner and those desiring to acquire his Unit. In the absence of agreement on the appraisers, the minority Unit Owner and those desiring to acquire his interest hereunder may each select an appraiser, and the two so selected shall select a third, and the fair market value, as determined by a majority of the three so selected, shall control. If either party shall fail to select an appraiser, then the one designated by the other party shall make the appraisal. In the event any condominium statute applicable to this project shall require a different procedure than provided for herein, then the requirements of that act shall govern and shall be observed as if incorporated herein.

Section 2. Termination. In the event the election is made to terminate these Bylaws and said Declaration and to withdraw the property from its status as a Condominium and from the application of any statute relating to condominiums, then upon the consummation of the purchase of dissenting Unit Owners' interests as herein provided, all of the Unit Owners and their respective spouses shall duly execute, acknowledge and record an instrument setting forth the facts and circumstances, waiving dower and homestead rights insofar as such rights affect the exclusive ownership of any Unit, and expressly declaring their intention to withdraw the Condominium Property from Chapter 5311 of the Ohio Revised Code. The instrument shall provide that titles to all Units shall thereby be conveyed and become vested in all the then Unit Owners of the elements as tenants in common, in the same proportions as such Unit Owners shall then own said common elements, subject, however, to the rights of any mortgagee or other person having a bona fide lien of record against any Unit, unless such lienholders shall consent in writing to the transfer of its lien to the appropriate Unit Owner's undivided interest in the whole property resulting from the recording of such instrument. In the event any

condominium statute applicable to this project shall provide a different procedure than the one herein set forth, then the provisions of that act shall be observed as if incorporated herein.

ARTICLE IX GENERAL PROVISIONS

Section 1. Books and Records. The Association shall keep correct and complete books and records of account, specifying the receipts and expenditures relating to the Common Areas and Facilities and other common receipts and expenses, together with records showing the allocation, distribution and collection of the common profits, losses and expenses among and from the Unit Owners, minutes of the proceedings of the Unit Owners and the Board of Managers, and records of the names and addresses of the Unit Owners, their respective percentages of interest in the Common Areas and Facilities, and their mortgages.

Section 2. Ratification. All present or future Unit Owners or tenants or their employees shall be subject to the terms of the Declaration, the Bylaws, the Condominium Act, and such rules and regulations as the Board may reasonably adopt for the use of the Common Areas and Facilities. The mere acquisition or rental of any of the Units located within the Condominium Property described in the Declaration, or the mere act of occupancy of any of said Units, will constitute acceptance and ratification of the Declaration, these Bylaws, and said rules and regulations.

Section 3. Service of Notices on Devisees, Heirs at Law and Personal Representatives. Notices required to be given to any devisees, heirs at law or personal representatives of a deceased or incompetent Unit Owner may be delivered either personally, by mail, or by telegram, to such person at his, her or its address appearing on the records of the court wherein the estate of such deceased Unit Owner is being administered, or to the last address which has been provided to the Association by said devisees, heirs at law or personal representatives.

Section 4. Enforceability of Covenants. The invalidity of any covenant, restriction, condition, Limitation, or any other provision of these Bylaws, or any part of the same, shall not impair or affect in any manner the validity or enforceability of the rest of these Bylaws.

Section 5. Rule Against Perpetuities. If any of the privileges, covenants or rights established by these Bylaws shall be unlawful or void for violation of the rule against perpetuities or some analogous statutory provision, the rule restricting restraints and alienation, or any other statutory or common law rule imposing time limits, then such provision shall continue only until twenty-one (21) years after the death of the survivor of the now living descendants of the United States Senator representing the State of Ohio, the Honorable _____ [name] .

Section 6. Conflict Between Declaration and Bylaws. In the event of a conflict between any provision of the Declaration and a provision of these Bylaws, it is hereby agreed that the provisions of the Declaration shall prevail and apply.

Section 7. Construction of Provisions. The provisions of these Bylaws shall be liberally construed to effectuate their purpose of creating a uniform plan for the development and operation of the Condominium Property as a highly desirable residence.

Section 8. Amendment of Bylaws. These Bylaws may be amended or modified at any time, by action or approval of the Unit Owners to which appertain _____ percent (_____%) or more of the voting power, except the Bylaws affecting the rights or interests of the Declarant or its agent shall not be amended or modified without the prior written consent of the Declarant; provided, further, amendments may be made to these Bylaws by the Declarant for the reasons as provided herein or to correct scrivener's errors or other inadvertent errors as set forth herein (or in the Declaration or for the reasons set forth in Article XV of the Declaration). Any amendments to these Bylaws shall be in writing and shall be effective from the time a certificate setting forth such modification or amendments is

delivered for recording to the Recorder of _____ [county] County.

IN TESTIMONY WHEREOF, the undersigned, officers of the Association, have caused these Bylaws to be duly adopted on or as of the _____ [day] day of _____ [month] _____ [year] .

SMITH COURT CONDOMINIUM

UNITOWNERS ASSOCIATION

By: _____

[name and title]

STATE OF _____ [state])
COUNTY OF _____ [county]) SS:

BEFORE ME, a Notary Public in and for said County and State, personally appeared SMITH COURT, an Ohio limited liability company, by _____ [name] , its _____ [title] , who acknowledged that he did sign the foregoing instrument for and on behalf of said limited liability company, being thereunto duly authorized, and that the same is his free act and deed individually and as such member and the free act and deed of said limited liability company.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed my official seal at _____ [city] , _____ [state] , this _____ [day] day of _____ [month] _____ [year] .

[Notary Public]

This Instrument Prepared by:



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Current Legal Forms for Real Estate

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Current Legal Forms for Real Estate
Chapter 20 REAL ESTATE ENTITIES

Part IV. Forms

H. CONDOMINIUMS AND HOMEOWNERS ASSOCIATION

24-20 Current Legal Forms for Real Estate FORM 20.72

AUTHOR: by Stephen E. Pigott and Harold O. Maxfield, Jr.

FORM 20.72 Disclosure statement--Ohio

COMMENT

In several jurisdictions, in addition to requirements concerning the recording of a declaration and bylaws before a condominium is established, a disclosure statement must be used. In some states, the disclosure statement and/or the public report must be filed with a governmental agency. Ohio does not require the filing of the disclosure statement. The regulations governing such approval serve the same purpose as similar Securities and Exchange Commission prospectus requirements--namely, protection of the public. Condominium offering requirements exist in most jurisdictions.

FORM

SMITH COURT CONDOMINIUMS

_____, Ohio

DISCLOSURE STATEMENT

Introduction

SMITH COURT CONDOMINIUMS (the "Condominium") constitutes condominium property under Ohio Revised

Code Chapter 5311, as amended (the "Ohio Condominium Act") and this Disclosure Statement is provided to prospective purchasers of Units in the Condominium in compliance with the Ohio Condominium Act. This Disclosure Statement is intended to be a fully and accurate presentation of all material circumstances or features affecting the Condominium, without the omission of any material facts or the inclusion of any untrue statement of a material fact. It is requested and encouraged that each prospective purchaser of a unit carefully read this Disclosure Statement.

In addition to the information furnished in this Disclosure Statement, copies of the original condominium instruments are available for review at the offices of the Condominium, as required by the Ohio Condominium Act. The Condominium instruments (the "Condominium Instruments") include the Declaration of Condominium Ownership of the Condominium, as amended (the "Declaration") and the accompanying drawings, as amended (the "Drawings"), the Bylaws of the Smith Court Condominium Unit Owners' Association (the "Bylaws"), and any other documents, contracts or instruments establishing ownership of or exerting control over the condominium property or any unit.

THE CONDOMINIUM INSTRUMENTS ARE BINDING AND LEGAL DOCUMENTS IMPOSING RIGHTS AND OBLIGATIONS UPON THE PARTIES. SHOULD THEY NOT BE CLEARLY UNDERSTOOD, THE PROSPECTIVE PURCHASERS ARE TO SEEK COMPETENT LEGAL ADVICE.

This Disclosure Statement is intended to be relied upon only by prospective purchasers of Units in the Condominium who purchase their units from the Developer. Prospective purchasers should rely only upon the information, data, or representations referred to in this Disclosure Statement or contained in the various Condominium Instruments described above. No person has been authorized by Smith Court, Ltd. (the "Developer") to make any representation which is not expressly contained in this Disclosure Statement or in any of the other Condominium Instruments. This presentation may not be changed or modified orally, but only in a writing signed by the Developer.

The information regarding the Condominium that is required to be furnished to the purchaser of a Unit has been assembled in this Disclosure Statement in a manner which is intended to be informative and useful. The Disclosure Statement includes both a narrative statement and attached Exhibits. The narrative statement provides an explanation of the significant features of the Condominium, as well as additional information of interest to prospective purchasers. The exhibits include projections and other estimates which should be closely reviewed by prospective purchasers.

Unless otherwise defined herein, the terms used in this Disclosure Statement should be interpreted to have the meanings given to them in the Declaration and Bylaws. In case of any inconsistency between this Disclosure Statement and the Declaration or Bylaws, the Declaration and Bylaws shall control.

NATURE OF CONDOMINIUM FORM OF PROPERTY OWNERSHIP

The term "condominium" refers to a form of property ownership which combines features of individual home ownership with features of apartment or other multi-family living. The owner of a residential condominium unit ("Unit Owner") is the sole owner of the portion of the single-family residential building that contains his residence or Unit, and has exclusive use of his residence or Unit, in the same manner that a tenant would have exclusive use of a leased apartment.

However, in contrast to the Owner of a single-family home, who owns his yard and driveway, the owner of a Condominium Unit is one of many co-owners, the lawns, roadways and sidewalks, and all other parts of the condominium development necessary or convenient to its existence, maintenance and safety, or normally in common use. Such common owned portions are referred to as "Common Areas and Facilities." All Unit Owners share the right to use the Common Areas and Facilities, as would be the case in an apartment building, except certain portions of the Common Areas and Facilities designated as Limited Common Areas are designated for the exclusive use of the owner of the Unit near which they are physically located. In this Condominium, these areas include the areas surrounding the

Unit such as driveways and sidewalks, and decks and patios, if any. The Unit Owners also share the right to manage the Common Areas and Facilities, subject to the terms of the Declaration and Bylaws, and share the obligation to pay the expenses of operating, maintaining, repairing and replacing the Common Areas and Facilities (the "Common Expenses") and Limited Common Areas, save and except that some of such expenses as they relate to the Limited Common Areas shall be borne solely by the Unit Owner to which those Limited Common Areas pertain as enumerated in Article III of the Declaration.

Each Unit Owner owns an undivided, fractional fee simple interest in all of the Common Areas and Facilities. This fractional interest is expressed as a fraction or its percentage equivalent and, in accordance with the Declaration, is determined by the Developer on the basis of par value assigned to the Unit. As later discussed, each Unit (which Unit consists of a "Single-Family Building" as more fully described in the Declaration), shall be assigned the same par value.

Each Unit Owner receives and is responsible for paying an individual real estate tax bill just as would the owner of a single-family home, but the real estate taxes are based upon the assessed value of the Unit and the assessed value of the Unit's percentage interest in the Common Areas and Facilities. Each Unit Owner may mortgage his Unit, together with its percentage interest in the Common Areas and Facilities. In addition, each Unit Owner may sell his Unit to anyone without restrictions or limitations except for those certain restrictions or limitations set forth in the Declaration or which are imposed by rules and regulations adopted by the Unit Owners' Association.

The Condominium is an expandable condominium, which means that in the Declaration, the Developer has reserved the right to expand the Condominium Property by adding a parcel of vacant land more fully described below and buildings and improvements which may be constructed thereon from time to time in the future. The current construction, development and sales program now being undertaken by the Developer is referred to in this Disclosure Statement as "Phase I." Future expansion may happen on the land described in Exhibit B-1 which is referred to in this Disclosure Statement as "Phase II."

The remainder of this Disclosure Statement follows generally the specific requirements of *Section 5311.26 of the Ohio Revised Code*, and each portion of this Disclosure Statement bears the alphabetical and numerical designations of that Section 5311.26.

A. NAME AND ADDRESS OF THE CONDOMINIUM DEVELOPMENT AND OF THE DEVELOPER.

The name of the Condominium Development is the "Smith Court Condominiums." The Condominium will be an expandable residential condominium situated along a new private roadway to be constructed and called Smith Court, ending in a cul-de-sac. Smith Court will run north off of Route 42. The Developer of the Condominium is Smith Court, Ltd., an Ohio limited liability company. The Developer's address is _____ [address] , _____ [city] , _____ [state] and its telephone number is _____.

The Developer is the manager of the actual construction and development of the Condominium, and will initially manage the Condominium on a month-to-month basis until Unit Owners other than the Developer control the Unit Owners' Association to be established.

B. GENERAL NARRATIVE DESCRIPTION OF CONDOMINIUM DEVELOPMENT.

Phase I of the Condominium includes fifteen (15) parcel(s) of land zoned for single-family purposes, fifteen (15) parcels consisting of approximately 4.33 acres of land and zoned to allow the construction thereon of Single-Family Buildings on which the Developer has approval to construct fifteen (15) Single-Family Buildings or Units. The Units shall be either a ranch plan consisting of approximately 1,824 square feet or a two-story plan consisting of approximately 2,272

square feet. In either case, they will be of frame construction, with vinyl siding and constructed with basements. Under the Ohio Condominium Act, the Condominium cannot be formed until at least some of the Units in it have been substantially completed. Therefore, the Condominium will be created in stages as sales and construction of Units are completed. As Units are constructed and added, the Condominium Instruments will be amended to include such improvements so constructed. At the time the Condominium Instruments are first recorded, it is anticipated that just 3 or 4 of the Units will be substantially completed and described in the Drawings to be filed. As additional Units are constructed, the Condominium Instruments will be amended accordingly.

Phase II may consist of forty (40) additional Single-Family Unit on approximately 16.04 acres of land located across the street from Phase I. Phase II is zoned single-family and the Developer has not determined the size, architectural design or building materials which may be utilized.

The numerical designation, location, layout, dimensions, number of rooms in each Unit and the location of the immediate Limited Common Areas to which each Unit has access shall be graphically shown on the Drawings, or shall be set forth elsewhere in the Declaration and/or the exhibits thereto. The Limited Common Areas to the Units are as follows: driveways, sidewalks, patios and decks (if any), and planting beds adjacent to the structure. In addition to the Limited Common Areas, the Common Areas and Facilities and for use by all the Unit Owners.

Unit Owners will share ownership of the Common Areas and Facilities and will share the responsibility for paying all of the Common Expenses relating to the Common Areas and Facilities. The option to expand the Condominium extends for a seven (7) year period from the time the Condominium is created, unless Unit Owners vote to extend that time. There is no provision for the merger of the Condominium with any other condominium.

The initial base price range at which each Unit to be located in Phase I of the Condominium is listed on Exhibit A to this Disclosure Statement. However, economic circumstances may result in price changes from time-to-time after the initial base price list is established. Therefore, prospective purchasers are to contact the Developer to make certain that the price schedule contained in this Disclosure Statement is effective as of the date it is received by the prospective purchaser. Changes in the standard features of the Units will affect the base price.

The portion of the Condominium that is to be exclusively owned by a Unit Owner is called a "Unit." Each Unit Owner will own the entire "fee simple" interest in the Unit that the Unit Owner purchases. A fee simple interest in a Unit is the full legal title to that Unit. Each Unit consists of the single-family building, including the attached garage. The precise location of each Unit is shown on the Drawings.

C. STATUS OF CONSTRUCTION, ZONING, SITE PLAN, ETC. AND THE ACTUAL OR SCHEDULED DATES OF COMPLETION OF THE UNITS AND OTHER COMMON AREAS AND FACILITIES.

As of the date of this Disclosure Statement, the status of construction of the Units is that none have been started but they are in the planning stages. The Condominium Property is presently zoned for single-family residences under the ordinances of the City of Wadsworth, Ohio. The Developer has not received notice of violation of any federal, state or local statutes, ordinances or regulations applicable to the Condominium, and to the best of its knowledge it is in compliance with the requirements of such governmental authorities and its statutes, ordinances and regulations.

The estimated schedule dates of completion of the Condominium is as follows: the first four (4) Units should be done by January 31, _____ [year] .

D. FINANCING.

As of the date of this Disclosure Statement, there is no financing offered by or through the Developer to purchasers of Units in the Condominium. Upon request, Developer will be able to suggest a lending institution which may, but is not obligated to, finance a portion of the purchase price of Units in the Condominium. Such a suggestion will not obligate or commit any purchaser to obtain financing for such source and each Purchaser is free to obtain financing wherever financing is available.

E. DESCRIPTION OF WARRANTIES.

The Developer will furnish to each Purchaser of a Unit, but to no other person or party, certain limited warranties, solely and only to the extent such warranties are required by Section 5311.25 of the Ohio Condominium Act. Those warranties, which will be included in the written sales agreement between the Developer and the purchaser(s) of each Unit, are a two-year warranty covering the full cost of labor and materials for any repair or replacement of roof and structural components, and mechanical, electrical, plumbing and common service elements serving the Condominium Property or Additional Property as a whole, occasioned or necessitated by a defect in material or workmanship and a one-year warranty covering the full cost of labor and materials for any repair or replacement of structural, mechanical and other elements pertaining to each Unit, occasioned or necessitated by a defect in material or workmanship, commencing as follows:

(a) The two-year warranty shall commence for property submitted by the original Declaration on the date the deed or other evidence of ownership was filed for record following the first Sale of a Condominium Ownership Interest (defined as the execution by both parties of an agreement for the conveyance or transfer for consideration of a fee simple interest in a Unit) in the Condominium Property, and for any Additional Property submitted by Amendment to the Declaration, on the date the deed or other evidence of ownership is filed for record following the sale of the first Condominium Ownership Interest in the Additional Property; in either case to a purchaser in good faith for value.

(b) The one-year warranty shall commence on the date the deed or other evidence of ownership is filed for record following the first sale of a Condominium Ownership Interest to a purchaser in good faith for value.

The limited warranties given by the Developer in the written sales agreement, which will include those set forth above, are the only warranties, expressed or implied, made by the Developer to the purchaser of a Unit with respect to the construction or physical condition of the Condominium Property, including, without limitation, the Unit that is the subject of the written sales agreement, and any Additional Property and improvements thereon. None of the warranties set forth above cover repairs or replacements necessitated or occasioned by ordinary wear and tear or by the negligent or wanton acts of any Unit Owner, occupant, guest or invitee, or for any reason whatsoever other than by a defect in material or workmanship. All warranties made to the Developer that exceed the period specified in the warranties described above and included in the written sales agreement with respect to any part of the Units or Common Areas and Facilities shall be assigned to the Unit Owners, if assignable.

F. PROJECTION OF ANNUAL EXPENDITURES NECESSARY TO OPERATE AND MAINTAIN THE COMMON AREAS AND FACILITIES AND THE ESTIMATED MONTHLY COST PER UNIT.

The Developer has prepared and has attached to this Disclosure Statement on Exhibit B a two-year projection of annual expenditures necessary to operate and maintain the Common Areas and Facilities of the Condominium, specifically stating the assumptions and basis of the projection. The annual and monthly projections will be updated every six (6) months.

The projections are merely estimates based on limited available information and cannot be viewed as assurances or representations that actual expenditures will not exceed projected figures. The actual Common Expenses will be

determined by operating experience and by services contracted for, charges made by, and decisions of, the Board of Managers of the Association. These matters are in many respects beyond the control of the Developer and could materially affect the projections from the date of this Disclosure Statement. Updated projections will cover at least two (2) years.

Based on the projections set forth on Exhibit B, attached hereto, the estimated monthly cost per Unit of annual expenses necessary to operate and maintain the Common Areas and Facilities (exclusive of Limited Common Areas and Facilities) is _____ Dollars (\$ _____) per month for the first year and _____ Dollars (\$ _____) per month for the second year. Each Unit's annual share of Common Expenses is calculated on the basis of the Unit's percentage interest in the Common Areas and Facilities which shall be proportional to the par value. In this instance, because the primary Common Areas and Facilities for which expenses will be incurred exclude Limited Common Areas and Facilities appurtenant to a Unit (which Limited Common Areas and Facilities are maintained by each Unit Owner, not by the Association) and therefore consist primarily of the private roadway and lift station facility, each Unit shall have the same par value of one (1) assigned to it. The percentage interest of a Unit will therefore be the percentage equivalent of one (1) divided by the total number of Units.

The Association does not own any real estate, and will not be liable for real estate taxes. Real estate taxes will be levied individually against each Unit, and will be the responsibility of each Unit Owner. Association assessments will not include amounts to pay these taxes.

G. REPORT BY DEVELOPER STATING THE AGE, CONDITION AND DEVELOPER'S OPINION OF THE REMAINING USEFUL LENGTH OF STRUCTURAL ELEMENTS AND MECHANICAL AND SUPPORTING SYSTEMS AND DEVELOPER'S ESTIMATE OF REPAIR AND REPLACEMENT COSTS PROJECTED FOR FIVE YEARS FROM RECORDING OF THE DECLARATION.

Not applicable to this Condominium.

H. MANAGEMENT OF THE CONDOMINIUM DEVELOPMENT.

1. **Formation of Association.** The Association will be created as an Ohio nonprofit corporation, for the purpose of managing and maintaining the Condominium. Each Unit Owner is a member of the Association and will continue to be a member so long as such ownership continues. The Association shall manage the Condominium and the affairs of the Condominium with the right, however, to delegate its authority to a management company. The Association shall be established by the Developer not later than a date the deed or other evidence of ownership is filed for record following the first sale of a Unit in the Condominium. Until the Association is established, the Developer shall act in all instances where action of the Association or its officers is authorized or required by law or the Declaration.

2. **Voting Rights.** Each purchaser, upon acquisition of a fee simple title interest ("Condominium Ownership Interest") in a Unit within the Condominium automatically becomes a member of the Association. Such membership shall automatically terminate upon the sale or the disposition by such member of his Condominium Ownership Interest, at which time the new owner of such Unit automatically becomes a member of the Association. Each member constituting the entire Condominium Ownership Interest in the Unit shall be entitled to exercise in person or by proxy that percentage of the total voting power of the Association which is equivalent to the percentage interest of such member's Unit in the Common Areas and Facilities. If two or more persons, whether fiduciaries, tenants in common or otherwise, own individual interests in the Condominium Ownership Interests, each shall be entitled to exercise the proportion of the voting power for such Unit as is equivalent to such person's proportionate interest in the Condominium Ownership Interest of such person.

3. Responsibility of the Unit Owners' Association.

(a) Management. The administration, management, maintenance, repair, alterations and improvements of the Condominium Property shall be the responsibility of the Association; provided, however, that the Association may delegate all or any portion of its authority to discharge such responsibility as hereinafter provided.

(b) Common Areas. Except as otherwise expressly provided herein or in the Declaration or Bylaws, the Common Areas and Facilities and driveways (excluding the other Limited Common Areas and Facilities) are required to be maintained in good repair and condition by the Association and the cost thereof shall be Common Expenses.

(c) Improvements Within Units. All maintenance, repairs and replacements to the Units are required to be made by the Owners of the Units, respectively, at their own expense. However, excluding the driveways, Limited Common Areas designated for the exclusive use of the Owner of a Unit, must be maintained, repaired and replaced solely by such Unit Owner. The Board of Managers has the right of access to any Unit for the purpose of making any repairs or replacements to any of the Common Areas and Facilities contained in such Unit or to remedy any condition which would result in damage to any other Unit or to the Common Areas and Facilities, or for the purpose of complying with any laws, orders, rules or regulations of any governmental body having jurisdiction thereof. In addition, if a Unit or a Limited Common Area, excluding the driveways, designated for the exclusive use of a Unit Owner becomes impaired, in a neglected state or otherwise in need of repair or restoration and if the Unit Owner fails after notice from the Association to correct the condition, the Association may but is not obligated to correct the situation at the expense of the responsible Unit Owner.

(d) Bylaws. The Bylaws of the Association provide that the Board of Managers will consist of three (3) persons, each of whom shall be the owner of a Unit or the spouse of such Owner elected by the Owners of the Units. The term of office of the members of the Board of Managers is three (3) years and members of the Board of Managers serve without compensation. It is anticipated that the three (3) members of the Board of Managers will be Perry M. Troyer, Bernice L. Dennison and Timothy D. Stutzman. The Bylaws provide that the officers of the Association will include a President, Vice President, Secretary and a Treasurer, each of whom is elected by and is a member of the Board of Managers. Officers serve without compensation. The officers are Perry M. Troyer, President, Bernice L. Dennison, Vice President and Timothy D. Stutzman, Secretary-Treasurer.

(e) Rights of the Developer. Pursuant to the provisions of the Bylaws and the Declaration, the Developer presently possesses all of the powers, rights, duties and functions of the Association and of the Board of Managers. Accordingly, through the exercise of this authority, the members of the Board of Managers and the officers of the Association have been designated by the Developer. The Developer will continue to have the right to exercise the powers, rights, duties and functions of the Association and of the Board of Managers until the earlier of: (i) five (5) years from the date of the establishment of the Condominium Owners' Association; or (ii) thirty (30) days after the sale and conveyance of Condominium Ownership Interests to which appertain _____ percent (_____%) of the undivided interests in the Common Areas and Facilities to purchasers in good faith for value. Prior to the earlier of the aforesaid, the Developer shall under certain instances as provided in the Declaration provide for certain minority representation on the Board of Managers, but not majority control.

(f) Delegation of Authority. The Developer, prior to formation of the Association, and the Association thereafter may, but shall not be required to, delegate all or any portion of its authority and responsibilities to a manager, managing agent, or managing company (herein called the "Managing Agent"). Such delegation may be evidenced by a management agreement which shall provide for the duties to be performed by the Managing Agent and for the payment to the Managing Agent of a reasonable compensation as a common expense. Upon the expiration of each management agreement the Association may renew said agreement or enter into a different agreement with a different Managing Agent. The Managing Agent, whether selected by the Developer or the Association, may be an entity owned, in whole

or in part, associated with in whole or in part or in any other manner connected or associated with any owner, partner, agent, contractor or employee of Developer without in any manner restricting, limiting or affecting the validity of said agreement; provided, however, that any contract entered into by the Developer with a Managing Agent shall be in accordance with the provisions of *Section 5311.25(D) of the Ohio Revised Code* which limits the duration of any management contract entered into prior to the assumption of control of the Association by the Unit Owners to one year following such assumption of control, unless such contract is renewed by a vote of the Unit Owners. The holders of first mortgages on Units shall be given notice by the Association of the name and address of any new management company at least thirty (30) days prior to the employment of said new management company. In the event the Association decides or elects to terminate the employment of a Managing Agent or management company with the intent to manage the Condominium itself and no longer employ a Managing Agent or management company, and the terms of any first mortgage on a Unit provides that said termination shall be a default sufficient to accelerate and immediately call due and payable the entire principal balance of said mortgage, that said termination must be approved by said mortgagee(s) prior to the effective date of the termination.

4. Condominium Instruments --Binding Legal Documents-- Alterations or Amendments. The Condominium Instruments are binding legal documents. All amendments to the Declaration to change percentages of interest in Common Areas and Facilities must be approved by all Unit Owners, except that the Developer reserves the right in the Declaration to amend the Declaration to change percentages of interest, without the consent of the Unit Owners, upon the addition of Units to the Condominium Property.

All other amendments to the Declaration or the Bylaws may be made only by the affirmative vote of Unit Owners entitled to exercise not less than _____ percent (_____%) of the voting power of the Association, except that the Developer reserves the right to amend the Declaration, without the consent of the Unit Owners, in connection with the addition of Additional Property and Units thereon to the Condominium, and except that no amendment shall affect the rights of the Developer under the Declaration and the rights of bona fide first mortgagees until the written consent to such amendment has been obtained from the Developer and if required, from such mortgagees.

I. NO MANAGEMENT AGREEMENT.

The Association has not entered into any management contract or other agreement affecting the operation, use or maintenance of or access to all or part of the Condominium. As mentioned, it is the Developer's present intention to manage the Condominium on a month-to-month basis until the Unit Owners meet and determine who will manage the Association's affairs, and on what basis.

J. PURCHASER'S RIGHTS.

Set forth on Exhibit C attached hereto, is a statement in twenty-point boldface type of the purchaser's right to review the Condominium Instruments, to void the contract for the purchase and sale of the Unit which is the subject of such contract, the conditions for the return of the purchase deposit made by the purchaser, and the statement of the rights of purchasers under Section 5311.27 of the Revised Code.

K. ESTABLISHMENT OF RESERVE FUND FOR REPAIR OR REPLACEMENT OF COMPONENTS OF CONDOMINIUM AREAS AND FACILITIES.

The Bylaws of the Association provide that the Association shall build up and maintain a reasonable reserve for contingencies and replacements, to finance the cost of repair and replacement of the components of the Common Areas and Facilities. The projected Common Expenses set forth on Exhibit B to this Disclosure Statement include a reserve

for repairs and replacements. In addition, the Association may assess each Unit Owner for payments to be made into the reserve account on the basis of the budgeted or actual costs.

L. SIGNIFICANT TERMS OF ANY ENCUMBRANCES, EASEMENTS, LIENS, AND MATTERS OF TITLE AFFECTING THE CONDOMINIUM DEVELOPMENT.

Attached as Exhibit D to this Disclosure Statement is a list of any encumbrances, easements, liens, and matters of title affecting the Condominium Development. To the best of the Developer's knowledge, none of the items listed on Exhibit D to this Disclosure Statement constitutes an impairment to the use and enjoyment of the common development as a residential property. The mortgages referred to on Exhibit D to this Disclosure Statement will be released as to each Unit and its percentage of interest in the Common Areas and Facilities at the time of the sale of each such Unit and interest in the Common Areas and Facilities.

M. ESCROW DEPOSITS.

Any deposit or down payment made in connection with the sale will be held in trust or escrow until delivered at closing, returned to or otherwise credited to the purchaser or forfeited to the Developer. If a deposit or down payment of _____ Dollars (\$_____) or more is held for more than ninety (90) days, interest at the rate of _____ percent (_____%) per annum for any period exceeding ninety (90) days shall be credited to the purchaser at closing or upon return or other credit made to the purchaser, or added to any forfeiture to the Developer. Deposits and down payments held in trust or escrow shall not be subject to attachment by creditors of the Developer or of the purchaser.

N. RESTRICTIONS ON ALIENABILITY.

No Unit shall be rented by the respective Unit Owner thereof for transient or hotel purposes, which shall be defined as (i) rental for any period less than twelve (12) months, or (ii) any rental if the occupants of the Units are provided customary hotel service, such as room service for food and beverage, maid service, or the furnishing of laundry and linen and bellboy service. Other than the foregoing obligations, the Unit Owners shall have the right to lease the same, provided that said lease is made subject to the covenants and restrictions in the Declaration, the Bylaws and the Rules, as amended.

O. LITIGATION.

There is no present litigation concerning the Condominium.

P. ATTACHED EXHIBITS.

As an integral part of this Disclosure Statement, there are attached hereto the following Exhibits, which are incorporated herein and made a part hereof:

Exhibit A	-	Price List of Units
Exhibit B	-	Projection of Costs and Expenses
Exhibit C	-	Statutory Rights of Condominium Purchasers
Exhibit D	-	List of Title Encumbrances



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Current Legal Forms for Real Estate
Chapter 20 REAL ESTATE ENTITIES
Part IV. Forms

H. CONDOMINIUMS AND HOMEOWNERS ASSOCIATION

24-20 Current Legal Forms for Real Estate FORM 20.73

AUTHOR: by Stephen E. Pigott and Harold O. Maxfield, Jr.

FORM 20.73 Agreement for sale of real property

COMMENT

The following agreement is for the sale of a new condominium in the State of Ohio. It includes many of the typical provisions that one would find in a purchase agreement (i.e., price, closing date, title insurance, etc.). It also includes some provisions that are specific to the offering of a new condominium unit. It provides for the purchase of an individual interest in the common area. It includes a reference to the governing condominium documents and provisions. It provides the buyer with the statutory warranty regarding the condition of the property. This warranty is required by Ohio law.

FORM

Smith Court, Ltd.
Agreement for Sale of Real Property

1) GENERAL TERMS: Smith Court, Ltd., ("SELLER") agrees to sell and

_____ [name] ("BUYER") agrees to purchase upon the following terms the property
known as Unit Number

_____ and

_____ percent (
 _____ %) in the Common Areas and Facilities appurtenant to the Unit.

INCLUDED IN THE SALE: The property shall include the land, with all improvements, fixtures and the standard package for the

_____ and the items on Exhibit A and B and on Exhibit C. SELLER warrants that all such items are owned free of liens and encumbrances.

2) PAYMENT:

BUYER shall pay SELLER	\$	_____

When BUYER signs the Agreement	\$	_____

_____ cash		_____
_____ check		_____
Balance of down payment to be deposited in escrow	\$	_____

Mortgage loan to be obtained by BUYER	\$	_____

_____ Conven-		_____
tional		
_____ FHA		
_____ VA		
_____ Other		

3) DEPOSIT: In the event of a dispute over any monies held in trust by SELLER, SELLER shall retain the deposit until:
 (1) BUYER and SELLER have settled the dispute; or (2) disposition has been ordered by a court.

4) MORTGAGE: This transaction is contingent upon BUYER obtaining a commitment and loan approval acceptable to SELLER for the above described mortgage loan from a lending institution in the amount set forth above. BUYER agrees to apply in writing for the loan within five (5) weekdays excluding federal holidays after the date of Acceptance, to cooperate fully with the lender's request for information and to good faith efforts to obtain the loan. If BUYER's loan application is neither approved nor denied within

_____ [number] days after the date of Acceptance, then this Agreement shall be null and void.

5) CASH PAYMENT FOR EXTRAS: BUYER shall pay to SELLER a non-refundable payment of

_____ Dollars (\$

_____) for the extras included in Exhibit A and Exhibit B.

6) DEED: The Deed will be in the names of

_____ [names]. SELLER shall furnish at SELLER=S expense, a general warranty deed free from all liens and encumbrances except reservations, restrictions, easement conditions, zoning ordinances, legal highways if any, of record, taxes and assessments not yet due.

7) ESCROW: BUYER and SELLER agree to deposit in Escrow with SMITH COURT, LTD., and/or assigns, all monies, and documents necessary to close this sale within ten (10) days of substantial completion of the Unit. In the event property does not transfer by the above date, BUYER shall pay to SELLER

_____ Dollars (\$

_____) per day in interest up to and including the day of title transfer. In the event BUYER does not close within fourteen (14) days of substantial completion, the SELLER reserves the right to null and void the contract and place the property back on the market and retain all funds that have been deposited with SELLER.

8) SELLERS CLOSING and POSSESSION: Subject to Paragraph 7 above, BUYER to close with SELLER one day after SELLER receives all funds due and utilities have transferred. Closing will take place at

_____ [address],

_____ [city],

_____ [state], at which time SELLER will review with BUYER the Occupancy form, Builder Warranty and all other pertinent information. SELLER agrees to deliver possession to BUYER at this CLOSING, provided that SELLER has received all funds due and utilities have transferred.

9) TITLE: SELLER agrees to pay for a title search and one half of insuring premium for an Owner's Title Insurance Policy. BUYER agrees to pay the balance of the premium for the Owner's Title Insurance policy and costs or charges the Lender may require for a Lender's Title Insurance Policy. Closing Costs: In the event BUYER, BUYER=S agent or BUYER=S lending institution chooses their own Title Company other than

_____, then BUYER will be responsible for paying all SELLER=S closing costs, over and above the sums below, one-half (1/2) of the Escrow Fee not to exceed \$50.00, Title Search Fee

_____ Dollars (\$

_____), County Transfer Tax paid by SELLER, Deed Preparation

_____ Dollars (\$

_____), Mortgage Cancellation

_____ Dollars (\$

_____. SELLER agrees to pay above noted fees only.

10) TAXES AND ASSESSMENTS: Condominium Association assessments and taxes and certified assessments shall be pro-rated as of the date of closing. The pro-ration shall be based on the latest available tax duplicate. SELLER represents that SELLER has received no notice of any pending, proposed or uncertified special assessments, unless otherwise disclosed in this Agreement. BUYER understands this pro-ration may be based on land only. SELLER agrees to reimburse BUYER directly outside of escrow for any increase in valuation.

11) GOVERNING DOCUMENTS: This sale and purchase, together with the percentage interest in the Common Areas shall be subject to:

(i) the Declaration of Condominium of Smith Court (the "Declaration") and any amendments thereto made pursuant to the authority granted therein or reserved herein;

(ii) the Bylaws of the Smith Court Condominium Unit Owners Association (the "Bylaws") and any amendments thereto made pursuant to the authority granted therein or reserved herein;

(iii) the Smith Court Condominium Drawings (the "Drawings"), and any amendments thereto made pursuant to the authority granted therein or reserved herein;

(iv) Chapter 5311 of the Ohio Revised Code (the "Act"); and

(v) the matters set forth in the Disclosure Statement ("Disclosure Statement"), required by the Act and furnished to the BUYER.

12) INSPECTION: BUYER shall have the right to inspect the property, with any qualified professional(s) BUYER chooses, at BUYER's sole election and expense, within fourteen (14) days after Acceptance, or within five (5) days after completion of house. If BUYER is not satisfied with the inspection report, then SELLER may either (1) correct the unsatisfactory conditions or (2) void this Agreement whereupon earnest monies on deposit shall be returned to BUYER. If BUYER does not inspect, inspection is waived and BUYER takes the property AS IS. SELLER will provide a walk-through inspection with the field Supervisor when the house is complete.

13) LIMITED WARRANTY:

A. Statutory Limited Warranty. Solely and only to the extent that such warranties are required by the provisions of Division (E) of *Section 5311.25 of the Ohio Revised Code*, SELLER hereby furnishes, solely to BUYER, and to no other person or party, a two-year warranty covering the full cost of labor and materials for any repair or replacement of roof and structural components, and mechanical, electrical, plumbing and common service elements servicing the Condominium Property or Additional Property, as defined in the Declaration, as a whole (it is understood that such term includes Common Areas and Facilities), occasioned or necessitated by a defect in material or workmanship and a one-year warranty covering the full cost of labor and materials for any repair or replacement of structural, mechanical, and other elements pertaining to the Unit being purchased by BUYER, occasioned or necessitated by a defect in material or workmanship, commencing as follows:

(1) The two (2) year warranty shall commence for property submitted by the original Declaration on the date the Deed or other evidence of ownership is filed for record following the sale of the first condominium ownership interest in the Condominium Property, and for any Additional Property submitted by amendment to the Declaration, on the date the deed or other evidence of ownership is filed for record following the sale of the first condominium ownership interest in the Additional Property, to a purchaser in good faith for value.

(2) The one-year warranty shall commence on the date the Deed is filed for record.

B. SELLER's Only Warranties. The limited warranties set forth above are the only warranties, expressed or implied, made by SELLER to BUYER with respect to the construction or physical condition of the Condominium Property, including, without limitation, the Unit. None of the warranties set forth above shall cover repairs or replacements necessitated or occasioned by ordinary wear and tear or by the negligent or wanton acts of any unit owner, occupant, guest or invitee, or for any reason whatsoever than by a defect in material or workmanship.

14) INSURANCE: The "risk of loss" shall remain with the SELLER until the closing date.

15) COMMISSIONS: Real Estate Broker commissions are involved in this transaction as follows:

_____ Dollars (\$

_____) to listing broker and

_____ Dollars (\$

_____) to selling broker. Commission to be paid on the following amount:

_____ Dollars (\$

_____).

16) EXHIBITS: Exhibits A, B and C are made a permanent part of this Agreement.

17) BINDING AGREEMENT: The term Acceptance means the signing and/or initializing of this Agreement by the latter of the parties to do without making material change. Upon Acceptance, this offer shall become an Agreement binding to BUYER and SELLER, their heirs, executors, administrators, and assigns. This Agreement shall be made a part of or be used as the escrow instructions and shall be subject to the Escrow Agent's standard conditions of escrow acceptance not inconsistent herewith. The terms, covenants, conditions and provisions of this Agreement to be performed by SELLER shall survive the delivery and recording of the Deed.

Fax signatures constitute a valid signing of this Agreement.

BUYER DATE _____ [month]

_____ [day],

_____ [year]

—
[name]

—
[address]

SELLER DATE _____ [month]

_____ [day],

_____ [year]

—

[*name*]

[*address*]



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Chapter 20 REAL ESTATE ENTITIES

Part IV. Forms

H. CONDOMINIUMS AND HOMEOWNERS ASSOCIATION

24-20 Current Legal Forms for Real Estate FORM 20.74

AUTHOR: by Stephen E. Pigott and Harold O. Maxfield, Jr.

FORM 20.74 Mobile home park condominium--master deed and bylaws

COMMENT

This master deed (or declaration as it is called in some jurisdictions) converts an existing mobile home park into a condominium. Each mobile home is located on its individual lot and is not attached to any other mobile home. One of the special features of this mobile home condominium includes the transformation of the mobile homes from personalty to real property, permitting mortgage financing rather than installment loan financing.

An additional feature includes representation of the existing tenant-occupants on the condominium association board of directors. This is provided for in the bylaws of the condominium association.

A specific provision of the master deed frees the developer from paying assessments on the undeveloped plots in the mobile home park, until such time as certificates of occupancy are issued for the completed units. Easements of access are specifically granted to municipal, county, and state authorities for fire, police, and other protection, due to the extensive road network required by numerous mobile home lots.

The mobile home park:

The master deed establishes a condominium in a mobile home park. The development is broken down (but not legally subdivided) into separate plots. The plots are then leased to individual mobile home owners, pursuant to a real estate lease for a term of one year or more. The lessee would then purchase the mobile home and have it placed on his rented lot. The mobile home, being

personal property, is financed in the same manner as other personal property, by a secured installment loan. A security interest in the mobile home is perfected under Article 9 of the Uniform Commercial Code or other state laws, such as the motor vehicle law.

From the purchaser-tenant's perspective, this straight mobile home park arrangement has certain disadvantages when compared to purchasing a conventional house or condominium apartment. First, the financing of the mobile home, which, in this case, is treated as a motor vehicle, requires higher monthly payments. This is due to (1) the shorter term of the installment loan compared to the mortgage loan, and (2) the higher interest rate allowed on motor vehicle loans. A second disadvantage is nonownership of the land. Although some states have enacted laws to protect tenants from arbitrary eviction, a mobile home park tenant is usually subject to summary eviction proceedings. A failure to pay rent on leased land could result in a summary court ordered eviction sooner than a failure to pay an installment on a real estate mortgage. A third disadvantage is the practical problem of relocating the mobile home itself if there is an eviction. Modern mobile homes, in many cases, are substantially similar to prefabricated homes. The fact that these units are set, without wheels, on concrete blocks, and hooked up to underground utilities, makes them almost permanently affixed to the leased land.

Condominium:

In a condominium arrangement, a unit owner receives fee title to his unit, while sharing joint ownership as tenants in common with other unit owners in the common elements. In a conventional high-rise condominium, the boundaries of a unit might consist of the interior walls, floor and ceiling. The structural framework of the building, as well as water pipes, electric wiring and heating, ventilation and air-conditioning components would be common elements. Their maintenance is a common expense, assessed against all the units proportionately. The land upon which the condominium structure is located is often a common element also.

A mobile home park is a completely different arrangement. Each mobile home is located on a separate piece of land. If the underlying land is a common element, then the only property which makes up the unit is the mobile home itself. An alternative approach was used in the master deed here. The unit consists not only of the mobile homes, but also includes the specifically mapped-out lot upon which the unit is located. The fact that the lot is privately owned real property, rather than a common element, is emphasized by the fact that the unit owner is responsible for the lot's landscaping and maintenance. This is set out in the rules and regulations contained in the bylaws, which are annexed to the master deed.

The conversion of the mobile home park into a condominium causes several significant changes. Under state laws, the individual condominium unit is treated as real estate, rather than personalty. In the master deed here, the definition of "unit" includes the "residential dwelling," i.e., the mobile home, located on the lot. A precondition to the real estate status of the mobile home itself is that the unit owner also own the plot upon which the mobile home is located. Thus, where a tenant rents a lot from the developer, the tenant's mobile home remains his personalty. If the tenant opts to purchase the condominium unit, i.e., the plot which he rents, his mobile home will become part of the condominium unit, and thus real estate, upon his acceptance of the unit deed.

Because both the plot of land and the mobile home situated thereon are both realty, and designated as the condominium unit, the unit owner is able to obtain mortgage financing based on the total value of the home and land. (The previous installment loan was based only on the value of the mobile home.) Usually mortgage financing is for a longer term and lower interest rate than

installment loan financing. The ownership of the underlying land eliminates the requirement to pay rent. The monthly con-dominium assessment, although an additional charge, should be substantially lower than the land rent. The assessment covers the cost of maintaining the common elements, and does not include amounts to cover the landlord's return on investment or land and development costs.

Conversion to condominium:

Several states require substantial disclosure statements to be distributed to prospective purchaser as well as registration statements to be filed with state authorities upon conversion to a condominium. These include New York (an "Offering Statement" is filed with the Attorney General), California (disclosure forms are filed with the Department of Investment--Division of Real Estate), New Jersey (a "Prospectus" is filed with the Department of Community Affairs), and Virginia (an "Application for Registration" and "Public Offering Statement" are filed with the Real Estate Commission). A practitioner should carefully review and follow the disclosure and registration requirements of the local jurisdiction where the conversion is to take place.

Several states have enacted separate laws dealing with the protection of tenant rights in conversion situations. The laws generally apply to conversions to cooperatives as well as to condominiums. Again substantial disclosure statements and administrative filings may be required under local law. Whether tenants in a mobile home park are exempt from such laws is a question for local counsel or perhaps court interpretation.

Easements of access:

A specific easement is granted in favor of governmental agencies for purposes of providing police, fire, sanitation, and other services. Although the mobile home park condominium contains a relatively substantial road network, it is privately owned. This is a significant difference from a filed subdivision, where the roads and other public improvements are dedicated to the local municipality. In a subdivision, there is no question that the local authorities, as well as the public in general, can use the roads and other amenities. In a mobile home development, the private ownership could conceivably inhibit entry unless the right to enter is unquestioned. The easement of access in favor of the public entities, does not, however, expressly permit the entry of the public in general.

Unit mortgages:

In order to protect mortgage lenders, and thus encourage loans for unit purchases, specific provisions for this purpose are contained in the master deed. Included is an express provision that assessments for common expenses shall be subordinate to the first mortgage or purchase money mortgage on a unit. Many state condominium laws also establish such priorities. Repeating the priority in the master deed is an additional precaution.

Because a mobile home can be easily moved, it is advisable for a mortgage lender to take extra precautions to protect its security in the mobile home. Therefore, in addition to the mortgage covering the mobile home as part of the real estate unit, it is also advisable to obtain a security interest under Article 9 of the Uniform Commercial Code, motor vehicle law, or other superseding state statute. Thus, if the mobile home should be removed from the lot, and conceivably lose its character as real property, the lender would be protected by following the steps necessary to obtain a security interest in personal property. This additional precaution could also avoid the

defendant in a foreclosure action from raising the issue of whether the mobile home is covered by a real estate mortgage, alleging that the home is still personal property.

Designation of units:

The dimensions and location of the various condominium units are established in a schedule annexed to the master deed. This is an essential part of any master deed or declaration. The unit designation is thereafter as descriptive as any metes and bounds or filed map designation. This part of the master deed is usually prepared by professional engineers or architects, and varies substantially with each project. Therefore, the illustration of the lot locations has not been included.

Mobile home regulations:

Another feature of this form is the incorporation of the regulations governing the everyday operation of the mobile home park into the bylaws. By including the regulations in the bylaws, as part of the master deed, the grantor reserves the right to amend them. Thereafter the regulations can only be amended in the same manner as amending the bylaws. As a practical matter, the inclusion of the regulations in the bylaws, which are recorded in the county seat and distributed to each unit owner, precludes the unit owner from claiming lack of notice of such regulations. See Form 20.98 for a form of Rules and Regulations for a mobile home park which is not subject to a condominium declaration.

FORM

Tranquility Village Condominium
Master Deed

THIS MASTER DEED made _____ [month] _____ [day] ,
_____ [year] , by DEVON HAMLET, INC., a corporation of the State of _____
[state] , having an office at _____ [address] , _____ [city] ,
_____ [state] .

Article I
Condominium Established

Devon Hamlet, Inc., herein referred to as the Grantor, hereby submits, declares, and establishes a condominium form of ownership of the lands located in the City of _____ [city] , _____ [state] , described in Schedule A annexed hereto and made a part hereof.

Article II
Tranquility Village Cadmium

The name by which the real estate shall hereafter be known is Tranquility Village Condominium.

Article III

Definitions

The terms used herein and in the Bylaws of the Association shall have the meanings stated in the _____ [state] Condominium Act and as follows unless the context otherwise requires:

3.1 Unit means unit as defined by the Condominium Act and includes the lot upon which a residential dwelling is located, or is intended to be located. The unit owner shall have the exclusive right of use and quiet enjoyment to such lot, except as may be provided herein. Except where the residential dwelling is a mobile home, title to which is held by an owner other than the owner of the realty, the unit shall include the residential dwelling located on the lot and any such residential dwelling as may be subsequently located on the lot.

3.2 Association means Tranquility Village Condominium Association, and its successors.

3.3 Common Elements shall consist of all parts of the Property other than the Units including those listed in the definition of "Common Elements" contained in the Condominium Act.

3.4 Common expenses include:

- (a) Expenses of administration; expenses of maintenance, operation, repair or replacement of the common elements;
- (b) Expenses declared common expenses by the provisions of this declaration and the Bylaws of the Association;
- (c) Any valid charge against the Condominium as a whole, including water and sewer charges;
- (d) Common expenses as defined by the Condominium Act.

3.5 Grantor shall mean Devon Hamlet, Inc., until such time as it specifically conveys, by deed, its interest as Grantor to a successor for the purpose of continuing development, thereafter such obligations and powers shall be binding upon and vested only in the successor grantor of Devon Hamlet, Inc.

3.6 Whenever the context so permits or requires, the use of the plural shall include the singular, the singular the plural, and the use of any gender shall be deemed to include all genders.

Article IV

Location of Units, Common Elements, and Other Improvements

The Condominium will consist of three hundred twenty-five (325) residential lots and the residential dwelling thereon, except where the residential dwelling is mobile home, title to which is held by an owner other than the owner of the realty, as shown on that certain map entitled "Final Plot of Tranquility Village," showing the location of units, common elements and other improvements, prepared by _____ [name] , Land Surveyor and Professional Engineer, and attached hereto as Schedule B, including all rights, roads, and appurtenances as common elements. The lots will each have a separate lot and block number designation and each will enclose an area sufficient for one residential dwelling unit and surrounding yards.

Article V

Unit Ownership

Unit ownership shall include the following rights, privileges, and obligations:

5.1 Unit owners shall mean the person or persons owning a unit in fee simple or whose estates or interests individually or collectively aggregate fee simple absolute ownership of a unit.

5.2 Ownership of a unit shall include the respective undivided interest in the common elements specified and established herein. The undivided interest of a unit owner in the common elements shall be equal to _____ percent (_____ %) or _____ percent (_____ %) of the common elements, and such undivided interest in the common elements shall not be divisible from the unit to which it appertains.

5.3 Unit owners, by acceptance of their deeds, covenant and agree as follows:

(a) That the common elements shall remain undivided; and no owner may bring any action for partition, it being agreed that this restriction is necessary in order to preserve the rights of the owners with respect to the operation and management of the Condominium.

(b) The unit shall be occupied and used by the respective owners only as a private dwelling for the owner, his family, tenants and social guests and for no other purpose.

(c) The owners of the respective units agree that if any portion of the common elements including any driveway, walkway, parking area or utility line encroaches upon the unit, a valid easement for the encroachment and for the maintenance of same, so long as it stands, shall and does exist.

(d) An owner of a unit shall automatically, upon becoming the owner of the unit, be a member of the Tranquility Village Condominium Association, and shall remain a member of the Association until such time as his ownership of the unit ceases for any reason, at which time his membership in said Association shall automatically cease.

(e) The owners of the units covenant and agree that the administration of the Condominium shall be in accordance with the provisions of this Master Deed and the Bylaws of the Association.

(f) Each owner, tenant, or occupant, of a unit, shall comply with the provisions of this declaration, the Bylaws of the Associations, decisions, and resolutions of the Association or its representative or successor, each as lawfully amended from time to time, and failure to comply with any such provisions, decision, or resolutions, shall be grounds for an action to recover sums due, for damages or for injunctive relief. Any lease of a unit shall be subject to the covenants and restrictions contained in this Master Deed, the Bylaws of the Association, and the decisions and resolutions, and any lawful amendments thereto.

(g) No owner of a unit may exempt himself from liability for his contribution toward the common expenses by waiver of the use or enjoyment of any of the common elements or by abandonment of his unit.

(h) In any conveyance of a unit, the grantee of the unit shall be jointly and severally liable with the grantor of such unit for all unpaid assessments by the Association against the unit for common expenses up to the time of the grantor's conveyance, without prejudice to the grantee's right to recover from such grantor the amount paid by the grantee therefor. This provision shall not apply if the grantee is the first mortgagee of the unit.

(i) Each unit owner shall administer, maintain, and repair, at his own expense, the unit lot and the residential dwelling unit located thereon.

(j) A unit owner, in his discretion, may select as a residential dwelling, any conventionally built, modular or mobile

home, provided it complies with the Bylaws of the Association, or lawful amendments thereto, any local ordinance or ordinances relating thereto, or any decisions or resolutions of the Association. By acceptance of a unit deed, the unit owner acknowledges that any dwelling affixed to or located on the unit lot is included in the real property title of the unit, and is subject to any and all liens of mortgages, taxes, and assessments relative thereto.

(k) Each unit owner shall, by reasons of acceptance of their deeds, grant to the Association, on behalf of themselves and all unit owners, an irrevocable power of attorney coupled with an interest, to acquire title to, or lease any unit whose owner desires to surrender, sell or lease the same, or that may be subject to foreclosure or other judicial sale, and to convey, sell, lease, sublease, mortgage, or otherwise deal with any unit so acquired. Any unit leased or acquired by the Association in any manner whatsoever, shall be held by the Association on behalf of all unit owners, in proportion to the respective common interest of such owners as set forth above, provided, however, that the Association may act with regard to any such unit leased or acquired, as the Association, in its discretion, deems appropriate.

Article VI

Common Elements

The common elements shall include the land and all other parts of the condominium which are not units.

Article VII

Easements and Reservations

7.1 Easements are reserved throughout the condominium property units and common elements, as may be required for utility services in order to adequately serve the units. This Master Deed is subject to easements of record.

7.2 The grantor hereby reserves unto itself, its successors and assigns, an easement in, upon, through and over the common elements for as long as the grantor, its successors and assigns, shall be engaged in the construction, development, and sale of units, which easement shall be for the purpose of construction, installation, maintenance and repair of existing improvements and appurtenances thereto, for ingress and egress for the use of all roadways, existing and future dwelling unit models for sales promotion and exhibition.

7.3 The grantor reserves unto itself, its successors, assigns, and agents, an easement in, upon, through and over the lands comprising the common elements for the purpose of installation, maintenance, repair and replacement of all sewer, water, power and telephone lines, pipes, mains, conduits, waters, poles, transformers and any and all other equipment or machinery necessary or incidental to the proper functioning of any utility systems servicing the Condominium.

7.4 The grantor, for itself, its successors and assigns, hereby declare that the lawful agencies of the _____ [city] , _____ [county] , _____ [state] (but not the public in general) shall have a perpetual nonexclusive easement to enter upon all roadways, streams and driveways for the purposes of maintaining the safety, health, welfare, police and fire protection of the citizens of the Borough, County and State including the residents of the Condominium.

7.5 The Grantor, for itself, its successors and assigns, hereby declares that every unit owner, mortgagee, and the Association shall have an easement in, upon, through and over roads and driveways created by the Grantor running through the Condominium for purposes of ingress and egress, and that each unit owner respectively shall have the exclusive easement of use, occupancy and quiet enjoyment over his unit lot, subject to the restrictions set forth in this Master Deed and Bylaws.

Article VIII Unit Mortgages

The holder of any first mortgage or purchase money mortgage on a unit, unless the mortgage itself expressly provides otherwise, shall be deemed to include the following privileges:

8.1 The Condominium may not be abandoned or terminated without the prior written approval of the above unit mortgagees. Any material amendment to the Master Deed or the Bylaws of the Association, including but not limited to, any amendment which would change the percentage interests of the unit owners in the project, shall not take effect, until or unless the written approval of the above unit mortgagees is obtained in proportion to the number of unit owner approvals required for any such amendments, except as provided in Article XI hereof.

8.2 No unit in the Condominium may be partitioned or subdivided without the prior written approval of the unit mortgagee on such unit.

8.3 Any lien which the Association may have on any unit for the payment of common expenses or for assessments attributable to such unit is subordinate to the lien of the first unit mortgagee or purchase money mortgagee as to that unit, provided that such mortgage was recorded prior to the date of the filing by the Association of any claim of lien for unpaid assessments in the _____ [county] County Clerk's Office.

8.4 A first mortgagee or purchase money mortgagee of a unit shall, upon request, be entitled to inspect the books and records of the Association during normal business hours, and to receive an annual audited financial statement of the Association within ninety (90) days following the end of any fiscal year of the Association, and to written notice of all meetings of the Association and to designate a representative to attend any or all such meetings.

8.5 Upon written request to the Association, any first mortgagee or purchase money mortgagee shall be entitled to written notice of any substantial damage to or destruction of the unit upon which the mortgage is held, or any part of the common elements, and to any condemnation or eminent domain proceedings wherein the mortgagee might be entitled to an award or settlement by reason thereof.

Article IX The Association

The Association shall be a nonprofit corporation under the laws of the State of _____ [state] , subject to the _____ [state] Condominium Act and the following:

9.1 Membership. The members of the Association shall consist of all the record owners of units. Upon the recording of a unit deed, which conveys title to the unit, the grantee of such deed shall become a member of the Association, and the membership of the unit grantor shall be thereby terminated.

9.2 Voting. Each member of the Association shall be entitled to cast one vote for each unit owned by him, provided, however, that no more than one vote shall be allowed for any one unit. If a unit is owned by more than one person, or owned by a corporation, a certificate of appointment, designating the individual entitled to cast the vote for the unit shall be filed with the Secretary of the Association. Such certificate shall be valid until revoked or until superceded by a subsequent certificate or until a change of ownership in the unit occurs. A certificate designating the person entitled to cast the vote of the unit may be revoked by any owner of the unit. The Secretary may waive the filing of the certificate if the unit is owned by a married couple and only the husband or wife votes.

9.3 Board of Trustees. The affairs of the Association shall be conducted by a Board of Trustees each of whom shall be bonded and who shall be designated in the manner provided in the Bylaws. Notwithstanding any provision of the Bylaws of Tranquility Village Condominium Association the Grantor for itself and for its successor Grantor as provided in Article III, Section 3.5 hereof, reserves the right to elect a majority of the Board of Trustees of the Tranquility Village Condominium Association until the expiration of seven (7) years from the date of the recording of this instrument or, if sooner, until the sale and transfer of title of all of the units of the Condominium. The within reservation may not be amended, rescinded, revoked, modified or altered without the express consent of the Grantor or its successor Grantor.

Every trustee and every officer of the Association shall be indemnified by the Association against all expenses and liabilities, including counsel fees, incurred by or imposed upon him in connection with any proceeding to which he may be a party, or in which he may become involved, by reason of his being or having been a trustee or officer of the Association, or any settlement thereof, whether or not he is a trustee or officer at the time such expenses are incurred, except in such cases wherein the director or officer is adjudged guilty of willful misfeasance or malfeasance in the performance of his duties.

9.4 Limitation upon Liability. Notwithstanding the duty of the Association to maintain, operate, replace and repair the common elements of the Condominium, the Association shall not be liable for injury or damage, other than the cost of maintenance, operation, replacement and repair, caused by a latent condition of the common or by the elements, other owners or persons.

9.5 Agent to Receive Process. The following person, a resident of the State of _____ [state] , is designated as the agent to receive service of process upon the Association: [_____ Insert name and address of agent to receive process]

9.6 Property in Trust. All funds and title to property acquired by the Association and the proceeds thereof shall be held in trust for the members of the Association in accordance with the provisions of this Deed and the Bylaws, provided, however, that the Association may deal with such funds and title as it deems to be in the best interest of the Association.

9.7 Insurance. The Association shall obtain and continue in effect blanket property and casualty insurance on the common elements, in an amount equal to the maximum insurable replacement value of the common elements as determined annually by the Board of Trustees of the Association. Such insurance shall afford protection against loss or damage by fire or other hazards covered by a standard extended coverage endorsement and such other loss or risk as the Board of Trustees of the Association shall deem appropriate. Such policy of insurance shall name the Association, the individual unit owners, and the institutional first mortgagees as insureds and shall insure the units, if the Board of Trustees deems such additional insurance coverage appropriate. The Association shall also obtain and continue in effect public liability insurance in such amounts and with such coverage as shall be required by the Board of Trustees of the Association, including but not limited to hired automobile and nonowned automobile coverages, and with cross liability endorsement to cover liabilities of the unit owners as a group to a unit owner; workers compensation policy to meet the requirements of the law; and such other insurance as the Board of Trustees of the Association shall determine from time to time to be desirable. All proceeds covering property losses shall be paid to the Association and the Association shall have the sole right and duty to promptly settle, litigate or otherwise dispose of any property loss claim on behalf of the named insureds. Premiums for insurance policies purchased by the Association shall be paid by the Association as a common expense, to be included in the monthly assessment for common expenses.

9.8 Nothing contained herein shall bar a unit owner from obtaining insurance on his individual unit and individual unit owners shall have the exclusive right to settle, adjust or litigate any claims under any policies purchased by and paid for by the respective unit owners individually.

9.9 The Bylaws of the Association shall be in the form attached hereto as Schedule "C."

Article X
Use Restrictions

The use of the property of the Condominium shall be in accordance with the following provisions so long as the Condominium exists:

10.1 Units. Each of the units shall be occupied only by a single family, its servants and guests as a residence and for no other purpose.

10.2 Leasing. No unit shall be rented by the owners thereof for transient or hotel purposes, which shall be defined as "any rental for any period less than six (6) months."

10.3 Common Elements. The common elements shall be used only for the purposes for which they are intended or established, in the furtherance of the services and facilities for the enjoyment of the units.

10.4 Nuisances. No nuisance shall be allowed upon the Condominium property, nor shall any use or practice which is the source of annoyance to residences or which interferes with the peaceable possession and proper use of the property by the residents be allowed. All parts of the property shall be kept in clean and sanitary condition, and no rubbish or garbage or refuse shall be allowed to accumulate nor shall any fire hazard be allowed to exist.

10.5 Lawful Use. No immoral, improper, offensive or unlawful use shall be made of the Condominium property or any part thereof; and all valid laws, zoning ordinances and regulations of all governing bodies having jurisdiction shall be observed.

10.6 Regulations. Reasonable regulations concerning the use of the Condominium property may be made and amended from time to time by the Board of Trustees of the Association, provided, however, that all such regulations and amendments thereto shall be approved by not less than a majority of the voters of the Association before such shall become effective.

Article XI
Amendments to Master Deed

11.1 The Grantor expressly reserves for itself and for its successor Grantor as provided in Article III, Section 3.5 hereof for a period of seven years from the date hereof, or until the closing of title of not less than 325 condominium units within the confines of the lands owned by the grantor depicted in Schedule "A" attached hereto, whichever event occurs first, the right to execute on behalf of all contract purchasers, unit owners, mortgagees, other lien holders, and parties claiming any legal or equitable interest in the condominium or in any unit, any amendments to this master deed which it may deem appropriate, including but not limited to:

(a) Decreasing the number of units in the condominium to not less than one hundred thirty-four (134), increasing the proportionate share of common elements and the percentage share of costs and increasing voting rights proportionately.

(b) Adding units and lands to the area included within the condominium and adjusting the proportionate share of common elements, share of costs and voting rights proportionately. The voting right and proportionate share of common elements of the owners of each unit shall be a proportion which is equal to one divided by the total number of units contained within the condominium, as is set forth in the Master Deed as amended; provided, however, that until all units are completed and occupied, the share of costs of the owners of each unit shall be equal to one divided by the total number of units occupied at the beginning of each year.

(c) Adding to or altering the location, size and/or purpose of easements and lands for utilities, roads, access, egress, drainage, and/or financing purposes.

(d) To permit the users or occupants of lands owned by or controlled by the Grantor to utilize easements, roads, drainage facilities, utility lines and the like within or servicing the condominium, on fair and equitable terms and conditions to be negotiated with the Tranquility Village Condominium Association.

(e) To surrender or modify rights of the Grantor in favor of the unit owners and/or the Tranquility Village Condominium Association, and/or their respective mortgagees.

(f) Any amendment to the Master Deed will become effective upon the recording of an amendment to the Master Deed in the Office of the Clerk of Devon County. The Grantor will, thereafter, provide copies of said amendment to each owner and mortgagee affected.

11.2 Upon the expiration of the reservation of the Grantor, as set forth in Section 11.1 of this Article or upon surrender or modification of the rights reserved by the Grantor, in accordance with Section 11.1(e) of this Article then the following shall apply:

This Master Deed may be amended or supplemented by the affirmative vote of those unit owners entitled to exercise _____ percent (_____) of the total voting power of the association, cast in person or by proxy at a meeting duly called and held in accordance with the Bylaws of the Association, provided, however, that any such amendment or supplement must first have been approved in writing by first mortgagees and purchase money mortgagees holding mortgages on not less than _____ percent (_____) of the units subject to mortgages. No such amendment shall be effective unless recorded in the Office of the Clerk of _____ [county] , _____ [state] .

Article XII

Assessments for Common Expenses

Common expenses shall be assessed by the Board of Trustees annually, but shall be payable in equal monthly installments, except that upon default in the payment of any monthly installment, the Board of Trustees may elect to accelerate the amount due, and charge interest on the amount due at the maximum rate allowed by law, plus reasonable attorneys' fees, accrued as of the date of default. Only units for which certificates of occupancy have been issued shall be assessed, and each unit's share of such assessment shall be determined by dividing one by the total number of units for which certificates of occupancy have been issued on the first day of each year, anything to the contrary herein or in the Bylaws of the Association notwithstanding. The amount of assessments against new units shall be equal to the amount payable monthly by the existing units multiplied by the number of months remaining in the Association's fiscal year. If the total assessments exceed the costs for that year, such excess shall be applied to costs and reduce the assessments for the following year. Special assessments may be made if deemed appropriate by the Board of Trustees.

Article XIII

Invalidity

If any one or more provisions of this Master Deed are declared invalid, such invalidity shall in no way impair or affect the validity, enforceability, or effect of the remainder of this Master Deed.

Article XIV

Waiver

No provision contained in this Master Deed shall be deemed waived by reason of any failure to enforce the same, irrespective of the number of violations or the consistency of such failure of enforcement.

Article XV

Captions

Captions are inserted in this Master Deed for convenience and reference only, and shall not be taken in any way to limit or describe the scope of this Master Deed or any provision hereof.

Executed at _____ [city] , _____ [state] , on the date first above written.

DEVON HAMLET, INC.

By: _____

[name and title]

And: _____

[name and title]

Schedule A

All the following tract or parcel of land and the premises hereinafter particularly described, situate, lying and being in the _____ [city] , in the _____ [county] County, _____ [state] :

[Insert legal description of entire tract]

Subject to all covenants, agreements, easements and restrictions of record, municipal ordinances, and such state of facts as an inspection or accurate survey may disclose.

Said premises being designated as Block 139, Lot 12 on the Tax Map of the _____ [city] .

Schedule B

[Certified illustration of location and designation of each unit]

Schedule C

Bylaws of Tranquility Village Condominium Association

Article I

Purpose; Definitions

Section 1. The Tranquility Village Condominium Association, a nonprofit corporation organized under the _____ [state] Revised Statute, has been established to administer Tranquility Village Condominium, located in the City of _____ [city] , _____ [county] , _____ [state] , pursuant to the _____ [state] Condominium Act, the Master Deed of Tranquility Village Condominium and these Bylaws, as the same may be amended from time to time. Definitions contained in the _____ [state] Condominium Act, as the same may be modified by the Master Deed of Tranquility Village Condominium, apply herein.

Article II

Board of Trustees

Section 1. Number and Qualification. The affairs of the condominium shall be administered and managed by the association of owners, all power and authority of which shall be exercised through the Board of Trustees. The Board of Trustees shall be constituted of five persons. Until such time as limited by the Master Deed of Tranquility Village Condominium, the majority of the Board of Directors shall be selected by the Grantor, thereafter, the Board of Trustees shall be elected by the unit owners.

During the period of time when the Grantor shall select the majority of the Board of Directors, as provided in this Article II, at least one of the directors not selected by the Grantor shall be a representative of the tenants owning and occupying mobile homes within the Condominium. Such director shall be the President of Tranquility Village Tenants' Association, unless another representative is duly elected by said tenants to represent them on the Board by majority vote of such tenants. The remaining director positions, consisting of those not selected by the Grantor or the tenants, shall be selected from Tranquility Village condominium unit owners by a majority vote of the members of the Tranquility Village Condominium Association, excluding the votes of the Grantor in that Association.

Section 2. Powers and Duties. The Board of Trustees shall have the powers and duties necessary for the administration of the affairs of the Association as set forth in the _____ [state] Condominium Act and may do all acts and things as are not by law, the Master Deed or by these Bylaws directed to be exercised and done by the owners. The powers and duties of the Board of Trustees shall include, but not be limited to, the following:

- (a) Maintenance, repair, replacement and operation of the common elements, and utility lines to the extent that the utilities are under the control of the association, and not within any residential dwelling of any unit.
- (b) Establishing, assessing, and collecting of assessments from the owners, to cover both current expenses and reserves, and maintaining accounting records.
- (c) Designation and dismissal of the personnel necessary for the maintenance and operation of the common elements and facilities.
- (d) Establishment and enforcement of rules and regulations as adopted for the conduct of owners, occupants, and users of the condominium properties or facilities and/or any units therein.

Section 3. Management Agent. The Board of Trustees may employ for the Association a management agent at a compensation established by the Board to perform such duties and services as the Board shall authorize.

Section 4. Election and Term of Office. Each trustee shall be elected by a majority of the unit owners, except as set forth in Section 1 of this Article. For the first year one trustee shall be elected for a term of one year; one trustee shall be elected for a term of two years; one trustee shall be elected for a term of three years; one trustee shall be elected for a term of four years; and one trustee shall be elected for a term of five (5) years. After the first year, the terms of the trustee elected each year shall be five (5) years.

Section 5. Vacancies. Vacancies in the Board of Trustees caused by any reason other than the removal of a trustee by a vote of the Association shall be filled by the majority of the remaining trustees, provided that in the event of a deadlock, by the Grantor in the Master Deed and its successors and assigns, or if the Grantor is no longer entitled to designate a majority of the Board of Trustees, then by a majority of the unit owners. Each so elected shall serve as a trustee until the end of the term of the trustee whom he replaces.

Section 6. Removal of Trustees. Grantor-designated trustees may be removed and replaced by the Grantor at any time. Member-designated trustees at any regular or special meeting duly called, may be removed with or without cause by a three-fourths (3/4) vote of all of the members and a successor may then and there be elected to fill the vacancy thus created. Any trustee whose removal has been proposed by any owners shall be given an opportunity to be heard in the meeting and shall be afforded the right to have the vote on his removal adjourned to a new date not less than seven nor more than ten days from the date of the meeting at which the removal is proposed.

Section 7. Meeting. The first meeting of each newly elected/designated Board of Trustees thereafter shall be held within the first fourteen (14) days after the election or appointment at such place as shall be fixed by the trustees.

Section 8. Regular Meetings. Regular meetings of the Board of Trustees shall be held at such times and places as shall be determined from time to time by a majority of the trustees. At least two such meetings shall be held during each fiscal year. Notice of the regular meetings of the Board of Trustees shall be given by the Secretary to each trustee personally, by mail, or by telephone, at least three days prior to the day named for such meeting.

Section 9. Special Meetings. Special meetings of the Board of Trustees may be called by the President or any two members of the Board of Trustees on three days notice to each trustee, given personally, by mail, or by telephone, which notice shall state the time, place (as hereinabove provided), and purpose of the meeting.

Section 10. Waiver of Notice. Before or at any meeting of the Board of Trustees, any trustee may, in writing, waive notice of such meeting and such waiver shall be deemed equivalent to the giving of such notice. Attendance by a trustee at any meeting of the Board shall be a waiver of notice by him of the time and place thereof. If all the trustees are present at any meeting of the Board, no notice shall be required and any business may be transacted at such meeting.

Section 11. Board of Trustee's Quorum. At all meetings of the Board of Trustees, a majority of the trustees shall constitute a quorum for the transaction of business, and the acts of the majority of the trustees present at a meeting at which a quorum is present shall be the acts of the Board of Trustees. If, at any meeting of the Board of Trustees, there be less than a quorum present, the majority of those present may adjourn the meeting from time to time. At any such adjourned meeting, any business which might have been transacted at the meeting as originally called may be transacted without further notice.

Section 12. Fidelity Bonds. The Board of Trustees shall require that all officers and employees of the Association handling or responsible for Association funds furnish adequate fidelity bonds, the premiums of which are deemed to be common expenses.

Article III
Members of the Association

Section 1. Membership. All owners of a condominium unit shall be members of the Association.

Section 2. Place of Meetings. Meetings of the Association members shall be held at the principal office of the condominium or such other suitable place convenient to the owners as may be designated by the Board of Trustees.

Section 3. Annual Meetings. The first annual meeting of the Association shall be held during the last week of _____ [month] of _____ [year] . Thereafter, the annual meetings of the Association members shall be held during the last week of _____ [month] in each succeeding year.

Section 4. Special Meetings. It shall be the duty of the President to call a special meeting of the owners as directed by resolution of the Board of Trustees or upon a petition signed by a majority of the owners and having been presented to the Secretary. The notice of any special meeting shall state the time and place of such meeting and the purpose thereof. No business shall be transacted at a special meeting except as stated in the notice unless by consent of three-fourths (3/4) of the owners present.

Section 5. Notice of Meetings. It shall be the duty of the Secretary to mail a notice of each annual or special meeting, stating the purpose thereof as well as the time and place where it is to be held, to each owner of record, at least five but not more than 30 days prior to such meeting. The mailing of a notice in the manner provided in this Section shall be considered notice served.

Section 6. Adjourned Meetings. If any meeting of owners cannot be organized because a quorum has not attended, the owners who are present may adjourn the meeting to a time not in excess of seven days from the time the original meeting was called.

Section 7. Order of Business. The order of business at all meetings of the owners of units shall be as follows:

- (a) Proof of notice of meeting or waiver of notice;
- (b) Reading of minutes of preceding meeting;
- (c) Reports of officers;
- (d) Report of committees;
- (e) At annual meeting, election of trustees (following the initial term of the initial Board of Trustees);
- (f) Unfinished business; and
- (g) New business.

Section 8. Voting. Voting shall be on the basis of one vote for each unit. The owner of two or more units shall be entitled to the sum total of the vote assigned to those units.

Section 9. Majority of Owners. As used in these Bylaws, the term "majority of owners" shall mean those owners holding _____ percent (_____ %) of the votes.

Section 10. Quorum. Except as otherwise provided in these Bylaws, the presence in person of one-quarter (1/4) of persons entitled to vote shall constitute a quorum.

Section 11. Proxies. Votes may be cast by proxy with respect to election of trustees at the annual meeting. Otherwise, all votes shall be cast in person. Proxies must be filed in writing with the Secretary at least seven days prior to the appointed time of each meeting.

Section 12. Owners Through Foreclosure. Any mortgagee of a unit through a mortgage foreclosure proceeding shall be deemed to be an owner at the time of the recording of the Sheriff's deed. Said owner shall from thence forth be deemed to be an owner with all of the privileges, voting rights, and duties of an owner.

Article IV Officers

Section 1. Designation. The principal officers of the Association shall be a President, a Vice President, an Assistant Vice President, a Secretary and a Treasurer, all of whom shall be elected by and from the Board of Trustees. The trustees may appoint an assistant treasurer and an assistant secretary, and such other officers as in their judgment may be necessary.

Section 2. Election of Officers. The officers of the Association shall be elected annually by the Board of Trustees at the organization meeting of each new Board and shall hold office at the pleasure of the Board.

Section 3. Removal of Officers. Upon an affirmative vote of a majority of the members of the Board of Trustees, any officer may be removed, either with or without cause, and his successor elected at any regular meeting of the Board of Trustees, or at any special meeting of the Board called for such purpose.

Section 4. President. The President shall be the chief executive officer of the Association. He shall preside at all meetings of the Association and of the Board of Trustees. He shall have all the general powers and duties which are usually vested in the office of President of an association, including, but not limited to, the power to appoint committees from among the owners from time to time as he may in his discretion decide is appropriate to assist in the conduct of the affairs of the Association.

Section 5. Vice President. The Vice President and Assistant Vice President, respectively, shall take the place of the President and perform his duties whenever the President shall be absent or unable to act. If neither the President, Vice President, nor the Assistant Vice President is able to act, the Board of Trustees shall appoint some other member of the Board to so do on an interim basis. The Vice President and Assistant Vice President shall also perform such other duties as shall from time to time be imposed upon them respectively by the Board of Trustees.

Section 6. Secretary. The Secretary shall keep the minutes of all meetings of the Board of Trustees and the minutes of all meetings of the Association; he shall have charge of such books and papers as the Board of Trustees may direct; and he shall, in general, perform all the duties incident to the office of Secretary.

Section 7. Treasurer. The Treasurer shall have responsibility for Association funds and securities and shall be responsible for keeping full and accurate accounts of all receipts and disbursements in books belonging to the Association. He shall be responsible for the deposit of all moneys and other valuable effects in the name, and to the credit, of the Association in such depositories as may from time to time be designated by the Board of Trustees.

Article V Obligations of the Owners

Section 1. Assessments. All owners are personally obligated to pay, and all units are subject to the lien for, periodic assessments imposed by the Association to meet all expenses incident to the repair, maintenance, improvement and replacement of common elements, including recreational facilities, utilities, drainage facilities and all other expenses reasonably incident to the operation, enjoyment and furtherance of the condominium and its Association, as such assessments are fixed from time to time by the Board of Trustees. Said common expenses may include liability and hazard insurance policy premiums for the protection of the Association, its officers and trustees if deemed appropriate by the Board of Trustees for the protection of individual unit owners. The Board of Trustees may impose assessments upon individual units and unit owners arising out of proceedings described in Article VII below.

All assessments shall be made pro rata according to the proportionate share of expenses set forth in the Master Deed of the Tranquility Village Condominium as such Master Deed is amended from time to time in the future.

The Board of Trustees may enforce the collection of any assessment against any owner and/or unit by any lawful means including, but not limited to, the following:

- (a) Recording a notice of lien with the County Clerk of _____ [county] County; and
- (b) Filing suit against the individual owner(s) of said unit. The obligation of the owner(s) to pay said assessments shall be joint and several. In any suit filed, the individual owner(s) shall be liable to the Association for interest and reasonable counsel fees and costs entailed in the prosecution of said suit.

Section 2. Maintenance and Repair.

(a) Common Elements. The Board of Trustees acting for the Association shall perform promptly all maintenance and repair work required to properly maintain the common elements of the condominium.

(b) Utilities. All of the repairs and maintenance of underground installations within the common elements such as water, light, power, sewage, telephones, sanitary installations, and all accessories shall be at the expense of the association.

(c) Reimbursement to the Association. An owner shall reimburse the Association for any expenditures incurred in repairing or replacing any common element or part thereof damaged through the fault of such owner or any person coming within the limits of the condominium at the invitation or with the permission of said owner (including minor members of the owners' family).

Section 3. Rules of Conduct. Tranquility Village Condominium has been designed and built to exacting standards and esthetic requirements. These Rules have been established for the protection of unit owners to achieve the goal of a pleasant environment.

(a) Landscaping. Although Tranquility Village provides basic landscaping, it is understood that unit owners may wish to add plantings to their lot. Because of underground utility lines and the needs of maintenance equipment accessibility, unit owners shall obtain association approval prior to any digging or planting. Plantings added shall conform to the overall landscaping scheme.

(b) Speed Limits and Parking. The speed limit throughout the Village is 15 MPH unless otherwise posted. Adequate parking spaces are provided in drives or in designated parking areas. No parking shall be allowed in streets or unsurfaced areas.

(c) Garbage and Trash. Garbage and trash removal is provided by the City of _____ [city]. All

containers must be of metal or hard plastic and of a design approved by the Borough Board of Health. Plastic bags may be used only if they are placed in a container. Garbage and trash containers shall be kept clean and free of offensive odors. Containers shall be moved from the curb line after pick-up and placed in their proper storage area no later than the end of the day pick-up occurred.

BURNING IS NOT PERMITTED

(d) Garbage Disposals. Garbage disposals mounted in the kitchen sink are permitted by the City. A surcharge is levied by the Borough for the use of the disposal, which shall be paid by the unit owner.

(e) Pets. One small house type pet is permitted per living unit with the written approval of the Association. Pets must be leashed at all times and pet owners shall restrain their animals from the property of other unit owners. No outside pens or dog houses are permitted. No farm animals are permitted.

(f) Utilities. Tranquility Village is an all electric development. Power is provided by the _____ and is metered and billed directly to the unit owner. All heating shall be from electricity. No other fuel is available or permitted.

Telephone service is provided by _____ [*telephone service provider*] and billed directly to the unit owner.

Sewage disposal is provided by the _____ [*sewage disposal provider*] and paid for by the Association.

Amplified TV cable service will be available from a master antenna system with one channel allocated for City events announcements.

Water service is provided by the _____ [*water service provider*] through a master meter at Tranquility Village. All water charges are paid by the Association.

Various devices are employed to prevent the short section of water pipe entering the home from the ground from freezing in winter months. Electric heating tape is the most common. These devices are plugged or wired into the house current and are the responsibility and under the ownership of the unit owner.

(g) Recreation Facilities. The recreation facilities operated by Tranquility Village and the rules pertaining to each are shown in the following section.

(1) Lake Tranquility. The Association is the Assignee of a nonexclusive lease to Lake Tranquility, the term of which runs to _____ [*month*] _____ [*day*], _____ [*year*]. Under the lease, the lake is open at no charge to unit owners of Tranquility Village. This area offers recreation such as fishing, boating, picnicking and ice skating. No swimming is allowed. Use of these facilities are on a nonexclusive basis and at resident's own risk. The Association does not staff the facilities, nor provide for a lifeguard or caretaker at the lake.

The operating schedule and rules are posted at the lake area.

(2) Fishing. Open fishing is provided in Lake Tranquility to unit owners at no charge. (State Fishing licenses are required by the State).

(3) Boating. Boating rules are posted at the dock area. U. S. Coast Guard approved life preservers are required. No power boats are permitted. Fractional horsepower electric motors may be used by unit owners with the prior approval of

the Association.

(4) Swimming Pool. The pool will have hours of operation and rules posted in the pool area.

(h) Storage. Boats, utility trailers, commercial trucks, motor homes and recreational vehicles shall not be stored or parked in residential areas of Tranquility Village or at individual home sites.

Storage underneath the home is permitted where a base or floor of impervious material is provided. Stored items shall be located so as not to interfere with proper inspections of the mobile home.

(i) Site. To maintain overall esthetics and design concept, all accessory structures such as, but not limited to, utility sheds, carports, porches, storage fences, patio roofs, fences, etc., if permitted by the Association, shall meet the specific engineering, design, materials and color criteria of the Association.

Outside clothes drying is to be on removable clothes trees of our approved design, at specified locations shielded by corner fencing where necessary. No outside TV or radio antennas are permitted at the site or attached to the home or accessory structures, unless authorized by the Association.

Unightly debris will be removed from the site at the resident's expense.

(j) Home. Fire extinguishers (minimum 21/2 lbs.) meeting DOT requirements rated for Class B and C fires shall be kept in each home and maintained in working condition.

Maintenance of the home and accessory structures on the site is the responsibility of the unit owner. The home exterior shall be washed down at least once a year and accessory structures shall be kept in good repair and stained when necessary.

(k) General. The unit owner shall not violate and shall comply with these Bylaws, including amendments thereto, the Master Deed, and State, County and Municipal laws, including the "Mobile Home Licensing Ordinance of the City of _____ [city]."

Article VI

Amendments to Bylaws

These Bylaws may be amended by the Board of Trustees at any regular meeting of the Board or any meeting called for such purpose. However, no amendment shall take effect unless approved by three-fifths of the members of the Board of Trustees.

Article VII

Statutory Compliance

These Bylaws are intended to comply with the requirements of the _____ [state] Condominium Act.

Prepared by:



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Chapter 20 REAL ESTATE ENTITIES
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H. CONDOMINIUMS AND HOMEOWNERS ASSOCIATION

24-20 Current Legal Forms for Real Estate FORM 20.75

AUTHOR: by Stephen E. Pigott and Harold O. Maxfield, Jr.

FORM 20.75 Senior citizen restriction--amendment to master deed

COMMENT

Where a tract is zoned for senior citizen community development, there is no need for a restrictive deed covenant to establish a senior's community. Without such zoning, however, a deed restriction may be a viable method. This form illustrates a situation where the master deed was subsequently amended to establish a senior citizen deed restriction on a part of the condominium. The amendment to the master deed, in this case, affected only lots which were yet to be developed. The amendment provides that notice of the restriction will be specifically referred to in the unit deeds to the affected lots.

There are some potential problem areas with senior citizen restrictions, either by zoning ordinances or deed restriction. Among the major problems are the following: Can the property be conveyed by the deceased senior citizen's executor or administrator to younger beneficiary who would take under a will or by intestacy. Would occupancy of the premises by household members under the age limit, for example, grandchildren, be barred: These unresolved areas require careful research and drafting. In the amendment to the master deed no provisions were made to deal with these issues, permitting a future case by case review of any difficulties which may arise.

This amendment to the master deed provides that only a part of the entire development is restricted to senior citizen occupancy. The remainder of the development, which consists of the already improved and occupied lots, is not so restricted.

FORM

Tranquility Village Condominium

Amendment to Master Deed

THIS AMENDMENT made _____ [month] _____ [day] ,
 _____ [year], to the Master Deed of Tranquility Village Condominium, by DEVON HAMLET, INC.,
 dated _____ [month] _____ [day] , _____ [year] , and
 recorded in the office of the Clerk of _____ [county] County, on _____ [month]
 _____ [day] , _____ [year] , in Book 835 of Deeds, at page 278, et seq.

WHEREAS, Devon Hamlet, Inc., and the Mayor and Council of the City of _____ [city] have
 amicably adjusted their dispute as to the Senior Citizens' Restriction contained in the _____ [city]
 Development Regulation Ordinance, as amended on or about _____ [month]
 _____ [day] , _____ [year] , applicable to the Tranquility Village
 Condominium; and

WHEREAS, in furtherance of the settlement, this Amendment to the Master Deed of the Tranquility Village
 Condominium is made;

NOW, THEREFORE, the Board of Directors of Devon Hamlet, Inc., by resolution, and pursuant to Section 11.1 of the
 Master Deed of Tranquility Village Condominium, amends the Master Deed by adding the following additional use
 restriction as paragraph 10.7 thereof;

10.7 Senior Citizens' Restriction: (a) The 143 lots designated in Schedule A, annexed to this Amendment to the Master
 Deed and made a part hereof, shall be occupied, conveyed and rented, only to individual grantees or tenants over the age
 of 52 years; if conveyed to joint grantees or rented to co-tenants, at least one such joint grantee or tenant shall be over
 the age of 52 years. This restriction shall be binding on the grantees or tenants of Devon Hamlet, Inc., and their heirs
 and assigns and shall be a covenant running with the land.

(b) Every deed to the 143 lots designated in Schedule A shall contain a reference to the restriction set forth in
 subparagraph (a) above.

In witness whereof the undersigned have executed this instrument on _____ [month]
 _____ [day] , _____ [year] .

DEVON HAMLET, INC.

By: _____

[name and title]

And: _____

[name and title]

(Acknowledgments)



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H. CONDOMINIUMS AND HOMEOWNERS ASSOCIATION

24-20 Current Legal Forms for Real Estate FORM 20.76

AUTHOR: by Stephen E. Pigott and Harold O. Maxfield, Jr.

FORM 20.76 Consent of mortgagee to condominium declaration

COMMENT

Occasionally, it may be necessary or helpful to file a declaration on property which is subject to a mortgage. In this scenario, the mortgage should be made subordinate to the declarations. If it is not subordinated, then a foreclosure of the mortgage would have the potential to cancel the declarations. Under the normal scenario, as each unit is sold, the mortgagee will agree to release the unit. The following consent is very simple and it can be attached to the declaration before it is filed.

FORM

Consent of Mortgagee

The undersigned _____ [lender] is the mortgagee of the property described in the foregoing Declaration of Condominium Ownership by virtue of a certain Mortgage Deed filed in the mortgage records of the Recorder of _____ [county] , _____ [state] , in Volume _____, Page _____ (the "Mortgage"). The undersigned hereby consents to the Declaration of Condominium Ownership and to the filing thereof in the Office of the County Recorder of _____ [county] , _____ [state] , and further, subjects and subordinates the Mortgage to such Declaration and the Drawings attached thereto, and to the provisions of Chapter _____ of the _____ [state] Code. This consent is not a release of the Mortgage, nor is it a waiver of the priority or validity of the Mortgage as it relates to any other agreement, encumbrance, lien, reservation, restriction or condition affecting the Property.

[lender]

By: _____

[name and title]

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H. CONDOMINIUMS AND HOMEOWNERS ASSOCIATION

24-20 Current Legal Forms for Real Estate FORM 20.77

AUTHOR: by Stephen E. Pigott and Harold O. Maxfield, Jr.

FORM 20.77 Condominium presentation-townhouse condominium--expandable

COMMENT

Developers may convey townhouses as each building or row of buildings is completed. Similarly, it is possible to hold additional land for future offerings if the initial offering sells well. Accordingly, many developers have sought authorization to plan a townhouse condominium of indeterminate size with the number of units to be determined by the demand generated by the initial reaction.

Problems inherent in the townhouse concept derive from the fact that there are undivided fractional interests attached to each unit, fractional shares of the expenses for the common facilities, and that the voting strength of the unit owners who acquired their units early on is subject to being diminished. Adequate safeguards for both unit owners and their mortgagees may be provided by spelling out the rights and obligations of purchasers in all of the possible contingencies. The estimated percentage interest in common elements, the estimated monthly charges for each unit, and the estimated operating expenses for the development can be shown for each contingency. In this way, prospective purchasers should be able to gauge the approximate size of their holdings, their potential voting strength, and their fractional shares of the common expenses. So long as each section is relatively self-sufficient, the addition of units or the failure to do so should not have too much of an effect on future carrying costs.

It should be observed that while the ordinary homeowner may postpone major capital outlays until such time as his budget permits, a condominium dweller is usually subject to assessment whenever an appropriate vote of his neighbors so requires, and, typically, a unanimous vote is not required. Payment, moreover, may be due on a short-term basis. This agreement diminishes the impact of this feature of condominium ownership as follows. If at least 50% but less than 75% of

the unit owners agree to make an improvement to the common elements, the cost is divided only among those who have agreed to the improvement. If 75% or more vote for an improvement to the common elements, the cost is assessed to all owners, but if the cost is in excess of 10% of the value of the condominium, a disagreeing unit owner may go to court for an order directing the purchase of his unit by the board of managers at its fair market value.

FORM

Pinehurst Townhouses Condominium Presentation

Townhouse Development Corporation, (the "Sponsor"), herewith presents its proposal for condominium ownership of land adjacent to Spring Lake Park, Long Meadow, Massachusetts, (the "Land"), and the buildings and other improvements to be constructed thereon, (the "Buildings"). The condominium thus established will be known as Pinehurst Townhouses. This Presentation is intended only as a summary of the main features proposed by Pinehurst Townhouses and of the legal documents required for the creation of the Condominium. Because of the complexity and interdependence of those legal documents, all of the Sponsor's sales and other representatives are prohibited from changing any of the terms and conditions thereof or attempting to interpret their legal effect. You are urged to consult your own counsel in connection with a review of these documents. The Sponsor's counsel, in turn, will be available to discuss any matters that your counsel may wish to discuss. The Exhibits which follow this Presentation provide a more detailed description of the Condominium and the rights and obligations of the Unit Owners. If there is any inconsistency between the Exhibits and this Presentation, the Exhibits will govern.

The Condominium Concept

Condominium ownership yields the investment and tax advantages of homeownership without the attendant concerns of maintenance. A Condominium Unit Owner buys his own residence in fee simple and is entitled to the exclusive possession thereof. Through the Unit Deed, he acquires not only the physical apartment itself, but the right to use the facilities which all the Condominium participants own in common, such as the grounds, parking areas, and recreational facilities.

In order to insure full enjoyment of the common facilities, a Board of Managers is elected from among the Unit Owners to oversee the operation and maintenance of the Condominium. The cost of that operation and maintenance is shared by the individual Unit Owners in proportion to their respective interests in the common facilities, which proportion is established at the outset of the Condominium. Pinehurst Townhouses, however, may consist of one, two, or three Sections as more fully described in this Presentation.

As the Unit Deed makes each purchaser an owner in his own right, he bears no responsibility for the mortgage obligations or real estate taxes of his neighbors (just as the owner of a private home is unaffected by the mortgage responsibility or tax liability of the family next door). Each Unit Owner may mortgage his Unit or not, as he sees fit, and in such amount as he chooses, with any bank or other institutional lender. Each Unit Owner is free to resell his Unit, at such price as he determines, to any buyer subject only to the right of first refusal of the Board of Managers as specified in the Bylaws. The interior of one's Unit may be decorated in any way desired, except that in order to assure an aesthetically pleasing exterior, the color of the reverse side of draperies and curtains must meet with the approval of the Board of Managers.

As in the case of all other homeowners, a Unit Owner receives a federal income tax deduction for real estate tax and mortgage interest payments made in connection with his Unit, subject however, to applicable provisions of the Internal

Revenue Code with regard to the deduction of interest under certain circumstances. If the Unit is purchased with the proceeds of the recent sale of a home, *Section 1034 of the Internal Revenue Code* permits deferral of the recognition of gain realized from that sale. Similarly on resale of the Unit, taxes on the gain, if any, may be deferred by promptly reinvesting the sales proceeds in another home or condominium unit.

For these reasons the Sponsor believes that the creation of Pinehurst Townhouses as a condominium will offer many advantages not available elsewhere in the community.

Pinehurst Townhouses

The Sponsor proposes to establish the Condominium in three Sections. However, the Sponsor retains the option to complete only one, two, or all three Sections, as market and other relevant considerations dictate.

Section A will consist of 52 Townhouse Units with surface parking facilities, together with the security and recreational facilities hereinafter described. Section B will consist of 48 Townhouse Units with surface parking facilities. Section C will consist of fifty (50) Townhouse Units with parking facilities and a Unit for a resident manager.

Section A of the Condominium will be created by the recording of the Master Deed of the Section A portion of the land, which deed will be in the form attached hereto as Exhibit E. The Master Deed permits the Sponsor to amend its provisions to include either or both of Sections B or C, without the approval or consent of Unit Owners. Simultaneously with the recording of the Master Deed, the Sponsor will also record a Declaration of Easements to reserve for the benefit of Sections B and C certain utility and access easements in the event the Master Deed is not amended to include either or both of those Sections. If Sections B or C are not included in the Condominium, they will have the benefit of those easements only if developed as single family or multifamily residential projects. In no event will Section B or C have the benefit of the recreational facilities unless the respective Section is included in the Condominium. Unless and until Section C is included in the Condominium, the Board of Managers will have to provide, outside of the Condominium, an office for the Board and a residence for the resident manager or pay him a larger salary. So long as the existing structures remain on the Section C land, the Sponsor is willing to make suitable space available for such office and residence to the Board of Managers at a nominal cost, but the Sponsor reserves for itself, its successors, and assigns, the right to terminate such arrangement at any time on thirty (30) days' written notice.

You will note in the attached Exhibits the alternative proportionate interests and estimated expenses which will be appropriate depending on which of the Sections are included in the Condominium.

The Land

The Land, consisting of slightly wooded and gently sloping area, is located on the westerly side of Pine Street in Long Meadow, Massachusetts, only a short walk from Pinehurst Square. It abuts directly on Spring Lake Park, a town forest and park surrounding Spring Lake. The Sponsor, in planning the site and placement of the buildings, has taken advantage of these features to preserve the character of the neighborhood.

All utilities, including electric and telephone lines, will be underground.

The roads and drives that the Sponsor will construct on the Land will be owned by the Condominium and the obligation to maintain them will be that of the Condominium unless and until they are dedicated to, and accepted by, the governmental authority having jurisdiction.

Transportation, Shopping, and Services

Long Meadow is conveniently serviced by bus, auto, and rail. It is only a few miles from Springfield which has several bus lines, three railroads, and a privately owned airport. The town is served by several expressways, including Routes 9 and 91. It is only a few miles from Route 90, the Massachusetts Turnpike. Two of the area's largest shopping malls are within a 20 minute ride of Pinehurst Townhouses. Branches of New England's finest stores create an elegant air for the Pinehurst Shopping Center. Springfield is the site of Springfield and American International Colleges, both founded in 1885.

The Berkshire Mountains are within an hour's drive from Pinehurst Townhouses as are Massachusetts and Vermont ski areas.

Long Meadow is a well-planned, progressive community offering a full range of municipal services and programs. Full police, fire, recreation, park, sewer, and water services are combined with one of the state's best known secondary school systems. Excellent youth and senior citizen programs assure a full life in Pinehurst Townhouses. Library, post offices, churches, professional offices, convenience stores, and the Long Meadow Inn are within easy walking distance to support day-to-day activities or to aid when unexpected guests arrive for dinner or the weekend. All these features combine to provide the utmost in ease and convenience.

The Townhouses, Units, and Utilities

Each Townhouse will be a duplex structure constructed primarily of concrete and masonry material in substantial accordance with the specifications contained in Exhibit A attached hereto.

The Units will contain either two bedrooms, three bedrooms, or three bedrooms and a library. Each Unit shall be used only as a residence for a single family. A more complete description of the Units and the specifications for their construction is set forth in said Exhibit A.

Each Unit Owner will pay for all electricity consumed within his Unit, including electricity for heating and for the distribution of air conditioning. Electrical consumption will be measured by a separate meter for each Unit. Water and air conditioning coolant supplied to each Unit will be paid for by the Board of Managers as a part of the services for which the common charge is paid.

Parking Facilities

Each Unit Owner will have the exclusive right to use one designated parking space within the Section in which his Unit is located. The exclusive right to use some additional parking spaces will also be available for purchase as follows:

Section A	26 spaces
Section B	25 spaces
Section C	26 spaces

So long as additional spaces in a particular Section remain unsold, any purchaser in that Section may acquire the exclusive right to use an additional designated parking space or spaces in such Section. If rights in such additional space are acquired, the percentage interest attributable to the Unit will be increased as indicated in the Exhibits annexed hereto so that the user of such additional space pays an additional common charge. Thereafter the Unit may be sold or mortgaged only with the benefit of the rights in the additional space or spaces. The owner of an additional space may,

however, license such space to another Unit Owner without the consent or approval of the Board of Managers provided notice of such license is given to the Board of Managers.

Recreational Facilities

One of the common facilities of the Condominium will be an architecturally designed outdoor swimming pool surrounded by a pool deck area and located on the Land. A cabana with toilet facilities will be located adjacent to the pool. The pool will be available only for the exclusive use of Unit Owners and their invited guests. The estimated expenses for the first year of operation as set forth in the Exhibits annexed hereto include the salary of a lifeguard at the pool for three months, the estimated pool season. There will be a clubhouse available for the use of Unit Owners and their invited guests.

Security Facilities

The Condominium can be approached by car only from Pine Street. A gate house is to be constructed at that entranceway with a manned gate.

Expenses in Connection With the Creation, Construction, and Sale of the Condominium

The Sponsor will bear all costs and expenses incurred in connection with the creation of the Condominium and the sale of Units, including selling expenses and commissions upon the initial sale of Units, advertising and printing expenses, architects' fees, Sponsor's attorneys' fees, organization costs, and engineering and surveying costs, whether incurred by the Sponsor prior or subsequent to the effective date of the Condominium. The Sponsor will pay all brokerage commissions, if any, on initial sales of Units by the Sponsor's affiliated corporation, Townhouse Management Corp.. At the time of conveyance of a Unit to a Purchaser, there will be no liens or liabilities against such Unit, except the lien for current real estate taxes not then due and payable.

Purchase Agreement and Payments

If a prospective purchaser decides to purchase a Unit, a Purchase Agreement in the form attached hereto will be executed and a down payment toward the total price of the Unit shall be made in an amount which will equal _____ percent (_____) of the full purchase price.

Deposits

The Sponsor will place all deposits in its account at the New England National Bank. If the Sponsor does not complete the contemplated transaction for any reason, such moneys will be returned to the purchasers. It is intended, however, that when a respective Section becomes effective, such deposits as are attributable to that Section will be used by the Sponsor in connection with the construction of the Condominium. Therefore, a purchaser should understand that just as in a situation where a builder is to build single family homes, if the Sponsor fails to complete the construction of a Unit and has no financial resources, the purchaser may lose all or part of his deposit. You should consult your attorney in order to best evaluate the nature and extent of that risk. For purposes of this paragraph, the term "effective" means that Purchase Agreements for _____ percent (_____) in interest of the Units (or such lesser percentage as the Sponsor may determine) in the respective Section have been executed and accepted by the

Sponsor. If the Plan does not become effective by _____ [month] _____ [day] , _____ [year] , with respect to Section A, _____ [month] _____ [day] , _____ [year] , with respect to Section B, or _____ [month] _____ [day] , _____ [year] , with respect to Section C, all moneys paid by a purchaser of a Unit in the affected Section will be returned by the Sponsor.

Sale of Units

The Townhouse Units will be sold by the Sponsor, in fee simple, to purchasers who may be individuals, partnerships, corporations, or fiduciaries. Units will be sold together with their respective undivided interests in the Common Elements and exclusive rights and easements. Good record and insurable title to each Unit and its appurtenant interests in the Common Elements will be conveyed by the Sponsor by quitclaim deed, free and clear of all liens and encumbrances other than:

1. A state of facts as shown on the subdivision plan made by H. W. Moore Associates dated _____ [month] _____ [day] , _____ [year] , which indicates a utility easement to the Town of Long Meadow. Any additional state of facts which a subsequent survey would show, provided such additional facts do not render title uninsurable or materially interfere with the use of the Property as contemplated in this Presentation.
2. Zoning and Building Bylaws and any amendments thereto now or hereafter adopted. The Sponsor represents and warrants that the contemplated improvements comply with present zoning and building bylaws of the Town of Long Meadow.
3. Site Plan approval by the Board of Appeals of the Town of Long Meadow, and conditions, if any, imposed in connection therewith.
4. Easements in favor of utility companies for the construction and maintenance of utility and telephone lines, which easements may or may not have yet been recorded.
5. Easements in favor of the Town of Long Meadow, for use of sewer, drainage, and water lines, which easements may or may not have yet been recorded.
6. The Master Deed, Bylaws, Map, and Floor Plans to be recorded in Hampden County Registry of Deeds, as the same may be amended from time to time as provided in this Presentation, the Master Deed, or the Bylaws.
7. Any state of facts which an accurate survey of the Unit would show, provided that such state of facts would not render title unmarketable or materially interfere with the use of the Unit as contemplated in this Presentation.
8. Easements in favor of adjoining Units and in favor of the Common Elements for the continuance of all encroachments of such adjoining Units or Common Elements on the Unit, existing as a result of construction of the Units, or which may come into existence as a result of settling or shifting of the Units, or as a result of repair or restoration of the Units or of any adjoining Unit or of the Common Elements made by or with the consent of the Board of Managers, after damage or destruction by fire or other casualty, or after a taking in condemnation or eminent domain proceedings, or by reason of an alteration or repair to the Common Elements, made by or with the consent of the Board of Managers, so that any such encroachments may remain so long as the Units shall stand.
9. Easements in favor of the other Units to use the pipes, wires, flues, ducts, conduits, cables, public utility lines, roads, and other Common Elements located in the Unit or elsewhere on the Property and serving such other Units.

10. Exclusive rights in favor of other Units for the exclusive use of designated underground and surface parking spaces and storage cubicles.

11. Real estate taxes attributable to such Unit for the then current year as are not due and payable on the date of closing of the sale.

Section A shall have the benefit of a ten-foot utility easement and a seven-foot parking easement over Section B and two-foot drainage easements over land adjacent to the Premises.

Closing of Sales

The closing of the sale of each Unit shall take place only after, or concurrently with, the following events:

1. The issuance of a temporary or permanent Certificate of Occupancy permitting occupancy of the Unit under contract.
2. The Master Deed, Bylaws, floor plans, and architects' certification required by Sections 8 and 9 of Chapter 183A of Massachusetts General Laws shall be recorded as required by law.
3. Release of the Unit from the lien of all mortgages except the purchaser's mortgage, if any.
4. The issuance of a title insurance policy, if purchaser has applied for such title insurance, insuring fee title to the Unit in the purchaser, free and clear of all liens and encumbrances except those set forth or referred to in the Purchase Agreement and purchaser's mortgage, if any.
5. Assignment of all applicable warranties to the Board of Managers as set forth in the Exhibits annexed hereto.
6. Delivery to the purchaser of all applicable warranties on kitchen appliances and air conditioning equipment in his Unit as set forth in the Exhibits annexed hereto.

Closing Costs and Expenses

The estimated closing costs and expenses to be borne by each purchaser of a Unit will be as follows:

1. An Owner's title insurance policy, if ordered from _____ [*title company*], will cost approximately _____ Dollars (\$_____) through a special arrangement made by the Sponsors with the title insurer.
2. Recording fees for recording the Unit Deed and accompanying plans and certificate.
3. The fees and expenses of the purchaser's own attorney, if any.
4. The purchaser will be required to pay to the Board of Managers common charges allocable to his Unit monthly in advance. Common charges assessed during the month in which the sale of a Unit closes shall be adjusted on a per diem basis as of the closing date. The percentage of common charges to be assessed against each Unit is fixed by the Master Deed. The estimated common charges for the first year of operation for each Unit are set forth in the Exhibits annexed hereto.

5. In addition to the regular monthly charge, the purchaser will be required to pay at the closing to the Board of Managers an amount equal to _____ percent (_____) of the estimated annual common charges to provide the Condominium with working capital and a contingency reserve.

6. Current real estate taxes attributable to the Unit shall be adjusted as of the closing date.

Obligations of the Sponsor

The Sponsor will deliver to the Board of Managers, at the time of conveyance of the first Unit, an agreement requiring the Sponsor to perform the following:

1. The Sponsor will pay or cause to be paid all contractors, subcontractors, and materialmen and all others involved in the construction of the Units and Common Elements for work performed and fixtures, material, and equipment supplied or installed in the construction of the Condominium.
2. The Sponsor, at its sole cost and expense, will with reasonable diligence perform or cause to be performed such work, or will supply or cause to be supplied all materials necessary to complete the Units and Common Elements, including the recreational facilities, substantially in accordance with the provisions of this Presentation. The construction of the recreational facilities will be substantially completed within six (6) months after the time _____ percent (_____) of the Units in Section A have been occupied.
3. The Sponsor will cause any and all mechanic's liens arising out of the construction of the Units or Common Elements to be discharged by bonding or otherwise, promptly after the filing of such liens.
4. If a permanent Certificate of Occupancy shall not have been issued at the date of closing of any Unit, the Sponsor will use its best efforts to secure such permanent Certificate of Occupancy and will, at its sole cost and expense, perform or cause to be performed all work and supply or cause to be supplied all materials necessary therefor, consistent with the standards of this Presentation.
5. The Sponsor will pay the indebtedness secured by the construction loan mortgage and will comply with all the other terms and provisions of such mortgage and the note which it secures.
6. The Sponsor will promptly correct any defects in the construction of a Unit, or in the installation or operation of any mechanical equipment therein, that is due to improper workmanship or materials substantially at variance with this Presentation, provided it is notified of such defects in writing within one year from the date of occupancy of such Unit by the Unit Owner. The Sponsor will correct any defects in the construction of the Common Elements, or in the installation or operation of any mechanical equipment therein, due to improper workmanship or materials substantially at variance with this Presentation, provided it is notified of such defects in writing by the Board of Managers (or by any three Unit Owners if the Board of Managers fails to give such notice) within one year from the date of conveyance of the first Unit in the respective Section. The quality of construction shall be comparable to local standards customary in the particular trade. The Sponsor makes no warranties as to fixtures or equipment except that it will deliver to purchasers any manufacturer's warranties thereon received by the Sponsor. In no event shall the Sponsor be responsible for any nail pops, normal settlement, or any consequential damage resulting therefrom.
7. The Sponsor will deliver to the Board of Managers, when the Board takes over the management of the Condominium, heating, electrical, plumbing, roofing, and appliance warranties to the extent the same are given by the subcontractors and manufacturers.

The Sponsor makes no other undertakings or warranties except as otherwise set forth in this Presentation and none

should be implied.

The Sponsor has no obligation to make any repair to the Units or Common Elements except as set forth in this paragraph, and shall not be liable for or required to defend any suit arising out of any occurrence except claims arising out of acts of the Sponsor.

No bond or other security has been furnished to secure the performance of the Sponsor's obligations. The ability of the Sponsor to perform its obligations will depend upon its financial resources at the time it is called upon to perform.

Change in Number and Location of Units, Size,
Layout, and Percentage of Common Interest of Units
and Substitution of Materials, Etc.

In order to meet possible unforeseen or varying demands for the number and type of Units, or to meet particular requirements of prospective purchasers, lending institutions, or title insurance companies or for any other reason, the Sponsor reserves the right to change the size, number, and location of Units and other improvements in each Section (and the size, layout, location, and percentage interest in the Common Elements, of any Unit for which a Purchase Agreement has not been executed by the Sponsor or with respect to which the purchaser is in default), provided such changes do not change the percentage interest in the Common Elements of any Unit already sold or under an executed Purchase and Sale Agreement as to which the purchaser is not in default; increase the earlier purchaser's proportionate share of common expenses; alter the Sponsor's responsibilities and warranties; or diminish the assessments against unsold Units when Section A becomes effective. The Sponsor also reserves the right to substitute for any of the materials, equipment, and appliances specified in the Exhibits annexed hereto, materials, equipment, and appliances of equal or better quality.

Estimate of Common Charges

Annexed hereto are estimated annual budgets for the Condominium based respectively upon occupancy of all Units in Section A, upon occupancy of all Units in Sections A and B, and upon occupancy of all Units in Sections A, B, and C.

The Sponsor has prepared the estimates in the Exhibits annexed hereto. The Sponsor believes these estimates to be dependable, but because of actual expenditures differing from estimated expenditures, possible changes in the future income or expenses of the Condominium, and other variable factors, such estimates are not intended nor should they be considered as guarantees or warranties of any kind whatsoever.

Liens for Nonpayment of Common Charges.

Under the provisions of the _____ [state] General Laws, the Board of Managers, on behalf of the Unit Owners, shall have a lien on each Unit for unpaid common charges assessed against such Unit by the Board of Managers. Such lien, however, shall be subordinate to the liens for taxes on the Unit and any sums unpaid on a first mortgage of record on such Unit.

No Unit Owner may exempt himself from liability for his common charges by waiving use of any of the Common Elements or by abandonment of his Unit. Subject to the provisions of the Bylaws, a Unit Owner may, by conveying his Unit and his interest in the Common Elements to the Board of Managers, exempt himself from common charges

thereafter accruing.

Other Liens

Until the Condominium is terminated, no lien of any kind may be created against the Common Elements after the Master Deed is recorded unless all Unit Owners consent thereto. During such period, liens may arise only against the Units and their respective interests in the Common Elements. A lien for labor performed on or materials furnished to a Unit may not be filed against the Unit or any Unit Owner not expressly consenting to or requesting such labor or materials, except in the case of emergency repairs.

Bylaw Provisions

The following is a summary of important provisions of the Bylaws of the Condominium.

1. Management. Under the Bylaws of the Condominium, the affairs of the Condominium will be managed by a Board of Managers ultimately consisting of six members. The Board of Managers is authorized to employ a manager or a managing agent for the buildings and grounds on such terms as the Board of Managers may deem proper. The services to be rendered by the Board of Managers or any such manager or managing agent shall include billing and collecting common charges, hiring and discharging employees, supervising repairs and alterations, purchasing supplies, maintaining the Condominium's books, and attending meetings of the Board of Managers and of the Unit Owners when reasonably requested.

In order to assure professional management for the Condominium during the initial years of its operation, Townhouse Management Corp., an affiliate of the Sponsor, has been employed to act as managing agent for the Condominium for a period of four years following the conveyance of the first Unit at a maximum compensation equal to 1.6% per annum of the actual cumulative initial sales prices of the Units in the respective Section pursuant to the terms and provisions of a Management Agreement. The Management Agreement may not be cancelled without the consent of two-thirds (2/3) of the Unit Owners in each Section. A copy of the Management Agreement is available for inspection at the office of the Sponsor's counsel.

2. Board of Managers and Officers. The term of office of members of the Board of Managers shall be three years, with the term of one-third (1/3) of the Board of Managers expiring each year.

The officers shall consist of the President, the Vice President, the Secretary, and the Treasurer, all of whom shall be elected by the Board of Managers at its annual meeting. All members of the Board of Managers and officers shall serve without compensation from the Condominium. The Board of Managers and Officers need not be Unit Owners, until the Board of Managers is elected by the Owners and all Units in all Sections have been sold by the Sponsor.

3. Control by Sponsor. The first Board of Managers shall consist of six members who shall be designated by the Sponsor, one of whom shall be a Unit Owner. At the first annual meeting of Unit Owners which will take place within thirty (30) days after title to _____ percent (_____%) of the Units in Section A have been conveyed, or one year following the date of conveyance of the first Unit, whichever is sooner, two of the original Managers will resign and be replaced by Managers elected by the Unit Owners. At each of the next two annual meetings, two of the Managers designated by the Sponsor will resign and be similarly replaced. Prior to the second annual meeting, the Sponsor will have voting control of the Board which shall be responsible for maintenance, the facilities and services to be provided, and will determine the common charges to be paid by all Unit Owners, including the Sponsor. So long as the Sponsor owns one or more Units, the Sponsor will be entitled to elect at least one member of the Board of Managers and can vote as owner of all Units still held by the Sponsor.

4. Voting. Each Unit Owner shall be entitled to cast one vote at all meetings of the Unit Owners for each _____ percent (_____) of interest in the Common Elements belonging to the Unit or Units owned by him. The presence in person or by proxy of a majority of Unit Owners shall constitute a quorum at all meetings of the Unit Owners and, unless otherwise provided, the vote of a majority in interest of Unit Owners at a meeting at which a quorum shall be present shall be binding upon all Unit Owners. To amend or modify the Bylaws, a vote of _____ percent (_____) in number and in common interest of all Unit Owners entitled to vote, cast at a meeting duly held for such purpose, shall be necessary. Special meetings of Unit Owners may be held from time to time, whenever necessary to conduct the affairs of the Condominium.

If the Sponsor duly amends the Master Deed so as to cause the Condominium to be enlarged by the addition of Section B, Units in Section B shall be entitled to vote and shall be chargeable with their share of common charges from and after the date of conveyance of the first Unit in such Section. If the Sponsor duly amends the Master Deed so as to cause the Condominium to be enlarged by the addition of Section C, Units in Section C shall be entitled to vote and shall be chargeable with their share of common charges from and after the date of conveyance of the first Unit in such Section.

5. Common Charges. The common charges payable by each Unit Owner from time to time shall be based upon budgets prepared annually by the Board of Managers and in accordance with such Unit Owner's proportionate interest in the Common Elements. Each Unit Owner shall be advised promptly after the adoption of each budget of the amount of common charges payable by him for the period covered by such budget. The Sponsor shall pay _____ percent (_____) of the common charges allocable to Units that it owns but are unoccupied.

No Unit Owner shall be liable for the payment of any part of the common charges assessed against his Unit subsequent to a permissible transfer by him of such Unit, or subsequent to his conveyance of such Unit to the Board of Managers on behalf of all Unit Owners, in accordance with the provisions of the Master Deed and Bylaws. The latter conveyance may be made only if his Unit is free and clear of liens and encumbrances other than statutory lien for common charges.

6. Repairs. All painting, decorating, maintenance, repairs, and replacements to the Common Elements shall be made by the Board of Managers, and the cost thereof shall be charged to all Unit Owners as a common expense, except to the extent that the same are necessitated by the negligence, misuse, or neglect of a Unit Owner, as determined by the Board of Managers, in which case such expense shall be charged to such Unit Owner. The estimate of common charges for the first year covers the projected cost of upkeep of grounds and snow plowing.

All painting, decorating, maintenance, repairs, and replacements to any Unit shall be at the Unit Owner's expense, except as otherwise provided herein.

The Board of Managers and the manager or managing agent shall have the right of access to any Unit, at reasonable times and in the case of emergency, in the performance of their duties.

7. Insurance. The Board of Managers shall obtain and maintain, to the extent obtainable, fire insurance with extended coverage, insuring the Units (including the bathroom and kitchen fixtures initially installed in all of the Units by the Sponsor, but excluding wall covering, fixtures, furniture, furnishings, or other personal property supplied or installed by Unit Owners), together with all service machinery contained therein and covering the interests of the Condominium, the Board of Managers, and all Unit Owners and their mortgagees, as their respective interests may appear. Each of such policies shall contain a standard mortgagee clause in favor of each mortgagee of a Unit which shall provide that the loss, if any, thereunder, shall be payable to such mortgagee as its interest may appear, subject, however, to the loss payment provisions in favor of the Board of Managers hereinafter set forth. The cost of all such insurance shall be paid by the Board of Managers and shall constitute a common expense. The proceeds of all policies of physical damage insurance shall be payable to the Board of Managers, to be applied for the purpose of repairing, restoring, or rebuilding the Buildings unless otherwise determined by the Unit Owners in accordance with the Bylaws and the provisions of

Chapter 183A of Massachusetts General Laws. All policies of physical damage insurance shall, to the extent obtainable, contain waivers of subrogation, or reduction of pro rata liability of the insurer as a result of any insurance carried by Unit Owners, and of invalidity arising from any acts of the insured or any Unit Owners, and shall provide that such policies may not be cancelled or substantially modified without at least ten days' prior written notice to all of the insured, including all mortgagees of Units.

The public liability insurance policy to be maintained until the first meeting of the Board of Managers following the first annual meeting of the Unit Owners will be in limits of _____ Dollars (\$_____) for bodily injury to any one person and _____ Dollars (\$_____) covering all claims for bodily injury arising out of any one occurrence and _____ Dollars (\$_____) for property damage arising out of any one occurrence in the Common Elements and covering cross liability claims of one insured against another. However, such policy does not cover the individual liability of a Unit Owner arising from occurrences within his own Unit. A Unit Owner should insure himself against such liability by purchasing insurance for this purpose at his own expense.

Unit Owners should also carry insurance for their own benefit insuring their carpeting, parquet flooring, wall covering, fixtures, furniture, furnishings, and other personal property, provided that such policies contain waivers of subrogation and further provided that the liability of the carriers issuing insurance procured by the Board of Managers shall not be affected or diminished by reason of any Unit Owner's other insurance.

The Board of Managers will arrange for repair of the Units and Common Elements in the event of casualty loss. If the insurance proceeds are not sufficient to cover the cost of repairs to the Units, the balance of such cost will be assessed against all Unit Owners.

8. Improvements; Costs. If _____ percent (_____%) or more but less than _____ percent (_____%) of the Unit Owners agree to make an improvement to the Common Elements, the cost of such improvement shall be borne solely by the Unit Owners so agreeing. _____ percent (_____%) or more of the Unit Owners may agree to make an improvement to the Common Elements and assess the cost thereof to all Unit Owners as a common expense, but if such improvement shall cost in excess of _____ percent (_____%) of the then value of the Condominium, any Unit Owner not so agreeing may apply to the Hampden Superior Court, on such notice to the Board of Managers as the court shall direct, for an order directing the purchase of his Unit by the Board of Managers at the fair market value thereof as approved by the court. The cost of any such purchase shall be a common expense.

No Unit Owner shall make any structural alteration, addition, or improvement in his Unit without the prior written approval of the Board of Managers, but this provision shall not apply to Units owned by the Sponsor until such Units have been initially sold by the Sponsor.

9. Liability of Board of Managers and Unit Owners. Any contract or other commitment made by the Board of Managers, the managing agent, or the manager shall be made only as agent for the Unit Owners, and none of them shall be personally liable on any such contract or commitment (except as Unit Owners). The liability of any Unit Owner on any such contract or commitment shall be limited to such proportionate share of the total liability thereunder as the common interest of such Unit Owner bears to the aggregate common interest of all Unit Owners. The Board of Managers shall have no liability to the Unit Owners for errors of judgment, negligence, or otherwise, except for willful misconduct or bad faith. The Unit Owners shall severally indemnify the members of the Board of Managers against any liability or claims except those arising out of bad faith or willful misconduct of the members of the Board of Managers, but the liability of any Unit Owner on account of such indemnification shall be limited to such proportionate share thereof as the common interest of such Unit Owners bears to the aggregate common interest of all Unit Owners. Members of the Board of Managers shall not be required to be bonded.

10. Easements. Each Unit Owner shall have, in common with all other Unit Owners, an easement to use all pipes, flues, ducts, cables, wires, conduits, public utility lines, or other Common Elements located in other Units and serving his Unit and an easement for the continuance of any encroachment by his Unit on an adjoining Unit or on any Common Element, existing as a result of construction of the Units, or which may come into existence thereafter as a result of the Units settling or shifting, or as a result of restoration of the Units or a Unit after damage by fire or other casualty, or as a result of condemnation or eminent domain proceedings, or as a result of repairs or alterations made or approved by the Board of Managers or the Unit Owners as hereinabove provided, so that any such encroachment may remain undisturbed so long as the Units stand. Each Unit shall be subject to these easements in favor of all other Unit Owners. The Board of Managers, through the manager, managing agent, or their employees, shall have a right of access to each Unit to inspect and make repairs to the Unit to prevent damage to the Common Elements or any other Unit. The owner or owners of Sections B and C, or either, shall have the easement set forth in the Declaration of Easements.

General Information Concerning the Parties Involved

The Sponsor

Townhouse Development Corporation is a Massachusetts corporation.

The Builder

White Construction Company, a Massachusetts corporation having a place of business in Springfield, Massachusetts, will construct the Units and improvements on the Land, pursuant to a general contract with the Sponsor. The builder has no financial relationship, past or present, to the Property or the Sponsor, except as builder.

The Attorneys for the Sponsor

The Sponsor has retained the law firm of Marks and Dunne of Springfield, Massachusetts, who have drafted the Master Deed, the Bylaws, the form of Purchase Agreement, the form of Unit Deed, and all other documents necessary in connection with the formation of the Condominium, and who are advising the Sponsor in connection with all legal matters incidental thereto. The Condominium may retain its own counsel following the filing of the Master Deed.

The Architect

Aldrich Associates of Boston, Massachusetts, have been retained by the Sponsors as architects for the project. The architects have no financial relationship, past or present, to the Property or to the Sponsor, except as architects.

Sales and Managing Agent

Townhouse Management Corp., a Massachusetts corporation which owns a majority of the stock of the Sponsor, has been engaged to act as sales agent for the Sponsor and has been employed to act as managing agent for the Condominium for a period of four years following the conveyance of the first Unit.

Termination of Condominium

The Condominium shall continue (unless terminated by casualty loss or by condemnation) until such time as the Property shall be withdrawn from the provisions of Chapter 183A of Massachusetts General Laws, as a result of the vote to do so of at least 75% in number of the Unit Owners. At that time the Property shall be subject to an action for

partition by any Unit Owner or any lienor, as if owned in common. In that event the net proceeds of the sale resulting therefrom shall be divided among all Unit Owners in proportion to their respective common interests after first applying the share of the net proceeds of such sale otherwise payable to any Unit Owner, to the payment of any liens on his Unit, in the order of the priority of such liens.

The Exhibits which follow this Presentation provide a more detailed description of the Condominium and the rights and obligations of the Unit Owner. Please consider the Exhibits carefully and discuss your questions with your own counsel. Your counsel should direct his inquiries to the Sponsor's counsel, Marks and Dunne.

Any information, data, or representation not referred to in this Presentation and not contained in the various Exhibits and documents mentioned herein, must not be relied upon. No person has been authorized by the Sponsor to make any representation which is not expressly contained herein. This Presentation may not be changed or modified orally.

The Sponsor reserves the right to change the terms of this Presentation as they affect potential purchasers not then under contract provided any such change shall not affect the substance of the Presentation with respect to prior purchasers or purchasers under contract, or their undivided interest in the Condominium.

Dated: _____ [city] , _____ [state]

_____ [month] _____ [day] , _____ [year]

Pinehurst Townhouse Condominium Presentation

Description of Units, Common Elements, Utilities,
Appliances, and Pool Area

1. Description of units. If all three Sections are constructed, the 150 Units will be located in individual two-story brick buildings with basements, and there will be nine two-bedroom Units and 141 three-bedroom Units, including 42 three-bedroom Units with a library. All Units will be duplex.

The boundary lines of each Townhouse Unit are the interior surfaces of its perimeter walls, bearing walls, basement floors, top story ceiling, windows and window frames, doors, door frames and trims, and includes both the portions of the Units so described and the air space so encompassed.

2. Description of Common Elements. The Common Elements consist of the entire Property not located within any Unit. They include, without limitation, the following:

- (a) The land on which the buildings are erected;
- (b) All roofs, foundations, pipes, ducts, flues, chutes, conduits, wires, and other utility installations to outlets, bearing walls, perimeter walls, columns, and girders to the interior surfaces thereof, regardless of location;
- (c) All land, lawns, gardens, gatehouse, pool, cabana, clubhouse, roads, parking, and other improved or unimproved areas not within the Units, provided, however, that each Unit owner shall have an easement for the exclusive use of one designated parking space and may have an easement for the exclusive use of one or more additional parking spaces as designated in his Unit Deed;
- (d) All installations of power, lights, gas, hot and cold water, and heating existing for common use and all other parts of the property necessary or convenient to its existence, maintenance, and safety or normally in common use;

- (e) All sewer and drainage pipes;
- (f) All storage rooms located outside of the Units, provided, however, that each Owner shall have an easement for the exclusive use of one storage cubicle to be designated in his Unit Deed;
- (g) All other apparatus and installations existing in the Units for common use or necessary or convenient to the existence, maintenance, or safety of the buildings;
- (h) All other items listed as such in Massachusetts General Laws, Chapter 183A, and located on the Property.

3. Types of Units. The dimension and sizes given below are approximate dimensions or sizes, and are subject to variation due to field conditions. The following floor areas are taken from inside finish to inside finish. They include the partition walls with the Unit and the area of the patio to which the Unit has access and exclusive use.

(a) Two-bedroom townhouses. 1,695 square feet (including a patio and a finished basement). Ground floor--comprised of 12'8" x 9'6" kitchen, 12'5" x 9'6" dining room, 26'2" x 15'0" living room, entry, and powder room. Second floor--comprised of 16'0" x 14'6" master bedroom, 15'0" x 12'6" second bedroom, two bathrooms, dressing area, closets, and storage.

(b) Three-bedroom townhouses. 2,175 square feet (including a patio and a finished basement). Ground floor--comprised of 12'8" x 9'6" kitchen, 10'0" x 14'0" pantry, 12'5" x 10'6" dining room, 26'6" x 17'0" living room, entry, and powder room. Second floor--comprised of 18'0" x 15'6" master bedroom, 16'0" x 14'6" second bedroom, 15'0" x 12'6" third bedroom, three bathrooms, dressing area, closets, and storage.

(c) Three-bedroom townhouses with library. 2,350 square feet (including a patio and a finished basement). Ground floor--comprised of 12'8" x 9'6" kitchen, 10'0" x 14'0" pantry, 12'5" x 10'6" dining room, 26'6" x 17'0" living room, 14'0" x 12'0" library, entry, powder room. Second floor--comprised of 18'0" x 15'6" master bedroom, 16'0" x 14'6" second bedroom, 15'0" x 12'6" third bedroom, three bathrooms, dressing area, closets, and storage.

4. Utilities and Appliances.

(a) Water supply. Water will be supplied by the _____ and is a common expense of the Condominium. Meters will be supplied and installed by the Town of Long Meadow.

(b) Sewers. All building waste lines will be connected to sewer lines which connect to public sewers at the property lines.

(c) Waste disposal. Waste will be picked up several times weekly. There will be a compactor to compact and wrap the waste for transporting out of the Condominium. The cost of the pick up is included in the estimated annual operating expenses.

(d) Plumbing. Interior water lines will be copper. Interior waste lines will be cast iron.

(e) Plumbing Fixtures. All fixtures will be white.

(1) Bathtub will be a five-foot, standard width, cast iron unit with a nonskid bottom surface, nonscald shower control, shower head, and tub spout.

(2) Water closet will be a tank-type, floor mounted unit of a vitreous china material.

(3) Lavatory will be a counter mounted, oval unit of vitreous china with a wide spread faucet.

(4) Stall showers, where applicable, will have a nonscald shower control and head set.

Bathrooms will have high pressure laminate vanity tops and cabinet bases. There will be a combination unit with three dimensional mirrors and two medicine cabinets. The unit will be 36 inches high and the width of the vanity top. Each bathroom will contain two or more chrome towel bars and a flush mounted chrome toilet paper holder. There will be ceiling high ceramic tile around the bathtub and a ceramic tile floor in all bathrooms that have bathtubs or showers. There will be combination ceramic soap dish and grab bar for each bathtub and shower stall. Stall showers will have 2'0" glass shower doors.

(f) Kitchen Sink. Kitchen sinks will be a stainless steel duplex sink with a single lever faucet.

(g) Kitchen Cabinets and Countertops. All kitchen cabinets will be wood. All countertops will be high pressure laminate.

(h) Heat. Each Unit will contain electric baseboard radiation with individual room control provided by wall thermostats. The cost of operating and maintaining the heating system is a Unit expense.

(i) Air Conditioning. Each Unit will contain its own compressor and air handler with control from a wall thermostat within the Unit. Coolant will be provided to each compressor. The cost of operating and maintaining the compressor and air handler is a Unit expense. The cost of operating and maintaining the central cooling equipment will be included in the common charge.

(j) Hot Water Heaters. Hot water heaters will be electric. The cost of operating and maintaining the water heater is a Unit expense.

(k) Electrical Equipment. Each Unit will be metered separately from a central location in the garage area. A 150 amp feeder will be installed to a 150 amp 120/208 volt single phase, three wire circuit breaker panel. Common area electricity will be separately metered and will be included in the common charge.

(l) Electrical Outlets. All outlets are duplex receptacles. In all rooms where there are no ceiling fixtures, two duplex outlets will be wired to a switch. There will be special outlets for range, dishwasher, disposal, refrigerator, dryer, washer, air conditioning, or electric heat.

(m) Telephone and Television. All Units will be prewired for telephone in accordance with current requirements. Each Unit will contain at least two television antenna jacks connected to a master antenna system.

(n) Appliances. The following Hotpoint appliances or equal are included in every Unit at no extra cost:

-- Electric range: Double oven with self-cleaning lower master oven and built-in two level exhaust system

-- Refrigerator-freezer: 15 cu. ft. no frost refrigerator-freezer with icemaker.

-- Dishwasher: Built in with push button selection of washing cycles.

-- Food waste disposer: 1/2 hp. motor, insulated for sound control.

The above appliances come in the standard manufacturer's colors.

(o) Light Fixtures. Above-counter light fixtures will be supplied in kitchens and bathrooms. Stall shower will have recessed fixtures. Standard fixtures will be provided in the entry hall and hallways. Porcelain socket fixtures will be provided in walk-in closets and clothes closets. Electric outlet boxes for light fixtures will be provided as follows: kitchen--one; dining room--one.

(p) Floor Covering. In each Unit the floor will be covered with wood parquet in all areas except baths and lavatory which will be covered with ceramic tile and the kitchen which will be covered with sheet vinyl.

(q) Warranties and Reservations. At the time of conveyance of title to the first Unit in each Section, the plumbing, heating, central air conditioning, roofing, and electrical subcontractor's guaranties, covering for each Building a one-year period subsequent to the conveyance of title to the first Unit in each Building, shall be delivered to the Board of Managers. At the time of conveyance of each Unit, the kitchen appliances and Unit air conditioning equipment manufacturer's warranties covering a period subsequent to conveyance of title as outlined in each warranty, shall be delivered to the purchaser thereof.

All Buildings and facilities will conform to the applicable governmental codes. Sponsor reserves the right to substitute for any of the materials or equipment specific materials or equipment of equal or better quality.

5. Pool Area. The pool area contains a rectangular swimming pool of approximately 800 square feet surrounded by an attractive deck with an adjoining cabana. Pool water will be filtered to comply with local health codes.

6. Clubhouse. The clubhouse is a two-story brick and concrete building with basement, containing meeting rooms, game rooms, and party rooms with a six-lane bowling alley in the basement.

Rules and Regulations

of
Pinehurst Townhouses

1. The greens and walkways in front of the entranceways to the Townhouses shall not be obstructed or used for any purpose other than ingress and egress from the Townhouses.

2. No owner shall in any manner decorate the exterior of any Townhouses without the prior written consent of the Board of Managers.

3. No article shall be hung or shaken from the doors or windows or placed upon the window sills of the Townhouses.

4. No bicycles, scooters, baby carriages, or similar vehicles or toys, or other personal articles shall be allowed to stand in any of the common areas.

5. No owner shall make or permit any noises that will disturb or annoy the occupants of any of the Townhouses or do or permit anything to be done which will interfere with the rights, comfort or convenience of other owners.

6. Each owner shall keep such owner's Townhouse in a good state of preservation and cleanliness and shall not sweep or throw or permit to be swept or thrown therefrom, or from the doors or windows thereof, any dirt or other substance.

7. No shades, awnings, window guards, ventilators, fans, or air conditioning devices shall be used in or about the buildings except such as shall have been approved by the Board of Managers.

8. All garbage and refuse from the Townhouses shall be deposited with care in garbage containers intended for such purpose only at such times and in such manner as the Board of Managers may direct.
9. Water closets and other water apparatus in the buildings shall not be used for any purposes other than those for which they were constructed nor shall any sweepings, rubbish, rags, paper, ashes, or any other article be thrown into the same. Any damage resulting from misuse of any water closets or other apparatus shall be paid for by the owner in whose Townhouse it shall have been caused.
10. No owner shall send any employee of management out of the development on any private business of the owner.
11. No bird or animal shall be kept or harbored in the development unless the same in each instance is expressly permitted in writing by the Board of Managers. In no event shall dogs be permitted in any of the public portions of the development unless carried or on leash. The owner shall indemnify the Board of Managers and hold it harmless against any loss or liability of any kind or character whatsoever arising from or growing out of having any animal in the development.
12. No industry, business, trade, occupation, or profession of any kind, commercial, religious, educational, or otherwise, designed for profit, altruism, or otherwise, shall be conducted, maintained, or permitted on any part of the Property, nor shall any "For Sale," "For Rent," or "For Lease" signs or other window displays or advertising be maintained or permitted on any part of the Property or in any Unit therein nor shall any Unit be used or rented for transient, hotel, or motel purposes. The right is reserved by the Sponsor and the Board of Managers, or its agent, to place "For Sale," "For Rent," or "For Lease" signs on any unsold or unoccupied Units, and the right is hereby given to any mortgagee, who may become the owner of any Unit, to place such signs on any Unit owned by such mortgagee, but in no event will any sign be larger than one foot by two feet.
13. Nothing shall be altered or constructed in or removed from the Common Elements, except upon the written consent of the Board of Managers.
14. All radio, television, or other electrical equipment of any kind or nature installed or used in each Unit shall fully comply with all rules, regulations, requirements, or recommendations of the Board of Fire Underwriters and the public authorities having jurisdiction, and the Unit Owner alone shall be liable for any damage or injury caused by any radio, television, or other electrical equipment in such Unit.
15. The agents of the Board of Managers or the managing agent, and any contractor or workman authorized by the Board of Managers or the managing agent, may enter any room or Unit in the Buildings at any reasonable hour of the day after notification (except in case of emergency) for the purpose of inspecting such Unit for the presence of any vermin, insects, or other pests and for the purpose of taking such measures as may be necessary to control or exterminate any such vermin, insects, or other pests.
16. The Board of Managers, or its designated agent, may retain a pass key to each Unit. No Unit Owner shall alter any lock or install a new lock or a knocker on any door of a Unit without the written consent of the Board of Managers. In case such consent is given, the Unit Owner shall provide the Board of Managers, or its agent, with an additional key pursuant to its right of access to the Unit.
17. No vehicle belonging to an owner or to a member of the family or guest, tenant, or employee of an owner shall be parked in such manner as to impede or prevent ready access to another owner's space. The owners, their employees, servants, agents, visitors, licensees, and the owner's family shall obey the parking regulations posted at the private streets, parking areas, and drives and any other traffic regulations promulgated in the future for the safety, comfort and convenience of the owners.

18. The owner shall not cause or permit the blowing of any horn from any vehicle of which he or his guests or family shall be occupants, approaching or upon any of the driveways or parking areas serving the development.

19. An owner must not permit his guests, tenants, or members of his family to use parking spaces owned by other owners.

20. All damage to the Townhouses caused by the moving or carrying of any article therein shall be paid by the owner responsible for the presence of such article.

21. Water shall not be left running for any unreasonable or unnecessary length of time.

22. No owner shall use or permit to be brought into the Townhouses any inflammable oils or fluids such as gasoline, kerosene, naphtha, or benzine, or other explosives or articles deemed extra hazardous to life, limb, or property, without in each case obtaining written consent of the Board of Managers.

23. The owners shall not be allowed to put their names on any entry of the Townhouses, except in the proper places provided for such purpose.

24. The owners shall close all windows when necessary, to avoid possible damage from storm, rain, or freezing.

25. No owner shall do any painting of the exterior of the Townhouses or to the patio, fences, parking spaces, or storage areas.

26. The swimming pool may be used by owners or their guests. No alcoholic drinking shall be permitted in the pool area. The owners and their guests must abide by the swimming pool rules as posted in the pool area. Personal copies shall be available upon request.

27. The Board of Managers may charge guests for the use of the swimming pool and may restrict the number of guests that may use the swimming pool.

28. The swimming pool may not be used unless a qualified lifeguard is present.

29. Rules of behavior for the swimming pool and pool area will be promulgated by the Board of Managers, and all Unit Owners and their families and guests must abide by such rules.

30. Draperies or curtains must be installed by each Unit Owner on all windows of his Unit and must be maintained in such windows at all times. No blinds may be installed or used without draperies. The color of the portion of such draperies, blinds, or curtains visible from the exterior shall conform to standards specified by the Board of Managers.

31. The Board of Managers shall, from time to time, promulgate a list of service and convenience individuals and firms such as dry cleaners, launderers, milkmen, repairmen, etc., who are authorized to do business on the Property. No owner shall authorize other such individuals or firms on the Property without the approval of the Board of Managers.

32. Any owner wishing to plant flowers, trees, or shrubs outside of his patio area must obtain written permission from management before doing so.

33. Any damage to the buildings, recreational facilities, or other common areas or equipment caused by children or their guests shall be repaired at the expense of the Unit Owners.

34. Complaints regarding the management of the Townhouses and grounds or regarding actions of other owners shall be made in writing to the Board of Managers.

35 Any consent or approval given under these Community Rules by the Board of Managers shall be revocable at any time.

36. These community rules may be modified, added to or repealed at any time by the Board of Managers.

Pinehurst Townhouses
Swimming Pool Regulations and Administration

1. The swimming pool and swimming pool area are for the use of the Pinehurst Townhouses residents and their invited guests.

2. All guests 18 years of age or under must be accompanied by a resident at all times.

3. All guests over 18, when not accompanied by a resident, must present a guest card. Guest cards may be obtained from the manager by the residents.

4. Except by prior arrangement with the lifeguard, the number of guests in one group in the pool at any one time will not exceed four.

5. No group of guests over four will be allowed on Saturday and Sunday.

6. Every Tuesday from one p.m. to nine p.m., the pool will be open only to persons over 18 years of age.

7. Residents are reminded that they are responsible for the conduct of their guests at all times.

8. Residents will sign the register for themselves and their guests when entering the pool area for swimming.

9. Swimming pool hours will be from nine a.m. to nine p.m.

10. The swimming pool attendant is in charge of bathing and safe conduct in the swimming pool area. Please respect his judgment and authority in enforcing safety and sanitation regulations.

11. Any person having any apparent skin disease, sore or inflamed eyes, cough, cold, nasal, or ear discharges, or any communicable disease shall be excluded from the pool.

12. No boisterous or rough play, except supervised water sports, is permitted in the pool, on diving board, or in the pool area.

13. Spitting, spouting water, and blowing nose in the pool, etc., are prohibited.

14. Solo swimming (swimming alone when no other person is in the immediate pool area) is prohibited.

15. Double bouncing on diving board is prohibited.

16. Drinking alcoholic beverages in the pool area is prohibited.

17. No horseplay... . No running... . Please walk.
18. The use of glassware or glass bottles, etc., in the pool area is prohibited.
19. Please observe swimming hours as posted.
20. All individuals will take a shower in their Townhouse or in facilities provided for that purpose before entering the swimming pool and will provide their own towels.
21. Attire will conform to conventional swimming suits. Full trunks or swimming suits will be worn.
22. It is requested that all individuals cooperate in maintaining maximum cleanliness and tidiness in the swimming pool area.
23. Tobacco, beverages, or food may not be taken within eight feet of the swimming pool.
24. No children in diapers are allowed in the pool.
25. No pets are allowed in the swimming pool or the clubhouse area.

Clubhouse Regulations.

1. The Clubhouse is for the use of Pinehurst Townhouse residents and their invited guests.
2. The Clubhouse shall be used in accordance with the rules and regulations as posted therein.
3. Any persons using the Clubhouse shall be responsible for keeping it clean and presentable.
4. Each owner shall be responsible for any damage caused to the Clubhouse or its contents by the owner or any of the owner's family, tenants, or guests. The owner shall pay for any such damage.



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Current Legal Forms for Real Estate

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Current Legal Forms for Real Estate
Chapter 20 REAL ESTATE ENTITIES
Part IV. Forms

H. CONDOMINIUMS AND HOMEOWNERS ASSOCIATION

24-20 Current Legal Forms for Real Estate FORM 20.78

AUTHOR: by Stephen E. Pigott and Harold O. Maxfield, Jr.

FORM 20.78 Homeowners' association declaration

COMMENT

Unlike the typical condominium, a homeowners' association includes each owner owning a separate lot of land. The improvements consist of the house, driveway, etc., owned exclusively by the homeowner. Living in a homeowners' association may involve separate common facilities such as tennis courts and swimming pools. In such case, the homeowner by virtue of owning the land belongs to the homeowners' association and has access to such facilities. However, the typical homeowners' declaration will also place numerous other restrictions on the owner. The limitations might include a limitation on fences or sheds. They might also provide restrictions on the size of a house or even the type of materials that may be used in the construction of the house, or even upon the colors of the exterior of the house or which way a garage faces. The declaration is usually filed in the Recorder's Office before lots are sold and as a result, each homeowner in the development purchases their property subject to the restriction and/or limitation set forth in the declaration.

Like condominiums, most homeowners' associations have a requirement for each member to pay dues. Since most homeowners' associations are non-profit enterprises, the dues are used as the operating revenue for the association. Operating expenses for the association are items like errors and omissions insurance for the trustees or officers, maintenance, repair and replacement of the common areas and facilities. The following form is a typical declaration for a homeowners' association. As discussed above, many states regulate the initial sale of condominiums by the developer and require the seller to certain disclosures of information. No such regulation generally exists with respect to homeowners' association and subdivisions.

FORM

DECLARATION OF COVENANTS AND RESTRICTIONS

FOR

ABC HOMESTEAD

THIS DECLARATION is made this _____ [day] day of _____ [month] ,
 _____ [year] , by ABC CORPORATION, an Ohio corporation ("Declarant").

WHEREAS, Declarant is the owner of certain real property situated in the _____ [city] ,
 _____ [county] County, _____ [state] , known as ABC Homestead (Phase I) and
 ABC Homestead (Phase II), and further described on Exhibit A and Exhibit B respectively, attached hereto
 (collectively, the "Subdivision"); and

WHEREAS, Declarant wishes to impose certain covenants and restrictions upon all real property in the Subdivision to
 insure uniformity of development as a residential subdivision;

NOW THEREFORE, Declarant hereby declares that, except as set forth in Paragraph 11, below, the Subdivision and
 each parcel therein (each such parcel hereinafter referred to as a "Lot") is and shall be held, used, owned, occupied,
 transferred, sold and conveyed subject to the covenants, restrictions, obligations, easements, reservations, conditions,
 limitations, agreements, charges and liens set forth below:

1. Residential Use. Each Lot shall be limited in use to single family residence purposes only, except that an owner of a
 Lot ("Owner") may use a portion of his or her residence constructed on a Lot for office or studio use, provided (i) the
 activities conducted therein shall not interfere with the quiet enjoyment or comfort of any other Owner, (ii) such use
 does not violate any local zoning ordinance, and (iii) no more than three (3) outside, non-resident employees are present
 at any time.

2. Approval by Committee.

A. Plan Approval. No construction, including, but not limited to, the construction of any residence, garage, deck,
 gazebo, outbuilding, patio, swimming pool, landscaping, grading or other improvement to the Lot, may be commenced
 or erected on any Lot unless the complete plans, specifications (including brand, style and color of the brick, shingles,
 and all other exterior surfaces) and building grades for such construction be first submitted to and approved in writing
 by an architectural committee (the "Committee") selected by Declarant, its successors, or any person or persons
 hereafter designated by Declarant or its successors. Any material changes made subsequent to the written approval by
 the Committee must be resubmitted and approved in writing prior to the commencement of changes.

B. Builder Approval. No general contractor, subcontractor, corporation, sole proprietorship, general partnership, limited
 partnership, limited liability company, individual or any other party (the "Builder") may commence or erect any
 construction described in subparagraph A hereof, or assist or participate in such construction, unless the Committee
 shall first approve such Builder for such purpose.

C. Committee. It will be the purpose of the Committee to insure the integrity and harmony of the Subdivision and each
 building constructed therein for the benefit of each Owner. The Committee will have sole and absolute discretion in its
 decisions. Refusal of approval of plans, specifications or locations by the Committee may be based on any ground,
 including purely aesthetic grounds. No action or conduct by the Committee in furtherance of these restrictions, or
 Declarant in establishing the Committee, shall be grounds for any liability whatsoever against the Committee or
 Declarant by any Owner, such Owner's heirs, successors or assigns, or any third party. Nothing herein shall be
 construed as relieving any Owner, such Owner's heirs, successors or assigns from any obligation to comply with all

applicable local, state and federal laws and regulations.

3. Building Restrictions.

A. Number of Residence Buildings. No more than (1) residence building may be erected on any Lot, however, a guest house conforming to the same architectural standards and of similar design to the main residence building is permitted.

B. Size of Residence. No residence erected on any Lot may contain less than 2,200 square feet for a one-story residence or less than 2,500 square feet for a two-story residence. The area of any residence shall be computed on the outside foundation of the first floor and the exterior dimensions of the second floor. In the case of a Cape Cod, the second floor area shall be computed from the outside dimension of the knee walls. Basement and garage area shall not be included in the computation. Any guest house constructed on a Lot shall not be required to meet the requirements of this subsection, however, the area of any such guest house shall not be included in the computation.

C. Garages. Except as provided herein, all garages shall be affixed to their respective residence building, shall have side or rear entry, and, except as otherwise provided in this subsection, shall have minimum inside dimensions of 23 feet by 32 feet so as to accommodate a minimum of two (2) automobiles. Detached garages are permissible but may not replace the required attached garage. Detached garages must conform to the same architectural standards as residence buildings and must be similar to the residence in design. In the event that a detached garage accommodating two (2) or more automobiles is constructed, the attached garage may be built so as to accommodate only two (2) automobiles. No garage doors may face or open toward the front of any Lot. In the case of corner Lots, the front of the Lot shall be considered the side of the Lot running along the residential building face with the longest dimension exclusive of the garage. All garage doors must face away from traffic traveling in the Subdivision, except where, in the discretion of the Committee, topographical conditions and/or aesthetic considerations prohibit such compliance.

D. Foundation. No exposed foundation may be constructed with cement or cinder block as the completed face. Exterior foundation surfaces must be brick, stone, stucco, wood, aluminum or vinyl siding, or any natural material.

E. Exposed Surfaces. No exposed surface may be constructed with unfinished masonry material (i.e., cement or cinder block) as the completed face. Exposed exterior walls must be brick, stone, stucco, wood, aluminum or vinyl siding, or any natural material or finished masonry products.

F. Roof Pitch. All residence buildings, guest houses, and garages (attached or otherwise) shall have a sloping roof with a pitch of 8 to 12.

G. Outbuildings. Outbuildings must conform to residence's architecture, including color and material. Outbuildings must be a minimum of 20 feet from the side property line or 30 feet from the rear property line.

H. Utilities. All electrical, television or telephone cables and any other utility lines and facilities which are to extend from outside a Lot to any residence or other structure located on the Lot or between structures on the Lot shall be placed underground.

I. Front Set Back. No building may be erected on any Lot, Lots or parts thereof nearer than 70 feet to the front of the Lot line, unless otherwise specified on plans which the Committee has approved pursuant to Section 2, above. The Committee may increase or decrease the required front set back if it deems, in its sole discretion, that topography and Lot configuration so require.

4. Construction and Maintenance.

A. Timing for Completion. Once construction on any structure on a Lot has commenced, it must be completed within

eighteen (18) months of commencement.

B. Construction Debris. During construction, the Owner shall keep the Lot free from construction debris and shall not allow the burial of such debris on the Lot or its use as fill material at any location on the Lot.

C. Construction Mud and Damage. Each Owner shall keep such Owner's Lot and the streets providing access thereto free of accumulations of dirt, mud and debris, and shall be responsible for all repairs of damage to the swales, ditches, storm sewers and streets occasioned by work on or around the Lot by the Owner or the Owner's contractor, or their agents, representatives, subcontractors or employees. If the Owner shall fail to keep such Owner's Lot and the streets free of such accumulations, or shall fail to repair any damage to the swales, ditches, storm sewers and streets, then in addition to all other rights and remedies Declarant may have (including the right to specific performance), Declarant shall have the right to remove such dirt, mud and debris and repair all damage and shall charge the cost of such removal or repair to the Owner. Such costs shall be payable by the Owner upon demand and shall constitute an assessment, as set forth in Section 8, below, against the Lot.

D. Building Maintenance. Each Owner shall, at such Owner's sole cost and expense, maintain and keep the residence building and all other buildings or structures on the Lot in a state of good repair.

E. Building Casualties. If all or any portion of a residence on a Lot is damaged or destroyed by fire or other casualty, the Owner shall promptly rebuild, repair or reconstruct such residence or raze the structure, remove all rubble and debris, fill in any basement areas or excavation areas with clean fill, and grade the Lot in accordance with any applicable improvement plans for the Subdivision or Lot.

F. Storm Sewer Maintenance on Lots. Each Owner shall maintain the ditches, storm sewers, culverts, water management areas and basins, swales and grading for the Lots owned by them in accordance with the improvement plans approved for the Subdivision.

5. Landscaping and Lot Appearance.

A. Lawns and Vegetation; Existing Trees. Lawns shall be kept properly trimmed at all times. No grains, underbrush, excessive weeds or other unsightly vegetation shall be permitted to grow or remain on any Lot or in any ditches in whole or in part on a Lot or in the street right-of-way in front of any Lot. All grass on any unbuilt lot must be kept at a maximum height of twelve (12) inches. Vegetables may be grown on a lot, provided they are not grown for commercial purposes and provided they are restricted to an area which is situated to the rear of the Lot and is at least 20 feet from any Lot line.

All plans for the clearing of a Lot which include removal of any tree with a trunk diameter greater than five (5) inches must be approved by the Committee prior to commencement of work.

B. Timing of Landscaping. All landscaping must be completed within one (1) year of the occupancy of the residence, including the replacement of any landscaping that does not survive initial and subsequent plantings.

C. Fences. No freestanding fences, solid or living, may be erected, placed, or permitted on any Lot from the street to the front building line, provided, however, that an entrance gate, the design and construction material of which must be approved by the Committee in writing, may be constructed. Fences may be installed from the building line to the rear property line for safety, decorative and/or aesthetic value only if approved in writing by the Committee. Chain link fences will not be permitted except for dog runs contiguous to and in the rear of the residence which are not visible from the street.

D. Driveways. All driveways must either be concrete, asphalt or brick and must be installed within one (1) year of

commencement of construction.

E. Signs. No nuisance or advertising signs, billboards, or banners will be permitted, erected, or maintained on any Lot. Signs offering the sale of Lots or residences in the Subdivision shall be limited to twelve (12) square feet in area. Subdivision signs at the entrances shall be a maximum of 60 square feet. All construction and realty signs shall be removed upon the occupancy of the building or sale of the Lot or Lots to which they relate. In the case of signs erected for the purpose of resale of Lots or residences, the same shall be removed at such time as the Lot or residence offered for sale is sold or is taken off the market.

F. Mailboxes. All mailbox stands or posts shall be of uniform design which shall be designed by and which shall be available from the Committee.

G. Re-grading. No re-grading of any Lot that affects drainage or construction work on any building shall be performed by any Owner, builder or contractor prior to receiving written approval for such grading, filling or excavating from the Committee.

H. Vehicles. No recreational vehicles, boats, buses, dump trucks or any other vehicle may be parked on any portion of a Lot beyond a period of 24 hours unless completely enclosed in a garage. Commercial vehicles are permitted during the period of time during which they are necessary to perform specific duties. No abandoned or non-operational vehicles may be parked on a Lot beyond a period of 24 hours unless it is parked in a garage so as to be concealed from public view.

I. Trash. No rubbish, trash, garbage, or waste material shall be kept or permitted on any Lot except in sanitary containers which shall be placed within enclosed areas so as to be concealed from public view, except when placed for collection.

J. Satellite Dishes. No satellite dish is permitted on any Lot in front of the rear line of any structure. If a satellite dish is installed, it shall be screened so as not to be visible from any adjoining Lots or from the street right-of-way.

K. Above-Ground Swimming Pools. No above-ground swimming pools are permitted.

L. Fuel Storage. All fuel storage containers on a Lot must be placed within the residence or underground, subject to applicable laws and regulations.

M. Clothes Lines. No clothes lines or clothes poles or other device or mechanism for hanging clothes shall be maintained on any building lot, unless totally screened from both public view and neighboring lots.

6. Use Restrictions.

A. Pets. No poultry or livestock of any kind shall be raised, bred or kept on any Lot, except for dogs, cats and other common household pets provided they are not kept, bred or maintained for commercial purposes.

B. Hazardous Substances. No Owner shall release, store or bury or permit the release, storage or burial of any hazardous substance on any Lot. "Hazardous substance" and "release" shall have the meanings given them in the Federal Comprehensive Environmental Response, Compensation, and Liability Act (42 U.S.C. 9601).

C. Oil and Gas Leases. No oil or gas lease will be permitted within the Subdivision. No Lot or portion of any Lot shall be used in any way for oil and/or gas drilling, exploration or production, including consolidation of any Lot or any portion of any Lot with any other property for purposes of oil and/or gas drilling, exploration or production.

7. Homeowners' Association.

A. Membership. All Owners shall be members of the ABC Homestead Homeowners' Association (the "Association"). Each Owner shall participate in and be subject to all rules, regulations, assessments and contractual obligations of the Association which may be established or enacted by its governing body. Each Owner shall have one (1) vote for each Lot owned by such Owner in all matters requiring approval of the Owners, whether such approval is required pursuant to this Declaration or the rules and regulations of the Association.

B. Governing Body. The governing body shall be established by the Owners after three-fourths (3/4) of the Lots in the Subdivision have been deeded to Owners other than Declarant. At such time as the governing body is created and the requisite number of Lots have been sold, the Association shall succeed to all rights and obligations of the Declarant under this Declaration, except Declarant's rights under Section 10, which Declarant shall retain.

8. Assessments.

A. Covenant to Pay Assessments. Declarant, for each Owner of a Lot within the Subdivision, hereby covenants and each Owner of a Lot by acceptance of a deed, whether or not it shall be so expressed in the deed, is deemed to covenant and agree to pay the Association annual assessments or charges and special assessments for capital improvements, such assessments to be established and collected by the Association. The annual and special assessments, together with interest, costs and reasonable attorneys' fees, shall be a charge on the land and shall be a continuing lien on the Lot against which each assessment is made. Each assessment, together with interest, costs and reasonable attorneys' fees, shall also be a personal obligation of the person or persons who are the titleholders to such Lot at the time the assessment falls due. Personal obligation for delinquent assessments shall not pass to successors in title unless expressly assumed by them, but the assessments shall continue as a charge on the Lot conveyed to the successor in title. The assessments levied by the Association shall be used for the improvement and maintenance of those portions of Lots which are subject to landscaping or other easements for the benefit of Declarant and/or the Association ("Easement Areas"), and for the maintenance of the private road and any other common areas within the Subdivision.

B. Allocation of Assessments. Each Owner of a Lot, including the Declarant, shall be responsible for the payment of his, her or its respective share of each assessment and charge established by the Association. Each Owner's share shall be determined by dividing the amount of such assessment or charge by the total number of Lots in the Subdivision. Notwithstanding the foregoing, all assessments and charges relating to the private road and entranceway to the private road located in Phase II shall be allocated among and paid by the Owners of the Lots located in Phase II only, including the Declarant, and each such Owner's respective share shall be determined by dividing the assessment or charge by the number of Lots located in Phase II. In the event that any Lot shall be jointly owned by two (2) or more Owners, all such Owners shall be treated collectively as one (1) Owner for purposes of determining the share allocated to such Lot hereunder.

C. Interest on Assessments. Any assessments not paid within thirty (30) days after the date due shall bear interest at the rate of _____ percent (_____%) per annum and shall include costs and reasonable attorneys' fees incurred in collection. The Association will bring an action of law against the owner personally obligated to pay the same, or foreclose the lien against the Lot in accordance with the laws of the State of Ohio. No Owner may waive or otherwise escape liability for the assessments by non-use of the Easement Areas or abandonment of the Lot.

D. Commencement of Assessments. The Association's responsibility and obligation to collect assessments and maintain any Easement Areas shall commence as of the date of creation of the Association's governing body. Prior to such date, maintenance of any Easement Areas shall be the responsibility of Declarant.

E. Maintenance of Common Areas and Easement Areas. The Association shall provide for the maintenance and repair of all common areas, including without limitation the private road, and all Easement Areas, including without limitation

the fire pond now or hereafter located on the Lot known as being proposed Sublot No. 22 (the "Fire Pond") and the entranceway(s) now or hereafter located on the Lot known as being proposed Sublot Nos. 31, 32, 16, and 46 (the "Entranceway"), each such Sublot being shown on Exhibit A attached hereto. In furtherance thereof, Declarant, for each Owner of a Lot within the Subdivision, hereby grants to the Association, its agents, employees, and contractors, such easements of access to all common areas and to the Fire Pond, Entranceway, and all other Easement Areas, as shall be required for the purpose of carrying out the maintenance and repair thereof. In consideration thereof, the Association hereby indemnifies, defends, and holds harmless Declarant, and the Owners of the Lots on which the Fire Pond, Entranceway, and any other Easement Areas, are or will be located, from all claims, actions, causes of action, liens, costs, expenses (including reasonable attorneys fees), and damages to persons or property caused by or growing out of the exercising of any of the rights granted under the aforesaid easements of access. In addition, to insure against the aforesaid risks the Association shall carry comprehensive general public liability insurance in such amounts as the Association shall reasonably determine, naming the Association, Declarant, and future owners of the Lots on which the Fire Pond, Entranceway, and other Easements Areas are or will be located, as insured parties thereunder. The Association shall provide proof of such insurance to the named insureds upon request.

F. Failure to Maintain Common Areas and Easement Areas. In the event the Association fails to make reasonable and necessary maintenance and repairs to any common area or Easement Area and to correct such failure within ten (10) days of receipt of notice of such failure, the Owners shall have the right to maintain and repair such common area or Easement Area and to recover the costs so incurred from the Association, and, in the event the Association shall fail to make such payment within sixty (60) days after written request therefor, from the Owners in proportion to each Owner's respective share of such costs determined in accordance with subsection 8. B., above. In addition, in the event the Association and the Owners fail to make reasonable and necessary maintenance or repairs to any common area or Easement Area, the City of _____ [city], after prior written notice upon the Association and the failure of the Association or the Owners to make such maintenance or repair within ten (10) days of receipt of said notice, shall have the right to perform such maintenance or repair at the expense of the Association and Owners. In furtherance thereof, Declarant, for each Owner of a Lot within the Subdivision, hereby grants to the City of _____ [city] and County of _____ [county], and their respective agents, employees, and contractors, such easements of access to all common areas, and to all Easement Areas, including without limitation the Fire Pond and Entranceway, as shall be required for the purpose of carrying out the maintenance and repair thereof. The City of _____ [city] shall have the right to assess the costs of such maintenance and repair against the Association, and, in the event the Association shall fail to make such payment within sixty (60) days after written request therefor, may collect such assessment from the Owners, provided however that each Owner shall be liable solely for such Owner's respective share of such assessment, which share shall be determined in the manner described in subsection 8. B., above.

9. Remedies. The remedies described in this Section 9. shall be in addition to any other remedies provided for in this Declaration.

A. Correction of Violations. Declarant shall provide written notice to any Owner whose Lot is in violation of this Declaration. The Owner shall have fifteen (15) days from receipt of written notice to take reasonable steps to correct the violation. If reasonable steps have not been taken toward the alleviation or termination of the violation within said fifteen (15) days, Declarant shall have the right, through agents and employees, to enter the Lot for the purpose of taking such steps as are necessary to abate and/or remove the violation. The Owner of the Lot in violation shall pay all costs incurred by Declarant in abating and/or removing the violation, including, without limitation, reasonable attorneys' fees and expenses, within fifteen (15) days of receipt of an invoice for same from Declarant. Beginning on the sixteenth (16th) day after receipt of such invoice, the outstanding balance of the costs incurred shall accrue interest at the rate of _____ percent (_____) per annum until paid.

B. Lien. Declarant shall have a perpetual lien upon the Lots to secure, as to any specific Lot, the payment of assessments levied pursuant to Section 8., above and costs incurred by Declarant in maintaining any specific Lot, and

such costs shall also be the personal responsibility of the Owner, other than Declarant (and the joint and several obligation of all parties comprising an owner, if applicable) as of the time the assessment or costs come due pursuant to subsections 8.A. and 9.A. respectively. If default in payment continues for a period of forty-five (45) days after the same shall become due and payable, Declarant shall have the right to declare the entire balance of such assessments or costs and any interest thereon to be immediately due and payable and may cause a "Notice of Lien" to be filed with the _____ [county] County Recorder. Such lien shall remain valid for ten (10) years from the time of filing thereof, unless extended or unless sooner released or satisfied in the manner provided by law or discharged by the final judgment or order of the court in an action brought to discharge such lien as hereinafter provided. In the event any such costs are not paid when due, the Declarant may, when and as often as such delinquencies occur, proceed by process of law to collect the amount then due by foreclosure of the above described lien or otherwise, and in such event shall also be entitled to recover and enforce against each Lot a lien for its costs and expenses, including attorneys' fees.

C. Priority of Declarant's Lien. The lien of Declarant may be foreclosed in the same manner as a mortgage on real property in an action brought by Declarant. In any such foreclosure action, Declarant shall be entitled to become a purchaser at the foreclosure sale. Sale or transfer of any Lot shall not affect the Declarant's lien; provided, however, that the sale or transfer of any Lot pursuant to foreclosure of a first mortgage shall, to the extent provided by laws as to liens, extinguish the lien of Declarant as to payments which became due prior to such sale or transfer. No sale or transfer shall relieve such Lot from liability for any costs thereafter becoming due or from the lien thereof.

D. Court Enforcement. Declarant shall have the right to have any breach of the covenants and restrictions contained herein enjoined by order of any court having jurisdiction and the right of specific performance with respect to the provisions of each such covenant or restriction.

10. Amendment. This Declaration may be amended only as follows:

A. Addition or Deletion of Real Property. So long as Declarant owns at least (1) Lot in the Subdivision, this Declaration may be amended by an instrument in writing signed by Declarant for the purpose of adding real property to the Subdivision, which shall then be subjected to the provisions of this Declaration, or deleting real property from the Subdivision, which shall then not be subjected to the provisions of this Declaration.

B. Amendment by Declarant. So long as Declarant owns at least one (1) Lot in the Subdivision, Declarant reserves the right to add to, modify or waive any or all of the covenants or restrictions set forth herein as to any individual Lot or as to all Lots, as Declarant, in its sole discretion, deems advisable.

C. Other Amendments and Termination. Provided Declarant does not own any Lot in the Subdivision, this Declaration may be amended or terminated for any reason by written instrument signed by Owners owning, in the aggregate, at least two-thirds (2/3) of the Lots in the Subdivision.

D. Amendment Regarding Duties of Association. Notwithstanding the foregoing provisions of this Section 10, no amendment to this Declaration shall materially affect the provisions of subsection 8.F. unless such amendment shall be submitted to and approved by the City of _____ [city] and County of _____ [county].

Any amendment shall become effective from and after the date of filing with the _____ [county] County Recorder an instrument stating the amendment and signed with the formalities required by law for recording by either (i) Declarant, in the case of amendment pursuant to subsection 10.A. or 10.B., or (ii) the requisite number of Owners in the case of amendment pursuant to subsection 10.C.

11. Exclusion of Sublot No. 8. Notwithstanding any provision contained herein, this Declaration shall not apply to the Lot known as being proposed Sublot No. 8 in ABC Homestead-Phase I Subdivision, as shown on Exhibit A, attached hereto, and said Lot shall be excluded from all covenants, restrictions, obligations, easements, reservations, conditions,

limitations, agreements, charges and liens set forth herein.

12. Miscellaneous Provisions.

A. No Waiver. No covenant, restriction, condition, obligation or provision contained herein shall be deemed to have been abrogated or waived by reason of any failure to enforce the same, regardless of the number of violations or breaches which may occur.

B. Lot Division. Except for Lots owned by Declarant, no Lot shall be further divided, nor shall any portion less than the whole Lot be conveyed, either voluntarily or involuntarily, without prior approval of Declarant.

C. Severability. Invalidation of any one of these covenants or restrictions by judgment or court order shall in no way affect any other provisions, which shall remain in full force and effect.

D. Application of Zoning Code. In the event that the local zoning code or other governmental regulation is more restrictive than this Declaration with regard to matters addressed herein, the local zoning code or applicable regulation shall control; otherwise the provisions of this Declaration shall control.

E. Covenants Binding on Owners. The covenants, rights, terms, reservations, limitations, agreements and restrictions contained in this Declaration shall be deemed to be covenants running with the Subdivision and each Lot therein, and not conditions, and shall bind Declarant and all Owners, their respective heirs, successors and assigns. This Declaration shall create privity of contract and/or estate with and among all Owners of any part of the Subdivision and/or any Lot therein, their heirs, executors, administrators, successors or assigns. It is understood and agreed that the covenants, rights, terms, reservations, limitations, agreements and restrictions herein are part of a uniform plan of development for the Subdivision as a whole, and the recording of this Declaration shall be constructive notice to any present or future Owner or Owners of any interest in the Subdivision and/or any Lot therein of the terms of this Declaration, whether or not specific reference is made in the deed or instrument of transfer to such Owner or Owners. By the acceptance of a deed or other instrument of conveyance, the Owner accepting such instrument automatically thereby consents to and approves of this Declaration and agrees to be bound by its provisions.

F. Duration. This Declaration and the covenants and restrictions set forth herein shall remain binding from the date of the filing of this Declaration for record in the _____ [county] County Recorder's office and for fifty (50) years thereafter, subject to termination pursuant to Section 10.C., above, and shall automatically extended for successive five (5) year periods thereafter unless on or before expiration of any one (1) such extension period the owners of a majority of the Lots shall by written instrument, duly recorded, declare a termination of the same.

G. Notice. Any notice to be delivered to an Owner hereunder shall be deemed received when mailed, postage prepaid, to the last address of such Owner as such address appears on the records of the _____ [county] County Auditor.

IN WITNESS WHEREOF, Declarant has executed this Declaration of Covenants and Restrictions as of the date first above written.

DECLARANT:

ABC CORPORATION

By: _____

[name and title]

(Acknowledgement)

This instrument prepared by:



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Current Legal Forms for Real Estate

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Current Legal Forms for Real Estate
Chapter 20 REAL ESTATE ENTITIES

Part IV. Forms

H. CONDOMINIUMS AND HOMEOWNERS ASSOCIATION

24-20 Current Legal Forms for Real Estate FORM 20.79

AUTHOR: by Stephen E. Pigott and Harold O. Maxfield, Jr.

FORM 20.79 Code of regulations--homeowners' association

COMMENT

The following form is a standard code of regulations for a typical homeowners association.

FORM

CODE OF REGULATIONS

OF

XYZ HOMEOWNERS' ASSOCIATION, INC.

The undersigned, who as of this day is the sole member of the XYZ Homeowners' Association, Inc., an Ohio corporation not for profit, does hereby adopt the following regulation for the government of said corporation:

ARTICLE I

The following definitions are applicable to this Code of Regulations:

- (a) "Association" means the XYZ Homeowners Association, Inc., an Ohio nonprofit corporation.
- (b) "Board" means the Board of Trustees of the Association, as more fully set forth below.
- (c) "Common Areas" shall mean all real property owned or maintained by the Association (including improvements

thereon) for the common benefit, use and enjoyment of the Owners, including entranceways and green space areas located within the borders of the property hereinafter described.

(d) "Declarant" means the XYZ Corporation, an Ohio corporation.

(e) "Declaration" means that certain Deed of Declaration of Restrictions of the XYZ Homeowners' Association, Inc. entered into by Declarant for the benefit of the owners as hereinafter defined, of all or any portion of the Property as hereafter defined. The Declaration is incorporated by reference herein.

(f) "Lot(s)" means any fee or undivided fee interest in a building lot as defined in the Declaration located within the Property as hereafter defined.

(g) "Member(s)" means a member of the Association, being the Declarant and owners as defined hereinbelow.

(h) "Owner(s)" means the record owner, whether one or more persons, of a fee simple title to a Lot, excluding those having such interest merely as security for the performance of an obligation.

(i) "Person" means a natural person or corporation, partnership, limited partnership, trust or other entity.

(j) "Property" means the real property described on Exhibit A attached hereto and made a part hereof, sometimes referred to as the XYZ Subdivision.

ARTICLE II

Members and Meetings of Members

1. Membership. The members of the corporation shall consist of the Declarant and all the Owners of Lots.

2. Rights of Members. The right of a member to vote and all his right, title and interest in or to the corporation shall cease on the termination of his membership.

3. Annual Meetings. The annual meeting of the members of the corporation shall be held at the principal office of the corporation, or at such other place as is selected by the board of Trustees, on the first Monday in January of each year, if not a legal holiday, and if a legal holiday, then on the next succeeding Tuesday not a legal holiday for the transaction of such business as may properly come before the meeting.

4. Notice of Annual Meeting. Notice of the time and place of annual meetings shall be served, either personally or by mail, not less than ten (10) nor more than forty (40) days before the meeting, upon each person who appears upon the books of the corporation as a member and, if mailed, such notice shall be directed to the member at his address as it appears on the books of the corporation, unless he shall have filed with the Secretary of the corporation a written request that notices intended for him be mailed to some other address, in which case it shall be mailed to the address designated in such request.

5. Special Meetings. Special meetings of the members may be called at any time by the President or vice President or by resolution by the Trustees, and must be called by the President or Secretary on receipt of the written request of one-third (1/3) of the members of the corporation.

6. Notice of special Meetings. Notice of a special meeting stating the time, place and purpose or purposes thereof shall be served personally or by mail upon each member residing within the United States, not less than five (5) nor more than forty (40) days before such meeting, and if mailed such notice shall be directed to each member at his address as it

appears on the books or records of the corporation, unless he shall have filed with the Secretary of the corporation a written request that notices intended for him shall be mailed to some other address, in which case it shall be mailed to the address designated in such request.

7. Quorum. At any meeting of members of the corporation, the presence of a majority of the members in person or by proxy shall be necessary to constitute a quorum for all purposes except as otherwise provided by law, and the act of a majority of the members present at any meeting at which there is a quorum shall be the act of the full membership except as may be otherwise specifically provided by statute or by this code of Regulations. A meeting may be adjourned from time to time, whether or not a quorum is present, by vote of the majority of the members present in person or by proxy, without notice other than by announcement at the meeting and without further notice to any absent member.

8. Voting. At every meeting of members, each member shall be entitled to vote in person, or by proxy duly appointed by instrument in writing which is subscribed by such member and which bears a date not more than eleven (11) months prior to the date of such meeting, unless such instrument provides for a longer period. Each member of the corporation shall be entitled to one (1) vote per Lot owned in the Property. The vote upon any questions before the members, upon the demand of any member, shall be by ballot. All elections shall be made and all questions decided by the members shall be by a majority vote of the members present in person or by proxy.

9. Waiver of Notice. Whenever, under the provisions of any law or under the provisions of the certificate of incorporation or Code of Regulations of this corporation, the corporation or the Board of Trustees or any committee thereof is authorized to take any action after notice to the members of the corporation, or after the lapse of a prescribed period of time, such action may be taken without notice and without the lapse of any period of time, if at any time before or after such action be completed, such requirements are waived in writing by the person or persons entitled to such notice or entitled to participate in the action to be taken or by its attorney thereunto authorized.

10. Compensation and Expenses. Members shall not receive any stated salary for their services as such, but the board of Trustees shall have the power in its discretion to contract for and to pay to members rendering unusual or special services to the corporation special compensation appropriate to the value of such services.

ARTICLE III

Trustees

1. Control. The business of the corporation shall be managed and controlled by a Board of Trustees.

2. Number and Designation of Trustees. Until the first annual meeting of the members, or the sale of Lots by the Declarant or the Declarant's successor, whichever is later, the affairs of the Association shall be managed by a board of three trustees as set forth and designated in the Articles of Incorporation of the Association. From and after the first annual meeting of the members, or the sale of Lots by the Declarant or the Declarant's successor, whichever is later, the Board shall consist of such number of trustees as the members shall agree but shall in no event be less than three.

3. Term. Each Trustee shall serve until his successor is designated or elected, as the case may be, or until his earlier resignation, removal from office, or death. A Trustee may resign at any time by giving written notice of such resignation to the Board of Trustees.

4. Removal. Any Trustee may be removed from the Board with or without cause by vote of the members of the Association holding a majority of the votes eligible to vote. In the event of the death, resignation or removal of a Trustee, a successor trustee shall be selected by the remaining members of the Board and shall serve until a successor is designated or elected.

5. Compensation. No Trustee shall receive compensation for any service he may render to the Association as Trustee. However, any Trustee may be reimbursed for his actual expenses incurred in the performance of his duties.

6. Election of Trustees. Nomination for election of the Board of Trustees may be made by a Nominating Committee but members shall have the right to make nominations from the floor at the annual meeting. The nominating committee shall consist of a Chairman who shall be a member of the Board of Trustees and two or more members of the Association. If the Board elects to appoint a Nominating Committee it shall be appointed by the Board prior to the giving of the written notice of the annual meeting of the members. The Committee shall serve from the date of its appointment to the close of the first succeeding annual meeting. The names of the persons appointed to a Nominating Committee shall be announced to the members with the written notice of the annual meeting or any time after the appointment of the committee and prior to the giving of the notice of the annual meeting.

The Nominating Committee shall make as many nominations for election to the Board of Trustees as it shall in its discretion determine, but not less than the number of vacancies that re to be filled. Such nominations my be made from among members or nonmembers.

Election to the Board of Trustees shall be by cumulative vote, that is, each member shall have the right to vote the number of votes owned by him for as many persons as there are Trustees to be elected, or to cumulate such votes andgive one candidate as many votes as the number of Trustees being elected multiplied by the number of his votes shall equal, or to distribute them on the same principal among as many candidates as he shall see fit. The persons receiving the largest number of votes shall be elected.

7. Regular Meetings. Regular meetings of the Board of Trustees may be held without notice at such time and places as may be fixed from time to time by resolution of the Board.

8. Special Meetings. Special meetings of the Board shall be held when called by the President of the Association, or by any two Trustees, after not less than three (3) days' notice to each Trustee.

9. Quorum. A majority of the number of Trustees shall constitute a quorum for the transaction of business. Every act or decision done or made by a majority of the Trustees present (as distinct from majority of those voting) at a duly held meeting at which a quorum is present shall be regarded as the act of the Board.

10. Powers and Duties of the Board of Trustees. The Board of Trustees shall have the power to: (i) suspend the voting rights of a member during a period in which such member shall be in default in the payment of any assessment levied by the Association; (ii) exercise for the Association all of the powers, duties and authority vested in or delegated to the Association pursuant to the Declaration, Articles and this Code of Regulations including the borrowing of money on behalf of the Association secured if necessary by a mortgage against the Common Areas, unless expressly reserved to the membership by other provisions of this Code of Regulations, the Articles or the Declaration; (iii) employ a managing agent, independent contractors and/or such employees as they deem necessary to carry out the purposes of the Association, and to prescribe their duties, on such terms as the Board shall determine; (iv) authorize and perform such other acts as may be reasonably necessary or proper to carry out the purposes of the Association; and (v) establish a three member architectural review committee for the purposes set forth in the Declaration.

The duty of the Board of Trustees shall be to implement and carry out the provisions of the Declaration, Articles and this Code of Regulations, including without limitation the duty to:

(a) cause to be kept a complete record of all its acts and corporate affairs and to present a statement hereof to the members at the annual meeting of the members, or at any special meeting when such statement is requested in writing;

(b) supervise all officers, agents and employees of the Association, and to see that their duties are properly performed;

(c) as more fully provided in the Declaration, fix the amount of the annual assessment against each Lot, and send written notice of each annual assessment and/or special assessment to every Owner subject thereto as provided in the Declaration;

(d) take all actions reasonably necessary in the circumstances to enforce the covenants and restrictions set forth in the Declaration; and

(e) maintain the Common Areas in good condition and repair, including day to day maintenance such as landscaping as required.

The failure to fix an annual assessment or special assessment and to send a notice thereof shall not relieve any Owner from paying an assessment when the Owner does receive notice of the assessment or from paying the assessment of which the Owner last had notice.

ARTICLE IV

Actions Without a Meeting

1. Members. Any action which may be authorized or taken at a meeting of the members may be authorized to be taken without a meeting with the affirmative vote or approval of, and in a writing or writings signed by, members holding a majority of the voting power unless the Declaration, Articles or this Code of Regulations require a greater percentage or number of votes for the particular act to be taken, in which case members holding such greater percentage in number of votes shall approve that action in a writing or writings signed by them.

2. Board of Trustees. Any action which may be authorized or taken at a meeting of the Trustees may be authorized to be taken without a meeting with the affirmative vote or approval of, and in a writing or writings signed by, all of the Trustees.

3. Recording of Actions. Any writing made pursuant to this Article shall be filed with and entered upon the records of the Association. Any certificate with respect to the authorization or taking of any such action which is required to be filed in the office of the Secretary of State of the State of Ohio shall recite that the authorization or taking of such action was in writing or writings approved and signed as specified in *Section 1702.25 of the Ohio Revised Code* and by the Code of Regulations of the Association.

ARTICLE V

Officers

1. Number. The officers of the corporation shall be the President, Vice President, Secretary, Treasurer, and such other offices with such powers and duties not inconsistent with this Code of Regulations as may be appointed and determined by the Board of Trustees, and may be members of the Board. Any two officers, except those of President and Secretary, may be held by the same person.

2. Election, Term of Office, and Qualifications. The President and the other officers shall be elected by the Board of Trustees from among such persons as the Board of Trustees may see fit, and shall serve until their successors are duly elected.

3. Vacancies. In case any office of the corporation becomes vacant by death, resignation, retirement, disqualification, or any other cause, the Trustees then in office may elect an officer to fill such vacancy, and the officer so elected shall hold

office and serve until the election and qualification of his successor.

4. President. The President shall preside at all meetings of members. He shall have and exercise general charge and supervision of the affairs of the corporation and shall do and perform such other duties as may be assigned to him by the Board of Trustees.

5. Vice President. At the request of the President, or in the event of his absence or disability, the Vice President shall perform the duties and possess and exercise the powers of the President, and to the extent authorized by law the Vice President shall have such other powers as the Board of Trustees may determine, and shall perform such other duties as may be assigned to him by the Board of Trustees.

6. Secretary. The Secretary shall have charge of such books, documents and papers as the Board of Trustees may determine. He shall attend and keep the minutes of all the meetings of the Board of Trustees and members of the corporation. He shall keep a record, containing the names, alphabetically arranged, of all persons who are members of the corporation, showing their mailing addresses, and such book shall be open for inspection as prescribed by law. He may sign with the President or Vice President, in the name and on behalf of the corporation, any contracts or agreements authorized by the Board of Trustees, and when so authorized or ordered by the Board of Trustees. He shall, in general, perform all duties incident to the office of Secretary, subject to the control of the Board of Trustees, and shall do and perform such other duties as may be assigned to him by the Board of Trustees.

7. Treasurer. The Treasurer shall have the custody of all funds, property and securities of the corporation, subject to such regulations as may be imposed by the Board of Trustees. He may be required to give bond for the faithful performance of his duties, in such sum and with such sureties as the Board of Trustees may require. He shall, in general, perform all the duties incident to the office of Treasurer, subject to the control of the Board of Trustees.

8. Salaries. The salaries, if any, of all officers shall be fixed by the Board of Trustees, and the fact that any officer is a member of the corporation or a Trustee shall not preclude him from receiving a salary or from voting on the resolution providing for the same.

9. Removal. Any officer may be removed from office by the Trustees at any regular or special meeting called for that purpose.

ARTICLE VI Books and Records

The books, records and papers of the Association shall be, at all times, during reasonable business hours, subject to inspection by any member and by the representative of any first mortgagee of a Lot. The Declaration, Articles and this Code of Regulations of the Association shall be available for inspection by any member and by the representative of any first mortgagee of a Lot at the principal office of the Association or copies may be purchased at reasonable cost.

ARTICLE VII Amendments

This Code of Regulations may be amended at a regular or special meeting by majority vote of a quorum of members present in person or by proxy.

ARTICLE VIII Priority of Documents

In the case of any conflict between the Articles and this Code of Regulations, the Articles shall control; in the case of any conflict between the Declaration and this Code of Regulations, the Declaration shall control.

ARTICLE IX

Miscellaneous

The fiscal year of the Association shall begin on the first day of January and end on the 31st day of December of every year except that the first fiscal year shall begin on the date of incorporation.

IN WITNESS WHEREOF, the undersigned, being the sole member of the Association, has hereunto set its hand this _____ [day] day of _____ [month] , _____ [year] .

XYZ CORPORATION

By: _____

[name and title]

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Current Legal Forms for Real Estate
Chapter 20 REAL ESTATE ENTITIES
Part IV. Forms
I. TIME SHARE

24-20 Current Legal Forms for Real Estate FORM 20.80

AUTHOR: by Stephen E. Pigott and Harold O. Maxfield, Jr.

FORM 20.80 Disclosure statement prospectus--public report

COMMENT

The offering of time share units is highly regulated. Each state has very specific requirements that a developer must address and comply with in order to make a lawful offering. The offering of a time share unit is also similar to that of the offer to sell a security or franchise. It requires complete disclosure of all relevant facts. The Disclosure Statement is extremely detailed. It typically must be submitted and approved by the applicable state department before the offering can be made. Most states will require information that generally describes the project and requires disclosure of all of the relationships of the developer, the manager, the selling agent and owner of the resort.

The typical Disclosure Statement starts out with numerous conspicuous disclaimers that are required by statute. The Disclosure Statement then should include the following, in addition to any other disclosures required by the jurisdiction where the project is located or offered:

- A general discussion of what a time share interest is and how the interest will be owned.
- A detailed description of the project including the type of units underlying resort facilities (i.e., golf course, pool, etc.), location and phases of the project.
- A statement disclosing various options and upgrades which the buyer may purchase. Most of the upgrades relate to becoming a member of a club which provides access to use other facilities or stay at other time share projects of the developer.

- There should be a disclosure of what utilities are available (i.e., gas, electric, water, cable, computer access, telephone, etc.).
- A discussion of the common area surrounding the project.
- A discussion of the local community.
- Various legal disclosures such as title matters, type of deed and real estates (i.e., restricting easements).
- A disclosure of the various legal and contractual relationships, such as, management company, title company, escrow company, developer and resort owner.
- A discussion of the unit owners association.
- There will typically be a significant amount of disclosure regarding financial pro forma projects and operating budgets.

The following public report was prepared in accordance with Arizona law. The preparation of a disclosure statement requires a significant amount of consideration on the part of the practitioner. In the preparation of a disclosure statement, it is absolutely critical that the practitioner be familiar with the details of the project and with the legal requirements of the jurisdictions where the project is located and where the interests are being sold.

FORM

STATE OF ARIZONA
DEPARTMENT OF REAL ESTATE
TIME-SHARE PUBLIC REPORT
FOR
SUNSET SUMMIT RESORT

Registration No.

DEVELOPER

SUNSET DEVELOPMENT, LLC

Effective Date
PROPERTY REPORT DISCLAIMER

This report is NOT A RECOMMENDATION NOR AN ENDORSEMENT by the State of Arizona of this land but is provided for informational purposes ONLY. The report reflects information provided by the subdivider and obtained by the Department in its review process in accordance with the provisions of Title 32, Chapter 20, Article 9, of the Arizona

Revised Statutes, as amended. NOTE that not all of the information in this report has been verified by the Department; certain information has been accepted by the Department as true and accurate based on attestation of the subdivider and/or the subdivider's agents. The purchaser should verify all facts before signing any documents. The Department has not passed upon the quality or quantity of any improvement or structure and does not assume responsibility in either event.

Phoenix Office:

Tucson Office:

_____ [address]

_____ [address]

_____ [telephone number]
ber]

_____ [telephone number]

THE ARIZONA DEPARTMENT OF REAL ESTATE REQUIRES THAT:

1. You BE GIVEN this public report;
2. YOU SIGN A RECEIPT indicating that you received this report;

RECOMMENDS:

1. You DO NOT SIGN ANY AGREEMENT before you have read this report:
2. You see an ACCURATE REPRESENTATION of the unit you are interested in BEFORE SIGNING any document for lease or purchase.

ARIZONA LAW STATES:

1. A PERSON SHALL NOT SELL OR LEASE OR OFFER FOR SALE OR LEASE IN THIS STATE TWELVE OR MORE TIME-SHARE INTERVALS WITHOUT FIRST OBTAINING A PUBLIC REPORT FROM THE COMMISSIONER. ANY SALE OR LEASE OF TWELVE OR MORE TIME-SHARE INTERVALS PRIOR TO ISSUANCE OF THE PUBLIC REPORT IS VOIDABLE BY THE PURCHASER. AN ACTION BY THE PURCHASER TO VOID SUCH TRANSACTION MUST BE BROUGHT WITHIN FIVE YEARS OF THE DATE OF THE EXECUTION OF THE PURCHASE AGREEMENT BY THE PURCHASER. IN ANY SUCH ACTION, THE PREVAILING PARTY IS ENTITLED TO REASONABLE ATTORNEY FEES AS DETERMINED BY THE COURT.
2. ANY CONTRACT OR AGREEMENT TO PURCHASE OR LEASE A TIME-SHARE INTERVAL MAY BE RESCINDED BY THE PURCHASER WITHOUT CAUSE OF ANY KIND BY SENDING OR DELIVERING WRITTEN NOTICE OF RESCISSION BY MIDNIGHT OF THE SEVENTH CALENDAR DAY FOLLOWING THE DAY ON WHICH THE PURCHASER OR PROSPECTIVE PURCHASER EXECUTED THE CONTRACT OR AGREEMENT. NOTICE OF RESCISSION MUST BE GIVEN

TO THE DEVELOPER C/O. _____.

GENERAL

This report includes:

One Hundred (100) units. Eighty-three (83) units in Phases 1, 2 and 3 divided into 52 timeshare intervals per unit, totaling 4316 intervals. Seventeen (17) units in Phase 3 (buildings 10, 11 and 12) are divided into 529,000 Rights per unit equivalent to 52 weeks of use resulting in 8,464,000 Rights total for the 16 units.

The Project Map for this development:

This is an undivided interest project. There is no subdivision or condominium plat. However the Site Plan, attached to the Declaration, recorded in Book _____, Page _____, records of _____ County, State of Arizona, identifies the location and numbering of the units. Phases 1, 2 and 3 of the development include 100 units all of which are completed.

The Project:

As provided for in the Declaration of Dedication as Sunset Resort, a Timeshare Resort ("Declaration"), Phases 1, 2 and 3 of the property are improved with structures described as follows: 18 one- and two-story buildings containing one hundred (100), identical 1260 sq. feet, 2 bedroom, 2 bathroom living units. A clubhouse and a pool house, which together total 6,800 square feet, house check-in desk, lounge area, fitness center, game room, and laundry facilities. A sales center, constituting Building 18, is part of Phase 3, but is controlled and used exclusively by the Developer. If Phases 4 and 5 are annexed and developed, buildings containing 132 units would be added. Developer is not obligated to annex or develop Phases 4 or 5.

TIME-SHARE USE

Sales:

Annual or Biennial Interval Ownership Interest: Will be evidenced by a deed conveying an interval in fee title for perpetuity and an undivided fractional ownership in all of the common elements and common areas that are a part of the project.

Flex Interval Ownership Interest (Rights): Will be evidenced by a deed conveying an undivided fractional interest in perpetuity in a unit or group of units and an undivided fractional ownership in all of the common elements and common areas that are a part of the project.

Both Interval Interests and Flex Interval Ownership Interests are allocated to "Units" only for convenience and inventory control purposes; all ownership interest in this project consist of undivided interests in all the Property subject to the Declaration. The offering is for variable unit, variable time. Although the Declaration includes the ability to offer fixed units and/or fixed weeks, the Developer has not offered such fixed units or weeks for sale.

Lock-outs:

Each of the units may be divided into a "Master Suite" of approximately 960 square feet, containing one-bedroom, one-bath, living-dining area and full kitchen; and a "Privacy Suite" of approximately 500 square feet containing bedroom/sitting room, one bathroom and wet bar area.

Maintenance Period:

Maintenance times occur throughout the use year, during times of non-occupancy of the unit. The Association may reserve up to a total of seven (7) days and nights in each calendar year for maintenance.

PROJECT LOCATION

The Project:

Is located in the western portion of _____, Arizona, an incorporated area approximately _____ miles _____ of Phoenix, Arizona. [insert directions from Phoenix].

Existing and Proposed Land Uses Adjacent to the Project: [describe existing land]

NARRATIVE OF OFFERING

Phases 1 and 2 are comprised of _____ acres, containing a clubhouse, pool house, 2 pools, 2 spas and 60 two-bedroom units in buildings 1 through 9 and was completed in 1997. Phase 3 is comprised of approximately 10 acres, on which Developer has built a sales center, deluxe spa and water feature and 40 units allocated among six (6) two-story buildings and three (3) one-story buildings, numbered buildings 10 through 17 and building 19, together, with related driveways, parking spaces, landscaped areas and three barbecues.

This offering covers any residual inventory in Phases 1 and 2. [insert addresses]. All of the buildings are complete and have received their Certificates of Occupancy. The developer should supply purchaser with a list of the furnishings for each unit. Purchasers are advised to satisfy themselves as to the quality and quantity of the furnishings.

Expansion of the resort for Phase 3 was permitted under a development agreement with the City of _____ [city] that places a taxation requirement upon purchasers of intervals in Phase 3 only of _____ Dollars (\$ _____) per interval week per year for a 2-bedroom, annual interest (with proportional equivalents for other interests). Based upon the consumer price index, this tax will be reviewed annually, but in no event may the tax be increased more than _____ percent (_____ %) per year. To account for this tax, Phase 3 maintenance fees will be higher than the rest of the resort by the exact amount of the tax (with proportional equivalents for other interests).

The Declaration reserves the Developer's ownership and control over a building (Building 18) in Phase 3 to be used for sales functions for the entire project.

Additional Information for Flex Interval Owners:

To provide purchasers with a greater variety in the amount of accommodation use they buy, or which they may add from time to time, Sunset Resort uses a Flex Interval Ownership form of undivided interest structure for units located in Buildings 10, 11 and 12. These units are divided into 529,000 Rights per unit. Rights are the medium of exchange with which an Owner reserves accommodations. A table explaining the number of Rights required to reserve various days and seasons is included in the project's Rules and Regulations.

Flex Interval Owners may participate in Club Sunshine, an international points-based exchange program. Under the Club Sunshine program, purchasers retain their deeded interest in the undivided interest regime. They assign their Rights to Club Sunshine and receive an assigned number of "Options." "Options" work similarly to the owner's Rights, but with "Options" the purchasers ultimately may decide to "spend" all of their "Options" at Sunset Resort or may use all or a portion of their "Options" in exchange for accommodations at other resorts participating in the Club Sunshine exchange program.

UTILITIES

Electricity
Telephone
Natural Gas
Computer Access is available via
Water
Cable
Sewage and Wastewater Treatment

ACCESS STREETS AND ROADS

Access to Development:

The resort is bordered by streets and highways maintained by the city, county, or the state.

Access Within the Development Roads internal to the development are complete and are maintained by the Association.

COMMON AREA FACILITIES

Within the Development:

The resort includes a 5,000 square foot clubhouse and a 3,000 square foot pool house which together house check-in desk, lounge area, fitness center, game room, laundry facilities (for owners), maintenance, housekeeping and activities. The common areas also include 2 pools and 2 spas. Phase 3 contains a deluxe spa and two barbecues.

Maintenance of Development Facilities:

Common areas are maintained by the Association through the manager using a portion of the annual maintenance fees collected from the Owners.

Sales Center:

The Developer shall pay all operating costs, utilities, property taxes and assessments for the Developer's sales center. The owners' association will receive additional financial remuneration if the Developer uses the sales building for more than 20 years.

Use Agreements:

Sunset Resort Owners' Association has entered into a Facilities Use Agreement with Arizona Racquet Club Inc. for the use of its fitness, swim and tennis facilities. For further details, ask to see a copy of the Agreement, if the developer has not already made it available for your examination.

In addition, RIP Management, LLC on behalf of the Sunset Resort Owners' Association has entered into an agreement with United Golf Courses of America, located at _____ Arizona, for the use of its recreational facilities which include an 18-hole golf course. This agreement is renewed annually in the discretion of either party. For

further details, ask to see a copy of the Agreement, if the developer has not already made it available for your examination.

ASSURANCES FOR COMPLETION OF IMPROVEMENTS

Assurances for Completion of Development Facilities: All buildings and amenities included in this amendment are completed.

LOCAL SERVICE AND FACILITIES

Shopping Facilities:

A supermarket, pharmacy, restaurants and shopping are located approximately 2 miles from the resort.

Public Transportation:

A private taxicab service and a seasonal trolley are the only forms of public transportation available to the resort.

Medical Facilities:

The resort is located one block from Kildare Medical Center.

Fire Protection: City Fire Department

Ambulance Service: 911, dispatch from City Fire Department

Police Service: City Police Department

SALES

Sales will be evidenced by seller delivering a special warranty deed to purchaser and the purchasers' earnest money being deposited into neutral escrow depository.

TITLE AND ENCUMBRANCES

Title to the property is vested in Sunshine Development, LLC

Developers Interest is evidenced by fee title.

Conditions to Title as noted in exhibit "A" attached. YOU SHOULD INVESTIGATE AND SATISFY YOURSELF AS TO WHAT EFFECT, IF ANY, THESE MATTERS MAY HAVE ON THE USE OF THE LAND. Each timeshare interest will be conveyed to purchasers free and clear of all liens, encumbrances, defects or judgments, but subject to the following matters affecting title: the Declaration and its amendments; any deed of trust placed upon the timeshare interest in connection with purchase-money financing; any taxes and assessments for the year of purchase and subsequent years; any restrictions, reservations, conditions, limitations; and any other matters of record prior to purchase or imposed by governmental authorities having jurisdiction or control over the subject property; and all visible

and apparent easements on the ground.

MANAGEMENT AND EXCHANGE NETWORK

The Project: Maintenance of the common and recreational facilities is provided for in the Management Agreement between the owner's association and RIP Management, LLC, a Delaware limited liability company and an affiliate of the Developer. The cost of operation and maintaining these facilities is a part of each timeshare owner's common expense assessment.

Purchasers should be aware that next to assurance of right of ownership, occupancy and use, competent on-going management will be the most important element in the value and satisfaction obtained from any type of timeshare purchase. Close attention should be paid to the arrangement both to manage the property and to service residential units. Management of the timeshare project is under the direction and control of the association, which is managed by a board of directors elected by the members. The board, among other things, may employ an Agent to manage and control the timeshare project, subject at all times to the board's direction, and certain administrative functions and powers may be delegated to that Agent by the Board, among them: (a) to supervise the operation of and to maintain and repair the timeshare project; (b) to lease, purchase, maintain and/or replace furniture, fixtures and equipment; (c) to employ, supervise and dismiss personnel necessary to maintain and operate the timeshare project; (d) to contract with others for the furnishing of such services as it deems proper for the timeshare project; (e) to prepare a proposed budget and to schedule assessments and payment of all bills; (f) to purchase insurance as is specified in the Declaration; and (g) to maintain custody and control of funds and to maintain books and records and to prepare financial reports.

EXCHANGE NETWORKS-Club Sunshine and Interval Brokerage, Inc.

The resort is affiliated with Club Sunshine, Inc. ("Club Sunshine"), an exchange membership program. Club Sunshine members may exchange their use privileges in this project for comparable use privileges at certain other timeshare resorts. Club Sunshine members retain their deeded timeshare interest. Participation in Club Sunshine is voluntary and members may terminate their membership at any time, subject to any assignment of use rights and Club Sunshine reservations that may have been made prior to termination. To maintain their membership exchange rights in Club Sunshine, a member must pay an annual membership fee and other club dues and charges to Club Sunshine, but no other fees are generally required each time a reservation is made in another project in the program. Full details of the Club Sunshine membership exchange program are set forth in the Club Sunshine documents and materials which will be provided to the purchaser and which should be carefully reviewed before deciding whether to join Club Sunshine. Membership in Club Sunshine for Owners at the Project automatically includes membership in Interval Brokerage, Inc., ("IBI") whose address is _____. Accordingly, "Options" may also be exchanged for use of accommodations through the IBI exchange system.

If the existence of the Club Sunshine exchange program (including the related IBI exchange program) is a significant factor in your decision to purchase a timeshare interest in this project, you should carefully consider the following before you make your decision.

A. Club Sunshine membership exchange rights and the related IBI exchange rights will not be available until you elect to join Club Sunshine and enter into the Club Sunshine documents.

B. You have no assurance that Club Sunshine or IBI will be able to provide you with an accommodation that meets your needs and desires when you want it, or at any time.

C. You have no assurance that this project will still be affiliated with Club Sunshine or IBI when you desire to exercise

exchange privileges.

D. The current affiliation agreement between the Developer and Club Sunshine (the "Club Sunshine Agreement") and the agreement between Sunshine Corporation and IBI which provides for Club Sunshine affiliation with IBI (the "IBI Agreement") are subject to termination upon various conditions. If the Club Sunshine Agreement is terminated, you as an individual owner will not be eligible to participate in the Club Sunshine exchange program. If the IBI Agreement is terminated, you as a member of Club Sunshine will not be eligible to participate in the IBI exchange program. Moreover, Club Sunshine can terminate the affiliation of this project if there is a breach of the Club Sunshine Agreement and IBI can terminate the IBI Agreement if there is a breach of the IBI Agreement.

E. Club Sunshine rules currently use a point system ("Options") to measure the value of accommodation in various resorts at various times and in different sizes and quality of units. This means that you will not be able to exchange your right to use for the same duration of right to use another unit that Club Sunshine rates higher than the interest that you own. This rating system is based upon the dwelling unit itself and the time of year and length of time that you are eligible to use it. For additional information concerning these and other restrictions on exchanges, you should obtain a fact sheet from the developer or from Club Sunshine.

BUDGETS AND ASSESSMENTS

Operating Costs:

A copy of the budget and the proposed annual maintenance fees is attached as Exhibit "B." It should be examined carefully to determine if it realistically and accurately projects current and future costs of managing and maintaining project properties. Annual maintenance fees are subject to periodic increase. Purchasers are advised that these maintenance fees and/or association fees probably will increase as experience has shown in the industry.

Payment of Operating Costs:

Will be paid by the Association through assessments.

Assessments:

Owners will be required to pay a yearly assessment according to Exhibit B attached hereto. Developer indicates the amount set forth in Exhibit B is adequate to support the operation based on estimated costs of operation.

Financial Arrangements:

Developer reports that the provisions of the Declaration are sufficient to guarantee the payment of assessments on unsold intervals. See Section 5.5 of the Declaration. In addition, Developer has entered into a Subsidy Agreement with Association which provides for the payment of Developer's appropriate share of the costs and expenses of the Association for the operation of the Property.

Other Assessments:

"Special Assessments" may be collected if the Basic Assessments are, or will become, inadequate to meet all expenses incurred by the Association.

"Personal Expenses" may be collected to cover any expense resulting from the act or omission of any Owner, or Permitted User, for one or more of the reasons permitted under the Declaration.

TAXES**Real Property Taxes:**

Developer reports that the time-share dwelling units will be taxed as follows: The association will be billed by the county tax commissioner, and a pro rata share of the property tax bill will be included as part of each owner's assessment.

Other Tax' Assessments:

May be levied by taxing authorities if deemed necessary.

INTERVAL OWNERS ASSOCIATIONS**Name of Association:**

Sunset Resort Owners Association ("Association")

Control of Association:

As contained in Article 3.5 of the Declaration, control of the association can occur at the first annual or special meeting of the Association following termination of the Initial Board Term (upon sale of _____ percent (_____%)) of the maximum number of Interval Interests created by the Declaration). The board of directors shall be elected by all then eligible members of the Association, including the Developer, who holds weighted votes, pursuant to the election procedures set forth in the bylaws.

Title to Common Areas:

Developer reports that individual owner's ownership interest in the common areas has been dedicated. However, the Developer has retained ownership and control of the Sales Center Building (i.e., the improvements and an exclusive easement over the underlying land), as is defined in the Declaration recorded for the resort.

NOTE:

The Developer has not provided a specific date or conditions for which title to the Sales Center Building will be transferred to the Association, but the Developer must pay the Association additional remuneration if Developer retains ownership and control of the Sales Center Building for more than twenty (20) years.

Membership:

All purchasers will be required to be members of the Association. Membership will mean certain responsibilities and obligations, such as:

In order to provide funds for operation and maintenance of the common facilities, the Association will have authority to levy assessments against your percentage of interest in the property. If you are delinquent in the payment of assessments, the Association may enforce payment through court proceedings, or your interest in the project or ability

to use or occupy the facilities, or participate in the management, may in other ways be in jeopardy.

The anticipated income and expense of the Association and the amount that you may expect to pay annually through assessments should be outlined in, and predicated upon, budgets. Ask to see a copy of the budget if the developer has not already made it available for your examination. Your ownership or interest rights as member of the association will be controlled by governing instruments, which include the Declaration, the articles of incorporation, bylaws and association rules and regulations. The provisions of these documents are intended to be, and in most cases are, enforceable in a court of law. Study these documents carefully before entering into a contract to purchase an interest.

Until there is a sufficient number of purchasers, it is likely that the developer will effectively control the affairs of the Association. It is frequently necessary and equitable that the developer does so during the early stages of development. It is important to interest owners that the transition from the developer to all the owners collectively be accomplished in an orderly manner.

When contemplating the purchase of a dwelling in a common-interest project, you should consider factors beyond the attractiveness of the dwelling units themselves. Study the governing instruments and give careful thoughts to whether you will be able to exist happily in an atmosphere of cooperative living where the interests of the group must be taken into account as well as the interest of the individual.

PAYMENTS TO INTERVAL OWNERS ASSOCIATIONS ARE SUBJECT TO CHANGE IN ACCORDANCE WITH RECORDED RESTRICTIONS. SAID ASSOCIATION MAY ALSO IMPOSE SPECIAL ASSESSMENTS. YOU ARE ADVISED TO READ THE RECORDED DECLARATION OF COVENANTS, CONDITIONS AND RESTRICTIONS, ARTICLES OF INCORPORATION, AND BYLAWS FOR THIS DEVELOPMENT TO DETERMINE THE RIGHTS OF INTERVAL OWNERS TO PARTICIPATE IN THE CONTROL OF THE INTERVAL OWNERS' ASSOCIATION AND TO DETERMINE THE RIGHTS, DUTIES AND LIMITATIONS OF OWNERS IN AND TO USE OF THEIR INTERVAL WEEKS. FURTHER, YOU SHOULD DETERMINE FOR YOURSELF IF DEVELOPER'S ARRANGEMENTS AND PLANS FOR THE PAYMENT OF ASSESSMENTS ON UNSOLD INTERVAL WEEKS WILL BE SUFFICIENT TO FULFILL THE NEEDS, DEMANDS AND FINANCIAL OBLIGATIONS OF THE ASSOCIATION, AS SET FORTH IN THE DECLARATION AND BYLAWS.



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Current Legal Forms for Real Estate

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Current Legal Forms for Real Estate
Chapter 20 REAL ESTATE ENTITIES
Part IV. Forms
I. TIME SHARE

24-20 Current Legal Forms for Real Estate FORM 20.81

AUTHOR: by Stephen E. Pigott and Harold O. Maxfield, Jr.

FORM 20.81 Receipt of disclosure statement

COMMENT

Most states have a requirement that the purchaser of a time share interest acknowledges that they have received the Disclosure Statement. If this is not required, this is something that a prudent offering should include, so as to avoid any finger-pointing later.

FORM

PUBLIC REPORT RECEIPT

The developer shall furnish you, as a prospective customer, with a copy of the Public Report required by the Arizona Department of Real Estate. It is recommended that you read the report before you make any written offer to purchase or lease an interest in the development and before you pay any money or other consideration toward the purchase or lease of an interest in the development.

FOR YOUR PROTECTION, DO NOT SIGN THIS RECEIPT UNTIL YOU HAVE RECEIVED A COPY OF THE REPORT AND HAVE HAD THE OPPORTUNITY TO READ IT. BY SIGNING THIS RECEIPT, THE BUYER HAS ACCEPTED THE PUBLIC REPORT AND ACKNOWLEDGES THE INFORMATION IT CONTAINS.

Sunset Summit Resort

Unit No.

(Development Name and Unit No.)

(Public Report Registration No.)

I understand the report is not a recommendation or endorsement of the development by the Arizona Department of Real Estate, but is for information only.

Date _____ [buyer]
: _____ [month] _____
_____ [day], _____ [year]
_____ [address]



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Current Legal Forms for Real Estate

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Current Legal Forms for Real Estate
Chapter 20 REAL ESTATE ENTITIES
Part IV. Forms
I. TIME SHARE

24-20 Current Legal Forms for Real Estate FORM 20.82

AUTHOR: by Stephen E. Pigott and Harold O. Maxfield, Jr.

FORM 20.82 Declaration for time share project

COMMENT

As with any real estate project, such as a condominium or homeowners' association, in order to commence the project the real estate must be dedicated. Included with the dedication are rights, restrictions, conditions and limitations. The Declaration is intended to benefit the purchaser. Without the dedication, a purchaser of an interest in the land would be free to deal with his or her interest in any manner which they desire. By filing the Declaration, each purchaser purchases his or her interest subject to the terms and conditions of the Declaration and they are, therefore, bound by it. Time share declarations are subject to the same criteria as other real estate declarations (i.e., easement agreements, condominium declarations, etc.). They must be filed with the public record. As such, they are subject to the recording agreements of the local jurisdiction where the real estate is located. The content of the time share declaration must be disclosed to the buyer of the time of the purchase of the share, along with all other title conditions.

Furthermore, the Declarations are typically provided to the buyer, along with the Disclosure Statement. As a result, they will generally be reviewed by the governmental body which regulates time shares in the jurisdiction where the project is located. The terms of a declaration vary widely depending on the project, the requirements of the local jurisdiction and the nature of the real estate which is being dedicated. The following form is a typical Declaration for time share.

FORM

DECLARATION OF DEDICATION FOR

SUNSHINE RESORT, A TIMESHARE RESORT

WHEN RECORDED, RETURN TO:

THIS DECLARATION FOR SUNSHINE RESORT (the "Declaration") is made this _____ [day] day of _____ [month] , _____ [year] , by SUNSHINE RESORT, INC., an Arizona corporation ("Sunshine") and SUNSHINE CORPORATION, an Ohio corporation ("Sunshine") (individually and collectively "Declarant").

WHEREAS, Resort is or was the Owner of certain real property (the "Phases I and 2") located in _____ County, Arizona, which is more particularly described on Exhibit "A" attached hereto and incorporated herein by this reference; and

WHEREAS, Resort has or intends to transfer, convey, and assign all of its remaining right title, and interest in Phases I and 2, and all rights as Declarant, to Sunshine, whereupon Sunshine shall be the sole Declarant under this Declaration; and

WHEREAS, Sunshine is the owner of certain real property ("Phases 3, 4, and 5") located in _____ County, Arizona, which is more particularly described on Exhibit "B" (Phase 3), Exhibit "C" (Phase 4), and Exhibit "D" (Phase 5) attached hereto and incorporated herein by this reference; and

WHEREAS, except for intervening public or private streets, Phases 3, 4, and 5 are adjacent to Phases I and 2 and/or to one another; and

WHEREAS, Sunshine has obtained land use approvals from the City of _____ for construction and operation of a timeshare resort on Phases 1, 2 3, 4, and 5; and

WHEREAS, Declarant intends to establish a common scheme and plan for the use, enjoyment, repair, maintenance, restoration and improvement of the Property (as hereinafter defined), and for the payment of taxes, assessments, insurance premiums and other expenses pertaining thereto.

NOW, THEREFORE, in furtherance of such intent, Declarant hereby declares that the Property is and shall be held, conveyed, hypothecated, encumbered, leased, rented, used and occupied subject to the following limitations, easements, covenants, conditions and restrictions set forth in this Declaration, as this Declaration may from time to time be further amended, and in such other rules and regulations as are instituted pursuant to the provisions of this Declaration, and all of which declarations, easements, limitations, covenants, conditions and restrictions and rules and regulations are declared to be in furtherance of a plan established for the purpose of enhancing and perfecting the value, desirability and enjoyment of the Property. All such declarations, easements, limitations, covenants, conditions and restrictions and rules and regulations shall constitute covenants running with the land and equitable servitudes and liens, and shall be binding upon and for the benefit of Declarant, and all parties having or acquiring any right, title or interest in the Property including, without limitation, the heirs, executors, administrators, successors and assigns of any such parties and all subsequent Owners and lessees of all or any part of the Property.

1. DEFINITIONS

1.1. The following terms used in this Declaration, shall have the following meanings:

1.2. "Property" means Phases 1, 2, 3, 4 and 5 together with any other real property which Declarant may acquire and

which is adjacent to the Property (or adjacent to intervening public or private roads, public lands, open space, or eliosymmentary institutions or properties), all or any part of which may at some time be annexed hereto. Phases 1, 2, 3, 4 and 5 are more particularly described on Exhibits "C" and "D" attached hereto and incorporated herein by this reference, but no part of Phases 1, 2, 3, 4 **or 5** or any other Property shall be subject to this Declaration unless annexed as provided in paragraph 7.1 below.

1.3. "Annual Interval Ownership Interest" means that form of undivided fee interest in the Property subject to this Declaration, by which an Owner is entitled to occupy a Unit for one (1) Interval Week on an annual and recurring basis, along with the non-exclusive right to use and enjoy the Common Area and to use and enjoy the Common Furnishings contained in such Unit during such Owner's Use Period as provided in this Declaration. Each Annual Interval Ownership Interest is Floating and the exact Interval Week of use shall be established each year by reservation (unless Fixed Time) according to the Rules and Regulations. Each Annual Interval Ownership Interest shall constitute an Undivided Interest in the Property. The number of Annual Full Interval Ownership Interests (counting each Annual Partial Interval Interest as one-half (1/2) an Annual Full Interval Interest) available for sale shall not exceed (a) fifty-two (52) times the number of Units *which* are not dedicated to Flex Interval Ownership interests, minus (b) the greater of (x) the number of Biennial Interval Ownership Interests sold for use in even numbered Use Years, or (y) the number of Biennial Interval Ownership Interests sold for use in odd numbered Use Years. For convenience in inventory control, conveyancing, and titling, an Annual Interval Ownership Interest may be allocated to a specific Unit; **however, this interest does NOT carry with it the right to use that specific Unit, only the right to use a Unit.**

1.4. "Articles" means the Articles of Incorporation of the Association as they may be amended from time to time.

1.5. "Assessments" means the Basic Assessments, Special Assessments and Personal Expenses as provided in Article 5 below, and any other amounts due the Association pursuant to the terms of this Declaration.

1.6. "Association" means Sunshine Resort Owners Association, an Arizona nonprofit corporation.

1.7. "Biennial Interval Ownership Interest" means that form of undivided fee interest in the Property subject to this Declaration by which an Owner is entitled to occupy a Unit for one (1) Interval Week on a biennial (every other year) and recurring basis, along with the non-exclusive right to use and enjoy the Common Area and to use and enjoy the Common Furnishings contained in such Unit during such Owner's Use Period as provided in this Declaration. Each Biennial Interval Ownership Interest is Floating and the exact Interval Week of use shall be established every other year by reservation (unless Fixed Time) according to the Rules and Regulations. Each Biennial Interval Ownership Interest shall constitute an Undivided Interest in the Property. The number of Biennial Full Interval Week Ownership Interests (counting each Biennial Partial Interest as one-half (1/2) a Biennial Full Interval Interest) available for sale for each of even-numbered Use Years and odd-numbered Use Years shall not exceed (a) fifty-two (52) times the number of Units which are not dedicated to Flex Interval Ownership Interests, minus (b) the total number of Annual Interval Ownership Interests sold. For convenience in inventory control, conveyancing, and titling, a Biennial Interval Ownership Interest may be allocated to a specific Unit; **however, this interest does NOT carry with it the right to use that specific Unit, only the right to use a Unit.**

1.8. "Board" means the Board of Directors of the Association.

1.9. "Building" means one of the structures on the Property containing Units.

1.10. "Bylaws" means the Bylaws of the Association, as they may be amended from time.

1.11. "Common Area" means all portions of the Property except the Units and Common Furnishings, but including the Buildings in which the Units are located. Any Declarant Building (as defined in paragraph 2.9 below), ownership and control of which is reserved to Declarant by this Declaration shall not be part of the Common Area, shall be maintained

by Declarant rather than the Association, and Declarant shall pay all operating costs, utilities, taxes and assessments relating to such Declarant Building.

1.12. "Common Furnishings" means all furniture, furnishings, appliances, fixtures, equipment, telephone system and all other personal property from time to time owned, leased or held by the Owners in Undivided Interests, or by the Association for use by Owners or the Association, and which are located in or upon the Property.

1.13. "Date" means a Fixed Time Interval Interest where the Fixed Use Period is related to a calendar date or period (e.g., birthday, holiday, school vacation, anniversary, etc.) and where the numbered Use Period used by the Owner may vary from year to year to match the calendar date or period.

1.14. "Declarant" means Sunshine Resorts, Inc., an Arizona corporation, and/or Sunshine Corporation, an Ohio corporation, or any successor-in-interest by express assignment of the rights of the Declarant hereunder in writing.

1.15. "Declaration" means this instrument, as this instrument maybe amended from time to time in the manner herein provided.

1.16. "Event" means a Fixed Time Interval Interest where the Fixed Use Period is related to an activity or celebration (e.g., music festival, pageant, show, parade, tournament, etc.) and where the numbered Use Period used by the Owner may vary from year to year to match the activity date.

1.17. "Fiscal Year" means the one year period set forth from time to time in the Bylaws as the fiscal year for the Association.

1.18. "Fixed" means an Interval Interest that is limited to, and carries with it the right to, use a particular Unit, a particular Use Period, or both.

1.19. "Fixed Time" means an Interval that is Fixed as to Use Period.

1.20. "Fixed Unit" means an Interval Interest that is Fixed as to Unit.

1.21. "Flex Interval Ownership Interest" means that form of undivided fee interest in the Property subject to this Declaration in the percentage or fractional interest indicated in the Owner's warranty deed, by which an Owner is entitled to occupy a Unit during a Use Period properly reserved by the Owner in accordance with Section 2.2 of this Declaration on an annual recurring basis, along with the non-exclusive right to use and enjoy the Common Area and to use and enjoy the Common Furnishings contained in such Unit during the reserved Use Period. Each Flex Interval Ownership Interest shall constitute an Undivided Interest in the Property. The maximum number of Interval Interests to be conveyed will depend on the total number of Units subject to this Declaration and the respective number of Annual Interval Ownership Interests, Biennial Interval Ownership Interests, and Flex Interval Ownership Interests conveyed to Owners, but in no event shall Declarant convey Interval Interests in excess of a "one-to-one" accommodation ratio.

1.22. "Floating" means an Interval Interest that is not limited to, and carries with it no right to use of either a particular Unit or a particular Use Period; the specific Use Period and Unit used being determined by availability and reservation according to the Rules and Regulations. All Interval Interests under this Declaration are Floating as to Unit and Use Period, unless otherwise specified on the deed conveying the Interval Interest to the Owner, except for Large Fraction Interests which shall be subject to special reservation and Use Period provisions set forth in the Rules and Regulations which may include, without limitation, rotating use by calendar periods, and which may, by designation in the deed transferring a Large Fraction Interest to an Owner, fix or limit usage to a particular Unit or Building.

1.23. "Full" means an Interval Interest entitling the Owner to use of all of a Unit; unless specified on the deed of the

Interval Interest to an Owner, all Interval Interests are Full.

1.24. "Interval Week" means a floating period of approximately one week, commencing on a set day of the week at 4:00 p.m., local time, _____ County, Arizona, and ending the same day of the following week at 11:00 a.m., local time, _____ County, Arizona. The exact dates, and starting and ending day, of each Interval Week for a particular calendar year may be determined by reference to the Association's chart of Use Periods for that year. The specific period(s) during which an Owner may use his Interval Week is determined by reservation made each year. Check in and check out times may be changed by the Association without amendment to this Declaration. Without amendment to this Declaration, the Association may allow an Owner to divide his Interval Week into two or more separate Use Periods.

1.25. "Interval Interest" means any Annual Interval Ownership Interest, Biennial Interval Ownership Interest, or Flex Interval Ownership Interest.

1.26. "Interval Ownership Plan" means the entire plan for Interval Interest ownership as described and set forth in this Declaration and for the development, improvement and sale of Interval Interests.

1.27. "Large Fraction" means two or more Annual or Biennial Interval Interests or Interval Weeks combined into a single block for ownership by one Owner.

1.28. "Lockout" means the double-locking door in each Unit that allows division of occupancy of the Unit into a Master Suite and a Privacy Suite.

1.29. "Managing Agent" means the agent engaged by the Board pursuant to paragraph 4.4 hereof, which Managing Agent may be an affiliate of Declarant.

1.30. "Owner" means the Owner or co-Owner of an Interval Interest.

1.31. "Partial" means an Interval Interest entitling the Owner to use only the Master Suite or the Privacy Suite portion of a Unit.

1.32. "Permitted User" means any person occupying a Unit or utilizing the Common Area by or under any Owner, including, but not limited to, such Owner's family members, invitees, guests or licensees.

1.33. "Person" means a natural person, corporation, partnership, association, joint venture, limited liability company, trust, or other legal entity, or any combination thereof.

1.34. "Property" means Phases 1, 2, and 3 as more particularly described on Exhibits "A" and "B" attached hereto and incorporated herein by this reference, together with all improvements thereon and any rights incident thereto and the Additional Property to the extent all or any portion thereof is annexed to the Property pursuant to the terms of paragraph 1 of this Declaration.

1.35. "Rights" means the units of symbolic value used as the basis for determining the interest of an Owner of a Flex Interval Ownership Interest and such Owner's occupancy rights at the Property in any calendar year.

1.36. "Rules and Regulations" means the rules and regulations adopted and promulgated from time to time by the Association relating to the possession, use and enjoyment of the Property.

1.37. "Sunshine Resort Bonus Time" means an Owner's use of a Unit pursuant to the provisions of the Rules and Regulations governing its use (a) which is in addition to such Owner's Use Period under its Annual Interval Ownership

Interest or Biennial Interval Ownership Interest, (b) which is subject to availability, (c) which is to subject the Rules and Regulations governing its use which may, from time to time, be changed in the best interest of the membership of the Association in the discretion of the Board.

1.38. "Service Period" means, with respect to each Unit, a period reserved by the Association as a Service Period. The Association shall determine which days and nights will comprise the Service Period for each Unit, which determination may be changed from time to time, provided, however, that the Service Period shall not be during any properly reserved Use Period, unless the Owner is provided reasonably similar replacement accommodations.

1.39. "Site Plan" means the drawings and lists attached as Exhibits "E" and "F" to this Declaration.

1.40. "Unit" means one of the apartment units within the Property (or the Additional Property if annexed hereto).

1.41. "Undivided Interest(s)" means the undivided ownership scheme described in this Declaration. As an Undivided Interests plan of ownership this Declaration establishes an undivided fractional tenancy in common in favor of each Owner in the entire Property.

1.42. "Use Period" means the time period or periods for which an Owner is entitled to use and occupy a Unit as set forth in paragraph 2.1 of this Declaration, and which the Owner has reserved consistent with the class of Interval Interest owned in accordance with the provisions of this Declaration and the then-current Rules and Regulations.

1.43. "Use Year" means each one-year period commencing on the first Saturday in January of each calendar year and ending on the Saturday at the end of the fifty-second week thereafter, except for years with fifty-three weeks, in which case the year shall end on the Friday at the end of the fifty-third week thereafter. The Use Year for a Biennial Interval Ownership Interest (odd year) shall commence in January of odd-numbered years and the Use Year for a Biennial Interval Ownership Interest (even year) shall commence in January of even-numbered years. The day of the week commencing and ending the Use Year may be changed from time to time by the Association without amendment of this Declaration, and for Flex Interval Ownership interests the Association may use the same Use Year for all Owners or use an anniversary.

1.44. "Visible from Neighboring Property" means, with respect to any given object, that such object is or would be visible to a person six feet tall, standing on any part of such neighboring property at an elevation no greater than the elevation of the base of the object being viewed.

2. RESERVATION RIGHTS, USE RIGHTS AND USE RESTRICTIONS

2.1 Reservation and Use Rights of Annual or Biennial Interval Ownership Interval Owners. Subject to all of the terms and conditions contained elsewhere in this Declaration, an Annual or Biennial Interval Ownership Interval Owner shall have the right, for each Interval Week owned (and in the case of Declarant, during all periods not timely reserved by other Owners) to use and occupy, pursuant to the reservation procedures set forth in the Rules and Regulations, a Unit, and the Common Furnishings contained within such Unit, and the non-exclusive right to use and enjoy the Common Area for one Interval Week during such Owner's Use Year; provided, however, that such Owner shall have reserved such use and occupancy in accordance with the requirements and procedures for the making of reservations set forth in the Rules and Regulations. The timing and details of the reservation procedure are subject to change by the Board in the best interest of the Owners. No use or occupancy by any Annual or Biennial Interval Ownership Interest Owner or Flex Interval Ownership Interest Owner will be permitted if such Owner is delinquent in the payment of any amounts owed to the Association. If, because of an error by the Association or Managing Agent, a Unit is not available for the Use Period to which an Owner was entitled by a properly made reservation, the Owner shall receive a compensating use of the next available Use Period selected by the Owner, together with such monetary compensation, if any, as the Board may elect to make, either on a case by case basis, or by established policy and schedules.

2.2. Flex Plan. An Owner who owns a Flex Interval Ownership Interest shall have the right, every Use Year, to reserve, use and occupy an assigned Unit(s) within the Property (though not necessarily any Unit identified in their deed) to the extent the number of Rights allocated to such Owner in such Use Year does not exceed the number of Rights required to reserve the subject Unit(s) during the desired Use Period(s) as properly reserved in accordance with the Rules and Regulations. Declarant shall record an amendment or supplement to this Declaration identifying each Unit dedicated to Flex Interval Ownership, which Declarant may do without the vote or assent of other Owners. Each Unit of the Property dedicated to Flex Interval Ownership shall have a total Rights allocation as set forth in the following chart (i.e., the number of Rights it would take to reserve a particular Unit for 52 Intervals in any Use Year):

Unit	Total Rights Allocation
Privacy Suite	_____
	___ Rights
Master Suite	_____
	___ Rights
Total Unit	_____
	___ Rights

If the Total Rights Allocation table set forth above in this paragraph contains blanks and does not reflect the number of Rights allocated to a Privacy Suite, Master Suite, and total Unit, Declarant shall not offer for sale or sell any Flex Interval Ownership Interest in the Property before first executing and recording an amendment or supplement to this Declaration setting forth the number and allocations of Rights. Notwithstanding other provision herein to the contrary, Declarant may unilaterally add such amendment or supplement to this Declaration without the Vote or assent of the Owners.

The undivided interest of an Owner of a Flex Interval Ownership Interest shall be expressed in terms of a fraction, the numerator of which is the number of Rights associated with Flex Interval Ownership Interest, and the denominator of which is the total number of Rights allocated to the particular Unit (or group of Units). Each deed conveying a Flex Interval Ownership Interest shall also include a contract number assigned by the Developer. The contract number and Rights allocated must appear on all subsequent deeds, deeds of trust and other documents affecting the subject Flex Interval Ownership Interest. In the event an Owner desires to purchase an additional Flex Interval Ownership Interest, such purchase shall be evidenced by a separate deed, which shall include a separate designation of allocated Rights and a separate contract number, and in no event shall such subsequent purchase be consolidated with the purchaser's original or subsequent purchase; provided, however, that the foregoing restrictions shall not prohibit the Owner from combining his Rights for reservation or occupancy purposes. In the event the Declarant reacquires title to a Flex Interval Ownership Interest (whether by deed, foreclosure or otherwise), (a) the Rights allocated to such Flex Interval Interest shall be deemed reacquired by the Declarant and the Declarant shall be free to reallocate such Rights in its discretion in connection with the conveyance of another Flex Interval Interest, and (b) the contract number originally assigned to the Flex Interval Ownership Interest by Declarant shall cease to exist. A new contract number shall be assigned by the Declarant in connection with any subsequent sale of the Flex Interval Ownership Interest by the Declarant. All Flex Interval Ownership Interests in a Unit shall have been conveyed when the sum of the fractional undivided tenant-in-common fee interests allocated to such Unit equals the whole number one (1). A Flex Interval Ownership Interest shall be Floating unless the deed indicates that the Use Period, Unit or both, associated with such Flex Interval Ownership Interest is Fixed. The Use Period may be Fixed by Date or Event.

2.3. Service Periods. To the extent reasonably feasible, the Association shall perform required maintenance between periods of occupancy of Units. However, the Association may reserve up to a total of seven (7) days and nights (not necessarily consecutive) in each calendar year as Service Period(s) for each Unit. Upon sellout of a Unit, the Association shall use reasonable efforts to reserve Service Period(s) when such Unit will not be occupied (e.g., when an

Owner exchanges his interest through an exchange company). To the extent possible, if a reserved Use Period conflicts with any required Service Period, the Managing Agent shall use reasonable efforts to move the reservation to an unoccupied Unit of the same type within the Property, or to a Unit which holds at least as many occupants, or, if no Units are then available, to alternate accommodations pursuant to paragraph 2.1 of this Declaration. The Association and its agents shall have free access to each Unit during its reserved or designated Service Period(s) for the purpose of effecting any necessary or appropriate maintenance, repair= modifications, alterations, replacements and additions to such Unit and to the Common Furnishings therein. The Service Period(s) for a particular Unit may vary from time to time in the Board's sole discretion and need not occur at the same time for each Unit. The Association shall use reasonable efforts to reserve Service Periods in Units so as to reasonably maximize the use and enjoyment thereof by Owners and reasonably minimize any scheduling problems under the reservation system established by the Rules and Regulations.

2.4. Occupancy. No Owner shall occupy a Unit or the Common Area or exercise any rights of ownership with respect to the Property during any time period other than his Use Period(s) unless expressly authorized by the Owner entitled to such use rights during such time period. Each Owner shall keep the Unit occupied by him and the Common Furnishings therein in good condition and repair during his Use Period(s), vacate the Unit at the expiration of his Use Period(s), remove all persons and property therefrom, excluding only the Common Furnishings, leaving the Unit and the Common Furnishings therein in good and sanitary condition and repair and otherwise comply with such check-out and other procedures and regulations as may from time to time be contained in the Rules and Regulations. Any Owner may permit a Unit which he is entitled to occupy to be occupied by other persons (not in excess of the number of occupants permitted by the Rules and Regulations) for the purposes permitted by this Declaration during his Use Period(s), but such Owner shall be responsible for any loss, damage, destruction or violation of this Declaration, the Bylaws, the Articles or the Rules and Regulations which occurs during such occupancy as if such Owner were occupying the Unit.

2.5. Holdover User. In the event any Owner or Permitted User occupying a Unit with or without the permission of an Owner fails to vacate a Unit at the expiration of its Use Period in accordance with the provisions hereof, or at such earlier time as may be fixed by the Rules and Regulations adopted by the Association from time to time, such Owner or Permitted User shall be deemed a "Holdover Owner." It shall be the responsibility of the Association or the Managing Agent, if so provided in the Management Agreement, to take all steps necessary to remove the Holdover Owner from a Unit and assist the person entitled to occupy the Unit during the subsequent Use Period to find alternative accommodations during such holdover period, but neither the Association nor the Managing Agent is liable for the acts of a Holdover Owner. In addition to other remedies available to it, the Association may assist any Owner or Permitted User entitled to occupy a Unit, and denied occupancy due to a Holdover Owner's failure to vacate, in seeking alternate accommodations. Such accommodations should be as comparable as possible to the Unit to which occupancy is denied. A Holdover Owner shall be responsible for the cost of such alternate accommodations, travel expenses incurred by the Owner or Permitted User if an alternate Unit is not available, and any other expense incurred due to the Holdover Owner's failure to vacate. In addition, a Holdover Owner shall be charged an administrative fee, as determined by the Board of not less than _____ Dollars (\$_____) per day, for each day of the, holdover period. If the Association is required to contract for a period greater than the actual period of holding over in order to secure alternate accommodations as set forth above, the expense of the entire period shall be the responsibility of the Holdover Owner, although any daily administrative fee shall cease upon the day following that upon which the Holdover Owner vacates the Unit. The Association shall submit a bill to the Holdover Owner in accordance with this paragraph. In the event the Holdover Owner fails to pay the bill within ten (10) days of the bill's date, the Association shall have a lien against the Holdover Owner's Interval Interest, which may be enforced in accordance with the provisions hereof. The provisions of this paragraph shall not abridge the Association's right to take such other action(s) available to it at law or in equity, including, but not limited to, eviction proceedings.

2.6. Use Restrictions-Owners. Except for Units used by Declarant for sales, marketing or management purposes, a Unit shall be used solely for resort or vacation use. Except as required to prevent damage or injury to person or property in an emergency, no Owner shall: make or authorize any alterations, additions or improvements to the Property; repair, tile,

paper or otherwise refinish or redecorate the inner surfaces of the walls, ceilings, floors, windows or doors bounding the Property; or remove, alter or replace any portion of the Common Furnishings; or use his Unit in any way which will interfere with, or unreasonably disturb the rights of the other Owners without the prior written consent of the Association. The right to perform all of the foregoing acts has been delegated to the Association by this Declaration. The foregoing prohibitions, however, shall not modify or affect the obligation of each Owner for the prudent care and ordinary maintenance and upkeep of all property subject to his use.

2.7. Easement for Sales, Customer Service and Related Purposes. Declarant, on behalf of itself, its successors and assigns, and its and their respective agents, employees, contractors, subcontractors, invitees and other authorized personnel, reserves, for an initial period of twenty (20) years from the date of the sale of the first Interval Interest, a non-exclusive easement, in, over and through the Units and the Common Area, for the purpose of: (1) marketing and selling the Intervals and any other travel or vacation products offered by Declarant or any of its affiliates; (2) maintaining customer relations and providing post-sale service to Owners; (3) displaying signs and erecting, maintaining and operating, for sales and administrative purposes, model Units and customer relations, customer service and sales office complex(es) on the Property; (4) showing the Units and Common Area; and (5) arranging for the use of any recreational facilities within the Common Area by prospective purchasers. The use of such easement shall not materially interfere with or unreasonably diminish the rights of Owner(s) to use and occupy Units and Common Area amenities in accordance with this Declaration and the Rules and Regulations. Upon expiration of the initial 20-year term of this easement, Declarant's easement shall automatically be extended for so-long as Declarant: (i) pays the Association an annual extension fee of _____ Dollars (\$_____) (against which Declarant shall receive a credit equal to _____ percent (_____%)) of all Assessments paid by Declarant the previous twelve [12] months) on or before January 31 of each year (commencing with the year following expiration of the initial 20-year term); (ii) paying the Association on or before January 31 of each year (commencing with the year following expiration of the initial 20-year term) the fair rental value (to be determined by a licensed real estate broker practicing in Sedona, Arizona, and not affiliated with or representing Declarant or the Association) of any building or improvement (or space within any building or improvement) controlled or occupied by Declarant on the Property; and (iii) paying the Association, within thirty (30) days of written request by the Association, all operating costs, utilities cost, and taxes and assessments for such building or improvement (to be prorated in an equitable manner if not separately billed or assessed).

2.8. Use of Units by Declarant. Declarant shall have the right, with respect to all unsold Interval Interests owned by Declarant, to reserve any Unit for use by Declarant or for use and occupancy by prospective purchasers of Interval Interests who have been brought to the Property as a result of the promotional efforts of the Declarant (the "Promotional Program") or for use and occupancy by members of the public for hotel use or other transient accommodations. Declarant may make such reservations in the same manner as reservations made by other Owners and consistent with the established Rules and Regulations for use and occupancy of the Property. The Declarant shall reimburse the Association for expenses incurred by and allocated to the Association in connection with the Promotional Program or such hotel use or other transient accommodations to the extent such expenses are not included in the Basic Expenses used by the Association in calculating Assessments. Declarant may use any Unit not registered for sale as part of the Interval Interest Program with the Arizona Department of Real Estate or other applicable regulatory agency for any lawful purpose, including without limitation for models, offices, sales, or administrative purposes, whether related to the Property or not.

2.9. Declarant Control and Use of Sales Center and other Declarant Buildings. Declarant has or intends to construct a sales center on Phase 3 of the Property. Declarant may also construct one or more maintenance buildings, service buildings, additional or replacement sales centers, or other buildings (the "Declarant Buildings"). Declarant hereby reserves and retains all right, title, interest, and control in, to, and over the improvements of the Phase 3 sales center and other Declarant Buildings, together with an exclusive easement over, under, and upon the land underlying the Declarant Buildings and non-exclusive easements, in bulk, over all the Property, for construction, repair, maintenance of the Declarant Buildings, vehicular and pedestrian ingress and egress to and from the Declarant Buildings, public and private

utility lines providing service to the Declarant Buildings (and the construction, repair, and maintenance of such lines), and for parking. Declarant's ownership and control of the Declarant Buildings, and the exclusive and non-exclusive easements, shall run for a period of twenty (20) years from the date the certificate of occupancy or other final construction inspection approval is issued for the particular Declarant Building. During such 20-year period the particular Declarant Building shall not be part of the Common Area, shall be maintained by Declarant rather than the Association, and Declarant shall pay all operating costs, utilities, taxes and assessments relating to such Declarant Building, either directly, by prompt reimbursement of the Association, or through any other fair and reasonable payment or subsidy arrangement with the Association. Upon expiration of said 20-year period for any particular Declarant Building, the Declarant Building shall revert to the Owners in undivided interests, with the same fractional ownership as the Owners' interest in the other Common Areas, provided, however, Declarant may continue to use and occupy the Declarant Building and extend the exclusive and non-exclusive easement reserved by this paragraph by paying the annual fee, rental, and other charges set forth in paragraph 2.7 above. Declarant may use, discontinue the use, or modify the use of any Declarant Building at Declarant's sole discretion, and may elect to terminate use of any Declarant Building and transfer the ownership and control of a Declarant Building to the Owners and the Association at any time, including any time prior to expiration of the initial 20-year easement period established under this paragraph. If Declarant elects to let any Declarant Building revert to or be transferred to use and occupancy by the Association, Declarant shall surrender such Declarant Building broom clean, in reasonably good condition, ordinary wear and tear excepted.

2.10. Additional Amenities in New Phases. To preserve the Owners use and enjoyment of the amenities of the Common Area, Declarant will provide additional amenities in each new phase of the Property. Declarant has or will provide, as part of the Common Area in Phase 3, a large spa and water feature, and will expand the existing laundry and exercise facilities in Phases 1 and 2 to accommodate additional demand from expansion of the Property. If Developer builds out Phases 4 and/or 5, Phase 4 will include a swimming pool and a spa, and Phase 5 will include a swimming pool and a spa.

2.11. Declarant's Right to Modify Site Plan. Declarant is under no obligation to complete any or all of the planned Units or other improvements of Phases 3, 4, or 5 beyond those registered at any time with the Arizona Department of Real Estate as part of the Interval Interest Ownership Plan. Declarant will complete the additional amenities set forth in the previous paragraph of this Declaration, if, but only if, Declarant builds some or all of the Units in the respective Phases for which the additional amenities have been promised. The location, configuration, and other details regarding the amenities may be modified in Declarant's sole and absolute discretion. Declarant may also add, delete, modify, or otherwise change all other particulars of the Site Plan for un-built portions of the Property, including without limitation, the number, size, location, configuration, appearance, floor plans, and elevations of the Units and the location, configuration and appearance of driveways, sidewalks, landscape areas, parking areas and other portions of the Common Area, subject only to compliance with applicable laws and ordinances and public approval processes.

2.12. Separate Mortgages. Each Owner shall have the right to mortgage or otherwise encumber all, but not less than all, of his Interval Interest. Any mortgage encumbering an Interval Interest shall be subordinate to all of the provisions of this Declaration, and in the event of foreclosure, the provisions of this Declaration, shall be binding upon any Owner whose title is derived through foreclosure by private power of sale, judicial foreclosure, assignment in lieu of foreclosure or otherwise. Notwithstanding any other provision of this Declaration, no breach of the provisions herein contained, nor the enforcement of any lien created pursuant to the provisions hereof shall defeat or render invalid the lien of any mortgage of any Owner's Interval Interest if such mortgage is recorded in the Office of the County Recorder of _____ County, Arizona, and is given in good faith and for value.

2.13. Transfer of Interest. No Owner shall sell, convey, hypothecate or encumber less than all of his Interval Interest. Any sale, conveyance, hypothecation or encumbrance by any Owner of less than all of his Interval Interest, shall be null, void and of no effect. The transfer of any Interval Interest shall operate to transfer to the new owner of the Interval Interest the interest of the prior Owner in all funds in the hands of the Association even though not expressly mentioned

or described in the instrument of transfer and without further instrument of transfer.

2.14. Waiver of Right of Partition and Subordination of Tenancy-In-Common Attributes.

2.14.1. It is intended that this Declaration shall govern all rights with respect to the use, possession, enjoyment, management and disposition of the Interval Interests. Accordingly, all rights with respect to the use, possession, enjoyment, management or disposition of an Interval Interest which an Owner might otherwise have as a tenant-in-common (including, but not limited to, any common law or statutory right jointly to use, possess or manage commonly owned property) are hereby unconditionally and irrevocably waived and subordinated to this Declaration for so long as this Declaration shall remain in effect.

2.14.2. Except as provided in Subparagraph 2.14.1 above and paragraph 8.3 below, every Owner or other person or entity acquiring any right, lien or interest in any of the Property, hereby waives any and all right as a concurrent owner to any common law or statutory right of partition and no such party shall seek or obtain, through any legal procedures, judicial partition of the Property or the sale thereof in lieu of partition. If, however, any Interval Interest is owned by two or more persons as tenants-in-common, joint tenants or community property, nothing herein contained shall prohibit a judicial sale of the Interval Interest in lieu of partition as between such co-tenants.

2.15. Protection of Interest. Except as provided in paragraph 2.14.2 above, no Owner shall permit his Interval Interest to be subject to any lien (other than the liens of current real property taxes), claim or charge, the enforcement of which may result in a sale or threatened sale of the Interval Interest of any other Owner or any part thereof or result in any interference in the use or enjoyment thereof by any other Owner. In the event of a threatened sale of the Interval Interest of any Owner or any part thereof, or should the use and enjoyment of any portion thereof by any Interval Owner be threatened by reason of any lien, claim or charge against the Interval Interest of any other Owner, or should proceedings be instituted to effect any such sale or interference, any Owner acting on his behalf or through the Association or the Association acting on behalf of any one or more Owners (if promptly indemnified to his or its satisfaction) may, but shall not be required to, pay or compromise the lien, claim or charge without inquiry into the proper amount or validity thereof and, in such event, the Owner whose interest was subjected to such lien, claim or charge shall forthwith pay the amount so paid or expended to Owner or the Association, whomsoever shall have paid or compromised the lien, claim or charge, together with such reasonable attorneys' fees and related costs as he or it may have incurred. No Owner shall permit his interest in any funds from time to time in possession of the Association to be subjected to any attachment, lien, claim or charge or other legal process and each Owner shall promptly restore any funds held by the Association in respect of his Interval Interest to the extent depleted by the reason of the assertion of any such attachment, lien, claim, charge or process and shall reimburse the Association for all reasonable attorneys' fees or other costs incurred in respect thereof.

2.16. Easement for Maintenance and Project Use. The Association, for itself, its successors and assigns, and its and their agents, employees, contractors, subcontractors, and other authorized personnel, shall have the right and is hereby granted, for so long as the Association or its successors and assigns shall be required hereunder to manage and maintain the Property, an exclusive easement in gross in, over and through the Property for the repair and maintenance of the Units, the Common Area and the Common Furnishings during Service Periods; provided, however, that use of such easement shall not unreasonably interfere with or diminish the rights of Owners, Permitted Users, or Declarant to occupy the-Units and the Common Area, and to use the Common Furnishings.

2.17. Owner's Easement. Each Owner is hereby granted a non-exclusive easement for use during such Owner's Use Period as may be required for the purposes of access and ingress and egress to, the respective Unit reserved by such Owner, and Owner shall have the right to use the Common Furnishings in said Unit. Such rights shall extend to each Owner and Permitted Users. Such easements rights and rights to use and possess the personal property in each Unit shall be subject to this Declaration, the Articles and Bylaws of the Association and the Rules and Regulations.

2.18. Identification of Interval Interest in Deed. Each deed transferring one or more Interval Interests to an Owner shall identify the Interval Interest being For example, the deed designation: "Interval 0003, Unit 201 Full Even Fixed Event Thanksgiving" would describe a Biennial Full Interval Ownership Interest counted against Unit 201 inventory (assigned number 0003 for record keeping purposes) and entitling the Owner to use a Full Unit in even-numbered years during the Use Period including Thanksgiving. "Interval 0600, Unit 102 Privacy Annual Floating Time" would describe an Annual Interval Ownership Interest counted against Unit 102 inventory (assigned number 0600 for record keeping purposes) entitling the Owner to use the Privacy Suite of a Unit annually with the specific Use Period to be determined by availability and reservation. ""Interval 15764, Unit 125 Flex Floating Fixed 7800" would describe a Flex Interval Ownership Interest (counted against Unit 125 inventory and assigned number 15764 for record-keeping purposes) and entitling the Owner to reserve Floating Time in Unit 125 (because Fixed Unit) commensurate with the Owners' 7,800 Rights.

2.19. Not All Combinations May be Available. While Declarant has reserved the right under this Declaration to sell Partial Interval Interests, Fixed Time Interval Interests, and Flex Interval Interests, Declarant is not obligated to do so and such interests may or may not actually be sold. Declarant may also elect to place limits on the number of such Interval Interests sold.

2.20. Automatic Adjustment of Undivided Interests. An Owner's Undivided Interest shall remain proportional to the total number of Interval Interests in the Property should more or less Units be constructed on the Property than anticipated or if some or all of the Additional Property is annexed to this Declaration. The Undivided Interests fractional ownership of each Owner shall be established at any given time by the following formulas:

Full Annual Interval Interest = I

Total Units times 52

Full Biennial Interval Interest = 1

Total Units times 104

Partial Annual Interval Interest = I

Total Units
times 104

Partial Biennial Interval Interest = 1

Total
Units
times

"Units" as used in the foregoing formulas shall mean the number of Units actually and completely constructed on the Property subject to this Declaration, including any annexed portions of the Additional Property, less the number of Units for Flex Interval Ownership Interests, the numerator shall be the number of Rights shown in the deed to the Interval Interest and the denominator shall be the Total of all Units (whether or not dedicated to Flex Interval Ownership Interests) times the Total Rights allocated per Unit.

2.21. Structural Support. Every portion of a Unit or the Common Area which contributes to the structural support of another Unit or the Common Area shall be burdened with an easement of structural support. No Owner shall be permitted to demolish their Unit except to the extent that such demolition may be required to repair or rebuild the Unit when the same has been partially or totally destroyed.

2.22. Utility Easement. Notwithstanding any other provision hereof, there is hereby created a blanket easement in favor of the Association and each Owner, including Declarant and any foreclosing Construction Lender, upon, across, over and under the entire Property, except any Unit. This easement shall be for ingress, egress, installation, replacing, repairing and maintaining all utility and service liens and systems, including without limitation water, sewer, gas, telephone, electricity, television, cable and communication lines and systems. By virtue of this easement, it shall be expressly permissible for the providing utility or service company to install and maintain facilities and equipment on the Property and to affix and maintain wires, circuits and conduits on, in and under the roofs and exterior walls of the Property; provided, that no such utility and service liens or system may be installed or relocated on the Property except as initially installed to each Unit or other improved portion of the Property, or as thereafter approved by Declarant (during any period of Declarant control of the Association) and the Association. This easement shall in no way affect any other recorded easements on the Property.

2.23. Encroachments. If any portion of the Common Area encroaches upon any Unit, or if any Unit encroaches upon any other Unit or upon any portion of the Common Area, as a result of the construction, reconstruction, repair, renovation, restoration, shifting, settlement or movement of any portion of the Property, an easement for the encroachment and for the maintenance, repair and replacement thereof shall exist so long as the encroachment exists. In the event that any Building, any Unit, any adjoining Unit, or any adjoining portion of the Common Area shall be partially or totally damaged or destroyed as a result of fire or other casualty or as a result of condemnation or eminent domain proceedings, and then be repaired or reconstructed, encroachments of portions of the Common Area upon any Unit, or of any Unit upon any other Unit or upon any portion of the Common Area, due to such repair or reconstruction, shall be permitted, and easements for such encroachments and the maintenance, repair and replacement thereof shall exist. This easement is intended to apply to minor unintentional encroachments that are reasonable in extent and do not deprive another Person of a substantial property right or use.

2.24. Maintenance and Repair. There shall be an easement in favor of the Association and the Owners through the Units and the Common Area as may be reasonably necessary for the installation, maintenance, repair and replacement of Units and the Common Area. Use of this easement shall be only upon prior notice during normal business hours, except that access may be had at any time in case of emergency.

2.25. Use of Units. Each Unit shall be used primarily for residential purposes for transient vacation lodging. No business activity is permitted, except for the activities of Declarant, its agents and employees, in selling or renting the Units or any time-share interest in the Units.

2.26. Use of Common Area. There shall be no obstruction of the Common Area, nor shall anything be kept or stored on any part of the Common Area without the prior written consent of the Association except as specifically provided herein. Nothing shall be altered on, constructed on, or removed from the Common Area except upon the prior written

consent of the Association.

2.27. Animals. Unless permitted by the Rules and Regulations of the Association, and except for animals that assist persons with disabilities (e.g., seeing eye dog, etc.), no Owner shall raise, breed or keep any animal in any Unit or on the Common Area or any part thereof Unless provided for by the Rules and Regulations, no pet shall be kept in a Unit or in the Common Area.

2.28. Antennas. No antenna, satellite television dish antenna or other device for the transmission or reception of television or radio signals or any other form of electromagnetic radiation, including, but without limitation, Citizen's Band or Ham Radio signals, shall be erected, used or maintained outdoors on any Unit. Any satellite dish other than are serving the entire property and maintained by Declarant or the Association must be ground mounted and not Visible From Neighboring Property.

2.29. Trucks, Trailers, Campers and Boats. No truck, mobile home, travel trailer, tent trailer, trailer, camper shell, detached camper, recreational vehicle, boat, boat trailer, or other similar or vehicle may be parked, maintained, constructed, reconstructed or repaired on Property except for parking of (i) pickup trucks of less than two (2) ton capacity with camper shells not exceeding seven (7) feet in height measured from ground level or (ii) mini-motor homes not exceeding seven (7) feet in height and eighteen (18) feet in length, which pickup trucks and minimotor homes are parked as otherwise permitted in this Declaration and are used on a regular and recurring basis for basic transportation.

2.30. Motor Vehicles. No automobile, motorcycle, motorbike or other motor vehicle shall be constructed, reconstructed or repaired upon the Property, and no inoperable vehicle may be stored or parked on any Unit or street, so as to be Visible From Neighboring Property or to be visible from any street; provided, however, that the provisions of this Section shall not apply to emergency vehicle repairs.

2.31. Parking. All vehicles of Owners and of their Permitted Users shall be parked only as permitted by the Rules and Regulations; provided, however, this Section shall not be constructed to permit the parking in a marked parking space of any vehicle whose parking is otherwise prohibited by this Declaration or the parking of any inoperable vehicle. Street parking is restricted to approved deliveries, pickup, or short-term guests or invitees and then only if permitted by law.

2.32. Nuisances. No nuisance (either public or private) shall be permitted to exist or operate upon any Unit so as to be offensive or detrimental to any other property in the vicinity thereof or to its occupant. Without limiting the generality of the foregoing provisions, no exterior speakers, horns, whistles, bells or other sound devices, except fire detection and security devices used exclusively for such purposes, shall be located, used or placed on any Unit.

2.33. Trash Containers- and Collection. No garbage or trash- shall be placed outside of any building, except in containers. In no event shall such containers be maintained so as to be Visible From Neighboring Property except to make the same available for collection and then only for the shortest time reasonably necessary to effect such collection. All rubbish, trash, and garbage shall be regularly removed from each Unit and shall not be allowed to accumulate thereon.

2.34. Clothes Drying Facilities. Outside clotheslines or other outside facilities for laundering, drying or airing clothes shall not be erected, placed or maintained on any Unit.

2.35. Encroachments. The Common Area and all Units shall be subject to an easement for overhangs and encroachments by walls, fences or other structures upon adjacent Units as constructed by the Declarant or as reconstructed or repaired in accordance with the original plans and specifications or as a result of repair, shifting, settlement or movement of any such structure, and the easement shall be an addition to and not in derogation of any easement under applicable law.

2.36. Machinery and Equipment. No machinery or equipment of any kind shall be placed, operated or maintained upon any Unit or the Common Area except such machinery or equipment as is usual and customary in connection with the use, maintenance or repair of Improvements or other appurtenant structures constructed by the Declarant.

2.37. Diseases and Insects. No Owner shall permit any thing or condition to exist upon any Unit which might induce, breed or harbor infectious plant diseases or noxious insects.

2.38. Burning and Incinerators. No open fires or burning shall be permitted on any Unit at anytime, and no incinerators or like equipment shall be placed, allowed, or maintained upon any Unit. The foregoing shall not be deemed to preclude the use, in customary fashion, of outdoor noncommercial barbecues or grills, subject to applicable laws and the Rules and Regulations.

2.39. Misuse and Mismaintenance. No Unit shall be maintained or utilized in such a manner as to constitute an unreasonable annoyance to, or as to endanger the health of, other Owners or Units; no noxious or otherwise offensive condition or activity shall be allowed to exist or be conducted on any Unit or the Common Areas. All Units shall be kept clean so as to present a neat and sightly appearance.

2.40. Declarant's Exemption. Nothing contained in this Declaration shall be construed to prevent the erection, maintenance, use or operation by Declarant, or its duly authorized agents, of structures, improvements or signs necessary or convenient to the construction, development, identification, or sale of Interval Interests or other travel or vacation products by Declarant or any of its affiliates within the Property. Declarant shall have the right, during the period of construction, development, and sale, to have reasonable and specifically limited exemptions from these restrictions and to grant reasonable and specifically limited exemptions from these restrictions to any builder or contractor, or agent of Declarant. Any such exemption shall be enjoyed by Declarant or granted by Declarant to others only "upon specific written notice to the Association. No such exemption shall be broader in terms of activity, location, or time than is reasonably required.

2.41. Large Fraction Owners Right. Notwithstanding any provision in this Declaration to the contrary, the Owner of a Large Fraction- may, subject to compliance with reservation requirements under the Rules and Regulations, lease its Use Periods to one or more third parties, may divide its Use Periods into smaller periods of occupancy by successive Permitted Users, and may lease its Use Periods for transient lodging. Large Fraction Owners may retain a property manager of their choice, which may be the Managing Agent, to perform all management functions not required to be performed by the Association under this Declaration.

3. THE ASSOCIATION

3.1. Association. Sunshine Resort Owners Association, an Arizona non-profit corporation, has been organized to operate and manage the Sunshine Resort.

3.2. Membership in Association. Each Owner (including Declarant as to all Interval Interests not conveyed by Declarant to third parties) shall be a member of the Association and shall remain a member thereof until he ceases to be an Owner.

3.3. Transfer of Membership. The membership of each Owner in the Association is appurtenant to and inseparable from his ownership of an Interval Interest and shall be automatically transferred upon any authorized transfer or conveyance of the ownership of his Interval Interest to any transferee or grantee, and said membership apart from the ownership of an Interval Interest shall be nontransferable whether by gift, bequest, assignment or otherwise.

3.4. Voting. In accordance with the provisions of the Bylaws, the Association shall have two (2) classes of voting membership.

3.4.1. Class "A" Memberships. Class "A" Members shall be all Owners, except Declarant, and shall be entitled to four (4) votes for each Annual Full Interval Ownership Interest owned, two (2) votes for each Annual Partial or Biennial Full Interval Ownership Interest owned, and one (1) vote for each Biennial Partial Interval Ownership Interest owned, and one "fractional vote" for each Flex Interval Ownership Interest owned; provided, when more than one person or entity owns an Interval Interest, all such persons and entities shall be members and the vote(s) for such Interval Interest shall be exercised as they among themselves determine, but in no event shall more than the number of votes allocated above be cast with respect to any Interval Ownership Interest. Owners of Large Fractions shall have multiple votes in proportion to the number and kind of Interval Ownership Interests their Large Fraction represents. Owners of Flex Interval Ownership Interests shall have a "fractional vote," the numerator of which shall be the Owners number of Rights times 208, and the denominator of which shall be the total number of Rights allocated to the Unit referenced in the Owner's deed.

3.4.2. Class "B" Memberships. The Class "B" Member shall be Declarant, who shall be entitled to twelve (12) votes for each Annual Full Interval Ownership Interest owned, six (6) votes for each Annual Partial or Biennial Full Interval Ownership Interest owned, and three (3) votes for each Biennial Partial Interval Ownership Interest owned. Said Class "B" Membership shall cease and be converted to Class "A" Membership one (1) year after the total votes outstanding in the Class "B" Membership fall below _____ percent (_____%) of the total voting power of the Association. However, if Additional Property is annexed to this Declaration within such one year period, the additional Units built or proposed to built in the annexed Additional Property shall be counted in determining Class "B" Membership, but if the additional Units are not completed within eighteen (18) months of annexation, they shall no longer be counted in determining Class "B" Membership. Declarant also shall have a Class "B" Member vote for dedicated but unsold Flex Ownership Interval Interests equal to the number of allocated but unsold Rights times 624, divided by the total number of Rights (sold and unsold) allocated to all Units dedicated to Flex Ownership Interval Interests.

Interval Interests owned by the Association shall not have appurtenant voting rights.

3.5. Board of Directors. The affairs and control of the Association shall be governed by the Board in accordance with the Articles and Bylaws. The Board shall initially consist of the persons appointed by Declarant. The initial Board and any replacements thereof shall be appointed by the Declarant without the necessity of any meeting of members and shall serve for a period commencing upon the incorporation for the Association and terminating no later than the date upon which the Declarant or its successor has sold and conveyed _____ percent (_____%) of the maximum number of Interval Interests created by this Declaration, the _____ percent (_____%) to be calculated based upon the maximum number of Interval Interests in Sunshine Resort, including the Units proposed for the Additional Property, such period hereinafter referred to as the "Initial Board Term." Until expiration of the Initial Board Term, the Declarant, in its sole discretion, may appoint, remove and replace any Director and the Board shall consist solely of Directors appointed and determined by the Declarant. The Board shall consist of Directors appointed by the Declarant until termination of the Initial Board Term, the election of successor Directors, and the qualification of such Directors. At the first annual or special meeting of the Association following termination of the Initial Board Term, the Board of Directors shall be elected by all then eligible members of the Association pursuant to the election procedures set forth in the Bylaws. The rights of Declarant under this paragraph 3.5 shall inure to any person or entity succeeding to all of Declarant's interest in the Property.

3.6. Transfer of Common Area. The legal title to the Common Area shall be held in common by the Owners as part of their Undivided Interest in the Property.

4. MANAGEMENT

4. 1. Powers and Duties Generally. Administration of the Interval Ownership Plan, operation, maintenance, repair and restoration of the Property and the Common Furnishings, and any alterations and additions thereto, shall be vested in the

Association. The Association, acting alone (through its Board, its officers, or other duly authorized representatives) may, subject to the provisions of the Articles, the Bylaws and this Declaration, exercise any and all rights and powers herein, and all the rights and powers of a nonprofit corporation under the laws of the State of Arizona.

4.2. Specific Powers and Duties of the Association. The management, operation, maintenance and repair of the Units and Common Area, the acquisition (by purchase or lease), maintenance, repair and replacement of the Common Furnishings, and the administration of the affairs of Owners, the use and occupancy of the Units and payment, as agent, of expenses and costs enumerated in this Declaration shall be under the direction and control of the Association. The Association shall have the duty to maintain and repair the Units, all Buildings and other structures, and the Common Area, to acquire (by lease or purchase), maintain, repair and replace Common Furnishings as needed, to administer the Interval Ownership Plan as provided herein and to levy, collect and enforce the Assessments (as provided in Article 5 below) enumerated in this Declaration. The Association shall have the exclusive possession of each Unit during the Service Periods for the performance of maintenance and repairs on such Unit. The Association shall have the power to do all things that are required to be done by it pursuant to this Declaration. Without limitation of the foregoing powers and duties, the Association is expressly authorized in its discretion and on behalf of the Owners to do any or all of the following:

4.2.1. Maintenance and Repair. To repair, maintain, repaint, furnish or refurnish the Units and the Common Area or any part thereof, to establish reserves for anticipated costs, including the costs of acquisition and replacement of Common Furnishings; and to acquire and pay for materials, supplies, furniture, furnishings, labor or services which the Association deems necessary or proper for the operation, maintenance and repair of the Property and the Common Furnishings.

4.2.2. Taxes and Assessments. As agent and not as principal, to pay all taxes and assessments, and other costs affecting or relating to the Property, the Common Furnishings and/or the Common Area (as applicable), including without limitation any special tax under any Development Agreement(s) affecting the Property; and to discharge, contest or protest liens or charges affecting the Property. The Association is expressly authorized in its discretion and on behalf of each Owner to represent each Owner in any tax appeal process.

4.2.3. Utilities. To obtain and pay the costs of electrical, telephone, gas and other utility services for the Property.

4.2.4. Rules and Regulations. To adopt, publish and enforce, from time to time, Rules and Regulations relating to the possession, use and enjoyment of the Property, which Rules and Regulations shall be consistent with the provisions of this Declaration.

4.2.5. Legal and Accounting. To obtain and pay the cost of legal and accounting services necessary or proper in the operation, maintenance and repair of the Property and the enforcement of this Declaration, the Bylaws and the Rules and Regulations.

4.2.6. Insurance. To obtain and pay the cost of

4.2.6.1. Insurance against property damage as a result of fire and other hazards commonly insured against, covering all real and personal property comprising the Property in an amount not less than _____ percent (_____) of the full replacement value naming the Association, as agent for each of the Owners, as a coinsured party under such policy.

4.2.6.2. Liability insurance against death, bodily injury and property damage arising out of or in connection with the use, ownership or maintenance of the Units. Such insurance shall be in such amounts and with such coverage as shall be required by the Board of Directors. Such insurance policy shall provide that all Owners as a class are named as additional insureds in the policy issued to the Association. The policy shall also include a waiver by the insurer of its

right to subrogation under the policy against any Owner or member of a Owner's household. Lastly, the policy shall provide that no act of an individual Owner, unless acting within the scope of his authority on behalf of the Association, will void the policy or operate as a condition to the recovery under the policy by any other person; and

4.2.6.3. Any other insurance, including but not limited to worker's compensation insurance, deemed necessary or desirable by the Board.

4.2.7. Levy and Collection of Assessments. To levy, collect and enforce assessments against the Owners in the manner provided in Article 5 hereof in order to pay the expenses of the Interval Ownership Plan including the fee of the Managing Agent; and to do all things necessary to enforce each Owner's obligations hereunder.

4.2.8. Bank Accounts. To deposit: (a) all funds collected from Owners pursuant to Article 5 hereof and paragraph 4.2.7 and (b) all other amounts collected by the Association in connection with its rights and duties provided herein, as follows:

4.2.8.1. All funds shall be deposited in a separate account or accounts (the "General Account") with a bank or savings and loan association located in the State of Arizona selected by the Association. Funds deposited in the General Account(s) may be used by the Association only for the purposes which such funds have been collected.

4.2.8.2. Funds which the Association shall collect for "Reserve Expenses" (as defined pursuant to paragraph 5.1.1 shall, within ten (10) days after deposit in the General Account, be deposited in an interest bearing account with a bank or savings and loan association selected by the Association or invested in Treasury Bills or Certificates of Deposit (said interest bearing bank or savings and loan account or Treasury Bills or Certificates of Deposit are all herein collectively referred to as the "Reserve Account"), and the Association shall keep accurate books and records reflecting the amount in the Reserve Account attributable to each Owner. Funds deposited in the Reserve Account shall be held in trust and may be used by the Association only for the specific purposes for which such funds have been collected.

4.2.9. Statements of Status. Upon the request of any Owner, purchaser or other prospective transferee of an Interval Interest, to issue a written statement setting forth any amounts unpaid with respect to the Interval Interest, the use entitlement for the remainder of the Use Year and the reservation status respecting such Interval Interest.

4.2.10. Cleaning and Maid Service. To provide for cleaning and maid service upon the departure of each Owner or other occupant of the Unit and during Service Periods so that the Units are maintained in good order and repair. In addition to cleaning and maid service that is normally provided to each Unit, to provide such cleaning and maid services as shall reasonably be requested and paid for by an Owner.

4.2.11. Right to Entry. During Service Periods and at any other reasonable time, upon giving reasonable notice, if a Unit is occupied, to enter the Unit for the purpose of cleaning, maid service, painting, maintenance and repair, and to enter upon and within any Unit, at any reasonable time, whether or not during a Service Period and whether or not in the presence of an Owner, for the purpose of (i) making emergency repairs therein, (ii) abating any nuisance or any dangerous, unauthorized, prohibited or unlawful activity being conducted or maintained in such Unit, (iii) protecting property rights and welfare of the other Owners, or (iv) for any other purpose reasonably related to the performance by the Association of its responsibilities under the terms of this Declaration. Such right of entry shall be exercised in such a manner as to avoid any unreasonable or unnecessary interference with the possession, use and/or enjoyment of the Owner, his Permitted User or other occupant of such Unit and shall be preceded by reasonable notice to the Owner or occupant thereof whenever the circumstances permit.

4.2.12. Relocation of Easements. To execute and cause to be recorded any and all documents and instruments required, in the discretion of the Association, to relocate utility easements within the Property to assure the use and enjoyment of the Common Area and the Units by all Owners with the least possible interference by the holders of such easements,

and each Owner, by accepting the conveyance of an Interval Interest, hereby confers upon the Association, as trustee for all Owners, the power and authority to relocate such easements on behalf of all Owners.

4.3. Books and Records; Financial Information. The Association shall maintain complete and current copies of the Declaration, the Articles, the Bylaws, the Rules and Regulations, and all amendments to any of the foregoing, and the books, records, budget and financial statements of the Association, and, upon the prior written request to the Association by any Owner, shall make the same available for inspection at reasonable times and under reasonable circumstances by such Owner. In the event any Owner submits to the Association a request for an audited financial statement of the Association for the most recently concluded Fiscal Year, the Association shall promptly deliver such audited financial statement to such Owner, and in the event no such audited financial statement has been prepared for the most recently concluded Fiscal Year, the Association shall cause the same to be prepared and delivered to such Owner as soon as reasonably possible. The cost of having such an audited financial statement prepared shall be a Basic Expense under paragraph 5.1.1 below.

4.4. Authority and Duty to Engage Managing Agent. The Association shall have the authority to engage and maintain a Managing Agent, which Managing Agent may be an affiliate of Declarant, for the Interval Ownership Plan pursuant to a written agreement (the "Management Agreement") and to provide for compensation to be paid to the Managing Agent. Pursuant to the Management Agreement, the Association may delegate to the Managing Agent the power to perform all the duties and obligations of the Association specified in paragraph 4.2 above. The Managing Agent will be terminated in accordance with the provisions of the Management Agreement. Each Owner, his heirs, successors and assigns, by acquiring title to an Interval Interest, shall be deemed to:

4.4.1. adopt, ratify, confirm and consent to the execution of such Management Agreement by the Association;

4.4.2. adopt, ratify, confirm and approve each and every provision of such Management Agreement and acknowledge that all of the terms and provisions thereof are reasonable;

4.4.3. covenant and promise to perform each and every covenant, promise and undertaking to be performed by Owners as provided in that Management Agreement;

4.4.4. recognize that some or all of the persons comprising the original Board are or may be stockholders, officers and directors of the Declarant or the Managing Agent, and acknowledge that such circumstances shall not and can not be construed or considered as a breach of their duties and obligations to the Association, nor as possible grounds to invalidate such Management Agreement, either in whole or in part;

4.4.5. agree that the persons acting as officers and directors of the Association entering into such Management Agreement have not breached any of their duties or obligations to the Association; and

4.5.6. adopt, ratify, confirm and consent to the acts of the persons acting as officers and directors of the Association in entering into the Management Agreement.

5. ASSESSMENTS

5.1. Creation of Personal Obligations for Assessments. Each Owner except Declarant, by acceptance of a deed for an Interval Interest and by virtue of such ownership, is deemed to covenant and agree to pay its Proportionate Share (as defined below) of the following assessments (the "Basic Assessments"):

5.1.1. Basic Expenses. As used herein "Basic Expenses" means the estimated aggregate amount of expenses to be incurred by the Association during the applicable Fiscal Year (i) to operate, manage, maintain, improve and repair the Property including the Units, the Common Area, and the Common Furnishings, and to administer the Interval

Ownership Plan; (ii) to provide for reserves to ensure payment when due of the cost of capital expenditures relating to the repair or restoration of the Units, the Common Areas and the Common Furnishings, and for such other purposes as are required by good business practice (the "Reserve Expenses"); (iii) to provide for a fund to account for the possibility that some Assessments may not be paid on a current basis; (iv) to pay all real and personal property taxes on the Property and the Common Furnishings; and (v) to provide for the payment of the fee of the Managing Agent. Without limiting the generality of the foregoing, Basic Expenses shall include: all charges, costs and expenses whatsoever incurred by the Association for or in connection with the administration and operation of the Property; assessments and other similar governmental charges levied on or attributable to the Property, including, without limitation, any hotel or bed tax or any governmental charge levied in lieu of such hotel or bed tax; insurance, including fire and other casualty and liability insurance, obtained pursuant to this Declaration; and liability whatsoever for loss or damage arising out of or in connection with the Property, or any fire, accident, or nuisance therein; cost of repair, reinstatement, rebuilding and replacement of the Property, or the Common Furnishings therein; the cost of all basic utility services, including water, electricity, garbage disposal, telephone and any other similar service attributable to the Units and the Common Areas; the unpaid share of any Assessments levied during the previous Fiscal Year against any Owner who has defaulted in payment thereof to the extent that the same becomes uncollectible; wages, accounting and legal fees, management fees, maid service, and cleaning fees, and other necessary expenses of upkeep, maintenance, management and operation actually incurred with respect to the Property. Basic Expenses shall not include any expenses constituting Personal Expenses. Basic Expenses shall not include any operating cost, utilities cost, or taxes and assessments paid by Declarant under paragraphs 2.7 or 2.9 above. The Basic Assessments for each Interval Interest shall commence, and be due and payable for, the year in which the Owner has the first right to use his Interval Week. If the Owner may use his Interval Week in the year of purchase, the Proportionate Share his Interval Week until the year following purchase, the Proportionate Share of the first annual Basic Assessments shall be paid on January 1 following closing. Subsequent annual Basic Assessments shall be due and payable on January 1 of each year. No Owner may waive or otherwise avoid liability for the Basic Assessments by non-use of his Interval Interest or any part thereof or any abandonment thereof. "Proportionate Share" for Owners of an Annual Full Interval Ownership Interest shall be determined by dividing the total Basic Expenses attributable to such Fiscal Year by (a) fifty-two (52) times (b) the number of Units included in the Property (the "Annual Interval Assessment"). "Proportionate Share" for each Owner of an Annual Partial or Biennial Full Interval Ownership Interest shall be _____ percent (_____) of the Annual Full Interval Assessment, and "Proportionate Share" for each owner of a Biennial Partial Interval Ownership Interest shall be _____ percent (_____) of the Annual Full Interval Assessment. "Proportionate Share" for each owner of a Flex Interval Ownership Interest shall be one annual Full Interval Assessment times a fraction, the numerator of which is the Owner's number of Rights and the Denominator of which is the total number of Rights allocated to the Unit referenced in the Owner's deed. So long as Flex Interval Ownership Interest Owners pay an Assessment that is proportionately equal to or greater than that paid by Owners of other types of Interval Interests, the Association or Declarant may adopt an assessment system for Flex Interval Ownership Interests charging a flat and uniform amount per Right.

5.2. Payment of Special Taxes under Development Agreement(s). There shall be added to the Basic Expenses paid by the Association and to the Basic Assessment charged to each Owner who is deeded an Interval Interest in one of the Units of Phase 3 (and, to the extent annexed, in one of the Units of Phases 4 and 5 or any other Additional Property), any "special tax" imposed by the City of Sedona under any Development Agreement, including without limitation the _____ Dollars (\$) per "interval week" special tax (subject to annual increase based on the Consumer Price Index) provided for in the Development agreement dated _____ [month] _____ [day] , _____ [year] , between Declarant (or its predecessor) and the City of Sedona. Any special tax shall be allocated on the basis of 52 "interval weeks" per Unit, and an Owner's share of the special tax shall equal the total special tax assessed per Unit multiplied by the Owner's Undivided Interest in the Unit to which the Owner's Interval Interest relates.

5.3. Special Assessments. If the Basic Assessments are, or will become, inadequate to meet all expenses incurred by the Association hereunder (other than for items constituting Personal Expenses) for any reason, including non-payment by

any Owner of its Proportionate Share of the Basic Assessments on a current basis, the Association shall immediately determine the approximate amount of such inadequacy, prepare and distribute a supplemental budget and levy a special assessment (the "Special Assessment") in an amount sufficient to provide for such inadequacy; provided, however, that without the vote or written assent of a majority of the voting power of the Association residing in members other than the Declarant, Special Assessments shall not, in the aggregate, exceed: (1) _____ percent (_____%) of Basic Expenses for the applicable Fiscal Year, or (2) for a Special Assessment for repair or rebuilding of Unit(s), _____ percent (_____%) of the Basic Expenses. Any Special Assessment shall be payable in one lump sum or periodically, as determined by the Association, and shall be payable within fifteen (15) days after receipt of a statement therefor. The amount of Special Assessments payable by an Owner shall be based upon the Owner's Proportionate Share.

5.4. Personal Expenses. Each Owner of any Interval Interest, by acceptance of a deed for an Interval Interest and by virtue of such ownership, is deemed to covenant and agree to pay all Personal Expenses. The term "Personal Expenses" mean's any expense resulting from the act or omission of any Owner, or Permitted User, including, without limitation: the cost of long-distance telephone charges or telephone message unit charges, any optional maid service and other special services or supplies attributable to the occupancy of the Unit during such Owner's Use Period; the cost to repair any damage to the Unit, to repair or replace any Common Furnishings located therein or within the Common Area on account of loss or damage occurring during such Owner's Use Period; the cost to satisfy any expenses to any other Owner(s) or to the Association due to any intentional or negligent act or omission of such Owner, or a Permitted User relating to, and any expenses necessary to reimburse the Association for costs incurred in bringing the Owner into compliance with the provisions of this Declaration, the Bylaws or the Rules and Regulations, specifically including, but not limited to, charges pursuant to paragraphs 2.5 and 5.8 of this Declaration.

5.5. Purpose of Assessments. Assessments shall be used exclusively to promote the recreation, health, safety and welfare of the Owners, to operate, maintain and improve the Property, and to pay for the administration of the Interval Ownership Plan and reimbursement of expenses incurred by the Association and other expenditures incurred in the performance of the duties of the Association as set forth in this Declaration.

5.6 Declarant's Exemption. The Declarant shall not be required to pay any Basic Assessments or Special Assessments for any Interval Interest owned by the Declarant within the Property. However, for so long as Declarant elects not to pay Assessments and Special Assessments, the Declarant shall subsidize the Association by paying the lesser of: (a) the amount necessary to make up any short-fall between budgeted Association expenses and actual income received from other Owners based on the Basic Assessments and the Special Assessments; or (b) the amount which would otherwise be payable as individual Owner's Basic Assessments and Special Assessments for the Interval Interests owned by the Declarant.

5.7 Increased or Decreased Expenses Due to Annexation of Additional Property. In the event of annexation of all or any portion of the Additional Property pursuant to Article 7, the Board shall, not later than sixty (60) days following the date of such annexation (the "Annexation Date"), cause to be prepared a supplemental budget showing any increase or decrease in the Basic Expenses for the applicable Fiscal Year, prorated for the remainder of the Fiscal Year from the Annexation Date, multiplied by the fraction (i) the numerator of which is the total number of Units subject to this Declaration immediately following the Annexation Date and (ii) the denominator of which is the total number of Units subject to this Declaration on the date immediately prior to the Annexation Date; provided, however, that no increase in the Proportionate Share of Basic Assessments due to annexation of all or any portion of the Additional Property shall exceed _____ percent (_____%) of the Proportionate Share of Basic Assessments for the preceding Fiscal Year unless a majority of the members of the Association, excluding Declarant, shall consent thereto by vote or written assent.

5.8 Unpaid Association Assessments. All Association Assessments, including Basic Assessments, Special Assessments and Personal Expenses, which remain unpaid for a period of ten (10) days after the due date shall bear interest at the rate

of _____ percent (_____ %) per annum from the due date until paid. The Basic Assessments, Special Assessments and Personal Expenses, together with interests, costs and reasonable attorneys' fees shall be a lien on the Interval Interest and all tangible personal property owned by the Owner and located in a Unit, and such lien shall be deemed effected upon the filing in the office of the Recorder of _____ [county] County, Arizona, of a notice of claim of lien, in such form as the Association may deem appropriate. The Basic Assessments, Special Assessments and Personal Expenses shall also be the personal obligation of the Owner of such Interval Interest at the time such assessments were levied. The lien may be foreclosed by appropriate action in court or in the manner provided by law with respect to the exercise of powers of sale in deeds of trust or in any other manner provided by law. The Association shall be entitled to bid at any sale held pursuant to foreclosure of such lien, and to apply as a cash credit against its bid all sums due as provided herein and covered by the lien to be enforced. The lien against an Owner shall be limited to the Interval Interest owned by that Owner and shall not encumber the property, real or personal, of any other Owner. No use or occupancy by any Owner will be permitted if such Owner is delinquent in the payment of any Assessments.

5.9 Subordination of Lien. The lien provided for in Section 5.8 above shall be subordinate to the lien of any first mortgage made in good faith and for value, and recorded in the office of the Recorder for _____ [county] County, Arizona, prior to the recordation of a notice of claim of lien hereunder ("Prior Mortgage"). The sale or transfer of any Interval Interest shall not defeat or affect the assessment lien provided for herein; provided, however, that the sale or transfer of any Interval Interest which is subject to any Prior Mortgage pursuant to a foreclosure or any proceeding or deed in lieu of foreclosure under such Prior Mortgage shall extinguish the lien provided for herein as to payments which became due prior to such sale or transfer. No such sale or transfer shall relieve any Owner from liability for any assessment(s) thereafter becoming due or from the lien thereof. No breach of the covenants, conditions or restrictions contained herein nor the enforcement of any lien provisions herein shall affect, impair, defeat or render invalid the lien or charge of any mortgage made in good faith and for value encumbering any Interval Interest, but all of said covenants, conditions and restrictions shall be binding upon and effective against any Owner whose title is derived through foreclosure or a trustee's sale or otherwise, with respect to an Interval Interest. It is intended that any loan to facilitate the resale of any Interval Interest after judicial foreclosure, deed in lieu of foreclosure or trustee's sale is a loan made in good faith and for value and entitled to all the rights and protections afforded to other mortgagees. Nothing in this section shall be construed to release any Owner from his personal obligation to pay the Assessments levied pursuant to this Declaration.

5.10. Adjusted Assessments for Owners of Large Fractions. If the Board or the Managing Agent reasonably determines that Basic Expenses or Reserve Expenses are higher or lower for Large Fractions or Whole Units (as a result of items such as owner-provided furniture, owner-contracted outside management, reduced or increased turnover or occupancy, etc.), then the Managing Agent may recommend and the Board may adopt higher or lower Basic Assessments or Reserve Assessments for Large Fraction or Whole Unit Owners.

6. DAMAGE, DESTRUCTION, CONDEMNATION

6.1. In General. In the event of any damage or destruction, whether resulting from an insured casualty, uninsured casualty or a partial taking in eminent domain proceedings to the Property and/or the Common Furnishings other than by ordinary wear and tear, the Association shall, subject to the provisions of paragraph 6.2, forthwith cause such damage or destruction to be repaired and shall use any available insurance or condemnation proceeds for such purpose. If the damage is not covered by condemnation proceeds or by insurance proceeds, or if the available insurance or condemnation proceeds are insufficient, the Association shall, subject to the provisions of paragraph 6.2, levy a Special Assessment at a uniform rate against all Owners for the amount required to meet the cost of such repair or restoration. In the event the damage or destruction was caused by the intentional or negligent act or omission of an Owner or his Permitted User(s), the cost of such repair or the amount of such deficiency shall be a Personal Expense and paid by such Owner as provided in paragraph 5.4 above.

6.2. Extensive Damage or Destruction. In the event the amount of the Special Assessment which is required to be levied pursuant to paragraph 6.1 above is not so approved or if no action is taken with respect to such Special Assessment within one-hundred eighty (180) days following the date of such damage or destruction, such disapproval or inaction shall be deemed to be an election to terminate this Declaration in the manner provided for in paragraph 8.3, in which event this Declaration shall terminate pursuant to the recordation of an amendment stating that the Declaration has been terminated in accordance with the provisions of paragraph 8.2. The proceeds arising from such sale, together with any insurance proceeds or condemnation proceeds received as a result of such damage or destruction, shall be distributed by the Association to each Owner (subject to the rights of each Owner's mortgagee) in accordance with the undivided percentage interest in the Property owned by each Owner; provided, however, that there shall be deducted from the amount due any Owner the amount, if any, of all sums due to the Association from such Owner.

6.3. Excess Insurance Proceeds. Any excess insurance or condemnation proceeds over the cost of repair or restoration or any insurance or condemnation proceeds available in the event the Property or the Common Furnishings are not rebuilt, restored, repaired or replaced pursuant to the provisions of this Declaration, shall be distributed to the Owners (subject to the rights of such Owners' mortgagees) in accordance with the undivided percentage interest in the Property owned by each Owner, provided, however that there shall be deducted from the amount due any Owner, the amount, if any, of all sums due to the Association from such Owner.

7. ANNEXATION

7.1. Annexation of Additional Property. Declarant, or any successor in title to Declarant owning all or any portion of the Additional Property as a result of foreclosure or proceeding or deed in lieu of foreclosure, may, at any time and from time to time, dedicate to the Interval Ownership Plan all or any portion of the Additional Property subject to this Declaration from time to time without the consent of any Owner. The dedication of all or any portion of the Additional Property shall be effective by recording in the office of the County Recorder of _____ [county] , Arizona, a declaration of annexation executed and acknowledged by Declarant.

7.2. Deannexation. Declarant may deannex all or any portion of the Additional Property which is annexed to the Property pursuant to Paragraph 7.1 from coverage of this Declaration and jurisdiction of the Association, so long as Declarant is the owner of such portion of the Additional Property, and provided that a declaration of termination is recorded in the office of the _____ [county] County Recorder, in the same manner as this Declaration was recorded, and that no escrow is closed for the sale of any Interval Interest affecting the annexed portion of the Additional Property.

8. MISCELLANEOUS

8.1. Amendment by Declarant. This Declaration may be amended by the Declarant by a written instrument in recordable form may:

8.1.1. Any time prior to the recordation of a deed to an Interval Interest allocated to a Unit or Units to be affected by the amendment; or

8.1.2. At any time where the amendment modifies the provisions of this Declaration relating to Flex Time Ownership Interests and Declarant has not previously sold Flex Time Ownership Interests, or where the amendment affects only Flex Time Ownership Interest not yet sold, or where the amendment does not materially adversely affect the rights of existing Owners of Flex Time Interests; or

8.1.3. Any time following the recordation of a deed conveying an Interval Interest, when necessary to correct errors or eliminate ambiguities; or

8.1.4. When necessary to comply with state, county, city or federal law, or regulations of any housing authority and agency which purchases, guarantees or insures mortgage loans; or

8.1.5. At any time that the Declarant holds not less than _____ percent (_____) of the total votes of the Association, the Declarant being given a three to one weighted voting advantage as set forth above.

8.2. Other Amendments. This Declaration may be amended, at any time, by the vote or written assent of _____ percent (_____) of the voting power of the members of the Association.

8.3. Termination. Subject to the provisions of paragraph 6.2 and the provisions of this paragraph, this Declaration shall remain in effect for a period of thirty (30) years from the date of recordation thereof, and thereafter shall remain in effect for successive periods of ten (10) years each. This Declaration may be terminated at any time after thirty (30) years after the date of recordation of this Declaration by the vote or written consent of _____ percent (_____) of the members of the Association electing to terminate the Declaration and authorizing the Association to sell the Property and the Additional Property, if subsequently annexed; in which event, this Declaration shall terminate upon the consummation of such sale and the recordation of an amendment stating that this Declaration is terminated pursuant to this paragraph. Each Owner, by accepting the conveyance of an Interval Interest, hereby constitutes and appoints the Association his attorney-in-fact in his name, place and stead, and for his use and benefit, to execute, acknowledge and deliver on behalf of each Owner any instrument or document which is required in order to effect a sale, conveyance, or transfer of the Property pursuant to this paragraph. Each Owner does further give and grant unto the Association, as his attorney-in-fact, full power and authority to do and perform any act necessary and proper to be done in the exercise of the foregoing power including, without limitation, the power and authority to sell and convey, and to petition for sale in lieu of partition if necessary to effect such conveyance, as fully as each Owner might or could do. The power of attorney is coupled with an interest, irrevocable and binding on the successors and assigns of each Owner. Proceeds obtained from such sale, conveyance or transfer shall be paid to each Owner (subject to the rights of each Owner's mortgagee) in the same proportion as the undivided interest of each Owner bears to the aggregate of all undivided interest in the Property; provided, however, that there shall be deducted from the amount due any Owner, the amount, if any, of all sums due to the Association from such Owner. Declarant may terminate the Declaration at any time prior to the conveyance of the first Interval Interest.

8.4. Notices. Notices provided for in this Declaration shall be in writing and shall be deemed sufficiently given when delivered personally at the appropriate address set forth below (in which even such notice shall be deemed effective only upon such delivery or forty eight (48) hours after deposit of same in any United States post office box, postage prepaid, addressed as set forth below). Any notice to an Owner required under this Declaration shall be addressed to the Owner at the last address for such Owner appearing in the records of the Association or, if there be none, at the address of the Property. Notices to the Association shall be addressed to the address designated by the Association by written notice to all Owners. Notices to the Managing Agent shall be addressed to the address designated by the Managing Agent by written notice to Owners. Notices to Declarant shall be addressed: Sunshine Corporation, _____ [address] , _____ [city] , _____ [state] . The addresses and addressees for purposes of this paragraph may be changed by giving written change in the manner herein provided for giving notice. Unless and until such written notice is received, the last address and addressee as stated by written notice or as provided herein, if no written notice of change has been sent or received, shall be deemed to continue in effect for all purposes hereunder.

8.5. Notification of Sale of Interval Interest. No later than thirty (30) days prior to the sale or transfer of any Interval Interest under circumstances whereby the transferee becomes the Owner thereof, the transferor shall notify the Association or the Management Agent in writing and in whatever form, if any, required by the Association of such pending sale or transfer. Such notice shall set forth the name and address of the transferee and transferor, and the date on which such sale or transfer is to be consummated. Unless and until such notice is given, the Association shall not be required to recognize the transferee for any purpose; and any action taken by the transferor as an Owner may not be

recognized by the Association. Prior to receipt of any such notification by the Association or the Managing Agent, any and all communications required or permitted to be given by the Association shall be deemed duly given and made to the transferee if duly and timely made and given to such transferee's transferor.

8.6. Declarant's Right of First Refusal to Purchase. Declarant hereby reserves and shall hold, as to any Interval Interest or Undivided Interest or Undivided Interest in or relating to any Unit in Phase 3 of the Property (and, to the extent annexed, in one of the Units of Phases 4 or 5 or any other Additional Property) and as to any Interval Interest or Undivided Interest in or relating to any Unit in Phases I and 2 of the Property that has not been sold to an Owner prior to the date of this Declaration or which is reacquired by Declarant (by foreclosure, deed in lieu of foreclosure, or otherwise) after the date of this Declaration, a right of first refusal as to the resale by an Owner of any Interval Interest (collectively, a "First Right Interval Interest"). If an Owner of an First Right Interval Interest desires to sell, convey or otherwise transfer ownership of such Owner's First Right Interval Interest, and such Owner receives an offer to purchase such First Right Interest ("Purchase Offer") which such Owner desires to accept, the Owner, prior to accepting such offer or otherwise transferring such First Right Interval Interest ownership, shall notify the Declarant and provide the Declarant with a copy or summary of such Purchase Offer. Developer shall then have the right and option to purchase such First Right Interval Interest at the same price and on the same terms as set forth in the Purchase Offer. If the Declarant elects to purchase the Owner's Interval Interest as provided herein, such election shall be made by notice, sent to such Owner within fifteen (15) calendar days beginning with the day following receipt by Declarant of such Owner's notice. Such notice from the Declarant of its intent to purchase the Owner's First Right Interval Interest shall be deemed to create a binding contract between such Owner and the Declarant that the Developer will purchase the Owner's First Right Interval Interests) in accordance with the terms and provisions of such Purchase Offer. If the Declarant does not notify such Owner of its election to purchase such First Right Interval Interest within such fifteen (15) day period, such Owner shall thereafter be free to sell such First Right Interval Interest to the person or entity submitting such Purchase Offer in accordance with the terms and provisions of such Purchase Offer. Should, however, such sale not be closed within four (4) months after the date such Purchase Offer is communicated to the Declarant at the price and terms equal or more favorable to such Owner, the terms of this Paragraph shall once again be imposed on any sale by such Owner. There is no guaranty that the Developer will buy back any Owner's First Right Interval Interest pursuant to this right of first refusal, and the Association may establish additional reasonable requirements for the noticing and processing of transfers of Ownership of Interval Interests, including without limitation, the assessment of reasonable transfer fees, and may establish separate requirements for transfers of Flex Interval Ownership Interests.

8.7. Severability and the Rule Against Perpetuities. If any provision of this Declaration, or any section, sentence, clause, phrase, or word or the application thereof in any circumstances, shall be held invalid, the validity of the remainder of this Declaration and of the application of such provision, sentence, clause, phrase or word under any other circumstances shall not be affected thereby. If any provision of this Declaration would violate the Rule Against Perpetuities or any other limitation on the duration of the provisions contained herein imposed by law, then such provisions shall be deemed to remain in effect only for the maximum permissible period permitted by law or until twenty-one (21) years after the death of the last survivor of the now living descendants of either President William J. Clinton or Governor Jane D. Hull, whichever is later.

8.8. Successors. The provisions of this Declaration shall be binding upon all parties having or acquiring any Interval Interest or any right, title, or interest therein and shall be for the benefit of each Owner and his heirs, successors and assigns. Each Owner (including Declarant) shall be fully discharged and relieved of liability on the covenants herein insofar as such covenants relate to each Interval Interest upon ceasing to own such Interval Interest and paying all sums and performing all obligations hereunder, insofar as, the same relate to each Interval Interest up to the time his ownership interest terminated.

8.9. Violation or Nuisance. Every act or omission whereby any provision of this Declaration, the Bylaws or the Rules and Regulations is violated, in whole or in part, is hereby declared to be a nuisance and may be enjoined or abated whether or not the relief sought is for negative or affirmative action, by Declarant, the Association or any Owner.

8.10. Interpretation. The captions of the Articles, paragraphs and subparagraphs hereof are of convenience only and shall not be considered to expand, modify or aid in the interpretation, construction or meaning of this Declaration. As used herein the singular shall include the plural and the masculine shall include the feminine and neuter.

8.11. Enforcement: No Waiver. The Association or any Owner shall have the right to enforce by proceedings at law or in equity, all restrictions, conditions, and covenants now or hereafter by the Declaration. The failure to enforce any provision of this Declaration shall not constitute a waiver thereof or of the right to enforce such provision thereafter.

8.12. Waiver of Homestead Protections. Each Owner, to the extent permitted by law, shall and hereby waives any protections of any homestead or homestead exemption available to said Owner under the laws of the State of Arizona.

8.13. Disclaimer of Representations and Warranties. Declarant specifically disclaims any intent to have made any representations or warranties in connection with Sunshine Resort or the Interval Interests except as specifically set forth herein, and no person shall rely upon any representation or warranty not specifically made herein.

8.14. Approval of Declaration. Owners of Interval Interests, by virtue of their execution of a purchase contract and/or by acceptance of a deed to an Interval Interest, approve the foregoing and all of the terms and conditions, duties and obligations of this Declaration, and agree to be bound thereby. Each Owner shall be responsible for compliance with this Declaration, by that Owner's agents, guests, invitees, lessees, licensees, and their respective servants and employees, as this Declaration may be amended from time to time. The Owner's failure to so ensure compliance by any such person shall be grounds for the same action available to the Association as though by reason of said Owner's non-compliance.

IN WITNESS WHEREOF, the Declarant has caused this Declaration to be executed this _____
[day] , _____ [month] , _____ [year] .

SUNSHINE RESORT, INC.

By: _____

[name and title]

SUNSHINE CORPORATION

By: _____

[name and title]



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Current Legal Forms for Real Estate

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Current Legal Forms for Real Estate
Chapter 20 REAL ESTATE ENTITIES
Part IV. Forms
I. TIME SHARE

24-20 Current Legal Forms for Real Estate FORM 20.83

AUTHOR: by Stephen E. Pigott and Harold O. Maxfield, Jr.

FORM 20.83 Articles of incorporation--time share

COMMENT

Much like a condominium or homeowner's association, a time share association is usually a non-profit corporation. The following are Articles of Incorporation for a time share association.

FORM

ARTICLES OF INCORPORATION

SUNSET RESORT OWNERS ASSOCIATION

In compliance with the requirements of Arizona Revised Statutes, the undersigned, who is a resident of the State of Arizona and is of legal age, has this day associated for the purpose of forming a corporation not for profit and does hereby certify:

ARTICLE I
NAME OF CORPORATION

The name of the corporation is Sunset Resort Owners Association, hereafter called the "Association."

ARTICLE II INCORPORATOR

The name and address of the incorporator is:

Name

Bobby Smith

Address

ARTICLE III STATUTORY AGENT

Bobby Smith, whose address is _____, is hereby appointed the initial statutory agent of this Association and by his signature below, he approves of such appointment and consents to act in such capacity.

ARTICLE IV PURPOSE AND POWERS OF THE ASSOCIATION

This Association is organized to serve as the Owners and community association for a time share resort known as Sedona Summit Resort, established pursuant to that certain Declaration of Dedication and Covenants, Conditions, Restrictions, and Easements, hereinafter called the "Declaration", recorded or to be recorded in the Office of the _____ [county] County Recorder, as the same may be amended from time to time as therein provided, said Declaration being incorporated herein as if set forth at length. The Declaration establishes a timeshare resort on certain real property, hereinafter called the "Property", located in the City of _____ [city], County of _____ [county], State of _____ [state], and more particularly described in the Declaration. Capitalized terms used in these Articles but not defined herein shall have the meaning set forth in the Declaration. Pursuant to the Declaration, some or all of certain additional adjacent real property more particularly described in the Declaration may be from time to time be annexed by the Declarant under the Declaration and become part of the Property.

This Association does not contemplate pecuniary gain or profit to the members thereof, and the specific purposes for which it is formed are to provide for (directly or through any Master Association referred to in the Declaration) the use, enjoyment, repair, maintenance, restoration and improvement of the Property, for the payment of taxes, assessments, insurance premiums and other expenses pertaining thereto, for the collection of Assessments from the Owners, and to promote the health, safety and welfare of the Owners of the Property and any additions thereto as may hereafter be brought within the jurisdiction of this Association and for these purposes to:

(a) exercise all of the powers and privileges and to perform all of the duties and obligations of the Association as set forth in the Declaration;

(b) fix, levy, collect and enforce payment by any lawful means, all charges or assessments pursuant to the terms of the Declaration; to pay (directly or through any Master Association) all expenses in connection therewith and all office and other expenses incident to the conduct of the business of the Association, including all licenses, taxes or governmental charges levied or imposed against the Property and other property of the Association;

(c) acquire (by gift, purchase or otherwise), own, hold, improve, build upon, operate, maintain, convey, sell, lease, transfer, dedicate for public use or otherwise dispose of real or personal property in connection with the affairs of the

Association;

(d) borrow money, and with the assent of two-thirds (2/3) of each class of members, mortgage, pledge, deed in trust, or hypothecate any or all of its real or personal property as security for money borrowed or debts incurred;

(e) dedicate sell or transfer all or any part of the common areas or common elements of the Property owned by this Association to any public agency, authority, or utility for such purposes and subject to such conditions as may be agreed to by the members, provided, however, no such dedication or transfer shall be effective unless an instrument has been signed by two-thirds (2/3) of each class of members, agreeing to such dedication, sale or transfer;

(f) participate in mergers and consolidations with other nonprofit corporations organized for the same purposes or annex additional common area or common elements provided that any such merger, consolidation (other than with any Master Association) or annexation of additional common area shall have the assent of two-thirds (2/3) of each class of members;

(g) have and to exercise any and all powers, rights and privileges which a corporation organized under the Non-Profit Corporation Law of the State of Arizona by law may now or hereafter have or exercise.

ARTICLE V MEMBERSHIP

Each Owner (including Declarant as to all Interval Interests not conveyed by Declarant to third parties) shall be a member of the Association and shall remain a member thereof until he ceases to be an Owner.

ARTICLE VI VOTING RIGHTS

The Association shall have two classes of voting membership:

Class A. Class A members shall be all Owners, with the exception of the Declarant, and shall be entitled to four (4) votes for each Annual Full Interval Interest owned, two (2) votes for each Annual Partial or Biennial Full Interval Interest owned, and one (1) vote for each Biennial Partial Interval Interest owned; provided when more than one person or entity owns an Interval Interest, all such persons and entities shall be members and the vote for such Interval Interest shall be exercised as they among themselves determine, but in no event shall more than four (4) votes be cast with respect to any Annual Full Interval Interest, nor more than two (2) votes be cast with respect to any Annual Partial or Biennial Full Interval Interest, nor more than one (1) vote with respect to any Biennial Partial Interval Interest.

Class B. The Class B member(s) shall be the Declarant (as defined in the Declaration), and shall be entitled to twelve (12) votes for each Annual Full Interval Interest owned, six (6) votes for each Annual Partial or Biennial Full Interval Interest owned, and three (3) votes for each Biennial Partial Interval Interest owned. The Class B membership shall cease and be converted to Class A membership when the total votes outstanding in the Class "B" Membership fall below _____ percent (_____%) of the total voting power of the Association.

ARTICLE VII BOARD OF DIRECTORS

The affairs of this Association shall be managed by a Board of three (3) Directors, who need not be members of the

Association. The number of directors may be changed by amendment of the By-Laws of the Association. The names and addresses of the persons,, who are to act in the capacity of directors until the selection of their successors are:

Name

Address

At the first annual meeting after expiration of the Initial Board Term, as defined in the Declaration, the members shall elect new directors for a term of one year, and at each annual meeting thereafter the members shall elect new directors for a term of one year.

ARTICLE VIII DISSOLUTION

The Association may be dissolved with the assent given in writing and signed by not less than three-fourths (3/4) of each class of members. Upon dissolution of the Association, other than incident to a merger or consolidation, the assets of the Association shall be dedicated to an appropriate public agency to be used for purposes similar to those for which this Association was created. In the event that such dedication is refused acceptance, such assets shall be granted, conveyed and assigned to any nonprofit corporation, association, trust or other organization to be devoted to such similar purposes.

ARTICLE IX DURATION

The Association shall exist perpetually.

ARTICLE X AMENDMENTS

During the Initial Board Term, amendments of these Articles may only be made by majority vote of the Board and no member shall be entitled to vote on the proposed amendment. Amendments of these Articles after expiration of the Initial Board Terms shall require the affirmative vote of _____ percent (_____) of the total voting power of the Association.

ARTICLE XI PERSONAL LIABILITY

To the fullest extent allowable under governing laws, including without limitation Arizona Revised Statute Section 10-2305 A.18 and 10-2342 A.8, no director shall have personal liability to the corporation or its members, nor to any other person or entity, for monetary damages for a breach of his or her fiduciary duty as a director, except where there has been:

- (a) A breach of the director's duty of loyalty to the corporation or its members;
- (b) Acts or omissions which are not in good faith or which involve intentional misconduct or a knowing violation of

law;

(c) A violation of the provisions of Arizona Revised Statutes Section 10-2326 concerning stock certificates, dividends, and distributions of income or profit;

(d) Any transaction from which the director derived an improper personal benefit; or

(e) A violation of the provisions of Arizona Revised Statutes Section 10-2550 concerning director's conflicts of interest.

IN WITNESS WHEREOF, for the purpose of forming this Association under the laws of the State of Arizona, I, the undersigned, constituting the incorporator of this Association, have executed these Articles of Incorporation this _____ [day] day of _____ [month] , _____ [year] _____.

[name]



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Current Legal Forms for Real Estate
Chapter 20 REAL ESTATE ENTITIES
Part IV. Forms
I. TIME SHARE

24-20 Current Legal Forms for Real Estate FORM 20.84

AUTHOR: by Stephen E. Pigott and Harold O. Maxfield, Jr.

FORM 20.84 Bylaws for time share association

COMMENT

Most time share associations are organized as non-profit corporations. The following Bylaws are very similar to Bylaws of a condominium or homeowner's association.

FORM

BYLAWS

OF

SUNSET RESORT OWNERS ASSOCIATION

**ARTICLE 1
NAME AND LOCATION**

The name of the corporation is SUNSET RESORT OWNERS ASSOCIATION, hereinafter referred to as the "Association." The principal office of the corporation shall be located at Sedona, Arizona, but meetings of member and directors may be held at such places within the State of Arizona, County of _____ or County of _____, or such other County as may be designated by the Board of Directors.

ARTICLE 2 DEFINITIONS

Section 2.1 "Association" shall mean and refer to Sunset Resort Owners Association, its successors and assigns.

Section 2.2 "Properties" shall mean and refer to that certain real property described in the Declaration of Dedication and Covenants, Conditions, Restrictions, and Easements, and such additions thereto as may hereafter be brought within the jurisdiction of the Association.

Section 2.3 "Common Area" shall mean all real property owned by the Association or in undivided interests owned by the Owners and managed by the Association for the common use and enjoyment of the Owners.

Section 2.4 "Unit" shall mean and refer to any "unit" shown upon any recorded subdivision map or condominium plat or any unrecorded site plan of the Properties with the exception of the Common Elements if a condominium plat has been recorded and, otherwise, were the exception of the Common Area.

Section 2.5 "Owner" shall mean and refer to the record owner, whether one or more persons or entities, of the fee simple title to any Unit or timeshare interest therein, or of an undivided fee simple interest in all of the Properties, which is a part of the Properties, including contract buyers, but excluding those having such interest merely as security for the performance of an obligation.

Section 2.6 "Declarant" shall mean and refer to DEVELOPER, INC., an Arizona corporation, its successors and assigns if such successors or assigns should acquire more than one Unit or more than an undivided one-twelfth (1/12) interest in all of the Properties from the Declarant for the purposes of development or resale.

Section 2.7 "Declaration" shall mean and refer to the Declaration of Dedication and Covenants, Conditions, Restrictions, and Easements applicable to the Properties recorded in the Office of the _____ [county] County Recorder.

Section 2.8 "Member" shall mean and refer to those persons entitled to membership as provided in the Declaration.

ARTICLE 3 MEETING OF MEMBERS

Section 3.1 Annual Meetings. The first annual meeting of the Members shall be held within one year from the date of incorporation of the Association. Thereafter, regular meetings of the members shall be held at least annually and shall be held at the time and place and on the date established by majority vote of the Board of Directors.

Section 3.2 Special Meetings. Special meetings of the members may be called at any time by the president or by the Board of Directors, or upon written request of the members who are entitled to vote one-fourth (1/4) of all of the votes of the Class A membership.

Section 3.3 Notice of Meetings. Written notice of each meeting of the members shall be given by, or at the direction of, the secretary or person authorized to call the meeting, by mailing a copy of such notice, postage prepaid, at least thirty (30) days before such meeting to each member entitled to vote thereat, addressed to the member's address last appearing on the books of the Association, or supplied by such member to the Association for the purpose of notice. Such notice shall specify the place, day and hour of the meeting, and, in the case of a special meeting, the purpose of the meeting.

Section 3.4 Quorum. The presence at the meeting of members entitled to cast, or of proxies entitled to cast, one-tenth (1/10) of the votes of each class of membership shall constitute a quorum for any action except as otherwise provided in

the Articles of Incorporation, the Declaration, or these Bylaws. If, however, such quorum shall not be present or represented at any meeting, the members entitled to vote thereat shall have power to adjourn the meeting from time to time, without notice other than announcement at the meeting, until a quorum as aforesaid shall be present or be represented.

Section 3.5 Proxies. At all meetings of members, each member may vote in person or by proxy, but no more than the maximum number of votes allocated to a particular timeshare interest or undivided interest by the Declaration shall be cast. All proxies shall be in writing and filed with the secretary. Every proxy shall be revocable and shall automatically cease upon conveyance by the member of his timeshare interest or undivided interest.

ARTICLE 4

BOARD OF DIRECTORS: SELECTION: TERM OF OFFICE

Section 4.1 Number. The affairs of this Association shall be managed by a Board of three (3) directors, who need not be members of the Association.

Section 4.2 Term of Office. Declarant shall appoint the initial members of the Board. At the first annual meeting after expiration of the Initial Board Term, the Members shall elect three directors, each of whom shall serve for one (1) year. At each annual meeting thereafter, as appropriate, the Members shall elect three directors. Such directors shall all serve for a term of one (1) year.

Section 4.3 Removal. Any director may be removed from the board, with or without cause, by a majority vote of the members of the Association. In the event of death, resignation or removal of a director, his successor shall be selected by the remaining members of the Board and shall serve for the unexpired term of his predecessor.

Section 4.4 Compensation. No director shall receive compensation for any service he may render to the Association. However, any director may be reimbursed for his actual expenses incurred in the performance of his duties.

Section 4.5 Action Taken Without a Meeting. The directors shall have the right to take any action in the absence of a meeting which they could take at a meeting by obtaining the written approval of all the directors. Any action so approved shall have the same effect as though taken at a meeting of the directors.

ARTICLE 5

NOMINATION AND ELECTION OF DIRECTORS

Section 5.1 Nomination. Nomination for election to the Board of Directors shall be made by a Nominating Committee. Nominations may also be made from the floor at the annual meeting. The Nominating Committee shall consist of a Chairman, who shall be a member of the Board of Directors, and two or more members of the Association. The Nominating Committee shall be appointed by the Board of Directors prior to each annual meeting of the members, to serve from the close of such annual meeting until the close of the next annual meeting and such appointment shall be announced at each annual meeting. The Nominating Committee shall make as many nominations for election to the Board of Directors as it shall in its discretion determine, but not less than the number of vacancies that are to be filled. Such nominations may be made from among members or non-members.

Section 5.2 Election. Election to the Board of Directors shall be by secret written ballot. At such election, the members or their proxies may cast, in respect of each vacancy, as many votes as they are entitled to exercise under the provisions of the Declaration. The persons receiving the largest number of votes shall be elected. Cumulative voting is not permitted.

ARTICLE 6

MEETINGS OF DIRECTORS

Section 6.1 Regular Meetings. Regular meetings of the Board of Directors shall be held quarterly without notice, at such place and hour as may be fixed from time to time by resolution of the Board. Should said meeting fall upon a legal holiday, then that meeting shall be held at the same time on the next day which is not a legal holiday.

Section 6.2 Special Meetings. Special meetings of the Board of Directors shall be held when called by the president of the Association, or by any two directors, after not less than three (3) days notice to each director.

Section 6.3 Quorum. A majority of the number of directors shall constitute a quorum for the transaction of business. Every act or decision done or made by a majority of the directors present at a duly held meeting at which a quorum is present shall be regarded as the act of the Board.

ARTICLE 7

POWERS AND DUTIES OF THE BOARD OF DIRECTORS

Section 7.1 Powers. The Board of Directors shall have the power to:

- (a) adopt and publish rules and regulations governing the use of the Common Area and facilities, and the personal conduct of the members and their guests hereon, and to establish penalties for the infraction thereof;
- (b) suspend the voting rights and right to use of the recreational facilities of a member during any period in which such member shall be in default of the payment of any assessment levied by the Association. Such rights may also be suspended after notice and hearing, for a period not to exceed sixty (60) days for infraction of published rules and regulations;
- (c) exercise for the Association all powers, duties and authority vested in or delegated to this Association and not reserved to the membership by other provisions of these Bylaws, the Articles of Incorporation, or Declaration;
- (d) declare the office of a member of the Board of Directors to be vacant in the event such member shall be absent from three (3) consecutive regular meetings of the Board of Directors; and
- (e) employ a manager, an independent contractor, or such other employees as they deem necessary, and to prescribe their duties.

Section 7.2 Duties. It shall be the duty of the Board of Directors to:

- (a) cause to be kept a complete record of all its acts and corporate affairs and to present a statement thereof to the members at the annual meeting of the members, or at any special meeting when such statement is requested in writing by one-fourth (1/4) of the Class A members who are entitled to vote;
- (b) supervise all officers, agents and employees of this Association, and to see that their duties are properly performed;
- (c) as more fully provided in the Declaration, to:
 - (i) fix the amount of the annual assessment against each Unit, interval interest, or undivided interest at least thirty (30) days in advance of each annual assessment period;
 - (ii) send written notice of each assessment to every Owner subject thereto at least thirty (30) days in advance of each annual assessment period; and

(iii) when deemed in the best interest of the Association, foreclose the lien against any property for which assessments are not paid within thirty (30) days after due date or to bring an action at law against the Owner personally obligated to pay the same or pursue any other remedy legally available to the Association;

(d) issue, or to cause an appropriate officer to issue, upon demand by any person, a certificate setting forth whether or not any assessment has been paid. A reasonable charge may be made by the Board for the issuance of these certificates. If a certificate states an assessment has been paid, such certificate shall be conclusive evidence of such payment;

(e) procure and maintain adequate liability and hazard insurance on property owned by the Association;

(f) cause all officers or employees having fiscal responsibilities to be bonded, as it may deem appropriate;

(g) cause the Common Area to be maintained.

ARTICLE 8 OFFICERS AND THEIR DUTIES

Section 8.1 Enumeration of Offices. The officers of this Association shall be a president and vice-president, who shall at all times be members of the Board of Directors, a secretary, and a treasurer, and such other officers as the Board may from time to time by resolution create.

Section 8.2 Election of Officers. The election of officers shall take place at the first meeting of the Board of Directors following each annual meeting of the members.

Section 8.3 Term. The officers of this Association shall be elected annually by the Board and each shall hold office for one year unless he/she shall sooner resign, or shall be removed, or shall be otherwise disqualified to serve.

Section 8.4 Special Appointments. The board may elect such other officers as the affairs of the Association may require, each of whom shall hold office for such period, have such authority, and perform such duties as the Board may, from time to time, determine.

Section 8.5 Resignation and Removal. Any officer may be removed from office with or without cause by the Board. Any officer may resign at any time giving written notice to the Board, the president or the secretary. Such resignation shall take effect on the date of receipt of such notice or at any later time specified therein, and unless otherwise specified therein, the acceptance of such resignation shall not be necessary to make it effective.

Section 8.6 Vacancies,. A vacancy in any office may be filled by appointment by the Board. The officer appointed to such vacancy shall serve for the remainder of the term of the officer he replaces.

Section 8.7 Multiple Offices. The offices of secretary and treasurer may be held by the same person. No person shall simultaneously hold more than one of any of the other offices except in the case of special offices created pursuant to Section 4 of this Article.

Section 8.8 Duties. The duties of the officers are as follows:

President:

(a) The president shall preside at all meetings of the Board of Directors; shall see that orders and resolutions of the Board are carried out; shall sign all leases, mortgages, deeds and other written instruments and shall co-sign all

promissory notes.

Vice-President:

(b) the vice-president shall act in the place and stead of the president in the event of his absence, inability or refusal to act, and shall exercise and discharge such other duties as may be required of him her by the Board.

Secretary:

(c) The secretary shall record the votes and keep the minutes of all meetings and proceedings of the Board and of the members; keep the corporate seal of the Association and affix it on all papers requiring said seal; serve notice of meetings of the Board and of the members; keep appropriate current records showing the members of the Association together with their addresses, and shall perform such other duties as required by the Board.

Treasurer:

(d) The treasurer shall receive and deposit in appropriate bank accounts all monies of the Association and shall disburse such funds as directed by resolution of the Board of Directors; shall co-sign all promissory notes of the Association; keep roper books of account; cause an annual audit of the Association books to be made by a public accountant at the completion of each fiscal year; and shall prepare an annual budget and a statement of income and expenditures to be presented to the membership at its regular annual meeting, and deliver a copy of each to the members.

ARTICLE 9 COMMITTEES

The Association shall appoint an Architectural Control Committee, as provided in the Declaration, and a Nominating Committee, as provided in these Bylaws. In addition, the board of Directors shall appoint other committees as deemed appropriate in carrying out its purpose.

ARTICLE 10 BOOKS AND RECORDS

The books, records and papers of the Association shall at all times, curing reasonable business hours, be subject to inspection by any member. The Declaration, the Articles of Incorporation, and the Bylaws of the Association shall be available for inspection by any member at the principal office of the Association, where copies may be purchased at reasonable cost.

ARTICLE 11 ASSESSMENTS

As more fully provided in the Declaration, each member is obligated to pay to the Association annual and special assessments which are secured by a continuing lien upon the property against which the assessment is made. Any assessments which are not paid when due shall be delinquent. If the assessment is not paid within ten (10) days after the due date, the assessment shall bear interest at the rate of _____ percent (_____%) per anum until it is paid in full.

The Association may bring an action at law or equity to enforce the Bylaws or the Articles of Incorporation including, without limitation, the right to file an Association Lien for the failure of payment of any amount due. Such lien may be foreclosed upon by the Association. All costs and expenses associated with the enforcement of a lien or any other provision hereunder shall be the responsibility of Owner.

ARTICLE 12
AMENDMENT OF BYLAWS

Section 12.1 Amendment These Bylaws may be amended or modified by the member, by a vote of a majority of a quorum of members at a meeting, or by proxy.

Section 12.2 In case of a conflict between the Articles of Incorporation and the Bylaws, the Articles of Incorporation shall control.

IN WITNESS WHEREOF, we, being all of the directors of Sunset Resort Owners Association, hereby set our hands this _____ [day] day of _____ [month] , _____ [year] .

[name]

[name]



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Current Legal Forms for Real Estate

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Current Legal Forms for Real Estate
Chapter 20 REAL ESTATE ENTITIES
Part IV. Forms
I. TIME SHARE

24-20 Current Legal Forms for Real Estate FORM 20.85

AUTHOR: by Stephen E. Pigott and Harold O. Maxfield, Jr.

FORM 20.85 Summary of purchase and receipt of documents

COMMENT

The purchase of a time share is very technical and involves many complicated legal provisions. Accordingly, it is an excellent practice to provide a lay person's summary of the important terms of the transaction. The summary should be provided prior to the execution of the purchase documents. Further, because so many documents are used in the typical time share offering, it is appropriate to obtain a separate receipt from the buyer acknowledging receipt of the relevant documents.

FORM

SUMMARY

**PURCHASER'S UNDERSTANDING AND ACKNOWLEDGMENT
OF INTERVAL INTEREST PURCHASE**

Prior to the execution of your Purchase Agreement to acquire an Interval Interest in Sunset Resort (the "Project"), Developer LLC ("Seller") desires to minimize the possibility of any misunderstandings regarding your purchase. Accordingly, we have prepared this non-technical summary of various key terms and conditions of your Interval Interest purchase to ensure that you are aware of certain rights, privileges and obligations under your Purchase Agreement as the owner of an Interval Interest in the Project. Please read each paragraph carefully, insert your initials, and sign below indicating that you acknowledge and fully understand the following statements:

1. In the event that Seller is unable to convey the specific Interval Interest identified on the first page of my/our Purchase Agreement, Seller may, at its option, substitute a comparable Interval Interest without prior notice to me/us.
2. Notwithstanding any provision of my/our Purchase Agreement or Special Warranty Deed to the contrary, I/we will NOT have the exclusive right to reserve, use, and occupy the Unit identified in such Purchase Agreement during any specific Use Period(s) (unless a particular Fixed Use Period is indicated on page 1 of my/our Purchase Agreement). Rather, I/we will be entitled to use and occupy an assigned Unit within the Project, during the Use Period(s) consistent with the class of Interval Interest I/we own as indicated in my/our Purchase Agreement, as shall properly have been reserved by me/us in accordance with the provisions of the then current Rules and Relations (the "Club Documents"). I/We further understand and acknowledge that all of my/our use and occupancy rights and obligations are governed by such Rules and Regulations, together with the Declaration of Dedication and Covenants, Conditions, Restrictions and Easements for Sunset Resort, including the payment of any fees associated with such use and occupancy.
3. Subject to the provisions of the Club Documents (if applicable), if I/we do not use a Unit within the Project for the maximum number of days and nights to which I am/we are entitled, any unused time cannot be accumulated or carried forward for future use at the Project.
4. Subject to the provisions of the Club Documents (if applicable), all reservation requests must conform to the requirements of the then current Rules and Regulations. I/We further acknowledge and understand that reservations are generally confirmed by the Managing Agent on a first come, first served, space-available basis.
5. Subject to the provisions of the Club Documents (if applicable), the time and day(s) on which Use Periods begin and end are set forth in the Rules and Regulations. I/We further acknowledge and understand that such time and day(s) for check-in and check-out may be changed from time to time by the Board, in its sole discretion.
6. I/We acknowledge my/our obligation to pay various Assessments to the Sunset Resort Owners Association (the "Association"), and that I/we may not exempt myself/ourselves from such obligation by waiving my/our right to use a Unit at the Project for the maximum number of days and nights to which I am/we are entitled during a particular Use Year. I/We understand that I/we must be current in the payment of all assessments due the Association before I/we may reserve a Use Period or otherwise occupy or allow others to occupy a Unit within the Project during a reserved Use Period. I/We also understand that the amount of my/our annual assessments may vary from year to year as determined by the Board. I/We further understand that my/our annual assessments may not include real estate taxes, which may be billed separately.
7. I am/We are responsible for the cost of repairing any damage to my/our assigned Unit or its contents caused by me/us or our family members or guests.
8. I/We have acquired an Interval Interest for my/our own personal use and enjoyment. No representations of any nature whatsoever concerning investment potential, rent returns, tax advantages, depreciation, or other possible financial benefits have been made by Seller or any of its salespersons or other representatives in connection with my/our purchase of an Interval Interest in the Project.
9. Seller has no resale or rental program for non-Seller owned Interval Interests, and no salesperson or other representative of Seller has made any representation to me/use that Seller or any agent or representative of Seller can or will handle the resale or rental of my/our Interval Interest. I/We understand that I/we may sell my/our Interval Interest or rent any properly reserved Use Period to which I am/we are entitled, either on my/our own or through the use of a properly licensed sales or rental agent. I/We acknowledge that Seller does not recommend or endorse any particular such sales or rental agent.
10. Seller has executed an agreement with Club Sunshine under which Club Sunshine has agreed to offer its reciprocal

1. Purchase Agreement
2. Deed of Trust (if applicable)
3. Promissory Note (if applicable)
4. Special Warranty Deed
- 5 Time Share Public Report
6. Receipt for Public Report

7. Second Amended and Restated Declaration of Dedication and Covenants, Conditions, Restrictions and Easements

8. Articles of Incorporation

9. Bylaws

10. Rules and Regulations

11. Management Agreement

12. Escrow Agreement

13. Privacy Policy

14. HUD-1 Settlement Statement (if applicable)

15. Truth in Lending Disclosure Statement (if applicable)

16. Good Faith Estimate (if applicable)

17. Estimated Operating Budget

18. Pay Authorization Form (if applicable)

19. Purchaser's Understanding and Acknowledgment

20. Loan Servicing Disclosure Statement

21. Signature Verification

22. Receipt for Time Share Documents

23. Arizona Department of Revenue Affidavit of Property Value

24. Club Documents (if applicable)

a. Disclosure Guide

b. Charter

c. Rules and Regulations

d. Membership Agreement and Enrollment Application

e. Member Assurance Agreement

f. Assignment Agreement

g. Upgrade Option

_____ [name] _____
[month] _____
_____ [year]
[day],
_____ [Printed
Name]



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Current Legal Forms for Real Estate

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Current Legal Forms for Real Estate
Chapter 20 REAL ESTATE ENTITIES
Part IV. Forms
I. TIME SHARE

24-20 Current Legal Forms for Real Estate FORM 20.86

AUTHOR: by Stephen E. Pigott and Harold O. Maxfield, Jr.

FORM 20.86 Purchase agreement for time share

COMMENT

The purchase of a time share requires a Purchase Agreement. Many of the provisions are similar to a standard purchase agreement. However, a significant number of provisions are unique to time shares. The following form is designed for the purchase of an interest in an Arizona time share development by one purchaser.

FORM

PURCHASE AGREEMENT

THIS PURCHASE AGREEMENT (this "Agreement") is made and entered into this _____ [day]
_____ [month] , _____ [year] , by and between SUNSET DEVELOPMENT,
LLC, a Delaware limited liability company (hereinafter referred to as "Seller"), the address of which is c/o
_____, and BOBBY SMITH (hereinafter referred to as "Purchaser");

WITNESSETH

That for and in consideration of the mutual covenants contained herein, Seller does hereby agree to sell unto Purchaser and Purchaser does hereby agree to purchase from Seller the following described real property (the "Interval Interest") upon the price, terms, and conditions hereinafter set forth, including but not limited to Paragraphs 1 through 26 of the Terms and Conditions set forth herein:

An undivided interest in Sunset Resort (the "Project"), according to the Second Amended and Restated Declaration of Dedication and Covenants, Conditions, Restrictions and Easements for Sunset Resort, duly recorded in the Official Records of _____ County, Arizona, in Book _____, Page _____, and all annexations, amendments, and supplements thereto (the "Declaration"), and as shown on Arbitrary Plat _____, Page _____, together with the recurring (i) exclusive right to reserve, use, and occupy a Full Unit or Units or Partial Unit or Units within the Project; and (ii) nonexclusive right to use and enjoy the Project's Common Area and Common Furnishings, for their intended purposes, during such Fixed Use Period as is set forth below (if Grantee has purchased a Fixed Use Period) or such Use Periods as shall properly have been reserved in accordance with the provisions of the then current Rules and Regulations promulgated by Sunset Resort Owners Association, all pursuant to the Declaration. For convenience in inventory control, conveyancing, and titling, the Interval Interest is allocated to one or more specific Unit(s); however, the Grantee shall NOT have the right to use and occupy such specific Unit(s), only the right to use and occupy a Unit.

Unit No.: Flex

(Floating)

Initial Use Year:

Fixed Unit

(if applicable): Floating Time

Fixed Use Period Fixed Event (if applicable):

(if applicable): Number of Rights (if applicable):

Suite (if applicable):

Interval Interest No. (if applicable): Undivided Interest:

PURCHASE TERMS

1. Purchase Price of Time Share Interest: _____

2. Initial Cash Deposit: _____

3. Ascribed Equity Value of Timeshare Interest
Conveyed to Seller (applicable to Upgrade
Transactions only): _____

4. Additional Cash Depositions Due: _____
a. On or before _____

- b. On or before _____

5. Total Down Payment (line 2 plus
line 3 plus lines 4.a. and 4.b.) _____

6. Credits (if any): _____

7. Balance of Purchase Price to be Financed
at Closing (line 1 minus line 5 minus line 6): _____

8. Closing Costs: _____

- A. Initial Year's Association Assessments (estimated): \$ _____

- B. Initial Year's Ad Valorem Taxes (estimated): \$ _____

- C. Initial Year's club Sunshine Dues and Club Processing Fee (if applicable) \$ _____

- D. Initial Year's External Exchange Company Membership fee \$ _____

- E. Other Closing Costs: \$ _____

- F. Total Estimated Closing Costs: \$ _____

Purchaser desires to pay for the aforescribed Interval Interest, in lawful currency of the United States, by using the following method (check one), subject to the Terms and Conditions contained herein:

☐ Cash Payment ☐ Seller Financing

Credit Card Type: _____ Number: _____ Expiration Date: _____

In addition to the financial obligations of Purchaser set forth above, Purchaser will be required to pay all Assessments described in Paragraph 8 below. Purchaser will also be required to pay any ad valorem taxes separately assessed and levied against his or her Interval Interest.

If Purchaser obtains purchase money financing, Purchaser will also be responsible for the payment of all charges incident to the extension of credit, which charges are specified in the Truth-in-Lending Disclosure Statement furnished to Purchaser, including but not limited to monthly installments of principal and interest, late charges (if applicable), and a monthly collection fee of _____ Dollars (\$_____). Finally, Purchaser will be required to pay the fixed amount of \$0.00 to cover all recording costs, documentary fees, title insurance premiums, maintenance assessments, and other closing costs as specified on the HUD-1 Settlement Statement provided to Purchaser at or prior to Closing, as hereinafter defined, and/or above (collectively "Closing Costs"). All Closing Costs in connection with the purchase of the above-described Interval Interest must be paid by Purchaser prior to or at the time of Closing.

In the event that Purchaser consists of more than one person, then title shall be vested among them as Sole and Separate Property.

Monthly Payment Method

☐ ☐ SurePay (Credit or Debit Card) ☐ SurePay (Checking or Savings Account)

Coupon

PURCHASER MAY CANCEL THIS AGREEMENT WITHOUT A PENALTY OR OBLIGATION WITHIN SEVEN

(7) CALENDAR DAYS AFTER PURCHASER SIGNS THIS AGREEMENT. IF PURCHASER DECIDES TO CANCEL THIS AGREEMENT, PURCHASER MUST NOTIFY SELLER IN WRITING OF PURCHASER'S INTENT TO CANCEL. PURCHASER'S NOTICE OF CANCELLATION WILL BE EFFECTIVE ON THE DATE THAT IT IS SENT TO SELLER C/O _____. SELLER'S TELEPHONE NUMBER FOR INQUIRIES IS (_____) _____. HOWEVER, ALL CANCELLATION NOTICES MUST BE IN WRITING AS AFOREDESCRIBED. PURCHASER MAY EXECUTE ALL CLOSING DOCUMENTS IN ADVANCE. HOWEVER, THE CLOSING, AS EVIDENCED BY DELIVERY OF THE DEED, IS PROHIBITED BEFORE THE SEVEN (7) CALENDAR DAY CANCELLATION PERIOD EXPIRES.

IN WITNESS WHEREOF, Purchaser has executed this Agreement on the day and year first written above.

PURCHASER:

_____ Social Security Number
 _____ Printed _____ Street Address
 Name
 _____ Home Tele- _____ City, State, Zip Code
 phone Number
 _____ Business _____
 Telephone Number

SELLER:

Sunset Development, LLC, a Delaware
 limited liability company

By: _____ [name _____ Acceptance Date
 and title]

TERMS AND CONDITIONS

1. DEFINITIONS

Unless expressly indicated herein to the contrary or the context otherwise requires, the capitalized terms used herein shall have the meanings ascribed to them in the Declaration.

2. PAYMENT OF PURCHASE PRICE

(a) Purchaser may pay for the Interval Interest described herein in cash or by borrowing a portion of the purchase price set forth on line 1 of Page 1 hereof (the "Purchase Price") from Seller. If a portion of the Purchase Price is financed by Seller, then Purchaser will be required to execute a Promissory Note (the "Note") payable to the order of Seller in the amount of the unpaid balance of the Purchase Price, together with a first priority Deed of Trust (the "Deed of Trust") that secures the payment of the Note and encumbers Purchaser's Interval Interest, as well as certain other documents and instruments which Seller, in its sole discretion, deems reasonably necessary or appropriate in order to secure Purchaser's payment of the Note. Purchaser will be subject to all of the terms, provisions, and conditions described in and set forth in all such documents and instruments.

(b) If Purchaser requests purchase money financing, Seller may agree to finance Purchaser's purchase but is NOT required to do so. Purchaser agrees that all personal financial information submitted to Seller will

be accurate, and Purchaser authorizes Seller to make credit inquiries regarding Purchaser, whether through a consumer credit reporting agency or other means. Purchaser agrees to provide immediate written notice to Seller of any material adverse change in Purchaser's financial condition that occurs prior to Closing. If, despite Purchaser's good faith best efforts to obtain purchase money financing, Purchaser is unable to qualify for such financing within ten (10) days following Seller's acceptance of this Agreement due to Purchaser's failure to satisfy completely Seller's credit requirements or for any other reason, then Purchaser shall be entitled to terminate this Agreement and receive a refund of any and all payments theretofore made by Purchaser hereunder (without interest) or, at Purchaser's option, to consummate the transaction contemplated hereby by paying the entire Purchase Price, less the amount of Purchaser's initial deposit and any other payments made to or on behalf of Seller hereunder, in cash at Closing. If Purchaser is unable to qualify for Seller financing within such ten (1) day period, Seller shall provide written notice thereof to Purchaser, whereupon Purchaser shall promptly notify Seller whether Purchaser elects to terminate this Agreement or consummate the transaction as provided in the preceding sentence. Seller reserves the right, in its sole discretion, to sell or assign the Note and the Deed of Trust to another person or entity, whether or not such person or entity is affiliated with Seller.

(c) In the event that the Interval Interest represents an "upgrade" from another Interval Interest in the Project or a timeshare interest in another resort (the "Old Timeshare Interest"), Purchaser agrees to execute and deliver to Seller, on the date hereof, a deed in form and substance satisfactory to Seller, in its sole discretion, pursuant to which all of Purchaser's right, title, and interest in and to the Old Timeshare Interest is conveyed to Seller, free and clear of any liens or encumbrances not expressly approved by Seller (the "Deed-back"). Such Deed-back will be recorded by Seller upon Closing. Pending Closing, Purchaser shall remain fully liable for all costs, expenses, and other obligations of any and every kind related to the Old Timeshare Interest (the "Old Timeshare Interest Obligations"). In the event that the transaction contemplated hereby fails to close for any reason whatsoever, the Deed-back will be returned to Purchaser, and Purchaser will remain fully liable for the Old Timeshare Interest Obligations.

(d) In the event that the Note, the Deed of Trust, the Deed-back (if applicable), or any other document or instrument which evidences or secures payment of the Purchase Price is misplaced or has not been completely and validly executed by Purchaser for any reason whatsoever, Seller shall have the option, in its sole discretion, to (i) cancel this Agreement at any time prior to closing; or (ii) send Purchaser whatever document(s) and/or instrument(s) that Seller needs Purchaser to re-execute, along with instructions on how to do so. In the event that Seller elects to cancel this Agreement, Seller shall provide written notice thereof to Purchaser and cause any funds held on Purchaser's behalf, without interest, to be refunded by Escrow Agent, as hereinafter defined, to Purchaser in the same manner as provided in Paragraph 5 hereof, in which event this Agreement shall be deemed terminated and of no further force or legal effect. In the event that Seller sends Purchaser any document or instrument for re-execution, Purchaser shall promptly re-execute same, cause his or her signature to be notarized (to the extent indicated), and return such document(s) and/or instrument(s) to Seller in accordance with Seller's written instructions. Purchaser's failure to do so for any reason within seven (7) calendar days following Purchaser's receipt thereof shall constitute a default hereunder, entitling Seller to exercise its available rights and remedies pursuant to Paragraph 12 hereof.

3. SELLER'S RIGHT TO ACCEPT OR REJECT THIS AGREEMENT

It is understood that Seller can accept or reject this Agreement. If Seller rejects this Agreement, Purchaser is only entitled to a refund of his or her down payment and any additional payments made by him or her, without interest. This Agreement will become effective and legally binding upon both parties when signed by Purchaser in the space provided and accepted by Seller and may not be amended or in any manner modified except by a written instrument that is signed by both Seller and Purchaser. If Seller

accepts this Agreement, then Seller, subject to Paragraph 2 above, agrees to sell the Interval Interest described herein to Purchaser, and Purchaser agrees to make all of the payments required to be made under this Agreement when due and otherwise to comply fully with all of the terms, provisions, and conditions hereof and of the Project instruments.

4. DEPOSITS

Purchaser's initial deposit and any subsequent payments made by Purchaser to Seller prior to Closing shall be delivered to and held in escrow by Stewart Title Agency, Inc. (the "Escrow Agent"). PURCHASER AND SELLER AGREE TO ACCEPT ANY POTENTIAL RISKS THAT MAY ACCRUE AS A RESULT OF THE DEPOSITING OF ESCROWED FUNDS IN A DEPOSITORY LOCATED OUTSIDE OF ARIZONA. Any and all interest that accrues on Purchaser's deposit and any subsequent payments shall, except to the extent prohibited by law, be payable to and inure to the sole benefit of Seller and not be credited toward the Purchase Price. Escrow Agent shall hold such deposit and other amounts until the expiration of Purchaser's cancellation period as described herein without such right of cancellation having been exercised by Purchaser. Upon written notice from Seller to Escrow Agent that such cancellation period has expired and Closing has occurred, or alternatively, that Purchaser has breached any term, provision, or condition hereof, Escrow Agent shall deliver any funds held on Purchaser's behalf, together with any interest that has accrued thereon to Seller. Seller shall have no right to use any of the funds held by Escrow Agent until such funds have been delivered to Seller in accordance with the provisions hereof.

5. REFUND PRIVILEGE

In the event that Purchaser cancels this Agreement during the seven (7) calendar day cancellation period described herein, Seller will cause Escrow Agent to refund to Purchaser the total amount of any and all payments made by Purchaser under this Agreement and return any negotiable instruments, other than checks, executed by Purchaser in connection herewith.

6. SELLER'S RIGHT OF SUBSTITUTION

Purchaser expressly acknowledges and agrees that the actual Interval Interest conveyed by Seller to Purchaser upon Closing may be the same or different from the Interval Interest described on Page 1 hereof, provided that the conveyance of whatever Interval Interest is described in Purchaser's Special Warranty Deed affords Purchaser substantially the same rights, benefits, and privileges with respect to the Project's Units and Common Areas as the conveyance of the above-described Interval Interest would afford. Purchaser hereby authorizes Seller to modify and initial on Purchaser's behalf any documents or instruments executed by Purchaser in order to reflect such substitution.

7. VACATION OWNERSHIP PLAN

(a) Purchaser acknowledges that notwithstanding any provision of this Agreement or the Special Warranty Deed pursuant to which title to the Interval Interest described herein will be conveyed to Purchaser, Purchaser will not have the guaranteed exclusive right to reserve, use, and occupy the above-identified Unit(s) during any specific Use Period(s) (unless a specific Fixed Use Period is set forth on Page 1 hereof). Rather, Purchaser shall be entitled to use and occupy a Full Unit or Units or Partial Unit or Units within the Project during such use Period(s), either every calendar year or during alternate calendar years as indicated on Page 1 hereof, as shall properly have been reserved by Purchaser in accordance with the terms, provisions, and conditions of the Rules and Regulations, as they may be amended or restated from time to time. Because reservations are generally confirmed by the Managing

Agent on a first come, first served, space-available basis, Interval Interest owners are encouraged to make their reservation requests as far in advance of their desired Use Periods as the Rules and Regulations permit in order to maximize their chances of obtaining confirmed reservations for the Use Periods of their choice.

(b) The vacation ownership plan created by the Declaration shall be perpetual unless terminated by the owners of Interval Interests and Units in the manner described in the Declaration.

(c) Under no circumstances shall Purchaser be entitled to make a reservation or use and occupy a Unit at the Project unless Purchaser has timely paid any and all Assessments and other amounts levied upon his or her Interval Interest as described in Paragraph 8 below and otherwise fully complied with all of the terms, provisions, and conditions of the Declaration and all other applicable documents and instruments.

8. ASSESSMENTS

(a) Purchaser understands and agrees that in accordance with the provisions of the Declaration, Purchaser shall be responsible for his or her proportionate share of the Project's Basic Expenses and Reserve Expenses. The initial annual Basic Assessment shall be due and payable to the Association prior to Purchaser's use and occupancy of a Unit during any Use Period in the year in which Closing occurs. Subsequent Basic Assessments shall be due and payable on a calendar year basis at the time(s) and in the manner established from time to time by the Board, written notice of which shall be provided to each owner of an Interval Interest. The amount of Purchaser's Basic Assessment each year may vary and will be determined by the Board, pursuant to an annual budget that will be prepared by the Managing Agent and approved by the Board.

In the event that Purchaser's Initial Use Year as set forth on Page 1 hereof is the year following the year in which Closing occurs, then no Basic Assessment attributable to the current Use Year shall be due and payable by Purchaser. Purchaser's failure for any reason to pay on a timely basis any and all Assessments levied against his or her Interval Interest could result in the foreclosure thereof by the Association and the loss of such Interval Interest. Except with respect to the calendar year in which Closing occurs as described in this paragraph, Purchaser's failure for any reason to use and occupy a Unit within the Project for one (1) or more Use Periods in any given Use Year shall not exempt such Purchaser from his or her obligation to pay in full all Assessments levied against his or her Interval Interest with respect to such Use Year.

(b) In addition to the annual Basic Assessment, Purchaser understands and agrees that he or she will be responsible for the timely payment to the Association of any Special Assessments levied upon his or her Interval Interest by the Association, as well as any Personal Expenses that he or she incurs or for which he or she is responsible, all in accordance with the provisions of the Declaration and all other applicable documents and instruments.

(c) The Association may enforce Purchaser's obligation to pay the aforescribed Assessments in the manner set forth in Article 5 of the Declaration. Under no circumstances shall Purchaser be entitled to reserve, use, or occupy a Unit within the Project or exercise any other rights, benefits, or privileges to which Purchaser would otherwise be entitled, pursuant to the Declaration or any other document or instrument unless and until all Assessments and other amounts that Purchaser owes the Association or Seller have first been paid in full.

9. CLOSING

Except as otherwise provided by applicable law, for purposes of this Agreement, the term "Closing" shall mean the date following the expiration of Purchaser's seven (7) day right of cancellation without such right having been exercised as of which the parties hereto have properly executed and delivered all documents necessary to effect transfer of title to the Interval Interest described herein, including but not limited to this Agreement, a Special Warranty Deed, and a Promissory Note and Deed of Trust, if applicable. Upon Closing, Seller shall cause all necessary documents to be recorded in the Official Records of _____ County, Arizona. Except as otherwise expressly provided in any of the Project's documents or instruments to the contrary, Purchaser may not reserve, use, or occupy any of the Project's Units or exercise any other rights, benefits, or privileges appurtenant to his or her Interval Interest until Closing occurs.

10. TITLE AND TITLE INSURANCE

Unless Purchaser elects otherwise by written notice received by Seller prior to Closing, within a reasonable period of time following the date of Closing, Purchaser will be provided with a standard ALTA owner's title insurance policy from a title insurance company of Seller's choosing, paid for by Purchaser out of the Closing Costs, insuring Purchaser's title to his or her Interval Interest, free and clear of all encumbrances except for taxes and assessments for the year of Closing and subsequent years and restrictions, reservations, conditions, limitations, and easements of record prior to Closing or imposed by governmental authorities having jurisdiction or control over the Project, and the lien of the Deed of Trust, if any. Purchaser may, at Purchaser's option exercised by written notice to Seller, elect to acquire a policy of title insurance from a title insurance company of Purchaser's choosing, in which event Seller shall refund to Purchaser from the Closing Costs the actual cost to Seller of the title insurance premium.

11. COMPLETION OF CONSTRUCTION

In the event that construction of any Unit described on Page 1 hereof has not been substantially completed as of the date hereof, Seller agrees, subject to the provisions hereof and excepting delays caused by strikes, inability to obtain labor or materials, governmental restrictions, civil commotion, fire, earthquakes, storms, floods, explosions, acts of God, and delays caused by conditions or circumstances beyond the reasonable control of Seller, to cause such Unit to be substantially completed no later than two (2) years after the date of execution of the first Purchase Agreement requiring the conveyance by Seller of an Interval Interest in such Unit.

12. DEFAULT

(a) Purchaser shall be in default under this Agreement if he or she fails to pay on time, keep any promise, or fulfill any agreement or obligation contained herein or in any of the documents or instruments referenced herein. In the event of a default by Purchaser, Purchaser shall not be entitled to reserve, use, or occupy a Unit at the Project, to use and enjoy any of the Project's Common Area, or to exercise any other rights, benefits, or privileges appurtenant to his or her Interval Interest.

(i) Purchaser's default in the performance of any of his or her obligations under this Agreement may result in the immediate and automatic termination of this Agreement and all of Purchaser's rights, benefits, and privileges hereunder. Upon such termination of this Agreement, Seller shall retain or, if such termination occurs prior to Closing, cause Escrow Agent to deliver to Seller, all sums of money previously paid by Purchaser hereunder as liquidated damages and not as a penalty. Furthermore, Seller may pursue any or all other legal and equitable remedies available to it, at law or in equity, including but not limited to specific performance and recovery of Seller's reasonable attorneys' fees and other costs of enforcement of Purchaser's obligations hereunder.

(ii) In the event that Purchaser fails to make any payment required under the terms of the Note or the Deed of Trust (if applicable) for the unpaid balance of the Purchase Price, Seller's and Purchaser's rights and remedies shall be governed by the provisions of said Note and Deed of Trust and by the applicable laws of the State of Arizona.

(b) In the event of a dispute between Purchaser and Seller with respect to Seller's performance hereunder, the matter in question may, in Seller's sole discretion, be settled by arbitration in accordance with the Commercial Arbitration Rules of the American Arbitration Association. If a matter in dispute is referred to Arbitration, Purchaser and Seller shall each pay one-half (1/2) of the fees and expenses required to initiate the arbitration proceedings. The parties agree, however, that the costs and expenses of arbitration, including attorneys' fees, shall ultimately be borne as determined by the arbitrator. The parties further agree that any arbitration proceeding in connection with this Agreement shall be conducted in _____ County, Arizona, and that the decision of the arbitrator with respect to any such matter in dispute shall be final and determinative of the respective rights and obligations of the parties hereunder.

Notwithstanding the foregoing provisions of this Sub-paragraph 12.(b) to the contrary, if, for any reason, Seller is unable or fails to comply with the material provisions of this Agreement, then the sole obligation of Seller shall be to refund or cause Escrow Agent to refund (whichever is applicable) to Purchaser all payments previously made by Purchaser hereunder, without interest. Upon such refund, this Agreement shall be deemed canceled, and all rights and obligations hereunder shall immediately terminate. PURCHASER HEREBY WAIVES ANY AND ALL RIGHTS AND REMEDIES THAT MIGHT OTHERWISE BE AVAILABLE TO HIM OR HER, AT LAW OR IN EQUITY.

13. ASSOCIATION MEMBERSHIP

Upon Closing, Purchaser will automatically become a member of Sunset Resort Owners Association (the "Association"). Purchaser agrees to be subject to and to comply fully with the Association's Articles of Incorporation, Bylaws, and such Rules and Regulations as the Association's Board of Directors (the "Board") may promulgate, as each such document may lawfully be amended and/or restated from time to time.

14. PURCHASER'S ACKNOWLEDGMENTS

Purchaser represents and warrants that the persons signing this Agreement have the legal capacity and are duly authorized to do so. Purchaser acknowledges that prior to signing this Agreement, Purchaser received the Timeshare Public Report prepared pursuant to *Section 32-2197.01, Arizona Revised Statutes*, together with the exhibits attached thereto, including the Declaration, the Bylaws, and the Rules and Regulations of the Association, all of which are hereby incorporated herein by this reference, and Purchaser agrees to be strictly bound and to comply fully with the terms, provisions, and conditions of such documents, as each may be amended or restated from time to time. Purchaser further acknowledges and represents that the Interval Interest described herein is being purchased for Purchaser's personal use and not for its investment potential or any possible rent returns, tax advantages, depreciation, or other financial advantages and that no representations of any nature whatsoever have been made to Purchaser concerning investment potential, rent returns, tax advantages, depreciation, or other financial advantages by Seller or any of its salespersons or other agents. Purchaser understands that Seller has no resale or rental program for non-Seller owned Interval Interests and acknowledges that neither Seller nor any of its sales agents, employees, or other representatives has indicated that Purchaser will be assisted in the resale or rental of his or her Interval Interest in the future. Purchaser represents that he or she does not

intend to use any Unit at the Project as his or her principal residence. If Purchaser has chosen to finance a portion of the Purchase Price, then Purchaser acknowledges receipt of a completed Truth-in-Lending Disclosure Statement, Good Faith Estimate, HUD-1 Settlement Statement, and Servicing Disclosure Statement, together with a copy of Seller's Privacy Policy, prior to executing this Agreement. Purchaser's acknowledgments set forth in this Paragraph 14 shall survive Closing.

15. EXCHANGE PROGRAMS

Seller has executed an agreement with Club Sunshine, Inc. ("Club Sunshine") under which Club Sunshine has agreed to offer its reciprocal exchange services to Purchaser and other owners of Timeshare Interests at the Project. If Purchaser becomes a member of Club Sunshine, Purchaser will automatically become a member of Interval Brokerage, Inc.'s ("IBI") reciprocal exchange program that is unaffiliated with Seller known as _____. Purchaser's participation in such exchange programs is totally voluntary and subject to the payment by Purchaser of such fees as are required from time to time by IBI and Club Sunshine. Seller makes no representations concerning the current or future services to be provided by IBI or Club Sunshine or the cost, continued availability, success, or possible failure of either IBI's or Club Sunshine's exchange program. Any representations made regarding either exchange program, either orally by IBI's or Club Sunshine's agents or within the videos, brochures, and literature prepared or provided by IBI or Club Sunshine, as appropriate, the receipt and review of which Purchaser expressly acknowledges, are solely the representations of IBI or Club Sunshine, as appropriate, and should not be interpreted or relied upon as being the representations of Seller.

16. RIGHT OF FIRST REFUSAL

Purchaser's right to sell or otherwise transfer his or her Interval Interest is subject to the right of first refusal in favor of Seller in Section 8.6 of the Declaration.

17. NO WARRANTIES

Except as otherwise expressly provided herein, in Purchaser's Special Warranty Deed, or by applicable law, Seller makes NO WARRANTIES, EXPRESS OR IMPLIED, of any type whatsoever regarding the Units or the Common Area of the Project, including but not limited to warranties of merchantability or fitness for a particular purpose.

18. FURNITURE AND FURNISHINGS

Although Seller's model Unit(s) and descriptive materials are for display purposes only, all Units within the Project have furniture, furnishings, appliances, and equipment that are substantially similar to, or of equal quality to, those shown or used in the model Unit(s) or descriptive materials.

19. RISK OF LOSS

Subject to Seller's right of substitution as described in Paragraph 6 above, all risk of loss to the Project's Units and Common Area shall be borne by Seller until Closing occurs. Thereafter, all such risk of loss shall be borne by Purchaser and the other owners of Interval Interests in the Project. In the event that Seller is unable to convey the subject Interval Interest to Purchaser and declines or is unable to exercise its right of substitution as described in Paragraph 6 above, then Seller's sole obligation shall be to cause any funds held on Purchaser's behalf, without interest, to be refunded to Purchaser in the same manner as provided in Paragraph 5 hereof, in which event this Agreement shall be deemed terminated and of no further force or legal effect.

20. NO ORAL OR WRITTEN REPRESENTATIONS

Seller and Purchaser agree that this Agreement (including the documents and instruments incorporated herein by reference) embodies the entire agreement between them related to the subject matter hereof and supersedes and replaces any and all prior negotiations, representations, agreements, and understandings, both oral and written, in connection therewith.

21. SURVIVAL OF AGREEMENT: ASSIGNMENT

This Agreement and the agreements and covenants herein set forth shall be binding upon and inure to the benefit of the parties hereto, their respective heirs, successors, assigns, and personal representatives, and the provisions of this Agreement shall survive the Closing of the transaction contemplated hereby and not be deemed merged into the Special Warranty Deed delivered pursuant hereto. Purchaser's Interval Interest cannot be sold, assigned, transferred, conveyed, or encumbered except in accordance with the terms, provisions, and conditions hereof, the Declaration, the Bylaws, and Rules and Regulations. Purchaser acknowledges Seller's right, in its sole discretion, to assign some or all of its rights and interests hereunder. Purchaser may not assign any of his or her rights or interests hereunder.

22. SEVERABILITY

The terms and provisions hereof shall be deemed independent and severable, and the invalidity of any one provision or portion thereof shall not affect the validity or enforceability of any other provision hereof.

23. CHOICE OF STATE LAW; WAIVER OF JURY TRIAL

This Agreement shall be governed by and construed in accordance with the laws of the State of Arizona. Subject to Sub-paragraph 12(b) hereof, any legal action or proceeding arising out of or in any way relating to this Agreement shall be brought in an appropriate court of competent jurisdiction located in _____ County, Arizona, and the parties hereto, on behalf of themselves and their respective successors and assigns, hereby irrevocably submit to the jurisdiction of any such court and agree that venue properly lies in such court. EXCEPT AS OTHERWISE PROVIDED BY APPLICABLE LAW, SELLER, PURCHASER, AND ANY OTHER PERSON CLAIMING RIGHTS OR OBLIGATIONS BY, THROUGH, OR UNDER THIS AGREEMENT SHALL BE DEEMED TO HAVE WAIVED ANY RIGHT THEY MAY HAVE UNDER ANY APPLICABLE LAW TO A TRIAL BY JURY IN CONNECTION WITH ANY SUIT OR LEGAL PROCEEDING THAT MAY BE COMMENCED BY OR AGAINST ANY OF THE FOREGOING PERSONS CONCERNING THE INTERPRETATION, CONSTRUCTION, VALIDITY, ENFORCEMENT, OR PERFORMANCE OF THIS AGREEMENT OR ANY RELATED DOCUMENT OR INSTRUMENT.

24. NOTICES

Any notice that either party hereto desires or is required to give the other party under this Agreement shall be in writing and shall be deemed to have been duly given upon the earlier to occur of (a) its actual receipt; (b) three (3) business days after being deposited in the United States mail as first class mail, postage prepaid; or (c) one (1) business day after being sent via overnight courier service such as Federal Express, addressed to the applicable party at the address therefor stated herein or at such other address as the receiving party has previously notified the giving party in the manner prescribed in this paragraph. If Purchaser consists of more than one (1) person, then notice to any of them shall be deemed to constitute

notice to all of them. Unless and until written notice of an alternative addressee and address is received by the other party, the last addressee and address as stated by written notice or as provided herein, shall be deemed to continue in effect for all purposes hereunder.

25. NO RECORDATION

Under no circumstances whatsoever shall this Agreement or any portion hereof be recorded in the Official Records of _____ County, Arizona, or in the public records of any other county or other jurisdiction.

26. MISCELLANEOUS

The captions used in this Agreement are for informational purposes only and do not amplify or limit in any way the provisions hereof. Purchaser is advised to read each and every paragraph very carefully and not just the captions alone. Whenever the context so requires, the use of any gender in this Agreement shall be deemed to include both genders, and the use of the singular shall be deemed to include the plural, and the plural shall be deemed to include the singular. Time is of the essence of this Agreement and of each of the terms, provisions, and conditions hereof. No term, provision, condition, restriction, agreement, covenant, or obligation contained herein shall be deemed to have been abrogated or waived by reason of any failure by a party hereto to enforce the same, irrespective of the number of violations or breaches thereof that may occur. The exercise of any right or remedy provided by law and/or the provisions of this Agreement shall not preclude the exercise of other consistent rights or remedies unless they are expressly precluded hereby. Purchaser hereby grants Seller the right, in its sole discretion, to correct any scrivener's, typographic, or clerical errors in connection with this Agreement or any documents or instruments related hereto, provided that no such correction adversely affects any rights, benefits, or privileges afforded to Purchaser hereunder or thereunder or materially alters any duties or obligations of Purchaser hereunder or thereunder. Any such corrections shall be initialed by an authorized representative of Seller and shall be legally binding upon Purchaser, together with its successors and assigns, even though not initialed or otherwise acknowledged by Purchaser.



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Current Legal Forms for Real Estate

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Current Legal Forms for Real Estate
Chapter 20 REAL ESTATE ENTITIES
Part IV. Forms
I. TIME SHARE

24-20 Current Legal Forms for Real Estate FORM 20.87

AUTHOR: by Stephen E. Pigott and Harold O. Maxfield, Jr.

FORM 20.87 Escrow agreement for exercise of waiver of rescission rights

COMMENT

Because the sale of time share units is so intense, and many are purchased on an impulse while on vacation, most states have enacted laws granting buyers with an absolute right of rescission. That is, that after the documents are executed the buyer will have a period of time to reflect on the purchase and determine if they still want the unit. Under the typical scenario, all funds and documents are deposited into escrow with an unrelated third party escrow or title company. If the buyer does not exercise his right of rescission, then the transaction is closed. The following form is intended to comply with Arizona time share rescission laws. This Escrow Agreement has the added condition that the Project must have been completed. The condition relating to the completion of construction does not extend to time for the right of the buyer to rescind.

ESCROW AGREEMENT

THIS ESCROW AGREEMENT ("Agreement") is made and entered into as of the _____ [day] day of _____ [month] , _____ [year] , by and between STEWART TITLE AGENCY, INC., a Texas corporation ("Escrow Agent") and SUNSET DEVELOPMENT, LLC, a Delaware limited liability company ("Developer).

WITNESSETH

WHEREAS, Developer is or will be the owner of that certain property upon which it is developing a timeshare condominium project known as Sunset Resort (the "Project") more particularly described in that certain Declaration of

Dedication and Covenants, Conditions, Restrictions and Easements for Sunset Resort recorded _____, in Book _____, Page _____, Official Records of _____ County, Arizona, as thereafter supplemented or amended; and

WHEREAS, Developer desires that Escrow Agent act as escrow agent for the Project, pursuant to the terms of this Agreement and in accordance with applicable laws.

NOW, THEREFORE, in consideration of these presents and other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the parties hereby agree as follows:

1. Representations. The representations set forth above are true and correct.
2. Establishment of Escrow Account. Developer does hereby establish an escrow account with Escrow Agent for the purpose of protecting deposits made by Purchasers (herein defined as persons contracting with Developer for the purpose of acquiring Timeshare Interests at the Project).
3. Receipt and Disbursement of Escrowed Funds. _____ percent (_____%) of all funds or other property which is received from or on behalf of Purchasers, prior to the occurrence of the events required to close escrowed sales in accordance with this Agreement, shall be deposited with Escrow Agent. The funds or property may be released from escrow only as follows:

(a) Cancellation.

(i) In the event a Purchaser gives a valid notice of cancellation, pursuant to Section 32-2197.02, Arizona Statutes, or is otherwise entitled to cancel his purchase of a Timeshare Interest, the funds or property received from or on behalf of the Purchaser, or the proceeds thereof, shall be returned to the Purchaser. Such refund shall be made within twenty (20) days of demand therefor by the Purchaser or within five (5) days after receipt of funds from the Purchaser's cleared check, whichever is later. Developer shall notify Escrow Agent immediately following its receipt of a notice of cancellation.

(ii) If the Purchaser has received benefits under his Purchase Contract with Developer prior to the effective date of the cancellation, the funds or property to be returned to the Purchaser may be reduced by the proportion of contract benefits actually received, in which case written instruction of Developer shall so indicate and also instruct Escrow Agent of the amount of such reduction.

(b) Purchaser's Default. Following expiration of the seven (7) day cancellation period provided by Section 32-2197.02, Arizona Statutes, if the Purchaser defaults in the performance of his obligations under the terms of his Purchase Contract with Developer, Developer shall provide written instruction to Escrow Agent requesting release of the escrowed funds or property.

(c) Compliance with Conditions. If no cancellation or default has occurred, Escrow Agent may release the escrowed funds or property directly to Developer or its designee when the following conditions have been met:

(i) Completion of construction has occurred, or Developer has furnished Escrow Agent with evident of a current and effective surety bond which Developer has posted to assure construction completion; and

(ii) Expiration of the Purchaser's seven (7) day cancellation period; and

(iii) Closing of the application purchase has occurred.

4. Deposit of Escrowed Funds. Escrow Agent must deposit such escrowed funds in non-interest bearing accounts in institutions insured by an agency of the United States government.

5. Separate Books and Records. Escrow Agent shall maintain separate books and records for the Project and shall maintain such books and records in accordance with good accounting practices.

6. General Obligations and Duties of Escrow Agent. Escrow Agent shall maintain the accounts called for in this Agreement only in such a manner as to be under the direct supervision and control of Escrow Agent. A fiduciary relationship shall exist between Escrow Agent and Purchasers. Escrow Agent shall retain all written instructions received pursuant to this Agreement for a period of five (5) years. Escrow Agent shall deliver monthly statements to Developer, which statements shall include: the escrowed funds received for the Project and the Purchasers who made payment on the funds so deposited; the funds disbursed for the Project and to whom such funds were disbursed; and the remaining balance of funds held in escrow for the Project. Escrow Agent further agrees and hereby authorizes Developer or its agents to obtain any information relating to the escrow account established by Escrow Agent pursuant hereto directly from the financial institution in which such funds are deposited.

7. Responsibilities of Developer. Developer agrees that it shall, at all times, file all required documents with the Arizona Department of Real Estate (hereinafter referred to as the "Arizona DRE") and, at all times, comply with all terms and provisions of Title 32, Chapter 20, Article 9, Arizona Statutes, and all other federal, state, and local regulations affecting the Project. Developer does hereby agree to indemnify and hold Escrow Agent harmless for any liability of Escrow Agent which shall occur as a result of the breach or violation by Developer of any of the terms or conditions of any rules, regulations, or laws affecting the Project.

8. Disputes. In the event Escrow Agent shall receive conflicting demands for the escrowed funds or property, Escrow Agent shall immediately notify the Arizona DRE and either:

(a) With the consent of all parties, submit the matter to arbitration; or

(b) by interpleader or otherwise, seek an adjudication of the matter by a court of competent jurisdiction.

In the event of any such dispute, or in the event of any litigation arising out of any of the terms or provisions of this Agreement, Escrow Agent shall be entitled to recover its reasonable attorneys' fees and court costs at all trial and appellate levels.

9. Term of Agreement.

(a) This Agreement shall remain in effect unless and until it is cancelled in either of the following manners:

(i) Upon written notice given by Developer to Escrow Agent of cancellation, in which event the cancellation shall take effect no later than thirty (30) days after notice to Escrow Agent of said cancellation; or

(ii) Escrow Agent may resign as Escrow Agent at any time upon giving notice to Developer of its desire to do so; provided, however, that any such resignation by Escrow Agent shall take effect not sooner than thirty (30) days after the giving of such notice of resignation unless a new escrow agent has been sooner designated by Developer and all escrowed funds and property have been delivered to such new escrow agent.

(b) Upon termination of the duties of Escrow Agent in either manner described hereinabove, Developer shall immediately designate a new escrow agent, and Escrow Agent shall deliver any and all funds and other property held by it in escrow and any and all contracts or documents and copies, if not the originals, maintained by Escrow Agent to the new escrow agent.

10. Non-Exclusive Agreement. The parties hereto acknowledge and agree that nothing herein shall prohibit Escrow Agent from serving in a similar capacity on behalf of other developers; provided, however, that any other escrow accounts under Escrow Agent's supervision and control shall be maintained separately pursuant to separate books and records for each timesharing plan.

11. Notices. All notices, certificates, requests, demands, materials, and other communications hereunder shall be in writing and shall be deemed to have been duly given upon the earlier to occur of the following:

(a) When actually received;

(b) When delivery is first refused; or

(c) On the third business day following the deposit thereof in the United States mail as registered or certified mail with postage prepaid and addressed to the designated party at the following addresses:

If to Developer, to:

If to Escrow Agent, to:

12. Right of Inspection. Developer and the Arizona DRE retain the right, upon providing Escrow Agent with reasonable notice, to inspect the pertinent books and records of Escrow Agent.

13. Escrow Agent Compensation. Any compensation which Developer agrees to pay Escrow Agent for the performance of the services provided for in this Agreement shall not be paid from principal escrowed or from any interest accruing thereon.

14. Binding Agreement. This Agreement shall be binding upon Developer and Escrow Agent and their successors and assigns and may not be modified except by a written amendment to this Agreement which is executed by each of the parties hereto.

15. Effective Date. Notwithstanding anything contained herein to the contrary, this Agreement shall not be effective until the date Developer obtains record title to the Project.

IN WITNESS WHEREOF, Developer and Escrow Agent have caused this Escrow Agreement to be executed on the date first above written.

DEVELOPER:

SUNSET DEVELOPMENT, LLC, a Delaware

limited liability company

By: _____

[name and title]

ESCROW AGENT:

STEWART TITLE AGENCY, a Texas

corporation

By: _____

[name and title]



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Current Legal Forms for Real Estate

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Current Legal Forms for Real Estate
Chapter 20 REAL ESTATE ENTITIES
Part IV. Forms
I. TIME SHARE

24-20 Current Legal Forms for Real Estate FORM 20.88

AUTHOR: by Stephen E. Pigott and Harold O. Maxfield, Jr.

FORM 20.88 Special warranty deed

COMMENT

A time share may be structured as an interest in real estate. As a result, a Deed is used to convey the interest. The following form is a form Deed that was used in an Arizona time share. As always, the practitioner must review and become familiar with the laws in the jurisdiction where the time share is being offered.

FORM

SPECIAL WARRANTY DEED

SUNSET DEVELOPMENT, LLC, a Delaware limited liability company ("Grantor"), the address of which his _____, in consideration of the sum of _____ Dollars (\$_____) and other good and valuable consideration paid to Grantor by the Grantee named herein, the receipt and adequacy of which are hereby acknowledged, has GRANTED and CONVEYED, and by these presents does GRANT and CONVEY, with Special Warranty, unto Bobby Smith and Separate Property (hereinafter collectively referred to as "Grantee"), whose address is _____ [address] , the following real property situated in the County of _____ [county] , Arizona (the "Property"):

An undivided interest in Sunset Resort (the "Project"), according to the Declaration of Dedication and Covenants, Conditions, Restrictions and Easements for Sunset Resort, duly recorded in the Official Records of _____ [county] County, Arizona, in Book _____, Page _____, and

all annexations, amendments, and supplements thereto (the "Declaration"), and as shown on Arbitrary Plat _____, Page _____, together with the recurring (i) exclusive right to reserve, use, and occupy a Full Unit or Units or Partial Unit or Units within the Project; and (ii) nonexclusive right to use and enjoy the Project's Common Area and Common Furnishings, for their intended purposes, during such Fixed Use Period as is set forth below (if Grantee has purchased a Fixed Use Period) or such Use Periods as shall properly have been reserved in accordance with the provisions of the then current Rules and Regulations promulgated by Sunset Resort Owners Association, all pursuant to the Declaration. For convenience in inventory control, conveyancing, and titling, the Interval Interest is allocated to one or more specific Unit(s); however, the Grantee shall NOT have the right to use and occupy such specific Unit(s), only the right to use and occupy a Unit.

Unit No.: Flex
(Floating)

Initial Use Year:

Fixed Unit Floating Time
(if applicable):

Fixed Use Period Fixed Event (if applicable):
(if applicable):

Number of Rights (if applicable):

Suite (if applicable):

Interval Interest No. (if applicable): Undivided Interest:

The Property is hereby conveyed in "AS IS" condition subject to all latent and patent defects or conditions and, except as otherwise provided by law, WITHOUT WARRANTY, EXPRESS OR IMPLIED, regarding its condition or fitness for a particular purpose.

Grantor hereby warrants titles against all acts of Grantor, and none others, subject to liens securing the payment of ad valorem taxes for the current and all subsequent years, all assessments, reservations (including mineral reservations), outstanding mineral royalties and/or interests, rights-of-way, easements, covenants, conditions, restrictions, and all similar matters of record in the Clerk's Office of the Circuit Court of _____ [county] County, Arizona, and all applicable to the Property, and all visible and apparent easements on the ground.

All capitalized terms used herein shall have the meanings ascribed to them by the Declaration.

EXECUTED in the County of _____ [county] , _____ [state] , this
_____ [day] day of _____ [month] , _____ [year] .

GRANTOR:

SUNSET DEVELOPMENT, LLC,

a Delaware limited liability company

By: _____

[name and title]

[printed name]

STATE OF _____)
 _____) SS.
 COUNTY OF _____)

The foregoing instrument was acknowledged before me this _____ [day] day of
 _____ [month] , _____ [year] , by _____, [name and title] of
 Sunset Development, LLC, a Delaware limited liability company, on behalf of the corporation.

[notary public]

Grantee, by signing the acceptance below, evidence their intention to acquire the property as joint tenants with right of survivorship or as community property with right of survivorship (whichever is stated in the first paragraph of this deed) and not as community property or as tenants in common.

GRANTEE:

By: _____

[name and title]

[printed name]

STATE OF _____)
 _____) SS.
 COUNTY OF _____)

The foregoing instrument was acknowledged before me this _____ [day] day of
 _____ [month] , _____ [year] , by _____, [name]

[notary public]



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Current Legal Forms for Real Estate

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Current Legal Forms for Real Estate
Chapter 20 REAL ESTATE ENTITIES
Part IV. Forms
I. TIME SHARE

24-20 Current Legal Forms for Real Estate FORM 20.89

AUTHOR: by Stephen E. Pigott and Harold O. Maxfield, Jr.

FORM 20.89 Rules and regulations of use of resort

COMMENT

The use and operation of the resort is generally governed by Rules and Regulations. Each unit owner must comply with these in connection with the use and enjoyment of the property which is subject to the time sharing. (References to the "Declaration" are references to Form 20.82.)

FORM

RULES AND REGULATIONS

SUNSET RESORT

The following Rules and Regulations have been established for the benefit of all Owners.

All of these Rules and Regulations are subordinate to the Declaration of Dedication and Covenants, Conditions, Restrictions and Easements for SUNSET RESORT (the "Declaration"). In the event there is a conflict between the Declaration and these Rules and Regulations, the Declaration shall control.

1. DEFINITIONS

The terms used in these Rules and Regulations shall have the same meanings set forth in the Declaration. To assist you

in reading these Rules and Regulations, some of the definitions contained in the Declaration are repeated or paraphrased below. Several definitions not contained in the Declaration are also included.

1.1. "Assigned Unit" means any unit, the use and occupancy of which has been assigned to an Owner in accordance with the provisions of these Rules And Regulations.

1.2. "Association" means Sedona Summit Resort Owners Association, whose Members are the Owners.

1.3. "Board" means the Board of Directors of the Association.

1.4. "Holdover User" means any Owner or Permitted User who fails to vacate a unit by 11:00 a.m. (MST) on the scheduled Check-Out day will be considered a Holdover User.

1.5. "Interval" means a floating period of approximately one week.

1.6. "Lockout" means the double locking door in each Unit that allows separation of occupancy of the Unit into a Master Suite and a Privacy Suite.

1.7. "Managing Agent" means an Agent appointed by the Association to which the Association has delegated the power to perform all the duties and obligations of the Association.

1.8. "Master Suite" means that portion of a Unit separated by a Lockout from the balance of the Unit and consisting of a living area, kitchen, bedroom, and bathroom.

1.9. "Owner" means and includes (a) the grantee or grantees named in the original Deed to any interval Interest, and (b) the successor to each person described in clause (a).

1.10. "Permitted User" means any person whom you permit to occupy a Unit or the Common Area during a properly reserved Use Period.

1.11. "Privacy Suite" means that portion of a Unit separated by a Lockout from the balance of the Unit and consisting of a bedroom, bathroom, and wet bar area.

1.12. "Reservation Date" means the day on which an Owner's request for a reservation is received by the Association.

1.13. "Resort" means Sunset Resort.

1.14. "Seasons" means (a) the exchange "season" assigned to particular weeks by Resort Condominiums International, which presently designates all weeks of the year as "Prime Season" or "Red Weeks" at the Resort; and (b) the reservation "season" to which a week is assigned for purposes of determining the number of Rights necessary to reserve occupancy of a Unit at the Resort during that week, as more particularly set forth on Exhibit "A" of these Rules and Regulations.

1.15. "Service Period" means a period of seven (7) days, not necessarily consecutive, during each Use Year used for cleaning, maintenance, and repair of Units by the Association.

1.16. "Split Unit" means an Assigned Unit the use and occupancy of which has been assigned to an Owner in accordance with the provisions of these Rules and Regulations where the Use Period is split into two (2) separate one week Use Periods consisting of one Use Period in a Master Suite only and a one week Use Period in the Privacy Suite only.

1.17. "Split Week" means an Assigned Unit the use and occupancy of which has been assigned to an Owner in accordance with the provision of these Rules and Regulations where the Use Week has been split into two Use Periods, one consisting of three (3) days, and one consisting of four (4) days.

1.18. "Use Period" means the time, period or periods for which an Owner is entitled to use and occupy a Unit as set forth in paragraph 2.1 of the Declaration of Dedication and Covenants. Conditions, Restrictions and Easements.

1.19. "Use Week" means the Use Period(s) in an Owner's Season during which an Owner has reserved the use and occupancy of a Unit in accordance with the provisions of the Declaration and these Rules And Regulations.

1.20. "Use Week" also means one of the numbered one-week periods commencing at 4:00 p.m., MST, on the scheduled Check-In day (day 1) and ending at 11:00 a.m., MST, on the scheduled Check-Out day (day 7). At Sunset Resort Use Weeks may be reserved for Check-In dates beginning Friday or Saturday subject to availability. The day of the week on which the Use Week commences and ends is subject to change from time to time upon reasonable notice from the Association.

1.21. "Use Calendar" means the calendar of Use Periods or Use Weeks published from time to time by the Association.

1.22. "Use Year" means each one year period commencing with the first day of the scheduled Use Week in January and ending on the 7th day of the fifty-second week thereafter, except for the years with fifty-three weeks, in which case the year shall end on the seventh (7th) day of the fifty-third week thereafter. The Use Year for a Biennial Interval Ownership Interest (odd year) shall commence in January of odd-numbered years and the Use Year for a Biennial Interval Ownership Interest (even year) shall commence in January of even-numbered years

GENERAL INFORMATION

2.1. Amendment

The Association may amend these Rules And Regulations from time to time with a majority vote of the Board of Directors.

2.2. Biennial Intervals

Biennial Interval Owners, own either even or odd year usage. They will be permitted to use their Interval in either an even or odd year as designated by their ownership, provided their entire maintenance fee is paid prior to usage. The full Annual Maintenance Fee amount must be paid prior to the first year usage. Every year thereafter, it will be billed annually at the rate of one-half the full annual maintenance fee in the amount of the then applicable Unit Maintenance Fee plus a \$10.00 service charge, assessed yearly in accordance with the annual assessment policy. Biennial Intervals and Biennial Interval Owners are treated the same as Annual Intervals and Annual Interval Owners under these Rules and Regulations except that their usage is every other year rather than annually and their voting rights are halved.

2.3. Check-In And Check-Out Procedures

Check-In shall commence at 4:00 p.m. (MST), and Check-Out Time shall be 11:00 a.m. (MST). The five (5) hour period from 11:00 a.m. (MST) and 4:00 p.m. (MST) between Use Periods is reserved exclusively as a service for cleaning, repair, and maintenance of the Unit. Use Periods, as designated in the Use Calendar, shall commence at Check-In Time and shall terminate at Check-Out Time.

A _____ Dollars (\$_____) fee will be charged for each hour, or fraction thereof, that the Unit is occupied after the Check-Out time of 11:00 a.m. (MST). If the Unit is occupied past 1:00 p.m. (MST) on Check-Out day, the provisions of the Failure to Vacate rules will be enforced (please see Section 3.7).

2.4. Housekeeping Service

Housekeeping service is provided without additional charge to assure that your Assigned Unit will be clean and neat at the commencement of your reserved Use Week and once during the reserved Use Week. Additional housekeeping service is also available to you for an additional charge. You may arrange for such additional housekeeping service by contacting the Front Desk. In the event you or your Permitted User's occupancy of an Interval Unit shall cause additional housekeeping services to be required over and above that which is would normally be needed to prepare the Unit for the next occupant, a charge shall also be made for such additional housekeeping service. Charges for additional housekeeping services shall be payable upon departure.

2.5. Inventory of Interior Furnishings and Equipment

During the Service Period between Use Periods, a complete inventory of the furnishings and equipment allocated to each Interval Unit will be conducted. At Check-in you will find an Inventory List in your Unit. Any items which are found to be missing or damaged following your departure, or the departure of your Permitted User, will be charged to you. Thus, you should make a careful inspection of the items shown on the Inventory List to protect yourself from unwarranted charges. During your use and occupancy of your Assigned Unit, please report any damage to or loss of any items of the Common Furnishings to the Housekeeping Manager as soon as possible.

2.6. Pass Key

The Resort Manager is provided with a pass key to all rooms. In case of emergency, the Manager or his/her employee may enter your Assigned Unit, and, in such case, shall notify you, as soon as reasonably possible, of the reason for such entry.

2.7. Maximum Occupancy

The maximum allowable occupancy for a one bedroom Unit is four (4) persons. The maximum allowable occupancy for a Studio Unit is four (4) persons. The maximum allowable occupancy for a two bedroom Unit is eight (8) persons.

2.8. Guests

You may permit another person to occupy an Assigned Unit during the Use Period reserved by you without charge from the Association. You may invite guests to share occupancy of your Assigned Unit during any of your Use Period(s), provided that maximum allowable occupancy limits are not exceeded.

If you intend for a guest to use your reserved Use Period, you must inform the Association in writing prior to the first day of the Use Period, indicating the name(s) and address(es) of the guest(s). Upon Check-In, the guest(s) will be required to show proof of identification and sign a registration card. The Resort Manager will not allow access to any Interval Unit without written permission from the Owner in whose name there is a confirmed reservation.

Persons under 21 years of age, who are not Owners, shall not be permitted to use and occupy the property unless accompanied by you or a Permitted User over the age of 21 years old.

Owners are responsible for any charges incurred by Permitted Users which are left unpaid at Check-Out time.

2.9. Personal Charges

All charges by Owners and/or Permitted Users must be paid upon Check-Out. At Check-In, both Owners and Permitted Users will be required to present a valid credit card to be imprinted and signed. If an Owner has made a reservation for a Permitted User the Owner will be responsible for any charges not paid by such Permitted User.

A service fee in excess of market rates will be charged on all telephone calls, local and long distance. A service fee will be charged to you for each necessary billing from the Association. Non-payment of personal charges may result in rejection of future reservation requests or in the suspension of your use and Association voting privileges as provided in the Declaration. The Owner is responsible for any charges accrued by Permitted Users or guests.

3. GENERAL USE RESTRICTIONS

3.1. Violations

Failure to abide by these Rules And Regulations or the terms and conditions contained in the Declaration or the Purchase Agreement may result in suspension of your rights and privileges as an Owner and/or the Assessment of monetary penalties.

3.2. Non Smoking Units

Management has designated certain Units as Non-Smoking Units. Violators are subject to a monetary fine of not less than \$250.00, as set forth by the Board of Directors from time to time.

3.3. Medical Assist Dogs

No animals, other than guide dogs or service dogs meeting the requirements of *A.R.S. Sec. 11-1024*, may be brought onto the Property. Notification at the time of reservation, that a guide dog or service dog will be accompanying an Owner or permitted User is necessary, followed by written notice prior to arrival. Failure to abide by the Rules and Regulations regarding the prohibition of pets on the Property will result in the suspension of the Owner's Use rights and privileges, the denial of future access to the Property without first meeting with a member of the Board of Directors, the payment of a cleaning fee, as set forth by the Board of Directors from time to time, and eviction upon discovery.

3.4. Building Modifications

No structural changes, reorganization or removal of furniture, wall hangings, or floor coverings or redecorating of any type within the Assigned Units or other areas of the property are permitted to be made by any Owner or Permitted User.

3.5. Control of Children

Parents are to be responsible for the conduct of their children. Unsupervised children under the age of twelve (12) will not be permitted to play in the parking areas, the lobby or any other portion of the Common Areas designated by the Association. You shall be responsible during your Use Period for any loss or damage to the Property and the Common Furnishings caused by an act, whether intentionally or by negligence, by any minor Permitted User(s).

3.6. Care of Interior Furnishings And Equipment

When an Owner or Permitted User uses an Assigned Unit, the Owner is responsible for any damage done to the Assigned Unit and its furnishings during the Use Period, other than the normal wear and tear. Any Common Furnishings which are required to be replaced as a result of any damage done during your Use Period shall be charged

for, based upon the most recent replacement cost list supplied to the Association by the Manager. Any non-reimbursed charges for damage or loss will be added to your bill at Check-Out time or will be billed directly to you along with a service fee as established above. Non-payment of such a charge will be cause for suspension of use privileges until such charge has been paid. You should report any damage or deterioration of your Assigned Unit or its Common Furnishings to the Front Desk as soon as possible after checking in. The Owner is responsible for all charges incurred by Permitted Users and Guests.

All Owners and their Permitted Users shall be responsible for removing all their personal property from their Assigned Unit at Check-Out time.

3.7. Failure to Vacate

Any Owner or Permitted User who fails to vacate an Interval Unit by 11:00 a.m. (MST) on the scheduled Check-Out day will be considered a Holdover User, and as such, you may experience severe consequences as set forth in the Declaration which may include one, or both of the following:

Payment of an administrative Fee, as determined by the Board of Directors, of not less than _____ Dollars (\$_____) per day for each day or portion of a day that the Owner or Permitted User occupies an Assigned Unit after the expiration of a Use Period.

Payment of the cost of travel and comparable alternative lodging for the next Owner or Permitted User to occupy the Assigned Unit for the next Use Period who is denied occupancy as a result of an Owner or Permitted User's failure to vacate the Assigned Unit at the end of a Use Period.

3.8. Over-sized Vehicle Parking

Parking space on property is very limited. All requests for parking of motor homes, trailers or any other over-sized vehicle must be made in advance with the Managing Agent. Parking for passenger vehicles is provided free of charge. Parking for over-sized vehicles is not guaranteed under any circumstances.

3.9. Bad Check Policy

A check submitted for payment of any charges, which is drawn on an account and returned for insufficient funds, will not be considered a payment. Such a check will be subject to the appropriate bank charges plus a service fee.

3.10. Alcoholic Beverage Statement

The Resort does not sell, serve or furnish alcoholic beverages of any kind and does not have a license to do so. Owners/Permitted Users shall take full responsibility for their consumption of alcoholic beverages on the Resort premises and for complying with the alcoholic beverage laws. Owners/Permitted Users shall not conduct themselves in any way which would constitute a nuisance to guests who are not members of their party.

4. GENERAL RESERVATION PROCEDURES

4.1. All reservations will be honored on a first-come, first-serve basis.

4.2. An Owner of a Flex Interval Ownership Interest ("Flex Owner") may reserve, each Use Year, an Assigned Unit (though not necessarily any particular Unit) for one (1) or more Use Periods (though not necessarily any particular Use Period) until the Owner's annual allotment of Rights is fully expended. Each Owner shall be allotted a number of Rights equal to the numerator of the Owner's undivided interest in the Unit(s) described on the Owner's Deed (for example, an

owner of a 10,000/532,000 interest in a particular Unit or a 10,000/5,320,000 interest in a group of ten (10) Units would have an allotment of 10,000 Rights each Use Year). Each Owner may use the Owner's Rights each Use Year to reserve one (1) or more Use Periods in accordance with the Rights Table attached to these Rules and Regulations as Exhibit "A."

4.3. Any request for a Use Period cannot be made until the entire Maintenance Fee for the Use Year being requested, has been paid in full. For example: If your Maintenance Fees have been paid for _____ [year] and you are requesting a Use Period in _____ [year], you must prepay the _____ [year] Maintenance Fee.

4.4. Reservations for a Use Period of at least seven (7) consecutive nights may be requested three hundred sixty-five (365) days prior to the first day of the Use Period. Reservations may be made up to sixty (60) days prior to the desired Check-In date. If you own more than one (1) interval, you may request consecutive Use Periods and every effort will be made to accommodate such requests. If you own a Fixed Time Interest you still must make a reservation at least twenty-one (21) days prior to the beginning of your Use Period or you may lose the use of your Interval Interest for that Use Year.

4.5. Reservation for Split Week use of less than seven (7) consecutive nights may be requested at least sixty (60) days but not more than one hundred eighty (180) days prior to the first day of the Use Period desired. Your maintenance fees for the Use Year must be current. If you own an Annual or Biennial Interval Interest, you may divide your week into a three (3) day visit and four (4) day visit, however, you may not bank a Split Week.

As an Annual or Biennial Interval Interest Owner at the Sedona Summit Resort, your start days for Split Week use would be:

Friday Check-In: Three (3) day visit; Friday, Saturday, and Sunday night visit
 Four (4) day visit; Monday, Tuesday, Wednesday, and Thursday night visit
 Saturday Check-In: Three (3) day visit; Saturday, Sunday and Monday night visit
 Four (4) day visit; Tuesday, Wednesday, Thursday and Friday night visit

At the time the request is made, the cost of a Split Week fee, as determined by the Board of Directors, will be charged to a valid credit card. There is a 21 day cancellation policy. You may cancel your reserved period without penalty by giving notification to the reservation department at least twenty-one (21) days in advance of your first day of Check-In. Flex Owners may start their stay on any day, but a minimum stay of two (2) nights is required.

4.6. If any of your seven (7) days or Rights are not used in any Use Year, there shall be no accrual or carry over of unused time.

4.7. If you own a two-bedroom of Full Interval Interest, you may submit a reservation request to split your two (2) bedroom unit into a one (1) bedroom and a studio unit for separate use. At the time the request is made, the cost of a Split Unit fee, as determined by the Board of Directors, will be charged to a valid credit card.

4.8. Cancellation of any Owner Use Period must be made at least 21 days prior to Check-In time of the first day of the scheduled Use Period reserved. In the event a cancellation is made less than 21 days prior to Check-In, that Owner Use Period will be forfeited.

4.9. Reservation Information

Below are listed the different ways you may request reservations.

(a) Telephone ()..... or ().....

(b) Written request mailed to:

Sunset Resort

Attn: _____

(c) In person at the reservation office.

4.10. Notwithstanding anything set forth in these Rules and Regulations or elsewhere to the contrary, an Owner who is a member of Club Sunset shall be subject to the reservation system established within the rules and regulations of Club Sunset, as the same may be amended from time to time, and shall not be subject to the reservation system established above.

5. DAY USE

Although not specifically provided for in the Declaration, the Association allows for day use of on-site amenities by Owners not occupying a Unit during an assigned Use Period ("Day Use"). The facilities which may be used on this basis are the clubhouse, pool house, fitness center, game room, pools, spas and barbecues.

5.1. Day Use Procedure:

Day Use of the Resort is available on a pre-reserved basis ONLY. Reservations may be made at least twenty-four (24) hours in advance and will be available on a first-call, first-reserved basis. Front desk personnel will take Owner's name, number of guests in party and approximate arrival time. Persons under the age of 21 must be accompanied by an adult Owner (at least 21 years of age) and unsupervised minor children will not be permitted to remain at the Resort.

5.2. Day Use Capacity:

A maximum of twenty (20) persons may use Day Use at any one time with no more than four (4) persons in any one party (including Owners). Owners must be present with guests at all times. Day Users are subject to the Rules and Regulations.

5.3. Day Use Check-In:

Hours will be 8:00 AM to 10:00 PM. Owners and guests must register at the front desk and are requested to check-out prior to departure. A "no-show" list will be maintained at the front desk. An Owner who "no-shows" twice within one year will be notified by mail that no Day Use reservation will be taken for a three-month period after notification.

5.4 Golf Vouchers

Sunset Resort Owners must obtain a punch card for Golf Vouchers at the Sunset Resort. Punch cards are valid for one (1) calendar year. The punch cards must be presented to obtain Golf Vouchers. The Golf Vouchers are available at the Sunset Resort and The Mountain Golf Resort.

Golf Vouchers include use by the Owner, spouse and children of Owner, and may be used at any time. Persons other than Owner, spouse or children of owner may use Golf Vouchers only when staying as a guest with Owner in a unit at the Sunset Resort that has been properly reserved as a Use Period or for Bonus Time.

Punch cards are issued based on one voucher, per interval day, per year of Sunset ownership. Bi-annual owners will receive four (4) vouchers per year. Club members, who are owners at the Sunset Resort are entitled to receive vouchers based on the number of interval days that are equivalent to the number of Options or Rights owned per year.

Restrictions for Golf Vouchers, include, but are not limited to:

- (a) Only one (1) voucher may be issued per day.
- (b) Only four (4) players per voucher.
- (c) From time to time Vouchers are available for other golf courses.

Owner must be in good standing with an active Sunset Ownership Contract and Maintenance Fees paid up to date.

Owner agrees that owner, spouse, children are permitted guest(s) will comply with any rules or regulations that may be adopted by the participating golf courses.

6. BONUS TIME USE

Subject to availability, and all terms and conditions contained in the Declaration and these Rules and Regulations, you may reserve additional time periods ("Bonus Time") other than your basic entitlement of seven (7) nights per Interval owned or the Rights owned by you, provided you have reserved such use and occupancy in accordance with the following procedures:

6.1. Reservations may be made up to twenty-one (21) days in advance. You may not have more than one (1) outstanding Bonus Use reservation at any time. Reservations for Bonus Time are subject to availability and availability is based upon unreserved owner space.

6.2. Bonus Time reservations can be made for a maximum of seven (7) nights subject to availability.

6.3. Reservations made for Bonus Time shall be honored on a first-come, first-serve basis and may be made by telephone or in person.

6.4. A valid credit card number must be given at the time a reservation is made to guarantee the reservation. Once your Bonus Time has been confirmed, if you fail to occupy your Bonus Time Unit, you will be billed for the confirmed Bonus Time charges unless you follow the proper cancellation procedures. The 48 hour cancellation policy will be adhered to or the credit card will be charged.

6.5. Cancellation of Bonus Use must be made forty-eight (48) hours prior to check-in time of the first day of the Use Period reserved. In the event a cancellation is made less than forty eight (48) hours prior to check-in, your credit card will be charged the daily Bonus Time rate for the entire unused time. These charges are non-refundable.

6.6. You may reserve Bonus Time on a Holiday weekend subject to availability, however, there is a three (3) night minimum requirement for a four day holiday weekend and a two (2) night minimum requirement for a three day holiday weekend.

6.7. Reservation requests for Bonus Time will not be considered if you are not current in all charges to the Association, Developer, Management Company, or associated entities.

6.8. If you reserve a Unit for Bonus Time, you will be charged a reasonable rental therefore, which rental will be fixed from time to time by the Association. All rental revenues generated by Bonus Time of interval Units will be deposited in the General Account of the Association.

6.9. Bonus Time may be used by an Owner or any member of his immediate family. Immediate family is defined as being parents, spouses, or children of an Owner. All Bonus Time reservations must be made by the Owner, even though it may be for the use by their family.

An Owner who is a member of Club Sunset may be given a discounted Options values program (for 30-day or less in advance reservations, subject to availability) instead of or in addition to Bonus Time.

7. MISCELLANEOUS

7.1. Use of the Pool/Spa Facilities

Use hours and rules are posted at the pools/spas. Use of the facilities is solely at your own risk. No lifeguard will be on duty. Children under the age of twelve (12) are not permitted in the pool/spa areas unless accompanied by an adult. Hours and rules are, subject to change at the discretion of the Managing Agent. Any person violating any of these rules will be denied use of the facilities.

7.2. Employee Relations

The Association has employed personnel who are responsible for maintenance of the Property and Units and all duties necessary to make your stay at the Resort pleasant and comfortable. All employees at the Resort are under the sole direction of the Manager, and, during working hours, shall not be diverted to the employment of any Members. Complaints regarding employees made by Owners/Permitted Users and for assistance from employees should be made to the Resort Manager or his/her designated assistant.

8. SAFETY AND HEALTH RULES

8.1. The Association reserves the right to establish specific rules governing such potentially loud or disturbing activities as use of musical instruments, stereo equipment, or late-evening entertaining or any activity that may disturb the peaceful enjoyment of the Resort by other Owners and guests.

8.2. Any recreational or sporting equipment including, but not limited to roller blades, in-line skates, skateboards, "go-peds" and bicycles is strictly prohibited on walkways, at entrances to Units, in BBQ areas, around pools and spas and any other areas designated by the Managing Agent.

8.3. Use of all recreational facilities is at User's risk.

8.4. No dangerous, illegal, or offensive activities may be conducted in any Unit or in any Common Area at any time

8.5. The Managing Agent shall enforce these Health and Safety Rules at its discretion.

9. ASSESSMENTS

9.1. As more fully provided in the Declaration, each member is obligated to pay to the Association annual and special assessments, which are secured by a continuing lien upon the Interval Interest against which the assessment is made. Any assessments, which are not paid when due, shall be delinquent. If the assessment is not paid within ten (10) days

after the due date, the assessment shall bear interest from the date of delinquency at the rate of ten percent (10%) per annum, and the Association may bring an action at law against the Owner personally obligated to pay the same and the Association may file a lien and may foreclose the lien against the property, and interest, costs, and reasonable attorney's fees of any such action shall be added to the amount of such assessment. No Owner may waive or otherwise escape liability for the assessments provided for herein by non-use of any Common Area or abandonment or non-use of the Owner's Interval Interest.

9.2. The Declaration provides that in lieu of using the formula set forth in paragraph 5.1.1 of the Declaration for determining each Interval Ownership Interest Owner's Proportionate Share of Basic Expenses, the Board or the Declarant may adopt a flat and uniform Basic Assessment amount per Right owned by a Interval Ownership Interest Owner, so long as Interval Ownership Interest Owners pay an Assessment that is proportionately equal to or greater than that paid by Owners of other types of Interval Interests. Without limiting the Board's or the Declarant's right to make future modifications in the method of determining Basic Assessments, and notwithstanding anything contained in the Declaration to the contrary, the Board has adopted a simple flat and uniform Basic Assessment amount per Right owned by a Interval Ownership Interest Owner.

9.3. The Per Right Basic Assessment amount represents the total Basic Expenses for the Resort divided by the number of Units in the Resort multiplied by the number of Rights allocated per Unit. For example, if there are 99 Units in the Resort and if the total Basic Expenses for the Resort were \$2,900,000 and if there were 532,000 Rights per Unit, then the per Right annual Basic Assessment would be \$0.055062 ($\$2,900,000 \text{ in Basic Expenses for the Resort} = 99 \text{ total Units in the Resort} = \$29,292.93 \text{ in Basic Expenses per Unit}$ $532,000 \text{ Rights per Unit} = \$0.055062 \text{ Basic Assessment per Right}$). If an Owner owned 10,000 Rights, the Owners annual Basic Assessment would be \$550.62. These numbers are illustrative only, and assessment amounts will generally increase annually.

9.4. The actual per Right Basis Assessment amount will be provided by the Association annually with the Association Budget.



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Current Legal Forms for Real Estate

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Current Legal Forms for Real Estate
Chapter 20 REAL ESTATE ENTITIES
Part IV. Forms
I. TIME SHARE

24-20 Current Legal Forms for Real Estate FORM 20.90

AUTHOR: by Stephen E. Pigott and Harold O. Maxfield, Jr.

FORM 20.90 Management agreement

COMMENT

As discussed above, the typical time share scenario involves the association engaging a management company to manage the resort.

FORM

MANAGEMENT AGREEMENT

THIS MANAGEMENT AGREEMENT (the "Agreement"), made and entered into as of the _____ day of _____, by and between SUNSET RESORT OWNERS ASSOCIATION with a mailing address at: _____ [address] , _____ [city] , _____ [state] (hereinafter referred to as the "Association"), and RIP MANAGEMENT, INC. with a mailing address at: _____ [address] , _____ [city] , _____ [state] (hereinafter referred to as "Manager"), regarding the management of the resort development known as: SUNSET RESORT which is located at _____ [address] , _____ [city] , _____ [state] .

WITNESSETH

WHEREAS, the Association is responsible for operations of the Development (hereinafter referred to as the "Development").

WHEREAS, the Association and Manager desire to agree on terms for Manager to provide management services to the Development.

NOW, THEREFORE, for and in consideration of the mutual promises contained herein the parties hereto agree as follows:

1. Definitions. The governing documents for the Development establishing the plan for interval vacation ownership for the Development are listed in the attached Exhibit "A" incorporated herein by reference and are herein collectively referred to as the "Project Instruments," unless the context requires otherwise. This Agreement pertains to all residential dwellings (hereinafter referred to as the "Units") now or hereafter submitted to the Project Instruments. The term "Owner" as used in this Agreement shall refer to persons (other than temporary tenants, invitees, licensees, or mortgagees) who are fee or leasehold titleholders of the Units. The term "Vacation Interval" is used in this Agreement to refer to the annual or biennial period of time of less than one-year during which an Owner has the right of occupancy of a Unit.

2. Engagement of Manager. The Association hereby engages Manager, to the exclusion of all others, to perform the services described herein to manage the Development, and Manager hereby accepts such engagement on the terms and conditions herein set forth. Manager shall perform its duties and responsibilities hereunder strictly as an independent contractor, and neither the execution of this Agreement nor the performance hereof is intended to be, nor shall it be construed as, evidencing the formation of a partnership, joint venture or similar agreement between the Association and Manager.

3. Term and Renewal. The "Initial Term" of this Agreement shall commence as of the date hereof and continue through December 31 of the year noted in Paragraph 14 as the "Initial Term Expiration Year." This Agreement shall automatically renew for successive Renewal Periods unless either party hereto shall give the other written notice of a nonrenewal not less than ninety (90) days prior to the Expiration Date; provided, however, that the Association may not give notice of nonrenewal unless such notice is authorized by the vote and consent of not less than a majority of the Units voting at a meeting where not less than two-thirds of the Units are present (unless a lesser vote is required by the Project Instruments or applicable law in which case such lesser vote shall be required). Each "Renewal Period" shall be for the number of years noted in Paragraph 14 hereof as the "Renewal Years." The "Expiration Date" shall be December 31 of the Initial Term Expiration Year or December 31 of the last year of each Renewal Period, as applicable.

Manager shall have the right, at any time either during the Initial Term or thereafter to terminate management under this Agreement upon sixty (60) days' notice to the Association. The Association shall use commercially reasonable efforts to execute a replacement management agreement within the sixty (60) day period. If the Association has not entered into a replacement management agreement within such sixty (60) day period, Manager agrees to continue to perform its obligations hereunder for an additional thirty (30) days (a total of 90 days after the initial notice), at which time its management under this Agreement shall terminate.

Failure of Manager to substantially perform its duties and obligations under this Agreement, or to commence to cure any default thereunder, for a continuous period of sixty (60) days after written notice of default from the Association, specifying the default complained of, shall be grounds for the Association to terminate this Agreement as its sole remedy. In no event shall Manager be liable to the Association or Owners for damages for nonwillful, nonfraudulent or nongrossly negligent acts, errors or omissions exceeding the Management Fee earned by Manager during the twelve (12) month period immediately prior to the occurrence of Manager's default, except as heretofore provided. Upon termination of this Agreement, for any reason, Manager agrees to promptly prepare a summary of all fees due through termination, and Association agrees to pay such fees within fifteen (15) days of presentation of the summary.

4. Brand Display. In performing its services under this Agreement, Manager intends to employ the systems, techniques,

and expertise developed by it and its affiliates in management of Vacation Interval properties. In the performance of its services, Manager may, but shall not be obligated to, identify the Development as a "Managed Resort."

The parties acknowledge that all of Manager's intellectual property related to its management for the Association and the Owners, including but not limited to any and all computer hardware and software provided by or obtained through Manager (the "Proprietary Materials"), is and always shall be the property of Manager. The parties expressly agree that upon termination of this Agreement due to the expiration of its term, cancellation or default, the Association shall cease using and thereafter abstain from using any Sunset-branded (collectively, "Branded Materials") or Proprietary Materials and shall return any Branded Materials and Proprietary Materials in its possession to Manager within fifteen (15) days after termination of this Agreement.

5. Powers and Duties. The Association hereby delegates to Manager, to the exclusion of all persons including the Association and its members, all the powers and duties of the Association as set forth in the Declaration (except those which cannot be delegated as a matter of law). This delegation in no way relieves the Association's officers and directors of the fiduciary obligations owed by them to Owners under applicable law. Manager shall, among other things including those duties set forth on the Fee Addendums attached hereto, perform the following services in the estimated frequency of performance set forth on Exhibit "B" attached hereto, or otherwise as agreed to between Manager and the Association:

5.1 Budget. Manager shall prepare: (i) a recommended operating budget setting forth an itemized statement of the anticipated receipts and disbursements for each year, based upon the then-current schedule of maintenance fees, assessments, Development fees, membership fees and other budgeted amounts due from the Owners to the Association (collectively "Assessments") and taking into account the general condition of the Development and/or Units; (ii) a capital expenditure budget; and (iii) a forecast of cash flow to and from current expense and capital replacement reserve funds (collectively, the "Budget"). The Budget shall be submitted to the Board of Directors in final draft at least sixty (60) days prior to the commencement of the year for which it has been proposed, or such shorter period of time as may be required by applicable law. Upon approval thereof by the Board of Directors, the Budget shall determine the schedule of Assessments.

5.2 Resale Programs. Association hereby grants to the Manager, or any affiliate of the Manager, as Manager may designate, the exclusive right to occupy the common areas of the Development and access areas of the Development for the purpose of providing any resale program to Owners and the Association, as well as for the provision of guest services, concierge services, time share or other vacation interval sales programs, as well as displaying any advertising or other promotional material with respect to any such programs. The Association agrees not to enter into any agreement with any other party with respect to the provision of such services without the prior written consent of the Manager.

5.3 Collections

Manager shall bill and collect from the Owners on behalf of the Association, based upon the Budget, all Assessments, real estate and other taxes (unless billed separately to each Owner) and any other amounts due and owing the Association or a third party pursuant to the provisions of any applicable law or the Project Instruments. All Assessment payments by an Owner shall be applied as to interest, delinquencies, costs and attorneys' fees, other charges, expenses and advances as provided herein and in the Project Instruments.

Manager may charge and collect for such purposes and against such parties as Manager determines, to the same extent that the Association is required or permitted by the Project Instruments or applicable law to do so. Manager is authorized to charge and collect from any Owner(s) the cost of providing special services on behalf of and at the request of such Owner.

Manager shall have the authority on behalf of the Association to utilize such means as may be established by law or the Project Instruments for collecting any delinquent amounts. Manager shall furnish the Association with an itemized list of all delinquent accounts overdue more than sixty (60) days, if requested. The Association shall aid and assist Manager in collecting Assessments and other amounts in any reasonable manner requested by Manager. Manager may, on behalf of the Association, file a lien against an Owner's Unit or Vacation Interval should such Owner fail to pay any Assessments or other amounts due, pursuant to the Project Instruments, and may take such other action as is permitted by the Project Instruments, in the name of or as agent of the Association. Manager may compromise liens in such amount(s) as it deems advisable, in its sole discretion, and may satisfy liens of record and render statements as to the current status of an Owner's account. To the extent permitted by law and subject to the requirements of the Project Instruments, Manager may suspend a delinquent Owner's right to use (or allow others to use) such Owner's Unit or Vacation Interval. The Association agrees to defend, indemnify and hold Manager harmless from and against any and all claims asserted against Manager, its agents, employees or affiliates, arising out of or in connection with any such suspension.

5.4 Records

Manager shall maintain the Association's financial record books, accounts and other records as required by the Project Instruments, and issue certificates of account to Owners and their mortgagees and lienors, without liability for errors other than as a result of gross negligence. Such books and records of the Association shall include records of the Association's receipts and disbursements, an individual account for each Owner designating such Owner's name and address and the amount of any assessments or other amounts paid by and/or due from such Owner, and a list of the names and current mailing addresses of all Owners and their mortgagees as provided by the Owners. Manager shall maintain records to describe its services hereunder and such financial books and records to identify the source and the disbursement of all Association funds collected by Manager. Manager shall make the Association's accounting records available for inspection and reproduction by the Owners, at reasonable times, in the office of Manager; provided, however, that Manager may charge the Owner or its authorized representative such reasonable reproduction fee as the Board from time to time establishes.

Manager shall also prepare and have available for each Owner for inspection any financial report required by the Project Instruments within one hundred fifty one (151) days following the end of each fiscal year (or such earlier date as may be required by applicable law). In addition, Manager shall make available at the required times to the Association or Owners, as applicable, any reports or other documents as may be required by the Project Instruments or any applicable law.

If required by the Association or by law or the Project Instruments, Manager shall arrange for an annual independent audit of all the books maintained for Association by Manager, to be conducted at the Association's expense by a certified public accountant. Subject to the prior direction and approval of the Board, Manager shall select an accountant to prepare the Association's annual tax returns. True and correct copies of such tax returns shall be available for inspection by the Owners of the Association in the office of Manager during normal business hours.

Manager is authorized to make available for inspection by any applicable governmental agency all books and records of the Association, upon the request of said agency, and file with said agency any and all reports and information requested and required by law. Manager is authorized to provide to any applicable governmental agency, upon request, a complete list of the names and addresses of all purchasers and Owners of interests in the Development.

5.5 Accounts Manager shall deposit all funds collected from all sources in the accounts of the Association or in special bank accounts (collectively the "Accounts") in federally insured banks and/or savings and loan associations, with suitable designation indicating their source; provided, however, that all sums collected by Manager for Assessments to the Development may be commingled in a single fund or divided into more than one (1) fund, as determined by Manager, but may not be commingled with any other funds or accounts of Manager or otherwise; provided, further, that

Manager shall maintain a separate account for reserve funds and shall not commingle reserve funds with the operating funds for a period in excess of thirty (30) days. Manager is authorized to withdraw such funds from the Accounts as required to pay expenses pursuant to Paragraph 6. Manager shall maintain fiduciary bonds normally required of management agents as required by law.

5.6 Maintenance

Manager shall arrange for the regular cleaning, maintenance and repair of the common elements of the Development and the Units committed to Vacation Ownership and the contents thereof for which the Association has maintenance responsibility. Manager shall cause such maintenance to be performed in conformity with good maintenance practices; provided, however, that Manager shall not be responsible for any pre-existing condition of any of the Units or the Development or for discovering any such condition which would require maintenance.

For any one (1) item of repair, replacement or refurbishing, the expense incurred as to the Development as a whole shall not exceed the sum of _____ Dollars (\$_____) unless either contemplated in the approved Operating Budget or capital budget, or specifically authorized by the Association. However, in the case of an emergency, Manager is authorized to expend on behalf of the Association any sum necessary to protect and preserve the Development or any of the Units. For purposes of this paragraph, all expenses incurred by Manager on behalf of the Association during any twenty-one (21) day period and paid to any single person, entity or affiliates or principals thereof, shall be considered to be a single expense unless reasonably demonstrated by Manager to the contrary.

Manager shall have access to the Development and each Unit during reasonable hours as may be necessary for the upkeep of the Development and Units or for the making of emergency repairs to prevent damage to common areas of the Development, or to any Unit or Units; provided, however, that this right of access shall not be deemed to confer on Manager any affirmative obligation for inspection of, and resulting responsibility for, any repairs to ordinarily inaccessible areas (e.g., balconies). To the extent reasonably convenient, all maintenance, repairs, replacements, additions and/or changes to the interior of Units shall be performed at a time when such Unit is vacant. If it becomes necessary, in the judgment of Manager, to perform maintenance or repairs within an occupied Unit in order to prevent foreseeable personal injury or imminent damage to any of the Units, or personal belongings, of any Unit occupant or the Development, and if such work cannot be performed while the Unit is occupied, in the judgment of Manager, then Manager shall exercise reasonable efforts to relocate the Unit occupant(s) for the duration of such displacement to such reasonably comparable nearby accommodations as possible, at the Association's expense, to the extent so required by the Project Instruments.

If it is determined pursuant to the terms of the Project Instruments that Development property damaged by casualty be reconstructed, Manager shall have the Association's responsibility of reconstruction. In that event, Manager shall have all the rights, obligations and duties granted to the Association, and Manager shall be paid as a fee the sum of ten percent (10%) of the gross amount of all insurance proceeds received by the Association and Owners resulting from such damage or destruction. Where applicable and permitted under the provisions of the Project Instruments, such sum shall be paid to Manager from such insurance proceeds. If ten percent (10%) fee cannot be paid entirely from such insurance proceeds under the provisions of the Project Instruments, such fee shall be paid by the Association to Manager from revenues collected by the Association as regular and/or Special Assessments. In the event that for any reason the Project requires unforeseen and unbudgeted renovations or requires repair due to an uninsured casualty loss, and the Association desires for the Manager to have the responsibility for overseeing such renovations or reconstruction, the parties agree that the Manager will be entitled to a reasonable fee for the performance of such services, such fee to be determined by a negotiation between the parties at the time such services are requested. In the event that the Association and the Manager are unable to reach agreement with respect to the amount of the fee or how the fee will be paid, then the Manager shall have no responsibility for the oversight of such renovations or reconstruction, such responsibility in such event remaining with the Association.

5.7 Contracts

Manager may enter into contracts, on behalf of the Association for garbage and trash removal, heating and air conditioning maintenance, pool maintenance, landscaping, telephone service, cable television service, pest control and such other services as it deems necessary or appropriate for the proper maintenance and operation of the Development. To the extent not subcontracted by Manager to third parties, Manager may purchase or lease all tools, equipment, vehicles, appliances, goods, furniture, supplies and other materials that it determines to be reasonably necessary to properly maintain and operate the Development. All such contracts and purchases may be made in either the Association's or Manager's name, as Manager may elect. The Association agrees to honor all agreements and contracts executed by Manager in accordance with the terms and provisions of this Agreement as the agent of the Association for the operation, repair and upkeep of the Development and the Units. Where Manager has executed such contracts for the upkeep, management and administration of the Development and the Units in conformity with the terms and provisions of this Agreement, the Association shall be deemed to have ratified such agreements and contracts, and the Association will fully and completely perform all of its duties and obligations under such agreements for their entire term. Where Manager has entered into agreements and contracts on behalf of the Association in compliance with the terms and provisions of this Agreement, and where Manager has substantially complied with all of the material terms and provisions of such contracts and agreements, the Association shall indemnify and hold harmless Manager from any claims or actions instituted by the other party to such contracts and agreements in accordance with the terms and provisions of Paragraph 11 hereof.

Manager shall engage such attorneys, accountants and other professionals, experts and subcontractors as may reasonably be required, in the discretion of the Manager, in order to enable Manager to effectively perform its duties and exercise its powers hereunder. The foregoing shall not be a limitation upon the right of the Association to employ other such professionals and experts on its own account as it may desire, but the employment of the same by the Association shall in no way affect Manager's rights to employ and continue the employment of the professionals and experts which it has or will employ, nor shall the same in any way relieve the Association of its obligation to pay the cost of professionals and experts retained by Manager; provided that the Association has approved the retainer of specific firms and that the cost thereof either is consistent with the Budget or has been separately approved by the Board.

Except upon the approval of the Board, Manager hereby agrees not to enter into any contract on behalf of the Association with an initial term in excess of one (1) year or which does not permit termination of the contract by the Association without penalty upon no more than sixty (60) days' written notice. Manager shall have the, authority to extend, modify or terminate such contracts relating to the upkeep, maintenance and operation of the Development and/or Units, and Manager shall have the additional authority to enter into new service contracts for the upkeep, maintenance and operation of the Development and/or Units, subject to the above-described limitations. Moreover, it is specifically contemplated by Manager that, for an indefinite period of time, Manager may, at its option, subcontract some or all of the duties and responsibilities of Manager under this Agreement to a substitute local manager (or companies, over time) (the "Subcontract Manager"). The Association specifically consents to and approves of such subcontract(s) to the Subcontract Manager, provided that Manager remains contractually obligated to the Association to meet all of Manager's duties and obligations under this Agreement.

5.8 Insurance. Manager shall cause to be placed or kept in force such insurance as the Association requests and is provided for in the Budget provided such insurance is available. To the same extent that the Association is so required or permitted, Manager shall act as agent for the Association, each Owner and for each other insured interest to adjust all claims arising under said insurance policies, to bring suit thereon and deliver releases upon payment of claims, to otherwise exercise all of the rights, powers and privileges of the insured parties, to receive all insurance proceeds on behalf of the insured parties, subject to the provisions of the Project Instruments. Manager and any Subcontract Manager shall be designated as additional insureds in the comprehensive public liability policy obtained by or for the benefit of the Association, and any additional premium therefor shall be the responsibility of the Association.

5.9 Rules and Regulations; Enforcement

Manager shall be authorized to take such action as may be necessary to enforce the provisions of the Project Instruments or Rules and Regulations of the Development adopted pursuant thereto. Manager shall have all the rights and powers of the Association to remedy any violations thereof or to pursue such legal remedies as Manager may deem appropriate. Manager may act upon its own determination, either on its own behalf or on the behalf of the Association. If Manager deems it advisable not to act in any particular situation, Manager shall not be liable or responsible to the Association, its directors or any Owner for the failure to so act. Subject to the prior direction and approval of the Board, Manager is authorized to represent the Association in any action, suit or other proceeding, and any such action may be brought or defended in the name of the Association.

Manager shall have the authority to propose to amend the Rules and Regulations for the use and occupancy of the Development, subject to the approval of the Association. Manager shall ensure that a copy of the then-current Rules and Regulations promulgated by the Association is kept furnished to the Unit Occupant(s), at check-in or otherwise, upon request. Manager shall have the power to regulate all vehicular parking. Manager shall regulate the use of the storage areas on the Development property, if any.

5.10 Direction. Manager shall have the authority to perform such other acts and be responsible for such additional duties as may from time to time be delegated to it by the Association or the Project Instruments, or as may be imposed upon Manager by any applicable provisions of law, rule or regulation (in which event Manager's compensation under Paragraph 9 hereof will be adjusted as appropriate by mutual agreement). Manager shall hire and supervise the employees and/or subcontract for and supervise persons to perform the duties and responsibilities of Manager set forth herein. Such persons shall be under the exclusive supervision and control of Manager. Manager shall have absolute discretion as to the retention or discharge of any such employee or subcontractor. Although all employees shall be employees of the Manager, and not the Association, the Association acknowledges that all expenses of such employees (and an allocable share of the expenses related to Manager's employees who are not present at the Development on a full-time basis), including salary, payroll taxes and other benefits which are paid by the Manager shall be an expense reimbursable to Manager under the Budget.

6. Application of Funds. Manager shall pay the Association's financial obligations to the extent of available Association funds. Funds available shall be applied monthly as follows:

(i) Management Fee. First, to Manager's management Fee and other compensation to Manager, pursuant to Paragraph 9 hereof.

(ii) Reimbursement. Next, to reimbursement of Manager for any reimbursable expenses, including indemnities pursuant to Paragraph 11, or any funds advanced or incurred by Manager, in accordance with the Budget, or to carry out any of Manager's duties or responsibilities under this Agreement or as otherwise allowed under this Agreement on behalf of the Association.

(iii) Insurance. Next, to the payment of premiums on insurance policies for the Development carried by the Association and Manager.

(iv) Utilities. Next, to the payment of all utilities, if any, chargeable to the Association in accordance with either the Budget or otherwise as allowed under this Agreement.

(v) Balance. The balance shall be utilized, applied and disbursed and otherwise expended or reserved by Manager to pay Association expenses.

7. Duties of the Association

7.1 Interference. For so long as this Agreement remains in effect and is not properly terminated by the Association as herein provided, the Association shall not unlawfully interfere nor permit, allow or cause any of its officers, directors or Owners to interfere unlawfully with Manager in the performance of its duties or the exercise of any of its powers hereunder.

7.2 Amendments of Documents. The Association shall not amend any of the Project Instruments in a manner which might impair or prejudice the rights of Manager without the prior written consent of Manager.

7.3 Permits, Licenses and Quiet Title. The Association will use all commercially reasonable efforts to maintain quiet title to the common facilities in the Development and to obtain and maintain any and all permits and licenses necessary to the operations of the Development.

7.4 Meetings of Association. Manager shall receive written notice of any meeting of the Association's board of directors at least five (5) business days prior to the meeting, and shall have the right to have a representative attend, and shall cause a representative to attend all meetings of the Association and of any board of directors of the same. The minutes of all the Association's meetings, whether of Owners or of any board of directors, shall be taken by the Association's secretary and the minute book shall remain in the custody of said secretary, who shall always be responsible for preparing and furnishing notices of all meetings to the required parties. The Association shall provide Manager with a current roster of the officers and directors of the Association at all times, and with a current copy of any minutes taken of all meetings of both the Association and any board of directors.

At the Association's request, (i) Manager shall organize the meetings of the Owners, including the preparation and delivery of the notice of the meeting and the preparation of proxy forms; (ii) Manager shall prepare the agenda for the meeting, conduct the meetings and oversee the election of any board of directors; and (iii) Manager shall assist with the meetings of any board of directors, including the election of officers.

8. Deficits. Notwithstanding any implication in this Agreement or the Project Instruments to the contrary, Manager shall not be required to undertake to pay any costs or expenses necessary for the maintenance, repair, replacement, restoration, improvement, operation or administration of the Association from its own funds, and shall only be required to perform its services and make disbursements to the extent that and as long as, the payments of Assessments received by Manager from the Association and its members are sufficient to pay said costs and expenses in full. If it shall appear to Manager that said Assessments are insufficient to pay the same, and to adequately provide full reserves, Manager shall forthwith determine, advise the Association and, subject to the Association's approval, assess and collect from the Association and/or the Owners such additional Assessments as are required to pay expenses and/or maintain reasonable reserves. In the event of an emergency posing imminent danger to the Development or any portion thereof, including but not limited to the Units, the common elements or the common furnishings, or to the health or safety of any Owner or other person, Manager is authorized to expend from its own funds, for the protection of said property or person, an amount necessary to do so in its reasonable judgment, and the Association shall promptly reimburse Manager therefor.

The Manager shall have no obligation or fiduciary responsibility to make up shortfalls in the collection of maintenance fees or other assessments, but shall have the option of making advances, in the form of loans, to the Association as the Manager determines to be appropriate, in its sole discretion. Any such loans will be approved, in advance, by the Board of Directors of the Association. To the extent that the Manager does make loans to the Association, they shall be based upon terms with reasonable interest, the specific terms to be negotiated with the Board of Directors of the Association at the time of such loans.

9. Management Fee. In consideration for its services hereunder, Manager shall be paid the compensation provided for in the Fee Addendums or as specifically set forth herein. It is specifically understood and agreed that Manager shall

perform all of the services required of it hereunder at no cost or expense whatsoever to itself, but solely at the cost and expense of the Association and that the compensation provided for in the Fee Schedule is to be after recovery of all sums advanced by Manager to provide the services required by this Agreement. Manager's Management Fee, overhead, employees and other costs, reimbursable expenses, accounting and administrative expenses, and other expenses necessary to fulfill Manager's obligations will be included in the Budget as Association expenses as reimbursable items. Any other out-of-pocket costs and expenses incurred by reason of special mailings, newsletters, polls and the like, requested by the Association, will also be considered reimbursable costs, which must be paid for by the Association. Nothing contained herein shall be deemed to preclude the payment to Manager or any of its affiliates of any fees, costs or compensation set forth in or contemplated by the Budget, provided that such fees, costs or compensation are for services or goods required by the Association and subject to Paragraph 4 hereof are not in excess of the prevailing rate or fees for such services or goods which would be charged by unaffiliated parties in arm's-length transactions.

10. Assignment. Manager may assign this Agreement in whole or in part with the consent of the Association, which consent shall not be unreasonably withheld, so long as the assignee agrees, in writing, to assume and perform the terms and covenants of this Agreement. Upon an assignment, Manager shall automatically be released from any and all further obligations hereunder for the assigned term. Manager may also assign this Agreement in whole or in part to any affiliate of Manager without the prior consent or approval of the Association. For purposes of this Agreement, an "affiliate" of Manager shall mean any company, partnership or entity in which either Manager or any of its constituent partners or shareholders owns _____ percent (_____%) or more of the beneficial ownership interest in such entity.

11. Indemnification. Manager shall not be liable to the Association or Owners for any loss or damage not solely caused by the fraud, gross negligence or willful misconduct of Manager, its employees, officers, directors, shareholders or agents, including the Subcontract Manager (collectively, the "Indemnitees"). The Association will defend, indemnify and hold the Indemnitees harmless from and against any such liability, or claims for damages, costs and expenses, including attorneys' fees, arising out of or related to the administration of the Indemnitees' duties hereunder, or from alleged injury to any person or property in and about, or in connection with the Development from any cause whatsoever, unless such loss or injury shall be solely caused by the fraud, gross negligence or willful misconduct of the Indemnitees not covered by the Association's insurance.

12. Default by Association. If the Association or its members shall interfere with Manager in the performance of its duties and exercise of its powers hereunder, or the Association shall fail to promptly do any of the things required of it hereunder, then Manager may, thirty (30) days after having given written notice to any officer of the Association, declare this Agreement in default if such default remains then uncured. Unless such default is cured by the Association within thirty (30) days following its receipt of such notice of default, Manager may, in addition to any other remedy given it by agreement or in law or equity, (i) terminate this Agreement pursuant to Paragraph 3 hereof, and (ii) bring an action against the Association for damages and/or injunctive relief. All rights of Manager, upon default, shall be cumulative and the exercise of one or more remedies shall not be deemed to exclude or constitute a waiver of any other additional remedy.

13. Miscellaneous

13.1 This Agreement shall be governed by, and shall be construed in accordance with, the laws of the State identified on the signature page hereto. The parties hereby waive any right they may have under any applicable law to a trial by jury with respect to any suit or legal action which may be commenced by or against the other concerning the interpretation, construction, validity, enforcement or performance of this Agreement or any other agreement or instrument executed in connection with this Agreement.

13.2 Except as otherwise specifically set forth herein, time is of the essence for all terms of this Agreement. In the event that Manager shall be delayed, hindered in or prevented from the performance of any act required hereunder by reason

of strikes, lock-outs, labor troubles, inability to procure materials, failure of power, restrictive governmental laws or regulations, riots, insurrection, war or any other reasons beyond Manager's control, then performance of such act shall be excused for the period of the delay, and the period for the performance of any such act shall be extended for a period equivalent to the period of such delay.

13.3 No modification, release, discharge or waiver of any provision hereof shall be of any force, effect or value unless in writing and signed by the parties to this Agreement. No waiver of a breach of any of the covenants contained in this Agreement shall be construed to be a waiver of any succeeding breach of the same or any other covenant, irrespective of the number of violations or breaches thereof which may occur. This Agreement embodies the entire agreement between the parties hereto relating to the subject matter hereof and supersedes and replaces any and all prior negotiations, representations, agreements and understandings, both oral and written, in connection therewith. The invalidity in whole or in part of any covenant, promise or undertaking, or any section, subsection, sentence, clause, phrase or words, or of any provisions of this Agreement, shall not affect the validity of the remaining portions hereof. Whenever the context hereof so permits, the use of the plural will include the singular, the singular the plural and the use of any gender will be deemed to include all genders.

13.4 Except as may be otherwise provided herein, any notice, demand, request, consent, approval or communication under this Agreement shall be in writing and shall be deemed duly given and made upon receipt. A party may designate a different address for receiving notices hereunder by notice to the other parties.

13.5 In the event either party hereto institutes an action to enforce its rights hereunder or to resolve any dispute arising with respect hereto, the substantially prevailing party in such action shall be entitled, in addition to any other relief granted by the court, to such reasonable attorney's fees and costs as such court may award.

14. Additional Terms. The following additional terms are herein stated:

Initial Term Expiration _____
 Year: _____
 Governing State Law: _____ [state]

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

ASSOCIATION:

SUNSET RESORT OWNERS ASSOCIATION

By: _____

[name and title]

MANAGER:

RIP MANAGEMENT, INC.

By: _____

[name and title]



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Current Legal Forms for Real Estate

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Current Legal Forms for Real Estate
Chapter 20 REAL ESTATE ENTITIES
Part IV. Forms
J. MISCELLANEOUS FORMS

24-20 Current Legal Forms for Real Estate 20.91

AUTHOR: by Stephen E. Pigott and Harold O. Maxfield, Jr.

20.91 Assignment agreement

COMMENT

In connection with the purchase of real estate, an individual or a company may initially enter into the agreement to purchase the property. However, after the execution for the purchase agreement, such party may decide to purchase and operate the property using an entity. The following form is a simple assignment and assumption which may be utilized to transfer the right to purchase the property to an entity. Under this form, the initial purchaser is not released.

FORM

ASSIGNMENT AGREEMENT

THIS AGREEMENT entered into this _____ [day] of _____ [month] , _____ [year] by and between JOHN DOE ("Assignor"), and ABC SQUARE, LLC, an Ohio limited liability company ("Assignee").

WHEREAS, Assignor entered into a Purchase Agreement on or about _____ [month] _____ [day] , _____ [year] regarding the property known as ABC Square located on _____ [address] , _____ [city] , _____ [state] , hereinafter referred to as the "premises." A copy of said Purchase Agreement is attached hereto, as Exhibit A (the "Purchase Agreement").

WHEREAS, Assignor is the sole Buyer identified in the Purchase Agreement;

WHEREAS, Assignor, for the consideration hereinafter provided, agrees to assign unto Assignee all of Assignor's right, title and interest in and to the Purchase Agreement;

NOW, THEREFORE, the parties agree as follows:

1. Assignment. Assignor agrees to, and hereby does, assign unto Assignee all of Assignor's right, title, duties and obligations in and to the Purchase Agreement.
2. Assumption. Assignee agrees to, and hereby accepts, the assignment of the Purchase Agreement and agrees to be bound by the terms and conditions of the Purchase Agreement.

The parties have hereunto caused this Agreement to be duly executed the day and year first above written.

ASSIGNOR:

JOHN DOE

ASSIGNEE:

ABC SQUARE, LLC

By: _____ *[name and title]*

CONSENT TO ASSIGNMENT

APPLE RETAIL LIMITED PARTNERSHIP, a Delaware corporation, the Seller in the Purchase Agreement, hereby consents to the assignment by JOHN DOE, Assignor, to ABC SQUARE, LLC, Assignee.

APPLE RETAIL LIMITED PARTNERSHIP

By: _____

[name and title]



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Current Legal Forms for Real Estate
Chapter 20 REAL ESTATE ENTITIES
Part IV. Forms
J. MISCELLANEOUS FORMS

24-20 Current Legal Forms for Real Estate 20.92

AUTHOR: by Stephen E. Pigott and Harold O. Maxfield, Jr.

20.92 Management Agreement--terminable at will

COMMENT

In connection with the ownership of real estate, particularly investment real estate, the owner of the property may not want to be involved in the day-to-day management of the property. The reasons for this are numerous. The owners may be strictly money managers, and may not have any real estate expertise. The owners may not be located in the same geographical area of the property, and it may be a way for a family to have equal ownership in a property and divert income and cash flow to family members that are actively involved with the operation of the property. Typically, a Management Agreement is utilized in connection with a multi-tenant property. The following form is a simple management agreement, and would likely be utilized in connection with a property when the management is being delegated to a trusted party. The following form is terminable at the will of the owner and places the risk of negative cash flow from the operations of the property upon the owner.

FORM

MANAGEMENT AGREEMENT

THIS MANAGEMENT AGREEMENT is made and entered into this _____ [day] day of _____ [month] , _____ [year] , by and between _____, a(n) _____ corporation ("Owner"), and _____, a(n) _____ corporation

("Manager").

RECITALS

Owner is presently the owner of the property known as _____ (the "Property").

Owner desires to obtain the services of Manager to manage and operate the Property, and Manager is willing to render such services on the terms and conditions hereinafter set forth.

For good and valuable consideration, the receipt and sufficiency of which are mutually acknowledged, the parties agree as follows:

1. Term. This Agreement may be terminated at any time by Owner upon written notice to Manager. This Agreement may be terminated by Manager upon thirty (30) days written notice to Owner.
2. Appointment. Owner appoints Manager, and Manager accepts such appointment, to manage, operate, supervise and conduct business of the Property during the term of this Agreement, upon the terms and conditions set forth.
3. Operation. Manager shall conduct business of and operate the Property in a good, efficient and lawful manner, and use its best efforts to preserve and protect the business, operations and goodwill of the Property. Subject to the requirements of this Agreement, Manager shall have reasonable discretion in the management and operation of the Property.
4. Compliance with the Leases. Manager shall, at its own cost and expense, perform Owner's obligations under the leases to tenants of the Property, for which Owner shall be responsible. Subject to the foregoing, neither Owner nor Manager shall, by act or omission, cause any breach or default under, or any termination of, the leases. Manager is authorized, from time to time, to renew and extend existing leases, and to enter into new leases with tenants, as suites become vacant.
5. Management Fee. Manager shall collect the Property's rents received from tenants, and any other miscellaneous income derived from the Property, deduct its management fee of _____ percent (_____%), pay any costs and expenses associated with the Property, and remit the balance (along with the appropriate documentation showing the costs and expenses paid) to Owner not later than the tenth (10th) day of the calendar month following the month in which collections are made. If requested by Owner, Manager shall first make all mortgage, insurance, and real estate tax payments attributable to the Property.
6. Relationship of Parties. This Management Agreement is solely for the purpose of providing for certain management services to be rendered by Manager to Owner in the Property. This Management Agreement is not, nor shall it be deemed to be, a sublease of any Property or any part thereof, or an assignment or transfer of any part of the leasehold estates granted by the leases of the Property's suites.
7. Non-Assignment. This Agreement shall not be assigned or otherwise transferred by either party hereto without the express written consent of the other party, except that no such consent shall be required as to any such assignment or transfer to a parent, subsidiary or other affiliate of Manager (in which event Manager shall remain liable hereunder).
8. Miscellaneous.

There are no prior or contemporaneous written or oral agreements, undertakings, promises, warranties, guaranties or covenants between the parties, respecting the subject matter hereof, except as set forth in a writing(s) signed by the

parties.

No waiver of any term or condition of this Agreement by any party shall be valid unless set forth in a writing signed by such party. No such waiver shall be deemed to be a waiver of any other or similar provision or condition, or of any future event, act, breach or default.

This Agreement may be modified, supplemented or amended only by a written memorandum executed by all parties.

Headings of sections are for convenience of reference only, and shall not be construed as a part of this Agreement, or as limiting or defining the scope of any section.

All notices and other material communications permitted or required to be given hereunder shall be in writing and shall be personally delivered or sent by U.S. registered or certified mail, proper postage paid, to the party in question at its address set forth below, or to such other addresses as such party may designate by written notice to the other party.

If to Owner:

If to Manager:

All such notices shall be deemed given and effective: (a) if personally delivered, upon receipt, and (b) otherwise, upon deposit thereof in the U.S. mail or with a reputable express delivery service in accordance with this Section 8.5.

This Agreement shall be construed and enforced in accordance with the laws of the State of _____
[state] .

Nothing contained herein is intended, nor shall it be construed, to create, evidence or confirm any relationship between the parties of partnership, joint venture, sublessor and sublessee, or any relationship other than that of Manager and Owner.

This Management Agreement is duly executed on behalf of the parties by their duly authorized officers as of the date first above written.

OWNER:

By: _____

[name and title]

MANAGER:

By _____

[name and title]



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Current Legal Forms for Real Estate
Chapter 20 REAL ESTATE ENTITIES
Part IV. Forms
J. MISCELLANEOUS FORMS

24-20 Current Legal Forms for Real Estate 20.93

AUTHOR: by Stephen E. Pigott and Harold O. Maxfield, Jr.

20.93 Management Agreement-apartment building

COMMENT

In connection with the ownership of real estate, particularly investment real estate, the owner of the property may not want to be involved in the day-to-day management of the property. The reasons for this are numerous. The owners may be strictly money managers, and may not have any real estate expertise. The owners may not be located in the same geographical area of the property, and it may be a way for a family to have equal ownership in a property and divert income and cash flow to family members that are actively involved with the operation of the property. Typically, a Management Agreement is utilized in connection with a multi-tenant property. The following form is a simple management agreement, and would likely be utilized in connection with a property when the management is being delegated to a trusted party. This form has a stated term and places the risk of negative cash flow from the operations of the property on the manager. The placing of the risk of negative cash flow from the operation of the property is not the typical situation, and would likely require a higher management fee. The form states that it is being utilized in connection with an apartment building, but it can be easily revised to cover any type of property. This type of structure gives the manager an incentive to operate the property efficiently.

FORM

MANAGEMENT AGREEMENT
(Apartment Building)

THIS MANAGEMENT AGREEMENT is made and entered into this _____ [day] of _____ [month] , _____ [year] , by and between _____, a(n) Ohio corporation ("Owner"), and _____, a(n) _____ corporation ("Manager").

RECITALS

A. Owner is presented the owner of the _____ suite apartment complex known as _____ (the "Apartments").

B. Owners desires to obtain the services of Manager to manage and operate the Apartments, and Manager is willing to render such services on the terms and conditions hereinafter set forth.

For good and valuable consideration, the receipt and sufficiency of which are mutually acknowledged, the parties agree as follows:

1. Term. This Agreement shall commence on the _____ [month] _____ [day] _____ [year] and shall terminate on _____ [month] _____ [day] _____ [year] . This Agreement may be renewed only upon a writing signed by both of the parties hereto.
2. Appointment. Owner appoints Manager, and Manager accepts such appointment, to manage, operate, supervise and conduct business of the Apartments during the term of this Agreement, upon the terms and conditions set forth.
3. Operation. Manager shall conduct business of and operate the Apartments in a good, efficient and lawful manner, and use its best efforts to preserve and protect the business, operations and goodwill of the Apartments. Subject to the requirements of this Agreement, Manager shall have complete discretion in the management and operation of the Apartments.
4. Compliance with the Leases. Manager shall, at its own cost and expense, perform Owner's obligations under the leases to tenants of the Apartments, for which Owner shall be responsible. Subject to the foregoing, neither Owner nor Manager shall, by act or omission, cause any breach or default under, or any termination of, the leases. Manager is authorized, from time to time, to renew and extend existing leases, and to enter into new leases with tenants, as suites become vacant. Except as is set forth in Paragraph 5., all expenses, costs, maintenance, repairs and replacements, associated with the Apartments shall be the sole and exclusive responsibility of Manager.
5. Limitation of Ownership Expenses. Owner shall be responsible for all mortgage and debt service, insurance, capital improvements and real estate tax payments and assessments attributable to the Apartments.
6. Management Fee. Manager shall collect the Apartment's rents received from tenants, and any other miscellaneous income derived from the Apartments, deduct its management fee of _____ percent (_____ %) and remit the balance to Owner not later than the tenth (10th) day of the calendar month following the month in which collections are made. If requested Owner, Manager shall first make all mortgage and debt service, insurance, capital improvements, real estate tax payments, and assessments attributable to the Apartments.
7. Relationship of Parties. This Management Agreement is solely for the purpose of providing for certain management services to be rendered by Manager to Owner in the Apartments. This Management Agreement is not, nor shall it be deemed to be, a sublease of any Apartments or any part thereof, or an assignment or transfer of any part of the leasehold estates granted by the leases of the Apartments' suites.

8. Non-Assignment. This Agreement shall not be assigned or otherwise transferred by either party hereto without the express written consent of the other party, except that no such consent shall be required as to any such assignment or transfer to a parent, subsidiary or other affiliate of Manager (in which event Manager shall remain liable hereunder).

9. Miscellaneous.

There are no prior or contemporaneous written or oral agreements, undertakings, promises, warranties, guaranties or covenants between the parties, respecting the subject matter hereof, except as set forth in a writing(s) signed by the parties.

No waiver of any term or condition of this agreement by any party shall be valid unless set forth in a writing signed by such party. No such waiver shall be deemed to be a waiver of any other or similar provision or condition, or of any future event, act, breach or default.

This Agreement may be modified, supplemented or amended only by a written memorandum executed by all parties.

Headings of sections are for convenience of reference only, and shall not be construed as a part of this Agreement, or as limiting or defining the scope of any section.

All notices and other material communications permitted or required to be given hereunder shall be in writing and shall be personally delivered or sent by U.S. registered or certified mail, proper postage paid, to the party in question at its address set forth below, or to such other addresses as such party may designate by written notice to the other party;

If to Owner:

If to Manager:

All such notices shall be deemed given and effective: (a) if personally delivered, upon receipt, and (b) otherwise, upon deposit thereof in the U.S. mail or with a reputable express delivery service in accordance with this Section 8.5.

This Agreement shall be construed and enforced in accordance with the laws of the State of _____
[state] .

Nothing contained herein is intended, nor shall it be construed, to create, evidence or confirm any relationship between the parties of partnership, joint venture, sublessor and sublessee, or any relationship other than that manager and owner.

This Management Agreement is duly executed on behalf of the parties by their duly authorized officers as of the date first above written.

OWNER:

By: _____

[name and title]

MANAGER:

By: _____

[name and title]



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Current Legal Forms for Real Estate
Chapter 20 REAL ESTATE ENTITIES
Part IV. Forms
J. MISCELLANEOUS FORMS

24-20 Current Legal Forms for Real Estate 20.94

AUTHOR: by Stephen E. Pigott and Harold O. Maxfield, Jr.

20.94 Management agreement-unrelated parties

COMMENT

In connection with the ownership of real estate, particularly investment real estate, the owner of the property may not want to be involved in the day-to-day management of the property. The reasons for this are numerous. The owners may be strictly money managers, and may not have any real estate expertise. The owners may not be located in the same geographical area of the property, and it may be a way for a family to have equal ownership in a property and divert income and cash flow to family members that are actively involved with the operation of the property. Typically, a Management Agreement is utilized in connection with a multi-tenant property. The following form is a relatively comprehensive management agreement, typically for use with unrelated parties.

FORM

MANAGEMENT AGREEMENT

THIS MANAGEMENT AGREEMENT, made and entered into as of the _____ day of _____, _____ and between _____ an Ohio limited liability company (hereinafter referred to as "Owner") and _____ (hereinafter referred to as "Manager").

WITNESSETH:

WHEREAS, Owner is the owner of the property located at _____, and the surrounding property and improvements, all of which are known as _____ (hereinafter referred to as "Property"); and

WHEREAS, Manager is experienced in the management of income properties similar to the Property; and

WHEREAS, Owner wishes to engage Manager, exclusively, as the manager of the Property, and Manager is willing to perform such responsibilities, all in accordance with the terms and provisions hereof.

NOW, THEREFORE, for and in consideration of the mutual promises and covenants herein contained, and for other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the parties hereto agree as follows:

ARTICLE ONE

Definitions

For the purposes of this Agreement, the following defined terms shall have the meanings ascribed thereto:

1.01 "Agreement": This Management Agreement.

1.02 "Budget": The budget for the operation and management of the Property, as prepared and approved pursuant to Article Three hereof.

1.03 "Improvements": Any improvements now or hereafter erected on the "Property."

ARTICLE TWO

Employment of Manager

2.01 Employment. Owner hereby employs and authorizes Manager to take sole, entire and exclusive charge of the management of the Property, and Manager hereby accepts said employment and authorization and agrees to use the skills and efforts of Manager diligently to effect management of the Property. In the performance of Manager's duties hereunder, Manager agrees to render capable and competent services and to exercise due care in accordance with standard practices acceptable and common in the industry.

2.02 Independent Contractor Status. It is acknowledged that it is the express intent of Owner and Manager, and this Agreement shall be so construed, that the rights and duties hereby granted by Owner to Manager, and assumed by Manager, are those of an independent contractor only, with a fiduciary duty to Owner. Owner has retained Manager in such capacity because of Manager's expertise and experience in the management of income properties similar to the Property. Manager shall devote such portion of Manager's time, energy and skills in the accomplishment of Manager's duties hereunder in such manner as Manager sees fit.

ARTICLE THREE

Duties Of Manager

Manager shall take such actions, and perform such duties, as Manager deems necessary and desirable for the care, protection, operation, maintenance, repair and replacement, subject to the provisions hereof, of the Property, including, but not limited to the following:

3.01 Employment of Personnel. Manager shall investigate, hire, train, supervise and discharge such personnel as Manager deems necessary or desirable for the performance of Manager's duties hereunder. Such supervision and direction shall be the responsibility of Manager. All salaries, wages and other compensation of personnel employed by Manager hereunder, including fringe benefits, medical and health insurance, pension plans, social security, taxes, workman's compensation, *et cetera*, shall be borne and paid by Manager.

Manager agrees that Manager shall not discriminate against any employee, or applicant for employment, hereunder because of race, color, religion, national origin, ancestry, age or sex.

3.02 Preparation of Annual Report. Within sixty (60) days prior to the commencement of each succeeding fiscal year, Manager shall prepare and deliver to Owner an operating budget for the Property, setting forth an itemized statement of the estimated receipts and disbursements for the coming fiscal year. Said budget shall include a proposed rent schedule for all space within the Property, inclusive of then currently pending or projected repairs, replacements and additions thereto, and the market for competing properties similar to the Property. Owner and Manager shall jointly adjust, modify or amend said budget in order to fix the standard of operation for the succeeding fiscal year and the budget, as so revised and as it may be subsequently revised by agreement in writing executed by Owner and Manager, shall thereafter constitute the "Budget." Except in the case of emergency repairs permitted by Section 3.11 hereof or items specifically authorized by the Budget, or otherwise, no expenses may be incurred or commitments made by Manager in connection with the operation of the Property which would exceed the sum of Two Thousand and 00/100 Dollars (\$2,000.00), or, in any event, which will, taken together with all additional commitments previously incurred or sums previously made or paid, exceed the line amount contained within said Budget, without the prior written consent of Owner. Provided, however, that written approval by Owner of a contract or other expenditure, capital or otherwise, shall, unless said written approval indicates otherwise on its face, not be included within any such line item and shall constitute an increase in the relevant line item of the Budget by said amount.

3.03 Property Bank Accounts. Manager shall open and maintain, during the term of this Agreement, a separate bank account, or, if Manager deems multiple accounts preferable, accounts, for the exclusive benefit of Owner and the Property, which account or accounts shall be separate from Manager's accounts and any other accounts maintained by Manager and not relating to the Property. Manager shall not mix any funds generated by the Property with any other monies of Manager or generated by other properties. All income and other monies received by Manager as a result of the operation of the Property or received by Manager as a result of the operation of the Property or otherwise delivered to Manager under the terms and provisions hereof shall be deposited in a timely manner by Manager in such separate account or accounts. All such monies shall be and remain the property of Owner and shall be disbursed by Manager, in accordance with the provisions hereof, in payment of the costs and expenses, including sums payable to Manager hereunder, of Owner relating to the Property.

3.04 Collection of Monies. Manager shall collect all rents, and all other amounts, whether in the form of rents, common area maintenance charges or other reimbursable expenses, due to Owner from any tenants within the Property, or licensees authorized to utilize portions of the Property and owe such sums to Owner as a result of the operation of the Property. In connection with enforcement of consumer price index or other escalators and collection of any other variable rent, Manager shall keep all records required to effectuate such collections. Owner hereby expressly authorizes Manager to request, demand, collect, and receive for all such rent and other charges and to institute legal proceedings, either in the name of Manager or, if necessary, the name of Owner for the collection of all such sums and expressly authorizes Manager to file any legal actions to enforce the terms of any lease or leases related to the Property, including, but not limited to, dispossessory actions and actions to terminate leases on space within the Property, if such is deemed necessary by Manager. The authority granted in this section as to lease enforcement shall be absolute except as to those restrictions, if any, placed on Manager, in writing, by Owner.

Any expenses, including attorney's fees, incurred by Manager in connection with its performance under this section shall be borne by and paid by Manager. Manager is expressly authorized to retain counsel of its own choosing to assist

Manager in fulfilling its responsibilities hereunder.

3.05 Leasing. Manager shall use its best efforts to lease space in the Property in accordance with guidelines furnished by Owner. Manager shall also negotiate for the renewal of leases; shall conduct all negotiations with tenants; and shall submit for Owner's prior written approval, all lease and/or lease renewal proposals.

3.06 Books and Reports. Manager agrees that it shall, during the terms of this Agreement and immediately thereafter, in accordance with the provisions hereof:

(a) Maintain, at the office of Manager, a comprehensive system of office records, books and accounts relating to the income, expenses and operations of the Property. Owner and those designated by Owner shall have access to such office records, books and accounts and to all vouchers, files and other material relating to the Property and maintained by Manager relating to the Property. Owner shall exercise its rights of inspection hereunder solely during normal business hours and shall do so in such a manner so as not to unreasonably interfere with the operations of Manager.

(b) Deliver to Owner, on or before the fifteenth (15th) day of each calendar month during the terms hereof, a detailed written report of all receipts and disbursements relating to the Property and made during the preceding calendar month, or any portion thereof. Such report shall be made on a cash, rather than accrual basis and shall include all such transactions, whether or not reimbursable pursuant to the provisions hereof. Said reports shall also include statements of arrearages of any tenant or others within the Property, vacancies, and the balance of sums retained in any escrow accounts maintained pursuant to the provisions hereof.

(c) Deliver to Owner, within sixty (60) days after the end of each fiscal year the Property, which fiscal year is hereby designated as running from January 1 to December 31 of each calendar year during the term hereof, a profit and loss statement showing the results of operations for the preceding fiscal year, or any portion thereof, as well as a balance sheet of the Property dated as of the end of such fiscal year. Each such report shall be prepared in accordance with generally accepted accounting principals.

(d) In the event of the termination of this Agreement, whether by normal expiration or otherwise, Manager shall, within the applicable time period set forth herein, deliver to Owner both a monthly report and an annual report, each covering that portion of the relevant time period which is included within the term hereof, prior to such termination.

(e) Execute and file, in a timely fashion, all forms, reports and returns required by law relating to the employment of personnel in the operation of the Property (with the exception of income tax returns).

3.07 Compliance with Legal Requirements. Manager shall take such actions as may be necessary to comply with any and all orders or requirements affecting the Property by any federal, state, county or municipal authority having jurisdiction thereof, and order of the Board of Fire Underwriters or similar bodies subject to the limitations set forth in the Budget. Provided Manager is timely notified, Manager shall not, however, take any such actions for so long as Owner is contesting, or has affirmed its intention to contest and promptly institutes proceedings contesting, any such order or requirement, except that, if a failure to comply promptly with any such order or requirement would or might expose Manager to criminal or civil liability, Manager shall cause the same to be complied with. Manager shall promptly, and in no event later than seventy-two (72) hours from time of receipt, send written notice to Owner, including a copy thereof, of all such orders and notices of requirements and of Manager's actions or projected actions in response thereto.

3.08 Assistance in Tax and Awards Negotiations. Manager shall, when requested by Owner and without charge or reimbursement except for actual out-of-pocket costs, render advice and assistance to Owner in the negotiation and prosecution of all claims for the abatement of property taxes and other taxes effecting the Property and for awards for taking by condemnation proceedings or friendly acquisition in lieu thereof of all or portions of the Property.

3.09 Execution of Contracts. Subject to other limitations contained herein, including, but not limited to, those contained in the Budget, Manager shall, in the name of Owner, enter into such contracts and other agreements for the providing of all utilities and other services either required or deemed as desirable by Manager in connection with the operation of the Property. Manager shall order, in the name of Owner, such equipment, tools, appliances, materials and supplies as it deems desirable to properly maintain the Property, subject, however, to other limitations contained herein. If requested by the contracting third party, Owner shall execute such contract in its own name and by its own hand. Any contract in excess of _____ Dollars (\$_____) per fiscal year must be approved in advance by Owner.

In the event that Manager delivers to Owner a written request that Owner approve, in writing, any such contract or order, and Owner does not, within ten (10) days of its receipt of such request, disapprove, by telephonic notice to be confirmed in writing, said contract or order, the same shall be considered approved by Owner and all costs, expenses, *et cetera*, shall be reimbursable to Manager hereunder. Manager shall always respect its fiduciary duty to Owner in the execution of such contracts or orders; provided, however, that Owner shall be required to cause to be made available to Manager such sums of monies as are required in order to enable Manager to obtain prompt payment, cause or similar discounts.

3.10 Maintenance and Repair of Property. Subject to limitations placed on it by the Budget, Manager shall maintain the Property in a first class manner, comparable to similar properties in the area of the Property. Such maintenance shall include, but not necessarily be limited to, interior and exterior cleaning, painting, decorating and maintenance, both preventative and otherwise, of all systems and improvements which are a part of the Property. All expenses incurred in connection with such maintenance shall be reimbursable by Owner to Manager, subject again to the Budget. Manager shall not incur or pay, in connection with said maintenance, any expense in excess of Two Thousand and 00/100 Dollars (\$2,000.00), unless such item is contained within the Budget or has otherwise been, specifically authorized by Owner. Provided, however, the Manager is hereby authorized and empowered to incur or pay in excess of such sum in the event that emergency repairs or maintenance are required for the preservation and safety of the Property, to avoid the suspension of any service to the Property, or to avoid danger or damage to life or property. It is understood and agreed that, should any such emergency repairs be required, Manager shall bring same to the attention of Owner as soon as possible.

3.11 Insurance. Manager shall maintain, during the term of this Agreement, insurance in forms, companies and substance reasonably acceptable to Owner, and at Owner's sole cost and expense, as follows:

(a) Public liability insurance on a comprehensive general liability form in an amount of not less than _____ Dollars (\$_____) single limit bodily injury and _____ Dollars (\$_____) property damage;

(b) Fire and extended coverage insurance in an amount of not less than eighty (80) percent of the replacement cost of the Property, exclusive of land and excavation costs;

(c) Such other insurance as may be required by law or deemed desirable by either Owner or Manager to cover the interest of said parties, including, but not limited to, workman's compensation insurance, boiler insurance, burglary and theft insurance and, at the option of Owner, rent insurance;

(d) All insurance obtained pursuant to the provisions hereof, as well as any additional insurance which Owner, in its sole discretion, might desire to obtain, shall name both Owner and Manager as insured, as their interests may appear. Each such policy shall contain a waiver of subrogation reasonably acceptable to Owner;

(e) Manager shall promptly investigate all accidents, damages and other casualty to the Property or any claims of injury,

to property or person, arising out of or related to the ownership, operation and maintenance of the Property. Manager shall promptly submit to Owner a written report regarding such incident including an estimate of the cost of repair of any damage or destruction and its recommendations as to such repair. Manager shall prepare, for approval by Owner, any and all reports required of any insurance companies or other interested entities or governmental bodies regarding such damage, destruction or injury; and

3.12 Claims. Manager shall advise Owner promptly, with confirmation in writing, of the service upon Manager of any summons, subpoena, or other similar legal document, as well as receipt of any notices, letters or other communication, setting out or claiming an actual or alleged potential liability of the Owner, the Property or Manager, arising out of the Property. The written confirmation by Manager to Owner shall include a copy of any such summons, subpoena, *et cetera*.

3.13 Disbursements. Manager shall, to the extent that funds are available from receipts relating to the Property or otherwise received from Owner, cause to be disbursed in a timely fashion;

(a) Sums reimbursable to Manager pursuant to the provisions hereof,

(b) Amounts otherwise due and payable as operating expenses of the Property and authorized pursuant to the terms and provisions hereof, inclusive of any compensation due and payable to Manager hereunder.

All such disbursements shall be made from the account, or accounts, maintained by Manager pursuant to the provisions hereof and any sums remaining in said account, subject to a reasonable reserve as agreed upon by Owner and Manager, shall be disbursed in accordance with the written instructions of Owner. Owner shall, in connection with Manager's duties hereunder, promptly forward to Manager any tax statements, payment schedules, invoices or similar notices received by Owner relating to the Property and requiring payment of sums relating thereto.

3.14 Tenant Relations. Manager shall take such actions as it deems necessary in order to maintain a professional, businesslike relationship with all tenants within the Property. All requests, complaints and notices delivered to Manager by any tenants will be incorporated into the monthly reports required to be delivered by Manager to owner hereunder and such reports shall indicate the action, or proposed action, taken, or to be taken, with respect thereto. Manager shall periodically review all leases and tenant premises within the Property in order to ensure compliance, by both Owner and tenant, with the leases.

ARTICLE FOUR

Responsibilities of Owner

4.01 Contract Execution. Owner agrees that it shall, if requested by Manager or any third party contracting with Owner pursuant to the provisions of Article Three hereof, execute in its own name and by its own hand any such contracts.

4.02 Payments to and Reimbursement of Manager. Owner covenants and agrees that it shall make available to, or otherwise cause to be made available to, Manager such sums as are required pursuant to the provisions hereof to (i) pay to Manager all compensation required by Article Six hereof, and (ii) reimburse (or provide monies) for all expenses incurred pursuant to this Agreement. Manager shall not be required to, although it may in its sole discretion, advance its own funds for the benefit of Owner. This provision shall survive the termination of this Agreement, whether by normal expiration or otherwise.

ARTICLE FIVE

Term

5.01 Term; Extension. The term of this Agreement shall commence on _____ and remain in effect for a period of _____ years. Not later than thirty (30) days prior to the end of the term, Manager shall notify Owner that the term is about to expire and Owner shall have sixty (60) days to notify Manager that it wishes the term not to be automatically extended for an extension period of ten (10) years. If not so notified, the term shall be automatically renewed for a ten (10) year period. Thereafter, this Agreement shall continue on a year-to-year basis unless terminated by either party.

5.02 Termination for Cause. Notwithstanding the foregoing stated term, this Agreement may be terminated by Owner immediately, for cause. For this purpose, "for cause" shall mean (i) Manager's indictment or conviction of a felony, (ii) a material breach by Manager of this Agreement, (iii) Manager's gross neglect of his duties, or commission of an act of dishonesty toward Owner's business, (iv) Manager's addiction to alcohol or any drug or substance (whether or not prescribed by a physician), or (v) the occurrence of any act or omission, or set of facts and circumstances, set forth hereinbelow.

(a) Provided that the necessary funds are available, either through Property receipts or deposits by Owner, Manager fails to pay any sum payable under this Agreement when due or fails to perform or comply with any of its obligations hereunder at the time or times and in the name required under this Agreement, provided that the Owner first gives the Manager prior written notice of such default or breach and the Manager (A) when the default or breach is a failure to pay a sum payable hereunder fails to pay such sum within five (5) days of receipt of such notice; or (B) when the default or breach is other than the failure to pay a sum payable hereunder, fails to commence curing any default or breach within ten (10) days of receipt of such notice, or after commencing the same fails to pursue the curing of such default with due diligence;

(b) Manager files a petition to be adjudicated a bankrupt or for reorganization or arrangement under the bankruptcy laws of any state or of the United States;

(c) A petition is filed against the Manager to have him adjudicated a bankrupt and such petition is not dismissed within sixty (60) days after filing;

(d) An assignment for the benefit of creditors is made by the Manager; or

(e) A receiver or trustee of the Manager's rights or interests (which include or consist of the rights and interests of Manager hereunder) is appointed pursuant to any judicial proceeding and such proceeding is not dismissed, and the receiver or trustee discharged, within sixty (60) days after such appointment.

Manager may terminate this Agreement, immediately and at any time (for so long as the default continues), upon giving written notice to Owner after any one of the following:

(a) Owner does not fulfill its obligations hereunder with regard to deposit of any sums required by Manager, as reimbursement of expenses incurred by Manager, on behalf of Owner, hereunder or as compensation to Manager, provided that Manager first gives Owner prior written notice of such sums within five (5) days of receipt of such notice;

(b) Owner files a petition to be adjudicated a bankrupt or for reorganization or arrangement under the bankruptcy laws of any state or of the United States;

(c) A petition is filed against the Owner to have it adjudicated a bankrupt and such petition is not dismissed within sixty (60) days after filing;

(d) An assignment for the benefit of creditors is made by the Owner;

(e) A receiver or trustee of the Owner's rights or interests (which include or consist of the rights and interests of Owner hereunder) is appointed pursuant to any judicial proceedings and such proceeding is not dismissed, and the receiver or trustee discharged, within sixty (60) days after such appointment.

5.03 Termination Upon Destruction, Condemnation, Sale. This Agreement shall terminate upon the date of any damage or destruction of the Property which in the reasonable opinion of either party materially affects the operation of the Property for its intended purpose and the Property ceases so to be operated. This Agreement shall also terminate upon the date of the conveyance to or taking by any authorized entity under the threat of or by eminent domain of the Property or any portion thereof which in the reasonable opinion of either party materially effects the operation of the Property for its intended purpose and the Property ceases so to be operated.

5.04 Duties Upon Termination. Upon termination, whether by normal expiration or otherwise, of this Agreement, the parties hereto agree that:

(a) Manager shall deliver to Owner, or to any person or agent designated by Owner:

(i) Cash in the amount equal to all amounts then due Owner hereunder including any security deposits or other payments of tenants in the Property held by Manager;

(ii) An assignment of any escrow accounts in form approved by the depositories of holder thereof,

(iii) All executed copies of leases related to the Property and all related files;

(iv) All architectural, mechanical and electrical plans and specifications used in connection with the construction of the Property, to the extent held in the possession of Manager, as well as all sets of keys and all books and records pertaining to the Property;

(v) All permits issued by appropriate governmental authorities and utilities relative to the Property, if held by Manager;

(vi) All extra promotional brochures, forms, leases, posters, signs and stationery and all engraved plates and art work used for such promotional items which do not contain references to Manager's name, address or telephone number;

(vii) Any other papers or items of any kind held by Manager relating to the Property.

Manager shall be entitled to retain copies of all records, documents and other agreements which were in Manager's possession relating to the Property, and Owner shall execute and deliver to Manager a receipt evidencing delivery by Manager to Owner of all papers or items delivered in accordance with the provisions hereof. Additionally, Owner shall expressly indemnify and hold Manager harmless from and against any and all costs, damages or expenses (including attorney's fees) arising out of any claims made or threatened for return of security deposits so delivered to Owner.

(b) Anything contained herein to the contrary notwithstanding, no termination of this Agreement, whether by normal expiration or otherwise, shall release either party from any obligations or liabilities arising under the terms and provisions hereof prior to the date of such termination or pursuant to continuing contracts or other commitments approved, pursuant to the terms and provisions hereof, prior to the date of such termination. It is expressly agreed that no such termination shall effect or modify in any respect the compensation due and payable, or to become due and payable, by Owner to Manager hereunder. In connection with any termination of this Agreement, Manager shall assign to Owner, if same are assignable, all contracts and other agreements, if any, executed in the name of Manager, relating to the operation and maintenance of the Property. Owner shall expressly assume and agree to pay all obligations arising

under such contracts or other agreements and shall indemnify and hold Manager harmless from and against any and all costs, damages and expenses (including attorney fees) arising out of or related to said contracts and other agreements.

(c) Manager shall, in addition to other requirements placed on Manager pursuant to this Article, furnish all additional information and take such further actions, at Owner's expense, as Owner shall reasonably require in order to effectuate an orderly and systematic termination of Manager's duties and activities with regard to the termination of Manager's duties and activities with regard to the Property. Within ten (10) days after any such termination, Manager shall deliver to Owner the written reports required by Section 3.06(b) hereof for any periods not covered by prior reports submitted pursuant to such Section and shall, within sixty (60) days after any such termination, deliver to Owner a profit and loss statement for the fiscal year, or portion thereof, ending on the date of termination, and a balance sheet of the Property as of the date of termination.

ARTICLE SIX

Compensation of Manager

6.01 Management Fee.

(a) Owner shall pay to Manager, in consideration of Manager's management services hereunder, an amount equal to six percent (6%) of "Gross Receipts," as defined herein, as reflected in the monthly reports delivered by Manager to Owner pursuant to Section 3.06 hereof.

(b) Said Management Fee shall be paid by Owner to Manager on a monthly basis, in arrears, and shall be prorated for any partial month during the term hereof. For the purposes hereto, the term "Gross Receipts" is defined as all amounts actually collected by Manager as minimum rent or other sums collected and from any other persons paying monies to Owner as a result of the operation of the Property, in the ordinary course of business. There shall be included within the definition of Gross Receipts any sums collected as a result of a consumer price index or other escalator applied to any base rents or similar charges payable by tenants or others, but there shall not be included within the term Gross Receipts interest or other income derived from investments or interest bearing accounts, proceeds of claims on account of insurance policies, abatement of taxes, awards arising out of taking by eminent domain (or conveyance in lieu thereof), discounts or dividends on insurance policies, court awards for prospective rents or other damages. In the event that Manager, in accordance with the provisions hereof, receives monies as settlement of claims for past due rent or in consideration of cancellation of a lease, such sums shall be included within the term Gross Receipts, when actually received. Similarly, security deposits shall not be deemed to be within Gross Receipts until retention of same, or any portion thereof, for the sole benefit of Owner, pursuant to the terms and provisions of the lease under which same are retained.

(c) Owner shall also pay to Manager a leasing commission equal to two (2) percent of Gross Receipts to be collected for any lease renewals or extensions. Owner shall pay to Manager a lump sum equal to the commission upon commencement of such renewal or extension term.

ARTICLE SEVEN

Miscellaneous

7.01 Indemnification.

(a) Manager agrees to indemnify and hold Owner harmless from and against any and all liabilities, claims, obligations, expenses, losses, damages, judgments or other injuries (including, but not limited to, attorney's fees, costs and expenses of litigation and appeals), which Owner may incur or suffer in connection with grossly negligent acts, willful

misconduct or knowing misrepresentations of material fact by Manager, acting as such under the provisions hereof.

(b) Owner agrees to indemnify and hold Manager harmless from and against:

(i) Any and all liabilities, claims obligations, expenses, losses, damages, judgments or other injuries (including, but not limited to, attorney's fees, costs and expenses of litigation and appeals), which Manager may incur or suffer in connection with Owner's failure to discharge its obligations hereunder, actions or inaction's at Owner's directive; and

(ii) Any and all liabilities, claims, obligations, expenses, losses, damages judgments or other injuries (including, but not limited to, attorney's fees and costs and expenses of litigation and appeals) which Manager may incur in the performance of its duties under this Agreement which are not caused in whole or in part by the gross negligence or willful misconduct of, or knowing misrepresentation of a material fact by Manager.

7.02 Survival. The indemnification's contained in Section 7.01 and the agreement contained in Articles Four, Five and Six hereof shall survive any termination of this Agreement.

7.03 Notice. Any notices required or authorized, by this Agreement shall be deemed effective five (5) days after deposit in the United States mail, postage prepaid, registered or certified mail, return receipt requested, when mailed to the following addresses, or to such other addresses as parties hereto may designate, in writing and in accordance with the provisions hereof, or personal service shall be deemed effective when delivered:

To Manager:

To Owner:

With a copy to Owner's
Attorney

7.04 Assignment. Manager shall not, without Owner's prior written approval, assign any of its rights or obligations under this Agreement. Owner may assign its right and obligations to any successor in title to the Property and shall, provided that Owner complies with the terms and provisions of this Section, be relieved of all liability accruing after the effective date of such assignment; provided, however that Owner shall remain secondarily liable to Manager for reimbursement of any expenses incurred by Manager either:

(a) Prior to the date of such assignment; or

(b) Pursuant to Approved Contracts executed prior to the effective date of such assignment Owner agrees that it will obtain, from any such successor in title, an express assumption of all obligations and liabilities of Owner hereunder.

7.05 Competing Activities of Manager. Anything contained herein to the contrary notwithstanding, Owner hereby agrees that, during the term of this Agreement, Manager, affiliated (or wholly owned) companies or related entities of Manager, may render services identical or similar to those required of Manager hereunder to other owner of real property, improved in a similar fashion to the Property or otherwise, and may themselves engage in the acquisition, development, leasing and exploitation of real property for their own account and benefit and without any accountability or liability whatsoever to Owner even though such services or business activities compete with or are enhanced by the business activity of Owner, including Owner's involvement in the Property.

7.06 Time of Essence. Time is of the essence of this Agreement.

7.07 Force Majeure. In the event that any obligation contained herein is not fulfilled within the time period applicable thereto, and such failure is beyond the obligor's reasonable control, including but not limited to, compliance with any regulations, order or instruction of any federal, state or municipal government or any department or agency thereof, acts or omissions of any other party hereto, acts of civil or military authority, fires, strikes, embargoes, war, riots, delays in transportation, tempests, earthquakes, floods and the inability due to causes beyond such obligor's reasonable control to obtain necessary labor, manufacturing facilities or materials (all of the foregoing, without limitation, being herein referred to as "force majeure"), such party shall give the other parties prompt notice of the occurrence of any such force majeure delay or expected delay, specifying the cause thereof and the suspected duration. In the event of any such delay, the date required for fulfillment of such obligation shall be automatically extended for a period equal to the time lost by reason of the delay. In no event, however, shall this provision apply to an obligation requiring solely the payments of money.

7.08 Amendment. Neither this Agreement nor any provision hereof may be changed, waived, discharged or terminated orally, but only by instrument in writing signed by the party against whom enforcement of the change, waiver, discharge or termination is sought.

7.09 Severability. Whenever possible, each provision of this Agreement shall be interpreted in such manner as to be effective and valid under Ohio law, but if any provision of this Agreement shall be prohibited by or be invalid under such law, such provision shall be ineffective to the extent of such prohibition or invalidity without invalidating the remainder of such provision or the remaining provisions of this Agreement.

7.10 Entire Agreement. This Agreement, and other documents executed in connection with the Property, constitutes and expresses the entire Agreement of the parties hereto and no agreements, warranties, representations or covenants not herein expressed shall be binding upon the parties.

7.11 Counterparts. This Agreement may be executed in several counterparts, each of which shall be deemed an original and all of which counterparts together shall constitute one and the same instrument.

7.12 Captions. The captions appearing before Sections and Articles in this Agreement have been inserted solely for the purposes of convenience and ready reference. They do not purport to, and shall not be deemed to, define, limit or extend the scope or intent of the Sections or Articles to which they appertain.

7.13 Binding Effect and Pronouns. The provisions of this Agreement shall inure to the benefit of, and shall be binding upon, the parties hereto, and their respective heirs, successors and assigns (if permitted hereunder) and the legal representatives of their estates, as the case may apply. The terms "Owner" and "Manager" shall be construed in the plural and the appropriate gender shall be read into all pronouns used herein to reference any of said parties whenever the sense of this Agreement requires.

IN WITNESS WHEREOF, the parties hereto have set their hands as of the day and year first above written.

OWNER:

By: _____

[name and title]

MANAGER:

By: _____

[name and title]



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24-20 Current Legal Forms for Real Estate 20.95

AUTHOR: by Stephen E. Pigott and Harold O. Maxfield, Jr.

20.95 Office Sharing Agreement--doctor

COMMENT

This agreement involves two doctors who want to share space. One doctor is the lessee of the space, and therefore, is responsible for and controls the space. This agreement is for an arms-length transaction which is intended to cover all aspects of the relationship, including, non-compete provisions and referrals. To some extent, this agreement contains elements of a sublease, however, this Agreement specifically attempts to avoid granting the adjunct doctor an interest in the real estate.

FORM

OFFICE SHARING AGREEMENT

THIS OFFICE SHARING AGREEMENT ("Agreement") is made this _____ [day] day of _____ [month] , _____ [year] by and between DR. JOHN SMITH, INC. (the "Company") and DR. MAX MCCOLLISTER ("Adjunct Doctor").

WHEREAS, pursuant to a Lease dated _____, [date] (the "Lease"), the Company maintains a chiropractic medical office at _____(the "Office"); and

WHEREAS, Adjunct Doctor is a chiropractor duly licensed to practice chiropractic medicine in the State of

_____; and

WHEREAS, Adjunct Doctor is desirous of practicing chiropractic medicine at the Office, and the Company is desirous of having him practice at the Office;

NOW, THEREFORE, in consideration of the mutual covenants contained herein, the parties agree as follows:

1. Office Sharing. Subject to the terms and conditions of this Agreement, and the terms and conditions of the Lease, Adjunct Doctor shall have the non-exclusive right to use the Office solely for use in connection with his chiropractic practice and for no other use. In addition, Adjunct Doctor and his patients and invitees will have the non-exclusive right in conjunction with the other occupants of Liberty Court to use the parking areas of Liberty Court.

2. Cooperation. The parties agree that they will use their best efforts to cooperate with each other to minimize the interruption of their practices. The parties will use their best efforts to work together to resolve conflicts and disputes that may arise between them, including, without limitation, scheduling conflicts (i.e., examination rooms, equipment etc.), designating the responsible party for walk-in and call-in patients that do not identify a doctor, and covering each other for absences from the Office.

3. Term. This Agreement shall commence _____ [month] _____ [day] _____ [year] and will terminate on _____ [month] _____ [day] _____ [year], unless it is extended in writing by the parties or terminated early pursuant to the terms and conditions of this Agreement.

4. Patient Files. Each party will own and be responsible for maintaining his or its patient files, including without limitation, the integrity and confidentiality thereof. The Company agrees to provide Adjunct Doctor with filing cabinet space for the storage of his patient files.

5. Reimbursement for Fixed Office Expenses. Commencing on _____, [date] and on the same day of each successive month thereafter, Adjunct Doctor agrees to pay to the Company on or before the first _____ [last] day of each month the sum of _____ Dollars (\$ _____) as a contribution for the fixed office expenses of the Office.

6. Reimbursement for Variable Office Expenses. Commencing on _____ [month] _____ [day] _____ [year] and on the same day of each successive month thereafter, Adjunct Doctor agrees to pay to the Company on or before the first _____ [last] day of each month a sum equal to _____ percent (_____%) of the costs incurred by the Company during the preceding month in connection with the expenses identified on **Schedule 6**, attached hereto. Costs and expenses of the Company not identified on **Schedule 6** will be considered fixed office expenses.

7. Representations and Covenants of Adjunct Doctor. Adjunct Doctor represents to the Company that he is a duly licensed and qualified doctor of chiropractic medicine, in good standing and authorized to practice chiropractic medicine in the State of _____. Adjunct Doctor agrees that at all times that this Agreement shall remain in effect that he will remain duly licensed and qualified to practice chiropractic medicine within the State of _____.

8. No Partnership. The parties agree that this Agreement should not be construed to create a partnership, joint venture or other similar profit-sharing arrangement. Furthermore, the parties agree that this Agreement should not be construed to authorize either party to act on behalf of, or in any way bind, the other party. Except as specifically set forth herein, each party will be responsible for the payment of his or its own expenses, including, without limitation, income taxes, self-employment taxes, worker's compensation, disability insurance, retirement benefits, professional dues, continuing

education and malpractice insurance. In addition, each party will be responsible for the generation, billing and collection of his or its own revenue.

9. Insurance. During the term of this Agreement, each party will maintain malpractice insurance from reputable companies licensed to conduct business in the State of _____ with customary terms and amounts as are generally maintained by reputable chiropractors in _____ County, _____. In addition, the Company will name Adjunct Doctor as an additional insured under the liability policy that it is required to maintain under the Lease. Each party hereby assumes the risk of loss with respect to their own personal property and each agrees to maintain casualty insurance with respect thereto.

10. Referral and Consultations. The parties acknowledge that from time to time, they may refer a patient to the other and/or request a consultation for one of their patients.

A. Referrals. If one of the parties refers a patient to the other party, the patient shall be considered for purposes of this Agreement to be the patient of party that received the referral. In such event, the party that received the referral will pay to the other party a sum of money equal to _____ percent (_____%) of the gross fees paid by such patient for a one (1) year period following such patient's first office visit. No compensation is required after the expiration of the first (1st) year.

B. Consultations. From time to time, a party may request from the other a consultation for one of his or its existing patients. In such event, the party called in to consult will be compensated by the other party on the basis of _____ Dollars (\$_____) per hour. Such hourly rate will be ratably reduced for partial hours.

All compensation required to be paid hereunder will be paid within ten (10) business days after receipt of the payment from the patient by the party requesting the consultation.

11. Indemnity. Each party agrees to indemnify, defend and hold harmless the other party with respect to claims, causes of action, damages, fees (including reasonable attorney's fees) costs or expenses which the other party incurs or becomes subject to as a result of the following:

- (a) a breach of this Agreement by the other party;
- (b) a claim of malpractice resulting from the activities of the other party; or
- (c) any cost or expense of the other party;

12. Noncompetition. Adjunct Doctor hereby covenants with the Company that, for a period of one (1) year commencing upon the expiration or termination of this Agreement, that he will not:

- (a) practice chiropractic medicine from an office located within a five (5) mile radius of the Office;
- (b) employ, assist in employing, or otherwise associate in business with any employee, past or present, of the Company;
- (c) induce any person who is an employee, patient, consultant, agent, customer or supplier of the Company to terminate said relationship; and
- (d) solicit or transact any business with any patient, customer or client of the Company.

Adjunct Doctor has carefully considered the nature and extent of the restrictions upon him and the rights and remedies

conferred upon the Company hereunder and hereby acknowledges and agrees that the same are reasonable in time and territory, are designed to eliminate competition which otherwise would be unfair to the Company, do not stifle the inherent skill and experience of Adjunct Doctor, would not operate as a bar to Adjunct Doctor's sole means of support, are fully required to protect the legitimate interests of the Company and its shareholder and do not confer a benefit upon the Company disproportionate to the detriment of Adjunct Doctor. Adjunct Doctor further acknowledges that the Company would not have entered into this Agreement without this provision.

13. Nondisclosure; Noninterference. Adjunct Doctor hereby covenants with the Company that, at all times after the date of this Agreement, he will hold in strictest confidence any and all confidential nonpublic data and information within his knowledge concerning the business of the Company.

14. Modifications; Equitable Relief. The Company and Adjunct Doctor expressly agree that if any claim is made that any of the covenants set forth in Paragraphs 12 and 13 above is invalid or unenforceable, due to the duration or geographic area thereof, and/or otherwise, the covenant shall not thereby be rendered invalid or unenforceable, but it shall instead be modified to the maximum duration, maximum geographic area, and/or otherwise as a court of competent jurisdiction examining the covenant shall find to be reasonable and legally enforceable. The Company and Adjunct Doctor acknowledge that a violation of the covenants set forth in Paragraphs 12 and 13 above will result in irreparable harm to the Company and, accordingly, the Company and Adjunct Doctor agree that the Company shall be entitled to injunctive relief to enforce such covenants, as well as damages at law as may be recovered by the Company. In the event Adjunct Doctor shall violate any legally enforceable provision of this Agreement as to which there is a specific time period during which Adjunct Doctor is prohibited from taking certain actions or from engaging in certain activities, as set forth in such provision, then, in such event, such violation shall toll the running of such time period from the date of such violation until such violation shall cease.

15. Severable Provisions. The provisions of this Agreement are severable, and if any one or more provisions may be determined to be illegal or otherwise unenforceable, in whole or in part, the remaining provisions and any partially unenforceable provision to the extent enforceable in any jurisdiction shall nevertheless be binding and enforceable.

16. No Interest in Real Estate or Lease. The parties acknowledge and agree that this agreement is not intended to create an interest in real property or convey to Adjunct Doctor an interest in the Premises (as defined in the Lease) and that this Agreement does not constitute a Sublease and/or Assignment of the Lease.

17. Termination. This Agreement will terminate upon the happening of one of the following events:

(a) Upon a breach of this Agreement by Adjunct Doctor which breach is not cured within five (5) days after the Company notifies Adjunct Doctor in writing of his default.

(b) Upon a breach of this Agreement by the Company which breach is not cured within five (5) days after Adjunct Doctor notifies the Company in writing that it is in default.

(c) Immediately upon a breach of or the failure of Adjunct Doctor to comply with the provisions of Paragraph 7, above.

(d) By either party giving at least _____ (_____) days' advance written notice of termination to the other party.

(e) Upon the expiration of the term set forth in Paragraph 3, above, without the parties agreeing to extend this Agreement.

18. Governing Law. This Agreement is executed, delivered and will be solely performed in the State of _____ [state] . Any dispute will governed by the laws of the State of _____ [state]

] .

19. Entire Agreement. This Agreement constitutes the entire agreement between the parties with respect to the subject matter hereof, and this Agreement is intended to supersede any prior discussions, agreements or writings. Any amendments or modifications to this Agreement must be in writing and must be signed by the party against which enforcement is sought.

20. Binding Effect. This Agreement will be binding upon the parties and their respective heirs, legal representatives and assigns.

21. Assignability. This Agreement may not be assigned by either party, and any purported assignment or attempted assignment will be null and void and of no force or effect whatsoever.

22. Force Majeure. The Company will not be deemed to be in default of this Agreement as a result of being unable to perform its obligations hereunder as a direct or indirect result of cause beyond the reasonable control of the Company; provided, however, in such event, both parties shall use reasonable efforts to remedy the conditions preventing such performance hereunder.

IN WITNESS WHEREOF, the parties hereto have executed this Office Sharing Agreement on the day and year first above written.

JOHN SMITH, INC.

By: _____

John Smith, President

Dr. Max McCollister

EXHIBIT A

Employees
Journals and Magazines



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AUTHOR: by Stephen E. Pigott and Harold O. Maxfield, Jr.

20.96 Office sharing agreement--related companies

COMMENT

This agreement is a very simple agreement between two companies that have common ownership, but seek to maintain separate existences. Typically, this type of agreement is used so that a creditor of one company will be unsuccessful in arguing that it should be able to hold the other liable for the debts of the other because they operated as one enterprise. Again, one party typically will be in control of the real estate and this agreement should avoid granting the other party a right in the real estate. The drafter must be careful, because if the lessee of the premises defaults under its lease, the other party could be left without a place to operate its business.

FORM

_____ [month] _____ [day], _____ [year]

XYZ Co.

Gentlemen:

This letter is intended to set forth the agreement between XYZ Co. and ABC Co. relating to the common use of certain

facilities and management services.

XYZ Co. is the lessee of the premises located at _____ (the "Premises"). Both companies will conduct their businesses at the Premises. In addition, certain employees of XYZ Co. will provide management and administrative services to ABC Co. from time to time.

To the extent possible, each company will incur and pay their own expenses. However, the companies acknowledge that each company may incur expenses which benefit both companies (i.e., rent, utilities, telephone and office equipment). Further, certain employees will render services to both companies (i.e., receptionist and certain management personnel). The parties acknowledge that it is difficult to predict the amount of these expenses. As a result, the parties agree that with respect to expenses incurred by either company which benefit both companies, XYZ Co. will be allocated _____ percent (_____%) and ABC Co. will be allocated seventy-_____ percent (_____%) of such expenses. [Alternative approach -- The parties acknowledge that it is difficult to specifically account for the amount of these expenses attributable to each company. As a result, the parties agree that with respect to expenses incurred by either company which benefit both companies, that they will allocate such expenses based upon the fraction using the aggregate gross revenue of the companies as the denominator and the gross revenue of each company as the numerator. The parties will reimburse each other as often as practicable, however, in all events the parties will reconcile and reimburse any amounts due on an annual basis. The party paying such expense will be promptly reimbursed by the other party.

The parties agree that this Agreement should not be construed to create a partnership, joint venture or other similar profit sharing arrangement. Furthermore, the parties agree that this Agreement should not be construed to authorize either party to act on behalf of, or in any way bind the other party. Except as is specifically set forth herein, each party will be responsible for the payment of their own expenses, including, without limitation, income taxes, worker's compensation, retirement benefits, and insurance. In addition, each party will be responsible for the generation, billing and collection of their own revenue.

The parties agree to indemnify, defend and hold harmless the other party with respect to claims, causes of action, damages, fees (including reasonable attorney's fees), costs or expenses which the other party incurs or becomes subject to as a result of the following:

- (a) A breach of this Agreement by the other party; and
- (b) A claim resulting from the activities of the other party.

This agreement shall have a term of one (1) year and shall be automatically renewed annually thereafter, unless one (1) of the parties hereto shall notify the other in writing of their intent to terminate the contract thirty (30) days prior to the end of the term then in effect.

ABC Co.

By: _____

[name and title]

Accepted and Agreed this _____ day [day] of _____ [month] ,
 _____ [year] .

XYZ Co.

By: _____

[name and title]



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AUTHOR: by Stephen E. Pigott and Harold O. Maxfield, Jr.

20.97 Arbitration clauses

COMMENT

Many of the form agreements contained in this Chapter contain arbitration clauses. Most of the clauses are relatively simple in nature and refer solely to the rules of the American Arbitration Association. In order to avoid disputes, the practitioner may find it preferable to provide for a more detailed dispute resolution mechanism. The following two arbitration clauses provide alternatives to the simple language clause. Each provision requires mediation prior to the dispute being arbitrated. Mediation may be helpful because it requires the parties to sit down and negotiate before time, costs, and effort of preparing for arbitrating a dispute. While arbitration should be faster and cheaper than a typical lawsuit, it can still be time consuming and expensive.

FORM

Clause No. 1

Any controversy, claim, or breach between the parties relating to this Agreement or the Company, shall first be submitted to an independent mediator knowledgeable in the area in which the dispute arose. If the parties, using reasonable efforts are unable to resolve the dispute through mediation, then the dispute shall be settled by arbitration in _____ [city] , _____ [state] under the Commercial Rules of the American Arbitration Association in effect at the time such controversy, claim or breach shall be selected from a panel of persons having experience with and a knowledge of the issue in dispute. The panel will consist of at least three (3) arbitrators. The award of the arbitrators will be final, binding and non-appealable. Judgment on the award may be entered in any

court, state or federal, having jurisdiction. The cost of any arbitration, including the fees and expenses of the arbitrators, will be paid by the losing party. The parties agree and acknowledge that money damages may not be an adequate remedy for a breach of a provision of this Agreement and that either party, in its sole discretion, may apply to a court for specific performance and/or injunctive relief in order to enforce or prevent any violations of the provisions of this Agreement.

Clause No. 2

Remedies

(a) In the event a dispute of any kind arises in connection with this Agreement, including any dispute concerning its construction, performance or breach, the Members will attempt to resolve the dispute as set forth in subsection (b) before proceeding to arbitration as provided in subsection (c). The Members waive all rights to seek remedies in any court (except to enforce the provisions of this Agreement in circumstances in which subsection (d) applied) and the right to jury trial. All documents, discovery and other information related to any such dispute, and the attempts to resolve or arbitrate such dispute will be kept confidential to the fullest extent possible.

(b) If a dispute arises, any Member will give notice to the other Member. After notice has been given, the Members in good faith will attempt to negotiate a resolution to the dispute.

(c) If, within twenty (20) days after the notice provided in subsection (b), a dispute is not resolved through negotiation or mediation, the dispute will be arbitrated. The Members agree to be bound by the selection of an arbitrator, and to settle the dispute exclusive by binding arbitration in accordance with the following provisions:

(i) The Members will collectively select one arbitrator. If they fail to do so within thirty (30) days after the notice provided in subsection (b), the Members will request the American Arbitration Association to submit a panel of ten arbitrators who are qualified in such matters from which the choice will be made. The Members will flip a coin and the loser will strike first, followed by alternative striking until one name remains. The Members may by agreement reject one entire list and request a second list. If selection by the above method is not completed within sixty (60) days after the notice provided in subsection (b), then an arbitrator will be selected by the American Arbitration Association. That arbitrator will then arbitrate the dispute in _____ [city], _____ [state], and issue an award.

(ii) The arbitration will be conducted under the Commercial Arbitration Rules of the American Arbitration Association. The arbitrator shall have no ability to add, change or delete provisions of this Agreement and shall be required to interpret the terms of this Agreement as they exist. The award of the arbitrator will be final, binding and non-appealable. Judgment on the award may be entered in any court, state or federal, having jurisdiction.

(iii) The cost of any arbitration including the fees and expenses of the arbitrator, will be shared by the Members to the dispute in equal proportions. Each Member will bear his own costs, expenses and attorney's fees.

(d) The Members agree and acknowledge that money damages may not be an adequate remedy for any breach of the provisions of this Agreement and that either Member, in his sole discretion, may apply to the court for specific performance and/or injunctive relief in order to enforce or prevent any violations of the provisions of this Agreement



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AUTHOR: by Stephen E. Pigott and Harold O. Maxfield, Jr.

20.98 Rules and regulations--mobile home

COMMENT

A written copy of the park rules should be given to each resident prior to the resident's execution of the rental agreement. The rules and regulations should be posted in a conspicuous location at the park. Many parks have business offices or laundry facilities. These are excellent locations to post the rules and regulations. Mobile home parks are highly regulated and local laws should be reviewed before the rules and regulations are put into place or changed. A good practice is to attach the rules and regulations to the rental agreement.

FORM

Rules and Regulations of _____

Purpose

1. These rules and regulations are binding on all residents, their guests and visitors, and park management of this mobile home park. The park operator has promulgated these rules to preserve uniformity and quality of standards, convenience, and enjoyment of all persons interested in this mobile home park. No one will be denied residency or tenancy in this mobile home park on the basis of race, ancestry, color, religion, creed, sex, or marital status.

Guests

2. Guests who have stayed with a resident or tenant more than a total of twenty consecutive days or a total of thirty days in a calendar year and who intend to stay on for any continued period beyond that must register with the park operator. Guests include any family of the resident's or tenant's mobile home other than the resident or tenant and his or her spouse and minor children.

Pets

3. Animals are not allowed in the park.

Mobile Home Standards

4. All mobile homes and mobile home accessory structures and buildings must be approved by the management before being placed or installed on individual lot sites. Complete skirting and awning installation of mobile homes is required within fourteen (40) business days of occupancy in this mobile home park. Awnings are required over the length and width of patios and carports of mobile homes. Residents and tenants of this mobile home park may acquire installation and accessory equipment from any vendor of their choice. Approved forms of mobile home accessory buildings and structures are available for purchase or rental from the park operator, including installation on the lot site, as follow: *[list equipment and charges]*.

Mobile Home Exteriors

5. Exteriors of all mobile homes must be kept clean and neat. All connections for utilities must be kept in safe, leak proof, and operative condition at all times. Clothing or other items not approved as accessories by management may not be hung from or outside of any mobile home. Clothes may be hung in the dryer yards of the laundry facilities. Patio furniture and barbecue equipment on the patio and a storage cabinet on the carport side are the only items permitted outside of a mobile home.

Lot Maintenance

6. All lot sites must be maintained by their residents or tenants in a clean, well-kept, and attractive fashion. The park operator may take over care of any neglected lot site and bill the resident or tenant for services rendered. Each resident or tenant must landscape the lot site within thirty (30) days of taking occupancy. Residents and tenants will maintain any lawns, flowers, and shrubs on their lot sites in an orderly, trimmed, and water manner and will keep all trash, debris, boxes, barrels, brooms, ladders, and other equipment out of site. Gardening equipment is available at the park operator's office for borrowing without charge. Unsightly decorations should not be used on lot sites. On vacating a lot site, the resident or tenant must ascertain that the lot site is leveled and have all holes filled, unless otherwise consented to in writing by the park owner.

Lot Usage

7. Lot sites are to be used for residential purposes in a manner that does not disturb the peaceful enjoyment of any part of the premises of this mobile home park by any resident or tenant. Repairing or washing of vehicles may not take place on lot sites or in driveways, carports, or streets of this mobile home park. Storage is not allowed under any mobile

home. All material or debris gathered or accumulated under a mobile home must be removed immediately on request of management.

Utilities

8. Each lot site is equipped with individual meters for measuring the actual consumption of _____ (e.g., gas, electricity, and water). Charges for utilities not included in rent payments according to the rental agreement for a lot site will be made by the individual companies supplying such services. Current schedules of the charges will be posted in the management center and at various other convenient locations by the park operator.

Notices from Enforcement Agencies

9. Any notice of violation of mobile home or mobile home park standards, laws, regulations, or ordinances received by a resident or tenant of this mobile home park from any federal, state, or local enforcement agency with jurisdiction must be fully attended to immediately and no later than the time limit given within the notice.

Park Utility and Convenience Centers

10. This mobile home park provides various laundry, trash disposal or collection centers. The equipment available at these centers is for the exclusive use of mobile home park residents and tenants. These areas are to be used according to instructions posted at the equipment and on the premises. An individual facility for the use of one resident or tenant must be kept neat and clean by the resident or tenant who uses it. If other persons are waiting to use any particular equipment, the person who has already used it for at least _____ (e.g., thirty) minutes should relinquish it to the next person waiting. All facilities must be used in a safe manner. No smoking or food or drink is permitted in facilities. Children under six must be accompanied by an adult while at a facility.

Recreational Facilities

11. All recreational facilities in this mobile home park are for the exclusive use of residents, tenants, and their guests. Guests must be accompanied by a resident or tenant and children under six must be accompanied by an adult when using a recreational facility. Recreation areas are to be kept clean and neat by those using them. Recreational facilities and equipment are used at the risk of the individual using them. Facilities and equipment must be used safely and with concern for the safety of others. All equipment is to be employed in accordance with instructions posted for its use. No smoking and no alcoholic beverages, food, or other drinks are permitted in or around any facilities except at areas designated by signs posted by the park operator. Wet bathing suits or other wet swimming apparel are not to be worn in facilities other than at the swimming pool and shower or steam facilities. If other persons are waiting to use equipment or a facility already in use, those using it should relinquish or vacate it after having used it for a total of _____ (e.g., thirty minutes). Facilities will open at _____ [time] and close at _____ [time] unless otherwise posted.

Moving Vehicles and Parking

12. The speed limit for all vehicles moving through the streets in this mobile home park is _____ (e.g., fifteen) miles per hour. No parking is allowed on streets, or other areas not designated as parking areas. Only the resident's or tenant's mobile home and two passenger automobiles may be parked on the lot site at any one time. All

other automobiles, motor homes, trailers, boats, and other vehicles must be parked in the parking areas or assembly centers provided for the appropriate kind of vehicle. The park operator will issue passes for permanent parking of all vehicles that are required to be parked in special areas. Residents and tenants may be assigned up to two parking spaces besides their carport parking areas free of charge.

Tenant Meetings

13. Meetings of residents, tenants, and occupants of mobile homes in this mobile home park relating to mobile home living and affairs may be held in any of the community or recreation halls or facilities of this mobile home park. Meetings must be held at reasonable hours when the hall or facility is not otherwise in use. All tenant meetings should be booked through either the park operator's office or the secretary of the tenant's association in order to assure that no other meeting is scheduled for the same time and place.

Tenants' Association

14. Residents and tenants of this mobile home park may join the tenants' association and membership is exclusively limited to them. The association is responsible for setting the social, educational, and recreational programs for this mobile home park community. It also is responsible for negotiating with the park operator in respect to rents, facilities, services, and charges. Due and procedures for operating are to be adopted by the association, and it will operate according to bylaws established and amended by its members.

Cooperation with Park Operator in Cleanup and Safety

15. All residents, tenants, and their guests have a responsibility to report to management any unsightly or unsafe condition that they observe in this mobile home park. Each should also keep the premises of this mobile home park free from any such conditions due to their own use of the premises and facilities. Residents and tenants are to cooperate with management in any formal fire protection or education program reasonably prescribed to maintain the safe condition of this mobile home park and the physical well-being of all its occupants.

Annoying Conduct

16. No residents, tenants, or their guests may engage in any conduct within any mobile home, at any lot site, or anywhere in this mobile home park that may reasonably be determined to constitute a substantial annoyance to other residents or tenants. Upon formal notice from management to desist from any annoying activities, a resident or tenant must immediately comply. A resident or tenant who believes that the conduct complained about is unreasonably categorized as an annoyance may request an immediate open meeting of tenants and the park operator to discuss the issue. After the meeting, the park operator will make a new determination of whether to demand that the resident or tenant refrain further from the conduct.

Compliance with Park Rules

17. All residents, tenants, and their guests shall fully comply with all park rules and amendments to these rules. Residents and tenants must keep themselves currently informed of the rules and amended rules in effect and have the responsibility of keeping their guests informed of appropriate rules on any occasion. If the park operator has reasonable grounds to believe that any resident or tenant is in violation of the park rules, the park operator may deliver the resident

or tenant at least one written notice of the alleged violation. The tenant or resident shall be given _____ (e.g., thirty) days to comply with the rule before tenancy may be terminated.

Advertisements of Mobile Homes Sales

18. Residents and tenants are permitted to advertise availability of their mobile homes for sale, exchange, rental or leasing. Advertising within this mobile home park is restricted to the placing of a sign no larger than _____ (e.g., twelve inches long by twelve inches wide) in the window of the mobile home. This sign may advertise the availability of the mobile home for sale, exchange, rental, or leasing, and give the owner's or agent's name, address, and telephone number. The only other form of advertising permitted in the mobile home, on the lot site, or anywhere in this mobile home park is restricted to the listing service offered by the park operator.

Amendment to Park Rules

19. These park rules may be amended by the park operator at any time, as long as the amendment is not arbitrary, capricious, or unreasonable. Prior written notice of collective meetings may be given to all residents and tenants by the park operator. Amendments to the park rules will become effective only after residents and tenants of this mobile home park have received written notice of the amendment from the park operator. The effective date of any amendment shall be at least thirty (30) days from the date written notice is received by the residents and tenants of this mobile home park.

Right of Entry by Park Operator

20. The park operator or its agents or employees may enter the lot site on which the resident's or tenant's mobile home is located to inspect and maintain utilities, to protect the mobile home park and its residents and tenants, and to maintain the lot site in accordance with the park rules when the resident or tenant fails to do so. Entry may also be made into a resident's or tenant's mobile home to inspect and maintain utilities, to inspect and make ordinary, necessary, or agreed to repairs, decorations, alterations, or improvements to the mobile home, to supply necessary or agreed to services, or to deliver parcels that are too large for the mail facilities. Unless authorized by the resident or tenant, no entry may be made for any other reasons. No entry may occur without twenty-four (24) hours notice to the resident or tenant except in the case of an emergency or when delivery of prior notice is impracticable. Any entry by the park operator or its agents or employees must be made at a reasonable time and in a reasonable manner. Entry or demands for entry will not be made continuously and repeatedly by the park operator or its agents or employees for the purpose of harassing the resident or tenant.



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FORM 21.98 Occupancy agreement--occupancy by purchaser prior to settlement--owner's form

FORM 21.99 Occupancy agreement--occupancy by seller subsequent to closing--letter agreement

FORM 21.100 Party driveway agreement--adjoining land owners

FORM 21.101 Smoke alarm affidavit

FORM 21.102 FIRPTA Affidavit

FORM 21.103 Installment note and deed of trust--escrow for taxes--assignment of rents--mortgage insurance and escrow--trustee's power of sale--California

FORM 21.104 Commercial building note and mortgage--building equipment included as collateral--parties' rights regarding rent defined--no recourse against borrower--New York

FORM 21.105 Wraparound mortgage--loan evidenced by promissory note and secured by second mortgage

FORM 21.106 Variable interest rate mortgage note--annual adjustment--adjustment limitations

FORM 21.107 Graduated payment rider to mortgage--increase in principal for interest deficiency--constant payment after fifth year--mortgage insurance premium payment

FORM 21.108 Condominium mortgage note and mortgage--assignable to institutional lender

FORM 21.109 Cooperative apartment loan security agreement

FORM 21.110 Junior lien note and deed of trust--plain language note--right of rescission

FORM 21.111 Plain language note and mortgage--residential mortgage loan

FORM 21.112 Plain language mortgage assumption agreement--release of seller by lender--prepayment penalty

FORM 21.113 Mortgagee-in-possession agreement--delivery of possession--assignment of leases and equipment

FORM 21.114 Home Equity Conversion Mortgage

FORM 21.114A Short Sale Agreement with Mortgage Lender

FORM 21.115 Mortgage clauses and provisions



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Current Legal Forms for Real Estate
Chapter 21 SALES AND EXCHANGES
Part I. The Tax Background

25-21 Current Legal Forms for Real Estate § 21.01

§ 21.01 Summary of this Chapter

§ 21.02 The Taxable Event. Gain or loss on disposition of property generally is reportable for the year of realization. A completed sale is a taxable event, so that gain or loss is realized in the year that title passes. Offers, contracts to sell, and grants of options to purchase property, however, do not constitute taxable events. But, sale, exchange, or nonexercise of option may result in recognition of gain or loss.

§ 21.03 Options to Buy Real Estate. Exercise of option is treated as purchase by option holder and sale by grantor. Gain or loss on sale or exchange of option is treated as capital gain or loss if underlying property would be capital asset in option holder's hands. Option payments are not usually included in income until option is exercised or lapses. Failure to exercise option is treated as sale or exchange, and results in ordinary or capital loss. Option gives right, but not obligation, to purchase property.

§ 21.04 Amount of Gain or Loss. Amount of gain or loss from sale or other disposition of real property is the difference between its adjusted basis and "amount realized." Basis for computing gain or loss is generally cost of property, increased by capital expenditures and certain other adjustments, and decreased by depreciation or cost recovery deductions allowed or allowable.

§ 21.05 Dealer Property or Capital Asset Status. Tax consequences of selling real estate depends on purpose for which held or used. Property used in taxpayer's trade or business is a "quasi-capital" asset which produces capital gain or ordinary loss. Property held by taxpayer primarily for sale to customers in ordinary course of trade or business produces ordinary income or loss. Otherwise, real estate is a capital asset producing capital gain or loss.

§ 21.06 Cost Recovery and Depreciation. The cost of depreciable real property is recovered under the straight-line method over a 27.5 year period for residential rental property and 39 years for nonresidential real property. Residential real property must have 80 percent of gross rental income from dwelling units. Lessee improvements are recovered over recovery period rather than lease term. Real property placed in service from 1981 through 1986 was eligible for accelerated cost recovery. Depreciation is allowed for real property placed in service before 1981.

§ 21.07 Recapture of Cost Recovery and Depreciation. Depreciation or accelerated cost recovery system (ACRS)

deductions taken or allowed in previous years on certain real or personal property may be recaptured as ordinary income upon disposition of the property. Recapture provisions prevent taxpayers from realizing favorable capital gain treatment on some or all of gains resulting from use of cost recovery of depreciation allowances to the extent they previously reduced taxable income.

§ 21.08 Passive Activity Loss Limitation. Losses from passive activities may not offset other income, but may offset income from same or other passive activities. Disallowed passive activity losses are carried forward indefinitely to offset income from passive activities in following years. Disallowed losses are used to offset passive and nonpassive income when activity is completely disposed of in a taxable disposition. Passive activities include trade or business, or activities for production of income, in which taxpayer does not materially participate, and rental activities.

§ 21.09 At Risk Limitation on Loss Deductions. Losses from activity of holding real property are limited to amount taxpayer has at risk. Amount at risk includes money and property contributed to activity, and borrowed funds. Nonrecourse financing amounts are not at risk. However, for real property, qualified nonrecourse financing is amount at risk. Qualified nonrecourse financing is generally amounts borrowed from government or institutional lenders. At risk rules apply to individuals, including partners and S corporation shareholders, and to closely held corporations.

§ 21.10 Postponement of Income Recognition: General and Special Rules. "Amount realized" on sale or other disposition of real property includes fair market value of property received, including notes or other evidence of indebtedness, for unpaid portion. Original issue discount and imputed interest rules may apply to deferred or installment sales if adequate interest is not provided.

§ 21.11 Postponement of Income Recognition: Installment Sales. If some or all of sales price is paid after year of sale, installment method or reporting gain is applied automatically, unless seller elects otherwise. Dealers are not eligible to report under installment method. Under installment method, seller reports as income in any taxable year the proportion of payments received during that year which gross profit to be realized bears to total contract price. Depreciation recapture income must be recognized in taxable year of sale even if gain on sale qualifies for installment sale treatment. Interest charges are imposed on deferred tax payments resulting from certain installment dispositions of real property.

§ 21.12 Tax-Free Exchanges. No gain or loss is recognized when property held for productive use in a trade or business or for investment is "exchanged" solely for property of "like kind" which is to be held either for such productive use or for investment. Receipt of "other property or money" (*i.e.*, "boot") in tax-free exchange results in recognition of gain to extent of boot received. Like-kind exchange postpones depreciation recapture except to extent of boot received. Exchange of like-kind property with related party does not qualify for nonrecognition treatment if either party disposes of transferred property within two years.

§ 21.13 Sale-Leaseback Transactions. Sale-leaseback transactions offer tax and other financial advantages to seller, as lessee, and purchaser, as lessor. However, if a transaction has no legitimate business purpose and is considered to be primarily for tax avoidance, it may be recharacterized for tax purposes as a mortgage loan or similar arrangement, resulting in corresponding changes to anticipated tax benefits. Each case is decided on its own facts.

§ 21.14 Exclusion of Gain from Sale of Principal Residence. Taxpayers may typically exclude up to \$250,000 of gain from the sale of a residence which the taxpayer has owned and used as a principal residence for periods aggregating two years or more during the five year period ending on the date of the sale. Married taxpayers filing a joint federal income tax return may typically exclude \$500,000 of gain. There is no requirement that the sales proceeds be used to purchase another residence and the taxpayers need not be any certain age to utilize the exclusion.

§ 21.15 Residential Mortgage Interest Deduction. Qualified residence interest not subject to deduction limitation on personal interest. Qualified residence interest includes interest on acquisition indebtedness and home equity

indebtedness secured by principal residence or second home. Maximum allowed acquisition indebtedness is \$1 million. Home equity indebtedness is limited to \$100,000.

§ 21.16 Sale of Real Property Related Interests. Sale of real property related interest may involve sale of leasehold, or real estate partnership interest, or of real estate corporation stock. Different tax consequences may result from disposition, depending upon the particular interest sold.

Legal Topics:

For related research and practice materials, see the following legal topics:

Real Property LawPurchase & SaleGeneral OverviewReal Property LawPurchase & SaleLike-Kind ExchangesReal Property LawPurchase & SaleOption ContractsGeneral OverviewTax LawFederal Income Tax ComputationDeductions for Amortization, Depletion & DepreciationAmortization, Cost Recovery & Depreciation (IRC secs. 167-169, 171, 178, 194-195, 197, 216, 248, 280F)General OverviewTax LawFederal Income Tax ComputationDeductions for Amortization, Depletion & DepreciationAmortization, Cost Recovery & Depreciation (IRC secs. 167-169, 171, 178, 194-195, 197, 216, 248, 280F)Accelerated Cost Recovery SystemTax LawFederal Income Tax ComputationDeductions for Amortization, Depletion & DepreciationAmortization, Cost Recovery & Depreciation (IRC secs. 167-169, 171, 178, 194-195, 197, 216, 248, 280F)Property Used in Business & TradeTax LawFederal Income Tax ComputationDeductions for LossesPassive Activity Loss (IRC sec. 469)Tax LawFederal Income Tax ComputationSales & ExchangesBusiness Property (IRC secs. 1031, 1221, 1231)Property Held for Productive Use & InvestmentTax LawFederal Income Tax ComputationSales & ExchangesCapital Gains & Losses (IRC secs. 1201-1202, 1211-1212, 1221-1223, 1231-1260, 1271-1278, 1281-1288, 1291-1298)Capital AssetsTax LawFederal Income Tax ComputationSales & ExchangesInstallment Sales (IRC secs. 1001, 1031, 1231)General OverviewTax LawFederal Income Tax ComputationSales & ExchangesIntangible Property (IRC secs. 1234-1235, 1241, 1253)OptionsTax LawFederal Income Tax ComputationSales & ExchangesRecapture of Depreciation (IRC secs. 1245, 1250)



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Current Legal Forms for Real Estate
Chapter 21 SALES AND EXCHANGES
Part I. The Tax Background

25-21 Current Legal Forms for Real Estate § 21.02

§ 21.02 The Taxable Event

[1] Sales--When Title Passes

As a general rule, gain or loss on the sale of real estate is reportable when it is realized. Realization of gain or loss is deemed to result in the year that the transaction is completed, so that the mere execution of a contract of sale does not trigger any tax consequences. Generally, a sale is considered to be completed when title passes.ⁿ¹ In some situations, however, the transaction may be deemed to have been completed before title passes. An example is when possession is transferred to a buyer under a contract of sale, even though the deed is delivered and an adjustment of purchase price is made in the following year.ⁿ² Another example of a completed transaction without passage of title is where a deed and possession is tendered by an accrual basis seller but is refused by the buyer, and where specific performance of the contract is enforced in the subsequent year.ⁿ³

[2] Offers and Contracts

The transfer of anything less than title generally does not trigger any tax consequences. Thus, an offer to purchase or sell, the making of a contract, the conveyance of an exclusive option to purchase, or the tender of a down payment, does not, in itself, constitute a taxable event. No gain or loss is realized in such cases, even if the seller is on the accrual basis.ⁿ¹

An advance payment for property to be constructed has been held to be a mere deposit, not a selling price.ⁿ² On the other hand, a sale was held to be sufficiently consummated by an accrual basis seller where a warranty deed was placed on record, even though payment of the purchase price was dependent upon a subsequent ascertainment of acreage and an examination of title.ⁿ³ With respect to an option, no income was deemed to be realized even though part of the sales price was received, where the agreement required the seller to deliver a deed only if and when the payments made pursuant to the option aggregated a specified sum before a fixed future date, or where, under local law, the purchaser had a right to forfeit his initial payment and not take title.ⁿ⁴

[3] Options

The mere granting of an option to purchase property does not constitute a taxable event.ⁿ¹ Gain or loss may result,

however, if an option is sold or exchanged, or if the optionee fails to exercise it.ⁿ² The federal income tax aspects of options to purchase real estate are discussed in greater detail in the following section.

[4] Reporting Real Estate Transactions

Real estate transactions are required to be reported to the Service. The primary person responsible for reporting the transaction is the attorney or title company responsible for closing the transaction. If there is no person responsible for closing the transaction, the reporting must be done by the mortgage lender. If there is no mortgage lender, the reporting must be done by the seller's broker. If there is no seller's broker, the reporting must be done by the buyer's broker. If there is no buyer's broker, the reporting is to be done in accordance with regulations. This reporting requirement applies to real estate transactions closing after 1986.ⁿ¹

Planning Notes

Refinancing Transactions Are Not Reported: Reporting Forms and Rules. Information reporting is not required on refinancing of real estate, unless required by regulations according to the Conference Committee Report to the Tax Reform Act of 1986. A form similar to Form 1099 used to report customer information by securities and other brokers should be available from the Service. A statement must also be given to customers whose name(s) appear on the form on or before January 31 of the year following the transaction.ⁿ²

Backup Withholding May Be Required for Real Estate Transaction. Backup withholding rules under *I.R.C. Section 3406* require withholding of 20 percent of payments from reportable payments, when a payee fails to furnish a taxpayer identification number (*i.e.*, social security number or employer identification number). However, the definition of "broker" required to withhold does not include a real estate broker under the real estate transaction reporting requirements. However, the amendment to *I.R.C. Section 3406(h)* does permit the Service to issue regulations including real estate brokers (or title closers, or attorneys) in the definition of brokers required to comply with backup withholding.

Legal Topics:

For related research and practice materials, see the following legal topics:

Real Property Law
Financing
Mortgages & Other Security Instruments
General Overview
Real Property Law
Purchase & Sale
General Overview
Real Property Law
Purchase & Sale
Option Contracts
General Overview
Tax Law
Federal Tax Administration & Procedure
Administration
Identification Numbers & Information Returns (IRC secs. 6031-6065)
General Overview
Tax Law
Federal Tax Administration & Procedure
Administration
Identification Numbers & Information Returns (IRC secs. 6031-6065)
Broker Returns

FOOTNOTES:

(n1)Footnote 1. *Clodfelter v. Comm'r*, 48 T.C. 694 (1967) , *aff'd* 426 F.2d 1391 (9th Cir. 1970) ; *Lowry v. Comm'r*, T.C. Memo 2003-225 (T.C. 2003) . As to the effect of rescission of a sale either during or after the tax year of sale, see Rev. Rul. 80-58, 1980-1 C.B. 181 . Final regulations provide that interests in real property include fee ownership and co-ownership of land or improvements on it, options to acquire land or improvements on it, and options to acquire leaseholds of land or improvements on it. Timeshare interests are covered if they represent an undivided fractional fee interest, or undivided leasehold interest, in real property, as well as stock held by a person as a tenant-stockholder in a cooperative housing corporation. *Treas. Reg. § 1.856-3(c)*.

(n2)Footnote 2. *Helvering v. Nibley-Mimnaugh Lumber Co.*, 70 F.2d 843 (D.C. Cir. 1934) ; *Comm'r v. Baertschi*, N. 1, *supra*; *White v. Comm'r*, T.C. Memo 1974-69 . Abandonment of real property that is subject to a nonrecourse debt in excess of its fair market value is a sale or exchange for purposes of determining whether a loss is a capital loss. *Yarbro v. Comm'r*, 737 F.2d 479 (5th Cir. 1984) .

(n3)Footnote 3. *Comm'r v. North Jersey Title Ins. Co.*, 79 F.2d 492 (3d Cir. 1935) ; see *Brunton v. Comm'r*, 42 F.2d 81 (9th Cir. 1930) , *cert. denied* 282 U.S. 889 (papers held in escrow). But see *U.S. Indus. Alcohol Co. v. Helvering*, 137 F.2d 511 (2d Cir. 1943) , where the court indicated that an actual transfer of possession is required, even where there has been an agreement as to the exact price and all other essential details.

(n4)Footnote 1. *Lucas v. North Texas Lumber Co.*, 281 U.S. 11 (1930) (making of a contract to sell).

(n5)Footnote 2. *Woodlawn Park Cemetery Co. v. Comm'r*, 16 T.C. 1067 (1951) .

(n6)Footnote 3. *Frost Lumber Indus., Inc. v. Comm'r*, 128 F.2d 693 (5th Cir. 1942) , *rev'g* 44 B.T.A. 1249 (1941) ; *cf.* *Saunders v. U.S.*, 450 F.2d 1047 (9th Cir. 1971) .

(n7)Footnote 4. *Comm'r v. Stuart*, 300 F.2d 872 (3d Cir. 1962) , *rev'g* T.C. Memo 1960-234 ; *cf.* *Estate of Gordon v. Comm'r*, 17 T.C. 427 (1951) , *aff'd* 201 F.2d 171 (6th Cir. 1952) . For further discussion of options to purchase real estate, see § 21.03, *infra*.

(n8)Footnote 1. *Birch Ranch & Oil Co. v. Comm'r*, 3 T.C.M. 378 (1944) , *aff'd on other issue* 152 F.2d 874 (9th Cir. 1946) , *cert. denied* 328 U.S. 863 ; see also *Helvering v. San Joaquin Fruit & Inv. Co.*, 297 U.S. 496 (1936) , *reh. denied* 297 U.S. 728 (option to purchase does not constitute ownership of the property).

(n9)Footnote 2. *I.R.C. § 1234*. For a further discussion of sales and exchanges of options to buy or sell real estate, see Rabkin & Johnson, *Federal Income, Gift and Estate Taxation* (FIGET) Ch. 43 (Matthew Bender 2004).

(n10)Footnote 1. *I.R.C. § 6045(e)*, added by the Tax Reform Act of 1986, Pub. L. No. 99-514, 99th Cong., 2d Sess. § 1521(a) (Oct. 22, 1986). The Service issued final regulations under *I.R.C. § 6050H* relating to the reporting of mortgage interest received in a trade or business after 1987 from individuals. *T.D. 8191, 1988-1 C.B. 387* . When real property is sold, taxes on it are apportioned between the seller and the buyer: taxes relating to the part of the year ending the day before the closing are allocated to the seller and the balance is the buyer's obligation. For a transaction involving a residence, the real estate reporting person (e.g., the settlement agent) must report the portion of the real estate tax imposed on the buyer on a tax return and customer statement. *I.R.C. § 6045(e)(4)*, added by Comprehensive National Energy Policy Act of 1992 (1992 Act), Pub. L. No. 102-486, 102d Cong., 2d Sess., § 1933 (Oct. 24, 1992), effective for transactions after 1992. If a taxpayer claims an itemized deduction for qualified residence interest paid on any seller-provided financing, his tax return must include the taxpayer's name, address, and taxpayer identification number. Any person receiving or accruing interest from seller-provided financing must also report the same information for the payor. *I.R.C. §§ 6109(h), 6724(d)(3)*, added by 1992 Act, § 1933, effective for tax years beginning after 1991. The Service issued final regulations regarding information reporting requirements for taxpayers who receive an aggregate of at least \$600 in interest, including interest in the form of points on a residential mortgage. Seller-paid points must be reported on Form 1098, and FHA and VA points are subject to information reporting as well. *Treas. Reg. §§ 1.6050H-0 through 6050H-2* amended by *TD 8571 (Dec. 7, 1994)* .

(n11)Footnote 2. H.R. Conf. Rep. No. 99-841, 99th Cong., 2d Sess. 786-87 (1986).



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Chapter 21 SALES AND EXCHANGES
Part I. The Tax Background

25-21 Current Legal Forms for Real Estate § 21.03

§ 21.03 Options to Buy Real Estate

The holder of an option may exercise the option, sell, or exchange it, or let it lapse by failing to exercise within the required time. Each of these actions, or inactions, may result in different tax treatment for both the option holder and grantor. Each requires a separate analysis to determine the tax consequences.

[1] Options Defined

There is a clear distinction between an option and a contract of sale. An option gives a person a right to purchase at a fixed price within a limited period of time but imposes no obligation on the person to do so, while a contract of sale contains mutual and reciprocal obligations: the seller is obligated to sell and the purchaser is obligated to buy.ⁿ¹

An executory contract for the sale of an asset is not the equivalent of an option even though the amount paid to the seller upon execution is retained as liquidated damages upon the buyer's breach. As a result, it is not an option and the purchaser suffers an ordinary loss upon the failure to consummate the transaction.ⁿ²

Capital gain treatment was denied when a contract to purchase property gave the taxpayer a five-year option to acquire the property. The contract also permitted the optionors to purchase the option from the taxpayer at a stated price rather than to sell the optioned property itself. The court found that the payment to the taxpayer amounted to a cleverly disguised finder's fee.ⁿ³

[2] Exercise of Option

Generally, if the holder exercises an option, the transaction is treated as a purchase by the holder and a sale by the option grantor. For example, the holding period of the property begins the day after the property is acquired, rather than when the option is acquired, and the seller's holding period ends with the sale.ⁿ¹ The purchaser's cost for the option is included in his basis for the acquired property.ⁿ² The receipt of consideration for giving an option to buy property is treated as a nontaxable transaction until the option is either exercised or lapsed. If the option is exercised, the consideration is treated as part of the selling price. If the property itself is a capital asset, any loss on a sale under an exercise of the option is a capital loss.ⁿ³

Example:

John pays \$5,000 for an option to purchase real property on the payment of an additional \$95,000. The option is given on January 1, 2001. The grantor of the option has held the property for only three months as of January 1, and his basis is \$90,000. John exercises the option, and the transfer of title takes place on July 1, 2002. John's basis in the property is \$100,000, and his holding period starts the day after the closing or settlement. The Seller's holding period exceeds the one-year period required for long-term capital gain, and his gain is \$10,000, *i.e.*, \$100,000 less the \$90,000 basis.

[3] Sale or Exchange of Option

Gain or loss from the sale or exchange of an option to buy or sell property which is, or if acquired would be, a capital asset in the hands of the taxpayer holding the option is considered gain or loss from the sale or exchange of a capital asset. The period for which the taxpayer has held the option determines whether the capital gain or loss is short-term or long-term.ⁿ¹ However, any gain or loss realized from the sale or exchange of an option by a dealer in options is considered as ordinary income or loss. A dealer in options to buy and sell property is considered a dealer in the property subject to the option.ⁿ²

Example 1:

Louis is searching for a residence, and acquires an option to buy a house at a fixed price. Although the property goes up in value, Louis decides he does not want the house for his residence and sells the option for more than he paid for it. The gain which Louis realized is a capital gain since the property, if acquired, would have been a capital asset in his hands.

Example 2:

Assume the same facts as in Example 1, except that the property goes down in value, and Louis decides not to purchase the house. He sells the option at a loss. While this is a capital loss, it is not a deductible loss because it is not a business or investment loss.ⁿ³

Example 3:

John, a dealer in industrial property, acquires an option to buy an industrial site and fails to exercise the option. The loss is an ordinary loss since he would have held the property for sale to customers in the ordinary course of his trade or business if he had acquired it.ⁿ⁴

The allowance of capital gain or loss on the sale or exchange of an option does not apply to an option to lease property, but does apply to an option to buy or sell a lease. Therefore, an option to obtain all the right, title, and interest of a lessee in leased property is subject to the rule allowing capital gain, but an option to obtain a sublease from the lessee is not. When the rule applies to an option to buy or sell a lease, it is the character the lease itself, if acquired, would have in the hands of the taxpayer, and not the character of the property leased, which determines the treatment of gain or loss of the taxpayer with respect to the option.ⁿ⁵

[4] Option Payments

The granting of an option does not constitute a taxable sale. No income is realized even upon the receipt of part of the sales price when the agreement requires the grantor of the option to deliver a deed only if and when the payments are made in a specified sum before a fixed date.ⁿ¹ Generally, the treatment of the option payment is not determined until the option is exercised or lapsed. If the option is exercised, the seller realizes gain or loss at that time.ⁿ² Any gain to the grantor of an option arising from the failure of the holder to exercise it is ordinary income.ⁿ³

Despite the general rule that the transaction remains "open" until the option is either exercised or forfeited, there can be immediate ordinary income recognized on granting the option if the taxpayer can have only ordinary income whether the optionee exercises the option or allows it to expire.ⁿ⁴

[5] Failure to Exercise Option

If the holder of an option to buy or sell property incurs a loss on failure to exercise the option, the option is deemed to have been sold or exchanged on the date that it expired. Any such loss to the holder of an option is treated under the general rule that loss incurred when the option is unexercised is either an ordinary loss, or a capital loss, depending on the character of the property covered by the option.ⁿ¹ The period that the taxpayer held the option determines whether the loss is long-term or short-term.ⁿ²

Example 1:

Robert purchases an option for \$5,000 to acquire real property. The option expires three months after it is written, and Robert fails to exercise it. Assuming the real estate would be a capital asset in Robert's hands, the loss would be a capital loss. However, because the option was held for only three months, the loss would be short term.

Example 2:

Robert, a dealer in real property, acquires a one and a half year option on real estate for \$10,000. Robert fails to exercise the option. Although Robert held the option long enough to qualify for a long term loss, the loss is not a capital loss because Robert is a dealer in real property. The property would not be a capital asset in his hands, but would be treated as similar to inventory.ⁿ³

If an owner of property receives payments under an option which are subsequently forfeited, income normally is not realized until the time of forfeiture. This rule applies even though the payments exceed the basis of the property.ⁿ⁴ Any gain realized by the grantor of an option upon the failure of the holder to exercise it is ordinary income.ⁿ⁵

If an owner of property has granted a purchase option but then pays for its release in order to sell the property to another person, the payment is a capital expenditure which increases his basis for the property.ⁿ⁶

Planning Note

If Optioned Property Is to Be Resold, Capital Gain from Sale of Option Is Better than Ordinary Income from Sale of Property. If the holder of an option locates a buyer for the optioned property, willing to pay a higher price, taxes may be saved by selling the option rather than the property. The holding period for the option starts when the option is acquired. Under the same principle, the holding period for the property does not start until the property is purchased by exercise of the option. If the option runs for a period longer than the long term capital gain holding period, the holder can achieve long term capital gain on the sale of the option. The option, however, must be held for the required long term capital gain period (more than one year, for options acquired after 1987). If the option is held for the required time and the option is exercised, the holding period for the property starts the day after it is purchased. There is no tacking of holding periods here, and the property must be held for the required time before long term capital gain can be achieved. If a buyer is found before the option is exercised, it may be better to sell him the option after it has been held for the required time, rather than exercise the option, acquire the property, and wait during the required holding period to sell it.

Legal Topics:

For related research and practice materials, see the following legal topics:

Real Property LawPurchase & SaleGeneral OverviewReal Property LawPurchase & SaleOption ContractsGeneral OverviewTax LawFederal Income Tax ComputationSales & ExchangesCapital Gains & Losses (IRC secs. 1201-1202, 1211-1212, 1221-1223, 1231-1260, 1271-1278, 1281-1288, 1291-1298)General OverviewTax LawFederal Income Tax ComputationSales & ExchangesCapital Gains & Losses (IRC secs. 1201-1202, 1211-1212, 1221-1223, 1231-1260, 1271-1278, 1281-1288, 1291-1298)Long Term & Short Term Gains & LossesTax LawFederal Income Tax ComputationSales & ExchangesIntangible Property (IRC secs. 1234-1235, 1241, 1253)Options

FOOTNOTES:

(n1)Footnote 1. Koch v. Comm'r, 67 T.C. 71 (1976) ; W. A. Drake Inc. v. Comm'r, 3 T.C. 33 (1944) , *aff'd* 145 F.2d 365 (10th Cir. 1944) ; Carter v. Comm'r, 36 T.C. 128 (1961) ; see *Estate of Franklin v. Comm'r*, 64 T.C. 752 (1975) .

(n2)Footnote 2. U.S. Freight Co. v. U.S., 422 F.2d 887 (Ct. Cl. 1970) ; *cf.* Case v. U.S., 633 F.2d 1240 (6th Cir. 1980) .

(n3)Footnote 3. Saunders v. U.S., 450 F.2d 1047 (9th Cir. 1971) , *rev'g* 294 F. Supp. 1276 (D.C. Hawaii 1969) .

(n4)Footnote 1. Borelli v. Comm'r, T.C. Memo 1972-178 ; *Helvering v. San Joaquin Fruit & Inv. Co.*, 297 U.S. 496 (1936) ; Weir v. Comm'r, 10 T.C. 996 (1948) , *aff'd* 173 F.2d 222 (3d Cir. 1949) .

(n5)Footnote 2. *Rev. Rul. 58-234, 1958-1 C.B. 279* .

(n6)Footnote 3. O'Madigan v. Comm'r, T.C. Memo 1960-212 , *aff'd* 300 F.2d 154 (9th Cir. 1962) .

(n7)Footnote 1. *I.R.C. § 1234(a)(1); Treas. Reg. § 1.1234-1(a)*.

(n8)Footnote 2. *I.R.C. §§ 1221(a)(1), 1234(a)(3)(A); Treas. Reg. § 1.1234-1(d)*.

(n9)Footnote 3. *See I.R.C. §§ 165(c), 262*.

(n10)Footnote 4. *Treas. Reg. § 1.1234-1(g)*.

(n11)Footnote 5. *Treas. Reg. § 1.1234-1(f)*.

(n12)Footnote 1. Koch v. Comm'r, 67 T.C. 71 (1976) ; Birch Ranch & Oil Co. v. Comm'r, 3 T.C. Memo 378 (1944) , *aff'd on other issue* 152 F.2d 874 (9th Cir. 1946) , *cert. denied* 328 U.S. 863 ; *cf.* Estate of Gordon v. Comm'r, 17 T.C. 427 (1952) , *aff'd* 201 F.2d 171 (6th Cir. 1953) ; C.V.L. Corp. v. Comm'r, 17 T.C. 812 (1952) .

(n13)Footnote 2. Koch v. Comm'r, N. 1*supra*; see Virginia Iron Coal & Coke Co. v. Comm'r, 37 B.T.A. 195 (1938) , *aff'd* 99 F.2d 919 (4th Cir. 1938) , *cert. denied* 307 U.S. 630 ; Waukesha Malleable Iron Co. v. Comm'r, 67 F.2d 368 (7th Cir. 1933) ; Dill Co. v. Comm'r, 33 T.C. 196 (1959) , *aff'd* 294 F.2d 291 (3d Cir. 1961) .

(n14)Footnote 3. *Treas. Reg. § 1.1234-1(b)*.

(n15)Footnote 4. Comm'r v. Pickard, 401 F.2d 615 (10th Cir. 1968) .

(n16)Footnote 1. *I.R.C. § 1234(a)(2); Treas. Reg. § 1.1234-1(b); Willis v. Comm'r*, 736 F.2d 134 (4th Cir. 1984) , *rev'g* T.C. Memo 1983-180 .

(n17)Footnote 2. *I.R.C. § 1234(a)(1); Treas. Reg. § 1.1234-1(a)*.

(n18)Footnote 3. *See Willis v. Comm'r*, 736 F.2d 134 (4th Cir. 1984) , *rev'g* T.C. Memo 1983-180 .

(n19)Footnote 4. Hunter v. Comm'r, 140 F.2d 954 (5th Cir. 1944) ; see Rev. Rul. 57-40, 1957-1 CB 266 ; Rev. Rul. 58-234, 1958-1 CB 279 ; *cf.* Estate of Gordon v. Comm'r, 17 T.C. 427 (1952) , *aff'd* 201 F.2d 171 (6th Cir. 1953) .

(n20)Footnote 5. *Treas. Reg. § 1.1234-1(b); Rev. Rul. 57-40, 1957-1 C.B. 266* .

(n21)Footnote 6. *Rev. Rul. 55-557, 1955-2 C.B. 60* .



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Current Legal Forms for Real Estate

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Current Legal Forms for Real Estate
Chapter 21 SALES AND EXCHANGES
Part I. The Tax Background

25-21 Current Legal Forms for Real Estate § 21.04

§ 21.04 Amount of Gain or Loss

[1] In General

The amount of gain or loss realized from the sale or other disposition of real property, as with dispositions of property in general, involves consideration of two factors: the adjusted basis of the property conveyed and the amount realized. Gain or loss is the difference between the adjusted basis and the consideration received.ⁿ¹

Generally, the basis for computing gain or loss is the seller's original basis (usually cost, which includes mortgages involved in the original acquisition), adjusted upward for improvements and other capitalized expenditures or investments, and adjusted downward by cost recovery or depreciation deductions allowed or allowable in prior years.ⁿ² The amount realized is the sum of any money received plus the fair market value of the property (other than money) received plus debt relief.ⁿ³

[2] Adjusted Basis

[a] Original Cost

The adjusted basis for determining the gain or loss from the sale or other disposition of property is the basis adjusted as provided in *I.R.C. Section 1016*.ⁿ¹ The basis of property is generally its cost.ⁿ² Original cost basis for real property consists of amounts paid or incurred in constructing or acquiring and perfecting title to the property. Such costs include fees for architects, attorneys and surveyors, as well as costs of defending title and removing a cloud on title. The face amount of a purchase money mortgage is part of the purchase price, as is the face amount of an existing mortgage assumed by the taxpayer at the time of purchase. Even where the property is acquired subject to an existing mortgage which the taxpayer does not assume, its basis includes the amount of that non-recourse obligation.ⁿ³ There are significant benefits of including a loan in the basis of property it finances. If the property is eligible for depreciation deductions, including the debt in the basis enables a taxpayer to recover costs that he or she has not yet paid or assumed directly. Although the outstanding debt will be included in the taxpayer's amount realized on eventual sale (offsetting the earlier depreciation deductions), the taxpayer enjoys the time value of the depreciation deductions.

If, subsequent to the purchase, the taxpayer gives a mortgage on the property as security for a loan, that transaction

normally has no effect on the basis of the property.ⁿ⁴ Since no gain is realized when the taxpayer obtains, without personal liability, a mortgage in excess of the property's basis, that excess does not give the taxpayer a stepped-up basis for the computation of gain or loss when the property is subsequently disposed.ⁿ⁵

The cost of real property does not include any portion of real property taxes that are treated as imposed upon the purchaser.ⁿ⁶ This rule applies whether or not the contract of sale calls for the purchaser to reimburse the seller for such taxes paid or to be paid by the seller. On the other hand, if the purchaser pays, or assumes liability for, real property taxes which the Code treats as imposed upon the seller, such taxes are considered part of the cost of the property.ⁿ⁷

[b] Improvements

The most common adjustments which increase the basis of real property are improvements and betterments.ⁿ⁸ There is specific statutory authority for capitalizing taxes and other carrying charges, incurred with respect to unimproved property and property under development, which are properly chargeable to capital account and which have not been previously taken as deductions.ⁿ⁹ Abandonment losses and distribution losses result in a decrease of basis.ⁿ¹⁰

[c] Other Adjustments

The only other adjustment to the basis for real property is for depreciation, cost recovery, obsolescence, amortizations, and depletion.ⁿ¹¹ Since the allowance for depreciation or cost recovery is limited to property which is used in the trade or business, or which is held for the production of income,ⁿ¹² no such adjustment is required in computing gain or loss on the sale of a taxpayer's residence. Where the basis of property is determined by its basis in the hands of the transferor, or by the basis of property exchanged by the taxpayer (*i.e.*, carry-over basis), the depreciation adjustment must be made for the period during which the property was held by such transferor, or for the period during which the other property was held.ⁿ¹³

[3] Amount Realized

The second factor in determining the amount of gain or loss is the amount realized upon the sale or other disposition. The "amount realized" from the sale or other disposition of property is the sum of any money received plus the fair market value of other property (except money) received (such as the purchaser's obligations to pay in the future, plus outstanding mortgages which the purchaser assumes or to which the property is subject).ⁿ¹

In determining the amount realized, any amount received as reimbursement for real property taxes, which is treated under *I.R.C. Section 164(d)* as imposed upon the purchaser, are not taken into account; however, account amounts representing real property taxes which are treated under that statute as imposed upon the seller if those taxes are to be paid by the purchaser are taken into account.ⁿ²

In the case of a deferred payment sale, the obligations of the purchaser received by the seller are considered as an amount realized by the seller to the extent of their fair market value in ascertaining the gain or loss from the transaction. If the obligations have no fair market value, the payments in cash or other property having a fair market value are applied against and reduce the basis of the property sold, and, if they exceed such basis, are taxable to the extent of the excess. Gain or loss is realized when the obligations are disposed of or satisfied; that amount is the difference between the reduced basis, as discussed above, and the amount realized. Only in rare and extraordinary cases does property have no fair market value.ⁿ³

The requirement for immediate realization of obligations with a fair market value is not limited to sales in which there is an immediate transfer of title. This rule applies also to purchase and sale agreements which contemplate that a conveyance is not to be made at the outset but only after all, or a substantial portion of the selling price has been paid.ⁿ⁴

If the buyer assumes a mortgage for which the seller is personally liable (a recourse mortgage), the selling price includes the face amount of the mortgage.ⁿ⁵ Moreover, the Supreme Court has held, in two separate decisions, that the amount realized on a sale of property includes a nonrecourse obligation, whether the amount of such obligation exceeds or is less than the property's fair market value.ⁿ⁶ In the latter of these two cases, the Court held that when a taxpayer sells or otherwise disposes of property encumbered by a nonrecourse obligation that exceeds the fair market value of the property sold, the amount realized includes the outstanding amount of the obligation. The Court pointed out that the only difference between a nonrecourse mortgage and one on which the borrower is personally liable is that, in the event of nonpayment, the nonrecourse mortgagee's remedy is limited to foreclosure against the secured property. In effect, the risk of devaluation of the property is shifted from the borrower to the lender, but the nature of the obligation is not altered. The Court also stated that the amount of nonrecourse liability is to be included in calculating both the basis of the propertyⁿ⁷ and the amount realized on disposition. The fact that the nonrecourse loan exceeded the value of the property was deemed to be irrelevant.ⁿ⁸ In the earlier case, the Court held that the amount realized on sale of property included a nonrecourse obligation assumed by the purchaser, who also paid cash, even though the amount of that liability was less than the fair market value of the property. The Court indicated that the face amount of the mortgage had to be included in the selling price because the cash payment proved that the property was worth more than the mortgage.ⁿ⁹

[4] Recognition of Gains and Deductibility of Losses

Gain realized from the sale or other disposition of real property is included in income, unless an exclusion or nonrecognition provision applies.ⁿ¹⁰ The Internal Revenue Code contains a number of exceptions which permit taxpayers to postpone or permanently exclude the reporting of gain. Most are narrowly defined and constitute the exception rather than the general rule. Several including the exclusion of gain from the sale of a principal residence, the nonrecognition of gain from the exchange of like-kind properties and the involuntary conversion of property are addressed later in this chapter.ⁿ¹¹

Just as recognized gains are included in the taxpayer's gross income, losses sustained by the taxpayer are generally deductible.ⁿ¹² However, for individuals, only three types of sustained losses are deductible: (1) losses that are connected with a trade or business; (2) losses that are incurred in a transaction entered into for profit; and (3) casualty losses.ⁿ¹³ As a result of this loss limitation, a loss sustained on the sale of residential property purchased or constructed by the taxpayer for use as his personal residence and so used by him up to the time of the sale is not deductible. However, if the property is, prior to sale, rented or otherwise appropriated to income-producing purposes and is used for such purposes up to the time of its sale, a loss sustained on the sale of the property shall be allowed as a deduction.ⁿ¹⁴

Planning Note

Basis of Real Property Not Constant. The basis of real property is not necessarily constant, but may be "adjusted" upward (such as by capitalized expenditures), or downward (by depreciation or cost recovery allowances). Thus, for the purpose of computing gain or loss upon the disposition of real property, these adjustments must be taken into account. Capital expenditures will result in a higher adjusted basis, thereby creating a smaller gain (or larger loss) when the property is sold. Conversely, depreciation or cost recovery deductions will result in a lower adjusted basis, thereby producing a larger gain (or smaller loss) upon disposition.

Legal Topics:

For related research and practice materials, see the following legal topics:

Real Property LawPurchase & SaleGeneral OverviewTax LawFederal Income Tax ComputationDeductions for Amortization, Depletion & DepreciationAmortization, Cost Recovery & Depreciation (IRC secs. 167-169, 171, 178, 194-195, 197, 216, 248, 280F)General OverviewTax LawFederal Income Tax ComputationDeductions for Amortization, Depletion & DepreciationAmortization, Cost Recovery & Depreciation (IRC secs. 167-169, 171, 178,

194-195, 197, 216, 248, 280F)Property Used in Business & TradeTax LawFederal Income Tax ComputationSales & ExchangesBasis (IRC secs. 1011-1017, 1019, 1021, 1023)General OverviewTax LawFederal Income Tax ComputationSales & ExchangesBasis (IRC secs. 1011-1017, 1019, 1021, 1023)Adjustments to BasisTax LawFederal Income Tax ComputationSales & ExchangesBasis (IRC secs. 1011-1017, 1019, 1021, 1023)Real PropertyTax LawFederal Income Tax ComputationSales & ExchangesCapital Gains & Losses (IRC secs. 1201-1202, 1211-1212, 1221-1223, 1231-1260, 1271-1278, 1281-1288, 1291-1298)General Overview

FOOTNOTES:

(n1)Footnote 1. *I.R.C. § 1001(a)*. For a further discussion of realization of gain or loss on the disposition of real property, see Rabkin & Johnson, *Federal Income, Gift and Estate Taxation* (FIGET) § 43.01 (Matthew Bender 2004).

(n2)Footnote 2. *I.R.C. § 1011 et. seq. See § 21.04[2], infra.*

(n3)Footnote 3. *I.R.C. § 1001(b)*. *See § 21.04[3], infra.*

(n4)Footnote 1. *I.R.C. § 1011.*

(n5)Footnote 2. *I.R.C. § 1012*. The starting point for determining the adjusted basis for property being disposed of may not be cost. For example, if the property was acquired by gift, the starting point is the donor's adjusted basis. *I.R.C. § 1015*. If the property was acquired from a decedent, the starting point is the fair market value of the property at the date of the decedent's death. *I.R.C. § 1014*.

(n6)Footnote 3. *See Comm'r v. Tufts*, 461 U.S. 300 (1983) , *rev'g* 651 F.2d 1058 (5th Cir. 1981) , *and reinstating* 70 T.C. 756 (1978) ; *Crane v. Comm'r*, 331 U.S. 1 (1947) , *aff'g* 153 F.2d 504 (2d Cir. 1945) , *rev'g* 3 T.C. 585 (1944) . Both cases are discussed in § 21.04[3], *infra*. *Cf. Columbus & Greenville Ry Co. v. Comm'r*, 42 T.C. 834 (1964) , *aff'd* 358 F.2d 294 (5th Cir. 1966) , *cert. denied* 385 U.S. 827 .

(n7)Footnote 4. *See Redford v. Comm'r*, 28 T.C. 773 (1957) .

(n8)Footnote 5. *Woodsam Assocs., Inc. v. Comm'r*, 16 T.C. 694 (1951) , *aff'd* 198 F.2d 357 (2d Cir. 1952) . When such property is later sold, however, the amount realized includes the outstanding amount of the obligation assumed by the purchaser. *Comm'r v. Tufts*, discussed in § 21.04[3], *infra*.

(n9)Footnote 6. *I.R.C. § 1012*. *See I.R.C. § 164(d)* as to the rules for apportioning real property taxes between the parties.

(n10)Footnote 7. *Treas. Reg. § 1.1012-1(b)*. For illustrations of the application of the rules treating real estate taxes as part of the cost, see *Treas. Reg. § 1.1001-1(b)*.

(n11)Footnote 8. *See Franklin Lumber & Power Co. v. Comm'r*, 50 F.2d 1059 (4th Cir. 1931) ; *Johnson v. Comm'r*, 7 T.C. 465 (1946) , *rev'd on other issue* 162 F.2d 844 (5th Cir. 1947) . If a taxpayer pays cash for improvements to property, the taxpayer obtains an upward basis adjustment for such expenditures. If a taxpayer finances improvements in the typical way--borrows money from a bank and "pays" the contractor with the borrowed money--the taxpayer also obtains an upward basis adjustment. What if cash method taxpayers, already the owners of the property, have improvements made to their property, and issue their own promissory notes to the contractor rather than paying cash (*e.g.*, improvements financed by the contractor itself)? In *Owen v. United States*, 34 F. Supp. 2d 1071 (W.D. Tenn. 1999) , the court held that cash basis taxpayers cannot increase their basis on account of the improvements until they make payments on their promissory notes.

(n12)Footnote 9. *I.R.C. § 266* (carrying charges), 1016(a) (adjustments to basis, general rule). *See Treas. Reg. § 1.266-1* as to the taxes and carrying charges which may be capitalized at the taxpayer's election.

(n13)Footnote 10. Destruction or casualty losses are deductible under *I.R.C. § 165*. As to deductibility in the case of abandonment, see *Treas. Reg. § 1.167(a)-8*. The Service has provided a safe harbor for structural modifications to a building, the expenses for which will not be treated as amounts expended, and losses incurred on account of, modifications pursuant to a demolition under *I.R.C. § 280B* and chargeable to a capital account. The costs and losses may, however, be subject to other treatment under *I.R.C. §§ 162, 168, 263, and 263A*. *Rev. Proc. 95-27, 1995-1 C.B. 704*.

(n14)Footnote 11. *I.R.C. § 1016(a)(2)*.

(n15)Footnote 12. See *I.R.C. § 167(a)*. For discussion of cost recovery and depreciation of real property, see § 21.06, *infra*.

(n16)Footnote 13. *I.R.C. § 1016(b)* (substituted basis).

(n17)Footnote 1. *I.R.C. § 1001(b)*; *Treas. Reg. § 1.1001-1* and-2; see *Willow Terrace Dev. Co. v. Comm'r*, 345 F.2d 933 (5th Cir. 1965), *cert. denied* 382 U.S. 938, *aff'g* 40 T.C. 689 (1963). See also *Rev. Rul. 79-292, 1979-2 C.B. 287* (accrual method taxpayer who receives long-term obligations realizes the principal or face amount of the notes, and any cash received).

(n18)Footnote 2. *I.R.C. § 1001(b)(1)* and (2); *Treas. Reg. § 1.1001-1(b)*. Cf. *I.R.C. § 1012* basis provision with respect to apportionment of real property taxes, discussed in § 21.04[2][a], *supra*.

(n19)Footnote 3. *Treas. Reg. § 1.453-6(a)*. As to a selling price contingent as to the amount or time of payment, see *I.R.C. § 453(j)(2)*. This provision, which applies to sales completed after October 19, 1980, increases the availability of the installment method of reporting gain. See *Temp. Treas. Reg. § 15A.453-1(c)*. For an example of an "open" transaction where a note could not be given a value because of the speculative nature of underlying collateral, see *McShain v. Comm'r*, 71 T.C. 998 (1979).

(n20)Footnote 4. *Treas. Reg. § 1.453-4(a)*; cf. *Miller v. U.S.*, 235 F.2d 553 (6th Cir. 1956) (where second mortgage notes were shown to have had no fair market value when received, it was error for trial court to find fair market value based on substantial payments made in subsequent years).

(n21)Footnote 5. *Treas. Reg. § 1.453-4(c)*.

(n22)Footnote 6. *Comm'r v. Tufts*, 461 U.S. 300 (1983), *rev'g* 651 F.2d 1058 (5th Cir. 1981), and *reinstating* 70 T.C. 756 (1978); *Crane v. Comm'r*, 331 U.S. 1 (1947), *aff'g* 153 F.2d 504 (2d Cir. 1945), *rev'g* 3 T.C. 585 (1944).

(n23)Footnote 7. As to the adjusted basis of real property, see § 21.04[2], *supra*.

(n24)Footnote 8. *Comm'r v. Tufts*, N. 6, *supra*.

(n25)Footnote 9. *Crane v. Comm'r*, N. 6, *supra*.

(n26)Footnote 10. *I.R.C. § 1001(c)*.

(n27)Footnote 11. See, e.g., §§ 21.12, 21.14, *infra*.

(n28)Footnote 12. *I.R.C. § 165(a)*. A loss must be evidenced by closed and completed transactions fixed by identifiable events.

(n29)Footnote 13. *I.R.C. § 165(c)*. There has been much litigation over the meaning of the word "casualty." Generally, the I.R.S. and courts require an identifiable event of a sudden, unexpected, and unusual nature. See, e.g., *Caan v. United States*, 83 A.F.T.R.2d 1640, 99-1 U.S.T.C. § 50,349 (C.D. Calif. 1999) (disallowing casualty loss

deduction of \$399,900 to taxpayers who asserted that their Brentwood home fell in value by that much after the double murder of Nicole Brown Simpson and Ronald Goldman and the subsequent public focus on O.J. Simpson, whose house was in close proximity to taxpayers; holding that the Code does not cover losses to property value due to "buyer resistance" when there has been no physical damage to the property). *But see Finkbohner v. United States*, 788 F.2d 723 (11th Cir. 1986) (interpreting the phrase "other casualty" as permitting loss deductions for devaluation caused by "permanent buyer resistance" in the absence of physical damage to the property).

(n30)Footnote 14. It should be noted that there is a special rule that provides that the adjusted basis for determining loss on such conversion shall be the lesser of the (1) fair market value of the property at the time of the conversion or (2) the adjusted basis at the time of conversion, adjusted (*e.g.*, for depreciation) for the period subsequent to the conversion of the property to income-producing purposes. *Treas. Reg. § 1.165-9(b)*.



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Current Legal Forms for Real Estate
Chapter 21 SALES AND EXCHANGES
Part I. The Tax Background

25-21 Current Legal Forms for Real Estate § 21.05

§ 21.05 Dealer Property or Capital Asset Status

[1] General Rule for Capital Gains and Losses

Capital gain or loss may result from the sale or exchange of a capital asset.ⁿ¹ Individuals typically prefer gains to be classified as capital gains rather than ordinary income, since capital gains have been afforded preferential tax treatment. For sales after May 5, 2003, long-term capital gain of individuals (and of estates and trusts) is generally taxed at a maximum rate of 15%,ⁿ² as compared to a much greater maximum rate on ordinary income.ⁿ³ On the other hand, individuals prefer losses to be characterized as ordinary losses, because of the statutory limitation on capital loss deductions. An individual's capital losses can only be used to offset capital gains; plus, if such losses exceed such gains, an individual may offset up to \$3,000 of such excess capital losses against other income.ⁿ⁴ For corporations, the maximum tax rate for capital gains is 35 percent, which is also the maximum corporate tax rate.ⁿ⁵ Corporate capital losses are deductible only to the extent of capital gains.ⁿ⁶

[2] Net Capital Gains and Losses

The tax treatment of capital gains and losses depends upon specific rules which, in effect, determine whether there are net capital gains (taxed only at a specified maximum rate for individuals) or net capital losses. The holding period of capital assets is an important factor distinguishing between long-term and short-term capital gains and losses, which, in turn, determine net capital gain or net capital loss. The long-term capital gains apply only if the property is "held" by the taxpayer for more than the prescribed holding period.ⁿ¹ Thus, gain or loss realized from the sale or exchange of a capital asset is long-term if the property is held for more than one year (more than six months for property acquired after June 22, 1984 and before January 1, 1988), and is short-term if the property is held for one year or less (six months or less for property acquired after June 22, 1984 and before January 1, 1988).ⁿ² The holding period is generally the same as the period during which it is "owned" by the taxpayer.ⁿ³

[3] Categories of Property for Tax Purposes

For tax purposes, property is divided into two major categories, capital assets and noncapital assets. There is a special rule for certain noncapital assets which, for purposes of this discussion, we may call "quasi-capital" assets. In effect, therefore, there are three major classes of property: (1) capital assets, the sale or exchange of which produce either

capital gain or loss; (2) noncapital assets, the sale or exchange of which produce either ordinary income or loss; and (3) "quasi-capital" assets, the sale or exchange of which produce either capital gain or ordinary loss, under special rules.ⁿ¹ Each of these categories are briefly discussed below.

[4] Capital Assets

The term "capital asset" refers to all property held by a taxpayer, regardless of whether it is connected with his trade or business, except for eight categories of property described in the Code.ⁿ¹ For the purposes of the sale or exchange of real estate, the following categories of property do not constitute capital assets:

(1) property held by a taxpayer primarily for sale to customers in the ordinary course of his trade or business;ⁿ² and

(2) depreciable property or real estate (*i.e.*, land) used in a taxpayer's trade or business.ⁿ³

Property may be depreciated if it is used in the taxpayer's trade or business, or if it is held for the production of income.ⁿ⁴ In this context, only property which is depreciable (or subject to recovery under the accelerated cost recovery system) and real estate (*i.e.*, land) that is used in the trade or business is excluded from the definition of "capital asset." Property which is held for the production of income is not excluded.ⁿ⁵ Real estate (*i.e.*, land) is designated separately from depreciable property used in the trade or business because land may not be depreciated.ⁿ⁶

In determining whether property is a "capital asset," the period for which it is held is immaterial; however, the holding period is controlling in determining whether any gain or loss realized from the sale or exchange of such asset is short-term or long-term gain or loss.ⁿ⁷

[5] Noncapital Assets

Although the Code does not define noncapital assets, the sale of which produces either ordinary income or loss, they generally fall within one of the categories of property (such as stock in trade or inventory) that are excluded from the definition of capital assets.ⁿ¹ However, this statutory exclusion has been judicially broadened. The Court has stated that the "preferential" treatment of capital gains "is an exception from the normal tax requirements of the Internal Revenue Code" and that "the definition of a capital asset must be narrowly applied and its exclusions interpreted broadly."ⁿ² Ordinary income includes any gain from the sale or exchange of property which is neither a capital asset nor property used in a trade or business. Ordinary loss includes any loss from the sale or exchange of property which is not a capital asset.ⁿ³

[6] "Quasi-Capital" Assets

A "quasi-capital" asset is an asset the sale of which will produce either a long-term capital gain or an ordinary loss under special provisions of the Code.ⁿ¹ It consists of depreciable property or real estate used in a taxpayer's trade or business which is held for more than one year (more than six months for property acquired after June 22, 1984 and before January 1, 1988).ⁿ² In contrast with the definition of a capital asset, the holding period for a quasi-capital asset constitutes a material part of its definition. As in the case of capital assets, however, quasi-capital assets do not include what would otherwise be classified as inventory or other property which, for the most part, is excluded from the definition of capital assets.ⁿ³

The full thrust of the tax rules concerning quasi-capital assets covers not only the sale or exchange of property used in a taxpayer's trade or business, but also any involuntary conversion of such quasi-capital assets, and also capital assets held for more than one year (more than six months for property acquired after June 22, 1984 and before January 1, 1988). Accordingly, only if the gains exceed the losses from *all* of such transactions, for the taxable year, will such gains *and*

losses be considered as long-term capital gains *and* losses.ⁿ⁴ Conversely, if the losses equal or exceed the gains, all of the gains *and* losses are considered as ordinary income and loss.ⁿ⁵

Thus, as a result of the aggregating process described above, if there are gains and losses on different assets, the taxpayer may not take an ordinary loss on the gross losses, and capital gains on the gross gains. Such gains *and* losses will be either capital or ordinary in nature, depending upon whether gains exceed losses.ⁿ⁶

[7] Dealer Property; Dealer vs. Investor Status

The application of the capital gain provisions to persons actively engaged in selling real estate has resulted in extensive litigation. Where a profit is realized, the taxpayer urges that he is an investor and not a dealer, so that he may obtain preferential capital gain treatment. Where a loss is incurred, however, the taxpayer contends that he is a dealer, so that an ordinary loss may be taken. Perhaps more than in any other area of the tax law, each case must be decided on its own facts. For the purpose of determining dealer status, the primary criteria are frequency and substantiality of the taxpayer's sales.ⁿ¹

In determining whether a taxpayer is a dealer with respect to a parcel of real property, the facts and circumstances connected with the purchase, operation, and sale of that particular parcel must be separately considered. Thus, a taxpayer may hold some property as a dealer and some property as an investor.ⁿ²

The courts have developed a number of criteria for determining when property is dealer property. The most important factors are:

- (1) the nature and purpose of the acquisition and the duration of ownership;
- (2) the extent and nature of sales efforts;
- (3) the number, extent, continuity, and substantiality of sales;
- (4) the extent of subdividing, developing, and advertising to increase sales;
- (5) the use of a business office for sales;
- (6) the taxpayer's control over any sales representatives; and
- (7) the time and effort habitually devoted to the sales.ⁿ³

Example:

The sale of 22 parcels of real estate during a three-year period, together with a relatively short holding period for most of the parcels, led to a holding that the taxpayer realized capital gain on the sale of investment properties rather than ordinary income on the sale of dealer properties (*i.e.*, properties held primarily for sale to customers in the ordinary course of trade or business). The court based its decision on the following factors: the taxpayer was not a real estate broker; he made no personal effort to initiate the sales (the buyer came to him); he did not advertise, have a sales office, hire brokers, or develop or improve the properties; and he devoted minimal time and effort to the sale.ⁿ⁴

An individual who is in the business of subdividing property for sale or exchange holds the property "for sale to customers," even though his sales are not made through brokers.ⁿ⁵ The nature of the original acquisition may be significant, at least where the selling activities are not very extensive. Thus, the Tax Court has held that parcels acquired for use as nursery tracts were not sold by the taxpayer as a dealer where the city built streets through the tract, and

where the taxpayer did not actively attempt to sell but merely accepted satisfactory orders.ⁿ⁶

Financing construction through long-term loans is an indication that the taxpayer contemplated investment rather than sale.ⁿ⁷ Parcels acquired by inheritance are not held for sale to customers where the taxpayer merely lists them for sale.ⁿ⁸ Earlier dealings of the taxpayer may indicate that the property was acquired for sale. Where the taxpayer acquires property for sale and never changes his purpose, frequent sales produce ordinary income even though he is able to make the sales without extensive activity.ⁿ⁹

The Code requires that the property be held *primarily* for sale to customers.ⁿ¹⁰ The Court has construed that term to mean "of first importance" or "principally."ⁿ¹¹ Thus, a merely "substantial" sales purpose does not meet the "primarily" requirement.ⁿ¹² The Court apparently requires a finding of a singly dominant purpose at the outset, even though other "substantial" purposes are present.ⁿ¹³ An evaluation of the taxpayer's purpose in holding the real estate cannot be limited to circumstances existing at the time of sale; consideration should also be given to the purposes for which the property was acquired and held, the motive at the time of sale, and the method of sale.ⁿ¹⁴

Property is not acquired for sale merely because the taxpayer realizes at the outset that the inability to rent the property might force its sale.ⁿ¹⁵ Also, capital gain was allowed to a housing developer who was undecided at the time of an unsolicited offer as to whether to develop the property or hold it for investment, because neither purpose had ripened into the "principal" purpose at the time of sale.ⁿ¹⁶

Capital gain treatment is allowed in favor of certain noncorporate taxpayers who subdivide real property for sale under limited circumstances.ⁿ¹⁷ Where a noncorporate taxpayer who is an actual investor (or, at least, who was so when the property was first acquired) sells lots or parcels from a tract of land, the sales will not be treated as property held primarily for sale to customers in the ordinary course of trade or business solely because the taxpayer subdivided the tract for sale, or tried to sell the property. Certain conditions must be met, however:ⁿ¹⁸

- (1) The property must not have been held primarily for sale in the ordinary course of business at any previous time, unless the special subdivision provisions applied to that circumstance, nor may any other real property be so held during the taxable year in which the sale occurred;
- (2) The taxpayer cannot have made any "substantial improvement" that substantially enhances the value of the parcel or lot sold; and
- (3) The lot or parcel, except where acquired by inheritance or devise, must have been held by the taxpayer for at least five years.

If all the above requirements are met, the taxpayer may sell up to five lots or parcels from a tract and treat the proceeds as amounts received for property not held primarily for sale to customers in the ordinary course of business, *i.e.*, the proceeds will be treated as capital gains.ⁿ¹⁹

[8] Nonbusiness Capital Assets

Land and buildings not used in the taxpayer's trade or business are capital assets, and, therefore, are subject to both the capital gain and loss rules.ⁿ¹ Sales of business real property, as indicated above, may produce capital gain or ordinary loss. The distinction may be especially difficult to make when applied to rental property. In a district court opinion upheld by the Second Circuit, it was held that mere renting does not make "business" property, unless the renting involves substantial supervision and maintenance activity.ⁿ² The Tax Court has held, however, that depreciable property is "used in the trade or business," and is, therefore, a noncapital asset, when it is devoted to the production of taxable income.ⁿ³ The Tax Court's income-production test also has been applied to a residence converted to rental property.ⁿ⁴ Moreover, even property which the taxpayer unsuccessfully attempted to rent has been held to be

noncapital.n5

[9] Transactions Between Related Taxpayers

The general rules relating to capital or ordinary income treatment of gains and losses do not apply to transactions between related taxpayers. Special rules apply under such circumstances. Among other things, these rules:

- (1) disallow deductions for losses (and certain expenses) on transactions between related taxpayers;n1
- (2) deny losses and provide for the realization of ordinary income instead of capital gains on transactions between taxpayers and controlled partnerships;n2 and
- (3) require a taxpayer to realize ordinary income on the sale of depreciable property to a related person.n3

In addition, the Service may reallocate gains and losses among commonly controlled taxpayers (corporate or noncorporate) where there is tax avoidance intent.n4 Such reallocation may result in tax consequences which the parties did not intend.

Planning Note

If Higher Tax Rates Are Expected, Delay Capital Gains and Losses. If you anticipate higher tax rates in the future and if the sale or exchange of real property can be held off until a later tax year, the capital gain or loss may receive a better tax benefit. If the tax rates are increased, the capital losses can be used to offset other income that would be taxed at those higher rates. The maximum tax on any net capital gain of an individual is generally 15 percent.n5

Legal Topics:

For related research and practice materials, see the following legal topics:

Tax LawFederal Income Tax ComputationOrdinary Income (IRC sec. 64)Tax LawFederal Income Tax ComputationSales & ExchangesBusiness Property (IRC secs. 1031, 1221, 1231)General OverviewTax LawFederal Income Tax ComputationSales & ExchangesBusiness Property (IRC secs. 1031, 1221, 1231)Property Held for Productive Use & InvestmentTax LawFederal Income Tax ComputationSales & ExchangesBusiness Property (IRC secs. 1031, 1221, 1231)Property Used in Trade or BusinessTax LawFederal Income Tax ComputationSales & ExchangesCapital Gains & Losses (IRC secs. 1201-1202, 1211-1212, 1221-1223, 1231-1260, 1271-1278, 1281-1288, 1291-1298)Capital AssetsTax LawFederal Income Tax ComputationSales & ExchangesCapital Gains & Losses (IRC secs. 1201-1202, 1211-1212, 1221-1223, 1231-1260, 1271-1278, 1281-1288, 1291-1298)Long Term & Short Term Gains & LossesTax LawFederal Income Tax ComputationSales & ExchangesRelated Party Transactions (IRC sec. 1239)General Overview

FOOTNOTES:

(n1)Footnote 1. *I.R.C. §§ 1221, 1222, 1231(a)(1).*

(n2)Footnote 2. As explained in this chapter, net capital gain to the extent of so-called "unrecaptured Section 1250 gain" is still subject to a maximum rate of tax of 25 percent (and not 15 percent). *See I.R.C. § 1(h)(1)(D).* In general, "unrecaptured Section 1250 gain" is the long term capital gain attributable to depreciation allowed with respect to real estate (*e.g.*, buildings) held for more than one year.

(n3)Footnote 3. The Economic Growth and Tax Relief Reconciliation Act of 2001 (hereinafter the 2001 Tax Act) reduced individual tax rates on ordinary income over a six-year period, from 28% to 25%, from 31% to 28%, from 36% to 33%, and from 39.6% to 35%. *I.R.C. § 1*, as amended by the 2001 Tax Act. However, the Jobs and Growth Tax

Relief Reconciliation Act of 2003 (hereafter, the 2003 Tax Act), signed into law on May 28, 2003, accelerated these individual tax rate reductions retroactive to January 1, 2003. The rates will apply through 2010, after which the rates will revert to the levels that applied prior to the 2001 Tax Act.

(n4)Footnote 4. *I.R.C. § 1211(b)*.

(n5)Footnote 5. *I.R.C. §§ 11(b)(1)*, as amended by the 1993 Act § 13221(a)(1)-(3); 1201(a), as amended by the 1993 Act § 13221(c)(2).

(n6)Footnote 6. *I.R.C. § 1211(a)*.

(n7)Footnote 1. *See I.R.C. §§ 1201, 1222*.

(n8)Footnote 2. *I.R.C. § 1222*.

(n9)Footnote 3. *McFeely v. Comm'r*, 296 U.S. 102 (1935) ; *Howell v. Comm'r*, 140 F.2d 765 (5th Cir. 1944) , *cert. denied* 322 U.S. 735 .

(n10)Footnote 1. *See I.R.C. §§ 1221, 1231*.

(n11)Footnote 1. *I.R.C. § 1221*.

(n12)Footnote 2. *I.R.C. § 1221(1)*. This exception is discussed in greater detail at § 21.05[7], *infra* .

(n13)Footnote 3. *I.R.C. §§ 1221(2)*.

(n14)Footnote 4. *I.R.C. § 167(a)*. For a discussion as to when property is used in a trade or business and when it is held for the production of income, see *Grier v. U.S.*, 120 F. Supp. 395 (D.C. Conn. 1954) , *aff'd* 218 F.2d 603 (2d Cir. 1955) .

(n15)Footnote 5. *I.R.C. § 1221(2)*.

(n16)Footnote 6. *Treas. Reg. § 1.167(a)-2*.

(n17)Footnote 7. *I.R.C. §§ 1201, 1222; Treas. Reg. § 1.1221-1. See Rev. Rul. 93-84, 1993-2 C.B. 225* .

(n18)Footnote 1. *See I.R.C. § 1221*.

(n19)Footnote 2. *Corn Prods. Ref. Co. v. Comm'r*, 350 U.S. 46 (1955) ; *see Comm'r v. Lake*, 356 U.S. 260 (1958)

(n20)Footnote 3. *I.R.C. §§ 64, 65*. "Property used in a trade or business" is a "quasi-capital" asset, the sale of which may produce either capital gain or ordinary loss, depending on the outcome of the "netting" process required under *I.R.C. § 1231*. *See the discussion at § 21.05[6], infra*.

(n21)Footnote 1. *I.R.C. § 1231*.

(n22)Footnote 2. *I.R.C. § 1231(b)*.

(n23)Footnote 3. *I.R.C. § 1231(b)(1)*.

(n24)Footnote 4. *I.R.C. § 1231(a)(1)*.

(n25)Footnote 5. *I.R.C. § 1231(a)(2)*.

(n26)Footnote 6. There can be a possible recapture of net Section 1231 losses for prior years. A taxpayer who has a net Section 1231 gain (i.e., excess of Section 1231 gains over Section 1231 losses) for the tax year must review the five preceding tax years for possible recapture of net Section 1231 losses during such 5-year period. *I.R.C. § 1231(c)*.

(n27)Footnote 1. *Biedenharm Realty Co. v. U.S.*, 526 F.2d 409 (5th Cir. 1976) , *on reh.* of 509 F.2d 171 , *cert. denied* 429 U.S. 819 ; *see also* *U.S. v. Winthrop*, 417 F.2d 905 (5th Cir. 1969) ; *Maltz v. Comm'r*, T.C. Memo 1998-334 (T.C. 1998) .

(n28)Footnote 2. *Pritchett v. Comm'r*, 63 T.C. 149 (1974) ; *Farry v. Comm'r*, 13 T.C. 8 (1949) ; *Scheuber v. Comm'r*, 371 F.2d 996 (7th Cir. 1967) , *rev'g* *T.C. Memo 1966-107* .

(n29)Footnote 3. *U.S. v. Winthrop*, N. 1, *supra*.

(n30)Footnote 4. *Byram v. U.S.*, 705 F.2d 1418 (5th Cir. 1983) .

(n31)Footnote 5. *Gruver v. Comm'r*, 142 F.2d 363 (4th Cir. 1944) , *aff'g* 1 T.C. 1204 (1943) ; *cf.* *Fahs v. Crawford*, 161 F.2d 315 (5th Cir. 1947) .

(n32)Footnote 6. *Farley v. Comm'r*, 7 T.C. 198 (1946) ; *cf.* *Nevin v. Comm'r*, T.C. Memo 1965-53 ; *Riddell v. Scales*, 406 F.2d 210 (9th Cir. 1969) ; *Howell v. Comm'r*, 57 T.C. 546 (1972) .

(n33)Footnote 7. *Self v. Comm'r*, T.C. Memo, CCH 17,666, P-H P 50,128.

(n34)Footnote 8. *Hopkins v. Comm'r*, 15 T.C. 160 (1950) .

(n35)Footnote 9. *Wood v. Comm'r*, 25 T.C. 468 (1955) ; *cf.* *Tri-S Corp. v. Comm'r*, 48 T.C. 316 (1967) , *aff'd* 400 F.2d 862 (10th Cir. 1968) .

(n36)Footnote 10. *I.R.C. §§ 1221(1), 1231(b)(1)(B)*.

(n37)Footnote 11. *Malat v. Riddell*, 383 U.S. 569 (1966) , *rev'g* 347 F.2d 23 (9th Cir. 1965) .

(n38)Footnote 12. *Municipal Bond Corp. v. Comm'r*, 341 F.2d 683 (8th Cir. 1965) , *rev'g* 41 T.C. 20 (1963) , *on remand* 46 T.C. 219 (1966) , *rev'd* 382 F.2d 184 (8th Cir. 1967) ; *cf.* *Meridian, Inc. v. Comm'r*, 322 F.2d 198 (6th Cir. 1963) , *aff'g* *T.C. Memo 1962-59* , *cert. denied* 375 U.S. 922 .

(n39)Footnote 13. *Malat v. Riddell*, N. 11, *supra*.

(n40)Footnote 14. *Byram v. U.S.*, 705 F.2d 1418 (5th Cir. 1983) (*see* N. 4, *supra*, and accompanying text); *Municipal Bond Corp. v. Comm'r*, N. 12, *supra*; *see* *Home Co. v. Comm'r*, 212 F.2d 637 (10th Cir. 1954) ; *Bynum v. Comm'r*, 46 T.C. 295 (1966) .

(n41)Footnote 15. *Ramey Inv. Corp. v. Comm'r*, T.C. Memo 1967-4 , *app. dism'd* 4th Cir.

(n42)Footnote 16. *Olivieri v. Comm'r*, T.C. Memo 1966-177 ; *see* *Shibley v. Comm'r*, T.C. Memo 1971-139 .

(n43)Footnote 17. *I.R.C. § 1237*.

(n44)Footnote 18. *I.R.C. § 1237(a)*. Special rules for the application of *I.R.C. § 1237*, including what does not constitute a "substantial improvement," are found in *I.R.C. § 1237(b)*.

(n45)Footnote 19. *I.R.C. § 1237(b)(1)*.

(n46)Footnote 1. *I.R.C. § 1221*.

(n47)Footnote 2. Grier v. U.S., 120 F. Supp. 395 (D. Conn. 1954) , *aff'd per curiam* 218 F.2d 603 (2d Cir. 1955) ; *cf.* Gilford v. Comm'r, 201 F.2d 735 (2d Cir. 1953) (rental realty held for use in trade or business, so that loss on sale was treated as ordinary loss rather than as long-term capital loss).

(n48)Footnote 3. Stern Trust v. Comm'r, 26 T.C. 1213 (1956) .

(n49)Footnote 4. Hayard v. Comm'r, 7 T.C. 372 (1946) . The Service has acquiesced in the *Hayard* decision. See Norton v. Comm'r, T.C. Memo, CCH 15,543, P-H P 46,295.

(n50)Footnote 5. Crawford v. Comm'r, 16 T.C. 678 (1951) ; *see* Good v. Comm'r, 16 T.C. 906 (1951) .

(n51)Footnote 1. *I.R.C.* § 267.

(n52)Footnote 2. *I.R.C.* § 707.

(n53)Footnote 3. *I.R.C.* § 1239.

(n54)Footnote 4. *I.R.C.* § 482 (allocation of income and deductions among commonly controlled corporate and noncorporate taxpayers).

(n55)Footnote 5. *I.R.C.* § 1(h). Net capital gain to the extent of so-called "unrecaptured Section 1250 gain" would be subject to a maximum rate of tax of 25 percent (and not 15 percent). *I.R.C.* § 1(h)(1)(D).



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Current Legal Forms for Real Estate

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Current Legal Forms for Real Estate
Chapter 21 SALES AND EXCHANGES
Part I. The Tax Background

25-21 Current Legal Forms for Real Estate § 21.06

§ 21.06 Cost Recovery and Depreciation

[1] Depreciation and ACRS Deductions--Generally

Taxpayers may recover the cost of property used in the trade or business or held for the production of income, over the time that the property is used. Specifically, the Code provides a depreciation deduction, or a "reasonable allowance for the exhaustion, wear and tear (including a reasonable allowance for obsolescence)" of business or income-producing property. Depreciation of property placed in service before 1981 was allowed by assigning property an expected useful life, and deducting the property's cost, less salvage value, over that life through the use of one of several accounting methods.ⁿ¹ The depreciation provisions have taken on diminishing importance because of the introduction of the accelerated cost recovery system (ACRS).

Under the ACRS,ⁿ² the cost of "recovery property" placed in service after 1980 is deducted over a pre-established period of time, rather than the taxpayer's estimated useful life of the property. "Recovery property" is placed into one of several general categories or classes, based upon its useful life under the guideline class to which it is assigned by the Service. Deductions allowed for the property are taken in accordance with statutory prescribed methods to be written off each year. At the completion of the specified period, *e.g.*, 27.5 years for residential rental property and 39 years for nonresidential real property under a straight-line method, the deductions will have totaled the original basis of the depreciable property (salvage value is not considered).ⁿ³

[2] Cost Recovery of Real Property: 1987 and After

[a] Recovery Method and Periods

The cost recovery allowance for tangible property, including real property, is determined by using the applicable depreciation method, recovery period, and convention.ⁿ¹ Most depreciable real property will fall within the category of residential rental property or nonresidential real property. The applicable depreciation method for each of these classifications is the straight line method, not an accelerated method.ⁿ² The applicable recovery period for each is as follows:ⁿ³

Real Property

Recovery Period

Residential Rental Property	27.5 years
Nonresidential Real Property	39 years

The applicable convention for residential rental property and nonresidential real property is the mid-month convention. Under the mid-month convention, the real property placed in service or disposed of by a taxpayer at any time during a month is treated as having been placed in service or disposed of in the middle of the month.ⁿ⁴ Under an alternative depreciation system, the taxpayer can irrevocably elect, on a building by building basis, a longer 40 year straight line recovery period for residential rental property or nonresidential real property.ⁿ⁵

[b] Real Property in Recovery Property Classes

A building or structure is residential rental property for the tax year if 80 percent or more of the gross rental income from it for the tax year is rental income from dwelling units. A dwelling unit is a house or apartment used to provide living accommodations in a building or structure, but does not include a unit in a hotel, motel, inn, or other establishment more than one half of the units in which are used on a transient basis. The rental value of the portion of the building or structure occupied by the taxpayer is included in the gross rental income to determine if the 80 percent test is met.ⁿ⁶

Example 1:

Martin constructs a six-story building starting in 2000. When it is placed in service in 2001, the first floor is rented to a retail store at \$15,000 rent for the year. The dwelling units are rented and generate rental income of \$60,000 for the tax year. Since 80 percent ($\$60,000/\$75,000$) of the gross rental income is from the dwelling units, the building qualifies as residential rental property in 2001.

Example 2:

Martin operates the retail store in the building in Example 1 in 2002, and he also occupies one of the apartment units. If the fair rental value of the store and the apartment are the same as in 2001, the building would qualify as residential rental property since the rental value of the store and the apartment occupied by Martin are treated as rental income from the building.

Example 3:

The building in Example 1 produces \$18,000 rent from the store in 2002 and \$64,000 gross rental income from the apartments. Since only 78.05 percent ($\$64,000/\$82,000$) of the gross rental income comes from the dwelling units, the building does not qualify as residential rental property in 2002.ⁿ⁷

Nonresidential real property is Section 1250 property, *i.e.*, depreciable real property, which is not residential rental property or property with a class life of less than 27.5 years.ⁿ⁸ For example, nonresidential real property would not include real property with a class life of less than 27.5 years, such as a theme or amusement park (12.5 year class life), recreational facilities, including theaters, bowling alleys, and miniature golf courses (10 year class life), or even farm buildings (25 year class life). Since the class life of property is subject to revision by the Service, the latest ruling by the Service should be reviewed.ⁿ⁹

[c] Improvements and Leasehold Improvements

The cost recovery allowance for any addition to or improvement of property is computed in the same manner as the deduction for the underlying property would be computed if the underlying property were placed in service at the same time as the addition or improvement.ⁿ¹⁰

The recovery period of any addition or improvement to property begins on the later of (1) the date on which the addition

or improvement is placed in service, or (2) the date on which the property, on which the addition or improvement was made, is placed in service.ⁿ¹¹

The cost of leasehold improvements made by a lessee, including the erection of a building on leased property, is recovered under the cost recovery rules, without regard to the lease term. On termination of the lease, the lessee who does not retain the improvement computes gain or loss by reference to the adjusted basis of the improvement at that time.ⁿ¹²

In determining the amortization period for the lessee's cost of acquiring a lease (rather than leasehold improvement made by the lessee) the lease term is treated as including all renewal options, and any other period for which the parties reasonably expect the lease to be renewed, if less than 75 percent of the lease acquisition cost is attributable to the period of the term of the lease remaining on the date of its acquisition. In determining the period remaining on the term of the lease under the 75 percent test, the period of renewal, extension, or continuation under an option exercisable by the lessee are not taken into account.ⁿ¹³

[3] Accelerated Cost Recovery of Real Property: 1981-1986

The accelerated cost recovery system required the capital cost of qualified real (or personal) property, placed in service by the taxpayer during 1981 through 1986, to be recovered by an accelerated or straight-line method (without regard to salvage) over predetermined periods generally unrelated to, but shorter than, the property's useful life.ⁿ¹ The ACRS applied to "recovery property," which was defined as depreciable tangible property used in a trade or business or held for the production of income.ⁿ² Depreciation under *I.R.C. Section 167* remains in effect for property placed in service before 1981.ⁿ³

[a] Recovery Property; Recovery Period

Several classes of recovery property were distinguished by the number of years over which cost recovery deductions may be taken with respect to the property in each class.ⁿ⁴ At the completion of the specified period, the deductions should total the original basis of the property. Salvage value is not taken into account in determining the allowable deductions.ⁿ⁵

Most real property fell within a class which described its recovery period. This was initially "15-year real property," later extended to "18-year real property," and then "19-year real property." Other classes for which real property could qualify included "10-year property" and "low-income housing," the latter remaining with a 15-year recovery period.ⁿ⁶ The recovery periods and methods still apply to taxpayers who placed that property in service during the applicable periods.

A taxpayer could have elected to recover the cost of recovery property over a period longer than that described above, using the straight line method. Thus, for ten-year property the electable recovery periods were 10, 25, or 35 years; for 15, 18, or 19-year real property, the electable periods were 15, 18, 19 (respectively), 35, or 45 years.ⁿ⁷ The election could be made on a property-by-property basis with respect to 15, 18 or 19-year real property or low-income housing.ⁿ⁸ Longer periods were required for property used predominantly outside the United States.ⁿ⁹

Under special "anti-churning rules," the ACRS provisions excluded (and still exclude) property obtained in certain transactions from qualifying as recovery property even if acquired by the taxpayer after 1980 (or 1986). These rules, which apply to real and personal property, were (and are) designed to prevent taxpayers from turning their depreciable property placed in service before 1981 (or 1986) into ACRS property available for the newer writeoffs.ⁿ¹⁰

[b] Recovery Methods; Cost Recovery Deductions

The accelerated cost recovery allowance for 15, 18 or 19-year real property, was based on the 15, 18, or 19-year recovery period using a method similar to 175 percent declining balance (200 percent in the case of low-income housing property), switching to a straight-line method in later years to maximize the allowable deduction.ⁿ¹¹ The applicable percentage in the tax year that the property was placed in service was determined on the basis of the number of months in the year during which the property was in service in the years of acquisition and disposition.ⁿ¹² Recovery of property, other than 19-year real property, was subject to a half year convention, rather than 15, 18 or a monthly allocation for the year it was placed in service.ⁿ¹³

In effect, the recovery allowance for 15, 18 or 19-year real property for the year it was placed in service or the year of disposition was based on the number of months it was in service during the year, regardless of the duration of the taxpayer's taxable year, the property's recovery period, or the recovery method used.ⁿ¹⁴

The recovery method elected for a building which is Section 1250 class property, generally real property, applies to any component of the building. The recovery period for a building component begins on the later of the date such component, or the building, is placed in service.ⁿ¹⁵ For practical purposes, this provision eliminates the former practice of "component depreciation," under which separate depreciation methods based on various useful lines were used for the building and individual components.

A substantial improvement to a building, however, was eligible for a cost-recovery method other than the one used for the principal building, *i.e.*, the improvement is treated as a separate building.ⁿ¹⁶ The improvement was substantial only if (1) it was made more than three years after the building was placed in service, and (2) it added to the capital account of the building within a 24-month period an amount equal to or in excess of 25 percent of the building's adjusted basis as of the first day of the 24-month period.ⁿ¹⁷

[c] Disposition of Recovery Property

If 1981-1986 ACRS property is sold or otherwise disposed of in a transaction where gain or loss is recognized, the gain or loss is usually recognized on an asset-by-asset basis. An ACRS deduction may not be claimed for the property in the year of disposition unless it is transferred in a tax-free exchange where the transferee is treated as the transferor to the extent of carryover basis,ⁿ¹⁸ or it is 15, 18 or 19-year real property.ⁿ¹⁹ However, that to the extent ACRS deductions in excess of straight line have been claimed for the property, there may be ordinary income recapture under *I.R.C. Sections 1245 and 1250*.ⁿ²⁰

[4] Depreciation of Property Placed in Service Before 1981

Depreciation of the cost or other basis of real property permits a taxpayer to deduct certain amounts each year. The deduction for depreciation generally applies only to property placed in service before 1981 and used in a trade or business or held for the production of income.ⁿ¹ The amount of the annual depreciation deduction depends on various factors such as the useful life of the property, its salvage value, and the method of depreciation permitted and used.ⁿ² Land is not subject to an allowance for depreciation because it is not subject to exhaustion or wear and tear.ⁿ³

Although straight-line and various accelerated depreciation methods are permitted, the accelerated depreciation methods allowed for depreciable real property are subject to special rules.ⁿ⁴ Only "new" residential rental property is eligible for the 200 percent declining balance method or the sum of the years-digits method.ⁿ⁵ Used residential rental property is generally limited to the straight-line method or the 125 percent declining balance method.ⁿ⁶ Other "new" real property is eligible for straight-line depreciation or the 150 percent declining balance method in most cases.ⁿ⁷ Used real property is generally limited to straight-line depreciation.ⁿ⁸ The property is "new" property if its original use commenced with the taxpayer.ⁿ⁹

The useful life of real (or other) property depends upon various factors. The estimate of useful life by the taxpayer and

the Service has led to controversy in many situations.ⁿ¹⁰ Guidelines issued by the Service indicate that the useful life of real property ranges from 40 years for apartment buildings to 60 years for warehouses.ⁿ¹¹

Planning Notes

Residential Rental Property Can Include Commercial Use. If at least 80 percent of the gross rental income from a building is rental income from apartments, the balance of the gross rental income can come from office, retail, or other commercial space. When the gross rental income test is met the entire building, not just the residential use portion, is entitled to the shorter recovery period.ⁿ¹²

Rents from Mixed Use Residential Rental Property Must Be Examined Each Year. The test requiring that 80 percent of the property's gross rental income come from dwelling units is applied for the tax year. The building can pass the test one year and not meet it the next.ⁿ¹³ A careful examination of the rental income from the property is therefore required each year if the shorter recovery period is to be retained. This includes separating out certain income items which are specifically excluded from the category of gross rental income from the building in general. Excluded are:

- (1) rent attributable to personal property, such as furniture, in a furnished apartment or house;
- (2) income from performance of significant services, such as maid service (this does not include usual and customary cleaning of public areas, however); and
- (3) amounts paid by tenants directly to independent contractors, such as utilities for gas and electric (but amounts paid to the building owner are gross rental income items).

Included and excluded items of gross rental income from a dwelling unit must also be examined each year:

- (1) Tenant parking space and swimming pool fees are included as income from dwelling units.
- (2) Rental income from portions used as office space, such as a doctor's office, is not from a dwelling unit.
- (3) Rental value or asking rent for vacant units is not deemed income from a dwelling unit.
- (4) The inclusion of the fair rental value of the portion of the building occupied by the owner does not include space for a rental office or for storage of equipment, nor occupancy by a resident manager or maintenance personnel.ⁿ¹⁴

Leasehold Improvements Costs Are Recovered over Recovery Period Rather than Shorter Lease Term. The Tax Reform Act of 1986 requires that leasehold improvements made by a lessee be recovered under the cost recovery rules applicable to other taxpayers, including the recovery period (27.5 years for residential rental property or 39 years for nonresidential real property). This is a significant change from the prior law which permitted the lessee, in most circumstances, to recover the cost of improvements over the remaining term on the lease if it was shorter than the recovery period.ⁿ¹⁵

Legal Topics:

For related research and practice materials, see the following legal topics:

Tax Law Federal Income Tax Computation Deductions for Amortization, Depletion & Depreciation General Overview Tax Law Federal Income Tax Computation Deductions for Amortization, Depletion & Depreciation Amortization, Cost Recovery & Depreciation (IRC secs. 167-169, 171, 178, 194-195, 197, 216, 248, 280F) General Overview Tax Law Federal Income Tax Computation Deductions for Amortization, Depletion & Depreciation Amortization, Cost Recovery & Depreciation (IRC secs. 167-169, 171, 178, 194-195, 197, 216, 248, 280F) Accelerated Cost Recovery System Tax Law Federal Income Tax Computation Deductions for Amortization, Depletion & Depreciation Amortization, Cost Recovery & Depreciation (IRC secs. 167-169, 171, 178, 194-195, 197, 216, 248, 280F) Property Held for Income Production Tax Law Federal Income Tax Computation Deductions for Amortization, Depletion & Depreciation Amortization, Cost Recovery & Depreciation (IRC secs. 167-169, 171, 178, 194-195, 197, 216, 248, 280F) Property Used in Business & Trade Tax Law Federal Income Tax Computation Sales & Exchanges Capital Gains & Losses (IRC secs. 1201-1202, 1211-1212, 1221-1223, 1231-1260, 1271-1278, 1281-1288, 1291-1298) Disposition of Depreciable Property Tax Law Federal Income Tax Computation Sales & Exchanges Recapture of Depreciation (IRC secs. 1245, 1250)

FOOTNOTES:

(n1)Footnote 1. *I.R.C. § 167. See § 21.06[3], infra.*

(n2)Footnote 2. *I.R.C. § 168.* The Service has issued final regulations for an election to maintain general asset accounts for certain depreciable assets. Taxpayers are permitted to group assets in one or more general asset accounts that are depreciated as a single asset. The election is irrevocable and binding on the taxpayer for computing taxable income as well as for computing alternative minimum taxable income. The election is available for depreciable assets placed in service in tax years ending on or after October 11, 1994. *Treas. Reg. §§ 1.168(i)-0 and 1.168(i)-1* added by *T.D. 8566 (Oct. 7, 1994)*.

(n3)Footnote 3. *I.R.C. §§ 167, 168.* It should be noted that the recovery period for nonresidential real property is 39 years for property placed in service by a taxpayer on or after May 13, 1993. *I.R.C. § 168(c)(1)*, as amended by the Revenue Reconciliation Act of 1993 (the "1993 Act"), Pub. L. No. 103-66, 103rd Cong., 1st Sess. § 13151(a) (Aug. 10, 1993). Prior to the 1993 Act, the recovery period was 31.5 years.

It should also be pointed out that the extended recovery period of 39 years does not apply to property placed in service by a taxpayer before 1994 if: (1) the taxpayer or a qualified person entered into a binding written contract to purchase or construct such property before May 13, 1993; or (2) the construction of such property was commenced by or for the taxpayer or a qualified person before May 13, 1993. "Qualified person" means any person who transfers his rights in such a contract or such property to the taxpayer but only if the property is not placed in service by such person before such rights are transferred to the taxpayer. The 1993 Act § 13151(b)(2).

(n4)Footnote 1. *I.R.C. § 168(a)-(d).* Land is not depreciable. *Treas. Reg. § 1.167(a)-2.*

(n5)Footnote 2. *I.R.C. § 168(b)(3).*

(n6)Footnote 3. It should be noted that the recovery period for nonresidential real property is 39 years for property placed in service by a taxpayer on or after May 13, 1993. *I.R.C. § 168(c)(1)*, as amended by the Revenue Reconciliation Act of 1993 (the "1993 Act"), Pub. L. No. 103-66, 103rd Cong., 1st Sess. § 13151(a) (Aug. 10, 1993). Prior to the 1993 Act, the recovery period was 31.5 years.

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(n7)Footnote 4. *I.R.C. § 168(d)(2), (4)*; S. Rep. No. 99-313, 99th Cong., 2d Sess. 88, 101 (1986); H.R. Rep. No. 99-841, 99th Cong., 2d Sess. 138, 154 (1986).

(n8)Footnote 5. *I.R.C. § 168(g)(2), (7)(A), (B)*.

(n9)Footnote 6. *I.R.C. § 168(e)(2)(A)*.

(n10)Footnote 7. Treas. Reg. § 1.167(j)-3(b).

(n11)Footnote 8. *I.R.C. § 168(e)(2)(B)*.

(n12)Footnote 9. *Rev. Proc. 83-35, 1983-1 C.B. 745*.

(n13)Footnote 10. *I.R.C. § 168(i)(6)(A)*; S. Rep. No. 99-313, 99th Cong., 2d Sess. 105 (1986).

(n14)Footnote 11. *I.R.C. § 168(i)(6)(B)*.

(n15)Footnote 12. *I.R.C. § 168(i)(8)*; S. Rep. No. 99-313, 99th Cong., 2d Sess. 105 (1986).

(n16)Footnote 13. *I.R.C. § 178*; S. Rep. No. 99-313, 99th Cong., 2d Sess. 105 (1986).

(n17)Footnote 1. Former *I.R.C. § 168*, prior to amendment by T.R.A. 1986 § 201(a).

(n18)Footnote 2. Former *I.R.C. § 168(c)(1), (e)*, prior to amendment by T.R.A. 1986 § 201(a).

(n19)Footnote 3. *I.R.C. § 167*, see § 21.06[4], *infra*; Former *I.R.C. § 168(e)*, prior to amendment by T.R.A. 1986 § 201(a).

(n20)Footnote 4. Former *I.R.C. § 168(c)(2)*, prior to amendment by T.R.A. 1986 § 201(a).

(n21)Footnote 5. Former *I.R.C. § 168(f)(9)*, prior to amendment by T.R.A. 1986 § 201(a).

(n22)Footnote 6. Former *I.R.C. § 168(c)(2)(C)-(F)*, prior to amendment by T.R.A. 1986 § 201(a).

(n23)Footnote 7. Former *I.R.C. § 168(b)(3)(A)*, prior to amendment by T.R.A. 1986 § 201(a).

(n24)Footnote 8. Former *I.R.C. § 168(b)(3)(B)(ii)*, prior to amendment by T.R.A. 1986 § 201(a).

(n25)Footnote 9. Former *I.R.C. § 168(f)(2)*, prior to amendment by T.R.A. 1986 § 201(a).

(n26)Footnote 10. Former *I.R.C. § 168(e)(4)*, prior to amendment by T.R.A. 1986 § 201(a); *I.R.C. § 168(f)(5)*, amended by T.R.A. 1986 § 201(a).

(n27)Footnote 11. Former *I.R.C. § 168(b)(2)(A)*, prior to amendment by T.R.A. 1986 § 201(a).

(n28)Footnote 12. Former *I.R.C. § 168(b)(2)(A)*, prior to amendment by T.R.A. 1986 § 201(a).

(n29)Footnote 13. Former *I.R.C. § 168(b)(3)(B)(iii)*, prior to amendment by T.R.A. 1986 § 201(a).

(n30)Footnote 14. Former *I.R.C. § 168(f)(5)*, prior to amendment by T.R.A. 1986 § 201(a).

(n31)Footnote 15. Former *I.R.C. § 168(f)(1)(A)*, prior to amendment by T.R.A. 1986 § 201(a). Apparently this rule against separate cost recovery for a building and its components applies under the post-1986 cost recovery system. See the Senate Committee Report for T.R.A. 1986, S. Rep. No. 99-313, 99th Cong., 2d Sess. 105 (1986); see also *I.R.C. § 168(f)(6)*, amended by T.R.A. 1986 § 201(a).

(n32)Footnote 16. Former *I.R.C. § 168(f)(1)(C)(i)*, prior to amendment by T.R.A. 1986 § 201(a).

(n33)Footnote 17. Former *I.R.C. § 168(f)(1)(C)(ii)* and *(iii)*, prior to amendment by T.R.A. 1986 § 201(a).

(n34)Footnote 18. Former *I.R.C. § 168(f)(10)*, prior to amendment by T.R.A. 1986 § 201(a); *I.R.C. § 168(i)(7)*, amended by T.R.A. 1986 § 201(a).

(n35)Footnote 19. Former *I.R.C. § 168(b)(2)(B)*, prior to amendment by T.R.A. 1986 § 201(a); *I.R.C. § 168(d)(2)*, (4), amended by T.R.A. 1986 § 201(a).

(n36)Footnote 20. The *I.R.C. § 1245* and *§ 1250* rules governing recapture of cost recovery and depreciation allowances are discussed in *§ 21.07, infra*.

(n37)Footnote 1. *I.R.C. § 167*.

(n38)Footnote 2. *I.R.C. § 167*; *Treas. Reg. § 1.167(a)-1(a)*.

(n39)Footnote 3. *Treas. Reg. § 1.167(a)-2*.

(n40)Footnote 4. Former *I.R.C. § 167(j)*.

(n41)Footnote 5. Former *I.R.C. § 167(j)(2)*; *Treas. Reg. §§ 1.167(j)-1(a)*, 1.167(j)-3.

(n42)Footnote 6. Former *I.R.C. § 167(j)(5)*; *Treas. Reg. § 1.167(j)-1(a)(1)*.

(n43)Footnote 7. Former *I.R.C. § 167(j)(1)*; *Treas. Reg. § 1.167(j)-2(b)*.

(n44)Footnote 8. Former *I.R.C. § 167(j)(4)*; *Treas. Reg. § 1.167(j)-1(a)(1)*.

(n45)Footnote 9. Former *I.R.C. § 167(c)*; *Treas. Reg. § 1.167(c)-1(a)(2)*.

(n46)Footnote 10. *See* S. Rep. No. 144, 97th Cong., 1st Sess. 47 (1981).

(n47)Footnote 11. Rev. Proc. 62-21, 1962-2 C.B. 418, at 420 .

(n48)Footnote 12. *I.R.C. § 168(e)(2)(A)*, amended by T.R.A. 1986 § 201(a).

(n49)Footnote 13. *See* *Treas. Reg. § 1.167(j)-3(b)(6)*.

(n50)Footnote 14. *Treas. Reg. § 1.167(j)-3(b)*.

(n51)Footnote 15. *I.R.C. § 168(i)(8)*, amended by T.R.A. 1986 § 201(a); *see* S. Rep. No. 99-313, 99th Cong., 2d Sess. 105 (1986).



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Current Legal Forms for Real Estate

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Current Legal Forms for Real Estate
Chapter 21 SALES AND EXCHANGES
Part I. The Tax Background

25-21 Current Legal Forms for Real Estate § 21.07

§ 21.07 Recapture of Cost Recovery and Depreciation

[1] Recapture Rules Generally

The Code contains two important "recapture" provisions under which at least a portion of accelerated cost recovery system (ACRS) or depreciation deductions taken or allowed in previous years on certain real or personal property is recaptured as ordinary income when the property is sold or otherwise disposed.ⁿ¹ The purpose of the recapture rules is to prevent the taxpayer from realizing favorable capital gain treatment on some or all of the gains resulting from the use of cost recovery or depreciation deductions which previously reduced taxable income.ⁿ² *I.R.C. § 1245* recaptures gain from dispositions of depreciable personal property and certain other depreciable tangible property ("Section 1245 property").ⁿ³ *I.R.C. § 1250* recaptures gain, to the extent of "additional depreciation," from dispositions of certain depreciable real property ("Section 1250 property").ⁿ⁴

The rules governing recapture of depreciable real property under *I.R.C. Section 1250* are applied differently from the recapture rules for depreciable personal property under *I.R.C. Section 1245*. Both sets of recapture rules are important, particularly when the sale of real property includes the sale of personal property, as in the sale of commercial property with equipment, furnishings, or an active business.ⁿ⁵

In general, *I.R.C. Section 1250* treats as ordinary income gain realized upon the sale, exchange, or other disposition of depreciable real property to the extent that the depreciation deductions allowed exceed the amount allowed under the straight-line method, i.e., "additional depreciation." If the property is held for one year or less, however, all depreciation claimed is recaptured as ordinary income.ⁿ⁶ Similarly, "additional depreciation" is recaptured for cost recovery real property. For purposes of recapture of recovery property under Section 1250, "additional depreciation" is generally the depreciation in excess of straight line over the recovery period used by the taxpayer with respect to the particular property.ⁿ⁷ It should be noted that, as a result of the Taxpayer Relief Act of 1997, any gain from depreciable real property attributable to depreciation deductions allowed to the taxpayer and not otherwise recaptured as ordinary income, is considered "unrecaptured section 1250 gain" and taxed at a maximum capital gains rate of 25 percent.ⁿ⁸

Recapture under *I.R.C. Section 1250* applies only to "Section 1250 property." This category generally includes only depreciable real property, which encompasses a leasehold interest in Section 1250 property.ⁿ⁹ Other property, including

real property-like assets, is Section 1245 property and, therefore, is excluded from the definition of Section 1250 property.ⁿ¹⁰

For any disposition of depreciable property (whether real or personal), all depreciation recapture income must be recognized currently in the year of the disposition, even if the transaction is an installment sale. Recaptured depreciation is added to the adjusted basis of the property to determine the amount of a principal payment constituting nontaxable recovery of basis.ⁿ¹¹

The following discussion is divided into five parts. The first part examines recapture of ACRS deductions for cost recovery real property placed in service after 1980.ⁿ¹² The second part considers recapture of depreciation allowances for depreciable real property placed in service before 1981.ⁿ¹³ The third part discusses the amount of the gain subject to recapture and what is a "disposition."ⁿ¹⁴ The fourth part examines the application of Section 1250 to tax-free exchanges and involuntary conversions.ⁿ¹⁵ The final part considers the rules for determining the holding period of property for purposes of Section 1250 recapture of ordinary income.ⁿ¹⁶

[2] Recapture of ACRS Allowance

As a general rule, the amount recaptured on a disposition of real property is the amount of accelerated depreciation or cost recovery taken on the property in excess of the amount that would have been taken using straight line cost recovery or depreciation.ⁿ¹ Since real property placed in service after 1986 is depreciated under the straight line method, *i.e.*, nonresidential real property (39 years) and residential rental property (27.5 years), there is no excess depreciation and no recapture.ⁿ²

Real property placed in service during 1981 through 1986 was assigned a recovery period of 15, 18, or 19 years, depending on the recovery period allowed at the time the property was placed in service.ⁿ³ The accelerated cost recovery allowance resembled the 175 percent declining balance method changing to a straight-line method when it would yield a higher allowance.ⁿ⁴ Alternatively, the taxpayer could elect to recover the cost under the straight line method over the applicable 15, 18, or 19 year period, or one of two extended periods of 35 or 45 years.ⁿ⁵ For recapture purposes, real property placed in service during this period is divided into two classes: nonresidential (commercial) and residential. If the cost of nonresidential property is recovered under the prescribed accelerated method, *all* gain attributable to such recovery method is ordinary income to the extent of all recovery allowances previously taken. If, however, the straight line method is elected, no depreciation is recaptured and all gain is capital gain.ⁿ⁶

Different rules apply, however, to real property which is residential rental property. For all such property, gain attributable to cost recovery is ordinary income only to the extent the recovery allowed under the prescribed accelerated method exceeds the recovery that would have been allowable had the straight-line method over the applicable 15, 18 or 19-year period been used. Therefore, if the straight-line method was elected for residential property, all gain will be capital gain.ⁿ⁷ In summary, accelerated deductions with regard to residential rental property (placed in service from 1981 to 1986) are subject to Section 1250 recapture only to the extent they exceed straight line.

[3] Recapture of Depreciation Allowance

[a] Statutory Background

To the extent that depreciation deductions are taken against ordinary income while any gain on the sale of the property is treated as capital gain, there is, in effect, an opportunity to convert ordinary income into capital gain. This may occur when the allowed depreciation deduction reduces the basis of the property faster than its actual decline in value.ⁿ¹ The Treasury initially sought a statute which would eliminate this "loophole" in every case, on the questionable assumption that any sale for a price in excess of the property's depreciated basis is automatic proof that the taxpayer has deducted too much depreciation.ⁿ² The Court, however, pointed out that this assumption disregards the basic accounting concept

of depreciation as a prorated recovery of cost and not as a measure of decline in market value, and also that it ignores such true capital appreciation factors as inflation, scarcity, and improvement of environment.ⁿ³ Nevertheless, a substantial segment of industry was willing to accept this restriction on equipment as the price for obtaining more liberal depreciation allowances. The result was the enactment in 1962 of *I.R.C. Section 1245*, which subjected the disposition of personal property to ordinary income treatment to the extent of post-1961 depreciation.ⁿ⁴ Two years later (in 1964), Congress added Section 1250, the depreciation recapture provision for real property, to the Code.ⁿ⁵ Both of these sections have subsequently been amended several times, including changes to account for ACRS deductions for property placed in service after 1980.ⁿ⁶

[b] Depreciation from 1964 to 1969

In 1964, the concept of depreciation recapture that was previously enacted with respect to personal property was extended to "Section 1250 property" (generally real property used in a trade or business, or held for the production of income).ⁿ⁷ Under the 1964 Act, if the real property was sold or disposed of after 1963, an "applicable percentage" of "additional depreciation" taken after 1963 was recaptured and treated as ordinary income to the extent of any gain.ⁿ⁸ If the property was sold before the end of 20 months, the "applicable percentage" was 100, and, accordingly, all "additional depreciation" was taxed as ordinary income. The additional depreciation that was recaptured was the excess depreciation allowed or allowable, after 1963, over straight-line depreciation, but if the property was held for less than one year before it was sold, *all* depreciation, including straight-line, was recaptured.ⁿ⁹ If the property was sold after 20 months, the applicable percentage was 100 percent, reduced by 1 percent for every month after 20 that the property continued to be held. Thus, if the property was held for 120 months (ten years) and then sold, there was no recapture of any depreciation.ⁿ¹⁰

[c] Depreciation from 1970 to 1975

For property sold after 1969 and before 1976, the depreciation recapture rules were modified by the Tax Reform Act of 1969, with respect to post-1969 depreciation, depending upon whether the property was residential rental or commercial property. If the property was residential real estate, the post-1969 excess depreciation was fully recaptured at the ordinary income rates (to the extent of gain) if the property was held for less than 100 months prior to its sale. For each month held over 100 months, there was a 1 percent reduction in the amount of post-1969 excess depreciation that was recaptured. Accordingly, if the property was held for 200 months (16 years, eight months) or more prior to being sold, there was no recapture of any depreciation and all gain was taxable as capital gain.ⁿ¹¹ If the real estate was nonresidential (commercial) property, all post-1969 excess depreciation was fully recaptured to the extent of any gain, regardless of the length of time that the property was held.ⁿ¹² The pre-1969 recapture rules for real estate (1 percent per month reduction after 20 months) was applied in the case of federal, state, and locally assisted housing projects (such as FHA 221(d)(3) and 236 programs) that were constructed or acquired after 1976; however, if such property was constructed or acquired after 1975, the regular post-1969 recapture rules with respect to residential property were applied, *i.e.*, a 1 percent per month reduction after 100 months.ⁿ¹³

[d] Depreciation After 1975

As to post-1975 excess depreciation for other Section 1250 property, the Tax Reform Act of 1976 applied to residential rental property the recapture rules discussed above with respect to commercial property. Thus, for any depreciable real estate sold or otherwise disposed of after 1975 (except for specified government-subsidized housing discussed above), all post-1975 depreciation taken in excess of straight-line is fully recaptured as ordinary income (to the extent of any gain), regardless of the length of time that the property is held.ⁿ¹⁴ If the property was acquired before or after 1969 and prior to 1976, the respective excess depreciation rules applicable to such periods continue in effect to the extent of any gain not recaptured for post-1975 excess depreciation.ⁿ¹⁵ Since the inception of this rule in 1964, all depreciation, including straight-line, is recaptured as ordinary income if the property is held one year or less prior to its sale.ⁿ¹⁶

[4] Recapture on Disposition

When depreciation is recaptured upon the sale, exchange, or involuntary conversion of real property, the gain subject to recapture is the excess of the amount realized over the adjusted basis of the property. In the case of any other disposition, the gain is the excess of the fair market value of the property over its adjusted basis.ⁿ¹ The Treasury has issued regulations for the taxation of gain on real estate sales, but has not taken into account changes made by the 1969 and 1976 Acts. Thus, the regulations are applicable to post-1969 and -1975 transactions only to the extent that the Code was not changed by the 1969 and 1976 amendments. This includes the recapture of pre-1970 and -1976 depreciation, and some definitional provisions.ⁿ²

For any disposition of real (or personal) property occurring after June 6, 1984, all depreciation recapture income must be recognized currently, even if the transaction is an installment sale. In determining the amount of any principal payment which constitutes a nontaxable recovery of basis, however, the taxpayer's adjusted basis in the transferred property includes the amount of depreciation recapture income.ⁿ³

A "disposition," for purposes of the recapture rules, includes an otherwise nontaxable transaction, such as a corporate liquidation or dividend or other distribution, or an involuntary conversion, as well as ordinary sales and exchanges.ⁿ⁴ The recapture rules do not apply, however, to a gift (since the donee may have to pay the tax upon his own disposition of the property),ⁿ⁵ or to a transfer at death (except to the extent that the "income at death" provisions of the Code apply).ⁿ⁶

[5] Tax-Free Exchanges and Involuntary Conversions

As indicated above, the recapture rules apply to otherwise nontaxable transactions, such as tax-free exchanges and involuntary conversions. Ordinary income treatment does not apply to such transactions where the basis of the property carries over to the transferee. There may be ordinary income, however, to the extent of the larger of the following: (1) the recognized gain plus the value of any replacement stock, or (2) the ordinary income which would have been realized on a taxable exchange, less the value or cost of depreciable real estate acquired as an exchange or replacement.ⁿ¹

Example:

Depreciable real property with a \$100,000 basis and \$16,000 recapturable depreciation is destroyed, and \$117,000 is received. If \$105,000 is invested in real estate, and \$9,000 in corporate stock, ordinary income under the first limitation is \$3,000, plus \$9,000, or \$12,000. If the reinvested \$105,000 (\$117,000 less \$12,000) is allocated \$90,000 to land and \$15,000 to building, there is no increase by reason of the second formula, because that limit is the \$16,000 potential ordinary income less the \$15,000 building cost, or \$1,000. But, if the entire \$105,000 is used for land, then there is \$16,000 ordinary income.ⁿ²

In all nontaxable conversions, the basis of the replacement property is decreased to reflect any unrecognized gain. Where replacement property consists of both depreciable real estate and other property, this decrease is allocated by first applying the portion of the unrecognized ordinary income to the depreciable property.ⁿ³ In the above example, where only \$12,000 of the \$16,000 depreciation was taxable, the \$15,000 cost of the new building is first reduced by the excluded \$4,000 of depreciation to a cost of \$11,000. Next, the \$110,000 total "cost" of the properties is reduced by the amount that the unrecognized conversion gain, \$14,000, exceeds the excluded depreciation of \$4,000. The \$100,000 basis thus obtained is allocated to the properties in proportion to "cost."ⁿ⁴

The ordinary income rule does not apply to a nontaxable sale of a principal residence, to the extent that the property is so used at the time of the sale, even though depreciation has been previously taken on such property.ⁿ⁵

[6] Holding Period

For purposes of determining the holding period of depreciable property under the Section 1250 recapture of ordinary

income rules, *i.e.*, the applicable percentage, the Code's general rules for "tacking" a transferor's holding period to that of a transferee in an exchange (so as to determine the application of the capital gain provisions) do not apply.ⁿ¹ Rather, the holding period of Section 1250 property is determined under special rules:

(1) The holding period of Section 1250 property is deemed to begin:

(a) in the case of property acquired by the taxpayer, on the day after the date of acquisition;

(b) in the case of property constructed, reconstructed, or erected by the taxpayer, on the first day of the month during which the property is placed in service.ⁿ²

(2) If the basis of property acquired by means of gift, death, certain tax-free transactions, or *I.R.C. Section 1071* or *1081* transactions is determined by reference to its basis in the transferor's hands, the holding period of the property in the transferee's hands includes the holding period of the property in the transferor's hands.ⁿ³

(3) If the basis of property acquired in a transaction involving the disposition of a principal residence under *I.R.C. Section 1250(d)(7)* is determined by reference to the basis in the hands of the taxpayer of other property, the holding period of the property acquired includes the holding period of such other property.ⁿ⁴

Planning Notes

Depreciation Recapture Income Must Be Recognized Currently. It is important to remember that for dispositions made after June 6, 1984, all depreciation recapture income must be recognized currently, even if the transaction is an installment sale.ⁿ⁵

Importance of Tacking Rules. As noted above, *I.R.C. Section 1250* has its own tacking rules to determine the recapture amounts upon exchanges of depreciable real property. These special tacking rules are important because the applicable percentage of additional depreciation which is recaptured is reduced, for certain types of property, depending upon the length of time the property has been held.

Legal Topics:

For related research and practice materials, see the following legal topics:

Tax LawFederal Income Tax ComputationSales & ExchangesBusiness Property (IRC secs. 1031, 1221, 1231)Involuntary ConversionsTax LawFederal Income Tax ComputationSales & ExchangesCapital Gains & Losses (IRC secs. 1201-1202, 1211-1212, 1221-1223, 1231-1260, 1271-1278, 1281-1288, 1291-1298)Disposition of Depreciable PropertyTax LawFederal Income Tax ComputationSales & ExchangesCapital Gains & Losses (IRC secs. 1201-1202, 1211-1212, 1221-1223, 1231-1260, 1271-1278, 1281-1288, 1291-1298)Holding Period of PropertyTax LawFederal Income Tax ComputationSales & ExchangesRecapture of Depreciation (IRC secs. 1245, 1250)

FOOTNOTES:

(n1)Footnote 1. *I.R.C. §§ 1245, 1250. See § 21.06, supra*, for discussion of ACRS cost recovery and depreciation deductions for real property.

(n2)Footnote 2. *See S. Rep. No. 830, 88th Cong., 2d Sess. 131 (1964).*

(n3)Footnote 3. *I.R.C. § 1245(a)(3).*

(n4)Footnote 4. *I.R.C. § 1250(c).*

(n5)Footnote 5. For a complete discussion of the *I.R.C. § 1245* recapture rules for personal property and business assets, see *The Tax Background* in Volume 7, Chapter 5, *supra* .

(n6)Footnote 6. *I.R.C. § 1250(b)(1)*. Special rules apply for property which is substantially improved. *I.R.C. § 1250(f)*.

(n7)Footnote 7. *I.R.C. § 1250(b)(5)(A)*.

(n8)Footnote 8. *I.R.C. § 1(h)(7)*.

(n9)Footnote 9. *I.R.C. § 1250(a),(c)*; *Treas. Reg. § 1.1250-1(e)(3)*. See *I.R.C. § 1250(b)(2)*.

(n10)Footnote 10. *I.R.C. § 1250(c)*. See § 1245(a)(3).

(n11)Footnote 11. *I.R.C. § 453(i)*. For further discussion of postponement of income recognition through installment sales, including current recognition of depreciation recognition income, see § 21.11, *infra*.

(n12)Footnote 12. See § 21.07[2], *infra*.

(n13)Footnote 13. See § 21.07[3], *infra*.

(n14)Footnote 14. See § 21.07[4], *infra*.

(n15)Footnote 15. See § 21.07[5], *infra*.

(n16)Footnote 16. See § 21.07[6], *infra*.

(n17)Footnote 1. *I.R.C. § 1250(a)(1)(A), (b)(1)*.

(n18)Footnote 2. See *I.R.C. § 168(c)*.

(n19)Footnote 3. Former *I.R.C. § 168(c)(2)(D)*, prior to amendment by T.R.A. 1986 § 201(a).

(n20)Footnote 4. Former *I.R.C. § 168(b)(2)(A)*, prior to amendment by T.R.A. 1986 § 201(a).

(n21)Footnote 5. Former *I.R.C. § 168(b)(3)(A)*, prior to amendment by T.R.A. 1986 § 201(a).

(n22)Footnote 6. *I.R.C. § 1245(a)(1) and (5)(C)*.

(n23)Footnote 7. *I.R.C. § 1250*. See § 21.07[3], *infra*.

(n24)Footnote 1. S. Rep. No. 830, 88th Cong., 2d Sess. 131 (1964).

(n25)Footnote 2. See *Rev. Rul. 62-92, 1962-1 C.B. 29* .

(n26)Footnote 3. *Fribourg Navigation Co. v. Comm'r*, 383 U.S. 272 (1966) , *rev'g* 335 F.2d 15 (2d Cir. 1964) ; see *Motorlease Corp. v. U.S.*, 383 U.S. 573 (1966) , *rev'g* 334 F.2d 617 (2d Cir. 1964) . The Service follows *Fribourg* in allowing an adjustment of the depreciation deduction in the year of sale only where an unreasonable estimated useful life or salvage value was used. *Rev. Rul. 67-272, 1967-2 C.B. 99* .

(n27)Footnote 4. *I.R.C. § 1245*.

(n28)Footnote 5. *I.R.C. § 1250*. See § 21.07[3][b]-[d], *infra*.

(n29)Footnote 6. See § 21.07[2], *supra*.

(n30)Footnote 7. *I.R.C. §§ 167(a), 1250(c).*

(n31)Footnote 8. *See I.R.C. § 1250(a)(1).*

(n32)Footnote 9. *I.R.C. § 1250(b)(1).*

(n33)Footnote 10. *See I.R.C. § 1250(a)(3)(B).*

(n34)Footnote 11. *See I.R.C. § 1250(a)(2)(B)(iii).* These recapture rules are also applied to real estate with respect to which rapid depreciation for rehabilitation expenditures was allowed. *See I.R.C. § 1250(a)(2)(B)(iv).*

(n35)Footnote 12. *See I.R.C. § 1250(a)(2)(B)(v).*

(n36)Footnote 13. *See I.R.C. § 1250(a)(1)(B)(i), (a)(2)(B)(ii).*

(n37)Footnote 14. *I.R.C. § 1250(a)(1).*

(n38)Footnote 15. *I.R.C. § 1250(a)(2) and (3).*

(n39)Footnote 16. *I.R.C. § 1250(b)(1).*

(n40)Footnote 1. *I.R.C. § 1250(a)(1)(A).*

(n41)Footnote 2. *Treas. Reg. §§ 1.1250-1 through 5.*

(n42)Footnote 3. *I.R.C. § 453(i).*

(n43)Footnote 4. *I.R.C. § 1250(a); Treas. Reg. § 1.1250-1.* For treatment of recapture on tax-free exchanges and involuntary conversions, see § 21.07[5], *infra*.

(n44)Footnote 5. *I.R.C. § 1250(d)(1).* For a disposition which is in part a sale or exchange and in part a gift, see *Treas. Reg. § 1.1250-3(a)(2).*

(n45)Footnote 6. *I.R.C. §§ 1250(d)(2), 691; Treas. Reg. § 1.1250-3(b).*

(n46)Footnote 1. *I.R.C. § 1250(d)(4).*

(n47)Footnote 2. *See H.R. Rep. No. 749, 88th Cong., 1st Sess. 155 (1963); see also Clayton v. Comm'r, 52 T.C. 911 (1969).*

(n48)Footnote 3. *I.R.C. § 1250(d)(4)(D).*

(n49)Footnote 4. H.R. Rep. No. 749, N. 2, *supra*, at 156. Similar basis adjustments are to be provided in the regulations for "like-kind" exchanges. *I.R.C. § 1250(d)(4)(D).*

(n50)Footnote 5. *I.R.C. § 1250(d)(7).*

(n51)Footnote 1. *I.R.C. § 1250(e).* The general tacking rules applied to exchanges are found in *I.R.C. § 1223.*

(n52)Footnote 2. *I.R.C. § 1250(e)(1).*

(n53)Footnote 3. *I.R.C. § 1250(e)(2).*

(n54)Footnote 4. *I.R.C. § 1250(e)(3).* For the holding period of qualified low-income housing described in *I.R.C. § 1250(d)(8)(E)(i)*, see *I.R.C. § 1250(e)(4).*

(n55)Footnote 5. *See § 21.07[1], supra.* For application of this rule to gain on sales qualifying for installment sale treatment see § 21.11, *infra*.



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Current Legal Forms for Real Estate
Chapter 21 SALES AND EXCHANGES
Part I. The Tax Background

25-21 Current Legal Forms for Real Estate § 21.08

§ 21.08 Passive Activity Loss Limitation

[1] Limitation on Passive Activity Losses

Deductions in excess of income (*i.e.*, losses) from passive activities generally may not offset other income such as salary, interest, dividends, and active business income. Deductions from passive activities may offset income from the same or other passive activities. Credits from passive activities generally are limited to the tax attributable to income from passive activities.ⁿ¹

A "passive activity" is any business or profit seeking activity in which the taxpayer does not "materially participate." A taxpayer materially participates in an activity only if the taxpayer is involved on a regular, continuous, and substantial basis in the operations of the activity. The Service has promulgated regulations which provide seven situations in which the material participation test may be satisfied.ⁿ²

Disallowed losses and credits are carried forward and treated as deductions and credits from passive activities in the next taxable year. Disallowed losses from an activity are allowed in full when the taxpayer disposes of his entire interest in the activity in a taxable transaction. Credits are not so allowed upon disposition.ⁿ³

The passive activity loss limitation applies to individuals, estates, trusts, and certain corporations.ⁿ⁴

Closely held corporations may not offset portfolio income (interest, dividends, etc.) with passive losses and credits but may use passive losses and credits to offset active business income. Due to the pass-through nature of partnerships and S corporations, individual partners and S corporation shareholders are subject to the limitation.ⁿ⁵ Interest deductions attributable to passive activities are subject to the passive loss rule, but are not subject to the investment interest limitation (unless the phase-in rules apply).ⁿ⁶

Example:

Albert has net passive losses of \$100 for a tax year beginning after 1986, \$40 of which consists of interest expense. The entire \$100 is subject to limitation under the passive loss rule. No portion of the loss is subject to limitation under the investment interest limitation.

Interests in passive activities acquired by the taxpayer on or before October 22, 1986 are eligible for the phase-in under the passive loss rule. Interests in activities acquired after October 22, 1986, however, are not eligible for the phase-in, but rather are fully subject to the passive loss rule.

Under the phase-in rule, the amount disallowed under the passive loss rule during any year in the phase-in period equals the applicable percentage of the amount that would be disallowed for that year under the provision if fully effective. The applicable percentage is 35 percent for taxable years beginning in 1987, 60 percent in taxable years beginning in 1988, 80 percent in taxable years beginning in 1989, 90 percent in taxable years beginning in 1990, and 100 percent in taxable years beginning after 1990.ⁿ⁷

[2] Passive Activities, Rental Real Estate

Generally speaking, rental activity (*i.e.*, any activity where payments are principally made for the use of tangible property) is considered to be a passive activity.ⁿ¹ Therefore, deductions and credits from rental activities can only offset income from other passive activities, generally. Such deductions and credits *cannot* be deducted from nonpassive income, such as wages, dividends, interest, etc. However, there are two major exceptions to this general rule.

First, beginning in 1994, certain eligible taxpayers who materially participate in rental real estate activities can deduct losses from such activities against nonpassive income. These eligible taxpayers include individuals and closely-held C corporations that meet special eligibility requirements.

An individual taxpayer meets the eligibility requirements if:

- (1) more than half of the personal services the taxpayer performs during the tax year are performed in real property trades or businesses in which the taxpayer materially participates; and
- (2) such taxpayer performs more than 750 hours of service during the tax year in the real property trades or businesses in which the taxpayer materially participates.

A closely-held C corporation meets the eligibility requirements if more than 50 percent of its gross receipts for the tax year are derived from real property trades or businesses in which the corporation materially participates.ⁿ²

"Real property trade or business" means any real property development, redevelopment, construction, reconstruction, acquisition, conversion, rental, operation, management, leasing or brokerage trade or business.ⁿ³

To be a material participant, the taxpayer must be involved in the business on a regular, substantial and continuous basis.ⁿ⁴

In the case of a joint return, the eligibility requirements are met if either spouse separately satisfies the two requirements. Thus, one of the spouses must satisfy the requirement with respect to half of such spouse's personal services, as well as the requirement with respect to 750 hours of services, without regard to services performed by the other spouse. However, participation of the taxpayer's spouse is taken into account in determining material participation.ⁿ⁵

The second exception provides that an individual who owns at least a 10-percent interest and who *actively* participates in rental real estate activity is permitted to offset up to \$25,000 of passive activity losses against his nonpassive income.ⁿ⁶ The active participation requirement is not as stringent as the material participation rule. It can be satisfied without regular, continuous, and substantial involvement in operations if the taxpayer participates in the making of significant management decisions (approving new tenants, deciding on rental terms, approving capital/repair expenditures, etc.). The \$25,000 exception is applicable to individuals other than those whose income is very large.ⁿ⁷

Legal Topics:

For related research and practice materials, see the following legal topics:

Tax Law Federal Income Tax Computation Deductions for Losses Passive Activity Loss (IRC sec. 469)

FOOTNOTES:

(n1)Footnote 1. *I.R.C. § 469(a), (b), (d)*, added by the Tax Reform Act of 1986 (T.R.A. 1986), Pub. L. No. 99-514, 99th Cong., 2d Sess. § 501(a) (Oct. 22, 1986). For a more detailed discussion of the passive activity loss limitation, see Chapter 1, "Partnerships," Volume 1, *supra*.

(n2)Footnote 2. *See I.R.C. § 469(c), (h)(1)*; Treas. Reg. § 1.469-5T (providing a substantially mechanical set of rules to determine whether the material participation test is satisfied).

(n3)Footnote 3. *I.R.C. § 469(b), (g)*, added by T.R.A. 1986 § 501(a).

(n4)Footnote 4. *I.R.C. § 469(a)(2)*.

(n5)Footnote 5. *I.R.C. § 469(a)(2), (e)(2)*, added by T.R.A. 1986 § 501(a).

(n6)Footnote 6. *I.R.C. § 469(e)(1)(A)*, added by T.R.A. 1986 § 501(a).

(n7)Footnote 7. *I.R.C. § 469(m)*.

(n8)Footnote 1. *I.R.C. § 469(c)(2)*.

(n9)Footnote 2. *I.R.C. § 469(c)(7)(D)(i)*.

(n10)Footnote 3. *I.R.C. § 469(c)(7)(c)*.

(n11)Footnote 4. *I.R.C. § 469(h)(1)*.

(n12)Footnote 5. *I.R.C. § 469(c)(7)*, added by the Revenue Reconciliation Act of 1993, Pub. L. No. 103-66, 103rd Cong., 1st Sess. § 13143(a) (Aug. 10, 1993).

(n13)Footnote 6. *I.R.C. § 469(i)*.

(n14)Footnote 7. *I.R.C. § 469(i)(3)*.



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Chapter 21 SALES AND EXCHANGES
Part I. The Tax Background

25-21 Current Legal Forms for Real Estate § 21.09

§ 21.09 At Risk Limitation on Loss Deductions

[1] At Risk Limitation Applicable to Real Estate

Losses from the activity of holding real property are limited to the amount the taxpayer has at risk.ⁿ¹ Deductions and losses not allowed in a tax year because of the at risk limitation are suspended until the taxpayer's at-risk investment in the activity increases. Amounts at risk are the amount of money and the adjusted basis of other property contributed to the activity by the taxpayer, and amounts borrowed with respect to the activity. However, except as to qualified nonrecourse financing hereafter described, borrowed amounts are not at risk to the extent the taxpayer is protected from loss through nonrecourse financing, guarantees, stop loss agreements, or other similar arrangements.ⁿ² Taxpayers subject to the at risk limitation include individuals, as well as individual partners and individual S corporation shareholders, and closely-held corporations.ⁿ³

[2] Qualified Nonrecourse Financing at Risk

Qualified nonrecourse financing secured by real property used in an activity of holding real property is treated as an amount at risk. Qualified nonrecourse financing generally includes financing loaned by a federal, state or local government or instrumentality, or guaranteed by federal, state or local government. It also includes amounts borrowed from qualified persons, generally any person actively and regularly engaged in the business of lending money. This category of qualified persons would include, for example, banks, savings and loan associations, credit unions, or regulated insurance companies. Qualified persons do not include (1) any person from whom the taxpayer acquired the property, *i.e.*, seller financing (or person related to the seller), or (2) any person who receives a fee, such as a promoter, from the taxpayer's investment in the property (or person related to such person). Nonrecourse financing from a person related to the taxpayer can qualify if the terms of the loan are commercially reasonable and on substantially the same terms as loans from unrelated persons.ⁿ¹

Planning Note

At Risk Rules Apply to Newly Acquired Partnership Interests and S Corporation Shares. The application of the at risk rules to real property generally applies to losses incurred after 1986 from real property placed in service after 1986. However, the at risk limitations apply to partnership interests, S corporation shares, and interests in other pass through entities acquired after 1986 regardless of when the

real property was placed in service by the pass through entity.ⁿ²

Legal Topics:

For related research and practice materials, see the following legal topics:

Tax Law Federal Income Tax Computation Deductions for Losses General Overview Tax Law Federal Income Tax Computation Deductions for Losses At-Risk Limitations (IRC secs. 49, 465) Tax Law Federal Taxpayer Groups S Corporations Shareholders (IRC secs. 1361, 1362, 1366, 1377) Determination of Tax Liability

FOOTNOTES:

(n1)Footnote 1. *I.R.C. § 465(c)(3)*, amended by the Tax Reform Act of 1986 (T.R.A. 1986), Pub. L. No. 99-514, 99th Cong., 2d Sess. § 503(a) (Oct. 22, 1986). This amendment deleted an exclusion for real property under former *I.R.C. § 465(a)(3)(D)*. For a more detailed discussion of the at risk rules see the Tax Background to Chapter 1, "Partnerships," in Volume 1, *supra*.

(n2)Footnote 2. *I.R.C. § 465(b)*.

(n3)Footnote 3. *I.R.C. § 465(a)(1)*.

(n4)Footnote 1. *I.R.C. § 465(b)(6)*, added by T.R.A. 1986 § 503(b). *See also I.R.C. § 49(a)(1)(D)(iv)*.

(n5)Footnote 2. T.R.A. 1986 § 503(c).



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Chapter 21 SALES AND EXCHANGES
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25-21 Current Legal Forms for Real Estate § 21.10

§ 21.10 Postponement of Income Recognition: General and Special Rules

[1] Payment Pursuant to Contract or Note

Income is realized when a sale or other disposition of property takes place.ⁿ¹ Gain on a disposition is the excess of the amount realized or the sale over the adjusted basis of the property.ⁿ² The "amount realized" includes not only the amount of money received but also the fair market value of any other property received, including notes or other obligations of the purchaser.ⁿ³ Thus, these notes or other evidences of indebtedness are considered part of the amount received, thereby increasing the taxable gain.ⁿ⁴

In the case of a cash basis taxpayer, the amount realized upon receipt of the notes is their fair market value, which is taxable either as ordinary income or capital gain depending upon the nature of the transaction. Subsequent payments on such notes are treated as ordinary income to the extent they exceed the fair market value.ⁿ⁵ For an accrual method taxpayer, the entire face amount of the notes is included when received.ⁿ⁶ For both cash basis and accrual method taxpayers, a mortgage or other indebtedness to which the property is subject or which is assumed by the buyer is included in the amount realized.ⁿ⁷

In the event of an installment sale, the seller may defer payment of tax or the entire gain in the year of sale by spreading out the payments over a period of time; however, in any disposition of depreciable real or personal property, all depreciation recapture income must be recognized currently, even if the transaction is an installment sale.ⁿ⁸

If a cash basis taxpayer does not receive the purchaser's notes but merely has the right to receive payments under a purchase contract, the taxpayer generally does not report income until the payments are received.ⁿ⁹ The reporting of income and gain in this type of transaction is reported under the rules applicable to installment reporting, which may require the recognition of income or gain before payment is received under certain circumstances. The situation is less certain with respect to an accrual basis taxpayer, but similar deferred recognition treatment has been allowed in at least one case.ⁿ¹⁰

If a seller receives notes with a fair market value less than face, only such value is taxable at the time of sale, either as ordinary income or capital gain depending upon the nature of the transaction. The balance, however, is ordinary income

when the notes are paid, unless the capital gain provision for redemption of corporate obligations is applicable. The erroneous failure to report any value for the notes in the year of sale does not make the ultimate payment capital gain. On the other hand, barring estoppel, the taxpayer is not required to report the original fair market value of the notes in the year of payment, notwithstanding his omission of this sum from income in the year of sale.ⁿ¹¹

[2] Original Issue Discount

[a] Debt Subject to Original Issue Discount Rules

Purchase money and other debt instruments may be subject to the original issue discount rules, which can significantly affect the deduction of the borrower or buyer and the taxable income of the lender or seller. The original issue discount rules may apply to real estate financing transactions and is most likely to apply to purchase money financing, either by the seller or a third party lender, with below-market interest rates or deferred interest payments.

Example:

An accrual method purchaser of real estate gives a note and mortgage to a cash method seller. The note provides that interest accrues annually but not paid for ten years when the note matures. Prior to the extension of the original issue discount rules to this type of transaction, the accrual method purchaser-borrower would claim an annual deduction for accrued, but unpaid, interest. The cash method seller-lender would defer interest income until it is actually received. The extension of the original issue discount rules to this type of transaction would require the periodic inclusion of interest in the seller-lender's income and the periodic deduction of interest by the purchaser-borrower.ⁿ¹ This is not the only type of transaction which may be subject to the original issue discount rules.

Debt instruments, including bonds and notes, received as consideration for the sale or exchange of property in a transaction with consideration of over \$250,000 generally will be subject to an imputed principal amount, and correspondingly higher interest rate, if the interest on the debt is inadequate. Generally, the debt interest will be inadequate if it is not at least equal to the applicable federal rate.ⁿ² The applicable federal rate is determined by the term of the debt instrument.ⁿ³

If the Debt Term is:	The Applicable Federal Rate is:
Not over three	Federal short-term rate
Over three but not over nine years	Federal mid-term rate
Over nine years	Federal long-term rate

The original issue discount rules also apply to other debt instruments, but mostly affect the timing of the interest deduction and income inclusion rather than an adjustment in the amount of principal and interest. It applies to debt if the stated redemption price (*i.e.*, generally the sum of all payments, except fixed periodic interest payment on a fixed interest at intervals of at least one year) exceeds the stated principal amount, when the interest is adequate. The rules only apply if a debt instrument has some or all payments due more than six months after the date of the sale or exchange of the property.ⁿ⁴

[b] Excluded Transactions and Persons

Exceptions to the operation of the original discount rules apply to particular situations and persons in certain transactions. A major exception applies to debt instruments given for property (*i.e.*, seller financing) when the stated principal amount of the debt instrument does not exceed \$2.8 million. For such debt instruments, the discount rate used for imputed interest rules or for original issue discount rules cannot exceed 9 percent, compounded semiannually.ⁿ⁵

Debt instruments in sales involving total payments of \$250,000 or less are exempt. The exemption applies when the debt instrument is received as consideration for the sale or exchange of property if the sum of the payments due under the instrument, including principal and interest, together with any other debt instruments and consideration received in the sale does not exceed \$250,000.

Any debt instrument from the sale or exchange by an individual of his principal residence is also exempt. A sale for \$1 million or less of a farm by an individual or small business may qualify as an exception. The sale of the farm must be by an individual, estate, testamentary trust, or by a small business corporation or partnership provided the aggregate amounts received for the corporation's stock or the partnership interests do not exceed \$1 million under the requirements of *I.R.C. Section 1244(c)(3)*.

Debt instruments that are publicly traded or are issued for publicly traded property are subject to other original issue discount rules. A qualified land sale by an individual to a member of his family is also exempt from this set of original issue discount rules.ⁿ⁶

Loans between two individuals, not in excess of \$10,000 and not made in the course of a trade or business of the lender, are exempt. Debt instruments with a fixed maturity date of one year or less are exempt.ⁿ⁷

A cash method issuer of a debt instrument is exempt from the original issue discount rules if the debt was given for personal use property, *i.e.*, property not used in a trade or business or for the production or collection of income.ⁿ⁸

[c] Original Issue Discount Formulas and Rules

The original issue discount is the excess of the stated redemption price at maturity of the instrument over the issue price. The stated redemption price at maturity is the sum of all payments due under the instrument, including principal and interest, except interest based on a fixed rate and payable unconditionally at fixed periodic intervals of one year or less during the entire term of the loan. The issue price for debt instruments issued for property is either the stated principal amount if the interest is adequate, or the imputed principal amount if the interest is inadequate.ⁿ⁹

Example 1:

The purchaser of real property gives the seller a note and mortgage in the principal amount of \$300,000. The term of the note is 15 years, with interest fixed at 14 percent. Each month the buyer pays an installment of principal and interest in the amount of \$3,995.25. This note has no original issue discount because the interest is based on a fixed rate and the interest is unconditionally payable in fixed monthly intervals over the term of the loan.

Example 2:

The purchaser in the above example issues a \$300,000 balloon note, for which the entire principal and interest will be payable in full in 15 years. The amount fixed by the note due in 15 years is \$900,000. The original issue discount is determined by subtracting from the stated redemption price of \$900,000, the issue price or stated principal of \$300,000. \$600,000 would be the original issue discount. The amount is allocated periodically as interest under rules described below.

The principal amount of the debt is imputed if the interest is inadequate. Interest is inadequate if it is less than the applicable federal rate.ⁿ¹⁰ If this safe harbor interest rate is not satisfied, the amount of principal, and correspondingly the original issue discount, is redetermined by using a discount rate equal to the applicable federal rate. Under this formula, the principal on the debt will generally be deemed to be the sum of the present values of all payments due using a discount rate equal to the applicable federal rate, if not issued in a potentially abusive situation.

In a potentially abusive situation, the principal amount will be determined with reference to the fair market value of the

property sold or exchanged.ⁿ¹¹ Potentially abusive situations include tax shelters (*i.e.*, a partnership, entity, plan or arrangement with the principal purpose of avoidance or evasion of tax) and other situations provided by regulation. Regulations are authorized for tax shelters and other transactions involving recent sales transactions, nonrecourse financing, financing with a term in excess of the economic life of the property, or other circumstances.ⁿ¹²

The applicable federal rate is determined as of the first day there is a binding contract for the transaction. As indicated, the rate used is one of three different rates, depending on the term of the debt instrument. The rates are determined monthly by the Service based on average market yield. The lowest rate in effect for any month in the three month period ending with the first month in which there is a binding written contract for the transaction is the governing rate.ⁿ¹³

[3] Imputed Interest

When property is sold for a deferred payment which does not specify an adequate rate of interest, the payment is deemed to include an "un- stated interest." Unstated interest is imputed for covered deferred payment sales or exchanges if the stated interest is not at least equal to the applicable federal rate. However, for debt instruments given for property (*i.e.*, seller financing) with a face amount not exceeding \$2.8 million, the discount rate used cannot exceed 9 percent, compounded semiannually. A separate federal rate is set periodically by the Service, based on treasury securities, for short-term, mid-term and long-term obligations. If the stated interest is inadequate, *i.e.*, less than the applicable federal rate, an imputed rate, equal to the applicable federal rate, will be applied to determine the unstated interest. When interest is imputed, a portion of each payment is deemed to be interest income to the seller, and correspondingly an interest deduction for the buyer. Interest is imputed in covered deferred payment transactions for payments due more than six months after the sale or exchange. However, for the transaction to be covered by these rules, some or all of the payments must be due more than one year after the sale or exchange.ⁿ¹

Example:

A taxpayer sells real estate under a deferred payment contract. The purchaser will make full payment in nine monthly installments. Interest is below the applicable federal short-term rate. The transaction is not subject to the imputed interest rules because no payments are due more than one year after the sale. If the deferred payments extend past one year after the sale, then interest would be imputed on payments due after the sixth month following the sale.

[a] Imputed Interest Transactions and Rules

Interest will be imputed for deferred payments which meet certain criteria. The payment must be on account of the sale or exchange of property and constitute part or all of the price. Interest will be imputed, if stated interest is inadequate, on payments due more than six months after the sale or exchange, provided some or all of the payments are due more than one year after the date of the sale or exchange. In addition, there must be a total unstated interest determined by using a discount rate equal to the applicable federal rate. The rules apply to deferred payments under a contract for sale or exchange, as well as payments due under a debt instrument given as consideration for the sale or exchange. However, when the stated principal amount of the instrument does not exceed \$2.8 million, the discount rate may not exceed 9 percent compounded semiannually.ⁿ²

The imputed interest rules do not apply to debt instruments for which an issue price is determined under the original issue discount rules.ⁿ³ The original issue discount rules apply to various categories of debt instruments.ⁿ⁴ Imputed interest rules do not apply to deferred payments if the sales price of the property does not exceed \$3,000 and the price can be determined at the time of the sale or exchange.ⁿ⁵ Certain other exceptions, generally not applicable to real estate, also apply.ⁿ⁶ Special rules, discussed below, apply to certain sales or exchanges of land to a related party.ⁿ⁷

[b] Sale of Residence, Farm, or Land

Sales of personal residences and farms are subject to the general rules discussed above. Thus, for these transactions,

when the stated principal amount of the debt instrument is over \$2.8 million, the discount rate used to determine whether there is unstated interest is equal to the applicable federal rate compounded semiannually.ⁿ⁸ If the stated principal amount of the debt instrument is not over \$2.8 million, a discount rate of not over 9 percent compounded semiannually is used.ⁿ⁹ However, if the principal residence or farm is leased back to the seller, a discount rate equal to 110 percent of the applicable federal rate is used.ⁿ¹⁰ Under prior law, sales of personal residences (to the extent the purchase price did not exceed \$500,000) and farms qualified for special treatment because a discount rate of 9 percent was used to determine whether there was unstated interest.ⁿ¹¹

For sales or exchanges of land between family members when the combined sales price for all sales between the same family members in the same calendar year is not over \$500,000, the discount rate may not exceed 6 percent compounded semiannually. Family members of an individual are limited to his brothers, sisters, spouse, ancestors, and lineal descendants.ⁿ¹²

Planning Notes

OID Rules Affect Scope of *I.R.C. Section 483*. The Tax Reform Act of 1984 significantly expanded the scope of the original issue discount (OID) rules.ⁿ¹³ The unstated interest rules under *I.R.C. Section 483* continue to apply only in the case of deferred payment transactions involving sales or exchanges of property that are within one of the exceptions to the OID rules. For seller financing debt instruments not exceeding \$2.8 million, the discount rate used cannot exceed 9 percent. This limit is particularly useful when the applicable federal rate exceeds this 9 percent cap. If the applicable federal rate is less than 9 percent, then the lower applicable federal rate will produce less taxable income under these rule.ⁿ¹⁴

Tax Treatment of Imputed Interest. Remember that imputed interest is treated as ordinary income to the seller, and as an interest deduction to the buyer. The remaining portion of the payment is divided into basis recovery and gain portions under the installment sale rules.ⁿ¹⁵

Legal Topics:

For related research and practice materials, see the following legal topics:

Tax Law Federal Income Tax Computation Sales & Exchanges Capital Gains & Losses (IRC secs. 1201-1202, 1211-1212, 1221-1223, 1231-1260, 1271-1278, 1281-1288, 1291-1298) Original Issue Discount Tax Law Federal Income Tax Computation Sales & Exchanges Capital Gains & Losses (IRC secs. 1201-1202, 1211-1212, 1221-1223, 1231-1260, 1271-1278, 1281-1288, 1291-1298) Small Business Investment Companies Tax Law Federal Income Tax Computation Sales & Exchanges Capital Gains & Losses (IRC secs. 1201-1202, 1211-1212, 1221-1223, 1231-1260, 1271-1278, 1281-1288, 1291-1298) Treatment of Gains Tax Law Federal Income Tax Computation Sales & Exchanges Installment Sales (IRC secs. 1001, 1031, 1231) General Overview Tax Law Federal Income Tax Computation Tax Accounting Original Issue Discount (IRC secs. 1271-1276, 1278)

FOOTNOTES:

(n1)Footnote 1. See § 21.03, *supra*, for the taxable event.

(n2)Footnote 2. *I.R.C. § 1001(a)*.

(n3)Footnote 3. *I.R.C. § 1001(b)*; *Treas. Reg. § 1.1001-1(a)*. See also *Treas. Reg. § 1.451-1(a)* (gains, profit, and income are included when actually or constructively received).

(n4)Footnote 4. *Darby Inv. Co. v. Comm'r*, 315 F.2d 551 (6th Cir. 1963) ; *Potter v. Comm'r*, 44 T.C. 159 (1965) , *acq.* 1966-1 C.B. 3 ; *Rev. Rul.* 63-57, 1963-1 C.B. 103 . See § 21.04, *supra*, for the amount of gain or loss on the sale or other disposition of property.

(n5)Footnote 5. *Darby Inv. Co. v. Comm'r*, 315 F.2d 551 (6th Cir. 1963) ; see also *Treas. Reg. § 1.453-6(a)(1)*. For

treatment of gains on sale of property as capital gain or ordinary income, see § 21.05, *supra*.

(n6)Footnote 6. *Treas. Reg. § 1.451-1(a)* (under accrual method of accounting, income is includable in gross income when all events have occurred which fix right to receive such income and its amount can be determined with reasonable accuracy); *Rev. Rul. 79-292, 1979-2 C.B. 287*.

(n7)Footnote 7. *Treas. Reg. § 1.1001-2*; *Tufts v. Comm'r*, 461 U.S. 300 (1983); *Crane v. Comm'r*, 331 U.S. 1 (1947).

(n8)Footnote 8. *I.R.C. § 453*. Installment sales of real property under *I.R.C. § 453* are discussed at § 21.11, *infra*.

(n9)Footnote 9. *Helvering v. Nibley-Minnaugh Lumber Co.*, 70 F.2d 843 (D.C. Cir. 1934); *see also Ennis v. Comm'r*, 17 T.C. 465 (1951).

(n10)Footnote 10. *Titus v. Comm'r*, 33 B.T.A. 928 (1936), *app. dism'd* 88 F.2d 1007 (10th Cir. 1937); *see also George L. Caster Co., Inc. v. Comm'r*, 30 T.C. 1061 (1958).

(n11)Footnote 11. *Culberston v. Comm'r*, 14 T.C. 1421 (1950).

(n12)Footnote 1. S. Rep. No. 169, 98th Cong., 2d Sess. 251 (1984).

(n13)Footnote 2. *I.R.C. § 1274*, amended by Pub. L. No. 99-121, effective for sales or exchanges after June 30, 1985.

(n14)Footnote 3. *I.R.C. § 1274(d)*, amended by Pub. L. No. 99-121, effective for sales or exchanges after June 30, 1985.

(n15)Footnote 4. *I.R.C. § 1274(c)*, amended by Pub. L. No. 99-121, effective for sales or exchanges after June 30, 1985.

(n16)Footnote 5. *I.R.C. § 1274A*, added by Pub. L. No. 99-121 (Oct. 11, 1985). The 9 percent is adjusted for inflation starting in 1989. *I.R.C. § 1274A(d)(2)*.

(n17)Footnote 6. *I.R.C. § 1274(c)(2)*, effective for sales or exchanges after June 30, 1985. *See § 21.10[3], infra*. *See I.R.C. § 1274(c)(3)* (sales of farms by individuals or small businesses), amended by the Tax Reform Act of 1986 (T.R.A. 1986), Pub. L. No. 99-514, 99th Cong., 2d Sess. § 1803(a)(14)(A) (Oct. 22, 1986).

(n18)Footnote 7. *I.R.C. § 1272(a)(2)*, amended by Pub. L. No. 99-121, effective for sales or exchanges after June 30, 1985.

(n19)Footnote 8. *I.R.C. § 1275(b)*, amended by Pub. L. No. 99-121, effective for sales or exchanges after June 30, 1985.

(n20)Footnote 9. *I.R.C. §§ 1273(a) and 1274(a)*, amended by Pub. L. No. 99-121, effective for sales or exchanges after June 30, 1985.

(n21)Footnote 10. *I.R.C. § 1274(c)(2), (3)*, amended by Pub. L. No. 99-121, effective for sales or exchanges after June 30, 1985.

(n22)Footnote 11. *I.R.C. § 1274(b)*, amended by Pub. L. No. 99-121, effective for sales or exchanges after June 30, 1985.

(n23)Footnote 12. *I.R.C. §§ 1274(b)(3) and 1274A(c)(4)*, added by Pub. L. No. 99-121, § 105(a), effective for sales

or exchanges after June 30, 1985.

(n24)Footnote 13. *I.R.C. § 1274(d)*, amended by Pub. L. No. 99-121, effective for sales or exchanges after June 30, 1985.

(n25)Footnote 1. *I.R.C. § 483*, as amended by Pub. L. No. 99-121, effective for sales or exchanges after June 30, 1985. *See I.R.C. § 1274A*, added by Pub. L. No. 99-121 (Oct. 11, 1985) for 9 percent cap (adjusted for inflation after 1988) on debt for property not exceeding \$2.8 million face amount. For a further discussion of the imputed interest rules and the original issue discount rules with respect to installment sales, see Rabkin and Johnson, *Federal Income, Gift and Estate Taxation* (FIGET) Ch. 37 (Matthew Bender 2004).

(n26)Footnote 2. *I.R.C. §§ 483(c)* and *1274A*, added by Pub. L. No. 99-121, effective for sales or exchanges after June 30, 1985.

(n27)Footnote 3. *I.R.C. § 483(d)(1)*, as amended by T.R.A. 1986 § 1803(a)(14)(B); *see I.R.C. § 1273(b)* (issue price under O.I.D. rules); *I.R.C. § 1274* (issue price for debt instruments issued for property).

(n28)Footnote 4. *I.R.C. §§ 1272* and *1274(c)*, as amended by Pub. L. No. 99-121, effective for sales or exchanges after June 30, 1985.

(n29)Footnote 5. *I.R.C. § 483(d)(2)*, amended by Pub. L. No. 99-121, effective for sales or exchanges after June 30, 1985.

(n30)Footnote 6. *I.R.C. § 483(d)(3)* and *(4)*, amended by Pub. L. No. 99-121, effective for sales or exchanges after June 30, 1985.

(n31)Footnote 7. *I.R.C. § 483(e)*, amended by Pub. L. No. 99-121, effective for sales or exchanges after June 30, 1985.

(n32)Footnote 8. *I.R.C. §§ 483(b)*, *1274(b)* and *(d)* and *1274A*, added by Pub. L. No. 99-121, effective for sales or exchanges after June 30, 1985.

(n33)Footnote 9. *I.R.C. § 1274A*, added by Pub. L. No. 99-121, effective for sales or exchanges after June 30, 1985.

(n34)Footnote 10. *I.R.C. § 1274(e)(1)*, added by Pub. L. No. 99-121, effective for sales or exchanges after June 30, 1985.

(n35)Footnote 11. *I.R.C. § 483(e)* (prior law).

(n36)Footnote 12. *I.R.C. § 483(e)(1)-(4)*, amended by Pub. L. No. 99-121, effective for sales or exchanges after June 30, 1985. *See also I.R.C. § 267(c)(4)*.

(n37)Footnote 13. *See I.R.C. §§ 1271-1275*, amended by Pub. L. No. 99-121, effective for sales or exchanges after June 30, 1985.

(n38)Footnote 14. *I.R.C. §§ 1274(c)(4)*, *1274A*, amended by Pub. L. No. 99-121, effective for sales or exchanges after June 30, 1985.

(n39)Footnote 15. *I.R.C. §§ 483*, *1274*, amended by Pub. L. No. 99-121, effective for sales or exchanges after June 30, 1985.



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Current Legal Forms for Real Estate

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Current Legal Forms for Real Estate
Chapter 21 SALES AND EXCHANGES
Part I. The Tax Background

25-21 Current Legal Forms for Real Estate § 21.11

§ 21.11 Postponement of Income Recognition: Installment Sales

[1] General Rules

For various reasons, a seller might not require that the purchase price for his property be paid in full at the time of sale; instead, he may be willing to accept payment over a period of time. In order to prevent the seller from being taxed on the full amount before all payments are received,ⁿ¹ the Code provides for an installment method of reporting gain.ⁿ² These installment sale provisions generally allow the seller to escape taxation of the full gain in the year of sale, except that all depreciation recapture income must be recognized currently.ⁿ³

The installment sale rules will not apply unless at least one payment is received after the end of the taxable year in which the sale takes place.ⁿ⁴ Essentially, taxable income is spread over the time during which installment payments of the sales price are made. The income to be recognized in any taxable year from a disposition is that proportion of payments received in such year which the gross profit from the sale bears to the total contract price (the "gross profit ratio"). The installment method does not apply, however, to the recognition of losses from deferred payment sales.ⁿ⁵

The total contract price consists of any cash received in the year of sale, the fair market value of other property received, and the face amount of the installment obligations. The total contract price does not include payments made or obligations assumed by the purchaser to the mortgagee, even though such amount is included in the selling price and realized profit, except to the extent that it exceeds the seller's basis for the property sold.ⁿ⁶ The Tax Court, acknowledging a different result for nondealers, has held that a real estate dealer must compute gross profit without reducing cost by sales expenses, which are independently deductible under the taxpayer's basic cash or accrual method.ⁿ⁷

Under the installment sale rules, it is not required for a sale of real estate that there be an established accounting method or a minimum selling price. The sale can be one in which title is immediately transferred, with the seller being protected by a mortgage, or one which contemplates a transfer of title after all or part of the selling price is paid.ⁿ⁸ The sale of each lot or parcel of a subdivided trust must be treated as a separate transaction.ⁿ⁹

The election to adopt the installment method is automatic for nondealer sales of real property (as well as to casual sales

of personal property), unless the taxpayer "elects out."ⁿ¹⁰ The election not to use the installment method must be made on or before the due date (plus extensions) of the return for the taxable year in which the sale takes place. If the taxpayer reports the full selling price (including the full face amount of any installment obligation) in the year of sale, the election not to use the installment method is deemed to have been made.

Nondealers may also "elect out" by reporting the sale on Form 4797 (for sales involving trade, business, or rental property) or on Schedule D, and writing in the margin, next to the sale, "I elect out of the installment method." If the nondealer received a note that is reported at less than face value, that fact, along with the percentage of valuation, also must be stated.ⁿ¹¹ Late election will be allowed only rarely, and then only if the Service finds good cause. Once made the election is irrevocable, although the Service may permit a revocation if tax avoidance or a contingent selling price is not involved.ⁿ¹²

Dealers are not eligible to report under the installment method because the installment sale definition expressly excludes a dealer disposition.ⁿ¹³ A dealer disposition of property includes any disposition of real property held by the taxpayer for sale to customers in the ordinary course of the taxpayer's trade or business.ⁿ¹⁴ All payments received from a dealer disposition of property generally are treated as received in the year of disposition.ⁿ¹⁵

A dealer disposition does not, however, include certain dispositions of residential lots or timeshares if the taxpayer elects to pay interest on the amount of deferred tax attributable to the use of the installment method. Also, a dealer disposition does not include a disposition of property used or produced in the trade or business of farming. As a result, a disposition of such property on the installment plan is eligible for the installment method.ⁿ¹⁶

The installment method may be used in determining alternative minimum taxable income for all nondealer dispositions of property.ⁿ¹⁷

[2] Recapture Currently Recognized as Ordinary Income

Gain on sales of depreciable property is "recaptured" or taxed as ordinary income (even if the gain otherwise qualifies for capital gain treatment) to the extent of the depreciation allowed for personal property, and of "excess depreciation" (*i.e.*, depreciation in excess of a straight-line computation) in the case of real property.ⁿ¹

There is immediate recapture of depreciation or cost recovery as ordinary income in the case of an installment sale.ⁿ² In determining how much of any principal payment constitutes a nontaxable recovery of basis, the taxpayer's adjusted basis in the transferred property is treated as including the depreciation recapture income. Any gain in excess of the recapture income is recognized under the installment method.ⁿ³

Example:

A, a calendar year taxpayer, sells commercial real estate to B on September 1, 1985, for \$100,000 under a qualified installment contract executed earlier that year. The contract requires B to pay A \$20,000, plus interest, for five years. A's basis in the property is \$50,000, and \$25,000 of the purchase price represents depreciation recapture income. Under this contract, A must recognize \$25,000 in 1985 as ordinary recapture income even though he has only received \$20,000. A's basis for installment reporting over the next four years (1986-1989) is increased to \$75,000 (\$50,000 basis plus \$25,000 recapture income recognized in 1985).

[3] Payment and Price

Installment reporting is available if at least one payment (as defined below) is received in a year following the year of sale.ⁿ¹ Thus, payments may be split between the year of sale and a later year or years, or the entire sum may be paid in a later year. As long as some part of the total payment is deferred until after the year of sale, the installment method

applies no matter how much of the total price is received in that year.ⁿ²

"Payment" does not include the receipt of evidence of indebtedness of the person acquiring the property. Thus, a seller who receives cash and a note in the year of sale may still use the installment method. However, any bond or other evidence of indebtedness that is payable on demand, or that is issued by a corporation or a government (or one of its political subdivisions) and is readily tradable, will be considered a payment when received by the seller.ⁿ³

Although property received without recognition of gain in like-kind exchanges is not treated as a "payment" for purpose of reporting income under the installment method, the receipt of like-kind property qualifies as a "payment" for purposes of determining whether a transaction is an installment sale.ⁿ⁴

[4] Nondealer Installment Obligations

[a] In General

If an installment obligation arises from the disposition of *any* property (real, personal, etc.) under the installment method, and the sales price of the property exceeds \$150,000, the taxpayer is required to pay interest on the deferred tax liability resulting from the obligation if:

- (1) the obligation is outstanding at the close of the tax year in which it arose, and
- (2) the face amount of all such obligations of the taxpayer which arose during, and are outstanding as of the close of, such tax year exceeds \$5 million.ⁿ¹

These obligations are referred to as nondealer installment obligations. They do not include an installment obligation arising from the disposition of (1) "personal use property" by an individual, or (2) any property used or produced in the trade or business of farming. (Personal use property is any property if substantially all of its use by the taxpayer is unconnected with the taxpayer's trade, business or income producing activities.) Also excluded are installment obligations from the disposition of residential lots or timeshares if the taxpayer elects to pay interest on the deferred tax resulting from use of the installment method.ⁿ²

[b] Interest Charged on Installment Sale Tax Deferral

When interest is to be paid for nondealer real property installment obligations arising during any year, interest must be paid for any subsequent taxable year if any of the installment obligation is outstanding at the close of that year. The interest equals the applicable percentage (defined below) of the deferred tax liability (defined below) for the obligation multiplied by the underpayment rate for the month that the taxable year ends. The deferred tax liability for an installment obligation is the amount of gain under the obligation that has not been recognized by the close of the taxable year multiplied by the maximum rate of tax in effect for the taxable year (which depends upon whether the taxpayer is an individual, corporation, estate or trust). The applicable percentage of an installment obligation is determined by dividing (1) the portion of the aggregate face amount of the installment obligations outstanding at the close of the taxable year in excess of \$5 million, by (2) the aggregate face amount of the installment obligations outstanding at the close of the taxable year. This percentage does not change as payments are made in subsequent taxable years.ⁿ³

The interest is payable as an additional tax.ⁿ⁴ However, the amount is taken into account in computing the deduction allowable for interest paid or accrued during the tax year.ⁿ⁵

[c] Pledged Real Estate Installment Obligation

If any indebtedness is secured by an installment obligation arising from the sale of property at a price in excess of \$150,000, the net proceeds of the indebtedness are treated as a payment received on the obligation for the purposes of

the installment method. The time of payment is the later of the time (1) the indebtedness is secured, or (2) the proceeds of the indebtedness are received by the taxpayer. Net proceeds of the indebtedness are gross proceeds minus the direct expenses of obtaining the indebtedness. Indebtedness is secured to the extent that payment of principal or interest is directly secured, under the terms of the indebtedness or any underlying arrangement, by any interest in the installment obligation.

The amount treated as payment cannot exceed the amount, if any, by which the total contract price, exceeds any portion of the contract price received under the contract before the later of the times referred to in the preceding paragraph. Subsequent payments received on an obligation are not taken into account under the installment method to the extent that the aggregate amount of these payments does not exceed the aggregate amount treated as payment under the pledge rule. The total amount of gain recognized on an obligation because of the pledge rule and receipt of payments cannot exceed the total gain from the installment sale.ⁿ⁶

[d] Timeshares and Residential Lots Special Election

Dealer installment sales of residential lots or timeshares are eligible for installment sale treatment if the dealer elects to pay interest on the amount of deferred tax attributable to the use of the installment method. When the election is made, the dealer exclusion from installment sale treatment will not apply to an installment obligation arising from the sale to an individual of a timeshare ownership interest in residential real property for not more than six weeks per year (including campground timeshares), or of a residential lot if the taxpayer is not to make any improvements. The taxpayer is not eligible for the election if the installment obligation is guaranteed by any person other than an individual (for example, government or private mortgage insurance would disqualify the obligation from the election).

If these conditions are met, then the seller may elect to have the installment sales rules apply, provided that the seller pays interest on the deferral of its tax liability attributable to the use of the installment method. The interest rate charged is the applicable federal rate that would apply to the installment obligation received in the sale (without regard to the three-month lookback rule).

In applying the "six-week" limitation on the eligibility of timeshare interests, a timeshare right to use, or timeshare ownership in, a specific property, which right, or ownership interest, is held by the spouse, children, grandchildren or parents of an individual, is treated as held by such individual.ⁿ⁷

[5] Related Parties

[a] General Rule

The constructive ownership rules applicable to stock ownership, with one minor exception, define the targeted relationships to include the seller's spouse, children, grandchildren and parents, corporations controlled (50 percent) by the seller, and partnerships, trusts, or estates to the extent of the seller's proportionate interest in them.ⁿ¹ Related parties also include those related under the rule denying loss deductions in related party transactions. Related parties under this rule include brothers, sisters, member corporations in the same controlled group, certain trust, fiduciary and beneficiary relationships, as well as certain partnership, S corporation, and C corporation relationships.ⁿ² If a sale is made to a related person who, in turn, resells the property before the original seller receives all the payments under that sale, the amount realized under the second sale is deemed to be received by the original seller at the time of the second sale.ⁿ³

[b] Limitations and Exceptions to General Rule

The above rule about related party installment resales is subject to several important limitations and exceptions. The general rule applies only if the second sale occurs within two years of the first sale (except there is no two-year limit in the case of marketable securities). Thus, if the second sale occurs within two years of the first, the gain on the first sale must be reported in the year of the second sale rather than as payments are made. The running of the two-year period is

suspended for the time the related person's risk of loss is substantially diminished by the holding of a put on the same or similar property, by another person's holding of a right to acquire the property, or by a short sale or similar transaction.ⁿ⁴

To the extent that a taxpayer is treated as receiving the proceeds of a second sale under the related party rules, installment proceeds from the first sale are not treated as received; only payments in excess of that amount are considered to be received pursuant to the sale.ⁿ⁵ Certain second dispositions do not trigger the resale rule, such as compulsory or involuntary conversions where the first disposition occurred before the conversion, and transfers occurring after the death of the first seller or the related party. In addition, any sale or exchange of stock to the issuing corporation is not treated as a first sale.ⁿ⁶ A more general rule exempts from the resale rule transactions in which neither the first nor second disposition has tax avoidance motives as one of its principal purposes.ⁿ⁷

In any event, the gain realized by the original seller on the second disposition under the related party resale rules is limited to the lesser of either (1) the amount realized on the second disposition, or (2) the contract price of the first disposition, reduced by the payments already received pursuant to the first disposition.ⁿ⁸ When a disposition is not a sale or exchange, *e.g.*, a charitable contribution, the original seller is deemed to have realized the property's fair market value at that time.ⁿ⁹

[c] Cancellations and Bequests of Installment Obligations

If an installment obligation is cancelled or becomes unenforceable, it is treated as if it were disposed of in a transaction other than a sale or exchange. If the parties to the transaction are related, therefore, the value of the obligation is its face amount, and this amount, less the basis for the obligation, is given to the obligee at the time of the cancellation. This rule is intended to prevent the cancellation of debt between family members.ⁿ¹⁰

If the installment sales obligation is bequeathed by the seller to the obligor, the seller's estate is treated as having made a taxable disposition of it. This rule prevents an avoidance of taxation of gain unreported at the seller's death, which would result if the obligor had the right to his or her own payments.ⁿ¹¹ In situations where the seller's estate or beneficiary forecloses on real estate to cancel a second installment obligation which it received from the decedent, the gain is limited under *I.R.C. Section 1038*, thereby benefitting the estate or beneficiary.ⁿ¹²

[d] Installment Sales of Depreciable Property to Controlled Entity

The installment method is not available where a sale of depreciable property is made to a "related person," as defined in the rule treating gain from such sales as ordinary income. This denial of installment sale treatment applies even in situations where the second resale rules do not apply. In such cases, the seller is deemed to have received all payments in the year of disposition, unless the taxpayer can establish that tax avoidance was not one of the principal purposes of the transaction.ⁿ¹³ A "related person" under this rule includes (1) corporation or partnership which is 50-percent owned by the taxpayer, (2) a trust in which the taxpayer (or his spouse) is a beneficiary whose interest in the trust is not a remote contingent interest, and (3) certain corporation and corporation-partnership relationships described under the related party transaction loss deduction denial rule.ⁿ¹⁴ The constructive ownership rules of the loss deduction denial rule apply as well.ⁿ¹⁵ If the installment payments are contingent as to the amount, but their fair market value may not be reasonably ascertained, the basis is recovered ratably by the seller. The purchaser may not increase the basis of the property acquired by any amount before the time such amount is includable in the seller's gross income. This rule requires, in effect, conformity between the buyer and seller regarding recognition of income and basis.ⁿ¹⁶

Planning Notes

Secure Sufficient Down Payment on Installment Sale. Since all potential recapture under *I.R.C. Section 1245* or *Section 1250* is treated as ordinary income received in the year of sale regardless of the amount of payment received, it may be important that the seller in an installment sale secure a down

payment that is large enough to cover the taxes on the recapture. Otherwise, the initial payment received by the seller may be insufficient to pay the taxes on the amount of ordinary income gain recognized under the recapture rules.ⁿ¹⁷

Annual Cash Payments May Be in Seller's Best Interest. Under the proportionate disallowance rule an installment seller subject to the rule is taxed on "phantom" income, even though no (or little) cash is received in the tax year. If the seller will be taxed on the "phantom" installment payment, i.e., the "allocable installment indebtedness" (AII), the seller would be better off having the cash payment each tax year in that amount, or at least in the amount of taxes due on the phantom AII.ⁿ¹⁸

I.R.S. Notification of Second Transaction. Where a taxpayer makes a sale to a "related person" who then resells the property before the original seller receives all the payments under the first sale, the statute of limitations for assessing a deficiency with respect to the gain on the first transaction does not start to run until the notice is given.ⁿ¹⁹

Legal Topics:

For related research and practice materials, see the following legal topics:

Real Property LawPurchase & SaleGeneral OverviewTax LawFederal Income Tax ComputationDeductions for Nonbusiness ExpensesRelated Taxpayers (IRC sec. 267)Tax LawFederal Income Tax ComputationSales & ExchangesInstallment Sales (IRC secs. 1001, 1031, 1231)General OverviewTax LawFederal Income Tax ComputationSales & ExchangesInstallment Sales (IRC secs. 1001, 1031, 1231)Installment MethodTax LawFederal Income Tax ComputationSales & ExchangesRelated Party Transactions (IRC sec. 1239)General OverviewTax LawFederal Income Tax ComputationSales & ExchangesRelated Party Transactions (IRC sec. 1239)Ordinary Income Rule

FOOTNOTES:

(n1)Footnote 1. See IRC § 1001(a) and (b).

(n2)Footnote 2. I.R.C. §§ 453, 453A, and 453B. The installment method is applicable to both cash and accrual method taxpayers.

(n3)Footnote 3. I.R.C. § 453(i) requires recognition of recapture income in the year of disposition.

(n4)Footnote 4. I.R.C. § 453.

(n5)Footnote 5. I.R.C. § 453(c).

(n6)Footnote 6. Treas. Reg. § 1.453-4(c) (under pre-1980 Act); Prop. & Temp. Treas. Reg. 15A.453-1(b)(2). The Tax Court has rejected the Service's argument, based on this regulation, that if property is taken subject to a mortgage or if the mortgage is assumed by the purchaser, the installment seller immediately realizes gain to the extent that the mortgage exceeds the seller's basis. *Hunt v. Comm'r*, 80 T.C. 1126 (1983) (holding that principle set forth in regulations did not apply to installment sale at issue). The Service has adopted a similar provision in its regulations under the Installment Sales Revision Act of 1980. Temp. Treas. Reg. § 15a.453-1(b)(3)(ii) (wrap-around mortgage). Proposed regulations clarify that a transferor in a deferred like-kind exchange receiving a transferee's obligation to transfer replacement property does not treat the obligation as payment for purposes of the installment sales rules when the transferee's obligation is or may be secured by cash or cash equivalents held in a qualified escrow account or a qualified trust. Treas. Reg. § 15A.453-1(b)(3)(i), Temp. Treas. Reg. § 1.1031(k)-1(j)(2)(i).

(n7)Footnote 7. *Frankenstein v. Comm'r*, 31 T.C. 431 (1958), *aff'd on other issue*, 272 F.2d 135 (7th Cir. 1959), *cert. denied* 362 U.S. 918.

(n8)Footnote 8. *Treas. Reg. § 1.453-4(a)* (predating the 1980 Act).

(n9)Footnote 9. *Treas. Reg. § 1.453-5(a)* (predating the 1980 Act). *See Collins v. Comm'r*, 48 T.C. 45 (1967) .

(n10)Footnote 10. *I.R.C. § 453(a),(d)*.

(n11)Footnote 11. *I.R.C. § 453(d)*; *Temp. Treas. Reg. § 15A.453-1(d)(3)*.

(n12)Footnote 12. *I.R.C. § 453(d)(2)* and (3); *Temp. Treas. Reg. § 15A.453-1(d)(3)(ii), (d)(4)*. *See S. Rep. No. 1000*, 96th Cong., 2d Sess. 12 (1980).

(n13)Footnote 13. *I.R.C. § 453(b)(2)(A)*, amended by the Revenue Act of 1987, Pub. L. No. 100-203, 100th Cong., 1st Sess. § 10202(b)(1) (Dec. 22, 1987), generally applicable to installment obligations arising from dispositions occurring after December 31, 1987.

(n14)Footnote 14. A dealer disposition of property also includes any disposition of personal property by a person who regularly sells or otherwise disposes of personal property on the installment plan. *I.R.C. § 453(l)(1)*, amended by the Revenue Act of 1987 § 10202(b)(1), generally applicable to installment obligations arising from dispositions occurring after December 31, 1987.

(n15)Footnote 15. *S. Rep. No. 100-63*, 100th Cong., 1st Sess. (1987).

(n16)Footnote 16. *I.R.C. § 453(l)(2), (3)*, amended by the Revenue Act of 1987 § 10202(b), generally applicable to installment obligations arising from dispositions occurring after December 31, 1987. For a further discussion of this special rule see § 21.11[4][d] of this Tax Background, *infra*.

(n17)Footnote 17. *I.R.C. § 56(a)(6)*, amended by the Revenue Act of 1987 § 10202(d), generally applicable to dispositions in taxable years beginning after December 31, 1987.

(n18)Footnote 1. *I.R.C. §§ 1245 and 1250*. *See § 21.07, supra*, for discussion of recapture of depreciation and cost recovery allowances.

(n19)Footnote 2. *I.R.C. § 453(i)*.

(n20)Footnote 3. *I.R.C. § 453(i)*; *S. Rep. No. 169*, 98th Cong., 2d Sess. 465-466 (1984); *H.R. Rep. No. 861*, 98th Cong., 2d Sess. 1008-1009 (1984).

(n21)Footnote 1. *I.R.C. § 453(b)(1)*.

(n22)Footnote 2. *I.R.C. § 453(b)(1)*.

(n23)Footnote 3. *I.R.C. § 453(f)(3)* and (4).

(n24)Footnote 4. *I.R.C. § 453(f)(6)(C)*.

(n25)Footnote 1. *I.R.C. § 453A(a), (b)(1), (b)(2)*.

(n26)Footnote 2. *I.R.C. § 453A(b)(4)*. *I.R.C. § 453A(b)(3)*, amended by the Omnibus Budget Reconciliation Act of 1989 (O.B.R.A.), Pub. L. No. 101-239, 101st Cong., 1st Sess. § 7815(g) (Dec. 19, 1989), effective as if included in T.A.M.R.A. § 5076. Personal use property is defined at *I.R.C. § 1275(b)(3)*; farming is defined at *I.R.C. § 2032A(e)(4)* or (5).

(n27)Footnote 3. *I.R.C. § 453A(c)*.

(n28)Footnote 4. *I.R.C. 453A(c)(1)*.

(n29)Footnote 5. *I.R.C. § 453A(c)(5)*, redesignated and amended by O.B.R.A. § 7821(a)(4)(B), effective as if included in the Revenue Act of 1987 § 10202.

(n30)Footnote 6. *I.R.C. § 453A(b)(1)*; H.R. Rep. No. 495, 100th Cong., 1st Sess. 930 (1987). *I.R.C. § 453A(d)*, amended by O.B.R.A. § 7821(a)(2), (3), effective as if included in the Revenue Act of 1987 § 10202.

(n31)Footnote 7. *I.R.C. § 453(l)(2), (3)*.

(n32)Footnote 1. *I.R.C. § 453(f)(1)(A)*. See *I.R.C. § 318(a)(1)-(3)* (stock ownership attribution rules). The exception is for an *I.R.C. § 318(a)(4)* attribution for stock options.

(n33)Footnote 2. *I.R.C. § 453(f)(1)(B)*.

(n34)Footnote 3. *I.R.C. § 453(e)(1)*.

(n35)Footnote 4. *I.R.C. § 453(e)(2)*.

(n36)Footnote 5. *I.R.C. § 453(e)(5)*.

(n37)Footnote 6. *I.R.C. § 453(e)(6)*.

(n38)Footnote 7. *I.R.C. § 453(e)(7)*. This is determined by the Service on a case-by-case basis.

(n39)Footnote 8. *I.R.C. § 453(e)(3)*.

(n40)Footnote 9. *I.R.C. § 453(e)(4)*.

(n41)Footnote 10. *I.R.C. § 453B(f)*.

(n42)Footnote 11. *I.R.C. § 691(a)(4)* and (5). This provision also applies if the decedent's estate allows the obligation to become unenforceable, even if the obligation is not transferred to the obligor.

(n43)Footnote 12. *I.R.C. § 1038(g)*.

(n44)Footnote 13. *I.R.C. § 453(g)*; see *I.R.C. § 1239(b)* (related parties under rule treating gain from related party transactions as ordinary income).

(n45)Footnote 14. *I.R.C. § 1239(b), (c)*; see *I.R.C. § 267(b)* (related parties under loss deduction denial rule).

(n46)Footnote 15. *I.R.C. § 267(c)*.

(n47)Footnote 16. *I.R.C. § 453(g)(1)*.

(n48)Footnote 17. See § 21.11[1], *supra*, for recapture rules in case of installment sales.

(n49)Footnote 18. See § 21.11[4], *supra*, for proportionate disallowance rule.

(n50)Footnote 19. *I.R.C. § 453(e)(8)*.



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Current Legal Forms for Real Estate

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Current Legal Forms for Real Estate
Chapter 21 SALES AND EXCHANGES
Part I. The Tax Background

25-21 Current Legal Forms for Real Estate § 21.12

§ 21.12 Tax-Free Exchanges

[1] Statutory Scope; Tax Benefits

Taxable gain or loss generally results from the exchange of one property for another property, measured by the fair market value of the property received on the exchange.ⁿ¹ However, special rules provide for nonrecognition of gain or loss, when property "held for productive use in a trade or business or for investment" is "exchanged solely" for property of "like kind" which is to be held for such productive use or for investment.ⁿ² This tax-free exchange of like-kind property permits the taxpayer to defer the recognition of gain on certain business or investment transactions. For that reason, the like-kind exchange has become a useful technique for tax deferral by real estate investors and other investors in commercial real property, who are thereby able to trade up unwanted qualifying property for other more desirable property, or to exchange unimproved land for improved real property (or vice versa), without being taxed at the time of the exchange on the resulting gain. Another tax advantage of a like-kind exchange is that it allows the owner of depreciated real property to postpone depreciation recapture and its accompanying tax burden.ⁿ³

Several requirements must be met, however, before real (or other) property may qualify for a tax-free exchange.ⁿ⁴ Also, certain property is specifically excluded from like-kind exchange treatment.ⁿ⁵ Moreover, if a taxpayer receives money or other property (other than like-kind property) in a tax-free exchange, gain (if any) is recognized to the extent of the money and the fair market value of the property received (the "boot").ⁿ⁶

Before examining the requirements, exclusions, and limitations of *I.R.C. Section 1031*, it is important to understand the tax consequences of a qualifying like-kind exchange, as demonstrated in the following examples:

Example 1:

Investor Smith owns a small apartment house, which cost him \$200,000 and now has a fair market value of \$500,000. Smith wishes to acquire a nearby office building which is on the market for \$500,000. If Smith were to sell the apartment house, he would have to pay an immediate tax on the gain, which would reduce the amount available to buy the office building. *I.R.C. Section 1031*, however, allows Smith to exchange the apartment house for the office building without paying any tax.

It is important to remember, however, that a tax-free exchange only postpones gain. The taxpayer must eventually pay

tax on that gain when he disposes of the property received on the exchange. Assume in the above example that Smith had written off \$100,000 for depreciation on the apartment house. His basis would then be \$100,000 (\$200,000 cost less \$100,000 depreciation). If Smith were to sell the house for \$500,000, taxable profit would be \$400,000 (\$500,000 sales price less \$100,000 adjusted basis), and his basis for the office building which he then purchased would be the \$500,000 cost. If, however, Smith exchanges the properties under *I.R.C. Section 1031*, the replacement property (office building) would take on the basis of the old property.ⁿ⁷ Thus, Smith's basis in the office building would be only \$100,000, so that when he later sells the building he will pay tax on his entire profit, including the \$400,000 profit made on the original apartment house.

[2] Property Held for Productive Use in Trade or Business or for Investment

One of the major requirements for a like-kind exchange to qualify under *I.R.C. Section 1031* is that the property exchanged must have been held for productive use in the taxpayer's trade or business or for investment, and the property received in exchange must similarly be held either for such productive use or for investment.ⁿ¹ Thus, these rules are not applicable to exchanges of personal use property, such as a residence.ⁿ² However, a residence such as a vacation home used at least in part for rental purposes can qualify for like-kind exchange treatment as an investment property under certain circumstances. Now, the IRS in a recent revenue procedure effective for exchanges occurring after March 10, 2008, has created a safe harbor for taxpayers who own vacation homes primarily for rental income, but who use the vacation home occasionally for personal use.^{n2.1} This is the first time the IRS has provided any guidance in this area. Previously, the IRS had traditionally taken the position that the sale or exchange of a residence constitutes a personal residence and not an investment property. Taxpayers who want to take advantage of the new revenue procedure must be aware of its requirements. The safe harbor specifies the requirements for both the property being transferred and the property being received. In order for the properties to qualify as investment properties, the taxpayer must have owned the property being transferred for at least 24 months before the transfer and must own the property received in exchange for no less than 24 months after the transfer. During each of the two 12-month periods constituting those 24-month periods: (i) the taxpayer must rent the dwelling unit at a fair rental price for 14 days or more; and (ii) the period of the taxpayer's personal use of the dwelling unit must not exceed the greater of 14 days or 10% of the number of days during the 12-month period that the dwelling unit is rented at a fair rental. On the other hand, unproductive real estate held by a taxpayer, other than a dealer, for future use or future realization of the increment in value is deemed to be held for investment and not primarily for sale.ⁿ³ Also, business property may be exchanged for investment property, and vice versa.ⁿ⁴

A distinction is made between business or investment real estate and real property that is held primarily for sale. Thus, exchanges made by dealers in real estate of property held primarily for sale to customers is not eligible for the tax-free exchange.ⁿ⁵ Similarly, the requirement that both the transferred property and the acquired property must be held for productive use or for investment excludes property which the taxpayer intends to sell in the immediate future.ⁿ⁶ The fact that property was not sold but was exchanged for similar property is an indication that the taxpayer was holding it for investment rather than for sale.ⁿ⁷ The application of these rules is illustrated in the following example.

Example:

Corporation Y wants to acquire a tract of land and an existing factory owned by Corporation X. Corporation Y acquires new land on which it constructs a factory solely for the purpose of exchanging the land and property for Corporation X's land and factory. Under these facts: (1) as to X, the exchange qualifies for nonrecognition despite the fact that Y acquired the property specifically to complete exchange; and (2) the exchange by Y does not qualify for nonrecognition because Y never held its newly acquired property for productive use in its trade or business or for investment.ⁿ⁸

[3] Exchange

The second major requirement for tax-free treatment under *I.R.C. Section 1031* is that there must be an "exchange" of

property.ⁿ¹ This requirement raises two closely related questions: (1) what constitutes the requisite "exchange," and (2) within what period of time must the exchange take place.

The term "exchange" is not specifically defined either in the statute or in the accompanying regulations. Other regulations, however, provide that "ordinarily, to constitute an exchange, the transaction must be a reciprocal transfer of property, as distinguished from a transfer of property for a money consideration only."ⁿ²

Prior to the Tax Reform Act of 1984, the courts held that there was no specific requirement that a like-kind exchange had to be completed within a specified period in order to qualify for tax-free treatment. In one leading case, the Ninth Circuit held that an exchange could qualify even though the property to be exchanged could be designated by the transferor for up to five years after the transaction and even though the transferor could have ultimately received cash or other than like-kind property.ⁿ³ The 1984 Act, however, amended *I.R.C. Section 1031* to provide that any property received by the taxpayer more than 180 days after the date on which the taxpayer transfers property (or after the due date of the taxpayer's tax return for the taxable year in which the transfer occurs) cannot be treated as like-kind property.ⁿ⁴ As a result, tax-free treatment is not available unless the exchange is completed within this 180-day time period. In addition, property must be designated as the property to be received by the taxpayer within 45 days of the date the transferred property was relinquished in the exchange.ⁿ⁵ Failure to meet either the 45-day identification requirement or the 180-day receipt requirement will result in denial of tax-free exchange treatment under *I.R.C. Section 1031*, because either there was no "exchange" or the exchange was not of like-kind property.

The Courts and the Service have been divided over the validity of multi-party exchanges, with the results generally being determined on a case-by-case basis. For example, a "triangle" exchange, under which the taxpayer agrees to transfer his property to X if X will arrange to have other property transferred to him from third party Y, has been held to qualify as a sufficient "exchange" if X causes a direct conveyance to the taxpayer from Y.ⁿ⁶ The Tax Court, however, found a sale, rather than an exchange, where the taxpayer gave X an option to purchase a building and then entered into an exchange agreement with Y subject to the option, and where X exercised the option before the exchange with Y was concluded.ⁿ⁷

[a] Safe Harbor Deferred Exchange

In a deferred exchange, usually the biggest concern of the taxpayer is how to avoid the actual or constructive receipt of money or other property in connection with completing the exchange. Fortunately, Treasury Regulations issued in 1991 provide some safe harbors in this area. The preferred method used by most taxpayers is the Qualified Intermediary safe harbor.ⁿ⁸ The Qualified Intermediary is an independent party to the exchange transaction who performs the function of creating the reciprocal trade of properties for the exchange, holds the exchange funds, and sometimes supplies the necessary exchange documents. The exchange documents usually include an exchange agreement, assignments of the existing purchase and sale agreements and closing instructions. The taxpayer assigns the taxpayer's rights in the sale contract for the relinquished property and in the purchase contract for the replacement property to the Qualified Intermediary, who essentially becomes the "seller" of the relinquished property and the "buyer" of the replacement property. To avoid actual constructive receipt of exchange funds by the taxpayer, the proceeds from the sale of the relinquished property are held by the Qualified Intermediary until they are needed for the acquisition of the replacement property. Under this safe harbor, the Qualified Intermediary will be considered to have entered into the contract if (i) the Qualified Intermediary is assigned all of the taxpayer's rights under the sale contract, and (ii) all of the parties to that contract are notified in writing of the assignment on or before the closing of the transfer of that relinquished property.ⁿ⁹

In both simultaneous and delayed exchanges in which a Qualified Intermediary is used to create the reciprocal exchange of properties, direct deeding of the relinquished property from the taxpayer to the buyer and of the replacement property from the seller of the replacement property to the taxpayer is permitted thereby avoiding the necessity of the Qualified Intermediary holding title to any property.ⁿ¹⁰ Direct deeding avoids the possibility of the assessment on double state, county or local transfer taxes and also avoids any liability on the part of the Qualified Intermediary for possible

environmental liability risks with respect to the properties.

These Treasury Regulations issued in 1991 further clarify the acceptable methods to properly identify the replacement property.ⁿ¹¹ The taxpayer must receive all replacement property within the earlier of 180 days after the date on which the taxpayer transferred the first relinquished property, or the due date (including extensions) for the taxpayer's tax return for the year in which the transfer of the first relinquished property occurs. Second, the taxpayer must identify the replacement property to be acquired by the end of the exchange period, within 45 days of the transfer of the first relinquished property. Proper identification of replacement property is critical and, if not made in a timely manner, the exchange fails and the entire transaction is taxable. The rules are (i) the replacement property identification must be in writing and signed by the taxpayer, (ii) it must be delivered by mail, fax, or hand-delivery to a party to the exchange transaction (usually the Qualified Intermediary) by midnight of the 45th day, (iii) the replacement properties must be unambiguously described, such as by street address, tax lot number or legal description, and (iv) the taxpayer may list up to three properties of unlimited value, but if more than three properties are listed, their total aggregate fair market value may not exceed 200% of the aggregate fair market value of the relinquished property. It is essential in a delayed exchange to adhere to these rules and deadlines established for identifying and acquiring replacement property. Failure to comply with the rules may result in a taxable transaction.

[b] Reverse Exchanges

In a reverse exchange, the taxpayer, for various reasons, must acquire the taxpayer's like-kind replacement property before disposing of the relinquished property. For example, for various reasons, the closing on the relinquished property may be delayed because of problems with the lender, zoning changes required by the buyer, or title or environmental concerns. The taxpayer can try to delay the closing on the replacement property so that the relinquished property can be sold, but that is not always possible. Case law has been inconsistent on the success of reverse exchanges.ⁿ¹² However, on September 15, 2000, in the form of *Revenue Procedure 2000-37*, the IRS provided that tax-deferral on reverse exchanges will be recognized if the transaction falls within the scope of the safe harbor described in that Revenue Procedure.ⁿ¹³ In the reverse exchange structured under the safe harbor protection of the Revenue Procedure, the entity used to facilitate a reverse exchange is referred to as the Exchange Accommodation Titleholder ("EAT"), and the property held by the EAT is commonly called the "parked property." To complete a reverse exchange, the EAT can take title to either the relinquished property or to the replacement property under an arrangement referred to as a "Qualified Exchange Accommodation Arrangement." The document between the two parties is called the "Qualified Exchange Accommodation Agreement" ("QEAA"). The QEAA must state that the EAT will be treated as the beneficial owner of the property for all federal income tax purposes. Both parties must report the federal income tax attributes of the property on their federal income tax returns in a manner consistent with the agreement. The QEAA must be entered into no later than five (5) business days after the EAT first acquires qualified indicia of ownership of the parked property (usually by acquiring legal title.)ⁿ¹⁴

If the closing on the replacement property cannot be avoided prior to the disposition of the relinquished property, generally two options are available under the Revenue Procedure.ⁿ¹⁵ In the most common type of reverse exchange the taxpayer contracts with the EAT to have it purchase and retain title to the replacement property. In the first phase of the reverse exchange, the taxpayer loans the necessary down payment funds to the EAT, who in turn uses these funds along with funds provided by a third-party lender, if any, to close on the replacement property and take title in the EAT's name. Under the terms of the parking agreement, or the QEAA, the EAT leases the property to the taxpayer under a triple net lease. In this way, the taxpayer can begin to use the property or sublet the property while the EAT holds title. On the rare occasion that a lease agreement is not possible, the EAT may be willing to retain the taxpayer or third party designated by the taxpayer as the property manager. The use of a property management agreement instead of a triple net lease has a substantial tax reporting obligation to the reverse exchange structure and therefore this type of arrangement should not be used if there are more suitable options.

When the taxpayer sells the relinquished property identified in the exchange, it is transferred directly to the buyer

through a simultaneous exchange with the Qualified Intermediary and the use of direct deeding. The cash proceeds of the sale go to the Qualified Intermediary who uses the proceeds to acquire the replacement property from the EAT. The EAT uses these proceeds from the sale to first repay the loan from the taxpayer, and then any additional proceeds are used to pay down the third party loan on the replacement property prior to deeding the replacement property to the taxpayer. If there are more proceeds from the relinquished property sale then the Qualified Intermediary needs to acquire the replacement property and then the Qualified Intermediary can use the excess proceeds to purchase additional replacement property within 180 days of the transfer of the relinquished property, provided that such additional replacement property can be properly identified by the taxpayer within 45 days of the close of the relinquished property.ⁿ¹⁶ If a loan from an institutional lender is required, the taxpayer should seek lender approval for this type of exchange prior to beginning the exchange because the EAT will be required to be the borrower on the loan as the title holder of the property. In a safe harbor exchange, to protect the lender's security interest and to protect the EAT from liability in the event of a default by the taxpayer, the taxpayer will guaranty the loan and the EAT will only be the borrower on a non-recourse basis secured by a mortgage or deed of trust.

An alternative to parking the replacement property is to have the EAT park the taxpayer's relinquished property. This type of reverse exchange begins with the simultaneous exchange involving the taxpayer, the EAT, the seller of the replacement property, and the Qualified Intermediary. Here, with the assistance of the Qualified Intermediary, the taxpayer transfers the relinquished property to the EAT and then simultaneously receives the replacement property from the seller. Both transfers occur through the Qualified Intermediary and the use of direct deeding. Since the relinquished property has not yet been sold to a true buyer to provide exchange funds for the acquisition of the replacement property, the taxpayer must loan the funds to the EAT. The funds are then put into the exchange through the Qualified Intermediary to be used to acquire the replacement property from the seller. As in the replacement parking alternative, the EAT leases the relinquished property to the taxpayer under a triple net lease arrangement. In the second half of the transaction when the taxpayer has located a suitable buyer for the relinquished property, the relinquished property is sold and deeded from the holding entity to the buyer. The cash proceeds from the sale go to the EAT and are used first to retire any existing debt that the EAT took subject to, and then to repay the taxpayer for the original loan to the EAT.

Under Revenue Procedure 2000-37, a safe harbor reverse exchange must be completed within 180 days after the EAT acquires the parked property.ⁿ¹⁷ At the time the property is transferred to the EAT, the taxpayer must have a bona fide intent that the property represents either replacement property or relinquished property that is intended to qualify for non-recognition of gain under Section 1031. In addition, under a safe harbor reverse exchange in which the replacement property is parked with the EAT, the taxpayer must identify one or more relinquished properties within 45 days after the replacement property is acquired by the EAT.ⁿ¹⁸ *Revenue Procedure 2000-37* adopts the same identification rules that apply in forward delayed exchanges.

[4] Like-Kind Property

The final major requirement for tax-free treatment under *I.R.C. Section 1031* is that the property received as a result of the exchange must be of "like kind" to the property given up.ⁿ¹ The words "like kind" have reference to the nature or character of the property and not to its grade or quality. Thus, one kind or class of property may not be exchanged for property of a different kind or class. However, improved real estate may be exchanged for unimproved real estate, or vice versa, because such an exchange relates to the grade or quality of the property and not to its kind or class.ⁿ² Specific examples of permissible exchanges are: the exchange of city real estate for a farm or ranch; the exchange of a leasehold of a fee with 30 years or more to run for real estate; and the exchange of improved real estate for unimproved real estate.ⁿ³ But real estate located in the United States is not considered of like kind with real estate located outside of the United States.ⁿ⁴

[5] Exclusions from Like-Kind Exchanges

Certain types of property are specifically excluded from the nonrecognition rules of *I.R.C. Section 1031*. The rules do not apply to an exchange of:ⁿ¹

- (1) stock in trade or other property held primarily for sale;
- (2) stocks, bond, or notes;
- (3) other securities or evidences of indebtedness or interest;
- (4) interests in a partnership;
- (5) certificates of trust or beneficial interests; or
- (6) choses in action.

An interest in a partnership that has in effect a valid election to be excluded from the application of all of Subchapter K is treated as an interest in each of the assets of such partnership and not as an interest in a partnership.ⁿ² Thus, whether like-kind exchange treatment is available is determined with regard to the exchanges of the separate assets.

[6] Receipt of Other Property or Money ("Boot")

If a taxpayer receives, in addition to like-kind property, "other property or money" in a tax-free exchange under *I.R.C. Section 1031*, any gain is taxable to the extent of the value of the other property and the amount of money (*i.e.*, the "boot") received in that exchange.ⁿ¹ The receipt of boot results in the recognition only of gain; however, any loss resulting from an exchange involving boot is not recognized to any extent.ⁿ²

The payment of boot is fairly common in Section 1031 exchanges, particularly where the value of the exchanged properties is not equal because they are subject to mortgages or other liabilities. In such cases, "other property or money" is usually paid by one party to the other as compensation for the differing amounts of equity involved in the exchanged properties.

If the taxpayer transfers mortgaged property in the exchange, and receives unencumbered property, the amount of the mortgage is treated as money received on the exchange. This rule applies regardless of whether the taxpayer is personally liable for the mortgage, or whether the mortgage is assumed by the transferee.ⁿ³ If, however, the taxpayer receives mortgaged property in exchange for his own mortgaged property, the amount of the mortgage on the acquired property is offset against the amount of the mortgage on the exchanged property. Similarly, any money paid by the taxpayer in the exchange is offset against the mortgage on the exchanged property. However, any money that the taxpayer *receives* in the exchange is taxable because it may not be offset by a mortgage on the received property.ⁿ⁴

[7] Basis in Exchanged Property; Holding Period

Property received in a tax-free exchange under *I.R.C. Section 1031* acquires the same basis as that of the property transferred, decreased by the amount of money received by the taxpayer,ⁿ¹ and increased by the amount of gain to the taxpayer that was recognized on the exchange.ⁿ² The basis of the property received is also increased by any brokerage commissions paid by the taxpayer.ⁿ³ Where more than one property is acquired in a nontaxable exchange, the basis for the acquired properties is allocated according to their respective values on the exchange date.ⁿ⁴

The holding period of property acquired in a tax-free exchange includes the holding period of the property transferred provided that (1) the property was either a capital asset or Section 1231 property, and (2) the basis for the property received is determined, in whole or in part, by the basis of the property exchanged. If the property acquired does not

meet these two requirements, its holding period begins on the date of the exchange.ⁿ⁵

The Service has stated in *Notice 2000-4*, that depreciable property acquired on a like-kind exchange should be depreciated over the remaining recovery period of, and using the same depreciation method and convention as that of the property given up. This rule applies to the extent the basis in the acquired property does not exceed the basis in the property given up. To the extent the basis of the acquired property exceeds the basis of the property given up, the acquired property is to be treated for depreciation purposes as if it had been newly purchased.ⁿ⁶

[8] Effect of Recapture Rules

As discussed earlier, the disposition of depreciable real property may result in the recognition, under *I.R.C. Section 1250*, of ordinary income, *i.e.*, all or part of the cost recovery or depreciation deductions allowed or claimed in earlier years may be recaptured as ordinary income.ⁿ¹ The recapture rules, however, do not apply to like-kind exchanges except to the extent that boot is involved.ⁿ² Thus, if a taxpayer transfers and receives only like-kind Section 1250 property (generally depreciable real property), the transaction does not result in recapture, *i.e.*, no ordinary income is recognized.ⁿ³

If, however, gain is recognized on an exchange of property because the taxpayer receives money or other property ("boot"), there is recapture to the extent of the greater of:

- (1) the Section 1031 gain (determined without regard to *I.R.C. Section 1250*); or
- (2) the excess of:
 - (a) the amount of Section 1250 gain which would (but for Section 1031) have been recognized, over
 - (b) the fair market value of the property received.ⁿ⁴

The Section 1250 property received in the exchange is treated as including the additional depreciation which was not recognized as ordinary income.ⁿ⁵ Thus, the additional depreciation must be taken into account when the taxpayer later disposes of the property in a taxable transaction.

[9] Special Rules for Exchanges Between Related Persons

If a taxpayer otherwise qualifies for nonrecognition of gain or loss in a like-kind exchange of property, but the exchange is with a related person, and either the taxpayer or the related person disposes of the property received in the exchange within two years thereafter, the taxpayer is not entitled to nonrecognition of gain or loss on the exchange. The taxpayer takes the previously unrecognized gain or loss into account on the date of the subsequent disposition of the exchanged property.ⁿ¹

For purposes of this rule, the term "related persons" is defined in the same manner as for the purposes of the limitation on the deduction of losses between related parties. Thus, "related persons" include, among others, members of a family, an individual and a 50-percent-owned corporation, and two corporations that are members of the same controlled group. For transfers after August 3, 1990, related persons also include a partnership and a person owning, directly or indirectly, more than 50 percent of the capital interest or the profits interest in the partnership, and two partnerships in which the same persons own, directly or indirectly, more than 50 percent of the capital interest or profits interest.ⁿ²

A disposition of the property will not invalidate the nonrecognition treatment of the original exchange if such disposition (1) is after the death of either the taxpayer or the related party, or (2) is in a compulsory or involuntary

conversion of the property, provided that the original exchange occurred before the threat or imminence of the conversion. A disposition also will not invalidate the nonrecognition treatment of the original exchange if it is established to the satisfaction of the Service that neither the exchange nor the disposition had as one of its principal purposes the avoidance of federal income tax.ⁿ³

The legislative history indicates that the non-tax avoidance exception generally will apply to (1) a transaction involving an exchange of undivided interests in different properties that results in each taxpayer holding either the entire interest in a single property or a larger undivided interest in any of such properties, (2) dispositions of property in nonrecognition transactions, and (3) transactions that do not involve the shifting of basis between properties.ⁿ⁴

Nonrecognition will not be accorded to any exchange which is part of a transaction or series of transactions structured to avoid the purposes of the related party rules.ⁿ⁵ For example, if a taxpayer, pursuant to a prearranged plan, transfers property to an unrelated party who then exchanges the property with a party related to the taxpayer within two years of the previous transfer in a transaction otherwise qualifying under *I.R.C. Section 1031*, the related party will not be entitled to nonrecognition treatment under the section.

The running of the two-year holding period will be suspended during any period with respect to which a party's risk of loss with regard to the property is substantially diminished.ⁿ⁶

Planning Notes

Use Like-Kind Exchange to Trade Up Tax-Free. A qualified like-kind exchange of investment properties offers the taxpayer a useful technique to defer taxes. Such an exchange enables the investor to trade up highly appreciated real property for other real property while postponing the tax liability until the replacement property is sold. In effect, the tax deferral amounts to an interest-free loan from the Service.

When to Avoid Like-Kind Exchanges. A like-kind exchange is not beneficial for every owner of business or investment real property. The low carryover basis from the original property reduces depreciation deductions on the replacement property. Also, if the taxpayer has a loss on the original property, he will lose the deduction for it (although the loss will be reflected in a higher basis for the replacement property).

Designate Replacement Property in Contract. An exchange of like-kind property qualifies for tax-free treatment only if the taxpayer identifies the replacement property within 45 days after transfer of the original property.ⁿ⁷ This designation requirement may be met by designating the property to be received in the parties' contract. If this is not possible, the contract may specify a limited number of properties that may be transferred and state that the particular property to be transferred will be determined by contingencies beyond the parties' control. For example, **A** may agree to transfer real estate to **B** in exchange for **B**'s promise to transfer property **1** to **A** if zoning changes are approved and property **2** if they are not.ⁿ⁸

Use Like-Kind Exchange to Postpone Recapture on Depreciated Property. A special attraction for some real estate investors is the avoidance of recapture of previously claimed accelerated depreciation deductions when the depreciated property is sold. A qualified like-kind exchange benefits such investors because it prevents the recaptured write-offs from being treated as ordinary income in the year of sale. Remember, however, that depreciation recapture is merely postponed and not eliminated. The replacement property includes the additional depreciation which was not taxed as ordinary income at the time of exchange, so that the taxpayer must pay tax on the recapture when the property is later sold.

Legal Topics:

For related research and practice materials, see the following legal topics:

Tax Law Federal Income Tax Computation Sales & Exchanges Like-Kind Exchanges (IRC sec. 1031) General Overview Tax Law Federal Income Tax Computation Sales & Exchanges Like-Kind Exchanges (IRC sec. 1031) Nonrecognition of Gains & Losses Tax Law Federal Income Tax Computation Sales & Exchanges Like-Kind Exchanges (IRC sec. 1031) Not Like-Kind Property Tax Law Federal Income Tax Computation Sales & Exchanges Like-Kind Exchanges (IRC sec. 1031) Requirements

FOOTNOTES:

(n1)Footnote 1. *I.R.C. § 1001(c)*.

(n2)Footnote 2. *I.R.C. § 1031*.

(n3)Footnote 3. *See § 21.12 [8], infra*, for effect of recapture rules on tax-free exchanges under *I.R.C. § 1031*.

(n4)Footnote 4. *See § 21.12[2]-[4], infra*, for requirements that must be met for there to be a tax-free exchange under *I.R.C. § 1031*.

(n5)Footnote 5. *See § 21.12[5], infra*, for exclusions from nonrecognition treatment under *I.R.C. § 1031*.

(n6)Footnote 6. *See § 21.12[6], infra*, for effect of "boot" *I.R.C. § 1031* exchanges.

(n7)Footnote 7. *See § 21.12[7], infra*, for basis and holding period rules applicable to like-kind property acquired under *I.R.C. § 1031*.

(n8)Footnote 1. *I.R.C. § 1031(a)(1)*. In most situations, there is no statutory requirement dictating how long property must be held. Most situations must be judged on their own facts. There is, however, a statutory two-year holding period for exchanges between related parties. *See I.R.C. § 1031(f)*.

(n9)Footnote 2. *Rev. Rul. 59-229, 1959-2 C.B. 180*. Term "used in the trade or business" is not defined in *I.R.C. § 1031* or in the regulations to that section. Presumably, it has the same meaning as that used in *I.R.C. §§ 167* (for depreciation purposes) and 1231 (for purposes of determining capital gains and losses for property used in the trade or business and involuntary conversions).

(n10)Footnote 2.1. *Rev. Proc. 2008-16*.

(n11)Footnote 3. *Treas. Reg. § 1.1031(a)-1(b)*. *I.R.C. § 1031* does not apply to an exchange of the stocks in trade or other property held primarily for sale. *I.R.C. § 1031(a)(2)(A)*; *see § 21.12[2], infra*.

(n12)Footnote 4. *Treas. Reg. § 1.1031(a)-1(a)*.

(n13)Footnote 5. *I.R.C. § 1031(a)(2)(A)*; *Harr v. MacLaughlin*, 15 F. Supp. 1004 (E.D. Pa 1936); *Wineberg v. Comm'r*, T.C. Memo 1961-336, *aff'd* 326 F.2d 157 (9th Cir. 1963); *Griffin v. Comm'r*, 49 T.C. 253 (1967); *Little v. Comm'r* 106 F.3d 1445 (9th Cir. 1997).

(n14)Footnote 6. *Regal Realty Co. v. Comm'r*, 43 B.T.A. 194 (1940), *aff'd* 127 F.2d 931 (2d Cir. 1942); *Rev. Rul. 57-244, 1957-1 C.B. 247*; *Rev. Rul. 75-291, 1975-2 C.B. 332*; *see Klarkowski v. Comm'r*, T.C. Memo 1965-328, *aff'd* 385 F.2d 398 (7th Cir. 1967) (exchange of income-producing improved land for vacant tract); *Maloney v. Comm'r*, 93 T.C. 89 (1989).

(n15)Footnote 7. *Margolis v. Comm'r*, 337 F.2d 1001, (9th Cir. 1964), *reh. denied* 339 F.2d 537, *rev'g on this issue* T.C. Memo 1962-86; *cf. Wineberg v. Comm'r*, N. 5, *supra*.

(n16)Footnote 8. *Rev. Rul. 75-291, 1975-2 C.B. 332 ; cf. Rev. Rul. 75-292, 1975-2 C.B. 333 ; Rev. Rul. 77-337, 1977-2 C.B. 305 .*

(n17)Footnote 1. *I.R.C. § 1031(a)(1)*. The place where property is transferred or received in the exchange is immaterial. *Rev. Rul. 68-363, 1968-2 CB 336 .*

(n18)Footnote 2. *Treas. Reg. § 1.1002-1(d)*.

(n19)Footnote 3. *Starker v. U.S., 602 F.2d 1341 (9th Cir. 1979) .*

(n20)Footnote 4. *I.R.C. § 1031(a)(3)*.

(n21)Footnote 5. *I.R.C. § 1031(a)(3)*. For further definition of "like-kind" property under *I.R.C. § 1031*, see § 21.12[4], *infra*.

(n22)Footnote 6. *W.D. Haden Co. v. Comm'r, 165 F.2d 588 (5th Cir. 1948) ; Rev. Rul. 57-244, 1957-1 C.B. 247 . See also Baird Publishing Co. v. Comm'r, 39 T.C. 608 (1962) ; Coupe v. Comm'r, 52 T.C. 394 (1969) , acq. 1970-2 CB xix; Barker v. Comm'r, 74 T.C. 555 (1980) (four-party exchange valid); Estate of Bowers v. Comm'r, 94 T.C. 582 (1990) .*

(n23)Footnote 7. *Rogers v. Comm'r, 44 T.C. 126 (1965) , aff'd 377 F.2d 534 (9th Cir. 1967) ; see Carlton v. U.S., 255 F. Supp. 812 (S.D. Fla. 1966) , aff'd 385 F.2d 238 (5th Cir. 1967) .*

(n24)Footnote 8. There are three other safe harbors which, when strictly complied with, protect the taxpayer from being considered to have actually or constructively received consideration for the property the taxpayer relinquishes. The three other safe harbors are (i) a qualified security or guarantee arrangement (Regulation § 1.1031(k)-1(g)(2)); (ii) a qualified escrow or qualified trust (Regulation § 1.1031(k)-1(g)(3)); and (iii) interest and growth factors on property accrued during the exchange period (Regulation § 1.1031(k)-1(g)(5)(6)).

(n25)Footnote 9. Regulation §§ 1.1031(k)-1(g)(4)(iv)(B) and (v).

(n26)Footnote 10. *Rev. Proc. 90-34, 1990-16 C.B. 552 ; Regulation § 1.1031(k)-1(g)(4)(v)*.

(n27)Footnote 11. Regulation § 1.1031(k)-1(b)-(e).

(n28)Footnote 12. *See Lee v. Comm'r T.C. Memo 1986-294 ; Rutherford v. Comm'r, T.C. Memo 1978-505 ; Dibsby v. Comm'r, T.C. Memo 1995-477 ; and Bezdijaian v. Comm'r, 845 F.2d 217 (9th Cir. 1988) ; Cabirac v. Comm'r, 120 T.C. 163 (2003) .*

(n29)Footnote 13. *See 2000- 40 I.R.B. 308 .*

(n30)Footnote 14. *See 2000-40 I.R.B. at 309 , Section 4.02(3)*.

(n31)Footnote 15. *2000- 40 I.R.B. at 309 , Section 4.01*.

(n32)Footnote 16. *2000- 40 I.R.B. at 309 , Section 4.02*.

(n33)Footnote 17. *2000- 40 I.R.B. 309 , Section 4.02(5)*.

(n34)Footnote 18. *2000- 40 I.R.B. at 309 , Section 4.02(4)*.

(n35)Footnote 1. *I.R.C. § 1031(a)*.

(n36)Footnote 2. *Treas. Reg. § 1.1031(a)-1(b)*.

(n37)Footnote 3. *Treas. Reg. § 1.1031(a)-1(c)*.

(n38)Footnote 4. *I.R.C. § 1031(h)*.

(n39)Footnote 1. *I.R.C. § 1031(a)(2)*.

(n40)Footnote 2. *I.R.C. § 1031(a)(2)*.

(n41)Footnote 1. *I.R.C. § 1031(b)*. See *Rev. Rul. 84-121, 1984-2 C.B. 168* (seller of real property used in trade or business who transfers such property pursuant to exercise of an option in exchange for other real property recognizes gain solely to extent of premium paid for option; buyer recognizes no gain on the exchange solely because the amount realized is equal to his basis in the exchanged property).

(n42)Footnote 2. *I.R.C. § 1031(c)*; *Treas. Reg. § 1.1031(b)-1(a)*; see *Barker v. Comm'r*, 74 T.C. 555 (1980) ; *Fredericks v. Comm'r*, T.C. Memo 1994-27 (T.C. 1994) . Proposed regulations clarify that a transferor in a deferred like-kind exchange receiving a transferee's obligation to transfer replacement property does not treat the obligation as payment for purposes of the installment sales rules when the transferee's obligation is or may be secured by cash or cash equivalents held in a qualified escrow account or a qualified trust. A transferor of property utilizing a deferred like-kind exchange also can transfer it to a qualified intermediary who may dispose of it for cash or other property that the qualified intermediary may use to acquire like-kind replacement property for the transferor. *Treas. Reg. § 15A.453-1(b)(3)(i)*, *Temp. Treas. Reg. § 1.1031(k)-1(j)(2)(i)*.

(n43)Footnote 3. *Treas. Reg. § 1.1031(b)-1(c)*; *Aagaard v. Comm'r*, 56 T.C. 191 (1971) .

(n44)Footnote 4. *Treas. Reg. §§ 1.1031(b)-1, 1.1031(d)-2 Example (1)*; see *Comm'r v. North Shore Bus. Co.*, 143 F.2d 114 (2d Cir. 1944) .

(n45)Footnote 1. An assumption of liability, or the acquisition of property subject to a mortgage or other liability, is treated as the payment of money. See § 21.12[6], *supra*.

(n46)Footnote 2. *I.R.C. § 1031(d)*; *Treas. Reg. § 1.1031(d)-1*. Basis is not affected by loss because no loss is recognized on the exchange even if boot is involved. See § 21.12[6], N. 2, *supra*, and accompanying text. *Cf. Treas. Reg. § 1.1031(d)-1(e)*.

(n47)Footnote 3. *Rev. Rul. 72-456, 1972-2 C.B. 468* (brokerage commissions paid on a like-kind exchange are added in computing the basis of the acquired property even though they have the effect of reducing the amount realized on the exchange).

(n48)Footnote 4. *Treas. Reg. § 1.1031(d)-1(d)*; *Rev. Rul. 68-36, 1968-1 C.B. 357* .

(n49)Footnote 5. *I.R.C. § 1223(1)*; *Treas. Reg. § 1.1223-1(a)*.

(n50)Footnote 6.

Notice 2000- 4, 2000-3 I.R.B.

(n51)Footnote 1. *I.R.C. § 1250*. Recapture of cost recovery and depreciation allowances under *I.R.C. § 1250* is discussed in § 21.07, *supra*.

(n52)Footnote 2. *I.R.C. § 1250(d)(4)*; *Treas. Reg. § 1.1250-3(d)*.

(n53)Footnote 3. *I.R.C. § 1250(d)(4)(A)*.

(n54)Footnote 4. *I.R.C. § 1250(d)(4)(A), (C).*

(n55)Footnote 5. *I.R.C. § 1250(d)(4)(E).*

(n56)Footnote 1. *I.R.C. § 1031(f), (g).*

(n57)Footnote 2. *I.R.C. § 1031(f)(3)*, amended by the Revenue Reconciliation Act of 1990 § 11701(h) (Nov. 5, 1990). *See I.R.C. § 267(b).*

(n58)Footnote 3. *I.R.C. § 1031(f)(2).*

(n59)Footnote 4. See Sen. Fin. Rep. No. 56, 101st Congress, 1st Session, Cong. Rec. 24,319, 24,359 (1989).

(n60)Footnote 5. *I.R.C. § 1031(f)(4).*

(n61)Footnote 6. *I.R.C. § 1031(g).*

(n62)Footnote 7. *I.R.C. § 1031(a)(3).*

(n63)Footnote 8. H.R. Rep. No. 861, 98th Cong., 2d Sess. 866 (1984).



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Current Legal Forms for Real Estate
Chapter 21 SALES AND EXCHANGES
Part I. The Tax Background

25-21 Current Legal Forms for Real Estate § 21.13

§ 21.13 Sale-Leaseback Transactions

[1] Sale-Leaseback Transactions: General Considerations

The sale-leaseback transaction offers a real estate owner an alternative method (in lieu of mortgage financing) for realizing the cash value of his property while retaining its use and possession. In a typical sale-leaseback transaction, the initial property owner sells it and then leases it back from the new owner (the purchaser-lessor). The rent payments, under ideal circumstances, are sufficient to pay all liabilities and costs that the new owner incurs in acquiring and owning the property. All of such costs, previously paid by the initial owner, are then paid to the new owner in the form of rent.

Usually, the lease is made for a long term, often with renewal options. The sale-leaseback is not limited to transactions involving the fee ownership of property, but can be applied as well to the sale of a leasehold interest, in which event the transaction is technically a sale-subleaseback.ⁿ¹

A sale-leaseback has important tax and financial advantages for both the seller-lessee and the purchaser-lessor. These advantages may be destroyed, however, if the Service successfully challenges the substance of the transaction. A principal legal issue in a sale and leaseback transaction, in tax and other areas of the law, is whether the transaction, in substance, is a true sale and leaseback or rather a loan or other long-term financing arrangement. Moreover, the advantages of a sale-leaseback to the purchaser-lessor may be disadvantageous to the seller-lessee; conversely, advantageous consequences for the seller-lessee may result in detrimental consequences for the purchaser-lessor.

The following discussion examines three separate, but cognate, questions with respect to sale and leaseback transactions: (1) what are the financial advantages and disadvantages to the parties;ⁿ² (2) what are the tax consequences for the parties;ⁿ³ and (3) what factors will prompt the Service to recharacterize a sale-leaseback as a financing arrangement or other transaction (thereby probably resulting in tax consequences that the parties did not anticipate or desire).ⁿ⁴

[2] Financial Advantages and Disadvantages

[a] To Seller-Lessee

From a financing prospective, a sale-leaseback permits the initial owner to obtain funds equal to the market value of the property, in contrast to an alternative mortgage loan which is usually limited to a lower percentage (usually 80 percent or less) of the value. This financing technique is especially valuable in a tight-money market, where funds are not readily available or are subject to high borrowing rates. Also, funds obtained through a sale-leaseback do not carry the restrictions on company activities often imposed by capital financing loan documents.

The seller, as a tenant, may deduct his rental payments, which are often greater than the deductions for depreciation and mortgage interest available to him as an owner.ⁿ¹ If a substantial portion of the value of property is allocable to the land (which is not depreciable) or to substantially depreciated assets, the deductions as a lessee are even more likely to be greater than those as an owner. However, the loss of the depreciation deduction may, in some circumstances, outweigh any advantage from the deductible leaseback rent payments. In such cases, the sale and leaseback arrangement may not be advantageous for the initial owner.

Sale and leaseback arrangements sometimes include option clauses that give the seller-lessee the right to renew the lease or even to buy back the property. These options to renew or purchase should be carefully considered and structured, because they may subject the transaction to challenge by the Service on the ground that the parties are actually financing by mortgage loan rather than completing a bona fide sale.ⁿ²

[b] To Purchaser-Lessor

A major advantage to the purchaser-lessor of a sale-leaseback arrangement is that it may enable him to obtain a long-term tenant who has a special interest in remaining on the property and in making substantial improvements on it.ⁿ³ The lease often provides for a net rental, which obligates the tenant to pay all carrying charges, such as taxes, insurance, and the like; the purpose is to give the new owner sufficient rental payments to pay the mortgage servicing charges (interest plus amortization) and a fair return on his investment. The entire rental, of course, is deductible by the tenant. The owner, on the other hand, has interest and cost recovery or depreciation deductions to set off against his rental income.ⁿ⁴

Also, under ideal circumstances, the new owner is able to acquire the property without having to make an equity investment. Moreover, the new owner's equity interest in the property increases as principal payments are made under the mortgage (which are funded by the rental payments).

[3] Tax Consequences

[a] Taxation of Seller-Lessee

In a sale-leaseback, the seller-lessee exchanges deductions of mortgage interest and depreciation for the deduction of rent. In addition, other expenses paid in the case of a net leaseback, such as insurance, taxes, maintenance, and repairs are deductible by the seller as additional rent payments.ⁿ¹ Even if the rent deduction does not exceed the former interest depreciation deduction, other tax and financial considerations may still make the sale and leaseback desirable. Of course, a careful examination of all these factors is necessary.

The seller-lessee can determine the time of sale, thus timing the realization of gain or loss (the difference between the property's basis and the amount received).ⁿ² Gain may be realized on an appreciated asset in a year when net operating loss carryover or investment credits would expire otherwise unused. The gain would thus be sheltered, while the net operating loss carryover or investment credit carryover would not be lost.

Any gain realized upon the sale is normally long-term in nature if the property has been held for the requisite holding period or if it qualifies as *I.R.C. Section 1231* trade or business property.ⁿ³ If, however, the property is subject to

investment credit or depreciation recapture, all or a portion of the gain, *i.e.*, the recaptured amount, is taxed at ordinary income rates.ⁿ⁴ In that event, the ordinary income treatment may offset any advantages from the sale and leaseback arrangement. It should also be remembered that ordinary income treatment may result, to the extent of the gain, if the sale-leaseback is between related parties.ⁿ⁵ Moreover, if such a transaction between related parties results in a loss, the loss may be disallowed.ⁿ⁶

[b] Taxation of Purchaser-Lessor

The purchaser-lessor in a sale-leaseback reports rent as ordinary income.ⁿ⁷ This amount is offset to a certain extent by the cost recovery or depreciation deduction, which is available to the purchaser for business or income producing property acquired after 1980 (cost recovery) or before 1981 (depreciation).ⁿ⁸ If accelerated depreciation is available in the early years, the purchaser-lessor may not only receive the rent tax-free, but may also shelter some other income as well. Interest on the purchaser's purchase money mortgage is also a deductible offset against rental income.ⁿ⁹ The purchaser may also be eligible for the rehabilitation tax credit if the property qualifies for that credit and if the purchaser is the original user of the property after the rehabilitation.ⁿ¹⁰

[4] Service Challenges; Tax Classification Factors

The tax and financial advantages of a sale and leaseback may be destroyed in the event of a successful Service challenge on the substance of the transaction. This risk is greatly increased if there is an obvious tax avoidance scheme without a legitimate business purpose. Even in the absence of tax avoidance, the Service has successfully used other avenues of attack to invalidate what the parties intended as a sale and leaseback arrangement. The principal challenges, and the tax factors which the Service and courts have applied in sale-leaseback litigation, are discussed below.

[a] Financing Devices

Although the payments in a sale-leaseback arrangement are in the form of rent rather than principal and interest, a true sale-leaseback transaction contains various characteristics which show that it is not a long-term loan or other financing device in substance. For example, if the purported purchaser-lessor assumes the risk of loss of the property's value, has entered into the transaction for business or income producing purposes, and possesses other meaningful benefits and burdens of ownership, it is more likely that the transaction is in fact a true sale and leaseback, and not a financing device.ⁿ¹

Whether a transaction is a bona fide sale-leaseback or a financing arrangement in the form of a sale-leaseback depends upon the facts of each case. Some of the principal factors examined in deciding the issue include the economic substance of the transaction, business realities, and other tax-independent considerations not used solely for tax avoidance.ⁿ² The same and related factors are used to determine whether sale-leaseback of equipment and other personal property is a true lease or merely a financing arrangement.ⁿ³

The landmark case dealing with a sale-leaseback of real property is *Frank Lyon Co. v. United States*,ⁿ⁴ in which the Supreme Court held that where there is a genuine multiple-party transaction with economic substance which is compelled or encouraged by business or regulatory realities, imbued with tax-independent considerations, and not shaped solely by tax-avoidance features that have meaningless labels attached, the Service should honor the allocation of rights and duties effectuated by the parties. The purchaser-lessor in *Lyon* financed the purchase by paying cash and borrowing funds for which there was substantial personal liability. The Court held that the transaction was a bona fide sale-leaseback. Among the many factors the Court cited in support for its holding was the fact that there was a business purpose for the sale-leaseback. This was evidenced by the fact that state and federal regulations prohibited the lessee-bank from borrowing a sufficient amount to finance construction. In addition, investment diversification was the lessor's principal motive. The Court also noted that the depreciation deductions would have been equally available to the lessee-bank had it retained title. The lessee's option to purchase, though fixed, was for a reasonable amount, and the

lessor bore the risk that the lessee would not exercise that option if the price was more than the fair market value of the property. The facts indicated that the lessor would realize an overall profit from the transaction independent of tax benefits if the lessee-bank exercised its option to purchase the leased property.ⁿ⁵

In a subsequent case, decided in the Tax Court,ⁿ⁶ the fact that the lessor could not reasonably expect to show a profit from the transaction, without taking into consideration the tax benefits of depreciation, etc., was a significant factor in denying lease treatment to the transaction. Following the guidelines set down in *Lyon*, above, the court found a financing corporation was organized for the purpose of buying land from a department store chain, constructing a building, and then leasing it back to the chain under a net lease. The lessee was treated as the owner, not the lessor. The court reached this conclusion because the lessee's status vis-a-vis the property underwent no appreciable change when the sale and leaseback arrangement was made, the lessor made no investment in the project, financing had been obtained using the store's credit with rental payments being made by the lessee directly to the lender under the nonrecourse mortgage, and the corporation's ownership interest was marketed to individuals as a tax shelter. The court found further that there was no economic foundation for their investment other than as a tax loss.ⁿ⁷

The above cases and rulings indicate that the Service is especially likely to recharacterize a transaction as a mortgage loan when the transaction looks like an alternative to conventional mortgage financing and the seller retains substantial control over the property. A purchase option in the leaseback for nominal consideration or for a price against which the rent is credited may cause the transaction to fail as a sale-leaseback. If the Service prevails, the seller would not be entitled to deduct the entire rental payments, but only that portion which would have been interest on the intended mortgage. The seller, not the buyer, would be entitled to the depreciation deduction. The income to the buyer would not include all the rent payments, but rather only that portion deemed to be interest on the hypothetical mortgage.ⁿ⁸

[b] Like-Kind Exchanges

As discussed earlier, no gain or loss is recognized under *I.R.C. Section 1031* where there is an exchange of "like-kind" property held for productive use in a trade or business or for investment.ⁿ⁹ The regulations provide that an ownership in fee and a 30-year lease are properties of "like-kind."ⁿ¹⁰ This provision has caused apparently conflicting decisions, as to whether a sale with a leaseback for a period of 30 years or more will result in the recognition of loss to the seller, or rather will be treated as a nontaxable like-kind exchange in which no loss can be recognized. An examination of the cases indicates that the courts look primarily at two related factors when the Service seeks to deny loss to the seller by claiming that the transaction is a like-kind exchange: (1) whether fair market value was paid for the property in cash, without including the leaseback as part of the consideration, and (2) whether fair rental value was paid on the leaseback. If the sale was consummated for a fair market price and the rentals are at fair market value, the sale-leaseback will probably be upheld and the seller-lessee will be able to recognize its loss.ⁿ¹¹

Where the leaseback is for less than 30 years and the selling price represents fair market value, loss (or gain) on the sale is recognized by the Service. In such a case, the transaction will not be treated as a like-kind exchange, even if the loss contains options permitting extensions beyond 30 years.ⁿ¹²

Planning Notes

Structure Sale-Leaseback Transaction to Satisfy *Lyon* Factors. In order to lessen the chances that the Service will challenge a sale-leaseback transaction as a financing arrangement rather than a true sale-leaseback, the parties should make every effort to structure the transaction so that it satisfies all, or at least most, of the factors listed by the Court in *Lyon*. If that is done, the Service will probably not try to recharacterize the transaction as a loan or financing device, and the parties will receive the intended tax consequences.ⁿ¹³

Sale with Leaseback in Excess of 30 Years--Loss on Sale. If the sale in a sale-leaseback results in a loss to the seller and the leaseback is for 30 years or more, the Service may argue that the transaction is a

tax-free exchange of "like-kind" property, for which no loss may be recognized. The necessity for a 30-year term under such circumstances should be carefully considered. If a leasehold term of 30 years or more is required, the transaction should be structured so as to meet the fair market and fair rental value criteria.ⁿ¹⁴

Legal Topics:

For related research and practice materials, see the following legal topics:

Real Property Law Financing Mortgages & Other Security Instruments Nonconventional Mortgages Real Property Law Landlord & Tenant Lease Agreements Commercial Leases Sale-Leaseback Transactions Tax Law Federal Income Tax Computation Deductions for Amortization, Depletion & Depreciation Amortization, Cost Recovery & Depreciation (IRC secs. 167-169, 171, 178, 194-195, 197, 216, 248, 280F) General Overview Tax Law Federal Income Tax Computation Deductions for Amortization, Depletion & Depreciation Amortization, Cost Recovery & Depreciation (IRC secs. 167-169, 171, 178, 194-195, 197, 216, 248, 280F) Property Used in Business & Trade Tax Law Federal Income Tax Computation Deductions for Losses Net Operating Loss (IRC secs. 172, 382) General Overview Tax Law Federal Income Tax Computation Sales & Exchanges Related Party Transactions (IRC sec. 1239) General Overview Tax Law Federal Income Tax Computation Sales & Exchanges Related Party Transactions (IRC sec. 1239) Ordinary Income Rule

FOOTNOTES:

(n1)Footnote 1. For sale of leasehold interests, see § 21.16[1], *infra*.

(n2)Footnote 2. See § 21.13[2], *infra*.

(n3)Footnote 3. See § 21.13[3], *infra*.

(n4)Footnote 4. See § 21.13[4], *infra*.

(n5)Footnote 1. As to the tax consequences to the seller-lessee in a sale-leaseback, see § 21.13[3], *infra*.

(n6)Footnote 2. See § 21.13[4], *infra*.

(n7)Footnote 3. See I.R.C. § 178, which provides rules for determining the period of depreciation or cost recovery of lessee improvements on the lessor's property. Depreciation and cost recovery deductions generally are discussed in § 21.06, *supra*.

(n8)Footnote 4. As to the tax consequences to the purchaser-lessor in a sale-leaseback, see § 21.13[3][b], *infra*.

(n9)Footnote 1. I.R.C. § 162(a)(3). As to depreciation or amortization of improvements made by a lessee on the lessor's property, see § 21.06[2][c], *supra*.

(n10)Footnote 2. I.R.C. § 1001(a). See §§ 21.02 and 21.04, *supra*, for the taxable event and the amount of gain or loss respectively.

(n11)Footnote 3. See § 21.05, *supra*, as to the types of property and transactions that qualify for long-term capital gain or loss treatment.

(n12)Footnote 4. I.R.C. § 1250. For discussion of cost recovery and depreciation recapture rules with respect to real property, see § 21.07, *supra*.

(n13)Footnote 5. I.R.C. §§ 1239 (ordinary income recognized on gains from sale of depreciable property between certain related taxpayers) and 707(b)(2) (ordinary income recognized on gains from certain sales or exchange of property with respect to controlled partnerships). See § 21.05[9], *supra*.

(n14)Footnote 6. *I.R.C. §§ 267* (disallowing losses resulting from certain transactions between related taxpayers) and *707(b)(1)* (disallowing losses from certain transactions with respect to controlled partnerships). *See § 21.05[9], supra.*

(n15)Footnote 7. *I.R.C. § 61(a)(5).*

(n16)Footnote 8. *I.R.C. § 168* provides a cost recovery deduction for business or income producing property acquired after 1980, and *I.R.C. § 167* provides a depreciation deduction for similar property acquired before 1981. *See § 21.06, supra.*

(n17)Footnote 9. *I.R.C. § 163(a)*. Note, however, that *I.R.C. § 163(d)* imposes limitations on investment indebtedness interest.

(n18)Footnote 10. *I.R.C. §§ 46, 48.*

(n19)Footnote 1. The tax consequences and economic characteristics of sale and leaseback transactions are analyzed in *Frank Lyon Co. v. U.S.*, 435 U.S. 561 (1978) , *rev'g* 536 F.2d 746 (8th Cir. 1976) , discussed in text accompanying Ns. 4-5, *infra*. *See also* *Hilton v. Comm'r*, 74 T.C. 305 (1980) , *aff'd per curiam* 671 F.2d 316 (9th Cir. 1982) , discussed in text accompanying Ns. 6-7, *infra*.

(n20)Footnote 2. *Frank Lyon Co. v. U.S.*, N. 1, *supra*; *Hilton v. Comm'r*, N. 1, *supra*. *See also* *Rev. Rul. 83-47, 1983-1 C.B. 63* (sale and leaseback status denied where investors purchased townhouses and immediately leased them back to seller; principal defect was stipulation that town houses would be resold to original seller).

(n21)Footnote 3. *See, e.g., Rev. Rul. 72-408, 1972-2 C.B. 86* ; *Rev. Rul. 60-122, 1960-1 C.B. 86* ; *see also* *Rev. Proc. 2001-28, 2001 I.R.B. 1156* ; *Rev. Proc. 2001-29, 2001-19 I.R.B. 1160* ; *Rev. Proc. 76-30, 1976-2 C.B. 647* ; *Rev. Proc. 75-28, 1975-1 C.B. 752* ; *Rev. Proc. 75-21, 1975-1 C.B. 715* . Although these rulings apply to leases of personal property, the guidelines and principles are generally applicable to leases of real property. S Rep. No. 494, 97th Cong., 2d Sess. 132 (1982).

(n22)Footnote 4. 435 U.S. 561 (1978) , *rev'g* 536 F.2d 746 (8th Cir. 1976) .

(n23)Footnote 5. *Frank Lyon Co. v. U.S.*, N. 4, *supra*, 435 U.S. at 572-584 .

(n24)Footnote 6. *Hilton v. Comm'r*, 74 T.C. 305 (1980) , *aff'd per curiam* 671 F.2d 316 (9th Cir. 1982) .

(n25)Footnote 7. *Hilton v. Comm'r*, 74 T.C. 305 (1980) , *aff'd per curiam* 671 F.2d 316 (9th Cir. 1982) . Sale and leaseback status was also denied in *Sowerby v. Comm'r*, T.C. Memo 1984-21 , because the transaction lacked economic substance. Among the disqualifying factors were that the interest and principal payments on a purchase money mortgage equaled the monthly rental payments, and that the buyer-lessor granted to a related party of the seller-lessee an option to buy back the property at the end of the lease term for the same price it sold for at the beginning of the term.

(n26)Footnote 8. For the tax consequences of a sale and leaseback transaction both as to the seller-lessee and the purchase-lessor, *see § 21.13[3], supra.*

(n27)Footnote 9. Tax-free exchanges under *I.R.C. § 1031* are discussed in *§ 12.12, supra.*

(n28)Footnote 10. *Treas. Reg. § 1.1031(a)-1(c)* ("no gain or loss is recognized if ... a taxpayer who is not a dealer in real estate exchanges... a leasehold of a fee with 30 years or more to run for real estate.")

(n29)Footnote 11. *See, e.g., Century Elec. Co. v. Comm'r*, 192 F.2d 155 (8th Cir. 1951) , *aff'g* 15 T.C. 581 (1950) , *cert. denied* 342 U.S. 954 (company transferred foundry building to college and received back 95-year lease; held, that transaction was an exchange and not a sale); *Jordan Marsh Co. v. Comm'r*, 269 F.2d 453 (2d Cir. 1959) , *nonacq* Rev.

Rul. 60-43, 1960-1 CB 687 (department store chain sold buildings to unrelated party and leased them back for 30 years and three days with a 30-year renewal option; held, that transaction was a sale-leaseback rather than an exchange, and seller-taxpayer would recognize its loss.) See *Leslie Co. v. Comm'r*, 64 T.C. 247 (1975), *aff'd* 539 F.2d 943 (3d Cir. 1976); *Missouri Pac. R.R. Co. v. U.S.*, 497 F.2d 1386 (Ct. Cl. 1974).

(n30)Footnote 12. *Treas. Reg. § 1.1031(a)-1(c)*. See also cases in N. 11, *supra*.

(n31)Footnote 13. See § 21.13[4][a], *supra*, for discussion of *Lyon* and the factors that will support a finding that the transaction is a true sale-leaseback rather than a financing device.

(n32)Footnote 14. See § 21.13[4][b], *supra*, for discussion of these criteria, and the Service's treatment of leasehold terms of 30 years or more as a tax-free exchange under *I.R.C. § 1031*.



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Current Legal Forms for Real Estate
Chapter 21 SALES AND EXCHANGES
Part I. The Tax Background

25-21 Current Legal Forms for Real Estate § 21.14

§ 21.14 Exclusion of Gain from Sale of Principal Residence

[1] In General

I.R.C. Section 121 excludes from gross income \$250,000 of gain from the sale of a principal residence (\$500,000 for certain taxpayers filing a joint return).ⁿ¹ The exclusion is available for any sale or exchange of a principal residence that satisfies the ownership and use requirements discussed below, unless an exclusion has applied to a sale or exchange of a principal residence within the preceding two years. The two-year period is measured from the date of the sale in question. In circumstances in which the buyer needs occupancy before the two-year period will have expired, it is possible for the seller to take advantage of the relief provision and still accommodate the buyer by entering into a contract with a closing date after the end of the two-year period and allowing the buyer to rent the property for the interim period.

Example:

H&P purchase Blackacre on 7/1/95 and immediately use it as their principal residence. On 10/18/97, they purchase Whiteacre, to which they move as their new principal residence, converting Blackacre to a rental property. They sell Blackacre on 6/10/98 in a transaction that takes advantage of *I.R.C. § 121*. In January, 2000, they put Whiteacre on the market and find a buyer who must move in by 6/1/00. H&P can sign a contract for the sale of Whiteacre with a 6/15/00 closing date, providing that the risk of loss from fire or other casualty remains with them, and lease Whiteacre to the Buyer from 6/1/00 through 6/15/00, for an arm's length rental. The sale of Whiteacre will close (and take place for tax purposes) on 6/15/00, which is more than two years after the sale of Blackacre. H&P occupied each of Blackacre (from 7/1/95-10/18/97) and Whiteacre (from 10/19/97-5/31/00) as their principal residence for more than two years during the five-year period preceding the sale of each property. Each sale can take advantage of *I.R.C. § 121*.

In determining whether there has been a sale or exchange within the preceding two years, sales or exchanges before May 7, 1997, are not taken into account.ⁿ² The exclusion is available without regard to the taxpayer's age.ⁿ³ The exclusion does not apply to any gain attributable to depreciation adjustmentsⁿ⁴ for periods after May 6, 1997; such gain must be recognized.ⁿ⁵

[2] Ownership and Use Requirements

To qualify for the exclusion, the taxpayer must have owned the property and used it as a principal residence for at least two years of the five-year period ending on the date of the sale or exchange.ⁿ⁶ A taxpayer is treated as using his or her residence for purposes of the use requirement during any period in which he or she is incapable of self-care and resides in a licensed nursing home or similar facility, provided the following requirements are met:ⁿ⁷

- (1) the taxpayer is physically or mentally incapable of self-care;
- (2) the taxpayer owns and uses the property as a principal residence for at least one year of the five-year period ending on the date of the sale or exchange; and
- (3) the taxpayer owns the property while living in the licensed nursing home or other facility.

Note that this relief provision would not apply to an incapacitated taxpayer who is residing with a relative.

Taxpayers, in some cases, may be treated as the owners of a residence for purposes of *I.R.C. Section 121*, even though title to the residence is actually held by another entity. For example, a residence the title to which is held by a partnership or a grantor trust may be treated as owned by the taxpayers for purposes of satisfying ownership and other requirements of *I.R.C. Section 121*.ⁿ⁸

[3] Requirements when Joint Return Is Filed

The \$250,000 exclusion is available when a husband and wife file a joint return if either spouse meets the statutory ownership and use requirements with respect to the property.ⁿ⁹ Each spouse could utilize the full \$250,000 exclusion with respect to property as to which he or she separately satisfied the use and ownership requirements. A \$500,000 exclusion is available, however, if the following requirements are met:ⁿ¹⁰

- (1) a husband and wife file a joint return;
- (2) either spouse meets the ownership requirements during the applicable two-year period;
- (3) both spouses meet the use requirements with respect to the property during the applicable two-year period; and
- (4) neither spouse is ineligible for the exclusion by virtue of a sale or exchange of a principal residence within the preceding two years.

Thus, if H, a single taxpayer who owns his principal residence and is otherwise eligible for an exclusion under *I.R.C. Section 121*, marries W, who has recently used the exclusion, H is allowed a maximum exclusion of \$250,000, whether on a separate return or on a joint return with W. Once both spouses satisfy the eligibility rules and two years have passed since the last exclusion was allowed to either spouse, the taxpayers may exclude \$500,000 on their joint return.ⁿ¹¹

Where a husband and wife filing a joint return do not satisfy the two-year ownership test, the two-year use test and the prohibition on any other sale or exchange of a residence within the last two years, the limit on the amount of excludable gain is computed separately for each spouse. Each spouse is treated as owning the property during the period that either spouse owned the property.ⁿ¹²

[4] Availability of Partial Exclusion

In some instances, a partial exclusion from gain recognition may be available even if the ownership and use requirements are not met, or if there has been a prior sale or exchange of a principal residence within two years. This relief is available for taxpayers who sell or exchange their principal residence after May 6, 1997.ⁿ¹³

The partial relief is based on a fraction of the maximum exclusion (\$500,000 [joint] or \$250,000 [single]), instead of a fraction of the actual profit realized because of the sale transaction.

The amount of the partial exclusion is determined by a ratio. The amount of exclusion is the amount that bears the same ratio to the amount that otherwise would be excluded under *I.R.C. Section 121* if the statutory requirements were met, as the shorter of the following bears to two years: (1) the aggregate periods during the five-year period ending on the date of the sale or exchange that the property was owned and used as the taxpayer's principal residence; or (2) the period *after* the date of the most recent prior sale or exchange of a principal residence by the taxpayer to which the *I.R.C. Section 121* exclusion applied and *before* the date of the sale or exchange.ⁿ¹⁴ The ratio is applied to the maximum exclusion (*i.e.*, \$250,000 or \$500,000), not to the gain recognized on the sale.

Example 1:

To illustrate, if a married couple purchased a new home for \$300,000 and sold it one year later for \$350,000, there would be a gain of \$50,000. They would be eligible for up to one half of the \$500,000 exclusion which they would have qualified for if they had lived in the house for at least two years before selling it: $\$500,000 \times 1/2 = \$250,000$. In this example, no tax would be owed on the gain of \$50,000 because that amount is less than \$250,000.

Example 2:

Elsa, an unmarried taxpayer, buys a midtown Manhattan condo in 1998 for \$2 million and uses it for a year as her principal residence. She sells it in 1999 for \$2.5 million, at a profit of \$500,000. Since Elsa is single and only used the new condo for a year, she is entitled to claim an exclusion equal to only one half of the \$250,000 maximum exclusion available for singles. Thus, she may only exclude \$125,000 of her \$500,000 gain. The remainder of the gain -- \$375,000 -- is taxable.

For sales and exchanges taking place after August 4, 1999, the partial exclusion is available only if the sale or exchange in question occurs by reason of a change of place of employment, health, or, to the extent provided in regulations, unforeseen circumstances.ⁿ¹⁵

[5] Application of Exclusion Under Special Circumstances

[a] Property of Deceased Spouse

For an unmarried individual whose spouse is deceased, for purposes of the exclusion, the period that such person owned and used a property as his or her principal residence includes any period the deceased spouse owned and used the property before death.ⁿ¹⁶ This provision would seem to allow a surviving spouse to exclude gain from the sale of property which he never used as a principal residence. For example, it would seem to apply to a sale by H of Mountainview on 1/1/99, if H married his late wife W on 1/1/96, and W had owned and occupied Mountainview as her principal residence from 1/1/94 through 12/31/95. It appears that the exclusion provided by *I.R.C. Section 121* thus could apply to appreciation in the value of Mountainview occurring after W's death, with appreciation occurring before W's death being, in effect, excluded from income pursuant to the basis provisions of *I.R.C. Section 1014*. In addition, it seems that this provision does not apply to a surviving spouse who has remarried.

[b] Property Owned by Spouse or Former Spouse

For property transferred to a spouse or to a former spouse incident to a divorce, the period that the transferee owns the

property includes the period the transferor owned the property.ⁿ¹⁷ The reference to the period of *ownership* should presumably include the period of *usage* as a principal residence, but the statutory language does not so provide. In addition, an individual is treated as using property as a principal residence during any period of ownership while that individual's spouse or former spouse is granted use of the property under a divorce or separation instrument.ⁿ¹⁸

[c] Tenant-Stockholders in Cooperative Housing Corporations

I.R.C. Section 121 applies to tenant-stockholders in cooperative housing corporations. In that case, the holding requirements are applied to the holding of the stock, and the use requirements are applied to the house or apartment that the taxpayer's stock ownership (and proprietary lease) entitles the taxpayer to occupy.ⁿ¹⁹

[d] Involuntary Conversion

For purposes of *I.R.C. Section 121*, an involuntary conversion or destruction is treated as a sale of the property.ⁿ²⁰ In applying *I.R.C. Section 1033*, the amount realized from the sale or exchange is treated as being the amount determined without regard to *I.R.C. Section 121*, reduced by the amount of gain not included in gross income by reason of *I.R.C. Section 121*.ⁿ²¹ If the taxpayer takes a carryover basis under *I.R.C. Section 1033(b)* in property acquired after the involuntary conversion, the holding and use periods of the converted property are taken into account with respect to the acquired property.ⁿ²²

[e] Sales of Remainder Interests

Unless the sale or exchange is to a related party,ⁿ²³ a taxpayer selling a remainder interest in a principal residence may elect to have the exclusion apply if the requirements of *I.R.C. Section 121* are met. However, the exclusion does not apply to any other interest in that residence that is sold or exchanged separately.ⁿ²⁴

[f] Principal Residences Acquired in Rollovers Under Former I.R.C. Section 1034

In the case of a principal residence acquired in a reinvestment pursuant to which any gain was not recognized on the sale or exchange of another residence under former *I.R.C. Section 1034*, the period that the taxpayer owned and used the replacement residence includes the period the taxpayer owned and used the prior residence (and also the period of ownership and use of any other prior residences taken into account under *I.R.C. Section 1223(7)*) in determining the holding period of the replacement residence.ⁿ²⁵

[g] Expatriates

The exclusion is not available for certain expatriates.ⁿ²⁶

[h] Bankruptcy Trustees

Several cases have held that a Chapter 7 or Chapter 11 bankruptcy trustee may use the *I.R.C. Section 121* exclusion in selling the debtor's principal residence.ⁿ²⁷

The authority for the estate's use of the Section 121 exclusion is found in *I.R.C. Section 1398*. *I.R.C. Section 1398(g)(6)* provides that with respect to any property acquired by the estate from the debtor, the property retains the same basis, holding period, and character that it had in the hands of the debtor. Thus, if the debtor owned the property for the period required in *I.R.C. Section 121*, the estate succeeds to that holding period. Similarly, the "character" of the home as the taxpayer's principal residence for the requisite period also carries over to the bankruptcy estate. Because the estate succeeds to those attributes, it qualifies for the *I.R.C. Section 121* exclusion.ⁿ²⁸

The conclusion is also compelled by *I.R.C. Section 1398(c)(1)*, which states that an estate is taxed like an individual. In

addition, *I.R.C. Section 1398(f)(1)* says that a transfer of property from a debtor to the bankruptcy estate is not a disposition for tax purposes, but that the estate must be treated as the debtor would with respect to the asset. The above cases depart from prior cases holding that bankruptcy trustees could not make an election to exclude gain under the pre-1998 version of *I.R.C. Section 121*.ⁿ²⁹

[i] Grantor Trusts

If a grantor trust owns title to the trustor's personal residence, the trustor is treated as the owner of the trust and the residence under statutory grantor trust provisions.ⁿ³⁰ The trustor is also treated as the owner of the residence for purposes of meeting requirements under *I.R.C. Section 121*. Therefore, a sale by the trustee-grantor of the residence is eligible for the exclusion under *I.R.C. Section 121* if statutory conditions are otherwise met.ⁿ³⁰

[6] Election Not to Have Exclusion Apply

The exclusion does not have to be elected (except for sales of remainder interests),ⁿ³¹ and automatically applies unless the taxpayer makes an election not to have the exclusion apply.ⁿ³² Such an election might be prudent where the taxpayer expects to have two eligible sales within a two-year period, and expects that the gain on the first sale will be less than the \$250,000/\$500,000 ceiling and also smaller than the gain on the second sale. Under these circumstances, it would make sense for the taxpayer to waive the application of the exclusion to the first sale so that it can apply to the second sale.

[7] Return Filing Requirements

The return that is generally required in the case of a real estate transaction need not be filed with respect to sales or exchanges of residences for \$250,000 or less (or \$500,000 or less if the seller is married) if the real estate reporting person has written assurance of the following:ⁿ³³

- (1) the property is the principal residence of the seller;
- (2) there is no federally subsidized mortgage assistance with respect to the mortgage on the residence;
- (3) the full amount of gain is excludable under *I.R.C. Section 121*; and
- (4) when the \$500,000 base amount applies, the seller is married.

The Secretary is authorized to increase the above dollar amounts by regulation.

Planning Tip

It should be noted that, for purposes of the above exception to the reporting requirements, the \$250,000 amount (or \$500,000 amount if the seller is married) refers to the *selling price* of the property, not the amount of gain from the sale. ⁿ³⁴

[8] Effective Date and Transition Rules

The exclusion of gain under *I.R.C. Section 121* described above is generally effective for sales and exchanges after May 6, 1997. However, a taxpayer may elect to have the 1997 amendments to *I.R.C. Section 121* not apply to any sale or exchange taking place before August 5, 1997, or to any sale or exchange taking place after August 4, 1997, pursuant to a binding contract in effect on August 5, 1997. A taxpayer may also elect not to have the 1997 amendments apply to a sale or exchange taking place after August 4, 1997, if, without regard to the amendments, gain would not be recognized under former *I.R.C. Section 1034*, as in effect before August 5, 1997, on the sale or exchange by reason of the acquisition of a new residence on or before that date, or with respect to the acquisition of which by the taxpayer a

binding contract was in effect on that date.ⁿ³⁵

[9] Alternative to Sale--Conversion to Business Use

An alternative to selling a personal residence is to convert it to business or investment real estate. The tax benefits available to the investor, together with potential rental income and appreciation, may make conversion economically advantageous. Consideration should be given to the tax effects of *I.R.C. Section 1231*. Under *I.R.C. Section 1231*, property that has been converted to investment or income-producing property may receive capital gains treatment if sold at a profit, or ordinary loss treatment if sold below basis.ⁿ³⁶

When converting property from personal use to business or investment use, a taxpayer generally obtains a new tax basis for the converted property. The new basis, which is used to determine allowable depreciation as well as the amount of any loss sustained, is the lesser of: (1) the fair market value of the property at the time of conversion; or (2) the original cost, adjusted upward for capital improvements and downward for any allowable deductions (*e.g.*, depreciation up to the date of conversion).ⁿ³⁷ The taxpayer will have the burden of establishing the fair market value of the property at the time of conversion.ⁿ³⁸

A personal residence is converted, for these purposes, only if it achieves the status of income-producing property.ⁿ³⁹ Property offered for rent, as evidenced by the owner's affirmative actions, will be considered as having been converted to income-producing property for purposes of deducting business expenses and depreciation, but a taxpayer will be entitled to deduct a loss on the sale of a former personal residence only if the property has actually been rented for more than a *de minimis* period of time.ⁿ⁴⁰ The key issue is the intent of the taxpayer in light of all the facts and circumstances.

It should be noted that, once the property is converted to investment status, the relief provisions of Section 121 discussed earlier in this chapter may no longer be available to the taxpayer when the property is sold.ⁿ⁴¹

Legal Topics:

For related research and practice materials, see the following legal topics:

Real Property LawPurchase & SaleGeneral OverviewTax LawFederal Taxpayer GroupsIndividualsExclusions From Gross Income (IRC secs. 101-112, 115, 117-123, 125-139)General OverviewTax LawFederal Taxpayer GroupsIndividualsFiling Status (IRC secs. 1-2)Tax LawFederal Taxpayer GroupsIndividualsIncome From Joint Property (IRC sec. 6013)Joint Returns by Spouses

FOOTNOTES:

(n1)Footnote 1. *I.R.C. § 121(a), (b)(1), (2)*.

(n2)Footnote 2. *I.R.C. § 121(b)(3)(B)*.

(n3)Footnote 3. *I.R.C. § 121(a)*.

(n4)Footnote 4. *See I.R.C. § 1250(b)(3)*.

(n5)Footnote 5. *I.R.C. § 121(d)(6)*.

(n6)Footnote 6. *I.R.C. § 121(a)*.

(n7)Footnote 7. *I.R.C. § 121(d)(7)*.

(n8)Footnote 8. Rev. Rul. 85-45, 1985-1 CB 183 (sale of trust property used by beneficiary as a primary residence qualifies for the exclusion under former *I.R.C. § 121*).

(n9)Footnote 9. *I.R.C. § 121(d)(1).*

(n10)Footnote 10. *I.R.C. § 121(b)(2)(A).*

(n11)Footnote 11. *I.R.C. § 121(b)(2)(A).*

(n12)Footnote 12. *I.R.C. § 121(b)(2)(B).* According to Section 121(b)(2)(B), the exclusion will equal the sum of the amount each spouse would be entitled to exclude vis-a-vis the residence under section 121(b) if the spouses had not been married. For purposes of computing that amount, each spouse is to be treated as owning the property during the period that either spouse owned the property.

(n13)Footnote 13. *I.R.C. § 121(c)(1)*; I.R.S. Restructuring and Reform Act of 1998, Pub. L. No. 105-206, 105th Cong., 2d Sess., § 312(d)[e] (July 22, 1998).

(n14)Footnote 14. *I.R.C. § 121(c)(1).*

(n15)Footnote 15. *I.R.C. § 121(c)(2)(B)*; see Pub. L. No. 105-34, § 312(d)[e](3).

(n16)Footnote 16. *I.R.C. § 121(d)(2).*

(n17)Footnote 17. *I.R.C. § 121(d)(3)(A).*

(n18)Footnote 18. *I.R.C. § 121(d)(3)(B).*

(n19)Footnote 19. *I.R.C. § 121(d)(4).*

(n20)Footnote 20. *I.R.C. § 121(d)(5)(A).*

(n21)Footnote 21. *I.R.C. § 121(d)(5)(B).*

(n22)Footnote 22. *I.R.C. § 121(d)(5)(C).*

(n23)Footnote 23. See *I.R.C. §§ 267(b), 707(b).*

(n24)Footnote 24. *I.R.C. § 121(d)(8).*

(n25)Footnote 25. *I.R.C. § 121(g).*

(n26)Footnote 26. *I.R.C. § 121(e)*; see *I.R.C. § 877(a)(1)* for the definition of an expatriate. It is difficult to explain the tax policy reasons for this exclusion. Since the provision dealing with expatriation focuses on the expatriate's tax avoidance motives, it would seem that tax avoidance could not be a motive with respect to otherwise excludable gain on the sale of a personal residence.

(n27)Footnote 27. *In re Curran*, 99-2 U.S.T.C. P 50,742 (U.S. Bkcy. Ct. N.D. Ala. 1999); *In re Slye*, 99-2 U.S.T.C. P 50,739 (U.S. Bkcy. Ct. Md. 1999); *In re Williams*, 99-2 U.S.T.C. P 50,738 (U.S. Bkcy. Ct. Md. 1999); *In re Munster*, 226 B.R. 632 (E.D. Mo. 1998); *In re Luciano Popa*, 98-1 U.S.T.C. P 50,276 (U.S. Bkcy. Ct. N.D. Ill. 1998); *In re Kerr* (Debtor), 99-1 U.S.T.C. P 50,310 (W.D. Wa. 1999); *In re Bradley*, 1998 W.L. 400737 (MD Tenn. 1998); *In re St. Francis* (Debtor), 232 B.R. 518 (N.D. Ga. 1999); *In re Godwin*, 230 B.R. 341 (S.D. Ohio 1999); 99-1 U.S.T.C. P 50,287; but see *In re Winch*, 226 B.R. 591 (S.D. Ohio 1998) (holding that trustee cannot use the exclusion).

(n28)Footnote 28. *In re Curran*, 99-2 U.S.T.C. P 50,742 (U.S. Bkcy. Ct. N.D. Ala. 1999); *In re Slye*, 99-2 U.S.T.C. P 50,739 (U.S. Bkcy. Ct. Md. 1999); *In re Williams*, 99-2 U.S.T.C. P 50,738 (U.S. Bkcy. Ct. Md. 1999); *In re Munster*, 226 B.R. 632 (E.D. Mo. 1998); *In re Luciano Popa*, 98-1 U.S.T.C. P 50,276 (U.S. Bkcy. Ct. N.D. Ill. 1998); *In re Kerr* (Debtor), 99-1 U.S.T.C. P 50,310 (W.D. Wa. 1999); *In re Bradley*, 1998 W.L. 400737 (MD Tenn. 1998); *In re St.*

Francis (Debtor), 232 B.R. 518 (N.D. Ga. 1999) ; *In re Godwin*, 230 B.R. 341 (S.D. Ohio 1999) ; 99-1 U.S.T.C. P 50,287 ; *but see In re Winch*, 226 B.R. 591 (S.D. Ohio 1998) (holding that trustee cannot use the exclusion).

(n29)Footnote 29. *See In re Mehr*, 153 B.R. 430, 93-1 U.S.T.C. P 50,091 (Bankr. D.N.J. 1993); *In re Barden*, 97-1 U.S.T.C. P 50,243 (E.D.N.Y. 1996), *aff'd* 97-1 U.S.T.C. P 50,244, 97-1 Trade Cas. (CCH) P50244 (2d Cir. 1997).

(n30)Footnote 30. *See I.R.C. §§ 671, 676(a)*.

(n31)Footnote 30. *See Rev. Rul. 85-45, 1985-1 C.B. 183* (gain realized from the sale of trust property used by trust beneficiary as a principal residence qualified for one-time exclusion of gain under former *I.R.C. Section 121*); *see Rev. Rul. 66-159, 1966-1 CB 162* (gain from the sale of a residence in a grantor trust qualified for rollover of gain into replacement residence under former *I.R.C. Section 1034*); *Ltr. Rul. 199912026* .

(n32)Footnote 31. *See I.R.C. § 121(d)(8)*; *see § 21.14[5][e], above*.

(n33)Footnote 32. *I.R.C. § 121(a), (f)*.

(n34)Footnote 33. *I.R.C. § 6045(e)(5)*.

(n35)Footnote 34. *See I.R.C. § 6045(e)(5)*.

(n36)Footnote 35. Pub. L. No. 105-34, § 312(d)[e].

(n37)Footnote 36. *Treas. Reg. § 1.165-9(b)*.

(n38)Footnote 37. *Treas. Reg. § 1.165-9(b)*; *Howard v. Comm'r*, 69-2 U.S.T.C. P 9534 (N.D. Ill. 1969).

(n39)Footnote 38. *Wood v. Comm'r*, 197 F.2d 859 (5th Cir. 1952) .

(n40)Footnote 39. *Ireland v. Comm'r*, 10 T.C.M. 430 (1951) .

(n41)Footnote 40. *Grammar v. Comm'r*, 12 T.C. 34 (1949) ; *McAuley v. Comm'r*, T.C. Memo 1976-276 ; *Richardson v. Comm'r*, T.C. Memo 1978-322 (note that the property in this case was rented, but only for 8 days--not a sufficiently substantial time).

(n42)Footnote 41. *See I.R.C. § 121(a)*.



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Current Legal Forms for Real Estate
Chapter 21 SALES AND EXCHANGES
Part I. The Tax Background

25-21 Current Legal Forms for Real Estate § 21.15

§ 21.15 Residential Mortgage Interest Deduction

Qualified residence interest is not subject to the deduction limitation that applies to personal interest.ⁿ¹ Nondeductible personal interest, or consumer interest, is any interest that is not (1) properly allocable to a trade or business, (2) investment interest, (3) interest used in computing the taxpayer's passive activity income or loss, or (4) qualified residence interest.ⁿ² Qualified residence interest includes interest on acquisition indebtedness and home equity indebtedness of a principal and second residence of the taxpayer. The debt must be secured by the taxpayer's principal or a second residence. The maximum allowed acquisition indebtedness is \$1 million.ⁿ³

Acquisition indebtedness means debt that is incurred in acquiring, constructing, or substantially improving the principal or a second residence of the taxpayer. This indebtedness is reduced as payments of principal are made, and cannot be increased by refinancing.ⁿ⁴

Example:

An individual incurs an \$85,000 mortgage to acquire his principal residence. Eventually, the mortgage debt is paid down to \$60,000. His acquisition indebtedness for the residence cannot now be increased above \$60,000, unless incurred to substantially improve the residence.

The total amount of acquisition debt for qualified residence interest is \$1 million. As a result, if the taxpayer's debt to acquire, construct, or substantially improve his principal or second residence exceeds \$1 million, then only interest on the total principal amount of \$1 million of the debt is deductible as acquisition interest. For married persons filing separate returns, the limit is \$500,000.ⁿ⁵

"Home equity indebtedness" is any indebtedness (other than acquisition indebtedness) secured by a qualified residence to the extent that the aggregate amount of such indebtedness does not exceed (1) the fair market value of such qualified residence, minus (2) the amount of acquisition indebtedness with respect to the residence.ⁿ⁶ The aggregate amount treated as home equity indebtedness for any period may not exceed \$100,000 (\$50,000 in the case of a separate return filed by a married individual).ⁿ⁷

A qualified residence includes the taxpayer's principal residence which would qualify as a principal residence under the

gain rollover rules. A qualified residence also includes one other residence used for personal purposes by the taxpayer for the greater of 14 days or 10 percent of the number of days it is rented during the year.ⁿ⁸ If a second residence is not rented at any time during the taxable year, the taxpayer need not meet the use requirements that the residence be used for personal, non-rental, purposes.ⁿ⁹

For a housing cooperative, debt secured by stock held by the taxpayer as a tenant-stockholder is treated as secured by the residence of the taxpayer entitled to occupy it as a tenant-stockholder. If stock may not be used as security by virtue of restrictions arising, for example, pursuant to state or local law, or pursuant to reasonable restrictions in the cooperative agreement, the stock may be treated as securing such debt, if the taxpayer establishes to the satisfaction of the Service that the debt was incurred to acquire the stock.ⁿ¹⁰

Planning Note

The total residence indebtedness may be as high as \$1,100,000. The total acquisition and home equity indebtedness secured by a taxpayer's principal residence and a second home that is eligible for the qualified residence interest exception may be as much as \$1,100,000 overall. This maximum amount is \$550,000 for a married individual filing a separate return.

Legal Topics:

For related research and practice materials, see the following legal topics:

Real Property LawCommon Interest CommunitiesTimesharesReal Property LawFinancingMortgages & Other Security InstrumentsGeneral OverviewReal Property LawFinancingSecondary FinancingGeneral OverviewTax LawFederal Income Tax ComputationGeneral OverviewTax LawFederal Income Tax ComputationDeductions for Business ExpensesInterest (IRC sec. 163)

FOOTNOTES:

(n1)Footnote 1. *I.R.C. § 163(h)(1)*.

(n2)Footnote 2. *I.R.C. § 163(h)(2)*.

(n3)Footnote 3. *I.R.C. § 163(h)(3)*.

(n4)Footnote 4. *I.R.C. § 168(h)(3)(B)*.

(n5)Footnote 5. *I.R.C. § 163(h)(3)(B)(ii)*.

(n6)Footnote 6. *I.R.C. § 163(h)(3)(C)(i)*.

(n7)Footnote 7. *I.R.C. § 163(h)(3)(C)(ii)*.

(n8)Footnote 8. *I.R.C. § 163(h)(4)(A)*. A taxpayer may treat a residence under construction as a qualified residence for a period of up to 24 months, provided that the residence becomes a qualified residence when it is ready for occupancy. Temp. Treas. Reg. § 1.163-10T(p)(5). A taxpayer may hold an interest in a qualified residence under a time-sharing arrangement, as long as the property otherwise qualifies. Temp. Treas. Reg. § 1.163-10T(p)(6).

(n9)Footnote 9. *I.R.C. § 163(h)(4)(A)(iii)*. If a portion of a residence is used as a home office, that portion does not qualify as a residence and the taxpayer must make an allocation of the property's fair market value and basis between the portion of the property used as a residence and the portion not so used. No allocation is made as to the average balance or interest on the debt. Temp. Treas. Reg. § 1.163-10T(p)(4)(i). If a second home is not rented or used by the taxpayer at any time during the tax year, it will be treated as a qualified residence regardless of the lack of personal use. For these purposes, a residence will be deemed to be rented for any period that the taxpayer holds the property out for sale or rental, or repairs or renovates the residence with the intention of holding it out for sale or rental. Temp. Treas.

Reg. § 1.163-10T(p)(3)(iii).

(n10)Footnote 10. *I.R.C. § 163(h)(4)(B).*



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Current Legal Forms for Real Estate
Chapter 21 SALES AND EXCHANGES
Part I. The Tax Background

25-21 Current Legal Forms for Real Estate § 21.16

§ 21.16 Sale of Real Property Related Interests

[1] Sale of Leasehold Interest

In the hands of the lessee, a leasehold is ordinarily a capital asset.ⁿ¹ Thus, a lessee who disposes of his leasehold interest by quit claim to a purchaser of the property is allowed to recover the unexhausted portion of his basis in the interest, and to have the balance of the consideration taxed as capital gain.ⁿ² On the other hand, a lessee was held to realize ordinary rental income rather than capital gain from the proceeds of a sale where the agreement with the lessor and a third party created merely a sublease and not a complete transfer of all rights in the underlying lease.ⁿ³

Capital gain treatment has been allowed in several cases where the lessee transferred all of his interest in the property. Thus, capital gain treatment was allowed for an amount received by a lessee from the sublessee of part of the leased property under a three-party agreement pursuant to which the lessee assigned his interest as sublessor to the lessor so that the latter could lease directly to the sublessee; the assignment was treated as a sale, even though the payment was made by the sublessee, because it was for a legitimate business purpose.ⁿ⁴ Similarly, the amount received by a lessee for cancelling a sublease was held to be capital gain when accompanied by an assignment of the prime lease; the assignment completely divested the lessee-sublessor of all interest in the property so that the transaction was a sale of income-producing property rather than a payment in lieu of future rent.ⁿ⁵

A leasehold is depreciable business property where the lessee is engaged in the business of subleasing.ⁿ⁶ Although such a lease is not a capital asset,ⁿ⁷ a gain realized upon its sale is subject to the special capital gain rule unless the taxpayer is in the business of selling leaseholds.ⁿ⁸ A lessee's renewal option upon property used in his business is depreciable business property. Presumably, consideration received for the release of this option would be capital gain under the special capital gain provisions of *I.R.C. Section 1231*.ⁿ⁹ The present position of the Service is that a leasehold interest in land with less than 30 years to run is real property; if used in the lessee's trade or business it is not a capital asset but instead falls within the special capital gain rule so that a sale may still result in capital gain if the taxpayer is not in the business of selling leaseholds. If the leasehold is subject to depreciation, the recapture rules operate upon its sale.ⁿ¹⁰ On the other hand, the Service has ruled that consideration received by a lessee for an assignment of his 99-year lease was advance rental rather than the proceeds of a sale where the lessee reserved the right to exercise a purchase option in the lease.ⁿ¹¹

Where a shareholder's investment in a cooperative apartment is in the shares rather than the lease, any loss is limited to a capital loss even if the lease constitutes real property held for sublease. In any case, any loss on the lease is limited to its value at the time it was first held for sublease.ⁿ¹²

[2] Sale of Partnership Interest

Where real estate is held by a partnership, a sale of a partnership interest may be the method utilized to terminate the business as an alternative to the sale of the specific assets. In general, capital gain or loss is realized by the transferor partner upon the sale or exchange of a partnership interest.ⁿ¹

Ordinary income is recognized, however, to the extent that the payment is made for an interest in "unrealized receivables" or "substantially appreciated inventory."ⁿ² This limitation inhibits the use of the "collapsible partnership" to circumvent the collapsible corporation provisions.ⁿ³ If depreciable property would be subject to ordinary income tax upon a sale to the extent of gain attributable to "over-depreciation," that property is classified as an "unrealized receivable" to the extent that the partnership would have had ordinary income upon a sale for fair market value at the time of the sale.ⁿ⁴

The Supreme Court has held that when a taxpayer sells or otherwise disposes of partnership property that is encumbered by a nonrecourse mortgage or other obligation (one on which the borrower is not personally liable) in excess of the fair market value of the property sold, the "amount realized" includes the outstanding amount of the obligation.ⁿ⁵ The Court pointed out that the only difference between a nonrecourse mortgage and a recourse one is that in the event of nonpayment, the nonrecourse mortgagee's remedy is limited to foreclosure against the secured property. In effect, the risk of devaluation of the property is shifted from the borrower to the lender, but the nature of the obligation is not altered. The Court also pointed out that the amount of nonrecourse liability is to be included in calculating both the basis of the property and the amount realized on disposition. The fact that the nonrecourse loan exceeds the value of the property was deemed by the Court to be irrelevant.ⁿ⁶

A publicly traded partnership is treated as a corporation for tax purposes. This applies to partnerships that were not publicly traded on December 17, 1987. However, an existing publicly traded partnership on that date will not be treated as a corporation until its taxable years beginning after 1997.ⁿ⁷ An exception to corporate tax treatment applies to certain partnerships if 90 percent or more of their gross income is qualifying passive-type income.ⁿ⁸

Net income from a publicly traded partnership is not treated as passive income for purposes of the passive loss rules. Each partner treats loss from the partnership as separate from income and loss from any other publicly traded partnership, and from any other passive activities. Net income is treated as portfolio income.ⁿ⁹ Under the passive activity loss rules, if a taxpayer disposes of his entire interest in a passive activity, any previously suspended losses from the activity are deductible against income, whether passive or nonpassive. However, the Service is authorized to issue regulations, to the extent necessary to prevent avoidance of this provision, providing that taxpayers must reduce the amount of suspended losses by the amount of income or gain realized from the activity in past years. For example, regulations might be appropriate for situations where passive activities produce taxable passive income in the initial years of an investment and then a loss upon disposition, such as where the investment is structured so that income is recognized in years prior to the allowance of related deductions.ⁿ¹⁰

[3] Sale of Corporate Stock

Capital gain treatment is generally realized on the sale of stock in a real estate corporation. There are, however, three major exceptions to this rule. First, if the shareholder-seller does not meet the capital gain holding period requirement for the stock, the sale will be treated as a short term capital gain and will be taxed at ordinary income rates.ⁿ¹ Secondly, if the shareholder is a dealer in securities, the shares will be treated as a noncapital asset, *i.e.*, property held primarily for

sale to customers in the ordinary course of the taxpayer's trade or business, so that the sale will result in recognition of ordinary income.ⁿ² Finally, if the corporation is a "collapsible" corporation, the sale will result in the realization of ordinary income, even if the transaction would otherwise have resulted in capital gain.ⁿ³

Planning Note

Sale of Leasehold May Result in Capital Gain or Ordinary Income Treatment. Note that the sale of a leasehold may have different tax consequences for the seller, depending upon whether the property is characterized as a capital asset, as *I.R.C. Section 1231* property, or as "dealer" property. A leasehold is ordinarily a capital asset, so that if the lessee disposes of his entire interest in it he reports capital gain or loss (except to the extent of over-depreciation). If the lessee is engaged in the business of subleasing, the leasehold constitutes Section 1231 property, and its sale results in capital gain or ordinary loss treatment. But, if the leasehold is "dealer" property, *i.e.*, the lessee is in the business of selling leaseholds, ordinary income or loss must be reported.ⁿ⁴

Legal Topics:

For related research and practice materials, see the following legal topics:

Tax Law Federal Income Tax Computation Deductions for Losses Passive Activity Loss (IRC sec. 469) Tax Law Federal Income Tax Computation Sales & Exchanges Business Property (IRC secs. 1031, 1221, 1231) General Overview Tax Law Federal Income Tax Computation Sales & Exchanges Capital Gains & Losses (IRC secs. 1201-1202, 1211-1212, 1221-1223, 1231-1260, 1271-1278, 1281-1288, 1291-1298) General Overview Tax Law Federal Income Tax Computation Sales & Exchanges Capital Gains & Losses (IRC secs. 1201-1202, 1211-1212, 1221-1223, 1231-1260, 1271-1278, 1281-1288, 1291-1298) Long Term & Short Term Gains & Losses Tax Law Federal Income Tax Computation Sales & Exchanges Installment Sales (IRC secs. 1001, 1031, 1231) General Overview Tax Law Federal Taxpayer Groups Limited Liability Companies & Partnerships Transfers of Interest (IRC secs. 741-743) Exchanges & Sales of Partnership Interests

FOOTNOTES:

(n1)Footnote 1. *I.R.C. § 1221*. Final regulations provide that interests in real property include fee ownership and co-ownership of land or improvements on it, options to acquire land or improvements on it, and options to acquire leaseholds of land or improvements on it. Timeshare interests are covered if they represent an undivided fractional fee interest, or undivided leasehold interest, in real property, as well as stock held by a person as a tenant-stockholder in a cooperative housing corporation. *Treas. Reg. § 1.856-3(c)*, added by *T.D. 8458* (Dec. 22, 1992) .

(n2)Footnote 2. *Sutliff v. Comm'r*, 46 B.T.A. 446 (1942) .

(n3)Footnote 3. *Voloudakis v. Comm'r*, 29 T.C. 1101 (1958) , *aff'd* 274 F.2d 209 (9th Cir. 1960) ; *see Fairmount Park Raceway, Inc. v. Comm'r*, 327 F.2d 780 (7th Cir. 1964) ; *Price v. Comm'r*, T.C. Memo 1958-124 .

(n4)Footnote 4. *Metropolitan Bldg. Co. v. Comm'r*, 282 F.2d 592 (9th Cir. 1960) , *rev'g and remanding* 31 T.C. 971 (1959) .

(n5)Footnote 5. *Miller v. Comm'r*, 48 T.C. 649 (1967) ; *cf. McEnery v. Comm'r*, T.C. Memo 1967-213 (sale to controlled corporation).

(n6)Footnote 6. *I.R.C. § 167(a)*.

(n7)Footnote 7. *I.R.C. § 1221(2)*.

(n8)Footnote 8. *I.R.C. § 1231(a), (b)(1)*. *Cf.* (prior law) *Fackler v. Comm'r*, 133 F.2d 509 (6th Cir. 1943) , *aff'g* 45 B.T.A. 708 (1941) ; *see Pekras v. Comm'r*, T.C. Memo CCH 13,243, P-H P 43,258, *aff'd per curiam* 139 F.2d 699 (6th Cir. 1943) , *cert. denied* 322 U.S. 739 .

(n9)Footnote 9. *See I.R.C. § 1231. See also* (prior law) 512 W. 56th St. Corp. v. Comm'r, 151 F.2d 942 (2d Cir. 1945) . As to goodwill included in a leasehold, see Comm'r v. Chatsworth Stations, Inc., 282 F.2d 132 (2d Cir. 1960) , *rev'g* 29 T.C. 1150 (1958) , *on remand* T.C. Memo 1964-11 .

(n10)Footnote 10. *Rev. Rul. 72-85, 1972-1 C.B. 234* . The ruling uses the example of a lessee who has constructed a building upon leased land in which he leases space to others, and who sells the lease, including an interest in the building, when it has 29 years to run. The leasehold in this instance is a *I.R.C. § 1231* asset, and the recapture provisions (*I.R.C. § 1250*) apply.

(n11)Footnote 11. *Rev. Rul. 57-537, 1957-2 C.B. 52* .

(n12)Footnote 12. *Peake v. Comm'r*, T.C. Memo CCH 18,397, P-H P 51,181.

(n13)Footnote 1. *I.R.C. § 741*. For further discussion of sales of partnership interests, see The Tax Background to Chapter 1 in Volume 1; Rabkin & Johnson, *Federal Income, Gift and Estate Taxation* (FIGET) § 16.12 (Matthew Bender 2004).

(n14)Footnote 2. *I.R.C. § 751(a)*.

(n15)Footnote 3. For discussion of "collapsible corporation" rules, see The Tax Background to Chapter 5 in Volume 7, *supra*. See also FIGET § 23.11 (Matthew Bender 2004).

(n16)Footnote 4. *I.R.C. § 751(c)*; *see Treas. Reg. § 1.751-1(g)*, Example (6). For recapture of "over-depreciation," *see § 21.08, supra*.

(n17)Footnote 5. *Comm'r v. Tufts*, 461 U.S. 300 (1983) , *rev'g* 651 F.2d 1058 (5th Cir. 1981) , *and reinstating* 70 T.C. 756 (1978) .

(n18)Footnote 6. *Cf. Crane v. Comm'r*, 331 U.S. 1 (1947) (nonrecourse obligation less than fair market value of property included in amount realized). For further discussion of sale of partnership property subject to nonrecourse obligations, including the "at-risk" rules, see The Tax Background to Chapter 1 in Volume 1.

(n19)Footnote 7. *I.R.C. § 7704*. For purposes of the mark-to-market method of accounting for dealers in securities, a beneficial ownership interest in a publicly-traded partnership that the taxpayer controls is always deemed to be an asset held for investment. Temp. Treas. Reg. §§ 1.475(b)-1T, 1.475(b)-2T, 1.475(c)-1T, 1.475(c)-2T, 1.475(d)-1T and 1.475(e)-1T.

(n20)Footnote 8. *I.R.C. § 7704(c), (d)*.

(n21)Footnote 9. *I.R.C. § 469(k)*.

(n22)Footnote 10. *I.R.C. § 469(g)(1)*, amended by the Technical and Miscellaneous Revenue Act of 1988, Pub. L. No. 100-647, 100th Cong., 2d Sess. § 1005(a)(2) (Nov. 10, 1988). For a further discussion of publicly traded partnerships and passive losses, see the Tax Background in Chapter 1, Partnerships, in Volume 1, *supra*.

(n23)Footnote 1. *I.R.C. § 1222. See § 21.05, supra*.

(n24)Footnote 2. *I.R.C. § 1221(1)*. For applications of capital gain rules to dealer property, see § 21.05, *supra*.

(n25)Footnote 3. *I.R.C. § 341*.

(n26)Footnote 4. *See § 21.05, supra*, for discussion of capital gain or loss treatment versus ordinary income treatment.



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Current Legal Forms for Real Estate
Chapter 21 SALES AND EXCHANGES
Part I. The Tax Background

25-21 Current Legal Forms for Real Estate § 21.17

§ 21.17 Involuntary Conversions

Section 1033 permits the nonrecognition of gain in certain circumstances in which property is involuntarily converted as the result of destruction, theft, condemnation, sale under threat or imminence of condemnation, and similar events. If old property is converted directly into qualified replacement property (*i.e.*, by an exchange of real estate threatened with condemnation for similar property in another locality), nonrecognition of gain is mandatory. If old property is involuntarily converted into money (*i.e.*, proceeds of fire insurance or a condemnation award), nonrecognition of gain is optional. Gain is not recognized only if the taxpayer acquires qualified replacement property within two years, the cost of which is greater than the amount realized as a result of the conversion.ⁿ¹ As a general rule, qualified replacement property must be "similar or related in service of use." Neither the Code nor the regulations defines the phrase. Courts have generally held, however, that the statute requires a reasonably similar business continuation of the taxpayer's prior commitment of capital and not a departure from it (*i.e.*, the reinvestment must be made in substantially similar property).ⁿ²

There are some special rules that apply to real property that is converted by reason of condemnation or threat or imminence thereof. First, Congress enacted section 1033(g) to permit certain condemned realty to be replaced by other real property of a "like-kind" whether or not it is similar or related in service or use. This special rule only applies if the property is involuntarily converted by reason of seizure, requisition or condemnation, or threat or imminence thereof; it does not apply to destructions by fire, flood, or other catastrophe. Second, in keeping with the more liberal provision of section 1033(g), a three-year replacement period (rather than the two-year period) applies to conversions of business or investment real estate described in section 1033(g).ⁿ³

The basis of qualified replacement property is the cost of the new property less any unrecognized gain.ⁿ⁴ The holding period of the replacement property includes the holding period of the converted property if the latter was a capital asset at the time of conversions.ⁿ⁵

Section 1033 does not apply to losses resulting from involuntary conversions. In the case of individuals, the Code allows deductions for (1) losses that are connected with a trade or business; (2) losses that are incurred in a transaction entered into for profit; and (3) casualty losses arising from "fire, storm, shipwreck, or other casualty" and theft.ⁿ⁶ There has been much litigation over the meaning of the word "casualty." Generally, the I.R.S. and courts require an

identifiable event of a sudden, unexpected, and unusual nature. A casualty loss is deductible in the year sustained. If there exists a claim for reimbursement with a reasonable prospect for recovery, allowance of the loss awaits the resolution of the claim with reasonable certainty. The amount of the casualty loss is the lesser of (1) the adjusted basis of the property; and (2) the difference between the fair market value of the property beforehand and the fair market value afterwards (*i.e.*, decline in value).ⁿ⁷ The amount of the loss must, of course, be reduced by any reimbursements received. For example, assume Taxpayer's office building was partially destroyed by a tornado. The adjusted basis of the building before the tornado was \$50,000 and its fair market value was \$75,000. Immediately after the tornado, the fair market value of the building was \$60,000. There was a \$10,000 insurance reimbursement. The amount of the Taxpayer's casualty loss is \$5,000.

Legal Topics:

For related research and practice materials, see the following legal topics:

Tax Law Federal Income Tax Computation Deductions for Losses General Losses (IRC sec. 165) General Overview Tax Law Federal Income Tax Computation Sales & Exchanges Involuntary Conversions (IRC sec. 1033) General Overview Tax Law Federal Income Tax Computation Sales & Exchanges Involuntary Conversions (IRC sec. 1033) Basis Tax Law Federal Income Tax Computation Sales & Exchanges Involuntary Conversions (IRC sec. 1033) Condemnation Awards Tax Law Federal Income Tax Computation Sales & Exchanges Involuntary Conversions (IRC sec. 1033) Insurance Proceeds Tax Law Federal Income Tax Computation Sales & Exchanges Involuntary Conversions (IRC sec. 1033) Nonrecognition of Gains

FOOTNOTES:

(n1)Footnote 1. *I.R.C. § 1033(a)(1), (2)*.

(n2)Footnote 2. *See, e.g., Maloof, 65 T.C. 263, 269-70 (1975)*.

(n3)Footnote 3. *I.R.C. § 1033(g)*. *See Biedermann v. Commissioner, 68 T.C. 1 (1977)* (holding that condemned unimproved realty can be replaced with improved realty under section 1033(g) even though such properties do not qualify under section 1033(a)).

(n4)Footnote 4. *I.R.C. § 1033(b)*. If the taxpayer purchases two or more items of replacement property, the basis must be allocated among them in proportion to their respective costs.

(n5)Footnote 5. *Rev. Rul. 72-451, 1972-2 C.B. 480*.

(n6)Footnote 6. *I.R.C. § 165(a), (c)*.

(n7)Footnote 7. *Treas. Reg. § 1.165-7*.



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[Reserved]

§§ 21.18[Reserved]



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Current Legal Forms for Real Estate
Chapter 21 SALES AND EXCHANGES
Part I. The Tax Background

25-21 Current Legal Forms for Real Estate § 21.26

§ 21.26 Checklist for Doing Forward Deferred Exchange with a Qualified Intermediary

>[1] Determine Eligibility of Transaction for Like-Kind Exchange ☐

>[a] Qualified Property -- in general all property (real or personal) can qualify ☐

>[b] Property must be held for a qualified use or purpose. Both the property transferred and the property received must be held by the taxpayer for use in a trade or business or investment ☐

>[c] The replacement property acquired in the exchange must be like-kind to the property the taxpayer desires to sell. Like-kind means similar in nature or character, notwithstanding differences in grade or quality. All real property is like-kind regardless of whether it is improved or unimproved, and regardless of the type of improvement or interest ☐

>[d] An exchange of one property for another must take place rather than sold for cash. The exchange does not need to be simultaneous, but there are time restrictions for nonsimultaneous (deferred) exchanges. The exchange is created by using an intermediary and required exchange documentation ☐

>[2] The taxpayer obtains a contract to sell the relinquished property and adds to it an exchange cooperation clause stating that it is the taxpayer's intention to do a like-kind exchange and reserving the right to assign the contract to a Qualified Intermediary ("QI") for the purpose of completing the deferred exchange, and the Buyer of the relinquished property agrees to cooperate ☐

>[3] The taxpayer hires the QI and enters into an Exchange Agreement with the QI. Usually, the QI will prepare this document ☐

>[4] The taxpayer assigns the sales contract to the QI, and the QI notifies the buyer of the assignment and obtains the buyer's consent ☐

>[5] The QI gives direct deeding instructions to the taxpayer and the taxpayer executes a deed to the buyer. In this way, the QI does not need to take title to the relinquished property ☐

>[6] The buyer deposits the buyer's funds into escrow with the QI so that the taxpayer does not directly or constructively receive the funds. Those funds are held for ultimate use to acquire the replacement property ☐

>[7] The taxpayer has 45 days from the closing of the sale of the relinquished property to identify a replacement property ☐

>[a] The identification notice must contain an unambiguous description of the replacement property and must be signed by the taxpayer. The identification must include a legal description, a street address, or a distinguishable name. ☐

>[b] The written notification should be made to the person obligated to transfer the replacement property to the taxpayer (this will usually be the seller of the replacement property and the QI), and to any person involved in the exchange other than the taxpayer or a disqualified party (this will usually be the settlement or title officer who is providing the taxpayer with services) solely related to the exchange of the property ☐

>[c] The taxpayer can identify up to 3 properties without regard to their fair market value, or more than 3 properties if the total fair market value of all of the properties does not exceed 200% of the fair market value of all of

the property relinquished in the exchange ☐

>[8] When the replacement property is found, the taxpayer enters into a sales contract with the owner of such replacement property, containing an exchange cooperation clause ☐

>[9] The taxpayer assigns the contract to the QI and gives the seller of the replacement property written notice of the assignment ☐

>[10] The QI orders the seller to execute a direct deed to the taxpayer ☐

>[11] The seller of the relinquished property is paid by the QI from the escrowed funds ☐

>[12] The deferred exchange must be completed by the earlier of 180 days from the first closing of the relinquished property or the due date (including extensions) of the taxpayer's tax return for the year in which the transfer of the relinquished property occurs ☐

>[13] At the time of the filing of the tax return of the taxpayer, IRS Form 8824 must be filed with the IRS providing the information requested related to the exchange ☐

Legal Topics:

For related research and practice materials, see the following legal topics:

Real Property LawPurchase & SaleLike-Kind ExchangesTax LawFederal Income Tax ComputationSales & ExchangesLike-Kind Exchanges (IRC sec. 1031)General OverviewTax LawFederal Income Tax ComputationSales & ExchangesLike-Kind Exchanges (IRC sec. 1031)Requirements



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Current Legal Forms for Real Estate
Chapter 21 SALES AND EXCHANGES
Part II. The Practice Background

25-21 Current Legal Forms for Real Estate § 21.27

§ 21.27 Introduction; scope of coverage

This section reviews the practical aspects of real estate sales. It describes the process of negotiating a contract of sale, drafting the contract of sale, preparing for the closing, conducting the closing, and following up after the closing. The section contains a description of potential problems which the practitioner may encounter, as well as suggested techniques and strategies for avoiding problems and resolving them when they arise.

Legal Topics:

For related research and practice materials, see the following legal topics:

Real Property LawPurchase & SaleGeneral OverviewReal Property LawPurchase & SaleClosing & SettlementReal Property LawPurchase & SaleContracts of SaleGeneral Overview



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Chapter 21 SALES AND EXCHANGES
Part II. The Practice Background

25-21 Current Legal Forms for Real Estate § 21.28

§ 21.28 Negotiating the sales agreement

Attorneys are often involved in negotiating commercial sales agreements, but frequently they are not directly involved in the negotiation of a residential sales agreement. Generally, a residential agreement has been negotiated and execution has been supervised by real estate agents prior to the attorney's involvement. It is usually only where the purchaser or seller is not using a real estate agent (a "by owner" sale) that an attorney is involved in residential negotiations.

For most purchasers and sellers, the price is the most important aspect of the entire transaction. Once that is agreed upon, the other issues can be resolved.

When real estate agents are involved, a written offer is generally prepared by the seller's agent or the purchaser's agent, if any, and presented to the seller. The offer may be in the form of a binder, a letter of intent or a full contract. If the parties execute any type of agreement which has not been reviewed by their respective attorneys, it is common and advisable to include a provision in the agreement conditioning it upon the attorneys' approvals. Where the attorneys negotiate a binder, a letter of intent or a full contract, an attorney approval clause obviously is not necessary.

A binder is a short written description of the basic terms of the deal, signed by both parties. A binder is often, but not always, accompanied by a "good faith" deposit. Sometimes the binder is simply a check for the "good faith" deposit which has the terms of the deal noted on the back of the check. A binder is, by definition, incomplete and uncertain, and therefore, may not be an enforceable contract. For this reason, and because binders can potentially create liability for a broker's commission even though there is no enforceable contract of sale for the property, binders should be discouraged. The listing agreement with the seller's real estate agent should state that the commission is not earned until the contract is signed and closed. The seller's attorney should advise the seller not to accept a binder, but instead to negotiate and execute a complete contract of sale.

Letters of intent, sometimes used in commercial sales, describe transactions which the parties intend to negotiate further. A letter of intent is not intended to bind the parties, and should so expressly state. Letters of intent, combined with the conduct of the parties, have been held by courts to create liability for the parties. The courts have also held that in some cases the parties to a letter of intent have a duty to negotiate the terms and conditions of the contract of sale in good faith. The letter of intent can expressly include a requirement for good faith negotiation, or it could expressly state

that there is no binding obligation until a fixed length contract is signed.

Alternatively, oral negotiations may take place. Once terms are agreed upon, an agreement can be prepared. This avoids risky binders and letters of intent, or a purchase contract that has the price changed so many times that it is no longer legible.

The attorney should not be in the position of advising the client as to the appropriate price for the property. The client should provide the attorney with an acceptable range of prices. The attorney may wish to suggest that an appraiser or knowledgeable real estate agent be used to develop that range. It should be noted that if the sales price exceeds the fair market value of the property, the purchaser may experience difficulty in obtaining a mortgage loan. This is especially true if the purchaser's initial equity in the property is to be small. Banks generally have guidelines for loan to value (of property) ratios. If the transaction does not fit the guidelines, the purchaser will not receive loan approval. For example, if the property is worth \$100,000, and the purchaser intends to make a down payment (total equity) of \$10,000, the purchaser will have a 90% loan to value ratio. In a residential transaction, the bank will usually require Private Mortgage Insurance (PMI) to protect it from loss in the event of foreclosure unless a downpayment of at least 20% is made. However, if the purchaser offers \$120,000 for the property with the same equity, the purchaser will not receive mortgage approval, as the loan to value ratio will be 110%. That is, the loan will exceed the value of the property. Obtaining a market analysis of the appraisal before making an offer will help avoid this situation.

Prior to signing a letter of intent or a contract, the client should be asked whether the client has ascertained whether there are any use restrictions affecting the property. In a residential transaction, such restrictions might include a restriction against pets or against operating a business from the property. In a commercial transaction, there may be restrictions against the use of the property for certain types of businesses that are offensive or that compete with other businesses.

The other items to be negotiated are set forth in the following sections in the discussions on drafting the contract.

Legal Topics:

For related research and practice materials, see the following legal topics:

Real Property LawBrokersGeneral OverviewReal Property LawPurchase & SaleGeneral OverviewReal Property LawPurchase & SaleContracts of SaleGeneral OverviewReal Property LawPurchase & SaleContracts of SaleFormalities



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Current Legal Forms for Real Estate

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Current Legal Forms for Real Estate
Chapter 21 SALES AND EXCHANGES
Part II. The Practice Background

25-21 Current Legal Forms for Real Estate § 21.29

§ 21.29 Drafting the contract of sale

Many of the basics of the contract of sale are the same for most transactions. A standard form purchased or developed by the attorney can be used for those aspects. Those items will be identified in the discussions which follow. The balance of the contract must be agreed upon by the parties and drafted for each transaction.

[1] Parties

The contract must identify the parties by role, *i.e.*, purchaser and seller, as well as by name and address. If any of the parties is not an individual, that party should be identified by its genre, such as a corporation, partnership, limited liability company or joint venture. Instead of a residence address, the business office of such a party should be set forth.

Special care should be taken to ensure that all of the owners of the property are named as the sellers in the contract. The name of the seller or sellers should be identical with the name on the recorded deed for the property and on the relevant title insurance policy.

The attorney should be sure that all individual parties are over the age of majority. Infancy is not a bar to the purchase or sale of real property, but in most states laws protect minors by allowing them to disaffirm the contract within a reasonable period after reaching the age of majority. Thus, unless special care is taken under applicable state law, contracts made by those under the age of majority may be voidable. The attorney should also determine that none of the individual parties is incapacitated by a mental disease or defect, which also could render the contract voidable.

[a] Corporations

If one of the parties is a corporation, it can only act by direction of its board of directors. The attorney should obtain proof of the authority of the person who is to execute the contract on behalf of the corporation. This proof should include a copy of the resolution of the board of directors and a certificate by the secretary of the corporation acknowledging that the resolution was properly adopted, is in full force and effect, and has not been rescinded or modified.

[b] Partnerships

If one of the parties is a partnership, whether general, limited, or a limited liability partnership, the attorney should obtain proof of the authority of the person to act on behalf of the partners. If the partners are few in number, they should all sign the contract. If there are too many, or they are too distant, the attorney should review the partnership agreement and any amendments to determine whether authority exists. The attorney should also obtain an affidavit acknowledging that the partnership agreement is in full force and effect and has not been modified. Alternatively, the attorney could request a letter of authorization from each of the partners. Letters of authorization can also be used if there are any ambiguities in the partnership agreement. Also, it may be helpful for the attorney to review with the clients who are contracting with the partnership what recourse, if any, the clients may have against the partners individually. For example, it may be beneficial for the clients to understand that the partners of a limited liability partnership generally are protected against individual liability in much the same way shareholders of corporations and members of LLCs are protected. In such cases, the client contracting with the partnership may wish to obtain guaranties or representations and warranties directly from the individual partners.

[c] Limited Liability Company

If one of the parties is a limited liability company, the attorney should obtain proof of the authority of the person acting on behalf of the members. The attorney should review the operating agreement to determine whether there is a managing member with authority to bind the entity or if not, what type of vote of the members is required to bind the entity. Evidence that such a vote was taken and successfully given should be obtained. In the alternative, a written resolution signed by all of the members can be obtained.

[d] Fiduciaries

If one of the parties is a fiduciary, the attorney needs to obtain proof of the appointment. Such proof can be in the form of a certificate of letters testamentary, letter of administration, order of guardianship or conservatorship, or other similar order. The attorney must examine the order or decree appointing the fiduciary and must determine the scope of the fiduciary's authority. In addition, the attorney should examine any will, trust or other document which created or is related to the appointment. Finally, the attorney should review the relevant local laws for general powers of fiduciaries. Under certain circumstances, a court order may be required in order to sell real property.

[e] Power of attorney

If one of the parties is represented by an attorney-in-fact, the attorney must obtain proof of the appointment. A certified copy of the power of attorney document, together with an affidavit executed by the attorney-in-fact denying actual knowledge of the termination of his or her power by death, disability, incapacity or revocation by the principal, is sufficient in most states.

Some states have adopted the Uniform Durable Powers of Attorney Act, which contains rules for the effective use of durable powers. Other states, although they have not enacted the Uniform Act, have similar statutes. Some statutes provide forms for power of attorney documents. The attorney should consult the relevant statutes to determine the scope of authority granted in a particular document and whether that power is durable.

Although most states do not require that powers of attorney be acknowledged or recorded, they generally can and should be recorded.

[2] Premises

[a] Description

The contract should identify the subject real property in detail. The municipality and county should be specified. If there

is a street address, that should be included as well. The lot size should be stated, although it is usually advisable to avoid stating an exact amount of acreage or square footage unless the figure is based upon a guaranteed survey, or unless the purchase price is tied to a certain price per acre of land in the parcel. In the case of the latter, if the acreage has not been exactly determined by survey, the contract should require the acreage to be determined by a registered surveyor who is directed to determine and certify the exact acreage to a stated decimal point. The purchaser's attorney should specify that the acreage must be usable as defined in the contract and not, for example, wetlands. The tax map number should be included. If the property is part of a parcel, that fact should be noted. A reference to the deed into the seller should be included. If a metes and bounds description or a subdivision description (filed map) is available, it should be included.

Often, the premises are defined by reference to an annexed schedule. Preferably, such a schedule should contain a description of the property that is identical to the description contained in the seller's title insurance policy. Often, to guard against typographical errors, the schedule contains a photocopy of the title insurance policy description. If the title insurance policy description is used in the contract of sale to identify the property, the attorney should compare that description with the description of the property contained in the recorded deed into the seller in order to avoid inconsistencies and to discover potential problems as soon as possible.

If the description will be derived from a survey or other event, that fact should be noted. In addition, a method for resolving any disputes should be included.

[b] Structures

The contract should specify all structures which are located on the premises, including buildings, houses, detached garages, sheds, barns, pools, or other structures. Customarily, contracts of sale provide that they include as part of the premises all buildings and improvements on the land. If known, the buildings and improvements should be specifically described in the contract or annexed schedule. If any structure is removable and not included in the sale, the contract should so specify.

[c] Fixtures

The term "fixtures," for the purpose of this section, is defined as any item of personal property which is attached to the premises. In sales of residential property, this would include such things as cabinets, lighting fixtures, doors, ceiling fans, and built-in appliances. In sales of commercial or industrial buildings, this would include a variety of equipment and machinery. The purchaser should consider requiring the seller to specifically represent that the seller owns the fixtures included in the sale, that they are not subject to liens or claims of any kind, and that they are included in the sale.

Disputes often arise where the seller has installed a fixture and expects to remove the item, but the purchaser expects the item to stay because it is "attached." The attorney drawing the contract should recommend that the client make a list of all fixtures that he or she expects to be included in the sale and a list of those which are not included. If there is any doubt about the removability of any item, it should be included on one of the two lists. Those lists should become a part of the contract.

[d] Personalty

Often custom window treatments, appliances which are not built-in, inventory and supplies used in an ongoing business, and other personal property not considered fixtures are offered to the purchaser. The contract should specify what personalty is to be transferred to the purchaser. In addition, the contract should state whether the personalty is included in the sales price or whether separate consideration will be paid. If separate consideration is paid, a bill of sale to transfer title to the personal property should be required as a closing document. The attorneys should consider the tax consequences of paying separate consideration for personal property, since, depending upon the state, real property

transfer taxes will be reduced to the extent part of the purchase price is allocated to personalty, but a sales or use tax may be charged. If the purchaser is not certain whether he or she will want certain items, a time limit and notice provision should be included in the agreement.

[e] Condition of the premises, personalty and fixtures

The traditional rule of *caveat emptor*, or "let the buyer beware," places the responsibility for defects in the condition of the premises, personalty or fixtures on the purchaser, who is required to inspect the property carefully before closing the deal. The parties are free to vary the general rule by including express warranties as to the condition of the property in the contract of sale. However, as discussed in detail below, a variety of common law and statutory implied warranties and disclosure requirements in many states have eroded the general application of the rule of *caveat emptor*.

[i] "As is" condition

Absent a provision to the contrary, it is generally assumed that real property is transferred in its "as is" condition; however, there are a growing number of exceptions to the general rule that real property is assumed to be transferred in "as is" condition. Consequently, it is advisable to specify the condition of the premises to be transferred in the contract.

Typically, a contract specifies "as is" condition, but contains a contingency which allows a purchaser to obtain a structural inspection of the property. Under the contingency, the purchaser reserves the right to terminate the contract if the inspection shows that there are any substantial structural defects. (See § 21.29[4][f], below, on structural contingency.) Additionally, the contract usually gives the buyer the right to inspect the premises before the closing or before the buyer takes possession of the premises to check for changes in the condition of the property between the signing of the contract and the closing or the taking of possession by the buyer.

Often the contract provides that the personalty and fixtures are sold "as is;" however, the parties are certainly free to negotiate a contract which provides that personalty and fixtures are in working order or good working order. Many contracts contain such a "working order" requirement for plumbing, electrical and heating systems, machinery and appliances. An appliance, system or machine is considered to be in working order if it works when it is turned on. The seller's attorney may wish to avoid the phrase "good working order," which not only may require more than "working order," but may require the seller to improve an appliance, system or machine at the closing. Sometimes contracts provide that personalty and fixtures are sold in their present condition subject to reasonable use, wear, tear and natural deterioration between the contract date and the closing. A purchaser may desire a specific provision regarding the absence of leaks in the roof and cellar; however, the seller generally seeks to avoid such a warranty because the remedies for leaks can be extremely expensive.

The contract generally also provides that all agreements between the parties are merged in the contract, and neither party is relying on any statement made by anyone unless it is contained in the contract. (See § 21.29[12][c], below, on merger or entire agreement clauses.) The customary "as is" and merger clauses are not sufficient to expressly waive warranties now implied in some states and never protect the seller from claims of misrepresentation or fraud.

[ii] New construction

In almost all states, new residential construction is subject to a statutory or common law implied warranty as to condition, habitability or fitness for its intended purpose. Such implied warranties apply to the sale of completed new homes as well as to those under construction at the time of the contract, and usually survive the passing of title. Where implied warranties do not survive the closing, the purchaser should attempt to negotiate a provision setting forth the seller's liability for defects in construction after the closing. It is advisable to obtain at least a one-year guaranty against defects in construction and an assignment by the seller of all warranties and guaranties the seller receives from subcontractors and suppliers. Few states extend the implied warranty beyond the sale of the home to the initial

purchaser, although a minority of states extend the warranty to a subsequent purchaser, at least as to latent defects not discoverable at the time of the subsequent purchase.

In general, statutory provisions regarding the condition of newly constructed homes presume certain warranties regarding workmanship and fitness for habitation to be implied in the contract of sale unless they are expressly waived. For example, under such a statute, there may be warranties for a specified or reasonable period of time that the new home will be free from defects due to unskillful construction; the plumbing, electrical, heating, cooling and ventilation systems will be free from defects due to unskillful installation; and the home will be free from material defects. In some states, such statutory provisions coexist with a common law implied housing merchant warranty of habitability or fitness.

In most states, the parties may expressly disclaim implied warranties for new construction. Some statutes require that the disclaimer must be clear and conspicuous. Usually, a simple "as is" clause is insufficient to disclaim implied warranties.

[iii] Disclosure of defects

In residential transactions, a growing majority of states now require the seller and/or the seller's agent to disclose facts which materially affect the value or desirability of the property, especially if such adverse facts are peculiarly within the seller's knowledge and are not discoverable by a reasonable inspection. The seller may be required by law or contract to give the purchaser a written report on the condition of the property. In residential transactions, sellers and brokers have been sued for both undisclosed physical defects in the property and undisclosed nonphysical facts about the property, such as alleged ghosts,ⁿ¹ murdersⁿ² and former occupants infected with the AIDS virus, and even the presence in the neighborhood of a sex offender of whom the residents in the neighborhood are notified.ⁿ³

Even where not required by local law, many brokers now recommend that sellers give such a report, to protect both the broker and the seller from liability for nondisclosure. Disclosure statements generally include information about structural defects, utilities, water, septic systems, defects in equipment and appliances, environmental problems and regulatory compliance. The seller's attorney should discuss the relevant disclosure law with the seller to determine what disclosure must or should be made under the circumstances.

State disclosure statutes do not eliminate the purchaser's duty to inspect the premises, at least for apparent defects, and the contract should still be made contingent upon the purchaser's inspection if such an inspection has not occurred before execution of the contract.

[iv] Disclosure of lead-based paint hazards

Federal law requires the disclosure of lead-based paint hazards to individuals who are renting, buying or renovating pre-1978 residential housing.ⁿ⁴ Lead-based paint and paint dust is often found in housing built before 1978. Lead is very dangerous, especially to young children and pregnant women. It can cause death, damage to the brain and nervous system, behavior and learning problems, reproductive problems, high blood pressure, slowed growth, hearing problems, and many other health problems in children and adults. Lead may be breathed into the body as dust from old paint, and small children often eat paint chips. Lead is extremely difficult to remove from the body.

Sellers of pre-1978 housing must disclose known information on lead-based paint hazards before selling a house, and landlords must disclose such information before leases take effect. Both sales contracts and leases must include a lead warning statement and disclosure information. Renovators must provide information about lead-based paint before starting work.ⁿ⁵

The seller and the broker are responsible for providing lead-based paint information to the purchaser before the sale.

The information required by law includes both specific information about the property being sold and general information about lead-based paint hazards. The seller must disclose known lead-based paint and lead-based paint hazards and provide available records and reports to the purchaser. The seller also must give the purchaser the pamphlet, developed by EPA, HUD, and the Consumer Product Safety Commission (CPSC), titled "Protect Your Family From Lead in Your Home."⁶ The purchaser must be given a 10-day period to conduct a lead-based paint inspection or risk management at the purchaser's expense. The parties have flexibility to negotiate the key terms of the evaluation.⁷ Finally, the sales contract must include certain notification and disclosure language.

Note that the law does not require the seller to test for lead-based paint or to remove such paint if it is known to exist. The law also does not invalidate a sales contract that does not include the required disclosure. However, any person who violates the lead disclosure requirements may be subject to civil and criminal penalties, as well as treble damages in a private civil suit.⁸

[v] Responsibility for defects and losses occurring after contract executed

Disputes often arise where, at the time the contract is executed, a particular item is functioning, but is no longer working by the time the closing or transfer of title occurs. Under an "as is" contract, the purchaser has no recourse unless the malfunction is due to deliberate misuse of the item. Under a "good working order" contract, the seller must repair or replace the item. Often the repair will be in the form of a credit of a specified amount against the purchase price at closing. The seller may be too busy to repair the problem or the purchaser may wish to select his or her own replacement. In addition, the warranty on the repair will run to the purchaser if the purchaser obtains the repair. If a repair or replacement is required, the parties should obtain two or three estimates of the cost. The parties can agree to take the lowest or use the average. Therefore, estimates should be sought only from reliable sources, capable of accomplishing the repair.

In a minority of states, the risk of a major casualty loss to the premises will be governed by the Uniform Vendor and Purchaser Risk Act. This provides that risk of loss remains with the seller until the transfer of title or possession, whichever occurs first. Thus, the seller must remain insured until the transfer of title. If the purchaser is allowed possession before the transfer of title occurs, the purchaser must obtain insurance before taking possession. The contract of sale may expressly waive the statutory allocation of risk, and the parties may allocate the risk of a casualty loss as they see fit.

In states where there is no statute governing the risk of loss, it is important to include a risk of loss provision in the contract. If a loss occurs and the contract is silent, it may become necessary to litigate the question of who bears the risk of loss. Since such litigation is expensive, and case law in this area varies a great deal from state to state, both of the parties' attorneys should advise their respective clients to negotiate a risk of loss provision.

[f] Conveyance of Non-Possessory and Non-Surface Interests

Frequently the conveyance of the primary piece of real property also includes non-possessory or non-surface rights that may be required to be conveyed with the real property. If so, these need to be adequately described in the contract.

Non-possessory rights include easements that may be required in order to use the real property. For example, an easement to gain access to the property for ingress or egress, or an easement to allow utilities or telecommunications facilities to be brought to the boundaries of the property may be required before the property can be used. If such easements are required for use, the purchaser's attorney must ascertain if such easements already exist and can be conveyed, or whether they need to be created as part of the transaction, and then conveyed. The title company should be asked to insure these rights when they are conveyed to the purchaser.

Non-surface interests include mineral interests in place, such as rights to oil and gas, and water rights. If the mineral

interests in place are not available to be conveyed, the seller may have rights to oil and gas on adjoining properties by virtue of oil and gas leases on the adjoining properties. These can be conveyed by assignment of the oil and gas leases to the purchaser. The purchaser's attorney should review the oil and gas lease to ascertain its terms prior to requesting that it be part of the sale.

[3] Purchase price

[a] In general

The contract must specify the total purchase price. The contract should specify how and when such price will be paid. Typically, a deposit is made when the contract is executed. This deposit is held until the closing, at which time it usually is applied to the total purchase price. The total purchase price due at closing generally is adjusted to account for such items as taxes, fuel, prepaid services, water and sewer, and special assessments. Payments, both of the deposit and at the closing, are usually made by certified or bank check. In commercial sales, deposits are often made by wire transfers. A letter of credit is sometimes used for the deposit.

[b] Deposits

A deposit, sometimes called an earnest money deposit or a downpayment, usually is made when the contract is executed. A second deposit may be required when the contingencies are satisfied. The seller will want the deposits to be as large as possible to indicate the purchaser's strong commitment to the property. The purchaser will want the deposits to be as small as possible, especially if the purchaser will not be earning interest on the deposit while the sale is pending. In addition, if there is a termination of the contract due to a breach by the purchaser, the deposit is usually forfeited.

Typically in residential sales, especially where the contract has been prepared by a broker, deposits are held by the real estate broker in an escrow account. However, the seller's attorney will usually prefer that an independent third party, such as a lending institution or title company, hold the deposit as escrow agent. If there is no broker, the deposit may be held by either attorney in a trust or escrow account. In commercial sales, deposits are sometimes held by the seller's attorney. In some jurisdictions, deposits are held by the title company.

Although interest usually is not paid on deposits, if the deposit is quite large, or to be held for a lengthy period of time, the title company, whether or not acting as escrow agent, may be required by the contract to open an interest bearing account. The account should carry the social security or taxpayer identification number of the party who is to receive the interest. The contract should specify who is to receive the interest and pay income tax on it. Usually, the party who receives the deposit also receives the interest.

If, for any reason, there is no closing, either party to the contract can make a written demand on the broker, attorney or other escrow agent holding the deposit for payment. The escrow agent will then notify the other party of the demand and the escrow agent's intention to pay the deposit money. The escrow agent may pay the deposit to the demanding party if he or she does not receive a written objection from the other party. If the other party makes an objection, the escrow agent must hold the deposit until he or she is directed by the parties or a court judgment to do otherwise.

[c] Purchase money and existing mortgages

Although technically a purchase money mortgage is defined as a new mortgage given in connection with the purchase of real property, including an institutional mortgage, more commonly, a purchase money mortgage is thought of as a mortgage given in connection with a loan by the seller to the purchaser. In most cases, the parties know that they intend to enter into a purchase money loan and mortgage arrangement before they execute the contract, and the forms to be used for the note and mortgage (or deed of trust in some states) should be attached to the contract and incorporated by reference. If the sale also will be subject to an existing mortgage securing a mortgage debt evidenced by a promissory

note, the parties should negotiate appropriate subordination provisions.

If the parties intend that an existing mortgage securing a mortgage debt will continue after the closing, that mortgage and note evidencing the debt should either be attached to the contract or described in detail. The note should disclose all relevant provisions regarding the principal amount, interest rate, installment payments and final maturity date. The purchaser's attorney should include in the contract an express representation by the seller that the mortgage and note attached or described are true and complete, do not contain a due on sale clause, is not now in default, and will not be in default at the time of the closing. If the existing mortgage requires the mortgagee's consent to the sale, the contract should require the seller to request such consent within a specified number of days after the contract is executed. The contract may require the purchaser to accept expected conditions of the mortgagee's consent, such as a specified increase in the interest rate. The contract also should permit the purchaser to terminate the contract if the mortgagee fails or refuses to consent to the sale or requires an additional payment or a change in the terms of the mortgage note as a condition of its consent. The seller should have a similar termination right if he or she is taking back a purchase money mortgage.

[d] Adjustments to purchase price

Several adjustments to the purchase price are typically made. These are actually adjusted and paid at closing. Adjustments should be specified in the contract.

[i] Taxes

Real property taxes sometimes are paid in advance, sometimes in arrears. These include state, county, municipal and school taxes. The attorney must check the period covered by each installment. Some are annual, some are semiannual, and some are quarterly. If the taxes have been paid, the seller will be entitled to a refund from the purchaser for the remaining period of the tax year after the transfer of title. If the taxes have not yet been prepaid, the purchaser will be entitled to a credit from the seller for the period of time in the tax year preceding transfer of title.

In new construction, or in the case of subdivision of an existing tract, the parcel to be purchased may not be separately assessed. It may be assessed as one parcel of vacant land. In that case, an estimate must be made. Many developers waive the adjustment because the amount is small in comparison to the effort required to perform the calculation. If the adjustment is not waived, the usual method is to divide the total tax by the number of acres in the entire parcel and to multiply by the number of acres purchased. When the actual tax bill for the split parcel is obtained, the parties can agree to recompute the prior adjustment that was done.

[ii] Fuel

Where the premises contain fuel oil or propane gas in tanks, the contract should provide that the purchaser will reimburse the seller for the amount on hand at the transfer of title. The seller can measure the tank or have it filled to a known capacity just prior to transfer of title. Generally, the contract will provide for reimbursements by the purchaser at current fair market value. Attempting to use the amount paid by the seller will be difficult. Since tanks are not emptied before filling, the seller may have paid varying amounts at different times when the tank was filled.

[iii] Prepaid services and wages

The cost of certain services affecting the real property may have been prepaid by the seller. These may include such services as trash removal, heating and air conditioning service, elevator service, building management, lawn care and security systems. The contract should specify that these will be reimbursed to the seller by the purchaser at closing. In addition, the contract should require the seller to assign his or her interest in such contracts, if assignable.

If such contracts are written, they should be reviewed to be sure that there are no prohibitions against assignment and

that all necessary notices are timely given. If the assignment of the seller's rights requires the vendor's approval, the contract of sale should provide that the seller will obtain the vendor's written approval. The purchaser's obligation to reimburse the seller for the remainder of the period should be conditioned on the seller obtaining the vendor's approval.

The wages and benefits of building employees who will not be terminated upon the sale of the building also must be adjusted at the closing. Such an adjustment must include salaries, commissions, bonuses, vacation pay, pension and welfare benefits, and other fringe benefits.

[iv] Water and sewer expenses

Each locality has a different system for billing water and sewer expenses. Some areas have a municipal water and sewer system. Some areas have private water and sewer companies. Generally, municipal systems bill by usage or periodic minimums or a combination thereof. If not paid, these charges may be levied on the following year's general tax, thereby becoming a lien against the property. Private water and sewer companies are not afforded that privilege. They must use suspension of service and/or regular debt collection techniques to collect past due payments.

Some suppliers will provide an interim bill which terminates service on the seller's account and begins service on the purchaser's account. This is convenient, as a final bill will be sent to the seller which will be the seller's responsibility. Other suppliers do not provide interim bills. If the supplier has a "minimum" system, the bill must be allocated between the parties to reflect the number of days each will own the property during the billing period.

If the supplier has a "usage" system, a meter reading must be taken at or about the date of transfer of title. Generally, the supplier, based on the meter reading, can give a dollar amount to be credited against the purchase price or paid to the purchaser. The purchaser will receive and be responsible for the future bills.

This can be very difficult, because suppliers may bill at unusual times. In addition, there is often a significant lag between reading the meters and sending regular bills, so that a reading in one month may not be billed until several months later. It is important to verify with the supplier that all previous bills have been rendered and paid.

The contract should specify the supplier of water and sewer services and the method of billing. The contract should provide for an adjustment of water and sewer billing at the closing. In addition, it should contain a provision that the seller will hold the purchaser harmless for any past due bills. This provision, by its terms, should survive the transfer of title.

[v] Special assessments

Special assessments are often levied on a particular area to fund municipal installation of the infrastructure, including lights, streets, sewers, storm sewers, and roads. The municipality issues bonds to pay for the cost of the work and repays the bonds from the assessments. The assessments are usually levied for a set period, such as ten or twenty years, but often may be prepaid at a reduced amount. If a prepayment has been made, whether for the year or in its entirety, the contract may provide for reimbursement by the purchaser to the seller for the remaining period which the prepayment covered, unless the purchase price included what was considered to be the value of the improvement.

[vi] Rent

In a sale of a tenanted building, adjustments must be made at the closing for prepaid rents, percentage rents, escalation charges, and rent arrears. The seller should pay the purchaser for the unearned portion of any prepaid rents and for any future rent concessions or abatements given by the seller. The purchaser should be required to pay to the seller the seller's proportionate share of percentage rents and escalation charges to the extent they apply to a period of time prior to the closing of the transaction, since those payments are based upon future calculations of past amounts due.

Commonly, where there is rent in arrears at the time of the closing, the contract provides a formula for apportioning any payments received for such rent after the closing. The rent is generally applied first to the seller for the month before the month in which the closing occurred. The rent is next apportioned between the seller and the purchaser for the month in which the closing occurred. Then the payment is applied to the amount owed to the purchaser for the months after the month in which the closing occurred. Finally, if any money remains, it is applied to the seller for the period of rent arrears occurring before the month with respect to the month in which the closing occurred. The parties may agree to handle rent arrears in some other manner if they so choose.

[vii] Property Owners' Association Assessments

Residential properties are frequently part of a development that has a property owners association set up to maintain and operate certain amenities within the development. The association is authorized to assess the owners on a monthly or quarterly basis to pay for the costs of the association. These assessments are usually prorated as part of the sale. The contract should provide how the assessments shall be prorated depending on whether they are prepaid or accrued.

[4] Contingencies

[a] In general

Contingencies to the contract are designed to protect the purchaser from perils which cannot reasonably be determined at the time the contract is executed. The properly drafted contingency will set a period of time within which the purchaser or the purchaser's agent may conduct a specified test. The contingency may specify an acceptable result for the test. If that result is not achieved, the purchaser may terminate the contract and receive a refund of his or her deposit, provided that he or she timely gives notice of the failure. If the purchaser does not give notice to a specified party (usually to the seller, the seller's attorney, or the seller's real estate agent) within the specified time, the contingency is deemed waived. Subject to any other unresolved contingencies or contract provisions, the purchaser is obligated to complete the purchase.

Frequently, when the required test fails, the purchaser may still want the property. The parties may amend the contract to reflect the cost of alterations required to pass the test. This is typically done in one of two ways. The purchase price may be reduced, in which case the purchaser will bear the expense of repairs or alterations after the transfer of title. Alternatively, the price may be maintained and the seller required to perform the alterations or repairs prior to closing, or if time is a factor, may be required to deposit funds into escrow or to have funds held back from the net sales proceeds until the work can be done. In the latter event, the funds held in escrow will be used to cover the costs after the repairs are completed.

Where the seller will perform repairs, an amendment to the contract should specify the scope and nature of the work which is to be performed, the materials to be used, and the results to be achieved. In addition, the amendment should provide for inspection and/or additional testing to be sure that the desired result was achieved. The amendment should also provide that all work will be done in a workmanlike manner.

Occasionally, a lender will require that work which the purchaser is obligated to perform be completed prior to closing. In that case, a contract amendment must grant the purchaser access to the property and specify the risk of loss in addition to those items specified above. The purchaser and his or her contractor must be insured, and the amendment should specify the required levels of insurance. The amendment should also specify whether there will be a payment to the purchaser to cover the cost of the work if the closing does not take place for a reason other than the purchaser's fault.

At any time, the parties may agree to the extension of a contingency to allow further testing or investigation. This is helpful in preventing a viable purchaser from canceling the contract just to protect himself or herself when the purchaser

really wants the property.

Generally, the cost of testing to satisfy a contingency is borne by the purchaser; however, this may be negotiated. Although there are many possible contingencies depending upon the circumstances of the transaction, the following discussion reviews some of the contingencies which are typical in a real estate transaction, including several common environmental contingencies. For a more detailed discussion of environmental contingencies and specific forms relating to them, see Vol. 33, Chapter 25, *Environmental Considerations in Real Estate Transactions*, *infra*.

[b] Wood-boring organisms

Wood-boring organisms include termites, carpenter ants, powder post beetles, and other organisms which eat or tunnel into wood. Such organisms can cause serious structural damage in a very short period of time. They are typically found in dark or damp places or where wood contacts the ground directly.ⁿ¹

The usual standard for the contingency is that there shall be no wood boring organisms, or damage from wood-boring organisms, present in the structures on the premises. The purchaser usually is given the right to terminate the contract if there is any evidence of wood-boring organisms or damage from such creatures. If such evidence is found, the parties can modify the agreement to provide for extermination and repairs and to designate who will pay for such work.

A qualified inspector can determine whether wood-boring organisms are present and whether any damage has been done. The inspector can determine the cost of extermination. A contractor's estimate may be needed to determine the cost of repairs, if any.

An inspection usually costs less than \$100, and can be accomplished in approximately one hour. Before establishing the time frame for the contingency, the inspector should be approached to determine how quickly he or she can schedule an inspection and the type of guaranty provided.

[c] Well water quality

Well water should be free of harmful bacteria.ⁿ² The most frequently found bacteria are E. Coli and Coliform. The presence of these may be determined from a laboratory test performed by a qualified laboratory. The water is drawn from a tap in the building and delivered to the laboratory for analysis. Depending on the laboratory, a week or two may be required to obtain the results.

If bacteria are found, the well may be disinfected by adding chlorine to it. This is not very costly. The well must then be retested. If bacteria are still present, it may indicate a more serious problem, such as seepage from the septic system. The source of contamination must be located and remedied. This may be very costly. It may require the use of an engineer and extensive excavations. It may ultimately require the relocation of the septic system or the well. Both solutions are very costly.

In addition to the bacteria, other substances may be present in the water. Although some are not considered harmful, they may be noxious or unpleasant, such as sulphur or iron, which have a characteristically unpleasant smell. Others may be quite harmful, such as lead or methane gas. The presence of these and other substances also can be determined by laboratory tests. There are generally recognized industry standards of acceptable levels of substances; however, personal taste may not always be the same as industry standards. This should be taken into account when drafting the contingency.

If unwanted substances are found in the water, some of them may be removed by a filtering system which can be installed. Others, such as methane gas, must be removed by a ventilation system to prevent an explosion. The initial cost of such systems and the maintenance thereof varies widely and should be investigated thoroughly before negotiating an

amendment to the contract.

[d] Well water quantity

In determining the standard to use in the contingency, the purchaser needs to consider his or her own anticipated use of water in addition to the quantity which may be required by the lender. There is no "industry standard" as such. The purchaser should get in touch with his or her intended lender(s) to obtain the quantity standards which they use. The standard is generally expressed as a sustained flow of a specified number of gallons per minute for a specified number of hours, such as four gallons per minute for four hours.

If the well does not produce the required number of gallons, several solutions may be attempted. A holding tank can be added to the water system to store water pumped from the well, giving added capacity during heavy uses such as showering and using washing machines and dishwashers. This solution is the least expensive way to proceed.

The well may be deepened. This solution has potential problems. It may not produce the desired increased flow. In addition, the process of deepening may tap into veins of water or minerals which may affect the quality of the well water.

A new well may be dug or drilled. Again, this may not produce any additional water and the quality of the water may not be acceptable.

Hydrofracturing may be undertaken. Hydrofracturing is a process of breaking up veins of water to make them more readily available to the well. This includes a variety of techniques, including blasting. It has the inherent dangers associated with blasting and is not guaranteed to produce the desired results. A seller should be extremely reluctant to allow this to occur prior to transfer of title. If the seller does allow hydrofracturing, a hold harmless agreement and substantial amounts of insurance should be obtained prior to the commencement of work. A thorough investigation of the qualifications of the hydrofracturer should be undertaken.

[e] Septic system

Three issues need to be considered with a septic system. First is whether the system is functioning. This is generally determined by the use of a dye test. A quantity of dye is placed in a toilet, which is flushed. The septic system is observed to determine where the dye goes.

Second is whether the system has adequate capacity. Local laws generally provide standards for capacity, which in many areas have increased over time. An older home may have a very small system. In addition, the size of a family and its habits will impact on the sufficiency of capacity. Generally, unless records exist on the capacity, it may be necessary to excavate to determine the size. The local health department often can provide information on the appropriate size for different size families.

Finally, as size standards have changed over the years, so have standards for types of systems. There are many types of septic systems. The type necessary depends on the amount of use, soil type, drainage, density of housing, and proximity of nearby waterways. Although an existing system may be grandfathered, if the system needs an alteration due to breakdown or lack of capacity, the locality may require replacement with a system which meets current code rather than allow a mere repair of the existing system.

Before drafting the contingency, the attorney should obtain information regarding capacity needs and the required type of system. Consideration should be given to a contingency which requires the system to be in good working order and to be of sufficient capacity for the purchaser's uses. If the system fails either test, it is likely that a new system will be required. Depending on the type of system required, a new system may be very costly. Estimates should be obtained

before negotiating any amendment to the contract of sale. A seller may be very reluctant to contribute to the cost of a septic system replacement where the system has been adequate for the seller's needs. The purchaser may have to accept a large share of the cost to keep the deal together.

[f] Structural inspection

A structural inspection consists of a thorough review of the beams, joists, foundation, roof, plumbing, heating, air conditioning, ventilation, and other major systems in the structures, the purpose of which is to determine whether any major defects exist. Such an inspection may be performed either before the parties sign the contract or as a condition subsequent in the contract.

Structural inspections are typically performed by architects, engineers, or "structural inspectors." In most states, there are no statutory qualifications for an inspector, so it is recommended that the inspector's qualifications be examined before he or she is engaged. The purchaser should also make sure that the inspector has errors and omissions insurance and should determine whether the inspector includes a limit of liability in his or her report. These items are vital in case a major defect is missed by the inspector. Such a defect can be costly to repair and can affect the integrity of the house.

In drafting the contingency, it is always problematic to define the term "major structural defects." Some attorneys define it in terms of the cost of repair. For example, any single item which will cost in excess of \$500 to repair is a structural defect. Other attorneys define it in terms of the importance of the item to the integrity of the house. Each approach has its problems, because reasonable minds may differ as to cost or importance of an item.

Other problems arise in the way that structural inspectors make their reports. For example, a report may state that the roof is not leaking but is of an age where it has reached the end of its expected life. This clearly will raise a concern with the purchaser, since the cost of a new roof is substantial; however, the seller will argue that it does not constitute a defect.

Similarly, some inspectors will classify a noted insufficiency as a "major defect," when the insufficiency may not meet the contractual definition of a major structural defect. Once clients have seen such a report, it may be difficult for them to comprehend the difference between the inspector's use of the term and that of the contract. It may be helpful to obtain an independent estimate of the repair cost to support the purchaser's claim or defuse it.

Some inspectors will not provide estimates of costs to repair. Some inspectors will not opine on certain items and recommend that a roofer or plumber be consulted for a more detailed determination of a potential problem. The purchaser should obtain estimates only from parties whom the purchaser would be willing to hire to do the work. This will prevent an estimate which has no relationship to reality.

Major structural defects, by their nature, are costly to repair. The purchaser may be unable to obtain a mortgage with such defects. The seller may not have enough cash to make repairs. Structural defects often result in termination of the contract. The parties may be able to negotiate an agreement with the contractor where the contractor will agree to accept payment at the closing instead of immediately. The contractor may exact a premium or interest in order to agree to a delayed payment.

[g] Radon gas inspection³

Radon is a colorless, odorless gas which occurs naturally. It has been linked to high levels of lung cancer.⁴ Radon enters structures through the foundation, through water, and through radon containing building materials used in the structure. Radon is only dangerous in enclosed areas.

Radon testing can be done with home test kits, which are purchased, set up in the basement, and mailed to a laboratory

at the end of the test period. Alternatively, a radon testing company can be hired to test. The home test kits are often not as accurate. If a borderline result is achieved, the purchaser may wish to retest with a more sophisticated test. Most tests require the maintenance of "closed door" conditions. That is, the seller must agree to keep the house closed up for the test period and limit the number of times the doors are opened. This may be difficult during a heat wave. The test conditions which must be observed by the seller should be made part of the contingency. The cost of testing is usually between \$100 and \$200, and is customarily paid by the purchaser, although this is certainly negotiable.

Radon testing is not mandatory in most states, but many institutional lenders require such testing as a part of the mortgage application process. A radon contingency must provide what test is acceptable to the parties and must provide sufficient time for the testing to be completed. Before drafting the contingency, the purchaser's attorney may need to contact the radon testing company to determine how much time will be needed to complete the test.

A radon contingency should give the purchaser the right to terminate the contract if radon levels are above a specified amount. The amount of radon is expressed in pico curies per liter of air. Although there is no level of radon which is deemed safe, it is generally believed that it is difficult to reduce radon levels below 4 pico curies per liter. The higher the level of radon, the greater the need to reduce the level.

It may be helpful for the clients and attorneys to become familiar with current literature on radon. The United States Environmental Protection Agency publishes several pamphlets on radon.ⁿ⁵ They may be useful in making an informed determination as to what radon level is high enough to require a prudent purchaser to seek remediation or cancellation of the contract.

Reduction of radon levels can be performed in a number of ways depending on the source, radon level, and type of construction. The simplest methods involve ventilation of the basement. The more complicated methods require suctioning of air from under the basement. The cost can be considerable. There may be disadvantages to certain systems such as increases in heating costs.

After a reduction method is installed, the structure should be tested again to be sure that the method has been successful in achieving a reduction in the radon level. If remediation is to be done before closing, the contingency should be extended until the final testing is complete and shows an acceptable level. A practical consideration to keep in mind is that the other contingencies which are costly to satisfy, such as the mortgage contingency, should also be extended. The purchaser will spend a considerable amount of money in satisfying the mortgage contingency, including application fee, points, appraisal fee, credit report, title searching and survey fees, all of which are non-refundable. If the radon cannot be effectively reduced, the money spent on the mortgage application would be wasted.

[h] Asbestos inspectionⁿ⁶

Asbestos is a substance which was used in the past for its flame retardant and insulating properties. It is frequently found in older homes wrapped around pipes, furnaces, and in ceiling and floor tiles. Asbestos is known to cause lung disorders, including asbestosis and cancer.ⁿ⁷

Since the mid-1980s, there has been a movement to remove or encapsulate asbestos in all structures. Asbestos has been classified as a "hazardous air pollutant" under the Clean Air Act.ⁿ⁸ Work with asbestos is dangerous and costly. Asbestos workers must be certified to handle asbestos and must wear protective gear. Work areas must be sealed and negative air pressure must be maintained to prevent contamination of other areas. Air quality monitoring must take place to be sure that the fibers have been successfully removed.

The presence of asbestos is usually confirmed by microscopic examination of the suspected material. A certified asbestos handler can report whether the condition of the asbestos requires its removal.

The contingency should allow for termination of the contract if any asbestos is present. If the parties already know that asbestos is present, the purchaser may wish to make the contract contingent upon its removal with a satisfactory clearance air test, or upon a report by a qualified party that the condition of the asbestos does not require its removal.

The cost of removal depends on the quantity of asbestos and the location. For example, if the asbestos is solely on pipes in the basement, it can be removed by the glove bag technique, which does not require as many protective measures. However, if the asbestos is found in several rooms in tiles, it will be quite costly to remove. If it is on the furnace, replacement insulation will be required. Where the furnace is older, it may be less expensive to replace the furnace than to reinsulate.

The seller is frequently reluctant to contribute to the cost of removing asbestos which he or she has lived with, especially if it includes the cost of replacing a furnace which is working. It may be a better approach to take the possibility of asbestos removal into account when making the original offer rather than trying to do so in resolving the contingency.

[i] Urea formaldehyde insulation⁹

During the energy crisis in the 1970s, many existing buildings had insulation added by blowing foam into the spaces between the outer siding and the interior walls. The foam would harden into a solid, providing some insulation. Some of this type of insulation contained urea formaldehyde. A number of health problems have been reported from exposure to the fumes released by the insulation. Once in place, the hardened foam is difficult to remove. Generally, the removal of insulation requires the removal of the exterior siding.

Because of the potential health hazards, many lenders require certification that the building contains no urea formaldehyde insulation. If, upon inspection of the building, plugs in the siding are visible, further investigation is warranted. Unless records are available specifying the composition of the blown-in insulation, a piece of siding should be removed and a sample taken. If analysis shows that it contains urea formaldehyde, a contractor's estimate for removal and reinsulation should be obtained.

The contract contingency should specify the location where the siding may be removed for sampling. The contingency should also provide that the siding be replaced and the paint touched up if needed.

The contingency should provide the purchaser with the ability to terminate the contract if *any* urea formaldehyde insulation is present. The cost of removal is high because it is very labor intensive. If the purchaser still wants to purchase the property, an amendment to the contract of sale may be negotiated. The amendment should provide either that the seller will perform the removal and reinsulation with the price remaining stable or that the purchaser will perform the removal with a reduction in the purchase price.

The lender may require that the removal be completed before closing or a holdback from the mortgage for the costs of removal be made. This should be verified with the lender prior to negotiating an amendment to the contract of sale. The holdback is the preferable procedure, if the seller will wait for the held back funds. Otherwise, the purchaser may be making improvements to property which he or she does not own. There are a number of risks inherent in such an arrangement. If the closing does not occur, the purchaser may have to sue the seller for unjust enrichment to recoup the purchaser's investment. The seller may counterclaim for any damage resulting from poor workmanship. If a person or property is injured, both the purchaser and the seller will likely be sued. The parties should be certain that each of them and any contractor is properly insured.

[j] Lead¹⁰

Lead is often found in structures built before 1978 in the paint and/or in water pipes. Lead is very dangerous, especially

to young children and pregnant women. It can cause death, damage to the brain and nervous system, behavior and learning problems, reproductive problems, high blood pressure, slowed growth, hearing problems, and many other health problems in children and adults. Lead is introduced into the body in a variety of ways. It leaches into the drinking water from pipes. It may be breathed into the body as dust from old paint, and small children often eat paint chips. Lead is extremely difficult to remove from the body.ⁿ¹¹

Federal law requires that individuals receive certain information before renting, buying or renovating pre-1978 housing.ⁿ¹² Sellers must disclose known information on lead-based paint hazards before selling a house, and landlords must disclose such information before leases take effect. Both sales contracts and leases must include a lead warning statement and disclosure information. Renovators must provide information about lead-based paint before starting work.

The presence of lead pipes can usually be determined by visual inspection. Lead paint problems can be determined by visual inspection of paint condition and location, surface dust tests, spectrography or chemical tests of samples. Home test kits generally are not considered to be reliable.

The dangers of lead water pipes can only be eliminated by removal and replacement of the pipes. The cost of this will depend on the number of pipes and the ease of access to them.

Lead paint can be handled in three ways: removal of the surface containing the paint, encapsulation (*i.e.*, by sheetrocking over the surface), or by sanding the surface. Removal is the most permanent and most expensive method, and it causes the least amount of lead dust. Encapsulation may not be permanent and is moderately expensive. As the seams age, lead dust may escape. Encapsulation may not be performed by painting alone. Sanding is not recommended, as it produces high quantities of lead dust; however, sanding is a lower cost alternative and deemed permanent.

In drafting contingencies, the attorney should draft separate contingencies for lead pipes and lead paint respectively. The pipe contingency should allow termination of the contract if any lead water pipes exist.

A lead paint contingency should be included in any contract for the sale of a structure built before 1978, especially if the structure is a residence and the purchaser or anticipated tenant has small children. A commercial property contract should contain a contingency that at least provides for testing for lead dust, which is harmful to people of any age.

The lead paint contingency should allow the purchaser to terminate the contract if any lead paint or dust is found, or if the soil around the premises is found to be contaminated with lead. Alternatively, the contingency may provide that the agreement will be modified to provide for the remediation of any lead problem. The contingency should specify the method of testing and analysis to be used and should require that multiple samples be taken in each room, as well as soil samples from outdoors. The contingency should provide for repair of the sampled areas.

The lead paint contingency also should specify the qualifications and credentials of the party performing the sampling and analysis. It is important to be sure that the inspector is qualified and has received training in sampling and spectrography techniques.

Upon receipt of the results, the purchaser will have to decide whether remediation is required under the circumstances. If the purchaser has no small children and none are expected, he or she may decide against the expense. If the purchaser has small children or is purchasing a building where children may live or visit, he or she may be advised to seek another property.

[k] Mold Inspection

Mold inspection contingencies are becoming more common, possibly because of publicity surrounding litigation involving claims that mold has been the primary cause of personal injury to certain persons exposed to it. Mold belongs

to a group of unicellular or multicellular organisms known as fungi. Fungi that is found indoors growing as branched filaments is what has caused concern. The most common, allegedly toxic, mold that you hear about is "black mold," technically called *Stachybotrys*. Some experts believe that these black molds generate volatile vapors known as mycotoxins. Black mold grows on water saturated or water damaged cellulose items.

The most common response to mold exposure is an allergic reaction in those with an allergy to the mold. Infections from mold are possible in an immunosuppressed individual. It is alleged that children are particularly susceptible to mold because their immune systems are still developing.

Currently there are no state or federal regulatory standards establishing permissible levels of molds or mold spores in indoor air. Guidelines that are currently available, which have been published by state and local governments, and by the U.S. EPA, talk in terms of when mold needs to be cleaned up and how to clean it up. In general, the guidelines state that where mold growth is visible, it is at a level that requires remediation.

It is important to hire an expert who is familiar with the problem, knows where and what to look for, and knows how to test the source samples or air samples taken. If it does exist, the contingency should allow the purchaser to terminate the transaction unless the seller is willing to remedy the problem. The inspector should propose a plan for remediation and estimate of its cost.

[l] Attorney's approval

This is used primarily where a lay person has drawn the contract and the parties have signed before the attorneys can review the agreement. This contingency allows the attorneys to correct the wording and clarify any ambiguities. As with the other contingencies, it is waived if not acted upon within a specified time period. The contingency generally cannot be used to change the substance of the deal, such as the purchase price.

If there are items which need to be changed, the attorney typically sends a letter stating that he or she disapproves of the contract unless the following changes are made, or sends a proposed amendment to the contract. If the changes are not made, the contract is terminated and the deposit returned.

[m] Sale of present home by purchaser or purchase of new home by seller

These contingencies, used in residential sales, generally provide a specified period of time either for the purchaser to sell his or her present home or for the seller to locate a new home. Where the contract is contingent upon the purchaser selling his or her present home, it usually also provides that the seller may consider additional offers. If the seller receives such an offer which is acceptable, the seller may give the purchaser a notice of the offer. The purchaser then has a specified period of time (usually quite brief, such as forty-eight hours) in which to remove the contingency. If the purchaser fails to do so, the seller may terminate the contract and accept the second offer.

In both types of contingencies, consideration should be given to extending the satisfaction of all other contingencies to dates after this contingency is satisfied. Most other contingencies require the expenditure of sums of money for tests or inspections. If the contract may fail due to a contingency requiring one of the parties to sell or purchase another home, it is unwise to spend money on those other contingencies.

[n] Environmental site assessment

The prospective purchaser of real property should try to obtain full disclosure from the seller of any possible environmental problems. Pursuant to disclosure requirements in some states, discussed at § 21.29[2][e][iii] above, the seller may have a duty to disclose environmental problems which constitute defects in the condition of the premises. Even in states with such disclosure requirements, the purchaser should conduct an independent environmental

examination of the property appropriate to the circumstances.

Environmental site assessments are not yet as typical in residential sales as in commercial sales. A Phase I assessment reviews the history of use of the property through public records, interviews, aerial photographs and maps, to determine whether there is any evidence that the site or a nearby site was ever used for an environmentally hazardous use. If any such evidence is found, a Phase II review, which includes sampling of soils, air and water, is performed. The cost of a Phase I assessment is quite high, and a Phase II assessment is even more costly. An environmental site assessment contingency usually provides that the sale of the property is contingent upon the purchaser obtaining a Phase I assessment which finds no evidence of adverse environmental impact.

Under the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA),ⁿ¹³ an owner has a strict liability obligation to clean up hazardous wastes on its site. The cost of clean up can be immense. Thus, if an environmental problem is uncovered by an environmental site assessment, the purchaser should reserve the right in the contract to terminate the contract promptly.

For a more detailed discussion of environmental assessments and specific forms relating to them, see Vol. 33, Chapter 25, *Environmental Considerations in Real Estate Transactions*, *infra*.

[o] Mortgage contingency

The purchaser of residential property usually must obtain a loan from an institutional lender to afford the purchase price, but also usually must execute the contract of sale before obtaining the loan. To protect the purchaser from liability if he or she is unable to complete the transaction because a loan cannot be obtained, the purchaser's attorney should insist that the contract provide that it is conditioned upon the purchaser obtaining the necessary financing. Mortgage contingency provisions are less common in sales of commercial property because the purchaser generally assumes the risk of obtaining financing or prearranges the financing before executing the contract.

There are a tremendous variety of mortgage products available in the market today. In some states, deeds of trust are used instead of mortgages. Deeds of trust are nearly indistinguishable from mortgages, and the term "mortgage" will be used here to describe both forms of financing.

When drafting a mortgage contingency, it is extremely important to carefully specify the type of mortgage which, if it is obtained by a particular date, will bind the purchaser to perform. There are three basic types of residential mortgages given by institutional lenders: VA, FHA, and conventional. VA mortgages are available to a very limited population of veterans. They generally require a very small amount of equity, and are guaranteed by the Veterans Administration.

FHA mortgages are generally used by home buyers with very little or no equity. Home buyers may even finance a portion of their closing costs, causing the amount of the mortgage to exceed the purchase price. FHA mortgages are guaranteed by the Federal Housing Administration.

Conventional mortgages cover a large range of products. They may have fixed or adjustable interest rates. Some mortgages have an adjustable rate that may be converted to a fixed rate. They may require private mortgage insurance which guarantees payment to the lender in case of a default under the loan.

When drafting the mortgage contingency, specify the type, the amount and the term of the mortgage, whether the interest rate will be fixed, adjustable or convertible, and the maximum interest rate. The seller may wish to specify the maximum amount of the loan to prevent the purchaser from applying for too large a loan and being turned down.

The use of the phrases "prevailing rate" or "not in excess of the maximum legal rate" to describe the maximum interest rate can cause problems for some purchasers. A change of one percent in the interest rate can make a very significant

change in the monthly payment. A mortgage which is affordable at 9% may not be affordable at 10%, and rates can change rather quickly. On the other hand, because of the unpredictability of interest rates, obtaining a loan at a maximum interest rate which is defined too specifically may be difficult.

In addition, the contingency should specify the maximum number of "points" which the lender may charge. "Points" are considered prepaid interest, which is used to buy down the interest rate. Each "point" is 1% of the mortgage amount. A lender who offers a lower interest rate will often require a larger number of points. A purchaser may not be in the position to pay four points to obtain a 9% mortgage. If the maximum points have not been specified, the purchaser may be required to accept a 9% mortgage regardless of the number of points.

When drafting the contingency, the attorney should confer with the borrower's anticipated lender(s) to determine the expected lapse of time between the application and receipt of the commitment. The attorney should add at least a week to that time to be sure that the borrower's right to cancel if he or she fails to obtain a mortgage commitment will be protected.

The seller's attorney should obtain a clause requiring the purchaser to apply promptly for financing, to pay all required fees, and to notify the seller of the name and address of the lending institution upon making the application. The purchaser also should be required to accept the mortgage commitment, to comply with the lender's requirements, and to deliver a copy of the commitment promptly to the seller.

Typically, the contract provides that if the purchaser fails to obtain the mortgage commitment by the stated date, the contract is canceled automatically, unless the parties agree to an extension or the purchaser waives the mortgage contingency in writing. The seller might prefer to have the right to extend the time for obtaining the commitment unilaterally, the right to obtain financing for the purchaser, or the right to take back a purchase money mortgage. The parties might also choose to provide that, rather than having an automatic cancellation, either party has the right to cancel the contract in writing.

[p] Governmental approvals and rezoning

If the purchaser has any intention of changing the use or structures on the premises, consideration should be given to a governmental approvals contingency. Such a contingency would give the purchaser a specified period of time to determine whether approvals are required and to obtain such approvals. Similarly, the parties may make the sale contingent upon a rezoning of the property.

Several types of approval should be considered. If the structure is a multi-family dwelling, the lender may require certificates of occupancy or compliance for the non-owner occupied units. The contingency should specify that, if there are any violations, the seller shall promptly make all necessary repairs.

If exterior changes are contemplated, the purchaser should determine whether the premises lie within any special district, such as a historic district or a conservation district, and whether it contains a wetland. If the premises do lie in a special district or adjacent to or contain a wetland, approvals must be obtained before the changes can be made. If the exterior change relates to the construction of something that the adjoining landowners might object to, such as the construction of a telecommunications tower, the purchaser should verify whether the local ordinances allow such installation, or necessitate obtaining a variance or conditional use permit to install it. If the changes are integral to the purchaser's use, a contingency must be included.

Many of these approvals take a considerable amount of time to obtain. The attorney should inquire as to the expected amount of time for approval and add a month to that time. Many review boards meet infrequently or are short staffed. If the purchaser does not reserve sufficient time for review and approval, he or she may need to seek an extension. The seller is not obligated to grant an extension, so the purchaser may be faced with the dilemma of purchasing without

approval or losing the property.

Obtaining governmental approvals or rezoning can be very costly. The contract should clearly set forth the obligations and responsibilities of the parties in obtaining and paying for such approvals, including the possibility that such approvals or rezoning, once obtained, may be subjected to challenge in court.

[5] Deed type

The contract should specify the type of deed which will be used to transfer title to the purchaser. Different types of deeds are customarily given in different regions.

A warranty deed is the most comprehensive deed. In addition to transferring fee title, the grantor-seller provides certain assurances to the grantee-purchaser. The grantor-seller warrants that he or she will defend the grantee-purchaser if any of the assurances are violated.

In contrast, a special warranty deed, sometimes called a limited warranty deed, only warrants that the grantor did nothing to encumber the title, but does not warrant against what others may have done to encumber the title.

A bargain and sale deed also transfers fee title. It assures the purchaser that the seller has done nothing to encumber the property and prevent the purchaser's use and enjoyment.

A quit claim deed contains no warranties at all. It simply transfers to the grantee-purchaser anything which the grantor-seller may have had, if anything.

An executor's or administrator's deed is used when the seller is an estate. A trustee's deed is used when the seller is a trust. Each of these deeds will set forth full consideration and the source of authority for the grantor. A referee's deed is generally used in a foreclosure or partition sale.

The purchaser should request a warranty deed wherever possible, but may accept less than a warranty deed comfortably with fee title insurance. Fee title insurance gives assurances which are similar in effect to those contained in the warranty deed. If the seller is willing to offer only a quit claim deed, inquiry into the reason should be made promptly.

[6] Conditions to which purchaser shall take subject

The purchaser must review each of these conditions and the effect such conditions will have on his or her ability to use the land and improvements.

[a] Zoning laws

Many local governments have enacted zoning laws to establish the types of activities which are permissible in various areas. Among the purposes of such zoning laws is to protect neighborhoods from activities which are not appropriate in certain settings and thereby to help maintain property values.

The purchaser's attorney or his client should review the local zoning law to determine whether the area is zoned for the use contemplated by the purchaser. Such a review also will indicate what other uses may be part of the area as a permitted use or under a special use permit. For example, home occupations may be allowed in residential areas but professional offices may not. These other uses may affect the area. The purchaser should be aware of them prior to entering into the agreement.

In addition, if the purchaser intends to use or alter the property in any manner which is not permitted under the local

zoning law, it may be necessary for him or her to obtain a variance or special use permit. If that is the case, a contingency for such approval or permit should be made a part of the contract. The contingency provision should also require the seller to cooperate in good faith with the purchaser to obtain the desired variance or permit.

[b] Environmental laws

Environmental laws cover a wide spectrum. They may include refuse removal, the ability to use certain pesticides or herbicides, the ability to use adjacent waterways, and other similar laws. These are of importance to the purchaser because they will affect his or her ability to use the property and the cost of enjoyment of the property. The purchaser should be aware of these before executing the contract.

Some municipalities provide refuse removal for residents as an ordinary service. Others do not, and residents must contract with private haulers to collect refuse. Private pickup may be quite costly. Private haulers often require customers to use specific containers, which may be costly to acquire. Many municipalities require refuse to be sorted according to ability to recycle.

Some municipalities have banned the use of certain chemicals as pesticides, herbicides or fertilizers. If the purchaser intends to garden or landscape extensively, this may be a concern. Some municipalities do aerial spraying for mosquitoes, black flies, and other insects. This may be of concern to a purchaser with chemical sensitivity.

These and other environmental concerns should be reviewed carefully, as the seller has no control over them. If they are not satisfactory to the purchaser, he or she should consider a different location. For a more detailed discussion of environmental laws and specific forms relating to them, see Vol. 33, Chapter 25, *Environmental Considerations in Real Estate Transactions*, *infra*.

[c] Covenants and restrictions

The seller's chain of title may contain covenants and restrictions with respect to the use of the property. These should be reviewed before the purchaser executes the contract. Unless the seller is the developer, he or she will have no ability to change covenants and restrictions. If the covenants and restrictions adversely affect the use which the purchaser intends for the property, the purchaser may not wish to purchase this parcel.

Covenants and restrictions are usually placed on the property through the deed or by a filing of a declaration of covenants and restrictions with the county clerk. The purposes are generally to maintain the characteristics of a development and to protect property values.

Covenants are generally affirmative duties. These may include requirements for style and cost of homes. They may require the payment of annual fees for the maintenance of parks, pools and other recreational facilities within a development.

Restrictions are often negative in nature. They prohibit certain uses of the property. Older developments may prohibit the manufacture and sale of alcoholic beverages on the premises. Some may prohibit the sale of the premises to members of certain races or ethnic groups. These latter types of restrictions are not enforceable.

More typically, residential restrictions apply to types and height of fencing and clothes lines. Restrictions may prohibit storage of commercial vehicles on the premises. There may be prohibitions against harboring certain types of animals or limiting the number of animals on the premises.

The purchaser and his or her attorney should review the covenants and restrictions before executing the contract; however, often it is not possible to review restrictions and covenants until the title search is complete. The purchaser

may request a provision in the contract which allows the purchaser to terminate the contract if there are covenants or restrictions which affect his or her intended use. That use should be specified clearly in the contract. For example, if in addition to residing on the premises, the purchaser intends to raise show dogs, a restriction limiting the number of animals may interfere with his or her use of the property. Generally, such covenants and restrictions can only be waived by the approval of all of the owners of the property meant to be benefitted by the covenants and restrictions. This is a very difficult task, especially if the area contains more than a few properties.

The seller's attorney should review the seller's title insurance policy or abstract of title, as well as the deed, to make sure that all exceptions listed in the policy or abstract, and all covenants, restrictions, easements and the like contained in the deed, are listed as exceptions to the title promised to the purchaser in the contract.

[d] Easements

An easement is the burdening of one parcel of land for the benefit of another. Most often easements are found as rights to cross one parcel to gain access to another. For example, town house developments, where the houses are attached in rows, have easements for access to the rear of lots so that lawn mowers do not have to be taken through the townhouse to cut the rear lawn. Such easements may affect whether the property may be fenced or landscaped to provide privacy.

Commonly, there are also easements for power lines, telephone lines, cable television, water lines, sewer mains, storm sewers, gas pipes, and drainage. These easements often include more than just the rights to lay and maintain the facilities. They may prohibit construction or planting on the easement area, or they may allow entry for the purpose of cutting and removal of trees which may interfere with power lines.

Easements may be established through a recorded document, such as a deed or a declaration of easement, or on a filed map. Easements also may be established by use or necessity. Such easements are not recorded, and may or may not be visible by an inspection of the property. Inquiry should be made regarding such easements.

Easements can only be modified or released by the owner of the parcel receiving the benefit. The purchaser and his or her attorney should carefully review the location of easements, preferably before executing the contract. However, the existence of easements may not become known until the title search is complete, and a survey is obtained locating the easements. A provision should be included in the contract allowing termination if any easements are so extensive that they interfere with the beneficial use of the improvements on the property or they render the property unmarketable.

[e] Tenancies

Unlike other conditions affecting the property, tenancies should be obvious, although the status and rights of tenants are not. Tenancies are generally month to month or for a fixed term. Month to month tenancies in most jurisdictions may be terminated by giving written notice at least one month before the date on which the tenant is obligated to pay rent. A tenancy for a fixed period cannot be terminated before the end of the fixed period absent a contrary provision in the lease or unless a violation of the lease has occurred. The purchaser takes subject to the existing tenancies, and the contract should list all tenancies and tenants' rights as exceptions to title.

Where there are existing tenancies, commercial or residential, the purchaser's attorney should obtain a rent schedule from the seller and attach such a schedule to the contract. The rent schedule should contain the names of tenants; descriptions of the leased spaces; commencement and expiration dates of the leases; rental and escalation amounts; security deposit information; information on lease amendments, extensions and renewal rights; information on options and rights of first refusal; and information on termination rights.

In addition to attaching a rent schedule to the contract, the contract should include the seller's representations that the rent schedule is accurate; that it contains the material terms of all leases; and that the schedule sets forth all leases,

tenancies, subleases and subtenancies at the premises. The purchaser should obtain and include in the contract detailed representations from the seller regarding the information included in the rent schedule to ensure that there are no hidden problems with any tenancies, such as arrearages, withheld rents, entitlement to rent concessions or abatements, tenants' defaults, seller's defaults, pending or anticipated litigation, unpaid leasing commissions, or incomplete work. The contract should provide that representations of the seller regarding the rent schedule survive the closing for a specified period of time to enable the purchaser to verify the seller's representations.

The purchaser's attorney also may wish to obtain and review copies of the leases or rental agreements. Some sellers will insist on such a review, as well as a provision in the contract that if a lease reviewed by the purchaser is inconsistent with the rent schedule representations, such representations will be deemed modified to eliminate the inconsistencies. If the seller requires such a provision, the purchaser should review the leases carefully to be sure that they match the information in the rent schedule. If an option to purchase exists, the purchaser should obtain proof that it has been waived by the tenant and is no longer effective.

The purchaser also should obtain a provision in the contract barring the seller, without the purchaser's written consent, from: (a) amending, renewing or extending the lease of any existing tenant; (b) renting to new tenants or granting a new lease to any existing tenant; and (c) terminating any lease except for tenant default (unless the purchaser wants the building vacant anyway). The seller's attorney may seek a clause providing that the purchaser's consent will not be withheld unreasonably or that the purchaser will reimburse the seller for rent the seller would have received if the purchaser had consent to the new lease. Where both parties desire that rental activities in the building continue between the time the contract is executed and the closing, they may wish to include in the contract agreed terms under which the seller may enter into new leases without the purchaser's consent. If a tenant is residing in a unit in which the purchaser intends to reside, the purchaser would be wise to require a provision in the lease making the seller responsible for removing the tenant before the transfer of title.

The contract should provide that at the closing and transfer of title, the leases or rental agreements will be assigned to the purchaser. In addition, the contract should provide that the prepaid rents for the remainder of the term will be adjusted, which means that the seller will give the purchaser credit for the rent paid by tenants to the seller which covers any days after the transfer of title. For example, if the closing takes place on June 17, and the seller has been paid rent of \$600 for the month of June, the purchaser is entitled to a credit of \$260 for the thirteen days he or she will own the property.

The contract should provide that the seller will not apply any part of any security deposit unless the tenant has vacated the premises, and that the seller will give the purchaser an accounting of any interest earned on the security deposits. The contract should also provide that the seller will send a notice to each tenant, certified mail, return receipt requested, advising that the tenant's security deposit has been transferred to the purchaser, and advising that a change in ownership has taken place. The name, address and telephone number of the purchaser should be included in the notice.

[f] Licenses

A license is a terminable right to use property. Licenses are granted to excavate minerals, to remove timber, and for other similar purposes. They generally run for a finite period or can be terminated upon specified notice.

Licenses may be recorded or unrecorded. The terms of any license should be reviewed prior to the execution of any contract to purchase, because they may seriously impact on the purchaser's ability to use the property and/or upon the aesthetic value of the property.

If the license is terminable upon notice, the purchaser may wish to include a provision in the agreement requiring the seller to terminate prior to the transfer of title.

[7] Title

The contract should provide that the seller will transfer marketable or fee simple title, or in some states insurable title, to the purchaser, and that if the seller is unable to do so, the seller will return the purchaser's deposit and terminate the agreement. The seller's attorney should include a provision setting forth all exceptions to title contained in the seller's title insurance policy or abstract of title, since this is the state of title which has been insured to the seller. The purchaser should consider adding a provision which requires the seller to reimburse the purchaser's out-of-pocket expenses for title review and for mortgage application.

A minority of states have enacted marketable title laws. These statutes are designed to bar stale or ancient title defects or claims. Generally, such statutes provide that any interest in land arising from a transaction occurring before a certain date is extinguished unless the holder of the interest acts to preserve it.

Whether title is marketable is generally determined by review of an abstract of title or a title insurance report. An abstract of title is a list of recorded items which affect the real property. The abstract of title will include all deeds to the premises, all mortgages, all building loan agreements, any satisfactions, all judgments, tax warrants, mechanic's liens, easements, covenants, restrictions, real property taxes, and other miscellaneous records affecting the title. The person preparing the abstract typically will not indicate whether title is marketable. An attorney must review the abstract of title to make that judgment.

A title report is a preliminary step to obtaining title insurance. The title report takes an abstract and lists "objections" or "exceptions" to title, including liens which must be satisfied prior to closing and other items of which the purchaser should be aware, such as easements, covenants and restrictions. The title report indicates that the title company will provide title insurance subject to the objections or exceptions set forth therein. The title insurance insures against any forfeiture of title other than from the causes listed as objections or exceptions. The attorney reviews the title report to determine whether the title is marketable. Customarily, in many states, the contract expressly states that the seller's delivery of a title insurance policy or abstract of title that conforms to the contract satisfies the seller's obligation to deliver marketable title.

Responsibility for the cost of the abstract of title, the searching portion of the title report, or title insurance varies throughout the country. In most states, it is traditionally the seller's responsibility to prove that he or she has good title. Therefore, the seller pays for the abstract or the searching. In other states, traditionally, *caveat emptor* applies, and the purchaser needs to determine whether the seller has good title. In such areas, the purchaser pays for the abstracting. The terms of the contract are controlling over tradition, however, and the responsibility for the cost of the abstract of title, the searching, and title insurance is often negotiated, especially in commercial contracts. The contract should provide that the seller will provide to the purchaser copies of any back title reports or title policies which the seller has in his or her possession. This will save the purchaser considerable time and expense.

[8] Survey

A survey is a map, drawn to scale under the supervision of a licensed or professional engineer or a licensed land surveyor. The drawing is done on the basis of actual field measurements taken with surveying equipment. The survey should show the property boundaries, the location of any structures, the access to the property from public roads, the location of any bodies of water, and the location of any easements. It should contain references to any filed maps of the property and a certification that it was prepared in accordance with the standards of the applicable surveying association, or the requirements of state law, if one is applicable. The survey should be certified to the purchasers, title company and lender, if any, and must be signed and sealed.

A survey should be performed for each purchase; however, it is more common to obtain a survey only if improvements to the property were made during the seller's ownership or if an existing survey cannot be located. A survey coverage

endorsement may be available for the lender's mortgagee title insurance; however, this does not protect the purchaser.

It is customary in some states for the contract to provide that the survey will be performed at the purchaser's expense. In other states, it is customary for the contract to require the seller to provide a current survey at the seller's expense. The contract also may provide that the seller will provide copies of any existing surveys or other maps of the premises which the seller may have.

[9] Transfer of title

The contract should provide the date, time and place of the transfer of title. In most cases, it is nearly impossible to predict the date of transfer of title at the time of execution of the contract. Therefore, the contract may specify an approximate date, and the transfer of title will take place near that date at the convenience of the parties and lender, if any. However, under certain circumstances, a particular date for transfer of title may be quite important, and the contract should specify that "time is of the essence." If time is of the essence and either party is unable to close on the specified date, that party has committed a breach of contract and may be liable for damages to the other party. "Time is of the essence" should not be used unless it is absolutely necessary. It has caused problems for many parties who demanded such a clause and then were unable to close in a timely manner. Without a 'time of the essence' clause, either party is entitled to a reasonable adjournment of the date of the title transfer.

When selecting a date for the transfer of title, the parties should consider such factors as the time needed to complete new construction, the seller's plans to purchase a new residence or the purchaser's need to sell his or her old residence. Under certain circumstances, one or both of the parties may need to make temporary financing, living or business arrangements during the period of transition from one building to another.

Generally, the parties should allow at least two weeks for a title search, as well as sufficient time to obtain a mortgage commitment if a loan is required. On the average, contracts of sale provide for the transfer of title within thirty to sixty days after the contract is signed.

The customary location of the transfer varies from state to state, although in any state the parties may agree upon a location other than the customary location in that area. Often, the location of the transfer of title is dictated by the lender. If there is no lender, the transfer is often held at the office of the seller's attorney. In some states, the transfer is customarily held at the title company's office.

In a few states (California, Illinois and Ohio), it is customary for an escrow agent to accomplish the transfer in escrow, without the physical presence of the parties. Typically, the escrow agent will be the escrow department of the lending institution financing the purchaser's acquisition, or the escrow department of the title company handling the title work. In these states, the parties give the escrow agent instructions to be followed in transferring title. All of the necessary documents and payments are sent to the escrow agent, who will close the sale when all of the escrow closing instructions have been complied with by the escrow agent.

[10] Transfer of possession

The right to possession is attached to ownership. That is, as soon as title transfers, the right of possession transfers. However, it is very common for the purchaser to need possession before the closing or for the seller to need possession after the closing. These needs are often dictated by successive closings or the need to relinquish a rental property on a particular date. If such needs are known at the time of execution, they should be included in the contract, and can be considered in negotiating the overall purchase price of the contract. Alternatively, the parties can negotiate separate payments for the privilege of transferring possession at a time other than when title transfers, and can insert the terms of such payments in the contract.

If the parties do not discover the need to transfer possession at a time other than the closing until after execution of the contract, a separate agreement should be drawn with appropriate consideration. The consideration is a matter to be agreed upon by the parties; however, some traditional guidelines may be helpful. The holding over seller can be expected to pay to the purchaser the *per diem* amount of the purchaser's mortgage payment, including principal, interest, taxes and insurance. Alternatively, if the purchaser's rent at the place the purchaser currently occupies while waiting to move is higher, it is appropriate for the seller to pay to the purchaser the amount of such rent. Where the purchaser moves in early, he or she can be expected to pay at least the *per diem* amount of the seller's existing mortgage and the cost of utilities incurred during such occupancy.

In any event, both parties should maintain their insurance coverage until both title and possession have vested in the purchaser.

[11] Brokers

The attorney drafting the contract of sale must ascertain from his client whether there is a brokerage commission payable in connection with the transaction. That question can be difficult to ascertain unless the attorney has been involved with his client at the time the client started looking to sell or purchase the property, as the case may be. If there is a broker or brokers involved, the names should be disclosed, as well as which party is required to pay their commission. Most frequently, the broker represents the seller and does so pursuant to the terms of a listing agreement, which spells out the type of listing, its duration, the duties of the broker, and fee schedule, and how the commission is earned.

The purchaser may hire his or her own broker. If so, there must be a clear understanding between the purchaser and his broker regarding who is responsible for paying the commission of the purchaser's broker. In most instances, the purchaser's broker's commission will be paid by the seller but will be split with the seller's broker. In addition, in some transactions, the broker may be acting in a dual capacity as broker for the seller and for the purchaser. This is permissible as long as full disclosure is made to both parties.

The contract of sale should identify the brokers and who is paying their commissions, but does not necessarily disclose the amount of the commission. The listing agreements do that, and clarify when the commission is earned. The brokers will have to supply evidence of the amount of the commission to the escrow agent if such commission is to be paid as part of the closing, and the parties will have to verify that amount. If only one of the parties is responsible for paying the commission, that party should indemnify the other for any claims to a commission emanating from that party's broker. If no brokers are involved, each party should indemnify the other from any claims to a commission resulting from that party's acts.

[12] Miscellaneous clauses

The miscellaneous clauses are often referred to as "boilerplate" clauses. Although the terms may be fairly standard, they are very important. Care should be taken to include them in the agreement.

[a] Waiver

This clause provides that the failure to demand performance does not waive the right to require performance at a later date. This could be important where a second deposit was due on a particular date and the seller forgot to obtain the deposit or the purchaser was unable to pay the deposit on that date. This clause protects the seller's right to collect the balance of the deposit later.

[b] State law

This provision designates which state's law will apply to the transaction. The purchaser and the seller may be residents

of a state other than the designated state. This clause is important because real property laws vary significantly from state to state. Such issues as priority of taxes and liens are not even similar among the various states. Traditionally, the law of the situs applies to real estate transactions.

[c] Entire agreement

This clause acknowledges that the contract contains the entire terms of the agreement between the parties. There are no understandings, promises, representations or warranties not included in the contract. This protects each party from a claim by the other based on an oral statement.

[d] Binding effect

This clause provides that the contract is binding on the heirs, assigns, personal representatives, etc. of each party. This protects the right of each party to complete the transaction in the event of the death or incompetence of the other party. As a practical matter, however, the seller receives less protection, as lenders are unlikely to give a mortgage to a deceased purchaser.

[e] Written amendments

This clause provides that all amendments to the contract must be in writing and must be signed by both the purchaser and the seller. This protects both parties from any claim under an oral agreement. It also requires the parties to put any agreed upon changes, such as occupancy date changes or adjustments in purchase price based on contingencies, in writing.

[f] Alternative dispute resolution

Occasionally, the parties may desire to provide in the contract for an alternative method for resolving disputes in order to avoid litigation. The most common alternative methods are arbitration and mediation.

[13] Execution of the contract

The contract should be signed in multiple originals. Each party and his or her attorney and the lender will need originals. The contract should indicate that it has been executed in this fashion. The contract may be executed by fax or by electronic signature. Most states have adopted the Uniform Electronic Transaction Act (UETA) or some variation thereof. Under the UETA, the parties may agree that an electronic signature will be a valid form of execution. If the parties agree that the electronic signatures may be used, then the electronic signatures will have the same force and legal effect as a manual signature. Electronic signatures have not yet come into common use in real estate transactions.

The contract should be dated. Any changes on the face of the contract should be initialed by all parties and dated to indicate the parties' knowledge of that change.

The proper execution of the contract does not require witnesses or acknowledgment before a notary public; however, an acknowledged contract does not require authentication before submission as evidence in a trial. Unfortunately, notaries often are not available when contracts are executed.

[14] Plain language

In some states, certain consumer contracts must be written in plain language. The attorney drafting the contract must determine whether plain language laws apply to the particular contract. In some states, such as New York, a monetary limit on the value of contracts subject to the plain language requirements excludes most (but not all) real estate transactions. In other states, such as New Jersey, consumer contracts for the sale of real property are expressly included

in the plain language law, regardless of the value of the property. If the attorney determines that the contract must be drafted in plain language, the attorney must then examine the particular plain language requirements in the relevant state. These range from a general requirement that the contract be written in a clear and coherent manner to detailed descriptions of the grammatical uses and words to be avoided. Plain language laws generally provide for damages and penalties for violations; however, such violations do not render the underlying contract void or voidable and are not a defense to an action under the contract.

[15] Miscellaneous comments on new residential construction

When dealing with individual sellers and purchasers, the bargaining power of the parties is usually relatively equal. However, where the seller is a residential developer, the bargaining power often becomes unequal. If the purchaser wants the property, he or she may have to accept a variety of unpleasant terms. These may include closing dates with penalties if the purchaser misses, but not if the developer misses. Similarly, if there are items not completed, the developer may refuse to allow a holdback of funds to ensure completion.

In such cases, the purchaser must be entirely sure that he or she wants the property enough to accept such conditions. In addition, the purchaser should investigate the reputation of the developer in the community. If the reputation is one of failure to complete items, the purchaser should consider another site.

Some states require that the deposit paid by the purchaser with respect to a one- or two-family house be held in escrow, and, regardless of state law, the purchaser should always require that the deposit be held in an escrow account. The purchaser should *never* allow the builder to use the deposit in construction. If the builder files a petition in bankruptcy, an escrow deposit can be returned, but a used deposit may be lost. The purchaser will then become a general unsecured creditor. This is a major risk for the purchaser, who is very unlikely to receive a refund of any part of the deposit, since general unsecured creditors often receive payment of only a tiny portion of the debt.

The purchaser also should make sure that the contract specifies in detail what will be built, when it will be completed and when it will be paid for by the purchaser. The contract should refer to either a model of the building or detailed plans and specifications.

[16] Special provisions required by governmental regulations

Federal regulations affecting certain property transactions may produce a need for the parties to include special provisions in the contract. These provisions may ensure one party that the other party has complied with governmental regulations, or may allocate between the parties the responsibility for compliance.

The Americans with Disabilities Act (ADA)ⁿ¹ prohibits discrimination on the basis of disability by public accommodations. Among other things, the law requires places of public accommodation and commercial facilities to be designed, constructed and altered in compliance with accessibility standards contained in federal regulations.ⁿ² Depending upon the circumstances of the transaction, the seller and purchaser of real property which meets the statutory definition of a "public accommodation" and/or a "commercial facility" will desire to provide in the contract of sale for compliance with ADA requirements.

The parties may desire contract provisions to assure compliance with other federal laws. The Interstate Land Sales Full Disclosure Actⁿ³ is designed to protect purchasers from abuse by real estate developers through interstate commerce and the mail. This law prohibits and punishes fraud by real estate developers. The Hart-Scott-Rodino Antitrust Improvements Actⁿ⁴ requires a preacquisition filing and compliance with a mandatory waiting period before closing the sale of certain hotel and shopping center properties.

Legal Topics:

For related research and practice materials, see the following legal topics:

Real Property LawBrokersRight to CommissionsReal Property LawEnvironmental RegulationGeneral OverviewReal Property LawFinancingMortgages & Other Security InstrumentsPrivate Mortgage InsuranceReal Property LawOwnership & TransferPowers of AttorneyReal Property LawPurchase & SaleContracts of SaleGeneral OverviewReal Property LawPurchase & SaleContracts of SaleFormalitiesReal Property LawPurchase & SaleEscrowReal Property LawPurchase & SaleInterstate Land Sales Full Disclosure ActReal Property LawPurchase & SaleRemediesGeneral OverviewReal Property LawPurchase & SaleRemediesDuty to Disclose

FOOTNOTES:

(n1)Footnote 1. *Stamboursky v. Ackley*, 572 NYS 2d 672 (1991) .

(n2)Footnote 2. *Reed v. King*, 145 Cal. App. 3d 261 (1993) .

(n3)Footnote 3. *Grav v. Colenzo*, 2004 Cal. App. Unpub. LEXIS 1835 .

(n4)Footnote 4. *See* the Residential Lead-Based Paint Hazard Reduction Act of 1992, at 42 U.S.C. § 4851-4856.

(n5)Footnote 5. For detailed rules and regulations regarding lead-based paint disclosure, see 40 C.F.R. Part 745 and 24 C.F.R. Part 35, Subpart A.

(n6)Footnote 6. For general information on lead-based paint disclosure, copies of federal rules and regulations, copies of the pamphlet, and background materials, contact the national Lead Information Clearinghouse (NLIC), at (800) 424-LEAD.

(n7)Footnote 7. For a discussion of contract provisions making the sale contingent upon the outcome of lead testing, see § 21.29[4][j], *infra*.

(n8)Footnote 8. 42 U.S.C. § 4852d.

(n9)Footnote 1. *See* Vol. 33, Chapter 25, § 25.02P[3][a][v], *infra* .

(n10)Footnote 2. *See* Vol. 33, Chapter 25, § 25.02P[3][b][iv], *infra* .

(n11)Footnote 3. *See* Vol. 33, Chapter 25, § 25.02P[3][a][i], *infra*.

(n12)Footnote 4. *See* N.Y. State Joint Legislative Commission on Toxic Substances and Hazardous Wastes, *Radon: Risk, Reality And Reason* (1990).

(n13)Footnote 5. *See* United States E.P.A., *A Citizen's Guide to Radon: What Is It and What to Do About It* (1986); United States E.P.A., *Radon Reduction Methods* (1987).

(n14)Footnote 6. *See* Vol. 33, Chapter 25, § 25.02P[3][a][ii], *infra*.

(n15)Footnote 7. *See* N.Y. Labor Law § 900 for factual findings of the New York State Legislature relating to the dangers of asbestos.

(n16)Footnote 8. 42 U.S.C. § 7412. *See also* 40 C.F.R. Part 61.

(n17)Footnote 9. *See* Vol. 33, Chapter 25, § 25.02P[3][a][iii], *infra*.

(n18)Footnote 10. *See* Vol. 33, Chapter 25, § 25.02P[3][a][vi], *infra*.

(n19)Footnote 11. For general information on lead-based paint disclosure, copies of federal rules and regulations,

copies of the pamphlet, and background materials, contact the national Lead Information Clearinghouse (NLIC), at (800) 424-LEAD.

(n20)Footnote 12. *See* the Residential Lead-Based Paint Hazard Reduction Act of 1992, at 42 *U.S.C.* § 4851-4856. For detailed rules and regulations regarding lead-based paint disclosure, see 40 C.F.R. Part 745 and 24 C.F.R. Part 35, Subpart A.

For a discussion of contract provisions regarding lead-based paint disclosure, see § 21.29[2][e][iv], *supra*.

(n21)Footnote 13. 42 *U.S.C.* § 9601 *et seq.*

(n22)Footnote 1. 42 *U.S.C.* § 12181.

(n23)Footnote 2. 28 C.F.R. Part 36.

(n24)Footnote 3. 15 *U.S.C.* § 1701 *et seq.*

(n25)Footnote 4. 15 *U.S.C.* § 18a.



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Current Legal Forms for Real Estate
Chapter 21 SALES AND EXCHANGES
Part II. The Practice Background

25-21 Current Legal Forms for Real Estate § 21.30

§ 21.30 Preparation for closing

[1] The mortgage commitment

After the contract has been signed, the purchaser and his or her attorney will be busy satisfying the contingencies. The purchaser will apply for a mortgage. The attorney will order the title work (abstract or insurance) and survey. Then the parties wait for the mortgage to be approved. The mortgage generally will contain a number of conditions to be satisfied prior to closing. These may include title and survey requirements, insurance requirements, tests for any of the items included in the contract contingencies, and the repair of any deficiencies noted by the lender's appraiser. It is the attorney's responsibility to obtain, review and provide the title and survey to the lender. The purchaser should obtain the casualty and liability insurance. If the property is in a flood plain, flood insurance may be required also. The purchaser should forward the test results to the lender.

If repairs are required, the purchaser should inquire whether they must be completed prior to closing. If so, an agreement must be reached between the purchaser and the seller granting the purchaser or the purchaser's agents access to perform the work. The seller must be protected by insurance and must be assured that the work will be done in a workmanlike manner. If the repairs can be completed after closing, a holdback agreement can be prepared. Lenders generally hold one and one-half times the cost of the repairs. The agreement will provide a period of time in which repairs must be performed. If the repairs are not completed within that time, the lender may complete them using the escrowed funds, or the lender may apply the funds to the principal balance of the loan.

In connection with the mortgage application, the purchaser or purchaser's counsel should review the Disclosure Statement required by the Truth in Lending Act (TILA),ⁿ¹ and its implementing Regulation Z.ⁿ² TILA was designed to promote the informed use of credit by requiring lenders to disclose the terms and cost of credit.ⁿ³ In general, TILA applies to consumer real estate loans but does not apply to business or commercial real estate loans.ⁿ⁴ As a general rule the creditor in a consumer real estate transaction must disclose the identity of the lender, a statement of the amount financed with a separate itemization of the finance charge, the annual percentage rate, details of any variable rate, payment schedule, total payments involved, and any demand feature imposed by the obligation of the parties.ⁿ⁵ As a general rule, the borrower must be provided with the disclosures prior to the consummation of the transaction.ⁿ⁶

In a commercial loan negotiation, as opposed to a residential transaction described above, where the purchaser has a proven track record and is buying a property with a proven history of producing a net income sufficient to cover the debt service on the loan being obtained, the purchaser may be able to negotiate a nonrecourse provision in its loan documents. Such a provision provides that the lender, upon default, will look only to the security of the mortgaged property to recover the amount owed to it, not to the personal assets of the purchaser. If such a nonrecourse provision can be obtained, the purchaser can expect the lender to except or carveout from its nonrecourse clause certain items for which the lender will require the purchaser to be personally liable. These so-called carveouts include personal liability for such matters as damages resulting from the existence of hazardous or toxic substances, failure of the property to comply with environmental laws, intentional damage to the property, failure to pay real estate taxes or other liens having priority ahead of the lender's mortgage lien, or damages arising from the fraud or malfeasance of the purchaser.

[2] Review of title and survey

[a] Description

The attorney for the purchaser should obtain a copy of the proposed deed from the seller's attorney. The deed should be compared with the contract of sale to be sure it describes the same property. Next, the deed description should be compared with the description in the title work and survey. Be sure to compare the metes and bounds description line by line. Map references should be checked for date and filing information. If the description refers to a map, the map must be filed or recorded in accordance with state law.

The deed should also be examined to be sure that the grantees are shown as in title in the title work. Check spelling, middle initials and designations such as "junior" or "senior."

The deed should be examined for correct spelling of the grantees' names. In addition, if there is more than one purchaser, an indication of the type of tenancy should be included in the deed. If the purchasers are married, the phrases "husband and wife" or "as tenants by the entirety" should be used. If the parties are not married, the phrases "as joint tenants" or "as tenants in common" should be used. A joint tenancy provides that the survivor takes all. A tenancy in common allows an owner to bequeath his or her undivided share of the property to someone other than the co-owner. The distinctions clearly have important ramifications and should be discussed with the clients.

The survey must be reviewed. It should include the map references. It should be certified to the purchaser, lender and title company, and should contain the standard of certification of the applicable surveying association. The survey should contain the signature and seal of the surveyor.

[b] Encroachments

The survey should be examined to be sure that all permanent improvements, such as buildings and driveways, are located within the property lines. If set back lines exist, those should be shown as well. In older cities, stoops may encroach on the setback. Often the city will provide a letter indicating that it will not enforce the setback with respect to the stoop.

If any neighboring improvements encroach upon the property or if the improvements on this property encroach upon the neighboring property, the seller's attorney should be notified immediately. The seller is responsible for clearing up the encroachments. If the encroachments are not permanent, such as a shed or fence, they can be moved. In some states, if the encroachment is small, there may be a statutory easement. If the improvements are of a more permanent nature, an agreement should be sought by the seller with the neighboring landowner. The agreement can take the form of an easement allowing the encroachment to remain so long as the encroaching structure stands, and providing for maintenance of the encroachment.

Alternatively, a deed from the neighbor for the area of the encroachment could be transferred to the owner of the property being sold. The neighbor will be very likely to ask for consideration from the seller if the encroachment is on the neighbor's land. If the encroachment has been in existence for a certain statutorily prescribed period of time, the owner of the encroachment may have the right to the area of the encroachment by virtue of adverse possession if the owner can prove such facts. This may help to reduce the amount of consideration sought by the neighbor.

Where a portion of a neighboring property must be acquired by the seller, a title search of that property must be obtained. If any liens exist, a release must be obtained as to the portion to be transferred. Frequently, there will be at least a mortgage. The mortgagee will want to review the survey and proposed deed. Under the terms of most mortgages, the mortgagee will have the right to the consideration paid by the seller to the owner of the neighboring property. If that right is exercised, the consideration is used to reduce the principal of the mortgage. The mortgagee can be expected to charge for the preparation of the release and review of the documents by its attorneys. It will be expected that these expenses will be paid by the seller.

The encroachment agreement, in whatever form it takes, should be acknowledged and recorded.

[c] Covenants and restrictions

Next, the title work should be reviewed for the terms of any restrictions or covenants. These should be reviewed with the purchaser to determine whether they will impact on the purchaser's intended use. Any existing violations of the covenants and restrictions should be noted and corrected by the seller.

If the covenants indicate that a property owners' association exists, proof of payment of all dues should be obtained from the association. Any past due payments should be collected from the seller at the transfer of title.

[d] Liens

The title work must be reviewed for liens, including taxes, mortgages, judgments and miscellaneous liens. The seller's attorney or the escrow agent handling the closing of the transaction should be given a list of all liens, and should then obtain written payment instructions from each lien holder. Generally, those instructions will give a payment figure as of a particular date with a *per diem* interest amount after that date. The instructions should also specify the proper payee, the form of payment (*e.g.*, certified check), and the address for payment.

[e] Real property taxes

The title work should indicate whether real property and school taxes are paid. If the transfer of title takes place near a tax payment date, the records may be unavailable for review. The seller's attorney should provide copies of the receipted tax bills. If taxes are unpaid, they can be collected at the time of transfer of title. A proration of those taxes may be necessary.

[3] Preparation of closing documents

[a] Deed

The contract of sale will indicate the type of deed required for the transfer of title. The seller's attorney should review the deed into sellers for the exact spelling of the names. If any of the sellers' names have changed, both the former and current names should be used. For example, "Jane Doe, now known as Jane Wilson" or "Jane Wilson, formerly known as Jane Doe" should be used.

If any of the co-owners have died, that fact should be noted in the deed. If the decedent was a spouse of the surviving owner, or a joint tenant, the following should be used:

"James Roe died (testate or intestate) a resident of _____ County on _____, [date] leaving him survived by Janet Roe, the grantor herein."

If the decedent was a tenant in common, the deed should explain who is standing in place of the decedent, and why. For example:

"James Roe died testate on _____, [date], a resident of _____ County. His will was admitted to probate on _____, [date]. His interest in the property was bequeathed to Helen Johnson, one of the grantors above named."

The description of the property should match the description in the deed into the sellers; however, if that deed contains an antiquated description (such as in chains and links, or from this tree to that fence), the more modern surveyor's description can be added to the deed, with a preface stating that, "the premises are more modernly (or accurately) described as follows:"

The deed must contain signature lines for all sellers. If any sellers will execute by an attorney-in-fact, the following should be used: "Jane Doe by Mary Roe, her attorney-in-fact." The attorney-in-fact should sign both names. The deed must contain an acknowledgment to be executed by a notary public. If any seller executed the deed by an attorney-in-fact, the power of attorney must be recorded. The recording information for the power of attorney is added to the acknowledgment.

[b] State transfer and other tax documents

Many states tax real property transfers using a variety of methods. In some states the transfer itself is taxed; in others the recording of any instrument conveying real property is taxed. In the majority of states that tax transfers in some way, the taxes are paid by the seller, although in a few states the transfer taxes are shared or they are paid by the purchaser. Generally, both or one of the parties, most often the purchaser, must prepare a tax return to be delivered with the tax payment. In some states, the parties are required to submit other affidavits and forms to the state or local governmental agency handling transfers of real property. Often the payment, the tax return, and any other required documents are delivered to the title closer at the closing. The attorneys should consult local law to determine what is required and customary in a given state.

A few states also tax gains on the sale of real property. Again, the attorneys must consult local law to determine what tax payments, tax returns, affidavits, questionnaires or other documents are required in a particular state.

[c] Holdover agreement

This agreement is used when the seller will not vacate the premises until after the transfer of title. The agreement should identify the parties, recite the existence of the contract of sale, specify the period of time during which the seller may remain in occupancy of the premises, and require the seller to maintain casualty and liability insurance on the property. In addition, the seller should hold the purchaser harmless for any injury to person or property which occurs on the premises during the holdover period.

The agreement should specify the consideration for the holdover. Typically, the consideration will be the amount of the purchaser's *per diem* mortgage including principal, interest, taxes and insurance. The agreement should specify whether the consideration is to be paid based on the actual number of days of occupancy or based on the period reserved. The parties may consider including a substantial penalty for any days of occupancy beyond those agreed to by the parties. This will avoid the seller's staying on indefinitely.

[d] Early occupancy agreement

This agreement is used where the purchaser must take occupancy prior to transfer of title. This often occurs when the closing is scheduled to occur near the end of a month and becomes delayed. The purchaser may be obligated to vacate a rental property the purchaser is leasing by a certain date.

The agreement should recite the identity of the parties, the existence of the contract of sale, and the commencement date for occupancy. Under the Uniform Vendor and Purchaser Risk Act, which has been adopted in a minority of states, and under most contracts, the risk of loss transfers on the earlier of the transfer of possession or the transfer of title. Thus, the purchaser must have in effect both casualty and liability insurance. The agreement should provide that the purchaser holds the seller harmless for any injury to person and/or property which occurs during the period of occupancy prior to the transfer of title.

Often when a purchaser takes possession before the transfer of title, the purchaser discovers things which are not perfect about the property. Although these things might have been discovered by a structural or other inspection, they were not or did not concern the purchaser at that time. To avoid conflict, many sellers' attorneys require a provision in the early occupancy agreement stating that the purchaser has inspected the premises and accepts the premises in its current condition.

[e] Contract addenda

During the course of the resolution of the multitude of inspections required by the contingencies to the contract, a condition may be discovered which would permit the purchaser to terminate the agreement. If the purchaser wishes to purchase despite the condition, the parties usually renegotiate the contract. This is done either by having the seller correct the condition or by having the purchaser correct it and reducing the sales price accordingly. The reduction may not be a dollar for dollar reduction, but instead an amount which the parties can agree upon. The solution needs to be memorialized in a written contract amendment. Most contracts have a provision requiring amendments to be written and signed by the parties to be valid.

The amendment should recite the parties, the contract of sale, and the problem discovered. It should detail the solution to the problem. It should also note, if the seller is to perform the work, the nature of the work, the materials to be used, and the contractor. In addition, the desired result should be set forth.

The parties should also make provisions for what must be done if the desired results are not achieved. For example, if the desired level of radon is 4 pico curies per liter of air, but the post-remediation level is 20, will the seller be required to perform additional work, and if so, at what expense? Will the purchaser be obligated to purchase? If so, will there be a reduction in purchase price? These issues should be considered in advance, and the parties' desires should be clearly set forth in the addendum to avoid conflict.

If the purchaser is to perform the work, the amendment should show the reduction in the purchase price. The amendment should also state that in consideration for the reduction, the purchaser waives his or her right to terminate the contract, and will be responsible for all expenses in connection with the remediation.

[f] Hold harmless agreements

In some circumstances, it can be difficult to determine whether water and sewer charges have been paid to the date of closing. Often the determination must be made based on the seller's representations and canceled checks. Where water or sewer systems are municipally owned, an unpaid bill can be levied as a tax. The title insurance company will be insuring to lender and purchaser that all taxes, including water and sewer levies, are paid. The title company may require a hold harmless agreement from seller for those levies.

Such an agreement should recite the parties, the date of transfer of title and the purpose of the agreement. The benefit of the agreement should run to the purchaser and the title company. The agreement should cover both minimum charges and usage charges to the date of transfer of title.

If the seller is unwilling to provide such an agreement, the seller can provide a letter from the municipality stating that all charges are paid to the date of transfer of title. Alternatively, the seller can place a sum in escrow with the title company to cover any unpaid bills. It is recommended that the amount of the escrow be no less than the amount of one period's average bill.

[g] Smoke alarm affidavit

Some states now provide by statute that all transferred residences be equipped with a functioning smoke alarm. Based on this requirement, many lenders require proof of the existence of a smoke alarm. To satisfy this requirement, the seller generally executes an affidavit at closing stating that an approved and functioning smoke alarm exists. In some states, the deed will not be recorded until such an affidavit is filed.

[h] Judgment affidavit

If the title work sets forth a judgment against anyone with a name similar to that of any seller, the purchaser must investigate further, since a judgment filed against a person can become a lien against his or her property. If the judgment is against the seller, it must be satisfied at or before the transfer of title. If the judgment is not against the seller, the seller must prove that fact to the title company and the purchaser. This can be accomplished by giving an affidavit, swearing under the penalties of perjury, that the judgment is not against the seller.

[i] Title affidavit

There is available to lenders an endorsement for mortgagee title insurance which insures the lender against any loss arising from any state of facts an accurate survey would show. In order to grant this endorsement, the title company will require an affidavit from the seller which details, under the penalties of perjury, the length of time the seller has owned the property, whether he or she has made any improvements to the property, and whether he or she has had any disputes with the adjoining landowners. If the seller is unable or unwilling to give such an affidavit, the purchaser should obtain a survey immediately. In addition, the purchaser should contact the adjoining landowners to determine whether a dispute does exist. If a dispute does exist, it is the responsibility of the seller to settle the dispute before transfer of title.

[j] Settlement Statement

This document is sometimes prepared by each attorney for his or her client before the closing. Hopefully, the attorneys will compare figures and provide them to the lender before the closing. However, under the Real Estate Settlement Procedures Act ("RESPA")ⁿ¹ in purchase and sale transactions involving federally related mortgage loansⁿ² the person conducting the real estate settlement or closing is required to complete and make available to the seller and purchaser before closing a Uniform Settlement Statement prescribed by the Secretary of HUD.ⁿ³ This standard Settlement Statement form is referred to as the HUD-1 Settlement Statement.

The settlement statement, sometimes called the closing statement, including the HUD-1 Settlement Statement, shows the purchase price less the deposit and all of the adjustments. These adjustments include fuel oil, water and sewer, taxes, rents and security deposits, and any contractual amendments.

The statement should also list all of the closing costs. For the seller, the closing costs usually include the broker's commission, legal fees, state and local transfer taxes, recording of the discharge of mortgage or certificate of existing mortgage, and title searching, if applicable. For the purchaser, the closing costs usually include recording of the deed,

recording of the mortgage, title insurance, survey, mortgage tax, lender's attorney's fees, purchaser's legal fees, tax and insurance escrow, points, prepaid interest and miscellaneous fees of the lender. These costs vary from state to state, so the attorney should examine local laws and customs.

The purchaser's attorney is well advised to ask the lender which, if any, of the closing costs of each party are cut from the mortgage proceeds. If all closing costs are cut, the net mortgage proceeds will be several thousand dollars less than the gross. The contract of sale generally provides that all sums payable to the seller must be in certified or bank funds. If the purchaser is not aware of the deductions in advance, he or she will not have the appropriate certified funds at the closing.

[k] Holdback agreements

The lender may identify, in its commitment letter, repairs which it deems necessary to protect the value of its security. Often, due to weather or preference of the seller, these items cannot be repaired before the transfer of title. Similarly, with new construction, it may not be possible to complete certain items before closing due to weather or availability of supplies. The most frequent solution is a holdback agreement.

In negotiating the holdback agreement, the following issues need to be considered: (a) which items are incomplete, (b) the reasons for the items being incomplete, (c) the time needed to complete the items, (d) the standards of workmanship, and (e) the amount of money to be withheld.

Where the lender has provided a list of items in its commitment letter, there is little to negotiate as to what needs to be completed. In new construction, there may be a considerable disagreement. Before the transfer of title takes place, there is generally a "walk through" where the purchaser is required to make a list of items which need touching up. These may include "dings" in walls or woodwork, stains on carpets, missing grids on windows, and the like. These items are placed on a "punch list" which the contractor completes within a reasonable time after transfer. Some of these items may entail significant cost, such as broken tiles or chipped windows. The purchaser may not be willing to take the contractor's assurances that these will be repaired after the transfer of title. Items such as landscaping and paving cannot be done in cold weather. These are very costly items to perform.

A helpful basis for distinguishing between "punch list" items and "holdback" items is whether the purchaser, a lay person, could readily perform the items of work, using his or her own materials and equipment, if the contractor failed to do so. Money should be held back wherever the purchaser cannot.

The second item to be negotiated is when the work will be completed. This depends in part on why the items are not completed. If the weather is the problem, the parties should allow approximately forty-five days after the date by which the weather would normally permit the activity. This will allow sufficient time to complete even if spring is late. It will also give a builder who may have many such holdbacks time to finish without doing a rushed job.

If the item is incomplete because a particular piece of material or equipment is unavailable, an estimate of when it will be available should be obtained. The parties should add a few days to that as items seem never to arrive when expected. The parties should then determine the number of days needed to complete the work. Again, a few days should be added for the unexpected.

The standard of workmanship should always equal or exceed that of the remainder of the building. For items such as driveways and landscaping, the workmanship should meet industry standards. The parties may wish to appoint an independent party such as an appraiser or design professional to determine whether the job is complete and has been performed to industry standards.

The amount of money to be withheld is the most difficult item to negotiate. Banks have a "rule of thumb" for items

which they require to be done. They usually require one and one-half times the estimate for the work. This provides them with a cushion if the bank should have to do the work or if there is an unexpected increase in price.

Contractors usually want as little as possible held back, while the purchaser wants enough held back to act as a strong incentive to the contractor to complete the work in a timely fashion. In addition, the purchaser will want enough held back so that if the contractor does not complete the job, the purchaser will have sufficient funds to hire someone to complete the job. The bank's standard will usually work here. However, the purchaser should remember that it will usually cost the contractor less to complete the job than an outside craftsman, since the contractor has the benefit of the economies of scale.

The agreement should specify who will hold the funds. If the holdback is at a bank's request, the bank will hold the funds. If the holdback is at the purchaser's request, the bank or the purchaser's attorney may hold the funds. However, if there is an escrow agent designated to close the transaction, the escrow agent should hold the funds.

The agreement should contain a dispute resolution procedure. Most disputes arise over the quality of workmanship. The use of an independent third party should resolve that.

The agreement must provide a remedy if the work is not timely completed. Where the bank is involved, the remedy is usually that the bank may complete the work using the held back funds or that the bank may apply the funds to the principal of the mortgage. Where the bank is not involved, the remedy is usually that the purchaser receives the funds to complete the work.

A problem often arises where part of the work has been completed. An issue arises as to how much the contractor is to be paid. If the items were individually priced, the contractor should be paid only for those items fully completed. If the items were not individually priced, the contractor should be paid only what is left over, if anything, after the substitute worker has been paid.

[l] Escrow agreements

Escrow agreements are used when a lien or a possible lien exists and cannot be satisfied before the transfer of title. This situation may arise where an ancient mortgage appears in the chain of title or where the seller paid a lien but a satisfaction or release was not filed. It often takes a considerable period of time to locate the former mortgagor or lienor to obtain the satisfaction or release. In order to allow the transfer of title to take place, the title company may agree to hold in escrow an amount sufficient to pay the debt plus continuing interest until a satisfaction or release can be obtained.

The agreement will provide that the seller is responsible for obtaining the satisfaction or release within a specified time. If the seller fails to do so, the title company may attempt to obtain the release, and charge its costs to the escrowed funds.

When the problem is an ancient mortgage, the amount to be held is often difficult to determine. There is no easy way to determine whether payments were made. The title company will insist on a hold harmless provision from the seller in case the amount in escrow is not sufficient to pay the lien.

[m] IRS reporting requirements for real estate transactions (Form 1099-S)

Internal Revenue Code § 6045(e) requires that a form 1099-S be filed for each sale of real estate, unless the seller is exempt. Corporate sellers are exempt from the IRS reporting requirement. Generally, it is the responsibility of the person listed on the RESPA form as "settlement agent" to prepare and file the 1099-S. This will usually be the lender's attorney or the escrow agent handling the closing. If the

transaction does not involve a lender, several other parties may be responsible for preparing and filing the 1099-S. These include the attorneys for the parties, the brokers for the parties, and the purchaser.

The following information is required for the form:

- (a) name, address, and taxpayer identification number of the seller;
- (b) description of the property sold by address or section, block and lot;
- (c) date of transfer of title;
- (d) gross proceeds of sale;
- (e) name, address, and taxpayer identification number of the reporting person;
- (f) indication that the seller has or may receive property other than cash or services as part of the consideration or that the gross proceeds cannot be determined with certainty.

The reporting person must file the 1099-S after December 31 of the year in which the transfer occurred and before February 28 of the following year. The filing may be done on paper if there are less than 250 filings by the reporting person. Otherwise, the filing must be on magnetic media. A copy of the filing must be given to the transferor. There is a penalty for each 1099-S which a reporting person failed to file.ⁿ⁴

[n] Tenanted buildings

Typically, additional items must be delivered by the seller before the closing of a tenanted building. These may include some or all of the following: (a) copies of leases; (b) an updated rent schedule and updated seller's representations; (c) a schedule of security deposits; (d) copies of any tenant records; (e) original letters to the tenants from the seller notifying them of the sale and directing them to make future payments to the purchaser; (f) tenant estoppel letters; (g) copies of service contracts; (h) original insurance policies to be apportioned; (i) an assignment, without recourse or warranty, of the seller's interests in all leases, security deposits, insurance policies and service contracts; (j) plans and specifications; and (k) approvals of leases by lenders.

[o] Existing mortgage

The seller's attorney may be required to obtain or prepare several documents relating to the seller's existing mortgage on the property if the purchaser is purchasing the property subject to the mortgage or is assuming the mortgage. The contract may require the seller to obtain the mortgagee's written consent to the sale and/or a mortgagee's certificate as to the status of the loan, including the amount of unpaid principal and interest, the rate of interest, and the date of maturity.

If the mortgagee is holding escrow amounts for the payment of real estate taxes and insurance premiums, the seller's attorney must obtain a statement of such escrow amounts and an assignment of such escrow deposits to the purchaser. The amounts prepaid for such taxes and insurance will be apportioned at the closing.

The seller's attorney should prepare and bring to the closing a letter, signed by the seller and addressed to the existing mortgagee, advising the mortgagee of the sale of the property and directing the mortgagee to address future correspondence to the purchaser.

[p] Purchase money note and mortgage

If a purchase money note and mortgage were not prepared for attachment to the contract, the purchaser's attorney or seller's attorney must prepare these documents, in proper form for recording, for delivery at the closing. Before they are executed and recorded, they must be received and approved by both attorneys and their clients. Where personal property, fixtures or equipment are included in the sale, financing statements also must be prepared. The seller taking back the purchase money mortgage may demand that the purchaser prepare and execute a collateral assignment of leases and rents or other security interests.

[q] Corporate resolution

If one of the parties is a corporation, it can only act by direction of its board of directors. The attorney for that party should obtain a resolution of the corporation's board of directors authorizing the sale, purchase or loan, as the case may be. The resolution should be certified by the corporation's secretary or assistant secretary.

[r] Bill of sale

If the transaction involves the sale of personal property as well as the sale of real property, the seller's attorney must prepare a bill of sale of such personal property.

[4] Reminders to client

A few days before the date scheduled for the transfer of title, the purchaser's attorney should remind his or her client of the items needed for the transfer.

[a] Casualty and liability insurance

The client must have arranged for casualty and liability insurance. If the property is in a flood zone, flood insurance also is required. Casualty and flood insurance is required in at least the amount of the mortgage; however, the purchaser would be well advised to obtain insurance in the amount of the replacement cost of the structures. Some lenders have requirements on the maximum deductible for a loss. In addition, some lenders do not allow policies of co-insurance. At closing, the purchaser must present an insurance binder and paid receipt as proof of insurance.

[b] Proof of sale of prior home

Lenders generally require proof of sale of the purchaser's prior residence, if the equity from that residence will be part of the equity for the new residence. The proof required is generally the RESPA or Uniform Settlement Statement, also known as a HUD-1 form.ⁿ¹ However, this form will only be available if an institutional lender was involved in that prior sale. A privately held mortgage or a cash sale will not result in a HUD-1 form. The purchaser should so advise the lender and inquire as to what other proof of sale is acceptable.

[c] Certified checks

The purchaser will need to obtain the required certified or bank checks for the balance of the purchase price. The purchaser should also bring a number of personal checks. Where the lender does not deduct closing costs from the mortgage, the purchaser may need as many as ten personal checks.

[d] Types of title insurance

This is also an appropriate time to discuss title insurance options with the purchaser. It is often too confusing to discuss these options for the first time at the closing. In addition, since fee title insurance may be an expense which was not disclosed to the purchaser by the lender, the purchaser may need time to consider the issue and set aside funds.

The options to be considered are fee title insurance and the market value rider to such insurance. Fee insurance protects the *owner* from defects in title. Common defects include liens which were overlooked or mis-indexed and claims of ownership by adjoining land owners. Fee insurance provides coverage to the extent of the purchase price.

The market value rider provides for an increase in the limits of coverage as the value of the property increases due to normal market activity.

The decision to spend a large sum of money to purchase property is often difficult, and purchasers rarely understand why it is valuable to them to spend even more money to purchase fee title insurance. The purchaser's attorney should explain that if a title problem arises, the cost of such insurance is likely to be less than the cost of the first visit to the lawyer's office to try to straighten out the problem.

[e] Other

The purchaser's attorney should remind the purchaser to make arrangements for the transfer of telephone, gas, electric and cable television service. In some areas, it also may be necessary to transfer refuse disposal, water and sewer service.

The seller should be reminded to transfer the various services. The seller will need to bring checks to pay for the transfer taxes and title search, if applicable, although the attorney can sometimes arrange to have these amounts paid by the purchaser and credited against the amount due from the purchaser.

The seller should be told not to cancel his or her casualty and liability insurance until after the transfer of title has been consummated.

Legal Topics:

For related research and practice materials, see the following legal topics:

Banking Law Consumer Protection Truth in Lending Disclosure Real Property Law Financing Mortgages & Other Security Instruments General Overview Real Property Law Purchase & Sale General Overview Real Property Law Purchase & Sale Closing & Settlement Real Property Law Purchase & Sale Contracts of Sale Period Between Execution & Closing Right of Possession

FOOTNOTES:

(n1)Footnote 1. 15 U.S.C. §§1601-1667(e). The Truth in Lending Act is Title I to the Consumer Credit Protection Act.

(n2)Footnote 2. 12 C.F.R. Part 226.

(n3)Footnote 3. 15 U.S.C. §1601(a); see C.F.R. §226.1(b).

(n4)Footnote 4. 15 U.S.C. §1603(l); 12 C.F.R. §226.3(a).

(n5)Footnote 5. 15 U.S.C. §1638; 12 C.F.R. §226.18.

(n6)Footnote 6. 15 U.S.C. §1638(b)(1); 12 C.F.R. §226.17(b).

(n7)Footnote 1. The Real Estate Settlement Procedures Act (RESPA) may be found at 12 U.S.C. §§2602-2617.

(n8)Footnote 2. 12 U.S.C. §2602, defines a federally related mortgage loan as:

...any loan (other than temporary financing such as a construction loan) which--

(A) is secured by a first or subordinate lien on residential real property (including individual units of

condominiums and cooperatives) designed principally for the occupancy of from one to four families, including any such secured loan, the proceeds of which are used to prepay or pay off an existing loan secured by the same property; and

(B) (i) is made in whole or in part by any lender the deposits or accounts of which are insured by any agency of the Federal Government, or is made in whole or in part by any lender which is regulated by any agency of the Federal Government; or

(ii) is made in whole or in part, or insured, guaranteed, supplemented, or assisted in any way, by the Secretary or any other officer or agency of the Federal Government or under or in connection with a housing or urban development program administered by the Secretary or a housing or related program administered by any other such officer or agency; or

(iii) is intended to be sold by the originating lender to the Federal National Mortgage Association, the Government National Mortgage Association, the Federal Home Loan Mortgage Corporation, or a financial institution from which it is to be purchased from the Federal Home Loan Mortgage Corporation; or

(iv) is made in whole or in part by any "creditor", as defined in section 103(f) of the Consumer Credit Protection Act... who makes or invests in residential real estate loans aggregating more than \$1,000,000 per year, except for the purpose of this Act, the term "creditor" does not include any agency or instrumentality of any State;...

(n9)Footnote 3. *12 U.S.C. §2603.*

(n10)Footnote 4. *Treas. Reg. § 1.6045-4.*

(n11)Footnote 1. The Real Estate Settlement Procedures Act (RESPA) may be found at *12 U.S.C. § 2602-2617.*



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§ 21.31 Conducting the closing

The closing should be a pleasant culmination of the transaction, provided that all parties have fully performed their responsibilities prior to the closing. If a lender is involved, an average residential real estate closing can be expected to take approximately one hour. If there is no mortgage, the transaction should consume no more than half an hour.

[1] Parties

The seller need not be present if the seller's attorney is there with an executed deed and any other required documents, such as state or local tax documents or a smoke alarm affidavit. It is helpful for the attorney to have a limited power of attorney, so that he or she may sign the RESPA statement and other documents of the lender. Alternatively, someone acting under a power of attorney may attend on behalf of the seller and execute all documents, including the deed, at the closing.

Either all of the purchasers or a person authorized to act for them under a power of attorney must be present. The power of attorney must be recorded prior to or with the closing documents. An affidavit that the power of attorney is still in effect and the principal is alive may be required.

Often the listing and selling real estate brokers attend the closing. Where a residential purchaser is new to the area, the selling broker may drive the purchaser to the closing. The brokers often have extra keys and information about the property to deliver to the purchaser. The brokers typically collect their commissions at the closing.

The lender will generally be represented by an attorney or paralegal. The lender's representative generally conducts the closing. A representative of the title company will also attend the closing.

In states where it is customary for an escrow agent to conduct the closing in escrow, none of the parties need to be present.

[2] Coordinating closings of loan and sale

The lender's representative may have a number of closings in a day, and may not stay for the entire closing. Since the

lender's funds are necessary to complete the transfer of title, the lender's representative generally will request that the lender's documents be executed first. Then the deed can be delivered in exchange for the consideration.

If there is any dispute between the parties, the lender's representative will generally excuse himself or herself and return when the dispute has been resolved. Similarly, if the borrower's counsel intends to read the mortgage line by line, the lender's representative may leave the room. Many lenders use FNMA documents for their closings. If the borrower's attorney is not familiar with the documents used by the lender, the attorney should inquire in advance, and obtain a copy of the printed forms. Then, at the closing, the attorney need only review the typed portions. By reviewing the documents in advance, the attorney can also satisfy any questions he or she may have in advance.

[3] Role of title company

The title company representative has many functions. Prior to closing, a search should have been performed for use in preparing a title report which sets forth the description of the property, the source of title, and any liens, covenants, restrictions, easements, and other objections. Before closing, the seller's attorney should have arranged for the payment of all liens and the satisfaction of other objections.

At the closing, the title representative does the following: (a) reviews the deed and mortgage to be certain that the description matches the premises searched; (b) collects documentary evidence of satisfaction of objections, such as paid receipts for taxes and property owners association dues; (c) collects the funds to satisfy the existing liens; (d) takes the responsibility for insuring that satisfactions or releases are filed properly; (e) records the deed, mortgage and other related documents; and (f) notifies the purchaser of the right to purchase fee title insurance and the market value rider to the fee policy. After the closing, the title representative delivers the title insurance policy to the lender and, if applicable, to the purchaser.

In some areas, it is customary to tip title company representatives. Tipping is never required. The purchaser pays an insurance premium which covers the services of the title company.

[4] Role of bank attorney

The lender's attorney reviews the title in advance of the closing for the lender's benefit. He or she is responsible for the preparation of the note, mortgage, HUD #1 (RESPA), and the 1099-S, as well as any other documents required by the lender.

The lender's attorney collects the casualty insurance proof, fees and other items specified in the commitment at closing. He or she can answer specific questions about the lender's documents and practices, but should not provide any legal advice to the purchaser or the seller.

[5] Role of purchaser's attorney

The purchaser's attorney reviews the title work in advance of the closing for the benefit of the purchaser. The purchaser's interest will not always be the same as the lender's. Restrictions which may not bother the lender may pose a distinct problem or annoyance for the purchaser. For example, there may be restrictions on the storage of recreational vehicles on the premises. That will not bother the lender; however, if the purchaser has a thirty-foot recreational vehicle, he or she may be quite unhappy if it must be stored elsewhere.

The purchaser's attorney should review with the purchaser the distinction between mortgagee title insurance, which the purchaser must obtain, and optional fee title insurance. Purchaser's attorney must make the purchaser understand that mortgagee title insurance offers the purchaser no protection at all.

The purchaser's attorney is responsible for preparing a closing statement and the early occupancy agreement, if any.

The purchaser's attorney should review the lender's documents for accuracy. He or she should review with the purchaser the important features of the promissory note, including payment terms, adjusting interest rate mechanisms, grace periods, late fees, prepayment provisions, and default provisions. The attorney should also review the important features of the mortgage, including the escrow account, condemnation, insurance requirements, and foreclosure. In short, the purchaser's attorney should be certain that the purchaser thoroughly understands the obligations which he or she is incurring and the consequences of default.

[6] Role of seller's attorney

The seller's attorney's obligations are nearly complete before the closing. He or she must make arrangements for the satisfaction of all liens and title objections prior to closing. Additionally, he or she must prepare a closing statement, the deed, and a holdover agreement, if needed. In some states, the seller's attorney also must prepare state or local tax documents or a smoke alarm affidavit.

At closing, the seller's attorney's role is primarily to see that the seller's liens are satisfied and that the seller obtains the appropriate amount of money.

If there is no lender, the seller's attorney is responsible for preparing and filing the IRS's 1099-S form.

Legal Topics:

For related research and practice materials, see the following legal topics:

Banking LawConsumer ProtectionReal Estate Settlement ProceduresGeneral OverviewBanking LawConsumer ProtectionReal Estate Settlement ProceduresDisclosureInsurance LawProperty InsuranceTitle InsuranceReal Property LawBrokersRight to CommissionsReal Property LawFinancingMortgages & Other Security InstrumentsGeneral OverviewReal Property LawFinancingSecondary Mortgage MarketFederal National Mortgage AssociationReal Property LawPurchase & SaleClosing & SettlementReal Property LawPurchase & SaleEscrow



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§ 21.32 After the closing

After the closing, the purchaser's attorney should diary his or her file to receive the recorded deed. Depending on the area, this may be for two weeks to six months. When the deed is received, it should be reviewed to make certain that it was properly recorded. The original should be transmitted to the client, and a copy retained by the attorney for future reference.

The file should also be diared to receive the fee title insurance policy. This should be reviewed to be certain that all objections were removed. The sole lien should be the purchase money mortgage, if any. The original policy should be transmitted to the client, with a copy retained by the attorney.

The seller's attorney should diary his or her file to receive the recorded satisfactions or releases. These should be reviewed for proper recording. The seller's attorney should also receive any recorded mortgage held by the seller.

The attorneys may be called upon to assist in terminating holdover occupancy by the seller. They also may be called upon to assist in the administration of any holdback agreements.

As a practical matter, the attorneys should keep their closing files easily accessible through April 15 of the year following the transfer of title. Many purchasers and sellers need copies of documents or have questions when they prepare their income tax returns. The seller's attorney can generally archive the file at this point. The purchaser's attorney may wish to retain the file. Many purchasers of residences sell or refinance their homes within three to five years after purchasing.

Legal Topics:

For related research and practice materials, see the following legal topics:

Insurance LawProperty InsuranceTitle InsuranceReal Property LawFinancingMortgages & Other Security
InstrumentsSatisfaction & TerminationGeneral OverviewReal Property LawFinancingMortgages & Other Security
InstrumentsSatisfaction & TerminationRelease PaymentsReal Property LawPriorities & RecordingRecording ActsReal
Property LawPurchase & SaleClosing & SettlementReal Property LawTitle QualityAdverse Claim ActionsUnlawful

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[Reserved]

§§ 21.33[Reserved]



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§ 21.41 Research Checklist

A. Taxation

1. Federal taxation

-- Anderson, *Royalty Valuation: Should Overriding Royalty Interests and Nonparticipating Royalty Interests, whether Payable in Value or in Kind, be Subject to the Same Valuation Standard as Lease Royalty?*, 35 *Land & Water L. Rev.* 1 (2000)

..... ☐

-- Brown, *Proposal to Reform the Like Kind and Involuntary Conversion Rules in Light of Fundamental Tax Policies: A Simpler, More Rational and More Unified Approach*, 67 *Mo. L. Rev.* 705 (2002)

☐

-- Colligan, *Forest Land Taxation in the New Millennium: Stewardship Incentivized*, 78 *Denv. U.L. Rev.* 413 (2001)

☐

-- Coughlan, *Land Value Taxation and Constitutional Uniformity*, 7 *Geo. Mason L. Rev.* 261 (1999)

☐

-- Cuff, *High Anxiety and the Effect of a Premature Disbursement of Exchange Balances on Deferred Exchanges*, 23 *J. Real Est. Tax'n* 31 (1995)

☐

-- Cuff, *Real Estate and Deferred Exchange Regulations*, 54 *Inst. on Fed. Tax'n* 10.1 (1996)

☐

- Dorocak, *Protecting Real Estate Investors: The Fight to Maintain the Like-Kind Standard for Exchanges Under I.R.C. 1031* -- "You Don't Have to Call Me Darling, Darling," 33 *Santa Clara L. Rev.* 571 (1993) ☐
- Fowler, *Regulations Furnish Guidance for Deferred Like-Kind Exchanges*, 20 *Real Est. L.J.* 182 (1991) ☐
- Freedman, *The Growing Popularity of the Tax-Deferred Exchange*, 24 *Real Est. L.J.* 160 (1995) ☐
- Frost and Berry, *Impact of Final Publicly Traded Partnership Regulation on Real Estate Related Partnerships*, 23 *J. Real Est. Tax'n* 267 (1996) ☐
- Greiner, *Real Estate Professionals Tax Relief Act of 1993*, 23 *Colo. Law.* 1317 (1994) ☐
- Hamill, *Making Tax-Free Exchanges of Like-Kind Investment Property*, 13 *J. Tax'n Invest.* 220 (1996) ☐
- Haynes and Bird, *The Deferred Like-Kind Exchange*, 24 *Real Est. Rev.* 54 (1995) ☐
- Ji, *Nonrecourse Financing of Real Property: Depreciation Allocation and Full Recapture to Minimize Deferral and Eliminate Conversion*, 29 *Colum. J.L. & Soc. Probs.* 217 (1996) ☐
- Krooks, *Tax Considerations Incident to the Transfer of a Residence*, 66 *N.Y. St. B.J.* 26 (1994) ☐
- Lipman and Williamson, *Will the Final Regulations Under IRC § 469(c)(7) Renew Taxpayer Interest in Real Estate?*, 25 *Real Est. L.J.* 137 (1996) ☐
- Lipton, *IRS Issues Final Regulations on Passive Loss Relief for Real Estate Professionals*, 74 *Taxes* 91 (1996) ☐
- Lofton, Judice and Cook, *Generating Significant Tax Savings for Complying with Title III of the Americans with Disabilities Act*, 22 *Real Est. L.J.* 94 (1993) ☐
- Richmond, *Taxes and the Elderly: An Introduction*, 19 *Nova L. Rev.* 587 (1995) ☐
- Schachat, *Final Regulations Under Section 469 (c)(7): How Do You Spell Passive-Loss*

☐

-- Walker, *Real Estate Exchanges in the 1990s: Lessons From the Front*, 25 Colo. Law. 1 (1996) ☐

-- Weidner, *Synthetic Leases: Structured Finance, Financial Accounting and Tax Ownership*, 25 Iowa J. Corp. L. 445 (2000) ☐

-- Weisman, *Real Property Exchanges May Offer Tax Advantages*, 186 N.Y.L.J., Nov. 18, 1983 at p. 21, col. 4 ☐

-- Weld, Price and Edmonds, *Tax Aspects of Acquiring Business or Investment Real Estate*, 24 Real Est. Rev. 27 (1993) ☐

2. State and local taxation ☐

-- Adamson, *Preferential Land Assessment in Virginia*, 10 U. Richmond L. Rev. 111 (1975) ☐

-- Bass, *The Gains Tax and Acquisitions of Controlling Interests in Corporations and Other Entities*, 17 N.Y. St. B.A. Real Prop. Law Sec. Newsletter 23 (1989) ☐

-- Bell, *Taxation: Part One: Taxes Administered by the Virginia Department of Taxation Part Two: Taxes Administered by Localities*, 31 U. Rich. L. Rev. 1221 (1997) ☐

-- Cooper, *Real Property Tax Exemption in New York: When Is a Bible Society Not Religious?* 45 Fordham L. Rev. 949 (1977) ☐

-- Dunlevy and Belline, *State and Federal Tax Liens on Minnesota Real Estate*, 21 Hamline L. Rev. 395 (1998) ☐

-- Ellingson, *Differential Assessment and Local Governmental Controls to Preserve Agricultural Lands*, 20 S.D. L. Rev. 548 (1975) ☐

-- Feld, *Special Forms of Taxation for a Unique Property: Sharing Property Tax Revenues From the Seabrook Nuclear Power Plant With Cities and Towns Throughout New Hampshire*, 22 N.H.B.J. 23 (1979) ☐

-- Fox, *The Uneasy Law of Real Estate Tax Exemptions in Pennsylvania*, 39 U. Pitt. L. Rev. 175 (1977) ☐

- Gilbert, *The Path of Special Assessment Bond Law in Illinois: From the Attic to the Courtroom*, 27 De Paul L. Rev. 651 (1978) ☐
- Gore and Emmersan, *Real Estate Tax Assessments A Study of Illinois Taxpayers' Judicial Remedies*, 24 De Paul L. Rev. 465 (1975) ☐
- Heller, *The Theory of Property Taxation and Land Use Restrictions*, 1974 Wis. L. Rev. 751 (1974) ☐
- Hilbert, *Illinois Property Tax Exemptions: A Call for Reform*, 25 De Paul L. Rev. 586 (1976) ☐
- Klitzke and Edger, *Wisconsin Special Assessments*, 62 Marq. L. Rev. 171 (1978) ☐
- Lawlor, *Real Property Tax Delinquency and the Rehabilitation of Multi-Family Housing Stock in Chicago, Illinois: The Role of the Collection Provisions of the Illinois Revenue Act*, 26 De Paul L. Rev. 1 (1976) ☐
- Levin and Spak, *Personal Liability for Forfeited Real Estate Taxes The Illinois Land Trust*, 67 Ill. B.J. 706 (1979) ☐
- Malone and Zyesh, *Comprehensive Land Use Control Through Differential Assessment and Supplemental Regulation*, 18 Washburn L.J. 432 (1979) ☐
- McCleary, *Regulating Land Use While Taxing Tenants and Homeowners Equitably: An Alternative to the Real Property Tax System*, 27 Am. U. L. Rev. 2 (1978) ☐
- McClendon, *What the National Health Care Debate Tells Us About Whether Hospitals are Entitled to Exemption from Real Estate Taxes*, 6 Widener J. Pub. L. 41 (1996) ☐
- Morris and Ichel, *The All-New New York State Real Property Gains Tax*, Part I, 2 J. State Tax'n 219 (1983), and Part II, 3 J. State Tax'n 55 (1984) ☐
- Ominsky, *The Lender's Exemption From Realty Transfer Taxes A 1978 Amendment*, 52 Temp. L.Q. 509 (1979) ☐
- Penn, *Real Property Taxation of Private Leaseholds in Exempt Government Property*, 41 Mo. L. Rev. 613 (1976) ☐

- Quirk and Watkins, *A Constitutional History of the Property Tax in South Carolina*, 26 S.C. L. Rev. 397 (1974) ☐
- Rocklen, *Equality in Property Taxation The Law, Practice and Prospects*, 11 New Eng. L. Rev. 617 (1976) ☐
- Rosenberger, *Historical Perspective on Constitutional Limitation of Property Taxes in Michigan*, 24 Wayne L. Rev. 939 (1978) ☐
- Rudnick, *Methodology and Cultural Traits. Financing Privatization in Eastern Europe. Comparative Privatization. Financial and Tax Issues: Taxing Foreign Investment in Real Property*, 13 B.U. Int'l L.J. 392 (1995) ☐
- Sentell, *Caesar Confronts Caesar: Local Government Property Taxation and Local Government Property*, 31 Mercer L. Rev. 293 (1979) ☐
- Starichna, *Giving and Taking Notice: The Relative Priority and Enforceability of the Federal General Tax Lien Versus the State's Specific Real Property Tax Lien*, 21 Hamline L. Rev. 469 (1998) ☐
- Turano, *Equitable Relief, Collateral Attack and the Illinois Tax Deed*, 52 Chi.-Kent L. Rev. 725 (1975) ☐
- Weber and Olson, *Religious Property Tax Exemptions in Kentucky*, 66 Ky. L.J. 651 (1978) ☐
- Wright, Jr. and Morrissey, *Arkansas Facility/Real Property Redevelopment in the Year 2000: Tools Available to Resolve Environmental Issues*, 52 Ark. L. Rev. 751 (1999) ☐
- Yzenbaard, *Kentucky Real Property Law In Review: Three Cases, Taxes, and a "Non Closing,"* 25 N. Ky. L. Rev. 435(1998) ☐

B. Contract and title issues

1. Title, ownership, and transfer

- Balbach, *Counseling Seniors on Residential Real Estate Transactions*, 12 Prac. Real Est. Law. 39 (1996) ☐
- Bergman, *Real Estate Binders Revisited Still a Trap for the Unwary*, 58 N.Y. St. Bar J. 16 (1986) ☐

-- Bild, *Dissolution of Marriage and the Finality of Judgments*, 35 J. Mo. B. 241 (1979)
 ☐

-- Blyth, *What You Should Know About "Subject to the Approval of my Attorney" Clauses*, 12 Prac. Real Est. Law. 81 (1996) ☐

-- Browder, *Running Covenants and Public Policy*, 77 Mich. L. Rev. 12 (1978)
 ☐

-- Delsack, *The Mortgage Contingency Clause: A Trap for the Residential Real Estate Purchaser Using a Mortgage Broker*, 17 Cardozo L. Rev. 299 (1995) ☐

-- Feinman, *Economic Negligence in Residential Real Estate Transactions*, 25 Real Est. L.J. 110 (1996) ☐

-- Geu, *Limited Liability Companies: Gaining Momentum*, 7 Prob. & Prop. 46 (1993)
 ☐

-- Goldstein, *Plain Language Ten Years After: Some Reflections on Its Basic Assumptions*, 61 N.Y. St. B.J. (1989) ☐

-- Heller, *The Theory of Property Taxation and Land Use Restrictions*, 1974 Wis. L. Rev. 751 (1974) ☐

-- Hendrix, *Myths of Property Rights*, 12 Ariz. J. Int'l & Comp. L. 183 (1995)
 ☐

-- Hertz, *A Model Home Purchase Cotenancy Contract*, 13 Prac. Real Est. Law. 21 (1997) ☐

-- Holtzschue, *Contract of Sale for Office, Commercial and Multi-Family Residential Premises*, 17 Real Prop., Prob. & Tr. J. 382 (1982) ☐

-- Holtzschue, *Drafting the Real Estate Closing Memorandum and Statement*, 2 Prob. & Prop. 17 (1988) ☐

-- Kristnik, *Transferring Title to Partnership Real Property Under the UPA and Proposed RUPA*, 27 Real Prop. Prob. & Tr. J. 143 (1992) ☐

-- Kubicek, *Selected Topics in Examination of Abstracts of Title*, 26 Drake L. Rev. 1 (1977) ☐

- Lansdown, *The Implied Marketing Covenant in Oil and Gas Leases: The Producer's Perspective*, 31 St. Mary's L. J. 297 (2000) ☐

- Levey, *Title Insurance and the LLC*, 9 Prob. & Prop. 17 (1995) ☐

- Malone, *Title Searches: The Potential for Liability*, 49 Miss. L.J. 689 (1978) ☐

- Mattis, *Severance of Joint Tenancies by Mortgages: A Contextual Approach*, S. Ill. U. L.J. 27 (1977) ☐

- McEvoy and Potash, *New York Allows Limited Liability Companies*, 22 N.Y. St. B.A. Real Prop. L. Sec. Newsletter 8 (1994) ☐

- Milich, *Master Limited Partnerships*, 20 Real Est. L.J. 54 (1991) ☐

- Pedowitz, *Title Insurance What Every New York Lawyer Should Know*, 52 N.Y.S. Bar J. 292 (1980) ☐

- Piccola, *Executing Real Estate Contracts by Fax*, 9 Prob. & Prop. 15 (1995) ☐

- Sacher, *Estate Planning and Joint Tenancy With a Right of Survivorship*, 50 Notre Dame Law 618 (1975) ☐

- Sheppard, *Assurances of Titles to Real Property Available in the United States: Is a Person Who Assures a Quality of title to Real Property Liable for a Defect in the Title Caused by Conduct of the Assured?*, 79 N. Dak. L. Rev. 311 (2003) ☐

- Speyer, *Property Insurance Aspects of Real Estate Practice*, 24 N.Y. Real Prop. L.J. 75 (1996) ☐

- Steverson, *Covenants and Equitable Servitudes in California*, 29 Hastings L.J. 545 (1978) ☐

- Stoebeck, *Running Covenants: An Analytical Primer*, 52 Wash. L. Rev. 861 (1977) ☐

- Stonefield, *Symposium: Choosing the Digital Future: The Use and Recording of Electronic Real Estate Instruments Electronic Real Estate Documents: Context, Unresolved Cost-Benefit Issues and a Recommended Decisional Process*, 24 W. New Eng. L. Rev. 205 (2002) ☐

-- Turano, *Equitable Relief, Collateral Attack and the Illinois Tax Deed*, 52 Chi.-Kent L. Rev. 725 (1975) ☐

-- Ulrich, *Fraudulent Conveyances and Preferences in Virginia*, 36 Wash. & Lee L. Rev. 51 (1979) ☐

2. Future interests

-- Bostick, *Loosening the Grip of the Dead Hand: Shall We Abolish Legal Future Interests in Land?*, 32 Vand. L. Rev. 1061 (1979) ☐

-- Fetters, *Perpetuities: The Wait-and-See Disaster A Brief Reply to Professor Maudsley, With a Few Asides to Professors Leach, Simes, Wade, Dr. Morris, et al.*, 60 Cornell L. Rev. 380 (1975) ☐

-- Fetters, *The Perpetuities Period in Gross and the Child en Ventre Sa Mere in Relation to the Determination of Common-Law and Wait-and-See Measuring Lives: A Minor Heresy Stated and Defended*, 62 Iowa L. Rev. 309 (1976) ☐

-- Haskins, *Extending the Grasp of the Dead Hand: Reflections on the Origins of the Rule Against Perpetuities*, 126 U. Pa. L. Rev. 19 (1977) ☐

-- Hopperton, *Teaching Present and Future Interests: A methodology for Students That Unifies Estates in Land Concepts, Structures, and Principles*, 26 U. Tol. L. Rev. 621 (1995) ☐

-- Link, *The Rule Against Perpetuities in North Carolina*, 57 N.C. L. Rev. 728 (1979) ☐

-- Link, *The Rule in Wild's Case in North Carolina*, 55 N.C. L. Rev. 751 (1977) ☐

-- Link and Licata, *Perpetuities Reform in North Carolina: The Uniform Statutory Rule Against Perpetuities, Nondonative Transfers, and Honorary Trusts*, 74 N.C.L. Rev. 1783 (1996) ☐

-- Mahoney, *Perpetual Restrictions on Land and the Problem of the Future*, 88 Va. L. Rev. 739 (2002) ☐

-- Maudsley, *Escaping the Tyranny of Common Law Estates*, 42 Mo. L. Rev. 355 (1977) ☐

-- Maudsley, *Perpetuities: Reforming the Common Law Rule --How to Wait and See*, 60 Cornell L. Rev. 355 (1975) ☐

-- Pedowitz, *Perpetuities Rule: A Potent Nemesis*, 200 N.Y.L.J., Sept. 22, 1988 at p. 33, col. 4 ☐

-- Shepperd, *Stale Future Interests: Can Texas Pass a Constitutional Reverter Act?* 9 St. Mary's L.J. 525 (1978) ☐

-- Young, *Future Interests Problem of the Life Tenant Who Lives "Forever,"* 5 Ky. L.J. 3 (1978) ☐

-- Youngs, *A Compendium of Cases on Future Interests in Kentucky*, 6 N. Ky. L. Rev. 51, 283 (1979) ☐

3. Warranties, representations, condition, disclosure and caveat emptor

-- Coffey, *Is Caveat Emptor Still Viable?*, 20 N.Y.S. Bar Sec. Newsletter 47 (1992) ☐

-- Cooper, *The Wave of Seller Liability*, 6 Prob. & Prop. 26 (1992) ☐

-- Flores, *A Comparison of the Rules and Rationales for Allocating Risks Arising in Realty Sales Using Executory Sale Contracts and Escrows*, 59 Mo. L. Rev. 307 (1994) ☐

-- Fusco, Collins and Birnbaum, *Damages for Breach of the Implied Warranty of Habitability in Illinois A Realistic Approach*, 66 Chi. Kent L. Rev. 337 (1979) ☐

-- Greenblatt, *An Assessment of the Impact of an Implied Warranty of Habitability in New York State*, 24 Buffalo L. Rev. 189 (1974) ☐

-- Hagglund and Wiemer, *Caveat Emptor: Realty Purchaser's Duty to Investigate*, 20 Real Est. L.J. 373 (1992) ☐

-- Lahey and Redle, *The Ohio Experience: The Effectiveness of Mandatory Real Estate Disclosure Forms*, 25 Real Est. L.J. 319 (1997) ☐

-- Lansdown, *The Implied Marketing Covenant in Oil and Gas Leases: The Producer's Perspective*, 31 St. Mary's L. J. 297 (2000) ☐

-- Lawlor, *Seller Beware: Burden of Disclosing Defects Shifts to Sellers*, 78 ABA Journal

90 (1992) ☐

-- Locke and Elliott, *Caveat Broker: What Can Real Estate Licensees Do About Their Potentially Expanding Liability for Failure to Disclose Radon Risks in Home Purchase and Sale Transactions?*, 25 Colum. J. Env't'l L. 71 (2000) ☐

-- McDaniel, *The New York Housing Merchant Warranty Statute: Analysis and Proposals*, 75 Cornell L. Rev. 754 (1990) ☐

-- Meyers, *The Covenant of Habitability and the American Law Institute*, 27 Stan. L. Rev. 879 (1975) ☐

-- Moore, *Notice and Consent to the Financial and Legal Obligations In Property Owners' Associations*, 25 Real Est. L.J. 378 (1997) ☐

-- Morrissy and Rupp, *The Implied Warranty of Habitability: A Step Toward Protecting Home Buyers*, 23 Tr. Law. G. 137 (1979) ☐

-- Nesvold, *What Are You Trying to Hide? Synthetic Leases, Financial Disclosure, and the Information Mosaic*, 4 Stan. J. L. Bus. & Fin. 83 (1999) ☐

-- Murray, *AIDS, Ghosts, Murder: Must Real Estate Brokers and Sellers Disclose?*, 27 Wake Forest L. Rev. 203 (1992) ☐

-- Pancak, Miceli and Sirmans, *Residential Disclosure Laws: The Further Demise of Caveat Emptor*, 24 Real Est. L.J. 291 (1996)..... ☐

-- Powell, *Disclaimer of Implied Warranties in the Sale of New Homes*, 34 Vill. L. Rev. 1123 (1989) ☐

-- Roeser, *The Implied Warranty of Habitability in the Sale of New Housing: The Trend in Illinois*, 1978 S. Ill. L.J. 178 (1978) ☐

-- Sawyer, *Contracts Land Sales Vendor's Misrepresentation of Local Zoning Status of Property Not Ground for Rescission*, 26 Mercer L. Rev. 349 (1974) ☐

-- Shepard, *Assurances of Titles to Real Property Available in the United States: Is a Person Who Assures a Quality of title to Real Property Liable for a Defect in the Title Caused by Conduct of the Assured?*, 79 N. Dak. L. Rev. 311 (2003) ☐

-- Spector and Dannenberg, *Developer's Liability: New York's Implied Warranty in Contracts for Sale of New Homes*, 61 N.Y. St. B.J. 32 (1989) ☐

-- Thomas, *Specific Performance of Land Purchases, Nebraska Supreme Court Sets a Tender Trap for Would-Be Purchasers*, 12 Creighton L. Rev. 295 (1978)

☐

-- Walker, *The Lead-Based Paint Real Estate Notification and Disclosure Rule*, 8 Buff. Env't'l L. J. 65 (2000) ☐

4. Sales and leasebacks

-- Farragher and Reinstein, *Accounting for Real Estate Sale-leaseback Transactions*, 20 Real Est. Rev. 90 (1990) ☐

-- McGrath, *Sale-Leasebacks of Corporate Property: A Response to New Financial Reporting Requirements*, 19 Real Est. Rev. 43 (1989) ☐

5. Environmental considerations

[Note: For further material, see Vol. 33, Chapter 25, *Environmental Considerations in Real Estate Transactions, infra*.]

-- Anderson and Lewis, *Lead-Based Paint: Abate or Wait? Your Insurance Policy May Hold the Answer*, 182 N.J. Law. 10 (1997) ☐

-- Bartlett and Bartlett, *Environmental Problems as Material Defects*, 19 N.Y. St. B.A. Real Prop. L. Sec. Newsletter 18 (1991) ☐

-- Becker, Butler and Jatlow, *The Role of Environmental Assessments in Real Estate Transactions*, 18 Real Est. L.J. 379 (1990) ☐

-- Billauer, *Protection for the Latest Wave of Asbestos Litigation*, 60 N.Y.S. B.J. 12 (1988) ☐

-- Bleicher and Stonelake, *Caveat Emptor: The Impact of Superfund and Related Laws on Real Estate Transaction*, 14 Env't'l L. Rep. 10017 (1984) ☐

-- Block, *Asbestos Litigation Reaches Commercial Building Doors*, 198 N.Y.L.J., Sept. 23, 1987 at p. 25, col. 5 ☐

-- Block, *Landlords Risk Asbestos Suits*, 200 N.Y.L.J., June 15, 1988 at p. 11, col. 4. ☐

-- Bookspan, *Asbestos A Major Real Estate Concern*, 19 Real Est. L.J. 158 (1990)



-- Bookspan, *Radon: The Risks of a Natural Gas*, 19 Real Est. L.J. 363 (1991)

..... ☐

-- Bourdeau, *Minimizing Hazardous Waste Liabilities in Real Estate Transactions*, 6 *Constr. Law* 1 (1986) ☐

-- Comment, *Radon Litigation: An Overview of Homeowners' Potential Causes of Action*, *Cum. L. Rev.* 825 (1990) ☐

-- Cross, *Establishing Environmental Innocence*, 23 Real Est. L.J. 332 (1995)
..... ☐

-- Driesen, *What is Free Trade? The Real Issue Lurking Behind the Trade and Environmental Debate*, 41 *Va. J. Intl'l L.* 279 (2001) ☐

-- Fitzsimmons and Sherwood, *The Real Estate Lawyer's Primer (and More) to Superfund: The Environmental Hazards of Real Estate Transactions*, 22 *Real Prop., Prob. & Tr. J.* 765 (1987) ☐

-- Forte, *Environmental Due Diligence, A Guide to Liability Risk Management in Commercial Real Estate Transactions*, 5 *Fordham Env'tl L.J.* 349 (1994)
☐

-- Glazerman, *Asbestos in Commercial Buildings: Obligations and Responsibilities of Landlords and Tenants*, 22 *Real Prop., Prob. & Tr. J.* 661 (1987) ☐

-- Goldstein, *Green Wood in the Bundle of Sticks: Fitting Environmental Ethics and Ecology into Real Property Law*, 25 *B.C. Env'tl Aff. L. Rev.* 347 (1998)
☐

-- Goodman and Harkawik, *Handling Transactions Involving Environmentally Contaminated Property*, 21 *Real Est. Rev.* 40 (1991) ☐

-- Kublicki, *Heavy Metal: Residential Lead Rule*, 10 *Prob. & Prop.* 38 (1996)
..... ☐

-- Lanigan, *Asbestos Abatement: The Owner's Dilemma*, 18 *Real Est. Rev.* 65 (1988)
..... ☐

-- Lee and Schwartz, *Radon Practical Approaches to the Risks and Uncertainties*, 19



-- Maltese and Jankowski, *An Overview of the New Federal Lead-Based Paint Disclosure Requirements*, 182 N.J. Law. 7 (1997) ☐

-- McKeith and Luban, *Environmental Considerations in Real Estate Purchase and Sale Transactions*, 14 Cal. Real Prop. J. 1 (1996) ☐

-- Moskowitz, *Hazardous Waste and Real Estate Transactions*, 9 L.A. Law. 51 (1987) ☐

-- Murphy and Conant, *Contractual Allocation of Environmental Liabilities: Recent Developments and Practice Considerations*, 9 Env'tl Claims J. 91 (1997) ☐

-- Riewer, *Environmental Cleanup-Cost Recovery Actions in Illinois: Good News for Property Buyers*, 84 Ill. B.J. 474 (1996) ☐

-- Schwenke, *Environmental and Land Use Laws, Regulations and Permits: How They Affect Real Estate Transactions, Financing and Lawyers, and What to Do About It*, 14 Real Prop., Prob. & Tr. J. 851 (1979) ☐

-- Smith, *Investor Protection Against Environmental Risks*, 19 Real Est. Rev. 14 (1989) ☐

-- Stern, *Testing Your Mettle: The New Lead-Based Paint Regulations*, 24 N.Y. Real Prop. L.J. 115 (1996) ☐

-- Story, *New Asbestos Regulations for Private Building Owners*, 9 Prob. & Prop. 25 (1995) ☐

-- Suttles, Jr., *Transmigration of Hazardous Industry: The Global Race to the Bottom, Environmental Justice, and the Asbestos Industry*, 16 Tul. Env'tl L. J. 1 (2002) ☐

-- Todd, *Handling Environmental Law Concerns in Real Estate Transactions*, 19 Real Est. Rev. 76 (1989) ☐

-- Tondro, *Reclaiming Brownfields to Save Greenfields: Shifting the Environmental Risks of Acquiring and Reusing Contaminated Land*, 27 Conn. L. Rev. 789 (1995) ☐

-- Truglia, *Asbestos as an Impairment of Warranty of Habitability*, 200 N.Y.L.J., Mar.

16, 1988 at p. 32, col. 3 ☐

-- Wactor, *New Federal Regulations Require Disclosure of Lead Paint in Residential Dwellings*, 14 Cal. Real Prop. J. 24 (1996) ☐

-- Warren, *Lead Paint: Hazardous to Your Health and to the Real Estate Industry*, 8 Prob. & Prop. 22 (1994) ☐

-- Wright, Jr. and Morrissey, *Arkansas Facility/Real Property Redevelopment in the Year 2000: Tools Available to Resolve Environmental Issues*, 52 Ark. L. Rev. 751 (1999) ☐

6. Governmental regulations

-- Bernstein, *RESPA Storm Clouds Rain on Home Equity Loans*, 8 Real Prop. & Prob. 18 (1994) ☐

-- Bowman, *Instream Flow Regulation: Plugging the Holes in Maine's Water Law*, 54 Me. L. Rev. 287 (2002) ☐

-- Coffee and Welch, *Federal Regulation of Land Sales: Full Disclosure Comes Down to Earth*, 21 Case W. Res. L. Rev. 5 (1969) ☐

-- Cogbill, III and Keene, *Real Estate and Land Use Law*, 37 U. Rich. L. Rev. 271 (2002) ☐

-- Feller, *Non-Threshold Pollutants and Air Quality Standards*, 24 Env't'l L. 821 (1994) ☐

-- Grossman, *Counseling the Client on Zoning Issues in Residential Closings*, 12 Prac. Real Est. Law. 87 (1996) ☐

-- Haft, *The Americans with Disabilities Act Concerns for Lenders, Owners, and Tenants*, 7 Real Est. Fin. J. 48 (1992) ☐

-- Hammes, *The Intersection of Real Estate Finance and Land Use Controls*, 23 U. Balt. L. Rev. 119 (1993) ☐

-- Isaacson and Hosford, *The ADA and Real Estate Transactions*, 6 Prob. & Prop. 57 (1992) ☐

-- Jones, *Real Estate Impact of the Americans with Disabilities Act*, 21 Real Est. L.J. 3

☐

-- Lisman, *Understanding the Interstate Land Sales Full Disclosure Act*, 13 Prac. Real Est. Law. 57 (1997) ☐

-- Moore, *The Americans with Disabilities Act Title III The "New" Building*, 71 Neb. L. Rev. (1992)..... ☐

-- Poindexter, *Light, Air, or Manhattanization?: Communal Aesthetics in Zoning Central City Real Estate Development*, 78 B.U.L. Rev. 445 (1998) ☐

-- Shibata, *Access to Justice: The Social Responsibility of Lawyers: Land-Use Law in the United States and Japan: A Fundamental Overview and Comparative Analysis*, 10 Wash. U. J. L. & Pol'y. 161 (2002) ☐

-- Sterrett, *The RESPA Surprise*, 21 N.Y. St. B.A. Real Prop. L. Sec. Newsletter 112 (1993) ☐

-- Stoppello, *Federal Regulation of Home Mortgage Settlement Costs: RESPA and Its Alternatives*, 63 Minn. L. Rev. 367 (1979) ☐

-- Todd, *Real Estate Transactions Become Targets for Antitrust Scrutiny*, 17 Real Est. Rev. 72 (1988) ☐

-- Tondro, *Reclaiming Brownfields to Save Greenfields: Shifting the Environmental Risks of Acquiring and Reusing Contaminated Land*, 27 Conn. L. Rev. 789 (1995) ☐

7. Remedies

-- Freeman, *Condominiums --Breach of Contract of Sale --Specific Performance Is Not Automatically Available to the Vendor of a Condominium*, 6 St. Mary's L.J. 766 (1974) ☐

-- Hoeniz and Hunter, *Dispute Resolution in Construction and Real Estate*, 23 Real Est. Rev. 79 (1993) ☐

-- Klingler, *Representing Clients in Real Estate Mediations*, 14 Cal. Real Prop. J. 16 (1996) ☐

-- Kronman, *Specific Performance*, 45 U. Chi. L. Rev. 351 (1978) ☐

-- Maggs, *Remedies for Breach of Contract Under Article II of the Uniform Land*

Transactions Act, 11 Ga. L. Rev. 275 (1977) ☐

C. Mortgages and financing

1. Mortgages and financing

-- Abbasi, *Hedging Interest Rate Risk on Variable Rate Debt*, 23 Real Est. Rev. 44 (1993)
..... ☐

-- Baker, *Adjustable Interest Rates in Home Mortgages: A Reconsideration*, 1975 Wis. L.
Rev. 742 (1975) ☐

-- Bartke and Tagaropulos, *Michigan's Looking Glass World of Due-On-Sale Clauses*, 24
Wayne L. Rev. 971 (1978) ☐

-- Bruce, *Mortgage Law Reform Under the Uniform Land Transactions Act*, 64 Geo. L.J.
1245 (1976) ☐

-- Burkhart, *Lenders and Land*, 64 Mo. L. Rev. 249 (1999) ☐

-- Cerezola, *Acceleration Clause Disclosure Under the Truth in Lending Act*, 77 Colum.
L. Rev. 649 (1977) ☐

-- Cook, *Jumping Through the Hoops With Standby Letters of Credit*, 8 Prob. & Prop. 24
(1994) ☐

-- Dicker and Campo, *FF&E and the True Lease question: Article 2A and Accompanying
Amendments to UCC Section 1-201(37)*, 7 Am. Bankr. Inst. L. Rev. 517 (1999)
..... ☐

-- Draper, *Tight Money and Possible Substantive Defenses to Enforcement of Future
Mortgage Commitments*, 50 Notre Dame Law. 603 (1975) ☐

-- Edwards, *Commercial Mortgage Loan Commitments: A Borrower's Perspective*, 8
Prob. & Prop. at 28 of July/Aug. issue (1994) ☐

-- Eggleston, *Mortgage Discrimination: Eliminating Racial Discrimination in Home
Financing Through the Fair Housing Act of 1968*, 20 St. Louis U. L.J. 139 (1975)
..... ☐

-- Fileti and Steen, *Synthetic Lease Financing for the Acquisition and Construction of
Power Generation Facilities in a Changing U.S. Energy Environment*, 24 Fordham Int'l
L. J. 1083 (2001) ☐

-- Forte, *A Capital Markets Mortgage: A Ratable Model for Main Street and Wall Street*, 31 *Real Prop., Prob. & Tr. J.* 489 (1996) ☐

-- Groot, *Specific Performance of Contracts to Provide Financing*, 60 *Cornell L. Rev.* 718 (1975) ☐

-- Hammes, *Development Agreements: The Intersection of Real Estate Finance and Land Use Controls*, 23 *U. Balt. L. Rev.* 119 (1993) ☐

-- Holtzschue, *Opinions on Real Estate Secured Transactions in a Post-Accord World: The Opinion Giver's Perspective*, 29 *Real Prop., Prob. & Tr. J.* 655 (1994) ☐

-- Hughes, *Future Advance Mortgages: Preserving the Benefits and Burdens of the Bargain*, 29 *Wake Forest L. Rev.* 1101 (1994) ☐

-- Humphrey, *Tucker v. Larsen The Demise of the Due-On-Sale Clause in California?* 10 *U.S.F.L. Rev.* 665 (1976) ☐

-- Ji, *Nonrecourse Financing of Real Property: Depreciation Allocation and Full Recapture to Minimize Deferral and Eliminate Conversion*, 29 *Colum. J.L. & Soc. Probs.* 217 (1996) ☐

-- Kolb, *Deficiency Judgments in Louisiana*, 49 *Tul. L. Rev.* 1094 (1975) ☐

-- Kratovil, *A New Dilemma for Thrift Institutions: Judicial Emasculation of the Due-On-Sale Clause*, 12 *J. Mar. J.* 299 (1979) ☐

-- Leipziger, *Deficiency Judgments in California: The Supreme Court Tries Against*, 22 *U.C.L.A. L. Rev.* 753 (1975) ☐

-- Leipziger, *The Mortgagee's Remedies for Waste*, 64 *Calif. L. Rev.* 1086 (1976) ☐

-- Lindquist, *Real Estate Lending Regulation: The New Ball Game*, 7 *Prob. & Prop.* 11 (1993) ☐

-- Marcus, *Beyond the Boundaries of the Community Reinvestment Act and the Fair Lending Laws: Developing a Market-Based Framework for Generating Low- and Moderate- Income Lending*, 96 *Colum. L. Rev.* 710 (1996) ☐

-- Mehr and Kilgore, *Enforcement of the Real Estate Loan Commitment: Improvement of the Borrower's Remedies*, 24 Wayne L. Rev. 1011 (1978) ☐

-- Menkes, *What You Need to Know About Commitment Letters in Residential Real Estate Transaction*, 12 Prac. Real Est. Law. 63 (1996) ☐

-- Mombach and Levin, *Debt Acceleration on Transfer of Mortgages Property*, 29 U. Miami L. Rev. 584 (1975) ☐

-- Mukatis and Nielsen, *Real Estate Lending activities of Commercial Banks Under Superfund*, 24 Real Est. L.J. 358 (1996) ☐

-- Myers, *Acceleration Clauses as a Protection for Mortgages in a Tight Money Market*, 20 S.D. L. Rev. 329 (1975) ☐

-- Nathan, *The Civil Code and Modern Methods of Financing*, 50 Tul. L. Rev. 583 (1976) ☐

-- Nauts, *Reverse Mortgages Backing Into the 90s*, 8 Prob. & Prop. 56 (1994) ☐

-- Nelson, *Constitutional Problems With Power of Sale Real Estate Foreclosure: A Judicial Dilemma*, 43 Mo. L. Rev. 25 (1978) ☐

-- Newton, III, *Structuring Foreign Investment in United States Real Estate*, 50 U. Miami L. Rev. 517 (1996) ☐

-- O'Malley, *Due-On-Sale Clauses in Deeds of Trust: State Regulation or Preemption?* 2 Ariz. St. L.J. 367 (1979) ☐

-- Ornstein, *Examining the Effect of New Legislation on Consumer Protection for "High Cost Mortgages"*, 25 Real Est. L.J. 40 (1996) ☐

-- Pearson and Reedy, *Enforceability of "Dragnet Clauses" in Deeds of Trust: The Current State of the Law in Texas*, 56 Tex. L. Rev. 733 (1978) ☐

-- Peters, *Judicial Mortgage Rights: Recordation of Non-Executory Judgments*, 35 La. L. Rev. 892 (1975) ☐

-- Ragain, *Acceleration Clause*, 17 Washburn L.J. 219 (1977) ☐

-- Salsich, *Housing Finance Agencies; Instruments of State Housing Policy or Confused*

Hybrids? 21 *St. Louis U. L. J.* 595 (1978) ☐

-- Schrader, *The Wrap-Around Mortgage: A Critical Inquiry*, 21 *U.C.L.A. L. Rev.* 1529 (1974) ☐

-- Shepherd, *Adding Certainty to Fixed Fee Quotes*, 12 *Prac. Real Est. Law.* 13 (1996) ☐

-- Siegel and Doyle, *Sales of Real Estate With Contingent Payment Debt*, 24 *J. Real Est. Tax'n* 243 (1997) ☐

-- Steiner, *A Letter of Credit Primer for Real Estate Lawyers*, 28 *Real Prop., Prob. & Tr. J.* 125 (1993) ☐

-- Swire, *The Persistent Problem of Lending Discrimination: A Law and Economics Analysis*, 73 *Tex. L. Rev.* 787 (1995) ☐

-- Weidner, *Synthetic Leases: Structured Finance, Financial Accounting and Tax Ownership*, 25 *Iowa J. Corp. L.* 445 (2000) ☐

-- Weill and Thottathil, *Real Property: Revisiting Takings, Assumptions, and Reverse Mortgages*, 24 *Real Est. L.J.* 333 (1996) ☐

2. Mortgagees' and creditors' rights and responsibilities

-- Cyphert and Leslie, *Lender Liability: The New Horizon*, 9 *Prob. & Prop.* 56 (1995) ☐

-- Edmonds, *Virginia Law of Interest and Usury*, 10 *U. Rich. L. Rev.* 77 (1975) ☐

-- Fleischer, Sprouls and Klein, *Forgive Us Our Debts: The Nonrecourse Bargain*, 24 *Real Est. Rev.* 25 (1994) ☐

-- Iezman and Arnold, *The False Promises of Recourse Loans*, 24 *Real Est. Rev.* 8 (1994) ☐

-- Jorgensen, *Who Would Gain the Real Advantage in the 2001 Bankruptcy Amendments Addressing Consumer Tax Issues?*, 75 *Am. Bankr. L. J.* 409 (2001) ☐

-- Kingen, *Superpriorities: An Analysis of Five Instances of Federal Tax Lien Subordination*, 11 *Gonz. L. Rev.* 550 (1976) ☐

- Klee, *One Size Fits Some: Single Asset Real Estate Bankruptcy Cases*, 87 Cornell L. Rev. 1285 (2002) ☐
- Kuklin, *Counseling the Client on Subordination and Intercreditor Agreements*, 11 Prac. Real Est. Law. 11 (1995) ☐
- Kuney, *Further Misinterpretation of Bankruptcy Code Section 363(f): Elevating in Rem Interests and Promoting the Use of Property Law to Bankruptcy-Proof Real Estate Developments*, 76 Am. Bankr. L. J. 289 (2002) ☐
- Madison, *Sloppy Draftsmanship of Loan Commitment Letters: An Open Invitation for Litigation Against Real Estate Lenders*, 22 N.Y. St. B.A. Real Prop. L. Sec. Newsletter 8 (1994) ☐
- O'Dorisio, *Lender-Vendor's Liability for Structural Defects in New Housing*, 53 Denver L.J. 413 (1976) ☐
- Poindexter, *Subordinated Rolling Equity: Analyzing Real Estate Loan Default in the Era of Securitization*, 50 Emory L. J. 519 (2001) ☐
- Shapiro, *Transfer Fees in Home Loan Assumptions: Illegal Interest or Legal Consideration?* 9 Geo. L.J. 454 (1975) ☐
- Siemers, *The Mortgagee's Lien Against Rents*, 25 Tex. Tech. L. Rev. 873 (1994) ☐
- Stein, *The Scope of the Borrower's Liability in a Nonrecourse Real Estate Loan*, 55 Wash & Lee L. Rev. 1207 (1998) ☐
- Thorstenson, *Mortgage Lender Liability to the Purchaser of New or Existing Homes*, 1 U. Ill. L. Rev. 191 (1988) ☐
- Townsend, *Secured Transactions and Creditors Rights*, 9 Ind. L.J. 305 (1975) ☐
- Walker, *The Collection of Debts From Insolvent and Fully Mortgaged Debtors*, 43 Tenn. L. Rev. 399 (1976) ☐
- Witkin and Desiderio, *Safe Harbors for Lenders: EPA's New UST Rule*, 10 Prob. & Prop. 20 (1996) ☐

3. Installment land sales

-- Greenberg, *Use of the Land Contract as a Financing Vehicle Some Thoughts and Observations*, 1 Milw. Law. 29 (1976) ☐

-- King, *Forfeiture: The Anomaly of the Land Sale Contract*, 41 Albany L. Rev. 71 (1977) ☐

-- Lohn, *Toward Abolishing Installment Land Sales Contracts*, 36 Mont. L. Rev. 110 (1975) ☐

-- Moringiello, *A Mortgage by Any Other Name: A Plea for the Uniform Treatment of Installment Land Contracts and Mortgages Under the Bankruptcy Code*, 100 Dick. L. Rev. 733 (1996) ☐

-- Nelson and Whitman, *Installment Land Contracts The National Scene Revisited*, 1985 B.Y.U. L. Rev. 1 (1985) ☐

-- Randolph, *Updating the Oregon Installment Land Contract*, 15 Will. L.J. 181 (1979) ☐

D. Condominiums and cooperatives

[Note: For further material, see Vol. 24, Chapter 20, *Real Estate Entities, supra* ; Vol. 26, Chapter 22, *Development and Subdivision*; and Vol. 29, Chapter 22B, *Real Estate Securities, infra*.]

-- Freeman, *Condominiums Breach of Contract of Sale Specific Performance Is Not Automatically Available to the Vendor of a Condominium*, 6 St. Mary's L.J. 766 (1974) ☐

-- Kennedy and Imbriani, *The Rights of Tenants in Condominium and Homeowner Association Communities*, 174 N.J. Law. 18 (1996) ☐

-- Johnson, *Condominium Practice: A Second Look*, 51 N.D. L. Rev. 761 (1975) ☐

-- Krasnowiecki, *Townhouses With Home Associations: A New Prospective*, 123 U. Pa. L. Rev. 711 (1975) ☐

-- Krebs, *The Legislative Response to "Sweetheart" Management Contracts: Protecting the Condominium Purchaser*, 55 Chi.-Kent L. Rev. 319 (1979) ☐

-- Lawrence, *Legislative Symposium Condominiums*, 35 La. L. Rev. 653 (1975) ☐

-- Madison, *Multi-Use Condominiums: Tax Planning to Avoid Double Taxation of Outside Income*, 16

- W. & M. L. Rev. 37 (1974) ☐
- Minahan, *State and Federal Regulation of Condominiums*, 58 Marq. L. Rev. 55 (1975)
☐
- Rosen, *Residential Housing Cooperatives A Legal Perspective*, 174 N.J. Law. 14 (1996)
☐
- Rosner, *Reducing the Risks of a Failing Common Ownership Community*, 11 Prac. Real Est. Law. 13 (1995) ☐
- Smith, *The Condominium Subdivision and Beyond*, 174 N.J. Law. 24 (1996) ☐
- Whitman, *Financing Condominiums and Cooperatives*, 13 Tul. L. Rev. 15 (1977) ☐

E. Brokers

- Barasch, *Negotiating Real Estate Brokerage Agreements*, 8 Real Est. Law J. 240 (1980)
☐
- Bergman, *How to Draft a Real Estate Brokerage Agreement*, Prac. Real Est. Law 45 (March 1987)
 ☐
- Black, *Client Liability to Real Estate Brokers: From Contract to Punitive Damages*, 25 Real Est. L.J. 78 (1996) ☐
- Braunstein, *Structural Change and Inter-Professional Competitive Advantage: An Example Drawn From Residential Real Estate Conveyancing*, 62 Mo. L. Rev. 241 (1997) ☐
- Brown, Grohman and Valcarcel, *Real Estate Brokerage: Recent Changes in Relationships and a Proposed Cure*, 29 Creighton L. Rev. 25 (1995) ☐
- Cameron, *Buyer Brokering More Complicated Than It Sounds*, 12 Prac. Real Est. Law. 13 (1996)
 ☐
- Fain, *An Overview of Real Estate Agent or Broker Liability*, 23 Real Est. L.J. 257 (1995)
☐
- Ferguson and Gray, *Environmental Liability of Brokers and Other Parties*, 19 Real Est. L.J. 218 (1991) ☐
- Hagglund, Weimer, Berman and Weiss, *Caveat Misrepresenter: The Real Estate Agent's Liability to*

the Purchaser, 5 Hofstra Prop. L.J. 381 (1993) ☐

-- Jaworski, *Overages: To Pay or Not to Pay, That Is the Question*, 113 Banking L.J. 909 (1996)
..... ☐

-- Pancak, Miceli and Sirmans, *Real Estate Agency Reform: Meeting the Needs of Buyers, Sellers and Brokers*, 25 Real Est. L.J. 345 (1997) ☐

-- Pendergrass, *The Real Estate Consumer's Agency and Disclosure Act: The Case Against Dual Agency*, 48 Ala. L. Rev. 277 (1996) ☐

F. Texts

1. Taxation

-- I. Faggen, A. Hague, et al., *Federal Taxes Affecting Real Estate* (Matthew Bender 1996) ☐

-- Hoven, *The Real Estate Investor's Tax Guide: What Every Investor Needs to Know to Maximize Profits* (Real Estate Educ. Co. 2nd ed. 1996)..... ☐

2. Contract and title issues

-- Bellairs, Helsel and Caldwell; McAdams, consulting ed., *Real Estate Practice in Pennsylvania* (Real Estate Educ. Co. 7th ed. 1996) ☐

-- K. Holtzschue, gen. ed., *RET: Purchase and Sale of Real Property* (Matthew Bender 1996) ☐

-- C. Nance, *Modern Real Estate Practice in Texas* (Real Estate Educ. Co. 1996)
..... ☐

-- Powell on Real Property (Matthew Bender 1996) ☐

-- Witkin, ed., *Environmental Aspects of Real Estate Transactions* (ABA 1995)
..... ☐

-- C. Yzenbaard, *Kentucky Real Estate Sales Contracts, With Forms* (Harrison 2nd ed. 1995) ☐

-- *Principles of Oregon Real Estate Law* (Oregon State Bar Continuing Legal Educ. 1995) ☐

3. Mortgages and financing

-- J. Norton & M. Baggett, eds., Lender Liability Law and Litigation (Matthew Bender 1996) ☐

-- P. Rohan, RET: Real Estate Financing (Matthew Bender 1996) ☐

4. Commercial property

-- E. Morris, gen. ed., Real Estate Development: Business, Commercial, Industrial and Major Residential Properties (Matthew Bender 1996) ☐

5. Condominiums and cooperatives

-- P. Rohan & M. Reskin, RET: Condominium Law and Practice (Matthew Bender 1996) ☐

-- P. Rohan & M. Reskin, RET: Cooperative Housing Law and Practice (Matthew Bender 1996) ☐

-- P. Rohan, RET: Home Owner Associations and Planned Unit Developments (Matthew Bender 1996) ☐

6. Brokers

-- P. Rohan, B. Goldstein & C. Bobis, RET: Real Estate Brokerage Law and Practice (Matthew Bender 1996) ☐

Legal Topics:

For related research and practice materials, see the following legal topics:

Real Property Law Financing General Overview Real Property Law Purchase & Sale General Overview Real Property Law Purchase & Sale Like-Kind Exchanges Tax Law Federal Income Tax Computation Sales & Exchanges General Overview Tax Law Federal Income Tax Computation Sales & Exchanges Capital Gains & Losses (IRC secs. 1201-1202, 1211-1212, 1221-1223, 1231-1260, 1271-1278, 1281-1288, 1291-1298) General Overview



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Current Legal Forms for Real Estate

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Current Legal Forms for Real Estate
Chapter 21 SALES AND EXCHANGES
Part III. Drafting Guidelines

25-21 Current Legal Forms for Real Estate § 21.42

§ 21.42 Drafting Guidelines

The drafting of a Purchase and Sale Agreement for real estate is usually undertaken by the purchaser's attorney because it is the purchaser who usually has to protect itself to be sure its contingencies are satisfied and that it is obtaining good title to what it is purchasing. The one exception might be when the real estate is a residential property. Frequently, in residential deals the broker has a preprinted form of contract which is used assuming a broker is involved, or the local bar association or local realtors' board has adopted a contract for use in residential transactions. Nevertheless, even the standard forms should be reviewed by counsel for both parties.

In a commercial transaction, the purchaser may have the benefit of obtaining much of the information required to prepare the contract from a letter of intent signed by the parties. The purchaser's attorney may have prepared the letter of intent, but in many instances it may have been prepared by the broker. In any event, the purchaser's attorney must obtain the necessary background information in order to prepare the contract. That information can be obtained primarily from the client, but also from any broker or title company involved in the transaction. The purchaser's attorney should have legal descriptions and maps or surveys of the property to understand the transaction, and if possible should view the property itself. The attorney must find out what the intended use of the property will be, and should find out if the client has done any due diligence type investigations of the property. If not, all such due diligence work must be written into the contract as contingencies which must be met to the purchaser's satisfaction.

Seller's counsel will review the draft prepared by purchaser's counsel. The primary concern of seller's counsel, apart from verifying the factual terms of the contract, is that the seller will receive the full amount of the purchase price in a timely fashion on the closing date, and that if there are delays, the seller will be able to enforce the seller's rights. Seller's counsel must also review the warranties the client is asked to give to make sure they can be given without exposing the seller to undue liability. The allocation of the closing costs must be examined to make sure they are fair and customary for the type of transaction in the area where the property is located.

A sample of a purchase and sale agreement for a commercial transaction involving the sale of a shopping center follows. Comments are set forth opposite noteworthy provisions in the agreement.

Legal Topics:

For related research and practice materials, see the following legal topics:

Real Property LawPurchase & SaleGeneral OverviewReal Property LawPurchase & SaleContracts of SaleGeneral
OverviewReal Property LawPurchase & SaleContracts of SaleFormalitiesReal Property LawPurchase & SaleContracts
of SalePeriod Between Execution & ClosingGeneral Overview



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Current Legal Forms for Real Estate
Chapter 21 SALES AND EXCHANGES
Part III. Drafting Guidelines

25-21 Current Legal Forms for Real Estate § 21.43

§ 21.43 Analysis of a Purchase and Sale Agreement for a Commercial Property

Analysis of a Purchase and Sale Agreement for a Commercial Property

CONTRACT

PURCHASE AGREEMENT AND ESCROW INSTRUCTIONS

THIS AGREEMENT is made at _____ [city], Ohio, this _____ [day] day of _____ [month], _____ [year], between Seller Associates, LLC, an Ohio limited liability company, hereinafter called "Seller," and Roudabush Properties, Ltd., an Ohio limited liability company, hereinafter called "Buyer." (n1)COMMENT

WITNESSETH:

In consideration of the mutual promises and covenants hereinafter set forth, the parties mutually agree as follows:

1. Description of Property. The Seller agrees to sell and convey to the Buyer, and the Buyer agrees to purchase and pay for, the premises known as the James Square Shopping Center located in the City of _____ [city], _____ [county] County, Ohio, which premises are outlined in red on the drawing marked Exhibit A, attached hereto and made a part hereof. The premises shall include the land and any and all buildings, fixtures, improvements, rights, privileges, and easements appurtenant thereto, and the personal property listed on Exhibit B, attached hereto and made a part hereof, all of which shall hereinafter be referred to as the "Property." (n2)COMMENT

It is understood that the Property excludes certain adjoining land consisting of approximately five (5) acres, which is zoned for residential purposes. Seller agrees at its expense to take all necessary steps required to subdivide such residential land from the larger parcel of which it is a part, including without limitation, the preparation of the lot split plat in form required for such approval of the subdivision. In addition, Seller shall have prepared a legal description of the portion of such parcel which is zoned commercial and is included as part of the Property. Copies of such lot split plat and legal description shall be submitted to Buyer and its counsel for approval prior to the submission of same to the

local governmental authorities required to approve such lot split. (n3)COMMENT

2. Purchase Price. The total purchase price for the Property is Three Million Five Hundred Thousand Dollars (\$3,500,000), payable by Buyer as follows: (n4)COMMENT

A. Twenty Five Thousand Dollars (\$25,000) in cash or by check upon the completion of Buyer's due diligence as hereafter described in Paragraph 4.A. below, delivered to Seller, which sum shall be deposited into escrow with the escrow agent hereinafter designated.

B. The balance of the purchase price, namely Three Million Four Hundred Seventy Five Thousand Dollars (\$3,475,000), in cash (or certified or official bank check), or partly in cash (or certified or official bank check) and partly by immediately available funds from an irrevocable commitment for mortgage financing issued by a reputable lending institution committing said institution to loan Buyer a portion of the purchase price, all of which shall be deposited into escrow on or before the closing date of this transaction. (n5)COMMENT

3. Closing Date. The closing date of this transaction shall be on or before ninety (90) days from the date of execution of this Agreement. However, if necessary, Buyer shall be permitted to extend the closing date for thirty (30) days by written notice to Seller. (n6)COMMENT

4. A. Contingencies. This Agreement is expressly conditioned upon the following contingencies being met to Buyer's satisfaction:

(i) review and approval of a Phase I environmental audit to determine that no environmental hazards exist in, on or about the Property, and a wetlands delineation to determine if there are any wetlands on the Property. Seller will provide copies to Buyer of all previous environmental audits performed on the Property, if any; (n7)COMMENT

(ii) inspection and approval of the physical condition of the improvements located on the Property;

(iii) review and approval of leases, tenancies and rental agreements affecting the Property, copies of which shall be delivered to Buyer by Seller upon the execution of this Agreement, and approval of the operating statements for the Property provided by Seller to Buyer for the two years preceding the year of this Agreement. (n8)COMMENT

Buyer shall use commercially reasonable efforts to satisfy the above conditions within forty-five (45) days of the date of execution of this Agreement. Buyer, its agents and employees, shall have the right of access to the Property to perform all such tests, investigations and reports as Buyer shall determine to do, at Buyer's cost and expense. Buyer agrees to and does hereby indemnify, defend and hold harmless Seller from any damages to persons or property resulting from such inspections. In the event the aforesaid contingencies are not satisfied within the aforesaid 45-day period, Buyer shall have the right, at its option, to terminate this Agreement by written notice to Seller in which event all funds and documents shall be returned to the respective parties without further liability hereunder to either party. (n9)COMMENT

B. Financing Contingency. This Agreement is further conditioned upon Buyer obtaining a commitment within thirty (30) days from the date of execution of this Agreement, from a reputable lending institution of a mortgage loan of at least Two Million Dollars (\$2,000,000), payable in equal constant monthly payments over a period of fifteen (15) years or longer, with interest at seven and one-half percent (7 1/2 %) per annum or less and a loan fee of one percent (1%) or less. Buyer shall endeavor in good faith to obtain a mortgage loan on said terms or more favorable terms, but if Buyer shall be unable to obtain such a commitment by the aforesaid date, this Agreement shall be null and void and all funds and documents shall be returned to the respective parties hereto, and neither party shall have any rights against the other. (n10)COMMENT

C. Warranties. Seller hereby warrants, which warranties shall be effective as of the closing date and shall survive the transfer of title to Buyer or Buyer's nominee, as follows:

(i) that all improvements now on the Property are entirely within the boundary lines of the land described on Exhibit A, attached hereto, and no other adjoining property encroaches upon said land;

(ii) that all work and labor performed and all materials furnished with respect to any improvements or repairs to the Property have been paid in full, and there will be no mechanic's liens or the possibility thereof in connection with any such work, labor and materials performed on or furnished to the Property; (n11)COMMENT

(iii) that there are no outstanding notices or orders from any governmental authority with respect to the condition of the Property or repair of the same, or with respect to any claim of a violation of any laws, ordinances, zoning codes, building codes or orders applicable thereto;

(iv) that to Seller's knowledge the improvements on the Property are structurally sound and in good condition and repair, including, without limitation of the foregoing, the roof, foundation, walls, heating and cooling system, plumbing, water and electrical systems;

(v) that all improvements made by the local governmental authority that now benefit or will benefit the Property upon completion have been assessed against the Property as of the execution date of this Agreement;

(vi) that there are no actions, suits or proceedings against the Seller with respect to the Property, and that there are no investigations pending or actions, suits or proceedings at law or in equity or investigations threatened against Seller that would adversely affect this transaction or the Property being sold hereunder;

(vii) that there are no employment contracts, service contracts, or similar contracts and agreements relating to the management, ownership or operation of the Property except as set forth on Exhibit C attached hereto and made a part hereof; (n12)COMMENT

(viii) that Seller will assign to Buyer on or before the closing date by delivering into escrow any and all guaranties or warranties with respect to the condition of the Property, including all improvements and fixtures being conveyed hereunder that remain in effect and are assignable; (n13)COMMENT

(ix) that all leases, tenancies, and rental agreements affecting the Property, and any amendments thereto, hereafter referred to collectively as the "Leases", have been delivered to Buyer and are identified on Exhibit D, attached hereto and made a part hereof, that the information describing the Leases as set forth on Exhibit D is accurate and complete, that no tenants are entitled to any rebate, concession or other benefit except as set forth therein, and there shall be no cancellations, amendments or modifications to the aforesaid Leases or new leases or agreements entered into prior to the closing date, without the written consent of Buyer; Seller further warrants that Seller has not and will not collect from any tenant more than one month's rental in advance; (n14)COMMENT

(x) that all Leases affecting the Property are now in full force and effect and the tenants are not in default under said Leases, and that Seller has neither committed nor suffered any act or omission which would constitute a default on Seller's part under the Leases, nor would entitle the tenants to damages, a right of setoff, or a right to terminate the Leases; furthermore, Seller has not received any notice nor is Seller aware of any intention on the part of any tenant to assert any claim of default, any claim for damages, any right of setoff, any right to terminate, or any intention of the tenant to vacate the tenant's premises; (n15)COMMENT

(xi) that all financial statements, rent rolls, and other documents and information given Buyer accurately reflect the operation of the Seller's Property and Seller has not withheld any material information from Buyer relating to the operation of the Seller's Property; (n16)COMMENT

(xii) that all documents delivered or required hereunder to be delivered to Buyer and all warranties herein made by

Seller are accurate and complete and there has been no material change in any of the facts, circumstances or subjectmatter of this transaction of which Buyer has not been informed; and

(xiii) that the sale and transfer of the Property aforesaid is or shall be prior to the closing date duly authorized in accordance with law, and within the scope of authority of the party or parties conveying the Property, and evidence of such authority shall be presented to Buyer prior to the closing of this transaction.

5. A. Deed. Seller shall convey marketable title to the Property to Buyer or Buyer's nominee by good and sufficient general warranty deed, warranting title to be free and clear of all liens, charges and encumbrances, clouds and defects whatsoever, except such restrictions, reservations, limitations, easements and conditions of record which are approved by Buyer as hereinafter provided, leases to occupying tenants which have been approved by Buyer as provided above, zoning ordinances and taxes and assessments, both general and special, which are a lien but not yet due and payable. Said deed shall be deposited into escrow on or before the closing date. Prior to the deposit of said deed into escrow, a copy of said deed shall be submitted to Buyer's counsel for approval. (n17)COMMENT

Seller shall convey marketable title to the personal property being conveyed hereunder by a bill of sale in form approved by counsel for Buyer, warranting title to be free and clear of all liens and encumbrances whatsoever. Said bill of sale shall be deposited into escrow on or before the closing date. Prior to the deposit of said bill of sale into escrow, a copy of said bill of sale shall be submitted to Buyer's counsel for approval.

B. Title Insurance. Seller shall accompany Seller's deed with an Owner's Fee Policy of title Insurance (hereafter referred to as "title insurance") issued by Sloan Title Agency, Inc. as agents for First American Title Insurance Company (hereinafter called "title company"), in its customary form, in the amount of the purchase price, insuring marketable title to be good in Buyer, subject only to the exceptions to be contained in the deed. (n18)COMMENT

C. Title Report. A preliminary title report, with a special tax search included, in the form of a commitment to issue the required title policy requested by Buyer ("title report") shall be ordered from the title company by Seller immediately upon the execution of this Agreement, a copy of which shall be delivered to Buyer. Within ten (10) days from the receipt of said title report by Buyer, Buyer shall notify Seller and the title company of any restrictions, reservations, limitations, easements and conditions of record (together herein called "title defects") disclosed in said title report which are objectionable to Buyer. In the event Buyer so notifies Seller of any such title defects, Seller shall have until the closing date to cure or remove said title defects. Seller shall be obligated to remove all such title defects objected to by Buyer that may be removed by the payment of money, and Seller shall take whatever reasonable steps may be necessary to remove any other title defects. (n19)COMMENT

On the closing date, the escrow agent shall notify Seller and Buyer as to whether the title company is then in a position to issue the title insurance showing as exceptions only those items in the title report to which the Buyer did not object. If the escrow agent shall notify the parties that (a) the title company will issue such title insurance, this transaction shall be consummated in accordance with the terms and provisions of this Agreement, or (b) the title company will not issue such title insurance, and if the Seller does not forthwith cure the title defects that the escrow agent shall recite as preventing such issuance showing as exceptions only those items in the title report to which the Buyer did not object, or within such period of time as Buyer in Buyer's sole discretion shall permit, or Buyer does not forthwith waive the same, then this Agreement shall be automatically void and of no further force and effect, the escrow agent shall return to the parties the respective funds and documents deposited into escrow by them, and the parties shall be fully released from any liability or obligation hereunder. If Buyer shall waive the title defects preventing such issuance by so notifying the title company and the escrow agent, or if the Seller shall have cured the same as permitted above, the obligations of the parties hereunder shall not be affected by reason thereof, there shall be no abatement or reduction of the purchase price, and this transaction shall be consummated in accordance with the terms and provisions of this Agreement, except that such title defects that are waived by Buyer, if any, shall be set forth as exceptions in the deed and in the title insurance. (n20)COMMENT

6. Assignment of Leases. The Seller agrees to assign to Buyer or Buyer's nominee, on or before the closing date, each and every Lease affecting the Property, by means of a blanket assignment specifically identifying all such Leases, in form approved by counsel for Buyer. Said blanket assignment shall be deposited into escrow on or before the closing date. Prior to the deposit of said blanket assignment into escrow, a copy of the same shall be submitted to Buyer's counsel for approval. Executed counterparts of all Leases affecting the Property shall also be delivered to Buyer or Buyer's counsel on or before the closing date, along with a current rent roll and list of security deposits or other tenant deposits, if any, certified by Seller as to its accuracy and completeness. A copy of same shall be delivered to the escrow agent. (n21)COMMENT

Buyer, at Buyer's option, shall have the right to request that Seller obtain prior to the closing, estoppel certificates from all tenants occupying space pursuant to the Leases. Such estoppel certificates shall be in such form as is reasonably approved by Buyer and its counsel. If all of such certificates from tenants leasing at least 10,000 square feet of space are not timely obtained, Buyer at its option, shall have the right to terminate this Agreement or to delay the closing until such certificates are obtained. (n22)COMMENT

7. Damage. Should the building or any other improvements on said Property be damaged or destroyed prior to transfer of record title (a) to the extent of Fifty Thousand Dollars (\$50,000) or less, then this Agreement shall continue in full force and effect and Seller shall forthwith assign to Buyer all rights of Seller to the insurance proceeds due by reason of said damage, or (b) to the extent of an amount greater than Fifty Thousand Dollars (\$50,000), then the Buyer may, at Buyer's option, (i) elect to continue this Agreement in full force and effect, in which case the Seller shall forthwith assign to Buyer all rights of Seller to the insurance recovery due by reason of said damage, or (ii) elect to rescind and void this Agreement, and thereupon there shall be returned to Buyer all money, papers or documents deposited by Buyer, and there shall be returned to Seller all papers or documents deposited by Seller. After transfer of record title to the Property to Buyer, the risk of loss shall be and is assumed by the Buyer. There shall be no proration of insurance. Seller shall retain Seller's insurance until transfer of record title to Buyer, and it shall be the obligation of Buyer to procure Buyer's own policies of insurance to be effective from and after the date title to the Property is transferred to the Buyer or Buyer's nominee. (n23)COMMENT

8. Possession. Seller shall maintain the Property in good repair and continue to operate it in a first-class manner through the closing date. Seller shall deliver possession of the Property as of the closing date, subject to the rights of tenants in possession, in the condition as warranted by Seller and in no event in any worse condition than the condition as of the date of execution of this Agreement, less reasonable wear and tear. (n24)COMMENT

9. Prorations. All prepaid rentals shall be prorated by the escrow agent as of the closing date, and Buyer shall receive credit for security deposits on said leases, if any, through the escrow. All maintenance and operating expenses applicable to the Property, to the extent they are not currently being paid by existing tenants, shall be prorated by the parties outside of escrow. All utility charges applicable to the Property, to the extent they are not being paid by existing tenants, shall be paid by Seller up to the date of closing based on final bills for the same obtained by Seller, after which such charges shall accrue to Buyer.

The sum of Five Hundred Dollars (\$500) shall be held in escrow as security for the payment of said utilities until Seller deposits into escrow receipts evidencing the payment of said utilities. (n25)COMMENT

10. Real Estate Taxes. All real estate taxes and assessments, both general and special, shall be prorated by the escrow agent as of the date the deed is filed for record, using for such purpose the rate and valuation shown on the last available tax duplicate. If the aforesaid proration shall not fully reimburse Buyer for all real estate taxes and assessments accrued and unpaid with respect to the Property as of the record date of transfer of title, Seller shall promptly reimburse Buyer that amount accrued in excess of the proration credit upon the official certification of the real estate tax duplicate for the year in which transfer of title occurs. (n26)COMMENT

11. Brokers. The Seller and the Buyer represent to each other, which representation shall survive the closing of

this transaction, that no real estate broker was involved in this transaction and that no brokerage fees or other compensation is due any real estate broker or any other person because of this transaction, except for Sadd Realty, Ltd., whose commission shall be the sole responsibility of Seller and shall be paid by the escrow agent from the funds deposited into escrow and charged to Seller, if and when the transaction contemplated by this Agreement is consummated. (n27)COMMENT

12. Escrow. This transaction shall be placed in escrow with Sloan Realty Title Agency, Inc. ("escrow agent"). An executed counterpart of this Agreement shall be deposited with the escrow agent by the Buyer, and this Agreement shall serve as the escrow instructions. The escrow agent may attach its standard conditions of acceptance thereto; provided, however, that in the event said standard conditions are inconsistent or in conflict with the terms of this Agreement, then this Agreement shall control. (n28)COMMENT

13. Duties of Escrow Agent. On the closing date, the escrow agent shall file for record the deed and any other instruments required to be recorded and shall thereupon deliver to each of the parties the funds and documents to which they shall be respectively entitled, together with its escrow statement, provided that the escrow agent shall then have on hand all funds and documents necessary to complete the within transaction and provided the title company has stated in writing that it shall be in a position to and will issue and deliver, upon the filing of the deed for record, the title insurance required hereunder. (n29)COMMENT

In closing this transaction, the escrow agent shall charge the Seller with the following:

- (a) the full amount of real estate taxes and assessments prorated up to and including the date of transfer of title;
- (b) the cost of any transfer tax;
- (c) the cost of a title report, title search, and title insurance policy in the amount of the purchase price;
- (d) the cost of paying off and satisfying any mortgage indebtedness for which Seller is liable, together with the cost of any mortgage cancellation, recording fee or other costs incident to the satisfaction of any such indebtedness; (n30)COMMENT
- (e) the cost of the brokerage commission required to be paid hereunder;
- (f) one-half (1/2) of the escrow fee; and
- (g) all other charges properly borne by Seller consistent with the terms of this Agreement;

and immediately thereafter shall deliver to the Seller the balance of the funds in its hands due under the terms hereof, and any documents due the Seller.

On closing, said escrow agent shall charge the Buyer with the following:

- (a) any cost of financing this transaction which may be arranged for by the Buyer;
- (b) the cost of filing the deed for record;
- (c) one-half (1/2) of the escrow fee; and
- (d) all other charges properly borne by Buyer consistent with the terms of this Agreement;

and immediately thereafter, said escrow agent shall deliver to Buyer said title insurance, the recorded deed or Recorder's receipt therefor, any prorations to which Buyer is entitled, and any other funds or documents due the Buyer.

14. Notices. Any notice which may be or is required to be given pursuant to the provisions of this Agreement shall be deemed to be sufficiently given if personally delivered or sent by certified or registered mail, postage prepaid, return receipt requested, and addressed as follows:

If to Seller, to: Mr. Robert Johnson
Seller Associates, LLC
[Address]

With a copy to: Seller's Counsel
[Address]

If to Buyer, to: Mr. Joseph Roudabush
Roudabush Properties, Ltd.
[Address]

With a copy to: Buyer's Counsel
[Address] (n31)COMMENT

15. Like-Kind Exchanges. Buyer acknowledges that Seller may wish to structure Seller's disposition of the Property in a manner intended by Seller to constitute an exchange of land for property of a like-kind (hereinafter the "replacement property") that is described in *Section 1031 of the Internal Revenue Code of 1986*, as amended (an "Exchange"). Notwithstanding anything in this Agreement to the contrary, Seller shall have the right to assign Seller's interest in this transaction without Buyer's consent, to such person or entity as Seller may designate to serve as a Qualified Intermediary (within the meaning of *Treasury Regulation § 1.1031(k)-1(g)(iv)*) for the sole purpose of enabling Seller to effect an Exchange; provide, however, that notwithstanding any such assignment, Seller shall not be released from any of Seller's liabilities, obligations or covenants under this Agreement. (n32)COMMENT

Buyer shall cooperate in all reasonable respects with Seller to effect any Exchange; provided, however, that (i) Seller's ability to consummate an Exchange shall not be a condition to the obligations of Seller under this Agreement, and Buyer shall not be responsible for any of the tax consequences to Seller with respect to the transaction contemplated hereunder, and (ii) Buyer shall not be required to incur any additional costs or expenses as a result of any Exchange.

16. Miscellaneous. This Agreement represents the entire agreement between the parties and shall not be modified except by a written amendment executed by both of the parties hereto. This Agreement shall be binding upon and inure to the benefit of Seller and Buyer and their respective successors and assigns. This Agreement shall be governed by the laws of the state where the Property is located.

The parties hereto have hereunto set their hands the day and year first above written.

SELLER:

SELLER SQUARE ASSOCIATES, LLC

By: _____ Managing Member

BUYER:

ROUDABUSH PROPERTIES, LTD.

By: _____

Managing Member

(n33)COMMENT

Legal Topics:

For related research and practice materials, see the following legal topics:

Real Property LawDeedsGeneral OverviewReal Property LawLandlord & TenantLease AgreementsAssignmentsReal Property LawOwnership & TransferBusiness & Corporate EntitiesReal Property LawPurchase & SaleContracts of SaleGeneral OverviewReal Property LawPurchase & SaleContracts of SaleFormalitiesReal Property LawPurchase & SaleEscrowReal Property LawPurchase & SaleLike-Kind ExchangesReal Property LawZoning & Land UseBuilding & Housing CodesTax LawFederal Income Tax ComputationSales & ExchangesLike-Kind Exchanges (IRC sec. 1031)Requirements

FOOTNOTES:

(n1)COMMENT(n1) The first paragraph should identify the parties and if entities, the type of entity. If the Seller is an individual, the Seller's marital status can be important to know in states which still have dower as an interest of a spouse in real property owned by the other spouse. If so, the spouse of the Seller should also be required to sign the contract. It is important to confirm how title to the real estate is held so that the titleholder is properly identified as the "Seller" on the contract.

(n2)COMMENT(n2) An adequate description of what is to be sold is critical to have an enforceable contract. A legal description is the best method. In this contract, a drawing is used because there is no separate legal description of the real estate because it is part of a larger parcel and not yet separately described. If personal property is included, it should be separately identified on an Exhibit to the contract.

(n3)COMMENT(n3) This paragraph is used to identify the excluded portion of the real property being sold. In order to split this excluded portion from the sale, it will be necessary to hire a surveyor to prepare a lot split plat in the form required by the local governmental authority for submission to such authority to obtain the approval necessary to split or subdivide the parcel. The Seller has agreed to undertake such expense so that the Seller can sell the remainder of the parcel. It may take several weeks to obtain the approval, and then the plat will be recorded to legally create the separate parcels. If there are any easements required to make each parcel self-sustaining, the easements should also be described in the contract. If the easements are appurtenant to the parcel to be sold, the contract should recite that the easement as identified is to be conveyed along with the parcel. The easement should be insured as part of the property covered in the title policy to be issued.

(n4)COMMENT(n4) The purchase price must be identified, to be followed by how it is to be paid and what time it must be paid.

(n5)COMMENT(n5) This paragraph states how the balance of the purchase price is to be paid, and when it is required to be paid. In this transaction, the Buyer is borrowing a portion of the purchase price from a lending institution which will secure its loan by a mortgage against the property being sold.

(n6)COMMENT(n6) The closing date must be adequately described for the contract to be enforceable and so that the parties know how much time they have to do what is necessary to prepare for the closing. Because this transaction is to be closed through an escrow agent, it is not necessary to state the place where the parties must meet to close the transaction. If it is closed by means of an escrow, all funds and documents are deposited with the escrow agent with instructions from both sides relating to the closing of the transaction. The parties and their counsel may or may not

decide to attend the closing.

(n7)COMMENT(n7) Usually, it is the Buyer who will have the contingencies because the Buyer will have to perform the usual due diligence work to verify the condition of the Property, and to make sure the Property can be used by the Buyer for the Buyer's intended purpose. The environmental and physical condition of the Property must be satisfactory to the Buyer and the Buyer's lender.

(n8)COMMENT(n8) If the Property is an income producing property being purchased for investment purposes, all leases will have to be reviewed to ascertain the amount of the income stream and how long it will last. The rights granted to the tenants must be ascertained as well. For example, if a tenant was given an option to purchase the Property, the Buyer must make sure that right has been waived by the tenant.

(n9)COMMENT(n9) The Buyer will expect a certain date by which the contingencies must be satisfied so that the Seller knows the Seller has a firm contract and can plan accordingly. This paragraph clarifies that the inspections are to be done at the Buyer's expense and the indemnity protects the Seller from liability resulting from the inspections.

(n10)COMMENT(n10) In many real estate transactions because of the size of the transaction, financing will be required. By this contingency, the Buyer can protect itself both from the possibility of not qualifying for the financing, and from not being able to obtain financing on terms that will make the deal economically feasible. The Seller will want to know some detail about the financing that the Buyer needs, and also will want a certain deadline for satisfying the contingency.

(n11)COMMENT(n11) The Buyer's counsel will usually ask for some warranties from the Seller because the Seller has owned the Property and should know more about it than the Buyer. The Seller's attorney will try to limit the warranties or modify them so that the Seller is not unnecessarily exposed to claims for breach of warranties. If the warranties are approved by the Seller, the Seller's counsel may want to impose a dollar limit on them and a limit on how long the warranties will survive the closing. The Seller's attorney will take the position that the Buyer can inspect the Property for itself and if not satisfied, terminate the deal or negotiate with the Seller for a lower price, or for an agreement by the Seller to take care of the Buyer's objections. These warranties are typical examples of Seller warranties. The first one is suitable if the Buyer is not having a survey prepared to verify whether any encroachments exist, otherwise a survey will answer that question. Most attorneys for the Buyer will recommend that the Buyer obtain a survey to show the boundaries of the real estate and location of all improvements on the parcel, encroachments from adjoining land, and location of easements or other encumbrances affecting the land. The Buyer's lender also may insist on a survey, and that it be certified to the Buyer, the lender, and the title company.

(n12)COMMENT(n12) This warranty is important for an income producing property. The Buyer should review all such contracts prior to closing.

(n13)COMMENT(n13) If the Property is relatively new, there may still be warranties in effect for such things as the roof and heating and air conditioning systems. If the warranties are assignable, they should be assigned to the Buyer.

(n14)COMMENT(n14) This warranty is to insure full disclosure by the Seller of all leases affecting the Property. The Buyer must know the terms of all leases because these leases and the rents they produce are what makes the property valuable and worth the price being paid.

(n15)COMMENT(n15) The Buyer must make sure the Buyer is not purchasing a property having any significant tenant claims. The other way to ascertain this is by obtaining estoppel certificates from the tenants which the Buyer has the right to request as set forth below in this contract.

(n16)COMMENT(n16) This representation will provide a cause of action against the Seller if financial misrepresentations are made by the Seller.

(n17)COMMENT(n17) If the Seller is a limited liability company, care must be taken that the transaction is properly authorized by the members of the limited liability company, or by the principals in another type of entity if other than a limited liability company. The title company insuring the title to the Property must also make sure the conveyance is properly authorized because it is insuring such fact as part of the policy it is issuing.

The type of deed to be used should be spelled out. The general warranty deed is the best the Buyer can get because it contains the broadest warranty. Sometimes it may not be possible to obtain such a deed, but rather only a limited warranty deed, fiduciary deed or quitclaim deed may be given by the Seller. If an easement is to be conveyed as part of the sale of the parcel being conveyed, a description of the easement should be included in the deed.

(n18)COMMENT(n18) As a matter of good practice, the Buyer should protect itself from title claims by obtaining title insurance in the amount of the purchase price, from a reputable title company. If there is a claim, the title insurance company will defend the claim. It is easier to rely on title insurance than to try to sue the Seller on a warranty in the deed, if one was obtained as part of the deed.

(n19)COMMENT(n19) In advance of closing, the Buyer and its counsel must find out through review of a current title report what title matters the property is subject to. This clause gives the Buyer that right. The matters that the Buyer may object to depend on the Buyer's intended use of the Property. For example, there may be a restriction against the use of the Property for a purpose for which the Buyer intended to use it. If the items objected to cannot be removed, then the Buyer has the right to terminate the transaction.

(n20)COMMENT(n20) This paragraph spells out the duties of the escrow agent as they relate to ascertaining whether the title company can insure the title as required by the terms of the contract. The contract requires a title policy to be issued insuring marketable title to the Buyer upon filing the deed, subject only to those title matters approved by the Buyer as described in the contract.

(n21)COMMENT(n21) This assignment of leases is a document which, if used, will usually be recorded at the closing. It formally identifies the tenants having leases and identifies the Buyer as the new owner, and as the landlord of such tenants.

(n22)COMMENT(n22) It is good practice to require the Seller to obtain estoppel certificates from each tenant, or at least from all the major tenants (in this transaction, those leasing at least 10,000 square feet). In this way the Buyer will know before closing that the terms of the leases are accurate and that the tenants have no claims against the Seller, or if they do, the nature of the claim.

(n23)COMMENT(n23) The damage clause spells out what happens in the event of damage to the property prior to transfer of title to the Buyer. In this clause, if the damage is significant (greater than \$50,000) the Buyer has the right to terminate the transaction. If not, the Buyer closes and takes an assignment of the insurance proceeds. That may be satisfactory unless the Seller has a large deductible. If so, the Buyer may want to negotiate as part of the contract that any deductibles will reduce the purchase price by the amount of the deductible.

(n24)COMMENT(n24) This clause spells out when possession is to be given, and in what condition the Property must be delivered. The Seller will want to change this clause so that it is clear that the Seller is conveying the Property without any warranties as to the condition, repair or use of the Property. In other words, that the Property is being sold in "as is" condition, except as expressly warranted in the contract, if at all.

(n25)COMMENT(n25) This clause spells out how the escrow agent is to prorate rents and other economic items affecting the Property. In addition, if there are security deposits, they must be credited to the Buyer. This clause can go into much more detail depending on the transaction and intent of the parties. Prior to closing, both the Seller and Buyer and their counsel should ask to see preliminary closing statements showing these computations to verify their accuracy.

(n26)COMMENT(n26) Real estate taxes are a lien against the Property and must also be prorated by the escrow

agent as of the closing date, using the latest taxes available to do the prorations. In this locale, the real estate taxes are accrued and then paid by the owner in arrears. Therefore, the Buyer will receive a credit at closing for taxes accrued but not paid up to and through the closing date. When the actual bill is sent out, the Buyer will pay the entire bill, having received credit for the portion relating to the time the Seller owned the Property. If the actual bill is different than the latest available bill used to do the proration at the closing, the parties can later adjust the proration accordingly.

(n27)COMMENT(n27) This clause should disclose if there is a broker, and who has the obligation to pay the broker. If there is a commission, and it is to be paid at closing, the broker and the party paying the commission must notify the escrow agent of the amount of the commission agreed upon.

(n28)COMMENT(n28) Many real estate transactions are closed by means of an escrow agent. In this contract, the title company has a separate escrow department that insists on handling the escrow because it generates another fee for the lender.

(n29)COMMENT(n29) This clause spells out the duties of the escrow agent on the closing date. These duties are frequently expanded upon and clarified by supplemental letters from counsel for the Seller and counsel for the Buyer.

(n30)COMMENT(n30) This portion of the contract allocates the closing costs between Seller and Buyer. These costs vary from state to state and locale to locale. There probably is a custom in any area for such allocations, but the allocation of the costs can be negotiated in any event. Counsel should be familiar with the custom in the area so that counsel can be sure the allocation is fair.

(n31)COMMENT(n31) The contract should spell out how notices may be given and to whom. Counsel should request copies of any notices sent to their clients.

(n32)COMMENT(n32) If the Seller intends to do a like-kind exchange under *Section 1031 of the Internal Revenue Code* in order to defer the Seller's tax on the gain, the Seller should include a clause such as this one. Frequently, if an exchange is done, the Seller will elect to use a qualified intermediary as defined in the Regulations to facilitate the exchange. Use of a qualified intermediary is one of the safe harbors that can be used by the Seller to better insure that the transaction will be treated as complying with the requirements of Section 1031 for a like-kind exchange.

(n33)COMMENT(n33) These clauses are examples of additional clauses that may be used for this type of contract, but are not exhaustive.



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Current Legal Forms for Real Estate

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Current Legal Forms for Real Estate
Chapter 21 SALES AND EXCHANGES
Part III. Drafting Guidelines

25-21 Current Legal Forms for Real Estate § 21.44

§ 21.44 Drafting Checklist: Contract of Sale

A. Parties ☐

1. Identity of seller(s) ☐

a. Name ☐

b. Address (residential for individual, business
for non-individual) ☐

2. Character of seller ☐

a. Individual ☐

(1) Marital status, in states where applicable ☐

(2) Over the age of majority ☐

(3) Not incapacitated by mental disease or defect ☐

b. Corporation ☐

(1) State of incorporation ☐

(2) Obtain proof of authority of person executing contract on behalf of corporation ☐

(3) Obtain copy of resolution of corporation's board of directors authorizing sale of property ☐

(4) Obtain any required court or government agency approvals ☐

c. Partnership or Limited Liability Company ☐

(1) State of formation ☐

(2) Obtain proof of authority of partnership representative to act on behalf of all partners or of Manager of limited liability company to act on behalf of all of the members ☐

(3) Obtain copy of partnership decision or limited liability company decision authorizing sale ☐

(4) If too many partners or members to obtain signatures of all, obtain copy of partnership agreement or operating agreement to determine whether authority exists and obtain affidavit acknowledging partnership or operating agreement still in effect, or obtain letter of authorization from each partner or each member ☐

(5) Obtain any required court or government agency approvals ☐

d. Fiduciary ☐

(1) Obtain proof of appointment ☐

(2) Examine order or decree appointing fiduciary and determine scope of authority ☐

(3) Examine document (will, trust, etc.) creating appointment ☐

(4) Determine whether court order required to complete sale ☐

e. Attorney-in-fact ☐

(1) Obtain proof of appointment (certified copy of power of attorney document) ☐

(2) Determine whether appointment has been terminated by death, disability, incapacity or revocation (in most states, affidavit of attorney-in-fact denying actual knowledge of termination of power is sufficient) or whether it is a durable power of attorney which would survive death, disability or incapacity ☐

(3) Determine scope and duration of powers, making sure it includes power to sell real property ☐

3. Identity of purchaser(s) ☐

a. Name ☐

b. Address (residential for individual, business for nonindividual) ☐

4. Character of purchaser ☐

a. Individual ☐

(1) Marital status, in states where applicable ☐

(2) Over the age of majority ☐

(3) Not incapacitated by mental disease or defect ☐

b. Corporation ☐

(1) State of incorporation ☐

(2) Obtain proof of authority of person executing contract on behalf of corporation ☐

(3) Obtain copy of resolution of corporation's board
of directors authorizing purchase of property ☐

(4) Obtain any required court or government
agency approvals ☐

c. Partnership or Limited Liability Company ☐

(1) State of formation ☐

(2) Obtain proof of authority of partnership
representative to act on behalf of all partners or
manager of the limited liability company to act on
behalf of all of the members ☐

(3) Obtain copy of partnership decision or limited
liability company decision authorizing purchase ☐

(4) If too many partners or members to obtain
signatures of all, obtain copy of partnership
agreement operating agreement to determine
whether authority exists and obtain affidavit
acknowledging partnership agreement or
operating agreement still in effect, or obtain
letter of authorization from each partner or
member ☐

(5) Obtain any required court or government
agency approvals ☐

d. Fiduciary ☐

(1) Obtain proof of appointment ☐

(2) Examine order or decree appointing fiduciary and
determine scope of authority ☐

(3) Examine document (will, trust, etc.) creating
appointment ☐

(4) Determine whether court order required to
complete purchase ☐

e. Attorney-in-fact ☐

(1) Obtain proof of appointment (certified copy of power of attorney document) ☐

(2) Determine whether appointment has been terminated by death, disability, incapacity or revocation (in most states, affidavit of attorney-in-fact denying actual knowledge of termination of power is sufficient) or whether it is a durable power ☐

(3) Determine scope and duration of powers, making sure it includes power to purchase real property ☐

B. Premises ☐

1. Identify premises in detail ☐

a. Specify location by municipality and county ☐

b. Set forth street address, if one exists ☐

c. State lot size, but avoid an exact amount of acreage or square footage unless figure is based on guaranteed survey ☐

d. Set forth real estate tax map number ☐

e. Describe location by prior recorded deed(s) ☐

f. Set forth metes and bounds description or subdivision description (filed map), if available ☐

2. Identify buildings, structures and other permanent improvements located on premises, including houses, garages, pools, etc ☐

3. Fixtures and equipment ☐

a. Identify fixtures and equipment included in sales price ☐

b. Identify fixtures and equipment for which additional consideration will be paid by the purchaser ☐

c. Identify fixtures and equipment excluded from sale ☐

4. Personalty ☐

a. Identify personal property included in sales price ☐

b. Identify personal property for which additional consideration will be paid by the purchaser ☐

(1) If purchaser wants time to decide whether he or she wants to purchase personalty for additional consideration, include time limit and notice provision ☐

c. Identify personal property excluded from sale ☐

d. Conveyance by bill of sale with warranty of title ☐

5. Condition of premises, fixtures and personalty ☐

a. Specify condition premises, fixtures and personalty will be transferred in (*e.g.*, "as is," or "good working order" or "working order") ☐

(1) Provide for pre-closing inspection by the purchaser ☐

(2) In sale of new residential construction, determine if state law implies any warranties and add express disclaimers as agreed by the parties ☐

b. Disclose defects as required by state law ☐

c. Disclose lead-based paint hazards as required by federal law ☐

d. Specify who will bear the risk of loss between contract execution and closing ☐

e. Specify who will insure property and who will be beneficiary of insurance between contract execution and closing ☐

C. Purchase price ☐

1. Total purchase price ☐

2. Additional price for fixtures ☐

3. Additional price for personalty ☐

4. Deposit ☐

a. Amount ☐

b. Date(s) when due ☐

c. Form of payment ☐

d. Specify who will hold deposit ☐

(1) Where deposit held ☐

(2) Interest ☐

5. Attach forms of proposed purchase money note and mortgage deed or set forth provisions ☐

6. Attach or describe any existing mortgage continuing after closing ☐

a. Provide that purchaser will assume existing mortgage ☐

b. Seller representation no defaults (at time of contract and at time of closing) ☐

c. Seller representation no due on sale clause ☐

☐

e. Termination rights if mortgagee refuses consent ☐

7. Adjustments to purchase price ☐

a. Real property taxes ☐

b. Utilities (fuel, water, sewer, electric, gas,
telephone, etc.) ☐

c. Prepaid services ☐

d. Supply and maintenance contracts ☐

e. Employee salaries and benefits ☐

f. Water and sewer expenses ☐

g. Special assessments ☐

h. Property owners association dues or common charges ☐

i. Rent ☐

(1) Prepaid rent ☐

(2) Percentage rent ☐

(3) Escalation charges ☐

(4) Rent arrears ☐

j. Lease brokerage ☐

k. Other ☐

8. Allocation of expenses ☐

- a. Transfer taxes ☐
- b. Conveyance fees ☐
- c. Recording taxes ☐
- d. Survey ☐
- e. Satisfying contingencies ☐
- f. Escrow Fees ☐

D. Contingencies ☐

1. General provisions applicable to all contingencies ☐

a. Specify who must obtain satisfaction of contingency and what that party must do ☐

b. Set time limit for resolving contingency ☐

c. Set standard for determining whether contingency is satisfied ☐

d. Specify whether seller, purchaser or both have right to waive satisfaction of contingency ☐

e. Specify who will pay cost of testing ☐

2. Mortgage ☐

a. Specify type of mortgage note and mortgage deed ☐

(1) Conventional ☐

(a) Fixed rate ☐

(b) Adjustable rate ☐

(c) Variable rate ☐

(d) Balloon ☐

(e) Convertible ☐

(f) Other ☐

(2) FHA ☐

(3) VA ☐

b. Specify amount of mortgage note ☐

c. Specify term of mortgage note ☐

d. Specify maximum interest rate note ☐

e. Specify maximum points ☐

f. Specify any other desired terms ☐

g. Require purchaser to: ☐

(1) Apply promptly ☐

(2) Pay application fees ☐

(3) Notify seller of application ☐

(4) Accept mortgage commitment ☐

(5) Comply with lender's requirements ☐

(6) Promptly deliver copy of commitment to seller ☐

3. Governmental approvals ☐

a. Certificate of occupancy ☐

- b. Certificate of compliance with local ordinances, such as building, housing, safety, environmental, or fire ordinances ☐
- c. Special districts (*e.g.*, historic or conservation districts) ☐
- d. Wetlands ☐
- 4. Rezoning, variance or subdivision approval ☐
- 5. Attorney's approval ☐
- 6. Sale of present home by purchaser ☐
 - a. Extend satisfaction of other contingencies to dates after this contingency satisfied ☐
 - b. Permit seller to consider additional offers ☐
- 7. Purchase of new home by seller ☐
 - a. Extend satisfaction of other contingencies to dates after this contingency satisfied ☐
- 8. Inspection for major structural defects ☐
- 9. Inspection for presence of and damage from wood boring organisms ☐
- 10. Testing of well water quality ☐
- 11. Testing of well water quantity ☐
- 12. Septic or other on-site sewage disposal system ☐
 - a. Condition (*e.g.*, "good working order") ☐
 - b. Capacity ☐

- c. Availability of sewer connections ☐
13. Radon gas inspection ☐
14. Asbestos inspection ☐
15. Urea formaldehyde insulation ☐
16. Inspection for lead pipes ☐
17. Inspection for lead paint and dust ☐
18. Environmental site assessment ☐
19. Inspection for Mold ☐
- E. Warranties and Representations ☐
1. Seller's Warranties ☐
- a. Marketability of title ☐
- b. Condition of property ☐
- (1) Physical ☐
- (2) Environmental ☐
- c. No encroachments ☐
- d. No lawsuits or claims ☐
- e. No violation of laws ☐
- f. Leases and Contracts fully disclosed and in good standing ☐
- g. Zoning properly for intended uses of purchaser ☐

h. Financial Statements accurate ☐

i. Sale Authorized ☐

2. Purchaser's Warranties ☐

a. Properly established, in good standing and authorized to
do business ☐

b. Purchase authorized ☐

F. Type of deed to be given ☐

1. Warranty deed ☐

2. Limited warranty deed (special warranty deed) ☐

3. Bargain and sale deed ☐

4. Quit claim deed ☐

5. Executor's or administrator's deed ☐

6. Trustee's deed ☐

7. Referee's deed ☐

G. Purchaser will take property subject to the following
conditions ☐

1. Zoning laws ☐

2. Environmental laws ☐

a. Federal ☐

b. State ☐

c. Local ☐

3. Covenants and restrictions ☐

4. Easements ☐

5. Tenancies ☐

a. Attach rent schedule containing: ☐

(1) Tenants' names ☐

(2) Descriptions of leased premises ☐

(3) Lease commencement and expiration dates ☐

(4) Rental and escalation amounts ☐

(5) Security deposit information ☐

(6) Lease amendments, extensions and renewal rights ☐

(7) Options and rights of first refusal ☐

(8) Termination rights ☐

b. Seller's representations regarding accuracy and completeness of rent schedule ☐

c. Detailed seller's representations regarding tenancies and possible problems ☐

(1) Arrearages ☐

(2) Withheld rents ☐

(3) Entitlement to rent concessions or abatements ☐

(4) Tenants' defaults ☐

(5) Landlord's (seller's) defaults ☐

(6) Pending or anticipated litigation ☐

(7) Unpaid leasing commissions ☐

(8) Incomplete work ☐

(9) Tenants' purchase options ☐

d. Changes in tenant status ☐

(1) Permission for seller to continue normal
rental activities ☐

(2) Provision barring seller, without purchaser's written
consent, from: ☐

(a) Amending, renewing or extending the lease of any
existing tenant ☐

(b) Renting to new tenants or granting a new lease to
any existing tenant ☐

(c) Terminating any lease except for tenant default
(unless the purchaser wants the building vacant
anyway) ☐

(3) Purchaser's consent not unreasonably withheld ☐

(4) Seller reimbursed for rent not received because
purchaser failed to consent ☐

(5) Seller required to remove tenant before closing ☐

e. All leases and rental agreements to be assigned
at closing ☐

f. Rent adjusted at closing ☐

g. Security deposits ☐

h. Notices to tenants ☐

6. Licenses ☐

H. Title ☐

1. Type of title to be transferred ☐

2. Exceptions to title contained in seller's title insurance policy
or abstract of title which purchaser will accept ☐

3. Title review (abstract or insurance) ☐

a. State who will prepare abstract update ☐

b. State who will prepare title commitment or report for
purchaser's review and approval ☐

c. State how long purchaser has to object to items shown
in title report, and how long seller has to correct
title objections ☐

d. State who will provide title insurance and type of
policy ☐

e. State who is responsible for cost of abstract of title, title
report and title insurance ☐

I. State who will provide and pay for survey, requirements of the
survey and procedure for review and approval by purchaser ☐

J. Closing (Transfer of title) ☐

1. Date ☐

a. State whether date is approximate ☐

b. State whether time is of the essence ☐

2. Time ☐

3. Place ☐

- a. attorneys' office ☐
- b. escrow agent's office ☐
- (1) Escrow department of lending institution ☐
- (2) Escrow department of title company ☐

4. Duties at closing ☐

- a. Order of recording documents ☐
- b. Prorations and computations for settlement statement ☐

K. State when transfer of possession will occur ☐

1. Possession transferred before transfer of title ☐

- a. Rent or other payments ☐
- b. Allocation of risk of loss between transfer of possession and transfer of title ☐
- c. Hazard and liability insurance responsibilities between transfer of possession and transfer of title ☐
- d. Purchaser's right to inspect premises and time of inspection ☐

2. Possession transferred at transfer of title ☐

- a. Purchaser's right to inspect premises before closing ☐
- b. Time of inspection ☐
- c. Subject to rights of tenants in possession ☐

3. Possession transferred after transfer of title ☐

- a. Rent or other payments ☐
- b. Allocation of risk of loss between transfer of title and transfer of possession ☐
- c. Hazard and liability insurance responsibilities between transfer of title and transfer of possession ☐
- d. Purchaser's right to inspect premises and time of inspection ☐
- e. Amount of purchase price held back to cover damages ☐

L. Broker ☐

1. Name brokers involved in sale and specify who will pay commissions ☐

2. Indemnification against brokerage claims ☐

M. Remedies for breach ☐

1. Seller's remedies ☐

a. Retain deposit as liquidated damages ☐

b. Specific performance ☐

c. Right to sue for damages ☐

2. Purchaser's remedies ☐

a. Return of deposit, with interest, and reimbursement for other expenses ☐

b. Specific performance ☐

c. Right to sue for damages ☐

3. Alternative dispute resolution to avoid litigation ☐

a. Arbitration ☐

b. Mediation ☐

N. Notices to parties and their attorneys ☐

O. Miscellaneous clauses ☐

1. Waiver provision ☐

2. Select state law which will apply to transaction ☐

3. Merger clause providing that contract contains entire agreement between parties ☐

4. Binding effect of contract on parties and their successors and assigns ☐

5. All amendments to contract to be in writing ☐

6. State whether purchaser can assign contract ☐

P. Execution of the contract ☐

1. Signed by parties or their representatives ☐

2. Dated ☐

3. Witnesses if desired ☐

4. Acknowledgment if desired ☐

5. Multiple originals ☐

Legal Topics:

For related research and practice materials, see the following legal topics:

Real Property LawDeedsGeneral OverviewReal Property LawPurchase & SaleContracts of SaleGeneral OverviewReal Property LawPurchase & SaleContracts of SaleFormalitiesReal Property LawPurchase & SaleContracts of SalePeriod

Between Execution & ClosingGeneral OverviewReal Property LawPurchase & SaleContracts of SalePeriod Between
Execution & ClosingRisk of LossReal Property LawPurchase & SaleRemediesDuty to Disclose



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Current Legal Forms for Real Estate
Chapter 21 SALES AND EXCHANGES
Part III. Drafting Guidelines

25-21 Current Legal Forms for Real Estate § 21.45

§ 21.45 Drafting Checklist: Deed

A. Parties ☐

1. Identity of seller(s) ☐

a. Name ☐

(1) Make sure spelling of name(s) is the same as
spelling of name in deed into seller(s) ☐

(2) If name of seller has changed since deed into seller,
give both former and current names ☐

(3) If any of co-owners have died, note that fact ☐

(4) If any tenant in common has died, explain who is
standing in place of the decedent and why ☐

(5) Set forth authority of grantor if executor's,
administrator's or trustee's deed ☐

b. Address ☐

c. Marital status ☐

2. Type of seller's ownership ☐

a. Tenancy by entirety ☐

b. Joint tenancy ☐

c. Tenancy in common ☐

3. Identity of purchaser(s) ☐

a. Name ☐

b. Address ☐

4. Type of purchaser's ownership ☐

a. Tenancy by entirety ☐

b. Joint tenancy ☐

c. Tenancy in common ☐

B. Description of property ☐

1. Metes and bounds ☐

2. Map references ☐

3. Reference to prior deed ☐

C. Consideration ☐

D. Interest to be transferred ☐

1. Fee title ☐

2. Life estate ☐

3. Easement ☐

4. License ☐

5. Other ☐

E. Interest to be retained ☐

1. Life estate ☐

2. Easement ☐

3. License ☐

4. Mineral rights ☐

5. Other ☐

F. Restrictive covenants ☐

G. Type of deed and warranties granted by seller to purchaser ☐

1. Warranty deed with full covenants or limited
warranty deed ☐

2. Bargain and sale deed with covenants against
grantor's acts ☐

3. Quitclaim deed without warranties ☐

H. Execution ☐

1. By seller ☐

a. Signature lines for all sellers ☐

b. Attorney-in-fact should sign both names ☐

2. By purchaser, where purchaser's assumption of liability or

restriction is included in deed ☐

3. By spouse, if state where property is located has dower or
other marital interest ☐

I. Acknowledgment ☐

Legal Topics:

For related research and practice materials, see the following legal topics:

Real Property LawDeedsConstruction & InterpretationReal Property LawDeedsTypesGeneral OverviewReal Property
LawDeedsProperty DescriptionsReal Property LawEstatesConcurrent OwnershipJoint TenanciesReal Property
LawEstatesConcurrent OwnershipTenancies by EntiretiesReal Property LawEstatesConcurrent OwnershipTenancies in
CommonReal Property LawEstatesPresent EstatesLife EstatesReal Property LawOwnership & TransferBusiness &
Corporate EntitiesReal Property LawRestrictive CovenantsGeneral Overview



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Current Legal Forms for Real Estate
Chapter 21 SALES AND EXCHANGES
Part III. Drafting Guidelines

25-21 Current Legal Forms for Real Estate § 21.46

§ 21.46 Action Checklist: Documents and Payments Needed for Closing

A. Documents and payments to be delivered by seller ☐

1. Deed ☐

2. Bill of sale for any personal property included in transaction ☐

3. Proof of authority of seller ☐

a. If seller is a corporation, a resolution of the corporation's board of directors
authorizing the sale, certified by the corporation's secretary or assistant secretary
..... ☐

b. If seller is a partnership, letters of authorization from all partners ☐

c. Appropriate proof of appointment and authority of fiduciary ☐

d. Power of attorney document, together with affidavit of attorney-in-fact denying actual
knowledge of termination of power by death, disability, incapacity or revocation by the
principal ☐

4. Transfer tax returns, other state and local tax returns, related affidavits, questionnaires or other
documents required by taxing authority, and checks for tax payments (depending upon state law and
local custom, some or all of these items may be delivered by the purchaser) ☐

5. Holdover agreement if seller will not vacate the premises until after the transfer of title

☐

6. Judgment affidavit ☐

7. Title affidavit from seller detailing length of time seller has owned the property, whether he or she has made any improvements to the property, and whether he or she has had any disputes with the adjoining landowners ☐

8. Escrow agreement to ensure satisfaction or release of lien ☐

9. Licenses and permits necessary to operate premises, including certificate of occupancy

☐

10. Plans and specifications relating to original construction and any additions or renovations
..... ☐

11. Warranties and guarantees for structural elements (heating and cooling systems, roof, appliances, personal property, etc.) ☐

12. Service contracts and assignments of service contracts ☐

13. For tenanted buildings: ☐

a. copies of leases ☐

b. an updated rent schedule and updated seller's representations ☐

c. a schedule of security deposits ☐

d. copies of any tenant records ☐

e. original letters to the tenants from the seller notifying them of the sale and directing them to make future payments to the purchaser ☐

f. tenant estoppel letters ☐

g. copies of service contracts ☐

h. original insurance policies to be apportioned ☐

- i. an assignment, without recourse or warranty, of the seller's interests in all leases, security deposits, insurance policies and service contracts ☐
 - j. plans and specifications ☐
 - k. approvals of leases by lenders ☐
- 14. For new construction: ☐
 - a. Evidence that work complete ☐
 - b. Evidence that contractors paid in full ☐
 - c. Applicable new construction warranties, if any ☐
 - d. Architect's certificate of compliance ☐
 - e. Holdback agreement, if necessary ☐
- 15. Condominium documents ☐
 - a. Waiver of board of manager's right of first refusal and any required approvals ☐
 - b. Statement as to payment of common charges ☐
 - c. Check for payment of condominium fees, costs and expenses ☐
- 16. Homeowners' association documents ☐
- 17. If there is an existing mortgage: ☐
 - a. closing letter from seller's lender ☐
 - b. mortgagee's written consent to sale and/or mortgagee's certificate as to the status of the loan, including the amount of unpaid principal and interest, the rate of interest, and the date of maturity, if existing mortgage to survive sale ☐
 - c. statement of escrow amounts held by mortgagee and assignment of such escrow

deposits to purchaser, if existing mortgage to survive sale ☐

d. a letter, signed by seller and addressed to the existing mortgagee, advising the mortgagee of the sale of the property and directing the mortgagee to address future correspondence to purchaser, if existing mortgage to survive sale ☐

18. Evidence of removal of any violations ☐

19. Evidence of payment of assessments ☐

20. Official bills for unpaid taxes, assessments, water and sewer charges ☐

21. Hold harmless agreement from seller for benefit of purchaser and title company for water and sewer levies ☐

22. Current water meter reading ☐

23. Current fuel oil reading ☐

24. Current gas and electric meter readings ☐

25. Smoke alarm affidavit ☐

26. Check (or purchaser credit) for various apportionments ☐

27. Evidence that broker has been paid ☐

28. Designate person to file I.R.S. Form 1099-S ☐

29. Foreign Investment in Real Property Tax Act ("FIRPTA") affidavit that seller is not a foreign person, if applicable ☐

B. Documents to be delivered by purchaser ☐

1. Check for balance of purchase price ☐

2. Purchase money note and mortgage ☐

3. Check to seller's attorney for preparation of purchase money note and mortgage ☐

4. Transfer tax returns, other state and local tax returns, related affidavits, questionnaires or other documents required by taxing authority, and checks for tax payments (depending upon state law and local custom, some or all of these items may be delivered by the seller) ☐

5. Check to seller for prepaid apportionments ☐

6. Checks for other closing costs (recording fees, title insurance, bank fees, points, legal fees, etc.) ☐

7. Certified checks to clear encumbrances ☐

8. Financing statements for personal property, fixtures or equipment included in sale ☐

9. Collateral assignment of leases and rents or other security interests ☐

10. If purchaser is a corporation, a resolution of the corporation's board of directors authorizing the purchase, certified by the corporation's secretary or assistant secretary ☐

11. Documents to be provided to purchaser's lender: ☐

a. Binder and paid receipt for casualty and liability insurance policy naming lender as insured (some lenders require duplicate original of actual insurance policy) ☐

b. Proof of flood insurance, if required ☐

c. Proof of sale of prior home (HUD-1 form or other proof) ☐

d. Note, mortgage and other documents required by lender ☐

e. Check for lender's tax and insurance escrow, if required by lender ☐

12. Depending upon local custom, gratuity for title closer ☐

13. Designate person to file I.R.S. Form 1099-S ☐

14. Acknowledgment of receipt from Seller of FIRPTA affidavit ☐

Legal Topics:

For related research and practice materials, see the following legal topics:

Real Property LawCommon Interest CommunitiesCondominiumsPurchase & SaleReal Property LawDeedsGeneral
OverviewReal Property LawFinancingMortgages & Other Security InstrumentsGeneral OverviewReal Property
LawLandlord & TenantLease AgreementsAssignmentsReal Property LawOwnership & TransferBusiness & Corporate
EntitiesReal Property LawPurchase & SaleGeneral OverviewReal Property LawPurchase & SaleClosing & Settlement



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25-21 Current Legal Forms for Real Estate FORM 21.01

FORM 21.01 Option to purchase--simple form--contract of sale to be attached

COMMENT

An option is a contract which gives its holder, the optionee, the exclusive right for a specified period of time to purchase property at the price and under the terms and conditions set forth in the option agreement. While the optionor, the proposed seller, is bound by the option and, in normal circumstances, cannot revoke the option, the optionee is not bound unless it exercises the option. See The Tax Background (TB) § 21.03[1], at the beginning of this chapter.

Options are most commonly used in land sales or sales of commercial property. They are useful in transactions where the purchaser needs a long period of time to resolve some aspect of the sale. This may include situations where the purchaser must arrange for complicated financing or for the purchase of adjacent property from other owners. Options also can be useful where the purchaser must obtain a zoning change or other local permit, verify the physical condition or suitability of the property, or where the purchaser must negotiate with prospective tenants.

Contents of option agreement

The following points are generally covered in an option agreement:

- (1) A description of the property under option;**
- (2) The option price, i.e., the consideration for which the option is granted;**
- (3) The price at which the optioned property may be purchased;**

- (4) The expiration date of the option;
- (5) The manner in which notice of exercise of the option is to be given;
- (6) The consequence of failure to exercise the option (usually forfeiture of the consideration for the option); and
- (7) Assignability of the option.

Other provisions may be included, such as extension of the option period for additional consideration; credit of the option price against the purchase price; and special conditions of sale or payment, such as price adjustments, escrow, promissory notes, mortgage, etc.

Tax consequences to optionee

Gain or loss upon a sale or exchange of an option to purchase a capital asset is entitled to capital gain treatment, as would a loss upon a failure to exercise the option. The nature of the loss determines whether it is deductible. For example, a loss on the sale of an option to purchase a personal residence would not be deductible. If the loss is attributable to a failure to exercise the option, the option is deemed to have been sold or exchanged on the date it expired. If the optionee is a dealer in options or would have been considered a dealer with respect to the optioned property had the option been exercised, any gain or loss realized from the sale or exchange would be considered as ordinary income or loss. See TB § 21.03[3].

If the option is exercised, the consideration for the option is considered as part of the purchase price, and is included in the optionee's basis for the property purchased. The purchaser's holding period for the property does not include the period during which the option was outstanding. See TB § 21.03[2].

Tax consequences to optionor

The optionor's receipt of consideration is treated as a nontaxable transaction until the option is either exercised or lapsed. Gain or loss is not realized upon the exercise of the option but when the sale itself takes place. To the extent that the consideration for the option is credited against the selling price, it must be included in computing gain or loss on the sale of the property. To the extent it is not applicable to the purchase price, the consideration would be ordinary income to the optionor in the year of receipt. The seller's holding period for the property sold includes the period during which the option was outstanding. Upon the failure of the optionee to exercise the option, if the consideration is forfeited, the optionor realizes ordinary income. See TB § 21.03[2], [4].

Tax consequences of options to lease real estate

The above rules regarding gain or loss in the treatment of options apply to an option to buy or sell a lease but do not apply to an option to lease or sublease property. If the option is to buy or sell a lease, the character the lease itself would have in the hands of the taxpayer, rather than the character of the property leased, determines the character of the gain or loss. See TB § 21.03[3].

Advantages of options

Since gain is not realized until the sale of the optioned property takes place, an option may

provide the seller with the advantage of receiving a portion of the sales price (the option price, i.e., the consideration for the option) prior to the tax year for which a tax on any gain must be paid. On the other hand, the purchaser, by obtaining an option, prevents a sale to another party and buys time to study the advisability of consummating the sale before committing himself.

Option form

This form is a simple option agreement with many applications. It can be used in a wide range of transactions since the contract of sale must be attached. This option contains the seven points generally covered in an option agreement. It provides that the consideration for the option be credited against the selling price. It provides for the optionee's right of access to the property during the option term to determine its suitability. Revisions of the terms of the sale can be made during the option period, with the consent of both parties, by changing and initialing the contract of sale without the necessity of reexecution or revision of the option agreement itself. The agreement allows for a short form version of the option to be recorded. It is important that the optionee's rights be protected by recording the option agreement itself or a short form version of it if allowed by the state recording statute. In the alternative, if the parties do not wish to disclose the purchase price of the property, the purchase price can be omitted from the option agreement and be set forth only in the purchase agreement attached as an exhibit to the option agreement. The parties can then agree that the option agreement be recorded without the attached purchase agreement.

FORM

OPTION, granted July 10, _____[year], by Sam Howard, residing at 18 Oakdale Terrace, Mount Vernon, New York ("Optionor"), to James T. Sherman, residing at 11 East 28th Street, New York, New York ("Optionee").

1. *Grant of option.* In consideration of the sum of \$9,000 paid by Optionee to Optionor, receipt whereof is hereby acknowledged, Optionor grants to Optionee the exclusive option to purchase the premises known as [insert short description], more particularly described in the annexed form of agreement initialed by the parties.
2. *Expiration date.* This option shall expire at 10 a.m. on _____[date].
3. *Notice of exercise.* Optionee may exercise this option only by giving written notice thereof to Optionor at his above address, by registered or certified mail, prior to the expiration date.
4. *Purchase price.* The total purchase price for the property shall be the sum of \$100,000, which Optionee shall pay to Optionor as provided in the annexed form of agreement. The foregoing sum of \$9,000 paid for this option shall be credited on account of the cash payment to be made on the closing of title, as provided in the annexed form of agreement.
5. *Failure to exercise option.* If Optionee does not exercise this option, Optionor shall retain Optionee's \$9,000 payment made hereunder, free from any and all claims which Optionee may have. In that event, neither party shall have any further rights or claims against the other.
6. *Exercise of option.* If Optionee exercises this option, Optionor and Optionee shall perform their respective obligations set forth in the annexed form of agreement, as Seller and Purchaser respectively.

7. *Assignment.* This option and all rights hereunder shall be freely assignable. If Optionee shall assign the same, all acts to be performed by him with respect to the purchase of the property, including the execution and delivery of the purchase money note and mortgage, may be performed by any assignee, whether the assignment is made before or after the exercise of this option.

8. *Access.* During the term of the option, Optionee, its agents and employees shall have access to the premises for the purposes of making such tests and investigations as Optionee deems necessary to determine its suitability for Optionee's intended use. All such tests and investigations shall be done at Optionee's sole risk and expense. Optionee shall restore the premises to their prior condition as a result of such tests and investigations, and indemnify, defend and hold Optionor harmless from any liabilities, costs or expenses resulting therefrom.

9. *Recording.* Optionee shall have the right to record a short form version of the Option not disclosing the purchase price, at Optionee's expense.

Optionor has signed and acknowledged this option.

Sam Howard

[Acknowledgment]

Attach agreement of sale



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25-21 Current Legal Forms for Real Estate FORM 21.02

FORM 21.02 Option to purchase--two option periods--installment sale--contract of sale attached

In this agreement, the term of the option is divided into two periods. The option expires at the end of the first period unless an additional payment is made by the optionee.

Recording option prohibited

The recording of the option is prohibited and if the optionee violates this provision the option is terminated, the optionors having the right to retain the consideration for the option. While the purpose of this provision is the desire of the optionors to keep the title to the property free of any possible cloud on title and not to disclose the purchase price, the rights of the optionee are not as well protected as would be the case if the option were recorded. Recording of the option, or at least a short form version of it, gives constructive notice to all third persons of the rights of the optionee to purchase the property.

Installment sale

The optioned property is to be sold under the installment method, which requires that full or part payment be made in a taxable year after the year of sale. For nondealers, the installment method is automatic, unless the taxpayer elects to the contrary. Dealers, subject to limited exceptions, are not eligible for installment sale tax treatment. The aggregate consideration for the option generally is credited against the purchase price, and this amount will be treated as part of the payment made in the year of sale. See The Tax Background (TB) § 21.03 (options) and § 21.11 (installment sales), at the beginning of this chapter.

Special rules exist when there is an installment sale of property to a related party who then resells the property before payment is made in full to the initial seller. If the second sale occurs within two years of the first, the gain on the first sale must be reported in the year of the second sale, rather

than as payments are made. See TB § 21.11[5].

Installment gain, recapture

Under the installment method, the seller reports as income in any tax year that proportion of the payments received during the year which the gross profit to be realized bears to the total contract price. The recapture of accelerated cost recovery allowances as ordinary income is recognized currently in the year of sale, even if the disposition is by an installment sale. The installment seller should require the purchaser to pay sufficient cash in the year of the sale to at least pay the taxes that may be due by reason of the immediate recognition of the ordinary recapture income. For the balance of the gain, after subtracting out the amount of recaptured ordinary income, the use of the installment method does not change the character of the gain as capital gain or ordinary income. If the property sold is a capital asset, or is treated as a capital asset, the profit to be reported under the installment method is capital gain, and would be either short-term or long-term depending upon the holding period. See TB § 21.11[1].

Original issue discount

A purchase money note, or other debt instrument, involved in an installment sale may be subject to the original issue discount rules. If the rules apply, there can be a significant effect on the deductions of the buyer-borrower and the taxable income of the seller-lender. The original issue discount rules are most likely to apply to seller purchase money financing at below market interest rates or deferred interest payments.

Notes, or other debt instruments, received as consideration for the sale of property in a transaction with consideration of at least \$250,000 will be treated as involving a lower imputed principal amount, and correspondingly higher imputed interest payments, if the interest provided for the debt is inadequate. Generally, interest is inadequate when it is not equal to at least 110 percent of the applicable federal rate. However, for debt instruments not in excess of \$2.8 million given in exchange for the sale of property, the discount rate cannot exceed 9 percent. The original issue discount rules are discussed in TB § 21.10[2] at the beginning of this chapter.

FORM

OPTION AGREEMENT made June 19, _____ [year], between James Baron and his wife Mary Baron ("Optionors"), both residing at 100 Oak Lane, Palm Beach, Florida, and Great Land Corporation, a Florida corporation ("Optionee"), whose post office address is 500 Northwest 8th Street, Miami, Florida.

In consideration of the payment of the sum of \$25,000 (the "Option Money"), by Optionee to Optionors, the receipt whereof is hereby acknowledged, by check subject to collection, the parties agree as follows:

1. *Grant of option.* Optionors irrevocably grant to Optionee the exclusive option to purchase from Optionors all those lands (the "Lands"), in Lee County, State of Florida, which are described in the annexed Exhibit A.
2. *Term and extended term of option; access to the lands.* This option shall continue in effect until 12 p.m. on May 15, _____ [year], and may be exercised in accordance with its terms at any time on or before that date. This option, however, shall automatically terminate, without notice to Optionee, at 12 p.m. on February 2, _____ [year], if prior thereto Optionee shall not have exercised the within option and shall not have

paid Optionors, in addition to the Option Money paid on the execution hereof, the further sum of \$75,000 (the "Additional Option Money"). The exercise of this option must be by written notice sent to Optionors in the manner prescribed by paragraph 12 before its expiration or termination.

During the term of the option, Optionee, its agents and employees shall have access to the Lands for the purposes of making such tests and investigations as Optionee deems necessary to determine its suitability for Optionee's intended use. All such tests and investigations shall be done at Optionee's sole risk and expense. Optionee shall restore the Lands to their prior condition as a result of such tests and investigations, and indemnify, defend and hold Optionor harmless from any liabilities, costs or expenses resulting therefrom.

3. *Failure to exercise option.* If Optionee shall fail to exercise the within option at any time herein permitted, Optionor shall retain the Option Money and Additional Option Money, if paid. This agreement shall thereupon terminate and neither party shall have any further rights or obligations hereunder.

4. *Exercise of option.* If this option is exercised (in accordance with its terms) Optionors shall sell and convey and Optionee shall purchase and acquire the Lands on and subject to the terms and conditions contained in the attached Agreement marked Exhibit B, which is made a part of this option agreement (the "Agreement").

5. *Purchase price.* The total purchase price for the Lands shall be \$900,000, payable in installments as provided in the Agreement. All amounts paid for this option shall be credited against the purchase price as provided in the Agreement.

6. *Closing.* The closing of this transaction shall be at the offices of Optionors, 25 Lake Drive, West Palm Beach, Florida, at 10 a.m. on May 20, _____ [year], provided that the option is exercised in accordance with the terms hereof. Optionee may accelerate the closing to an earlier date if it so notifies Optionors in writing at least 30 days before the accelerated date. If, however, the acceleration of closing is to a date subsequent to 12 p.m. on February 2, _____ [year], Optionee shall pay Optionors the Additional Option Money on or before the accelerated closing date.

7. *Assignment.* Optionee may assign this option without obtaining Optionors prior consent, provided that concurrently with such assignment, Optionee shall notify Optionors of such assignment, together with the name and address of the assignee, and shall send Optionors a copy of such assignment and assignee's written agreement to observe, perform and keep all of the terms, provisions, covenants and conditions that Optionee is required to observe, perform and keep hereunder. All provisions herein contained shall be binding upon all subsequent assignees hereof.

8. *Broker.* The parties warrant and represent to each other that no broker brought about, or participated in, this option or transaction. Optionee shall indemnify and hold Optionors harmless against all liabilities and expenses (including, without limitation, reasonable attorneys' fees) arising from any claims for brokerage on this transaction based on any act of Optionee. The warranties, representations and agreements contained in this paragraph shall survive any closing of the transaction contemplated by this option. This indemnification agreement shall be binding on Optionee and all subsequent assignees.

9. *Recording option.* Optionee shall not record this option. If this option is recorded, all of Optionee's rights hereunder shall automatically terminate and Optionors may retain absolutely all payments made hereunder by Optionee.

10. *Corporate authority.* Optionee represents and warrants that it is a duly incorporated and validly existing corporation, in good standing under the laws of the State of Florida, and that its board of directors have duly authorized the execution and performance of this option and the attached Agreement.

11. *Entire agreement.* This option, including the attached Agreement, constitutes the entire agreement between the parties. No representations, warranties, or promises pertaining to this option or any property affected by it have been

made by, or shall be binding on, any of the parties, except as expressly stated in the option and the Agreement. This option and the Agreement may not be changed orally, but only by an agreement signed by the party against whom enforcement of any such change is sought.

12. *Notices.* Any notice or demand under this option shall be by registered or certified mail, sent as follows: to Optionors at 25Lake Drive, West Palm Beach, Florida; and to Optionee at 500 Northwest 8th Street, Miami, Florida.

13. *Binding effect.* This Agreement shall be binding upon and inure to the benefit of the parties and their respective heirs, successors, and assigns.

14. *Headings.* Headings in this Agreement are for convenience only and shall not be used to interpret or construe its provisions.

15. *Governing law.* This Agreement shall be governed by and construed in accordance with the laws of the State of Florida.

16. *Counterparts.* This Agreement may be executed in one or more counterparts, each of which shall be deemed an original but all of which together shall constitute one and the same instrument.

17. *Time of essence.* Time is of the essence of this Agreement.

The parties hereto have executed and delivered this Agreement the day and year first above mentioned.

Optionors:

James Baron

Mary Baron

Optionee:

Great Land Corporation

By:_____

Attest:

By:_____

Secretary

[Acknowledgments]



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25-21 Current Legal Forms for Real Estate FORM 21.03

FORM 21.03 Option to purchase--annual increasing payments by optionee--escalating purchase price

COMMENT

This option refers to an annexed form of contract of sale. Since both parties are corporations, there are provisions for the exchange of appropriate corporate resolutions authorizing the execution of the option agreement and the sales contract. This option also restricts the assignment of the option to a parent, subsidiary or merged corporation of the optionee.

Increasing option installments and purchase price

A most distinctive feature of this agreement is an option price which increases during the option period. This device is used because of the relatively long period during which the option may be outstanding. The option is granted for a total of five years, but the optionee must pay additional amounts on the first, second, third, and fourth anniversaries of the option agreement in order to keep the option alive. The purchase price for the property also is increased on each anniversary date from the date that the option is granted. Unlike the usual option agreement, no portion of the consideration paid for the option is credited toward the purchase price.

Lapse of option

Upon the failure of the optionee to pay any amount required to extend the option period or upon any breach of its obligations after the exercise of the option, all payments made by the optionee are retained as liquidated damages, which would be considered as ordinary income to the optionor. For the optionee, the damages would be considered as a business expense if the optioned property was intended for use in a trade or business, or for the production of income. Whether a liquidated damage clause will be given effect depends upon applicable state law.

FORM

OPTION AGREEMENT, executed on July 21, _____ [year], by and between Mainland Corporation, a Texas corporation having its principal office in the County of Dallas, State of Texas ("Optionor"), and Southwest Lands, Incorporated, a Delaware corporation having its principal office in the County of Dallas, State of Texas ("Optionee").

1. Grant of option and consideration.

(a) In consideration of the following cash payments, made and to be made, to Optionor by Optionee:

(1) \$5,000 at the time of the execution of this Agreement;

(2) \$7,000 on July 21,

_____ [year];

(3) \$9,000 on July 21,

_____ [year];

(4) \$11,000 on July 21,

_____ [year]; and

(5) \$13,000 on July 21,

_____ [year].

(b) Optionor grants and gives to Optionee, for the period of five years from the date of the execution of this Agreement and ending at 10 a.m. on July 21, _____ [year], the right and option to purchase all that certain tract of land lying and being situated in the City of Arlington, County of Tarrant, State of Texas, more particularly described in the annexed Appendix 1 (the "Property"). Notwithstanding any provision in this paragraph to the contrary, Optionee's exercise of this option shall relieve it from making any required payments to Optionor under this paragraph at any date or dates after the "time of closing" (as defined in paragraph 2 below).

(c) Concurrently with the execution of this option:

(1) Optionor shall deliver to Optionee a certified resolution of Optionor's Board of Directors authorizing (i) Optionor to enter into this option, and (ii) its officers to execute this Agreement and do all other things and execute all other documents required to close this transaction if Optionee exercises its option hereunder; and

(2) Optionee shall deliver to Optionor a certified resolution of its Board of Directors authorizing Optionee to enter into this option and its officers to execute this Agreement.

2. Notice of exercise. To exercise this option Optionee must deliver a written notice to Optionor fixing a date not more than 60 days in advance for the closing of title to the Property (the "time of closing"). Concurrently with the exercise of the option, Optionee shall deliver to Optionor a certified resolution of its Board of Directors authorizing the exercise of

the option and authorizing its officers to execute all documents and do all things necessary to close this transaction. If this option is exercised, Optionor shall sell and Optionee shall buy Property pursuant to the terms and provisions of the attached Agreement set forth in Appendix 2.

3. *Purchase price.* The total purchase price for the land described in Appendix 1 shall be determined at the time of closing as follows:

- (a) \$100,000 if the option is exercised on or before July 20, _____[year];
- (b) \$115,000 if the option is exercised after July 20, _____[year] and on or before July 20, _____[year];
- (c) \$130,000 if the option is exercised after July 20, _____[year] and on or before July 20, _____[year];
- (d) \$140,000 if the option is exercised after July 20, _____[year] and on or before July 20, _____[year]; and
- (e) \$150,000 if the option is exercised after July 20, _____[year] and on or before July 21, _____[year].

The total purchase price, as shown above, shall be paid to Optionor in cash at the time of closing. Optionee shall not receive any credit against the purchase price for the amounts paid for this option.

4. *Payment default; liquidated damages.* If Optionee shall fail to pay promptly any payment required under paragraph 1, this option shall automatically terminate on the date specified for the payment and this Agreement shall no longer be effective. In that event, or if Optionee in any manner breaches its obligations hereunder after exercising the option, Optionor may keep all previous payments made for the option as liquidated damages. Both parties agree that the total amount of such payments is a reasonable approximation of the damages that Optionor would sustain if damages were readily ascertainable.

5. *No assignment by optionee.* Optionee may assign this option to any of its subsidiary or parent corporations, to any corporation into or with which Optionee or its subsidiary or parent corporation is duly merged or consolidated, or to anyone to which all or substantially all of Optionee's assets are sold. Except as expressly permitted herein, any direct or indirect assignment of this option shall automatically terminate the option and all of Optionee's rights hereunder.

6. *Binding effect.* This option shall be binding upon and inure to the benefit of the parties and their respective representatives, successors, and assigns.

7. *Headings.* Headings in this Agreement are for convenience only and shall not be used to interpret or construe its provisions.

8. *Governing law.* This Agreement shall be governed by and construed in accordance with the laws of the State of Texas.

9. *Counterparts.* This Agreement may be executed in one or more counterparts, each of which shall be deemed an original but all of which together shall constitute one and the same instrument.

10. *Time of essence.* Time is of the essence of this agreement.

11. *Entire agreement.* This Agreement supersedes all prior agreements between the parties with regard to the subject matter hereof and there are no other understandings or agreements between them.

12. *Notices.* All notices hereunder shall be in writing and delivered personally or mailed by certified mail, postage prepaid, addressed to the parties at their last known addresses.

The parties have duly executed this Agreement on the day and year first above written.

Attest:

Secretary

Attest:

Secretary

Mainland Corporation

by _____

Vice President

Southwest Lands, Incorporated

by _____

Vice President

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FORM 21.04 Option to purchase--sale through escrow

COMMENT

If this option is exercised, title to the property is conveyed by a warranty deed deposited into escrow and a copy submitted to optionee's counsel for approval. The deed is to be accompanied by a title guaranty policy or title insurance policy. The title guaranty referred to in this form is sometimes used in this locale in lieu of a title insurance policy. It insures only that, based on the examination of all public records, the Optionee is getting good record title. The title insurance policy goes beyond insuring just the record title. It insures that the Optionee is obtaining good marketable title even for such matters which are not ascertainable from the public records such as forgeries. This type of title insurance is also called an Owner's Fee Policy of Title Insurance. The Optionee's counsel should specify the type of title insurance policy which is desired. The form most frequently used is the one adopted by the American Land Title Association (ALTA). If the title company issues the policy or insurance, the sale is consummated; if not, and the optionor does not cure the title defects or the optionee does not waive such defects, the optionor has 30 days to remove the defects. If the defects are not removed, the consideration for the option and the balance of the purchase price, deposited with the escrow agent, are returned to the optionee and the transaction is cancelled. The better practice for the Optionee is to find out the condition of title to the property before the option agreement is executed. The agreement should then provide that the property must be conveyed by the Optionor subject only to the known conditions of title which were previously approved by the Optionee and are identified in the option agreement. See *Form 21.06* for an example. By providing for a closing in escrow, it becomes unnecessary for the parties to be present at a specified time and place in order to consummate the transaction.

Proration of real estate taxes

As is customary in real estate sales, the real property taxes and assessments are prorated. The

purchaser and seller are each entitled to claim a deduction for that part of the real property taxes which is proportionate to the period of the real property tax year during which each held the property. This applies whether or not the parties themselves allocate the tax and regardless of who paid the tax.

Release of dower

To avoid any complications with a reluctant spouse, the agreement provides for its execution by the wife of the optionor to evidence her consent to its terms. The deed to be furnished to the optionee requires that dower rights be released.

Recording

The option agreement is to be executed in recordable form so that it may be recorded at the optionee's election and at his expense. While, generally, recording is not essential, it is in the optionee's interest to record the option agreement in order to give notice to prospective purchasers or encumbrancers.

Sale through escrow

In a few states, it is customary for an escrow agent to accomplish the transfer in escrow, without the physical presence of the parties. In these states, the parties give the escrow agent instructions to be followed in transferring title. All of the necessary documents and payments are sent to the escrow agent, who will close the sale when all of the escrow closing instructions have been complied with.

FORM

OPTION given June 2, _____ [year], by Howard Smith of Cleveland, Ohio ("Optionor") to William Harris of Cleveland, Ohio ("Optionee").

1. *Grant of option.* The Optionor, in consideration of the sum of \$1,500 received from Optionee, gives Optionee the exclusive option to purchase, upon the following terms and conditions, a certain parcel of land in Cuyahoga County, Ohio (the "real property") described in the attached Exhibit A.

2. *Option period.* This option shall run for a period of seven months, beginning June 2, _____ [year] and terminating December 31, _____ [year] (the "option period").

3. *Exercise of option.* Optionee may exercise this option at any time during the option period by delivering or mailing notice to Optionor by certified mail, return receipt requested.

4. *Price.* The purchase price for the property is \$45,000, payable by Optionee as follows:

(a) \$1,500, the sum paid for this option, shall be credited against the purchase price.

(b) The balance of the purchase price, \$43,500, shall be deposited into escrow with the Escrow Agent, in cash or its equivalent, after the option is exercised and on or before the closing date.

5. *Failure to exercise option.* If Optionee does not exercise this option, Optionor shall retain the consideration paid hereunder and neither party shall have any further rights or claims against the other by reason of this agreement.

6. *Closing date.* Optionor shall close the transaction contemplated hereby 30 days after he shall have received written notice of the exercise of this option.

7. *Deed; title insurance.* (a) If Optionee exercises this option, Optionor shall convey title to the real property to Optionee or his nominee by good and sufficient general warranty deed, with any dower rights released. The deed shall warrant title to be free and clear of all liens, charges, encumbrances, clouds and defects, except for restrictions, reservations, limitations, easements and conditions of record, zoning ordinances, and taxes and assessments, both general and special, which are a lien but not due and payable. The deed shall be deposited into escrow with the Escrow Agent on or before the closing date. Before the deed is deposited, however, a copy thereof shall be submitted to Optionee's counsel for approval.

(b) Optionor shall submit with the deed a title guaranty policy, in the amount of the purchase price, issued by a title company selected by Optionee (the "Title Company"), in its customary form, guaranteeing the record title to the real property to be good in Optionee, subject only to the exceptions to be contained in the deed and the title guaranty policy as set forth in Section 10(b). Notwithstanding the above, Optionee may elect to receive an ALTA form of Owner's Fee Policy of title insurance in the amount of the purchase price, prepared by the Title Company, insuring marketable title to be good in Optionee subject only to the exceptions to be contained in the deed and the title insurance as set forth in Section 10(b). Such election shall be made by giving written notice thereof to the Escrow Agent prior to the closing date. In that event, Optionor shall furnish Optionee with title insurance, in lieu of a title guaranty policy. Optionor shall then pay the portion of the costs that would have been incurred had a certificate of title guaranty been issued, and Optionee shall pay the remaining costs.

8. *Possession.* Optionor shall deliver possession of the real property as of the date of transfer of the record title.

9. *Escrow.* The transaction contemplated hereby shall be closed in escrow with the Title Company or, if Optionee desires, with the lending institution through which Optionee will finance this transaction (the "Escrow Agent"). Optionee shall deposit an executed counterpart hereof with the Escrow Agent, and this Agreement shall serve as the Escrow Agent's escrow instructions. The Escrow Agent may attach its standard conditions of acceptance to the counterpart, but if its conditions are inconsistent or in conflict with the terms and conditions hereof, those contained in this Agreement shall control.

10. *Title closing.* (a) On the closing date, the Escrow Agent shall notify the parties whether the Title Company is then in a position to issue the title guaranty policy or title insurance, whichever applies. If the Escrow Agent notifies the parties that:

(1) The Title Company will issue a title guaranty policy or title insurance, this transaction shall be consummated in accordance with the terms and provisions of this Agreement; or

(2) The Title Company will not issue such a title guaranty policy or title insurance, and if Optionor does not forthwith cure the title defects that the Escrow Agent recites as preventing such issuance in the form required hereunder, or Optionee does not waive the same, this transaction shall be postponed for a reasonable period of time not to exceed 30 days until Optionor removes such title defects. If Optionor is unable or refuses to do so, this transaction shall be cancelled, the full amount of the consideration paid for the option plus the balance of the purchase price, deposited with the Escrow Agent, shall be promptly refunded to Optionee, and the documents deposited into escrow shall be returned to Optionor. The parties shall be fully released from any liability hereunder except that Optionor shall pay the cost of the escrow and the charges of the Title Company.

(b) If Optionee waives the title defects preventing the above issuance by so notifying the Title Company and the Escrow Agent, or if Optionor cures such defects, the parties' obligations shall not be affected by reason thereof, there shall be no abatement or reduction of the purchase price, and the transaction contemplated hereby shall be consummated in accordance with the terms and conditions hereof. However, any title defects waived by Optionee shall nevertheless be set forth as exceptions in the deed and in the title guaranty policy or title insurance, as the case may be.

11. *Prorations.* The Escrow Agent shall prorate all general and special real estate taxes and assessments as of the date the deed is filed for record. For such purposes the Agent shall use the rate and valuation shown on the last available tax bill.

12. *Duties of escrow agent.* (a) On the closing date, the Escrow Agent shall file for record the deed and all other required instruments. The Agent shall then deliver to each party the funds and documents to which it is entitled, together with the Agent's escrow statement.

(b) In closing this transaction, the Escrow Agent shall charge Optionor with:

- (1) The full amount of real estate taxes and assessments prorated up to and including the date of transfer of title;
- (2) The cost of any transfer tax;
- (3) The cost of the title search, and title guaranty policy in the amount of the purchase price;
- (4) The cost of satisfying any mortgage indebtedness on the property for which Optionor is liable, together with the cost of any mortgage cancellation, recording fee or other costs incident to the satisfaction of any such indebtedness;
- (5) The cost of any brokerage commission;
- (6) One half of the escrow fee; and
- (7) All other charges properly borne by Optionor consistent with the terms of this Agreement.

Immediately thereafter, the Escrow Agent shall deliver to Optionor the balance of the funds in its hands due under the terms of this Agreement, and all documents due Optionor.

(c) Upon the closing, the Escrow Agent shall charge Optionee with:

- (1) Any cost of financing this transaction arranged for by Optionee;
- (2) The cost of filing the deed for record;
- (3) The amount by which the cost of furnishing the title insurance exceeds the cost of furnishing the title guaranty if Optionee elects to be furnished with title insurance as provided for in Section 7(b);
- (4) One half of the escrow fee;
- (5) All prepaid prorated real estate taxes and assessments charged to Optionee, as well as prepaid premiums for insurance policies transferred to Optionee; and
- (6) All other charges properly borne by Optionee consistent with the terms of this Agreement.

Immediately thereafter, the Escrow Agent shall deliver to Optionee the title guaranty policy or title insurance, as the case may be, the recorded deed or Recorder's receipt therefor, and all other funds or documents due to Optionee.

13. *Broker.* Optionor shall indemnify and hold harmless Optionee from all costs, expenses, or damages resulting from any claims for brokerage fees or other similar forms of compensation made by any real estate broker or any other person or entity because of the sale of the real property hereunder.

14. *Notices.* Any notice under this Agreement shall be delivered or sent by certified mail, postage prepaid, return receipt requested, and addressed as follows:

If to Optionor, to: Howard Smith
 20000 Jones Court
 Cleveland, Ohio 44118

If to Optionee, to: William Harris
 23752 James Lane
 Cleveland, Ohio 44120

15. *Consent of spouse.* Joan Smith, wife of Optionor, joins in the execution of this Agreement to evidence her consent to its terms, including specifically the requirement of the release of her dower interest and all other marital rights she may have in the real property if and when it is conveyed under this Agreement.

16. *Recording.* This Agreement shall be executed in recordable form, and, if Optionee elects, may be recorded at his expense with the Cuyahoga County Recorder.

17. *Binding effect.* This Agreement shall be binding upon and inure to the benefit of the parties and their respective heirs, executors, administrators, and assigns.

18. *Headings.* Headings in this Agreement are for convenience only and shall not be used to interpret or construe its provisions.

19. *Governing law.* This Agreement shall be governed by and construed in accordance with the laws of the State of Ohio.

20. *Counterparts.* This Agreement may be executed in one or more counterparts, each of which shall be deemed an original but all of which together shall constitute one and the same instrument.

21. *Time of essence.* Time is of the essence of this Agreement.

22. *Entire agreement.* This Agreement supersedes all prior agreements between the parties with regard to the subject matter hereof and there are no other understandings or agreements between them.

The parties hereto have signed this Agreement as of the date first above written.

Optionor:

Howard Smith

Optionee:

William Harris

State of Ohio
County of Cuyahoga

)
) ss:
)

Before me, a Notary Public in and for said County and State, personally appeared Howard Smith, who acknowledged that he did sign the foregoing instrument, and that the same is his free act and deed.

In testimony whereof I have hereunto set my hand and official seal at _____, Ohio, on _____ [date].

Notary Public

State of Ohio
County of Cuyahoga

)
) ss:
)

Before me, a Notary Public in and for said County and State, personally appeared Joan Smith, who acknowledged that she did sign the foregoing instrument, and that the same is her free act and deed.

In testimony whereof I have hereunto set my hand and official seal at _____, Ohio, on _____ [date].

Notary Public

State of Ohio
County of Cuyahoga

)
) ss:
)

Before me, a Notary Public in and for said County and State, personally appeared William Harris, who acknowledged that he did sign the foregoing instrument, and that the same is his free act and deed.

In testimony whereof I have hereunto set my hand and official seal at _____, Ohio, on _____ [date].

Notary Public

This instrument prepared by:



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Current Legal Forms for Real Estate

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Current Legal Forms for Real Estate
Chapter 21 SALES AND EXCHANGES
Part IV. Forms
A. OPTIONS AND OFFERS

25-21 Current Legal Forms for Real Estate FORM 21.05

FORM 21.05 Option to purchase--sale through escrow--terms of sale included--preliminary title report when option exercised

COMMENT

In this form a preliminary title report is to be issued upon the exercise of the option and prior to the closing. This gives the optionee the opportunity to object to any title defects disclosed in the report and the optionor would have until the closing date to cure or remove such defects. Since the preliminary report may be delayed and the optionee has ten days after its receipt to notify the optionor and the title company of any objectionable title defects, the closing is held 30 days after the report is received rather than 30 days after the option is exercised. Any defect not objected to by the optionee is considered as waived and set forth as exceptions in the deed and in the title policy or insurance.

The better practice for the optionee is to find out the condition of title to the property before the option agreement is executed so that the option agreement can state that the property must be conveyed by the optionor subject only to the known conditions of title which were previously approved. See *Form 21.06* for an example.

FORM

OPTION to purchase granted July 1, _____ [year], by Russell Hall and Joan Hall, husband and wife ("Optionor"), to Philip Horn, unmarried ("Optionee").

1. *Grant of option.* Optionor, for the option price of \$5,000, receipt of which is acknowledged, grants to Optionee the exclusive option to purchase a certain parcel of land in Franklin County, Ohio (the "Property"), described in Exhibit A.

2. *Option period.* This option shall be for a period of six months, beginning July 1, _____ [year] and terminating December 31, _____ [year].

3. *Exercise.* This option may be exercised at any time during the option period by notice to Optionor delivered or mailed by certified or registered mail, return receipt requested, to Optionor's address set forth in Section 14.

4. *Purchase Price.* The purchase price for the Property is \$100,000, payable by Optionee as follows:

(a) \$5,000, the sum paid for this option, shall be credited against the purchase price.

(b) The balance of the purchase price, \$95,000, shall be deposited into escrow with the Escrow Agent in cash or its equivalent after the option is exercised and on or before the closing date described in Section 6.

5. *Failure to exercise.* If Optionee fails to exercise the option, Optionor shall retain the consideration paid for the option and neither party shall have any further rights or claims against the other by reason of this transaction.

6. *Closing date.* The closing date shall be 30 days after Optionee receives the preliminary title report, as set forth in Section 7(c).

7. *Deed and title.* (a) *Deed.* If Optionee exercises this option, Optionor shall convey title to the Property to Optionee by good and sufficient general warranty deed, warranting title to be free and clear of all liens, charges and encumbrances, clouds and defects, except for restrictions, reservations, limitations, easements and conditions approved by Optionee in the manner hereafter provided in Section 7(c) below, zoning ordinances and taxes and assessments, both general and special, which are a lien but not due and payable. The deed shall be deposited into escrow with the Escrow Agent on or before the closing date. A copy of the deed shall be submitted to Optionee's counsel for approval before it is deposited into escrow.

(b) Optionor shall accompany the deed with a title guaranty policy in the amount of the purchase price issued by a title company of Optionee's choice (the "Title Company") in its customary form, guaranteeing the record title to the Property to be good in Optionee subject only to the exceptions to be contained in the deed and the title guaranty policy. In lieu of a title guaranty policy, Optionee may elect, by giving written notice to the Escrow Agent before the closing date, to be furnished with an Owner's Fee Policy of title insurance (ALTA form) in the amount of the purchase price, prepared by the Title Company, insuring marketable title to be good in Optionee, subject only to the exceptions to be contained in the deed and the title insurance as set forth in Section 10(b). In that event, in lieu of a title guaranty policy Optionor shall furnish Optionee with title insurance, and Optionor shall pay that portion of its costs which would have been incurred had a title guaranty policy been issued, and Optionee shall pay the remaining costs.

(c) *Preliminary title report.* As soon as Optionor receives notice that this option is exercised, it shall order from the Title Company a preliminary title report in the form of a commitment to issue the title policy requested by Optionee, with instructions to deliver a copy of the report to Optionee. Within ten days after Optionee receives the title report, he shall notify Optionor and the Title Company of all restrictions, reservations, limitations, easements, liens, and conditions of record (collectively, "title defects") disclosed in the title report which are objectionable to Optionee. If Optionee so notifies Optionor, Optionor shall have until the closing date to cure or remove such title defects. If Optionee does not notify Optionor, Optionee shall be deemed to have waived the title defects and such defects shall be set forth as exceptions to be contained in the deed and the title policy or title insurance as provided in Section 10(b).

8. *Possession.* Optionor shall deliver possession of the Property as of the closing date.

9. *Escrow.* This transaction shall be closed in escrow with the Title Company or, if Optionee elects, with the lending

institution through which Optionee finances this transaction (the "Escrow Agent"). Optionee shall deposit an executed counterpart of this Agreement with the Escrow Agent, and the Agreement shall serve as the Agent's escrow instructions. The Escrow Agent may attach its standard conditions of acceptance to the Agreement, but if the Escrow Agent's conditions are inconsistent or in conflict with the terms and conditions hereof, the conditions contained herein shall control.

10. *Closing of title.* (a) On the closing date, the Escrow Agent shall notify parties whether the Title Company will issue the title guaranty policy or title insurance, as the case may be, required under this Agreement. If the Escrow Agent notifies the parties that:

(1) The Title Company will issue such a title guaranty policy or title insurance, this transaction shall be consummated in accordance with the terms and provisions of this Agreement; or

(2) The Title Company will not issue such a title guaranty policy or title insurance, and if Optionor does not forthwith cure the title defects that the Escrow Agent recites as preventing such issuance in the form required, or Optionee does not waive the defects, this transaction shall be postponed for a reasonable period of time not to exceed 30 days until Optionor removes the title defects. If Optionor is unable or refuses to do so, this transaction shall be cancelled, the full amount of the consideration paid for the option plus the balance of the purchase price, if any, deposited with the Escrow Agent, shall be promptly refunded to Optionee, and the documents deposited into escrow shall be returned to Optionor. The parties shall be fully released from any liability hereunder except that Optionor shall pay the cost of the escrow and the charges of the Title Company.

(b) If Optionee waives the title defects preventing such issuance by so notifying the Title Company and the Escrow Agent, or if Optionor cures the defects within the permitted time, the parties' obligations hereunder shall not be affected by reason of such waiver or cure, the purchase price shall not be abated or reduced, and this transaction shall be consummated in accordance with the terms and conditions hereof. However, any title defects waived by Optionee shall nevertheless be set forth as exceptions in the deed and in the title guaranty policy or title insurance, whichever applies.

11. *Prorations.* The Escrow Agent shall prorate all general and special real estate taxes and assessments as of the date the deed is filed for record. For such purposes the Agent will use the rate and valuation shown on the last available tax bill.

12. *Duties of escrow agent.* (a) On the closing date, the Escrow Agent shall file for record the deed and all other required instruments and shall thereupon deliver to each of the parties the funds and documents to which they are respectively entitled, together with its escrow statement.

(b) In closing this transaction, the Escrow Agent shall charge Optionor with:

(1) The full amount of real estate taxes and assessments prorated up to and including the date of transfer of title;

(2) The cost of any transfer tax;

(3) The cost of the title report, including the preliminary title report described in Section 7(c), title search, and title guaranty policy in the amount of the purchase price;

(4) The cost of paying off and satisfying any mortgage indebtedness on the property for which Optionor is liable, together with the cost of any mortgage cancellation, recording fee, or other costs incident to the satisfaction of any such indebtedness;

(5) The cost of any brokerage commission required to be paid under this Agreement;

(6) One half of the escrow fee; and

(7) All other charges properly borne by Optionor consistent with the terms of this Agreement.

Immediately thereafter, the Escrow Agent shall deliver to Optionor the balance of the funds in its hands and documents due Optionor.

(c) Upon the closing, the Escrow Agent shall charge Optionee with:

(1) Any cost of financing this transaction which Optionee arranges for;

(2) The cost of filing the deed for record;

(3) The amount by which the cost of furnishing the title insurance exceeds the cost of furnishing the title guaranty if Optionee elects to be furnished with title insurance, as provided by Section 7(b);

(4) One half of the escrow fee;

(5) All prepaid prorated real estate taxes and assessments charged to Optionee, as well as prepaid premiums for insurance policies transferred to Optionee; and

(6) All other charges properly borne by Optionee consistent with the terms of this Agreement.

Immediately thereafter, the Escrow Agent shall deliver to Optionee the title guaranty policy or title insurance, as the case may be, the recorded deed or Recorder's receipt for the deed, and all other funds or documents due Optionee.

13. *Broker.* Optionor represents and warrants to Optionee that no broker has listed the Property for sale and that no broker has been involved in this transaction. Optionor shall indemnify and hold harmless Optionee from any and all costs, expenses, or damages resulting from any claims for brokerage fees or other similar forms of compensation made by any real estate broker or any other person or entity because of the sale of the real property hereunder.

14. *Notices.* Any notice under this Agreement shall be delivered or sent by certified or registered mail, postage prepaid, return receipt requested, and addressed as follows:

To Optionor: Russell Hall and Joan Hall
 10 East Runnymede Court
 Columbus, Ohio

To Optionee: Philip Horn
 21 Franklin Mews
 Columbus, Ohio

15. *Recording.* This Agreement shall be executed in recordable form, and, if Optionee elects, may be recorded at his expense with the Franklin County Recorder.

16. *Binding effect.* This Agreement shall be binding upon and inure to the benefit of the parties hereto and their respective heirs, executors, administrators, and assigns.

17. *Headings.* Headings in this Agreement are for convenience only and shall not be used to interpret or construe its

provisions.

18. *Governing law.* This Agreement shall be governed by and construed in accordance with the laws of the State of Ohio.

19. *Counterparts.* This Agreement may be executed in one or more counterparts, each of which shall be deemed an original but all of which together shall constitute one and the same instrument.

20. *Time of essence.* Time is expressly declared to be the essence of this Agreement.

21. *Entire agreement.* This Agreement supersedes all prior agreements between the parties with regard to the subject matter hereof and there are no other understandings or agreements between them.

The parties hereto have signed this Agreement as of the date first above written.

Optionor:

Russell Hall

Joan Hall

Optionee:

Philip Horn

[Acknowledgments]



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Chapter 21 SALES AND EXCHANGES
Part IV. Forms
A. OPTIONS AND OFFERS

25-21 Current Legal Forms for Real Estate FORM 21.06

FORM 21.06 Option to purchase--exercisable against separate parcels--sale through escrow--terms of sale included

COMMENT

In this form a copy of a commitment for title insurance is furnished to the optionee prior to the execution of the agreement. The commitment shows the condition of the title to the optioned property and the optionor only warrants delivery of title as reflected in the commitment. Accordingly, this form can be used when all matters initially reflected in the title insurance commitment are acceptable to the optionee.

Advantages of prior title commitment

A commitment for title insurance issued prior to entering into the option agreement gives the optionee the opportunity to consider the title he would receive if the option is exercised and the property is purchased. If he does not wish to take title subject to any title defects shown in the commitment, he would not execute the option agreement and there would be neither an option nor a sale. The optionee could, instead, negotiate the terms of the transaction, such as a reduction in the purchase price, or removal of the defects by the optionor, before the option agreement is executed. In such case the Option Agreement should require the Optionor to deliver title to the Property subject only to those items identified in the Commitment, save and except for the defects objected to by the Optionee and agreed to be removed by Optionor.

Once the option is exercised, the closing date will be set, the title policy or insurance will be issued according to the commitment and the transaction will be consummated.

Recording of option

This form is drafted for recordation. In many jurisdictions, the essential element of an option may be contained in a so-called "short-form" of option for recording. The short form may be preferable because it will not disclose matters such as the purchase price which the parties may want to be kept confidential.

Partial exercises

This form provides for the exercise of options by notice given from time to time for separate parcels of land or groups of parcels. The option holder may also exercise the option for all the land at one time. The price is based on the category of land involved. A separate price applies to platted lots, and a set price per acre applies to the unplatted land, depending upon its location. To keep the option alive, the option holder is required to make quarterly payments based on a percentage of the balance of the total purchase price.

FORM

OPTION granted May 1, _____ [year], by James Elliot and Alice Elliot of Akron, Ohio ("Optionor") to Michael Olsen and Carol Olsen, of Toledo, Ohio ("Optionee").

1. *Option.* In consideration of the sum of \$2,500 received from Optionee, Optionor grants and gives Optionee the exclusive option to purchase certain parcels of land in Lucas County, Ohio (the "real property"), described in Exhibit A, attached hereto and made a part hereof.

2. *Exercise of option, purchase prices.* (a) *Price.* The option may be exercised either in whole, or in part from time to time. By exercising the option in whole, the maximum total purchase price shall be \$1.75 million. By exercising the option in part, each platted lot shall be based upon a purchase price of \$7,500, and all lands not platted in lots shall be based upon \$15,000 per acre with the exception of a parcel of land consisting of approximately 10 acres located at Blue Springs, which is to be based upon \$22,000 per acre. If the option is exercised in part, then as soon as the purchase price of the property aggregates \$1.75 million any remaining property shall be conveyed to Optionee without payment of further consideration.

(b) *Exercise.* If Optionee decides to exercise this option, either in whole or in part, it shall so notify Optionor by written notice. Simultaneously with such notice, Optionee shall deliver to Optionor a check representing one percent of the total cost of the lands for which the option is being exercised.

3. *Purchase price credits.* Whenever the option is exercised in part, the purchase price shall be credited toward the total option price of \$1.75 million. However, whenever the purchase price has been reduced by reason of Seller's inability to convey title as required, the total option price shall be reduced by the decreased amount.

4. *Continuation of option period.* The option contained in this Agreement shall continue for a period of five years, provided that Purchaser pays to Seller on a quarter annual basis (every three months), starting the first day of August, an amount equal to 1.5 percent of \$1.75 million less the purchase price of all lands sold under the option portion of this Agreement. The determination as to the amount to be paid with each quarter annual payment shall be based upon the \$1.75 million less all of the purchases made under the option provision to the date of each quarter annual payment.

5. *Failure to exercise option.* If Optionee does not exercise any option, Optionor shall retain the \$2,500 paid by Optionee, free of all Optionee's claims, and neither party shall have any further claims against the other.

6. *Closing date.* This transaction shall be closed as to each parcel 60 days after receipt of written notice of an exercise of option.

7. *Title commitment.* Optionor has delivered to Optionee a copy of a Commitment for Title Insurance issued by the National Title Insurance Company (the "Title Company"), on April 14, _____ [year], under its Commitment No. 38324, showing the condition of the title of the real property. Optionee has approved the condition of title as shown therein. If Optionee exercises this option, Optionor shall convey title to the real property to Optionee or its nominee by good and sufficient general warranty deed, with any dower rights released. The deed shall warrant title to be free and clear of all liens, charges and encumbrances, clouds, and defects for each parcel conveyed, except for those defects, restrictions, reservations, limitations, easements, and conditions of record disclosed in the Commitment previously approved by Optionee, zoning ordinances, and general and special taxes and assessments which are a lien but not due and payable. The deed shall be deposited into escrow with the Escrow Agent on or before the closing date. A copy of the deed shall be submitted to Optionee's counsel for approval before the deed is deposited into escrow.

Optionor warrants that the real property is subject only to the defects, encumbrances, etc., set forth in the above Commitment. This warranty shall survive the execution of this Agreement. Optionor agrees not to further encumber the real property in any manner while this option remains in effect.

8. *Title insurance.* Optionor shall accompany the deed with an Owner's Fee Policy of title insurance in the amount of the purchase price, prepared by the Title Company in its customary form, insuring marketable title to be good in Optionee, subject only to the exceptions to be contained in the deed as shown above. Optionor shall pay for the cost of the title insurance.

9. *Possession.* Optionor shall deliver possession of each parcel of the real property as of the date of transfer of title.

10. *Escrow.* Each transaction shall be closed in escrow with the Title Company or, if Optionee desires, with the lending institution through which Optionee will finance the transaction (the "Escrow Agent"). Optionee shall deposit an executed counterpart hereof with the Escrow Agent, and this Agreement shall serve as the Agent's escrow instructions. The Escrow Agent may attach its standard conditions of acceptance to such counterpart, but if its conditions are inconsistent or in conflict with the terms and conditions hereof, those contained herein shall control.

11. *Proration.* The Escrow Agent shall prorate all general and special real estate taxes and assessments as of the date the deed is filed for record. For such purposes the Escrow Agent shall use the rate and valuation shown on the last available tax bill.

12. *Closing documents; funds.* On each closing date, the Escrow Agent shall file for record the deed and all other required instruments and shall deliver to both parties the funds and documents to which they are respectively entitled, together with its escrow statement.

13. *Cost of optionor.* In closing each transaction, the Escrow Agent shall charge Optionor with:

- (1) The full amount of real estate taxes and assessments prorated up to and including the date of transfer of title;
- (2) The cost of any transfer tax;
- (3) The cost of the title commitment, title search, and title insurance policy in the amount of the purchase price;
- (4) The cost of paying off and satisfying any mortgage indebtedness on the property for which Optionor is liable, together with the cost of any mortgage cancellation, recording fee, or other costs incident to the satisfaction of any such indebtedness;

- (5) The cost of the brokerage commission;
- (6) One half of the escrow fee; and
- (7) All other charges properly borne by Optionor consistent with the terms of this Agreement.

Immediately thereafter, the Escrow Agent shall deliver to Optionor the balance of the funds in its hands due under the terms hereof, and all documents due Optionor.

14. *Costs of optionee.* Upon the closing, the Escrow Agent shall charge Optionee with:

- (1) Any cost of financing this transaction which is arranged for by Optionee.
- (2) The cost of filing the deed for record;
- (3) One half of the escrow fee;
- (4) All prepaid premiums for insurance policies transferred to Optionee; and
- (5) All other charges properly borne by Optionee consistent with the terms of this Agreement.

Immediately thereafter, the Escrow Agent shall deliver to Optionee the title insurance, the recorded deed or Recorder's receipt therefor, and all other funds or documents due Optionee.

15. *Broker.* Optionor represents and warrants that the sole and exclusive broker for this transaction is Decade Ten: Toledo Real Estate Agency. Optionor shall indemnify and hold harmless Optionee from all costs, expenses or damages resulting from any claims for brokerage fees or other similar forms of compensation made by Decade Ten or by any other real estate broker or any other person or entity because of the sale of the real property under this Agreement.

16. *Notices.* All notices hereunder shall be delivered or sent by registered mail, return receipt requested, to Optionor at 1010 Main Street, Akron, Ohio 44200, and to Optionee at 1031 Second Avenue, Toledo, Ohio 44202.

17. *Recording.* This Agreement shall be executed in recordable form, and, if Optionee elects, may be recorded at Optionee's expense with the Lucas County Recorder.

18. *Binding effect.* This Agreement shall be binding upon and inure to the benefit of the parties hereto and their respective heirs, executors, administrators, and assigns.

19. *Headings.* Headings in this Agreement are for convenience only and shall not be used to interpret or construe its provisions.

20. *Governing law.* This Agreement shall be governed by and construed in accordance with the laws of the State of Ohio.

21. *Counterparts.* This Agreement may be executed in one or more counterparts, each of which shall be deemed an original but all of which together shall constitute one and the same instrument.

22. *Time of essence.* Time is of the essence of this Agreement.

23. *Entire agreement.* This Agreement supersedes all previous agreements between the parties with regard to the subject matter hereof and there are no other understandings or agreements between them.

The parties hereto have signed this Agreement as of the date first above written.

Optionor:

James Elliot

Alice Elliott

Optionee:

Michael Olsen

Carol Olsen

[Acknowledgments]



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Chapter 21 SALES AND EXCHANGES
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A. OPTIONS AND OFFERS

25-21 Current Legal Forms for Real Estate FORM 21.07

FORM 21.07 Option to purchase--exercise period to commence after death of optionor

COMMENT

This form may be used when an optionee desires to acquire real estate owned by an elderly or terminally ill person with a low basis in the property. The option exercise period does not commence until the optionee receives notice of the death of the optionor. The notice is usually in the form of a letter from the executor or administrator of the optionor's estate.

Stepped-up basis for estate

The purpose of the form is to enable the seller of the property, which would be either the estate or the person to whom the property was devised, to take advantage of the stepped-up basis for the property.

Estate tax

The fair market value of the optioned real property as of the date of death of the optionor or as of the alternate valuation date, if so elected, would be includable in the optionor's estate for estate tax purposes.

The basis of property acquired from or passing from a decedent to the estate, legatee or heir is equal to the fair market value of the property at the time of the decedent's death, so that, when the property is sold, little or no gain is realized.

Title commitment

This form provides for a title commitment, the inclusion of the terms of sale and sale through

escrow.

FORM

OPTION given August 1, _____ [year], by George Green of Akron, Ohio, his heirs, executors, administrators, successors and assigns ("Optionor"), to Walter Alen of Cleveland, Ohio ("Optionee").

1. *Option price and grant.* For \$25,000, receipt of which is acknowledged, Optionor grants to Optionee the exclusive option to purchase, upon the following terms and conditions, a certain parcel of land in Summit County, Ohio (the "Real Property"), described in Exhibit A.

2. *Exercise period.* This option shall remain in full force and effect for a period commencing August 1, _____ [year] and terminating 90 days after Optionee receives notice of Optionor's death (the "Exercise Period").

3. *Exercise of option.* Optionee may exercise this option at any time during the Exercise Period by giving notice to Optionor's estate, delivered or mailed by certified mail, return receipt requested, to Optionor's address set forth in paragraph 14.

4. *Price.* The purchase price for the Property is \$175,000, payable by Optionee as follows:

(a) \$25,000, the sum paid for this option, shall be credited against the purchase price.

(b) The balance of the purchase price, \$150,000, shall be deposited into escrow with the Escrow Agent, designated before, in cash or its equivalent after the exercise of the option and on or before the closing date set forth before.

5. *Failure to exercise option.* If Optionee does not exercise the option, Optionor shall retain the \$25,000 paid as consideration for the option, free of all claims by Optionee and neither party shall have any further claims against the other.

6. *Closing date.* The parties shall close this transaction 30 days after Optionor shall have received written notice of the exercise of this option.

7. *Title commitment.* Optionor has delivered to Optionee a copy of a Commitment for Title Insurance issued by the National Title Insurance Company (the "Title Company"), on May 15, _____ [year], under its Commitment No. 63754, showing the condition of the title of the real property. If Optionee exercises this option, Optionor shall convey title to the real property to Optionee or his nominee by good and sufficient fiduciary warranty deed, with any dower rights released. The deed shall warrant title to be free and clear of all liens, charges and encumbrances, clouds, and defects, except for those defects, restrictions, reservations, limitations, easements, and conditions of record disclosed in the Commitment of Title Insurance, zoning ordinances, and general and special taxes and assessments which are a lien but not due and payable. The deed shall be deposited into escrow with the Escrow Agent on or before the closing date. A copy of the deed shall be submitted to Optionee's counsel for approval before the deed is deposited into escrow.

Optionor warrants that the Real Property is subject only to the defects, encumbrances, etc., set forth in the above Commitment. This warranty shall survive the execution of this Agreement. Optionor shall not further encumber the real property in any manner while this option remains in effect.

8. *Title Guaranty.* Optionor shall accompany the deed with a title guaranty policy in the amount of the purchase price issued by the Title Company in its customary form, guaranteeing the record title to the Real Property to be good in Optionee subject only to the exceptions to be contained in the deed, as set forth in Section 7.

9. *Possession.* Optionor shall deliver possession of the Real Property as of the date of transfer of record title.

10. *Escrow.* The transaction contemplated hereby shall be closed in escrow with the Title Company or, if Optionee desires, with the lending institution through which Optionee will finance the transaction (the "Escrow Agent"). Optionee shall deposit an executed counterpart hereof with the Escrow Agent, and this Agreement shall serve as the Agent's escrow instructions. The Escrow Agent may attach its standard conditions of acceptance to such counterpart, but if such conditions are inconsistent or in conflict with the terms and conditions hereof, those contained herein shall control.

11. *Proration.* The Escrow Agent shall prorate all general and special real estate taxes and assessments as of the date the deed is filed for record. For such purposes the Agent shall use the rate and valuation shown on the last available tax bill.

12. *Duties of escrow agent.* (a) *Closing.* On the closing date, the Escrow Agent shall file for record the deed and all other required instruments. The Agent shall then deliver to each party the funds and documents to which it is entitled, together with the Agent's escrow statement.

(b) *Optionor expenses.* In closing this transaction, the Escrow Agent shall charge Optionor with:

- (1) The full amount of real estate taxes and assessments prorated up to and including the date of transfer of title;
- (2) The cost of any transfer tax;
- (3) The cost of the title commitment, title search, and title guaranty policy in the amount of the purchase price;
- (4) The cost of paying off and satisfying any mortgage indebtedness on the property for which Optionor is liable, together with the cost of any mortgage cancellation, recording fee, or other costs incident to the satisfaction of any such indebtedness;
- (5) The cost of any brokerage commission required to be paid by Optionor;
- (6) One half of the escrow fee; and
- (7) All other charges properly borne by Optionor consistent with the terms of this Agreement.

Immediately thereafter, the Escrow Agent shall deliver to Optionor the balance of the funds in its hands due under the terms hereof, and all documents due Optionor.

(c) *Optionee expenses.* Upon the closing, the Escrow Agent shall charge Optionee with:

- (1) Any cost of financing this transaction which Optionee arranges for;
- (2) The cost of filing the deed for record;
- (3) One half of the escrow fee;
- (4) All prepaid premiums for insurance policies transferred to Optionee; and

(5) All other charges properly borne by Optionee consistent with the terms of this Agreement.

Immediately thereafter, the Escrow Agent shall deliver to Optionee the title guaranty policy or title insurance, the recorded deed or Recorder's receipt, and all other funds or documents due Optionee.

13. *Broker.* Optionor shall pay any broker commissions due and payable by reason of this transaction. Optionor shall indemnify and hold harmless Optionee from all costs, expenses, or damages resulting from all claims for brokerage fees or other similar forms of compensation made by any real estate broker or any other person or entity because of the sale of the real property hereunder.

14. *Notices.* Any notice under this Agreement shall be delivered or sent by certified mail, postage prepaid, return receipt requested, and addressed as follows:

If to Optionor, to:	George Green 1235 16th Street Akron, Ohio 44200
If to Optionee, to:	Walter Alen 5 North Main Street Cleveland, Ohio 44118

15. *Release of dower interest.* Margaret Green, wife of Optionor, joins in the execution of this Agreement to evidence her consent to its terms, including specifically the requirement of the release of her dower interest and all other marital rights she may have in the real property if and when it is conveyed under this Agreement.

16. *Recording.* This Agreement shall be executed in recordable form, and, if Optionee elects, may be recorded at Optionee's expense with the Summit County Recorder.

17. *Binding effect.* This Agreement shall be binding upon and inure to the benefit of the parties hereto and their respective heirs, executors, administrators, successors, and assigns.

18. *Headings.* Headings in this Agreement are for convenience only and shall not be used to interpret or construe its provisions.

19. *Governing law.* This Agreement shall be governed by and construed in accordance with the laws of the State of Ohio.

20. *Counterparts.* This Agreement may be executed in one or more counterparts, each of which shall be deemed an original but all of which together shall constitute one and the same instrument.

21. *Time of essence.* Time is of the essence of this Agreement.

22. *Entire agreement.* This Agreement supersedes all previous agreements between the parties with regard to the subject matter hereof and there are no other understandings or agreements between them.

The parties hereto have signed this Agreement as of the date first above written.

Optionor:

George Green

Margaret Green

Optionee:

Walter Alen

[Acknowledgments]



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FORM 21.08 Right of first refusal agreement

COMMENT

The holder of a right of first refusal essentially has a latent option to purchase real property that is activated when a third party offers or agrees to purchase the property. The holder's right to purchase the property for the price and on the terms offered by the third party is superior to the third party's offer or agreement. An outstanding right of first refusal can make it difficult for a property owner to market and sell the property, since brokers and prospective purchasers know that the holder of the right may intervene in the transaction and purchase the property.

FORM

AGREEMENT made and dated _____ [date], between _____, Grantor, residing at _____ Street, City of _____, State of _____, and _____, Grantee, residing at _____ Avenue, City of _____, State of _____.

In consideration of the payment of _____ Dollars (\$_____) by Grantee to Grantor, the receipt of which is hereby acknowledged, by check subject to collection, the parties agree as follows:

1. *Right of first refusal.* Grantor grants to Grantee a right of first refusal for the purchase of the real property located in the City of _____, _____ County, State of _____, more particularly described in the annexed Exhibit A (the Property). Grantor and Grantee agree that if Grantor receives a bona fide offer from a third party for the purchase of all or any part of the Property, which offer Grantor is willing to accept, Grantor will give Grantee written notice thereof, and will send Grantee a copy of the proposed contract of sale to such third

party. Grantee shall have the right for _____ days after the receipt of such notice to enter into a contract for the sale of the Property at the same price and on the same terms as contained in the proposed contract of sale to the third party, which right of Grantee shall be paramount to the rights of the third party. If Grantee fails to exercise any such preemptive right within the time herein specified, Grantor shall be at liberty to enter into a contract for the sale of the Property with the third party at the same price and on the same terms as contained in the proposed contract of sale sent to Grantee.

2. *Term of right of first refusal.* This right of first refusal shall continue in effect until the conveyance of the Property in fee simple to Grantee or to a third party pursuant to the right of first refusal described above. If the Property is not conveyed in fee simple to Grantee or to a third party pursuant to the right of first refusal described above, the right of first refusal shall expire at _____ a.m. on _____ [date]. Upon the termination of this right of first refusal, either by a conveyance of the Property or by expiration, Grantee shall deliver to Grantor a signed and acknowledged document stating that this right of first refusal has terminated and that Grantee expressly relinquishes all rights under this right of first refusal agreement.

3. *Grantor's right to encumber and lease.* Notwithstanding anything to the contrary contained in this agreement, grantor shall have the right during the term of this right of first refusal to mortgage or otherwise encumber the Property and to grant leases for all or parts of the property, as Grantor sees fit; however, Grantor may not lease all or any part of the Property for a term of more than _____ years, including renewal periods, and may not grant any lessee an option to purchase all or part of the Property.

4. *Warranty of title.* Grantor warrants and represents that Grantor is the sole owner of good, fee simple, marketable title to the Property and has full authority to grant this right of first refusal.

5. *No assignment by grantee.* Grantee may not assign its rights under this right of first refusal agreement. Any direct or indirect assignment of Grantee's rights under this agreement shall automatically terminate this right of first refusal and all of Grantee's rights hereunder.

6. *Broker.* The parties warrant and represent that no broker brought about or participated in this right of first refusal agreement or transaction. Grantee shall indemnify and hold Grantor harmless against all liabilities and expenses (including, without limitation, reasonable attorneys' fees) arising from any claims for brokerage on this transaction based on any act of Grantee. The warranties, representations and agreements contained in this paragraph shall survive any conveyance of the Property pursuant to this right of first refusal agreement.

7. *Recording.* This agreement shall be executed in recordable form, and if Grantee elects, may be recorded at Grantee's expense with the _____ County Recorder.

8. *Binding effect.* This right of first refusal shall be binding upon and inure to the benefit of the parties and their respective representatives, successors and assigns.

9. *Headings.* Headings in this agreement are for convenience only and shall not be used to interpret or construe its provisions.

10. *Governing law.* This agreement shall be governed by and construed in accordance with the laws of the State of _____.

11. *Counterparts.* This agreement may be executed in one or more counterparts, each of which shall be deemed an original but all of which together shall constitute one and the same instrument.

12. *Entire agreement.* This agreement supersedes all prior agreements between the parties with regard to the subject

matter hereof, and there are no other understandings or agreements between them. This agreement can only be modified by a written instrument signed by both Grantor and Grantee.

13. *Notices and correspondence.* All notices and correspondence shall be sent by certified mail, return receipt requested, to the parties hereto at the following addresses:

If to Grantor, to: _____ Street, City of _____, State of _____.

If to Grantee, to: _____ Street, City of _____, State of _____.

Either party may change the above address by sending a certified letter, return receipt requested, to the other party setting forth such changed address.

The parties hereto have executed and delivered this agreement the day and year first above written.

Grantor:

Grantee:

[Acknowledgments]



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FORM 21.09 Right of first offer agreement

COMMENT

The grantor of a right of first offer is obligated to offer to sell the subject property to the holder of the right before offering to sell the property to any third parties. The grantee's right to purchase is activated when the grantor offers the property to the grantee at a price and upon terms chosen by the grantor. The grantee may then accept the grantor's terms, or, if not, the grantor may offer the property to third parties at the same price and upon the same terms. An outstanding right of first offer generally does not impair the property owner's ability to market and sell the property, since the holder of the right must elect whether or not to purchase the property upon the terms offered before any real estate brokers and prospective purchasers become involved.

FORM

AGREEMENT made and dated _____ [date] between _____, Grantor, residing at _____ Street, City of _____, State of _____, and _____, Grantee, residing at _____ Avenue, City of _____, State of _____.

In consideration of the payment of _____ Dollars (\$_____) by Grantee to Grantor, the receipt of which is hereby acknowledged, by check subject to collection, the parties agree as follows:

1. *Right of first offer.* Grantor grants to Grantee a right of first offer for the purchase of the real property located in the City of _____, _____ County, State of _____, more particularly described in the annexed Exhibit A (the Property). Grantor and Grantee agree that Grantor shall not market, offer for

sale, agree to sell or sell the Property without first offering to sell it to Grantee. Before Grantor enters into any agreement for the marketing or sale of the Property, Grantor will offer to sell the property to Grantee.

2. *Form of first offer.* Grantor will make such first offer to Grantee in a writing which shall advise Grantee that Grantor intends to market, offer for sale, agree to sell or sell the Property to a third party. The written first offer shall set forth the purchase price and terms for the sale of the Property which Grantee would be willing to offer to a third party, including: (a) the total amount of the purchase price; (b) the amount of deposit required; (c) the forms of payment of the deposit and the purchase price; (d) the amount and terms of any purchase money financing; and (e) the date and place of transfer of title. The first offer shall contain all of the essentials of a contract for the sale of the Property, and shall be executed by Grantor.

3. *Grantee's acceptance of first offer.* Grantee shall have the right for _____ days after the receipt of Grantor's first offer to accept the offer by delivering an executed copy of the first offer and the required deposit to Grantor prior to the expiration of the _____-day period. If Grantee then fails to consummate the sale of the Property by the date for transfer of title set forth in the first offer, Grantor shall retain the deposit paid pursuant to Grantee's acceptance as liquidated damages, and this right of first offer shall terminate.

4. *Counteroffer.* If Grantee responds to Grantor's offer under this agreement with anything other than an unequivocal and unconditional acceptance or rejection of the offer, such response shall be deemed to be an offer to purchase the Property ("Counteroffer"), which shall cause this agreement to terminate. Grantor may accept or reject Grantee's Counteroffer in Grantor's sole discretion.

5. *Second offer rights.* If Grantee expressly rejects Grantor's first offer under this agreement or makes a Counteroffer as described above, and Grantor subsequently becomes willing to sell the Property at a price or on terms substantially less favorable to Grantor than those contained in the first offer, Grantor shall then offer to sell the Property to Grantee at such new price or on such new terms ("Second Offer"). The second offer shall be made in the form described above for the making of the first offer, and shall be subject to the same terms, requirements, and time limits for acceptance, rejection or counteroffer as described above for a first offer.

6. *Termination of right of first or second offer.* If Grantee fails to respond to Grantor's offer before the expiration of the _____-day acceptance period described above, the offer shall be deemed rejected and this agreement and all of Grantee's rights under it shall terminate. If, within the _____-day acceptance period described above, Grantee expressly rejects Grantor's offer or makes a Counteroffer as described above, this agreement and all of Grantee's rights under it shall terminate, subject to Grantee's second offer rights described above. Upon the termination of this agreement for any reason other than Grantee's express rejection of Grantor's offer or Grantee's making of a Counteroffer, Grantor may market, offer for sale, agree to sell or sell the Property to any other party for whatever price and on whatever terms Grantor may choose, without any further obligation under this agreement.

7. *Term of right of first offer.* This right of first offer shall begin at _____ a.m. on _____ [date], and shall continue until _____ p.m. on _____ [date], unless terminated sooner in accordance with this agreement.

8. *Grantor's right to encumber and lease.* Notwithstanding anything to the contrary contained in this agreement, grantor shall have the right during the term of this right of first offer to mortgage or otherwise encumber the Property and to grant leases for all or parts of the property, as Grantor sees fit; however, Grantor may not lease all or any part of the Property for a term of more than _____ years, including renewal periods, and may not grant any lessee an option to purchase all or part of the Property.

9. *Warranty of title.* Grantor warrants and represents that Grantor is the sole owner of good, fee simple, marketable title to the Property and has full authority to grant this right of first offer.

10. *No assignment by grantee.* Grantee may not assign its rights under this right of first offer agreement. Any direct or indirect assignment of Grantee's rights under this agreement shall automatically terminate this right of first offer and all of Grantee's rights hereunder.

11. *Broker.* The parties warrant and represent that no broker brought about or participated in this right of first offer agreement or transaction. Grantee shall indemnify and hold Grantor harmless against all liabilities and expenses (including, without limitation, reasonable attorneys' fees) arising from any claims for brokerage on this transaction based on any act of Grantee. The warranties, representations and agreements contained in this paragraph shall survive any conveyance of the Property pursuant to this right of first offer agreement.

12. *Time of the essence.* Time is of the essence in this agreement.

13. *Binding effect.* This right of first offer shall be binding upon and inure to the benefit of the parties and their respective representatives, successors and assigns.

14. *Headings.* Headings in this agreement are for convenience only and shall not be used to interpret or construe its provisions.

15. *Governing law.* This agreement shall be governed by and construed in accordance with the laws of the State of _____.

16. *Counterparts.* This agreement may be executed in one or more counterparts, each of which shall be deemed an original but all of which together shall constitute one and the same instrument.

17. *Entire agreement.* This agreement supersedes all prior agreements between the parties with regard to the subject matter hereof, and there are no other understandings or agreements between them. This agreement can only be modified by a written instrument signed by both Grantor and Grantee.

18. *Notices and correspondence.* All notices and correspondence shall be sent by certified mail, return receipt requested, to the parties hereto at the following addresses:

If to Grantor, to: _____ Street, City of _____, State of _____.

If to Grantee, to: _____ Avenue, City of _____, State of _____.

Either party may change the above address by sending a certified letter, return receipt requested, to the other party setting forth such changed address.

The parties hereto have executed and delivered this agreement the day and year first above written.

Grantor:

Grantee:

[Acknowledgments]



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25-21 Current Legal Forms for Real Estate FORM 21.10

FORM 21.10 Option related forms--exercise--assignment--extension

COMMENT

Notice of exercise of option

The notice to the optioner that an option to purchase is being exercised normally does not require any particular form. Its contents will depend mainly upon the terms of the option agreement itself. The date of the option agreement and the property under option should be referred to in the notice. It should be sent as required by the agreement, whether by registered or certified mail. It is advisable to send the notice of exercise with a return receipt requested, whether or not this is required by the option agreement.

Often the option agreement requires the optionee to designate the date and time of closing the sale and, if so, this should be spelled out in the notice. If the agreement provides that any other action be taken at the time of exercise, such provisions must, of course, be followed by the optionee. The prime objective of the notice of exercise is to set in motion the events leading to the sale of the optioned property to the optionee.

Assignment of option

While the rights and obligations of an assignee of an option will be subject to all of the provisions of the option agreement, the instrument of assignment may be relatively simple. It must identify the option agreement. If the original option was recorded, or if it was drawn in recordable form, the assignment of the option should also be in recordable form. The assignee should require the assignor to deliver the original option agreement with the assignment. It may be advisable also to require the assignor to deliver other papers relating to the property, such as any survey, title search, development plans, municipal

resolutions, variance applications, and the like. In addition to recording the assignment of the option, notice of the assignment should be given to the grantor of the option.

Assignment tax aspects

Gain or loss upon a sale of an option to purchase real property is entitled to capital gain treatment. The character of the loss will determine whether or not it is deductible. If the option is to purchase a personal residence, loss on the sale of the option would not be deductible. If the optionee is a dealer in options or would have been considered a dealer with respect to the property under option had the option been exercised, any gain or loss realized from the sale of the option would be considered ordinary gain or loss. See the Tax Background § 21.03[3] at the beginning of this chapter.

Extension of option

This set of forms includes an agreement to extend an option for specific periods upon the payment of additional sums. The optionor's receipt of consideration for an option generally is treated as a nontaxable transaction until the option is exercised or forfeited. If the option is exercised, the additional amounts paid for the extensions, in addition to the consideration for the initial option period would become part of the optionee's basis for the property purchased. If the option expires without being exercised, the consideration received by the optionor is ordinary income. See TB § 21.03[4]

FORMS

(1) Notice of exercise of option

Ramsay Realty Corporation

500 North Main Street

White Plains, New York 10046

Gentlemen:

Please take notice that the undersigned as Optionee under that certain option agreement made by you as Optionor on August 1, _____ [year], for the purchase of the property located at the corner of First Street and Sixth Avenue, in Mt. Vernon, New York, does hereby elect to exercise such option to purchase, and hereby designates March 31, _____ [year], at 10 a.m. as the time for the closing of the purchase transaction in accordance with the terms and conditions contained in the option agreement.

Optionee

Dated: New York, New York

March 10, _____ [year]

(2) Assignment of option

ASSIGNMENT made July 15, _____ [year], by Joseph Carson ("Assignor"), to Nathan Franklin ("Assignee").

For the sum of \$5,000 paid by Assignee to Assignor, receipt of which Assignor acknowledges, Assignor assigns to Assignee, and Assignee's legal representatives and assigns, all of Assignor's right, title, and interest under that certain option agreement (hereto attached) made by Warren Realty Corp., as Optioner, to Assignor, as Optionee, dated June 10, _____ [year], conferring upon Optionee and his assigns the right to purchase for the sum of \$50,000, under the terms and conditions set forth in such option agreement, the following described premises:

[Insert description of premises]

Assignor has executed this assignment.

Joseph Carson

[Acknowledgement]

(3) Extension of option

AGREEMENT made July 15, _____ [year], between David Carter ("Optionor"), and William Andrews ("Optionee").

Recitals

The parties entered into an option agreement dated May 26, _____ [year], under which Optionor granted an option to Optionee to purchase certain real property owned by Optionor as more particularly described in Schedule A annexed to such agreement,

Under that agreement the option may not be exercised after August 25, _____ [year] and

The parties wish to extend the option period,

Now, therefore, it is mutually agreed as follows:

1. Extension of option.

(a) Simultaneously with the execution of this agreement, Optionee will pay Optionor the sum of \$1,000 and thereupon the above-mentioned option will be extended to 11 a.m. on November 25, _____[year].

(b) Upon payment by Optionee to Optionor of an additional sum of \$1,250 on or before 11 a.m. on November 25, _____[year], such option will be further extended until 11 a.m. on January 26, _____[year].

(c) Upon payment by Optionee to Optionor of an additional sum of \$500 on or before 11 a.m. on January 26, _____[year], the option will be further extended until 11 a.m. on February 25, _____[year].

2. Effect upon option agreement. Any extension of the option as set forth in paragraph 1, above, shall likewise be an extension of all of the terms and conditions of the option agreement of May 26, _____[year].

3. Consideration and purchase price. All payments made by Optionee under this agreement shall be deemed consideration for the option extensions but shall not be applied against the purchase price called for in the option agreement if Optionee exercises his option to purchase.

4. Failure to pay. If Optionee fails to make any required payment in order to further extend the option period, the option shall automatically terminate at the time and on the date specified for such payment.

5. Assignment. Optionee may assign this option. The assignment will be effective as soon as Optionee notifies Optionor of the assignment.

The parties have executed this agreement as of the day and year first above written.

David Carter

William Andrews

[Acknowledgements]



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25-21 Current Legal Forms for Real Estate FORM 21.11

FORM 21.11 Offer to purchase--revocable until accepted--offeror's option to terminate if premises damaged

COMMENT

The following forms are offers to purchase real estate. No consideration is paid but earnest money is deposited by the offeror which is to be returned if the offer is not accepted during the period in which it is open. Since the consideration paid for an option may be substantial, the option period may be longer than is the case with an offer to purchase. The open period of an offer is usually short in order to avoid the use of the offer by the owner of the property to obtain a higher price with other prospective purchasers.

Offer written as a contract:

An offer should always contain all of the essentials of the contract of sale, so that nothing more will be required to bind both parties other than the acceptance of the owner. The offer, upon its acceptance, becomes a contract that is binding on both parties.

Acceptance of offer:

The most desirable and practical form of notification to the offeror of the acceptance is the delivery of a copy of the offer containing the owner's executed acceptance.

The offer form:

The form may be used in transactions involving residential and uncomplicated income property where the condition of record title is known. All of the essential elements of the contract of sale are present including escrow instructions. Upon acceptance, the offeror is obligated to place the earnest money into escrow and the owner is obligated to pay an agreed commission out of escrow

upon the consummation of the transaction.

If the premises are damaged or destroyed prior to the transfer of possession, the offeror has the option of receiving the proceeds of any insurance payable in connection with the damages or destruction or terminating the agreement and recovering all funds he had paid.

FORM

Cleveland, Ohio

June 12, _____[year]

John Smith ("Purchaser"), offers to purchase from Helen Jones ("Seller"), the property located at 1200 South Warren Street, Cleveland, Ohio, also known as Sublot No. 12 in Calloway Subdivision, Volume 20, Page 200, Cuyahoga County Map Records, Permanent Parcel No. 216-24-18, and further described on Exhibit A attached hereto and made a part hereof.

The property shall include the land, all appurtenant rights, privileges and easements, and all buildings and fixtures in their present condition, including, without limitation, any of the following that are now on the property: all electrical, heating, plumbing and bathroom fixtures, all window and door shades, blinds, awnings, screens, storm sash, curtain and drapery fixtures, all landscaping, incinerator, TV antenna, and all built-in appliances.

The terms and conditions of this offer are as follows:

1. *Purchase price.* Purchaser shall pay for such property the sum of \$80,000 as follows:

(a) The sum of \$8,000 to be paid to Seller as earnest money on the date hereof, the same to be deposited in a trust or special account and deposited in escrow as hereinafter provided; and

(b) The balance of \$72,000 to be deposited in escrow as hereinafter provided.

Such balance of \$72,000 shall be payable in cash or its equivalent and all or any part thereof may be by an irrevocable commitment for mortgage financing issued by a reputable lending institution committing such institution to lend the required sum to the Purchaser and to deposit the same in escrow on or before the closing date.

2. *Title.* Seller shall furnish a warranty deed conveying to Purchaser a marketable title to the property, with dower rights, if any, released, free and clear of all liens and encumbrances, except:

(a) Restrictions of record and all conditions, reservations, and easements created in conjunction with such restrictions;

(b) Zoning ordinances, if any; and

(c) General and special taxes and assessments, both general and special, not yet due and payable.

3. *Title insurance.* At the closing, Seller shall furnish Purchaser with a Title Guaranty issued by The Home Title Insurance Company (the "Title Company"), or, if it cannot be obtained, a Fee Policy of Title Insurance, in the amount of the purchase price, as evidence or assurance that there has been conveyed to Purchaser the required title. If the property is Torrenized, the Seller shall furnish, in lieu of the foregoing, an Owner's Duplicate Certificate of Title, together with a

United States Court Search and Tax Search.

4. *Prorations.* Unless Purchaser elects to secure new insurance, prepaid premiums on all insurance policies deposited in escrow, and tenant rents, if any, shall be prorated in escrow as of the date of transfer of title. In addition, any municipal and county general taxes and annual maintenance charges shall be prorated as of the same date on the basis of the latest available tax assessment. Any special assessments which are a lien against the property, shall be prorated as of the date of transfer of title. If any improvements have not been assessed, the Escrow Agent shall hold \$1,000 until correct proration can be made.

5. *Escrow.* All documents and funds necessary to complete this transaction shall be placed in escrow in Hilltop Title Company (the "Escrow Agent"), on or before the closing date. If a defect in title appears, Seller at her expense shall have 10 days after notice to remove the defects. The closing date shall be July 31, _____ [year]. The Escrow Agent shall charge Seller out of the purchase price:

- (a) The cost of any Real Estate Transfer Tax;
- (b) The cost of the evidence or assurance of title required hereunder;
- (c) Any amounts due Purchaser by reason of prorations;
- (d) The amount of any special assessments payable by Seller;
- (e) Any broker's commission payable by Seller; and
- (f) One half of the escrow fee.

Seller shall also pay directly all utility charges to the date of filing the deed for record or date of possession, whichever is later. The Escrow Agent shall charge Purchaser with one half of the escrow fee and all fees for filing the deed and any mortgage placed on the property by Purchaser. Seller shall furnish all occupancy permits required by law.

6. *Possession.* Seller shall deliver possession of the property to Purchaser two days after transfer of title. If any building or other improvement is damaged or destroyed before the transfer of possession, Purchaser may either (a) receive the proceeds of any insurance payable in connection therewith, or (b) terminate this Agreement and recover all funds previously paid.

7. *Acceptance.* This offer shall expire at 10 a.m. on June 23, _____ [year]. If an accepted copy is not delivered to Purchaser by that time, it shall be deemed revoked and the earnest money shall be promptly refunded to Purchaser. Upon acceptance, this offer shall become an agreement binding upon and accruing to the benefit of Purchaser and Seller, and their respective heirs, executors, administrators and assigns, and shall be deemed to contain all the terms and conditions agreed upon. It being agreed that there are no outside conditions, representations, warranties or other agreements, written or oral. Purchaser may revoke this offer at any time before its acceptance.

8. This Agreement may be used as escrow instructions subject to the Escrow Agent's usual conditions of acceptance which are not inconsistent herewith.

Purchaser:

Address: _____

Telephone: _____

DEPOSIT RECEIPT

Receipt is acknowledged, as agent for the Seller, of \$8,000 earnest money, subject to the terms of the above offer.

White and Black, Inc.

by _____

ACCEPTANCE

Seller accepts the above offer, acknowledges receipt of the earnest money, consents both to its deposit in trust with White and Black, Inc. and to its deposit in escrow, and agrees to pay out of escrow, 7 percent commission, based upon the purchase price. The commission shall be due and payable only if the sale is consummated pursuant hereto.

Seller:

Address: _____

Date: _____



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25-21 Current Legal Forms for Real Estate FORM 21.12

FORM 21.12 Offer to purchase--irrevocable term--purchase through escrow--liquidated damages upon default

COMMENT

This form contains all of the essential elements of a contract of sale, including escrow instructions. This offer is irrevocable for a period of ten days.

The owner's acceptance binds all parties. The owner is obligated to deliver and the offeror obligated to accept such title as is reflected in the existing title commitment which the offeror has seen.

Tax aspects

Neither the earnest money nor the deposit of the balance of the purchase price into escrow are taxable to the seller until title passes, which is when the sale is deemed to have taken place. The earnest money would be considered as part of the purchase price to the seller and included in the basis of the property to the purchaser. See The Tax Background § 21.03, at the beginning of this chapter.

Earnest money, liquidated damages

If the purchaser defaults after acceptance by the seller, the earnest money will be retained by the seller as liquidated damages which would be considered as ordinary income. For the purchaser, the damages would be considered as a deductible business or investment expense if the property for which the offer was made was intended for use in a trade or business or for the production of income. Whether a liquidated damage clause will be given effect would depend upon applicable local law.

FORM

Cleveland, Ohio

June 20, _____ [year]

Harry Black ("Purchaser"), offers to purchase from Joseph Johnson ("Seller"), certain vacant real estate consisting of 20 acres of land located in Solon, Ohio, the legal description of which is contained on the attached Exhibit A.

1. **Purchase price** The purchase price for the property is \$200,000, which Purchaser shall pay as follows:

(a) Earnest money to be deposited in a trust or special account and deposited in escrow as provided below
.....\$20,000.

(b) Balance to be deposited in escrow payable in cash or its equivalent and all or any part thereof may be by an irrevocable commitment for mortgage financing issued by a reputable lending institution committing it to lend the required sum to Purchaser and to deposit the same in escrow on or before the closing date\$180,000

2. **Closing and possession date.** The closing date of this transaction shall be August 1, _____ [year], which shall also be the possession transfer date.

3. **Seller's warranty.** Seller's acceptance of this offer to purchase, in the manner provided below, shall constitute his warranty and representation that he has good and marketable title to the land to be purchased and sold hereunder, that the land is not subject to any liens, charges, or encumbrances of any type except those shown in Schedule B of the Title Guaranty Commitment No. 343346, dated May 9, _____ [year], issued by Blue Title Guaranty and Trust Company (the "Title Company"), and except for zoning ordinances, and general and special taxes and assessments not yet due and payable. Seller's warranty and representation shall survive the delivery of the deed, the closing date, and all other transactions, matters and things consummated pursuant thereto.

4. **Deed and title guaranty.** (a) Seller shall convey to Purchaser marketable title to the property by good and sufficient general warranty deed with dower rights released, warranting title to be free and clear of all liens, charges, and encumbrances except those referred to in paragraph 3.

(b) Seller shall accompany the deed with a title guaranty policy in the amount of the purchase price, issued by the Title Company, in its customary form, guaranteeing the record title to the premises to be good in Purchaser, subject only to the exceptions referred to in paragraph 3.

5. **Escrow agent.** This transaction shall be placed in escrow with the First National Bank and Trust Company (the "Escrow Agent"). An executed copy of this Agreement shall be deposited with the Escrow Agent concurrently with its acceptance by Seller, and this Agreement shall serve as the escrow instructions.

All documents and funds necessary to complete this transaction shall be placed in escrow with the Escrow Agent on or before the closing date.

The Escrow Agent may attach its standard conditions of acceptance to this Agreement. However, if such conditions are inconsistent or in conflict with the terms and provisions hereof, the terms and provisions of this Agreement shall control.

6. *Closing by escrow agent.* The Escrow Agent shall prorate all general and special real estate taxes and assessments as of the closing date, using for such purpose the rate and valuation shown on the last available tax duplicate.

On the closing date, the Escrow Agent shall file for record the deed and all other required instruments. The Escrow Agent shall then deliver to each party the funds and documents to which he is entitled, together with the Agent's escrow statement, but only if (1) the Agent then has on hand all necessary funds and documents to complete the transaction, and (2) the title company has stated in writing that it shall be in a position to and will issue and deliver, upon the filing of the deed for record, the title guaranty required hereunder.

7. *Closing costs.* In closing this transaction, the Escrow Agent shall charge Seller with the following:

- (a) The full amount of taxes and assessments up to and including the closing date;
- (b) The cost of any transfer tax;
- (c) The cost of title report, title search, and of a title guaranty policy in the amount of the purchase price; and
- (d) One half of the escrow fee;

and immediately thereafter shall deliver the balance of the funds in his hands, due under the terms hereof, to Seller.

On the closing date, the Escrow Agent shall charge Purchaser with the following:

- (a) The cost of filing the deed for record; and
- (b) One half of the escrow fee,

and immediately thereafter, shall deliver to the Purchaser the title guaranty policy, the recorded deed, or Recorder's receipt therefor, any prorations to which the Purchaser is entitled, and any other funds or documents required by the provisions hereof.

8. *Notice.* Any notice under this Agreement shall be sent by certified or registered mail, postage prepaid, return receipt requested to the parties respective addresses included at the end of this Agreement.

9. *Acceptance.* This offer shall be irrevocable until 5 p.m., June 30, _____ [year]. If Seller does not accept this offer by that time, the same shall be deemed revoked and the earnest money shall immediately be refunded to Purchaser.

10. *Liquidated damages.* If Seller accepts this offer and Purchaser subsequently defaults, Seller may declare a forfeiture hereunder. In that event, the earnest money shall be delivered to Seller and retained by him as liquidated damages.

11. *Binding effect.* This Agreement shall be binding upon and inure to the benefit of the parties hereto and their respective heirs, executors, administrators, and assigns.

12. *Headings.* Headings in this Agreement are for convenience only and shall not be used to interpret or construe its provisions.

13. *Governing law.* This instrument shall be governed by and construed in accordance with the laws of the State of Ohio.

14. *Counterparts.* This instrument may be executed in one or more counterparts, each of which shall be deemed an original but all of which together shall constitute one and the same instrument.

15. *Time of essence.* Time is of the essence of this offer and of the agreement resulting from the acceptance hereof.

16. *Entire agreement.* If this offer is accepted, the resulting agreement shall supersede all prior agreements between the parties relating to the subject matter hereof, and no warranties, representations, or agreements with regard thereto, except for those contained herein, shall be binding upon the parties.

Purchaser:

Address: _____

Telephone: _____

DEPOSIT RECEIPT

Receipt is acknowledged, as agent for Seller, of \$20,000 earnest money, subject to the terms of the above offer.

Black and White, Inc.

by _____

ACCEPTANCE

Seller accepts the above offer, acknowledges receipt of the earnest money, consents to its deposit in trust with White and Black, Inc., and consents to deposit thereof in escrow, and agrees to pay out of escrow 5 percent commission, based upon the purchase price. The commission shall be due and payable only if the sale is consummated pursuant hereto.

Seller:

Address: _____

Date: _____



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25-21 Current Legal Forms for Real Estate FORM 21.13

FORM 21.13 Offer to purchase--earnest money paid to seller--irrevocable term--cure of title defects

COMMENT

In this offer there is no provision with respect to a broker. The earnest money is paid directly to the seller to be deposited into escrow upon acceptance or returned to the offeror if the offer is not accepted. The offer is irrevocable for a limited period of time.

The form contains provisions for a title search after acceptance of the offer and alternatives are available with respect to the record title after receipt of the title report.

FORM

Columbus, Ohio

June 16, _____[year]

The undersigned, ABC Corporation ("Purchaser"), offers to purchase from Charles Axelrod ("Seller"), certain real estate known generally as 1220 Broad Street, Columbus, Ohio ("Property"), the legal description of which is contained on Exhibit A attached hereto and made a part hereof.

The terms and conditions of this offer are as follows:

1. Purchase price The purchase price for the Property shall be \$100,000, payable by Purchaser as follows:

(a) The sum of \$10,000 to be paid to Seller as earnest money on the date hereof, the same to be deposited in a trust or

special account and deposited in escrow as hereinafter provided; and

(b) The balance of \$90,000 to be deposited in escrow as hereinafter provided.

The foregoing balance of \$90,000 shall be payable in cash or its equivalent and all or any part thereof may be by an irrevocable commitment for mortgage financing issued by a reputable lending institution committing it to lend the required sum to Purchaser and to deposit the same in escrow on or before the closing date.

2. *Closing date and possession.* The closing date of this transaction shall be September 1, _____ [year] and possession of the Property shall be surrendered to Purchaser on that date.

3. *Title.* Seller shall convey, to Purchaser or its nominee, marketable title to the Property by good and sufficient general warranty deed, with any dower rights released. The deed shall warrant title to be free and clear of all liens, charges, encumbrances, clouds and defects, except for any restrictions, reservations, limitations, easements and conditions of record approved by Purchaser, and except for zoning ordinances, and general and special taxes and assessments which are a lien but not due and payable. The deed shall be deposited with the escrow agent on or before the closing date. Before the deed is deposited into escrow, however, a copy thereof shall be submitted to Purchaser's counsel for approval.

4. *Title insurance.* Seller shall accompany its deed with a title guaranty policy in the amount of the purchase price issued by the Home Title Insurance Company (the "Title Company"), in its customary form, guaranteeing the record title to the Property to be good in Purchaser subject only to the exceptions to be contained in the deed. Notwithstanding the above, Purchaser may elect, by giving written notice to the Escrow Agent before the closing date, to be furnished with an Owner's Fee Policy of title insurance in the amount of the purchase price, prepared by the Title Company, insuring the marketable title to be good in Purchaser, subject only to the exceptions to be contained in the deed. In such event, in lieu of a certificate of title guaranty, Seller shall furnish Purchaser with title insurance. Seller shall pay the portion of the costs that would have been incurred had a certificate of title guaranty been issued, and Purchaser shall pay the remaining costs.

5. *Preliminary title report.* Immediately upon accepting this offer, Seller shall order from the Title Company a preliminary title report in the form of a commitment to issue the required title policy requested by Purchaser ("Title Report"). A copy of the Title Report shall be delivered to Purchaser within ten days of the date of acceptance. Within five days after Purchaser receives the Title Report, it shall notify Seller and the Title Company of all restrictions, reservations, limitations, easements, liens and conditions of record ("title defects"), disclosed in the Title Report which are objectionable to Purchaser. If Purchaser notifies the Seller of any title defects, Seller shall have until the closing date to cure or remove the defects. Seller shall be obligated to remove all such objectionable title defects that may be removed by the payment of money, and shall take all reasonable steps necessary to remove any other title defects.

6. *Title insurance contingency.* On the closing date, the Escrow Agent shall notify the parties whether or not the Title Company is in a position to issue the guaranty or title insurance, as the case may be, showing as exceptions only those items in the Title Report to which Purchaser did not object. If the Escrow Agent notifies the parties that: (1) The Title Company will issue such a guaranty or title insurance, this transaction shall be consummated in accordance with the terms and provisions of this Agreement; or that (2) the Title Company will not issue such a guaranty or title insurance, and if Seller does not forthwith cure the title defects that the Escrow Agent recites as preventing such issuance in the form approved by Purchaser as aforesaid (or within such period of time as Purchaser in its sole discretion permits), or Purchaser does not forthwith waive the same, this Agreement shall be automatically void and of no further force and effect. The Escrow Agent shall thereupon return to the parties their respective funds and documents deposited into escrow, and they shall be fully released from any liability or obligation hereunder, except Seller shall pay the full cost of the escrow and the charges of the Title Company. If Purchaser waives the title defects preventing such issuance by so notifying the Title Company and the Escrow Agent, or if Seller has cured the same as permitted above, the obligations

of the parties hereunder shall not be affected by reason thereof, there shall be no abatement or reduction of the purchase price, and this transaction shall be consummated in accordance with the terms and provisions of this offer, except that any title defects waived by the Purchaser shall be set forth as exceptions in the deed and in the title guaranty or title insurance, as the case may be.

7. *Escrow agent.* This transaction shall be placed in escrow with The Third National Bank and Trust Company (the "Escrow Agent"). An executed copy of this Agreement shall be deposited with the Escrow Agent concurrently with its acceptance by Seller, and this Agreement shall serve as the escrow instructions.

The Escrow Agent may attach its standard conditions of acceptance hereto. However, if such conditions are inconsistent or in conflict with the terms and provisions hereof, then the terms and provisions of this Agreement shall control.

The deed, cash or its equivalent, and all other documents needed to close this transaction shall be deposited into escrow with the Escrow Agent on or before the closing date.

8. *Tax adjustment.* The Escrow Agent shall prorate all general and special real estate taxes and assessments as of the closing date, using for such purpose the rate and valuation shown on the last available tax duplicate.

9. *Escrow closing.* On the closing date, the Escrow Agent shall file for record the deed and all other required instruments. The Escrow Agent shall then deliver to each party the funds and documents to which it is respectively entitled, together with the Agent's escrow statement, but only if (1) the Agent then has on hand all necessary funds and documents to complete the transaction, and (2) the title company has stated in writing that it shall be in a position to and will issue and deliver, upon the filing of the deed for record, the title guaranty required hereunder.

10. *Seller's costs.* In closing this transaction, the Escrow Agent shall charge Seller with the following:

- (a) The full amount of real estate taxes and assessments prorated up to and including the date of transfer of title;
- (b) The cost of any transfer tax;
- (c) The cost of the title report, title search, and title guaranty policy in the amount of the purchase price;
- (d) The cost of paying off and satisfying any mortgage indebtedness against the Property for which Seller is liable, together with the cost of any mortgage cancellation recording fee or other costs incident to the satisfaction of any such indebtedness;
- (e) One half of the escrow fee; and
- (f) All other charges properly borne by Seller consistent with the terms of this Agreement;

and immediately thereafter shall deliver to Seller the balance of the funds in its hands due under the terms hereof, and all documents due Seller.

11. *Purchaser's costs.* On closing, the Escrow Agent shall charge Purchaser with the following:

- (a) Any cost of financing this transaction which Purchaser arranges for;
- (b) The cost of filing the deed for record;
- (c) The amount by which the cost of furnishing the title insurance exceeds the cost of furnishing the title guaranty, if the

Purchaser elects to be furnished with title insurance as provided for in paragraph 4;

(d) One half of the escrow fee; and

(e) All other charges properly borne by Purchaser consistent with the terms of this Agreement;

and immediately thereafter, shall deliver to Purchaser the title guaranty or title insurance, as the case may be, the record deed or Recorder's receipt therefor, all prorations to which Purchaser is entitled, and all other funds or documents due Purchaser.

12. *Notice.* Any notice under this Agreement shall be sent by certified or registered mail, postage prepaid, return receipt requested, to the parties at their respective addresses shown at the end of this Agreement.

13. *Irrevocable term.* In consideration of the payment to Purchaser by Seller of the sum of \$10, receipt of which is acknowledged, Purchaser agrees that this offer shall be irrevocable until 5 p.m. June 30, _____ [year]. If an accepted copy of this offer is not delivered to Purchaser by that time, this offer shall be deemed revoked and Seller shall promptly refund the earnest money to Purchaser.

14. *Binding effect.* Upon acceptance, this offer shall become the agreement which shall be binding upon and accrue to the benefit of the parties hereto and their respective heirs, executors, administrators, successors, and assigns, and shall constitute the sole and entire agreement between the parties hereto with regard to the subject matter hereof.

15. *Headings.* Headings in this Agreement are for convenience only and shall not be used to interpret or construe its provisions.

16. *Governing law.* This Agreement shall be governed by and construed in accordance with the laws of the State of Ohio.

17. *Counterparts.* This Agreement may be executed in one or more counterparts, each of which shall be deemed an original but all of which together shall constitute one and the same instrument.

18. *Time of essence.* Time is of the essence of this offer and of the agreement resulting from the acceptance hereof.

19. *Entire agreement.* If this offer is accepted, the resulting agreement shall supersede all prior agreements between the parties relating to the subject matter hereof, and no warranties, representations, or agreements with regard thereto, except for those contained herein, shall be binding upon the parties.

This offer has been duly executed by the undersigned officers of Purchaser, each of whom certifies that he is duly authorized to execute this offer and to complete this transaction pursuant to the terms and conditions hereof upon acceptance and due performance by Seller.

ABC Corporation

by _____

President

by _____

Secretary Purchaser

ACCEPTANCE

Seller accepts the above offer, acknowledges receipt of the earnest money and agrees to deposit the same in escrow as provided therein.

Furthermore, Marie Axelrod, wife of Charles Axelrod, joins in this acceptance for the sole purpose of agreeing to execute the deed for the purposes of releasing all of her dower rights and any other interest to the Property.

Charles Axelrod, Seller

Marie Axelrod



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25-21 Current Legal Forms for Real Estate FORM 21.14

FORM 21.14 Offer to purchase motel--foreclosure property--seller's form submitted as bid

COMMENT

This offer to purchase is illustrative of the type of contract necessary to accept an invitation for offers to purchase real estate held pursuant to acquisition by foreclosure. In this case, the owner through foreclosure has advertised property for sale, consisting of a motel and related facilities.

Terms of offer

All offers to be considered must be in writing and accompanied with an earnest money deposit of 5 percent of the offer price in the form of a certified or cashier's check. The property is offered on an "as-is" basis and all prospective purchasers should inspect the property being sold before tendering offers. The owner reserves the right to reject any or all offers and to waive any deviation from the form.

Board approval contingency

An added condition of this type of purchase is the approval of the owner's board of directors. The earnest money is refundable to the offeror if the board of directors does not issue its written approval of the sale within the time period specified in the contract.

FORM

The undersigned, as Purchaser, offers to purchase certain real estate and other property from Fifth Federal Savings and Loan Association as Seller, upon the following terms and conditions:

Article I Property To Be Sold

1.01. *Property.* The property which is the subject of this offer consists of the following:

(a) *Land.* Fee title to the real estate legally described at Exhibit A, located approximately 198 feet South of the Southeast corner of the intersection of Dixie Highway (U.S. 31) and Penn Street, in the Town of Rosewood, County of St. James, State of Indiana, together with all interests of Seller in and to all appurtenances thereto and in and to all adjacent streets, alleys, and other public ways (the "Land").

(b) *Improvements.* Fee title to the improvements (the "Improvements"), in, upon, and under the Land, consisting of the buildings and other property described at Exhibit B. (The Land and the Improvements are collectively the "Real Estate.")

(c) *Lease.* Seller's interest as Lessor under that certain Lease (the "Lease"), dated May 15, _____ [year] made by and between Seller, as Lessor, and Dixie Lodge, Inc., as Lessee. A copy of the Lease is attached as Exhibit C.

(d) *Stock.* All of the issued and outstanding stock (the "Stock") of Dixie Lodge, Inc., an Indiana corporation (the "Corporation"), which consists of 10 shares of the capital stock of the Corporation registered in the name of Seller. A description of the certificate evidencing such shares is attached as Exhibit D.

(e) *Tangible property.* All fixtures, equipment, furniture, furnishings, and other personal property located on or about the Real Estate and used in connection with it and in connection with the Corporation's operations, to the extent that it is the property of Seller (the "Tangible Property").

A schedule of the Tangible Property which is the property of Seller is attached at Exhibit E, and a schedule of certain tangible property which is the property of the Corporation is attached as Exhibit F.

1.02. *Property.* All of the items of property referred to in Section 1.01 are referred to collectively as the "Property."

Article II Purchase Price

2.01. *Price.* The total purchase price of the Property shall be \$3 million.

Article III Payment of Purchase Price

3.01. *Payment.* The purchase price of the Property shall be paid as follows:

(a) *Earnest money.* Five percent has been paid by cashier's or certified check to Seller upon the execution and delivery of this offer by Purchaser, and an additional 10 percent shall be paid by cashier's or certified check to Seller within five days after Seller accepts this offer. The payments, totaling 15 percent of the purchase price, shall constitute the Earnest Money for all purposes of this Agreement. No interest shall accrue or become payable on the Earnest Money payment.

(b) *Balance.* The balance of the purchase price, plus or minus prorations, shall be paid to Seller at closing by cashier's or certified check.

Article IV Conveyance of the Property

4.01. *Deed.* The Real Estate shall be conveyed by Special Warranty Deed wherein Seller shall warrant only that it has not done or allowed to be done anything whereby the Real Estate has been, or may have been, in any manner

encumbered or charged.

4.02. *Assignments.* The Lease and the Stock shall be conveyed by separate assignments without warranty.

4.03. *Bill of sale.* The Tangible Property belonging to Seller shall be conveyed by Bill of Sale wherein Seller shall warrant only that it is the owner of the Tangible Property, that it has not caused same to be encumbered or charged, and that it has full right, power, and authority to sell the same and to make such Bill of Sale. All warranties of quality, fitness, and merchantability shall be expressly excluded from the conveyance of the Tangible Property.

Article V Title to the Property

5.01. *Title; adjustments.* The Real Estate and the Lease, and the above instruments by which they are conveyed, shall be subject to the following:

- (a) General real estate taxes to the extent that they are not due and payable at the date of closing;
- (b) Special taxes or assessments for any improvements not completed as of the date of this Agreement, and all installments not due at the date of this Agreement of any special tax or assessment for completed improvements;
- (c) Zoning and building laws, ordinances, and regulations;
- (d) Private, public, and utility easements and roads and highways;
- (e) Covenants, restrictions, and conditions of record;
- (f) Party wall rights, boundary fence agreements, party sidewalks, and driveways;
- (g) The Lease and all other existing leases, tenancy agreements, service and other agreements affecting the Property, including, without limitation, those leases and agreements listed at Exhibit G;
- (h) The exclusions from coverage and the general exceptions to be contained in the policy of owner's title insurance described below, and any commitment therefor;
- (i) Location and condition of the Improvements; and
- (j) All matters arising out of or in connection with the acts of Purchaser or those claiming under or through it.

5.02. *Unpaid taxes and assessments.* The Tangible Property and the above instruments by which the Property is conveyed shall be subject to the matters referred to at Section 5.01(g) and (j), and also to personal property taxes to the extent they are not due and payable at the date of closing.

5.03. *Permitted exceptions.* All of the above matters, including those listed in Exhibit G, are collectively the "Permitted Exceptions."

Article VI Title Insurance and Survey

6.01. *Title commitment.* If Purchaser shall so elect, Seller shall at its expense deliver to Purchaser a commitment for an ALTA owner's title insurance policy issued by National Title Insurance Company. The commitment shall be delivered not less than five days prior to the closing date, including any postponement thereof pursuant to any of the provisions hereof. Such commitment shall be for the amount of the purchase price less such amount, if any, that Seller shall

allocate to portions of the Property other than the real estate. Purchaser's election under this Section shall be made, if at all, by written notice thereof delivered to Seller within 20 days after the date of approval of this Agreement pursuant to Section 12.01 hereof.

6.02. *Title exceptions.* The above commitment shall be dated on or after October 15, _____ [year]. It shall show fee title to the Real Estate to be vested in Seller as of that date, subject only to the Permitted Exceptions and title exceptions pertaining to liens or encumbrances of an ascertainable amount which may be removed by the payment of money at the time of closing and which Seller may so remove at that time by using a portion of the purchase price to be paid at closing, including deposit of same for Seller's account with the title insurer pursuant to a "title indemnity" or similar escrow arrangement pending removal or release of the liens or encumbrances. The policy or commitment shall be conclusive evidence of good title as therein shown as to all matters insured or to be insured by the policy, subject only to the exceptions as therein stated.

6.03. *Nonpermitted exceptions.* If the above policy or commitment discloses any exceptions ("Nonpermitted Exceptions") to title other than the Permitted Exceptions, Seller shall have 90 days from the date of delivery thereof to Purchaser to have the Nonpermitted Exceptions removed from the policy or commitment, or to have the title insurer commit to insure against any loss or damage that is occasioned by such Nonpermitted Exceptions. In that event, the time of closing shall be the day following the date of such removal or commitment to insure, or the date for closing as provided under to Section 8.01, whichever comes later.

6.04. *Conditions of termination.* If Seller fails to have the Nonpermitted Exceptions removed, or in the alternative, to obtain the commitment for title insurance specified above as to such exceptions within the specified time, Purchaser may terminate this Agreement as to all of the Property or take title as then is, in either case by giving Seller written notice of Purchaser's election and, in the latter case, by tendering performance on Purchaser's part. If Purchaser fails to give such notice within five days after the 90-day period expires, Purchaser shall be deemed to have elected to take title as it then is, and this transaction shall close in accordance with the preceding provisions. If Purchaser gives notice of its election to terminate this Agreement within the time provided, this Agreement shall thereupon, without further action by any party, become null and void and neither party shall have any obligation hereunder, except that Purchaser's Earnest Money payment shall be refunded upon delivery to Seller of all executed copies of this Agreement previously delivered to, or upon the direction of, Purchaser or its agents or representatives.

6.05. *Survey.* Upon Seller's execution of this Agreement, Seller shall deliver to Purchaser a true copy of that certain survey of the Real Estate made by Clark Associates dated _____ [date]. All recertifications of such survey, and all other surveys which may be required in connection with the closing of this transaction, shall be at Purchaser's expense.

Article VII Damages and/or Condemnation

7.01. *Casualty.* If prior to the closing of this transaction the Improvements or any portion thereof are destroyed or materially damaged (as defined in Section 7.02) by fire or other casualty and if Purchaser shall elect within ten days after the date of such fire or other casualty, such election to be made in the manner required in Section 11.07 hereof for service of notice:

(a) This Agreement shall become null and void and all payments previously made by Purchaser to Seller shall be returned to Purchaser, if Purchaser gives notice of such election at or before the closing; or

(b) This transaction shall close in accordance with the other provisions of this agreement, and Seller shall at closing assign to Purchaser all claims arising under any policy of insurance covering such destruction or damage.

7.02. *Material damage.* "Material damage" is damage to the Real Estate caused by fire or other casualty of such a nature

that the cost of restoring the property to its prior condition will exceed \$100,000. If the damage is not material damage, the transaction shall close in accordance with and subject to the conditions of Section 7.01(b). At any time after such destruction or damage, and before closing, Seller may proceed to settle all such insurance claims, regardless of whether Purchaser has made its above election or of the nature of the election.

7.03. *Condemnation.* If any governmental or other entity with condemnation authority institutes an eminent domain proceeding against the Real Estate before the closing, Purchaser may terminate this Agreement by giving notice to Seller if Seller decides that the balance of the Real Estate remaining after the taking contemplated by the proceeding would not be suitable for carrying on the business for which the Real Estate is presently used. If Purchaser does not, or is not entitled to, terminate this Agreement, Seller shall assign to Purchaser, at closing, all of Seller's interest in the proceeding and in any resulting award.

Article VIII Closing of Possession

8.01. *Closing.* This transaction shall be closed upon a date to be designated by Seller. The date shall be within 60 days following the approval referred to at Section 12.01 subject, however, to the provisions of Section 6.03. The transaction shall be closed at the address of the Real Estate, in Rosewood, Indiana, or at any other place the parties agree upon.

8.02. *Delivery of possession.* Possession of the Property shall be delivered to Purchaser at closing subject to the Lease and other Permitted Exceptions.

Article IX Prorations

9.01. *Adjustments.* All items customarily prorated and adjusted in connection with the closing of the sale of property similar to the Real Estate shall be prorated and adjusted between the parties and computed as of 11:59 p.m. of the day immediately preceding the closing date. The prorations and adjustments shall include the following:

- (a) General real estate taxes and personal property taxes upon the basis of the amounts of the most recent ascertainable taxes;
- (b) The current installment of any special tax or assessment;
- (c) Assignable insurance policies shall be cancelled or assigned at Seller's election and prepaid premiums adjusted as required;
- (d) Water and other utility charges, and assignable utility deposits;
- (e) Prepaid or unpaid amounts under the service and other agreements subject to which conveyance is to be made, including those listed at Exhibit G, and the agreements shall be assigned to Purchaser at closing;
- (f) Prepaid or unpaid amounts of fees and other charges for license and permits assigned by Seller to Purchaser;
- (g) Rents, security deposits, and other payments under the Lease;
- (h) Security deposits, if any, and deposits by guests in excess of their current indebtedness as of the closing or with respect to reservations after the closing;
- (i) Guest ledger accounts relating to guests residing in the Lodge at the closing shall be collected by Purchaser for the benefit of Seller concurrently with the collection by Purchaser from such guests for periods after the closing. All collections from guests residing in the Lodge at or before the closing shall be allocated first to the oldest items due from

the respective guests and Purchaser shall use its reasonable best efforts to effect such collections. Purchaser shall make remittances to Seller weekly for the first 30 days after the closing and then on the second and third monthly anniversary of the closing. Purchaser shall return all items unpaid at the end of the three months to Seller for its own collection efforts;

(j) Income from guests in the Lodge as of 11:59 p.m. on the date before closing shall be allocated with respect to the "hotel day" starting on the day before closing and continuing over to the next calendar day, shall be allocated in equal shares to the parties, and shall be remitted at the times set forth in paragraph (i) above;

(k) There shall be no proration with respect to payroll. Seller shall pay all accrued wages (including all pro rata vacation allowances and Social Security taxes) through the closing to its employees and the Corporation's employees in the normal course;

(l) Purchaser shall pay all state and local transfer or similar taxes.

Article X Purchaser's Representations and Covenants

10.01. *Authorization.* Purchaser Corporation represents and warrants to Seller that the execution and delivery of this Agreement by Purchaser has been duly authorized, and that the Agreement creates legally enforceable obligations as to Purchaser in accordance with its respective terms.

10.02. *Resolutions.* Purchaser Corporation, at Seller's request before closing, shall deliver to Seller certified copies of appropriate shareholder/director resolutions authorizing this transaction, in form reasonably acceptable to Seller and the title insurer.

10.03. *Broker's commission.* Purchaser shall pay all fees, commissions, or other compensation which shall be or become due and payable to any broker, consultant, agent, or finder in connection with this transaction. Purchaser shall also indemnify and hold Seller harmless from and against all claims, demands, actions, causes of actions, debts, liabilities, judgments, and damages (including costs and reasonable attorneys' fees, including those incurred by Seller in connection with the enforcement of this indemnity) which are asserted or recovered against Seller on account of any brokerage fee, consulting fee, commission or other fee arising out of or in connection with this transaction, or by reason of any matter or alleged matter which is inconsistent with Purchaser's representations in this Section.

10.04. *"As is" sale.* The parties expressly agree that the Property (including the Land, Improvements, Lease, and Tangible Property) is sold on an "as is" basis only. Purchaser has examined the Property and the assets of the Corporation and is completely satisfied with their condition. Seller does not make any warranties and representations, expressed or implied, as to the state of the Property, and assets, their area, condition, quality, quantity, character, size or description or suitability or fitness for any use, whether existing or contemplated, matters of zoning or survey, or in any other respect, and makes no agreement as to the condition of title except as expressly provided. Purchaser waives all rights conferred by statute or other law to make any claim against Seller before or after the closing of this transaction with respect to any matter arising out of or in connection with any of the foregoing.

10.05. *Assignment.* This Agreement, and/or any interest of Purchaser hereunder, may not be assigned in whole or in part without Seller's prior written consent.

10.06. *No recordation.* This Agreement shall not be recorded in whole or in part, and any party doing so or causing same to be done shall be deemed to be in default of this Agreement for all purposes hereof.

10.07. *Assumption documents.* Upon the closing of this transaction, Purchaser shall execute and deliver to Seller, in form acceptable to Seller, Purchaser's agreement to assume and be responsible for all obligations of Seller and the

Corporation under all instruments affecting the Property and transferred in connection with the closing of this transaction, including, without limitation, the Lease, all licenses and permits, and all contracts and agreements listed in Exhibit G.

Article XI Miscellaneous

11.01. *Entire agreement.* This instrument contains the entire Agreement between the parties. Neither Seller nor its agents has made any representation or promise with respect to, or affecting the Property or this Agreement not expressly contained herein.

11.02. *Governing law.* This Agreement shall be governed by, and construed in accordance with, the laws of the State of Indiana.

11.03. *Headings.* Headings in this Agreement are for convenience only and shall not be used to interpret or construe its provisions.

11.04. *Earnest money.* Seller shall hold the Earnest Money payment and the original of this Agreement for the mutual benefit of the parties, but Purchaser's Earnest Money checks shall not be negotiated before the date of the approval referred to in Section 12.01.

11.05. *Time of essence.* Time is expressly declared to be of the essence of this Agreement.

11.06. *Default; specific performance.* If Seller defaults, Purchaser may enforce specific performance of this Agreement, or may terminate the same and recover the Earnest Money and all other payments made on account of the purchase price. The preceding remedies shall be exclusive and in lieu of all other remedies provided by law, including, without limitation, the recovery of damages of any type.

If Purchaser defaults, Seller may enforce specific performance of this Agreement, or may terminate it and retain the above Earnest Money payment of 15 percent of the purchase price as Seller's liquidated damages. Neither party shall then have any further right or claim against the other.

11.07. *Notices.* All notices under this Agreement shall be in writing and delivered personally or mailed by certified mail, postage prepaid, addressed to the parties at their last known addresses.

11.08. *Survival of conditions.* The terms and conditions of this Agreement, and all representations, covenants, warranties, and agreements made herein, shall survive the closing of this transaction, and shall not be deemed to have merged or terminated upon closing.

11.09. *Binding effect.* This Agreement shall be binding upon and inure to the benefit of the parties hereto and their respective successors and assigns.

11.10. *Counterparts.* This Agreement may be executed in one or more counterparts, each of which shall be deemed an original but all of which together shall constitute one and the same instrument.

Article XII Acceptance by Seller

12.01. *Acceptance.* This offer to purchase shall be irrevocable until Seller accepts or rejects the same, or until December 10, _____ [year], whichever occurs first. Upon its acceptance by Seller, this offer shall constitute the agreement between the parties upon all of the terms and conditions contained herein. If Seller does not accept this offer by the above date, it shall be deemed rejected and the Earnest Money paid hereunder shall be returned to Purchaser.

PURCHASER:
(Corporate Seal)

NEW ERA MOTEL CORPORATION, a
corporation of the State of Indiana.
by _____
John Appel
Vice President
Address: 20 Speedway Drive
Indianapolis, Indiana

Attest:

Mark Caplin
Secretary

Date of Offer: October 10, _____ [year]

Acceptance of Offer to Purchase

The foregoing offer to purchase is hereby accepted by the undersigned as Seller.

FIFTH FEDERAL SAVINGS AND LOAN ASSOCIATION

by _____

Robert R. Ryan

Address: 10001 W. Roosevelt Rd.

Westchester, Illinois

Date of acceptance: October 15, _____ [year]



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Current Legal Forms for Real Estate

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Current Legal Forms for Real Estate
Chapter 21 SALES AND EXCHANGES
Part IV. Forms

B. CONTRACTS OF SALE: RESIDENTIAL PROPERTY

25-21 Current Legal Forms for Real Estate FORM 21.15

FORM 21.15 Contract for sale of residence--purchase money mortgage--title subject to existing mortgage--mortgage contingency--settlement adjustments

COMMENT

This contract can be used for a variety of real estate sale transactions. Although practices and legal requirements vary from jurisdiction to jurisdiction, this contract contains many useful sections for dealing with common problem areas, such as financing, title conditions, settlement adjustments, and pest inspections.

Gain or loss recognized on sale

Most dispositions of real estate result in the realization and recognition of gain or loss to the seller. Gain or loss is the difference between the adjusted basis of the property sold and the consideration received by the seller. The date of the completion of the transaction usually fixes the tax year in which it must be reported by the seller. The nature of the property determines whether capital gain (or loss) or ordinary income (or loss) is realized by the seller.

Time of sale

The execution of a contract of sale does not in itself result in the realization of gain or loss. Usually, the sale does not occur until the transaction is completed. Generally this is when title passes. In some special situations the transaction may be completed before title passes, for example, when possession is transferred to a buyer under a contract of sale. See The Tax Background (TB) § 21.03 at the beginning of this chapter. The date of the completion of the transaction determines the holding period of property.

Adjusted basis

A seller's adjusted basis of his property, generally, is his original basis (usually cost, which includes the mortgages involved in acquisition) adjusted for improvements, other capital expenditures and for cost recovery or depreciation prior to the sale, if any. Cost recovery or depreciation is taken into account only with respect to real property used in a trade or business or held for the production of income, but not for property used exclusively as a residence. The consideration received by the seller is the cash plus the fair market value of other property received, such as the purchaser's obligations to pay in the future, plus outstanding mortgages which the purchaser assumes or to which the property is subject. See TB § 21.04.

Capital or ordinary gain or loss

Whether the gain or loss on the sale of real property is capital or ordinary depends upon whether the property is: (1) a capital asset; (2) "Section 1231" property; or (3) dealer property. These classifications are discussed in TB § 21.05. In general, a taxpayer's own residence is a capital asset, so that gain on its disposition ordinarily qualifies as capital gain.

Gain on Sale of Residence

For sales after May 6, 1997, an individual may exclude from his income up to \$250,000 of gain (\$500,000 on a joint return in most situations) realized on the sale or exchange of a principal residence. The exclusion may not be used more frequently than once every two (2) years. Gain may only be excluded if, during the five (5) year period that ends on the date of the sale or exchange, the individual owned and used the property as a principal residence for periods aggregating two (2) years or more. Short, temporary absences for vacations or seasonal absences are counted as periods of use, even if the individual rents out the property during those periods of absence. The ownership and use tests may be met during non-concurrent periods, provided that both tests are met during the 5-year period that ends on the date of the sale or exchange. The amount of excludable gain is \$500,000 for married individuals filing jointly if (i) either spouse meets the ownership test; (ii) both spouses meet the use test; and (iii) neither spouse is ineligible for exclusion by virtue of a sale or exchange of a residence within the prior two (2) years. The exclusion is determined on an individual basis. Therefore, if a single individual who is otherwise eligible for an exclusion marries someone who has used the exclusion within the two (2) years prior to the sale, the newly married individual is entitled to a maximum exclusion of \$250,000. Once both spouses satisfy the eligibility rules and two (2) years have passed since the exclusion was allowed to either of them, they may exclude up to \$500,000 of gain on their joint return.

In some instances, a partial exclusion from gain recognition may be available even if the ownership and use requirements are not met, or if there has been a prior sale or exchange for a principal residence with two (2) years. This relief is available for taxpayers who sell or exchange their principal residence after May 6, 1997. See T.B. Section 21.14[4].

The exclusion does not apply, and gain is recognized, to the extent of any depreciation adjustments with respect to the rental or business use of a principal residence after May 6, 1997. In determining the period of ownership and use of a current residence, taxpayers may include periods of ownership and use of all prior residences with respect to which gain was rolled over to the current residents under former Code Section 1034.

If the residence does not qualify from the exclusion because it is not a principal residence, for example a vacation residence, there is the possibility gain could be avoided by converting the

vacation residence to a rental property and then exchanging it for another rental property as part of a like-kind exchange. For a discussion of a like-kind exchange, see TB § 21.12. There is a recently enacted revenue procedure discussed in TB § 21.12[2] which provides a safe harbor. The safe harbor allows for an exchange of a vacation residence used primarily for rental purposes for a two year period before the exchange, if the replacement rental property is also used primarily for rental purposes for a two year period after the exchange. See *Rev. Proc. 2008-16*, discussed in TB § 21.12[2] above, for the specific requirements which must be met to qualify for the safe harbor.

Deductible and nondeductible loss

A loss incurred by an individual on the sale of real property is deductible only if the property was held by him in his trade or business or as an investment for a profit. A loss on the sale of the taxpayer's own residence generally is not deductible. However, if the property is leased by the taxpayer prior to its sale, a loss may be deducted if the property is deemed to have been converted into an investment for profit. The basis for determining the loss is the value of the property on the date of its change to rental use, adjusted for cost recovery allowances. Cost recovery is computed on the cost of the property or on its value on the conversion date, whichever is less. When the property is held partly for personal use and partly for income producing purposes, a proportionate part of the loss on its sale is deductible. The deductible loss is computed by apportioning cost, selling price, cost recovery or depreciation, and selling expenses, as if there were two separate transactions.

Reporting gain or loss

An important question in connection with gain or loss on a sales transaction is the time when it is to be reported. When the purchase price is fully paid in cash, gain or loss is reported when the transaction is completed. However, there are two types of sales in which part or all of the payment is not made at the time of the sale. One class is that which qualifies as an installment sale. The second class includes deferred payment sales. Installment and deferred payment sale rules, as well as the original issue discount rules, are discussed in TB §§ 21.10 and 21.11.

Information reporting of real estate transactions

The attorney or title company responsible for closing title is responsible for reporting the real estate transaction to the IRS. In addition a statement must be provided to the customer before January 31 of the year following the closing. If an attorney or title company is not involved in the closing, the information reporting is the responsibility of the mortgage lender. The information reporting requirements are discussed in TB § 21.02[4].

Plain language laws apply to consumer transactions

New York, and a few other jurisdictions, have adopted plain language laws which generally require contracts for consumer transactions to be written in plain language. Plain language laws generally provide for damages and penalties for violations; however, such violations do not render the underlying contract void or voidable and are not a defense to an action under the contract. New York's law, similar to other plain language laws, requires the consumer contract to be written in a clear and coherent manner using words with common and everyday meaning, with appropriate divisions and captions. The law applies if the subject of the contract involves money, property, services or leases of personal property used primarily for personal, family or household purposes and a consumer is a party to the agreement. The law does not apply, however, to

agreements involving amounts over \$50,000, which exempts most real estate transactions. *New York General Obligation Law Section 5-702*. Other jurisdictions with plain language laws, however, may not include such an exemption. Because the price exceeds \$50,000, the following contract is not a plain language agreement.

Disclosure of lead-based paint hazards

Federal law requires the seller of pre-1978 residential housing to disclose known information to the prospective purchaser on lead-based paint hazards. See 42 U.S.C. §§ 4851-4856; 40 C.F.R. Part 745 and 24 C.F.R. Part 35, Subpart A. The sales contract must include a lead warning statement and certain disclosure information. The information required by law includes both specific information about the property being sold and general information about lead-based paint hazards. The seller must disclose known lead-based paint and lead-based paint hazards and provide available records and reports to the purchaser. The seller also must give the purchaser the pamphlet, developed by EPA, HUD, and the Consumer Product Safety Commission (CPSC), titled "Protect Your Family From Lead in Your Home." The purchaser must be given a 10-day period to conduct a lead-based paint inspection or risk management at the purchaser's expense. The parties have flexibility to negotiate the key terms of the evaluation. Finally, the sales contract must include certain notification and disclosure language. The law also does not invalidate a sales contract that does not include the required disclosure; however, any person who violates the lead disclosure requirements may be subject to civil and criminal penalties, as well as treble damages in a private civil suit. A sample lead-based paint sales contract rider, including both disclosure under the federal law and a lead-based paint contingency clause, is included in this chapter at Form 21.30, *infra*.

FORM

CONTRACT OF SALE made May 1, _____ [year], between John Curran, residing at 134 E. 67th Street, New York, New York ("Seller"), and Harrison Whitman, residing at 200 Chester Street, New York, New York ("Purchaser").

1. *Sale*. Seller shall sell, and Purchaser shall purchase the property, including all buildings and improvements thereon, erected, situated, lying, and being in the Borough of Manhattan, City, County, and State of New York, more particularly described as follows (the Premises):

(Insert description)

2. *Street rights*. This sale includes all the right, title, and interest, if any, of Seller in and to any land lying in the bed of any street, or highway opened or proposed, in front of or adjoining the Premises, to the center line thereof. It also includes any right of Seller to any unpaid award by reason of any taking by condemnation and/or for any damages to the Premises by reason of grade of any street or highway. Seller shall deliver to Purchaser on demand, at or after closing, and at no additional cost to Purchaser, any document that Purchaser may require in order to collect the award and damages.

3. *Personal property*. All fixtures and articles of personal property, attached to or used in connection with the Premises, are included in the sale unless specifically excluded. Seller represents that the fixtures and personal property are paid for and owned by him free and clear of all security interests or liens other than the existing mortgage(s). The following fixtures and personal property are included in this sale: heating, air conditioning, plumbing, electrical and lighting

fixtures, bathroom and kitchen fixtures and cabinets, storm windows and doors, screens, shades, venetian blinds, awnings, window boxes, mail boxes, wall-to-wall carpets, mantels, sump pumps, well pump, shrubbery, fences, exterior sheds, ranges, refrigerators, freezers, washing machines, clothes dryers, dishwashers, garbage disposal units, and drapery and curtain hardware and rods.

Not included in this sale are the following: furniture, household furnishings, drapes, curtains, microwave oven, automatic garage door openers, fireplace equipment, and trash compactor.

4. *Purchase price.* The purchase price is \$250,000, payable as follows:

By check on the signing of this contract, subject to collection, to be held in escrow by Seller's attorney	\$25,000
By allowance for the principal amount remaining unpaid on the Existing Mortgage	\$110,000
By a Purchase Money Note and Mortgage from Purchaser, as assigns, to Seller	\$60,000
Balance due and payable at closing	\$55,000

5. *Purchase money mortgage.* The Purchase Money Note and Mortgage in the amount of \$60,000 shall be drawn on the standard forms of Central Title Company by Seller's attorney at Purchaser's expense. Purchaser shall pay the mortgage recording tax, recording fees, and the attorney's fee of \$500 for preparation of the mortgage. If this sale is subject to an Existing Mortgage, the Purchase Money Note and Mortgage will state that it is subject to the prior lien of any Existing Mortgage, and to any extension or modification of the Existing Mortgage made in good faith. It also shall be subject to the new mortgage being obtained by Purchaser described in Section 23. below. If any required payments are made on an Existing Mortgage between now and closing, which reduce the unpaid principal amount of an Existing Mortgage below the amount shown in this agreement, the balance of the price payable at closing will be adjusted.

6. *Existing Mortgage.* The Premises will be conveyed subject to the lien of an Existing Mortgage as follows: Mortgage now in the unpaid principal amount of \$110,000 and interest of 12 percent per year payable in monthly installments of \$1,484.35, which include principal, interest, and real property taxes, and with any balance of principal and interest being due and payable on July 31, _____ [year]. If there is a mortgage escrow account that is held for the payment of taxes, insurance or other expenses, Seller will assign it to Purchaser, if it can be assigned, and Purchaser will pay the amount of the escrow account to Seller at the closing. Seller states that:

- (a) The principal amount shown above for the existing mortgage is reasonably correct and only the payments required by the Existing Mortgage will be made;
- (b) No Existing Mortgage contains any provision requiring the prior consent of the holder of the mortgage to the transfer of the Premises and if no consent is obtained allowing the holder of the mortgage to require its immediate payment in full or to change any interest rate or other terms by reason of the transfer of title or closing; and
- (c) Any Existing Mortgage will not be in default at the time of closing.

7. *Title conditions.* The Premises are sold and are to be transferred subject to:

- (a) Laws and government regulations that affect the use and maintenance of the Premises, if they are not violated by the buildings and improvements existing on the Premises or by their current use;
- (b) Consents by Seller or any former owner of the Premises for the erection of any structure or structures on, under, or

above any street or streets on which the Premises abut;

(c) Encroachments of stoops, areas, cellar steps, trim, and cornices, if any, upon any street or highway;

(d) Any state of facts an accurate survey may show, provided that it does not render title unmarketable; and

(e) Any covenants and restrictions of record, if they are not violated by existing use of the Premises.

8. *Mortgage estoppel certificate.* If there is a mortgage on the Premises Seller shall deliver to Purchaser at closing a certificate dated not more than 30 days before closing signed by the holder of each Existing Mortgage, in form for recording, certifying the amount of the unpaid principal and interest, date of maturity, and rate of interest. Seller will pay the fees for recording the certificate.

9. *Violations.* Seller shall comply with all notes or notices of violations of law or municipal ordinances, order, or requirements noted in or issued by any governmental department having authority as to lands, housing, buildings, fire, health and labor conditions affecting the Premises at the date of this contract, and the premises shall be conveyed free of them. This provision shall survive closing. Seller shall furnish Purchaser with an authorization to make the necessary searches. If the Premises are located within New York City, Seller shall discharge at closing all obligations affecting the Premises incurred under the Administrative Code of the City of New York and payable in money. This provision shall survive closing.

10. *Assessments.* If, at the time of closing, the Premises are affected by any assessment which is or may become payable in annual installments, and the first installment is then a lien, or has been paid, for the purposes of this contract all the unpaid installments shall be deemed to be due and shall be paid by Seller at closing.

11. *Items to be apportioned.* The following are to be apportioned as of midnight of the day before closing:

(a) Rents as and when collected;

(b) Interest on existing mortgage(s);

(c) Premiums on existing transferable insurance policies or renewals of those expiring before the closing;

(d) Taxes, water charges, and sewer rents, if any, on the basis of the fiscal year for which assessed;

(e) Fuel, if any; and

(f) Vault charges, if any.

If the closing occurs before a new tax rate is fixed, the apportionment of taxes shall be upon the basis of the old tax rate for the preceding period applied to the latest assessed valuation.

If there is a water meter on the Premises, Seller shall furnish a reading to a date not more than 30 days before closing, and the unfixed meter charge and sewer rent, if any, shall be apportioned on the basis of the last reading.

All errors or omissions in computing apportionments of any of the above items at closing shall be corrected, and this provision shall survive closing.

12. *Lien of purchaser.* All money paid on account of this contract and the reasonable expense of the examination of the title to the Premises and of any survey and survey inspection are made liens on and are collectible out of the Premises.

However, the lien shall not continue if Purchaser shall default in the performance of this contract.

13. *Purchaser's credit for unpaid items.* As an adjustment to the purchase price, Seller may credit Purchaser with the amount of all unpaid taxes, assessments, water charges, and sewer rents, plus any interest and penalties, to a date not less than five days after the closing, if the official bills, computed to that date, are produced at closing. If Seller is required to pay and discharge at closing anything else affecting the sale, he may use any part of the balance of the purchase price to discharge the same. Alternatively, Seller may deposit money with Purchaser's title insurance company to assure discharge, but only if the company will insure Purchaser's title free and clear of the matter or insure against its enforcement against the Premises. Upon request made within a reasonable time before closing, Purchaser shall provide separate certified checks as requested to assist in clearing these matters.

14. *Judgment affidavit.* If a title examination discloses judgments, bankruptcies, or other returns against other persons having names the same as or similar to that of Seller, Seller will deliver to Purchaser at closing an affidavit showing that they are not against Seller.

15. *Default by seller.* If on the closing date Seller is unable to convey title in accordance with the terms of this contract, the closing shall be delayed up to 30 days to allow Seller to cure the defects preventing such conveyance of title, unless Purchaser agrees to waive such defects and take title subject to such defects.

16. *Closing, deed.* The term "closing" as used in the contract means the settlement of the parties' obligations hereunder to each other. Closing includes the payment of the purchase price to Seller and the delivery to Purchaser of a bargain and sale with covenants against grantor's acts deed in the proper statutory form for recording to transfer full ownership, fee simple title, to the Premises, free of all encumbrances except as stated in this contract. The deed will contain a covenant by Seller required by Section 13 of the Lien Law.

If Seller is a corporation, it will deliver to Purchaser at closing (a) a resolution of its Board of Directors authorizing the sale and delivery of the deed, and (b) a certificate of its Secretary or other authorized officer certifying the resolution and stating the facts showing that the transfer conforms with the requirements of Business Corporation Law Section 909. The deed will contain a recital sufficient to establish compliance with that Statutory section.

The closing will take place at the office of Purchaser's lending institution at 10:00 A.M. on July 1,
_____ [year].

17. *Title.* Seller shall give and Purchaser shall accept any title that a reputable title company which is a member of the New York Board of Title Underwriters will be willing to approve and insure at standard rates with their standard form of title policy, subject only to the matters specifically excepted in this contract.

18. *Payments by acceptable funds.* All money payable under this contract shall be paid, unless otherwise specified, as follows:

(a) Cash, but not over \$1,000,

(b) Good certified check of Purchaser, or an official check of any bank, savings bank, trust company, or savings and loan association having a banking office in New York State, payable to the order of Seller, or to the order of Purchaser duly endorsed to the order of Seller in the presence of Seller or his attorney,

(c) Money other than the purchase price, payable to Seller at closing, may be by Purchaser's check up to the amount of \$500, or

(d) As Seller or his attorney otherwise agrees in writing.

19. *Risk of casualty loss.* Seller assumes the risk of loss or damage to the premises by fire or other casualty until delivery of the deed.

20. *Broker.* Purchaser has not dealt with any broker in connection with this sale other than Wilson Real Estate & Company. Seller shall pay the broker the commission earned under a separate agreement.

21. *Transfer and recording taxes.* Seller will deliver a certified check at the closing payable to the order of the appropriate State, City or County officer in the amount of any applicable transfer tax, recording tax, or both, payable by reason of the delivery or recording of the deed, together with any required tax return. Purchaser shall duly complete the tax return and cause the check and the tax return to be delivered to the appropriate officer promptly after closing. Seller will also deliver a signed certificate of exemption from the capital gain tax applicable to New York real property transfers.

22. *"As is" condition.* Purchaser has inspected the buildings on the Premises and the personal property included in this sale and is fully acquainted with their condition. Purchaser shall purchase the Premises, buildings and personal property "as is" and in their present condition subject to reasonable use, wear, tear and natural deterioration between now and closing. Purchaser may, after reasonable notice to Seller, inspect them before closing.

23. *Mortgage contingency.* This contract is conditioned upon Purchaser's ability to obtain, at his expense, a conventional mortgage loan in the principal amount of \$50,000, to be amortized over a period of not less than 25 years, with interest at the prevailing rate at the time of closing for a second mortgage. Such mortgage shall be subject to the Existing Mortgage, but not the Purchase Money Mortgage. Purchaser shall with due diligence apply to a lending institution or institutions for such a loan and fully cooperate with their procedures in the processing thereof. Purchaser shall have 45 days from the date hereof to obtain a firm commitment for the mortgage loan. If Purchaser does not receive such commitment before the expiration of such period, either party may cancel this contract. Cancellation shall be in writing, by certified mail. Upon cancellation, all money paid hereunder by Purchaser shall be returned to him, and neither party shall have any further rights or obligations hereunder with respect to the other party.

24. *Pest inspection.* Purchaser shall, at his expense, obtain a termite inspection of the Premises within ten days after the date hereof. If the inspection report indicates the presence of termite infestation, Seller may either eliminate the infestation or cancel the contract by returning Purchaser's down payment. If Seller decides to do either, he shall give Purchaser appropriate notice within ten days after the termite inspection report is received. If notice is not given within the ten day period, Seller shall eliminate the reported infestation at his expense. If Seller does not receive the termite inspection report within 15 days after the date hereof, this paragraph shall be unenforceable and void.

25. *Entire agreement.* All prior understandings and agreements between the parties are merged in this contract, which constitutes the entire agreement between the parties. This contract is entered into after full investigation made by Seller, and neither party relies upon any statement or representation made by anyone unless contained herein.

26. *Oral modification.* No provision of this contract may be modified or waived unless in writing and signed by the party against whom the enforcement of such modification or waiver is sought.

27. *Binding effect.* This contract shall be binding upon and inure to the benefit of the parties hereto and their respective executors, administrators, legal representatives, heirs, successors, distributees, and assigns.

28. *Non-waiver.* No delay or failure by either party to exercise any right under this contract, and no partial or single exercise of that right, shall constitute a waiver of that or any other right, unless otherwise expressly provided herein.

29. *Headings.* Headings in this contract are for convenience only and shall not be used to interpret or construe its

provisions.

30. *Governing law.* This contract shall be construed in accordance with and governed by the laws of the State of New York.

31. *Counterparts.* This contract may be executed in two or more counterparts, each of which shall be deemed an original but all of which together shall constitute one and the same instrument.

32. *Time of essence.* Time is of the essence of this contract.

33. *Notices.* All notices hereunder shall be in writing and delivered personally or mailed by certified mail, postage prepaid, addressed to the parties at their last known addresses.

This contract has been duly executed by the parties.

Purchaser

Seller

[Acknowledgments]

NOTICE:

NO REPRESENTATION IS MADE THAT THIS CONTRACT FOR THE SALE AND PURCHASE OF REAL ESTATE COMPLIES WITH THE PLAIN ENGLISH LAW, SECTION 5-702 OF THE GENERAL OBLIGATIONS LAW OF NEW YORK. CONSULT YOUR LAWYER BEFORE SIGNING IT.



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Current Legal Forms for Real Estate

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Current Legal Forms for Real Estate
Chapter 21 SALES AND EXCHANGES
Part IV. Forms

B. CONTRACTS OF SALE: RESIDENTIAL PROPERTY

25-21 Current Legal Forms for Real Estate FORM 21.16

FORM 21.16 Contract for sale of residence--seller warranties--time of essence--late closing per diem penalty--mortgage contingency--purchaser's form

COMMENT

The attorney for the purchaser of residential real estate should want the specific inclusion of clauses in a contract of sale which protect the purchaser's interest. These clauses emphasize what are of principal concern to the buyer. The practical importance of the various purchaser oriented clauses will vary in each situation. For example, a purchaser may feel the price of the home is sufficiently low to reflect the elimination of any warranties or "working-order" representations in the contract. On the other hand, a buyer may be paying a higher price than he otherwise would because he is relying on the move-in and good working-order condition of the house. Some purchaser clauses may be absolutely essential to the buyer, such as a mortgage contingency, because without the mortgage funds, the buyer would be unable to complete the closing.

Mortgage contingency:

More often than not the buyer will require borrowed funds to pay for the house, and condition performance upon obtaining a written mortgage commitment from a financial institution. The mortgage contingency clause sets forth certain basic minimum requirements. The amount of the mortgage required is an essential element. From the buyer's perspective this amount should be as high as reasonably possible. If the commitment comes in at a lower principal amount, the buyer can waive the clause and still close with the lower mortgage amount. If, on the other hand, the stated mortgage contingency amount is too low, the buyer may receive a commitment for that amount and will remain bound by the contract but might be unable to come up with the additional cash at the time of closing.

The interest rate can be for a stated percentage for the term of the loan or for the initial year(s), or

for the "prevailing rate." The set percentage favors the purchaser, especially in times of rising interest rates, because he can claim the contingency is not satisfied if a commitment is received at a rate higher than set forth in the contract. If the contingency sets forth the "prevailing rate" then a higher interest rate would be binding on the buyer. The term of the mortgage, usually 25 or 30 years, will affect the size of the periodic payments on the mortgage. To be in a position to evaluate these terms, the attorney should obtain information on the current local mortgage market situation. This information can be obtained most readily from mortgage officers at local banks and real estate brokers or salesmen.

Seller's warranties and representations:

The purchaser would like as many express representations or warranties written into the contract as are reasonably negotiable. A representation is a statement of existing fact which induced a party to enter into the contract. Therefore, if the representation is false or mistaken, the party to the contract, who was induced to enter the contract based upon the representation, can sue for rescission and restitution of all funds paid, or if not rescinded, can sue for damages related to the misrepresentation. A warranty is a statement that certain facts do and will exist, and is included as a term of the contract. If the warranty is breached, the injured party has an action for damages, but not, necessarily, for rescission. The contract, upon breach of warranty, would otherwise generally remain binding.

A provision or statement that the representations or warranties will survive closing of title and will not merge with the deed should assure a right of action after closing if the representation proves false, or if the warranties are breached. The inclusion of representations and warranties in the contract also assists in resolving problems which may arise before or at closing.

Marketable title:

Despite the general rule of caveat emptor in real estate transactions, some limited obligations are placed upon the seller by common law. Included is the implied obligation of the seller to convey good or marketable title. The contract can expressly state that obligation and even broaden it. The seller might represent that unencumbered title, insurable title, or title free of encroachments will be conveyed.

Violations of municipal or other local laws are not title encumbrances per se, and would not be included in the seller's implied obligation to convey marketable title. Therefore, an express representation that the seller has not violated any local laws--zoning ordinances, health codes, multiple dwelling laws, building codes, fire ordinances, etc.--would protect the buyer in this regard.

Condition of premises:

Traditionally, absent an express warranty regarding the condition of the premises, personalty and fixtures, it was generally assumed that the property was transferred in its "as is" condition. In recent years, a variety of common law and statutory implied warranties and disclosure requirements in many states have eroded the traditional rule of *caveat emptor*, or "let the buyer beware." A growing majority of states now require the seller and/or the seller's agent to disclose facts which materially affect the value or desirability of the property, especially if such adverse facts are peculiarly within the seller's knowledge and are not discoverable by a reasonable inspection. The seller may be required by law or contract to give the purchaser a written report on the condition of the property.

Sellers and brokers have been held liable to purchasers for both physical defects in the property and nonphysical facts about the property, such as alleged ghosts, murders and former occupants infected with the AIDS virus.

Consequently, it is advisable to specify the condition of the premises to be transferred in the contract and to expressly state whether any representations or warranties in the contract will survive the closing. Often the contract provides that the personalty and fixtures are sold "as is;" but contains a contingency which allows a purchaser to obtain a structural inspection of the property. Under the contingency, the purchaser reserves the right to terminate the contract if the inspection shows that there are any substantial structural defects.

The parties are free to include express warranties as to the condition of the property in the contract of sale. Sometimes the seller is willing to warrant that certain systems or structural parts of the premises are in working order or good working order. The seller's attorney may wish to avoid the phrase "good working order," which not only may require more than "working order," but may require the seller to improve the premises at the closing. The seller may prefer a contract provision that specified systems or structural parts of the premises are sold in their present condition subject to reasonable use, wear, tear and natural deterioration between the contract date and the closing.

The purchaser should require that the seller, if required by local ordinances, have the property inspected by the local governmental authority for any code violations, and repair any such violations prior to the closing. Many communities have such local ordinances called "point of sale" ordinances, to assist in keeping its housing stock up to code. These ordinances require an inspection and any violations corrected prior to allowing a residential property to be sold.

Disclosure of lead-based paint hazards:

Federal law requires the seller of pre-1978 residential housing to disclose known information to the prospective purchaser on lead-based paint hazards. See 42 U.S.C. §§ 4851-4856; 40 C.F.R. Part 745 and 24 C.F.R. Part 35, Subpart A. The sales contract must include a lead warning statement and certain disclosure information. See discussion in comments to Form 21.13, *supra*. A sample lead-based paint sales contract rider, including both disclosure under the federal law and a lead-based paint contingency clause, is included in this chapter at Form 21.30, *infra*.

Preclosing property inspection:

As a practical matter, a substantial question of fact may exist as to whether a certain household system was in good repair or in good working order on a specified date. The usefulness of this clause comes into play in the preclosing inspection of the premises by the buyer. The right of inspection should be expressly provided for in the contract, especially where there are representations regarding the condition of certain items. It should be done even if there is a "point of sale" inspection done by the local governmental authority because the latter usually just deals with code violations. If an item is not in the represented condition then adjustments can be made before or at closing. The situation can be remedied by the preclosing repair of the defective item by seller, the escrow of funds at closing to cover the estimated cost of repair by the buyer, or a straight credit to the buyer or lowering of the purchase price at closing. The buyer's attorney may prefer to set forth a specific remedy in the contract, or to handle the problems as they may arise.

Date of possession:

Usually, unless otherwise agreed, the seller is obligated to surrender possession of the property to the buyer as of the date of closing. Problems often arise and the transfer of possession can be delayed. For example, the seller's mover might not be available until a week after closing. If the seller is buying another home, that closing may occur at a later date. The buyer might want an earlier closing date because his mortgage commitment will expire before the contract closing date, or the old residence must be vacated.

Time of essence and alternatives:

If the buyer must be in possession as of the date of closing, some attorneys make the closing date an essential part of the agreement, by making time of the essence. Care is required here, because if the closing does not occur on the specified date, the buyer may be left with a claim for damages and no house to move into. If a seller fails to close on the date specified in the contract, where time is of the essence, the contract is breached. There is a conflict of authority as to whether the buyer is thereafter entitled to specific performance. As a practical matter, however, a time of the essence clause puts a substantial burden on the seller to be ready to close and surrender possession on the date specified, or to otherwise obtain a written extension of time from the buyers.

An alternative to the time of the essence clause is a per diem penalty clause, whereby the seller is obligated to pay so much per day to buyer for each day he remains in possession after the closing date specified in the contract. This induces the seller to surrender possession on the closing date in the contract, but does not carry the risk to the buyer that a time of the essence clause would entail.

Escrow closing:

In some jurisdictions the practice is to close real estate transactions through professional escrow companies. The objective is to place responsibility for all the details of the transaction in a skilled intermediary. While all funds and all documents are cleared through this intermediary, the function of the attorney is not eliminated. It is his responsibility to see that his client, whether seller or purchaser, gets precisely what he bargained for in the transaction. This imposes upon the attorney the obligation to see that the instructions to the escrow agent are fully consistent with the terms of the contract between the parties, and that these instructions are carried out by the escrow agent.

Most instructions to the escrow agent fix the period during which the escrow is to continue. The activities of the escrow agent may in many cases extend over a period of weeks or months, depending upon the complexity of the title or transaction. Nevertheless, the intention is that the payment of the purchase price and the passage of title and of possession occur on the closing date even though some details of the escrow may extend beyond that date

FORM

AGREEMENT made at Dayton, Ohio, on June 1, _____ [year], between Joseph P. Allen ("Seller"), and John W. Collins ("Buyer").

The parties agree as follows:

1. *Sale.* Seller shall sell and convey to Buyer, and Buyer shall purchase and pay for, the premises located at 1622 Fourth Street, Dayton, Ohio, described in Exhibit A. The premises shall include the land and all buildings, fixtures, improvements, rights, privileges, and easements appertaining thereto (the "Property"). The personal property identified on Exhibit B shall be included as part of this transaction.

2. *Price.* The total purchase price for the Property is \$160,000, payable by Buyer as follows:

(a) \$10,000 in cash or by check upon the execution of this agreement, delivered to Seller or Seller's broker, to be deposited into escrow with the escrow agent.

(b) The balance of the purchase price, namely \$150,000, in cash or certified check, or partly in cash or certified check and partly by an irrevocable commitment for mortgage financing issued by a reputable lending institution committing it to lend Buyer a portion of the purchase price. The entire balance shall be deposited into escrow on or before the closing date of this transaction.

3. *Time of essence.* The closing date of this transaction shall be on or before March 3, _____ [year]. Time is of the essence for the closing of this Agreement. If Seller is unable to deliver possession of the Property to Buyer or Buyer's nominee by March 3, _____ [year], other than for any reason caused by Buyer's acts or omission, Seller shall pay to Buyer \$100 per day until Seller is able to deliver possession to Buyer.

4. *Mortgage Contingency.* This Agreement is subject to Buyer obtaining a commitment by February 14, _____ [year], from a reputable lending institution of a mortgage loan of at least \$128,000 payable in equal constant monthly payments over a period of 25 years or longer, with interest at the prevailing rate and a loan fee or points of 1 percent or less. Buyer shall endeavor in good faith to obtain a mortgage loan on the above or more favorable terms, but if Buyer is unable to obtain such a commitment by the aforesaid date, this Agreement shall be null and void, all funds and documents shall be returned to the respective parties, and neither party shall have any rights against the other.

5. *Seller's warranties.* Seller warrants and represents to Buyer as follows:

(a) *Encroachments.* All improvements now on the Property are entirely within the boundary lines of the land described on Exhibit A, and no other adjoining property encroaches upon the land;

(b) *Mechanic's liens.* All work and labor performed and all materials furnished with respect to any improvements or repairs to the Property have been paid in full, and there will be no mechanic's liens or the possibility of any in connection with any such work, labor and materials performed on or furnished to the Property;

(c) *Violations.* Seller has no knowledge of any outstanding notices or orders from any governmental authority with respect to the condition of the Property or its repair, or with respect to any claim of a violation of any laws, ordinances, zoning codes, building codes or orders;

(d) *Structural soundness.* To Seller's best knowledge and belief, the personal property included as a part of this transaction and the improvements on the Property are structurally sound and in good condition and repair, including, without limitation, the roof, foundation, walls, heating and cooling system, plumbing, water and electrical systems; and

(e) *Assessments.* All improvements made by the local government that now benefit or will benefit the Property upon completion have been assessed against it as of the execution date of this Agreement.

All of Seller's foregoing warranties and representations shall be continuing in nature, shall be effective on the closing date, and shall survive Seller's delivery of the deed to Buyer and the consummation of all matters and things at the

closing.

6. *Title and deed.* Seller shall convey to Buyer, or Buyer's nominee, good and marketable title to the property, by good and sufficient general warranty deed with all dower rights released. The deed shall warrant title to be free and clear of all liens, charges and encumbrances, clouds and defects, except any restrictions, reservations, limitations, easements, and conditions of record approved by Buyer, zoning ordinances, and general and special taxes and assessments which are a lien but not yet due and payable. The deed shall be deposited into escrow on or before the closing date, but a copy thereof shall be submitted to Buyer's counsel for approval prior to the same being deposited into escrow.

7. *Title guaranty, insurance.* Seller shall accompany Seller's deed with a title guaranty policy in the amount of the purchase price issued by General Title Company ("title company") in its customary form, guaranteeing record title to the Property to be good in Buyer subject only to the exceptions to be contained in the deed. However, Buyer may elect to be furnished with an Owner's Fee Policy of title insurance ("title insurance"), in the amount of the purchase price, insuring marketable title to be good in Buyer, subject only to the exceptions to be contained in the deed. In such event, in lieu of a title guaranty policy, Seller shall furnish Buyer with title insurance. Seller shall pay that portion of the costs which would have been incurred had a title guaranty policy been issued, and Buyer shall pay the remaining costs.

8. *Preliminary title report.* Immediately upon the execution hereof, Seller shall order from the title company a preliminary title report, with a special tax search included, in the form of a commitment to issue the required title policy requested by Buyer ("title report"). A copy of the title report shall be delivered to Buyer. Within 10 days after Buyer receives the title report, he shall notify Seller and the title company of all restrictions, reservations, limitations, easements, and conditions of record ("title defects") disclosed in the title report that are objectionable to Buyer. If Buyer notifies Seller of title defects, Seller shall cure or remove the same by the closing date. Seller shall remove all objectionable title defects that may be removed by the payment of money, and shall take reasonable steps necessary to remove all other title defects.

9. *Title contingency.* On the closing date, the escrow agent shall notify the parties whether the title company is then in a position to issue its title guaranty or title insurance, as the case may be, showing as exceptions only those items in the title report to which Buyer did not object. If the escrow agent notifies the parties that (a) the title company will issue such title guaranty or title insurance, this transaction shall be consummated in accordance with the terms and provisions of this Agreement, or (b) the title company will not issue such title guaranty or title insurance, and if Buyer does not immediately waive the title defects claimed by the escrow agent to prevent such issuance or Seller does not cure the defects within the permitted period, this Agreement shall be null and void, the escrow agent shall return to the parties all funds and documents previously deposited by them into escrow, and the parties shall be fully released from any liability or obligation hereunder, except that Seller shall pay the full cost of the escrow and the title company's charges.

10. *Title defects waiver.* If Buyer waives the title defects preventing issuance of the title guaranty or title insurance by notifying the title company and the escrow agent, or if Seller has cured the title defects, the obligations of the parties shall not be affected by them. There shall be no abatement or reduction of the purchase price, and this transaction shall be consummated in accordance with the terms and provisions of this Agreement, except that any title defects waived by Buyer, shall be set forth as exceptions in the deed and in the title guaranty or the title insurance, as the case may be.

11. *Casualty.* If the building or buildings or any other improvements on the Property are damaged or destroyed before transfer of record title, and the damages are \$3,000 or less, this Agreement shall continue in full force and effect and Seller shall immediately assign to Buyer all of Seller's rights to the resulting insurance proceeds. If the damages are greater than \$3,000, Buyer may either (a) continue this Agreement in full force and effect, and Seller shall immediately assign to Buyer all of Seller's rights to the insurance proceeds, or (b) rescind this Agreement, and all money, papers, or documents deposited by the parties shall be returned to them. Buyer shall assume risk of loss after record title to the Property is transferred to him. There shall be no proration of insurance. Seller shall retain his insurance until record title is transferred to Buyer, and Buyer shall procure his own policies of insurance to be effective from and after the date title

to the Property is transferred to Buyer or his nominee.

12. (a) *Point of Sale Inspection.* Prior to the closing date, Seller agrees to correct, at Seller's expense, any violations found in connection with the inspection done to comply with the point-of-sale or similar ordinance required by the local governmental authority, if any. Evidence in writing that the corrections were made to the satisfaction of the local governing authority shall be given to Buyer prior to the closing date.

12. (b) *Possession.* Seller shall deliver possession of the Property as of the closing date, in the condition as warranted by Seller and in no event in any worse condition than the condition as of the date of execution of this Agreement, less reasonable wear and tear.

13. *Utility charges.* There shall be no proration of utilities. Seller shall cause the meters to be read for water, electricity, gas and other utilities, if any, as of the date of delivery of possession, and shall pay all utility charges to the date of the readings, after which the charges shall accrue to Buyer. The sum of \$200 shall be held in escrow as security for the payment of utilities until Seller deposits into escrow receipts evidencing such payment.

14. *Taxes, rents.* All general and special real estate taxes and assessments shall be prorated by the escrow agent as of the date the deed is filed for record, using the rate and valuation shown on the last available tax duplicate. If the proration does not fully reimburse Buyer for all real estate taxes and assessments accrued and unpaid with respect to the Property as of the record date of transfer of title, Seller shall promptly reimburse Buyer that amount accrued in excess of the proration credit upon the official certification of the real estate tax duplicate for the year in which transfer of title occurs. The escrow agent shall prorate any rents as of the date the deed is filed for record.

15. *Broker's commission.* No real estate broker was involved in this transaction and no brokerage fees or other compensation is due any real estate broker or any other person because of this transaction except for Smith Co., whose commission of \$10,000 shall be Seller's sole responsibility and shall be paid by the escrow agent from the funds deposited into escrow and charged to Seller, if and when the transaction contemplated by this Agreement is consummated.

16. *Escrow agent.* This transaction shall be closed in escrow with an escrow agent of Buyer's choice ("escrow agent"). Buyer shall deposit with the escrow agent an executed counterpart of this Agreement, which shall serve as the escrow instructions. The escrow agent may attach its standard conditions of acceptance, but if they are inconsistent or conflict with the terms of this Agreement, this Agreement shall control.

17. *Closing documents; funds.* If on the closing date (1) the escrow agent then has on hand all necessary funds and documents to complete the transaction, and (2) the title company has stated that it shall be in a position to and will issue and deliver, upon the filing of the deed for record, the required title guaranty policy or title insurance, the escrow agent shall thereupon file for record the deed and all other required instruments and shall deliver to each party the funds and documents to which it is entitled, together with the agent's escrow statement.

18. *Seller's charges.* In closing this transaction, the escrow agent shall charge Seller with the following:

- (a) the amount of real estate taxes and assessments prorated up to and including the date of transfer of title;
- (b) the cost of any transfer tax;
- (c) the cost of a title report, title search, and title guaranty policy in the amount of the purchase price;
- (d) the cost of paying off and satisfying any mortgage indebtedness for which Seller is liable, together with the cost of any mortgage cancellation, recording fee or other costs incident to the satisfaction of any such indebtedness;

(e) the cost of any required brokerage commission;

(f) one half of the escrow fee; and

(g) all other charges properly borne by Seller consistent with the terms of this Agreement;

and immediately thereafter shall deliver to Seller the balance of the funds in its hands due, and all documents due Seller.

19. *Buyer's charges.* On closing, the escrow agent shall charge Buyer with the following:

(a) any cost of financing this transaction which Buyer arranges for;

(b) the cost of filing the deed for record;

(c) the amount by which the cost of furnishing the title insurance exceeds the cost of furnishing a title guaranty policy, if Buyer elects to be furnished with title insurance;

(d) one half of the escrow fee; and

(e) all other charges properly borne by Buyer consistent with the terms of this Agreement;

and immediately thereafter, the escrow agent shall deliver to Buyer the title guaranty or title insurance, as the case may be, the record deed or Records' receipt, any prorations to which Buyer is entitled, and all other funds or documents due Buyer.

20. *Notice.* All notices under this Agreement shall be deemed to be sufficiently given if personally delivered or sent by certified or registered mail, postage prepaid, return receipt requested, and addressed as follows:

If to Seller, to:

If to Buyer, to:

21. *Release of dower.* Seller's spouse (if Seller is married), if not already a party, joins in the signing of this Agreement to evidence her consent to the terms and provisions hereof, including the obligation to release of all dower and other marital rights in the Property upon its conveyance to Buyer.

22. *Binding effect.* This Agreement shall be binding upon and inure to the benefit of the parties and their respective heirs, executors, administrators, successors, and assigns.

23. *Non-waiver.* No delay or failure by either party to exercise any right hereunder, and no partial or single exercise of that right, shall constitute a waiver of that or any other right, unless otherwise expressly provided herein.

24. *Headings.* Headings in this Agreement are for convenience only and shall not be used to interpret or construe its provisions.

25. *Governing law.* This Agreement shall be construed in accordance with and governed by the laws of the State of Ohio.

26. *Counterparts.* This Agreement may be executed in two or more counterparts, each of which shall be deemed an original but all of which together shall constitute one and the same instrument.

27. *Entire agreement.* All prior understandings and agreements between the parties are merged in this contract, which constitutes the entire agreement between the parties. This contract is entered into after full investigation made by Seller, and neither party relies upon any statement or representation made by anyone unless contained herein.

The parties have set their hands the day and year first above written.

Seller:

Joseph F. Allen

Buyer:

John W. Collins



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Current Legal Forms for Real Estate
Chapter 21 SALES AND EXCHANGES
Part IV. Forms

B. CONTRACTS OF SALE: RESIDENTIAL PROPERTY

25-21 Current Legal Forms for Real Estate FORM 21.17

FORM 21.17 Contract for sale of residence--"as is" condition--title defect cure period--cash transaction--seller's form

COMMENT

The seller's form of a contract of sale is characterized by its lack of certain clauses which are primarily aimed at protecting the purchaser and the inclusion of clauses which protect the seller.

Title clause

One of the seller's principal obligations is to convey good or marketable title. If the seller's attorney is aware of encumbrances to title which cannot be removed, it should be specified in the contract that the title to be conveyed will be subject to such an encumbrance. Exceptions to title, which would most likely appear in the seller's own title guaranty or title insurance policy, would include utility easements, covenants and restrictions, minor encroachments or other items which do not substantially affect marketability. If these encumbrances are included in the contract, then the buyer's attorney is not in a position to object to them at closing.

Dealing with title objections

If unanticipated title problems arise at closing, the seller may be in breach of contract without time to cure the defect. The seller's attorney might provide in the contract that if the buyer raises title objections at closing, through his attorney or title insurance company, then the seller's attorney will have a specified amount of time, for example, 30 days, to cure the defect. Some contracts provide that the purchaser must notify the seller's attorney of any objections to title before closing, for example, 15 days prior to closing, or any defects will be deemed waived. The buyer's attorney should make or receive a title search sufficiently prior to closing to meet this deadline.

Condition of premises

Traditionally, absent an express warranty regarding the condition of the premises, personalty and fixtures, it was generally assumed that the property was transferred in its "as is" condition. In recent years, a variety of common law and statutory implied warranties and disclosure requirements in many states have eroded the traditional rule of *caveat emptor*, or "let the buyer beware."

The seller may want to avoid the risk of representing or warranting that the condition of the property is satisfactory, in good repair or in good working order, even if the seller is sure that there are no such problems. A seller's attorney can accomplish this by including an express disclaimer and "as-is" clause. The contract would provide that the purchaser has inspected the dwelling, is fully aware of its condition and agrees to accept the property "as is." An additional clause would disclaim any representation as to the condition of the property (or any of its components) made by the seller or any of the seller's agents, including real estate salesmen, brokers, or lawyers.

If warranties cannot be obtained, the purchaser should at least require the seller to correct any code violations that may be found in connection with the inspection done by the local governmental authority, if one is required. Many communities have adopted such ordinances, sometimes referred to as "point of sale" ordinances, requiring an inspection and correction of code violations found before a residence in the community can be sold.

Known defects

A growing majority of states now require the seller and/or the seller's agent to disclose facts which materially affect the value or desirability of the property, especially if such adverse facts are peculiarly within the seller's knowledge and are not discoverable by a reasonable inspection. The seller may be required by law or contract to give the purchaser a written report on the condition of the property. Sellers and brokers have been held liable to purchasers for both physical defects in the property and nonphysical facts about the property, such as alleged ghosts, murders and former occupants infected with the AIDS virus. Seller and brokers should also consider disclosure of known facts regarding the neighborhood where the property is located. For example, disclosure of a notice received from the local government pursuant to a state law version of "Megan's Law" requiring notices to be given to neighborhood property owners when a registered sexual predator has moved into the neighborhood.

Even where not required by local law, many brokers now recommend that sellers give such a report, to protect both the broker and the seller from liability for nondisclosure. Disclosure statements generally include information about structural defects, utilities, water, septic systems, defects in equipment and appliances, environmental problems and regulatory compliance.

The seller's attorney should discuss the relevant disclosure law with the seller to determine what disclosure must or should be made under the circumstances. If the seller is aware of any defects in the condition of the property or any of its components, the seller's attorney might be well advised to specify the defect, and the buyer's knowledge of it, in the contract. The existence of the defect may have led the parties to negotiate a lower sales price, and this should be noted in the contract.

Disclosure of lead-based paint hazards

Federal law requires the seller of pre-1978 residential housing to disclose known information to the prospective purchaser on lead-based paint hazards. See 42 U.S.C. §§ 4851-4856; 40 C.F.R. Part 745 and 24 C.F.R. Part 35, Subpart A. The sales contract must include a lead warning statement and certain disclosure information. See discussion in comments to Form 21.15, *supra*. A sample lead-based paint sales contract rider, including both disclosure under the federal law and a lead-based paint contingency clause, is included in this chapter at Form 21.30, *infra*.

If the seller is aware of any defects in the condition of the property or any of its components, the seller's attorney might be well advised to specify the defect, and the buyer's knowledge of it, in the contract. The existence of the defect may have led the parties to negotiate a lower sales price, and this should be noted in the contract.

Mortgage contingency

Ideally, the seller's contract would be without contingencies, and the buyer would shoulder the risk of having the necessary purchase funds at closing. Some sellers' attorneys insist that the buyer obtain a written mortgage commitment prior to permitting their clients to sign the contract. The problem here is that many financial institutions will not issue a mortgage commitment unless there is a contract in existence. The practical realities of the situation may require the inclusion of a mortgage contingency clause in the contract.

The time period within which the purchaser must receive a mortgage commitment should be as short as reasonably possible, from the seller's perspective. The seller, by entering the contract, has taken the house off the market and is no longer receiving purchase offers. The time period should be long enough to permit a diligent purchaser to obtain a commitment, but not so long as to allow the purchaser the luxury of shopping around for the best possible mortgage at the seller's time and expense.

FORM

THIS AGREEMENT is made at Columbus, Ohio on August 11, _____ [year], between John Howard Jones, ("Seller") and William E. Coleman, ("Buyer").

The parties mutually agree as follows:

1. *Sale.* Seller shall sell and convey to Buyer, and Buyer shall purchase and pay for, the premises located at 1422 North Street, Columbus, Ohio, a legal description of which is attached hereto, made a part hereof, and marked Exhibit A. The premises shall include the land and all buildings, fixtures, improvements, rights, privileges, and easements appertaining thereto (the "Property"). The personal property identified on Exhibit B, attached hereto and made a part hereof, shall be included as part of this transaction.

2. *Price.* The total purchase price for the Property is \$100,000, payable by Buyer as follows:

(a) \$5,000 in cash or by check upon the execution of this Agreement, delivered to Seller or his broker. This sum shall be deposited into escrow with the escrow agent, designated in paragraph 12.

(b) The balance of the purchase price, \$95,000, in cash (or certified check), or partly in cash (or certified check) and

partly by an irrevocable commitment for mortgage financing issued by a reputable lending institution committing the institution to loan Buyer a portion of the purchase price. The entire balance shall be deposited into escrow on or before the closing date of this transaction.

3. *Closing date.* The closing date of this transaction shall be on or before November 3, _____ [year].

4. *Deed.* Seller shall convey the Property to Buyer by general warranty deed with dower rights released, if any, free and clear of all liens, encumbrances, clouds and defects, except restrictions, reservations, limitations, easements and conditions of record, all other conditions that would be disclosed by an accurate survey of the Property, zoning ordinances, and general and special taxes and assessments which are a lien but not yet due and payable. The deed shall be deposited into escrow on or before the closing date.

5. *Title guaranty, insurance.* Seller shall furnish Buyer with a title guaranty policy in the full amount of the purchase price, to be issued by Mid-West Title Company ("title company") in its customary form, guaranteeing record title to the Property to be good in Buyer, subject only to the allowed exceptions to be set forth in the deed. However, Buyer may elect to be furnished with an Owner's Fee Policy ("title insurance") in the full amount of the purchase price, subject only to the allowed exceptions to be contained in the deed. In such event, in lieu of a title guaranty policy, Seller shall furnish Buyer with title insurance. Seller shall pay the portion of the costs that would have been incurred had a title guaranty policy been issued, and Buyer shall pay the remaining costs.

6. *Title contingency.* On the closing date, the escrow agent shall notify the parties whether the title company is then in a position to issue its title guaranty or title insurance, as the case may be. If the escrow agent notifies the parties that (a) the title company will issue the title guaranty or title insurance, this transaction shall be consummated in accordance with the terms and provisions of this Agreement, or (b) the title company will not issue the title guaranty or title insurance, and if Buyer does not immediately waive the title defects claimed by the escrow agent to prevent such issuance or if Seller does not immediately cure the defects, the closing of this transaction shall be postponed for a reasonable period of time, not to exceed 30 days, to permit Seller to remove the defects. If Buyer waives the title defects by notifying the escrow agent in writing, or if Seller cures such defects, as provided above, then this Agreement shall remain in full force and effect and the parties shall perform the same in accordance with the provisions hereof; provided however that any defects waived by Buyer, if any, shall be set forth as exceptions in the deed and in the title guaranty or the title insurance, as the case may be.

7. *Taxes, rents.* All real estate taxes and assessments shall be prorated by the escrow agent as of the date the deed is filed for record, using for such purpose the rate and valuation shown on the latest available tax duplicate. Any rents shall be prorated by the escrow agent as of the date the deed is filed for record.

8. *"As is" condition.* Except as hereafter stated, Seller shall deliver possession of the Property to Buyer in its "as is" condition as of the closing date, except for reasonable wear and tear.

9. *Point of Sale Inspection.* Prior to the closing date, Seller agrees to correct, at Seller's expense, any violations found in connection with the inspection done to comply with the point-of-sale or similar ordinance required by the local governmental authority, if any. Evidence in writing that the corrections were made to the satisfaction of the local governing authority shall be given to Buyer prior to the closing date.

10. *Utilities.* Seller shall cause the meters to be read for water, electricity, gas, and any other utilities, as of the date of delivery of possession, or as close thereto as is practicable. Seller shall pay all charges to the date of the readings, after which the charges shall accrue to Buyer. The sum of \$200 shall be held in escrow as security for payment of the utilities until Seller deposits into escrow receipts evidencing their payment.

11. *Broker's commission.* The parties warrant and represent to each other that no real estate broker is involved in this

transaction and no brokerage or other compensation is due any real estate broker on account of this transaction, except for ABC Real Estate Company which is owed a commission of \$5,000. Seller shall be responsible for the commission, which shall be paid by the escrow agent from the funds deposited into escrow and which shall be charged to Seller upon the consummation of this transaction.

12. *Casualty.* If the building or any other improvement on the Property is damaged or destroyed before transfer of record title, and the damages are \$10,000 or less, this Agreement shall continue in full force and effect and Seller shall immediately assign to Buyer all of Seller's rights to the resulting insurance proceeds. If the damages exceed \$10,000, Buyer may either (a) continue this Agreement in full force and effect, whereupon Seller shall assign to Buyer all of Seller's rights, title and interest in and to the insurance proceeds, or (b) rescind this Agreement, whereupon all money, instruments, and documents deposited in escrow by the parties shall be returned to them. Buyer shall assume risk of loss after record title to the Property is transferred to him. There shall be no proration of insurance. Seller shall retain his insurance until record title is transferred to Buyer, and Buyer shall procure his own insurance policies to be effective from and after the date title to the Property is transferred to him.

13. *Escrow agent.* All funds and documents required to close this transaction shall be deposited with Mid-West Title Company (the "escrow agent"). Buyer shall deposit with the escrow agent an executed counterpart of this Agreement, which shall serve as the escrow instructions. The escrow agent may attach its standard conditions of acceptance, but if those conditions are inconsistent or in conflict with the terms of this Agreement, this Agreement shall control.

14. *Escrow closing.* If on the closing date (1) the escrow agent then has on hand all necessary funds and documents to complete the transaction, and (2) the title company has stated that it is in a position to and will issue and deliver, upon filing of the deed for record, the title guaranty or policy of title insurance, the escrow agent shall thereupon file for record the deed and all other required instruments, and shall deliver to the parties the funds and documents to which each are entitled, together with its escrow statement.

15. *Expenses of seller.* In closing this transaction, the escrow agent shall charge Seller with the following:

- (a) The amount of real estate taxes and assessments prorated as provided in Paragraph 7, up to and including the date of transfer of title;
- (b) The cost of any transfer tax;
- (c) The cost of a title search and of a title guaranty policy in the amount of the purchase price;
- (d) The cost of paying off and satisfying any mortgage indebtedness for which Seller is liable, together with the cost of any mortgage cancellation, recording fee or other costs incident to the satisfaction of the indebtedness;
- (e) The cost of any required brokerage commission;
- (f) One half of the escrow fee; and
- (g) All other charges properly borne by Seller consistent with the terms of this Agreement;

and immediately thereafter shall deliver to Seller the balance of the funds in its hands due, and all documents due Seller.

16. *Expenses of buyer.* On closing, the escrow agent shall charge Buyer with the following:

- (a) Any cost of financing this transaction which Buyer arranges for;

(b) The cost of filing the deed for record;

(c) The amount by which the cost of furnishing the title insurance exceeds the cost of furnishing the title guaranty, if Buyer elects to be furnished with title insurance;

(d) One half of the escrow fee; and

(e) All other charges properly borne by Buyer consistent with the terms of this Agreement;

and immediately thereafter shall deliver to Buyer the title guaranty or title insurance, as the case may be, the record deed or Recorder's receipt, any prorations to which Buyer is entitled, and all other funds or documents due Buyer.

17. *Binding effect.* This Agreement shall be binding upon and inure to the benefit of the parties hereto and their respective heirs, legal representatives, and assigns.

18. *Non-waiver.* No delay or failure by either party to exercise any right hereunder, and no partial or single exercise of such right, shall constitute a waiver of that or any other right, unless otherwise expressly provided herein.

19. *Headings.* Headings in this Agreement are for convenience only and shall not be used to interpret or construe its provisions.

20. *Governing law.* This Agreement shall be construed in accordance with and governed by the laws of the State of Ohio.

21. *Counterparts.* This Agreement may be executed in two or more counterparts, each of which shall be deemed an original but all of which together shall constitute one and the same instrument.

22. *Time of essence.* Time is of the essence of this Agreement.

23. *Entire agreement.* All prior understandings and agreements between the parties are merged in this contract, which constitutes the entire agreement between the parties. This contract is entered into after full investigation made by Seller, and neither party relies upon any statement or representation made by anyone unless contained herein.

24. *Notices.* All notices hereunder shall be in writing and delivered personally or mailed by certified mail, postage prepaid, addressed to the parties at their last known address.

The parties have set their hands the day and year first above written.

Seller:

John Howard Jones

Buyer:

William E. Coleman



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Current Legal Forms for Real Estate
Chapter 21 SALES AND EXCHANGES
Part IV. Forms

B. CONTRACTS OF SALE: RESIDENTIAL PROPERTY

25-21 Current Legal Forms for Real Estate FORM 21.18

FORM 21.18 Contract for sale of residence--purchase money installment mortgage--subject to first mortgage--advance notice of title defects

COMMENT

Many of the clauses in a sales contract raise important tax considerations. These include the clauses relating to taxes, assessments, interest on mortgages, expense of sale, and fire loss.

Deduction of allocable real estate taxes

Real property taxes are apportioned between a seller and purchaser. The real property tax properly allocable to that part of the year which ends on the day before the date of the sale is treated as a tax imposed on the seller. The tax properly allocable to that part of the year which begins on the date of the sale is treated as a tax imposed on the purchaser. The deduction is allowed only for the portion of the real property tax year during which the purchasers own the property, even though they actually pay the entire tax. The statutory allocation formula applies whether or not the parties themselves allocate the tax. Under the statute, the only governing factors are the date of sale and the real property tax year.

Timing of real estate tax deduction

If either the seller or the purchaser used the cash method of tax accounting, and is liable for the tax, his portion of the tax becomes deductible when he makes the payment. If the other party is liable for the tax, or if the other party holds the property at the time the tax becomes a lien, then the taxpayer who is entitled to a portion of the deduction is considered to have made his payment at the time of the sale. An accrual method taxpayer who has not elected to prorate real estate taxes is treated as having accrued on the date of the sale that portion of the real property tax which is allocable to him. The apportionment rules do not apply to delinquent real property taxes for any

real property tax year prior to the year of sale.

Gain and basis not affected by tax allocation

The amount realized upon the sale or exchange of property by the seller does not include any amount received as reimbursement for real property taxes from the purchaser. It does include amounts representing real property taxes which are treated as imposed on the seller if such taxes are to be paid by the purchaser. These rules apply whether or not the contract specifies a reimbursement or reduction for the taxes in question. Similarly, the cost basis of real property does not include any amount of real estate taxes which are treated as imposed on the purchaser.

Property assessment tax treatment

Assessments against real property, depending upon their nature and purpose, may be deducted as taxes or are required to be capitalized. Deduction as a tax is allowed for those assessments levied for the general public welfare by the proper taxing authorities at a like rate against all property in the territory. Assessments for local benefits, such as street, sidewalk, and similar improvements, imposed because of and measured by the benefit inuring to the benefitted property, are not allowable deductions, but are usually capitalized. An assessment is generally a nondeductible capital expense when it is assessed against the local benefit to the property or properties affected, rather than against all properties within the jurisdiction of the taxing authority. Special assessments are not deductible, even though an incidental benefit may inure to the public welfare. However, to the extent that assessments are made for the purpose of maintenance and repair or for meeting interest charges on such benefits, they are deductible. But the burden is on the taxpayer to show the allocation of the amount assessed to the different purposes.

Mortgage interest deduction

Interest on a mortgage covering real estate, whether business or residential property, is deductible when paid or accrued by one who has a legal or equitable interest in the property, even though under a mortgage assumption no liability exists on the bond or note secured by the mortgage. Interest is not deductible if it represents an initial cost of the property. Interest which is properly chargeable to capital account may be capitalized or deducted at the taxpayer's annual option, except construction period interest which must be capitalized. Interest on a mortgage debt secured by real property which is subject to the passive loss rules is part of the passive activity losses. Passive activity losses can only be used to offset income from the same or other passive activities. The passive activity loss limitation is discussed in The Tax Background (TB) § 21.08, at the beginning of this chapter.

Document and recording costs tax treatment

This agreement allocates the various expenses of the sale between purchaser and seller. The purchaser is to pay for recording the deed, mortgage tax, for the cost of recording the mortgage, and for the cost of preparing the purchase money note and mortgage. The seller is to pay for the drawing of the contract and deed and for any sales tax on the transaction. These various nontax expenditures are not deductible. They increase the purchaser's cost and decrease the seller's amount realized from the sale.

Installment sale qualification

A transaction may qualify as an installment sale of real estate if at least one payment is made in a tax year following the year of sale. Since there need not be two payments, a lump sum paid in a year after the year of sale will qualify for installment treatment. The receipt of evidences of indebtedness of the person acquiring the property is not a payment. However, debt that is payable on demand or issued by a corporation or a governmental unit and readily tradable is payment when received. The sale may be one in which title is immediately transferred, with the seller protected by a mortgage, or one which anticipates a transfer of title after all or part of the selling price is paid. In order to use the installment method, the taxpayer need not make any affirmative election; the installment method is applied automatically unless the taxpayer elects not to use it. Installment sales are discussed in TB § 21.11.

Imputed interest in installment sale of residence

An installment sale of property with an inadequate rate of interest is subject to readjustment of the rate of interest and the principal amount. A special rule applies to an installment sale of a principal residence to the extent the purchase price of the residence does not exceed \$250,000. If the installment payments include "unstated interest," the selling price must be reduced by the amount of such interest. If no interest is provided in the sales agreement, or if interest that is provided is more than 1 percent lower than the minimum currently required under the regulations, a portion of each payment will be treated as interest. The interest component of each payment will be treated as ordinary income to the seller, and will allow the purchaser a deduction. When the debt instrument given in exchange for property does not exceed \$2.8 million, the imputed interest, or discount rate, cannot exceed 9 percent. See TB § 21.10[3].

Installment reporting of gain recognized

If the seller sells the old residence in an installment sale but gain realized exceeds the exclusion amount permitted under *I.R.C. Section 121*, the gain in excess of the excluded amount may be reported under the installment method. Because a residence is not eligible for cost recovery or depreciation allowances, there is no recapture of these items. Under the installment method of reporting income, gain is proportionately allocated under a formula each year that installment payments are received. The proportion of each installment that is realized as gain is the same proportion that the gross profit (in excess of the exclusion amount), realized or to be realized, bears to the total contract price. The contract price is the proceeds actually received or to be received by the seller. It does not include payments made or obligations assumed by the purchaser to the mortgagee. See TB § 21.11.

Information reporting of real estate transactions

The attorney or title company responsible for closing title is required to report the real estate transaction to the IRS. In addition a statement must be provided to the customer before January 31 of the year following the closing. If an attorney or title company is not involved in the closing, the information reporting is the responsibility of the mortgage lender. The information reporting requirements are discussed in TB § 21.02[4].

Mortgage assumption tax treatment

Mortgages assumed by the purchaser or mortgages to which the property is subject are not considered as part of the payments in the year of sale, except to the extent that the mortgage amount exceeds the seller's basis for the property.

Disclosure of lead-based paint hazards

Federal law requires the seller of pre-1978 residential housing to disclose known information to the prospective purchaser on lead-based paint hazards. See 42 U.S.C. §§ 4851-4856; 40 C.F.R. Part 745 and 24 C.F.R. Part 35, Subpart A. The sales contract must include a lead warning statement and certain disclosure information. *See* discussion in comments to Form 21.13, *supra*. A sample lead-based paint sales contract rider, including both disclosure under the federal law and a lead-based paint contingency clause, is included in this chapter at Form 21.30, *infra*.

FORM

AGREEMENT made January 10, _____ [year], between Joseph Lyons ("Seller"), and Maxwell Dawson ("Purchaser").

1. *Sale.* In consideration of the deposit made by Purchaser and the Purchaser's covenants and agreements in this contract, Seller shall sell to Purchaser, and Purchaser shall purchase, the real property described as follows:

(Insert description)

subject to taxes and assessments for the current year not in default, reservations, restrictions, and easements of record, applicable zoning ordinances, and the first mortgage referred to in paragraph 2.

2. *Purchase price.* The purchase price for the above property shall be \$100,000, which Purchaser shall pay as follows:

(a) \$8,000 deposit on the signing of this contract, receipt of which Seller hereby acknowledges.

(b) \$20,000 by taking title to the property subject to a first mortgage for such amount held by Central Mortgage Company, a copy of which Purchaser has examined and initialed.

(c) \$52,000 by Purchaser executing and delivering to Seller at the closing a promissory note, secured by a second mortgage on the property, to be prepared by Seller's attorney. The note shall require quarter-annual principal payments of \$1,000, beginning three months after the closing, together with interest of 12 percent per annum on unpaid balances of principal, until the full mortgage debt is paid. Purchaser may prepay all or any part of the principal without premium or penalty. All such prepayments shall be applied first to the payment of interest accrued to the date of such prepayment, and the balance, if any, shall be applied to the payment of unpaid principal installments, in the inverse order of their maturity.

(d) \$20,000 in cash upon delivery of the deed at closing.

3. *Title to property.* Within ten days from the date of this contract Seller will, at his expense, deliver to Purchaser evidence of his title to the property in either one of the following forms:

(a) A binder from a title insurance company which is carrying on a regular title insurance business in the county in which the property is located agreeing to issue to Purchaser, upon the recording of the deed to be executed and delivered by Seller, a title insurance policy in the amount of the purchase price insuring Purchaser's title to the property, excepting only the items specified in paragraph 1, taxes and assessments for the current year, any state of facts an accurate survey

would show, if such facts do not render title unmarketable, and whatever standard conditions and exceptions usually are printed in policies issued by that title insurance company.

(b) An abstract of title prepared by a person or company acceptable to Purchaser's attorney showing that Seller's title is good and marketable, excepting only the items specified in paragraph 1.

4. *Notice of title defects, survey.* If there are defects in title, Purchaser shall notify Seller in writing within 15 days after the receipt of the binder or abstract, as the case may be, and Seller shall in good faith and with due diligence proceed to cure the defects. If Purchaser fails to give notice of any title defect (or defects) within the required time, he shall be deemed to have waived the same and shall take title subject to them without objection, credit, or adjustment to the purchase price.

In addition, Seller will deliver to Purchaser, at or before the closing, a survey of the property made by a duly licensed surveyor after the date of this contract showing that there are no encroachments on the property.

5. *Expenses.* The expenses of this transaction shall be paid as follows:

(a) Seller shall pay for (i) the preparation of this contract and the deed, and (ii) any sales tax on this transaction.

(b) Purchaser shall pay for (i) the recording of the deed, (ii) any recording, intangible, or other tax on the mortgage, and (iii) the cost of recording the mortgage and drawing the purchase money note and mortgage.

6. *Apportionments.* The following items shall be apportioned between the parties as of the date of closing:

(a) Real property taxes for the fiscal year in which the closing takes place.

(b) Premiums on any policies of hazard insurance taken over by Purchaser.

(c) Rents, if the property is occupied by tenants at the date of the closing.

(d) Interest on the first mortgage.

(e) Seller shall assign to Purchaser all right, title, and interest in and to all reserves held in escrow by the first mortgagee for payment of taxes, interest, insurance premiums, and other items, and Purchaser shall repay to Seller the amount of such reserves.

(f) Water and sewer charges.

7. *Fire.* Seller assumes all risk of loss or damage to the property by fire until delivery of the deed.

8. *Assessment.* Seller shall pay all assessments for local improvements which are now, or may become, a lien before the closing.

9. *Closing.* The closing shall take place at the office of James Warren, Esq., Seller's attorney, at 10 a.m. on February 25, _____ [year]. At the closing, and upon receiving the purchase price in the manner herein provided, Seller shall execute and deliver to Purchaser a good and sufficient warranty deed, containing all the usual covenants of title, conveying the property to Purchaser in fee simple, subject only to the items referred to in paragraph 1. In addition, Seller shall deliver to Purchaser satisfactory evidence of the balance due on the first mortgage debt and of the fact that the mortgage is not in default. Possession of the property will pass to Purchaser on the closing. The transfer of title is to include, without further consideration, all fixtures, appurtenances, and appliances now in the property, and all other

items listed on the attached schedule.

10. *Default.* If Seller shall default in the performance of his obligations hereunder, Purchaser may either sue for specific performance or terminate this contract. If Purchaser elects to terminate, all amounts Purchaser paid toward the purchase price shall be returned to Purchaser. If Purchaser defaults in performing his obligations hereunder, Seller may retain all amounts previously paid by Purchaser toward the purchase price as liquidated damages.

11. *Binding effect.* This contract shall be binding upon and inure to the benefit of the parties hereto and their respective heirs, legal representatives, successors, and assigns.

12. *Non-waiver.* No delay or failure by either party to exercise any right hereunder, and no partial or single exercise of such right, shall constitute a waiver of that or any other right, unless otherwise expressly provided herein.

13. *Headings.* Headings in this contract are for convenience only and shall not be used to interpret or construe its provisions.

14. *Governing law.* This agreement shall be construed in accordance with and governed by the laws of the State of New York.

15. *Counterparts.* This contract may be executed in two or more counterparts, each of which shall be deemed an original but all of which together shall constitute one and the same instrument.

16. *Time of essence.* Time is of the essence of this agreement.

17. *Entire agreement.* All prior understandings and agreements between the parties are merged in this contract, which constitutes the entire agreement between the parties. This contract is entered into after full investigation made by Seller, and neither party relies upon any statement or representation made by anyone unless contained herein.

18. *Notices.* All notices hereunder shall be in writing and delivered personally or mailed by certified mail, postage prepaid, addressed to the parties at their last known address.

This contract has been signed, sealed, and delivered the day and year first above written.

_____(L.S.)

Seller

_____(L.S.)

Purchaser

[Acknowledgments]



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Chapter 21 SALES AND EXCHANGES
Part IV. Forms

B. CONTRACTS OF SALE: RESIDENTIAL PROPERTY

25-21 Current Legal Forms for Real Estate FORM 21.19

FORM 21.19 Contract for sale of residence--installment sale contract--deed delivered in escrow until after installments paid

COMMENT

This form is an installment sale contract which serves the dual purpose of a contract of sale and a recordable security device for the payment of the installments. Under the installment sale arrangement the deed to the property is deposited in escrow, held during the installment payment period, and finally delivered to the purchaser after the installments have been paid.

Terms of installment sale contract

Under this agreement, the purchase price is to be paid in annual installments over an extended period. The purchaser is permitted to take possession of the property upon the execution of the contract. The deed is placed in escrow with a title company and is not to be delivered to the purchaser until the purchase price is completely paid. If the buyer defaults, the seller may elect either specific performance of the contract, or may enforce a forfeiture. The general practice in this type of transaction is to record the contract of sale, so that the equitable rights of the purchaser in the property become a matter of public record.

Tax aspects

This arrangement constitutes an exception to the general rule that a sale is deemed to occur when title passes. See The Tax Background § 21.02 at the beginning of this chapter. Here the transaction is completed for tax purposes when possession is transferred, which is upon the execution of the contract. The retention of the deed by the escrow agent is recognized for what it is: a security device. After assuming possession, the purchaser is considered as the owner of the property and may deduct interest, taxes, and all other deductible items otherwise available to an owner.

Disclosure of lead-based paint hazards

Federal law requires the seller of pre-1978 residential housing to disclose known information to the prospective purchaser on lead-based paint hazards. See 42 U.S.C. §§ 4851-4856; 40 C.F.R. Part 745 and 24 C.F.R. Part 35, Subpart A. The sales contract must include a lead warning statement and certain disclosure information. *See* discussion in comments to Form 21.15, *supra*. A sample lead-based paint sales contract rider, including both disclosure under the federal law and a lead-based paint contingency clause, is included in this chapter at Form 21.30, *infra*.

FORM

AGREEMENT entered into on January 10, _____ [year], between Boulder Development Company, an Arizona corporation, whose address is 100 West Campbell Street, Phoenix, Arizona ("Seller"), and Maude Ranier, a widow, whose address is 3000 North 18th Avenue, Phoenix, Arizona ("Buyer").

1. *Sale.* Seller shall sell and convey to Buyer, and Buyer shall buy, all that certain real property, together with all and singular the rights and appurtenances thereto in anyway belonging, situate in the County of Maricopa, State of Arizona, described as follows, to wit:

(Insert description)

2. *Purchase price.* The total purchase price for the property is \$108,000, which Buyer shall pay as follows: \$9,000 upon the execution of this agreement, the receipt of which Seller acknowledges; and \$9,000 on January 10th of each year, commencing _____ [date] and ending _____ [date], together with interest of 12 percent per annum on unpaid balances of the purchase price, payable with each installment.

3. *Improvement liens, taxes, and assessments.* Buyer shall pay, before they become delinquent, the following: all presently nondelinquent installments of principal and interest of any improvement liens against the property; all taxes and assessments levied on the property after December 31, _____ [year]; and all other assessments and charges for or on account of irrigation water or power used to furnish irrigation water, after the date of this agreement.

4. *Fire insurance.* Buyer shall insure against fire all present and future buildings upon the property, in the amount of their reasonable insurable value. Such insurance shall be placed with insurance companies approved by Seller for the parties' mutual benefit and protection. Buyer shall deliver the fire insurance policies, together with evidence that the premiums were paid, to Central Title and Trust Company ("Central Title"), to be held by Central Title or a mortgagee.

5. *Buyer's default.* If Buyer fails to (a) pay the required taxes, charges, assessments, or fire insurance premiums, (b) place the fire insurance policies with Central Title, or (c) pay any amount due, or to perform any required condition or covenant of any agreement for sale or mortgage, before the same becomes delinquent, Seller may pay the required amount, together with all necessary costs and legal fees. The amount advanced by Seller and its repayment shall be secured hereby and repaid to Seller by Buyer on demand, together with interest of 14 percent per annum from the date advanced by Seller until repaid. Any such payment by Seller shall be prima facie evidence that such payment was necessary. If Seller notifies Central Title in writing of any such advances, Central Title shall not deliver the deed to Buyer until Buyer repays the amount with interest. If Seller institutes suit against Buyer to enforce its rights hereunder and obtains a valid judgment against Buyer, Buyer shall pay all of Seller's expenses and reasonable attorney's fees.

6. *Delivery of deed in escrow.* Seller's Warranty Deed conveying the property to Buyer, subject only to easements, reservations, restrictions, and exceptions affecting title to the property (which are identified on the deed and which have previously been approved by Buyer), has been delivered to Central Title in escrow. The Deed shall, as provided in the escrow instructions to Central Title, be delivered to Buyer as soon as Buyer fulfills her obligations hereunder to Seller.

7. *Possession of property.* Buyer may take possession of the property and continue in possession while this agreement remains in effect. Buyer shall maintain the premises and all improvements thereto in good repair, shall permit no waste, and shall take the same care of such property as would a prudent owner.

8. *Assignment.* No person having an interest under this agreement shall make any transfer or assignment of rights hereunder unless the assignment is made in a manner, and accompanied by deeds and other instruments required by Central Title, or until Central Title's regular escrow fee and other costs, including its charge for the issuance of a new Title Insurance Policy, are fully paid, and all instruments are deposited in escrow with it.

9. *Indemnity of escrow agent.* Both parties shall promptly pay, indemnify and hold harmless Central Title against all costs, damages, attorney's fees, and liabilities which it in good faith or without its fault, incurs or sustains in connection with this agreement or any court action arising hereunder.

10. *Seller's remedies.* If Buyer defaults in making any payment or in performing any other obligation hereunder, Seller may either bring an action against Buyer for specific performance, or enforce a forfeiture of Buyer's interest in any lawful manner, including forfeiture by notice as provided in the escrow instructions or supplemental escrow instructions given to Central Title in connection with this transaction. If a forfeiture is enforced, Buyer shall forfeit all rights and interests in and to the property and appurtenances, and shall immediately surrender to Seller peaceable possession of the property and forfeit to Seller, as liquidated damages, all payments made hereunder together with all improvements placed on or in the property. In no event shall the provisions of this paragraph or of the escrow instructions affect Seller's other lawful rights or remedies against Buyer.

11. *Time of essence.* Time is of the essence of this agreement.

12. *Non-waiver.* No delay or failure by either party to exercise any right hereunder, and no partial or single exercise of any such right, shall constitute a waiver of that or any other right, unless otherwise expressly provided herein.

13. *Headings.* Headings in this agreement are for convenience only and shall not be used to interpret or construe its provisions.

14. *Governing law.* This agreement shall be construed in accordance with and governed by the laws of the State of Arizona.

15. *Counterparts.* This agreement may be executed in two or more counterparts, each of which shall be deemed an original but all of which together shall constitute one and the same instrument.

16. *Entire agreement.* All prior understandings and agreements between the parties are merged in this contract, which constitutes the entire agreement between the parties. This contract is entered into after full investigation made by Seller, and neither party relies upon any statement or representation made by anyone unless contained herein.

17. *Notices.* All notices hereunder shall be in writing and delivered personally or mailed by certified mail, postage prepaid, and addressed to the respective parties at their last known address.

The parties have hereunto caused this agreement to be entered into as of the day and year first written above.

(Seller)

(Buyer)

[Acknowledgments]



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B. CONTRACTS OF SALE: RESIDENTIAL PROPERTY

25-21 Current Legal Forms for Real Estate FORM 21.20

FORM 21.20 Contract of sale--deferred installment payments--deed given when price balance equals existing deed of trust balance

COMMENT

This form illustrates a deferred payment contract of sale under which the buyer enters into possession of the property on the execution of the contract. The property is encumbered by a deed of trust. Payments are credited first to the payment of taxes and assessments against the property, secondly, for the payment of insurance on the property, third, for the interest on the unpaid balance of the purchase price, and, finally, for the reduction of the unpaid principal of the balance of the purchase price. The seller is not permitted to further encumber the property or make any improvements or additions without the consent of the buyer. The Seller is required to continue to make payments due on the debt secured by the deed of trust. If the buyer defaults, the seller is entitled to retake immediate possession and the payments made by the buyer will be credited to the reasonable rental value of the property during the period the buyer used and occupied it.

Deferred payment contract

The deferred payment requirements under this contract require the buyer to make monthly payments to the seller. Once the principal balance due under the contract equals the balance of an existing deed of trust, the seller will convey title to the purchaser and the purchaser will assume the deed of trust.

Disclosure of lead-based paint hazards

Federal law requires the seller of pre-1978 residential housing to disclose known information to the prospective purchaser on lead-based paint hazards. *See* 42 U.S.C. §§ 4851-4856; 40 C.F.R. Part 745 and 24 C.F.R. Part 35, Subpart A. The sales contract must include a lead warning statement and

certain disclosure information. *See* discussion in comments to Form 21.15, *supra*. A sample lead-based paint sales contract rider, including both disclosure under the federal law and a lead-based paint contingency clause, is included in this chapter at Form 21.30, *infra*.

FORM

AGREEMENT entered into July 3, _____ [year], by and between Hollywood Realty Co., a California corporation ("Seller"), and Charles Crosby, of Los Angeles, California ("Buyer").

1. *Sale*. Seller shall sell and convey, and Buyer shall purchase, the real property situated in the City of Los Angeles, Los Angeles County, California, described as follows:

(Insert description)

on the following terms and conditions.

2. *Purchase price*. The total purchase price for the property is \$1,500,000, payable as follows: \$50,000 on the execution of this contract, receipt of which is acknowledged, and the balance in installments of \$14,500 per month payable to Seller at any place or places it designates in writing on the first day of each month commencing August 1, _____ [year], and continuing until the full purchase price together with interest has been paid. Seller shall credit each such monthly installment as follows:

(a) First, to a trust fund for the payment of taxes and assessments that are levied, assessed, or accrue against the property during the continuance of this contract. The amount of each installment to be credited to the trust fund will be determined by dividing the latest available tax bill for the property by 12. If taxes or assessments are increased during the continuance of this contract, Buyer's monthly installments shall be increased by the amount necessary to pay the tax or assessment increase.

(b) Secondly, to a trust fund for the payment of premiums on insurance policies issued by insurance companies selected by Seller insuring all buildings and improvements on the property for their full insurable value, with loss payable to Seller, against loss by fire. Seller shall apply all monies which it collects from the insurance policy (or policies) to the payment of the then unpaid principal balance of this contract, plus interest, in any order it elects.

(c) Thirdly, to interest of 12 percent per annum from the date of this contract on the then remaining unpaid principal balance of the purchase price.

(d) Finally, to reduction of the then remaining unpaid principal balance of the purchase price.

3. *Encumbrances*. The property is subject to the following encumbrance which is outstanding at the date of this contract and will be paid by Seller according to its terms:

Deed of Trust recorded in Book 1027 at Page 101 of the Official Records in the Office of the County Recorder of Los Angeles County, California, securing a promissory note in the principal amount of \$700,000 payable, together with interest on the remaining unpaid principal balance thereof at 12 percent per annum, to Home Savings and Loan Association in installments of \$10,000 on the 15th day of each month and having an unpaid principal balance of approximately \$600,000.

4. *No future encumbrances by seller.* Seller, after the date of this contract, shall not in any manner further encumber the property without Buyer's written consent.

5. *No future work by seller.* Seller, after the date of this contract, shall not undertake any additional off-site improvements or perform any other work on the property if it may result in the creation of a mechanic's lien on the property, unless Seller first obtains Buyer's written consent and files a surety bond with the city or county in which the property is located for the performance and payment of required materials and labor costs. If Seller undertakes additional improvements or work, it shall furnish the contractor with a copy of the Final Subdivision Report, issued by the California Real Estate Commissioner, pertaining to the tract and lot constituting the property.

6. *Risk of loss.* Buyer shall not be released from any obligation hereunder because of destruction of, or damage to, any present or future building or other improvement placed on the property, whether from fire or any other cause. Buyer shall bear all risk of loss to, or damage of, the property.

7. *Condition and repair of property.* Buyer acknowledges that as of the date hereof, the property, including the buildings and improvements thereon, are in good condition, order, and repair. Buyer shall, at his expense, maintain the property, buildings, and improvements in as good order and repair as they are now, reasonable wear and tear excepted.

8. *Inspection and repair.* Seller may enter upon and inspect the property, buildings, and improvements at least once during each calendar month. Buyer shall, at his expense, make all required repairs noted by Seller, within 10 days after Seller's written notice is given with respect thereto.

9. *Maintenance of buildings.* Buyer shall not remove or permit removal from the property of any building or other improvement without Seller's written consent, or commit or permit the commission of any waste of the property or of any building or improvement.

10. *Alterations.* Buyer shall not renovate, remodel, or alter any present or future building or improvement on the property, or construct any additional building or improvement thereon without first giving Seller written notice and submitting plans for the renovating, remodeling, or construction, for the purpose of receiving Seller's written approval with regard thereto.

11. *Mechanics' liens.* Buyer shall indemnify and hold harmless Seller and its property, including its interest in the subject property, from liability for all mechanics' liens or other expenses or damages resulting from any renovations, alterations, buildings, repairs, or other work placed on the property by Buyer.

12. *Personal injuries.* Buyer shall indemnify and hold Seller free and harmless from all demands, loss, or liability resulting from the injury to or death of any person or persons because of Buyer's negligence or strict liability or the condition of the property at any time after the date possession of the property is delivered to Buyer.

13. *Possession.* Buyer may enter into possession of the property on execution of this contract and continue in possession so long as he is not in default in its performance.

14. *Default.* Buyer's payment of all monies becoming due hereunder and the performance of all of his other obligations hereunder are conditions precedent to Seller's performance of any of its obligations herein contained. If Buyer fails either to pay any amount due within 15 days after the due date thereof, or to comply with any of his other obligations hereunder, then:

(a) Seller shall be released from all obligations in law or equity to convey the property to Buyer;

(b) Buyer shall forfeit all rights to the property or to its possession;

(c) Seller shall have an immediate right to retake possession of the property; and

(d) Payments previously made by Buyer under this contract shall be credited by Seller to the reasonable rental value of the property during the period Buyer had its use and occupancy, and any excess of such payments over the reasonable rental value shall be refunded to Buyer.

(e) In lieu of the foregoing, Seller may declare, by notice to Buyer, the entire unpaid balance of the purchase price specified in this contract to be due and payable, and may by appropriate action, in law or in equity, proceed to enforce payment thereof.

(f) All rights or remedies given herein to Seller shall not be exclusive of, but in addition to, all other rights and remedies which Seller may have at law or in equity.

15. *Conveyance of title.* When the remaining unpaid principal balance of the purchase price stated above equals (but does not exceed) the remaining unpaid principal balance owing on that certain promissory note secured by a Deed of Trust on the property in favor of Home Savings and Loan Association, Seller shall execute and deliver to Buyer, at his request, a good and sufficient deed conveying to him good and marketable title to the property, subject to the Deed of Trust, as evidenced by a standard form C.L.T.A. title insurance policy, in the full amount of the purchase price, which policy shall be procured and paid for by Seller. Buyer shall then assume the obligations on the promissory note and Deed of Trust.

16. *No representations.* Buyer has inspected the property and has been assured by means independently of Seller or its agents of the truth of all facts material to this contract. Buyer is purchasing the property, as it is described in this contract, as a result of such inspection or investigation and not by or through any representations made by Seller or its agents. Buyer waives all claims for damages or for rescission or cancellation of this contract because of any representations made by Seller or its agents, except for those expressly contained herein. Seller and its agents shall not be liable for or on account of any inducements, promises, representations, or agreements not contained herein. Seller has not authorized its agents or employees to make any warranties or representations with respect to the property, and if any are so made, the same shall not be binding upon Seller.

17. *Entire agreement.* All prior understandings and agreements between the parties are merged in this contract, which constitutes the entire agreement between the parties. This contract is entered into after full investigation made by Seller, and neither party relies upon any statement or representation made by anyone unless contained herein.

18. *Attorney's fees.* If any litigation is commenced between the parties concerning the property or this contract, or the parties' respective rights and duties hereunder, the prevailing party may recover, in addition to other relief granted, reasonable attorney's fees.

19. *Notices.* All notices hereunder shall be in writing and delivered personally or mailed by certified mail, postage prepaid, addressed, if to Buyer, at the address of the property, or, if to Seller, at 100 Wilshire Boulevard, Los Angeles, California. Either party may change its address by notifying the other party in writing as provided above.

20. *Binding effect.* This agreement shall be binding upon and inure to the benefit of the parties and their respective heirs, executors, administrators, successors, and assigns. Nothing in this paragraph shall be construed as Seller's consent to Buyer's assignment of this contract or of any interest herein, except as provided in paragraph 21.

21. *Assignment.* Buyer shall not, other than by will, intestate succession, or right of survivorship, assign this contract or any interest herein, without receiving Seller's prior written consent.

22. *Time of essence.* Time is of the essence of this agreement.

23. *Non-waiver.* No delay or failure by either party to exercise any right hereunder, and no partial or single exercise of any such right, shall constitute a waiver of that or any other right, unless otherwise expressly provided herein.

24. *Headings.* Headings in this contract are for convenience only and shall not be used to interpret or construe its provisions.

25. *Governing law.* This agreement shall be construed in accordance with and governed by the laws of the State of California.

26. *Counterparts.* This contract may be executed in two or more counterparts, each of which shall be deemed an original but all of which together shall constitute one and the same instrument.

The parties have set their hand and seals hereto the day and year above written.

Attest:

Secretary

Hollywood Realty Co.

by _____

President

Charles Crosby



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B. CONTRACTS OF SALE: RESIDENTIAL PROPERTY

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FORM 21.21 Contract of sale--cash and purchase money deed of trust

COMMENT

A contract for the sale of real property, such as a residence to be occupied by a buyer, should spell out the terms to be embodied in the deed which will be delivered upon closing. If the full purchase price will not be paid in cash at the closing, the seller may be willing to stand in the shoes of a mortgagee and accept a deed of trust arrangement whereby the unpaid balance is periodically reduced by payments to named trustees.

Deed of trust

In the standard deed of trust, payments are applied first to interest and then to the amortization of principal. For tax purposes, a deed of trust is treated like a mortgage:

- (1) Interest payments are deductible currently by the purchaser;
- (2) Payments of interest are ordinary income to the seller;
- (3) Payments of principal are returns of capital to the holder of the security interest.

Interest

Interest on a mortgage of the owner's residence is deductible when paid or accrued by a person who has a legal or equitable interest in the property. However, if it represents an initial cost of the property, interest is not deductible. It may be capitalized or deducted at the taxpayer's annual option if it is an item properly to be charged to the capital account.

Installment sale accounting for gain

If some or all of the sales price is paid after the year of sale, the installment method is applied automatically, unless the seller elects to the contrary. If the property sold is not the seller's residence, but was held in a business or for the production of income, any amounts recaptured as ordinary income due to prior deductions of accelerated cost recovery or accelerated depreciation (if any) are recognized and taxed in the year of sale, whether or not cash payments are received in the year of sale. After taking into account any recapture amounts, the gain in excess of the recapture amount is recognized proportionately each year installment payments are received. Under the installment method, the seller reports as income in any taxable year the proportion of the payments received during that year which the excess gross profit to be realized bears to the total contract price. The character of the gain is not changed by use of the installment method. For a further discussion of the installment method, see *The Tax Background (TB)* § 21.11 at the beginning of this chapter. See TB § 21.07 for coverage of the recapture rules.

Imputed interest

To the extent that the purchase price of an individual's principal residence does not exceed \$250,000, interest may be imputed under a special rule. If a contract for the sale of an individual's principal residence by deferred payments provides for no interest, or for interest at a rate more than 1 percent below the rate set out in the Regulations, a prescribed portion of the gain must be treated as interest. If the debt instrument given for the property does not exceed \$2.8 million, the imputed interest, or discount rate, cannot exceed 9 percent. The unstated interest is treated as ordinary income to the seller, and as an interest deduction to the buyer. See TB § 21.10[3].

Information reporting of real estate transactions

The attorney or title company responsible for closing title is required to report the real estate transaction to the IRS. In addition, a statement must be provided to the customer before January 31 of the year following the closing. If an attorney or title company is not involved in the closing, the information reporting is the responsibility of the mortgage lender. See TB § 21.02[4].

Disclosure of lead-based paint hazards

Federal law requires the seller of pre-1978 residential housing to disclose known information to the prospective purchaser on lead-based paint hazards. *See* 42 U.S.C. §§ 4851-4856; 40 C.F.R. Part 745 and 24 C.F.R. Part 35, Subpart A. The sales contract must include a lead warning statement and certain disclosure information. *See* discussion in comments to Form 21.15, *supra*. A sample lead-based paint sales contract rider, including both disclosure under the federal law and a lead-based paint contingency clause, is included in this chapter at Form 21.30, *infra*.

FORM

AGREEMENT entered into on February 10, _____ [year], between John Costas, residing at 10 Jay Street, Washington, D.C. ("Seller"), and Jack and Sally Olwick ("Buyers").

1. *Sale*. In consideration of the deposit of \$1,000 made by Buyers, Seller shall sell, and Buyers shall purchase, the following real property: Lot 15 in Square 3, with all improvements on it, known as No. 10 Rock Creek Drive in the

District of Columbia.

2. *Terms of sale.* The total purchase price of the property is \$100,000, payable as follows:

(a) \$10,000 by check, subject to collection, simultaneously with the execution of this agreement;

(b) \$20,000 at the date of conveyance, by certified check made payable to the order of Seller;

(c) the balance of the purchase money, in the principal amount of \$70,000, is to be secured by a deed of trust on the property securing a note, to be paid in 60 equal monthly installments, including interest of 10 percent per annum, the payment of each installment to be applied, first, to the payment of interest on the amount of principal remaining unpaid, and the balance credited to principal.

3. *Financing.* This contract is contingent upon Buyers obtaining the necessary financing within 30 business days.

4. *Warranties.* Seller warrants that the plumbing, heating, and electrical facilities shall be in good working order at the time of settlement.

5. *Seller's covenant.* Seller shall provide a termite letter on the settlement date.

6. *Trustees.* Trustees in the deed of trust are to be named by the parties secured thereby.

7. *Title warranty.* The property is sold free of encumbrances. Title is to be good of record and in fact; subject, however, to covenants, conditions, and restrictions of record, if any. Otherwise, the deposit is to be returned and the sale cancelled at the option of the purchaser unless the defects are of such character that they may readily be remedied without legal action, but the seller and agent are expressly released from all liability for damages by reason of any defect in the title.

8. *Settlement adjustments.* Rents, taxes, water rent, insurance and interest on existing encumbrances, if any, and operating charges are to be adjusted to the date of the transfer. General and special taxes, are to be adjusted according to the certificate of taxes issued by the Collector of Taxes of the District of Columbia, except that assessments for the improvements completed before the date of this agreement, whether levied or not, shall be paid by Seller or allowance made therefor at the time of transfer.

9. *Title expenses.* Examination of title, tax certificate, conveyancing, notary fees and all recording charges, including those for any purchase money trust, shall be at the purchaser's expense. If upon examination the title is found defective, Seller shall pay the cost of title examination and also an agent's commission just as if the sale had actually been consummated and all the terms of this contract complied with by the parties.

10. *Settlement.* Within 60 days from the date of acceptance by the seller, or as soon thereafter as a report of the title can be secured if promptly ordered, the seller and purchaser are required and agree to make full settlement in accordance with the terms thereof. If the deposit is forfeited, the seller shall allow the agent one half of the deposit as compensation for his services.

Settlement is to be made at the office of James Martin, Esq., or at the Title Company searching the title. Deposit with the Title Company or with James Martin of the purchase money, the deed of conveyance for execution, and all other papers required of either party by the terms of this contract shall be considered good and sufficient tender of performance of those terms.

11. *Possession.* Seller shall give possession at the time of settlement. If he fails to do so he shall become a tenant by sufferance of the purchaser and waives all notice to quit, as provided by the laws of the District of Columbia.

12. *Risk of loss.* Seller assumes the risk of loss or damage to the property by fire or other casualty until the deed of conveyance is recorded.

13. *Notices.* All notices of violations of municipal orders or requirements noted or issued by any department of the District of Columbia, or any prosecutions in any court of the District of Columbia on account of the violations which affect the property at the date of the settlement of this contract shall be complied with by Seller and the property conveyed free thereof. This provision shall survive delivery of the deed.

14. *Broker's fee.* Seller shall pay John Bryant, his agent, a commission amounting to the standard fee. The Title Company or the Real Estate Office through which settlement is made is authorized and directed to deduct this commission from the proceeds of the sale and to pay it to the agent. Entire deposit is to be held by the Title Company until settlement is made.

15. *Binding effect.* This agreement shall be binding upon and inure to the benefit of the parties and their respective heirs, legal representatives, and assigns.

16. *Non-waiver.* No delay or failure by either party to exercise any right hereunder, and no partial or single exercise of any such right, shall constitute a waiver of that or any other right, unless otherwise expressly provided herein.

17. *Headings.* Headings in this contract are for convenience only and shall not be used to interpret or construe its provisions.

18. *Governing law.* This contract shall be construed in accordance with and governed by the laws of the District of Columbia.

19. *Counterparts.* This contract may be executed in two or more counterparts, each of which shall be deemed an original but all of which together shall constitute one and the same instrument.

20. *Time of essence.* Time is of the essence of this agreement.

21. *Entire agreement.* This agreement, made in triplicate, contains the entire agreement between the parties but shall not be effective until ratified by Seller.

22. *Notices.* All notices hereunder shall be in writing and delivered personally or mailed by certified mail, postage prepaid, addressed to the respective parties at their last known address.

February 10, _____ [year]

Jack Olwick, Purchaser

Sally Olwick Purchaser

John Costas, Seller

Mary Costas, Seller



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B. CONTRACTS OF SALE: RESIDENTIAL PROPERTY

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FORM 21.22 Contract for sale of residence--deferred payments secured by landlord-tenant arrangement

COMMENT

In this form of contract the relationship between the seller and purchaser, pending payment of the full purchase price, is that of landlord and tenant. The purchaser takes immediate possession. He is to receive a deed upon completing payments of the required installments. During the tenancy period he is obligated to pay taxes, assessments, and water rents and is required as well to purchase fire and liability insurance. Upon default by the purchaser, the contract provides that the seller may recover possession by summary proceedings, usual in the landlord and tenant relationship. The effect and enforceability of this type of contract is a matter of local law. The purchaser will normally record the agreement so as to give public notice of his equity in the property.

Sale for tax purposes

From the tax viewpoint, the purchaser is treated as the owner of the property beginning with the date of his possession, so that all deductions for interest, taxes, and other proper items will thereafter be available to him. For the purpose of reporting gain or loss, the date of the change in possession is also the date of the completion of the transaction.

Deferred payment sale

The deferred payments under this contract are not represented by a note or mortgage or other negotiable document. The consideration given by the purchaser is only a contract right. If this sale cannot qualify as an installment transaction, the question is whether the seller realizes the value of the contract right in the taxable year of the "sale." When the seller holds a mere contract right so that there are no secured "obligations" with a fair market value, it seems that a cash basis seller is

not taxable until he receives the payments. He reports gain only when the installment payments received by him exceed his adjusted basis for the property. The situation with respect to an accrual basis seller is less certain, although there is some authority for his receiving similar treatment. In either case (cash method or accrual method seller), if the transaction is treated as an installment sale, it may be subject to imputed interest because no interest is stated, and recognition of income may be accelerated under the proportionate disallowance rule. Deferred payment sales, imputed interest, and the proportionate disallowance rule are discussed in The Tax Background (TB) §§ 21.10 and 21.11, at the beginning of this chapter.

Information reporting of real estate transactions

The attorney or title company responsible for closing title is required to report the real estate transaction to the IRS. In addition, a statement must be provided to the customer before January 31 of the year following the transaction. The information reporting requirements are discussed in TB § 21.02[4].

Disclosure of lead-based paint hazards

Federal law requires the seller of pre-1978 residential housing to disclose known information to the prospective purchaser on lead-based paint hazards. *See* 42 U.S.C. §§ 4851-4856; 40 C.F.R. Part 745 and 24 C.F.R. Part 35, Subpart A. The sales contract must include a lead warning statement and certain disclosure information. *See* discussion in comments to Form 21.15, *supra*. A sample lead-based paint sales contract rider, including both disclosure under the federal law and a lead-based paint contingency clause, is included in this chapter at Form 21.30, *infra*.

FORM

AGREEMENT made February 12, _____ [year], between Ace Development Corporation, a domestic corporation with its principal office at 200 South Street, Albany, New York ("Seller"), and David Polling, residing at 105 Williams Avenue, Albany, New York ("Purchaser").

1. *Sale.* Seller shall sell and Purchaser shall purchase the following described property:

(Description)

2. *Price and terms of payment.* The total purchase price for the premises is \$81,000, which Purchaser shall pay as follows:

(a) \$1,000 on the execution and delivery of this contract, receipt of which Seller acknowledges; and

(b) \$836.73 on April 1, _____ [year], and a similar sum on the first day of each subsequent month until the balance of the purchase price is paid in full. The monthly installments shall be applied, first, to the payment of interest at 10 percent per annum on all unpaid balances of the purchase price, and, second, to the reduction of the principal amount of the purchase price. The principal balance may be prepaid, in whole or in part, without premium or penalty. Partial payments of principal installments shall be applied to such installments in the inverse order of their maturity.

3. *Deed upon full payment.* Installment payments shall continue until the purchase price, plus accrued interest, is paid in full. At that time, Purchaser shall receive a deed in proper statutory form for record, containing the usual full covenants and warranty, duly executed and acknowledged by Seller, so as to convey to Purchaser the fee simple of the premises, free of all encumbrances except as follows:

(Enumerate exceptions in title)

4. *Additional payments.* In addition to the required monthly payments, Purchaser shall pay Seller, on the first day of every month, a sum equal to one-twelfth of (a) the annual taxes, assessments, and water rents taxed, assessed, or levied against the premises, and (b) the annual insurance premiums.

5. *Apportionments.* Taxes, water rates, and insurance premiums shall be apportioned as of March 1, _____ [year].

6. *Insurance.* Purchaser shall obtain and maintain not less than \$80,000 of fire insurance to cover Seller's interest, and liability insurance in favor of Seller covering up to \$100,000 for injury or death to a single person and up to \$200,000 for any one accident.

7. *Possession as tenant; default.* Purchaser may enter into possession and occupancy of the premises on March 1, _____ [year]. Until delivery of the deed, all payments and improvements made to the premises shall be regarded as rent and the relationship between the parties shall be that of landlord and tenant. If Purchaser defaults in any manner in the performance of any of his obligations hereunder, including failure to make any payment within 10 days after its due date, Seller may maintain summary proceedings for Purchaser's removal from the premises, with the same force and effect as for the nonpayment of rent. In that event, and upon a final order in summary proceedings, Seller shall be released and discharged from all claims or obligations hereunder, and all payments made by Purchaser shall be deemed rent for the use and occupation of the premises, as herein previously provided.

8. *Assignment.* Purchaser shall not assign this contract without Seller's prior written consent.

9. *Binding effect.* This agreement shall be binding upon and inure to the benefit of the parties and their respective heirs, legal representatives, successors, and assigns.

10. *Non-waiver.* No delay or failure by either party to exercise any right hereunder, and no partial or single exercise of any such right, shall constitute a waiver of that or any other right, unless otherwise expressly provided herein.

11. *Headings.* Headings in this contract are for convenience only and shall not be used to interpret or construe any of its provisions.

12. *Governing law.* This agreement shall be construed in accordance with and governed by the laws of the State of New York.

13. *Counterparts.* This agreement may be executed in two or more counterparts, each of which shall be deemed an original but all of which together shall constitute one and the same instrument.

14. *Time of essence.* Time is of the essence of this agreement.

15. *Entire agreement.* All prior understandings and agreements between the parties are merged in this contract, which constitutes the entire agreement between the parties. This contract is entered into after full investigation made by Seller, and neither party relies upon any statement or representation made by anyone unless contained herein.

16. *Notices.* All notices hereunder shall be in writing and delivered personally or mailed by certified mail, postage prepaid, addressed to each of the parties at their last known address.

The parties hereto have executed this agreement.

Attest:

Secretary

Witness:

Ace Development Corp.

by _____

President

David Polling, Purchaser

[Acknowledgments]



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Current Legal Forms for Real Estate

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Current Legal Forms for Real Estate
Chapter 21 SALES AND EXCHANGES
Part IV. Forms

B. CONTRACTS OF SALE: RESIDENTIAL PROPERTY

25-21 Current Legal Forms for Real Estate FORM 21.23

FORM 21.23 Contract for sale of residence--contingencies for mortgage commitment, pest, mold and engineering inspections--broker's form--plain language form--seller warranties and representations

COMMENT

This form contains several provisions that are particularly useful in residential real estate sale contracts. These include the contingencies for a mortgage commitment, separate termite and structural-mechanical engineering inspections, and attorney approval. In addition, the contract includes a listing of specific personal property and fixtures sold with the property and seller representations and warranties about the condition of the building, fixtures, and appliances.

Contingencies for satisfactory inspection reports

Under this agreement, the purchaser is allowed to have the property inspected for termite and other pest infestation, for the existence of mold, and for structural and mechanical problems. If insect infestation or resulting damage is reported, the seller has the option to exterminate and repair any damage, or cancel the contract. If mold is found, the seller has the option to remediate the problem, or cancel the contract. The purchaser, however, may waive this or any other contingency in the agreement. If the structural-mechanical engineering report shows any defects, the seller may either correct the problem, credit the estimated cost of repair against the selling price, or cancel the contract. Because a negative report gives the seller the right to cancel and the buyer may waive the defects, the parties are in a position to negotiate who will pay for repairs or whether the costs will be shared. Although the buyer may waive the defects, there is the risk that the seller will cancel the contract and refuse to negotiate new contract terms. If the purchaser wants the benefit of the inspections, but with less risk of seller cancellation or renegotiation, the contingencies could be drawn in a different manner. Thus, the seller could agree to pay the cost of any reported defects, but only up to a specified amount. If the costs of correction exceed the specified amount, then the seller would have the option to cancel the agreement. Separate ceiling

amounts may be provided for each inspection contingency, or the ceiling may apply to the total costs of repair and correction. This assures the purchaser that defects shown in the reports will be corrected, at least up to the specified cost, without increasing the purchaser's costs to complete the transaction.

Seller representations and warranties

The seller, in this agreement, assumes more responsibility than the minimum obligation to convey good or marketable title. For example, the seller warrants that, at the time of closing, the electrical, heating and various other building systems will be in good working order. This means that, beyond the risk of loss from fire or other casualty, the seller must maintain and repair these building systems until the closing. This obligation also extends to appliances included in the sale. The appliances are specifically listed in the provision which includes the fixtures and personal property also sold to the buyer. Other representations of the seller relate to environmental and hazardous material risks. For example, the seller states that a specific hazardous building material is not used in the building, and that the water source is a private rather than a community well and the water is drinkable or potable. For specific forms relating to environmental representations and warranties, *see* Vol. 33, Chapter 25, *Environmental Considerations in Real Estate Transactions*, *infra*. Other seller representations relate to local real estate tax reductions which may only apply to the seller and not the buyer. These representations may be used as a model for specific risks or tax laws in other locations.

Disclosure of lead-based paint hazards

Federal law requires the seller of pre-1978 residential housing to disclose known information to the prospective purchaser on lead-based paint hazards. *See* 42 U.S.C. §§ 4851-4856; 40 C.F.R. Part 745 and 24 C.F.R. Part 35, Subpart A. The sales contract must include a lead warning statement and certain disclosure information. *See* discussion in comments to Form 21.15, *supra*. A sample lead-based paint sales contract rider, including both disclosure under the federal law and a lead-based paint contingency clause, is included in this chapter at Form 21.30, *infra*.

Approval by attorney

When a contract is made up by the parties themselves, or a real estate broker, attorney review and approval is advisable. This contract contains a three day review period by the attorneys, who are authorized to disapprove and void the contract. The provision in this agreement is one required by New Jersey law, but may serve as a model for contracts used by real estate brokers or others who frequently use contracts in real estate transactions. The attorney approval contingency would not be appropriate when the initial contract is drawn by an attorney for a client in a specific transaction. It would be useful, however, if the client intends to use the same form over and over, such as a real estate broker or developer.

Plain language laws

In some jurisdictions, consumer contracts are required to be written in plain language. Plain language laws generally provide for damages and penalties for violations; however, such violations do not render the underlying contract void or voidable and are not a defense to an action under the contract. New Jersey's plain language law covers leases and purchases of real or personal property, regardless of the value of the property, as well as other consumer transactions. Under that law, a contract with certain characteristics tends to negate its being a plain language form.

These include confusing cross references, longer than necessary sentences, double negatives, exceptions to exceptions, confusing or illogical order of sentences or sections, and use of obsolete words. That law requires the agreement to be simple, clear, understandable, and easily readable. The statute encourages a logical division of sections with captions, a table of contents or index for contracts over 3,000 words, and equal prominence and at least ten-point type for exception or conditions to the main promise. Although this form has been written in an attempt to comply with the plain language law, it has not been submitted to or approved by the New Jersey Attorney General for an opinion that it complies with the law as to its form and language.

FORM

THIS IS A LEGALLY BINDING CONTRACT THAT WILL BECOME FINAL WITHIN THREE BUSINESS DAYS. DURING THIS PERIOD YOU MAY CHOOSE TO CONSULT AN ATTORNEY WHO CAN REVIEW AND CANCEL THE CONTRACT. SEE THE SECTION ON ATTORNEY REVIEW FOR DETAILS

CONTRACT OF SALE

Dated: May 7, _____[year]

1. *Purchaser, seller and property.* John Wells and Alice Wells, husband and wife, residing at 2 Elm Lane, Arrowwood, New Jersey, Purchaser, agree to purchase from James Mills and Carol Mills, husband and wife, residing at 43 Maple Road, Riverwater, New Jersey, Seller, the following property:

Lot 52, Block 5378 on a certain map entitled "Map of Riverwater Estates" filed in the Office of the Clerk of Morris County as Map No. 9876 on June 1, 1982; also known as 43 Maple Road, Riverwater, New Jersey

Being Lot 8, Block 987 on the Tax Map of Riverwater Township, N.J.

Approximate size of lot: 175 x 350, more or less or as an accurate survey may show.

2. *Purchase price and payment*

The total purchase price is \$160,000

Payment as follows:

Initial deposit paid on signing this Agreement, for which this is a receipt, to be held in trust account \$1,000

Additional cash deposit to be paid within 14 days after the later of this Agreement or written attorney approval of this Agreement \$15,000

Amount of mortgage \$120,000

Balance of purchase price, by cash or certified check, on delivery of warranty deed if Seller received one, otherwise a bargain and sale, with covenants against grantor's acts, deed \$24,000

3. *Deposit money.* Cross out the paragraph which does not apply:

Delivered at closing. All deposit money paid by Purchaser will be held in Seller's attorney's trust account until the closing of title. At the closing the deposit money will be paid to Seller. If this contract is voided by either party, the deposit money will be disbursed pursuant to the written instruction of Purchaser or Purchaser's attorney and Seller.

Delivered before closing. Purchaser authorizes the delivery of all deposit money to Seller as soon as this Agreement is signed unless it contains contingencies which need to be satisfied. If there are unsatisfied contingencies, Seller's attorney will hold the deposit money until all of them are satisfied or waived, after which the deposit money will be delivered to Seller. If the contingencies are not satisfied or waived, the deposit money will be returned to Purchaser and this Agreement will be voided, as provided below.

4. *Mortgage contingency.* This Agreement is contingent on Purchaser obtaining a firm commitment for a conventional mortgage of \$120,000 at prevailing interest rates for 30 years, with monthly payments based on a 30-year amortization payment schedule, secured by a first mortgage on the property. Purchaser will immediately apply for the mortgage commitment, and pay all application, origination, and other fees to obtain the mortgage financing. Unless Seller is notified that Purchaser will complete this transaction without the mortgage commitment, either party may void this Agreement, by giving written notice to the other party or the party's attorney, if Purchaser does not receive a written mortgage commitment within 45 days after this Agreement is signed or is approved by both parties' attorneys, whichever occurs later. Seller or its attorney, in writing, may extend the time for Purchaser to obtain the required mortgage commitment. If the mortgage commitment is not received and there is no written waiver or extension, this Agreement will be void, the deposit money shall be returned to Purchaser, and neither party shall have any claim against the other or the property.

5. *Other financing.* The following paragraph(s) apply only if filled in and completed:

Purchaser to assume existing mortgage. Purchaser will assume and agree to pay the first mortgage which is now a lien against the property. There is presently due \$ _____, approximately, with interest at _____ percent per year, due and payable on or about _____. Seller states that the mortgage will be in good standing at the time of the closing of title. This means that all required mortgage payments will be paid as of the date of the closing and that the lender will have no legal basis for demanding full payment of the mortgage or foreclosing against the property.

Seller to take back a mortgage. Purchaser will sign and give to Seller a purchase money note and mortgage in the usual form. The note and mortgage will be prepared by Seller's attorney at Purchaser's expense. The attorney's fee will not exceed \$ _____. The principal amount due under the note and mortgage will be \$ _____. The interest rate will be _____ percent, and the term _____ years. Principal and interest will be paid as follows:

6. *Closing, deed, and closing papers.* The closing of title will be at the office of Seller's attorney, or at any other place mutually agreed upon, on or before July 7, _____ [year] at 10:00 am. Seller will sign and deliver a deed containing a legal description of the property, transferring title to the property free of all encumbrances except as stated in this agreement, together with an affidavit of title. Purchaser will pay the balance of the purchase price at the closing. The parties agree to sign other papers reasonably necessary to complete this transaction at the closing.

7. *Adjustments at closing.* The following will be apportioned as of the date of the closing of title: real estate taxes, rents, interest on mortgages, fuel, insurance premiums, water rents, sewer service charges, municipal utilities, and rent securities, if any.

8. *Inspection and possession.* Seller will permit Purchaser or Purchaser's representative to make an inspection of the

premises at a reasonable time before the closing of title. Physical possession of the premises will be delivered to Purchaser at the time of closing of title and delivery of the deed.

9. *Assessments.* Seller will pay, or credit to Purchaser at the closing of title, all assessments for municipal or other public improvements completed or under construction at the date of this Agreement.

10. *Claims paid at closing.* Seller may pay any person with a claim or right affecting the property from the proceeds of this sale at the closing of title.

11. *Title.* Seller will convey clear and marketable title, insurable at regular rates by a reputable title insurance company licensed to do business in New Jersey, subject only to the rights of tenants, if any, and the claims and rights described as follows:

Easements and restrictions. This sale is subject to easements and restrictions of record, if any. Generally, an easement is a right of a person other than the owner to use a portion of the property for a special purpose. A restriction is a recorded limitation on the manner of use of the property by the owner. Purchaser does not have to complete this purchase, however, if any easement or restriction would substantially interfere with the use of the property for residential purposes.

Survey facts. This sale is subject to any state of facts that an accurate survey of the property may disclose. It is understood and agreed that the buildings, driveway, septic and/or well, if any, are within the boundary lines of the property, and that there are no encroachments whatsoever. If any facts disclosed by an accurate survey would substantially interfere with the use of the property for residential purposes, Purchaser does not have to complete this purchase.

Zoning ordinances. The sale is subject to applicable zoning ordinances. Neither the property nor its current use violate applicable zoning ordinances.

Mortgage. If Purchaser has agreed to take title subject to any existing mortgage(s), or to assume any existing mortgage(s), title will be transferred subject to it (them).

12. *Tenants.* This sale is subject to the following tenancies. These tenancies are not in violation of existing municipal, county, state, or federal laws, ordinances, rules, or regulations.

Name	Location	Rent	Term
_____	_____	_____	_____
_____	_____	_____	_____
_____	_____	_____	_____
_____	_____	_____	_____
_____	_____	_____	_____

13. *Personal property and fixtures included in sale.* Included in the sale price, unless specifically excluded in this agreement, are the following: Gas and electric fixtures, cooking ranges, stoves and ovens, exhaust fans and hoods, furnaces, hot water heaters, sump pump, linoleum, built in refrigerator, dishwasher and central air conditioning, water softener unless a rental, chandeliers, drapery and curtain hardware, cornices, radiator covers, interior and exterior window shutters, porch blinds, venetian blinds, television antenna, screens, storm sash, shades, awnings, bathroom fixtures, shelving, mirrors and fireplace screens attached to the building, storm windows and doors, attic fans, built in furnishings and furniture, smoke or fire and burglar detection devices, mailbox, trees, shrubbery and plantings, and all

fixtures not specifically listed here, if any (and if not belonging to any tenant of the property) now on the property.

Not included in this sale are the following: microwave oven, exercise equipment, stereo equipment and wiring, and outdoor furniture.

14. *Risk of loss.* The risk of loss to the property by fire, casualty, or otherwise, except ordinary wear and tear, is on Seller until closing of title. Except for ordinary wear and tear, Seller will repair damage arising before the closing of title or make appropriate deductions from the purchase price. However, if the cost of replacement or repair exceeds 25 percent of the purchase price, Purchaser may cancel this Agreement and receive back the deposit money.

15. *Condition of property.* The seller states that the roof is free of leaks. The heating, plumbing, electrical, hot water, water supply, and if included with the property, the air conditioning, septic and well systems and all appliances included in this sale will be in good working order at the time of closing of title, but these representations will not survive the closing of title. Seller will cut grass and remove snow until the closing of title, and deliver the premises in broom clean condition. The parties enter into this Agreement with knowledge of the value of the land and buildings on the property, and without reliance on any representation made as to the character or quality of the property or other items included in the sale, except as stated in this Agreement.

16. *Broker.* Seller will pay Westwood Real Estate Co., pursuant to a separate commission agreement, if Westwood is the listing broker, or will pay the listing broker and Westwood as subagent, pursuant to that agreement, if Westwood is the subagent negotiating this Agreement. The broker's commission will be earned, due and payable by cash or attorney trust check on the closing of title and delivery of the deed. Westwood has permission and authority to make known the names, sale price, terms and financing used by the parties in the ordinary course of Westwood's business.

17. *Health and safety laws.* If Seller is notified by an appropriate governmental authority that the property is subject to violations of housing, building, fire, health, or safety laws, Seller will correct the violations at his expense before title is closed, and the property will be transferred free of them. Seller represents that the property complies with the requirements of the New Jersey Hotel and Multiple Dwelling Health and Safety Act, but this representation does not extend to minor repairs or redecoration.

18. *Binding effect.* This Agreement is binding in accordance with its terms on all persons who sign it, and on their respective heirs, executors, administrators, successors, and assigns.

19. *Entire agreement.* All prior understandings and agreements between the parties are merged in this contract, which constitutes the entire agreement between the parties. This contract is entered into after full investigation made by Seller, and neither party relies upon any statement or representation made by anyone unless contained herein.

20. *Assignment.* This Agreement cannot be assigned without Seller's written consent. This means that Purchaser may not transfer the rights under this Agreement to buy the property to anyone else, unless Seller approves the transfer in writing.

21. *Pest and Mold inspection contingency.* This Agreement is contingent on an inspection by a reliable pest control company for termites and other wood-destroying insects and related structural damage to the building(s) on the premises, and inspection by an environmental engineer or hygienist for the presence of mold, both within 14 days after the later of the signing of this Agreement or attorney approval. If the inspection report shows no infestation or damage, and no mold is found this Agreement is binding and effective. If the report shows infestation or damage, or the presence of mold, Seller will promptly notify Purchaser in writing whether Seller intends to pay for the extermination and for repair of any structural damage from the infestation before the closing of title, and pay for the removal of the mold or to cancel this Agreement and cause the return of Purchaser's deposit money. If Purchaser accepts the deposit refund, this Agreement will be terminated and unenforceable. Purchaser may waive the pest and mold inspection contingency, either

by stating so in writing or by refusing the refund, in which event this Agreement will be binding and enforceable. Purchaser will pay for the cost of the pest inspection and mold inspection.

22. *Attorney review.* If this Agreement is entered into through a real estate broker, the following applies:

Study by attorney. Either party may choose an attorney to study this contract. The attorney must complete the review within three days, unless the parties agree in writing to extend the period. The contract will be legally binding at the end of the three-day period (or any other period the parties agree upon) unless the reviewing attorney disapproves of the contract.

Counting the time. You count the beginning of the three days from the date the signed contract is delivered to both parties. You do not count Saturdays, Sundays, or legal holidays.

Notice of disapproval. If the attorney for either party disapproves of this contract after review, he must so notify the Broker(s) and the other party within the three-day period. Otherwise, this contract will be legally binding as written. The attorney must send the notice of disapproval to the Broker(s) by certified mail or telegram, or by delivering it personally. The certified letter or telegram will be effective as soon as it is sent. The personal delivery will be effective as soon as the notice is delivered to the Broker's office. The attorney may inform the Broker(s) of any suggested revisions in the contract to make it satisfactory.

23. *Engineer inspection contingency.* This Agreement is contingent on an inspection by a reliable engineer or firm for the following items and conditions within 14 days after the later of the signing of the Agreement or attorney approval. The inspection shall be for structural and mechanical soundness of any buildings, including the proper functioning of the roof, foundation, walls, basement, windows, doors, and the heating, plumbing, electrical, air conditioning, water supply, and sewage disposal systems. If the inspection report shows no deficiencies, this Agreement is binding and effective. If the report shows deficiencies, Seller will promptly notify Purchaser whether Seller will (a) correct the deficiencies at its expense before closing of title, (b) allow a credit against the purchase price for Purchaser's reasonable estimate of the costs to correct the deficiencies, or (c) cancel this Agreement. If Seller elects to cancel, and Purchaser accepts refund of the deposit money, this Agreement will be void and unenforceable. Purchaser may waive this contingency, either by refusing the refund or by stating so in writing. In either event, this Agreement will be binding and enforceable, and Purchaser will accept the property "as is" except as otherwise stated in the Agreement.

24. *Seller representations.* Seller states that:

Flood zone. The property is not located in a flood hazard zone, flood plain, or flood way as designated by any governmental agency or body.

Certificate of occupancy. If required by the municipality, Seller will provide, at Seller's expense, an unconditional certificate of occupancy at the closing of title.

Insulation. The building(s) on the property do not contain urea formaldehyde or other formaldehyde based insulation.

Water supply. The property is not served by a spring or any form of community well. If the water supply is a private well, the water from the well is potable.

Real estate tax reductions. If a veteran, senior citizen, or comparable deduction is allowed against the real estate taxes on the property, the tax adjustment at closing of title will be made on the basis of the net annual taxes on the property after taking the applicable deduction.

25. *Purchaser representations.* Purchaser states that:

Sufficient funds. Purchaser has sufficient cash, or other property readily changeable into cash (liquid assets), which together with the mortgage monies to be applied for, assumed, taken subject to or taken back by Seller as provided in this Agreement, are sufficient to complete the purchase of the property, arrange the mortgage financing, and pay closing costs.

26. *Legally binding agreement.* Both parties have read all the terms of this Agreement, and understand and agree to all of them.

27. *Headings.* Headings in this Agreement are for the parties' convenience only and are not to be used to interpret or construe its provisions.

28. *Governing law.* This Agreement will be construed in accordance with and governed by the laws of the State of New Jersey.

29. *Counterparts.* This Agreement may be executed in two or more counterparts (duplicates). Each one will be deemed an original but all of them together will constitute the same instrument.

30. *Time of essence.* Time is the essence of this Agreement.

31. *Notices.* All notices under this Agreement must be in writing and delivered personally or mailed by certified mail, postage prepaid, addressed to the parties at their last known addresses.

Seller

Seller

Purchaser

Purchaser

NO REPRESENTATION IS MADE THAT THIS FORM COMPLIES WITH THE NEW JERSEY PLAIN LANGUAGE LAW, OR THAT IT HAS BEEN CERTIFIED BY THE NEW JERSEY ATTORNEY GENERAL AS COMPLYING WITH THE PLAIN LANGUAGE LAW



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Current Legal Forms for Real Estate
Chapter 21 SALES AND EXCHANGES
Part IV. Forms

B. CONTRACTS OF SALE: RESIDENTIAL PROPERTY

25-21 Current Legal Forms for Real Estate FORM 21.24

FORM 21.24 Contract for sale of cooperative apartment--contingent on effective sponsor's plan, apartment corporation approval, and loan commitment--subject to existing tenant's lease and right of first refusal

COMMENT

This form illustrates the sale of a cooperative apartment either to the tenant occupying the apartment or to an outside purchaser subject to the tenant's occupancy rights. This contract, or subscription agreement, can be used as a model when a sponsor initially converts an apartment building to a cooperative arrangement.

Sponsor's offering plan

An offering plan, prospectus, or similar document is required to be given to prospective purchasers and/or filed with a state office in a number of jurisdictions. In New York, administrative approval is required before cooperative apartments may be sold. Other jurisdictions may require only a filing containing the required information with the appropriate state office and delivery of much or all of this information to prospective purchasers. Some jurisdictions may have few or no such requirements. It is important that the contract conform with the requirements of the local jurisdiction in these and other matters.

Apartment corporation approval contingency

In most cases, the sale of a cooperative apartment is subject to the approval of the cooperative apartment's board of trustees or board of directors. This prior approval requirement is usually found in the cooperative's articles, charter, or by-laws.

Existing tenant rights

In certain jurisdictions, including New York, specific steps must be taken in order to evict existing tenants to obtain possession for the apartment purchasers. If the prescribed steps are not taken, generally the existing tenants cannot be removed. In this contract, the purchaser's rights are subject to the right of occupancy of any existing tenant and to the tenant's right of first refusal to purchase the apartment. If the tenant remains in possession, the new owner will become the landlord, rather than the occupant of the apartment. If the purchaser is the existing tenant, then this point is moot. On the resale by the owner-occupant, the existing tenant provisions would not be included in the contract.

Disclosure of lead-based paint hazards

Federal law requires the seller of pre-1978 residential housing to disclose known information to the prospective purchaser on lead-based paint hazards. See 42 U.S.C. §§ 4851-4856; 40 C.F.R. Part 745 and 24 C.F.R. Part 35, Subpart A. The sales contract must include a lead warning statement and certain disclosure information. See discussion in comments to Form 21.15, *supra*. A sample lead-based paint sales contract rider, including both disclosure under the federal law and a lead-based paint contingency clause, is included in this chapter at Form 21.30, *infra*.

FORM

Subscription Agreement

Existing lease information:	Purchaser(s): Barlow, Andrew & Barlow, Joan
Expires: December	Apartment: 3-D
31, _____ [year]	
Tenant or Occupant:	
Allison, John & Martha	Purchase Price: \$249,900
Rent: \$1,850 per month	Down Payment: \$500
Rent Controlled: No.:	Balance: \$249,400
Rent Stabilized: No.	No. of Shares: _____

1. *Offering statement, plan.* As Purchaser, I have received and read the Offering Statement-Plan of Cooperative Organization (the "Plan") with respect to premises 159 West 95th Street, New York, New York, (dated January 3, _____ [year]) and a copy of the Proprietary Lease, all of which are made part hereof, at least three full business days before signing this Subscription Agreement.

2. *Purchase.* I agree to purchase the above-stated number of shares of 159 W. 95th St. Tenants Corp. (the Apartment Corporation) allocated to the apartment, for the Purchase Price stated above and to become the proprietary lessee of the apartment in the premises.

3. *Payment.* Herewith is my check to the order of "159 W. 95th St. Tenants Corp. Escrow Account" for the amount of the Down Payment. I agree that, if and after the Plan becomes effective, I will pay the Balance of the Purchase Price within 15 days after written notice and demand by you or the Apartment Corporation (the notice to state that the date of closing title has been specified to be not later than 60 days thereafter), such payment to be by personal certified check or official check drawn on a New York bank to the order of "159 W. 95th St. Tenants Corp.", delivered to you, and that I

will sign the Proprietary Lease for the apartment promptly upon presentation to me in the form contained in the Offering Plan. The Selling Agent will give me prompt written notice when the Plan either becomes effective or is abandoned.

4. *Acquisition date.* The date of the commencement of the term of Proprietary Lease, and the date of issuance of the certificate for the shares, which may be inserted by either you or the Apartment Corporation, shall be the date it acquires title to the premises. If I have paid the full Purchase Price for the shares, and am not in default, I am to receive the certificate for the shares, together with my executed copy of the proprietary lease, promptly after the Apartment Corporation acquires title. I agree that my present lease (if any) or monthly tenancy of the apartment shall be deemed terminated and cancelled as of such date. If I am not the tenant of the apartment when the Proprietary Lease is issued, I will accept same subject to the then tenant's lease and tenancy of apartment.

5. *Subject to existing tenancy.* I understand that if the tenant in occupancy does not voluntarily remove from the apartment when his lease expires or is terminated, or his right to occupy ends, I shall be required to obtain possession at my expense. I further understand that if the apartment I am purchasing is subject to an existing tenancy, that I will, after the closing date, be assuming the seller's rights and obligations, under the existing lease or tenancy, which will include the obligation to repair and maintain the apartment for the benefit of the existing tenant and the right to collect rent payable under the existing lease and tenancy whether the same is greater or less than the proprietary rent established by the proprietary lease.

6. *Deposit in trust.* The Sponsor will hold all moneys received by it through its agents or employees directly or indirectly in trust until actually employed in connection with the consummation of the transaction. The Agent will deposit all such moneys with Bank of Queens, at its branch at 61 East 42nd Street, New York City, to be held in trust in a special account under the name of "159 W. 95th St. Tenants Corp.," or similar name. The deposited funds will be disbursed only at the closing and only for the purposes of the consummation of this Plan or returned to me as herein provided. I shall be entitled to any interest earned on the sums deposited by me.

7. *Condition of apartment.* My signing of this Purchase Agreement shall constitute my acceptance of the apartment in its condition as of the time of Closing, including the existing equipment, air conditioning units and installations.

8. *Contingent on effective plan.* This contract is contingent on the Plan being declared effective, as provided in the Plan. Seller may abandon the Plan at any time before it is declared effective, and it shall be abandoned and deemed abandoned if it is not declared effective within the prescribed time.

9. *Abandoned or ineffective plan.* If the Plan is abandoned or does not become effective, or, if after being declared effective, the Plan is not consummated for any reason on or before December 31, _____ [year], this Agreement shall be deemed cancelled and the Plan terminated. In that event, I am to receive back, not later than 45 days thereafter, in full, all monies paid by me hereunder, together with any interest actually earned and accrued on the monies at the rate set by the Depository Bank (except as provided in this Agreement). Upon such repayment no party shall have any claim against any other party or person, the Sponsor, or the agent, and all parties shall be released from all obligations hereunder.

10. *Time of closing.* Title shall be transferred to the Apartment Corporation not earlier than 30 days nor later than 120 days after the Plan has been declared effective, unless the Closing of title is adjourned.

11. *Payment default.* If I fail to pay the Balance of the Purchase Price when due, the Apartment Corporation may cancel this Agreement by written notice to me at my residence or at the address stated below, by registered or certified mail. If I do not pay the Balance of the Purchase Price in full within 30 days after the date of mailing, the notice shall be effective, this Agreement shall be deemed cancelled, and all rights of the parties shall terminate, except that the Down Payment shall be paid over to the Sponsor, with any earned or accrued interest, as liquidated damages not to exceed

\$500. In case of cancellation, the Sponsor or Apartment Corporation may sell the shares and proprietary lease to another purchaser as if this Agreement had never been made. If, however, the purchaser cannot secure financing from a lending institution, all his payments will be returned to him.

12. *Entire agreement; assignment; binding effect.* This Agreement and the Plan contain the entire contract between the parties, as well as the only representations made to me. I have not relied upon any other written or oral representations, statements, or warranties as to any matter or estimate. I acknowledge that I have had full opportunity to examine all documents and investigate all facts referred to and stated herein. I may not assign this Agreement without the Apartment Corporation's prior written consent. The Agreement shall bind and apply to the parties and their respective legal representatives, successors, and assigns. It may not be changed orally. Conflicts between this Agreement and the Plan will be resolved in favor of the Plan.

13. *Tenant right of first refusal.* If this offer is for an apartment not occupied by Purchaser, and, if the tenant purchases the shares allocated to the apartment within the 90-day exclusive period or match-offer period granted to the tenant under the Plan or any amendment, this Agreement shall be deemed cancelled. Within 45 days after cancellation, the Agent shall refund to Purchaser all monies paid by him, together with all accrued interest earned. Upon repayment, there shall be no liability or obligation by or among the Purchaser, Sponsor, Apartment Corporation, Agent, or other party. If the Rent Stabilization Law or an administrative or judicial interpretation allows the tenant to purchase the apartment at a later date, and the tenant does so, this Agreement will be deemed cancelled and the provisions of this paragraph will apply.

14. *Approval contingency.* This Agreement will not be binding on me or the Apartment Corporation until I, as Purchaser, am accepted by endorsement hereon by the Apartment Corporation and the Agent, and a fully signed copy is promptly delivered to me. If this Agreement is not accepted within 40 days of its execution by delivery to me of the endorsed and fully signed copy, it shall be deemed to be rejected and cancelled and my deposit shall be promptly refunded to me. This paragraph does not apply if I am or was a tenant at the time of presentation of the Plan.

15. *"Purchaser."* I represent that I am a person resident in the State of New York and over 18 years of age. The term "I" shall be read as "we" and "Purchaser" shall be read as "Purchasers" if more than one person are subscribers, in which case our obligations shall be deemed joint and several.

16. *Notice.* Notices shall be delivered or mailed as follows: to Purchaser(s), at the address stated below; and, to the Agent and the Apartment Corporation, at the Agent's office.

17. *Certification.* I certify that I have agreed in good faith to purchase the shares allocated to the above-described apartment with no discriminatory repurchase agreement or other discriminatory inducement.

18. *Loan contingency.* Purchaser's obligations are subject to (a) the issuance of a commitment letter by a bank or other lending institution selected by Purchaser, within 60 days from the date of signing of this Subscription Agreement, under which the lending institution agrees to make a Cooperative Mortgage Loan for 60 percent or more of the purchase price, at the prevailing rate of interest for cooperative loans, for a term of at least 25 years, solely upon the security of a pledge, security interest, or assignment of the Shares and Proprietary Lease; and (b) the consent of the Apartment Corporation to the Loan, if required by the terms of the Proprietary Lease or of the Corporation's bylaws. The form and substance of the loan agreement must be satisfactory to the lending institution and the Apartment Corporation and protect the institution's right as lender.

Purchaser may cancel this Agreement if he fails to procure the above commitment. In that case, neither party shall have any further rights or obligations under the Agreement, except that the Sponsor shall refund the down payment to Purchaser. Purchaser shall promptly apply to a lending institution for the loan, execute all necessary instruments in connection with the application, and provide the bank with all required information.

19. *Governing law.* The terms of this Agreement shall be construed in accordance with and governed by the laws of the State of New York.

20. *Counterparts.* This Agreement may be executed in two or more counterparts. Each one will be deemed an original, but all of them together will constitute one and the same instrument.

21. *Time of essence.* Both parties understand that time is the essence of this Agreement.

22. *Non-waiver.* No delay or failure by either party to exercise any right hereunder, and no partial or single exercise of any such right, shall constitute a waiver of that or any other right, unless otherwise expressly provided herein.

23. *Headings.* Headings in this Agreement are for convenience and reference only, and may not be used to interpret or construe its provisions.

Dated: April 23, _____ [year]

Purchaser(s)

APPROVED AND ACCEPTED:

Apartment Corporation



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Current Legal Forms for Real Estate

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Current Legal Forms for Real Estate
Chapter 21 SALES AND EXCHANGES
Part IV. Forms

B. CONTRACTS OF SALE: RESIDENTIAL PROPERTY

25-21 Current Legal Forms for Real Estate FORM 21.25

FORM 21.25 Contract for sale of condominium unit--subject to effective offering plan after conversion from rental apartment building--subject to existing tenancy--plain language

COMMENT

This form is a contract of sale for a condominium unit in an apartment building. The contract is subject to the sponsor obtaining an effective offering plan after conversion of the rental apartment building into a condominium.

Unit purchaser and tenant

This agreement provides that the purchaser will acquire the condominium unit subject to the rights of an existing tenant. Certain jurisdictions have enacted laws protecting the occupancy of tenants in apartments converted to condominium units, and these laws vary in the jurisdictions which have adopted them. If the applicable law permits the tenant to remain indefinitely, the purchaser will be in the position of a landlord rather than an occupant of the unit. This contract contains a provision that the purchaser will acquire the unit subject to the existing tenancy (paragraph 12). The unit may also be purchased by the existing tenant, or by a third party who intends to purchase the unit vacant, free of any tenancy. This form includes provisions for each of these circumstances.

Disclosure of lead-based paint hazards

Federal law requires the seller of pre-1978 residential housing to disclose known information to the prospective purchaser on lead-based paint hazards. *See* 42 U.S.C. §§ 4851-4856; 40 C.F.R. Part 745 and 24 C.F.R. Part 35, Subpart A. The sales contract must include a lead warning statement and certain disclosure information. *See* discussion in comments to Form 21.15, *supra*. A sample lead-based paint sales contract rider, including both disclosure under the federal law and a lead-based paint

contingency clause, is included in this chapter at Form 21.30, *infra*.

FORM

PURCHASE AGREEMENT

THE PARK CONDOMINIUM

Purchaser's Name: John Addison and Ellen Addison, husband & wife

Address: 235 West Elm St., Staten Island, N.Y. 10079

Apartment Unit No.: 5-D in Building E-4

1.	Down Payment	\$490
2.	Balance of 10% Due	\$4,410
3.	Amount to be Financed	\$39,200
4.	Balance Due at Closing	\$ 4,900
5.	Total Purchase Price (1 + 2 + 3 + 4)	\$49,000

1. *My agreement to purchase.* As Purchaser, I agree to purchase from you, Park Apts. Co., apartment unit No. 5-D in Building E-4 and the appurtenant interest in the common elements of The Park Condominium for the Total Purchase Price shown on line 5, above. I am delivering to you now my \$490 check, subject to collection, for the Down Payment shown on line 1. When you sign this Agreement you acknowledge receiving this check although you will not then have cashed it.

2. *Balance of total purchase price and Closing Expenses.* (a) Deposit balance. Upon the Offering Plan of Condominium Ownership of The Park Condominium (the "Plan") being declared effective, you shall advise me in writing when the balance of 10 percent of the Total Purchase Price is due, as shown on line 2, and I will pay it to you within 15 days after I receive your notice.

(b) *Balance due and costs at closing.* You will also write to me at least 15 days (but not more than 90 days, unless you request an adjournment of Closing as provided in paragraph 3) in advance of my closing to tell me the exact scheduled date of Closing. In that notice, you will inform me that I must give you or anyone you designate, not later than 15 days from the date I receive the notice, my certified check or official bank check for the Balance Due at Closing, as shown on line 4, drawn on a New York City bank which is a member of the New York Clearing House Association. You will, however, offset against amounts due at closing the security deposit you hold for me under my lease, if I am a tenant and am not in default under the lease on the closing date. You will also notify me of the date on which common charges will first be due and payable. In the same notice, you will remind me that I must also pay, within the same time period, (i) the expenses shown in the Plan under "Closing Costs and Adjustments" which are my obligations, plus (ii) any amount I owe you as a result of our apportionment of the real estate taxes and common charges for the apartment, so that you pay those real estate taxes and common charges attributable to any period prior to the midnight before the date of closing and I will pay the rest. You agree to pay at Closing the expenses shown in the Plan which are your obligations.

(c) *Bank financing.* If I am taking advantage of Met Bank financing as permitted in the Plan, I will promptly sign and return all documents and instruments required by Met Bank to complete its financing and pay all expenses due by check upon demand by Met Bank, or its authorized representatives. I understand that the form of the note, mortgage, deed, and power of attorney is contained in the Plan. I will also execute any other document or instrument that Met Bank deems necessary to complete its loan.

(d) *Sponsor financing.* If I am unable to obtain Met Bank financing, but am entitled to Sponsor-financing, you will also notify me in writing what expenses relating to the loan are payable by me. In addition, you will send me the required Note, Mortgage, Deed, and Power of Attorney in the form contained in the Plan, as well as all other documents that you, your counsel, or the insurance company deem necessary to assure the validity of your mortgage lien and compliance of the loan with law. I will pay the expenses due by check, made payable to anyone you designate, and will sign and return all documents and instruments in appropriate form for recording to the Selling Agent within 15 days after I receive your notice. I authorize the Selling Agent to complete, date and deliver to you or the title company representative the Note, Mortgage, Deed, Power of Attorney and other documents and instruments that are necessary to properly conclude the transaction.

3. *Delivery of deed and marketable title.* Upon my properly paying you the full amount of the Total Purchase Price, the Closing Costs and Adjustments and expenses (as described in the preceding paragraphs) and delivery of the Deed, Power of Attorney, Note, Mortgage and other required documents and instruments, you will execute the deed to my apartment unit and request the Bank or the Selling Agent, whichever is applicable, to deliver all documents and instruments to The Title Security Insurance Company for recording. The proceeds of the Escrow Account may be used to meet the purchase price and such costs, adjustments, and expenses. The deed will be a standard type of deed known as a bargain and sale deed with covenant against grantor's acts, the form of which is shown in the Plan. In any case, you will not deliver to me the deed to my Apartment Unit until all of the events described in the Plan under "Closing of Title to Units" have occurred. I agree to be bound by the Declaration, By-Laws and Rules and Regulations of the Condominium and the Plan.

You will convey to me good and marketable title in fee simple to my apartment unit without any liens or encumbrances other than those shown in the Plan.

I understand that you have the right at any one or more times, by giving me written notice, to adjourn the scheduled closing date for a period of not more than 180 days.

4. *Recording of deed.* I understand that the deed to my apartment unit will be delivered to the title company representative issuing title insurance to me or to you (if I do not obtain title insurance), so that the deed can be recorded in the Office of the New York City Register, Queens County.

5. *My payments to be held in trust.* All monies received from me by you through your agents or employees will be deposited with Met Bank (the "Escrow Agent") at 13-25 Jay Avenue, Queens, New York, in a special account with or without interest under the name of "Park Condominium Escrow Account" or similar name. These funds will be held on the following terms: (a) if the Plan is declared effective and the Closing takes place under this Agreement, you will be paid the monies due you, and the Selling Agent may satisfy expenses I owe from my previous payments and any interest earned thereon, (b) if the Plan is abandoned or the closing does not take place because you fail to keep your promises under this Agreement, I will be paid the monies and any interest earned thereon, and (c) if I fail to keep my promises under this Agreement, you will be paid the monies (not more than 10 percent of the Total Purchase Price, plus any interest earned thereon). The Escrow Agent will pay out the monies only upon written instructions of the attorneys for the Board of Managers, Conrad, Weis & Bok, who may rely upon your written description of the facts when they give the instructions.

I understand that you will have no obligation to place any monies received from me in an interest-bearing account. You

will hold all such monies through your agents or employees in trust in accordance with the provisions of Sections 352-h and 352-e(2-b) of the General Business Law until actually employed in connection with the consummation of my purchase. I understand that Conrad, Weis & Bok may rely on your written description of the facts when they give instructions to the Escrow Agent.

6. *My mortgage loan.* I will not be obligated to purchase my apartment unit from you unless Met Bank (the "Bank") promises in writing to give me a mortgage loan for the same amount shown on page one of this Agreement. The mortgage loan must provide for repayment in full within no more than 30 years and be on the terms regularly offered by Met Bank. I understand that the actual interest rates to be charged on my Mortgage Loan may not be determinable until approximately five days before you give me the deed to my Unit and I sign the documents for this mortgage loan. I also understand that my application may have to be renewed every 90 days, and I agree to do so. I know that each monthly payment I make will be used first to pay the interest I then owe and second to pay back the amount I have borrowed. I may make payments in addition to these monthly payments in the amounts of repayment of principal that would be due in future monthly payments so that I pay back sooner the amount I have borrowed, but I may have to pay any extra fee for making these additional payments depending upon the type of mortgage loan I select among those offered by the Bank. The sample forms of documents which the Bank will require me to sign for this mortgage loan are contained in the Plan, but I understand that these might be different at closing.

I have signed and given you my application for a mortgage loan, which you will send to the Bank promptly. I agree to supply all information which the Bank requests for this application within five business days and to keep you advised of its status. I authorize you to check the status of my application directly with the Bank, and I will tell you when my application has been accepted or rejected. If 45 days from now, the Bank has not given me its then current written promise to make the mortgage loan as described in this Paragraph (or if a commitment is issued and is subsequently withdrawn), and I give you written notice of this fact, either of us may cancel this Agreement, unless within 30 days after my written notice, you arrange for me to receive from a lending institution (including the Bank) or from you the same type of mortgage loan. If no such mortgage loan is available to me, either of us may cancel this Agreement by written notice no later than five days after the 30-day period expires. In that case, all my payments to you under this Agreement and all interest earned on them will be returned to me. However, you may cancel this Agreement and keep my Down Payment and all interest earned on it if either I do not promptly supply the information required for a mortgage application loan within five days after the information is requested, or I do not accept a written promise from the Bank, any other bank, or you to give me the type of mortgage loan described in this Paragraph.

7. *Your rights if I fail to keep my promises and agreements.* You may keep my payments and any interest earned on them if I fail to do any of the following: (a) to pay when due any portion of the Total Purchase Price when notified, (b) to pay when due closing adjustments and expenses, (c) to execute and return within 15 days any document or instrument needed to complete the transaction, including any mortgage application, note, or mortgage, if I elect financing and, in any case, the power of attorney, deed, and New York State gains tax transferee questionnaire, or (d) to keep any other promise under this Agreement.

If I am in default under my lease or the terms of my apartment tenancy, and if I am now a tenant of the apartment unit that I agree to purchase under this Agreement, or become a tenant of the unit before the closing of title on it, you may also keep any payment made by me on account of the Total Purchase Price (but not more than 10 percent, plus any interest earned thereon). I understand that any default in that situation will be treated also as a default under this Agreement. I further understand that my above promise is a separate and material inducement for you to enter into this Agreement with me.

Before you may keep any payment, however, you must first send me a notice stating that you intend to cancel this Agreement and describing each promise you think I did not keep under it. If I do not cause each promise to be kept within 30 days after your notice is sent, you may keep the payments (but not more than 10 percent of the Total Purchase Price, plus any interest earned on it). After that, neither of us will have any further obligations under this Agreement, the

Agreement will be considered cancelled without any further action by either of us, and you may sell the apartment unit to any other person.

8. *No right to assign this agreement.* I understand that I cannot give or sell my rights under this Agreement to anyone else (except my spouse or my adult children), unless I first obtain your written consent.

9. *Survival of seller's obligations.* After you give me the deed to the apartment unit, your only remaining obligations are those set forth in this Agreement and the Plan.

10. *Agreement subject to plan becoming effective.* This Agreement is contingent upon the Plan being declared effective. The Agreement will be cancelled if (a) the Plan is abandoned or does not become effective within 15 months after the Attorney General issues a letter stating that the Plan has been accepted for filing, or (b) the Plan is declared effective within 15 months after the acceptance letter is issued, but the first deed to an apartment unit in the Condominium is not delivered within 21 months after the letter's issuance. Not later than 45 days after cancellation, I will receive a full refund of all my payments to you under this Agreement and all interest earned on them. After I receive this refund, neither of us will have any claim against the other or any further obligation under this Agreement.

11. *My acceptance of the apartment unit.* I have read the Sponsor's Statement of Condition of the Property. I have also examined the apartment unit and agree to accept it, and all fixtures, machinery, equipment, furnishings, appliances, installations and other personal property in the apartment unit in their present condition, except for reasonable wear and tear and natural deterioration between now and the time you give me the deed to the apartment unit. I understand that because of the amount and power of electricity in the Building I will not be able to install air conditioners or other appliances in my unit unless the Board of Managers permits me to do so.

12. *Purchase subject to rights of tenant in occupancy.* I understand that the apartment unit is now occupied by a tenant under a lease expiring on May 31, _____ [year] (monthly tenancy) at a rent of \$400 per month. If the tenant does not voluntarily move out when his lease expires or his right to occupancy ends, you will have no obligation to obtain possession for me. I also understand that the apartment unit is subject to the Rent Stabilization Law or Rent Control Law and the Omnibus Housing Act of 1983 (as described in the Plan), and I will have all your rights and obligations under the tenant's lease or tenancy after you give me the deed to the apartment unit, including, without limitation, the right to collect all rents (whether more or less than my common charges and assessments and mortgage payments) and the obligations to comply with the applicable law and to repair and maintain the apartment unit for the benefit of the tenant, and the tenant cannot be evicted except for nonpayment of rent or other default under his lease or tenancy or his refusal to renew his lease in compliance with law. I know I cannot evict the tenant for my own occupancy unless allowed under Section 352_____ of the General Business Law. In addition, I agree that I (and my successors) shall always use the managing agent of the property to manage my unit. I shall deliver promptly to the managing agent and continue to maintain a fund equal to two months common charges to secure my performance of my obligations, and I shall not subject the tenants to unconscionable rent increases if the apartment unit becomes no longer subject to the Rent Stabilization Law and Rent Control Law. This sale is subject to the tenant's right to continue in occupancy as a nonpurchasing tenant in accordance with Section 352-eeee of the General Business Law and as set forth in the Plan. I represent and warrant I have read Section G of the Plan and understand and accept the risks involved in this purchase.

13. *Designation of managing agent.* If this Agreement is for an apartment not occupied by me, I will designate the managing agent of the Property as my agent to provide to the nonpurchasing tenant now in occupancy all services and facilities required by law, as provided in the Plan.

14. *Purchase for personal occupancy.* If this agreement is for an apartment I do not occupy, I represent to you that I am purchasing the apartment for my personal occupancy or for the occupancy of a member of my immediate family and, if requested, I will promptly deliver an affidavit confirming this to you.

15. *Broker.* I did not negotiate for the apartment unit with any broker other than Broderick & Dey, Real Estate Brokers.

16. *Receipt of documents.* I received at least 72 hours ago a copy of the Plan. I understand that we are treating the contents of the Plan as if it were included in this Agreement. I have also been given an opportunity to examine the apartment unit, the Building and the Property.

17. *No representations.* I have not relied on any statements made by you or any other person except those contained in this Agreement or the Plan. You will have no liability to me if there is a minor error or inaccuracy in the layout or dimensions of the apartment unit or of the common elements of the Condominium as shown on the floor plans (the "floor plans") certified by Vox & Albans, Architects, on file at the office of the Selling Agent and to be filed in the Office of the Register of the City of New York, County of Queens, so long as the layout and dimensions conform substantially to the floor plans, which I have been given the opportunity to examine.

18. *Plain language.* I have read this Agreement, and I understand it. Under New York law (General Obligations Law Section 5-702), I know that as a consumer I have a right to an agreement written in clear and simple language. You and I both think that this is such an agreement.

19. *Notices.* All notices between us (including requests, consents, and other communications) must be in writing and sent by registered or certified mail, to me, at the address shown on page one of this Agreement, and, to you, at 10 East 59th Street, New York, N.Y. 10022. I will send a copy of any notice I give you to your attorneys, Boone & Davis, at 10 East 39th Street, New York, N.Y. 10016, Attention: John Davis, Esq. Either of us can specify a different address by notifying the other, as provided in this paragraph. A notice shall be considered given on the date it is mailed, except that a notice of an address change shall be considered given when it is received.

20. *Jury waiver.* I waive my right to trial by jury in any action, proceeding, or counterclaim in any way connected with this Agreement or the Plan.

21. *No discriminatory inducement.* If I am a tenant, I confirm that I have purchased the apartment unit in good faith and without fraud, discriminatory repurchase agreements or other discriminatory inducements. If requested to do so, I will promptly deliver an affidavit confirming this to you, together with all other documents or instruments you reasonably request.

22. *Acceptance of this agreement.* This Purchase Agreement shall not be binding on me or the Sponsor until it is accepted, as evidenced by endorsement hereon by the Selling Agent, and a fully signed copy is delivered to me. The Purchase Agreement will be deemed accepted if I am not notified within 20 days of the date hereof whether it has been accepted or rejected. If the Purchase Agreement is rejected within the 20-day period, the Down Payment, together with any interest on it, will be refunded to me within 10 days after the rejection.

23. *Headings.* Headings in this Agreement are for convenience and reference only, and may not be used to interpret or construe its provisions.

24. *Binding effect.* This Agreement shall be binding upon both of us and our respective heirs, legal representatives, and assigns.

25. *Non-waiver.* No delay or failure by either party to exercise any right hereunder, and no partial or single exercise of any such right, shall constitute a waiver of that or any other right, unless otherwise expressly provided herein.

26. *Governing law.* This Agreement shall be construed in accordance with and governed by the laws of the State of New York.

27. *Counterparts.* This Agreement may be executed in two or more counterparts. Each copy shall be deemed an original, but all of them together shall constitute one and the same instrument.

28. *Time of essence.* Time is of the essence of this Agreement.

29. *Entire agreement.* All prior understandings and agreements between the parties are merged in this contract, which constitutes the entire agreement between the parties. This contract is entered into after full investigation made by Seller, and neither party relies upon any statement or representation made by anyone unless contained herein.

30. *Definitions.* The term "I" shall be read as "we" if more than one person is a purchaser, in which case our obligations shall be considered joint and several. All the terms used in this Agreement shall have the same meanings as in the Plan.

Dated: June 2, _____ [year]

Purchaser

Purchaser

Accepted:

PARK APTS. CO.,

by: _____

Dated _____



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Chapter 21 SALES AND EXCHANGES
Part IV. Forms

B. CONTRACTS OF SALE: RESIDENTIAL PROPERTY

25-21 Current Legal Forms for Real Estate FORM 21.26

FORM 21.26 Contract for sale of condominium unit--new construction--anticipated completion date in lieu of set closing date--option to apply for mortgage at developer's lending institution

COMMENT

New construction provisions

A number of paragraphs in this form cover matters which come up in new construction. For example, rather than establish a set closing date, the contract specifies an anticipated date for completion of construction (paragraph VI). The title closing will take place after the seller-developer gives notice to the buyer (paragraphs 10, 11, 12). This is an alternative to a set closing date in the contract which recognizes unanticipated or uncontrollable delays in construction. Other new construction oriented terms provide that the buyer cannot enter the premises prior to closing without a sales representative of the developer (paragraph 15), and a disclaimer of the survival of trees and shrubbery (paragraph 22). These terms are aimed at protecting the seller from potential liability resulting from personal injury at the construction site or from failed landscaping.

New residential construction warranties

In almost all states, new residential construction is subject to statutory or common law implied warranties as to condition, habitability or fitness for its intended purpose. Such implied warranties apply to the sale of completed new homes as well as to those under construction at the time of the contract, and usually survive the passing of title. In states where implied warranties do not survive the closing, the purchaser should attempt to negotiate a provision setting forth the seller's liability for defects in construction after the closing.

In general, statutory provisions regarding the condition of newly constructed homes presume certain warranties regarding workmanship and fitness for habitation to be implied in the contract of sale unless they are expressly waived. For example, under such a statute, there may be warranties for a specified or reasonable period of time that the new home will be free from defects due to unskillful construction; that the plumbing, electrical, heating, cooling and ventilation systems will be free from defects due to unskillful installation; and that the home will be free from defects in material. In some states, such statutory provisions coexist with a common law implied housing merchant warranty of habitability or fitness.

In most states, the parties may expressly disclaim implied warranties for new construction and substitute specific limited warranties, as in this form (paragraph 17). The disclaimer must clear and conspicuous. Usually, a simple "as is" clause is insufficient to disclaim implied warranties.

Mortgage application, closing costs

This contract gives the buyer the option to apply for a mortgage loan with either a lender of the buyer's choice, or with the lender working with the developer-seller (paragraphs 6, 7). When a developer is involved in the construction and sale of a large number of residential units, an institutional mortgage lender can be engaged to provide mortgage financing to the various purchasers. Allowing the buyer the option to select its own mortgage lender or use the lender working with the developer avoids a tie-in with the developer's financial institution. To clarify the buyer's costs and expenses at closing, this agreement contains a listing of items to be paid for by the buyer at or before the closing, including items which would be required by the purchaser's mortgage lender (paragraph 8).

FORM

CONDOMINIUM SALES CONTRACT
ALP RIDGE, INC.

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SELLER: Alp Ridge, Inc.
 Mailing Address: c/o Jones & Smith
 99 Main Street
 Flemington, New
 Jersey 08822

Telephone
 Number:

II. PURCHASER: Catherine Conover
 Mailing Address: 1345 Elm Lane
 Somerville, New Jersey 08876
 Telephone Number:

III. PROPERTY:

(A)	Unit No.: 3	Building No.: 12
	Section: A	
(B)	Model/Floor Plan:	DLX
(C)	Map Reference:	Lot No.: 6
	ALP-A	
	Block No.: 303	
(D)	Street Address:	12-3 Matterhorn Court

Date of Contract: June 23,
 _____ [year]

IV. PURCHASE PRICE \$110,000

The purchase price is to be paid as
 follows:

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(A)	Deposit previously paid by Buyer	\$1,000
(B)	Deposit paid upon signing this Contract	\$4,500
(C)	Additional deposit due upon receipt of written mortgage commitment	\$5,500
(D)	Proceeds from Mortgage Loan	\$88,000
(E)	Balance to be paid at settlement in cash, certified check or cashier's check	\$11,000
V.	MORTGAGE BEING SOUGHT BY PURCHASER	
(A)	Amount	\$88,000
VI.	ANTICIPATED COMPLETION DATE: December 15, _____ [year]	
VII.	LOCATION OF CLOSING: 99 Main Street, Flemington, New Jersey	

THIS CONTRACT FOR SALE BETWEEN ALP RIDGE, INC., a New Jersey Corporation and with mailing address set forth in Paragraph I, "Seller," AND Catherine Conover, "Purchaser." The word "Purchaser" includes all the purchasers listed in Paragraph II.

Based on all of the information and promises in this Contract, Seller agrees to sell to Purchaser and Purchaser agrees to buy from Seller the property set forth on page one.

1. *Description of property.* The property is shown on the Map of Alp Ridge, Ridge Township, Hunterdon County, New Jersey and filed in the Hunterdon County Clerk's Office, together with a housing unit which Seller will or has built on that property. The exact description is set forth on Schedule A. The housing unit will be substantially like the model designated in Paragraph III and which Purchaser saw and inspected before signing this Contract. In addition to the unit, Seller will convey to Purchaser an undivided interest in the common elements of Alp Ridge Condominium Association, Inc., a nonprofit corporation. This interest shall be calculated as set forth in Schedule F. However, the interest shall be determined by dividing the number 1 by the total number of units in the applicable condominium association.

Seller represents that the housing unit has been or will be constructed substantially in accordance with the floor plan of the unit designated in Paragraph III of this Contract and set forth on Schedule B.

2. *Purchase price.* The Purchase Price is payable as set forth in Paragraph IV. It is made up of the Base Price, "Options/Extras" and other items on Schedule B.

3. *Exclusions.* Unless indicated, as included in Schedule C under "Options/Extras" being paid for, the following items which are or may be found in the model or available as extras/options/change order are excluded from this sale, including but not limited to all furniture, draperies, furnishings, special landscaping, fences, special finishing of garage area, special flooring, lighting and tiling, wallcoverings, all devices such as radio and electronic equipment, fireplaces, air conditioning systems, full basements, garage in condominiums, second car garage in homes, side entry to garage, decks.

4. *Color selections.* Within seven days after notice by Seller, Purchaser shall promptly make choices and selections from samples and lists submitted by Seller. Purchaser shall pay for all extras she selects. The monies shall be held in escrow in accordance with Paragraph 5. If Purchaser fails to make the choices and selections, Seller may do so on

Purchaser's behalf and complete the unit.

5. *Deposit monies.* All deposit monies shall be held in escrow by Jones & Smith, Esqs., 99 Main Street, Flemington, New Jersey 08822. The deposit monies shall be held in escrow and shall not be released until title is closed, this agreement is terminated as provided herein, or a bond or other guaranty acceptable to the State of New Jersey is provided. In any event, no deposit will be released for eight days after this agreement is executed.

6. *Mortgage.* Purchaser acknowledges that he has the right to arrange for a direct reduction conventional mortgage from a lending institution of her choice upon written notice to Seller. If Purchaser notifies Seller on execution hereof in writing that she does not want Seller to assist in securing the mortgage called for in Paragraph IV, she must obtain a firm written commitment from her lending institution within 30 days from the date of this Agreement. If Purchaser is unable to obtain the mortgage commitment within this time, Seller, upon written notice to Purchaser, at the address set forth above, may terminate this Contract. If Seller chooses to terminate the contract, all monies paid hereunder shall be returned to Purchaser without interest.

7. *Mortgage placement.* If Purchaser fails to elect to seek his own mortgage as provided in Paragraph 6, Purchaser appoints Seller to arrange for and process a mortgage loan from a mortgage lending institution selected by Seller in the amount set forth in Paragraph IV and Purchaser shall agree to the mortgage commitment with all applicable terms. For this service, Purchaser shall pay the lending institution a nonrefundable application fee payable upon the request of the lending institution or Seller. Purchaser will sign the mortgage loan application and supply complete financial and employment information requested by the lending institution. If Seller has obtained a written commitment for a mortgage loan from the lending institution for Purchaser, any future change in Purchaser's credit or employment status or any failure by her to comply with the conditions or requirements of the commitment, will not affect Purchaser's obligation to complete this Contract.

Seller does not guarantee that it can obtain a mortgage commitment for Purchaser. If the mortgage application submitted by Seller on behalf of Purchaser is refused, Seller shall return Purchaser's deposit without interest within ten days of notice thereof. If Seller determines that a mortgage commitment cannot be obtained, Seller may cancel this Contract and refund to Purchaser all deposit monies without interest. In that event, neither party shall have any claim against the other. Once a lending institution issues its written mortgage loan commitment to Purchaser, there shall be no refund of monies paid by Purchaser to Seller for deposits, options, or changes. This provision applies to Paragraph 6, as well as this paragraph.

8. *Purchaser's closing costs.* Purchaser will pay the following charges at or before closing:

(a) Purchaser's attorney's fees; and all charges, fees and escrows (including taxes, insurance, and prepaid interest) required by the lending institution;

(b) All taxes for any period following the actual closing date required by the lending institution;

(c) Title insurance charges for searches, preparation of title binder, and title insurance premiums for buyer's and lender's policies;

(d) Charges to County Clerk for recording the deed and mortgage;

(e) Document review fees to lending institution or its attorney;

(f) Nonrefundable water meter charge, if any;

(g) The sum of \$_____ for a survey on a single family residence; \$_____ on a

townhome; and \$175 on a condominium unit, if requested.

(h) Hazard insurance premiums;

(i) Flood and private mortgage insurance premiums when required by the lending institution;

(j) All advance deposits or payments for water, sewer or utilities required by companies or governmental agencies supplying these services. Purchaser shall make and pay for all applications to start utility services;

(k) First quarter's Alp Ridge Owners' Association assessment based on rate from first of the month in which closing occurs;

(l) First quarter's Alp Ridge Condominium Association assessment based on monthly rate from first of the month in which closing occurs.

9. *Seller's costs.* Seller will pay the following charges at or before closing: Realty transfer fee and premium on homeowner's warranty.

10. *Anticipated completion date.* It is expected that the housing unit will be completed on or near the date set forth in Paragraph VI. It will be considered finished when the Township issues a temporary or permanent Certificate of Occupancy covering the property. Purchaser will close so long as an occupancy certificate is provided at closing.

11. *Delay in completion.* Completion of this housing unit may be delayed for various reasons. If the delay is caused by Seller's inability to secure an occupancy certificate or other causes, and continues for more than six months beyond the anticipated closing date, Purchaser may terminate this contract without penalty and be refunded all money and deposits previously paid.

12. *Closing.* The exact closing date cannot be made final at this time. Upon completion of the housing unit, a closing will take place at the date and time specified by Seller in a notice to Purchaser. If Purchaser fails to close within ten business days of the date in the notice, Purchaser shall be deemed to have breached this contract and Seller shall be entitled to remedies in Paragraph 20. The closing, also known as the settlement, is when Seller transfers ownership of the property by deed and Purchaser pays the balance of monies due.

Closing will take place at the office of Seller's attorney as set forth in Paragraph VII. If Purchaser arranges for a mortgage loan with a lending institution not selected by Seller and closing takes place at another location, Purchaser will pay \$150 for closing within the State of New Jersey and \$250 for closing out of the state, but travel shall not exceed 75 miles.

13. *Title.* Seller, upon receipt of the purchase price, shall deliver to Purchaser a Bargain and Sale Deed with Covenants Against the Acts of Grantor, in proper statutory form for recording, together with the required New Jersey Realty Transfer Fee, so as to convey to Purchaser title to the property. Seller shall also execute and deliver an Affidavit of Title, in the form attached to this agreement as Schedule C. Seller will not execute any other affidavits.

The title to the property shall be in the condition set forth in the Policy of Title Insurance issued by Lawyer's Title Insurance Company, attached as Schedule D, which Purchaser acknowledges was received and approved by Purchaser. Further, title to the property shall be subject to the covenants, conditions, restrictions and terms of the Declaration of Covenants and Restrictions, Rules and Regulations and By-Laws of the Alp Ridge Owners Association and, if applicable, Master Deed and Rules and Regulations of the Alp Ridge Condominium Association, Section I. The title condition as shown in the attached Policy of Title Insurance and as described in this paragraph shall be deemed marketable title for purposes of this contract. However, title shall be insurable at regular rates.

It is understood that Purchaser is not obligated to obtain title insurance from Lawyer's Title Insurance Company.

14. *Adjustments at closing.* Taxes, water rents, sewer rents, and fuel, if any, shall be apportioned as of the date of the closing. Seller shall be responsible for payment of these items up to the date of closing. Purchaser shall be responsible thereafter.

15. *Possession.* Purchaser understands that possession of the premises is given by a deed at the time of closing of title. Before then, Purchaser shall have no right to take possession of the premises, to use any part of the premises, or to move into or store anything in it.

Purchaser understands that she may not enter onto the property for any purpose before closing of title except for purposes set forth in Paragraph 24 (Pre-Closing Inspection). Any entrance onto the property before closing must be in the presence of a sales representative. Any entrance onto the property other than as specified above is unauthorized and Purchaser does so at her own risk. Purchaser releases Seller from any liability for personal injuries or property damage occurring while on the property without a sales representative, except while being in designated sales areas.

If requested, Purchaser shall sign a written request for the issuance of a Certificate of Occupancy.

16. *Use of premises.* Purchaser agrees that the property will be used only for a residence and not for any other purpose. However, units may be leased in accordance with requirements of Alp Ridge Owners' Association and, if applicable, the Alp Ridge Condominium Association, Section I. This Paragraph shall continue in full force and effect following the closing date. If Purchaser violates the terms of this Paragraph, Seller, in addition to its other rights, may specifically enforce this Paragraph by obtaining an injunction preventing Purchaser from violating this clause.

17. *Seller's warranty.* Seller is a member of the Home Owner's Warranty Program, and a specimen Limited Warranty-Home Warranty Agreement, together with Approved Standards, is available upon request. Seller's sole responsibility shall be limited to the terms and conditions set forth therein. Seller makes no further warranties, express, general, limited or implied, except as contained in the Limited Warranty-Home Warranty Agreement, together with the Approved Standards. Seller makes no warranties regarding consumer products for which a written, manufacturer's warranty is available. Additionally, Purchaser acknowledges that she was advised by Seller before execution of this agreement that written manufacturers' warranties for all consumer products included in the dwelling for which there exists a written manufacturer's warranty are available for Purchaser's inspection at Seller's sales office and that Purchaser was given an opportunity to inspect them before the execution of this agreement. This clause shall survive closing of title.

In addition, Seller warrants for a period of one year following closing of title, subject to normal use and upkeep, that the outbuildings, driveways, walkways, patios, retaining walls and fences, if any, shall be free from defects due to faulty workmanship or materials, that the surface drainage is proper and adequate, and that all off-site improvements constructed by Seller are free from defects for a period of one year from the date of their construction, all as required by the Planned Real Estate Development Full Disclosure Act (*N.J. Stat. Ann. §§ 45:22A-21, et seq.*).

Seller further represents that the lots, parcels, units, or interest described herein are fit for their intended use as more fully required by *N.J. Stat. Ann. §§ 45:22A-21, et seq.* Seller also warrants the construction of the common facilities existing in the Development for a period of two years after completion of each facility. Seller also warrants that all common facilities are fit for their intended use. Seller shall repair or correct any defect in construction, material, or workmanship of the common facilities within a reasonable time after it receives notice of the defect, or as more fully required by *N.J. Stat. Ann. §§ 45:22A-21, et seq.*

18. *Fire and other casualty.* If the housing unit is damaged by fire, storm, or other casualty after this Contract is signed

but before the closing, Seller may repair the damage at its expense. If it does so, the Contract will remain in full force and effect and the date of closing will be extended for the additional time required to repair the damage. In case of damage to the housing unit, Seller shall notify Purchaser within 15 days whether it intends to repair the premises or to refund all deposit monies paid under this Contract. If Seller elects to refund the monies, the Contract shall be considered cancelled.

19. *Seller's default.* If Seller's title proves to be unmarketable, or if for any reason Seller does not construct or complete the premises, its only liability under this Contract shall be to return to Purchaser the deposit money, without interest, plus up to no more than \$250 of Purchaser's out-of-pocket costs for the search and survey. Neither party shall have any further liability to the other, and this Contract shall be considered void, as if it never existed.

20. *Purchaser's default.* Purchaser will be considered in default of this Contract if she: fails to make any payment as provided in Paragraph IV; fails in any way to comply with the terms of this Contract; repudiates this agreement or otherwise prevents its performance by her own action, including (1) failure to supply documentation for mortgage application, or (2) any material overstatement of her cash or net worth in any mortgage application; becomes bankrupt or makes an assignment for the benefit of creditors; or is placed under the control or custody of any court or court-appointed custodian or guardian. If Purchaser defaults, Seller may declare this Contract cancelled. In that case, Seller may retain all deposit monies paid and all other monies not to exceed 10 percent of the purchase price of the housing unit, plus extras and change orders installed by Seller, which shall be paid as liquidated damages to Seller. If the Contract is cancelled, all copies shall be returned to Seller for cancellation, and the parties will have no further obligations or responsibilities to each other.

Seller may elect not to cancel this agreement if Purchaser defaults. In that event, the closing shall take place as if Purchaser did not default.

21. *Subordination.* Purchaser's rights under this contract are expressly subordinated to any existing or future mortgage on the premises, or to any mortgage advances made thereon. Seller shall satisfy any mortgage or lien encumbering the property from the sales proceeds at the closing of title.

22. *Landscaping.* Seller makes no representation regarding the condition of trees or any other vegetation or growth on the premises, and shall not be responsible for their survival before or after closing of title. Moreover, Seller shall not be responsible to replace any vegetation, growth, or seed that washes away.

23. *License.* Seller shall have the irrevocable right to enter into, upon, over, and under the conveyed property for a period of ten years after the deed is delivered or the Development is completed, whichever occurs first, for the completion of construction, repair, or emergency matters, or under government order or requirement. This provision shall survive delivery of the deed.

24. *Pre-closing inspection.* Within a reasonable time before the deed is delivered, Purchaser shall perform a pre-closing inspection of the unit with Seller or its representative during normal business hours. At that time, both parties will compile and sign a listing of items requiring completion, adjustment, or repair. Seller shall complete the items on the listing within a reasonable time. Under no circumstances shall any escrows be held for any incomplete items at closing. This provision shall survive closing of title.

25. *No assignment or recording.* Purchaser shall not assign, sell, or otherwise transfer this Contract without Seller's prior written consent.

Purchaser shall not record or file this Contract in any court or public office. If Purchaser does so, the filing or recording will be invalid and Seller may declare Purchaser in default of the Contract.

26. *Notices.* All notices under this Contract shall be in writing and sent by registered or certified mail, postage prepaid, to the other party at the address shown in Paragraphs I and II.

27. *Entire agreement; representations.* This Contract and application for registration constitute the entire understanding between the parties. There are no other representations, warranties, covenants, or understandings between them. No agent, representative, salesperson, or officer of the parties or Alp Ridge Realty, Inc. has authority to make, or has made, any oral agreement or representation modifying or supplementing the provisions of this Contract.

28. *Changes in contract.* No provision of this Contract may be changed unless the change is in writing and signed by both parties.

29. *Binding effect; parties liable.* This Contract is binding on the parties and their respective heirs, administrators, executors, successors, and assigns.

30. *Headings.* Headings in this agreement are for convenience and reference only and shall not be used to interpret or construe its provisions.

31. *Non-waiver.* No delay or failure by either party to exercise any right hereunder, and no partial or single exercise of any such right, shall constitute a waiver of that or any other right, unless otherwise expressly provided herein.

32. *Governing law.* This Contract shall be construed in accordance with and governed by the laws of the State of New Jersey.

33. *Counterparts.* This Contract may be executed in two or more counterparts. Each copy shall be deemed an original, but all of them together shall constitute one and the same instrument.

34. *Time of essence.* Time is of the essence of this Contract.

35. *Pronouns.* The neuter gender, when used, shall include all persons, and words used in plural shall include words in the singular where the text of the agreement so requires.

36. *Receipt of documents.* Purchaser acknowledges receipt of a copy of the Declaration of Covenants and Restrictions, Master Deed, By-Laws and Rules and Regulations of the Alp Ridge Owner's Association, By-Laws and Rules and Regulations of Alp Ridge Condominium Association, and the Public Offering Statement of Seller.

37. *Representation by attorney.* Purchaser understands that Seller's attorney represents Seller only and the purchase money mortgagee, if any, and not Purchaser. Accordingly, Seller urges Purchaser to retain independent counsel at Purchaser's expense in order to better serve her interests.

SIGNED AND AGREED TO BY:

_____	APL RIDGE, INC.
Seller	by _____
	Seller

	Purchaser
_____	_____
Purchaser(s)	Purchaser

NOTICE TO THE PURCHASER

YOU HAVE THE RIGHT TO CANCEL THIS AGREEMENT BY SENDING OR DELIVERING WRITTEN NOTICE OF CANCELLATION TO THE SELLER BY MIDNIGHT OF THE SEVENTH CALENDAR DAY FOLLOWING THE DAY ON WHICH IT WAS EXECUTED. SUCH CANCELLATION IS WITHOUT PENALTY, AND ANY DEPOSIT MADE BY YOU SHALL BE PROMPTLY REFUNDED IN ITS ENTIRETY.

Purchaser

Purchaser



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Current Legal Forms for Real Estate

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Current Legal Forms for Real Estate
Chapter 21 SALES AND EXCHANGES
Part IV. Forms

B. CONTRACTS OF SALE: RESIDENTIAL PROPERTY

25-21 Current Legal Forms for Real Estate FORM 21.27

FORM 21.27 Contract for sale of condominium unit--resale of apartment unit in existing condominium building

COMMENT

This form is a contract for the sale of a condominium apartment unit in a combined residential and commercial use building. The contract is designed to be used for the resale of a unit in an existing condominium building.

Purchase money mortgage

This form provides that some of the purchase will be financed by a purchase money mortgage given in connection with a loan by the seller to the purchaser. If the parties know that they intend to enter into a purchase money loan and mortgage arrangement before they execute the contract, then the forms to be used for the note and mortgage (or deed of trust in some states) may be attached to the contract and incorporated by reference. In this case, the contract provides that a specified standard form mortgage will be used.

Subordination of purchase money mortgage

If, as in this form, there will be a purchase money mortgage and the sale also will be subject to an existing mortgage, the parties should negotiate appropriate subordination provisions. This contract provides that any purchase money mortgage will be subordinate to the existing mortgage on the premises.

Existing mortgage

In this transaction, an existing mortgage on the premises will survive the closing. The contract describes the existing mortgage by including a statement of the principal amount of the existing

mortgage, the interest rate and the final maturity date. Alternatively, a copy of the existing mortgage may be attached to the contract. The seller expressly represents that the existing mortgage does not contain a due on sale clause, is not in default, and will not be in default at the time of the closing.

Mortgagee's certificate

This contract requires the seller to obtain a mortgagee's certificate as to the status of the loan, including the amount of unpaid principal and interest, the rate of interest, and the date of maturity. Alternatively if the mortgagee is a bank or other financial institution, the seller is permitted to substitute for the certificate a letter signed by an authorized officer, employee, or agent of the mortgagee containing the information required to be set forth in the certificate. The seller must pay the fees for recording the certificate or letter.

Disclosure of lead-based paint hazards

Federal law requires the seller of pre-1978 residential housing to disclose known information to the prospective purchaser on lead-based paint hazards. See 42 U.S.C. §§ 4851-4856; 40 C.F.R. Part 745 and 24 C.F.R. Part 35, Subpart A. The sales contract must include a lead warning statement and certain disclosure information. See discussion in comments to Form 21.15, *supra*. A sample lead-based paint sales contract rider, including both disclosure under the federal law and a lead-based paint contingency clause, is included in this chapter at Form 21.30, *infra*.

FORM

THIS AGREEMENT, made the _____ day of _____ [date], between _____, a corporation incorporated under the law of the State of _____, having a business office at _____ Street, City of _____, State of _____ ("Seller"), and _____, residing at _____ Street, City of _____, State of _____ ("Purchaser").

Seller agrees to sell and Purchaser agrees to purchase the apartment unit designated as Unit No. _____ in the Declaration and on the Floor Plans filed in the Office of the _____ of the City of _____, _____ County, State of _____, and which is designated at Tax Lot No. _____ in Block _____ on the Tax Map of the City of _____, _____ County, State of _____.

1. This sale includes all right, title and interest of Seller in and to the apartment unit designated as Unit No. _____ as stated above, together with:

a. An undivided

_____ percent interest in the common elements of the Property described in the Declaration (Common Elements);

b. An easement for the continuance of all encroachments by the Unit on any adjoining units or Common Elements now existing as a result of construction of the Building, or which may come into existence hereafter as a result of settling or shifting of the Building, or as a result of repair or restoration of the

Building or the Unit, after damage or destruction by fire or other casualty, or after a taking in condemnation or eminent domain proceedings, or by reason of an alteration or repair to the Common Elements made by or with the consent of the Board of Managers, so that any such encroachments may remain so long as the Building shall stand;

c. An easement in common with the owners of other units to use any pipes, wires, ducts, cables, conduits, public utility lines, and other Common Elements located in any of the other units or elsewhere on the Property, and serving the Unit;

d. The appurtenances and all the estate and rights of the Seller in and to the Unit;

e. All easements of necessity in favor of the Unit or in favor of other units or the Common Elements; and

f. An easement for the exclusive use of any balcony or enclosed garden to which there is direct access from the interior of the Unit.

2. The apartment unit designated as Unit No. _____ as stated above, shall be conveyed subject to:

a. Easements in favor of adjoining units and in favor of the Common Elements for the continuance of all encroachments of such adjoining units or common elements on the Unit, now existing as a result of construction of the Building, or which may come into existence hereafter as a result of settling or shifting of the Building, or as a result of repair or restoration of the Building or of any adjoining unit or of the Common Elements, after damage or destruction by fire or other casualty, or after a taking in condemnation or eminent domain proceedings, or by reason of an alteration or repair to the Common Elements made by or with the consent of the Board of Managers, so that any such encroachments may remain so long as the Building shall stand;

b. An easement in favor of the other units to use the pipes, wires, ducts, conduits, cables, public utility lines and other Common Elements located in the Unit or elsewhere on the Property and serving such other Units;

c. All easements of necessity in favor of the Unit or in favor of other units or the Common Elements;

d. Easements in favor of any unit having sole access to a balcony or enclosed garden directly from the interior of such Unit for the exclusive use of such balcony or enclosed garden;

e. The provisions of the Declaration, By-Laws, and Floor Plans of the Condominium recorded simultaneously with and as part of the Declaration, as the same may be amended from time to time by instruments recorded in the Office of the Clerk of

..... County, Division of Land Records, which provisions, together with any amendments thereto, shall constitute covenants running with the land and shall bind any person having at any time any interest or estate in the Unit as though such provisions were recited and stipulated at length herein.

3. The Declaration has designated _____ Units as residential Units, and they shall be used for such purpose. _____ Units have been designed for professional use and may be used by a doctor of medicine or a dentist licensed to practice in the State of _____.

4. The price is _____ Dollars (\$_____), payable as follows: (a) on the signing of this contract, \$_____ by check subject to collection, the receipt of which is hereby acknowledged; (b)

\$_____ in cash or good certified check to the order of the Seller on the delivery of the deed as hereinafter provided; (c) \$_____ by taking title subject to a _____ mortgage now a lien on the premises in that amount, bearing interest at the rate of _____ percent per annum, the principal being due and payable _____ [date]; and (d) \$_____ by the Purchaser or assigns executing, acknowledging and delivering to the Seller a bond or, at the option of the Seller, a note secured by a purchase money _____ mortgage on the above premises, in that amount, payable _____ together with interest at the rate of _____ percent per annum payable _____ [date].

5. Any bond or note and mortgage to be given by Seller hereunder shall be drawn, on the standard forms of the _____ Board for mortgages of like lien, by the Attorney for the Seller at the expense of the Purchaser, who shall also pay the mortgage recording tax and recording fees.

6. If such purchase money mortgage is to be a subordinate mortgage on the premises, it shall provide that it is subject and subordinate to the lien of the existing _____ mortgage of \$_____, any extensions thereof and to any mortgage or consolidated mortgage which may be placed on the premises in lieu thereof, and to any extensions thereof, provided (a) that the interest rate thereof shall not be greater than _____ percent per annum, and (b) that, if the principal amount thereof shall exceed the amount of principal owing and unpaid on the existing mortgage at the time of placing such new mortgage or consolidated mortgage, the excess be paid to the holder of such purchase money mortgage in reduction of the principal thereof. Such purchase money mortgage shall also provide that such payment to the holder thereof shall not alter or affect the regular installments, if any, of principal payable thereunder, and shall further provide that the holder thereof will, on demand and without charge therefor, execute, acknowledge and deliver any agreement or agreements further to effectuate such subordination.

7. If there is a mortgage on the premises, the Seller agrees to deliver to the Purchaser at the time of delivery of the deed a proper certificate executed and acknowledged by the holder of such mortgage and in form for recording, certifying the amount of the unpaid principal and interest thereof, date of maturity thereof and rate of interest thereon, and the Seller shall pay the fees for recording such certificate. If the mortgagee is a bank or other financial institution, the mortgagee may, in lieu of the certificate, furnish a letter signed by an authorized officer, employee, or agent, containing the information required to be set forth in the certificate. Seller represents that such mortgage will not be in default at or as a result of the delivery of the deed hereunder, and that neither the mortgage, nor any modification thereof contains any provision to accelerate payment, or to change any of the other terms or provisions thereof, by reason of the delivery of the deed hereunder.

8. The premises are sold and are to be conveyed subject to:

a. Zoning regulations and ordinances of the city, town or village in which the premises lie which are not violated by existing structures.

b. Consents by the Seller or any former owner of the premises for the erection of any structure or structures on, under or above any street or streets on which the premises may abut.

c. Encroachments of stoops, cellar steps, trim and cornices, if any, upon any street or highway.

d. Covenants, restrictions, easements, reservations, consents and agreements of record, if any, provided same are not violated by existing dwelling structures and present use thereof and/or render title unmarketable.

e. Rights, if any, acquired by any utility company to maintain and operate lines, wires, cables, poles and

distribution boxes in, over and upon the premises.

f. Such a state of facts as an accurate survey or personal inspection may show, provided same does not affect marketability of title.

9. All notes or notices of violations of law or municipal ordinances, orders or requirements noted in or issued by the Department of Housing and Buildings, Fire, Labor, Health, or other State or Municipal Department, having jurisdiction, against or affecting the premises at the date hereof, shall be complied with by the Seller, and the premises shall be conveyed free of the same. This provision of this contract shall survive delivery of the deed hereunder. The Seller shall furnish the Purchaser with an authorization to make the necessary searches therefor.

10. If, at the time of the delivery of the deed, the premises or any part thereof shall be or shall have been affected by an assessment or assessments which are or may become payable in annual installments, of which the first installment is then a charge or lien, or has been paid, then for the purposes of this contract all the unpaid installments of any such assessment, including those which are to become due and payable after the delivery of the deed, shall be deemed to be due and payable and to be liens upon the premises affected thereby and shall be paid and discharged by the Seller, upon the delivery of the deed.

11. The following are to be apportioned: (a) rents as and when collected; (b) interest on mortgages; (c) premiums on existing transferable insurance policies or renewals of those existing prior to the closing; (d) taxes and sewer rents, if any, on the basis of the fiscal year for which assessed; (e) water charges on the basis of the calendar year; and (f) fuel, if any.

12. If the closing of the title occurs before the tax rate is fixed, the apportionment of taxes shall be upon the basis of the tax rate for the next preceding year applied to the latest assessed valuation.

13. If there is a water meter on the premises, the Seller shall furnish a reading to a date not more than thirty days prior to the date set for closing title, and the unfixed meter charge and the unfixed sewer rent, if any, based thereon for the intervening time shall be apportioned on the basis of such last reading.

14. The deed shall be the usual deed in proper statutory short form for recording and shall be executed and acknowledged so as to convey to the purchaser the fee simple of the premises, free of all encumbrances, except as herein stated.

15. Seller, a corporation incorporated under the laws of the State of _____, will deliver to the Purchaser, at the time of the delivery of the deed hereunder, a resolution of its Board of Directors authorizing the sale and delivery of the deed, and a certificate by the Secretary or Assistant Secretary of the corporation certifying such resolution and setting forth facts showing that the conveyance is in conformity with the requirements of applicable law.

16. At the closing of the title, the Seller shall deliver to the Purchaser a certified check to the order of the recording officer of the county in which the deed is to be recorded for the amount of the documentary stamps to be affixed thereto in accordance with applicable law, and a certified check to the order of the appropriate officer for any other tax payable by reason of the delivery of the deed, and a return, if any be required, signed and sworn to by the Seller. Purchaser also agrees to sign and swear to the return and to cause the check and the return to be delivered to the appropriate officer promptly after the closing of title.

17. The Seller shall give and the Purchaser shall accept a title such as _____, a member of the State of _____ Board of Title Underwriters, is willing to approve and insure.

18. All sums paid on account of this contract, and the reasonable expenses of the examination of the title to the premises

and of the survey, if any, made in connection therewith are hereby made liens on the premises, but such liens shall not continue after default by the Purchaser under this contract.

19. All fixtures and articles of personal property attached or appurtenant to or used in connection with the premises are represented to be owned by the Seller, free from all liens and encumbrances except as herein stated, and are included in this sale; without limiting the generality of the foregoing, such fixtures and articles of personal property include plumbing, heating, lighting and cooking fixtures, air conditioning fixtures and units, ranges, refrigerators, radio and television aerials, bathroom and kitchen cabinets, mantels, door mirrors, Venetian blinds, shades, screens, awnings, storm windows, window boxes, storm doors, mail boxes, weather vanes, flagpoles, pumps, shrubbery and outdoor statuary.

20. The amount of any unpaid taxes, assessments, water charges and sewer rents which the Seller is obligated to pay and discharge, with the interest and penalties thereon to a date not less than two business days after the date of closing title, may at the option of the Seller be allowed as a credit to the Purchaser out of the balance of the purchase price, provided official bills therefor with interest and penalties thereon figured to that date are furnished by the Seller at the closing.

21. If at the date of closing there are any other liens or encumbrances which the Seller is obligated to pay and discharge, the Seller may use any portion of the balance of the purchase price to satisfy the same, provided the Seller simultaneously either delivers to the Purchaser at the closing of title instruments in recordable form and sufficient to satisfy such liens and encumbrances of record together with the cost of recording or filing such instruments; or, provided that the Seller has made arrangements with the title company employed by the Purchaser in advance of closing, to deposit with such company sufficient monies, acceptable to and required by it to insure obtaining and the recording of such satisfactions and the issuance of title insurance to the Purchaser either free of any such liens and encumbrances or with insurance against enforcement of same out of the insured premises. The Purchaser, if request is made within a reasonable time prior to the date of closing of title, agrees to provide at the closing separate certified checks as requested, aggregating the amount of the balance of the purchase price to facilitate the satisfaction of any such liens or encumbrances. The existence of any such taxes or other liens and encumbrances shall not be deemed objections to title if the Seller complies with the foregoing requirements.

22. The Purchaser has inspected the premises and agrees to take same "as is" in its present physical condition, and the parties agree that, except as otherwise set forth in this contract, the Seller has made no representations or warranties whether express or implied, of any nature, kind or description with reference to the physical condition of the premises.

23. It is understood and agreed that all items of personalty passing hereunder shall be delivered in its "as is" present physical condition and no warranty whatsoever is made with respect to same, except as otherwise herein set forth.

24. This contract constitutes the entire contract between the parties hereto, and the Seller is not liable or bound in any manner by expressed or implied warranties, guarantees, promises, statements, representations or information pertaining to the premises, made or furnished by any real estate broker, agent, employee, servant, or other person representing or purporting to represent the Seller, unless such warranties, guarantees, promises, statements, representations or information is expressly and specifically set forth in this contract.

25. This agreement is personal with the Purchaser and shall not be sold, transferred or assigned by the Purchaser without first obtaining the written consent of the Seller endorsed hereon. Any such consent given by the Seller shall not be construed as a release, or be a release, to the purchase of and from any of its obligations hereunder.

26. Included in the within sale, but not necessarily limited thereto, are all lighting fixtures with the exception of those presently existing in the front hall and dining room, all existing carpeting, one dishwasher and combination washer/dryer, all to the extent the above presently exist in the premises. Any lighting fixtures removed by Seller shall be

replaced by standard lighting fixtures in working order at the closing.

27. It is further understood that this contract is subject to and conditional upon the Seller obtaining the consents necessary if required, as set forth in the Condominium by-laws, or in any other provisions, rules or regulations to sell the premises to the Purchaser.

28. Seller shall have thirty (30) days from the date of this contract to obtain the consents necessary, and Seller agrees to make all reasonable effort to secure such consent promptly, and further agrees to comply with all the requirements of the Condominium to which such application is made.

If Seller fails to obtain such consent by such date, then either party shall have the right to cancel this contract upon delivering written notice to the other party or their attorney, whereupon the Seller shall return to the Purchaser all consideration paid hereunder and this contract shall thereupon become null and void and neither party shall have further rights or claims against the other.

29. The Seller hereby certifies that the appliances, plumbing, heating and electrical systems will be in working order on the closing date.

30. The Purchaser shall have a reasonable right of inspection prior to the closing of title.

31. Seller represents that at the closing the premises will be in substantially the same condition as existed on the date of this contract, reasonable wear and tear excepted. Seller further represents that as of the date of closing, the premises shall be vacant and "broom clean."

32. As of the date of closing, Seller represents and warrants that there shall be no unpaid assessments or liens against the premises for capital improvements or repairs, except for the then current assessment for common charges.

33. If a search of the title discloses judgments, bankruptcies or other returns against other persons having names the same as or similar to that of the Seller, the Seller will on request deliver to the Purchaser an affidavit showing that such judgments, bankruptcies or other returns are not against the Seller.

34. If Seller is unable to convey title in accordance with the terms of this contract, the sole liability of Seller will be to refund to Purchaser the amount paid on account of the purchase price and to pay the net cost of examining the title, which cost is not to exceed the charges fixed by the State of _____ Board of Title Underwriters, and the net cost of any survey made in connection therewith incurred by the Purchaser, and upon such refund and payment being made this contract shall be considered canceled.

35. The deed shall be delivered upon the receipt of the payments at the office of _____ at _____ a.m. on _____ [date].

36. The parties agree that _____ is the broker who brought about this sale, and the Seller agrees to pay any commission earned thereby.

37. It is understood and agreed that all understandings and agreements heretofore had between the parties are merged in this contract, which alone fully and completely expresses their agreement, and that the same is entered into after full investigation, neither party relying upon any statement or representation, not embodied in this contract, made by the other. The Purchaser has inspected the buildings standing on the premises and is thoroughly acquainted with their condition and agrees to take title "as is" and in their present condition and subject to reasonable use, wear, tear, and natural deterioration between the date of this contract and the closing of title.

38. This agreement may not be changed or terminated orally. The stipulations stated above are to apply to and bind the heirs, executors, administrators, successors, and assigns of the respective parties.

39. If two or more persons constitute either the Seller or the Purchaser, the word "Seller" or the word "Purchaser" shall be construed as if it read "Sellers" or "Purchasers" whenever the sense of this agreement so requires.

This agreement has been executed by the parties hereto.

Date: _____ [date]

Buyer: _____

Date: _____ [date]

Seller: _____ Corp.

By: _____



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Current Legal Forms for Real Estate

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Current Legal Forms for Real Estate
Chapter 21 SALES AND EXCHANGES
Part IV. Forms

B. CONTRACTS OF SALE: RESIDENTIAL PROPERTY

25-21 Current Legal Forms for Real Estate FORM 21.28

FORM 21.28 Contract for construction and sale of new home--builder's warranty of major systems--liquidated damages for seller's breach--closing after construction completed

COMMENT

This form is for the construction and sale of a single family home. It includes paragraphs which reflect the interests of the builder-seller, and others which are directed toward the purchaser's interests.

New residential construction warranties

In almost all states, new residential construction is subject to statutory or common law implied warranties as to condition, habitability or fitness for its intended purpose. Such implied warranties apply to the sale of completed new homes as well as to those under construction at the time of the contract, and usually survive the passing of title. In states where implied warranties do not survive the closing, the purchaser should attempt to negotiate a provision setting forth the seller's liability for defects in construction after the closing.

In general, statutory provisions regarding the condition of newly constructed homes presume certain warranties regarding workmanship and fitness for habitation to be implied in the contract of sale unless they are expressly waived. For example, under such a statute, there may be warranties for a specified or reasonable period of time that the new home will be free from defects due to unskillful construction; that the plumbing, electrical, heating, cooling and ventilation systems will be free from defects due to unskillful installation; and that the home will be free from defects in material. In some states, such statutory provisions coexist with a common law implied housing merchant warranty of habitability or fitness.

In most states, the parties may expressly disclaim implied warranties for new construction and

substitute specific limited warranties. In this form, there is no express disclaimer of implied warranties, so the specific warranties expressly made in the contract are presumably in addition to implied warranties as to condition, habitability or fitness for intended purpose.

Warranty of major systems by builder

The builder, in this form, agrees to be responsible for the proper operation of the heating, plumbing, electrical and other major systems for a period of one year. The warranty also extends to roof and basement water leaks. (See paragraph 29 of the form.) This warranty, which clearly benefits the buyer, is not considered a standard provision in new construction contracts. However, similar warranties are included in new home agreements if the builder is willing to take on this additional obligation. This form also includes an agreement by the builder to assign to the buyer any warranties given by appliance suppliers or other parties involved in construction. (See paragraph 25 of the form.)

Liquidated damages for seller-builder's breach

Another nonstandard provision in this contract is the seller's obligation to pay a specified amount of liquidated damages to the buyer if the seller fails to perform or otherwise breaches the contract. (See paragraph 30 of the form.) A more usual provision is for the seller to return the purchaser's deposit and other money advanced on the contract and a release of the parties. A liquidated damages clause, however, protects the purchaser from the risk of the seller refunding the deposit and selling the new home to a third party for a higher price. Although the seller may be liable for damages in such a case, depending on the contract terms and local law, a liquidated damages provision is more likely to encourage the builder to complete the transaction with the purchaser.

Closing date

In this form, the closing date is agreed upon, but it can be adjourned or advanced based on the completion of construction. (See paragraphs 19, 20, 21, and 33 of the form.) Generally, a builder requires this flexibility in setting the closing date, rather than a set closing date with no adjournments allowed, or a time of the essence closing date. There are numerous possible causes for construction delays: material delivery delays, unavailable subcontractors, bad weather, etc. As additional protection to the builder, cancellation of the contract is allowed if essential construction materials or utility hook-ups become unavailable, or if local ordinances, regulations, or approvals change to bar use of the property for a single family dwelling. (See paragraphs 14 and 18 of the form.)

Additional construction contract terms

Other terms and conditions in this agreement deal with issues which arise in new construction situations. For example, this contract allows the purchaser to inspect the property during construction and order changes in the work, subject to the builder's right to adjust the price. (See paragraph 23 of the form.) This not only allows the purchaser, or the purchaser's architect or other agent, to see that construction is done according to plans, but also permits changes if they are desirable or necessary.

Because the property will have an increased assessed value for real estate tax purposes after the building is completed and approved, the real estate taxes will increase. This agreement provides that the tax adjustment at the closing will be based on the assessed value as fully determined, even

if this determination is made after the closing. (See paragraph 16 of the form.)

FORM

CONTRACT OF SALE made September 15, _____ [year]y Shore, New York ("Seller") and James Perry, residing at 80 Fifth Street, Babylon, New York ("Purchaser").

1. *Sale.* Seller agrees to sell, and Purchaser agrees to purchase, the property (the "premises" or "property") described as follows:

(Insert description)

2. *Street rights, easement.* This sale includes all of Seller's right, title, and interest of, in, and to the land lying in the bed of the street, or highway in front of and adjoining the premises to the center line thereof, if such street, or highway in front of and adjoining the premises is, at the time of closing of title, dedicated to, and under maintenance by, the town, city, village, or other municipality in which the premises are situate. If at the time of title, such street or highway is not thus dedicated and maintained, Seller shall grant to Purchaser a good and sufficient easement of ingress and egress to and from the nearest public highway.

3. *Construction of dwelling.* Seller shall, at its expense, erect and complete a one family dwelling on the premises substantially similar to the Model House Type A on Exhibit 1. Such dwelling shall be constructed in accordance with the requirements as to materials and workmanship of the municipality where it is or will be located, and with the requirements of the lending institution which makes the mortgage loan to Purchaser. Seller reserves the right to make changes or substitutions, or both, in the construction as required, authorized, or approved by Purchaser and by Purchaser's lending institution. Seller shall determine the exterior color and design to fit into the general pattern of the development.

4. *Property and work included in sale.* All furniture and furnishings in the Model House are for exhibition purposes only and are not included in this sale. Except as otherwise specifically provided in this contract, Seller shall, at its expense, furnish and perform the following:

(a) Grade the premises and landscape the area in front of the house.

(b) Furnish and install a four-burner range, or if Purchaser furnishes a range before the title closing, install the same and allow Purchaser \$200 as an adjustment.

(c) Furnish and install kitchen cabinets, inlaid linoleum on kitchen floor, electrical fixtures, and plumbing and heating plants and fixtures.

(d) Within ten days of notification, Purchaser shall select wallpaper at a place to be designated by Seller or Seller's painting contractor, at a list price of \$9.50 per roll. The wallpaper will be installed at Seller's expense. If Purchaser selects a more expensive wallpaper he shall pay the additional cost of the wallpaper and of the painting contractor for installing it. Unless the parties specifically agree otherwise, Purchaser may not select more than one design of wallpaper for the walls in any one room.

5. *Purchase price.* The purchase price of the property is \$240,000, payable as follows: \$24,000 on the signing of this contract, receipt of which is acknowledged (subject to collection, if made by check), and \$216,000 in cash, or by good

certified or savings bank check or the proceeds of the mortgage loan upon delivery of the deed.

6. *Mortgage loan.* Purchaser shall make diligent, truthful, and proper applications to lending institutions designated by Seller for a loan to be secured by a first mortgage against the premises, and without delay furnish such verifications of bank accounts and employment, and all other instruments or information required by the lending institutions in processing Purchaser's application for the following type of loan:

A first mortgage in the amount of \$192,000, to run for a period of 30 years, to bear interest at the prevailing rate, and to be payable in monthly installments. The installments may include amortization of principal, interest, taxes, water rates if not a private company, fire and other hazard insurance premiums, and all other provisions required by the lending institution.

7. *Mortgage commitment conditions.* If the application for the mortgage loan is approved and commitment issued, Purchaser shall execute, acknowledge, and deliver any bond, mortgage assumption, extension, and modification agreements, affidavits, statements, or other instruments that are necessary or required by the lending institution to properly place the mortgage loan and any mortgage insurance. If the mortgage loan is granted in a reduced amount and the reduced amount is not more than \$6,000 less than the amount specified for such mortgage loan, Purchaser shall nevertheless accept the mortgage loan in the reduced amount, but the amount of cash to be paid on the closing of title shall be increased by the amount of the reduction. If the lending institution refuses to approve the application for the reduced amount and upon the terms and conditions above described, this contract shall become null and void and upon refunding the deposited money without interest both parties shall be released from any liability under this contract.

8. *Mortgage application.* Purchaser shall make diligent, truthful, and proper application to a lending institution designated by Seller, and without delay furnish all verifications of bank accounts, employment, and other instruments or information required by the lending institution in processing Purchaser's application for the mortgage loan.

9. *Subordination to building loan mortgage.* All terms and provisions of this contract are and shall be subject and subordinate to the lien of all present or future building loan mortgages and advances made thereon, without the execution of further legal documents by Purchaser.

10. *Mortgage costs and fees.* Seller shall pay the following costs and fees in connection with the mortgage loan: title examination fee and title policy premium to insure the mortgagee; attorney's fees for drawing the mortgage instruments; mortgage taxes; recording fees of the mortgage instruments; and survey, inspection, and approval fees. Purchaser shall pay Seller, at the time of closing title, the sum of \$1,200, to cover all of the foregoing costs and fees advanced by Seller. In addition, Purchaser shall pay the lending institution at title closing all origination, appraisal, and service charges and all points in connection with the mortgage loan.

11. *Closing adjustments.* Purchaser shall apportion with Seller and pay all taxes, water rates, and insurance premiums on existing policies determined to be due at closing of title. Purchaser shall also make the usual and required adjustments with and prepayments to the lending institution.

12. *Closing before completion.* The fact that the dwelling or its environs are not fully completed at the time set by Seller for closing of title shall not constitute an objection to the closing if Purchaser's lending institution issues an inspection report, Seller deposits an escrow fund with the institution (if the report so requires), and a certificate of occupancy has been issued for the dwelling.

13. *Title exceptions.* Purchaser shall accept the premises subject to:

- (a) Municipal building restrictions and regulations and all amendments and additions in effect at the date of closing of title.

- (b) Any state of facts an accurate survey may show if title is not rendered unmarketable thereby.
- (c) Encroachments of stoops, area ways, steps, trim and cornices, retaining walls, party walls and extensions thereof, if any.
- (d) Sewer, water, electric, gas, telephone, railroad, and other public utility consents and easements now or hereafter recorded.
- (e) Covenants, agreements, and restrictions now or hereafter recorded against or affecting the premises if they do not prohibit the erection or maintenance of the structures as a single family residence.
- (f) Local, municipal, town, county, and state zoning ordinances and resolutions if they do not prohibit use of the property as a single family dwelling.

14. *Local ordinances; approvals and regulations contingency.* If at any time on or before closing of title any zoning or building ordinance or regulation, or required approval, prohibits or will prohibit Purchaser from using the property as a single family dwelling, this contract shall become null and void, Seller shall return to Purchaser the amount paid under the contract, and neither party shall have any further obligation or liability to the other by reason of hereof.

15. *Assessments.* If, upon delivery of the deed, all or any part of the premises is or has been affected by an assessment or assessments which are or may become payable in annual installments, and the first installment is then a charge or lien or has been paid, for the purpose of this contract all the unpaid installments of the assessments, including those which are to become due and payable after delivery of the deed, shall be deemed to be due and payable and to be liens upon the premises, and shall be paid and discharged by Seller upon delivery of the deed.

16. *Unpaid or unassessed taxes.* The existence of unpaid taxes at closing of title shall not constitute an objection to title if Seller deposits a sufficient amount with the title company and the company insures against the collection of such taxes from the premises. If the closing of title occurs before the tax rate is fixed, the tax apportionment shall be made when the valuation is fully determined, and this sentence shall survive delivery of the deed. The parties intend that the apportionment of taxes be based on the assessed value of the property with the completed dwelling and other improvements.

17. *Seller's inability to deliver title.* If for any reason Seller is unable to deliver title to the premises in accordance with this contract, Seller's liability shall be limited to the return of Purchaser's payments together with the net bulk rate cost of title examination without title insurance as actually charged to Purchaser by the title company engaged in making a search of the premises for the lending institution. Upon the return of such sum, this contract shall be and become null and void.

18. *Seller's inability to obtain construction materials.* Seller shall endeavor to complete the construction of the dwelling on the premises before the date set for the closing of title. Nevertheless, Seller may cancel this contract by forwarding its check in the full amount paid by Purchaser on the execution of this contract, together with a notice in writing, addressed to Purchaser if any of the following events occur: (a) a governmental bureau, department, or subdivision imposes restrictions on the manufacture, sale, distribution, or use of materials necessary in the construction of residential housing, (b) Seller is unable to obtain materials from its usual sources due to strikes, lockouts, war, military operations, abnormal prices and requirements, acts of terror or National emergencies, or (c) the installation of public utilities is restricted or curtailed.

19. *Adjournment of closing.* Closing of title shall be adjourned to a date fixed by Seller if final action on the mortgage applications is not taken, final inspection or other necessary instruments or reports are not made or issued, or the

dwelling is not ready for occupancy at the date set for title closing. However, the adjourned date shall not be later than one month after the dwelling is ready for occupancy and all necessary reports, inspections, and instruments are made or issued.

20. *Construction delays; adjourned closing.* The closing date shall be extended for up to one month after the dwelling can be completed, as provided above, if completion of the dwelling is delayed due to inclement weather; strikes, lockouts, or other disputes affecting either Seller or any of its suppliers of material or labor; delay in issuance of certificates, permits, or licenses; delayed inspections; acts of war or terror or civil commotion; emergency proclamation; governmental regulations; changes ordered by Purchaser in the construction; or any reason beyond Seller's control.

21. *Early completion and closing.* If the house is completed before the closing date specified herein, Purchaser shall accept title five days after he receives written notice thereof from Seller's attorneys.

22. *Unauthorized possession; purchaser's default.* Purchaser shall in no event take possession of the premises before delivery of the deed and full compliance with the terms of this contract. If Purchaser violates this provision, Seller may dispossess him from the premises as a squatter and intruder by summary proceedings. If Purchaser fails to take title at closing or there is an unauthorized possession, this contract shall be deemed cancelled without further notice by Seller, and the amount paid hereunder shall belong to Seller as liquidated damages.

23. *Inspection by purchaser; change orders.* Purchaser or his agent shall have access to the dwelling at reasonable times during progress of the construction for the purpose of examining the work. Purchaser may order reasonable changes in the work, and the purchase price shall be adjusted accordingly. All such change orders and price adjustments shall be in writing and signed by Purchaser.

24. *Certificate of occupancy, permits.* On the closing of title, Seller shall deliver to Purchaser a certificate of occupancy issued by the proper authorities, and the certificate shall be in full force and effect at that time. Seller shall secure all permits and licenses, and pay all fees, necessary for construction of the dwelling.

25. *Appliance warranties and operating systems.* Seller will transfer to Purchaser all warranties given to Seller by any contractor, subcontractor, supplier, or third party for any portion of the building, fixtures, or appliances included in this sale. At the closing date, all water, heating and electrical services will be turned on and in good working order.

26. *Risk of loss.* Seller assumes all risk of loss or damage to the premises by fire or other casualty until delivery of the deed.

27. *Type of deed.* The deed shall be a bargain and sale deed with covenants against grantor's acts in proper statutory short form for record and shall contain the covenant required by Section 13. The deed shall be duly executed and acknowledged by Seller at its expense, so as to convey to Purchaser the fee simple of the premises free of all encumbrances, except as herein stated. The deed shall contain any description of the premises accepted and approved by Purchaser, the lending institution or the title company insuring it.

28. *Seller's full performance on delivery of deed.* This contract is a single, indivisible contract. The delivery to and acceptance of the deed by Purchaser shall be deemed and considered as full performance and compliance by Seller of all the terms of this contract, and as a release by Purchaser of all rights, obligations, claims, or causes of action against Seller. No provision of this contract, unless otherwise herein expressly provided, and no promise, representation, agreement, or obligation of Seller or its agents, employees, or representatives, shall survive the delivery and acceptance of the deed, unless the same is fully set forth in writing together with an express provision that it shall survive delivery of the deed, and is signed by Seller.

29. *One year builder's warranty.* In order to assure the proper care of the dwelling, Seller assumes responsibility for the

proper operation, under normal conditions for a period of one year from the date of closing of title, of the following major systems: maintenance of the roof and roof flashings against leaks, except if caused by an act or event beyond Seller's control; service of the basement against water conditions resulting from seepage or pressure if such conditions develop; the heating unit and heating system that it is sufficient to heat the building when it is zero degrees outside with a five m.p.h. wind to a 70 degree temperature inside (Fahrenheit degrees); and the electrical system and interior plumbing. Seller's responsibility under this paragraph is subject to the condition that the above major systems are properly maintained. Seller's obligations and warranties under this paragraph shall survive delivery and acceptance of the deed.

30. *Liquidated damages for seller's breach.* If Seller breaches this contract or refuses to complete the sale of the property to Purchaser as herein provided, Purchaser may recover from Seller the amount paid hereunder, together with the sum of \$6,000 as liquidated damages. Such amount is agreed upon as the damages that Purchaser will sustain from Seller's breach, it being impractical and extremely difficult to fix actual damages at this time. The foregoing shall be in addition to all other remedies which Purchaser shall have either at law or in equity.

31. *Assignment.* Seller may assign this contract to any building corporation that assumes construction and completion of the dwelling and complies with all other terms and provisions hereof. Purchaser shall in no event make such assignment without Seller's written consent.

32. *Broker.* Thomas Cowan is the broker for this transaction, and his commission shall be paid by Seller as set forth in a separate agreement. However, Seller warrants and represents that no commission shall be due and payable unless and until title closes hereunder.

33. *Closing.* The closing of the within transaction shall be held at Seller's office, or at the office designated by the lending institution which accepts the mortgage on the premises, at 10 a.m. on February 10, _____ [year].

34. *Binding effect.* This contract shall be binding upon the parties and their respective heirs, executors, administrators, successors, and assigns.

35. *Headings.* Headings in this agreement are for convenience and reference only and shall not be used to interpret or construe its provisions.

36. *Non-waiver.* No delay or failure by either party to exercise any right hereunder, and no partial or single exercise of any such right, shall constitute a waiver of that or any other right, unless otherwise expressly provided herein.

37. *Governing law.* This contract shall be construed in accordance with and governed by the laws of the State of New York.

38. *Counterparts.* This contract may be executed in two or more counterparts, each of which shall be deemed an original, but all of which together shall constitute one and the same instrument.

39. *Time of essence.* Time is of the essence of this contract.

40. *Entire agreement.* All prior understandings and agreements between the parties are merged in this contract, which constitutes the entire agreement between the parties. This contract is entered into after full investigation made by Seller, and neither party relies upon any statement or representation made by anyone unless contained herein.

41. *Notices.* All notices hereunder shall be in writing and sent by registered or certified mail, postage prepaid, to the respective parties at their address shown above.

The parties have signed this contract.

Attest:

Secretary

Seller:

Southshore Buildings, Inc.

by _____

President

Purchaser:

James Perry



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Current Legal Forms for Real Estate
Chapter 21 SALES AND EXCHANGES
Part IV. Forms

B. CONTRACTS OF SALE: RESIDENTIAL PROPERTY

25-21 Current Legal Forms for Real Estate FORM 21.29

FORM 21.29 Contract for sale of tract of land--release of subdivided parcels on specified payments--purchase money deed of trust and guaranty given to seller

COMMENT

In this form a developer buys a tract of land which will be subdivided into residential lots after the acquisition. Payment of most of the purchase price is deferred. Frequently a developer in these circumstances intends to pay part of the purchase money debt as each subdivided lot is sold. To allow this, the deed of trust, which will secure the balance of the purchase price due to the seller, will provide that certain portions of the property are released from the seller's lien as the indebtedness is reduced by specified amounts. This type of release provision is a common device when the purchaser is planning to subdivide the property or otherwise intends to improve the property in parcels.

The seller needs to be sure that the land remaining subject to the seller's deed of trust not only has enough value to cover any remaining debt owed by the purchaser, but also that the land has direct access (or access over easements) to a public street. In this way, if there is a default and the seller needs to foreclose, the land will be usable and salable by the seller. For the same reasons, the seller also may want to control the location and order in which the parcels will be released.

On rare occasions, parties to a contract for the sale of land will agree to honor electronic signatures in lieu of manual signatures. The Uniform Electronic Transaction Act, adopted in some form by most states, provides that electronic signatures will have the same legal effect as manual signatures, if the parties to a contract so agree. This contract contains a provision authorizing electronic signatures.

Tax aspects

The release provision has no effect on basic tax consequences. The purchaser's cost basis and the amounts realized by the seller are established at the time of the sale. Subsequent releases from the lien do not affect these items, except to the extent that the purchaser's original allocation of his cost among the various parcels may have to be modified if a default occurs after some parcels have already been released from the seller's lien. The year in which payments are received by the seller will affect the seller's taxable income for that year. If the seller is a dealer, installment sale tax treatment generally is not available. The lien is released as the purchaser pays the deed of trust for each lot. Each lot is not sold separately by the seller receiving the installment payments. For a further discussion of deferred payment and installment sales see The Tax Background (TB) §§ 21.10, 21.11 at the beginning of this chapter.

Information reporting of real estate transactions

The attorney or title company responsible for closing title is required to report the real estate transaction to the Service. In addition, a statement must be provided to the customer before January 31 of the following year. If an attorney or title company is not involved in the closing, the information reporting is the responsibility of the mortgage lender. The information reporting requirements are discussed in TB § 21.02[4].

FORM

AGREEMENT made and entered into February 6, _____ [year], by and between Graham Corporation, a California corporation ("Seller"), Central Housing Corporation, a California corporation ("Buyer"), and William Doyle ("Guarantor").

1. *Sale of property.* Seller shall sell and Buyer shall buy the following described real property located in the County of Los Angeles, State of California.

(Insert description)

2. *Purchase price.* The total purchase price of the property shall be \$200,000. Buyer shall deposit \$10,000 of the purchase price in escrow at the opening of the escrow provided for below and an additional \$75,000 of the purchase price in escrow before the close of escrow. The balance of the purchase price of \$115,000 shall be payable in 10 equal annual installments, plus interest at the rate of 12 percent per annum, commencing one year after the close of escrow. If Buyer fails or refuses to pay the \$75,000 by the close of escrow, the initial deposit of \$10,000 shall immediately become Seller's property and be paid to it. Buyer may make additional payments of principal at any time before maturity, which shall be applied against the payment of future principal installments in the inverse order of their maturity. In such event, the balance of the unpaid purchase price shall continue to be payable in equal annual installments, plus interest of 12 percent per annum, for the remainder of the above ten year period.

3. *Note, guaranty, deed of trust.* The total unpaid balance of the purchase price of \$115,000 shall be evidenced by Buyer's promissory note providing for payment upon the terms set forth in Section 2. The note shall be guaranteed by Guarantor, as provided in Section 5. The note shall be secured by a deed of trust on the property, which shall be prior to any other deed of trust, mortgage, lien, or encumbrance on the property.

4. *Release of parcels from deed of trust.* One third of the total property then subject to the deed of trust referred to in Section 3 shall be released therefrom when all of Buyer's payments of principal after the close of escrow, including all

elective prepayments referred to in Section 2, equal \$40,000. One half of the total property then subject to the deed of trust shall be released when the principal payments total an additional \$40,000. The balance of the property shall be released from the deed of trust as soon as the remaining unpaid balance of the purchase price is paid in full. For this purpose, the property, which has a 450 foot frontage along Holmes Avenue in Van Nuys, California, shall be divided into three equal parcels, each having a frontage of 150 feet along Holmes Avenue. The three parcels shall be referred to as follows: the most northerly parcel as Parcel A; the most southerly parcel as Parcel C; and the remaining portion of the property between Parcels A and C as Parcel B. Buyer may select Parcel A or Parcel C as the first parcel to be released in accordance with the above. If either parcel is released upon total payments of \$40,000 as set forth above, and Buyer makes additional payments of \$40,000 in accordance with the provisions of this Section, Parcel B shall be the second parcel released.

5. *Guaranty.* William Doyle ("Guarantor") personally guarantees all of Buyer's obligations under the terms of this agreement, including but not limited to the guarantee of the payment of the purchase price as provided in Sections 2 and 3. Guarantor shall execute a written guarantee of payment of Buyer's note evidencing the unpaid balance of the purchase price. Guarantor shall reimburse Seller, and its successors and assigns, for all damages sustained by Seller by reason of Buyer's breach of any term of this agreement.

6. *Escrow.* The sale shall be completed through an escrow to be opened at Central Title Insurance Company, 3000 Wilshire Boulevard, Los Angeles, California. The escrow instructions shall be in the standard form used by the Central Title Insurance Company, but shall be consistent with the terms and conditions of this agreement which shall control if there is any inconsistency. The escrow shall be for a period of 120 days.

7. *Title to property.* At the close of escrow Seller shall convey to Buyer title to the property subject to all covenants, conditions, restrictions, easements, and rights of way of record, all of which shall be subject to Buyer's approval within ten days after receipt of a preliminary title report, and subject to any current unpaid real property taxes which are a lien on the property.

8. *Title insurance policy.* Seller shall provide Buyer with a C.L.T.A. standard coverage policy of title insurance in an amount equal to the total sales price.

9. *Taxes, insurance, and costs.* Any real property taxes and insurance shall be prorated as of the close of escrow. Escrow costs and recording fees shall be divided between the parties according to the normal practice in connection with escrows in Los Angeles County, California.

10. *Commissions.* A commission of five percent of the total purchase price is payable by reason of this sale to Harris & Company, 1000 Van Nuys Boulevard, Van Nuys, California. Seller shall pay this commission.

11. *Binding effect.* This agreement shall be binding upon the parties hereto and their respective legal representatives, successors, and assigns.

12. *Headings.* Headings in this agreement are for convenience and reference only and shall not be used to interpret or construe its provisions.

13. *Non-waiver.* No delay or failure by either party to exercise any right hereunder, and no partial or single exercise of any such right, shall constitute a waiver of that or any other right, unless otherwise expressly provided herein.

14. *Governing law.* This agreement shall be construed in accordance with and governed by the laws of the State of California.

15. *Counterparts; Electronic Signatures.* This agreement may be executed in two or more counterparts, each of which

shall be deemed an original but all of which together shall constitute one and the same instrument. This agreement may be executed by electronic signature pursuant to Section 1633.1 *et seq.* of the California Civil Code.

16. *Time of essence.* Time is of the essence of this agreement.

17. *Entire agreement.* All prior understandings and agreements between the parties are merged in this contract, which constitutes the entire agreement between the parties. This contract is entered into after full investigation made by Seller, and neither party relies upon any statement or representation made by anyone unless contained herein.

18. *Notices.* All notices hereunder shall be in writing and sent by registered or certified mail, postage prepaid, addressed to the respective parties at their addresses shown above.

The parties have executed this agreement the day and year first above written.

Attest:

Secretary

Attest:

Graham Corporation

by _____

Central Housing Corporation

by _____

President

William Doyle, Guarantor



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B. CONTRACTS OF SALE: RESIDENTIAL PROPERTY

25-21 Current Legal Forms for Real Estate FORM 21.30

FORM 21.30 Contract rider for residential sales contracts containing lead-based paint disclosures and lead-based paint contingency

COMMENT

Disclosure of lead-based paint hazards

Federal law requires the disclosure of lead-based paint hazards to individuals who are renting, buying or renovating pre-1978 residential housing. See 42 U.S.C. §§ 4851-4856; 40 C.F.R. Part 745 and 24 C.F.R. Part 35, Subpart A. Lead-based paint and paint dust often found in housing built before 1978. Lead is very dangerous, especially to young children and pregnant women. Sellers of pre-1978 housing must disclose known information on lead-based paint hazards before selling a house, and landlords must disclose such information before leases take effect. Both sales contracts and leases must include a lead warning statement and disclosure information. Renovators must provide information about lead-based paint before starting work.

The seller and the broker are responsible for providing lead-based paint information to the purchaser before the sale. The information required by law includes both specific information about the property being sold and general information about lead-based paint hazards. The seller must disclose known lead-based paint and lead-based paint hazards and provide available records and reports to the purchaser. The seller also must give the purchaser the pamphlet, developed by EPA, HUD, and the Consumer Product Safety Commission (CPSC), titled "Protect Your Family From Lead in Your Home." The purchaser must be given a 10-day period to conduct a lead-based paint inspection or risk assessment, at the purchaser's expense. The parties have flexibility to negotiate the key terms of the evaluation. Finally, the sales contract must include certain notification and disclosure language.

Note that the law does not require the seller to test for lead-based paint or to remove such paint if it is known to exist. The law also does not invalidate a sales contract that does not include the required disclosure. However, any person who violates the lead disclosure requirements may be subject to civil and criminal penalties, as well as treble damages in a private civil suit.

Lead testing contingency

To protect against the dangers of lead, many purchasers desire a provision making the contract of sale contingent upon the outcome of lead-based paint testing. A lead paint contingency should be included in any contract for the sale of a structure built before 1978, especially if the structure is a residence and the purchaser or anticipated tenant has small children. A commercial property contract should contain a contingency that at least provides for testing for lead dust, which is harmful to people of any age.

The contingency should specify the method of testing and analysis to be used and should require that multiple samples be taken in each room, as well as soil samples from outdoors. The contingency should provide for repair of the sampled areas. The lead paint contingency also should specify the qualifications and credentials of the party performing the sampling and analysis. It is important to be sure that the inspector is qualified and has received training in sampling and spectrography techniques.

The lead paint contingency should allow the purchaser to terminate the contract if any lead paint or dust is found, or if the soil around the premises is found to be contaminated with lead. Alternatively, the contingency may provide that the agreement will be modified to provide for the remediation of any lead problem. Upon receipt of the test results, the purchaser will have to decide whether remediation is required under the circumstances. If the purchaser has no small children and none are expected, he or she may decide against the expense. If the purchaser has small children or is purchasing a building where children may live or visit, he or she may be advised to seek another property.

Lead-based paint testing techniques and remedies

Lead paint problems can be determined by visual inspection of paint condition and location, surface dust tests, spectrography or chemical tests of samples. Home test kits generally are not considered to be reliable.

Lead paint can be handled in three ways: removal of the surface containing the paint, encapsulation (i.e., by sheetrocking over the surface), or by sanding the surface. Removal is the most permanent and most expensive method, and it causes the least amount of lead dust. Encapsulation may not be permanent and is moderately expensive. As the seams age, lead dust may escape. Encapsulation may not be performed by painting alone. Sanding is not recommended, as it produces high quantities of lead dust; however, sanding is a lower cost alternative and deemed permanent.

FORM

between _____, as Seller, and _____, as Purchaser

Property address: _____

☐ **Disclosure of Information on Lead-Based Paint and Lead-Based Paint Hazards**

Lead Warning Statement: Every purchaser of any interest in residential real property on which a residential dwelling was built prior to 1978 is notified that such property may present exposure to lead from lead-based paint that may place young children at risk of developing lead poisoning. Lead Poisoning in young children may produce permanent neurological damage, including learning disabilities, reduced intelligence quotient, behavioral problems, and impaired memory. Lead poisoning also poses a particular risk to pregnant women. The seller of any interest in residential real property is required to provide the buyer with any information on lead-based paint hazards from risk assessments or inspections in the seller's possession and notify the buyer of any known lead-based paint hazards. A risk assessment or inspection for possible lead-based paint hazards is recommended prior to purchase.

Seller's Disclosure (initial)

_____ (a) Presence of lead-based paint and/or lead-based paint hazards
(check one below):

☐ Known lead-based paint and/or lead-based paint hazards are present in the housing
(explain):

☐ Seller has no knowledge of lead-based paint and/or lead-based paint hazards in the housing.

_____ (b) Records and reports available to the seller (check one below):

☐ Seller has provided the purchaser with all available records and reports pertaining to lead-based paint and/or lead-based paint hazards in the housing (list documents below):

☐ Seller has no reports or records pertaining to lead-based paint and/or lead-based paint hazards in the housing.

Purchaser's Acknowledgment (initial)

_____ (c) Purchaser has received copies of all information listed above.

_____ (d) Purchaser has received the pamphlet *Protect Your Family from Lead in Your Home*.

_____ (e) Purchaser has (check one below):

☐ Received a 10-day opportunity (or mutually agreed upon period) to conduct a risk assessment or inspection for the presence of lead based paint and/or lead-based paint haz-

ards; or

☐ Waived the opportunity to conduct a risk assessment or inspection for the presence of lead-based paint and/or lead-based paint hazards.

Agent's Acknowledgment (initial)

____ (f) Agent has informed the seller of the seller's obligations under 42 U.S.C.
 _____ 4582(d) and is aware of his/her responsibility to ensure compliance.

☐ **Exclusion from Disclosure.** Seller hereby represents that this property is excluded from the legal requirement to disclose the existence of lead-based paint and/or lead-based paint hazards in housing because this housing was constructed after 1978. (Initial _____)

Lead-Based Paint Contingency: This contract is contingent upon a risk assessment or inspection of the property for the presence of lead-based paint and/or lead-based paint hazards at the purchaser's expense within _____ days after the signing of this contract. If the risk assessment or inspection report shows no lead-based paint or lead-based paint hazards to be present, this contract is binding and effective. If the report shows the presence of lead-based paint and/or lead-based paint hazards, Purchaser (or Purchaser's agent) will deliver to Seller (or Seller's agent) a written list of the specific existing deficiencies and correction needed, together with a copy of the inspection and/or risk assessment report. Within _____ days after delivery of the list, Seller will notify Purchaser in writing whether Seller elects to correct the condition(s) before the closing of title, or to cancel this contract and cause the return of Purchaser's deposit money. If Seller elects to cancel the contract and to refund the deposit, this contract will be terminated and unenforceable. If Seller will correct the condition, Seller will furnish Purchaser with certification from a risk assessor or inspector demonstrating that the condition has been remedied before the closing of title. Purchaser may waive this contingency at any time without cause, either by stating so in writing or by refusing the deposit refund, in which event this contract will be binding and enforceable.

The risk assessor or inspector shall be fully qualified to conduct the risk assessment or inspection, and shall meet the standards for such professionals promulgated by the State of _____. The risk assessment or inspection shall include a visual inspection of paint condition and location, lab tests of multiple paint samples taken in each room, surface dust tests, lab tests of outdoor soil samples, and examination by a portable x-ray fluorescence machine.

Certification of Accuracy

The following parties have reviewed the information above and certify, to the best of their knowledge, that the information provided by the signatory is true and accurate.

Seller	Date	Seller	Date
_____	_____	_____	_____
Agent	Date	Agent	Date
_____	_____	_____	_____
Purchaser	Date	Purchaser	Date
_____	_____	_____	_____



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B. CONTRACTS OF SALE: RESIDENTIAL PROPERTY

25-21 Current Legal Forms for Real Estate FORM 21.31

FORM 21.31 Residential property disclosure form

COMMENT

This form is the official form for residential property disclosure in Ohio. See Ohio Rev. Code § 5302.30, which requires sellers of residential property to disclose various aspects of the property's physical condition on this form. The Ohio form is a useful model for disclosure statements by sellers in states which do not have mandatory disclosure laws, since disclosure of the condition of the property may be recommended even when not required.

Required disclosure of defects

A growing majority of states now require the seller and/or the seller's agent to disclose facts which materially affect the value or desirability of the property, especially if such adverse facts are peculiarly within the seller's knowledge and are not discoverable by a reasonable inspection. The seller may be required by law or contract to give the purchaser a written report on the condition of the property. Sellers and brokers have been held liable to purchasers for both undisclosed physical defects in the property and undisclosed nonphysical facts about the property, such as alleged ghosts, murders and former occupants infected with the AIDS virus. In some cases it might even be prudent to disclose matters which affect not just the property being sold but also the neighborhood. For example, if a registered sex offender has moved into the neighborhood the seller has likely received a notice from the local governmental authority of such fact, and may want to disclose such fact to the purchaser. All 50 states have now adopted some version of what is commonly called "Megan's Law," requiring such notifications to be given.

Recommended disclosure of defects

Even where not required by local law, many brokers now recommend that sellers give purchasers

a disclosure report, to protect both the broker and the seller from liability for nondisclosure. Disclosure statements generally include information about structural defects, utilities, water, septic systems, defects in equipment and appliances, environmental problems and regulatory compliance. The seller's attorney should discuss the relevant disclosure law with the seller to determine what disclosure must or should be made under the circumstances.

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B. CONTRACTS OF SALE: RESIDENTIAL PROPERTY

25-21 Current Legal Forms for Real Estate FORM 21.32

FORM 21.32 Contract for sale of tract of land--purchase money mortgage--release provisions for large subdivision development

COMMENT

This contract illustrates a transaction in which the purchaser contemplates the subdivision and platting of property for development purposes. Many of these transactions are partly financed by purchase money mortgages which give the purchaser the right to secure the release of separate parcels from the lien of the mortgage by specific payments which are applied against the total mortgage debt.

A definite scheme is used in this contract for the geographical order in which parcels may be released from the purchase money mortgage. This is designed to prevent a "raiding" of the most desirable locations and a subsequent default by the purchaser, leaving the seller-mortgagee with the less valuable parcels. To facilitate the development of the property, the seller-mortgagee commits himself to join in the execution of any plat or any instrument dedicating part of the property for public use. A special provision has been added, as required by local law, giving some protection to a person who buys one of the plots and later faces the possibility of losing it because the developer has defaulted on the purchase money mortgage held by the original owner.

FORM

AGREEMENT made November 15, _____ [year], between Arthur Brown, joined by his wife Harriet Brown ("Seller"), and Great Land Corporation, a Florida corporation ("Buyer").

1. *Sale.* Seller agrees to sell and Buyer agrees to purchase the following four Parcels of property, located in Lee County,

Florida, and described as follows:

(Insert description)

The acreage shown for each of the Parcels are acreages as shown on their respective tax receipts. Seller makes no representations as to the exact number of acres comprising all four Parcels, and the purchase price set forth in this agreement is a firm price without regard to any variance from the actual number of acres shown.

2. *Purchase price.* The total purchase price for the property shall be \$3.5 million, payable as follows:

(a) As earnest money, Buyer, upon the execution of this agreement, has paid \$100,000 to the law firm of Smith & Harris as Escrow Agent.

(b) On or before March 3, _____ [year], Buyer shall pay Escrow Agent an additional \$250,000 on account of the purchase price. Immediately upon receipt of this additional sum, Escrow Agent shall pay Seller all escrow moneys then held hereunder.

(c) At closing, Buyer shall pay Seller an additional \$650,000, plus or minus prorations, Buyer shall assume existing mortgage or mortgages on the property with a balance of \$100,000, and the remainder of the purchase price of \$2,400,000 shall be represented by a promissory note secured by a purchase money mortgage, to be executed by Buyer and delivered to Seller after it is recorded at the closing.

3. *Nonrecourse note and mortgage.* The promissory note shall be payable in five equal annual installments of principal, with the first installment due and payable on March 1, _____ [year], and bear interest at 5-percent per annum payable with each installment of principal. The purchase money mortgage shall be in the usual Florida form, contain a grace period for the payment of any installment of principal and interest of 20 days, provide for prepayment without penalty at any time after January 1, _____ [year], and further provide that if the mortgagor fails to meet any installment of mortgage debt when due, the mortgagee may in no case accelerate the unpaid balance of principal and interest until the mortgagor has first been given notice of any such default by registered or certified mail, and such default has not been cured within ten days after receipt thereof. The purchase money note and mortgage shall also provide that Buyer's obligation in respect of the indebtedness secured thereby shall be limited wholly and solely to the value of the land encumbered thereby, without right to any deficiency claim or judgment.

4. *Closing.* This agreement shall be consummated and the purchase and sale concluded on or before December 15, _____ [year], at the office of Smith & Harris, attorneys for Seller. Buyer shall notify Seller at least 40 days before the date fixed by Buyer for the closing.

5. *Title insurance or abstracts.* At least 30 days before the closing date, Seller will furnish to Buyer, at Buyer's expense, either commitments for title insurance from a recognized title company, or abstracts of title extended to such date, showing title to the property to be good and marketable and vested in Seller free and clear of all encumbrances, except (a) the mortgage encumbrances to be assumed as part of the purchase price, (b) taxes and assessments for the year _____ [year] and thereafter, (c) conditions and restrictions of record common to the neighborhood, (d) any oil, gas, and mineral leases of record and reservations to receive royalties, rentals, and other receipts therefrom, and (e) any applicable zoning ordinances.

6. *Objections to title.* Buyer shall have 15 days from the date of delivery of either the commitment or abstract in which to examine and make written objections. If Buyer has valid objections to the state of the title, Seller shall have 60 days after it receives written notice thereof to have the same removed, and the date of closing shall be extended for that purpose. If the objections are not eliminated by the end of the 60-day period, Buyer may refuse to accept the title or may

accept it in its then existing condition without reduction of the purchase price. If Buyer refuses to accept title, all monies paid on account of the purchase price shall immediately be refunded. If there are valid objections to the condition of title, any closing will be held within 10 days after the objections are eliminated.

7. *Adjustments.* Taxes, insurance, rents, and interest on existing mortgages shall be prorated as of the date of closing.

8. *Deed.* At the closing, Seller shall convey good and marketable title to Buyer by warranty deed, conveying the property free and clear of all liens and encumbrances except as herein noted. The deed shall be prepared at Seller's expense.

9. *Tracts released from mortgage.* The purchase money mortgage to be delivered to Seller shall provide that property in ten-acre tracts shall be released from the lien of the mortgage on the payment to Seller of \$5,000 per acre as to Parcels No. 1, 2, and 3, and on payment of \$12,000 per acre as to Parcel No. 4, except that releases of tracts in Parcel No. 4 shall be at \$5,000 per acre after Buyer has paid Seller the first two installments of principal due under the purchase money note and mortgage. Buyer may commence releases of tracts in any Parcel comprising the property described in paragraph 1 of this agreement, and may obtain releases of tracts in different Parcels at the same time. However, all such releases in a given Parcel shall commence at a boundary of such Parcel and extend across the entire Parcel to the boundaries which are perpendicular to the commencement boundary, e.g., a ten-acre tract being released on the south boundary of a given Parcel shall extend from its east to its west boundaries. All subsequent releases in a given Parcel shall be contiguous to previous releases in the same Parcel, and shall likewise extend across the entire Parcel.

10. *Easements over released tracts.* If tracts released from the lien of the mortgage operate so as to separate the still-encumbered property from access to a section line or to an existing public road, Buyer, at Seller's request, shall grant an easement to Seller furnishing access from the property still encumbered by the mortgage to the section line or to a then existing public road. The easement, however, shall not be over ten feet in width and Buyer shall select its location.

11. *Lots released from mortgage.* After the property encumbered by the mortgage has been platted into lots of less than one acre each, but to not less than three lots per acre, after approval of the plat by the appropriate governmental authorities as provided in the appropriate Florida statutes, and after posting of bond and recording of such plat, Seller will release each lot from the lien of the mortgage at the rate of \$400 per lot as to lots in Parcel No. 4 until the first two annual installments of the mortgage have been paid, after which the release price in Parcel No. 4 shall be \$2,000 per lot; and at the rate of \$1,750 per lot in Parcels No. 1, 2, and 3. Each lot shall be approximately 80 x 125 feet in size, and shall be comprised of approximately 10,000 square feet. Buyer shall not be required to request releases of lots in a contiguous manner after the platting has been completed in accordance with the foregoing.

12. *Releases for public facilities.* Seller shall join with Buyer in the execution of any plat or instrument dedicating to public use all streets, rights-of-way, easements for drainage, waterways, and similar or comparable public facilities, after the plat is approved by appropriate governmental authorities. Buyer shall not be required to pay any release price for areas dedicated as public facilities, nor for areas shown as usual canals. However, Buyer shall pay Seller \$500 per acre for all other bodies of water created by Buyer, or for other dedicated areas.

13. *Application of release payments.* Payments made on account of releases shall be applied to the next principal installment due and payable under the terms of the purchase money note and mortgage.

14. *Releases after mortgage default.* If Purchaser defaults under the purchase money note and mortgage after a plat has been approved and recorded, any lot encumbered by the mortgage will nevertheless be released by Seller from the mortgage lien. The price to be paid for the release of any such lot, however, will be not less than the release price above provided.

15. *Release preparation expenses.* All mortgage releases shall be prepared and paid by Buyer. With reference to acreage releases, Buyer shall pay to Seller the additional sum of \$150 for each release requested in order to cover attorneys examination fees on Seller's behalf.

16. *Broker.* Buyer represents to Seller that this agreement was procured only by and through the efforts of Terence Powell, as broker, and that it has dealt with no other salesman or broker in connection with this purchase. Buyer shall indemnify and save Seller harmless of and from any claim to real estate brokerage or commission by Terence Powell, but assumes no responsibility or obligation with respect to any other claim or claims in respect of this agreement by any other broker or salesperson.

17. *Binding effect.* This agreement shall be binding upon the parties and their respective legal representatives, successors, and assigns.

18. *Headings.* Headings in this agreement are for convenience and reference only and shall not be used to interpret or construe its provisions.

19. *Non-waiver.* No delay or failure by either party to exercise any right hereunder, and no partial or single exercise of any such right, shall constitute a waiver of that or any other right, unless otherwise expressly provided herein.

20. *Governing law.* This agreement shall be construed in accordance with and governed by the laws of the State of Florida.

21. *Counterparts.* This agreement may be executed in two or more counterparts, each of which shall be deemed an original, but all of which together shall constitute one and the same instrument.

22. *Time of essence.* Time is of the essence of this agreement.

23. *Entire agreement.* This agreement supersedes all prior agreements and constitutes the entire agreement between the parties hereto with regard to the subject matter hereof.

24. *Notices.* All notices hereunder shall be in writing and sent by registered or certified mail, postage prepaid, to the respective parties at their addresses shown above.

The parties have hereunto set their hands and seals the day and year first above written.

Corporate Seal

_____(L.S.)
Arthur Brown

_____(L.S.)
Harriet Brown

Attest:

Great Land Corporation
by _____
President

The undersigned acknowledge receipt of \$100,000 earnest money under this agreement and they agree to hold the same, plus any additional sums received by them, in accordance with the terms of this agreement.

Smith & Harris

by _____

Escrow Agent



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B. CONTRACTS OF SALE: RESIDENTIAL PROPERTY

25-21 Current Legal Forms for Real Estate FORM 21.33

FORM 21.33 Sale of garden apartment complex--purchase price allocation between personal and real property--assignment and assumption of leases--apartment unit and parking space leases

COMMENT

This agreement involves the sale of a four-unit garden type apartment complex with the purchase price to be allocated as to personal and real property in each unit. The personal property is to be conveyed by general warranty bills of sale. There is a warranty as to minimum amount of rent roll. The leases are to be assigned to and assumed by purchaser.

Allocation of purchase price

In this contract not only is there a separate allocation of price for each of four parcels, but also sub-allocations, on each parcel, for both personal property and real property. (See paragraph 3 of the contract.) The cost recovery allowance each tax year for personal property and real estate does vary substantially and will, therefore, have an effect on the buyer's taxable income. The allocation also establishes a separate basis in each parcel of land and the personalty. For a further discussion of accelerated cost recovery see The Tax Background § 21.06 at the beginning of this chapter.

Lease provisions

The contract contains specific provisions relating to the unit leases. The seller not only provides the purchaser with a "rent roll" showing the annual gross rent, but also represents and warrants a minimum amount of rent. (See paragraph 7(f).) The leases are to be assigned to the purchaser, and the purchaser agrees to indemnify the seller against claims and liabilities which may arise from the leases. The seller represents and warrants that there are no defaults in the leases to be assigned. (See paragraphs 7(g) and 12.)

Mortgage commitment

The purchaser, in this contract obtained a commitment for financing prior to entering the agreement. This contract contains a relatively unique representation and warranty that the purchaser does in fact have a mortgage commitment. Also included is the representation and warranty that the purchaser will meet all conditions in the commitment. (See paragraph 4.)

Closing documents

Paragraph 7 lists each document needed at closing and requires seller to deliver them to the escrow agent not later than five days before the closing date. This can serve as a preclosing checklist and should prevent disputes as to what documents are required at the closing. Specific items required for each unit include security deposit schedule, lease assignments, rent roll certification, employee list, and bills of sale on personal property used in connection with the operation of the complex. (See paragraph 7.)

Real estate tax litigation

Another relatively unique clause in this contract acknowledges pending litigation challenging the existing tax assessment, and provides for the allocation of the tax savings in the event that the challenge is successful. Tax savings by reason of taxes due prior to closing are to be paid over to the seller. (See paragraphs 8 and 10(c).)

Seller's representations

Several representations and warranties made by the seller upon which the purchaser relies in entering the contract are listed. Included are representations that the property is free of mechanic's liens, that the property (real and personal) will be in good condition on closing date, and that the various systems will be in good working order. There are no pending law suits, violations, or condemnation proceedings outstanding. (See paragraph 13.) These statements provide the buyer with a remedy in the event that any representations are not fulfilled at closing. The purchaser can claim breach of contract and sue for damages, or holding the threat of such a suit, renegotiate the relevant terms of the transaction at or prior to closing.

Disclosure of lead-based paint hazards

Federal law requires the seller of pre-1978 residential housing to disclose known information to the prospective purchaser on lead-based paint hazards. *See* 42 U.S.C. §§ 4851-4856; 40 C.F.R. Part 745 and 24 C.F.R. Part 35, Subpart A. The sales contract must include a lead warning statement and certain disclosure information. *See* discussion in comments to Form 21.15, *supra*. A sample lead-based paint sales contract rider, including both disclosure under the federal law and a lead-based paint contingency clause, is included in this chapter at Form 21.30, *supra*.

FORM

1. *Purchase*. John E. Dowell, located at 700 Lakeside Tower, Toledo, Ohio ("Purchaser") agrees to purchase from Rosewood, Inc., Rosewood, Inc., No. 2, Rosewood, Inc., No. 3, and Rosewood, Inc., No. 4, each an Ohio Corporation (collectively, "Seller") certain real property, including certain premises identified collectively as 13755-13829 Cedar

Road, City of Toledo, County of Lucas, State of Ohio, and certain personal property located thereon, appurtenant and/or relating thereto, and Seller agrees to sell the property to Purchaser.

2. *Property.* The property to be purchased and sold includes the following:

(a) *Lot 10, Block 1035.* From Rosewood, Inc., certain premises commonly known as 13755-773 Cedar Road, Toledo, Ohio, and more particularly described in Exhibit A;

(b) *Lot 11, Block 1035.* From Rosewood, Inc., No. 2, certain premises commonly known as 13775-791 Cedar Road, Toledo, Ohio, and more particularly described in Exhibit B;

(c) *Lot 12, Block 1035.* From Rosewood, Inc., No. 3, certain premises commonly known as 13793-811 Cedar Road, Toledo, Ohio, more particularly described in Exhibit C;

(d) *Lot 13, Block 1035.* Rosewood, Inc., No. 4, certain premises commonly known as 13813-829 Cedar Road, Toledo, Ohio, and more particularly described in Exhibit D;

(e) *Appurtenances.* For each of the properties described in subparagraphs (a) through (d), all easements, rights of way, privileges, appurtenances and rights to the same belonging to and inuring to the benefit of the premises; and

(f) *Fixtures and equipment.* For each of the properties described in subparagraphs (a) through (d) all of the fixtures and articles of personal property, including, but not limited to, furniture, furnishings, gas and electric apparatus and equipment, engines, radiators, heating, ventilating and air-conditioning units, furnaces and equipment, steam and hot water boilers, stoves, ranges, refrigerating plant and refrigerators, cooking apparatus and appurtenances, shades, awnings, screens, blinds, carpeting, drapes, curtains, flowers, trees, shrubs, linoleum, storm windows and storm doors, and all other machinery, vehicles and equipment, attached to or appurtenant to the premises or used in connection with the maintenance or operation of the premises, and owned by Seller.

3. *Purchase price.* The purchase price for the properties described in paragraph 2 is as follows:

(a) *Lot 10.* For the property hereinabove described as Lot 10, Block 1035.

Personal Property	\$ 7,500.00
Land and Building	930,000.00
Total	\$ 937,500.00

(b) *Lot 11.* For the property hereinabove described as Lot 11, Block 1035.

Personal Property	\$ 8,000.00
Land and Building	940,000.00
Total	\$ 948,000.00

(c) *Lot 12.* For the property hereinabove described as Lot 12, Block 1035.

Personal Property	\$ 10,000.00
Land and Building	1,200,000.00
Total	\$1,210,000.00

(d) *Lot 13.* For the property hereinabove described as Lot 13, Block 1035.

Personal Property	\$ 9,000.00
Land and Building	1,100,000.00
Total	\$1,109,000.00

(e) *Earnest money.* Purchaser shall pay Seller or Seller's nominee \$25,000 as earnest money concurrently with the execution hereof by Seller; and

(f) *Balance.* The balance of the purchase price and/or bona fide commitments for payment shall be paid to the Escrow Agent not later than ten days before the time of closing.

4. *Mortgage commitment.* Purchaser represents and warrants that The Charleston Life Insurance Company of America has issued to Purchaser its commitment for a first mortgage loan on the property for \$3,000,000, that the commitment is in full force and effect, and that Purchaser is ready, willing and able to meet all of the conditions of the commitment, including providing for the payment of the balance of the purchase price over and above the sum total of the first mortgage loan and the earnest money deposit.

5. *Cash prior to closing.* Purchaser shall deliver into escrow the balance of the purchase price not less than ten days before the Closing Date.

6. *Closing date.* The sale described herein shall be consummated on the date all of the required deeds are recorded with the Lucas County Recorder, which shall be the same date on which possession is transferred to Purchaser. This date shall be no later than July 1, _____ [year] (the "Closing Date"), but the Closing Date may be any earlier date specified by Purchaser provided that Purchaser gives Seller at least ten days' prior written notice thereof.

7. *Closing documents.* Except for subparagraph (b) below, not later than five days before the Closing Date, Seller shall deliver to White Title & Trust Company (the "Escrow Agent") the following documents:

(a) *Deed.* Full warranty deeds conveying to Purchaser and/or Purchaser's nominee in deeds fee simple title to the real property. The title shall in each instance be free and clear of all encumbrances, except:

(i) zoning ordinances and conditions;

(ii) any reservations, easements, and restrictions of record approved by Purchaser;

(iii) taxes and assessments which are a lien but not yet due and payable;

(iv) leases to occupying tenants, whether of record or not; and

(v) matters which would be disclosed by a physical examination or accurate survey of the properties.

However, if Purchaser reasonably objects to any of the above conditions, reservations, easements, or restrictions of record, this Agreement shall be null and void and the parties shall be returned to their prior positions without penalty or cost to them.

(b) *Title report.* Notwithstanding any provisions to the contrary herein contained, Seller will cause to be

delivered to Purchaser, within 30 days after this agreement is executed, a Preliminary Title Report prepared by White Title & Trust Company, together with copies of the most recent real estate tax bills and a tax search prepared by the Escrow Agent.

(c) *Bill of sale.* General warranty bills of sale including all personal property described herein and in the Exhibits, to be conveyed in accordance with this Agreement.

(d) *Security deposit schedule.* A schedule, which Seller represents and warrants and which Seller shall on the Closing Date represent and warrant to be accurate and complete, of all security deposits received to the Closing Date by or for Seller from or on account of the rental and/or occupancy of each dwelling unit in the garden-type apartment complex and/or on account of parking privileges exercised or to be exercised by persons in the parking facility situated on the premises.

(e) *Insurance documents.* True copies of policies plus endorsements and riders, if any, and assignments thereof from Seller to Purchaser or his nominee of all insurance contracts relating to the premises, whether casualty, liability, or any other form of insurance coverage. The assignments shall be effective as of the Closing Date. Seller shall also furnish to Purchaser satisfactory evidence that the issuer of each insurance contract has consented to each assignment. Purchaser may obtain all or part of his own insurance coverage, in which event Seller shall retain its policies and cause them to be cancelled. The parties shall prorate, as of the Closing Date, the costs of all insurance contracts for which Purchaser accepts assignment from Seller.

(f) *Rent rolls.* A copy of the rent rolls reflecting annual gross rentals in an amount which Seller represents and warrants to be not less than \$686,400. Seller also represents and warrants that on the Closing Date, an accurate and complete copy of the rent rolls will be delivered to Purchaser for all of the 320 suites and 300 parking spaces conveyed under the terms of this Agreement, which shall reflect all rentals in effect at the Closing Date.

(g) *Lease assignments.* Written assignments from Seller to Purchaser of leases and leasehold interests, under the provisions of paragraph 12. As soon as the lease assignments become effective, Purchaser shall assume the leases and leasehold interests and indemnify Seller from all claims and liabilities subsequently arising from or on account of the leases and leasehold interests.

(h) *Corporate authority.* An opinion letter from Seller's counsel stating that Seller has full and complete authority to take all actions and make all conveyances and assignments required by this Agreement.

(i) *Corporate resolution.* Certification by Seller's secretary or other appropriate officer that Seller's Board of Directors and shareholders have authorized the sale in accordance with the terms of this Agreement to Purchaser and/or his grantee in deeds and/or nominee of the real and personal property which is the subject matter of this Agreement.

(j) *Employee list.* A schedule, which Seller represents and warrants on the Closing Date to be accurate and complete, of all maintenance and custodial employees presently engaged on a regular basis, whether by contract or otherwise, in, on, or for the benefit of the premises.

(k) *Miscellaneous contracts.* Copies, which Seller represents and warrants and shall on the Closing Date represent and warrant to be accurate and complete, of all contracts, whether for labor, materials, services or otherwise, which relate to the operation of the premises and/or which reasonably might become a liability of or a lien against the premises.

8. *Tax complaints.* Any proceeds realized from real estate tax complaints pending for periods preceding the date of closing shall belong to Seller.

9. *Brokers.* Purchaser represents and warrants that Peter John and Sarah Stine are the only real estate brokers or persons with whom he has dealt in this transaction who may have reason to make a claim for a sales commission. Seller shall indemnify and hold harmless Purchaser from and against losses and expenses arising out of, by reason of, or in connection with, claims asserted by any person for a broker's commission in this transaction and arising from any broker's contacts with Seller.

10. *Real estate taxes*

(a) *Adjustment.* All general and special real estate taxes and assessments on the property conveyed or to be conveyed under this Agreement shall be prorated as of the date of transfer of title, based upon the most recently available tax duplicate.

(b) *Payment.* Seller represents and warrants, and shall on the Closing Date represent and warrant, that all assessments and respreads of assessments, both general and special, on the property have been paid to the extent due as of the Closing Date or paid through the Escrow Agent.

(c) *Readjustment.* If any real estate tax controversy pending as of the Closing Date is successfully resolved, with the result that Seller would have been entitled to additional funds on the Closing Date due to the proration of taxes at Closing, Purchaser shall remit the additional funds to Seller as if they were included in the proration.

11. *Maintenance expenses.*

(a) *Indemnity.* Seller shall indemnify and hold harmless Purchaser and his nominee for all claims by employees, including any wages and holiday or sick pay arising out of employment occurring before the Closing Date.

(b) *Utility and rental charges.* Utility charges and rent paid or payable on account of the apartment suites or the rental of parking space in the parking facility shall be prorated as of the date of transfer of title.

(c) *Rent prepayment prohibited.* Seller has not collected, and shall not at any time before the Closing Date collect, from any person more than one month's rental in advance, including apartment and parking rent.

12. *Lease assignment.* Seller shall assign to Purchaser or his nominee, or both, on or before the Closing Date, every lease of space, whether residential, parking, or otherwise, affecting the premises. Seller does not know, and has no reason to know, of any defaults presently existing on any lease. If any default of which Seller knows or should know occurs between the Acceptance Date and the Closing Date, Seller shall so notify Purchaser in writing on or before the Closing Date and shall promptly take all usual, necessary, and lawful steps to correct the default.

13. *Warranties.* Seller represents and warrants, and shall on the Closing Date represent and warrant, as follows:

- (a) *No liens.* The premises are free and clear of all mechanics' liens and all other liens, except as recited in this agreement;
- (b) *No defects.* All property, whether real or personal, which is conveyed or to be conveyed under the terms of this Agreement is and shall be on the Closing Date in good condition, except for ordinary wear and tear, and there are no structural defects of any kind or any latent defects of which Seller knows or should have known in the property;
- (c) *Good working order.* The heating and cooling system, plumbing and sprinkler system, and roof are and at the time of closing shall be in good working order and condition, except for ordinary wear and tear, with valid permits outstanding where required;
- (d) *Occupancy regulations.* All occupancy and fire regulations of the City of Toledo have been and, on the Closing Date shall have been, to the extent that Seller knows or should have known, fully complied with for each building on the premises;
- (e) *No condemnations.* Seller has received no written notice or official notice of any condemnation proceedings against the whole or any part of the premises;
- (f) *No violations.* Seller does not know or have reason to know of any substantial violations of law or municipal ordinances affecting the premises. Seller shall, by the Closing Date, cure all violations of which it knows or should have known that occur between the Acceptance Date and the Closing Date;
- (g) *Lawful occupancy.* Seller does not know, nor has it received written or official notice, of any violation of laws or ordinances governing occupancy of the premises;
- (h) *No pending suits.* No lawsuits are presently pending or have been threatened in writing concerning the property to be conveyed hereunder. Seller does not know of any claims or liens against the property, other than those set forth herein;
- (i) *Good title.* Seller now has and on the Closing Date shall have good, clear, and sufficient title, free from all liens, security interests, and encumbrances, to all fixtures and articles, including, but not limited to, furniture, furnishings, gas and electric apparatus and equipment, engines, radiators, heating and ventilating and air-conditioning units, furnaces and equipment, steam and hot water boilers, stoves, ranges, refrigerating plant and refrigerators, cooking apparatus and appurtenances, shades, awnings, screens, blinds, carpeting, drapes, curtains, flowers, trees, shrubs, linoleum, storm windows and storm doors, and all other machinery, vehicles, and equipment attached to or appurtenant to the premises or used in connection with the maintenance or operation of the premises, and owned by Seller;
- (j) *Copies of contracts.* Seller has delivered and as of the Closing Date shall have delivered copies of every contract which it is required to deliver to the Escrow Agent under the provisions of paragraph 7(k);
- (k) *Maintenance.* Seller has maintained, is continuing to maintain, and as of the Closing Date shall have maintained the premises in good condition and continued normal operations on the premises. Seller shall not, between the Acceptance Date and the Closing Date, incur any new indebtedness, enter into any new lease, or renew any existing lease, except in the ordinary course of business and on terms at least as favorable as those in effect on the Acceptance Date.
- (l) *Possession.* Seller shall on the Closing Date transfer actual possession of premises to Purchaser or his nominee on the deeds; and

(m) *Documents*. All documents that Seller has delivered or will deliver hereunder to Purchaser are and shall remain wholly accurate at closing. Seller shall immediately notify Purchaser, in writing, of every material change of which Seller knows or should have known in the facts, circumstances, or subject matter of every statement, assertion, schedule, or warranty made by Seller or under the terms hereof.

14. *Earnest money*. On or before the date all documents are required to be delivered to the Escrow Agent, Seller shall deliver to the Escrow Agent the \$25,000 earnest money deposit which Purchaser has delivered to Seller under the provisions of paragraph 3(e).

15. *Escrow agent*. A copy of this Agreement shall serve as instructions to the Escrow Agent. The Escrow Agent shall, under the terms of this Agreement, receive and accept not later than ten days before the Closing Date originals of all documents that Seller is required to deliver to it. On or before the Closing Date, the Escrow Agent shall perform the following acts:

(a) *Real estate taxes*. Prorate between the parties as of the Closing Date all real estate taxes, based on the most recently available tax duplicate, in accordance with paragraph 10, and other applicable taxes on the premises;

(b) *Utility charges*. Prorate between the parties as of the Closing Date all utility charges applicable to the premises;

(c) *Rent*. Prorate between the parties as of the Closing Date all rentals. Seller shall deliver all security deposits to Purchaser under the terms and definitions of this Agreement;

(d) *Purchase price*. Receive from Purchaser or his nominee the balance of the purchase price required under this Agreement;

(e) *Title guaranty*. Prepare and issue to Purchaser or his nominee, or both, a title guaranty in the amount of the purchase price, showing fee simple title in Purchaser or his nominee on the deeds, subject only to those exceptions for liens for taxes and assessments, both general and special, not yet due and payable, zoning ordinances, and conditions, reservations, easements, restrictions and leases of record, if any, approved by Purchaser, and charge their costs to Seller.

(f) *Documents*. Deliver to Purchaser or his nominee, or both, all documents that Seller is required to deliver to the Escrow Agent under this Agreement, except the warranty deeds, the disposition of which is described in paragraph 15(h);

(g) *Closing statement*. Deliver to Seller, after application of all debits and credits, the purchase price paid to the Escrow Agent under this Agreement; and

(h) *Recording of deeds*. Cause all four full warranty deeds to be filed concurrently for record on the Closing Date in the appropriate place in Lucas County and in the appropriate manner, all as provided by law, and charge their cost to Purchaser.

(i) *Escrow fee*. Each party shall pay one half of the escrow fee charged by the Escrow Agent. The above escrow instructions may be supplemented as required to comply with the normal standard form of escrow instructions used by the Toledo Real Estate Board.

16. *Possession conditional*. Seller shall transfer actual possession of the premises on the Closing Date, if the purchase

price has been paid to Seller under the terms of this Agreement.

17. *Casualty.* Seller assumes all risks and liability for loss, damage or injury by fire, windstorm, accident, or other cause to the premises until the Closing Date. Moreover, if the premises suffer any damages beyond ordinary wear and tear, Seller shall make repairs before the Closing Date. If, however, the damages exceed \$100,000, Purchaser may, within 10 days after Seller notifies him of the damages, declare in writing to Seller that this agreement is null and void. If Purchaser does so, all documents and monies delivered to the Escrow Agent up to that date shall be returned to the parties who sent them. If Purchaser elects not to declare this agreement null and void, Seller shall assign to him all insurance proceeds payable on account of the damages, except to the extent required and used to make necessary repairs to the premises. If the damages do not exceed \$100,000, Seller may either retain the insurance and make or agree to make all necessary repairs before the Closing Date, or assign the insurance proceeds to Purchaser on the Closing Date and instruct him to make the repairs if he chooses to do so. If any damage occurs to the property before the Closing Date, Seller shall, not later than 10 days before that date, exercise in writing the option with regard to repairs of damage not exceeding \$100,000. If, however, the damage occurs less than 10 days before the Closing Date or Seller reasonably believes that repairs cannot be made before that date, Seller shall then so notify Purchaser and deliver written evidence of the exercise or disposition of the option at the time of closing.

18. *Nominees.* Purchaser reserves the right to designate the name of his nominee or nominee on the deeds at a reasonable time before the Closing Date.

19. *Survival.* The parties' representations, warranties, covenants and agreements in this Agreement shall survive the closing.

20. *Time of essence.* All matters pertaining to the closing shall take place on the Closing Date at the office of the Escrow Agent. Time is of the essence of this Agreement.

21. *Notice.* All notices shall be in writing and shall be sent by First Class Mail, postage fully prepaid. If to Seller, they shall be addressed:

[Insert Address]

and if to Purchaser:

[Insert Address]

Either party may at any time, by written notice addressed to the other party, change its address for sending notices.

22. *Binding effect.* This Agreement shall be binding upon and inure to the benefit of the parties and their respective heirs, personal representatives, successors, and assigns.

23. *Governing law.* This Agreement shall be construed in accordance with and governed by the laws of the State of Ohio.

24. *Interpretation.* Where necessary or appropriate to the meaning of this agreement, the singular shall be deemed to include the plural, the plural to include the singular, the masculine to include the feminine and neuter, the feminine to include the masculine and neuter, and the neuter to include the masculine and feminine.

25. *Entire agreement.* This contract contains the entire agreement between the parties. Neither party has made any

representations or promises with respect to the premises other than those expressly set forth herein.

26. *Headings.* Headings in this agreement are for convenience and reference only and shall not be used to interpret or construe its provisions.

27. *Non-waiver.* No delay or failure by either party to exercise any right hereunder, and no partial or single exercise of any such right, shall constitute a waiver of that or any other right, unless otherwise expressly provided herein.

28. *Counterparts.* This Agreement may be executed in two or more counterparts, each of which shall be deemed an original, but all of which together shall constitute one and the same instrument.

The parties hereto have set their hands on April 7, _____ [year].

John E. Dowell (Purchaser)

Rosewood, Inc.

by _____

Rosewood, Inc. 2

by _____

Rosewood, Inc. 3

by _____

Rosewood, Inc. 4

by _____

(Seller)



67 of 152 DOCUMENTS

Current Legal Forms for Real Estate

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Current Legal Forms for Real Estate
Chapter 21 SALES AND EXCHANGES
Part IV. Forms

B. CONTRACTS OF SALE: RESIDENTIAL PROPERTY

25-21 Current Legal Forms for Real Estate FORM 21.34

FORM 21.34 Sale of apartment building--seller to refinance mortgage in larger amount--buyer takes title subject to refinanced mortgage

COMMENT

In the agreement illustrated here, the closing of the sale is contingent upon the seller's obtaining a new and larger first mortgage. The terms of the new mortgage are carefully defined. The seller's primary concern is with the amount of the first mortgage. The buyer's concern, however, is with all the terms of the mortgage, since the buyer will have to live with this mortgage during his ownership of the property even though he is not personally liable on the mortgage debt. The contract provides that the purchaser may within a fixed period of time procure the required first mortgage if the seller himself has been previously unsuccessful in doing so. The parties have agreed that any amortization payments on the new mortgage, between the date of the new mortgage and the date of the closing, shall benefit the purchaser.

Refinancing alternative to purchase money mortgage

If a purchaser's cash resources are limited, refinancing will enable the seller to obtain more cash than he would receive by the purchaser's taking subject to the old mortgage and the execution of a purchase money second mortgage for the balance. Also, the seller obtains in cash the full benefit of the appreciation in the value of his property. While the refinancing itself does not result in tax, a sale can lead to tax liability. This is because the amount of the new mortgage is not subtracted from the amount realized by the owner on the sale of his property.

Purchaser considerations

So far as the purchaser is concerned, he may want nonrecourse financing to avoid any personal liability on the new mortgage and for that reason may insist that the larger mortgage be obtained

by the seller before the sale takes place. If the purchaser can take title to the property subject to the seller's existing mortgage, rather than assume it outright, the effect is practically the same as the purchaser obtaining his own nonrecourse loan. The amount of the new mortgage will, however, be included in the purchaser's cost basis of the property.

Disclosure of lead-based paint hazards

Federal law requires the seller of pre-1978 residential housing to disclose known information to the prospective purchaser on lead-based paint hazards. See 42 U.S.C. §§ 4851-4856; 40 C.F.R. Part 745 and 24 C.F.R. Part 35, Subpart A. The sales contract must include a lead warning statement and certain disclosure information. See discussion in comments to Form 21.15, *supra*. A sample lead-based paint sales contract rider, including both disclosure under the federal law and a lead-based paint contingency clause, is included in this chapter at Form 21.30, *supra*.

FORM

AGREEMENT made April 28, _____ [year], between Herman Darwin, residing at 60 Main Street, Harrisburg, Pennsylvania ("Seller") and David Powell, of 100 East 42d Street, New York, New York ("Buyer").

Seller shall sell to Buyer, and Buyer shall buy from Seller, the real estate described on attached Schedule A, commonly known as and referred to as Sunset Apartments, Pittsburgh, Pennsylvania, together with all improvements, and the stoves, refrigerators, and other personal property owned by Seller and now situated thereon.

1. *Purchase price.* The purchase price for the premises shall be \$2.4 million, payable as follows:

(a) \$600,000 in cash or good certified check or checks on the closing of title.

(b) \$1.8 million by accepting title subject to a first mortgage in that amount, to be obtained by Seller as described in Section 2. If Seller has made amortization payments reducing the aggregate balance of the mortgage against the premises below \$1.8 million at the time of closing, the amount under paragraph (a) above, shall be increased by the amount of such payments.

2. *Contingent on first mortgage*

(a) *Terms of mortgage.* This contract is conditioned upon Seller obtaining a conventional first mortgage loan, which Buyer shall not be required to assume, for \$1.8 million from a bank, insurance company, mortgage lending institution, or other financial institution upon terms and conditions similar to those presently customary in a real estate loan of such amount in Pittsburgh, Pennsylvania. The loan shall, among others, have the following provisions: it shall bear interest of not more than 12-percent per annum; principal and interest is to be payable in equal monthly installments until the final maturity date; the amount of each monthly installment due before the maturity date is to be determined upon the basis of a 25-year amortization period; the final maturity date is to be not earlier than 20 years from the date thereof; and prepayment shall be permitted after the fifth year upon 90 days prior written notice and the payment of a prepayment penalty during the first five years not to exceed 3 percent of the amount prepaid.

(b) *Failure to obtain commitment.* Seller shall use due diligence to obtain the loan. If Seller is unable to obtain a commitment for the loan within 45 days after the date hereof, Buyer shall have 45 days thereafter in which to secure a commitment for the loan for and on behalf of Seller. If neither party obtains a commitment for the loan within 90 days after the date of this contract, this contract shall be null and void and all moneys or securities deposited shall be returned

forthwith to Buyer, unless Buyer agrees in writing both to accept title subject to a loan upon less favorable terms without abatement in the purchase price and to pay to Seller in cash on the closing date an additional sum equal to any amount by which the original principal balance of the loan is less than \$1.8 million.

(c) *Discharge existing mortgage.* If the loan is obtained, Seller shall prepay in full the existing first mortgage presently a lien against the premises. Seller shall pay all costs and expenses of securing the loan and prepaying and releasing of record the existing first mortgage, except that Buyer shall pay the appraisal fees and legal fees of the new lender to the extent that such fees do not total more than \$4,000, and any net title insurance premium for title insurance required by the new lender.

(d) *Notice of commitment.* Seller shall notify Buyer promptly upon securing a commitment for the loan and shall deliver a copy of the commitment to him. Seller shall grant Buyer's counsel a reasonable opportunity to discuss with counsel for the new lender the form of mortgage and note to be utilized in the transaction.

(e) *Acceptable lenders.* The following lending institutions are the only ones that may place the loan:

New York Life Insurance Company,

Home Life Insurance Company,

Metropolitan Life Insurance Company,

The Equitable Life Assurance Society of the United States,

New England Mutual Life Insurance Company, or

Penn Mutual Life Insurance Company.

(f) *Contingent second mortgage loan.* Notwithstanding any provision to the contrary herein contained, if a commitment for the loan is obtained which meets all of the requirements set forth herein except that the amount thereof is for \$1.6 million rather than \$1.8 million, Seller shall take back a purchase money second mortgage, prepared by Buyer's counsel and approved by Seller's counsel, for \$200,000. The second mortgage loan shall, among others, have the following provisions: it shall be payable in constant monthly installments of principal and interest, each installment being applicable first to interest of 12-percent per annum and the remainder in reduction of principal; it shall be a loan for a term of at least three years, with options exercisable by the then owner of the premises to extend the maturity date for at least two additional three-year terms on the same conditions of payment; and it shall not impose any personal liability on Buyer or any owner of the premises for the repayment of the secured debt.

3. *Seller's representations and warranties.* Seller makes the following representations and warranties, which shall survive the passing of title:

(a) *Rents.* Attached and marked Exhibit B is a true and accurate schedule of rentals presently being collected by Seller. There are no rents prepaid for more than one month in advance and no tenant has been granted any rent-free occupancy. Seller has performed, or will perform before the closing date, at his expense, all decorating and alteration work that he is required to perform by that date.

(b) *Insurance.* Attached and marked Exhibit C is a true and accurate schedule of insurance carried on the premises. The insurance shall not be increased between the date hereof and the closing date. Seller has not failed to comply with any notice or request from any insurance company issuing the policies, and Seller shall comply before the closing date with any such notice or request received before that date.

- (c) *Payroll*. Attached and marked Exhibit D is Seller's true and accurate payroll record for the period indicated.
- (d) *Maintenance contracts*. The only maintenance or other contracts (exclusive of leases and tenancy agreements) affecting the premises are set forth in the schedule attached and marked Exhibit E.
- (e) *Work notices*. Seller has complied with all notices from the holder of the existing first mortgage requiring any work to be performed or completed in or on the premises.
- (f) *Violations*. The premises do not violate the provisions of any applicable building code, fire regulations, or other governmental ordinances, orders, or regulations. Seller will convey the premises free of any such violations.
- (g) *Utility bills*. Attached and marked Exhibit F are true and accurate lists of gas bills, electricity bills, and telephone bills relating to the premises for the 12 months indicated.
- (h) *Refrigerators and ranges*. Seller owns, free and clear of all liens, at least 105 refrigerators and 105 ranges located upon the premises. All of the refrigerators and ranges are included in the sale, regardless of where located.
- (i) *Income and expenses*. Attached and marked Exhibit G is a true and correct statement of income as of May 1, _____ [year], and expenses for calendar year _____ [year].
- (j) *Tax bills*. Attached and marked Exhibit H are copies of tax bills for the premises for the periods indicated.
- (k) *Building addition*. The penthouse currently being added to the building on the premises does not violate any zoning regulations, building restrictions, or other municipal ordinances, or any certificate of occupancy or building permit, and the addition will be fully completed and paid for by Seller before the closing of title. At the closing Seller shall deliver to Buyer a copy of a certificate of occupancy or other evidence of the legality of the premises as laid out.
- (l) *Leases*. All leases affecting the premises have been exhibited to Buyer. The leases have not been modified or amended and shall not be modified or amended without Buyer's written consent, which Buyer will not unreasonably withhold. The rentals set forth in the leases are legally collectable. No concessions have been granted to the holder of any lease. All of the leases are in full force and effect and not in default, and will be in full force and effect and not in default at closing of title.
- (m) *Utility access*. All public utilities required for the operation of the premises enter the premises through adjoining public streets, or if they pass through adjoining private land do so in accordance with valid public easements.
- (n) *Effective at closing*. All of Seller's representations and warranties shall be true at the closing date as if they were made at that time.
4. *Survey and title insurance*. Seller represents that the building upon the premises is entirely within the boundary lines of the land described in attached Schedule A and that there are no encroachments. Seller will deliver to Buyer a survey of the premises at the closing of title. Seller represents further that its title shall be insurable at the closing by a responsible title insurance company selected by Buyer.
5. *Maintenance of premises*. Between the date hereof and the closing date, Seller will continue to maintain the premises in good condition and repair, ordinary wear and tear, damage by fire or other casualty, or by acts of God and the elements, excepted, subject, however, to Section 8 governing casualty losses.
6. *Prorations*. The following items shall be prorated between the parties as of the closing date: real estate taxes for the

calendar year _____ [year]; water and sewer rents; utilities; prepaid transferable insurance; mortgage interest; employees' wages, payroll taxes, fringe benefits, and vacation pay, if any; maintenance and service contracts; and prepaid rents. In addition, Seller shall turn over to Buyer all security deposits held by Seller under the leases.

7. *Assessments.* If at or before delivery of the deed, the premises or any part thereof is affected by a special assessment or assessments which are or may become payable in installments, of which the first installment is a charge or lien on the closing date or theretofore has been paid, Seller shall pay and discharge all the unpaid installments of the assessment or assessments.

8. *Casualty.* Buyer may cancel this contract if before delivery of the deed any improvements on the premises are destroyed, or if there has been damage by fire or other casualty, which would cost over \$30,000 to repair, and the repair is not completed on or before the closing date. If Buyer cancels this contract, all monies and securities deposited by him will be returned to him. If Buyer does not cancel, all insurance monies payable as a result of the casualty shall be turned over to Buyer for the purpose of making the required repairs, except to the extent that the insurance moneys are paid to, or must be turned over to, the holder of the first mortgage on the premises. Any fire or casualty damage of less than \$30,000 shall be repaired by Seller before the closing.

9. *Buyer's deposit in escrow.* Upon the execution of this contract Buyer has deposited with the Pennsylvania National Bank as escrowee securities with attached stock powers endorsed in blank to be held by the escrowee pursuant to the terms and conditions of an escrow letter entered into by Buyer, Seller, and the Bank dated this day. Buyer shall, within ten days after receipt of an unconditional commitment for a first mortgage loan satisfying the conditions set forth in Section 2, deposit with the escrowee additional marketable securities of comparable quality with attached stock powers endorsed in blank, with a marketable value at the time of deposit of not less than \$100,000, to be held in escrow by the escrowee pursuant to the terms and conditions of the escrow letter. The parties intend that such securities be held by the escrowee as security for the performance by Buyer of his obligations under this contract and be disposed of in accordance with the terms and provisions of the escrow letter. If Buyer defaults under this contract and the securities are sold by the escrowee under the terms and conditions of the escrow letter, the net proceeds from any such sale which are paid over to Seller, together with any additional amount, the "deficiency sum," shall be retained by Seller as liquidated damages for Buyer's breach, and this contract shall thereupon be deemed null and void. The term "deficiency sum" shall mean any amount by which the net proceeds from the sale of all securities deposited by Buyer with the escrowee upon the execution of this contract is less than \$100,000. If, however, Buyer has made the required additional deposit of securities upon receipt of the mortgage commitment, the term "deficiency sum" shall mean any amount by which the net proceeds from the sale of all securities held by the escrowee is less than \$200,000. Seller's sole remedy shall be the liquidated damages, consisting of the net proceeds from the sale of the securities and any "deficiency sum." Seller expressly waives the remedy of specific performance.

10. *Documents at closing.* At the closing of title hereunder Seller shall:

(a) *Deed.* Execute, acknowledge, and deliver to Buyer a general warranty deed conveying to Buyer a fee simple title to the premises free and clear of all liens and encumbrances except as herein provided. The Commonwealth of Pennsylvania and the City of Pittsburgh transfer taxes on recording the deed shall be borne equally by the parties.

(b) *Lease assignments.* Assign to Buyer all of the existing leases between Seller and all tenants of the premises.

(c) *Bill of sale.* Execute and deliver to Buyer a bill of sale with affidavit of title to all the personalty, furnishings, and fixtures included in this sale.

(d) *Guaranties.* Assign to Buyer all guaranties or warranties received by Seller from contractors or materialmen with respect to any work or installations in the premises.

11. *Date of closing.* This transaction shall be closed at 11 a.m. on July 28, _____ [year], at the offices of the title company selected by Buyer in Pittsburgh, Pennsylvania. Buyer shall give Seller written notice of the time and place of the closing. If the first mortgage loan referred to in Section 2 closes before the closing date Seller shall notify Buyer of the time and place of the closing of the mortgage loan, and Buyer or his representative shall have an opportunity to attend that closing.

12. *Brokerage.* At closing, Buyer shall pay a brokerage commission of \$45,000 to H. Gordon & Company, Pittsburgh, Pennsylvania, in accordance with the provisions of a separate agreement dated this day.

13. *Assignment.* Buyer may assign his rights hereunder. In the event of such an assignment and the assignee assumes Buyer's obligations hereunder, Buyer shall be relieved of all liability hereunder.

14. *Notices.* All notices under this contract shall be in writing and sent by registered or certified mail, postage prepaid, if to Seller, c/o James T. Shane, Esq., 100 Union Trust Building, Pittsburgh, Pennsylvania, and if to Buyer, at 100 East 42d Street, New York, New York 10017, with a copy to Arnold Gore, Esq., 11 East 39th Street, New York, New York 10016.

15. *Entire agreement.* All prior understandings and agreements between the parties are merged in this contract, which constitutes the entire agreement between the parties. This contract is entered into after full investigation made by Seller, and neither party relies upon any statement or representation made by anyone unless contained herein.

16. *Modifications.* No provision of this contract may be modified except in an instrument signed by both parties.

17. *Binding effect.* This contract is binding on the parties and their respective personal representatives, successors, and assigns.

18. *Headings.* Headings in this agreement are for convenience and reference only and shall not be used to interpret or construe its provisions.

19. *Non-waiver.* No delay or failure by either party to exercise any right hereunder, and no partial or single exercise of any such right, shall constitute a waiver of that or any other right, unless otherwise expressly provided herein.

20. *Governing law.* This contract shall be construed in accordance with and governed by the laws of the State of Pennsylvania.

21. *Counterparts.* This contract may be executed in two or more counterparts, each of which shall be deemed an original, but all of which together shall constitute one and the same instrument.

22. *Time of essence.* Time is of the essence of this agreement.

The parties have caused the execution hereof on the day and year first above written.

Herman Darwin, Seller

David Powell, Buyer



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Current Legal Forms for Real Estate

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Current Legal Forms for Real Estate
Chapter 21 SALES AND EXCHANGES
Part IV. Forms

B. CONTRACTS OF SALE: RESIDENTIAL PROPERTY

25-21 Current Legal Forms for Real Estate FORM 21.35

FORM 21.35 Contract for sale of rental property--allocation of rent and tenant related expenses--assumption of leases and service contracts--nonrecourse purchase money and existing debt

COMMENT

This agreement contains several important provisions in the sale or purchase of rental property. Some of the more significant items are:

- (1) The sale is subject to the rights of tenants and existing leases, which were examined and initialed by the purchaser (paragraph 7(d)).**
- (2) Vacant space may be leased by the seller before the closing, existing leases may be extended or renewed, and the related expenses are allocated or apportioned between the seller and purchaser (paragraph 9).**
- (3) Existing service contracts and leases are listed on separate schedules, and are to be assumed by the purchaser (paragraph 10).**
- (4) Rents allocated to the seller, but unpaid for up to one month at the time of closing, are to be paid to the seller when received by the purchaser, less collection expenses (paragraph 11).**
- (5) Electricity and water charges owed but unpaid by the tenants, similarly, are to be paid to the seller when received by the purchaser (paragraph 12).**
- (6) Security deposited by tenants are to be transferred to the purchaser (paragraph 14).**
- (7) Summary proceedings against defaulting tenants may be instituted by the seller (paragraph**

15).

Nonrecourse financing and "subject to" existing debt

Under this agreement, the seller agrees to take back a purchase money note, secured by a deed of trust, as part of the purchase price. There is no personal liability imposed on the debtor-purchaser, and the seller cannot seek a deficiency judgment against the debtor-purchaser after any action against the property, i.e., nonrecourse financing (paragraph 6). To further protect the purchaser from personal liability, the financing package includes taking title "subject to" two existing deeds of trust. Taking title subject to existing financing is significantly different than assumption of that debt. Under an assumption of debt the purchaser most likely becomes personally liable for repayment of that debt. By taking title subject to the existing debt liens, without assumption of the debt, the nonrecourse character of the purchaser's obligations is retained. Generally, the purchaser risks loss of the property through a trustee's sale, foreclosure, or similar proceeding, but does not assume personal liability for amounts not satisfied out of the proceeds of sale of the property. Generally, amounts owed under nonrecourse financing arrangements are not "at risk." Loss deductions in the activity of holding real property are limited to the amount at risk. Under an exception, however, qualified nonrecourse financing, i.e., generally amounts borrowed from a financial institution, are considered as amounts at risk. A further limitation on loss deductions applies to passive activities. Any rental activity is a passive activity. For a discussion of the passive activity loss limitations and the at risk rules, see The Tax Background (TB) §§ 21.08 and 21.09 at the beginning of this chapter.

Ordinary income and capital gain on installment sales

If some or all of the sales price is paid after the year of sale, the installment method is applied automatically, unless the seller elects to report all gain currently. Any amounts recaptured as ordinary income due to prior deductions of accelerated cost recovery or accelerated depreciation are recognized and taxed in the year of sale, whether or not cash payments are received in the year of sale. After taking into account any recapture amounts, the gain in excess of the recapture amount is recognized proportionately each year installment payments are received. Under the installment method, the seller reports as income in any taxable year the proportion of the payments received during that year which the excess gross profit to be realized bears to the total contract price. Although the character of the gain is generally not changed by use of the installment method, under the imputed interest rules or the original issue discount rules more than the stated amount of interest may be treated as interest. However, for debt instruments not exceeding \$2.8 million given for property, the discount rate cannot exceed 9 percent under these rules. If the seller is a dealer, installment sale tax treatment is not available, unless certain limited exceptions apply. For a further discussion of installment sale tax treatment see TB § 21.11.

Recapture of cost recovery

Different sets of recapture rules apply to real property, depending upon when the property was placed in service, and whether the capital cost of the property was recovered under the accelerated cost recovery method or rules of depreciation. Under the recapture rules for accelerated cost recovery, real property is categorized into two broad classes: nonresidential and residential. Generally, if the cost of nonresidential real property was recovered under the prescribed accelerated method, all gain attributable to the accelerated recovery method will be ordinary income to the extent of all recovery allowances previously taken. However, if the straight-line method is elected, all gain will be capital gain. For all residential real property, gain will be

ordinary income only to the extent that the recovery allowed under the prescribed accelerated method exceeds the recovery that would have been allowed if the straight-line method over the cost recovery period had been used. Therefore, if the straight-line method is elected for residential real property, all gain will be capital gain. Residential rental property and nonresidential real property placed in service after 1986 are allowed only straight line recovery over 27.5 years and 39 years respectively, and therefore, are not subject to recapture. For a discussion of recapture of accelerated cost recovery and depreciation deductions, see TB § 21.07.

Information reporting of real estate transactions

The attorney or title company responsible for closing title is required to report real estate transactions to the IRS. In addition, a statement must be provided to the customer before January 31 of the year following the closing. If an attorney or title company is not involved in the closing, the information reporting is the responsibility of the mortgage lender. The information reporting requirements are discussed in TB § 21.02[4].

Disclosure of lead-based paint hazards

Federal law requires the seller of pre-1978 residential housing to disclose known information to the prospective purchaser on lead-based paint hazards. *See* 42 U.S.C. §§ 4851-4856; 40 C.F.R. Part 745 and 24 C.F.R. Part 35, Subpart A. The sales contract must include a lead warning statement and certain disclosure information. *See* discussion in comments to Form 21.15, *supra*. A sample lead-based paint sales contract rider, including both disclosure under the federal law and a lead-based paint contingency clause, is included in this chapter at Form 21.30, *supra*.

FORM

AGREEMENT made October 23, _____ [year], between Moosac Corporation, a Delaware corporation having its principal office at 100 Fifth Avenue, New York, New York ("Seller"), and James Davis, having an office at 100 Connecticut Avenue, N.W., Washington, D.C. ("Purchaser").

1. *Sale*. Seller shall sell and convey, and Purchaser shall purchase, all that certain plot, piece, or parcel of land, with the buildings and improvements thereon erected, situate, lying and being in the District of Columbia, generally known as 100 Harrison Street, N.W., Washington, D.C., (the "Premises"), and more particularly described as follows:

(Insert description)

2. *Rights in streets*. This sale includes all of Seller's right, title, and interest in and to any land lying in the bed of any street, road, or avenue opened or proposed, in front of or adjoining the premises, to the center line, in and to any award made or to be made in lieu thereof and in and to any unpaid award for damage to the premises by reason of change of grade of any street. Seller will execute and deliver to Purchaser, on closing of title, or thereafter, on demand, all proper instruments for the conveyance of such title and the assignment and collection of any such award.

3. *Personal property*. This sale includes all of Seller's right, title, and interest in and to the personal property which is appurtenant to or used in the operation of the premises. Seller's personal property covered by this sale shall be free and clear of all security interests and other encumbrances, except the lien, if any, of mortgages or deeds of trusts covering the premises.

4. *Purchase price.* The purchase price is \$450,000, payable as follows:

(a) \$20,000 on the signing of this contract, by check subject to collection, the receipt of which is hereby acknowledged;

(b) \$40,000 in cash or by a bank, cashier's, or Purchaser's certified check payable to Seller, drawn on a New York Clearing House bank on delivery of the deed;

(c) \$146,480 by Purchaser taking title subject to a First Deed of Trust, now a lien on the premises in that approximate amount, bearing interest of 12 percent per annum, the principal being due and payable on August 23, _____ [year];

(d) \$88,871 by Purchaser taking title subject to a Second Deed of Trust, now a lien on the premises in that approximate amount, bearing interest of 12 percent per annum, the principal being due and payable on March 23, _____ [year]; and

(e) \$154,649 by Purchaser executing and delivering on the delivery of deed a 90-day promissory note payable to Seller in that amount, with interest of 12 percent per annum and a purchase money Deed of Trust covering the premises as security for the payment thereof, except that the amount of such note shall be increased by the payments made by Seller under the First and Second Deeds of Trust as provided in Section 5.

5. *Increase of purchase price for mortgage payments.* Purchaser shall repay Seller at the closing all payments of principal or amortization made by Seller under the First and Second Deeds of Trust from the date of this Agreement to and including the date of closing of title, including, without limitation, the following:

(a) Any regular payment of principal or amortization required to be made thereunder, including any portion thereof contained in a combined installment of interest and principal; and

(b) Any additional payment of principal or amortization required to be made under the Second Deed of Trust.

6. *Nonrecourse purchase money note.* The purchase money note referred to in Section 4(e), to be delivered by Purchaser to Seller at the closing of title, shall provide as follows:

(a) The amount shall be \$154,649 plus the payments made by Seller under the First and Second Deeds of Trust as provided in Section 5.

(b) Interest shall be 12-percent per annum and be payable on the first day of each month for the preceding month (or any part thereof) until the total amount of the loan is paid in full.

(c) The entire principal, together with any accrued interest, shall be due and payable 90 days from date. The Deed of Trust in security of the note shall be subject, in form and substance, to the approval of Seller's counsel, and shall contain all provisions that Seller's counsel deems necessary or advisable to protect Seller's subordinate lien. The note and Deed of Trust shall not impose a personal liability on the maker and shall provide that in any action brought thereon no deficiency or other judgment will be sought or obtained against the maker.

7. *Liens and encumbrances.* The premises are sold and are to be conveyed subject to:

(a) All present and future state, local, and municipal regulations and ordinances relating to the premises.

(b) All encroachments of stoops, areas, cellar steps, trim, and cornices upon any street or highway.

(c) Any state of facts as shown on survey of Cady & Homer, Inc., dated _____ [date], redated _____ [date], and to any further state of facts which a continuation of such survey may disclose, if such further facts do not render title unmarketable.

(d) Rights of tenants under and subject to existing leases with such tenants, which have been exhibited to Purchaser, and examined and initialed by him. Purchaser approves the forms and terms of the leases, and all other new tenancies permitted in this contract. Purchaser assumes the obligations of the landlord under the leases after delivery of the deed, and shall hold Seller harmless from all claims in connection with the leases arising after delivery of the deed. This assumption and indemnity shall survive the closing of title.

(e) Purchaser has read, initialed, and approved the First and Second Deeds of Trust together with the note secured by the First Deed of Trust, the form of note secured by the Second Deed of Trust, and the Constitution and Bylaws of Capital Savings Association, the holder of the beneficial interest under the First Deed of Trust.

(f) Possible lack of right in Seller to maintain vaults or excavations under the sidewalk beyond the building line.

8. *Other liens and encumbrances.* The existence of other deeds of trust, mortgages, security interests, liens, or other encumbrances shall not be objections to title if properly executed instruments in recordable form necessary to satisfy them are delivered to Purchaser at the closing of title, together with recording and filing fees. The other deeds of trust, mortgages, security interests, liens, or other encumbrances may be paid out of the cash consideration paid by Purchaser. If request is made within a reasonable time before closing of title, Purchaser shall provide at closing separate certified checks aggregating the balance of the purchase price, to facilitate the satisfaction of any such lien or encumbrance.

9. *New leases and vacant space.* Seller may rent any present or future vacant space in the premises, and may extend or renew leases if their terms end no later than December 31, _____ [year], or any later date approved by Purchaser, but Purchaser shall not unreasonably withhold his approval. Any brokerage commission or painting expenses in connection with the new tenancies shall be for Purchaser's account, and Purchaser shall reimburse Seller for such expenses, but Purchaser's liability for brokerage commissions shall not exceed 10 percent of the annual rent. Purchaser shall reimburse Seller for all decorating expenses, repairs, or alterations in connection with any new tenancy. The reimbursement shall equal the cost incurred by Seller multiplied by a fraction, the numerator of which is the number of days between the closing of title and the end of the term of such tenancy, and the denominator of which is the total number of days of the tenancy. Purchaser shall take title subject to any vacancies which may exist at closing, without reduction or abatement in price.

10. *Schedules of leases and service contracts.* Seller represents that attached Schedules A and B, respectively, are accurate schedules of all leases and tenancies (Schedule A) and all service contracts (Schedule B) affecting the premises as of the date of this Agreement, unless otherwise provided. Purchaser acknowledges that he has examined and initialed all the leases and contracts listed on the schedules. Purchaser shall assume at the closing Seller's obligations under the leases and contracts arising on and after the closing date and with respect to the items adjusted at the closing irrespective of the period covered. If there is any discrepancy between the information set forth on Schedules A and B and on the contents of any leases or contracts referred to in the schedules, the schedules shall be deemed amended to conform to the leases and contracts.

11. *Rents allocated to Seller.* If Seller is entitled at closing of title to all or part of any past rentals owed by tenants, not exceeding one month, Purchaser shall hold the first monies received from the tenants as trustee for Seller on account or in payment of such past due rentals, and shall immediately remit to Seller from such monies, less any amounts expended for collection, the amount due Seller. This provision shall survive delivery of the deed.

12. *Tenants' unpaid electricity and water.* If tenants in possession are required to pay for electricity and water,

depending upon consumption, and if at closing of title any tenant owes Seller accrued but unpaid (or unread) charges for electricity and water, Purchaser shall use his best efforts to collect the unfixed or past due charges and shall remit the collected monies to Seller. This provision shall survive delivery of the deed.

13. *Tenants' unpaid water meter charges and taxes.* If the tenants in possession are required by their leases to pay for water meter charges or taxes and those charges or taxes are accrued but are not liens against the premises at the time of closing, Seller shall not be required to pay any portion of them. Purchaser shall take title subject to the unpaid charges and taxes and they shall not be deemed an objection to title.

14. *Security under leases.* Upon the closing of title, Seller shall turn over to Purchaser all securities deposited by tenants with Seller under the terms of leases for space occupied by tenants in the premises (to the extent that Seller has not applied the securities in accordance with leases with respective tenants). Purchaser shall simultaneously execute an agreement acknowledging receipt of the securities and agreeing to indemnify and hold Seller harmless from liability for the proper application or return of the securities to the respective tenants in accordance with the terms of their leases.

15. *Summary proceedings against tenants.* Seller may, at its expense, institute summary proceedings against any tenant of the premises based upon the tenant's default or failure to perform before title closing.

16. *Premises purchased "as is."* Seller has not made and does not make any representations as to the physical condition, layout, leases, footage, rents, income, expenses, operation, or any other matter or thing affecting or related to the premises and to this contract, except as herein specifically set forth, neither party relying upon any statement or representation made by the other not embodied in this contract. Purchaser acknowledges that no such representations have been made and agrees to take the premises "as is." Seller is not liable or bound in any manner by any verbal or written statements, representations, real estate broker's exhibitions, ads, or information pertaining to the premises or its operation, layout, expenses, condition, income, leases, or rents furnished by any real estate broker, agent, employee, servant, or other person, unless specifically set forth herein.

17. *Representations by Seller.* Seller makes the following representations and warranties:

(a) The First and Second Deeds of Trust are not in default and all payments required to be made thereunder, coming due before delivery of the deed, shall be paid.

(b) The rents shown on Schedule A, or as shown in the leases set forth in the attached schedule, have been actually collected except for arrears of certain tenants as set forth on Schedule D.

(c) The real estate taxes for the _____/[year]/[year] taxable year do not exceed \$12,000.

(d) Attached Schedule C is an accurate payroll schedule for the period shown.

(e) Seller has not failed to comply with any written demands by mortgagees for performance of work by Seller.

(f) Attached Schedule E is a current insurance schedule affecting the premises, and Seller will keep such insurance (or comparable insurance) in effect until the closing.

(g) Seller has paid no more than \$3,000 for fuel oil during the calendar year 1991.

(h) Seller has paid no more than \$2,500 for electricity during the calendar year _____ [year].

(i) Seller has a Management Agreement with Stuart Graham, a copy of which Purchaser has examined and approved.

Purchaser shall assume Seller's obligations under the Management Agreement and hold Seller harmless under it.

18. *Items to be apportioned.* The following are to be apportioned as of the date of delivery of the deed:

(a) Rents as and when collected.

(b) Interest on Deeds of Trust.

(c) Premiums on existing transferable insurance policies or renewals of those expiring before closing.

(d) Real Estate taxes and sewer rents, if any, on the basis of the fiscal year for which assessed. If the closing of the title occurs before the tax rate is fixed, the apportionment of taxes shall be upon the basis of the tax rate for the next preceding year applied to the latest assessed valuation.

(e) Water charges. If there is a water meter or other meter on the premises, any unfixed meter charges and unfixed sewer rents shall be apportioned on the basis of the last reading.

(f) Purchaser shall pay Seller the cost of all building supplies such as soap, cleaning powder, electric bulbs, and the like, in unopened containers, at cost, and in accordance with an inventory to be made by the Managing Agent of the premises as of the date preceding the closing.

(g) The cost of the fuel in the premises on the date preceding closing of title. The written estimate of the dealer supplying the fuel on the premises at such time shall be accepted as conclusive by the parties.

(h) All contracts referred to herein.

(i) Wages of employees, any vacation pay, and all related payroll taxes.

19. *Payment of outstanding items at closing.* The amount of any unpaid taxes, assessments, water charges, and sewer rents which Seller is obligated to pay and discharge, with the interest and penalties, may at its option be allowed to Purchaser out of the balance of the purchase price, if Seller furnishes official bills with interest and penalties figured to such date at the closing. If at closing there are any other liens or encumbrances which Seller is obligated to pay and discharge, Seller may use any portion of the balance of the purchase price to satisfy them, if it has delivered to Purchaser at the closing title instruments in recordable form and sufficient to satisfy such liens and encumbrances of record, together with the cost of recording or filing such instruments. Purchaser shall provide at the closing separate certified checks as requested, aggregating the amount of the balance of the purchase price, to facilitate the satisfaction of all such liens or encumbrances. The existence of any such taxes or other liens and encumbrances shall not be deemed objections to title if Seller complies with the foregoing requirements.

20. *Unpaid liens.* Unpaid liens for taxes, water charges, and assessments shall not be objections to title, but shall be subject to the provisions for apportionment of taxes and water charges contained in this Agreement. Unpaid franchise tax of any corporation in the chain of title which is a lien against the premises shall be no objection to title if Seller at the closing of title deposits with its attorneys or the title company, in escrow, a reasonable amount to secure the payment of the unpaid franchise tax within 60 days from the date of closing of title, and if Purchaser's title company examining title insures against the collection of the franchise tax out of the premises.

21. *Seller's deposits with mortgagees.* If any mortgagee has moneys on hand deposited with it by Seller for taxes, insurance, etc., Purchaser shall, at the closing of title, pay to Seller an amount equal to the total of the deposits held on hand by the mortgagee, and thereupon Seller shall assign to Purchaser all of its right, title, and interest in and to the deposit.

22. *Outstanding security interests.* If on the date of closing there are financing statements which were filed more than five years before closing of title, these shall not be deemed to be an objection to title, if Seller executes and delivers to Purchaser an affidavit setting forth that the property covered by the financing statements is no longer in the premises; or if such property still is in the premises, that it has been fully paid for. Financing statements or other encumbrances, although filed against the premises but affecting a tenant or which are the obligation of any tenant, shall not be an objection to title.

23. *Evidence as to outstanding mortgages.* Receipts, or letters signed by the beneficial owners of the First and Second Deeds of Trust, their agents or attorneys, evidencing the payment of installments of principal or interest, or reciting the present status of the Deeds of Trust as to principal and interest shall be sufficient evidence of the reduction of principal and the payment of interest. If, however, Purchaser's title company does not insure that the liens of such Deeds of Trust are in their respective reduced amounts at the time of closing, the same shall be no objection to title if Seller represents at the closing the reduced amounts thereof. This representation shall survive the closing.

24. *Judgments against persons with similar names.* If a search of the title discloses judgments, bankruptcies, or other returns against persons having names the same as or similar to that of Seller, Seller will on request deliver to Purchaser an affidavit showing that the judgments, bankruptcies, or other returns are not against Seller.

25. *Building violations.* Seller shall comply with all notices or orders of violations of law or municipal ordinances issued to it by the Departments of Housing and Buildings, Fire, Labor, Health, or other district or municipal departments having jurisdiction against or affecting the premises at the date of this Agreement. However, if any issued building or other municipal department violations of record are pending against the premises at the date hereof which will cost \$3,500 or more to remove, Seller shall not be obliged to remove them, but may elect to cancel this contract on the same terms as in the case of unmarketability of title, unless Purchaser accepts title subject to such violations without reduction of the purchase price, except to the extent of the actual cost of removing them, but in no event, to exceed \$3,500. If Seller is required to remove the violations hereunder, such requirement shall not be an objection to the closing of title if Seller agrees in writing to remove them within 60 days after the closing of title and this covenant shall survive delivery of the deed. Purchaser shall accept title subject to violations noted after the date of this Agreement, without reimbursement or abatement. Radio and television antenna violations or violations which a tenant is required to comply with or remove pursuant to the terms of a lease or tenancy, or violations relating to a tenant's use or occupancy which are prohibited by the tenant's lease, shall not be an objection to title, and Purchaser shall take title subject thereto, notwithstanding any contrary provision contained herein.

26. *Assessments.* If upon delivery of the deed, all or any part of the premises is affected by an assessment or assessments which are or may become payable in annual installments, Purchaser shall take title subject to all unpaid installments becoming due and payable after delivery of the deed.

27. *Destruction of premises.* Neither party may cancel this contract if before closing all or any part of the premises is destroyed by fire, the elements, or any cause beyond either party's control. Seller shall assign to Purchaser all of its right to receive any insurance proceeds for such complete or partial destruction as well as to negotiate a settlement with the insurance carriers, it being understood that Purchaser shall assume the risk of any such destruction pursuant to the foregoing.

28. *Eminent domain.* If before the date for closing title all or any part of the premises is taken by eminent domain, either party may, by written notice to the other, elect to cancel this contract. If either party so elects, both parties shall be relieved and released of and from any further liability hereunder, and Seller shall forthwith repay Purchaser the amount paid upon the execution and delivery of this contract. Unless this contract is so cancelled, it shall remain in full force and effect, and Seller shall assign, transfer, and set over to Purchaser all Seller's right, title, and interest in and to any awards that may be made for such taking.

29. *Liens for deposit money.* All sums paid on account of this contract, and any reasonable expenses of examining title to the premises and of the survey made in connection therewith, are made liens on the premises, but such liens shall not continue after Purchaser's default under this contract.

30. *Default by seller.* If Seller is unable to convey title to the premises in accordance with the terms and provisions of this contract, Purchaser may either accept any title Seller is able to convey, without any claim by Purchaser for defects or objections, or rescind the contract. If Purchaser elects to rescind, he shall be entitled to a return of the amount paid upon the execution hereof (plus net title company charges if Purchaser has ordered title insurance, or the cost of an abstract of title if he has ordered an abstract of title), including any cost of redating of survey. Upon such repayment, this contract shall be null and void, and Seller shall not be obligated or liable to Purchaser for any damages resulting from Seller's failure to convey title.

31. *Default by purchaser.* If Purchaser defaults in the performance of its obligations hereunder, Seller may retain as liquidated damages all monies paid hereunder by Purchaser, neither party shall have any further liability hereunder to the other, and this contract shall thereupon be null and void.

32. *Objections to title.* Within 15 days before the date set for closing of title, Purchaser shall notify Seller's attorneys in writing of any objections to title that require Seller's compliance hereunder. Purchaser shall promptly order a title report for the premises from The Capital Title Company, Washington, D.C.

33. *Form of deed.* The deed shall be the usual Bargain and Sale Deed, with covenant against grantor's acts, in proper statutory form for record, and shall be duly executed and acknowledged so as to convey to Purchaser the fee simple title to the premises, free of all encumbrances, except as herein stated. Purchaser shall pay for recording fees to record the deed and any local taxes imposed, including, among others, the District of Columbia transfer tax. Seller shall pay for any charges or taxes incurred in respect of the Purchase Money Deed of Trust.

34. *Date and place of closing.* The deed shall be delivered upon receipt of the purchase price at the offices of The Capital Title Company, 100 H Street, Washington, D.C., at 11 a.m. on December 17, _____ [year], and all apportionments shall be as of December 15, _____ [year]. Seller, however, may adjourn the closing to January 3, _____ [year] by so notifying Purchaser on or before December 1, _____ [year], in which event all apportionments shall be as of January 3, _____ [year].

35. *Survival of contract provisions.* No provision of this contract survives delivery of the deed except as expressly provided. Acceptance of the deed shall be a satisfaction of all Seller's obligations except those expressly stated to survive delivery of the deed.

36. *Brokerage.* The only broker Purchaser has authorized to act on his behalf in respect of this transaction or the premises is James Robbins. Purchaser has not authorized any other broker to submit any offer on his behalf to Seller to purchase the premises. Purchaser shall indemnify and hold Seller harmless against any claim by any broker (other than James Robbins) that he was authorized on behalf of Purchaser to make an offer to Seller in respect of this transaction or the premises. The representations contained in this paragraph shall survive delivery of the deed.

37. *Notices.* All notices shall be in writing. All notices and payments required to be made before closing of title by Purchaser shall be sent by certified mail as follows:

To Seller:

c/o Salter & Richards, Esqs.

100 Park Avenue
New York, New York

All notices by Seller shall be in writing and sent by certified mail to Purchaser as follows:

To Purchaser:

c/o Louis Stone, Esq.
1000 Connecticut Avenue, N.W.
Washington, D.C.

38. *Assignment.* Purchaser may assign this contract without Seller's written consent if the assignee is a corporation, partnership, joint venture, or other entity owned or controlled by Purchaser, by members of his immediate family, or by both.

39. *Entire agreement.* This contract constitutes the entire agreement between the parties.

40. *Construction.* All terms and words used in this contract, regardless of the number and gender in which they are used, shall be deemed and construed to include any other number, singular or plural, and any other gender, masculine, feminine, or neuter, as the context or sense of this contract or any paragraph or clause may require, the same as if such words had been fully and properly written in the required number and gender.

41. *Binding effect.* This contract shall be binding on the parties hereto and their respective personal representatives, successors, and assigns.

42. *Headings.* Headings in this agreement are for convenience and reference only and shall not be used to interpret or construe its provisions.

43. *Non-waiver.* No delay or failure by either party to exercise any right hereunder, and no partial or single exercise of any such right, shall constitute a waiver of that or any other right, unless otherwise expressly provided herein.

44. *Governing law.* This contract shall be construed in accordance with and governed by the laws of the District of Columbia.

45. *Counterparts.* This contract may be executed in two or more counterparts, each of which shall be deemed an original, but all of which together shall constitute one and the same instrument.

46. *Time of essence.* Except as provided in Section 34, time is of the essence of this agreement.

The parties have executed these presents the day and year first above written.

Attest:

Secretary

Moosac Corporation

by _____
President

James Davis

[Acknowledgments]



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B. CONTRACTS OF SALE: RESIDENTIAL PROPERTY

25-21 Current Legal Forms for Real Estate FORM 21.36

FORM 21.36 Sale of apartment building subject to overall lease to third party--subject to existing mortgage--seller representations and warranties

COMMENT

This agreement is a contract for the sale of a multi-family apartment building which is subject to a long-term lease of the land and entire building to a third party. The purchaser, therefore, is acquiring a fee interest subject to the long-term lease, and will only receive fixed rental payments from the long-term lessee for the duration of this lease. All dealings with the tenants are the obligation of the long-term lessee, and the profits or losses from the actual operation of the apartment building, subject to the rent payment, belong to the long-term lessee.

Leasehold improvements and acquisition costs

The cost of leasehold improvements made by a lessee are recovered under rules applicable to other taxpayers. Therefore, the cost recovery of improvements made by a lessee to real property would generally be recoverable over 27.5 years in the case of residential rental property or 39 years in the case of nonresidential real property. The recovery period applicable under the cost recovery rules applies, regardless of the term of the lease. On termination of the lease, the lessee who does not retain the improvements computes gain or loss by reference to the adjusted basis of the improvements at that time. The amortization of lease acquisition costs, however, involves the term of the lease. In determining the amortization period, the term of the lease includes all renewal options as well as other periods for which the parties reasonably expect the lease to be renewed, if less than 75 percent of the acquisition cost is attributable to the period of the term remaining on the date of its acquisition. Not taken into account, however, are any periods for which the lease may subsequently be renewed, extended, or continued pursuant to an option exercisable by the lessee. For a discussion of cost recovery of leasehold improvements and acquisition costs, see The Tax Background (TB) § 21.06[2], at the beginning of this chapter.

Information reporting of real estate transactions

The attorney or title company responsible for closing title is required to report the real estate transactions to the IRS. In addition, a statement must be provided to the customer before January 31 of the year following the transaction. If an attorney or title company is not involved in the closing, the information reporting is the responsibility of the mortgage lender. The information reporting requirements are discussed in TB § 21.02[4].

Disclosure of lead-based paint hazards

Federal law requires the seller of pre-1978 residential housing to disclose known information to the prospective purchaser on lead-based paint hazards. See 42 U.S.C. §§ 4851-4856; 40 C.F.R. Part 745 and 24 C.F.R. Part 35, Subpart A. The sales contract must include a lead warning statement and certain disclosure information. See discussion in comments to Form 21.15, *supra*. A sample lead-based paint sales contract rider, including both disclosure under the federal law and a lead-based paint contingency clause, is included in this chapter at Form 21.30, *supra*.

FORM

AGREEMENT made November 28, _____ [year], by and between Samuel Gower and Harriet Gower, residing at 100 Center Street, Detroit, Michigan ("Sellers,") and James Allen, of New York, New York ("Purchaser").

Sellers agree to sell to Purchaser, and Purchaser agrees to purchase from Sellers, the real property described on Schedule A attached hereto and made a part hereof, commonly known as the Redwood Apartments, Dearborn, Michigan, together with all improvements, and the stoves, refrigerators, and other personal property owned by Sellers and now situated therein (the "Premises").

1. *Purchase price.* The purchase price for the premises shall be \$600,000 over the unpaid principal balance of the first mortgage as of the time of closing. The purchase price is payable as follows:

(a) \$30,000 by Purchaser's check made payable to the order of Harris Winslow, as Escrowee, to be held subject to the terms and conditions of this agreement.

(b) \$570,000 in cash or by certified check or checks on closing of title.

2. *Outstanding mortgage.* Purchaser shall accept title subject to the then unpaid balance of the first mortgage, presently constituting a lien against the premises in the approximate unpaid principal balance, as of October 30, _____ [year], of \$1,082,000. This mortgage is held by the Farm Insurance Company. Sellers represent that they have exhibited to Purchaser a true copy of the mortgage and the note secured by the mortgage, and that the mortgage and note have not been modified or amended. Sellers further represent that the mortgage is presently in full force and effect, that no default exists by the mortgagor, and that the foregoing state of facts shall be true as of the date of closing.

3. *Closing subject to mortgage.* Sellers shall, at the closing of title, deliver to Purchaser a closing letter from the holder of the mortgage setting forth the unpaid principal balance as of that date, the last date to which interest has been paid, the amount then held on deposit for real property taxes and insurance premiums, and whether to the mortgagee's

knowledge any default then exists in the performance by the mortgagor of its obligations under the mortgage. Sellers shall make all regular payments of principal and interest due under the mortgage up to and including the date of closing. Purchaser shall accept title subject to the unpaid principal balance of the mortgage as so reduced at the time of closing, without any adjustment in the purchase price, but shall not be required to assume payment of the unpaid balance of the mortgage.

4. *Technical default under mortgage.* The parties acknowledge that the note secured by the first mortgage contains a provision granting to the mortgagee the option to accelerate the maturity date of the mortgage upon any termination of the corporate existence of the corporate mortgagor or upon any bankruptcy, insolvency, or similar act affecting the original corporate mortgagor. Sellers represent that the original corporate mortgagor has been dissolved and its corporate existence terminated. Sellers shall use their best efforts to secure from the present holder of the mortgage a waiver of the right to accelerate the maturity date of the mortgage by reason of any event described in this paragraph. If Sellers are unable to secure such a waiver in writing from the holder of the mortgage within 30 days from the date hereof, they shall give Purchaser written notice of such fact and Purchaser may either:

(a) Terminate this agreement, in which event the monies deposited by Purchaser shall be returned to him, the agreement shall be deemed terminated, and neither party shall have any further claims against the other; or

(b) Accept title subject to the above state of facts.

Purchaser shall make his election within 30 days after receiving Sellers' written notice that they cannot obtain a waiver by the mortgage holder. If Purchaser elects to accept title despite Sellers' failure to secure the waiver, Purchaser may adjourn the closing date for a period of up to 60 days in order to permit him to secure a new first mortgage to replace the existing first mortgage.

5. *Outstanding lease.* Sellers have exhibited to Purchaser a true copy of the Lease Agreement dated April 13, _____ [year], entered into by Sellers, as Lessors, and Redwood Ltd., a limited partnership, as Lessee, under which the entire premises have been leased to the Lessee for a term expiring June 30, 2009, at a net monthly rental of \$14,000 payable in advance upon the first day of each month of the term. Sellers represent and warrant that the Lease is presently in full force and effect and unmodified, that neither party to the Lease is presently in default in the performance of the respective obligations thereunder, and that this state of facts will be true as of the closing date. Sellers shall deliver to Purchaser at the closing of title a letter from the Lessee certifying that the Lease is then in full force and effect, unmodified, and that the Lessor is not in default in performing any of its obligations thereunder.

6. *Seller's other representations and warranties.* Sellers make the following representations and warranties:

(a) *Work notices.* Sellers represent that no notices or requests have been received by them from any insurance company issuing any policy of insurance covering the premises, from the holder of the first mortgage, or from the Lessee, requesting full compliance in the performance of work on or in the premises. Sellers shall, at their expense, fully comply at or before the closing with all such work notices and requests received before then.

(b) *Violations.* The premises and their present use do not violate any provision of any applicable building code, fire regulation, or governmental ordinances, orders, or regulations. Sellers will convey title free of any such violations.

(c) *Personal property.* Each apartment in the premises contains a refrigerator and range owned by Sellers free and clear of all liens and encumbrances other than the possible lien of the first mortgage. All of such refrigerators and ranges are included in this sale.

(d) *Taxes.* The city and school taxes payable with respect to the premises for the fiscal year ending June 30, _____ [year], are \$9,600, and the county taxes for the fiscal year ending November 30,

_____ [year], are \$7,200.

(e) *Contracts*. There are no existing maintenance or other contracts affecting the premises, other than the Lease.

(f) *Insurance*. Attached Schedule B is a true and accurate schedule of all insurance carried by Sellers with respect to the premises. The total annual premiums for such insurance is \$4,200.

(g) *Utilities*. The parcels described on Schedule A are contiguous, and all public utilities required for the operation of the premises either enter the premises through adjoining public streets, or if they pass through adjoining private lands do so in accordance with valid easements.

(h) *Encroachments access*. The buildings upon the premises are entirely within the boundary lines of the lands described in Schedule A; there are no encroachments; and there is access from each building to a legally opened public street or highway over lands included in this sale or pursuant to irrevocable easements running to the benefit of the owner of the premises. Sellers shall deliver to Purchaser at the closing a completion survey covering all of the premises.

(i) *Survival of representations and warranties*. All representations, warranties, and agreements made by Sellers herein shall be binding upon Sellers jointly and severally and shall survive the closing.

7. *Prorations*. The following items shall be prorated between the parties as of the closing date: prepaid rents, and interest on the first mortgage. Sellers shall at the closing assign to Purchaser without further proration all sums then held as advance real property tax deposits and insurance premium deposits held by the holder of the first mortgage.

8. *Casualty*. Purchaser may cancel this agreement, by giving written notice to Sellers, if before delivery of the deed (a) any improvement on the premises is damaged or destroyed by fire or other casualty, the estimated cost of repair and restoration exceeds \$30,000, and (b) the repair or restoration is not completed by the closing date (for which purpose Sellers shall be entitled to a reasonable adjournment of the closing of up to 60 days). Upon cancellation, all monies deposited by Purchaser shall be returned to him and neither party shall have any further claim against the other. If Purchaser does not exercise the option to cancel, he shall accept title to the premises in its damaged condition, and Seller shall turn over to Purchaser all insurance proceeds payable because of the casualty. Any damage from fire or other casualty shall be repaired by Sellers if the cost of repairs is less than \$30,000. Sellers shall complete the repairs before the closing date, but shall be entitled to a reasonable adjournment of the closing of up to 60 days.

9. *Sellers' inability to convey good title*. If Sellers are unable, after due diligence, to convey title in accordance with this agreement and Purchaser is unwilling to accept such title as Sellers are able to convey, Sellers' sole liability to Purchaser shall be to return to him the monies deposited plus the net cost of title examination. In that event, this agreement shall be canceled and neither party shall have any further claim against the other.

10. *Default by purchaser*. If Purchaser defaults in performing his obligations hereunder, Sellers may retain the monies deposited by Purchaser as and for liquidated damages, it being agreed that actual damages would be difficult or impossible to ascertain. Liquidated damages shall be Sellers' sole remedy, and Sellers expressly waive the remedy of specific performance.

11. *Deed; title policy; assignment of lease*. Sellers shall convey title on the closing date by general warranty deed duly executed and acknowledged. The deed shall convey to Purchaser a good, marketable, and insurable fee simple title to the premises. Sellers shall provide Purchaser at the closing with an Owners Fee Title Insurance Policy in the amount of \$1.67 million, issued by the Central Title Insurance Co. or any other comparable title insurance company selected by Purchaser. Sellers shall assign to Purchaser at the closing, in form for recording, all of the landlord's interest in the Lease.

12. *Closing.* The closing of title shall be held at 11 a.m., on February 12, _____ [year], at the office of Monroe Davis, Esq., 1700 Skyway Building, Detroit, Michigan.

13. *Broker.* The Smith Management Co. was the broker who brought about this transaction, and Sellers shall pay the broker a commission pursuant to separate agreement when this transaction closes.

14. *Notices.* Any notice required under this agreement shall be given by certified mail to Sellers in care of Monroe Davis, Esq., 1700 Skyway Building, Detroit, Michigan, and to Purchaser at 100 Park Avenue, New York, New York.

15. *Escrow.* Harris Winslow by the execution of this agreement as Escrow Agent agrees to hold the proceeds from the check deposited by Purchaser upon the execution of this agreement in escrow, and to dispose of the proceeds by return to Purchaser if Purchaser becomes entitled to the proceeds in accordance with this agreement, or by turning over the proceeds to Sellers upon the closing of title or a default by Purchaser.

16. *Assignment by purchaser.* Purchaser may assign his interest under this agreement. If Purchaser makes such an assignment and the assignee assumes all of Purchaser's obligations under the agreement, he shall thereupon be relieved of all liability hereunder.

17. *Binding effect.* This agreement shall be binding on the parties and their respective heirs, personal representatives, and assigns.

18. *Entire agreement.* All prior understandings and agreements between the parties are merged in this contract, which constitutes the entire agreement between the parties. This contract is entered into after full investigation made by Seller, and neither party relies upon any statement or representation made by anyone unless contained herein.

19. *Headings.* Headings in this agreement are for convenience and reference only and shall not be used to interpret or construe its provisions.

20. *Non-waiver.* No delay or failure by either party to exercise any right hereunder, and no partial or single exercise of any such right, shall constitute a waiver of that or any other right, unless otherwise expressly provided herein.

21. *Governing law.* This contract shall be construed in accordance with and governed by the laws of the State of Michigan.

22. *Counterparts.* This agreement may be executed in two or more counterparts, each of which shall be deemed an original, but all of which together shall constitute one and the same instrument.

23. *Time of essence.* Time is of the essence of this agreement.

The parties have executed this agreement at Detroit, Michigan, on the day above first written.

Samuel Gower, Seller

Harriet Gower, Seller

James Allen, Purchaser

Harris Winslow, Escrow Agent



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C. CONTRACTS OF SALE: COMMERCIAL PROPERTY

25-21 Current Legal Forms for Real Estate FORM 21.37

FORM 21.37 Sale of office building--assumption of leases and other contracts by buyer--transaction closed in escrow

COMMENT

This is a contract for sale of an office building. After the initial contract deposit, the buyer is required to pay the balance of the purchase price in cash at the closing. The purchaser has examined the leases, service contracts, and other documents prior to signing of the contract, and agrees to assume each of them listed in an exhibit to the contract. Prior to execution of the contract, the buyer has inspected the property not just to ascertain its physical condition, but also to verify compliance with the Americans With Disabilities Act of 1990 ("ADA") and its Accessibility Guidelines ("ADAAG"), and all regulations or amendments promulgated thereunder. The buyer also has inspected the property to make sure it is in compliance with all environmental laws, rules and regulations, federal, state and local. In the absence of inspections, or in addition thereto, the buyer should attempt to obtain warranties from the seller that to its knowledge, it is in compliance with such laws.

The buyer agrees to indemnify the seller against matters arising after the closing, and the seller indemnifies the buyer against matters arising prior to the closing. The contract specifies the documents to be delivered at the escrow closing and the closing adjustments. The seller must maintain and operate the property until title is transferred.

FORM

AGREEMENT made in Los Angeles, California, by and between the Camelot Building Corporation, a California corporation ("Seller") and James Warren ("Buyer").

1. *Purchase and sale.* Buyer agrees to buy, and Seller agrees to sell, the property more particularly described in Schedule A attached (the "property"), together with all items of personal property owned by Seller and located in or used in connection with the operation of the subject property.

2. *Purchase price.* The purchase price for the property shall be \$2 million.

3. *Terms of payment.* The purchase price shall be paid as follows:

(a) \$200,000 to be paid to Seller upon the execution of this agreement.

(b) \$1.8 million to be deposited in the escrow referred to in paragraph 5, before the closing.

4. *Inspection of documents and premises and assumption of obligations*

(a) Buyer acknowledges that, prior to the execution of this agreement, he has inspected each of the instruments listed on attached Exhibit B. Seller warrants that Exhibit B is a complete list of all leases and contracts under which it has any obligation or benefit. Buyer approves each of the instruments on Exhibit B. Seller represents that no tenant is entitled to any rebate, concession, or other benefit except as set forth in the leases referred to in Exhibit B, and that the rentals due or to become due under such leases and other tenancies will not be assigned, encumbered, or subject to liens at the close of the escrow. Buyer expressly accepts, assumes, and agrees to all of Seller's terms, provisions, covenants and conditions contained in each such instrument. Buyer shall also indemnify, defend and hold Seller harmless from any claim, demand, or cause of action asserted against Seller arising from a breach, violation, or failure to perform any provision of any such instrument that allegedly occurred after the closing date of the escrow. Seller shall indemnify, defend and hold Buyer harmless from any claim, demand, or cause of action asserted against Buyer arising from a breach, violation, or failure to perform any provision of any such instrument that allegedly occurred before the closing date of the escrow.

(b) Buyer has inspected a preliminary report of title issued by the Title Insurance Company of Los Angeles, California, dated July 2, _____ [year], bearing Order Number 50132, as to the status of the fee title of the property. This report is annexed and marked Exhibit C. If the extended coverage policy of title insurance fails to show any exception not shown in the preliminary report, and exceptions 4 through 10 of the report, Buyer expressly approves the report of title and agrees to accept title subject to exceptions 1, 2, and 3 of the report.

(c) Buyer has examined Seller's books and records, and is relying on such examination and not upon any representations made by Seller or its agents concerning the income or expense of the property. Seller warrants and represents that the books and records furnished to Buyer are kept and maintained by Seller in its ordinary and normal course of business and used by it in computing its federal income tax returns.

(d) Buyer has inspected the property during January _____ [year] with respect to the physical condition of the structure, its compliance with the Americans With Disabilities Act of 1990 and its Accessibility Guidelines, and all regulations thereunder, and its compliance with all environmental laws, federal, state, and local, and agrees to accept it at the close of escrow in the same condition as it was at the time of inspection, reasonable wear and tear excepted.

5. *Escrow*

(a) Within ten days after the execution hereof, the parties shall cause an escrow ("escrow") to be opened at the Title Insurance Company of Los Angeles, California, at its main office, 500 South Water Street, Los Angeles, for the purpose of carrying out the provisions hereof.

(b) Each party shall execute escrow instructions and all other necessary instruments to consummate the transaction and effectively convey and assign the property from Seller to Buyer. Each party shall also deposit into escrow all sums and documents required from time to time by the escrow instructions.

(c) Seller shall deposit the following documents into escrow on or before the escrow closing date:

(1) The original, or duplicate original, of each instrument listed in Exhibit B.

(2) All documents and data necessary to determine the prorations to be made, as set forth in paragraph 6.

(3) A grant deed to the property, duly executed and acknowledged and in sufficient recordable form to convey the required fee title.

(d) If for any reason Seller is unable to convey and assign all or any part of the property in accordance with the terms hereof, Buyer may purchase all rights, title, and interest Seller is able to convey and assign, without abatement of any part of the purchase price. Nothing in this subparagraph, however, shall relieve Seller of any of its obligations under this agreement.

(e) On the close of the escrow, Seller shall furnish, at its expense, a policy of title insurance issued by the Title Insurance Company of Los Angeles, California, in its extended coverage form, in the amount of \$2 million, insuring Buyer's title to the property, subject only to exceptions 1, 2, and 3, as they appear on Exhibit C, as provided in subparagraph 4(b).

(f) Each party will pay the portion of the escrow costs and charges which are normally charged to it, respectively, under existing escrow practices in the City of Los Angeles, California. Seller will pay the cost of the title policy to be furnished by it.

(g) The closing date of the escrow shall be on or before July 1, _____ [year]. Buyer shall designate the closing date, by giving the Title Insurance Company, as escrow holder, and Seller, written notice at least ten days before the designated date. Time is of the essence with regard to the closing date. If the escrow fails to close on or before the above date for any reason other than Seller's default, this agreement shall terminate.

(h) At the close of the escrow, Seller will deliver to Buyer all documents, correspondence, lease files, and related records pertaining to the leases and contracts listed on Exhibit B.

(i) Seller shall pay a real estate broker's commission of \$35,000 to Harrison & Co., Inc., 100 State Street, Los Angeles, California, from the proceeds of the escrow, when the escrow is closed.

(j) The escrow instructions are not intended to supersede this agreement, but are deemed merely to be supplemental hereto and a means of carrying out and consummating the provisions hereof.

6. *Prorations.* The following items shall be prorated as of the close of the escrow:

(a) Rents, other than delinquent rents under the leases and tenancies listed on Exhibit B. If any lease set forth in Exhibit B provides for a minimum basic rent, plus an additional rent to be computed on the basis of a stated percentage of the tenant's monthly or annual revenue or volume of business, then for the purpose of prorating such additional rents, it shall be assumed that the revenue for each month or each year for which additional rent is to be computed is the same as the revenue for the last calendar month or last calendar year, as the case may be, immediately before the close of escrow. Delinquent rents are rents which are not paid within ten days after they are due. Delinquent rents shall not be

prorated and shall remain the property of Seller, except that Buyer shall be entitled to receive and retain all rents allocable to the period after the close of escrow.

(b) All security deposits and lease considerations then held by Seller shall be credited to Buyer as of the closing date. Seller shall, on the close of escrow, represent and warrant that such security deposits or lease considerations are the only ones in its possession.

(c) Garage parking and service income.

(d) City and county real and personal property taxes.

(e) Salaries of employees (not including management employees). Attached Exhibit D is a list of the names of such employees, their positions and salaries.

(f) Union welfare and pension fund contributions, social security payments, Christmas bonus payments (based on a calendar year on the amounts paid in _____ [year]), and vacation payments accruing since the last previous vacation of the employees shown on Exhibit D or of employees replacing them.

(g) Exhibit E is a list of insurance policies showing the name of the insuring company, the policy number, the term and expiration date of the policy, the premium charged, and the general nature and the type of policy. Premiums on such policies shall be prorated. Seller shall maintain such policies in full force and effect until close of escrow.

(h) Charges under the service contracts listed on Exhibit B. The net balance of the foregoing prorations, if in favor of Seller, shall be added to the cash required to be paid by Buyer, before the close of escrow; or, if in favor of Buyer, shall be deducted from such cash required. No prorations will be made of public utilities but, in lieu thereof, Seller will cause the respective utility companies to read the gas, water, electric, and power meters on the morning of the close of escrow, and will pay such invoices when rendered. Seller will also pay any telephone charges allocable to the period before the close of escrow.

7. *Possession and use of building name.* Possession of the property shall be delivered to Buyer upon conveyance of title and the close of escrow. Seller will assign to Buyer its right to use the name "Camelot Building."

8. *Conduct of business during escrow*

(a) Seller shall continue to maintain, repair, manage, and operate the property in the same manner as it is now conducted, reasonable wear and tear excepted, and shall perform all obligations under the leases and contracts referred to in Exhibit B until the close of escrow and the delivery of possession of the property to Buyer. Except as provided in subparagraph (b) of this paragraph, Buyer shall have no rights with respect to the management, operation, or conduct of the property until the close of escrow.

(b) Seller shall submit to Buyer, for his approval, after the execution hereof, any contract or lease relating to the property which Seller contemplates executing. Seller shall not execute any such contract or lease until it is first approved in writing by Buyer. Seller, however, shall not be required to execute a contract or lease because it has been submitted to Buyer for approval and approved by him. Buyer will not unreasonably withhold approval of any contracts or leases submitted to him for approval by Seller. Seller shall not modify, extend, renew, cancel, or surrender any of the existing leases or contracts in Exhibit B without Buyer's written consent in each instance.

(c) If Buyer approves any such contract or lease, in writing, and it is subsequently executed by Seller, an executed copy of the contract or lease shall be deposited by Seller into the escrow.

(d) As of the closing date Buyer shall accept and assume all of the terms, provisions, covenants and conditions which Seller is required to observe, perform and keep in each contract or lease that Buyer approves under subparagraph (c) of this paragraph, and which is executed by Seller. Buyer shall indemnify and hold Seller harmless from and against any claim, demand, or cause of action asserted against Seller arising from a breach, violation, or failure to perform any provision of any such contract or lease that allegedly occurs after the closing date of the escrow. Seller shall hold Buyer harmless from any claim, demand, or cause of action asserted against him arising from any breach, violation, or failure to perform any provision of any such contract or lease that allegedly occurs before the closing date of the escrow.

9. *Passage of title.* Until the closing of escrow, the parties do not intend that title to the property pass from Seller to Buyer, that title to the funds to be deposited in escrow hereunder pass from Buyer to Seller, or that this agreement be deemed consummated. Seller's warranties, covenants, and representations contained in paragraphs 4(a) and (c), in paragraph 6(a), in the last two sentences of paragraph 6, and in paragraphs 8(a) and (d), shall survive the closing of escrow.

10. *Fire, earthquake, or other casualty.* If, at any time before the close of escrow, the property is destroyed or damaged by fire, earthquake, or other casualty, and the damage cannot be repaired for less than \$100,000, Buyer may terminate this agreement and be released from all obligations hereunder. If Buyer elects to terminate, he shall be entitled to the return of all monies paid hereunder and deposited in escrow. If Buyer does not elect to terminate, Seller shall assign to him any insurance proceeds paid on account of the casualty, or any claims under the insurance policies, and if such insurance payment is subject to a deductible under Seller's policy, the amount of such deductible shall be credited against the purchase price. In that event, Buyer shall complete the purchase of the property and accept the same in its damaged condition. If, at any time before the close of escrow, the property is damaged by fire, earthquake, or other casualty and the damage can be repaired for less than \$100,000, Seller shall repair the damage at its expense but may retain the insurance proceeds.

11. *Default.* The \$200,000 that Buyer is to pay Seller upon the execution hereof shall become Seller's property immediately upon payment. Seller shall apply the \$200,000 toward payment of the purchase price of the property upon the close of escrow. Buyer acknowledges that he has no right to the return any portion of the \$200,000, unless either Seller defaults or Buyer becomes entitled to the return of the money under the provisions of paragraph 10. If Buyer shall be in default of its obligations hereunder, Seller's sole remedy shall be to retain the foregoing sum of \$200,000 as liquidated damages. Seller and Buyer agree that said sum represents their best estimate of what the actual damages would be to Seller, which damages would be difficult to ascertain.

12. *Assignment.* Buyer may assign this agreement and it shall be binding upon and inure to the benefit of the legal representatives, successors and assigns of both parties.

13. *Entire agreement; modification.* This contract constitutes the entire agreement between the parties. It may not be modified except by an instrument signed by the party against whom the enforcement of such modification is sought.

14. *Nonwaiver.* No delay or failure by either party to exercise or enforce any right hereunder, and no partial or single exercise of any such right, shall constitute a waiver of that or any other right, unless otherwise expressly provided herein.

15. *Headings.* Headings in this agreement are for convenience only and shall not be used to interpret or construe its provisions.

16. *Governing law.* This agreement shall be construed in accordance with and governed by the laws of the State of

California.

17. *Counterparts*. This agreement may be executed in one or more counterparts, each of which shall be deemed an original but all of which together shall constitute one and the same instrument.

18. *Time of essence*. Time is of the essence of this agreement.

19. *Notices*. All notices hereunder to Seller shall be given by certified mail, addressed to:

Camelot Building Corporation
100 Wilshire Boulevard
Los Angeles, California

All notices to Buyer under this agreement shall be given by certified mail, addressed to:

James Warren
200 State Street
Denver, Colorado

The parties have executed this agreement January 15, _____ [year], in the City of and County of Los Angeles, State of California.

Attest

Secretary

Camelot Building Corporation

by _____
President, Seller

James Warren, Buyer



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Current Legal Forms for Real Estate

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Current Legal Forms for Real Estate
Chapter 21 SALES AND EXCHANGES
Part IV. Forms

C. CONTRACTS OF SALE: COMMERCIAL PROPERTY

25-21 Current Legal Forms for Real Estate FORM 21.38

FORM 21.38 Sale of office building and theatre--operating income guaranteed by seller's escrow deposit--seller to obtain purchaser's mortgages

COMMENT

The purchaser under this contract requires the seller to obtain a new mortgage, in a specified amount and upon certain terms, on each of the two parcels involved in the transaction. The amount of these mortgages will be included in the tax basis of the properties to the purchaser.

Guaranty of operating profits

The unique feature of this agreement is the seller's guaranty to the purchaser of a minimum net profit from the operation of the properties for a ten-year period. A specific fund is deposited by the seller into escrow. Payments are made to the purchaser from this fund to the extent that the net operating profit is less than the guaranteed minimum in any year. Notwithstanding the possibility that payments may have to be made to the purchaser in the future, the seller in reporting his gain or loss in the year of sale must include within the amounts realized the money paid into the escrow fund. To the extent that amounts are paid from this fund to the purchaser in later years, the seller will have deductible losses with the same character as the gain or loss recognized in the year of sale. Thus, if capital gain is recognized in the year of sale, payments in later years will be capital losses.

Title defect provision

The seller agrees to convey marketable title subject only to specified encumbrances. Title defects are liens or encumbrances against the title which are not included within the specific exceptions. An interesting aspect of this contract's title provision is that the seller agrees to take prompt legal action to remedy title defects for which legal action would be effective. Although this is not a

common provision, it may be of more benefit to the buyer to have the encumbrance removed by legal action than to hold an escrow to remedy the defect in the future.

Compliance with laws

The purchaser in this contract was able to obtain certain representations from the seller that the property is in compliance with certain laws relevant to and affecting office buildings, namely the Americans With Disabilities Act of 1990 and its Accessibility Guidelines, and with all environmental laws, federal, state, and local. There is also a warranty that there is no asbestos in the buildings. In the absence of warranties, or in addition thereto, the purchaser should do its own due diligence with respect to such matters.

FORM

AGREEMENT made August 20, _____ [year], between Capital Realty Corporation, a Delaware corporation ("Seller"), and Karl Kramer ("Purchaser").

1. *Sale.* Seller agrees to sell, and Purchaser agrees to buy, the real property situated in the District of Columbia consisting of two parcels of land with improvements thereon, one improved by the Talbert Building, and the other by the Talbert Theatre Building. The parcels of land are more particularly described in the annexed Schedule A. The sale includes all of the furniture, fixtures, machinery, and equipment located in and upon the two buildings, and used in connection with their operation and maintenance. A detailed inventory of the personal property situated in the Talbert Theatre Building and comprising a part of the within sale is set forth in the annexed Schedule B.

2. *Purchase price.* The total purchase price for the property is \$3.2 million, computed in accordance with the breakdown contained in Schedule C attached. The purchase price is payable as follows:

(a) \$100,000 upon the signing of this agreement, by check subject to collection, and deposited with the District Title Insurance Company, 1000 Eye Street, N.W., Washington, D.C., to be held in escrow until the date of settlement of this contract or until other disposition is made as provided for herein. If this sale is consummated the escrow holder shall deliver the proceeds of the \$100,000 check to Purchaser to be applied on account of the purchase price.

(b) \$1 million by cashier's or certified check to the order of Seller on the date for closing of title. However, if Purchaser elects to adjourn the closing date in accordance with the provisions hereof, the \$1 million payment shall be reduced by the additional payment or payments made by Purchaser on account of the purchase price when he gave notice or notices of such election.

(c) \$1.4 million out of the proceeds of the new mortgage financing of the Talbert Building, the financing to be procured by Seller.

(d) \$700,000 out of the proceeds of the new mortgage financing of the Talbert Theatre Building, the financing to be procured by Seller.

3. *Additions to purchase price.* An amount equal to the total of the following items, adjusted as of the closing date, shall be added to the purchase price in paragraph 2:

(a) Prepaid insurance premiums on the policies of insurance enumerated in Schedule D annexed. Seller

represents that all the listed insurance policies are transferable and at the date of the closing will be in full force and effect without modification. If any policies expire before the closing date, renewals shall be made only with Purchaser's written consent.

(b) Prepaid real estate taxes apportioned on the basis of the real estate tax year.

(c) Prepaid water and sewer rents.

(d) The value, at Seller's expense, of all fuel on hand, and janitor and custodial supplies to the extent of unopened packages containing such supplies.

4. *Reductions in purchase price.* An amount equal to the total of the following items, adjusted as of the closing date, shall be deducted from the purchase price in paragraph 2:

(a) Unpaid insurance premiums on the policies of insurance enumerated on Schedule D annexed.

(b) Accrued and unpaid real estate taxes, apportioned on the basis of the real estate tax year.

(c) Charges to be accrued for electricity, water, sewer, gas, and other utilities.

(d) Rents received in advance for any period after the date of closing.

(e) All unpaid water, frontage, and sewer taxes, impositions, and charges.

(f) Security rent deposits and any other deposits made or given by any tenant of the properties.

(g) Employees' salaries, wages and vacation pay, welfare funds and union dues if any, federal income tax on employees' wages withheld at the source, federal and District of Columbia payroll and social security taxes, all apportioned on the basis of time and adjusted as of the closing date.

5. *Seller's representations and warranties.* Seller represents and warrants to Purchaser as follows:

(a) It is the owner in fee simple of all of the real property and owner of the personal property described in Schedules A and B, free from all liens and encumbrances other than the rights of tenants in possession under the leases and rental agreements.

(b) Such real and personal property is subject to certain leases and rental agreements listed in the attached Schedule E, which sets forth the name of each tenant and the space occupied by him, the expiration date of each lease, all allowances and concessions to tenants, the rate of rental actually and currently collected from such tenants, and the new rental rates as they will be placed into effect on or before the closing date.

(c) At the time of closing the rentals of the Talbert Building alone will aggregate \$400,000 per year, and the rentals of the Talbert Theatre Building will aggregate \$100,000 per year.

(d) Only those tenants indicated in the annexed Schedule E as "lease tenants" have written leases; and no written or oral agreements, except those leases, have been entered into with any tenants, relating to or connected with their occupancy of such real property.

(e) All work to be done, and all equipment to be furnished by the Landlord under such leases or

agreements have been done or furnished.

(f) There are no deposits by any tenant of such real property either as security for or prepayment of rent, except as set forth in the annexed Schedule E.

(g) No condemnation of any of the real property described in Schedule A has occurred for which damages are unpaid, and there is no existing notice covering future condemnation.

(h) Seller has not violated any provision of the insurance policies to be transferred to Purchaser at the date of closing.

(i) To Seller's knowledge the property is in compliance with the Americans With Disabilities Act of 1990 and its Accessibility Guidelines, and all regulations promulgated thereunder.

(j) To Seller's knowledge, the property is in full compliance with all environmental laws, federal, state, and local.

(k) The property is free from asbestos and any asbestos containing materials.

6. *Conditions to purchase.* Purchaser's obligation to consummate this transaction is subject to and conditioned upon the following:

(a) That at the closing of this contract the title to all of the improved real property and the personal property described in Schedules A and B will be good of record and fully marketable, free of all liens and encumbrances excepting only the rights of the lessees and tenants in possession as set out in Schedule E, and that the state of such title will be such that either the District Title Insurance Company, the Lawyers Title Corporation, or the Columbia Title Insurance Company will insure at normal and usual rates. If, upon examination, the title to such real and personal property is found defective and not as herein represented, Purchaser may terminate this contract unless the defects may be readily remedied by prompt legal action. If Purchaser terminates, all deposits shall be returned to him, together with all of his reasonable costs in connection with examining title and obtaining any surveys. Seller is released from all liability for damages by reason of any defect in the title. Seller will do no act nor permit anything to be done between the date hereof and the date of closing that will affect the state of the title to such property. If legal action is necessary to perfect the title, Seller shall take such action promptly at its expense, whereupon the time for full settlement by Purchaser will be extended for the period necessary for such prompt action. If Seller does not remedy such defects in title within 20 days following the date fixed as the date of the original closing, Purchaser may terminate this contract by giving 15-days' written notice to Seller of his intention to do so, after which period this contract shall terminate and all deposits shall be returned to Purchaser, together with the reasonable costs incurred by him in connection with the examination of title and obtaining any surveys.

(b) That Seller shall comply with all notes or notices of violations of law or municipal ordinances, orders, or requirements noted in or issued by any federal or municipal department or other department of the District of Columbia having jurisdiction over or affecting the real property described in Schedule A, at the date of closing, and that there shall be no violations imposed by any public authorities outstanding against such real property at the time of the closing.

(c) That, at the time of closing, all of the real property described in Schedule A and all furniture, fixtures, machinery, and equipment located thereon and used in connection therewith will conform with all applicable municipal or other local laws, including zoning ordinances, health codes, building codes, fire

ordinances, and the like, and there will be no outstanding notices or orders not complied with affecting the use or occupation of any part of such property or requiring any repairs, alterations, or improvements.

7. *Condemnation and casualty.* Purchaser may terminate this agreement, by giving Seller ten-days' written notice, if before the closing date the real property described in Schedule A is condemned in whole or in part, or it is wholly or partly damaged by fire or other casualty and the cost of repair is \$100,000 or more. Upon termination, Seller shall return to Purchaser the deposit and other monies paid on account of the purchase price, plus Purchaser's reasonable costs in connection with examining title and obtaining surveys. Upon such payment, both parties shall be released and discharged from all further obligations to each other, and this agreement shall become null and void. If Purchaser does not terminate, this agreement shall be performed, but the purchase price shall be adjusted in Purchaser's favor by the amount realized by Seller from the proceeds of fire or other casualty insurance or condemnation plus the amount of any deductible under Seller's insurance policy applicable to such insurance payment, and Seller shall not be responsible for restoring or repairing the property.

If the property is damaged by fire or other casualty and the cost of repair is less than \$100,000, Seller shall promptly repair and restore the property at its expense, and the closing date hereunder shall be extended for the reasonable period required to make such repairs and restoration.

8. *Cost of title search and related expenses.* Purchaser shall pay the cost of title examination, tax certificates, conveyances, notary fees, and all recording charges. If upon examination, however, title to the property is found defective and is not remedied by Seller within the period provided for herein, and if Purchaser declares this agreement terminated as a result, Seller shall return all deposits and reimburse Purchaser for his reasonable cost in connection with examining title and obtaining surveys.

9. *Placing of new mortgage.* In order to induce Purchaser to enter into this agreement and to purchase the property, Seller at its expense shall:

(a) Obtain for Purchaser a mortgage loan of \$1.4 million, the loan to be secured by a first Deed of Trust on the property, known as the Talbert Building, and to be closed contemporaneously with the closing of this agreement. The mortgage loan shall be made and advanced by an institutional lender, be for a period of not less than 15 years, bear interest of not more than 12 percent per annum, have a combined total of interest and principal amortization of not more than 14.5 percent per annum of the face amount, and provide for constant monthly payments of interest and principal amortization of not more than \$16,100, to be applied first to interest on outstanding balances of principal and then to principal. The first Deed of Trust and note secured by it shall be drawn in the completed form attached as Schedule F.

(b) Obtain for Purchaser a mortgage loan of \$700,000, the loan to be secured by a first Deed of Trust on the property known as the Talbert Theatre Building, and to be closed contemporaneously with the closing of this contract. The mortgage loan shall be made by an institutional lender, be for a period of not less than 15 years, bear interest of not more than 12 percent per annum, have a combined total of interest and principal amortization of not more than 14.5 percent per annum of the face amount, and provide for constant monthly payments of interest and principal amortization of not more than \$8,402, to be applied first to interest on outstanding balances of principal and then to principal. The first Deed of Trust and note secured thereby shall be in the form attached as Exhibit G.

10. *Operation of property.* Between the date hereof and the closing date:

(a) Seller shall not modify or terminate any lease identified in annexed Schedule E except by reason of a tenant's default or with the prior written consent of Purchaser or his designated representative.

(b) Seller shall not enter into any new lease or tenancy without the prior written consent of Purchaser or his designated representative, except as provided in Schedule E.

(c) Seller shall not increase the salary of any building employee without the prior written approval of Purchaser or his designated representative. Seller warrants and represents that the annexed Schedule H is a true and complete list of all persons presently employed in the operation and maintenance of the buildings, together with the amount of wages and salaries actually paid to them and overtime and vacation time allowed them.

(d) Seller shall make all repairs and replacements to the real and personal property at its expense. Seller shall maintain the buildings and personal property in their existing condition, reasonable wear and tear excepted.

11. *Survival of warranties and representations.* All of Seller's warranties, representations, and agreements shall be and remain true at the time of closing, and shall survive the closing and the conveyance of the property to Purchaser.

12. *Misrepresentation by seller.* If Purchaser has relied to his detriment on any substantial misrepresentation made hereunder by Seller, Purchaser may terminate this agreement by giving Seller written notice thereof. Upon termination, Seller shall return to Purchaser all monies paid hereunder, together with Purchaser's reasonable expenses in connection with examining title and obtaining surveys. Purchaser may exercise all other rights and remedies against Seller that are available to Purchaser. However, if Purchaser decides not to terminate and the effect of any misrepresentation may be remedied by an adjustment of the purchase price, Purchaser may close this transaction and accept delivery of the property upon payment of the purchase price less any adjustments.

13. *Default by purchaser.* If on the date set for the closing, or any other adjourned date, the Seller is ready, willing, and able to carry out and perform this contract, and all other conditions precedent to such closing are complied with, but Purchaser nevertheless refuses or is unwilling to perform the obligations imposed upon him, the amount deposited on account of the purchase price shall be paid to Seller as fixed and liquidated damages, and not as a penalty, and this contract shall, thereupon, become void and neither party shall have any further rights against the other. Seller and Purchaser agree that the actual damages would be difficult to ascertain and that the amount of the deposit represents their best estimate of what the actual damages would be.

14. *Type of deed.* Seller shall convey the real property listed in the annexed Schedule A to Purchaser by good and valid special warranty deed.

15. *Closing and adjournments thereof.* The closing of this contract shall take place at 10 a.m. on _____ [date] (the "original closing date") at the office of District Title Insurance Company, 1000 Eye Street, N.W., Washington, D.C. Purchaser may adjourn the closing of title by giving Seller not less than ten-days' written notice of his decision. The notice shall specify an adjourned date for the closing of title, which shall be not more than 30 days after the original closing date, if Purchaser delivers to the District Title Insurance Company, as Escrow Agent, at the time notice is given, \$50,000 as an additional deposit on account of the purchase price. The additional deposit shall be applied on account of the purchase price at the closing of the title and shall be held by the Escrow Agent until the closing or other disposition. Purchaser shall have a further right to a second adjournment of the closing by giving Seller not less than ten-days' written notice of Purchaser's election. The latter notice shall specify an adjourned date for the closing, which shall be not more than 60 days after the original closing date, if Purchaser delivers to the District Title Insurance Company, as Escrow Agent, at the time notice is given, another \$50,000 as an additional deposit on account of the purchase price. The additional deposit shall likewise be applied on account of the purchase price at the closing of title and shall be held by the Escrow Agent until the closing or other disposition.

16. *Guaranty of operating income by escrow deposit.* At the closing, Seller shall cause \$125,000 to be deposited with

the Central Savings and Trust Company, the principal office of which is 1500 New York Avenue, N.W., Washington, D.C. Seller shall hold this amount, plus all income derived from it, as Escrow Agent, with the right to invest in short term securities guaranteed as to principal and interest by the U.S. Government, for the following purposes:

(a) If the net operating profit (as defined in subparagraph (b)) derived from the operation of the Talbert Building and the Talbert Theatre Building is less than \$140,000 in any operating year (as defined in subparagraph (c)) the Escrow Agent shall, upon demand from Purchaser, his successors or assigns, pay to Purchaser, his successors or assigns, out of the escrow funds, an amount equal to the difference between \$140,000 and the net operating profit for the operating year in question, upon the certificate of any certified public accountant auditing the books and records of Purchaser, his successors or assigns, and certifying that the amount is due and payable under the terms of this contract.

(b) For the purpose of this paragraph, the term "net operating profit" shall mean net profits derived from the operation of the Talbert Building and the Talbert Theatre Building as ascertained through the use of standard accounting practices, except that (1) depreciation of buildings and improvements shall not be considered as a deduction, (2) mortgage amortization shall be considered as a deduction, (3) the cost of capital improvements not in excess of \$5,000 per year shall be considered as a deduction, and (4) management and leasing fees not exceeding 5 percent of gross rentals shall be considered as a deduction. The term "capital improvements," shall be deemed to include only those capital expenditures that are necessary in the normal management of the property and which may not be charged to expense under the Regulations of the Service, except, that tenants' alterations up to \$14,000 per year shall not be included as "capital improvements," but shall be considered a deduction. No item shall be allowed as a deduction unless it constitutes an expenditure that is directly attributable to the property, and no overhead or administrative expenses of a type not now charged against the operations of the property shall be allowed as a deduction.

(c) For the purpose of this paragraph, the term "operating year" shall mean a period of 12 consecutive calendar months commencing on the first day of the month following the closing date, and each 12 consecutive months thereafter.

(d) The provisions of this paragraph shall apply to each of the first ten operating years immediately following the closing date, and the benefits of the provisions of this paragraph may at any time be assigned by Purchaser, his successors or assigns, to the fee owner or owners of the Talbert Building and the Talbert Theatre Building or to the lessee of the entire Talbert Building and the Talbert Theatre Building.

(e) Purchaser, his successors or assigns, shall keep a full and accurate set of books adequately showing the amount of net operating profit received by him in each operating year. Within 60 days of the close of each operating year Purchaser, his successors or assigns, shall furnish to Seller a statement certified by a certified public accountant of the State of New York or District of Columbia setting forth the amount of net operating profit received by him during the preceding operating year. If the net operating profit in any operating year is less than \$140,000, Purchaser, his successors and assigns, shall serve upon the escrow agent a demand for payment from the escrow funds to Purchaser or his successors or assigns, as the case may be, of an amount equal to the difference between \$140,000 and the net operating profit for the operating year in question. Within ten days after the receipt of such demand the Escrow Agent shall make payment of the amount demanded to Purchaser, or to his successors or assigns, subject to the provisions of subparagraph (g), and will continue to hold the balance in escrow subject to the terms of this paragraph.

(f) Seller, and its duly authorized representatives, may inspect the books and records of Purchaser, or his

successors or assigns, as the case may be, at all times during such ten-year period during normal business hours, and such books and records shall be kept at a convenient place in the City of New York or District of Columbia during such period.

(g) If Seller is not satisfied with the certified statement, it shall notify Purchaser or his successors or assigns in writing to that effect within ten days after receipt of the statement. If Seller fails to do so, Seller shall be deemed to have accepted and approved the statement. Any dispute as to the amount of net operating profit shall be determined by arbitration in accordance with the rules of the American Arbitration Association. Judgment upon the resulting award may be entered in any court of competent jurisdiction.

(h) The Escrow Agent shall hold the escrow funds during the ten operating years immediately following the closing date. Upon the expiration of such period, the Escrow Agent shall return to Seller any moneys remaining in escrow with it, except that it shall continue to retain in escrow a sum of money equal to the amount which Purchaser may have been demanded of the Escrow Agent for the tenth or prior operating years if not yet paid to Purchaser.

(i) At the closing, the Escrow Agent shall sign a depository agreement which shall contain the terms and conditions of this paragraph. All expenses charged by the Escrow Agent, and all costs of administering the Escrow Account, shall be paid out of the income arising from such deposit. If, however, the income is insufficient to cover all the expenses and costs, Seller shall reimburse the Escrow Agent for the difference.

17. *Broker.* Seller represents that the Hemlock Company, of Washington, D.C., is the broker that brought about this transaction. Seller shall pay for the broker's services and shall indemnify and hold Purchaser harmless from all claims for broker commissions in connection with this transaction. Purchaser represents that no broker other than the Hemlock Company and its employees have interested Purchaser in entering into this contract, and that he has not dealt with any broker other than the Hemlock Company in bringing about this transaction.

18. *Notices.* All notices under this contract shall be sent by registered or certified mail, addressed to the parties at the addresses set forth below:

Seller's address:

c/o Frank Smith, Esq.
100 15th Street, N.W.
Washington, D.C.

Purchaser's address:

c/o William Mason, Esq.
805 F Street, N.W.
Washington, D.C.

19. *Entire agreement; modifications.* This instrument constitutes the entire agreement between the parties with regard to the subject matter hereof. It may not be modified except by an instrument duly executed by the party against whom the enforcement of such modification is sought.

20. *Assignment.* Purchaser may assign this agreement and all rights hereunder, which shall inure to the benefit of Purchaser's assignees or successors in interest.

21. *Binding effect.* This contract shall be binding upon and inure to the benefit of both parties and their respective legal representatives, successors, and assigns.

22. *Nonwaiver.* No delay or failure by either party to exercise any right hereunder, and no partial or single exercise of such right, shall constitute a waiver of that or any other right, unless otherwise expressly provided herein.

23. *Headings.* Headings in this contract are for convenience only and shall not be used to interpret or construe its provisions.

24. *Governing law.* This contract shall be construed in accordance with and governed by the laws of the District of Columbia.

25. *Counterparts.* This contract may be executed in one or more counterparts, each of which shall be deemed an original but all of which together shall constitute one and the same instrument.

26. *Time of essence.* Time is of the essence of this agreement.

In witness whereof the parties have hereunto set their hands as of the day and year first above written.

Attest:

Secretary

Witness:

Capital Realty Corporation

by _____
President

Karl Kramer



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Current Legal Forms for Real Estate

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Current Legal Forms for Real Estate
Chapter 21 SALES AND EXCHANGES
Part IV. Forms

C. CONTRACTS OF SALE: COMMERCIAL PROPERTY

25-21 Current Legal Forms for Real Estate FORM 21.38A

FORM 21.38A Sale of Apartment Building--Green Building Certification Requirement

COMMENT

This is an agreement for the construction of a new apartment building to be purchased upon its substantial completion and certification by the United States Green Building Council as a LEED Certified building. There are several green building rating systems, but the one referred to as "LEED," which stands for Leadership in Energy and Environmental Design, obtained from the U.S. Green Building Council, is the one most frequently used for such a certification. In general, a "green" building is one that is environmentally and economically sustainable, cost effective, energy efficient, resource efficient, climate and community appropriate, contains building systems optimization, uses integrated design and construction methods, and is planned and designed particularly for the end user.

In order to obtain the LEED Certification, it is necessary to register the building project, and have the U.S. Green Building Council professionals track the progress of construction and document achievement of certain levels or standards required to obtain the LEED Certification. The U.S. Green Building Council has four (4) levels of LEED, known as the basic "LEED Certified," and also "LEED Silver," "LEED Gold," and "LEED Platinum." In this particular form, the minimum certification required is just the LEED Certified level. The perceived advantages of obtaining the Certification is it evidences a decrease in operating costs, an increase in building value, improvement in the return on investment for the owner, a potential increase in occupancy rates, and a potential higher level of rents. It is a strong selling point to owners of LEED Certified buildings at the time they are ready to start leasing the LEED Certified building, whether it be for commercial or residential purposes. According to the McGraw-Hill Construction Analytics SmartMarket Trends Report of 2008, the value of green building construction starts are expected to exceed \$12 billion in 2008, and is projected to increase to \$60 billion by the year 2010.

In addition to the sales advantages of a green building, there are now certain tax advantages as well. A taxpayer may deduct the cost of certain energy efficiency improvements installed on or in a depreciable building located in the United States, effective for improvements placed in service before December 31, 2013, under the terms of *IRC § 179(D)*. The deduction applies to "energy efficient commercial building property" which is defined as depreciable property installed as part of a building's: (i) interior lighting systems, (ii) heating, cooling, ventilation and hot water systems, or (iii) envelope as part of certified plan to reduce the total annual energy and power costs of these systems by at least fifty percent (50%) in comparison to a reference building that meets specified minimum standards. The fifty percent (50%) achievement is measured against a similar reference building that meets the minimum specified energy standards described in Standard 90.1-2001, Energy Standard for Buildings Except Low-Rise Residential Buildings, of the American Society of Heating, Refrigerating, and Air Conditioning Engineers and the Illuminating Engineering Society of North America. The deduction is limited to the product of \$1.80 and the total square footage of the building, over the aggregate amount deducted for all prior tax years. Generally, the deductions may be claimed by the person who is entitled to depreciate the property (the owner of the building or the lessee who pays for and installs the improvements). However, in the case of a federal, state or local government building, the person who designs the energy efficient commercial building property may claim the deduction (see *IRC § 179(D)(d)(iv)*). This incentive was added by the Energy Tax Incentives Act of 2005, and amended by the Tax Relief and Health Care Act of 2006. The benefit of this Act was extended from December 31, 2008 to December 31, 2013 by the 2008 Amendments.

FORM

PURCHASE AGREEMENT AND ESCROW INSTRUCTIONS

THIS AGREEMENT is made at _____,
_____ this ____ day of _____, 20____, between _____
_____, hereinafter [collectively] called "Seller," and _____ hereinafter [collectively] called "Buyer."

WITNESSETH:

In consideration of the mutual promises and covenants hereinafter set forth, the parties mutually agree as follows:

1. A. Upon substantial completion of the hereafter described premises, the Seller agrees to sell and convey to the Buyer, and the Buyer agrees to purchase and pay for, the premises located at _____, _____, a legal description of which premises is attached hereto, made a part hereof, and marked Exhibit A. The premises shall include the land and any and all buildings, fixtures, improvements, rights, privileges, and easements appertaining thereto, all of which shall hereinafter be referred to as the "Property."

B. All work done by Seller to complete the Property shall be done in a good and workmanlike manner. Seller agrees to substantially complete the Property in an expeditious manner, and in strict accordance with the plans and specifications marked Exhibit B, attached hereto and made a part hereof. Seller shall cause the construction of the Property to be registered with the United States Green Building Council ("USBC") so as to permit the Property to be eligible for certification through the USBC's Leadership in Energy and Environmental Design ("LEED") program. Upon substantial completion,

Seller shall take steps to ensure that the property meets at least the minimum level for such LEED certification.

2. The total purchase price for the Property is _____ Dollars (\$ _____), payable by Buyer as follows:

A. _____ Dollars (\$ _____) in cash or by check upon the execution of this Agreement, delivered to Seller, which sum shall be deposited into escrow with the escrow agent, hereinafter designated.

B. The balance of the purchase price, namely _____ Dollars (\$ _____), in cash (or certified check), or partly in cash (or certified check) and partly by an irrevocable commitment for mortgage financing issued by a reputable lending institution committing said institution to loan Buyer a portion of the purchase price, all of which shall be deposited into escrow on or before the closing date of this transaction.

3. The closing date of this transaction shall be upon substantial completion of the Property as required hereunder and obtaining of the LEED Certification described above, but in no event later than _____, 20____.

4. A.

This Agreement is subject to Buyer's obtaining a commitment by _____, 20____, from a reputable lending institution of a mortgage loan of at least _____ Dollars (\$ _____), payable in equal constant monthly payments over a period of _____ (____) years or longer, with interest at _____ percent (____ %) per annum or less and a loan fee of _____ percent (____ %) or less. Buyer shall endeavor in good faith to obtain a mortgage loan on said terms or more favorable terms, but if Buyer shall be unable to obtain such a commitment by the aforesaid date, this Agreement shall be null and void and all funds and documents shall be returned to the respective parties hereto, and neither party shall have any rights against the other.

B. This Agreement is expressly conditioned upon the following contingencies being met to Buyer's satisfaction:

(i) review and approval of a Phase I environmental audit to determine that no environmental hazards exist in, on or about the Property. Seller will provide copies to Buyer of all previous environmental audits performed on the Property, if any;

(ii) inspection and approval of the physical condition of the improvements located on the Property upon substantial completion;

(iii) review and approval of all surveys, maps, blueprints, engineering reports, soil tests, and plans in Seller's possession affecting the Property.

Buyer shall use commercially reasonable efforts to satisfy the above conditions within one hundred twenty (120) days of the date of execution of this Agreement. Buyer, its agents and employees, shall have the right of access to the Property to perform all such tests, investigations and reports as Buyer shall determine to do, at Buyer's cost and expense. Buyer agrees to and does hereby indemnify, defend and hold harmless Seller from any damages to persons or property resulting from such inspections. In the event the aforesaid contingencies are not satisfied within the aforesaid 120-day period, Buyer shall have the right, at its option, to terminate this Agreement by written notice to Seller in which event all funds

and documents shall be returned to the respective parties without further liability hereunder to either party.

This Agreement is also contingent upon Seller obtaining by the closing date the LEED Certification described above. In addition, it is contingent upon Buyer obtaining and approving an ALTA/ACSM survey of the Property from a reputable, licensed surveyor, which survey shall locate on the survey all items shown in the title commitment referred to hereinbelow. Buyer shall have the right, at its expense, to cause such surveyor to locate all such items, and to certify the survey to the title company to enable the title company to delete its standard survey exceptions from the title policy to be issued to Buyer or Buyer's nominee. Upon receipt of such survey by Buyer, a copy of same shall be delivered to Seller. In the event such a survey shows any items which are reasonably objectionable to Buyer, Buyer shall have the right to terminate this Agreement by written notice to Seller given within twenty (20) days from receipt of such survey, and to receive the return of all funds and documents, unless the Seller agrees to cure or cause to be cured by the closing date such items which are reasonably objectionable to Buyer.

C. Seller hereby warrants, which warranties shall be effective as of the closing date and shall survive the transfer of title to Buyer or Buyer's nominee, as follows:

(i) that upon substantial completion of the Property, all improvements now on the Property are entirely within the boundary lines of the land described on Exhibit A, attached hereto, and no other adjoining property encroaches upon said land;

(ii) that upon substantial completion of the Property, all work and labor performed and all materials furnished with respect to any improvements have been paid in full, and there will be no mechanic's liens or the possibility thereof in connection with any such work, labor and materials performed on or furnished to the Property;

(iii) that upon substantial completion of the Property, there are no outstanding notices or orders from any governmental authority with respect to the Property, or with respect to any claim of a violation of any laws, ordinances, zoning codes, building codes or orders applicable thereto;

(iv) that all improvements made by the local governmental authority that now benefit or will benefit the Property upon completion have been assessed against the Property as of the execution date of this Agreement;

(v) that upon substantial completion of the Property, there are no actions, suits or proceedings against the Seller with respect to the Property, and that there are no investigations pending or actions, suits or proceedings at law or in equity or investigations threatened against Seller that would adversely affect this transaction or the Property being sold hereunder;

(vi) that Seller will assign to Buyer on or before the closing date by delivering into escrow any and all guarantees or warranties with respect to the condition of the Property, including all improvements, fixtures and equipment;

(vii) that upon substantial completion of the Property, all documents delivered or required hereunder to be delivered to Buyer and all warranties herein made by Seller are accurate and complete and there has been no material change in any of the facts, circumstances or subject matter of this transaction of which Buyer has not been informed;

(viii) that upon substantial completion of the Property, the sale and transfer of the Property aforesaid is or shall be prior to the closing date duly authorized in accordance with law, and within the scope of authority of the party or parties conveying the Property, and evidence of such authority shall be presented to Buyer prior to the closing of this transaction;

(ix) that all split and subdivision approvals required for the use of the Property have been obtained, and the Property is properly zoned for its current use;

(x) that there are no underground oil and gas wells or septic tanks affecting the Property;

(xi) that there are no unrecorded easements or other possessory rights affecting the Property;

(xii) that electric, gas, telephone and other utility pipes, lines or facilities have been properly installed in the street adjoining the Property, are available for connection to the Property and are paid in full;

(xiii) that all water and sewer (storm and sanitary) lines and facilities necessary to serve the Property have been properly installed in the street adjoining the Property, are available for connection to the Property, and are paid for in full;

(xiv) that the Property is not located in a flood plain or a wetlands area; and

(xv) that upon substantial completion of the Property, the Property shall be in compliance with all applicable governmental laws, rules and regulations, including without limitation the Americans with Disabilities Act, as amended.

5. A. Seller shall convey marketable title to the Property to Buyer or Buyer's nominee by good and sufficient general warranty deed, with dower rights released, if any, warranting title to be free and clear of all liens, charges and encumbrances, clouds and defects whatsoever, except such restrictions, reservations, limitations, easements and conditions of record, if any, which are approved by Buyer as hereinafter provided, zoning ordinances and taxes and assessments, both general and special, which are a lien but not yet due and payable. Said deed shall be deposited into escrow on or before the closing date. Prior to the deposit of said deed into escrow, a copy of said deed shall be submitted to Buyer's counsel for approval.

B. Seller shall accompany Seller's deed with an ALTA Owner's Fee Policy of title Insurance with extended coverage (hereafter referred to as "title insurance") issued by _____ (hereinafter called "title company"), in its customary form, in the amount of the purchase price, insuring marketable title to be good in Buyer, subject only to the exceptions to be contained in the deed.

C. A preliminary title report, with a special tax search included, in the form of a commitment to issue the required title policy requested by Buyer ("title report") shall be ordered from the title company by Seller immediately upon the execution of this Agreement, a copy of which shall be delivered to Buyer. Within twenty (20) days from the receipt by Buyer of said title report and the survey referred to above showing all items in Schedule B - Section 2 of the title report, Buyer shall notify Seller and the title company of any restrictions, reservations, limitations, easements and conditions of record (together herein called "title defects") disclosed in said title report or survey which are objectionable to Buyer. In the event Buyer so notifies Seller of any such title defects, Seller shall have until the closing date to cure

or remove said title defects. Seller shall be obligated to remove all such title defects objected to by Buyer that may be removed by the payment of money, and Seller shall take whatever reasonable steps may be necessary to remove any other title defects.

On the closing date, the escrow agent shall notify Seller and Buyer as to whether the title company is then in a position to issue the title insurance showing as exceptions only those items in the title report to which the Buyer did not object (or providing affirmative endorsements acceptable to Buyer). If the escrow agent shall notify the parties that (a) the title company will issue such title insurance, this transaction shall be consummated in accordance with the terms and provisions of this Agreement, or (b) the title company will not issue such title insurance, and if the Seller does not forthwith cure the title defects that the escrow agent shall recite as preventing such issuance showing as exceptions only those items in the title report to which the Buyer did not object, or within such period of time as Buyer in Buyer's sole discretion shall permit, or Buyer does not forthwith waive the same, then this Agreement shall be automatically void and of no further force and effect, the escrow agent shall return to the parties the respective funds and documents deposited into escrow by them, and the parties shall be fully released from any liability or obligation hereunder, except Seller shall pay the full cost of the escrow and the charges of the title company. If Buyer shall waive the title defects preventing such issuance by so notifying the title company and the escrow agent, or if the Seller shall have cured the same as permitted above, the obligations of the parties hereunder shall not be affected by reason thereof, there shall be no abatement or reduction of the purchase price, and this transaction shall be consummated in accordance with the terms and provisions of this Agreement, except that such title defects that are waived by Buyer, if any, shall be set forth as exceptions in the deed and in the title insurance.

6. Should the building or any other improvements on said Property be damaged or destroyed prior to transfer of record title and the same cannot be reconstructed by the outside closing date referred to above, Buyer shall have the option to terminate this Agreement and be refunded the down payment, or to extend the outside closing date to allow Seller to substantially complete the Property by such extended date and to obtain the LEED Certification referred to above.

7. All real estate taxes and assessments, both general and special, shall be prorated by the escrow agent as of the date the deed is filed for record, using for such purpose the rate and valuation shown on the last available tax duplicate. If the aforesaid proration shall not fully reimburse Buyer for all real estate taxes and assessments accrued and unpaid with respect to the Property as of the record date of transfer of title because the Property is not yet fully valued as a completed Building or otherwise, Seller shall promptly reimburse Buyer that amount accrued in excess of the proration credit upon the official certification of the real estate tax duplicate for the year in which transfer of title occurs or year in which the Property is fully valued as a completed Property on the tax duplicate.

8. The Seller and the Buyer represent to each other, which representation shall survive the closing of this transaction, that no real estate broker was involved in this transaction and that no brokerage fees or other compensation is due any real estate broker or any other person because of this transaction, except for _____, whose commission in the amount of _____ Dollars (\$_____) shall be the sole responsibility of Seller and shall be paid by the escrow agent from the funds deposited into escrow and charged to Seller, if and when the transaction contemplated by this Agreement is consummated.

9. This transaction shall be placed in escrow with _____ ("escrow agent"). An executed counterpart of this Agreement shall be deposited with the escrow agent by the Buyer, and this Agreement shall serve as the escrow instructions. The escrow agent may attach its standard conditions of acceptance thereto; provided, however, that in the event said standard conditions are inconsistent or in conflict with the terms of this Agreement, then this Agreement shall control.

10. On the closing date, the escrow agent shall file for record the deed and any other instruments required to be

recorded and shall thereupon deliver to each of the parties the funds and documents to which they shall be respectively entitled, together with its escrow statement, provided that the escrow agent shall then have on hand all funds and documents necessary to complete the within transaction and provided the title company has stated in writing that it shall be in a position to and will issue and deliver, upon the filing of the deed for record, the title insurance required hereunder.

In closing this transaction, the escrow agent shall charge the Seller with the following:

- (a) the full amount of real estate taxes and assessments prorated up to and including the date of transfer of title;
- (b) the cost of any transfer tax;
- (c) the cost of a title report, title search, and title insurance policy in the amount of the purchase price;
- (d) the cost of paying off and satisfying any mortgage indebtedness for which Seller is liable, together with the cost of any mortgage cancellation, recording fee or other costs incident to the satisfaction of any such indebtedness;
- (e) the cost of the brokerage commission, if any, required to be paid hereunder;
- (f) one-half (1/2) of the escrow fee; and
- (g) all other charges properly borne by Seller consistent with the terms of this Agreement;

and immediately thereafter shall deliver to the Seller the balance of the funds in its hands due under the terms hereof, and any documents due the Seller.

On closing, said escrow agent shall charge the Buyer with the following:

- (a) any cost of financing this transaction which may be arranged for by the Buyer;
- (b) the cost of filing the deed for record;
- (c) one-half (1/2) of the escrow fee; and
- (d) all other charges properly borne by Buyer consistent with the terms of this Agreement;

and immediately thereafter, said escrow agent shall deliver to Buyer said title insurance the recorded deed or Recorder's receipt therefor, any prorations to which Buyer is entitled, and any other funds or documents due the Buyer.

11. Any notice which may be or is required to be given pursuant to the provisions of this Agreement shall be deemed to be sufficiently given if personally delivered, sent by a nationally recognized overnight courier, or sent by certified or registered mail, postage prepaid, return receipt requested, and addressed as follows:

If to Seller, to:

with a copy to:

If to Buyer, to:

with a copy to:

12. This Agreement represents the entire agreement between the parties and shall not be modified except by a written amendment executed by both of the parties hereto. This Agreement shall be binding upon and inure to the benefit of Seller and Buyer and their respective heirs, successors and assigns. This Agreement shall be governed by the laws of the State of Ohio.

13. This Agreement may be executed in any number of counterparts, each of which shall be considered an original for all purposes; provided, however, that all of such counterparts shall together constitute one and the same instrument.

The parties hereto have hereunto set their hands the day and year first above written.

SELLER:

[typed name]

[typed name]

BUYER:

By: _____

Its: _____



73 of 152 DOCUMENTS

Current Legal Forms for Real Estate

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Current Legal Forms for Real Estate
Chapter 21 SALES AND EXCHANGES
Part IV. Forms

C. CONTRACTS OF SALE: COMMERCIAL PROPERTY

25-21 Current Legal Forms for Real Estate FORM 21.39

FORM 21.39 Sale of land--new office and warehouse to be constructed by seller--construction formula of hard costs plus percentage up to ceiling amount--provisions for construction changes, inspections and arbitration

COMMENT

This form is a contract for the sale of land and the construction of an office and warehouse on the land by the seller. Construction is to be completed according to existing drawings and specifications, with provisions for additional costs based on changes before completion. The purchase price for the land is set, but the construction costs are based on a formula of hard costs plus a percentage, not to exceed a specified maximum. Hard costs are defined in the contract.

If the buyer has not ascertained certain matters with respect to the land before signing the contract, the buyer should ask for certain representations from the seller regarding the land. Examples would include that the soil conditions are adequate to allow for such building to be constructed, that the land itself is in compliance with all environmental laws, rules and regulations, that there are no underground storage tanks on the land, and that the property is not located in a flood plain or wetlands area.

New construction clauses

Several provisions of this contract relate particularly to new construction situations. The buyer is authorized to inspect the improvements as they are being constructed. This is useful not only to assure proper construction, but also to permit inspection by prospective tenants, mortgage lenders, and various other persons involved in the completed project. Written "change orders," or changes in construction plans, are allowed. These are to be completed at buyer's expense. Such changes might be required by new tenants who had not signed on before the project was started. Construction or safety codes may change in the middle of a project's development. Construction delays caused by events beyond the developer's control will extend the completion date. The sale of

a site coupled with a contract for the construction of a building is commonly known as a "turn-key" transaction.

Time of the essence

This contract contains a time of the essence clause which could result in a significant loss to a seller, particularly if the seller is also the builder. In new construction situations builders generally are reluctant to agree to time being of the essence.

Arbitration

This form provides for the arbitration of any disagreement between the parties with regard to construction of the improvements. The contract may provide for alternative methods of dispute resolution, such as arbitration or mediation, where the parties desire to avoid expensive, protracted litigation.

Tax aspects

Nonresidential real property is limited to cost recovery on a straight line method over 39 years. Losses from real property activity are limited by both the passive activity loss limitation and the at risk rules. Under passive loss rules, passive activity losses can only offset passive activity income. A rental real estate activity is a passive activity. The at risk limitation limits loss deductions to the amount the taxpayer has at risk. For real property, nonrecourse financing is generally an amount not considered at risk, except to the extent it is qualified nonrecourse financing, i.e., generally amounts borrowed from government or financial institutions. For a further discussion of the cost recovery rules, see The Tax Background (TB) § 21.06 at the beginning of this chapter. For a brief discussion of the passive loss rules and the at risk rules, see TB §§ 21.08 and 21.09. For a more detailed discussion of the passive activity loss limitations and the at risk rules, see The Tax Background to Chapter 1, "Partnerships," in Volume 1.

Information reporting of real estate transactions

The attorney or title company responsible for closing title is required to report the real estate transaction to the IRS. In addition, a statement must be provided to the customer before January 31 of the year following the closing. The information reporting requirements are discussed at TB § 21.02[4].

FORM

THIS AGREEMENT, entered into between L. B. Construction Company, of Akron, Ohio ("Seller"), and John E. Lacey ("Buyer").

Seller and Buyer agree as follows:

Article I

Sale and Purchase

Seller agrees to sell and convey to Buyer or his nominee, and Buyer agrees to purchase a parcel of land, being approximately 4.0 acres, on Mountain Road, Akron, Ohio, together with the improvements to be constructed and known as 31300 Mountain Road, together with all easements, rights and appurtenances appertaining. The land is described more fully in Exhibit A, and the land and improvements are hereinafter referred to collectively as "the premises."

Article II

Construction

2.1. *Improvement.* Seller shall construct or cause to be constructed on the land described on Exhibit A, at its expense, an office and warehouse facility, with site improvements, in strict accordance with certain drawings and specifications initialed by both parties and identified on the attached Exhibit B.

2.2. *Change orders.* Any changes in the construction work planned and specified shall be made only by written agreement signed by both parties, specifying the addition to or subtraction from the purchase price occasioned by each change.

2.3. *Additional costs.* Seller shall perform all additions to the construction work on the basis of its hard costs for the additions, plus 15 percent. Such additions to the purchase price shall be paid on the closing date.

2.4. *Construction period.* Seller shall commence construction of the improvements not later than the execution date of this Agreement, and shall thereafter diligently and in good faith prosecute the construction so that it is completed on or before August 31, _____ [year].

2.5. *Delays.* The completion date shall be extended by the time caused by delays due to any act or neglect of Buyer or Buyer's agents and nominees, by written changes ordered in the plans and specifications, or by strike, public authority or lockout, fire or other casualty, material shortages, or any other cause beyond Seller's control.

2.6. *Time of essence.* Time is expressly declared to be of the essence of this Agreement.

2.7. *Compliance with law.* Seller shall cause all work in connection with construction of the improvements to be completed in accordance with all local ordinances, building codes, statutes, and applicable governmental regulations bearing on the construction of the improvements. If any required construction work is at variance with any applicable governmental laws, rules and regulations, Seller shall promptly notify Buyer in writing and any necessary changes shall be adjusted by proper change orders.

2.8. *Standards.* All materials and supplies used in connection with construction of the improvements shall be new and both workmanship and materials shall be of good quality.

2.9. *Nonconformities.* Seller shall, upon discovery that any work in connection with construction of the improvements fails to conform to the requirements of this Agreement, correct the work without delay at its expense.

2.10. *Defects.* If within one year after the date of final payment of the purchase price, any construction work is found to be defective or not in accordance with the plans and specifications of Article I (or proper change orders with respect thereto), or if a defect is found with respect to work covered by guaranty or warranty not assignable to Buyer within any longer period of time prescribed by the terms of said guaranty or warranty obtained by Seller from its suppliers or the

subcontractors or suppliers of the subcontractors, Seller shall correct, or cause to be corrected, such situation promptly after receiving written notice from Buyer specifying the nature of the defect. Buyer shall give such notice promptly after discovery of any such condition. Seller shall within a reasonable time after receipt of written notice thereof make good any defects in materials or workmanship which may develop during the one-year period, and any damage to other work caused by the repairing of such defect shall be at Seller's expense and without cost to Buyer. Seller shall assign to Buyer all warranties or guarantees of workmanship and materials that are assignable.

2.11. *Right of inspection.* Seller shall allow Buyer and his duly authorized agents at all reasonable times during construction of the improvements, (a) the right of entry and free access to the improvements, (b) the right to inspect all work done, labor performed and materials furnished in and about the improvements, and (c) the right to inspect all books, contracts, and records of Seller or its subcontractors to the extent they relate to the construction of the improvements.

2.12. *Insurance.* Seller shall purchase and maintain during construction of the improvements property insurance insuring the improvements, including any materials stored on the site or elsewhere, to their full insurable value, against the perils of fire, extended coverage, vandalism, and malicious mischief. Upon construction of the improvements under this Agreement, and before transfer of title to Buyer, Seller shall purchase and maintain property insurance on the improvements against loss or damage by fire and other perils normally included within extended coverage insurance policies, in an amount not less than the full replacement value of the improvements. Buyer shall be named as an additional insured under the insurance policies as his interest may appear. Seller shall deliver certificates of such insurance to Buyer. In addition to the amounts payable by Buyer to Seller under Article IV, Buyer shall reimburse Seller for the cost incurred to obtain such insurance, upon substantial completion of the construction work.

2.13. *Construction financing.* Seller shall arrange the necessary construction financing. In addition to the amounts payable by Buyer to Seller under Article IV, Buyer shall pay Seller all costs incurred by Buyer in connection with such construction financing in addition to the purchase price set forth below, upon substantial completion of the construction work. Seller shall submit to Buyer for Buyer's review during the period of construction, copies of the construction loan draw requests. Seller shall also assist Buyer, at his request in arranging permanent financing, at no additional cost to Buyer.

2.14. *Fees.* Seller shall secure all necessary permits, governmental fees, and licenses for the proper execution and completion of the construction work. Upon substantial completion of the construction, Buyer shall pay Seller the cost of such permits, fees, and licenses, in addition to the amounts set forth in Article IV.

2.15. *Bonds.* At Buyer's request, Seller and its subcontractors shall obtain bonds satisfactory to Buyer covering the faithful performance of the construction work. In addition to the amounts payable by Buyer to Seller under Article IV, Buyer shall reimburse Seller for the costs of any such bonds within 30 days after Seller submits to Buyer the receipt evidencing such payment or upon substantial completion of the construction, whichever occurs first.

2.16. *Mechanic's liens.* Upon substantial completion of the construction work, and before the closing date of this Agreement, Seller shall submit to Buyer mechanic's lien affidavits from Seller's major suppliers and the subcontractors and major suppliers of the subcontractor, for the purpose of satisfying Buyer as to mechanic's liens.

Article III

Seller's Default

Buyer may terminate this Agreement by giving Seller ten-days' prior written notice if any one or more of the following

events shall occur: Seller is adjudged a bankrupt; Seller makes a general assignment for the benefit of its creditors; a receiver is appointed on account of Seller's insolvency; Seller persistently or repeatedly refuses or fails, except for cases in which extension of time is provided or reasons beyond Seller's control, to supply enough properly skilled workmen or proper materials; Seller fails to make payment to its subcontractors; Seller persistently disregards laws or ordinances; or Seller otherwise is guilty of a substantial violation of any provision of this Agreement. In addition to the right of termination, Buyer may prosecute all of his other legal and equitable rights and claims, including the right of specific performance.

Article IV

Purchase Price

4.1. *Land price.* The purchase price for the land shall be \$330,000, payable by Buyer or his nominee as follows:

(i)	Earnest money deposit, receipt of which is hereby acknowledged.	\$15,000.00
(ii)	Balance to be paid at closing date, as defined in Article VIII.	\$315,000.00
	Total \$330,000.00	
-

In addition, Buyer shall pay interest of 8 percent per annum on the unpaid purchase price from September 14, _____ [year] to the closing date, payable at the closing.

4.2. *Improvement price.* The purchase price for the improvements being constructed shall be the sum of the hard costs (as defined in Section 4.3) incurred by Seller, plus 15 percent, plus \$60,000 for supervision, plus \$15,000 for landscaping. The purchase price, however, shall not exceed the "upset price" of \$1,697,880 (which includes the above cost of \$60,000 for supervision and allowance of \$15,000 for landscaping). If the total purchase price is less than the upset price, the amount payable by Buyer for the improvements shall be the upset price less an amount equal to 70 percent of the difference between (i) the sum of the hard costs, plus 15 percent, plus supervision and landscaping allowance, and (ii) the upset price. The maximum cost to the Buyer for the improvements is guaranteed not to exceed \$1,697,880.

4.3. *Hard costs.* Seller's hard costs are all costs incurred by Seller for:

- (a) *Wages.* Wages paid for labor in the direct employ of Seller in the performance of the construction work, and including any welfare or other benefits that are payable with respect thereto;
- (b) *Salaries.* Salaries of Seller's employees when stationed at the field office, in whatever capacity employed. Employees engaged, at shops or on the road, in expediting the production or transportation of materials or equipment shall be considered as stationed at the field office and their salaries paid for that portion of their time spent on the construction work;
- (c) *Payroll taxes.* Cost of contributions, assessments or taxes for such items as unemployment compensation and social security, insofar as such cost is based on wages, salaries, or other remuneration paid to Seller's employees and which are included in the cost of the construction work;

(d) *Structural materials.* Cost of all materials, supplies, and equipment incorporated in the construction work, including costs of transportation thereof;

(e) *Subcontractors.* Payments made by Seller to subcontractors for work performed under subcontracts for the construction work;

(f) *Supplies.* Cost, including transportation and maintenance, of all materials, supplies, equipment, temporary facilities, and hand tools now owned by the workmen, which are consumed in the performance of the work, and cost, less salvage value, on such items used but not consumed which remain Seller's property;

(g) *Rentals.* Rental charges of all necessary machinery and equipment, exclusive of hand tools, used at the site of the construction work, whether rented from Seller or others, including installation, minor repairs and replacements, dismantling, removal, transportation and delivery costs, at rental charges consistent with those prevailing in the area;

(h) *Sales taxes.* Sales, use, or similar taxes related to the construction work and for which Seller is liable;

(i) *Deposits.* Royalties, and deposits lost for cause other than Seller's negligence;

(j) *Clean-up.* Cost of removal of all debris;

(k) *Engineer's fees.* Cost of engineering services; and

(l) *Additional items.* Other costs, except for those provided in Article II, incurred in the performance of the construction work if and to the extent approved in advance in writing by Buyer.

Article V

Conveyance

Seller shall convey to Buyer or his nominee, by general warranty deed, in form satisfactory to Buyer, good marketable title in fee simple, free and clear of all defects, liens, encroachments, and encumbrances, except an easement to the Smith Pipe Company recorded at Volume 16122, page 143, of Summit County Records, general taxes and general and special assessments, which are due but not yet payable, and building and zoning ordinances affecting the premises.

Article VI

Real Estate Taxes

Seller shall pay all delinquent taxes, penalties and interest applicable to the land being conveyed. Buyer shall receive a credit against the purchase price for all unpaid real estate taxes and both general and special assessments, for years before the closing, and a portion of such unpaid taxes for the year of closing, prorated through the date of closing. The proration of undetermined taxes shall be based on the value of the land without any improvements constructed pursuant hereto on a 365-day year and on the last available duplicate showing the tax rate and valuation, and the amounts so computed and adjusted shall be final. Until closing date, taxes shall be paid as they become due by Seller. If any split

tax bills are required, Buyer's proration credit shall be estimated on a per-acre basis, and funds due Seller shall be held in escrow pending receipt of the actual split tax bill issued by the County Auditor, at which time the proration shall be completed using the split tax bill.

Article VII

Title Insurance

At closing, Seller shall provide to Buyer a Title Insurance Policy issued by Merit Title Insurance Company ("title company") with mortgagee protection, if required, in the full amount of the Buyer's costs under this contract, insuring marketable title as specified in Article V. Seller, however, shall pay only the portion of the cost that would be charged for a Title Guaranty in the amount of \$330,000, the excess cost to be paid by Buyer.

Article VIII

Escrow Closing

Except as provided in Article IX, closing shall be on a date not more than 30 days after the improvements have been substantially completed, at a closing date mutually agreeable to the parties. Upon substantial completion, an escrow shall be opened at Merit Title Insurance Company or at Buyer's lending institution, at Buyer's election, and the same shall act as escrow agent for this transaction. An executed counterpart of this Agreement shall be deposited with the escrow agent, and this Agreement shall act as the escrow instructions for the escrow agent. The escrow agent may attach its standard conditions of escrow, but if they are inconsistent, this Agreement shall control.

All funds due and payable by Buyer to Seller but not paid under Article II, shall be deposited in escrow by Buyer on or before the closing date.

Article IX

Title Defects

If on the closing date, title to all or part of the real estate to be conveyed is subject to any liens, encumbrances, easements, conditions or restrictions other than those set forth in Article V, or in the event of any encroachment, Seller shall have a reasonable time, not to exceed 30 days after written notice thereof, within which to remedy or remove the defect, lien, encumbrance, easement, condition, restriction, or encroachment, or obtain title insurance against the same. If Seller is unable to cure or eliminate such objections or defects within the 30-day period, Buyer may, by written notice to Seller and the escrow agent:

- (i) terminate this Agreement, whereupon it shall be null and void and the obligations of the parties shall cease, except that Seller shall be charged with all title fees; or
- (ii) waive such objections or defects; or
- (iii) extend the time for curing or eliminating such objections or defects for an additional period not to

exceed 60 days.

If Buyer elects the remedy under subparagraph (iii), and at the end of the 60-day period Seller is unable to cure or remove the defects or obligations, Buyer will, by notice to Seller, either elect to terminate this Agreement as provided in subparagraph (i) or waive the designated objections or defects as provided in subparagraph (ii). The closing date shall be postponed to a date five days after resolution of title problems as set forth in this Article.

Article X

Possession

Possession of the premises shall transfer from Seller to Buyer as of the closing date in "broom-clean" condition.

Article XI

Costs

11.1. *Seller's costs.* Seller shall be charged with and pay out of the funds due it all costs of:

- (a) The conveyance fee required by law applicable only to the value attributable to the land, namely \$330,000;
- (b) The title search;
- (c) Cost of a Title Guaranty in the amount of \$330,000;
- (d) The full amount of the proration of general and special taxes and assessments; and
- (e) Any delinquent taxes and assessments.

11.2. *Buyer's costs.* Buyer shall pay for:

- (a) The cost of filing the deed for record;
- (b) The cost of the Title Insurance Policy in excess of the cost of a Title Guaranty in the amount of \$330,000; and
- (c) The conveyance fee required by law attributable to the value paid by Buyer for the improvements.

11.3. *Escrow fee.* Each party shall pay one half of the escrow fee.

Article XII

Condemnation

12.1 *Eminent domain.* If before transfer of record title the premises, or any part thereof, are taken for public or quasi-public purposes by the United States, the State of Ohio, or any other government or power, or by any corporation by the right of eminent domain, or are condemned by any federal, state, city, or other governmental department, bureau, or other authority, and such taking or condemnation would necessitate a substantial alteration of the building plans or make it economically unreasonable for Buyer to have the improvements constructed, Buyer may either (a) accept the proceeds from the award or damages and complete the purchase without a reduction in the purchase price, or (b) withdraw from this Agreement. If Buyer elects to withdraw, all awards and damages shall belong to Seller and Buyer shall not interfere with Seller's claim nor shall Buyer make any claim. Buyer shall exercise either option by notifying Seller in writing within ten days after he receives notice of the appropriation. If Buyer fails to notify Seller within such period, Buyer shall be deemed to have withdrawn from this Agreement. If Buyer withdraws or is deemed to have withdrawn from the Agreement, as provided above, Buyer shall have no further obligation to Seller, and Seller shall pay all title costs incurred to that date.

12.2. *Destruction.* If damage occurs at any time to the improvements being constructed (whether during or after construction), before the Deed conveying title to the premises to Buyer is filed for record with the Summit County Recorder, Seller shall repair or reconstruct the improvements to the same condition as existed before the damage or destruction. In the event of damage or destruction, Seller shall promptly commence and diligently prosecute the repair or reconstruction so that it is completed as soon as reasonably possible. The closing date shall be postponed for a sufficient period of time to permit Seller to complete the repair or reconstruction of the improvements in the manner contemplated by this paragraph.

Article XIII

Survival

All warranties, representations, covenants, and options herein contained shall survive the closing, and if the deed and this Agreement are inconsistent, the provisions of this Agreement shall control.

Article XIV

Entire Agreement

This Agreement contains the entire understanding between the parties.

Article XV

Ohio Law

This Agreement shall be construed in accordance with and governed by the laws of the State of Ohio.

Article XVI

Brokers

The parties warrant that no real estate broker has been involved in this transaction except for Richard Jones, whose commission shall be paid entirely by Seller outside of escrow, if and when this Agreement is consummated.

Article XVII

Notice

All notices under this Agreement shall be in writing and delivered or mailed by United States mail, certified with return receipt requested, and addressed as follows:

If to Seller: L.B. Construction Company
 P.O. Box 510
 1095 Broadway
 Akron, Ohio

If to Buyer: John E. Lacey
 1234 Highway 21
 Barbertos, Ohio

Either party may have notices sent to a different address by so notifying the other party in accordance with the above terms.

Article XVIII

Arbitration

Any disagreement arising out of this Agreement with regard to construction of the improvements shall be submitted to arbitration. Judgment upon the award rendered may be entered in any court of competent jurisdiction. The decision of the arbitrators shall be a condition precedent to any right of legal action by either party against the other. The arbitration shall be held under the standard form of construction arbitration procedure of the American Arbitration Association of Cleveland, Ohio.

Article XIX

Assignments

Except as otherwise provided herein, neither party may assign this Agreement or any right under it without the other party's prior written consent.

Article XX

Binding Effect

This Agreement shall be binding upon and inure to the benefit of both parties and their respective legal representatives, successors, and assigns.

Article XII

Non-waiver

No delay or failure by either party to exercise any right hereunder, and no partial or single exercise of such right, shall constitute a waiver of that or any other right, unless otherwise expressly provided herein.

Article XXII

Headings

Headings in this Agreement are for convenience and reference only and shall not be used to interpret or construe its provisions.

Article XXIII

Counterparts

This Agreement may be executed in one or more counterparts, each of which shall be deemed an original but all of which together shall constitute one and the same instrument.

The parties have executed this Agreement as of the day and year first shown below.

Date:

Buyer:

John E. Lacey

Seller:

Date:

L.B. Construction Company

by



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Current Legal Forms for Real Estate

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Current Legal Forms for Real Estate
Chapter 21 SALES AND EXCHANGES
Part IV. Forms

C. CONTRACTS OF SALE: COMMERCIAL PROPERTY

25-21 Current Legal Forms for Real Estate FORM 21.40

FORM 21.40 Sale of non-residential condominium unit in medical office building--condominium to be formed--sale based upon proposed declaration, by-laws and offering plan--agreement to terminate if plan not completed

COMMENT

This form is a contract for the sale of a condominium unit in a medical office building. The condominium is yet to be formed, so the sale is based upon the proposed condominium's declaration, by-laws and offering plan. The sale is contingent upon the completion of the condominium plan.

Because the unit in this contract is essentially being sold in "as is" condition, except for any warranties that may be in the Offering Plan, the purchaser should, prior to signing the contract, have the unit and personal property inspected for any physical defects.

Mortgage contingency

This contract is contingent upon the purchaser obtaining a loan from an institutional lender to afford the purchase price. This contingency protects the purchaser from liability if he or she is unable to complete the transaction because a loan cannot be obtained. When drafting a mortgage contingency, it is extremely important to specify carefully the type and amount of the mortgage which, if it is obtained by a particular date, will bind the purchaser to perform. This contract specifies that the purchaser obtain a conventional mortgage in a fixed amount. This contract also requires the purchaser to apply promptly for financing, to pay all required fees, and to notify the seller of the name and address of the lending institution.

Existing tenant

In this transaction, the purchaser is responsible for obtaining possession of the condominium unit from the existing tenant if the tenant is still in possession at the time of the closing. Unless the contract provides otherwise, a purchaser takes property subject to existing tenancies. The contract should list all tenancies and tenants' rights as exceptions to title. The purchaser should be advised that where the tenancy is for a fixed period of time, it cannot be terminated before the end of the fixed period absent a contrary provision in the lease or unless a violation of the lease has occurred.

FORM

THIS AGREEMENT made and dated _____ [date], between MEDICAL CENTER ASSOCIATES, a State of _____ partnership with offices at _____ Street, City of _____, State of _____, hereinafter called the Seller (Sponsor), and _____, M.D., residing at _____, hereinafter called the Purchaser.

WHEREAS, the Seller will promulgate a Condominium Plan and desires to offer for sale units in the building located at _____ Avenue, City of _____, County of _____, and State of _____, and the Purchaser desires to purchase a Condominium unit therein;

NOW, THEREFORE, in consideration of the mutual promises and undertaking hereinafter set forth, the Seller and the Purchaser agree as follows:

1. The Purchaser hereby agrees to purchase and the Seller agrees to sell the Condominium unit designated as Unit # _____ and containing approximately _____ square feet, together with a _____% undivided interest in the common elements appurtenant thereto.
2. Prior to the closing of title set forth herein, the Seller will declare the property and the Condominium units erected thereon, to be a Condominium pursuant to the laws of the State of _____.
3. The Seller has exhibited and delivered to the Purchaser at least 72 hours prior to the execution of this Agreement, and the Purchaser has read and agrees to be bound by the proposed Declaration, By-Laws and Offering Plan of the Condominium (and the Schedules, Plans and Exhibits attached thereto) all of which are incorporated by reference and made a part of this agreement with the same force and effect as if set forth in full herein.
4. The Purchaser acknowledges that he is purchasing a Condominium unit in a Condominium to be formed, and that, except as stated in this agreement (and as set forth in the Declaration, By-Laws and Offering Plan) he has not relied on any plans, brochures, schedules, advertisements, representations or other statements of any kind or nature made by the Seller or otherwise, including, but not limited to any relating to the description, size or dimensions of the Unit or rooms therein, the estimated common charges or other expenses in connection therewith.
5. The closing of title shall take place at an office to be designated by Seller on or about _____ [date], at _____ a.m., or at another date and time designated by the Seller upon ten (10) days' written notice mailed to the Purchaser at the address set forth above. The Seller shall be entitled to a reasonable adjournment in the closing of title in the event of delay by reason of weather conditions, strikes or material shortages, or delays in inspections and reports thereon, or other requirements.
6. The purchase price is \$ _____, payable as follows:
\$ _____ on the signing of this agreement, the receipt whereof is hereby acknowledged;

\$_____ by certified or bank cashier's check on closing of title;

\$_____ by obtaining a conventional mortgage loan in that amount to be procured by the Purchaser from a lending institution. (See paragraph 24.) Any payment made by check is accepted by Seller subject to collection.

7. The Declaration and By-Laws will be recorded by Seller in the Office of the Clerk of _____ County, prior to the conveyance of the first Condominium unit as set forth in the Offering Plan. The Seller shall file with the Declaration when it is recorded, or shall amend the Declaration prior to the closing date, and file at such time, a verified statement of a registered architect or licensed professional engineer, simultaneously with such amendment, fully and fairly depicting the layout, location, Condominium unit designation and approximate dimensions of the Condominium units as built. The Declaration and By-Laws when recorded by the Seller will be substantially in the form and substance of the Declaration and By-Laws delivered to the Purchaser and any changes therein will not substantially adversely affect the Purchaser.

8. It is specifically understood and agreed that if the Seller is unable to deliver or cause to be delivered a deed to the premises to the Purchaser, in accordance with this agreement, because of the inability of the Seller to complete the filing of the premises as part and parcel of a condominium plan, in accordance with the Offering Plan, _____ Medical Center Condominium, and any amendments thereto, then the Seller shall immediately notify the Purchaser, and thereupon this agreement shall terminate and the sole liability between the parties shall be the return by the Seller to the Purchaser of the Purchaser's down payment with interest, if any, under this agreement.

9. The Purchaser may, at his option, pay the Purchase Price "all cash" without obtaining a mortgage, provided Purchaser gives written notice to Seller thereof within 30 days from the date hereof.

10. If the Purchaser is financing any part of the purchase price by a mortgage loan, Purchaser agrees to pay any and all expenses therefor. In addition, Purchaser will contribute \$_____ to the Condominium as initial working capital. The Purchaser also agrees to apportion with Seller such real estate taxes and common charges as may be determined to be due at closing.

11. The Seller will hold all monies received directly or through its agents or employees hereunder in trust until the closing of title to a unit. Such funds will be held as trust funds, in a special account entitled "_____ Medical Center Condominium Special Account" or similar in the _____ Bank, City of _____, State of _____. The signature of a member of the firm of _____, _____ Avenue, City of _____, State of _____, shall be required to withdraw such funds. The funds existing in the trust account will be payable to the Seller after the closing of title to the unit covered by this purchase agreement. In the event of a default by the Purchaser under this purchase agreement which continues for fifteen days after notice of such default from the Seller to the Purchaser, the down payment may be released to the Seller from such account as liquidated damages and thereafter neither party shall have any rights or obligations against or to the other. The parties agree that such sum represents their best estimate of what the actual damages would be because of such default.

12. If the Seller cannot convey title to the Unit, all monies advanced by the Purchaser hereunder shall be returned to the Purchaser, with interest, if any. The Seller will not record the Declaration until it has purchase agreements for at least 15% in number of all the Units declared. If the Seller does not record the Declaration within eighteen months of the date of the Offering Plan, all monies advanced by the Purchaser will be returned promptly.

13. The Purchaser understands and acknowledges that on the date hereof, the Unit is occupied under a lease expiring _____ [date], at a rent of \$_____ per month. If the tenant does not voluntarily remove from the Unit when his lease expires or is terminated or his right to occupancy ends, Purchaser shall be required

to obtain possession at Purchaser's sole expense. Purchaser understands and acknowledges that Purchaser shall be obligated to comply with existing law in evicting the tenant, and Purchaser will, after the closing of title, assume Seller's rights and obligations under the existing lease or tenancy, which will include the obligation to repair and maintain the Unit for the benefit of the tenant and the right to collect rent payable under the existing lease or tenancy, whether the same be greater or less than the common charges for the Unit under the Condominium Documents.

14. All articles of personal property, fixtures and equipment as set forth in the Offering Plan for the Unit are included in this sale, and same will be delivered free and clear of all liens and encumbrances, except the lien of the mortgage applied for by Purchaser herein.

15. The Purchaser is purchasing this Unit "as is", and as described in the Offering Plan. Seller makes no representation as to the condition of the building or Unit other than as set forth in the Offering Plan and will not be responsible for any defects whatsoever in the building, the Unit or any equipment, mechanical or otherwise, included therein.

16. The closing deed shall be a bargain and sale deed with covenant against grantor's acts, in proper statutory form for recording, and shall be executed and acknowledged by the Seller at the Seller's expense, excluding State of _____ Transfer Tax. The deed shall contain a description of the premises which is acceptable and/or approved by the lending institution or the title company insuring such lender, so as to validly convey the Unit and the undivided interest in the common elements referred to herein. At the closing of title, the Purchaser agrees to execute and deliver to the Seller the Power of Attorney in the form annexed hereto (and made a part hereof) and designated as Exhibit _____.

17. The Seller shall give and the Purchaser shall accept a good and marketable title (subject to the terms of the Declaration and By-Laws as filed and of the Offering Plan), free and clear of all liens and encumbrances, except the lien of the mortgage applied for by Purchaser herein, and except as set forth in the Offering Plan, and such title as _____ Title Company will approve and insure. Fee title insurance, if ordered by Purchaser, shall be purchased from the above title company at Purchaser's expense.

18. The Seller's liability under this agreement for failure to complete and/or deliver title for any reasons other than Seller's willful default, shall be limited to the return of the money paid hereunder, with interest, if any, and upon the return of such money this agreement shall be null and void and the parties hereto released from any and all liability hereunder. In any event, the Seller shall not be required to bring any action or proceeding or otherwise incur any unreasonable expense to render the title to the premises marketable or to cure any objection to title.

19. Anything to the contrary herein contained notwithstanding, it is specifically understood and agreed by the parties hereto that the acceptance of the delivery of the deed at the time of the closing of title hereunder shall constitute full compliance by the Seller with the terms of this agreement and none of the terms hereof, except as otherwise herein expressly provided, shall survive the delivery and acceptance of the deed. All representations contained in the Offering Plan shall survive delivery of the deed. The parties hereto agree that trial by jury in any action, proceeding or counterclaim arising out of or from this agreement is hereby waived.

20. The existence of unpaid taxes or liens of any kind at the time of title closing shall not constitute an objection to title, provided the Seller shall deposit a sufficient amount with a title company, so that such company shall be willing to insure against collection of same from the property herein described. The parties agree that the Seller may pay and discharge any liens and encumbrances upon the property, not provided for in this agreement, out of the monies to be paid by the Purchaser at the time of closing title.

21. Purchaser agrees to deliver to Seller all documents and to perform all acts required by the Seller to carry out the provisions of the Offering Plan, establish the Condominium, and conform to the provisions of all applicable laws and regulations. This paragraph shall survive delivery of the deed.

22. If the Seller is unable to convey title to the Condominium unit on or before twelve (12) months after the date of delivery of title set forth herein, the Purchaser shall have the option to cancel this agreement and to have the down payment advanced by him returned with interest, if any. The Seller has the option not to close title to the Condominium unit described herein if less than 80% of all the Condominium units to be constructed as part of the Condominium are not sold within one (1) year after the date of the initial filing of the Offering Plan, so long as title to any Condominium unit has not been conveyed and the Declaration has not been filed at such time. If Seller exercises such option, it shall forthwith return the Purchaser's down payment with interest, if any.

23. The parties agree that the stipulation and agreements herein contained shall be binding upon them, their respective executors, administrators and/or assigns. The Purchaser agrees that he will not record or assign this agreement or any of his rights hereunder without the written consent of the Seller. Any notice to be given hereunder shall be in writing and sent by certified mail to the parties at the address above given, or at such address as either party may hereafter designate to the other in writing.

24. The parties agree that no broker except _____ Management Corp. brought about this sale, and the Purchaser agrees to indemnify Seller against any claim brought for brokerage commission based upon Purchaser's acts.

25. If two or more persons are named as the Purchaser herein, any one of them is hereby made agent for the other in all matters of any and every kind or nature affecting the premises herein or this agreement.

26. This purchase agreement is conditional upon Purchaser obtaining mortgage financing in the amount set forth above. Purchaser agrees to expeditiously make all necessary applications for such financing and represents that he shall furnish the lending institution to which he makes applications with all financial statements and other information that such institution may require. In the event that the Purchaser is unable to obtain a mortgage commitment in the amount set forth above within sixty (60) days of the date of this agreement, this agreement shall become null and void and the down payment paid herein by the Purchaser shall be returned to him without interest. If the Seller does not receive written notice of the Purchaser's inability to obtain such financing within such sixty-day period, this provision shall be deemed waived by the Purchaser. The Purchaser agrees to furnish the Seller at the Seller's request with a copy of his mortgage application and the name and address of the institution to which the application has been made.

27. This agreement states the entire understanding of the parties and the Seller shall not be bound by any oral representations and/or agreement.

Date: _____

Buyer _____

_____, M.D.

Date: _____

Seller: _____

Medical Center Associates

by: _____



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Current Legal Forms for Real Estate

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Current Legal Forms for Real Estate
Chapter 21 SALES AND EXCHANGES
Part IV. Forms

C. CONTRACTS OF SALE: COMMERCIAL PROPERTY

25-21 Current Legal Forms for Real Estate FORM 21.41

FORM 21.41 Sale of shopping center--assumption of deed of trust, leases and service contracts--percentage rent adjustment--tenant estoppel certificate form

COMMENT

This form is an agreement for the sale of a shopping center. The contract is contingent on the delivery to and approval by the buyer of the leases; the delivery to the buyer of a written assignment of leases executed by the seller; and the delivery to the buyer of estoppel certificates signed by the tenants.

Lease assignment and estoppel certificates

Although a transfer of real property normally carries with it the grantor's rights as landlord under leases without the necessity of requiring the tenants to formally attorn to the new owner, the buyer should know what kind of leases he is buying. An examination of the written lease may not be sufficient to protect the buyer. For example, the buyer will generally be bound by any waivers granted by his predecessor in title. Thus, this form provides for the seller to execute a formal written assignment in a form approved by the buyer's attorney of the leases and for each tenant to sign an estoppel certificate stating that he has no offset or defense to an action for collection of rent. Included is a form of estoppel certificate.

Percentage rent adjustment

Under this contract percentage rents are adjusted based on the percentage rent which accrued for the prior rental period. This allows for a final adjustment at closing. A frequently used alternative provides that the closing adjustment of percentage rent will be redetermined when the final percentage rent figures are available at the end of the rental period in which the closing takes place. This would require a post-closing payment by one party to the other.

Due Diligence Inspection

In this transaction the buyer did an inspection prior to signing the contract and was satisfied with the results of the inspection. As part of its due diligence, the buyer needs to inspect for such matters as the physical condition of the improvements on the property, and compliance of the property with such laws as the Americans With Disabilities Act of 1990 and its Accessibility Guidelines, environmental laws, and zoning and building codes, including parking requirements.

FORM**(1) Contract of Sale**

AGREEMENT made July 17, _____ [year], by and between Anderson Associates, a California Limited Partnership with offices at 75 Golden Gate Drive, Sausalito, California ("Sellers") and Clifford, Inc., a California corporation with offices at 55 Marejos Boulevard, San Francisco, California ("Buyer").

Sellers agree to sell to Buyer and Buyer agrees to purchase from Sellers the real property in the City of San Francisco, San Francisco County, California, known as The Presidio Shopping Center, described as follows:

(Insert description)

together with the building name and personal property owned by Sellers and used in connection with the operation of the real property (collectively the "property").

1. *Purchase price.* The purchase price for the property shall be \$500,000.

2. *Payment of purchase price.* The purchase price for the property shall be paid in the following manner:

(a) The sum of \$5,000 on the execution of this contract by a certified check payable to the California Title Company, the escrow holder, as a deposit on the purchase price, receipt of which Sellers hereby acknowledge.

(b) The assumption and payment by Buyer according to its terms of the unpaid balance of the promissory note, having an approximate balance of \$300,000, that is secured by a Deed of Trust on the property executed January 15, _____ [year], in favor of the Union Bank and Trust Company, as named beneficiary and recorded January 17, _____ [year], in Book 12,732, at page 1011, of the Official Records in the Office of the County Recorder of San Francisco County, California.

(c) The balance on the close of escrow as herein provided.

3. *Sellers' warranty as to leases.* Sellers warrant that the attached Exhibit A is a complete list of all leases, tenancies, rental agreements, and concession agreements presently encumbering the property; and that:

(a) *Complete list.* No person, firm, or corporation has any title, interest, or right to possession of the property or any portion of it as a lessee, tenant, or concessionaire of Sellers except as shown on Exhibit A.

(b) *Seller not in default.* All the leases, tenancies, rental agreements, and concession agreements shown on Exhibit A are now in full force and effect; Sellers are not in default in performing any such instrument or agreement; and no tenant, lessee, or concessionaire is entitled to any rebate, concession, or other benefit except as set forth in the leases and agreements referred to in Exhibit A.

(c) *Rents.* The rentals and other sums due or to become due under the leases and agreements referred to in Exhibit A have not been assigned or encumbered by Sellers and will not be assigned, encumbered, or subjected to any liens by Sellers before the close of escrow as herein provided.

4. *Warranty as to insurance.* Sellers warrant that the attached Exhibit B is a complete list of all insurance policies now insuring the property, showing for each policy: (a) its number; (b) the name of the insurance company that issued the policy; (c) the term and expiration date of the policy; (d) the premiums on the policy; and (e) its general nature and type.

5. *Warranty as to employees.* Sellers warrant that the annexed Exhibit C is a true and complete list of all persons employed by Sellers in connection with the property, showing for each employee: (a) the employee's name, social security number, position, and salary; (b) the collective bargaining agreement covering the employee; and (c) the amount of contributions accruing to union welfare and pension funds, Christmas bonus funds, and vacation funds for the employee.

6. *Warranty as to service and other contracts.* Sellers warrant that the annexed Exhibit D is a true and complete list of all services and other contracts pertaining to the property on which Sellers are obligated, showing for each contract: (a) the names of the parties to the contract; (b) the service rendered or to be rendered under the contract; (c) the compensation payable by Sellers under the contract; and (d) its term and expiration date.

7. *Agreement to continue operations.* Until the close of the escrow and delivery of possession of the property to Buyer, Sellers shall:

(a) *Leases.* Perform all obligations arising under the leases, agreements, and other relationships described in Exhibits A through D attached hereto.

(b) *Maintenance.* Maintain the property in good repair and in the same condition, reasonable wear and tear excepted, as it was when Buyer inspected it on June 15, _____ [year].

(c) *Operation.* Continue to operate and manage the property in a reasonable, diligent, and prudent manner, except that Sellers shall not enter into any additional leases or contracts pertaining to the property before the close of the escrow without Buyer's written consent.

8. *Agreement to inventory personal property.* Sellers shall prepare jointly with Buyer and deposit in escrow within ten days after the execution of this contract a true and complete inventory of all personal property owned by Sellers and used in connection with the operation of the real property described in the contract.

9. *Indemnity agreement.* Sellers shall indemnify and hold Buyer and the property free and harmless from any liability arising because of a breach of lease, breach of contract, or other matter related to the property which occurred or is alleged to have occurred before the close of escrow.

10. *Opening of escrow.* An escrow shall be opened to complete the sale of the property under this contract at the California Title Company within ten days after the date hereof.

11. *Conditions of escrow.* The close of the escrow and Buyer's obligations under this contract to purchase the property are expressly conditioned on:

(a) *Title.* The conveyance to Buyer of good and marketable title to the real property, as evidenced by a standard form C.L.T.A. title insurance policy issued by the California Title Company in the full amount of the purchase price, subject only to the Deed of Trust described in subparagraph 2(b) of this contract, any existing leases approved by Buyer, and any other encumbrances and matters approved by Buyer. Buyer's failure to object to any item or exception, except leases, shown on a preliminary title report of the real property prepared by the California Title Company within ten days after it has been delivered to Buyer shall be deemed Buyer's approval of the item or exception.

(b) *Leases.* Delivery to and approval by Buyer within 15 days after the execution of this contract of all leases and lease amendments encumbering the property. Buyer's failure to object in writing to any such lease or amendment within ten days after it has been delivered for approval shall be deemed Buyer's approval of the lease or amendment.

(c) *Tenant estoppel certificates.* Delivery to Buyer on the close of escrow of an estoppel certificate, in a form drafted by Buyer's attorney, from each tenant of the property signed by the tenant certifying that:

(1) He is a tenant in possession of a portion of the property under a written lease;

(2) The date and names of the parties to the written lease;

(3) The landlord, as of the date of the certificate, is not in default in the performance of the lease;

(4) The tenant, at the date of the certificate, has no defense or offsets to any action brought for collection of rents thereafter accruing under the lease.

(d) *Management records.* Delivery to Buyer within 15 days after the execution of this contract of true copies of all books and records relating to the management of the property during the past three years and showing the current or delinquent status of each lessee during that period.

(e) *Service contracts.* Delivery to and approval by Buyer within 15 days after the execution of this contract of all service and other contracts pertaining to the property listed on Exhibit D. Buyer's failure to object in writing to any such contract within ten days after it has been delivered for approval shall be deemed Buyer's approval of the contract.

(f) *Property inventory.* Deposit in escrow within 15 days after the date of this contract of a true and complete written inventory taken jointly by the parties of all personal property now owned by Sellers and used in connection with the management of the real property described in the contract.

(g) *Lease assignments.* Delivery to Buyer on the close of escrow of a written assignment, in a form to be approved by Buyer's attorney, duly executed and acknowledged by Sellers, assigning to Buyer all of Sellers' right, title, and interest in the leases encumbering the property.

(h) *Bill of sale.* Delivery to Buyer on the close of the escrow of a bill of sale duly executed by Sellers conveying to Buyer title to all personal property used in connection with the management of the real property as listed on the inventory to be taken jointly by the parties and deposited in escrow.

(i) *Possession.* Delivery of possession of the property to Buyer immediately on the close of the escrow free and clear of all uses and occupancies except those which Buyer in this contract expressly agrees to assume.

(j) *Permits, licenses, etc.* Issuance to Buyer by the appropriate governmental agencies on applications filed by Buyer within 15 days after execution of this contract of all permits, certificates, and licenses required by Buyer to operate the property in the manner previously operated by Sellers.

12. *Failure of conditions of escrow.* If any condition specified in paragraph 11 fails to occur within 45 days after the opening of escrow, Buyer may, by giving written notice to the escrow holder and Sellers, elect to cancel the escrow, terminate this contract, and recover all amounts paid to Sellers or the escrow holder on account of the purchase price of the property. Such election, however, shall not constitute Buyer's waiver of any other right against Sellers for breach of this contract. If any condition fails to occur and Buyer gives the necessary notice, Sellers irrevocably instruct the escrow holder to immediately refund to Buyer all monies and instruments deposited by it in escrow under this contract.

13. *Prorations.* The following items shall be prorated between the parties as of the close of escrow on the basis of 30-day months:

(a) *Taxes.* Real and personal property taxes for the current tax year levied or assessed against the property, including any water tax or water rate levied against the property for the furnishing of water, based on the latest available tax bills for that year or the preceding tax year.

(b) *Insurance premiums.* Premiums on all insurance policies insuring the property against damage or destruction that are assignable and that have been approved by and are being transferred to Buyer.

(c) *Rent and percentage rent.* All rentals accruing under the leases for the period in which the escrow is closed. If any lease provides for the payment of rent in a specified minimum amount plus additional rent equal to a percentage of the tenant's annual or monthly gross receipts or sales in excess of a specified amount, for the purposes of prorations the amount of percentage rent accruing under the lease for the rental period in which escrow closes shall be deemed the same as the amount of percentage rent that accrued under the lease for the rental period immediately preceding the rental period in which the escrow closes. The term "rental period" as used in this subparagraph means the period, fiscal year, calendar year, fiscal month, or calendar month over which the gross receipts or sales of the tenant are measured in determining the percentage rent payable by him under the lease.

(d) *Security deposits.* Security deposits made under the terms of any lease from which resort may be properly had for rent accruing or breaches occurring during the period in which escrow is closed, all of such shall be paid to or credited against the purchase price for Buyer's benefit.

(e) *Salaries.* Salaries of employees shown on the schedule marked Exhibit C.

(f) *Benefits.* Social security payments and contributions to union welfare and pension funds, Christmas bonus funds, or vacation funds on account of the employees listed on the schedule marked Exhibit C accruing for the period in which escrow closes.

(g) *Service contract charges.* Charges accruing for the period in which the escrow closes on service and other contracts approved by Buyer and listed on the schedule marked Exhibit D.

(h) *Interest.* Interest on obligations secured by encumbrances to which the property will remain subject after close of escrow.

14. *Assessments.* Any bonds or improvement assessments which are a lien on the property shall, on close of the escrow, be assumed by Buyer.

15. *Broker's commissions.* All commissions due to real estate or other brokers as a result of the sale of the property shall be paid for by Sellers.

16. *Expenses of escrow.* The expenses of the escrow shall be paid in the following manner:

(a) *Seller expenses.* Sellers shall pay:

- (1) The full cost of securing the title insurance policy described in paragraph 11(a);
- (2) The full cost of preparing, executing, and acknowledging to Buyer or its nominee good and marketable title to the real property in the manner provided in paragraph 11(a);
- (3) The full cost of preparing and securing the execution of the certificates described in paragraph 11(c);
- (4) The full cost of preparing the inventory of personal property described in paragraph 11(f);
- (5) The full cost of preparing, executing, and acknowledging the written assignment of leases described in paragraph 11(g);
- (6) The full cost of preparing and executing the bill of sale described in paragraph 11(h);
- (7) Any sales tax that might become due to the State of California because of the transfer of the personal property used in connection with the management of the real property to Buyer or its nominee;
- (8) Any tax that may be imposed on the conveyance of title to the real property to Buyer.

(b) *Buyer expenses.* Buyer shall pay:

- (1) The full cost of preparing, executing, acknowledging, and recording any instruments required by the holder thereof to allow Buyer to assume the promissory note and Deed of Trust described in paragraph 2(b);
- (2) The cost of recording the grant deed, or other instrument executed by Sellers conveying good and marketable title to the real property to Buyer or its nominee;
- (3) The cost of recording the written assignment of leases described in paragraph 11(g).

(c) *Escrow fee.* Any escrow fee charged by the escrow holder in addition to the cost of the title insurance policy required by this contract shall be paid by the parties in equal proportions.

17. *Assumption of leases and contracts.* On the performance of the conditions specified in paragraph 11 and the close of the escrow, Buyer shall accept, assume, and perform all the terms and conditions of the leases now encumbering the property and the service and other contracts listed on the schedule marked Exhibit D that were to be kept or performed by Sellers.

18. *Inspection by buyer.* Buyer warrants that it inspected the property on June 15, _____ [year] to ascertain the physical condition of the property, compliance with environmental laws, compliance with all zoning and parking regulations, and compliance with the Americans With Disabilities Act of 1990 and its Accessibility Guidelines, and is satisfied with the aforesaid. Buyer agrees to accept the property at the close of the escrow as herein provided in the same condition as it was at the time of the inspection, reasonable wear and tear thereafter expected.

19. *Indemnity agreement.* After the performance of the conditions specified in paragraph 11 and the close of escrow, Buyer will indemnify, defend and hold Sellers and their property free and harmless from any liability arising because of a breach of lease, breach of contract, or other matter related to the property which occurred or is alleged to have occurred after the close of escrow.

20. *Default by buyer.* If Buyer defaults in performing this contract, Sellers shall be released from their obligation to sell the property to Buyer or to further perform this contract and may proceed against Buyer on any cause of action or for any remedy given them by law or equity.

21. *Notices.* All notices between the parties or between a party and the escrow holder, whether hereunder or otherwise required by law, shall be in writing and be deemed duly served and given when personally delivered to the party, or, in lieu of personal service, when deposited in the United States mail, first class postage prepaid, addressed, if to Buyer, at 55 Marejos Boulevard, San Francisco, California, and if to Sellers, at 75 Golden Gate Drive, Sausalito, California. Either party may change its address for the purposes of this paragraph by giving the other party written notice of the change in the manner provided above.

22. *Objections.* Any objections in writing provided for or mentioned in paragraph 11 shall be of no force and effect until served on Sellers in the manner provided in paragraph 21 and delivered to the escrow holder either personally or by United States mail, first-class postage prepaid.

23. *Attorney's fees.* If any litigation is commenced between the parties concerning the property, this agreement, or the parties' respective rights and duties hereunder, the prevailing party shall be entitled to a reasonable sum for attorney's fees, in addition to all other relief granted. The amount of such fees shall be determined by the court in the litigation or in a separate action brought for that purpose.

24. *Entire agreement; modification.* This instrument contains the entire agreement between the parties with regard to the property. It may not be modified except by an instrument signed by both parties.

25. *Binding effect.* This agreement shall be binding upon and inure to the benefit of both parties and their respective legal representatives, successors, and assigns.

26. *Nonwaiver.* No delay or failure by either party to exercise any right hereunder, and no partial or single exercise of such right, shall constitute a waiver of that or any other right, unless otherwise expressly provided herein.

27. *Headings.* Headings in this contract are for convenience and reference only and shall not be used to interpret or construe its provisions.

28. *Governing law.* This agreement shall be construed in accordance with and governed by the laws of the State of California.

29. *Counterparts.* This agreement may be executed in one or more counterparts, each of which shall be deemed an original but all of which together shall constitute one and the same instrument.

30. *Time of essence.* Time is of the essence of this agreement.

The parties have executed this agreement the day and year first above written.

Anderson Associates (Sellers)

by _____

George Anderson, General Partner

Clifford, Inc. (Buyer)

by _____

Harry Clifford, President

(2) Estoppel certificate

To: Clifford, Inc., Buyer:

I hereby certify that:

1. I am the tenant in possession of _____.
2. I hold the premises under a written lease between myself as lessee and George Anderson and Betty Anderson, as lessors dated _____, _____ [date].
3. My lease of the premises expires _____ [date].
4. As of the date of this certificate, I am not in default in the performance of the lease nor have I committed any breach.
5. So far as is known to me, the lessor under the lease is not, as of the date of this certificate, in default in the performance of the lease nor has he committed any breach.
6. No rent has been paid by me in advance under the lease except the rent that became due on _____ [date] for the current month.
7. I have no claim against the lessor for any deposits except _____.
8. I have, as of the date of this certificate, no defenses or offsets I could allege in any action brought against me for rent accruing under the lease after _____ [date].
9. I make this certificate with the understanding that you are contemplating purchase of the leased premises and that if you do purchase the premises you will do so in material reliance on this certificate.

Executed on _____ [date] at _____, County, California.

I declare under penalty of perjury that the foregoing is true and correct.

Tenant



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Current Legal Forms for Real Estate

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Current Legal Forms for Real Estate
Chapter 21 SALES AND EXCHANGES
Part IV. Forms

C. CONTRACTS OF SALE: COMMERCIAL PROPERTY

25-21 Current Legal Forms for Real Estate FORM 21.42

FORM 21.42 Sale of shopping center--subject to existing mortgages--seller representations and disclaimers for existing leases--percentage rent and other adjustments

COMMENT

The property in this contract is a completed shopping center. In many respects the terms in this type of transaction are similar to those involved in the sale of rental property in general. Here the seller is taking back a second mortgage and the purchaser takes title subject to the existing mortgage on the property. The contract contains specific provisions concerning existing leases and adjustments for rents, arrears, tax escalation amounts, percentage rents, and security deposits.

Mortgage financing

This contract provides that the purchase money mortgage will be subject to the first mortgage, and that the purchaser-mortgagor can refinance the first mortgage, subject to specified limitations as to amount and allocations of funds, and the second purchase money mortgage will be subordinate to the refinanced amount.

The seller's first mortgage lender, whose mortgage is to be assumed by the purchaser, may be in a position to approve or disapprove (1) the assumption of its mortgage by the purchaser, and (2) the second purchase money mortgage from the buyer to the seller. An examination of the mortgage document and note (or bond) is required. Many mortgages provide that the mortgage is not assumable without the lender's prior consent.

Existing leases

In this contract the seller not only exhibits all the lease documents to the buyer, but also represents that they are not modified and that no other changes in leases have been made. The

seller also separately represents that the seller, as landlord, has complied with his obligations as landlord (i.e., that the tenants cannot claim that the landlord has breached the lease, and thereby withhold rent), and that there are no claims or offsets against future rents. The purchaser is assured that no tenant has substantially prepaid rent to the seller, which prepayment would include the period of time after the buyer takes title.

Shopping center lease adjustments

Adjustments for percentage rent, amounts due under the lease tax escalation clause or as rent arrearages and penalties are specifically adjusted. Because many of these adjustments are based on amounts which may not become certain until after closing, such as percentage rent, the provisions are made expressly to survive closing.

Seller's disclaimers

Here the seller, although representing that the leases are effective as exhibited to the buyer, makes no representation that the tenants will be in possession at closing, or not in default of their lease at closing. In this contract because the purchaser has agreed to take the property in "as is" condition, without warranties related to the condition of the property, under circumstances where the purchaser has not done an inspection prior to signing the contract, the purchaser should make the contract contingent on performing an inspection. This will allow the purchaser to verify the physical condition of the property, environmental condition, and compliance with laws such as the Americans With Disabilities Act of 1990 and its Accessibility Guidelines, and with building and zoning codes, including those related to adequacy of parking. In addition to the express acceptance of the premises "as is" by the purchaser, the contract states that the seller has not made any representations or warranties as to the conditions, rents, leases, income, expenses, or use of the property except as expressly set forth in the contract. The seller is expressly relieved of any representations which may have been made to buyer by the seller's agents, brokers, or other representatives. Security interests in tenant fixtures and other tenant personal property are expressly excluded as objections which the purchaser can raise at closing.

Seller's representations

In addition to the representations made by the seller regarding the leases, the contract contains a rider (as prepared by the purchaser's attorney and accepted by seller and seller's attorney) which lists the seller's representations. The seller represents that the first mortgage, to be assumed by the buyer, will be kept current; that certificates of occupancy for uses by tenants are in existence (i.e., that the tenant uses are in compliance with local ordinances); that seller will pay the real estate commission after closing, if not at closing; that lease copies exhibited to the buyer are true; and that amount specified has been paid by tenants toward certain real estate taxes.

FORM

AGREEMENT made January 14, _____ [year], between Center Realty Co., Inc., a New York corporation, having an address care of Cullen Bronson, 32 Elm Street, West End, New Jersey ("Seller"), and Adam Cole, residing at 215 Jefferson Lane, County Seat, New York, and Michael Roland, residing at 510 Liberty Drive, County Seat, New York (collectively "Purchaser").

Seller agrees to sell, convey, and transfer to Purchaser, and Purchaser agrees to purchase and acquire from Seller, all that certain plot, piece or parcel of land with the buildings thereon erected and the appurtenances thereto (collectively the "Premises") situate, lying, and being in the Town of West End, County of Sussex, and State of New York, bounded and described in Exhibit A.

This sale includes all of Seller's right, title, and interest in and to any land lying in the bed of any street, road or avenue, open or proposed, in front of or adjoining the Premises, to the center line, and all of Seller's right, title, and interest in and to any award made or to be made in lieu thereof and in and to any unpaid award for damage to the Premises by reason of change of grade of any street; and Seller will execute and deliver to Purchaser, on closing of title, or thereafter, on demand, all proper instruments for the conveyance of such title and the assignment and collection of any such award.

Article I Purchase Price

1.1. *Purchase price.* The purchase price shall be \$450,000 over and above the reduced amount as of the Closing Date (as that term is defined in Article XIV) of a first mortgage (the "First Mortgage"), which is now a lien on the premises to the extent of \$1,220,308.96. The First Mortgage is held by The Essex Savings Bank ("Essex"), bears interest of 10.5 percent per annum, and is payable as set forth in a note and mortgage executed by Seller to Essex. True copies of the note and mortgage have been delivered to and examined by Purchaser or his attorney.

The \$450,000 purchase price shall be payable as follows:

1.2. *Deposit.* On the signing of this contract of sale, \$25,000 by Purchaser's check made payable to the order of Seller, subject to collection.

1.3. *Cash.* On the closing date, \$225,000 in bank, cashier's, or good certified check of Purchaser (or a combination of checks for that amount), all drawn upon a bank or banks that are members of the New York City Clearing House, to the order of Seller.

1.4. *Second purchase money mortgage.* Two hundred thousand dollars (\$200,000) by Purchaser or his assigns, executing, acknowledging, and delivering to Seller a note in that amount, secured by a purchase money second mortgage (the "Purchase Money Mortgage") on the Premises.

(a) *Terms.* The note and Purchase Money Mortgage shall be for \$200,000, bear interest of 9 percent per annum, and be payable on the first day of the month following the Closing Date and on the first day of each subsequent month, with the principal to become due and payable seven years from the Closing Date;

(b) *Form.* The note and mortgage shall be drawn on the standard forms of the New York Board of Title Underwriters for similar mortgages;

(c) *Amendments.* The note and mortgage shall contain no additional provisions except as provided below;

(d) *Purchaser's expense.* Purchaser shall pay for Seller's attorney's costs in drawing up the note and mortgage, as well as for the mortgage recording tax and recording fees.

(e) *Subordination.* The mortgage shall also provide that it shall be subject and subordinate to the lien of the existing First Mortgage in its reduced amount as of the Closing Date and any extensions thereof and to any new first mortgage or new consolidated first mortgage made with a Lending Institution (as that term is defined in paragraph 1.4(i)) for a term to be at least one year beyond the maturity date of any Purchase Money Mortgage placed on the Premises in lieu

thereof and to any extensions thereof, if:

(1) *Interest rate.* The interest rate is not more than 10.5 percent per annum, but if the proposed interest rate exceeds such amount (but in no event exceeds 12.5 percent), the mortgagee will accept the increased rate if the then unpaid principal balance of the mortgage is reduced by 50 percent;

(2) *Installments.* The total annual debt service charge is not greater than the charge on the existing First Mortgage as of the date any new first mortgage or new consolidated first mortgage was placed;

(3) *Principal amount.* If the principal amount exceeds the amount of principal owing and unpaid on the First Mortgage at the time such new first mortgage or new consolidated first mortgage was placed, the excess will be paid to the holder of the Purchase Money Mortgage by reduction of the principal. The excess payment, however, shall not alter or affect the regular installments, if any, of principal then payable thereunder and the Purchase Money Mortgage shall further provide that the holder will, on demand, and without charge, execute, acknowledge, and deliver any further agreement needed to effectuate such subordination.

(f) *Tax escrow.* The Purchase Money Mortgage shall also provide that the mortgagor will make monthly deposits for payment of real estate taxes, except that such provision will be waived if the provisions of a Lending Institution first mortgage require similar tax deposits to be made with the Lending Institution mortgagee.

(g) *Prepayment.* Mortgagor may, on any interest date, prepay without penalty the entire unpaid balance of principal with interest to the date of payment, by giving the Mortgagee not less than 30-days' prior written notice of the prepayment.

(h) *Nonrecourse.* The note and Purchase Money Mortgage shall contain provisions in substance to the effect that the Mortgagee will not look to the Mortgagor for the payment of all or any part of the mortgage indebtedness but will look solely to the mortgaged premises.

(i) *"Lending institution."* The term "Lending Institution" shall include the following institutions that are subject to the jurisdiction of the New York State courts: a savings or commercial bank or trust company (whether acting individually or in any fiduciary capacity), an insurance company, a college, university, or other educational institution, a real estate investment trust whose certificates of beneficial interest are listed on either the New York or American Stock Exchange, a state, corporate, or municipal (or similar public employees) welfare, pension endowment fund or retirement fund system.

Article II Subject Clauses

The Premises shall be sold subject to the following:

2.1. *Zoning.* Zoning regulations and ordinances (and any variances therefrom) of the city, town, or village in which the Premises lie, which are not violated by existing structures.

2.2. *Access roads.* Curb cuts and access roads to and from abutting streets in existence at the Closing Date.

2.3. *Covenants and restrictions.* Covenants and restrictions in Liber 1936, page 159 and in Liber 5243, page 212, true excerpts of which have been delivered to and examined and initialed by Purchaser or his attorney.

2.4. *Utility easements.* The rights of Empire Lighting Company and New York Telephone Company under agreement recorded in Liber 4789, page 88 granting such corporations the right to maintain their route of polls and wires along the abutting street with the right to trim trees along such route necessary to keep wires clear at least 18 inches.

2.5. *Survey.* The state of facts shown on survey made by J. Henry Carpenter & Co. and dated March 17, _____ [year], a true copy of which has been examined and initialed by Purchaser or his attorney and to any change in the physical condition of the Premises since the date thereof, if such change does not render title unmarketable.

2.6. *Franchise taxes.* Liens, if any, of franchise taxes against Seller if Purchaser's title company will insure Purchaser against collection of such taxes out of the Premises.

2.7. *Real estate taxes.* Non-delinquent and unpaid real property taxes, water charges, and sewer rents but subject to apportionment as hereinafter provided.

2.8. *Water easements.* Water and sewer easements, if any, as existing on the Closing Date.

2.9. *Secured financing.* The Mortgage, the Purchase Money Mortgage, and any existing or future (i) assignment of rents or leases; and (ii) security agreement and financing statements covering fixtures, improvements, and personal property issued in favor of any mortgagee under any such mortgage.

2.10. *Leases*

(a) *Scheduled leases.* Subleases and tenancies set forth in the annexed Schedule of Space Leases and the rights of tenants thereunder (including but not limited to recorded subleases, any future subleases, or tenancies emanating therefrom and any nondisturbance agreements relating thereto) and where the Schedule of Space Leases refers to written leases, modifications, or supplementary letter agreements, the same have been exhibited to, examined and initialed by Purchaser or his counsel.

(b) *Representations.* Seller represents that the Space Leases referred to therein will not be modified in any manner which will survive the Closing Date or affect Purchaser, and will not be voluntarily cancelled or terminated. Seller represents that to the best of its knowledge, information, and belief it has complied with all of landlord's obligations under the space leases referred to and that it knows of no claims, offsets, or defenses which any of the tenants under such spaces may have against Seller.

(c) *No warranties.* Seller makes no representations to Purchaser whether in fact the tenants under the existing space leases will be in possession or not in default on the Closing Date; and lack of possession or default by any such tenant shall not affect Purchaser's obligations hereunder.

(d) *Defaults.* Seller reserves the right between contract and Closing Date to terminate leases for defaults by tenants and to institute and prosecute available dispossession remedies for default, except that Seller shall notify Purchaser before instituting any such proceeding and Purchaser may cure or remedy the default. If Purchaser does so, Seller will not institute proceedings against the tenants.

(e) *New leases.* No new leases or modifications will be entered into without Purchaser's consent, which shall not be unreasonably withheld. If, however, space becomes available by reason of a tenant's default, Seller may relet the space for a term not to exceed ten years (plus a five-year renewal if required by the prospective tenant) at rental rates not less than those of the existing lease with the defaulting tenant. In that event, however, the new tenant shall pay the parking maintenance charge specified by Seller and its proportionate share of increases in real estate taxes above the year in which the new lease is executed.

(f) *Schedule of leases.* Seller represents that the annexed Schedule of space leases is a full and correct list of the leases presently affecting the real property and that, with the exception of James' Hair Stylists, Inc., who is presently paying a rental, including maintenance, at the rate of \$9,462 per annum against the lease provision of \$10,000 per annum, such

leases as of the date hereof are in full force and effect; that except as aforesaid, none of the leases have been modified or amended except as provided for in such leases, modifications, or supplemental letter agreements which have been exhibited to or examined by Purchaser or his counsel.

(g) *Commissions.* Seller represents that it has paid or will pay brokerage commissions on all existing leases.

(h) *Documents.* Seller will deliver to Purchaser all leases, agreements, modifications, and other documents and correspondence of current value on the Closing Date. Seller warrants that none of the tenants have received any concessions or inducements to enter into their respective leases which will survive the Closing Date, except as referred to in the leases, modifications, and other letter agreements referred to in the schedule of space leases. If any tenants enter into occupancy before the Closing Date, Seller shall maintain and provide for them all essential services that they are entitled to receive under their leases through the Closing Date.

2.11. *Fixture financing.* All security agreements and financing statements filed against or with respect to any articles or fixtures installed by or for any tenant listed in the schedule of space leases, if they are or become the tenant's property under its lease.

2.12. *Set back violation.* A one-story brick and masonry bank building on the Premises violates that portion of the restrictive covenant in Liber 5290, page 506 calling for the set back of 50 feet from the highway property line in that said building is within 50 feet from the highway property line because that building is within 50 feet of Garden Lane as shown in the survey referred to in Section 2.5 of this agreement. Seller, however, represents that The State Title Insurance Company will insure that the bank building may remain as presently located as long as the building stands.

2.13. *Adam avenue access.* No representation is made with respect to access over Adam Avenue.

2.14. *First mortgage.* Seller represents that the first mortgage, as exhibited to Purchaser, has not been changed or modified.

Article III Violations

Seller shall remove, at its expense, all notes or notices of violation of applicable state, county, or municipal laws affecting the Premises on the date hereof, if Purchaser notifies Seller of the violations at least 15 days before the Closing Date. Seller may cure the violations after the Closing Date and transfer of title if Seller deposits with Anderson, Brown & Alan (Seller's attorneys) a sufficient sum to remove the same. Such deposit shall be returned to Seller as soon as the violations are removed. Any dispute between the parties as to the sufficiency of the deposit shall be submitted to George Marshall, the town of West End's attorney, as arbitrator, and his determination shall be final and binding upon them. If Seller shall fail to remove the violations within 60 days after the Closing Date, Purchaser shall be entitled to the return of the deposit. If Seller makes the required deposit, the existence of any violation on the date hereof shall not be deemed an objection to the title or grounds for Purchaser to reject the deed on the Closing Date. Notwithstanding any contrary provision above, if the total cost of removing all violations exceeds \$5,000, Seller may refuse to make the deposit or to remove the violations. In that event, Purchaser may either (i) terminate this agreement and be entitled to a refund of the deposit and the new cost of his title examination (as defined in Section 7.3), or (ii) accept title subject to the violations and the Purchase Price shall be deemed reduced by only \$5,000, but Seller shall not be required to remove such violations.

Article IV Fire, Casualty, and/or Condemnation

If all or any part of the Premises are damaged by fire or other casualty or if there is a taking of all or any part of the Premises by eminent domain, the provisions of Section 5-1311 of the General Obligations Law (Uniform Vendor and Purchaser Risk Act) shall control in all instances.

Article V Apportionments

The following are to be apportioned on the Closing Date as of the close of business on the preceding day (the "Adjustment Date"):

5.1. *Rent.*

(a) *Current rent.* Rents as and when collected. If at the Closing Date tenants owe past due rents of not more than one month, the first monies received by Purchaser from the tenants shall be on account or in payment of the past due rents and Purchaser shall immediately remit to Seller its share of such rents.

(b) *Rent arrears.* Seller may retain the right to recover any rents that are in arrears for at least one month, or may assign or transfer the arrears to Purchaser against his agreement to pay the arrears to Seller as and when collected, less reasonable collection charges not in excess of the local prevailing rates. This paragraph shall survive the Closing Date.

(c) *Tax escalation.* If a tenant lease contains obligations for escalation rent charges for taxes and Seller collects prior to the Adjustment Date any portion of the charge for a period beyond the Adjustment Date, a pro rata adjustment and credit shall be given to Purchaser for that period. If such charges have not been billed or, if billed, have not been collected by Seller as of the Closing Date, and the amount of the additional rent is subsequently determined and is collected by Purchaser from the tenants, Purchaser shall remit to Seller a fraction of such rent, the denominator of which is 12 and the numerator of which is the number of months (or part thereof) in the particular lease year for which the items have been paid that have elapsed from the start of the lease year to and including the Adjustment Date. This paragraph shall survive the Closing Date.

(d) *Percentage rent.* If a tenant lease contains percentage rent provisions and as of the Closing Date Seller has not billed the tenant or collected the rent, Purchaser shall bill and collect the rent from the tenants when the amount of percentage rent is determined, and Purchaser shall remit to Seller the applicable portion up to and including the Adjustment Date. The determination shall be made on the basis of a denominator, which shall be 12, and a numerator, which shall be the number of months (or part thereof) in the particular lease year for which the percentage rent has been collected. This paragraph shall survive the Closing Date.

(e) *Tenant audits.* Purchaser shall not be required to conduct an audit on any tenant's records with respect to percentage rent for periods preceding the Closing Date. However, if Purchaser conducts an audit with respect to any tenant's lease year in which the Adjustment Date falls, the audit shall include the portion of the lease year that precedes the Closing Date.

5.2. *Real estate taxes.* Taxes, assessments, and sewer rents, if any, on the basis of the fiscal year for which assessed, except that if the Closing Date occurs before the tax rate is fixed, the apportionment of taxes shall be upon the basis of the tax rate for the next preceding year applied to the latest assessed valuation, and when the tax rate is fixed there shall be a recomputation and any additional payment or refund shall be made accordingly. This paragraph shall survive the Closing Date.

5.3. *Water charges.* Water frontage charges on the basis of the calendar year, or if there are water meters on the Premises Seller shall furnish a reading, to the extent it is obtainable, to a date not more than 30 days before the Closing Date. Any unfixed meter charges and sewer rent based thereon for the intervening period shall be apportioned on the basis of the last reading. As soon as an actual reading is taken, the apportionment will be readjusted and Seller or Purchaser, as the case may be, will promptly deliver to the other the amount determined to be so due upon the readjustment. If Seller is unable to furnish the prior reading, any reading subsequent to the Closing Date will be apportioned on a per diem basis from the date of such reading and the reading immediately prior thereto and Seller shall pay the proportionate charge due up to the date of the closing. Unpaid water meter bills which are the obligations of

tenants in possession in accordance with the terms of leases shall not be deemed an objection to title and Purchaser will take title subject thereto. Seller shall assign to Purchaser all amounts owing by the tenants. This provision shall survive the Closing Date.

5.4. *Interest.* Interest on First Mortgage.

5.5. *Insurance premiums.* Premiums on existing transferable insurance policies or renewals of those expiring before the Closing Date, if any; it being understood that if blanket policies have been used by Seller and if severable and assignable, Purchaser will nevertheless be required to adjust therefor.

Appropriate reflection will be made if premiums are affected by declaration of dividends on any mutual insurance company policies before or after the Closing Date. Purchaser shall pay Seller a proportionate share of all dividends declared after the Closing Date, based on the Adjustment Date. This provision shall survive the Closing Date.

5.6. *Utility charges.* Seller will cause all the utility meters to be read to and including the Adjustment Date and will be responsible therefor. This provision shall survive the Closing Date.

5.7. *Security deposits.* On the Closing Date, Seller shall deliver to Purchaser all securities deposited by tenants against and in exchange for Purchaser's execution and delivery of an agreement indemnifying and holding Seller harmless against all claims against Seller for the amounts turned over to Purchaser.

5.8. *Mortgage escrow account.* Purchaser shall reimburse Seller for any tax, water rates, sewer rents, insurance, etc., escrow fund held by Essex, in consideration for which Seller shall assign the proceeds of the fund to Purchaser.

Article VI Deed

The deed shall be the usual Bargain and Sale Deed with covenant against grantor's acts in proper statutory form for recording and shall be duly executed and acknowledged by Seller so as to convey to Purchaser the fee simple to the premises, free of all encumbrances, except as herein stated, and shall also contain the covenant required by subdivision 5 of Section 13 of the Lien Law.

Article VII Title

7.1. *Notice of defects.* Purchaser, at least 15 days before the Closing Date, shall give written notice to Seller of objections to title as shown on the report of Purchaser's title insurance company. Purchaser, notwithstanding such notice, shall not be bound by any defects arising after the date of the title report and on or before the Closing Date, if Purchaser promptly notifies Seller of the defect as soon as he learns of it.

7.2. *Cure of waiver of defects.* If, after Seller receives notice of objections to title and is afforded reasonable adjournments of the Closing Date to enable it to remove the objections, Seller is unable to convey title to the Premises, subject only to the liens, encumbrances, terms, and conditions specified herein, Purchaser may either:

- (a) Accept such title Seller is able to convey without any reduction or abatement of the Purchase Price; or
- (b) Rescind this Contract, in which event Seller's sole obligation shall be to refund the monies deposited hereunder and to reimburse Purchaser for the new cost of title examination.

7.3. *Reimbursement.* As used in this Contract, the term "new cost of title examination" means the expenses incurred by Purchaser for the examination of title but in no event to exceed the new amount charged by The State Title Insurance Company without issuance of a policy, plus the cost of redating the existing survey. Upon the making of such refund

and reimbursement, this Contract shall terminate, neither party shall have any further claim against the other, and any lien of Purchaser against the Premises shall wholly cease.

7.4. *Closing adjournment.* If Purchaser fails to give notice of objections or defects on or before the applicable dates Seller may elect to receive a "reasonable adjournment," which shall be not less than one month after Purchaser gives such notice.

7.5. *Seller's obligation.* Nothing herein contained, however, shall be deemed to obligate or require Seller to institute, bring, maintain, or prosecute any action or proceeding or otherwise to incur any expense or cost in order to render title to the Premises marketable.

7.6. *Mortgages, liens, and other encumbrances.* The existence of mortgages, liens, or encumbrances other than those expressly set forth in this Contract shall not be objections to title, if properly executed instruments, in recordable form, necessary to satisfy the same are delivered to Purchaser on the Closing Date together with recording and/or filing fees, and such mortgages, liens, or encumbrances may be paid for out of the cash consideration paid by Purchaser. Unpaid liens or taxes, water charges, and assessments shall not be objections to title, but shall be deducted from the cash consideration to be paid hereunder and allowed to Purchaser, subject to the provisions for apportionment herein contained. If Seller requires the use of any portion of the cash consideration to be paid by Purchaser for such purposes, Seller shall notify Purchaser not later than 24 hours before the Closing Date.

Article VIII Judgments, Etc.

If a search of the title discloses judgments, bankruptcies, or other returns against other persons with names the same as or similar to that of Seller, Seller will, on request, deliver or cause to be delivered, to Purchaser an affidavit or affidavits, showing that such judgments, bankruptcies, or other returns are not against Seller.

Article IX Assessments

Purchaser shall take title subject to the existence of any assessment or assessments, regardless of whether they are payable in annual installments or whether the first installment is then a charge or lien or has been paid. Any installment assessment shall be subject to apportionment as herein provided. Seller represents to Purchaser that as of the date hereof Seller knows of no existing assessments and has no knowledge, information, or belief respecting pending assessments.

Article X Fixtures

10.1. *Conveyance.* The plumbing, heating, air-conditioning systems, and all other fixtures and personal property attached or appurtenant to or used in connection with the operation of the Premises, to the extent presently located thereon or owned by Seller, are included within this Contract excluding, however, any personal property which is or shall be the property of any space tenant.

10.2. *Good title.* All fixtures and personal property included in this sale at the Closing Date will be free and clear of all liens and encumbrances (except for the First Mortgage and the Purchase Money Mortgage). Any lien which is or may have been filed against the property of any space tenant shall not be a breach or violation of this representation or warranty or an objection to title, and Purchaser shall not refuse to accept title by reason thereof.

Article XI Disclaimer, Merger

11.1. *Examination of premises.* Purchaser has examined the Premises and is familiar with its physical condition. Seller has not made and does not make any representations or warranties as to the physical condition, rents, leases, income expenses, costs of operation, and maintenance (past and future), use to which the Premises may be put, the quantity, quality, and condition of the articles of personal property and fixtures used in connection with the Premises, or any

other matter or thing affecting or related to the Premises except as herein specifically set forth. Purchaser acknowledges that he has inspected the Premises and agrees to take the Premises "as is."

11.2. *Agent representations.* Further, Seller is not liable or responsible for, or bound by brokers, agents, or other representatives' statements, set-ups, writings, or other representations to Purchaser or others, all of which are merged into this Contract and are superseded by the provisions of this Article XI.

11.3. *Entire agreement.* This Contract constitutes the entire agreement between the parties, who have entered into the same after full investigation. Neither party has relied upon any statement, representation, or warranty by the other not embodied herein.

Article XII Notices

All notices to Seller hereunder shall be given by certified or registered mail, addressed to Seller at the address set forth above, with a copy to Anderson, Brown & Alan, Attention: George Anderson, Esq., 310 Second Avenue, West End, New York. All notices to Purchaser shall similarly be sent by certified or registered mail, addressed to Purchaser at the above address, with a copy to James Goodard, Esq., 150 Court Square, County Seat, New York.

Article XIII Brokers

Purchaser represents and warrants to Seller that Purchaser has had no dealings with respect to this transaction with any real estate broker, firm or salesman, or any other person or corporation, except West End Real Estate Company and County Seat Real Estate, Ltd. In reliance upon this representation, Seller agrees to pay a brokerage commission to West End Real Estate Company and County Seat Real Estate, Ltd., in accordance with the terms of a separate agreement (evidenced by a writing with West End Real Estate Company and County Seat Real Estate, Ltd.). The provisions of this Article shall survive the delivery of the deed.

Article XIV Closing Date and Place

The Closing Date shall be at 10 a.m. on March 30, _____ [year], and shall take place, and the deed shall be delivered upon the receipt of the Purchase Price, at the Office of Anderson, Brown & Alan, 310 Second Avenue, West End, New York.

Article XV Liability of Purchaser

If Purchaser defaults under this agreement, Seller shall look solely to the monies deposited by Purchaser upon the execution and delivery hereof as liquidated damages, and shall not look to Purchaser for any liability in connection therewith.

Article XVI Maintenance of Premises

Seller agrees to maintain the Premises in a normal state of repair up to the Closing Date.

Article XVII Modification

This agreement may not be changed or terminated orally but only by an instrument signed by both parties.

Article XVIII Binding Effect

This agreement shall be binding upon and inure to the benefit of both parties and their respective legal representatives, successors, and assigns.

Article XIX Non-Waiver

No delay or failure by either party to exercise any right hereunder, and no partial or single exercise of such right, shall constitute a waiver of that or any other right, unless otherwise expressly provided herein.

Article XX Headings

Headings in this agreement are for convenience only and shall not be used to interpret or construe its provisions.

Article XXI Governing Law

This agreement shall be construed in accordance with and governed by the laws of the State of New York.

Article XXII Counterparts

This agreement may be executed in one or more counterparts, each of which shall be deemed an original but all of which together shall constitute one and the same instrument.

Article XXIII Time of Essence

Time is of the essence of this agreement.

(See Addendum attached hereto and made a part hereof.)

The parties have caused this agreement to be duly executed as of the day and year first above written.

Center Realty Co., Inc.

by _____

Cullen Bronson, President (Seller)

Adam Cole (Purchaser)

Michael Roland (Purchaser)

Addendum to Contract of Sale Dated January 14, _____ [year] Between Center Realty Co., Inc., as Seller and Adam Cole and Michael Roland, as Purchaser

A. Seller represents that between now and the Closing Date it will pay all of the regular constant monthly installments of principal and interest that become due and payable under the terms of the First Mortgage.

B. Seller represents that there are certificates of occupancy with respect to the Premises which permit the occupancy of the existing tenants for the purposes set forth in their respective leases and that it will deliver such certificates on the Closing Date.

C. The representation contained in the Contract with respect to the payment of all brokerage commissions by Seller on all of the space leases shall survive delivery of the deed.

D. Seller represents that the space leases which are being initialed by the parties contemporaneously herewith are true and correct copies of the original leases.

E. Seller represents that for the fiscal school tax year 1991-_____ [year] and for the calendar year _____ [year], it has received approximately \$300,000 in state, county, and town taxes from the space tenants, in accordance with their respective leases.

Initialed	Date
_____	_____

_____	_____

_____	_____

Exhibit
[Schedule of Space Leases]

Exhibit
[Security Deposit Schedule]



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Current Legal Forms for Real Estate

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Current Legal Forms for Real Estate
Chapter 21 SALES AND EXCHANGES
Part IV. Forms

C. CONTRACTS OF SALE: COMMERCIAL PROPERTY

25-21 Current Legal Forms for Real Estate FORM 21.43

FORM 21.43 Sale of shopping center under construction--construction and tenant occupancy completed before closing--sale subject to nonrecourse first mortgage--seller note in escrow for liquidated damages--purchaser note in escrow in lieu of cash deposit

COMMENT

This form is a contract for the sale of a shopping center under construction. The seller is required to complete construction and have tenants in occupancy before closing. As part of the purchase price, the buyer will take title subject to a nonrecourse first mortgage to be placed on the shopping center by the seller before closing. In place of a cash deposit, the purchaser deposits a note in escrow. The seller also deposits a note in escrow to fix liquidated damages to the buyer for a seller default.

Financing and escrow of notes

This agreement provides that the purchaser will take title subject to a first mortgage to be placed on the property by the seller before closing. If the seller obtains a first mortgage loan for less than the amount specified in the contract, the seller will take back a subordinated mortgage for the difference (paragraph 3). The buyer does not assume the mortgage. To further protect the purchaser from personal liability, the contract requires the first mortgage to be a nonrecourse loan (paragraph 7). Even if a nonrecourse loan can be obtained from the lender, the lender will usually carve out certain exceptions to the nonrecourse feature. Examples of such carveouts where the borrower will have personal liability are damages arising from the existence of hazardous or toxic substances or failure of the property to comply with environmental laws, misapplication of insurance or condemnation proceeds or tenant security deposits, or damage from any fraud or misrepresentation. The buyer is released from liability under the contract, except for the note in escrow, if the buyer assigns the contract (paragraph 25). These terms allow the purchaser to form a corporation, partnership, or other arrangement to further insulate itself from liability and bring

in other investors. The use of the note in lieu of a cash deposit benefits the buyer who will continue to have the use of the funds which would otherwise have been deposited toward the purchase price (see paragraph 4). The seller's deposit of a note in escrow, to fix liquidated damages for a seller default, is not a common or usual provision and is more of a benefit to purchaser than the seller (see paragraph 5).

Construction and tenancy occupancy

The seller's principal obligations include completion of construction and tenant occupancy before closing. This is in addition to the obligation to place a first mortgage on the shopping center. Construction is to be in accordance with pre-existing plans and specifications as well as tenant lease requirements, supported with a two year guarantee from the seller (paragraph 6). The seller is also required to deliver possession of completed space to tenants listed on an exhibit to the contract. If the minimum rentals from tenants do not reach a specified amount, the seller agrees to rent the remaining space for an amount to make up the difference (paragraph 8). These terms are particularly beneficial to the purchaser.

FORM

AGREEMENT made and entered into September 8, _____ [year], by and between Patrick Baker, joined by Harriet Baker, his wife, residing at 10 Sunset Lane, Palm Beach, Florida ("Seller"), and Realty Investment Corp., a New York corporation, having its principal place of business at 500 Fifth Avenue, New York, New York, or nominee ("Purchaser").

Recitals

Seller is the owner of a tract of land situated in Palm Beach County, Florida, which is more particularly described in the appended print of survey marked Exhibit A (the "premises").

Seller is in the process of constructing upon the premises a shopping center, substantially in accordance with the appended plot layout marked Exhibit B, which is being built by Halloway Company of Jacksonville, Florida, pursuant to a firm building contract, and

Seller has agreed to sell the premises, together with the improvements to be constructed (the "improvements"), and Purchaser has agreed to purchase them.

Now, therefore, the parties agree as follows:

1. *Property.* Seller shall sell and Purchaser shall purchase the premises more particularly described in the annexed Exhibit A, together with the improvements and all equipment, machinery, and personal property attached, appurtenant to, or used in connection with the premises (other than those owned by tenants).

2. *Permitted encumbrances.* The premises and the improvements thereon are to be sold and conveyed subject to the following:

(a) A first mortgage to be placed with the Central Insurance Company, as more particularly described in the appended letter of commitment, marked Exhibit C.

(b) The leases for space in the property, described in the appended schedule marked Exhibit D, as well as all other leases hereafter executed in accordance with paragraph 7(c).

(c) Conditions, restrictions, and limitations of record, none of which prohibit the use of the premises for the operation of the planned shopping center, nor the operation of their respective businesses by the various lessees.

3. *Purchase price and financing*

(a) *Price.* The purchase price for the premises, together with the completed shopping center, shall be \$5.2 million, payable as follows: \$1.2 million in cash or good certified checks upon the closing of title and delivery of the deed; and the balance of \$4 million by taking title subject to a first mortgage, which Seller will place upon the premises, at his expense, with the Central Insurance Company, as provided in paragraph 2(a).

(b) *First mortgage.* If the amount of the first mortgage to be placed by Seller with the Central Insurance Company is less than \$4 million at the closing of title (or if there are senior and junior participations in the first mortgage under the provisions of paragraph 3(c), and the participations total less than \$4 million at the title closing), by reason of amortization payments on the first mortgage made by Seller between the placing of the mortgage and the closing of title, Seller shall not receive any credit for the amortization payments, but the purchase price shall be reduced by their amount. If the closing of title occurs on the day when a constant monthly payment on the first mortgage is due and payable, that payment shall be made by Seller in full. If the closing of title occurs on any other day, the total of the next constant monthly payment due under the first mortgage shall be adjusted between the parties in the same manner as interest on a mortgage is normally adjusted at title closings.

(c) *Seller's junior participation.* Purchaser will not object if the Central Insurance Company reduces the amount of the first mortgage at the time of the mortgage closing below \$4 million, in accordance with the commitment for the mortgage as set forth in Exhibit C (but in no event shall the reduced amount be less than \$3.6 million). Seller shall, however, at the closing of the reduced first mortgage, take and simultaneously close a junior participation interest in the first mortgage, in an amount equal to the difference between the amount taken by the Central Insurance Company and \$4 million. The terms of the junior participation interest shall be identical in all respects with those of the first mortgage taken by the Central Insurance Company, which will then become the senior participation interest, except that the amount of monthly payments on the junior participation interest shall equal the difference between \$33,500 (the amount of monthly installments required to be made pursuant to the commitment for the first mortgage as set forth in Exhibit C) and the amount to be paid to the Central Insurance Company under the reduced first mortgage. The holder of the junior participation interest shall be bound by all decisions of the holder of the senior participation interest.

4. *Purchaser's escrow note in lieu of deposit*

(a) *Seller's liquidated damages.* The parties, recognizing that damages are difficult to determine in this type of transaction, agree that if Purchaser defaults Seller's damages will be \$300,000, which will be deemed to be liquidated damages without any further proof by Seller.

(b) *Purchaser's note.* Simultaneously with the execution of this agreement, Purchaser shall execute and deposit with Harold Jones, Esq., of 100 Clematis Street, Palm Beach, Florida, as Escrow Agent, its promissory note payable after a default by Purchaser, in the principal amount of \$300,000. The note shall be noninterest bearing except after a default, when interest shall commence at the rate of 9 percent per annum, or the applicable federal rate as defined in *IRC Section 1274*, whichever is higher. The promissory note is deposited in lieu of earnest money to assure the faithful performance of the terms of this agreement by Purchaser.

(c) *Escrow terms.* The conditions of the escrow are these: If on the closing date Purchaser fails, neglects, or refuses to

consummate the transaction in accordance with the terms and conditions of this agreement, through no fault of Seller, the Escrow Agent shall affix a due date to the note, which shall be the date set for the closing, and shall deliver the note to Seller. The Escrow Agent will then be deemed to have performed his duties and will be discharged from any further obligations in connection therewith. If this transaction is not consummated in accordance with the terms and conditions of this agreement, or if Seller defaults and prevents the consummation of the transaction, the Escrow Agent shall return the note to Purchaser, whereupon the Escrow Agent will be deemed to have performed his duties and will be discharged from any further obligations in connection therewith.

(d) *Sole remedy.* Seller's sole remedy for Purchaser's default shall be the liquidated damages provided for in paragraph 4(a).

5. *Seller's escrow note to fix liquidated damages.*

(a) *Purchaser's liquidated damages.* The parties recognize that damages are difficult to determine in this type of transaction and agree that if Seller defaults, Purchaser's damages will be \$300,000, which shall be deemed to be liquidated damages without any further proof required of Purchaser.

(b) *Seller's note.* Simultaneously with the execution of this agreement, Seller shall execute and deposit with Harold Jones, Esq., of 100 Clematis Street, Palm Beach, Florida, as Escrow Agent, his promissory note payable after a default by Seller, in the principal amount of \$300,000. The note shall be noninterest bearing except after a default, when interest shall commence at the rate of 9 percent per annum, or the applicable federal rate as defined in *IRC Section 1274*, whichever is higher.

(c) *Escrow terms.* The conditions of the escrow are these: If Seller closes this transaction on the closing date, or if Purchaser defaults at the closing, the promissory note shall be returned to Seller, whereupon the Escrow Agent will be deemed to have performed his duties and will be discharged from any further obligation in connection therewith. If Seller defaults and fails or refuses to consummate this transaction on the closing date, the Escrow Agent shall affix a due date to the note, which shall be the date set for closing, and shall deliver the note to Purchaser, whereupon the Escrow Agent will be deemed to have performed his duties and will be discharged from any further obligations in connection therewith.

(d) *Sole remedy.* Purchaser's sole remedy for Seller's default shall be the liquidated damages provided for in paragraph 5(a). Purchaser acknowledges that actual damages would be difficult to ascertain.

6. *Construction of the shopping center.*

(a) *Shopping center.* Seller covenants, at his expense, to proceed promptly and diligently to erect upon the premises a modern shopping center consisting of a group of store buildings containing at least 175,000 square feet of rentable space and other related structures with appropriate entrances and driveways, and with parking facilities for at least 1400 cars for the conduct of a modern shopping center, in full compliance with all governmental and legal requirements.

(b) *Plans and specifications.* Construction shall be in accordance with the plot layout in Exhibit B and the plans and specifications of Francis Kane, Registered Architect of Palm Beach, Florida, copies of which will be delivered to Purchaser within 15 days from the date hereof. The documents comprising the plans and specifications, as last revised, are more fully described in appended Exhibit E, consisting of six sheets and initialed by John Morris, Consulting Engineer, New York, New York. The shopping center is to be fully completed, leased and occupied by the tenants described in appended Exhibit D, with the permanent first mortgage financing fully in effect, in accordance with the Exhibit C, not later than the closing date. All notes and requirements contained in the specifications or endorsed upon the plans shall be deemed covenants to be performed by Seller as if set forth therein in detail. Any work shown on the plans and not described in the specifications, or shown in the specifications and not described in the plans, or any other

work necessary to the construction, furnishing, decorating, equipping, and completion of the entire project as a modern shopping center, shall be performed and completed by Seller.

(c) *Governmental approvals.* Seller, at his expense, shall procure the necessary governmental approval of the plans and specifications, and, if required under any lease, approval by the tenant of that lease. If any changes in the plans or specifications are required, Seller shall submit the same to Purchaser for its approval, which Purchaser shall not unreasonably withhold if the changes are not substantial. Purchaser shall give Seller its answer within five days after it receives Seller's submission. Purchaser's approval of the plans and specifications or of any required changes, or any action taken by it in respect thereof, shall not constitute Purchaser's opinion or representation as to the sufficiency of the plans and specifications so far as the governmental authorities, the mortgagee, or any other party is concerned, nor impose any liability or responsibility upon Purchaser.

(d) *Compliance.* The construction of the shopping center shall comply with all applicable provisions hereof, all leases, all applicable governmental laws and regulations, including without limitation all environmental laws, federal, state and local, and the Americans With Disabilities Act of 1990 and its Accessibility Guidelines, and all applicable orders and requirements of any agency or authority having jurisdiction.

(e) *Certifications on completion.* Before the closing of this transaction, and as a condition thereof, Seller shall procure and deliver to Purchaser: (1) a certificate duly executed by Francis Kane, architect in charge of the construction of the shopping center, attesting to the fact that the shopping center has been completed substantially in accordance with the plans and specifications, (2) a certificate of occupancy issued by the necessary governmental authorities, (3) a certificate of approval by the Board of Fire Underwriters, if the same is customary in the South Florida area, having jurisdiction, (4) all other certificates, permits, and approvals customarily issued in the locality upon the completion of building construction, and (5) the affidavit of Halloway Company, the general contractor, verifying to the completion of construction and to the payment in full of all work, labor, services, and material, as well as an acknowledgment by the general contractor in the affidavit that it has been paid in full for its services and costs, including any excess to the contract price which may result from Seller's undertaking to make installations or alterations for tenants.

(f) *Construction quality.* The work in constructing the shopping center shall be first class and of workmanlike quality.

(g) *Indemnification.* Until the title actually closes, Purchaser shall have no control over the premises or the construction of the shopping center. Seller assumes full responsibility and entire liability for all damage or injury of any kind to all persons, whether employees or otherwise, and to all property, arising from or connected with the operation of the premises and the construction and operation of the shopping center. Seller shall indemnify and hold harmless Purchaser and its agents, servants, and employees of and from all liability, loss, expense (including reasonable attorneys' fees), or damages arising out of or in connection with the foregoing. Nothing in this paragraph shall be deemed to relieve Seller of any obligation under this agreement or to affect Purchaser's right to approve certain phases of the construction.

(h) *Insurance.* At all times during construction of the shopping center, up to and including the closing of title, Seller shall maintain and keep in full force and effect, by valid and enforceable policies issued by recognized insurance companies doing business in the State of Florida, which are reasonably satisfactory to Purchaser, the following types and amounts of insurance: general public liability insurance against claims for personal injury, death, or property damage occurring in or about the premises or the adjacent streets and sidewalks, in an amount not less than \$1 million for bodily injury or death to any one person, in an amount not less than \$2.5 million for bodily injury or death to any number of persons arising out of one accident or disaster, in an amount not less than \$500,000 for damage to or destruction of property arising out of any one claim on account of any one accident, and in an amount not less than \$1,000,000 for damage to or destruction of property arising out of any number of claims arising out of any one accident; together with all necessary endorsements covering the additional risks during the course of construction.

(i) *Inspections.* During construction of the shopping center, Purchaser, its supervising architect, engineer, or other

authorized agent, may enter and inspect the premises for the limited purpose of determining whether the work performed or being performed conforms with the plans, specifications, and terms of this agreement. Seller shall keep at the construction site the plans and specifications and shop drawings relating to the construction, which Purchaser and its architect, engineer, or other authorized agent may examine at all reasonable times. If during construction, Purchaser, or its architect, engineer, or other authorized agent reasonably determines that construction is not proceeding in accordance with the plans or specifications of this agreement and if Purchaser gives Seller notice specifying the particular deviation, deficiency, or omission, Seller shall immediately take all necessary steps to correct the deviation, deficiency, or omission.

(j) *Construction guarantee.* Seller, at closing of title, will deliver to Purchaser his absolute guaranty that for a period of two years from completion of the shopping center, the Halloway Company, at its expense, will make all necessary repairs, replacements, and corrections of any nature or description, whether interior or exterior, or structural or nonstructural, that become necessary because of faulty construction, labor, or materials. If the Halloway Company fails or refuses to make the above repairs, replacements, or corrections, Seller shall do so at his expense.

(k) *Guaranties and warranties.* By way of extension and not in limitation of the provisions of the preceding subparagraph, Seller will deliver to Purchaser at the closing and cause to be effectively assigned to it the following additional guaranties and warranties: 20-year guaranty of the roofing and sheetmetal contractor with a surety company bond; five-year factory warranty on all air conditioning compressors; and all other guaranties or warranties that Seller receives in connection with any work or services performed or equipment installed in the construction of the shopping center.

(l) *Service contracts.* Purchaser shall not be obligated to take over any maintenance, service, or employment contracts entered into by Seller or on his behalf.

7. *Nonrecourse first mortgage.* On or before the closing date, Seller shall, at his expense, obtain and close a first permanent mortgage loan with the Central Insurance Company under the terms set forth in the letter of commitment appended as Exhibit C. In no event shall the mortgage or the bond or note provide that, by taking the conveyance of the premises subject to the mortgage, Purchaser shall become personally obligated for the payment of the mortgage indebtedness or the performance of any of the mortgagor's terms, covenants, and conditions thereunder with the exception for the customary personal liability carveouts for items such as environmental conditions.

8. *Tenant leases*

(a) *Occupancy.* Before the closing of title, Seller shall consummate the delivery of possession to each tenant of its respective space under the terms of its respective lease, the spaces being indicated on the appended Exhibit D. Copies of the leases have been examined and initialed by Purchaser's attorney.

(b) *Lease terms.* Seller shall use his best efforts to consummate the execution and delivery of occupancy leases for the remainder of the rentable space at the shopping center. Each lease shall be for a term of not less than three years, at a minimum basic rental of not less than \$15 per square foot and, unless the tenant is rated as having a net worth in excess of \$2 million, shall require a deposit of an amount equal to at least three months' rent as security. Each new lease shall be on the same general terms as those previously entered into by Seller, and shall be to tenants whose respective type of use will not conflict with any provision of past or future leases entered into by Seller. The leases shall require the tenants to pay for all utilities, utility services, and plate glass insurance, to maintain all equipment installed in the rented premises, including air conditioning, and to make all interior repairs to the premises, except structural repairs. No lease shall in any way violate any term of the mortgage commitment or of the mortgage.

(c) *Purchaser approval.* Each proposed new renting shall be subject to Purchaser's prior approval, which shall not be unreasonably withheld. If Purchaser fails to disapprove of the terms of a proposed new renting within 48 hours

(Saturdays, Sundays, and holidays excluded) after submission by telegram, Purchaser shall be deemed to have given its approval.

(d) *Seller's lease of unleased space.* If the aggregate basic minimum rentals under all leases executed by Seller to the time of closing are less than \$725,000 per year, Seller shall, at closing, enter into a lease for the remaining rentable space at an annual rental equal to the difference between the aggregate minimum basic rental of all existing leases and \$725,000, for a term of three years from the date of closing. Seller's lease shall give to the landlord the absolute right to cancel the lease at any time by giving five-days' notice. Seller's lease shall provide that Seller, as lessee, may at any time and from time to time, with Purchaser's approval, enter into leases on behalf of Purchaser, upon the terms and subject to the restrictions in this paragraph relating to new leases to be made before closing. Upon the execution of any such new lease and the taking of possession by the tenant, the space included within the new lease shall be released from the lease with Seller, and the rental payable by Seller as lessee shall be reduced by the amount of the minimum basic annual rent of each such new lease. When the rental payable by Seller, as lessee, is reduced to zero, Seller's lease shall terminate, and any remaining space covered by that lease shall be surrendered by Seller, as lessee, to Purchaser, as landlord. If Purchaser unreasonably disapproves any new lease, Seller's liability under the lease for the unrented space shall be reduced by the amount of the rent for which consent was so unreasonably withheld, and the space covered by the proposed lease shall be surrendered to Purchaser.

(e) *Leasing expenses.* All expenses connected with the negotiation, execution, and delivery of occupancy leases executed before the closing, including real estate brokerage commissions, attorneys' fees, and recording fees, as well as all expenses for changes at the premises required by any tenants, shall be Seller's obligation and shall be fully paid for by Seller before the closing. Evidence of the full satisfaction of these obligations shall be delivered to Purchaser before or at the closing. Similarly, Seller shall bear all expenses connected with the negotiation, execution, and delivery of leases to tenants which are made after the closing by Seller under the provisions of subparagraph (d), as well as any changes required by the tenants. Seller shall pay all these expenses as they are incurred.

9. *Mechanics and other liens*

(a) *Preclosing liens.* Any mechanics or other lien, charge, or order for the payment of money is not a permitted encumbrance, and shall be removed and satisfied of record as against the premises by Seller before the closing.

(b) *Postclosing liens.* If after the closing, any mechanics or other lien, charge, or order for the payment of money is filed against the premises or Purchaser or its assigns, based upon any actual or alleged act or omission of Seller, its agents or employees, or any contractor or subcontractor connected with the construction and completion by Seller of the shopping center (regardless of whether the lien, charge, or order is valid or enforceable), Seller shall, within 20 days after receiving notice of the filing, take any action, by bonding, deposit, payment, or otherwise, necessary to remove and satisfy the lien of record against the premises.

10. *Seller warranties.* Seller warrants that at the time of the closing:

(a) *Lease changes.* The contents of any lease will not be changed after the date of this contract without Purchaser's written consent. The Purchaser will not unreasonably withhold its consent to a change in any lease if the change is requested by the Central Insurance Company as a condition to closing the first permanent mortgage.

(b) *Compliance with leases.* All of the occupancy leases executed and delivered before the closing (the executed originals of which Seller will deliver to Purchaser at the closing, together with duly executed and acknowledged assignments of Seller's interest in each, in form for recording) will be in full force and effect and unmodified and Seller as landlord will not be in default. There will be no existing set-offs or defenses against the enforcement of the terms, conditions, covenants, agreements, and limitations to be performed or complied with by the tenants under the leases. All tenants will have taken possession and will have made payment of all rent due and will have executed acknowledgments

of the completion by the landlord of the required work in accordance with the terms of their respective leases, and the acknowledgments shall be delivered to Purchaser at the closing. Each lease will, as of the date of closing, conform with the requirements of all other leases so that there will be no violation by the landlord of any lease provisions.

(c) *First mortgage.* The mortgage referred to in paragraph 7 will be in full force and effect, unmodified, and Seller, as mortgagor, will not be in default in performing or observing any of the terms, agreements, covenants, conditions, and limitations. At the closing, Seller shall deliver to Purchaser a letter issued by the then holder of the mortgage, or its servicing agent, dated not earlier than ten days before the closing date and executed by a duly authorized officer, certifying as to the amount of the unpaid principal and interest, the date of maturity, the amount of the constant payments, the interest rate, the last date to which interest has been paid, and the last date when a constant payment was paid and the period covered by the payment. The letter will state that the mortgage is in good standing and not in default, and that the owner of the premises has performed all his obligations under the mortgage.

(d) *Lease deposits.* Seller will pay over to Purchaser all moneys on deposit with Seller as security under the occupancy leases. Purchaser will give the usual indemnity agreement protecting Seller from liability for such security.

(e) *Zoning.* The premises will be, at the time of closing, properly zoned for retail commercial and shopping center uses and purposes, and the zoning regulations will not prohibit the tenants from operating their various businesses under the terms and conditions of their respective leases.

(f) *Violations.* The premises will not be subject to violations of any laws or regulations, and Seller does not know of any threatened violations or notices of actual or threatened violations.

(g) *Tenant construction requirements.* The plans and specifications prepared by Francis Kane, Architect, will have incorporated the requirements of all tenants who submitted their requirements in accordance with the terms and conditions contained in their respective leases. The plans and specifications will satisfy the landlord's obligations under each of the leases, and will meet the requirements of the tenants under the leases, as well as of the Central Insurance Company as mortgagee, and the applicable governmental authorities.

11. *Violations.* Seller shall remedy all violations of law noted or issued against or affecting the premises at the date hereof or at any later time up to and including the closing date, and the premises shall be conveyed free and clear of such violations. Seller shall authorize Purchaser to make the necessary searches for violations. Seller shall also remedy all violations noted or issued against or affecting the premises after the closing that result because of Seller's acts or omissions to act before the closing.

12. *Assessments.* If, at closing, all or part of the premises is affected by any one or more assessments which are or may become payable in annual installments of which the first installment is then a lien or has been paid, all the unpaid installments of any such assessment, including those which are to become due and payable after the closing, shall be deemed to be due and payable and to be liens upon the premises and shall be paid and discharged by Seller on the closing date. If, at any time after the closing, all or any part of the premises are affected by any assessment for any utilities, sewers, street laying, or other improvement placed upon the premises or any part before closing of title, the assessment shall be paid and discharged by Seller upon Purchaser's demand. If any improvement is completed or in process, it shall be treated as a certified lien regardless of whether noted in the public records, and it shall be paid by Seller.

13. *Deed, bill of sale.* A warranty deed shall be duly signed, executed, and acknowledged by Seller, in form for recording, and shall be delivered to Purchaser at the closing. The deed shall convey to Purchaser the fee simple title to the premises and all appurtenances thereto, together with the buildings, structures and fixtures comprising the shopping center free of all liens and encumbrances, except as herein expressly provided. Seller shall pay all city, county, or state transfer or similar taxes connected with the conveyance of the premises. In addition, Purchaser may elect to receive

Seller's duly executed bill of sale covering all personalty in or used in connection with the shopping center, in form and substance satisfactory to Purchaser and sufficient to convey title to Purchaser free of all liens and encumbrances, except the lien of the mortgage referred to in paragraph 2(a). Seller shall pay all state, county, or city transfer taxes or similar taxes payable in respect of either instrument.

14. *Affidavit of title.* In addition to the warranty deed and bill of sale, Seller shall deliver to Purchaser at the closing Seller's affidavit setting forth the following: (a) that Seller is the owner of the premises, improvements and equipment, free and clear of all encumbrances, save for the first mortgage, (b) that all work, labor, services, and material furnished to or in connection with the premises and the improvements and the installation of equipment have been fully paid for, so that no mechanic's, materialmen's, or other lien may properly be filed against the premises or the improvements or equipment, (c) that Seller is not the subject of any insolvency or bankruptcy proceeding, nor the subject of any suit or proceeding at law or in equity, or otherwise, the result of any of which might affect the title to the premises, or to the improvements and equipment, (d) that Seller has no knowledge of any violations against the premises, whether filed or threatened, nor of any restriction against the sale of the premises, or of the improvements and equipment, and (e) that Seller has no knowledge of any claim or claims made or threatened, the result of which could in any way affect the title to the premises, or to the improvements and equipment.

15. *Eminent domain or land trusts.* If the premises or any part is the subject of an eminent domain proceeding, or if there is in the chain of title any reverter clauses or any conveyance by, through, or under grantors of the nature commonly referred to as Land Trusts, then, in addition to all other valid objections to good and marketable title, any of the foregoing may likewise be treated by Purchaser as valid objections to title.

16. *Survey.* At the closing, Seller will furnish Purchaser with a current survey prepared by a duly Registered Engineer prepared in accordance with the then current accuracy standards as adopted from time to time by the American Congress on Surveying and Mapping ("ACSM"), the National Society of Professional Surveyors, and the American Land Title Association ("ALTA"). Such survey shall confirm that there are no existing encroachments.

17. *Closing date.* The full completion of the construction of the shopping center, the obtaining and closing of the permanent first mortgage loan, the occupancy by the tenants under the leases, and the performance by Seller of all other conditions under this agreement, are indivisible transactions, and Purchaser shall not be required to accept the deed unless Seller has fully complied with all the required provisions. Subject to the foregoing, the deed and other instruments shall be delivered at the office of Butler & Butler, Esqs., 200 Olive Street, Palm Beach, Florida, at 10 a.m. on November 30, _____ [year]. If Seller has complied with all requirements hereof before the closing date, Seller may, on or after December 1, _____ [year], accelerate the closing date by giving Purchaser at least 180 days' prior written notice of the accelerated closing date, and the accelerated closing shall take place at the same place and time of day as set forth above. Seller may not give notice accelerating the closing date unless the buildings are 80-percent completed according to a certificate issued by Purchaser's architect in charge of the construction. The architect shall furnish the certificate when the notice accelerating the closing date is given. As used in this agreement, "closing date," "date of closing," "date for closing," or similar terms shall be construed to mean the original closing date, or if accelerated, the accelerated date.

18. *Adjustments and apportionments.* The following shall be adjusted and apportioned as of the closing date:

(a) *Rent.* The rent and other charges due from the occupancy tenants at the premises, less any prorated reasonable management commissions, as, if, and when collected, but Purchaser shall not be obligated to collect or account for rents in arrears for more than 30 days before closing.

(b) *Taxes, utilities.* Real estate taxes, utility charges, and like charges (except charges payable by any occupancy tenant) on the basis of the fiscal year for which they are respectively assessed. If the closing occurs before the tax rate is fixed, the apportionment of real estate and like taxes shall be held at a future date after the tax rate has been fixed. Pending

readjustment, Seller shall deposit with Purchaser's title company, as Escrowee, a sum reasonably satisfactory to the Escrowee to cover Seller's estimated share of the tax apportionment. It shall not be an objection to title that utility meter readings were not obtained as of the closing date. However, promptly after the closing, Seller shall obtain a reading to the date of closing, or to the nearest date, and Seller shall pay Purchaser, within 30 days after the reading is obtained, Seller's proportionate share of the utility charges determined by the reading up to the date of closing. Seller will deposit with the Escrowee a sum reasonably satisfactory to the Escrowee to assure payment of the utility charges.

(c) *Mortgage payments.* The constant monthly payments to be due under the first mortgage in accordance with the provisions of paragraph 3.

(d) *Insurance premiums.* Premiums on fire and extended coverage insurance, and on all other transferable insurance. All of the policies shall be delivered to Purchaser at closing. No insurance policy shall be written for a period of more than three years.

(e) *Payroll.* Payroll of employees, if Purchaser has previously consented to the employment, and the vacation pay.

(f) *Fuel.* Fuel on the premises, if any, as determined by Seller's supplier, at the cost price.

(g) *Lease overage.* If the closing of title occurs more than one month after the commencement of the term of leases which provide for overages, any overages collected by Purchaser at the end of the first year will be adjusted and apportioned at that time between the parties.

(h) *Rent free occupancies.* If, at closing, any tenant is not obligated to pay rent by reason of provisions in its lease concerning dates of compulsory occupancy and dates upon which payments of rent are to commence, even though the tenant is in possession and has accepted possession, Seller will allow to Purchaser as a cash adjustment under each such lease rent from the date of closing until the date the tenant is obligated to commence paying rent.

19. *Risk of loss.* Between the date of this agreement and the date of closing, Seller assumes the full risk for any damage or destruction by fire or the elements to the premises, including the buildings, structures, and other improvements comprising the shopping center, and Seller shall pay the cost of the work of restoring, rebuilding, repairing, and replacing, before the closing date. The risk of loss or damage assumed by Seller shall continue until the actual delivery of the deed in accordance with the terms of this agreement.

20. *Abstract of title.* Within 60 days from the date of this agreement, Seller shall furnish to Purchaser's attorneys, an abstract of title showing Seller's title to be good and marketable. Purchaser shall, within 60 days thereafter, examine the title and advise Seller of any defects. If the title is not found to be good and marketable, Seller shall make title good and marketable within 60 days after receipt of notice of defects. In addition, between 20 and 30 days before the closing date, Seller shall furnish Purchaser with a continuation of the abstract of title to show Seller's title to be currently good and marketable. If the continuation shows any defects in title, Seller shall cure them and furnish Purchaser with adequate evidence of cure at least three days before the closing.

21. *Waivers and releases of liens.* At least ten days before the closing, Seller will make available to Purchaser for examination and copying all of the waivers and releases of lien connected with the improvements on the premises, and will certify that, except for contractors, subcontractors, or materialmen whose total bills are less than \$250, the waivers and releases of lien submitted represent those of all contractors, subcontractors, laborers, and materialmen.

22. *Escrow for recording deed.* The cash proceeds of sale shall be retained by Purchaser's title company, as Escrowee, for a period of five business days after the closing, to allow the deed to Purchaser to be recorded, and the abstract of title continued at Purchaser's expense. The abstract of title shall show title in Purchaser without any intervening encumbrance, cloud, or defect from the date of the last prior continuation, except for the purchase money mortgage and

other acts of Purchaser.

23. *Notices.* All notices under this agreement shall be in writing, furnished in duplicate, and transmitted via registered mail, return receipt requested, as follows: (a) One copy to Seller or Purchaser, as the case may be, at the party's address set forth on the first page of this agreement, or any other address the party designates to the other by appropriate notice, and (b) the other copy, if sent by Seller, addressed to Harris and Jacobs, Esqs., Empire State Building, New York, New York, or, if sent by Purchaser, addressed to Butler & Butler, Esqs., 200 Olive Street, Palm Beach, Florida.

24. *Survival of provisions.* Each covenant, condition, and representation made in this agreement shall survive the closing. All provisions which are to be performed or apply to circumstances after the closing shall likewise survive the closing.

25. *Assignment by purchaser.* Purchaser may assign this agreement and all deposits in escrow made on account of the purchase price if, at least five days before the closing date, Purchaser gives Seller written notice of the assignment (which shall include the assignee's name and address), together with an executed counterpart thereof requiring the assignee to assume the performance of all Purchaser's terms hereunder. The assignment shall release Purchaser of all liabilities and obligations hereunder, except the liability on the note in lieu of deposit referred to in paragraph 4.

26. *Corporation as title holder.* If title to the premises is taken by or on behalf of Purchaser or its assignee in the name of a corporation, the corporation shall be qualified to do business in the State of Florida before the closing date.

27. *Short form contract for recording.* The parties will simultaneously herewith execute a short form contract in form for recording. The short form contract shall not be recorded, but shall be held in escrow by Harold Jones, Esq., until the closing of the first mortgage transaction with Central Insurance Company, after which Purchaser may record the contract among the Public Records of Palm Beach County, Florida.

28. *Brokerage commissions.* The parties acknowledge that Garson & Holt of Miami, Florida, are the brokers who brought about this transaction. Seller shall pay the brokers' commissions under a separate agreement between Seller and the brokers.

29. *Entire agreement; modification.* This instrument constitutes the entire agreement between the parties and may not be modified except by an instrument signed by the party against whom the enforcement of such modification is sought.

30. *Binding effect.* This agreement shall be binding upon and inure to the benefit of the parties hereto and their respective legal representatives, successors, and assigns.

31. *Nonwaiver.* No delay or failure by either party to exercise or enforce any right hereunder, and no partial or single exercise of such right, shall constitute a waiver of that or any other right, unless otherwise expressly provided herein.

32. *Headings.* Headings in this agreement are for convenience and reference only and shall not be used to interpret or construe its provisions.

33. *Governing law.* This agreement shall be construed in accordance with and governed by the laws of the State of Florida.

34. *Counterparts.* This agreement may be executed in one or more counterparts, each of which shall be deemed an original but all of which together shall constitute one and the same instrument.

35. *Time of essence.* Time is of the essence of this agreement.

36. *Variation in pronouns.* All pronouns and variations thereof shall be deemed to refer to the masculine, feminine, neuter, singular, or plural, as the identity of the party or parties, or their personal representatives, successors, and assigns may require.

The corporate party has caused these presents to be executed by its duly authorized officers and the corporate seal affixed and the individual parties have affixed their respective hands and seals this 8th day of September _____ [year].

Corporate Seal

Attest:

Secretary

Realty Investment Corp.

by _____

President

(L.S.)

Patrick Baker

(L.S.)

Harriet Baker

Exhibit	Description
A	Survey description of premises
B	Plot layout of shopping center
C	Commitment for first mortgage
D	Schedule of leases
E	Construction plans and specifications



78 of 152 DOCUMENTS

Current Legal Forms for Real Estate

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Current Legal Forms for Real Estate
Chapter 21 SALES AND EXCHANGES
Part IV. Forms

C. CONTRACTS OF SALE: COMMERCIAL PROPERTY

25-21 Current Legal Forms for Real Estate FORM 21.44

FORM 21.44 Sale of operating hotel--liquor license transfer contingency--closing adjustments and other payments--assessed value reduction sought

COMMENT

This form is an agreement for the sale of an operating hotel. The sale includes not only the real property, but also the business, inventory, other personal property, and additional items related to the hotel. The contract contains terms, therefore, covering matters usually found in contracts for the sale of real estate as well as terms related to the sale of a business.

In this contract because the purchaser has agreed to take the property in "as is" condition, without warranties related to the condition of the property. Under circumstances where the purchaser has not done an inspection, the purchaser should make the contract contingent on performing an inspection. This will allow the purchaser to verify the physical condition of the property, environmental condition, and compliance with laws such as the Americans With Disabilities Act of 1990 and its Accessibility Guidelines, and with building and zoning codes including those related to adequacy of parking.

Closing adjustments and other payments under this contract include a number of hotel items (paragraph 4). The purchaser will pay an additional amount for inventory items certified by accountants, including new and unused furniture and furnishings, supplies, food and liquor. The purchaser pays sales tax for the personal property items (paragraph 15). The apportionment of rent covers percentage rent due from hotel shops as well as guest rentals. The contract contains specific procedures for the transfer of custody of safe deposit boxes (paragraph 6), guest baggage (paragraph 7), and tenant security deposits (paragraph 8). The contract is contingent on governmental approval of the transfer of the hotel's liquor license to the purchaser (paragraph 36).

In this agreement, the seller seeks a reduction in the hotel property's assessed valuation for lower

real property taxes. The reduced taxes, if any, and the costs of seeking the reduced assessed value are to be apportioned between the buyer and seller (paragraph 26). A seller oriented provision contained in this contract is the parties' waiver of the Uniform Vendor and Purchaser Risk Act, coupled with detailed procedures in the event of a casualty loss (paragraph 17). Under the Uniform Vendor and Purchaser Act, which has been adopted in a minority of states, the risk of loss transfers on the earlier of the transfer of possession or the transfer of title. As in this contract, the parties may waive the statute and allocate the risk of a casualty loss as they see fit.

FORM

AGREEMENT, made January 30, _____ [year], by and between Carson Hotel, Inc., a New York corporation, having its principal place of business at 100 East 42d Street, in the City, County, and State of New York ("Seller"), and Central Realty Corporation, a New York corporation, having its principal place of business at 500 Fifth Avenue, in the City, County, and State of New York ("Purchaser").

1. *Description of property.* Seller agrees to sell and convey, and Purchaser agrees to purchase, all that lot or parcel of land, with the buildings and improvements thereon, in the Borough of Manhattan, City, County, and State of New York, bounded and described as follows:

(Insert description)

Such premises being known as and by the street numbers 100-112 East 68th Street.

Together with Seller's entire right, title, and interest:

(1) of, in, and to any land lying in the bed of the street in front of or adjoining such premises to its center line; and

(2) to the name "Carson" and all trade names used in connection with the hotel.

Also together with all fixtures, chattels, and articles of personal property that are now, or later may be, placed upon, attached to, or used in connection with or in the operation of the premises, regardless of whether enumerated herein, including, among other items, furnaces, boilers, oil burners, radiators and piping, plumbing and bathroom fixtures, refrigeration, air conditioning and sprinkler systems, washtubs, sinks, gas and electric fixtures, stoves, ranges, awnings, screens, window shades, elevators, motors, dynamos, refrigerators, kitchen cabinets, incinerators, and all furniture, fixtures, silverware, linen, china, glassware, napery, and all other articles of personal property owned by Seller and used in connection with that portion of the premises used and operated as a hotel.

Seller represents that it owns all of the above property free from liens and encumbrances, except as set forth hereinafter. Expressly excluded, however, are the following:

(a) Fixtures, chattels, and articles of personal property in that portion of the premises known as 102 East 68th Street, all of which are owned by the tenant in possession.

(b) Furniture, furnishings, and articles of personal property owned by tenants or occupants of rooms, apartments, or other areas in that portion of the premises used and operated as a hotel; and

(c) Television sets and antenna owned by James Television, Inc. and leased to the hotel under the lease agreement set forth on Schedule B.

2. *Subject clauses.* The premises and personal property are sold and are to be conveyed and transferred, subject to the following:

(a) State of facts as shown on survey made by Herbert C. George, dated April 20, _____ [year], to any changes since the date of the survey and to any state of facts the survey brought down to date will show, if such additional facts do not render title unmarketable.

(b) To leases and tenancies as set forth in the annexed Schedule A, and to all tenancies that exist on closing. Purchaser acknowledges that it has examined all leases referred to in Schedule A and has initialed each one for identification.

(c) A mortgage, now a lien of record originally given to secure the principal sum of \$1.3 million, which will have been reduced by payments at or before the date set for closing, to the sum of \$660,000 bearing interest at 9 percent per annum, requiring payments of \$12,500 on the first day of each month, applicable first to interest and the remainder to amortization of the principal balance, until December 1, _____ [year], when the balance of principal then remaining unpaid becomes due and payable. Seller represents that the last monthly payment on such mortgage was made to the Central Savings Bank.

(d) Zoning regulations and ordinances of the City of New York, now in force, which are not violated by existing structures.

(e) Covenants, restrictions, easements, and reservations of record, if any, if they are not violated by existing structures.

(f) Party walls, and party wall and sewer agreements, if any.

(g) Possible encroachments of retaining walls, foundations, cellar doors, gratings, water tables, trim, cornices, sidewalk, elevator, fences, copings, and variations between record lines and fences or retaining walls.

(h) Rights, if any, acquired by any utility company to maintain and operate lines, wires, cables, pipes, poles, and distribution boxes, in, over, or upon such premises.

3. *Purchase price.* The purchase price is \$4 million, which is payable as follows:

(a) \$340,000 on the signing of this agreement, by check subject to collection, the receipt of which is acknowledged.

(b) \$660,000 by taking title subject to the existing first mortgage now a lien on the premises. Receipts or letters signed by the mortgagee, its agent or attorney, evidencing the payment of installments of principal and interest or reciting the present status of the mortgage as to principal and interest, shall be sufficient evidence of the reduction of principal and the payment of interest.

(c) \$3 million in cash or by certified check, drawn by the grantee named in the Deed, on a New York Clearing House bank, to the direct order of Seller as payee, on delivery of the Deed.

4. *Apportionments and additional payments.* The following apportionments and payments are to be made:

(a) Rents. The rental paid by the tenant who occupies the portion of the premises known as 102 East 68th Street is measured in part by a percentage of the tenant's sales, the tenant being required to pay or adjust the rental at a date after the closing of title. The fixed and percentage rental shall be apportioned between the parties as at the closing date on the

basis of a monthly rental accrual of \$3,000 for each month of the leased term, notwithstanding any contrary provision of the lease regarding fixed or percentage rental, even if payment or adjustment of rent by the tenant is after the closing.

(b) Interest on the mortgage.

(c) Premiums on existing transferable insurance policies or renewals of those expiring before the closing.

(d) Taxes and sewer rents, if any, on the basis of the fiscal year for which assessed. If the closing of title occurs before the tax rate is fixed, the apportionment of taxes shall be upon the basis of the tax rate for the preceding year applied to the latest assessed valuation.

(e) Water charges on the basis of the calendar year. If there is a water meter on the premises, the unpaid meter charge and unpaid sewer rents for the time intervening between the date of the last reading and the date of closing shall be apportioned on the basis of such last reading. If any tenant in possession is required to pay for water meter charges under the terms of a lease, Seller shall not be required to pay any portion thereof. Purchaser will take title subject to any unpaid water meter charges owing by any tenant, and Purchaser shall look solely to the tenants who are obligated to pay the same for payment.

(f) Employees' vacation pay, if any, and other fringe benefits under a collective bargaining agreement.

(g) One year after date of closing the accounting firm of Williams & Company shall determine whether Purchaser has failed to pay beneficiary employees the accruals for vacation pay charged against Seller, and if so, the unpaid amounts. On the basis of such determination, and within ten days thereafter, Purchaser shall pay Seller the amount charged against Seller but not paid out by Purchaser. In addition, Williams & Company shall determine whether, as a result of negotiations currently pending between the union representing Seller's employees and the hotel association of which Seller is a member, any wage increases are effective retroactively for any period before the date as of which closing adjustments are made. If there are, Seller shall pay Purchaser the retroactive wage adjustments determined to be due.

(h) All rents and charges payable under servicing and maintenance contracts to which Seller is a party, including those set forth on the annexed Exhibit B. The contracts shall be assigned Purchaser, who shall assume the obligations to be performed after the closing.

(i) Employees' accrued wages or salaries and wages and salaries of employees up to 7 a.m. on the day of closing shall be charged to Seller.

(j) Charges for the consumption of electricity, steam, gas, and telephone services.

(k) Telephone equipment rental.

(l) If the payment does not violate state and federal rules and regulations governing liquor sales, at the closing Purchaser shall pay Seller, in cash or by certified check, a sum equivalent to the cost of all foodstuffs, in good, wholesome condition and liquor inventories consisting of bottled or canned goods on hand at the hotel premises owned and operated by Seller, computed at cost and certified to by Williams & Company, whose certification shall be final, conclusive, and binding upon the parties.

(m) At the closing Purchaser shall pay Seller, in cash or by certified check, a sum equivalent to the cost of the following inventories and operating supplies, regardless of whether such inventories or supplies have been issued from storerooms to operated departments, computed at cost and certified to by Williams & Company, whose certification shall be final, conclusive, and binding upon the parties:

- (1) food inventory, cooked or raw;
- (2) linen, glass, china, and silverware in unbroken packages;
- (3) guests' cleaning and paper supplies and stationery in unbroken packages;
- (4) printing and stationery, such as front office bills, menu stock, and advertising matter, in unbroken packages;
- (5) upholstery material in full bolts;
- (6) new and unused carpets and rugs on hand or in storage;
- (7) new and unused furniture, fixtures, and equipment;
- (8) new and unused engineers' supplies and equipment;
- (9) new and unused paint and painters' supplies and equipment;
- (10) new and unused employees' uniforms.

(n) At the closing Purchaser shall pay Seller, in cash or by certified check, a sum equivalent to all monies in house banks. The house banks shall be counted jointly by the parties' representatives on the day of closing.

(o) Transient rentals for guests for the night on the day of the closing shall be apportioned equally between the parties.

Except as otherwise provided herein, all apportionments provided for in this agreement shall be made as of the close of business of the day preceding the closing date. If any questions arise with respect to the amount of apportionments, the decision of Williams & Company shall be final, conclusive, and binding upon the parties. Closing adjustments shall be determined by Williams & Company tentatively at the closing and payment of the net figure resulting from such adjustment shall be made by Purchaser to Seller by check at the closing. A final closing adjustment shall be made by Williams & Company within 30 days after the closing, and to the extent that any additional payment or repayment is indicated on the final closing adjustment, the payment or repayment shall be made within five days after the final adjustment is made.

5. *Past due rents and past due accounts.* The following shall apply to past due rents and other customary hotel charges:

(a) Seller's accountants shall, as of the close of business set forth as the closing date, prepare a listing of all accounts receivable balances originating before the closing date and due to Seller from tenants, guests, and patrons of the hotel for rents and other customary hotel charges.

(b) Purchaser shall take over and exercise all reasonable diligence to collect for the account of Seller all balances contained in such listing. The first moneys received after the title closing from debtors owing such accounts receivable balances shall be received in trust for Seller on account of such accounts receivable for rents and other customary hotel charges and shall be remitted to Seller, together with a listing of such collections at ten-day intervals from the closing date.

(c) Any credit balance of guests shall be credited to Purchaser.

(d) Seller's accountants may review accounts receivable collections whether for rent or from other sources after the

closing date at least once in each month following the closing date.

(e) All past due accounts not collected by Purchaser within six months from the date of closing shall be turned back to Seller who, as the exclusive owner, may institute any proceedings and take any steps to effect collection.

6. *Safe deposit boxes.* Seller shall send written notice to guests who have safe deposit boxes advising of the sale of property to Purchaser and requesting the removal and verification of the contents within five days after the closing. Seller, at its expense, shall have a representative on the premises during such five-day period for this purpose. Boxes of guests not responding to written notice shall be listed at the end of the five-day period, and Seller shall have no responsibility to them in connection with the safe deposit boxes. Purchaser shall indemnify Seller against any such liability, unless Seller's representative is present when the box is finally opened.

7. *Baggage inventory.* All baggage checked or left in Seller's care shall be listed in an inventory to be prepared in duplicate and signed by the parties' representatives on the day before closing. Purchaser shall be responsible from and after the closing for all baggage listed in such inventory. All baggage or other property of guests retained by Seller as security for unpaid accounts receivable may be left on the hotel premises without any responsibility or liability therefor by Purchaser, for a period not exceeding six months from the closing date, within which time Seller shall remove or otherwise dispose of the baggage or other property.

8. *Security deposits.* Schedule A contains the names of all tenants who have deposited securities and the amounts deposited. At the closing, Seller shall deliver the security deposits to Purchaser (if not prohibited by the terms of the lease), after which Purchaser shall hold and apply the security for the purpose contained in the lease, and shall indemnify and hold Seller harmless against any liability in connection therewith.

9. *Fuel.* Purchaser shall purchase from Seller, at Seller's cost, all fuel on the premises at the time of delivery of the Deed, and shall pay Seller for the fuel upon such delivery. The parties shall accept as conclusive the written estimate of a reputable dealer as to the amount of oil on the premises at such time.

10. *Violations.* Seller shall furnish Purchaser, upon written request, with authorization to make the necessary searches for violations. All notices of violations of applicable federal, state, or municipal zoning ordinances, including those related to environmental matters, health codes, multiple dwelling laws, building codes, fire ordinances, and the like, against or affecting the premises at the date hereof shall be removed by Seller before the closing, or within a reasonable time thereafter, if Purchaser gives Seller written and detailed notice of the violations not later than ten days after the date hereof. Such violations shall not be objections to title. Seller, however, may cancel this agreement by notifying Purchaser in writing, if the reasonable cost of removal exceeds \$10,000 or if such compliance is affected by any governmental law, regulation, requirement, or limitation order in such a manner that, in the sole opinion of the architect named below, the violation cannot be removed within a reasonable time and with reasonable certainty. If Seller elects to terminate, this agreement shall be null and void and the parties shall be released from all further obligations hereunder, except that Seller shall refund to Purchaser the amount of the down payment. Seller's written election to terminate shall be given not later than ten days after it receives Purchaser's written notice. The written estimate of Harris & Johnson, Architects, 111 Fifth Avenue, New York, of the reasonable cost of such compliance shall be conclusive on the parties. Radio and television antennae violations shall be no objection to title and Purchaser will take title subject thereto. Violations which a tenant is required to comply with or remove pursuant to the terms of a lease shall be no objection to title and Purchaser will take title subject thereto. Notwithstanding anything in this paragraph, Purchaser may elect to close the contract and pay the purchase price in full without abatement, taking subject to the violations which Seller is not obligated to correct hereunder.

11. *Special assessments*

(a) If, at the time of delivery of the Deed, the premises, or any part thereof, shall be or has been affected by an

assessment or assessments which are or may become payable in annual installments, of which the first installment is then a charge or lien, or has been paid, then, for the purposes of this agreement, all the unpaid installments of any such assessment, including those which are to become due and payable after delivery of the Deed, shall be deemed to be due and payable and to be liens upon the premises affected thereby and shall be paid and discharged by Seller upon such delivery.

(b) Purchaser shall have ten days after the date of this agreement within which to examine the records with regard to any assessments, other than those referred to in subparagraph (a) above. If the examination discloses any assessments subject to which Purchaser is unwilling to take title, it shall so notify Seller in writing within the ten-day period and request Seller to discharge them. Within ten days after receiving the notice, Seller shall notify Purchaser whether Seller is willing to discharge the assessments. If Seller is not willing to do so, Purchaser may, within five days after notification by Seller, cancel this agreement. In that event, both parties shall be released from any further obligation hereunder, and Seller shall immediately return to Purchaser the amount paid upon the execution and delivery of this agreement. If Purchaser does not cancel, the assessments shall not be the subject of adjustment of the purchase price, and Purchaser shall be deemed to have waived the assessments as an objection to closing and for all purposes of this agreement.

12. *Encumbrances to be removed at closing.* If, at closing of title, the premises are affected by any liens which Seller is required hereunder to discharge or satisfy, Seller shall be deemed to have discharged or satisfied the same if proper instruments of satisfaction or discharge are delivered to Purchaser at title closing and reasonable allowances are made to Purchaser for the estimated charges for recording. Purchaser shall advance at title closing, in cash or by certified check satisfactory to Seller, drawn to the order of a payee or payees named by Seller, any amount (not exceeding the cash balance of the purchase price) required to discharge the liens, and the amount so advanced shall be credited against the cash balance of the purchase price due at title closing. Lien or liens dealt with as herein provided shall not be an objection or objections to title. Violations filed in any county, city, state, or federal department which Seller is required to remove shall not be objections to title if Seller deposits with its attorney a sufficient sum to secure the performance of the work and provide the necessary materials to remove such violations and agrees to remove such violations within 90 days from the closing date.

13. *Amortization payments by the seller.* Any installment of principal, including the portion which represents principal of a combined payment of principal and interest on the first mortgage, between the date hereof and the closing of title, and paid by Seller, which reduces the unpaid principal of such mortgage below \$660,000, shall be repaid to Seller by Purchaser, in cash or by certified check, at title closing.

14. *Deed.* The Deed shall be the usual bargain and sale deed with covenants against grantor's acts, in proper statutory form for recording, duly executed and acknowledged, so as to convey to Purchaser the fee simple of the premises, free of all encumbrances, except as herein stated, and shall also contain the covenant required by subdivision 5 of Section 13 of the Lien Law.

15. *Sales tax.* Purchaser shall pay Seller, in cash or by certified check, the amount that Williams & Company estimates Purchaser to owe for New York City and state sales and use tax. Such payment shall not be, or construed to be, part of the purchase price. Purchaser shall reimburse Seller for any additional amount Seller is required to pay for sales and use tax in connection with the sale. The final audits of the state and City of New York, Sales Tax Division, determining the amount of sales and use tax in connection with this purchase, together with receipted bills showing payment, shall be final and conclusive evidence of the amount of the additional tax and the fact of payment. The provisions of this paragraph shall survive the delivery of the Deed, Bill of Sale, and other instruments.

16. *Deposit a lien.* All sums paid on account of this agreement and the reasonable expenses of the cost of title examination are made liens on the premises, but such liens shall not continue after Purchaser's default under this agreement.

17. *Destruction of premises and eminent domain*

(a) The parties waive the provision of Section 5-1311 of the General Obligations Law, the New York Uniform Vendor and Purchaser Risk Act, if, before the date for closing title (1) all or a material part of the hotel building on the premises is destroyed, or (2) all or a material part of the premises is taken by eminent domain. In either such event, neither party may cancel this agreement, and upon the closing of title, and the receipt of the purchase price less the credit hereafter described in this Section 17, Seller shall pay Purchaser any money collected by Seller under the insurance policies or renewals thereof, listed on the annexed Schedule D, insuring against the loss in question, after deducting any amounts which Seller has agreed or become obligated to pay for repairs or restoration of the damage. If the proceeds received by Seller does not fully cover the amount of damage because of a deductible or for any other reason, then Purchaser shall receive a credit against the purchase price in the amount of such deficit. In addition, Seller shall assign to Purchaser all of its right, title, and interest in and to such policies and any further sums payable under them, and, if any part of the premises is taken by eminent domain, in and to any awards made for such taking.

(b) If, before closing of title, (1) an immaterial part of the hotel building on the premises is destroyed, or (2) an immaterial part of the premises is taken by eminent domain, neither party may cancel this agreement, and Purchaser shall be entitled to an equitable abatement of the purchase price, to the extent of the destruction or taking.

(c) Any dispute as to (1) the materiality of any part of the building destroyed or of the premises taken by eminent domain, or (2) the amount of any equitable abatement of the purchase price to which Purchaser is entitled, shall be referred to Harris & Johnson, Architects, whose written determination of the questions in dispute shall be final and conclusive as if rendered by a court of competent jurisdiction. If necessary, the closing date shall be adjourned until the dispute is fully resolved.

18. *Broker.* Purchaser represents to Seller that this sale was brought about by James Stoner & Company and Smith & Baron, as brokers, and that all negotiations with respect to the terms of this agreement were and are conducted exclusively by or through such brokers. If any claim is made for commissions by any broker other than James Stoner & Company or Smith & Baron, by, through, or on account of any acts of Purchaser or its representatives, Purchaser will hold Seller free and harmless from all liability and expenses in connection therewith. Purchaser shall pay the brokerage commission to James Stoner & Company and Smith & Baron if and when title passes hereunder. The provisions of this paragraph shall survive delivery of the Deed.

19. *Waiver, change, or modification.* This agreement may not be modified or terminated except by an instrument signed and executed by both parties.

20. *Unmarketable title.* If Seller is unable to convey a marketable title, subject to and in accordance with this agreement, other than due to his willful acts or omissions, its sole obligation shall be to refund Purchaser's down payment and to reimburse Purchaser for the cost of title examination. Upon the making of such refund and reimbursement, this agreement shall terminate and neither party shall have any further claim against the other by reason thereof, and Purchaser's lien, if any, against the premises shall wholly cease. Seller shall not be required to bring any action or proceeding or otherwise to incur any expense to render the title to the premises marketable. Purchaser may, nevertheless, accept such title Seller is able to convey, without any reduction of, or credit or allowance against, the purchase price and without any other liability against Seller. Purchaser's acceptance of a Deed shall be deemed to be a full performance and discharge of all of Seller's obligations hereunder, except any specifically stated herein to survive delivery of the Deed.

21. *Cost of title examination.* The term "cost of title examination" is defined, for the purposes of this agreement, as the expense actually incurred by Purchaser for title examination. Such cost, however, shall not exceed the net amount that would be charged by a title company in the City of New York for title examination of the premises, without issuance of

policy, plus the cost to Purchaser of any survey actually obtained, such cost, however, not to exceed the amount which would be charged by such title company for a similar survey.

22. *"As is" condition.* Purchaser represents that it has inspected the premises and the personal property included in the sale and is purchasing them "as is."

23. *Unpaid franchise tax.* The nonpayment by Seller of the New York State franchise tax due at any time during the current year and its omission to file a franchise tax return during the current year shall not constitute an objection to Seller's title or a ground for the rejection of title. Seller shall hold Purchaser harmless from the collection of such franchise tax out of the premises. The provision of this paragraph shall survive delivery of the Deed. Unpaid franchise taxes of any corporation in the chain of title shall be no objection to title if Seller deposits with its attorney, in escrow, a reasonable amount to secure the payment of such unpaid franchise taxes within 60 days from the date of closing title.

24. *Other unpaid liens.* Unpaid liens for taxes, water charges, and assessments shall not be objections to title, but their amount, plus interest and penalties, shall be deducted from the cash consideration to be paid by, and allowed to, Purchaser, subject to the provisions for apportionment of taxes and water charges.

25. *Seller's right to summary proceedings.* Seller may institute summary proceedings against any tenant based on the tenant's default or failure to perform before the title closing.

26. *Seller's right to proceedings for reduction of assessed values.* Purchaser recognizes that there are currently pending proceedings instituted by Seller in connection with applications for the reduction of assessed values of the premises. Seller expressly reserves the right to continue such proceedings, to prosecute them through judgment, or to settle on any terms that it deems advisable. All refunds or tax savings resulting from such proceedings shall be apportioned between the parties as of the date of adjustments. Purchaser shall assume the legal retainer agreement with respect to required fees for such proceedings and such fees shall be apportioned between the parties as of the date of adjustments. Purchaser consents to any action so determined to be taken by Seller with respect to such proceedings.

27. *Agreement indivisible.* This agreement for the sale of Seller's real and personal property is indivisible even though separate considerations have been stated for the property. An election by either party under any provision hereunder shall be an election as to all such property, subject to the rights of election as set forth herein.

28. *Entire agreement.* This instrument constitutes the entire agreement between the parties. Seller is not liable or bound in any manner, except as otherwise expressly set forth herein, by express or implied warranties, guaranties, promises, statements, or representations pertaining to the premises or personal property or their condition, the rentals, or any other matter made or furnished by any real estate broker, agent, employee, or other person representing or purporting to represent Seller.

29. *Survival of warranties.* All warranties, representations, promises, covenants, and agreements specifically set forth in this agreement shall survive the acceptance of the Deed by Purchaser and payment made at the closing.

30. *Notices.* All notices under this agreement shall be in writing and sent by registered or certified mail, return receipt requested, postage prepaid, addressed, if to Seller, to Carson Hotel, Inc., c/o Nathan & Adams, Esqs., 200 Fifth Avenue, New York, New York; and if to Purchaser, to Central Realty Corporation, c/o John Banner, Esq., 500 Fifth Avenue, New York, New York. Either party may, at any time and from time to time, in the manner set forth for the giving of notices, change the address designated in this paragraph.

31. *Closing.* The closing shall take place at the offices of Nathan & Adams, Esqs., Seller's attorney, at 10 a.m. on the fifth day after the New York State Liquor Authority takes final action on Purchaser's application or May 30, _____ [year], whichever date is later.

32. *Seller's documents at the closing.* At the closing, Seller shall deliver to Purchaser the following:

- (a) Deed to the real property;
- (b) Bill of Sale to the personal property;
- (c) Assignment of leases set forth in Schedule A, together with the leases referred to in such assignments and any security deposits provided for in such leases;
- (d) Assignment of any licenses that may be lawfully assigned;
- (e) Assignment of service contracts set forth in Schedule B;
- (f) Assignment of insurance policies on which apportionments were made;
- (g) Certified copy of minutes of Seller's directors and shareholders authorizing the sale; and
- (h) Assignment of service and maintenance contracts.

33. *Purchaser obligations at the closing.* At the closing, Purchaser shall deliver the following:

- (a) The consideration set forth in paragraph 3;
- (b) An amount for New York City and state sales tax set forth in paragraph 15;
- (c) An assumption agreement assuming all of the service contracts set forth in Schedule B;
- (d) Certified copy of minutes of Purchaser's directors and shareholders authorizing the purchase; and
- (e) Sales tax payment.

34. *Assignment by purchaser.* Purchaser may not assign this agreement without Seller's prior written consent.

35. *Headings.* Headings in this agreement are for convenience and reference only and shall not be used to interpret or construe its provisions.

36. *Liquor license*

(a) This sale is conditional upon the approval of the New York State Liquor Authority of Purchaser's application for a license to dispense alcoholic beverages for on-premises consumption for the premises and the issuance of an appropriate license.

(b) Purchaser represents and warrants as follows: that neither it nor any officers, directors, or shareholders owning 10 percent or more of it have ever been convicted of a crime; that the State Liquor Authority has never disapproved of an application of Purchaser or of its officers, directors, or shareholders; that neither Purchaser nor any of its officers, directors, or shareholders has ever had a license revoked, cancelled, or suspended; that Purchaser is not borrowing money from any brewery, wholesaler, or dispenser of wines and liquors for the purpose of investing it in the business being purchased; that the funds to be paid under this agreement are from sources acceptable to the State Liquor Authority; and that Purchaser knows of no reason why its application for a liquor license should be denied.

(c) Any refund that the State Liquor Authority or another governmental agency returns to Seller on its unexpired portion of a license shall fully belong to Seller.

(d) Purchaser shall make diligent effort to procure a license by, among other things, executing and filing an appropriate application within five days after this agreement is executed, and attending all hearings and interviews required by the Alcoholic Beverage Control Board and the State Liquor Authority. If the State Liquor Authority disapproves the application, and the disapproval is not due to Purchaser's omission or other fault under the representations made in subparagraph (b), this agreement shall terminate, the deposit shall be returned to Purchaser, and neither party shall have any claim against the other.

(e) Purchaser shall deliver to Seller a photocopy of each communication from the State Liquor Authority within 24 hours after receipt by Purchaser or its representative, and Purchaser authorizes Seller to make inquiries as to the status and progress of the application.

(f) Purchaser shall be deemed in default hereunder if (1) the State Liquor Authority disapproves of Purchaser's application for a liquor license because of any act, omission, or other fault of Purchaser under the representations made in subparagraph (b), or (2) Purchaser withdraws its application for the license. If Purchaser is in default for either reason, Seller shall retain, as liquidated damages, the monies paid by Purchaser on the signing of this agreement. The parties agree that the actual damages would be difficult to ascertain. The parties agree that said sum represents their best estimate of what the actual damages would be.

(g) If Purchaser is unable, not through its fault, to obtain the State Liquor Authority's approval of its application for an appropriate liquor license within 180 days from the date hereof, Seller may cancel this agreement by giving Purchaser written notice. If Seller elects to cancel, this agreement shall immediately terminate, the deposit made herein shall be returned to Purchaser, and neither party shall have any claim against the other.

37. *Seller's representations.* Seller has not made and does not make any representations as to the physical condition, income, expense, operation, or any other matter or thing affecting or related to the premises, except as herein specifically set forth, and Purchaser acknowledges that no such representations have been made. Seller is not liable or bound in any manner by any verbal or written statements, representations, real estate broker's "set ups," or information pertaining to the premises furnished by any real estate broker, agent, employee, servant, or other person, except as specifically set forth herein.

38. *Lease renewals and rentals*

(a) Seller makes no representations as to the continued occupancy by any tenant or tenants.

(b) Seller does not undertake, represent, or guarantee that any leases or tenancies currently in effect will be in effect at closing.

(c) Seller reserves the right to terminate any lease or tenancy by agreement or through summary proceedings.

(d) Seller may rent any space now vacant or which may become vacant and may extend or renew leases. However, all rentals, leases, extensions, or renewals shall be for a period of not more than two years from the date of making and at rentals consistent with those currently existing for comparable space in the premises.

(e) Seller represents that no concessions for free rent or otherwise have been given to any tenant or occupant of the premises.

39. *Purchaser's inspections.* From the date of this agreement, Purchaser may have its representatives upon the premises, but they shall not in any manner interfere with the operation of the hotel.

40. *Purchaser's right to designate nominee.* At the closing, Purchaser may require Seller to convey the land to one of Purchaser's nominees and the building and personal property to Purchaser or another nominee.

41. *Binding effect.* This agreement shall be binding upon and inure to the benefit of the parties hereto and their respective successors and assigns.

42. *Nonwaiver.* No delay or failure by either party to exercise or enforce any right hereunder, and no partial or single exercise of such right, shall constitute a waiver of that or any other right, unless otherwise expressly provided herein.

43. *Governing law.* This agreement shall be construed in accordance with and governed by the laws of the State of New York.

44. *Counterparts.* This agreement may be executed in one or more counterparts, each of which shall be deemed an original but all of which together shall constitute one and the same instrument.

45. *Time of essence.* Time is of the essence of this agreement.

The parties have caused this agreement to be signed the day and year first above written by their respective duly authorized officers.

Attest:

Secretary

Attest:

Secretary

Carson Hotel, Inc.

by _____
President

Carson Realty Corporation

by _____
President



79 of 152 DOCUMENTS

Current Legal Forms for Real Estate

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Current Legal Forms for Real Estate
Chapter 21 SALES AND EXCHANGES
Part IV. Forms

C. CONTRACTS OF SALE: COMMERCIAL PROPERTY

25-21 Current Legal Forms for Real Estate FORM 21.45

FORM 21.45 Sale of operating hotel--IRS tax ruling contingency--terms covering liquor license, inventory adjustments and purchases

COMMENT

This form illustrates some of the numerous provisions involved in the sale of a hotel. Many of these provisions are necessary because in a transaction of this kind the seller is transferring not only real estate but a hotel business connected with the real estate.

Hotel contract terms

Many of the provisions in this agreement cover items directly related to the sale of an operating hotel. These terms are in addition to those usually found in a contract for the sale of real estate, such as liens, purchase price, closing date, default, violations, assessments, deeds, casualty and condemnation, etc. Violations may relate to such matters as building and zoning codes, environmental laws, and the Americans With Disabilities Act of 1990 and its Accessibility Guidelines. The seller maintains a liquor license at the hotel. In this agreement, if the purchaser does not obtain the necessary governmental approval for transfer of the liquor license, the purchaser must still acquire the hotel, but the seller can store the liquor at the hotel until that inventory is sold to another party (paragraph 21). This is an alternative to having the contract contingent on approval of the liquor license transfer. This contract includes detailed adjustment terms which deal with inventory and other items used in the hotel operation (paragraph 14). In addition to adjustments, the purchaser will pay additional amounts for certain inventory and other personal property items not already included in the sale (paragraphs 19 and 20). This agreement also covers the transfer of custody over guest baggage, safe deposit boxes, and tenant security deposits (paragraphs 23 and 24). This contract is contingent on receipt of a satisfactory tax ruling (paragraph 5). This contingency is not unique to hotel contracts, and can be used in other appropriate transactions.

Tax ruling contingency

The closing of title under this contract is conditioned upon the issuance to the seller by the Service of a specific ruling with respect to the tax consequence of the transaction. Under some circumstances a taxpayer may obtain an advance ruling on a prospective transaction. Except in the few cases where the statute requires a prior determination, the issuance of such a ruling is discretionary.

Liquidation by seller

In this case the seller was a corporation. It sought a ruling that the sale qualified as a tax-free 12-month liquidation so that gain would not be recognized to the corporation, but only to the shareholders on the distributions in liquidation of the corporation. This provision was repealed by the Tax Reform Act of 1986. The framework of the contract clause, however, can still be used in other cases where a ruling is sought and the contract is contingent on the ruling.

Allocation of purchase price

The sale of a business involves purchase price allocation for both the seller and the purchaser. A going business is not a single property. Gain or loss must be computed for each of the assets sold, and the character of the gain or loss is separately determined for each asset. Consequently, the selling price should be allocated to each asset included in the sale. If, however, all of the assets produce capital gain, the allocation for the seller is not significant. The allocation for the purchaser is usually significant, particularly for establishing the cost of depreciable property and the cost of any inventory property.

Passive activity loss limitation

Generally speaking, rental real estate activity is considered to be a passive activity. Therefore, deductions and credits from rental activities can only offset income from other passive activities. Such deductions and credits *cannot* be deducted from nonpassive income, such as wages, dividends, interest, etc. However, there are two major exceptions to this general rule.

First, beginning in 1994, certain eligible taxpayers who *materially* participate in rental real estate activities can deduct losses from such activities against nonpassive income. These eligible taxpayers include individuals and closely-held C corporations that meet special eligibility requirements. *IRC* § 469(c)(7). Second, an individual who owns at least a 10-percent interest and *actively* participates in rental real estate activity is permitted to offset up to \$25,000 of passive activity losses against his nonpassive income. *IRC* § 469(i). For an in-depth discussion of the passive activity loss rules, see the Tax Background at the beginning of this chapter, § 21.08[2].

"At risk" rules apply to hotel property

The "at risk" rules, limit, generally, the loss deductions which a taxpayer may take in most activities to the amount which the taxpayer has at risk. For example, funds secured by nonrecourse mortgages are not at risk because the taxpayer is not personally liable (unless the financing meets the definition of qualified nonrecourse financing). The at risk limitation does apply to real estate placed in service by the taxpayer after 1986. The activity of holding real property includes losses and expenses related to personal property and services which are incidental to making real

property available as living accommodations. Thus, losses realized in rendering services or maintaining personal property incidental to the operation of a motel or hotel, held by the taxpayer, are limited to the amount at risk by the taxpayer with respect to such services, personal property and real estate. For a further discussion of the at risk rules see the Tax Background (TB) § 21.09 at the beginning of this chapter, and the TB in Chapter 1, "Partnerships," in Volume 1.

FORM

AGREEMENT made September 10, _____ [year], between Hotel Crown Corporation, a New York corporation, having its principal office at the Hotel Crown, 800 Main Street, White Plains, New York ("Seller"), and William Alterman, residing at 100 Circle Drive, New Rochelle, New York ("Purchaser").

1. *Sale.* Seller shall sell and convey, and the Purchaser shall purchase, all that certain plot, piece, or parcel of land, with the buildings and improvements thereon erected, in the City of White Plains, County of Westchester, State of New York, bounded and described as follows:

(Insert description)

Together with all right, title, and interest of the Seller in and to the use of the names "Hotel Crown" and "Crown Hotel," and in and to the use of the names of all the public rooms in the hotel.

2. *Purchase price.* The purchase price is \$3.8 million, of which \$330,000 is allocated to the price of the furniture and furnishings included in this sale, to be paid as follows:

\$40,000--on the signing of this contract, by check subject to collection, receipt acknowledged;

\$3 million--(except as herein provided) in cash or good certified check or checks upon the delivery of the deed;

\$760,000--by taking title subject to a consolidated first mortgage now a lien on the premises in that amount, bearing interest of 9 percent per annum, with constant quarter-annual payments on the 1st days of March, June, September, and December in each year as follows:

To and including March 1, _____ [year]	--\$18,000
To and including March 1, _____ [year]	--\$17,400
To and including March 1, _____ [year]	--\$15,000
Balance due March 1, _____ [year]	

3. *First mortgage.* A copy of each of the following instruments relating to the consolidated first mortgage referred to in paragraph 2 has been exhibited to and initialed by Purchaser's attorney:

(a) Consolidation and extension agreement, dated March 2, _____ [year], between Mountain Insurance Company and James Cooper.

(b) Security interest granted by James Cooper to Mountain Insurance Company pursuant to a Security Agreement dated March 2, _____ [year].

Seller shall procure and deliver on the closing date receipts or a letter from the mortgagee and the holder of the security interest indicating the amount of the unpaid principal and interest on the closing date, and such receipts or letter shall be deemed sufficient evidence of such facts. All regular installments of principal paid under the consolidated first mortgage between the date hereof and the closing date shall be repaid by Purchaser to Seller by adding the amount thereof to the amount of cash to be paid on the closing date.

4. *Liens and encumbrances.* The premises are sold and are to be conveyed subject to:

(a) The consolidated first mortgage referred to in paragraph 2.

(b) The state of facts shown on survey dated April 6, _____ [year], and redated August 1, _____ [year], made by William Wolf, P.E., a copy of which has been exhibited to and initialed by Purchaser's attorney.

(c) Zoning regulations and ordinances, if they are not violated by existing structures or use.

(d) Consents by any owner of the premises for the erection of any structure or structures on, under, or above any street or streets on which the premises abut.

(e) Utility easements and agreements.

(f) Leases and agreements set forth on the annexed schedule marked Schedule A.

(g) Service, rental, and music contracts set forth on the annexed schedule marked Schedule B.

(h) Management contract dated October 1, _____ [year], between Hotel Crown Corporation and Hotel Managers, Inc.

A copy of each instrument recited in items (f), (g), and (h) has been exhibited to and initialed by Purchaser's attorney.

5. *Tax ruling*

(a) The closing of title is conditioned upon the procurement by Seller of a ruling from the U.S. Treasury Department that no gain or loss to Seller will result from the proposed sale under the provisions of *IRC Section 337*. Seller shall file its application for such ruling not later than 30 days from the date hereof, and in any event shall use its best efforts to obtain the ruling as promptly as practicable. Seller shall deliver to Purchaser, within three business days after filing the application, a copy of the application with a statement as to the date of filing.

(b) Seller shall deliver to Purchaser, within three business days of receipt, a copy of the ruling issued with respect to the application. If Seller obtains a favorable ruling on or before April 1, _____ [year] (or May 1, _____ [year], if Seller's time to obtain a favorable ruling is extended as provided in subparagraph (c), below), and a copy of the ruling is furnished to Purchaser in the manner provided above, Purchaser shall, within three days after receiving the copy, make a further payment of \$150,000 on account of the purchase price.

(c) If a favorable ruling is not obtained by April 1, _____ [year], Purchaser may extend Seller's time for obtaining a favorable ruling to May 1, _____ [year]. If Purchaser does not notify Seller by April 4, _____ [year] of Purchaser's election to exercise this option, or if the option is exercised but a favorable ruling is not obtained by the adjourned date, this agreement shall terminate, Seller shall return to Purchaser all sums paid on account of the purchase price, and neither party shall have any further claim against, or obligation to, the other.

(d) If a favorable ruling is obtained, Seller shall cause a special meeting of its shareholders to be held within 45 days thereafter, for the purpose of voting upon (1) a plan of complete liquidation in compliance with the provisions of *IRC Section 337*, and (2) the approval of the sale under this contract. Seller agrees to obtain the requisite vote of shareholders at the meeting for such approvals. Seller shall deliver to Purchaser, within five days after such meeting, a certified copy of the resolutions adopted with respect to the plan of liquidation and sale.

6. *Closing.* The closing of title shall then take place at the office of Loomis & Goodman, Esqs., 500 Fifth Avenue, New York, New York, at 10 a.m., on the last business day (the "closing date") of the third complete calendar month following the month in which the ruling referred to in paragraph 5 is obtained. Purchaser shall be entitled to an adjournment of the closing date for a period of one month upon making a further payment of \$20,000 on account of the purchase price, at least ten days before the closing date. Purchaser shall be entitled to a further adjournment for a period of one month upon making a further payment of \$20,000 on account of the purchase price, at least ten days before the adjourned closing date. Purchaser shall be entitled to no other adjournments of the closing date.

7. *Adjustment date.* All adjustments hereunder are to be made as of 11:59 p.m. on the last day of the month in which the closing of title takes place (the "adjustment date").

8. *Default by purchaser.* If Purchaser defaults, this contract shall terminate and Seller shall retain, as liquidated damages, all payments made by Purchaser on account of the purchase price. Thereupon, neither party shall have any further claim against, or obligation to, the other. If the further payment of \$150,000 has not been made as provided in paragraph 5(b), Purchaser shall be personally liable to Seller for such amount, notwithstanding any transfer or assignment of this contract. In that event, Seller shall retain, as liquidated damages, both the \$150,000 and the initial payment of \$50,000 on account of the purchase price, and neither party shall have any further claim against, or obligation to, the other.

9. *Failure of title.* If Seller is unable to convey title to the premises, subject only to the encumbrances, terms, and conditions set forth herein, and such failure is not due to Seller's wilful act or failure to act, Purchaser may either: (1) accept such title Seller is able to convey, without making a claim for abatement for defects or objections, or (2) rescind this contract, after first affording Seller reasonable adjournments of title (not exceeding two months) to enable it to cure or correct the defects or objections to title. If Purchaser elects to rescind, Seller shall immediately repay Purchaser all sums deposited on account of the purchase price, plus the net cost of title examination, this contract shall terminate, and neither party shall have any further claim against, or obligation to, the other. Nothing contained herein, however, shall be deemed to require Seller to bring any action or proceeding, or otherwise to incur any expense, to render title to the premises marketable, except that Seller shall make the required payments if any defect or objection can be cured or corrected by the payment of a fixed sum of money.

10. *Violations*

(a) *Violations.* Seller shall comply with all notices or notes of violations of law noted or issued against or affecting the premises at the date hereof or at any later time up to and including the closing date, including without limitation those related to environmental laws, federal, state and local, and those related to the Americans With Disabilities Act of 1990 and its Accessibility Guidelines, and the premises shall be conveyed free of such violations. Seller shall authorize Purchaser to make the necessary searches for violations if requested in writing. Seller's failure to comply with any notices or notes by the closing date shall not be an objection to title if Seller, at the closing, deposits with its attorney, in escrow, a sufficient sum, or furnishes to Purchaser a bond of a reputable surety company in a sufficient amount, reasonably to insure compliance with or discharge of such notes or notices within 90 days from the closing date. If this cannot be done, Seller will promptly commence the required work and proceed with due diligence to completion.

(b) Notwithstanding the above, if the lending institution from which Purchaser procures financing in connection with

this transaction requires such compliance or discharge before the closing date, Seller, upon receiving notice, shall so comply or secure the discharge if compliance may be accomplished by the closing date with the exercise of due diligence. If it cannot, Seller shall commence the required work promptly and proceed with due diligence to completion, and shall make the deposit upon closing to insure compliance and discharge. Seller shall give Purchaser written notice promptly upon Seller's receipt of all notices of violation.

11. *Assessments.* If, on the closing date, the premises or any part thereof are affected by an assessment or assessments which are or may become payable in annual installments, of which the first installment is then a charge or lien, or has been paid, for the purposes of this contract all the unpaid installments of any such assessments, including those which are to become due and payable after the closing date, shall be deemed to be due and payable and to be liens upon the premises, and shall be paid and discharged by Seller on the closing date.

12. *Deed.* The deed shall be the usual bargain and sale deed with covenants against grantor's acts in proper statutory short form for record and shall be duly executed, and acknowledged, so as to convey to Purchaser the fee simple of the premises, free of all encumbrances, except as herein stated, and shall also contain the covenant required by subdivision 5 of Section 13 of the Lien Law. Seller shall give and Purchaser shall accept whatever title the Manhattan Guarantee & Trust Company would approve and insure.

13. *Bulk sale.* Seller shall indemnify Purchaser against any claim, loss, or liability arising under the Bulk Sales Law in connection with this transaction.

14. *Adjustments.* The following adjustments, to be computed and determined by Smith & Smith, C.P.A.s, are to be made at the closing:

(a) Rents and other charges due Seller, as collected. With respect, however, to rents and other charges for which the liability is undisputed for the two-month period preceding the adjustment date, the first monies received for 90 days after the closing date from debtors owing such rents or other charges shall be received in trust for Seller on account of the rents or charges, and the same shall be remitted to Seller every ten days during such 90-day period. Seller may, at any one or more times, enforce collection of such rents and charges against the debtors, in its own name only, and Purchaser shall have no collection obligation except to receive and remit. At the end of the 90-day period Purchaser's obligations under this subparagraph (a) shall terminate, and Purchaser shall remit all collections then in its possession and return all accounts receivable records.

(b) The adjustment, if any, of guest room revenues for the night of the adjustment date shall be determined by the accounting firm of Smith & Smith, the determination to be evidenced by letter of the firm and to be conclusive upon the parties.

(c) Public room operations shall be adjusted as of the closing hours of the rooms involved in the day following the adjustment date. All expenses and income to such closing hours shall belong to Seller, and the inventory of food, beverage, and liquor therein shall be taken as of such closing hours on that date.

(d) Interest on the consolidated first mortgage referred to in paragraph 2.

(e) Premiums on the insurance policies, or renewals of those expiring before the closing date, such policies being set forth on the annexed schedule marked Schedule C, and all dividends or premium credits with respect to them. Wherever possible Seller shall make such renewals for five-year periods payable in annual installments.

(f) Wages and related payroll expenses. Seller has exhibited to Purchaser and Purchaser has initialed the current payroll. Seller represents that the employees listed thereon are all of the employees of the hotel, for the period indicated, and that there will be no additions to the payroll between the date hereof and the closing date, except as required in the

normal course of operation. Seller represents that there are no employment contracts, except as specified in paragraph 4 and except the union contract noted in Schedule B. There shall be no adjustment for Christmas or other bonuses of employees.

(g) Vacation pay of all employees, except those positions listed on the annexed schedule marked Schedule D. Seller shall, however, receive a credit against this adjustment in a sum equivalent to 15 percent (in lieu of any adjustment in favor of Seller for normal turnover of employees and for employees who are not replaced during their vacation periods).

(h) Taxes, on the basis of the fiscal year for which assessed. If the closing date occurs before the tax rate is fixed, the apportionment of taxes shall be upon the basis of the tax rate for the next preceding year applied to the latest assessed valuation.

(i) Water charges and sewer rents. Seller shall furnish a reading of all water meters to a date not more than 30 days before the closing date, and the unfixed meter charge and the unfixed sewer rent, if any, based thereon for the intervening time shall be apportioned on the basis of such last reading.

(j) Fuel. The amount of fuel on hand on the adjustment date shall be determined by Seller's supplier and set forth in a letter from the supplier, a copy of which will be delivered to Purchaser. Smith & Smith will determine the cost based upon Seller's most recent bills.

(k) Advertising expenses and unused advertising contracts and due bills.

(l) Trade publication subscriptions, and hotel and trade association dues.

(m) Auditing fees, and credit information service.

(n) Music and entertainment expenses, music license fees, broadcasting charges, and copyright charges.

(o) Licenses and permits assignable by law.

(p) Postage meter rental, and unused meter postage.

(q) Sundry deposits made to suppliers, if transferable.

(r) All other charges on service contracts, equipment rental contracts, and music contracts as set forth in Schedule B. In making these adjustments Seller shall pay all laundry, dry cleaning, and contract cleaning charges on items sent out before the adjustment date even if not returned by that date.

(s) House banks, petty cash funds, and cash registers. Seller and Purchaser shall jointly participate with Smith & Smith in the counting of these moneys. Seller may, however, by giving two-days' prior notice to Purchaser, remove all such moneys on the adjustment date in lieu of adjusting them.

(t) Tour agents commissions.

(u) American Express, Master Card, Visa, and Diners Club commissions, and commissions of other credit organizations.

(v) Checkroom and washrooms coin lock income.

(w) Laundry, florist, and vending machine percentage rentals.

(x) All prepaid rents, room rental deposits, and all other deposits for advance reservations, banquets, or future services.

(y) All employees union dues to be paid to New York Trades Council, Inc.

15. *Discharge of taxes, water rents, etc.* The amount of any unpaid taxes, assessments, water charges, and sewer rents which Seller is obligated to pay and discharge, with the interest and penalties to a date not less than three business days after the adjustment date, may, if Seller elects, be allowed to Purchaser out of the balance of the purchase price, if official bills with interest and penalties included to such date, are furnished by Seller on the closing date. If on the closing date there are any other liens or encumbrances which Seller is obligated to pay and discharge, Seller may use any portion of the balance of the purchase price to satisfy them, if Seller has delivered to Purchaser on the closing date instruments in recordable form and sufficient to satisfy such liens and encumbrances of record, together with the cost of recording or filing such instruments. Purchaser, if request is made within a reasonable time before the closing date, shall provide on that date separate certified checks as requested, aggregating the amount of the balance of the purchase price, to facilitate the satisfaction of any such liens or encumbrances. The existence of such taxes or other liens and encumbrances shall not be deemed objections to title if Seller complies with the above requirements.

16. *Unpaid franchise taxes.* Unpaid franchise taxes of Seller or of any corporation in the chain of title shall not be an objection to the title, if Seller deposits in escrow with the title company insuring the title the amount required by such company to enable it to insure against collection of such unpaid franchise taxes out of the premises.

17. *Items not to be adjusted*

(a) Telephone, electricity, gas, and steam charges will not be adjusted. Seller will arrange for the making of collections or rendition of final bills by the public utility companies involved as of the adjustment date, and will pay such bills as rendered.

(b) Seller shall be responsible for any income, franchise, occupancy, or other tax liabilities relating to periods before the adjustment date, even if such liabilities do not arise or become payable before then.

18. *Documents to be delivered by seller*

(a) On the closing date Seller shall turn over to Purchaser all mailing lists, register books, rental records, other guest records, promotion records, banquet records, and other hotel operational records. Seller may examine such records for three years after the closing, but Purchaser shall have no responsibility for their care.

(b) On the closing date Seller shall assign to Purchaser all its right, title, and interest in and to all leases and contracts set forth in Schedules A and B, and in and to the contract set forth in paragraph 4(h), and Purchaser shall assume the performance of all Seller's obligations accruing under such leases and contracts from and after the closing date. Seller shall indemnify the Purchaser against all claims, losses, and liabilities in connection with such leases, contracts, and agreements accruing before the closing date or arising out of Seller's acts or omissions before the closing date.

(c) Seller covenants and warrants that all license fees for all vault space appurtenant to premises have been paid, and Seller shall indemnify Purchaser against any claim, loss, or liability in connection therewith. Seller shall deliver to Purchaser at the closing all vault licenses and permits in its possession.

19. *Personal annexed property*

(a) The items of personal property set forth in the annexed inventory marked Exhibit E, are included in the sale. Seller represents that it owns all of such items free and clear of any liens and encumbrances, except the consolidated first

mortgage and security interest referred to in paragraph 3. Seller shall not remove from the premises any of such items or any other items of personal property included in this sale between the date hereof and the closing date, except as required for repair or replacement. Replacements shall be of equal quality and quantity, and shall be free and clear of any lien and encumbrance, except the consolidated first mortgage and security interest. Seller may retain the proceeds of the sale of any replaced item, except that if the proceeds exceed the cost of the replacement item the excess shall be turned over to Purchaser on the closing date. On the closing date, Seller shall deliver a supplemental inventory setting forth all additions and replacements of personal property between the date of the annexed inventory and the closing date.

(b) On the closing date, Seller shall also deliver a detailed additional inventory of all restaurant, bar, and kitchen equipment, service bars, housekeeping linens, blankets, carpeting and other equipment, mechanical, carpentry, and electrical shop machinery and equipment, and furnishings and equipment belonging to Seller in the barber, valet, and beauty shops. The additional inventory shall also include the serial number or manufacturers' make of each office machine listed on the annexed inventory. Purchaser may at any time before the closing date take a physical inventory of the personal property included in this sale. If Purchaser takes an inventory, he will apprise Seller of any discrepancies found in the annexed inventory, at least five days before the closing date, in order that an opportunity be given to reflect the actual personal property to be contained in the supplemental inventory. Seller warrants and represents that it now has and on the closing date will have good title to all the personal property included in this sale, and that the same will be delivered to Purchaser free and clear of all liens and encumbrances, except the consolidated first mortgage and security interest. On the closing date, Seller will deliver to Purchaser a bill of sale covering the personal property together with the usual warranty of title.

20. *Certain personalty to be purchased separately.* Included in this sale are all fixtures, chattels, and articles of personal property (except items owned by tenants or occupants of space and rental items listed on Schedule B) constructed or placed upon or attached to or used in connection with the operation of the premises or which may hereafter be attached to or used in connection with the premises by Seller, regardless of whether enumerated on the annexed inventory marked Schedule E, or located on or off the premises, including television receivers, air conditioning machinery, ducts, apparatus, and equipment, office furniture, machines, and equipment, restaurant, bar, and kitchen furnishings and equipment, operating supplies and equipment, public and guest room furniture and furnishings, and all glassware, chinaware, silverware, and three changes of linens. Notwithstanding the foregoing, the following shall be purchased separately by Purchaser: food supplies in raw state and unprocessed; alcoholic beverages and soft drinks in unopened bottles; and supplies, stationery, printed matter, advertising literature, linen, chinaware, silverware, glassware, and other inventory in reserve stock and unused. The separate purchase of such items shall be upon the following conditions:

- (a) The only items to be purchased separately are those Smith & Smith certifies to be unused, in good condition, and readily saleable or useable. All other items are included in the purchase price for the premises.
- (b) All stationery, printed matter, and advertising literature shall have no distinguishing names other than that of "Hotel Crown" or its public rooms.
- (c) Purchaser shall only be obligated to purchase normal amounts of items reasonably required for the operation of the hotel.
- (d) The amount of such items shall be determined by an inventory to be taken by Smith & Smith, and the price shall be computed at cost or market, whichever is lower, as certified by Smith & Smith. The parties shall jointly supervise the taking of the inventory.
- (e) Seller warrants that it has and will have on the closing date good title to all the items being purchased separately and that such items will be delivered to Purchaser free and clear of all liens and

encumbrances, except the consolidated first mortgage and security interest referred to in paragraph 3. Seller will deliver to Purchaser on the closing date a bill of sale covering such items, together with the usual warranty of title.

(f) All adjustments shall be determined and computed by Smith & Smith, which shall also make all other determinations relating to inventory, prices, saleability, and useability. All determinations of Smith & Smith under this agreement shall be consistent with general hotel accounting practice and shall be conclusively binding on both parties. The payment of this firm's fees for services shall be shared equally by the parties. In view of the difficulty in completing the computation of adjustments and the taking of inventory and pricing of personal property to be purchased separately, on the closing date Purchaser or Seller, as the case may be, will pay the amount certified by Smith & Smith as that firm's estimate of the net adjustments. Within 30 days thereafter, or on any later date that Smith & Smith reasonably requires, that firm shall make and certify final computations. At that time, Seller or Purchaser, as the case may be, will promptly make such payments as are found to be due upon such final computation.

21. *Liquor license and liquor.* Promptly after the execution hereof, Purchaser shall cause an application to be filed with the appropriate governmental authorities for an on-premises liquor license. The application shall be prosecuted with due diligence, and an endeavor made to obtain such license before the closing date. Seller shall apply for and obtain a liquidator's permit and take all other necessary steps to comply with the applicable laws so as to permit the sale by Seller of all liquor in unopened bottles under the terms of this agreement. If, however, the on-premises liquor license is not granted by the closing date, such liquor will not be purchased hereunder, but in that event, Seller may store such liquor on the premises, rent free, until the license is granted, and at that time Purchaser will purchase the liquor.

22. *Operation and maintenance of hotel.* Seller covenants and warrants that between the date hereof and the closing date it will continue its usual program of maintenance and repair of the premises, the existing operation of the premises, and its present advertising commitments and its usual program of advertising. However, Seller will not be required during such period to make any capital improvements in the premises, except those required in the usual program of maintenance and repair. Smith & Smith shall make the conclusive determination as to whether the existing operating, maintenance, repair, and advertising programs have been properly continued. The determination of that firm shall also be conclusively binding as to capital improvements that may be required in the usual program of maintenance and repair. It is the parties' intention that the general operation of the premises shall not be changed between the date hereof and the closing date. Purchaser may, during normal business hours, make a physical inspection of the premises and obtain from Seller all information with respect to the operation of the premises that would enable him to determine whether the provisions of this paragraph are being complied with.

23. *Guest baggage and safe deposits*

(a) Any baggage or other property of departed guests held by Seller as security for unpaid accounts receivable may be left on the premises for a period of 60 days following the closing date. After such period, Seller will remove all such baggage or property. Seller shall indemnify Purchaser against all claims, losses, and liabilities in connection with the holding of such baggage or other property.

(b) On the closing date, the parties shall jointly inventory, seal, and tag all baggage checked with or left in Seller's care that belongs to guests who are still in the hotel on such date. Purchaser shall indemnify Seller against all claims, losses, or liabilities in connection with the baggage arising out of Purchaser's acts or omissions after the closing date. Seller shall indemnify Purchaser against all claims, losses, or liabilities with respect to the baggage arising out of Seller's acts or omissions before the closing date.

24. *Leases, rents, and tenants*

(a) Seller represents and covenants that all rents due or to become due in connection with the use and occupancy of any space in the premises are not now and on the closing date will not be subject to any assignments, liens, or encumbrances, except the consolidated first mortgage and security interest referred to in paragraph 3.

(b) Seller shall turn over to Purchaser at the closing all security deposits of tenants which Seller holds at that time against Purchaser's written receipt. Included in Schedule A is a list of all security deposits now held by Seller. Seller will not return any deposits to the tenants or allow part of the deposits as a credit against rent unless required to do so by the terms of the tenants' leases. On the closing date, Seller will represent and warrant to Purchaser that the securities delivered to Purchaser are the only ones then held by Seller.

(c) Seller represents and warrants that there are no leases or agreements in force and effect covering the use and occupancy of space in the premises other than those listed on Schedules A and F and transient guests on a day-to-day basis. Seller covenants that the leases and agreements thus listed will not be modified or cancelled by agreement, or an accepted surrender, during the period between the date hereof and the closing date without Purchaser's written consent.

(d) Seller shall not enter into any extensions or renewals of existing or expired leases, or enter into any new leases, without Purchaser's prior written consent. If the terms of any new leases or extensions or renewals of old leases commence after the date hereof, the cost of any required repairs or improvements and any brokerage fees and commissions due to brokers, incurred in connection therewith, shall be apportioned between the parties on the closing date on the basis of the initial term of the extension, renewal, or new lease.

(e) The existence of any new or additional vacancies or the expiration of any leases shall not affect the obligations of the parties, and Purchaser shall take title subject thereto without allowance or abatement, or reduction of purchase price, if such vacancies or expirations do not result from any cancellation by agreement or any acceptance by Seller of the surrender of the unexpired term of any leases, and Purchaser has not consented in writing to the cancellation or surrender. Seller shall pay over to Purchaser on the closing date any cancellation penalty paid by a tenant in connection with a cancellation or surrender.

(f) Seller covenants and warrants that all work required to be performed at any time under leases executed before the date hereof, and all work required to be performed and all personal property required to be furnished in rooms at any time pursuant to agreements or commitments with hotel guests made before the date hereof, have been or will be completed and paid for before the closing. Seller shall indemnify Purchaser against any claim, loss, or liability with respect to such requirements. Seller further covenants and warrants that no payments, credits, rebates, reductions, concessions, or other amounts are due or will become due to tenants under leases executed before the date hereof, except as expressly provided in the leases referred to in Schedule A or agreements or commitments made with hotel guests before the date hereof; and Seller shall indemnify Purchaser against any claim, loss, or liability with respect thereto. Seller shall pay all commissions in connection with any lease executed before the date hereof and indemnify Purchaser against any claim, loss, or liability with respect thereto.

25. *Fire and other insurance.* Until the closing of title, Seller will not cancel its present fire insurance policies on building and contents, or for rent and use and occupancy insurance, now carried upon the premises, as listed upon annexed Schedule C. If the insurance carrier cancels any such policy, Seller will promptly obtain new coverage in the same amount.

26. *Uninsured damage to premises.* If the premises are damaged before the closing date by fire or other casualty not covered by insurance, the provisions of Section 5-1311 of the General Obligations Law, the New York Uniform Vendor and Purchaser Risk Act, shall govern.

27. *Insured damage to premises.* If the premises are damaged before the closing date by fire or other casualty covered by insurance:

- (a) Seller shall give prompt written notice of the damage to Purchaser.
- (b) Seller shall furnish Purchaser promptly with an estimate of the Hammer Company, contractor, of 100 Country Drive, White Plains, New York, of the estimated cost of restoration, replacement, or repair of the damage.
- (c) If the estimated cost of restoration, replacement, or repair does not exceed \$600,000, Seller shall, with due diligence, proceed to effect the restoration, replacement, or repair, at its expense, and shall receive the funds payable by the insurance companies.
- (d) If the estimated cost of the restoration, replacement, or repair exceeds \$600,000, Purchaser may cancel this contract by giving Seller written notice of cancellation within 30 days after receipt of Seller's notice of damage and of such estimate. In that case, all sums paid by Purchaser to Seller on account of the purchase price shall be repaid to Purchaser, this agreement shall be cancelled, and neither party shall have any further claim or remedy against the other. If Purchaser does not elect to cancel this contract, Seller shall, with due diligence, proceed to effect the restoration, replacement, or repair, at its expense, and shall receive the funds payable by the insurance companies for the restoration, replacement, or repair.
- (e) Seller shall submit all contracts for the restoration, replacement, or repair to Purchaser for approval of their provisions except the provision regarding cost, but Purchaser shall not unreasonably withhold his approval.
- (f) If the restoration, replacement, or repair is not completed on the closing date:
- (1) Seller shall furnish Purchaser a bond of a surety company authorized to do business in the State of New York in any form and contents and amount that is reasonably acceptable to Purchaser, guaranteeing the performance and completion of all such work, the discharge of any liens that are filed in connection therewith or by reason thereof, and the payment of the cost of restoration, replacement, or repair. Or Seller shall deposit with the Central Trust Company under a depositary agreement to which Purchaser is a party cash, government bonds, or securities listed on the New York Stock Exchange or American Stock Exchange in the amount determined by Hammer Company, as adequate to guarantee the performance and completion of such work, the discharge of liens with respect thereto, and the payment of the cost thereof.
 - (2) Seller shall deliver to Purchaser Seller's agreement to indemnify and save harmless Purchaser against all claim, loss, or liability with respect to the performance, completion, discharge of liens, and payment of the cost of such work, regardless of whether such bond, bonds, or securities are sufficient for these purposes.
 - (3) Seller shall also obtain public liability insurance in which Purchaser is named as one of the insureds, with limits of \$1,000,000 for personal injury to any one person, and \$2 million in connection with any one occurrence, and \$500,000 for property damage, and Workmen's Compensation Insurance. Seller shall deliver the insurance policies, together with proof of payment of the premiums, to Purchaser. The policies shall provide that Purchaser be given at least ten-days' prior notice of any cancellation. Seller shall indemnify and hold harmless Purchaser from and against all claims, loss, or liability resulting from Purchaser's failure to carry the required insurance.

(g) Seller shall assign to Purchaser on the closing date all of Seller's claims under the rent and use and occupancy insurance policies listed in Schedule C for damages accruing after the closing date by reason of such casualty.

28. *Eminent domain.* If before the closing date the entire premises is taken by any governmental authority under its power of eminent domain, Purchaser may, by giving Seller written notice within ten business days after the taking, either:

(a) Take title to the premises on the closing date without any abatement or adjustment in the purchase price, in which event Seller shall assign its rights in the condemnation award to Purchaser (or Purchaser shall receive the condemnation award from Seller if it has already been paid before the closing date); or

(b) Cancel this contract, in which event all sums deposited on account of the purchase price shall be refunded to Purchaser, this agreement shall be null and void, and neither party shall have any further right or remedy against the other.

29. *Lien for purchaser's deposit and expenses.* All sums paid on account of this contract and the reasonable expenses of the examination of the title to the premises are made liens thereon, but such liens shall not continue after Purchaser's default hereunder.

30. *Judgments not applicable.* If a search of the title discloses judgments, bankruptcies, or other returns against other persons having names the same as or similar to that of Seller, Seller will on request deliver to Purchaser an affidavit showing that such judgments, bankruptcies, or other returns are not against it.

31. *Pending lawsuits.* Seller covenants and warrants that no other suits, actions, or proceedings are pending, whether involving a governmental authority or private party, to which Seller is a party or in connection with the operation of the hotel or its bars or restaurants, except those arising in the ordinary course of business and negligence actions covered by liability insurance and Workmen's Compensation claims. Seller shall give Purchaser prompt notice of all suits instituted between the date hereof and the closing date.

32. *Corporate resolutions and affidavits.* Seller shall deliver to Purchaser at the closing a certified copy of the resolution of its Board of Directors authorizing the sale of the premises under this contract, together with the affidavit of its President or Vice President stating that the resolution of stockholders authorizing the sale, referred to in paragraph 5(d), was adopted by a vote of the holders of at least two thirds of Seller's shares issued, outstanding, and entitled to vote, at a special meeting duly called for such purpose. Seller shall also deliver to Purchaser the affidavit of its President, Treasurer, or other fiscal officer warranting that the conveyance of the premises to Purchaser will not render Seller insolvent, and all other resolutions and documents that the title company insuring title reasonably requires.

33. *Abatement of purchase price for limited breach by seller.* If either of the following events occur, and Purchaser's resulting damages do not exceed \$70,000, Purchaser may not cancel or rescind this contract but rather shall receive an appropriate abatement of the purchase price on the closing date: (1) any of Seller's representations or warranties under the contract are incomplete or untrue, or (2) any of Seller's covenants hereunder are breached before the closing date. Nothing contained herein, however, shall constitute a waiver of Purchaser's rights to recover for damages after the closing date by reason of incomplete or untrue representations and warranties, or the breach of covenants, which survive delivery of the deed.

34. *Broker.* The parties acknowledge that Deerfoot Realty Corp. is the only broker involved in this transaction and brought about this sale. Seller shall pay the broker's commission in accordance with the terms of a separate agreement made between them.

35. *Recording of contract.* This contract or a memorandum of it may be recorded in the Office of the Register of Westchester County.

36. *Notices.* All notices under this contract shall be sent by certified mail, be deemed given when mailed, and be addressed as follows:

(a) If to Purchaser: c/o William Johnson, Esq.
200 Madison Avenue
New York, New York

(b) If to Seller:

c/o
Loomis &
Goodman,
Esqs.
100 Fifth
Avenue
New
York,
New York

37. *Provisions surviving delivery of deed.* The provisions of the following paragraphs shall survive the delivery of the deed hereunder: 10, 13, 14, 17, 18, 19, 20, 21, 23, 24, 25, 33, and 34.

38. *Entire agreement; modification.* This contract constitutes the entire agreement between the parties. It may not be modified except by an instrument duly executed by the party against whom the enforcement of such modification is sought. This contract is being entered into after full investigation, neither party relying upon the other party's statements or representations unless contained herein. Purchaser has inspected the buildings, furnishings, and equipment on the premises and is thoroughly acquainted with their condition.

39. *Binding effect.* This agreement shall be binding upon and inure to the benefit of the parties hereto and their respective legal representatives, successors, and assigns.

40. *Nonwaiver.* No delay or failure by either party to exercise or enforce any right hereunder, and no partial or single exercise thereof, shall constitute a waiver of that or any other right, unless otherwise expressly provided herein.

41. *Headings.* Headings in this contract are for convenience and reference only and shall not be used to interpret or construe its provisions.

42. *Governing law.* This agreement shall be construed in accordance with and governed by the laws of the State of New York.

43. *Counterparts.* This agreement may be executed in one or more counterparts, each of which shall be deemed an original but all of which together shall constitute one and the same instrument.

44. *Time of essence.* Time is of the essence of this agreement.

The parties have duly signed this agreement.

Corporate Seal

Attest:

Secretary

Hotel Crown Corporation

by: _____

President

William Alterman



80 of 152 DOCUMENTS

Current Legal Forms for Real Estate

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Current Legal Forms for Real Estate
Chapter 21 SALES AND EXCHANGES
Part IV. Forms

C. CONTRACTS OF SALE: COMMERCIAL PROPERTY

25-21 Current Legal Forms for Real Estate FORM 21.46

FORM 21.46 Sale of resort motel, restaurant, and lounge--price allocation by separate contracts for motel and for restaurant-lounge--inventory valuation by accountant--contingent on mortgage commitment, franchise and liquor license transfers

COMMENT

These two contracts are part of a single transaction. In the first agreement, the largest asset, the real estate of the motel, is sold along with the personal property used in connection with the operation of the motel. The purchaser has made its purchase contingent on inspection of the property. This will allow the purchaser to do its due diligence regarding such matters as the physical condition of the property, environmental compliance, and compliance with the Americans With Disabilities Act of 1990 and its Accessibility Guidelines. This transaction should be approached not only as a sale of real estate, but also as the sale of an on-going business. In the second contract the parties deal with the sale of the lounge and restaurant business.

Allocation of purchase price

The specific allocation of the purchase price in the contract to the various assets sold is an advantage to both the buyer and the seller. The negotiation of the price for each asset, specified in the contract, is strong evidence of its fair market value. This negotiated allocation should be persuasive with the Service for purposes of determining the seller's gain or loss, and the purchaser's basis for depreciation.

In the transaction here, the parties have allocated the price to the various assets, not only in the individual contracts, but also by means of writing two separate contracts dealing with two different classes of assets: (1) the motel (real estate vs. related personal property), and (2) the lounge and restaurant businesses (business, licenses, and franchise vs. inventory). A further break down of the purchase price may be desirable in other circumstances. Value may be determined at

a later date for tax purposes, but without the advantage of a specifically negotiated, arm's length fair market value set forth in a written contract.

At risk loss limitation

Generally, an investor's loss deductions are limited to the amount which he has "at risk." The amount of money invested in a venture, but obtained through nonrecourse financing, i.e., the borrower-investor is not personally liable on the loan, is not considered, generally, to be at risk (unless the nonrecourse financing is "qualified nonrecourse financing"). Subject to the at risk loss deduction limitation are the losses incurred in the holding of real estate and personal property and rendering services in making such real property available as a living accommodation.

Transferee liabilities

One of the prime considerations of buyer's counsel recommending a purchase of assets rather than the corporate entity itself is the avoidance of certain contingent liabilities of the corporation. Although a buyer may be willing to assume known liabilities which are a lien on a particular asset, such as a mortgage or secured loan, he may be unwilling to assume liability for outstanding or potential law suits, regulatory violations, or executory contracts. Although a substantial amount of the seller's liability can be avoided by the purchaser, counsel should carefully examine current developments in the law, especially where substantially all of the assets of a corporation are sold and transferee liability is sought to be imposed. Potentially dangerous areas to purchasers involve product liability claims, and qualified plan funding requirements. If the situation requires specific protection for the buyer, buyer's counsel might include specific warranties or representations in the contract that there have been no violations of the relevant law, rules, or regulations. Another method of providing some protection to the purchaser is to provide that the seller will indemnify the purchaser for any unspecified liability incurred by reason of the transfer of substantially all the assets to the purchaser. The second form has such an indemnity paragraph.

Special business *property* clauses

Aside from the provisions in this contract which deal specifically with real estate matters, there are special clauses included due to the purchase of the business as well. In addition to a deed, the seller is required to give a bill of sale for the furnishings and other personal property used in connection with the motel. A separate paragraph is added to protect the purchaser under the Bulk Sales Provisions of the Uniform Commercial Code, especially since a major part of the seller's supplies and inventory are to be transferred. The seller represents that it has good title to the personalty.

Franchise transfer

The contract is contingent upon the motel franchisor approving the operation of the motel by purchaser. This approval contingency should be included whether or not the franchise agreement between the seller and the franchisor expressly permits assignment of the franchise, or is silent on the matter. If assignment of the franchise is prohibited, entering the contract to sell the motel may be a ground for termination of the seller's franchise.

Apportionment of income

A relatively unique provision of this agreement apportions the resort income and expenses as of

the close of the calendar year. This arrangement is especially useful if both buyer and seller are calendar year taxpayers. Any delay in closing, expected or otherwise, will not prevent the calendar year purchaser from receiving the maximum tax and economic benefit from his investment. Depreciation, mortgage interest, and other deductible items should more than offset any additions to taxable income realized between January 1 and the delayed closing date.

Tie-in with business contract

The performance of the first contract is made expressly contingent upon the closing of the lounge and restaurant sale agreement. This permits the attorneys to deal with each matter in a separate writing, while preserving the interdependence of the transactions.

FORMS

(1) Sale of motel

THIS AGREEMENT is made at City of _____, State of _____ on January 1, _____ [year], by and between M&L Limited, a limited partnership in the State of _____ ("Seller") and M&L Resort Company, a corporation incorporated in the State of _____ ("Purchaser").

1. *Purchase and sale.* Seller agrees to sell and convey and Purchaser agrees to purchase from Seller, all of the real estate owned by Seller, with the building and improvements thereon, situated at 2200 Blayne Road in the City of _____, _____ County, State of _____, as more particularly described in attached Exhibit A (the "premises"), and all personal property, both tangible and intangible, used by Seller in its motel business, including, assets listed in a certain writing, exhibited by Seller to Purchaser, and initialed by Purchaser on the date of this Agreement entitled "List of Assets of M&L Limited, Used in Connection with the Operation of Siesta of America Motel", City of _____, State of _____ (the "personal property").

2. *Real estate.* The sale includes the land described in Exhibit A, the buildings and improvements thereon consisting of buildings used for a motel, lounge, restaurant, and golf clubhouse.

3. *Inspection.* Within 30 days from the date of execution of this Agreement, Purchaser or its agents may, at its or their own risk, inspect the premises regarding its physical condition and compliance with all laws, including environmental laws and with the Americans With Disabilities Act of 1990 and its Accessibility Guidelines, and show the same to prospective mortgagees at reasonable times during normal business hours if reasonable notice is given to Seller. In the event Purchaser is not satisfied with its inspections and Seller is not willing to correct the matters objected to by Purchaser, this Agreement may be terminated by Purchaser by written notice given by Purchaser to Seller within 40 days from the date of execution of this Agreement.

4. *Purchase price.* The purchase price shall be \$5.023 million, which shall be deposited into escrow as provided in paragraph 13. The purchase price shall be allocated as follows: \$173,000 to the personal property, and the balance of \$4.85 million to the premises.

5. Bill of sale; deed; title guaranty

(a) Seller shall convey marketable title to the personal property to Purchaser by bills of sale and other documents

necessary to effect such transfer. Seller shall convey marketable title to the premises to Purchaser or Purchaser's nominee(s) by good and sufficient general warranty deed warranting title to be free and clear of all liens and encumbrances except easements, covenants, and restrictions of record, if any, zoning ordinances and taxes and assessments, both general and special, which are a lien but not due and payable.

(b) Seller shall accompany its deed to the real estate with a title guaranty policy in the amount of the purchase price issued by State Title Guarantee and Trust Co. in the City of _____, State of _____ ("title company"), in its customary form, guaranteeing the record title to the premises to be good in Purchaser subject only to the exceptions to be contained in the deed. Notwithstanding the foregoing, Purchaser may, by giving written notice to the escrow agent before the closing date, elect to be furnished with an owner's policy of title insurance ("title insurance") in the amount of the purchase price, prepared by the title company, insuring marketable title to be good in Purchaser, subject only to the exceptions to be contained in the deed. In such event, in lieu of a guarantee, Seller shall furnish Purchaser with title insurance, and Seller shall pay that portion of the costs which would have been incurred if a guarantee had been issued, and Purchaser shall pay the remaining costs.

(c) On the closing date, the title company shall notify parties whether it is then in a position to issue the guaranty or title insurance (as the case may be). If the title company notifies the parties that (1) it will issue such a guaranty or the title insurance (as the case may be), this transaction shall be closed; or (2) it will not issue such a guaranty or title insurance (as the case may be), and if Purchaser does not forthwith waive such defects which the title company recites as preventing such issuance, or if Seller does not forthwith cure them, the closing of this Agreement shall be postponed for a reasonable period of time not to exceed 30 days until Seller removes the defects. If Purchaser waives such title defects by forthwith notifying the escrow agent, the title company and Seller or if Seller has cured such defects, the obligations of the parties hereunder are not affected by reason thereof, there shall be no abatement or reduction of the purchase price, and this transaction shall be closed, except that any title defects waived by Purchaser shall be set forth as exceptions in the deed and in the title guaranty or title insurance (as the case may be).

6. State of _____ Bulk Sales Act. No provision is made in this Agreement for compliance with the State of _____ Bulk Sales Act. In lieu of compliance with such act, and for the protection of the transferee of the assets, Seller guarantees and warrants to Purchaser that:

(a) As of the closing date, Seller shall have paid all of its creditors when their bills are due.

(b) Seller, at its expense, shall hold Purchaser harmless from all claims of Seller's creditors for claims arising under the State of _____ Bulk Sales Act.

7. *Damage or destruction.* If any damage or destruction in excess of \$100,000 occurs to the buildings or improvements on the premises before the closing date, Purchaser may either: (a) receive any proceeds of insurance payable in connection with the damage or destruction, but if the insurance proceeds are less than the amount of the damage and cost to restore, the purchase price shall be credited in the amount of such deficit, or (b) withdraw from the within transaction. In the latter event, the escrow agent shall return to the parties the respective funds and documents deposited in escrow by them, and thereupon each party shall be fully released and discharged from any liability or obligation hereunder to the other. However, each party shall pay one half of the escrow agent's charges.

If any such damage or destruction occurs, Seller shall forthwith give notice thereof to Purchaser, and Purchaser within 15 days after delivery of such notice shall elect under (a) or (b) hereof by so notifying Seller. If Purchaser fails to so elect within the 15-day period, it shall conclusively be deemed to have elected under (a). If Purchaser elects or is deemed to have elected under (a), its obligation hereunder shall not be affected by reason of any damage or destruction, and the within transaction shall be closed without abatement reduction of the purchase price, but if the insurance proceeds are less than the amount of the damage and cost to restore, the purchase price shall be credited in the amount of such deficit. All insurance proceeds received by Seller before the closing date by reason of damage or destruction to

the buildings and improvements shall be applied as a credit towards the funds Purchaser is required to deposit hereunder. If any such proceeds become payable but are not received by Seller before the closing date, Seller shall as of that date assign to Purchaser all of Seller's right, title, and interest in and to the proceeds. Seller shall maintain fire and extended coverage insurance on the buildings located on the premises in an amount not less than their full insurable value, and a standard "Contract of Sale Clause" naming Purchaser shall be endorsed on all Seller's policies of insurance until the transfer of title of record.

If any such damage or destruction of \$100,000 or less occurs to the buildings or improvements on the premises before the closing date, this Agreement shall remain in effect and, if Purchaser elects, Seller, at Seller's expense, shall promptly restore the premises or the purchase price shall be abated by the amount of the damage or destruction.

8. *Authority.* Seller shall deliver to the escrow agent, on the date hereof, certified copies of resolutions duly adopted by its partners, authorizing the execution and delivery of this Agreement by the partner(s) who have executed it and the performance of all acts required for carrying out its terms, provisions, and conditions.

9. *Other agreements.* Contemporaneously with the signing of this Agreement, another document is being executed. It is:

An Agreement for Purchase of Lounge and Restaurant (both of which are located on the premises) between Purchaser and Seller.

10. *Conditions of sale.* This sale is conditioned upon:

(a) Purchaser demonstrating to the satisfaction of the lender through which Purchaser intends to finance the purchase that it possesses working capital or a commitment to provide working capital of \$180,000, by the closing date;

(b) Purchaser obtaining approval of transfers of Seller's franchise as a motel operator from Siesta of America by the closing date;

(c) A lender delivering to Purchaser within 30 days from the date of execution of this Agreement a commitment to lend to Purchaser \$4.2 million, with interest payable monthly at 12 percent per annum for a three-year period, and principal payments of \$100 per month during such period, and with a financing fee of one point;

(d) The American Savings and Loan Company delivering to Purchaser by the closing date a commitment for permanent financing committing the lender to lend Purchaser \$4.2 million, with interest at 12 percent per annum, payable over a period of 22 years in equal monthly installments, with a financing fee of one point, such financing to commence at the end of the three-year period referred to in (c) above, unless Purchaser obtains other permanent financing during the three-year period; and

(e) The concurrent closing of the Agreement for Purchase of Lounge and Restaurant referred to in paragraph 9 above.

If any of the above conditions do not occur by the dates set forth above, Purchaser shall immediately give notice to that effect to Seller and to the escrow agent, and this Agreement shall be void. If this Agreement is voided, none of the parties shall have any claims against any other party by reason of anything contained herein. The escrow agent shall thereupon return any property previously delivered to it to the party originally making delivery.

11. *Closing date.* The transactions forming the subject of this Agreement shall be closed on February 1, _____ [year].

12. *Seller's warranties.* Seller represents and warrants, the warranties to be effective as of the closing date and to survive the closing, that:

(a) It will have good and marketable title to all of the personal property to be purchased, sold and assigned under the terms of this Agreement, that the same are not subject to any liens, charges or encumbrances of any type, and that such personal property shall be delivered to Purchaser on the closing date in good working order;

(b) It shall have completed, by February 1, _____ [year], all of the facilities of the motel, lounge, restaurant, recreational facilities, and golf clubhouse in accordance with the plans and specifications drawn by the firm of Alan and Cooper, Inc., the plans and specifications and any amendments having been delivered by Seller to Purchaser;

(c) The buildings comprised as part of the premises are entirely within its property lines and do not encroach upon any adjoining property and that no buildings on adjoining property encroach upon the premises;

(d) It has no knowledge of any outstanding notices or orders from any governmental authority with respect to the condition of the buildings and improvements comprised as part of the premises or the repair of the same, or with respect to any claim to violation of laws, ordinances, statutes, building codes, regulations and orders applicable thereto;

(e) It shall have paid for all work, labor and materials furnished to the premises before the closing date, and will indemnify and hold Purchaser harmless from any mechanic's liens, filed or otherwise claimed, in connection with any such work, labor and materials performed on or furnished to the premises before the closing date, and all legal and related expenses incurred by Purchaser by reason of the mechanic's liens;

(f) The heating, air-conditioning, electrical, and plumbing systems in the buildings are in good working order, and shall be on the date of title closing; and

(g) It shall have and/or will obtain all use, occupancy or other governmental approvals needed by Purchaser in connection with Purchaser's ownership, use and occupancy of the premises being conveyed.

13. *Escrow agent.* This transaction shall be placed in escrow with an escrow agent to be designated by Seller. An executed copy of this Agreement shall be deposited with the escrow agent concurrently with its execution by Seller, and the Agreement shall serve as the escrow instructions. The escrow agent may attach its standard conditions of acceptance thereto but if the standard conditions of acceptance are inconsistent with or in conflict with the terms and provisions hereof, the terms and provisions of this Agreement shall prevail.

On or before the closing date, (a) Purchaser shall deposit in escrow the purchase price described in paragraph 4, all or any portion of which may be cash or by way of a firm written loan commitment of lender, which shall require lender to make such cash available on the closing date, and (b) Seller shall deposit in escrow its deed, bills of sale, the resolution of authority under paragraph 8, and all other documents required by the terms hereof.

14. *Duties of escrow agent.* The escrow agent shall make a special tax search as of the closing date, both of record and with appropriate municipal authority in order to ascertain the existence of any special assessments which constitute a lien against the premises. The escrow agent shall charge Seller with the cost of the title search and title guaranty, the cost of the tax search, the conveyance fee for the deed, the cost to cancel any existing liens against the premises, one half of the escrow fee and all other charges properly chargeable to Seller consistent with the terms hereof. The escrow agent shall charge Purchaser with the cost of filing for record the deed, any mortgage Purchaser elects to place on the premises, one half of the escrow fee, the amount by which the costs of furnishing title insurance exceed the cost of furnishing a guaranty if Purchaser (under paragraph 5) elects to be furnished with title insurance, and all other charges properly chargeable to Purchaser consistent with the terms of this Agreement.

As of January 1, _____ [year], the escrow agent shall make the following prorations: real estate taxes

and assessments, both general and special, using for such purpose the rate and valuation shown on the last available tax duplicate, except that the full amount of any special assessments which shall as of the closing date constitute liens upon the premises, together with interest and penalties, if any, shall be paid into escrow by Seller, and the cost of any assignable insurance carried on the premises and personal property being conveyed by the terms of this Agreement.

On the closing date, the escrow agent shall file for record the deed and all other required instruments, and shall thereupon deliver to each party the funds and documents to which it is respectively entitled, together with its escrow statement in triplicate, if it then has on hand all funds and documents necessary to complete the within transaction and is in a position to and will issue and deliver, upon the filing of the deed for record, the title guaranty or its title insurance if so elected by Purchaser.

15. *Allocation of income and expenses.* The parties shall prorate income and expenses from the operation of the resort outside of escrow, using January 1, _____ [year], as the proration date. All bills relating to goods and services rendered before January 1, _____ [year], all Social Security, Withholding, Sales, Workmen's Compensation and Unemployment Insurance Taxes, or any other taxes or bills accrued or due and payable as of the close of business on December 31, _____ [year], shall be paid by Seller; all bills relating to goods and services provided on January 1, _____ [year], and thereafter, and any other taxes or bills accruing on or after January 1, _____ [year], shall be paid by Purchaser. Income from resort operations accrued as of the close of business on December 31, _____ [year], shall be payable to Seller, and income from resort operations accrued on or after January 1, _____ [year], shall be payable to Purchaser.

On January 1, _____ [year], or as soon thereafter as possible, the parties will cause the meters for all utility services, including, water, gas and electricity, to be read, and on said date to be changed from the name of Seller to the name of Purchaser. Seller will pay for all utility services up to such date, and Purchaser will pay for all utility services rendered on or after such date. Seller will cancel as of the closing date, all service contracts relating to the premises that can be cancelled, and Seller shall assume as of the closing date those service contracts that cannot be cancelled.

16. *Delivery of possession.* As of 12:00 p.m. on the closing date, Seller shall deliver possession of the premises to Purchaser.

17. *Notice.* All notices under this Agreement shall be sent by certified or registered mail, postage prepaid, return receipt requested, and addressed as follows:

If to Purchaser, to: M&L Resort Company
c/o John R. Martin, Esq.
1256 East Main Street
City of _____, State of _____

If to Seller, to: M&L Limited
c/o Olson, Radner & Kulpepper
235 Cleveland Avenue
City of _____, State of _____
Attn: James E. Olson

18. *Condition of premises.* Subject to the provisions of paragraph 7, between January 1, _____ [year], and the closing date, Seller represents that it will maintain the premises in a condition in which it existed as of January 1, _____ [year], subject, however, to ordinary wear and tear. Such obligation of maintenance includes adequately protecting the premises, maintaining the sprinkler system in operating condition and maintaining the heating, air conditioning, electrical and plumbing systems.

19. *Binding effect.* This Agreement shall be binding upon and inure to the benefit of the parties hereto and their respective legal representatives, successors, and assigns.

20. *Entire agreement; modification.* This instrument constitutes the entire agreement between the parties hereto and may not be modified except by an agreement duly executed and signed by the party against whom the enforcement of such modification is sought.

21. *Nonwaiver.* No delay or failure by either party to exercise or enforce any right hereunder, and no partial or single exercise of such right, shall constitute a waiver of that or any other right, unless otherwise expressly provided herein.

22. *Headings.* Headings in this Agreement are for convenience and reference only and shall not be used to interpret or construe its provisions.

23. *Governing law.* This agreement shall be construed in accordance with and governed by the laws of the State of Ohio.

24. *Counterparts.* This Agreement may be executed in one or more counterparts, each of which shall be deemed an original but all of which together shall constitute one and the same instrument.

25. *Time of essence.* Time is of the essence of this Agreement.

The parties have executed this Agreement on the day and year first above written.

Seller:

M&L Limited

by _____

General Partner

Purchaser:

M&L Resort Company

by _____

(2) Sale of lounge and restaurant

THIS AGREEMENT is made and entered into at City of _____, State of _____, on January 1, _____ [year], by and between M&L Limited ("Seller") and M&L Resort Company, a Michigan corporation ("Purchaser").

Recitals

Seller has conducted a lounge and restaurant business located at 2200 Blayne Road, City of _____, State of _____, under the name "Meadow Lark"; and

Seller desires to sell and convey to Purchaser, and Purchaser desires to purchase from Seller, all of the tangible and intangible assets of the business;

Now, therefore, the parties agree with each other as follows:

1. *Purchase and sale.* Seller agrees to sell to Purchaser or its nominee, and Purchaser shall purchase, all the tangible and intangible assets used by Seller in its lounge and restaurant business, wheresoever located, including those assets listed on a certain writing, exhibited by Seller to Purchaser, and initialed by Purchaser on the date of this Agreement, entitled "List of Assets of M&L Limited, Used in Connection with the 'Meadow Lark' Restaurant and Cocktail Lounge, in the Siesta of America Motel, City of _____, State of _____.

2. *Purchase price.* The total purchase price shall be (a) \$102,880, plus (b) the value of the inventory on January 1, _____ [year] as provided in paragraph 9, which shall be deposited into escrow as hereinafter provided.

3. *Other agreements.* Contemporaneously with the signing of this Agreement, another agreement is being executed. It is a Purchase of Motel Agreement between Purchaser and Seller.

4. *Liquor license; bills of sale and assignments.* As soon as this Agreement is executed, Seller shall forthwith execute the requisite form of the State of _____ Department of Liquor Control, and shall cause the same, together with a copy of the Purchase of Motel Agreement referred to above, a copy of this Agreement, and all other documents required as a part of said application, to be filed with the proper State of _____ agency for approval of the transfer to Purchaser of Seller's liquor permits.

Seller shall convey marketable title to the assets being sold by bills of sale, assignments, and all other documents in customary form that are necessary to transfer the assets listed in paragraph 1 to Purchaser, free and clear of all liens, claims, charges, and encumbrances.

5. *Seller's warranties.* Seller represents and warrants (the warranties to survive the closing date) that:

(a) On closing date, it will have good and marketable title to all the assets to be purchased, sold and assigned under the terms of this Agreement, that the same are not subject to any liens, charges or encumbrances of any type, and that such assets shall be delivered to Purchaser on the closing date in good working order;

(b) It now holds liquor permits which are in good standing and have never been suspended or revoked; and

(c) It shall deliver possession of the premises at which the lounge and restaurant business are located to Purchaser at 12:00 p.m. on February 1, _____ [year], in a clean condition so as to permit Purchaser to operate the business as of that date.

6. *State of _____ Bulk Sales Act.* No provision is made in this Agreement for compliance with the State of _____ Bulk Sales Act. In lieu of compliance with such act, and for the protection of the transferee of the assets, Seller guarantees and warrants to Purchaser that:

(a) As of the closing date, Seller shall have paid all of its creditors when their bills are due.

(b) Seller, at its expense, shall hold Purchaser harmless from all claims of Seller's creditors for claims arising under the State of _____ Bulk Sales Act.

7. *Conditions of sale.* This sale is conditioned upon (i) approval by the State of _____ Liquor Control Department of the transfer of Seller's liquor licenses to Purchaser and the issuance to Purchaser of an appropriate vendor's license and food handling license by the closing date or within a reasonable period of time thereafter, and (ii) closing of the Purchase of Motel Agreement referred to in paragraph 3 above concurrently with the closing of this Agreement.

If any of the above conditions do not occur by the times stated above, Purchaser shall immediately give notice to that effect to Seller and to the escrow agent and this Agreement shall be voided. If this Agreement is voided, neither party shall have any claims against the other party by reason of anything contained herein. The escrow agent or respective parties shall thereupon return any property previously delivered to them to the party originally making delivery.

8. *Closing date.* The transactions forming the subject of this Agreement shall be closed on February 1, _____ [year], or on the same date the Purchase of Motel Agreement referred to in paragraph 3 above is closed, whichever is later.

9. *Transaction at closing.* On January 1, _____ [year], the parties shall take inventory of all unopened liquor, beer and wine used in the lounge and restaurant business. Such inventory shall be valued at cost, and the amount as determined by the parties shall be paid to Seller on the closing date, but in no event shall the amount paid to Seller exceed \$10,000. Seller shall have its normal supply of food for the restaurant on hand on the closing date, and said food supplies shall pass to Purchaser as part of this transaction, without cost to Purchaser.

10. *Escrow Agent.* This transaction shall be placed in escrow with an escrow agent to be designated by Seller. An executed copy of this Agreement shall be deposited with the escrow agent concurrently with its execution by Seller, and this Agreement shall serve as the escrow instructions. The escrow agent may attach its standard conditions of acceptance thereto, but if the standard conditions of acceptance are inconsistent with or in conflict with the terms and provisions hereof, the terms and provisions of this Agreement shall control.

On or before the closing date, (a) Purchaser shall deposit into escrow the purchase price described in paragraph 2, except for the value attributed to the inventory which is deposited into escrow on the closing date, all or any portion of which may be cash or by way of a firm written loan commitment of Purchaser's lender, the commitment requiring lender to make such cash available on the closing date, and (b) Seller shall deposit in escrow its bills of sale and any other documents needed to transfer to Purchaser the assets being sold to Seller.

11. *Duties of escrow agent.* On the closing date, if the conditions set forth in paragraph 7 are met, the escrow agent shall:

- (a) Deliver to Purchaser all documents held by it that are necessary to transfer to Purchaser the assets listed in paragraph 1;
- (b) Pay to Seller the purchase price referred to in paragraph 2, less any prorations charged against Seller; and
- (c) Pay to Seller the value of the inventory as of January 1, _____ [year].

In closing this transaction, the escrow agent shall charge one half of its escrow fee to each party.

12. *Allocation of income and expenses.* The parties shall prorate income and expenses from the operation of the restaurant-lounge outside of escrow, using January 1, _____ [year], as the proration date. All bills

relating to goods and services rendered before January 1, _____ [year], all Social Security, Withholding, Sales, Workmen's Compensation and Unemployment Insurance Taxes, or any other taxes or bills accrued or due and payable as of December 31, _____ [year], shall be paid by Seller. All bills relating to goods and services provided on January 1, _____ [year], and thereafter, and any other taxes or bills accruing on or after January 1, _____ [year], shall be paid by Purchaser. Income from restaurant-lounge operations accrued as of the close of business on December 31, _____ [year], shall be payable to Seller, and income from restaurant-lounge operations accrued on or after January 1, _____ [year], shall be payable to Purchaser.

On January 1, _____ [year], or as soon thereafter as possible, the parties will cause the meters for all utility services, including water, gas and electricity, to be read, and on said date to be changed from the name of Seller to the name of Purchaser. Seller will pay for all utility services up to such date, and Purchaser will pay for all utility services rendered on or after such date. Seller will cancel as of the closing date, all service contracts relating to the restaurant-lounge business that can be cancelled, and Seller shall assume as of the closing date those service contracts that cannot be cancelled.

13. *Indemnification.* Seller shall indemnify and hold Purchaser harmless from and against all actions, suits, damages, judgments, costs, charges, expenses, and attorneys' fees in consequence of any liabilities of whatever nature accruing before the closing date and which may be asserted against Purchaser as the transferee of assets to be purchased by Purchaser hereunder. It is understood that this indemnity refers only to such transferee's liabilities as might be imposed by law on Purchaser as transferee of the assets to be purchased under this Agreement.

14. *Binding effect.* This Agreement shall be binding upon and inure to the benefit of the parties hereto and their respective legal representatives, successors, and assigns.

15. *Notices.* All notices hereunder shall be in writing and delivered personally or mailed by certified or registered mail, postage prepaid, return receipt requested, addressed to the parties at their last known addresses.

16. *Entire agreement; modification.* This instrument constitutes the entire agreement between the parties. It may not be modified except by an instrument duly executed by the party against whom the enforcement of such modification is sought.

17. *Nonwaiver.* No delay or failure by either party to exercise or enforce any right hereunder, and no partial or single exercise of such right, shall constitute a waiver of that or any other right, unless otherwise expressly provided herein.

18. *Headings.* Headings in this Agreement are for convenience and reference only and shall not be used to interpret or construe its provisions.

19. *Governing law.* This agreement shall be construed in accordance with and governed by the laws of the State of _____.

20. *Counterparts.* This Agreement may be executed in one or more counterparts, each of which shall be deemed an original but all of which together shall constitute one and the same instrument.

21. *Time of essence.* Time is of the essence of this Agreement.

The parties have executed this Agreement on the day and year first above written.

Seller:

M&L Limited

by _____

General Partner

Purchaser:

M&L Report Company

by _____



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Current Legal Forms for Real Estate

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Current Legal Forms for Real Estate
Chapter 21 SALES AND EXCHANGES
Part IV. Forms

C. CONTRACTS OF SALE: COMMERCIAL PROPERTY

25-21 Current Legal Forms for Real Estate FORM 21.47

FORM 21.47 Sale of racket club with restaurant and lounge--covenant not to compete with allocation of purchase price--real estate sale agreement attached--guarantee of seller's performance

COMMENT

Sale of a sports facility, here a racquet ball and tennis court complex, is, in effect, the sale of an operating business. Included in the contract are the specific provisions relating to taking inventory, allocation of income and expenses, transfer of licenses as well as warranties and representations related to compliance with all laws, including environmental laws, building codes, and the Americans With Disabilities Act of 1990 and its Accessibility Guidelines. However, additional matters must be dealt with in the sale of a sports complex, including the assignment of membership deposits, employee contracts, and certification of the membership roster, if any. Because of the potentially exhaustible local market for use of racquet ball and tennis facilities, the purchaser is particularly interested in obtaining a covenant not to compete from the sellers. The value of this type of business would be severely diminished if the sellers were to open up a newer and competing facility in the same or adjoining county.

Covenant not to compete:

The practitioner should carefully examine the jurisdiction's limitations on the enforceability of a covenant not to compete. State courts vary in their interpretation as to what is a reasonable time period or geographical location in which the seller can be barred from competition.

Personal guaranty and covenant not to compete:

The seller in this contract is a closely held corporation with the sole purpose being the ownership and operation of the club. In the contract the seller's covenants, warranties, and representations, for the most part, are intended to survive the closing, and should be enforceable after closing. As a

practical matter, however, rights of enforcement against a shell or defunct corporation are useless. Therefore the buyer here obtained the personal guarantee of the principals of the selling corporation, as well as their personal and individual covenants not to compete.

Separate contracts:

Separate contracts are written for the transfer of the business and of the real estate. This is principally a matter of price allocation, as the provisions of the real estate contract can easily be included in the same writing as the business sale contract. However, when separate forms are used, care should be taken to include cross-contingency clauses in each. By this approach, performance of either contract is contingent upon performance of the other.

Joint closing:

The real estate closing is through an escrow agent with the business asset closing taking place simultaneously with the real estate closing. The status of title to be insured by a title company has been approved by the buyer. All of the purchase price is to be escrowed through the escrow agent closing the real estate portion of the sale.

FORM

Purchase Agreement

THIS AGREEMENT is made on February 27, _____ [year], between Tennis Associates, Inc. ("Seller"), and Jonathon S. Smythe and Harold E. Burns (collectively, "Buyer").

Recitals

Seller owns and operates a racket club, restaurant and lounge business and desires to sell the property and assets of the business upon the terms and conditions hereinafter set forth; and

Buyer desires to purchase the property and assets upon such terms and conditions;

It is therefore agreed as follows:

1. *Sale of business assets.* Seller shall sell, assign, and transfer to Buyer, and Buyer shall purchase, at the closing date described at paragraph 3 below, Seller's land, building, and assets set forth in Exhibit A, located at 1792 Sloan Avenue, City of _____, State of _____, and which are used in conjunction with a racket club, restaurant, bar and pro shop business known as "The Racket Club."

2. *Purchase price.* The purchase price for the property and assets shall be \$1.7 million.

3. *Closing.* The closing of this transaction shall take place at the date and place mutually agreed upon by the parties, but in no event later than 35 days following the execution of this Agreement, except for unavoidable delays arising from the time requirements of the Escrow Agent named in the Real Estate Purchase and Sale Agreement attached as Exhibit B.

The transfer of the business shall be deemed to take place as of the beginning of business on the closing date. All items of income and expense respecting the business, including utilities, _____ [year] personal property taxes, prepaid insurance, and all other expenses, and all items referred to in attached Exhibit C, shall be prorated between the parties as of the beginning of business on the closing date.

4. *Payment of purchase price.* The purchase price shall be delivered to Seller at the closing by the Escrow Agent appointed under the Real Estate Purchase and Sale Agreement, attached as Exhibit B, which shall be executed contemporaneously with the execution of this Agreement and thereafter performed according to its terms.

It is acknowledged that inventory to be purchased and sold in this transaction may, on the closing date, exceed \$12,000. The amount of such excess, if any, exclusive of spare parts inventory, shall be paid by Buyer to Seller in cash at the closing.

5. *Warranties and representations*

(a) Seller makes the following warranties and representations, all of which shall survive the closing, delivery of possession, delivery of a Bill of Sale, and recording of the deed:

(1) *Systems.* All plumbing and electrical systems in the building sold shall be, to Seller's knowledge, in good working order at transfer of possession;

(2) *Violations.* Seller has and shall have at the closing date no knowledge of any building code, use, or other violation at the premises including without limitation, any violation of environmental laws, federal, state or local, and violations of the Americans With Disabilities Act of 1990, and its Accessibility Guidelines;

(3) *Connection lines.* All sewer and other waste lines used in connection with the premises are lawfully tied into main lines in compliance with all applicable governmental regulations;

(4) *Good standing.* The Seller is a corporation incorporated under the laws of the State of _____, and authorized to do business in the State of _____. This transaction will not violate any corporate articles, bylaws, shareholder agreements, loan documents, or other corporate restrictions, and is duly authorized by all of Seller's Shareholders and Directors;

(5) *Leases, contracts.* There are no leases, contracts, or other obligations existing with respect to the business except as disclosed to Buyer in writing within 30 days;

(6) *Roof.* The roof on the property shall not leak at delivery of possession and shall be in good condition;

(7) *Income.* The Statement of Income exhibited to and initialed by Buyer fairly and accurately reports the earnings of Seller's business for the 12-month period ended June 30, _____ [year]; and

(8) *Liquor license.* Seller's liquor license is a D-5 permit in good standing with no revocation or suspension proceedings known, pending, or threatened as of the closing date.

(b) *Membership roster and deposits.* Seller represents and warrants that the roster of members is true and complete, and that the listed deposits, being made by each respective member, are in a separate account with the Eastlake Bank and Trust Company, and shall be assigned by Seller to Buyer at closing. Seller shall, at its expense, send written notice, approved by Buyer, to each such member advising it of the prospective change in ownership of The Racket Club, transfer of their deposit to the new owners, and a statement that operation of the club and court schedules shall remain

unchanged during the transfer. Such notice shall be sent out no later than 15 days before closing, but no sooner than 30 days before closing. Seller shall renew all memberships, and accept new memberships to The Racket Club in the ordinary course of business, pursuant to terms and conditions no less favorable to Seller than those presently in effect.

6. *Bulk sales.* In lieu of compliance with the State of _____ Bulk Sales Act, and for the protection of Buyer, Seller covenants and agrees that all of its creditors will be duly paid as their bills are presented or otherwise become due; and that Seller will indemnify and hold harmless Buyer from all claims, demands or losses, including costs of defense and attorney's fees, arising out of Seller's noncompliance with the State of _____ Bulk Sales Act.

7. *Operation of business and risk of loss.* Seller shall operate the business as before closing, consult with Buyer in connection with all contracts coming up for renewal, and maintain inventories in standard levels. If before the closing date the property or assets are damaged in an amount not exceeding \$25,000, this transaction shall be closed and Buyer shall be entitled to recover (i) all insurance proceeds paid by reason of such loss or damage, plus (ii) an additional amount equal to the deductible damage clause (if applicable) reflected in insurance policies covering such damage. If the damage before the closing exceeds \$25,000, Buyer may either (i) terminate this Agreement without liability, or (ii) waive the diminution in value and close hereunder, buying the property "as is." If Buyer elects (ii), he shall receive any insurance proceeds paid by reason of the loss or damage and the indicated deductible damage allowed.

8. *Transfers at closing.* In addition to the acts and transfers described in the Real Estate Purchase and Sale Agreement attached as Exhibit B, at the closing Seller shall furnish to Buyer:

(a) *Tax clearance.* Certificate of Property Tax Clearance issued by the Treasurer of _____ County, State of _____;

(b) *Good standing certificate.* A Certificate of Good Standing of Seller issued by the Secretary of State of the State of _____;

(c) *Bill of sale.* A Bill of Sale for all personal property, contract rights, fixtures, equipment, and motor vehicles sold herein. The Bill of Sale shall schedule all such items, include inventories at the customary levels, contain the warranties herein provided for, and convey all such items free and clear of all encumbrances;

(d) *Motor vehicle titles.* Motor vehicle titles free and clear of all encumbrances signed by Seller as assignor;

(e) *Liquor permits.* Seller's liquor permit, together with all documents that Buyer reasonably requests Seller to execute in connection with the transfer of the permit by the State of _____ Department of Liquor Control to Buyer; and

(f) *Resolutions.* Certified copies of Shareholders' and Directors' Resolutions of Seller authorizing this Agreement, and designating by name and title the individuals who are duly authorized to execute it. Such Resolutions shall refer to this Agreement by date and by complete reference and shall incorporate it as if fully included in such Resolutions.

(g) *Membership deposits.* Evidence of transfer of the membership deposit accounts held at the Eastlake Bank and Trust Company;

(h) *Proration.* At the closing, the Escrow Agent shall make the prorations required herein and in the attached Exhibit B, and shall deliver the balance of the purchase price to Seller.

9. *Transfer of liquor permit; employment agreement*

(a) Promptly upon completion of the closing, Buyer shall, with Seller's cooperation, forward to the State of _____ Department of Liquor Control all application forms and ancillary documents required for the transfer of Seller's liquor sales permit to Buyer. The parties shall take all steps reasonably necessary to effect such transfer. Pending the completion of such transfer, the liquor sales portion of the business shall be operated by Buyer, in accordance with the terms of the Employment Agreement exhibited to and initialed by him, which shall be mutually executed and delivered at the closing.

(b) *Professional contract and trade name.* Buyer desires that the Employment Agreement be executed on behalf of Racket Sports, Inc., a corporation to be formed in the State of _____. It is agreed that:

(1) *Professional contract.* Buyer jointly and severally guaranties performance of every covenant, warranty, and representation made by said corporation in the Employment Agreement, waiving notice of acceptance of guarantee, notice of modification of terms when the same are known to Arnold C. Marshall in advance, any extension or forbearance given by Seller, and further waiving any requirement that suit first be brought against said Racket Sports, Inc., in order to enforce any of such obligations of Buyer.

(2) *Trade name.* If the closing does not occur, or if the closing occurs but paragraph 10 of this Agreement subsequently becomes operative, all right, title, and interest in the name "The Racket Club" and every variation thereof shall forthwith be irrevocably transferred and assigned to Seller, and the name of the corporation shall be changed, by means of filing amended Articles of Incorporation with the Secretary of State of _____, to a name not including the words "Racket," "Racquet Ball," "Tennis," or "Courts."

10. *Failure of transference.* If the parties are notified by full and final order of the State of _____ Department of Liquor Control that Seller's liquor sales permit cannot be transferred to Buyer, and if Buyer cannot obtain a substitute permit, the within transaction shall be deemed void, and all property, documents and monies shall be promptly re-exchanged between the parties. In such event, (i) all profits attributable to the operation of the business before such re-exchange shall belong one half to Buyer and one half to Seller, and (ii) all property returned to Seller shall be in at least as good condition as when originally transferred to Buyer at the closing, reasonable wear and tear excepted.

11. *Covenant not to compete.* Seller, and by their signatures even though such signatures are in a representative capacity, Phillip S. Cameron, and Joan M. Cameron agree that for three years from the closing neither it nor they will directly or indirectly, whether as owner, Shareholder, Director, agent, employee, or in any other capacity, compete with Buyer or his successors or assigns, in the operation of a racquetball, tennis, or similar racket sports courts in the area of _____ and _____ Counties of the State of _____. Without limiting the foregoing, Seller and Phillip S. and Joan M. Cameron agree that they will not for a period of three years from the closing request or induce any employee of Buyer to leave Buyer's employment at The Racket Club or directly or indirectly assist any other person or entity in taking such action.

12. *Assignment.* Buyer may assign all or part of this Agreement to any person or entity, or sever any portions hereof, without Seller's consent. No such assignment or severance shall require Seller to perform any greater obligations than those set forth herein, but no assignment shall relieve Buyer of his liability to perform this Agreement.

13. *Acts necessary.* Each party shall do all acts necessary to carry out this Agreement and shall not disqualify himself or itself from performing.

14. *Representation of title and authority.* Seller warrants and represents that it has title to all assets to be purchased and

sold, and has full power and authority to execute this Agreement.

15. *Notices.* All notices and communications under this Agreement shall be mailed by certified mail, return receipt requested, or hand delivered as follows:

If to Seller: Tennis Associates, Inc.
1792 Sloan Avenue
City of _____, State of _____

with a copy to: Alan, Wood & Staele
150 South Main Street
P.O. Box 1031
City of _____, State of _____

If to Buyer: Jonathon S. Smythe, and/or
Harold E. Burns
368 Raven Court
City of _____, State of _____

16. *Binding effect.* This Agreement shall be binding upon and inure to the benefit of the parties hereto and their respective legal representatives, successors, and assigns.

17. *Entire agreement; modification.* This instrument constitutes the entire agreement between the parties. It may not be modified except by an instrument signed by the party against whom the enforcement of such modification is sought.

18. *Nonwaiver.* No delay or failure by either party to exercise or enforce any right hereunder, and no partial or single exercise of such right, shall constitute a waiver of that or any other right, unless otherwise expressly provided herein.

19. *Headings.* Headings in this Agreement are for convenience and reference only and shall not be used to interpret or construe its provisions.

20. *Governing law.* This agreement shall be construed in accordance with and governed by the laws of the State of _____.

21. *Counterparts.* This Agreement may be executed in one or more counterparts, each of which shall be deemed an original but all of which together shall constitute one and the same instrument.

22. *Time of essence.* Time is of the essence of this Agreement.

23. *Contracts disclosed.* Seller represents that at or before the closing it will have disclosed and delivered to Buyer all Contracts pertaining to the premises and the operation of the business.

24. *Certificate of sales tax clearance.* Seller will secure and deliver to Buyer as soon as possible a Certificate of Sales Tax Clearance. Buyer acknowledges that same will not be delivered until after closing.

25. *Additional repairs to premises.* The Escrow Agent is to hold back \$2,500 from the proceeds to Seller at the closing. The Escrow Agent may pay this sum to Seller when the Agent receives a Certificate of Horace Jones verifying that Seller has completed repaving of the parking lot over sewer line repairs and roto-tilling and seeding of the area affected by sewer line repairs, such repaving and seeding being comprised by the following:

(a) *Repaving.* Repaving of the strip 3 feet wide by 130 feet long at the back of the building, from the

edge thereof to the sewer basin; and

(b) *Seeding*. Roto-tilling and seeding along the length of the building, at the south side thereof parallel to Sloan Avenue, from east to west.

The parties have executed this Agreement, in duplicate, on the date first above written.

Tennis Associates, Inc.

by _____

Philip S. Cameron, President

and _____

Joan M. Cameron, Secretary

Jonathon S. Smythe

Harold E. Burns

Personal Guaranty

The undersigned, Philip S. Cameron and Joan M. Cameron, jointly and severally guarantee performance of each and every obligation and satisfaction of each and every warranty and representation made by Seller in the foregoing Agreement, waiving: Notice of Acceptance of Guaranty; Notice of Modification or Change to the Terms of the Agreement when such Modification of Terms is made known to Phillip S. Cameron in advance of such modification; all extensions or forbearance given by Buyer; and any requirement that suit first be brought against Seller in order to enforce any of such obligations.

Phillip S. Cameron

Joan M. Cameron

Exhibit A

Asset and Value Allocation

Land _____

\$ 90,000

Building, etc. _____	870,000
Courts _____	640,000
Inventory _____	12,000
Buses _____	6,000
Furniture and Fixtures _____	72,000
Covenant not to compete _____	10,000
TOTAL	1,700,000

The foregoing is intended to include all property located at the premises used in connection with Seller's business at the premises but excluding all cash and accounts receivable.

Exhibit B

Real Estate Purchase and Sale Agreement

THIS REAL ESTATE PURCHASE AND SALE AGREEMENT is made on February 27, _____ [year], between Tennis Associates, Inc. ("Seller"), and Jonathon S. Smythe and Harold E. Burns (collectively, "Buyer").

Recitals

Seller and Buyer are entering into an Agreement dated this date (the "Business Agreement") for the sale of a racket club, restaurant and lounge business known as "The Racket Club" and located at 1792 Sloan Avenue, City of _____, State of _____, including the real estate; and

Seller and Buyer desire to provide by separate agreement the terms and provisions of the purchase and sale of the real estate assets;

It is therefore agreed as follows:

1. *Real estate assets.* The real estate assets being sold include the land described on the attached Schedule 1, and all buildings, fixtures, improvements, rights, privileges, and easements appurtenant thereto.
2. *Purchase price.* The purchase price for the real estate and assets shall be as set forth on Exhibit A annexed to the Business Agreement. The purchase price for the real estate assets, and additional funds to be applied toward payment of the business assets referred to in the Business Agreement, shall be paid by the deposit of Buyer's funds into escrow with the Escrow Agent, and by the deposit into escrow of the mortgage loan proceeds obtained by Buyer.
3. *Escrow Agent.* This transaction shall be placed in escrow with an Escrow Agent of Buyer's choice. Buyer shall deposit an executed counterpart of this Agreement with the Escrow Agent, and this Agreement shall serve as the Escrow Agent's escrow instructions. The Escrow Agent may attach its standard conditions of acceptance thereto, but if such conditions are in conflict with the terms and provisions hereof, this Agreement shall control.

4. *Closing.* This transaction shall be closed contemporaneously with the closing of the Business Agreement.

5. *Deed and title insurance.* Seller shall convey marketable title to the real estate assets to Buyer by good and sufficient general warranty deed, warranting title to be free and clear of all liens, charges and encumbrances, clouds and defects whatsoever, except zoning ordinances, taxes and assessments, both general and special, not yet due and payable, and restrictions, reservations, limitations, easements and conditions of record which have been previously approved by Buyer by review of the Title Guaranty Commitment referred to in Paragraph 10. below. An unexecuted copy of the warranty deed has been delivered to Buyer. The warranty deed shall be deposited into escrow with the Escrow Agent on or before the closing date.

Seller shall accompany its warranty deed with a title guaranty policy in the amount of \$1.7 million issued by Omaha Title Insurance Company ("Title Company") in its customary form, guaranteeing record title to the real estate assets to be good in Buyer subject only to the exceptions to be contained in the warranty deed. Notwithstanding the above, Buyer may, by giving written notice to the Escrow Agent before the closing date, elect to be furnished with an Owner's Fee Policy of title insurance ("title insurance") in the same amount issued by the Title Company, insuring marketable title to be good in Buyer subject only to the exceptions to be contained in the warranty deed. In such event, in lieu of the certificate of title guaranty, Seller shall furnish Buyer with title insurance. Seller shall pay that portion of the costs which would have been incurred if a certificate of title guaranty had been issued, and Buyer shall pay the remaining costs.

6. *Prorations.* Real estate taxes and assessments, both general and special, shall be prorated as of the date the warranty deed is filed for record, using for such purpose the rate and valuation shown on the latest available tax duplicate. If the proration does not fully reimburse Buyer for all real estate taxes and assessments accrued and unpaid as of the record date of transfer of title for the real estate assets, Seller shall promptly reimburse Buyer that amount accrued in excess of the proration credit upon the official certification of the real estate tax duplicate for the year _____ [year]. Further, the Escrow Agent shall prorate any insurance premiums on assignable policies assumed by Buyer, and service contract prepayments. Buyer shall receive a credit for any security deposits on leases affecting any part of the premises, and all tenant rents shall be prorated to the date of closing, treating rents which have become due before such date as having been paid on the date on which they became due, regardless of whether they were in fact paid.

As of the beginning of business on the closing date, the parties shall cause to be read all meters for utilities used in connection with the real estate assets, and shall bear their respective costs of such utilities.

7. *Duties of escrow agent.* On the closing date, the Escrow Agent shall file for record the warranty deed and any other required instrument and thereupon deliver to both parties the funds and documents to which they are respectively entitled, together with its escrow statement, if (i) the Escrow Agent is then in receipt of all funds and documents required to be deposited with the Escrow Agent, (ii) the Business Agreement between the parties is contemporaneously closed, and (iii) the Title Company is in the position to and will issue and deliver upon the filing of the deed for record, the required title guaranty or policy of title insurance. If the Escrow Agent notifies the parties that the Title Company will not issue such a guaranty or title insurance, and if Buyer is not willing to waive such defects, Seller shall immediately cure any title defects that the Escrow Agent recites as preventing such issuance, or cure the defects within 30 days (or any longer period permitted by Buyer).

8. *Closing costs.* In closing this transaction, the Escrow Agent shall charge Seller with (i) the full amount of real estate taxes and assessments, both general and special, prorated up to and including the date of transfer of title, (ii) the cost of a title search and title guaranty policy, (iii) the cost of satisfying any mortgage indebtedness for which Seller is liable, together with the cost of any mortgage cancellation, recording fee, or other costs incurred in connection with the satisfaction of such indebtedness, (iv) one-half of the escrow fee, (v) all other charges properly borne by Seller consistent with the terms of this Agreement, and (vi) the State of _____ Transfer and Conveyance Fee. The Escrow Agent shall charge Buyer with (i) the cost of financing this transaction which may be arranged for by

Buyer, (ii) the cost of filing for record the warranty deed, (iii) the amount by which the cost of furnishing the title insurance exceeds the cost of furnishing the title guaranty, if Buyer elects to be furnished with title insurance, (iv) one half of the escrow fee, and (v) all other charges properly borne by Buyer consistent with the terms of this Agreement.

From the proceeds distributable to Seller, the Escrow Agent shall withhold \$1,000 until Seller satisfies the Escrow Agent that all water bills owed by Seller have been paid.

9. *Binding effect.* This Agreement shall be binding upon and inure to the benefit of the parties hereto and their respective legal representatives, successors, and assigns.

10. *Title guaranty commitment.* Seller has secured from Omaha Title Insurance Company, a Title Guaranty Commitment in favor of Buyer, or his nominee, in the amount of \$1.7 million, and has delivered the commitment to Buyer. Buyer does not object to any matters contained therein.

11. *Notices.* All notices hereunder shall be in writing and delivered personally or mailed by certified or registered mail, postage prepaid, return receipt requested, addressed to the parties at their last known addresses.

12. *Entire agreement; modification.* This instrument constitutes the entire agreement between the parties. It may not be modified except by an instrument duly executed by both parties.

13. *Nonwaiver.* No delay or failure by either party to exercise any right hereunder, and no partial or single exercise of such right, shall constitute a waiver of that or any other right, unless otherwise expressly provided herein.

14. *Headings.* Headings in this Agreement are for convenience and reference only and shall not be used to interpret or construe its provisions.

15. *Governing law.* This Agreement shall be construed in accordance with and governed by the laws of the State of _____.

16. *Counterparts.* This Agreement may be executed in one or more counterparts, each of which shall be deemed an original but all of which together shall constitute one and the same instrument.

17. *Time of essence.* Time is of the essence of this Agreement.

Tennis Associates, Inc.

by _____

Phillip S. Cameron, President

Jonathon S. Smythe

Harold E. Burns



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Current Legal Forms for Real Estate
Chapter 21 SALES AND EXCHANGES
Part IV. Forms

C. CONTRACTS OF SALE: COMMERCIAL PROPERTY

25-21 Current Legal Forms for Real Estate FORM 21.48

FORM 21.48 Sale of bar and restaurant --transfer of liquor license and fixtures--seller agreement not to compete

COMMENT

This form is a contract for the sale of an operating bar and restaurant. The sale includes not only the real property, but also the business, fixtures, other personal property, and the liquor license. Consequently, the contract contains terms related to the sale of a business as well as terms relating to the sale of real property.

Allocation of purchase price:

The contract specifically allocates portions of the purchase price to real property, personal property and the liquor license. Such a negotiated allocation is strong evidence of the fair market value of each asset for the purposes of determining the seller's gain and loss, and the purchaser's basis for depreciation.

Stock in trade not included:

This contract specifically excludes from its provisions the sale of stock in trade, such as inventory and supplies needed to carry on the business. The purchaser is to buy such items separately and not as a part of the sale of the business. This exclusion is designed to remove the transaction from the Bulk Sales provisions of the Uniform Commercial Code.

Covenant not to compete:

The practitioner should carefully examine the jurisdiction's limitations on the enforceability of a covenant not to compete. State courts vary in their interpretation as to what is a reasonable time period or geographical location in which the seller can be barred from competition.

 AGREEMENT made and dated _____ [date], between _____, having an office at _____ Street, City of _____, State of _____ ("Seller"), and _____, having an office at _____ Avenue, City of _____, State of _____ ("Purchaser").

1. *Agreement to sell.* Seller agrees to sell, and Purchaser agrees to purchase, the following property:

a. The land and building located at _____ Street, City of _____, State of _____, on which is currently located the _____ Bar and Restaurant, and which is more particularly described in the annexed Exhibit A;

b. The fixtures, equipment and furniture located at _____ Bar and Restaurant, more particularly described in the annexed Exhibit B; and

c. Seller's liquor permit, No. _____, issued by the State of _____ Department of Liquor Control.

2. *Purchase price.* The total purchase price for all the property described above, real and personal, is \$_____, computed as follows: (a) \$_____ for the land and building; (b) \$_____ for fixtures, equipment and furniture; and (c) \$_____ for the liquor permit. The total purchase price is payable as follows:

a. \$_____ as a deposit upon the signing of this contract, by Purchaser's check to the order of Seller, subject to collection, the receipt of which is hereby acknowledged.

b. \$_____, by Purchaser's good certified or official bank check to the order of Seller on the closing of this transaction.

3. *Stock in trade excluded.* This sale does not include Seller's inventory, supplies or other stock in trade.

4. *Liquor Permit.* The approval of the State of _____ Department of Liquor Control of Purchaser's application for the transfer from Seller to Purchaser of Seller's liquor permit, No. _____. Immediately upon the execution of this contract, Seller and Purchaser shall jointly apply to the State of _____ Department of Liquor Control for the transfer of the liquor permit. If the State of _____ Department of Liquor Control fails or refuses to approve the application for such transfer, this contract shall terminate and the deposit money shall be returned to Purchaser.

5. *Conduct of business between contract and closing.* Seller will continue to operate, manage, maintain and repair the _____ Bar and Restaurant in the same manner as it is now conducted, reasonable wear and tear excepted, until the closing of this transaction and the delivery of possession of the property to Purchaser.

6. *Subject clauses.* The property described in Exhibits A, B and C is sold subject to the following:

a. Zoning regulations and ordinances and municipal building restrictions and all other laws, ordinances, regulations or restrictions of the federal, state, county or city governments now in force which are not violated by existing structures or use;

b. Any state of facts an accurate survey would show, if the facts do not render title unmarketable;

- c. Covenants, easements, restrictions and reservations of record, if any, which do not render title unmarketable or prevent the present use of the property;
- d. Possible encroachments of retaining walls, foundations, stoop areas, cellar steps, trim, cornices, sidewalks, driveways, parking lots, and fences;
- e. Rights, if any, acquired by any utility company to maintain and operate lines, wires, cables, pipes, poles and distribution boxes in, over or upon the property;
- f. Any matter that a title insurance company would ordinarily insure against without additional premium.

7. *Delivery of deed.* Upon receiving payment of the purchase price as required by this contract, Seller shall execute, acknowledge and deliver to Purchaser a deed in proper statutory form for record, containing the usual full covenants and warranty so as to convey to Purchaser the fee simple of the premises free from all encumbrances except as stated in this contract.

8. *Deliver of bill of sale.* Upon receiving payment of the purchase price as required by this contract, Seller shall execute a bill of sale to Purchaser for the personal property.

9. *Closing.* The closing shall take place at the office of _____, at _____ Street, City of _____, State of _____, or at such other place as the parties mutually agree upon, on or about _____ [date]. The parties agree that if either party sends notice hereafter that time is of the essence, no less than _____ weeks' notice shall be given. No such notice shall be given until the transfer of the liquor permit has been approved as described in this contract.

10. *Possession.* Seller shall give Purchaser possession of the premises upon the closing of this transaction.

11. *Seller's representations and warranties.* Seller represents and warrants to Purchaser as follows:

- a. Seller is the owner in fee simple of all of the real property and owner of the personal property and liquor permit described in Exhibits A, B and C, respectively, subject only to the liens and encumbrances expressly stated in this contract.
- b. There are no liens, judgments, action or proceedings pending against Seller in any court or administrative agency as of the date of the signing of this contract.
- c. Seller has timely paid all taxes and assessments with respect to the property or its operation which are or could become liens against the property.
- d. All labor performed and materials supplied for the property have been fully paid by Seller, and no mechanic's liens or other liens may be claimed by any person for such labor and materials.
- e. No condemnation of any of the real property described in Exhibit A has occurred for which damages are unpaid, and there is no existing notice covering future condemnation.
- f. Seller has received no notice alleging or claiming any violations of building, housing, safety, fire, zoning, health, environmental, or other laws, rules or regulations affecting the property, including the Americans With Disabilities Act of 1990 and its Accessibility Guidelines, and Seller has no knowledge of any such violations. Seller will notify Purchaser promptly if Seller receives any such notice prior to Closing.

g. The property shall be conveyed free and clear from all violations or complaints filed or existing in any of the municipal departments of the City of _____ or any other governmental entity and affecting the property or its use. Compliance shall be at Seller's expense and fully completed before the delivery of the deed.

12. *Adjustments to purchase price.* The following adjustments shall be made to the purchase price at the closing:

- a. Real property taxes for the current fiscal year;
- b. Fees or charges to all transferable licenses and permits;
- c. Water and sewer expenses in accordance with customary practice in the City of _____;
- d. Electricity and gas, based on readings thereof obtained by Seller;
- e. Fuel on hand, if any, based on Seller's cost therefor.

13. *Risk of loss.* If the property is damaged by fire or other casualty before the closing, in an amount of not more than \$_____, Seller will be obligated to repair such damage before the delivery of the deed. If such damage is not or cannot be repaired within that time or if the damages exceed \$_____, Purchaser may elect to terminate this contract and the deposit money shall be returned to Purchaser. If Purchaser elects to carry out this contract despite such damage, Purchaser will be entitled to all the credit for the insurance proceeds resulting from such damage plus the amount of the deductible; however, such proceeds may not exceed the total purchase price. If any fixtures, equipment, appliances, furniture or the like fail between the date of this contract and the closing, Seller shall be liable for the repair or replacement of such items with items of similar size, age and quality, or an equivalent credit.

14. *Use of business name.* At the closing, Seller will assign to Purchaser its right to use the name "_____ Bar and Restaurant," and will execute any document required to transfer that name to Purchaser.

15. *Covenant not to compete.* Seller agrees that for a period of _____ years from the date of the closing, Seller will not engage directly or indirectly, as an owner, shareholder, agent, employee or in any other capacity, in a competing bar or bar and restaurant business within _____ miles from the _____ Bar and Restaurant.

16. *Unmarketable title.* If Seller is unable to convey a good and marketable title to the premises free from encumbrances, restrictions, encroachments or other defects in title except those specified in this contract, and Purchaser refuses to take title for that reason, this contract shall be deemed canceled and Seller shall return Purchaser's deposit.

17. *Liquidated damages.* If Purchaser fails to take title as required by this contract, Seller shall retain the deposit money paid on the signing of this contract as liquidated damages, and neither party shall have any other rights under this contract against the other. The parties agree that in such event actual damages to Seller would be difficult to ascertain and that said sum represents their best estimate of such actual damages.

18. *Assignment.* This contract shall not be assigned without Seller's prior written consent, which consent Seller shall not unreasonably withhold.

19. *Entire agreement; modification.* All previous understandings and agreements between the parties are merged in this

contract, which alone fully and completely expresses their agreement. This contract is entered into after full investigation made by Seller, and neither party relies upon any statement or representation made by anyone unless contained herein.

20. *Nonwaiver.* No delay or failure by either party to exercise any right under this contract, and no partial or single exercise of that right, shall constitute a waiver of that or any other right, unless otherwise expressly provided herein.

21. *Amendments.* No provision of this contract may be modified or waived unless in writing and signed by the party against whom the enforcement of such modification or waiver is sought.

22. *Binding effect.* This contract shall be binding upon and inure to the benefit of the parties hereto and their respective executors, administrators, legal representatives, heirs, successors, distributees, and assigns.

23. *Headings.* The headings used in this contract are for convenience only and shall not affect the construction to be given any of this contract's provisions.

24. *Governing law.* This contract shall be construed in accordance with and governed by the laws of the State of _____.

25. *Counterparts.* This contract shall be executed in counterparts, each of which shall be deemed an original _____.

26. *Notices.* All notices, elections, demands, requests and responses hereunder to Seller shall be given by certified mail, return receipt requested, addressed to _____, _____ Street, City of _____, State of _____. All notices hereunder to Purchaser shall be given by certified mail, return receipt requested, addressed to _____, _____ Avenue, City of _____, State of _____.

The parties have executed this agreement on _____ [date], in the City of _____, State of _____.

Seller

Purchaser



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Current Legal Forms for Real Estate
Chapter 21 SALES AND EXCHANGES
Part IV. Forms

C. CONTRACTS OF SALE: COMMERCIAL PROPERTY

25-21 Current Legal Forms for Real Estate FORM 21.49

FORM 21.49 Sale of land parcels--preconstruction testing and mortgage contingencies--right of entry for tests--seller retains one-half deposit if tests unsatisfactory

COMMENT

When a buyer intends to construct a building or other structure on vacant land, it is advisable for him to run tests on the property to determine if it is suitable for the purpose intended. If such a determination cannot be made prior to entering the contract, the contract should provide for such soil and other underground tests as the buyer's engineer or architect may require. The buyer should also make sure there are no environmental conditions affecting the land parcels, such as contaminated soils, which would necessitate large expenditures to clean up. The inspection should also include a wetlands delineation to determine if there are any wetlands areas and, if so, where they are located on the parcels.

Right of entry:

This contract gives the buyer the right to enter the property before closing for inspections, surveys, and tests. Before actual construction can begin, usually several inspections, surveys, and tests must be made. These are required for municipal, county, state, and, in some cases, federal approval, financing commitments, as well as for architectural and engineering plans and other items. To delay these inspections, surveys and tests until the buyer takes title may substantially increase the cost of a project.

Liquidated damages:

The contract provides that if the sub-soil tests do not meet specific standards, the purchaser will forfeit one half of the deposit (earnest money). The buyer will forfeit all of the deposit if he fails to take title for any reason (other than failure of the mortgage contingency or seller's default). Each

amount forfeited by the buyer is retained by the seller as liquidated damages. Frequently land acquisition contracts are made contingent on satisfactory soil and other tests. This is an alternative to the provision in this contract for forfeiture of one half of the deposit.

Liquidated damages received by a seller upon a buyer's default are taxable as ordinary income. This arrangement between buyer and seller strongly resembles an option. Except for failure of the mortgage contingency, the buyer will never see one half of his deposit or earnest money, while the seller is fairly assured of receiving at least one half of the earnest money, either upon a negative sub-soil test or at closing. If, in fact, the contract is deemed to be an option, the seller would receive ordinary income treatment for the "liquidated damages." The buyer, on the other hand, would receive capital loss (or gain) treatment upon his failure to exercise the option. For a further discussion of options see The Tax Background § 21.03 at the beginning of this chapter.

Liquidated damages, local law:

Generally, where liquidated damages are deemed to be a penalty, the courts will not permit the seller to collect them. The amount provided as liquidated damages must be reasonably related to anticipated actual damages, which are not ascertainable at the time of signing of the contract. A careful review of the relevant jurisdiction's law should be made before setting an amount for liquidated damages.

FORM

THIS AGREEMENT is entered into at Cleveland, Ohio, by and between Josephine Jones, a widow, her executors, administrators, successors and assigns ("Seller"), and Larry Harris, his executors, administrators, successors and assigns ("Buyer").

The parties agree as follows:

1. *Premises.* Seller agrees to sell, and Buyer agrees to buy, the real estate identified as parcels 3-C, 3-D and 3-E on the attached plat of survey, marked Exhibit "B," and said parcels 3-C, 3-D and 3-E being more fully described on Exhibit "A" attached, each of said Exhibits being initialed by the parties (the "property").

2. *Purchase price.* The total purchase price for the property shall be \$530,825, payable as follows:

(a) \$25,000 delivered to Seller concurrently with the execution hereof, to be held by Seller as earnest money and applied as part of the purchase price, subject to the provisions of paragraph 5.

(b) \$145,000 to be deposited in escrow with the Escrow Agent on or before December 22, _____ [year].

(c) The balance of \$360,825 from Buyer's lender, The Midwest Insurance Company of America, in the form of a first mortgage loan in such amount, with a fixed interest rate of 8% per annum or lower, amortized by fixed payments of principal and interest over a period of twenty (20) years with a balloon payment due at the end of ten (10) years.

3. *Delivery of possession.* Seller shall deliver possession of the property to Buyer upon the date of the transfer of title. Buyer and his agents or employees may enter upon the property in order to cause inspections, surveys, or tests as

provided in paragraph 6, at Buyer's expense, including costs for adverse environmental conditions and to determine if there are any wetlands areas. Buyer shall indemnify and save Seller harmless from all liability with respect thereto, including claim for damages to person or property occurring as a result thereof. Buyer shall repair and restore any damage caused to the property to as near as possible to its prior condition.

4. *Proration of taxes.* Taxes and assessments, both general and special, shall be prorated as of the date of the filing of the deed for record, using as the basis of such proration the last available tax duplicate. The full amount of all installments on any assessments payable from and after the date of the filing of the deed for record shall be assumed by Buyer. Seller shall pay when due the real estate taxes and assessments, both general and special, for the first half of the year _____ [year], directly to the Cuyahoga County Treasurer. Seller has applied for a reduction in the _____ [year] official valuation of the property for real estate tax purposes and contemplates applying for a reduction in such valuation for the year _____ [year]. If either or both of such applications result in a refund (or refunds) of real estate taxes for _____ [year], _____ [year], or both years, Seller shall receive the entire amount of the refund or refunds.

5. *Title.* Seller shall convey the property to Buyer or Buyer's nominee by good and sufficient warranty deed, free and clear of all liens and encumbrances, except applicable zoning ordinances, and other governmental limitations affecting or restricting said property, and those restrictions, limitations, easements and reservations of record which are identified on Exhibit C, attached hereto, and determined by Buyer not to interfere with Buyer's proposed construction and use of the property, and taxes and assessments, both general and special, which are a lien but not yet due and payable.

Seller shall furnish Buyer, at Seller's expense, an owner's title guaranty of the Mountain Land Title and Trust Company or, if it cannot be obtained, a fee policy of title insurance, in the full amount of the purchase price, guaranteeing or insuring, as the case may be, record title to be good in Buyer or his nominee as of the date of transfer of title, subject only to those matters permitted under this paragraph.

6. *Conditions of closing.* The following shall be conditions of Buyer's obligation to accept title to the property subject to the conditions of the within agreement:

(a) Buyer shall promptly cause Arrow Testing Laboratories ("Arrow") to make all inspections, surveys, and tests of the subsoil conditions of the property, including test borings, that are sufficient, in Arrow's judgment, to determine whether the subsoil meets the standards of "3500-pound bearing soil." Buyer shall furnish Seller with a copy of Arrow's report on or before September 30, _____ [year]. If the report indicates that the subsoil does not meet the above standards, Buyer may, by written notice to Seller on or before October 10, _____ [year], terminate this Agreement. In that event, Seller shall promptly return to Buyer one half of the \$25,000 earnest money provided for in paragraph 2(a), and retain the balance as liquidated damages. Otherwise, this Agreement shall remain in full force and effect, subject to the provisions of paragraph 6(b).

(b) On or before September 30, _____ [year], Buyer shall submit to The Midwest Insurance Company of America ("Midwest") his application for a first mortgage covering the property. If Midwest approves the application on the terms described in Paragraph 2(c) above by December 15, _____ [year], Buyer shall notify Seller in writing of that fact within five days after he receives the approval. This Agreement shall then remain in full force and effect, and subject to the terms of Paragraph 6(a), the parties shall close on December 27, _____ [year]. If such approval is not obtained by such date, this Agreement shall be terminated and all funds and documents shall be returned to the respective parties.

If either of the following events occur, this Agreement shall automatically terminate, but Seller shall be permitted to retain the earnest money as liquidated damages: (a) Buyer does not receive Midwest's approval on or before December

15, _____ [year], and does not, by that date, notify Seller in writing of his intention to close the transaction in accordance with this Agreement, or (b) Buyer receives Midwest's approval on or before December 15, _____ [year], but, without default by Seller, this transaction is not closed on December 27, _____ [year].

The parties agree that the liquidated damage amount referred to in this Paragraph 6(b) and in Paragraph 6(a) above represents their best estimate of what the actual damages would be in the event such events occur. The parties agree that such actual damages would be difficult to ascertain.

7. *Escrow instructions.* A fully executed copy hereof, which shall be deposited with the Escrow Agent promptly upon execution, shall serve as escrow instructions to the Escrow Agent. All documents and funds necessary to close this transaction shall be deposited in escrow with the Escrow Agent on or before December 22, _____ [year].

The parties instruct Mountain Land Title and Trust Company, as Escrow Agent, to proceed to close this transaction upon the following terms and conditions:

(a) When the funds, note, deed, mortgage, and other papers and documents necessary to close this transaction are deposited with you, and when Mountain Land Title and Trust Company is in the position to issue its title guaranty or fee policy of title insurance, in favor of Buyer in the amount of the purchase price, guaranteeing or insuring title to the property in Buyer as specified in Paragraph 5, and showing that Buyer's mortgage provided in Paragraph 2(c) is the first lien against the property, you shall proceed to cause to be filed the warranty deed and mortgage deed for record, cause to be issued the above-described title guaranty or policy, and make the charges and distribution of funds and documents as hereinafter provided;

(b) You shall charge Seller with the following:

- (1) The full amount of all taxes and assessments, both general and special, prorated up to and including the date of transfer of title;
- (2) The cost of necessary and applicable governmental transfer or other taxes due by reason of the transfer of property;
- (3) The charges of Mountain Land Title and Trust Company covering the title guaranty or policy;
- (4) The cost of recording the first mortgage;
- (5) One half of the escrow fee; and
- (6) All other charges that should properly be borne by Seller in accordance with the provisions of this Agreement;

(c) You shall charge Buyer with the following:

- (1) The cost of the filing of the deed for record;
- (2) One half of the escrow fee; and

(3) All other charges properly to be borne by Buyer in accordance with the provisions of this Agreement;

(d) Upon closing, after making the necessary charges and prorations, you will:

(1) Pay to the order of Seller the balance of the purchase price and other funds properly payable to Seller;

(2) Deliver to Seller the promissory note and mortgage deed;

(3) Deliver to Buyer the warranty deed;

(4) Deliver to Buyer the owner's title guaranty or policy; and

(5) Deliver to Seller or Buyer all other funds or documents necessary by reason of the provisions hereof;

(e) You may attach and incorporate your usual conditions of acceptance, not inconsistent with the provisions hereof, and the same, when so incorporated, shall be binding upon the parties and upon you as Escrow Agent. All of the terms and provisions of this Purchase Agreement are incorporated in these escrow instructions.

8. *Notice.* All notices under this Agreement shall be deemed given when deposited in the United States Mail, postage prepaid, and marked registered or certified mail, return receipt requested, and addressed to the parties and/or the Escrow Agent at the following addresses:

To Buyer: Mr. Larry Harris
1035 Maple Avenue
Cleveland, Ohio 44777

To Seller: Ms. Josephine Jones
c/o Marshall, Smith & Brown
2072 North Main Street
Cleveland, Ohio 44777

To Escrow Agent: Mountain Land Title and Trust
Co.
400 Main Street
Cleveland, Ohio 44777

9. *Entire agreement; modification.* This instrument constitutes the entire agreement between the parties with respect to the property. It may not be modified except by an agreement duly executed by both parties. Buyer acknowledges notice of, and agrees to take title subject to, Ceylon Ordinance No. 1992-874 creating a connection charge to the water main in Century Road. Buyer represents and warrants with respect to the property that he has not been contacted by, or engaged in any activity with, any broker other than A. C. Smith Company.

10. *Binding effect.* This Agreement shall be binding upon and inure to the benefit of the parties hereto and their respective legal representatives, successors, and assigns.

11. *Nonwaiver.* No delay or failure by either party to exercise any right hereunder, and no partial or single exercise of such right, shall constitute a waiver of that or any other right, unless otherwise expressly provided herein.

12. *Headings.* Headings in this Agreement are for convenience and reference only and shall not be used to interpret or construe its provisions.

13. *Governing law.* This Agreement shall be construed in accordance with and governed by the laws of the State of Ohio.

14. *Counterparts.* This Agreement may be executed in one or more counterparts, each of which shall be deemed an original but all of which together shall constitute one and the same instrument.

15. *Time of essence.* Time is of the essence with respect to the performance of all obligations hereunder.

The parties hereto have executed this Agreement as of September 15, _____ [year].

Josephine Jones, Seller

Larry Harris, Buyer



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Chapter 21 SALES AND EXCHANGES
Part IV. Forms

C. CONTRACTS OF SALE: COMMERCIAL PROPERTY

25-21 Current Legal Forms for Real Estate FORM 21.50

FORM 21.50 Sale of land tract--payment in publicly traded stock issued by purchaser

COMMENT

Under this agreement a publicly owned corporation is to purchase real property with shares of its own common stock. The land is warranted to be free of any adverse environmental conditions and free of wetlands areas. The agreement imposes upon the purchaser the responsibility for filing a proper registration statement with the Securities and Exchange Commission for the shares to be issued to the seller, and for the listing of such shares with the American Stock Exchange.

When property is sold for marketable securities there is little difficulty in calculating the seller's gain or loss. The amount realized by a seller is the fair market value of the securities plus the amount of mortgages assumed by the purchaser or to which the property is subject. Gain or loss is the amount realized less the adjusted basis of the property to the seller. See The Tax Background § 21.04.

A corporation which issues its own stock for property conveyed to it does not realize any gain or loss as a result of the acquisition, whether or not the stock issued by it was previously unissued or was held by it as treasury stock. The basis of the property acquired by the corporation is determined in the same manner as in the case of other purchasers, i.e., the fair market value of the stock issued to the seller plus the mortgages assumed or to which the property is subject.

FORM

AGREEMENT made February 17, _____ [year], by and between Harold J. Barnes and Barbara Barnes, his wife, of 700 Lake Drive, Richmond, Virginia, and Arnold Morrison and Dorothy Morrison, his wife, of 100

Center Drive, Falls Church, Virginia ("Sellers"), and Lansing Realty Corporation, a Delaware corporation with an office at 100 Fifth Avenue, New York, New York ("Purchaser").

Recitals

Sellers are the owners as tenants in common of a certain tract of land in Fairfax County, Virginia, more particularly described in the attached Exhibit 1; and

Sellers desire to sell, and Purchaser desires to purchase such land and to pay the purchase price therefor in shares of Purchaser's common stock, which are to be registered with the Securities and Exchange Commission pursuant to the Securities Act of 1933, as amended and supplemented, and are to be listed on the American Stock Exchange;

Now, therefore, it is mutually agreed as follows:

1. Representations by sellers. Sellers jointly and severally represent and warrant to Purchaser:

(a) As tenants in common, they are the owners of the land described in Exhibit 1, and at the date of the closing such land will be conveyed to Purchaser by deed of special warranty, free and clear of all easements, restrictions, and encumbrances, except as set forth in Exhibit 1.

(b) No litigation is now pending or threatened with respect to the ownership of the land described in Exhibit 1, or Seller's rights to enter into this agreement or to convey such land.

(c) The land described in Exhibit 1 consists of a tract of 50,000 acres zoned Commercial-Retail/Office, and such zoning permits the erection of a commercial building on a minimum lot containing 10,000 square feet.

(d) All items of information furnished by Sellers to Purchaser in connection with the Registration Statement required under this agreement will be true, correct, and complete in all material respects, and will not include any untrue statement of a material fact or omit any material fact necessary to make the information furnished not misleading in the light of the circumstances under which such information is furnished.

(e) In addition to the encumbrances set forth in Exhibit 1, the land described in such Exhibit is presently subject to a Deed of Trust given by Harris Homes, Inc. to James Wallis, as Trustee, and recorded in Deed Book 3542 at Page 190 of the land records of Fairfax County, Virginia, which on the date of the closing and the delivery of the stock provided for herein will have been paid and fully satisfied by them.

(f) The land is free from any hazardous or toxic substances or other contamination in violation of any environmental laws, federal, state or local.

(g) The land is free of any wetlands areas.

2. Representations by purchaser. Purchaser represents and warrants:

(a) It is a corporation duly organized and existing under the laws of the State of Delaware duly qualified to exercise its franchise and to do business in each state wherein such qualification is required. No action is pending or threatened in any court or administrative body which might deprive it of any of its corporate franchise, privileges, or powers.

(b) It will take the necessary action to reserve, out of its authorized capital stock, the number of shares necessary to be delivered to Sellers to close this transaction.

(c) The shares of its outstanding common stock are listed on the American Stock Exchange.

(d) The shares of its common stock to be issued under this agreement will, when issued, be validly issued and outstanding shares fully paid and nonassessable.

3. *Sale and consideration.* Sellers agree to sell, and Purchaser agrees to purchase from Sellers, the land described in Exhibit 1 in consideration of the issuance and delivery by Purchaser to Sellers of 75,000 shares of Purchaser's common stock, par value 25 cents per share, subject to the terms and conditions of this agreement, such shares to be issued at Sellers' instruction to the persons and in the denominations set forth in the attached Exhibit 2.

4. *Registration of shares of stock.* Promptly after the execution and delivery of this agreement Purchaser will, if in its discretion it is deemed practicable so to do, amend its presently pending Registration Statement filed with the Securities and Exchange Commission, so as to cover the shares of stock to be issued to the persons designated in Exhibit 2 upon the closing of the title. If such amendment is not deemed practicable Purchaser will promptly prepare and use its best efforts to file as soon as practicable after completion of the effectiveness of the pending Registration Statement a new Registration Statement with reference to such shares. In either case, the Registration Statement or amended Registration Statement may apply also to Purchaser's other shares or securities issued or to be issued pursuant to any other transaction which Purchaser may then have in view. Purchaser will use its best efforts to cause the applicable Registration Statement to become effective, and at the closing it will deliver to Sellers, and their assigns, as many copies of the applicable Prospectus as the parties agree upon, but not less than two copies of such Prospectus for each of the persons designated in Exhibit 2, in addition to one copy for each Seller.

5. *Failure of title.* If title to the land described in Exhibit 1 is not as represented by Sellers, Purchaser may terminate this agreement. In such event, Sellers shall be released from all liability for damages by reason of defect in title, but shall be obligated to pay Purchaser the reasonable costs of title examination and Purchaser's expenses in preparing and filing the applicable Registration Statement (or that portion equitably allocable to the securities deliverable to Sellers).

6. *Closing date.* It is a condition of this agreement that the applicable Registration Statement shall become effective on or before June 15, _____ [year]. If, however, Purchaser exerts its best efforts to file the Registration Statement in accordance with paragraph 4 and diligently pursues the same, Sellers shall, at Purchaser's request, grant any additional reasonable time beyond June 15, _____ [year] that will enable Purchasers to comply with the requirements of the Securities & Exchange Commission, to the end that the Registration Statement becomes effective at the earliest practicable date thereafter. As soon as the Registration Statement becomes effective, either by the original or extended date, Purchaser shall notify Harvey Baron, Esq., attorney for Sellers, at 1700 Connecticut Avenue, Washington, D.C. The date of the closing shall be not less than five days nor more than 15 days after the effective date of the Registration Statement, as set forth in the notice to Sellers. The closing shall take place at the office of Sellers' attorney or any other place agreed upon by the parties.

7. *Exchange of deed and stock.* At the closing Sellers shall deliver to Purchaser a special warranty deed for land described in Exhibit 1 conveying to Purchaser good and marketable title to such land, in fee simple, free and clear of all easements, restrictions, and encumbrances except as set forth in Exhibit 1, or otherwise acceptable to Purchaser, against delivery to the persons named in Exhibit 2 of 75,000 shares of Purchaser's fully paid and nonassessable common stock as set forth in Exhibit 2.

8. *Transfer of engineering work.* At the closing Sellers will assign, transfer, and deliver to Purchaser, in any form Purchaser requires, all engineering work performed or obtained by Sellers or their predecessors in title in connection with the proposed development of the land described in Exhibit 1, including all of Sellers' right, title, and interest in and to all soil borings, engineering work, plans, drawings, and copies thereof, together with an authorization directed to the engineers who performed such work for or on behalf of Sellers or their predecessors in title to deliver such work, plans,

drawings, and copies to Purchaser, at its request.

9. *Conditions to obligations of purchaser.* Purchaser's obligations to issue and deliver shares of its common stock shall be subject to the following conditions:

- (a) There has been no material breach of any representation or warranty set forth in paragraph 1 before the closing date, and all such representations and warranties shall be true as of the closing date.
- (b) Sellers and their respective spouses have taken all required action to convey to Purchaser, as herein provided, the land described in Exhibit 1.
- (c) Purchaser has received satisfactory evidence of good and marketable title to the land described in Exhibit 1.
- (d) All actions or proceedings to enjoin the carrying out of this transaction, except those instituted by Purchaser or on his behalf, have been completely determined at the time of closing.
- (e) The Registration Statement has become effective.

10. *Conditions to obligations of Sellers.* Sellers' obligation to convey the land described in Exhibit 1 shall be subject to the following conditions:

- (a) There has been no material breach of any representation or warranty set forth in Paragraph 2.
- (b) The Registration Statement has become effective within the time prescribed by paragraph 6, and no stop order is in effect at the closing date with respect to such Statement.
- (c) Purchaser has filed a listing application with the American Stock Exchange for the listing of the shares of its common stock to be issued to the persons designated in Exhibit 2, and such listing has been approved by the Exchange, subject to notice of issuance.

11. *Real estate taxes.* At any closing the parties will adjust real estate taxes, as of the date of closing, in accordance with customary practice in Fairfax County, Virginia.

12. *Broker.* The parties mutually represent and agree that no agent or broker brought about this sale.

13. *Assignment.* Purchaser may assign this agreement to a new or existing subsidiary, and in such event title to the land described in Exhibit 1 will be conveyed by Sellers to the assignee. The assignment, however, shall not release Purchaser from its obligations under this agreement.

14. *Notices.* All notices hereunder shall be in writing and delivered personally or mailed by certified or registered mail, postage prepaid, return receipt requested, addressed to the parties at their above addresses.

15. *Binding effect.* This agreement shall be binding upon and inure to the benefit of the parties hereto and their respective legal representatives, successors, and assigns.

16. *Entire agreement; modification.* This instrument constitutes the entire agreement between the parties. It may not be modified except by an agreement duly executed by both parties.

17. *Nonwaiver.* No delay or failure by either party to exercise any right hereunder, and no partial or single exercise of such right, shall constitute a waiver of that or any other right, unless otherwise expressly provided herein.

18. *Headings.* Headings in this agreement are for convenience and reference only and shall not be used to interpret or construe its provisions.

19. *Governing law.* This agreement shall be construed in accordance with and governed by the laws of the State of Virginia.

20. *Counterparts.* This agreement may be executed in one or more counterparts, each of which shall be deemed an original but all of which together shall constitute one and the same instrument.

21. *Time of essence.* Time is of the essence of this agreement.

The individual Sellers have hereunto set their hands and seals and the Lansing Realty Corporation has caused this agreement to be executed by its proper corporate officers, all on the date above written.

Sellers:

_____ (L.S.)

Harold J. Barnes

_____ (L.S.)

Barbara Barnes

_____ (L.S.)

Arnold Morrison

_____ (L.S.)

Dorothy Morrison

Purchaser:

Lansing Realty Corporation

Attest: _____

Secretary

by _____

President



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Current Legal Forms for Real Estate

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Current Legal Forms for Real Estate
Chapter 21 SALES AND EXCHANGES
Part IV. Forms

C. CONTRACTS OF SALE: COMMERCIAL PROPERTY

25-21 Current Legal Forms for Real Estate FORM 21.51

FORM 21.51 Sale of improved parcels--income-investment properties--payment in cash, purchase money note and deed of trust, and purchaser's unregistered corporate stock--title transferred subject to mortgages--stock to be registered on seller's request

COMMENT

The consideration for the sale in the contract illustrated here is cash, a purchase money note secured by a deed of trust, various existing mortgages, and stock of the purchasing corporation. The stock to be issued to the seller, although that of a public corporation, is not to be registered with the Securities and Exchange Commission as part of the sales transaction. Instead, the purchaser agrees to file the necessary registration statement with the Securities and Exchange Commission upon the request of the seller at the time the seller decides to dispose of the stock. In the meantime, the seller is required to deliver to the purchaser an investment letter. The purchaser, however, is required, as part of the sales transaction, to comply with the local securities statute and secure a permit approving the issuance of its stock to the seller.

The assets to be conveyed to the purchaser under this contract consist of seven different parcels, each in separate locations. Nevertheless, the transaction is treated as an entirety, primarily because the purchase money deed of trust is to cover all of the seven parcels. If a taxpayer acquires two or more properties at an aggregate cost, such cost must be apportioned in accordance with the respective values of the properties. The sale of each parcel is treated as a separate transaction and gain or loss is computed separately on each parcel. A lump-sum selling price for several parcels generally requires allocation in proportion to values, and neither the taxpayer nor the Service may allocate arbitrarily. On the other hand, parcels purchased separately retain their separate basis, even when they are later sold as a unit. There may be long-term capital gain on one, and short-term capital loss on the other.

In this contract because the purchaser has agreed to take the property in "as is" condition,

without warranties related to the condition of the property, under circumstances where the purchaser has not done an inspection prior to signing the contract, the purchaser should make the contract contingent on performing an inspection. This will allow the purchaser to verify the physical condition of the property, environmental condition, and compliance with laws such as the Americans With Disabilities Act of 1990 and its Accessibility Guidelines, and with building and zoning codes, including those related to adequacy of parking.

FORM

AGREEMENT made August 24, _____ [year], by and between Standard Realty Corporation, a Delaware corporation with offices at 100 Center Street, Dallas, Texas ("Seller"), and Jamestown Corporation, a Delaware corporation with offices at 500 Lake Street, Chicago, Illinois ("Purchaser").

1. *Sale.* Seller agrees to sell, assign, transfer, convey, and deliver to Purchaser, and the Purchaser agrees to purchase and pay for, all of the following:

All of those certain parcels of land and the improvements thereon, situated in the Counties of Dallas and Harris, State of Texas, more particularly described as Parcels A, B, C, D, E, F, and G, in Exhibit 1 hereto attached, together with and including all the rights, hereditaments, and appurtenances in anyway belonging or appertaining thereto, and Seller's interest in all fixtures and articles of personal property attached to or used in or about the buildings now erected on such lands, including refrigerators, ranges, boilers, engines, cabinets, shades, blinds, lawn mowers, and plumbing, heating, air conditioning, lighting, ventilating, laundry, and incinerating equipment, supplies and inventory;

For the considerations and upon the terms, provisions, and conditions hereinafter specified.

2. *Purchase price.* The purchase price for all of the above properties is as follows:

- (a) \$250,000 by check subject to collection as provided in paragraph 11 hereof.
- (b) \$750,000 in cash or a certified or cashier's check, or checks, in Dallas, Texas, funds at the closing of title.
- (c) The issuance by Purchaser to Seller at the closing of title of 50,000 shares of Purchaser's common stock of the par value of \$1 per share.
- (d) Purchaser's delivery to Seller of Purchaser's vendor's lien note in the principal amount of \$1.2 million, in the form attached as Exhibit 2, and a Deed of Trust securing such note, covering the properties described in Exhibit 1. The Deed of Trust shall be in the form attached as Exhibit 3 and subject only to the title exceptions set out in the attached Exhibit 4.
- (e) Purchaser shall take title to the parcels of land described in Exhibit 1, subject to the mortgages (which term as used throughout this agreement shall include deeds of trust) thereon securing indebtedness, the principal balance owing on which as of August 31, _____ [year], will be the sum set out opposite each such parcel, as follows:

Parcel	[date] Mortgage Balance
A	\$200,000
B	610,000

C	305,000
D	700,000
E	900,000
F	500,000
G	620,000

(f) The foregoing considerations are allocable to the properties in the respective amounts set forth in the attached Exhibit 5.

3. *Form of conveyance.* The parcels of land shall be conveyed by Purchaser by general warranty deed, subject only to the exceptions set out in Exhibit 4, and to the vendor's lien and Deed of Trust securing Seller in the payment of the deferred portion of the purchase price. The personal property shall be conveyed by a bill of sale with an affidavit of title, subject only to any liens of mortgages covering the real estate on which such personalty is located and any security agreements given in connection therewith.

4. *Seller's representations.* Seller represents, warrants, and covenants to and with Purchaser as follows:

(a) Upon the closing date, the improvements presently situated upon the parcels of land described in Exhibit 1 shall be in substantially the same condition as presently existing, reasonable wear and tear and damage from any risk insured against excepted.

(b) The schedule attached as Exhibit 6 correctly sets forth, as of the date specified therein, in all material respects, the information indicated thereon with respect to each commercial property and apartment project covered by this agreement.

(c) There exists, and at the time of closing there will exist, no written or oral agreement with any person or persons for occupancy of any space or apartment unit subject to this agreement at rentals less than the rental applicable to such unit as set out in the schedule of rental information attached as Exhibit 6, except as indicated upon such schedule.

(d) The schedule attached as Exhibit 7 is true and accurate, and correctly identifies all lease agreements and amendments with Seller's tenants as of the date hereof, covering space in properties described in Exhibit 1, other than apartment projects. Copies of the lease agreements and all amendments have been submitted to and examined by Purchaser. Seller has not collected from any of the tenants any advance rental or security deposit except as indicated upon such schedule.

(e) Upon the closing date none of the mortgages or any assignments of rent or security interests collateral thereto referred to in Exhibit 4 shall be in default.

(f) Seller is acquiring the shares of Purchaser's stock required to be delivered to Seller on the closing date, for its own account for investment, and with no present intention of resale.

(g) Seller is not subject to any charter, bylaw, mortgage, security interest, lien, lease, agreement, indenture, instrument, order, judgment, decree, or other provision or restriction, of any kind or character, which would be violated by the consummation of the transactions contemplated by this agreement.

(h) All decorating and alteration work required to be performed on or before the closing date for any

tenant of space in the properties described in Exhibit 1, or required to be performed by the landlord, or the cost thereof to be reimbursed to any such tenant, as an incident of any tenancy existing on the date hereof, has been performed or reimbursed or will be performed or reimbursed by Seller, at its cost, before the closing. All moving expenses for any tenant and all rents payable under pre-existing leases of any tenant to owners of other properties, where Seller has assumed pre-existing leases or the obligation to pay the rentals thereunder, have been paid or will be paid by Seller before the closing. If any tenant, in accordance with its present lease, lawfully demands, subsequent to the closing, reimbursement from Seller or offsets any amount against rental payments, for decorating, alteration, moving, or rentals payable with respect to other premises, Seller will pay the same and will indemnify and hold Purchaser, its successors and assigns, free and harmless from all such tenants' claims, except to the extent that Seller grants Purchaser at the closing a credit against the purchase price for such claims.

(i) Pending the closing of title, no existing lease shall be terminated, amended, or extended, and no new lease entered into, without Purchaser's prior written consent. Seller, however, may rent individual apartments as they become vacant for terms not exceeding two years, and at rentals not less than those shown on the rent rolls in Exhibit 6.

(j) The present use of each of the properties described in Exhibit 1 is in conformity with the Certificate of Occupancy issued for such property, or in the absence of a permanent Certificate of Occupancy, with legal uses for such property as presently laid out. None of the properties or the present use or condition thereof violate any applicable building code, deed restriction, fire regulations, zoning regulations, or other applicable ordinance, order, or regulation, and Seller will convey all such properties free of any such violations.

(k) Seller has not received any notice from any mortgagee, insurance company, board of fire underwriters, the Department of Housing and Urban Development, or any other governmental agency requesting the performance of any work or alterations with respect to any of the properties described in Exhibit 1. Seller will comply at its cost with any such notice received before the closing.

(l) Seller has no knowledge of any pending or contemplated condemnation of any property described in Exhibit 1.

(m) The following attached Schedules are true and accurate:

Exhibit 8	--	Insurance Schedule
Exhibit 9	--	Payroll Schedule
Exhibit 10	--	Schedule of Maintenance Contracts
Exhibit 11	--	Schedule of Utility Bills
Exhibit 12	--	Schedule of Real Estate Taxes
Exhibit 13	--	Schedule of Rental Commissions Payable

(n) Seller shall not enter into any new contracts (other than apartment leases for terms not exceeding two years) affecting the ownership or operation of any property described in Exhibit 1 between the date hereof and the closing of title, other than the usual and customary agreements relating to the ownership or operation of the property which are terminable at will.

(o) No tenant of any property described in Exhibit 1, to Seller's knowledge, has asserted any claim, offset, or defense against Seller which may affect the collection of rent; no tenant has been granted any rent free occupancy or concession

other than as set forth in Exhibits 6 or 7; no tenant of any space other than in the apartments has given Seller any notice of intention to terminate its tenancy or move from the premises. Seller will notify Purchaser before the closing of any exception to the above representations.

(p) The leases described in Exhibit 7 are all in full force and effect; none of the tenants of the leases, except as shown on the Exhibit, are in default in performing their obligations thereunder; and to Seller's knowledge no conditions exist that would give any tenant the right to terminate its lease. The above representations will be true as of the closing date.

(q) Except as set forth in the attached Exhibit 14, all fixtures and articles of personal property, including furniture and furnishings in the furnished apartments, attached to or pertaining to or used in connection with, or to maintain any of the properties described in Exhibit 1 or their operation, other than property owned by tenants or maintenance equipment and fixtures owned by independent contractors, are represented to be owned by Seller, free and clear of all encumbrances other than the possible lien of any mortgage against the property wherein such personalty is located, and such personalty shall be owned by Seller at the time of closing. Before the closing Seller will deliver to Purchaser an inventory of all personal property included in this sale.

(r) All sewers required for the operation of the properties described in Exhibit 1 enter the respective properties through adjoining public streets or, if they pass through adjoining private lands, do so in accordance with valid public easements. All roads in the parcels described in Exhibit 1 have been dedicated to the appropriate municipality and accepted thereby.

The above representations, warranties, and covenants by Seller shall survive the closing, except that no claim on account of any alleged breach thereof (except the representations, warranties, and covenants set forth in subparagraphs (d), (g), (h), (i), and (r)) shall be valid unless presented in writing to Seller within one year from the closing date.

5. *Purchaser's representations.* Purchaser represents, warrants, and covenants to and with Seller as follows:

(a) Purchaser is a corporation duly organized, validly existing, and in good standing under the laws of the State of Delaware.

(b) Purchaser has the corporate power to own its properties and carry on its business as now conducted.

(c) The information contained in Purchaser's Registration Statement filed with the Securities and Exchange Commission, Washington, D.C., under the Securities Act of 1933, as amended, for the registration of 500,000 shares of common stock, File No. 2-1456, and in the Prospectus dated June 8, _____ [year], issued in connection therewith, is correct in all material respects as of the date thereof. Since the date of the Registration Statement, there has been and, before the closing, there will be no material adverse change in Purchaser's financial or other condition, other than changes occurring in the ordinary course of business, none of which has been or will be materially adverse. Notwithstanding anything to the contrary hereinafter contained, no claim made by Seller or anyone claiming under or through Seller by reason of any alleged breach of the representations contained in this subparagraph shall be valid unless presented in writing to Purchaser on or before June 8, _____ [year].

(d) There shall be no reclassification or recapitalization of Purchaser's stock, nor shall any stock dividend be declared between the date hereof and the date of closing.

(e) Purchaser is not subject to any charter, bylaw, or loan or other agreement, of any kind or character, which would be violated by the consummation of the transactions contemplated by this agreement.

(f) Upon Seller's request at any time after the closing, accompanied by Seller's statement that it intends to sell or otherwise dispose of no less than 20,000 shares of Purchaser's common stock to be issued to Seller at the closing under this agreement, Purchaser will, at its expense, file under the Federal Securities Act of 1933, and the applicable Rules and Regulations thereunder, an appropriate Registration Statement with respect to that portion of the 50,000 shares of common stock to be issued to Seller in partial payment for the properties covered by this agreement which Seller desires to sell or otherwise dispose of. Purchaser will use its best efforts to cause the Registration Statement to become effective. If Seller does not sell or otherwise dispose of the entire 50,000 shares of Purchaser's common stock during the period the Registration Statement is effective, Purchaser shall, upon Seller's request, file an additional Registration Statement, at Purchaser's expense, with respect to the balance of the 50,000 shares, and shall use its best efforts to cause the additional Registration Statement to become effective.

(g) Purchaser has inspected the properties covered by this agreement and is purchasing them "as is."

The foregoing representations, warranties, and covenants by Purchaser shall survive the closing.

6. *Closing.* Closing of the sale shall take place on September 8, _____ [year], at Seller's office in Dallas, Texas, or at any other place in Dallas, Texas, agreed upon by the parties.

7. *Documents to be delivered to purchaser.* At the closing, Seller shall deliver to Purchaser the following:

- (a) A certified copy of the resolution of Seller's directors authorizing this agreement and the consummation of this transaction.
- (b) A general warranty deed or deeds conveying to Purchaser the real properties described in Exhibit 1, subject only to the exceptions listed in Exhibit 2. In each deed there shall be reserved a vendor's lien upon such properties to secure payment of the deferred portion of the purchase price.
- (c) A bill of sale to Purchaser covering all personal property covered by this agreement, containing warranties of title. The bill of sale shall be subject only to existing security interests upon such properties securing first mortgage indebtedness identified in Exhibit 4. Also, assignments of Seller's interest in all cash deposits for taxes and insurance held by the mortgagees pursuant to the mortgages identified in Exhibit 4.
- (d) The owner's title insurance policies insuring ownership by Purchaser of the real properties to be conveyed hereunder, such policies to be in amounts equal to the respective purchase prices of such properties as shown on Exhibit 5. The policies shall be issued by the Southern Title Insurance Corporation, Dallas, Texas, and shall contain no exceptions other than those listed in Exhibit 4, the vendor's lien and deed of trust securing the unpaid portion of the purchase price covering such properties, and any other exceptions acceptable to Purchaser. The title policies shall be in Texas Standard Form, the survey exception in each policy shall be deleted, and no restrictive covenants, except as set forth in Exhibit 4, shall be shown.
- (e) Certificates of security interest searches by abstracters in Dallas and Harris Counties, Texas, in customary form, covering a period three years before the closing date, the certificates to indicate the existence of no unreleased security agreements upon personal property covered by this agreement, executed by Seller, except any security interests that may additionally secure first mortgage indebtedness identified in Exhibit 4.
- (f) All original lease agreements and amendments thereto, and rental and other records or copies thereof,

relating to the operation of the properties described in Exhibit 1.

(g) Possession of the realty and personal property covered by this agreement, subject to the rights of tenants.

(h) Certificate of the mortgagee or of its servicing agent as to the status of and the balance owing upon each mortgage identified in Exhibit 4, and amount of any escrow deposits being held. Such certificate shall include a statement to the effect that the indebtedness is in good standing at the time of closing, and that to the knowledge of the mortgagee no default then exists or has occurred. The certificate shall likewise set forth the last date to which principal and interest have been paid.

(i) An opinion from Seller's counsel, reasonably acceptable to Purchaser's counsel, as to the valid authorization, execution, and delivery by Seller to Purchaser of this agreement, and of the documents referred to in subparagraphs (b), (c), and (k) of this paragraph.

(j) Assignments in recordable form of all leases set forth in Exhibit 7. The assignments may be in the form of blanket assignments with respect to each individual building.

(k) If the consent of any other party is needed in connection with the transfer of any interest in any lease or the assignment of any other required item, Seller will furnish Purchaser such consent in duly recordable form before consummation of the transactions covered by this agreement. The foregoing shall specifically include a consent from the holder of the first deed of trust on Parcel B together with the holder's agreement that the term "grantor" as used in such deed of trust shall refer, after the date of the transfer, solely to the then owner from time to time of the mortgaged premises, and a waiver from the holder of the second mortgage on Parcel E waiving all right to accelerate the unpaid balance of such second mortgage in the event of any dissolution of the mortgagor therein named.

(l) An assignment of all tenants' security deposits.

(m) An assignment of all utility deposits, if any.

(n) Assignments of all guarantees or warranties, if any, supplied to Seller by manufacturers, contractors, materialmen, or other suppliers or installers supplying or installing equipment or doing work upon any of the properties described in Exhibit 1.

(o) A letter to the tenants occupying space in the properties described in Exhibit 1 notifying them of the change of ownership and directing them to pay all future rentals to Purchaser or its designee.

8. Documents to be delivered to seller. At the closing, Purchaser shall deliver to Seller the following:

(a) Cash or certified check or cashier's check or checks issued by a member of the Dallas Clearing House Association, in the amount of \$750,000.

(b) An authorization directing the Southern Title & Abstract Co. to pay over to Seller the \$250,000 being deposited with such company as provided in paragraph 11.

(c) A vendor's lien note in the principal amount of \$1.2 million, in form and containing provisions as set out in Exhibit 2.

(d) A Deed of Trust in form attached as Exhibit 3.

(e) A mortgagee's title insurance policy issued by the Southern Title Insurance Corporation to Seller, covering the vendor's lien note described in subparagraph (c) of this paragraph.

(f) Certificates for 50,000 shares of Purchaser's common stock duly and validly issued to Seller, fully paid and nonassessable.

(g) An Opinion of Purchaser's general counsel, reasonably satisfactory to Seller's counsel, as to the matters contained in paragraph 4(a), (b), and (e), the valid issuance, full payment, and nonassessability of the shares of Purchaser's common stock delivered to Seller, and the valid and legal authorization, execution, and delivery by Purchaser to Seller of this agreement and of the documents referred to in subparagraphs (c) and (d) of this paragraph.

(h) A certified copy of resolutions of Purchaser's Board of Directors authorizing this agreement and the consummation of all transactions contemplated hereby.

(i) An instrument executed by Purchaser indemnifying Seller and agreeing to hold Seller harmless with respect to commissions set forth on Schedule 13 to the extent that they are payable for periods after the closing date.

9. *Adjustments and prorations.* Ad valorem taxes (based on _____ [year] taxes), accrued interest on debts represented by deeds of trust and mortgages, electric, water, sewer, and other utility charges, salaries, vacation pay, bonuses, and all other fringe benefits of Seller's personnel, if any, retained by Purchaser and current rentals, in respect to all properties shall be prorated to midnight, August 31, _____ [year], and adjusted in cash at the closing. If the *ad valorem* taxes for _____ [year] are not ascertainable at closing time, the proration for taxes shall be made on the basis of _____ [year] taxes. When the _____ [year] taxes are subsequently determined, any difference in the proration resulting from use of the _____ [year] taxes shall be paid by Seller to Purchaser, or from Purchaser to Seller, as the case may be. At the closing, Purchaser shall pay Seller in cash the amount of cash deposits for taxes and insurance held by mortgagees of the properties described in Exhibit 1, and any utility deposits. At the closing, Seller shall pay Purchaser in cash the amount of all prepaid rents and security deposits made by tenants and any rentals collected by Seller for periods after August 31, _____ [year]. Purchaser shall pay Seller all past due rents on the properties described in Exhibit 1 for periods before September 1, _____ [year], as collected by Purchaser. To the extent that it is impracticable to prorate or adjust any of the above items on the closing date, settlement in accordance with the provisions hereof shall be made as promptly after the closing date as is reasonably possible and adjusted in cash.

10. *Mutuality of obligations.* Seller's obligations hereunder are subject to the performance by Purchaser of all its obligations under paragraph 7, at or before the closing. Purchaser's obligations hereunder are subject to the performance by Seller of all its obligations under paragraph 6, at or before the closing.

11. *Escrow deposit.* Purchaser, contemporaneously with the execution of this agreement, is depositing with the Southern Title & Abstract Co., in escrow, the sum of \$250,000 by check subject to collection, to be held by such escrowee and disposed of on the following terms and conditions:

(a) If the sale is closed in accordance with this agreement, the escrowee shall turn over such funds to Seller.

(b) If this agreement is terminated by reason of Purchaser's default, the escrowee shall deliver such funds to Seller, which shall retain them as and for its liquidated damages for Purchaser's breach hereof, in lieu

of all other damage suffered by Seller by reason of the breach. The parties agree that said sum represents their best estimate of what the actual damages would be upon such default.

(c) If Seller is unable or fails to convey title subject to and in accordance with the terms of this agreement, or if this sale is not consummated for any reason other than Purchaser's default, the escrowee shall return the funds to Purchaser upon its demand.

(d) If the escrowee receives conflicting instructions from the parties, it is authorized to deliver the funds to any court of competent jurisdiction, after which it will be relieved from any further liability hereunder.

12. *Default by seller.* If Seller is unable to convey title to the properties subject to and in accordance with the terms of this agreement other than due to its willful acts or omissions, its sole obligation shall be to authorize the escrowee to refund Purchaser's deposit. Upon such refund, this agreement shall terminate, and neither party shall have any further right against, or obligation to, the other. Seller shall not be required to bring any action or proceeding or otherwise to incur any expense to render the title to the properties insurable in accordance with this agreement. If, however, any title defect may be remedied with reasonable diligence within 30 days from the scheduled date of closing of this agreement and the reasonably estimated cost of remedying all title defects does not exceed \$100,000, the closing of title shall be adjourned pending removal of the defects, and Seller shall use its best efforts to cure the same and to convey title in accordance with the terms hereof. If there is any adjournment, the date for prorations and adjustments as provided in paragraph 9 shall remain unchanged.

If at the closing there is a lien against any of the properties, and the lien is dischargeable by the payment of a specific sum of money and it is not one of the encumbrances subject to which Purchaser has agreed to accept title, Purchaser may pay and discharge the lien and deduct the amount thereof from the purchase price of the property. Purchaser may in any event accept any title Seller is able to convey, without any reduction of the purchase price. If Purchaser accepts the conveyance, that shall be deemed a full performance and discharge of all of Seller's obligations hereunder, except those that are specifically stated herein to survive the closing.

13. *Risk of loss.* Seller assumes the risk of loss or damage to the properties by fire or other casualty until passing of title. If any portion of the properties is damaged by fire or other casualty before that time and the estimated cost of repair and restoration exceeds \$25,000, and Seller does not repair the damage before the closing (for which purpose Seller may request a reasonable adjournment and proration shall be as of the date of actual closing), Purchaser may either: (a) accept the properties in their damaged condition at the purchase price provided herein, reduced by the amount of any insurance proceeds (other than rental insurance for the period before the closing) received by Seller or to which Seller is entitled by reason of the damage or casualty, and reduced by the amount of any deductible applicable thereto, or (b) terminate this agreement, either in its entirety or solely with respect to the damaged properties, by giving written notice to Seller. If Purchaser elects to terminate the entire agreement, Seller shall direct the escrowee to return to Purchaser all sums deposited by it under paragraph 11, this contract shall thereupon be deemed null and void, and neither party shall have any further claim against the other.

14. *Broker.* The parties represent that this sale was brought about by Harrison Deal of Dallas, Texas, as broker, and that neither of them negotiated with respect to the terms of this agreement with or through any other brokers. Seller has agreed to pay as brokerage a total commission of \$50,000 to Harrison Deal if and when this sale is closed in accordance with this agreement. Upon Purchaser's written request before closing of title, accompanied by a release from Harrison Deal and an agreement from Purchaser assuming Seller's obligations to pay the commissions, Seller shall pay Purchaser \$50,000 at the closing. If either party makes a misrepresentation with respect to the facts set forth in this paragraph, it shall be responsible to the other party for all resulting damages.

15. *Additional documents.* After this transaction is closed, both parties shall execute, acknowledge, and deliver any additional instrument of transfer or conveyance that is required from time to time to effectuate this agreement. Seller

shall furnish Purchaser, at its request, with any operating statement relating to Seller's period of ownership of any property to be conveyed hereunder that is required by the holder of a mortgage against such property.

16. *Authority for stock as purchase price.* Purchaser shall use its best efforts between the date hereof and the closing of title to secure a permit from the Texas State Securities Commissioner approving the issuance by Purchaser to Seller of the 50,000 shares of Purchaser's common stock to be delivered by it to Seller at the closing in accordance with this agreement. If Purchaser is unable to secure a permit, it shall pay Seller \$1 million, in cash or by certified or cashier's check or checks, in substitution for and discharge of all of Seller's claims with respect to such shares. Upon receipt of the shares, Seller shall deliver to Purchaser an investment letter in form satisfactory to Purchaser's counsel.

17. *Assignment.* Purchaser may assign all or part of its interest in any one or more properties under this agreement. Such assignment, however, shall not release Purchaser from its obligations hereunder, including its obligation to deliver stock (subject to the limitation of Purchaser's liability for breach of contract set forth in paragraph 11(b)) or from its obligation to execute and deliver the Vendor's Lien Note and second Deed of Trust or, in the alternative, to guarantee the obligations of any assignee who is the maker of such Vendor's Lien Note and Deed of Trust in form satisfactory to Seller's counsel.

18. *Seller's inspection of documents.* If any claim or demand is made by Purchaser against Seller arising out of any undertaking, representation, covenant, or warranty by Seller contained in this agreement, Purchaser shall make available to Seller, for inspection and copying, at all reasonable times, for the purpose of enabling Seller to determine the validity of such claim or demand, any document or record reasonably designated by Seller from among those delivered by Seller to Purchaser at the closing.

19. *Notices.* All notices under this agreement shall be in writing and delivered personally or mailed by certified or registered mail, postage prepaid, return receipt requested, addressed as follows:

If to Seller: 100 Center Street
 Dallas, Texas

If to Purchaser:

500 Lake Street
Chicago, Illinois

20. *Binding effect.* This agreement shall be binding upon and inure to the benefit of the parties hereto and their respective successors and assigns.

21. *Entire agreement; modification.* This instrument constitutes the entire agreement between the parties. It may not be modified except by an agreement duly executed by both parties.

22. *Nonwaiver.* No delay or failure by either party to exercise any right hereunder, and no partial or single exercise of such right, shall constitute a waiver of that or any other right, unless otherwise expressly provided herein.

23. *Headings.* Headings in this agreement are for convenience and reference only and shall not be used to interpret or construe its provisions.

24. *Governing law.* This agreement shall be construed in accordance with and governed by the laws of the State of Texas.

25. *Counterparts.* This agreement may be executed in one or more counterparts, each of which shall be deemed an original but all of which together shall constitute one and the same instrument.

26. *Time of essence.* Time is of the essence of this agreement.

In witness whereof the parties have executed this agreement on the day and year first above written.

Corporate Seal

Standard Realty Corporation

Attest:

by _____

Secretary

President

Corporate Seal

Jamestown Corporation

Attest:

by _____

Secretary

President

[Acknowledgments]



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Current Legal Forms for Real Estate

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Current Legal Forms for Real Estate
Chapter 21 SALES AND EXCHANGES
Part IV. Forms

C. CONTRACTS OF SALE: COMMERCIAL PROPERTY

25-21 Current Legal Forms for Real Estate FORM 21.52

FORM 21.52 Sale of leasehold interest--initial lease replaced with prime lease and sublease back to seller-tenant--landlord included as contract party

COMMENT

This form involves a three-party transaction in which a tenant in effect sells its leasehold interest, together with title to certain leasehold improvements to a third party, and subleases the premises from the third party who becomes the prime lessee. The landlord and the prime lessee agree to revise the terms of the leasehold interest. Consequently, the original lease is cancelled and the landlord and the prime lessee enter into a new lease. The prime lessee then subleases the space to the original tenant. The broker's commission is divided between the landlord, tenant, and prime lessee. The new lease contains a cancellation clause which, if exercised, requires the prime lessee to reimburse the landlord for its share of the broker's commission.

Although not contained herein, the purchaser of a leasehold should have the same concerns regarding the condition of the property and improvements and their compliance with laws as if the fee title were being acquired.

FORM

This AGREEMENT is made and entered into June 30, _____ [year], by and among American Tool Corporation, a Delaware corporation ("Tenant"), Ohio Foundry, Inc., an Ohio corporation ("Prime Lessee"), and Lawrence S. Jones ("Landlord").

Recitals

Tenant on or about May 31, _____ [year], entered into a lease agreement with Landlord (the "Lease Agreement"), a copy of which is attached and marked Exhibit 1.

Tenant and Landlord wish to terminate the Lease Agreement; Prime Lessee and Landlord wish to enter into a new lease agreement to be dated as of the date Tenant delivers to Prime Lessee possession of the leased premises (the "Prime Lease"), a copy of which is attached and marked Exhibit 2; and Prime Lessee and Tenant wish to enter into a sublease to be effective as of said delivery of possession (the "Sublease"), a copy of which is attached and marked Exhibit 3.

The parties desire to have all the right, title and interest of Tenant in the leasehold improvements and the premises leased under the Lease Agreement (the "Leased Premises") transferred and assigned to the Prime Lessee;

Now, therefore, it is agreed as follows:

1. *Lease and sublease.* All further rights and obligations of Tenant and Landlord under the Lease Agreement shall terminate upon delivery, subject to the Sublease, to Prime Lessee of possession of the Leased Premises. Tenant consents to the execution by Prime Lessee and Landlord of the Prime Lease Agreement; Landlord consents to the execution by Tenant and Prime Lessee of the Sublease. Tenant and Landlord individually and not jointly, covenant, represent and warrant that at the date of this Agreement and up to the time the Sublease becomes effective, the Lease Agreement will be in full force and effect, unmodified, and with no defaults.

2. *Rent payments.* Tenant shall continue to make all required payments to Landlord under the Lease Agreement for or in respect of periods before the date of delivery of possession of the Leased Premises to Prime Lessee, including the full rental and leasehold amortization payments due and payable on August 1, _____ [year]. To the extent that any such payments relate to the portion of the Leased Premises referred to in the Lease Agreement as Premises "A," "B," and "C" for or in respect of periods subsequent to said delivery of possession, Prime Lessee will give Tenant a credit against required payments by Tenant to Prime Lessee under the Sublease.

3. *Possession date.* Tenant shall give possession of the Leased Premises, subject to the provisions of the Sublease, to Prime Lessee no later than August 16, _____ [year]. Tenant may give such possession to Prime Lessee prior to such date, whereupon Prime Lessee shall become the lessee under the Prime Lease Agreement effective as of the date of such possession. The Sublease shall become effective as of the date of such possession.

4. *Leasehold improvements.* Exhibit 4 is a list prepared by Tenant of all leasehold improvements installed in the Leased Premises with detailed costs and depreciation and amortization schedules. Tenant transfers and assigns to Prime Lessee, effective on delivery of possession of the Leased Premises to Prime Lessee, all right, title, and interest of Tenant in and to all of said leasehold improvements. Landlord consents to such transfer and assignment. Tenant shall execute and deliver to Prime Lessee appropriate documents satisfactory to counsel for Tenant and Prime Lessee to effect such transfer and assignment.

5. *Title information.* Landlord shall promptly furnish to Prime Lessee a set of the working drawings of the Leased Premises, a copy of the survey of the Leased Premises described in the Lease Agreement and copies of all title insurance policies or title guarantys with respect to the Leased Premises. The policies or guarantees shall promptly be assigned to Prime Lessee to the extent they are assignable.

6. *Real estate commission.* It is understood that Brown-Smith, Inc., is the only real estate broker who has represented any party to this transaction, and that the broker's commission shall be computed and payable as follows:

(a) *Tenant payment.* Tenant will pay \$8,000 to Brown-Smith, Inc., payable on the date that possession of the Leased Premises is given to Prime Lessee.

(b) *Assignee payment.* Prime Lessee will pay \$34,000 to Brown-Smith, Inc., \$4,500 of which is payable when Prime Lessee takes possession of the Leased Premises and \$29,500 one year thereafter.

(c) *Landlord payment.* Concurrently with the execution hereof, Landlord will pay \$25,000 to Prime Lessee, which Prime Lessee agrees is in full consideration of all liability of Landlord with respect to any Commission due Brown-Smith, Inc., to be payable by Prime Lessee to Brown-Smith, Inc., on the date that Tenant gives possession of the Leased Premises to Prime Lessee.

(d) *Repayment.* If Prime Lessee exercises the right to cancel pursuant to the terms and conditions of paragraph 29 of the Prime Lease Agreement (Exhibit 2), concurrently with the delivery of written notice of cancellation, Prime Lessee shall repay \$25,000 to Landlord.

7. *Commencement date.* Upon delivery to Prime Lessee by Tenant of possession of the leased premises under paragraph 1, Prime Lessee and Landlord shall amend paragraph 2 of the Prime Lease Agreement (Exhibit 2) by inserting the date of delivery of possession as the date of commencement of the term of the Prime Lease Agreement. Delivery of possession shall be evidenced by a letter signed by Prime Lessee and Tenant on such date.

8. *Binding effect.* This agreement shall be binding upon and inure to the benefit of the parties and their respective successors and assigns.

9. *Warranty.* Tenant and Landlord represent and warrant that the Lease Agreement is the only agreement between Tenant and Landlord and that it has not been amended, superseded, added to or interpreted at any time.

In witness whereof the parties have signed or have affixed their corporate signatures as of the date first above written.

Attest:

Attest:

Ohio Foundry, Inc.

by _____

American Tool Corporation

by _____

Landlord

Exhibit 1

_____ [year] Lease Agreement between Tenant and Landlord

Exhibit 2

Prime Lease Agreement between Prime Lessee and Landlord

Exhibit 3

Subleases between Tenant and Prime Lessee

Exhibit 4

Leasehold Improvement List



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C. CONTRACTS OF SALE: COMMERCIAL PROPERTY

25-21 Current Legal Forms for Real Estate FORM 21.53

FORM 21.53 Sale of lease--lease assignment subject to net sublease of entire property

COMMENT

The lease being sold in the agreement illustrated here is subject to a net sublease covering the entire premises. Generally, a net lease or net sublease requires the lessee or sublessee to pay all or most of the costs and expenses of the leased property, including such items as maintenance, utilities, labor costs, taxes or tax escalation, insurance, and repairs. Therefore, as between the seller and the purchaser, it is necessary to provide only for an apportionment of the rent under the sublease. If on the other hand, the lease covered property occupied by various tenants, or occupied by one tenant who was not on a net rental basis, it would be necessary to make the usual adjustments for taxes, insurance, etc., and to take the precautions generally considered in the purchase of rental property.

Although not contained herein, the purchaser of a leasehold should have the same concerns regarding the condition of the property and improvements and their compliance with laws as if the fee title were being acquired.

Leasehold improvement and acquisition costs:

The cost of leasehold improvements made by a lessee are recovered under the rules applicable to other taxpayers. Therefore, the cost recovery of improvements made by a lessee to real property would generally be recoverable over 27.5 years for residential rental property and 39 years for nonresidential real property on a straight line method. The recovery period under the cost recovery rules apply, regardless of the lease term. On termination of the lease, the lessee who does not retain the improvements computes gain or loss by reference to the adjusted basis of the improvements at that time. The amortization of lease acquisition costs, however, involves the term of the lease. In determining the amortization period, the term of the lease includes all renewal

options as well as other periods for which the parties reasonably expect the lease to be renewed, if less than 75 percent of the acquisition cost is attributable to the period of the term remaining on the date of its acquisition. Not taken into account in this determination, however, are any periods for which the lease may subsequently be renewed, extended, or continued pursuant to an option exercisable by the lessee. For a discussion of cost recovery of leasehold improvements and acquisition costs, see The Tax Background (TB) § 21.06[2].

Information reporting of real estate transactions:

The attorney or title company responsible for closing title is required to report the real estate transaction to the Service. In addition, a statement must be provided to the customer before January 31 of the year following the transaction. For a discussion of the information reporting requirements, see TB § 21.02[4].

FORM

AGREEMENT made March 25, _____ [year], between Walker Properties, Inc., a New York corporation, having its office at 100 West 40th Street, New York, New York ("Seller"), and Capital Center Company, a New York partnership, having its office at 200 Third Avenue, New York, New York ("Purchaser").

1. *Sale.* Seller agrees to sell and assign, and Purchaser agrees to purchase all of Seller's right, title, and interest as Lessee in and to that certain lease and the leasehold estate created thereby dated May 1, _____ [year], made by The Atlantic Insurance Company as Lessor and the Seller, as Lessee (the "Lease"), and recorded in the office of the Register of the City of New York in New York County on May 2, _____ [year], in Liber 6000 of Conveyances, page 1, covering the following described property:

(Insert description)

Together with the buildings and improvements erected upon such parcel of land.

2. *Purchase price.* The purchase price shall be \$900,000, payable in cash or certified check on the delivery of the assignment of the lease.

3. *Encumbrances.* The Lease is sold and is to be assigned subject to:

(a) The matters set forth in the "subject" clauses contained in Article 1 of the Lease.

(b) Franchise taxes, if any, against any corporation in the chain of title. Seller shall indemnify and hold Purchaser harmless from and against any claim, loss, or liability arising out of any collection or attempted collection of any such franchise taxes out of the Lease or the premises.

(c) A Sublease of the entire premises substantially in the form annexed as Exhibit A.

4. *Closing.* The closing shall be held at the offices of Charles Borden, Esq., 100 Fifth Avenue, New York, New York, on the 1st day of June, _____ [year], at 10 a.m., the closing date, at which time the Purchaser shall pay the purchase price and Seller shall deliver the assignment of the Lease and the other documents herein referred to. Purchaser may, by giving at least five days prior written notice to Seller, adjourn the closing date for one month, to July

1, _____ [year], at the same time and place.

5. *Form of assignment.* The assignment of the Lease shall be in the form annexed as Exhibit B and shall be in recordable form, duly executed and acknowledged in triplicate so as to transfer to Purchaser the Lease, free of all encumbrances, except as herein stated. Such assignment shall also be executed by Purchaser, for the purpose of assuming the Lessee's obligations under the Lease and releasing Seller from liability thereunder.

6. *Apportionment.* The basic rent payable under the Sublease shall be apportioned between the parties as of midnight of the day preceding the closing. No other adjustments or apportionments shall be made.

7. *Judgments against others.* If a search of the title discloses judgments, bankruptcies, or other returns against persons having names the same as or similar to that of Seller, Seller will, on request, deliver to Purchaser an affidavit showing that such judgments, bankruptcies, or other returns are not against Seller.

8. *Objections to title.* Purchaser shall furnish Seller with any objections to title at least ten days before the closing date.

9. *Additional documents at closing.* At the closing, Seller shall deliver to Purchaser:

(a) A duplicate original or true copy of the Lessor's consent to the assignment of the Lease.

(b) An estoppel certificate from the Lessor under the Lease setting forth that the Lease is unmodified and in full force and effect, or if the Lease has been modified, setting forth the modifications, the dates to which the rent and other charges under the Lease have been paid, and stating whether, to the best knowledge of the signer of the certificate, the Lessee is in default in performing any covenant, agreement, or condition contained in the Lease, and, if so, specifying each such default of which the signer of such certificate has knowledge.

(c) An estoppel certificate from the Sublessee under the Sublease setting forth that the sublease is in full force and effect and unmodified, or if the Sublease has been modified, setting forth the modifications, the dates to which the basic rent and all other charges under the sublease have been paid, whether there are any existing set-offs or defenses to the basic rent and all additional rent due to the Sublessor under the Sublease, and stating whether, to the Sublessee's best knowledge, the Sublessor is in default in performing any covenant, agreement, or condition contained in the Sublease, and, if so, specifying each such default of which Sublessee has knowledge.

10. *Purchaser's partnership agreement.* At least ten days before the closing, Purchaser shall deliver to Seller a duplicate original copy of its partnership agreement, and a certified copy of its Partnership Certificate filed in the Office of the County Clerk of the County of New York. Such partnership agreement and Certificate shall be in the form necessary to qualify Purchaser as a permissible assignee of the Lease.

11. *Seller's covenants and warranties.* Seller covenants that, upon the execution and delivery of the assignment of the Lease, the Lease will be in full force and effect as a valid and subsisting lease. On the closing date, Seller will warrant that it has had no notice of default from the Lessor under the Lease. Seller will not modify or consent to a modification of the Lease or the Sublease between the date hereof and the closing, without Purchaser's prior written consent. Purchaser will not unreasonably withhold its consent to any modification of the Lease or the Sublease if such modification does not adversely affect the interests of the Lessee under the Lease or the Sublessor under the Sublease.

12. *Satisfaction of liens.* Seller may use any portion of the purchase price to satisfy liens or encumbrances of record which it is obligated to pay and discharge at the closing, if it delivers to Purchaser at the closing instruments in recordable form and sufficient to satisfy the liens and encumbrances, together with the recordation and filing costs. If

request is made within a reasonable time before the closing date, Purchaser will provide at the closing separate certified checks aggregating the amount of the purchase price, to facilitate the satisfaction of all such liens or encumbrances. The existence of liens or encumbrances shall not be deemed objections to title if Seller complies with the above requirements.

13. *Insurance policies and casualty damage.* Seller shall maintain or cause to be maintained the existing insurance on the premises. If such insurance is cancelled by the issuing company, Seller shall obtain new insurance of the same amount and coverage. If the premises are damaged or destroyed before the closing date as a result of fire or other casualty, this agreement and the parties' rights thereunder shall continue unaffected, and Seller shall, at the closing, pay over to Purchaser all insurance proceeds in its possession, which Purchaser shall hold subject to the terms and conditions of the Lease. The parties hereby waive the provisions of Section 5-1311 of the General Obligations Law, the New York Uniform Vendor and Purchaser Risk Act, and agree that their respective rights in case of fire or other casualty covered by such Section shall be governed by the provisions of this paragraph.

14. *Entire agreement; modification.* This instrument constitutes the entire agreement between the parties. It has been entered into after full investigation, neither party relying upon any statement or representation by the other unless embodied herein. Purchaser has inspected the building upon the premises and is fully acquainted with its condition. This agreement may not be modified except by an agreement duly executed by both parties.

15. *Binding effect.* This agreement shall be binding upon and inure to the benefit of the parties hereto and their respective legal representatives, successors, and assigns.

16. *Notices.* All notices hereunder shall be in writing and delivered personally or mailed by certified or registered mail, postage prepaid, return receipt requested, addressed to the parties at their addresses listed above.

17. *Nonwaiver.* No delay or failure by either party to exercise any right hereunder, and no partial or single exercise of such right, shall constitute a waiver of that or any other right, unless otherwise expressly provided herein.

18. *Headings.* Headings in this agreement are for convenience and reference only and shall not be used to interpret or construe its provisions.

19. *Governing law.* This agreement shall be construed in accordance with and governed by the laws of the State of New York.

20. *Counterparts.* This agreement may be executed in one or more counterparts, each of which shall be deemed an original but all of which together shall constitute one and the same instrument.

21. *Time of essence.* Time is of the essence of this agreement.

In witness whereof the parties have executed this agreement the day and year first above written.

Attest:

Secretary

Walker Properties, Inc.

by _____

President

Capital Center Company

by _____

Partner



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C. CONTRACTS OF SALE: COMMERCIAL PROPERTY

25-21 Current Legal Forms for Real Estate FORM 21.54

FORM 21.54 Sale of contract to purchase property--cash payments timed with payments required under real estate contract

COMMENT

In this agreement, the seller, who holds a contract to purchase certain real estate, is selling his purchase contract to the buyer. The principal purpose of this agreement is to assign to the buyer all the seller's rights in the purchase contract. If the title report received by the purchaser discloses a defect in the title not provided for in the purchase contract, the seller is required to submit notice of the defect to the owner of the property. If the defect is not cured prior to the title closing, the seller is obligated to refund all payments previously made by the purchaser, together with net title company charges incurred by the purchaser.

The consideration for the assignment of the purchase contract is payable in three installments. The first two of these installments represent amounts required to be paid under the purchase contract to the owner of the property. In effect, the payment of these two installments would represent the seller's basis for his purchase contract. The third installment, which is to be paid by the buyer to the seller at the time of the closing, is the seller's profit on the sale of his purchase contract. Whether the profit will be ordinary income or capital gain depends upon whether the contract in the hands of the seller was held primarily for sale to customers in the ordinary course of business or was investment property. If the purchase contract is held by the seller for more than the prescribed holding period, the gain, if capital gain, will be long-term. Note: For property acquired after 1987 (or before June 23, 1984), the required holding period for long-term capital gain treatment is more than one year. See *The Tax Background* § 21.05.

FORM

AGREEMENT made February 28, _____ [year], by and between James Turner, residing at 100 Bayberry Drive, Scarsdale, New York ("Vendor"), and William Saxon, residing at 300 Ocean Avenue, Red Bank, New Jersey ("Vendee").

Recitals

Smith Realty Corp. has entered into a contract dated December 24, _____ [year], to purchase certain improved real property located in Bridgeport, Connecticut, more particularly described in such contract (the "Real Property"), from Carl Williams, as seller (the "Owner"), a copy of the purchase contract (the "Purchase Contract"), being annexed hereto, made part hereof and marked Exhibit A; and

Smith Realty Corp., by assignment dated December 24, _____ [year], assigned to Vendor all of its right, title, and interest in the Purchase Contract, together with the sum of \$100,000 deposited with the Owner on account of the purchase price set forth in the Purchase Contract; and

The purchaser under the Purchase Contract is required, pursuant to the terms thereof, to deposit with the Owner on or before April 1, _____ [year], an additional sum of \$100,000 on account of the purchase price set forth in the Purchase Contract; and

Vendor intends to make the \$100,000 deposit on or before April 1, _____ [year]; and

Vendor desires to sell to Vendee and Vendee desires to purchase all of Vendor's right, title, and interest in and to the Purchase Contract, and the parties desire to record all their agreements and understandings,

Now, therefore, it is agreed as follows:

1. *Sale.* Vendor shall assign or cause to be assigned to Vendee all of Vendor's right, title, and interest in and to the Purchase Contract, together with the sum previously deposited by Vendor and the sum to be deposited by Vendor on or before April 1, _____ [year], both sums on account of the purchase price fixed in the Purchase Contract.

2. *Purchase price.* The consideration for the assignment of the Purchase Contract is \$350,000, which Vendee shall pay to Vendor as follows:

(a) \$100,000 upon the execution of this agreement to reimburse Vendor for a like sum advanced by him on account of the purchase price fixed in the Purchase Contract;

(b) \$100,000 by delivering, on or before March 25, _____ [year], an acceptable certified check in that sum to Farnsworth & Grant, attorneys for Vendor, the proceeds of which Farnsworth & Grant shall pay to the Owner on or before April 1, _____ [year], on account of the purchase price fixed in the Purchase Contract;

(c) \$150,000 on the closing.

3. *Default of vendee.* If at the time or times fixed herein, Vendee fails or refuses to perform any term, provision, covenant, or condition hereof required by Vendee to be kept, observed or performed, Vendor may terminate this agreement by giving notice to Vendee or his attorneys, Lane & Williams, 99 Park Place, Roseland, New Jersey. In such event, this agreement shall be deemed terminated for all purposes, and Vendor may retain, as liquidated damages, all

sums paid hereunder by Vendee.

4. *Title report.* Vendee shall, within five days after the date hereof, order a title report from a title company acceptable to Vendor, and shall deliver a true copy to Vendor's attorneys within five days after receiving the report, but in no event later than April 5, _____ [year].

5. *Title defect.* If the title report referred to in Section 4 discloses any defect, lien, or encumbrance not provided for in the Purchase Contract, which would render title unmarketable and give the purchaser under the Purchase Contract the right to cancel the Purchase Contract as provided therein, and if by reason thereof Vendee intends to reject title, Vendee shall give immediate notice in writing to Vendor setting forth the alleged defect, lien, or encumbrance. Upon receipt of such notice from Vendee, Vendor shall, in accordance with the provisions of the Purchase Contract, immediately give the Owner notice of such alleged defect, lien, or encumbrance. If the Owner fails or refuses to remove such defect, lien, or encumbrance at or before the date of closing of title provided for in the Purchase Contract and Vendee elects not to waive such defect, lien, or encumbrance, Vendor's sole liability shall be limited to refund to Vendee all sums paid on account under this agreement, together with the net title company charges, without interest. In that event, this agreement, upon receipt of such payments by the Vendee, shall terminate, and the parties shall be released and discharged of all further claims and obligations hereunder. Vendee shall exercise its right to terminate this agreement within five days after Vendor has apprised Vendee by notice in writing of the fact that the Owner cannot or refuses to cure such defect, lien, or encumbrance.

6. *Assignment of purchase contract.* On the closing date, if Vendee shall have fully performed all the terms and conditions of this agreement, Vendor shall execute and deliver to Vendee or its assign a separate instrument of assignment (the "Assignment") in the form annexed as Exhibit B.

7. *Broker.* Vendee represents and warrants to Vendor that no broker brought about this transaction and that this transaction was negotiated between the principals. This representation shall survive delivery of the Assignment.

8. *Representations and warranties by vendor.* Vendor represents to Vendee that he is the sole owner of the Purchase Contract, that the Purchase Contract has not been modified, and is in full force and effect. Vendor warrants that he will not modify the Purchase Contract without the consent in writing of Vendee and, except as provided for in the Purchase Contract, shall not extend the time for title closing without Vendee's written consent, which he will not unreasonably withhold.

9. *Exclusiveness of contract.* This agreement is made without any express or implied representation or warranty by Vendor or any person acting in his behalf, except for representations or warranties specifically set forth herein, and there shall be no recourse to Vendor for any express or implied acts, omissions, alleged representations, or warranties relating to the Purchase Contract, the property which is the subject thereof, or this transaction, except for representations or warranties specifically set forth herein.

10. *Closing.* The closing date shall be June 28, _____ [year]. All acts to be performed by the parties on the closing date shall take place at the office of Farnsworth & Grant, 500 Fifth Avenue, New York, New York, at 9:30 a.m. on that date.

11. *Notices.* All notices hereunder shall be in writing and delivered personally or mailed by certified or registered mail, postage prepaid, return receipt requested, addressed, if to Vendor, c/o Farnsworth & Grant, at the address in paragraph 10, and if to Vendee, c/o Lane & Williams, 99 Park Place, Roseland, New Jersey.

12. *Binding effect.* This agreement shall be binding upon and inure to the benefit of the parties hereto and their respective legal representatives, successors, and assigns.

13. *Entire agreement; modification.* This instrument constitutes the entire agreement between the parties. It may not be modified or terminated except by an agreement duly executed and signed by both parties.

14. *Nonwaiver.* No delay or failure by either party to exercise any right hereunder, and no partial or single exercise of such right, shall constitute a waiver of that or any other right, unless otherwise expressly provided herein.

15. *Headings.* Headings in this agreement are for convenience and reference only and shall not be used to interpret or construe its provisions.

16. *Governing law.* This agreement shall be construed in accordance with and governed by the laws of the State of New York.

17. *Counterparts.* This agreement may be executed in one or more counterparts, each of which shall be deemed an original but all of which together shall constitute one and the same instrument.

18. *Time of essence.* Time is of the essence of this agreement.

The parties have executed and delivered this agreement.

James Turner, Vendor

William Saxon, Vendee

[Acknowledgments]



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C. CONTRACTS OF SALE: COMMERCIAL PROPERTY

25-21 Current Legal Forms for Real Estate FORM 21.55

FORM 21.55 Sale of partner's interest in real estate partnership--sale to remaining partners

COMMENT

This form is a contract for the sale of a partner's interest in a real estate partnership. The purchasers are the remaining partners of the partnership. Because the remaining partners are already familiar with the real estate owned by the partnership, there are not the usual concerns regarding the condition of the real estate and its compliance with laws. In addition to a basic price, the selling partner will also receive his distributive share of the profits for a period before the closing. The selling partner's distributive share of profits is paid, however, after the closing when it is determined by the accountants.

Frequently the seller of a partnership interest will indemnify the purchaser against undisclosed liabilities which may have been incurred by the partnership. This agreement contains an indemnity with respect to such liabilities, and a representation that the seller will not incur any liabilities on the behalf of the partnership between the date of the contract of sale and the date of the closing.

For a discussion of the tax aspects of a sale of a partnership interest see The Tax Background to Chapter 1 in Volume 1.

FORM

AGREEMENT made April 25, _____ [year], by and between Karl Marden of Chicago, Illinois ("Seller"), and Bernard Coates and Lawrence Hess, of Chicago, Illinois ("Purchasers").

Recitals

Karl Marden, Bernard Coates, and Lawrence Hess each owns a one-third interest in the partnership known as 500 River Drive Associates.

Purchasers wish to purchase, and Seller wishes to sell, Seller's one-third interest in such partnership.

Now, therefore, the parties agree as follows:

1. *Sale.* Seller agrees to sell and assign to Purchasers, and Purchasers agree to purchase from Seller, Seller's one-third interest in the partnership known as 500 River Drive Associates.

2. *Purchase price.* The purchase price shall be \$300,000, plus Seller's distributive share of the partnership profits for the period May 1, _____ [year], to the date of closing, computed as set forth in paragraph 3, less any amounts previously withdrawn by Seller from the partnership on account of such distributive share. Such profits shall be computed, for purposes of determining the amount to be paid to Seller, without deduction for depreciation of fixed assets.

3. *Payment of purchase price.* The purchase price shall be paid as follows:

(a) Purchasers shall pay Seller the sum of \$300,000 in cash or by check at the closing.

(b) Within 60 days after the closing, Marks & Co., accountants for the partnership, shall submit to the parties a certified profit and loss statement of the partnership, computed as of the close of business on the day preceding the date of closing, in accordance with the terms of this agreement. Within five days of receipt of such statement, Purchasers shall pay Seller his distributive share of the Partnership profits computed in accordance with the terms of this agreement. The books and records of the partnership shall continue to be kept in the same manner as they have been kept on the accrual basis.

4. *Continuance of partnership.* Seller shall remain as a member of the partnership from the date hereof to the date of closing.

5. *Documents at closing.* At the closing, Seller shall deliver to Purchasers:

(a) An assignment or assignments of his partnership interest, and of his interest, if any, in the real property and other assets owned by the partnership to such designees and in such fractional interests as Purchasers direct in writing.

(b) All additional instruments and documents that Purchasers may reasonably require in order to evidence the transfer of Seller's interest in the partnership and the termination of his interest therein.

6. *Representations, covenants, and warranties by seller.* Seller warrants, covenants, and represents, and at the closing will warrant, covenant, and represent, that he has not:

(a) previously assigned, transferred, pledged, hypothecated, or in any other manner disposed of or encumbered any part of his partnership interest.

(b) incurred any liabilities on behalf of the partnership other than the liabilities shown on its balance sheet, dated as of February 28, _____ [year], prepared by Marks & Co., and that he

will not incur any liabilities on behalf of the partnership between the date hereof and the date of closing.

7. *Indemnity to seller.* At the closing, Purchasers shall indemnify and hold Seller harmless from and against all claims, losses, and liabilities of the partnership, except for those incurred by Seller on behalf of the partnership but not disclosed to Purchasers, or which Seller incurred on behalf of the partnership in violation of paragraph 6, whether such liability accrued before or after the closing date. This indemnity shall not extend to any liability of the partnership or of its partners for any tax imposed upon or measured by the income of the partnership or of its partners.

8. *Amendment of partnership certificate.* Immediately after the closing, Purchasers shall cause to be filed in the Office of the Clerk of Cook County an amendment to the partnership's Certificate of Conducting Business, which shall show that effective on the date of closing, Seller is no longer a member of the partnership.

9. *Closing.* The closing shall be held on July 1, _____ [year], at the offices of Howard Gordon, Esq., 100 Michigan Boulevard, Chicago, Illinois, at 10 a.m., at which time the purchase price, the assignment, and the other documents herein provided for shall be delivered by the respective parties.

10. *Notices.* All notices under this agreement shall be in writing, by registered or certified mail, return receipt requested, addressed to Purchasers, c/o Howard Gordon, 100 Michigan Boulevard, Chicago, Illinois, and to Seller, c/o Arnold Evans, 200 West Randolph Street, Chicago, Illinois.

11. *Binding effect.* This agreement shall be binding upon and inure to the benefit of the parties and their respective heirs, administrators, successors, and assigns.

12. *Entire agreement; modification.* This instrument constitutes the entire agreement between the parties. It may not be modified or terminated except by an agreement duly executed and signed by both parties.

13. *Nonwaiver.* No delay or failure by either party to exercise any right hereunder, and no partial or single exercise of such right, shall constitute a waiver of that or any other right, unless otherwise expressly provided herein.

14. *Headings.* Headings in this agreement are for convenience and reference only and shall not be used to interpret or construe its provisions.

15. *Governing law.* This agreement shall be construed in accordance with and governed by the laws of the State of Illinois.

16. *Counterparts.* This agreement may be executed in one or more counterparts, each of which shall be deemed an original but all of which together shall constitute one and the same instrument.

17. *Time of essence.* Time is of the essence of this agreement.

The parties have executed this agreement the day and year first above written.

Purchasers:

Bernard Coates

Lawrence Hess

Seller:

Karl Marden



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C. CONTRACTS OF SALE: COMMERCIAL PROPERTY

25-21 Current Legal Forms for Real Estate FORM 21.56

FORM 21.56 Sale of portion of partner's interest in real estate partnership--sale to third party--amended certificate and amendment to partnership agreement attached--partial mortgage indemnity

COMMENT

This agreement is another form involving sale of a partnership interest in an existing real estate partnership. Although not set forth in this agreement, a third party purchaser of a partnership interest in a real estate partnership should do a certain amount of due diligence regarding the underlying real estate owned by the partnership as would be done if the real estate were being purchased outright. The partnership is a general partnership and the partnership property is encumbered by a mortgage. The new partner has agreed to indemnify the former partners on a pro rata basis with respect to the mortgage liability. The Amendment to the Partnership Agreement and Amended Certificate are attached as exhibits.

See The Tax Background to Chapter 1, Volume 1, for a discussion of the law and tax aspects of exchanges of partnership interests.

FORM

THIS AGREEMENT is made on January 27, _____ [year], by and between Oscar A. Brown, 2200 Erie Road, New Haven, Indiana ("Seller"), and George B. Stein, 6122 String Road, Auburn, Indiana ("Buyer").

Recitals

Seller is a partner in a general partnership known as The Ft. Wayne Realty Company, pursuant to a General Partnership

Agreement dated October 28, _____ [year]; and

Seller owns a 50-percent interest in the partnership and desires to sell 20 percent of his interest to Buyer, and Buyer desires to purchase the 20-percent interest.

Now, therefore, the parties agree as follows:

1. *Price.* The purchase price for 20 percent of Seller's partnership interest shall be \$150,000, payable in cash or its equivalent.

2. *Effective date of transfer.* The sale and transfer of the above partnership interest shall be effective as of January 1, _____ [year]. From and after that date, Buyer shall have a 10-percent interest in the cash flow and net income or loss of the partnership, subject to its liabilities.

3. *Indemnification.* As a condition of this purchase, Buyer covenants, such covenant to survive the sale and transfer of the partnership interest, that he shall and hereby assumes 10 percent of the mortgage liability of the partnership to Louisville Life Insurance Company, and shall indemnify Seller and John L. Blaird, the other partner in the partnership, from their personal liability on the promissory note payable to Louisville Life Insurance Company, as partners and as guarantors of the note, up to the amount of 10 percent of the liability.

4. *Covenant of buyer.* Subject to the terms of paragraph 5, Buyer shall be bound by all of the terms and provisions of the above General Partnership Agreement, dated October 28, _____ [year], effective as of the date of transfer of Seller's partnership interest.

5. *Resale of partnership interest.* If for any reason Buyer terminates his employment with Advance Builders Corp., an Indiana corporation, he shall immediately resell his 10-percent partnership interest to Seller, or Seller's successors in interest, and Seller shall purchase same. The price for Buyer's 10-percent interest shall be the same as the price paid by Buyer for the partnership interest as set forth in paragraph 1. Notwithstanding the preceding, if Buyer's termination of employment is due solely to his retirement from the corporation under its employee retirement plan or policy, Buyer shall not be required to resell his partnership interest but rather the disposition thereof shall be governed by the General Partnership Agreement.

6. John L. Blaird has executed this Agreement solely for the purpose of agreeing to execute the Amended Certificate of Partnership, attached as Exhibit A, and the *First Amendment* to General Partnership Agreement, attached as Exhibit B, and the parties each agree to execute Exhibits A and B.

7. *Binding effect.* This Agreement shall be binding upon and inure to the benefit of the parties and their respective heirs, executors, administrators, and assigns.

8. *Entire agreement; modification.* This instrument constitutes the entire agreement between the parties. It may not be modified except by an agreement duly executed and signed by both parties.

9. *Nonwaiver.* No delay or failure by either party to exercise or enforce any right hereunder, and no partial or single exercise of such right, shall constitute a waiver of that or any other right, unless otherwise expressly provided herein.

10. *Notices.* All notices hereunder shall be in writing and delivered personally or mailed by certified or registered mail, postage prepaid, return receipt requested, addressed to the parties at their respective addresses above.

11. *Governing law.* This Agreement shall be construed in accordance with and governed by the laws of the State of Indiana.

12. *Headings.* Headings in this Agreement are for convenience and reference only and shall not be used to interpret or construe its provisions.

13. *Counterparts.* This Agreement may be executed in one or more counterparts, each of which shall be deemed an original but all of which together shall constitute one and the same instrument.

14. *Time of essence.* Time is of the essence of this Agreement.

The parties have executed this Agreement on the date first above written.

Seller:

Oscar A. Brown

Buyer:

George B. Stein

Consented to:

John L. Blaird

Exhibit A

Amended
Certificate of Partnership
for
The Ft. Wayne Realty Company

The undersigned certify, acknowledge, and resubmit the following amended certificate of The Ft. Wayne Realty Company, an Indiana general partnership having a fictitious name for the purpose of adding George B. Stein as a partner, effective as of January 1, _____ [year]:

Partnership Name and Principal Place of Business:	The Ft. Wayne Realty Company 2500 First Avenue Ft. Wayne, Indiana

Partners' Names and Addresses:	Oscar A. Brown 2200 Erie Road New Haven, Indiana

John L. Blaird
26520 Lake Road
Huntington, Indiana

George B. Stein
6122 String Road
Auburn, Indiana

The undersigned have executed this Amended Certificate of Partnership on _____ [date].

Oscar A. Brown

John L. Blaird

George B. Stein

[Acknowledgments]

Exhibit B

First Amendment to
General Partnership Agreement
of
The Ft. Wayne Realty Company

The undersigned amend certain sections of the General Partnership Agreement of The Ft. Wayne Realty Company, to account for the addition of George B. Stein as a Partner, such amendments to be effective as of the 1st day of January, _____ [year]:

1. Paragraph 5 of the Agreement is amended to read in its entirety as follows:

"5. *Partners.* The names and addresses of each of the Partners are as follows:

Name	Address
Oscar A. Brown	2200 Erie Road New Haven, Indiana
John L. Blaird	26520 Lake Road

George B. Stein

Huntington, Indiana
 6122 String Road
 Auburn, Indiana"

2. Paragraph 7 of the Agreement is amended to read in its entirety as follows:

"7. *Net profits, net losses and cash flow.*

A. *Profits and losses.* Subject to the adjustments that may be made as hereinafter provided, the net profits and the net losses shall be shared by the Partners as follows:

Partner	Percentage
Oscar A. Brown	40%
John L. Blaird	50%
George B. Stein	10%

The terms "net profits" and "net losses" shall mean the net profits and net losses of the Partnership as determined for federal income tax purposes by its certified public accountant.

B. *Cash flow.* The "cash flow" of the Partnership shall be its net profit or loss as defined in paragraph 7A, plus depreciation and other noncash charges deducted in determining the net profit or loss, plus sums borrowed by the Partnership, minus principal payments on all mortgages, any other cash expenditures which have been not deducted in determining the net profit or loss of the Partnership, and any amount reasonably required by it to maintain sufficient working capital and a reasonable reserve for replacements. The cash flow of the Partnership shall be determined separately for each fiscal year and not cumulatively and, as so determined, but subject to any adjustments required below, shall be distributed as follows:

Partner	Percentage
Oscar A. Brown	40%
John L. Blaird	50%
George B. Stein	10%

The cash flow shall be distributed on or before the 90th day following the end of the Partnership's fiscal year. The fiscal year end of the Partnership shall be December 31."

3. The first paragraph of paragraph 9 of the Agreement is amended to read in its entirety as follows:

"9. *Managing Partner.* The day-to-day affairs of the Partnership shall be handled by the Managing Partner, John L. Blaird. If at any time John L. Blaird is unable or unwilling to serve as Managing Partner, the successor Managing Partner of the Partnership shall be Oscar A. Brown. If at any time Oscar A. Brown is unable or unwilling to serve as Managing Partner, the successor Managing Partner of the Partnership shall be elected by a majority in interest of the Partners."

In witness whereof, the undersigned Partners of The Ft. Wayne Realty Company have signed this *First Amendment* as of January 27, _____ [year].

Signed in the presence of:

General Partners:

Oscar A. Brown

John L. Blaird

George B. Stein



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Chapter 21 SALES AND EXCHANGES
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C. CONTRACTS OF SALE: COMMERCIAL PROPERTY

25-21 Current Legal Forms for Real Estate FORM 21.57

FORM 21.57 Sale of Membership Interests in Limited Liability Company in Lieu of Direct Sale of Real Estate

COMMENT

Real estate can be sold directly by the title holder or indirectly by a sale of Membership Interests in a limited liability company ("LLC") if the real estate is owned by an LLC (or if it can be transferred by the owner to an LLC). There are several reasons why it may be more advantageous to sell the Membership Interests as opposed to a direct sale of the real estate. One advantage if Membership Interests are sold is that no deed will have to be recorded in the public records where the real property is located. Therefore, the transaction can be kept private by the parties. In addition, because no deed is recorded, the county real property assessor will not be able to increase the value of the real property on the tax rolls to the current value as established by the purchase price, which likely will be higher than the value on the tax rolls. That disclosure would result in a revaluation of the real property for real estate tax purposes, and higher real estate taxes to pay.

A second advantage is the sale of Membership Interests may avoid the parties having to pay a transfer tax or conveyance fee. In many jurisdictions a transfer tax or conveyance fee must be paid when there is a transfer of real estate for value. The fee is usually based on the purchase price paid for the real property and it is usually paid when the deed is recorded. If the Member Interests are sold, there is no transfer of real property because the Membership Interests are considered personal property.

If the real property to be sold is not already held in an LLC, but rather is held by an individual, the individual can transfer the real property to a new LLC set up by the individual. In exchange for that transfer, the individual will receive 100% of the Membership Interests in the LLC. In most jurisdictions there is no transfer tax required to be paid on the transfer into the LLC by the individual owning it because it is treated as a contribution, not as a sale, and because the same individual that contributed the real property continues to own it, although indirectly through an LLC.

In the following form the parties anticipated setting up an LLC from the outset so the purchase agreement sets forth that the buyer would acquire the LLC Units (or Membership Interests) owned by the seller, instead of acquiring the real estate directly. In this form the owner of the real property was an existing LLC, but to protect the buyer from unknown liabilities of the existing LLC, the agreement required the seller to transfer the real estate to a new LLC, which would have no risk of unknown liabilities. The buyer then is required to purchase all of the Units held by the owner of the new LLC and is able to avoid having to record a deed. By not having to record a deed in this jurisdiction, the parties avoided any transfer tax and any upward revaluation of the real estate by the county real property assessor. The price paid for the units is the same as what would have been paid for the real estate because the only asset of the new LLC is that real estate. The buyer ends up owning the real estate, but indirectly as the sole owner of the LLC.

The next form illustrates a form which can be used to convert a conventional direct sale of real estate into a sale of Membership Interests in an LLC.

FORM

THIS AGREEMENT is made at _____, Ohio, this _____ day of _____, 20____, between READING LLC, an Ohio limited liability company (hereinafter called "Seller"), and JOHN S. STONE, or his nominee (hereinafter called "Buyer").

WITNESSETH:

WHEREAS, Seller is the owner of the premises described on Exhibit A, attached hereto and made a part hereof, consisting of approximately 5 acres of vacant land, made up of four (4) parcels and the single story buildings thereon known as 28350 Woods Road, 28230 Woods Road, and 28220 Woods Road, Ohio, which buildings the Buyer may elect to demolish at some time after closing. The aforesaid premises include the land and any and all rights, privileges, and easements appertaining thereto, the buildings and all improvements thereon, all of which shall hereinafter be referred to as the "Property"; and

WHEREAS, it is the intention of Seller to contribute the Property to a new Ohio limited liability company called Blackstone Development Company, LLC, hereinafter referred to as "Blackstone," in exchange for all of the membership units in Blackstone, consisting of 100 units to be issued to Seller in exchange for its contribution to Blackstone; and

WHEREAS, the Property shall be contributed to Blackstone by Seller on the closing date hereafter set forth, by good and sufficient general warranty subject only to the encumbrances approved by Buyer as hereafter described, provided all conditions set forth herein have been satisfied; and

WHEREAS, after the issuance of such 100 units, Seller shall own all of the outstanding membership units in Blackstone (collectively, the "Units"); and

WHEREAS, Seller desires to sell to Buyer, and Buyer desires to purchase from Seller, all of the Seller's right, title and interest in and to the Units; and

WHEREAS, Blackstone consents to such purchase and sale of the Units, subject to the terms set forth herein; and

WHEREAS, the parties hereto desire to provide for the purchase and sale of the Units under the terms and conditions set forth herein;

NOW, THEREFORE, in consideration of the mutual covenants and conditions contained herein, the parties hereto, intending to be legally bound hereby, covenant and agree as follows:

1. **Transfer of Units.** Subject to the terms and conditions of this Agreement, Seller hereby agrees to sell, convey, transfer, assign, set over and deliver to Buyer, and Buyer does hereby purchase, acquire and accept from Seller, all of the Units in Blackstone.

2. **Purchase Price.** Subject to the adjustments hereafter set forth, the total purchase price for the Units is Two Million and 00/100 Dollars (\$2,000,000), payable by Buyer as follows:

(a) Twenty Thousand and 00/100 Dollars (\$20,000.00) in cash or by check upon the execution of this Agreement, delivered to Seller, which sum shall be deposited into escrow with the escrow agent hereinafter designated.

(b) The sum of One Million Five Hundred Thousand and 00/100 Dollars (\$1,500,000.00) in cash (or certified check), which sum shall be deposited into escrow on or before the closing date of this transaction, as hereinafter designated.

(c) The balance of the purchase price, namely Four Hundred Eighty Thousand and 00/100 Dollars (\$480,000.00), shall be payable within five (5) years from the closing date, or when Buyer (or any affiliated party of Buyer) obtains title to the adjacent property located at 28400 Woods Road, Ohio, whichever is sooner. Said balance shall be evidenced by a promissory note secured by a mortgage subordinate to any mortgage deed securing a construction loan obtained by Buyer to develop and improve the Property in an amount not to exceed eighty percent (80%) of the completed value of the land and improvements as determined by a reputable MAI appraiser engaged by Buyer's lender. A copy of said promissory note and mortgage deed are marked Exhibit B and Exhibit C, respectively, attached hereto and made a part hereof. Executed counterparts shall be deposited into escrow on or prior to the closing date.

The purchase price for the Units shall be adjusted if necessary, in the event a registered surveyor, licensed in the State of Ohio, hired and paid for by Seller, determines the actual usable acreage of the Property to be more or less than five (5) acres, assuming a price per usable acre of Four Hundred Thousand and 00/100 Dollars (\$400,000.00). It is agreed that the purchase price for the Units is tied directly to the value of the Property. The surveyor shall measure the actual usable acreage, as hereafter defined, within the boundaries of the parcels, but not to the centerline of the roadway, to at least two (2) decimal places, and shall notify Seller and Buyer of such determination. The term "usable acreage" shall mean that portion of the acreage which is buildable, specifically excluding (i) the utility substation and the areas immediately around it that may be restricted from use (ii) the electric utility right of way easement containing a transformer and utility poles and the areas immediately adjacent thereto which may be restricted from use by law or by regulation of the utility company, (iii) the portions of Woods Road which are a part of the land taken in connection with the widening of those roads, and (iv) any other nonbuildable areas. If the actual usable acreage is determined to be different than five (5) acres, the purchase price shall be adjusted accordingly, using \$400,000 per usable acre or fraction thereof. Within five (5) business days of receipt of the surveyor's determination of usable acreage, Buyer and Seller must mutually agree to such determination by written notice given to the other. The parties agree to use the legal descriptions of the parcels prepared by the surveyor for the deed of conveyance, and a copy thereof shall be certified to the title company by the surveyor. Seller agrees to cause such survey to be obtained within sixty (60) days from the date of execution hereof, and to cause copies thereof to be delivered to

Buyer. Seller agrees to order the survey from a surveyor designated by Buyer, but shall not be required to pay in excess of \$5,000 towards said cost. If the cost exceeds \$5,000, Buyer shall pay the excess.

3. **Closing.** The closing of this transaction shall be the later of _____, 20____, or seventy-five (75) days from the date of execution of this Agreement.

4. **Contingencies.** A. Buyer shall have sixty (60) days from the date of execution of this Agreement to satisfy the following contingencies:

(i) To determine the suitability of Blackstone's land for Buyer's intended purposes, including subsurface soil conditions, soil tests and such other tests and investigations as Buyer shall determine;

(ii) To determine the environmental condition of the Property by obtaining a Phase I site assessment and wetlands delineation prepared by a licensed professional environmental engineering company; and

(iii) To inspect the buildings on the Property.

All of the above shall be done at Buyer's sole risk and expense. Seller agrees that Buyer, its agents and employees, shall have access to the Property for the purpose of performing the above site assessments, tests and investigations. Buyer agrees to interfere as little as possible with Seller in the conduct of such matters, and agrees to indemnify, defend and hold harmless Seller from any damages to persons or property resulting from the aforesaid. Any damage to the real or personal property resulting from the inspections and testing shall be promptly repaired by Buyer to restore the Property to its pre-existing condition.

In the event Buyer does not satisfy and approve any one or more of the above contingencies within sixty (60) days from the date of execution of this Agreement, Buyer shall have the right to notify Seller in writing of its disapproval, in which event this Agreement shall be terminated without further liability to either party, and all funds and documents shall be returned to the respective parties. Seller shall have no obligation to convey the Property into Blackstone until the above contingencies shall have been satisfied or waived by Buyer, and the parties are in the position to close this transaction.

B. Buyer agrees that upon completion of its inspections and tests referenced above, except as otherwise provided herein, Buyer is purchasing the Property in "as is" and "where is" condition, with all faults.

5. A. On or before the closing date, Seller shall deposit into escrow with the escrow agent the certificates evidencing the Units to be sold by Seller hereunder, duly endorsed for transfer to the Buyer or Buyer's nominee, or accompanied by written powers duly executed and otherwise sufficient to convey and transfer the Units to the Buyer or Buyer's nominee. Such Units shall be delivered by the escrow agent to Buyer in connection with the closing of this transaction, provided Buyer has deposited all funds and documents required under the terms of this Agreement. Seller shall execute and deliver to Buyer such other and further documents and instruments of conveyance, sale, assignment and transfer, and shall take or cause to be taken such other or further action as Buyer may reasonably request in order to more fully vest, confirm or evidence the Buyer's title to and ownership of the Units. In addition, Seller shall provide to Buyer and to the title company all such resolutions as are required to satisfy Buyer and the title company that Seller has all requisite authority to convey the Property to Blackstone and to transfer the Units to the Buyer or his nominee.

B. Seller shall accompany the conveyance of Seller's Units with the simultaneous issuance of an ALTA Owner's Fee Policy with respect to the Property in the amount of the purchase price issued by First American Title Insurance Company, Ohio (hereinafter called "title company"), insuring marketable title to be good and marketable in Blackstone

upon the filing of Seller's warranty deed conveying the Property to Blackstone, subject only to the exceptions approved by Buyer as hereafter set forth. Seller and Buyer shall split equally the cost of the title insurance premium.

C. A preliminary title report, with a special tax search included, in the form of a commitment to issue the required title insurance ("title report") shall be ordered from the title company by Seller immediately upon the execution of this Agreement, a copy of which shall be delivered to Buyer. Within fifteen (15) days from the receipt of said title report by Buyer, Buyer shall notify Seller and the title company of any restrictions, reservations, limitations, easements and conditions of record (together herein called "title defects") disclosed in said title report which are objectionable to Buyer. In the event Buyer so notifies Seller of any such title defects, Seller shall have until the closing date to cure or remove said title defects. Seller shall be obligated to remove all such title defects objected to by Buyer that may be removed by the payment of money, and Seller shall take whatever reasonable steps may be necessary to remove any other title defects. If any special assessments are shown in such commitment other than for routine maintenance of street improvements, Buyer may object to same within the aforesaid 15-day period. If such objection is made, Seller may, but shall not be obligated to, pay in full such assessments, including all future installments thereof. If Seller elects not to pay such assessments in full, Buyer shall have the right to terminate this Agreement by written notice to Seller, in which event all funds and documents shall be returned to Buyer. Notwithstanding the above, Buyer shall have the option to request that the surveyor hired by Seller also prepare an ALTA/ACSM survey to be certified to the title company, in addition to the boundary survey referred to in Paragraph 2. above. If so, the 15-day period shall not commence until Buyer is in receipt of the ALTA/ACSM survey. In addition, Buyer shall have the right to object to any items shown in the survey, in which event such objections shall be treated in the same manner as title defects referred to hereinabove.

On the closing date, the escrow agent shall notify Seller and Buyer as to whether the title company is then in the position to file the warranty deed referred to above and issue its title insurance showing as exceptions in the deed and in the title insurance policy only those items in the title report to which the Buyer did not object. If the escrow agent shall notify the parties that (a) the title company will issue such title insurance then this transaction shall be closed in accordance with the terms of this Agreement, or (b) the title company will not issue such title insurance, and if the Seller does not forthwith cure the title defects that the escrow agent recites as preventing such issuance showing as exceptions only those items in the title report to which the Buyer did not object, or within such period of time as Buyer shall permit, or Buyer does not forthwith waive the same, then this Agreement shall be automatically void and of no further force and effect, the escrow agent shall return to the parties the respective funds and documents deposited into escrow by them, and the parties shall be fully released from any liability or obligations hereunder. If Buyer shall waive the title defects preventing such issuance by so notifying the title company and the escrow agent, or if the Seller shall have cured the same as permitted above, the obligations of the parties hereunder shall not be affected by reason thereof, there shall be no abatement or reduction of the purchase price, and this transaction shall be consummated in accordance with the terms and provisions of this Agreement, except that such title defects that are waived by Buyer, if any, shall be set forth as exceptions in the warranty deed and in the title insurance.

6. If the buildings or other improvements shall be damaged prior to transfer of record title to the Buyer, Seller shall promptly notify Buyer of the extent of said damage, and, if said damage exceeds Fifty Thousand Dollars (\$50,000), Buyer shall have the option, exercisable in writing within ten (10) days of receipt of notice of said damage from Seller (i) to rescind and void this Agreement, in which event all funds and documents shall be returned to the respective parties by the escrow agent, or (ii) to continue this Agreement in full force and effect, in which case the Seller shall execute and deliver to Buyer all documents reasonably required to irrevocably assign to Buyer all insurance proceeds payable because of the damage; otherwise this Agreement shall be closed in accordance with (i) above. Seller shall carry a fire and extended coverage insurance policy insuring the improvements in an amount not less than their full insurable value until the closing date. After transfer of record title to the Property, risk of loss shall be and is assumed by Buyer. There shall be no proration of insurance. It shall be the obligation of Buyer to obtain Buyer's own policies of insurance from and after the closing date. After transfer of record title to the Property, risk of loss shall be and is assumed by Buyer. There shall be no proration of insurance. It shall be the obligation of Buyer to obtain Buyer's own

policies of insurance from and after the closing date.

7. A. All real estate taxes and assessments, both general and special, shall be prorated by the escrow agent as of the closing date, using for such purpose the rate and valuation shown on the latest available tax duplicate.

B. There shall be no holdback for water and sewer charges. Buyer acknowledges that the buildings on Woods Road have well water and septic systems.

8. The Seller and the Buyer represent, which representation shall survive the transfer of title, that no real estate broker was involved in this transaction and that no brokerage fees or other compensation is due any real estate broker or any other person because of this transaction.

9. This transaction shall be placed in escrow with First American Title Insurance Company ("escrow agent"). An executed counterpart of this Agreement shall be deposited with the escrow agent by the Buyer, and this Agreement shall serve as the escrow instructions. The escrow agent may attach its standard conditions of acceptance thereto; provided, however, that in the event said standard conditions are inconsistent or in conflict with the terms of this Agreement, then this Agreement shall control.

10. On the closing date, the escrow agent shall deliver to Buyer or his nominee the Units and shall thereupon deliver to each of the parties the funds and documents to which they shall be respectively entitled, together with its escrow statement, provided that the escrow agent shall then have on hand all funds and documents necessary to complete the within transaction and provided the title company has stated that it shall be in a position to and will issue and deliver, upon the closing date, the title insurance required hereunder.

In closing this transaction, the escrow agent shall charge the Seller with the following:

- (a) the amount of real estate taxes and assessments prorated up to and including the date of transfer of title to the Units;
- (b) the cost of a title report, title search, and one-half (1/2) of the premium for the title insurance in the amount of the purchase price;
- (c) the cost of paying off and satisfying any mortgage indebtedness for which Seller is liable, together with the cost of any mortgage cancellation, recording fee or other costs incident to the satisfaction of any such indebtedness;
- (d) one-half (1/2) of the escrow fee; and
- (e) all other charges properly borne by Seller consistent with the terms of this Agreement;

and immediately thereafter shall deliver to the Seller the balance of the funds in its hands due under the terms hereof, including any prorations due the Seller, and any documents due the Seller.

On closing, said escrow agent shall charge the Buyer with the following:

- (a) one-half (1/2) of the cost of the premium for the title insurance;
- (b) The cost to record the deed to Blackstone;
- (c) one-half (1/2) of the escrow fee; and
- (d) all other charges properly borne by Buyer consistent with the terms of this Agreement;

and immediately thereafter, said escrow agent shall deliver to Buyer any proration to which Buyer is entitled and any other funds or documents due the Buyer and, as soon as available, the recorded warranty deed to Blackstone and title insurance issued with respect to the Property.

11. Any notice which may be or is required to be given pursuant to the provisions of this Agreement shall be deemed to be sufficiently given if personally delivered or sent by certified or registered mail, postage prepaid, return receipt requested, and addressed as follows:

If to Seller, to: Reading LLC

With a copy to:

If to Buyer, to: John S. Stone

With a copy to:

12. This Agreement and the transaction described herein shall be kept strictly confidential by all of the parties hereto and their respective representatives and advisor.

13. This Agreement shall be binding upon and inure to the benefit of Seller and Buyer and their respective legal representatives, successors and assigns. Buyer shall have the right to assign this Agreement to such persons or entities as Buyer designates, provided all such persons or entities assume the obligations of Buyer hereunder.

The parties hereto execute this Agreement the day and year first above written.

SELLER:

READING LLC, an Ohio limited liability company

By: _____

Managing Member

BUYER:

John S. Stone

EXHIBIT A

Legal Description of Property

EXHIBIT B

Promissory Note for \$480,000

EXHIBIT C

Mortgage Deed Securing the Promissory Note for \$480,000



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Current Legal Forms for Real Estate

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Chapter 21 SALES AND EXCHANGES
Part IV. Forms

C. CONTRACTS OF SALE: COMMERCIAL PROPERTY

25-21 Current Legal Forms for Real Estate FORM 21.57A

FORM 21.57A Amendment to Real Estate Purchase Agreement to Convert to Sale of Membership Interests in Limited Liability Company

COMMENT

For the reasons discussed in the Comment to the prior Form 21.65, it is sometimes advantageous to sell the Membership Interests in a limited liability company (LLC) in lieu of selling the real estate owned directly by the LLC. However, frequently before the seller and buyer realize this fact, they have already signed the Purchase Agreement. In such a case this Amendment can be used to convert the purchase and sale transaction to a purchase and sale of the Membership Interests of the LLC owning the real estate.

In this instance, the real property is owned by an existing LLC who transfers it into a new LLC, in this agreement called the "Subsidiary." The existing LLC then becomes the sole member of the Subsidiary. That sole member then sells its Membership Interests for the same price the real estate was agreed to be sold for in the original Purchase Agreement. A new LLC was used because the buyer is then better protected from unknown liabilities of the existing LLC.

FORM

THIS AMENDMENT is entered into this ____ day of _____, by and among _____ or her nominee(s) (referred to hereafter as "Buyer"), _____, an _____ limited liability company (referred to hereafter as "Seller"), and _____ (referred to hereafter as "Member").

WHEREAS, Buyer and Seller entered into a Purchase Agreement, Offer, Receipt, and Acceptance effective as of _____ (referred to hereafter as the "Agreement") wherein Buyer agreed to purchase from Seller, and Seller agreed to sell to Buyer, the building and land on which it is located at _____ as more fully described therein (referred to hereafter as the "Real Property"); and

WHEREAS, Member is the sole member of Seller and has economic and other interests in Seller and in the proceeds of the sale contemplated herein; and

WHEREAS, the parties hereto desire that in lieu of Buyer's purchase of the Real Property in accordance with the Agreement, Seller shall sell and transfer to Buyer, and Buyer shall purchase and acquire from Seller, all of Seller's right, title, and interest in the membership interests (referred to hereafter as "Membership Interests") of a newly-formed, wholly-owned subsidiary of Seller (i.e., _____) (referred to hereafter as the "Subsidiary"), which will own the Real Property, together with all rights as a landlord resulting from any tenancies, and the personal property used in connection with the operation of the Real Property described in **Exhibit A** (referred to hereinafter as the "Personal Property"), attached hereto and incorporated herein; and

WHEREAS, the parties hereto desire to amend the Agreement to provide for such purchase and sale of the Membership Interests in lieu of the Property;

NOW, THEREFORE, in consideration of the mutual covenants and conditions contained herein, the parties hereto, intending to be legally bound hereby, covenant and agree as follows:

1. Transfer of Membership Interests. Subject to the further terms and conditions of this Amendment, Seller hereby sells, conveys, transfers, assigns, sets over, and delivers to Buyer, free and clear of all liens and encumbrances, and Buyer does hereby purchase, acquire, and accept from Seller, all of the Membership Interests in the Subsidiary.

2. Transfer of Real Property and Personal Property. As soon hereinafter as is practicable, Seller will transfer to the Subsidiary by general warranty deed good and marketable title to the Real Property and will transfer to the Subsidiary by bill of sale good and marketable title the Personal Property, but Seller shall not be obligated to do either until after Buyer has waived Buyer's contingencies under the Agreement.

3. Closing. The closing date of this transaction shall be _____ or such other date as the parties may hereafter agree. On the closing date, the purchase price, costs, fees, taxes, security deposits, prorations and expenses associated with the transaction shall be borne by and/or allocated to Seller and Buyer as though Buyer had purchased the Property from Seller as of the closing date. The purchase price and all other funds and documents required to close the transaction shall be deposited with the escrow agent. On or before the closing date, Seller shall deposit in escrow with the escrow agent the certificate evidencing the Membership Interests to be sold by Seller hereunder, duly endorsed for transfer to Buyer or accompanied by written assignments duly executed and otherwise sufficient to convey and transfer the Membership Interests to Buyer, which shall be delivered by the escrow agent to Buyer on the closing date. Seller and the Subsidiary shall execute and deliver to Buyer such other and further documents and instruments of conveyance, sale, assignment and transfer, and shall take or cause to be taken such other or further action as Buyer may reasonably request, in order to more fully vest, confirm or evidence in Buyer title to and ownership of the Membership Interests. Notwithstanding any provision of the Agreement to the contrary, the sole title company and escrow agent for this transaction shall be Lighthouse Title Agency.

4. Allocation of Income and Expense. The parties agree that all income and expenses relating to the Subsidiary that accrue prior to the closing date shall be allocated to and be the responsibility solely of Seller and that all income and expenses of the Subsidiary that accrue on or after the closing date shall be allocated to and be the responsibility solely of Buyer. The parties agree to cooperate in order to satisfy all tax reporting and filing obligations in a timely and consistent manner.

5. Warranties and Representations of Seller. Seller and Member hereby jointly and severally warrant and represent that the following are true and correct on the date of this Amendment and will be true and correct as of the closing date:

A. Seller is validly existing and in full force and effect under the laws of the State of _____, with all requisite power and authority to own the Real Property and Personal Property, and was formed on _____ under Charter Number _____; and, furthermore, the Subsidiary is or will be validly existing and in full force and effect under the laws of the State of _____ as of the closing date;

B. Seller is the sole owner of the Subsidiary and the sole record and beneficial holder of the Membership Interests and holds the Membership Interests free and clear of any lien, pledge, encumbrance, claim or other charge whatsoever;

C. Seller is not subject to any legal or personal restraint or disability that would prevent or restrict Seller's execution, delivery or performance of this Amendment, and the execution, delivery and performance of this Amendment by Seller will not (i) constitute a breach of or violate any provision of any agreement or instrument, or any law, regulation, order or decree, to which Seller is a party or by which Seller is bound, (ii) conflict with or violate the governing documents of Seller in any material respect, or (iii) result in any lien against the Membership Interests, the Real Property, or the Personal Property;

D. As of the Closing Date, the Subsidiary owns good and marketable title to the Real Property free and clear of all liens and encumbrances, except zoning ordinances and building codes, taxes and assessments, both general and special, which are a lien but not yet due and payable, and such restrictions, reservations, limitations, easements and conditions of record as are waived by Buyer under the terms of the Agreement;

F. As of the Closing Date, all of the Personal Property is held by the Subsidiary free and clear of all liens, claims, or encumbrances whatsoever;

G. There are no pending or threatened actions, suits or proceedings against Seller or the Subsidiary, and there are no outstanding notices or orders from any governmental authority with respect to any claim of any violation of any laws, ordinances, zoning codes or rules and regulations;

H. Exhibit B attached hereto is a list of all agreements and contracts to which Seller and/or the Subsidiary is a party, whether written or oral;

J. All warranties and representations of Seller set forth in the Agreement are true and correct on the date of this Amendment and will be true and correct as of the closing date;

K. Seller has disclosed to Buyer all facts known to Seller that are material to the condition, assets, liabilities, and operations of Seller and the Subsidiary, and no representations or warranties of Seller contained in this Amendment or in the Agreement, and no statement contained in any schedule, list or other writing furnished or to be furnished by Seller to Buyer, contains any untrue statement of a material fact or omits to state a material fact necessary in order to make the statements contained therein not misleading;

L. The Subsidiary will not have any liabilities other than real estate taxes due and not yet payable, and since its formation the Subsidiary has not conducted any business or commercial activities other than the ownership and operation of the Real Property and the Personal Property;

M. Neither the Subsidiary nor Seller has any employees for purposes of income tax and withholdings requirements or otherwise; and

N. Seller has delivered to Buyer all operating agreements and other contracts and agreements to which the Subsidiary is a party, if any.

Each of the foregoing representations and warranties shall survive the closing of the transaction contemplated herein.

6. Buyer's Indemnification. Buyer shall hold harmless, defend and indemnify Seller and its agents, representatives, successors and assigns, from and against any claim, loss, damage, obligation, liability, expense or cost of any kind or amount whatsoever including, without limitation, reasonable attorneys' fees, resulting from or arising out of any liabilities of Buyer, the Subsidiary, the Real Property, or the Personal Property that relate to the period after the date of this Agreement, including, without limitation, claims based upon the failure to file federal, state, or local tax returns and/or failure to pay any federal, state, or local taxes.

7. Sellers' Indemnification. Seller and Member jointly and severally shall hold harmless, defend and indemnify Buyer and Buyer's respective agents, heirs, representatives, successors and assigns, from and against any claim, loss, damage, obligation, liability, expense or cost of any kind or amount whatsoever including, without limitation, reasonable attorneys' fees, resulting from or arising out of (i) any liabilities of or relating to Seller, the Subsidiary, the Real Property, or the Personal Property that relate in any way to the period immediately preceding the closing date, including, without limitation, claims based upon the failure to file Federal, state or local tax returns and/or failure to pay any federal, state, or local taxes; (ii) Seller's breach of the Agreement or this Amendment; and (iii) any inaccuracy in, breach of or default under any of the foregoing warranties and representations or in any document furnished or to be furnished by or on behalf of Seller in connection with the transactions contemplated in the Agreement and/or this Amendment.

8. Resignations. At the closing, all officers and managers or the Subsidiary shall submit written resignations, effective immediately upon the consummation of this transaction, and Seller shall provide Buyer with all originals of all of the Subsidiary's documents and written actions.

9. Good Standing. As of the closing date, Seller shall deliver to Buyer a full force and effect certificate for the Subsidiary, dated not more than ten (10) days before the closing date, issued by the Secretary of State of _____.

10. Securities Restriction. Buyer agrees that Buyer is acquiring the Membership Interests for Buyer's own account as an investment without the intent to distribute the Membership Interests.

11. Binding Effect; Assignment. This Amendment and the various rights and obligations arising hereunder shall inure to the benefit of and be binding upon the parties hereto and their respective legal representatives, heirs, successors and assigns.

12. Counterparts. This Amendment may be executed simultaneously in multiple counterparts, each of which shall be deemed an original, but all of which taken together shall constitute one and the same instrument.

13. Effect of Amendment. Except as expressly provided herein or as the context of this Amendment may otherwise require, all other terms of the Agreement shall remain unmodified and in full force and effect and shall remain binding upon and inure to the benefit of Buyer and Seller, including, without limitation, all contingencies to closing (including, but not limited to, Buyer's due diligence review and approval of zoning and development feasibility), all warranties and representations of Seller.

The parties hereto have executed this Amendment on the day and year first written above.

BUYER:

SELLER:

By: _____

MEMBER:

By: _____

EXHIBIT A

Personal Property

EXHIBIT B

List of All Agreements to Which Seller or Subsidiary is a Party



93 of 152 DOCUMENTS

Current Legal Forms for Real Estate

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Current Legal Forms for Real Estate
Chapter 21 SALES AND EXCHANGES

Part IV. Forms

D. CONTRACTS OF SALE: MISCELLANEOUS CLAUSES AND PROVISIONS

25-21 Current Legal Forms for Real Estate FORM 21.57B

FORM 21.57B Miscellaneous clauses and provisions

COMMENT

The following clauses and provisions cover a wide variety of situations in both residential and commercial real estate sale and purchase contracts. These items may be included in the original contract or any amendments or riders to the contract.

The clauses and provisions have been arranged under general categories. The categories are arranged in the following order (with corresponding clause numbers):

- ☐ --Property, improvements, condition: (1) through (22)
- ☐ --Title, liens, deed: (23) through (45)
- ☐ --Representations, warranties: (46) through (48)
- ☐ --Parties: (49) through (53)
- ☐ --Taxes, assessments, adjustments to purchase price: (54) through (63)
- ☐ --Contingencies, conditions other than mortgages: (64) through (78)

- ☐ --Mortgages, financing: (79) through (88)
- ☐ --Casualty, condemnation, insurance: (89) through (94)
- ☐ --Purchase price, deposit, remedies, liability: (95) through (109)
- ☐ --Possession, closing: (110) through (115)
- ☐ --Assignment: (116) through (120)
- ☐ --Boilerplate clauses: (121) through (128).

FORMS

Property, Improvements, Condition

(1) Land, building, and improvements

Seller agrees to sell and convey to Purchaser, and Purchaser agrees to purchase all that certain plot, piece or parcel of land (the "Land"), together with the building and improvements thereon (the "Building"), situate, lying, and being in the City of New York, County of New York, State of New York, more particularly described in the attached Exhibit A (the Land and the Building collectively referred to as the "Property");

Together with all right, title, and interest, if any, of Seller in and to any land lying in the bed of any street, road or avenue, opened or proposed, in front of or adjoining the Property, to the center line thereof, and all right, title, and interest of Seller, if any, in and to any award for damage to the Property by reason of change of grade of any street;

Together with all right, title, and interest of Seller, if any, in and to all fixtures and articles of personal property including, without limitation, equipment, inventory, and supplies now or hereafter affixed to or used in connection with the use, operation, maintenance and occupancy of the Property;

And together with all easements, rights of way or use, privileges, licenses, appurtenances, and rights to the same belonging or appertaining to the Property.

(2) Residential land, building, and improvements

Seller agrees to sell and convey, and Purchaser agrees to purchase, all that certain plot, piece or parcel of land, together with the buildings and improvements thereon erected (hereinafter collectively referred to as the Premises), situate, lying and being in the City of _____, County of _____, and State of _____, bounded and described as follows:

(insert description of property)

The Premises are known as and by the street number _____ Street, City of _____, State of _____.

This sale includes all right, title and interest, if any, of the Seller in and to any land lying in the bed of any street, road or avenue opened or proposed, in front of or adjoining said premises, to the center line thereof.

(3) Apartment building to be constructed

Purchaser agrees to purchase, and Seller agrees to sell, that certain property (collectively, the "Apartment Project") in the City of _____, County of _____, and State of _____, described in Exhibits A, B and C attached hereto and made a part hereof as follows:

A. The real property ("Land") described in Exhibit A;

B. The buildings and other improvements ("Improvements") to be constructed and installed on the Land by Seller at Seller's expense, and substantially completed not later than _____ [date], in accordance with the plans and specifications described in Exhibit B, or as amended with the approval of the construction or permanent lender;

C. The tangible personal property ("Personal Property") which Seller, at its expense, shall furnish and install in or about the Land and Improvements as described in Exhibit C; and

D. All intangible property ("Intangible Property") owned or hereafter acquired by Seller in connection with the Land, the Improvements, and the Personal Property and any business and apartment building operation to be conducted thereon or with the use thereof, including but not limited to use, occupancy and operating permits, trade style or names (including specifically the name "_____") and agreements, contract rights, condominium documents, advertising materials, prospective purchaser lists, utility contracts and assignable telephone numbers.

(4) Condominium unit

Seller agrees to sell to Buyer, and Buyer agrees to buy, the residential condominium unit (the "Unit") designated as Unit _____ in the building commonly known as "_____ " located at _____ Street, City of _____, State of _____, in the _____ Condominium (the "Condominium"), together with its _____ percent interest in the common elements of the Condominium, as described in the declaration recorded on _____ [date] in the _____ County Clerk's Office at Book _____, Page _____ (the "Declaration"). The Unit includes _____ rooms.

(5) Cooperative apartment

Seller agrees to sell, transfer and deliver to Purchaser, and Purchaser agrees to purchase and take title to:

(a) _____ shares of stock in the _____ Street Apartment Corporation (the "Corporation"), which carries with it the privilege of receiving a proprietary lease to Apartment _____, located at _____, Street, City of _____, State of _____.

(b) The proprietary lease appurtenant to the shares of stock for Apartment _____, either by assignment of Seller to Purchaser, or issuance of a new lease by the Corporation to Purchaser, as required by the Corporation and subject to any amendments, additional terms or conditions, or deletions as prescribed by the Corporation; and

(c) The fixtures and equipment in the apartment, subject to the provision of Seller's proprietary lease, including range,

refrigerator, dishwasher, air conditioner, carpeting, fireplace mantel, Venetian blinds, shades, and attached drapery hardware. Neither Seller nor the Corporation shall be required to install or replace any additional fixtures, equipment, or other items included in this sale. Purchaser shall accept the fixtures, equipment, and other items in "as is" condition. Purchaser has inspected the fixtures, equipment, and other items and does not rely on any representation regarding them made by Seller or Seller's agents, except as expressly stated in this contract.

(6) Fixtures and other personal property included in sale

All fixtures and articles of personal property attached or appurtenant to or used in the operation of the premises, including plumbing, heating, lighting, cooking and air conditioning fixtures, air conditioning units, ranges, built-in and microwave ovens, vent fans, refrigerators, television antennae, bathroom and kitchen cabinets, trash disposal and compactors, dishwashers, clothes washers and dryers, dehumidifiers, mantels, door and wall mirrors, shades and blinds, screens and screen doors, storm windows and doors, awnings, chandeliers, garage door openers, mail boxes, installed carpeting, installed drapery and curtain hardware, pumps, exterior lighting fixtures, shrubbery and plants are represented to be owned by Seller, free from all liens and encumbrances except as herein stated and are included in the sale.

(7) Appliances included in and excluded from sale

A. The following appliances are included in the sale:

- (i) refrigerator;
- (ii) gas stove;
- (iii) dishwasher;
- (iv) washer/dryer; and
- (v) carpeting.

B. The following appliances are excluded from the sale:

- (i) air conditioner; and
- (ii) fireplace mantel in living room.

(8) Seller to erect building on premises

Seller shall immediately proceed (or continue) with the construction of a building on the premises in accordance with plans and specifications made by _____, architect, and exhibited to Purchaser and initialed by him for the purpose of identification and shall cause the construction of the building to be completed on or before the _____ day of _____ [date]. The building shall be constructed in accordance with not only the plans and specifications but also any ordinances of the City of _____ or laws of the State of _____ or any other legal requirements of the building or other department of such city or state. The building shall not be deemed complete until certificates of occupancy have been duly issued by the building department of the City of _____ and the same together with necessary electrical certificates of the fire department and National Board of Fire Underwriters are delivered to Purchaser and all other certificates required under any ordinance or statute to permit the full occupancy of the building. It is understood and agreed further that the building must be completed in every particular in accordance with the plans and specifications and in every respect be ready for occupancy before Seller will be deemed to have complied with this provision of this contract. Seller shall not make any

variation in the plans and specifications without Purchaser's written consent unless so required by a federal, state, or municipal department or other competent governmental body. It is further understood and agreed that the time for the completion of the building is important but if Seller is unduly delayed for a period not to exceed _____ months through any cause over which he is unable to exercise any control and for which he is not legally responsible, failure to complete within the time specified shall not be deemed a breach of this agreement, but the time for the closing of title shall be deemed extended to the time of the completion of the building but not in any event for a period to exceed _____ months after the date specified in this agreement for such completion.

(9) Seller to make repairs or alterations

Seller shall on or before the date set for the closing of the contract make the following repairs and alterations on the premises: _____ *[list repairs and alterations to be made in as complete detail as may be necessary to insure completion in the manner anticipated by the parties]*

(10) Standards for repairs made pursuant to contract

Unless otherwise agreed in writing, any repairs required under this agreement shall be completed before the closing and shall comply with applicable building code and permit requirements. Materials used shall be of comparable quality to existing materials.

(11) Seller to improve subdivision street, etc.

It is understood that Seller under this agreement is in the process of developing a tract of land of which the premises herein described are a part and, as part of such development, intends to open and improve certain streets, including the street upon which the premises fronts, and to cause sewers, city water and gas to be installed in such street and to be connected with the proper systems and sources of supply and discharge. It is, therefore, agreed that Seller will at his own expense cause such improvements to be made in the tract of land being subdivided and in particular in the street on which the premises fronts within _____ months from the date of this agreement, such work to be done in a good and workmanlike manner and in the form required by the ordinances and regulations of the City of _____ *(or otherwise describe the utility installations and improvements to be made in the street in as complete detail as is necessary to insure that the work is properly done.)*

(12) Building may be used for retail purpose under zoning ordinance

The parties understand that Purchaser desires to use the building on the premises for the purpose of conducting a retail business. If before the closing of title under this contract it appears that the zoning ordinance of the City of _____ prevents use of the building for such purpose, Seller shall return to Purchaser the money paid on the signing of this contract, and neither party shall thereafter be under any liability or responsibility to the other on account of this agreement.

(13) Property sold "as is"

No representations or warranties have been made by Seller or anyone in his behalf to Purchaser as to the condition of the premises or the improvements, and it is understood and agreed that the premises are sold "as is" at the time this agreement is closed.

or

All previous understandings and agreements between the parties are merged in this Agreement, which alone fully and completely expresses their agreement, and the same is entered into after full investigation, neither party relying upon

any statement, representation, express or implied warranties, guarantees, promises, statements, "setups," representation, or information, not embodied in this Agreement, made by the other, or by any real estate broker, agent, employee, servant, or other person representing or purporting to represent Seller. Purchaser has inspected the Property and is thoroughly acquainted with its condition and takes same "as is," as of the date of this contract, ordinary wear and tear and damage by the elements or casualty excepted. Seller has not made and does not make any representations as to the physical condition, expenses, operation or any other matter or thing affecting or related to the Property, except as specifically set forth in this contract. Purchaser acknowledges that all representations which Seller has made, and upon which Purchaser relied in making this contract, have been included in this contract.

or

Purchaser represents to Seller that Purchaser knows and has investigated, to the full satisfaction of Purchaser, the physical nature and condition of the land, improvements and the personal property agreed to be sold hereby; that neither Seller nor any agent, employee or representative of Seller has made any representations as to the physical condition, income, expense, operation or any other matter or thing affecting or related to the premises, except as herein specifically set forth. Purchaser further agrees to take the premises together with any personalty to be conveyed hereby, "as is," in their present condition, subject to wear, tear and casualty between the date hereof and the closing of title. Seller is not liable or bound in any manner by any verbal or written statements, representations, real estate broker, agent, employee, servant or other person, unless the same are specifically set forth herein.

(14) Pre-contract inspection by purchaser, no warranties by seller or agent

Purchaser has inspected the property and is not relying upon warranties, representations or statements of Seller or Agent (except as specifically warranted by Seller in this contract) as to age, size, physical condition of the property, title, zoning, boundary lines, land use restrictions, building codes or environmental matters of any nature specifically including, but not limited to, matters concerning hazardous materials. Purchaser further understands that Agent disclaims the making of any warranty or representation as to the potential success or profitability of any venture involving the property.

(15) Pre-closing inspection of condition of property

Purchaser shall have the right to make a final inspection of the property approximately _____ days before the closing, not as a contingency of the sale, but solely to confirm that: (a) Seller has completed alterations, repairs, replacements or modifications as required by this contract; (b) Seller has complied with warranty obligations as required by this contract; and (c) the property is in substantially the same condition as on the date of this contract.

(16) Seller to keep premises in good repair

Seller shall keep the premises in their present state of good repair up to the date for the closing of title or such adjourned date as may be agreed upon and shall not allow any deterioration of the premises while in possession.

(17) Electrical, plumbing and other systems to be in normal working order

Purchaser shall have the right, at Purchaser's expense, to do a more detailed inspection of the property to assure Purchaser that the electrical, plumbing, exhaust, and heat and air conditioning systems are all in normal working order. Purchaser shall notify Seller within ten business days after acceptance by the Seller if any of the above items are found not to be in normal working order. If Purchaser does not give notice of defects within the said ten business days, any necessary repairs shall be solely at Purchaser's expense. If Seller, following receipt of Purchaser's notice of defects, refuses to pay the costs of repairs, Purchaser may accept the property in its present condition or may declare this contract null and void. If Purchaser makes the initial inspection and notifies Seller of defects, then Purchaser shall have

the right to reinspect the above items immediately prior to the closing to assure Purchaser that said items have been repaired and that same are in normal working order at the time of closing. If such reinspection discloses defects which were not repaired, or additional defects, Purchaser shall again notify Seller to the end that the listed items shall be in normal working order at the time of closing, "In normal working order" means, as to any item, that said item functions for the purpose and in the manner intended, e.g., that the heating unit heats, that the air conditioning cools, etc. If an item is "in normal working order," an opinion that such item may cease to be in normal working order in the future will not require repair by the Seller.

(18) Smoke detectors

Prior to the closing, Seller shall provide to Purchaser a written statement of compliance and any other documents required by state and local laws mandating that residences be equipped with operable smoke detectors. Additional smoke detectors, if required, shall be installed by Seller at Seller's expense prior to delivery of the deed.

(19) Guaranty that two parcels are contiguous

The parties understand that Purchaser will construct a building that will cover both of the parcels of land described in this Agreement. Seller, therefore, guarantees that the two parcels of land are contiguous and constitute one parcel. If it appears upon the examination of the title or upon a survey of the premises or otherwise, that the two parcels are not contiguous, Purchaser shall return to Seller the money paid on account of the purchase price and neither party thereafter shall be under any further liability or responsibility to the other.

(20) Disclaimer of new construction implied warranties

Seller agrees to deliver to Purchaser at closing or within a reasonable time thereafter a Home Warranty Agreement for the property. Seller and Purchaser disclaim any and all implied warranties of merchantability and fitness as to the property, and in the place of such warranties, whether arising from custom, usage, course of trade, statutory or case law or otherwise, substitute the Home Warranty Agreement described above. The provisions of this paragraph shall survive the closing and delivery of the deed to the Purchaser.

(21) Seller's warranty of no violations

Seller warrants that Seller has received no notice alleging or claiming any violations of building, housing, safety, fire, zoning, health, environmental, or other laws, rules or regulations affecting the property, and Seller has no knowledge of any such violations. Seller will notify Purchaser promptly if Seller receives any such notice prior to Closing.

(22) No representations by seller

All of the terms and conditions of this agreement between the parties are stated herein and no representations or inducements have been made to Purchaser by Seller other than those expressly stated in this Agreement.

Title, Liens, Deed

(23) Title conveyed as title company will insure

Seller will convey and Purchaser will accept any title that the _____ Title Insurance Company (or a reputable title insurance company licensed to do business in the State of _____ and approved by Seller) will approve and insure.

(24) Seller to furnish abstract of title

Seller shall on or before the _____ day of _____ [date], furnish to Purchaser a complete abstract of title to the premises brought up to date and certified as correct by a title or abstract company or other person or corporation competent to make the same showing that Seller has a marketable title to the premises free and clear of all encumbrances except those set forth in this agreement. Seller shall allow Purchaser a reasonable opportunity to have the abstract examined and passed upon by his attorney. If, after examination, Purchaser's attorney finds the title to the premises to be defective or encumbered, Seller shall have a reasonable time within which to render the title marketable, to cure or correct any defects in title, or to remove any encumbrances that cannot be removed by payment of money on the closing of this agreement.

(25) Seller to furnish preliminary title report, title insured at purchaser's expense

Seller shall furnish to Purchaser a current preliminary title report at Seller's expense. Purchaser shall, within _____ days, provide written notice to Seller of any items reasonably disapproved. At the closing: (a) title shall be transferred by bargain and sale deed; (b) title shall be free of liens, except as provided in this agreement; (c) title shall be free of other encumbrances, easements, restrictions, rights and conditions of record or known to Seller, except for matters shown in the preliminary title report which are not disapproved in writing by Purchaser; (d) Purchaser shall receive a title insurance policy issued by _____ Title Company, at Purchaser's expense.

(26) Purchaser to obtain title commitment and to furnish copy to seller

Purchaser shall promptly make application to Purchaser's title company for a title commitment with respect to the premises, and upon receipt of the same shall furnish Seller's attorneys with a copy thereof. Purchaser shall direct its title insurance company to deliver to Seller's attorneys copies of the title commitment and all amendments and correspondence with respect thereto delivered by Purchaser's title insurance company to Purchaser's attorneys. Purchaser shall furnish Seller's attorneys with a list of objections to title no later than thirty (30) days prior to closing. In the event that Purchaser does not furnish Seller's attorneys with a copy of Purchaser's title report as above stated, any objections to title, except those arising after such date, will thereupon be deemed to have been waived by Purchaser.

(27) Purchaser to give notice of objections to title

Purchaser shall within a reasonable time after the execution of this contract cause the title to be examined by an attorney or title insurance or abstract company selected by Purchaser's attorney. If the examination discloses any apparent objections to the title to the premises, Purchaser shall notify Seller thereof in writing on or before the _____ day of _____ [date]. If any such objections to title appear to be valid, Seller shall have a reasonable time thereafter within which to remove the same. If it appears to Seller that the objections cannot be removed or removal will be too costly, Seller may return the amount paid on the execution of this agreement to Purchaser (with interest at _____ percent per annum) and all reasonable expenses of examination of title and neither party shall have any other rights hereunder against the other.

(28) Violations not title objections

If Seller or a prior owner appears to have violated any statute or ordinance governing the maintenance or repair of the building on the premises and violations have been filed against the property, such violations shall not be an objection to title if (a) they can be removed by repair or alteration of the building, and (b) Seller deposits in escrow with Purchaser's attorney a sufficient sum of money to provide the material and pay for the work required to remove the violations. All materials shall be furnished and work done within _____ days from the closing date.

(29) Title to be obtained through foreclosure sale

The parties understand that Seller is not the owner of the premises but is the plaintiff in an action to foreclose a

mortgage thereon held by Seller and recorded in the office of (*state recording office*) of the County of _____ in Liber _____ of Mortgages at page _____ (*or other record of recording*), which action is now pending in the _____ Court of _____ County and is entitled _____ against _____. If Seller does not obtain title to the said premises within _____ months from the date of this agreement for any reason, Seller shall return to Purchaser the moneys paid on the signing of this agreement and neither party shall thereafter have any rights hereunder against the other, and the parties shall be mutually released.

(30) Right of way to be reserved: easement

Seller reserves a right of way over the Property to be used in connection with other premises owned by Seller as a means of ingress and egress from and to _____ Street in front of the Property. The right of way shall be over the driveway now existing across the Property to the full width thereof (*or otherwise describe the right-of-way reserved*). The right of way shall be kept in repair by Purchaser under this agreement and at all times shall be kept open for Seller's use. The right of way shall run with the land and shall remain an encumbrance upon the Property for the benefit not only of Seller but of any person or corporation which hereafter becomes the owner of the adjoining premises, the ownership of which is retained by Seller and for the benefit of which the right of way is reserved.

(31) "Subject to" statement of encumbrances, general

The conveyance of the Premises shall be subject to the following:

- (a) Zoning regulations and ordinances and municipal building restrictions and all other laws, ordinances, regulations, or restrictions of the city, town, or township in which the Premises are located if they do not prohibit the present use of the Premises.
- (b) Any state of facts an accurate survey would show, if the facts do not render title unmarketable.
- (c) Easements, covenants, and restrictions of record, if any, if they do not render title unmarketable or prevent the present use of the Premises.
- (d) Any assessment or assessments for municipal improvements, construction of which is commenced after the date of this Agreement and thereafter becoming liens on the Premises.
- (e) Any matter that a title insurance company would ordinarily insure against without additional premium.
- (f) Leases and tenancies, if any, described in this Agreement.

(32) "Subject to" statement of encumbrances, commercial building

The Property is to be conveyed subject to the following:

- (a) Encroachments of stoop areas, cellar steps, trim, and cornices, if any, upon any street or highway.
- (b) Consents by any former owner of the Property for the erection of any structure or structures on, under, or above any street or streets on which the property may abut.
- (c) All present or future city, state, and federal rent laws and regulations.
- (d) Leases and tenancies listed on the annexed Exhibit B, and any new leases which may hereafter be entered into. All

leases referred to in Exhibit B have been examined by Purchaser and Purchaser's attorney. Seller makes no representation or warranty that on the Closing all of the tenants shown on Exhibit B will be in occupancy, and reserves the right to dispossess any tenant for any default and a tenant may vacate its premises either at the expiration of its lease or in violation of its lease. Purchaser acknowledges that any inconsistency between Exhibit B and the actual lease initialed by Purchaser or his representative shall be controlled by the terms of the initialed lease and that any errors in Exhibit B shall not constitute an objection to title.

Seller will not enter into any new lease of space in the Building after the date of this contract without Purchaser's consent, but Purchaser will agree by written instrument to indemnify Seller from and against any loss of rental for the period before the Closing which Seller incurs as a result of failing to enter into such new lease, the indemnity to be effective regardless of whether title to the Property closes in accordance with this Agreement.

(e) All present and future zoning and building laws, ordinances, codes, restrictions, and regulations of all governmental authorities having jurisdiction, none of which are violated by the present structure and use.

(f) Rights and easements, if any, of any utility company to maintain, operate, and repair lines, wires, conduits, boxes, cables, poles, and other utility facilities on, under, or across the Property, none of which are violated by the present structure or use.

(g) Service, maintenance, union contracts, and other contracts in connection with the Property as set forth in the annexed Exhibit C. Personnel employed in connection with the maintenance and operation of the Building are listed in the annexed Exhibit D. At Closing, Purchaser shall, by written agreement, assume for the benefit of Seller, Seller's obligations under the contracts set forth in Exhibit C.

(h) Possible lack of right to maintain vault or vaulted areas, if any, under the sidewalk or the right of governmental or municipal authorities to require removal of same.

(i) Matters disclosed in a survey of the Property dated _____ [date], and to any matters an accurate survey after the latter survey would disclose, if such subsequent matters will not interfere with the present use of the Building.

(j) All other matters set forth in Certificate of Title No. _____ of the _____ Title Insurance Company, other than items designated as _____, and _____, and if the Title Insurance Company will insure against collection of items designated _____, and _____ out of the Property.

(33) "Subject to" statement of encumbrances, residential property

The premises are sold and are to be conveyed subject to:

(a) Zoning regulations and ordinances of the city, town or village in which the premises are located.

(b) Consents by the Seller or any former owner of the premises for the erection of any structure or structures on, under or above any street or streets on which the premises may abut.

(c) Covenants, restrictions, easements, agreements and reservations of record, if any, provided same are not violated by and do not prevent the present use of the present structure on the premises;

(d) Encroachments of shrubbery, stoops, areas, steps, doors, ledges, window sills, bay windows, trim, coping, sidewalk elevators, cornices, vaults, chutes, fuel oil lines, drainage pipes, standpipes, sewerage pipes, retaining walls,

foundations, footings, fences, fire escapes, air conditioning units, canopies, ramps and similar projections, if any, on, over or under the premises or the streets or sidewalks or property abutting the premises and variations between record lines of the premises and fences, walls, retaining walls and the like, if any.

(e) Any easement or right of use created in favor of any public utility company for electricity, steam, gas, telephone, water or other service, and the right to install, use, maintain, repair and replace wires, cables, terminal boxes, lines, service connections, poles, mains, facilities and the like, upon, under and across the premises.

(f) Any state of facts an accurate survey may disclose.

(g) Party walls, party wall and sewer agreements, if any.

(h) Revocability or possible lack of right to maintain vault or vaulted areas, cellar doors on sidewalk, coal chutes or other underservice areas, if any, under the sidewalk or beyond the building line.

(i) Rent regulations or laws now or hereafter in effect.

(j) Violations noted in or issued by any governmental body having jurisdiction over the premises which are the obligations of tenants in occupancy to cure.

(k) Any violations of record which Seller is required to remove hereunder, provided Seller shall undertake to cure the same within a reasonable time, not to exceed four (4) months after the closing, such undertaking to survive closing, and provided that a reasonable sum shall be deposited in escrow with the Seller's attorneys for the curing of the same. If the reasonably estimated cost of curing such violations shall exceed \$_____ in the aggregate, Seller may decline to cure the same, in which event Purchaser shall have the option of (i) accepting title subject to such violations and receiving an allowance of \$_____ against the cash portion of the purchase price, or (ii) terminating this contract, in which event the provisions hereunder applicable to Seller's inability to convey title shall apply.

(l) Any state of facts or condition which might constitute a violation of law, ordinance or regulation but which is not as of the closing of title noted in or issued by any governmental body having jurisdiction over the premises.

(m) Radio and television antennae violations.

(n) The printed exceptions contained in the form of title insurance policy then issued by the title insurance company which shall insure Purchaser's title.

(o) Any other matters which do not render title unmarketable.

(34) Subject to existing mortgage

If Purchaser is to take title subject to an existing mortgage or assume an existing mortgage against the Premises, and the mortgage has been reduced by payments on account of the principal, Seller shall deliver to Purchaser upon delivery of the deed a proper certificate executed and acknowledged by the holder of such mortgage and in form for recording, certifying the amount of the unpaid principal of the mortgage and rates of interest, and Seller shall pay the fees for recording the certificate.

(35) Seller may pay liens at closing

Seller may pay and discharge any liens and encumbrances not provided for in this contract out of the moneys to be paid by Purchaser on the closing of title.

(36) Liens allowed as credit to purchaser at closing

If at the closing the premises are affected by any lien or encumbrance which can be liquidated and discharged by the payment of a sum of money, the same shall not be deemed an objection to title, but in that event Seller shall allow on the closing of the title an amount sufficient to pay such lien or encumbrance.

(37) Property to be conveyed free of violations

Seller shall convey the premises free and clear from all violations or complaints filed or existing in any of the municipal departments of the City of _____ and affecting the premises. Compliance with the requirements of the Housing Department will be certified in writing upon a search made for any violations of the multiple dwelling laws. Compliance shall be at the Vendor's expense and fully completed before delivery of the deed.

(38) Compliance with governmental laws and regulations

Seller shall promptly disclose to Purchaser any improvements, additions or repairs made by Seller or known to Seller to have been made without required governmental permits, final inspections, or approvals. In addition, Seller represents that Seller has no knowledge of any notice of violations of city, county, state or federal building, zoning, fire or health laws, codes, statutes, ordinances, regulations or rules filed or issued against the property. If Seller receives notice or is made aware of any of the above violations before the closing, Seller shall immediately notify Purchaser in writing.

(39) Liens satisfied by escrow at closing

If at closing the Premises are affected by any liens or encumbrance which can be paid and discharged by the payment of money, the same shall not be deemed an objection to title, but Seller shall deposit with the title company (or attorney) representing Purchaser on closing a sum of money sufficient to cover the same under an agreement that the title company (or attorney) shall be permitted out of the deposited money to pay such lien or encumbrance and return any unused balance to Seller. Seller shall pay any additional amount required for the purpose of paying and satisfying such lien or encumbrance.

(40) Property conveyed subject to water charges incurred by tenants

The premises shall be conveyed subject to any water meter charges for which the tenants in the property are liable or have agreed to pay under any lease or leases.

(41) Sale subject to rights in party wall

The parties understand that the building on the property is constructed up to the north line of the premises and that the north wall of the building is a party wall standing one-half on the property and the other half on the property adjoining on the north, forming part of the building on the adjoining property. The premises shall, therefore, be sold subject to all rights of the owner of the adjoining property in the party wall.

(42) Sale subject to existing and new leases

The Property is sold subject to those written leases exhibited to and initialed by Purchaser and to present occupancies. It is understood that the termination of any lease or occupancy shall not be deemed an objection to title. If a tenant under any lease or occupancy vacates or is dispossessed, Seller may enter into a new lease upon such terms as to him may seem proper, if the new lease or letting does not extend beyond the 1st day of _____ [date], and the monthly rent under the new lease or occupancy is not less than 15 percent of the present rental of the premises affected. The existence of a new lease shall not be an objection to title.

(43) Deed and delivery of deed

Seller upon receiving payment of the purchase price at the time and in the manner above set forth shall, at his expense, execute, acknowledge and deliver, or cause to be executed, acknowledged and delivered, to Purchaser, his heirs and assigns, a deed in proper statutory form for record. The deed shall contain the usual full covenants and warranty (or a good and sufficient bargain and sale deed containing the usual covenant against grantor's acts or a good and sufficient quit-claim deed) so as to convey to Purchaser the fee simple of the premises free from all encumbrances except as herein stated.

(44) Deed to contain subdivision restrictions

It is understood and agreed that the deed to be delivered by Seller under this agreement shall contain the following covenants, conditions, and restrictions: *(Set forth restrictions as these are to be inserted in the deed.)*

It is further understood and agreed that Seller shall insert the above covenants, conditions, and restrictions in every deed to be delivered by him conveying lots or plots or other portions of the property shown on the map of the subdivision, and that the insertion of the covenants, conditions, and restrictions shall be deemed a part of the consideration of this agreement.

(45) Seller to disclose information about condominium or planned development

If the property is in a condominium or planned development: (a) the current regular Homeowners' Association dues and/or assessments are \$ _____ per month; (b) Seller shall promptly disclose to Buyer in writing any known pending special assessments, claims or litigation; and (c) Seller shall promptly request, and upon receipt shall provide to Purchaser (i) copies of covenants, conditions and restrictions, (ii) articles of incorporation, (iii) by-laws, (iv) other governing documents, (v) most current financial statement distributed, (vi) current Homeowners' Association statement showing any unpaid assessments, and (vii) most recent Homeowners' Association minutes, if available.

Representations, Warranties

(46) Seller representations and warranties

To induce Purchaser to enter into this Agreement, Seller makes the following representations and warranties, each of which is material and relied upon by Purchaser:

(a) Seller is the sole owner of good, fee simple, unencumbered, marketable title to all of the real and personal property to be sold to Purchaser under this Agreement, including the real and personal property described in the annexed Schedules A and B, subject only to the liens and encumbrances expressly stated in this Agreement, and the rights of tenants in possession under leases specified in this Agreement and in Schedule _____.

(b) Except as expressly stated in this Agreement, there are no encroachments, easements, or rights-of-way on, over, under, or across the Property or any part of it. No part of the buildings or structures on the Property encroach on any other property and all improvements on the Property are fully within its boundaries and violate no set back requirements. None of the improvements on the Property violate any ordinance, regulation or restriction of the City of _____ or any other governmental authority, or any restrictions, covenants, or agreements of any kind or nature.

(c) No part of the Property is subject to any building or use restrictions or any easements or right-of-way except as disclosed in this Agreement, and the same will not impair or interfere with the continued use of the Property as it is presently used. The Property is properly zoned for its current use.

(d) There are no violations of any rule, regulation, code, resolution, ordinance, statute, or law involving the use, maintenance, operation, or condition of the Property or improvements. All installations and improvements on the Property fully and duly comply with all applicable resolutions, statutes, rules, regulations and codes of the City of _____, the County of _____, and State of _____, and all governmental agencies having jurisdiction over the Property, and the requirements of all Boards of Underwriters.

With respect to the Property, the Seller represents that [except as identified and disclosed in Exhibit _____ with respect to environmental and environmental related matters] the Seller has no knowledge (a) that the Property is or may be in violation of applicable federal, state or local environmental laws and regulations ("Environmental Requirements") including, without limitation, the Comprehensive Environmental Response, Compensation and Liability Act of 1980 ("CERCLA") and the Resource Conservation and Recovery Act of 1976 ("RCRA"); (b) of any pending or threatened investigation or inquiry by any environmental government authority relating to the Property; (c) that hazardous substances or hazardous wastes have been disposed of or otherwise released on the Property; (d) that the Seller, in respect of the Property, is subject to any remedial obligations under any Environmental Requirements; and (e) that the Seller has no knowledge of any claim or suit or threatened claim or suit of a non-governmental third party with regard to damage to such third party based upon environmental matters or environmental related matters in the use, operation or ownership of the Seller's Property. For purposes of this provision, the terms "hazardous substance" and "release" shall have the meanings specified in CERCLA; the terms "hazardous waste" and "disposal" (or "disposed") shall have the meanings specified in RCRA; provided that, to the extent that applicable state laws establish a meaning for "hazardous substance," "release," "hazardous waste," or "disposal" which is broader than that specified in CERCLA or RCRA, such broader meaning shall apply.

(e) All improvements and systems have been constructed in a good workmanlike manner and in compliance with all applicable laws, statutes, codes, and requirements of all governmental authorities having jurisdiction and all Boards of Underwriters, and all improvements and systems, and parts thereof, are structurally safe and sound. Seller does not know or have reason to know of any defects in or about any part of the Property, improvements, or systems.

(f) Seller has timely paid all of his taxes with respect to the Property or its operation which are or could become liens against the Property.

(g) All labor performed and materials supplied for the Property have been fully paid by Seller, and no mechanic's lien or other lien may be claimed by any person for such labor or materials.

(h) No condemnation proceedings are pending, or to the best of Seller's knowledge are threatened, against the Property or any part thereof, and Seller has not received any oral or written notice that any public authority or utility intends or desires to take or use the Property or any part thereof.

(i) All statements made and information given to Purchaser in this Agreement, including any related Schedules and Exhibits, are true and accurate in every material respect, and no material fact has been withheld from Purchaser. No representation or warranty of Seller in this Agreement contains any untrue statement of a material fact, or omits to state a material fact necessary to make the statements not misleading.

(j) Seller has no knowledge or information of any facts, circumstances, or conditions which do or would in any way adversely affect the Property, the improvements thereon, or the successful operation of the Property, except as specifically stated in this Agreement or any related Schedules and Exhibits.

Seller's representations and warranties shall survive the closing of this Agreement for a period of one year after delivery of the deed.

(47) Seller representations covering leases and other items

Seller represents that, as of the date hereof:

- (a) There are no leases or other occupancy agreements relating to the Property other than those set forth in Exhibit B.
- (b) Seller has not collected any prepaid rent in advance in excess of rent for the month during which the Closing occurs or the month immediately following such month, and as of the date hereof, there are no leasing commissions owing in connection with the Property.
- (c) Seller has not received (and has no knowledge of) any notice or request from any insurance company or Board of Fire Underwriters (or organization exercising similar functions) requesting the performance of any work or alteration in respect of the Property. Seller shall promptly notify Purchaser if Seller receives any such notice before the Closing.
- (d) Seller has no knowledge of any pending or contemplated condemnation proceeding affecting the Property or any part thereof.
- (e) All personal property and any alterations or work in connection with the Property performed or required to be performed by Seller (i) under the terms of any leases, or (ii) under any contracts or other agreements affecting the Property have been completed and fully paid for by Seller.
- (f) No rents or leases have been assigned (except pursuant to any mortgage to which Purchaser agrees to take subject and for which Purchaser receives a credit towards the purchase price).
- (g) To the best of Seller's knowledge, no person, firm, or entity (except as may be set forth in this agreement) has any rights in or right to acquire the Property or any part thereof.
- (h) Seller is not a party to any litigation, nor does he know of any litigation or threatened litigation, affecting the Property, and Seller shall give Purchaser prompt notice if any such litigation is instituted before the Closing.
- (i) There are no contracts or agreements for services rendered in connection with the operation of the Property which Purchaser shall be required to take the Property subject to, except as set forth in Exhibit C-1 and the union contract pursuant to which the employees listed in Exhibit C-2 are employed, and Exhibits C-1 and C-2 are true, correct, and complete.
- (j) Seller has paid all sums due for wages, utilities, or fees pursuant to all service contracts, management agreements, union contracts, or other agreements affecting the Property.
- (k) The Certificate of Occupancy, a copy of which has been delivered to Seller and is included in the Certificate of Title referred to herein, shall be in effect on the Closing, without amendment or modification.
- (l) Seller shall not, without Purchaser's consent, negotiate or enter into any new service or other contract affecting the Property which cannot be terminated without cost to Purchaser on or before the Closing.

It shall be a condition to Purchaser's obligation to close that all of the foregoing representations shall be true at and as of the Closing (except to the extent Seller is permitted herein to take actions which may change such state of facts), and Seller further makes such representations as of the Closing (except to the extent Seller is permitted herein to take actions which may change such state of facts). The representations contained in this Article shall survive the Closing for a period of six months only, and any claim based upon breach of any such representation must be asserted within that period.

(48) Seller warranty of compliance with Americans with Disabilities Act

Seller warrants and represents that to the best of its knowledge the Premises are in compliance with the requirements of Title III of the Americans with Disabilities Act of 1990, 42 U.S.C. § 12101 *et seq.* ("ADA") and the rules and regulations issued thereunder. Seller further represents and warrants that any alterations, modifications, or construction performed by Seller to the Premises or any part thereof before the Closing shall be performed in compliance with the ADA.

Parties

(49) Seller not owner but has contract to purchase property

It is understood that Seller is not the owner of the premises but that he has an interest therein as purchaser under a contract with _____, dated _____ [date], which Seller believes to be valid and binding. Purchaser has read the contract in its entirety.

If the above contract is not closed within _____ months from the date of this agreement, or if Seller does not obtain title to the premises within that period, Seller shall return to Purchaser the moneys paid by him on the signing of this agreement, and the parties shall thereupon be mutually released from all other liability and responsibility hereunder.

(50) Purchasers to be joint tenants, not tenants in common

The purchasers under this agreement will take title as joint tenants and not as tenants in common, and the deed shall so designate them so as to comply with the statutes of the State of _____. If either purchaser dies before delivery of the deed, both purchasers' entire interest in this contract and in the premises shall vest in the surviving purchaser, whom the deed shall designate as sole grantee.

(51) Spouse to join in deed

In consideration of the purchase of the premises by Purchaser, _____, Seller's spouse shall execute the deed to be delivered hereunder and release to Purchaser all [his] [her] rights of dower, curtesy, election, or otherwise in the premises.

(52) Resolution of board of directors of corporate party

Seller (or Purchaser), a corporation incorporated under the laws of the State of _____, will deliver to the Purchaser (or Seller) at the closing a resolution of its Board of Directors authorizing the sale (or purchase) of the premises, and a certificate by the Secretary or Assistant Secretary of the corporation certifying such resolution.

(53) Title to assignee corporation; original purchaser liable or not liable on purchase money note

Purchaser may assign this contract to any corporation organized under the laws of the State of _____ if it is legally qualified to take title to and hold the premises, and to perform all the terms, covenants, and conditions of this agreement and of the notes and mortgages that are now or may become liens upon the premises. If an assignment is made, Seller shall convey the premises to the assignee corporation on the same terms, covenants, and conditions as are contained in this contract. In such event, however, Purchaser shall remain liable for the due performance of all of its terms, covenants, and conditions until title is closed hereunder.

Taxes, Assessments, Adjustments to Purchase Price

(54) Taxes to be paid or adjusted

All taxes which may be a lien on the premises shall be paid by Seller except the city and county taxes for the current fiscal year, which shall be prorated and adjusted by the parties as of the date of the delivery of the deed.

(55) Tax rate to be used for adjustment

If the closing of title occurs before the tax rate is fixed, the adjustment of taxes shall be made on the basis of the tax rate for the next preceding year applied to the latest assessed valuation, subject to further and final adjustment when the tax rate is fixed for the year in which the closing takes place.

(56) Taxes and assessments to be allowed out of purchase price

All taxes, assessments, and water rents that at the time of sale are liens upon the property will be allowed out of the purchase money if, before delivery of the deed, the purchaser produces proof of such liens and duplicate receipts for their payment. The existence of unpaid taxes or assessments shall not be deemed an objection to the title if the amount thereof is so allowed.

(57) Franchise taxes not objection to title

If it appears upon examination that title has passed through any corporation, it shall not be an objection to title that the corporation has unpaid franchise taxes if the corporation has filed all past reports with the state tax department or other department where reports are to be filed, and the seller makes a sufficient deposit with the title insurance company (or abstract company or attorney) representing the purchaser to insure payment of such franchise tax or taxes within _____ days after closing.

(58) Purchaser to pay taxes after contract executed

Purchaser shall pay all taxes, assessments, and water rents which may become a lien upon the premises between the date of this contract and the date for the closing of title.

(59) Unpaid outstanding assessments to be paid by seller

The parties understand that an assessment has been levied against the property by the proper authorities of the City of _____ to pay for the cost of opening _____ Street (or other purpose) and that such assessment is a lien upon the property for the full amount thereof but is payable in annual installments of which the first installment is now due (or has been paid). It is further agreed, therefore, that all unpaid installments of such assessment, including any that are to become due and payable after the delivery of the deed under this agreement, shall be deemed due and payable immediately so far as the parties are concerned and to be liens on the property at the time of the closing of the title, and shall be paid and discharged by Seller before delivery of the deed, or Seller shall upon the closing of title allow to Purchaser a sufficient amount to pay any unpaid installments.

(60) Pending proceedings for reduction of real estate taxes

If proceedings are pending for the reduction of real estate taxes at the premises for the tax year in which the closing occurs, Purchaser shall continue such proceedings with the attorney previously employed by Seller. The parties shall mutually negotiate and settle all claims in connection with said proceedings. The cost of such proceedings and (in the event taxes are reduced) any refund shall be apportioned between Seller and Purchaser according to the ownership of the premises during respective portions of the relevant tax year. Any refund covering a period prior to the closing and all expenses incurred in connection with obtaining such refund shall belong to or be incurred by Seller alone. This paragraph shall survive the closing.

(61) List of items to be adjusted at closing

The following items are to be prorated and adjusted by the parties at the closing: (a) taxes on the basis of the fiscal year for which assessed; (b) water and sewer charges on the basis of the calendar year; (c) fuel; (d) rents as and when collected; (e) interest on mortgages; (f) premiums on existing transferable insurance policies or renewals of those expiring before the closing; (g) prepaid amounts for services under existing transferable service contracts for trash removal and elevator maintenance.

(62) Apportionment of water and sewer charges between seller, purchaser and tenants

If there is a water meter on the premises, the unfixed meter charge and the unpaid sewer rents for the time intervening between the date of the last reading thereof and the date of closing hereunder shall be apportioned on the basis of such last reading; provided, however, if any of the tenants is obligated to pay any portion of any water charges, Seller shall not be required to pay the same and Purchaser shall look solely to each tenant or tenants for payment thereof.

(63) Adjustment for fuel on premises at closing

Purchaser agrees to purchase from Seller the fuel on the premises at the time of the delivery of the deed, at the cost price thereof to Seller, and Purchaser agrees to pay Seller for the same at the time of delivery of the deed. The written estimate of a reputable dealer as to the amount of the fuel on the premises at such time shall be accepted as conclusive by the parties.

Contingencies, Conditions Other Than Mortgages

(64) Zoning authorization and construction improvements contingency

The purchaser may terminate this contract if, before the closing of the sale, he is unable to obtain valid zoning authorization, ordinances, or permits from the proper authorities to conduct his business upon the premises, or if the soil tests indicate that the soil or ground is not suitable for the construction of improvements for the conduct of his business.

(65) Contract void if zoning prohibits intended use

If before the date set for closing of title any zoning ordinance prohibits Purchaser from using the property for the intended use, this contract shall terminate, Seller shall return to Purchaser the amount paid on the signing of this agreement, and neither party shall be under any further liability or responsibility to the other.

(66) Building permit contingency

Purchaser shall apply to the Department of Housing and Buildings or any other board or officer having jurisdiction in the matter in the City of _____ for a permit for the erection upon the premises of a business building 25 stories in height. If all reasonable efforts are made by Purchaser to secure such permit and it is denied on or before the 1st day of _____ [month/year], this contract shall terminate, and the amount paid on account hereof shall be returned to Purchaser, and neither party shall thereafter be under any liability to the other. In any other event, however, the contract shall remain in full force and effect.

(67) Unmarketable title: cancellation or price reduction

If Seller is unable to convey a good and marketable title to the premises free from encumbrances, restrictions, encroachments or other defects in title except those specified in this contract, and Purchaser refuses to take title for that reason, this contract shall be deemed cancelled. In that event, Seller shall return forthwith to Purchaser the amount paid on the signing of this agreement (with interest thereon at _____ percent per annum) and in addition

all reasonable expenses of a survey and the examination of title; and the liens reserved to secure said sums shall be preserved, anything to the contrary notwithstanding, and thereupon neither party shall have any other claim against the other. However, if there are any encumbrances, Purchaser may take title subject to them, and in that event, the amount of the encumbrances, together with the expenses of discharging them, shall be deducted from the purchase price and be first charged against the amount to be paid on closing.

(68) Cancellation for defective title

If Seller is unable to convey a good and marketable title free from all encumbrances or other defects in title, except those specified herein, and the purchaser rejects title for that reason, this contract shall be deemed cancelled and the seller shall return to Purchaser forthwith the amount paid on the signing of this agreement (with interest thereon at the rate of _____ percent per annum) and in addition all reasonable expenses of a survey and the examination of title. Purchaser shall have a lien upon the premises for such amount, anything to the contrary herein notwithstanding and, upon repayment of said amount, neither party will have any other claim or rights against the other.

(69) Subject to court approval, fiduciary seller

Seller is executing this contract as general guardian of Jane Roe, an infant, who is the owner of record of the real property and has no power or authority to execute and deliver a deed of the premises unless authorized so to do by a court of competent jurisdiction. It is understood and agreed, therefore, that this contract is subject to the approval of such a court. Seller shall, at his expense, take all steps and bring proceedings necessary under the statutes of the State of _____, to obtain the approval and authority of such a court to the making of the conveyance under this agreement. If the Seller has used all reasonable diligence to obtain such approval and authority and for reasons beyond his control has not been able to do so at the date set in this contract for the closing, he shall be entitled to a reasonable adjournment of not to exceed _____ months for the purpose of obtaining such approval and authority. If, however, such approval and authority are not obtained within _____ months from the date of closing under this agreement, Purchaser may terminate this agreement, Seller will thereupon repay to Purchaser the money paid on the signing of this agreement, and neither party will thereafter be under any responsibility or liability to the other.

(70) Termite inspection contingency, inspection at purchaser's expense

Purchaser, at his expense (not to exceed \$ _____), shall cause a termite inspection of the premises to be made by _____ Co. before the date of closing. If such inspection discloses a termite condition or termite damage which Seller is unwilling to adequately correct, either party may cancel this contract and all rights of both parties hereunder shall cease. Notice of such cancellation must be served upon Seller or Seller's attorneys personally within five days after either receives a written report of such inspection.

(71) Termite inspection contingency, inspection at seller's expense, insurance bond

Seller shall cause the premises, at Seller's expense, to be inspected by a qualified exterminating company approved by Purchaser for the purpose of determining whether the premises are infested with or have been damaged by termites or other wood boring organisms. If any infestation or damage is found, Seller shall, at Seller's expense, treat such infestation and/or damage. At the closing, Seller shall deliver to Purchaser (a) a report from the exterminating company certifying that no infestation or damage exists, or that any infestation or damage has been satisfactorily treated or removed, and (b) a bond, issued by a reputable insurer acceptable to Purchaser, and on terms acceptable to Purchaser, insuring against loss from any such infestation or damage.

(72) Wood boring insect contingency, temporary removal of items for accessibility

This agreement is subject to the results of an inspection demonstrating that no wood boring insects exist within the

structures located on the premises and that no damage to the structures has been caused by wood boring insects. The inspection shall be performed by a licensed exterminator at the expense of the Purchaser (*or* the Seller). A copy of the inspection report shall be provided to both Purchaser and Seller.

Seller consents to the temporary removal of any wall, floor or ceiling cover in any area deemed inaccessible by the inspector. All items removed shall be restored to their prior condition, all at Purchaser's expense, at the conclusion of the inspection.

(73) Structural inspection contingency

This contract is contingent on a structural inspection by a reliable structural inspector, engineer or engineering firm within _____ days after the execution of this agreement. The engineer shall inspect for the structural and mechanical soundness of any buildings, including the proper functioning of the roof, foundation, walls, basement, windows, doors, beams, joists, and the heating, plumbing, electrical, air conditioning, ventilation, water supply, and sewage disposal systems. If the inspection report shows no deficiencies, this contract shall be binding and effective. If the report shows deficiencies, Seller will promptly notify Purchaser whether Seller will (a) correct the deficiencies at its expense before closing of title, (b) allow a credit against the purchase price for the Purchaser's reasonable estimate of the costs to correct the deficiencies, or (c) cancel this contract. If Seller elects to cancel, and Purchaser accepts the refund of the deposit money, this contract shall be void and unenforceable. Purchaser may waive this contingency, either by refusing the refund or by stating so in writing. In either event, this contract shall be binding and enforceable, and Purchaser will accept the property "as is" except as otherwise stated in this contract.

(74) Contract contingent on results of survey and appraisal

This contract is subject to the following contingencies:

(1) That an accurate survey shows that the driveway, walkways, fences, gardens and buildings are entirely within the property lines of the subject premises.

(2) That the subject premises have an appraised value of \$ _____. The appraisal shall be performed by _____, who is a licensed appraiser, on or before _____ [date], at the expense of the Purchaser. A copy of the appraisal shall be provided to both Purchaser and Seller.

(75) Contract contingent on letters from tenants of intent to remain in building

This contract is contingent upon Seller providing Purchaser with letters of intent from at least _____ percent of the tenants whose leases expire within _____ months after execution of this contract indicating that the tenants intend to remain as tenants in the buildings. Seller shall provide these letters of intent to Purchaser on or before _____ [date]. If Seller fails to provide a sufficient number of letters by that date, Purchaser shall have the option to terminate this contract by giving Seller written notice by certified mail, return receipt requested, within _____ days. If Purchaser elects to terminate this contract, Seller shall immediately return Purchaser's deposit.

(76) Contract contingent on approval by parties' attorneys

This contract is contingent upon Seller and Purchaser obtaining their respective attorneys' approvals of this contract and all matter contained in it. This contingency shall be deemed waived unless, within _____ days from the signing of this contract, Seller's or Purchaser's attorney, on behalf of his or her respective client, notifies the other party, at the address set forth below, in writing, of his or her disapproval of the contract. If Seller's or Purchaser's attorney so notifies the other party, then this contract shall be deemed canceled, null and void, and all deposits shall be returned to Purchaser.

(77) Option to cancel contract during first few days

Purchaser may at any time within _____ days after the date of this agreement cancel this contract by giving written notice thereof to Seller by registered or certified mail at Seller's address. Seller shall then return to Purchaser the amount paid on the signing of this agreement (*or otherwise provide for disposition of money paid on signing*), and thereupon this contract shall for all purposes be deemed terminated and neither party shall have any further rights against the other.

(78) No mortgage or other contingencies unless expressly stated in contract

This contract is not contingent upon (i) Purchaser's ability to finance the transaction, or (ii) any other matter or condition except as may be expressly stated to the contrary herein.

Mortgages, Financing

(79) Purchaser to assume and to pay mortgage

Purchaser shall take the premises subject to the mortgage held by _____, and shall assume and agree to pay such mortgage and to save Seller harmless from any liability on the note which the mortgage was given to secure. Simultaneously with the execution and delivery of the deed to the premises, Purchaser shall execute and acknowledge either a statement that he assumes and agrees to pay such mortgage debt and give the specific amount of the debt assumed, or the deed which shall contain a similar written statement.

(80) Buyer to obtain mortgage commitment

Part of the purchase price shall be paid by mortgage money borrowed from an established lender on a note secured by a first mortgage on the Property in the principal amount of \$_____. Buyer shall promptly apply for the mortgage loan and use his best efforts to obtain a mortgage commitment. Buyer shall supply all necessary information and fees requested by the lender. The commitment for the mortgage loan must be received by Buyer no later than _____ [date]. Buyer shall notify Seller whether the commitment has been received by that date. The terms of the mortgage commitment shall be at least as favorable to Buyer as the following: conventional mortgage with interest at the then prevailing rate, for a term of 30 years. Any points are to be paid by Buyer. Buyer may accept a commitment on less favorable terms or agree to acquire the Property without a mortgage commitment. The parties may agree to extend the date for receipt of a mortgage commitment. If the commitment is not received by the time specified, or if this contingency is not waived or extended, either party may cancel this contract.

(81) Mortgage contingency, if commitment not obtained seller option to finance sale

This contract is contingent upon Purchaser obtaining a participation mortgage in the amount of \$_____, at an annual interest rate not to exceed the prime rate plus one percent (1%) for a term of at least twenty (20) years. Purchaser shall not be required to accept a mortgage which is conditioned on the personal guaranty of any of its officers, directors or shareholders, or on any cross corporate guaranty.

This condition shall be deemed waived unless Purchaser notifies Seller in writing of Purchaser's inability to obtain a mortgage on or before _____ [date]. Notice shall be deemed given when received by Seller, in person or by certified mail, return receipt requested. If notice is timely given, Seller may elect to hold the mortgage under the same terms and conditions described above. Purchaser shall be obligated to accept the mortgage if Seller elects to offer it. Any such offer by Seller shall be made in writing and delivered to Purchaser as described above within five (5) days of receipt of notice of Purchaser's inability to obtain a mortgage. If Seller does not elect to hold the mortgage, this contract shall be deemed canceled. All deposits made pursuant to this contract shall be returned to the Purchaser immediately.

(82) Contract contingent on closing new mortgage commitment to pay off seller's mortgage in default

It is understood that the premises are now encumbered by a mortgage given by _____ to _____ on the _____ day of _____ [date], to secure the principal sum of \$ _____ and interest and duly recorded in the office of (*specify recording office*) in Liber _____ of mortgages at page _____ (*or other proper notation of recording*), and that the mortgage is past due and full payment has been demanded by the holder thereof. It is further understood that Purchaser has obtained a commitment for a loan for an amount sufficient to pay the past due mortgage and that the execution of this agreement by him is subject to the actual closing of such loan at the time of closing this contract. If Purchaser is unable for any reason, other than his wilful default, to obtain the mortgage by the date set forth herein for the closing of title, or any reasonable time thereafter agreed upon by the parties, this contract shall terminate, Seller shall return to Purchaser the amount paid on the signing of this agreement, and neither party thereafter shall be under any liability or responsibility to the other.

(83) Buyer to give seller note secured by mortgage

As part of the purchase price, Buyer shall deliver to Seller, at closing, a purchase money note and mortgage in the principal amount of \$ _____. The note and mortgage shall be payable with interest at _____ percent per year by monthly installments of \$ _____. The term of the note and mortgage shall be _____ years with full prepayment rights, without interest or penalty, and _____ days default period. The note, mortgage, and mortgagor's affidavit of title shall be in the form prepared by Seller's attorney at a cost to Buyer not exceeding \$ _____, plus recording costs, mortgagee title insurance, and credit report costs, if any.

(84) Purchase money mortgage permitting prepayment

The purchase money mortgage to be executed by Purchaser to Seller shall contain a clause permitting the Mortgagor or the then owner of the property to pay the amount secured thereby with interest to date at any time before the date fixed in the mortgage for the payment thereof (*or in amounts of not less than _____ Dollars each on any interest-bearing date under the mortgage*).

(85) Acceleration of purchase money mortgage

The purchase money mortgage shall contain a provision allowing the Mortgagee or the then holder of the mortgage to have the entire sum become due and payable if Mortgagor or the then owner of the property defaults in paying interest on the mortgage for more than ten days after the same becomes due and in paying taxes and assessments for more than ten days after such charges become a lien on the property.

(86) Execution of purchase money mortgage by purchaser or assigns

If Purchaser makes an assignment of this contract of sale, Purchaser or his assigns shall execute the purchase money mortgage that is to be taken back as part of the purchase price.

(87) Purchase money mortgage to be subordinate to construction loan mortgage

Seller shall subordinate the purchase money mortgage to a construction loan mortgage for an amount not to exceed _____ percent of the total cost (*or value*) of the premises and of the building erected thereon and, if Purchaser within one year from the date of the closing of the title under this contract elects to erect upon the premises a building, Seller will execute all subordination agreements required to subordinate the purchase money mortgage to the construction loan mortgage obtained by Purchaser. The purchase money mortgage shall contain a clause to that effect, and Seller will indicate his acceptance thereof by executing the mortgage.

(88) Interest to be paid on unpaid purchase price

Purchaser shall pay Seller interest of _____ percent per annum upon all unpaid amounts of the purchase price from the date of the signing of this contract until the amounts are fully paid.

Casualty, Condemnation, Insurance

(89) Premises damaged or destroyed

If, before the date for closing or any adjourned date, the premises are damaged or destroyed by fire or other casualty in an amount as adjusted of less than _____ percent of the total amount of insurance then covering the premises (which Seller represents now to be not less than \$_____, and which Seller will maintain throughout the term of this contract), Purchaser shall be required to perform this contract and upon so doing shall be entitled to a deduction on account of the purchase price of the amount received by Seller from such insurance. If the amount so adjusted equals or exceeds _____ percent of the total insurance, Purchaser may perform this contract, such option to be exercised within _____ days after notification to Purchaser that the loss or damage has been adjusted and of the amount of the adjustment. In such event, Purchaser shall be entitled to a deduction from the purchase price of the amount of the insurance received by Seller (to be applied in the first instance to an amount of the purchase money mortgage and not to the cash payments required under this contract). If Purchaser so elects to perform the contract, the time for performance shall be extended until _____ days after the option is exercised. If Purchaser does not exercise the option, this contract shall be automatically terminated and the down payment refunded to him.

If within _____ months from the date of such loss or damage Purchaser has not received notice of the adjustment of the loss or damage and of the amount, he may terminate this contract and shall be entitled to the return of the down payment. The loss or damage shall be deemed adjusted within the meaning of this provision when the amount has been agreed upon and the insurers are ready, willing, and able to pay it.

(90) Premises damaged, destroyed, or taken by condemnation or eminent domain

If, on or prior to the closing, any part of the premises or the building situated on the premises shall be destroyed or damaged by fire or other casualty or shall be taken by condemnation or eminent domain, then (i) such event shall not be an objection to title to the premises, (ii) Purchaser shall be required to purchase the premises and this contract shall remain in full force and effect, (iii) there shall be no reduction in the purchase price, and (iv) at the closing, Seller shall (a) pay over to Purchaser the amount of any insurance proceeds or condemnation awards to the extent at that time collected by Seller in connection with such casualty or taking, less the amount of actual expenses incurred by Seller in collecting such proceeds and in making repairs to the premises occasioned by such fire or other casualty or taking, and (b) assign to Purchaser by assignment (without recourse to Seller) all of Seller's right, title and interest in and to any such insurance proceeds or condemnation awards that are uncollected at the time of closing, subject to the payment by Purchaser to Seller, upon the receipt of any such proceeds or awards, as the case may be, to the extent not reimbursed to or retained by Seller pursuant to clause (a) of this sentence. Purchaser's rights under this paragraph are in lieu of any other rights Purchaser may have at law. This paragraph shall survive the closing.

(91) Assignment of fire insurance proceeds

Seller represents that there is now in force and existence fire insurance on the building on the premises in the amount of \$_____ and agrees that the insurance shall be kept in force until the closing of this contract. If the insurance is continued in force, any loss or damage by fire to the building before the closing of this contract shall not constitute ground for the rejection of the title to the property. In case of fire, however, Seller upon the closing of the title to the property shall allow to Purchaser on account of the purchase price any amount received by him from the policies of fire insurance or shall pay such amount to Purchaser. If at the time of the closing of this title payment for the loss has not

been made by the insurance company or companies insuring the premises, Seller will assign to Purchaser all policies of fire insurance held by him on the premises together with all his rights and claims thereunder.

(92) Building partially destroyed by fire to be rebuilt

If before the closing of title under this contract the building now on the premises is partially destroyed by fire or other casualty, Purchaser (*or* Seller) shall be required to rebuild to the extent of any money received on any policy or policies of insurance now or hereafter in force covering the premises. Neither party, however, shall be required to expend in the rebuilding any sum of money in excess of the amount received from the insurance policies.

(93) Right to cancel in case of condemnation

If proceedings to condemn the property or any portion thereof are legally commenced before the date for closing or any adjourned dates, Purchaser at any time after such commencement, but not later than _____ days after receipt of notification thereof from Seller, may terminate this contract, Seller shall return to Purchaser the down payment, and neither party shall thereafter have any other claim against the other.

(94) Property to be insured against loss

Until the purchase money called for in this agreement has been fully paid (*or* until the closing of the title under this contract) Purchaser (*or* Seller) shall keep all buildings on the premises insured against loss by fire, lightning, tornado, wind storms and other insurable casualty for an amount of at least \$_____ in a good and sufficient insurance company or companies authorized to do business in the State of _____. The insurance is to be written in the name of the then owner of the premises with loss, if any, payable to either or both of the parties according to their respective rights and interests in the premises at the date the loss is incurred.

Purchase Price, Deposit, Remedies, Liability

(95) Purchase price and deposit

The price is _____ Dollars (\$_____), payable as follows: (a) _____ Dollars (\$_____) on the signing of this contract, by check subject to collection, the receipt of which is hereby acknowledged; and (b) _____ Dollars (\$_____) by certified check to the order of Seller on the delivery of the deed as provided below.

(96) Purchaser to pay by certified check at closing

If request is made of Purchaser by Seller or Seller's attorneys within a reasonable time prior to the closing, Purchaser agrees to provide at the closing separate certified checks or official cashier's checks, as requested, drawn upon a bank which is a member of the New York Clearing House Association, aggregating the amount of the cash portion of the balance of the purchase price due hereunder to facilitate the satisfaction of any obligations or liabilities affecting the premises or Seller, including, but not limited to, any unpaid real estate taxes, assessments, water charges or sewer rents and the payment of any liens and encumbrances.

(97) Deposit held by listing broker, applied to brokerage fee

Seller and Purchaser agree that any deposits made by Purchaser are to be deposited with the Listing Broker at _____ as part of the purchase price. All such deposits shall be held in escrow by the Listing Broker until the contingencies and terms have been met. Purchaser will receive credit on the total amount of the deposit toward the purchase price. The Listing Broker shall then apply the total deposit to the brokerage fee. Any excess of deposit over and above the fee earned shall be paid to Seller. If the contingencies and terms contained in this contract cannot be

resolved, or if Seller or Purchaser defaults, the deposits will be held by the Listing Broker pending a resolution of the disposition of the deposits.

(98) Deposit to be held in escrow

The amount paid on the signing of this contract shall be delivered to _____, as attorney for the seller, to be held in escrow and to be delivered to the seller at the time fixed for the closing of this title or any adjourned date mutually agreed upon in writing. If the purchaser is entitled to a full or partial refund of such money under this contract, the amount due shall be refunded to him.

(99) Deposit to be held pursuant to escrow letter terms

The down payment deposit in the amount of \$_____ ("Deposit") made upon the execution of this contract shall be made to Seller by payment thereof _____ & _____, Esqs. ("Escrow Agent"), to be held by Escrow Agent in escrow pursuant to the terms of the Escrow Letter entered into by and between Seller and Purchaser as of the date hereof ("Escrow Letter"). The down payment together with the interest earned thereon, if any, shall be held by Escrow Agent until the earlier of (i) the delivery of the deed to Purchaser, or (ii) such time as Seller or Purchaser may be entitled to a refund thereof, at which time Escrow Agent shall remit the Deposit together with the interest earned thereon to the party entitled thereto. At the closing, the Deposit together with the interest earned thereon shall be paid to Seller. The parties hereto have mutually requested that Escrow Agent act as escrow agent for the purpose of holding the Deposit in accordance with the terms of this contract. Purchaser recognizes that Escrow Agent represents Seller herein and has agreed to act as Escrow Agent as an accommodation to both parties hereto. Purchaser further acknowledges and agrees that in the event of any dispute between the parties to this contract or the Escrow Letter, Escrow Agent shall be free to continue its representation of Seller with regard to these matters.

(100) Payment on signing as liquidated damages

If Purchaser fails to take title as required by this agreement, Seller shall retain the amount paid on the signing of this contract as liquidated damages and neither party shall have any other rights hereunder against the other.

(101) Retention of deposit as liquidated damages and not as a penalty

If Purchaser fails to accept title and pay the purchase price in accordance with this contract, the down payment together with interest earned thereon, if any, shall be retained by Seller as liquidated damages. The provisions herein contained for liquidated and agreed-upon damages are bona fide provisions for such and are not a penalty, the parties agreeing that by reason of Seller binding himself to the sale of the premises and by reason of the withdrawal of the premises from sale at a time when other parties would be interested in acquiring them, that Seller will have sustained damages if Purchaser defaults, which damages will be substantial but will not be capable of determination with mathematical precision. Therefore, this provision for liquidated and agreed-upon damages has been incorporated in this contract as a provision beneficial to both parties.

(102) Provision for purchaser's lien

All sums paid by Purchaser on account of the purchase price set forth in this agreement and the reasonable expenses of a survey and the examination of the title are made liens on the premises, but such liens shall not continue after Purchaser's default under this contract.

(103) Remedies of seller in case of default

If the Purchaser fails or refuses to take title to the property as required by this agreement, the Vendor shall retain as liquidated damages the amount paid upon the signing of this agreement, and thereafter neither party shall have any

rights against the other.

(104) Remedies of buyer in case of default

If Seller is unable to convey a good and marketable title to the premises as required by this contract, he shall repay to Buyer the amount paid by Buyer upon execution of this agreement (with interest thereon of _____ percent per annum) and the reasonable expenses of examining title and the making of a survey of the premises, and thereafter neither party shall have any rights against the other.

(105) Purchaser election to accept defective title without claim or to rescind contract

In the event that Seller cannot convey title or cause same to be conveyed in accordance with the terms of this contract, subject to the encumbrances specifically enumerated in this contract, Purchaser shall, at its election, which election shall be made at or prior to the closing date, have the right to accept such title as Seller (who is under no obligation whatsoever to take any steps to render title marketable) is able to convey, or cause to be conveyed, without any claim on the part of the Purchaser for abatement for defects or objections; or the Purchaser shall have the right to rescind this contract, upon which rescission, pursuant to this paragraph the sole liability of Seller will be to refund to Purchaser the amount paid on account of the purchase price together with the interest earned thereon, if any, and to pay the net cost of examining the title, and upon such refund and payment being made, this contract shall be considered canceled; provided, however, that Seller shall have, at Seller's option, an additional sixty (60) days to remove or satisfy valid objections to title and Seller shall be entitled to an adjournment of the closing for a period of up to sixty (60) days.

(106) Purchaser's liability limited to deposit

Purchaser is in no event liable under this agreement for any amount except the \$_____ paid by him upon the execution of this agreement. The vendor must look to the property for any additional amounts to which he is entitled.

(107) Purchaser to pay broker's commissions, if any

The purchase price is based upon Purchaser's statement that the sale was not brought about through the efforts of any broker and that neither party is required to pay any commissions. If, therefore, it appears that this sale was brought about through the efforts of a broker, Purchaser shall pay the required commissions.

(108) Alternative dispute resolution clause

Mediation of disputes: Seller and Purchaser agree to mediate any dispute or claim between them arising out of this contract or any resulting transaction before resorting to arbitration or court action. Mediation is a process in which parties attempt to resolve a dispute by submitting it to an impartial, neutral mediator who is authorized to facilitate the resolution of the dispute, but who is not empowered to impose a settlement on the parties. The mediation fee, if any, shall be divided equally among the parties involved. Before the mediation begins, the parties agree to sign a document limiting the admissibility in arbitration or any civil action of anything said, any admission made, and any documents prepared, in the course of the mediation. If any party commences an arbitration or court action based on a dispute or claim to which this paragraph applies without first attempting to resolve the matter through mediation, then, in the discretion of the arbitrator(s) or judge, that party shall not be entitled to recover attorney's fees even if they would otherwise be available to that party in any such arbitration or court action. However, the filing of a judicial action to enable the recording of a notice of pending action, for order of attachment, receivership, injunction, or other provisional remedies, shall not in itself constitute a loss of the right to recover attorney's fees under this provision. The following matters are excluded from the requirement of mediation hereunder: (a) a judicial or non-judicial foreclosure or other action or proceeding to enforce a mortgage, (b) an unlawful detainer action, (c) the filing or enforcement of a mechanic's lien, and (d) any matter which is within the jurisdiction of a probate court.

Arbitration of disputes: Any dispute or claim in law or equity between Seller and Purchaser arising out of this contract or any resulting transaction which is not settled through mediation shall be decided by neutral, binding arbitration and not by court action, except as provided by the laws of the State of _____ for judicial review of arbitration proceedings. The arbitration shall be conducted in accordance with the rules of the American Arbitration Association (AAA), unless the parties agree in writing to use different rules or a different arbitrator. In all other respects, the arbitration shall be conducted in accordance with Section _____ of the _____ Code of the State of _____. Judgment upon the award rendered by the arbitrator may be entered in any court having jurisdiction thereof. The parties shall have the right to discovery in accordance with Section _____ of the _____ Code of the State of _____. The following matters are excluded from arbitration hereunder: (a) a judicial or non-judicial foreclosure or other action or proceeding to enforce a mortgage, (b) an unlawful detainer action, (c) the filing or enforcement of a mechanic's lien, (d) any matter which is within the jurisdiction of a probate or small claims court, and (e) an action for bodily injury or wrongful death, or for latent or patent defects. The filing of a judicial action to enable the recording of a notice of pending action, for order of attachment, receivership, injunction, or other provisional remedies, shall not in itself constitute a waiver of the right to arbitration under this provision.

Any dispute or claim by or against a real estate broker or agent participating in this sale shall be submitted to mediation followed by binding arbitration consistent with the above provisions.

(109) Seller to pay selling broker's commission, purchaser warranty that no other broker brought about transaction

The parties agree that _____ Realty, Inc. is the broker who brought about this sale. Purchaser represents and warrants to Seller that no broker other than _____ Realty, Inc. brought about this transaction; that all negotiations with respect to the terms of this contract were conducted by or through said broker; and that in the event any claim is made for broker's commission or finder's fee as the result of any acts or actions of Purchaser or Purchaser's representatives with respect to this transaction, Purchaser and Purchaser's heirs, successors and assigns do hereby agree to hold Seller harmless from any and all loss, liability, cost, damage or expense with respect to such claims (including without limitation, reasonable attorneys' fees and disbursements) without any charge or cost to Seller. Seller shall pay the brokerage commission to _____ Realty, Inc. in accordance with Seller's agreement with _____ Realty, Inc. if and when title passes hereunder. This paragraph shall survive the delivery of the deed.

Possession, Closing

(110) Possession of premises delivered at closing

Seller shall take all necessary steps to insure that he will be able to deliver possession of the premises to Purchaser on the date set in this contract for the closing of title, that the premises will be vacant at that time, and that Purchaser will be able immediately to go into possession. If for any reason Purchaser is unable to obtain possession of the premises or the premises are not vacant, Purchaser may elect to terminate this contract, Seller will return to Purchaser the money paid at the time of the signing of this agreement, and neither party shall thereafter be under any liability or responsibility to the other.

(111) Purchaser to be allowed to take possession

Upon the signing of this contract and the payment of the required amount, the purchaser shall be permitted to take immediate possession of the property (and shall be entitled to retain such possession so long as he makes the payments herein stated).

(112) Time and place of closing, time of the essence upon notice by either party

The closing shall take place at the office of _____, at _____ Street, City of _____, State of _____, or at such other place as the parties mutually agree upon, on or about _____ [date]. The parties agree that if either party sends notice hereafter that time is of the essence, no less than _____ weeks' notice shall be given. No such notice shall be given until all contingencies contained in this contract have been satisfied or waived.

(113) Extension of closing by making additional payment

If Purchaser under this agreement is not ready to close title on the date set in this agreement, he shall be entitled to an extension of time for a further period of _____, upon paying to the Vendor on or before the date set for the closing of title on account of the purchase price of the premises an additional sum of \$_____.

(114) Certificate of occupancy to be furnished

On the closing of the title, Seller shall deliver to Purchaser a certificate of occupancy issued by the proper authorities of the City of _____, permitting the property to be occupied for the purposes for which it is designed. The certificate shall be in full force and effect on that date and not subject to any violations filed against the property by the officials of the City of _____.

(115) Assignments of leases, service contracts and security deposits at closing

The Seller shall deliver to the Purchaser at the closing:

- (a) An assignment, without representation, warranty or recourse, of all of Seller's right, title and interest in and to all tenancies and leases affecting the property, or any part thereof, as of the closing date;
- (b) An assignment, without representation, warranty or recourse, of all of Seller's right, title and interest in and to all service, maintenance and other contracts affecting the property, or any part thereof, as of the closing date;
- (c) An assignment, without representation, warranty or recourse, of all of Seller's right, title and interest in and to all rent security deposits made by tenants under the tenancies and leases affecting the property which are in Seller's possession as of the closing date, together with any accrued interest earned thereon.

Purchaser shall execute the assignments of leases, service contracts and security deposits for the purposes of assuming Seller's obligations thereunder from and after the closing date, and indemnifying Seller against any and all loss or expense resulting from Purchaser's failure to perform its obligations under such leases or service contracts, or from any claims made in connection with any transferred security deposit.

Assignment

(116) Contract not to be assigned without written consent of seller

This contract shall not be assigned without Seller's prior written consent. If an assignment is made without such consent, the contract shall terminate and Seller shall retain the down payment made under it.

(117) Right to assign contract

Either party may assign this contract and all his interests in and rights under it to other persons or corporations.

(118) Right to assign contract, purchaser liable on purchase money mortgage

Purchaser shall execute the purchase money note to be given as required by this agreement so as to render himself personally liable for the amount of the mortgage debt. The execution of the note shall be the consideration given by Purchaser for the right to assign this agreement.

(119) Right to assign contract, assignee liable on purchase money mortgage

Seller will accept a purchase money note and mortgage executed by Purchaser's assignee in lieu of Purchaser.

(120) Assignment of contract and rights endorsed on contract

I hereby assign to John Doe my right, title, and interest in this contract, together with all present and future rights, claims, and demands arising under it and the negotiations leading to its execution.

Boilerplate Clauses

(121) Non-waiver of contract rights

No delay or failure by either party to exercise any right under this contract, and no partial or single exercise of that right, shall constitute a waiver of that or any other right, unless otherwise expressly provided herein.

(122) Controlling state law

This contract shall be construed in accordance with and governed by the laws of the State of _____.

(123) Contract entire agreement between parties (merger clause)

All prior understandings and agreements between the parties are merged in this contract, which constitutes the entire agreement between the parties. This contract is entered into after full investigation made by Seller, and neither party relies upon any statement or representation made by anyone unless contained herein.

(124) Binding effect on parties' successors

This contract shall be binding upon and inure to the benefit of the parties hereto and their respective executors, administrators, legal representatives, heirs, successors, distributees, and assigns.

(125) Any amendments to agreement to be in writing

No provision of this contract may be modified or waived unless in writing and signed by the party against whom the enforcement of such modification or waiver is sought.

(126) Provisions of rider to control over printed contract

If any provision of this rider shall conflict with any printed provision of this contract, the provision of this rider shall control.

(127) Indivisible contract, terms do not survive closing

It is specifically understood and agreed that this contract is a single, indivisible contract, and the delivery and acceptance of the deed shall be considered full compliance with all the terms of this contract by Seller, and none of the terms shall survive the delivery and acceptance of the deed, except those provisions which this contract expressly states shall survive such delivery.

(128) Delivery of notices

Any and all notices, elections, demands, requests and responses thereto permitted or required to be given under this contract (collectively "Notices") shall be in writing, signed either by the party giving the same or such party's attorneys, and shall be deemed to have been properly given and shall be deemed effective upon receipt (i) if personally delivered, or (ii) if delivered by express overnight delivery service with receipt for delivery, or (iii) if deposited in the United States mail, postage prepaid, certified with return receipt requested, to the other party at the address of such other party set forth above or at such other address as such party may designate by notice specifically designated as a notice of change of address and given in accordance herewith. Rejection or other refusal to accept or inability to deliver because of changed address of which no notice has been received shall also constitute receipt. Copies of all Notices shall also be delivered as follows: *(set forth addresses of parties' attorneys)*.



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Current Legal Forms for Real Estate

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Current Legal Forms for Real Estate
Chapter 21 SALES AND EXCHANGES
Part IV. Forms
E. EXCHANGES

25-21 Current Legal Forms for Real Estate FORM 21.58

FORM 21.58 Exchange agreement--both properties subject to mortgage

COMMENT

This agreement is for an exchange of two properties between two parties. Each property is to be transferred subject to an existing first mortgage. The difference in the values of the properties, over and above the first mortgage liens, is paid by one party to the other. One party receives like kind property as consideration for the transfer of property, and the other party receives like kind property, cash, and a purchase money second mortgage. Because each party is taking title to real estate, this agreement includes many of the provisions contained in a contract for the sale of real estate for cash and/or purchase money financing. These provisions include the form of the purchase money mortgage, encumbrances, violations, closing date, and apportionments.

General tax rule for exchanges

Usually, the fair market value of property received by a transferor is considered equivalent to cash. Therefore, the tax consequences of an exchange are normally the same as those of a sale. Each of the parties to an exchange will realize taxable gain or loss measured generally by the difference between the fair market value of the property received and the adjusted basis of the property conveyed. However, nonrecognition provisions apply to the exchange of property of "like kind." See The Tax Background (TB) § 21.12, at the beginning of this chapter, for a further discussion of like kind exchanges.

Like kind exchange nonrecognition

No gain or loss is recognized on the exchange of property held for productive use in a trade or business or for investment if the property is exchanged solely for property of like kind to be held

for productive use in a trade, business, or for investment. The "like kind" test refers to the nature or character of the property and not to its grade or quality. Therefore, no gain or loss is recognized by a taxpayer who exchanges city real estate for a ranch or farm, or a leasehold of a fee with 30 years or more to run for real estate, or improved real estate for unimproved real estate. See TB § 21.12[4].

Business and investment property limitation

Business property may be exchanged for investment property and vice versa. Both the transferred property and the acquired property must be held for productive use or for investment. This excludes personal residences and property which is held primarily for sale to customers or which is intended to be sold immediately after the exchange. The fact that property was not sold but was exchanged for similar property is an indication that the taxpayer is holding it for investment rather than for sale. See TB § 21.12[2].

However, it is possible for a residence which is converted to a rental property to be exchanged for another rental property under certain circumstances. Both of the rental properties would have to be considered investment properties under I.R.C. § 1031, and then be eligible for like-kind exchange treatment. TB § 21.12. To meet the safe harbor now available for such an exchange, the residential rental properties would have to meet the requirements of *Rev. Proc. 2008-16*, applicable to exchanges occurring after March 10, 2008. TB § 21.12[2].

Receipt of cash

A taxpayer's exchange is nontaxable even if he pays cash in addition to transferring property. However, if the taxpayer receives "like kind" property plus other property or money, any gain is taxable to the extent of the value of the other property and the amount of money received. The receipt of other property or money, however, does not permit the recognition of loss. If the taxpayer receives cash on the exchange, his gain is taxable to the extent of the cash even if he assumes a mortgage on the property acquired on the exchange. Most likely the result would be different if the taxpayer received unencumbered property and no money, and then obtained a mortgage. See TB § 21.12[6].

Exchange of mortgaged property

If the taxpayer transfers mortgaged property in the exchange, and receives unencumbered property, the amount of the mortgage is treated as money received on the exchange. This rule applies regardless of whether the taxpayer was personally liable for the mortgage, or whether the mortgage was assumed by the transferee. But, if the taxpayer receives mortgaged property in exchange for his own mortgaged property, the amount of the mortgage on the acquired property is offset against the amount of the mortgage on the property exchanged. Similarly, any money paid by the taxpayer in the exchange is offset against the mortgage on the property exchanged. However, if the taxpayer receives money in the exchange, the money is taxable, because it may not be offset by a mortgage on the property received. See TB § 21.12[6].

Information reporting of real estate transactions

The attorney or title company responsible for closing title is required to report the real estate transaction to the IRS. In addition, a statement must be provided to the customer before January 31 of the year following the transaction. The information reporting requirements are discussed in

TB § 21.02[4].

FORM

AGREEMENT made December 10, _____ [date], between William Barnes, residing at 300 Palmer Street, Larchmont, New York ("Barnes"), and James B. Harris, residing at 200 Bank Street, New Rochelle, New York ("Harris").

1. *Transfer by Barnes.* Barnes agrees to sell and convey to Harris, at a valuation, for the purpose of this contract, of \$188,000:

All that certain plot, piece, or parcel of land, with the buildings and improvements thereon, situate, lying, and being in the

(Insert description)

Such premises are to be sold and conveyed subject to the following:

(a) A first mortgage now a recorded lien on such premises upon which there is unpaid the principal sum of \$120,000 and interest, a copy of which Harris has examined and initialed.

(b) Covenants and restrictions of record, if they are not violated by the existing building and improvements on such premises and the use thereof.

2. *Transfer by Harris.* Harris agrees to sell and convey to Barnes, at a valuation, for the purpose of this contract, of \$300,000:

All that certain plot, piece, or parcel of land with the buildings or improvements thereon, situate, lying, and being in the

(Insert description)

Such premises are to be sold and conveyed subject to the following:

(a) A first mortgage now a recorded lien upon such premises upon which there is unpaid the principal sum of \$180,000 and interest, a copy of which Barnes has examined and initialed.

(b) Covenants and restrictions of record, if they are not violated by the existing building and improvements on such premises and the use thereof.

3. *Payment of difference in net values.* The difference between the values of the respective premises, over and above encumbrances, for the purpose of this contract, shall be deemed to be \$52,000, which shall be due and payable by Barnes to Harris as follows: \$12,000 on the signing of this contract, by check subject to collection, the receipt of which is acknowledged; \$30,000 by Barnes or his assigns executing, acknowledging, and delivering to Harris a note in that amount, satisfactory to Harris, secured by a purchase money second mortgage covering the above described premises to be conveyed by Harris, payable in quarter-annual installments of \$1,000 beginning 90 days from the date of the closing until fully paid, together with interest of 12 percent per annum payable with each installment of principal on unpaid balances; and \$10,000 at the closing in a certified or cashier's check to the order of Harris.

4. *Street rights.* The sale by each party includes all right, title, and interest, if any, of the seller in and to any land lying in the bed of any street, road, or avenue opened or proposed, in front of or adjoining the premises to be conveyed to the center line thereof, as well as in and to any award made or to be made in lieu thereof and in and to any unpaid award for damage to such premises by reason of change of grade of any street. Each party will execute and deliver to the other, on the closing of title, or thereafter, on demand, all proper instruments for the conveyance of such title and the assignment and collection of any such award.

5. *Form of purchase money mortgage.* Any note and mortgage to be given by Barnes shall be drawn on the standard forms of the New York Board of Title Underwriters for mortgages of like lien. The note and mortgage shall be drawn by the mortgagee's attorney at the mortgagor's expense. The mortgagor shall also pay the mortgage recording tax and recording fees and pay for and affix to such instruments all necessary revenue stamps.

6. *Additional encumbrances.* The premises of each party shall be sold and conveyed subject to:

- (a) Zoning regulations and ordinances of the city, town, or village in which the premises lie which are not violated by existing structures.
- (b) Encroachments of stoops, areas, cellar steps, trim, and cornices, if any, upon street and highway.
- (c) Consents by the seller or any former owner of such premises for the erection of any structure or structures on, under, or above any street or streets on which the premises abut.
- (d) Any state of facts an accurate survey may show which does not render the title unmarketable.

7. *Evidence of mortgage debt.* If there is a mortgage on the premises and such mortgage has been reduced by payments on account of the principal, the seller agrees to deliver to the purchaser upon delivery of the deed a proper certificate executed and acknowledged by the holder of such mortgage and in form for recording, certifying as to the amount of the unpaid principal and interest, date of maturity, and rate of interest, and the seller shall pay the fees for recording such certificate.

8. *Departmental violations.* The respective sellers shall comply with all notes or notices of violations of applicable municipal or other laws, including zoning ordinances, health codes, multiple dwelling laws, building codes, fire ordinances, and the like, against or affecting the premises at the date hereof, and the premises shall be conveyed free of such violations. This provision shall survive delivery of the deeds. Each party shall furnish the other with an authorization to make the necessary searches for such violations.

9. *Unpaid assessments.* If upon delivery of the deeds all or part of either premise is or has been affected by any assessment which is or may become payable in annual installments, of which the first installment is then a charge or lien or has been paid, all the unpaid installments of any such assessment, including those that are to become due and payable after delivery of the deed, shall be deemed for purposes of this contract to be due and payable after delivery of the deed and to be liens upon the premises affected thereby, and shall be paid and discharged by the seller upon delivery of the deed. Sewer taxes shall be excluded from the provisions of this paragraph, and the installments not due and payable at the time of the delivery of the deed shall be assumed by the purchaser of the property so affected without abatement of the purchase price.

10. *Apportionments.* The following items shall be apportioned: (a) rents as and when collected; (b) interest on mortgages; (c) premiums on existing transferable insurance policies or renewals of those expiring before the closing; (d) taxes and sewer rents, if any, on the basis of the fiscal year for which assessed; (e) water charges on the basis of the calendar year; and (f) fuel, if any.

If the closing of the title occurs before the tax rate is fixed, the apportionment of taxes shall be upon the basis of the tax rate for the next preceding year applied to the latest assessed valuation. If there is a water meter on either of the premises, the respective seller shall furnish a reading to a date not more than 30 days before the closing, and the unfixed meter charge and the unfixed sewer rent, if any, based thereon for the intervening time shall be apportioned on the basis of such last reading.

11. *Deeds.* Each deed shall be the usual bargain and sale deed with covenant against grantor's acts in proper statutory short form for record and shall be duly executed and acknowledged, so as to convey to the grantee the fee simple of the premises conveyed, free of all encumbrances, except as herein stated, and shall also contain the covenant required by subdivision 5 of Section 13 of the Lien Law. Each party shall give and the other party accept any title that the Central Title Insurance Company or the General Title Insurance Company approves and insures.

12. *Lien for deposit and title expense.* All sums paid on account of this contract, and the reasonable expense of the survey and the examination of the title, are made liens on the respective properties, but such liens shall not continue after default by the respective purchaser under this contract.

13. *Fixtures and personal property.* All fixtures and articles of personal property attached or appurtenant to or used in connection with such premises are represented to be owned by the respective sellers of such premises, free from all liens and encumbrances except as herein stated, and are included in this exchange. Such fixtures and articles of personal property include plumbing, heating, lighting, and cooking fixtures, air conditioning fixtures and units, ranges, refrigerators, television aerials, bathroom and kitchen cabinets, mantels, door mirrors, blinds, shades, screens, awnings, storm windows, window boxes, storm doors, mail boxes, pumps, and shrubbery.

14. *Judgments against others.* If a search of the title discloses judgments, bankruptcies, or other returns against other persons having names the same as or similar to those of the respective parties, such party will on request deliver to the other party an affidavit showing that such judgments, bankruptcies, or other returns are not against the affiant.

15. *Default.* If either party is unable to convey title in accordance with the terms of this contract, his sole liability shall be to refund to the other party any amount paid on account of the difference between the agreed values of the respective premises and to pay the net cost of surveying and examining such title. As soon as the refund and payment are made this contract shall be considered cancelled.

16. *Fire loss.* The respective sellers assume the risk of loss or damage to the premises by fire until delivery of the deeds.

17. *Closing.* The closing shall be held at the office of Mark Davidson, Esq., 10 Court Square, White Plains, New York, at 10 a.m. on February 10, _____ [date].

18. *Broker.* The parties agree that Noonan & Company brought about this exchange and agree to pay the commission as provided in a separate agreement executed by them.

19. *Binding effect.* This agreement shall be binding upon and inure to the benefit of the parties hereto and their respective legal representatives, successors, and permitted assigns.

20. *Entire agreement; modification.* This instrument constitutes the entire agreement between the parties. It is entered into after full investigation, neither party relying upon any statement or representation made by the other not embodied herein. The parties have inspected the buildings standing on the respective premises to be purchased by them and are thoroughly acquainted with their condition. This instrument may not be changed or terminated orally, but only by an agreement duly executed and signed by the parties.

21. *Notices.* All notices hereunder shall be in writing and delivered personally or mailed by certified or registered mail, postage prepaid, return receipt requested, addressed to the parties at their above addresses.

22. *Non-waiver.* No delay or failure by either party to exercise any right hereunder, and no partial or single exercise of such right, shall constitute a waiver of that or any other right, unless otherwise expressly provided herein.

23. *Headings.* Headings in this agreement are for convenience and reference only and shall not be used to interpret or construe its provisions.

24. *Governing law.* This agreement shall be construed in accordance with and governed by the laws of the State of New York.

25. *Time of essence.* Time is of the essence of this agreement.

This agreement has been duly executed by the parties.

William Barnes

James B. Harris

[Acknowledgments]



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 Chapter 21 SALES AND EXCHANGES
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 E. EXCHANGES

25-21 Current Legal Forms for Real Estate FORM 21.59

FORM 21.59 Exchange agreement--one parcel subject to long term lease--transfers subject to existing mortgages--excess value of one parcel paid in cash

COMMENT

This is a contract for the exchange of rental properties. One of the properties is subject to a long term lease of the entire parcel and is to be conveyed subject to the lease. Because the lessee pays expenses, such as taxes and insurance, usually apportioned between the parties at closing, this exchange agreement provides for no apportionment of expenses for the leased parcel. Expenses for the property not subject to the long-term overall lease, however, are apportioned at closing under this agreement. Since the value of one parcel exceeds that of the other, the excess is to be paid in cash at the closing. Due to the differences in title and other matters, this contract is generally arranged to treat each parcel separately. The provisions in this agreement are arranged under five areas: the description of the first parcel; the description of the second parcel; matters relating to the first parcel; matters relating to the second parcel; and matters applicable to both parcels.

Tax aspects

This exchange most likely will qualify as a "like kind" exchange. However, the nonrecognition possibility virtually disappears for one of the parties in this case, because of the disparity in the gross values of the properties. Also, the assumption of the mortgage on the more valuable property provides a major portion of the consideration in the exchange. Mortgage assumption transactions usually create taxable gain for the owner of the more valuable property, even if no cash is received, notwithstanding the nonrecognition provision. For a general discussion of like-kind exchanges and of the effect of mortgages on the amount of recognized gain, see The Tax Background § 21.12[6], at the beginning of this chapter.

FORM

AGREEMENT, made September 30, _____ [date], between Charlton Corporation, a New York corporation with its principal place of business at 100 East 42d Street, New York, New York ("Charlton"), and Center Realty Corporation, a New York corporation, having its principal place of business at 500 Fifth Avenue, New York, New York ("Center Realty").

1. Description of first parcel. Charlton agrees to sell and convey to Center Realty;

All that certain plot, piece, or parcel of land, with the buildings and improvements thereon, situate, lying, and being in the Borough of Manhattan, City, County, and State of New York, more particularly bounded and described as follows:

(Insert description)

Together with all the right, title, and interest of Charlton, if any, of, in, and to all strips or gores of land adjacent to or abutting such premises.

The above described premises are hereinafter referred to as the first parcel.

2. Description of second parcel. Center Realty agrees to sell and convey to Charlton,

All that certain plot, piece, or parcel of land, with the buildings and improvements thereon, situate, lying, and being in the Borough of Manhattan, City, County, and State of New York, bounded and described as follows:

(Insert description)

The above described premises are hereinafter referred to as the second parcel.

3. Matters relating to first parcel. The following provisions contained in this paragraph shall apply solely to the sale by Charlton to Center Realty of the first parcel:

(a) Liens and encumbrances on first parcel. The first parcel is to be sold and conveyed subject to the following:

(1) A mortgage to be a lien on the parcel upon delivery of the deed, which shall secure the principal sum of \$5,300,000 and interest. The mortgage shall be executed to the General Life Insurance Company, shall be payable and made in accordance with the provisions of the commitment issued by such institution, dated August 26th, _____ [year], and the mortgage documents shall contain the appropriate provisions of such commitment. The commitment has been examined and initialed by or on behalf of Center Realty. The first payment of interest only under such mortgage shall be due and payable three months after the closing of title hereunder, and the first fixed quarterly payment of \$106,000 shall be due and payable six months after the closing of title. All expenses (including broker's commissions and the other expenses set forth in such commitment) in connection with the mortgage loan shall be paid by or on behalf of Charlton.

(2) The state of facts shown on the survey made by George C. Hollerith, dated March 14, _____ [year] and redated June 27, _____ [year], a blueprint of which has been examined and initialed by or on behalf of Center Realty.

(3) A lease of the entire parcel for a term of 25 years, commencing on or about the date of the delivery of the deed, with options of renewal, such lease to be in the form of the attached Schedule A, made a part hereof, after all blanks are filled in with appropriate data.

(4) Subleases and tenancies of portions of the parcel.

(5) All municipal assessments, water meter charges, and sewer rents assessed, levied, imposed, or confirmed against and becoming a lien against the parcel or any part thereof and which the lessee under the lease described in subparagraph (3) is obligated to pay.

(6) Covenants and restrictions of record, if any, to the extent they are in force and effect, if they are not violated by the existing building and improvements on the parcel and the use thereof.

(7) Licenses and easements, if any, for public utilities.

(b) *No apportionments.* There shall be no apportionment between the parties with respect to insurance, real estate taxes, water rates, sewer rents, charges, and other items normally apportioned with respect to the sale of real property, since all of such items are payable by the lessee under the lease described in subparagraph (3).

(c) *Damage to property.* If before the closing any building or improvement is totally or partially damaged or destroyed by causes covered by insurance, such damage or destruction shall not affect this agreement. Notwithstanding the damage or destruction, Center Realty shall close this transaction without any claim or abatement of price or allowance of any kind, except that Charlton shall at closing of title deliver to Center Realty all insurance proceeds received by Charlton, and Charlton shall also transfer, assign, and set over to Center Realty all of Charlton's rights to such proceeds or any claim thereto received by or accrued to Charlton at or before the closing.

(d) *Purchase price.* For purposes of this agreement the value of the first parcel, over encumbrances, shall be deemed to exceed the value of the second parcel, over encumbrances, by \$200,000. At the closing Center Realty shall deliver to Charlton \$200,000 in cash or by good certified check.

(e) *Modification of existing leases.* From and after the date hereof Charlton shall not, without Center Realty's prior written consent, modify, amend, or terminate any lease or tenancy affecting the first parcel. At the closing, Charlton shall deliver to Center Realty a list of all existing subleases and tenancies with relevant data.

4. *Matters relating to second parcel.* The following provisions contained in this paragraph shall apply solely to the sale by Center Realty to Charlton of the second parcel:

(a) *Liens and encumbrances on second parcel.* The second parcel shall be sold and conveyed subject to the following:

(1) A mortgage now a recorded lien on the parcel upon which there is now unpaid the principal sum of \$280,000, and interest. Such mortgage is payable in constant quarter-annual payments of \$5,950 each, until August 1, _____ [year], when the balance of principal then unpaid, together with accrued interest, shall become due and payable. Such constant quarter-annual payments of \$5,950 each are to be applied first towards the payment of interest at the rate of 9 percent per annum, and the balance of each payment on account of principal of the mortgage. Copies of such mortgage and of the obligation secured thereby have been examined and initialed by or on behalf of Charlton.

(2) The state of facts shown on the survey made by J. George Hollerith, dated May 26, _____ [year], and redated May 22, _____ [year], a copy of which survey has been examined and initialed by or on

behalf of Charlton.

(3) Leases and tenancies of portions of the parcel listed in the annexed Schedule B and made a part hereof; any written leases and agreements so listed have been examined and initialed by or on behalf of Charlton. It is recognized that such leases and tenancies may change between the date hereof and the closing of title, by reason of defaults, summary proceedings, or other reasons beyond the control of Center Realty.

(b) *Water and sewer charges.* If there are water meters on the second parcel, the unfixed meter charges and the unfixed sewer rents if any, based thereon for the intervening time between the date of the last reading and the closing of title, shall be apportioned on the basis of such last reading. Notwithstanding any contrary provision herein, if the second parcel is subject to any lease or leases or tenancies, pursuant to which any tenant is obliged to pay water meter charges or sewer rents, such charges or rents shall not be apportioned, and Charlton shall look solely to such tenant or tenants for the payment thereof.

(c) *Mortgage installments.* Mortgage installments representing payments of principal required to be paid by the terms of the mortgage on the second parcel between the date hereof and the closing of title, and paid by Center Realty, shall be repaid by Charlton to Center Realty in cash at the time of closing title, and the second parcel shall be conveyed subject to the mortgage as reduced.

(d) *Assumption of service contracts.* Charlton shall at the closing of title assume in writing the performance of the maintenance contracts set forth in the annexed Schedule C affecting the second parcel. All charges payable under such maintenance contracts shall be apportioned at the closing of title.

(e) *Departmental violations.* Within 60 days after the closing of title, Center Realty shall comply with all notes or notices of violations of applicable municipal or other laws, including zoning ordinances, health codes, multiple dwelling laws, building codes, fire ordinances, and the like, against or affecting the second parcel at the date hereof. This provision shall survive delivery of the deed. Center Realty shall furnish Charlton with authorization to make the necessary searches for such violations.

(f) *Apportionments.* The following shall be apportioned between the parties as of November 1, _____ [year]:

(1) Rents as and when collected.

(2) Interest on the first mortgage.

(3) Taxes, based on the fiscal year for which assessed.

(4) Fuel, if any.

(g) *Unpaid assessments for improvements.* If, at closing, all or part of the second parcel is or has been affected by any assessment which is or may become payable in annual installments, of which the first installment is then a charge or lien or has been paid, all the unpaid installments of any such assessment, including those that are to become due and payable after delivery of the deed, shall be deemed for purposes of this contract to be due and payable and to be liens upon the second parcel, and shall be paid and discharged by Center Realty before delivery of the deed.

(h) *Evidence of mortgage debt.* An ordinary receipt or letter from the holder of the mortgage covering the second parcel, reciting the amount unpaid, and the date to which interest was last paid, shall be sufficient evidence thereof, and no further evidence shall be required.

5. *Matters applicable to both parcels.* The following provisions shall be applicable to the sale by each party of its respective parcel:

(a) *Additional encumbrances.* In addition to the items set forth in paragraphs 3 and 4, each of the parcels shall be sold and conveyed subject to:

(1) Zoning regulations and ordinances of the city, town, or village in which the parcels lie which are not violated by existing structures.

(2) Consents by the seller or any former owner of the parcels for the erection of any structure or structures on, under, or above any street or streets on which each parcel abuts.

(3) Encroachments of stoops, areas, cellar steps, trim, and cornices, if any, upon any street or highway.

(b) *Street rights.* The sale by each party includes all right, title, and interest, if any, of the seller in and to any land lying in the bed of any street, road, or avenue opened or proposed, in front of or adjoining the parcel to be conveyed to the center line thereof, any award made or to be made in lieu thereof, and any unpaid award for damage to such parcel by reason of change of grade of any street. Each party will execute and deliver to the other, on the closing of title, or thereafter, on demand, all proper instruments for the conveyance of such title and the assignment and collection of any such award.

(c) *Deeds.* Each deed shall be the usual bargain and sale deed without covenants in proper statutory short form for record and shall be duly executed and acknowledged, so as to convey to the grantee the fee simple of the parcel conveyed, free of all encumbrances, except as herein stated, and shall also contain the covenant required by subdivision 5 of Section 13 of the Lien Law. Center Realty shall pay any New York City Real Property transfer tax in connection with the transfers by both parties. Both parties shall join in executing and filing any returns required under the New York City Real Property Transfer Tax Law.

(d) *Fixtures.* All fixtures and articles of personal property attached or appurtenant to or used in connection with the parcels owned by the respective sellers, free from all liens and encumbrances except as herein stated, are included in this exchange.

(e) *Judgments against others.* If a search of title discloses judgments, bankruptcies, or other returns against other persons having names the same as or similar to those of either party, such party will on request deliver to the other party an affidavit showing that such judgments, bankruptcies, or other returns are not against the affiant.

(f) *Unpaid corporate taxes.* Unpaid corporation or franchise taxes of any corporation in the chain of title to either parcel shall be no objection to title, if the title company examining the title for the purchaser of such parcel agrees to insure that such taxes will not be collected against the parcel.

(g) *Broker.* The parties agree that no broker brought about this exchange, and that this exchange was negotiated by and made directly between them.

(h) *Closing.* The closing shall be held at the offices of Kahn & Carlin, Esqs., 100 Madison Avenue, New York, New York, at 10:30 a.m. on November 2, _____ [year]. At that time, the deeds and other necessary documents shall be delivered, and Center Realty shall make the required payment to Charlton. Center Realty may adjourn the closing to November 30, _____ [year], upon payment to Charlton of \$20,000 as security for the performance of this agreement by Center Realty. Charlton shall refund this sum to Center Realty if the closing takes place. If Center Realty defaults in performing this agreement, Charlton shall retain the \$20,000, which shall be credited against the liquidated damages to be paid by Center Realty as set forth in subparagraph (j).

(i) *Default by Charlton.* If Charlton is unable to acquire title to the first parcel or is unable to convey title in accordance with the terms of this agreement, its sole liability shall be to reimburse Center Realty for any sums paid by Center Realty as security for performance of this agreement together with the net costs of title examination and of any survey made in connection therewith incurred by Center Realty. Thereupon, this agreement shall terminate and neither party shall have any further rights against the other.

(j) *Default by Center Realty.* If Center Realty defaults hereunder, this agreement shall terminate and neither party shall have any further rights against the other, except as set forth below. The parties acknowledge that if this agreement terminates, Charlton will suffer damages, the precise amount of which cannot be determined. Accordingly, in the event of such termination, Center Realty shall pay Charlton, as liquidated damages and not as a penalty, \$60,000 less any amount Center Realty has paid to Charlton and which Charlton has retained under the provisions of subparagraph (h).

(k) *Entire agreement; modification.* This agreement constitutes the entire agreement between the parties. It is entered into after full investigation, neither party relying upon any statement or representation made by the other not embodied herein. The parties have inspected the buildings standing on the respective premises to be purchased by them and are thoroughly acquainted with their condition. This instrument may not be changed or terminated except by an agreement duly executed and signed by both parties.

(l) *Binding effect.* This agreement shall be binding upon and inure to the benefit of the parties hereto and their respective legal representatives, successors, and assigns.

(m) *Notices.* All notices hereunder shall be in writing and delivered personally or mailed by certified or registered mail, postage prepaid, return receipt requested, addressed to the parties at their above addresses.

(n) *Non-waiver.* No delay or failure by either party to exercise any right hereunder, and no partial or single exercise of such right, shall constitute a waiver of that or any other right, unless otherwise expressly provided herein.

(o) *Headings.* Headings in this agreement are for convenience and reference only and shall not be used to interpret or construe its provisions.

(p) *Governing law.* This agreement shall be construed in accordance with and governed by the laws of the State of New York.

(q) *Time of essence.* Time is of the essence of this agreement.

In witness whereof this agreement has been duly executed by the parties.

Attest:

Secretary

Attest:

Secretary

First Party:

Charlton Corporation

by _____

President

Second Party:

Center Realty Corporation

by _____

President

[Acknowledgments]



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Chapter 21 SALES AND EXCHANGES
Part IV. Forms
E. EXCHANGES

25-21 Current Legal Forms for Real Estate FORM 21.60

FORM 21.60 Exchange agreement--three-party exchange, two-party agreement--third property and owner to be located--alternative exchange and sale timing and methods

COMMENT

In this agreement, two parties agree to exchange property. One party owns land which the other party wishes to acquire. This is a three party transaction because other property or properties are to be located, and the owner or owners are to agree to sell or exchange it with one of the parties to the agreement. The completion of this agreement, therefore, depends upon locating and acquiring other satisfactory property. This agreement intends that one of the parties to the agreement will purchase the third party's property and then exchange it for the property owned by the other party to the agreement. If this cannot be arranged, the agreement provides for a direct exchange between the property owner in the agreement and the third party. The third party will then sell the property acquired in the exchange to the other party to the agreement. Under either transaction, the property owner who enters into this agreement should qualify for nonrecognition of gain as a result of the like kind exchange. Also, under either transaction, the party wishing to acquire the owner's property completes the transaction with title to the other party's property. An owner who engages in a triangular exchange secures the benefit of a "like-kind" tax-free exchange, if, among other requirements, his intention was only to make an exchange and if he did not have a binding agreement to sell for cash.

Exchange preceded by third party sale

There are two basic patterns for triangular exchange transactions. In the first, the owner causes a third party (who wants to sell his property rather than exchange it) to make a sale of his property to the purchaser. The owner then exchanges his property for the property acquired by the purchaser from the third party. A variation of this pattern occurs where the owner agrees to

transfer his property to the purchaser if the purchaser will arrange to have the third party's property transferred to the owner. In this latter situation, there is usually a sufficient "exchange" even though the purchaser causes a direct conveyance to the owner from the third party. While in these cases the owner does not make a direct exchange with the third party (because the owner conveys his property to the purchaser), the effect of the over-all arrangement is a like-kind exchange by the owner. This latter technique of exchange is provided in this form as an alternative method to be followed by the parties for making an exchange if the parties' preferred exchange method cannot be completed.

Exchange followed by third party sale

The second pattern for a triangular exchange transaction, and the one described as the basic or preferred method in this form, is one in which the owner exchanges his property with a third party, but arranges as part of the exchange to have the third party sell the owner's property to the purchaser. The net effect is the same as under the first pattern: the owner makes an exchange; the third party makes a sale; and the purchaser acquires the owner's property. Here the owner's intention to make an exchange is carried out directly, and he himself is never obligated to sell for cash. Such a transaction by the owner should, therefore, fall within the tax-free exchange provision.

Tax free exchange time limitations

Any property received by the taxpayer more than 180 days after the date on which the taxpayer transfers property, or after the due date of the taxpayer's tax return for the taxable year in which the transfer occurs if earlier, is not to be treated as like-kind property. Thus, tax-free treatment will be unavailable for exchanges not completed within this time period. In addition, property which was not designated as the property to be received by the taxpayer on or before the day which is 45 days after the date the transferred property was relinquished will not qualify as like-kind property. In this agreement, the transfers and exchanges all occur well within these time limitations.

Form combines option with three party exchange

In this form, the owner grants an option to purchase to an optionee, i.e., the purchaser. If this option is exercised, the owner has the right to exchange his property with a third party, but is obligated to find and commit a third party to sell the owner's property to the optionee-purchaser. If the owner is unable to effect an exchange within a prescribed period, he is then obligated to sell his property directly to the optionee-purchaser. Thus, in this agreement an option and a third-party exchange are combined. Also in this agreement, the optionee-purchaser is given two successive options, one exercisable after the other, and a third-party exchange is to be used in each instance.

Recognized gain or loss for third party

The position of the third party in these transactions is fairly clear. Under the first pattern (exchange preceded by third party sale), the third party has plainly been involved only in a sale of his property. Under the second pattern (exchange followed by third party sale), although the third party appears to engage in an exchange, it is not a tax-free exchange because the property received is not intended to be held either in business or for investment. In any event, the immediate sale by the third party of the property received by him will result, most likely, in taxable gain or loss.

Tax aspects

For a discussion of the basic rules on tax-free "like-kind" exchanges, and for the method of treating mortgages, cash, and other property in such exchanges, see The Tax Background § 21.12, at the beginning of this chapter.

FORM

AGREEMENT entered into October 15, _____ [year], by and between Mountain Bank and Trust Company, as Trustee under Trust 500 ("Owner"), and Smith Realty Company, a corporation ("Optionee").

Recitals

Owner is the owner in fee of certain real property in Orange County, California, comprising approximately 400 acres, more or less (the "Subject Property"), which is bordered by a yellow line and shown on a map prepared by Kay Engineering, Map No. K425, dated March 15, _____ [year]. A copy of this map is attached as Exhibit A and made a part hereof as fully as though set out at length herein. For purposes of this agreement, the Subject Property is divided into two parcels which shall be referred to as follows: Parcel A, comprising 160 acres, and Parcel B, comprising 240 acres.

Owner has made available to Optionee copies of the attached map, which Optionee has examined. Optionee acknowledges that the boundaries bordered by a yellow line on such map are acceptable to it.

Owner wishes to exchange Parcels A and B of the Subject Property for other property of like kind and having these transactions qualify as Exchanges under *Section 1031 of the Internal Revenue Code*.

The Subject Property is the only land to which Optionee acquires any rights hereunder. All other property shown on the map is excluded.

Now, therefore, it is mutually agreed as follows:

1. *Grant of first option.* In consideration of \$50,000 paid by Optionee to Owner, the receipt of which is acknowledged, Owner grants to Optionee the sole and exclusive option to acquire Parcel A of the Subject Property. This option shall automatically terminate at 5 p.m. on June 15, _____ [year]. If Optionee does not duly exercise this option to acquire Parcel A, Owner may retain the \$50,000 paid to it by Optionee as consideration for the option, without any obligation or liability to Optionee, and this agreement shall automatically terminate.

2. *Exercise of first option.* Optionee shall exercise the option for Parcel A of the Subject Property by delivering written notice thereof to Owner, no earlier than June 15, _____ [year], but no later than 5 p.m. on June 15, _____ [year], at the place set forth in paragraph 12 for sending notices. Such notice shall be deemed to have been delivered after personal delivery to Owner at the address to which notices are to be sent or within 24 hours after deposit in any branch of the United States Post Office in California, addressed as herein provided, registered or certified mail, return receipt requested and postage fully prepaid.

3. *Owner's right to effect an exchange.* Upon timely exercise of the option, Owner shall thereafter have until July 15, _____ [year], to exchange Parcel A of the Subject Property for other property of like kind, and to

close the exchange. As soon as Owner exchanges Parcel A for other property, it will cause the new owner or owners to agree in writing to sell Parcel A to Optionee according to the following terms and provisions:

(a) If Parcel A is not exchanged by Owner in a consummated transaction within the time provided above, it shall be sold by Owner to Optionee as provided below.

(b) Optionee shall acquire Parcel A from Owner or from the person or persons then owning Parcel A, for the price and upon the terms set forth herein. Within five business days after Optionee has duly exercised the option, Owner shall enter into an escrow at the Western Title Company, Santa Ana, California, or cause the person or persons with whom Owner has entered into an exchange for Parcel A to enter therein, with Optionee, for the sale of Parcel A. Such escrow shall provide for the closing not later than on July 15, _____ [year]. The value and purchase price of Parcel A shall be \$600,000. The purchase price of Parcel A shall be paid in cash at the close of escrow, and Optionee shall not be entitled to any credit for the \$50,000 already paid under the terms of paragraph 1.

(c) The parties agree to execute the escrow instructions as an accommodation for assisting the escrow holder in settling the escrow transaction. If no escrow instructions are executed, the terms of this agreement shall be deemed to be instructions to such escrow holder.

(d) The following provisions shall govern the escrow:

(1) Parcel A shall be conveyed to Optionee free and clear of encumbrances, except any lien or liens for real property taxes and assessments not then delinquent, and any lien or charge suffered or created by the Optionee on Parcel A. The condition of title shall be subject to reservations, restrictions, easements, and rights-of-way of record at the date of execution of this agreement, but no others. Title shall also be subject to any future bonds and assessments placed of record after the date hereof.

(2) All real property taxes and assessments for the then current fiscal year shall be prorated to the close of the escrow.

(3) The seller and purchaser under such escrow shall pay the customary charges of the Western Title Company for its services and delivery of a standard coverage policy of title insurance. In particular, the seller shall pay for the standard policy of title insurance, the seller and purchaser shall each pay one-half of the escrow fee, the purchaser shall pay for the recordation of documents, and any unusual charges shall be paid by the party causing such expense to occur.

4. *Grant of second option.* If Optionee exercises the option set forth in paragraph 1, and acquires Parcel A of the Subject Property according to all of the applicable conditions, Optionee shall have the exclusive right and option to acquire Parcel B of the Subject Property upon the terms and conditions hereinafter set forth. The option to acquire Parcel B shall automatically terminate if Optionee fails either to perform any condition specified above within the time limitation provided or to exercise the option as provided below. In either event, Owner may retain the \$50,000 paid to it by Optionee under paragraph 1 as consideration for this option.

5. *Exercise of second option.* Optionee shall exercise the option as to Parcel B of the Subject Property by delivering to Owner, at the address provided in paragraph 12, a written notice that it intends to exercise the option as provided in paragraph 6. Such notice shall be deemed to have been delivered after personal delivery to Owner at the address to which notices are provided to be sent, or within 24 hours after deposit in any branch of the United States Post Office in California, properly addressed, registered or certified mail, return receipt requested, and postage fully prepaid.

6. *Time for exercise and price.* The written notice of exercise of the option to acquire Parcel B of the Subject Property shall be made in the manner described in the next preceding paragraph but shall only be effective if given during one of

the periods of time set forth below. The value and purchase price of Parcel B shall be adjusted upward depending upon the date of exercise of the option. The applicable value and purchase price of Parcel B per gross acre is set forth opposite the respective periods of time for exercise of such option, as follows:

Period of Time	Value per Gross Acre
(a) July 16-31, ____ [year]	\$20,600
(b) October 16-31, ____ [year]	\$20,800
(c) January 16-31, ____ [year]	\$21,000
(d) April 16-30, ____ [year]	\$21,200
(e) July 16-31, ____ [year]	\$21,400
(f) October 16-31, ____ [year]	\$21,600

7. *Owner's right to effect exchange.* Upon timely exercise of the option, Owner shall have 90 days within which to exchange Parcel B of the Subject Property for other property of like kind, if such exchange is completed within 90 days after exercise of the option. As soon as Owner exchanges Parcel B for other property, it will cause the owner or owners to agree in writing to sell Parcel B to Optionee according to the following terms and provisions:

(a) If Parcel B is not exchanged by Owner in a consummated transaction within the time provided, it shall be sold by Owner to Optionee as provided below.

(b) Optionee shall acquire Parcel B from Owner or from the person or persons then owning Parcel B for the price and upon the terms set forth herein. Within 150 days after exercise of the option, Owner shall enter into an escrow at the Western Title Company at its then existing office in Orange County, or cause the person or persons with whom Owner has entered into an exchange for Parcel B to enter therein, with Optionee for the sale of all of Parcel B. Such escrow shall provide for the closing within 180 days after exercise of the option to acquire Parcel B. The purchase price shall be paid in cash at the close of escrow, except that Optionee shall be entitled to credit for the \$50,000 already paid as option money under paragraph 1.

(c) The following provisions shall govern the escrow:

(1) Parcel B shall be conveyed to Optionee free and clear of encumbrances, except any lien or liens for real property taxes and assessments not then delinquent, and any lien or charge suffered or created by Optionee on Parcel B. The condition of title shall be subject to reservations, restrictions, easements, and rights-of-way of record at the date of execution of this agreement, but no others. Title shall also be subject to any future bonds and assessments placed of record after the date hereof.

(2) All real property taxes and assessments for the then current fiscal year shall be prorated to the close of escrow.

(3) The seller and purchaser under such escrow shall pay the customary charges of the Western Title Company for its services and delivery of a standard coverage policy of title insurance. In particular, the seller shall pay for the standard policy of title insurance, the seller and purchaser shall each pay one-half of the escrow fee, the purchaser shall pay for the recordation of documents, and any unusual charges shall be paid by the party causing such expense to occur.

8. *Alternative method of exchange.* As an alternative to the manner of exchanging Parcels A and B of the Subject Property as set forth in paragraphs 3 and 7 above, Optionee shall cooperate fully with Owner and purchase any other

land that Owner wishes to receive in exchange for Parcel A or B, or both. Optionee shall not be charged with any additional expense on account of the exchange transactions. The closing dates and other provisions of this agreement shall remain unchanged.

9. *License to optionee to enter property.* Owner hereby grants to Optionee a nonexclusive license to enter the Subject Property from time to time during the option period referred to in paragraph 1, for the sole and exclusive purpose of allowing Optionee to conduct soil, engineering, and other tests on such land. Optionee shall indemnify and hold Owner harmless from all damage caused by Optionee or its agents to the land, crops, and cattle grazing thereon. Optionee shall be responsible for any hazards created through its conduct on the Subject Property. After performing its tests and engineering work, Optionee shall restore the land to substantially the same condition that existed before its activities thereon. Optionee shall warn Owner before it goes onto the land so that Owner may post notices of nonresponsibility. Owner's failure to post such notices shall not be deemed a failure to mitigate any damages caused by Optionee's conduct on the land. Optionee shall indemnify and hold Owner harmless from all mechanic's, laborer's, and other liens arising out of its activity on the Subject Property. The license to go onto the Subject Property shall be only for the limited purpose of allowing Optionee to perform soil, engineering, and other tests. The license shall automatically terminate after the option period referred to in paragraph 1 expires or the tests are completed, whichever occurs first. Thereafter, Optionee shall not have the right to possession of any portion of the Subject Property until it acquires fee title.

10. *Limitation on right of assignment.* Optionee shall not assign this agreement or any right or interest hereunder without Owner's prior written consent. No such prior approval shall be necessary, however, if Optionee assigns its entire rights hereunder to a corporation in which it owns at least 50 percent of the voting stock, or to a joint venture in which it owns at least a 50-percent interest in the profits. Optionee shall remain liable hereunder even if it makes a valid assignment.

11. *Remedies.* If either party brings an action against the other to enforce any term or provision of this agreement or in connection with the Subject Property, the prevailing party shall be awarded its reasonable costs and expenses, not limited to taxable costs, and reasonable attorneys' fees. Such award shall be in addition to any other available relief, including damages or injunction.

12. *Notices.* All notices under this agreement, whether to a party or the escrow holder, shall be in writing and delivered personally or mailed by certified or registered mail, postage prepaid, return receipt requested, addressed to the parties or the escrow holder at the respective addresses set forth below, or to any other address later designated by them:

<i>Owner:</i>	Mountain Bank & Trust Company, Trustee under Trust 500 100 West First Street Santa Ana, California
<i>Optionee:</i>	Smith Realty Company 100 Coast Highway Santa Barbara, California
<i>Escrow Holder:</i>	Western Title Company Santa Ana, California

Any notice sent by mail shall be deemed given on the day after it is deposited in the United States mail, properly addressed with postage fully prepaid, if mailed in the County of Orange, or on the second day after mailing if mailed elsewhere.

13. *Binding effect.* This agreement shall be binding upon and inure to the benefit of the parties hereto and their respective legal representatives, successors, and assigns.

14. *Entire agreement; modification.* This agreement constitutes the entire agreement between the parties. It is entered into after full investigation, neither party relying upon any statement or representation made by the other not embodied herein. This instrument may not be changed or terminated except by an agreement duly executed and signed by both parties.

15. *Non-waiver.* No delay or failure by either party to exercise any right hereunder, and no partial or single exercise of such right, shall constitute a waiver of that or any other right, unless otherwise expressly provided herein.

16. *Headings.* Headings in this agreement are for convenience and reference only and shall not be used to interpret or construe its provisions.

17. *Governing law.* This agreement shall be construed in accordance with and governed by the laws of the State of California.

This agreement has been executed at Santa Ana, California, by the parties as of the day and year first above written.

Mountain Bank and Trust Company

Trustee under Trust 500

by _____

Vice President

by _____

Secretary

Owner

Smith Realty Company

by _____

Vice President

by _____

Secretary

Optionee



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Current Legal Forms for Real Estate
Chapter 21 SALES AND EXCHANGES
Part IV. Forms
E. EXCHANGES

25-21 Current Legal Forms for Real Estate FORM 21.61

FORM 21.61 Addendum to Purchase and Sale Agreement -- Conversion to Like-Kind Exchange Transaction -- Use of Qualified Intermediary in a Deferred Exchange.

COMMENT

This form can be used where the seller of the real property has already executed the purchase and sale agreement and then decides to do a forward delayed like kind exchange transaction, through a "qualified intermediary." *See* Tax Background § 21.12[3]. The form makes clear that the purchaser has no responsibility with respect to accomplishing the like kind exchange transaction for the seller, but does agree to cooperate with the seller towards that end.

The 1991 Treasury Regulations established four "safe harbors" the use of which allow the taxpayer to avoid actual or constructive receipt of money or other property for the purposes of completing a like kind exchange. The use of a qualified intermediary is the preferred method of accomplishing a deferred forward like kind exchange, similar to the transaction described in the preceding Form 21.60, which did not use a qualified intermediary. The qualified intermediary, who is not treated as the agent of the seller, holds the seller's property (the "relinquished property") until the replacement property is received. Even though the intermediary may actually sell the property and acquire the replacement property, the taxpayer is treated as exchanging the property.

The qualified intermediary is a person who enters into a written agreement with the seller (the "exchange agreement") and, as required by the exchange agreement, acquires the relinquished property from the seller, transfers the relinquished property to the purchaser, acquires the replacement property, and transfers the replacement property to the seller. All of this must be accomplished within the time constraints imposed by Section 1031. *See* Tax Background § 21.12[3]. An example of an assignment of the purchase and sale agreement to the qualified intermediary by the

taxpayer is set forth as Form 21.62.

FORM

Addendum to Purchase and Sale Agreement

This Addendum to Purchase and Sale Agreement ("Addendum") is made by and between Harry E. Simpson and Joann Simpson, husband and wife (collectively "Seller"), and Brown Realty Corporation, an Ohio corporation ("Purchaser").

WITNESSETH:

WHEREAS, Seller and Purchaser entered into a Purchase and Sale Agreement dated June 12, _____ [year] (the "Purchase Agreement"), whereby Seller agreed to sell, and Purchaser agreed to buy, certain real property situated in the City of Elyria, County of Lorain, State of Ohio, and more particularly described in the Purchase Agreement; and

WHEREAS, it is Seller's intention to sell the land described in the Purchase Agreement (the "Land") in exchange for a like kind property as part of a tax free like kind exchange transaction; and

WHEREAS, in order to facilitate such exchange, Seller and Purchaser desire to modify the Purchase Agreement as herein set forth;

NOW, THEREFORE, in consideration of the premises and the mutual covenants and agreements herein set forth, the parties hereto agree as follows:

1. Capitalized Words and Phrases. Unless otherwise defined or redefined herein, the capitalized words and phrases used herein shall have the same meanings ascribed to them in the Purchase Agreement.

2. Like Kind Exchange. Purchaser and Seller acknowledge that Seller may wish to structure Seller's disposition of the Land in a manner intended by Seller to constitute an exchange of the Land for property of a like kind (the "Replacement Property") that is described in *Section 1031 of the Internal Revenue Code of 1986*, as amended (an "Exchange"). Notwithstanding anything in the Purchase Agreement to the contrary, Seller shall have the right to assign Seller's interest in the Purchase Agreement, without Purchaser's consent to such person or entity as Seller may designate to serve as a Qualified Intermediary (within the meaning of *Treasury Regulation § 1.1031(k)-1(g)(4)*) for the sole purpose of enabling Seller to effect such an Exchange; provided, however, that notwithstanding any such assignment, Seller shall not be released from any of Seller's liabilities, obligations or covenants under the Purchase Agreement.

Purchaser shall cooperate in all reasonable respects with Seller to effect any Exchange; provided, however, that (i) Seller's ability to consummate an Exchange shall not be a condition to the obligations of Seller under the Purchase Agreement, and Purchaser does not warrant and shall not be responsible for any of the tax consequences to Seller with respect to the transactions contemplated hereunder, and (ii) Purchaser shall not be required to incur any additional costs or expenses as a result of any Exchange.

3. Effect of Addendum. Except as provided herein all other terms and provisions of the Purchase Agreement shall remain unmodified and in full force and effect.

Seller and Purchaser have caused this Addendum to be duly executed as of the ____ day of ____ [year].

SELLER:

Harry E. Simpson

Joann Simpson

PURCHASER

Brown Realty Corporation

By _____

Title: _____



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25-21 Current Legal Forms for Real Estate FORM 21.62

FORM 21.62 Assignment of Purchase Agreement to Qualified Intermediary -- Like Kind Exchange Transaction

COMMENT

If the Seller of real property decides to use a "qualified intermediary" to accomplish a like kind exchange, assignment of the purchase and sale agreement by the seller to the qualified intermediary will be necessary. For the advantage in using a qualified intermediary, see Tax Background § 21.12[3]. Once it is decided to use a qualified intermediary to facilitate the deferred exchange, an exchange agreement is entered into with the qualified intermediary. In this instance, the qualified intermediary is an affiliate of the title company doing the title work for the purchase and sale agreement. The exchange agreement is usually provided by the qualified intermediary after the seller provides the necessary information to the qualified intermediary, but with the understanding that the exchange agreement will be reviewed by the seller's attorney to ensure that the agreement complies with the Treasury Regulations.

Once the exchange agreement is executed, the seller will assign the purchase and sale agreement to the qualified intermediary to facilitate the exchange by use of this form of an assignment.

FORM

ASSIGNMENT OF PURCHASE AGREEMENT

For value received, Harry E. Simpson and Joann Simpson ("Assignor") hereby transfers, sets over, and assigns all of Assignor's right, title and interest, but not Assignor's obligations, in and to that certain Purchase Agreement dated

_____ [date], between Assignor (as seller therein) and Brown Realty Corporation (as buyer therein), and any earnest money or other deposit received pursuant thereto for property known as _____ to North American Exchange Services Co. ("Assignee").

This Assignment is made in furtherance of the terms, conditions and obligations of that certain Agreement for Exchange of Real Property dated _____ [date] between Assignor (as Exchange Party therein) and Assignee (as Intermediary therein).

Assignor:

Harry E. Simpson

Joann Simpson

Date: _____



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25-21 Current Legal Forms for Real Estate FORM 21.63

FORM 21.63 Trade-in of old residence to developer for new home--developer's sale of old home in exchange for acquisition of new home--developer's guaranteed sale or acquisition of old home at minimum price

COMMENT

In the series of forms illustrated here, a residential subdivision developer agrees to purchase and/or sell the old residence of a purchaser of a new residence in the developer's tract. Ordinarily, a developer is not involved in the sale of his purchasers' former residences. But in a slow residential real estate market, the developer's agreement either to acquire or to sell his customers' old homes can result in sales of new homes which otherwise may take longer to sell.

Tax aspects

A taxpayer's residence will not qualify for like kind exchange nonrecognition of gain. A principal residence is not used in a trade or business or for investment. Therefore, the forms illustrated here do not comply with the like kind exchange requirements. The transactions, however, do resemble exchanges in that the transfers of title occur within the same approximate time period, and in some of the forms the parties acquire and sell each others' residences. Despite the ineligibility of these transactions for like kind exchange treatment, a taxpayer selling a principal residence can exclude from income up to \$250,000 of gain (\$500,000 on a joint return in most situations) realized on the sale or exchange. These tax rules are discussed below. Because the parties are not restricted by the like kind exchange requirements, there can be actual sales and purchases between the parties.

A taxpayer's residence may qualify for like-kind exchange treatment if it is converted to a rental property which meets the definition of an investment property. See TB § 12.21 for a discussion of like-kind exchanges. In the past, the IRS has traditionally treated residential properties which were used partly for rental purposes and partly as a personal residence as not qualifying for a

like-kind exchange. However, under a recent revenue procedure, the IRS has created a safe harbor which, if met, would qualify the residence as an investment property eligible for like-kind exchange treatment. The property being transferred and the property being received must both meet the requirements of the safe harbor.

In order for the properties to qualify as investment properties, the taxpayer must have owned the property being transferred for at least 24 months before the transfer and must own the property received in exchange for no less than 24 months after the transfer. During each of the two 12-month periods constituting those 24-month periods: (i) the taxpayer must rent the dwelling unit at a fair rental price for 14 days or more; and (ii) the period of the taxpayer's personal use of the dwelling unit must not exceed the greater of 14 days or 10% of the number of days during the 12-month period that the dwelling unit is rented at a fair rental. This safe harbor is effective for exchanges occurring after March 10, 2008.

Developer to accept trade-in of purchaser's residence

In the first form in this series, the developer agrees to acquire its customer's old residence as consideration for the customer purchasing one of the developer's homes. This "trade-in" agreement is not effective until the customer notifies the developer of the customer's election to have the developer acquire the old home. This form is, in effect, an option to sell, which allows the customer time to sell the old home at a higher price to a third party. In this first form involving a trade-in, upon the trade-in there is clearly a taxable exchange of one residence for another. The selling price is in effect that value of the new residence received. The amount realized in the selling price less expenses such as commissions and legal fees. The taxable gain is equal to the amount realized less the adjusted basis of the old residence. The adjusted basis refers to the original basis in the old residence, usually cost, plus costs such as capital improvements. Depending on the amount of the gain, all or part of it may be excluded under the tax rules mentioned above and discussed below.

Developer to sell purchaser's residence

The second form in this series is a combination of an option to purchase a new residence from a developer and the grant of a real estate listing to the developer for the old residence. The option to purchase the new residence is contingent upon the sale of the old residence within a specified period of time. If no sale is made during such period, the agreement is cancelled, and the option price, or deposit, is returned. If the old residence is sold, and the option not exercised, the deposit is forfeited as the cost of the option. Gain on the sale of the old residence may be excluded under the tax rules discussed below.

Developer to sell or purchase at guaranteed price

In the third form in this series, the developer has a limited time to sell the old residence for the best price obtainable. If it is not sold within such limited time, the developer agrees to purchase it at the guaranteed price which is, presumably, lower than the price a third party would have paid. Gain on the sale of the old residence may be excluded under the tax rules discussed below.

Exclusion of gain on sale of residence

An individual may exclude from income up to \$250,000 of realized gain (\$500,000 on a joint return in most situations) on the sale or exchange of a principal residence. Certain ownership and

use tests must be met. For a further discussion of these ownership and use tests see **The Tax Background § 21.14[2]**. The exclusion may not be used more frequently than once every two years. The old tax rule allowing for the postponement or roll over of gain on the sale of a principal residence if a new principal residence was bought or built in an amount at least equal to the old residence has been repealed, along with the once in a lifetime exclusion of \$125,000 of gain on the sale of a principal residence by taxpayers at least 55 years old. Both have been replaced by the exclusion of gain provisions discussed above.

Ordinary income treatment for developer

When a developer sells a house purchased under a trade-in, he would have ordinary gain or loss since for him the property is dealer property. For a further discussion of dealer property, see TB § 21.05[7].

FORMS

(1) Developer to accept trade-in of purchaser's residence

Mr. John Larkin _____ May 10, _____ [year]
 15 Spring Lane
 Peoria, Illinois

Dear Mr. Larkin:

In exchange for the premises known as [insert short description of developer's new home] more particularly described in the annexed attachment, Metropolitan Development Corporation agrees to purchase from you the six-room, two-bath residence now owned by you at [insert short description of customer's old home] more particularly described in the annexed schedule, together with all fixtures and articles of personal property attached to or used in connection with the premises, free from all liens and encumbrances except as herein stated, including articles of personal property, plumbing, heating, lighting, and cooking fixtures, air conditioning units, ranges, refrigerators, television aerials, bathroom and kitchen cabinets, mantels, door mirrors, venetian blinds, shades, screens, awnings, storm windows, window boxes, storm doors, mail boxes, weather vanes, flagpoles, pumps, shrubbery, and outdoor statuary for the sum of \$70,000, if you request us to do so before September 10, _____ [year], or before the date you vacate the property, whichever comes first.

The property shall be conveyed by a warranty deed, duly executed and acknowledged by you in a manner proper for recording on the basis of which a title company acceptable to us will, on the closing, insure to us a fee simple title free from all liens and encumbrances except real estate taxes due and payable in the year _____ [year] and a balance of \$24,000 on the first mortgage held by the Federated Savings and Loan Association. We shall assume and agree to pay the balance, which shall be deducted from the purchase price. Customary real estate practices in Peoria County, including apportionments and adjustments, shall apply to the sale. Possession shall be given within 15 days after the closing date.

If you exercise your option to sell your property to Metropolitan Development Corporation, you also agree to enter into a contract of sale with Metropolitan Development Corporation in the form of the attached exhibit.

Please signify your agreement to the above by signing and returning the enclosed copy of this letter.

Metropolitan Development Corporation

by _____

President

Accepted:

John Larkin

(2) Developer to sell purchaser's residence

AGREEMENT entered into May 10, _____ [year], between P.B.M. Corporation, the Developer, and Joseph Maxwell, the Seller, wherein it is mutually agreed as follows:

1. *Construction of new residence.* In order to give the Seller the opportunity to sell his present eight-room, two-bathroom residence located at 500 Circle Drive, Ogden, Utah, with a view toward obtaining sufficient proceeds from such sale to purchase a new residence from the Developer, the Developer shall immediately begin construction of a house in accordance with the plans and specifications accepted by the Seller which are attached to this agreement as Exhibit A. The house is to be erected on Lot No. 14 of the development owned by the Developer known as Saddle Ridge Estates in Ogden, Utah.

2. *Completion and option.* The house shall be completed by December 11, _____ [year], and until that date the Seller shall have the option to purchase the house and lot for \$90,000. If the Seller exercises the option to purchase the Developer's home, the parties agree to sign the contract of sale attached as Exhibit B.

3. *Title and mortgage.* The Developer shall furnish a lot survey and merchantable abstract of title certified to the date of the closing and shall convey title by warranty deed subject to a purchase money mortgage to the Developer in the amount of \$40,000, which the Seller shall execute and assume, such amount to be deducted from the purchase price.

4. *Deposit and listing.* In consideration of the option granted him, the Seller herewith deposits with the Developer \$3,000 as earnest money and grants the Developer a real estate listing for the present residence of the Seller for the sum of \$70,000 subject to a first mortgage to the Utah Savings and Loan Association, which has a present balance of \$20,000. A copy of the listing agreement is attached as Exhibit C.

5. *Failure to sell present residence.* If the Seller's present residence is not sold on or before December 11, _____ [year], this option shall become null and void, the deposit shall be returned to the Seller, and the real estate listing shall be cancelled.

The parties have executed this agreement as of the day and year first above written.

P.B.M. Corporation

by _____

President

John Maxwell

[Acknowledgments]

(3) Developer to sell or purchase at guaranteed price

AGREEMENT made May 10, ____ [year] between the Wyatt Sprague Corporation, the Developer and Mills Clark, the Owner.

Recitals

The Owner has purchased a residence from the Developer located at 215 Fern Lane, Louisville, Kentucky, (the "New House"), under a Contract of Sale executed simultaneously with the execution of this agreement.

The Owner desires to sell his ten-room, three-bathroom home located at 95 Elm Street, Covington, Kentucky, together with all fixtures and articles of personal property attached to or used in connection with the property (the "Old House"), so that he can pay a portion of the purchase price for the New House.

The Developer is willing to guarantee the sale value of the Old House and to apply the equity of the Old House against the purchase price of the New House.

The parties mutually agree as follows:

1. *Guarantee.* The Developer guarantees to the Owner that the Developer will effect a sale of the Old House on or before September 10, ____ [year], for a net sale value of not less than \$70,000 subject to a first mortgage to the Old Kentucky Savings and Loan Association, the present balance of which is \$20,000, leaving an equity of \$50,000.

2. *Credit against purchase price.* The Developer will credit the equity of \$50,000 against the purchase price of the New House.

3. *Sale at higher price.* The parties will use their best efforts to sell the Old House for the highest price and on the best terms obtainable. The Owner agrees to sell the Old House to the purchaser offering the best price and terms, whether the purchaser is obtained by the Developer or the Owner, if the purchase price is not less than \$70,000 and the terms are acceptable to the Owner. The Owner will not unreasonably reject terms of any offer of \$70,000 or more. The Owner is permitted to give a sales listing to a bona fide real estate broker in addition to the listing to the Developer.

4. *Sharing of amount in excess of minimum price.* If a purchaser is obtained for the Old House for a purchase price of more than \$70,000 after the payment of the real estate commissions, 25 percent of the excess price over \$70,000 shall be paid to the Developer as consideration for its guarantee and the balance retained by the Owner.

5. *Failure to obtain purchaser.* If no purchaser is obtained for the Old House on terms acceptable to the Owner and for a purchase price of not less than \$70,000 on or before September 10, ____ [year], the Owner will have the following options: (a) to convey the Old House to the Developer in full payment of the \$50,000 to be credited against the purchase price of the New House, in which case the Developer will assume the mortgage to the Old Kentucky Savings and Loan Association, or (b) to pay the Developer \$50,000 in cash to be credited against the purchase price of the New House and retain full title to the Old House free and clear of any further obligations under this agreement.

6. *Date of conveyance.* If the Owner elects to convey the Old House to the Developer under subparagraph 5(a), the conveyance of title, unless otherwise agreed upon by the parties, will be made not later than 30 days after September 10, _____ [year]. If prior possession of the New House is taken by the Owner, an executed deed for the Old House will be held in escrow by the Developer's attorney, Morris Clay, until the end of such 30-day period and the Owner shall pay all maintenance, fuel, utilities, interest, insurance, and other expenses during such period.

7. *Right of cancellation.* At any time within 30 days from the date hereof, the Owner may give notice cancelling this agreement. In such event, this agreement shall be automatically modified to provide that the \$50,000 to be credited against the purchase price of the New House shall be paid in cash within five days of the notice of cancellation by the Owner to the Developer.

8. *Time of essence.* The parties agree that the time of sale, payment, and cancellation as provided in this agreement shall be of the essence.

9. *Binding effect.* All of the covenants contained in this agreement shall be binding upon and extend to the respective parties, their heirs, executors, administrators, successors, and assigns.

The parties have executed this agreement as of the day and year first above written.

Wyatt Sprague Corporation

by _____

President

Mills Clark

[Acknowledgments]



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Part IV. Forms
E. EXCHANGES

25-21 Current Legal Forms for Real Estate FORM 21.64

FORM 21.64 Exchange agreement--joint venture-partnership interests--investment real property principal assets

COMMENT

This contract illustrates an exchange of interests in joint ventures. The underlying assets in each joint venture is real estate held for investment, i.e., apartment complexes. Many of the clauses found in this exchange agreement resemble those found in a contract for the sale of real estate. The exchanging party is, in substance, acquiring real estate, through the exchange of his joint venture interest. Therefore, special attention is given to the condition of title, status of tenancies, local laws, taxes and other matters. Because the joint ventures are on-going businesses, the contract also contains representations, indemnification clauses and other items similar to those found in the outright purchase of an existing business.

Partnership interest exchange not qualified for nonrecognition

An exchange of interests in a partnership does not qualify for nonrecognition as a like kind exchange. Congress enacted this exception to the like kind exchange rules under the belief that partnership interests typically represent investment interests, similar to those which continue to be excluded from qualification for nonrecognition.

No longer a method of tax shelter bailout

One of the reasons for the specific exclusion of partnership interest exchanges from nonrecognition was their use to facilitate an investor's bail-out of a tax shelter. Previously, partnership interest exchanges were made when the parties had held tax deferring "partnership" interests for a number of years, and were realizing or soon would realize income from the

investment instead of deductible losses. In effect, the tax shelter had reached the "cross-over" point and was "burned out." Since the basis of the taxpayer in the partnership was equal to his cash investment and borrowings, less deductible losses, he risked realization of substantial gain upon the sale of that interest. This realized gain often exceeded the actual cash received in many situations and cash to pay the taxes on the gain might not be available.

In an effort to continue the deferral of tax on gain, some taxpayers and practitioners had used the exchange of partnership interest route. As indicated above, this was a controversial approach, but could result in continued tax deferral.

If the taxpayer was holding interests in a venture which had exhausted its benefits in terms of deductible losses and expenses, his basis in the partnership was low. An election under *IRC Section 754* to adjust the basis in the partnership property upward upon the exchange could be favorable to the taxpayer. By trading into a "younger" venture, "phantom gain" realized on the exchange was not recognized, the taxpayer obtained a new, upwardly adjusted basis, and a more favorable relationship between cash flow and recognized taxable income was created. As stated above, this no longer works because the exchange of partnership interests no longer qualifies as a tax free exchange.

Limited partnership interests exchanges

A limited partnership interest, for tax purposes, is generally treated substantially the same as any other partnership interest. An exchange of limited partnership interests, therefore, is not qualified for nonrecognition.

FORM

AGREEMENT made November 15, ____ [year], at Cleveland, Ohio, between Ohio State Corporation ("Ohio State"), an Ohio corporation, with its principal office located at 65 East Main Street, Toledo, Ohio; Summer Lake Corporation ("Summer Lake"), an Ohio corporation, with its principal office located at 324 Washington Avenue, Akron, Ohio; Lake Erie Homes, Inc., and Lake Erie Development Co., Inc. (respectively "Lake Erie Homes," and "Lake Erie Development"), each a corporation of the State of Ohio, and each with its principal office located at Suite 701, 1414 East Ohio Street, Cleveland, Ohio.

Preamble

1. Ohio Valley Company is a joint venture by and between Ohio State and Lake Erie Homes, pursuant to a certain agreement of the said co-venturers dated January 1, ____ [year]; and
2. Ohio Valley Company owns and operates a certain garden apartment complex, commonly known as "Valley Garden Apartments," located in Fairfield, Baxter County, Ohio; and
3. Great Lake Hills Company is a joint venture by and between Summer Lake and Lake Erie Development, pursuant to a certain agreement of the said co-venturers dated December 31, ____ [year]; and
4. Great Lake Hills Company owns and operates a certain combination shopping center-apartment complex, commonly known as "Great Lake Community" located in Chester, Erie County, Ohio; and

5. Lake Erie Homes and Summer Lake wish to exchange interests; and

6. The value of interest of Lake Erie Homes in the joint venture, Ohio Valley Company, exceeds by \$600,000 the value of Summer Lake in the joint venture, Great Lake Hills Company;

Accordingly, Lake Erie Homes and Summer Lake agree, and Lake Erie Development and Ohio State consent to the following:

Article I Exchange

1.1. Lake Erie Homes agrees to assign all its right, title, and interest in Ohio Valley Company, a joint venture, to Summer Lake in exchange for the payment of \$600,000, the assignment of interests in Great Lake Hills Company, a joint venture.

1.2. Summer Lake agrees to assign all its right, title, and interest in Great Lake Hills Company, a joint venture, to Lake Erie Homes and to pay Lake Erie Homes \$600,000, in exchange for the assignment of interests in Ohio Valley Company, a joint venture.

Article II Conditions

2.1. *Mortgagee consent.* The performance of this agreement by either Lake Erie Homes or Summer Lake is conditioned upon the written consent to this exchange by Main Life Insurance Company, the holder of the first mortgage on the Valley Garden Apartments, and Toledo Realty Investment Trust, the holder of the first mortgage on Great Lake Community.

2.2. *Mortgagee conditions.* If either mortgagee, Main Life Insurance Company or Toledo Realty Investment Trust, conditions its consent upon any adjustment of the terms or conditions of their respective first mortgages, including any proposed change in interest rate, the parties shall have the right to terminate this agreement, without liability to any other party hereto, within ten business days of receipt of a true copy of such consent. If the termination is not so elected within the ten-day period the parties shall be deemed to have consented to the preconditions set by the respective mortgagee, as between the parties, and shall be precluded from using such preconditions as grounds for termination of this agreement.

2.3. *Financing.* This agreement is contingent upon Summer Lake, for itself or by joining with Ohio Valley Company, a joint venture, obtaining a written commitment for financing, from Main Life Insurance Company, or any other financial institution authorized to do business in the State of Ohio, in the amount of \$500,000, repayable over a term of 25 years, or more, with interest at the then prevailing rate. If Summer Lake does not receive such written financing commitment within 60 days of the date of this agreement, it may cancel this agreement without further liability, and all obligations hereunder shall cease. If Notice of Cancellation by Summer Lake is not received by the other parties within three business days after the 60-day period expires, this contingency shall be deemed waived by Summer Lake.

Article III Representations

Lake Erie Homes and Summer Lake warrant and represent to each other as follows:

3.1. *Organization and authority.* Each is a corporation, duly organized and in good standing under the laws of the State of Ohio; has the power to own its property and conduct its business in the State of Ohio; the joint venture, of which each is respectively a member, is duly organized and existing under the laws of the State of Ohio, and possesses the power and authority to own its property and conduct its business in the State of Ohio.

3.2. *Co-venturers.* The only persons or corporations holding any equity interest in the respective joint ventures are those set forth in the preamble of this agreement.

3.3. *Financial statements.* The financial statements of Lake Erie Homes and Ohio Valley Company as examined and initialed by representatives of Summer Lake, and the financial statements of Summer Lake and Great Lake Hills Company as examined and initialed by representatives of Lake Erie Homes, are true, complete, and correct statements of the financial status of the respective entity, and are each prepared in accordance with generally accepted accounting principles, uniformly applied.

3.4. *Taxes.* Each corporation and joint venture party to or subject of this agreement has filed all required federal, state, county, and local tax returns and reports, including those with respect to income, withholding, social security, unemployment, franchise, excise and sales taxes, no taxes, interest, or penalties shown on such returns or assessments are delinquent or unpaid, and copies of such returns and reports exhibited to and initialed by representatives of the respective parties are complete and correct.

3.5. *Title to property.* Each has good and unencumbered title to its interest in the aforesaid joint venture, and each has fee title to the real property specified in the preamble hereof, subject only to exceptions specified in Schedule B to the respective title policies exhibited to and initialed by the parties' representatives, as well as good and valid title to all other personal intangible property used by the joint venture in the operation of its business.

3.6. *Leases.* All leases pursuant to which the respective joint ventures lease apartment units and commercial space to tenants therein are in good standing and are valid and effective in accordance with their terms, and the respective landlords are not in violation or breach of any of their duties under said leases. Copies of said leases exhibited to and initialed by the parties' representatives are true and complete, and the rent rolls as exhibited to and initialed by the respective parties are true, accurate, and complete.

3.7. *Litigation.* No litigation, arbitration, government investigation, or any other proceeding, claim, or controversy is pending or threatened against or relating to any of the parties, the consenting parties or the above-mentioned joint ventures, or against their respective businesses, properties, or other assets.

3.8. *No brokers.* All negotiations relative to this agreement and transaction have been initialed and carried on by and between the parties directly and without the intervention or assistance of any third party broker, finder, commission agent, or attorney. There is no basis for a valid claim for a brokerage commission, finder's fee, or other like payment by any third party either presently existing or to become due upon closing of this transaction.

3.9. *Securities registration.* The entering into and completion of this contract does not bring the respective entities mentioned within this agreement under the filing requirements of the federal securities law, and such entities, prior to entering this agreement, were not required to make any filings with the Securities and Exchange Commission.

3.10. *Conduct of business.* Prior to and pending closing of this transaction, each party shall conduct its business in the ordinary course consistent with past practices.

Article IV Closing

4.1. *Assignments.* Lake Erie Homes shall assign its interests in Ohio Valley Homes, a joint venture, by a written assignment in a form satisfactory to Summer Lake's attorneys. Summer Lake shall assign its interest in Great Lake Hills Company, a joint venture, by a written assignment satisfactory to Lake Erie Homes' attorneys.

4.2. *Payment.* Payment of \$600,000 by Summer Lake to Lake Erie Homes shall be made at closing by cash, certified

check or bank check, or any combination thereof.

4.3. *Title.* At time of closing title to the real property held by the respective joint ventures shall be insurable by a reputable title insurance company authorized to do business in the State of Ohio; subject only to the covenants, easements, restrictions, and mortgages specified in the existing Schedule B to the title insurance policies now outstanding and exhibited to and initialed by the parties' representatives.

4.4. *Adjustments.* The parties, at closing, shall make adjustment (to the extent of their proportionate one-half interest) for items customarily adjusted at real estate title closings, including, taxes, mortgage interest, rent, insurance premiums, any interest which the respective parties may have in security deposit accounts, operating bank or checking accounts, and any other such similar items.

4.5. *Date.* All warranties and representations made herein by the respective parties shall survive the closing. Closing of title shall take place between the hours of 10 a.m. and 1 p.m. at the offices of Lamb, Smith, and Albert, Suite 701, 1414 East Ohio Street, Cleveland, Ohio, attorneys for Lake Erie Homes on January 2, ____ [year]. If the consent of either or both mortgagees, or the commitment of the financial institution committed to extend funds to Summer Lake, expires before the specified closing date, closing shall occur on a mutually agreeable date before such expiration, but in no event before December 21, ____ [year].

Article V Termination

Either party may terminate this agreement at any time before the closing, by written notice, upon the occurrence of any of the following events:

5.1. *Closing date.* Closing is not completed by February 1, ____ [year].

5.2. *Misrepresentation.* The other party has made a material misrepresentation of the representations set forth herein.

5.3. *Contingencies.* The above specified contingencies fail to occur.

5.4. *Litigation.* Any legal action or proceeding is instituted against any corporation or joint venture named herein, or any in rem action is brought against the real property of either joint venture, unless either the affected party waives its termination right or the disputed matter is insubstantial.

Article VI Miscellaneous

6.1. *Indemnification.* Effective subsequent to, and surviving closing, Lake Erie Homes and Summer Lake respectively agree to indemnify and hold harmless the other with respect to all liabilities, contingent or otherwise, incurred by reason of their being a former holder of a joint venture interest in the respective joint venture, so that Lake Erie Homes shall be indemnified and held harmless against the debts of Ohio Valley Company, and Summer Homes shall be indemnified and held harmless against the debts of Great Lake Hills Company.

6.2. *Notice.* Notice by either party to the other shall be by certified mail, return receipt requested, directed to the president of the respective corporation at the address specified above, and in addition, any notice to Lake Erie Homes or to Lake Erie Development shall also be noticed to their attorneys, Lamb, Smith and Albert, Suite 701, 1414 East Ohio Street, Cleveland, Ohio.

6.3. *Binding effect.* This agreement shall be binding upon and inure to the benefit of Lake Erie Homes and Summer Lake only (and consenting parties shall not be deemed third-party beneficiaries hereof), and their successors and assigns.

6.4. *No assignment.* This agreement shall not be assigned by any party, the exchange of joint venture interests held by the respective parties being of the essence of this agreement.

6.5. *Amendments.* This agreement may be amended only by a writing subscribed to by authorized representatives of Lake Erie Homes and Summer Lake, with the written consent to such amendment endorsed thereon by authorized representatives of the consenting parties and the first mortgages.

6.6. *Entire agreement; modification.* This agreement constitutes the entire agreement between the parties and may not be changed or terminated except by an agreement duly executed by both parties.

6.7. *Non-waiver.* No delay or failure by either party to exercise any right hereunder, and no partial or single exercise of such right, shall constitute a waiver of that or any other right, unless otherwise expressly provided herein.

6.8. *Headings.* Headings in this agreement are for convenience and reference only and shall not be used to interpret or construe its provisions.

6.9. *Governing law.* This agreement shall be construed in accordance with and governed by the laws of the State of Ohio.

6.10. *Time of essence.* Time is of the essence of this agreement.

6.11. *Counterparts.* This agreement, and any amendment hereof, may be executed in one or more counterparts, all of which shall be considered one and the same, and shall become effective when one or more counterparts have been signed and consented to by each of the parties and delivered to the other party, even though both parties do not sign the same counterpart.

In witness whereof this agreement has been signed by the duly authorized officers and attested to by the respective secretaries of the respective parties, as of the date and year first above written.

Attest:

Secretary

Secretary

Lake Erie Homes, Inc.

by _____

President

Summer Lake Corporation

by _____

President

Consent. The undersigned consents to the above contract and to the above contract and the underlying transaction contemplated therein.

Lake Erie Development Company for itself and as coventurer of Great Lakes Hills Company, a joint venture:

by _____

Attest:

Secretary

Secretary

Ohio State Corporation for itself and as co-
venturer of Ohio Valley Company, a joint venture

by _____



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F. BROKERAGE AGREEMENTS

25-21 Current Legal Forms for Real Estate FORM 21.65

FORM 21.65 Broker's agreement granting open listing for sale of real property

COMMENT

A real estate broker may be required to be licensed by an appropriate administrative agency to act as a broker and collect a commission. As a general rule, a real estate broker has earned a commission when he finds a ready, willing, and able buyer, regardless of whether the property is actually transferred. This rule may be modified by contract, and in some jurisdictions it has been modified by statutes adding conditions such as an actual transfer of title.

Real estate listing agreement

Although many jurisdictions require a written agreement before a real estate broker is entitled to collect a commission on a sale, it is advisable to have a written agreement in jurisdictions which do not impose this obligation. The amount of the broker's commission is usually expressed as a percentage of the sale price. The commission customarily includes any expenses or disbursements of the broker, such as advertising and mileage, incurred in locating a purchaser. It is in the seller's interest to specify a term for the listing agreement either by stating the period of its duration, such as six months or one year, or an expiration date. It is in the broker's interest to provide that if a person to whom he showed the property purchases it after the expiration of the listing, the commission is earned. Before such a commission is payable upon expiration of the listing, however, the seller should require that the broker submit in writing upon the expiration of the listing, the names of all parties who were shown the property. In addition, the seller should place some time limit after the expiration of the listing within which the sale must occur. The seller should specify the price sought for the property so that no obligation to pay a commission will arise if he turns down an offer at a lower price.

Open listing, exclusive agency, and exclusive right to sell

Brokers may be given open listings, exclusive agencies, or exclusive rights to sell. An open listing is one in which the owner reserves the right to list the property with other brokers or sell the property himself. If no agreement to the contrary is made, the broker's listing is most likely an open listing. An exclusive agency is an arrangement under which the broker is the sole and exclusive agent of the owner to sell the property. If the owner sells the property through another broker during the term of the exclusive agency, other than one who is cooperating with the exclusive agency broker, the owner will be liable to pay a commission to the exclusive agent as well as the other broker in most cases. An exclusive agency does not prevent the owner from making the sale himself. If he does, the exclusive agency is terminated and the owner is not liable for the broker's commission. Under an exclusive right to sell, on the other hand, the broker is entitled to a commission no matter who sells the property--another broker, the owner, or anyone else. In an exclusive right situation, the contract should specifically spell out the exclusive right to sell. And in this situation, the agreement should provide that if the property is sold to a party to whom the broker showed it during a specific time, the broker will be entitled to the commission.

Conditions to commission payment

Under a conditional contract, the owner protects himself by providing that certain conditions must occur before payment of the commission to the broker will be due, such as (a) the contract of sale being valid and enforceable, (b) the specific purchase price and terms being met, (c) the transaction being finally completed by a transfer of title or possession, or (d) in the case of the sale of a cooperative apartment or condominium unit, the approval of the sale by the appropriate board of directors or trustees. If specific conditions are included in the listing agreement, the broker is not entitled to a commission after he only finds a buyer ready, willing, and able to purchase the property. Payment will depend upon the specific conditions being met. The conditions should be clearly drafted to preclude any right to a commission until the conditions are met. If the listing contracts provide, for example, that the commission is to be paid when title is transferred, it may be implied that the commission is earned upon the broker's producing a ready, willing, and able buyer, but payment is delayed until closing. The owner, in this case, should provide that the commission is not earned, due or payable until title is transferred.

"Net" listing

Under a "net" listing, the owner sets a minimum price which he is to receive for the property. The broker agrees to a fee equal to, or a substantial percentage of, the selling price over the minimum price plus, in some cases, the owner's selling expenses. In some jurisdictions brokers are prohibited from taking a net listing. These prohibitions are generally based on a policy to protect unsophisticated owners from agreeing to a below market minimum price for the property.

Tax aspects of commission payment

The commission received by the broker is taxable in the same manner as any other compensation. If a broker's commission is paid by the purchaser, the amount will be an addition to his cost basis, not a current deduction. Commissions paid by the seller are offset against the selling price and not separately deducted. Commissions, however, are not deducted or taken into account in determining the "initial payment" or "selling price" to qualify a transaction as an installment sale.

FORM

AGREEMENT made June 20, _____ [year], between James Nielson of 120 Wellington Street, Knoxville, Tennessee, the Owner, and Thomas Hadfield of 600 Park Avenue, Knoxville, Tennessee, the Broker.

1. *Employment.* The Owner hereby grants to the Broker a nonexclusive agency to sell the real property owned by the Owner situated at 900 Gilbert Drive, Knoxville, Tennessee, for a period of 90 days from the date of this agreement.

2. *Terms of sale.* The purchase price for the property shall be not less than \$80,000, payable by the purchaser as follows: \$10,000 in cash upon the execution of the sales contract; \$20,000 in cash upon the closing of title; \$30,000 by the purchaser taking the property subject to a first mortgage in that amount now a lien on the property; and \$20,000 by the purchaser executing and delivering to the Owner a purchase-money second mortgage in that amount payable in 15 years with interest of 8 percent per annum payable quarter-annually.

3. *Commission.* The Broker shall be entitled to a commission of 6.5 percent of the purchase price if he procures a purchaser for such property upon the terms above set forth. The commission shall be earned and payable out of the purchase price, when, as, and if title actually closes.

4. *Representations.* The Owner represents that he is now the owner in fee simple of the property referred to above and agrees to convey it by warranty deed if it is sold by the Broker for the price and on the terms and conditions hereinabove set forth.

The parties have subscribed this agreement the day and year first above written.

James Nielson

Thomas Hadfield



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25-21 Current Legal Forms for Real Estate FORM 21.66

FORM 21.66 Broker's agreement granting exclusive agency to sell real property for fixed time period--terms of sale include existing and purchase money mortgages

COMMENT

In the following form, an owner of real property grants a broker an exclusive agency to negotiate a sale of the property. This agreement does not preclude the owner from selling the property without the broker. Unless the owner is a dealer in real estate, selling commissions are an offset against selling price and are not separately deductible.

FORM

AGREEMENT made September 21, ____ [year], between Max Ross, 4 Larch Avenue, Scarsdale, New York, the Owner, and Michael Blum, 912 Third Avenue, New York, New York, the Broker.

1. *Exclusive agency.* The Owner grants to the Broker the exclusive agency to sell the real property hereinafter described for a period of six months from the above date.

2. *Description of property.* The property covered by this agency is the parcel of land, with the buildings and improvements thereon in the County of Westchester, State of New York, generally known as 4 Larch Avenue, Scarsdale, New York, and more particularly described in the annexed Exhibit A subject to the encumbrances listed in Exhibit A and to any other encumbrances and to any zoning regulations, ordinances, encroachments, covenants, restrictions of record, and any other defects which a title search may reveal and to any state of facts an accurate survey may show.

3. *Terms of sale.* The purchase price for the property shall be not less than \$200,000, to be paid by the purchaser as follows: \$10,000 in cash on the signing of the contract; \$50,000 in cash or certified check upon the closing of title; \$60,000 by the purchaser taking the premises subject to a mortgage for that amount now a lien on the premises; and \$80,000 by the purchaser executing and delivering to the Owner a purchase-money mortgage for \$80,000 payable in 15 years with interest of 8 percent per annum payable semiannually.

4. *Commission.* The Broker shall be entitled to a commission of 7 percent, payable out of such purchase price when, as, and if title actually closes.

5. *Commission at higher sales price.* If the Broker sells the real property for more than the amount set forth in paragraph 3, and on the same terms and conditions, except that the balance of such purchase price over the mortgages referred to in paragraph 3 is payable in cash, the excess amount over \$200,000 shall be divided as follows: 75 percent to the Owner and 25 percent to the Broker.

6. *Authority of broker.* The Broker is authorized to place a "For Sale" sign on the premises and to take all necessary steps to bring about a sale.

7. *Duties of broker.* The Broker shall make diligent efforts to effect a sale of the property, and shall list and advertise it in such manner as he deems most likely to bring about a sale.

8. *Representations.* The Owner represents that he is now the owner in fee simple of the property, and shall convey it by a bargain and sale deed with full covenants if it is sold by the Broker for the price and on the terms and conditions above set forth.

The parties have executed this agreement the date above written.

Max Ross

Michael Blum



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F. BROKERAGE AGREEMENTS

25-21 Current Legal Forms for Real Estate FORM 21.67

FORM 21.67 Broker's agreement granting exclusive agency to sell real property--owner may terminate at automatic renewal dates

COMMENT

In this form, the property owner grants the broker an exclusive agency to sell real property. This agreement does not preclude the owner from selling the property without the broker. Unless the owner is a dealer in real estate, selling commissions are an offset against selling price and are not separately deductible.

FORM

AGREEMENT made _____ [date], between _____, of _____ Street, City of _____, State of _____, hereafter designated as the Owner, and _____, of _____ Street, City of _____, State of _____, hereafter designated as the Agent.

The Owner hereby grants to the Agent the exclusive agency to sell the property (*insert description*) for a period of _____ days from the above date, to be renewed automatically for like _____-day periods, unless before the expiration of any _____-day period the Owner terminates such agency by written notice.

The property shall be sold for a total purchase price of not less than \$_____, such price to be made up by the assumption by the purchaser of a mortgage for not more than \$_____, at _____ percent to be due in _____ years and payable \$_____ annually. The balance of the purchase price is to be paid in cash, certified check or bank check, at the time the owner conveys the property.

The Agent shall be entitled to a commission of _____ percent of the purchase price of \$_____, payable out of the purchase money when, as, and if title actually closes. In the event that the Agent succeeds in selling the property at a price greater than \$_____ and on the same terms and conditions as above, the surplus over \$_____ shall be divided equally between the Owner and Agent.

The Agent is authorized to place a "for sale" sign on the property and to take the usual necessary steps to place the property on the market.

The Agent agrees to make diligent efforts to sell the property and to list and advertise it immediately.

The Owner represents that Owner is now the owner in fee simple of the property and agrees to convey it by _____ deed if it is sold by the Agent on the terms set forth above.

Owner

Agent

[Acknowledgments]



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F. BROKERAGE AGREEMENTS

25-21 Current Legal Forms for Real Estate FORM 21.68

FORM 21.68 Broker's agreement granting exclusive agency to sell residential real property--short form with plain language explanations

COMMENT

In this form, the property owner grants the broker an exclusive agency to sell real property. This agreement does not preclude the owner from selling the property without the broker. Unless the owner is a dealer in real estate, selling commissions are an offset against selling price and are not separately deductible.

FORM

In consideration of One (\$1.00) Dollar and other good and valuable services, the receipt of which is hereby acknowledged, the undersigned hereby grants _____ Real Estate, Inc. the Exclusive Agency for the sale of _____ Street, City of _____, State of _____, for the price of \$_____, and terms to which the undersigned may consent. This agreement shall be in effect _____ days.

It is further understood and agreed that the undersigned will pay _____ Real Estate, Inc. commissions due at a rate of _____ percent of the selling price.

AGREED AND ACCEPTED:

_____ Real Estate, Inc.

By: _____

Date: _____

Date: _____

Owner/Owners Representative

NOTE:

EXPLANATION: An "Exclusive Right to Sell" listing means that if you, the owner of the property find a buyer for your house, or if another broker finds a buyer, you must pay the agreed commission to the listing broker.

EXPLANATION: An "Exclusive Agency" listing means that if you, the owner of the property, find a buyer, you will not have to pay a commission to the broker. However, if another broker who did not have a separate agreement with _____ Real Estate, Inc. finds a buyer, you will owe a commission to both the selling broker and your present listing broker. If a separate agreement was entered into between listing and selling brokers, the commission divided between them shall not exceed _____ percent.

I have read the above and understand
the distinction.

Owner/Owner's Legal Representative

ACCEPTED:

For _____ Real Estate, Inc.



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25-21 Current Legal Forms for Real Estate FORM 21.69

FORM 21.69 Broker's agreement granting exclusive agency to sell proprietary lease for and shares allocated to cooperative apartment

COMMENT

In this form, the property owner grants the broker an exclusive agency to sell the proprietary lease for, and the shares allocated to, a cooperative apartment. This agreement does not preclude the owner from selling the apartment without the broker. Unless the owner is a dealer in real estate, selling commissions are an offset against selling price and are not separately deductible.

FORM

Re: Apt. # _____
_____ Street
City of _____, State of _____

EXCLUSIVE AGENCY AGREEMENT

Dear _____,

This will confirm your appointment of _____ of _____ Real Estate, Inc. as your exclusive agent for the sale of the above captioned property.

The asking price is to be \$_____ for the property and is subject to change at any time by notice from the seller.

This agreement shall be in effect for _____ days from the date hereof.

It is agreed that the undersigned will pay _____ Real Estate, Inc. commissions at the rate of _____ percent of the aggregate sales price.

It is further understood and agreed that the undersigned will pay _____ Real Estate, Inc. commissions when due at the rate of _____ percent of the selling price when, as, and if the sale actually closes except in the event of willful default of the seller, where the commission will be due and payable.

It is understood that you will refer all inquiries from other brokers to us as exclusive agents. In the event a customer has been introduced to the property by us during the term of the agreement for the sale of the property and has informed us in writing of the name of such person within ten (10) days of the expiration or early cancellation of this agreement, and such purchaser buys the property after the expiration or early cancellation of the agreement, the undersigned will pay _____ Real Estate, Inc. commissions at the above rates.

The seller warrants that there are no existing conditions to prevent the "stock and lease" from being transferred.

This agreement shall be binding on all parties hereto, their heirs, executors, and assigns.

Kindly execute the two copies of this agreement and return a copy to us for our records.

_____ Real Estate, Inc.

By: _____

Agreed:

By: _____

Date: _____



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25-21 Current Legal Forms for Real Estate FORM 21.70

FORM 21.70 Broker's agreement granting exclusive right to sell or exchange real property

COMMENT

This is an illustration of an agreement granting a broker an exclusive right to sell or exchange real property. This exclusive rights agreement is for a stipulated term but will continue thereafter unless either party elects to terminate by written notice. The broker is entitled to a commission no matter who sells the property during the effective period of the agreement. However, if the property is sold or exchanged with to the persons or entities listed on Exhibit B, there is no commission payable to the broker. This exclusion allows the owner to exclude relatives or other close acquaintances, or anyone with whom the owner may have previously negotiated before this listing went into effect. The broker has the right to act on his own behalf as purchaser or principal and may represent both parties to an exchange and receive a commission from both owners. Except for the failure of the broker to use commercially reasonable efforts to sell the property, the broker is entitled to his commission if the owner withdraws the property from the market during the effective period of the agreement or otherwise prevents the broker from performing. The agreement provides for an arbitration clause so that any dispute can be settled expeditiously.

FORM

AGREEMENT entered into on June 12, _____ [year], between Daniel Colombi, of 1025 Hyland Boulevard, Staten Island, New York (the "Owner"), and Associated Realtors, of 600 St. George Avenue, Staten Island, New York (the "Broker").

1. *Exclusive right to sell or exchange.* In consideration of the promise of the Broker to list and its efforts to sell or

exchange the Owner's real property and improvements, located in Staten Island, Borough of Richmond, City and State of New York, known as 1025 Hyland Boulevard, the Owner grants the Broker the sole and exclusive right to offer for sale or exchange and to sell or exchange such property through its efforts for a purchase price of not less than \$400,000.

2. Duration of agreement

(a) This agreement shall remain in force for a period of six months from the date specified above, and shall continue thereafter until either party terminates it by written notice to the other party not less than 15 days before the intended termination date.

(b) During the six-month period specified above, this agreement shall be irrevocable, unless terminated by the Owner because of the failure of the broker to use commercially reasonable efforts to sell the property.

(c) If the Owner withdraws the property from sale or exchange during the period of this agreement or otherwise prevents the Broker from selling or exchanging such property, the Broker will be entitled to its full commission, unless terminated by the Owner because of the failure of the broker to use commercially reasonable efforts to sell the property.

3. Authority of broker. During the term of this agreement, the Broker is granted the sole authority to advertise the property for sale or exchange, to place a "For Sale or Exchange" sign on the property, and to take all necessary steps to bring about a sale or exchange. The Owner shall refer all inquiries or offers to the Broker.

4. Representations

(a) The Owner represents that he is the Owner in fee simple of the property and that there are no encumbrances thereon except as identified on Exhibit A attached hereto.

(b) The Broker makes no representations or guarantee of a sale or exchange but agrees at all times during the term to use commercially reasonable efforts to sell the property.

5. Right of broker to act on own behalf. The Broker may purchase the property or participate as a principal in an exchange. In such case, title to the property shall be conveyed to the Broker or its designee.

6. Commission. The Broker will be entitled to a commission of 6 percent if any of the following events occur: the property is sold or exchanged through the Broker's efforts; the Broker locates a prospect ready, willing, and able to purchase or exchange for the property; or the property is sold or exchanged, by the Owner or anyone else, while this agreement is in force. Notwithstanding the above, if the purchase or exchange is to those persons or entities listed on Exhibit B, there shall be no commission payable to the Broker.

7. Right of broker to represent both parties to exchange. If there is an exchange of properties, the Broker may represent and receive commissions from both parties and cooperate with other brokers or divide with them the commissions earned.

8. Sale or exchange after termination of agreement. If a sale or exchange is consummated after the termination of this agreement, to or on behalf of a party to whom the property was submitted by the Broker and written notice thereof was given to Owner within ten (10) days of the termination of this Agreement, the Broker will be entitled to its full commission.

9. Arbitration. Any claim or controversy under this agreement shall be submitted to arbitration under the rules and regulations of the Arbitration Committee of the Real Estate Board of the City of New York.

The parties have executed this agreement on the date first above written.

Daniel Colombi

Associated Realtors

By: _____

President



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25-21 Current Legal Forms for Real Estate FORM 21.71

FORM 21.71 Broker's agreement granting exclusive right to sell residential real property--short form with plain language explanations

COMMENT

In this form, the property owner grants the broker an exclusive right to sell real property. The broker is entitled to a commission no matter who sells the property during the effective period of the agreement. Unless the owner is a dealer in real estate, selling commissions are an offset against selling price and are not separately deductible.

FORM

In consideration of One Dollar (\$1.00) and other good and valuable services, the receipt of which is hereby acknowledged, the undersigned hereby grants _____ Real Estate, Inc. the Exclusive Right to negotiate for the sale of _____ Street, City of _____, State of _____, for the price of \$_____, and terms to which the undersigned may consent. This agreement shall be in effect _____ days.

It is further understood and agreed that the undersigned will pay _____ Real Estate, Inc. commissions due at a rate of _____ percent of the selling price.

AGREED AND ACCEPTED:

_____ Real Estate, Inc.

By: _____

Date: _____

Owner/Owner's Representative

Date: _____

NOTE:

EXPLANATION: An "Exclusive Right to Sell" listing means that if you, the owner of the property find a buyer for your house, or another broker finds a buyer, you must pay the agreed commission to the listing broker.

EXPLANATION: An "Exclusive Agency" listing means that if you, the owner of the property, finds a buyer, you will not have to pay a commission to the broker. However, if another broker who did not have a separate agreement with _____ Real Estate, Inc. finds a buyer, you will owe a commission to both the selling broker and your present listing broker. If a separate agreement was entered into between listing and selling brokers, the commission divided between them shall not exceed _____ percent.

I have read the above and understand the
distinction

Owner/Owner's Legal Representative

ACCEPTED:

For _____ Real Estate, Inc.



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25-21 Current Legal Forms for Real Estate FORM 21.72

FORM 21.72 Broker's agreement granting exclusive right to sell real property--broker authorized to enter and show property any time

COMMENT

In this form, the property owner grants the broker an exclusive right to sell real property. The broker is entitled to a commission if the property is sold during the listing period regardless of whether the broker is responsible for the sale. Generally, a broker may not negotiate directly with an owner if the broker knows that the owner is a party to an exclusive listing contract with another broker.

FORM

City of _____, State of _____
[date]

_____, Real Estate Brokers
City of _____, State of _____

Dear _____:

In consideration of your listing and undertaking the sale of the property which is described on the reverse side hereof (or insert description), I give to you for a period of _____ months from this date the exclusive right and agency to sell the property for the price of \$_____ to be paid (set forth financial terms).

If you procure a purchaser for the property at the above price and upon the above terms, and in any event in the case of the sale of such property during the term of this contract, whether such sale is negotiated by you or by any broker, or directly by me, I shall pay you on the sale price commissions as follows: (*set forth rate of commission*)

I have good and saleable title to the property and will execute and deliver to the purchaser a warranty deed to the same in which my wife (*or husband, or other parties, as necessary*) will join, to give good title.

I authorize you to accept a deposit to be applied on the purchase price set forth above.

You are authorized to place a "For Sale" sign on the property, with your name as broker and your address and telephone number, and you are authorized to enter upon and show the premises at any and all times to prospective purchasers. I will cooperate in every way to consummate the sale. You will notify me in writing of all persons who are shown the property.

During the period of this agreement, I will refer to you all inquiries concerning the property and names of all prospective purchasers coming to my notice.

It is understood and agreed that your advertisement and showing the property shall be without expense to me, or us, except for the commissions agreed to be paid above.

Owner

Agreed to and accepted this ____ day of ____ [*date*].

_____, Real Estate Brokers

By: _____

Agent



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25-21 Current Legal Forms for Real Estate FORM 21.73

FORM 21.73 Brokerage agreement for sale of cooperative apartment--conditional upon completion of sale to specified purchaser

COMMENT

This form illustrates a conditional brokerage contract for the sale of a cooperative apartment for which the broker has a purchaser. The broker's right to compensation is conditioned upon the actual completion of the proposed transaction; otherwise there can be no claim for payment.

FORM

Mr. Samuel Levy _____
470 West End Avenue
New York, New York 10024

June 11, _____ [year]

Re: 470 West End Avenue

Apartment 5B

Dear Mr. Levy:

To induce you to proceed with negotiations for the sale of the captioned apartment to Mr. Arthur Reynolds, the undersigned, duly licensed real estate brokers and broker-dealers in the State of New York, confirm that our

understanding regarding the compensation to be paid to us in connection with any such sale is as follows:

1. *Written agreement.* No compensation shall be earned by us for any past or future services connected with the sale of the captioned apartment to Mr. Reynolds unless a written contract, satisfactory to you and your attorneys, is entered into between you and Mr. Reynolds, the closing of the sale of the captioned apartment is consummated, and the agreed upon purchase price is paid in full in the manner required by the terms of such contract.

2. *Compensation.* Our right to receive compensation is conditioned upon the actual completion of the proposed transaction. We shall have no claim for any payment for our services in the event of noncompletion because of your inability to agree upon contract terms, the failure or refusal of Mr. Reynolds to accept title as required by any duly executed contract, the failure of the cooperative corporation to unconditionally consent to the sale in the manner provided by your lease, or because of any other reason.

3. *Rate of commission.* Our compensation for the sale of the apartment to Mr. Reynolds shall be 6.5 percent of the purchase price. If we are paid for our services, we shall indemnify you against commission claims made by any other broker in connection with the sale. In such case, however, our liability will be limited to the amount of the payment made to us.

Please signify your assent to the above by signing and returning the enclosed copy of this letter.

Very truly yours,

Accepted:

Samuel Levy

Century Realty Associates

By: _____
Partner



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25-21 Current Legal Forms for Real Estate FORM 21.74

FORM 21.74 Brokerage agreement for sale of residential property--conditional upon completion of sale to specified purchaser

COMMENT

This is a form for an agreement between a broker and an owner for the sale of residential real property for which the broker has a purchaser. The broker's right to compensation is conditioned upon the completion of the proposed sale to the specified purchaser.

FORM

BROKER'S AGREEMENT

Dated: _____ [date]

City of _____, State of _____

Re: Sale of Premises known as _____ Street, City of _____, State of _____

Dear _____:

As an inducement to you to enter into and/or continue negotiations with _____ and _____ ("Purchaser") for the sale by you to the Purchaser of the above-captioned property ("Premises") for a purchase price of \$ _____ ("Transaction"), the undersigned warrants to you that: (a) the undersigned is a real estate broker licensed as such in the State of _____; (b) the undersigned is the sole broker in any way instrumental in interesting the Purchaser in acquiring the Premises, and that the undersigned knows of no other broker who has dealt with the Purchaser in connection with the purchase of the Premises; (c) the undersigned is the sole procuring cause of any contract of sale for the Premises that may result from such negotiations; and (d) the undersigned's services in this Transaction are for the account of the undersigned and that the undersigned has not and will not act in this Transaction for or with any other broker or for or with any other firm or corporation either as employee, agent or in any other capacity.

As a further inducement to you to enter into or continue such negotiations, the undersigned agrees that the sole compensation for commissions and otherwise for services or reimbursement of expenses to be paid to the undersigned in connection with this Transaction will be \$ _____, but that such commission shall not be deemed to be due, earned or payable unless and until all the following conditions are met: (a) you and the Purchaser shall have agreed upon all of the terms and conditions of the sale; (b) a contract of sale ("Contract of Sale") for the Premises between you and the Purchaser satisfactory in all respects to you, as to which matter the undersigned agrees you shall be the sole judge, shall be executed and delivered by and between you, as seller, and the Purchaser, as purchaser; (c) the Contract of Sale shall close in accordance with all of its terms and conditions; and (d) the Purchaser shall pay the full purchase price specified in and take title to the Premises pursuant to the Contract of Sale.

The above commission shall be the sole compensation payable to a broker and the undersigned agrees to accept \$ _____ as and for the undersigned's sole commission, fees and compensation in this Transaction. In the event that the purchase price for the Premises shall be other than as set forth above, then the commission due hereunder shall be modified so that the total amount of commission shall be _____ percent of such revised purchase price.

It is further agreed that (a) if, for any reason, a Contract of Sale is not entered into between you and Purchaser, or (b) such Contract of Sale is entered into, but is not consummated for any reason, it being expressly understood that the closing of this Transaction is an absolute condition to any liability for any brokerage commission, then, and in any such event, the brokerage commission shall not be due, earned or payable to the undersigned and the undersigned hereby releases you from any and all claims, commission or other compensation in connection with this Transaction.

The undersigned acknowledges that (a) no understanding has yet been reached between you and the Purchaser, (b) any compensation to any other broker or real estate salesperson shall be the undersigned's sole responsibility, (c) no representation, promise or inducement of any kind has been made to the undersigned by you or anyone else to induce the signing of this broker's agreement, (d) if more than one person is executing this broker's agreement on behalf of the undersigned, our liability hereunder shall be joint and several, primary and direct, and that any payment made by you to any one signer shall be deemed to constitute payment to all, and (e) the undersigned has no claim and will assert no claim in the future with respect to any other transaction that you may make with the Purchaser unless a separate written brokerage agreement shall be executed by you with respect to such other transaction.

The undersigned further agrees that the undersigned will indemnify and hold you harmless from and against any damage, cost or expense (including, without limitation, reasonable attorneys' fees) sustained or incurred by you by reason of any claims of any nature that may arise from any person, corporation, or other entity in connection with any brokerage fee, commission, or other compensation in connection with this Transaction in the event that any of the undersigned's warranties or representations set forth herein are incorrect.

This broker's agreement supersedes and replaces any prior written or oral agreement which may have been entered into between you and the undersigned.

If the foregoing meets with your understanding and approval, please sign and return to the undersigned the enclosed copy of this broker's agreement as evidence of your agreement to pay commission to the undersigned upon the conditions indicated in this agreement.

Very truly yours,

_____ Realty, Inc.

By: _____

Accepted and Agreed to:

Owner



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25-21 Current Legal Forms for Real Estate FORM 21.75

FORM 21.75 Broker's agreement--"net" type listing

COMMENT

This is a net listing under which the broker's compensation is to be a percentage of the excess over the net minimum price specified by the seller.

Under a net type of listing, the seller sets a minimum amount which he wishes to receive and the broker agrees to a compensation based upon the excess over and above the minimum plus the seller's expenses. Care should be taken to make it clear in the listing whether that minimum figure which the seller is to receive is truly a net figure or whether there are some expenses of the seller which must still be accounted for in order to arrive at the exact amount of money which the seller is to receive.

Although net listings are recognized in most jurisdictions, they are less commonly used than other types of listings. One reason that net listings are less frequently used is that they are more easily subject to attack on the grounds that the brokers involved have, for their own personal advantage, influenced their principals to set too low a minimum net figure. It should be noted that the license of a real estate agent may be suspended or revoked should he fail to disclose to his principal, prior to or coincident with the signing of the agreement, the full amount of his compensation.

FORM

AGREEMENT made July 10, ____ [year], between James Spear of 150 Hull Drive, Sacramento, California (the "Owner"), and Keith Johnson, 500 University Place, Sacramento, California (the "Broker").

1. *Description of property.* The property to be sold pursuant to this listing is situated in the City of Sacramento, County of Sacramento, State of California, and is described as follows:

(Insert description)

2. *Terms of sale.* The selling price of the Property shall be any sum which exceeds the total of \$75,000 net to the Owner and all expenses, costs, and other charges with respect to the Property (including those outstanding obligations secured by encumbrances on the Property) which must be paid by the Owner during escrow. Subject to such minimum requirements, the selling price shall be determined, fixed, and approved, in writing, by the Broker in his sole and absolute discretion. The selling price shall be payable in lawful money of the United States.

3. *Term.* This listing shall commence on July 11, _____ [year], and terminate at midnight on September 10, _____ [year].

4. *Compensation.* The Owner shall pay the Broker, as his commission, 25 percent of that portion of the selling price in excess of the sum of \$75,000 net to the Owner and all such expenses, cost, and other charges which must be paid by the Owner as set forth in paragraph 2. The Broker's commission shall be earned, due, and payable if the Owner enters into a sales agreement with the purchasers through the Broker's efforts.

The parties have executed this agreement the day and year first above written.

James Spear

Keith Johnson



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25-21 Current Legal Forms for Real Estate FORM 21.76

FORM 21.76 Broker's agreement with purchaser--open listing

COMMENT

On occasion, a purchaser may wish to use his own broker in order that he may have independent representation. In such circumstances, typically, the purchaser does not have in mind any specific property on which he wishes to make a definite offer. Accordingly, the purchaser designates a broker to represent him in the purchase of a property and empowers him to solicit sales offers which are to be submitted to the purchaser for acceptance.

This form will normally be used in advance of locating a specific property for which the purchaser wishes to make an offer. Thus, the description cannot be as precise as it can be in the other broker agreements in this chapter. However, an attempt should be made to come as close as possible to accurately depicting the property desired. Unless the property can be described with such accuracy, questions may arise as to whether or not the purchaser is obligated to compensate the broker should a property be purchased or refused which does not conform to the description set forth in the agreement.

FORM

AGREEMENT made May 15, ____ [year], by and between Newell Manufacturing Company, Inc. (the "Purchaser"), and Ace Realty Associates (the "Broker").

1. *Description.* The property to be purchased shall be a single-story factory building with an area of between 100,000 and 125,000 square feet, a floor load of at least 125 pounds per square foot, electrical power of 220 volts, air

conditioned offices, a railroad siding, and located in the City of Peekskill, Westchester County, New York, in a zone which permits light manufacturing.

2. *Term of agreement.* This agreement shall commence on July 17, _____ [year], and terminate at midnight on September 15, _____ [year].

3. *Conditions.* The above-described property shall be purchased on the following terms and conditions: the price for the property shall not exceed \$2 million, payable as follows: 5 percent as a deposit upon the execution of the contract of sale, 10 percent at the closing, and the balance of 85 percent of the purchase price in the form of a purchase money mortgage, maturing in 20 years with interest not to exceed 8 percent per annum and with the right of prepayment after two years without penalty. Title shall be subject to liens, easements, restrictions, rights, and conditions of record or known to the seller which are approved by Purchaser, not to be unreasonably withheld. Interest, insurance, taxes, fuel, and other prepaid expenses shall be prorated as of the date of the closing.

4. *Compensation.* Subject to the other provisions of this agreement, the Purchaser shall pay the Broker a commission of 5 percent of the purchase price. The commission shall be earned, due, and payable if the deed to the property is recorded and the purchase of the property is consummated through the efforts of the Broker in procuring the seller.

5. *Open agency.* The Broker shall not be entitled to any compensation if the Purchaser enters into an agreement to purchase the property through the efforts of other brokers, firms, or persons, including the Purchaser.

6. *Safety clause.* The Purchaser shall pay the Broker the compensation set forth in paragraph 4 if, within 90 days after this agreement terminates, the Purchaser purchases the above property from any person or firm with whom the Broker or its associates negotiated during the term of this agreement and the Purchaser had knowledge of such negotiations given by written notice to the Purchaser from the Broker.

7. *Cooperation of purchaser.* The Purchaser shall cooperate with the Broker and commit no act that might tend to obstruct the purchase of the above property, and shall execute and deliver all necessary papers to complete the transaction.

8. *Power of acceptance.* It is understood that this agreement is only authority to solicit offers from Sellers, and that such offers are to be submitted to the Purchaser for its approval and acceptance.

9. *Time of essence.* Time is declared to be of the essence of this agreement.

This agreement has been executed by the parties on the day and year first above written.

Attest:

Secretary

Newell Manufacturing Company, Inc.

By _____

President

Ace Realty Associates

By _____

Partner



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25-21 Current Legal Forms for Real Estate FORM 21.77

FORM 21.77 Broker's Agreement with purchaser--exclusive right to represent--commission paid by seller or landlord

COMMENT

Many brokers now specialize in representing purchasers of real estate or tenants looking to lease space in a commercial office building. The purchaser may not have the time to locate and analyze the market of available properties of space. After informing the broker of the criteria for the property desired to be purchased or space to be leased, the broker will search its database of available properties or space.

In this transaction, the broker, if successful in finding a suitable and acceptable property or space, is actually paid by the seller or landlord. If the seller or landlord already has hired a broker, the two brokers will work out an agreement to split the commission.

FORM

_____[date]

Mr. Fred Bencraft
Attorney at Law
Bencraft & Associates

_____, _____

Dear Mr. Bencraft:

This letter will constitute an agreement between our firm and yours, recognizing your appointing us as your Exclusive Real Estate Agent to lease or purchase facilities for your company. The term of this Exclusive Right to Represent Bencraft & Associates in its search becomes effective upon signing and expires in one (1) year, and will automatically renew unless written notice is given from one party to another.

The Roudabush Brokerage Company will utilize its best efforts and expertise to acquire the complete details on all existing facilities presently available and/or those contemplated being available, and carefully select and present to you those facilities which in our opinion are the most suitable for your utilization. Such facilities, submitted for your consideration, will include those properties listed by other recognized commercial real estate brokers.

It is understood and agreed that our services will be provided at no cost to you, unless otherwise agreed to in writing, and The Roudabush Brokerage Company will look only to the landlord or the seller for compensation for their efforts. Bencraft & Associates agrees to refer to The Roudabush Brokerage Company all inquiries and offers from other recognized real estate brokers and property owners, and inform all persons and companies that make inquiry and/or offers, of The Roudabush Brokerage Company's exclusive representation.

It is further agreed that under no circumstances will The Roudabush Brokerage Company commit Bencraft & Associates to any obligations unless specifically authorized to do so, and Bencraft & Associates will use their best efforts to protect and effect The Roudabush Brokerage Company's receiving compensation for real estate brokerage services to be paid by the property owner at the successful completion of the transaction.

Sincerely,

The Roudabush Brokerage Company

By: _____

President

AGREED AND ACCEPTED:

Bencraft & Associates

By: _____

Fred Bencraft

Date: _____



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25-21 Current Legal Forms for Real Estate FORM 21.78

FORM 21.78 Sale and leaseback of commercial property

COMMENT

The nature of a "sale and leaseback" transaction is apparent from its title. Generally, a sale of property is made on condition that the purchaser lease it back to the former owner. The seller becomes the lessee of the property he has just sold. The new owner does not get physical possession of his property; his right is to receive rent under the lease to the former owner. Usually, the lease is made for a long term, and often with renewal options.

Tax advantages to seller-lessee

The sale and leaseback arrangement may frequently offer tax and nontax advantages to both parties. The seller converts his equity in the property into the cash and other proceeds of the sale, while retaining physical use of the property. As tenant, he may deduct his rental payments, which are often greater than the deductions for cost recovery or depreciation and mortgage interest available to an owner. When a substantial portion of the value of property is allocable to the land, which is not depreciable, or is allocable to substantially depreciated assets, the deductions as a lessee are especially likely to be greater than those as an owner. The loss of the cost recovery or depreciation deduction may, in some circumstances, outweigh any advantage from the deductible leaseback rent payments. In that case, the sale and leaseback may not be appropriate.

Options to renew or purchase

Because the seller-lessee wants to retain use and occupancy of the property, there may be an option to renew the lease in the leaseback, or even an option to buy back the property. The options to renew or purchase may subject the transaction to attack by the Service, on the basis that the

parties are actually financing by mortgage loan, rather than completing a bona fide sale. Here, a careful examination of the case law, the Code, and regulations is required.

The renewal option in the leaseback assures the seller continued use of the property, even though title has been relinquished. The purchase option provisions in the leaseback agreement often establishes the option price. The price can be stated, or can be determined in the future by appraisal, or related to the remaining lease payments. The purchase option can be limited in time by permitting exercise only during the term of the lease, only during certain periods, or only upon expiration of the lease. These terms are usually negotiated between the parties based on business concerns, but with an eye toward the possible tax consequences of these factors.

Advantages to purchaser

A major attraction to the buyer is that he often obtains a long-term tenant who has a special interest in remaining on the property. In many transactions, the lease calls for a net rental, under which the tenant is obligated to pay all carrying charges, such as taxes, insurance, etc. This rental usually is designed to give the new owner sufficient money to pay the mortgage servicing charges (interest plus amortization of principal) and a fair return on his investment. The entire rental, of course, is deductible by the tenant. The owner, on the other hand, has interest and cost recovery or depreciation deductions to set off against his rental income.

Taxation of the seller-lessee

The seller-lessee exchanges deductions of mortgage interest and cost recovery or depreciation for the deduction of rent, and additional rent in the net leaseback. The seller-lessee can determine the time of sale, thus timing the realization of gain or loss. Gain may be timed to be realized on an appreciated asset in a year when net operating loss carryover or investment credits would expire otherwise unused. The gain would thus be sheltered by the net operating loss carryovers or investment credit carryover which would otherwise be lost.

Although normally gain realized would be capital gain, the property sold may be subject to investment credit or depreciation recapture. In general, the amount of prior depreciation recaptured is the amount of the depreciation, if any, in excess of the amount allocable under the straight-line method. Because real estate placed in service after 1986 must be depreciated under the straight-line MACRS rules, there may be no recaptured depreciation. However, any long term gain attributable to prior depreciation (not otherwise treated as ordinary income) is taxed at a maximum rate of 25%, not at the maximum capital gain rate of 15%. This is called "unrecaptured Section 1250 gain." The recaptured amount, if any, would be taxed at ordinary income rates, and the unrecaptured Section 1250 portion of the depreciation would be taxed at a maximum rate of 25%. Those higher taxed portions of the gain may offset any advantages from the sale and leaseback set up.

Taxation of purchaser-lessor

Rent received by the purchaser-lessor is ordinary income. This is offset, to a certain extent, by the cost recovery or depreciation deduction. If accelerated cost recovery or depreciation is available, in the early years, the purchaser-lessor cannot only receive the rent tax-free, but shelter some other income as well. Interest on the purchaser's purchase money mortgage is also a deductible offset against rental income.

Tax recharacterization risks

The tax and financial advantages of the sale and leaseback may be destroyed in the event of a successful Service attack on the substance of the transaction. This risk is increased when there is an obvious tax avoidance arrangement without a legitimate business purpose. The Service, however, has specific lines of attack on sales and leasebacks.

Like kind exchange

Gain or loss will not be recognized upon the sale, if it is deemed to be a like kind exchange, such as a fee for a leasehold. The Regulations state that an ownership in fee and a 30-year lease are properties of "like kind." This provision has caused apparently conflicting decisions so that it is uncertain whether a sale with a leaseback for a period of 30 years or more will result in the recognition of gain or loss to the seller, or will be treated as a nontaxable like kind exchange in which no gain or loss can be recognized.

The courts have looked primarily at two factors when the Service claims the transaction is a like kind exchange. The first factor is whether fair market value was paid for the property in cash, without including the leaseback as part of the consideration. The second factor is whether fair rental value is paid on the leaseback. A leaseback rental of less than fair rental value would indicate that the favorable rent is part of the consideration for the fee title.

If the leaseback is for less than 30 years and the selling price represents fair market value, gain or loss on the sale usually is recognized. The fact that the lease contains options permitting extensions beyond 30 years usually will not cause the transaction to be treated as a like kind exchange.

Recharacterization as mortgage loan

A second line of attack by the Service on the sale and leaseback transaction is the recharacterization of the transaction as a mortgage loan. This approach is most likely to occur when the transaction looks like an alternative to conventional mortgage financing while the seller retains substantial control over the property. A purchase option in the leaseback for nominal consideration or for a price against which the rent is credited could cause the transaction to fail. If the Service prevails, the seller-lessor would not be entitled to deduct the entire rental payments, but only that portion which would have been interest on the intended mortgage. The seller, not the buyer-lessor, would be entitled to the cost recovery or depreciation deduction. The income to the lessor would not include all the rent payments, but only that portion credited to be interest on the hypothetical mortgage.

Economic substance test for tax classification

The Supreme Court has held that where there is a genuine multiple-party transaction with economic substance which is compelled or encouraged by business or regulatory realities, is imbued with tax-independent considerations, and is not shaped solely by tax-avoidance features that have meaningless labels attached, the government should honor the allocation of rights and duties put into effect by the parties. Looking to the economic substance of the transactions, the court also found that the lessee's option to purchase, though fixed, was for a reasonable amount, and that the lessor bore the risk that the lessee would not exercise that option if the price was more than the fair market value of the property.

For a further discussion of tax considerations in sale-leaseback transactions, see The Tax Background (TB) § 21.13, at the beginning of this chapter.

Sale and leaseback agreement

This form illustrates an agreement for the sale and leaseback of property which the seller is under contract to purchase. In effect, the seller is arranging to finance his acquisition of a leasehold by the sale-leaseback technique. The seller is primarily interested in this commercial property for the various subleases. The rent is a fixed annual amount, plus an amount equal to the buyer-lessor's annual payments on the mortgage, plus a percentage of gross rentals from subtenants in excess of a fixed amount. If the rentals received from the subtenants exceed the fixed amount, the owner and the lessee will share the excess.

Information reporting of real estate transactions

The attorney or title company responsible for closing title is required to report the real estate transaction to the IRS. In addition, a statement must be provided to the customer before January 31 of the year following the closing. If an attorney or title company is not involved in the closing, the information reporting is the responsibility of the mortgage lender. The information reporting requirements are discussed in TB § 21.02[4].

FORM

AGREEMENT made September 12, _____ [year], by and between Major Realty Corp., a New York corporation having an office at 100 East 42d Street, New York, New York ("Seller"), and Midwest Realty Investments Company, a partnership having its principal place of business at 1100 Main Street, Cleveland, Ohio ("Purchaser").

Recitals

Seller has entered into a contract to purchase a shopping center located in Broward County, Florida.

The parties desire that Seller, upon acquiring title to the shopping center, shall convey title to Purchaser and, that thereupon, Purchaser shall lease the premises back to Seller, all in accordance with the terms and conditions of this agreement.

Now, therefore, the parties agree as follows:

1. *Sale of premises.* Seller shall sell and convey, and Purchaser shall purchase, all that certain tract of land, together with the buildings and improvements erected thereon, lying and being in the County of Broward, State of Florida, commonly known as the Southern Shopping Plaza, and more particularly described in the annexed Exhibit A (the "Premises"). This sale shall include all of Seller's right, title, and interest in, to, and under all fixtures and articles of personal property attached or appurtenant to or used in connection with the Premises, excluding, however, any such fixtures or personal property belonging to tenants or subtenants.

2. *Purchase price.* The purchase price shall be \$1.45 million over and above an existing first mortgage covering the Premises held by the Central Life Insurance Company in the original principal amount of \$4.2 million and having an unpaid principal balance in the approximate amount of \$4.16 million, payable as follows:

(a) \$150,000 on the execution of this contract, by check subject to collection, payable to Wilson & Meredith, Esqs., as attorneys for Seller, to be held in escrow; and

(b) \$1.3 million in cash or certified check or checks on delivery of the deed.

3. *Liens and encumbrances and title policy.* The Premises are to be sold and conveyed subject to the following:

(a) The first mortgage held by the Central Life Insurance Company.

(b) All current zoning and building laws, regulations, and requirements relating to the Premises;

(c) Any state of facts as shown on an accurate survey of the Premises, if the same does not render title unmarketable.

(d) Rights of tenants under and subject to existing leases, and vacancies, rentals, and leases in existence at the time of closing of title.

(e) Such state of facts as a personal inspection may disclose.

(f) Conditions, restrictions, and limitations of record none of which prohibit the use of the Premises for the operation of a shopping center or contain any reverter or forfeiture provisions.

Seller shall deliver to Purchaser at the closing, at Seller's expense, a title policy for \$5.61 million insuring Purchaser's interest as fee owner of the Premises, subject, however, to the matters herein set forth and the usual standard exceptions of the title company issuing such policy. Seller shall use its best efforts to have such policy provide that there are no restrictions of record which contain reversions or forfeitures.

4. *Representation by seller.* The Seller warrants and represents, which representations and warranties shall survive the closing, as follows:

(a) The first mortgage held by the Central Life Insurance Company is repayable in constant monthly payments of \$50,228 which include interest of 8 percent per annum, and is self-liquidating over a period of approximately 20 years.

(b) The attached Exhibit B is a true and correct list of tenants who have leased space in the Premises and the rentals provided for in their respective leases, all such leases having been exhibited to Purchaser and initialed by the parties. The tenants listed on Exhibit B are in possession and such leases are in full force and effect, except as otherwise noted thereon. Seller does not make any representations or covenants herein with respect to any vacancies which may occur between the date hereof and the closing date.

(c) The Premises are in full compliance with all environmental laws, rules and regulations, federal, state and local.

5. *Additional documents at closing.* At the closing Seller shall deliver to Purchaser:

(a) A certificate of occupancy issued by the applicable governmental authority (if any is issued under local regulations).

(b) A letter or receipt issued by the Central Life Insurance Company or its servicing agent certifying as to the amount of the unpaid principal and interest on the first mortgage, the date to which interest has been paid, and further certifying that the mortgage is in good standing and that the mortgagor is not in default. Such letter or receipt shall be deemed sufficient evidence of the reduction of the first mortgage.

(c) A letter from the present owner of the Premises stating that the first mortgage is in good standing and not in default and that all of the owner's obligations under the first mortgage have been performed.

6. *Outstanding assessments, taxes, etc.* In view of the leaseback provided in this agreement:

(a) If the Premises are affected by assessments at the time of Seller's delivery of the deed to Purchaser, Purchaser shall accept title subject to such assessments, and Purchaser shall not be entitled to any reduction of the cash to be paid at closing on account thereof. However, to the extent that Seller has received sufficient payment (or credit at closing) from the present owner of the Premises to discharge an assessment, Seller shall apply the amount in payment of such assessment.

(b) The existence of any violations or unpaid real estate taxes, utility charges, or like charges on the date of title closing shall not be deemed an objection to title.

(c) No closing adjustments shall be made between the parties at the closing.

7. *Seller's contract to obtain title.* It is understood that Seller is not the owner of the Premises, but Seller represents that it is the owner of a contract for the purchase of the Premises. It is further understood that all of the statements, conditions, representations, and agreements herein contained, in reference to the title to the Premises, the income, the rents, leases, other agreements, rent rolls, and other matters and things are made by Seller based not upon its own knowledge but upon information received from others and as contained in the contract of sale executed by the present owner. Seller shall use its best efforts to obtain title to the Premises from the present owner and convey the same to the Purchaser at the closing so as to vest title to the Premises in Purchaser. However, if for any reason (other than Purchaser's default) title is not conveyed in accordance with the terms hereof, or if any matter represented herein appears to be inaccurate, Purchaser shall be entitled to the return of the monies deposited on the execution hereof. Upon such payment, this contract shall terminate, and there shall be no further obligation or liability between the parties. If the present owner of the Premises defaults under its contract with Seller, Seller shall pay Purchaser one half of all amounts received by Seller as liquidated damages by reason of the owner's default. Seller shall not be required to incur any expense or commence any litigation in order to clear title or compel performance of the sales contract with the present owner.

8. *Destruction of premises.* Seller represents that the following provision is set forth in its contract with the present owner of the Premises: "Between the date hereof and the date of closing hereunder, Seller assumes the full risk for any damage or destruction by fire or the elements to the premises, including the buildings, structures, and other improvements comprising the shopping center, and Seller shall bear the full cost of the work of restoration, rebuilding, repairing, and replacement before the closing date. Such risk of loss or damage assumed by Seller shall continue until the actual delivery of the deed in accordance with the terms of this agreement."

9. *Deed.* The deed shall be the usual bargain and sale deed with covenant against grantor's acts in proper statutory form for recording, and shall be duly executed and acknowledged so as to convey to Purchaser the fee simple of the Premises free of all encumbrances except as herein provided.

10. *Closing.* The closing shall be held at the office of Burger & Kahn, Esqs., Plaza Office Building, Palm Beach, Florida, at 10 a.m. on October 3, ____ [year], or at any other place in Florida or New York City that Seller designates by notice to Purchaser. However, Seller reserves the right to cause title to be closed earlier than October 3, ____ [year] by giving Purchaser at least 48 hours prior written notice, in which event Purchaser shall close title on the earlier date designated by Seller. Purchaser shall not adjourn closing of title without Seller's prior written consent. Seller reserves the right to grant an adjournment of closing of title in connection with its contract for the purchase of the Premises, and Purchaser agrees to a similar adjournment of closing of title hereunder in order to provide for simultaneous closings.

11. *Leaseback.* At the closing, and immediately after Purchaser receives a deed to the Premises from Seller, Purchaser, as landlord, shall enter into a net lease of the Premises with Seller, as tenant. The lease shall be in the form of that annexed as Exhibit C, and shall provide, inter alia, as follows:

(a) The initial term shall be for 21 years, and there shall be three 21-year renewal options.

(b) The fixed rent shall be \$159,500 plus the annual interest and amortization charges required to be paid in reduction of the first mortgage now held by the Central Life Insurance Company.

(c) The tenant shall pay the landlord 50 percent of gross rentals received by the tenant from sublessees in excess of \$620,000, as reduced by 50 percent of any increase in real and personal property taxes and assessments against the Premises after the first lease year.

The form of lease attached hereto shall be completed at the closing as follows: the date of the lease shall be the date of the closing of title; the commencement date of the initial term of the lease shall be the date of title closing; and the dates of the renewal terms shall be set forth to comply with the foregoing.

12. *Assignment and reassignment of leases.* At the closing, Seller shall assign to Purchaser all of its right, title, and interest in and to all of the existing leases (or subleases) affecting the Premises; and, in turn, Purchaser shall reassign such leases (or subleases) to Seller as lessee under the foregoing leaseback. All securities and deposits paid over by the present owner of the Premises to Seller at the closing of title shall be retained by Seller as lessee under the foregoing leaseback.

13. *Rental of space.* Purchaser consents to the renting of any space in the Premises which is now vacant, or which may become vacant between the date hereof and the date of title closing, and agrees to take title subject to such leases.

14. *Corporation as purchaser.* If Purchaser takes title in the name of a corporation, such corporation shall be qualified to do business in the State of Florida before the closing date.

15. *Escrow of deposit money.* The down payment check of \$150,000 delivered by Purchaser to Seller's attorneys on the execution hereof shall be deposited by the attorneys, and the proceeds therefrom shall be held in escrow upon the following conditions:

(a) If Purchaser fails or refuses to consummate this agreement in accordance with its terms, through no fault of Seller, Seller's attorneys shall deliver such proceeds to Seller, whereupon Seller's attorneys shall have performed their duties hereunder and will be relieved and discharged of any further obligations in connection therewith.

(b) If Seller defaults under this agreement, or is unable to convey title to Purchaser, Seller's attorneys shall return such proceeds to Purchaser, whereupon Seller's attorneys shall be relieved and discharged of any further obligations in connection therewith.

(c) If there is any dispute in respect of the above, Seller's attorneys may deposit the proceeds with any court of competent jurisdiction in New York City. In such event, they shall be relieved and discharged of any further obligations in connection therewith.

16. *Broker.* The parties agree that Parsons & Company of New York City brought about this sale and leaseback, and Seller agrees to pay a commission to Parsons & Company pursuant to separate agreement. Purchaser shall indemnify and hold Seller harmless from any claim made by any other broker in connection with this transaction. This agreement by Purchaser shall survive the closing of title.

17. *Notices.* All notices hereunder shall be in writing and delivered personally or mailed by certified or registered mail, postage prepaid, return receipt requested, addressed to the other party at its address set forth at the beginning of this agreement, or at any other address the party designates in writing.

18. *Entire agreement; modification.* This instrument constitutes the entire agreement between the parties with respect to the subject matter hereof. It may not be modified or terminated except by an agreement duly executed by both parties.

19. *Nonwaiver.* No delay or failure by either party to exercise any right hereunder, and no partial or single exercise of such right, shall constitute a waiver of that or any other right, unless otherwise expressly provided herein.

20. *Headings.* Headings in this contract are for convenience and reference only and shall not be used to interpret or construe its provisions.

21. *Governing law.* This agreement shall be construed in accordance with and governed by the laws of the State of Florida.

22. *Counterparts.* This agreement may be executed in two or more counterparts, each of which shall be deemed an original but all of which together shall constitute one and the same instrument.

23. *Time of essence.* Time is of the essence of this agreement.

The parties have caused these presents to be executed on the day and year first above written.

Attest:

Major Realty Corp.

Secretary

By _____
President

Midwest Realty Investments Company

By _____
Partner

Receipt of the down payment made by the Purchaser is acknowledged by the undersigned to be held in escrow pursuant to the provisions of paragraph 15.

Wilson & Meredith, attorneys for seller

By _____

John Wilson



115 of 152 DOCUMENTS

Current Legal Forms for Real Estate

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Current Legal Forms for Real Estate
Chapter 21 SALES AND EXCHANGES
Part IV. Forms
G. SALES AND LEASEBACKS

25-21 Current Legal Forms for Real Estate FORM 21.79

FORM 21.79 Sale of land for shopping center--construction by developer--leaseback of store to seller

COMMENT

The seller in this form is a retailer who owns land suitable for a shopping center and is interested in operating a retail store in the center. He sells the land to a developer for cash and a purchase money mortgage. The developer is to construct a building to be occupied by the seller, in accordance with the seller's plans and specifications, and the building is to be leased back to the seller at the closing. The developer has investigated, and is satisfied with, the geological and environmental condition of the property. The remainder of the shopping center is to be constructed by the developer, subject to the approval of the seller, and is to be leased to others. The developer agrees to obtain commitments from lessees of specified types of establishments. For the tax considerations in a sale and leaseback situation, see The Tax Background § 21.13, at the beginning of this chapter.

FORM

AGREEMENT made May 10, ____ [year], between Metropolitan Realty Co., Inc., a New York corporation of 100 East 42d Street, New York, New York ("Seller"), and Fillmore Shopping Centers, Inc., a New York corporation of 525 Fifth Avenue, New York, New York ("Developer").

Recitals

Seller acquired real estate for development and use as a one-stop regional shopping center; and

Developer, having been fully informed of Seller's intent and desires with respect to the development and use of such real estate, on its own initiative proposed that if Seller would sell such real estate to Developer, Developer would cause the same to be developed and used in the manner below and in the accompanying documents and would give Seller the assurances to do so.

The parties, therefore, agree as follows:

Article I Sale of Center

Section 1.1. *Sale.* Seller shall sell and convey, and Developer shall purchase, that certain parcel of land situate, lying, and being in Rockland County, State of New York, described as follows:

(Insert description)

Section 1.2. *Purchase price.* The purchase price for the Center is \$800,000, payable as follows:

(a) Upon the execution and delivery of this agreement, a down payment of \$100,000 by check subject to collection (the "down payment"); and

(b) Upon the closing date, as defined below:

(1) by delivery to Seller of a check of Developer drawn to Seller's order upon a bank which is a member of the New York Clearing House and duly certified by such bank or official, or cashier's check of a New York City bank to Seller's order, for \$200,000; and

(2) by Developer duly executing, acknowledging, and delivering to Seller a purchase money note and mortgage for \$500,000 covering the Center in the form and substance annexed, completed as therein indicated.

Section 1.3. *Deed.* The deed conveying the Center to Developer shall be the usual bargain and sale deed with covenant against grantor's acts in proper short statutory form for recording; shall be duly executed and acknowledged so as to convey to Developer the fee simple to the Center, free of all encumbrances, except as herein stated; and shall also contain the covenant required by subdivision 5 of Section 13 of the Lien Law. All expenses in connection with the recording of the deed, including the recording charges, shall be paid on the closing date by Developer.

Section 1.4. *Purchase money mortgage.* The purchase money note and mortgage shall be drawn by Seller's attorneys at Seller's expense. Developer shall, on the closing date, pay the mortgage recording tax and recording fees.

Section 1.5. *Prorations.* All taxes, including town, village, and school taxes, and water charges for the Center, shall be apportioned as of the closing date. If the closing date occurs before the tax rate is fixed, the apportionment of taxes shall be based upon the tax rate for the next preceding year applied to the latest assessed valuation. If there is any water meter or meters on the Center, Seller shall furnish a reading to a date not more than 30 days before the closing date and the unfixed meter charge for the intervening time shall be apportioned on the basis of the last reading.

Section 1.6. *Condition of property.* Seller has not made and does not make any warranty or representations as to the quality or nature of the Center's ground or subsurface it being acknowledged that Developer (i) has investigated and tested the soil by test borings and other geological tests, and is satisfied with the suitability of the soil for construction purposes, and (ii) has had the land tested for compliance with all environmental laws, federal, state and local, and is

satisfied with the environmental condition of the land..

Section 1.7. *Right of entry.* From and after the date hereof and so long as Developer is not in default under any provision of this agreement, Developer may, from time to time, at its sole cost, expense and risk, enter upon all or any part of the Center for the purpose of performing Developer's obligations hereunder.

Section 1.8. *Title examination.*

(a) Developer shall order an examination of title to, and survey of, the Center, and shall deliver a copy of the report and survey to Seller's attorneys, Sterne and Leeds, Esqs., 666 Fifth Avenue, New York, New York, no later than 20 days after the date hereof. If any defects, encumbrances, or encroachments appear upon such report or survey, other than those to which Developer has agreed to take subject to by the terms of this agreement, which render the title unmarketable, Developer shall send notice to Seller's attorneys within five days after the above-specified date. Developer shall take title subject to any defects, encumbrances, and encroachments set forth in such report or survey and not included in such notice. Within 20 days after receipt of such notice, Seller shall notify Developer either that it will cure the defects, encumbrances, and encroachments of which Developer notified Seller (other than those to which Developer has agreed to take subject), or that it elects to cancel this agreement. If Seller fails to notify Developer that it will cure such defects, encumbrances, and encroachments, this agreement shall be cancelled. In such event, neither party shall have any liability to the other hereunder; but Seller shall promptly thereafter refund to Developer the down payment and pay to Developer the cost of title examination, Developer's reasonable attorneys' fees, and the reasonable value of all work performed by architects and engineers, which Developer has paid or is obligated to pay, as provided in Article II of this agreement. The term "cost of title examination" is defined, for the purposes of this agreement, as the expense actually incurred by Developer for title examination, but in no event to exceed the charges fixed by the New York Board of Title Underwriters for title examination of the Center, without the issuance of a policy, plus the cost to Developer of any survey actually obtained.

(b) Developer shall also order a continuation of the examination of title and a survey of the Center, and deliver a copy of the report and survey to Seller's attorneys not less than ten or more than 20 days before the closing date.

(c) Seller shall be entitled to a 20-day adjournment of the closing date in order to eliminate the defects, encumbrances, and encroachments contained in the continuation report and survey.

Section 1.9. *Failure of title.* If Seller is unable to convey title to the Center to Developer in accordance with the terms of this agreement, Developer shall have only the following rights:

(a) to accept any title Seller is able to convey without any abatement of the purchase price or any other liability by Seller. However, if the title is encumbered by any lien dischargeable by the payment of money (except liens that Developer has agreed hereunder to take subject to), Seller shall either present a proper discharge to Developer at the closing and pay the cost of filing and recording such instruments, or deduct the amount thereof with costs of discharge from the purchase price; or

(b) to reject title.

Developer shall not have any other right or remedy. If Developer rejects title, neither party shall have any liability to the other hereunder, but Seller shall promptly refund the down payment to Developer and pay Developer for the cost of title examination and its reasonable attorneys' fees. If Developer rejects title because of any defect, encumbrance, or encroachment appearing on the report, continuation report, or surveys, which render title unmarketable, or if title is rejected under Section 1.14, Seller shall pay Developer, in addition to and at the time of the payments specified above, all related architects' and engineers' fees and other expenses which Developer has paid or is obligated to pay under Article II. If, however, the defects, encumbrances, or encroachments that render title unmarketable appear in the

continuation report or survey but not in the original title report or survey, and such defects, encumbrances, or encroachments were in existence when the original title report was issued or the original survey was made and should have been disclosed therein, Seller shall not be required to pay Developer the architectural and engineering fees and expenses specified in this section.

Section 1.10. *Test of good title.* Seller shall give, and Developer shall accept, any title approved and insured by Home Guaranty Company, subject to any objection that Developer has agreed under this agreement to take subject to. If at the closing date the Center is subject to any liens that are the subject of litigation or negotiation or that have not been finally fixed (except those to which Developer is to take subject hereunder), such liens shall not be deemed an objection to title if Home Guaranty Company, upon delivery of the deed, issues or binds itself to issue a fee title policy which will insure Developer against the collection of such liens.

Section 1.11. *Customs.* Except as otherwise provided in this agreement, "the customs in respect of title closings" adopted by the Real Estate Board of New York, Inc., as amended, shall apply to the apportionments and other matters mentioned in this Article I.

Section 1.12. *Fire and condemnation.* The parties waive the provisions of *Section 5-1311 of the New York General Obligations Law*. If, before the closing date, all or any part of the Center is taken by eminent domain, neither party shall have the right to cancel this agreement, and Seller, upon the closing of title and the receipt of the purchase price, shall assign, transfer, and set over to Developer all of Seller's right, title, and interest in and to any awards made for such taking.

Section 1.13. *Purchaser's lien.* The cost of title examination and the \$100,000 down payment by check subject to collection delivered by Developer simultaneously with the execution and delivery of this agreement shall, upon collection, become a lien upon the Center. Such lien shall not continue after default by Developer or payment to it of all the moneys provided for in Sections 1.8 or 1.9.

Section 1.14. *Zoning and other restrictions.*

(a) Developer shall take title subject to existing zoning and building laws, ordinances, restrictions, and regulations imposed by any public authority ("zoning laws") affecting the Center. If, between the date hereof and the closing date, such zoning laws are so changed as to prevent the construction, operation, maintenance, and use of the Center as a one-stop regional shopping center as described in this agreement, Developer shall have only the right to accept title and thereby waive any objections to such change in zoning laws or to reject title, in which case its only rights and remedies shall be as provided in Section 1.9.

(b) If any governmental authority having jurisdiction over the Center has obtained, at the closing date, any rights in and to any streets, roads, or avenues in, upon, or across the Center which may be plotted or laid out on any map or plan issued and filed by such authority, or has imposed any restrictions against building upon the bed of such streets, roads, or avenues, and if such rights or restrictions would prevent the construction, operation, maintenance, and use of the Center as a one-stop regional shopping center as described in this agreement, Developer shall have only the right to accept title and thereby waive any objections to such rights and restrictions or to reject title, in which case Developer's only rights and remedies shall be as provided in Section 1.9.

Article II Development of Center

Section 2.1. *Outline plans.* Seller has previously prepared and delivered to Developer, and each has approved and initialed, outline plans and specifications for the construction of Seller's building. As used in this agreement, the term "Seller's building" means the Tenant's building--including building equipment--to be erected and installed as provided in Article II of the lease. The plans and specifications for Seller's building shall be so drawn and written that it will be

capable of supporting and servicing four stories, including a basement.

Section 2.2. *Preliminary architectural and structural engineering plans.* No later than 30 days after the date hereof, Developer shall, at no expense to Seller, prepare and deliver to Seller preliminary architectural and structural engineering plans and specifications for Seller's building, including building equipment. Such plans and specifications and those referred to in Section 2.3 shall be consistent with and reasonably inferable from both Seller's outline plans and specifications referred to in Section 2.1 and provide for first-class workmanship and materials. The parties contemplate that Seller's building will be of the same quality of workmanship and material as is contained in, but may otherwise differ substantially from, Seller's Yonkers, New York, store. Such preliminary plans and specifications and all other plans and specifications and drawings shall be prepared by architects and engineers selected by Developer from time to time, as provided in this section. Developer shall select only architects or engineers approved by Seller from time to time to perform services with respect to the leased premises. Before selecting an architect or engineer to perform services with respect to the remainder of the Center, excluding the premises, Developer shall deliver to Seller a list of one or more proposed architects or engineers. Within 20 days after receiving such list, Seller shall advise developer of any architect or engineer of which it disapproves, but Seller shall not unreasonably withhold its approval. After the 20-day period expires, Developer may select any architect or engineer named in the list to perform services with respect to the remainder of the Center, excluding the leased premises, except those specifically disapproved of by Seller. Developer shall pay all of the selected architects' and engineers' fees and expenses. Developer shall submit each unit or part of the preliminary architectural and structural engineering plans and specifications for Seller's building as soon as it completes the same. Developer shall complete and submit all of the preliminary plans and specifications to Seller on or before July 10, _____ [year]. Seller shall have full right and authority to object to, and require changes, modifications, and corrections which it deems necessary or desirable in the plans and specifications, if such objections and requirements are made in writing within 30 days after receipt of the preliminary plans and specifications and are consistent with and reasonably inferable from Seller's outline plans and specifications referred to in Section 2.1. Developer shall, at no cost to Seller, revise the preliminary plans and specifications and diligently make all changes, modifications, and corrections required by Seller promptly after it receives Seller's written request therefor. Seller's failure to make such request within the specified 30-day period shall be deemed to constitute its approval. Three copies of all revised and corrected preliminary plans and specifications shall promptly be supplied to Seller without charge after they are completed.

Section 2.3. *Preliminary mechanical engineering plans.* Developer shall diligently prepare, at no cost to Seller, preliminary mechanical engineering plans and specifications for Seller's building, and shall submit each unit or part thereof to Seller as it is completed, but in any event shall complete and submit all such plans and specifications no later than August 10, _____ [year]. Seller shall have the unconditional right to object to such plans and specifications and to require any change, modification, or correction it deems necessary or desirable, if the objections and requirements are made in writing within 30 days after the plans and specifications are received and are consistent with and reasonably inferable from Seller's outline plans and specifications referred to in Section 2.1. Promptly after receiving Seller's written request, Developer shall, at no cost to Seller, revise the preliminary plans and specifications and diligently make all required changes, modifications, and corrections. Seller's failure to make the request within the above 30-day period shall be deemed its approval of the preliminary plans and specifications. Copies of all revised and corrected preliminary plans and specifications shall promptly be supplied to Seller without charge.

Section 2.4 *Final plans.* No later than 30 days after (a) Seller approves Developer's preliminary plans and specifications originally submitted to Seller under Section 2.3, or (b) Developer makes all of the requested changes, modifications, and corrections and supplies the revised and corrected plans and specifications to Seller, as the case may be, Developer shall:

Commence to prepare and thereafter diligently prepare, without cost to Seller, and deliver to Seller detailed final architectural and engineering plans and specifications, including working drawings, for Seller's building. The final plans, specifications, and drawings shall be consistent with and reasonably inferable from the preliminary plans and

specifications, as revised and corrected under Sections 2.2 and 2.3. Developer covenants that it will submit completed units or parts of the final plans, specifications, and working drawings for Seller's building as each unit or part is completed, and that it will complete all the plans, specifications, and drawings and deliver them to Seller within eight months after the applicable date provided in the first sentence of this section for Developer to commence their preparation. Seller shall have the unconditional right to object to the final plans, specifications, and drawings and to require any change, modification, or correction it deems necessary or desirable, if the objections and requirements are made in writing within 30 days after the plans, specifications, and drawings are received and are consistent with and reasonably inferable from the preliminary plans and specifications, as revised and corrected under Sections 2.2 and 2.3. Promptly after receiving Seller's written request, Developer shall, at no cost to Seller, revise the final plans, specifications, and drawings and diligently make all required changes, modifications, and corrections. Seller's failure to make the request within the above 30-day period shall be deemed to constitute its approval of the plans, specifications, and drawings. Copies of all revised and corrected final plans, specifications, and drawings shall promptly be supplied to Seller without charge.

Section 2.5. *Costs in excess of items in seller's building.* If the plans, specifications, and drawings for Seller's building, under Sections 2.2, 2.3, and 2.4, include any items of equipment or material which are more or less expensive than items that serve the corresponding functions in Seller's Yonkers, New York store, Developer shall advise Seller of any such net increase, as follows:

(a) Whenever Seller requests, Developer shall promptly cause to be prepared and submitted to Seller a bona fide written estimate by the architects or engineers responsible for the preparation of such plans, specifications, and working drawings of any increase or decrease in architects' and engineers' fees and in such construction costs that would result from any such request. Such estimate shall itemize separately the estimated cost of any item of material Seller so requested Developer to include.

(b) Any approval by Seller of the submitted estimate shall be in writing and returned to Developer within 15 days after the estimate is received. If Seller approves the estimate, it shall reimburse Developer under the attached lease for any aggregate net increase in architects' and engineers' fees and in construction costs shown on all the approved estimates promptly after a statement therefor is received following completion of the work involved. Alternatively, Seller may revise the submitted estimate by deducting from any stated increase in such fees and costs the difference between the estimated cost of any item of material included therein and the lower written bid for the identical item from a reliable supplier, if Seller submits the bid to Developer within 15 days after Seller receives the estimate. Any approval by Seller of the revised estimate shall be in writing and returned to Developer within 15 days after it is received. If Seller approves the revised estimate, it shall reimburse Developer under the attached lease for any aggregate net increase in architects' and engineers' fees and in construction costs shown on all the approved estimates, as so revised, promptly after a statement therefor is received following completion of the work involved. If Seller does not approve of the estimate, whether or not revised, and return it to Developer within the above 15-day period, Seller shall be deemed to have withdrawn the request, but it shall reimburse Developer for reasonable architects' and engineers' fees for preparing the estimate.

Section 2.6. *Preliminary plans for other buildings.* No later than 30 days after the date hereof, Developer shall commence to prepare and thereafter diligently prepare, at no cost to Seller, and deliver to Seller, preliminary architectural plans and outline specifications, including isometric drawings and elevations, for the construction of at least 200,000, but not more than 400,000, square feet of building floor area of the buildings, other than Seller's building, and the other improvements. Such plans, specifications, drawings, and elevations shall provide for good quality workmanship and materials, that all vehicular and pedestrian traffic ways be hard-surfaced, and that all parking areas be finished with a permanent surface at least equal in quality to blacktop. Developer covenants to complete and submit to Seller without charge copies of such plans, specifications, drawings, and elevations no later than 90 days after the date hereof. If Seller, within 30 days after receiving such plans, specifications, drawings, or elevations, gives written notice to Developer that any of them do not comply with this section, Developer shall, promptly after receipt of such notice,

and at no cost to Seller, diligently make any change, modification, or correction to make them so comply. Seller's failure to give Developer notice within the above 30-day period shall be deemed to constitute Seller's approval of the plans, specifications, drawings, and elevations. Copies of the revised and corrected plans, etc., shall be promptly supplied to Seller without charge after their completion.

Section 2.7. *Plans for service areas.* Developer covenants to prepare, without cost to Seller, and deliver to Seller no later than 60 days before the closing date, preliminary architectural plans for screened service courts for all buildings other than Seller's building, unless before the delivery date the parties agree on a substitute arrangement to replace such courts.

Section 2.8. *Other leases.* Developer guarantees that on or before June 30, ____ [year], tenants other than Seller will have entered into commitments to lease stores aggregating at least 200,000 square feet of floor area in the Center. Such tenants will be obliged to open for business on or before the date that Seller opens for business in its building, or May 10, ____ [year], whichever is later. Developer shall deliver a true copy of each lease commitment to Seller on or before June 30, ____ [year]. Each commitment shall include a commitment for lease of at least: (a) 5,000 square feet of floor area to a drugstore for an initial term of at least ten years; (b) 15,000 square feet of floor area to a supermarket for an initial term of at least 15 years; (c) 20,000 square feet of floor area to one or more variety of stores for initial terms of at least 20 years each; and (d) 40,000 square feet to apparel stores for initial terms of at least 15 years each. Developer shall deliver to Seller a true copy of each lease or commitment to lease space in the Center within ten days after its execution.

Article III Closing

Section 3.1. *Place of closing.* All matters to be performed under this agreement on the closing date shall be done at the office of Sterne and Leeds, Esqs., 666 Fifth Avenue, New York, New York, at 11 a.m. on the closing date.

Section 3.2. *Date of closing.* The closing date shall be September 11, ____ [year]. However, Developer may accelerate the closing date if (1) it is not in default hereunder, (2) all matters to be performed hereunder before the closing date, except those required of Seller, have been performed, and (3) Developer gives 20-days' prior written notice to Seller of the earlier closing date. The closing date may be extended as provided in Section 1.8 or 3.3.

Section 3.3 *Default by developer.* Seller may cancel this agreement and retain the down payment if Developer defaults under any provision hereof and shall fail to cure the same within 20 days after Seller's written notice specifying the nature of the default. Seller's cancellation shall not prejudice any of its other rights or remedies hereunder, in any other instrument, or at law.

Section 3.4 *Completion bond.* On the closing date, Developer shall deliver a bond to Seller in which the general contractor to be employed by Developer to construct Seller's building and Developer shall be the Principals, Seller shall be the Obligee, and any surety company shall be the Surety. The bond shall be for \$700,000, unless the amount is changed as provided below, and shall guarantee the construction and completion of Seller's building, fully paid for. If either party believes that the cost of such construction and completion will be more or less than \$700,000, it may request that the amount be changed by giving the other party written notice between 60 and 90 days before the closing date. If the parties cannot agree upon a mutually satisfactory amount within ten days after notice is given, either party may refer the dispute to the architect selected to perform services for the leased premises, as provided in Section 2.2, not later than 45 days before the closing date. The architect shall, not later than 15 days before the closing date, advise the parties of the amount required by a responsible contractor to construct and complete Seller's building, and the bond shall be in that amount.

Section 3.5. *Authority of seller.* On the closing date, Seller shall deliver to Developer: (1) certified resolutions of Seller's Board of Directors authorizing the execution of this agreement and performance of its obligations, and (2) an opinion of

Sterne & Leeds, Esqs., Seller's attorneys, to the effect that the execution and delivery of this agreement and of the deed and lease have been duly authorized by Seller, have been duly executed and delivered on behalf of Seller by a duly authorized officer or officers, and are legal, valid, and enforceable under their terms.

Section 3.6. *Authority of developer.* On the closing date, Developer shall deliver to Seller: (1) certified resolutions of Developer's Board of Directors authorizing the execution of this agreement and performance of its obligations, (2) an opinion of James Cooper, Esq., Developer's attorney, to the effect that the execution and delivery of this agreement and of the purchase money mortgage, purchase money note, the bond, and the lease have been duly authorized by Developer, have been duly executed and delivered on behalf of Developer by a duly authorized officer or officers, and that all the above documents are legal, valid, and enforceable in accordance with their terms, and (3) a certificate, executed by Developer's chief executive officer, to the effect that all leases or written commitments to lease any part of the Center entered into by or on behalf of Developer conform with this agreement and the accompanying documents.

Section 3.7. *Documents.* On the closing date, provided that all matters required to be performed hereunder by both parties prior thereto have been duly performed:

- (a) Seller shall deliver the required deed to Developer;
- (b) Concurrently, Seller and Developer shall duly execute, acknowledge, and deliver, as Tenant and Landlord, respectively, the lease in the attached form (the "lease").

On the closing date, before the parties execute such lease:

- (a) Both parties shall approve, date, and initial the final plans, specifications, and drawings, as revised and corrected under Section 2.4, and the preliminary plans, specifications, drawings, and elevations, as revised and corrected under Section 2.6.
- (b) The lease in form attached shall be completed as indicated therein.

Article IV Miscellaneous

Section 4.1. *Notices.* Unless otherwise expressly provided herein, all notices hereunder shall, be in writing and be deemed to have been given when mailed by registered or certified mail, postage prepaid, to the other party at the address stated below, or at the last changed address given by the other party:

If to Developer, at:	Fillmore Shopping Centers, Inc. 525 Fifth Avenue New York, New York 10017
If to Seller, at:	Metropolitan Realty Co., Inc. 100 East 42nd Street New York, N.Y. 10017

Either party, however, may at any time change its address for notification purposes by mailing a notice to the other party, as provided above, stating the change and setting forth the new address.

Section 4.2. *Assignment; binding effect.* All references herein to Developer shall be deemed to mean Fillmore Shopping Centers, Inc. If, however, Developer assigns all of its right, title, and interest under this agreement to any person, firm, or corporation, Developer shall be deemed to mean that person, firm, or corporation. If this agreement is assigned, the assignee shall expressly assume, in writing, all of Developer's obligations hereunder, and a duplicate original of the

assignment and assumption shall be delivered to Seller no later than five days before the closing date. The duplicate original shall state the assignee's business address and, if the assignee is a corporation, the state of its incorporation. Except as otherwise expressly provided herein, this agreement shall be binding upon and inure to the benefit of both parties and their respective legal representatives, successors, and assigns.

Section 4.3. *Relationship between parties.* The relationship between the parties is solely that of Vendor and Purchaser. Nothing contained herein shall be construed to make the parties partners or joint venturers, or to render either party liable for the other party's debts or obligations. The provisions of Sections 1.6, 4.3, and 4.5 and of Article II shall survive the delivery of the deed and lease.

Section 4.4. *Nonwaiver.* No delay or failure by either party to exercise any right hereunder, and no partial or single exercise of such right, shall constitute a waiver of that or any other right, unless otherwise expressly provided herein.

Section 4.5. *Broker.* The parties agree that Rossman Realty Associates, 600 Third Avenue, New York, New York, brought about this agreement as broker. Developer shall pay all commissions or brokerage with respect to this agreement and its negotiation, including the attached lease and extensions or renewals thereof and all additions to Seller's building.

Section 4.6. *Headings.* Headings in this contract are for convenience and reference only and shall not be used to interpret or construe its provisions.

Section 4.7. *Governing law.* This agreement shall be construed in accordance with and governed by the laws of the State of New York.

Section 4.8. *Entire agreement; modification.* This instrument constitutes the entire agreement between the parties. It may not be changed or terminated except by an agreement duly executed by the parties.

Section 4.9 *Short forms for recording.* For recordation purposes, Developer shall execute and deliver a short form of this agreement, in the form requested by Seller, in order to record its provisions. Each party shall execute, in recordable form, any certificate reasonably requested by the other party concerning the parties' rights and obligations hereunder.

Section 4.10. *Counterparts.* This agreement may be executed in two or more counterparts, each of which shall be deemed an original and all of which together shall constitute one and the same instrument.

Section 4.11. *Time of essence.* Time is of the essence of this agreement.

The parties have duly executed this agreement as of the day and year first above mentioned.

Attest:

Secretary

Attest:

Secretary

Metropolitan Realty Co., Inc.

By _____
President

Fillmore Shopping Centers, Inc.

By _____
President



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Current Legal Forms for Real Estate

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Current Legal Forms for Real Estate
Chapter 21 SALES AND EXCHANGES
Part IV. Forms
G. SALES AND LEASEBACKS

25-21 Current Legal Forms for Real Estate FORM 21.80

FORM 21.80 Sale and leaseback of single-purpose property improved by seller to his own specifications

COMMENT

This form illustrates the use of the sale-leaseback technique as a method of releasing working capital for a business organization. Here, the owner is planning to construct an office and research building to its own specifications for use in its own business. The owner has arranged to sell the property for cash upon the completion of the improvements, and simultaneously to take back a long-term lease from the new owner. The owner is required to comply with all municipal codes prior to closing, and to represent compliance with all environmental laws. For the tax considerations in a sale and leaseback, see The Tax Background (TB) § 21.13, at the beginning of this chapter. For a discussion of the cost recovery of leasehold improvements by the lessee and amortization of leasehold acquisition costs, see TB § 21.02[4].

Tax aspects on termination

If the lease is cancelled before the end of its term, the unamortized portion of the cost of the lessee's improvements is deductible in the year of cancellation. The lessor is not entitled to depreciation upon a building or other improvements constructed by the lessee. The value of improvements made by the lessee does not constitute income to the lessor either during the lease term or when the lessor acquires the improvements upon the termination of the lease.

FORM

AGREEMENT made January 2, _____ [year], between Jason Products, Inc., a New York corporation, having its

principal office at 100 White Plains Road, White Plains, New York ("Seller"), and Realty Holding Corp., a New York corporation, having its principal office at 600 Fifth Avenue, New York, New York ("Purchaser").

1. *Sale.* Seller agrees to sell and convey, and Purchaser agrees to purchase, the premises situated on Central Avenue, in the City of White Plains, County of Westchester, State of New York, together with the buildings and improvements to be completed and constructed by the Seller, such premises being more particularly described in the annexed Schedule A initialed by the parties (the "Premises").

2. *Liens and encumbrances.* The premises are being sold subject to the encumbrances, liens, and exceptions to title enumerated in Schedule A.

3. *Purchase price.* The purchase price is \$600,000, payable as follows:

\$60,000 on the signing of this agreement, receipt of which, by check, is acknowledged, subject to collection; and

\$540,000 either by check drawn by the grantee named in the deed, on a bank or trust company which is a member of the New York Clearing House, to the direct order of Seller as payee, and duly certified by such bank or trust company, or by an official check of such a bank or trust company to the direct order of Seller, to be delivered against receipt of the deed.

4. *Satisfaction of liens at closing.* If, at closing of title, the premises are affected by any lien which Seller is required hereunder to discharge or satisfy, Seller shall not be required to discharge or satisfy the lien of record if proper instruments of satisfaction or discharge are delivered to Purchaser at the closing and proper allowance is made to Purchaser for recording charges.

5. *Construction of improvement by Seller.* Seller shall, at its expense, complete and construct a two-story and basement office and research building on the premises in accordance with the plans and specifications of Jones & Harrison, Architects, which have been initialed by the parties. Such construction shall include all improvements shown on the plans and specifications, and the installation of all fixtures and articles of personal property shown thereon. Seller shall perform the construction and installation with diligence and continuity until completion. All construction and installations, and the buildings and improvements when completed, shall comply with all federal, state, and local laws and regulations, including the Americans with Disabilities Act of 1990 and all rules and regulations issued thereunder, as well as the orders, rules, and regulations of the New York Board of Fire Underwriters or any other body exercising similar functions. All construction and installation shall be under the supervision of Jones & Harrison, Architects. Construction and installation shall not be deemed completed until the following are delivered to Purchaser:

(a) a certificate of completion by Jones & Harrison, Architects, certifying that the work has been completed in accordance with such plans and specifications, and with all applicable laws, ordinances, orders, rules, regulations, and requirements, and

(b) a Certificate of Occupancy issued by the governmental authorities having jurisdiction over the premises, a certificate of the New York Board of Fire Underwriters, and any other certificate required or customarily issued by any other governmental authority or agency having jurisdiction over the premises.

If the construction and installation is not completed on July 10, ____ [year], Purchaser may either:

(a) Cancel this agreement by giving written notice to Seller. If Purchaser cancels, Seller shall immediately refund to Purchaser the amount paid on account of the purchase price, without interest, and pay Purchaser's net cost of examining the title. This agreement shall then terminate, and neither party shall have any further claim against the other by reason thereof; or

(b) Extend Seller's time for completing the construction and installation, by giving it written notice of the extension. If the construction and installation is not completed at the end of the extended time, Purchaser may either cancel as provided in subdivision (a) or further extend as provided in this subdivision (b).

Seller warrants and represents that the building and improvements on the premises, when completed, their sale to Purchaser, and Seller's use thereof as tenant under the lease will not violate any applicable zoning restrictions or ordinances.

6. *Personalty, fixtures, and equipment.* No part of the personal property, fixtures, machinery, or equipment used or procured for use in connection with the operation of Seller's business, whether now or later placed on the premises, is included in this sale, regardless of whether such property, etc., can be removed without material damages to the freehold. It is expressly understood and agreed that all the above property, including movable partitions, shall be and remain Seller's property. However, all fixtures and articles of personal property, machinery, and equipment used or procured for use in connection with the operation of the building, now or hereafter placed on the premises, and the heating, lighting, ventilating, plumbing, and any air conditioning systems are represented to be owned by Seller free from all liens and encumbrances and are included in this sale as a part of the realty.

7. *Leaseback.* Upon closing of title, Seller, as tenant, and Purchaser, or the person or corporation taking title to the premises, as landlord, shall enter into a lease of the premises in the form and containing the same provisions as those set forth in the annexed Schedule B, initialed by the parties, and a short form memorandum of such lease for recording in the form set forth in the annexed Schedule C, initialed by the parties.

8. *Street rights.* This sale includes all of Seller's right, title, and interest in and to any land lying in the bed of any street, road, or avenue opened or proposed, in front of or adjoining the premises, and in and to any award made or to be made in lieu thereof. Seller will execute and deliver to Purchaser on closing of the title, or thereafter, on demand, all proper instruments for the conveyance of such title and the assignment and collection of any such award. The proceeds of any such award shall, however, be dealt with by Purchaser pursuant to the terms of the lease in the same manner and to the same extent as though Purchaser were now the owner, and Seller the tenant from Purchaser, of the premises under the lease.

9. *Deed.* Seller shall, upon receipt of the amounts specified in paragraph 3, make, execute, and deliver a good and sufficient deed to convey to Purchaser, or Purchaser's assigns, the fee of the premises, free from all encumbrances, except as herein stated. Such deed shall be a bargain and sale deed in statutory short form for record, and, except as hereinafter stated, shall contain no covenants or warranties, and shall be duly executed and acknowledged by Seller, at Seller's expense. Such deed shall contain the covenant required by subdivision 5 of Section 13 of the Lien Law.

10. *Closing.* The closing of title shall take place and the deed shall be delivered and the price paid on the 24th day of July, _____ [year] at 11 a.m. at the office of the Seller's attorneys, Messrs. Smith & Ryan, 100 Wall Street, in the Borough of Manhattan, City of New York. Purchaser may have the title closing advanced to an earlier date if it notifies Seller's attorneys at least five days before such date.

11. *Objections to title.* Purchaser shall deliver to Seller's attorneys, at least five days before title closing, a statement of all defects, encumbrances, and objections to title, except those to which by the terms of this agreement the premises are to be conveyed subject or which may be expressly waived herein. Seller shall pay all taxes or assessments that are assessed, levied, confirmed, imposed, or become a lien upon the premises or that are due and payable at or before title closing, and shall cure or remove all encumbrances or objections to title arising from Seller's own acts. Seller, however, shall not be under any duty or obligation to cure or remove, or incur any expense to cure or remove, any other defects, encumbrances, or objections to title.

12. *Seller's inability to convey good title.* If Seller is unable to convey a good and marketable title under this agreement, its sole liability shall be to refund to Purchaser the amount paid on account of the purchase price, without interest, and to pay Purchaser's net cost of examining the title. Upon the Seller's making the refund and payment, this agreement shall terminate, neither party shall have any claim against the other, and any lien of Purchaser against the premises shall wholly cease. Seller shall not be required to bring any action or proceeding, or otherwise to incur any expense or take any steps, to render the title to the premises marketable, except as provided in paragraph 11. Purchaser may, however, accept any title that Seller is able to convey, without reduction of the purchase price or any credit or allowance against the same, and without any other liability of Seller. Purchaser's acceptance of a deed shall be deemed full performance and discharge of all Seller's agreements and obligations hereunder, except those specifically stated herein to survive delivery of the deed. All of Seller's obligations as tenant under the lease shall survive delivery of the deed.

13. *Lien for deposit and title expense.* All sums paid on account of this agreement and the reasonable cost of title examination are made a lien against the premises. The lien, however, shall not continue after Purchaser's default hereunder or after any termination of this agreement as provided herein.

14. *Brokers.* The parties agree that Messrs. Gordon & Roth, of 400 Lexington Avenue, New York, New York, are the brokers who brought about this sale. Seller shall pay the brokerage commission, but only upon the conditions and in the amount, with which Purchaser is fully familiar, agreed upon between Seller and Messrs. Gordon and Roth.

15. *Notices.* All notices under this agreement shall, unless otherwise expressly provided herein, be in writing and be deemed to have been given when mailed by registered or certified mail, postage prepaid, to the other party at the address set forth above, or at the last changed address given by the other party.

16. *Departmental violations; Environmental Laws.* Seller shall, at or before title closing, comply with all applicable state, local, or municipal laws affecting the premises at the closing date, including zoning ordinances, health codes, multiple dwelling laws, building codes, fire ordinances, and the like. This provision shall survive delivery of the deed. Seller shall furnish Purchaser, at its request, with an authorization to make the necessary searches for the above violations.

Seller warrants that the Premises are in full compliance with all environmental laws, rules and regulations, federal, state and local. Such warranty shall survive the closing and transfer of title.

17. *Unpaid assessments for improvements.* If, upon delivery of the deed, all or part of the premises are or have been affected by any one or more assessments which are or may become payable in annual installments, of which the first installment is then a lien or charge, or has been paid, for the purposes of this agreement all the unpaid installments of any such assessment, including those that are to become due and payable after the delivery of the deed, shall, if required by the mortgagee from whom Purchaser or its assigns borrows part of the purchase price, be deemed to be due and payable and to be liens upon the premises affected thereby. Seller shall pay and discharge such assessments at or before delivery of the deed. The Westchester County Sewer System taxes shall be excluded from the provisions of this paragraph, and the installments of such taxes not due and payable upon delivery of the deed shall not be assumed by Seller as tenant under the lease.

18. *Taxes, assessments, and insurance.* The parties shall not apportion any taxes, assessments, or insurance premiums. At or before title closing, Seller shall pay and discharge all taxes, assessments, water charges, and sewer rents that are assessed, levied, confirmed, imposed, or become liens upon the premises or that become due and payable on or before the closing date. In addition, Seller, as tenant under the lease, shall pay all taxes and assessments, water charges, and sewer rents that become liens on or after the closing date. At title closing, Seller shall have in force and deliver to Purchaser all insurance policies required under such lease, and shall cause such policies to be bound for the benefit of the landlord and tenant and the holder of any mortgage upon the premises, as their respective interests appear, in the manner required by the provisions of such lease.

19. *Survival of certain provisions.* The provisions of paragraphs 5, 8, 16, 17, and 18 shall survive delivery of the deed.

20. *Entire agreement; modification.* This instrument constitutes the entire agreement between the parties. It may not be changed or terminated except by an agreement duly executed by the parties.

21. *Nonwaiver.* No delay or failure by either party to exercise any right hereunder, and no partial or single exercise of such right, shall constitute a waiver of that or any other right, unless otherwise expressly provided herein.

22. *Headings.* Headings in this contract are for convenience and reference only and shall not be used to interpret or construe its provisions.

23. *Governing law.* This agreement shall be construed in accordance with and governed by the laws of the State of New York.

24. *Counterparts.* This agreement may be executed in one or more counterparts, each of which shall be deemed an original but all of which together shall constitute one and the same instrument.

25. *Time of essence.* Time is of the essence of this agreement.

The parties have caused these presents to be executed in their names and on their behalf by their respective officers the day and year first above written.

Corporate Seal

Attest:

Secretary

Corporate Seal

Attest:

Secretary

Jason Products, Inc.

By _____

President

Realty Holding Corp.

By _____

President

[Acknowledgments]



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Current Legal Forms for Real Estate

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Current Legal Forms for Real Estate
Chapter 21 SALES AND EXCHANGES
Part IV. Forms
G. SALES AND LEASEBACKS

25-21 Current Legal Forms for Real Estate FORM 21.81

FORM 21.81 Sale and leaseback of professional building prior to construction--buyer to participate in construction financing

COMMENT

The sale and leaseback in this form is used as a method of obtaining construction financing. The seller is the developer of the property on which a professional building is to be constructed. The buyer plans to organize a limited partnership to own the fee and will obtain a mortgage for the excess of the purchase price over the assets of the partnership. The buyer will periodically advance sums to the seller in order to finance the construction. The agreement also provides for a long-term leaseback to the seller calling for a minimum rent plus a percentage of the net rentals. The same result is obtained as in a mortgage transaction but the developer-lessee can deduct all of his rental payments and the buyer-lessor, unlike a mortgage lender, can depreciate the building and share in the profits. The nonrecourse obligation under the mortgage to be obtained by the buyer is limited to recourse against the property, the buyer not being personally liable on the mortgage debt. If the mortgage cannot be obtained, the deal will be cancelled and the deposit returned. If the sale is not consummated because of the buyer's fault, the deposit is retained as liquidated damages. If the sale is not consummated because the seller cannot convey good title or complete the construction in time, the buyer may terminate and the seller will be obligated to honor the promissory notes issued by him for the construction advances made by the buyer and is required to return the deposit. If a mortgage is unobtainable or if the seller is unable to obtain a surety bond, the sums advanced by the buyer are to be returned. Interest paid by the seller on the deposit and notes is income to the buyer. For the tax considerations in a sale and leaseback, see *The Tax Background § 21.13*.

FORM

AGREEMENT made June 1, ____ [year], by and between Benjamin Stone, of 90 Parkside Drive, Stamford, Connecticut ("Seller"), and Alexander Courtney, of 800 Redding Road, Hamden, Connecticut ("Buyer").

Recitals

Seller is the owner of a certain parcel of real property (the "Property"), located in Stamford, Connecticut, adjacent to U.S. Highway 1, containing approximately four acres, as described in the annexed Exhibit A.

Seller intends to erect on the Property a ten-story professional building together with all appurtenances, including parking facilities at a cost of approximately \$4 million ("the Building").

Buyer desires to purchase the Property and Building when completed but before its occupancy.

Seller desires to lease the Building from Buyer.

Buyer is willing to participate in the financing of the construction of the Building.

Now therefore, it is mutually agreed as follows:

1. *Construction of building; Environmental compliance.* Seller will erect or cause the Building to be erected on the Property in accordance with the plans and specifications prepared by Jacobs Associates, Architects, and in full compliance with all applicable building and zoning codes, and with the requirements of the Americans With Disabilities Act of 1990, and all rules and regulations thereunder. The plans and specifications, initialed by the parties and marked Exhibit B, are annexed.

Seller warrants that the Property and Building are in full compliance with all environmental laws, federal, state and local. This warranty shall survive the closing and transfer of title.

2. *Sale.* The total purchase price for the Property and Building shall be \$6 million. Buyer's obligation to purchase is conditioned upon him or his nominees obtaining a first mortgage commitment on the Property and completed Building. The mortgage shall be in the amount of at least \$5 million, bearing interest of not more than 8 percent per annum, with the principal and interest payable on a 20-year amortizing basis. Buyer shall pay Seller the balance of the purchase price, \$1,000,000, at the times and in the manner set forth below. The Property and Building shall be the only security for the mortgage debt, and neither Buyer nor his nominees or assigns shall have any personal liability for payment of such debt in the event of foreclosure.

3. *Failure to obtain mortgage.* Buyer shall make all reasonable efforts to obtain the first mortgage described in paragraph 2 upon terms and conditions satisfactory to him, within the limitations of that paragraph. If Buyer is unable to obtain the mortgage by September 29, ____ [year], he may demand that Seller return all monies advanced or paid by Buyer or his nominees under this agreement. Upon such return, this agreement shall terminate and the parties shall be released from all further obligations hereunder.

4. *Lease to seller.* If Buyer purchases the Property and Building, a lease of both shall be entered into by Buyer or his nominees, as Landlord, and Seller, as Tenant. A copy of the lease, marked Exhibit C, is annexed. The original term of the lease shall be for 20 years, with a renewal option for an additional ten years, at an annual minimum rental of \$300,000, payable in advance monthly installments of \$25,000 on the first day of each month, commencing on the first day of the month following the date when this sale is consummated. The minimum rental is to be a net rental, and Seller will pay in addition: (a) all taxes and assessments levied against the Property and Building; (b) premiums for fire and

extended coverage insurance in an amount sufficient to insure the Building for its value; (c) premiums for comprehensive liability insurance with limits of not less than \$500,000/\$1,000,000, with Buyer as named insured; (d) the cost of all repairs, replacements, maintenance, decoration, and management of the Property and the Building including the parking area; and (e) all other costs and expenses connected with the Property and Building other than the principal and interest payable on the mortgage. The intent of the parties is that the minimum rental payable by Seller as Tenant shall be net to Buyer or his nominees as Landlord. If Seller designates a nominee as Tenant, Seller shall unconditionally guarantee the faithful performance by such nominee of all the Tenant's obligations under the lease.

5. *Additional rent*

(a) The lease provides that, in addition to the minimum rent and other charges as set forth in Paragraph 4, Seller as Tenant shall pay to Buyer or his nominees as Landlord, as additional rent, an amount equal to 5 percent of net rentals realized by Seller as prime tenant of the property. The term "net rental" for the purpose of determining the additional rent shall mean "gross rentals" derived from the Building less the amount paid by Seller for the following:

- (1) Leasing commissions, not to exceed 5 percent for offices and 10 percent for stores.
- (2) State, county, local, and school real estate taxes.
- (3) Water and sewer assessments and taxes.
- (4) Assessments for streets, sidewalks, curbs, gutters, or other special improvements, excluding those made on account of the original construction.
- (5) Premiums for any insurance deemed necessary by Seller or required by Buyer or his nominees, but not including insurance covering the operations of Seller or his nominee as occupants of the Building.
- (6) Repairs and maintenance of the exterior of the Building, as well as the cost of lighting, policing, and maintaining of the parking area.
- (7) Repairs and redecoration of vacant offices and stores.

(b) The additional rent provided for in subparagraph (a) above shall be payable on an annual basis within 60 days following the end of each calendar year, the first payment to cover the first complete calendar year plus the months during which the lease was effective before such year. Simultaneously, Seller shall furnish a certified statement to Buyer or his nominees showing the basis for the payment. Seller shall make his books and records available to Buyer, his nominees, or duly authorized representatives at all reasonable hours for the purpose of auditing and verifying the statements submitted by Seller.

6. *Deposit and liquidated damages.* Upon the execution of this agreement, Buyer will pay \$200,000 as a deposit on account of the purchase price of the property, and Seller will pay Buyer interest on such deposit at the rate of 6 percent per annum, payable monthly until the sale is consummated or the deposit is returned. If Buyer refuses or fails to consummate the sale through no fault of Seller, the deposit and any accrued unpaid interest shall be considered as fixed and liquidated damages to be retained by Seller, and thereupon neither party shall have any further liability to the other party. The parties acknowledge that Seller's actual damages would be difficult to ascertain, and that such deposit represents their best estimate of what the actual damages would be upon such default.

7. *Advances and escrow*

(a) Upon receipt by Buyer of satisfactory evidence that Seller has obtained all necessary licenses and permits to

construct the Building, as well as valid and binding bonds issued by sureties acceptable to Buyer guaranteeing completion of construction of the Building and payment of all costs incurred in connection with such construction on or before December 31, ____ [year], Buyer shall deliver an advance of \$100,000 to the Stamford National Bank at 11 Main Street, Stamford, Connecticut, as Escrow Agent, an additional advance of \$100,000 within 30 days thereafter, and a further advance of \$100,000 within 30 days from the second payment. The checks shall be made payable to Seller and delivered by the Escrow Agent to Seller when and as received. Simultaneously with the receipt of each check, Seller will deliver to the Escrow Agent, for transmittal to Buyer, his promissory note for the amount of the check payable to Buyer, bearing interest payable monthly at the rate of 14 percent per year, each of such notes to be dated as of the date of receipt of the check for which it is issued and to fully mature on or before December 31, ____ [year], the date scheduled for completion of the Building.

(b) The delivery of the checks to the Escrow Agent and the transfer to and acceptance by Seller shall constitute a performance guarantee that the construction of the Building will proceed within 30 days of their acceptance by Seller and also constitute a guarantee of the completion of the Building in accordance with the approved plans and specifications. A Builder's Completion Bond shall cover this guarantee and the Surety shall be responsible to Buyer for completion of the Building.

(c) If Seller is not able to obtain a surety bond or necessary permits and licenses as set forth in subparagraph (a) above, by December 31, ____ [year], all moneys advanced or paid by Buyer or its nominees under this agreement shall upon demand be returned to Buyer or its nominees. Upon such return, this agreement shall terminate and the parties be released from all further obligations hereunder.

8. *Closing*

(a) The closing of title under this agreement shall be on December 31, _____ [year], at 10 a.m. or at an earlier date if the Building has been fully completed.

(b) If for any reason the closing cannot be made by December 31, ____ [year], Seller, as Tenant, shall commence payments to Buyer or his nominees as Landlord, of the minimum rental to be paid under the lease to the same extent as if the lease became effective on January 1, ____ [year], if Buyer or his nominees submit satisfactory evidence to Seller that Buyer or his nominees are ready, willing, and able to consummate the transaction and that the balance of the purchase price is available.

(c) The closing is to be held at the offices of the Escrow Agent. Deposit will be made with the Escrow Agent of the purchase money, the deed of conveyance for execution, and all other documents required of either party under this agreement.

9. *Payment of balance of purchase price.* Upon the consummation of this sale by the closing of title, all funds advanced by Buyer under paragraph 7 shall be credited against the purchase price of \$6 million, and the promissory notes issued by Seller to Buyer shall be cancelled and surrendered to Seller. The \$500,000 balance of the purchase price over and above the mortgage, deposit, and advances shall be paid by Buyer or his nominees to Seller at closing. If the date of completion of the Building and closing date are before December 31, ____ [year], Seller shall give Buyer at least 60-days' prior written notice.

10. *Title and closing costs.* The costs of title examination, title insurance, recording fees, and all other costs, charges, and expenses involved in this transaction shall be borne by Seller.

11. *Deed and title.* The property is to be sold and conveyed to Buyer or his nominee by a good and valid special warranty deed, free of encumbrances, and title is to be good of record. Otherwise, all sums paid by Buyer or his nominees under this agreement are to be returned and the agreement declared null and void at Buyer's option unless the

defects are of such nature as to be readily remediable by legal action. Such legal action must be taken promptly by Seller at his expense.

12. *Adjustments at closing.* At the closing, all taxes affecting the Property and Building shall be currently paid. There shall be no adjustments of taxes at the closing since Seller, as Tenant under the 20-year lease, has agreed to assume and pay all taxes and assessments.

13. *Failure to transfer title.* Notwithstanding any other provisions of this agreement, if Seller is unable to transfer title either because of inability to comply with the requirements of paragraph 11, or inability to complete the Building by December 31, ____ [year], and has not obtained a Builder's Completion Bond, Buyer or his nominees may terminate this agreement. Such termination will cancel Seller's lease from the date of termination, and Seller's only obligation will be the payment of the promissory notes given to the Escrow Agent plus any interest due on such notes and the return of the \$200,000 deposit to Buyer. Upon notice of termination, the Escrow Agent must turn over the promissory notes to Buyer or his nominees. Seller, however, is not relieved of his obligation to pay all of the expenses enumerated in paragraph 10.

14. *Broker.* Seller agrees that the broker in this transaction is William Keef Associates, whose compensation Seller will pay under a separate agreement.

15. *Risk of loss.* The risk of loss or damage to the Building or other casualty is assumed by Seller until the closing.

16. *Violations.* Seller shall, at his expense, comply with all notices of violations of applicable municipal or other local laws against or affecting the Property or Building at the closing date, and both shall be conveyed free from such violations.

17. *Investment by seller.* Buyer intends to form a limited partnership which will be the purchaser of the Property and Building. If a limited partnership purchases both at the closing, Seller shall invest \$100,000 in the partnership to obtain an interest therein. Such interest shall be of the same class of ownership as all other limited partner interests in the partnership.

18. *Entire agreement; modification.* This instrument constitutes the entire agreement between the parties. It may not be changed or terminated except by an agreement duly executed by the parties.

19. *Nonwaiver.* No delay or failure by either party to exercise any right hereunder, and no partial or single exercise of such right, shall constitute a waiver of that or any other right, unless otherwise expressly provided herein.

20. *Binding effect.* This agreement shall be binding upon and inure to the benefit of both parties and their respective heirs, legal representatives, successors, and assigns.

21. *Notices.* All notices hereunder shall be in writing and delivered personally or mailed by certified mail, postage prepaid, addressed to the parties at their last known addresses.

22. *Headings.* Headings in this agreement are for convenience and reference only and shall not be used to interpret or construe its provisions.

23. *Governing law.* This agreement shall be construed in accordance with and governed by the laws of the State of Connecticut.

24. *Counterparts.* This agreement may be executed in one or more counterparts, each of which shall be deemed an original but all of which together shall constitute one and the same instrument.

25. *Time of essence.* Time is of the essence of this agreement.

The parties have duly executed this agreement as of the day and year first above written.

Benjamin Stone

Alexander Courtney



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Current Legal Forms for Real Estate

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Current Legal Forms for Real Estate
Chapter 21 SALES AND EXCHANGES
Part IV. Forms
G. SALES AND LEASEBACKS

25-21 Current Legal Forms for Real Estate FORM 21.82

FORM 21.82 Sale of lease and subleaseback

COMMENT

This form illustrates the application of the sale and leaseback technique to a leasehold interest in improved property. The seller is the owner of a leasehold interest on property which is occupied by various tenants. This leasehold interest is sold to a new owner who in turn enters into a subleasehold with the seller. Thus, the seller (sublessee) will collect rent from the various tenants (as sub-sublessees); the seller will pay rent to the new owner of the leasehold interest (sublessor); and the new owner will pay ground rent to the owner of the fee interest (lessor).

FORM

AGREEMENT made March 28, ____ [year], between Webster-Fisher, Inc., a Delaware corporation, having its principal office in the State of New York at 500 Seventh Avenue, New York, New York ("Seller"), and Charles A. Jonas, residing at 150 Fifth Avenue, New York, New York ("Purchaser").

1. *Sale of ground lease.* Seller agrees to sell and assign and Purchaser agrees to purchase:

All of Seller's right, title, and interest as Tenant in and to that certain lease (and the leasehold estate created thereby) bearing date the 25th of July, ____ [year], made by Universal Building, Inc., as Landlord, to Seller, or Tenant, the "Ground Lease," which was recorded in the office of the Register of the City of New York in the County of New York on July 25, ____ [year], in Liber 12000 of Conveyances at Page 500.

The Ground Lease covers the following described property:

(Insert description)

Together with all right, title, and interest of Seller, if any, in and to any streets or avenues abutting the premises, and the easements appurtenant to the ownership of such premises.

Together also with all equipment and fixtures of every kind and nature whatsoever owned by Seller and used and procured for use in connection with the operation and maintenance of the building on the premises, including all machinery, engines, furnaces, heaters, boilers, elevators, refrigerators, air conditioning compressors, ducts, units and equipment, heating and hot water systems, pipes, plumbing, wiring, gas, steam, water and electrical fittings, tanks, motors, generators, switchboards, lifting, and ventilating equipment.

Together with all rights of Seller, if any, in and to the use of the name Universal Building.

2. *Purchase price.* The purchase price is \$3,356,000, payable as follows:

(a) \$200,000 on the signing of this contract, by check subject to collection, the receipt of which is acknowledged.

(b) \$1.35 million by Purchaser taking the Ground Lease subject to the existing Indenture of Mortgage and Deed of Trust dated as of July 25, ____ [year], made by Seller to The National Bank of New York, as Trustee, the "Leasehold Mortgage," recorded in the office of the Register of the City of New York on July 25, ____ [year], in Liber 10512 of Mortgages at page 700 . The Leasehold Mortgage will be a lien on the Ground Lease in the amount of \$1.35 million after the payment of principal to be made by Seller on or before July 1, ____ [year], the closing date.

(c) \$1.8 million in cash, or good certified check drawn on a bank which is a member of the New York Clearing House Association or check of such a bank, on the execution and delivery of the assignment of the Ground Lease.

3. *Liens and encumbrances on ground lease.* The Ground Lease is sold subject to:

(a) City of New York zoning and building restrictions and regulations, and all other applicable local laws and regulations.

(b) State of facts shown on survey made by James Harvey dated July 26, ____ [year], and redated June 24, ____ [year], by Harold Walsh, a copy of which Purchaser has examined and initialed, and any subsequent changes in such facts that might be shown by an accurate survey if such changes do not render the title unmarketable.

(c) Franchise taxes, if any, against any corporation in the chain of title, if Title guaranty Company or Home Title Company is willing to insure Purchaser, in connection with any title insurance policy procured by Purchaser, against the collection of any such taxes out of the premises.

(d) All taxes, assessments, sewer rents, and water rents, rates and charges, and governmental impositions and charges, which become due and payable after the closing date.

(e) All notes or notices of violations of applicable municipal or other local laws, including zoning ordinances, health codes, multiple dwelling laws, building codes, fire ordinances, and the like, affecting the premises, or any proceeding relating thereto.

(f) The Leasehold Mortgage.

(g) Existing leases and tenancies.

4. *Warranties of Seller.* Seller hereby warrants, which warranty shall survive the conveyance of the Ground Lease, as follows:

(a) The Ground Lease and all improvements thereon are in full compliance with all applicable governmental laws, rules and regulations, including the Americans With Disabilities Act of 1990 and the Accessibility Guidelines and rules and regulations issued thereunder; and

(b) The Ground Lease and all improvements thereon are not in violation of any environmental laws, federal, state or local.

5. *Sublease to seller.* It is a condition of this sale that Purchaser or his assigns, as Tenant under the Ground Lease, and Seller shall enter into a Sublease of the premises in the form annexed as Exhibit 1. Seller, as sublessee, shall execute and deliver to the Trustee under the Leasehold Mortgage, in duplicate, either counterparts of the Sublease or any other instrument required by the Trustee to comply with the provisions of the Leasehold Mortgage.

6. *Closing.* The assignment of the Ground Lease, and the other instruments to be executed and delivered by Seller, shall be delivered upon receipt of the payment of \$1.8 million specified above, at 10 a.m. on July 2, ____ [year], at the office of Webster-Fisher, Inc., 500 Seventh Avenue, New York, New York. Such closing shall be deemed to take place as of July 1, ____ [year], which date (or the first day of the month in which any adjourned closing shall take place, as the case may be) is the closing date. No apportionments or adjustments shall be made or required. Seller shall make on or before the closing date all payments of interest and principal amortization required under the Leasehold Mortgage to and including the closing date. Seller shall produce an estoppel letter from The National Bank of New York, as Trustee, or other satisfactory evidence of the making of all such payments, and showing the unpaid principal balance due under the Leasehold Mortgage as a result of having made such payments.

7. *Adjournment of closing.* Purchaser may adjourn the closing to August 1, ____ [year]. If the closing is adjourned, the purchase price shall be reduced by the amount Seller is required to pay in reduction of the unpaid principal balance due under the Leasehold Mortgage. In addition, the term of the Sublease shall commence on the adjourned closing date, the Sublease shall be dated as of such date, and the month or months preceding the commencement of the term and the rents stipulated therefore in Schedule A attached to the Sublease shall be eliminated from such schedule.

8. *Form and condition of assignment of lease.* The assignment of the Ground Lease shall be in the form annexed as Exhibit 2, or any variation required by the Trustee under the Leasehold Mortgage, and shall be duly executed and acknowledged in triplicate by both parties so as to transfer the Ground Lease to the assignee, free of all encumbrances, except as herein stated, and so as to impose on the assignee, the obligations of the Tenant under the Ground Lease and of the mortgagor under the Leasehold Mortgage to the extent required by such instruments. Seller will take all steps necessary under the Leasehold Mortgage to comply with its provisions relating to such assignment of the Ground Lease, and this provision shall survive the closing.

9. *Fire or other casualty.* The parties waive the provisions of Section 5-1311 of the General Obligations Law and agree that if, before the closing, the premises is damaged by fire or other casualty and the loss does not exceed \$200,000, or is partially taken by eminent domain, the parties' rights shall be the same as if the casualty had occurred on the first day of the term of the Sublease. If the loss exceeds \$200,000, Purchaser may terminate this contract by giving Seller written notice within 30 days after the casualty occurs. Upon such termination, Seller shall return to Purchaser the \$200,000 paid to Seller on the signing hereof, this contract shall be null and void, and neither party shall have any further claim against the other hereunder. If Purchaser does not elect to cancel this contract, the parties' rights shall be the same as if the casualty had occurred on the first day of the term of the Sublease.

10. *Insurance.* Seller shall maintain in full force and effect until the closing all insurance carried by it as required by the terms of the Ground Lease.

11. *Failure of good title.* If Seller, because of unmarketability of title or otherwise, cannot deliver title to the Ground Lease in accordance with the terms of this contract, and Purchaser rejects whatever title Seller can give, Seller will return to Purchaser the \$200,000 Purchaser paid on the execution and delivery hereof. In addition, Seller will reimburse Purchaser the reasonable expenses incurred for title examination, such expenses not to exceed the customary net charges of title companies which are members of The New York Board of Title Underwriters. Thereupon, this contract shall become null and void and neither party shall have any claim against the other hereunder.

12. *Default by purchaser.* In the event of a default by Purchaser or his assigns, Seller's rights and remedies shall be limited to the retention by Seller as liquidated damages of the \$200,000 paid by Purchaser upon the execution hereof, and Purchaser shall be deemed released of any further obligation hereunder. The parties represent that said sum represents their best estimate of the actual damages to Seller which would be difficult to ascertain.

13. *Representations as to broker.* Each party represents to the other that no broker had any part in bringing about this transaction, or has been consulted by, or has approached such party in connection therewith.

14. *Additional data.* Seller shall make available to Purchaser all documents or copies thereof pertaining to the premises and its operation, including information as to income and expenses, required by the Securities and Exchange Commission in connection with any registration statement or prospectus that Purchaser desires to file with the Commission in connection with this transaction.

15. *Seller's representation and warranty.* Seller represents that, upon the execution and delivery of the assignment of the Ground Lease, the Ground Lease will be in full force and effect as a valid and subsisting lease. On the closing date, Seller will warrant that it has had no notice from the Landlord under the Ground Lease, nor is it aware, of any existing default by Tenant under the Ground Lease. The foregoing representation and warranty shall survive the closing of this transaction.

16. *Modification of ground lease.* So long as Purchaser is not in default hereunder, Seller shall not change, amend, or modify the Ground Lease or the Leasehold Mortgage without Purchaser's written consent.

17. *Assignment.* Purchaser may assign this contract provided that Seller is given written notice thereof at least five days prior to the closing date.

18. *Entire agreement; modification.* This contract constitutes the entire agreement between the parties. It may not be changed or terminated except by an agreement duly executed by the parties.

19. *Notices.* All notices hereunder shall, unless otherwise expressly provided herein, be in writing and be deemed to have been given when mailed by registered or certified mail, postage prepaid, if by Purchaser, to Seller at its address stated above, and if by Seller, to Purchaser, c/o James & Harrison, Esqs., 200 Madison Avenue, New York, New York.

20. *Binding effect.* This contract shall be binding upon and inure to the benefit of both parties and their respective heirs, legal representatives, successors, and assigns.

21. *Nonwaiver.* No delay or failure by either party to exercise any right hereunder, and no partial or single exercise of such right, shall constitute a waiver of that or any other right, unless otherwise expressly provided herein.

22. *Headings.* Headings in this contract are for convenience and reference only and shall not be used to interpret or

construe its provisions.

23. *Governing law.* This agreement shall be construed in accordance with and governed by the laws of the State of New York.

24. *Counterparts.* This contract may be executed in one or more counterparts, each of which shall be deemed an original but all of which together shall constitute one and the same instrument.

25. *Time of essence.* Time is of the essence of this agreement.

The parties have duly executed this agreement the day and year first above written.

Corporate Seal

Attest:

Webster-Fisher, Inc.

Secretary

By _____
President

Purchaser



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Current Legal Forms for Real Estate

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Current Legal Forms for Real Estate
Chapter 21 SALES AND EXCHANGES
Part IV. Forms
G. SALES AND LEASEBACKS

25-21 Current Legal Forms for Real Estate FORM 21.83

FORM 21.83 Sale and leaseback with purchase money second mortgage--mortgage assigned by seller to purchaser as security for seller's obligations under lease

COMMENT

In this sale and leaseback transaction the new owner will pay the purchase price by taking title subject to an existing first mortgage, by cash, and by a promissory note secured by a purchase money second mortgage. As part of the transaction, however, the seller is required to assign the purchase money note and mortgage back to the purchaser as collateral security for the seller's obligations as tenant under the leaseback. In effect, therefore, the purchase money mortgage will serve as security for both parties. If the rent is paid by the seller, the purchaser will pay his mortgage debt. If the rent is not paid by the seller, the mortgage debt will serve to reduce the damages sustained by the purchaser as landlord under the lease to the seller.

FORM

AGREEMENT made October 6, ____ [year], by and between Graham Baker and Marian Baker, his wife, as joint tenants ("Sellers"), and David T. Cowin ("Buyer").

1. *Sale.* Sellers agree to sell to Buyer, and Buyer agrees to buy from Sellers, the following described real estate, commonly known and referred to as Garden City Apartments, 1000 Maple Avenue, West Sacramento, California, together with all improvements thereon and personal property owned by Sellers and now situated thereon, situate in Yolo County, State of California:

(Insert description)

The premises shall be conveyed subject to matters set forth in items one through eight in the preliminary title report for a policy of title insurance issued by the Mountain States Title Guaranty Company, Yolo County Division, and subject to existing leases and tenancies.

2. *Purchase price.* The purchase price for the premises shall be \$2 million, which Buyer shall pay as follows:

(a) \$30,000 at the signing of this agreement, which amount has been deposited with the Pacific Title Guaranty Company, Sacramento, California, Escrow Agent.

(b) \$570,000 shall be deposited by Buyer with the Escrow Agent on or before the closing date.

(c) \$930,000 by the acceptance of title by Buyer subject to a First Deed of Trust constituting a lien against the premises in such aggregate unpaid principal balance.

(d) The balance shall be paid by the delivery to Sellers of a promissory note in the amount of \$470,000. The note shall bear interest, from the date of the payment and discharge of the presently existing First Deed of Trust, of 8 percent per annum and shall provide for quarter-annual amortization payments of \$35,623.20 per annum, the first quarter-annual installment of amortization becoming due 90 days after the payment and discharge of the presently existing First Deed of Trust. Interest shall be payable quarter-annually with each installment of amortization, computed on unpaid balances of principal. The promissory note shall be secured by a Second Deed of Trust against the premises and such note and Second Deed of Trust shall be in the forms annexed as Schedule A.

3. *Consent of trust holder to sale.* Sellers shall deliver to Buyer within ten days of the date hereof a consent from the holder of the First Deed of Trust to the sale of the premises to Buyer or his assigns. Such consent shall waive all rights of the holder of such deed of trust to accelerate the unpaid principal balance upon any sale of the premises. Sellers shall also secure within such period the removal of the matters listed as items nine and ten on the preliminary title report issued by the Mountain States Title Guaranty Company.

4. *Sellers' representations.* To induce Buyer to enter into this agreement, Sellers make the following representations, covenants, and warranties, all of which shall be true at and survive the closing:

(a) The attached Schedule B is a true and accurate schedule of leases, tenancies, and rentals presently being collected by Sellers; there are no rents prepaid for more than one month in advance; and no tenant has been granted any rent-free occupancy. All decorating and alteration work which Sellers are obligated on or before the closing date to perform for any tenant has been performed or will be performed before the closing date.

(b) The attached Schedule C is a true and accurate schedule of insurance carried on the premises. Such insurance shall not be increased between the date hereof and the closing date. Sellers have complied with all notices and requests from the insurance companies issuing such policies. Sellers shall comply with all such notices and requests received before the closing date or, in the alternative, will obviate the need for compliance.

(c) The attached Schedule D is a true and accurate payroll record of Sellers for the period indicated.

(d) All maintenance or other contracts (exclusive of leases and tenancy agreements) affecting the premises are either terminable at will or on not more than 60 days' notice.

(e) Sellers have performed all work with respect to the premises required by the holder of the First Deed of Trust at the date hereof.

(f) The buildings located upon the premises conformed at the date of construction to all of the requirements of applicable zoning ordinances, and a permit for the construction of such buildings was duly granted, and are in full compliance with the Americans with Disabilities Act of 1990 ("ADA") and the Accessibility Guidelines and rules and regulations issued thereunder. No changes or alterations have been made to such buildings since their completion which would render them in violation of the applicable zoning ordinances. Sellers have no knowledge of any violation or alleged violation of any applicable building code, fire regulation, or other governmental order or regulation, including the ADA and all rules and regulations issued thereunder, and Sellers will cure before the closing date (or as soon thereafter as the same reasonably can be cured, and the closing date shall be adjourned until the same is cured) all violations of which Sellers receive written notice before the closing date from any competent governmental authority.

(g) All apartments contained in the premises are furnished with the items of personal property listed on the annexed Schedule E, and all of such personal property is included in this sale. All of such personal property is owned by Sellers free and clear of all liens other than the liens of the existing First Deed of Trust and the Security Interests given by Sellers in connection with such First Deed of Trust.

(h) There is no existing default under the First Deed of Trust or the Security Interests given in connection with such First Deed of Trust. The attached Schedule F is a true and accurate schedule showing the balance of principal due on the First Deed of Trust as of October 1, ____ [year], the interest rate, the monthly payments of interest and amortization, and the maturity date.

(i) The cost of all utilities (gas, electric, water, and sewer service) incurred in the operation of the premises for the calendar year ____ [year] did not exceed \$44,500. The cost of real and personal property taxes and licenses for such calendar year did not exceed \$40,100.

(j) All of the lots which comprise the premises make up one contiguous parcel. The streets on which the premises abut are legally dedicated public streets. All utilities which enter the premises enter through publicly dedicated streets or if over private lands, enter by virtue of valid easements. Each of the buildings erected on the premises is totally within the boundary lines of the lands being conveyed and do not violate any restrictions. There are no encroachments upon the premises.

(k) The premises, land and building are in full compliance with all environmental laws, federal, state and local.

5. *Deed.* Title shall be conveyed by Sellers on the closing date by general warranty deed duly executed and acknowledged conveying to Buyer a fee simple title to the premises free and clear of all liens and encumbrances except as herein provided. The purchase money promissory note and the accompanying Second Deed of Trust properly executed shall be delivered to the Escrow Agent concurrently with the deposit by Buyer of the portion of the purchase price due on or before the closing date. Title to the personal property shall be conveyed by bill of sale with affidavit of title, subject only to the Security Interests referred to herein.

6. *Title policy.* Sellers shall deliver to Buyer a standard form Owner's Title Insurance Policy in ATA form, in the amount of \$2 million from the Mountain States Title Insurance Company insuring a good and marketable fee simple title in Buyer, except only as herein set forth. Sellers and Buyer shall each pay one half of the cost of such policy.

7. *Leaseback.* This transaction is subject to the condition that upon the closing of title Buyer shall grant to Sellers a lease of the entire premises in the form annexed as Schedule G and Sellers shall execute such lease as tenants. The execution and delivery of such lease shall take place at the offices of the Escrow Agent and duplicate originals of such executed lease shall be delivered to the Escrow Agent for redelivery to Sellers and Buyer after recordation of the deed and Second Deed of Trust.

8. *Fire or other casualty.* If before delivery of the deed, damage occurs to the improvements on the premises by fire or any other casualty which would cost more than \$30,000 to repair, and such repair is not completed on or before the closing date, Buyer may cancel this agreement, in which event all moneys deposited hereunder shall be returned by Sellers to Buyer.

9. *Purchase money deed of trust as collateral under leaseback.* Notwithstanding any contrary provision herein, Sellers shall at the closing of title assign to Buyer as landlord under the lease referred to in paragraph 7 the purchase money promissory note and the accompanying Second Deed of Trust which are to be held by Buyer as landlord as security for the performance of Sellers' obligations as tenants under such lease, all as provided for in paragraph 21 of such lease.

10. *Closing.* The closing of title shall take place on December 6, ____ [year], at 10 a.m., or on any other date the parties agree upon. Such closing shall be held at the offices of the Mountain States Title Guaranty Company, Sacramento, California.

11. *Broker.* Sellers shall pay a brokerage commission to Grayson & Company, Sacramento, California, in accordance with a separate agreement. Buyer represents that no other broker was responsible for this transaction.

12. *Entire agreement; modification.* This instrument constitutes the entire agreement between the parties with respect to the subject matter hereof. Buyer acknowledges that Sellers have made no representations or warranties concerning this agreement or its subject matter, or the condition of the improvements upon the premises, except to the extent expressly set forth herein. This agreement may not be changed or terminated except by an agreement duly executed by both parties.

13. *Notices.* All notices hereunder shall be in writing and be deemed to have been delivered for all purposes upon the second business day following the date upon which such notice was deposited in the United States mail in the State of California, by registered or certified mail, postage prepaid, if to Buyer, c/o Harris & Patton, 200 Park Avenue, Sacramento, California, and if to Sellers, c/o Boone & Smith, 100 H Street, Sacramento, California.

14. *Default by buyer.* If Buyer defaults in making any payment or performing any other covenant hereunder, all monies previously paid or deposited hereunder by Buyer shall be paid over to and retained by Sellers as liquidated damages, the agreement shall be deemed cancelled, and neither party shall have any further claim against the other.

15. *Assignment.* Buyer may assign this agreement. Upon Sellers' receipt of written notification of such assignment, Buyer shall be relieved of all future liability hereunder, and the assignee shall execute the purchase money promissory note and the accompanying Second Deed of Trust to be given at the closing, as well as all other closing documents.

16. *Binding effect.* This agreement shall be binding upon and inure to the benefit of both parties and their respective heirs, legal representatives, and assigns.

17. *Nonwaiver.* No delay or failure by either party to exercise any right hereunder, and no partial or single exercise of any such right, shall constitute a waiver of that or any other right, unless otherwise expressly provided herein.

18. *Headings.* Headings in this agreement are for convenience and reference only and shall not be used to interpret or construe its provisions.

19. *Governing law.* This agreement shall be construed in accordance with and governed by the laws of the State of California.

20. *Counterparts.* This agreement may be executed in one or more counterparts, each of which shall be deemed an original but all of which together shall constitute one and the same instrument.

21. *Time of essence.* Time is of the essence of this agreement.

The parties have caused the execution hereof on the day and year first above written.

Sellers:

Graham Baker

Marian Baker

Buyer:

David T. Cowin

[Acknowledgments]



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Current Legal Forms for Real Estate

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Current Legal Forms for Real Estate
Chapter 21 SALES AND EXCHANGES
Part IV. Forms
G. SALES AND LEASEBACKS

25-21 Current Legal Forms for Real Estate FORM 21.84

FORM 21.84 Sale of property acquired in sale and leaseback transaction--second mortgage as security for rental obligations of lessee

COMMENT

In this form the property was originally acquired by the present owner in a sale and leaseback transaction. In the earlier transaction, the purchase money second mortgage given by the present owner as part consideration for the acquisition was also set up as collateral security by the former owner for the lease given to him. In this transaction, the present owner is selling his interest in the fee for cash, subject to the lease to the former owner, subject to a first mortgage, and subject to the purchase money second mortgage previously given by the present owner. The new purchaser as owner of the fee will, of course, have the benefit of the special provision in the second mortgage which states that no owner need make any payments of principal or interest unless the rent and other charges due under the lease are paid. Thus, the lessee (the original seller in the sale and leaseback transaction) will continue to receive payments on the mortgage debt only if the lease requirements are fulfilled.

As to the tax considerations in a sale and leaseback, see The Tax Background § 21.13.

FORM

AGREEMENT made March 26, ____ [year], between Garden City Corporation, a New York corporation, having its office at 500 Fifth Avenue, Borough of Manhattan, City of New York ("Seller"), and Dawson Realty Company, a New York limited partnership, having an office at 100 Fourth Avenue, Borough of Manhattan, City of New York ("Purchaser").

1. *Sale.* Seller agrees to sell and convey to Purchaser, and Purchaser agrees to purchase all those certain pieces or parcels of land, with the buildings and improvements thereon, in Bayshore, County of Suffolk, State of New York, as more particularly bounded and described in Schedule A annexed hereto.

2. *Purchase price.* The purchase price is \$4 million, payable as follows:

(a) \$1.2 million by the Purchaser taking title subject to a first mortgage in that amount. The mortgage shall be for a term of 15 years and four months from the date of closing, and shall provide for constant monthly installments of principal and interest, each for \$10,000, commencing one month from the date of closing, and continuing each and every month thereafter until the entire principal sum of \$1.2 million has been fully paid. Each payment shall be applied first to interest at the rate of 8 percent per annum and the balance against the principal amount. Such mortgage may require that the lease to General Products Corporation, as tenant, be assigned to the mortgagee as further collateral security.

(b) \$1.15 million by Purchaser taking title subject to a second mortgage in that amount. The mortgage shall provide for constant monthly installments of principal and interest, each for \$6,000, until fully paid. Each payment shall be applied and paid first to interest accrued on the principal sum outstanding to the date of payment at the rate of 10 percent per annum and the balance to reduction of the principal amount. Copies of such mortgage and the note it secures have been exhibited to Purchaser which agrees to take title subject to all the terms and conditions thereof.

(c) \$1.65 million, of which \$200,000 has previously been paid by Purchaser, receipt of which is acknowledged by Seller, the balance of \$1.45 million to be paid in cash or by good certified check, drawn on a New York City Clearing House bank, on the delivery of the deed.

3. *Liens and encumbrances.* The premises are sold subject to:

(a) The net lease between the Garden City Corporation, as the Landlord, and the General Products Corporation, as the Tenant, the "Lease," as set forth in Exhibit 1 annexed hereto. Seller warrants and represents that the Lease is in full force and effect and has not been modified or changed and will not be modified or changed by Seller.

(b) The state of facts shown on a survey made by Payson T. Williams, Licensed Professional Engineer and Land Surveyor, dated November 10, 1990, and to any change in the physical condition since the date thereof, provided any such change does not render title unmarketable.

(c) Covenants and restrictions of record.

(d) Unpaid license fees and franchise tax due by the General Products Corporation, if the Guarantee Title Insurance Company will insure against collection of the same out of the premises described in Schedule A.

(e) Zoning regulations and ordinances of the city, town, or village in which the premises lie which are not violated by existing structures or the use thereof.

(f) All taxes, water charges, and other assessments, ordinary or extraordinary, owing and unpaid as of the date of the closing of title, but subject, nevertheless, to the obligations of the General Products Corporation, as the Tenant, under the Lease, to pay the same.

(g) All notes or notices of violations of applicable municipal or other local laws, including zoning ordinances, health codes, multiple dwelling laws, building codes, fire ordinances, and the like, against or affecting the premises described in Schedule A as of the date of the delivery of the deed, but subject, nevertheless, to the obligation of the General

Products Corporation to comply with the same under the Lease.

4. *Warranties of Seller.* Seller warrants that the premises are in compliance with all applicable environmental laws, rules and regulations, federal, state and local, and with the Americans With Disabilities Act of 1990 and all rules and regulations issued thereunder.

5. *Placing first mortgage.* Seller has advised Purchaser that the first mortgage described in paragraph 2(a) of this contract is not in existence at the date hereof. Seller undertakes and agrees that at the time of the closing of this transaction such mortgage will be in existence, and that it will bear all costs and expenses incurred in connection with placing such mortgage.

6. *Limitation in second mortgage.* Seller warrants and represents to Purchaser that the second mortgage described in paragraph 2(b) of this contract includes the following provision: "The parties agree that neither the mortgagor nor any subsequent owner of the premises shall be required to pay any installment of principal and interest due under this mortgage, or the note which it secures, unless the rent and other charges due under the Lease for the corresponding month or months have been paid to the Landlord. If the Lease is terminated because of the Tenant's default, this mortgage, and the note that it secures, shall be deemed cancelled. In that event, General Products Corporation, or any subsequent owner and holder of this mortgage and the note that it secures, shall execute and deliver all further instruments necessary to carry out the provisions hereof, including the discharge, cancellation, or release of this mortgage. The cancellation of the mortgage referred to herein shall be self-operative and the owner and holder of this mortgage, and the note secured by it, covenants and agrees to appoint the mortgagor or any subsequent owner of the mortgaged premises its attorney-in-fact to execute the satisfaction, cancellation, discharge, or release of this mortgage if the same is required. The foregoing shall not be deemed in derogation of any other rights or remedies permitted the mortgagor by law."

7. *Documents to be delivered by seller.* At the time of the closing, Seller shall deliver to Purchaser the following documents:

(a) The net Lease between the Garden City Corporation, as the Landlord, and the General Products Corporation, as the Tenant, as set forth in Exhibit 1 annexed hereto, together with an assignment of such Lease to Purchaser.

(b) A certified copy of the resolution adopted by the General Products Corporation authorizing, among other things, the execution and delivery of the Lease.

(c) Opinion letter of Harris, Walker & Simpson, counsel for General Products Corporation, in respect of the execution and delivery of the Lease by General Products Corporation.

The originals of the instruments referred to in (a) to (c) inclusive have been exhibited to and initialed by Purchaser.

8. *Prorations.* There shall be no adjustments or apportionments between the parties at the time of the closing, except:

(a) Rent under the Lease shall be adjusted as of the date of the closing for the month of such closing.

(b) Interest on the second mortgage described in paragraph 2(b) of this contract shall be adjusted as of the date of the closing.

9. *Default by seller.* If Seller defaults under this contract, it shall refund to Purchaser all monies paid by Purchaser, after which neither party shall have any further claim against the other hereunder.

10. *Default by purchaser.* If Purchaser defaults under this contract, Seller may cancel it by giving written notice to

Purchaser and refunding all payments received from Purchaser, whereupon neither party shall have any further claim against the other hereunder.

11. *Deed.* The deed shall be the usual bargain and sale deed, with covenants against grantor's acts, in proper statutory form for record, and shall be duly executed and acknowledged and have revenue stamps in the proper amount affixed thereto by Seller, at Seller's expense, so as to convey to Purchaser the fee simple of the premises described in Schedule A, free from all encumbrances except as herein stated, and shall also contain the covenant required by Subdivision 5 of Section 13 of the Lien Law.

12. *Closing.* The deed shall be delivered, upon receipt of the payments provided for herein, at the office of Bailey & Dawes, 100 Main Street, Bayshore, Long Island, at 10 a.m., on June 15, ____ [year], or at any earlier date agreed upon by the parties.

13. *Broker.* Both parties represent that no broker brought about this sale, and that this sale was negotiated solely between the principals without the intervention of any broker.

14. *Entire agreement; modification.* This instrument constitutes the entire agreement between the parties. It may not be changed or terminated except by an agreement duly executed by both parties.

15. *Notices.* All notices hereunder shall, unless otherwise expressly provided herein, be in writing and be deemed to have been given when mailed by registered or certified mail, postage prepaid, to the other party at the address set forth above, or at the last changed address given by the other party.

16. *Binding effect.* This contract shall be binding upon and inure to the benefit of both parties and their respective heirs, legal representatives, successors, and assigns.

17. *Nonwaiver.* No delay or failure by either party to exercise any right hereunder, and no partial or single exercise of any such right, shall constitute a waiver of that or any other right, unless otherwise expressly provided herein.

18. *Governing law.* This contract shall be construed in accordance with and governed by the laws of the State of New York.

19. *Counterparts.* This contract may be executed in one or more counterparts, each of which shall be deemed an original but all of which together shall constitute one and the same instrument.

20. *Time of essence.* Time is of the essence of this contract.

The parties have duly executed this contract.

Attest:

Secretary

Dawson Realty Company

By _____
General Partner

Garden City Corporation

By _____
President

[Acknowledgments]



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Current Legal Forms for Real Estate
Chapter 21 SALES AND EXCHANGES
Part IV. Forms
G. SALES AND LEASEBACKS

25-21 Current Legal Forms for Real Estate FORM 21.85

FORM 21.85 Sale and leaseback with purchase money second mortgage--mortgage as security for seller's obligations under lease--provision for division between purchaser and seller of proceeds of refinancing first mortgage

COMMENT

In this agreement payment of that part of the purchase price represented by a purchase money second mortgage is conditioned upon the fulfillment by the seller of his obligations under the leaseback. In this case, the note and purchase money second mortgage and a blank assignment are to be held in escrow by one of the attorneys. Interest payments on the note are to be made to the seller while the note is on deposit with the escrow agent. If the seller is evicted from the premises by reason of his default under the lease, the purchaser may elect to declare the mortgage debt satisfied or may sell the note. In the latter case the seller will receive the proceeds in excess of the amount necessary to satisfy delinquencies under the lease.

The leaseback in this form requires the payment not only of a fixed rent, but also of a percentage of gross rentals received from tenants in excess of a specified amount. Thus, the purchaser has an interest in any possible increase in rental values during the lease term. On the other hand, the seller has retained an interest in the equity in the property, because the agreement permits either purchaser or seller to arrange for the refinancing of the first mortgage. The proceeds from such a refinancing will first be paid to the seller in satisfaction of the second mortgage obligation. Any excess amounts are to be divided between the seller and the purchaser. Proceeds from the refinancing received by the seller in excess of the tax basis of the mortgage would be reportable as income in the year received, with the same character as capital gain or ordinary income as the gain reported upon the original sale. The purchaser's tax basis would not be affected by the mortgage refinancing, except to the extent of the amount paid to the seller in excess of the amount of the purchase money mortgage.

FORM

AGREEMENT made December 15, _____ [year], between 185 Broadway Corporation, a New York corporation, with its principal place of business at 100 William Street, New York, New York ("Seller"), and Berrens Realty Corp., a New York corporation, with its principal office at 10 West 40th Street, New York, New York ("Purchaser").

1. *Sale.* Seller agrees to sell and convey, and Purchaser agrees to purchase,

ALL that certain plot, piece or parcel of land, with the buildings and improvements thereon erected, situate, lying, and being in the Borough of Manhattan, City, County, and State of New York, bounded and described as follows:

(Insert description)

The sale includes all of the following:

(a) Strips and gores of land adjoining or abutting the premises.

(b) Any agreement, privilege, and rights of way contiguous or adjacent to the premises, and all the easements, if any, inuring to the benefit of the fee owners thereof.

(c) Appurtenances belonging to or in any way relating to the premises, and right, title, and interest in and to vaults, if any, under the sidewalks or streets abutting the premises.

2. *Survey, restrictions, and tenancies.* The premises are sold subject to the following:

(a) Any state of facts shown by an accurate survey, if such facts do not render title unmarketable.

(b) Covenants, easements, and restrictions of record, if they do not prohibit the maintenance of the present structure on the premises and the use thereof. Seller represents that it has not created any covenants, easements, or restrictions which may now or hereafter affect the premises.

(c) Zoning regulations and ordinances of the city, town, or village in which the premises lie which are not violated by existing structures.

(d) Rights under existing leases and tenancies as per attached schedule, and under any new leases or extensions of old leases made between the date hereof and the date of title closing, if such new leases or extensions are made at the established market rentals.

3. *Purchase price.* The purchase price is \$3.25 million, payable as follows:

(a) \$70,000 on the signing of this contract, by check subject to collection, receipt of which is acknowledged.

(b) \$560,000 by bank, cashier's, or good certified check to the direct order of Seller, as payee, on a New York City clearing house bank, on delivery of the deed.

(c) \$1.82 million by taking title subject to a first mortgage now a lien on the premises in that reduced amount, bearing

interest at the rate of 8 percent per annum, and payable in quarter annual installments of \$48,750 on the 1st days of February, May, August, and November in each and every year, to and including August 1, ____ [year]; and in quarter annual installments of \$52,500 on November 1, ____ [year], and quarter-annually thereafter on the 1st days of February, May, August, and November in each and every year to and including May 1, ____ [year]; and the balance on August 1, ____ [year]. Each such quarter-annual payment shall be applied first towards the payment of interest on the unpaid principal amount, computed at the rate of 8 percent per annum and the balance in reduction of the principal of such mortgage. Purchaser's attorney has examined and initialed a copy of the mortgage. Seller shall make all amortization payments required by such mortgage and accompanying note to the date title closing without credit or allowance. All such payments shall have the effect of reducing the purchase price for the premises to the extent of such reduction. Seller represents and warrants that it is not in default under this mortgage, and that it has complied with each term and provision thereof.

(d) \$800,000 by Purchaser or its assigns executing, acknowledging, and delivering to Seller, a note satisfactory to Seller, secured by a purchase money second mortgage, on the premises, in that amount, which shall become due 25 years from the date of title closing, together with interest at the rate of 10 percent per annum. Interest shall be payable one month from the date of the closing of title and monthly thereafter to maturity. The mortgagor, or any owner of the premises, may prepay all or any part of the principal in multiples of \$1,000, on any interest payment date, upon giving to the holder of the mortgage at least 30-days' prior written notice. Such mortgage shall contain the following provision:

"The mortgagee will look solely to the property covered by this mortgage for the payment and satisfaction of the principal amount and the interest and will seek no personal or deficiency judgment against the mortgagor. Nothing herein contained, however, shall in any way affect or impair the lien of this mortgage."

Such note and mortgage shall be drawn on the standard forms of the New York Board of Title Underwriters for mortgages of like lien; and shall be drawn by Seller's attorney at the expense of Purchaser, who shall also pay the mortgage recording tax and recording fees. Such mortgage shall also contain the additional provisions set forth below.

4. *Apportionments.* The following are to be apportioned as of the closing date:

- (a) Interest on the first mortgage.
- (b) All rents, as per attached rent roll.
- (c) Premiums on existing transferable insurance policies, as per attached schedule.
- (d) Taxes, sewer rents, electricity, submeters, and water charges. If title closing occurs before the tax rate is fixed, the apportionment of taxes shall be upon the basis of the tax rate for the next preceding year applied to the latest assessed valuation.
- (e) Fuel, if any.
- (f) Supplies unopened and unused.
- (g) Union benefits, vacation pay, and employees' salaries, as per attached schedule.
- (h) Service contracts, as per attached schedule.
- (i) All other items customarily apportioned in transactions of this type.

5. *Assessments.* If, when the deed is delivered, all or part of the premises is or has been affected by an assessment or

assessments which are or may become payable in annual installments, of which the first installment is then a charge or lien, or has been paid, for the purposes of this contract all the unpaid installments of any such assessment, including those which are to become due and payable after delivery of the deed, shall be deemed to be due and payable and to be liens upon the premises affected thereby and shall be paid and discharged by Seller, upon delivery of the deed.

6. *Leaseback.* It is a condition of this contract and sale that at the time of title closing Purchaser, as landlord, and Seller, as tenant, will enter into a lease of the premises upon terms and conditions set forth herein and in the form of the proposed annexed lease. The provisions of this contract and such proposed lease are intended to operate so that they shall form and be read as a single agreement.

7. *Departmental violations.* Purchaser shall take title subject to all governmental violations against the premises, if Seller, as tenant under the lease to be executed contemporaneously with the closing of title, complies with the provisions of such lease governing the violations and, in addition, deposits with Purchaser at the closing any amount required to insure that the violations are removed within a reasonable time thereafter. Seller warrants that it has no knowledge of any violations that cannot be removed by the expenditure of nominal amounts of money, including violations of environmental laws, rules and regulations and with the Americans With Disabilities Act of 1990, and all rules and regulations issued thereunder. This provision and warranty shall survive delivery of the deed.

8. *Fixtures and personal property.* All plumbing, heating, lighting, and other fixtures and articles of personal property (except portable lamps and other articles and fixtures belonging to tenants) attached or appurtenant to, or used in connection with the operation of the premises, are represented to be owned by Seller, and to the extent that the same are located on the premises at the time of delivery of the deed, are included in this sale. Seller shall not remove any such articles of personal property unless such removal is due to obsolescence or for the purpose of making repairs. All articles of personal property owned by Seller are free and clear of liens and encumbrances. This provision shall survive delivery of the deed.

9. *Unpaid franchise taxes.* Unpaid franchise taxes or unfiled reports of Seller or any other corporation in the chain of title shall be no objection to title if Seller leaves a reasonable deposit with its attorney or the title company, in escrow, to secure the filing of reports, the payment of any unpaid franchise taxes, and the issuance of necessary releases within 90 days from date of closing title, and the title company insures against the collection of such items from the premises. This provision shall survive delivery of the deed.

10. *Condition of premises.* Seller has not made and does not make any warranties or representations as to the physical condition, income, expenses, or other matter or thing affecting or relating to the premises, except as herein specifically set forth. Purchaser shall take the premises "as is." Seller is not liable or bound in any manner by any verbal or written statements, representations, real estate brokers' "set-ups," or information pertaining to the premises, furnished by any real estate broker, agent, employee, or other person, unless the same are specifically set forth herein.

11. *Defects in title.* Not less than ten days before the closing date, Purchaser shall give written notice to Seller's attorney of any defects or objections to marketability of title, or objections of any kind, separately specifying and setting forth in detail each such defect or objection. If Seller is unable to convey a good and marketable title, in accordance with this contract, Purchaser may either accept any title Seller is able to convey without any reduction or abatement of the purchase price, or rescind this contract. If Purchaser elects to rescind, Seller's sole obligation shall be to refund any deposits made by Purchaser, together with the cost of any survey made by Purchaser and the net cost of title examination. (The term "net cost of title examination" means the expenses actually incurred by Purchaser for title examination, but in no event to exceed the net amount that a title company in the City of New York would charge without issuance of policy.) As soon as such refund and reimbursement is made, this contract shall terminate, neither party shall have any further claim against the other, and any lien of Purchaser against the premises shall wholly cease. Nothing contained herein, however, shall require Seller to bring any action or proceeding, or otherwise to incur any expense, in order to render title to the premises marketable. Acceptance of a deed by Purchaser shall be deemed a full

performance and discharge of all of Seller's agreements and obligations hereunder, except those stated to survive delivery of the deed.

12. *Deed.* The deed shall be a bargain and sale deed with covenants against grantor's acts in proper statutory short form for record, be duly executed and acknowledged, and contain the covenant required by subdivision (5) of Section 13 of the Lien Law, so as to convey to Purchaser the fee simple of the premises free from any encumbrances except as herein stated. Seller shall pay the New York City real property transfer tax by delivering a certified check in that amount to the title company representative at the time of closing.

13. *Default by purchaser.* In consideration of Purchaser depositing \$70,000 with Seller upon the execution and delivery of this contract, Seller shall, if Purchaser defaults in complying with the terms hereof, look solely to such amount, which will be deemed to be the liquidated damages to Seller caused by such default. Said sum represents their best estimate of what the actual damages would be if Purchaser defaults, which damages would be difficult to ascertain. Purchaser shall not look to Seller, by specific performance or otherwise, for any damages or other claim with respect to any such default.

14. *Broker.* Purchaser warrants and represents, and the price of the premises has been adjusted by reason of this warranty and representation, that no broker brought about this transaction or participated in it in any way. This provision shall survive delivery of the deed.

15. *Leaseback provisions and purchase money mortgage.* The parties shall at title closing make provision, either by separate agreement, or by inclusion in the lease referred to in paragraph 6, or in the note and purchase money mortgage referred to in paragraph 3(d), as required by their respective attorneys, for the following covenants and agreements:

(a) The net annual rent under such lease shall be \$482,500, payable in equal monthly installments in advance on the rent day until November 1, ____ [year], on which date the net annual rent shall be increased to \$492,500, similarly payable in equal monthly installments in advance.

(b) In addition to the net annual rent under subparagraph (a), the lessee shall pay to the landlord, as additional rent, a sum equal to 15 percent of any excess of the gross rent paid by the tenants, subtenants, and other occupants of the premises, during each year of the term of such lease over and above \$1 million per annum, the first year to commence as of date of execution of the lease. Payment of such additional rent shall be made annually as set forth below.

(c) The term "gross rent" as used in subparagraph (b) shall mean all rent received from the tenants, subtenants, and other occupants of the premises exclusive of income or so-called "additional rent" derived from the sale of electricity, hot or cold water, steam, tax escalator clauses, or from any items other than ordinary rental for occupancy of space.

(d) On the 15th day of the 14th month following the commencement of the term of such lease, and annually thereafter, the lessee shall furnish to the landlord a true and correct verified statement showing the gross rent collected from the premises for the preceding year, and pay to the landlord any sum shown to be due to the landlord as such additional rent. The same procedure shall be followed throughout the term of such lease and any renewals.

(e) Seller shall deposit the note and purchase money mortgage referred to in of paragraph 3(d) with the landlord as collateral security for the faithful performance by the lessee of the terms, covenants, and conditions of the lease. Such deposit shall be made by an appropriate assignment of the note and purchase money mortgage to the landlord which shall, among other things, recite that the assignment is only security for the obligations under the lease. Such original note and mortgage and a duly executed reassignment in blank to be executed by the landlord shall be held in escrow by Purchaser's attorney and shall not be surrendered by the escrow agent to the landlord except upon an affidavit by the landlord that the lessee is in default and has been evicted from the premises. The escrow agent shall not be liable for any act except fraud or malfeasance in the exercise of the escrow obligations.

(f) Upon the lessee's default and eviction from the premises, the landlord may either: (1) sell the security (consisting of such note and purchase money mortgage) in accordance with the provisions of the Lien Law of the State of New York, on due notice to the mortgagee or any other owner of such mortgage who has notified the landlord in writing of his ownership, and the moneys realized on sale shall be applied to cure any default existing under the terms of the lease and any balance remaining shall be paid to the mortgagee or other owner thereof; or (2) declare such note and purchase money mortgage, by its terms, satisfied and cancelled, in which event all obligations thereunder shall cease and terminate, the landlord may execute a formal satisfaction and cause the note and purchase money mortgage to be delivered to the appropriate authority for cancellation, and such satisfaction and cancellation shall be deemed a reduction in the purchase price of the premises not a penalty.

(g) The mortgagee may assign the note and purchase money mortgage subject, however, to the rights of the lessor under the lease. The note and purchase money mortgage shall remain as security under the lease until the last of the principal due has been paid.

(h) During the period in which the note and purchase money mortgage are held as security, all payments of interest on the mortgage shall be paid to the mortgagee or other owner thereof. If there is a default in the payment of interest for 20 days after written notice thereof, by registered or certified mail, to the landlord, the escrow holder shall deliver the note and purchase money mortgage and the assignment thereof to the mortgagee or other owner thereof. In such event, the note and purchase money mortgage shall cease to be security for the performance of the terms, covenants, and conditions of the lease.

16. *Refinancing first mortgage.* The parties shall at title closing make provision, either by separate agreement, or by inclusion in the lease referred to in paragraph 6, or in the note and purchase money mortgage referred to in paragraph 3(d), or by or in all or some of these documents, as required by their respective counsel, for the following covenants and agreements:

(a) Such note and purchase money mortgage shall be and remain subject and subordinate to the lien of the existing first mortgage, to any modification or extension thereof, and to any new or consolidated mortgage which is placed on the premises in lieu or in substitution thereof.

(b) The owner of such note and purchase money mortgage shall have the right, equal with the owner of the premises, to cause any existing first mortgage to be refinanced by a new mortgage (which may be a modification, extension, or consolidation of the existing mortgage).

(c) Such new mortgage shall be for a term of not less than five years and be obtained only from a "lending institution." For the purposes hereof, the term "lending institution" shall mean only a savings or commercial bank licensed to do business in the State of New York and under the supervision and jurisdiction of the Superintendent of Banking of the State of New York, or a life insurance company authorized to do business in the State of New York and under the supervision and jurisdiction of the Superintendent of Insurance of the State of New York, or a pension or union fund under the supervision and jurisdiction of either the Superintendent of Banking or the Superintendent of Insurance of the State of New York.

(d) The combined payments for principal and interest on such new mortgage and the interest on such note and purchase money mortgage shall not exceed the "mortgage debt service," as hereafter defined, but this limitation (except as provided in such lease) shall not apply to any such new mortgage obtained solely by the then owner of the premises. For the purposes hereof, the term "mortgage debt service" shall mean all sums payable by the owner of the premises for principal and interest on the existing first mortgage and on such note and purchase money mortgage. The present mortgage debt service is \$170,000 per annum, representing \$130,000 per annum payable for principal and interest under the existing first mortgage until August 1, _____ [year], and \$40,000 per annum payable for interest under such note

and purchase money mortgage. The mortgage debt service will increase to \$180,000 per annum beginning November 1, _____ [year], by reason of a \$10,000 annual increase payable under the existing first mortgage.

(e) If the amount of such new mortgage exceeds the principal then due on the existing first mortgage, any excess, less amounts paid by the mortgagor for mortgage recording tax, title insurance, recording fees, brokerage commissions not in excess of 4 percent of the principal amount of such new mortgage, and reasonable appraisal and attorney's fees, shall be paid to the owner of such note and purchase money mortgage and to the then owner of the premises as follows: The first amount up to \$500,000 shall be paid to the owner of such note and purchase money mortgage, in reduction of the principal sum thereof; the next amount up to \$500,000 shall be paid to the then owner of the premises, if there is no default in any term, covenant, or condition of such note and purchase money mortgage; the next amount up to \$300,000 shall be paid to the owner of such note and purchase money mortgage, in further reduction of the principal sum thereof, or in full payment thereof; and any balance remaining shall be distributed by paying 25 percent to the then lessee under such lease and 75 percent to the then owner of the premises.

17. *Procedure for refinancing first mortgage.* The following procedure shall be followed by the owner of the note and purchase money mortgage and the owner of the premises in refinancing any existing first mortgage and to the extent deemed necessary by the respective counsel of the parties shall be incorporated in a separate agreement, or shall be included in the lease referred to in paragraph 6, or in the note and purchase money mortgage referred to in paragraph 3(d), or by or in all or some of these documents:

(a) At least 30 days before either party desires to obtain refinancing, a notice to this effect shall be sent to the other party by registered or certified mail. If the owner of the note and mortgage obtains a prospective commitment from a lending institution which complies with the requirements of a new mortgage as above set forth, which shall result in excess cash, notice thereof shall be given to the then owner of the premises.

(b) The then owner of the premises shall have 30 days from the date of receiving such notice either to accept such prospective commitment or to notify the owner of the note and mortgage, by certified or registered mail, that it has obtained a commitment for a new mortgage which it considers more suitable.

(c) If the then owner of the premises fails to accept the prospective commitment or to notify the then owner of such note and mortgage of its own new mortgage commitment within such 30-day period, such failure shall be deemed an acceptance of the terms of the prospective commitment. If thereafter the then owner of the premises fails or refuses to execute the necessary instruments for the purpose of carrying out the terms of such prospective commitment, the same shall be deemed a default under the terms and conditions of the note and mortgage, and the owner thereof may declare the entire unpaid balance of the principal sum to be immediately due and payable.

(d) If during such 30-day period the owner of the note and mortgage receives notice from the then owner of the premises of its first mortgage commitment, the former shall, within five days after receiving such notice, notify the latter whether its proffered commitment is acceptable. If not acceptable, the matter shall be determined by arbitration in accordance with the rules of the American Arbitration Association. If either commitment is accepted as above set forth, immediate preparation shall be made for the prompt closing of the transaction. If the holder of such note and purchase money mortgage, within such five-day period, fails to accept or reject the commitment submitted by the then owner of the premises, the same shall be deemed to have been accepted.

18. *Assignment.* Purchaser may assign this contract to any person, firm, or corporation. Upon such assignment, Purchaser shall be relieved of all obligations under the contract which accrue after the effective date of the assignment, but not before, if the assignee assumes the performance of all the terms and conditions thereof.

19. *Closing.* The deed shall be delivered and title shall close upon the receipt of all payments and the execution and delivery of all instruments at the office of Frank Herbert, 80 Broadway, New York, New York, at 10 a.m. on the 15th

day of March, _____ [year].

20. *Entire agreement; modification.* This instrument constitutes the entire agreement between the parties. It may not be changed or terminated except by an agreement duly executed by both parties.

21. *Binding effect.* This contract shall be binding upon and inure to the benefit of the respective parties hereto and their successors and assigns.

22. *Nonwaiver.* No delay or failure by either party to exercise any right hereunder, and no partial or single exercise of any such right, shall constitute a waiver of that or any other right, unless otherwise expressly provided herein.

23. *Notices.* All notices under this contract shall, unless otherwise expressly provided herein, be in writing and be deemed to have been given when mailed by registered or certified mail, postage prepaid, to the other party at the address set forth above, or at the last changed address given by the other party.

24. *Headings.* Headings in this contract are for convenience and reference only and shall not be used to interpret or construe its provisions.

25. *Governing law.* This contract shall be construed in accordance with and governed by the laws of the State of New York.

26. *Counterparts.* This contract may be executed in one or more counterparts, each of which shall be deemed an original but all of which together shall constitute one and the same instrument.

27. *Time of essence.* Time is of the essence of this contract.

In witness whereof this contract has been duly executed by the parties.

Attest:

Secretary

Attest:

185 Broadway Corporation

By _____
President

Berrens Realty Corp.

By _____
President

[Acknowledgments]



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Current Legal Forms for Real Estate

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Current Legal Forms for Real Estate
Chapter 21 SALES AND EXCHANGES
Part IV. Forms
G. SALES AND LEASEBACKS

25-21 Current Legal Forms for Real Estate FORM 21.86

FORM 21.86 Sale and leaseback of apartment building under construction--warranties by seller--inclusion of fixtures, equipment and personalty--apartment form lease preapproval--nonassignable

COMMENT

This agreement provides that upon completion of construction of the apartment building, evidenced by a certificate of occupancy, the insurance company purchaser will buy the property and net lease it back to the seller. There is no mortgage contingency provided in this agreement, thereby indicating that the insurance company, which would otherwise be a source of mortgage funds, prefers to take fee title to the project rather than a permanent long-term mortgage. By net leasing the building, land and equipment back to the seller, the insurance company relieves itself of the responsibility of managing the complex. Although under this arrangement, the seller does not have to find a permanent mortgage lender or a buyer for the project, the insurance company receives the benefit of appreciation of value in the real estate as well as its rental payments.

During the period of construction, conventional construction financing is utilized by the seller. The agreement requires compliance with the construction loan documents under threat of termination. There is no obligation of the buyer to advance construction funds, nor is the buyer under any obligation until a certificate of occupancy is issued and other conditions are met.

A substantial portion of the contract contains clauses which would otherwise be found in a conventional real estate purchase agreement, including certain warranties from the seller relating to the condition of the property and its construction. The buyer's performance is contingent upon the seller's ability to convey title unencumbered by encroachments, mechanic's liens, violations of local laws and ordinances or special assessments.

The conveyance specifically will include fixtures and equipment used in connection with the

apartment. The conveyance of these items will be by bill of sale. The representation is made that the respective systems will be structurally sound and in good condition, including: the roof, foundation, walls, heating and cooling, plumbing, water and electrical systems. Any guarantees or warranties with respect to fixtures or equipment are to be transferred at closing.

Apartment leases will be in a preapproved form, to be assigned to the buyer on closing.

The contract calls for the seller to pay expenses related to the transfer, including the cost of title examination and insurance, surveys, recording and filing fees, taxes, broker and counsel fees. This may reflect the negotiating positions of the parties rather than local custom. From this perspective, the insurance company may view the transaction as it would a mortgage loan, and require the party receiving the funds to pay all the expenses incurred in the closing.

FORMS

(1) Land purchase and leaseback agreement

THIS LAND PURCHASE AND LEASE AGREEMENT is made March 1, _____ [year], by and between Admiral Life Insurance Company, a Delaware corporation having an office at 500 East 53rd Street, New York, New York ("Purchaser"), and Novel Land Company, an Ohio corporation having its principal place of business at 200 Center Street, Springfield, Ohio ("Seller").

Recitals

Seller is engaged in the construction of a high rise apartment building upon a parcel of land located at 6125 Mars Lane, High Mills, Ohio, more particularly described as follows:

[Insert land description]

and

Seller has executed a construction loan agreement, note and mortgage with Apex Loan and Trust Company (the "Construction Loan Documents"), for funds necessary to complete such construction.

The parties desire that upon completion of such construction Seller shall sell the aforementioned land, together with said apartment building and all fixtures, improvements, equipment and other personal property attached or appurtenant thereto described as follows:

_____ *[Insert description of fixtures and personalty]*, which land, building and other property is hereinafter called the "Premises," to Purchaser, and Purchaser shall lease the Premises back to Seller in accordance with the terms and conditions hereof.

Now, therefore, the parties agree as follows:

1. *Sale.* Seller agrees to sell and convey to Purchaser and Purchaser agrees to purchase from Seller the Premises.
2. *Purchase price.* The purchase price is \$1.3 million, to be deposited by Purchaser into escrow with the Escrow Agent,

designated below, on or before the Closing Date.

3. *Title.* Seller shall convey fee simple title to the Premises to Purchaser by good and sufficient general warranty deed, warranting title to be free and clear of all liens, charges and encumbrances, clouds and defects, except any restrictions, reservations, limitations, easements and conditions of record which are approved in writing by Purchaser, and leases to prospective tenants, whether of record or not, entered into by Seller in accordance with the terms and conditions hereof, zoning ordinances and taxes and assessments, both general and special, which are a lien but not yet due and payable. The deed shall be deposited in escrow on or before the Closing Date. Prior to such deposit, a copy of the deed shall be submitted to Purchaser's counsel for approval.

Seller shall convey marketable title to all personal property described above by good sufficient bill of sale in form approved by counsel for Purchaser. The bill of sale shall be deposited into escrow on or before the Closing Date. Prior to such deposit, a copy of the bill of sale shall be submitted to Purchaser's counsel for approval.

4. *Title insurance.* Seller shall accompany Seller's deed with a title insurance policy in the amount of the purchase price issued by the Apex Title & Guarantee Company of St. Louis, Missouri ("title company"), in its customary form, insuring marketable title to the Premises to be good in Purchaser, subject only to the exceptions to be contained in the deed described above.

5. *Escrow agent.* This transaction shall be placed in escrow with American Title and Guarantee Company of Springfield, Ohio. An executed counterpart of this Agreement shall be deposited with the Escrow Agent by Seller, and the Agreement shall serve as the escrow instructions. The Escrow Agent may attach its standard conditions of acceptance thereto, but if such conditions are inconsistent with or in conflict with the terms of this Agreement, the Agreement shall control.

6. *Closing date.* The Closing Date shall be June 1, _____ [year]. Seller, however, may select the first day of any prior month for the closing by giving Purchaser and the Escrow Agent at least 30-days' advance written notice. All instruments, evidences, papers, information and other material pertinent to the closing of this transaction shall be furnished to Purchaser for its approval on or before the closing date. The Escrow Agent shall charge Seller with all expenses incident to this purchase and lease transaction, including charges for the payment and cancellation of the construction loan mortgage, title examination and insurance, survey, recordings and filing fees, taxes, brokerage or finder fees, and all counsel fees and costs. There shall be no apportionment of taxes, insurance, or other charges at the Closing, since Seller will pay all such items, whether due before or after the Closing, pursuant to the Lease.

7. Seller warrants, such warranty to be effective as of the Closing Date and to survive the transfer of title to Purchaser, as follows:

(a) All improvements now on the Premises are entirely within the boundary lines of the land described on the attached Exhibit A, and no other adjoining property encroaches upon said land;

(b) All work and labor performed and all materials furnished with respect to any improvements or repairs to the Premises have been paid in full, and there will be no mechanic's liens or the possibility thereof in connection with any such work, labor, and materials;

(c) There are no outstanding notices or orders from any governmental authority with respect to the condition of the Premises or its repair, or to any claim of a violation of any laws, ordinances, zoning codes, building codes or orders applicable thereto including without limitation, the violation of any environmental laws, rules or regulations, federal, state or local;

(d) The personal property included as a part of this transaction and the improvements on the Premises are structurally

sound and in good condition and repair, including the roof, foundation, walls, heating and cooling system, plumbing, water and electrical systems;

(e) All improvements made by the local governmental authority that now benefit or will benefit the Premises upon completion have been assessed against the Premises as of the execution date of this Agreement;

(f) No actions, suits, proceedings, or investigations, whether at law or in equity, exist with respect to the Premises, and none are threatened or pending that would adversely affect this transaction or the Premises being sold;

(g) Seller will assign to Purchaser on or before the Closing Date, by delivering into escrow all guarantees or warranties with respect to the condition of the Premises, including all improvements, fixtures, equipment, and personal property being conveyed that remain in effect and are assignable;

(h) All documents delivered or required to be delivered to Purchaser and all warranties herein made by Seller are accurate and complete, and there has been no material change in any of the facts, circumstances, or subject matter of this transaction of which Purchaser has not been informed;

(i) The above sale and transfer of the Premises is or shall be, before the Closing Date, duly authorized in accordance with law, and within the scope of authority of the party or parties conveying the Premises, and evidence of such authority shall be presented to Purchaser before the closing of this transaction;

(j) All leases entered into by Seller with respect to the premises conform to and are in compliance with the terms and conditions of the form lease exhibited by Seller to Purchaser;

(k) The construction of the building and improvements constituting the Premises shall be in compliance with plans and specifications approved by Purchaser and that Seller is not in violation of any of the Construction Loan Documents; and

(l) The building shall be completed in compliance with all applicable building codes and ordinances, and in compliance with the Americans With Disabilities Act of 1990, and the Accessibility Guidelines and rules and regulations issued thereunder.

8. *Leaseback.* On or before the date of Closing there shall be deposited with the Escrow Agent a net lease of the Premises executed by Purchaser, as Lessor, and Seller, as Lessee, a copy of which has been executed by the parties. The lease shall be in full force and effect immediately upon the closing of the within transaction by the recording of the deed and a memorandum short form of lease.

9. *Conditions of closing.* The Closing of this transaction shall be conditioned upon delivery by Purchaser to the Escrow Agent on or before the Closing Date of written notice of compliance with the following:

(a) Delivery to Purchaser of a survey of the Premises satisfactory to it showing all final improvements and other physical conditions affecting the title and use thereof.

(b) Delivery to Purchaser in form satisfactory to it of an assignment of any leases and agreements pertaining to the Premises, the existing or proposed improvements, utility facilities and services, together with all easements essential to the proper functioning thereof.

(c) A favorable opinion or opinions issued to Purchaser from counsel satisfactory to it, dated the Closing Date, and satisfactory to Purchaser in form and substance, as to: (i) the organization, good standing and corporate authority of Seller; (ii) the due authorization, execution and delivery of this Agreement, the deed, and the lease; (iii) the validity and enforceability of the lease; (iv) the due conveyance of title in fee simple to the land, subject only to permitted

exceptions approved by Purchaser; (v) the recordation and filing of the instruments of conveyance and, if required, the lease; (vi) the absence of any violation (or notice of violation) of any zoning, building or other statute, ordinance or regulation with respect to the Premises; (vii) the absence of any action, proceeding, or investigation which questions the validity of this Agreement or the lease; and (viii) the absence of any restriction on Seller to convey the land to Purchaser and to enter into the lease.

(d) Receipt by Purchaser of evidence of the issuance of a certificate of occupancy issued by the appropriate governmental authority, or evidence satisfactory to Purchaser that none is required under local regulations.

Prior to closing, Purchaser shall not acquire or assume any equitable ownership of or title to the Premises or become liable in respect thereof, and Seller hereby indemnifies Purchaser and shall hold it harmless from any such liability.

10. *Assignability and termination.* This Agreement shall not be assignable, by operation of law or otherwise. It may be terminated by Purchaser in any manner Purchaser determines, if either:

(a) Seller fails to comply with any applicable term or condition with respect to the Construction Loan Documents or the construction of the Premises; or

(b) any of the following events occur: a petition in bankruptcy or insolvency, or for reorganization or the appointment of a receiver or trustee, is filed by or against Seller; Seller makes an assignment for the benefit of creditors; or Seller files a petition for arrangement which is not withdrawn, dismissed, cancelled, or terminated within 60 days after being filed or entered into, or which exists at any time established, whether now or later, for the closing of the transaction.

11. *Closing.* When the Escrow Agent is in possession of all funds and documents necessary to close this transaction, and upon compliance with all conditions precedent to closing in accordance herewith, the Escrow Agent shall cause first the deed, described in paragraph 3, and then the memorandum short form of lease, described in paragraph 8, to be duly and properly recorded, and then deliver to each party the funds and documents in accordance with the provisions hereof.

12. *Memorandum.* Purchaser and Seller each agree to execute and cause to be recorded on this date a certain form entitled: "Memorandum of Agreement of Land Purchase and Lease Agreement." The cost of recording shall be paid by Purchaser.

13. *Notices.* Unless otherwise expressly provided herein, all notices hereunder shall be in writing and be deemed to have been given when mailed by registered or certified mail, postage prepaid, to the other party at the address set forth above, or to any other address designated in writing by such party.

14. *Entire agreement; modification.* This instrument constitutes the entire agreement between the parties. It may not be changed or terminated except by an agreement duly executed by both parties.

15. *Binding effect.* This Agreement shall be binding upon and inure to the benefit of the parties and their respective successors and assigns.

16. *Nonwaiver.* No delay or failure by either party to exercise any right hereunder, and no partial or single exercise of any such right, shall constitute a waiver of that or any other right, unless otherwise expressly provided herein.

17. *Headings.* Headings in this Agreement are for convenience and reference only and shall not be used to interpret or construe its provisions.

18. *Governing law.* This Agreement shall be construed in accordance with and governed by the laws of the State of Ohio.

19. *Counterparts.* This Agreement may be executed in one or more counterparts, each of which shall be deemed an original but all of which together shall constitute one and the same instrument.

20. *Time of essence.* Time is of the essence of this Agreement.

The parties have caused this instrument to be executed by their authorized officers and to have affixed their corporate seals as of the date first above written.

Admiral Life Insurance Company

By _____

And _____

Novel Land Company

By _____

And _____

(2) Memorandum of agreement

This MEMORANDUM OF AGREEMENT OF LAND PURCHASE AND LEASE AGREEMENT, dated as of March 1, ____ [year], between NOVEL LAND COMPANY, an Ohio corporation having its principal place of business at 200 Center Street, Springfield, Ohio ("Seller"), and ADMIRAL LIFE INSURANCE COMPANY, a Delaware corporation having an office at 500 East 53rd Street, New York, New York ("Purchaser").

Subject to the terms and conditions referred to below, Purchaser agrees to purchase from Seller the land (the "Land") located in the City of High Mills, Cuyahoga County, Ohio, described in Schedule A attached hereto, together with all buildings and improvements thereon, and Seller guarantees to see that the Land is acquired by Purchaser within the time and on the terms and conditions referred to below.

The terms and conditions (including the purchase price to be paid by Purchaser) of such agreement are set forth in the Land Purchase and Lease Agreement, dated March 1, ____ [year], between Seller and Purchaser and are incorporated herein by reference with the same force and effect as though fully set forth herein. Title to the Land will be conveyed to Purchaser on or before June 1, ____ [year].

The purpose of this Memorandum of Agreement of Land Purchase and Lease Agreement is to give notice of the existence of such Land Purchase and Lease Agreement, which, together with this Memorandum, constitute the agreement between Seller and Purchaser.

Seller and Purchaser have respectively executed this Memorandum of Agreement of Land Purchase and Lease Agreement as of the date and year first above written.

Novel Land Company

By _____

And _____

Admiral Life Insurance Company

By _____

And _____

[Acknowledgments]



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Current Legal Forms for Real Estate

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Current Legal Forms for Real Estate
Chapter 21 SALES AND EXCHANGES
Part IV. Forms

H. SALES OF STOCK IN REAL ESTATE CORPORATIONS

25-21 Current Legal Forms for Real Estate FORM 21.87

FORM 21.87 Sale of stock of corporation--rental property principal asset--corporate and real estate warranties and representations

COMMENT

This form is an agreement for the sale of the stock of a corporation, the principal asset of which is rental property. This contract contains the representations and warranties which are usually included in contracts for the sale of stock, i.e., corporate organization, good standing, solvency, outstanding shares, etc. In addition this contract contains representations and warranties which are included in a contract for the sale of real estate, i.e., marketable title, current mortgage, rent rolls, etc. (paragraph 2). The purchase price is adjusted at closing for real estate items, such as taxes, insurance, rent, and mortgage interest (paragraph 3). Documents to be delivered at closing include not only the shares and corporate books and records, but also mortgage documentation, leases, and the resignation of the managing agent (paragraph 4). In the event of unsatisfactory title or damage to the real property, the agreement for the sale of the shares can be cancelled (paragraph 6). An additional feature of this agreement is the establishment of an escrow as security for the seller's representations and warranties (paragraph 9).

Sale of stock or asset alternatives

The owner of the shares of a real estate corporation essentially has two alternative methods of sale available to him. The shareholder may sell his shares in the corporation which owns the real estate, or the corporation itself may sell the real estate.

Sale by corporation followed by liquidation

Under the general rule, a sale of corporate assets followed by a liquidation distributing the

proceeds of sale may result in double taxation. The corporation is taxed on any gain realized in its sale, and the shareholder is taxed on the gain from the liquidation.

Sales of shares in real estate corporation

The sale of corporation shares does offer certain advantages. Assuming that the "collapsible corporation" provisions are not applicable, the shareholder will generally realize capital gain or loss on the sale of his shares. A sale of shares may be arranged as an installment sale, with the benefit of deferred taxation of capital gain. Finally, there may be some slight advantage in a sale of shares for a taxpayer who is concerned with the problem of ordinary income realized as a dealer in real estate. Of course, if the sale by the corporation will produce a taxable loss, and possibly a loss as well to the shareholder on liquidation, the taxpayer should not forego the tax benefits of these losses.

Particularly where real estate is the primary asset owned by the corporation, even though title to the real property is not being conveyed in a stock deal, it is prudent for the purchaser to obtain a title insurance policy insuring good marketable title to the asset in the corporation as of the closing date of the acquisition of the stock. Receipt of such title insurance can be made a condition for purchaser closing. In the absence of obtaining title insurance, the purchaser of the stock should at least obtain a representation that title to the real property assets is marketable.

In addition, the purchaser of the shares should do the same due diligence type of investigations that would be done in a straight purchase of real estate assets. This includes an environmental audit or inspection of the real property, and investigation whether the property is in compliance with governmental laws such as the Americans With Disabilities Act of 1990 and its Accessibility Guidelines. If an inspection is not done, the purchaser should attempt to obtain warranties from the seller (or its principals) regarding such matters.

Acquisition of corporate shares

If the purchaser of the shares will continue the real estate operation in its original corporate form, no unusual tax problems should arise. The basis of the property to the corporation is unchanged by the sale, and the purchaser's basis for his shares is his cost.

Purchase of shares followed by liquidation

In many cases, the purchaser may have good business reasons for not continuing the business in the original corporate form. If the purchase price for the shares took into account an appreciation of values above the corporation's adjusted basis for its real estate and other assets, the purchaser may want the benefit of his higher cost in the computation of cost recovery or depreciation. In that case, a prompt liquidation of the corporation will produce a tax basis for the assets received in liquidation "stepped-up" to the cost of the shares. When the purchaser is an individual, this is accomplished by treating the share purchase and the liquidation as a direct purchase of the corporate assets. However, the liquidation will cause the recapture of excess accelerated depreciation or accelerated cost recovery as ordinary income to the corporation. The benefits of cost basis may be lost to the individual if the individual transfers the assets acquired in the liquidation to a new corporation. In addition, the individual would likely be subject to loss deduction limitations under the passive activity loss limitation and the at risk rules. The liquidation and the transfer to the new corporation may be in effect an indirect transfer from the old corporation to the new corporation. If such a transfer would constitute a nontaxable

reorganization if made directly, the assets may have the same basis in the hands of the new corporation as they had in the hands of the old corporation.

Corporate election to treat stock purchase as asset purchase

As an alternative to the actual liquidation of a newly acquired corporation, a corporation may elect to treat the stock acquisition as an asset purchase if certain requirements are met. Generally, the acquiring corporation must purchase at least 80 percent of the stock of the "target corporation," i.e., acquired corporation. The irrevocable election is made within 75 days after the qualifying acquisition. The target corporation is treated as if it sold its assets, in a generally taxable liquidation, as of the date of the qualified stock acquisition by the acquiring corporation. On the day following the acquisition, the target corporation is treated as if it purchased those assets.

The purchasing corporation's basis in the assets would be generally equal to its basis in the target's stock, subject to adjustment for target company liabilities and other relevant items, as provided by regulation. Target corporation recapture items (e.g., accelerated cost recovery, investment credit, etc.) are reported separately by the target corporation, and cannot be offset by losses of the acquiring corporation or its affiliates. The election automatically applies to any other stock or assets purchased by the acquiring corporation (or an affiliate) from the target corporation (or an affiliate) made during a "consistency period." This period extends from at least one year preceding the acquisition to one year after the acquisition.

This rule severely restricts the ability of the acquiring corporation to structure a transaction as a combination of asset purchases and stock acquisitions for maximum tax benefit. Under the "consistency" requirement, one election to treat a stock acquisition as an asset purchase applies, as well, to other asset or stock purchases.

Transfer of stock under UCC, transfer restrictions

The validity and effect of a transfer of stock are dealt with in Article 8 of the Uniform Commercial Code. Proper transfer or negotiation of the stock requires compliance with the applicable rules for indorsement, delivery, and other considerations. Although generally, restrictions on transfers of securities are ineffective unless they are conspicuously noted on the security (*UCC Section 8-204*), they are effective against a person with actual knowledge of the restriction. Local interpretations of the term "actual knowledge" should be examined to determine if a purchaser is responsible for restrictions which could have been discovered with due diligence. Frequently, restrictions on stock transfers are found in shareholder agreements and mortgage loan documents.

Liabilities of acquired corporation

One of the significant differences between a purchase of real estate from a corporation and the purchase of its stock is the purchaser's involvement in the acquired corporation's debt and other obligations. In a real estate sale, the purchaser generally does not incur the liabilities of the selling corporation. (This is subject to certain exceptions, ranging from a contractual assumption of liabilities to the more complex transferee liability rules applicable under inventory bulk sale and other state laws.) In a stock sale, on the other hand, the corporation's assets and liabilities remain unchanged. These liabilities include not only those which are known, but also all other claims, whether absolute, contingent, or otherwise. The seller's indemnification, if any, does not eliminate these existing and potential liabilities, but only provides a possible redress for the purchaser. Therefore a careful examination of the corporation's liabilities, and potential liabilities, is

advisable.

FORM

AGREEMENT made June 14, _____ [year], between Harvey Brown, residing at 18 East 41st Street, New York, New York ("Seller"), and Jay Realty Corp., a New York corporation, having its principal office at 300 Madison Avenue, New York, New York ("Purchaser").

Recitals

Harvey Brown Realty Corp. (the "Corporation") is the owner of certain improved property.

Seller is the owner of all the outstanding shares of the Corporation and is willing to sell them to Purchaser, and Purchaser has agreed to purchase them.

It is therefore agreed as follows:

1. *Sale of shares.* Seller shall sell to Purchaser, and Purchaser shall purchase from Seller, without recourse except as hereinafter provided, all of the Corporation's issued and outstanding shares, consisting of 100 no par value common shares.

2. *Seller's representations, warranties, and covenants.* In order to induce Purchaser to enter into this agreement, Seller warrants and represents to Purchaser as follows:

2.1. *Valid corporation.* The Corporation is a business corporation duly organized and validly existing under the laws of the State of New York; it has no subsidiaries; it is authorized to own and operate real property; and since its incorporation, it has exercised and continues to exercise its functions as a business corporation under the laws of the State of New York.

2.2. *Good standing.* The Corporation is in good standing; there is no action or proceeding pending to dissolve the Corporation, or to declare any or all of its corporate rights, powers, franchises, or privileges to be null and void.

2.3. *Solvency.* The Corporation is solvent; it is not in the hands of a receiver nor is any application for receivership pending; it is a going business and has never suspended its operations; it does not contemplate insolvency; no proceedings are pending by or against it in bankruptcy or reorganization in any state or federal court, nor has it filed any petition in bankruptcy.

2.4. *Certificate of incorporation.* The Corporation's certificate of incorporation has never been amended; no proceeding has been instituted or authorized for the purpose of any such amendment.

2.5. *Shares.* The aggregate number of shares which the Corporation has authority to issue is 100 no par value common shares all fully paid and nonassessable, all of which have been duly issued for full consideration and are now validly outstanding. Seller is the owner of all of such common shares.

2.6. *Authority.* Seller has full power and right to enter into this agreement and to sell such shares free and clear of any option, commitment, lien, or encumbrance; no other person has any right in or to such shares or any part thereof or the certificate or certificates representing the same; such shares have not been pledged or hypothecated nor has a security

interest been created in them.

2.7. *Real property.* The Corporation is, and will be at the date of the closing, the owner in fee of the following property (the "Property"):

(Insert description)

2.8. *Personal property.* All of the personal property used directly or indirectly in connection with the Property is free and clear of all liens, claims, or encumbrances, and is or shall be fully paid for on or before the closing date.

2.9. *Title exceptions.* The Corporation has good and marketable title to the Property, subject only to the following:

- (1) Existing building and zoning restrictions, regulations, and ordinances of the City of New Rochelle.
- (2) Encroachments of stoops, areas, cellar steps, trim, and cornices, if any, upon any street or highway.
- (3) Consents by the owner or any former owner of such property for the erection of any structure or structures on, under, or above any street or streets.
- (4) Any fact or facts an accurate survey would show which do not render the title unmarketable.
- (5) Covenants and restrictions contained in any deeds of record which do not prohibit the use and maintenance of the present building.
- (6) Rights of tenants and lessees in possession, as set forth in Schedule A attached.
- (7) A mortgage, held by Central Savings Bank, in the present unpaid principal amount, as of the date hereof, in the sum of \$600,000. The mortgage provides for constant payments of \$12,000 on the first days of March, June, September, and December, in each year, from which interest is first applied at the rate of 10 percent per annum and the balance in reduction of the principal. Mortgage matures on _____ [date].

2.10. *Mortgage.* There has been no default in the terms and provisions of the mortgage held by Central Savings Bank; and there will be no default at the closing date.

2.11. *Rent rolls.* The rentals from the Property listed on Schedule A attached, are true, accurate, and complete; such rentals are those being actually and currently collected from the tenants of the Property; none of such rentals violate existing rent regulations; to Seller's knowledge there are no proceedings pending to reduce any of such rentals; all apartments on the Property have been rented unfurnished; no tenant has been granted any allowance or concession in connection with such rentals; only those tenants indicated as lease tenants have leases; no written agreements, except such leases, have been entered into with any tenants relating to or connected with their occupancy of the Property; all work provided to be done or equipment furnished by the landlord under such leases has been done or furnished; and there are no deposits by any tenants of the Property either as security for or prepayment of rent.

2.12. *Violations.* Seller, for the benefit of the Corporation, shall comply with all notes or notices of violations of applicable state or municipal laws and regulations affecting the Property at the closing date. However, the Corporation's failure to remove an existing violation before the closing date shall not be the basis for cancellation of this agreement or be deemed a breach hereunder by Seller, if Seller either deposits in escrow with his attorney a sufficient sum to pay for the removal of the violation or makes a sufficient allowance to Purchaser to pay for such removal.

2.13. *Appliances.* Every apartment in the Property is presently equipped with a refrigerator and electric range in good working order, which are owned and fully paid for by the Corporation.

2.14. *Assessments.* If at the closing date all or any part of the Property is or has been affected by any one or more assessments which are or may become payable in annual installments of which the first installment is then a charge or lien, or has been paid, for the purpose of this agreement all of the unpaid installments of any such assessment, including those that are due and payable after the closing date, shall be deemed to be due and payable and shall be paid and discharged by Seller at the closing date.

2.15. *Contracts.* The Corporation, at the closing date, will not have any commitments, agreements, or contracts outstanding, except the following:

(1) The mortgage on the Property held by the Central Savings Bank.

(2) Elevator service contract with Otman Elevator Company dated January 1, _____ [year], running to December 31, _____ [year].

(3) Laundry equipment contract with White Machine Corp. covering washing machines in such property, and expiring May 1, _____ [year].

2.16. *Litigation.* No suit, proceeding, or litigation is pending, or to the best of Seller's knowledge threatened, against or relating to the Corporation or its property or business, nor does Seller know, or have reasonable grounds to know, of any basis for such suit, proceeding, or litigation. No judgments of any nature exist against the Corporation.

2.17. *Mortgage and taxes.* The Corporation will have no unpaid bills or creditors of any kind or nature at the closing date, except for the following, for which Seller shall not be liable:

(1) The mortgage on the Property held by the Central Savings Bank.

(2) All amounts hereafter assessed against the Corporation by New York State or the United States for state franchise taxes or federal income taxes for taxable years beginning after December 31, _____ [year].

2.18. *Tax returns.* All required tax reports and returns have been duly filed. All payments reported on such reports and returns as due have been paid in full or will be allowed to Purchaser as a deduction from the purchase price at the closing. The Internal Revenue Service has audited the Corporation's federal income tax returns up through the fiscal year ended December 31, _____ [year].

2.19. *Employees and wages.* Schedule B annexed is a true and complete list of all the Corporation's present employees, together with their actual wages or salaries:

(List of employees and salaries)

2.20. *Status quo.* Schedule C annexed is a balance sheet of the Corporation as of December 31, _____ [year], prepared by the Corporation's accountants. Such balance sheet completely and accurately reflects, as of that date, the Corporation's financial condition and of all the Corporation's assets and liabilities of every nature and kind, whether accrued, absolute, contingent, or otherwise. There has been no change in the Corporation's financial condition between December 31, _____ [year] and the date of this agreement,

except as the result of the ordinary and regular conduct of its business.

2.21. *Status quo.* Between the date of this agreement and of the closing:

- (1) There will be no change in the financial condition of the Corporation as set forth in Schedule C, except as has and may occur in the ordinary and regular conduct of its business.
- (2) There will be no change in the corporate legal structure of the Corporation or of its directors or officers.
- (3) The Corporation will not enter into any contracts, agreements, or commitments or incur any expenses, except for those necessary in the ordinary and regular conduct of its business.
- (4) There will be no increase in the compensation paid or payable by the Corporation to any of its employees or agents.

2.22. *Books and records.* If Purchaser or the Corporation, or the representatives of either, at any time within three years after the closing, require the aid or assistance of, or consultation with, the Corporation's present accountants in connection with its books, records, tax returns and reports, or financial transactions before the closing date, Seller shall make available the services of its accountants for such purposes at no cost to Purchaser or the Corporation.

2.23. *Survival.* All of the above warranties and representations shall be true at the closing date.

3. *Purchase price.* Purchaser shall pay Seller for the stock to be sold and purchased under this agreement, the following:

3.1. *Deposit.* \$20,000 upon the execution of this agreement, receipt whereof is hereby acknowledged.

3.2. *Cash at closing.* \$300,000 in cash or good certified check on the closing date.

3.3. *Additional charges.* A sum calculated by charging to Purchaser the following items, adjusted as of the close of business of the day immediately before the closing date:

- (1) Cash on hand or on deposit to the order of the Corporation (which is expected to be approximately \$20,000).
- (2) With reference to the Property: (a) the following prepaid items: real estate taxes; fire, rent, liability, boiler, and compensation insurance premiums; water frontage charges; wages; and service contract installments; and (b) the reasonable value of the oil on hand.

3.4. *Allowances.* From the above purchase price there shall be deducted a sum calculated by making allowances of the following items, adjusted as of the close of business of the day immediately before the closing date:

- (1) With reference to the Property: (a) the following accrued items: sewer tax; interest on the mortgage; employees' vacation pay; and withholding, social security, unemployment, disability, and other payroll taxes; and (b) prepaid rentals from any tenants.
- (2) All unpaid assessments of taxes due, or to become due, in accordance with tax reports already filed.
- (3) Any other obligations or debts of the Corporation, whether accrued, absolute, contingent, or otherwise, other than the items set forth in subdivisions (1) and (2) of paragraph 2.17.

4. *Documents at closing.* At the closing Seller shall deliver to Purchaser the following:

- 4.1. The certificate, or certificates, representing the 100 common shares of the Corporation, endorsed to Purchaser.
- 4.2. The minute books of the Corporation, with a complete and accurate record of all meetings and transactions of its shareholders and Board of Directors from its inception to the closing date.
- 4.3. The Corporation's share certificate and share transfer books.
- 4.4. The Corporation's corporate seal.
- 4.5. A balance sheet of the Corporation as of June 30, _____ [year], prepared and certified by its accountants, which Seller will represent to be a true and complete statement as of that date of the Corporation's financial condition and of all its assets and liabilities, accrued, absolute, contingent, or otherwise.
- 4.6. A copy of the bond and mortgage executed and delivered by the Corporation to the Central Savings Bank.
- 4.7. A letter from the Central Savings Bank, certifying the present status of its mortgage and the absence of any default by the Corporation under the terms thereof.
- 4.8. All leases with the tenants of the Property.
- 4.9. A letter from Harris & Co. agreeing to its discharge as managing agent of the Property as of the closing date, and stating that it has been paid in full for all services rendered through that date.
- 4.10. The written resignations of each officer and director of the Corporation, effective as of the closing date, together with a general release to the Corporation from Seller and each director and each officer.
- 4.11. A written call and waiver of notice of a special meeting of the Corporation's board of directors to be held at the time and place of the closing.
- 4.12. All certificates of insurance or fire insurance policies in the Corporation's name.
- 4.13. The elevator service contract with Otman Elevator Company.
- 4.14. The laundry equipment contract with White Machine Corp.
- 4.15. Copies of all tax returns and reports filed by the Corporation in the past three years.
- 4.16. All of the Corporation's books, records, documents, instruments, invoices, bills, vouchers, cancelled checks, bank books and check books.
- 4.17. All assets of the Corporation, tangible and intangible.

5. *Physical condition of property.* Purchaser represents that it has inspected the Property for compliance with all governmental laws, rules and regulations, including without limitation, all environmental laws (federal, state and local) and with the Americans With Disabilities Act of 1990, and all rules and regulations issued thereunder. Purchaser agrees that the Corporation shall have no obligation to make any repairs, alterations, or restoration of the Property, except for ordinary repairs required between the date of this agreement and the closing date. Purchaser also agrees that it will

accept the Property in its present physical condition, without any claim or allowance by reason thereof, except for those as may be required hereunder.

6. *Failure of good title.* If, as of the closing date, title to the Property is not as represented in this agreement, or if the Property has in the meantime been destroyed or substantially damaged by fire or other elements, Purchaser's sole and exclusive remedy against Seller shall be to cancel this agreement and to recover from Seller only the amount deposited by Purchaser hereunder, together with the net cost of examination of title of the Property. Upon Seller's tendering such sums to Purchaser, this agreement shall terminate and both parties shall be released from all further obligations hereunder.

7. *Brokerage.* The parties agree that James Baker & Co. of 100 West 12th Street, New York, New York, is the sole broker in this transaction and that no other broker has any interest herein. The brokerage commission is \$10,000, to be paid by Seller's check to the order of such broker when, as, and if the shares are actually transferred and the consideration fully paid under this agreement. If for any reason such sale of the shares does not close, except for Seller's willful refusal to transfer and assign them, no commission shall become due, earned, or payable to such broker.

8. *Equitable remedy.* The Corporation's common shares are not readily marketable and are unique. If Seller fails or refuses to sell such shares, Purchaser, in addition to any other remedy available, shall be entitled to a suit for specific performance.

9. *Survival of warranties and indemnity.* To induce Purchaser to enter into and perform this agreement, Seller agrees as follows:

9.1. *Survival past closing.* All warranties, representations, covenants, and agreements made by Seller in this agreement or pursuant thereto shall be deemed continuing warranties, representations, covenants, and agreements, which shall survive the closing and the execution and delivery of all instruments and documents and any investigation at any time made by or on behalf of Purchaser.

9.2. *Title to shares.* Seller forever warrants his title in and to the common shares of the Corporation and will forever indemnify and hold harmless Purchaser, its successors and assigns, against all claims and demands that may be made to, under, or against any of such common shares, or against any lien or attachment upon such common shares by any creditor of Seller or any other person claiming to hold any interest therein by or through Seller.

9.3. *Indemnification.* Seller will forever indemnify and hold harmless Purchaser and the Corporation, or both, against and in respect of:

(1) Any tax or assessment imposed upon the Corporation resulting from a final determination by the tax authorities that the Corporation has realized gross income, rents, interest, dividends, or gains on the sale of any of its assets, other than as reflected on its franchise and income tax returns previously filed.

(2) All liabilities of the Corporation of any nature, whether accrued, absolute, contingent or otherwise, existing on June 30, _____ [year], to the extent not reflected or reserved against in full in the Corporation's balance sheet as of that date, except for any amount that is hereafter assessed against the Corporation by New York State or the United States for state franchise or federal income taxes, unless such taxes fall within the provisions of subdivision (1) hereof.

(3) All liabilities of or claims against the Corporation arising out of the conduct of its business between the date of this agreement and the closing date, other than in the ordinary course of business.

(4) All liabilities of or claims against the Corporation arising out of any presently existing contract or

commitment not specifically set forth in this agreement, or made or entered into by the Corporation between the date hereof and the closing date.

(5) All liability, damage, cost, deficiency, or expense resulting from any misrepresentation, material omission, breach of warranty, or nonfulfillment of any covenant or agreement by Seller under or relating to this agreement.

(6) All actions, suits, proceedings, demands, assessments, judgments, costs, legal and accounting fees, and other expenses incident to any of the foregoing.

9.4. *Reimbursement.* Seller will reimburse Purchaser or the Corporation, or both, on demand, in respect of any liability, damage, cost, deficiency, or expense to which the indemnities set forth in paragraph 9.3 relate.

9.5. *Notice.* If any claim made against Purchaser or the Corporation causes Seller to be liable as a result of the above indemnities, Purchaser shall promptly give Seller notice of such claim. Seller shall be afforded a reasonable opportunity to examine the Corporation's books and records to determine the merits of the claim and either to defend the claim at his cost or to join in its defense. None of the indemnities hereunder shall be binding on Seller if Purchaser causes the Corporation to settle, adjust, or admit liability of any claim referred to herein without first giving notice thereof to Seller and affording him sufficient time to defend or settle the claim.

9.6. *Security escrow.* As collateral security for Seller's compliance with its obligations hereunder, Seller shall deposit \$30,000 with George Nathan, Esq., as Escrow Agent, at the closing. The Escrow Agent shall hold this sum for a period of one year under the terms of an escrow agreement in the form annexed, to be executed by the Corporation, Purchaser, Seller, and the Escrow Agent at the closing. The respective rights of Purchaser and the Corporation thereunder shall be in addition to all other rights or remedies of Purchaser under this agreement.

10. *Closing.* The closing of this transaction shall take place at the office of Seller's attorney, George Nathan, Esq., at 280 Center Street, New York, New York, on July 15, _____ [year], at 2 p.m.

11. *Binding effect.* This agreement shall be binding upon and inure to the benefit of both parties and their respective legal representatives, successors, and assigns.

12. *Notices.* All notices under this agreement shall be in writing and deemed to have been given when mailed by registered or certified mail, postage prepaid, to the other party at the address set forth above, or to any other address designated in writing by such party.

13. *Entire agreement; modification.* This instrument constitutes the entire agreement between the parties. It may not be changed or terminated except by an agreement duly executed and signed by both parties.

14. *Non-waiver.* No delay or failure by either party to exercise any right hereunder, and no partial or single exercise of such right, shall constitute a waiver of that or any other right, unless otherwise expressly provided herein.

15. *Headings.* Headings in this agreement are for convenience and reference only and shall not be used to interpret or construe its provisions.

16. *Governing law.* This agreement shall be construed in accordance with and governed by the laws of the State of New York.

17. *Counterparts.* This agreement may be executed in one or more counterparts, each of which shall be deemed an original but all of which together shall constitute one and the same instrument.

18. *Time of essence.* Time is of the essence of this agreement.

The parties have duly executed this agreement

Attest:

Harvey Brown

Secretary

Jay Realty Corp.

By: _____
President



124 of 152 DOCUMENTS

Current Legal Forms for Real Estate

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Current Legal Forms for Real Estate
Chapter 21 SALES AND EXCHANGES
Part IV. Forms

H. SALES OF STOCK IN REAL ESTATE CORPORATIONS

25-21 Current Legal Forms for Real Estate FORM 21.88

FORM 21.88 Sale of stock of corporation--operating motel principal asset--seller protected against personal liability for corporate debt--buyer indemnified against undisclosed debts

COMMENT

This is a contract for the sale of stock of a corporation with an operating motel as its principal asset. The indemnifications in this agreement are to protect the purchaser not only against the risks involved in buying real estate, but also against the risks in buying a going business.

Indemnification of buyer

In this form, the indemnity includes all undisclosed debts of the business, all claims arising out of the seller's warranties, all deficiencies in taxes which may arise with respect to returns which have been filed, and all tax deficiencies for operations up to the closing in excess of those provided for in the agreement. A sum of money is to be set up by the seller in escrow as security for the indemnification provision.

Indemnification of seller

The seller under this agreement is protected by indemnification. During the course of his operation of the business of the corporation, the seller has personally guaranteed some of the corporate debts. To insure that these debts will be paid and that no liability will be asserted against the seller, the purchaser is obligated at the closing to make a cash loan to the corporation which is to be used to discharge all of its debts except specified mortgage loans, leases and certain contracts. In this agreement, the purchaser indemnifies the seller against liability for these obligations. The purchaser's loan to the corporation will not be taken into account either for determining gain or loss to the seller or the cost basis of the purchaser.

Collapsible corporation ordinary income risk

When stock of a real estate corporation is sold, the seller must consider whether, under the "collapsible corporation" provisions of the Code (IRC § 341), ordinary income, rather than capital gain, is realized on the sale.

FORM

AGREEMENT entered into between Herbert Lenore, a person of full age and majority and a resident of the Parish of Orleans, State of Louisiana ("Seller"), and J. & M. Corporation, a corporation organized under the laws of the State of Delaware, herein represented by its President, James Murray, duly authorized ("Purchaser").

Recitals

Seller is the owner of all of the outstanding capital stock of Bayside Hotels Corporation, and is its President.

Bayside Hotels Corporation operates and has operated the Bayside Motel at 100 University Avenue, New Orleans, Louisiana, and

Purchaser has inspected the premises of the Bayside Motel. Purchaser desires to purchase Seller's shares in Bayside Hotels Corporation, and intends to continue to operate the business of the Bayside Motel and its attendant facilities.

Now, therefore, the parties agree as follows:

1. *Sale of stock.* Seller shall sell and deliver to Purchaser, and Purchaser shall purchase from Seller, 6,000 shares of the no par value common capital stock of Bayside Hotels Corporation, a Louisiana corporation ("Bayside").

2. *Price.* The purchase price for this sale shall be \$1.5 million cash, payable at the closing.

3. *Loan to corporation as additional consideration.* Purchaser acknowledges that Seller has guaranteed certain of Bayside's obligations and has required that Purchaser make available to Bayside, in the form of a loan, at closing, the sum of \$250,000. Bayside shall use this amount, at closing, to pay all of its outstanding debts and obligations, except those which the parties have agreed will remain outstanding after the closing, as provided in paragraphs 4 and 5.

4. *Outstanding mortgages.* Purchaser acknowledges that the outstanding mortgages and debts due by Bayside as listed on the attached Exhibit A will not be paid at the closing but will remain as Bayside's obligations and shall survive the closing. To the extent that Seller has personally obligated himself in connection with any of such mortgages or debts as an indemnitor, endorser, or guarantor for the benefit of Bayside, Purchaser shall hold Seller harmless in connection with any liability which may be enforced against Seller by virtue of the nonpayment of any such obligations.

5. *Outstanding leases and contracts.* Purchaser further acknowledges that the leases and contracts made by Bayside as listed on the attached Exhibit B will not be satisfied or cancelled at the closing. Purchaser shall indemnify and hold Seller harmless in connection with any personal obligation or responsibility Seller may have in connection with such leases and contracts as the same may be enforced against Seller by virtue of any default by Bayside after the date of closing.

6. *Seller's representations and warranties.* Seller represents, covenants, and warrants (all of which shall survive the closing of this transaction) that as of the closing:

(a) *Corporate status.* Bayside is a corporation duly incorporated and validly existing under the laws of the State of Louisiana and is in good standing in such state; Bayside has filed all required returns with respect to state and federal income, franchise, and corporation taxes, for all previous years since incorporation up to the present fiscal year which commenced January 1, _____ [year]; Bayside has paid all taxes shown to be due on such returns.

(b) *Shares.* The 6,000 shares of Bayside are owned by Seller free and clear of all liens and encumbrances; Seller has the unrestricted and unlimited right and authority to sell, transfer, and deliver such shares; the total authorized capital of Bayside consists of 6,000 shares of no par value common stock; and all such shares have been fully paid for, duly issued.

(c) *Property.* Bayside is the owner of the furniture, fixtures, equipment, carpeting, draperies, air conditioning units, kitchen equipment, utensils, cleaning equipment and materials at the Bayside Motel, consisting of 200 motel units and 210 hotel units, dining facilities, and public spaces. All of the above personal property is owned free and clear of all liens, encumbrances, and claims for payment, except for any debts relating to items listed in paragraph 4.

Seller represents and warrants that the premises is in compliance with all applicable governmental laws, rules and regulations, federal, state and local, including without limitation, environmental laws, and the Americans With Disabilities Act of 1990, and its Accessibility Guidelines.

(d) *Debts.* All of Bayside's debts are or will be paid and satisfied prior to or concurrently with the closing contemplated by this agreement, except the debts, obligations, and contractual arrangements referred to in paragraphs 4 and 5 and listed in the attached Exhibits A and B.

(e) *Status quo.* There will be no material adverse changes in Bayside's assets, liabilities or financial condition, nor shall any contractual arrangement or obligation, other than those in the usual course of business, be undertaken before the closing except as is otherwise listed and provided for in this agreement. All wages, salaries, commissions, indebtedness, and obligations of Bayside to its shareholders, officers, directors, employees, and agents have been or will be discharged at the closing, except the debts, obligations, and contractual arrangements referred to in paragraphs 4 and 5 and listed in the attached Exhibits A and B.

(f) *Litigation.* No actions, suits, or proceedings are pending, or to Seller's knowledge are threatened, against or affecting Bayside or its property, except the following:

(1) Jones Construction Co., Inc. vs. Bayside Hotels Corporation. No. 300-602, Civil District Court for the Parish of Orleans, State of Louisiana--Suit for \$20,800, together with legal interest from May 20, _____ [year], until paid, and court costs.

(2) Robins, Inc. vs. Bayside Hotels Corporation. No. 304-702, Civil District Court for the Parish of Orleans, State of Louisiana--Suit for \$15,784, with interest from May 8, _____ [year], until paid, and court costs.

At or before the closing, Seller will obtain a receipt and release for full settlement and cancellation of each of the foregoing suits. If the suits are not so settled, compromised, or paid before the closing, Seller shall deposit with Price and Winters, Attorneys at Law, all sums deemed necessary to pay the amount of each claim in full, plus 5 percent of the total of such claims remaining unpaid as a contingent amount. Seller shall deliver to Purchaser a consent from Price and Winters that such funds were deposited in escrow with them, that such funds will not be disbursed to any person, firm, or corporation except in settlement or payment of such suits, and if such suits are not paid or settled within two years

from the closing date, that the escrow funds will be turned over to Purchaser, or its successors or assigns, and that thereupon Price and Winters and Seller shall be relieved of further responsibility therefor. It is the intention of this agreement that Purchaser will not be responsible for the payment of such claims. The consent of Price and Winters shall be to the effect that in the event of any adverse judgment on either of such claims, Price and Winters will either pay such judgments out of the funds deposited with them or will cause to be filed a suspensive appeal bond preventing the execution of any such judgment against the property of Bayside.

7. *Documents at closing.* Seller shall deliver or cause to be delivered to Purchaser at the closing the following:

(a) *Secretary's certificate.* A certificate from the Secretary of Bayside, certified by Seller, listing all shareholders of Bayside and setting forth the number of shares owned by each and the names of all officers and directors of Bayside.

(b) *Charter, books and records.* The original or a copy of the Charter of Bayside, minute books, stock books, and all books, records, and documents pertaining to Bayside and its affairs.

(c) *Shares.* 6,000 shares of the capital stock of Bayside, duly endorsed by Seller to Purchaser with the signature of Seller guaranteed by an officer of a national bank, or notarized by a Notary Public, duly qualified in and for the Parish where such signature is sworn to.

(d) *Certificate of no default.* A certificate from Seller that no default exists as to any items warranted by Seller in paragraph 4 of this agreement.

(e) *Resignations.* The written resignation of all of the officers and directors of Bayside, to be effective as of the closing date.

(f) *Estoppel certificates.* A statement from the appropriate creditor as of the closing date reflecting the balance due from Bayside to the various creditors listed on the attached Exhibit C.

8. *Indemnification by seller*

(a) *Indemnification.* Seller shall indemnify and hold harmless Purchaser and Bayside and its successors from and against all damages, liabilities, and claims which might exist on account of failure or default of any of Seller's covenants, agreements, or warranties hereunder, all debts of Bayside (known or unknown) and which are not disclosed or set forth in this agreement, and all amounts which might be claimed, asserted, or established for or as deficiencies with respect to federal or state income taxes, or franchise and other taxes including city taxes and charges against Bayside arising out of or related to the returns herein represented to have been filed, and the operations of Bayside during all fiscal years of Bayside, with the exception of the current fiscal year of ____ [year], and all such deficiencies with respect to operations and business of Bayside during such current fiscal year up to the date of the closing in excess of any amounts which have otherwise been herein provided for.

(b) *Survival.* All of Seller's covenants, agreements, and warranties hereunder are and shall remain in effect after the closing and sale of this purchase.

(c) *Claims.* If any claim for which Seller is obligated to Purchaser under the above provisions is asserted against Bayside or Purchaser, Seller shall, within ten days after receiving written notice thereof, notify Purchaser in writing whether he has any objection to the payment of such claim. Seller shall not object to such payment unless he promptly initiates proper proceedings to contest it (or undertakes the appropriate defense), at his expense, in a manner that will be effective fully to protect against any liability and expense in connection therewith.

(d) *Claim payment.* If Seller does not object to the payment of the claim within the ten-day notice period, Seller shall be

required to pay the same within five days after the period expires. Seller's failure to pay such claim and obtain a full release of Bayside and Purchaser shall constitute full authority either to contest the claim or to pay the claim and obtain a release of Bayside and both parties. In that event, Purchaser may immediately receive from Seller the amount paid, plus interest of 9 percent per annum from the date of payment. Seller may not, in such event, contest the validity of the creditor's claim against Bayside or Purchaser, as the case may be. If Seller objects in writing to the payment of any such claim within the above ten-day period, and promptly initiates proper proceedings to contest it (or undertakes the appropriate defense thereof), Purchaser shall not pay the claim as provided above, unless and until all or any part of the claim is finally determined to be due and owing. In such event, the parties shall be bound by the above provisions with respect to the payment of claims.

9. *Security for indemnification by seller.* In order to secure contingent liabilities for the warranties and indemnities herein granted by Seller, Seller shall deposit, at the closing, the sum of \$250,000 with Price and Winters, Attorneys at Law, for a period of nine months from the closing date. These funds may be invested by Price and Winters on instructions from Seller in any obligations of or guaranteed by the United States Government, or any obligations of any state of the United States or municipal subdivision, or in any bank or savings and loan association, the deposits of which are insured by the Federal Deposit Insurance Corporation or the Federal Savings & Loan Insurance Corporation. Such deposits shall not exceed in any one institution the amount which would be insured by such agencies. Price and Winters shall not be responsible for the failure or suspension of any bank wherein the deposits are made nor for the uncollectibility of any obligations purchased hereunder. These funds shall be held by Price and Winters, and receipted for by them, subject to the terms of this paragraph, and shall be paid to Seller upon the expiration of the term of this escrow deposit without claim of any person, firm, or corporation thereto, including Purchaser. If any claims or obligations arise for which Seller is obligated, Seller shall either pay or obtain a release of Bayside and Purchaser from such claims in accordance with the procedure established in paragraph 8, and upon Seller's failure so to do within the time limits therein provided, Price and Winters shall use portions of the funds deposited with them to pay and settle such claims and to obtain a release of Bayside and Purchaser. Price and Winters shall in no event be responsible for the payment of any funds over and above the amount so deposited. If such funds are not sufficient to pay or satisfy any claims arising within the period of the escrow deposit, the placing of this escrow deposit shall not relieve and release Seller from his hold harmless and indemnity for the full amount of such claims as otherwise provided in this agreement.

10. *Deposit by purchaser.* Purchaser has, concurrently with the execution of this agreement, deposited with Blaine and Smith, Inc., 100 Hillside Street, New Orleans, Louisiana, the sum of \$250,000 cash, to be applied against the \$1.5 million cash to be paid Seller under the provisions of paragraph 2. If Purchaser fails or refuses to close this sale for any reason, other than Seller's refusal or failure to comply with or perform any of his covenants and agreements, the \$250,000 shall be forfeited and paid to Seller as full liquidated damages without further formality, beyond the tender of title by Seller in accordance herewith. The responsibility of Blaine and Smith, Inc., who by their intervention herein acknowledge receipt of the \$250,000 deposit, shall be only to hold such funds so deposited in safe keeping and to disburse and pay them as herein provided.

11. *Brokerage and commission.* The parties agree that there are no broker's fees or commissions, or finder's fees, or otherwise, due as a result of the consummation of this transaction other than the payment of a \$25,000 commission to Blaine and Smith, Inc., which Seller agrees to pay. Blaine and Smith, Inc., by its intervention herein, agree that it shall not be entitled to any commission unless this sale and purchase is closed and the consideration paid by Purchaser. Purchaser further agrees with Seller that if there is any brokerage, finder's fee, or commission due to any other person, firm, or corporation, then, and in the event of any such claim, Purchaser shall defend or pay such claim and hold Seller harmless in connection with any liability or responsibility in connection therewith.

12. *Closing.* The sale and purchase under this agreement shall be closed at the law office of Price and Winters, 100 Bankers Building, New Orleans, Louisiana, at 10 a.m. on November 1, ____ [year], or at any other time the parties shall designate. Purchaser may close this transaction before the above date by giving Seller 10 days' prior written notice of its intention and fixing the exact date and time of the proposed closing, which, in any event, shall be at the office of

Price and Winters. In no event shall the sale and purchase be closed later than November 1, ____ [year], unless Purchaser requests a 30-day extension to December 1, ____ [year]. Purchaser shall be entitled to such 30-day extension only if it places an additional \$100,000 deposit with Blaine and Smith, Inc. This additional deposit shall be subject to the same terms, conditions, and provisions as the initial \$250,000 deposit provided for in paragraph 10.

13. *Assignment.* Purchaser may assign this agreement to any person, firm, or corporation if the assignee assumes all of Purchaser's obligations hereunder. Seller's rights in and to the deposit shall not be affected by any such assignment. If an assignment is made, Purchaser shall indemnify Seller by separate indemnity agreement with respect to Purchaser's obligations herein to hold Seller harmless in connection with Bayside's mortgages and debts as listed in the attached Exhibit A.

14. *Notices.* All notices hereunder shall be deemed properly given if sent by United States mail, postage prepaid, registered or certified mail, to either party, at the following addresses:

Seller: Herbert Lenore
400 Commercial Building
New Orleans, Louisiana

Purchaser: J. & M. Corporation
500 Fifth Avenue
New York, New York

The parties may change their respective addresses by written notice, as provided above.

15. *Governing law.* This agreement shall be construed in accordance with and governed by the laws of the State of Louisiana.

16. *Entire agreement; modification.* This instrument constitutes the entire agreement between the parties. It may not be changed or terminated except by an agreement duly executed and signed by both parties.

17. *Binding effect.* This agreement shall be binding upon and inure to the benefit of both parties and their respective legal representatives, heirs, successors, and assigns.

18. *Non-waiver.* No delay or failure by either party to exercise any right hereunder, and no partial or single exercise of such right, shall constitute a waiver of that or any other right, unless otherwise expressly provided herein.

19. *Headings.* Headings in this agreement are for convenience and reference only and shall not be used to interpret or construe its provisions.

20. *Counterparts.* This agreement may be executed in one or more counterparts, each of which shall be deemed an original but all of which together shall constitute one and the same instrument.

21. *Time of essence.* Time is of the essence of this agreement.

Thus done and signed by the respective parties in New Orleans, Louisiana, on September 1, ____ [year].

Corporate Seal

Attest:

Secretary

J. & M. Corporation

By: _____
President

Herbert Lenore

Intervention

Now comes and appears, John Blaine, President of Blaine and Smith, Inc., who does by these presents intervene, take cognizance of, and agree to any of the above and foregoing provisions of this agreement of purchase and sale, and particularly paragraphs 10 and 11, as same may affect Blaine and Smith, Inc., regarding commission, brokerage and the placing of the deposit, and John Blaine does for and on behalf of himself and Blaine and Smith, Inc., acknowledge receipt of a deposit of \$250,000 in accordance with the provisions of paragraph 10 of this agreement.

John Blaine for and on behalf of himself and Blaine and Smith, Inc.



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Current Legal Forms for Real Estate

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Current Legal Forms for Real Estate
Chapter 21 SALES AND EXCHANGES
Part IV. Forms

H. SALES OF STOCK IN REAL ESTATE CORPORATIONS

25-21 Current Legal Forms for Real Estate FORM 21.89

FORM 21.89 Sale of stock of corporation--operating hotel principal asset--nonrecourse installment note secured by stock being sold--separate security agreement

COMMENT

In this transaction, a substantial part of the purchase price is deferred by a nonrecourse promissory note of the purchaser. To secure the payment of this promissory note, the purchaser deposits as collateral, under a separate security agreement, all the shares of the corporation. Under this security agreement, the purchaser may liquidate the corporation and substitute a second mortgage as security for the promissory note.

Tax aspects

This transaction may qualify as an installment sale transaction, so that the gain is deferred and is not reported until each deferred payment is actually made. Furthermore, the seller indemnifies the purchaser against all unknown claims, but reserves the right to defend specific tax claims through his own counsel. Special provisions are incorporated to take care of pending claims for the refund of federal taxes.

FORMS

(1) Contract of sale

AGREEMENT made in New York, New York, October 15, _____ [year], between Harold Smith, of New Haven, Connecticut ("Seller"), and James Wilson, of New York, New York ("Purchaser").

Recitals

Seller is the owner of all the authorized and outstanding shares of Smith Hotel Corporation, a New York corporation (the "Company"), consisting of 200 common shares.

Seller desires to sell, and Purchaser desires to purchase, all the common shares of the Company.

It is therefore agreed:

1. *Representations.* Seller makes the following warranties and representations to Buyer:

1.1. *Corporation status and shares.* The Company is a business corporation duly organized and validly existing under the laws of the State of New York; the Company is authorized to issue an aggregate of 200 common shares.

1.2. *Authority to sell.* Seller is the owner of all the Company's shares; he has full right to sell and transfer such shares; such shares are free and clear of all liens, security interests, debts, or other encumbrances, and are fully paid and nonassessable.

1.3. *Property and title.* The Company is the owner of, and has a good and marketable title in fee simple to, the following described property (the "Property"):

(Insert description)

subject only to the following encumbrances:

(1) A first mortgage made by the Company to National Mortgage Corporation, dated March 5, _____ [year], recorded in the office of the Register of the County of New York in Liber 15278 of mortgages, page 400, originally given to secure a bond of \$1.5 million upon which there remains unpaid as of this date the sum of \$1.35 million, with interest at 8 percent per annum from October 1, [date], and upon which interest is payable on January 1, _____ [year], and quarter-annually thereafter, and principal is payable \$6,000 on January 1, _____ [year], and \$6,000 on the first days of every third month thereafter until April 1, _____ [year], when the entire balance of principal becomes due;

(2) A security interest on the furniture, furnishings, equipment, and other personal property belonging to the Company and used in the operation of the property, given as additional collateral security for the payment of the mortgage indebtedness due to National Mortgage Corporation;

(3) Any state of facts which an accurate survey would show, and which does not render title to the property unmarketable; and

(4) Leases, tenancies, and occupancies of the various stores, offices, and apartments in the building on the property, with all of which Purchaser is familiar.

1.4. *Financial statement.* The annexed balance sheet as of September 30, _____ [year] is a true and correct balance sheet of the Company as of that date; there are no liabilities or obligations, actual or contingent, of the Company as of that date except those therein set forth (except that no reserve has been set up for the Company's federal and state income and franchise taxes for the period from and after June 1, _____ [year]).

1.5. *Financial statement changes.* The Company has not, between September 30, _____ [year], and the date hereof, entered into any contract or incurred any obligation of any kind, except those in the regular course of its business.

1.6. *Employment contracts.* There is no contract of employment with any officer, director, or employee of the Company which is not terminable at will.

1.7. *Tax returns.* The Company has filed all necessary state and federal income and franchise tax returns, and all necessary reports and returns for all other taxes due to the federal, state, and city governments, and it has set up an adequate reserve for, or has fully paid and discharged, all such taxes accrued up to May 31, _____ [year].

1.8. *Litigation.* No litigation, reassessment, or audit of taxes, wage negotiation, or other proceeding now is pending against the Company, except possible tort claims covered by insurance.

1.9. *Contracts.* There are no service contracts or other contracts of more than one year's duration, except leases, the union contract, or contract that may be cancelled on 30 days notice.

1.10. *Condition of Real Property.* The Property is in compliance with all governmental laws, rules and regulations, federal, state and local, including without limitation all environmental laws, and the Americans with Disabilities Act of 1990, and its Accessibility Guidelines.

2. *Purchase price.* Seller shall sell and Purchaser shall purchase the entire capital stock of the Company for \$1.8 million, subject to the adjustments of purchase price set forth below.

3. *Additions to purchase price.* To the purchase price referred to in paragraph 2, there shall be added an amount equivalent to the total of the following assets of the Company, as of November 1, _____ [year]: (a) cash on hand and in banks; (b) accounts receivable; (c) the value of the inventories of merchantable food and beverages at the cost stated on the Company's books; (d) the prorated value of all existing policies of insurance; (e) prepaid real estate taxes, apportioned on the basis of the real estate tax year; (f) prepaid rates for licenses, telephone equipment, and telephone rental; (g) prepaid water rates; (h) fuel on hand; and (i) the value at cost of the linens, china, glass, silverware, carpets, curtains, draperies, and materials in reserve not required for normal replacements.

4. *Reductions in purchase price.* There shall be deducted from the purchase price an amount equivalent to the total of the following items, as of November 1, _____ [year]: (a) interest earned and unpaid on the first mortgage referred to in paragraph 1.3; (b) accounts payable; (c) taxes of the Company, determined on the basis that the Company ceased business on that date, including federal and state income tax, New York State franchise tax, federal, state, and city income tax on wages withheld at the source, federal and state payroll taxes, state and city utility taxes, New York City sales tax and water charges, and real estate taxes apportioned on the basis of the real estate tax year; (d) salaries and wages of employees apportioned on the basis of time; (e) charges to be accrued for electricity, water, steam, gas, telephone, and compensation insurance; (f) rents received in advance for any period after October 31, _____ [year]; (g) accrued real estate assessments which become liens before November 1, _____ [year]; and (h) any other liabilities shown on the balance sheet to be prepared in accordance with paragraph 5, except the first mortgage referred to in paragraph 1.3.

5. *Determination of purchase price.* The purchase price, adjusted as provided in paragraphs 3 and 4, be determined by the accounting firm of Jones & Jones, which shall take all necessary inventories and shall prepare the necessary statements, computations, and balance sheet, all to be made as of midnight, October 31, _____ [year]. Such determination of the adjusted purchase price shall be conclusive on the parties, when submitted in written form at the closing. Within 30 days after the date of closing, the firm of Jones & Jones shall audit and certify their

computation of the adjusted purchase price, and if it appears from such audited and completed statement that the computation was inaccurately made, adjustment shall be promptly made between the parties, so that Purchaser shall be reimbursed for any overpayment made or shall pay Seller the amount of any underpayment.

6. *Payment of purchase price.* The adjusted purchase price shall be payable as follows:

(a) \$150,000 by check, subject to collection, upon the execution and delivery of this agreement, receipt acknowledged.

(b) \$300,000 at the time of closing, by certified check or checks drawn to the order of Seller, upon a bank or trust company which is a member of the New York Clearing House Association or the Federal Reserve Bank.

(c) The balance, with interest from November 1, _____ [year], at 7 percent per annum, in installments, as follows: \$9,000 on January 10, _____ [year], and \$9,000 on the tenth day of every month thereafter, to be applied, first, on account of interest upon the unpaid balances of purchase price at 7 percent per annum, and then in reduction of the unpaid balances of purchase price, until November 10, _____ [year], when the entire balance of the purchase price shall be due and payable.

7. *Promissory note for balance of purchase price.* The unpaid balance of the purchase price due at the closing shall be evidenced by the execution and delivery by Purchaser to Seller, upon the closing, of a nonnegotiable promissory note, dated as of November 1, _____ [year], bearing interest of 7 percent per annum, and payable in the manner above provided. The promissory note may be prepaid in whole or in part in multiples of \$1,000, at any time prior to maturity, and shall provide that if the maker defaults in the payment of any installment of principal or interest upon such note, and such default continues for 15 days, then, at the option of the holder of such note, the entire unpaid principal balance with accrued interest shall forthwith become due and payable. The promissory note shall further provide that if any of the following events occur, it shall, at the holder's option, immediately become due and payable, notwithstanding any other provision therein contained: if the Company, its successors or assigns, or any owner of the property, defaults in paying any installment of principal or interest upon the first mortgage referred to in paragraph 1.3, or upon any mortgages which are placed upon its real or personal property in place thereof, and the default continues for ten days; if the Company, its successors or assigns, or any owner of the property, defaults in performing any other term of the first mortgage, or of any mortgage or security interest placed upon its real or personal property, and the default continues for ten days; if the Company, its successors or assigns, or any owner of the property, fails to pay promptly any tax or assessment levied against the property, and the default continues for 30 days; or if Purchaser otherwise defaults in performing any term in the security agreement to be executed and delivered at the closing in the form annexed and made a part hereof.

8. *Escrow of shares to secure promissory note.* To secure the payment of the promissory note referred to in paragraph 7, Purchaser shall, at the closing, deposit with Seller all the shares of the Company purchased by Purchaser, duly endorsed for transfer, and Seller shall hold such shares as security for the payment of the promissory note, and for the Purchaser's performance of the terms of the promissory note and the accompanying security agreement. In case of any default in the performance of the terms of the promissory note or the security agreement, Seller may sell such shares or any part thereof, at public or private sale, at which Seller may bid and purchase, on 30 days' notice in writing to Purchaser. Seller shall apply the proceeds to the expenses of such sale, including counsel fees, and to the payment of the principal and interest due upon the promissory note to the date of payment. Any surplus shall be paid over to Purchaser.

9. *Limitation on purchaser's liability.* Notwithstanding the above, Purchaser's liability to pay the promissory note is limited to the security held by Seller. In no event shall Purchaser be personally liable for any deficiency resulting from the sale of such shares, or of any security deposited in substitution, nor shall any action or proceeding in any event be brought by Seller against Purchaser to recover a personal judgment against him upon the promissory note or upon the security agreement.

10. *Accounts receivable unpaid.* If any of the accounts receivable included in the determination of the adjusted purchase price are not paid within 30 days after the closing Seller, upon receiving an assignment thereof, shall pay the Company their then unpaid face amount. The Company shall not be required to institute any suit or other proceeding for the collection of such accounts receivable. However, Purchaser agrees that the Company shall, at Seller's request and expense, assist in the collection of any accounts receivable so assigned to Seller, and shall make its facilities available to him. If Seller institutes any suit to collect the accounts receivable, Purchaser shall refrain from doing anything that might affect such collection.

11. *Additional taxes.* If the amount referred to in paragraph 1.7 as having been set aside for the Company's federal, state, and city taxes for fiscal years ended before June 1, _____ [year], is found to be insufficient, Seller shall pay Purchaser the amount of such deficiency. If at any time hereafter, by reason of any examination or audit made by the federal, state, or city governments, any additional taxes or assessments with interest or penalties (other than those now set forth in the reserve account), are levied or assessed against the Company for any fiscal year or period ended before June 1, _____ [year], Seller shall forthwith pay such amounts to Purchaser. If the federal, state, or city government makes or asserts any claim for additional taxes or assessments against the Company for any fiscal year or period ended before June 1, _____ [year], Seller may employ his own counsel to contest such claims, and to litigate them at his expense. In such case, however, Seller shall indemnify the Company and Purchaser against any damage resulting from the failure to pay such claims while such litigation is pending, and shall pay or discharge such assessment or assessments, with interest and penalties, as finally fixed and determined.

12. *Indemnification against unknown claims.* If at any time after the closing of this transaction, it appears that there are any suits, claims, demands, or obligations of the Company of any kind or nature (not including claims for which the Company is adequately insured against loss or damage), not appearing upon the balance sheet of October 31, _____ [year], to be prepared in accordance with paragraph 5, or not herein specifically referred to, Seller shall, upon receipt of written notice thereof within six years from the closing date, make payment thereof, or indemnify the Company and Purchaser against the collection thereof, defend, at his expense, any action brought thereon, and pay and discharge any judgment obtained against the Company or Purchaser by reason thereof.

13. *No recourse against seller on seller's obligations.* Notwithstanding any contrary provision herein, Seller personally does not obligate himself to perform any obligation set forth in paragraphs 10, 11, and 12, or to make any payment referred to in those paragraphs. If Seller fails to make any such payment as it becomes due and payable, Purchaser's sole remedy shall be to deduct the amount or amounts as they become payable from the next ensuing installments on the promissory note evidencing the balance of the purchase price. The mere assertion of a claim or demand, or the institution of any action, shall not authorize any offset against Purchaser's obligations under the promissory note, unless such claim or demand is either reduced to final judgment or admitted in writing by Seller. Reference to this provision shall be inserted in the promissory note evidencing the balance of the purchase price.

14. *Pending tax refund.* The Company has filed claims for refund of federal income taxes for the fiscal years ended May 31, _____ [year], and May 31, _____ [year]. Purchaser shall take no step to interfere with the prosecution of these refund claims, and shall permit any attorney selected by Seller to prosecute such claims upon terms determined by Seller. If the Company receives any refunds of these taxes for any period before June 1, _____ [year], Purchaser, by way of addition to the purchase price, shall pay to Seller, as such refunds are received, a sum equal to their amount, less attorneys' fees paid or agreed to be paid by the Company, and less any disbursements incurred in connection with any proceedings instituted for such refunds.

15. *Examination of books.* Purchaser, or his agents and accountants, shall have full and complete access to all of the Company's books, records, and accounts, and may make any examination and take any excerpts he or they deems necessary or desirable.

16. *Conduct of business.* Seller covenants that, between the date of this agreement and the date of closing, the Company

shall not:

16.1. Make any changes in its corporate structure, or its certificate of incorporation, or in the amount of its authorized or issued shares.

16.2. Enter into any transaction other than in the ordinary course of business.

16.3. Make any lease for any period later than one year from December 1, _____ [year].

16.4. Enter into any agreement altering or modifying the terms of the first mortgage and security interest referred to in paragraph 1.3.

16.5. Increase the rate of compensation payable to any officer or director of the Company, or enter into any new contract of employment with any officer or director.

16.6. Make any agreement of employment other than in the normal course of its business.

16.7. Default on the first mortgage and security interest referred to in paragraph 1.3, or in the maintenance of all policies of insurance now in effect, including workmen's compensation and liability insurance.

16.8. Sell, assign, or otherwise dispose of its trade name.

16.9. Default in the filing of any reports or returns due to any federal, state, or municipal authority.

17. *Fire or condemnation.* If before November 1, _____ [year], the Property owned by the Company, which is its principal asset, is condemned in whole or in part, or partly destroyed by fire, and such damage exceeds \$300,000, in either such event this agreement shall become null and void, Seller shall return to Purchaser the money paid on account, and the parties shall release and discharge each other from any further obligations. If such damage does not exceed \$300,000, this agreement shall nevertheless be performed; but, for the purpose only of determining the adjusted purchase price, the money realized by the Company from the fire insurance or condemnation shall not be deemed an asset of the Company, nor shall the cost of repairing the loss or damage be deemed a liability.

18. *Closing documents.* At the closing, Seller shall deliver to Purchaser:

18.1 *Shares.* Certificates for 200 common shares of the Company, duly endorsed for transfer, subject to Purchaser's obligation to deposit the shares with Seller in accordance with the provisions of paragraph 8.

18.2 *Resignations.* The resignations of each officer and director of the Company. Seller shall cause to be elected in their place the officers and directors designated by Purchaser.

18.3 *Replacement officers and directors.* Certificates of the Company's resigning secretary, duly certified by the resigning president and each resigning director, certifying that at a meeting of the Company's directors, duly called and held and at which a quorum was present, the resignation of the officers and directors thereof was accepted, and that there were duly elected in their place, as officers and directors, the persons Purchaser designated in writing.

18.4 *Documents.* A copy of the Certificate of Incorporation of the Company; its Bylaws, minute book, share book, and seal; the deed or deeds to the Property; the title policy issued by the Title guaranty and Trust Company, and all other papers relating to the title to the Property; copies of the first mortgage and security agreement referred to in paragraph 1.3; any bills, vouchers, and records showing the ownership of the furniture, furnishings, and equipment, and other personal property used in the operation of the Company; and all other of the Company's books of account, records, and

contracts.

18.5 *Estoppel letter.* A letter or memorandum from the National Mortgage Company showing the amount due, as of November 1, _____ [year], for principal and interest on the first mortgage and security agreement referred to in paragraph 1.3.

19. *Misrepresentation by seller.* If any of Seller's representations are untrue, inaccurate or misleading in any material respect, Purchaser's sole remedy shall be to rescind this agreement. If Purchaser rescinds, Seller shall immediately pay Purchaser the \$150,000 paid upon the execution hereof, whereupon Purchaser shall have no further claims against Seller. If the effect of any false, inaccurate, or misleading representation may be remedied by a reduction in the purchase price, Purchaser shall close this transaction, accept delivery of the common shares, and pay the purchase price provided for herein, less such reduction or adjustments.

20. *Default by purchaser.* If on the date set for the closing, Seller is ready, willing, and able to carry out and perform this agreement, and Purchaser refuses or is unwilling to perform his obligations, Seller shall retain the amount paid on account of the purchase price as liquidated damages, this agreement shall thereupon become void, and neither party shall have any further rights against the other. The parties acknowledge that said sum represents their best estimate of what the actual damages would be, which are difficult to ascertain.

21. *Closing.* The closing of this transaction shall take place at the office of Howard T. Brown, Esq., 10 Madison Square, New York, New York, on November 2, _____ [year], at 10 a.m.

22. *Releases.* At the closing, Purchaser shall cause the new directors of the Company to adopt a resolution releasing and discharging Seller, and all of the Company's present and former officers and directors, from the date of its incorporation to the date of such closing, from any claim or demand existing against them, or any of them, in favor of the Company, by reason of any act or thing done by them, or any of them, and shall cause the Company to execute and deliver such general release to Seller and the Company's present and former officers and directors. Seller and the Company's resigning officers and directors shall execute and deliver to Purchaser similar releases in favor of the Company, except that Seller's release shall exclude obligations of the Company which, under this agreement, Purchaser undertakes to have fulfilled.

23. *Broker.* Thomas Burke is the broker who brought about this transaction. Seller shall pay for the services of such broker, in accordance with a separate agreement made between them. Purchaser represents and warrants that he has had no dealings or negotiations with respect to this transaction with any person, firm, or corporation other than such broker.

24. *Entire agreement; modification.* This instrument constitutes the entire agreement between the parties with respect to the subject matter hereof. All representations herein made by Seller shall expire on the closing of this transaction, and none shall survive the closing. This agreement may not be modified except by an instrument duly executed by both parties.

25. *Non-waiver.* No delay or failure by either party to exercise any right hereunder, and no partial or single exercise of such right, shall constitute a waiver of that or any other right, unless otherwise expressly provided herein.

26. *Binding effect.* This agreement shall be binding upon and inure to the benefit of both parties and their respective legal representatives and assigns.

27. *Notices.* All notices hereunder shall be in writing and delivered personally or mailed by certified mail, postage prepaid, addressed to the parties at their last known addresses.

28. *Headings.* Headings in this agreement are for convenience and reference only and shall not be used to interpret or

construe its provisions.

29. *Governing law.* This agreement shall be construed in accordance with and governed by the laws of the State of New York.

30. *Counterparts.* This agreement may be executed in one or more counterparts, each of which shall be deemed an original but all of which together shall constitute one and the same instrument.

31. *Time of essence.* Time is of the essence of this agreement.

The parties have signed and sealed this agreement.

(L.S.)

Harold Smith

(L.S.)

James Wilson

(2) Security agreement

SECURITY AGREEMENT made November 2, _____ [year], between James Wilson, Purchaser, and Harold Smith, Seller.

Recitals

Pursuant to an agreement of sale and purchase between the parties on October 15, _____ [year], Purchaser has simultaneously herewith delivered his promissory note to Seller, dated November 1, _____ [year], evidencing the balance of the purchase price for 200 common shares of Smith Hotel Corporation, (the "Company").

Purchaser, by the terms of the agreement dated October 15, _____ [year], has agreed to secure the payment of his promissory note in the manner hereinafter set forth,

It is therefore agreed:

1. *Deposit of collateral.* Purchaser hereby deposits with Seller certificates for 200 of the Company's common shares, duly endorsed for transfer. Such share certificates shall be held by Seller subject to the terms and conditions of this agreement; and, upon the payment in full of the promissory note, shall be returned to Purchaser.

2. *Substitution of collateral.* Purchaser may at any time, so long as there is no default in the promissory note, or in the performance of the terms, covenants, and conditions of this security agreement, substitute other collateral for the 200 Company shares, and obtain the release of such shares. Other collateral may consist of shares of a corporation owning a hotel of approximately the same size, age, character, and value as the hotel now owned by the Company, if the net worth of such corporation is at least as great as the then net worth of the Company; or such other collateral may consist

of a mortgage, in the face amount of the unpaid portion of the promissory note, upon hotel property the equity value of which is at least three times such amount.

3. *Deposit of resignations.* Purchaser hereby deposits with Seller the undated resignations of James Wilson, Harold Wilson, and John Wilson, as officers and directors of the Company. Such resignations, however, shall not be used or acted upon unless the Company's shares are sold at public or private sale, by reason of a default by Purchaser. Following every meeting of the shareholders or directors of the Company at which new directors or officers are elected, the resignation of the new directors and the new officers shall immediately be deposited with Seller. If Purchaser fails to deposit any such resignation, and if such default continues for a period of ten days after the election of a director or officer, the promissory note, together with interest thereon, shall forthwith become due and payable.

4. *Dividends and voting rights.* All dividends upon the deposited shares or on any securities deposited in substitution, and, if the securities are interest bearing, the interest thereon, shall belong to Purchaser but shall be paid to Seller to be applied in reduction of the promissory note. All voting rights incident to such shares shall be vested absolutely in Seller, except that Purchaser or his nominee, so long as Purchaser is not in default in the performance of any term of the promissory note or of this security agreement, is irrevocably authorized to vote the shares for the election of any directors Purchaser designates, and also for the dissolution of the Company at any time after February 1, _____ [year]. All other voting rights incident to the shares shall remain vested absolutely in Seller. Seller may keep the shares in street name or in the name of his nominee.

5. *Dissolution of company and substitution of collateral.* If the Company is dissolved, Purchaser may promptly: (a) substitute other collateral security in character and amount satisfactory to Seller; (b) convey and deliver to Seller all of the assets received by Purchaser upon such dissolution or liquidation, to be held as security in place of the shares deposited with Seller; or (c) cause to be executed and delivered to Seller a second mortgage upon the real property of the Company, and a security interest subordinate to a prior perfected security interest on all of its personal property of every kind used in the operation of the property, including all after-acquired personal property, except property belonging to the tenants or occupants of the stores, offices, or apartments, and except food, beverages, and merchandise inventories used in the operation of the property, to be held as security in place of the shares deposited with Seller. If Purchaser elects alternative (c), the second mortgage and subordinate security interest shall be substantially in the forms annexed hereto as exhibits, and shall be executed in conformity with all applicable provisions of law, so that they shall constitute an effective second mortgage lien and security interest on the property and the chattels described therein. Purchaser will pay any tax, including the mortgage tax incident to such second mortgage and subordinate security interest, and the recording fees. Upon the execution and delivery of such second mortgage and subordinate security interest to Seller, he shall return the deposited shares to Purchaser, and shall cancel this collateral agreement, and will thereafter hold such second mortgage and subordinate security interest as security for the payment of the balance of the principal and interest due upon the promissory note.

6. *Covenants of purchaser.* Purchaser covenants that while this agreement is in full force, the Company:

(a) Shall not execute or deliver to anyone other than Seller a second mortgage upon all or any of its real property, or a security interest subordinate to the prior perfected security interest upon all or any of its personal property.

(b) Shall not engage in any business other than the operation of its property as a hotel.

(c) Shall not purchase any real property, or purchase any other property except in the regular course of its business.

(d) Shall deliver to Seller monthly audit reports, prepared by the Company's regular accountants, and a copy of each annual report, certified by independent certified public accountants.

(e) Shall carry complete insurance, in insurance companies authorized to do business in the State of New York,

covering the real and personal property to the extent of their full insurable value.

(f) Shall not pay salaries or compensation aggregating more than \$90,000 annually to all its officers and directors.

7. *Default.* (a) Seller may forthwith declare the promissory note due and payable, anything in the promissory note and in this agreement to the contrary notwithstanding, in any of the following events: (i) if Purchaser defaults in the payment of any installment of principal or interest due on the promissory note, and such default continues for 15 days; (ii) if the Company, its successors or assigns, or any owner of the property, defaults in the payment of any installment of principal or interest upon the first mortgages or security interests now owned by National Mortgage Corporation covering the real or personal property owned by the Company, or upon any mortgages or security interests which are placed upon its real or personal property in place thereof, and such default continues for ten days; (iii) if the Company, its successors or assigns, or any owner of the property, defaults in the performance of any other terms or covenants of such first mortgages, or security interests, or of any mortgages or security interests which are placed upon its real or personal property in place thereof, and such default continues for ten days; (iv) if the Company, its successors or assigns, or any owner of the property, fails to pay promptly any tax or assessment levied against its property, and such default continues for 30 days; or (v) if Purchaser defaults in performing any term or covenant of this security agreement for which no grace period is provided, and such default continues for 30 days.

(b) In such event, Seller may sell all or any part of the deposited shares, or any security which is substituted in place of the deposited shares (except the second mortgages and security interests referred to in paragraph 5, which when executed, delivered, and accepted in accordance with the provisions hereof shall result in the extinguishment of this security agreement), at public or private sale, on 30 days' written notice to Purchaser of the time and place of such sale; and Seller shall apply the proceeds of such sale to the payment of the expenses incident thereto, including counsel fees, and to the payment of the principal and interest upon the promissory note, and any surplus shall be paid over to Purchaser. At any sale of the collateral deposited hereunder, Seller may purchase all, but not part, of the collateral sold, and receive title thereto free from any claim or demand of Purchaser.

8. *No recourse against purchaser.* Purchaser's personal liability is limited to the value of the stock deposited with Seller, or any substituted collateral which is given and accepted in place thereof, and the amount realized thereon. In no event shall Purchaser be liable for any deficiency resulting from the sale of the deposited shares or of any security deposited in substitution therefor, irrespective of the amount realized. Upon such sale and the distribution of the proceeds, the Purchaser's personal liability and obligations on the promissory note and under this agreement shall be deemed fully paid and discharged. No action or proceeding of any kind shall in any event be brought against Purchaser to recover a personal judgment against him upon the promissory note or under this security agreement.

9. *Insolvency.* If the Company voluntarily files a petition in bankruptcy, or institutes insolvency or reorganization proceedings in the state or federal courts, or is adjudicated a bankrupt or insolvent in any state or federal court, Seller may immediately declare the full amount unpaid on the promissory note, with interest thereon, forthwith due and payable without any grace period, and may give notice to Purchaser that within seven days from the date of such notice the collateral held by Seller shall be sold as above provided.

10. *Certificate of validity.* Purchaser represents that the promissory note held by Seller is a valid and subsisting obligation of Purchaser for the full face amount, with interest, except to the extent of any offsets set forth in the promissory note. Purchaser covenants that he will at any time and from time to time, at the Seller's request, execute and deliver a certificate or certificates attesting to the validity of the promissory note, and attesting further that it is a valid and subsisting obligation of Purchaser, subject to the limitations of liability therein expressly set forth, and that there are no offsets or defenses against it except as set forth in the promissory note. Failure to execute and deliver such certificate or certificates within ten days after such demand shall be deemed a default for which Seller may forthwith declare the promissory note due and payable.

11. *Delays and waivers.* Any extension, modification, or indulgence at any time granted by Seller to Purchaser shall not affect or prejudice Seller's rights and remedies. No delay or omission in exercising any right, power, or remedy accruing to Seller shall be construed as a waiver of any default hereunder, nor shall any waiver of any single breach or default hereunder be deemed a waiver of any breach or default thereafter occurring. All waivers, consents, and notices of approval hereunder must be in writing.

12. *Notice.* Notices to Purchaser shall be sent by registered or certified mail, addressed to him at 700 Park Avenue, New York, New York. Notices to Seller shall be sent by registered or certified mail, addressed to him at 120 Main Street, New Haven, Connecticut.

13. *Binding effect.* This agreement is binding upon and shall inure to the benefit of both parties and their respective legal representatives and assigns.

14. *Entire agreement; modification.* This instrument constitutes the entire agreement between the parties, and may be modified only by an instrument duly executed by such parties.

15. *Headings.* Headings in this agreement are for convenience and reference only and shall not be used to interpret or construe its provisions.

16. *Governing law.* This agreement shall be construed in accordance with and governed by the laws of the State of New York.

17. *Counterparts.* This agreement may be executed in one or more counterparts, each of which shall be deemed an original but all of which together shall constitute one and the same instrument.

18. *Time of essence.* Time is of the essence of this agreement.

The parties have signed and sealed this agreement.

(L.S.)

James Wilson

(L.S.)

Harold Smith

Approved: _____ [date]

Corporate Seal

Attest:

Secretary

Smith Hotel Corporation

By _____
President



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Current Legal Forms for Real Estate

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Current Legal Forms for Real Estate
Chapter 21 SALES AND EXCHANGES
Part IV. Forms

H. SALES OF STOCK IN REAL ESTATE CORPORATIONS

25-21 Current Legal Forms for Real Estate FORM 21.90

FORM 21.90 Sale of stock by parent of subsidiary corporation--residential rental buildings principal assets--extensive seller representations survive closing--principal of seller party to agreement

COMMENT

This form illustrates a contract for the sale by a parent corporation of all the common stock of five subsidiary real estate corporations. Each of the five corporations is the owner of one unit in a development consisting of five multiple dwellings. The purchase price for all of the stock is a fixed amount, adjusted for various assets and liabilities of the corporations and for various real estate prorations. There is a representation by the seller that the cash assets of the corporation will increase by a specific amount for each month between the date of the contract and the date of the closing. No adjustment in purchase price is to be made by reason of this projected increase in cash assets.

The contract contains comprehensive representations and warranties by the seller, as well as a list of documents required to be delivered to the purchaser at the closing. Since the properties are occupied by various tenants, the facts relating to these tenancies are spelled out in detail. In addition, representations are included relating to the construction of the properties, permits for their use, and their present physical condition. As security for these and other representations, the seller is obligated to set up an amount in cash in escrow. As further protection for the purchaser, the principal shareholder of the selling corporation personally guarantees the faithful performance of the seller's obligations.

FORM

AGREEMENT made July 16, _____ [year], by and among Bayes Construction Corp. ("Seller"), a corporation organized under the laws of South Carolina, John J. Bayes ("Principal"), and William Harris ("Purchaser").

The parties agree as follows:

1. *Sale.* Seller shall sell and deliver and Purchaser shall purchase all the common shares (the "Shares") of the five corporations (the "Corporations") listed in the attached schedule Exhibit 1. This sale is made upon all of the agreements, terms, and conditions herein contained, each and all of which shall be deemed material and substantial inducements to the payment of the purchase price by Purchaser.

2. *Purchase price.* The purchase price (the "Price") for all of the Shares and the certificates representing them shall be the amount by which the total of the items stated in subparagraph (a) exceeds the total of the items stated in subparagraph (b) on the Closing Date.

(a) *Gross price.* The first such total shall be the aggregate of the following items (taken, if subject to adjustment, as of the Closing Date):

(1) *Price.* \$2.25 million.

(2) *Cash.* An amount equal to all the cash of the Corporations on hand and in banks on May 31, _____ [year] (other than security deposits, if any), but not including any cash receipts after that date.

(3) *Insurance.* An amount equal to the sum of prepaid hazard insurance and mortgage insurance, or deposits made with the banks or agents named in the mortgages to receive such deposits, provided such deposits are held for the purpose of paying such insurance premiums in advance for the account of the Corporations.

(4) *Taxes.* An amount equal to the apportioned amount of prepaid real estate taxes, or deposits paid in advance on account of such taxes, provided such deposits are held by such banks or agents under such mortgages for the purpose of paying such taxes for the account of the Corporations.

(b) *Price reductions.* The second such total shall be the aggregate of the following items (taken, if subject to adjustment, as of the Closing Date):

(1) *Interest.* An amount equal to the accrued unpaid interest on such mortgages.

(2) *Taxes.* An amount equal to the accrued unpaid real estate taxes on the properties owned by the Corporations.

(3) *Rents.* An amount equal to the apportioned, prepaid rents received by the Corporations.

(4) *Deposits.* An amount equal to the deposits made by tenants under leases or lease-options affecting the properties owned by the Corporations.

(5) *Refunds.* An amount equal to all items carried by the Corporations, or which any of them should properly carry, for rent refunds.

(6) *Corporate taxes.* An amount equal to the sum of all unpaid United States income taxes, unpaid Puerto Rico income or franchise taxes, unpaid South Carolina income taxes, and all other unpaid taxes (other than real estate taxes) of the Corporations for any fiscal year up to and including their respective fiscal years ended May 31, _____ [year], together with the amount of each of such taxes, if any, accrued for the elapsed part of the fiscal year of the respective Corporations commencing June 1, _____ [year], and ending on the

Closing Date. Such apportionment, however, shall not be deemed conclusive upon Purchaser or prejudice any of his rights or claims in respect of the Corporations' unpaid taxes or liabilities.

(7) *Operating expenses.* An amount equal to the sum of operating expenses, insurance, and water charges unpaid and accrued as of the Closing Date, exclusive of water charges, if any, payable by tenants. The term "operating expenses" shall be deemed to include (but not limited to) employees' salaries and wages, and apportioned vacation pay.

(8) *Transfer taxes.* An amount equal to the total of all transfer taxes payable in connection with the transfer of the Shares by Seller to Purchaser. Such amount shall be applied to the payment of the transfer taxes.

3. *Adjustments in price subsequent to closing.* The following additional adjustments shall be made to the Price:

(a) *Reserve overpayments.* With respect to the reserve items on the combined Balance Sheet of the Corporations attached as Exhibit 2, which are entitled, respectively, "Reserve for Replacements," "Reserve for Hazard Insurance," and "Reserve for Mortgage Insurance," if overpayment of any of such reserves are duly established for any periods before May 31, _____ [year], and if credits for such overpayments are allowed to the Corporations in reduction of payments required subsequent to the Closing Date on account of such reserves under any of such mortgages, then at such times and to such extent, Purchaser shall make additional payments to Seller up to the amount of such overpayments (reduced, however, by any tax liabilities of the Corporations incurred by reason of such overpayments). Except as herein stated, no payment or credit shall be made or allowed to Seller with respect to such reserves.

(b) *Reserve deficits.* With respect to the reserve items referred to in subparagraph (a), if any deficit is established in payments made with respect to any of such reserves, Seller shall promptly pay Purchaser the amounts of such deficits.

(c) *Limitation.* No payments or credits shall be allowed to Seller on account of any other item on such Balance Sheet.

(d) *Delinquent rent.* If any Corporation collects from tenants any delinquent rents due for periods before the Closing Date, Purchaser shall promptly pay the net proceeds thereof to Seller.

(e) *Unpaid taxes.* If any income or franchise taxes for any period before the Closing Date, or any penalties or interest thereon cause any reduction in the assets of any Corporation, the amount of the purchase price shall be reduced accordingly. If any such taxes or penalties or interest give rise to any lien upon the assets of any Corporation, Seller shall remove the lien at Seller's expense and without cost to the Corporations.

(f) *Price.* Even if after the Closing Date revisions are made in the Price on account of the matters provided in this paragraph, the Price, as computed on the Closing Date, in accordance with the provisions of paragraph 2, shall be paid by Purchaser on that date in the manner provided.

4. *Payment of price and escrow amount.* The Price shall be paid by Purchaser on the Closing Date as follows: After all applicable adjustments, the amount of the Price, as computed on the Closing Date, shall be paid to Seller at San Juan, Puerto Rico, by certified or cashier's check, against and concurrent with the deliveries to be made by Seller. Concurrent with such payment Seller shall pay The National City Bank of the City of New York (the "Bank") at its San Juan office, in escrow the sum of \$750,000 (the "Escrow Amount"). The Bank shall transfer the Escrow Amount to its main New York City office there to be held in escrow.

5. *Delivery by seller at closing.* Concurrent with the payment of the Price, and at the same place, Seller shall deliver or cause to be delivered to Purchaser the following:

(a) *Shares.* Certificates representing all the Shares duly endorsed in blank or as Purchaser directs, with Seller's

signature guaranteed by a Bank or a New York stock exchange member firm.

(b) *Corporate records.* The minute books, share certificate books, share transfer ledger, and corporate seals of each Corporation; the written resignations of every officer and director of each Corporation, providing that they shall be immediately effective upon acceptance by the respective Board of Directors; written waivers of notice of a special meeting of the respective Board of Directors of each Corporation, to be held at the time and place of the Closing, or, as Purchaser directs written waivers of notice of a special meeting of the shareholders of each Corporation to be held at the same time and place. Each of such waiver of directors' meetings and of the shareholders' meetings shall be duly executed by all of the directors or shareholders, as the case may be.

(c) *Books and records.* All other records and papers of each Corporation, including, all leases and lease-options made by the Corporations; all existing agreements of any kind made by the Corporations; all books of account, bank books, check books, and all books of original account and entry of each Corporation.

(d) *Access to records.* Purchaser shall cause the Corporations to retain all books, papers, and records for a period of not less than three years from the Closing Date, and permit Seller access thereto (insofar as they relate to matters before the Closing Date) upon written request during reasonable business hours at any place that Purchaser determines either in Puerto Rico or in New York City.

(e) *Certificates of occupancy.* All certificates of occupancy for the buildings owned by the Corporations.

(f) *Business certificates.* Copies of the papers filed by each Corporation with respect to its qualification to carry on business in the Commonwealth of Puerto Rico.

(g) *Special documents.* The present officers and directors of the Corporations shall properly execute all required papers on behalf of the Corporations in relation to all matters occurring before the Closing Date, including the execution, at Purchaser's request, of all related tax reports and returns. Without limitation, Seller and the Corporations' present officers and directors will furnish to Purchaser, and to the officers and directors elected after delivery of the Shares to Purchaser, all information reasonably requested by Purchaser or such officers and directors in relation to any matters affecting the Corporations before the Closing Date.

(h) *General releases.* General releases, each in proper form and duly executed and acknowledged by each officer and director of each Corporation, and also by Seller and by the Principal, each release running in favor of all of the Corporations.

6. *Other acts of seller.* On the Closing Date, concurrent with the deliveries provided for in paragraph 5, Seller shall do and cause to be done all things required of it that are necessary and proper to cause the Corporations to elect as new officers and directors the persons designated by Purchaser, and to cause the Corporations to register in the name of and issue to Purchaser, or any persons Purchaser designates, new certificates for the Shares of each Corporation. Seller shall cause the members of the respective Boards of Directors of the Corporations to be present in person at the times and places of the holdings of the special meetings of the Boards of Directors of the Corporations herein provided for and, at such meetings, to cause them in due course to accept the resignations of the members of the Boards in rotation, and, upon such acceptances, to cause the remaining members to elect as directors to the vacancies so created, in rotation, all persons nominated by Purchaser.

7. *Closing.* The closing shall take place at the main office of the National City Bank of the City of New York, in the City of San Juan, Commonwealth of Puerto Rico, at 11 a.m. on the Closing Date. The Closing Date shall be the date designated by Purchaser in a notice served upon Seller, but no later than September 20, _____ [year].

All things required to be done on the Closing Date shall be deemed conditions concurrent and shall be performed

concurrently or in immediate succession to each other.

8. *Representations and warranties to purchaser.* As an inducement to Purchaser to enter into this agreement and to purchase and pay for the Shares, Seller and the Principal jointly and severally represent and warrant:

(a) *Shares.* The Shares constitute all of the issued and outstanding shares of the Corporations with the exception of 100 preferred shares of each Corporation (comprising in all 500 preferred shares) issued to and held by the Housing and Urban Development Department. All of the Shares are fully paid and nonassessable. Seller has good and valid title to all of the Shares, free and clear of all liens, claims, and encumbrances; and has the right to sell, assign, and transfer the Shares, free from all liens, claims, and encumbrances. Prior to the Closing Seller will not encumber the Shares in any manner.

(b) *Property.* Attached as Exhibit 3 is a schedule correctly showing the properties owned by each Corporation. Each Corporation owns good, marketable, and insurable title in fee simple to each of the properties mentioned under its name, including all the buildings and appurtenances and all personal property used in connection therewith, free and clear of all liens, encumbrances, and encroachments with the exception of one mortgage with respect to each Corporation (as shown on Exhibit 3) and current Puerto Rican property taxes.

(c) *Building construction.* In the construction of all such buildings, all applicable laws, ordinances, rules, and regulations (including all applicable zoning laws, ordinances, or regulations) of the Commonwealth of Puerto Rico and the City of San Juan and of the United States and of every other competent governmental or quasi-governmental authority have been fully and faithfully complied with, including without limitation the Americans with Disabilities Act of 1990 ("ADA") and the Accessibility Guidelines and rules and regulations issued thereunder. Prior to construction of such buildings, plans therefor and all other requisite data were duly filed with all competent governmental and quasi-governmental authorities. Prior to and in the course of the construction of such buildings, all permits needed from any governmental or quasi-governmental authorities were duly issued and procured by the Corporation respectively owning the property and the building and by Seller, as the builder. Certificates of occupancy were duly issued for each such building, and all of such certificates of occupancy are in full force and effect.

(d) *Building condition.* All of such buildings are in good condition and currently comply and at the Closing Date will comply in all respects with the ADA and all rules and regulations thereunder, all applicable laws, ordinances, rules and regulations (including all applicable zoning laws, ordinances, or regulations) of the Commonwealth of Puerto Rico and the City of San Juan and of the United States, and of all competent governmental or quasi-governmental authorities.

(e) *Violations.* There are not currently, and on the Closing Date there will not be, any violations of any of the foregoing, nor with any violations of environmental laws, federal, state or local, with respect to the buildings and improvements and properties on which they are located. Neither Seller, the Principal, nor any of the Corporations has received any notice or claim, or has any knowledge or information as to any notice or claim, of any violation of such laws, ordinances, rules, or regulations including without limitation, environmental laws, ordinances, rules or regulations.

(f) *Mortgages.* The names of the mortgagees, and the payment dates and amounts, interest rates, and maturity dates of the mortgages affecting the property owned by each Corporation are correctly and fully set forth in Exhibit 3. Seller has delivered to Purchaser a full and true copy of each such mortgage, initialed by Seller. All of such mortgages are in the usual form of an F.H.A. mortgage, and none of them contains any unusual clauses. Prior to the Closing, the Corporations will not do or omit to do any act or thing which would be in violation of the terms or conditions of any such mortgage, or which would permit the existence of or create a default under any such mortgage.

(g) *Charter, bylaws.* Seller has delivered to Purchaser a full and true copy of the forms of Charter and Bylaws of one of the Corporations, initialed by Seller for identification. The Charter and Bylaws of all the Corporations correspond to such forms in all respects except for changes in identifying details, not affecting the substance. None of the Charters has

ever been amended or altered, and no proceedings have been initiated or authorized for the purpose of amending or altering any of them.

(h) *Corporate status.* Each Corporation is a business corporation duly organized and existing under the laws of the State of South Carolina. Each Corporation was incorporated on the date stated in Exhibit 1. Each Corporation is in good standing and is now duly exercising its functions as a corporation. The place of business of each Corporation is as stated in Exhibit 1. The officers and directors of each Corporation are as set forth in the schedule attached as Exhibit 4. Each Corporation has been duly qualified to carry on business in the Commonwealth of Puerto Rico.

(i) *Leases, options.* Attached as Exhibit 5 is a list of all leases and options to purchase, herein sometimes called "lease-options," affecting any space or buildings in the properties owned by the Corporations. Exhibit 5 fully and correctly states the name of each tenant, the identification of the unit of occupancy, whether the lease is accompanied by an option to purchase by the tenant, the date of the lease or lease-option, the rate of rent, and in the case of each lease-option, the total sales price, the amount thereof still unpaid as at May 31, _____ [year], and the amount payable monthly. There are no leases or lease-options affecting the properties owned by the Corporations or any portions thereof except as stated in Exhibit 5.

(j) *Rent, vacancies.* Seller has separately delivered to Purchaser a full and true copy of a form of lease and of a form of lease-option. Each of these forms has been initialed by Seller for identification. All of the leases and lease-options referred to in Exhibit 5 correspond in all respects to such forms except for identifying details. There are no agreements for the allowance of rent or any other special agreements, oral or written, with any tenant or tenant-optionee. The rents payable by tenants and tenant-optionees are not in any instance in excess of the respective rents permissible by law and by applicable regulations. None of the tenants or tenant-optionees has made any claim to the contrary. There are no vacancies in any of the buildings owned by the Corporations. During the fiscal year ended May 31, _____ [year], there were not at any one time more than three vacancies in such dwelling units. During the fiscal year ended May 31, _____ [year], all payments of rents and deposits under leases and lease-options were made promptly by the respective tenants, except only for 50 delinquencies running at an average rate of not exceeding 50 late payments per month.

(k) *Contracts.* Attached as Exhibit 6 is a list of all contracts of each Corporation, whether written or oral. All of the Corporations' contracts of employment are terminable at will.

(l) *Insurance.* Attached as Exhibit 7 is a list of all insurance of every nature procured by the Corporations and now in force. All such insurance, or its equivalent, will be in effect and in good standing on the Closing Date. In the event of damage to or destruction of the properties, appurtenances, or personal property of any Corporation, Seller shall make good such damage at its expense, and if such damage is insured against, Seller shall be entitled to reimbursement for such expense out of the net amount of the insurance proceeds.

(m) *Defaults.* Each Corporation has fully performed and observed all terms and provisions of each lease and lease-option affecting its properties, and all of the mortgages affecting its properties. No notice or claim of any default has been received by any Corporation from a mortgagee or any tenant under a lease or lease-option. No tenant has any offsets or defenses to the full and faithful performance of his respective lease or lease-option.

(n) *Corporate books.* The books and records of each Corporation, including its minute books and books of account, fully, correctly, and fairly reflect its affairs. There are no minutes other than those contained in the minute books of the Corporations. There have been no meetings of directors or shareholders except as reflected in the minutes books of the Corporations.

(o) *Taxes.* All income tax reports and other reports and returns required by any law or regulation of the Commonwealth of Puerto Rico, of the United States, of the State of South Carolina, or of the City of San Juan, or by any other

competent governmental body have been duly and properly filed and reported by each Corporation. All taxes of every nature believed by the Corporations or shown in any such report or return to be due, together with all applicable interest and penalties, have been paid except such parts thereof as are payable in installments not yet due. On June 10, _____ [year], Seller and each Corporation requested the Treasurer of Puerto Rico to audit the books of each Corporation and to make a determination of all taxes due or payable. Such determination has been made and all claims for taxes asserted by the Treasurer of Puerto Rico have been paid in full, including all penalties and interest.

(p) *Financial statements.* Attached as Exhibits 8 and 9, respectively, are a copy of the combined Balance Sheet of the Corporations as at May 31, _____ [year], and a copy of the combined Statement of Profit and Loss of the Corporations for the fiscal year ended May 31, _____ [year]. Both Exhibits have been certified as correct by Seller's Certified Public Accountants. The Balance Sheet fully and fairly reflects the assets, liabilities, and financial condition of the Corporations as at May 31, _____ [year]; and the Statement of Profit and Loss fully and fairly reflects the combined operations of the Corporations for the year ended May 31, _____ [year]. At the Closing Date none of the Corporations will have any contingent liabilities of any kind.

(q) *Cash assets.* At the Closing Date, the assets and liabilities will not be different in any material respect from those reflected in Exhibit 8, except that the net quick assets of the Corporations in excess of all liabilities (without deducting depreciation) shall be increased, from May 31, _____ [year], to the Closing Date, at the rate of approximately \$14,000 per month. No adjustment or credit or increase in the Price is to be allowed to Seller on account of such increase. During the fiscal year ended May 31, _____ [year], the excess of cash income of the Corporations over the total of all operating expenses plus all mortgage amortization payments was at the rate of approximately \$14,000 per month, which is the approximate rate of monthly increase in combined cash position of the Corporations. Seller does not know of any unusual liabilities, obligations, or contingencies which would in any way diminish such monthly increase in cash position.

(r) *Liabilities.* Prior to the Closing Date, Seller will cause all outstanding liabilities of the Corporations to be extinguished with the exception of:

- (1) The amounts due on the real estate mortgages.
- (2) The liability for prepaid rents and deposits made by tenants (the amount of which Seller will cause to be deposited to the credit of the respective Corporations).
- (3) Any accrued real estate taxes which are not payable (the amount of which Seller will cause to be deposited to the credit of the respective Corporations).
- (4) The common shares and preferred shares carried as capital liabilities in the balance sheets of the Corporations.

(s) *Liens, claims.* There are no security interests or other encumbrances against any personal property or fixtures appurtenant to the properties owned by the Corporations, except only for such security interests or other encumbrances, if any, as may have been made by tenant-occupants upon articles of personal property installed by them and not belonging to any of the Corporations. Except for the mortgages listed on Exhibit 3 and the leases and lease-options listed on Exhibit 5, there are no claims of any kind against any of the Corporations. No suits are pending against any of the Corporations. There is no litigation in which any of the Corporations is involved, except only for eviction proceedings brought by such Corporations against tenants or tenant-optionees, not exceeding five in number.

(t) *Sale resolutions.* Attached as Exhibits 11 and 12, respectively, are true copies of the resolutions authorizing the sale of the Shares, duly and unanimously adopted by Seller's Board of Directors at a special meeting at which all members

of the Board were present; and of the resolutions authorizing the sale of the Shares, duly and unanimously adopted by Seller's stockholders at a special meeting at which all shareholders were present.

(u) *H.U.D. correspondence.* Attached as Exhibit 13 are copies of all correspondence on behalf of the Corporations with the Department of Housing and Urban Development. Such attached copies are full and true copies and constitute the only correspondence between the Corporations and such Department.

(v) *Lease renewals.* Prior to the Closing Date, the Corporations will not make any agreements or commitments of any kind which would not be in the ordinary course of business or which would be operative after the Closing Date, except only leases and lease-options covering the vacancies created by cancellations or surrender of leases or lease-options. Any such lease or lease-option shall be made only in the usual form, corresponding to the forms delivered by Seller to Purchaser under this agreement and only for the maximum lawful rental; and in the case of a lease-option, for not less than the same purchase price under which the unit is presently optioned, without allowance for any deposits paid by tenants under a previously existing lease-option.

(w) *Status quo.* Prior to the Closing Date, the Corporations will not in any manner sell or encumber the respective properties or appurtenances owned by them; change, modify, or amend in any manner their respective certificates of incorporation or bylaws; declare or pay any dividends; pay or make any commitment for compensation for services to any of their officers or directors; or pay or withdraw any money from the funds of any Corporation, except in the regular and usual course of the operation of their respective properties and in the regular and ordinary amounts. No salary or compensation shall be paid to Principal for any periods up to and including the Closing Date; nor shall any commitments be made for the payment of such salary. No salaries shall be paid or payable to any employees for any periods before the Closing Date, except in ordinary course of business and at rates not greater than those paid in the past.

9. *Exceptions to warranties.* The following claims only shall be excluded from the claims in respect of which the warranties set forth in paragraph 8 shall operate:

(a) Any claim in respect of which the Corporations have been completely insured under a policy of insurance in effect when the claim accrued.

(b) Any claim for an item taken as an adjustment in the computation of the Price.

(c) Any claim relating to expenses incurred in the regular, ordinary, and actual operation of the properties owned by the Corporations.

10. *Representations as of closing date.* Seller and Principal jointly and severally represent and warrant:

(a) *Representations.* All of the matters stated or represented in paragraph 8 will be true, and are warranted, as of both the Closing Date and the date of this agreement.

(b) *Taxes.* On the Closing Date, there will be no tax claims of any kind against any Corporation.

(c) *Claims.* On the Closing Date, there will be no claims of any kind against any Corporation other than those not required to be eliminated by reason of the of paragraph 8(r).

(d) *Business conduct.* Between May 31, _____ [year], and the Closing Date, there will be no change in the condition of any Corporation, except for changes in its financial condition that are due to the conduct of its business in the regular, ordinary, and usual course during such period.

(e) *Financial items.* On the Closing Date, the assets and liabilities of the Corporations will not be different than those shown on Exhibit 8 except for:

- (1) The elimination of liabilities as provided for in paragraph 8(r).
- (2) The reduction in the amount of the mortgages by payments made pursuant to the terms thereof.
- (3) Improvement in the excess of assets over liabilities (without deducting depreciation) at the rate of approximately \$14,000 per month between May 31, _____ [year], and the Closing Date.
- (4) Possible reduction in book deficit.

(f) *Survival.* All of Seller's representations and warranties under this agreement shall survive the Closing, the transfer of title, and the payment of the Price hereunder, and shall continue to inure in favor of Purchaser and each Corporations.

11. *Affidavit on closing.* At the Closing, Seller shall deliver to Purchaser an affidavit sworn to on that date by Principal, deposing, representing, and warranting that all of the matters and things represented and warranted in and under this agreement are true on the Closing Date, except as therein otherwise specifically stated.

12. *Guarantee by principal.* Principal, as Seller's president and principal shareholder, represents that it is to his financial interest that the sale of the Shares be completed. Principal joins in all of the representations and warranties made by Seller under this agreement, and guarantees the full and faithful performance by Seller of all terms, provisions, and conditions herein, and the fulfillment of all of Seller's obligations and liabilities, present and future, hereunder. Principal agrees to be fully bound and obligated in respect of all such terms, provisions, and conditions in favor of Purchaser and of the Corporations with the same force and effect as if jointly and severally named with Seller in all of the provisions of this agreement. Principal's liabilities and obligations hereunder shall be those of a surety. Principal agrees that Purchaser, his successors or assigns, may enter into any extension, modification, or indulgence with Seller relating to the subject matter of this agreement, or may waive in any one or more instances any provision thereunder, and that despite any such extension, modification, or indulgence, or any such waivers, Principal's liabilities and obligations under this agreement shall not be deemed released, waived, or abated in any respect, but shall continue in full force and effect.

13. *Purchaser's right of rescission.* If, as of the Closing Date, the Corporation has liabilities, whether known or unknown, other than those permitted under paragraphs 8(r) and 9, and the total of such liabilities exceed, or are reasonably expected by Purchaser to exceed, \$225,000, Purchaser may rescind this agreement, in addition to all other rights and remedies which it may have. If Purchaser rescinds, he may immediately recover the Price paid to Seller, in addition to any damages incurred by him hereunder. Upon recovering the Price and damages, Purchaser shall return all shares which he shall have received hereunder.

14. *Escrow amount.* The Bank shall hold and dispose of the Escrow Amount, as escrowee, as follows:

(a) *Notice of claim.* Six months after the Closing Date, the Bank shall pay the Escrow Amount to Seller in San Juan, Puerto Rico, unless before that date Purchaser has served written notice upon the Bank, either by personal delivery or by registered or certified mail, that Purchaser has reasonable grounds to believe that an unsatisfied claim exists against one or more of the Corporations, other than claims and liabilities permitted under paragraphs 8(r) and 9. Such notice shall identify the claim involved and contain a statement of its amount so far as known to Purchaser.

(b) *Amount of claim.* Upon the service of such notice, Purchaser, Seller, and the affected Corporation or Corporations shall forthwith take all appropriate steps by suit, or, if such claim is a tax claim, by request for review or audit by the

appropriate tax authorities, to determine with finality the amount of such claim.

(c) *Payment.* Upon the determination of the amount of such claim, the Bank shall, upon Purchaser's written request (except as otherwise provided in subparagraph (e) of this paragraph), pay to Purchaser the amount thereof out of the Escrow Amount, and thereafter (unless other such claims exist) pay the balance of the Escrow Amount to Seller.

(d) *No waiver.* Neither Purchaser's failure to ascertain any claim or claims within the six-month period nor the Bank's payment to Seller of any part of the Escrow Amount shall in any way be deemed to waive, modify, or prejudice Purchaser's rights or claims against Seller on account of any present or future claim.

(e) *Objection.* If, upon the service of any notice of claim upon the Bank (as permitted under subparagraph (a) above), Seller within 20 days files with the Bank a written objection to its payment of such claim to Purchaser, the Bank shall not make such payment until Seller's and Purchaser's contentions with respect thereto are finally determined by litigation, arbitration, or agreement. Thereupon, the Bank shall make any payment as so determined.

(f) *Counsel fees.* If any claim arises for which Purchaser is entitled to be reimbursed or indemnified by Seller, the amount thereof shall be increased to include Seller's or the Corporations' reasonable counsel fees in defending against such claim, regardless of whether its existence or amount is finally established.

(g) *Limitation of liability.* The Bank shall be entitled to rely on any instrument it reasonably believes to be genuine and signed by the proper party. In any event, the Bank shall have no liability as Escrowee on account of any mistake of law or fact or error of judgment or anything except its gross negligence or bad faith.

(h) *Expenses.* Seller shall pay all of the Bank's fees and expenses.

15. *Information relating to liabilities.* Seller shall, upon Purchaser's request, request the mortgagees and holders of security interests under the respective mortgages and security agreements covering the properties of the Corporations, the Department of Housing and Urban Development, and all taxing authorities having jurisdiction in the premises to furnish to Purchaser, or his representatives, all records and information requested by Purchaser in relation to the Corporations.

16. *Notices.* All notices under this agreement shall, be in writing and sent by United States registered or certified mail, return receipt requested, addressed as follows:

(a) If intended for Seller or Principal, or both, addressed to John J. Bayes, Lee Building, Charleston, South Carolina.

(b) If intended for Purchaser, addressed to William Harris, 111 Broadway, New York, New York.

Any changes in names and addresses shall be made by giving notice as provided above.

17. *Governing law.* This agreement shall be construed in accordance with and governed by the laws of the State of New York.

18. *Binding effect.* This agreement shall be binding upon and inure to the benefit of the parties hereto and their respective legal representatives, successors, and assigns.

19. *Entire agreement; modification.* This instrument constitutes the entire agreement between the parties, and may not be modified except by an instrument duly executed by such parties.

20. *Non-waiver.* No delay or failure by any party to exercise any right hereunder, and no partial or single exercise of

such right, shall constitute a waiver of that or any other right, unless otherwise expressly provided herein.

21. *Headings.* Headings in this agreement are for convenience and reference only and shall not be used to interpret or construe its provisions.

22. *Counterparts.* This agreement may be executed in one or more counterparts, each of which shall be deemed an original but all of which together shall constitute one and the same instrument.

23. *Time of essence.* Time is of the essence of this agreement.

The parties have duly executed this agreement and caused it to be sealed as of the day and year first above written.

Bayes Construction Corp.

By _____
President

[SEAL]

Secretary

Seller

John J. Bayes

Surety

William Harris

Purchaser



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Current Legal Forms for Real Estate

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Current Legal Forms for Real Estate
Chapter 21 SALES AND EXCHANGES
Part IV. Forms

H. SALES OF STOCK IN REAL ESTATE CORPORATIONS

25-21 Current Legal Forms for Real Estate FORM 21.91

FORM 21.91 Sale of stock by parent of subsidiary corporation--shopping center construction, ownership, and management business--purchase money note secured by stock sold--security agreement--promissory notes--guaranty--management contract--asset appraisal letter

COMMENT

This is an agreement by a parent corporation for the sale of stock of one of its subsidiary corporations. Prior to the sale, two other subsidiary corporations of the parent are to be merged into the subsidiary corporation whose shares are being sold. The subsidiary being sold will continue to own its own subsidiary corporation and a minority interest in a limited partnership. The purchaser is a joint venture consisting of a partnership and individuals. The principal businesses of the subsidiaries involved in this transaction are the ownership and management of shopping centers and malls, and construction. Some of the principal assets, as shown in a separate appraisal or valuation letter, include developed and undeveloped shopping center sites, management contracts for shopping centers and malls owned or leased by third parties, and options and bids for new sites and construction projects. The valuation letter, prepared by a disinterested third party, is appended to the sale agreement because the principals of the joint venture acquiring the stock are also directors, officers, and principal shareholders of the parent corporation selling the subsidiary's stock. The independent appraisal or valuation supports the arm's-length nature of the transactions.

Continued business operation covered by contract

A number of provisions in this contract deal with specific business projects of the subsidiary corporations. For example, the price will be adjusted if negotiations for a certain construction

contract do not result in a contract (paragraph 3(b)), or if a joint venture for another construction project is abandoned (paragraph 3(c)). One of the conditions to the sale is the continuation of construction projects already in progress (paragraph 13(e)). In addition, the selling corporation is required to obtain for the subsidiary being sold certain management contracts for a number of shopping centers and malls (paragraph 18).

Purchase money note and security agreement

A substantial part of the price for the shares is paid by a purchase money note, bearing interest at a floating rate based on the prime rate of a specified bank. The security agreement, appended to the contract, secures not only the purchase money note, but also the buyer's guarantee of certain debts owed by the subsidiary being sold to the selling parent corporation. Under the security agreement, any cash or stock dividends are turned over to the secured party as additional security, but the debtor can vote the shares so long as the debtor is not in default. The purchase money note, the obligation of the subsidiary to the parent, and the guarantee by the purchaser are also appended to the contract.

Shopping center management contract

The management contract that the subsidiary corporation is to enter into before the stock is sold is also appended to the contract of sale. The same management contract form is to be used for each of the shopping centers or malls to be managed by the corporation. Under this management agreement, the management fee is a percentage of the property's gross income, which is defined in the contract. The management contract also specifies the duties of the managing agent in detail.

FORMS

(1) Stock purchase agreement

THIS STOCK PURCHASE AGREEMENT, made and entered into this March 30, _____ [year], by and between K. W. Corporation, a Delaware corporation (Seller), and Lowest, a joint venture composed of Low Brothers (a partnership composed of John D. Low and C. W. Low, Jr.) of Atlanta, Georgia, and Robert Levy, of Scarsdale, New York, and Ralph Green, of Summit, New Jersey (Purchaser).

Martin Realty Corporation (Martin), New York K. W. Corporation (NYKW), and K. W. Florida Corporation (KW Florida), are subsidiaries of Seller; Jo-Dee, Inc. (Jo-Dee) is a subsidiary (subject to an outstanding option to acquire 20 percent of the stock of Jo-Dee) of KW Florida; and Cross, Ltd. (Cross) is a limited partnership in which KW Florida owns a limited partnership interest. Prior to the Closing Date Martin and NYKW shall be merged (the Merger) into KW Florida, the latter being the surviving corporation.

In consideration of the premises and of the mutual agreements hereinafter set forth, the parties hereto, intending to be bound hereby, agree as follows:

Section 1. *Sale of stock.* Seller agrees to sell to Purchaser on the Closing Date, free and clear of all liens, pledges, and encumbrances of every kind, character and description whatsoever, other than the security interest created under the Security Agreement, and Purchaser agrees to purchase from Seller on the said date, all of the issued and outstanding shares of capital stock of K. W. Corporation ("KW Florida"), a Florida corporation.

Section 2. *Closing and closing date*

(a) The sale and purchase provided for in this agreement shall be closed (the Closing) at the offices of Weiss & Bishop, 45 Park Avenue, New York, New York, at the date and time designated by Seller to Purchaser by written notice not less than 20 days nor more than 30 days after all conditions precedent to the closing have been satisfied, or at any other date, time, or place mutually agreed upon by the parties (the Closing Date).

(b) At the Closing, Seller shall deliver to Purchaser certificates evidencing and representing all of the issued and outstanding capital stock of KW Florida, all of which is being sold hereunder, duly endorsed in blank or accompanied by stock powers duly executed in blank in proper form for transfer; subject, however, to the terms and provisions of the Security Agreement (Security Agreement) covering said capital stock, substantially in the form of the Security Agreement attached as Annex I.

Section 3. *Consideration and its payment*

(a) Purchaser shall pay Seller \$3,155,000, subject to adjustments as provided in subsection (b) below, for all of KW Florida's issued and outstanding capital stock. The purchase price shall be paid at the Closing as follows:

- (1) \$500,000 by a bank cashier's or certified check drawn on a New York City bank, in New York Clearing House funds, payable to the order of Seller;
- (2) \$2,655,000 by promissory note (Note), dated the Closing Date, made by Purchaser, payable to Seller within six months after the Closing Date, bearing interest at the highest rate of annual interest paid by Seller on its major bank borrowings, but not to exceed two percent per annum above the floating prime rate of interest at Merchants Bank, New York, New York (the applicable rate of interest being adjusted as of the start of the day following the effective date of any change in the highest rate of interest paid by Seller or charged by said bank, as the case may be), and secured by a security interest in the capital stock of KW Florida pursuant to the Security Agreement, substantially in the form of the note attached as Annex II.

(b) The purchase price of \$3,155,000 is subject to being decreased by \$560,500 by reason of the following:

- (1) Jo-Dee has been in negotiations with the University of Georgia with respect to contracts for proposed construction projects to be undertaken by Jo-Dee for the University;
- (2) Although the proposed terms and conditions of the contracts apparently have been settled, the contracts have not been finally approved and executed;
- (3) The purchase price of \$3,155,000 includes a value of \$560,500 for the contracts (\$279,921 for the University of Georgia at Macon, and \$280,579 for the University of Georgia at Atlanta);
- (4) If the contracts are not finally executed, the purchase price will be reduced by up to \$560,500, as follows:
 - (A) At the Closing, or as long as practicable prior thereto, Seller shall notify Purchaser whether the negotiations with the University of Georgia with regard to the two contracts have been terminated unsuccessfully. In such case, the Note shall be in the face amount shown above at Section 3(a)(2), as adjusted under Section 3(c), less \$279,921 if the University at Georgia at Macon contract (the "Macon" contract) has been terminated, and

less \$280,579 if the University of Georgia at Atlanta contract (the "Atlanta" contract) has been terminated (for a total reduction of \$560,500 if both contracts have been terminated);

(B) If the eventuality described in (A) does not occur and if, after the closing, the negotiations with the University of Georgia as to either or both of such contracts terminates unsuccessfully within six months from the Closing Date, Seller shall return the Note to Purchaser in exchange for a new Note having the same terms as the Note, except that the face amount shall be reduced by \$279,921 if the Macon contract has been terminated, and by \$280,579 if the Atlanta contract has been terminated (for a total reduction of \$560,500 if both contracts have been terminated). In such event, all references in this agreement and in the Security Agreement to the "Note" shall be deemed to be references to the new Note, or if the Note has previously been paid, Seller shall refund to Purchaser \$279,921 if the Macon contract has been terminated, and \$280,579 if the Atlanta contract has been terminated (for a total reduction of \$560,500 if both contracts have been terminated). In either case, an equitable adjustment of interest accrued or paid on the Note will be made.

(C) If the negotiations with the University of Georgia terminate unsuccessfully more than six months after the Closing Date, no reduction in the purchase price shall be made and, if the Note has been paid, no refund shall be due to Purchaser.

(c) The purchase price of \$3,155,000 is subject to being decreased by \$250,000 by reason of the following:

- (1) On or about January 31, _____ [year], KW Florida gave up the option it held on certain real estate in Raleigh, North Carolina; and
- (2) In connection with the release of the option, KW Florida received \$80,625 from Mondi Development Company and thereupon entered into an agreement with such Company contemplating the erection of a regional shopping center with it on certain property in Raleigh, North Carolina (other than the property as to which KW Florida had in such option); and
- (3) In accordance with the Joint Venture Agreement between KW Florida and Mondi Development Company, KW Florida has the right to terminate its joint venture relationship if a renegotiation of the present lease for the 93.77 acres on which the contemplated shopping center is to be developed is not renegotiated in a way satisfactory to KW Florida within six months of January 31, _____ [year]; and
- (4) The purchase price of \$3,155,000 includes a value of \$250,000 for KW Florida's interest in the joint venture; and
- (5) If KW Florida in fact withdraws from the joint venture, the purchase price will be reduced by the above \$250,000, as follows:
 - (A) At, or as long as practicable before, the Closing, Seller shall notify Purchaser whether the lease for such acreage has been successfully renegotiated so that KW Florida will not withdraw from the joint venture, or whether KW Florida has withdrawn from the joint venture. In the latter case, the Note shall be in the face amount shown at Section 3(a)(2), as adjusted under Section 3(b), less \$250,000.

(B) If, after the Closing, KW Florida withdraws (such withdrawal shall be deemed to occur on the date on which KW Florida gives notice of withdrawal under its Joint Venture Agreement with Mondi Development Company) from such joint venture within six months from the Closing Date, Seller shall return the Note to Purchaser in exchange for a new Note having the same terms as the Note, except that the face amount shall be reduced by \$250,000. In such event, all references in this agreement and the Security Agreement to the "Note" shall be deemed to be references to the new Note, or, if the Note has previously been paid, Seller shall refund \$250,000 to Purchaser. In either case, an equitable adjustment of interest accrued or paid on the Note will be paid.

(C) If KW Florida does not withdraw from the joint venture within six months from the Closing Date, no reduction in the purchase price shall be made and, if the Note has been paid, no refund shall be due Purchaser.

Section 4. *Transfer of stock and management of KW Florida*

(a) Seller agrees to cause duly authorized representatives of KW Florida to be present at the Closing on the Closing Date so that the stock of KW Florida being sold may be immediately transferred to and reissued in the name of Purchaser, or otherwise to provide appropriately for such stock, registered in Purchaser's name, to be delivered to Purchaser at the Closing.

(b) At the Closing on the Closing Date, Seller shall cause to be delivered to Purchaser written resignations of the officers and directors of KW Florida whose resignations were requested by Purchaser. Such requests to Seller shall be made by written notice a reasonable time before the Closing Date.

Section 5. *Access to properties and records of seller, et al.* From and after the date of this agreement, Seller shall afford, and cause KW Florida, Martin, NYKW, Jo-Dee, and Cross to afford, to Purchaser's officers, attorneys, accountants, and other authorized representatives, free and full access to the plants, properties, books and records of each such entity, so that Purchaser may have full opportunity to make any desired investigation of each one's affairs. Such investigation, however, shall not unreasonably interfere with the operations of any entity.

Section 6. *Representations and warranties of seller.* Seller represents and warrants to Purchaser that:

(a) *Corporate status.* KW Florida, Martin, and NYKW are corporations duly organized and existing in good standing under the laws of the States of Florida, Georgia, and New York, respectively. Each Corporation has the corporate power to own its properties and assets and to carry on its business as now being conducted, and is duly qualified to do business and is in good standing in every jurisdiction in which the nature of its business makes such qualification necessary.

(b) *Shares.* Pursuant to its Articles of Incorporation, as amended, KW Florida is authorized to issue 200 shares of Common Stock, no par value, 200 shares of which are issued and outstanding, fully paid and nonassessable. KW Florida does not have any treasury stock, any other authorized or outstanding equity securities of any class or of any kind or character, or any outstanding subscriptions, options, or rights with respect thereto, or any securities convertible into any shares of stock of any class.

(c) *Subsidiaries.* Martin, NYKW, and Jo-Dee, respectively, have no subsidiaries. Jo-Dee is the sole subsidiary of KW Florida.

(d) *Financial statements.* Seller has delivered to Purchaser a pro forma consolidated balance sheet of KW Florida as at November 30, _____ [year], reflecting the Merger and a pro forma statement of profit and loss for

the period commencing on March 1, _____ [year] and ending on November 30, _____ [year] (the Financial Statements). The Financial Statements (including the related notes and schedules) were prepared in accordance with generally accepted accounting practices consistently applied throughout the periods involved, are correct and complete and fairly present the consolidated financial condition of KW Florida, on a pro forma basis as aforesaid, as at the date thereof and the results of operations for the periods covered.

(e) *Title to properties.* KW Florida, Martin, NYKW, Jo-Dee, and Cross, respectively, have good and marketable title to all of their respective properties and assets as reflected in the Financial Statements (other than properties or assets disposed of since the date of the Financial Statements in the ordinary course of business); all subject to no liens or encumbrances of any kind except those listed on the Financial Statements, and such other liens and encumbrances that may arise or be created after the date thereof, that are incidental to the conduct of their respective business or the ownership of their respective properties or assets.

(f) *Litigation.* No actions, suits or proceedings are pending or threatened against or affecting KW Florida, Martin, NYKW, Jo-Dee, or Cross, at law or in equity, which may result in any material adverse change in their respective business, financial condition, operations, properties, or assets, except as otherwise set forth in prior written notice to Purchaser.

(g) *Compliance.* There exists no default under the provisions of any instrument evidencing any indebtedness or obligations of KW Florida, Martin, NYKW, Jo-Dee, and Cross, respectively, that would materially adversely affect any of them.

This agreement does not violate or constitute a default under any law, requirement or restriction imposed by any judicial, arbitral or governmental instrumentality, the charter, bylaws or declaration, as applicable, of Seller or any of such entities, or any agreement, contract or instrument by which Seller or any of such entities or any of their property may be bound or affected.

(h) *Seller's title to shares.* Seller has good and marketable title to all of the issued and outstanding capital stock of KW Florida, and the absolute right and necessary authority to sell, assign, and transfer all of such stock to Purchaser, free and clear of all liens, pledges and encumbrances of any kind, subject, however, to stockholders' approval as set forth in Section 10.

(i) *Compliance with laws.* All shopping centers and other properties (land and improvements thereon) are in full compliance with all applicable governmental laws, rules and regulations, federal, state and local, including without limitation, all environmental laws and the Americans With Disabilities Act of 1990, and the Accessibility Guidelines and rules and regulations issued thereunder.

Section 7. Representations and warranties of purchaser. Purchaser represents and warrants to Seller that it is a joint venture existing under the laws of Georgia, that it has full power, in accordance with law, to execute and perform this agreement, and that such execution and performance does not conflict with the joint venture agreement establishing Purchaser or with any agreement, contract or instrument to which Purchaser or any joint venturer of Purchaser is a party or to which it or any of them is subject. Purchaser and each joint venturer has duly authorized this agreement, the Note, the Security Agreement, the Guaranty, the transactions contemplated hereby and therein, and the execution and delivery hereof by Purchaser. Purchaser further represents and warrants to Seller that each joint venturer of Purchaser is jointly and severally liable for the Purchaser's obligations.

Section 8. Survival of representations and warranties. The representations and warranties set forth in Section 6 shall not survive the Closing. The representations and warranties set forth in Section 7 shall survive the Closing for a period of two years from the Closing Date.

Section 9. *Actions prior to closing date.* Prior to the Closing Date, Seller will not, except with Purchaser's prior written consent, permit KW Florida, Martin, NYKW, Jo-Dee, or Cross to declare or pay any dividend, issue or authorize the issuance of any stock, other security convertible into stock or any warranty or option or right for the purchase of any stock, sell or otherwise dispose of any asset, except in the ordinary course of business, or borrow any money or incur any debt or other obligation, except in the ordinary course of business and except for the Merger, will not permit any of such corporations to be a party to any merger, consolidation, reorganization, or recapitalization, Seller will cause KW Florida, Martin, NYKW, Jo-Dee, and Cross to conduct their affairs in the usual and ordinary course of business.

Section 10. *Corporate action of seller.* Prior to the Closing Date, in accordance with, and in the opinion of its counsel, as required by, applicable corporate and securities laws, Seller's Board of Directors shall submit this agreement or the substance thereof and the transactions contemplated hereby to Seller's stockholders for their approval at a special stockholders' meeting called for such purpose.

Section 11. *Approval of regulatory agencies.* If Seller is advised by its counsel that any approval (including an SEC Rule 144 opinion or a so-called "No Action" letter) is or might be required from any federal or state regulatory agency for the sale of the capital stock of KW Florida or for the other transactions contemplated hereby, Seller shall diligently request and seek to obtain the necessary approval.

Section 12. *Investment representations of purchaser and stock legend*

(a) Purchaser represents and warrants to Seller that it is acquiring all of the issued and outstanding shares of capital stock of KW Florida for its own account and for operation of KW Florida with no present intention of reselling or otherwise distributing the same except pursuant to an offering of shares duly registered under the Securities Act of 1933, as amended (the Act), or under other circumstances which in the opinion of counsel for KW Florida at the time would not require registration of such stock under the Act. Purchaser acknowledges that it has been advised and is aware that (i) Seller is relying upon an exemption under the Act predicated upon Purchaser's representations and warranties contained in this Section 12 in connection with the offer and sale of KW Florida stock pursuant to this agreement, and (ii) said capital stock in the hands of Purchaser will be restricted stock within the meaning of Rule 144 promulgated by the Securities and Exchange Commission (SEC) pursuant to the Act and unless, and until, registered under the Act, may be subject to limitations upon its resale (including, among others, pertinent requirements of Rule 144 and limitations on the amount of stock that can be resold and the time of resale) set forth in Rule 144 or in administrative interpretations by the SEC of the Act, or in other rules and regulations promulgated thereunder by the SEC, in effect at the time of the proposed sale or other disposition of the Stock.

(b) Purchaser consents to the endorsement of the following legend upon the certificate(s) representing the KW Florida capital stock (and any certificate(s) representing shares of KW Florida stock for which such stock may be exchanged) to be issued to Purchaser under this agreement:

The shares of stock of K. W. Florida Corporation (the "Company") represented by this certificate have not been registered under the Securities Act of 1933, as amended, (the "Act"), or under the securities laws of any state, and the holder hereof cannot make any sale, assignment, or other transfer of any shares of such stock except pursuant to an offering of such shares duly registered under the Act and the applicable state securities laws or under such other circumstances which in the opinion of counsel for the Company, at the time, do not require, registration under the Act and any state securities laws.

Section 13. *Conditions to obligations of purchaser.* Purchaser's obligations under this agreement are, at its option, subject to the conditions precedent that, at or before the Closing Date or as otherwise designated herein:

(a) *Corporate approvals.* All corporate action, and necessary approval required pursuant to the terms and provisions of this agreement and the applicable corporation and securities laws for the closing of this transaction shall have been

taken, and given, as appropriate, by Seller's directors and stockholders, respectively.

(b) *Governmental approvals.* The approval of any federal or state regulatory agency requested pursuant to Section 11 and reasonably deemed necessary by Purchaser for the closing of this transaction and the Rulings (defined in Section 14(a)) shall have been obtained, all on or before April 30, _____ [year], and that the Closing Date shall have been designated by Seller, as provided in Section 2(a), for a date no later than May 30, _____ [year].

(c) *Seller's performance.* At or before the Closing Date, Seller shall have complied with and performed all of its terms, covenants, and conditions under this agreement.

(d) *Status quo.* There shall have been no material adverse change in the financial condition, operations, properties, and assets of KW Florida, Martin and NYKW, other than changes contemplated by the Merger; and Seller's representations and warranties set forth in Section 6 shall be true on and as of the Closing Date with the same force and effect as if then made.

(e) *Construction projects.* Any construction project in process by KW Florida, Martin, and NYKW as of the date of this Assignment shall have continued through the Closing Date substantially on schedule.

(f) *Merger.* The Merger shall have occurred and Seller shall be the sole stockholder of all of the issued and outstanding capital stock of KW Florida, the surviving corporation.

(g) *Venture interests.* KW Florida shall be the owner of 100 percent (subject to the right of James Jones, a resident of Tampa, Florida, to acquire, the "Right of Acquisition," 20 percent of said capital stock of Jo-Dee) or 80 percent (not subject to the Right of Acquisition) of the issued and outstanding capital stock of Jo-Dee and of a 49 percent limited partnership interest in Cross.

(h) *Opinion of counsel.* Purchaser shall have received, at Seller's expense, an opinion of Messrs. Weiss and Bishop of New York, New York, Seller's counsel, dated the Closing Date, in form and substance satisfactory to Purchaser and its counsel, to the effect that:

(1) KW Florida is a corporation duly organized and existing and in good standing under the laws of the State of Florida.

(2) The authorized, issued, and outstanding capital stock of KW Florida is as set forth in of Section 6(b), except for any changes resulting from the Merger, and all such issued and outstanding stock is fully paid and nonassessable.

(3) This agreement has been duly authorized, executed, and delivered by Seller and to the best of its knowledge, Seller has good and marketable title to and full power and authority to transfer to Purchaser the issued and outstanding capital stock of KW Florida to be sold by it as provided in this agreement, and upon receipt of the certificates, Purchaser will have good, marketable, and indefeasible title to such common stock of KW Florida free and clear of all liens, charges, and encumbrances of any kind, except for the security interest created under the Security Agreement.

(4) No authorization, approval or consent of the SEC is necessary in connection with the sale and transfer of the issued and outstanding capital stock of KW Florida to Purchaser or for the continued operation of the business of KW Florida in the manner in which it is now conducted after such transfer, or, in the alternative, a statement of the nature of such authorization, approval or consent, that such authorization, approval or consent has been obtained, and that a copy of the evidence thereof is attached to such

opinion.

(5) The Merger has been effected in accordance with the applicable laws, KW Florida being the surviving Corporation.

In rendering such opinion such counsel may rely on the opinion of local counsel as to matters of law in states other than in the State of New York.

(i) *Management contracts.* At or before the Closing, the Management Contracts referred to in Section 18 shall have been executed and delivered.

(j) *Approval of counsel.* All legal proceedings in connection with the closing of this transaction, including the forms of all documents of transfer and assignment, other documents, legal matters, opinions, and procedures in connection therewith, shall have been approved in form and substance by Messrs. Jenkins & Gilchrist, of Atlanta, Georgia, counsel for Purchaser. Such approval shall not be unreasonably withheld.

Section 14. *Conditions to obligations of seller.* Seller's obligations under this agreement are, at its option, subject to the conditions precedent that, at or before the Closing Date:

(a) *Tax ruling.* Seller shall have received rulings (Rulings) from the Commissioner of Internal Revenue (Commissioner), in scope and content acceptable to Seller, and its special tax counsel, Messrs. Jenkins & Gilchrist of Atlanta, Georgia, pursuant to the application for tax rulings filed on behalf of Seller with the Commissioner on November 21, _____ [year], or other modifications or other applications for tax rulings that Seller and such counsel reasonably deem necessary for the closing of this transaction.

(b) *Stockholder approval.* Seller's stockholders shall have given all approval required under the terms and provisions of this agreement and the applicable corporation and securities laws for the closing of this transaction.

(c) *Governmental approval.* The approval of the federal or state regulatory agencies described in Section 11 shall have been obtained or Seller shall have received reasonable assurance, orally or in writing, from such agencies that no such approval is necessary.

(d) *Note and guaranty.* KW Florida shall have executed an unsecured promissory note evidencing certain open account intercompany debt of KW Florida to Seller, in the principal amount outstanding at the Closing Date (the principal amount of which, at the date hereof, being approximately \$2,186,000), and bearing interest at the same rate of interest as is provided in Section 3 with respect to the Note therein provided for on the principal balance from time to time remaining unpaid, and Purchaser shall have given its written guaranty (Guaranty) of the payment of such promissory note, the note and the Guaranty to be substantially in the form attached as Annex III and IV, respectively.

(e) *Opinion of counsel.* Seller shall have received, at Purchaser's expense, an opinion of Messrs. Jenkins & Gilchrist, of Atlanta, Georgia, Purchaser's counsel, dated the Closing Date, in form and substance satisfactory to Seller and its counsel, to the effect that:

(1) The Note, Security Agreement and Guaranty have been duly authorized, executed, and delivered by Purchaser, and each constitutes a legal, valid, and binding obligation of Purchaser, enforceable in accordance with its terms, except as such enforcement may be limited, delayed or otherwise affected from time to time by existing insolvency, bankruptcy, or other debtor relief laws.

(2) This agreement has been duly authorized, executed and delivered by Purchaser, and its purchase of

all of the issued and outstanding capital stock of KW Florida constitutes a legal and valid transaction binding upon Purchaser.

(f) *Purchaser's performance.* At or before the Closing Date, Purchaser shall have complied with and performed all of its terms, covenants, and conditions under this agreement, and shall have taken all action required under the applicable partnership and securities laws for the consummation of the transactions contemplated herein.

(g) *Management contract.* At or before the Closing, the Management Contracts referred to in Section 18 shall have been executed and delivered.

(h) *Approval of counsel.* All legal proceedings in connection with the consummation of the transactions contemplated by this agreement, including the forms of all documents of transfer and assignment, other documents, legal matters, opinions, and procedures in connection therewith, other than the tax matters referred to in Section 14(a), shall have been approved in form and substance by Weiss and Bishop of New York, New York, counsel for Seller. Such approval shall not be unreasonably withheld.

(i) *Guaranty releases.* At or before the Closing, Seller shall have received written releases of all guarantees given by it or of its subsidiaries (other than Martin, NYKW, and KW Florida) for any debts, obligations, or performances whatever by Martin, NYKW, KW Florida, Jo-Dee, Cross Ltd., and/or Winston Mall--Tampa Venture.

Section 15. *Expenses.* Each party shall pay its own expenses (including counsel fees) in connection with this agreement and the transactions contemplated herein. Each party, however, shall pay one half of the expenses (including counsel fees) arising in connection with the Rulings, the appraisals by independent appraisal engineers of the assets of KW Florida and Martin, and the valuation of other assets of KW Florida, Martin, and NYKW, which appraisals and valuation shall be made in connection with the transactions under this agreement.

Section 16. *Broker's and finder's commissions.* The parties acknowledge and agree that neither has incurred any obligation to pay any brokerage commission or finder's fee with regard to the transactions under this agreement. Purchaser shall indemnify Seller and Seller shall indemnify Purchaser from and against all liability (including counsel fees, and other costs of defending any such liability or enforcing this indemnification) for payment of any commission, fee, or other compensation in the nature of a brokerage commission or finder's fee to any person, firm, or corporation claiming to have acted on behalf of such indemnifying party in connection with the transactions contemplated by this agreement.

Section 17. *Litigation indemnification.* Seller shall indemnify and hold Purchaser harmless from and against all claims, costs, expenses, losses, damages, or liability of any nature or kind, including reasonable counsel fees and other costs of defending any such liabilities or enforcing this indemnification, arising out of or in connection with that certain legal proceeding entitled *Stylish Suits, Inc. v. K. W. Corporation, et al.* (E.D.N.Y. 83 Civ. 447).

Section 18. *Management contracts.* At or before the Closing, Seller, or its appropriate subsidiaries, shall enter into separate Management Contracts with KW Florida with respect to the following shopping centers:

Shopping Center and Location	Owner or Lessee
Shaw Mall	Shaw Management, Inc.
Tucson, Arizona	
Passaic Mall	Passaic Management, Inc.
Passaic, New Jersey	
Walt Roosevelt Shopping Center	Walt Roosevelt Management, Inc.
St. Petersburg, Florida	

Westfield Mall
Westfield, New Jersey

Westfield Development Co., Inc.

The Management Contracts for each of the above shopping centers shall be substantially in the form of the Management Contract attached and marked Annex V.

Section 19. *Miscellaneous*

(a) *Additional documents.* Seller, at any time and from time to time after the Closing Date, upon Purchaser's request, will, at Purchaser's expense, do, execute, acknowledge, and deliver all such further acts, deeds, assignments, transfers, conveyances, powers of attorney, and assurances required to convey and transfer to and vest in Purchaser and to protect the right, title and interest in and enjoyment of the capital stock of KW Florida, intended to be assigned, transferred, and conveyed under this agreement.

(b) *Binding effect.* This agreement shall be binding upon and inure to the benefit of the parties and their respective successors and assigns. However, Purchaser shall not assign or otherwise transfer any right or privilege hereunder without Seller's prior written consent.

(c) *Notices.* All notices under this agreement shall be in writing and delivered personally or mailed by registered or certified mail, postage prepaid, to the parties at their addresses listed below. Notice shall be deemed to have been received, in the case of personal delivery, when it is received by the addressee, and in the case of registered or certified mail, when the letter is deposited in the United States mail. All notices shall be given to the parties at their following addresses:

If to Seller:	K. W. Corporation 7 Park Avenue New York, New York Attention: Messrs. Green and Levy
with a copy to:	Weiss & Bishop 45 Park Avenue New York, New York 10022 Attention: Messrs. Shapiro and McCoy
If to Purchaser:	LOWEST 300 First National Bank Bldg. Atlanta, Georgia Attention: Mr. C. W. Low, Jr.
with a copy to:	Jenkins & Gilchrist 200 First National Bank Bldg. Atlanta, Georgia Attention: Messrs. Gilchrist and Husing

Either party may designate a different address for receiving notices by giving the other party at least ten days' prior written notice.

(d) *Entire agreement; modification.* This instrument constitutes the entire agreement between the parties. It may not be changed or terminated except by an instrument duly executed by both parties.

(e) *Governing law.* This agreement shall be construed in accordance with and governed by the laws of the State of Georgia.

(f) *Headings.* Headings in this agreement are inserted for convenience and reference only and shall not be deemed to be a part thereof.

(g) *Non-waiver.* No delay or failure by either party to exercise any right hereunder, and no partial or single exercise of such right, shall constitute a waiver of that or any other right, unless otherwise expressly provided herein.

(h) *Counterparts.* This agreement may be executed in one or more counterparts, each of which shall be deemed an original but all of which together shall constitute one and the same instrument.

(i) *Time of essence.* Time is of the essence of this agreement.

The parties have caused this agreement to be duly executed as of the day and year first above written.

Purchaser:

Lowest

(a joint venture)

By _____

Robert Levy

By _____

Ralph Green

by Low Brothers

By _____

C.W. Low, Partner
(Members of Joint Venture)

Seller:

K. W. Corporation

By _____

Robert Levy, President

LIST OF ANNEXES

Annex I -- Security Agreement

Annex II -- LOWEST Note

Annex III -- KW Florida Note

Annex IV -- Guaranty

Annex V -- Management Contract

(2) Security agreement

ANNEX I

This Security Agreement, made and entered into this March 30, _____ [year], by Lowest (Debtor), a joint venture composed of Low Brothers (a partnership composed of John D. Low and C. W. Low, Jr.) of Atlanta, Georgia, Robert Levy of Scarsdale, New York, and Ralph Green of Summit, New Jersey:

Recitals

Debtor has, concurrently with the execution and delivery hereof, issued to K. W. Corporation (Secured Party), a Delaware corporation, (a) a certain promissory note (the Note) of Debtor in the principal amount of \$2,655,000, payable to the order of Secured Party on or before six months after date, and with interest, which represents a portion of the purchase price paid by Debtor to Secured Party for all the shares of the issued and outstanding common stock (the KW Florida Stock) of K. W. Florida Corporation (KW Florida), a Florida corporation, and (b) a guaranty (the Guaranty) of a note of KW Florida payable to the order of Secured Party, evidencing certain open account intercompany debt that existed on the date hereof between KW Florida and Secured Party.

Debtor has agreed to grant to Secured Party a security interest in the KW Florida Stock and other collateral as security for the payment of the Note, and for performance of the Guaranty, among other things, in accordance with their respective terms and provisions.

Now, therefore, Debtor does grant Secured Party a security interest in the KW Florida Stock and any and all other property which may from time to time be pledged hereunder, the KW Florida Stock and such other property being the Collateral. Certificates representing the KW Florida Stock, accompanied by properly endorsed stock powers, are being contemporaneously herewith deposited with Secured Party.

1. *Secured obligations.* The security interest shall secure the payment and performance of (i) the Note, together with all of its renewals and extensions, or any part thereof, (ii) the Guaranty, and (iii) Debtor's obligations under this agreement.

2. *Possession of collateral.* Debtor covenants and agrees that so long as the Note or the note as to which the Guaranty applies, or any portion thereof, and Debtor's obligations herein, shall remain outstanding and unpaid or undischarged, the Collateral shall be held by and in the custody of Secured Party and Debtor shall not have the right to procure the release of any Collateral from the security interest except upon and in compliance with the terms and conditions herein set forth.

3. *Stock*

(a) *Endorsed certificates.* All stock certificates and other instruments which may constitute at any time or from time to time a part of the Collateral shall be endorsed in blank for transfer or be accompanied by proper instruments of

assignment and transfer in blank, in a manner satisfactory to Secured Party. Until the happening of an event of default specified in paragraph 9, and its continuation beyond the applicable period of grace, all stock and securities pledged hereunder, as applicable, shall remain registered in the name of Debtor, with the address stated as "c/o K. W. Corporation, 7 Park Avenue, New York, N.Y."

(b) *Dividends.* If cash or any shares of stock or other securities issued by way of any distribution, dividend, stock split up or spin off in respect of any of the shares of the KW Florida Stock or other stock or securities issued by way of any dividend, distribution, stock split up or spin off in respect of any of the pledged securities, then and in any such case, the cash or the shares of stock or other securities thus issued shall be delivered directly to Secured Party as additional security for the Note and other obligations of Debtor under this agreement, and immediately upon issue thereof Debtor will deliver to and deposit with the Secured Party, as appropriate, such proper instruments of assignment and transfer endorsed in blank, satisfactory to Secured Party. Debtor may, however, designate that any such case be used to prepay all or part of the Note in accordance with the terms thereof.

4. *Undertaking.* Debtor covenants and agrees to pay and discharge promptly the Note and the Guaranty and all other debts, obligations, or liabilities, including expenses and reasonable attorneys' fees incurred or paid by Secured Party in exercising or protecting its interests, rights and remedies hereunder, on the part of Debtor at any time hereby secured, as and when the same become due and payable, either by their own terms or by the exercise by Secured Party of any right or option which it may ever have to accelerate the maturity thereof; provided, nevertheless, that if Debtor pays to Secured Party all amounts due upon the Note and satisfies all its obligations under the Guaranty and also pays to Secured Party all other sums payable hereunder by Debtor, and all amounts due under the note as to which the Guaranty applies have been paid by KW Florida or by Debtor, this agreement and the security interest hereby granted shall cease, terminate and become void; and immediately thereafter the Secured Party shall deliver to Debtor the Collateral and, on demand of Debtor, shall also execute, acknowledge, and deliver to Debtor appropriate instruments of release and/or transfer in respect of the Collateral; otherwise, this Security Agreement shall remain in full force.

5. *Voting rights.* Until an event of default occurs, Debtor shall have the exclusive right to vote any and all shares of stock constituting a part or all of the Collateral, at any and all meetings of the shareholders of each corporation, for any and all purposes not inconsistent with the covenants of Debtor contained in this Security Agreement.

6. *Warranties.* Debtor represents and warrants that: (i) it has authority to execute and deliver this Security Agreement; (ii) no other security agreement covering the Collateral, or any part thereof, has been made and no security interests, other than the one herein created, have attached or been perfected in the Collateral or in any part thereof; and (iii) it is the owner of the Collateral now in existence.

7. *Additional documents and duties.* Debtor covenants and agrees to: (i) execute and deliver promptly from time to time to Secured Party all such other assignments, certificates, supplemental writing and financing statements, and do all such other acts and things, that Secured Party reasonably requests in order more fully to evidence and perfect the security interest; and (ii) promptly perform all of Debtor's covenants and duties under any security agreement, deed of trust, collateral pledge agreement, or contract of any kind now or hereafter existing as security for or in connection with payment of the Note, or any part thereof, or any other obligation of Debtor hereunder.

8. *Limited liability.* Secured Party shall have no duty to fix or preserve rights against prior parties to the Collateral, and shall never be liable for its failure to use diligence to collect any amount payable in respect of the Collateral, but shall be liable only to account to Debtor for what it may actually collect or receive thereon.

9. *Default.* The term "default" means the occurrence of any of the following events: (i) Debtor's failure to pay principal and interest due under the Note, or any part thereof, as it becomes due in accordance with its terms or when accelerated pursuant to any power to accelerate; (ii) Debtor's failure to perform its obligations punctually under the Guaranty; (iii) Debtor's failure to perform any covenant, agreement or condition contained herein or in any other security agreement,

mortgage, deed of trust, assignment or contract of any kind securing or assuring payment of the Note, or any part thereof, or any obligation of Debtor hereunder; (iv) Debtor's dissolution; (v) the levy against all or any part of the Collateral, of any execution, attachment, sequestration or other writ; (vi) the appointment of a receiver of all or any part of the Collateral; (vii) the adjudication of any joint venturer of Debtor as a bankrupt; or (viii) the filing, by way of petition or other pleading seeking adjudication of any joint venturer of the Debtor, or an assignment for the benefit of creditors or other adjustment of any such joint venturer's or partner's debts, or any other relief under any present or future bankruptcy, reorganization, debtor's relief, or insolvency laws.

10. Remedies and proceeds

(a) *Remedies.* Upon the occurrence of a default, in addition to all other Secured Party rights and remedies hereunder, under the Uniform Commercial Code of the State of Georgia (Code), or otherwise, Secured Party may: (i) declare the entire unpaid balance of principal of and all accrued interest on the Note immediately due and payable, without notice of dishonor, notice of any kind, demand, or presentment, which are waived; (ii) reduce its claim to judgment, foreclosure or otherwise enforce its security interest in all or any part of the Collateral by any available judicial procedure; (iii) after any notification provided for in paragraph 11, sell or otherwise dispose of, at its office, or elsewhere, as chosen by Secured Party, all or any part of the Collateral, and any such sale or other disposition may be as a unit or in parcels, by public or private proceedings, and by way of one or more contracts (it being agreed that the sale of any part of the Collateral shall not exhaust Secured Party's power of sale, but sales may be made from time to time until all of the Collateral has been sold or the Note and other obligations of Debtor hereunder have been paid or discharged in full), and at any such sale it shall not be necessary to exhibit the Collateral; (iv) at its discretion, retain the Collateral in satisfaction of the unpaid balance of principal of and interest upon the Note, the note as to which the Guaranty applies if the default in paragraph 9(ii) has occurred, and Debtor's other obligations hereunder whenever the circumstances are such that Secured Party is entitled to do so under the Code; (v) apply by appropriate judicial proceedings for appointment of a receiver for all or any part of the Collateral, and Debtor consents to any such appointment; or (vi) buy the Collateral at any public or private sale.

(b) *Proceeds.* Secured Party shall be entitled to apply the proceeds of any sale or other disposition of the Collateral in the following order: first, to the payment of all of its reasonable expenses, including attorneys' fees and other legal expenses, incurred in holding and preparing all or any part of the Collateral, for sale(s) or other disposition, in arranging for such sale(s) or other disposition, and in actually selling the same; and next, toward payment of the unpaid balance of principal of and interest upon the Note and other obligations of Debtor hereunder in such order and manner as Secured Party, in its discretion, deems advisable. Secured Party shall account for any surplus in accordance with the provisions of the Code. If the proceeds are not sufficient to pay the Note and, if applicable, the note as to which the Guaranty applies in full, Debtor shall remain liable for any deficiency.

11. *Notice of sale.* Reasonable notification of the time and place of any public sale of the Collateral, or of the time after which any private sale or other intended disposition of the Collateral is to be made, shall be sent to Debtor and to any other person entitled under the Code to notice. If, however, the Collateral threatens to decline speedily in value, Secured Party may sell or otherwise dispose of it without notification, advertisement or other notice of any kind. It is agreed that notice sent or given not less than five calendar days before the taking of the action to which the notice relates is reasonable notification and notice for the purpose of this paragraph.

12. *Cumulative remedies.* All rights and remedies of Secured Party are cumulative of each other and of every other right or remedy that it may otherwise have at law or in equity or under any other contract or other writing for the enforcement of the security interest or the collection of the indebtedness evidenced by the Note. The exercise of one or more rights or remedies shall not prejudice or impair the concurrent or subsequent exercise of other rights or remedies.

13. *Assignment.* Secured Party may transfer and assign all or any part of its rights, powers, and interests hereunder, together with the Collateral, at any time and upon any terms it deems advisable.

14. *Waiver.* The acceptance by Secured Party at any time and from time to time of part payment of the aggregate amount of the Note, or other obligations of Debtor, then matured shall not be deemed to be a waiver of any other subsequent default, nor shall any such waiver by Secured Party be deemed to be a continuing waiver. No delay or omission by Secured Party in exercising any right or power hereunder, or under any other writings executed by Debtor as security for or in connection with the Note, the Guaranty or the note as to which the Guaranty applies, shall impair any such right or power or be construed as a waiver thereof or any acquiescence therein, nor shall any single or partial exercise of any such right or power preclude other or further exercise thereof, or the exercise of any other right or power of Secured Party hereunder.

15. *Governing law.* This agreement is executed under and shall be construed in accordance with the laws of the State of Georgia.

16. *Binding effect.* This agreement shall be binding on Debtor and its successors and assigns, and shall inure to the benefit of Secured Party and its successors and assigns.

Executed as of the day and year first above written.

Lowest

(a joint venture), Debtor

by: Low Brothers

By: _____

Partner

By: _____

Ralph Green

Accepted:

K.W. Corporation

Secured Party

By: _____

Robert Levy, President

(3) Promissory note of buyer

ANNEX II

\$2,655,000

Atlanta, Georgia

March 30, _____ [year]

For value received, Lowest, a joint venture composed of Low Brothers (a partnership composed of John D. Low and C. W. Low, Jr.), of Atlanta, Georgia, and Robert Levy of Scarsdale, New York, and Ralph Green of Summit, New Jersey,

("Maker"), promises to pay to the order of K. W. Corporation, a Delaware corporation, ("Payee"), at its office in New York, New York, or at any other place that the holder designates in writing, on or before six months after the date the principal sum of \$2,655,000 by a bank cashier's check or certified check drawn on a New York City bank, in New York Clearing House funds, together with interest from date hereof, in like funds, on the principal balance from time to time remaining unpaid prior to maturity, at the highest rate of annual interest paid by Payee on its major bank borrowings, but not to exceed a rate of 2 percent per annum above the floating prime rate of interest at Merchants Bank, New York, N.Y. (the applicable rate of interest being adjusted as of the start of the day following the effective date of any change in the highest rate of interest paid by Payee or charged by said bank, as the case may be). The interest hereon shall never be charged or collected at a rate in excess of the maximum permitted by law. All past due principal and interest shall bear interest at the rate of 10 percent per annum.

Any full or partial prepayment of this Note shall be applied first to the interest accrued to the date of such payment, and the balance of such payment shall then be applied to the unpaid principal balance.

This note is secured by that certain Security Agreement, executed by Maker, dated the date hereof, covering certain collateral, which includes, among other things, all of the issued and outstanding capital stock of K. W. Florida Corporation, a Florida corporation. If a default occurs the holder(s) hereof shall have the right to exercise all of the rights and remedies created or otherwise referred to therein.

Maker and any guarantor or endorser of this Note waive demand, presentment for payment, notice of nonpayment or dishonor filing of suit and diligence in collecting this Note.

If this Note is collected by an attorney or by legal proceedings, Maker agrees to pay a reasonable sum not to exceed 10 percent of all unpaid principal and accrued interest as attorneys' or collection fees.

All of the covenants and agreements in this Note by or on behalf of Maker shall bind its successors and assigns.

The undersigned by each of its joint venturers has signed this Note as of the date and year first above written.

Lowest

(a joint venture)

by: Low Brothers

By _____

Partner

By: _____

Ralph Green

By _____

Robert Levy

(4) Promissory note: corporation to former parent

ANNEX III

\$2,186,000

March 30, _____ [year]

For value received, K. W. Florida Corporation, a Florida corporation, the Maker, promises to pay to the order of K. W. Corporation, a Delaware corporation, the Payee, at its office in New York, New York, or at any other place the holder designates in writing, on or before 13 months after date the principal sum of \$2,186,000 by a bank cashier's check or certified check drawn on a New York City bank, in New York Clearing House funds, together with interest from date hereof, in like funds, on the principal balance from time to time remaining unpaid prior to maturity, at the highest rate of annual interest paid by the Payee on its major bank borrowings, but not to exceed a rate of 2 percent per annum above the floating prime rate of interest at Merchants Bank, New York, New York (the applicable rate of interest being adjusted as of the start of the day following the effective date of any change in the highest rate of interest paid by the Payee or charged by said bank, as the case may be); and in the event the Payee ceases to exist or this Note is assigned, at the rate of 7 percent per annum. The interest hereon shall never be charged or collected at a rate in excess of the maximum permitted by law. All past due principal and interest shall bear interest at the rate of 10 percent per annum.

Any full or partial prepayment of this Note shall be applied first to the interest accrued to the date of such payment, and the balance of such payment shall then be applied to the unpaid principal balance.

If the principal of or interest on this Note is not paid in accordance with the terms hereof, the holder of this Note may declare immediately due and payable the entire unpaid principal balance of, and all accrued interest on, this Note and exercise any right or remedy provided by law or in equity.

The Maker and any guarantor or endorser of this Note waive demand, presentment for payment, notice of nonpayment or dishonor, filing of suit and diligence in collecting this Note.

If this Note is collected by an attorney or by legal proceedings, the Maker agrees to pay a reasonable sum not to exceed 10 percent of all unpaid principal and accrued interest as attorneys' or collection fees.

All of the covenants and agreements in this Note by or on behalf of the Maker shall bind its successors and assigns.

The Maker has caused this Note to be signed in its name by its duly authorized officer and to be dated as of the date and year first above written.

K. W. Florida Corporation

By _____

President

Attest:

Secretary

(5) Guaranty of subsidiary's promissory note by parent

ANNEX IV

The undersigned, ("Guarantor"), guarantees to K. W. Corporation, ("Creditor"), a Delaware corporation, the prompt payment at maturity of the Guaranteed Indebtedness upon the following terms and conditions:

1. *Indebtedness.* "Guaranteed Indebtedness" shall mean that certain unsecured promissory note in the original principal amount of \$2,186,000, dated the date hereof, made by K. W. Florida Corporation, the Debtor, payable to the order of the Creditor, and bearing interest and being payable as set forth therein, together with all renewals or extensions of all or part of such indebtedness, with or without notice to or consent of Guarantor.

2. *Cumulative remedies.* Creditor's rights hereunder shall be cumulative of all other rights that the Creditor may ever have against Guarantor. Creditor's exercise of any right or remedy hereunder or under any other instrument, or at law or in equity, shall not preclude the concurrent or subsequent exercise of any other right or remedy.

3. *Guaranty of payment.* If Debtor defaults in paying or performing all or part of the Guaranteed Indebtedness, when such Indebtedness becomes due, either by its terms or as the result of the exercise of any power to accelerate, Guarantor shall, on demand and without further notice of dishonor, pay the amount due thereon to Creditor, at its office in New York, New York. It shall not be necessary for Creditor, in order to enforce such payment by Guarantor, first, to institute suit or exhaust its remedies against Debtor. Guarantor shall pay reasonable attorneys' fees if this Guaranty is placed with an attorney for collection or collected through court or other legal proceedings.

4. *Notice waiver.* Guarantor waives notice to it of the acceptance of this Guaranty and of the making, renewing, extending, or assignment of all or part of the Guaranteed Indebtedness.

5. *Security.* This Guaranty is secured by that certain Security Agreement, executed by the Guarantor, dated the date hereof, covering certain collateral, which includes, among other things, all of Debtor's issued and outstanding capital stock. If a default occurs, as defined herein or therein, Creditor may exercise any and all of the rights and remedies created or otherwise referred to herein or therein. Guarantor hereby waives presentment, notice of nonpayment or dishonor, protest, or any other notice hereunder or under the Guaranteed Indebtedness.

6. *Liability.* If, for any reason, the Guaranteed Indebtedness cannot be enforced against Debtor, or any payments thereon must be refunded by Creditor to any party for any reason, including bankruptcy, such fact shall not affect Guarantor's liability and Guarantor shall be liable to the same extent as if the Guaranteed Indebtedness had been enforceable against Debtor or such payments had not been made to Creditor.

7. *Assignment.* This Guaranty is for the benefit of Creditor, its successors and assigns, and in the event of any assignment by the Creditor, its successors or assigns, of all or part of the Guaranteed Indebtedness, the applicable rights and benefits hereunder may be transferred with such indebtedness; provided, however, Creditor's rights hereunder shall retain priority. This Guaranty is binding on Guarantor and its successors and assigns.

Executed this March 30, _____ [year].

Lowest

(a joint venturer), Guarantor

by: Low Brothers

By _____

Partner

By _____

Ralph Green

By: _____

Robert Levy

(6) Management contract

ANNEX V

Agreement, made May 31, _____ [year], between K. W. Corporation, a Delaware corporation, having an office at 7 Park Avenue, New York, New York (Owner), and Passaic Management, Inc., a New Jersey corporation, having an office at 20 East Boulevard, East Paterson, New Jersey (Agent).

Owner and Agent agree as follows:

Article I Appointment

Owner appoints Agent as the sole and exclusive rental, operation and management agent of a certain shopping center, known as Passaic Mall Shopping Center, located in Passaic, State of New Jersey, the Shopping Center. Owner grants Agent the sole and exclusive right to lease all parts of the Shopping Center. Agent accepts the appointment.

Article II Term

The term of this agreement shall commence on June 1, _____ [year] and shall continue until midnight on June 1, _____ [year], unless this agreement is terminated and the obligations of the parties sooner cease and terminate.

Article III Management Fee

1. *Percentage.* Owner shall pay Agent, as its entire compensation for the services to be rendered hereunder, a management fee equal to 2 percent of the Gross Income of the Shopping Center.
2. *Gross income.* The term "Gross Income" shall mean all revenues of any kind and nature, whether ordinary or extraordinary, foreseen or unforeseen, received or accrued from the use and/or occupancy of the Improvements constituting the Shopping Center or any part thereof, exclusive of money received or accrued from any occupants or users of any part of such Improvements for real estate taxes, as provided in the space leases for space tenants.
3. *Percentage rent.* If any such space leases provide that the tenant has the right to offset its obligations for the payment of real estate taxes as against overage or percentage rents, such rents shall be included in "Gross Income" although all or part of them are applied to or utilized for the payment of such real estate taxes.
4. *Outside brokers.* Agent will use its best efforts not to use independent outside brokers in renting vacant space in the Improvements constituting the Shopping Center. If Agent utilizes the services of any independent outside broker, all fees, charges, or commissions paid to such broker shall be at Owner's expense, and shall not be deducted from Agent's management fee as provided in Section 1, Article III, except to the extent that such fees, charges, or commissions exceed those usually charged by brokers in the same locale or area of the Shopping Center for the renting of space in Shopping Centers.

Article IV Management

Agent agrees to do the following, which shall be at Owner's expense, and which Agent shall have the sole and exclusive right to do without Owner's further consent.

1. *Management.* Agent shall use due diligence in the renting, operating and managing of the Shopping Center, and in collecting all rents and other income therefrom.

2. *Maintenance.* Agent shall use due diligence in the repairing, making replacements and maintaining the Shopping Center in order that it shall be caused to be and remain in a good, sound and clean condition, and to make all improvements, construction, changes, and additions to the Shopping Center (including capital improvements) that Agent deems advisable.

3. *Owner approval.* Agent shall secure Owner's approval for all expenditures or the incurring of any obligation involving a sum in excess of \$25,000 for any one item, except for expenditures made and obligations incurred (i) pursuant to and set forth in a Budget prepared under this Agreement, theretofore approved by Owner and/or (ii) for emergency repairs in excess of \$25,000 if, in Agent's opinion, such repairs are necessary to protect the Improvements constituting all or part of the Shopping Center from damage, or (iii) to maintain services to the tenants as called for by their tenancy. Agent shall notify Owner promptly whenever emergency repairs have been ordered.

4. *Additional compensation.* If Owner's approval is required by the provisions of paragraph, 3 above, or, Owner decides to enlarge, remodel, or extensively refurbish all or part of the Shopping Center Agent shall be entitled to receive additional compensation for services it is required to render for such items as supervision of construction, initial space leasing in the event of the enlargement of the Shopping Center, and overhead allocation expense.

5. *Expenses.* Except for the foregoing, all expenses incurred by Agent shall be charged at net cost. Owner shall receive credit for all rebates, discounts, and allowances.

6. *Employees.* Agent shall hire, discharge, and supervise the work of all supervisory, maintenance, and service employees, including the Center Manager and security personnel, in order to discharge Agent's responsibilities hereunder. All such employees shall be employed and paid by Owner.

7. *Insurance.* Agent shall procure and maintain adequate insurance coverage with respect to employer's liability and workmen's compensation.

8. *Accounting.* Agent shall provide all general bookkeeping and accounting services required by paragraphs 17(a) and (b) of this Article IV, at Agent's expense. All clerical services performed at the Shopping Center Site, including the maintenance of payroll records incident to the efficient operation and maintenance of the Shopping Center, shall be performed at Owner's expense.

9. *Service contracts.* Agent shall enter into contracts for the furnishing to the Shopping Center of all services and utilities, including electricity, gas, water, steam, telephone, cleaning, security, vermin extermination, elevator, escalator, and boiler maintenance, and all other utilities or service Agent deems advisable to assure that the Shopping Center shall be caused to be and remain in a good, sound, and clean condition and properly operating.

10. *Supplies.* Agent shall purchase all material and supplies it deems necessary to properly repair, maintain and operate the Shopping Center.

11. *Rent and disbursements.* Agent shall demand, receive, and collect all rents, income, and other revenues, which it shall deposit in a special bank account or accounts maintained by it for the deposit of moneys in regard to the Shopping

Center. Agent shall disburse, deduct, and pay from all rents, etc., all amounts required to be disbursed or paid in connection with the repair, maintenance, and operation of the Shopping Center and in the carrying out of Agent's duties. Such disbursements and payments shall include the following items:

(a) all assessments and charges of every kind imposed by any competent governmental authority (including real estate taxes, assessments, sewer rents, and water charges), and interest and penalties thereon. Agent, however, shall reimburse Owner for all interest or penalty payments imposed by reason of delay in payment caused by Agent's negligence.

If any mortgage covering the Shopping Center requires Owner to escrow payments for real estate taxes and assessments, Owner and not Agent shall make such payments. Moreover, the provisions of this subsection (a) shall not apply as to the disbursement and deduction of such escrowed taxes and assessments.

(b) license fees, permit fees, insurance appraisal fees, fines, penalties, legal fees, accounting fees incurred in the auditing of tenants' books and records to establish and collect overage or percentage rents, and all disbursements incurred in connection with the ownership, management or operation of the Shopping Center. Agent, however, shall reimburse Owner for all such fines and penalties imposed by reason of delay in payment caused by Agent's negligence.

(c) premiums on all policies of insurance.

(d) service contracts, utilities, repairs, replacements, salaries and wages, bonuses, fringe benefits and administration expenses, including Agent's compensation.

(e) contributions to Merchants Association, as required by outstanding agreement and advertisement and public relations costs for Center promotional activities.

(f) all other expenses or costs customarily disbursed by managing agents of comparable buildings and property or required in order for Agent to perform its duties.

12. *Agent advances.* If at any time the funds in Agent's custody from the current collections, rents, income, or other revenues from the Shopping Center are insufficient to pay such expenses, Owner shall, on five days' written notice, immediately furnish Agent with the required funds to make such payments. Owner shall promptly reimburse Agent, with interest at the rate of three percent above the prime rate being charged by the Manhattan Bank of New York City, for all disbursements advanced by Agent of its own money for Owner when funds are insufficient. Nothing contained herein, however, shall be construed to obligate Agent to make any such advances. If the interest above mentioned exceeds the maximum applicable legal rate, the rate of interest shall be the applicable legal maximum rate.

13. *Trust funds.* All amounts on deposit in the special bank account in a member bank of the Federal Reserve System shall be held by Agent, in its name, as trust funds for Owner to be devoted to the purposes herein provided.

14. *Insurance.* Agent shall procure, renew and at all times keep in force insurance covering the Shopping Center and its contents which Owner is required to maintain, including all insurance required under tenants' leases of the Shopping Center and by any mortgage on the Shopping Center. All policies of insurance shall be procured from carriers and through brokers to be selected by Agent. Agent shall also obtain any other insurance which may, from time to time during the term of this agreement, be advisable or be customarily or usually carried in connection with comparable properties or buildings in the area. All liability policies shall insure both Owner and Agent. All casualty policies shall insure Owner and any mortgagee of the Shopping Center when so required by any mortgage. If requested by Owner, a certificate of each policy issued shall be delivered to it by Agent. Agent shall adjust and settle all losses with the insurance companies.

15. *Claims.* Agent shall give Owner notice of any claims made against either. Owner and Agent shall cooperate fully

with each other and with any insurance carrier to the end that all such claims will be properly investigated and defended. Agent may hire its own attorney, but at Owner's expense, to defend any such claim in any instance when insurance policies do not provide complete coverage.

16. *Compliance with laws.* Agent shall cause, at Owner's expense, all such acts and things to be done in or about the Shopping Center as are necessary to comply with all applicable governmental statutes, ordinances, laws, rules, regulations, orders and determinations, ordinary or extraordinary, foreseen or unforeseen, of every kind or nature affecting or issued in connection with the Shopping Center, as well as with all such orders and requirements of the Board of Fire Underwriters, Fire Insurance Exchange, or any other body which may hereafter exercise similar functions. Agent may contest such statutes, ordinances, laws, regulations, orders, determinations or requirements, and pending the final determination of the contest, may withhold compliance.

17. *Statements and payments.* Agent shall render statements and make payments to Owner as follows:

(a) on or before the 20th day of each month in which rental income is received from the Shopping Center, Agent will render to Owner a statement as to the preceding calendar month, which shall set forth all receipts and disbursements handled by Agent.

The statements shall include at least the following information:

(i) the name of each tenant, identification of the space occupied by such tenant, and the rental payable by each tenant;

(ii) breakdown of the gross rental income into stores, offices, warehouse, and open storage areas;

(iii) breakdown of income from any sources other than the rental of space; and

(iv) breakdown of all expenses, including real estate taxes and all other taxes, water rents, steam, lighting, power, insurance, repairs, materials and supplies, labor, and improvements.

(b) within 15 days after the end of each month, Agent will remit to Owner the amount collected by Agent during the said preceding calendar month, less fees, disbursements, and advances made on behalf of and for the account of Owner as authorized by this agreement, less all reasonable sums that Agent deems necessary or appropriate, as reserves to meet obligations which will or may become due thereafter, taking into account estimated future income.

(c) once annually, within 45 days after January 1st of each year, Agent will furnish to Owner, at Owner's expense, an audited, detailed statement of cash receipts and disbursements covering the 12 month period immediately preceding said January 1st, prepared in accordance with generally accepted accounting practices consistently applied.

18. *Actions against tenants.* Agent shall institute, in its own name or in the name of Owner, but in any event at Owner's expense, all legal actions or proceedings to collect rent or other income from the Shopping Center or to oust or dispossess tenants or other persons therefrom, or to cancel or terminate any lease for the breach thereof or default thereunder by the tenant, and to hold all security deposits posted by tenants and occupants and to apply the same against defaults by the tenant or occupant.

19. *Tax reduction actions.* Agent shall file applications in its own name or in the name of Owner, but in any event at Owner's expense, for the reduction of real estate tax assessments and/or water charges and sewer rents, and/or for the cancellation or reduction of any other taxes, assessments, duties, imposts or other obligations of any nature imposed by law and to institute all legal actions or proceedings in connection therewith; and to file, settle, try, appeal, or otherwise dispose of all such applications and/or proceedings, upon any terms and conditions Agent deems appropriate.

20. *Violations actions.* Agent shall take, at Owner's expense, all appropriate steps to protest and/or litigate to final decision in any appropriate court or forum any violation, order, rule, or regulation affecting the Shopping Center.

21. *Attorneys.* Agent shall, at Owner's expense, engage counsel, selected by Agent, and pay counsel fees and court costs and disbursements in connection with any proceedings involving the Shopping Center.

22. *Contract compliance.* Agent shall comply with all the terms, conditions, and obligations of any lease, mortgage, or other agreement on behalf of Owner which relate to any matters in connection with the rental, operation, or management of the Shopping Center, unless prevented or delayed by strikes, riot, civil commotion, war, inability to obtain materials because of governmental restrictions or acts of God or the public enemy, administrative or statutory rules or judicial decisions, or any other cause beyond Agent's control.

23. *Leasing.* Agent shall conduct all negotiations connected with any leases or renewal agreements (and renting commission agreements and other documents in connection therewith) in any part of the Shopping Center, and enter into and execute, in its name or in the name of and as agent for Owner, all such leases (and renting commission agreements with brokers and other documents in connection therewith).

24. *Outside brokers.* Agent shall enlist the services of outside brokers, who shall be compensated at the rates referred to in Section 4 of Article III.

25. *Budget.* Not less often than once each fiscal year, Agent shall prepare and submit to Owner, for its consideration and approval, a Budget setting forth the estimated receipts and expenditures (Capital, Operating and other) of the Shopping Center and a reasonable contingency allowance for the period covered by the Budget. When approved by Owner, Agent shall implement the Budget and be authorized to make the expenditures and incur the obligations provided therein. If Owner fails to disapprove the Budget, by giving Agent written notice within ten days after its submission, the Budget shall be deemed approved. If Owner disapproves as above provided, Agent shall operate under the previous Budget with an increase based upon (i) any increase over the first day of the previous year to the date of submission of the Budget in question in the Consumer Price Index for Urban Wage Earners and Clerical Workers (1982-1984=100) applicable to the locality where the Shopping Center is situated, and (ii) any increase of the previous Budget made necessary by existing union wage contracts. Nothing contained herein, however, shall render Agent liable for the making of any expenditures or incurring any obligation not contained in the Budget, if such expenditures or obligations are necessarily incurred by Agent in performing its duties under this agreement.

Article V Agency

Owner covenants and agrees that:

1. *Ratification.* Whenever a provision in this agreement allows Agent to take action in the name of or on behalf of Owner, Owner will promptly execute all required documents to enable Agent to carry out its prescribed functions. Agent is appointed as Owner's attorney-in-fact for the purpose of making all payments that Agent is authorized to make hereunder for or on behalf of Owner.

2. *Prospects.* Owner shall refer to Agent all inquiries for any leases or renewal agreements for the rental of all or any part of the Shopping Center.

3. *Advertising.* Agent, at Owner's expense, is authorized to advertise the premises or portions thereof for rent, and to prepare and secure renting signs, renting plans, circular matter, and other forms of advertising.

Article VI Assignment

Neither Owner (except in connection with a transfer of its interest in the Shopping Center) nor Agent shall assign this agreement or any of its rights hereunder. If Owner's interest in the Shopping Center is transferred, all of its obligations under this agreement shall be binding on the transferee, who shall assume all of Owner's obligations, if Agent elects to continue hereunder. This agreement shall be noncancellable, except as otherwise permitted herein.

Article VII Termination

1. *Breach, arbitration.* If either party commits, or is alleged to have committed, a material breach of this agreement (the breaching party), the party alleging the breach (the other party) shall serve written notice upon the breaching party, setting forth the details of the alleged breach. The breaching party shall cure the breach within 30 days after receiving the notice, unless it disputes the claim as set forth below. If the breach cannot be cured within the 30-day period, the breaching party shall, within such time, commence and diligently proceed with all necessary acts to cure the breach. If the breaching party fails to cure the breach within the 30-day period, the other party may terminate this agreement by sending a second written notice to the breaching party, termination to be effective as of the date specified in the second notice. If, however, the breaching party, within 15 days after receiving the first notice, sends the other party a written notice disputing the claim of material breach and demanding arbitration, the parties shall promptly submit the dispute to the American Arbitration Association in the City of New York for determination in accordance with its rules. Such determination shall be binding upon both parties. While the arbitration is pending, Agent shall continue to perform all its obligations under this agreement. If it is determined that a breach was committed, the breaching party shall cure the breach within ten days after it is served with a copy of the award or determination. If the breach is not timely cured, the agreement shall be terminated.

2. *Insolvency.* Either party may terminate this agreement if either of the following events occur during the term thereof: a petition in bankruptcy or insolvency, for reorganization, or for the appointment of a receiver or trustee of all or a portion of the other party's property is filed against such party in any court, under any federal or state statute, and the petition is not discharged within 30 days after filing; or either party makes an assignment for the benefit of creditors, petitions for or enters into an arrangement, or permits this agreement to be taken under a writ of execution or attachment. In either event, the other party may terminate this agreement, by giving written notice by certified mail, effective as of the date specified in the notice.

3. *Termination.* Either party may terminate this agreement at any time during its term by giving the other party at least 12 months' written notice of termination. Such notice, however, may not be given during the first three years of the agreement. Upon such termination, each party's obligations to the other shall terminate immediately, except for Owner's payment to Agent of all fees earned to the date of expiration of the notice and Agent's accounting and payment to Owner of all net collections made by it to the date of such expiration.

Article VIII Relationship

Nothing contained herein shall be deemed to have created, or be construed as having created, any joint venture or partnership relationship between parties. At all times during the performance of its duties and obligations arising hereunder, Agent shall be deemed to be acting as an independent contractor.

Article X Miscellaneous

1. *Notices.* All notices under this agreement shall be sent by registered or certified mail, postage prepaid, return receipt requested, addressed to the other party at its address set forth at the beginning hereof. Either party, however, may designate a different address by serving written notice of change of address on the other party, in the manner provided above.

2. *Entire agreement; modification.* This instrument constitutes the entire agreement between the parties in connection

with the agency created herein. It may not be modified except by an instrument duly executed by both parties.

3. *Governing law.* This agreement shall be construed in accordance with and governed by the laws of the State of New York.

4. *Binding effect.* This agreement shall be binding upon and inure to the benefit of both parties and their respective successors and assigns.

5. *Headings.* Headings in this agreement are for convenience and reference only and are not deemed to be a part thereof.

6. *Non-waiver.* No delay or failure by either party to exercise any right hereunder, and no partial or single exercise of such right, shall constitute a waiver of that or any other right, unless otherwise expressly provided herein.

7. *Counterparts.* This agreement may be executed in one or more counterparts, each of which shall be deemed an original but all of which together shall constitute one and the same instrument.

8. *Time of essence.* Time is of the essence of this agreement.

The parties have set their hands and seals the day and year first above written.

(7) Appraisal letter

EXHIBIT B

SMITH REAL ESTATE CORPORATION
One Fifth Avenue
New York, N.Y.
(212) 000-0000

K. W. Corporation
7 Park Avenue
New York, New York 10022

January 24, _____ [year]

Attention: Mr. Ralph Green
Vice President for Finance

Gentlemen:

At your request, we have completed a valuation study to determine the fair market value of certain stock proposed to be sold by K. W. Corporation ("KW"). This letter identifies the stock which you are proposing to sell, the source materials provided by KW for our examination, the assumptions which we have made, our valuation techniques, and on the basis of the foregoing, presents our conclusions regarding its fair market value.

We understand that this letter may be relied upon by the Board of Directors and stockholders of KW, and may be referred to or reproduced in proxy or other material submitted to the SEC and the stockholders of KW in connection with the proposed sale.

We acknowledge receipt of the letter from KW's counsel, Weiss & Bishop, dated January 23, _____ [year], which outlines the terms of the proposed merger of Martin Realty Corporation and NYKW Corporation, wholly owned subsidiaries of KW, into a third wholly owned subsidiary of KW, K. W. Florida Corporation ("Florida Corporation"), and the sale by KW of its shares in Florida Corporation to a joint venture consisting of parties who are described as directors, officers or substantial stockholders of KW. In view of the relationship to KW of the members of the purchasing joint venture, you have indicated to us that the purchase price for the stock of Florida Corporation will be substantially based on the valuation presented herein.

To enable us to complete this valuation study, you have supplied us with a schedule, annexed as Schedule 1, identifying the principal assets which will be owned by Florida Corporation at the time of the contemplated sale of its stock.

You have also supplied us with various information and documentation (including appraisals, copies of relevant agreements, and written responses to certain inquiries by us) pertinent to this valuation, is identified by Schedule 2.

We have inspected the two properties at Los Angeles, California owned by Martin Realty Corporation, as well as the Passaic, New Jersey property which is the subject of a letter agreement between NYKW Corporation and Giant Stores. With respect to Florida Corporation, we have inspected the option sites located in Raleigh, North Carolina and Rutland, Vermont, as well as the Cross County Mall and adjacent lands in Tampa, Florida.

In addition, we have reviewed the two proposed contracts of Jo-Dee, Inc., and valued them at \$560,496. If formal negotiations with the University of Georgia prove unsuccessful, our valuation should be reduced by this amount.

We have also reviewed and valued the management contracts to be entered into by Florida Corporation regarding the following shopping centers: Shaw, Passaic, Roosevelt, Palm Beach, and Westfield. If each such contract provides for no more than 2 percent management fee, we would regard each contract to be without value; our valuation has assumed a 2 percent management fee in each of the above listed instances.

Our valuation assumes the timely, scheduled completion of the Cross County Mall Shopping Center in Tampa, Florida, now under construction, substantially in accordance with the plans and specifications; the operation of this asset and the other assets comprising the holdings of the three corporations in accordance with contractual arrangements as presented to us in documents received from you and in interviews with various of your operating personnel; and that the net intercompany receivables (which was \$1,885,525 as of November 30, _____ [year]) owed to KW will be guaranteed by the joint venture which will purchase the stock of Florida Corporation.

Utilizing information provided by you from your files, inclusive of independent appraisals, information derived from conversations with your operating personnel, and facts determined by our examination and analysis of local market conditions, we developed a market value for each property.

In each case, we calculated the cash flow, adjusted as appropriate on the basis of estimated income and expenses, and then capitalized such cash flow at appropriate rates. We consider our estimates substantially correct after considering the supporting data, the balance sheets of the corporations as of November 30, _____ [year], and the appraisals which were made available to us and are identified on Schedule 2. We are therefore of the opinion that the proposed sales price for the three corporations should be \$2,849,000, if the sales agreement is executed before or not substantially later than March 30, _____ [year], and if there has been prior to such execution no material change in the assets or the financial condition of the corporations in question.

The values of the component corporations are as follows:

K.W. Corporation	\$4,489,880
Martin Realty Corporation	(482,674)

NYKW Corporation	(1,158,049)
.....	
TOTAL	\$2,849,157
SAY	\$2,849,000

We believe that our investigation and valuation procedures have recognized all of the relevant considerations and that the resulting opinion of value is demonstrable, reasonable, supportable and warranted under the circumstances.

We certify that neither Smith Real Estate Corporation nor any of its officers, directors or employees has any present or contemplated interest in the assets which are valued.

Very truly yours,

John L. Sullivan, Executive Vice President

Bernard Greenberg, Vice President

(8) Valuation letter update

EXHIBIT C

SMITH REAL ESTATE CORPORATION
One Fifth Avenue
New York, N. Y.
(212) 000-0000

February 21, _____ [year]

Mr. Ralph Green

Vice President for Finance
K. W. Corporation
7 Park Avenue New York New York 10022

Dear Mr. Green:

In your letter of February 12, _____ [year], you asked that we update our valuation letter of January 24, _____ [year], to take cognizance of various circumstances which have changed relative to your dropping your option on the Raleigh, North Carolina, proposed shopping center site and entering into a partnership with Mondri Development Company for the purpose of developing a shopping center at another site in Raleigh.

It is our opinion that at this time, the market value of your position in the Raleigh shopping center partnership would be

approximately \$250,000.

This figure, when integrated into the balance sheet, would increase the value of K. W. Florida Corporation by approximately \$155,000, which amount represents the excess over cost or carrying value of this asset.

Very truly yours,

John L. Sullivan, Executive Vice President



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Current Legal Forms for Real Estate

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Current Legal Forms for Real Estate
Chapter 21 SALES AND EXCHANGES
Part IV. Forms

H. SALES OF STOCK IN REAL ESTATE CORPORATIONS

25-21 Current Legal Forms for Real Estate FORM 21.92

FORM 21.92 Option to purchase majority of stock--minority holders can sell under same option terms--nonrecourse purchase money note secured by acquired stock or first mortgage upon liquidation

COMMENT

This form has three special features. First, the contract is set up as an option rather than a sale. Second, the option applies only to a majority, rather than all of the stock. Third, payment of the nonrecourse purchase money note is secured by the acquired stock. If the corporation is liquidated, a first mortgage may be substituted as security. Other provisions of this agreement relate to these three principal features.

Option price based on adjusted net worth

To protect the optionees against significant dilution in the value of the assets of the corporation between the date of the grant of the option and the date of its exercise, the optionors guarantee that the adjusted net worth of the corporation will not decline below a fixed amount. Adjusted net worth is adjusted primarily for market values substituted for land, building, building improvements, furniture, and equipment. Other adjustments apply to such items as supplies, taxes, capital expenditures for tenants, and other closing adjustments. The purchase price for the optioned stock is to be measured by the adjusted net worth.

Option tax aspects

The tax consequences of granting and exercising an option to purchase stock are similar to those applicable to an option to purchase real estate. No income is realized by the optionor upon the granting of the option. The consideration for the option constitutes part of the purchase price for the optioned property, and as such is reportable in the year of sale. Gain or loss resulting from the

exercise or failure to exercise an option has the same character as gain or loss from the sale or exchange of the property to which the option relates. For a discussion of the tax aspects of options, see The Tax Background § 21.03 at the beginning of this chapter.

Majority and minority shares benefit from option

In this agreement, the optionors own only a majority of the outstanding stock, and can obviously grant an option only as to their stock. Nevertheless, the optionees are obligated to purchase the stock of any minority shareholder who tenders it before the closing date, provided the option is exercised as to the majority stock. All purchases are to be made on the same terms. Thus, the benefits of the optionors who sell their stock under the option contract are made available to all other shareholders of the corporation.

Deferred payment security

The third special feature of this form relates to the security device for the deferred portion of the purchase price. This portion of the purchase price is to be paid in negotiable nonrecourse notes, and, as security for payment, the purchased stock is to be deposited with an escrowee under a pledge agreement. However, the optionees are granted proxies to vote the pledged stock, with certain limitations. These limitations do not prevent the optionee from voting a liquidation of the corporation, provided they substitute as security a first mortgage on the property itself.

FORM

OPTION given by the undersigned, James Baker, William Harris, George Loomis, and Benjamin Butler, of Detroit, Michigan ("Optionors"), to Harold Black and Joseph Warren of New York, New York ("Optionees").

1. *Definitions.* The following words shall have the following meanings, for the purpose of this Option:

(a) "Optioned Stock" shall mean the common capital stock of Central Building Corporation, a Michigan corporation ("Corporation") owned by Optionors, as listed on the attached Exhibit A.

(b) "Date of Closing" shall mean the date upon which Optionees actually exercise the Option, but only if they fully comply with the conditions and method provided herein for such exercise, including the payment of the down payment, and the complete execution of the notes and Pledge Agreement by Optionees and the other parties.

(c) "Fractional Portion" shall mean that portion represented by a fraction, the numerator of is the number of shares of the Optioned Stock, and the denominator of which is the then total outstanding and issued shares of the Corporation's common stock, exclusive of treasury stock.

(d) "Purchase Price Addition" shall mean an addition to the purchase price arrived at by determining what in dollars would have been the interest on the adjusted Purchase Price of the Optioned Stock at the rate of 6 percent per annum for the period from the first day of the month in which Date of Closing occurs, and the actual Date of Closing, if interest were collected for such period.

(e) "Instrument Approved by James Baker" shall mean an instrument drawn in any form and substance that James Baker reasonably deems necessary or appropriate to protect and preserve Optionors' security, to insure payment to Optionors of the balance of the Purchase Price, and to carry out the terms of such instrument, as provided for in this

Option, or of any other instrument executed or to be executed pursuant thereto. Such instrument, however, shall not contain any terms that are inconsistent with the express provisions of this Option. If James Baker is unable, unwilling, or incapacitated to so act, another attorney appointed by a majority in interest of Optionors shall act as a substitute in his place, and with the same powers and responsibilities.

2. *Option and time of exercise.* Optionors, for and in consideration of the sum of \$100,000 in hand paid to them by Optionees, receipt of which is acknowledged, give and grant to Optionees, an irrevocable option to purchase the Optioned Stock at the Purchase Price, terms, time, and method of exercise provided below. This Option shall only be exercised between the 15th and 31st of any months, and must be exercised if at all on or before December 20, _____ [year]. Time is the essence hereof. No modification of this Option shall be binding on Optionors unless the modification (a) is in writing, (b) is either (i) personally signed by all Optionors, or (ii) similarly signed by James Baker on behalf of all Optionors, and (c) does not materially and adversely affect Optionors. No modification of this option shall be binding on Optionees unless the modification (a) is in writing, (b) is either (i) personally signed by all Optionees, or (ii) similarly signed by Harold Black on behalf of all Optionees, and (c) does not materially and adversely affect Optionees.

3. *Purchase price.* The Purchase Price of the Optioned Stock shall be its adjusted book value, as shown by the Balance Sheet (as adjusted as herein provided) of the Corporation, as of the close of business on the last day of the month preceding the Date of Closing, as prepared and duly certified to by Bernard Baron and Company, the Corporation's Certified Public Accountants. To arrive at such Purchase Price, the Balance Sheet shall be adjusted in the following manner for the purpose of computing such adjusted book value of the Optioned Stock:

(a) The dollar amount for fixed assets shall be \$50,000 for the land and shall be changed to \$2,000,000 for the building, building improvements, furniture, fixtures, and equipment, net after depreciation.

(b) The dollar amount for supplies shall be changed to a figure as established by a physical count at the Date of Closing at cost, less reasonable depreciation, if any. Any supplies not reasonably needed in the operation of the Central Building shall be eliminated.

(c) Prepaid property taxes and accrued property taxes shall be eliminated, and instead property taxes shall be included in such adjusted Balance Sheet only on a pro rata basis, based upon the fiscal year of the property taxing authority, thus including such property taxes in such adjusted Balance Sheet, just as current taxes are ordinarily adjusted in connection with the sale of real estate where it is agreed that current taxes are to be adjusted.

(d) The Purchase Price shall be increased by the Fractional Portion of capital expenditures made by the Corporation, made necessary in connection with new leases or renewing existing leases, from and after May 1, _____ [year], to the date of exercising the Option not exceeding \$25,000, if such expenditure was reasonably advisable and beneficial to the Corporation's operation.

(e) The Purchase Price shall be increased by the Purchase Price Addition.

(f) Optionors warrant and guarantee that such adjusted Balance Sheet as of the end of the month preceding the Date of Closing, shall show a net worth of \$2.06 million.

4. *Time, place and method of exercising option.* Optionees shall give Optionors written notice of exercise of this Option at least 30 days before the closing date, which shall be designated in the notice of exercise. However, if such notice is given and the Option is not closed on the day specified in the notice, Optionees shall pay Optionors all costs or expenses reasonably incurred by them on account thereof, and Optionees may give a new 30-day notice if the actual closing of the Option occurs on or before December 20, _____ [year]. The place of closing this Option shall be at the office of James Baker at 1500 Central Building, Detroit, Michigan. This Option shall be closed on the Date of

Closing only in the following manner:

(a) Optionees shall tender and pay 25 percent of the Purchase Price of the Optioned Stock to its owners, as the down payment. The amount paid by Optionees on the date hereof for this Option shall apply against the down payment, as more fully stated in paragraph 10.

(b) Optionees shall execute and deliver notes prepared by Optionors, in negotiable form, to the payees designated by Optionors, and in such principal denominations and amounts so that the total principal equals the balance of the Purchase Price of the Optioned Stock. Such notes shall be Instruments Approved by James Baker, and shall be payable as follows: 1.5 percent of the total Purchase Price of the Optioned Stock shall be payable on January 2, _____ [year], and an additional 1.5 percent shall be payable quarter-annually thereafter until the entire unpaid balance of the Purchase Price is paid, together with interest, payable on January 2, _____ [year], and quarter-annually thereafter, at 8 percent per annum while not in default, and at 10 percent per annum while in default.

(c) Such notes shall provide that the entire unpaid balance shall become due and payable immediately upon default in making payments for 30 days after notice of such default, or upon default in the undertakings of the Pledge Agreement as set forth in paragraph 5 or the Trust Mortgage as set forth in paragraph 6 to be performed by Optionees for a period of 30 days after notice of such default it is not cured within such 30-day period. The makers of such notes shall not be personally liable upon them, either in a direct action at law against the makers, or for deficiency after foreclosure or realization of the value of the pledged or mortgaged security given to secure the notes, except for waste or depletion of value of any security given for payment of the notes in violation of the provisions of any pledge or mortgage undertaking of Optionees.

(d) All of such notes shall be payable at and registered by the Central Bank, a national banking corporation of Detroit, Michigan, and all installments of principal or interest may be paid by the makers of such notes to the Central Bank, as Agent for the payees, in one aggregate lump sum as each principal or interest installment matures, to be distributed to payees of such notes by the Central Bank. By written notice approved by persons holding a majority in amount of such notes, any other bank in the City of Detroit may be substituted as Agent for the payees, in the place and stead of Central Bank, for the purpose of receiving payment from the makers of such notes.

(e) There shall be no right to prepay any installments of principal or interest on such notes during the calendar year _____ [year], but commencing in _____ [year] last maturing installments on such notes may be prepaid without premium.

5. *Pledge agreement.* Optionees shall execute and deliver a Pledge Agreement prepared by Optionors, pledging the Optioned Stock as security for the payment of the notes described in paragraph 4, and contemporaneously therewith Optionors shall deliver to the Escrowee for Optionees' account the Optioned Stock with revenue stamps attached and appropriate assignment and powers by the registered holders of such Optioned Stock in blank or street form, and the Escrowee shall deliver a receipt therefor to Optionors and Optionees. Such Pledge Agreement shall be an Instrument Approved by James Baker, and shall include the following provisions:

(a) The stock certificates of common stock which are the Optioned Stock, together with blank powers and assignments in street form signed by the registered holders of such certificates, shall be deposited with the Central Bank, as Escrowee, but the registration of such certificates shall not be changed until the notes described in paragraph 4 have been fully paid, or until such certificates and powers are delivered by the Escrowee to Optionees upon a substitution of securities as hereinafter provided.

(b) Irrevocable proxies to vote such stock shall be given by Optionors to James Baker or William Harris or George Loomis, or The State Bank, a Michigan corporation, in that order, and Optionors and such persons so designated as

proxies, so long as Optionees are not then in default in the payment of the notes described in paragraph 4, or in the terms of such Escrow Agreement, agree to vote such stock as directed by Optionees, except that they shall not follow such directions which violate any of the following provisions or safeguards so long as such stock certificates are so pledged to Optionors:

(1) James Baker, William Harris, or George Loomis, shall at all times be a Director of the Corporation, of which there shall be five Directors.

(2) No unreasonable executive salaries shall be paid, and in no event shall executive salaries, in addition to those paid to the Building Manager and his Assistant, exceed \$80,000 per annum.

(3) None of the following transactions shall be made without the written consent of the Director appointed by Optionors under subdivision (1), such consent not to be unreasonably withheld: the sale, exchange, gift, or mortgage of any fixed asset, consisting of land, building, or building improvements; the purchase of property not needed for operating and maintaining the Central Building; the purchase of any real estate; any other transaction not in the ordinary course of business; or the execution of any contract covering a period of more than two months (except leases as provided below).

(4) Unless approved in writing over the written signature of James Baker, no lease shall be entered into covering space in Central Building for more than a period of five years, and if the lease covers ground floor space, shall be for a rate of not less than \$15 per annum per square foot, and if for space above the ground floor, at a rate of not less than \$12 per annum per square foot.

(5) No dividends shall be declared, and no distributions of money or property shall be made to shareholders.

(c) Optionees shall not violate any provision of subdivisions (1) through (5) of subparagraph (b) above, and will see to it that the Corporation shall likewise not violate any such provisions.

(d) Optionees may cause the Corporation to adopt a plan of liquidation. It is further agreed that Optionees may cause the Corporation to consummate such plan of liquidation including a distribution, sale, exchange, or other disposition of its property, if provided contemporaneously therewith a Trust Mortgage Substitute Security for the Pledge is consummated pursuant to and in compliance with the provisions of paragraph 6.

(e) If Optionees violate any provision of the Pledge Agreement, and fail to cure the default within 30 days after being notified thereof by one or more of Optionors, the entire unpaid balance upon the notes described in paragraph 4, secured by such Pledge Agreement, shall become due and payable immediately, but not before January 2, _____ [year].

(f) If Optionees fail to perform any term of the Pledge Agreement, and the default continues for 30 days after they receive notice of such default, or if Optionees fail to pay any installment of principal or interest on the notes secured by the Pledge agreement for 30 days after such notice, the Escrowee shall deliver the pledged certificates of common stock, together with the blank powers and assignments, to Optionors or their representatives. Optionors may thereupon, after giving notice required by law, as well as 15 days' notice to Optionees of the time and place of sale, sell the stock so delivered at private or public sale, and apply the sales proceeds, after paying the costs and expenses thereof, to pay the indebtedness secured by the pledged stock.

6. *Substituted security.* The Pledge Agreement shall also contain a provision giving Optionees the right to substitute for the Optioned Stock as deposited in escrow under such Pledge Agreement, other security consisting of Certificates of Beneficial Interest in a First Trust Mortgage complying with the provisions, conditions, qualifications, and restrictions set forth in this paragraph. Upon substitution of the First Trust Mortgage security and Certificates of Beneficial Interest,

the certificates of common stock in the hands of the Escrow under such Pledge Agreement, together with the blank assignments and powers in street form, shall be delivered by the Escrowee to Optionees. The First Trust Mortgage which Optionors agree to accept as substituted security for the pledged stock shall meet and comply with the following provisions, conditions, qualifications, and restrictions:

(a) Such First Trust Mortgage shall run to the Central Bank, a national banking corporation, shall be a first lien upon the premises described in the attached Exhibit B, initialed by James Baker, and shall be subject to no prior mortgage, lien, or encumbrance except rights of tenants in possession holding under leases executed before the Date of Closing, or leases executed after the Date of Closing but which comply with the provisions of the Pledge Agreement.

(b) The principal amount of such First Trust Mortgage shall be in an amount equal to the aggregate of the principal then unpaid on all the notes described in paragraph 4.

(c) Such First Trust Mortgage shall be an Instrument Approved by James Baker, and shall follow the form, so far as reasonably possible, in the reasonable judgment of James Baker, the form of Trust Mortgage and Certificates of Beneficial Interest with one unit representing unpaid purchase money balance on one share of stock and with total units being the total of Optioned Stock, contained in a certain Trust Mortgage wherein National Construction Corporation is Mortgagor, and The Lakeside Bank and Trust Company is Mortgagee, recorded in Liber 15001, Page 100 et seq., Wayne County Register of Deeds Records, a copy of which has been furnished to Optionees, and shall likewise contain security agreement provisions and be in form recordable likewise as a security agreement.

(d) Payments of principal and interest on such First Trust Mortgage shall equal the payments provided for by the notes executed by Optionees, described in paragraph 4.

(e) Monthly deposits with the Mortgagee under such First Trust Mortgage in a Sinking Fund shall be in amounts sufficient to liquidate installments of property taxes and normal insurance premiums, as they become due.

(f) There shall be included in the transaction substituting security an assignment of rents. Such First Trust Mortgage shall provide that in the event of a default in the payment of principal or interest, or Sinking Fund, for a period of 30 days after written notice of such default, or in the event of default in failing to comply with any other provision of such First Trust Mortgage within 30 days after written notice of such default, the entire unpaid balance of the mortgage indebtedness and the notes referred to in paragraph 4 shall become due and payable, and the Mortgagee shall have the right to take immediate possession of the mortgaged premises, to collect the rentals, and to appoint a receiver to apply the net rents upon the mortgage indebtedness during foreclosure.

(g) The Mortgagor under such First Trust Mortgage shall be required to furnish annual Profit and Loss Statements of the operation of the mortgaged premises, in any reasonable detail that the Mortgagee requests, duly certified by a certified public accountant. The Mortgagee may inspect the mortgaged premises in such manner so as to determine whether the provisions of the First Trust Mortgage, so far as the maintenance of the mortgaged premises and the other obligations of the Mortgagor under such First Trust Mortgage are concerned, have been complied with. If additional statements of Profit and Loss are required by any lending institution giving a commitment or being substituted as Mortgagee, Optionees will furnish such required statements.

(h) Such First Trust Mortgage shall also provide that the Mortgagee, or Optionors, may at any time furnish to the Mortgagor a 45-day commitment for a new first mortgage from a responsible lender in the usual form of such lender, under which the unpaid balance on such First Trust Mortgage can be refinanced by a new mortgage which shall contain the provisions of such First Trust Mortgage and also provide for payments of principal which do not exceed the payments under such First Trust Mortgage, the mortgage to mature in 15 years or more, the interest rate not to exceed 8 percent per annum while not in default and 10 percent while in default, and also contain such prohibitions, provision for premiums, and restrictions on prepayments of the mortgage indebtedness as are then the current bona fide practice of

such representative lending institutions. Optionees shall pay in full the notes secured by such First Trust Mortgage within six months after such commitment is tendered. In addition thereto (but only if such commitment for a mortgage is obtained more than five years after the Date of Closing), Optionees agree to pay to the lender whatever premium is demanded by the lender giving such commitment to secure the mortgage, provided such premium does not exceed 4 percent of the principal of the mortgage provided for in such commitment. If such new mortgage requires title insurance, and Optionors did not furnish Optionees a title policy on the Date of Closing, Optionors will pay for such mortgage title insurance.

7. Agreements of optionors on closing

(a) Not less than 15 days before the Date of Closing, Optionors shall furnish Optionees with either a commitment for a title insurance policy by a Title Insurance Company, insuring marketable title to the land described in the attached Exhibit B, to be in the Corporation, free and clear of all encumbrances with the following exceptions: (1) use restrictions of record (other than use restrictions preventing the premises from being used for office building purposes), (2) the usual exceptions currently included in such policies where physical inspection of the premises is not applied for, and (3) leases to occupants of such property, or an abstract of title thereto certified to date, showing such marketable title, with such exceptions as herein stated. If commitment for a title policy has been furnished, the title policy will be furnished on the Date of Closing.

(b) If Optionors furnish an abstract of title and objection to the title is made, based upon a written opinion of Optionees' attorney, that the title is not in the condition as required for performance hereunder, Optionors shall have 30 days from the date they are notified in writing of the particular defects claimed, either (1) to remedy the title, or (2) to obtain title insurance as provided in subparagraph (a) of this paragraph.

(c) Effective on this Option being validly exercised, Optionors jointly and severally guarantee the Balance Sheet as of the close of business on the last day of the month immediately preceding the Date of Closing used to compute the Purchase Price, the Balance Sheet to be signed by the parties, including a guarantee that at such date there were no liabilities, actual or contingent, not reflected in such Balance Sheet, and that no income taxes or other taxes had accrued as of that date except as shown on such Balance Sheet which formed the basis of the computation of the Purchase Price, the "Certified Balance Sheet;" and if it later develops that there were such additional liabilities or taxes not reflected in such Certified Balance Sheet, Optionors agree that upon such indebtedness being finally established, they jointly and severally will pay their Fractional Share of the same, together with interest and penalties, if any, from the Date of Closing.

(d) Optionors jointly and severally agree and warrant that no change will have been made from the date hereof to the Date of Closing in the Corporation's capital structure, and that the Corporation will not have in such period sold, mortgaged, or otherwise disposed of treasury stock owned at the date hereof and while this Option was in force and effect.

(e) Optionors jointly and severally guarantee the Fractional Share of accounts receivable on such Certified Balance Sheet, less the reserve for bad debts, will be collected, and if not collected Optionors shall pay Optionees such uncollected amounts upon reassignment of such accounts receivable to Optionors, and if a portion of such reserve for bad debts is likewise collected, Optionees will pay Optionors their Fractional Share of such reserve so collected, such guarantee to be fulfilled and such payment to be made one year after the Date of Closing.

(f) Optionors represent and warrant that the buildings and the land owned by the Corporation are in compliance with all building codes, federal, state and local, and with all environmental laws, federal, state and local. Optionors further agree that if any notice of building or environmental violations is received by the Corporation before the first day of the month of the Date of Closing, Optionors will cause the Corporation to pay for the cost of rectifying same. Optionors and the Corporation shall be given reasonable notice and afforded the right to defend any liability asserted and for which

Optionees claim the Corporation is required to satisfy in whole or in part, and shall receive Optionees' cooperation in connection therewith to resist the legality of any such claim or any such building violation asserted by the Department of Buildings of the City of Detroit or any environmental agency.

(g) Optionors shall likewise agree that from and after the close of business of the last day of the month immediately preceding the date of execution of this Option to the Date of Closing, all business conducted by the Corporation was in the usual course of business, no extraordinary transactions were entered into during such period, nor any extraordinary liabilities assumed during such period, and no compensation or other disbursements substantially in excess of those made or paid during comparable previous periods have been made during such period.

(h) The undertakings in this paragraph 7 shall survive the Closing.

8. *Additional stock.* Optionees agree to purchase at the Date of Closing any common capital stock of the Corporation, "Additional Stock," from shareholders of the Corporation who are not parties to this Option and who elect to become parties hereto between the giving by Optionees of the notice of intention to exercise this Option and the Date of Closing. Optionees will not be obligated to make such purchase of Additional Stock unless the purchase of the Optioned Stock has actually been closed on the Date of Closing. Such purchase shall be made on the Date of Closing and not afterwards, upon the same terms and subject to the same obligations and conditions, and for the same Purchase Price per share as provided by this Option. For the purpose of the meaning of Optioned Stock as used in this Option, and for all other purposes of this Option, all Additional Stock shall be included in the number of shares of Optioned Stock and shall be deemed to be part of the Optioned Stock with the same force and effect as if the owners of such Additional Stock had been original parties to this Option and such Additional Stock had been listed on the attached Exhibit A, and all provisions of this Option shall be construed to include such Additional Stock as Optioned Stock and the owners thereof as Optionors. Thus, the rights inuring to Optionors herein upon exercise of this Option shall inure for the benefit of all other shareholders of the Corporation who elect to take advantage thereof within the period provided, except that if Optionees fail to exercise this Option the \$100,000 Option money shall belong solely to the Optionors who have signed this Option.

9. *Optionors to furnish proposed documents.* Optionors shall cause to be delivered to Darwin, McLean & Brady, attorneys for Optionees, a proposed draft of the notes, Pledge and Escrow Agreement, Trust Mortgage, and Certificate of Beneficial Interest within 90 days from the date hereof, or to any other attorneys that Optionees designate by prior written notice.

10. *Consideration paid for option.* The consideration paid for this Option is \$100,000. If the Option is exercised within the time and in the manner provided, the amount so paid shall apply upon the monies required to be paid upon its exercise. Optionors shall distribute the \$100,000 payment among themselves as follows:

James Baker	\$45,000
William Harris	\$25,000
George Loomis	\$15,000
Benjamin Butler	\$15,000

Upon Optionees' exercise of this Option, each of the above Optionors shall individually account for the moneys so distributed to him, to apply pro tanto upon the down payment on the Purchase Price for common capital stock of the Corporation owned by him. If this Option is not exercised, such consideration for the Option so paid shall belong to the Optionors who have signed this Option, and Optionees shall have no right to obtain the all or any part thereof.

11. *Notices.* All notices under this agreement shall be sent by registered or certified mail, postage prepaid, return receipt requested, addressed as follows: if to Optionors, c/o James Baker, 2000 Central Building, Detroit, Michigan; and if to

Optionees, c/o Harold Black, 1000 Connecticut Avenue, Washington, D.C.

12. *Authority of representatives.* In the absence of written notice to the adverse party, James Baker shall have authority to bind Optionors by written agreement signed by him, and in like manner to make a modification of this Option, or any instrument executed pursuant thereto, which does not materially and adversely affect Optionors; and Harold Black shall have like authority to bind Optionees, and in like manner to make a modification of this Option, or any instrument executed pursuant thereto, which does not materially and adversely affect Optionees.

13. *Complete agreement.* Optionees, in accepting this Option, agree that it contains all of the undertakings made by Optionors, and that Optionees have paid for this Option, after making a proper and appropriate investigation.

14. *Damages on failure of title.* If Optionors are unable to deliver an abstract or title policy in conformity with the requirements herein provided, they shall return the \$100,000 paid by Optionees together with interest of 8 percent per annum.

15. *Assignment by optionees.* No assignment or conveyance by Optionee, other than by operation of law, shall create any liability against Optionors unless a duplicate original of an assignment, duly witnessed and acknowledged containing a substitute address for sending notices to Optionees' assignee, is delivered to Optionors and receipt thereof endorsed thereon. Upon complying with the above, Optionees may assign their interest in the within Option.

16. *Compensation to and expense of optionors.* Optionors may use funds paid to them or to receive from funds paid for the benefit of the owners of Optioned Stock to apply on the Purchase Price, an amount in cash sufficient to reimburse them for all their costs, expenses, and liabilities, and reasonable compensation for their services, in connection with the closing of the sale, the administration of the Pledge Agreement and the Trust Mortgage, including Escrow fees and attorneys' fees, but such items shall not be chargeable to Optionees. Such amounts so used or received shall be reported to the owners of the Optioned Stock with reasonable promptness. If Optionors incur liability under paragraph 7, such liability shall be satisfied by deducting the amount thereof from the next maturing installments on the notes.

17. *Governing law.* This agreement shall be construed in accordance with and governed by the laws of the State of Michigan.

18. *Binding effect.* This agreement shall be binding upon and inure to the benefit of both parties and their respective legal representatives, successors, and assigns.

19. *Headings.* Headings in this agreement are for convenience and reference only and are not deemed to be a part thereof.

20. *Non-waiver.* No delay or failure by either party to exercise any right hereunder, and no partial or single exercise of such right, shall constitute a waiver of that or any other right, unless otherwise expressly provided herein.

21. *Counterparts.* This Option may be executed in one or more counterparts, each of which shall be deemed an original but all of which together shall constitute one and the same instrument.

22. *Time of essence.* Time is of the essence of this agreement.

The Optionors have set their hands this 9th day of May _____ [year].

James Baker

William Harris

George Loomis

Benjamin Butler



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Current Legal Forms for Real Estate

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Current Legal Forms for Real Estate
Chapter 21 SALES AND EXCHANGES
Part IV. Forms

I. SPECIAL CLOSING AGREEMENTS AND DOCUMENTS

25-21 Current Legal Forms for Real Estate FORM 21.93

FORM 21.93 Escrow agreement--lien against title

COMMENT

Escrow agreements may be used when a problem cannot be resolved prior to or at closing, but is not of sufficient severity or cost to cause an adjournment of the closing or breach of contract due to failure to timely close. Escrows have been used when the premises contain an insubstantial defect and the seller agrees to correct the defect by a specified date. The money held in escrow secures the seller's performance. In other instances, an escrow can be taken when there is an insubstantial title problem, which, based upon practical experience, appears to be readily resolvable within a reasonable time after closing.

Escrow to cure title defect

The escrow agreement here deals with a title lien. It is generally the seller's obligation to deliver title clear of any defects, unless otherwise specified in the contract. Here, the purchaser will accept the deed, with the readily curable defect, provided an escrow is taken. The escrow funds, withheld from the purchase money due under the contract, are deposited with the title insurance company which will insure title. Part of the escrow funds, withheld from the seller and otherwise due to the seller under the contract, will be used to discharge the lien. The balance, if any, will be paid over to the seller. Meanwhile, pursuant to the escrow agreement, the title company undertakes to insure title as if the defect did not exist at closing or after. The risk of loss, due to the lien, is thus assumed by the title company at the seller's expense.

Parties to escrow

This agreement is essentially between the seller, who has the primary responsibility to deliver title

free of defect, except as otherwise provided, and the title company, which will insure that the buyer took title free of the defect. The third party beneficiary of the contract is the buyer, who accepts title in reliance upon the escrow.

FORM

To: John Roberts, Esq., Title Officer for Encumbrance Title
Insurance Corporation, Devon, New Jersey, as
Escrow Agent

Re: Alfred Bean, Seller to David J. Lacey and Anita C.
Lacey, Purchasers
195 John Street, Devon, New Jersey
Your Title No. D-60903

1. *Escrow deposit.* Seller deposits in escrow the following sum, representing one half of the net proceeds from the sale of premises known and designated as Lot 25, Block 76 on the Tax Map of the Borough of Devon, New Jersey: \$45,000 (the "Escrow Amount").

2. *Disbursement to cure title.* You are authorized to deliver or disburse the Escrow Amount as directed by the State of New Jersey through Robert Johnson, Esq., Devon County Adjuster, in full and final settlement of Institutional Lien No. 999 set forth in Schedule B, Section 1, Item M of the preliminary title binder No. D-60903 effective March 21, _____ [year].

3. *Title policy.* By accepting the Escrow Amount, the escrow agent agrees to deliver a fee title insurance policy to the purchasers and a mortgagee title insurance policy to Devon Savings and Loan Association, subject only to the usual exceptions and stipulations contained in the policy and free of the exception contained in Schedule B, Section 1, Item M.

4. *Seller's cooperation.* Seller agrees to deliver to the escrow agent all documents and do or cause to be done all other things necessary to enable the escrow agent to comply with this agreement, and to enable Encumbrance Title Insurance Corporation to issue said policies of title insurance.

5. *Exculpation.* Escrow agent shall not be liable for any error of judgment or any act done or omitted by him in good faith, or for anything he may in good faith do or refrain from doing in connection with this agreement.

6. *Documents.* Escrow agent is authorized to act on any document he believes to be genuine and to be signed by the proper parties or party, and will incur no liability in so acting.

7. *Writings required.* No rescission of this escrow agreement or modification of its terms or any notice or demand shall be of any effect without the written consent of the undersigned and the escrow agent.

Michael L. Long, Esq.

Attorney for Seller, pursuant to

power of Attorney

Encumbrance Title Insurance Corporation

By _____

John Roberts, Esq.

Escrow Agent



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Current Legal Forms for Real Estate
Chapter 21 SALES AND EXCHANGES
Part IV. Forms

I. SPECIAL CLOSING AGREEMENTS AND DOCUMENTS

25-21 Current Legal Forms for Real Estate FORM 21.94

FORM 21.94 Escrow agreement--seller to repair premises--buyer to accept title

COMMENT

The escrow agreement here specifies that the seller is to repair certain defects in the property before receiving the escrow funds. These funds were deposited in escrow by the purchaser from moneys which would otherwise have been paid to seller at the settlement. The purchaser will accept title, and make settlement, in reliance upon the seller's obligation to correct the defects. The seller's performance is secured by the escrow funds and escrow agreement.

If the seller does not make the repairs, either personally or through his agent, within the prescribed time, the funds are to be paid over to the purchaser. The purchaser is then free to make the repairs using the funds formerly in escrow, or to retain the funds. Whether the funds are paid to the purchaser or, upon performance, to the seller, the escrow agent is released and discharged when he pays the funds, according to this agreement. The buyer and seller agree to look to each other only for any damages which they may incur by reason of the escrow.

FORM

Escrow Agreement

AGREEMENT made August 1, ____ [year], between John L. Lewis and Martha B. Lewis, husband and wife ("Purchaser"), and J. Clarence Stewart, Executor under the last will and testament of Sally B. Stewart, deceased, and J. Clarence Stewart, individually ("Seller"):

Recitals

Purchaser and Seller have entered into a contract, dated June 27, ____ [year], for the purchase and sale, respectively, of certain premises known as 235 East Elm Street, Elmira, New York, more particularly described in the contract.

Purchaser has conducted a pre-closing inspection of the premises, pursuant to the contract, and has complained of certain defects in and unsatisfactory conditions of the premises.

Seller is ready, willing and able to deliver title to Purchaser as required by the contract.

Agreement

Now, therefore, the parties agree as follows:

1. *Escrow funds.* Purchaser's attorney is appointed escrow agent, and as escrow agent shall hold, in a separate escrow account, the sum of \$2,000.

2. *Deposit in escrow.* Purchaser shall deposit with his attorney, the escrow agent, the sum of \$2,000, which would have otherwise been due Seller, and which shall be deducted from the amount due Seller. Seller consents to the escrow deposit and deduction, subject to the terms and conditions of this escrow agreement.

3. *Security.* The escrow agent shall hold the deposit money for the benefit of Purchaser and to secure Seller's performance under this agreement. If Seller fails to perform by the date set forth in Paragraph 4 below in a manner approved by Purchaser, who shall not unreasonably withhold approval, the escrow agent shall pay over the escrow funds to Purchaser. Seller releases the escrow agent from all liability incurred by him by reason of the payment of funds to Purchaser. Seller shall look solely to Purchaser for any money due Seller under this agreement.

4. *Seller's performance.* Seller shall, on or before August 7, ____ [year], correct the following defects and unsatisfactory conditions, solely at his expense:

(a) Repair or replace banister between first and second floors to a condition similar to the condition that existed prior to its breaking;

(b) Replace chandelier in dining room;

(c) Restore or replace shrubbery on north side of dwelling located on premises.

5. *Entry.* Purchaser grants a license to Seller and its authorized agents to enter the premises, solely for the purpose of making such repairs and replacements, except that any entry shall take place only during weekday business hours, unless otherwise consented to, in writing, by Purchaser. Seller releases Purchaser from all liability incurred by Purchaser by reason of Seller's entry; and Seller shall indemnify and hold Purchaser harmless for all liability incurred by Purchaser by reason of entry of Seller's authorized agents.

6. *Reliance.* Purchaser has accepted title to the premises from Seller in reliance upon Seller's representation that he will comply with the conditions of this escrow agreement. Purchaser's remedy for Seller's breach is not limited to the remedies provided in this agreement.

7. *Payment.* Upon satisfactory completion of Seller's performance, the escrow agent shall pay over the escrow money to Seller. The fact of satisfactory completion shall be evidenced by Purchaser's written approval, which shall not be unreasonably withheld, of Seller's performance. Upon delivery of such written approval and payment of funds to Seller, the escrow agent shall be discharged and released of all obligations arising by reason of this agreement.

The parties have hereunto set their hands on the date and year first above written.

John L. Lewis, Purchaser

Martha B. Lewis, Purchaser

J. Clarence Stewart

As Executor under the Last Will and Testament of Sally B. Stewart, Seller

J. Clarence Stewart, Individually

Brian C. Connelly, Escrow Agent



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25-21 Current Legal Forms for Real Estate FORM 21.95

FORM 21.95 Escrow agreement--funded by part of mortgage proceeds--completion of building

COMMENT

A lender is usually not required to disburse the mortgage proceeds until the terms and conditions of its mortgage commitment are satisfied. These conditions usually include such matters as title, insurable first lien, fire insurance, survey, and premises that are approved for occupancy. Occasionally, a loan will be made prior to complete satisfaction of the conditions of the commitment letter if the lender determines that the loan will otherwise comply with its lending restrictions and the unsatisfied matters are reasonably certain of being cleared within a short time. As a protective measure, the lender may withhold a part of the mortgage proceeds, in escrow, until the unsatisfied matters are resolved. Such matters might include the obtaining of an administrative certification, clearing a relatively minor title defect or removal of an undesirable exception to the title insurance.

Here the purpose of the escrow is the completion of a building to the point where the local authorities will issue various certifications. The escrow provides the lender with funds which it considers to be adequate to complete the building if the builder fails to do so by a specified date.

FORM

ESCROW RECEIPT

Dated: _____
Amount of Escrow: \$9,000

Re: Mortgage No. 99999
Premises: 571 Watterbury-Stamford Road

Georgetown, Connecticut

Depositor of Escrow: New England River
Homes, Inc.

In connection with the above premises, Hartford National Bank and Trust Company ("Hartford") acknowledges receipt of the above identified escrow deposit, to be held in escrow until completion of the "escrow purposes" hereafter defined.

If the escrow purposes are not completed on or before the completion date hereafter set forth to Hartford's sole and exclusive satisfaction, Hartford, without notice to anyone, may cause the escrow purposes to be completed and fulfilled, and may deduct from the escrow deposit the full costs, disbursements, and expenses deemed necessary by Hartford and actually incurred in the furtherance of the escrow purposes, regardless of whether the escrow purposes are in fact completed.

The costs, disbursements, and expenses shall include, work, labor, materials, general and subcontractor charges, official permit, license, filing and recording fees, legal fees, and fees of architects and other professionals and specialists.

The escrow sum shall not bear interest. Any balance remaining shall be returned to the depositor of the above escrow.

Hartford shall have no liability in completing any escrow purposes beyond the amount of the escrow deposit.

If the escrow purposes are completed on or before the completion date to Hartford's sole and exclusive satisfaction, the escrow shall be returned to the depositor of the escrow.

The escrow sum is not assignable by the depositor of the escrow.

Depositor of Escrow: New England River Homes, Inc.

Completion Date: May 24, ____ [year]

Escrow Purposes: Issuance of and exhibition to Hartford of a Certificate of Occupancy providing for a one-family dwelling; also Connecticut Electrical Inspection Certificate and Fire Underwriter's Certificate. Upon issuance of Certificate of Occupancy, \$9,000 will be released to the escrow depositor.

Hartford Bank and Trust Company

By: _____

The above terms accepted by:

New England River Homes, Inc.

By:_____



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25-21 Current Legal Forms for Real Estate FORM 21.96

FORM 21.96 Escrow instructions to title company for transfer of title in escrow

COMMENT

In some states, it is customary for an escrow agent to accomplish the transfer of title to real property in escrow, without the physical presence of the parties. In these states, the parties give the escrow agent, usually a title company, instructions to be followed in transferring title. All of the necessary documents and payments are sent to the escrow agent, who will close the sale when all of the escrow closing instructions have been complied with by the escrow agent.

FORM

ESCROW INSTRUCTIONS

_____, [date]
City of _____
State of _____

_____ Title Company

Re: Escrow No. _____

Dear _____:

The undersigned, _____ (Seller) and _____ (Purchaser), hereby authorize you to act as Escrow Agent on their behalf in connection with the sale by Seller to Purchaser of the real property commonly known as _____ Street, City of _____, State of _____, pursuant to the Contract of Sale between Seller and Purchaser, a copy of which is attached, and pursuant to the following instructions:

1. Escrow shall close within _____ business days after your receipt of these instructions. Time is of the essence in this transaction and in the implementation of these instructions. Escrow shall be deemed closed on the day papers are filed for record. If you cannot close this escrow within _____ business days after your receipt of these instructions, any party who has already fully complied with his or her instructions may demand in writing the return of his or her money and/or property. If no party has fully complied, no demand for return of money or property shall be recognized until _____ days after you have mailed copies of such demand to all other parties at their respective addresses shown in the escrow instructions. If no such demand is made, close this escrow as soon as possible.

2. On or before the closing date, Seller shall deposit or cause to be deposited in escrow a bargain and sale deed, without warranties, duly executed and acknowledged by Seller, conveying the property to Purchaser, as well as any other documents reasonably requested by you or Purchaser as necessary to consummate the closing.

3. On or before the closing date, Purchaser shall deposit or cause to be deposited in escrow: (a) \$_____ as an earnest money deposit; (b) \$_____ as the cash portion of the total purchase price for the property due from Purchaser, reduced by the amount of the earnest money deposit and by the amount of a loan from a third party to Purchaser; and (c) any additional amount of cash necessary to satisfy Purchaser's share of closing costs and prorations; (d) a promissory note executed by Purchaser in favor of a lender yet to be named in the face amount of \$_____; (e) a mortgage duly executed and acknowledged by Purchaser in favor of a lender yet to be named; (f) a certificate evidencing hazard and liability insurance covering the property, in an amount no less than \$_____, naming the lender as an additional insured; (g) any other documents reasonably requested by you, Seller or lender as necessary to consummate the closing.

4. On or before the closing date, you should receive from a bank, trust company, insurance company, or building and loan or savings and loan association yet to be named the amount of \$_____ pursuant to separate escrow instructions to be delivered by the lender. Any commitment made in writing to _____ Title Company by such lender to deliver its check or funds into this escrow may, in the sole discretion of _____ Title Company, be treated as the equivalent of a deposit in escrow of the amount thereof.

5. All funds received in this escrow shall be deposited in a general escrow account or accounts for _____ Title Company with any state or national bank. All disbursements shall be made by check of _____ Title Company.

6. All adjustments, allocations and prorations shall be made on the basis of a thirty-day month, as follows:

- a. Current installment of taxes shall be prorated as of the close of escrow;
- b. Delinquent taxes shall be charged to Seller;

- c. Interest on any assessment shall be prorated as of the close of escrow;
 - d. Transfer taxes shall be charged to Seller;
 - e. Any loan points and fees payable to the lender shall be charged to Purchaser;
 - f. The brokerage commission of \$_____, payable to _____ Realty Company, shall be charged to Seller, and is contingent upon the closing of escrow;
 - g. Insurance premiums on insurance to be assumed by Purchaser, if any, shall be prorated as of the close of escrow;
 - h. The premium on the owner's policy of title insurance shall be charged to Purchaser;
 - i. Recording fees shall be charged to Purchaser;
 - j. The escrow fee shall be charged one-half to Seller and one-half to Purchaser.
7. Escrow Agent shall not close this transaction unless and until you are prepared to issue a standard owner's policy of title insurance in the amount of \$_____, showing title to the property in Purchaser, and subject to no exceptions to title other than those listed in paragraph _____ of the attached Contract of Sale.
8. Escrow Agent shall record deeds, mortgages, and any other instruments delivered through this escrow, if necessary or proper in the issuance of a title insurance policy.
9. Escrow Agent shall execute, on behalf of Seller and Purchaser, form assignments of interest in any insurance policies (other than title insurance) required for the closing of this transaction and forward them upon close of escrow to the insurance agent and/or insurance company insuring, with the request, first, that insurer consent to such transfer or attach loss payable clause or make such other additions or corrections as may have been specifically required herein, and second, that the agent thereafter return such policies to you for delivery to the party entitled to them.
10. If Purchaser applies for or obtains a loan on the property during the pendency of this escrow, you are authorized to furnish the lender, or anyone operating on its behalf, any information concerning this escrow, including, but not limited to, a certified copy of the escrow instructions and any amendments thereto.
11. Escrow Agent shall have no liability with respect to any personal property which is the subject of this escrow.
12. Any amendment of or supplements to any instructions must be in writing and signed by Seller and Purchaser, and accepted by _____ Title Company.

Seller

Street

City of _____, State of _____

Purchaser

_____ Street

City of _____, State of _____

Accepted by:

_____ Title Company

Escrow Officer



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FORM 21.97 Standard conditions of acceptance of escrow by title company-- transfer of title in escrow

COMMENT

In a some states, it is customary for an escrow agent to accomplish the transfer of title to real property in escrow, without the physical presence of the parties. In these states, the parties give the escrow agent, usually a title company, instructions to be followed in transferring title. All of the necessary documents and payments are sent to the escrow agent, who will close the sale when all of the escrow closing instructions have been complied with. The escrow agent's standard conditions of acceptance of escrow become the escrow instructions to the extent that the standard conditions do not conflict with the parties' written escrow instructions or the contract of sale.

FORM

STANDARD CONDITIONS OF ACCEPTANCE OF ESCROW

In the matter of the sale of premises known as _____ Street, City of _____, State of _____, by _____ ("Seller") to _____ ("Purchaser"), instructions for escrow have been deposited by _____ Title Company in the form of a contract of sale and/or escrow instructions dated _____ [date], under which _____ Title Company is appointed to act as "Escrow Agent."

In consideration of the acceptance of escrow by Escrow Agent, all of the parties agree that the escrow instructions and any modifications thereof are subject to the following conditions:

1. Escrow Agent shall be liable only for funds and instruments actually deposited with it and received by it for the escrow transaction. Escrow Agent shall have a lien on all funds and instruments deposited with it to secure payment of fees and costs incurred while performing the escrow function.
2. Any funds, instruments or other property deposited with Escrow Agent by anyone other than Seller and Purchaser shall be subject to the instructions of such depositing party.
3. Escrow Agent may deposit any funds received by it under the terms of the escrow instructions in Escrow Agent's escrow account in any depository selected by Escrow Agent. Funds deposited in escrow shall not bear interest. Escrow Agent may invest such deposited funds and may keep all interest and profits derived from such investments for its own account. The parties hereby agree to waive any claim for interest or profits from the funds deposited in escrow. Escrow Agent shall not be liable for the payment of any funds in the event of the insolvency or suspension of payments by any depository selected by it. All disbursements shall be made by the issuance of checks on Escrow Agent's escrow account.
4. If any party gives Escrow Agent written notice of a default, non-performance or dispute, Escrow Agent will promptly give all other parties written notice of such claim. After giving such notice, Escrow Agent may refuse to disburse funds or deliver any instruments unless Escrow Agent receives a written agreement, signed by all parties, authorizing such disbursement or delivery, or unless such disbursement or delivery is ordered by a court.
5. Escrow Agent may terminate the escrow if any party fails to deposit additional funds or documents necessary for Escrow Agent to perform according to the escrow instructions within ____ days after written notice from Escrow Agent. After such termination of escrow, Escrow Agent will return all documents and property to the party who deposited them.
6. All parties to the transaction jointly and severally promise to save Escrow Agent harmless for all damages or losses resulting from the termination of escrow and agree to indemnify Escrow Agent from any and all amounts Escrow Agent may be required to pay on account of such termination, including, but not limited to costs, expenses and attorneys' fees.
7. Upon the termination of escrow, Escrow Agent may deduct all expenses and charges incurred in the escrow from the funds deposited with Escrow Agent, and the parties hereby agree that such expenses and charges may be apportioned among them in any manner which Escrow Agent considers equitable. Escrow Agent's apportionment of expenses and charges shall be binding and conclusive upon all of the parties.
8. Escrow Agent assumes no responsibility for, and shall not be liable for any loss or damage resulting from, the following:
 - a. The existence, condition or identity of any buildings, fixtures or improvements located or presumed to be located on the premises;
 - b. The condition, title or delivery of any personal property and the existence, sufficiency or transfer of any insurance thereon;
 - c. Any mechanics' liens which may be filed against the property;
 - d. The rights of any parties in possession whose interests do not appear of record;
 - e. Any restrictions upon the use of the premises created by zoning or other governmental law, statute, code, ordinance, rule, regulation or the like;

- f. The identity of parties or the sufficiency of any agency;
 - g. Any agency created at the direction of a party to this escrow concerning anything required to be done for its completion by anyone other than Escrow Agent;
 - h. Possession being given to the premises which are the subject of the escrow;
 - i. The existence or location of highways or improvements on or adjacent to the premises;
 - j. Any conditions or quantity of acreage which an accurate survey would disclose;
 - k. The validity, collectibility, genuineness of signature, negotiability or marketability of any stocks, bonds, currency, passbooks, checks, documents or negotiable instruments deposited in escrow;
 - l. Delay of escrow due to fires, forces of nature, governmental acts, strikes, or any other cause beyond Escrow Agent's control;
 - m. Any examination, adjustment or payment of special taxes or assessments, unless specifically instructed;
 - n. Any good faith act or forbearance by Escrow Agent;
 - o. The legal effect or desirability of any instrument exchanged by the parties or deposited by the parties.
9. Phrases such as "to date of transfer," "as of date of filing," and the like shall be construed to mean to and including the date that the title documents are filed for record. For the purposes of prorations, Seller shall be considered the owner through the day of title transfer.
10. Adjustments shall be made on a thirty (30) day month basis. Escrow Agent will not make adjustments for any charges for gas, electricity, heat, sewer and other utility charges, if any, unless the parties furnish in writing a mutually agreed upon exact amount for the adjustment prior to the filing of documents for record. If the final water bill has not been paid, Escrow Agent may hold \$_____ in escrow until proof of payment of the final water bill has been furnished to Escrow Agent, unless the parties agree to the contrary or agree to have a greater amount held in escrow. Information secured by Escrow Agent regarding taxes, assessments, insurance, rents, interest, and balance due on other encumbrances or mortgages, including prepayment penalties, if any, may be relied upon in making payments or adjustments and shall be conclusive against the parties. Taxes and assessments shall be prorated on a thirty (30) day month basis, using the amount shown on the last available County Treasurer's tax duplicate that has been certified by the County Auditor as of the date of title transfer.
11. Escrow Agent is not responsible for proration of insurance premiums or for the transfer of insurance policies, unless specifically required by the instructions. Escrow Agent may rely upon any information provided to Escrow Agent on any loan questionnaire or on original or memorandum insurance policies delivered into escrow before the transfer of title, and any errors or omissions in such information shall be adjusted between the parties outside of escrow.
12. If the consent of the holder of an existing mortgage to the Purchaser's assumption of that mortgage is required, the parties agree to obtain the mortgagee's consent and to hold Escrow Agent harmless if the consent is not obtained, or if there is any breach of mortgage conditions by such assumption or by Purchaser taking title subject to a mortgage.
13. Escrow Agent is not required to commence any title examination until all funds and documents necessary for the completion of this transaction have been deposited in escrow. Unless specifically instructed, Escrow Agent shall not be

obligated to order a special tax search, survey or location service.

14. Unless otherwise specified in the instructions, Seller shall be chargeable with the cost of the following items:

- a. Examination of title and title evidence;
- b. Transfer tax;
- c. One-half escrow fee;
- d. All taxes and assessments due and payable to the County Treasurer at the date of filing the instruments for record in the within escrow;
- e. Costs of satisfying the record liens or encumbrances not specifically assumed by Purchaser according to instructions.

15. Unless otherwise specified in the instruction, Purchaser shall be chargeable with the cost of the following items:

- a. One-half escrow fee;
- b. Cost of recording deed;
- c. Cost of recording Purchaser's mortgage;
- d. Additional expenses required by Purchaser or Purchaser's mortgagee.

16. The cost of any extraordinary services or expenses shall be borne by the party benefitted thereby.

17. Escrow Agent shall not file the deed or disburse any funds until it receives a mechanics' lien affidavit from Seller or the original contractor, and until Purchaser of a newly constructed home has acknowledged completion of the home's construction and has deposited an acceptance letter in escrow.

18. These standard conditions of acceptance of escrow will apply only if there are no specific escrow instructions to the contrary. In case of conflicts, the written escrow instruction or the terms of the contract of sale shall prevail.

19. The parties understand that this document represents a binding and enforceable agreement, and they have carefully read and examined it before signing.

Seller

Purchaser

Title Company

By _____
Escrow Officer



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FORM 21.98 Occupancy agreement--occupancy by purchaser prior to settlement--owner's form

COMMENT

An occupancy agreement is useful when the right of possession is transferred at a time before or after settlement. If the buyer wishes to occupy the building before settlement, possession would be given prior to closing by the seller. If, on the other hand, the seller wishes to remain in possession for a limited time after the transfer of title, the buyer, as the new owner, would let the seller retain possession for the limited time. The terms of the agreement depend upon the negotiating strength of each party. Matters to be negotiated include the occupancy fee, risk of loss, liability insurance, settlement adjustments, and surrender of possession if necessary.

Occupancy fee

Generally, the owner will require a fee from the party to occupy the property. Although the occupancy fee can be any amount agreed to by the parties, some practitioners believe it should have some relationship to the owner's expenses. These expenses include the monthly amortization due on the owner's mortgage, the proportionate amount of real estate and other taxes, insurance, and other charges incurred by the owner by reason of having title to the property. The owner may add a premium to this amount and establish the occupancy fee. If the party taking possession does not assume the utility charges for gas, electric, water, etc., these should be included in the occupancy fee. However, since the occupying party has control over the extent of use of utility services, it is often provided that the occupant assume such charges.

Risk of loss

The risk of loss to the premises is usually assumed by the party in possession. The party in

possession maintains the most control over the premises, so the occupier is better able to protect against loss. If the buyer is to take possession prior to settlement, then the risk of loss should, by agreement, shift to the buyer upon occupancy. If the seller is to remain in possession after closing, the risk of loss should remain with the seller until possession is surrendered.

Liability and insurance

Both the party in possession and the owner have insurable interests in the property and liability risks. Each should maintain insurance for their own protection. Usually an owner will have insurance from the date of ownership to the date of transfer. However, the party in occupancy may overlook this risk. The owner may wish to have a fund to recover against in the event the occupant is liable to the owner. Therefore the agreement should provide that the party in occupancy maintain satisfactory insurance coverage.

Settlement adjustments

Customarily, expenses incurred in occupying property are borne by the party in possession. Therefore, settlement adjustment associated with possession should correspond to the time when possession changes hands, rather than the date title changes hands. Such items would include fuel, utilities, real estate, water or other taxes, and maintenance expenses. Personal obligations of the parties, however, would be adjusted as of settlement, and would include such items as insurance, mortgage payments, and mortgage insurance, if any. (Part or all of these personal expenses can be recovered, however, in the occupancy fee.)

Surrender of possession

If all does not go as planned, the owner will want some assurance that possession will be surrendered or returned. This can be handled by a number of different methods. One method may require liquidated damages in a prescribed monthly amount. Another approach would prescribe an increased monthly occupancy fee, which could be secured by an adequate cash deposit. Another approach, used separately or in conjunction with the other methods, would be an express submission to the court having jurisdiction over summary eviction proceedings.

Inspection of the property

In some locations it is customary for the purchaser to conduct an inspection of the property prior to closing. This may be specifically allowed in the contract, or may be part of the practice in the locality. In order to avoid a situation where the seller is held responsible for damages to the property between the time the buyer takes possession and the settlement date, the pre-closing inspection should be moved up to a time just prior to the purchaser's taking possession. Any objections can be raised and resolved before possession or closing. Any unsatisfactory conditions not objected to by purchaser, or occurring during purchaser's occupancy, would be the purchaser's responsibility.

FORM

USE AND OCCUPANCY AGREEMENT

AGREEMENT made September 23, _____ [year], by and between John P. La Costa and Mildred O. La Costa, husband and wife, residing at 449 Windsor Street, Round Valley, Pennsylvania ("Seller"), and Charles W. Long and Alice B. Long, husband and wife, residing at 213 Craig Drive, Chattanooga, Tennessee ("Buyer").

Recitals

By a certain contract of sale between the parties, dated August 11, _____ [year], Seller agreed to sell and Buyer agreed to purchase the premises known as 449 Windsor Street, Round Valley, Monongahela County, Pennsylvania ("the premises").

Buyer is desirous of taking possession of the premises before the anticipated closing of title on October 31, _____ [year], and Seller is willing to allow such possession of the premises subject to certain conditions:

Now, therefore, the parties agree as follows:

1. *Possession; fee.* Seller will on September 27, _____ [year], at 4:00 p.m., deliver to Buyer the full possession of the premises as if the conveyance thereof had been executed, and Buyer shall pay Seller an occupancy fee of \$1,000 per month commencing with this agreement, prorated if necessary for months less than 30 days.

2. *Disclaimer.* Buyer acknowledges and agrees that the use and occupation of the premises contemplated by this agreement is on an AS IS basis. SELLER HAS NOT INSPECTED THE PREMISES TO DETERMINE ITS PRESENT CONDITION. SELLER MAKES NO WARRANTIES OR REPRESENTATIONS, EXPRESS OR IMPLIED, ABOUT THE PREMISES EXCEPT AS SPECIFICALLY SET FORTH IN THE CONTRACT OF SALE. SELLER HAS ENTERED INTO THIS AGREEMENT IN RELIANCE UPON THESE LIMITATIONS OF SELLER'S LIABILITIES AND WOULD NOT HAVE ENTERED INTO THIS AGREEMENT WITHOUT SUCH LIMITATIONS.

3. *Liability.* Buyer assumes all risks of and responsibility and liability for all losses, damages, and personal injuries or damage to property, including damage to the premises, incurred by Buyer or any other persons during Buyer's use and occupancy of the premises, regardless of whether they are caused by Buyer's use and occupancy thereof. Buyer shall indemnify and hold Seller harmless from all claims, actions, suits, proceedings, costs, expenses, damages, and liabilities, including attorneys' fees, arising out of, connected with, or resulting, directly or indirectly, from or during Buyer's use and occupancy of the premises. Buyer shall defend, at his expense, all suits brought against Seller, either alone or in conjunction with others, upon any such liabilities or claims, and shall promptly satisfy, pay, and discharge all judgments and fines recovered against Seller in all such actions.

4. *Adjustments.* All adjustments for taxes, water charges, and utility charges shall be determined as of September 27, _____ [year], and Buyer shall thereupon be solely liable for their payment.

5. *Insurance.* Buyer shall secure hazard and liability insurance covering the premises to protect against any loss or damage occurring, or liability incurred, during Buyer's use and occupancy of same. Prior to delivery of possession, Buyer shall provide satisfactory evidence of such insurance to Seller's attorney. Such evidence shall include a copy of the insurance policy issued and a premium paid receipt.

6. *Surrender of possession.* If the closing of title does not take place by October 31, _____ [year], through no fault of Seller, Buyer shall pay \$1,300 per month to Seller commencing on November 1, _____ [year], prorated if necessary for occupancy that is less than a full calendar month. In no event, however, shall Buyer's use and occupancy of the premises at any time be considered a tenancy in any form. Buyer shall

vacate the premises immediately following Seller's demand in the event of a breach by Buyer of any term or conditions of this agreement. Buyer further agrees that, failing such voluntary vacation, Buyer may be dispossessed on three days' notice by summary proceedings.

7. *Maintenance and compliance.* During Buyer's use and occupancy of the premises, Buyer shall keep the premises in good condition and repair at his expense and shall comply with all governmental ordinances and regulations concerning the premises.

8. *Deposit.* Prior to delivery of possession, Buyer shall deposit \$3,000 with Seller's attorney to be held in escrow. This sum may be applied to: (a) the \$1,000 per month occupancy fee agreed to by and between the parties; (b) the repair of any damages to the premises incurred after the date of delivery of possession; (c) the payment of any taxes, water charges, or utility charges incurred after that date; or (d) the payment of any other amounts which are Buyer's responsibility under the terms and conditions of this agreement, following Buyer's failure to pay for any of the above items upon demand. Any balance remaining shall be repaid to Buyer at title closing.

9. *Assignability.* Neither this agreement, nor any right or obligation hereunder, is assignable by Buyer.

10. *Contract of sale.* Neither this agreement, nor Buyer's taking of possession of the premises, shall be deemed a waiver of the contract of sale, but shall be considered as being conditional upon, and without prejudice to, the due performance of the contract of sale in all respects.

11. *Inspection of premises.* Buyer acknowledges that he has conducted an inspection of the premises prior to taking occupancy thereof, and waives all rights to such an inspection prior to settlement, which may arise by custom or contract. Buyer shall accept the premises in the condition found upon their taking occupancy, and acknowledges that any personal property included in the sale is properly located in the premises and is in good working order.

12. *Entire agreement; modification.* This instrument constitutes the entire agreement between the parties in connection with Buyer's use and occupancy of the premises. No modification of this agreement shall be effective unless in writing and signed by both parties.

13. *Governing law.* This agreement shall be construed in accordance with and governed by the laws of the State of Pennsylvania.

14. *Notices.* All notices hereunder shall be sent by registered or certified mail, postage prepaid, return receipt requested, addressed to the other party at its address set forth at the beginning hereof. Either party, however, may designate a different address by serving written notice of change of address on the other party, in the manner provided above.

15. *Binding effect.* This agreement shall be binding upon and inure to the benefit of the parties hereto and their respective legal representatives, successors, and assigns.

16. *Headings.* Headings in this agreement are for convenience and reference only and are not deemed to be a part thereof.

17. *Non-waiver.* No delay or failure by either party to exercise any right hereunder, and no partial or single exercise of such right, shall constitute a waiver of that or any other right, unless otherwise expressly provided herein.

18. *Counterparts.* This agreement may be executed in one or more counterparts, each of which shall be deemed an original but all of which together shall constitute one and the same instrument.

19. *Time of essence.* Time is of the essence of this agreement.

The parties have set their hands and seals the day and year first above written.



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FORM 21.99 Occupancy agreement--occupancy by seller subsequent to closing--letter agreement

COMMENT

This form reflects the buyer's agreement to permit the seller to remain in occupancy after settlement. The seller is usually required to surrender possession of the property, along with title, at closing. This agreement not only permits the seller to remain in possession for the specified time, but also deals with closing adjustments, utilities, failure to surrender possession, buyers' right of inspection, indemnification and insurance.

Closing adjustments

Settlement adjustments are made as of the date the seller is to vacate the property. The seller will enjoy the benefits of possession until such date, and should bear the expenses related to possession. Such adjustments would include real estate taxes, utilities, and fuel.

Possession deposit

At closing, the seller, under the agreement, deposits a sum of money with the buyer's attorney to secure the surrender of possession by the seller. The deposit also secures the payment of the monthly occupancy charge, as well as expenses incurred to obtain possession from the seller. A specified \$100 per diem liquidated damages provision is also secured by the deposit. The seller will be obligated to pay the buyer an additional \$100 per day for each day beyond the date the seller is supposed to vacate the property. This is in addition to the other accruing charges and expenses.

Right of inspection

The purchaser's right to inspect the property just prior to closing will not give the buyer an opportunity to object to any defects or unsatisfactory conditions in the premises after the seller vacates. Therefore, this agreement provides for the inspection to take place after the property is vacated by the seller. All representations and warranties contained in the contract are extended past settlement, so that, upon inspection, the buyer has the same rights as he had prior to closing. This provision should prevent non-title representations being deemed waived or merged with delivery of the deed, by expressly providing that the parties intend such representations and warranties to survive settlement and delivery of the deed.

Indemnification and insurance

By reason of ownership of the property, the buyer may be subject to liability and law suits. This agreement provides that the seller will indemnify the buyer for any liability incurred by reason of the seller's continued occupancy. To back up this indemnity, the seller is obligated to continue his insurance on the property.

FORMS

(1) Letter agreement form

May 16, _____ [year]

Mr. and Mrs. Mark C. Witkowski
c/o Dolan, Levine and Camprice
Attorneys at Law
1030 First Street
Bridgeport, Connecticut

Re: 195 Centerville Road
Hamden
New Haven County
Connecticut

Dear Mr. and Mrs. Witkowski:

As sellers of the above premises pursuant to our contract dated May 1, _____ [year], we are not entitled to remain in possession of the premises after closing. However, at our request, you agreed to our continued possession.

1. *Adjustments.* We agree at the closing, all adjustments will be as of June 30, _____ [year]. During the time of extended possession, we will pay all the expenses of running the premises, including fuel oil, water, electricity, gas, and repairs.

2. *Relationship.* The relationship between us in this transaction is that of licensee and licensor, and not that of landlord

and tenant.

3. *Surrender of possession.* If we do not surrender possession to you for any reason by July 1, _____ [year], we agree upon three days' written notice from you or your attorney, to vacate the premises and deliver it to you in broom clean and good condition. In addition, we shall make full payment of the amount then due at the monthly rate of \$1,112, as apportioned from June 30, _____ [year] to such date. Furthermore, if we refuse to remove ourselves and possessions on the date set forth in such notice, we shall reimburse you for all reasonable costs incurred in recovering possession of the property, including reasonable attorney's fees and an additional \$100 per day for each day we continue in possession after the date of such revocation of license. You are authorized to deduct such sums from the \$4,000 deposited at closing with your attorney before returning the balance to us.

4. *Inspection.* We acknowledge that you have the right to inspect the house after our vacation therefrom. We agree that your closing of title, in reliance upon this letter agreement, shall not constitute an acceptance of the house in its present state and condition. Any representations, covenants, promises, or obligations made by us as set forth in such contract shall survive the closing of title and delivery and acceptance of the deed. Further, we agree that all of the personal property set forth in the contract as included in the sale, shall be present in the house upon surrender of our license.

5. *Occupancy.* While we are in possession of the house, after the closing of title, we shall take good care of the premises, make all necessary and reasonable repairs, and be responsible for any damage.

6. *Indemnification.* We further agree to indemnify you and hold you harmless from all damages caused by our occupancy of the house, and the money deposited at closing with your attorney shall be held by him also as a fund out of which you shall be reimbursed for such damages, after the assessment of same. We agree to continue our insurance on the premises until we turn over possession to you.

Very truly yours,

Roger V. Rustic

Jane C. Rustic

Agreed and Accepted:

Mark C. Witkowski

Barbara J. Witkowski

(2) Contract form

THIS AGREEMENT, made this 1st day of August, _____ [year] between Roger V. Rustic and Jane C. Rustic, husband and wife ("Sellers"), and Mark C. Witkowski and Barbara J. Witkowski, husband and wife ("Purchasers"), each of whom is a party to the following agreement and to that certain contract to sell and purchase

premises located at 12 Elm Street, Hempstead, Nassau County, New York dated June 2, _____
[year].

Recitals

The closing of title has been negotiated and took place on August 27, _____ [year], in accordance with the terms of the sale contract.

Sellers are unable to vacate the premises on the date of closing of title and desire to continue to reside within the premises until September 15, _____ [year].

Purchasers are willing to grant Sellers continued occupancy until the September 15, _____ [year], and not longer.

It is understood and agreed that:

1. Purchasers and Sellers have made their adjustments as of September 1, _____ [year]. If Sellers remove themselves and their personal property from occupancy by such date, no additional charges shall be made or payable by them except as set forth below. If, however, Sellers remain beyond September 1, _____ [year], they shall pay a charge of \$77 for each day until removal, or such amount shall be deducted from any deposit or escrow held herein and given to Purchasers.
2. Sellers will deposit in the trust account of Purchasers' attorney the sum of \$4,000 as a good faith deposit to insure the performance of this agreement. The deposit will be returned to Sellers when they vacate the premises.
3. Sellers shall be responsible for the cost of any repairs, maintenance, or damage with respect to the premises resulting from their occupancy during the above period of time.
4. Sellers shall be responsible for all public and private utility charges, inclusive of oil, gas, electricity and water, for the period during their occupancy.
5. Sellers shall suffer all risk of loss or damage to their property stored or located on the premises, and shall hold Purchasers harmless from all claims or liabilities arising from their occupancy of the premises.
6. Sellers agree that if they fail to vacate the premises on or before September 15, _____ [year], a penalty of \$200 per day shall be charged against them until they vacate the premises.
7. It is expressly understood and agreed that no landlord-tenant relationship is implied or created by this agreement, except that this agreement may be enforced in the landlord-tenant court or in any other court of the state and Seller may be put out of the premises on and after September 15, _____ [year] by Purchaser's physical act if Purchaser so desires, without any further liability to Purchaser.
8. Seller waives any defense it may have with respect to any matter contained in this agreement.

The parties have duly executed this agreement, the day and year first above written.

Roger V. Rustic, Seller

Mark C. Witkowski, Purchaser

Jane C. Rustic, Seller

Barbara J. Witkowski, Purchaser



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25-21 Current Legal Forms for Real Estate FORM 21.100

FORM 21.100 Party driveway agreement--adjoining land owners

COMMENT

Where two adjoining land owners share one driveway, a party driveway agreement may be desirable. In some situations, a mortgage lender may require that such an agreement be made and recorded prior to advancing the mortgage funds.

Easements

Generally, such agreements provide that each party will grant the other a right of way over that part of the driveway which lies on their respective properties. This use easement is occasionally coupled with a maintenance agreement, where the two parties agree to share the cost of maintaining the driveway.

Protection of mortgage lender

A mortgage lender or insurer often will require a joint driveway agreement. The principal purpose of such a requirement is to assure unimpeded access to the property in the event of possession subsequent to foreclosure. The market value of the property may be diminished if the adjoining neighbor determines that he no longer wishes to permit access over his part of the driveway.

FORM

AGREEMENT made July 26, _____ [year], by and between Harold F. Daws and Joan C. Daws, husband and wife, each residing at 349 Colonial Way, Fairview Mews, Farmingdale, Massachusetts ("The Daws"), and Albert C. Barnstable and Margaret F. Barnstable, husband and wife, each residing at 351 Colonial Way, Fairview Mews, Farmingdale, Massachusetts ("The Barnstables").

Recitals

The Daws own certain real property commonly known as 349 Colonial Way, Fairview Mews, Farmingdale, Birmingham County, Massachusetts, said premises also being known as and by Lot 3 in Block 240C on the Tax Map of the Township of Farmingdale, and more particularly described in the deed recorded in the Birmingham County Clerk's Office in Book 2034 at Page 236; said property being improved by part of a driveway running along its northerly line.

The Barnstables own certain real property known as 351 Colonial Way, Fairview Mews, Farmingdale, Birmingham County, Massachusetts, said premises also being known as and by Lot 4 in Block 240C on the Tax Map of the Township of Farmingdale, and more particularly described in the deed recorded in the Birmingham County Clerk's Office in Book 1956 at Page 215; said property being improved by a part of a driveway running along its southerly line.

The driveway improvements on the respective properties adjoin and abut each other along the common property line between the two properties, and neither driveway improvement alone is sufficient to accommodate the vehicular traffic relating to the use of the respective properties; but both driveway improvements, together, are sufficient and adequate for the vehicular traffic of both properties.

The parties wish to provide for the unobstructed use of the driveway improvements for ingress and egress and for the maintenance of the driveway improvements for their mutual benefit.

Agreement

Now, therefore, in consideration of the mutual covenants and easements herein contained, it is agreed as follows:

1. *Mutual easements.* The Daws grant to The Barnstables, for the benefit of the parcel on which their house is located, and The Barnstables grant to The Daws for the benefit of the parcel on which their house is located, an easement of ingress and egress over so much of their respective property as is presently improved as part of a driveway for use of vehicular traffic used in connection with their respective properties. A legal description of both such easement premises is set forth on Exhibit A, attached hereto.

2. *Obstructions.* The parties shall not obstruct, impede, or interfere, either with the other, in the reasonable use of such driveway improvements for the purpose of ingress and egress to and from the respective properties.

3. *Maintenance.* The parties shall maintain their respective driveway improvements in a usable, neat, and uniform manner, so that the overall appearance of the said driveway improvements is that of one driveway. The parties shall share the cost of tri-annual protective coating and sealing of said driveway improvements. Any extraordinary cost of repair and rebuilding said driveway improvements shall also be shared equally; except that any damage due to the negligence of any third person who uses or has used the driveway improvement pursuant to authority of either party hereto, in which case, the party granting such authority to use shall be liable for such damages.

4. *Effective term.* This agreement shall be effective only so long as the mortgagee of the persons taking title from The Daws has an interest in the property presently owned by The Daws, and shall remain effective so long as any successor or assign of said mortgagee has an interest in said property, whether such interest arose by reason of an assignment of

such mortgage, acceptance of a deed in lieu of foreclosure or by reason of foreclosure, or otherwise. This agreement shall automatically terminate upon the termination, satisfaction, or expiration of said interest or interests.

5. *Binding effect.* This agreement shall be binding upon the parties hereto, and their respective heirs, executors, administrators, and assigns.

6. *Superior mortgage.* This agreement is subordinate and subject to a certain mortgage given by The Barnstables to Farmingdale Savings and Loan Association, dated July 24, _____ [year], and recorded in the Birmingham County Clerk's Office in Book 1345 at Page 501; provided, however, that nothing contained in this clause shall preclude said mortgagee from benefitting from this agreement if it so elects, upon said mortgagee, its successor, or assigns obtaining possession of the property of The Barnstables.

7. *Indemnity.* The Daws hereby agree to indemnify, defend and save The Barnstables and their heirs and assigns, harmless from and against any claims and liabilities on account of bodily injury, death, and property damage, or any of them, arising in connection with The Daws' exercise of any of their rights hereunder and occasioned by any act or omission on The Daws' part or the part of its agents, contractors, employees, tenants, visitors, or licensees, and not attributable to the negligence of, or failure to comply with the terms and conditions of this agreement by The Barnstables, their heirs or assigns, or their respective agents, contractors, or employees.

The Barnstables hereby agree to indemnify and save The Daws, their heirs and assigns, harmless from and against any claims or liabilities on account of bodily injury, death, and property damage, or any of them, arising in connection with The Barnstables' exercise of any of their rights hereunder and occasioned by any act or omission on The Barnstables' part or the part of their agents, contractors, employees, tenants, visitors, or licensees, and not attributable to the negligence of, or failure to comply with the terms and conditions of this agreement by The Daws, their heirs or assigns, or their respective agents, contractors, or employees.

The parties have set their hands and seals the day and year first above written.

Harold F. Daws

Joan C. Daws

Albert C. Barnstable

Margaret F. Barnstable

[Acknowledgments]



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25-21 Current Legal Forms for Real Estate FORM 21.101

FORM 21.101 Smoke alarm affidavit

COMMENT

Some states now provide by statute that all transferred residences be equipped with a functioning smoke alarm. Based on this requirement, many lenders require proof of the existence of a smoke alarm. To satisfy this requirement, the seller generally executes an affidavit at closing stating that an approved and functioning smoke alarm exists. In some states, the deed will not be recorded until such an affidavit is filed.

FORM

STATE OF _____

COUNTY OF _____

_____, being sworn, states that an operable single station smoke detecting alarm device has been installed in the dwelling located at _____ Street, City of _____, State of _____, in compliance with Section _____ of the _____ Laws of the State of _____.

(Print name below signature)

Sworn to before me this _____ day

of _____ [*date*]

Notary Public



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I. SPECIAL CLOSING AGREEMENTS AND DOCUMENTS

25-21 Current Legal Forms for Real Estate FORM 21.102

FORM 21.102 FIRPTA Affidavit

COMMENT

In the case of the disposition of a United States Real Property Interest ("USRPI"), which is very broadly defined to include almost all interests in real property located in the United States, if the seller is a "foreign person," the purchaser is generally required to deduct and withhold a tax equal to 10% of the amount realized on the disposition under *Section 1445(a) of the Internal Revenue Code*. The withholding is to insure compliance with U.S. income tax laws on the disposition of such real property. In general, a "foreign person" is a nonresident alien individual, foreign corporation, foreign partnership, foreign trust or foreign estate, but not a resident alien individual.

Withholding generally is not required by the purchaser if the seller furnishes the purchaser with a non-foreign affidavit. The affidavit, made under penalties of perjury, states that the seller is not a "foreign person" and furnishes the seller's taxpayer identification number. The certification by the seller in the affidavit must be obtained prior to or at the time of transfer. The affidavit must also contain the address of the seller. Many residential transactions are exempted from this withholding requirement by a price threshold. Withholding is not required if the property is acquired by the purchaser for use as a residence and the amount realized does not exceed \$300,000. If the purchaser fails to deduct and withhold the correct amount of tax on a non-exempt sale, the purchaser will be liable to the Internal Revenue Service for that tax.

The form of affidavit is adopted by use by an individual or by an entity.

FORM

FIRPTA AFFIDAVIT

State of _____)
 County of _____) ss:

Section 1445 of the Internal Revenue Code provides that a transferee of a U.S. real property interest must withhold tax if the transferor (seller) is a foreign person. To inform the transferee that withholding of tax is not required upon a disposition of a U.S. real property interest by _____, with respect to the property located at _____, the undersigned hereby certifies the following:

1. The names, addresses and United States taxpayer identification numbers of all of the owners of the above property are as follows:

Seller's Name	U.S. Tax I.D. No. (or SSN) (Or, Social Security Number)	Address (if the seller is an individual, the in- dividual's home address must be used)
_____	_____	_____
_____	_____	_____
_____	_____	_____

There is no other person or entity who has an ownership interest in the Property.

(2) None of the owners of the Property are non-resident aliens for purposes of U.S. income taxation or, if seller is an entity, it is not a foreign corporation, foreign partnership, foreign trust, or foreign estate, as such terms are defined in the Internal Revenue Code and regulations thereto.

(3) I(we) understand that the purchaser of the Property intends to rely on the foregoing representations in connection with the Foreign Investment in Real Property Tax Act and that this certification may be disclosed to the Internal Revenue Service.

The undersigned hereby declare under penalty of perjury that the foregoing is true and correct.

Seller: _____

Purchaser: _____

By: _____

By: _____

Title: _____

Title: _____

Date: _____

Date: _____

(The original of this certificate is to be delivered to the purchaser, or the closing agent, if any, on or before the closing).



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J. MORTGAGE FINANCING

25-21 Current Legal Forms for Real Estate FORM 21.103

FORM 21.103 Installment note and deed of trust--escrow for taxes--assignment of rents--mortgage insurance and escrow--trustee's power of sale--California

COMMENT

The terms of this installment note and deed of trust are substantially similar to those found in a mortgage note and mortgage, since either a mortgage or a deed of trust may be used for loans secured by real property, depending upon state law. Some states recognize encumbrances that utilize either concept.

Real estate tax escrow

This deed of trust provides for the borrowers' payment of an additional monthly charge toward the annual real estate taxes assessed against the property. These advances are accumulated by the lender in a separate account and are used to pay the real estate tax bills, usually due quarterly. Although the monthly payment toward principal and interest remains constant under this note and deed of trust, the additional payments required for taxes increase or decrease depending upon the amount of taxes assessed each year against the property and the amount of surplus or deficiency in the escrow account. The homeowner, on his federal income tax return, may deduct the amount of taxes paid to the local taxing authority through the escrow account. Some states require the institution maintaining the escrow to accrue interest in favor of the borrower on the amounts held in escrow. However, other states do not have this requirement and local law should be consulted.

Assignment of rents

As additional security for loans, mortgages and deeds of trust may provide for an assignment to

the lender of all rentals realized from the property that is subject to the mortgage. This assignment usually takes effect only upon the default of the borrower to make the required payment under the note, or upon some other prescribed default. As a practical matter, only property which generates rental income, from either residential or commercial tenants, rather than property occupied solely by the borrower, will be affected by the assignment of rents provision. The clause is often included in strictly residential deeds of trust for the lender's protection in the event that the borrower does lease his former residence.

Mortgage financing

Banks and savings and loan associations are limited in the amount of money they may lend on a specific piece of real estate. For example, the limitation may be that the loan amount cannot exceed 80 percent of the appraised value or market value of the property. This may require the borrower to provide at least the remaining 20 percent of the purchase price in cash, if we assume that the purchase price is the same as the market value. If the buyer puts down only 10 percent of the purchase price, a lending institution subject to the 80 percent limitation nevertheless may lend the remaining 90 percent of the purchase price if repayment of the additional 10 percent is insured by a private mortgage insurer. If the borrower defaults before the loan is reduced to the 80 percent limitation (i.e., 80 percent of the purchase price) the insurer will pay the lender the difference between the permitted amount and the total unpaid principal amount. If the loan is reduced to the 80 percent limitation amount, the insurer is no longer liable. Variations of this formula may occur with different insurers. The private insurer will charge a premium for the insurance which is usually calculated as a percentage of the monthly amortization payments. This premium is in addition to the principal and interest paid to amortize the loan.

Trustee's title and powers

In a deed of trust arrangement, the owner or buyer of the property, who borrows the funds secured by the real estate (the "trustor"), conveys limited title to the property to a trustee for the benefit (i.e., security) of the lender. As a matter of practice, the trustee is usually a responsible institution, such as a financial institution or title insurance company. Although express conveyance language similar to that found in a deed is used, it is generally held, in states where the deed of trust is used as a security device, that the title conveyed to the trustee is limited to the extent necessary to secure the loan and carry out the terms of the deed of trust. As a practical result, the deed of trust has substantially the same effect as a mortgage, with some additional benefits to the lender. These additional benefits may include the trustee's power to sell the property after the statute of limitations on a mortgage would have run, or to sell without prior court proceedings, depending upon the laws of the state in which the property securing the loan is located.

Satisfaction of loan

Upon payment of the deed of trust, the interest of the trustee in the property is reconveyed to the owner. This procedure differs from satisfaction of a mortgage, where the mortgage is cancelled or discharged of record without any conveyance by the lender to the owner.

The promissory note must not be destroyed upon payment. When paid, the note, together with the deed of trust, must be surrendered to the trustee for cancellation and retention before there is a reconveyance.

Model disclosure forms and clauses

The Truth in Lending Act authorized the Federal Reserve Board to issue model disclosure forms and clauses. The model forms and clauses have been published in an appendix to Regulation Z. A creditor is not required to use the models; however, a creditor who uses a model form or clause is deemed to be in compliance with the disclosure requirements of the Act with respect to that form or clause (but not as to the correctness of the figures inserted in the forms).

A creditor may still be deemed to be in compliance if the model form or clause is changed by either deleting unrequired information, or rearranging the format, provided the deletion or rearrangement does not affect the substance, clarity, or meaningful sequence of the disclosure. The disclosure form under (3) "Model disclosure form," which follows, is taken directly from Regulation Z, and does not reflect the transactions in the note (1) and deed of trust (2). However, the model should be useful as a guide in completing the disclosure form on a level payment mortgage loan.

FORM

(1) Installment note

\$175,000

Menlo Park, California

November 7, _____ [year]

For value received, I promise to pay to California American First National Bank, or order, at 100 Locust Street, San Francisco, California, the sum of \$175,000, with interest from December 1, _____ [year], on unpaid principal at the rate of 10 percent per annum; principal and interest payable in installments of \$1,535.76 or more on the first day of each month, beginning on January 1, _____ [year], and continuing until the principal and interest have been paid.

The Deed of Trust securing the within note contains the following provision:

In the event the herein described property or any part thereof, or any interest therein is sold, agreed to be sold, conveyed or alienated by the Trustor, or by the operation of law or otherwise, all obligations secured by this instrument, irrespective of the maturity dates expressed therein, at the option of the holder hereof and without demand or notice shall immediately become due and payable.

If interest is not so paid it shall thereafter bear like interest as the principal, but such unpaid interest so compounded shall not exceed an amount equal to simple interest on the unpaid principal at the maximum rate permitted by law.

If default is made in payment of any installment of principal or interest when due the whole sum of principal and interest shall become immediately due at the option of the holder of this note. Principal and interest are payable only in lawful money of the United States. If action be instituted on this note I promise to pay such sum as the court may fix as attorney's fees.

This note is secured by a Deed of Trust to Fidelity Title Insurance Company, a California corporation, as Trustee.

NOTICE TO BORROWER

Do not sign this Note if it contains blank spaces. All spaces should be completed before you sign.

James Alan Carson

(2) Deed of trust

DEED OF TRUST
With Assignment of Rents

DEED OF TRUST, made November 7, _____ [year], between James Alan Carson, as Trustor, whose address is 123 Redwood Road, Menlo Park, California, Fidelity Title Insurance Company, as Trustee, and California American First National Bank, as Beneficiary.

The Trustor irrevocably grants, transfers, and assigns to Trustee in trust, with power of sale, the property in Menlo Park, San Mateo County, California, described as:

[Insert Description]

Together with the rents, issues, and profits, subject, however, to the right, power, and authority hereinafter given to and conferred upon Beneficiary to collect and apply such rents, issues, and profits;

For the purpose of securing performance of each agreement of Trustor herein contained and payment of the sum of \$175,000 with interest according to the terms of a promissory note of even date herewith, payable to Beneficiary or order and made by Trustor.

1. *Prepayment.* Privilege is reserved to pay the debt secured hereby in whole or in an amount equal to one or more principal payments next due on the note, on the first day of any month prior to maturity, provided written notice of intention so to do is given at least 30 days prior to prepayment and provided that if the debt is fully paid prior to final maturity, all other charges be paid also.

2. *Additional monthly payments.* Trustor shall pay to Beneficiary in addition to the monthly payments of principal and interest payable under the terms of said note, on the first day of each month until said note is fully paid, the following sums:

(a) *Mortgage insurance premium.* An amount sufficient to provide the holder of this instrument with funds to pay the next mortgage insurance premium if this instrument and the note secured hereby are insured, or any part thereof.

(b) *Ground rent, taxes, insurance.* An installment of the ground rents, if any, and of the taxes and special assessments levied or to be levied against the premises covered by this Deed of Trust; and an installment of the premium or premiums that will become due and payable to renew the insurance on the premises covered hereby against loss by fire or such other hazard as may be required by Beneficiary in amounts and in a company or companies satisfactory to Beneficiary; trustor agreeing to deliver promptly to Beneficiary all bills and notices therefor. Such installments shall be equal respectively to 1/12 of the annual ground rent, if any, plus the estimated premium or premiums for such insurance, and taxes and assessments next due (as estimated by Beneficiary) less all installments already paid therefor, divided by the number of months that are to elapse before one month prior to the date when such premium or premiums and taxes and assessments will become delinquent. Beneficiary shall hold such monthly payments in trust to pay such ground

rents, premium or premiums and taxes and special assessments before the same become delinquent; and

(c) *Allocation.* All payments mentioned in the two preceding subsections of this paragraph and all payments to be made under the note secured hereby shall be added together and the aggregate amount thereof shall be paid each month in a single payment to be applied by Beneficiary to the following items in the order set forth:

- (1) Premium charges under the contract of mortgage insurance;
- (2) Ground rents, taxes, special assessments, fire and other hazard insurance premiums;
- (3) Interest on the note secured hereby; and
- (4) Amortization of the principal of said note.

Any deficiency in the amount of any such aggregate monthly payment shall, unless made good prior to the due date of the next such payment, constitute an event of default under this Deed of Trust.

3. *Overpayments and deficiencies.* If the total of the payments made under (b) of paragraph 2 preceding shall exceed the amount of payments actually made by Beneficiary for ground rents, taxes or assessments, or insurance premiums, as the case may be, such excess may be released, applied on any indebtedness secured hereby, or be credited by Beneficiary on subsequent payments to be made by Trustor. If, however, the monthly payments made under (b) of paragraph 2 preceding shall not be sufficient to pay ground rents, taxes, and assessments, and insurance premiums, as the case may be, when the same shall become due and payable, then Trustor shall pay to Beneficiary any amount necessary to make up the deficiency on or before the date when payment of such ground rents, taxes, assessments, or insurance premiums shall be due. If at any time Trustor shall tender to Beneficiary, in accordance with the provisions hereof, full payment of the entire indebtedness secured hereby, Beneficiary shall, in computing the amount of indebtedness, credit to the account of Trustor all payments made under the provisions of (a) of paragraph 2, which the Beneficiary has not become obligated to pay and any balance remaining in the funds accumulated under the provisions of (b) of paragraph 2 hereof. If there shall be a default under any of the provisions of this Deed of Trust and thereafter a sale of the premises in accordance with the provisions hereof, or if the Beneficiary acquires the property otherwise after default, Beneficiary shall apply, at the time of the commencement of such proceedings, or at the time the property is otherwise acquired, the balance then remaining in the funds accumulated under (b) of paragraph 2 preceding, as a credit against the amount of principal then remaining unpaid under said note and shall properly adjust any payments which shall have been made under (a) of paragraph 2.

4. *Late charge.* If any payment or portion thereof is not paid within 15 days from the date the same is due, Trustor shall pay a "late charge" of two cents for each dollar so overdue, if charged by Beneficiary.

To protect the security of this Deed of Trust, Trustor shall:

5. *Preservation of premises.* Protect and preserve the property and maintain it in good condition and repair, and in compliance with all environmental laws.

6. *Nondemolition.* Not remove or demolish any building or improvement on the property.

7. *Reconstruction and construction.* Complete or restore promptly and in good and workmanlike manner any building or improvement on the property which may be constructed, damaged, or destroyed, and pay when due all costs incurred therefor. If the loan secured hereby or any part thereof is being obtained for the purpose of financing construction of improvements on said property, Trustor shall:

(a) *Commencement.* Commence construction promptly and in any event within 30 days from the date of this Deed of Trust, and complete same in accordance with plans and specifications satisfactory to beneficiary,

(b) *Inspection.* Allow Beneficiary to inspect said property at all times during construction,

(c) *Replacement.* Replace any work or materials unsatisfactory to Beneficiary, within 15 calendar days after written notice from Beneficiary of such fact, which notice may be given to the Trustor by registered or certified mail, sent to his last known address, or by personal service of the same,

(d) *Continuation.* Not discontinue the construction of such improvements for any reason whatsoever for any period of 15 consecutive days.

The Trustee, upon presentation to it of an affidavit signed by Beneficiary, setting forth facts showing a default by Trustor under this numbered paragraph, is authorized to accept as true and conclusive all facts and statements therein, and to act thereon hereunder.

8. *Waste.* Not commit or permit waste of said property.

9. *Compliance.* Comply with all laws, ordinances, regulations, covenants, conditions, and restrictions affecting the property.

10. *Vegetation.* Cultivate, irrigate, fertilize, fumigate, prune, and do all other acts which, from the character and use of said property, may be reasonably proper or necessary, the specific enumerations herein not excluding the general.

11. *Insurance.* Provide and maintain insurance against loss by fire and other hazards, casualties, and contingencies including war damage as may be required from time to time by the Beneficiary in such amounts and for such periods as may be required by the Beneficiary, with loss payable solely to Beneficiary, and shall deliver all policies to Beneficiary, which delivery shall constitute an assignment to Beneficiary of all return premiums.

12. *Legal actions.* Appear in and defend any action or proceeding purporting to affect the security hereof or the rights or powers of Beneficiary or Trustee. If Beneficiary or Trustee elects to also appear in or defend any such action or proceeding, Trustor shall pay all costs and expenses, including cost of evidence of title and attorney's fees in a reasonable sum incurred by Beneficiary or Trustee.

If any environmental claims, violations, citations or assessments are made, Trustor shall indemnify, defend and hold harmless Trustee and Beneficiary therefrom.

13. *Water.* Pay at least 10 days before delinquency all assessments upon water company stock, and all rents, assessments and charges for water, appurtenant to or used in connection with said property. Trustor shall pay, when due, all encumbrances, charges, and liens with interest, on said property or any part thereof, which at any time appear to be prior or superior to this instrument.

14. *Trust fees.* Pay all costs, fees, and expenses of this Trust.

15. *Cure.* If Trustor shall fail to make any payment or to do any act as herein provided, then Beneficiary or Trustee without notice to or demand upon Trustor and without releasing Trustor from any obligation hereof, may: make or do the same in such manner and to such extent as either may deem necessary to protect the security hereof, Beneficiary or Trustee being authorized to enter upon the property for such purposes; commence, appear in and defend any action or proceeding purporting to affect the security hereof or the rights or powers of Beneficiary or Trustee; pay, purchase, contest, or compromise any encumbrance, charge or lien which in the judgment of either appears to be prior or superior

to this instrument; and in exercising any such powers, incur any liability, expend whatever amounts in its absolute discretion it may deem necessary therefor, including cost of evidence of title, employ counsel, and pay his reasonable fees.

16. *Repayment of advances.* Pay immediately and without demand all sums expended hereunder by Beneficiary or Trustee, with interest from date of expenditure at the rate provided on the principal debt, and the repayment thereof shall be secured by this instrument.

It is mutually agreed that:

17. *Condemnation or destruction.* If the property or any part thereof is taken or damaged by reason of any public improvement or condemnation proceeding, or damaged by fire, or earthquake, or in any other manner, Beneficiary shall be entitled to all compensation, awards, and other payments or relief therefor, and shall be entitled at its option to commence, appear in and prosecute in its own name, any action or proceedings, or to make any compromise or settlement, in connection with such taking or damage. All such compensation, awards, damages, rights of action and proceeds, including the proceeds or any policies of fire and other insurance affecting said property, are assigned to Beneficiary, who may after deducting all its expenses, including attorney's fees, release any moneys so received by it or apply the same on any indebtedness secured hereby. Trustor shall execute such further assignments of any compensation, award, damage, and rights of action and proceeds as Beneficiary or Trustee may require.

18. *Nonwaiver.* By accepting payment of any sum secured hereby after its due date, Beneficiary does not waive its right either to require prompt payment when due of all other sums so secured or to declare default for failure so to pay.

19. *Title registration.* If proceedings are instituted to register title of said property under any Land Title Law, Trustor will pay upon demand all sums expended by Trustee or Beneficiary, including attorney's fees, and forthwith deliver to Beneficiary all evidence of title.

20. *Encumbrances and conveyances.* At any time and from time to time upon written request of Beneficiary, payment of its fees and presentation of this Deed and the note for endorsement (in case of full reconveyance, for cancellation and retention), without affecting the liability of any person for the payment of the indebtedness, Trustee may (a) consent to the making of any map or plat of said property; (b) join in granting any easement or creating any restriction; (c) join in any subordination or other agreement affecting this Deed or the lien or charge thereof; (d) reconvey, without warranty, all or any part of the property.

The grantee in any reconveyance may be described as the "person or persons legally entitled thereto," and the recitals therein of any matters or facts shall be conclusive proof of the truthfulness thereof. Trustee's fees for any of the services mentioned in this paragraph shall be \$25.

21. *Assignment of rents.* As additional security, Trustor assigns to Beneficiary during the continuance of these trusts, all rents, issues, royalties, and profits of the property affected by this Deed and of any personal property located thereon. Until Trustor shall default in the payment of any indebtedness secured hereby or in the performance of any agreement hereunder, Trustor shall have the right to collect all such rents, issues, royalties, and profits earned prior to default as they become due and payable, save and excepting rents, issues, royalties, and profits arising or accruing by reason of any oil, gas, or mineral lease of said property. If Trustor shall default as aforesaid, Trustor's right to collect any of such moneys shall cease and Beneficiary shall have the right, with or without taking possession of the property affected hereby, to collect all rents, royalties, issues, and profits. Failure or discontinuance of Beneficiary at any time, or from time to time, to collect any such moneys shall not in any manner affect the subsequent enforcement by Beneficiary of the right, power, and authority to collect the same. Nothing contained herein, nor the exercise of the right by Beneficiary to collect, shall be, or be construed to be, an affirmation by Beneficiary of any tenancy, lease or option, nor an assumption of liability under, nor a subordination of the lien or charge of this Deed to any such tenancy, lease or

option.

22. *Possession upon default.* Upon any default by Trustor, Beneficiary may, at any time without notice, either in person, by agent, or by a receiver to be appointed by a court, and without regard to the adequacy of any security for the indebtedness hereby secured, enter upon and take possession of said property or any part thereof, in its own name and sue for or otherwise collect said rents, issues, and profits, including those past due and unpaid, and apply the same, less costs and expenses of operation and collection, including reasonable attorney's fees, upon any indebtedness secured hereby, and in such order as Beneficiary may determine.

23. *Effect of possession by beneficiary.* The entering upon and taking possession of said property, the collection of such rents, issues, and profits, or the proceeds of fire and other insurance policies, or compensation or awards for any taking or damage of the property, and the application or release thereof as aforesaid, shall not cure or waive any default or notice of default hereunder or invalidate any act done pursuant to such notice.

24. *Notice of default and sale.* Upon Trustor's breach of or default in any of the provisions of this Agreement, after the lapse of such time as may then be required by law following the recordation of said notice of default, and notice of sale having been given as then required by law, Trustee, without demand on Trustor, shall sell said property at the time and place fixed by it in said notice of sale, either as a whole or in separate parcels, and in such order as it may determine (but subject to any statutory right of Trustor to direct the order in which such property, if consisting of several known lots or parcels, shall be sold), at public auction to the highest bidder for cash in lawful money of the United States, payable at time of sale. Trustee may postpone sale of all or any portion of said property by public announcement at the time and place of sale, and from time to time thereafter may postpone the sale by public announcement at the time fixed by the preceding postponement. Trustee shall deliver to the purchaser its Deed conveying the property so sold, but without any covenant or warranty, express or implied. The recitals in the Deed of any matters or facts shall be conclusive proof of the truthfulness thereof. Any person, including Trustor, Trustee, or Beneficiary, may purchase at the sale. Trustee shall apply the proceeds of sale to payment of (1) the expenses of such sale, together with the reasonable expenses of this Trust, including therein Trustee's fees in the following amounts based upon the amount secured hereby and remaining unpaid: 6 2/3 percent on the first \$1,000 thereof, 2 percent on the next \$7,000 thereof, and 1 1/3 percent on the balance thereof, said sum to include counsel fees if any are incurred; (2) cost of any evidence of title procured in connection with such sale; (3) all sums expended under the terms hereof, not then repaid, with accrued interest at the rate provided on the principal debt; (4) all other sums then secured hereby; and (5) the remainder, if any, to the person or persons legally entitled thereto.

25. *Sale upon default.* Beneficiary may declare all sums secured hereby immediately due and payable by delivery to Trustee of a written declaration of default and demand for sale, and of a written notice of default and of election to cause the property to be sold, which notice Trustee shall cause to be duly filed for record. Beneficiary shall also deposit with Trustee this Deed, the note and all documents evidencing expenditures secured hereby.

26. *Successor trustees.* Beneficiary may from time to time substitute a successor or successors to any Trustee named herein or acting hereunder to execute this Trust. Upon such appointment, and without conveyance to the successor trustee, the latter shall be vested with all title, powers, and duties conferred upon any Trustee herein named or acting hereunder. Each such appointment and substitution shall be made by written instrument executed by Beneficiary, containing reference to this Deed and its place of record, which, when recorded in the office of the County Recorder of the county or counties in which the property is situated, shall be conclusive proof of proper appointment of the successor trustee.

27. *Waiver of statute of limitations.* The pleading of any statute of limitations as a defense to any and all obligations secured by this Deed is waived, to the full extent permissible by law.

28. *Additional recourse.* Any Trustor who is a married woman agrees that recourse may be had against her separate

property, but without hereby creating a present or any lien or charge thereon, for any deficiency after sale of the property hereunder.

29. *Parties.* This Deed shall inure to and bind the heirs, legatees, devisees, administrators, executors, successors, and assigns of the parties hereto. All obligations of Trustor hereunder are joint and several. The term "Beneficiary" shall mean the owner and holder, including pledgees, of the note secured hereby, whether or not named as Beneficiary herein.

30. *Acceptance.* Trustee accepts this Trust when this Deed, duly executed and acknowledged, is made a public record as provided by law. Trustee is not obligated to notify any party hereto of pending sale under any other Deed of Trust or of any action or proceeding in which Trustor, Beneficiary, or Trustee shall be a party, unless brought by Trustee.

31. *Trustor's charges.* Trustor shall pay to Beneficiary or to the authorized loan servicing representative of the Beneficiary a charge not to exceed \$60 for providing a statement regarding the obligation secured by this deed of trust as provided by Section 2954 of the Civil Code of the State of California.

32. *Governing law.* This Deed shall be construed according to the laws of the State of California.

33. *Notices.* The Trustor requests that a copy of any notice of default and of any notice of sale hereunder be mailed to him at the address above set forth.

James Alan Carson, Trustor

*(3) *Model Truth in Lending disclosure form*

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Current Legal Forms for Real Estate

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Current Legal Forms for Real Estate
Chapter 21 SALES AND EXCHANGES
Part IV. Forms
J. MORTGAGE FINANCING

25-21 Current Legal Forms for Real Estate FORM 21.104

FORM 21.104 Commercial building note and mortgage--building equipment included as collateral--parties' rights regarding rent defined--no recourse against borrower--New York

COMMENT

This is a note secured by a mortgage on a commercial building which the seller of the building accepts from the purchaser as part of the purchase price.

Building equipment and fixtures as collateral

As additional collateral for the payment of this note and mortgage, the mortgage covers "any and all articles of personal property attached to or used in any way in connection with the operation or renting of the premises." In the event of default, the mortgagee may take possession of the building or request the court to appoint a receiver to collect rents and operate the building. The right to possession of not only the building itself, but also the fixtures, equipment and furnishings necessary or desirable for the continued operation of the building and the collection of rent, can have significant economic effects. A substantial factor in the valuation of a commercial building is the amount of rent generated. Upon possession, the mortgagee is concerned not only with receiving sufficient cash flow to pay operating expenses but also maintaining rent-paying tenants in the building. The fixtures, equipment and furnishings for the operation of the building are therefore important security for the loan. Although fixtures, permanently attached to the building, are generally covered by the mortgage on the real estate, it may be advisable to take additional steps, under Article 9 of the Uniform Commercial Code, to perfect a security interest in personal property used in the operation of the building. Some practitioners take the additional step of perfecting a UCC security interest in fixtures as well.

Rent provisions

Specific and detailed provisions dealing with rent are included in this mortgage. The building owner is prohibited from accepting rent prepayments from tenants (paragraph 28), and rents are assigned to the mortgagee effective on default (paragraph 18). Upon default, the owner of the building is also required to pay rent, if it is an occupant in the building (paragraph 19).

No recourse

The mortgagee agrees not to sue on the note, but to resort solely to the security of the mortgage to recover any money due on the note. If, after foreclosure, there is a deficiency, the mortgagee may not seek a judgment against the mortgagor (note and paragraph 27 of the mortgage). However, the lender has required certain exceptions to the nonrecourse provision that makes the mortgagor personally liable for certain events that could otherwise result in damages to the lender, such as liability for environmental violations.

FORM

(1) Nonrecourse note

\$3,150,000

New York, New York
July 28, [year]

FOR VALUE RECEIVED, Central Offices, Inc., a New York corporation, having its principal place of business at 250 East 57th Street, New York, New York ("Maker"), promises to pay to 236 West 32nd Street Corporation of 926 Fifth Avenue, New York, New York ("Payee"), or order, at 926 Fifth Avenue, New York, New York, or at any other place designated in writing by the holder of this note, the principal sum of \$3,150,000, as follows: \$126,000 on November 1, _____ [year], and a like amount of \$126,000 on the first days of February, May, August, and November in each year thereafter, to be applied first to interest at the rate of 8 percent per annum computed from the date hereof, and the balance in reduction of the principal of this note, until August 1, _____ [year], when the entire unpaid principal balance, together with accrued interest on this note, shall become due and payable. The Maker of this note may prepay it in whole at any time after August 1, _____ [year], upon giving 30 days' prior written notice to the holder, without penalty or premium.

1. *Default.* The principal sum secured by this note shall become due at the holder's option on the happening of any default or event by which, under the terms of the mortgage securing this note, the principal sum may or shall become due and payable. All of the covenants, conditions, and agreements contained in the mortgage are made part of this instrument.

2. *No recourse.* This is a nonrecourse note and, anything herein to the contrary notwithstanding, Payee agrees for itself, its representatives, successors, endorsees, and assigns that (a) neither Maker nor its representatives, successors or assigns shall be personally liable on this note, it being intended that Maker's obligation to pay the principal of this note with interest thereon is included for the sole purpose of establishing the existence of the indebtedness represented hereby, and (b) in the event of default, Payee (and any such representative, successor, endorsee, or assign) shall look for payment solely to the security of the property which is the subject of the mortgage and will not make any claim or institute any action or proceeding against Maker (or any representative, successor or assign of Maker) for payment of this note (or for any deficiency remaining after application of the property which is the subject of the mortgage). Nothing contained herein, however, shall be construed to release or impair the indebtedness evidenced by this note, or of the lien upon the property mortgaged to secure it, or preclude the application of said mortgaged property to the

payment hereof in accordance with the terms of the mortgage.

Notwithstanding the aforesaid, Mortgagee may look to Maker and any principal of Maker for (i) misapplication of insurance proceeds, condemnation proceeds, tenant's security deposits, (ii) rent revenue and other income collected more than one month in advance (iii) rental revenue and other income collected after an event of default under the loan documents not applied to the debt service or operating expenses of the business, (iv) intentional damage to the mortgage premises, (v) failure to pay (or deposit into reserves held by Mortgagee) funds sufficient to pay taxes or other liens with priority over Mortgagee's loan documents, (vi) damages arising from any fraud or misrepresentation of Maker or any of its principals, and (vii) damages arising from the existence of hazardous or toxic substances or the failure of the mortgage premises to comply with environmental laws.

3. *Waiver.* Presentment for payment, notice of dishonor, protest, and notice of protest are waived.

4. *Mortgage.* This note is secured by a mortgage made by Maker to Payee of even date herewith, on property situate at 236 West 32nd Street, in the Borough of Manhattan, City and State of New York.

5. *Amendment.* This note may not be changed or terminated orally.

Central Offices, Inc.

By _____

Conrad Johnson, President

(2) Commercial building mortgage

THIS MORTGAGE made July 28, _____ [year], between Central Offices, Inc., a New York corporation, having its office and principal place of business at 250 East 57th Street, Borough of Manhattan, City and State of New York, the mortgagor, and 236 West 32nd Street Corporation, a New York corporation, having its office and principal place of business at 926 Fifth Avenue, Borough of Manhattan, City and State of New York, the mortgagee.

Witnesseth, that to secure payment of an indebtedness in the sum of \$3,150,000, lawful money of the United States, to be paid with interest thereon, according to a certain note or obligation bearing even date herewith, the mortgagor hereby mortgages to the mortgagee

All that certain plot, piece or parcel of land, situate, lying and being in the Borough of Manhattan, City, County and State of New York, bounded and described as follows:

[Insert Description of Property]

This mortgage and the accompanying note have been executed and delivered by authority of the mortgagor's Board of Directors.

Together with any and all articles of personal property attached to or used in any way in connection with the operation or renting of the premises, including all partitions, elevators, engines, motors, dynamos, boilers, furnaces, fuel oil, coal; heating, refrigerating, air-conditioning, plumbing, gas and electric light equipment; vacuum cleaning system, sprinkler system or other fire preventing or extinguishing equipment and materials; stoves, ranges, refrigerators, ice boxes, awnings, screens, window shades; furniture and furnishings for the common halls and lobbies; hotel, theatre, meeting

hall, club and lodge furnishings and equipment; also all other articles constituting a part of, or used in connection with the operation of, the plant of the mortgaged premises, to all of which the mortgagor represents that the mortgagor has title free from any prior liens or encumbrances, and all buildings, structures, improvements, fixtures and articles of personal property at any time hereafter constructed, affixed to or placed upon said premises or used in connection with the operation thereof. This provision shall apply to any personalty or fixtures, now or hereafter in the premises, even though any fixture or article of personal property may not form a part of the realty as a matter of law, or may not be essential to the support of the realty. It is intended that such fixtures and articles of personal property shall become a part of the mortgaged realty and be covered by the lien of the mortgage. If any security agreement is executed simultaneously with the execution hereof, the security agreement shall be deemed to be given by the mortgagor and accepted by the mortgagee as additional security and shall be in confirmation of the foregoing. The execution or delivery of such other security agreement shall not render the security interest or mortgage herein contained ineffective or without force, regardless of whether any financing statement or mortgage is filed or refiled, the security interest herein being, notwithstanding the execution and delivery of such security agreement, fully effective and operative. If any of the personal property or fixtures are placed in the premises by the mortgagor or any successor in interest subject to any conditional bill of sale, or subject to a security interest, the lien of this mortgage shall be deemed to include the equity and interest of the mortgagor or any such successor in interest in any of such personal property. In the event of any default hereunder, all the right, title and interest of the mortgagor or of any such successor in interest in and to any and all personal property is assigned to the mortgagee, together with any benefits of any deposits or payments theretofore made thereon by the mortgagor or any such successor in interest. The mortgagor grants to the mortgagee a security interest in all fixtures and personal property to the extent provided herein.

Together also with all awards made by any municipal, county, state, federal or other governmental authority to the present and all subsequent owners of the premises, including awards for any changes of grade of streets affecting the premises. All such awards are assigned to the mortgagee, and its legal representatives, successors and assigns. The mortgagee, for itself and its legal representatives, successors and assigns (at its or their option) is authorized, directed, and empowered to collect and receive the proceeds of all such awards from the authorities making the same and to give proper receipts and acquittances therefor, and to apply the proceeds toward the payment of the amount owing on account of this mortgage and its accompanying note, even though the amount owing on account of the mortgage and note is not then due and payable. The mortgagor, for itself and its legal representatives, successors, and assigns, agrees to and with the mortgagee and its legal representatives, successors, and assigns, upon demand by the holder, to make, execute, and deliver all assignments and other instruments sufficient for the purpose of assigning the awards to the holder of this mortgage, free, clear, and discharged of all encumbrances of any kind or nature.

And the mortgagor covenants with the mortgagee as follows:

1. *Payment of debt.* The mortgagor will pay the indebtedness as above provided.
2. *Insurance on real property.* The mortgagor will keep the buildings on the premises insured against loss by fire and all other hazards and casualties against which the mortgagee, from time to time, deems it advisable to be insured for its behalf. The mortgagor will assign and deliver to the mortgagee fully prepaid, unassigned, unpledged, and unencumbered policies of insurance required by the mortgagee. The unexpired premiums on such policies shall at all times likewise be unassigned, unpledged, and unencumbered, except that in the event of any default hereunder, any unearned premium on any policy of insurance for fire or any other insurance required by the mortgagee, is assigned to the mortgagee. The mortgagor will reimburse the mortgagee for any premiums paid for insurance by the mortgagee on the mortgagor's default in so insuring the buildings or in so assigning and delivering said policies. The provisions of subdivision 4 of Section 254 of the Real Property Law applying to insurance against loss by fire shall apply, so far as possible, to any other insurance required by the mortgagee hereunder.
3. *Insurance on personal property.* The mortgagor will insure and keep insured all of the articles of personal property, referred to above, against loss by fire or any other casualty or hazard against which the mortgagee from time to time

deems it advisable to be insured, for the mortgagee's benefit. This provision shall be construed in the same manner as the foregoing provision for the keeping of the buildings on the premises insured against loss by fire and any other casualty or hazard.

4. *Maintenance of building.* The mortgagor will maintain the buildings on the premises in good repair. If all or any portion thereof is rented or adopted for renting, the mortgagor will maintain same in good rentable condition at all times, whether or not occupied.

5. *Structural changes.* No structural changes shall be made to the building on the premises, and no building on the premises shall be removed or demolished, without the mortgagees' prior written consent.

6. *Payment defaults.* The entire principal sum, and the interest thereon, shall become due, at the mortgagee's option, after default in any of the following: in the payment of any installment of principal when due, or of interest for ten days; in the payment of any taxes, including corporate franchise taxes payable by any corporate owner of the premises, water rates, or assessments for 30 days; either in assigning or delivering the policies insuring the buildings against loss by fire, or any other hazard or casualty referred to in paragraph 2 hereof, or in reimbursing the mortgagee for premiums paid on such insurance; or upon request, in furnishing a statement setting forth the amount due on the mortgage and whether any offsets or defenses exist against the mortgage debt.

7. *Receiver.* The holder of this mortgage shall be entitled to the appointment of a receiver in any action to foreclose the same.

8. *Taxes.* The mortgagor shall pay all taxes, including corporate franchise taxes, assessments, and water rates, and, on demand, shall submit receipted bills therefor to the mortgagee. If the mortgagor fails to pay such taxes and assessments, the mortgagee may do so. If any duplication of payment results from the mortgagor's failure to submit receipted bills, mortgagor shall bear the costs of procuring a refund of duplicate payments.

9. *Debt statement.* The mortgagor, within six days upon request in person or within 15 days upon request by mail, will furnish a written statement, duly acknowledged, setting forth the amount due on this mortgage and whether any offsets or defenses exist against the mortgage debt.

10. *Notice.* All notices and demands or requests under this mortgage shall be served either in person or by registered or certified mail, postage prepaid, return receipt requested, addressed to the other party at its address set forth at the beginning hereof. Either party, however, may designate a different address by serving written notice of change of address on the other party, in the same manner.

11. *Warranty of title.* The mortgagor warrants the title to the premises.

12. *One parcel.* In case of a sale, the premises, or so much thereof as may be affected by this mortgage, may be sold in one parcel.

13. *Defaults.* The principal shall become due, at the mortgagee's option, upon the occurrence of any of the following events of default: (a) after default for 30 days, after notice and demand, in the payment of any installment of any present or future assessment for local improvement, which is, or may become, payable in installments, and which has affected, now affects, or may hereafter affect the premises, even if the installments are not due and payable when the notice and demand is made; (b) immediately after any structural change is made, or upon the actual or threatened demolition or removal of any present or future building on the premises, without the mortgagee's prior written consent. In such event, interest on the indebtedness secured by this mortgage shall be 12 percent per annum from the date that the unauthorized structural change, demolition, or removal commenced, but only if such interest rate is then less than 12 percent per annum; (c) upon any default in keeping the building and contents on the premises insured against loss by fire or any

other casualty or hazard, as required by paragraphs 2 and 3; or (d) if the buildings on the premises are not maintained in reasonably good repair or good rentable condition.

14. *Real estate and mortgage taxes.* If, after the date of this mortgage, the State of New York enacts any law that deducts the lien on land from the value of the land for tax purposes, or changes in any way the laws of taxation of mortgages, or debts secured thereby, for state or local purposes, or the manner of collecting such taxes, so as to affect such mortgage, the holder of the mortgage and of the debt secured thereby may, by giving 30 days' written notice, require the owner of the land to pay the mortgage debt. If such notice is given, the debt shall become due, payable, and collectible when the 30-day period expires.

15. *Mortgage foreclosure moratorium laws.* If this mortgage is now or hereafter protected or affected by moratorium laws, or by any other statutes preventing the mortgagee from foreclosing for nonpayment of the principal at the expiration date hereof, the mortgagor shall continue to pay amortization to the mortgagee (if the mortgagee so elects, and only so long as such laws or statutes protect the mortgagee from foreclosure for nonpayment of the balance of the principal debt), at the same rate existing during the last year of this mortgage, on its maturity date, and, thereafter, on the same days of the months provided for herein. If, however, the laws of New York State require, in connection with mortgages so protected or affected, that installment payments to the mortgagee amortizing such debt be greater, in aggregate per annum, than the aggregate per annum of the payments that would be due if based on such last year's payments, the mortgagee may elect, as soon as permitted after the debt matures, that the installments payable, after the installment required by this paragraph to be paid on the maturity date hereof, shall be at the rate and as provided for in such laws. If the mortgagor defaults in paying any such amortization installment on its due date, the mortgagee may foreclose solely by reason of such default.

16. *Litigation expenses.* If any action or proceeding is commenced (except an action to foreclose this mortgage, or to collect the debt secured thereby) and to which the holder of this mortgage is made a party, or in which it becomes necessary to defend or uphold the lien there of, all sums paid by the holder for the expense of any litigation to prosecute or defend the rights and lien created by this mortgage (including reasonable counsel fees), shall be paid by the mortgagor, together with interest thereon at 10 percent per annum. Any such sum, and the interest thereon, shall be a lien on the premises before any right or title to, interest in, or claim upon the premises attaches or accrues, subsequent to the lien of this mortgage, and shall be deemed to be secured by this mortgage and by the note secured thereby. In any action or proceeding to foreclose this mortgage, or recover or collect the debt secured thereby, the provisions of law respecting the recovery of costs, disbursements, and allowances shall not be affected by this covenant.

17. *Violations.* If the premises, as they exist or are used, or because of changes in their physical condition or use, are or may become in violation of any New York State statute, or any other applicable local or municipal law, including zoning ordinances, labor laws, multiple dwelling laws, building codes, fire ordinances, and the like, or if the premises may become in violation of any environmental law, federal, state or local, the mortgagor shall take immediate steps to alter the premises to comply with such laws or to remediate such environmental condition. In any such event, (a) the alteration, repair, or remediation shall proceed with all due diligence and be completed within a reasonable time, and (b) there shall be submitted to the mortgagee, upon completion (i) receipted bills evidencing the payment of the cost of such work, and (ii) satisfactory proof that no liens or encumbrances have been, or will be, filed on account thereof. If the alterations or repairs require filing and approval of plans or specifications by a governmental department, the plans and specifications must first be approved by the mortgagee. The mortgagor, on completion, shall procure and exhibit to the mortgagee a Certificate of Occupancy issued by such governmental department, and a Notice of Dismissal of all violations, or No Further Action letter. If the alterations do not require filing and approval of plans, the mortgagor shall produce, on completion, a Notice of Dismissal of all violations or other evidence of its remediation. For the purpose of this mortgage, any attempted compliance with the above by the partial, or total, vacating of the premises, shall not be considered compliance with the requirements hereof. On any occasion, when the premises are deemed to be in violation of any law, order, decree, code, violation or requirement, it shall be deemed so to be on the assumption that the premises are, or will be, fully occupied. The repairs and alterations to be made, in order to comply with the foregoing, shall

include all unoccupied portions of the premises with like effect as though they were fully occupied.

18. *Assignment of rents.* In the event of any default hereunder, by the mortgagor or any subsequent owner of the premises, the rents and profits of the mortgaged premises are assigned to the holder of the mortgage as further security for the payment of the indebtedness. Immediately upon the occurrence of any default or breach, the mortgagee may immediately, with the irrevocable consent of the mortgagor, or any subsequent owner or person then in possession, given and evidenced by the execution of this mortgage, enter upon and take possession of the premises, including any portion occupied by the mortgagor or any subsequent owner. At the option of the mortgagee, such entry and taking of possession shall be accomplished either by actual physical entry and taking of possession or by written notice given personally or by mail addressed to the owner at his address as it then appears on the mortgagee's records. Such entry and taking of possession may be so accomplished irrespective of the pendency of any action of foreclosure by the mortgagee or any junior lienor. Simultaneously with such actual physical entry and taking of possession or the giving of written notice, the rents, issues, profits and all other amounts accrued, and accruing, to the owner by reason of the ownership of the premises, including deposits held as security under leases, thereupon shall be deemed to be assigned as security to the mortgagee, together with the leases and all other documents evidencing such rents, issues, profits and other amounts, including deposits held as security under leases. For the purpose of giving immediate effect to such assignment, no other or further instrument of assignment or other document shall be necessary or requisite. The mortgagee may then let all or any part of the premises, collect and receive all the rents, issues, profits, and other amounts past due, due, or to become due to the mortgagor or any subsequent owner of the premises by reason of such ownership, and apply the same after payment of all necessary charges and expenses in connection with the operation of the premises, including any managing agent's commission, at the mortgagee's option, on account of the interest, amortization, taxes, water charges and assessments, insurance premiums, and any advance made by the mortgagee for the account of the mortgagor, or on account of the debt hereby secured.

19. *Rent upon possession.* In the event of entry, of taking of possession by the mortgagee pursuant to the above provisions, or of the appointment of a receiver of rents or profits in any action brought by the mortgagee under this mortgage, the mortgagor or any subsequent owner, if in possession of any portion of the mortgaged premises, shall be obligated to pay to the mortgagee or to the receiver of rents, a reasonable rental monthly in advance for the portion of the premises so occupied. If a receiver is appointed by reason of such default or breach, the amount of rent payable shall be determined upon an application to be made by the receiver to the court for a determination of the reasonable rental value payable by the mortgagor, or any subsequent owner. In the event of a default in the payment of any advance monthly rent, to be determined as above stated, the mortgagor, or any subsequent owner, may be dispossessed by the usual summary proceedings in the same manner that any defaulting tenant may likewise be dispossessed.

20. *Assignment.* The mortgagor shall not assign, pledge, or otherwise alienate any rents, issues, or profits from the premises without the mortgagee's prior written consent and any such attempted assignment, pledge, or alienation shall be subject and subordinate to the rights of the mortgagee.

21. *Proportionate income payments.* If, at any time, the income of the property is any criterion of the amount of interest, or amortization, payable by the owner, either by operation of any law, or otherwise, the portion of the mortgaged premises occupied by the owner shall be treated as income producing and the reasonable rental value thereof shall be treated as additional income from the mortgaged premises.

22. *Books and records.* If by law, or the provisions hereof, the amount of income from the premises is any basis for a determination of the amounts payable to the mortgagee, the mortgagor shall make its books, records and vouchers of income and disbursements available for inspection by the mortgagee at any time, upon the mortgagee giving mortgagor five days' prior written notice.

23. *Accounting.* The mortgagor, or any subsequent owner of the premises, upon demand, shall furnish to the mortgagee or any subsequent holder of this mortgage, a full and complete statement of all income and expenses incurred in the

operation and maintenance of the premises.

24. *Trust funds.* In compliance with Section 13 of the Lien Law, the mortgagor shall receive the advances secured by this mortgage, and hold the right to receive such advances, as a trust fund to be applied first for the purpose of paying the cost of the improvement, and the mortgagor shall apply the advances first to the payment of the cost of the improvement before using any part of them for any other purpose.

25. *Acceleration.* Upon the breach of any covenant hereof, at the option of the mortgagee, or any subsequent holder of this mortgage, the entire principal sum secured hereby shall become due and payable, and the mortgagee, or any subsequent holder hereof, may foreclose this mortgage.

26. *Sundays and holidays.* If the date for payment of all or any part of the principal sum secured by the note to which this mortgage is collateral falls on a Sunday or any public holiday other than a half holiday, it is understood and agreed that interest thereon at the rate provided for therein shall be paid to the actual date of payment of such principal sum.

27. *No recourse.* The mortgagee shall not exercise its right to institute any action at law against the mortgagor for the payment of any sum of money which is or may be payable under the note secured hereby, other than the right to foreclose, which is specifically reserved; nor shall it seek against the mortgagor any judgment for a deficiency in any action to foreclose this mortgage, provided, however, that nothing shall be, or be deemed to be, a release or impairment of the indebtedness, or of the lien thereof upon the Premises, or preclude the holder of the note secured by the mortgagee from foreclosing the mortgage in case of any default, or from enforcing any and all rights under and by virtue of the mortgage.

Notwithstanding the aforesaid, the mortgagee may look to mortgagor and any principal of mortgagor for (i) misapplication of insurance proceeds, condemnation proceeds, tenant's security deposits, (ii) rent revenue and other income collected more than one month in advance (iii) rental revenue and other income collected after an event of default under the loan documents not applied to the debt service or operating expenses of the business, (iv) intentional damage to the mortgage premises, (v) failure to pay (or deposit into reserves held by mortgagee) funds sufficient to pay taxes or other liens with priority over mortgagee's loan documents, (vi) damages arising from any fraud or misrepresentation of mortgagor or any of its principals, and (vii) damages arising from the existence of hazardous or toxic substances or the failure of the mortgage premises to comply with environmental laws.

28. *Rent prepayment.* The mortgagor shall not accept the prepayment of rent under any leases for a period of more than one month.

29. *Purchase money.* This is a Purchase Money Mortgage given to secure a portion of the purchase price of the mortgaged premises conveyed this day from the mortgagee, as seller, to the mortgagor, as purchaser.

30. *Late payment penalty.* If default is made in the payment of the indebtedness when due, pursuant to the terms hereof, the mortgagee shall be entitled to receive interest on the entire unpaid principal sum at the legal rate of interest at the time of such default, at 10 percent, or at the highest rate of interest set forth herein or in the obligation secured by the mortgage, whichever is the greater, to be computed from the due date and until the actual receipt and collection of the entire indebtedness. This charge shall be added to and be deemed secured by the mortgage. The within clause, however, shall not be construed as an agreement or privilege to extend the mortgage, nor as a waiver of any other right or remedy accruing to the mortgagee by reason of any such default.

31. *Collection fees.* If the mortgage is referred to attorneys for collection or foreclosure, the mortgagor shall pay all sums, including reasonable attorney's fees, incurred by the mortgagee, together with all statutory costs, disbursements and allowances, with or without the institution of an action or proceeding. All such sums with interest thereon at the rate set forth herein shall be deemed to be secured by the mortgage and collectible out of the mortgaged premises.

32. *Late charge.* If any payment provided for herein is made more than 15 days after the due date thereof, a "late charge" of four cents for each \$1 of such payment shall become immediately due to the mortgagee as liquidated damages for failure to make prompt payment. Such charge shall be payable not later than the due date of the next payment, and shall be secured by such mortgage.

33. *Condemnation.* In the event of condemnation, the mortgagee shall not be limited to the interest paid on the award by the condemning authority but shall be entitled to receive out of the award interest on the entire unpaid principal sum at the rate herein provided. The mortgagor assigns to the mortgagee so much of the balance of the award payable by the condemning authority as is required to pay such total interest.

34. *Ownership change fee.* For recording on its records a change of ownership of the mortgaged property, the mortgagee shall be entitled to receive a fee of \$50, except that in no event shall this fee be payable if it would render the loan usurious under the laws of the jurisdiction where the property is situated.

35. *Prepayment.* The mortgagor may prepay this mortgage in whole without penalty or premium after eight years from the date hereof, by giving the holder of the mortgage 30 days' prior written notice.

36. *Rent roll statement.* The mortgagor shall furnish to the mortgagee, within 15 days after the mailing by the mortgagee of a written request therefor, a detailed certified statement in writing, duly sworn, showing all income derived from the operation of the premises, and all disbursements made in connection therewith, and containing a list of the names of all tenants of the premises and all occupants other than those claiming possession through such tenants, the portion or portions of the premises occupied by each such tenant and occupant, the rent and other charges payable under the terms of their leases or other agreements, and the periods covered by such leases or other agreements. Such statement shall cover the period of time specified in the request.

37. *Corporate authority.* The execution and delivery of this mortgage has been duly authorized by the mortgagor's Board of Directors, and the mortgagor's certificate of incorporation does not require any vote or consent of the shareholders to authorize the making of this mortgage.

38. *Insurance proceeds.* If the buildings on the mortgaged premises are damaged by fire or other insured casualty, the mortgagee shall deliver to the owner of the premises the loss proceeds, if any, received from the insurance companies by appropriate progress payments if the work or repair and rehabilitation progresses to full restoration to the reasonable satisfaction of the mortgagee. Any excess of moneys over the cost of restoration of the damaged buildings is to be applied toward reduction of the mortgage principal or returned to the owner at the mortgagee's discretion. No moneys shall be delivered to the owner if the mortgage is in arrears or under foreclosure, and any loss under the fire insurance policies, as stated in the loss payable clause, shall be payable to the mortgagee.

39. *Undisclosed principals.* The covenants to pay the indebtedness contained herein shall be binding only upon the mortgagor, and not upon any disclosed or undisclosed principal or any other person or corporation.

40. *Entire agreement; modification.* This instrument constitutes the entire agreement between the parties. No modification or discharge of this mortgage shall be effective unless it is in writing and signed by the party, or by its duly authorized agent, against whom enforcement of the change or discharge is sought.

41. *Binding effect.* This instrument shall be binding upon and inure to the benefit of both parties and their respective heirs, legal representatives, successors, and assigns.

42. *Governing law.* This mortgage shall be construed in accordance with and governed by the laws of the State of New York.

43. *Headings.* Headings in this instrument are for convenience and reference only and are not deemed to be a part thereof.

44. *Non-waiver.* No delay or failure by either party to exercise any right under this mortgage, and no partial or single exercise of such right, shall constitute a waiver of that or any other right, unless otherwise expressly provided herein.

45. *Counterparts.* This instrument may be executed in one or more counterparts, each of which shall be deemed an original but all of which together shall constitute one and the same instrument.

This mortgage has been duly executed by the mortgagor.

[Corporate Seal]

Central Offices, Inc.

Attest:

Barbara Smith, Secretary

By: _____
Conrad Johnson, President

[Acknowledgment]



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Current Legal Forms for Real Estate

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Current Legal Forms for Real Estate
Chapter 21 SALES AND EXCHANGES
Part IV. Forms
J. MORTGAGE FINANCING

25-21 Current Legal Forms for Real Estate FORM 21.105

FORM 21.105 Wraparound mortgage--loan evidenced by promissory note and secured by second mortgage

COMMENT

A wraparound mortgage is a form of second mortgage and is subordinate to an existing first mortgage or other prior mortgages, on the real property involved. The first mortgage remains outstanding and unsatisfied but the face of a wraparound mortgage restates the actual indebtedness by adding in the unpaid balance of the first mortgage to raise the total. The wraparound contains a special provision for payment of the debt service on the first mortgage. The loan is otherwise evidenced and secured by the usual form of promissory note and a second or junior mortgage. The annual debt service is figured on the over-stated face amount so the wraparound mortgage interest rate is always greater than the interest rate on the first mortgage alone.

Prior mortgage payments

The wraparound lender agrees, when he receives his interest payments on the wraparound mortgage, to deduct and remit directly to the first mortgagee the required debt service on the first mortgage. If the wraparound lender does not receive the debt service on the wraparound mortgage, he has no obligation to remit the payments on the first mortgage. Failure to pay debt service on a wraparound mortgage constitutes a default under that mortgage. In addition, the borrower expressly agrees not to make any further payments to the first mortgagee on account of the first mortgage.

Borrower's obligations

The wraparound mortgage usually contains covenants by the borrower identical with those in the

first mortgage, including escrow of taxes and insurance premiums which, on receipt by the wraparound lender, will be remitted to the first mortgagee. The first mortgage must not contain covenants personal to the borrower and which cannot be cured or complied with by the wraparound mortgagee. The wraparound borrower agrees to comply with all nonmoney covenants in the first mortgage and a default in the first mortgage is deemed a default in the wraparound mortgage.

The borrower also has the following obligations:

- (1) Notification to the first mortgagee that payments of debt service, as well as any prepayment or payment after acceleration, are to be received from the wraparound mortgagee, in his behalf;**
- (2) Authorization of acceptance of such payments by the first mortgagee or prior mortgagees;**
- (3) Direction of due delivery to the wraparound lender of all notices by the lender under the first mortgage.**

Economic advantages

A hybrid mortgage of this type permits a lender to advance funds to a borrower in excess of an existing first mortgage, or to enable the borrower to obtain terms different from those of the existing first mortgage, without requiring the discharge of the existing mortgage. Usually, the wraparound mortgagee advances the difference between the amount due on the existing mortgage and the amount of the wraparound mortgage to the mortgagor. However, the wraparound mortgagee may instead give the borrower terms that are considerably different from those of the existing mortgage. In either case, the wraparound mortgagee takes over the obligations in connection with the existing mortgage. The borrower need no longer deal with the original mortgagee.

FORM

This Mortgage Agreement, made this June 29, _____ [year], between John Gigante & Sons, Inc., a New York corporation, having its office at 370 Fifth Avenue, New York, New York ("Mortgagor"), and Panadyne Corporation, a New York corporation, having its office at 37 Park Avenue, New York, New York ("Mortgagee").

Recitals

Mortgagor is the owner of the fee simple title to the real estate and the buildings and improvements thereon, situated and being in the County of Westchester, State of New York (collectively, the "Mortgaged Premises"), more particularly described in Exhibit A attached to this agreement.

The consideration for this mortgage is \$680,166.03, representing cash advanced by Panadyne Corporation, and \$1,769,833.97 representing the assumption, by Panadyne Corporation of the interest and principal payments under the First Mortgage (the "Wraparound Mortgage").

The Mortgaged Premises are subject to, and the Wraparound Mortgage is subordinate to, a certain mortgage note and

mortgage securing such note (collectively, the "First Mortgage"). The note by its terms matures on January 1, _____ [year]. The mortgage and the mortgage note, both of which are dated August 3, _____ [year], were originally made between Morris Management Corporation, as mortgagor, and Merchants Bank of New York Trust Company, as mortgagee. The mortgage was recorded in the Clerk's Office of the County of Westchester on August 5, _____ [year], in Liber 6862 of Mortgages on Page 6. The mortgage and mortgage note were subsequently assigned by Merchants Bank of New York Trust Company to Massachusetts General Life Insurance Company by assignment dated June 24, _____ [year] and recorded in the Clerk's Office of the County of Westchester on January 5, _____ [year], in Liber 6994 on Page 44. The mortgage constitutes a first mortgage lien upon the Mortgaged Premises described in Exhibit A attached hereto, the principal balance of which is \$1,769,833.97 as of the date of this agreement, the Mortgagor on the date hereof having made the principal payment coming due on July 1, _____ [year].

Now, therefore, the parties agree as follows:

1. *Wraparound mortgage.* The principal amount due to the mortgagee by the mortgagor is \$2.45 million. This sum represents \$680,166.03, the amount advanced by the mortgagor to the mortgagee upon the execution of this agreement, plus \$1,769,833.97, representing the mortgagee's assumption of the interest and principal payments under the First Mortgage.

2. *Interest.* The interest rate payable on the principal sum of the Wraparound Mortgage shall be 10 percent per annum. Such interest shall commence to accrue on June 29, _____ [year].

3. *Payments.* The principal sum of the Wraparound Mortgage, together with interest thereon at 10 percent per annum, shall be payable as follows: Constant equal monthly payments of \$34,166.66 each shall be paid on the 15th of each calendar month, starting on July 15, _____ [year], and ending on January 15, _____ [year], at which date the entire unpaid principal balance of the Wraparound Mortgage, together with accrued interest, shall be due and payable. Each constant monthly payment when received shall be applied first in payment of interest on the unpaid balance, and the balance in reduction of the unpaid principal sum.

4. *Payments on first mortgage*

(a) *Payment.* Mortgagee shall pay to the holder of the First Mortgage, the \$1,769,833.97 unpaid principal balance of the First Mortgage, together with all interest thereon accruing thereunder from and after June 29, _____ [year], as and when required by the terms of the First Mortgage, that is, by paying the constant monthly installments of principal of \$14,333.33 before the expiration of the applicable grace periods provided for such payments as contained in the First Mortgage.

(b) *Other obligations.* With the sole exception of the payments of principal, and of the interest due thereon after June 29, _____ [year], Mortgagee does not assume any of Mortgagor's obligations under the First Mortgage. Mortgagee's obligation to make the above payments of principal and interest under the First Mortgage shall be solely for the benefit of Mortgagor hereunder or any subsequent owner of the Mortgaged Premises, and shall not inure to the benefit of, or be enforceable by, any third person or party, and specifically not the holder of the First Mortgage.

5. *Prepayments of first mortgage.* Mortgagee shall not make any prepayments of principal or of interest under the First Mortgage, without Mortgagor's prior written consent. Mortgagee, however, may prepay all or any part of the First Mortgage if Mortgagor commits a default under either the First Mortgage or the Wraparound Mortgage, or in any other instance in which this agreement grants Mortgagee the express or implied right to make prepayments of the First Mortgage. Such implied right shall arise whenever a prepayment right is necessary or appropriate for Mortgagee to have the benefit of some other right granted to it under the Wraparound Mortgage (for example, Refinancing mentioned in

paragraph 35).

6. *Modification of first mortgage.* Mortgagor shall not exercise any right or privilege of prepayment (in whole or in part) of principal or interest under the First Mortgage, and shall not enter into any agreement with the holder of the First Mortgage modifying or amending any of its provisions, including the provisions dealing with payment of principal or interest, without Mortgagee's prior written consent.

7. *Obligations of mortgagor--first mortgage*

(a) *Performance.* Mortgagor shall comply with all of the terms, covenants, and conditions of the First Mortgage, other than with respect to the payment of the monthly constant payments of principal and interest due under the First Mortgage.

(b) *Default.* If Mortgagor shall fail to comply with any term, provision, or condition of the First Mortgage within five days before the expiration of any applicable grace period provided for in the First Mortgage, and Mortgagor's noncompliance results in a default thereunder (other than with respect to payment of the constant monthly payments), such failure shall automatically constitute a default under the Wraparound MORTGAGE. Such deemed default shall, in turn, entitle Mortgagee to exercise any or all of the same rights and remedies given to it in the Wraparound Mortgage in the event of a default in the payment of principal or interest thereunder.

8. *Principal reductions.* If the unpaid principal balance of the First Mortgage is reduced either by application by the holder of the First Mortgage of insurance proceeds or condemnation proceeds in reduction of the principal balance, or by prepayments made by Mortgagor with Mortgagee's prior written consent, so that in either event Mortgagee's obligation under the Wraparound Mortgage to pay the holder the unpaid principal balance of the First Mortgage is similarly reduced, Mortgagee agrees that Mortgagor's obligation to pay the principal indebtedness to Mortgagee under the Wraparound Mortgage, shall be likewise reduced by an equivalent amount, which shall be deducted from the payment Mortgagor is to make to Mortgagee under the Wraparound Mortgage at maturity. Such deduction, however, shall not operate to reduce Mortgagor's obligation to make the constant monthly payments (of principal and interest) due and payable under the Wraparound Mortgage.

9. *Grace period.* If Mortgagee defaults in making any required constant payment (of principal interest) under the First Mortgage, at least five days before the expiration of the applicable grace period therefor, Mortgagor may advance the necessary funds to cure such default. All funds so advanced by Mortgagor, together with interest thereon at the rate of 10 percent per annum, shall be credited against the next installment(s) of the interest and principal due under the Wraparound Mortgage.

10. *Title searches and defects.* Each month hereafter, Mortgagor shall furnish or cause to be furnished, at its expense, a continuation title search issued by The Urban Title Guaranty Company (the "Title Company"), showing the status of the title records in the Office of the County Clerk of Westchester County, respecting any liens or encumbrances which are filed against the Mortgaged Premises except the lien of the First Mortgage, the Wraparound Mortgage, and any other liens or encumbrances which were recorded at the date of this agreement. If a Title Company search discloses the entry of any liens or encumbrances, other than liens upon personal property created by occupancy tenants, Mortgagor shall cause the liens or encumbrances to be forthwith discharged of record by bonding or otherwise. If Mortgagor fails to do so within ten days after receiving written notice from Mortgagee, such failure shall constitute a default under the Wraparound Mortgage and entitle the Mortgagee to accelerate the maturity date thereof immediately, and Mortgagee may advance funds necessary to effect a discharge of such liens or encumbrances. All funds so advanced, together with interest thereon at the rate of 12 percent per annum (or lesser percentage, not exceeding the maximum rate legally collectible if 12 percent exceeds the maximum legal rate), shall be payable by Mortgagor to Mortgagee on demand, and shall be recoverable by Mortgagee in addition to all principal and interest then due on the Wraparound Mortgage, and shall be treated as part of the principal debt thereon for which the Wraparound Mortgage shall stand as security.

11. *Casualty and condemnation.* Notwithstanding any contrary provision above:

(a) *Casualty.* In case of casualty to any portion of the Mortgaged Premises resulting in damage or destruction, all insurance moneys paid to Mortgagee, less any actual costs, fees and expenses incurred in connection with the adjustment of the loss, and provided no default exists under the terms of the Wraparound Mortgage, shall be made available to Mortgagor from time to time towards the cost of restoring the Mortgaged Premises, as the work of restoration progresses. Such payments shall be made on the certification of an independent, reputable licensed architect of the Mortgagor or of the then owner of the Mortgaged Premises, showing the amounts actually expended or incurred in connection with such restoration. This provision shall be further conditioned on proof satisfactory to Mortgagee being submitted to Mortgagee in writing before the request for release of any proceeds, that the cost of such restoration will not exceed the net amount of the insurance proceeds actually collected. If it is determined that the cost of restoration will exceed the net amount of such proceeds, Mortgagor shall deposit with Mortgagee sufficient funds (or security therefor reasonably acceptable to Mortgagee) which, when added to the net insurance proceeds collected, shall be adequate to pay for the complete restoration. If the amount of the net insurance proceeds received by Mortgagee from the insurance carrier, plus any additional funds paid by Mortgagor, exceeds the actual amount necessary to effect such restoration, then after the completion of such restoration, any balance remaining in Mortgagee's hands shall be applied by Mortgagee to the payment of principal due under the Wraparound Mortgage at maturity. However, no such principal payments shall operate to reduce Mortgagor's obligation to make the constant monthly payments (of principal and interest) due and payable under the Wraparound Mortgage. The provisions of this subparagraph (a) are subject to the rights of the holder of the First Mortgage. Prior to release of funds under this subparagraph (a) or subparagraph (b), Mortgagor shall submit proof satisfactory to Mortgagee that there are no claims for mechanics liens.

(b) *Eminent domain.* In the event of any partial taking of the Mortgaged Premises in condemnation or by right of eminent domain, Mortgagee shall, if Mortgagor is not in default in performing any covenant or agreement contained herein, make the net award paid to Mortgagee, less all expenses incurred in effecting collection thereof, available from time to time as work progresses to Mortgagor or the then owner of the Mortgaged Premises for the purpose of restoring the improvements thereon to a complete architectural unit. Such award shall be made available to Mortgagor or the then owner of the Mortgaged Premises in the same manner and under the same conditions as required in the case of fire insurance proceeds under subparagraph (a) of this paragraph. The preceding provision shall apply only if Mortgagor or the then owner of the premises proceeds, with reasonable diligence, to so restore the improvements. The provisions of this subparagraph (b) are subject to the rights of the holder of the First Mortgage.

12. *Reimbursement.* If Mortgagor defaults in performing any covenant or condition hereof, Mortgagee may perform such covenant or condition. In such case, the expense thereof, together with interest at 12 percent per annum (or lesser percentage, not exceeding the maximum rate legally collectible, if 12 percent exceeds the maximum legal rate) from the date the expense is incurred until the date Mortgagor reimburses Mortgagee, shall immediately be due and payable from Mortgagor to Mortgagee, and be secured by the Wraparound Mortgage.

13. *Financial and operating reports.* Mortgagor shall furnish Mortgagee, within 30 days after Mortgagee mails a written request (but not more than once in any year), a detailed statement, signed by Mortgagor (or by one of its duly authorized officers if it is a corporation, or by a general partner if it is a partnership), covering the period specified in such request. The statement shall show all income derived from the operation of the Mortgaged Premises and all disbursements made in connection therewith, and a rent roll listing all tenants (which may be by apartment or office numbers instead of names) of the Mortgaged Premises, the rent and other charges payable under the terms of their leases or other agreements, and the expiration dates of their leases. The Mortgagee and its authorized representatives shall have the right to enter and inspect the Mortgaged Premises at all reasonable times.

14. *Covenants run with land.* The covenants contained in this agreement shall run with the land and bind Mortgagor, its successors and assigns, and all subsequent owners, encumbrancers, tenants, and subtenants of Mortgaged Premises, and

shall inure to the benefit of the Mortgagee, its personal representatives, successors, and assigns, and all subsequent holders of the Wraparound Mortgage.

15. *Attorneys' fees; defenses waived.* Mortgagor shall pay Mortgagee its reasonable attorneys' fees if (a) any mortgage secured by the Wraparound Mortgage is placed in the hands of an attorney for collection, either after maturity or upon Mortgagor's default; (b) legal proceedings are instituted for the recovery of all or part of such note, or for interest thereon; or (c) such note is placed in the hands of an attorney to protect the rights of the holder or to enforce any agreement contained in the Wraparound Mortgage. Mortgagor waives any defense, setoff, or counterclaim (except those resulting from Mortgagee's failure to make the constant monthly payments under the First Mortgage, as provided in paragraph 4(a)) in any action or proceeding to enforce payment or any other provision of the Wraparound Mortgage.

16. *Condemnation; application of proceeds.* If all or part of the Mortgaged Premises are taken in condemnation by any governmental authority, the Wraparound Mortgage and the notes secured by it, after vesting of title in such condemnation and until paid, shall nevertheless continue to bear interest at the rate of 10 percent per annum (or lesser percentage not exceeding the maximum rate legally collectible if 10 percent exceeds the maximum legal rate). If the rate of interest on the condemnation award is less than the 10 percent rate, Mortgagor covenants to pay to Mortgagee the difference between the 10 percent interest and the interest paid by the government or condemning authority, computed upon the unpaid principal from the date to which interest on the Wraparound Mortgage has been paid to the date of payment of the award to the Mortgagee. Mortgagor assigns to Mortgagee so much of the award in such condemnation as is required to pay the difference in interest. The foregoing assignment of the award is in addition to, and not in derogation or limitation of, the rights in and claim to any condemnation award for the taking of the whole or part of the Mortgaged Premises which, by virtue of the Wraparound Mortgage or by operation of law, Mortgagee may have for the principal and interest under the Wraparound Mortgage unpaid and accrued on the date of the vesting of title in such condemnation.

17. *Leases.* Mortgagor shall not cancel, abridge, or otherwise modify existing or future tenancies, sub-tenancies, leases, or sub-leases of the Mortgaged Premises, or accept prepayment of installments of rent without Mortgagee's prior written consent, which it shall not unreasonably withhold or delay. However, Mortgagor may cancel any lease, without Mortgagee's consent, if simultaneously therewith Mortgagor enters into a new lease with a replacement tenant, and (a) the new tenant has a net worth equal to or greater than the net worth of the tenant under the cancelled lease; (b) the annual rental payable under the new lease is not less than the annual rental payable under the cancelled lease; and (c) the new lease is for a term not less than the term remaining of the cancelled lease.

18. *Notices and payments.* Mortgagor shall promptly send to Mortgagee copies of all notices received by it from the holder of the First Mortgage. Mortgagee shall send to Mortgagor, at the time the Mortgagee makes each monthly constant payment to the holder of the First Mortgage, an advice that each such payment has been made. (A copy of Mortgagee's transmittal letter, if any, will suffice).

19. *Continuing obligations.* Mortgagor's obligations under the Wraparound Mortgage, and the mortgage notes which it is given to secure, shall continue until the entire debt is paid, notwithstanding any action or actions of partial foreclosure which are brought to recover any amount or amounts for installments of principal, interest, taxes, assessments, water rates, vault taxes or fire insurance premiums, or other payments due and payable under the provisions of the Wraparound Mortgage.

20. *Mortgage tax.* If it is determined by any competent governmental authority that United States or New York State mortgage taxes are due on any mortgage note secured by the Wraparound Mortgage, Mortgagor shall pay such taxes, together with any accrued penalty.

21. *Waiver.* No delay or omission by Mortgagee to exercise any right, power, or remedy accruing under the Wraparound Mortgage shall be construed to be a waiver of any default or acquiescence. A waiver in one or more instances to

exercise any right, power, or remedy shall apply only to the particular instance or instances, and at the particular time or times only. No such waiver shall be deemed a continuing waiver, but every term, covenant, provision, or condition establishing such right, power, or remedy shall survive and continue to remain in full force and effect.

22. *UCC documents.* At Mortgagor's request, the Mortgagor shall execute and deliver Uniform Commercial Code Financing Statements, in duplicate, covering the fixtures, chattels, and articles of personal property subject to the lien of the Wraparound Mortgage.

23. *Municipal requirements.* Mortgagor shall promptly pay and discharge all license fees or similar charges, with penalties and interest, which are imposed by the municipality in which the Mortgaged Premises are situated, for the use of vaults, chutes, areas and other space beyond the lot line and under or abutting the public sidewalks in front of or adjoining the Mortgaged Premises. Mortgagor shall promptly cure any violation of law and comply with any order of the municipality in which the Mortgaged Premises are situated respecting the repair, replacement, or condition of the sidewalk or curb in front of or adjoining the Mortgaged Premises. If Mortgagor defaults in any of the above, Mortgagee may pay any or all of the license fees or similar charges with penalties and interest, and the municipality's charges for such repair or replacement. In such event, Mortgagor shall, on demand, repay Mortgagee for all amounts expended, with interest thereon at 12 percent per annum (or lesser percentage, not exceeding the maximum rate legally collectible, if 12 percent exceeds the maximum legal rate) from the date the expenses are incurred until the date Mortgagor reimburses Mortgagee. Such amounts shall thereupon be liens on the Mortgaged Premises and secured by the Second Mortgage.

24. *Further instruments.* The Wraparound Mortgage is a security agreement which covers, and the Mortgaged Premises includes, both real and personal property and all other of Mortgagor's rights and interests, whether tangible or intangible in nature, in the Mortgaged Premises. Mortgagor shall, at Mortgagee's request deliver to Mortgagee all further instruments required by Mortgagee in order to further secure and perfect the lien of the Wraparound Mortgage.

25. *Severability.* If any term, covenant, or condition of the Wraparound Mortgage is held to be invalid, illegal, or unenforceable in any respect, the Wraparound Mortgage shall be construed without such provision.

26. *Governing law; cumulative rights.* The terms of the Wraparound Mortgage shall be construed under the laws of the State of New York. The rights of Mortgagee shall be separate, distinct, and cumulative, and none shall be given effect to the exclusion of the others. No act of Mortgagee shall be construed as an election to proceed under any one provision herein to the exclusion of any other provision.

27. *Prepayment penalty.* Mortgagor may prepay in full the unpaid balance of the indebtedness under the Wraparound Mortgage at any time by giving Mortgagee at least 90 days prior written notice, by paying the principal and interest due plus a prepayment fee as follows: During the first loan year, 3 percent of the then principal amount; thereafter the prepayment fee will reduce by one half of 1 percent each loan year until the prepayment fee is reduced to 1 percent, the 1 percent to prevail during the remaining term of the loan. A "loan year" shall be any one year beginning on the date of this agreement or any anniversary hereof. If Mortgagor prepays the entire unpaid principal balance of the indebtedness under the Wraparound Mortgage, such amount shall include all prepayment charges due under the First Mortgage. In addition, if Mortgagee makes all prepayment of the First Mortgage, either in whole or in part, and pays to the holder of the First Mortgage a prepayment fee, the amount of the prepayment fee shall be added to and become part of the principal of the Wraparound Mortgage, and shall bear interest of 10 percent per annum (or lesser percentage not exceeding the maximum rate collectible, if 10 percent exceeds the maximum legal rate).

28. *Subsequent liens.* No further mortgage may be placed by Mortgagor against all or any part of the Mortgaged Premises unless such mortgage contains express language satisfactory to Mortgagee subordinating the mortgage to the lien of the Wraparound Mortgage and to all the provisions thereof, including the full principal indebtedness of the Wraparound Mortgage as such indebtedness may be reduced by the application of a portion of the constant monthly

payments thereunder in amortization of the principal indebtedness and all past and future advances made or to be made by Mortgagee. The placing, by Mortgagor, or by any subsequent fee owner of all or any portion of the Mortgaged Premises, of any such mortgage not containing the subordination provisions herein required shall make such mortgage null and void and of no force and effect, and such act shall be a default under the Wraparound Mortgage, entitling Mortgagee to the same rights and remedies given it in the Wraparound Mortgage for nonpayment of interest or principal.

29. *Subrogation.* Mortgagor agrees that Mortgagee is subrogated to all of the rights, remedies, and liens held by the holders of the First Mortgage to the extent of all amounts paid out or advanced by Mortgagee which are used directly or indirectly to reduce, pay-off, discharge, or satisfy in whole or in part any part of the indebtedness secured by the First Mortgage, or to cure any default thereunder.

30. *First mortgage.* Mortgagor shall, immediately at Mortgagee's request from time to time, notify and confirm to the holder of the First Mortgage, by signed notice sent by registered or certified mail, return receipt requested, with a counterpart delivered to Mortgagee, that: (i) Mortgagor has entered into the Wraparound Mortgage, describing the essence of the Wraparound Mortgage so that the holder of the First Mortgage will understand the same as it affects said holder, (ii) payment of the constant monthly payments under the First Mortgage as well as deposits for taxes, assessments, and similar charges which are mentioned in the First Mortgage, as well as any prepayment under the First Mortgage, or payment after acceleration of the First Mortgage, shall be made by the holder of Wraparound Mortgage upon receipt of the same from Mortgagor, (iii) authorizing and directing the holder of the First Mortgage to accept the aforesaid payments, as well as the payment or performance of any other obligation contained in the First Mortgage to be performed by Mortgagor's thereunder, with same effect as if paid or performed by Mortgagor itself, (iv) directing the holder of the First Mortgage to send and deliver to the holder of the Wraparound Mortgage counterpart copies of all demands, notices and communications of defaults, payments due, or otherwise, required to be given or actually given to Mortgagor, and (v) requesting the holder of the First Mortgage to enter into an agreement with the holder of the Wraparound Mortgage whereby the holder of the Wraparound Mortgage is given notice of and opportunity to cure any default by Mortgagor under the First Mortgage.

31. *First mortgage due dates.* Notwithstanding any contrary provision in the Wraparound Mortgage, all payments required to be made by Mortgagor, whether to Mortgagee or to any other person, by the provisions of the First Mortgage (except the constant payments of principal and interest under the First Mortgage, which Mortgagee has agreed to pay) shall be due and payable at least 15 days before such payments are required to be made by the provisions of the First Mortgage, except if a period of time more than 15 days is required expressly by the Wraparound Mortgage, the longer period shall be effective.

The whole of the principal sum and interest on the Wraparound Mortgage shall become due at Mortgagee's option after default in the payment of any installment of principal or of interest for five days. The preceding sentence shall supersede any contrary provision contained elsewhere in the Wraparound Mortgage.

32. *Purchase-money mortgage.* The Wraparound Mortgage constitutes a purchase-money mortgage given to secure a portion of the purchase price paid by Mortgagor in acquiring the fee title to the Mortgaged Premises.

33. *Representations of mortgagor.* Mortgagor covenants, represents, and warrants that on the date of the agreement it is not default under the First Mortgage, and there are no outstanding claims of indebtedness for labor or materials furnished in connection with the construction, improvements, alteration or repair of any building or other improvements on the Mortgaged Premises.

34. *Assignment of first mortgage.* If Mortgagee pays or satisfies the First Mortgage at any time, it may obtain from the holder thereof, instead of satisfaction piece, an assignment to it of the First Mortgage.

35. *Refinancing.* The First Mortgage or the Wraparound Mortgage, or both, may, at Mortgagee's option, be extended, replaced, increased, modified, or consolidated ("Refinancing"), including a consolidation with the Wraparound Mortgage. Any mortgage so extended, replaced, increased, modified or consolidated, is referred to as "New Mortgage(s)."

The conditions of the Refinancing are as follows:

- (1) All proceeds, if any, in excess of the then unpaid principal amount of the First Mortgage and/or the Wraparound Mortgage being refinanced shall be the property of Mortgagee and shall not be deemed to reduce the principal amount of the Wraparound Mortgage plus interest and other charges secured by the Wraparound Mortgage. Notwithstanding any Refinancing, nothing shall be deemed to reduce, abridge, or postpone Mortgagor's obligation to make the regular payments of principal or interest or other payments required by the Wraparound Mortgage;
- (2) The aggregate annual charges payable for interest and amortization on the New Mortgage(s) shall not at any time exceed the annual charges then payable for interest and amortization under the Wraparound Mortgage;
- (3) The maturity date of any New Mortgage(s) shall not be later than the maturity date of the Wraparound Mortgage;
- (4) If the proceeds of any New Mortgage(s) are insufficient to pay the unpaid principal amount then due to the holder of the mortgage being refinanced, the deficiency shall be paid by Mortgagee;
- (5) Mortgagee shall pay all expenses necessary to consummate the closing of the New Mortgage(s);
- (6) The aggregate unpaid principal amount of the New Mortgage(s) shall not at any time exceed the unpaid principal amount of the Wraparound Mortgage plus interest and other charges secured by the Wraparound Mortgage;
- (7) In Refinancing, the forms customarily utilized by the holder of the New Mortgage for similar properties shall be used, and if the holder of the New Mortgage has no forms which are customarily used for such property, the customary forms of an institutional lender who makes loans on similar properties shall be used;
- (8) The New Mortgage(s) may provide for a prepayment penalty not to exceed 3 percent of the amount being prepaid;
- (9) Mortgagee shall request the holder of the New Mortgage(s) to utilize provisions equivalent to those contained herein for insurance and condemnation proceeds.
- (10) The New Mortgage(s) shall not prohibit the sale of the Mortgaged Premises.
- (11) The New Mortgage(s) shall not be cross-collateralized with any other mortgage or loan, and shall cover only the Mortgaged Premises. The maturity date of the Wraparound Mortgage for the purpose of this paragraph shall be deemed to be the maturity date when, pursuant to the terms of the Wraparound Mortgage, the unpaid principal amount thereof is stated therein to become due and payable.

Mortgagor shall execute all documents that are necessary to effectuate such Refinancing, provided such documents provide for an exculpation of Mortgagor from personal liability. Upon Mortgagor's failure to execute such documents

within ten days of Mortgagee's written request, the unpaid principal balance due on the Wraparound Mortgage and interest, shall become due, at Mortgagee's option in the same manner as Mortgagor's failure to pay interest or principal under the Wraparound Mortgage. Any additional mortgage placed by Mortgagor on the Mortgaged Premises or any part thereof shall be expressly subordinate to Mortgagee's right of Refinancing.

36. *Default in note.* Any default under the terms of any notes secured by the Wraparound Mortgage shall be deemed a default under the Wraparound Mortgage, and each of the terms, covenants, and conditions of such notes are incorporated in and made a part of this agreement.

37. *Ground leases.* No owner of the Mortgaged Premises shall enter into a ground or master lease covering all or a material part thereof unless: (a) a true copy is delivered to Mortgagee, by registered or certified mail not more than ten days after the execution thereof; and (b) such ground or master lease provides (i) that it is subject and subordinate to the Wraparound Mortgage and all advances, past or future, which are made thereunder and the Refinancing, and (ii) that all occupancy subleases shall provide that in case of termination of the ground or master lease, the sublessee will attorn to and recognize the lessor under such ground or master lease or the owner of the demised premises as sublessee's landlord unless such sublease has terminated in any dispossession or foreclosure proceedings.

38. *No usury.* Notwithstanding any contrary provision herein, Mortgagee shall not at any time charge, and Mortgagor shall not be required to pay, interest which exceeds the maximum rate of interest applicable to this agreement that is permissible under the laws of the State of New York.

If any interpretation of the provisions of this agreement would require Mortgagor to pay interest or other fees or sums the payment of which would, in the opinion of Mortgagee or its counsel, constitute a violation of the above-stated intention of the parties, Mortgagee shall advise Mortgagor in writing as to what reduced amount of interest or other charges or fees shall be paid. Thereupon, this agreement shall be deemed to be interpreted and intended to read as set forth herein as the true intention of the parties.

39. *Entire agreement; modification.* This instrument constitutes the entire agreement between the parties. It may not be modified, amended, or terminated unless such modification, amendment, or termination is in writing and signed by both parties.

40. *Binding effect.* This agreement shall be binding upon and inure to the benefit of both parties and their respective legal representatives, successors, and assigns.

41. *Notices.* All notices under this agreement shall be sent by registered or certified mail, postage prepaid, return receipt requested, addressed to the other party at its address set forth at the beginning hereof. Either party, however, may designate a different address by serving written notice of change of address on the other party, in like manner.

42. *Headings.* Headings in this agreement are for convenience and reference only and are not deemed to be a part hereof.

43. *Non-waiver.* No delay or failure by either party to exercise any right hereunder, and no partial or single exercise of such right, shall constitute a waiver of that or any other right, unless otherwise expressly provided herein.

44. *Counterparts.* This agreement may be executed in one or more counterparts, each of which shall be deemed an original but all of which together shall constitute one and the same instrument.

The parties have duly executed this instrument as of the date first above written.

Panadyne Corporation

By: _____

John Gigante & Sons, Inc.

[Acknowledgments]



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Current Legal Forms for Real Estate
Chapter 21 SALES AND EXCHANGES
Part IV. Forms
J. MORTGAGE FINANCING

25-21 Current Legal Forms for Real Estate FORM 21.106

FORM 21.106 Variable interest rate mortgage note--annual adjustment--adjustment limitations

COMMENT

Variable rate mechanism

This variable rate note provides for a periodic review of interest rates once a year, with the possibility of a modest change either up or down, as indicated by the cost of money at the time of each review. The interest rate changes are legally regulated and are based on a prescribed standard or "index" which reflects the cost of money.

(1) No adjustment may be made more often than each annual period thereafter, and twelve months must elapse between any changes.

(2) No adjustment can be made unless the latest index, compared with the loan's base index, has a cumulative increase or decrease of 0.1 percent or more.

(3) No adjustment up or down may exceed 0.25 percent per annum in any semiannual period and shall not result in an interest rate more than a specified percentage greater than the initial interest rate.

Mortgagor protection

There is "downside" protection for the borrower as evidenced by the following aspects:

(1) Decrease. The note provides for mandatory decreases of rate when applicable, and there is no percentage limitation on decreases.

(2) Constant payment. On single family (one to four unit property) loans, under certain circumstances, regulations permit the term of the loan to be extended, not to exceed 40 years, to keep the monthly payment constant in the event of interest rate increases.

(3) Prepayment. Within 90 days from the date of a notice of increase of rate, the borrower has the right to pay all, or part of the loan, without a prepayment charge.

(4) Notice. A notice must be mailed to the mortgagor at least 30 days before any change. The change is effective with the payment due in the second month following the notice.

FORMS

(1) Variable rate promissory note

Promissory Note

NOTICE TO BORROWER:

THIS DOCUMENT CONTAINS PROVISIONS FOR A
VARIABLE INTEREST RATE

\$44,000

Loan No. 210802-47

Ventura, California

May 7, _____ [year]

1. *Promise to pay.* For value received, I promise to pay to State Savings and Loan Association, a corporation, or order, at its offices in the City of Ventura, State of California, or at any other offices that the holder of this note may from time to time designate, the principal sum of \$44,000, with interest from the date hereof on the unpaid principal balance at the initial rate of 15 percent per annum (the "Initial Interest Rate"), principal and interest payable in monthly installments of \$558.77 each, beginning on June 1, _____ [year] and continuing on the first day of each and every month thereafter until May 1, _____ [year], when the principal and interest shall have been paid in full.

Each payment shall be credited first on interest then due and the remainder on principal; and interest thereupon ceases upon the principal so credited.

2. *Variable rate; standard.* I agree that the Initial Interest Rate shall be increased and decreased from time to time in accordance with increases and decreases in the prime rate of State Savings and Loan Associations (the "Standard"), or any other Standard that may be approved by the California Savings and Loan Commissioner. Subject to the following provisions, the increases and decreases shall be effected in such manner as to maintain the same margin above or below the Initial Interest Rate as the last published Standard is above or below the last published Standard on the date of this

Note:

(a) *Maximum for term.* Any change in the interest rate shall not exceed 1 percent per annum in any annual period, and shall not result in an interest rate more than 4.75 percentage points greater than the Initial Interest Rate.

(b) *Maximum per year.* No increase or decrease in the interest rate in any annual period shall be less than 1/10 of 1 percent per annum, except for increases or decreases not previously invoked in full by reason of the 1 percent per annum maximum limitation set forth above.

(c) *Annual changes.* No change in the rate of interest shall be made during the first annual period; after the first annual period there shall be only one change in any one annual period and at least 12 months shall elapse between each change. As used in this Note, "annual period" means each of the successive periods of 12 calendar months commencing with the first day of the calendar month in which this Note is dated.

(d) *Effective date of change.* Each change in the interest rate shall become effective commencing on the date the monthly installment becomes due during the second month following the first publication of the Standard in each annual period, provided, however, that the first change in interest rate (if there has then been a sufficient change in the Standard) shall become effective with the first loan installment falling due more than 30 days after the first publication of the Standard following expiration of the first annual period of the loan.

(e) *Decreases.* Decreases in the interest rate shall be mandatory and increases shall be optional with the holder. The fact, however, that the holder may not have invoked a permissible increase, in whole or in part, shall not be deemed a waiver of the holder's right to invoke such increase at any time thereafter within the limits herein provided.

(f) *Monthly installments, term.* When there is a change in the interest rate, at the option of the holder of this Note, (1) the amount of each monthly installment may be decreased or increased to an amount which, when paid in equal monthly installments rounded to the next highest dollar amount, would result in full payment of the then unpaid principal balance together with interest thereon at the changed rate by the end of the amortization period in effect just prior to such change, or (2) with the consent of the undersigned, such amortization period may be reduced or extended, or (3) a combination of (1) or (2) may be made. Notwithstanding the foregoing, if the purpose of the loan evidenced by this Note is to finance the purchase or construction of real property containing four or fewer residential units, then upon any increase in the interest rate, at the option of the undersigned the amortization period of this Note may be extended for the additional period required to amortize this Note without increasing the then existing monthly installment, but not to exceed a maximum amortization period of 40 years from the due date of the first installment; provided that when there is a subsequent reduction in the interest rate, at the option of the holder such amortization period may be reduced to the degree that it was extended pursuant to the provisions of this sentence.

(g) *Notices.* Notices of any change in interest rate or amount of the monthly installment shall be deemed given by the holder when deposited in the United States mail, postage prepaid, addressed to the current owner of the property described in the Deed of Trust securing this Note and any other person personally liable on this Note, as those persons' names and addresses appear on the holder's records at the time of giving notice.

3. The last published standard on the date of this Note is April 30, ____ [year].

*(2) *Variable rate disclosure form*

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Current Legal Forms for Real Estate
Chapter 21 SALES AND EXCHANGES
Part IV. Forms
J. MORTGAGE FINANCING

25-21 Current Legal Forms for Real Estate FORM 21.107

FORM 21.107 Graduated payment rider to mortgage--increase in principal for interest deficiency--constant payment after fifth year--mortgage insurance premium payment

COMMENT

The purpose of this rider is to add a graduated payment provision to a mortgage. Alternatively, the terms of the rider may be incorporated into the mortgage itself as a repayment clause. The payments increase each year until the sixth year. Since the initial payments are not sufficient to pay accrued interest, the unpaid interest is added to the principal amount. The constant payments, after the fifth year of the mortgage, should be sufficient to pay the interest on the increased principal amount and reduce principal to zero or near zero with the last payment.

Mortgage insurance premiums ("MIP") are also paid monthly under the rider.

The graduated payment mortgage differs from the variable rate mortgage. The amount of each payment in a graduated payment mortgage is established at the time the note and mortgage are executed. With a variable rate mortgage, the exact amount of the future payments is not known until time arrives for establishing the new amount based on the prescribed variables.

FORMS

(1) Graduated payment rider

June 1, _____ [year]

THIS SCHEDULE ANNEXED TO AND REFERRED TO IN THE MORTGAGE BOND AND MORTGAGE, WHICH BOND IS DATED JUNE 1, _____ [year], EXECUTED BY MICHAEL T. JONES AND ALICE B. JONES, HIS WIFE, WHICH BOND IS SECURED BY THE SAID MORTGAGE OF EVEN DATE WITH THE BOND, SAID BOND AND MORTGAGE BEING MADE TO CONVENIENT SAVINGS AND LOAN ASSOCIATION OF DELAWARE.

We certify that we fully understand the obligation we are undertaking, that our mortgage payment including principal, interest and mortgage insurance premium will start at \$446.62 and payments to interest and/or principal and Mortgage Insurance Premium (MIP) will increase each year for five years to a maximum varying from \$637.68 to \$627.37 and the mortgage balance will increase to \$59,219.91 at the end of the fourth year.

Monthly installments of principal, interest and MIP shall be due according to the following schedule:

PRINCIPAL AND INTEREST		MIP	TOTAL
\$423.35	First Bond year	\$23.27	\$446.62
\$455.87	Second Bond year	\$23.80	\$479.67
\$490.88	Third Bond year	\$24.23	\$515.11
\$528.60	Fourth Bond year	\$24.53	\$553.13
\$569.31	Fifth Bond year	\$24.66	\$593.91
\$613.08	Sixth Bond year and there- after	\$24.60	\$637.68

Deferred interest shall be added to the principal balance monthly and shall increase the principal balance to not more than \$59,219.91.

Witnessed by:

Michael T. Jones (L.S.)

Alice B. Jones (L.S.)

**(2) Graduated payment disclosure form*

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Current Legal Forms for Real Estate
Chapter 21 SALES AND EXCHANGES
Part IV. Forms
J. MORTGAGE FINANCING

25-21 Current Legal Forms for Real Estate FORM 21.108

FORM 21.108 Condominium mortgage note and mortgage--assignable to institutional lender

COMMENT

These forms may be used if the sponsor of a condominium project is unwilling or unable to sell the units for cash. In such case, the sponsor may decide to accept the purchaser's agreement to pay the unpaid balance of the purchase price over a period of time, evidenced by the purchaser's promissory note, and a mortgage on the unit sold to the purchaser as security for payment.

These forms have two distinguishing features. First, the promissory note is acquired by an institutional lender, and the purchaser agrees to pay additional amounts into a sinking fund which is used to discharge taxes and other amounts assessed against the condominium unit. Second, the forms presuppose that the unit is sold on a furnished basis and, accordingly, the furnishings within the unit are also covered under the mortgage. Since the furnishings constitute personal property, a security agreement and filed financing statements that comply with Article 9 of the UCC. are required. The "further assurance" clause contained in paragraph 22 of the mortgage only provides for situations which may arise subsequent to initial compliance with the UCC. For example, a financing statement will generally expire after five years and accordingly the security interest in the furnishings will not be perfected at that time unless another financing statement is obtained and filed.

Condominium owners may deduct mortgage interest and real estate taxes paid with respect to the unit to the same extent as other homeowners.

These forms may be adapted for use by any owner of a condominium unit who desires to sell to a subsequent purchaser on the purchaser's credit.

FORMS**(1) Mortgage note**

New York, New York

November 3, _____ [year]

1. *Promise to pay.* For value received, I, Henry Phillips, promise to pay to West House Condominium Corporation, or order, at 700 Central Park South, New York, New York, or at any other place designated in writing by the holder of this note, the principal sum of \$200,000, with interest thereon to be computed from the date hereof at the rate of 10 percent per annum, in constant monthly installments of \$1,755.16 each, commencing on the first day of the calendar month after the date hereof and on the first day of each succeeding calendar month until September 1, _____ [year], when the entire unpaid balance of principal, together with accrued interest, shall become due and payable. Each constant monthly installment shall be applied first to the payment of interest accrued on the unpaid principal, and the balance on account of the principal sum.

2. *Total amount due.* The principal sum evidenced by this note and all accrued and unpaid interest shall become due at the option of the holder on the happening of any default or event by which, under the terms of the mortgage securing this note, such principal sum and interest may or shall become due and payable. All of the covenants, conditions, and agreements contained in the mortgage are made part of this instrument.

3. *Extensions.* If time is extended for the payment of the principal sum because the due date falls on a Sunday or a public holiday, the extended time shall be included in the computation of interest.

4. *Prepayment right.* The principal sum may be prepaid in its entirety, or in part, on the first day of any calendar month without penalty. If partial prepayment of principal is made, the amount of each regular monthly installment of principal and interest thereafter shall not be reduced, and any such partial prepayments shall be applied to the regular monthly payments in the inverse order of their maturity.

5. *Tax escrow payments.* If the holder at any time is a bank, trust company, savings and loan association, insurance company, union, pension, welfare, or retirement fund or other institutional lender (the "Institutional Lender"), the maker agrees to deposit with the holder, at the holder's election, as and when each payment of a monthly installment becomes due during the period of 12 calendar months commencing on the first monthly installment payment date after the Institutional Lender becomes the holder and during each period of 12 calendar months thereafter, one twelfth of the amount, as estimated from time to time by the Institutional Lender, of the taxes, and assessments if any, becoming due with respect to the premises during the respective periods of 12 calendar months. It is intended that not later than one month before the respective due dates for such taxes, or assessments if any, sufficient amounts shall be deposited with the holder to pay the same. Such amounts shall be held by the Institutional Lender without interest, and applied to the payment of the items in respect of which such amounts were deposited, or, at the option of the Institutional Lender, to the payment of the items in any order of priority determined by such holder, on or before the respective dates on which the same or any of them would become delinquent. If one month before the due date of any of the aforesaid items, the amount then on deposit is insufficient for the payment of the item in full, the maker, within ten days after demand, shall deposit the amount of the deficiency with such holder. Nothing contained in this paragraph shall be deemed to affect any right or remedy of the holder under any provision of the mortgage or of any statute or rule of law to pay any such tax or assessment and to add the amount so paid, together with interest at the legal rate, to the indebtedness owing hereon which shall thereupon be secured by the lien of the mortgage.

6. *Joint and several liability.* If the maker consists of two or more parties, such parties shall be jointly and severally liable on all obligations of this note.

7. *Waiver of presentment.* Presentment for payment, notice of dishonor, protest, and notice of protest are waived.

8. *Security of note.* This note is secured by a mortgage made by the maker to the payee of even date herewith on the premises, including furnishings, designated as Unit No. 17W in the Declaration establishing a Plan for Condominium Ownership of the property known as and by the street number 700 Central Park South, Borough of Manhattan, City of New York.

In the Presence of:

Mark Davis

Henry Phillips

[Acknowledgment]

(2) Mortgage

THIS MORTGAGE, made November 3, _____ [year], between Henry Phillips, residing at 980 Riverside Drive, New York, New York (Mortgagor), and West House Condominium Corporation, having an office at 700 Central Park South, New York, New York (Mortgagee).

Recitals

To secure the payment of an indebtedness in the sum of \$200,000, lawful money of the United States, to be paid with interest thereon according to a certain note or obligation bearing even date herewith (the "note"), Mortgagor does mortgage to Mortgagee the unit known as Unit No. 17W in the property known as the West House Condominium located at 700 Central Park South, Borough of Manhattan, City, County and State of New York, such unit being designated and described as Unit No. 17W in the Declaration establishing a plan for condominium ownership of such property under Article 9-B (the "Condominium Act"), of the Real Property Law of the State of New York dated _____ [date], and recorded in the office of the City Register in the County of New York on _____ [date], in Reel 1975, page 1201 and also designated as Tax Lot 874 in Block 7518 of the Borough of Manhattan on the Tax Map of the Real Property Assessment Department of the City of New York and on the Floor Plans of the building, certified by Hans Hartmann, Architect, on June 15, _____ [year], and filed in the office of the City Register in the County of New York on September 27, _____ [year], as Condominium Plan No. 5018.

Together with the appurtenances and all the estate and rights of Mortgagor, including the appurtenant common interest, in and to the above-described unit conveyed or intended to be conveyed to Mortgagor by deed bearing even date herewith delivered and intended to be recorded simultaneously herewith. This mortgage is a purchase money mortgage.

Together also with all fixtures and equipment used or useful in connection with the above-described unit and now or hereafter attached to or installed therein.

Together also with all furnishings included within the above-described unit and now or hereafter attached to or installed therein, including furniture, rugs, carpeting, lighting fixtures, electrical appliances, cabinets, shelving, wall covering, pictures, decorative objects, draperies, window shades or blinds, and all other like furnishings used or useful within the unit.

Together also with the rents, issues, and profits of the above-described unit, including Mortgagor's right, title, and interest in the common profits.

Together also with all right, title, and interest hereafter acquired by Mortgagor in and to the property and in and to the net proceeds of sale thereof pursuant to provision of law or otherwise, not including, however, any other unit or any appurtenant common interest thereto hereafter acquired by Mortgagor or by the Board of Managers or their designee on Mortgagor's behalf.

The above-described unit is referred to in this mortgage as the Unit. The Unit together with the appurtenances and all the estate and rights of Mortgagor therein and all fixtures, furnishings, and equipment used or useful in connection with the Unit and now or hereafter attached to or installed therein, such rents, issues, and profits and such right, title, and interest of Mortgagor hereafter acquired in the property, and the net proceeds of sale pursuant to any provision of law are sometimes collectively referred to in this mortgage as the Mortgaged Premises.

Together with all awards heretofore and hereafter made for taking by eminent domain the whole or any part of the Mortgaged Premises or any easement, including any awards for changes of grade of streets, such awards being assigned to Mortgagee, which is authorized, subject to the provisions of Article VIII of the Condominium Bylaws, to collect and receive the proceeds of such awards and to give proper receipts and acquittances therefor, and to apply the same toward the payment of the mortgage debt, even if the amount owing thereon is not then due and payable.

The property in which the Unit is situated is bounded and described as follows:

All that certain plot, piece, or parcel of land, with the building and improvements thereon erected, situate, lying, and being in the Borough of Manhattan, City, County and State of New York, bounded and described as follows:

Beginning at a point on the southerly side of Central Park South, distance 200 feet easterly from the corner formed by the intersection of the easterly side of Apex Avenue with the southerly side of Central Park South; running thence southerly and parallel with Apex Avenue, 10 feet to the northerly side of 58th Street; thence easterly, along the northerly side of 58th Street, 270 feet 8 inches; thence northerly and again parallel with Apex Avenue, 310 feet to the southerly side of Central Park South; thence westerly along the southerly side of Central Park South, 270 feet 8 inches to the point or place of Beginning.

Together with an undivided 1.02 percent interest in the Common Elements of the Property, hereinafter called the Common Elements;

For the purposes of this mortgage, unless the context otherwise requires, the terms used herein shall have the meanings set forth in the Condominium Act.

Mortgagor covenants with Mortgagee as follows:

1. *Promise to pay.* Mortgagor will pay the indebtedness provided as in this mortgage and the note.
2. *Use of deposit.* If Mortgagee exercises any right under this mortgage to declare the principal sum and interest due, it may, at any time thereafter, apply the whole or any part of the amount then on deposit pursuant to the note on account

of any accrued interest, and/or on account of the principal sum and/or any costs and expenses (including reasonable attorneys' fees) paid or incurred by Mortgagee in connection with the exercise of any remedies hereunder. If this mortgage is assigned, the assignor shall transfer to the assignee the amount then on deposit with the assignor pursuant to the note, and upon each such assignment and transfer the assignor shall be under no further obligation to Mortgagor with respect to such amount.

3. *Late charges.* To cover the additional expense incurred by Mortgagee in handling delinquent payments, Mortgagor will pay on demand a "late charge" not exceeding 5 cents for each dollar of principal, interest and other sum required to be paid or deposited pursuant to the note or this mortgage if any such payment or deposit is received more than 15 days after its due date. Such late charge shall be payable on each event of delinquency, and payment or tender thereof shall not preclude the exercise by Mortgagee of any remedies herein provided upon Mortgagor's default.

4. *Warranty of title.* Mortgagor warrants the title to the Mortgaged Premises.

5. *Payment of taxes.* To the extent provision has not otherwise been made for the payment under the note, Mortgagor will pay all taxes and assessments affecting the Mortgaged Premises and in default thereof, Mortgagee may pay the same.

6. *Alterations.* No structural alteration or improvement shall be made to the Mortgaged Premises without Mortgagee's prior written consent.

7. *Estoppel certificate, tax receipts.* Mortgagor, within five days upon request in person or within ten days upon request by mail, will furnish a written statement duly acknowledged of the amount due on this mortgage and whether any offsets or defenses exist against the mortgage debt and that after a similar request Mortgagor will exhibit receipts showing payment of all taxes and assessments affecting the Mortgaged Premises, unless paid by Mortgagee pursuant to the note.

8. *Appointment of receiver.* The holder of this mortgage, in any action to foreclose it, shall be entitled to the appointment of a receiver.

9. *Foreclosure sale.* In case of a foreclosure sale, the Mortgaged Premises may be sold in one parcel.

10. *Defense of rights or lien.* If any action or proceeding is commenced to which Mortgagee is made a party, or in which it becomes necessary to defend or uphold the lien of this mortgage, all sums paid by Mortgagee for the expense of any litigation to prosecute or defend the rights and lien created by this Mortgage (including reasonable counsel fees), shall be paid by Mortgagor within 15 days after written demand, together with interest thereon at the legal rate. Any such sum and the interest thereon shall be a lien on the Mortgaged Premises, prior to any right, or title to, interest in or claim upon the Mortgaged Premises attaching or accruing subsequent to the lien of this mortgage, and shall be deemed to be secured by this mortgage. In any action or proceeding to foreclose this mortgage, or to recover or collect the debt secured hereby, the provisions of law respecting the recovery of costs, disbursements and allowances shall prevail unaffected by this covenant.

11. *Advance rent.* Mortgagor will not, without Mortgagee's written consent, receive or collect rent from any tenant of the Mortgaged Premises for a period of more than two months in advance.

12. *Use of advances.* Mortgagor will, in compliance with Section 13 of the Lien Law, receive the advances secured hereby and will hold the right to receive such advances as a trust fund to be applied first for the purpose of paying the cost of the Mortgaged Premises before using any part of the same for any other purpose.

13. *Rental payments in event of default.* In the event of any default under this mortgage, Mortgagor will pay monthly in

advance to Mortgagee, or to any receiver appointed to collect the rents, issues, and profits of the Mortgaged Premises the fair and reasonable rental value for the use and occupancy of the Mortgaged Premises if the same are in Mortgagor's possession. Upon default in any such payment Mortgagor will vacate and surrender the possession of the Mortgaged Premises to Mortgagee or to such receiver, and in default thereof may be evicted by any appropriate legal proceeding.

14. *Joint and several liability.* If Mortgagor consists of more than one party, such mortgagors shall be jointly and severally liable under all of Mortgagor's obligations, covenants, and agreements contained herein.

15. *Payment of common charges.* Mortgagor will pay all assessments for common charges, service charges, and expenses made against the Mortgaged Premises as and when they become due and payable.

16. *Condition of premises.* Mortgagor shall keep the Mortgaged Premises (other than the Common Elements) in reasonably good repair, working order and condition, and shall make all repairs, renewals, and replacements that Mortgagee deems reasonably necessary. Mortgagor shall keep the Mortgaged Premises in compliance with all environmental laws, federal, state and local.

17. *Compliance with rules.* Mortgagor shall observe, perform and keep all of the terms, provisions, covenants, and conditions required by it to be kept, observed and performed under the Declaration, Bylaws, and Rules and Regulations, as the same shall exist from time to time.

18. *Default.* At Mortgagee's option, the entire principal amount and interest accrued thereon, as evidenced by the mortgage and the note secured thereby, shall immediately become due and payable if one or more of the following "Events of Default" shall occur and be continuing:

(a) Default is made in the payment of any installment of interest, or of principal and interest, or in the making of any deposit under the note when all or any part thereof becomes due and payable, and such default continues for 15 days;

(b) Default is made in the payment of any tax or assessment when the same becomes due and payable, and the default continues for 30 days, unless provision for payment thereof has been made pursuant to the note;

(c) Default is made in the performance of any covenant in paragraph 3, 4, 6, 7, 10, 11, 12, 13, or 20 of this mortgage within the time provided, or in the performance of the covenant in paragraph 15, and the default continues for 30 days;

(d) Default is made in the performance of any covenant in paragraph 16 or 17, and the default continues for 30 days after written notice is given to Mortgagor, which specifies the nature of such default and requires the same to be remedied;

(e) Mortgagor sells or otherwise conveys the Mortgaged Premises without having simultaneously paid the note in full plus all interest accrued thereon to the date of the sale or conveyance;

(f) Withdrawal of the property from the Condominium Act is authorized as provided in Section 339-t of the Act, or 75 percent or more of the building is destroyed or substantially damaged and 75 percent or more of the Unit owners do not duly and promptly resolve to proceed with repair or restoration;

(g) Any provision of the Condominium Act, or its application, in any circumstances is held invalid, and such invalidity affects the lien of this mortgage or Mortgagee's rights;

(h) Mortgagor assigns the rents, issues, or profits (including the common profits) of all or part of the Mortgaged Premises without Mortgagee's prior written consent;

(i) Any fixtures, furniture, or equipment constituting a part of the Mortgaged Premises are removed from such premises unless, before or concurrently with such removal, the fixtures, furniture, or equipment are promptly replaced by other fixtures or equipment not necessarily of the same character but of a value at least equal to the removed items, which shall immediately become subject to the lien of this mortgage;

(j) Any law is passed that deducts from the value of the property for tax purposes any lien thereon, or that changes in any way the taxation of mortgages or debts secured thereby for state or local purposes so as to affect this mortgage; or

(k) A petition in bankruptcy is filed by or against Mortgagor, or Mortgagor makes an assignment for the benefit of creditors or receives the benefit of any insolvency or reorganization act.

19. *Waiver of provisions.* Any failure by Mortgagee to insist upon the strict performance by Mortgagor of any term or provision hereof shall not be deemed to be a waiver of that or any other term or provision. Notwithstanding such failure, Mortgagee may thereafter insist upon strict performance by Mortgagor of any or all of the terms and provisions of this mortgage. All clauses and covenants in this agreement that are similar to those construed under Section 254 of the Real Property Law shall also be construed under that section. The additional clauses and covenants herein shall afford rights that are supplemental to, and not exclusive of, the rights conferred by the clauses and covenants construed by Section 254. Such additional clauses and covenants shall not impair, modify, alter, or defeat such rights even though they relate to the same subject matter or provide for different or additional rights in the same or similar contingencies as clauses and covenants construed by Section 254. Mortgagee's rights hereunder shall be separate, distinctive, and cumulative, and none of them shall be exclusive of any other. Moreover, no act of Mortgagee shall be construed as an election to proceed under any one provision hereof to the exclusion of any other provision.

20. *Eminent domain.* Notwithstanding any contrary provisions of existing or future law, Mortgagor shall continue to pay interest on the entire principal sum secured as such principal is reduced from time to time at the rate specified in the note, until any award or payment made by any public or quasi-public authority or corporation for taking by eminent domain of the entire or part of the Mortgaged Premises, or any easement therein, has actually been received by Mortgagee. Any reduction in the principal sum resulting from the application by Mortgagee of such award or payment shall be deemed to take effect only on the date of such receipt.

21. *Inspection of premises.* Mortgagee and all persons authorized by it may enter and inspect the Mortgaged Premises at all reasonable times.

22. *Further assurances.* Promptly upon request, Mortgagor shall execute and deliver to Mortgagee all additional instruments or assurances that are reasonably necessary or desirable to further secure the lien of this mortgage, including the execution and delivery of one or more financing statements on Form UCC-1 under the Uniform Commercial Code.

23. *Definitions.* Wherever used in this mortgage, unless the text clearly indicates a contrary intent or otherwise specifically provided herein, the word "Mortgagor" shall be construed to mean the "Mortgagor and/or any subsequent owner or owners of the Mortgaged Premises," and the word "Mortgagee" shall be construed to mean "Mortgagee or any subsequent holder or holders of the mortgage." Other terms used herein shall be defined as follows: "Declaration" means the instrument recorded, as provided above, in the office of the City Register in New York County submitting the property to the provisions of the Condominium Act; "Bylaws" means the instrument required by Section 339-u of the Condominium Act providing for the operation of the property, a true copy of which is annexed to the Declaration; and

"Rules and Regulations" mean the instrument referred to in clause (i) of Section 339-v of the Condominium Act, relating to restrictions and requirements respecting the use and maintenance of the Unit and the common elements of the property.

This mortgage cannot be changed or terminated orally.

In witness whereof this mortgage has been duly executed by Mortgagor.

_____ (L.S.)

Henry Phillips

[Acknowledgment]



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Current Legal Forms for Real Estate

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Current Legal Forms for Real Estate
Chapter 21 SALES AND EXCHANGES
Part IV. Forms
J. MORTGAGE FINANCING

25-21 Current Legal Forms for Real Estate FORM 21.109

FORM 21.109 Cooperative apartment loan security agreement

COMMENT

This is a form for an agreement giving a creditor a security interest in the shares of stock and proprietary lease allocated to a cooperative apartment, as a part of the financing of the debtor's purchase of the apartment. Although similar to the financing of a purchase of real property, the financing of the purchase of a cooperative apartment must be structured differently because the purchaser is buying an interest in the cooperative corporation and a lease, rather than an interest in real property. Unlike a mortgage, a security interest in shares of stock of a cooperative corporation, or in a proprietary lease from such a corporation, is subject to the provisions of U.C.C. Article 9. This form provides for the execution and filing of a financing statement as provided by the Uniform Commercial Code for secured transactions.

Truth in Lending

A cooperative apartment loan security agreement must comply with the requirements of the Truth in Lending Act. The Federal Reserve Board has issued model disclosure forms and clauses which are published in an appendix to Regulation Z. A creditor is not required to use the model disclosure forms; however, they are a useful guide in drafting such forms.

FORM

Loan Security Agreement

THIS AGREEMENT made _____ [date], between _____, residing at _____ Street, City of _____, State of _____ ("Debtor"), and _____ Bank Corp., a corporation incorporated under the laws of the State of _____, having its principal office _____ Avenue, City of _____, State of _____ ("Secured Party").

WHEREAS:

A. Debtor has executed, or is about to execute, a Purchase Agreement for the purchase of _____ shares of capital stock of _____ Cooperative Apartment Corp. ("Corporation") allocated to Apartment No. _____ in premises known as _____ Road, City of _____, State of _____, and the acquisition of the accompanying proprietary lease at the purchase price of \$_____.

B. Pursuant to the Purchase Agreement, Debtor has made or is about to make the down payment of \$_____, leaving the remainder of the purchase price in the amount of \$_____ to be furnished by the Secured Party, for the account of and as a loan to the Debtor.

C. Debtor desires to borrow from the Secured Party, and the Secured Party is willing to lend to Debtor the remainder of the purchase price, namely \$_____, all upon the terms and conditions set forth below.

NOW THEREFORE, in consideration of their mutual promises, it is hereby covenanted and agreed as follows:

1. The Debtor hereby agrees to borrow from the Secured Party the sum of \$_____, and, provided that Debtor makes the payment required to be made by Debtor pursuant to the Purchase Agreement, Secured Party shall lend Debtor the sum of \$_____. The sum borrowed by Debtor from Secured Party shall be paid to the Corporation/Seller on behalf of and for the account of the Debtor.

2. Simultaneously herewith, Debtor shall execute the following documents: (a) a promissory note in form annexed hereto, (b) a stock power in form annexed hereto, (c) an assignment of proprietary lease in form annexed hereto, and (d) a pledge of the shares in the cooperative corporation. Debtor agrees that provided that the Secured Party makes the loan provided for herein and advances to the Corporation/Seller on behalf of and for the account of Debtor the sum borrowed, then when the certificate of shares being purchased by Debtor and the proprietary lease are issued, such certificate and proprietary lease shall be delivered to Secured Party, and Debtor hereby authorizes the Corporation to deliver the certificate and lease to Secured Party. The certificate and lease are herein sometimes collectively referred to as "collateral" or "security."

3. Debtor hereby grants to Secured Party, as collateral security for the payment of the note, a continuing security interest in and to all of Debtor's right, title and interest in and to the shares of the Corporation to be evidenced by the certificate issued to Debtor and the proprietary lease entered into between Debtor and the Corporation for Apartment No. _____, together with the proceeds thereof. Upon repayment in full of the entire balance of the indebtedness hereby secured, together with accrued interest, the documents referred to in paragraph 2 above held by Secured Party, or its assignee or designee, shall forthwith be returned to Debtor, the security interest created herein shall cease and terminate, and this agreement shall be deemed terminated without further liability on the part of any party to the other. Debtor shall execute a Financing Statement and hereby authorize the Secured Party to file it.

4. In case any one or more of the following events ("Events of Default") shall occur, then, at the option of Secured Party, the note shall immediately become due and payable, together with accrued interest, without presentation,

demand, protest or notice of any kind, all of which are hereby expressly waived:

- a. Nonpayment continued for thirty (30) days after the due date of any payment of interest and/or principal, or
- b. A default in the payment of maintenance charges and/or any other charges or payments required to be made pursuant to terms of the proprietary lease, which default is not cured within the time and in the manner provided for in the proprietary lease, or
- c. A default in performance of and/or a breach of any of the terms, covenants and conditions of the proprietary lease on the part of Debtor to be performed which is not cured within the time and in the manner provided for in the proprietary lease, or
- d. A termination and/or cancellation of the proprietary lease by the Corporation, or
- e. In the event Debtor shall become insolvent, or shall file a petition in bankruptcy, or take advantage of the Bankruptcy Act and/or any other law for the relief of debtors, or shall make an assignment for the benefit of creditors, or if a receiver, trustee or liquidator, whether temporary or permanent, shall be appointed for the property of Debtor, or if an involuntary proceeding under any bankruptcy law or insolvency act shall be instituted against Debtor and such proceedings and/or appointments shall not be dismissed or vacated within thirty (30) days after such institution or appointment, or if Debtor admits in writing Debtor's inability to pay his or her debts as they become due, or if Debtor becomes insolvent howsoever otherwise evidenced, or
- f. In the event Debtor shall transfer, sell, assign or grant a further security interest in the shares and/or proprietary lease without Debtor having paid Secured Party the entire remaining balance of Debtor's indebtedness, with interest, in or before the date of Debtor's transfer, sale, assignment or granting of a further security interest, or
- g. In the event Debtor sublets, or offers to sublet, or assigns, or offers to assign the proprietary lease for Apartment No. _____ without the prior written consent of Secured Party, which consent will not be unreasonably withheld if the Corporation's Board of Directors shall consent thereto.

Without limiting any of the terms and provisions contained in the Note, it is agreed that a default by Debtor in the performance of any of the terms or provisions on Debtor's part to be performed under the proprietary lease for Apartment No. _____, or the giving of any notice of surrender, cancellation or expiration of the proprietary lease (which notice the obligor represents shall not be given), shall constitute a default under the Note and entitle the holder of the Note, at its option, to exercise any and all of the rights under the Note and this Agreement.

5. In the event of the occurrence of any one or more of the Events of Default, and if the Secured Party elects to accelerate the Note, then written notice of such election and acceleration (which notice shall specify the amount of principal and accrued interest due) shall be given by Secured Party to the Debtor by registered or certified mail, return receipt requested; and, if Debtor shall fail to pay such principal and accrued interest within five (5) days of receipt (it being understood that if Debtor shall refuse to accept delivery of such notice, the date of refusal shall be deemed to be the date of receipt), of such notice, then Secured Party in addition to any and all rights which it might have pursuant to the Uniform Commercial Code, may, but shall not be obligated to, sell, assign and deliver the security at public or private sale, for cash, upon credit or for future delivery with or without advertisement of the time, place, or terms of sale except that if the sale be a private sale, five (5) days' notice in writing from Secured Party of the time and place of sale and the terms of sale shall be given to Debtor. In case of any sale on credit or for future delivery, the security sold shall be retained by Secured Party until the sale price is paid, but Secured Party shall incur no liability if the purchaser fails to

take up and pay for the security sold. In case of any such failure, the security may be again sold. At any sale, Secured Party, if Secured Party is an individual or individuals, may purchase the security sold, free from all right of redemption of the Debtor which is hereby waived and released. In case of any sale, Secured Party may first deduct all expenses of collections, sale and delivery of the security sold and any expenses incidental thereto, including, but not limited to, reasonable attorneys' fees, brokerage commissions and transfer taxes, and may then apply the residue to any liability of the undersigned under the Note, and shall return the surplus, if any, to Debtor. Any sale conducted upon the foregoing terms shall be deemed commercially reasonable. Debtor agrees that the Secured Party shall have the right to continue to retain the security until such time that Secured Party in its reasonable judgment believes that an advantageous price can be secured for the security, and Secured Party shall not be liable to Debtor for any loss in the value of the security by reason of any such retention of the security by Secured Party. If Secured Party shall not commence to dispose of the security within ninety (90) days after the right to dispose of the security shall have accrued, then Debtor shall have the right, at any time thereafter, and prior to the time that Secured Party shall commence to dispose of the security, to request of Secured Party that it dispose of the security, or Debtor himself or herself, at Debtor's own cost and expense, shall have the right to dispose of the security; provided however, that in the case of the former, Secured Party shall not be obligated to dispose of the security unless the net proceeds to be received therefrom shall be sufficient to satisfy in full the then obligations of Debtor to Secured Party, and that in the case of the latter, any disposition of the security by Debtor must be upon terms and conditions consented to by Secured Party. Secured Party shall be obligated to give consent to such terms and conditions if the net proceeds to be received from such disposition shall be sufficient to satisfy in full the then obligations of Debtor to Secured Party. Secured Party shall not be liable to Debtor for any agents' or brokers' fees in the event Debtor disposes of the security. Secured Party shall have the right to retain the security in partial discharge of Debtor's obligations to Secured Party. If Secured Party elects to retain the security, notice thereof by registered or certified mail, return receipt requested shall be given to Debtor, and if Debtor objects in writing within thirty (30) days after receipt of notification (it being understood that if Debtor shall refuse to accept delivery of the notice, the date of refusal shall be deemed to be the date of receipt) then and in such event Secured Party shall commence to dispose of the security in the manner hereinbefore set forth. In connection with any sale or disposition of the security, Secured Party shall have the absolute right to complete the incomplete stock power and assignment for the purpose of transferring the shares and proprietary lease.

6. Debtor agrees that until the Note together with accrued interest is paid in full, Debtor will not avail himself or herself of his or her rights under the proprietary lease to cancel and terminate the proprietary lease. A breach hereof shall be deemed an Event of Default entitling Secured Party to the rights provided for in paragraphs 5 and 6 hereof.

7. Debtor agrees that Debtor will not, and may not, assert against Secured Party or against the collateral security any claim, demand, offset or counterclaim arising out of the Purchase Agreement; and Debtor agrees that Debtor's sole remedies as a subscriber to the shares, as a shareholder and as a proprietary lessee are those afforded to all subscribers, shareholders and proprietary lessees in the Purchase Agreement and the proprietary lease. In an action on the Note or Security Agreement, Debtor will not interpose any defense or counterclaim which does not arise from this Loan Transaction.

8. Debtor agrees that the Corporation, its officers, agents, servants, employees and/or attorneys shall have no responsibility to Debtor hereunder other than to deliver the collateral security to Secured Party, or to return the collateral security to Debtor, all in accordance with the provisions of this Agreement.

9. Secured Party may, at its option, make any payments for Debtor's account, or do any acts required to be done in order to prevent a default in or breach of the proprietary lease, but Secured Party under no circumstances shall be obligated to do so. In the event Secured Party makes any of such payments or does any of such acts, the payments and the costs of such acts, together with interest thereon shall be added to the indebtedness hereby secured and the principal amount of the note shall be deemed increased accordingly; and the provisions thereof relating to no personal liability on the part of Debtor shall apply with equal force and effect to any such payments and/or costs.

10. In the event of a default as aforesaid, Debtor shall immediately remove himself or herself from the premises and give possession thereof to Secured Party. In the event that proceedings to evict Debtor become necessary, the cost of removal shall be borne by Debtor and the cost of the same may be added to the total indebtedness, evidenced by Debtor's Note.

11. The term "Secured Party" as used in this Agreement, includes the Secured Party named herein, its successors, assigns, heirs, executors, administrators and legal representatives.

12. The pronouns used herein shall be male, female or neuter and in the singular or plural, whichever the sense requires.

13. The term "Debtor" shall be read "Debtors" if more than one person is the Debtor, and in such event, the obligation of the Debtor shall be joint and several.

14. The Debtor shall not assign this Agreement without the prior written consent of Secured Party. Secured Party shall have the right to assign this Loan-Security Agreement and the collateral held as security hereunder and all of its right, title and interest hereunder and in said collateral without Debtor's consent.

15. Except as prohibited by statute, the respective parties hereto shall and they hereby do waive trial by jury in an action, proceeding or counterclaim brought by any of the parties hereto against the other on any matter whatsoever arising out of or in any way connected with this Agreement, the collateral security and/or the relationship created thereby and with respect to any matter for which a jury trial cannot be waived, the parties hereto agree not to assert any such claim as a counterclaim in nor move to consolidated same with any action or proceeding in which a jury trial is waived.

16. Secured Party agrees that until there has been an Event of Default and Secured Party has elected to accelerate the indebtedness, Debtor shall have the exclusive right to vote the shares as a shareholder at any meeting of shareholders of the Corporation, shall be entitled to receive and retain dividends, if any, from the Corporation, shall be exclusively entitled to the benefits of income tax deductions available to all shareholders of the Corporation, shall have the right to occupy the apartment as proprietary lessee and shall have all other rights and privileges of a shareholder and proprietary lessee. Debtor agrees that Debtor shall have the exclusive responsibility to the Corporation for payment of all maintenance charges and other charges to become due under the proprietary lease, shall be exclusively responsible for the performance of all of the terms, covenants and conditions of the proprietary lease on the part of the lessee to be performed and that Secured Party shall have no responsibility whatsoever under the proprietary lease and shall under no circumstances be deemed the lessee of the apartment for any purpose. Secured Party shall be entitled to receive distributions of capital, if any, from the Corporation, to be applied in reduction of the indebtedness in inverse order.

17. This Agreement contains the full understanding of the parties and may not be amended, altered, discharged or terminated, except by another instrument in writing signed by the party sought to be charged therewith, or by his, her or its duly authorized agent.

The parties hereto have set their hands and seals this ____ day of _____ [date].

Debtor

Bank Corp.,

By _____



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Current Legal Forms for Real Estate
Chapter 21 SALES AND EXCHANGES
Part IV. Forms
J. MORTGAGE FINANCING

25-21 Current Legal Forms for Real Estate FORM 21.110

FORM 21.110 Junior lien note and deed of trust--plain language note--right of rescission

The purpose of this note and deed of trust is to secure a loan for home improvement, or any other purpose where the funds are not used to purchase the property subject to the deed of trust. The borrower may use proceeds of the loan for purposes totally unrelated to the property used as security for the loan. The property may be subject to a first mortgage or deed of trust (usually a purchase money mortgage) and any other mortgage or lien which does not affect the lender's authority or inclination to make the loan.

Plain language note

This note is another example of a plain language note that is intended to comply with state plain language laws applicable, generally, to consumer transactions. The note uses everyday business terms, rather than words usually understood only by attorneys, experienced mortgage lenders, or other professionals. The note is written in the first and second person, rather than the usual third person syntax common to the majority of legal documents.

Prior mortgages

The deed of trust contains provisions dealing with prior mortgages or deeds of trust. Although the lender may require a monthly payment to cover real estate taxes and assessments, the borrower is not required to make these additional payments to the extent they are made to a senior lender (paragraph 2 of the deed of trust). The borrower is required, by the junior deed of trust, to perform all of the borrower's obligations under the senior mortgage or any other security instrument which is a superior lien (paragraph 4 of the deed of trust). A breach of this covenant, as well as any other covenant of the borrower in the junior deed of trust, is a breach of the agreement and a basis for acceleration (paragraph 16 of the deed of trust). If the borrower fails to make payments under prior security agreements, the lender may make such payments, add the amounts

paid to the principal amount of the loan and accrue interest (paragraph 7 of the deed of trust).

Assumption of junior lien

The deed of trust contains relatively detailed provisions for assumption of the lien of the deed of trust by a transferee of the borrower. Common practice results in the inclusion of a provision that permits the lender to accelerate the loan upon any transfer of title by the borrower. Here the right to accelerate is limited. The borrower is permitted, without risk of acceleration, to place liens on the property provided that they are subordinate to the deed of trust, or rent the property for a period of three years or less. Transfer by reason of death is also excluded as grounds for acceleration. The lender's election to accelerate upon a transfer of title to a new owner must be based upon an evaluation of the transferee's creditworthiness and its effect on the lender's security, or the likelihood of a breach of the deed of trust terms. (Paragraph 15 of deed of trust.)

Truth in Lending right of rescission

In a consumer credit transaction which will result in a mortgage, deed of trust, or security interest on the consumer's principal dwelling, the Truth in Lending Act (*15 USC 1601 et seq.*) permits the consumer to rescind the transaction within three days. The purpose of the provision is to give the consumer the opportunity to reconsider the transaction which would have the serious consequence of encumbering his title to his home. The right to rescind extends until the end of the third day following the later of consummation of the transaction or the delivery of the required information and rescission forms together with the material disclosure statement.

The Truth in Lending Act requires the creditor to provide the consumer with a statement regarding the right to rescind together with an appropriate form for the consumer to exercise the right to rescind. The term "material disclosure" refers to the disclosure required under the Act for such items as the annual percentage rate, finance charge, etc. The Federal Reserve Board, in Appendix H to Regulation Z (12 CFR 226), has published both model information and rescission forms and disclosure forms. A creditor who uses the model forms is deemed to meet the disclosure requirements of the Act (except for the correctness of the figures used). One of the model information and rescission forms is used in this form.

of right to rescind

The creditor is required, under Regulation Z, to provide two copies of the notice of the right to rescind to each consumer entitled to rescind. If more than one consumer has the right to rescind, the exercise of the right by one consumer is effective as to all of them. The notice must be contained in a separate document which identifies the transaction. The notice must clearly and conspicuously disclose:

- (1) The retention or acquisition of a security interest in the consumer's principal dwelling;
- (2) The consumer's right to rescind the transaction;
- (3) How to exercise the right to rescind, with a form for that purpose, designating the address of the creditor's place of business;
- (4) The effect of rescission; and

(5) The date the rescission period expires.

If the required notice or material disclosure is not given, the consumer's right to rescind extends for three years. The Truth in Lending Act allows 20 days within which the creditor must refund the consumer's money and take possession of the property sold after the consumer exercises the right to rescind.

Transactions exempt from the right of rescission

There are several consumer credit transactions in which the right of rescission does not apply. If the transaction does not result in a lien on the consumer's dwelling, there is no right of rescission. It does not apply to a transaction in which a mortgage, deed of trust, purchase money security interest arising under an installment sales contract (e.g., purchase of mobile home), or an equivalent consensual security interest is created or retained against the consumer's dwelling to finance the acquisition or initial construction of the dwelling. It does not apply to a refinancing or consolidation of the principal balance of an existing extension of credit, provided no new advances are made, nor to advances under a preexisting open-end credit plan within the previously established credit limit. Although these transactions are exempt from the three-day right of rescission rule, the Truth in Lending disclosure requirements, i.e., annual percentage rate, finance charge, etc., may still apply.

FORMS**(1) Note****JUNIOR LIEN NOTE**

U.S. \$20,000

Newport Beach, California

November 3, _____ [year]

1. *Borrower's promise to pay.* In return for a loan that I have received, I promise to pay \$20,000 (this amount will be called "principal"), plus interest, to the order of the Lender. The Lender is San Bernardino Federal Savings and Loan Association. I understand that the Lender may transfer this Note. The Lender or anyone who takes this Note by transfer and who is entitled to receive payments under this Note will be called the "Note holder."

2. *Interest.* I will pay interest at a rate of 10 percent per year. Interest will be charged on that part of principal which has not been paid. Interest will be charged beginning on the date of this Note and continuing until the full amount of principal has been paid.

3. *Payments.* I will pay principal and interest by making payments each month. Each of my monthly payments will be in the amount of \$264.31.

I will make my monthly payments on the 15th day of each month beginning on December 15, _____ [year]. I will make these payments every month until I have paid all of the principal and interest and any other charges, described below, that I may owe under this Note. If, on November 15, _____ [year] I still owe amounts under this Note, I will pay all those amounts, in full, on that date.

I will make my monthly payments at 20 West Second Street, San Bernardino, California, or at a different place if required by the Note holder.

4. Failure to make payment.

(a) *Late charge for overdue payments.* If the Note holder has not received the full amount of any of my monthly payments by the end of ten calendar days after the date it is due, I will pay a late charge to the Note holder. The amount of the charge will be 5 percent of my overdue payment, but not less than U.S. \$14 and not more than U.S. \$28. I will pay this late charge only once on any late payment.

(b) *Notice from note holder.* If I do not pay the full amount of each monthly payment on time, the Note holder may send me a written notice telling me that if I do not pay the overdue amount by a certain date I will be in default. That date must be at least ten days after the date on which the notice is mailed to me or, if it is not mailed, ten days after the date on which it is delivered to me.

(c) *Default.* If I do not pay the overdue amount by the date stated in the notice described in (b) above, I will be in default. If I am in default, the Note holder may require me to pay immediately the full amount of principal which has not been paid and all the interest that I owe on that amount.

Even if, at a time when I am in default, the Note holder does not require me to pay immediately in full as described above, the Note holder will still have the right to do so if, at a later time, I am in default again.

(d) *Payment of note holder's costs and expenses.* If the Note holder has required me to pay immediately in full as described above, the Note holder will have the right to be paid back for all of its reasonable costs and expenses. Those expenses include, for example, reasonable attorney's fees.

5. Borrower's payments before they are due. I have the right to make payments of principal at any time before they are due. Any payment made before it is due is known as a "prepayment." A prepayment of all of the unpaid principal is known as a "full prepayment." A prepayment of only part of the unpaid principal is known as a "partial prepayment." I may make a full prepayment or a partial prepayment without paying any penalty. The Note holder will use all of my prepayments to reduce the amount of principal that I owe under this Note. If I make a partial prepayment, there will be no delays in the due dates or changes in the amounts of my monthly payments unless the Note holder agrees in writing to those delays or changes. I may make a full prepayment at any time. If I choose to make a partial prepayment, the Note holder may require me to make the prepayment on the same days that one of my monthly payments is due. The Note holder may also require that the amount of my partial prepayment be equal to the amount of principal that would have been part of my next one or more monthly payments.

6. Borrower's waivers. I waive my rights to require the Note holder to do certain things. Those things are: (a) to demand payment of amounts due (known as "presentment"); (b) to give notice that amounts due have not been paid (known as "notice of dishonor"); and (c) to obtain an official certification of nonpayment (known as a "protest"). Anyone else (i) who agrees to keep the promises made in this Note, (ii) who agrees to make payments to the Note holder if I fail to keep my promises under this Note, or (iii) who signs this Note to transfer it to someone else (known as "guarantors, sureties, and endorsers"), also waives these rights.

7. Giving of notices. Any notice that must be given to me under this Note will be given by delivering it or by mailing it by certified mail addressed to me at the Property Address below. A notice will be delivered or mailed to me at a different address if I give the Note holder a notice of my different address.

Any notice that must be given to the Note holder under this Note will be given by mailing it by certified mail, return

receipt requested, to the Note holder at the address stated in Section 3 above. A notice will be mailed to the Note holder at a different address if I am given a notice of that different address.

8. *This note covered by deed of trust.* A Deed of Trust, dated November 3, _____ [year], protects the Note holder from possible losses which might result if I do not keep the promises which I make in this Note. That Deed of Trust describes how and under what conditions I may be required to make immediate payment in full of all amounts that I owe under this Note.

9. *Responsibility of persons under this note.* If more than one person signs this Note, each of us is fully and personally obligated to pay the full amount owed and to keep all of the promises made in this Note. Any guarantor, surety, or endorser of this Note (as described in Section 6 above) is also obligated to do these things. The Note holder may enforce its rights under this Note against each of us individually or against all of us together. This means that any one of us may be required to pay all of the amounts owed under this Note. Any person who takes over my rights or obligations under this Note will have all of my rights and must keep all of my promises made in this Note. Any person who takes over the rights or obligations of a guarantor, surety, or endorser of this Note (as described in Section 6 above) is also obligated to keep all of the promises made in this Note.

NOTICE TO BORROWER

Do not sign this Note if it contains blank spaces. All spaces should be completed before you sign.

1036 Cleveland Avenue

Peter A. Morrison

Newport Beach, Orange County, CA

Ann B. Morrison

(2) Deed of trust

JUNIOR LIEN DEED OF TRUST

THIS DEED OF TRUST is made November 3, _____ [year], among the Trustor, Peter A. Morrison and Ann B. Morrison, married to each other ("Borrower"), Pacific American National Title and Guarantee Insurance Company of California ("Trustee"), and the Beneficiary, San Bernardino Federal Savings and Loan Association, a corporation organized and existing under the laws of the United States of America, whose address is 20 West Second Street, San Bernardino, California ("Lender").

Borrower, in consideration of the indebtedness herein recited and the trust herein created, irrevocably grants and conveys to Trustee, in trust, with power of sale, the following described property located in the County of Orange, State of California:

[Insert Property Description]

which has the address of 1036 Cleveland Avenue, Newport Beach, California 99909 ("Property Address");

Together with all the improvements now or hereafter erected on the property, and all easements, rights, appurtenances, and rents (subject however to the rights and authorities given herein to Lender to collect and apply such rents), all of

which shall be deemed to be and remain a part of the property covered by this Deed of Trust; and all of the foregoing, together with said property (or the leasehold estate if this Deed of Trust is on a leasehold) are hereinafter referred to as the "Property";

To secure to Lender the repayment of the indebtedness of principal and interest evidenced by Borrower's note dated November 3, _____ [year] ("Note"), which is in the face amount of \$20,000, and which provides for monthly payments with the balance of the indebtedness, if not sooner paid, due and payable on November 15, _____ [year]; the payment of all other sums, with interest, advanced in accordance herewith to protect the security of this Deed of Trust; and the performance of the covenants and agreements of Borrower herein contained.

Borrower covenants that Borrower is lawfully seized of the estate hereby conveyed and has the right to grant and convey the Property, and that the Property is unencumbered, except for a mortgage or deed of trust dated June 23, _____ [year], and recorded at Book 1095, Page 316, on June 25, _____ [year], as Instrument No. 178239 of Official Records in the Office of the Recorder of the County of Orange, State of California (herein "Senior Mortgage") and other encumbrances of record. Borrower covenants that Borrower will warrant and defend generally the title to the Property against all claims and demands, subject to encumbrances of record.

Borrower and Lender covenant and agree as follows:

1. *Payment of principal and interest.* Borrower shall promptly pay when due the principal and interest indebtedness evidenced by the Note and late charges as provided in the Note.

2. *Funds for taxes and insurance.* Subject to applicable law or a written waiver by Lender, Borrower shall pay to Lender on the day monthly payments of principal and interest are payable under the Note, until the Note is paid in full, a sum ("Funds") equal to one twelfth of the yearly taxes and assessments which may attain priority over this Deed of Trust, and ground rents on the Property, if any, plus one twelfth of yearly premium installments for hazard insurance, plus one twelfth of yearly premium installments for mortgage insurance, if any, all as reasonably estimated initially and from time to time by Lender on the basis of assessments and bills and reasonable estimates thereof. Borrower shall not be obligated to make such payments of Funds to Lender to the extent that Borrower makes such payments to the holder of the Senior Mortgage.

If Borrower pays Funds to Lender, the Funds shall be held in an institution the deposits or accounts of which are insured or guaranteed by a federal or state agency (including Lender if it is such an institution). Lender shall apply the Funds to pay said taxes, assessments, insurance premiums and ground rents. Lender may not charge for so holding and applying the Funds, analyzing said account or verifying and compiling said assessments and bills, unless Lender pays Borrower interest on the Funds and applicable law permits Lender to make such a charge. Borrower and Lender may agree in writing at the time of execution of this Deed of Trust that interest on the Funds shall be paid to Borrower, and unless such agreement is made or applicable law requires such interest to be paid, Lender shall not be required to pay Borrower any interest or earnings on the Funds. Lender shall give to Borrower, without charge, an annual accounting of the Funds showing credits and debits to the Funds and the purpose for which each debit to the Funds was made. The Funds are pledged as additional security for the sums secured by this Deed of Trust.

If the amount of the Funds held by Lender, together with the future monthly installments of Funds payable before the due dates of taxes, assessments, insurance premiums and ground rents, exceeds the amount required to pay said taxes, assessments, insurance premiums and ground rents as they fall due, such excess shall be, at Borrower's option, either promptly repaid to Borrower or credited to Borrower on monthly installments of Funds. If the amount of the Funds held by Lender is not sufficient to pay taxes, assessments, insurance premiums and ground rents as they fall due, Borrower shall pay to Lender any amount necessary to make up the deficiency within 30 days from the date notice is mailed by Lender to Borrower requesting payment thereof.

Upon payment in full of all sums secured by this Deed of Trust, Lender shall promptly refund to Borrower all Funds held by Lender. If under paragraph 16 the Property is sold or is otherwise acquired by Lender, Lender shall apply, no later than immediately before the sale of the Property or its acquisition by Lender, any Funds held by Lender at the time of application as a credit against the sums secured by this Deed of Trust.

3. *Application of payments.* Unless applicable law provides otherwise, all payments received by Lender under the Note and paragraphs 1 and 2 shall be applied by Lender first in payment of amounts, if any, payable to Lender by Borrower under paragraph 2, then to interest payable on the Note, and then to the principal of the Note.

4. *Prior mortgages and deeds of trust; charges; liens.* Borrower shall perform all of Borrower's obligations under the Senior Mortgage or any other security agreement with a lien which has priority over this Deed of Trust, including Borrower's covenants to make payments when due and to keep the Property in compliance with all environmental laws, federal, state and local. Borrower shall pay all taxes, assessments and other charges, fines and impositions attributable to the Property which may attain a priority over this Deed of Trust, and leasehold payments or ground rents, if any.

5. *Hazard insurance.* Borrower shall keep all existing or future improvements on the Property insured against loss by fire, hazards included within the term "extended coverage," and all other hazards Lender may require and in such amounts and for such periods as Lender may require.

The insurance carrier providing the insurance shall be chosen by Borrower subject to Lender's approval, which shall not be unreasonably withheld. All insurance policies and renewals shall be in form acceptable to Lender and include a standard mortgage clause in favor of and in form acceptable to Lender. Lender shall have the right to hold the policies and renewals.

In the event of loss, Borrower shall give prompt notice to the insurance carrier and Lender. Lender may make proof of loss if not made promptly by Borrower.

If the Property is abandoned by Borrower, or if Borrower fails to respond to Lender within 30 days from the date notice is mailed by Lender to Borrower that the insurance carrier offers to settle a claim for insurance benefits, Lender is authorized to collect and apply the insurance proceeds either to restoration or repair of the Property or to the sums secured by this Deed of Trust.

6. *Preservation and maintenance of property; leaseholds; condominiums; planned unit developments.* Borrower shall keep the Property in good repair, shall not commit waste or permit impairment or deterioration of the Property, shall use the property in compliance with all environmental laws, federal, state and local, and shall comply with the provisions of any lease if this Deed of Trust is on a leasehold. If this Deed of Trust is on a unit in a condominium or a planned unit development, Borrower shall perform all of Borrower's obligations under the declaration or covenants creating or governing the condominium or planned unit development, the Bylaws and regulations of the condominium or planned unit development, and constituent documents.

7. *Protection of lender's security.* If Borrower fails to perform the covenants and agreements contained in this Deed of Trust, or if any action or proceeding is commenced which materially affects Lender's interest in the Property, then Lender, upon notice to Borrower, may make such appearances, disburse such sums, and take all action necessary to protect Lender's interest. If Lender required mortgage insurance as a condition of making the loan secured by this Deed of Trust, Borrower shall pay the premiums required to maintain such insurance in effect until the requirement for such insurance terminates in accordance with Borrower's and Lender's written agreement or applicable law.

Any amounts disbursed by Lender under this paragraph 7, with interest, at the Note rate, shall become additional indebtedness of Borrower secured by this Deed of Trust. Unless Borrower and Lender agree to other terms of payment,

such amounts shall be payable upon notice from Lender to Borrower requesting payment thereof. Nothing contained in this paragraph 7 shall require Lender to incur any expense or take any action.

8. *Inspection.* Lender may make or cause to be made reasonable entries upon and inspections of the Property, provided that Lender gives Borrower prior notice of any such inspection specifying reasonable cause therefor related to Lender's interest in the Property.

9. *Borrower not released; forbearance by lender not waiver.* Extension of the time for payment or modification of amortization of the sums secured by this Deed of Trust granted by Lender to any successor in interest of Borrower shall not operate to release, in any manner, the liability of the original Borrower and Borrower's successors in interest. Lender shall not be required to commence proceedings against such successor or refuse to extend time for payment or otherwise modify amortization of the sums secured by this Deed of Trust by reason of any demand made by the original Borrower and Borrower's successors in interest. Any forbearance by Lender in exercising any right or remedy hereunder, or otherwise afforded by applicable law, shall not be a waiver of or preclude the exercise of any such right or remedy.

10. *Successors and assigns bound; joint and several liability; co-signers.* The covenants and agreements herein contained shall bind, and the rights hereunder shall inure to, the respective successors and assigns of Lender and Borrower, subject to the provisions of paragraph 15. All covenants and agreements of Borrower shall be joint and several. Any Borrower who co-signs this Deed of Trust, but does not execute the Note, (a) is co-signing this Deed of Trust only to grant and convey that Borrower's interest in the Property to Trustee under the terms of this Deed of Trust, (b) is not personally liable on the Note or under this Deed of Trust, and (c) agrees that Lender and any other Borrower hereunder may agree to extend, modify, forbear, or make any other accommodations with regard to the terms of this Deed of Trust or the Note without that Borrower's consent and without releasing that Borrower or modifying this Deed of Trust as to that Borrower's interest in the Property.

11. *Notice.* Unless otherwise provided by applicable law, (a) any notice to Borrower under this Deed of Trust shall be given by certified mail, addressed to Borrower at the Property Address or at any other address Borrower designates by notice to Lender, and (b) any notice to Lender shall be given by certified mail, return receipt requested, to Lender's address stated herein or to any other address Lender designates by notice to Borrower. Any notice under this Deed of Trust shall be deemed to have been given to Borrower or Lender when given in the manner designated above.

12. *Governing law; severability.* This Deed of Trust shall be construed in accordance with and governed by the laws of the state of California, as well as by the local laws of the jurisdiction in which the Property is located. The preceding sentence shall not limit the applicability of federal law to this Deed of Trust. If any provision or clause of this Deed of Trust or the Note conflicts with applicable law, such conflict shall not affect other provisions of either instrument if the provisions can be given effect without the conflicting provision. To this end the provisions of this Deed of Trust and the Note are declared to be severable.

13. *Borrower's copy.* Borrower shall be furnished a conformed copy of the Note and of this Deed of Trust at the time of execution or after recordation.

14. *Rehabilitation loan agreement.* Borrower shall fulfill all of Borrower's obligations under any home rehabilitation, improvement, repair or other loan agreement which Borrower enters into with Lender. Lender may require Borrower to execute and deliver to Lender in a form acceptable to Lender, an assignment of any rights, claims or defenses which Borrower may have against parties who supply labor, materials or services in connection with improvements made to the Property.

15. *Transfer of property; assumption.* If all or any part of the Property or an interest therein is sold or transferred by Borrower, excluding (a) the creation of a lien or encumbrance subordinate to this Deed of Trust, (b) a transfer by devise, descent or by operation of law upon the death of a joint tenant, or (c) the grant of any leasehold interest of three years or

less not containing an option to purchase, Borrower shall, upon Lender's request, submit information required to enable Lender to evaluate the transferee's creditworthiness as if a new loan were being made to the transferee. If Lender, on the basis of a review of the creditworthiness of the transferee and the value of the Property, reasonably determines that, as a result of the sale or transfer, Lender's security may be impaired, or that there is an increased likelihood of a breach of any covenant or agreement in this Deed of Trust, Lender may declare all of the sums secured by this Deed of Trust to be immediately due and payable.

If Lender exercises such option to accelerate, it shall mail Borrower notice of acceleration in accordance with paragraph 11. Such notice shall provide a period of not less than ten days from the date the notice is mailed within which Borrower may pay the sums declared due. If Borrower fails to pay such sums before the ten-day period expires, Lender may, without further notice or demand on Borrower, invoke any remedies permitted by paragraph 16.

16. *Acceleration; remedies.* Except as provided in paragraph 15, upon Borrower's breach of any covenant or agreement in this Deed of Trust, including the covenants to pay when due any sums secured by this Deed of Trust, Lender prior to acceleration shall mail notice to Borrower as provided in paragraph 11 specifying: (1) the breach; (2) the action required to cure such breach; (3) a date, not less than ten days from the date the notice is mailed to Borrower, by which such breach must be cured; and (4) that failure to cure such breach on or before the date specified in the notice may result in acceleration of the sums secured by this Deed of Trust and sale of the Property. The notice shall further inform Borrower of the right to reinstate after acceleration and the right to bring a court action to assert the nonexistence of a default or any other defense of Borrower to acceleration and sale. If the breach is not cured on or before the date specified in the notice, Lender may declare all of the sums secured by this Deed of Trust to be immediately due and payable without further demand and may invoke the power of sale and all other remedies permitted by applicable law. Lender shall be entitled to collect all reasonable costs and expenses incurred in pursuing the remedies provided in this paragraph 16, including reasonable attorney's fees.

If Lender invokes the power of sale, it shall execute or cause Trustee to execute a written notice of the occurrence of an event of default and of Lender's election to cause the Property to be sold, and shall cause such notice to be recorded in each county in which the Property or some part thereof is located. Lender or Trustee shall mail copies of such notice in the manner prescribed by applicable law. Trustee shall give public notice of sale to the persons and in the manner prescribed by applicable law. After the lapse of time required by applicable law, Trustee, without demand on Borrower, shall sell the Property at public auction to the highest bidder at the time and place and under the terms designated in the notice of sale in one or more parcels and in any order Trustee determines. Trustee may postpone sale of all or any parcel of the Property by public announcement at the time and place of any previously scheduled sale. Lender or its designee may purchase the Property at any sale.

Trustee shall deliver to the purchaser a Trustee's deed conveying the Property so sold without any covenant or warranty, expressed or implied. The recitals in the Trustee's deed shall be prima facie evidence of the truth of the statements made therein. Trustee shall apply the proceeds of the sale in the following order: (a) to all reasonable costs and expenses of the sale, including reasonable Trustee's and attorney's fees and costs of title evidence; (b) to all sums secured by this Deed of Trust; and (c) the excess, if any, to the person or persons legally entitled thereto.

17. *Borrower's right to reinstate.* Notwithstanding Lender's acceleration of the sums secured by this Deed of Trust due to Borrower's breach, Borrower may have any proceedings begun by Lender to enforce this Deed of Trust discontinued at any time prior to five days before sale of the Property pursuant to the power of sale contained in this Deed of Trust or at any time prior to entry of a judgment enforcing this Deed of Trust if: (a) Borrower pays Lender all sums which would be then due under this Deed of Trust and the Note had no acceleration occurred; (b) Borrower cures all breaches of any other of Borrower's covenants or agreements contained in this Deed of Trust; (c) Borrower pays all reasonable expenses incurred by Lender and Trustee in enforcing Borrower's covenants and agreements contained in this Deed of Trust, and in enforcing Lender's and Trustee's remedies as provided in paragraph 16, including reasonable attorney's fees; and (d) Borrower takes all action that Lender reasonably requires to assure that the lien of this Deed of Trust, Lender's interest

in the Property and Borrower's obligation to pay the sums secured by this Deed of Trust shall continue unimpaired. Upon such payment and cure by Borrower, this Deed of Trust and the obligations secured hereby shall remain in full force and effect as if no acceleration had occurred.

18. *Assignment of rents; appointment of receiver; lender in possession.* As additional security hereunder, Borrower assigns to Lender the rents of the Property, except that Borrower may, before acceleration under paragraph 16 or abandonment of the Property, collect and retain such rents as they become due and payable.

Upon acceleration under paragraph 16 or abandonment of the Property, Lender, in person, by agent or by judicially appointed receiver may enter upon, take possession of and manage the Property, and collect the rents of the Property including those past due. All rents collected by Lender or the receiver shall be applied first to payment of the costs of management of the Property and collection of rents, including receiver's fees, premiums on receiver's bonds, and reasonable attorney's fees, and then to the sums secured by this Deed of Trust. Lender and the receiver shall be liable to account only for those rents actually received.

19. *Reconveyance.* Upon payment of all sums secured by this Deed of Trust, Lender shall request Trustee to reconvey the Property and shall surrender this Deed of Trust and all notes evidencing indebtedness secured by it to Trustee. Trustee shall reconvey the Property without warranty and without charge to the person or persons legally entitled thereto. Such person or persons shall pay all costs of recordation, if any.

20. *Substitute trustee.* Lender may, from time to time, remove Trustee or any trustee appointed hereunder and appoint a successor trustee. Without conveyance of the Property, the successor trustee shall succeed to all the title, power and duties conferred upon the Trustee herein and by applicable law.

21. *Requests for notices.* Borrower requests that copies of the notice of default and notice of sale be sent to Borrower's address, which is the Property Address. Lender requests that copies of notices of foreclosure from the holder of the Senior Mortgage and any other lien which has priority over this Deed of Trust be sent to Lender's address, as set forth on page one of this Deed of Trust, as provided by Section 2924b of the Civil Code of California.

22. *Beneficiary or payoff demand statement.* Lender may collect a fee not to exceed \$60 for furnishing a beneficiary statement or a payoff demand statement as provided by Section 2943 of the Civil Code of California.

Borrower has executed this Deed of Trust.

Peter A. Morrison, Borrower

Ann B. Morrison, Borrower

[Acknowledgments]

REQUEST FOR RECONVEYANCE

To Trustee:

The undersigned is the holder of the note or notes secured by this Deed of Trust. Said note or notes, together with all other indebtedness secured by this Deed of Trust, have been paid in full. You are directed to cancel said note or notes and this Deed of Trust, which are delivered hereby, and to reconvey, without warranty, all the estate now held by you under this Deed of Trust to the person or persons legally entitled thereto.

Dated _____

(3) Notice of right to cancel

Your Right to Cancel

You are entering into a transaction that will result in a deed of trust which will be a lien on your home. You have the legal right under federal law to cancel this transaction, without cost, within three business days from whichever of the following events occurs last:

(1) the date of the transaction, which is _____ [date];

(2) the date you received your Truth in Lending disclosures; or

(3) the date you received this notice of your right to cancel.

If you cancel the transaction, the deed of trust is also cancelled. Within 20 calendar days after we receive your notice, we must take the steps necessary to reflect the fact that the deed of trust on your home has been cancelled, and we must return to you any money or property you have given to us or to anyone else in connection with this transaction.

You may keep any money or property we have given you until we have done the things mentioned above, but you must then offer to return the money or property. If it is impractical or unfair for you to return the property, you must offer its reasonable value. You may offer to return the property at your home or at the location of the property. Money must be returned to the address below. If we do not take possession of the money or property within 20 calendar days of your offer, you may keep it without further obligation.

How to Cancel

If you decide to cancel this transaction, you may do so by notifying us in writing at: San Bernardino Federal Savings and Loan Association, 195 Main Street, Newport Beach, California 00000. You may use any written statement that is signed and dated by you and states your intention to cancel, or you may use this notice by dating and signing below. Keep one copy of this notice because it contains important information about your rights.

If you cancel by mail or telegram, you must send the notice no later than midnight of (date) (or midnight of the third business day following the latest of the three events listed above). If you send or deliver your written notice to cancel some other way, it must be delivered to the above address no later than that time.

I WISH TO CANCEL

Consumer's Signature

Date _____



147 of 152 DOCUMENTS

Current Legal Forms for Real Estate

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Current Legal Forms for Real Estate
Chapter 21 SALES AND EXCHANGES
Part IV. Forms
J. MORTGAGE FINANCING

25-21 Current Legal Forms for Real Estate FORM 21.111

FORM 21.111 Plain language note and mortgage--residential mortgage loan

COMMENT

The note, and the mortgage following this note, are drafted to comply with New York's "plain language" law. This law is a reflection of the increasing number of state laws enacted to protect consumers from deceptive trade practices.

"Consumer transactions"

Consumer transactions are purchases or leases by individuals of goods, equipment, or real estate for their personal, family, or household use. This typically includes automobile sales or leases, apartment leases, appliance, or furniture installment sales as well as purchase money loans on the purchase of a personal residence secured by a mortgage. One area of abuse, which consumer protection laws are aimed at correcting, is the use of complicated language incomprehensible to consumers. In some situations, the consumer contract language is in direct contradiction to the oral representations of the seller, lessor, or creditor, or not a true expression of the agreement which the consumer believes was made.

Consumer protection laws

Some states have enacted all or parts of the Uniform Deceptive Trade Practices Act (UDTPA), including Georgia, Nebraska, New Mexico, and Hawaii. Other jurisdictions have enacted their own version of consumer protection laws. The various consumer protection laws and UDTPA prohibit persons selling, leasing, or lending to individuals in consumer transactions from using unfair or deceitful practices. Enforcement of the act may be solely in the hands of the state's highest law enforcement official, such as an attorney general, or consumers themselves may be allowed to

bring a direct individual or class action. In addition to recovery of damages, consumers may be entitled to also recover attorney's fees and penalties. The Texas Deceptive Trade Practice-Consumer Protection Act goes so far as to permit the consumer to enjoin deceptive practices and obtain, in specified circumstances, treble damages. These statutory remedies are usually in addition to any remedies at common law or in equity which the individual may otherwise have.

Legal document language

Some courts have interpreted their jurisdiction's consumer protection law to proscribe the use of complicated, unclear, or deceptive language in consumer transaction legal documents. For example, the Pennsylvania courts have held that the Commonwealth's Consumer Protection Law forbids the use of incomprehensible language in a printed form of residential lease.

Plain language law

The New York "plain language" statute specifically addresses the use of "legalese" in consumer agreements. The act affirmatively requires (1) the use of common and every-day words in a clear and coherent manner, and (2) appropriately divided and captioned sections. The law applies to residential leases and every other written agreement where a consumer is a party and the subject matter, i.e., money, property, or services, is primarily for personal, family, or household use. A loan used by a consumer to purchase a principal residence, second home, or vacation home which is secured by a note and mortgage is a covered transaction.

Protection is given to sellers, creditors, and lessors under New York's law by a penalty limitation of \$50 per consumer and \$10,000 in class action situations. The penalty is in addition to actual damages which the consumer may be able to prove. No action can be brought by a consumer under the "plain language" law after both parties have fully performed their obligations. Good faith in attempting to comply with the law on the part of the seller, creditor, or lessor is a complete defense. Agreements involving amounts over \$50,000 are specifically excluded from the provision's protection. The use of language required by federal law, rule, or regulation or by a governmental instrumentality is allowed without penalty or liability.

FORMS

(1) Plain language note

NOTE

U.S. \$45,000

Newburgh, New York
November, 1, _____ [year]

1 . BORROWER'S PROMISE TO PAY

In return for a loan that I have received, I promise to pay \$45,000 (this amount will be called "principal"), plus interest, to the order of the Lender. The Lender is Fifth National Bank of Ulster County. I understand that the Lender may transfer this Note. The Lender or anyone who takes this Note by transfer and who is entitled to receive payments under this Note will be called the "Note holder."

2 . INTEREST

I will pay interest at a rate of 10 percent per year. Interest will be charged on that part of principal which has not been paid. Interest will be charged beginning on the date of this Note and continuing until the full amount of principal has been paid.

3 . PAYMENTS

I will pay principal and interest by making payments every month. Each of my monthly payments will be in the amount of U.S. \$394.91.

I will make my monthly payments on the first day of each month beginning on December 1, _____ [year]. I will make these payments every month until I have paid all of the principal and interest and any other charges, described below, that I may owe under this Note. If, on November 1, _____ [year], I still owe amounts under this Note, I will pay all those amounts, in full, on that date.

I will make my monthly payments at 50 West Main Street, Kingston, New York, or at a different place if required by the Note holder.

4 . BORROWER'S FAILURE TO PAY AS REQUIRED

(A) Late Charge for Overdue Payments

If the Note holder has not received the full amount of any of my monthly payments by the end of 15 calendar days after the date it is due, I will pay a late charge to the Note holder. The amount of the charge will be 1 percent of my overdue payment of principal and interest.

(B) Notice from Note Holder

If I do not pay the full amount of each monthly payment on time, the Note holder may send me a written notice telling me that if I do not pay the overdue amount by a certain date I will be in default. That date must be at least 30 days after the date on which the notice is mailed to me or, if it is not mailed, 30 days after the date on which it is delivered to me.

(C) Default

If I do not pay the overdue amount by the date stated in the notice described in (B) above, I will be in default. If I am in default, the Note holder may require me to pay immediately the full amount of principal which has not been paid and all the interest that I owe on that amount.

Even if, at a time when I am in default, the Note holder does not require me to pay immediately in full as described above, the Note holder will still have the right to do so if, at a later time, I am in default again.

(D) Payment of Note Holder's Costs and Expenses

If the Note holder has required me to pay immediately in full as described above, the Note holder will have the right to be paid back for all of its reasonable costs and expenses. Those expenses include, for example, reasonable attorney's fees.

5 . BORROWER'S PAYMENTS BEFORE THEY ARE DUE

(A) Borrower's Right to Make Prepayments

I have the right to make payments of principal before they are due. Any payment made before it is due is known as a "prepayment." A prepayment of only part of the unpaid principal is known as a "partial prepayment."

If I choose to make a partial prepayment, the Note holder may require me to make the prepayment on the same day that one of my monthly payments is due. The Note holder may also require that the amount of my partial prepayment be equal to the amount of principal that would have been part of my next one or more monthly payments. If I make a partial prepayment, there will be no delays in the due dates or changes in the amounts of my monthly payments unless the Note holder agrees in writing to those delays or changes. The Note holder will use all of my prepayments to reduce the amount of principal that I owe under this Note.

(B) Prepayment Charge

I will pay a prepayment charge to the Note holder only if a percentage and a date are filled in below *and if I make the prepayment using money lent to me by a lender other than the Note holder.* [Strike italics if not applicable.]

During any 12-month period ending on an anniversary of the date of this Note, I may make partial prepayments of up to \$5,000 without charge. This amount will be called the "free prepayment amount."

I will pay a prepayment charge if the total of my prepayments during any such 12-month period is greater than the free prepayment amount. The prepayment charge will be a percentage of the amount by which my prepayments in any such 12-month period are greater than the free prepayment amount. That percentage will be 3 percent until November 1, _____ [year]; it will change to 2 percent on that date until November 1, _____ [year]; and it will change to 1 percent on that date until November 1, _____ [year]. After the last date filled in above, there will be no prepayment charge.

6 . BORROWER'S WAIVERS

I waive my rights to require the Note holder to do the following things: (A) to demand payment of amounts due (known as "presentment"); (B) to give notice that amounts due have not been paid (known as "notice of dishonor"); (C) to obtain an official certification of nonpayment (known as a "protest"). Anyone else (i) who agrees to keep the promises made in this Note, (ii) who agrees to make payments to Lender if I fail to keep my promises under this Note, or (iii) who signs this Note to transfer it to someone else (known as "guarantors, sureties, and endorsers"), also waives these rights.

7 . GIVING OF NOTICES

Any notice that must be given to me under this Note will be given by delivering it or by mailing it addressed to me at the Property Address below. A notice will be delivered or mailed to me at a different address if I give the Note holder a notice of my different address.

Any notice that must be given to the Note holder under this Note will be given by mailing it to the Note holder at the address stated in Section 3 above. A notice will be mailed to the Note holder at a different address if I am given a notice of that different address.

8 . THIS NOTE COVERED BY A MORTGAGE

A Mortgage, dated November 1, _____ [year], protects the Note holder from possible losses which might result if I do not keep the promises which I make in this Note. That Mortgage describes how and under what conditions I may be required to make immediate payment in full of all amounts that I owe under this Note.

9 . RESPONSIBILITY OF PERSONS UNDER THIS NOTE

If more than one person signs this Note, each of us is fully and personally obligated to pay the full amount owed and to keep all of the promises made in this Note. Any guarantor, surety, or endorser of this Note (as described in Section 6 above) is also obligated to do these things. The Note holder may enforce its rights under this Note against each of us individually or against all of us together. This means that any one of us may be required to pay all of the amounts owed under this Note.

Any person who takes over my rights or obligations under this Note will have all of my rights and must keep all of my promises made in this Note. Any person who takes over the rights or obligations of a guarantor, surety, or endorser of this Note (as described in Section 6 above) is also obligated to keep all of the promises made in this Note.

(SIGN ORIGINAL ONLY)

235 North Elm Street

Charles T. Conroy

Little Britan, New York
[property address]

Ellen C. Conroy

(2) Plain language mortgage

MORTGAGE

WORDS USED OFTEN IN THIS DOCUMENT

(A) "Mortgage." This document, which is dated November 1, _____ [year], will be called the "Mortgage."

(B) "Borrower." Charles T. Conroy and Ellen C. Conroy, husband and wife will sometimes be called the "Borrower" and sometimes simply "I."

(C) "Lender." Fifth National Bank of Ulster County will be called the "Lender." Lender is a corporation or association which was formed and which exists under the laws of the United States of America. Lender's address is 50 West Main Street, Kingston, New York.

(D) "Note." The note signed by Borrower and dated November 1, _____ [year], will be called the "Note." The Note shows that I owe Lender Forty Five Thousand and no/100 Dollars (\$45,000) plus interest, which I have promised to pay in monthly payments of principal and interest and to pay in full by November 1, _____ [year].

(E) "Property." The property that is described below in the section titled "Description of the Property," will be called the "Property."

BORROWER'S TRANSFER TO LENDER OF RIGHTS IN THE PROPERTY

I mortgage, grant and convey the Property to Lender subject to the terms of this Mortgage. This means that, by signing this Mortgage, I am giving Lender those rights that are stated in this Mortgage and also those rights that the law gives to lenders who hold mortgages on real property. I am giving Lender these rights to protect Lender from possible losses that might result if I do not:

- (A) Pay all the amounts that I owe Lender as stated in the Note;
- (B) Pay, with interest, any amounts that Lender spends under this Mortgage, to protect the value of the Property and Lender's rights in the Property;
- (C) Pay, with interest, any other amounts that Lender lends to me as Future Advances under Paragraph 23 below; and
- (D) Keep all of my promises and agreements under this Mortgage.

DESCRIPTION OF THE PROPERTY

I give Lender rights in the following Property:

- (A) The property which is located at 235 North Elm Street, Little Britan, New York. This property is in Orange County in the State of New York. It has the following legal description:

[Insert Description]

If this property is a condominium, the following must be completed: This property is part of a condominium project known as Great Britan Gardens (called the "Condominium Project"). This property includes my unit and all of my rights in the common elements of the Condominium Project.

If this property is in a planned unit development, the following must be completed: This property is in a development which is a planned unit development known as _____ (called the "PUD"). The PUD was created by _____;

- (B) All buildings, structures and other improvements that are located on the property described in paragraph (A) of this section;
- (C) All rights in other property that I have as owner of the property described in paragraph (A) of this section. These rights are known as "easements, rights and appurtenances attached to the property;"
- (D) All rents or royalties from the property described in paragraph (A) of this section;
- (E) All mineral, oil and gas rights and profits, water, water rights and water stock that are part of the property described is paragraph (A) of this section;
- (F) All rights that I have in the land which lies in the streets or roads in front of, or next to, the property described in paragraph (A) of this section;
- (G) All fixtures on the property described in paragraphs (A) and (B) of this section. Usually, fixtures are items that are physically attached to buildings, such as hot water heaters;

(H) All of the property described in paragraphs (B) through (F) of this section that I acquire in the future, and all rights described in paragraphs (B) through (F) of this section that I acquire in the future;

(I) All replacements of or additions to the property described in paragraphs (B) through (F) and paragraph (H) of this section;

(J) All fixtures that: (i) are on the property described in paragraphs (A) and (B) of this section, and (ii) I acquire in the future, except for those fixtures that under the law are "consumer goods" and that I acquire more than ten days after the date of the Note; and

(K) All replacements of or additions to the fixtures that are on the property described in paragraphs (A) and (B) of this section, except for those replacements and additions that are: (i) made to fixtures that under the law are "consumer goods," and (ii) made more than ten days after the date of the Note.

It may be that I do not own the Property but am a tenant under a lease. In that case, the rights I am giving to Lender by this Mortgage are rights in my tenancy.

BORROWER'S RIGHT TO MORTGAGE THE PROPERTY AND BORROWER'S OBLIGATION TO DEFEND OWNERSHIP OF THE PROPERTY

I promise that except for the "exceptions" listed in any title insurance policy which insures Lender's rights in the Property: (A) I lawfully own the Property; (B) I have the right to mortgage, grant and convey the Property to Lender; and (C) there are no outstanding claims or charges against the Property.

I give a general warranty of title to Lender. This means that I will be fully responsible for any losses which Lender suffers because someone other than myself has some of the rights in the Property which I promise that I have. I promise that I will defend my ownership of the Property against any claims of such rights.

UNIFORM PROMISES

I promise and I agree with Lender as follows:

1 . BORROWER'S PROMISE TO PAY PRINCIPAL AND INTEREST UNDER THE NOTE AND TO FULFILL OTHER PAYMENT OBLIGATIONS

I will promptly pay to Lender when due: principal and interest under the Note; late charges and prepayment charges as stated in the Note; and principal and interest on Future Advances that I may receive under Paragraph 23 below.

2 . AGREEMENTS ABOUT MONTHLY PAYMENTS FOR TAXES AND INSURANCE

(A) Borrower's Obligation to Make Monthly Payments to Lender for Taxes and Insurance

I will pay to Lender all amounts necessary to pay for taxes, assessments, ground rents (if any), and hazard insurance on the Property and mortgage insurance (if any). I will pay those amounts to Lender unless Lender tells me, in writing, that I do not have to do so, or unless the law requires otherwise. I will make those payments on the same day that my monthly payments of principal and interest are due under the Note.

The amount of each of my payments under this Paragraph 2 will be the sum of the following:

- (i) One twelfth of the estimated yearly taxes, assessments and ground rents (if any) on the Property which under the law may be superior to this Mortgage; plus
- (ii) One twelfth of the estimated yearly premium for hazard insurance covering the Property; plus
- (iii) One twelfth of the estimated yearly premium for mortgage insurance (if any).

Lender will determine from time to time my estimated yearly taxes, assessments, ground rents and insurance premiums based upon existing assessments and bills, and reasonable estimates of future assessments and bills. (Taxes, assessments, ground rents and insurance premiums will be called "taxes and insurance.")

The amounts that I pay to Lender for taxes and insurance under this Paragraph 2 will be called the "Funds." The Funds are additional protection for Lender in case I do not fulfill my obligations under the Note and under this Mortgage.

(B) Lender's Obligations Concerning Borrower's Monthly Payments for Taxes and Insurance

Lender will keep the Funds in a savings or banking institution the deposits or accounts of which are insured or guaranteed by a federal or state agency. If Lender is such an institution then Lender may hold the Funds. Except as described in this Paragraph 2, Lender will use the Funds to pay taxes and insurance. Lender will give to me, without charge, an annual accounting of the Funds. That accounting must show all additions to and deductions from the Funds and the reason for each deduction.

Lender may not charge me for holding or keeping the Funds on deposit, for using the Funds to pay taxes and insurance, for analyzing my payments of Funds, or for receiving, verifying and totaling assessments and bills. However, Lender may charge me for these services if Lender pays me interest on the Funds and if the law permits Lender to make such a charge. Lender will not be required to pay me any interest or earnings on the Funds unless either (i) Lender and I agree in writing, at the time I sign this Mortgage, that Lender will pay interest on the Funds; or (ii) the law requires Lender to pay interest on the Funds.

If Lender's estimates are too high or if taxes and insurance rates go down, the amounts that I pay under this Paragraph 2 will be too large. If this happens at a time when I am keeping all of my promises and agreements made in this Mortgage, I will have the right to have the excess amount either promptly repaid to me as a direct refund or credited to my future monthly payments of Funds. There will be excess amounts if, at any time, the sum of (a) the amount of Funds which Lender is holding or keeping on deposit, plus (b) the amount of the monthly payments of Funds which I still must pay between that time and the due dates of taxes and insurance, is greater than the amount necessary to pay the taxes and insurance when they are due.

If, when payments of taxes and insurance are due, Lender has not received enough Funds from me to make those payments, I will pay to Lender whatever additional amount is necessary to pay the taxes and insurance in full. I must pay that additional amount in one or more payments as Lender may require.

When I have paid all of the amounts due under the Note and under this Mortgage, Lender will promptly refund to me any Funds that are then being held or kept on deposit by Lender. If, under Paragraph 20 below, either Lender acquires the Property or the Property is sold, then immediately before the acquisition or sale, Lender will use any Funds which Lender is holding or has on deposit at that time to reduce the amount that I owe to Lender under the Note and under this Mortgage.

3 . LENDER'S APPLICATION OF BORROWER'S PAYMENTS

Unless the law requires otherwise, Lender will apply each of my payments under the Note and under Paragraphs 1 and 2 above in the following order and for the following purposes:

- (A) First, to pay the amounts then due to Lender under Paragraph 2 above;
- (B) Next, to pay interest then due under the Note;
- (C) Next, to pay principal then due under the Note; and
- (D) Next, to pay interest and principal on any Future Advances that I may have received from Lender under Paragraph 23 below.

4 . BORROWER'S OBLIGATION TO PAY CHARGES AND ASSESSMENTS AND TO SATISFY CLAIMS AGAINST THE PROPERTY

I will pay all taxes, assessments, and any other charges and fines that may be imposed on the Property and that may be superior to this Mortgage. I will also make payments due under my lease if I am a tenant on the Property and I will pay ground rents (if any) due on the Property. I will do this either by making the payments to Lender that are described in Paragraph 2 above or, if I am not required to make payments under Paragraph 2, by making payments, when they are due, directly to the persons entitled to them. (In this Mortgage, the word "person" means any person, organization, governmental authority, or other party.) If I make direct payments, then promptly after making any of those payments I will give Lender a receipt which shows that I have done so. If I make payment to Lender under Paragraph 2, I will give Lender all notices or bills that I receive for the amounts due under this Paragraph 4.

If the Property includes a unit in a Condominium Project or in a PUD, I will promptly pay, when they are due, all assessments imposed by the owners association or other organization that governs the Condominium Project or PUD. That association or organization will be called the "Owners Association."

Any claim, demand or charge that is made against property because an obligation has not been fulfilled is known as a "lien." I will promptly pay or satisfy all liens against the Property that may be superior to this Mortgage. However, this Mortgage does not require me to satisfy a superior lien if: (A) I agree, in writing, to pay the obligation which gave rise to the superior lien and Lender approves the way in which I agree to pay that obligation; or (B) I, in good faith, argue or defend against the superior lien in a lawsuit so that, during the lawsuit, the superior lien may not be enforced and no part of the Property must be given up.

5 . BORROWER'S OBLIGATION TO OBTAIN AND TO KEEP HAZARD INSURANCE ON THE PROPERTY

(A) Generally

I will obtain hazard insurance to cover all buildings, structures and other improvements that now are or in the future will be located on the Property. The insurance must cover loss or damage caused by fire, hazards normally covered by "extended coverage" hazard insurance policies, and other hazards for which Lender requires coverage. The insurance must be in the amounts and for the periods of time required by Lender. It is possible that the insurance policy will have provisions that may limit the insurance company's obligation to pay claims if the amount of coverage is too low. Those provisions are known as "co-insurance requirements." Lender may not require me to obtain an amount of coverage that is more than the larger of the following two amounts: either (i) the amount that I owe to Lender under the Note and under this Mortgage; or (ii) the amount necessary to satisfy the co-insurance requirements.

I may choose the insurance company, but my choice is subject to Lender's approval. Lender may not refuse to approve my choice unless the refusal is reasonable. All of the insurance policies and renewals of those policies must include what is known as a "standard mortgage clause" to protect Lender. The form of all policies and the form of all renewals must be acceptable to Lender. Lender will have the right to hold the policies and renewals.

I will pay the premiums on the insurance policies either by making payments to Lender, as described in Paragraph 2 above, or by paying the insurance company directly when the premium payments are due. If Lender requires, I will promptly give Lender all receipts of paid premiums and all renewal notices that I receive.

If there is a loss or damage to the Property, I will promptly notify the insurance company and Lender. If I do not promptly prove to the insurance company that the loss or damage occurred, then Lender may do so.

The amount paid by the insurance company is called "proceeds." The proceeds will be used to repair or to restore the damaged Property unless: (a) it is not economically possible to make the repairs or restoration; or (b) the use of the proceeds for that purpose would lessen the protection given to Lender by this Mortgage; or (c) Lender and I have agreed in writing not to use the proceeds for that purpose. If the repair or restoration is not economically possible or if it would lessen Lender's protection under this Mortgage, then the proceeds will be used to reduce the amount that I owe to Lender under the Note and under this Mortgage. If any of the proceeds remain after the amount that I owe to Lender has been paid in full, the remaining proceeds will be paid to me. The use of proceeds to reduce the amount that I owe to Lender will not be a prepayment that is subject to the prepayment charge provisions, if any, under the Note.

If I abandon the Property, or if I do not answer, within 30 days, a notice from Lender stating that the insurance company has offered to settle a claim for insurance benefits, then Lender has the authority to collect the proceeds. Lender may then use the proceeds to repair or restore the Property or to reduce the amount that I owe to Lender under the Note and under this Mortgage. The 30-day period will begin on the date the notice is mailed or, if it is not mailed, on the date the notice is delivered.

If any proceeds are used to reduce the amount of principal which I owe to Lender under the Note, that use will not delay the due date or change the amount of any of my monthly payments under the Note and under Paragraphs 1 and 2 above. However, Lender and I may agree in writing to those delays or changes.

If Lender acquires the Property under Paragraph 20 below, all of my rights in the insurance policies will belong to Lender. Also, all of my rights in any proceeds which are paid because of damage that occurred before the Property is acquired by Lender or sold will belong to Lender. However, Lender's rights in those proceeds will not be greater than the amount that I owe to Lender under the Note and under this Mortgage immediately before the Property is acquired by Lender or sold.

(B) Agreements that Apply to Condominiums and PUDs

(i) If the Property includes a unit in a Condominium Project, the Owners Association may maintain a hazard insurance policy which covers the entire Condominium Project. That policy will be called the "master policy." So long as the master policy remains in effect and meets the requirements stated in this Paragraph 5: (a) my obligation to obtain and to keep hazard insurance on the Property is satisfied; (b) I will not be required to include an amount for hazard insurance premiums in my monthly payment of Funds to Lender under Paragraph 2 above; and (c) if there is a conflict, concerning the use of proceeds, between (1) the terms of this Paragraph 5, and (2) the law or the terms of the declaration, by-laws, regulations or other documents creating or governing the Condominium Project, then that law or the terms of those documents will govern the use of proceeds. I will promptly give Lender notice if the

master policy is interrupted or terminated. During any time that the master policy is not in effect the terms of (a), (b) and (c) of this subparagraph 5(B)(i) will not apply.

(ii) If the Property includes a unit in a Condominium Project, it is possible that proceeds will be paid to me instead of being used to repair or to restore the Property. I give Lender my rights to those proceeds. If the Property includes a unit in a PUD, it is possible that proceeds will be paid to me instead of being used to repair or to restore the common areas or facilities of the PUD. I give Lender my rights to those proceeds. All of the proceeds described in this subparagraph 5(B)(ii) will be paid to Lender and will be used to reduce the amount that I owe to Lender under the Note and under this Mortgage. If any of those proceeds remain after the amount that I owe to Lender has been paid in full, the remaining proceeds will be paid to me. The use of proceeds to reduce the amount that I owe to Lender will not be a prepayment that is subject to the prepayment charge provisions, if any, under the Note.

6 . BORROWER'S OBLIGATION TO MAINTAIN THE PROPERTY AND TO FULFILL OBLIGATIONS IN LEASE, AND AGREEMENTS ABOUT CONDOMINIUMS AND PUDs

I will keep the Property in good repair. I will not destroy, damage or substantially change the Property, and I will not allow the Property to deteriorate. If I do not own but am a tenant on the Property, I will fulfill my obligations under my lease.

If the Property is a unit in a Condominium Project or in a PUD, I will fulfill all of my obligations under the declaration, by-laws, regulations and other documents that create or govern the Condominium Project or PUD. Also, I will not divide the Property into smaller parts that may be owned separately (known as "partition or subdivision"), and I will not consent to any of the following unless I have first given Lender notice and obtained Lender's consent in writing:

(A) The abandonment or termination of the Condominium Project or PUD, unless, in the case of a condominium, the abandonment or termination is required by law;

(B) Any significant change to the declaration, by-laws or regulations of the Owners Association, trust agreement, articles of incorporation, or other documents that create or govern the Condominium Project or PUD, including, for example, a change in the percentage of ownership rights, held by unit owners, in the Condominium Project or in the common areas or facilities of the PUD;

(C) A decision by the Owners Association to terminate professional management and to begin self-management of the Condominium Project or PUD; and

(D) The transfer, release, creation of liens, partition or subdivision of all or part of the common areas and facilities of the PUD. (However, this provision does not apply to the transfer by the Owners Association of rights to use those common areas and facilities for utilities and other similar or related purposes.)

7 . LENDER'S RIGHT TO TAKE ACTION TO PROTECT THE PROPERTY

If: (A) I do not keep my promises and agreements made in this Mortgage, or (B) someone, including me, begins a legal proceeding that may significantly affect Lender's rights in the Property (such as, for example, a legal proceeding in bankruptcy, in probate, for condemnation, or to enforce laws or regulations), then Lender may do and pay for whatever is necessary to protect the value of the Property and Lender's rights in the Property. Lender's actions under this Paragraph 7 may include, for example, appearing in court, paying reasonable attorney's fees, and entering on the Property to make repairs. Lender must give me notice before Lender may take any of these actions.

I will pay to Lender any amounts, with interest, which Lender spends under this Paragraph 7. This Mortgage will

protect Lender in case I do not keep this promise to pay those amounts with interest.

I will pay those amounts to Lender when Lender sends me a notice requesting that I do so. I will also pay interest on those amounts at the same rate stated in the Note. However, if payment of interest at that rate would violate the law, I will pay interest on the amounts spent by Lender under this Paragraph 7 at the highest rate that the law allows. Interest on each amount will begin on the date that the amount is spent by Lender. However, Lender and I may agree in writing to terms of payment that are different from those in this paragraph.

Although Lender may take action under this Paragraph 7, Lender does not have to do so.

8 . LENDER'S RIGHT TO INSPECT THE PROPERTY

Lender, and others authorized by Lender, may enter on and inspect the Property. They must do so in a reasonable manner and at reasonable times. However, before one of those inspections is made, Lender must give me notice stating a reasonable purpose for the inspection. That purpose must be related to Lender's rights in the Property.

9 . AGREEMENTS ABOUT CONDEMNATION OF THE PROPERTY

A taking of property by any governmental authority by eminent domain is known as "condemnation." I give to Lender my right: (A) to proceeds of all awards or claims for damages resulting from condemnation or other governmental taking of the Property (or, if the Property includes a unit in a PUD, of the common areas and facilities of the PUD); and (B) to proceeds from a sale of the Property (or, if the Property includes a unit in a PUD, of the common areas and facilities of the PUD) that is made to avoid condemnation. All of those proceeds will be paid to Lender.

If all of the Property is taken, the proceeds will be used to reduce the amount that I owe to Lender under the Note and under this Mortgage. If any of the proceeds remain after the amount that I owe to Lender has been paid in full, the remaining proceeds will be paid to me. Unless Lender and I agree otherwise in writing, if only a part of the Property is taken, (or, if the Property is a unit in a PUD, if all or part of the common areas or facilities of the PUD are taken), the amount that I owe to Lender will only be reduced by the amount of proceeds multiplied by the following amount: (i) the total amount that I owe to Lender under the Note and under this Mortgage immediately before the taking, divided by (ii) the fair market value of the Property immediately before the taking. The remainder of the proceeds will be paid to me. The use of proceeds to reduce the amount that I owe to Lender will not be a prepayment that is subject to the prepayment charge provisions, if any, under the Note.

If I abandon the Property, or if I do not answer, within 30 days, a notice from Lender stating that a governmental authority has offered to make a payment or to settle a claim for damages, then Lender has the authority to collect the proceeds. Lender may then use the proceeds to repair or restore the Property or to reduce the amount that I owe to Lender under the Note and under this Mortgage. The 30-day period will begin on the date the notice is mailed or, if it is not mailed, on the date the notice is delivered.

If any proceeds are used to reduce the amount of principal which I owe to Lender under the Note, that use will not delay the due date or change the amount of any of my monthly payments under the Note and under Paragraphs 1 and 2 above. However, Lender and I may agree in writing to those delays or changes.

10 . CONTINUATION OF BORROWER'S OBLIGATIONS

Lender may allow a person who takes over my rights and obligations to delay or to change the amount of the monthly payments of principal and interest due under the Note or under this Mortgage. Even if Lender does this, however, that person and I will both still be fully obligated under the Note and under this Mortgage unless the conditions stated in Paragraph 19 below have been met.

Lender may allow those delays or changes for a person who takes over my rights and obligations, even if Lender is requested not to do so. Lender will not be required to bring a lawsuit against such a person for not fulfilling obligations under the Note or under this Mortgage, even if Lender is requested to do so.

11 . CONTINUATION OF LENDER'S RIGHTS

Even if Lender does not exercise or enforce any right of Lender under this Mortgage or under the law, Lender will still have all of those rights and may exercise and enforce them in the future. Even if Lender obtains insurance, pays taxes, or pays other claims, charges or liens against the Property, Lender will still have the right, under Paragraph 20 below, to demand that I make Immediate Payment In Full (see Paragraph 20 for a definition of this phrase) of the amount that I owe to Lender under the Note and under this Mortgage.

12 . LENDER'S ABILITY TO ENFORCE MORE THAN ONE OF LENDER'S RIGHTS

Each of Lender's rights under this Mortgage is separate. Lender may exercise and enforce one or more of those rights, as well as any of Lender's other rights under the law, one at a time or all at once.

13 . OBLIGATIONS OF BORROWERS AND OF PERSONS TAKING OVER BORROWER'S RIGHTS OR OBLIGATIONS; AGREEMENTS CONCERNING CAPTIONS

Subject to the terms of Paragraph 19 below, any person who takes over my rights or obligations under this Mortgage will have all of my rights and will be obligated to keep all of my promises and agreements made in this Mortgage. Similarly, any person who takes over Lender's rights or obligations under this Mortgage will have all of Lender's rights and will be obligated to keep all of Lender's agreements made in this Mortgage.

If more than one person signs this Mortgage as Borrower, each of us is fully obligated to keep all of Borrower's promises and obligations contained in this Mortgage. Lender may enforce Lender's rights under this Mortgage against each of us individually or against all of us together. This means that any one of us may be required to pay all of the amounts owed under the Note and under this Mortgage. However, if one of us does not sign the Note, then: (A) that person is signing this Mortgage only to give that person's rights in the Property to Lender under the terms of this Mortgage; and (B) that person is not personally obligated to make payments or to act under the Note or under this Mortgage.

The captions and titles of this Mortgage are for convenience only. They may not be used to interpret or to define the terms of this Mortgage.

14 . AGREEMENTS ABOUT GIVING NOTICES REQUIRED UNDER THIS MORTGAGE

Unless the law requires otherwise, any notice that must be given to me under this Mortgage will be given by delivering it or by mailing it addressed to me at the address stated in the section above titled "Description of the Property." A notice will be delivered or mailed to me at a different address if I give Lender a notice of my different address. Any notice that must be given to Lender under this Mortgage will be given by mailing it to Lender's address stated in paragraph (C) of the section above titled "Words Used Often In This Document." A notice will be mailed to Lender at a different address if Lender gives me a notice of the different address. A notice required by this Mortgage is given when it is mailed or when it is delivered according to the requirements of this Paragraph 14.

15 . AGREEMENTS ABOUT UNIFORM MORTGAGE AND LAW THAT GOVERNS THIS MORTGAGE

This is a "Uniform Mortgage." It contains "uniform promises" that are in mortgages used all over the country and also "non-uniform promises" that vary, to a limited extent, in different parts of the country.

The law that applies in the place that the Property is located will govern this Mortgage. If any term of this Mortgage or of the Note conflicts with the law, all other terms of this Mortgage and of the Note will still remain in effect if they can be given effect without the conflicting term. This means that any terms of this Mortgage and of the Note which conflict with the law can be separated from the remaining terms, and the remaining terms will still be enforced.

16 . BORROWER'S COPY OF THE NOTE AND OF THIS MORTGAGE

I will be given a copy of the Note and of this Mortgage. Those copies must show that the original Note and Mortgage have been signed. I will be given those copies either when I sign the Note and this Mortgage or after this Mortgage has been recorded in the proper official records.

17 . AGREEMENTS THAT APPLY TO VA LOANS

A loan that is guaranteed or insured by the United States Veterans Administration is known as a "VA loan." If the loan that I promise to pay in the Note is a VA loan, then my rights and obligations, as well as those of Lender, are governed by that law which is known as Title 38 of the United States Code and the Regulations made under that Title (called the "Title and Regulations"). It is possible that one or more terms of this Mortgage, or of other documents that are signed in connection with my VA loan, conflict with the Title and Regulations. For example, it is possible that the prepayment terms in the Note or Paragraph 19 of this Mortgage conflict with the Title and Regulations. Lender and I agree that if there is a conflict, the conflicting terms of this Mortgage or other documents are modified or eliminated as much as is necessary to make all of the conflicting terms agree with the Title and Regulations.

18 . BORROWER'S OBLIGATION TO PAY MORTGAGE INSURANCE PREMIUMS

If Lender required mortgage insurance as a condition of making the loan that I promise to pay under the Note, then I will pay the premiums for that mortgage insurance. I will pay the premiums until the requirement for mortgage insurance ends according to my written agreement with Lender or according to law. Lender may require me to pay the premiums in the manner described in Paragraph 2 above.

NON-UNIFORM PROMISES

I also promise and agree with Lender as follows:

19 . AGREEMENTS ABOUT ASSUMPTION OF THIS MORTGAGE AND ABOUT LENDER'S RIGHTS IF BORROWER TRANSFERS THE PROPERTY WITHOUT MEETING CERTAIN CONDITIONS

If I sell or transfer all or part of the Property or any rights in the Property, any person to whom I sell or transfer the Property may take over all of my rights and obligations under this Mortgage (known as an "assumption of the Mortgage") if: (A) I give Lender notice of the sale or transfer; (B) Lender agrees that the person's credit is satisfactory; (C) the person agrees to pay interest on the amount owed to Lender under the Note and under this Mortgage at whatever rate Lender requires; and (D) the person signs an assumption agreement that is acceptable to Lender and that obligates the person to keep all of the promises and agreements made in the Note and in this Mortgage. If I sell or transfer the Property and each of the conditions in (A), (B), (C) and (D) of this Paragraph 19 are satisfied, Lender will release me from all of my obligations under the Note and under this Mortgage.

However, if I sell or transfer the Property and the conditions in (A), (B), (C) and (D) of this Paragraph 19 are not satisfied, I will still be fully obligated under the Note and under this Mortgage and Lender may require Immediate Payment in Full, as that phrase is defined in Paragraph 20 below. However, Lender will not have the right to require Immediate Payment In Full as a result of any of the following: (i) the creation of liens or other claims against the

Property that are inferior to this Mortgage; (ii) a transfer of rights in household appliances, to a person who provides me with the money to buy those appliances, in order to protect that person against possible losses; (iii) a transfer of the Property to surviving co-owners, following the death of a co-owner, when the transfer is automatic according to law; or (iv) leasing the Property for a term of three years or less, as long as the lease does not include an option to buy.

If Lender requires Immediate Payment In Full under this Paragraph 19, Lender will send me a notice, in the manner described in Paragraph 14 above, which states this requirement. The notice will give me at least 30 days to make the required payment. The 30-day period will begin on the date the notice is mailed or, if it is not mailed, on the date the notice is delivered. If I do not make the required payment during that period, Lender may bring a lawsuit for "foreclosure and sale" under Paragraph 20 below without giving me any further notice or demand for payment. (See Paragraph 20 for a definition of "foreclosure and sale.")

20 . LENDER'S RIGHTS IF BORROWER FAILS TO KEEP PROMISES AND AGREEMENTS

If all of the conditions stated in subparagraphs (A), (B), and (C) of this Paragraph 20 are satisfied, Lender may require that I pay immediately the entire amount then remaining unpaid under the Note and under this Mortgage. Lender may do this without making any further demand for payment. This requirement will be called "Immediate Payment In Full."

If Lender requires Immediate Payment In Full, Lender may bring a lawsuit to take away all of my remaining rights in the Property and to have the Property sold. At this sale, Lender or another person may acquire the Property. This is known as "foreclosure and sale." In any lawsuit for foreclosure and sale, Lender will have the right to collect all costs allowed by law.

Lender may require Immediate Payment In Full under this Paragraph 20 only if all of the following conditions are satisfied:

(A) I fail to keep any promise or agreement made in this Mortgage, including the promises to pay when due the amounts that I owe to Lender under the Note and under this Mortgage; and

(B) Lender sends to me, in the manner described in Paragraph 14 above, a notice that states:

(i) The promise or agreement that I failed to keep;

(ii) The action that I must take to correct that failure;

(iii) A date by which I must correct the failure. That date must be at least 30 days from the date on which the notice is mailed to me, or, if it is not mailed, from the date on which it is delivered to me;

(iv) That if I do not correct the failure by the date stated in the notice, I will be in default and Lender may require Immediate Payment In Full, and Lender or another person may acquire the Property by means of foreclosure and sale;

(v) That I may speak with a named representative of Lender to discuss any questions which I have about the things stated in the notice;

(vi) That if I meet the conditions stated in Paragraph 21 below, I will have the right to have any lawsuit for foreclosure and sale discontinued and to have the Note and this Mortgage remain in full force and effect as if Immediate Payment In Full had never been required; and

(vii) That I have the right in any lawsuit for foreclosure and sale to argue that I did not fail to keep any of my promises or agreements under the Note or under this Mortgage, and to present any other defenses that I may have; and

(C) I do not correct the failure stated in the notice from Lender by the date stated in that notice.

21. BORROWER'S RIGHT TO HAVE LENDER'S LAWSUIT FOR FORECLOSURE AND SALE DISCONTINUED

Even if Lender has required Immediate Payment In Full, I may have the right to have discontinued any lawsuit brought by Lender for foreclosure and sale or for other enforcement of this Mortgage. I will have this right at any time before a judgment has been entered enforcing this Mortgage if I meet the following conditions:

(A) I pay to Lender the full amount that would have been due under this Mortgage, the Note, and any notes for Future Advances under Paragraph 23 below if Lender had not required Immediate Payment In Full; and

(B) I correct my failure to keep any of my other promises or agreements made in this Mortgage; and

(C) I pay all of Lender's reasonable expenses in enforcing this Mortgage including, for example, reasonable attorney's fees; and

(D) I do whatever Lender reasonably requires to assure that Lender's rights in the Property. Lender's rights under this Mortgage, and my obligations under the Note and under this Mortgage continue unchanged.

If I fulfill all of the conditions in this Paragraph 21, then the Note and this Mortgage will remain in full force and effect as if Immediate Payment In Full had never been required.

22. LENDER'S RIGHTS TO RENTAL PAYMENTS FROM THE PROPERTY AND TO TAKE POSSESSION OF THE PROPERTY

As additional protection for Lender, I give to Lender all of my rights to any rental payments from the Property. However, until Lender requires Immediate Payment In Full under Paragraphs 19 or 20 above, or until I abandon the Property, I have the right to collect and keep those rental payments as they become due. I have not given any of my rights to rental payments from the Property to anyone else, and I will not do so without Lender's consent in writing.

If Lender requires Immediate Payment In Full under Paragraphs 19 or 20 above, or if I abandon the Property, then Lender, persons authorized by Lender, or a receiver appointed by a court at Lender's request may: (A) collect the rental payments, including overdue rental payments, directly from the tenants; (B) enter on and take possession of the Property; (C) manage the Property; and (D) sign, cancel and change leases. I agree that if Lender notifies the tenants that Lender has the right to collect rental payments directly from them under this Paragraph 22, the tenants may make those rental payments to Lender without having to ask whether I have failed to keep my promises and agreements under this Mortgage.

If there is a judgment for Lender in a lawsuit for foreclosure and sale, I will pay to Lender reasonable rent from the date the judgment is entered for as long as I occupy the Property. However, this does not give me the right to be a tenant on the Property.

All rental payments collected by Lender or by a receiver, other than the rent paid by me under this Paragraph 22, will be used first to pay the costs of collecting rental payments and of managing the Property. If any part of the rental payments remains after those costs have been paid in full, the remaining part will be used to reduce the amount that I owe to Lender under the Note and under this Mortgage. The costs of managing the Property may include the receiver's fees, reasonable attorney's fees, and the cost of any necessary bonds. Lender and the receiver will be obligated to account only for those rental payments that they actually receive.

23 . AGREEMENTS ABOUT FUTURE ADVANCES

I may ask Lender to make one or more loans to me in addition to the loan that I promise to pay under the Note. Lender may, before this Mortgage is discharged, make those additional loans to me. This Mortgage will protect Lender from possible losses that might result from my failure to fulfill my obligation to pay the amounts of any of those additional loans plus interest, only if the notes which contain my promises to pay those additional loans state that this Mortgage will give Lender such protection. Additional loans made by Lender that are protected by this Mortgage will be called "Future Advances." The principal amount that I owe to Lender under the Note and under all notes for Future Advances, not including the amounts spent by Lender to protect the value of the Property and Lender's rights in the Property, may not be greater than the original amount of the Note plus U.S. \$_____.

24 . LENDER'S OBLIGATION TO DISCHARGE THIS MORTGAGE WHEN THE NOTE AND THIS MORTGAGE ARE PAID IN FULL

When Lender has been paid all amounts due under the Note, under this Mortgage and under any notes for Future Advances, Lender will discharge this Mortgage by delivering a certificate stating that this Mortgage has been satisfied. I will not be required to pay Lender for the discharge, but I will pay all costs of recording the discharge in the proper official records.

25 . AGREEMENTS ABOUT NEW YORK LIEN LAW

I will receive all amounts lent to me by Lender subject to the trust fund provisions of *Section 13 of the New York Lien Law*. This means that if, on the date this Mortgage is recorded in the proper official records, construction or other work on any building, structure, or other improvements located on the Property has not been completed for at least four months, I will: (A) hold all amounts, which I receive and which I have a right to receive from Lender under the Note and as Future Advances, as a "trust fund," and (B) use those amounts to pay for that construction or work before I use them for any other purpose. The fact that I am holding those amounts as a "trust fund" means that I have a special responsibility under the law to use the amounts in the manner described in this Paragraph 25.

By signing this Mortgage I agree to all of the above.

Witnesses:

Charles T. Conroy, Borrower

Ellen C. Conroy, Borrower

State of New York
Orange County

)

)

)

ss:

on this first day of November, _____ [year], before me personally came Charles T. Conroy and Ellen C. Conroy, husband and wife, to me known and known to me to be the individuals described in and who executed the foregoing instrument, and they duly acknowledged to me that they executed the same.

Notary Public



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Current Legal Forms for Real Estate

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Current Legal Forms for Real Estate
Chapter 21 SALES AND EXCHANGES
Part IV. Forms
J. MORTGAGE FINANCING

25-21 Current Legal Forms for Real Estate FORM 21.112

FORM 21.112 Plain language mortgage assumption agreement--release of seller by lender--prepayment penalty

COMMENT

Under a mortgage assumption agreement the buyer of property accepts title subject to the seller's preexisting mortgage and, in addition, assumes all of its obligations including the obligation to make all payments that become due under the mortgage. The holder of the mortgage may or may not release the seller from liability on the mortgage note or bond. If the mortgage holder does not release the seller, it can proceed against the seller if the buyer fails to make payment or otherwise defaults under the terms of the assumption agreement and mortgage.

Lender consent

In this form, the lender releases the sellers from their obligations under the mortgage that is assumed by the purchasers of the property (paragraph 8). Because a substantial number of mortgages permit the lender to accelerate the mortgage upon transfer of title by the seller, an assumption agreement, accepted and signed by the lender, is often necessary to protect the parties from the possibility that the lender may "call" the mortgage. The lender's consent may be conditioned upon the buyer accepting certain changes in the underlying mortgage. For example, this agreement provides for an increased rate of interest on the loan (paragraph 6), in addition to requiring that the buyer pay the loan (paragraph 7), thus making the buyer personally liable for the payment of the preexisting mortgage.

Prepayment

Most mortgages expressly permit prepayment of the loan. The prepayment may be permitted with or without payment of additional interest or premium (a "penalty"). The right to prepay may be

limited to prepayment in full, in part, or in prescribed partial amounts. This agreement provides that the loan may be prepaid in an amount up to 20 percent of the original loan in any one year without penalty. If payment is made in excess of the 20 percent limitation, a prepayment penalty of six months' interest on the excess amount is imposed (paragraph 10). Some states restrict prepayment penalties, and any penalties may be subject to state usury laws or the federal truth-in-lending laws.

FORM

ASSUMPTION AGREEMENT

1. Words used often in this agreement.

- (a) *Buyer.* Martin L. Arkin and Joan B. Arkin, his wife, will be called the "Buyer."
- (b) *Seller.* Arthur C. Traynor and Barbara M. Traynor, his wife, will be called the "Seller."
- (c) *Lender.* Northeast Federal Savings and Loan Association will be called the "Lender." Lender is an Association which was formed and which exists under the laws of the United States of America. Lender's address is 1095 Merrick Road, Baldwin, New York 11510.
- (d) *Property.* The property described in the mortgage in the Section titled "Description of the property" will be called the "Property." This includes land and any buildings built on the land located at 560 Millburn Creek Road, Baldwin Harbor, New York, in Nassau County in the State of New York. This land and buildings have the legal description contained in the mortgage given by the Seller to Lender and recorded in the Nassau County Clerk's Office on March 15, _____ [year], in Book 1362, page 395. The "property" also includes other property and other kinds of property, as explained on page 2 of the mortgage in the First and Second paragraphs on that page.

2. Seller has given Lender a mortgage. The Buyer understands that:

- (a) On March 13, _____ [year], Seller borrowed \$49,700 from Lender. To show that Seller owed Lender this money, Seller signed a Note or Bond. To protect Lender from any losses which might possibly result if Seller did not
 - (1) Pay all the amounts that Seller owed Lender as stated in the Note;
 - (2) Pay, with interest, any amounts that Lender spends under this Mortgage, to protect the value of the Property and Lender's rights in the Property;
 - (3) Pay, with interest, any other amounts that Lender might lend to Seller or to me as Future Advances, and
 - (4) Keep all of the other promises and agreements under the Mortgage,

Seller gave Lender a Mortgage. This means that by signing the Mortgage, Seller gave Lender those rights that are stated in the Mortgage and also those rights that the law gives

to Lenders who hold Mortgages on real property.

(b) The Seller now owes \$48,785.26, with interest at the rate of 11.5 percent per year. This amount will be called "the amount owed by Seller" in this Agreement.

(c) The Buyer has bought the property, and now owns it. The Seller wishes to be released from any liability for the repayment of the amount borrowed. The Lender has given permission for this sale and has agreed to release the Seller.

3. *Lender extends payment of amount borrowed.* Therefore, because the Buyer has agreed to take over payments on the mortgage and keep all of the promises contained in this Agreement, in the Mortgage, and in the Bond or Note, the Buyer, Seller, and Lender agree as provided in this Agreement.

4. *Extension.* The Lender extends the payment of the amount owed by Seller. This means, that although the Lender could require immediate payment in full because of this sale, it will not do so.

5. *Promise to pay.* The Buyer agrees to repay the amount owed by the Seller to the Lender or any person who takes the Mortgage and Note or Bond by transfer, at the Lender's address printed in the section called "words often used in this Agreement" or at another address if the Lender or person who takes the Mortgage and Note or Bond by transfer tells the Buyer to do so in writing.

6. *Interest.* The Buyer agrees to pay interest on the unpaid balance the amount owed by Seller at the rate of 11 percent per year.

7. *Payments.* The Buyer agrees to make payments for principal and interest each month. The first payment will be due on January 1, _____ [year]. Each payment will be in the amount of \$476.17. The payments will be applied to interest and principal in the way the Mortgage explains. Payments in the above amount will be made until all the principal and interest are paid.

8. *Release.* The Lender by this Agreement releases and discharges the Seller of any and all liability, claim, or demand of any kind on account of the Mortgage and Bond or Note.

9. *Additional promises.* Regardless of anything to the contrary contained in the Mortgage and Bond or Note, the Lender and Buyer agree to the following paragraphs 10 through and including 14.

10. *Prepayment.* The Buyer may prepay the amount owed under the Bond or Note at any time during any one year. The Buyer may prepay up to 20 percent of the amount originally borrowed by the Seller without any penalty. This 20 percent will be called the free prepayment amount.

If the amount the Buyer prepays exceeds the free prepayment amount, the Buyer will pay a prepayment charge. The charge Buyer will pay is six months interest on the amount by which the amount of the prepayment exceeds the free prepayment amount. The Lender may require that any prepayment the Buyer makes, be at least \$500.

11. *Late charges.* If the Lender has not received the full amount of any of Buyer's monthly payments by the end of 15 calendar days after the date it is due, Buyer will pay a late charge to the Lender. The amount of the charge will be 5 percent of Buyer's overdue payment of principal and interest.

12. *Penalty interest.* Buyer agrees that if Buyer is in default in keeping any of the promises contained in the Mortgage, the Bond or Note, or this Agreement, Buyer will pay interest on the amount Buyer owes under this Agreement at the maximum legal rate of interest as established by the Banking Board of the State of New York, or any other authority

having the power to regulate the maximum legal rate of interest or at the rate of interest provided in paragraph 6 of this Agreement, whichever is greater. Buyer will pay at this rate of interest as long as Buyer is in default and until Buyer has paid all the principal and interest Buyer owes.

13. *Insurance.* The Buyer agrees to keep the buildings on the land insured for the benefit of the Lender in any amount at least equal to the balance of the Mortgage and at least sufficient to satisfy any co-insurance clause in the policy. The Buyer also agrees to transfer title to any insurance policies to the Lender and to deliver the original insurance policies to the Lender if the Lender requires that the Buyer do so. If the Buyer does not assign or deliver the policies within 15 days after the Lender gives him notice that he requires him to assign and/or deliver the policies, the Lender may require Immediate Payment in Full.

14. *Default.* Regardless of anything to the contrary contained in the Mortgage and Bond or Note, Buyer agrees that if Buyer does not pay any monthly payment by the 15th day of the month in which payment is due on the Mortgage and Bond or Note, or if Buyer does not pay any taxes, water rates, assessments, insurance premiums, or similar charges affecting the property within 15 days after they become due, or if anything else happens which, under the Mortgage, puts Buyer in default, the Lender may require Immediate Payment in Full. This means that the Lender may require Buyer, if Buyer is in default, to pay back all of the money Buyer owes under this Agreement at once.

Buyer, Seller, and Lender agree to all of the above items.

In the presence of:

Arthur C. Traynor, Seller

Barbara M. Traynor, Seller

Northeast Federal Savings and Loan Association

By _____

Accepted:

Martin L. Arkin, Buyer

Joan B. Arkin, Buyer



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Current Legal Forms for Real Estate

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Current Legal Forms for Real Estate
Chapter 21 SALES AND EXCHANGES
Part IV. Forms
J. MORTGAGE FINANCING

25-21 Current Legal Forms for Real Estate FORM 21.113

FORM 21.113 Mortgagee-in-possession agreement--delivery of possession--assignment of leases and equipment

COMMENT

A mortgagee-in-possession agreement is used when the owner of a mortgaged building is in default on the mortgage, and the lender takes possession of the property, in lieu of foreclosure. Generally, the lender will use the rent proceeds to bring the mortgage payments current, after the payment of operating expenses, taxes and other costs. If the mortgage is brought current the owner may be restored to possession, and continue payment of the mortgage. If the proceeds of the building are inadequate to reinstate the mortgage, the alternatives of a deed in lieu of foreclosure or foreclosure itself may be pursued.

Assignments and possession

This agreement provides for the assignment of leases, equipment, outstanding contracts, rents, claims and other items necessary or desirable for the lender's operation of the building. The lender is given possession of the building and many of the owner's rights and discretion in the operation of the building.

Foreclosure and rent

The lender reserves the right to commence foreclosure proceedings at any time, but upon 30 days' notice to the owner. The owner is given the right to cure defaults in the mortgage within that 30-day period. Although the lender agrees to be chargeable for rents actually received, it is not liable for the application of those rents to expenses, its mortgage or any other items which it deems appropriate.

FORM

AGREEMENT, made February 20, _____ [year], between 1036 Nineteenth Avenue Corporation, 1136 Tenth Avenue, New York, New York ("Debtor") and East Side National Bank and Guarantee Company, 925 East 89th Street, New York, New York ("Bank").

Recitals

a. Note, mortgage, property. Bank is the owner and holder of certain notes and mortgages as follows:

(1) Note dated December 31, _____ [year] in the principal amount of \$460,000, made by 1036 Nineteenth Avenue Corporation to East Side National Bank and Guarantee Company and a mortgage, securing said note, of even date with the note, in favor of East Side National Bank and Guarantee Company, in the principal amount of \$460,000. The mortgage was recorded on January 3, _____ [year] in the Office of the Register, County of New York, State of New York, in Reel 6523 at page 236; and

(2) Note dated July 26, _____ [year] in the principal amount of \$300,000, made by 1036 Nineteenth Avenue Corporation to East Side National Bank and Guarantee Company and a mortgage securing the note, of even date with the note, in favor of East Side National Bank and Guarantee Company, in the principal amount of \$300,000. The mortgage was recorded in the Office of the Register, County of New York in Reel 7936 at page 152 on August 1, _____ [year]; and

(3) Modification and extension agreement between 1036 Nineteenth Avenue Corporation and East Side National Bank and Guarantee Company, extending and modifying the terms and conditions of the two mortgages, and the respective notes. The agreement is dated July 26, _____ [year], and was recorded in the Register's Office in Reel 7936 at page 160 on August 1, _____ [year].

Which notes and mortgages, as modified by the consolidation and extension agreements, being herein designated as the "note" and "mortgage," and which note and mortgage covers premises known as and by 1039 19th Avenue, New York, New York (the "property").

b. Ownership. Debtor is now the owner of the property.

c. Amounts due. Debtor is now in default under the terms of the note and mortgage. There is now unpaid, among other things, the principal amount of \$760,000, interest accrued and unpaid, as of the date hereof, in the amount of \$13,590.50, and the attorney's fees, collection charges, late charges, and other amounts due in the amount of \$7,890.70. By reason of such default the note and mortgage, by its terms, is subject to immediate foreclosure.

d. Mortgage-in-Possession. The parties have agreed that the property shall be placed in the possession of the Bank as mortgagee-in-possession, subject to the obligations and duties of applicable law.

e. Representations. To induce Bank to enter into this agreement and to take possession of the property as mortgagee, Debtor represents that it has not previously assigned, mortgaged, pledged, or otherwise encumbered in any manner whatsoever the assigned rents, issue, income and profits of the property, except as appears by the terms contained in any

mortgage covering the property and now of record. Debtor further represents and warrants that no rents have been collected from the property, or any part thereof, in respect to any period of time subsequent to the date hereof, and that no installment or payment of any part of the rent has been waived, released, discharged or compromised. Debtor further represents and warrants that the property is in full compliance with all environmental laws, rules and regulations, federal, state and local.

Now, therefore, it is agreed as follows:

1. *Delivery of possession.* Debtor does deliver, transfer, and assign to Bank possession of the property, with full power and authority, either directly or through agents, to manage same, rent and lease the whole or any part thereof, execute and deliver leases in the name of Bank as mortgagee-in-possession, modify and/or cancel leases and adjust rents, effect insurances, pay taxes and assessments, water rates, interest, and any other sums due on the note and mortgage, agents' commissions and other charges; make all alterations and repairs that Bank deems necessary and advisable for the preservation of the property; make such alterations as Bank deems advisable for the purpose of promoting the renting of the property or any part thereof; and generally to perform all acts that Debtor might legally do or perform as the holder of the legal title in fee of the property.

2. *Assignment of leases.* Debtor does also deliver, transfer and assign to Bank all the leases of the property and the rents past due, now due and becoming due thereon, together with all deposits made as security for the payment of the rent reserved under the leases; and all fire, rent, liability, casualty, workmen's compensation (in so far as the same affect or may affect the property) plate glass, boiler and all other insurances, if any. At Bank's option, the proceeds of loss under any policy, whether endorsed payable to Bank or another person or not, may be applied in payment of the principal, interest, or any other sum secured by the mortgage whether due or not; or to the restoration or replacement of any building or improvement on the property without in any way affecting the lien of the mortgage or the obligation of Debtor or any other person or corporation for the payment of the indebtedness secured by the mortgage, regardless of whether Debtor is the then owner of the property.

3. *Rent collection.* Bank is given full powers and authority, either directly or through agents, to proceed as mortgagee-in-possession against any and all tenants now or hereafter in default under any lease of the property, or the terms of any letting of the property or any part thereof, by action, summary proceedings, or otherwise.

4. *Equipment and contracts.* In addition to the lien of the mortgage, Debtor assigns to Bank all additional right, title, and interest it may have, in and to any contract for the purchase of any personal property or fixture, appurtenant to or used in the operation of the property, together with the benefits of any deposits and/or payments now or hereafter made thereon by Debtor. Debtor further irrevocably authorizes and empowers Bank to continue, modify, extend, or cancel any incompleated contracts for repairs, maintenance or other service or for the purchase of refrigerators, gas ranges, heating equipment, elevators, electrical or other equipment, furnishings or supplies for the property and to pay therefor out of rents, issues and income or profits of the property. Debtor declares and agrees that all the personal property and fixtures, if any, which may not be included in and covered by the mortgage shall be and remain and form part of the realty and shall be covered by the lien of the mortgage and grants a security interest therein to Bank.

5. *Continuation of possession.* Bank may elect to continue in possession of the property as long as any advances which it has previously made or may subsequently make, and any delinquencies under the note and mortgage remain unpaid; and until rents, issues and profits of the property are sufficient to pay operating expenses, taxes, assessments and water rates, insurance premiums, agents' commissions, brokerage, attorney's fees, interest and installments of principal on the note and mortgage, and all other carrying charges whatsoever.

6. *Expenses.* Bank may in its sole discretion advance money for the payment of taxes, assessments, water rates, insurance premiums, cost of maintenance and repairs, agents' commissions, brokerage and for all other purposes that may be reasonably necessary or desirable in the management and operation of the property, and repay itself from the

income of the property for any money so advanced with interest at the rate of 10 percent per annum.

7. *Foreclosure.* This agreement is not for any definite term, nor does Bank agree to withhold foreclosure for any definite period but expressly reserves the right to foreclose at any time. As part of the consideration for the execution and delivery of this agreement and the surrender of possession of the property by Debtor, Bank agrees to give in writing by mail addressed to Debtor at the address shown at the beginning of this agreement, 30 days' notice of its intention to foreclose. During such 30-day period, Debtor shall have the right to make good all defaults and make all payments necessary to place the mortgage in good financial standing in every way, whereupon Bank will immediately cancel this agreement.

8. *Possession upon foreclosure.* If Bank decides to foreclose the mortgage, it shall be entitled to remain in possession, under the terms of this agreement, during the pendency of the foreclosure action or proceeding and until such time as possession under the foreclosure deed is delivered; any provision of the law or anything herein contained to the contrary notwithstanding.

9. *Reinstatement of mortgage.* If at any time before the institution of the foreclosure action, the loan secured by the note and mortgage is placed in good financial standing in every way, Bank will immediately cancel this agreement; otherwise this agreement is to remain in full force and effect until the delivery of the foreclosure deed.

10. *Application of funds.* Debtor agrees that, in the operation of the property, Bank may at all times exercise its own judgment and discretion and shall not be accountable to Debtor for the application of any of the funds received from the property provided that they are applied in accordance with the terms of this agreement. Bank shall not be liable or responsible for any act or omission except for its own actual wrong-doing, nor for any act, omission, or wrong-doing by any agent appointed at Debtor's request.

11. *Entire agreement; modification.* This instrument contains the entire agreement of the parties. It may not be amended, modified, or cancelled without both parties' written consent.

12. *No waiver.* Except as modified by this agreement, the terms and conditions of the note and mortgage shall remain in full force and effect. Nothing contained herein shall be construed to be a waiver of any present or future default under the note or mortgage, or a waiver of any term or condition of the note or mortgage.

13. *Bank's accountability.* Bank shall only be chargeable for rents and profits actually received.

14. *Further assignment.* Without limiting the generality of the foregoing, Debtor does also deliver, transfer and assign all other issues, profits and income of and from the property, past due and now payable or hereafter to accrue or become due from the property or from any part or parts thereof, and also all of Debtor's claims for rents, issues, profits and income, or damages against any lessee, sub-lessee or tenant or against the estate of any deceased, insolvent or bankrupt lessee, sub-lessee or tenant, whether such rents, issues, profits and income, or claims have been reduced to judgment or otherwise.

15. *Tax refunds.* If one or more refunds are made by the city, town, county, village, school, or other taxing authority, on account of taxes paid before or after this agreement, the refunds shall be assigned by Debtor, and shall be payable only to Bank. Bank is deemed the party aggrieved within the meaning of the Tax Law for the purpose of obtaining and retaining the refunds regardless of whether the taxes refunded were paid from the income of the property. Debtor agrees to execute all necessary assignments, consents, and other papers to have the refunds paid to Bank. Debtor irrevocably constitutes and appoints Bank its attorney in fact to execute and deliver all such assignments, consents, or other papers for and on behalf of Debtor.

16. *Binding effect.* This agreement shall be binding upon and inure to the benefit of both parties and their respective

legal representatives, successors, and assigns.

17. *Governing law.* This agreement shall be construed in accordance with and governed by the laws of the State of New York.

18. *Notices.* All notices hereunder to be given by a party shall be sent by registered or certified mail, postage prepaid, return receipt requested, addressed to the other party at its address set forth at the beginning hereof. Either party may designate a different address by serving written notice of change of address on the other party, in the same manner.

19. *Headings.* Headings in this agreement are for convenience and reference only and are not deemed to be a part thereof.

This agreement has been duly executed by the parties.

East Side National Bank and Guaranty Company

By _____

1036 Nineteenth Avenue Corporation

By _____

[Acknowledgments]



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Current Legal Forms for Real Estate
Chapter 21 SALES AND EXCHANGES
Part IV. Forms
J. MORTGAGE FINANCING

25-21 Current Legal Forms for Real Estate FORM 21.114

FORM 21.114 Home Equity Conversion Mortgage

COMMENT

Home equity conversion mortgages, also referred to as "reverse" mortgages, allow homeowners who have paid off their home mortgages or have small mortgage balances to borrow against the equity in their homes. These mortgages are popular among older homeowners who need funds but prefer to stay in their homes rather than sell their homes and then move into a smaller home or an apartment. Reverse mortgages are often insured by the Department of Housing and Urban Development through the Fair Housing Administration. Unlike ordinary home equity loans, reverse mortgages do not require repayment as long as the home remains the borrower's principal residence, i.e., until the death of the homeowner or the sale of the home. Lenders recover the principal and interest when the home is sold. The remaining proceeds from the sale are paid to the homeowner or his or her survivors. The form below contains typical reverse mortgage provisions. If the reverse mortgage is HUD-insured, HUD may require the inclusion of additional provisions.

FORM

HOME EQUITY CONVERSION MORTGAGE

THIS HOME EQUITY CONVERSION MORTGAGE ("Mortgage") is given on _____ by _____, whose address is _____ ("Borrower"), to _____, whose address is _____ ("Lender").

Under an Adjustable Rate Promissory Note executed by Borrower concurrently herewith (the "Note"), Borrower has

agreed to repay to Lender all amounts that Lender has advanced or will advance under a Loan Agreement of even date herewith ("Loan Agreement"). This Mortgage secures (a) the repayment of the debt evidenced by the Note, with interest at a rate subject to adjustment, and all renewals, extensions and modifications thereof, up to a maximum principal amount of _____ (\$_____); (b) the payment of all other sums, with interest, advanced hereunder to protect the security of this Mortgage or otherwise due under the terms of this Mortgage; and (c) the performance of Borrower's covenants and agreements under this Mortgage and the Note. The full debt, including amounts described in (a), (b) and (c) above, if not paid earlier, is due and payable on _____, _____. Borrower does hereby mortgage, grant and convey to Lender the following described property located in and being the same Property conveyed to Borrower by that certain _____ recorded in Volume _____, Page _____, of the _____ Office in _____ County, Ohio:

which has the address of

_____, _____,
[Street][City]
 _____, _____ ("Property Address");
 [State][Zip Code]

TOGETHER WITH all the improvements now or hereafter erected on the property, and all easements, rights, appurtenances, and fixtures now or hereafter a part of the property. All replacements and additions shall also be covered by this Mortgage. All of the foregoing is referred to in this Mortgage as the "Property."

BORROWER COVENANTS that Borrower is lawfully seized of the estate hereby conveyed and has the right to mortgage, grant and convey the Property and that the Property is unencumbered. Borrower warrants and will defend generally the title to the Property against all claims and demands, subject to any encumbrances of record.

THIS SECURITY INSTRUMENT combines uniform covenants for national use and non-uniform covenants with limited variations by jurisdiction to constitute a uniform security instrument covering real property.

UNIFORM COVENANTS. Borrower and Lender covenant and agree as follows:

1. Payment of Principal and Interest. Borrower shall pay when due the principal of, and interest on, the debt evidenced by the Note.

2. Payment of Property Charges. Borrower shall pay all property charges consisting of taxes, ground rents, flood and hazard insurance premiums, and special assessments in a timely manner, and shall provide evidence of payment to Lender, unless Lender pays property charges by withholding funds from monthly payments due to the Borrower or by charging such payments to a line of credit as provided for in the Loan Agreement.

3. Fire, Flood and Other Hazard Insurance. Borrower shall insure all improvements on the Property, whether now in existence or subsequently erected, against any hazards, casualties, and contingencies, including fire. Borrower shall also insure all improvements on the Property, whether now in existence or subsequently erected, against loss by floods. All insurance shall be carried with companies approved by Lender. The insurance policies and any renewals shall be held by Lender and shall include loss payable clauses in favor of, and in a form acceptable to Lender.

In the event of loss, Borrower shall give Lender immediate notice by mail. Lender may make proof of loss if not made promptly by Borrower. Each insurance company concerned is hereby authorized and directed to make payment for such loss to Lender instead of to Borrower and to Lender jointly. Insurance proceeds shall be applied to restoration or repair of the damaged Property, if the restoration or repair is economically feasible and Lender's security is not lessened. If the restoration or repair is not economically feasible or Lender's security would be lessened, the insurance proceeds shall be

applied to the reduction of the indebtedness under the Note and this Mortgage.

In the event of foreclosure of this Mortgage or other transfer of title to the Property that extinguishes the indebtedness, all right, title and interest of Borrower in and to insurance policies in force shall pass to the purchaser.

4. Occupancy, Preservation, Maintenance and Protection of the Property; Borrower's Loan Application;

Leaseholds. Borrower shall occupy, establish, and use the Property as Borrower's principal residence after the execution of this Mortgage, and Borrower (or at least one Borrower, if initially more than one person are Borrowers) shall continue to occupy the Property as Borrower's principal residence for the term of the Mortgage. "Principal residence" shall have the same meaning as in the Loan Agreement.

Borrower shall not commit waste or destroy, damage or substantially change the Property or allow the Property to deteriorate, reasonable wear and tear excepted. Borrower shall also be in default if Borrower, during the loan application process, gave materially false or inaccurate information or statements to Lender (or failed to provide Lender with any material information) in connection with the loan evidenced by the Note, including, but not limited to, representations concerning Borrower's occupancy of the Property as a principal residence. If this Mortgage is on a leasehold, Borrower shall comply with the provisions of the lease. If Borrower acquires fee title to the Property, the leasehold fee title shall not be merged unless Lender agrees to the merger in writing.

5. Charges to Borrower and Protection of Lender's Rights in the Property. Borrower shall pay all governmental or municipal charges, fines and impositions that are not included in Paragraph 2. Borrower shall pay these obligations on time directly to the entity which is owed the payment. If failure to pay would adversely affect Lender's interest in the Property, upon Lender's request Borrower shall promptly furnish to Lender receipts evidencing these payments. Borrower shall promptly discharge any lien which has priority over this Mortgage in the manner provided in Paragraph 12(c).

If Borrower fails to make these payments or the property charges required by Paragraph 2, or fails to perform any other covenants and agreements contained in this Mortgage, or there is a legal proceeding that may significantly affect Lender's rights in the Property (such as a proceeding in bankruptcy, for condemnation or to enforce laws or regulations), then Lender may do and pay whatever is necessary to protect the value of the Property and Lender's rights in the Property, including payment of taxes, hazard insurance and other items mentioned in Paragraph 2.

6. Inspection. Lender or its agent may enter on, inspect or make appraisals of the Property in a reasonable manner and at reasonable times provided that Lender shall give the Borrower notice prior to any inspection or appraisal specifying a purpose for the inspection or appraisal which must be related to Lender's interest in the Property. If the Property is vacant or abandoned or the loan is in default, Lender may take reasonable action to protect and preserve such vacant or abandoned Property without notice to the Borrower.

7. Condemnation. The proceeds of any award or claim for damages, direct or consequential, in connection with any condemnation or other taking of any part of the Property, or for conveyance in place of condemnation shall be paid to Lender. The proceeds shall be applied to the reduction of the indebtedness under the Note and this Mortgage. Any excess proceeds over an amount required to pay all outstanding indebtedness under the Note and this Mortgage shall be paid to the entity legally entitled thereto.

8. Fees. Lender may collect fees and charges authorized by the Loan Agreement.

9. Grounds for Acceleration of Debt.

a. Due and Payable. Lender may require immediate payment in full of all sums secured by this Mortgage if:

- (i) A Borrower dies and the Property is not the principal residence of at least one surviving Borrower, or
- (ii) All of a Borrower's title in the Property (or his or her beneficial interest in a trust owning all or part of the Property) is sold or otherwise transferred and no other Borrower retains title to the Property in fee simple or retains a leasehold under a lease for less than 99 years which is renewable or a lease having a remaining period of not less than 50 years beyond the date of the 100th birthday of the youngest Borrower or retains a life estate (or retaining a beneficial interest in a trust with such an interest in the Property).

b. Due and Payable. Lender may require immediate payment in full of all sums secured by this Mortgage if:

- (i) The Property ceases to be the principal residence of a Borrower for reasons other than death and the Property is not the principal residence of at least one other Borrower, or
- (ii) For a period of longer than twelve (12) consecutive months, a Borrower fails to occupy the Property because of physical or mental illness and the property is not the principal residence of at least one other Borrower, or
- (iii) An obligation of the Borrower under this Mortgage is not performed.

c. Notice to Lender. Borrower shall notify Lender whenever any of the events listed in this Paragraph (a)(ii) or (b) occur.

d. Notice to Borrower. Lender shall notify Borrower whenever the loan becomes due and payable under Paragraph 9(a)(ii) or (b). Lender shall not have the right to commence foreclosure until Borrower has had thirty (30) days after notice to either:

- (i) Correct the matter which resulted in the Mortgage coming due and payable; or
- (ii) Pay the balance in full; or
- (iii) Sell the Property for the lesser of the balance or 95% of the appraised value and apply the net proceeds of the sale toward the balance; or
- (iv) Provide the Lender with a deed in lieu of foreclosure.

e. Trusts. Conveyance of a Borrower's interest in the Property to a trust which meets the requirements specified in the Loan Agreement or conveyance of a trust's interests in the Property to a Borrower, shall not be considered a conveyance for purposes of this Paragraph 9. A trust shall not be considered an occupant or be considered as having a principal residence for purposes of this Paragraph 9.

10. No Deficiency Judgments. Borrower shall have no personal liability for payment of the debt secured by this Mortgage. Lender may enforce the debt only through sale of the Property. Lender shall not be permitted to obtain a deficiency judgment against Borrower if the Mortgage is foreclosed. Borrower shall not be liable for any difference between the mortgage insurance benefits paid to Lender and the outstanding indebtedness, including accrued interest, owed by Borrower at the time of the assignment.

11. Reinstatement. Borrower has a right to be reinstated if Lender has required immediate payment in full. This right applies even after foreclosure proceedings are instituted. To reinstate this Mortgage, Borrower shall correct the condition which resulted in the requirement for immediate payment in full. Foreclosure costs and reasonable and customary attorneys' fees and expenses properly associated with the foreclosure proceeding shall be added to the principal balance. Upon reinstatement by Borrower, this Mortgage and the obligations that it secures shall remain in

effect as if Lender had not required immediate payment in full. However, Lender is not required to permit reinstatement if: (i) Lender has accepted reinstatement after the commencement of foreclosure proceedings within two years immediately preceding the commencement of a current foreclosure proceeding, (ii) reinstatement will preclude foreclosure on different grounds in the future, or (iii) reinstatement will adversely affect the priority of the Mortgage.

12. Lien Status

a. Modification. Borrower agrees to extend this Mortgage in accordance with this Paragraph 12(a). If Lender determines that the original lien status of the Mortgage is jeopardized under state law (including but not limited to situations where the amount secured by the Mortgage equals or exceeds the maximum principal amount stated or the maximum period under which loan advances retain the same lien priority initially granted to loan advances has expired) and state law permits the original lien status to be maintained for future loan advances through the execution and recordation of one or more documents, then Lender shall obtain title evidence at Borrower's expense. If the title evidence indicates that the Property is not encumbered by any liens, Lender shall request the Borrower to execute any documents necessary to protect the lien status of future loan advances. Borrower agrees to execute such documents. If state law does not permit the original lien status to be extended to future loan advances, Borrower will be deemed to have failed to have performed an obligation under this Mortgage.

b. Tax Deferral Programs. Borrower shall not participate in a real estate tax deferral program, if any liens created by the tax deferral are not subordinate to this Mortgage.

c. Prior Liens. Borrower shall promptly discharge any lien which has priority over this Mortgage unless Borrower: (a) agrees in writing to the payment of the obligation secured by the lien in a manner acceptable to Lender; (b) contests in good faith the lien by, or defends against enforcement of the lien in, legal proceedings which in the Lender's opinion operate to prevent the enforcement of the lien or forfeiture of any part of the Property; or (c) secures from the holder of the lien an agreement satisfactory to Lender subordinating the lien to all amounts secured by this Mortgage. If Lender determines that any part of the Property is subject to a lien which may attain priority over this Mortgage, Lender may give Borrower a notice identifying the lien. Borrower shall satisfy the lien or take one or more of the actions set forth above within 10 days of the giving of notice.

13. Forbearance by Lender Not a Waiver. Any forbearance by Lender in exercising any right or remedy shall not be a waiver of or preclude the exercise of any right or remedy.

14. Successors and Assigns Bound; Joint and Several Liability. The covenants and agreements of this Mortgage shall bind and benefit the successors and assigns of Lender. Borrower may not assign any rights or obligations under this Mortgage or under the Note, except to a trust that meets the requirements set forth in the Loan Agreement. Borrower's covenants and agreements shall be joint and several.

15. Notices. Any notice to Borrower provided for in this Mortgage shall be given by delivering it or by mailing it by first class mail unless applicable law requires use of another method. The notice shall be directed to the Property Address or any other address all Borrowers jointly designate. Any notice to Lender shall be given by first class mail to Lender's address stated herein or any address Lender designates by notice to Borrower. Any notice provided for in this Mortgage shall be deemed to have been given to Borrower or Lender when given as provided in this Paragraph 16.

16. Governing Law; Severability. This Mortgage shall be governed by Federal law and the law of the jurisdiction in which the Property is located. In the event that any provision or clause of this Mortgage or the Note conflicts with applicable law, such conflict shall not affect other provisions of this Mortgage or the Note which can be given effect without the conflicting provision. To this end, the provisions of this Mortgage and the Note are declared to be severable.

17. Borrower's Copy. Borrower shall be given one conformed copy of the Note and this Mortgage.

18. Assignment of Rents. Borrower unconditionally assigns and transfers to Lender all the rents and revenues of the Property. This assignment of rents constitutes an absolute assignment and not an assignment for additional security only. This assignment of rents of the Property shall terminate when the debt secured by this Mortgage is paid in full.

19. Foreclosure Procedure. If Lender requires immediate payment in full under Paragraph 9, Lender at its option may require immediate payment in full of all sums secured by this Mortgage without further demand and may foreclose this Mortgage by judicial proceeding. Lender shall be entitled to collect all expenses incurred in pursuing the remedies provided in this Paragraph 20, including, but not limited to, reasonable attorneys' fees and costs of title evidence.

20. Release. Upon payment of all sums secured by this Mortgage, Lender shall discharge this Mortgage without charge to Borrower. Borrower shall pay any recordation costs.

21. Advances to Protect Security. This Mortgage shall secure the unpaid balance of advances made by Lender, with respect to the Property, for the payment of taxes, assessments, insurance premiums and costs incurred for the protection of the Property.

BY SIGNING BELOW, Borrower accepts and agrees to the terms contained in this Mortgage and in any rider(s) executed by Borrower and recorded with it.

Witnesses:

Borrower

Borrower

STATE OF _____

COUNTY OF _____

)

)

)

SS

The foregoing instrument was acknowledged before me this _____ day of _____,
_____.

Notary Public

This instrument prepared by:



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J. MORTGAGE FINANCING

25-21 Current Legal Forms for Real Estate FORM 21.114A

FORM 21.114A Short Sale Agreement with Mortgage Lender

COMMENT

As a result of the decline in residential property values nationally, clients have recently been told, and inquired, about the possibility of negotiating a "short sale" of a residence. Because of the cooling of the residential real estate market and tightening of the lending industry's requirements, many borrowers/homeowners are finding themselves without the requisite equity needed to sell their homes and avoid foreclosure. In a short sale, the lender allows a property to be sold for less than the amount owed on the mortgage, and the lender takes the loss. If successful, it allows the seller to avoid foreclosure, the buyer often obtains an attractive price, the lender may walk away with a better return than it would at the end of a long, expensive foreclosure procedure, and the lender also gets the loan off of its books at a much earlier date. It is basically a loan workout program.

For those considering a short sale there are certain things to keep in mind:

1. The Loss Mitigation Department of the lender will require a lot of information from the borrower. In effect, the process includes pre-qualifying the potential short sale candidate by presenting a qualified proposal with supporting documentation and negotiating for the best possible results. It is advisable for the borrower to start early before it gets too far down the road and a foreclosure has been started. Lenders will have a laundry list of items required, for example, a copy of the Listing Agreement, a hardship letter, and financial information backing up the hardship letter, before they make a decision.
2. The lender will not consider a short sale unless there is a solid contract from the buyer out there

which has been executed and which they will want to review. The lender may allow the sale, but may still look to the borrower to collect the shortfall. Obviously, from the buyer's point of view, it is preferable to negotiate as part of the short sale a favorable release and to get the lender to accept the payment in full, without pursuit of any deficiency or responsibility as to the "short sale loss." In this form, a provision is provided for such a release.

3. A short sale is usually listed at the credit bureaus as a "settled debt" which is less destructive to the borrower's credit score than a foreclosure. There are many ways for the lender to report a short sale, therefore, part of the negotiations should be to try to get the lender to report it as a "settled debt." The seller's goal is to get the most favorable reporting possible. Some have even been successful getting the lender to report the short sale favorably as "paid in full."

4. Whatever is worked out with the lender, the borrower or the borrower's attorney must get the agreement in writing, preferably agreed to by an officer and/or supervisor with authority to execute the short sale agreement, and keep that paperwork.

5. It is important for both the borrower/seller and the buyer to have an experienced title company closing the short sale transaction. Often there are several layers of lien holders to work with, and the title exam will disclose all of the borrower's/seller's liens, and the escrow agent will have to address them all satisfactorily prior to closing.

There used to be adverse tax consequences resulting from a short sale in that in most cases the difference between the amount for which the property was sold and the mortgage loan amount was treated as forgiveness of debt income and taxed as ordinary income to the borrower/seller. Fortunately, the Mortgage Forgiveness Debt Relief Act of 2007 added a new exception for mortgage indebtedness on a principal residence. The new law excludes from taxation, discharges of up to \$2 million of indebtedness (\$1 million for a married taxpayer filing a separate return) which are secured by a principal residence and which are incurred in the acquisition, construction, or substantial improvement of the principal residence. Congress included this break in connection with actual foreclosures and for mortgage workouts such as the short sale. This provision applies to debt forgiven in 2007, 2008 and 2009. The amount excluded reduces the taxpayer's basis in the home. In addition, a loss on the sale of a personal residence is not deductible by the seller/homeowner.

FORM

SHORT SALE AGREEMENT

THIS SHORT SALE AGREEMENT ("Agreement") is entered into this ____ day of _____, 20____, by and between JOSEPH SMITH and MICHELLE SMITH ("Borrowers"), and FRANKLIN NATIONAL BANK ("Lender").

WHEREAS, Borrowers have entered into a legally binding Contract of Sale to sell the residence located at 11025 Francis Avenue, Cleveland, Ohio (the "Residence"); and

WHEREAS, the Lender holds a first mortgage deed against the Residence securing a loan balance in the principal amount of One Hundred Thousand and 00/100 Dollars (\$100,000.00), hereinafter referred to as the "Loan Balance;" and

WHEREAS, under the terms of the Contract of Sale, the net sales proceeds payable to the Lender will not be sufficient to pay off in full the Loan Balance, but Lender has agreed to accept such short sale, subject to the following terms and

conditions:

1. Borrowers agree to use its best efforts to close the Contract for the sale of the Residence as soon reasonably possible, and in no event later than _____, 20____. In the event such sale is not closed by the aforesaid date, this Agreement shall be terminated without further liability to Lender.
2. Upon the closing of the Contract of Sale, Lender agrees and shall instruct the escrow agent to forward the entire net sales proceeds resulting from the transaction to the Lender, at the following address:

(Address of Lender)

3. In consideration of the closing of the Contract of Sale and payment of the net sales proceeds to Lender, Lender agrees to accept such payment in full satisfaction of the Loan Balance and agrees to file a release of its mortgage lien with the escrow agent upon receipt of the net sales proceeds. The escrow agent shall then be authorized to file the mortgage lien release with the _____ County Recorder to release the lien of such mortgage against the residence.
4. Notwithstanding that the net sales proceeds will not equal the amount of the Loan Balance, Lender agrees to release the Borrowers from any deficiency between the Loan Balance and the net sales proceeds, and to waive any rights to enforce payment of the deficiency. As evidence thereof, Lender shall deliver to Borrowers the original Promissory Note executed by the Borrowers marked "Paid in Full."
5. Until the net sales proceeds are paid to the Lender, Borrowers agree that all of the terms and conditions of the Promissory Note and Mortgage Deed securing the Promissory Note, shall be complied with by the Borrowers, including without limitation the payment of any interest accruing thereon. In the event the Contract of Sale is not consummated in accordance with the terms of this Agreement, the Promissory Note and Mortgage Deed shall remain in full force and effect and shall be binding upon the Borrowers, their heirs, legal representatives and permitted assigns.
6. The parties hereby agree that a copy of this Agreement shall be deposited with the escrow agent within three (3) days of the date of its execution, which Agreement shall serve as instructions to the escrow agent in connection with the payoff and cancellation of the above-described mortgage loan. The escrow agent shall join in the execution of this Agreement to evidence its acceptance of the terms of this Agreement.
7. This Agreement shall be binding upon and inure to the benefit of the parties hereto, their respective heirs, legal representatives, successors and assigns.

Executed by the parties hereto as of the date first above written.

BORROWERS:

Joseph Smith

Michelle Smith

LENDER:

FRANKLIN NATIONAL BANK

By: _____

Title: _____

The undersigned escrow agent hereby accepts the terms and provisions set forth in this Agreement and agrees to be bound thereby.

CITY TITLE COMPANY

By: _____

Title: _____



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K. MORTGAGE CLAUSES AND PROVISIONS

25-21 Current Legal Forms for Real Estate FORM 21.115

FORM 21.115 Mortgage clauses and provisions

COMMENT

The following clauses and provisions cover the principal terms of mortgages, as well as many of the more specialized situations. In addition to numerous examples of plain language and other residential clauses, there are more specialized clauses covering matters such as nonrecourse mortgages (1), commercial leases and assignment of rents ((86) to (89)), extension of the mortgage lien to fixtures and other personal property ((6) and (90)), and a reduced interest rate for an employee-borrower (78).

These provisions have been arranged under general categories in the following order (with corresponding clause numbers):

Mortgage and mortgaged property: (1) through (9)

Transfer of title and title warranties: (10) through (17)

Payment, satisfaction, and release of lien: (18) through (24)

Interest and late charges: (25) through (29)

Insurance, taxes, and escrow: (30) through (42)

Default and remedies: (43) through (54)

Reimbursement, waiver, notice, and amendment: (55) through (65)

Maintenance, use, and compliance: (66) through (74)

Condemnation awards: (75) through (77)

Parties and successors: (78) through (85)

Assignment of rents, security interest, estoppel: (86) through (94)

Subordination and other liens: (95) through (97)

Interpretation: (98) through (103)

FORMS

(1) Nonrecourse mortgage with carveouts

No recourse against mortgagor. Mortgagee shall not look to Mortgagor or any principal of Mortgagor with respect to the indebtedness evidenced by this Mortgage. In enforcing its rights and remedies under this Mortgage, Mortgagee shall look solely to the mortgaged premises for the payment of the indebtedness secured hereby and for the performance of the provisions hereof. Mortgagee shall not seek a deficiency or other money judgment against Mortgagor or any principal of Mortgagor and shall not institute any separate action against Mortgagor by reason of any default which may occur in the performance of any term or condition of this Mortgage or the Note. This agreement by Mortgagee shall not be construed in any way so as to affect or impair the lien of this Mortgage or Mortgagee's right to foreclose hereunder as provided by law, or to limit or restrict any of Mortgagee's rights or remedies in any foreclosure proceedings or other enforcement of payment of the indebtedness secured hereby out of and from the security given therefor.

Notwithstanding the aforesaid, Mortgagee may look to Mortgagor and any principal of Mortgagor for (i) misapplication of insurance proceeds, condemnation proceeds, tenant's security deposits, (ii) rent revenue and other income collected more than one month in advance (iii) rental revenue and other income collected after an event of default under the Loan Documents not applied to the debt service or operating expenses of the business, (iv) intentional damage to the property, (v) failure to pay (or deposit into reserves held by Mortgagee) funds sufficient to pay taxes or other liens with priority over Mortgagee's Loan Documents, (vi) damages arising from any fraud or misrepresentation of Mortgagor or any of its principals, and (vii) damages arising from the existence of hazardous or toxic substances or the failure of the property to comply with environmental laws.

(2) Purchase money mortgage

Purchase money. This is a purchase money mortgage used to secure the repayment of funds used by Mortgagor to purchase the above described property.

(3) Purchase money mortgage: plain language

Nature of this agreement. This Agreement is a purchase money mortgage. I am signing this Agreement in exchange for the loan which you have given me for the purpose of purchasing the premises.

(4) Mortgaged premises, including all right, title and interest

The mortgaged premises includes all of Mortgagor's right, title, and interest in and to the streets abutting the premises to

the center line thereof.

The mortgaged premises are the same premises conveyed to Mortgagor by deed delivered and intended to be recorded simultaneously with this mortgage. This mortgage is a purchase money mortgage.

The mortgaged premises includes all and singular the tenements, hereditaments, and appurtenances belonging or appertaining, and the reversion or reversions, remainder and remainders, rents, issues, and profits; also all the estate, right, title, interest, property, possession, claim, and demand whatsoever, in law and in equity, of Mortgagor, and every part and parcel with the appurtenances; and also all the right, title, and interest of Mortgagor in and to all equipment and fixtures now used or hereafter to be used in connection with the operation or enjoyment of the buildings on the premises or any part thereof.

(5) Mortgaged premises, including condemnation award

Now, therefore, in consideration of the indebtedness and for better securing the payment of the same, Mortgagor does hereby grant, convey, and mortgage unto Mortgagee, the real property described in Exhibit "A" attached (the "Land").

TOGETHER with any and all buildings and improvements erected or hereafter erected thereon.

TOGETHER with all of Mortgagor's right, title, and interest, now owned or hereafter acquired, in and to any land lying in the bed of any street, road, or avenue, open or proposed, in front of or adjoining said Land.

TOGETHER with all of Mortgagor's right, title and interest, now owned or hereafter acquired, in and to all sidewalks and alleys, and all strips and gores of land, adjacent to or used in connection with said Land.

TOGETHER with all awards, damages, payments and other compensation and all claims therefor and rights thereto which may result from taking or injury by virtue of the exercise of the power of eminent domain of or to, or any damage, injury, or destruction in any manner caused to the Premises, or any part thereof, or from any change of grade or vacation of any street abutting thereon. All of such awards, damages, payments, compensation, claims, and rights are hereby assigned, transferred, and set over to Mortgagee to the fullest extent that Mortgagor may under the law so do. Mortgagee is irrevocably appointed attorney-in-fact for Mortgagor to settle for, collect and receive any such awards, damages, payments, and compensation from the authorities making the same, to appear in and prosecute any proceeding therefor, and to give receipts and acquittances therefor.

(6) Fixtures and personal property included in mortgage: commercial property

TOGETHER with all fixtures, and all machinery, equipment, chattels, goods, and other articles of property, whether real estate or not, now or at any time hereafter attached to or situated in or upon, and used or useful in the operation of, the Land or the buildings and improvements erected or hereafter erected thereon, or of any business now or hereafter operated by the owner or any occupant of the Premises, or any part thereof, including:

All gas and electric fixtures, radiators, heaters, engines and machinery, boilers, ranges, ovens, elevators and motors, bathtubs, sinks, toilets, basins, pipes, faucets, air-conditioning equipment, plumbing fixtures, heating fixtures, mirrors, mantels, refrigerating plant, refrigerators, dishwashers, carpeting, furniture, laundry equipment, cooking apparatus, and appurtenances, and all building material and equipment now or hereafter delivered to the Premises and intended to be installed therein; and all renewals or replacements thereof, all additions or articles in substitution and all of the estate, right, title, and interest of Mortgagor in and to all property of any nature whatsoever, now or hereafter situate on the Premises or intended to be used in connection with its operation shall be deemed to be fixtures and an accession to the freehold and a part of the realty as between the parties hereto and all persons claiming by, through or under them and shall be deemed to be a portion of the security for the indebtedness secured by this Mortgage.

(7) Miscellaneous property interests included in mortgage

TOGETHER with all and singular the tenements, hereditaments and appurtenances belonging to the mortgaged Land or any part thereof, or the buildings and improvements thereon, or in anyway appertaining, including but not limited to all income, rents, issues and profits arising therefrom, all streets, alleys, passages, ways, watercourses, easements, all other rights, liberties, and privileges of whatsoever kind or character, the reversions and remainders, and all the estate, right, title, interest, property, possession, claim, and demand whatsoever, as well at law as in equity, of Mortgagor, in and to all the foregoing or any or every part thereof. The Land, buildings, improvements, fixtures, machinery, equipment, tenements, and other property interests described and enumerated above are collectively referred to in this mortgage as the "Premises."

(8) Mortgaged property and fixtures--short form

TOGETHER with all of Mortgagor's right, title, and interest to the land located in the streets and roads in front of and adjoining the premises, and

TOGETHER with all fixtures, and articles of personal property which now or in the future are attached to or used in the operation of any building on the premises together with any replacements thereof or additions thereto (but excluding the furniture of Mortgagor); and

TOGETHER with all awards or payments made to Mortgagor in the event of a taking of all or part of the premises by eminent domain ("condemnation"), including awards or payments for changes of the grades of streets and awards and payments made in the event of any other injury to or decrease in the value of the premises.

(9) Mortgaged premises: plain language

Mortgaged property. I give you a mortgage on my property at _____ (address or location) and all the buildings and improvements on it. This is the legal description of my property for the official records:

A. *Legal description of property and improvements.* ALL that certain tract or parcel of land and premises, hereinafter particularly described, situate, lying and being

[insert legal description]

B. *Streets.* I also give you a mortgage on any right that I may have in the land in the streets or roads in front of or alongside my property.

C. *Fixtures.* I also give you a mortgage on the property now or later attached to my land and buildings, and on all replacements of this property. These are called "fixtures." (Some examples of fixtures: furnaces, radiators, plumbing and heating pipes, bathroom fixtures, kitchen cabinets, stoves, shrubbery, and trees).

D. *Condemnation awards.* I also give you a mortgage on any money I am entitled to receive if all or part of my property or my right to use it is taken from me by a government agency or other lawful authority. You are authorized to collect this money, give receipts for it, and use it to reduce my debt to you. I agree to give you a written assignment or any other document you may need to obtain this money. If for a time after the property is taken the agency or authority delays making payment but instead pays you interest, I agree to pay you the difference between the interest you receive and the interest I would owe you under

the Mortgage Note.

E. *Additional security.* As additional security for this loan, I also give you what is known as a security interest on any accounts maintained by me and in any securities of mine in your possession at any time while this loan remains unpaid.

(10) Acceleration on sale or transfer, except to spouse

Nonassumability. Upon the sale or transfer of all or part of the premises, Mortgagee may declare the entire principal sum and accrued interest thereon to be immediately due and payable. This paragraph, however, shall not apply to any sale or transfer between Mortgagor and his spouse.

(11) Acceleration on sale or transfer: plain language (residence)

Sale or transfer of premises. If I sell or transfer ownership of my property, I agree to repay what I owe you in full with interest up to the date of the sale or transfer, unless you have agreed in writing in advance to allow the new owner to take over my obligations under this Mortgage and the Mortgage Note.

(12) Title warranty

Mortgagor warrants and covenants with Mortgagee, that Mortgagor is seized of an indefeasible estate in fee simple in the premises, its appurtenances, equipment and fixtures, and will warrant and forever defend the title unto Mortgagee against all lawful claims.

(13) Title guaranty: plain language (residence)

Warranty. I guarantee to you that I am the sole owner of this property and that I have the legal right to give you a first mortgage on it. I guarantee to you title to the premises.

(14) Title warranty: plain language

I covenant ("agree") with you as follows:

Title. I warrant the title to the premises.

(15) Title warranty and covenant to defend

Warranty of title. Mortgagor warrants that it is lawfully seized of the Premises, that it has full right and is lawfully authorized to sell, convey, or encumber the same, and that the Premises are free and clear of all liens and encumbrances except as provided herein. Mortgagor further covenants to warrant and forever defend, all and singular, the Premises unto the Mortgagee forever from and against the Mortgagor and all persons whomsoever lawfully claiming the same or any part thereof.

(16) Further instruments to continue or preserve lien

Further assurances. At any time, and from time to time, upon Mortgagee's request, Mortgagor will make, execute, acknowledge, and deliver or cause to be made, executed, acknowledged, and delivered to Mortgagee, all other or further instruments, mortgages, conveyances, deeds, certificates, and documents that Mortgagee deems necessary, or desirable in order to effect, complete, confirm, enlarge, or perfect or to continue and preserve Mortgagor's obligation under the Note and the lien of this Mortgage. Upon any failure by Mortgagor to do so, Mortgagee may make, execute, and record any and all such instruments, certificates, and documents for and in the name of Mortgagor, and Mortgagor irrevocably

appoints Mortgagee its agent and attorney-in-fact of Mortgagor to do so. Mortgagor agrees to pay all filing, registration, and recording fees and all federal, state, county, and municipal fee, taxes or other duties, imposts, assessments, and charges on all such instruments, certificates, and documents.

(17) Warranty of corporate or partnership status

Good standing. If Mortgagor purports to be a partnership or a corporation, it warrants and covenants that:

- (i) it is duly organized, validly existing, and in good standing under the laws of the state in which it is organized or incorporated,
- (ii) it is duly qualified and in good standing in the state in which the Premises is located,
- (iii) it has full power, authority, and legal right to carry on the business now being conducted by it and to engaged in the transactions contemplated by this Mortgage and the Note, and
- (iv) the execution and delivery of and the carrying out of the transaction contemplated by this Mortgage, the execution and delivery of the Note and this Mortgage, and the performance and observance of the terms, covenants, agreements, and provisions of all of the foregoing, have been duly authorized by all necessary actions of Mortgagor and will not conflict with or result in a breach of the terms or provisions of any other agreement or of any existing law or any existing rule, regulation, or order of any court or governmental body or of the Certificate of Partnership or Certificate of Incorporation or the Partnership Agreement or the By-laws of Mortgagor.

(18) Payment without deduction for taxes or assessments

This mortgage is granted upon this express condition, that if Mortgagor pays to Mortgagee all moneys secured hereby when due and payable, and the interest, without deduction or credit for any amount for taxes, assessments or other impositions, then this mortgage, and the estate hereby granted shall cease, terminate, and be void, otherwise to remain in full force and effect.

And Mortgagor covenants and agrees to pay to Mortgagee the principal and interest owing on the note or obligation, without any deduction or credit for any amount paid for taxes, assessments, or other impositions assessed or to be assessed upon the mortgaged premises.

(19) Repayment without deductions or credits: plain language (residence)

This grant is made upon the express condition, that if Mortgagor repays to Mortgagee the principal sum specified in the note bearing today's date along with all interest due on such sum without deductions or credits of any kind according to the terms of the note, this grant shall be void and of no legal effect whatsoever.

(20) Payment of debt: plain language

Payment. I will pay the indebtedness as provided by the Mortgage Note.

(21) Payment and performance of all terms by borrower

Payment of sums secured. Mortgagor shall pay to Mortgagee the principal of and interest upon the Note according to the terms of the Note, reasonable charges fixed by Mortgagee to satisfy and discharge this Mortgage of record, and all other sums hereby secured. Mortgagor shall keep and perform every other term, provision, covenant, and agreement of the Note and this Mortgage.

(22) Timely payment, satisfaction of mortgage

Satisfaction of this mortgage. If Mortgagor complies with all of the provisions of this Mortgage and pays to Mortgagee the principal sum, and all other sums payable by Mortgagor to Mortgagee as are hereby secured, in accordance with the provisions of the Note and in the manner and at the times therein set forth, without credit for taxes, deduction, fraud, or delay, then and from thenceforth this Mortgage, and the estate hereby granted, shall cease and become void, otherwise to remain in full force and effect.

(23) Medium and place of payment

Medium of payment. All payments of principal, interest and all other payments required or provided for herein shall be paid in lawful money of the United States of America which shall be legal tender in payment of all debts and dues, public and private, at the time of payment, at the office of Mortgagee or at any other place either within or without the State of _____ that Mortgagee may from time to time designate.

(24) Partial release of lien, continued liability

Right of release. Mortgagee may allow Mortgagor any indulgences or forbearances, or extensions of any kind, respecting payment of the indebtedness secured hereby, or may release portions of the Premises without affecting the personal liability of any person, corporation or other entity for the payment of the indebtedness, or the lien of this Mortgage upon the remainder of the Premises for the full amount of the indebtedness then remaining unpaid. In the event of the sale or transfer by operation of law or otherwise, of all or any part of, or interest in, the Premises described in this Mortgage, Mortgagee is authorized and empowered to deal with the buyer or transferee with reference to the Premises and/or the debt secured hereby, or with reference to any of the terms and/or conditions hereof, as fully and to the same extent as it might deal with the original parties and without in any way releasing or discharging any of the liabilities or undertakings hereunder all of which shall remain in full force and effect notwithstanding any such action.

(25) Mortgage security for adjustable interest note: plain language

By signing this Mortgage document, I give you a mortgage on the property described below, as security for your loan to me of \$40,000, plus interest, as specified by the Mortgage Note signed the same day as this Mortgage. The Mortgage Note which this Mortgage secures provides for an adjustable interest rate. The interest rate may be increased or decreased at three-year intervals according to the formula which is fully described in the Mortgage Note. (The terms of the Note must be considered included in the terms of this Mortgage.)

NOTICE:

THE MORTGAGE SECURES A NOTE WHICH CONTAINS A PROVISION ALLOWING FOR CHANGES IN THE INTEREST RATE. INCREASES IN THE INTEREST RATE WILL RESULT IN HIGHER PAYMENTS. DECREASES IN THE INTEREST RATE WILL RESULT IN LOWER PAYMENTS.

In addition to the covenants and agreements made in the Mortgage, I and you further covenant and agree as follows:

A. INTEREST RATE AND MONTHLY PAYMENT CHANGES

The Note has an "Initial Interest Rate" of _____ percent. The Note interest rate may be increased or decreased on each Change Date, as described in the Note. Changes in the interest rate are governed by changes in the " _____ " made available by the _____ (the "Index"). The interest rate cannot be

changed to more than _____ percentage points higher or lower than the Initial Interest Rate.

If the interest rate changes, the amount of my monthly payments will change as provided in the Note. Increases in the interest rate will result in higher payments. Decreases in the interest rate will result in lower payments.

B. LOAN CHARGES

It could be that the loan secured by the Mortgage is subject to a law which sets maximum loan charges and that law is interpreted so that the interest or other loan charges collected or to be collected in connection with the loan would exceed permitted limits. If this is the case, then: (A) any such loan charge shall be reduced by the amount necessary to reduce the charge to the permitted limit; and (B) any sums already collected from me which exceeded permitted limits will be refunded to me. You may choose to make this refund by reducing the principal owed under the Note or by making a direct payment to me.

C. TRANSFER OF THE PROPERTY

If there is a transfer of the Property subject to paragraph _____ of this mortgage, you may require either an increase in the current Note interest rate or an increase in the Base Index figure, or both, as a condition of your waiving the option to accelerate provided in paragraph _____.

By signing this, I agree to all of the above.

(26) Repayment with interest, late charges: plain language (residence)

When this mortgage becomes void. When the loan secured by this Mortgage has been paid in full with all interest due, this Mortgage shall become void.

Payments and late charge. I promise to repay this loan according to the terms of this Mortgage and the Mortgage Note. For each payment that reaches you more than 15 days late, I will pay you a late charge of two cents (\$.02) for each dollar of the late payment. This charge covers the extra cost to you of handling late payments.

(27) Late payment charge for handling expenses

Late charge. Mortgagor shall pay to Mortgagee a "late charge" of five cents for each \$1.00 of each monthly payment or interest and amortization more than 15 days in arrears to cover the extra expense involved in handling delinquent payments.

(28) Late charge in addition to other charges

Late charges. If any installment of principal, interest, principal and interest or escrow deposit becomes overdue for a period in excess of 15 days, Mortgagee may charge Mortgagor a "late charge" of four cents for each dollar (\$1.00), or part thereof, so overdue, for the purpose of defraying Mortgagee's expenses incident to handling the delinquent payment. This charge shall be in addition to, and not in lieu of, any other remedy Mortgagee may have, and is in addition to any reasonable fees and charges of any agents or attorneys which Mortgagee is entitled to employ on any default hereunder, whether authorized herein, or by law. The "late charges" if not previously paid, shall, if Mortgagee so desires, be added to and become part of the next monthly payment to be made under the Note.

(29) Late charge: plain language

Late charges. If I fail to pay any mortgage installment within 15 days after its due date, I will pay a late charge in addition to the installment. This late charge cannot exceed 3 percent of the amount of the late installment and will cover your expenses in handling my late payment.

(30) Insurance requirement

Insurance. Mortgagor shall keep the buildings erected or to be erected upon the mortgaged premises insured against loss or damage by fire, and all other hazards specified by Mortgagee, for Mortgagee's benefit, and by insurers and in amounts approved by Mortgagee, and deliver such insurance policy or policies to Mortgagee. The policies shall have attached to them loss payable clauses in favor of and in form acceptable to Mortgagee, and the fire insurance policies shall contain the usual extended coverage endorsement. In default of this insurance requirement, Mortgagee may effect such insurance, and the premium or premiums paid shall be a lien on the mortgaged premises; added to the amount of the note or obligation and secured by this mortgage payable on demand with interest at the highest legal rate from the time of such payment. In case of loss, any insurance monies payable to Mortgagor and/or Mortgagee are, to the extent of Mortgagor's interest, assigned to Mortgagee to the end and with the right to so employ such monies as to preserve and protect Mortgagee's rights under this mortgage and the accompanying note or obligation; or to secure repayment of its indebtedness; or to rebuild or restore the damaged building or improvements, as Mortgagee in its absolute discretion may deem best; provided, however, that if Mortgagor is not in default and further provided that if such insurance proceeds alone or together with Mortgagor's own funds are sufficient to rebuild and restore the building and improvements, then Mortgagee agrees that Mortgagee shall have the right to use such proceeds for such purpose. Mortgagee shall have the absolute right to settle and compromise, without Mortgagor's consent, all claims under the policies of insurance.

(31) Insurance requirement, commercial building

Insurance

(a) Policies. Mortgagor shall keep the Premises continuously insured against loss by fire, with extended coverage and against any other hazards reasonably required by Mortgagee, in any total amount Mortgagee may require from time to time. In no event, however, shall the amount on the buildings and improvements on the Land be less than the greater of: (i) 100 percent of the full replacement cost of such buildings and improvements, without deduction for depreciation; (ii) an amount sufficient to prevent Mortgagee or Mortgagor from becoming a co-insurer within the terms of the applicable policies; or (3) the principal amount of the Mortgage. Mortgagor shall also maintain rent insurance on the Premises in an amount equal to at least one year's gross rent from the buildings and improvements on the Land. The policy or policies for all such insurance shall contain replacement cost endorsements and shall be maintained in full force and effect until the secured indebtedness is fully repaid. All policies, and any renewals, including policies for any amounts carried in excess of the minimum and policies not specifically required by Mortgagee, shall be with an insurance company or companies, and in form and substance satisfactory to Mortgagee, and shall be deposited, premiums paid, with Mortgagee.

(b) Loss proceeds. Any loss shall be payable to Mortgagee according to the terms of a standard mortgagee clause, not subject to contribution, or of such other form of mortgagee or loss payment clause as is satisfactory to Mortgagee. Mortgagee may adjust or compromise any loss claims under the insurance, and collect and receive the proceeds and apply them either to reduce the secured indebtedness or to restore the Premises. However, if the insurance proceeds do not exceed \$5,000, Mortgagor may use the proceeds to repair and reconstruct the Premises. In such event, Mortgagee may not retain the proceeds or apply them to the secured indebtedness. Mortgagor shall deliver all renewal policies, premiums paid, to Mortgagee at least ten days before the policies expire. Each policy shall provide Mortgagee with 20 days' prior written notice before any termination or cancellation becomes effective. If Mortgagee becomes the owner of all or any part of the Premises by foreclosure or otherwise, the policies shall become Mortgagee's absolute property. In the event of damage by fire, other casualty or catastrophe, Mortgagor shall forthwith restore the Premises to their prior

condition, irrespective of adequacy or availability of insurance proceeds.

(c) *Separate insurance.* Mortgagor shall not take out separate insurance concurrent in form or contributing in the event of loss with that required to be maintained under this Mortgage unless Mortgagee is included thereon as a named insured with loss payable to Mortgagee under a standard mortgage endorsement of the character above described. Mortgagor shall immediately notify Mortgagee whenever any such separate insurance is taken out, and shall promptly deliver to Mortgagee the policy or policies of such insurance.

(32) Insurance requirement: homeowner's and flood insurance

Insurance. I agree to keep the buildings on my property insured at all times against loss by fire and any other risks you may require. All policies shall be for at least the amounts and time periods that you specify. Each policy will contain the usual extended coverage endorsement. (A "Homeowner's Policy" will satisfy the extended-coverage requirement). If the property is located in an area with a high risk of flooding, I will insure it against flood damage if insurance is available under the National Flood Insurance Act of 1968. All policies will name you as the Mortgagee, which means you will receive payment made on any insurance claims. I agree to show you any of these policies whenever you ask to see them. I agree to pay all insurance premiums when due. If I do not, you may make the payment for me, and I will repay you immediately. If you receive payment of a claim, you may choose to let me use the money to repair the damage, or you may use the money to reduce what I owe you.

(33) Insurance requirement: plain language

Insurance. I will keep the buildings on the premises insured for your benefit against loss or damage by fire, flood, and any other hazards. I will purchase insurance in the amounts and for the time periods which you require, and will assign and deliver the policies to you. All insurance policies shall contain the usual extended coverage endorsements and the standard mortgagee endorsements. If you do not require payments for insurance premiums to be paid in escrow, I will make all premium payments according to the terms of the policies. If I default on the payment of premiums under such policies, you may pay the premiums and I shall repay you upon demand. If I default on any of my obligations under this Agreement, all insurance policies which I have purchased in connection with the premises and the unearned premiums on such policies shall be assigned to you as further security for my mortgage debt. If you collect on any of the insurance policies for loss or damage to the premises, you may apply such money towards the payment of my mortgage debt or you may turn over all or part of the money to me; provided, however, if I am not in default, I shall have the right to use the proceeds if I can rebuild and restore the buildings to the condition they were in prior to their damage. If you apply the insurance money which you collect towards the payment of my mortgage debt, the amount of your mortgage lien shall only be reduced by the amount of the insurance money which you collect and keep.

(34) Flood insurance requirement

Flood insurance. Mortgagor covenants and agrees that if, at any time during the term or any extensions of the Mortgage, the area in which all or part of the Premises is located is designated a "flood prone" area under the Flood Disaster Protection Act, as amended, Mortgagor shall obtain flood insurance in whatever amount Mortgagee requires from time to time, and shall otherwise comply with the National Flood Insurance Program as set forth in such Act. Mortgagor further agrees to fully comply with the requirements of the National Flood Insurance Act and the Flood Disaster Protection Act, as amended, and any other law, order, rule, ordinance, or regulation concerning flood insurance, to the extent that such law applies to all or any part of the Premises.

(35) Taxes paid by borrower

Taxes. Mortgagor shall pay all taxes, assessments, water rents, and other governmental charges levied upon the premises, within 15 days after they become due and payable, and will deliver proper receipts therefor to Mortgagee. If Mortgagor fails to make such payments, Mortgagee may pay the charges, in which case its payments shall be a lien on

the mortgaged premises, added to the amount of the debt, and secured by this mortgage, and shall be due and payable on demand, with interest at the highest legal rate from the time of such payment.

(36) Taxes and utility charges

Taxes and other charges. Mortgagor shall pay all real estate taxes, water and sewer rents, fines, impositions, and other similar claims and liens now or later assessed against all or any part of the Premises, without any deduction, defalcation, or abatement, not later than ten days before the dates on which such taxes and other charges start to bear interest or penalties, and shall produce to Mortgagee receipts for the payment thereof in full by not later than such dates. Mortgagor shall pay every other tax, assessment, claim, fine, imposition, lien, or encumbrance which may at any time be or become a lien upon the Premises prior to, or on a parity with, the lien of this Mortgage. If Mortgagor, in good faith and by proper legal action, contests the validity or amount of any taxes, assessments, fines, impositions, claims, liens, encumbrances, or other charges, and establishes on its books or by deposit of cash with Mortgagee (as Mortgagee may elect) a reserve for payment in such amount as Mortgagee shall require, Mortgagor shall not be required to pay such taxes or charges, or to produce such receipts, during the maintenance of the reserve and for so long as such contest operates to prevent collections, is maintained and prosecuted with diligence, and is not terminated or discontinued adversely to Mortgagor. Mortgagor shall pay all charges for public or private utilities with respect to the Premises when such charges are due, and shall not allow them to remain outstanding.

(37) No credit for tax payments: plain language

Taxes. No owner of the mortgaged property shall be entitled to any credit by reason of the payment of any tax thereon.

(38) Future mortgage or other tax

Future mortgage or other taxes. If any future federal, state, or local law, rule, regulation, or ordinance imposes a tax on Mortgagee either with respect to the Premises, the value of Mortgagor's equity, the amount of the secured indebtedness, the Note, or this Mortgage, Mortgagee may from time to time give Mortgagor 60 days' written notice to pay the secured indebtedness. The indebtedness shall then become due, payable, and collectible at the end of the 60-day period unless before such time Mortgagor has lawfully, without violation of any usury or other law, paid any such tax in full as it becomes due and payable. In such event, the notice shall be deemed rescinded with respect to any of Mortgagee's rights arising by reason of the tax so paid. No prepayment charge or premium shall apply to any payment of the secured indebtedness pursuant to any such notice, if the payment is made before the expiration of the 60-day period.

(39) No credit for taxes assessed

No credit for taxes. Mortgagor will not claim, demand, or be entitled to receive, any credit or credits on the principal indebtedness, or on the interest, for so much of the taxes assessed against the Premises as is equal to the tax rate applied to the principal indebtedness due on this Mortgage or any part thereof, and no deduction shall be claimed from the taxable value of the Premises by reason of this Mortgage.

(40) Escrow for taxes and insurance, without interest

Escrow funds. At Mortgagee's request, Mortgagor shall pay to Mortgagee monthly at the time when the monthly installment of principal, interest or principal and interest, is payable, an amount equal to one twelfth of the annual premium for fire and extended coverage insurance, other hazard insurance and the annual real estate taxes, water rents, sewer rents, special assessments, and any other tax, assessment, claim, lien, or encumbrance which may at any time be or become a lien upon the Premises prior to, or on a parity with, the lien of this Mortgage to enable Mortgagee to pay same at least 30 days before they become due, and on demand from time to time shall pay to Mortgagee additional sums necessary to pay the premiums and other payments, all as estimated by Mortgagee, the amounts so paid to be security for the premiums and other payments and to be used in payment thereof. No amounts so paid shall be deemed to be trust

funds but may be commingled with Mortgagee's general funds, and no interest shall be payable thereon. If, pursuant to any provision of this Mortgage, the entire principal debt remaining or any installment of interest, principal, or principal and interest becomes due and payable, Mortgagee may apply any amounts so held against all or any part of the secured indebtedness, any interest thereon, or in payment of the premiums or payments for which the amounts were deposited.

(41) Escrow payments and account: plain language (residence)

A. *Escrow Account.* At the time of the signing of this Mortgage, I will deposit with you a sum of money to establish an escrow account, from which you will pay future private mortgage insurance premiums, if any, real estate taxes, municipal water charges, sewer rents and special assessments on the property (together called "the Charges"). There must be enough money in the escrow account at all times to pay the Charges one month before they become due. I will make a new deposit to this account every month along with my monthly payment of the loan principal and interest as specified in the Mortgage Note. My monthly deposits shall be one twelfth of the annual Charges as estimated by you. I agree that your estimates may allow for possible future increases in the Charges. Whenever you decide the amount in the escrow account will be too small to pay the Charges when they become due, I agree to make whatever lump sum payment you request and/or to increase my monthly deposit. If I am in default (see Paragraph _____) and you become owner of my property or sell it at public sale, you may use the balance left in the escrow account to pay the Charges, or you may use this Balance to reduce what I owe you. When I have paid what I owe you in full, you will refund to me whatever money is in the escrow account at that time.

B. *Charges not paid from escrow account.* I agree to pay when due all Charges (See Paragraph A) that are not being paid by you from my escrow account. I will promptly show you receipts for these payments if you request it. If I do not pay these Charges when they are due, you may do so and I will repay you immediately. Even though I may be given the choice of paying an assessment in installments, you can demand that I pay the full assessment when the first installment is due.

(42) Monthly escrow payments: plain language

Monthly escrow deposits. Upon your request, I will pay you, in addition to my monthly installments of principal and interest, an amount equal to one twelfth of the taxes, municipal water rates, sewer rents, and assessments levied or to be levied against the premises, together with fire and other hazard insurance premiums, which you estimate will be due during a 1-year period. These amounts are called "escrow deposits." I will continue to make such monthly escrow deposits until my mortgage debt is fully paid so that you will have enough money to pay taxes, municipal water rates, sewer rents, assessments, and insurance premiums on the first day of the month preceding the month in which such payments become due. If at any time you decide that my monthly escrow deposits are not sufficient to make any of these payments as they become due, at your request I shall deposit the amount which you need in order to make payments when due. Should I default on any of the terms of this Agreement and (a) a public sale of the premises is conducted, or (b) if you otherwise acquire the premises after my default, you will have the right to use my escrow deposit funds to pay any taxes, municipal water rates, sewer rents, assessments, and insurance premiums or to apply my escrow deposit funds to the balance remaining on the mortgage. If you should do this, you will not be obligated to account to me for it. My escrow deposit funds may be kept with your general funds. You shall pay interest on my monthly escrow deposits only to the extent required by law. You may at any time decide to discontinue or reinstate my monthly escrow deposit requirements.

(43) Immediate acceleration for specified defaults

Default. The whole of the principal sum and the interest shall become due, at Mortgagee's option: (a) after failure to exhibit to Mortgagee, within ten days after demand, receipts showing payment of all taxes, water rates, sewer rents, and

assessments; (b) after the actual or threatened alteration, demolition or removal of any building on the premises without Mortgagee's written consent; (c) after the assignment of the rents of the premises or any part thereof without Mortgagee's written consent; (d) if the buildings on said premises are not maintained in reasonably good repair; (e) after failure to comply with any requirement or order or notice of violation of law or ordinance issued by any governmental department claiming jurisdiction over the premises within three months from the issuance thereof; (f) if on Mortgagee's application two or more fire insurance companies lawfully doing business in the state refuse to issue policies insuring the buildings on the premises; or (g) if Mortgagor fails to keep, observe, and perform any other covenant, condition, or agreement in this mortgage.

(44) Delayed acceleration for late payment, other defaults

Acceleration. The entire unpaid principal sum and accrued interest shall become due, at Mortgagee's option: (a) after default for 15 days in the payment of all or part of any installment of principal or interest; (b) after default in the payment of any tax, water rate, sewer rent, or assessment for 15 days after notice and demand; (c) after default after notice and demand either in delivering the policies insuring the buildings against loss by fire or in reimbursing Mortgagee for premiums paid on such insurance, as provided in this mortgage; or (d) after default upon request in furnishing a statement of the amount due on the mortgage and whether any offsets or defenses exist against the mortgage debt, as provided in this mortgage.

(45) Immediate default for nonpayment or other specified event

Events of default. The following shall constitute events of default under this Mortgage ("Events of Default"):

- (a) Mortgagor's failure to pay any installment of principal, interest or principal and interest, or any escrow deposit, when due and payable;
- (b) Mortgagor's failure to pay any other required sum in the Note or in this Mortgage when the same is due and payable;
- (c) Mortgagor's failure to perform or observe any other term, provision, covenant, or agreement in the Note or this Mortgage within 15 days after same is to be performed;
- (d) The filing by Mortgagor of a voluntary petition in Bankruptcy; Mortgagor's application as a bankrupt or insolvent; the filing by Mortgagor of any petition or answer seeking or acquiescing in any reorganization arrangement, composition, readjustment, liquidation, dissolution, or similar relief for itself under any present or future federal, state or other statute, law or regulation relating to bankruptcy, insolvency, or other relief for debtors; Mortgagor's seeking or consenting to or acquiescence in the appointment of any trustee, receiver, or liquidator of Mortgagor or of all or any substantial part of the Premises or of any or all of the rents, revenues, issues, earnings, profits, or income thereof; the making of any general assignment for the benefit of creditors; or the admission in writing of Mortgagor's inability to pay its debts generally as they become due; or
- (e) The occurrence of any event of default under the Note.

(46) Default: plain language (residence)

Default. I will be in default if I do not make any payment required by this Mortgage or the Mortgage Note within 15 days after the date it is due. I will also be in default if I violate any other terms and conditions of the Mortgage and Mortgage Note. If, in your opinion, my property is threatened with destruction or demolition, you may consider me to be in default. If I am in default for any reason, you have the right to demand payment of the entire amount I owe you,

with interest up to the day you receive payment. I agree to repay you for your reasonable legal expenses, if any, in collecting what I owe you.

(47) Default: plain language

Default. The entire amount of the mortgage debt, including principal and interest, shall become due and payable at your option:

If I fail to pay any installment of principal or interest, late charge or escrow deposit required under this Agreement within ten days of the date on which such amount is due.

If I fail to pay any tax, municipal water rate, sewer rent, assessment, or insurance premium which I am required to pay within 30 days of the date on which such amount is due.

If I fail to show you the receipts evidencing payment of all taxes, water rates, sewer rents, and assessments within ten days after you ask me to do so.

If I fail to assign and deliver to you the insurance policies insuring the premises against loss or other hazards after you have asked me to do so.

If I fail to repay you for those insurance premiums which you pay in connection with any insurance policies as herein provided.

If I fail to give you a statement which sets forth the amount due on the mortgage debt and any defenses or offsets which exist against the debt, after you ask me to do so.

If I have structurally altered, demolished, or removed any building on the premises or threatened to do so without your written consent.

If I do not keep any building on the premises in reasonably good repair.

If any of the fixtures or articles of personal property on the premises are removed, or totally or partly destroyed, and I fail to replace them promptly with similar items of at least equal quality which are free from any other security interests.

If an action is started to foreclose any lien affecting the premises.

If I fail to remove any federal tax lien on the premises within 30 days of your request that I do so.

If the premises are sold or transferred without your written consent.

If I fail to comply with any requirement, order, or notice issued by a governmental department claiming to have jurisdiction over the premises within three months after such requirement, order, or notice is issued, or within such shorter period of time as may be allowed by the governmental department.

If two or more fire insurance companies lawfully doing business in this state refuse to issue policies insuring any building(s) on the premises after you have applied for it.

If there are any changes in the way in which mortgages are to be taxed for state or local purposes. (You must give me 30 days' written notice that you intend to demand that I repay my entire mortgage debt under this circumstance of default.)

If I assign the rents or profits received from the premises without your written consent.

If there is any subordinate financing of the premises.

If the premises are no longer my domicile ("principal residence").

If I fail to honor any of my promises under this Agreement.

(48) Remedies: possession, rents, receiver

Mortgagee's remedies. If Mortgagor shall fail to observe, perform and keep all of the terms, provisions, covenants and conditions required by it to be kept, observed, and performed hereunder, Mortgagee may immediately enter upon, take possession of, and let the mortgaged premises, receive the rents, issues, and profits thereof, and apply such proceeds, after paying all necessary charges and expenses, on account of the amount secured hereby. In the event of any such default, all rents and profits shall thereupon be deemed assigned to Mortgagee, who may immediately, upon commencing proceedings for the foreclosure of this mortgage, apply for the appointment of a receiver of the rents and profits of the premises. Mortgagee shall be entitled to the appointment of such receiver as a matter of right, as security for the amounts due Mortgagee, without consideration of the value of the mortgaged premises or solvency of any person or persons liable for the payment of such amounts.

(49) Remedies: acceleration, foreclosure, entry, receiver

Remedies. Upon the happening of any one or more of the Events of Default, the entire unpaid balance of the principal, the accrued interest, and all other sums secured by this Mortgage shall, at Mortgagee's option, become immediately due and payable without notice or demand, and in any Event of Default Mortgagee may forthwith undertake any one or more of the following:

(a) *Foreclosure.* Institute an action of mortgage foreclosure, or take any other action allowed at law or in equity, for the enforcement and realization on the mortgage security or any other security which is herein or elsewhere provided for, and proceed to final judgment and execution for the entire unpaid balance of the principal sum, with interest at the rate stipulated in the Note to the date of default and thereafter at the rate stipulated in the Note, together with all other sums secured by this Mortgage, all costs of suit, interest at the rate stipulated in the Note on any judgment obtained by Mortgagee from and after the date of any foreclosure sale of the Premises (which may be sold in one parcel or in such parcels, manner or order as Mortgagee shall elect) until actual payment is made by the selling authority of the full amount due Mortgagee, and reasonable attorney's fees, without further stay, any law, usage or custom to the contrary notwithstanding;

(b) *Entry.* Enter into possession of the Premises, with or without legal action, and by force if necessary; lease the same, collect all rents, issues, and profits therefrom and, after deducting all costs of collection and administration expense, apply the net rents, issues, and profits to the payment of taxes, water and sewer rents, charges and claims, insurance premiums, and all other carrying charges (including agents' compensation and fees and costs of counsel and receivers) and to the maintenance, repair, and restoration of the Premises, or on account and in reduction of the secured principal or interest, in such order and amounts as Mortgagee in its sole discretion elects;

(c) *Receivership.* Have a receiver appointed to enter into possession of the Premises, collect the rents, issues, and profits therefrom and apply the same as the court directs. Mortgagee shall be entitled to the appointment of a receiver without having to prove either the inadequacy of the security or the insolvency of Mortgagor or any other person who may be legally or equitably liable to pay moneys secured hereby, and Mortgagor and each such person shall be deemed to have waived such proof and to have consented to the appointment of a receiver. If Mortgagee or any receiver collects rents, issues, or profits from the Premises, the moneys so collected shall not be substituted for payment of the debt or used to

cure the default, without Mortgagee's prior written consent. Mortgagee shall be liable to account only for rents, issues, and profits actually received by it.

(50) Cumulative rights and remedies

Cumulative rights and remedies. The rights and remedies of Mortgagee as provided in this Mortgage, or in the Note, shall be cumulative and concurrent, but not exclusive, and may be pursued singly, successively, or together at Mortgagee's sole discretion, and may be exercised as often as necessary. The failure to exercise any such right or remedy shall in no event be construed as a waiver or release thereof.

(51) Borrower's waiver of defenses and notices

Waiver of defenses and certain notices. To the full extent permitted by law, Mortgagor waives and releases (a) all errors, defects, and imperfections in any proceedings instituted by Mortgagee under this Mortgage, (b) all benefits that might accrue to Mortgagor by virtue of any present or future laws exempting the Premises, or any part of the proceeds arising from any sale thereof, from attachment, levy, or sale under execution, or providing for any stay of execution, exemption from civil process, or extension of time for payment, and (c) all notices, not specifically required by the Note and this Mortgage, of Mortgagor's default or of Mortgagee's exercise, or election to exercise, any option under this Mortgage.

(52) Tenancy of borrower after default

Use of premises after default. On or after any event of default in the payment of any sum secured by this mortgage, Mortgagor or anyone claiming by, through, or under it, shall, upon Mortgagor's demand, become a month to month tenant of Mortgagee, and shall pay as monthly rental for the portion of the Premises occupied by Mortgagor, the respective sums agreed to be paid as monthly payments in this Mortgage in advance on the dates and in the manner provided for such payment in the Note. In default of so doing, Mortgagor and anyone claiming by, through, or under it, may be dispossessed by proceeding under the Landlord and Tenant Act, any appropriate summary proceedings, or any other law and this covenant shall be effective either with or without any action being brought to foreclose this Mortgage and without applying for a receiver to collect rents.

(53) Foreclosure proceeds, deficiency and surplus: residence

Foreclosure. If I am in default and do not pay what I owe you when you demand payment, you will have the right to sell my property. This is called foreclosing the mortgage. You may use what you receive from the sale to repay what I owe you, after first paying the foreclosure expenses and your reasonable attorney's fees. If what you receive is not enough to pay off the entire amount I owe you, I will still have to pay you the difference. If the sale brings in more money than is needed to pay your expenses and my debt to you, the surplus will be available to pay any other of my debts which are secured by my property and which may be paid at that time. Any money left over will be paid to me. If you foreclose, you may have a receiver appointed to take care of my property for you until the sale. At the foreclosure sale, you may sell my property as one parcel.

(54) Foreclosure and receiver: plain language

Foreclosure. If I default in my obligations under this Agreement and a foreclosure sale is held, the premises may be sold in one parcel.

You or any other holder of this mortgage shall be entitled to the appointment of a receiver in any action to foreclose this mortgage without notice to me and without regard to the adequacy of the security for the debt.

(55) Legal expense reimbursement

Counsel fees. If Mortgagee becomes a party (by intervention or otherwise) to any action or proceeding affecting the Premises, the title, or Mortgagee's interest under this Mortgage, or employs an attorney to collect any of the indebtedness or to enforce performance of the obligations, covenants and agreements secured hereby, Mortgagor shall reimburse Mortgagee, forthwith upon written notice and without further demand, for all reasonable costs, charges, and counsel fees incurred by Mortgagee, in any such case, regardless of whether suit is commenced, and the same shall be added to the secured principal sum as a further charge and lien upon the Premises and bear interest at the rate provided for in the Note.

(56) Lender's right to cure borrower's defaults

Right to remedy defects. If Mortgagor fails to pay any tax, claim, lien, or encumbrance which shall be or become prior to, or on a parity with, the lien of this Mortgage, or to pay any insurance premium as aforesaid, or to pay any utility bill for services rendered to the Premises or to keep the Premises in repair, as aforesaid, or commits or permits waste or fails to perform or observe any term, agreement, provision, covenant, or condition under this Mortgage, Mortgagee, may pay such claim, lien, encumbrance, tax, assessment, or premium, with right of subrogation thereunder, may make any repairs and take any steps it deems advisable to prevent or cure such waste, and may appear in any action or proceeding with respect to any of the foregoing and retain counsel therein, and take such action therein as Mortgagee deems advisable. Mortgagee is empowered to enter and to authorize others to enter upon the Premises for the purpose of performing or observing any such defaulted covenant or condition without becoming liable to Mortgagor or any person in possession under Mortgagor. For any of such purposes, Mortgagee may advance any sums of money it deems necessary. Mortgagor will pay to Mortgagee, immediately and without demand, all sums of money advanced by Mortgagee pursuant to this paragraph and until paid, all such sums shall be added to the secured principal and bear interest at the rate provided for in the Note secured by this Mortgage.

(57) Legal expense reimbursement: plain language (residence)

Suits. If you are sued in any legal action which concerns this Mortgage or if you have to defend your rights to my property, I agree to repay your expenses (including reasonable lawyers' fees) with interest at _____ percent a year. This Mortgage is your security for these expenses, plus interest, as if they were part of my original debt to you.

(58) Legal expense reimbursement: plain language

Legal expenses. If you become involved in a lawsuit or legal proceeding to foreclose this mortgage or to recover or collect my mortgage debt, applicable provisions of law will govern your recovery of costs, disbursements and allowances.

If you become a party to any other lawsuit or legal proceeding concerning this mortgage, or if it becomes necessary for you to uphold or defend the lien of this mortgage, it will be my responsibility to pay for your legal expenses (including reasonable attorney's fees) which you reasonably spend in connection with such action. The sum of your legal expenses, plus interest, shall become a lien on the premises, superior to any right, title to, interest in, or claim upon the premises arising after the creation of your lien under this Agreement.

(59) Interest on lender's expenses and advances: plain language

Interest. If you ever incur any expenses or advance any money in connection with this Agreement or as required by law, I will pay you interest on that amount which you have spent. This interest will be figured at the interest rate provided for in the Mortgage Note which I have signed in connection with this Agreement.

(60) Waiver of default not waiver of subsequent defaults

Waiver. This mortgage, the note secured hereby, Mortgagees rights hereunder or thereunder, and Mortgagor's obligations and liabilities hereunder or thereunder, shall not in any way be affected by Mortgagee's (a) granting Mortgagor any extension of time to pay this mortgage (b) taking other or additional security for the payment hereof or thereof (c) releasing any security (d) changing any term of this mortgage or of the note secured hereby, or (e) waiver of, or failure to exercise, any right to accelerate the mortgage indebtedness under any covenant or stipulation contained herein.

(61) Notice to borrower and lender

Notice. Notice shall be deemed to have been properly given under this Mortgage if in writing and sent by certified mail, return receipt requested, addressed to Mortgagor or to the persons who are then the owners of the Premises, at the Premises, or to any other address designated in writing to Mortgagee, or if sent to Mortgagee, to its address stated above, by certified mail, return receipt requested.

(62) Notice requirement: plain language

Notices, demands, and request. All notices, demands, and requests to me with regard to this Agreement may be in writing and delivered in person or by mail.

(63) No oral amendments

Amendment. This mortgage may not be changed or terminated orally but only by an instrument signed by all affected parties.

(64) Amendment only by written agreement: plain language (residence)

Change of terms. The terms of this Mortgage may be changed only by written agreement signed by you and me.

(65) Amendment by written statement only: plain language

Changes to or the termination of this agreement. This Agreement may not be modified or terminated orally. Any modification or termination must be effected by an instrument signed by the party against whom the enforcement of such modification or termination is sought.

(66) Maintenance of property, inspection

Maintain improvements. Mortgagor shall maintain the buildings on the mortgaged premises, and all equipment and fixtures used in connection with the operation and enjoyment of the buildings, in reasonably good repair, and shall not remove or demolish, or permit the same to be removed or demolished, or make such alteration therein or such change in the use thereof, as to create a fire or other hazard not existing on the date hereof. Mortgagor or the then owner of the premises shall, at all reasonable hours, permit Mortgagee or its representatives to inspect the buildings.

(67) Maintenance of property, compliance with laws

Waste, maintenance, compliance and inspection. Mortgagor shall abstain from and not permit the commission of waste in or about the Premises; shall not remove or demolish, or alter in any substantial manner, the structure or character of any building at any time erected on the Land without Mortgagee's prior written consent; shall maintain the Premises in good condition and repair, reasonable wear and tear excepted; shall not remove, sell, or otherwise dispose of any fixture or personal property without Mortgagee's prior written consent unless the same is replaced or substituted by fixtures or personal property of like character and equivalent value and not subject to any encumbrance or security interest. Mortgagor shall comply with any present or future municipal, city, county, state, federal, or other governmental law,

order, rule, ordinance, or regulation affecting the Premises. However, if Mortgagor, in good faith and without cost or liability of any kind to Mortgagee, contests by proper legal proceedings any such law or regulation and furnishes satisfactory security to Mortgagee against any loss, injury, or damage to it by reason of such contest, Mortgagor shall not be required to comply therewith as long as the contest operates to prevent enforcement, is maintained and prosecuted with diligence, and is not terminated or discontinued adversely to Mortgagor. Mortgagee may enter upon the Premises at any reasonable hour to inspect the same. If all or any part of the Premises is damaged by fire or other cause, Mortgagor shall immediately notify Mortgagee thereof by written notice.

(68) Maintenance of building in good repair: residence

Repairs and alterations. I will keep the building on the property in good repair, and will not make major changes in them, tear them down, or move them without first getting your written consent. If any of the fixtures are destroyed or removed, I will replace them with other fixtures of the same quality and condition which are free of any mortgages.

(69) Permitted use, general

Use. Mortgagor shall use and occupy the Premises as general office space, and for all purposes related thereto and for no other use or purpose, unless Mortgagee's written consent is first obtained.

(70) Office and laboratory use by lessees

Use. Mortgagor's present lessees shall use and occupy the Premises for office and laboratory uses and for any purpose related thereto. Mortgagor's present and future lessees shall not use the Premises for any other use or purpose without Mortgagee's prior written consent, which Mortgagee shall not unreasonably withhold or delay.

(71) Compliance with environmental laws

Compliance with environmental laws. Mortgagor hereby represents and warrants to Mortgagee that as of the date hereof to the best of Mortgagor's knowledge, the property is not in direct or indirect violation of any local, state or federal law, rule or regulation pertaining to environmental regulation, contamination or cleanup (collectively, "Environmental Laws"), including without limitation the Comprehensive Environmental Response, Compensation and Liability Act of 1980 ("CERCLA"), the Resource Conservation and Recovery Act of 1976 ("RCRA"), the Federal Water Pollution Control Act, the Hazardous Materials Transportation Act, and other regulations promulgated pursuant to said laws. Mortgagor shall keep or cause the Property to be kept free from hazardous substances (except those substances used by Mortgagor in the ordinary course of its business and in compliance with all Environmental Laws) and in compliance with all Environmental Laws, shall not install or use any underground storage tanks, shall expressly prohibit the use, generation, handling, storage, production, processing and disposal of hazardous substances by all tenants of space in the Property, and without limiting the generality of the foregoing, during the term of this Mortgage, shall not install any improvements or permit to be installed any improvements of asbestos or any substance containing asbestos.

Mortgagor covenants and agrees, at Mortgagor's sole cost and expense, to indemnify, defend and hold harmless Mortgagee from and against any and all liens, damages, losses, liabilities, obligations, penalties, assessments, citations, directives, claims, litigation, demands, defenses, judgments, suits, proceedings, costs, disbursements or expenses of any kind or of any nature whatsoever which may at any time be imposed upon, incurred by or asserted or awarded against Mortgagee or the Property, and arising directly or indirectly from or out of: (i) the presence, release or threat of release of any hazardous substances on, in, under or affecting all or any portion of the Property or any surrounding areas, whether or not caused by or under the control of Mortgagor; (ii) the violation of any Environmental Laws relating to or affecting the Property, whether or not caused by or within the control of Mortgagor; (iii) the failure by Mortgagor to comply fully with the terms and conditions of this paragraph; (iv) the breach of any representation or warranty contained in this paragraph; or (v) the enforcement of the provisions of this paragraph including, without limitation, the

costs of assessment, containment and/or removal of any and all hazardous substances from all or any portion of the Property or any surrounding areas.

(72) Borrower to maintain exemption from specific law

Exemption. Mortgagor warrants that it is an exempt person within the meaning of Section _____ of the _____ Act, commonly known as the _____. Mortgagor shall not do any act or thing which would make this Mortgage subject to such _____ Act as amended. If this Mortgage at any time becomes subject thereto, all sums secured by this Mortgage without any deduction shall at Mortgagee's option become immediately due and payable.

(73) Compliance with government regulations: plain language (residence)

Government regulations. If any government authority issues regulations, orders, or notices of violation about the use or condition of my property, I understand I must correct the violations and comply with the orders or regulations within a reasonable time.

(74) No alteration or removal of building: plain language

Alterations, removal or demolition of buildings. I will not make any structural alterations to any building on the premises and will not remove or demolish any building on the premises without first receiving your written consent.

(75) Condemnation award

Condemnation. If all or any part of the premises is taken or condemned for public or quasi public purposes by the proper authorities, Mortgagor shall have no claim against the award for damages superior to that of Mortgagee, or be entitled to any portion of the award until the secured indebtedness is paid. All rights of Mortgagor to such damages, or such awards are assigned to Mortgagee to the extent of any indebtedness that then remains unpaid. Mortgagor, however, may appeal the award to any court of competent jurisdiction.

(76) Condemnation award, legal proceedings

Condemnation. If all or any part of the Premises is damaged or taken through condemnation, temporarily or permanently, except as hereinafter provided in this paragraph, all proceeds, at Mortgagee's option, shall be applied first to pay the secured indebtedness. Mortgagee is authorized to commence, appear in and prosecute, in its own or Mortgagor's name, any action or proceeding relating to any such condemnation, and to settle or compromise any claim in connection therewith. Mortgagee shall not settle or compromise any claim in connection with any damage or taking through condemnation without Mortgagor's prior written consent, which it shall not unreasonably withhold. Mortgagor shall not make any settlement for the damages sustained thereby without Mortgagee's prior written approval. If the amount of an initial award of damages for the condemnation is insufficient to pay the amount of the secured indebtedness in full with interest and costs, Mortgagee may file an appeal or other legal proceedings as its legal counsel may advise to be appropriate under the circumstances in the name of Mortgagor or of Mortgagee (for which action Mortgagee or any counsel it chooses is irrevocably appointed attorney in fact for Mortgagor) and to prosecute same to final conclusion or otherwise dispose thereof. In such event, the expenses of the appeal or other appropriate legal proceedings, including counsel fees, shall be first paid out of the proceeds, and no credit shall be given on account of the Mortgage debt other than a credit for the amount, if any, whereby the final proceeds exceed all such expenses. Nothing in this covenant or elsewhere in this Mortgage shall limit rights otherwise available at law or in equity to Mortgagee, including rights to intervene as a party to any condemnation proceeding. All compensation, awards, damages, claims, rights of action, and proceeds hereunder are assigned by Mortgagor to Mortgagee, to be applied as herein provided. Mortgagor agrees to execute any assignment agreements that Mortgagee may require in furtherance thereof. In the case of any taking covered by the provisions of this Paragraph, Mortgagor and Mortgagee (to the extent

that Mortgagee has not been reimbursed therefor by Mortgagor) shall be entitled as a first priority to reimbursement out of any award or awards for all reasonable costs, fees, reimbursements to Mortgagee, and expenses incurred in the determination and collection of any such awards.

(77) Condemnation award: plain language

Effect of eminent domain, injury to, or decrease in the value of the premises by a public or quasi-public authority or corporation. If the premises are taken by eminent domain ("condemnation") or if any public or quasi-public authority or corporation injures or decreases the value of the premises, I shall continue to pay interest on the whole principal due under this Agreement at the rate set forth in the Mortgage Note, until you have actually received the money from an award or payment compensating you for the injury to or decrease in value or taking of the premises. You may choose to keep such money and apply it to reduce the principal sum of my mortgage debt after you have received it or you may pay part or all of the money to me. If the premises are sold on the foreclosure of this mortgage before you receive the money from the award or payment and there remains a difference between what I owe you and what you receive after such foreclosure sale (called "deficiency"), you may retain that amount of the award or payment which is necessary to cure such deficiency, including legal interest on the amount of the deficiency. You may do so regardless of whether a deficiency judgment on this mortgage has been sought, recovered or denied. The award or payment may also be used to pay any expenses which you incur in connection with the collection of the award or payment (including reasonable attorney's fees, costs and disbursements). Upon your request, I will make, sign, and deliver an instrument which will assign the awards or payments discussed in this section to you, free of any encumbrances of any kind.

(78) Employee-borrower reduced interest rate

Employee interest rate. Since the interest rate on the loan secured by this Mortgage is less than that available to persons not employed by Mortgagee, the interest rate as stated in this Mortgage will remain in effect only so long as Mortgagor remains in the employ of Mortgagee. If Mortgagor leaves Mortgagee's employ for any reason other than death or retirement, the interest rate shall increase to _____ percent. Similarly, if Mortgagor no longer occupies the mortgaged premises as his principal residence, the interest rate shall increase to _____ percent.

Any increase in the interest rate, which occurs as provided for by this paragraph, will take effect six months after the happening of any of the events recited in this paragraph.

(79) Joint and several liability

Liability. If Mortgagor consists of more than one party, Mortgagors shall be jointly and severally liable under all of Mortgagor's obligations, covenants, and agreements contained in this Mortgage.

(80) Joint and several liability: plain language

Effect of two or more borrowers. If I sign this Agreement together with another person or other persons, I will be jointly and individually responsible with the other person(s) for repaying the entire mortgage debt. If you are not paid when any mortgage installment is due, I will be responsible for the payment of the entire installment upon receiving notice from you that you have not received payment. I will remain responsible for repaying the mortgage debt even if changes are made in the terms of this Agreement and even if you release any or all of the security given in connection with this Agreement.

(81) Binding effect on successors, assigns, subsequent owners

Binding effect. The covenants contained in this mortgage shall run with the land and bind Mortgagor, his heirs, personal representatives, successors and assigns, and all subsequent owners, encumbrancers, tenants, and subtenants of the premises, and shall enure to the benefit of Mortgagee, its successor and assigns, and to all subsequent holders of this

mortgage.

(82) Binding effect on successors and assigns

Successors and assigns. All of the grants, covenants, terms, provisions and conditions herein shall run with the Land and shall apply to, bind, and inure to the benefit of, the successors and assigns of Mortgagor and of Mortgagee.

(83) Binding effect on heirs, agents and future owners: plain language (residence)

Who is covered by this mortgage. Until I have satisfied all my obligation under this Mortgage and the Mortgage Note, the terms of this Mortgage will be binding on me, my heirs, and all those acting for me, and on all future owners and tenants of my property. The Mortgage is for your benefit, and for the benefit of anyone to whom you may assign it.

(84) Binding effect on personal representatives: plain language

Effect of covenants. The covenants contained in this Agreement are for your benefit and for the benefit of your successors and assigns. They must be honored by me, as well as by my heirs, personal representatives, successors, and assigns. All subsequent owners and tenants of the premises must also honor the covenants contained in this Agreement.

(85) Number and gender

Number and gender. Whenever the singular and plural number, masculine or feminine or neuter gender is used herein, it shall equally include the other.

(86) Leases, borrower's duties as landlord

Leases. Mortgagor will comply with and observe its obligation as landlord under all leases affecting the Premises or any part or parts thereof. No existing or future lease which covers all or any part of the Premises, or any facilities or business located or operated thereon or therefrom, shall be cancelled, surrendered, or modified without Mortgagee's prior written consent if the lease is for a term in excess of two years, is at an annual rent of over \$5,000, or affects more than 10 percent of the gross income of the Premises. Mortgagor shall notify Mortgagee immediately of any default asserted against Mortgagor by any tenant under such lease. If Mortgagor fails to cure such default, as landlord under any such lease, Mortgagee is authorized to cure such default in order to prevent the tenant's termination of the lease. All such leases shall set forth the above provisions. If, by reason of Mortgagor's default in the performance of any such lease, the tenant has the right to cancel the same or to claim any diminution of or offset against future rents, Mortgagee may elect to have the default deemed a default under the Note and this Mortgage. Mortgagor upon request, from time to time, but not more often than annually unless a default has occurred and is continuing under this Mortgage, will furnish to Mortgagee in such reasonable detail as Mortgagee may request, certified by Mortgagor, copies of all leases relating to the Premises; and on demand, Mortgagor will furnish to Mortgagee executed counterparts of all such leases. Further, Mortgagor, upon request, will furnish to Mortgagee information relative to the occupancy and vacancy rates of the Premises.

Mortgagor agrees that it will not, without Mortgagee's written consent, assign the rents, issues, or profits, or any part thereof, from the Premises, receive or collect rents from any tenant, subtenant, undertenant, or other occupant of any part of the Premises for a period of more than one month in advance, or grant any concessions to any of the foregoing persons or parties which will in any way reduce the monthly rentals as stated in any lease, and further that all leases on said Premises shall not be modified so as to in any way reduce the rental without Mortgagee's written consent.

The Mortgagor authorizes Mortgagee at its option to foreclose this Mortgage subject to the rights of any tenants of the Premises. The failure to make any such tenants parties defendant to any such foreclosure proceeding and to foreclose their rights will not be asserted by Mortgagor as a defense to any proceeding instituted by Mortgagee to collect the

secured indebtedness, or any deficiency remaining unpaid after the foreclosure sale of the Premises. It is expressly understood and agreed, however, that nothing herein contained shall prevent Mortgagor from asserting in any proceeding disputing the amount of the deficiency or the sufficiency of any bid at such foreclosure sale, that any such tenancies adversely affect the value of the Premises.

(87) Leases and rents assigned as security, commercial property

Assignment of leases and rents after default. As further security for payment of all indebtedness and performance of all obligations, covenants and agreements secured hereby, Mortgagor assigns to Mortgagee all existing and future leases, together with all rents to become due under such leases. This assignment, however, shall be operative only in the event of the occurrence of an Event of Default hereunder, or under the Note or any other instrument given as collateral security for the secured obligation, remaining uncured at the expiration of the grace period, if any, for the Event of Default. In any such case, Mortgagor confers on Mortgagee the exclusive power, to be used or not in its sole discretion, to act as agent, or to appoint a third person to act as agent for Mortgagor, with power to take possession of, and collect all rents arising from the Premises and apply such rents, at Mortgagee's option, to the payments of the mortgage debt, taxes, costs of maintenance, repairs, expenses incident to managing, and other expenses, in any order of priority Mortgagee determines, and to turn over to Mortgagor any remaining balance. Such collection of rents, however, shall not operate as an affirmation of the tenant or lease in the event Mortgagee acquires Mortgagor's title to the Premises. Mortgagee shall be liable to account only for rents and profits which it actually receives. In exercising any of its powers contained in this paragraph, Mortgagee may also take possession of, and for these purposes use, all personal property contained in or on the Premises and used by Mortgagor in the rental or leasing thereof or any part thereof.

(88) Records and certified rental statements, commercial building

Books, records and accounts. Mortgagor will keep and maintain, or will cause to be kept and maintained, proper and accurate books, records and accounts reflecting all items of income and expense in connection with the operation of the Premises or any services, equipment, or furnishings provided in connection with such operation, whether such income or expenses are realized by Mortgagor or by any other person or entity, excepting sublessors unrelated to and unaffiliated with Mortgagor, and who leased from Mortgagor portions of the Premises for the purposes of occupying the same. Mortgagee may, from time to time at all times during normal business hours, examine the books, records, and accounts at the office of Mortgagor, or other person or entity maintaining the books, records and accounts and make copies or extracts requested by Mortgagee. Mortgagor will furnish to Mortgagee, within 90 days after the end of each calendar year, a balance sheet and an income and expense statement both in detail satisfactory to Mortgagee and certified by a Certified Public Accountant. The balance sheet and income and expense statement shall include income from all sources in addition to rental and other income from the Premises.

(89) Assignment of rents: plain language (residence)

Right to collect rents and profits. I assign to you all rents and profits received from the premises as additional security for this debt. I grant you the right to enter the premises for the purpose of collecting rents and profits until my entire mortgage debt has been paid. You may rent or lease the premises and apply any rents or profits earned by the rental or lease to reduce my mortgage debt, after payment of all necessary charges and expenses. However, you agree to waive ("give up") the right to enter the premises for the purpose of collecting rents and profits and I am entitled to collect the rents and profits. I agree to use the rents and profits towards the payment of principal and interest becoming due under my monthly mortgage installments and towards the payment of my monthly escrow deposits. However, you may revoke my right to collect rents and profits should I default on any of the terms or obligations of this Agreement, but you must give me five days' written notice that you intend to revoke this right.

I will not receive or collect any rent from any tenant of the premises for a period of more than one month in advance without your prior written consent.

If I default under the terms of this Agreement, I will pay over to you or to a receiver appointed to collect these rents, all rent security deposits. In addition, I agree that I will pay you or the receiver every month, 30 days in advance, the fair and reasonable rental value of that portion of the premises which is in my possession. Upon my default in making such payments, I will vacate the premises and surrender the possession of the premises to you or to the receiver. If I fail to do this, I may be evicted from the premises by summary proceedings.

(90) Fixtures security interest

Security agreement: fixtures. This Mortgage creates a security interest in the property included in Premises and constitutes a security agreement under the Uniform Commercial Code. Mortgagor shall execute, file, and refile all financing statements or other security agreements required by Mortgagee from time to time with respect to property included in Premises. However, all such financing statements may be filed only with the signature of Mortgagee, or else signed by Mortgagee on behalf of Mortgagor, to the extent the same is permitted by the applicable provisions of the Uniform Commercial Code.

It is understood and agreed that, to protect Mortgagee against the effect of *UCC 9-313*, in the event that (a) any fixture on the Premises is replaced or added to, or any new fixture is installed or substituted by Mortgagor, and (b) such fixture is or may be subject to a security interest held by a seller or any other party:

A. Mortgagor or any owner, occupant or tenant shall, before the replacement, addition, installation, or substitution of any such fixture, obtain Mortgagee's written approval, and give Mortgagee written notice that a security agreement with respect to such fixture has been or will be consummated. Such notice shall contain the following information:

- (1) A description of the fixtures to be replaced, added to, installed, or substituted;
- (2) A recital of the address at which the fixtures will be replaced, added to, installed, or substituted;
- (3) A statement of the name and address of the holder and amount of the security interest; and
- (4) The date of the purchase of such fixtures.

Mortgagor's failure to give such notice shall be a material breach of its covenants under this Mortgage, and shall, at Mortgagee's option, constitute a default hereunder, entitling Mortgagee to all rights and remedies provided for herein on default of any term, covenant, agreement, or provision of this Mortgage and the Note.

B. Mortgagee may, at any time, pay the balance due under said security agreement, and the amount so paid shall be (1) a lien on the Premises, (2) added to the amount of the Note or other secured obligation, and (3) payable on demand with interest at the rate specified in the Note from the time of such payment as aforesaid. If Mortgagor is in default thereof for ten days after demand, the principal sum secured hereby with all interest, shall, at the option of Mortgagee, its successors or assigns, become due and payable immediately thereafter, notwithstanding any provision in this Mortgage or the Note to the contrary. Or, Mortgagee shall have the right to acquire by assignment from the holder of such security interest all contract rights, accounts receivable, chattel paper, negotiable or nonnegotiable instruments, or other evidence of Mortgagor's indebtedness for such fixtures, and, upon acquiring such security interest, may enforce it as assignee, in accordance with the terms and provisions of the Uniform Commercial Code in effect in the State of _____, as amended or supplemented, and in accordance with law.

C. Regardless of whether Mortgagee has paid or taken an assignment of such security interest, if at any time Mortgagor is in default for a period of ten days under the security agreement covering such fixtures, such default shall be a material

breach of Mortgagor's covenants under this Mortgage, and shall, at Mortgagee's option, constitute a default under this Mortgage, and the secured principal sum, with all interest, shall, at Mortgagee's option, become and be due and payable immediately, notwithstanding any contrary provision in this Mortgage or the Note.

(91) UCC financing statements signed by borrower: plain language

Financing statements. If at any time you ask me to sign a financing statement with respect to any fixtures or personal property covered by this Agreement, I will honor your request. However, you have the right to sign and file financing statements on my behalf at any time. I agree to pay all filing fees and will repay any money which you spend in connection with such financing statements.

(92) Estoppel statement by borrower on demand

Accounting. Mortgagor, within five days after request in person or within ten days after request by mail, will furnish a written statement duly acknowledged of the amount due on this mortgage and whether any offsets or defenses exist against the mortgage debt. Such notice and demand or request may be in writing and may be served in person or by mail.

(93) Estoppel statement on written demand

Estoppel affidavits. Mortgagor, within ten days after Mortgagee's written request, shall furnish a written statement, duly acknowledged, setting forth the unpaid principal of, and interest on, the Note and whether any offsets or defenses exist against such principal and interest.

(94) Acknowledgment of debt: plain language

Acknowledgment of my mortgage debt. Upon your request, I will provide you with a written and notarized statement stating (a) the amount which I owe on my mortgage debt, and (b) whether any offsets or defenses exist in connection with my mortgage debt. I will deliver my statement to you within five days if you deliver the request in person, or within ten days if you deliver it by mail.

(95) Wrap around financing barred

Wrap around financing. Mortgagor agrees that if the Premises at any time are or become subject to the lien of any mortgage or deed of trust in connection with which payments on account of the indebtedness secured hereby are to be made directly or indirectly by or through the mortgagee or beneficiary thereunder, regardless of such mortgagee or beneficiary, the whole of the principal and interest and other sums hereby secured, at the Mortgagee's option, shall immediately become due and payable.

(96) Subordinate lien limitations

Subordinate financing. Mortgagor covenants and agrees that it will not further encumber or mortgage the Premises, or any part thereof, or any interest therein, and will not execute, deliver, or take back any mortgage or mortgages ("Subordinate Mortgage"), unless the Subordinate Mortgage contains provisions to the effect that upon its foreclosure: (i) no tenants under leases of space in the Premises will be made parties defendant, nor will any other action be taken with respect to such tenants which would result in the termination of their leases or tenancies without Mortgagee's prior written consent; (ii) the rents, income, receipts, revenues, issues, and profits issuing from the Premises, or from any lease of space therein, shall not be collected, except through a Receiver appointed by a court after notice of application for such appointment has been given to Mortgagee. The money collected by the Receiver shall be first applied and used for the payment of interest and principal due and owing under this Mortgage and the indebtedness secured hereby, real estate taxes, water rates, sewer rents, assessments, or other governmental charges affecting the Premises and all other

maintenance and operation charges and disbursements incurred in connection with the operation and maintenance of the Premises. If during the pendency of any such mortgage foreclosure proceeding, action is instituted for the foreclosure of this Mortgage, and an application is made by Mortgagee for an extension of such Receivership for its benefit, all funds collected by the Receiver prior to the date of such application shall be held by the Receiver and applied solely for the benefit of Mortgagee hereunder, and the holder of such Subordinate Mortgage shall not be entitled to any part thereof, unless there is a surplus remaining after all of the aforesaid payments and any other necessary payments; and (iii) immediate notice of the institution of such foreclosure proceeding shall be given to Mortgagee, and true copies of all papers served or entered in such foreclosure proceeding shall be served upon Mortgagee.

Mortgagor shall deliver to Mortgagee an executed counterpart of each Subordinate Mortgage within ten days after Mortgagor's execution and delivery thereof to the subordinated mortgagee.

Any Subordinate Mortgage shall contain an express covenant to the effect that it is in all respects subject and subordinate to this Mortgage and that the mortgagee thereunder will upon demand further subordinate said Mortgage to the lien and terms, covenants and conditions of this Mortgage as hereinafter extended, renewed, modified, or consolidated.

(97) Compliance with recorded instruments

Recorded instruments. Mortgagor will promptly perform and observe, or cause to be performed or observed, all of the terms, covenants, and conditions of all instruments of record affecting the Premises, noncompliance with which may affect the security of this Mortgage, or which may impose any duty or obligation upon Mortgagor or any sublessee or other occupant of the Premises or any part thereof. Mortgagor shall do or cause to be done all things necessary to preserve intact and unimpaired all easements, appurtenances, and other interest and rights in favor of or constituting any portion of the Premises.

(98) Invalid provisions to affect no others

Invalid provisions. If any one or more of the covenants, agreements, terms, or provisions in this Mortgage or the Note are invalid, illegal, or unenforceable in any respect, the validity of the remaining covenants, agreements, terms, or provisions contained herein and in the Note shall be in no way affected, prejudiced, or disturbed thereby.

(99) Captions for convenience only

Captions. The captions in this Mortgage are inserted only for convenience of reference and in no way define, limit, or describe the scope, intent, or proper construction of this Mortgage or any particular paragraph or section hereof.

(100) Joint and several liability, successors and assigns

Construction. The term Mortgagor as used in every instance shall include Mortgagor's heirs, executors, administrators, successors, legal representatives, and assigns, either voluntary by act of the parties or involuntary by operation of law and shall denote the singular and/or plural, and the masculine and/or feminine and natural and/or artificial persons, whenever and wherever the context so requires or admits. If more than one party is named as Mortgagor, the obligation hereunder of each such party shall be deemed to be joint and several. The term Mortgagee as used in every instance shall include Mortgagee's successors, legal representatives, and assigns, including all subsequent assignees, either voluntary or by act of the parties, or involuntary by operation of law.

(101) Governing law

Governing law. This Mortgage and the Note secured hereby are to be construed according to and shall be entitled to the benefits of the laws of the State of _____.

(102) "Mortgagor" and "Mortgagee" includes plural

"Mortgagor," "Mortgagee." The word "Mortgagor" shall be construed as if it read "Mortgagors" and the word "Mortgagee" shall be construed as if it read "Mortgagees" whenever the sense of this mortgage so requires.

(103) "I" and "you": plain language

The words "I," "me" and "my" represent every individual person who signs this Mortgage Agreement. The words "you" and "your" represent _____.

or

In this Agreement, the words I, me and mine mean each person whose name appears at the top of this page. The words you, your and yours mean _____.



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Current Legal Forms for Real Estate

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Chapter 22 DEVELOPMENT AND SUBDIVISION

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FORM 22.85 Contract between real estate developer and purchaser of housing development which developer will build--project will provide housing for low-income persons--purchaser of housing project is non-profit corporation--funds to purchase housing project will be provided by government program--developer will transfer housing project to non-profit corporation, which will own and operate it--alternate form

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Current Legal Forms for Real Estate
Chapter 22 DEVELOPMENT AND SUBDIVISION
Part I. The Tax Background

26-22 Current Legal Forms for Real Estate § 22.01

§ 22.01 Summary of the Tax Background

§ 22.02 Introduction. Real estate development and subdivision activities raise special tax problems. Those problems include whether seller is dealer or investor, apportionment of basis to subdivided parcels, application of uniform capitalization rules to construction costs, elective capitalization of taxes and carrying charges, demolition of structures, accounting methods for short-term and long-term construction contracts, amortization of construction costs by lessor or lessee, rehabilitation tax credit, and passive activity loss limitation rules.

§ 22.03 The Developer As a Dealer or an Investor. Whether developer is a "dealer" or an "investor" generally depends on the facts of each case. Sale of "dealer property" results in ordinary income or loss. Sale of "investment property" is subject to capital gain treatment.

§ 22.04 Basis Rules: Apportionment of Basis to Subdivided Parcels. Basis of property that is subdivided and improved for resale must be equitably apportioned among lots or parcels to be sold in order to determine gain or loss upon sale of each. Allocation is based upon fair market value of lots or parcels at time of acquisition. Basis allocated to various parcels is increased by capitalized expenses, apportioned in same manner as basis.

§ 22.05 Capitalization of Construction Costs; Uniform Capitalization Rules. Uniform capitalization rules require capitalization of direct and indirect costs of real property produced by taxpayer and real property acquired for resale. Costs are allocated to property under various allocation methods.

§ 22.06 Elective Capitalization of Taxes and Carrying Charges. Taxpayers may elect either to deduct currently or capitalize taxes and carrying charges that are chargeable to capital account with respect to property. Election to capitalize taxes and other carrying charges may be made only for specific expenses that are otherwise deductible.

§ 22.07 Demolition of Structures. Owner or lessee cannot take current deduction for costs or other loss incurred in demolition of any real property structure. Deduction is disallowed even if taxpayer did not intend to demolish structure at time of purchase. Demolition cost or loss must be charged to capital account and added to basis of land on which demolished building was located.

§ 22.08 Accounting for Short-Term Construction Contracts. Taxpayers may elect to use cash or accrual method to account for income and expenses attributable to short-term construction contracts. Both methods are generally available to all taxpayers for income tax purposes, except that cash method may not be used by C corporations, partnerships and limited liability companies which have a C corporation as a partner, and tax shelters.

§ 22.09 Accounting for Long-Term Contracts: Overview. Taxpayers engaged in production of property must account for items of income from and costs allocable to long-term contracts under percentage of completion method.

§ 22.10 Accounting for Long-Term Contracts: What Are Long-Term Contracts. Long-term contracts are contracts for building, installation, or construction of property, which are not completed within same tax year they are made, even if term of contract is less than one year. Agreement for related services is not considered long-term contract.

§ 22.11 Accounting for Long-Term Contracts: Percentage of Completion Method. Under percentage of completion accounting method, taxpayer determines portion of long-term contract completed during tax year and reports gross income for that percentage of entire contract. All allocable costs must be deducted in tax year incurred. Method is available for small construction contracts and long-term contracts entered into prior to March 1, 1986.

§ 22.12 Exemption from Long-Term Accounting Rules for Certain Small Construction Contracts. Certain small construction contracts, including home construction contracts, are exempt from the long-term contract accounting rules. Such contracts may be accounted for using the completed contract method, under which the gross contract price is included in income for the tax year in which the contract is completed.

§ 22.13 Accounting for Long-Term Contracts: Look-Back Interest Adjustment. Under the percentage of completion method for long-term contracts the taxpayer must make adjustments for underpayments or overpayments of tax. On completion of contract, taxpayer must pay interest on underpayments or may receive interest on overpayments.

§ 22.14 Accounting for Long-Term Contracts: Allocation of Costs. Income and costs may be accounted for under long-term contract methods only if allocable to the long-term contract. Rules applicable to allocation of direct and indirect costs depend on whether long-term contract is for regular or extended period. Different methods are available to account for direct and indirect costs required to be allocated to long-term contracts.

§ 22.15 Amortization of Construction Costs by Lessor or Lessee. Lessor generally may recover costs of constructing buildings or making improvements on leased property through cost recovery allowance. Depreciation rate is based upon life of property even though lease is for longer period. Cost recovery is based on property's recovery period. Lessee may recover costs of leasehold construction or improvements under cost recovery rules, without regard to lease term.

§ 22.16 Rehabilitation Tax Credit. Taxpayers are entitled to rehabilitation credit for portion of investment in qualified rehabilitated building attributable to qualified rehabilitation expenditures. Credit available for qualified rehabilitation expenditures on existing buildings that are substantially rehabilitated.

§ 22.17 Passive Activity Limitation Rules. Development and subdivision of real property is generally subject to passive activity limitation rules, which limit deduction of passive activity losses and credits for most taxpayers.

Legal Topics:

For related research and practice materials, see the following legal topics:

Real Property Law Subdivisions General Overview Tax Law Federal Income Tax Computation Deductions for Losses Passive Activity Loss (IRC sec. 469) Tax Law Federal Income Tax Computation Ordinary Income (IRC sec. 64) Tax Law Federal Income Tax Computation Sales & Exchanges Business Property (IRC secs. 1031, 1221,

1231)Property Held for Productive Use & InvestmentTax LawFederal Income Tax ComputationSales &
ExchangesBusiness Property (IRC secs. 1031, 1221, 1231)Property Used in Trade or BusinessTax LawFederal Income
Tax ComputationSales & ExchangesCapital Gains & Losses (IRC secs. 1201-1202, 1211-1212, 1221-1223, 1231-1260,
1271-1278, 1281-1288, 1291-1298)Long Term & Short Term Gains & LossesTax LawFederal Income Tax
ComputationSales & ExchangesCapital Gains & Losses (IRC secs. 1201-1202, 1211-1212, 1221-1223, 1231-1260,
1271-1278, 1281-1288, 1291-1298)Real Property Subdivided for Sale



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Current Legal Forms for Real Estate
Chapter 22 DEVELOPMENT AND SUBDIVISION
Part I. The Tax Background

26-22 Current Legal Forms for Real Estate § 22.02

§ 22.02 Introduction

Real estate development and subdivision activities raise special tax problems. They include whether seller is dealer or investor, apportionment of basis to subdivided parcels, application of uniform capitalization rules to construction costs, elective capitalization of taxes and carrying charges, demolition of structures, accounting methods for short--term and long--term construction contracts, amortization of construction costs by lessor or lessee, rehabilitation tax credit, and effect of passive activity loss limitation rules.

The discussion in this chapter covers special tax problems and rules that commonly arise in connection with the development and subdivision of real estate. Those problems and rules include:

- (1) Determination of whether the seller of real property is a "dealer," who realizes ordinary income, or an investor, who reports capital gain (or loss) from the sale of a capital asset. This distinction is important for federal income tax purposes. See § 22.03.
- (2) Determination of basis, including how basis is apportioned to subdivided property and how easements, utilities, and development costs are taken into account in computing adjusted basis. See § 22.04.
- (3) Application of the uniform capitalization rules to construction costs for real property. See § 22.05.
- (4) Election to capitalize taxes and carrying charges. See § 22.06.
- (5) Effect of demolition of existing structures. See § 22.07.
- (6) Accounting for short-term construction contracts. See § 22.08.
- (7) Specific accounting methods that may be used to account for income and expenses attributable to long-term

construction contracts. See §§ 22.09 through 22.14.

(8) Right of a lessor or lessee to amortize its construction costs. See § 22.15.

(9) Availability of the rehabilitation tax credit. See § 22.16.

(10) Application of the passive activity limitation rules to real estate subdivision and development activities. See § 22.17.

Several other tax questions relating to real estate development are dealt with in The Tax Background to Chapters 20 and 21, in Volumes 24 and 25, respectively. The considerations involved in selecting the form of a development venture are discussed in The Tax Background to Chapter 20. The calculation of adjusted basis, gain or loss upon a sale or other disposition, general criteria for determining the seller's status as a dealer, and tax accounting on installment or deferred payment sales are examined in The Tax Background to Chapter 21.

Legal Topics:

For related research and practice materials, see the following legal topics:

Real Property LawSubdivisionsGeneral OverviewTax LawFederal Income Tax ComputationDeductions for LossesPassive Activity Loss (IRC sec. 469)Tax LawFederal Income Tax ComputationOrdinary Income (IRC sec. 64)Tax LawFederal Income Tax ComputationSales & ExchangesBusiness Property (IRC secs. 1031, 1221, 1231)Property Held for Productive Use & InvestmentTax LawFederal Income Tax ComputationSales & ExchangesBusiness Property (IRC secs. 1031, 1221, 1231)Property Used in Trade or BusinessTax LawFederal Income Tax ComputationSales & ExchangesCapital Gains & Losses (IRC secs. 1201-1202, 1211-1212, 1221-1223, 1231-1260, 1271-1278, 1281-1288, 1291-1298)Long Term & Short Term Gains & LossesTax LawFederal Income Tax ComputationSales & ExchangesCapital Gains & Losses (IRC secs. 1201-1202, 1211-1212, 1221-1223, 1231-1260, 1271-1278, 1281-1288, 1291-1298)Real Property Subdivided for Sale



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Current Legal Forms for Real Estate
Chapter 22 DEVELOPMENT AND SUBDIVISION
Part I. The Tax Background

26-22 Current Legal Forms for Real Estate § 22.03

§ 22.03 The Developer as a Dealer or An Investor

Whether developer is a "dealer" or an "investor" generally depends on the facts of each case. Sale of "dealer property" results in ordinary income or loss. Sale of "investment property" is subject to capital gain treatment.

[1] Importance of Distinguishing Between Dealer and Investor Status

An important issue in the area of real estate development and subdivision is whether a taxpayer holds real property as a "dealer," i.e., primarily for sale to customers in the ordinary course of business, so that the taxpayer will realize ordinary income upon its sale, or as an investor, so that the property will be a capital asset in the taxpayer's hands that qualifies for capital gain treatment upon its sale or exchange.ⁿ¹ Individual taxpayers (as well as estates and trusts) receive preferential tax treatment for capital gains. The maximum tax rate for the net capital gain portion of taxable income of individuals is 15 percent.ⁿ² By contrast, the tax rates applied to the ordinary income of individuals who are married and filing jointly range from 15 percent to 39.6 percent.ⁿ³

The favorable tax treatment for capital gains is important because the Code allows a noncorporate taxpayer to sell real estate from a single tract held for investment without having the gain treated as ordinary income merely because the taxpayer subdivides and improves the tract and actively attempts to sell it (see below).ⁿ⁴ However, that portion of gain that constitutes depreciation recapture is treated as ordinary income.ⁿ⁵

Noncorporate taxpayers may offset losses from the sale or exchange of capital assets (capital losses) against gains from the sale or exchange of capital assets (capital gains). If capital losses exceed capital gains, a noncorporate taxpayer may deduct up to \$3,000 of the excess loss against ordinary income for the tax year. Capital losses that cannot be used in a particular year because of the above limitations may be carried over to and used in future years.ⁿ⁶

For the above reasons, it is important to determine in a given case whether a taxpayer holds real estate as a dealer or as an investor.

[2] Dealer and Investor Status Distinguished: General Guidelines

The distinction between investor and dealer status is often a difficult factual question that must be resolved on a case-by-case basis. The courts have listed a number of criteria to assist them in making that determination. These include:

- (1) the nature and purpose of the acquisition;
- (2) the duration of ownership;
- (3) the extent and nature of sales efforts;
- (4) the number, frequency, continuity, and substantiality of sales;
- (5) the extent of subdividing, developing, and advertising to increase sales;
- (6) the use of a business office for sales;
- (7) the taxpayer's control over sales representatives;
- (8) the time and effort habitually devoted to the sales; and
- (9) the seller's main business or profession.ⁿ¹

Example:

In Year 1, Jones acquires 22 parcels of real estate, which he sells at a profit in Years 2, 3, and 4. Jones, who is not a real estate broker, makes no personal effort to initiate the sales (he did not advertise the property, have a sales office, hire brokers, or develop or improve the properties) and devoted minimal time and effort to the sales. The sales are of investment properties, on which Jones realizes capital gain, rather than dealer properties, on which he would report ordinary income.ⁿ²

Other factors occasionally are taken into account. For example, capital gain treatment applies if the taxpayer does not actively engage in a subdivision business but merely sells extensive long-term holdings because of advancing age and ill health and because he needs the cash.ⁿ³ On the other hand, an owner of a rental mobile home park who subdivides the property and sells it as lots is considered a dealer, and therefore is denied capital gain treatment, if the sales are frequent and substantial even if he attempts to sell the entire park in bulk on the advice of his physician.ⁿ⁴

There is no dealer status unless the property is held "primarily" for sale to customers.ⁿ⁵ The Supreme Court interpreted "primarily" in this connection to mean "of first importance" or "principally."ⁿ⁶ Thus, real property is a capital asset if investment is the taxpayer's principal reason for holding it, even if sale to customers is a "substantial" (but not singly dominant) purpose.ⁿ⁷

[3] Dealer and Investor Status Distinguished: Subdivision and Development of Property

A taxpayer who plans to liquidate an investment in land may have to determine the extent to which he may undertake subdivision and development activities without being classified a dealer. The Service takes the strict position that real estate automatically becomes "dealer" property when subdivision activity is undertaken in order to effect a disposition, regardless of the presence or absence of other circumstances normally taken into account.ⁿ¹ There is considerable judicial support for the Service's position.ⁿ²

- (1) A taxpayer who abandoned farming, subdivided his property, and engaged in large scale sale of the lots was found

to be a dealer in real estate. The court rejected the taxpayer's contention that the sales represented the liquidation of a capital asset acquired in the business of farming.ⁿ³

(2) An owner of an inherited tract of land who acquired adjoining tracts in an attempt to liquidate the inherited tract advantageously was held to be a dealer with respect to lots sold from the tracts because of extensive subdivision activity.ⁿ⁴

(3) Property reacquired by the taxpayer upon the buyer's default was held primarily for sale to customers even though it was originally held for investment and sold in one tract to a subdivision company. The taxpayer continued in the subdivision business after the reacquisition.ⁿ⁵

(4) It was determined that a taxpayer was a dealer because he engaged in active and continuous selling of property. It was immaterial that the taxpayer had held the property for a long time in the hope of making a single sale, and that the sales were induced by high property taxes.ⁿ⁶

(5) A taxpayer was found to be in the real estate business even though liquidation of his farm was forced by the mortgagee. Appreciation in the property's value was caused by the taxpayer's subdivision activity, so that the profit arose from the "everyday operation" of business rather than the "realization of appreciation in value accrued over a substantial period of time."ⁿ⁷

Considerable litigation has resulted from taxpayers' efforts to assert special exceptions to the Service's rigid rule. In some instances, the courts allowed capital gain treatment despite subdivision activity when the facts strongly demonstrated an intention to liquidate an investment rather than to engage in continuous selling. This result is most likely to occur in situations involving inherited property (see *Section 22.03[3][a]* below), business necessity dispositions (see *Section 22.03[3][b]* below), and property clearly held for investment only (see *Section 22.03[3][c]* below).

[a] Inherited Property

The courts are more likely to allow capital gain treatment if the subdivision and sale is of property acquired by inheritance or gift. This is particularly so if the taxpayer is engaged in another business or the subdivision activity is conducted by a broker or independent real estate company. Thus, capital gain was allowed in the following cases:

(1) When the taxpayer, who sold a large number of subdivided lots on inherited property, was exclusively engaged in another business, and a broker was retained to supervise the subdivision, fix selling prices, and make all selling arrangements.ⁿ⁸

(2) When the taxpayer sold inherited property to a real estate company for subdivision and sale in lots, under an agreement to reimburse the company for development costs and to pay a percentage commission on sales. The owner did not retain any control over the company's activities and did not actually participate in the development or sale of the property.ⁿ⁹

(3) When, in order to dispose of inherited land advantageously, the taxpayer had to subdivide it, build access roads, and authorize a real estate dealer to make sales.ⁿ¹⁰

[b] Business Necessity Liquidations

The presumption of dealership status arising from subdivision activity may be overcome if the taxpayer is primarily engaged in another business and circumstances connected with that business require him to dispose of the subdivided property. For example, the taxpayer was allowed capital gain treatment in the following cases:

(1) When a dairy farmer sold his land, even though he engaged in extensive selling activity, because changes in the neighborhood made it uneconomical for him to maintain the property and forced him to liquidate it.ⁿ¹¹

(2) When a sugar producer purchased and subdivided an adjoining sugar plantation and sold houses and lots on the property. The taxpayer purchased the plantation for use in its business and engaged in the sales primarily to provide housing for its employees.ⁿ¹²

(3) When a lawyer, who purchased a single tract from a trust of which he was the trustee, platted and improved the tract for subdivision and sale and sold the lots. The unimproved tract could not be sold profitably, improvements were necessary to put the land in a saleable condition, and they were largely initiated by a lumber company and a contractor. Sales were not substantial, and the taxpayer did not make any other purchases.ⁿ¹³

[c] Sales of Property Clearly Held for Investment Purposes

Another situation that may justify capital gain treatment upon the sale of subdivided property is when the property is clearly held as an investment for several years and the taxpayer engages in only infrequent or minimal sales or makes no active efforts to solicit sales. In fact, the frequency and substantiality of sales is frequently cited as the most important factor to indicate whether the taxpayer intends to hold the property for sale or as an investment.ⁿ¹⁴

[4] Dealer and Investor Status Distinguished: Housing Developments

Determination of whether property is held for sale or for investment may become complicated if the property consists of housing developments which are rented prior to sale. A developer who purchases property for the purpose of subdividing it and constructing homes for immediate sale generally falls within the definition of a dealer.ⁿ¹ If housing units are rented before their sale, however, a question may arise whether the property was held "primarily" for sale (see *Section 22.03[2]* above).ⁿ²

Housing units are not treated as capital assets solely because they are rented for short periods or are subject to temporary sales restrictions. Other factors that are taken into account include the taxpayer's purpose in acquiring the property, the number of individual sales, the intensity of the selling program, and the reason for the liquidation.ⁿ³ For example, property is a capital asset if the units are constructed for rent and their sales, although frequent, are the most economical method for liquidating the taxpayer's investment,ⁿ⁴ or if the sale was made to tenants because of a poor return from the rental business.ⁿ⁵

Infrequent sales or an absence of active efforts to sell may justify capital gain treatment. Moreover, the taxpayer's sales activities in other projects are not controlling, at least if those activities and related records are segregated.ⁿ⁶ Even a real estate dealer may hold housing projects for investment if there is a "continuity of interest to acquire and hold rental investment property extending over a period of many years."ⁿ⁷ Conversely, an individual who holds numerous rental properties for investment may hold one project for sale.ⁿ⁸ Also, a sale of vacant land within a rental development may create ordinary income.ⁿ⁹

A taxpayer is a dealer if he intends to rent when the rental market is high and to sell when the sales market is high.ⁿ¹⁰ However, the mere decision to sell houses constructed for rent does not in itself change the business from renting to selling. Capital gain treatment may be allowed if the taxpayer does not engage in a selling campaign or in active solicitation,ⁿ¹¹ if there is "inactive liquidation" through a brokerⁿ¹² or there are frequent but passive sales.ⁿ¹³

By contrast, extensive solicitation of sales through advertising, or purchase, improvement, and resale activities of employees and brokers, may override the liquidating purpose.ⁿ¹⁴ Purchases of additional units during the sales period also may indicate that the sales are not intended as a liquidation.ⁿ¹⁵

When multiple unit houses are built for sale, the taxpayer does not change its ultimate selling purpose even if its policy is to rent the property for short periods prior to the sale.ⁿ¹⁶ But when units are built for rent, a decision to sell after sales restrictions are removed does not change the taxpayer's status as an investor even though it uses its own staff for selling activities, if this is the most economical method for liquidating its operation and the units are sold "as is," with no attempt to make them more saleable.ⁿ¹⁷

[5] Capital Gain Treatment for Noncorporate Sellers

In drafting the 1954 Code, Congress recognized that an individual who subdivided real property held for investment was likely to be considered a dealer by the courts and therefore subject to ordinary income tax rates on the entire long-term gain, even if it was unusual for the taxpayer to be engaged in those activities.ⁿ¹ In order to prevent what Congress thought was an anomalous result, it enacted a provision which, under special circumstances, affords noncorporate sellers an opportunity to treat gain realized on the sale of certain subdivided real property as capital gain.ⁿ²

[a] When Capital Gain Treatment Applies

A special provision allows an individual or other noncorporate taxpayer to sell real estate from a single tract held for investment and not have the gain treated as ordinary income, even if the taxpayer subdivides and improves the tract or makes active efforts to sell it.ⁿ³ In order to qualify for this statutory treatment, the taxpayer:ⁿ⁴

- (1) Cannot previously have held the tract, or any part of it, primarily for sale to customers in the ordinary course of his trade or business (except under circumstances which would qualify for the same relief), nor in the year of sale held any other real property primarily for sale to customers.ⁿ⁵ In other words, the taxpayer cannot be a real estate dealer.ⁿ⁶
- (2) Cannot make, or agree with the buyer to make, substantial improvements that substantially enhance the value of the lot or parcel sold. For this purpose, an improvement is deemed to be made by the taxpayer if made by a member of his family (as defined in *IRC Section 267(c)(4)*), by a controlled corporation, by a partnership in which the taxpayer is a member, by a lessee if the improvement constitutes income to the taxpayer, or by a government or political subdivision if the improvement constitutes an addition to the taxpayer's basis.ⁿ⁷
- (3) Must have owned the lots or parcels for at least five years. This holding period requirement does not apply if the property was acquired by inheritance or devise. (However, any other applicable holding period required by the Code, such as *IRC Section 1222*, is applicable.)ⁿ⁸

If the above requirements are met, the taxpayer may sell real estate from a single tract held for investment without the income being treated as ordinary income merely because he subdivides the tract or makes active efforts to sell it.ⁿ⁹ Thus, if there is no other substantial evidence that the taxpayer holds the property primarily for sale to customers in the ordinary course of business, the taxpayer does not lose his status as an investor solely because he subdivides the tract for purposes of sale, engages in related advertising, promotion or selling activities, or uses sales agents in connection with the sales.ⁿ¹⁰

Even if all of those requirements are satisfied, however, a special rule provides for limited recognition of ordinary income if the taxpayer sells more than five lots or parcels in the same tract. Up to five percent of the selling price of each lot or parcel sold is treated as ordinary income in and after the year in which the sixth lot or parcel is sold (see *Section 22.03[5][e]* below).ⁿ¹¹

A tract of real property, for purposes of the special subdivision rule, must be a single piece of real property, except that two or more pieces are considered to be a tract if at any time they were contiguous in the taxpayer's hands or if they are

divided only by a road, street, railroad, stream, or similar property.ⁿ¹² If, following the sale of any lot or parcel from a tract, the taxpayer makes no further sales for a period of five years, the remainder of the original tract is considered a single tract.ⁿ¹³ The effect of this provision is to allow a taxpayer to start counting the sales of the first five lots before the special five percent income rule becomes operative.ⁿ¹⁴

[b] Factors that Overcome Presumption of Investment

Subdivision and sales activities may overcome the presumption of investment if other substantial evidence tends to show that the property was held for sale to customers. Such evidence may consist of the taxpayer's:

- (1) selling activities in connection with other property in prior years during which he was engaged in subdividing or selling activities with respect to the subdivided tract;
- (2) intention in prior years (or at the time of acquiring the subdivided property) to hold the tract primarily for sale in his business;
- (3) subdivision of other tracts in the same year;
- (4) holding other real property for sale to customers in the same year; or
- (5) construction of a permanent real estate office which can be used in selling other real property.ⁿ¹⁵

Conversely, the following activities are not taken into account as "substantial other evidence" if the taxpayer does no more than *one* of them in the year in question:

- (1) holding a real estate dealer's license;
- (2) selling other real property which was clearly investment property;
- (3) acting as a salesperson for a real estate dealer but without any financial interest in the business; or
- (4) mere ownership of other vacant real property without engaging in any selling activity with respect to it.

If more than one of these factors exists, the circumstances may or may not constitute substantial evidence that the taxpayer held real property for sale in his business, depending upon the particular facts in each case.ⁿ¹⁶

[c] Improvements that Substantially Enhance Value

As previously noted, a condition of the statutory capital gain presumption is that the taxpayer does not make any substantial improvement that substantially enhances the value of the lot or parcel sold.ⁿ¹⁷ Certain improvements are not substantial, for purposes of this requirement, if they are necessary to make the lot marketable at the prevailing local price and if they meet the other conditions for a necessary improvement (see *Section 22.03[5][d]*, below).ⁿ¹⁸

Among the improvements considered substantial are shopping centers, other commercial or residential buildings, and the installation of hard surface roads or utilities (such as sewers, water, gas, or electric lines). Substantial improvements do not include temporary structures used as a field office, surveying and clearing operations, and construction of minimum all-weather access roads.ⁿ¹⁹

Whether substantial improvements "substantially enhance" the value of the lots sold depends upon the circumstances in each case. If the improvements increase the value of a lot by 10 percent or less, that increase is not considered to be

substantial. If, however, the value of the lot is increased by more than 10 percent, all relevant factors are considered to determine whether, under the circumstances, the increase is substantial.ⁿ²⁰ For example, if the installation of curbs, culverts, a paved street, and water lines on lots results in approximately a 100 percent increase in the lots' value, the improvements are both substantial and substantially enhance the value of the property.ⁿ²¹

[d] Necessary Improvements

An improvement is not deemed substantial, so as to preclude capital gain treatment under the special subdivision provision, if it constitutes a "necessary improvement."ⁿ²² An improvement is necessary under the following conditions:

- (1) The taxpayer holds the property for at least ten years. The holding period begins when the taxpayer acquires the property, rather than when the subdivision is made.ⁿ²³
- (2) The improvement is the building or installation of a water, sewer, or drainage facility, or a road (if the improvement otherwise would be deemed substantial).ⁿ²⁴
- (3) The Service is satisfied that, without the improvement, the lot or parcel is not otherwise marketable at the prevailing local price for similar building sites.ⁿ²⁵
- (4) The taxpayer elects not to adjust the basis of the lot or parcel sold, or of any other property held by him, for any part of the cost of the improvement attributable to the lot, and not to deduct any part of that cost as an expense.ⁿ²⁶

[e] Sale of More than Five Lots

If there is no substantial evidence other than subdivision and related selling activities that real property is held in the ordinary course of the taxpayer's business (i.e., as dealer property), the taxpayer qualifies for capital gain treatment. However, a special rule for computing capital gain applies if the taxpayer sells more than five lots or parcels from the tract. In the year in which the sixth lot is sold, and in all subsequent years, the taxpayer's gain on all lots sold during those years (including the first five lots sold during those years) is reportable as ordinary income to the extent of five percent of the selling price of each lot.ⁿ²⁷

Example:

Martin buys a single tract of real estate, which he subdivides into lots A, B, C, and D. In Year 1, he sells all four lots to four different (and unrelated) buyers. In the same year, he buys three adjacent lots, E, F, and G, which he sells to three other buyers in January, June, and July, respectively, of Year 2. Assuming that the lots qualify as investment property, all of the Year 1 sales create capital gain (since Martin did not sell more than five lots in that year). However, all of the Year 2 sales, including that of Lot E, are subject to the five percent ordinary income treatment. Even though Lot E was only the fifth lot that Martin sold, the sale occurred in the same year (Year 2) as that of the sixth lot.ⁿ²⁸

Expenses of the sale are first taken as deductions from gross income to the extent that gain is reported as ordinary income. All remaining selling expenses are used in determining the amount realized on the sale of a capital asset.ⁿ²⁹

The above rules are illustrated as follows:ⁿ³⁰

Example (1):

Taxpayer Smith divides a tract of real estate into six lots. Smith sells five of the lots in the Year 1 and the sixth lot in Year 2. The lots all qualify for capital gain treatment as investment property. The sixth lot, which has a basis to Smith of \$5,000, is sold for \$10,000, and the expenses of sale are \$750. Smith realizes no ordinary income, and \$4,250 as capital gain, computed as follows:

Sales price.....	\$10,000

Basis.....	(5,000)	
Sales price in excess of basis.....	5,000	
5 percent of sales price.....	\$500	
Expenses of sale.....	(750)	
Gain realized as ordinary income	-0-	
Sales price in excess of basis.....	\$5,000	
5 percent of sales price.....	\$500	
Excess of expenses over 5 percent of sales price	250	(750)
Gain treated as capital gain.....		\$4,250

Example (2):

Assume the same facts as in Example (1), except that the expenses of sale of the sixth lot are \$300. Smith realizes \$200 as ordinary income, and \$4,500 as capital gain, computed as follows:

Sales price.....	\$10,000	
Basis.....	(5,000)	
Sales price in excess of basis.....	5,000	
5 percent of sales price.....	\$500	
Expenses of sale.....	(300)	
Gain realized as ordinary income	\$200	
Sales price in excess of basis.....	\$5,000	
5 percent of sales price.....	\$500	
Excess of expenses over 5 percent of sales price	-0-	(500)
Gain treated as capital gain.....		\$4,500

Planning Notes

Try to Establish Investment Motive. A taxpayer who decides to liquidate his real estate holdings is usually faced with the problem of how far he may engage in development activities without being treated as a dealer subject to ordinary income tax on his sales. Although the Service takes the strict view that almost any subdivision activity results in ordinary income when the property is sold, the courts may allow capital gain treatment if the facts clearly indicate an investment motive. Moreover, the Service cannot classify subdivided lots or parcels as dealer property unless they are held "primarily" for sale to customers.

Taxpayer May be Both Dealer and Investor. Under certain conditions, an individual taxpayer may have the dual status of dealer and investor. For example, if a taxpayer sells some of his housing units immediately upon completion but rents the remaining units for several years before they are sold in liquidation of the business, he may be treated as holding houses from the first sale as dealer property, but houses from the later sale as investment property.ⁿ³¹

Special Treatment Not Available for Losses. The special capital gain presumption for sales of realty from subdivided property by noncorporate taxpayers applies only to gains; it does not apply to sales that result in a loss.ⁿ³² This distinction is important because of the statutory limitations on capital losses by noncorporate taxpayers.ⁿ³³ Note, however, that the Code provides for "recapture" of net ordinary losses claimed under *IRC Section 1231* upon the subsequent sale of trade or business property at a capital gain,

i.e., net gains from the sale are treated as ordinary income to the extent of unrecaptured net losses.ⁿ³⁴

Legal Topics:

For related research and practice materials, see the following legal topics:

Real Property LawSubdivisionsGeneral OverviewTax LawFederal Income Tax ComputationDeductions for LossesGeneral Losses (IRC sec. 165)General OverviewTax LawFederal Income Tax ComputationDeductions for Nonbusiness ExpensesRelated Taxpayers (IRC sec. 267)Tax LawFederal Income Tax ComputationOrdinary Income (IRC sec. 64)Tax LawFederal Income Tax ComputationSales & ExchangesBusiness Property (IRC secs. 1031, 1221, 1231)Property Held for Productive Use & InvestmentTax LawFederal Income Tax ComputationSales & ExchangesCapital Gains & Losses (IRC secs. 1201-1202, 1211-1212, 1221-1223, 1231-1260, 1271-1278, 1281-1288, 1291-1298)Capital AssetsTax LawFederal Income Tax ComputationSales & ExchangesCapital Gains & Losses (IRC secs. 1201-1202, 1211-1212, 1221-1223, 1231-1260, 1271-1278, 1281-1288, 1291-1298)Long Term & Short Term Gains & LossesTax LawFederal Income Tax ComputationSales & ExchangesCapital Gains & Losses (IRC secs. 1201-1202, 1211-1212, 1221-1223, 1231-1260, 1271-1278, 1281-1288, 1291-1298)Real Property Subdivided for SaleTax LawFederal Income Tax ComputationSales & ExchangesCapital Gains & Losses (IRC secs. 1201-1202, 1211-1212, 1221-1223, 1231-1260, 1271-1278, 1281-1288, 1291-1298)Treatment of GainsTax LawFederal Income Tax ComputationSales & ExchangesCapital Gains & Losses (IRC secs. 1201-1202, 1211-1212, 1221-1223, 1231-1260, 1271-1278, 1281-1288, 1291-1298)Treatment of LossesTax LawFederal Income Tax ComputationSales & ExchangesRecapture of Depreciation (IRC secs. 1245, 1250)

FOOTNOTES:

(n1)Footnote 1. *IRC § 1221(1); Treas. Reg. § 1.1221-1(b).*

(n2)Footnote 2. *IRC § 1(h).*

(n3)Footnote 3. *IRC § 1(a).*

(n4)Footnote 4. *IRC § 1237.*

(n5)Footnote 5. *IRC §§ 1245, 1250.*

(n6)Footnote 6. *IRC §§ 1211(b), 1212(b); Treas. Reg. § 1.1211-1(b)(1).*

(n7)Footnote 1. *U.S. v. Winthrop, 417 F.2d 905 (5th Cir. 1969) ; Byram v. U.S., 705 F.2d 1418 (5th Cir. 1983) ; Harris v. Comm'r, T.C. Memo 1983-774 ; Davis v. Comm'r, T.C. Memo 1955-230 ; Bramblett v. Comm'r, 960 F.2d 526 (5th Cir. 1992) .*

(n8)Footnote 2. *Byram v. U.S., 705 F.2d 1418 (5th Cir. 1983) ; see also Pritchett v. Comm'r, 63 T.C. 149 (1974) .*

(n9)Footnote 3. *Mackall Est. v. Comm'r, T.C. Memo, CCH 14,044, P-H P 44,231; see Winding River Ranch, Inc. v. Comm'r, T.C. Memo 1966-260 ; see also Herndon v. Comm'r, T.C. Memo 1968-135 .*

(n10)Footnote 4. *Vanbibber v. Comm'r, T.C. Memo 1985-344 .*

(n11)Footnote 5. *IRC §§ 1221(1), 1231(b)(1)(B).*

(n12)Footnote 6. *Malat v. Riddell, 383 U.S. 569 (1966) , on remanded, 347 F.2d 23 (9th Cir. 1965) ; Phelan v. Comm'r, T.C. Memo 2004-206 .*

(n13)Footnote 7. *Municipal Bond Corp. v. Comm'r, 341 F.2d 683 (8th Cir. 1965) , on remand, 41 T.C. 20 (1963) 46 T.C. 219 (1966) , rev'd 382 F.2d 184 (8th Cir. 1967) ; Gates v. Comm'r, 52 T.C. 898 (1969) ; Olivieri v. Comm'r, T.C. Memo 1966-177 ; Phelan v. Comm'r, T.C. Memo 2004-206 .*

(n14)Footnote 1. *Rev. Rul. 59-91, 1959-1 C.B. 15 .*

(n15)Footnote 2. *Boeing v. U.S., 168 F. Supp. 762 (Ct. Cl. 1958) ; Kaltreider v. Comm'r, 28 T.C. 121 (1957) , aff'd, 255 F.2d 833 (3d Cir. 1958) ; Longfellow v. Comm'r 31 T.C. 11 (1958) ; Patrick v. Comm'r, 31 T.C. 1175 (1959) , aff'd, 275 F.2d 437 (7th Cir. 1960) ; Riley v. Comm'r, 37 T.C. 932 (1962) , aff'd, 328 F.2d 428 (5th Cir. 1964) ; Buono v. Comm'r, 74 T.C. 187 (1980) ; Gates v. Comm'r, 52 T.C. 898 (1969) .*

(n16)Footnote 3. *Oliver v. Comm'r, TC Memo, CCH 13,198, P-H P 43,229, aff'd per curiam 138 F.2d 910 (4th Cir. 1943) ; Sanders v. U.S., 740 F.2d 886 (11th Cir. 1984) .*

(n17)Footnote 4. *Cornish v. Comm'r, T.C. Memo 1957-61 ; but see Frank H. Taylor & Son Inc. v. Comm'r, T.C. Memo 1973-82 .*

(n18)Footnote 5. *Ehrman v. Comm'r, 41 BTA 652 (1940) , aff'd 120 F.2d 607 (9th Cir. 1941) , cert. denied 314 U.S. 668 ; Boeing v. U.S., 168 F. Supp. 762, 144 Ct. Cl. 75 (1958) .*

(n19)Footnote 6. *Palos Verdes Corp. v. U.S., 201 F.2d 256 (9th Cir. 1952) ; Nadalin v. U.S., 364 F.2d 431 (Ct. Cl. 1966) .*

(n20)Footnote 7. *Bynum v. Comm'r, 46 T.C. 295 (1966) ; Nadeau v. Comm'r, T.C. Memo 1996-427 .*

(n21)Footnote 8. *Smith v. Dunn, 224 F.2d 353 (5th Cir. 1955) ; Riedel v. Comm'r, 261 F.2d 371 (5th Cir. 1958) , rev'g T.C. Memo 1957-210 ; Voss v. U.S., 329 F.2d 164 (7th Cir. 1964) .*

(n22)Footnote 9. *Mundy Estate v. Comm'r, 36 T.C. 703 (1961) ; see Walton Estate v. Comm'r, T.C. Memo 1962-63 ; Simpson Estate v. Comm'r, T.C. Memo 1962-71 ; Hall v. Comm'r, T.C. Memo 1968-175 .*

(n23)Footnote 10. *Yunker v. Comm'r, 256 F.2d 130 (6th Cir. 1958) , rev'g 26 T.C. 161 (1956) ; see also Camp v. Murray, 226 F.2d 931 (4th Cir. 1955) ; but see Cornish v. Comm'r, T.C. Memo 1957-61 ; Simpson Estate v. Comm'r, T.C. Memo 1962-71 .*

(n24)Footnote 11. *Gudgel v. Comm'r, 273 F.2d 206 (6th Cir. 1959) , rev'g T.C. Memo 1958-83 ; see Clark v. U.S., 200 F. Supp. 668 (E.D. Tenn. 1961) ; see also Parmer v. Comm'r, T.C. Memo 1971-320 .*

(n25)Footnote 12. *Oahu Sugar Co. v. U.S., 300 F.2d 773 (Ct. Cl. 1962) .*

(n26)Footnote 13. *Boomhower v. U.S., 74 F. Supp. 997 (D. Iowa 1947) ; see also Fahs v. Crawford, 161 F.2d 315 (5th Cir. 1947) ; Riddell v. Scales, 406 F.2d 210 (9th Cir. 1969) ; cf. Grove v. Comm'r, 54 T.C. 799 (1970) ; Podell v. Comm'r, 55 T.C. 429 (1970) ; see also Wilson & Fields v. Comm'r, T.C. Memo 1962-200 .*

(n27)Footnote 14. *See Suburban Realty Co. v. U.S., 615 F.2d 171 (5th Cir. 1980) , cert. denied, 449 U.S. 920 ; Beidenharn Realty Co. v. U.S., 526 F.2d 409 (5th Cir. 1976) ; Bramblett v. Comm'r, 960 F.2d 526 (5th Cir. 1992) .*

(n28)Footnote 1. *IRC § 1221(1).*

(n29)Footnote 2. *Malat v. Riddell, 383 U.S. 569 (1966) ; see also Scottwood Devel Co. v. Comm'r, T.C. Memo 1967-175 .*

(n30)Footnote 3. *U.S. v. Winthrop, 417 F.2d 905 (5th Cir. 1969) ; Crabtree v. Comm'r, 20 T.C. 841 (1953) ; Wood v. Comm'r, T.C. Memo 2004-200 .*

(n31)Footnote 4. *Ross v. Comm'r, 227 F.2d 265 (5th Cir. 1955) ; Heller Trust v. Comm'r, 382 F.2d 675 (9th Cir. 1967) .*

(n32)Footnote 5. *Goldberg v. Comm'r*, 223 F.2d 709 (5th Cir. 1955) , rev'g 22 T.C. 533 (1954) ; *Heller Trust v. Comm'r*, 382 F.2d 675 (9th Cir. 1967) .

(n33)Footnote 6. *Delsing v. U.S.*, 186 F.2d 59 (5th Cir. 1951) ; *Smith v. Comm'r*, 232 F.2d 142 (5th Cir. 1956) .

(n34)Footnote 7. *Crabtree v. Comm'r*, 20 T.C. 841, 848 (1953) ; see also *Murray v. Comm'r*, 370 F.2d 568 (4th Cir. 1967) , cert. denied, 389 U.S. 834 (1967) .

(n35)Footnote 8. *King v. Comm'r*, 189 F.2d 122 (5th Cir. 1951) , cert. denied, 342 U.S. 829 ; *Rockwell v. Comm'r*, 512 F.2d 882 (9th Cir. 1975) , aff'g T.C. Memo 1972-133 , cert. denied 423 U.S. 1015 (1975) .

(n36)Footnote 9. *Phillips v. Comm'r*, 24 T.C. 435 (1955) ; see also *Grant v. Comm'r*, 333 F.2d 603 (4th Cir. 1964) .

(n37)Footnote 10. *Rollingwood Corp. v. Comm'r*, 190 F.2d 263 (9th Cir. 1951) ; but cf. *Cole v. U.S.*, 141 F. Supp. 558 (D. Wyo. 1956) ; *Malat v. Riddell*, 383 U.S. 569 (1966) .

(n38)Footnote 11. *Victory Housing No. 2, Inc. v. Comm'r*, 205 F.2d 371 (10th Cir. 1953) , rev'g 18 T.C. 466 (1952) ; see also *Voss v. U.S.*, 329 F.2d 164 (7th Cir. 1964) .

(n39)Footnote 12. *Dillon v. Comm'r*, 213 F.2d 218 (8th Cir. 1954) ; see also *Voss v. U.S.*, 329 F.2d 164 (7th Cir. 1964) .

(n40)Footnote 13. *Phillips v. Comm'r*, 24 T.C. 435 (1955) ; see also *Planned Communities, Inc. v. Comm'r*, T.C. Memo 1980-555 ; see also *Rouse v. Comm'r*, 39 T.C. 70 (1962) , overruled in part by *Macabe Co. v. Comm'r*, 42 T.C. 1105 (1964) .

(n41)Footnote 14. *Galena Oaks Corp. v. Scofield*, 218 F.2d 217 (5th Cir. 1954) ; *Carlson v. Comm'r*, 288 F.2d 228 (7th Cir. 1961) ; *Home Co., Inc. v. Comm'r*, 212 F.2d 637 (10th Cir. 1954) ; *Pool v. Comm'r*, T.C. Memo 1956-64 , aff'd 251 F.2d 233 (9th Cir. 1957) , cert. denied 356 U.S. 938 .

(n42)Footnote 15. *Monday v. Comm'r*, T.C. Memo 1957-1 , aff'd per curiam 252 F.2d 789 (6th Cir. 1958) , cert. denied 358 U.S. 883 .

(n43)Footnote 16. *Cohn v. Comm'r*, 21 T.C. 90 (1953) , aff'd, 226 F.2d 22 (9th Cir. 1955) ; see also *DeBuys v. Comm'r*, T.C. Memo 1956-128 .

(n44)Footnote 17. *Curtis v. Comm'r*, 232 F.2d 167 (3d Cir. 1956) , rev'g and rem'g 23 T.C. 740 (1955) ; see also *Dillon v. Comm'r*, 213 F.2d 218 (8th Cir. 1954) , rev'g 12 T.C.M. (CCH) 338 (1953) .

(n45)Footnote 1. S. Rep. No. 1622, 83d Cong., 2d Sess. 115 (1954).

(n46)Footnote 2. IRC § 1237.

(n47)Footnote 3. *Id.*; Treas. Reg. § 1.1237-1(a)(1).

(n48)Footnote 4. IRC § 1237(a); Treas. Reg. 1.1237-1(a)(5).

(n49)Footnote 5. IRC § 1237(a)(1); Treas. Reg. § 1.1237-1(b).

(n50)Footnote 6. Treas. Reg. § 1.1237-1(a)(1); *Gault v. Comm'r*, 332 F.2d 94 (2d Cir. 1964) ; *Smith v. Dept. of Revenue*, 1998 Ore. Tax LEXIS 48 (Oregon Tax Court) .

(n51)Footnote 7. IRC § 1237(a)(2); Treas. Reg. § 1.1237-1(c).

(n52)Footnote 8. *IRC § 1237(a)(3); Treas. Reg. § 1.1237-1(d).*

(n53)Footnote 9. *IRC § 1237(a); Treas. Reg. § 1.1237-1(a).*

(n54)Footnote 10. *Treas. Reg. § 1.1237-1(a)(2), (e)(1).*

(n55)Footnote 11. *IRC § 1237(b)(1).*

(n56)Footnote 12. *IRC § 1237(c); Treas. Reg. § 1.1237-1(g)(1).*

(n57)Footnote 13. *IRC § 1237(c); Treas. Reg. § 1.1237-1(g)(2).*

(n58)Footnote 14. *Estate of Finder v. Comm'r, 37 T.C. 411 (1961) , appeal dismissed CA 7; see also Treas. Reg. § 1.1237-1(g)(2).*

(n59)Footnote 15. *Treas. Reg. § 1.1237-1(a)(3).*

(n60)Footnote 16. *Id.*

(n61)Footnote 17. *IRC § 1237(a)(2).*

(n62)Footnote 18. *Treas. Reg. § 1.1237-1(c)(1).*

(n63)Footnote 19. *Treas. Reg. § 1.1237-1(c)(4).*

(n64)Footnote 20. *Treas. Reg. § 1.1237-1(c)(3).*

(n65)Footnote 21. *Pointer v. Comm'r, 48 T.C. 906 (1967) , aff'd, 419 F.2d 213 (9th Cir. 1969) ; English v. Comm'r, T.C. Memo 1993-111 .*

(n66)Footnote 22. *IRC § 1237(b)(3).*

(n67)Footnote 23. *Id.; Treas. Reg. § 1.1237-1(c)(5)(i)(a).*

(n68)Footnote 24. *IRC § 1237(b)(3)(A).*

(n69)Footnote 25. *IRC § 1237(b)(3)(B).*

(n70)Footnote 26. *IRC § 1237(b)(3)(c); Treas. Reg. § 1.1237-1(c)(5)(i)(d), (c)(5)(iii).*

(n71)Footnote 27. *IRC § 1237(b)(1).*

(n72)Footnote 28. *Treas. Reg. § 1.1237-1(e)(2)(i).*

(n73)Footnote 29. *IRC § 1237(b)(2).*

(n74)Footnote 30. *Treas. Reg. § 1.1237-1(e)(2)(ii), Examples (1) and (2).*

(n75)Footnote 31. *See, e.g., Bradley v. Comm'r, 26 T.C. 970 (1956) ; McKinney v. Comm'r, T.C. Memo 1981-181 .*

(n76)Footnote 32. *IRC § 1237; Treas. Reg. § 1.1237-1(a)(4)(i).*

(n77)Footnote 33. *IRC §§ 165(c), 1211(b), 1212(b), 1221(1), and 1231; see Treas. Reg. § 1.1221-1(b).*

(n78)Footnote 34. *IRC § 1231(c)*.



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Current Legal Forms for Real Estate
Chapter 22 DEVELOPMENT AND SUBDIVISION
Part I. The Tax Background

26-22 Current Legal Forms for Real Estate § 22.04

§ 22.04 Basis Rules: Apportionment of Basis to Subdivided Parcels

Basis of property that is subdivided and improved for resale must be equitably apportioned among lots or parcels to be sold in order to determine gain or loss upon sale of each. Allocation is based upon fair market value of lots or parcels at time of acquisition. Basis allocated to various parcels is increased by capitalized expenses, apportioned in same manner as basis.

[1] Basis of Subdivided Lots

The tax basis of an entire tract of land, like that of other real property, includes cash payments of the purchase price, the amount of any purchase money mortgage, and the amount of any other mortgage (or other liability) assumed or to which the property was subject when acquired.ⁿ¹ Gain or loss is recognized on the sale of each lot or parcel, so a portion of basis of the entire tract must be "equitably apportioned" to any parcel or lot which is sold by the developer. The developer cannot postpone the realization of gain or loss until he disposes of the entire property on the ground that he is first entitled to a tax-free recovery of its basis.ⁿ²

Example:

Mary, a dealer in real estate, acquires a 10-acre tract for \$10,000, which she divides into 20 lots of equal value. The \$10,000 cost must be equitably apportioned among the lots so that on the sale of each Mary can determine her taxable gain or deductible loss. Each lot, therefore, has a basis of \$500 (\$10,000 divided by 20). Assuming that one lot is sold for \$800 and another for \$300, Mary would have a \$300 gain and a \$200 loss, respectively. The transactions do not result in a "net gain" of \$100, and Mary cannot postpone recognition of gain until she realizes more than \$10,000 from the aggregated sale of the 20 lots.ⁿ³

Allocation of costs among the various lots may result in higher tax for the taxpayer. For example, if a condominium developer allocates a portion of its improvement costs to the surrounding land which it subsequently leases to the condominium owners, this results in a lower allocation of cost to the units sold and thus increases the developer's gain on their sale.ⁿ⁴

Equitable apportionment or allocation of a developer's tax basis among the various tracts or parcels is based upon their relative fair market value at the time of acquisition. The portion of the total basis allocated to any specific lot is measured by the ratio of the fair market value of that lot to the fair market value of the entire tract.ⁿ⁵ If the parcels or lots are indistinguishable, e.g., they all have the same value, their basis may be allocated uniformly by area (e.g., on a square foot basis).ⁿ⁶ Absent evidence to the contrary, a per unit area basis of allocation may be used. For example, if the owner cannot prove that the value per acre of one tract has a greater value than the value per acre of a second tract on the date of purchase, an allocation on a per acre basis is considered reasonable.ⁿ⁷

An allocation problem may arise if some units are more valuable than others, e.g., they have more street or water frontage, so that the values of the parcels among which the basis is to be allocated may not equal their relative values.ⁿ⁸ In those cases, real estate tax or other assessment values may be used to determine the relative value of the parcels for allocation purposes.ⁿ⁹ Expert testimony may also be used to make this determination.ⁿ¹⁰

The basis allocated to the various parcels or tracts is increased by legal fees and other capitalized expenses, which are apportioned in the same manner as basis.ⁿ¹¹ Improvement, subdivision, and development costs for each tract may be allocated in accordance with either acreage (acreage allocation)ⁿ¹² or value (value allocation).ⁿ¹³ Improvement and development costs, for this purpose, include costs of surveying, installing roads and utilities, and improving adjacent property to facilitate sale of the property.ⁿ¹⁴

[2] Easements, Utilities, and Development Costs

The distinction between expenditures that are currently deductible and those that must be capitalized is a troublesome tax problem in determining apportionment of basis. The cost (or other basis) of property must be adjusted for expenses, receipts, losses or other items that are properly chargeable to capital account (except for certain taxes or other carrying charges (see *Section 22.06*) and circulation expenditures)ⁿ¹ and for depreciation.ⁿ² All costs in acquiring property, perfecting title, and erecting developments on the property generally are taken into account in computing the adjusted basis of a parcel of property.

The most common items of addition to cost basis are improvements and betterments.ⁿ³ Other additions to basis include the costs of surveys and geological opinions,ⁿ⁴ defending or perfecting title,ⁿ⁵ removing clouds on title,ⁿ⁶ commissions paid by the purchaser,ⁿ⁷ and similar expenses.ⁿ⁸ Items that must be deducted from basis are generally those which are allowed as losses, such as abandonment and destruction losses.ⁿ⁹

The cost of separate improvements that benefit all lots in a subdivision may in certain circumstances be allocated to the basis of each lot. Such apportionment is allowed for the costs of water and sewage facilities, gas lines, and recreational areas (such as a golf course). For example, charges paid to public utilities for the extension of gas, electric, and water lines may be allocated to the basis of the subdivided lots, even though the developer would be entitled to pro rata refunds if new customers were obtained.ⁿ¹⁰ Amounts paid by a developer to a public utility for the installation of underground, rather than less expensive above ground, electric and gas distribution systems for a new mobile home park are nonrecurring capital expenditures that are included in the developer's basis for the land.ⁿ¹¹

Allocation of utility costs to the basis of subdivided property is allowed only if the taxpayer relinquishes ownership and beneficial interest in the facility. For example, a developer who retains title to a water-pumping system which he constructed may not allocate any part of its cost to the properties sold.ⁿ¹² On the other hand, a subdivider who conveys to the new owners the "substantial beneficial property rights" in a sewage disposal plant that he constructed may include its cost in the basis of the lots sold.ⁿ¹³ Also, allocation is proper if a developer transfers water and sewage facilities to a new utility company wholly owned by an individual who owns 40 percent of stock in the developer, if the transfer is in consideration for the utility's agreement to furnish services to purchasers of houses in the subdivision.ⁿ¹⁴

The seller of undeveloped acreage, particularly in large long-range programs, may want to use the property temporarily

for himself, or may choose to impose permanent restrictions on its use by the purchaser. The seller's motivation may be his ownership of adjacent land, a desire to continue farming, forestry or other business on the land, or an intention to exploit valuable interests. In these cases, the seller may impose conditions or limitations that survive the passage of title, such as covenants restricting the buyer's use, easements permitting the seller to use the land, reservations of mineral, timber, or other specific rights, or contractual provisions requiring the purchaser to meet a prescribed development program with respect to the property.

The principal tax question that arises when the seller retains an easement or other limited right with respect to the property sold is whether the right in itself constitutes a separate asset to which part of the basis of the entire property must be allocated. The consideration received for the grant of an easement constitutes the proceeds from the sale of an interest in real property and should be applied as a reduction of the cost or other basis of the underlying land.ⁿ¹⁵ If the easement affects only a specific portion of a tract of land, only the basis properly allocable to the affected portion is reduced by the consideration received.ⁿ¹⁶

A developer may include estimated development costs in the basis of lots sold even before the expenditures are made, but such estimates may be corrected in the light of actual experience.ⁿ¹⁷ The correcting adjustment should be made in and for the year the overestimate or underestimate is determined, rather than for the year the original estimate was made.ⁿ¹⁸

Planning Note

Taxpayer Has Burden of Proof on Cost Allocation. Whether the allocation of basis among parcels of property is made in proportion to their relative fair market value at the time of acquisition is a question of fact on which the taxpayer has the burden of proof.ⁿ¹⁹ The taxpayer may meet this burden by use of real estate tax or other assessment values, expert testimony, or both (see *Section 22.04[1]* above).

Legal Topics:

For related research and practice materials, see the following legal topics:

Real Property Law Subdivisions General Overview Tax Law Federal Income Tax Computation Sales & Exchanges Basis (IRC secs. 1011-1017, 1019, 1021, 1023) Adjustments to Basis Tax Law Federal Income Tax Computation Sales & Exchanges Basis (IRC secs. 1011-1017, 1019, 1021, 1023) Cost Basis of Property Tax Law Federal Income Tax Computation Sales & Exchanges Basis (IRC secs. 1011-1017, 1019, 1021, 1023) Real Property Tax Law Federal Income Tax Computation Sales & Exchanges Capital Gains & Losses (IRC secs. 1201-1202, 1211-1212, 1221-1223, 1231-1260, 1271-1278, 1281-1288, 1291-1298) Real Property Subdivided for Sale Tax Law State & Local Taxes Real Property Tax Assessment & Valuation Valuation

FOOTNOTES:

(n1)Footnote 1. *IRC §§ 1011, 1012, and 1016; see Crane v. Comm'r*, 331 U.S. 1 (1947) ; *Comm'r v. Tufts*, 461 U.S. 300 (1983) , *rev'g* 651 F.2d 1058 (5th Cir. 1981) , *reinstating* 70 T.C. 756 (1978) , *on remand* 712 F.2d 199 (5th Cir. 1983) ; *Rev. Rul.* 68-362, 1968-2 C.B. 334 ; *Emmons v. Comm'r*, T.C. Memo 1998-173 .

(n2)Footnote 2. *Treas. Reg. § 1.61-6(a); see Fairfield Plaza, Inc. v. Comm'r*, 39 T.C. 706 (1963) ; *Fasken v. Comm'r*, 71 T.C. 650 (1979) ; *Cleveland-Sandusky Brewing Corp. v. Comm'r*, 30 T.C. 539 (1958) ; *Iske v. Comm'r*, T.C. Memo 1980-61 .

Subdividers of real estate may request permission to add to the basis of their lots the estimated cost of future improvements that will benefit the lots if they are contractually obligated to make the improvements. Otherwise, the subdividers may not increase the basis until economic performance has occurred with respect to the improvements. 1991-1 C.B. 315, Notice 91-4 . Although subdividers can add some future improvements to basis, the total estimated common costs under the alternative cost method cannot exceed the amount treated as incurred under the economic performance rules at the end of the tax year. This cost limitation is applied on a project-by-project basis as defined by

the developer using any reasonable method. *Rev. Proc. 92-29, 1992-1 C.B. 748* .

(n3)Footnote 3. *Treas. Reg. 1.61-6(a)*, and Example (1).

(n4)Footnote 4. *Urbanek v. U.S.*, 2 Cl. Ct. 574 (Cl. Ct. 1983) ; *Dahling v. Comm'r*, T.C. Memo 1988-430 .

(n5)Footnote 5. *Searles Real Estate Trust v. Comm'r*, 25 BTA 1115 (1932) ; *Alamo Broadcasting Co. v. Comm'r*, 15 T.C. 534 (1950) ; *Soelling v. Comm'r*, 70 T.C. 1052 (1978) ; *Von Hafften v. Comm'r*, 76 T.C. 831 (1981) .

(n6)Footnote 6. *Ayling v. Comm'r*, 32 T.C. 704 (1959) ; *Henning Corp. v. Comm'r*, T.C. Memo 1960-90 .

(n7)Footnote 7. *Byram v. Comm'r*, T.C. Memo 1975-135 , *aff'd*, 555 F.2d 1234 (5th Cir. 1977) .

(n8)Footnote 8. *See Luckey v. Comm'r*, 334 F.2d 719 (9th Cir. 1964) , *aff'd*, 41 T.C. 1 (1963) ; *see also Fairfield Plaza, Inc. v. Comm'r*, 39 T.C. 706 (1963) ; *Biscayne Bay Islands Co. v. Comm'r*, 23 BTA 731 (1931) .

(n9)Footnote 9. *Cullinan v. Comm'r*, 5 BTA 996 (1927) ; *Cullinan v. Comm'r*, 19 BTA 930 (1930) ; *Bowman v. Comm'r*, T.C. Memo 1955-14 ; *see generally* 2554- 58 *Creston Corp. v. Comm'r*, 40 T.C. 932 (1963) .

(n10)Footnote 10. *Hoven v. Comm'r*, 56 T.C. 50 (1971) ; *see Almac's, Inc. v. Comm'r*, T.C. Memo 1961-13 ; *see generally Burrows v. Comm'r*, T.C. Memo 1970-80 .

(n11)Footnote 11. *Soelling v. Comm'r*, 70 T.C. 1052 (1978) ; *Rev. Rul. 68-528, 1968-2 C.B. 331* .

(n12)Footnote 12. *Hannibal Mo. Land Co. v. Comm'r*, 9 B.T.A. 1072 (1928) , *nonacq.*, 1928 C.B. 37 ; *see also Ewing v. Comm'r*, T.C. Memo 1958-115 .

(n13)Footnote 13. *Fairfield Plaza, Inc. v. Comm'r*, 39 T.C. 706 (1963) ; *see generally* 2554- 2554-58 *Creston Corp. v. Comm'r*, 40 T.C. 932 (1963) .

(n14)Footnote 14. *Comm'r v. Laguna Land & Water Co.*, 118 F.2d 112 (9th Cir. 1941) ; *Wilson v. U.S.*, 322 F. Supp. 1166 (N.D. Ala. 1971) .

(n15)Footnote 1. *IRC § 1016(a)(1)*.

(n16)Footnote 2. *IRC § 1016(a)(2)-(3)*.

(n17)Footnote 3. *See Franklin Lumber & Power Co. v. Comm'r*, 50 F.2d 1059 (4th Cir. 1931) ; *Johnson v. Comm'r*, 7 T.C. 465 (1946) , *rev'd on other issue*, 162 F.2d 844 (5th Cir. 1947) ; *see also Treas. Reg. § 1.1016-2(a)*.

(n18)Footnote 4. *Thompson v. Comm'r*, 9 BTA 1342 (1928) ; *see also Hannibal Mo. Land Co. v. Comm'r*, 9 BTA 1072 (1928) , *nonacq.*, 1928-1 CB 37 .

(n19)Footnote 5. *Bermont Oil Co. v. Comm'r*, 33 BTA 1061 (1936) , *aff'd*, 91 F.2d 710 (D.C. Cir. 1937) ; *see also Johnson v. Comm'r*, 162 F.2d 844 (5th Cir. 1947) .

(n20)Footnote 6. *Est. of Jones v. Comm'r*, 43 BTA 691 (1941) , *aff'd*, 127 F.2d 231 (5th Cir. 1942) ; *see also Johnson v. Comm'r*, 162 F.2d 844 (5th Cir. 1947) .

(n21)Footnote 7. *Briarcliff Investment Co. v. Comm'r*, 30 BTA 1269 (1934) ; *Frick v. Comm'r*, T.C. Memo 1976-343 (1976) .

(n22)Footnote 8. *See, e.g., Warner Mountains Lumber Co. v. Comm'r*, 9 T.C. 1171 (1947) ; *see generally Kirschenmann v. Comm'r*, 488 F.2d 270 (9th Cir. 1973) .

(n23)Footnote 9. See *Carolina Light & Power Co. v. Comm'r*, 23 BTA 140 (1931) ; see also *Cleveland-Sandusky Brewing Corp. v. Comm'r*, 30 T.C. 539 (1958) .

(n24)Footnote 10. *Colony, Inc. v. Comm'r*, 26 T.C. 30 (1956) , *aff'd on other issue* 244 F.2d 75 (6th Cir. 1957) , *rev'd* 357 U.S. 28 (1958) ; *Gersten v. Comm'r*, 28 T.C. 756 (1957) , *rev'd on other grounds*, 267 F.2d 195 (9th Cir. 1959) ; Rev. Rul. 60-3, 1960-1 C.B. 284 ; cf. *Fairfield Plaza, Inc. v. Comm'r*, 39 T.C. 706 (1963) ; Rev. Rul. 67-309, 1967-2 C.B. 263 ; see also *C. H. Robinson Inc. v. Comm'r*, T.C. Memo 1998-430 .

(n25)Footnote 11. Rev. Rul. 80-93, 1980-1 C.B. 50 .

(n26)Footnote 12. *Colony, Inc. v. Comm'r*, N. 10, *supra*; see also *Bryce's Mountain Resort Inc. v. Comm'r*, T.C. Memo 1985-293 .

(n27)Footnote 13. *Collins Estate v. Comm'r*, 31 T.C. 238 (1958) (divided Tax Court); see also *Willow Terrace Devel Co. v. Comm'r*, 345 F.2d 933 (5th Cir. 1965) , *cert. denied*, 382 U.S. 938 ; *Derby Heights, Inc. v. Comm'r*, 48 T.C. 900 (1967) ; *Herzog Bldg. Corp. v. Comm'r*, 44 T.C. 694 (1965) ; *Montclair Devel. Co. v. Comm'r*, T.C. Memo 1966-200 ; *Norwest Corp. v. Comm'r*, 111 T.C. 105 (1998) .

(n28)Footnote 14. *Comm'r v. Offutt*, 336 F.2d 483 (4th Cir. 1964) , *aff'g* T.C. Memo 1963-126 .

(n29)Footnote 15. *Inaja Land Co. v. Comm'r*, 9 T.C. 727 (1947) , *acq.*, 1948-1 C.B. 2 ; Rev. Rul. 59-121, 1959-1 C.B. 212 ; cf. *Nay v. Comm'r*, 19 T.C. 114 (1952) ; *Iske v. Comm'r*, T.C. Memo 1980-61 (1980) ; *Fasken v. Comm'r*, 71 T.C. 650 (1979) .

(n30)Footnote 16. Rev. Rul. 68-291, 1968-1 C.B. 351 .

(n31)Footnote 17. *Colony, Inc. v. Comm'r*, 26 T.C. 30 (1956) , *aff'd on other issue* 244 F.2d 75 (6th Cir. 1957) , *rev'd* 357 U.S. 28 (1958) ; see *Mount Vernon Gardens, Inc. v. Comm'r*, 298 F.2d 712 (6th Cir. 1962) , *rev'g*, 34 T.C. 598 (1960) ; see generally Rev. Proc. 92-29, 1992-1 CB 748 .

(n32)Footnote 18. Rev. Proc. 78-25, 1978-2 C.B. 505 , *amplifying* Rev. Proc. 75-25, 1975-1 C.B. 720 ; *obsolete in part* Rev. Proc. 92-29, 1992-1 CB 748 .

(n33)Footnote 19. *Fairfield Plaza, Inc. v. Comm'r*, 39 T.C. 706 (1963) ; *Scott v. Comm'r*, 6 B.T.A. 761 (1927) ; *Stonegate of Blacksburg, Inc. v. Comm'r*, T.C. Memo 1974-213 ; cf. *Walker v. Comm'r*, T.C. Memo 1992-416 .



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Current Legal Forms for Real Estate

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Current Legal Forms for Real Estate
Chapter 22 DEVELOPMENT AND SUBDIVISION
Part I. The Tax Background

26-22 Current Legal Forms for Real Estate § 22.05

§ 22.05 Capitalization of Construction Costs; Uniform Capitalization Rules

Uniform capitalization rules require capitalization of direct and indirect costs of real property produced by taxpayer and real property acquired for resale. Costs are allocated to property under various allocation methods.

[1] Application of Uniform Capitalization Rules

The uniform capitalization rules prescribe what costs associated with the production of property and the acquisition of property for resale must be capitalized, i.e., included in the property's basis.ⁿ¹ These rules also provide for allocating costs among various activities of the taxpayer.ⁿ² Capitalized costs are recovered when the taxpayer uses, sells, or otherwise disposes of the property. Recovery is through depreciation, amortization, cost of goods sold, adjustment to basis, or otherwise.ⁿ³

Note:

The uniform capitalization rules generally apply to all real or tangible personal property produced by the taxpayer, and to all inventory property or noninventory property acquired for resale as stock in trade. There is an exception for personal property acquired for resale by a taxpayer who has gross receipts of \$10 million or less,ⁿ⁴ and several exceptions for certain property and activities.ⁿ⁵ The discussion in this section is limited to the application of the uniform capitalization rules to real property produced by the taxpayer, and to noninventory real property (real property may not be held as inventory) acquired by the taxpayer for resale.

To conform to the uniform capitalization rules, a taxpayer must determine: (1) what costs are includable in the basis of the property (see *Sections 22.05[2]-[4]* below)ⁿ⁶ and (2) the proper allocation of the includable costs (see *Section 22.05[5]* below).

[2] Kinds of Property Affected

[a] Property Produced by Taxpayer

The uniform capitalization rules apply to real property produced by the taxpayer, with certain exceptions noted below.ⁿ¹ Property is produced by the taxpayer if it is constructed, built, installed, manufactured, developed, or improved by him.ⁿ² The taxpayer is treated as producing property that is produced for him under a contract, except that only costs paid or incurred by the taxpayer (whether under the contract or otherwise) are taken into account in applying the uniform capitalization rules to him.ⁿ³

The uniform capitalization rules do not apply to personal use property, i.e., property produced by the taxpayer for his use other than in a trade or business or an activity conducted for profitⁿ⁴ or to property produced by the taxpayer pursuant to a long-term contract.ⁿ⁵

[b] Property Acquired by Taxpayer for Resale

The uniform capitalization rules apply to any noninventory real (or tangible personal) property that the taxpayer acquires for resale as stock in trade. This includes any real property held primarily for sale to customers in the ordinary course of the taxpayer's trade or business.ⁿ⁶

[3] Capitalization of Direct Costs

The uniform capitalization rules require that the direct costs of real property produced by the taxpayer or acquired by him for resale must be included in the basis of the property.ⁿ¹

The direct costs that must be capitalized are:ⁿ²

- (1) direct material costs, including the costs of materials that are integrated into the property produced or acquired as well as the costs of materials that are consumed in the ordinary course of producing or acquiring the property; and
- (2) direct labor costs, including the costs of labor that can be identified or associated with producing or acquiring the property. The following are elements of direct labor costs, to the extent paid or incurred on behalf of employees engaged in direct labor: basic compensation; overtime pay; vacation and holiday pay; sick-leave pay; shift differential; payroll taxes; and payments to a supplemental unemployment benefit plan.

[4] Capitalization of Indirect Costs

Indirect costs that must be allocated to the basis of property under the uniform capitalization rulesⁿ¹ are all costs that are not direct costs and are not exempt from the general requirement to capitalize costs. Costs that are not direct costs are all costs, except direct material costs and direct labor costs, that directly benefit, or are incurred by reason of, the taxpayer's production or acquisition of property. If these costs also benefit, or are incurred by reason of, other activities of the taxpayer, they must be reasonably allocated to the several activities.ⁿ² See *Section 22.05[5]* below.

[a] Includable Indirect Costs

Interest on debt incurred or continued by the taxpayer to finance the production of property must be capitalized to the extent of interest costs paid or incurred during the production period if the property is real property.ⁿ³ The production period, for this purpose, is the period beginning on the date on which production of the property begins, and ending on the date on which the property is ready to be placed in service or is ready to be held for sale.ⁿ⁴ In contrast, interest on debt incurred or continued to finance the acquisition and holding of property for resale need not be capitalized under the uniform capitalization rules.ⁿ⁵ Note, however, that the taxpayer may elect to capitalize interest (and other carrying charges) that, under regulations, are chargeable to the capital account with respect to the property, rather than deducting the interest currently.ⁿ⁶

Taxes other than state, local, and foreign income taxes are indirect costs that must be capitalized to the extent they are allowable as a deduction if either of the following applies:

- (1) they relate to labor, materials, supplies, equipment, land, or facilities; or
- (2) they are paid or accrued in connection with the acquisition of equipment or facilities, the equipment or facilities would qualify for depreciation, amortization, or cost-recovery allowance, and the taxes are treated as part of the cost of acquisition.ⁿ⁷

Certain other indirect costs, in addition to the above, must be capitalized with respect to the production or acquisition of property. They include: repair or maintenance of equipment or facilities;ⁿ⁸ utilities that relate to equipment or facilities;ⁿ⁹ rental of equipment, facilities, or land;ⁿ¹⁰ indirect labor and contract supervisory wages, including basic compensation, overtime, vacation, holiday, and sick-leave pay, shift differential, payroll taxes, and contributions to supplemental unemployment benefit plans;ⁿ¹¹ indirect materials and supplies;ⁿ¹² tools and equipment the costs of which are not otherwise capitalized;ⁿ¹³ depreciation, amortization, and cost-recovery allowance on equipment and facilities to the extent allowable as deductions;ⁿ¹⁴ compensation paid to officers that is attributable to services performed in connection with the production or acquisition of property (but excluding any cost of selling);ⁿ¹⁵ insurance on the property produced or acquired;ⁿ¹⁶ contributions paid to employee-benefit plans, and certain other employee-benefit expenses;ⁿ¹⁷ certain bidding expenses incurred in the solicitation of contracts that are ultimately awarded to the taxpayer;ⁿ¹⁸ engineering and design expenses to the extent that they do not qualify as deductible research and experimental expenses;ⁿ¹⁹ and certain other items, such as purchasing expenses, handling costs, and storage costs incurred with respect to the production or acquisition of property.ⁿ²⁰

[b] Excludable Indirect Costs

Indirect costs that need not be capitalized with respect to the production or acquisition of real property include amounts incurred for:

- (1) state, local, and foreign income taxes;ⁿ²¹
- (2) interest on debt incurred or continued to finance the acquisition and holding of property for resale need not be capitalized under the uniform capitalization rules.ⁿ²² However, interest on debt incurred or continued to finance the production of real property must be capitalized to the extent it is paid or incurred during the production period;ⁿ²³
- (3) research and experimental expenditures that are allowable as a deduction. To the extent that such costs may not be claimed as a deduction, they are subject to the uniform capitalization rules.ⁿ²⁴ Thus, expenditures for improvements to land that will be used for research and experimental purposes, which are not deductible, are subject to these rules.ⁿ²⁵ Depreciation or depletion deductions on property used for research or experimental purposes are considered deductible expenditures and are, therefore, not subject to the uniform capitalization rules;ⁿ²⁶ and
- (4) certain other specified indirect costs, including marketing, selling, advertising, and distribution expenses, bidding expenses incurred in the solicitation of contracts not awarded to the taxpayer, uncompensated losses, income taxes, costs attributable to strikes, warranty and product liability costs, and depreciation, amortization, and cost-recovery allowances on equipment and facilities that have been placed in service but that are temporarily idle.ⁿ²⁷

[5] Allocation of Costs to Property

[a] Allocation Methods

The taxpayer may use any one of several methods under the uniform capitalization rules to allocate direct and indirect

costs, depending on the particular cost involved.ⁿ¹ These methods are:

(1) The specific-identification (tracing) method. Each separate cost, whether direct or indirect, is identified and assigned to particular property. No formulas or percentages are needed in using this method.ⁿ²

(2) The burden-rates method. This method allocates indirect costs through the use of predetermined rates that are intended to approximate the actual amount of indirect costs incurred.ⁿ³

(3) The standard-cost method. This method of allocating costs to property involves allocations based upon preestablished standard allowances, without regard to costs actually incurred during the taxable year, but then the taxpayer must reallocate to property a pro rata portion of any net negative or net positive overhead variances and direct-cost variances.ⁿ⁴

(4) The avoided-cost method. This method determines the amount of debt that is treated as incurred or continued to finance production, based on the amount of interest expense that would have been avoided if production expenditures had not been made and the amount of the expenditures had been used to reduce the taxpayer's indebtedness. This method must be used to allocate interest expense to produced property.ⁿ⁵

(5) Any other reasonable method. Any other reasonable method may be used to allocate costs to particular property. An allocation method is considered reasonable if it capitalizes all costs that directly benefit or are incurred by reason of the production or acquisition of property. If this condition is not met, an allocation method may still be used if it meets certain conditions.ⁿ⁶

A taxpayer may elect to use one of the following simplified methods for certain costs that must be capitalized:

(1) The simplified production method may be used only for property that is produced or manufactured by the taxpayer, except property produced under a long-term contract. It may not be used for property acquired for resale.ⁿ⁷

(2) A simplified service-cost method may be used to allocate administrative, support, and service costs that directly benefit or are incurred by reason of the production of property and also benefit other of the taxpayer's activities (mixed-service costs).ⁿ⁸

(3) A separate and distinct simplified resale method may be used to account for costs of property acquired for resale.ⁿ⁹

[b] Direct Labor Costs

Direct labor costs must be allocated using the specific-identification (tracing) method or any other method that reasonably allocates those costs to property. Elements of direct labor costs (other than basic compensation) may be grouped and allocated to property in proportion to the charge for the basic compensation. All direct labor costs must be capitalized. However, they may be treated as indirect costs if they are fully capitalized as required for indirect costs.ⁿ¹⁰

[c] Direct Material Costs

The direct material costs of producing or acquiring property generally must be allocated to the property for the particular year using the taxpayer's method of accounting for the property. However, these costs may be allocated using a tracing method or any other method that reasonably allocates them.ⁿ¹¹

[d] Indirect Costs

Indirect costs of producing or acquiring property must be allocated using the specific-identification (tracing) method,

the standard-cost method, or a method using burden rates, such as ratios based on direct costs, hours, or other items, or similar formulas. Indirect costs may be allocated on the basis of direct labor costs and direct material costs, or direct labor hours, but any other basis that results in a reasonable allocation of the costs may be used.ⁿ¹²

[e] Administrative, Service, or Support Costs

The uniform capitalization rules require the allocation of administrative, support, and service costs that directly benefit production or acquisition of particular property. Also included are service costs that benefit both production or acquisition and also benefit other activities of the taxpayer (mixed-service costs). Costs incurred by a service department that do not directly benefit production or acquisition of particular property but instead benefit the taxpayer's overall management or policy-guidance functions are not included.ⁿ¹³

[f] Interest Expense

Interest on debt incurred or continued by the taxpayer to finance the production of real property (or certain tangible personal property) must be capitalized to the extent of interest costs paid or incurred during the production period.ⁿ¹⁴ Detailed rules are prescribed for the allocation of such interest expense.ⁿ¹⁵

The allocation rules for interest expense are applied to partnerships, S corporations, and other flow-through entities first at the entity level and then at the beneficiary level.ⁿ¹⁶ The rules do not apply to qualified residence interest (interest on debt secured by the taxpayer's residence or second home).ⁿ¹⁷

[g] Costs Attributable to Related Parties

Direct and indirect costs allocable to property must be capitalized even if the materials, labor, or services underlying the costs in question are provided to the taxpayer by a related person for a price that is less than the arm's-length charge.ⁿ¹⁸ For this purpose, related persons are any two or more organizations, trades, or businesses between or among which the Service may allocate income and deductions as necessary to prevent evasion of taxes or to reflect clearly the income of any of them.ⁿ¹⁹

Both the taxpayer and the related person generally must account for the transaction for tax purposes as though the taxpayer had paid the arm's-length price as a direct or indirect cost allocable to property, and the related person must include the same amount in gross income.ⁿ²⁰ This requirement does not apply, however, if the transaction is accounted for in such a manner that the costs are capitalized or deducted by the related person no earlier than they would have been if the costs had been capitalized or deducted by the taxpayer.ⁿ²¹

[6] Borrowing and Financing Costs

The costs of obtaining a loan to finance the acquisition or construction of capital assets are not subject to the uniform capitalization rules.ⁿ¹ However, these costs must be capitalized and amortized over the term of the loan.ⁿ² If a fee, or any part of a fee paid to obtain financing, is in fact an additional cost of the borrowed money, rather than a cost of services rendered to obtain the loan, the amount may be deducted as interest instead of capitalized.ⁿ³

Planning Notes

Construction Costs Subject to Strict Capitalization Rules. The uniform capitalization rules impose strict requirements on capitalization of construction costs. All direct and indirect construction period costs generally must be capitalized into the basis of the building and depreciated over the applicable recovery period. Interest on debt incurred or continued by the taxpayer to finance the construction of buildings or other real property must be capitalized to the extent of interest costs paid or incurred while the property is under construction and until it is ready to be placed in service or held for sale. Taxes other than state, local, and foreign income taxes may also have to be capitalized under certain conditions.

Interest Expense Deductions Generally Subject to Limitations on Passive Activity Losses and Nonbusiness Interest. Interest on debt incurred or continued to finance the acquisition and holding (rather than the construction) of real property for resale need not be capitalized under the uniform capitalization rules. However, interest expense deductions generally are subject to the same limitations on passive activity losses and nonbusiness interest that are applicable to the underlying debt. Specific rules allow interest and debt to be allocated by tracing the debt proceeds to specific expenditures. If interest cannot be traced under these rules, debt proceeds in cash are treated as used to make personal expenditures.ⁿ⁴

Legal Topics:

For related research and practice materials, see the following legal topics:

Real Property LawSubdivisionsGeneral OverviewTax LawFederal Income Tax ComputationDeductions for Business ExpensesGeneral OverviewTax LawFederal Income Tax ComputationDeductions for Business ExpensesCapital Expenditures (IRC secs. 263-263A)Tax LawFederal Income Tax ComputationDeductions for LossesPassive Activity Loss (IRC sec. 469)Tax LawFederal Income Tax ComputationSales & ExchangesBasis (IRC secs. 1011-1017, 1019, 1021, 1023)General Overview

FOOTNOTES:

(n1)Footnote 1. *IRC § 263A(a); Treas. Reg. § 1.263A-1(a)(1).*

(n2)Footnote 2. *Treas. Reg. § 1.263A-1(a)(1).*

(n3)Footnote 3. *Treas. Reg. § 1.263A-1(c)(4); see also IRC §§ 167, 168, 1016.* The inclusion of items in cost on a taxpayer's tax return is not a proper election to capitalize the items. Increasing the cost without explanation is not a statement indicating the item or items to be capitalized. *Govier v. Comm'r, T.C. Memo 1990-611*.

(n4)Footnote 4. *IRC § 263A(b)(2)(B).*

(n5)Footnote 5. *IRC § 263A(c), (d), (h).*

(n6)Footnote 6. *See IRC § 263A(b), (c).*

(n7)Footnote 1. *IRC § 263A(b)(1).*

(n8)Footnote 2. *IRC § 263A(g)(1).*

(n9)Footnote 3. *IRC § 263A(g)(2); Treas. Reg. § 1.263A-2(a)(1)(ii)(B).*

(n10)Footnote 4. *IRC § 263A(c)(1).*

(n11)Footnote 5. *IRC § 263A(c)(4); see IRC § 460.*

(n12)Footnote 6. *IRC §§ 263A(b)(2)(A), 1221(1).*

(n13)Footnote 1. *IRC § 263A(a).*

(n14)Footnote 2. *Temp. Treas. Reg. § 1.263A-1(e)(2).*

(n15)Footnote 1. *See IRC § 263A(a).*

(n16)Footnote 2. *Treas. Reg. § 1.263A-1(e)(3).*

(n17)Footnote 3. *IRC* § 263A(f); *Treas. Reg.* § 1.263A-8(a)(2).

(n18)Footnote 4. *IRC* § 263A(f)(4)(B).

(n19)Footnote 5. *Treas. Reg.* § 1.263A-8(b); *see IRC* § 263A(f)(1).

(n20)Footnote 6. *IRC* § 266.

(n21)Footnote 7. *Treas. Reg.* § 1.263A-1(e)(3)(ii)(L), (I).

(n22)Footnote 8. *Treas. Reg.* § 1.263A-1(e)(3)(ii)(O).

(n23)Footnote 9. *Treas. Reg.* § 1.263A-1(e)(3)(ii)(N).

(n24)Footnote 10. *Treas. Reg.* § 1.263A-1(e)(3)(ii)(K).

(n25)Footnote 11. *Treas. Reg.* § 1.263A-1(e)(3)(ii)(A), (B), (C).

(n26)Footnote 12. *Treas. Reg.* § 1.263A-1(e)(3)(ii)(E).

(n27)Footnote 13. *Treas. Reg.* § 1.263A-1(e)(3)(ii)(R).

(n28)Footnote 14. *Treas. Reg.* § 1.263A-1(e)(3)(ii)(I); *see IRC* §§ 167, 168.

(n29)Footnote 15. *Treas. Reg.* § 1.263A-1(e)(3)(ii)(B).

(n30)Footnote 16. *Treas. Reg.* § 1.263A-1(e)(3)(ii)(M).

(n31)Footnote 17. *Treas. Reg.* § 1.263A-1(e)(3)(ii)(C), (D).

(n32)Footnote 18. *Treas. Reg.* § 1.263A-1(e)(3)(ii)(T).

(n33)Footnote 19. *Treas. Reg.* § 1.263A-1(e)(3)(ii)(P).

(n34)Footnote 20. *Treas. Reg.* § 1.263A-1(e)(3)(ii)(F), (G), (H).

(n35)Footnote 21. *Treas. Reg.* § 1.263A-1(e)(3)(iii)(F); *see also Treas. Reg.* § 1.263A-1(e)(3)(ii)(L).

(n36)Footnote 22. *Treas. Reg.* § 1.263A-8(a), (b).

(n37)Footnote 23. *Treas. Reg.* § 1.263A-1(e)(3)(iii)(B).

(n38)Footnote 24. *IRC* § 263A(c)(2); *see IRC* § 174.

(n39)Footnote 25. *See IRC* §§ 174(c), 263A(b)(1), (g)(1).

(n40)Footnote 26. *See IRC* § 263A(c)(2); *see also IRC* § 174(c); *Treas. Reg.* § 1.174-2(b).

(n41)Footnote 27. *Treas. Reg.* § 1.263A-1(e)(3)(iii).

(n42)Footnote 1. *See Treas. Reg.* § 1.263A-1(f)(1).

(n43)Footnote 2. *See Treas. Reg.* § 1.263A-1(f)(2).

(n44)Footnote 3. *Treas. Reg.* § 1.263A-1(f)(3)(i).

(n45)Footnote 4. *Treas. Reg. § 1.263A-1(f)(3)(ii).*

(n46)Footnote 5. *Treas. Reg. § 1.263A-9.*

(n47)Footnote 6. *Treas. Reg. § 1.263A-1(f)(4).*

(n48)Footnote 7. *Treas. Reg. § 1.263A-2(b)(2).*

(n49)Footnote 8. *See Treas. Reg. § 1.263A-1(h).*

(n50)Footnote 9. *See Treas. Reg. § 1.263A-3(d).*

(n51)Footnote 10. *Treas. Reg. § 1.263A-1(g)(2).*

(n52)Footnote 11. *Treas. Reg. § 1.263A-1(g)(1).*

(n53)Footnote 12. *Treas. Reg. § 1.263A-1(g)(3).*

(n54)Footnote 13. *Treas. Reg. § 1.263A-1(g)(4).*

(n55)Footnote 14. *IRC § 263A(f).*

(n56)Footnote 15. *Treas. Reg. § 1.263A-9.*

(n57)Footnote 16. *IRC § 263A(f)(2)(C); see Notice 88-99, 1988-36 IRB 29 ; Hutchinson v. Comm'r, 116 T.C. 172 (2001) .*

(n58)Footnote 17. *IRC § 263A(f)(2)(B); see IRC § 163(h).*

(n59)Footnote 18. *Treas. Reg. § 1.263A-1(j)((1)(i); see IRC § 263A(i)(1).*

(n60)Footnote 19. *IRC § 482; Treas. Reg. § 1.263A-1(j)(1)(i).*

(n61)Footnote 20. *Treas. Reg. § 1.263A-1(j)(1)(i).*

(n62)Footnote 21. *Treas. Reg. § 1.263A-1(j)(1)(ii)(B); see Treas. Reg. § 1.1502-13.*

(n63)Footnote 1. *See IRC § 263A(f).*

(n64)Footnote 2. *See, e.g., Detroit Consol. Theatres, Inc. v. Comm'r, 133 F.2d 200 (6th Cir. 1942) ; Buddy Schoellkopf Prods, Inc. v. Comm'r, 65 T.C. 640 (1975) , nonacq., 1981-2 C.B. 3 ; Rev. Rul. 75-172, 1975-1 C.B. 145 ; see Fort Howard Corp. v. Comm'r, 103 T.C. 345 (1994) .*

(n65)Footnote 3. *Cagle v. Comm'r, 63 T.C. 86 (1974) , aff'd, 539 F.2d 409 (5th Cir. 1976) ; Lychuk v. Comm'r, 116 T.C. 374 (2001) .*

(n66)Footnote 4. *Temp. Treas. Reg. § 1.163-8T.*



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Current Legal Forms for Real Estate
Chapter 22 DEVELOPMENT AND SUBDIVISION
Part I. The Tax Background

26-22 Current Legal Forms for Real Estate § 22.06

§ 22.06 Elective Capitalization of Taxes and Carrying Charges

Taxpayers may elect either to deduct currently or capitalize taxes and carrying charges that are chargeable to capital account with respect to property. Election to capitalize taxes and other carrying charges may be made only for specific expenses that are otherwise deductible.

[1] Application of Elective Capitalization Rules

Taxpayers may elect to capitalize otherwise currently deductible taxes and carrying charges with respect to specified property.ⁿ¹ The particular expenses for which the election is available vary, depending on the type of property to which the expense relates.ⁿ² The election to charge an expense to a capital account must be made in the manner prescribed by the regulations.ⁿ³

A taxpayer may charge specified expenses to a capital account even if they are otherwise expressly deductible. However, an expense may not be capitalized if it is not otherwise deductible.ⁿ⁴ In addition, expenses that are otherwise treated as capital expenses must continue to be treated as such.ⁿ⁵

If a tax or carrying charge with respect to property is only in part subject to the election to capitalize, a reasonable proportion of the tax or carrying charge must be allocated to each item, based on the facts and circumstances of the case.ⁿ⁶

Example:

Sound Builders Associates, the owner of a factory on which a new addition is under construction, pays Monroe, its general manager, a salary of \$80,000, and also pays a state unemployment insurance tax of \$320 on Monroe's salary. Monroe spends 75 percent of his time on the general business of the firm and 25 percent in supervising the construction work. Sound Builders treats as expenses \$60,000 (75 percent) of Monroe's salary and charges the remaining \$20,000 (25 percent) to a capital account. Sound Builders may elect to capitalize \$80 (.25 x \$320) of the unemployment insurance tax, because the tax is otherwise deductible.

The term carrying charges is not defined in the Code or regulations. However, examples in the regulations in connection with the construction of improvements refer to certain types of taxes and interest on loans. Any item properly includable as a carrying charge must consist of deductible, rather than capital, expenditures.ⁿ⁷ Advertising expenses on unproductive property and maintenance and upkeep costs attributable to improved and unimproved unproductive real property are not carrying charges chargeable to a capital account.ⁿ⁸

[2] Items to Which Election Applies

The election to capitalize taxes and carrying charges may be made only for specific expenses that are otherwise deductible. The particular expenses for which the election may be made varies, depending on whether the property is: (1) unimproved and unproductive real property; (2) other real property; or (3) personal property.ⁿ¹

In addition, for any property, an election to capitalize may be permitted for any other otherwise deductible taxes and carrying charges with respect to property which, in the Service's opinion, are under sound accounting practices chargeable to a capital account.ⁿ² Whether interest payments are chargeable to a capital account under sound accounting principles is a question of fact.ⁿ³

[a] Unimproved and Unproductive Real Property

For unimproved and unproductive real property, there are only three types of expenses that a taxpayer may elect to charge to a capital account: (1) annual taxes; (2) interest on mortgage; and (3) other carrying charges.ⁿ⁴

Example:

In Years 1 and 2, Martha pays annual taxes and interest on a mortgage on a piece of real property. During Year 1 the property is vacant and unproductive, but throughout Year 2 Martha uses the property as a parking lot. Martha may elect to capitalize the taxes and mortgage interest paid in Year 1 but not in Year 2.ⁿ⁵

The regulations do not make clear what is unimproved and unproductive real property. The Service has indicated that land covered by subdivision plats constitutes such property until the time that each plat is recorded.ⁿ⁶

[b] Other Real Property

For real property other than unimproved and nonproductive real property, a taxpayer may elect to capitalize specified expenses that are paid or incurred for the development of the real property or for the construction of an improvement or additional improvement to it. Expenses that are chargeable to a capital account are: interest on a loan (but not the theoretical interest of taxpayers using their own funds); taxes of the owner of real property that are measured by compensation paid to employees; taxes of the owner that are imposed on the purchase of materials or on the storage, use, or other consumption of materials; and other necessary expenditures. The election is available for these expenses only until the time the development or construction work is completed.ⁿ⁷

There is no requirement that the development or construction work with respect to which these expenses are incurred make the property income-producing. Thus, the election is available for qualifying expenses on improvements to property that is already improved or producing income, such as when those expenses relate to additions that are added to a plant or factory. The election also may be taken for costs incurred in constructing a personal residence.ⁿ⁸

[3] How Election is Made and Revoked; Effective Period; Selective Use of Election with Multiple Items

In order to capitalize expenses, the taxpayer must make a proper election.ⁿ¹ The election is made by filing a statement with the original return for the year for which the election is made. The statement must indicate the item or expenses (whether with respect to the same project or to different projects) that the taxpayer elects to treat as chargeable to a

capital account.ⁿ² There is no provision for filing a retroactive provision. Thus, once the return is filed and the due date for filing it passes, the taxpayer cannot make an election by filing an amended return or filing a claim for refund.ⁿ³ An election may be made, however, on an amended return that is filed before the due date of the original return.ⁿ⁴ In addition, the Service may, on a showing of good cause by the taxpayer, grant an extension of time for making the election.ⁿ⁵

The regulations contain no provision for revoking an election to capitalize taxes and carrying charges.ⁿ⁶ However, the cases allow revocation if there is a mistake of a material fact that is inextricably connected with the election.ⁿ⁷ In addition, if no valid election was ever made but the taxpayer treated qualifying expenses as having been capitalized, the election can be revoked by filing an amended return and claiming a refund for the year the taxpayer improperly capitalized the expenses. This remedy used to be available only if the year for which the refund is claimed begins with the first year for which the expenses were incorrectly capitalized.ⁿ⁸ In many cases, the Commissioner's consent now will be required.ⁿ⁹

Planning Note

Election Available Only if Carrying Charges are Otherwise Deductible and Chargeable to Capital Account. Note that the election to capitalize taxes and carrying charges with respect to real property is available only for those items that are otherwise deductible and under regulations chargeable to capital account. Thus, if a particular carrying charge is not a deductible expenditure, or if it is not properly chargeable to a capital account, the taxpayer may not take advantage of the election.

Legal Topics:

For related research and practice materials, see the following legal topics:

Tax LawFederal Income Tax ComputationDeductions for Business ExpensesGeneral OverviewTax LawFederal Income Tax ComputationDeductions for Business ExpensesCapital Expenditures (IRC secs. 263-263A)Tax LawFederal Income Tax ComputationDeductions for Business ExpensesCarrying Charges (IRC sec. 266)

FOOTNOTES:

(n1)Footnote 1. *IRC § 266; Treas. Reg. §§ 1.263(a)-3(b)(9), 1.266-1(a); see Treas. Reg. § 1.212-1(n).*

(n2)Footnote 2. *Treas. Reg. § 1.266-1(b)(1).*

(n3)Footnote 3. *Treas. Reg. § 1.266-1(c).*

(n4)Footnote 4. *Treas. Reg. § 1.266-1(b)(2).*

(n5)Footnote 5. *Treas. Reg. § 1.266-1(b)(3).*

(n6)Footnote 6. *Treas. Reg. § 1.266-1(e); see IRC § 164.*

(n7)Footnote 7. *Rev. Rul. 56-264, 1956-1 C.B. 153 ; see Treas. Reg. § 1.266-1(d).*

(n8)Footnote 8. *Rev. Rul. 71-475, 1971-2 C.B. 304 .*

(n9)Footnote 1. *Treas. Reg. § 1.266-1(b)(1).*

(n10)Footnote 2. *Treas. Reg. § 1.266-1(b)(1)(iv).*

(n11)Footnote 3. *See Purvis v. Comm'r, 65 T.C. 1165 (1976) .*

(n12)Footnote 4. *Treas. Reg. § 1.266-1(b)(1)(i).*

(n13)Footnote 5. *Treas. Reg. § 1.266-1(d)*, Ex. (1).

(n14)Footnote 6. *Rev. Rul. 69-105, 1969-1 C.B. 88* .

(n15)Footnote 7. *Treas. Reg. § 1.266-1(b)(1)(ii)*; see also *Aboussie v. U.S.*, 779 F.2d 424 (8th Cir. 1985) ; *Rev. Rul. 81-160, 1981-1 C.B. 312* ; *Rev. Rul. 75-467, 1975-2 C.B. 93* ; *Rev. Rul. 56-264, 1956-1 C.B. 153* .

(n16)Footnote 8. *Treas. Reg. § 1.266-1(b)(1)(ii)*.

(n17)Footnote 1. *Treas. Reg. § 1.266-1(c)*.

(n18)Footnote 2. *Treas. Reg. § 1.266-1(c)(3)*.

(n19)Footnote 3. *Parkland Place Co. v. U.S.*, 248 F. Supp. 974 (D. Tex. 1964) , *aff'd*, 354 F.2d 916 (5th Cir. 1966) ; *Govier v. Comm'r, T.C. Memo 1990-611* .

(n20)Footnote 4. *Rev. Rul. 56-264, 1956-1 C.B. 153* .

(n21)Footnote 5. *Treas. Reg. § 1.9100-1*; *Rev. Proc. 79-63, 1979-2 C.B. 578* ; *superseded by Rev. Proc. 92-85, 1992-2 CB 490* .

(n22)Footnote 6. See *Treas. Reg. § 1.266-1(c)*.

(n23)Footnote 7. *Parkland Place Co. v. U.S.*, 248 F. Supp. 974 (D. Tex. 1964) , *aff'd per curiam*, 354 F.2d 916 (5th Cir. 1966) ; *Estate of Stamos v. Comm'r*, 55 T.C. 468 (1970) ; *Hodel v. Comm'r, T.C. Memo 1996-348* .

(n24)Footnote 8. *Rev. Rul. 75-56, 1975-1 C.B. 98* , *clarified by*, *Rev. Rul. 77-236, 1977-2 C.B. 84* ; *revoked by Rev. Rul. 90-38, 1990-1 CB 57* .

(n25)Footnote 9. *Rev. Rul. 90-38, 1990-1 CB 57* .



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Current Legal Forms for Real Estate
Chapter 22 DEVELOPMENT AND SUBDIVISION
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26-22 Current Legal Forms for Real Estate § 22.07

§ 22.07 Demolition of Structures

Owner or lessee cannot take current deduction for costs or other loss incurred in demolition of any real property structure. Deduction is disallowed even if taxpayer did not intend to demolish structure at time of purchase. Demolition cost or loss must be charged to capital account and added to basis of land on which demolished building was located.

No deduction is allowed for any amount expended for the demolition of a structure or for any loss sustained on account of such demolition. This disallowance rule applies whether the taxpayer is the owner or the lessee of the structure. The costs of demolition and any associated loss generally must be charged to the capital account with respect to the land on which the demolished structure was located, i.e., the disallowed amounts are treated as an adjustment to the basis of the land.ⁿ¹

Previous law allowed the taxpayer to deduct otherwise allowable costs and associated losses in connection with the demolition of any real property structure, other than a certified historic structure, if demolition was not intended when the structure was acquired. If the taxpayer acquired the structure with an intent to demolish it, such as to raze it for new development, the demolition costs and losses were treated as under current law, i.e., they were treated as an adjustment to the basis of the land on which the structure was located.ⁿ²

The taxpayer's intent was determined from the particular circumstances of each case. Factors that suggested an intention to demolish included: a short interval between acquisition and demolition; prohibitive remodeling costs; governmental restrictions upon profitable use; unsuitability for the taxpayer's business; or inability to realize a reasonable income. Factors that suggested the intent was formed after acquisition were: substantial improvements to the property; prolonged use; suitability for investment; subsequent changes in economic or business conditions; subsequent damage or loss of useful value; discovery of latent defects; decline in the taxpayer's business; condemnation; or inability to obtain materials for improvement.ⁿ³

If the intention existed at the time of purchase, it was immaterial that actual demolition was subsequently postponed or

abandoned. The entire basis of the property was allocated to the land only, and that basis was increased by the net cost of demolition or decreased by the net proceeds from demolition.ⁿ⁴ Moreover, the intent to demolish did not have to be absolute, no matter what circumstances developed, but only had to be the "dominant" intent. For example, the requisite intent existed, and the loss was disallowed, when demolition was certain except for the remote possibility that a negotiated lease would not be executed.ⁿ⁵

In determining intent in the case of an inherited residence which was later converted to business use prior to demolition, "acquisition" occurred at the time of conversion.ⁿ⁶

A taxpayer who intended at the time of acquisition to demolish the building, but temporarily used it in his business or held it for rent, was allowed to allocate part of his cost to the building. Such allocation had to take into account the intention to demolish, and could in no event exceed the present value of the right to receive rentals from the building over the period of its intended use. Depreciation could then be taken on that part of the cost over the period of intended use; if the building later was prematurely demolished, any undepreciated portion of that amount was deductible as a loss.ⁿ⁷

There was some conflict among the authorities as to proper treatment when the taxpayer had no intention to demolish the structure at the time of acquisition, but subsequently demolished it with the intention of erecting a new structure. In those cases, it was held that the remaining cost of the building was not deductible as a loss, but had to be added to the cost of the new building.ⁿ⁸ The Service, however, allowed a demolition loss, except in the case of certain leased property, when the demolition occurred as a result of a plan formed subsequent to the acquisition of the demolished buildings and the taxpayer at the time of acquisition had no intent to demolish.ⁿ⁹ For example, a taxpayer could deduct demolition loss on property which it had intended to renovate, but which it was forced to replace because of latent defects discovered after the purchase.ⁿ¹⁰

A demolition loss was disallowed even when a new building was not contemplated. For example, loss was disallowed when a contract of sale required demolition of a building on property to be used as a parking lot. The basis of the property sold was increased by the remaining basis of the building and the cost of demolition.ⁿ¹¹ But the cost of demolition was deductible, despite an express provision in the sale agreement, when the building was in the process of being torn down before commencement of negotiations for sale, and the taxpayer did not originally intend to raze it (the land and building were originally purchased for investment purposes).ⁿ¹²

Planning Note

Taxpayer's Intent No Longer Determinative. The taxpayer's intent is no longer relevant in determining whether a current deduction will be allowed for costs or other losses sustained in connection with the demolition of buildings or other real property structures. Under present law, the taxpayer must add all such costs to the basis of the land, even if he had no intent to demolish the structure when it was originally purchased.

Legal Topics:

For related research and practice materials, see the following legal topics:

Tax Law Federal Income Tax Computation Deductions for Losses General Overview Tax Law Federal Income Tax Computation Deductions for Losses General Losses (IRC sec. 165) Casualty Gains & Losses Tax Law Federal Income Tax Computation Sales & Exchanges Basis (IRC secs. 1011-1017, 1019, 1021, 1023) General Overview Tax Law Federal Income Tax Computation Sales & Exchanges Basis (IRC secs. 1011-1017, 1019, 1021, 1023) Adjustments to Basis

FOOTNOTES:

(n1)Footnote 1. *IRC § 280B*. If a structure is damaged or destroyed by a casualty, and the structure is then demolished, the cost of demolition and any loss sustained on account of the demolition must be capitalized. *1990-1 C.B. 332*,

Notice 90-21 .

(n2)Footnote 2. *IRC § 280B*, prior to amendment by Deficit Reduction Act of 1984, Pub. L. No. 98-369 § 1063; *IRC § 165(a)*; *Treas. Reg. § 1.165-3*.

(n3)Footnote 3. *Treas. Reg. § 1.165-3(c)*; see *U.S. v. Ivey*, 294 F.2d 799 (5th Cir. 1961) , *aff'g on this issue* 60-1 U.S.T.C. P 9322 (N.D. Ga. 1960); *Rider v. Comm'r*, T.C. Memo 1971-43 .

(n4)Footnote 4. *Treas. Reg. § 1.165-3(a)(1)*; *Union Bed & Spring Co. v. Comm'r*, 39 F.2d 383 (7th Cir. 1930) ; *Nash v. Comm'r*, 60 T.C. 503 (1973) ; *Gilman v. Comm'r*, 72 T.C. 730 (1979) .

(n5)Footnote 5. *Meyer v. U.S.*, 247 F. Supp. 939 (D. Mass. 1965) , *aff'd per curiam*, 362 F.2d 264 (1st Cir. 1966) .

(n6)Footnote 6. *McBride v. Comm'r*, 50 T.C. 1 (1968) ; *Clayton v. Comm'r*, T.C. Memo 1981-433 .

(n7)Footnote 7. *Treas. Reg. § 1.165-3(a)(2), (3)*; see *Nash v. Comm'r*, 60 T.C. 503 (1973) ; *Mechanics & Merchants Bank v. U.S.*, 164 F. Supp. 246 (Ct. Cl. 1958) ; *Lynchburg Nat'l Bank & Trust Co. v. Comm'r*, 20 T.C. 670 (1953) , *aff'd on other issue*, 208 F.2d 757 (4th Cir. 1953) ; *Cleveland Electric Illuminating Co. v. U.S.*, 6 Cl. Ct. 718 (1984) .

(n8)Footnote 8. *Comm'r v. Appleby's Estate*, 123 F.2d 700 (2d Cir. 1941) , *aff'g*, 41 B.T.A. 18 (1940) .

(n9)Footnote 9. *Treas. Reg. § 1.165-3(b)*.

(n10)Footnote 10. *Parma Co. v. Comm'r*, 18 B.T.A. 429 (1929) ; *Piedmont National Bank v. U.S.*, 162 F. Supp. 919 (W.D. S.C. 1958) .

(n11)Footnote 11. *Standard Linen Serv., Inc. v. Comm'r*, 33 T.C. 1 (1959) ; see *Fox v. Comm'r*, 50 T.C. 813 (1968) ; *Simmons Mill & Lumber Co. v. Comm'r*, T.C. Memo 1963-185 .

(n12)Footnote 12. *Murray v. Comm'r*, T.C. Memo 1965-148 , *aff'd on other issue*, 370 F.2d 568 (4th Cir. 1967) , *cert. denied* 389 U.S. 834 .



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Current Legal Forms for Real Estate
Chapter 22 DEVELOPMENT AND SUBDIVISION
Part I. The Tax Background

26-22 Current Legal Forms for Real Estate § 22.08

§ 22.08 Accounting for Short-Term Construction Contracts

Taxpayers may elect to use cash or accrual method to account for income and expenses attributable to short-term construction contracts. Both methods are generally available to all taxpayers for income tax purposes, except that cash method may not be used by C corporations, partnerships and limited liability companies which have a C corporation as a partner, and tax shelters.

[1] Accounting Methods Generally

A taxpayer generally computes taxable income under the same method of accounting that he regularly uses to compute income in keeping his books.ⁿ¹ If no method of accounting has been regularly used, or if the method used does not clearly reflect income, taxable income must be computed under a method that, in the Service's opinion, clearly reflects income.ⁿ²

Subject to the above rules, a taxpayer may compute taxable income under the cash receipts and disbursements method (cash method), an accrual method, or any other method (or combination of methods) permitted by the Code or regulations.ⁿ³ A taxpayer engaged in more than one trade or business may, in computing taxable income, use a different method of accounting for each trade or business.ⁿ⁴ Once a method of accounting is selected, a change to a different method requires consent of the Service.ⁿ⁵

The cash and accrual methods are not available for taxpayers who enter into long-term contracts. A long-term contract is a contract for manufacturing, building, installing, or constructing property that is not completed within the same tax year in which it is made. Taxpayers must use one of several special accounting methods to report income from such contracts.ⁿ⁶ For a discussion of long-term contracts, including their definition, permissible accounting methods, and taxpayers eligible to use those methods, see *Sections 22.09 through 22.16*.

[2] Cash Method

Short-term construction contracts, i.e., those that are completed within the tax year in which the contract is entered into,

generally do not create complications for cash basis taxpayers. Under the cash method, income is reported for the year in which it is actually or constructively received, and expenditures generally are deducted for the year in which they are actually made.ⁿ¹ Therefore, taxpayers who use the cash method to account for income and expenses for short-term construction contracts include payments in income when received (either before or after completion of the contract) and take deductions for expenses when actually paid.

Three types of taxpayers may not use the cash method of accounting:ⁿ²

- (1) C corporations;
- (2) partnerships and limited liability companies which have a C corporation as a partner; and
- (3) tax shelters.ⁿ³

The following taxpayers may elect to use the cash method of accounting:ⁿ⁴

- (1) individuals;
- (2) sole proprietorships;
- (3) qualifying partnerships and limited liability companies (i.e., partnerships and limited liability companies that do not have a corporate partner other than an S corporation);
- (4) S corporations;
- (5) certain farming businesses;
- (6) qualified personal service corporations; and
- (7) corporations or partnerships that meet a \$5 million gross receipts test.ⁿ⁵

The use of a method of accounting that records some items on the cash method is considered the use of the cash method. Thus, a corporation (other than an S corporation) that uses a combination of accounting methods, including the cash method, is subject to the limitation on use of the cash method rules.ⁿ⁶

Notwithstanding the above rules, the Service may require the use of an accounting method that clearly reflects income, or that a taxpayer secure the Service's consent before changing its method of accounting (see *Section 22.08[1]* above). For example, a taxpayer using the cash method may be required to change to an accrual method of accounting because that method clearly reflects the taxpayer's income, even though the taxpayer is not otherwise prohibited from using the cash method. Similarly, a taxpayer using an accrual method may not change to the cash method, even though it is not otherwise prohibited from using that method, unless it first obtains the Service's consent and the Service believes that the use of the cash method clearly reflects the taxpayer's income.ⁿ⁷ The Service, however, may not change a taxpayer's accounting method to secure more tax if that method clearly reflects income and is used consistently and in accordance with generally accepted accounting principles.ⁿ⁸

If a taxpayer is required by the above rules to change its method of accounting for any tax year, the change is treated as initiated by the taxpayer and made with the consent of the Service. Any adjustments required by this change in accounting methodⁿ⁹ must be included in income over a period of not more than four years.ⁿ¹⁰

[3] Accrual Method

Under an accrual method of accounting, income is generally reported when all events have occurred that fix the right to receive it and the amount can be determined with reasonable accuracy, regardless of when it is received.ⁿ¹ Any method used by the taxpayer in determining when income is to be accounted for is acceptable if that method accords with generally accepted accounting principles, is consistently used by the taxpayer from year to year, and is consistent with the regulations. For example, under an accrual method, a taxpayer engaged in manufacturing may account for the sale of an item when it is shipped, delivered, or accepted, or when title to it passes to the purchaser, whether or not billed, depending upon the method regularly employed in keeping the taxpayer's books.ⁿ² Different rules may apply, however, with respect to advance payments by taxpayers that use an accrual method of accounting for purchases and sales of goods or a long-term contract method of accounting (see *Sections 22.09 through 22.16*).ⁿ³

Deductions are allowed for the tax year in which all the events have occurred that establish the fact of the liability giving rise to the deduction and the amount can be determined with reasonable accuracy.ⁿ⁴ (However, any expenditure that results in the creation of an asset having a useful life which extends substantially beyond the close of the tax year may not be deductible, or may be deductible only in part, for the tax year in which it is incurred.ⁿ⁵) The "all events" test is not treated as met until "economic performance" occurs.ⁿ⁶ Economic performance requires the actual providing or use of property or services. Accordingly, if the taxpayer's liability arises out of the providing of property or services to him by another person, economic performance occurs as that person provides them. If the taxpayer's liability requires him to provide property or services, economic performance occurs as he provides them.ⁿ⁷ An exception to the economic performance requirement allows certain recurring items to be currently deductible. This exception applies if the all events test is otherwise met during the tax year, economic performance occurs within a reasonable time (not exceeding eight and one-half months) after the close of that year, the taxpayer consistently treats items of such kind as incurred in the year in which the all events test is otherwise met, and the recurring item is not a material item or it results in a better matching of income and deductions.ⁿ⁸

Some controversy exists as to the manner in which a taxpayer who is eligible to use an accrual method of accounting must report income received under cost-plus contracts and other similar arrangements. An unpaid amount under a cost-plus contract generally is not accrued income until there is final agreement on proper costs.ⁿ⁹ However, a contractor under a cost-plus contract is required to accrue the full construction fee when the work is completed if there is not a substantial contingency that a portion of the fee may later have to be repaid.ⁿ¹⁰ A contractor does not have to report in the year of receipt partial payments received under a cost-plus government contract if the payments are made before the items are inspected or approved and are not related to the progress made under the contract.ⁿ¹¹

An accrual basis taxpayer working on a "unit price contract" may, under his normal accounting method, report income from each unit as it is completed.ⁿ¹² However, even if the final contract price is based upon complete units, the contractor must accrue amounts received on the basis of agreed estimates during construction.ⁿ¹³

Planning Note

Cash and Accrual Methods Not Available for Long-Term Contracts. A taxpayer may use the cash or an accrual method of accounting for a construction contract only if the contract is completed within the tax year in which it is entered. Neither method is available if the contract is not completed within that year, even if the contract term is less than one year. Such a contract is considered to be a long-term contract, and items of income from and costs allocable to it can be taken into account only under one of several other special accounting methods.

Legal Topics:

For related research and practice materials, see the following legal topics:

Real Property Law Construction Law General Overview Real Property Law Construction Law Contracts Tax Law Federal Income Tax Computation Tax Accounting Accrual Method (IRC secs. 446, 447, 451, 461, 467) General Overview Tax

LawFederal Income Tax ComputationTax AccountingAccrual Method (IRC secs. 446, 447, 451, 461, 467)Constructive ReceiptTax LawFederal Income Tax ComputationTax AccountingAccrual Method (IRC secs. 446, 447, 451, 461, 467)Taxable Year of DeductionTax LawFederal Income Tax ComputationTax AccountingCash Basis Method (IRC secs. 446, 448, 451, 461)General OverviewTax LawFederal Income Tax ComputationTax AccountingCash Basis Method (IRC secs. 446, 448, 451, 461)LimitationsTax LawFederal Income Tax ComputationTax AccountingCash Basis Method (IRC secs. 446, 448, 451, 461)Taxable Year of Deduction

FOOTNOTES:

(n1)Footnote 1. *IRC § 446(a); Treas. Reg. § 1.446-1(a)(1).*

(n2)Footnote 2. *IRC § 446(b); Treas. Reg. § 1.446-1(a), (b).*

(n3)Footnote 3. *IRC § 446(c); Treas. Reg. § 1.446-1(c).*

(n4)Footnote 4. *IRC § 446(d); Treas. Reg. § 1.446-1(d).*

(n5)Footnote 5. *IRC § 446(e); Treas. Reg. § 1.446-1(e).*

(n6)Footnote 6. *IRC § 460.*

(n7)Footnote 1. *IRC §§ 451(a), 461(a); Treas. Reg. §§ 1.446-1(c)(1)(i), 1.451-1(a), 1.451-2, 1.461-1(a)(1).*

(n8)Footnote 2. *IRC § 448(a), (d)(3).*

(n9)Footnote 3. *Temp. Treas. Reg. § 1.448-1T(a), (b).*

(n10)Footnote 4. *IRC § 448.*

(n11)Footnote 5. *Temp. Treas. Reg. § 1.448-1T(a), (d)-(f).*

(n12)Footnote 6. *Temp. Treas. Reg. § 1.448-1T(a)(4).*

(n13)Footnote 7. *Temp. Treas. Reg. § 1.448-1T(c).*

(n14)Footnote 8. *Kennedy v. Comm'r, 89 T.C. 98 (1987) ; Dayton Hudson Corp. v. Comm'r, 153 F.3d 660 (8th Cir. 1998) .*

(n15)Footnote 9. *See IRC § 481.*

(n16)Footnote 10. *IRC § 448(d)(7); Temp. Treas. Reg. § 1.448-1T(g), (h).*

(n17)Footnote 1. *Treas. Reg. §§ 1.446-1(c)(1)(ii), 1.451-1(a).*

(n18)Footnote 2. *Treas. Reg. § 1.446-1(c)(1)(ii).*

(n19)Footnote 3. *Treas. Reg. § 1.451-5.*

(n20)Footnote 4. *IRC § 461(h)(4); Treas. Reg. §§ 1.446-1(c)(1)(ii), 1.461-1(a)(2).*

(n21)Footnote 5. *Treas. Reg. § 1.461-1(a)(2).*

(n22)Footnote 6. *IRC § 461(h)(1).*

(n23)Footnote 7. *IRC § 461(h)(2).*

(n24)Footnote 8. *IRC § 461(h)(3)*.

(n25)Footnote 9. *U.S. v. Harmon*, 205 F.2d 919 (10th Cir. 1953) ; see *Jones v. Comm'r*, TC Memo 1960-115 ,
rev'd on other issue, 306 F.2d 292 (5th Cir. 1962) .

(n26)Footnote 10. *Reed v. Comm'r*, T.C. Memo 1963-173 .

(n27)Footnote 11. *Consolidated-Hammer Dry Plate & Film Co. v. Comm'r*, 317 F.2d 829 (7th Cir. 1963) , *rev'd*,
T.C. Memo 1962-97 .

(n28)Footnote 12. *Anderson-Dougherty-Hargis Co. v. U.S.*, 96 F. Supp. 404 (N.D. Cal. 1950) .

(n29)Footnote 13. *Dally v. Comm'r*, 20 T.C. 894 (1953) , *aff'd*, 227 F.2d 724 (9th Cir. 1955) , *cert. denied* 351
U.S. 908 ; see *Daley v. U.S.*, 243 F.2d 466 (9th Cir. 1957) , *cert. denied*, 355 U.S. 832 ; *Marquardt Corp. v. Comm'r*,
39 T.C. 443 (1962) ; *Berger Engineering. Co. v. Comm'r*, T.C. Memo 1961-292 ; see also *Broadaway v. Comm'r*, 111
F.3d 593 (8th Cir. 1997) .



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Current Legal Forms for Real Estate

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Current Legal Forms for Real Estate
Chapter 22 DEVELOPMENT AND SUBDIVISION
Part I. The Tax Background

26-22 Current Legal Forms for Real Estate § 22.09

§ 22.09 Accounting for Long--Term Contracts: Overview

Taxpayers engaged in production of property must account for items of income from and costs allocable to long-term contracts under percentage of completion method.

The Code contains special accounting rules for long-term contracts.ⁿ¹ A long-term contract is a contract for the manufacture, building, installation, or construction of property, which is not completed within the same tax year in which it is entered. The term of the contract may be for less than one year. For a discussion of what are long-term contracts, see § 22.10.

Items of income from and costs allocable to long-term contracts generally must be taken into account under the percentage of completion method. Under the percentage of completion accounting method, a taxpayer determines the portion of the long-term contract that is completed during the tax year and reports gross income for that percentage of the entire contract. The taxpayer must deduct all allocable costs in the tax year they are incurred. For a discussion of the percentage of completion method, see § 22.11.

Certain small construction contracts, including home construction contracts, do not have to be accounted for using the long-term contract rules. For a discussion of the accounting methods that may be used for those contracts, see § 22.12.

Taxpayers that use the percentage of completion method of accounting for long-term contracts must make adjustments for overpayments or underpayments of tax. When the contract is completed, the taxpayer must pay interest on the underpayment, or is entitled to receive interest on the overpayment. The amount of interest is determined by a look-back adjustment. This look-back interest adjustment rule is examined in § 22.13.

Income and costs may be accounted for under the long-term contract methods only if those items are allocable to long-term contracts. Application of the cost allocation rule in accounting for direct and indirect costs is *considered in* § 22.14.

Legal Topics:

For related research and practice materials, see the following legal topics:

Contracts LawTypes of ContractsConstruction ContractsTax LawFederal Income Tax ComputationTax AccountingGeneral OverviewTax LawFederal Income Tax ComputationTax AccountingLong Term Contracts (IRC sec. 460)

FOOTNOTES:

(n1)Footnote 1. *IRC § 460.*



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Current Legal Forms for Real Estate

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Current Legal Forms for Real Estate
Chapter 22 DEVELOPMENT AND SUBDIVISION
Part I. The Tax Background

26-22 Current Legal Forms for Real Estate § 22.10

§ 22.10 Accounting for Long--Term Contracts: Determining Which Contracts are Affected

Long-term contracts are contracts for building, installation, or construction of property, which are not completed within same tax year they are made, even if term of contract is less than one year. Agreement for related services is not considered long-term contract.

A long-term contract is any contract that (1) is for the building, installation, or construction of property, and (2) is not completed within the tax year in which the parties enter into it, regardless of its term.ⁿ¹ Special rules apply to activities between related parties, and in determining whether an agreement should be severed or whether several agreements should be aggregated in order to determine the completion date for accounting purposes.ⁿ²

The long-term contract accounting methods apply only to accounting for income and expenses attributable to long-term contracts. Other income and expense items must be accounted for another proper method of accounting.ⁿ³ See § 22.08.

[1] Term of Contract

Long-term contract accounting may be used for any contract that is not completed within the tax year in which it is entered.ⁿ¹ Such accounting may be used for contracts that span two years.ⁿ² The contract term may be less than one year, as long as performance begins in one tax year and ends in a subsequent tax year.ⁿ³

In determining whether a contract is completed in the tax year in which it is made, all activities of the taxpayer and any related parties in connection with the manufacture, building, installation, or construction must be taken into account.ⁿ⁴

A contract that satisfies the definition of a long-term contract is considered to be such even if the taxpayer reasonably believed at the time the contract was entered into that it would be completed within the same tax year. In other words, the key element in determining whether an agreement is a long-term contract is when the agreement is completed, not when the taxpayer expects it to be completed.ⁿ⁵

[2] Segregation and Aggregation of Long-Term Contracts

[a] Treatment for Accounting Purposes

Under segregation and aggregation of contract rules, an agreement may be treated as more than one contract ("severed"), and two or more agreements may be treated as a single contract ("aggregated") to determine the completion date of a long-term contract for accounting purposes.ⁿ¹ Although no regulations have been issued for the segregation or aggregation of long-term contracts, the pre- *IRC Section 460* accounting regulations, which are comparable to current Code law, are generally controlling in this area.ⁿ²

Two or more contracts that are interdependent, due to pricing or otherwise, may be treated as one contract.ⁿ³ On the other hand, an agreement that is properly treated as an aggregation of separate contracts may be considered as two or more independent contracts.ⁿ⁴

Prior to the enactment of the long-term contract accounting provision, the Service alone was authorized to determine whether to treat interdependent agreements as one contract or an aggregated agreement as several contracts.ⁿ⁵ Under current law, however, a taxpayer is permitted and required to sever and aggregate contracts.ⁿ⁶ Future regulations may require any taxpayer that severs or aggregates contracts to attach a statement to its federal income tax return for the first year in which it has entered into two or more agreements that are properly treated as a single contract, or a single agreement that is properly treated as more than one contract. Such a statement may be required to describe the criteria used by the taxpayer in determining to sever or aggregate the agreements.ⁿ⁷

One means by which a party may alter the treatment of a single agreement is by agreeing to an increase in the number of items to be supplied under the initial contract. An agreement may be modified in this manner, for example, if the other party exercises an option or issues a change order for the delivery of additional items. The first party may then treat the agreement as several independent contracts for tax accounting purposes.ⁿ⁸

Example:

Marklin is a contractor who constructs office buildings pursuant to long-term contracts. He reports income on a calendar-year basis using a long-term contract accounting method. In Year 1, Marklin enters into a contract to build a ten-story office building for Amalgamated Bank. During Year 2, Marklin completes the building structure and finishes the first three floors, which Amalgamated then accepts and occupies to operate its banking business. Because the contract is primarily for completion of a single unit--the entire office building--the Service treats it as one agreement for accounting purposes.ⁿ⁹

Before the end of Year 2, Amalgamated informs Marklin that business conditions have changed and that Amalgamated will not require completion of the remaining seven floors for at least two years. Marklin substantially stops all work on the building, and the parties enter into a new agreement under which Marklin will complete the project at the times requested by Amalgamated. In reporting income from the contract, Marklin may now treat the original contract, as modified by the subsequent agreement, as two separate contracts: one for construction of a ten-story building and completion of the first three floors, and one for completion of the remaining floors.ⁿ¹⁰

The combination or severance of long-term contracts is allowed to determine a completion date for them that will ensure that the accounting method clearly reflects the income received. That is, certain contracts may be severed or aggregated to prevent the taxpayer from unreasonably deferring income or from prematurely claiming a deduction for loss.ⁿ¹¹ This treatment is not meant to be used as a means of separating elements of an agreement that are ineligible for long-term contract accounting from those that are eligible. The factors applicable in determining whether to combine or sever a contract are therefore distinct from those considered with respect to ineligibility.ⁿ¹²

[b] Factors

Although not specified in the Code,ⁿ¹³ under the regulations, which the Service generally applies to the Code

aggregation rules, a decision to combine or sever long-term contracts depends on all of the facts and circumstances with regard to each contract.ⁿ¹⁴ The following factors are considered in making this determination: whether the parties have agreed to separately deliver or accept each of the units to be completed under the contract; whether the units are independently priced; whether there is a business purpose for entering into one agreement rather than several, or several contracts rather than one; whether the customary commercial practice is to make single or separate contracts; whether the parties have afforded similar treatment to any previous arrangements between themselves; whether the nature of the subject matter of the contract is such that the units to be completed are distinct from each other or interrelated; whether the parties subsequently increase the total number of units to be constructed, manufactured, or installed under the original contract; and whether the anticipated time lapse between the completion of each unit is brief or lengthy.ⁿ¹⁵ These factors need not all be present or absent for a contract to be combined or severed; the determination is made by balancing these factors with respect to each particular contract.ⁿ¹⁶

The Service generally will not sever aggregated agreements unless the contracts permit the separate delivery or acceptance of portions of the subject matter, or there is a business purpose for entering into several contracts but not for making a single agreement.ⁿ¹⁷ However, the existence of either factor does not automatically require that the agreement be severed when other contrary factors are present.ⁿ¹⁸

Example:

In Year 1, Collins, a contractor, executes an agreement with Lots, Inc., a real estate developer, to build three houses. The houses are different in design and are located in different suburbs of a large city. One house is to be completed and accepted each year, beginning in Year 2 and ending in Year 4. The portion of the total contract price attributable to each house can reasonably be determined. Because the agreement provides for the separate delivery and acceptance of three distinct units, the Service may sever the agreement and treat it as three individual contracts in applying the long-term contract accounting method.ⁿ¹⁹

With respect to the business purpose factor, the Service may consider whether the aggregated agreements concern two or more subject matters, none of which can be readily determined as the primary subject. The fact that a contract covers more than one item but has no primary subject matter is evidence that a reasonable business person would have entered into a single contract, not separate agreements.ⁿ²⁰ In this event, the Service will not sever the contract.ⁿ²¹ On the other hand, when there is a primary subject, the contract may be divided if at the end of the tax year the contract has been completed with respect to the primary subject but not the other item.ⁿ²²

Example:

In Year 1, Guaranteed Savings, a financial corporation, engages Solid Construction, Inc. to build a ten-story office building. In Year 2, Solid Construction finishes the building structure plus the first three floors. Guaranteed Savings accepts the completed floors and proceeds to move its offices into them. Construction is continued on the remaining floors and is completed and accepted in Year 3. Even though various portions of the building were accepted on different dates, the Service finds that the subject of the contract was to complete both the building structure and each floor; there is no primary and secondary subject matter. Moreover, the parties had a business purpose to enter into a single contract, rather than several agreements, i.e., the construction of an entire office building. Consequently, the Service will not sever the contract for tax accounting purposes.ⁿ²³

Several interdependent agreements are usually not combined unless there is a business purpose for entering into a single agreement, but not for making separate contracts.ⁿ²⁴ For example, a party who makes two related contracts is still deemed to have a business purpose to form a single contract if, under similar circumstances, a reasonable business person would not have made one agreement but for entering into the other. Thus, a party may agree to one contract despite its low profit margin if the party also makes a second agreement with the same person, but with more favorable terms that increase the overall potential profit. The Service may consider both agreements to be one contract for tax

accounting purposes.ⁿ²⁵ However, interdependent contracts are not treated as a single agreement if the parties, after making one agreement, simply expect to execute a second contract. Thus, if a party would not have agreed to the terms of a contract but for a mere expectation that the parties would enter into further agreements, the Service will refuse to combine the contracts in determining the completion date.ⁿ²⁶

The pricing formula of an agreement may also determine whether it should be treated as one or several contracts.ⁿ²⁷ For example, if a single agreement provides for the delivery of several similar items, and the first units to be produced are priced under a cost-plus incentive fee arrangement, while subsequent ones are priced under a fixed-price arrangement, the difference in the pricing may indicate that the agreement should be severed.ⁿ²⁸

[3] Building, Installation, or Construction

[a] What is Covered

A long-term contract, for purposes of the long-term accounting rules, is any contract for the building, installation, or construction of property, if the contract is not completed in the tax year in which it is entered.ⁿ¹ Any contract for the production or installation of real property, or for any improvements to real property, is considered to meet this definition.

A contract may be considered to be for the building, installation, or construction of property even if it provides that the contractor is to retain title to, control over, and risk of loss with respect to the property until it is completed and accepted by the customer, and even if the parties characterize the contract as a contract for the sale of property. The building, installation, or construction of the subject matter of the contract must be necessary in order for the taxpayer's contractual obligations to be fulfilled, and the building, installation, or construction must not be completed at the time the contract is entered. If these conditions are met, it is immaterial whether the customer has title to, control over, or risk of loss with respect to the property, or whether the parties characterize their agreement as a contract for the sale of property.ⁿ²

Example 1

: Arvin Builders, Inc., a calendar year builder with average annual gross receipts of more than \$10 million, begins construction of a house in October, Year 1, on speculation that it will find a buyer. One month later, Arvin enters into a contract with Bernice under which Bernice agrees to purchase the house upon completion of construction. The construction of the house is not complete on December 31, Year 1. Arvin's contract with Bernice is a contract for the building or construction of property for purposes of the long-term accounting rules, even if the parties characterize the contract as a contract for the sale of the house, since Arvin must build or construct property to comply with the contract.

Note, however, that if the contract is a "home construction contract" within the meaning of the long-term accounting rules, Arvin is not required to use the percentage of completion method of accounting for regular tax purposes. Arvin must account for the contract using the uniform capitalization rules (see *Section 22.12* for home construction contracts and other small construction contracts).ⁿ³

Example 2

: Caldor, Inc., a calendar year home builder with average annual gross receipts of more than \$10 million, enters into a contract with Davis on July 1, Year 1 to build a house for him. Davis has title to the underlying lot, provides Caldor, Inc. with all materials, and has title to the house while it is under construction. The contract is completed in February Year 2. The contract is one for the construction of property, even though Caldor, Inc. does not have title to the subject matter of the contract. It is, therefore, a long-term contract within the meaning of the statute.ⁿ⁴

[b] Exclusion of Services and Maintenance

The Service has consistently held that income from the provision of services cannot be reported under the long-term contract methods, even if it is related to building, installation, or construction methods. The Service's reasoning is that a contract for services does not require a contractor to build, install, or construct tangible property, and therefore there is not the same risk of loss from increased costs of materials during completion of the contract.ⁿ⁵

The Service has ruled that the following service providers are not entitled to use long-term contract accounting because they do not actually construct, build, or install property: engineers;ⁿ⁶ architects;ⁿ⁷ providers of engineering and construction management services;ⁿ⁸ and painting contractors involved in maintenance and repair.ⁿ⁹

The regulations include an express requirement for the allocation of income and expenses between service activities and long-term contract activities. Income and expenses from a service agreement must be excluded from a long-term contract and accounted for under another method, even if the service activities cannot be readily separated from the construction work.ⁿ¹⁰

Maintenance operations also are generally excluded from the long-term contract accounting rules. Thus, if a construction contract obligates the contractor to maintain the property for a period of time after construction has been completed, the contractor cannot account for the maintenance-related income under a long-term contract method.ⁿ¹¹ The Service informally indicated, however, that painting of a building during the initial construction, as opposed to subsequent maintenance and repair, may be sufficiently interrelated to construction work to qualify for long-term contract treatment.ⁿ¹²

[4] When Activities of Related Parties Constitute Long--Term Contract

Certain activities of related parties must be accounted for under the long-term accounting rules even though the activities do not, by themselves, constitute a long-term contract. If the related party enters into a long-term contract with a customer, and if the taxpayer performs any activities for or on behalf of the related person that benefit or are performed by reason of that contract, the taxpayer must account under the long-term contract methods for its income and costs attributable to those activities. Such activities include, for example, the production of items (such as components or subassemblies) that are reasonably expected to be used in the production of the subject matter of the related party's contract. The taxpayer must account for those activities under the long-term accounting rules regardless of whether the activities, considered by themselves, constitute manufacturing, building, construction, or installation of property, involve the manufacture of items that either are unique or require more than 12 months to complete, span the end of the taxpayer's tax year, or are performed under a contract with the related party.ⁿ¹

The taxpayer must treat as the total expected contract price the amount to be paid by the related party if that amount represents an arm's length charge. If not, the taxpayer must use an arm's length charge as the total expected contract price. This charge must reflect both the taxpayer's contribution to the long-term contract being performed by the related party, and the contract price to be received by that party. In addition, if the taxpayer treats as total expected contract price an arm's length charge that differs from the actual amount that the related party is obligated to pay, the related party must treat that charge as the cost it incurs with respect to the taxpayer's activities.ⁿ²

Planning Note

Requirements for Manufacturing Contracts Do Not Apply To Other Long-Term Contracts. The additional conditions used to determine whether a manufacturing contract for personal property is a long-term contract (i.e., that the property must be unique or normally require more than 12 months to complete) do not apply in determining whether a contract for the building, installation, or construction of real property is a long-term contract. For example, a contract to build a house or other building is a long-term contract if it is not completed in the tax year in which it is entered into, because the requirements applicable to manufacturing do not apply to building, construction, or installation contracts.ⁿ³ However, a long-term contract may also include a manufacturing contract, i.e., a contract for

the production of personal property.

Legal Topics:

For related research and practice materials, see the following legal topics:

Real Property Law Construction Law General Overview Real Property Law Construction Law Contracts Tax Law Federal Income Tax Computation Tax Accounting General Overview Tax Law Federal Income Tax Computation Tax Accounting Long Term Contracts (IRC sec. 460)

FOOTNOTES:

(n1)Footnote 1. *IRC § 460(f)(1)*.

(n2)Footnote 2. *IRC § 460(f)(3)*.

(n3)Footnote 3. *Treas. Reg. § 1.451-3(a)(3)*.

(n4)Footnote 1. *IRC § 460(f)(1)*.

(n5)Footnote 2. *Daley v. U.S.*, 243 F.2d 466 (9th Cir. 1957), *cert. denied*, 355 U.S. 832; *Bent v. Comm'r*, 56 F.2d 99 (9th Cir. 1932); *Sam W. Emerson Co. v. Comm'r*, 37 T.C. 1063 (1962); *LA Wells Constr. Co. v. Comm'r*, 46 B.T.A. 302 (1942), *aff'd per curiam* 134 F.2d 623 (6th Cir. 1943), *cert. denied* 319 U.S. 771; Notice 89-15, 1989-1 CB 634; *Foothill Ranch Co. Pshp. v. Comm'r*, 110 T.C. 94 (1998).

(n6)Footnote 3. *IRC § 460(f)(1)*; *Treas. Reg. § 1.451-3(b)(1)(i)*.

(n7)Footnote 4.

Notice 89-15, 1989-7 IRB 9, Q & A-2.

(n8)Footnote 5.

Notice 89-15, 1989-7 IRB 9, Q & A-3. "Completion" means final completion and acceptance, so that the look-back method is generally applied no later than the year in which the subject matter of the long-term contract is available for use, even if the taxpayer expects to incur additional contract costs in a year subsequent to the completion year. *Treas. Reg. § 1.460-6(c)*.

(n9)Footnote 1. *IRC § 460(f)(3)*.

(n10)Footnote 2. *Treas. Reg. § 1.451-3(e)*; Notice 89-15, 1989-7 IRB 9, Q & A-37.

(n11)Footnote 3. *IRC § 460(f)(3)(A)*; *Treas. Reg. § 1.451-3(a)(4)*.

(n12)Footnote 4. *IRC § 460(f)(3)(B)*; *Treas. Reg. § 1.451-3(a)(4)*.

(n13)Footnote 5. *Treas. Reg. § 1.451-3(e)(1)(i)(c)*.

(n14)Footnote 6. *IRC § 460(f)(3)*; Notice 89-15, 1989-7 IRB 9, Q & A-38.

(n15)Footnote 7.

Notice 89-15, 1989-7 IRB 9, Q & A-38.

(n16)Footnote 8. *Treas. Reg. § 1.451-3(e)(1)(viii)*; see Notice 89-15, 1989-7 IRB 9, Q & A-11.

(n17)Footnote 9. Treas. Reg. § 1.451-3(e)(2), Ex (4).

(n18)Footnote 10. Treas. Reg. § 1.451-3(e)(2), Ex (5).

(n19)Footnote 11. Treas. Reg. § 1.451-3(e)(1)(i)(A).

(n20)Footnote 12. Treas. Reg. § 1.451-3(e)(1)(i)(B).

(n21)Footnote 13. *See IRC § 460(f)(3).*

(n22)Footnote 14. Treas. Reg. § 1.451-3(e)(1)(ii); Notice 89-15, 1989-7 IRB 9 , Q & A-37.

(n23)Footnote 15. Treas. Reg. § 1.451-3(e)(1)(ii).

(n24)Footnote 16. Treas. Reg. § 1.451-3(e)(1)(ii), (iii), (v); *see Helvering v. Nat'l Contracting Co.*, 69 F.2d 252 (8th Cir. 1934) ; *see also Sierracin Corp. v. Comm'r*, 90 T.C. 341 (1988) .

(n25)Footnote 17. Treas. Reg. § 1.451-3(e)(1)(iii), (v); *see S. Rep. 494*, 97th Cong., 2d Sess. 200 (1982).

(n26)Footnote 18. Treas. Reg. § 1.451-3(e)(1)(ii), (iii), (v).

(n27)Footnote 19. Treas. Reg. § 1.451-3(e)(2), Ex. (1).

(n28)Footnote 20. Treas. Reg. § 1.451-3(e)(1)(v).

(n29)Footnote 21. *See Treas. Reg. § 1.451-3(e)(1)(v).*

(n30)Footnote 22. Treas. Reg. § 1.451-3(b)(2)(ii), (e)(2), Ex. (7).

(n31)Footnote 23. Treas. Reg. § 1.451-3(e)(2), Ex. (4).

(n32)Footnote 24. Treas. Reg. § 1.451-3(e)(1)(vi).

(n33)Footnote 25. Treas. Reg. § 1.451-3(e)(1)(vii).

(n34)Footnote 26. *Id.*

(n35)Footnote 27. Treas. Reg. § 1.451-3(e)(1)(iv); *see Helvering v. Nat'l Contracting Co.*, 69 F.2d 252 (8th Cir. 1934) ; *see also Sierracin Corp. v. Comm'r*, 90 T.C. 341 (1988) .

(n36)Footnote 28. Treas. Reg. § 1.451-3(e)(1)(iv); *see S. Rep. 494*, 97th Cong., 2d Sess. 200 (1982).

(n37)Footnote 1. *IRC § 460(f)(1).*

(n38)Footnote 2.

Notice 89- 15, 1989-7 IRB 9 , Q & A-4.

(n39)Footnote 3.

Notice 89- 15, 1989-7 IRB 9 , Q & A-4, Ex (2).

(n40)Footnote 4. Notice 89-15, 1989-7 IRB 9 , Q & A-4, Ex. (5).

(n41)Footnote 5. *See, e.g., Deer Island Logging Co. v. Comm'r*, 14 B.T.A. 1027 (1929) ; *Rev. Rul. 84-32*, 1984-1

C.B. 129 ; *Rev. Rul. 82-134, 1982-2 C.B. 88* ; *Rev. Rul. 80-18, 1980-1 C.B. 103* ; *Rev. Rul. 70-67, 1970-1 C.B. 117* ; *Point Comfort Venture v. Comm'r, T.C. Memo 1990-574* ; Private Ruling 200001006, 1999 PRL LEXIS 1610 .

(n42)Footnote 6. *Rev. Rul. 84-32, 1984-1 C.B. 129* ; *Rev. Rul. 82-134, 1982-2 C.B. 88* ; see *U.S. v. Howard, 855 F.2d 832 (11th Cir. 1988)* .

(n43)Footnote 7. *Rev. Rul. 70-67, 1970-1 C.B. 117* ; see *U.S. v. Howard, 855 F.2d 832 (11th Cir. 1988)* .

(n44)Footnote 8. *Rev. Rul. 82-134, 1982-2 C.B. 88* .

(n45)Footnote 9. *Rev. Rul. 84-32, 1984-1 C.B. 129* ; but see *Ltr. Rul. 8623001* .

(n46)Footnote 10. *Treas. Reg. § 1.451-3(a)(3)*.

(n47)Footnote 11. See, e.g., *Harrison v. Heiner, 28 F.2d 985 (D. Pa. 1928)* ; *W. J. Scholl Co. v. Comm'r, 30 B.T.A. 993 (1934)* .

(n48)Footnote 12. Cf. *Ltr. Rul. 8623001* with *Rev. Rul. 84-32, 1984-1 C.B. 129* .

(n49)Footnote 1.

Notice 89- 15, 1989-7 IRB 9 , Q & A-8.

(n50)Footnote 2. *Id.*

(n51)Footnote 3. *Notice 89-15, 1989-7 IRB 9 , Q & A-6.*



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Current Legal Forms for Real Estate
Chapter 22 DEVELOPMENT AND SUBDIVISION
Part I. The Tax Background

26-22 Current Legal Forms for Real Estate § 22.11

§ 22.11 Accounting for Long--Term Contracts: Percentage of Completion Method

Under percentage of completion accounting method, taxpayer determines portion of long-term contract completed during tax year and reports gross income for that percentage of entire contract. All allocable costs must be deducted in tax year incurred.

[1] Application of Method

Taxable income from any long-term contract must generally be determined under the percentage of completion method.ⁿ¹ Under this method, the percentage of completion is determined by comparing costs allocated to the contract under the allocation of costs rules (see § 22.14) and incurred before the close of the tax year with the estimated total contract costs.ⁿ² The Service, however, may prescribe a simplified procedure for allocation of costs to a long-term contract in lieu of the method prescribed by the Code.ⁿ³ (See § 22.11[2][a] below)

After a long-term contract has been completed and the actual profits and costs are known, the taxpayer must use a "look-back" method to compute the interest on any overpayment or underpayment of the tax on the income from the contract.ⁿ⁴

[a] What Portion of Total Price Is Included in Gross Income in Tax Year

Under the percentage of completion method, a certain portion of the total price under a long-term contract must be included in gross income in a tax year. The taxpayer must include in gross income in each tax year ending after the date that the contract is entered into an amount equal to the excess of--

(1) the product of (a) the total amount of revenue that the taxpayer estimates it will receive with respect to the contract, multiplied by (b) the cumulative percentage of the contract that has been completed as of the end of the tax year, over

(2) the total cumulative amount of contract revenue required to be included in gross income in all preceding years.ⁿ⁵

If the total cumulative amount of contract revenue required to be included in gross income in all preceding years

exceeds the product of total expected contract revenues for the tax year multiplied by the cumulative percentage of the contract completed as of the end of the tax year, the taxpayer may deduct the excess as a loss for the tax year. This may occur, for example, as a result of increases in total estimated contract costs occurring after the end of the tax year in which the contract is entered.ⁿ⁶

[2] Computing Percentage of Contract Completion

Unless the taxpayer uses the simplified method of accounting explained below, the percentage of the contract considered to be completed as of the end of the tax year is equal to the following ratio:

- (1) the total cumulative amount of costs allocable to the contract and incurred in the tax year and in all preceding tax years, to
- (2) the total amount of costs allocable to the contract that the taxpayer expects to incur.ⁿ¹

For the purpose of computing percentage of completion, nondeductible costs are not taken into account in determining expected total costs allocable to a contract, or costs allocable to a contract and incurred through the end of the tax year. This is so even if these costs are otherwise allocable to a contract under the allocation of costs provision. Thus, certain costs that are disallowed under the Code, such as payments for illegal bribes, kickbacks, and similar illegal activities,ⁿ² and costs of certain meals and entertainment,ⁿ³ are not taken into account in computing percentage of completion.ⁿ⁴

[a] Simplified Cost-to-Cost Method

The Service provides a simplified cost-to-cost method that may be elected by taxpayers who use the percentage of completion method under the Code's long-term accounting method rules.ⁿ⁵ Under this method, only certain costs are used in determining both costs allocated to the contract and incurred before the close of the tax year, and total estimated contract costs. These costs are (1) direct material costs and direct labor costs, and (2) depreciation, amortization, and cost recovery allowances on equipment and facilities directly used to construct or produce the subject matter of the long-term contract. Direct material costs include the costs of materials such as raw materials, land, equipment and components that become an integral part of the subject matter of a long-term contract, and the costs of those materials that are consumed in the ordinary course of building, constructing, installing, or manufacturing such subject matter.ⁿ⁶

The simplified method may be used by taxpayers using the percentage of completion method for all items under all long-term contracts in a particular trade or business.ⁿ⁷

Use of the simplified method is a method of accounting and may not be revoked without consent of the Service. The Service may, however, by revenue procedure or other administrative pronouncement, permit taxpayers to adopt the simplified method without obtaining consent.ⁿ⁸

[b] Allocation of Actual and Estimated Costs and Revenues

Taxpayers who properly use the cash method as their overall method of accounting do not treat a cost as incurred in the tax year in which it is paid for purposes of determining the total amount of costs allocable to the contract incurred in a particular tax year. This is because, in determining percentage of completion, costs are taken into account in the tax year that they are incurred, regardless of the taxpayer's overall method of accounting.ⁿ⁹ Similarly, under the percentage of completion method, costs allocable to the contract are deductible in the year incurred, regardless of the taxpayer's overall method of accounting. For this purpose, an item is treated as incurred when it would properly be taken into account under an accrual method of accounting, including the economic performance rules.ⁿ¹⁰

Costs of materials and supplies are deductible under the percentage of completion method for the first tax year in which

the costs both are allocable to the contract and have been incurred.ⁿ¹¹ Two sets of rules determine when a cost that is allocable to a long-term contract is treated as incurred (and, therefore, as deductible and taken into account in computing percentage of completion for the tax year), and when costs of materials and supplies are treated as allocable to a contract under the percentage of completion method.

Regardless of the taxpayer's overall method of accounting, contract costs generally are treated as incurred in the tax year in which the "all events" test, as modified by the economic performance rule, is met. Thus, costs that are not treated as incurred as of the end of the tax year for failure to satisfy the economic performance rule are not deductible. Similarly, such costs are not treated as contract costs incurred through the end of the tax year in determining percentage of completion (although they are taken into account in determining total expected contract costs).ⁿ¹²

The costs of direct materials and supplies purchased specifically for a particular long-term contract are allocable to the contract in the tax year in which the costs are incurred. The costs of other direct materials and supplies (such as those previously held by the taxpayer) are allocable to the contract in the tax year in which the materials and supplies are dedicated to the contract. The cost that is allocated to a contract is determined by using the taxpayer's method of accounting for such materials or supplies (e.g., specific identification, FIFO, or LIFO) based on the tax year in which the items are dedicated to the contract.ⁿ¹³

Costs that are allocable to a long-term contract, but that are incurred prior to the date that the contract is entered into, are treated as allocated to the contract and are deductible in the tax year in which the contract is made. These costs include, for example, bidding and proposal costs allocable to the contract, raw land purchased before a construction contract was entered into, and labor costs incurred in anticipation that a contract will be awarded.ⁿ¹⁴

In determining percentage of completion for a particular tax year, estimates of total contract revenue and contract costs must be based on the facts and reasonable estimates as of the last day of the tax year. Events that occur after the end of the tax year that were not reasonably subject to estimate as of the last day of that year are not taken into account.ⁿ¹⁵

[3] When All Income Must Be Accounted For

Except for purposes of applying the look-back method, all of the income under a long-term contract, with respect to which the percentage of completion method is used, must be taken into account no later than the tax year following the tax year in which the contract is completed. This rule applies even though all of the estimated total contract costs have not been incurred as of the end of that tax year. Because this rule does not apply for purposes of the look-back method, a taxpayer may be entitled to receive interest under that method if costs properly allocable to the contract are actually incurred after the end of that tax year.ⁿ¹

[4] Election to Use 10-Percent Method

A taxpayer may elect for any tax year not to recognize income under a long-term contract, and not take into account any costs allocable to that contract, if as of the end of that year less than 10 percent of the estimated total contract costs have been incurred. For the first tax year in which the 10-percent threshold is satisfied, all costs that have been incurred as of the end of that year are taken into account in determining (1) the percentage of the contract that has been completed, and (2) the amount of allowable deductions under the contract.

The 10-percent threshold election applies to all long-term contracts that a taxpayer enters into during the tax year in which the election is made and any subsequent tax year. However, the election does not apply to any long-term contract for which the percentage of completion method is used only for a portion of the contract items. (For example, residential construction contracts that are not home construction contracts may continue to be accounted for under the percentage of completion-capitalized cost method and the 70-30 ratio, as in effect under prior law. (See § 22.12 below) The 10-percent threshold election does not apply to these contracts.) Neither does the election apply to a contract for

which a simplified method of cost allocation is used.ⁿ¹

This 10-percent threshold election applies for purposes of the look-back method. Thus, in allocating income from the contract under the look-back method (i.e., on the basis of actual contract price and actual contract costs), costs are not taken into account for any tax year if, as of the end of that year, less than 10 percent of the actual total contract costs have been incurred. In addition, deductions under a contract are allocated to a different tax year for purposes of the look-back method if the first year in which 10 percent of the *actual* total contract costs were incurred differs from the first year in which 10 percent of the *estimated* total contract costs were incurred.

Planning Note

Documentation Required When There is Revision in Total Estimated Costs. If a taxpayer, in calculating the percentage of contract completed, revises the estimated total costs as of the end of the tax year, he must provide certificates of architects or engineers or other appropriate documentation showing the basis for that revision. The documentation must be available at the taxpayer's principal place of business for inspection in connection with an examination of the income tax return.ⁿ²

Legal Topics:

For related research and practice materials, see the following legal topics:

Real Property Law Construction Law General Overview Real Property Law Construction Law Contracts Tax Law Federal Income Tax Computation Deductions for Business Expenses Business, Entertainment & Trade Expenses (IRC secs. 162, 274) Tax Law Federal Income Tax Computation Tax Accounting Long Term Contracts (IRC sec. 460)

FOOTNOTES:

(n1)Footnote 1. *IRC § 460(a)*.

(n2)Footnote 2. *IRC § 460(b)(1)(A)*.

(n3)Footnote 3. *IRC § 460(b)(3)(A)*.

(n4)Footnote 4. *IRC § 460(b)(1)(B), (b)(2)*.

(n5)Footnote 5.

Notice 89- 15, 1989-7 IRB 9 , Q & A-19.

(n6)Footnote 6. *Id.*

(n7)Footnote 1.

Notice 89- 15, 1989-7 IRB 9 , Q & A-20.

(n8)Footnote 2. *See IRC § 162(c)*.

(n9)Footnote 3. *See IRC § 274*.

(n10)Footnote 4.

Notice 89- 15, 1989-7 IRB 9 , Q & A-30.

(n11)Footnote 5. *IRC § 460(b)(3)(A)*.

(n12)Footnote 6.

Notice 89- 15, 1989-7 IRB 9 , Q & A-22; *see also* 1987-2 C.B. 370, Notice 87-61 .

(n13)Footnote 7.

Notice 89- 15, 1989-7 IRB 9 , Q & A-23.

(n14)Footnote 8. *See, e.g.,* 1987-2 C.B. 370, Notice 87-61 .

(n15)Footnote 9. *IRC* § 460.

(n16)Footnote 10.

Notice 89- 15, 1989-7 IRB 9 , Q & A-21. *See IRC* § 461(h).

(n17)Footnote 11.

Notice 89- 15, 1989-7 IRB 9 , Q & A-34.

(n18)Footnote 12.

Notice 89- 15, 1989-7 IRB 9 , Q & A-33.

(n19)Footnote 13.

Notice 89- 15, 1989-7 IRB 9 , Q & A-35.

(n20)Footnote 14.

Notice 89- 15, 1989-7 IRB 9 , Q & A-36.

(n21)Footnote 15.

Notice 89- 15, 1989-7 IRB 9 , Q & A-24.

(n22)Footnote 1. *IRC* § 460(b)(1).

(n23)Footnote 1. *IRC* § 460(b)(5).

(n24)Footnote 2. *Treas. Reg.* § 1.451-3(c)(2).



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Current Legal Forms for Real Estate
Chapter 22 DEVELOPMENT AND SUBDIVISION
Part I. The Tax Background

26-22 Current Legal Forms for Real Estate § 22.12

§ 22.12 Exemption from Long-term Accounting Rules for Certain Small Construction Contracts

Certain small construction contracts, including home construction contracts, are exempt from the long-term contract accounting rules. Such contracts may be accounted for using the completed contract method, under which the gross contract price is included in income for the tax year in which the contract is completed.

Certain small construction contracts are exempt from the long-term accounting rules. Except for the interest capitalization requirements,ⁿ¹ the Code does not require use of the percentage of completion method of accounting for:

(1) any home construction contract entered into after June 20, 1988;ⁿ² or

(2) any other construction contract entered into by a taxpayer (a) who estimates at the time the contract is entered into that it will be completed within the two-year period beginning on the contract commencement date, and (b) whose average annual gross receipts for the three tax years preceding the year in which the contract is entered into do not exceed \$10 million.ⁿ³

Thus, except for the interest capitalization requirements, the law in effect before enactment of the Code long-term accounting rules applies to any contract described in (2) above, regardless of whether the contract involves the construction of a home or of commercial property. That prior law prescribed the use of the completed contract method of accounting. In addition, in the case of a home construction contract that is not described in (2) above (i.e., a contract that is not expected to be completed within two years of the commencement date, or a contract entered into by a taxpayer whose average annual gross receipts exceed \$10 million), the uniform capitalization rulesⁿ⁴ apply,ⁿ⁵ but the interest capitalization requirements also apply.ⁿ⁶

Under the completed contract method, the gross contract price for each long-term contract is included in gross income for the tax year in which the contract is completed.ⁿ⁷ Exceptions to this reporting requirement are provided for contracts that are subject to disputes with respect to the price or work performed.ⁿ⁸

All costs properly allocable to a long-term contract must be deducted from gross income for the tax year in which the contract is completed.ⁿ⁹

Example:

Best Builders constructs a building for another company under a long-term contract executed in Year 1. The gross contract price is \$2 million, which is paid in quarterly payments over the term of the contract. Best Builders completes construction in Year 3. Its costs were \$600,000 in Year 1, \$700,000 in Year 2, and \$600,000 in Year 3, for a total cost of \$1.9 million. Best Builders uses the completed contract method of accounting to report the entire \$100,000 profit from the contract in Year 3.

A similar rule applies to losses incurred in connection with the contract; they must be deferred until the contract is completed.ⁿ¹⁰ However, if an expense or loss is unexpectedly incurred in a tax year after contract completion, the taxpayer may deduct it in the tax year it is incurred.ⁿ¹¹

Planning Note

Uniform Capitalization Rules May Apply When Construction Activities Do Not Involve

Long-Term Contract. The uniform capitalization rules do not apply, except in the case of certain home construction contracts noted above, to property produced by the taxpayer under a long-term contract.ⁿ¹² However, if a builder has houses under construction as of the end of a tax year but does not enter into any contracts with customers for their sale, the builder is not considered to produce property under a long-term contract because no such contracts exist. In that event, the uniform capitalization rules may apply to the construction costs because these rules do not contain any exceptions for construction activities that do not involve long-term contracts.ⁿ¹³ See § 22.05 for discussion of uniform capitalization rules.

Legal Topics:

For related research and practice materials, see the following legal topics:

Real Property Law Construction Law General Overview Real Property Law Construction Law Contracts Tax Law Federal Income Tax Computation Deductions for Business Expenses Capital Expenditures (IRC secs. 263-263A) Tax Law Federal Income Tax Computation Tax Accounting Long Term Contracts (IRC sec. 460)

FOOTNOTES:

(n1)Footnote 1. *IRC § 460(c)(3)*.

(n2)Footnote 2. *IRC § 460(e)(1)(A)*.

(n3)Footnote 3. *IRC § 460(e)(1)(B)*.

(n4)Footnote 4. *IRC § 263A*.

(n5)Footnote 5. *IRC § 460(e)(1)*.

(n6)Footnote 6.

Notice 89- 15, 1989-7 *IRB* 9 , Q & A-42.

(n7)Footnote 7. *Treas. Reg. § 1.451-3(d)(1)*; see *LA Wells Constr. Co. v. Comm'r*, 46 B.T.A. 302 (1942) , *aff'd*, 134 F.2d 623 (6th Cir. 1943) , *cert. denied* 319 U.S. 771 ; see also *Rotolo v. Comm'r*, 88 T.C. 1500 (1987) .

(n8)Footnote 8. See *Treas. Reg. § 1.451-3(d)(1)-(4)*.

(n9)Footnote 9. Treas. Reg. § 1.451-3(d)(1).

(n10)Footnote 10. *Jones v. Smith*, 193 F.2d 381 (10th Cir. 1951) , cert. denied, 343 U.S. 952 .

(n11)Footnote 11. *Rev. Rul. 71-115*, 1971-1 C.B. 144 .

(n12)Footnote 12. *IRC §§ 263A(c)(4), 460(e)(1)*.

(n13)Footnote 13. *See IRC § 263A*.



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Current Legal Forms for Real Estate
Chapter 22 DEVELOPMENT AND SUBDIVISION
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26-22 Current Legal Forms for Real Estate § 22.13

§ 22.13 Accounting for Long-Term Contracts: Look-Back Interest Adjustment

Under the percentage of completion method for long-term contracts the taxpayer must make adjustments for underpayments or overpayments of tax. On completion of contract, taxpayer must pay interest on underpayments or may receive interest on overpayments.

The Code provides a look-back interest adjustment for taxpayers who use the percentage of completion method of accounting for long-term contracts.ⁿ¹ After a long-term contract has been completed and the actual profits and costs are known, a taxpayer must use the look-back method to compute the interest on any underpayment or overpayment of the tax on income from the contract. The look-back computation is not required, however, for relatively short-term and small contracts.ⁿ²

Under the look-back method, when the long-term contract is completed the taxpayer must compute whether the amount of tax paid each year during performance of the contract was equal to the amount that would have been paid if gross income had been ascertained on the basis of the actual contract cost rather than the estimated cost. The taxpayer must determine whether an underpayment or overpayment of the tax has been made.ⁿ³ If there has been an underpayment, the taxpayer must remit the interest on the amount underpaid. If there has been an overpayment, the taxpayer is entitled to receive the interest on that amount.ⁿ⁴

The same look-back computations are made with respect to any amount received or accrued following contract completion.ⁿ⁵ That amount must be taken into account, unless the taxpayer elects otherwise, by discounting the amount to its value as of completion of the contract, i.e., the amount must be discounted to present value as of contract completion.ⁿ⁶

The look-back interest adjustment is not required in the case of any contract (1) under which the gross price (as of contract completion) does not exceed the lesser of (a) \$1 million, or (b) 1 percent of the average annual gross receipts of the taxpayer for the three tax years preceding the tax year in which the contract was completed, and (2) that is completed within two years of the contract commencement date.ⁿ⁷ For purposes of (2), the contract commencement

date is the first date on which any costs (other than bidding expenses or expenses incurred in connection with negotiating the contract) allocable to the contract are incurred.ⁿ⁸

Planning Note

Practical Effect of Look-Back Adjustment. The practical effect of the look-back adjustment is that a conservative taxpayer who overestimates the expected costs or underestimates the expected contract price will owe interest. This result is based on the assumption that tax was actually due in previous years on the basis of the actual contract costs.

Legal Topics:

For related research and practice materials, see the following legal topics:

Real Property Law Construction Law General Overview Real Property Law Construction Law Contracts Tax Law Federal Income Tax Computation Tax Accounting Long Term Contracts (IRC sec. 460)

FOOTNOTES:

(n1)Footnote 1. *IRC § 460(b)(1)(B), (b)(2).*

(n2)Footnote 2. *IRC § 460(b)(3)(B).*

(n3)Footnote 3. *IRC § 460(b)(2).*

(n4)Footnote 4. *See IRC § 460(b)(1)(B).*

(n5)Footnote 5. *IRC § 460(b)(1)(B).*

(n6)Footnote 6. *IRC §§ 460(b)(2).*

(n7)Footnote 7. *IRC § 460(b)(3)(B).*

(n8)Footnote 8. *IRC § 460(g).*



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Chapter 22 DEVELOPMENT AND SUBDIVISION
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26-22 Current Legal Forms for Real Estate § 22.14

§ 22.14 Accounting for Long-Term Contracts: Allocation of Costs

Income and costs may be accounted for under long-term contract methods only if allocable to the long-term contract. Rules applicable to allocation of direct and indirect costs depend on whether long-term contract is for regular or extended period. Different methods are available to account for direct and indirect costs required to be allocated to long-term contracts.

[1] Application of Allocation Rules

Long-term contract accounting methods may be applied only to income and expenses allocable to a long-term contract.ⁿ¹ The allocation of expenses is made in accordance with special rules that the Service first adopted as regulations,ⁿ² and that were subsequently codified, with modifications.ⁿ³ The determination of whether expenses are allocated affects the calculation of a taxpayer's taxable income because allocated expenses that are attributed to a contract may not necessarily be deducted in the tax year paid under the long-term accounting methods.ⁿ⁴

Under the regulations, direct and indirect costs may be treated as follows:ⁿ⁵

- (1) allocated by the regular long-term contract rules;
- (2) allocated by the extended period long-term contract rules; or
- (3) accounted for as period costs under another appropriate method, such as the cash or an accrual method, and therefore deducted in the year paid or incurred.

The regulations continue to apply with respect to:

- (1) small construction contracts;ⁿ⁶
- (2) long-term contracts entered into prior to March 1, 1986;ⁿ⁷ and

(3) long-term contracts accounted for under the capitalized cost method of accounting when the uncapitalized portion is accounted for by the completed contract method.ⁿ⁸

The Tax Reform Act of 1986ⁿ⁹ abolished the distinction between extended period and regular long-term contracts.ⁿ¹⁰ Thus, for long-term contracts entered into after February 28, 1986, there is a uniform set of rules for all contracts,ⁿ¹¹ except small construction contractsⁿ¹² and the uncapitalized portions of long-term contracts reported by a combination of the capitalized contract and the completed contract methods.ⁿ¹³ To allocate direct and indirect costs for all long-term contracts, the Code adopts the extended period contract rules provided in the regulations.ⁿ¹⁴ For that reason, the statutory rules are known as the super full absorption rules; they have expanded the deferral rules for extended period contracts to all long-term contracts.ⁿ¹⁵ The Code provides special rules for allocation of the following:

(1) direct and indirect costs of long-term contracts generally.ⁿ¹⁶ For allocation of costs under the simplified cost-to-cost method, see § 22.11[2][a];ⁿ¹⁷

(2) costs of cost-plus and federal long-term contracts;ⁿ¹⁸

(3) costs of production period interest;ⁿ¹⁹ and

(4) period costs not allocable to long-term contracts and therefore not subject to deferral.ⁿ²⁰

Different methods are available to account for the direct and indirect costs required to be allocated to long-term contracts.

[2] Extended Period Long-Term Contracts Under Regulations

The distinction between extended period and regular long-term contracts remains significant for contracts that continue to be subject to the regulations. Moreover, the regulations apply the rules for extended period contracts only to contracts accounted for under the completed contract method.ⁿ¹ For these purposes, an extended period long-term contract is any long-term contract that the taxpayer estimates, when the contract is made, will not be completed within the two-year period beginning on the contract commencement date.ⁿ² Because the classification of an extended period long-term contract is based on an estimation of the time for completion, it may be treated under the extended period rules even if it is not actually completed in accordance with the time permitted.ⁿ³ A regular long-term contract is any long-term contract that does not qualify for the extended period rules.ⁿ⁴

The contract commencement date is the first date that the taxpayer incurs any costs, other than bidding expenses or other costs incurred in connection with negotiating the contract, allocable to the contract. Thus, the commencement date is usually the first date on which one of the following activities occurs: the taxpayer incurs design or engineering costs allocable to the contract, other than those incurred solely for bidding on it; materials or equipment are shipped to the project site; or workers whose labor cost is allocable as direct costs are sent to the project site.ⁿ⁵ The commencement date is determined regardless of when the taxpayer records the costs for accounting purposes.ⁿ⁶

Certain construction contracts are exempt from the extended period allocation rules.ⁿ⁷ For purposes of these rules, a construction contract is a contract that meets the following requirements:ⁿ⁸

(1) The contract was entered into by either:

(a) a taxpayer who estimates, when the contract is made, that it will be completed within three years from the contract commencement date, or

(b) a taxpayer whose average annual gross receiptsⁿ⁹ do not exceed \$25 million for the three tax years preceding the tax year in which the contract is made, or if the taxpayer has been in existence for less than three years, for the number of preceding tax years that the taxpayer has existed; and

(2) The contract is for the building, construction, erection, reconstruction, improvements to, installation of any integral component to, or rehabilitation of real property.ⁿ¹⁰

[a] Classification of Contract

Initially, at the time of making a contract, the taxpayer determines whether it is an extended period long-term contract. The taxpayer must estimate the time required for performance, providing reasonable allowances for delay, rework, change orders, technology or design considerations, and other anticipated problems. A contract generally need not be reclassified, and the income and expenses allocable to it need not be recomputed, merely because it was in fact completed other than in accordance with the times specified in the rules if the taxpayer's estimate was reasonable.ⁿ¹¹

If the Service finds that a taxpayer unreasonably estimated the time of completion and that the contract should have been classified as one for an extended period, the taxpayer must reclassify the contract. In this event, the taxpayer must account for the contract as an extended period long-term contract in the current tax year and all subsequent tax years. The taxpayer must additionally file amended returns for prior years in which costs were incurred for the contract, assuming that the period for assessment has not elapsed.ⁿ¹²

[3] Methods of Allocation

[a] Direct and Indirect Costs

For each long-term contract, a taxpayer is required to maintain a separate account. Direct costs and indirect costs incurred during a tax year and attributable to a particular long-term contract must be allocated to it for that tax year.ⁿ¹

Direct labor costs must be allocated to a particular long-term contract by a specific identification, or tracing, method.ⁿ² However, if direct labor costs are so intermingled that it is impractical to specifically identify the costs to a particular long-term contract, the taxpayer is required only to use a reasonable method of allocation. The method used must reasonably allocate the costs among those contracts completed during the tax year and those that have not yet been finished. To allocate elements of direct labor cost other than basic compensation, all such items may be combined and then attributed to particular contracts in proportion to the charge for basic compensation.ⁿ³

Direct material costs are allocated to the long-term contract for which the materials are dedicated in a tax year.ⁿ⁴ The cost allocated is determined on the basis of the inventory method the taxpayer uses, regardless of whether the materials are purchased specifically for a contract or were previously held and then dedicated to the contract. The dedication of materials includes, for example, a delivery of materials to a project site where a single contract is being performed; association of materials with a specific contract by purchase order, entry on records, or shipping instructions; and if not previously assigned, the physical incorporation of the materials in, or the consumption of the materials in the production of, the subject matter of the contract.ⁿ⁵

Indirect costs must be allocated to particular long-term contracts for the year in which the costs are incurred, using a specific identification (or tracing) method, the standard cost method, or a method using burden rates, so long as the method employed for such allocation reasonably allocates indirect costs among long-term contracts.ⁿ⁶ In employing a burden rate, for example, the allocation must reasonably attribute indirect costs among the completed and non-completed long-term contracts as of the end of the tax year. Burden rates are ratios based on direct labor and material costs, direct labor hours, or other items, or similar formulas.ⁿ⁷

The method used by a taxpayer to allocate a particular cost must be applied consistently with respect to all the taxpayer's long-term contracts. The Service will not consider an allocation method to be reasonable if it does not result in the allocation (and, to the extent applicable, the capitalization) of all costs that directly benefit or are incurred by reason of the performance of the taxpayer's long-term contract activities. The taxpayer must account for each long-term contract separately. Moreover, both the direct and indirect costs incurred during the tax year attributable to long-term contract activities must generally be allocated to particular long-term contracts for the tax year such costs are incurred.ⁿ⁸

[b] Administrative Costs

The allocation of administrative, service, or support costs to long-term contracts is subject to special rules. A taxpayer must allocate the total direct and indirect costs of a service department by applying a method that reasonably relates the cost incurred to the benefit received under the particular long-term contract.ⁿ⁹ Any reasonable method authorized by cost accounting principles may be used as long as the costs incurred reasonably relate to the benefits received from the contract.ⁿ¹⁰

For each tax year in which administrative costs are allocated to a long-term contract, the taxpayer must maintain the records used to make the allocation. These records must be available for verification by the Service.ⁿ¹¹ If the taxpayer can establish to the Service's satisfaction that all of a particular type of administrative, service, or support function was performed solely at the project site, he may allocate to the contract all direct and indirect costs of that function incurred at the project site. No further allocation of that type of cost is required.ⁿ¹²

A taxpayer who selects an allocation method or chooses to allocate costs not provided in the regulations is not required to change if, when all its long-term contracts are considered together, the taxpayer can show: one, that the total amount of costs incurred during the tax year of the allocation does not differ significantly from the total amount of costs that would be allocated to the contracts under the regulations; and, two, that his selections are consistently applied and do not result in any disproportionate allocation of costs to contracts expected to be completed in the future.ⁿ¹³

[c] Inventories

The use of an inventory method to determine the material costs attributable to a long-term contract has been the subject of considerable controversy. The regulations require the taxpayer to determine direct material costs by use of an inventory accounting method, such as specific identification, first-in, first-out (FIFO), or last-in, first-out (LIFO). Costs must be allocated in the year in which the materials are dedicated to the contract, even if the taxpayer uses the completed contract method to account for income and costs from the contract.ⁿ¹⁴ For indirect costs, the only inventory method expressly permitted is the specific identification method.ⁿ¹⁵

The judicial reasoning for extending inventory methods to the allocation of costs under a long-term contract is that contractors and manufacturers often inventory various materials used on multiple contracts as opposed to purchasing materials specifically for a single contract. The use of an inventory method to allocate costs is therefore a logical extension.ⁿ¹⁶

Planning Note

Allocation Rules Are Generally Same for Both Regular and Extended Period Long-Term Contracts. The Code generally requires allocation of all costs that directly benefit or are incurred because of regular long-term contracts to the contract in accordance with regulations that previously applied only to extended period long-term contracts. However, under the Code, some types of costs, such as independent research and development costs, expenses incurred in making unsuccessful bids and proposals, and marketing, selling, and advertising expenses, do not have to be capitalized; those types of costs may be currently deducted.

Legal Topics:

For related research and practice materials, see the following legal topics:

Real Property Law Construction Law General Overview Real Property Law Construction Law Contracts Tax Law Federal Income Tax Computation Tax Accounting General Overview Tax Law Federal Income Tax Computation Tax Accounting Long Term Contracts (IRC sec. 460)

FOOTNOTES:

(n1)Footnote 1. *IRC § 460(c)(1)*; Treas. Reg. § 1.451-3(a)(3).

(n2)Footnote 2. Treas. Reg. § 1.451-3(a)(3), (d).

(n3)Footnote 3. *IRC § 460(c)(1)*.

(n4)Footnote 4. *IRC § 460(a)(1)*, prior to amendment by the Omnibus Budget Reconciliation Act of 1989 (OBRA), Pub. L. No. 101-239, 101st Cong., 1st Sess. § 7621(a) (Dec. 19, 1989); *IRC § 460(b)(1)*, as redesignated by OBRA § 7621(c)(1); Treas. Reg. § 1.451-3(a)(3), (d).

(n5)Footnote 5. Treas. Reg. § 1.451-3(a)(3).

(n6)Footnote 6. *IRC § 460(e)*.

(n7)Footnote 7. Pub. L. No. 99-514, 99th Cong., 2d Sess. § 804(d)(1) (Oct. 22, 1986).

(n8)Footnote 8. See H.R. Conf. Rep. No. 99-841, 99th Cong., 2d Sess. II-311 (1986).

(n9)Footnote 9. Pub. L. No. 99-514, 99th Cong., 2d Sess. § 804(a) (Oct. 22, 1986).

(n10)Footnote 10. *IRC § 460(c)(1)*.

(n11)Footnote 11. See *IRC § 460(c)*; Treas. Reg. § 1.451-3(d).

(n12)Footnote 12. *IRC § 460 (e)*.

(n13)Footnote 13. See H.R. Conf. Rep. No. 99-841, 99th Cong., 2d Sess. II-311 (1986).

(n14)Footnote 14. *IRC § 460(c)(1)*.

(n15)Footnote 15. See *IRC § 460(c)(1)*; Treas. Reg. § 1.451-3(b)(3).

(n16)Footnote 16. *IRC § 460(c)(1)*.

(n17)Footnote 17. See 1987-2 C.B. 370, Notice 87-61 .

(n18)Footnote 18. *IRC § 460(c)(2), (d)*.

(n19)Footnote 19. *IRC § 460(c)(3)*.

(n20)Footnote 20. *IRC § 460(c)(4), (5)*.

(n21)Footnote 1. Treas. Reg. § 1.451-3(b)(3)(i).

(n22)Footnote 2. *Id.*

(n23)Footnote 3. Treas. Reg. § 1.451-3(b)(3)(iv)(A).

(n24)Footnote 4. *See* Treas. Reg. § 1.451-3(d)(5), (6).

(n25)Footnote 5. Treas. Reg. § 1.451-3(b)(3)(i).

(n26)Footnote 6. *Id.*

(n27)Footnote 7. Treas. Reg. § 1.451-3(b)(3)(ii).

(n28)Footnote 8. *Id.*

(n29)Footnote 9. Treas. Reg. § 1.451-3(b)(3)(iii)(A)-(C); *see* Treas. Reg. § 1.52-1(c), (d).

(n30)Footnote 10. Treas. Reg. § 1.451-3(b)(3)(ii).

(n31)Footnote 11. Treas. Reg. § 1.451-3(b)(3)(iv)(A).

(n32)Footnote 12. Treas. Reg. § 1.451-3(b)(3)(iv)(B).

(n33)Footnote 1. Treas. Reg. § 1.451-3(d)(8)(i).

(n34)Footnote 2. Treas. Reg. § 1.451-3(d)(8)(ii).

(n35)Footnote 3. *Id.*

(n36)Footnote 4. Treas. Reg. § 1.451-3(d)(8)(iii).

(n37)Footnote 5. *Id.*

(n38)Footnote 6. Treas. Reg. § 1.451-3(d)(8)(iv); Notice 89-15, 1989-7 IRB 9 , Q & A-40.

(n39)Footnote 7. *Id.*

(n40)Footnote 8.

Notice 89- 15, 1989-7 IRB 9 , Q & A-40.

(n41)Footnote 9. Treas. Reg. § 1.451-3(d)(9)(ii), (iii).

(n42)Footnote 10. Treas. Reg. § 1.451-3(d)(9)(ii)-(iv).

(n43)Footnote 11. Treas. Reg. § 1.451-3(d)(9)(iii)(A).

(n44)Footnote 12. Treas. Reg. § 1.451-3(d)(9)(iii)(B).

(n45)Footnote 13. Treas. Reg. § 1.451-3(d)(9)(i)(B).

(n46)Footnote 14. Treas. Reg. § 1.451-3(d)(8)(iii).

(n47)Footnote 15. *See* Treas. Reg. § 1.451-3(d)(8)(iv).

(n48)Footnote 16. *See Spang Indus., Inc. v. U.S.*, 6 Cl. Ct. 38 (1984), 84-2 , rev'd, 791 F.2d 906 (9th Cir. 1986) ; *Peninsula Steel Prods & Equipment Co. v. Comm'r*, 78 T.C. 1029 (1982) ; *Reco Indus., Inc. v. Comm'r*, 83 T.C. 912 (1984) .



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Current Legal Forms for Real Estate

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Current Legal Forms for Real Estate
Chapter 22 DEVELOPMENT AND SUBDIVISION
Part I. The Tax Background

26-22 Current Legal Forms for Real Estate § 22.15

§ 22.15 Amortization of Construction Costs by Lessor or Lessee

Lessor generally may recover costs of constructing buildings or making improvements on leased property through cost recovery allowance. Depreciation rate is based upon life of property even though lease is for longer period. Cost recovery is based on property's recovery period. Lessee may recover costs of leasehold construction or improvements under cost recovery rules, without regard to lease term.

[1] Amortization of Lessor and Lessee Costs

Many construction projects are undertaken pursuant to leases that require either the lessor or the lessee to improve the property. If the lessor makes the improvements, he is generally entitled to recover his costs through the allowance for depreciation or cost recovery.ⁿ¹ Capital expenditures made by a lessor for the erection of buildings or other improvements, if subject to depreciation allowances, are recovered by him over their estimated life without regard to the period of the lease, i.e., the depreciation rate is based upon the life of the improvements even if the lease term is for a longer period.ⁿ²

Cost recovery is based on the property's recovery period prescribed by the Code: 27.5 years for residential rental property, and 39 years for nonresidential real estate.ⁿ³ Residential rental property is any building or structure if 80 percent or more of the gross rental income from it for the tax year is rental income from dwelling units.ⁿ⁴ Nonresidential real property is Section 1250 property, i.e., depreciable real property, which is not residential rental property or property with a class life of less than 27.5 years.ⁿ⁵ The lessor is not allowed a depreciation or cost recovery deduction for construction or improvements made by the lessee.ⁿ⁶ However, the lessor may exclude from gross income any income (other than rent) that is attributable, on termination of the lease, to buildings erected or other improvements made by the lessee on the leased property.ⁿ⁷

The lessee is entitled to depreciate or amortize the costs of property purchased, improved, or constructed by him. If the lessee erects a building or makes improvements on leased property and the building or improvement is property to which the cost recovery rules apply, the cost recovery deduction is determined under the cost recovery rules, regardless

of the lease term.ⁿ⁸ When the lease terminates, a lessee who does not retain the improvement computes gain or loss by reference to the adjusted basis of the improvements at that time.ⁿ⁹

The costs incurred by a lessee in acquiring a lease, i.e., leasehold acquisition costs, are amortized. In determining the amortization period for this purpose, the lease term is treated as including all renewal options (and any other period for which the parties reasonably expect the lease to be renewed), if less than 75 percent of the lease acquisition cost is attributable to the period of the term of the lease remaining on the date of its acquisition. In determining the period of the lease term remaining on the lease acquisition date, any period of renewal, extension, or continuation under an option exercisable by the lessee is not taken into account.ⁿ¹⁰

[2] Requirement for Lessee's Restoration of Property

The courts and the Service are in some disagreement as to whether a lessor may take depreciation on property if the lease requires the lessee to restore the property at the end of the lease term in the same condition as at the beginning of that term. The courts, recognizing that the purpose of depreciation is to allow the property owner to recover an economic loss, hold that if a lease requires the lessee, upon lease termination, to return the property to the lessor in the same condition as at the beginning of the lease, or its equivalent in value, or otherwise fully protect the lessor from economic loss, then generally the lessor may not take a deduction for depreciation.ⁿ¹ The lessor is allowed a depreciation deduction, however, if the lease merely requires the lessee to make all necessary repairs and replacements and maintain the property in good condition during the lease term and if the lessor can show that it will suffer economic loss during the lease term.ⁿ²

The Service initially refused to allow the lessor to take a depreciation deduction in these cases, on the ground that the lessee's obligation to restore the property at the end of the lease term in as good a condition as at the beginning precluded any present loss.ⁿ³ The Service later modified its position in such cases to allow the lessor, upon a proper showing, to take a depreciation allowance on leased property if the lessee is not obligated to return the property or its equivalent in value to the lessor.ⁿ⁴

Planning Note

Lessee Must Amortize Leasehold Improvements Over Recovery Period. Prior to the Tax Reform Act of 1986,ⁿ⁵ a lessee of property could amortize the cost of improvements over the shorter of the ACRS recovery period or the remaining term of the lease. This was of particular importance in the case of leased real property, if the remaining lease term was shorter than either the recovery life or useful life of the property. The 1986 Act, however, eliminated this rule, so that the costs of the lessee's improvements are recovered just as they would have been in the hands of the property's owner, i.e., by looking to the recovery life of the improvement and not to the term of the lease.ⁿ⁶ For example, if a taxpayer has a 15-year lease on office space and makes structural changes to conform the space to his needs, he must recover the costs of the improvements over the 39-year-life for nonresidential real property. When the lease terminates, the taxpayer may deduct any remaining unrecovered costs.

Legal Topics:

For related research and practice materials, see the following legal topics:

Real Property LawConstruction LawGeneral OverviewReal Property LawConstruction LawContractsReal Property LawLandlord & TenantLease AgreementsCommercial LeasesGeneral OverviewTax LawFederal Income Tax ComputationDeductions for Amortization, Depletion & DepreciationGeneral OverviewTax LawFederal Income Tax ComputationDeductions for Amortization, Depletion & DepreciationAmortization, Cost Recovery & Depreciation (IRC secs. 167-169, 171, 178, 194-195, 197, 216, 248, 280F)General OverviewTax LawFederal Income Tax ComputationDeductions for Amortization, Depletion & DepreciationAmortization, Cost Recovery & Depreciation (IRC secs. 167-169, 171, 178, 194-195, 197, 216, 248, 280F)Accelerated Cost Recovery System

FOOTNOTES:

(n1)Footnote 1. See IRC §§ 167, 168; see also 76-2 U.S. Tax Cas. (CCH) P9698 (1976) .

(n2)Footnote 2. Treas. Reg. § 1.167(a)-4; *Lamson Bldg. Co. v. Comm'r*, 141 F.2d 408 (6th Cir. 1944) ; see also *Watson Land Co. v. Comm'r*, 799 F.2d 571 (9th Cir. 1986) .

(n3)Footnote 3. IRC § 168(c), (i)(8). It should be noted that the recovery period for nonresidential real property is 39 years for property placed in service by a taxpayer on or after May 13, 1993. IRC § 168(c)(1), as amended by the Revenue Reconciliation Act of 1993, Pub. L. No. 103-66, 103rd Cong., 1st Sess. § 13151(a) (Aug. 10, 1993). Prior to the 1993 Act, the recovery period was 31.5 years.

(n4)Footnote 4. IRC § 168(e)(2)(A)(i).

(n5)Footnote 5. IRC § 168(e)(2)(B).

(n6)Footnote 6. See *Reisinger v. Comm'r*, 144 F.2d 475 (2d Cir. 1944) ; see also *McGrath v. Comm'r*, T.C. Memo 2002-231 (2002) , *aff'd*, 2003 U.S. App. LEXIS 18669 (5th Cir. 2003) .

(n7)Footnote 7. IRC § 109.

(n8)Footnote 8. IRC § 168(i)(8).

(n9)Footnote 9. S. Rep. No. 99-313, 99th Cong., 2d Sess. 105 (1986).

(n10)Footnote 10. IRC § 178.

(n11)Footnote 1. *Hibernia Nat'l Bank v. U.S.*, 740 F.2d 382 (5th Cir. 1984) ; *Royal St. Louis Inc. v. U.S.*, 76-2 U.S. Tax Cas. (CCH) P9698 , *aff'd*, 578 F.2d 1017 (5th Cir. 1978) ; *Georgia Ry & Elec. Co. v. Comm'r*, 77 F.2d 897 (5th Cir. 1935) ; cf. *Kem v. Comm'r*, 432 F.2d 961 (9th Cir. 1970) .

(n12)Footnote 2. *Alaska Realty Co. v. Comm'r*, 141 F.2d 675 (6th Cir. 1944) ; *Gulf M. & N.R. Co. v. Comm'r*, 83 F.2d 788 (5th Cir. 1936) , *cert. denied*, 299 U.S. 574 ; *North Carolina Midland Railway Co. v. U.S.*, 163 F. Supp. 610 (Ct. Cl. 1958) *Terminal Realty Corp. v. Comm'r*, 32 B.T.A. 623 (1935) ; see also *Richmond Belt Ry v. Comm'r*, 13 B.T.A. 1291 (1928) , *nonacq.*, 1929-2 CB 70 (1929) .

(n13)Footnote 3. GCM 11933 (1933) , *distinguished in* Rev. Rul. 62-8, 1962-1 C.B. 31 ; see also *A. Wilhelm Co. v. Comm'r*, 6 B.T.A. 1 (1927) ; *Terre Haute, Indianapolis & Eastern Traction Co. v. Comm'r*, 24 B.T.A. 197 (1931) , *rev'd*, 67 F.2d 697 (7th Cir. 1933) , *cert. denied* 292 U.S. 624 .

(n14)Footnote 4. Rev. Rul. 62-8, 1962-1 C.B. 31 .

(n15)Footnote 5. Pub. L. No. 99-514, 99th Cong., 2d Sess. (Oct. 22, 1986).

(n16)Footnote 6. See IRC § 168(i)(8).



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Current Legal Forms for Real Estate
Chapter 22 DEVELOPMENT AND SUBDIVISION
Part I. The Tax Background

26-22 Current Legal Forms for Real Estate § 22.16

§ 22.16 Rehabilitation Tax Credit

Taxpayers are entitled to rehabilitation credit for portion of investment in qualified rehabilitated building attributable to qualified rehabilitation expenditures. Credit available for qualified rehabilitation expenditures on existing buildings that are substantially rehabilitated.

[1] Application of Credit

Taxpayers are entitled to a separately computed rehabilitation investment credit for that portion of the basis of a qualified rehabilitated building that is attributable to qualified rehabilitation expenditures.ⁿ¹ See *Section 22.16[2]* below for the amount of the credit. The portion eligible for the rehabilitation credit is treated as new Section 38 property.ⁿ² However, the regular investment percentage and the energy percentage do not apply to the portion that qualifies for the rehabilitation investment credit.ⁿ³

Buildings leased for non-exempt purposes, such as to tax-exempt organizations, are not eligible for the rehabilitation credit. Also not qualifying for the credit are buildings used by the federal government, by a state or local government, or by a foreign person or entity.ⁿ⁴

After 1986, the at-risk limitations generally applicable to investment credit property apply to property entitled to the rehabilitation investment credit.ⁿ⁵

Recapture provisions are triggered by early disposition or if the qualified rehabilitation credit property ceases being Section 38 property.ⁿ⁶

[2] Amount of Credit

[a] Property Placed in Service After 1986

The rehabilitation investment credit for property placed in service after 1986, other than property subject to transitional rules, is computed at the following rates:ⁿ¹

(1) 10 percent of qualified rehabilitation expenditures for qualified rehabilitated buildings other than certified historic structures; and

(2) 20 percent of qualified rehabilitation expenditures for certified historic structures.

Transition property (see *Section 22.16[7]* below) placed in service after 1986 and prior to 1994 is entitled to a rehabilitation investment credit at the following rates:ⁿ²

(1) 10 percent for a 30-year building;

(2) 13 percent for a 40-year building; and

(3) 25 percent for a certified historic structure.

Special rules apply to buildings that have been moved and those to which additions have been made.

[b] Property Placed in Service Before 1987

Property placed in service prior to 1987 but after 1981 is subject to a three-tier percentage arrangement that yields a credit of at least 15 percent and as high as 25 percent.ⁿ³

[3] Qualifying Buildings

Buildings must satisfy the following requirements to qualify for the rehabilitation investment credit:ⁿ¹

(1) The building must be substantially rehabilitated.

(2) The building must have been placed in service before the beginning of the rehabilitation.

(3) Unless the building is a certified historic structure, it must have been first placed in service before 1936.

(4) Unless the building is a certified historic structure, during the rehabilitation process:

(a) at least 50 percent of the existing external walls of the building must be retained in place as external walls;

(b) at least 75 percent of the existing external walls of the building must be retained in place as internal or external walls; and

(c) at least 75 percent of the existing internal structural framework of the building--for example, load-bearing internal walls, columns, girders, beams, trusses, spandrels, and other components essential to the stability of the buildingⁿ² must be retained in place.

Completely gutted structures do not qualify for the rehabilitation investment credit.ⁿ³

[a] Moved Buildings

A building placed in service after 1986 is not a qualified rehabilitated building unless it has been at the location where it is being rehabilitated since January 1, 1986. A building placed in service prior to 1987 and that is transition property is

not deemed a 30-year or a 40-year building, as the case may be, unless it has been at the location where it is being rehabilitated for the 30-year or 40-year period immediately preceding the start of rehabilitation.ⁿ⁴

[b] Buildings with Added Parts

An allocation is required for a building placed in service after 1986 if part of the building is a qualified rehabilitated building and part is not because that part was placed in service after 1935. In that case, the qualified rehabilitation expenses must be allocated to the pre-1936 and post-1935 parts. Qualified rehabilitation expenses attributable to the post-1935 addition do not qualify for the 10-percent rehabilitation percentage.ⁿ⁵

An allocation is also required for property placed in service before 1987 and transition property. If part of a building is a 40-year building and part was added and placed in service less than 40 years before the date on which rehabilitation work began but more than 30 years before that date, the qualified rehabilitation expenses must be allocated between the 40-year-old portion and the 30-year-old portion. In that case, a 20-percent rehabilitation percentage is applied to the 40-year portion and a 15-percent rehabilitation percentage is applied to the 30-year portion. If an allocation cannot be made between the expenses incurred for the two portions, the building is considered a 30-year building.ⁿ⁶

A building other than a certified historic structure is not a qualified rehabilitated building to the extent of the portion of it that is less than 30 years old. No rehabilitation percentage is applied to expenditures attributable to the rehabilitation of an addition that is not considered part of the qualified rehabilitated building if the addition does not meet the age requirements. In that case, it may be necessary to allocate rehabilitation expenses between the original portion of the building and the addition.ⁿ⁷

[c] Mixed-Use Buildings

An allocation of rehabilitation expenses must be made when they are incurred with respect to buildings that are partly Section 38 property and partly excluded from Section 38 property. An example is a building part of which is used for lodging.ⁿ⁸ This rule does not apply, however, to the basis of a certified historic structure that is attributable to qualified rehabilitation expenses, even if it is used as a place of lodging, because that basis is deemed Section 38 property.ⁿ⁹

In the mixed-use situation, an allocation is made between the expenditures that result in an addition to the basis of the Section 38 property portion of the building and those that pertain to the balance of the building. The rehabilitation percentage is then applied only to the Section 38 property portion of the rehabilitation expenditures.ⁿ¹⁰

[4] Qualified Rehabilitation Expenditures

A qualified rehabilitation expenditure is any amount incurred by the taxpayer after 1981 that is properly chargeable to capital account in connection with the rehabilitation of a qualified rehabilitated building, and that is for the following types of depreciable property:ⁿ¹

- (1) nonresidential real property;
- (2) residential rental property;
- (3) real property that has a class life of more than 12.5 years; or
- (4) an addition or improvement to property to the above listed property or housing.

The following do not constitute qualified rehabilitation expenditures:ⁿ²

- (1) expenditures for which a method of depreciation, other than the appropriate straight-line method, is used;
- (2) the cost of acquiring any building or interest in it;
- (3) any expenditure attributable to the enlargement of an existing building;
- (4) any rehabilitation expenditure related to a certified historic structure or a building in a registered historic district (except those buildings in such a district that are designated as not of historic significance to the district) unless the rehabilitation is certified;
- (5) any rehabilitation expenditure allocable to property that is tax-exempt use property;ⁿ³ or
- (6) any expenditure by the lessee of a building, unless on the day rehabilitation is completed the remaining lease term (determined without regard to any renewal periods) equals or exceeds the recovery period.ⁿ⁴

Qualified rehabilitation expenses are deemed incurred on the date they would be deemed incurred under an accrual method of accounting.ⁿ⁵ Rehabilitation expenses incurred by persons other than the taxpayer are treated as having been incurred by the taxpayer who is the transferee of the building if the building was not used after the expenses were incurred and before the date of acquisition and the credit is claimed only by the taxpayer.ⁿ⁶

Qualified rehabilitation expenditures are not limited to those expenses incurred during the measuring period used in determining whether substantial rehabilitation has occurred. For rehabilitated property placed in service in any particular tax year, if the building meets the test of a qualified rehabilitated building for that year, the taxpayer can claim qualified rehabilitation expenditures incurred in that year whether they were incurred before, during, or after the measuring period.ⁿ⁷

Lessee expenditures for a commercial office building do not qualify for the rehabilitation investment credit unless the lease term remaining at the end of the rehabilitation construction is at least equal to the 39-year recovery period for nonresidential real property.ⁿ⁸

[5] Substantial Rehabilitation

A building must be substantially rehabilitated to qualify for the rehabilitation investment credit.ⁿ¹ Rehabilitation, for purposes of the credit, includes reconstruction.ⁿ²

A building is substantially rehabilitated if the rehabilitation expenses during the 24-month period selected by the taxpayer, and ending with or within the tax year in issue, exceed the greater of the adjusted basis of the building and its structural components, or \$5,000. The adjusted basis of the building and its structural components is determined as of the beginning of the later of the first date in the applicable 24-month period, or the first date of the taxpayer's holding period of the building, without regard to any reconstruction by the taxpayer in connection with the rehabilitation.ⁿ³

A taxpayer who reasonably expects to complete phases of a rehabilitation set forth in architectural plans and specifications completed before the rehabilitation begins may make the determination of whether substantial rehabilitation has occurred during a 60-month period instead of a 24-month period.ⁿ⁴

Expenditures attributable to the rehabilitation of property that is, or may reasonably be expected to be, used for a tax-exempt purpose are not taken into account in determining whether the building is substantially rehabilitated.ⁿ⁵

[6] Rehabilitations of Historic Structures

[a] Certified Historic Structure

A certified historic structure is any building (and its structural components) that is either listed in the National Register or located in a registered historic district and is certified by the Secretary of the Interior to the Treasury Secretary as being of historic significance to the district.ⁿ¹

The Service will consider a building to be a certified historic structure when it is placed in service if the taxpayer reasonably believes on that date that the Department of Interior will certify the building as such. However, the taxpayer must have requested a Department of Interior determination on or before the date on which the building is placed in service, and the Department must later certify the building.ⁿ²

[b] Registered Historic District

A registered historic district is any district listed in the National Register, or any district that is designated under a state or local statute that is certified by the Interior Secretary as containing criteria to substantially achieve the purpose of preserving and rehabilitating buildings of historic significance to the district, and certified by the Interior Secretary as meeting substantially all of the requirements for the listing of districts in the National Register.ⁿ³

[c] Certified Rehabilitation

Certified rehabilitation is any rehabilitation of a certified historic structure that the Interior Secretary has certified to the Service as being consistent with the historic character of the property or the district in which the property is located. Only certified rehabilitations on buildings in registered historic districts qualify for the rehabilitation investment credit. However, the taxpayer need not obtain certification in order to claim a credit for expenditures on buildings in registered districts if the building is not a certified historic structure, the Interior Secretary has certified to the Service that the building is not of historic significance to the district and that certification occurs after the beginning of the building's rehabilitation, and the taxpayer certifies to the Service that he was not aware of the requirement for such certification at the beginning of the rehabilitation.ⁿ⁴

[7] Transitional Rules

Under transition rules for buildings placed in service between December 31, 1986, and January 1, 1994, the buildings are entitled to the special percentage rates for the rehabilitation investment credit described above. Any rehabilitation that is completed under a written contract that was binding on March 1, 1986 is eligible under these rules.ⁿ¹

In addition, qualified rehabilitation expenditures for a building (other than a certified historic building) placed in service between 1986 and 1994 may qualify for the special transitional rehabilitation credit rates if the following requirements are met:ⁿ².

(1) The property (including leasehold interests) is acquired before March 2, 1986, or is acquired on or after that date under a written contract that was binding on March 1, 1986; and

(2) An amount equal to the lesser of \$1 million, or 5 percent of the rehabilitation expenditures, was incurred before March 2, 1986, or had to be incurred under a written contract that was binding on March 1, 1986.

Planning Note

Basis of Rehabilitated Property is Reduced by Credit. The basis of rehabilitated property must be reduced by the amount of the rehabilitation expenditure credit taken. The effect is to reduce the amount of depreciation that the taxpayer can take in current and future years.ⁿ³

Legal Topics:

For related research and practice materials, see the following legal topics:

Real Property Law Zoning & Land Use Historic Preservation Tax Law Federal Income Tax Computation Deductions for Amortization, Depletion & Depreciation Investment Tax Credit (IRC secs. 38, 39, 46-50) Tax Law Federal Income Tax Computation Deductions for Business Expenses Business Credits (IRC secs. 38-54, 1396-1397) General Overview

FOOTNOTES:

(n1)Footnote 1. *IRC § 48(a)(1)(E); see IRC § 48(o)(3).*

(n2)Footnote 2. *IRC § 48(g)(4); Treas. Reg. § 1.48-12(a)(1).*

(n3)Footnote 3. *IRC § 46(b)(4)(B); Treas. Reg. § 1.46-1(q)(3).*

(n4)Footnote 4. *IRC § 48(g)(2)(B)(v).*

(n5)Footnote 5. *IRC § 46(c)(8).*

(n6)Footnote 6. *IRC § 47(a)(5).*

(n7)Footnote 1. *IRC § 46(b)(4)(A); Treas. Reg. § 1.46-1(q)(1)(ii).*

(n8)Footnote 2. Pub. L. No. 99-514, 99th Cong., 2d Sess. § 251(d)(5) (Oct. 22, 1986); *Treas. Reg. §§ 1.46-1(q)(1)(iv), 1.48-12(a)(2)(iv)(B), (C).*

(n9)Footnote 3. *Treas. Reg. § 1.46-1(q)(1)(iii); see IRC § 46(b)(4)(A), prior to amendment by Pub. L. No. 99-514, 99th Cong., 2d Sess. § 251(a) (Oct. 22, 1986).*

(n10)Footnote 1. *IRC § 48(g)(1)(A), (B); Treas. Reg. § 1.48-12(b)(1).*

(n11)Footnote 2. *See S. Rep. No. 313, 99th Cong., 2d Sess. 754 (1986).*

(n12)Footnote 3. *Id.*

(n13)Footnote 4. *Treas. Reg. §§ 1.46-1(q)(2)(i), 1.48-12(b)(5).*

(n14)Footnote 5. *Treas. Reg. § 1.46-1(q)(2)(ii)(A); see Treas. Reg. § 1.48-12(c)(10)(ii).*

(n15)Footnote 6. *Treas. Reg. § 1.46-1(q)(2)(ii)(B); see Treas. Reg. § 1.48-12(c)(10)(ii).*

(n16)Footnote 7. *Treas. Reg. § 1.46-1(q)(2)(ii)(B).*

(n17)Footnote 8. *Treas. Reg. §§ 1.46-1(q)(2)(iii), 1.48-1(h)(1)(iii).*

(n18)Footnote 9. *Treas. Reg. § 1.48-1(h)(2)(iv).*

(n19)Footnote 10. *Treas. Reg. § 1.46-1(q)(2)(iii); see Treas. Reg. § 1.48-12(c)(10)(ii).*

(n20)Footnote 1. *IRC § 48(g)(2)(A); see Treas. Reg. § 1.48-12(c).*

(n21)Footnote 2. *IRC § 48(g)(2)(B).*

(n22)Footnote 3. *See IRC § 168(h).*

(n23)Footnote 4. *See Treas. Reg. § 1.48-12(c)(7)(v); see also IRC § 168(c).*

(n24)Footnote 5. *Treas. Reg. § 1.48-12(b)(3)(i).*

(n25)Footnote 6. *Treas. Reg. § 1.48-12(b)(3)(ii).*

(n26)Footnote 7. *Treas. Reg. § 1.48-12(c)(6).*

(n27)Footnote 8. *IRC § 48(g)(2)(B)(vi); see IRC § 168(c).*

(n28)Footnote 1. *IRC § 48(g)(1)(A)(i).*

(n29)Footnote 2. *IRC § 48(g)(1)(D).*

(n30)Footnote 3. *IRC § 48(g)(1)(C); see Treas. Reg. § 1.48-12(b)(2).*

(n31)Footnote 4. *IRC § 48(g)(1)(C)(ii).*

(n32)Footnote 5. *IRC § 48(g)(2)(B)(v)(II); see IRC § 168(h).*

(n33)Footnote 1. *IRC § 48(g)(3)(A); see Treas. Reg. § 1.48-12(d)(1).*

(n34)Footnote 2. *Treas. Reg. § 1.48-12(d)(1).*

(n35)Footnote 3. *IRC § 48(g)(3)(B).*

(n36)Footnote 4. *IRC § 48(g)(2)(B)(iv)(I)-(III).*

(n37)Footnote 1. Pub. L. No. 99-514, 99th Cong., 2d Sess. § 251(d)(2)(B) (Oct. 22, 1986).

(n38)Footnote 2. *Id.*

(n39)Footnote 3. *IRC § 48(q)(3).*



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Current Legal Forms for Real Estate
Chapter 22 DEVELOPMENT AND SUBDIVISION
Part I. The Tax Background

26-22 Current Legal Forms for Real Estate § 22.17

§ 22.17 Passive Activity Limitation Rules

Development and subdivision of real property is generally subject to passive activity limitation rules, which limit deduction of passive activity losses and credits for most taxpayers.

[1] Effect of Passive Activity Rules on Development and Subdivision

Any discussion of development and subdivision of real property must take into account the passive activity limitation rules introduced by the Tax Reform Act of 1986.ⁿ¹ These rules generally limit the deduction of passive activity losses and credits of individuals, estates, trusts, closely held C corporations, and personal service corporations.ⁿ² (Closely held C corporations other than personal service corporations may offset passive activity losses and credits against active income but not against portfolio investment income.)ⁿ³ Although these limitations do not apply directly to partnerships, limited liability companies and S corporations, they are imposed at the taxpayer level so that the activities of such entities pass through to their owners, who are subject to the limits.

Passive activity losses generally are deductible only to the extent of income from passive activities. Similarly, credits from passive activities generally are limited to the tax allocable to passive activities. Passive activity losses and credits may not be deducted against other income, including wages, dividends, interest, and active business income.ⁿ⁴

Disallowed losses and credits may be carried forward and used against passive activity income in subsequent years.ⁿ⁵ All unused losses may be deducted in the year in which the taxpayer disposes of his entire interest in a passive activity.ⁿ⁶

For purposes of the above limitations, a passive activity is one that involves the conduct of any trade or business in which the taxpayer does not materially participate.ⁿ⁷ Material participation means the taxpayer's involvement in the activity on a regular, continuous, and substantial basis.ⁿ⁸ Thus, a taxpayer who invests in a business and whose only involvement consists of periodic consultation and general management decisions generally does not satisfy the material participation standard; direct involvement in the business operations is necessary. Except as provided in regulations, the interest of a limited partner in a limited partnership is not treated as an interest with respect to which the taxpayer

materially participates.ⁿ⁹ A closely held C corporation or personal service corporation is treated as materially participating in an activity only if one or more shareholders holding stock representing more than 50 percent (by value) of the corporation's outstanding stock materially participate in the activity, or in the case of a closely held C corporation other than a personal service corporation, the corporation carries on a qualifying business under the at-risk rules with respect to the activity.ⁿ¹⁰

For an extensive discussion of the passive activity loss and credit limitation rules, including their application to rental real estate activities, see the Tax Background to Chapter 1, in Volume 1.

[2] Exception for Losses and Credits from Rental Real Estate Activities

Generally speaking, rental activity (i.e., any activity where payments are principally made for the use of tangible property) is considered to be a passive activity.ⁿ¹ Therefore, deductions and credits from rental activities can only offset income from other passive activities, generally. Such deductions and credits *cannot* be deducted from nonpassive income, such as wages, dividends, interest, etc. However, there are two major exceptions to this general rule.

First, beginning in 1994, certain eligible taxpayers who materially participate in rental real estate activities can deduct losses from such activities against nonpassive income. These eligible taxpayers include individuals and closely-held C corporations that meet special eligibility requirements.

An individual taxpayer meets the eligibility requirements if:

- (1) more than half of the personal services the taxpayer performs during the tax year is performed in real property trades or businesses in which the taxpayer materially participates; and
- (2) such taxpayer performs more than 750 hours of service during the tax year in the real property trades or businesses in which the taxpayer materially participates.

A closely-held C corporation meets the eligibility requirements if more than 50 percent of its gross receipts for the tax year are derived from real property trades or businesses in which the corporation materially participates.

"Real property trade or business" means any real property development, redevelopment, construction, reconstruction, acquisition, conversion, rental, operation, management, leasing or brokerage trade or business.

To be a material participant, the taxpayer must be involved in the business on a regular, substantial and continuous basis.

In the case of a joint return, the eligibility requirements are met if either spouse separately satisfies the two requirements. Thus, one of the spouses must satisfy the requirement with respect to half of such spouse's personal services, as well as the requirement with respect to 750 hours of services, without regard to services performed by the other spouse. However, participation of the taxpayer's spouse is taken into account in determining material participation.ⁿ²

The second exception provides that an individual who owns at least a 10-percent interest and who *actively* participates in rental real estate activity is permitted to offset up to \$25,000 of passive activity losses against his nonpassive income.ⁿ³

Except as provided in regulations, no interest as a limited partner in a limited partnership is treated as an interest with respect to which the taxpayer actively participates.ⁿ⁴ Active participation is not required, however, for purposes of the rehabilitation investment credit.ⁿ⁵

The \$25,000 amount is phased out for higher-income taxpayers. For purposes of the limitation on losses, the \$25,000 amount is reduced (but not below zero) by \$1 for each \$2 of adjusted gross income in excess of \$100,000. Thus, it is fully phased out when adjusted gross income exceeds \$150,000.ⁿ⁶

Example 1

: Mr. and Mrs. Green own and manage a rental apartment. In Year 1, they have an \$8,000 loss from their rental activity. Their joint adjusted gross income (computed without regard to the rental loss) is \$58,000. The Greens may deduct the full \$8,000 rental loss from their \$58,000 of adjusted gross income from other sources.

Example 2

: Mrs. Parcel owns and actively manages several rental properties. In Year 1, she has a rental loss of \$30,000 and adjusted gross income from other sources of \$110,000. Since Mrs. Parcel's adjusted gross income from other sources exceeds \$100,000, she must reduce her \$25,000 maximum rental loss deduction by \$5,000, i.e., one-half of other adjusted gross income in excess of \$100,000. Mrs. Parcel, therefore, may deduct \$20,000 of her Year 1 rental loss under the \$25,000 rental loss exception. Of the remaining \$10,000 rental loss, 65 percent is deductible in Year 1 under the loss limitation phase-in rule and 35 percent must be carried forward.

For purpose of the rehabilitation credit limitation, however, the phase out does not begin until adjusted gross income exceeds \$200,000. The credit is fully phased out when adjusted gross income exceeds \$250,000.ⁿ⁷

For purposes of the \$25,000 rental activities exception to the passive activity rules, the active participation test is intended to be less stringent than the material participation test. Thus, a taxpayer who owns an interest in real estate is permitted to satisfy the active participation test by personally operating the rental property, or by hiring a rental agent or real estate management firm to operate it, so long as he participates in making management decisions or arranges for others to provide services (such as repairs). Significant management decisions that satisfy this test include approving new tenants, deciding on rental terms, approving capital expenditures or repairs, and similar types of decisions.ⁿ⁸

Legal Topics:

For related research and practice materials, see the following legal topics:

Real Property Law Construction Law General Overview Real Property Law Subdivisions General Overview Tax Law Federal Income Tax Computation Deductions for Losses Passive Activity Loss (IRC sec. 469) Tax Law Federal Taxpayer Groups S Corporations Passive Activities (IRC secs. 469, 1375)

FOOTNOTES:

(n1)Footnote 1. *IRC § 469*, added by the Tax Reform Act of 1986, Pub. L. 99-514, 99th Cong., 2d Sess. 501(a) (Oct. 22, 1986).

(n2)Footnote 2. *IRC § 469(a), (j)(1), (2)*.

(n3)Footnote 3. *IRC § 469(e)(2)*.

(n4)Footnote 4. *IRC § 469(a), (d)*.

(n5)Footnote 5. *IRC § 469(b)*.

(n6)Footnote 6. *IRC § 469(g)*.

(n7)Footnote 7. *IRC § 469(c)(1), (6)*.

(n8)Footnote 8. *IRC § 469(h)(1).*

(n9)Footnote 9. *IRC § 469(h)(2).*

(n10)Footnote 10. *IRC § 469(h)(4); see IRC § 465(c)(7)(c).*

(n11)Footnote 1. *IRC § 469(c)(2).*

(n12)Footnote 2. *IRC § 469(c)(7).*

(n13)Footnote 3. *IRC § 469(i).*

(n14)Footnote 4. *IRC § 469(i)(6)(C).*

(n15)Footnote 5. *IRC § 469(i)(6)(B); see IRC §§ 42, 48(o).*

(n16)Footnote 6. *IRC § 469(i)(3)(A), (E).*

(n17)Footnote 7. *IRC § 469(i)(3)(B).*

(n18)Footnote 8. *S. Rep. No. 99-313, 99th Cong., 2d Sess. 737-38 (1986).*



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[Reserved]

§§ 22.18 [Reserved]



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Chapter 22 DEVELOPMENT AND SUBDIVISION
Part II. The Practice Background

26-22 Current Legal Forms for Real Estate § 22.26

§ 22.26 Introduction and Scope of Practice Background

This Practice Background will review all aspects of a real estate development project. As used herein, the term "real estate development project" refers to a business enterprise in which a party utilizes one or more parcels of land for the purpose of constructing one or more structures intended either for personal use or for sale or lease to others. Such a project might result in:

- (1) an industrial park;
- (2) a single-family residential housing development;
- (3) an apartment complex;
- (4) an office complex;
- (5) a retail shopping mall;
- (6) a hotel development; or
- (7) an elder or assisted living development.

This Practice Background will examine a real estate development project from the pre-acquisition phase through the sales and marketing stage. It will offer practical advice for handling issues that typically arise during each stage, and it will recommend techniques and strategies for recognizing and solving problems commonly encountered. The Practice Background will also offer guidance on negotiating and drafting legal agreements and other documents pertinent to a real estate development deal.

In addition, the Practice Background will also highlight some areas of potential concern from a tax perspective. Since every real estate development deal is unique, the parties to a transaction must always consult their individual tax advisors for advice as to the tax consequences of the transaction. This Practice Background is not intended to provide

such specialized advice; rather, it merely seeks to identify some major tax issues of which the developer should be aware and explore in depth with his or her own accountant or other tax professional. (The reader is also directed to consult the Tax Background to this chapter for a discussion of the federal income tax issues raised by real estate development and subdivision projects.)

Legal Topics:

For related research and practice materials, see the following legal topics:

Real Property LawConstruction LawGeneral OverviewReal Property LawSubdivisionsGeneral OverviewReal Property LawZoning & Land UseGeneral OverviewTax LawFederal Income Tax ComputationSales & ExchangesCapital Gains & Losses (IRC secs. 1201-1202, 1211-1212, 1221-1223, 1231-1260, 1271-1278, 1281-1288, 1291-1298)Real Property Subdivided for Sale



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Chapter 22 DEVELOPMENT AND SUBDIVISION
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26-22 Current Legal Forms for Real Estate § 22.27

§ 22.27 Pre-acquisition Phase

The pre-acquisition phase of a real estate development project commences when a prospective developer first decides to embark upon a construction project and begins searching for a suitable site upon which to give the creation life. Having found one or more possible sites, the developer then begins to work out the general contours of the project. Among many other things, the developer must consider:

- (1) the nature and scope of the project;
- (2) the form of ownership (i.e., the type of business entity that will build and own the development, e.g., a corporation, a partnership, a limited liability company, etc.); and
- (3) whether the project is economically feasible.

In addition, the developer must seek acquisition financing and make arrangements for obtaining the land upon which the developer wishes to build the development. Real estate development projects are often abandoned during this stage as various hurdles arise that prove insurmountable, at least in the short term. These same projects are frequently revived later when a difficult problem is finally solved by a change in circumstances.

[1] Nature and Scope of the Project

The first issue for a developer to consider is the type of project to be undertaken. At this early stage in the process, the type of project may be expressed in very general terms, such as a "residential housing development" or a "commercial office complex." The developer will probably be undecided as to the number of units to be built or the style of construction to be used; however, the developer usually will have some notion as to whether the project will be sold or leased to the ultimate consumers.

In short, the pre-acquisition phase is one dominated by considerable "brainstorming." There will be extensive consideration of a wide variety of ideas as the developer seeks to create a clear picture of the real estate development project to be built. For example, because of our aging population, a developer may decide to develop senior housing.

The three general categories in the area of senior housing are those facilities which are devoted to congregate care and independent living, those facilities which are categorized as assisted living facilities, and those that are considered nursing homes. The first category is for those seniors who are essentially still able to take care of themselves, but desire to live with others of similar circumstances. Assisted living facilities are for elderly persons needing help with some aspects of daily living, and nursing home facilities are for seniors requiring skilled nursing care. Frequently, senior housing developments may consist of a combination of all of the types of senior housing facilities.

In planning senior housing, the developer must take into account the demographics of the area where he is developing his real estate. During the 1990's developers noticed the rising number of senior citizens and the construction of assisted living facilities grew at a rapid rate, to the point where there was an oversupply. However, that situation has now improved considerably, but the developer must still be aware that overbuilding may again occur because most states do not require state issued certificates of need authorizing assisted living facilities to be constructed. This is in contrast to and unlike the requirement to obtain a certificate of need from the appropriate state authority authorizing a nursing home facility to be constructed based on the state authority's determination that there is a need for more nursing beds. Nevertheless, over the long term, the rising number of seniors and their growing awareness of assisted living facilities should result in a continued demand for such facilities.

If the developer decides to develop the land as condominium property or as time share interests, the latter being fractionalized interests in a condominium, the developer needs some familiarity with the state statute governing these forms of ownership because they are both statutorily created and controlled. In addition, local ordinances will need to be reviewed to make sure there are no restrictions against condominiums or time shares. For a thorough discussion of the development of condominiums, see the Practice Background, in Volume 24, Chapter 20, *Real Estate Entities, Section 20.31, supra*. For a thorough discussion of time shares, see the Practice Background, in Volume 24, Chapter 20, *Real Estate Entities, Section 20.32, supra*. In addition, there is a Checklist for development of condominiums in the Drafting Guidelines, in Volume 24, Chapter 20, *Real Estate Entities, Section 20.53*, and a Checklist for the creation of time share interests in *Section 20.54, supra*.

Next, the developer must locate potential sites for the project. The availability of suitable land may have a dramatic effect on the type and ultimate size of the project. For example, a financially-successful residential housing development requires a considerable amount of land. If such a site is not available, the project may have to be redrawn as an apartment complex, which typically will require less land.

Another consideration is the environmental condition of the property. Properties that have environmental problems, and are typically located in heavy industrial areas in cities, or even in inuring suburbs, are known as "Brownfield" properties. There are an estimated 450,000 Brownfields throughout the United States. To encourage their development, state and local programs, to mitigate environmental liabilities, play an important role in encouraging development of these Brownfield properties. Approximately 35 states or more have some form of voluntary clean-up programs, making it easier for property owners to take remedial actions. Many of these states offer grants or loans to help defray the cost of the site analysis and clean-up, as well as tax incentives. The key part of many of these programs is a provision for liability relief for the purchasers undertaking to reclaim these properties, frequently in the form of covenants not to sue.

A purchaser of a Brownfields property can also attempt to rely on the innocent purchaser defense provided by the original Superfund law,ⁿ¹ but the conditions for satisfying that defense are difficult to achieve. In essence, you have to show you took reasonable steps before you purchased the property to check its environmental condition, and then proceeded to purchase the property not knowing there were any problems. In the year 2002, Congress passed the Small Business Liability Relief and Brownfields Revitalization Act ("SBLRA").ⁿ² This law expanded the exemption from Superfund liability to include bona fide prospective purchasers who knowingly bought contaminated property. A bona fide prospective purchaser is a person who acquires certain property but will not be deemed an owner/operator for liability purposes so long as all disposal occurred prior to the purchase. In addition, a bona fide prospective purchaser is a person that (i) made all appropriate inquiry before the purchase; (ii) provided all required notices, exercised due care

with respect to any contamination, and cooperated with authorities; (iii) abided by applicable institutional control; and (iv) is not affiliated with any party responsible for the contamination. Of the several conditions necessary to qualify for the defense of the bona fide prospective purchaser who knowingly bought contaminated property, the most difficult one is the one stating that the purchaser must "exercise appropriate care with respect to hazardous substances found at the facility by taking reasonable steps to: (1) stop any continuing release, (2) prevent any threatened future release, and (3) prevent or limit exposure to any previously released hazardous substance. Unfortunately, the EPA has stated that "the reasonable steps determination will be a site-specific, fact-based inquiry." Because this is an open-ended statement, it may not be sufficient to overcome the reluctance of some developers and lenders to become involved in known contaminated property. The best opportunity to deal with the Brownfields property may still be by use of the applicable state statute relating to the voluntary clean-up of Brownfields properties.

If a Brownfields property is being considered, and remediation efforts are undertaken, it may be possible to earn points towards the eventual certification of the property and the improvements as a "green" building under the rating system referred to as LEED. The term LEED stands for "Leadership in Energy & Environmental Design." The rating system is the one most frequently used for such a certification. In general a "green" building is one that is environmentally and economically sustainable, cost effective and energy efficient. In order to obtain LEED certification, it is necessary to register the project and have the U.S. Green Building Council professionals track the progress of the project as it proceeds to measure its compliance with the standard which must be met.

[2] Feasibility

[a] Location of the Project

Once potential sites have been located, they must be evaluated for feasibility. First, the sites must be reviewed to determine the maximum size real estate development project that could be built there. In a residential subdivision, for instance, an estimate must be made of the total number of lots and homes that could be included on the site. This estimate is based on two factors: (1) the minimum lot size allowed by the municipality; and (2) the type of development the builder wishes to construct. For example, if the developer wishes to construct a very upscale development consisting of single-family homes ranging in price from \$250,000 to \$500,000, then large lots will be needed to accommodate such expensive houses. Simply put, the rule of thumb is this: the higher the anticipated price of a house, the larger the lot size should be.

In a commercial or residential real estate project, the developer must consider minimum lot size and "setback" requirements. (Setback requirements refer to a distance from a curb, property line or structure within which building is prohibited. Setback requirements are normally provided for by local ordinances or building codes.)

In addition, the developer must consider municipal ordinances mandating the number of parking spaces a commercial establishment must make available to customers, clients, staff, etc. In some municipalities, the developer must also consider the amount of "green space" required by the municipality and local rules concerning natural screening. (Green space requirements are typically set forth in municipal ordinances and building codes. They require a real estate development to possess, for esthetic reasons, a certain amount of trees, shrubbery, grass, etc. Similarly, "natural screening" refers to local rules requiring the use of trees, bushes and other natural objects to conceal an esthetically unpleasant site, such as a trash dump.)

Once the developer has determined the maximum size development each site could hold, the developer must evaluate the general locations surrounding the competing sites, taking into consideration such factors as:

- (1) access to public utilities;
- (2) access to major roadways;

- (3) the area's need for the development; and
- (4) the proximity of the site to a major population center.

[i] Access to Utilities

Obviously, the structure or structures to be built will require an ample supply of clean water, natural gas and electricity, as well as telephone, cable and internet access, and sewer services, etc. Thus, for each potential site, the developer must consider these and related issues:

- (1) Does the site have easy access to existing water, gas, electricity, telephone, cable and sewer lines?
- (2) If not, how far away are the nearest accessible lines?
- (3) What will the cost be of accessing the lines?

[ii] Access to Roadways

The developer must also consider each site's access to major roadways that will serve the development. The site chosen should be conveniently located near the roadways in order to attract people and businesses to the development, whether that development is residential (homeowners and tenants), commercial (clients and employees), or retail (customers).

[iii] Need for the Development Project and Proximity to Population Center

The developer must also evaluate the local need for the proposed project, and whether the site is within close proximity of a major population center. For example, if the proposed project is a retail shopping mall, the developer should inquire as to whether the site is sufficiently near a population center that it will be utilized by shoppers. The developer should also inquire whether the local market is in need of a shopping mall, or whether another nearby shopping mall already meets the needs of the community. Finally, assuming another mall already exists nearby, the developer should look into the question of whether that mall has a great number of unsold or unleased units.

[b] Traffic

The developer should take notice of the roadways adjacent to each site and ask if the roadways are of sufficient quantity, width and durability to carry the additional traffic load anticipated. Understandably, the developer may feel uncomfortable making traffic predictions and road evaluations personally and may want to commission a traffic study by a private consulting firm. Indeed, it is very possible that such a study will be required by the municipality as part of the site approval process. Since these studies are quite costly, the developer should narrow the choice of potential sites to a very few--certainly no more than two or three--before commissioning the study.

The traffic study will review current usage of the relevant roadways and estimate future usage once the development is fully built and occupied. It might make recommendations for access points to the development, i.e., entrances and exits. In addition, it might recommend alterations or improvements to the existing roadways in order to accommodate the additional future traffic. These might include:

- (1) left--turn and right--turn lanes;
- (2) widening of the roadways;
- (3) the addition of sidewalks;

(4) the addition of crosswalks; and

(5) installation of traffic control devices, such as traffic lights, "Stop" signs and "Yield" signs.

The developer can be assured that any improvements recommended by the study will have to be made at the developer's expense and that the improvements can turn out to be quite costly.

[c] Taxes

The developer must also consider the future impact of local real property taxes on the development project, its owners and occupants. If the real estate development will be commercial in use and leased to tenants, then the taxes must be considered part of the developer's future cost of operations. In that case, the taxes can be passed along to the tenants through their rental payments. On the other hand, if the development is residential and its units are to be sold to individuals, local real estate tax rates will definitely impact on the marketability of units. Higher taxes will clearly reduce the desirability of buying into the project.

Some municipalities may be authorized to enter into tax abatement agreements with developers in order to encourage commercial real estate development. The abatement programs reduce the real estate taxes in the early years immediately following completion of the project on the theory that the development will bring jobs to the area and increased revenues from sales taxes generated at business establishments serving the development.

If tax abatement programs are not available, the developer should look into the possibility of tax increment financing to help his development. Simply stated, tax increment financing uses the projected tax revenues generated in a development project as a result of public and private investment, to finance the necessary public investment. In other words, the tax increment system is used to finance public improvements such as improvements to the infrastructure required for the project, or parking garages. The annual increment of tax revenues from the project are used to pay for the improvements, or bonds are sold by the governmental entity or agency to pay for the improvements, and the tax revenues are pledged to repay the bonds.

[d] Schools

If the project is a residential development, the developer must also consider the local school system. First, the developer must consider the reputation of the school system. Many residential purchasers--particularly married couples in their 20's and 30's--may make their purchase decisions based, at least in part, on the quality of the local school system. If the school has a poor reputation, the developer may have serious difficulty in marketing residential units.

Second, the developer must also consider the impact of the development on the school system. If the development is expected to draw a large number of school-age children, there may be a need to expand the existing schools or even build additional ones. Developers are often asked to donate land for such purposes. Although the developer cannot be required to make a donation, community opposition to real estate development projects often disappears after a donation is offered.

[3] Acquisition Financing

Once the developer has determined that the chosen site is feasible, the developer must next determine how to finance the acquisition of the property. The possible methods of financing are limited only by the developer's own creativity. The most commonly--used methods are discussed below:

First, the developer may finance the purchase by using his or her own capital. This may involve liquidating savings and

other assets. Not surprisingly, most developers attempt to avoid this method since it places the entire risk of loss on the developer and may significantly reduce personal assets and future borrowing ability.

Second, the developer may borrow capital from another real estate development project that the developer also owns. This may be accomplished by having the other project make a direct loan to the developer, if it has sufficient assets, or the developer may borrow funds from a third party, using the assets of the other project as collateral. (This is frequently referred to as "leveraging.") The technique has the advantage of not committing the developer's personal assets to the new development project, unless, of course, the lender requires the developer's personal guaranty as a condition for making the loan. The technique has the disadvantage of committing the assets of a successful project to an unknown project.

Third, some developers seek acquisition financing from the seller. In other words, the developer makes a down payment, and the seller takes back a purchase money mortgage for the balance of the purchase price, i.e., the seller holds the mortgage. This method has the dual advantages of shielding the developer's own capital from use, while being far less expensive than institutional borrowing. It may also have tax advantages for the seller. The developer may be eligible for installment treatment of the gain realized on the sale of the property.ⁿ¹

If the acquisition financing avenue is pursued, the developer should be extremely cautious in negotiating the terms of the loan. For instance, the developer should request a provision that would allow the purchase money mortgage to be subordinated to future financing agreements for construction of the infrastructure and buildings on the development, since an institutional lender who finances construction would certainly require a subordination. In addition, the developer should request a provision entitling the developer to releases from the seller as lots are sold to purchasers. In other words, with each lot sold, the developer would be partially released from the mortgage. The developer should also insist upon a provision allowing the loan to be assigned at the request of the developer.

Failure to obtain these provisions might require the developer to refinance the acquisition loan at some future time. However, refinancing could result in several serious drawbacks to the developer. Since many states impose a tax on mortgages--which may be as high as 1 percent of the total amount financed--refinancing would subject the developer to paying this onerous tax a second time. In addition, an institutional lender will often require the payment of "points" on a loan refinancing, with each point representing 1 percent of the amount financed. These added costs can easily run into millions of dollars when refinancing a loan for a major real estate development project. Avoiding the need to refinance via proper structuring of the loan agreement can save the developer a considerable amount of money and thereby increase the final profit from the project.

Fourth, acquisition financing can also be obtained by accepting capital contributions from partners or shareholders in the development project. This method has the advantage of spreading the risk of loss over several additional parties. On the other hand, of course, it has the disadvantage of reducing the level of control exercised by the developer over the project.

Fifth, acquisition financing may be obtained from institutional sources, such as financial institutions like banks, savings and loan associations, etc. Generally speaking, institutional lenders will not finance an acquisition of vacant land using only that land as collateral. Instead, they will require additional collateral which has the ability to produce a flow of steady income, such as:

- (1) a certificate of deposit;
- (2) accounts receivable;
- (3) corporate or government bonds; or

(4) rental property.

This last method is quite costly; in addition to interest on the loan, the developer will also have to pay the institution's various loan application fees and the charges related to the variety of lien recordings that may be necessary. Using an institutional lender creates other potential problems as well. Typically, an institutional lender will not be willing to agree to subordination of its acquisition loan to later construction loans, unless the subsequent loans are made by the same lender. In addition, institutional lenders may have pre-established lending limits for particular projects. Accordingly, on the whole, use of an institutional lender is the least attractive way to finance acquisition.

Sixth, use of the traditional sale-leaseback transaction may provide a means of financing for a developer. In the sale-leaseback transaction, the developer can obtain temporary financing to acquire and develop a parcel of land with a rental property, with a commitment from an institutional investor to purchase and then leaseback the improved property to the developer. The developer would agree, as part of the sale, to rent the property on a long-term basis, and as the leasehold owner the property is then subleased to a single user or multiple tenants. In effect, the institutional developer has financed the entire project for the developer. If the developer is able to obtain a commitment from a financially strong growth company to sublease the property, the risk to the developer is minimized. This technique also works for smaller, closely held corporations that may want to move the real estate out of the corporation and into another entity for estate planning or succession reasons.

A variation of the traditional sale-leaseback is what is called a synthetic lease. The synthetic lease was a response to the inability of many public corporations, mostly retailers, to obtain bank financing for real estate after the collapse of real estate values in the 1980's. Lenders did not want to assume the risk that if the borrower defaulted, the value of the real estate would not provide enough security to cover the amount of the unpaid loan. As an alternative, corporate borrowers obtained financing that was secured by the underlying credit of the corporation itself. The corporation, in that case, would then have to show the real estate as an asset and the loan as a liability. A better solution was devised called the synthetic lease. It exploited the different treatment for accounting and tax purposes of an "operating lease" and a "capital lease." In the synthetic lease situation, a special purpose entity is formed to own the land, build the building, and lease it to the corporation. The corporation executes a bondable net lease calling for a rental payment to the special purpose entity sufficient to cover the debt service payments. The security for the loan is the lease and the underlying credit of the corporation. For accounting purposes, the lease is treated as a true operating lease, which permits the corporation to deduct payment to the financial institution as rent and avoid the need to show the financing as debt on its balance sheet. For tax purposes, however, the lease is viewed as a capital lease, permitting the corporation to take interest deductions on the financing and depreciation on the building. Unfortunately, since the collapse of Enron, which used the synthetic lease concept in a fraudulent way with respect to assets other than real estate, its use in the future for real estate may be limited. In addition, on January 17, 2003, a pronouncement by the Financial Accounting Standard Board (FASB), Financial Interpretation No. 46, now requires corporations using or entering into synthetic leases using a single purpose entity, to show the asset on the corporation's balance sheet. Nevertheless, although synthetic leases may not be used as much anymore, the traditional sale-leaseback should remain a viable alternative.

Seventh, land banking is an alternative if the developer can find an investor to pay for a large parcel of land to be developed over a long period of time. Because all the land is not immediately developed, a large amount of equity has to be tied up in purchasing the excess land. The developer contracts for the purchase of the parcel but assigns his rights to purchase it to the investor, who acquires it and leases the land back to the developer. The developer obtains financing for each stage of the development. The investor controls release of the land parcels and receives ground rents from the developer according to a predetermined formula. That formula usually includes fixed rents for the land, plus bonus cash flow participation and project reversion proceeds.

Eighth, the developer should be aware of the availability of what is known as mezzanine financing. A mezzanine loan is a form of subordinate financing whereby the mezzanine financier holds a debt or preferred equity position between the true equity on the one hand, and the first mortgage lender on the other. A primary reason for the rise in mezzanine

financing is the unwillingness of first mortgage lenders to permit a second or subordinate lien on the property that might limit the second lender's rights in the event of a default. A second mortgage can delay a foreclosure by a senior lender and could tie up cash flow by forcing a bankruptcy or other legal action. In lieu of a mortgage lien, a mezzanine lender secures its loan with a pledge of the equity interest (a partnership or membership interest). In most cases, a senior lender will condition its approval of a mezzanine loan upon the execution of an intercreditor agreement between the senior lender and mezzanine lender setting forth their rights and responsibilities.

[4] Option Agreement

Many developers utilize option agreements as part of the acquisition of land suitable for development. An option agreement gives the developer the exclusive right to purchase a particular parcel of land for a stated period of time. The option requires the developer to pay a stated amount of consideration for this right at the time the option agreement is executed.

The purpose of the option is to remove the property from the market for a fixed period of time. The consideration is designed to compensate the seller for possibly losing the opportunity to sell the property to another buyer while the agreement is in effect. During the option period, the developer will perform all of the feasibility studies, discussed above, in order to determine whether the premises are appropriate for his or her needs. The developer will also investigate the availability of various acquisition financing sources.

[a] Environmental Site Assessment

The developer might also have an environmental site assessment performed at this time. A "Phase I" environmental site assessment is a study of the history of the property, performed by a qualified firm that typically specializes in geological studies, engineering or environmental matters. Specifically, the purpose of the Phase I environmental site assessment is to learn whether there is any evidence of an "adverse environmental impact" due to past or current releases of hazardous substances in, on, beneath or near the subject premises. This assessment is performed by reviewing past and present uses of the subject premises and nearby premises.

In performing its research, the consulting firm will typically make use of aerial photographs and maps, atlases and other illustrative materials pertaining to the surrounding area. The firm will also search municipal and county records for written information regarding the identity of, and businesses conducted by, past and present owners of nearby properties, and past owners of the subject property. Such records will include those held in:

- (1) the county clerk's office;
- (2) the local police and fire departments;
- (3) the office of the building inspector;
- (4) the health department; and
- (5) the chamber of commerce, etc.

Finally, the consulting firm will conduct in-person interviews with municipal officials, as well as with owners and occupants of neighboring properties.

If the Phase I site assessment shows no evidence of any adverse environmental impact, no further investigation is generally done. However, if some evidence of a potential adverse impact is discovered, a Phase II environmental site assessment will have to be performed.

In a Phase II assessment, samples of soil, air and water are taken and analyzed in order to determine whether hazardous substances are actually present on the premises. If hazardous substances are found, a Phase III environmental site assessment may be performed to determine the scope and source of contamination. An estimate of the cost of remediation would then be prepared. If the cost is very high, the developer is likely to abandon the site and look elsewhere for land suitable for the project. If the cost is moderate, the developer may ask the owner to either lower the purchase price in an amount equal to the cost of remediation, or to pay the cost of remediation. If the owner agrees to lower the purchase price, the developer will be responsible for the remediation. In determining whether to abandon the site, the developer should bear in mind the effect that any negative publicity about the presence of hazardous substances on the premises may have on the marketability of the project down the road.

In land developments, the developer must also determine whether the land contains any wetlands because if the proposed development might impact the wetlands or a stream, the developer must get a permit from the appropriate governmental agency. A wetlands delineation should be obtained by the developer from a qualified wetlands consultant. If there are wetlands and the wetlands will be impacted by dredged or fill material, a permit is needed from the United States Army Corps of Engineers. In addition, before proceeding under a Corps wetlands permit, the developer most likely will also need a certification from its state environmental agency that the proposed permit will not cause a violation of the state law governing such matters. An experienced consultant or environmental attorney should be consulted to assist the developer throughout the permitting process.

[b] Obtaining Government Approval of the Project

Some developers will use the option period to obtain government approval of the project. Thus, the option agreement should include a provision requiring the seller to fully support the developer's application for government approval of the project.

Where the developer intends to obtain government approval for the project during the option period, the developer should insist on including in the option agreement a provision giving the developer automatic extensions of time if government approval is not obtained by the end of the option period. This provision would grant the developer additional time in which to exercise the option by simply giving notice to the seller of the developer's need for an extension. In order to induce the seller to permit the mandatory extensions, the developer may have to offer to pay some additional consideration, either at the time the option agreement is executed or each time an extension is used.

[c] Consideration for the Option Agreement

In negotiating the terms of the option, consideration will be a major issue. The seller will want enough money to justify the temporary removal of the property from the market. The purchaser, on the other hand, will want to keep the amount as low as possible.

The amount of consideration must be negotiated by the parties. The factors to be considered by the purchaser in preparing for negotiation are:

- (1) the uniqueness of the property;
- (2) the degree of suitability of the property for the project;
- (3) the degree of confidence the developer has in obtaining government approval of the project; and
- (4) whether there are other potential buyers at the moment.

The factors to be considered by the seller in its preparation for negotiations are:

- (1) the length of time the seller is being asked to remove the property from the market and the value of the property that is being taken off the market for that period of time;
- (2) the cost of capital at the time and the carrying charges (for taxes and insurance) that the seller will incur during the option period;
- (3) the degree of confidence that the developer will exercise the option; and
- (4) the existence of other interested buyers.

A further consideration issue is whether the amount paid for the option will be credited toward the purchase price if the developer eventually decides to exercise the option. Clearly, the developer will want the entire option price credited toward the purchase price. However, the seller may demand that little or none of the option price be credited toward the purchase price. (This is especially likely if the option price is equal, or very close, to the cost of the carrying charges on the property during the option period.) Of course, in the final analysis, the seller must simply decide just how urgent it is about selling the property. If the need to sell is not terribly urgent, the seller may be able to hold out for none of the option price being credited toward the purchase price.

Another factor to be considered by the developer in negotiating the option price is whether the amount, if not credited toward the purchase price, can eventually be recovered through an increase in the price of the units charged to future purchasers without jeopardizing their marketability.

[d] Negotiating the Purchase Price of the Land in Case the Option Is Exercised

When negotiating the option agreement, the parties will need to negotiate a purchase price for the property in the event that the option is exercised. This price would be negotiated in the same fashion as any purchase price on any piece of real property. The parties may wish to use appraisals by local real estate brokers or market analyses in order to bolster their respective positions. Of course, the developer must be certain that the price agreed to does not exceed the amount recoverable through sales of units in the development.

[e] Time Limits in Exercising the Option

The option agreement will typically set forth a time period within which the option must be exercised. The developer must be certain that he or she can safely accomplish all of the goals within the allotted time. The seller is under no obligation to extend the period of the option unless the agreement provides for mandatory extensions, as discussed above in subsection [4][b].

[f] Exercising the Option

The option agreement must specify the method by which the purchaser will exercise the option. Generally, exercise is by written notice to the seller, either hand delivered or sent certified mail, return receipt requested, before the expiration of the option period. Often, the notice must be accompanied by further consideration (i.e., a down payment) and a contract of sale signed by the purchaser. The seller is usually obligated to execute and return a copy of the contract of sale within a specified period thereafter. (It should be noted that many option agreements have the contract of sale to be used annexed as an exhibit. This is a recommended procedure, since it prevents misunderstandings or dilatory practices by the parties.)

Some options allow for partial or successive exercises of the option. This is typically seen where the real estate

development project will be built in stages and where the lands covered by the option are quite extensive, perhaps encompassing hundreds or even thousands of acres. The seller should be sure that the residual land remaining after the exercise of successive options is self-sufficient in that it continues to have a means of ingress and egress to it and access to utilities, or if not direct access, has the right to obtain easements over the land sold to obtain such access. Here, the purchaser will exercise the option a number of times, each time purchasing a part of the total property covered by the option agreement. In such cases, the amount of consideration is set forth separately in the agreement for each option period. In addition, option periods may be calculated based upon *the occurrence of events*, rather than upon specified dates. For example, an option to purchase the land necessary for Phase II of a development project may expire six months after the sale or lease of the last unit in Phase I. Under such circumstances, the seller must be sure that it has obtained sufficient consideration for each option period, since it has virtually no control over when such events may occur, or the seller should require some outside date by which the option will expire.

Finally, many options contain a provision requiring the developer to accept the transfer of title within a specified period of time after the exercise of the option. If the option does not so specify, the contract of sale and purchase should.

[g] Assignment of the Option

The option agreement should contain a provision allowing the developer to assign his or her rights under the agreement, and under any other contract executed in furtherance of the option agreement, to any entity in which he or she is a principal. This provision will become vitally important to the developer in the event that the developer decides at a later date to incorporate or to form a partnership, limited liability company, or other entity in order to carry out the development project. This arrangement should not pose a problem for the seller, since the developer will remain actively involved in the project as a principal in the entity.

Some option agreements grant developers the unlimited ability to assign the option agreement and the sale and purchase contract. This arrangement may prove unacceptable to a seller who has agreed to finance the acquisition. Such a seller would be wise to require that its consent, based on its examination of the financial condition of the assignee, be obtained before an assignment to a third party may be made.

[5] Contract of Sale and Purchase

Some developers prefer to enter directly into a contract of sale and purchase with contingencies attached, instead of an option agreement followed by a contract of sale and purchase. The contract of sale and purchase must specify the property to be purchased and may allow for sequential purchases of tracts of land by the developer. These sequential purchases may occur on specified dates, or after the occurrence of certain events, such as subdivision approval or sale or lease of a certain number of units.

The contract must specify the purchase price. This may be expressed as a single figure, or the price may be divided by tracts if sequential sales are contemplated. If the price is tied to the amount of acreage, a survey may be required to verify the amount of acreage in the tract to a specified decimal point to take into account partial acres.

[a] Contingencies

The contract should contain a number of contingencies. The contingencies would include contractual provisions making the sale contingent upon:

- (1) the receipt of satisfactory results of an environmental site assessment, wetland delineation and test borings of the soil if construction is planned;ⁿ¹
- (2) obtaining financing under terms and conditions acceptable to the purchaser;

- (3) obtaining all necessary government approvals for the project; and
- (4) the resolution of any other project-specific concerns unique to the developer.

Each such contingency must specify a date by which the contingency must be resolved. In the event that the developer fails to notify the seller of his or her inability to satisfactorily resolve the contingency by the date specified, the developer thereby waives the protection of the contingency, that is, the developer waives the right to terminate the contract without penalty and walk away from the deal.

The contingency for financing must set forth the total amount of the loan being sought, together with the highest interest rate the developer will be required to accept from a lender. The contingency should also specify the amortization period of the loan, the repayment schedule, and any other loan terms upon which the developer insists. The contingency should also specify the maximum number of points which the developer may be required to pay in order to obtain the loan.

The contingency for government approvals must specify the types of approvals required for the project to go forward. These may include, among others:

- (1) approval of the proposed project by local planning and zoning boards;
- (2) approval by any applicable "historic review commission;"
- (3) approval by any applicable "environmental conservation district;" and
- (4) approval of the installation of any septic, sewage treatment or water systems on the premises.

The contingency should require that applications be submitted to the appropriate authorities by a particular date, and that the developer must use best efforts to obtain the necessary approvals. However, the developer should be cautious in negotiating and drafting this provision. The developer will not want to be in a position where he or she receives government approval of a project that is so markedly different from the original proposal that it may not be financially feasible. Accordingly, the provision should clearly state that if the government approvals would require the developer to substantially alter the plans for the project, then the developer may treat the contingency as having failed and walk away from the deal without penalty. The provision should also require that the governmental approval be final and non-appealable or that all appeals be exhausted.

The contingency should also require the seller to actively support the applications for government approval of the project. To protect the seller, many agreements specifically provide that the seller will not be required to expend any funds as part of its active support.

Other project-specific concerns which may form the bases for other contingencies may include whether the developer will be able to tap into existing water lines or sewage treatment systems, or access electrical transmission lines or natural gas mains, at a particular price. In addition, a developer may insist upon inserting a provision into the agreement which allows the developer to terminate the agreement to purchase if he or she is unable to obtain a specified number of contracts for the purchase or lease of units in the development by a certain date.

The parties should give careful consideration to creating a method for extending the time period of the contingencies. The amount of time required to obtain government approvals may be difficult to predict. Thus, inserting a method for obtaining extensions of time periods will protect the developer from an innocent miscalculation. The parties might also consider requiring some extra financial consideration from the developer in exchange for the extensions. This consideration may appear in the form of an amount of money added to the down payment which the seller will retain

regardless of the resolution of the contingency, and which may or may not be applied against the purchase price. This payment compensates the seller for the additional time which the property is off the market due to the extension of the contingency period.

[b] Assignment of Contract of Sale and Purchase

The contract should also specify whether it is assignable. If the contract calls for owner financing (i.e., the seller holds the mortgage, rather than a financial institution, such as a bank), the seller may wish to limit assignment to a business entity in which the developer is a principal. This will help ensure that the financial responsibility of the developer, upon which the seller relied in making the deal, is still part of the transaction. Alternatively, the seller may allow an assignment to unrelated parties only with the seller's permission and following a thorough financial review of such parties, and only without release of the seller.

[6] Form of Ownership

The last pre-acquisition phase consideration for the developer is the way in which he or she will take title to the land acquired from the seller. The developer may own the property in his or her individual name, through a partnership in which the developer is a partner, through a corporation in which the developer is a shareholder, or through a limited liability company in which the developer is a managing member. The developer should determine the form of ownership before accepting title to the land.

[a] Sole Proprietorship

The sole proprietorship is the least complicated form of ownership. It gives the developer direct and complete control over every aspect of the operation of the development project. Of course, the developer will have to hire employees and independent contractors to perform certain tasks, including some supervisory duties.

The developer, as sole owner, will be personally responsible for the repayment of the entire acquisition debt, unless the developer can obtain non-recourse financing. The developer, if he or she is married and holds assets jointly with his or her spouse, may be required, as a condition for receiving financing, to obtain a written guaranty from the spouse that marital assets will be fully available to satisfy the debt in the event of a default on repayment of the loan.

All profits will be taxed directly to the developer at the personal federal income tax rate. The developer would use a separate Schedule C for the project, which would be attached to the federal income tax return. Where a developer has more than one project in the works and maintains separate accounting books for each project, a separate Schedule C should be prepared for each project and attached to the return.

Finally, it should be noted that the sole proprietorship form of ownership leaves the owner open to liability for any injuries to person or property which arise out of the project.ⁿ¹ The development project, together with all personal assets, would be subject to levy to satisfy any claim not fully covered by insurance.

[b] General Partnership

A general partnership is formed by the agreement of two or more persons to join together to engage in a common business enterprise. Ideally, a general partnership agreement will be executed at the very outset of the real estate development project. Such an agreement sets forth the ownership interests of the parties, which may or may not be equal. The agreement also sets forth the capital contributions expected of the parties. This would include initial start-up capital, as well as any additional funds which may be required later in the project.

The agreement also establishes the responsibilities of the parties for the various aspects of the project. In addition, the agreement should establish a mechanism for making important decisions, and place responsibility for day-to-day

decisions in the hands of a specified partner or partners.

The agreement should also establish a means for termination of the partnership. Typically, the agreement will state that the partnership will terminate upon the:

- (1) retirement;
- (2) death;
- (3) disability; or
- (4) withdrawal of any partner; or upon
- (5) the mutual agreement of all the partners; or
- (6) the bankruptcy or insolvency of the partnership.

Failure to execute a partnership agreement may lead to serious disputes among the partners when difficult situations arise, which require costly and protracted litigation to resolve. Laws governing partnerships are usually codified in each state and found in the state's statutes.ⁿ²

The partnership form of ownership is similar in some respects to the sole proprietorship form. General partners have unlimited liability for injury to persons or property which arises out of the business of the partnership.ⁿ³ General partners are also liable for the debts of the partnership.ⁿ⁴ However, since there is a broader financial base due to the existence of two or more partners, a lender is less likely to request the guaranty of a spouse that marital assets may be used to satisfy the debt in the event of a default on repayment of the loan. It may also be easier to raise capital due to the multiple ownership of the project.

Federal taxes imposed on partnership income are somewhat similar to those imposed on income of the sole proprietor. The partnership must have its own federal tax identification number and file a federal (and, where appropriate, a state) income tax return. The income, gains, losses, deductions and credits shown on the return are divided among the partners in proportion to the partners' respective ownership shares.ⁿ⁵ These tax items are then reflected on "K-1" forms prepared by the partnership and distributed to each of the partners. Each partner's K-1 form becomes a part of the individual income tax return. The partner's share of partnership income is then taxed at the individual rate.

The partnership form of business is different from the sole proprietorship form in the areas of management and control. Control of the real estate development project would be shared among the partners.ⁿ⁶ Thus, the developer would not exercise exclusive control over the project.

At common law, any one partner could bind the partnership for various obligations.ⁿ⁷ Most partnerships today try to avoid this situation by establishing internal operating rules, whereby one partner is empowered to manage certain aspects of the business, but must consult with the remaining partners on particular matters, or where the amount of money involved exceeds a certain specified level. This shared control might make decision-making a bit more cumbersome; however, it does allow for the use of diverse talents. For example, if one partner has construction management experience and another has design experience, those partners may be able to save their partnership a great deal of money by contributing their services to the project, rather than hiring third parties to perform these functions. A sole proprietor, on the other hand, is unlikely to possess talent in many different fields.

[c] Limited Partnership

A limited partnership is very similar to a general partnership. The major differences between the two entities arise in the areas of control and liability.

A limited partnership is formed by a written agreement, which is filed with the Secretary of State of the jurisdiction where the entity is formed.ⁿ⁸ A limited partnership consists of one or more general partners who are charged with the duties of operating the partnership.ⁿ⁹ Only in very rare circumstances must they consult with the limited partners. Except for providing capital, the limited partners have virtually no role in the partnership and are generally prohibited from participation in management.ⁿ¹⁰ In exchange for this limitation, they also receive limited liability. The only assets of a limited partner which may be attached by creditors of the limited partnership are the funds which have been contributed to the partnership by the limited partner.ⁿ¹¹ By contrast, the general partner's personal assets, as well as the partnership's assets, may be subject to levy by creditors of the limited partnership.ⁿ¹²

Like the general partnership, the limited partnership files a federal partnership income tax return, and K-1 forms are delivered to all partners. The partners will show on their own individual income tax returns their respective shares of partnership income, gains, losses, deductions and credits.

[d] Corporate Ownership

A corporation is formed by the filing of a certificate of incorporation with the Secretary of State of the jurisdiction where the corporation is created and by the payment of the requisite fee.ⁿ¹³ After formation, the incorporator sells shares of the corporation to the shareholders at a specified price. Thereafter, the shareholders convene a meeting and elect a board of directors which will set policy and oversee the operation of the corporation. The board of directors, in turn, appoints officers who carry out the directions of the board and oversee the corporation's business on a day-to-day basis.ⁿ¹⁴

The shareholders also adopt by-laws, which govern the daily operations of the corporation, define the roles of the various officers, and set forth procedures for the election of the board of directors and amendment of by-laws.ⁿ¹⁵

It should be noted that the corporation can only act at the direction of the board of directors. The board expresses its directions through resolutions which are proposed, voted on, and approved by the board of directors. The by-laws will normally specify whether a majority of the directors, or more than a majority, is required to approve various types of resolutions.ⁿ¹⁶

In a small corporation, it is highly recommended that the shareholders execute a "buy-sell" agreement. Typically, such an agreement places limitations on the sale of stock. It may require, for example, that stock be offered to the corporation or to other shareholders before it may be sold to strangers. The agreement may also provide for the forced sale of stock upon the death, disability or retirement of a shareholder, cessation of employment with the corporation, or when certain serious disagreements arise among the shareholders.ⁿ¹⁷

Unlike the sole proprietorship or general partnership, the shareholders of a corporation have limited control over the operations of the corporation, and hence over the real estate development project. The sole participation of the shareholders in the operation of the corporation is the election of the board of directors.ⁿ¹⁸ However, in exchange for such lack of control, the personal assets of shareholders are sheltered from the claims of creditors of the corporation. In other words, a shareholder's exposure to liability is limited to his or her financial investment in the corporation.ⁿ¹⁹ Knowing this, lenders will often seek *personal* guarantees from shareholders of corporate debt.

Federal taxation of corporate profits occurs via the corporate income tax return. The corporation pays federal income taxes due on its taxable income.ⁿ²⁰ After-tax profits of the corporation may be distributed to shareholders on a pro-rata basis. These profits, known as dividends, are taxed again as income to the shareholder.ⁿ²¹

To avoid such "double taxation," many shareholders in small corporations are often employees of the corporation and receive salaries and bonuses from the company. These salaries and bonuses are corporate expensesⁿ²² and reduce pre-tax profit, resulting in a lowering of the corporation's income tax. Salaries and bonuses are taxed as income to the shareholder-employees at their individual income tax rates.ⁿ²³

[e] Limited Liability Company

The limited liability company ("LLC"), like corporations and limited partnerships, is a creature of statute. Generally, an LLC is a business entity through which each owner (called a "member") enjoys limited liability for the business's debts and other legal responsibilities just like shareholders in a corporation. However, for federal income tax purposes, it is treated as a partnership unless the members elect to be taxed as a corporation. If treated as a partnership for tax purposes, the income or loss from operations is passed through to its members and reported on their respective tax returns.

Most states also allow single member LLCs. Therefore, even sole proprietors should now consider forming an LLC to own and operate its development to obtain the advantage of limited liability. For tax purposes, the single member LLC is ignored and the tax consequences to the single member are the same as if the developer owned the development as a sole proprietor.

If there are two or more members in the LLC, the LLC should have an operating agreement. The operating agreement is similar to a general or limited partnership agreement. It will cover what contributions are required by the members, the manner of dividing profits and losses, distributions of cash flow, restrictions on the transfer of membership interests, voting rights and requirements, termination rights, procedures for dissolution of the entity, and all other matters usually covered in a partnership agreement. For a more thorough discussion of the use of LLCs, and of their tax treatment, see Volume 22, Chapter 18A, *Limited Liability Companies*, *supra*.

[f] Conclusion

In determining the appropriate form of ownership, all of the foregoing issues of management, control, taxes and potential civil liability must be considered in light of the specific real estate development project. No one form of ownership is best for all projects. Projects with the potential for generating substantial civil liability may call for a corporate form in order to adequately insulate the owners from lawsuits. Projects that may generate large tax losses--to be passed on to the owners--may encourage use of the partnership form. Very small real estate development projects may perhaps be most easily and efficiently accomplished in the sole proprietorship format. Finally, it should also be remembered that the more complicated the form of ownership, the greater the cost will be to establish and maintain that format.

Legal Topics:

For related research and practice materials, see the following legal topics:

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FOOTNOTES:

(n1)Footnote 1. *See* 42 U.S.C.A. § 9601 *et seq.*

(n2)Footnote 2. *See* 42 U.S.C.A. § 9607.

(n3)Footnote 1. *See* IRC § 453. For a further discussion of the installment method of reporting gain, see *Section 21.11* in the Tax Background in Volume 25, Chapter 21, *supra* .

(n4)Footnote 1. *See* § 22.02[4][a], *supra*.

(n5)Footnote 1. *See* C. Rohrllich, *Organizing Corporate and Other Business Enterprises*, Ch. 2, § 2.02[3] (6th ed. Matthew Bender 2000).

(n6)Footnote 2. *See, e.g.*, *NY Partnership Law* (McKinney 1988).

(n7)Footnote 3. *Uniform Partnership Act* § 15.

(n8)Footnote 4. *Uniform Partnership Act* § 15. The general partners in a general partnership might try to limit their liability for certain liabilities by forming a limited liability partnership now available in most states.

(n9)Footnote 5. *IRC* §§ 701, 702. For a thorough review of the principles of partnership taxation, see the Tax Background in Volume 1, Chapter 1, *Partnerships, supra*.

(n10)Footnote 6. *Uniform Partnership Act* § 18(e).

(n11)Footnote 7. *See Gibson v. Talley*, 156 Ga. App. 593, 275 S.E.2d 154, 155 (1981) . ("Generally, all partners are bound by the acts of any one, within the legitimate scope of the business of the partnership, until dissolution of the partnership."); *See also* *Uniform Partnership Act* § 9(1), (2).

(n12)Footnote 8. *Revised Uniform Limited Partnership Act* § 206.

(n13)Footnote 9. *Uniform Limited Partnership Act* § 1; *Revised Uniform Limited Partnership Act* § 101(7).

(n14)Footnote 10. *Uniform Limited Partnership Act* § 10; *Revised Uniform Limited Partnership Act* § 305.

(n15)Footnote 11. *Uniform Limited Partnership Act* §§ 1, 7.

(n16)Footnote 12. *Uniform Limited Partnership Act* § 1; *Revised Uniform Limited Partnership Act* § 107(7).

(n17)Footnote 13. *See, e.g.*, *NY Bus. Corp. Law* § 403 (McKinney 2003).

(n18)Footnote 14. *See, generally*, C. Rohrllich, *Organizing Corporate and Other Business Enterprises*, Ch. 6. § 6.06 (6th ed. Matthew Bender 2000).

(n19)Footnote 15. C. Rohrllich, *Organizing Corporate and Other Business Enterprises*, at § 6.04.

(n20)Footnote 16. C. Rohrllich, *Organizing Corporate and Other Business Enterprises*, Ch. 8A, § 8A.03.

(n21)Footnote 17. For an in--depth discussion of buy--sell agreements, see §§ 15.05P, 15.08P in the Practice Background, Vol. 18, Ch. 15, *Shareholders' Agreements, supra*.

(n22)Footnote 18. Z. Cavitch, *Business Organizations* § 109.21 (Matthew Bender 2003).

(n23)Footnote 19. *See* Note, *Limited Liability in Commercial Enterprises*, 57 *Colum. L. Rev.* 84 (1957); W. Johnson, *Liability of Parent or Successor Corporation, or Corporate Shareholders, in Action Pursuant to*

Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) (42 U.S.C.A. §§ 9601-9675), 121 A.L.R. Fed. 173 (1994) .

(n24)Footnote 20. *IRC* § 11.

(n25)Footnote 21. *IRC* § 61(a)(7).

(n26)Footnote 22. *IRC* § 162.

(n27)Footnote 23. *IRC* § 61(a)(1).



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Current Legal Forms for Real Estate

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Current Legal Forms for Real Estate
Chapter 22 DEVELOPMENT AND SUBDIVISION
Part II. The Practice Background

26-22 Current Legal Forms for Real Estate § 22.28

§ 22.28 Planning Phase

The planning phase of the real estate development project consists of two major parts. The first is the development of a project team. This team consists of professionals whose skills, knowledge and experience will be needed to plan, construct and operate the project. They include, among others:

- (1) a surveyor;
- (2) an engineer;
- (3) an architect;
- (4) a lawyer; and
- (5) a financial advisor

The second part is the actual designing and planning of the project. This second phase of the project must be formulated and executed carefully. Serious mistakes made at this stage may prove fatal to the project. For example, if the financial advisor greatly underestimates the amount which the developer must charge for each unit in the development in order to recoup the investment and realize a profit, the project (and its developer) might face financial disaster.

[1] Development Team

The selection of the members of the team will, in many respects, depend on the nature and scope of the project. For example, if the developer's role is to create a residential subdivision using lots that are ready to be built upon, the developer may have no need for an architect, but will probably need the services of a marketing firm. On the other hand, if the real estate development project consists of the construction of an office building for a particular client, the developer will need an architect but not marketing assistance.

It is absolutely vital to select the development team with great care. The developer must have individuals who are

experienced, honest, reliable, skillful and (preferably) possess a proven track record. In addition, the developer must make certain that the individuals selected have sufficient time available in their schedules to accommodate the project.

[a] Surveyor

[i] Role

A surveyor will be needed in nearly all real estate development projects. The surveyor's initial duties will be to determine and mark the boundaries of the property, and perhaps compute the amount of acreage in the development to a specified decimal point, especially if the purchase price of the parcel is based on a price per acre of land in the parcel. Also, the purchaser may want to limit the obligation to purchase just to usable land (excluding wetlands, roads or other unbuildable land). The surveyor will also prepare a preliminary map of the property, showing boundaries, easements, already-existing structures, roadways, bodies of water, and other important features of the property, both natural and artificial.

Additional duties of the surveyor will be specific to the particular type of project being built. For example, if the project is a residential subdivision, the surveyor will assist in laying out lots. Such lots must be laid out in accordance with local zoning laws, which will specify, among other things, the maximum and minimum size of the lots, their shape, and setback requirements. If the project under construction consists of a single structure, such as an office building, the surveyor will identify side lines and setbacks in order to assist the architect and engineer in proper placement of the structure. The surveyor will also identify the location of existing water and sewer lines and gas mains and power lines, if any, on the property.

The surveyor will also prepare site plan maps which are required for obtaining various government approvals, as well as survey maps showing the location of easements and other encumbrances identified in a recent title commitment required by the lender to verify that the developer has clear title to the property.

In a residential subdivision, the surveyor will prepare the final subdivision map, which typically must be filed with the county clerk. This map will become the basis for the legal description of each lot as it is sold to a purchaser in the future. As homes are built, the surveyor will prepare a survey map for each home. Such maps are required by residential lenders to verify that the home was indeed built on the correct lot and within the appropriate lot lines and setback lines.

[ii] Qualifications

The developer should carefully inquire as to the surveyor's qualifications. The surveyor should be a licensed land surveyor. In most states, this involves obtaining licensing from the appropriate state government department or agency. Licensing can usually be verified quickly and easily by telephone or fax machine.

The surveyor should possess ample experience in the particular type of work expected to be performed. The surveyor should also have a staff sufficiently large to accommodate the developer's needs. Stated differently, the developer must receive assurances that the surveyor will be able to meet all deadlines imposed by the developer. For example, if the project is a residential subdivision, the surveyor must be prepared to timely meet the needs of home buyers who will require individual survey maps for their purchases.

[iii] Compensation

When enlisting the services of a surveyor, the rate of compensation should be fully discussed and agreed upon. Many surveyors charge by the hour. This hourly rate may be for a "crew hour"--that is, for both a surveyor and the helpers--or the developer may be billed, at an hourly rate, for each crew member, draftsman, etc. The developer will need an estimate of the total cost of the surveyor's services project in order to prepare the budget for the entire project.

The developer should also be aware that special situations sometimes arise in real estate development projects which may increase the cost of the surveyor's services. These situations should be identified, if possible, and a fee covering them should be agreed upon in advance. These items may be added to the budget as "contingent" items if the project is being constructed for a known party. If the project is being constructed for still-unknown purchasers, the accounting and marketing staffs should be made aware of these potential expenses before preparing the project budget and pricing the units. Such special situations may include:

- (1) lot modifications required for final municipal approval of the project;
- (2) changes in the design of infrastructure or buildings required as a result of unexpected soil or water conditions;
- (3) green space requirements; or
- (4) unforeseeable changes in the law.

Each of these situations may require changes in the survey maps, as well as additional field work by the surveyor and its staff.

The surveyor may be willing to negotiate a fee which is somewhat lower than the usual hourly rate. For example, where the project is a residential development and the surveyor is likely to be hired to create most of the individual home survey maps, the surveyor may be willing to reduce the hourly fee, knowing that he or she will recoup all or most of it in preparing the individual survey maps. (It should be noted that the individual survey maps will require considerably less work than the principal survey for the entire development. In preparing the individual survey, only the placement of the new structure will actually require additional work.)

In real estate development projects where such additional work does not exist, the surveyor may not be willing to negotiate a lower hourly fee. Indeed, recent lending industry changes that now permit a title insurance company to provide insurance coverage to lenders for any loss occasioned by an inaccurate survey have affected surveyors adversely. This change has significantly reduced the number of surveys ordered for sales of residential properties. As a result, income for many surveyors has dropped significantly in recent years. Consequently, some surveyors may now be unwilling to negotiate prices on a large job.

[b] Engineer

[i] Role

The role of the engineer and his or her firm in a real estate development project is substantial. Some engineering firms may be able and willing to undertake both the surveying and engineering work. If the firm is sufficiently large, it may also be able and willing to perform the traffic study, environmental site assessment and wetlands delineation, if such studies are necessary.

However, the primary role of the engineering firm is site planning. Site planning consists of the laying out of the entire real estate development project. With a residential subdivision or a commercial park, site planning includes designing lots, laying out roads, and allocating areas to meet green space requirements. Site planning also includes the placement of sewers, water mains, storm drains, and utilities such as telephone and electrical lines, natural gas mains and cable television lines. Finally, site planning also entails providing for solid waste removal, parking, street lighting, sidewalks, traffic control devices and appropriate entrance and exit sites on the development.

The engineer must be sure that the plans meet municipal requirements for lot size, "density" of units, etc. The engineer

must also identify municipal requirements that cannot be met and develop a strategy for obtaining a variance. In general, to obtain a variance, it must be shown:

- (1) why the developer cannot meet the requirements of the law;
- (2) that such failure is not the fault of the developer; and
- (3) that the land is so situated that the developer cannot obtain a reasonable return on the investment without a variance.

One strategy frequently employed is to demonstrate that the *spirit* of the law will be met if the government is willing to make a small concession and grant the variance. For example, a town ordinance may set forth housing "density" requirements, providing that only a particular number of residences may be constructed on each five-acre parcel of land. The land chosen for the development may be unsuitable for building in one large area due to its topography and geology. However, that area might make an excellent spot for a recreational facility, such as a park or ball field. Accordingly, the site plan might propose an increase in the number (i.e., density) of residences on each five-acre parcel, and a single large green space, rather than a small green space on each five-acre parcel. The one large green space might well meet or exceed the combined size of the small green spaces that would otherwise be scattered throughout the development. Moreover, the large green space might be more useful and attractive to residents than the small areas would have been.

Similarly, in a commercial park, the zoning ordinances may require a particular number of parking spaces near each building. But it may be less costly to cluster the parking in a central location, such as a tiered garage, than to have several open lots scattered throughout the commercial park. In addition, sufficient space for such open lots may not be available. A tiered garage in a central location would thus meet the spirit, if not the letter, of the law.

Finally, the engineer for a real estate development project often prepares diagrams, charts and reports showing how the proposed plan will benefit the municipality. The engineer can also be expected to supervise the construction of the infrastructure to make certain that it is being built according to the plans. In addition, the engineer may be expected to certify the level of completion of the project to the developer's lender so that the lender can make progress payments under the development's financing documents.

[ii] Qualifications

The developer must carefully inquire into the qualifications of the engineer and his or her firm. The developer should likewise look into the firm's level of experience with similar projects. The engineer or the firm should have a portfolio on hand for the developer's review, illustrating work on earlier, similar projects.

The developer should also inquire about the engineer's or the firm's experience in dealing with the particular municipality involved. The developer should make certain that there is no potential conflict of interest between the engineer and the municipality. For example, municipalities often hire engineering firms to consult on particular government projects. The developer should not use a firm which regularly consults for the municipality where the development will be built. Instead, the developer should utilize an engineer who is an independent team member, not someone who is and will remain beholden to the municipality for work. Conversely, the developer also should make certain that the engineer does not have a poor rapport with the municipality. If a variance is necessary, a poor rapport between the engineer and the municipality may sound the death knell for the variance application.

The developer should also ascertain the variety of services which are available through the engineering firm. It is always more convenient to have all of the necessary services provided and coordinated by one engineering firm.

[iii] Compensation

The developer should fully discuss and reach agreement with the firm on the cost of its services. The engineering firm will probably offer to work on an hourly basis, or for a percentage of the total cost of the development. On an hourly basis, the engineers would bill the developer at one rate, draftsmen at another rate, and so forth. The firm should be able to provide an approximate total cost of its services, or at least a range within which the total cost will fall, based on its prior experience with similar development projects. Where the fee is based on a percentage of the total development cost, any unexpected increases in the development budget will naturally increase the engineering fee, unless the contract with the firm provides otherwise.

The developer should insist on a written agreement which clearly specifies the nature and scope of the firm's services in great detail. The method of compensation should be included as well, specifying hourly rates where appropriate. The agreement should also specify whether, and under what conditions, the hourly rates are subject to change during the course of the rendering of services.

If any of the services--such as traffic studies, environmental site assessments, or surveying--will be subcontracted, the agreement should specify these services, the identity of the subcontractors, and the method of compensation. The most important issue here is whether these costs will be passed along to the developer separately and in addition to the engineering firm's fee, or whether these costs will be incorporated into the firm's fee.

The agreement should also contain a provision for its termination if the developer becomes dissatisfied with the firm's services. Where compensation is on a percentage basis, a method for determining the amount due to the firm should be included in this provision. It is not recommended that a straight hourly rate be used to determine the amount due. The whole reason for termination of the agreement may be slowness and lack of progress on the firm's part. Thus, an hourly rate may be far too generous. A more equitable approach is to include a provision in the contract which sets forth the percentage of the engineer's total fee which is earned upon completion of each stage of the engineer's duties. (The total fee, of course, would be equal to that percentage of the cost of the project that the engineer would have received had the contract not been terminated.)

The agreement should also contain a dispute resolution mechanism. The method chosen should result in a rapid resolution of any disagreement that may arise between the engineer and the developer. The developer cannot afford to have the progress of the development slowed by a dispute. After all, the developer will be paying interest on the land acquisition loan during the delay, which will add to the overall cost of the project and reduce the profit.

[c] Architect

An architect is a professional individual whose training is in the design of structures. An architect will typically be needed where the developer intends to construct buildings as part of the real estate development project.

[i] Role

The role of the architect is to design the structure(s) consistent with state and local building codes and ordinances. In addition, the architect can be expected to supervise the construction of the structure(s) to make certain that it conforms to the plans and specifications previously drafted. The architect is also responsible for certifying the progress of the construction. This certification enables the developer to obtain progress payments under the construction loan, and allows the general contractor to receive progress payments under the construction contract.

In some areas of the country it is common for the architect to prepare the site plans required for planning and zoning board approval for a small real estate development project. Such a project might include a small strip mall or a single office building.

In the case of a residential subdivision, an architect might be hired to prepare a variety of designs from which purchasers can choose. In other developments, where a particular style of home is to be offered to all purchasers, the developer may hire the architect to work with purchasers to "customize" the standard home or even design custom-made homes. The architect can also be expected to prepare the "bid" documents for the construction of the project if the construction contract will be offered for bidding by contractors.

[ii] Qualifications

An architect must be licensed by the state in order to sign construction drawings. Licensing can usually be confirmed by telephone, or by a fax transmission sent to the appropriate state licensing agency.

The developer should inquire as to the level of experience of the architect with similar real estate development projects. Architects, like engineers, generally maintain a portfolio of designs which the developer can and should review. The developer should focus on projects which are similar in nature and scope to the proposed project. If the developer finds that he or she does not like the style of buildings suggested by the architect, the developer may wish to consider another architect. The developer cannot afford to waste time struggling with the architect over designs, since the developer will be paying interest on acquisition and construction loans while haggling with the architect. Thus, any delay will inevitably eat into the developer's profit margin.

If it is the intention of the developer to obtain a "green" building certification, the architect should be familiar with green building methods and the manner in which to obtain certification of the building as a "green" building. The rating system most used is the one used by the U.S. Green Building Council referred to as the LEED method. The term LEED stands for "Leadership in Energy & Environmental Design."

[iii] Compensation

Architects are generally compensated:

- (1) on an hourly basis;
- (2) by a flat fee; or
- (3) on a percentage-of-construction-price basis.

Regardless of the method of compensation used, the contract should carefully specify the nature and scope of the work to be performed. The agreement may also provide for certain additional services to be made available by the architect for the developer from time to time. The agreement should specify whether the architect is obligated to perform such services and the method for determining compensation. Such services might include:

- (1) helping to resolve a dispute between the developer and a purchaser of a unit;
- (2) attending planning or zoning board meetings;
- (3) serving as an expert witness at a trial arising from an action brought against the developer; or
- (4) preparing necessary modifications and additions to the original designs.

The contract should allow for termination by either party. The contract should also provide for a means of determining the fee earned by the architect as of the date of termination. Since the reason for termination is often the failure of the

developer and the architect to agree upon a design, use of an hourly fee may be overly generous and inappropriate. Thus, the contract should set forth the percentage of the architect's total fee which is earned at each stage of the design process. That percentage would then be applied against the total fee.

Most architects prefer to use the American Institute of Architects' (AIA) standard form of contract. As a rule, they are generally quite knowledgeable about the contract and their responsibilities under it. The developer should have his or her attorney carefully review and amend the contract to meet the developer's needs, especially because the AIA contract is designed to protect architects, not real estate developers. If it is used, it is known as AIA Document B141--Standard Form of Agreement Between Owner and Architect. This form and the other AIA forms are copyrighted, but they can be purchased from the American Institute of Architects for a nominal fee. (A listing of the various AIA forms of contract can be found on its website at www.AIA.org.) Of particular concern to the owner in using the AIA form is to add provisions to the standard form to deal with insurance issues. The owner, through consultation with its insurance advisor, should establish the minimum requirements for insurance to be carried by the architect. These requirements should include customary workers compensation, general liability and automobile liability coverages. More importantly, the owner should require the architect to maintain professional liability insurance to cover the architect's errors and omissions. The coverage should be required to be kept in effect for a period of time after completion of the services to cover claims made after the work is completed.

[d] Lawyer

[i] Role

The developer's lawyer is another crucial member of the development team. The role of the lawyer is to assist the developer in negotiating and preparing the contracts for purchase of the land, and the employment agreements between the developer and the various other members of the development team. In addition, the lawyer can prepare the contract between the general contractor and the developer.

The lawyer's services may also be required in connection with the presentations that must be made to the local zoning and planning boards. While the engineer or architect typically prepares the schematic drawings that will be presented to the boards, the lawyer should always review, if not draft, the arguments to be made to the boards in support of granting the necessary approvals. The lawyer should make certain that the presentations include evidence supporting each of the points which the developer is required to prove.

The lawyer's assistance will also be necessary if an appeal of the decision of the zoning or planning board is filed by a citizens' group. The lawyer will be required to prepare the various briefs, answers, affidavits, memoranda of law, etc., and appear in court to argue the case. If the decision of the zoning or planning board is not favorable, the developer may wish to commence an appeal through the courts, utilizing the attorney's services.

The lawyer may also be called upon to draw up restrictions and covenants for the development. These would include restrictions on certain uses of the property and types of construction, in order to maintain the quality and character of the development. Such restrictions and covenants are filed with the county clerk or county recorder, and are recorded so that their effect is to run with the land. They are also inserted into deeds given to purchasers of units within the development.

[ii] Qualifications

Most developers have their own attorneys. However, if a developer does not have an attorney or wishes to choose another one, there are several qualifications the developer should seek. A lawyer is, of course, required to be admitted to the bar of the state in which the lawyer practices. Typically, the state supreme court maintains records of all lawyers in good standing who are admitted to practice within that jurisdiction.

The lawyer should have extensive experience in real property law in order to be able to effectively handle the various purchases, sales and financing transactions involved in a real estate development project. The lawyer should also have considerable experience in land use planning and zoning law. The attorney should appear regularly before planning and zoning boards and be familiar with local ordinances and the peculiarities of the particular municipality involved.

The lawyer should also have broad knowledge of business law. In that regard, the attorney should be prepared to advise the developer concerning the best form of ownership of the real estate development, partnership agreements, "buy-sell" agreements, operating agreements for limited liability companies, as well as all other legal aspects of the real estate development business.

Obviously, lawyers do not have portfolios to show prospective clients. However, they usually can offer names of existing clients who are willing to serve as references, assuming such clients have previously provided the attorney with permission to use their names. When consulting a reference, the developer should inquire about the type of work performed by the attorney for the reference and the degree of the reference's satisfaction with the work.

[iii] Compensation

Lawyers are generally compensated by the hour, or by a flat fee for certain types of work, or by a combination of these two methods. For example, the lawyer may receive an hourly fee for providing advice concerning business affairs and contracts, but the lawyer may be paid a flat fee for handling each of the sales in a housing development or preparing the leases for tenants in a rental property.

It is fairly uncommon for a lawyer and client to have a formal contract. Instead, a letter or memorandum of understanding generally sets forth the fee schedule. The developer should try to obtain a provision which restricts fee increases during the construction of the development. If the development is to be constructed in phases over a number of years, it may be more appropriate to have an annual adjustment of the fee, or an adjustment upon the completion of each phase of the development.

[e] Financial Advisor

[i] Role

The financial advisor often is a member of the developer's full-time staff. The financial advisor's role is to assist the developer in creating a budget for the overall real estate development project. In addition, the financial advisor must keep track of expenses at all phases of the project and notify the developer of any potential financial problems which could place the development in danger.

The developer may also have his or her financial advisor negotiate loans with the various lending institutions. The financial advisor should be intimately familiar with projections of costs and revenues generated by the project. The advisor will thereby be in the best position to negotiate the terms of loan documents, particularly provisions relating to repayment of the loans. He or she will also know what the project can bear economically at various stages and help structure the loans accordingly.

The financial advisor will also be responsible for revising cost and revenue projections as conditions change. For example, if units are suddenly in greater demand than originally expected, the advisor may suggest an increase in price at an earlier time than projections initially indicated. Similarly, if there are cost overruns, the advisor will be responsible for recalculating the price of units in order to cover these overruns.

[ii] Qualifications

The qualifications for the financial advisor cannot be stated with as much specificity as the qualifications for other team members. Some developers may choose to use a certified public accountant who is either on staff or an outside consultant. Others may use an experienced bookkeeper who is already on staff, understands the business thoroughly, and is familiar with the procedures and formulas for setting prices for purchasers and tenants of units.

It should be noted that, where the financial advisor is on staff, he or she may already have many additional duties, such as handling payroll, accounts payable and accounts receivable. Depending on the size of the real estate development company, these extra duties may be helpful since they will provide the advisor with greater knowledge of the business, or they may prove overwhelming when added to his or her responsibilities as financial advisor to a particular development project. The developer should be aware of this and assign clerks to assist the financial advisor when needed.

[iii] Compensation

The compensation of the financial advisor will depend on whether the advisor is already on the developer's staff, and the role which the developer assigns to him or her *vis a vis* the particular real estate project. If the financial advisor is on staff, salary will be negotiated with the developer at the outset of the employment relationship. If the advisor is an outside consultant, such as a certified public accountant, the fee will probably be hourly.

It is relatively unusual for a developer to have a written contract with a financial advisor. If the advisor is a regular staff employee, he or she will usually be an "at-will" employee, which allows the advisor or the developer to terminate the relationship at any time. Where the advisor is a certified public accountant who is working as an independent contractor for the developer, there may be a letter agreement simply specifying the hourly rate for any services performed at the request of the developer.

Occasionally, a financial advisor who negotiates a loan will be paid a "point" or a half "point" for negotiating and securing the loan. A "point" is equal to 1 percent of the face amount of the loan. If the financial advisor is to be paid a point or other commission for negotiating and securing a loan, there should be a written memorandum specifying:

- (1) the fee to be paid to the financial advisor;
- (2) the loan terms that would be acceptable to the developer; and
- (3) whether the developer is legally obligated to accept a loan meeting these terms.

These loan terms should include, at a minimum:

- (1) the amount of the loan;
- (2) the interest rate;
- (3) an indication of whether the rate is to be fixed or variable;
- (4) if the rate is to be variable, the frequency with which the rate can be adjusted;
- (5) if the rate is to be variable, the maximum rate that can be charged;
- (6) repayment terms;
- (7) the term of the loan and its amortization period;

(8) any periods in which the developer would be entitled to pay interest only; and

(9) any other loan terms required by the developer.

If a written agreement is used, it should always reserve to the developer the right to terminate services at the developer's discretion. Where services are paid on an hourly basis, no problem should arise in determining the final payment following termination.

[f] Other Advisors

There may be a number of other advisors whose services are useful or necessary for specific types of development projects. The other advisors may include geologists where there is a question of soil suitability or water availability. In addition, a developer may wish to consult a marketing expert at the beginning of the real estate project in order to determine whether the proposed pricing of rental or sales units will be feasible in light of projected market conditions.

As with all members of the development team, the qualifications and past experience of these persons should be verified. Portfolios of prior work should be carefully reviewed or references verified, as the case may be.

The method of compensation should also be determined, and an estimate should be prepared by the advisor of the expected total cost of the services to the developer. If a written agreement is prepared, it should contain termination provisions protecting both the developer and the advisor. The agreement should be drawn up or reviewed by the developer's lawyer in order to be certain the developer will be receiving valuable services in exchange for the agreed-upon compensation.

[2] Development Plan

The development plan is prepared by the development team assembled by the developer. It is the task of the team to convert the general concept of the project, conceived by the developer in the pre-acquisition phase, into a detailed, workable plan that can be presented to the appropriate governmental authorities for their approval, and then constructed and finally leased or sold to the public. In order to complete the performance of this task, the development team must create a design which is economically feasible. The team must also identify potential problems and formulate practical and cost-effective solutions to have on hand in the event such problems appear.

[a] Design

In creating the design, the team must mold and shape the general concept of the project to the land which is available, in view of municipal zoning laws and state and local building codes.

[i] Infrastructure

The team must first identify:

- (1) what infrastructure, if any, already exists;
- (2) what infrastructure is nearby and can be used; and
- (3) what infrastructure must be constructed from scratch.

The term "infrastructure" is generally understood by developers to mean:

- (1) roads;
- (2) sewer lines;
- (3) water lines;
- (4) storm drains and sewers;
- (5) telephone lines;
- (6) natural gas mains;
- (7) electrical lines;
- (8) cable television lines; and
- (9) antennas, satellite dishes and cell towers.

In some areas, infrastructure may also include street lights and sidewalks.

The infrastructure must be in place before lots can be sold or buildings constructed. In some municipalities, performance bonds and/or letters of credit are routinely required from developers to insure completion of the infrastructure.

The installation of the infrastructure is a major expense which must be incurred in full before any return of investment is realized through the sale or rental of units. To the extent existing lines or mains can be tapped into, or extended and linked up with the development, great savings can be realized. Thus, careful investigation of the surrounding area is necessary. For example, there may be an opportunity to purchase water from a neighboring developer who owns a private water system (i.e., a well and pump) with extra capacity. It may also be possible to join with neighboring land owners to share the cost of sewage treatment if they will agree to allow the new development to link up to the existing sewer lines and sewage treatment facilities. In addition, it may be possible to persuade utility companies to share in the cost of extending lines to the development since these same companies will be benefitting from the many new and paying customers in the development project. If a utility company will not share the cost, it may be willing to finance the cost of extending the lines until enough lots are sold to generate sufficient cash to repay the loan.

The local government may have ordinances which restrict the height of cell towers, antennas, and satellite dishes, and the developer should ascertain what those restrictions state. However, as directed by Congress in the Telecommunications Act of 1996, the Federal Communications Commission (FCC) has adopted rules limiting restrictions on viewers' ability to receive video programming signals from direct broadcast satellites, wireless cable providers, and television broadcast stations.¹ The FCC adopted a rule that it is intended to eliminate unnecessary restrictions on antenna placement and use while minimizing any interference caused to local governments and associations.

In general, the rule prohibits most restrictions that (i) unreasonably delay or prevent installation, maintenance or use, (ii) unreasonably increase the cost of installation, maintenance or use, or (iii) preclude reception of an acceptable quality signal. The rule applies to individual homeowners and to rental property where the renter has an exclusive use area, such as a balcony or patio. In other words, it applies to viewers who place antennas that meet certain size limitations on property that they own or rent and that is within their exclusive use or control, including condominium owners and cooperative owners, and tenants who have an area where they have exclusive use, such as a balcony or patio, in which to install the antenna. The rule applies to townhomes and manufactured homes, as well as to single-family homes.

However, the rule does allow local governments, community associations and landlords to enforce restrictions that do not impair the installation, maintenance or use of the types of antennas described above, as well as restrictions needed for safety or historic preservation. In addition, under some circumstances, the availability of a central or common antenna can be used by a community association or landlord to restrict the installation of individual antennas. The rule does not apply to common areas that are owned by a landlord, community association, or jointly by condominium or cooperative owners. Such common areas may include the roof or exterior wall of a multiple-dwelling unit. Therefore, restrictions imposed by associations or landlords on antennas installed in or on such common areas are enforceable.

[ii] Unit Density and Green Space

The design must clearly indicate the total number of units that will be included in the project and how the units will be spaced. In a housing development, the number and spacing of units is based on lot size and construction type. For example, some areas of the development may consist of single-family homes on lots measuring one-third acre each. Other areas may consist of three or four townhomes connected by party walls on the same one-third acre lot.

In addition, the design must show the required amount of green space. Many municipalities mandate a fixed amount of green space per building or paved area. Some municipalities even specify that trees of a particular size and type must be included in the green space areas.

Some municipalities also require the creation of recreational facilities, such as parks and playgrounds, for a particular number of residential units. Often, a small park or picnic area will be sufficient. This requirement may apply to commercial, as well as residential, real estate developments.

[iii] Solid Waste Disposal

Many municipalities, particularly small ones and those in rural and even some suburban locales, have no trash collection service whatsoever. Other municipalities collect trash for residential buildings, but not for commercial structures. Accordingly, most municipalities around the country will require a real estate developer to indicate, as part of the plan for the development project, the expected method of solid waste removal.

The developer may intend to make use of municipal trash collection services, if available. If so, the developer may be required to estimate the anticipated tonnage of solid waste that will require disposal in a typical year. The municipality will use this figure to determine whether additional equipment and personnel will be required, and the likely effect on the municipal landfill, if any, from the increased dumping.

If private haulers are to be used, the municipality may require some assurance of their availability and willingness to provide services to the developer. The municipality may require a "contingent" contract as proof that such services will be available. (The contract would be made contingent upon the municipality's approval of the development project, and its construction and habitation.) Without such proof, as a practical matter, the burden of solid waste removal might fall on the municipality by default: the municipality would be besieged by complaints from neighbors if a private hauler failed to materialize and trash began to pile up. The municipality, having concern for the health and welfare of its citizens, would have to make some arrangements for the removal of the trash.

[iv] Waste Water and Sewage

The municipality will also require plans for the removal of waste water and sewage. In a housing development of a very small size, individual, "per unit" septic systems should be adequate. Such systems must be designed to accommodate the soil type, lot size and terrain of the property. The necessary capacity of such systems is generally based on the number of bedrooms contained in the building to be served by the system. Each system must be inspected and approved by the local health department before it is put into use.

Most residential developers find that they must build a large development in order to spread out the cost of expensive infrastructure over a sufficient number of lots to realize a reasonable profit. This fact requires most developers to use sewer systems, rather than individual septic systems for each house.

Many areas of the country have municipal sewer systems which can be easily accessed by the residential developer. If no such public system exists, the developer can build a sewer system to serve the development. The developer should plan to build a much larger system than is actually needed for the development. In that way, the developer will be prepared to service future residential real estate developments that may be built nearby. This can prove to be a very profitable venture for the developer. Of course, permits and various governmental approvals from state and local authorities are necessary before construction can begin.

Commercial and industrial developers are faced with similar choices. They can either:

- (1) install a large septic system, subject to local health department approval;
- (2) utilize an existing municipal sewer system, if one exists and is available to the developer; or
- (3) build their own sewer system.

To some extent, the decision will be guided by:

- (1) the geology of the area;
- (2) the volume of anticipated daily discharge; and
- (3) the availability of an existing municipal sewer system.

However, the decision may also be influenced by the *types* of substances which will be included in the discharge. For example, most municipalities will have no objection to human wastes, but they may prohibit discharge of industrial wastes containing certain substances, such as hazardous materials. In addition, where the volume of discharge will likely exceed certain limits, a discharge permit may be required, with the municipality restricting the time of release to low system-usage hours, such as midnight to 6:00 a.m. Finally, the developer may find that the cost of discharge into an existing municipal sewer system, which is usually based on volume, is prohibitively expensive. Accordingly, the developer may prefer to build his or her own sewage treatment facility and offer services to other commercial users in order to defray costs. Once again, permits and approvals will be required from state and local authorities before the building of such a system may begin.

[v] Recreational Facilities

Many developers of both commercial and residential real estate projects include recreational facilities as part of the development. These facilities may be as simple as walking trails and picnic grounds, or as costly as health clubs with pools and tennis courts. Although municipalities cannot require the inclusion of recreational facilities in a project, such inclusion might make the project more palatable to the municipality whose approval for the project is necessary. Thus, the facilities will be both a valuable selling point in winning the approval of the municipality for the project, and, of course, an added attraction for prospective purchasers, tenants and businesses.

Construction and maintenance of walking trails and picnic facilities is relatively inexpensive, and they are generally made open to the public without charge in an effort to improve community relations. More sophisticated facilities, like a health club or club house, may require an annual membership fee to be paid by nonresidents of the development in

order to cover operating expenses and insure recovery of construction costs.

[b] Financial Considerations

The next stage of the planning process is to project the expected costs of the real estate development and the expected income from sale or rental of units, and compare the two to ascertain whether the project is worth undertaking.

The developer is faced with a wide array of costs. These are often categorized as "soft" costs and "hard" costs. Soft costs are generally those expenses which are necessary for the completion of the project, but which do not produce anything tangible. Hard costs are the expenses which actually result in a structure, roadway, etc.

The soft costs include, among others, professional fees for design of the project and legal representation of the developer during the governmental approval process. Also included among soft costs are filing fees. Many municipalities charge fees for filing an application for subdivision approval, for site plan approval, and for zoning board approval. In addition, the county clerk or county recorder will typically charge a fee for accepting the subdivision maps for filing. There are also fees to obtain building permits.

In addition, there are soft costs involved in acquisition of the land, such as professional fees for surveying the property. There are also fees for title insurance, mortgage tax, and recording documents with the county clerk or county recorder. In addition, there may be "points" to be paid to lenders when loans are granted, lenders' legal fees and application fees for obtaining an acquisition or construction loan.

The municipality and utility companies may require the developer to post performance bonds or letters of credit to insure completion of the infrastructure in the development. And, of course, the developer will also have real property taxes to pay.

These costs can be predicted and set forth in a budget with a fair degree of certainty. Those items which are not fixed in price can be lumped together, and an estimate can be prepared to cover all of them.

The one item that cannot be easily fixed, however, is interest on the acquisition and construction loans. Generally, with a commercial project, the interest rate will be a variable rate, tied to the prime rate. The interest rate may fluctuate on a monthly, quarterly or annual basis. Neither the developer nor the lender has any control over the economic factors which cause the interest rate to vary. However, it should be noted that the same economic factors which cause the interest rate to vary may affect the price of the units being built and the sales of those units. For example, a high prime lending rate generally means higher mortgage rates for home buyers, which, in turn, may depress sales. Thus, it may be necessary for the developer to lower the sales price in order to entice otherwise interested prospective buyers to consider making a purchase. And, of course, these economic factors may also affect the length of time required to sell or rent units in the developer's project.

The amount of interest paid by the developer may also be increased by community opposition to the project. The time needed to satisfy the concerns of opponents, or to litigate legal disputes that arise, may cost the developer dearly in interest payments. This problem may be further exacerbated in northern climates where the construction season is frequently short. There, protracted opposition may push the developer's project into the following construction season.

Thus, dramatic interest rate fluctuations, or extended periods of interest payments when no building is actually going on, may ultimately doom the project. The developer must be prepared for both situations in making the financial projections.

The hard costs are generally the purchase price of the land and the cost of constructing and marketing the project. These expenses should be fairly predictable.

Having calculated the expenses for the project, the developer must next examine the market to determine the appropriate sales price or rental price for each unit. Advice received from the marketing expert will be vitally important at this stage of the project. Pricing of similar units in the area can be obtained through multiple listing services. In addition, the pace of sales can also be ascertained by examining records maintained by the recorder of deeds. Using this data, the developer, the financial advisor and the marketing advisor can together determine a price range for the units that will be both attractive to potential purchasers or tenants and profitable for the developer.

Finally, it should be noted that all of these financial projections will also be used in the process of obtaining financing for the project. While the project is being built, the lender(s) may ask for periodic updates on the status of the project. The developer should be monitoring the costs regularly during the course of the project in order to be certain that the project is not exceeding the projected costs.

[c] Identifying Potential Problems

The development team must identify and plan for potential problems in the earliest stages of the real estate development project. Such problems may include:

- (1) environmental problems;
- (2) municipal problems; or
- (3) neighborhood concerns about the project.

All of these problems, if not identified early and resolved, may stop the project dead in its tracks. A sudden halting of the project can prove very costly in light of the continued interest payments on land acquisition loans that the developer will be making while the problems are being handled. In addition, if litigation becomes necessary, the costs can be excessive. All of these problems may become so significant that they render the project financially unfeasible.

Of course, there may be some problems that simply cannot be overcome, or that can be overcome only at an exorbitant price. Under such circumstances, it is best to identify the problem early in the project so that there will not be an excessive waste of time and money.

[i] Environmental Problems

As noted earlier in § 22.27[4][a], prior to acquisition of the land, an environmental site assessment should be performed to determine whether there is any evidence of an adverse environmental condition due to prior releases of hazardous substances on or near the property. However, if the property was acquired before the mid 1980s, it is unlikely that such an assessment was ever performed. Such assessments became commonplace only after the passage of the *Comprehensive Environmental Response, Compensation and Liability Act* (CERCLA),ⁿ² and the first court judgments ordering clean up of contaminated real property pursuant to that federal statute.ⁿ³

If an environmental site assessment was not performed prior to acquisition, it will surely need to be performed prior to obtaining financing. If any adverse conditions are discovered, then before proceeding with the project, a determination will need to be made of the cost of remediation and the affect such cost will have on the project's economic feasibility.

In addition to concern about the presence of hazardous substances, many other environmental concerns may arise. These concerns typically appear when the real estate development project is located in or near an area considered to be environmentally or historically sensitive. Examples include:

- (1) seashore areas with large sand dunes;
- (2) pine barrens;ⁿ⁴
- (3) land that includes an aquifer providing water to a community;
- (4) areas that contain an historic site, like a Civil War battlefield;ⁿ⁵ or
- (5) areas that constitute a habitat for an endangered species, such as the snail darter or Karner blue butterfly.

Opposition to construction on such sites may have a statutory basis rooted in state or federal environmental laws. Such opposition may be extremely difficult or impossible to overcome, regardless of how much money is spent in taking protective measures or engaging in litigation.

[ii] Municipal Problems

Potential municipal problems may be more difficult to predict and prevent. Some municipalities have a silent, unwritten bias against certain types of land uses.

It may be very difficult and costly to prove that such a silent bias exists. Where a developer suspects that such a bias exists, he or she should review the minutes of planning and zoning board meetings for the past few years to see what type of reception similar projects received. If all such proposed projects required numerous revisions or were simply rejected, the developer must consider whether it is worth the time and money to present the project to local authorities and to engage in litigation necessary to obtain approval for the project. Some areas of the country have builders' associations which may be willing to join in the suit as *amicus curiae*, or may be willing to contribute towards the cost of legal fees.

Other municipal problems may include a moratorium on any new construction, or laws severely limiting new construction. A case decided in 1991 well illustrates the impact such actions may have on a developer.ⁿ⁶ A town law was enacted which limited, for five years, the number of building permits which could be issued in any approved subdivision in any year to 20 percent of the total units approved for the project. The purpose of the law was to alleviate traffic congestion until an additional highway exit could be constructed. The law was found to be a reasonable exercise of the municipal government's powers.

The effect of this type of law on a developer may be severe. It may significantly increase the projected costs by requiring the developer to build the project over a much longer period of time. Instead of paying interest on the building loan for one or two years, the developer will have to pay interest over five or more years. During these years, construction costs may significantly increase as well. In New York State, where the court decision was handed down, this blow came to many developers after they had already received subdivision approval and had begun the expensive process of constructing the infrastructure for their developments.

[iii] Neighborhood Problems

Residents already living in an area where a real estate development project is to be constructed often raise opposition to the project. The root of their objections is typically a dislike of change. However, the objections are frequently voiced as fears that increased traffic will be both noisy and dangerous. In addition, there are often claims that the development will further burden already-strained municipal services, such as police and fire protection, sewage treatment, etc. There may also be claims that additional schools will be necessary, and fears that property values will decrease due to the

increase in density of population. There may also be concerns that vandalism and other property damage may occur as new people are drawn to the neighborhood.

The developer must attempt to learn what fears are being entertained in the minds of community members. The developer may do this by meeting individually with neighbors or by holding a "town" meeting. The neighbors could be invited to a presentation where the developer would explain and show drawings of the proposed project, while giving the neighbors an opportunity to express their concerns and ask questions. The developer can then plan steps to alleviate their concerns. Such plans might include proposals to alter traffic patterns. For example, if the project is to be constructed near quiet streets which might become heavily-traveled thoroughfares, those streets could be made one-way or dead-end streets. This would keep traffic to a minimum, while not inconveniencing homeowners tremendously.

The developer might also offer to screen off the properties of existing homeowners, with a combination of wood fencing and trees, in order to safeguard the privacy they currently enjoy. This might also reduce their fears of vandalism by restricting access to their property. Such a step should also help to preserve their property values.

The developer would be well-advised to spend the money necessary to accomplish these measures. If they save the developer the time and expense of a prolonged battle in the courts for approval of the project, it will be well worth the effort. The developer may even find that he or she has won some new supporters of the project from among the neighbors. Such support is generally helpful when attempting to obtain approval from local zoning and planning boards.

[3] Types of Ownership

The developer must also decide on the type of ownership for the subdivision. For multi-residential developments, the choice may be the condominium or cooperative form of ownership, or the fee simple ownership forms. Examples of fee simple forms are the standard form of platted lots in a subdivision under which the owner owns his lot and the dwelling located on it, and cluster homes under which housing may be concentrated on portions of a parcel of land in order to gain open space on other portions of the parcel so long as the overall density does not exceed the density permitted by the local zoning code. The open space is usually owned by an association whose members are the individual lot owners. The condominium and the cooperative forms are creatures of statute. The developer must, therefore, be familiar with the state statutory requirements. Under the condominium form of ownership, which would include time share ownership interests, the owner usually owns a cube of space together with an undivided percentage interest in the common areas. In a cooperative, a corporation owns the building and the individual owners, through proprietary leases with the corporation, own a long-term leasehold interest in the spaces they occupy. In contrast, in the fee simple form of ownership, the owner will directly own a platted lot and dwelling situated on it. If there are common areas in the subdivision, they will be owned by an association set up to maintain the common areas.

In view of these differences, usually in a condominium or cooperative, neither the filing of the document to creating the condominium or cooperative, nor conveyance of the condominium or cooperative, will constitute a subdivision under state and local law. In contrast, in the fee simple form of development, separate lots are created that will be subject to governmental subdivision ordinances which will vary from community to community. The developer will have to weigh the advantages and disadvantages of each form of ownership before deciding which one is best and least onerous in trying to accomplish the type of development proposed to be done.

[4] Covenants, Restrictions and Easements

Many developers of residential and commercial property file, with the clerk or recorder of the county in which the project is located, a declaration of covenants and restrictions limiting the future use of the property. The purpose of the covenants and restrictions is to insure that property values will be protected by limiting the uses to which purchasers and tenants may put the property. And, of course, the declaration is intended to put all such prospective purchasers and tenants on notice regarding these limitations.

In residential subdivisions, the declarations cover a wide range of restrictions. Developers who wish to retain a natural, wooded setting may restrict the cutting or removal of trees, the color of structures, and the use of fences. Developers who wish to create an upscale, affluent ambiance might prohibit the use of clothes lines, ban the ownership of certain types of animals, and restrict storage of boats, campers and vehicles on the premises. Some developers may wish to retain a certain "look" or architectural style for the development. For example, they may require that all houses be constructed using a certain style, such as ranch, colonial or Spanish. Other common restrictions found in residential housing developments include:

- (1) prohibitions on the operation of businesses from the home;
- (2) minimum lot sizes;
- (3) minimum house sizes; and
- (4) minimum construction costs.

These declarations of restrictions normally contain a provision stating that they "run with the land" and are valid for a particular number of years. In many cases, they automatically renew themselves for successive periods thereafter. The declaration is enforceable by anyone who owns property subject to the declaration.

Declarations of covenants and restrictions affecting the use of commercial property are also filed with the appropriate county clerk. In addition, they may be placed in tenants' leases. The purpose is similar to the purpose of covenants and restrictions on the use of property in a residential development, namely, to maintain the value and desirability of a location by assuring control over the uses of the property by all purchasers and/or tenants. Commercial restrictions often prohibit uses of the property which produce hazardous substances or noxious odors.

Commercial and residential properties are often subject to a number of easements. Some easements are necessary so that utility lines and drainage sewers may be laid down, while other easements allow access to the developer or others to lands that have become "cut off" because of the sale of lots. Such easements run with the land and may be enforced by the party to whom the benefit inures.

[5] Property Management

Many residential developers include in the declaration of covenants and restrictions provisions regarding homeowners' associations. The purposes of such associations vary widely. Some are little more than social groups, while others undertake the very important responsibility of maintaining the grounds and other common areas of the development, including lawns, parking areas, recreational facilities, and other similar buildings and areas. The declaration typically provides for the appointment or election of a board of managers of the association. Depending on the extent of the association's duties, there may be a mandatory capital contribution imposed upon purchasers of units in the development, as well as regular monthly, quarterly or annual fees. The fees usually may be adjusted by a vote of the board of managers following receipt of notice from the homeowners. The homeowners' association usually has the right to place a lien against the individual homes if their owners fail to pay assessments of fees.

Commercial properties may have similar organizations with mandatory memberships. These organizations are generally characterized as "merchants' associations." If the commercial development is a shopping mall, for example, these associations encourage shopping at the mall through advertising and sales promotions. They are governed by a board of directors or managers who may be elected by the tenants, appointed by the developer, or selected through a combination of both methods. The association will usually impose mandatory dues that must be paid periodically. Failure to pay the dues is considered a default under the terms of the lease.

Legal Topics:

For related research and practice materials, see the following legal topics:

Environmental Law Assessment & Information Access General Overview Governments Public
Improvements Financing Real Property Law Construction Law General Overview Real Property Law Construction
Law Contractors & Subcontractors Real Property Law Construction Law Design Professionals Real Property
Law Financing Construction Loans Real Property Law Subdivisions General Overview Real Property Law Zoning & Land
Use General Overview Real Property Law Zoning & Land Use Building & Housing Codes

FOOTNOTES:

(n1)Footnote 1. 47 C.F.R. Section 1.4000.

(n2)Footnote 2. 42 U.S.C.A. § 9601, *et seq.* See, generally, the Practice Background in Volume 33, Ch. 25, Environmental Considerations in Real Estate Transactions, § 25.01P[2][c], *infra*.

(n3)Footnote 3. *United States v. Maryland Bank & Trust Co.* 632 F. Supp. 573 (D. Md. 1986) ; *New York v. Shore Realty Corp.*, 759 F.2d 1032 (2d Cir. 1985) ; *United States v. Hooker Chemicals & Plastics Corp.*, 680 F. Supp. 546 (W.D.N.Y. 1988) ; *United States v. Mirabile*, 15 Env't'l L. Rep. 20994 (E.D. Pa. 1985) .

(n4)Footnote 4. *In the Matter of Long Island Pine Barrens Society, Inc. v. Town of Islip*, 261 A.D.2d 474, 690 N.Y.S.2d 95 (1999) ; *Save the Pine Bush, Inc. v. City of Albany*, 70 N.Y.2d 193, 518 NYS2d 943, 512 N.E.2d 526 (1987) .

(n5)Footnote 5. See generally § 25.02P[3][b][v] in the Practice Background in Volume 33, Ch. 25, Environmental Considerations in Real Estate Transactions, *infra*.

(n6)Footnote 6. *Albany Area Builders Ass'n v. Town of Clifton Park*, 172 A.D.2d 54, 576 N.Y.S.2d 932 (3d Dep't 1991) .



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Current Legal Forms for Real Estate
Chapter 22 DEVELOPMENT AND SUBDIVISION
Part II. The Practice Background

26-22 Current Legal Forms for Real Estate § 22.29

§ 22.29 Subdivision Regulation

[1] Purposes of Subdivision Controls

The primary purpose of subdivision regulation is the integration of a new development into the existing community.ⁿ¹ Subdivision controls regulate such matters as:

- (1) street layout;
- (2) the provision of water, sewage and other utilities;
- (3) assurance of adequate drainage;
- (4) lot frontage;
- (5) lot size; and
- (6) the requirement of such amenities as sidewalks and street lights.

Modern subdivision regulations often require the dedication of land for public facilities, such as schools, parks and playgrounds or fees paid in lieu of such dedication.

Subdivision regulation is important for a variety of reasons. First, it enables the community to ensure, insofar as it is possible, that:

- (1) the new development will "fit in" with the existing community character;
- (2) the existing community will be able to provide needed services to the new development, both at the present time and in the future; and

(3) the new development will be a safe and healthy place for its citizens to live.ⁿ²

Second, subdivision controls give local governments the opportunity to encourage the success of the new development. This is important in several respects. Such regulations can protect tax revenue and prevent undue disbursements of public funds by limiting the formation of blighted areas. A financially successful development protects the lot purchaser and the mortgage lender by preserving resale value. It also helps to protect the reputation of the subdivision developer.

Finally, subdivision exactions and fees can aid a municipality in the provision of services to a new development by charging the developer for some or all of the cost of certain amenities required for the new development, such as parks, schools or libraries.

Subdivision regulation is closely related to the zoning and planning functions of local government.ⁿ³ Zoning law is one of the primary forms of land use regulation in the United States today. Zoning is based on specific ordinances which regulate the actual uses of real property. The ordinances are usually enacted by a local governing agency, a city council or county board, but may be supervised or implemented by other government bodies, such as a Board of Adjustment or Zoning Appeals Board.ⁿ⁴ Planning, on the other hand, has traditionally been more a matter of policy, of planning for the future needs and desires of the community. Although a comprehensive plan may be adopted by a local municipal governing body, it is usually designed by planners, and is not binding on the community.ⁿ⁵

Subdivision controls tend to be policy-oriented, since the predominate concern is the future development of the community.ⁿ⁶ On the other hand, subdivision requirements may be specifically enacted into law and, therefore, binding on both the developer and the decision makers.

New subdivisions, like all development, usually must comply with the existing zoning ordinances, but at least one jurisdiction has held that mere compliance with the zoning laws is not enough--a proposed plat may be denied approval where it fails to comply with the master plan.ⁿ⁷

[2] Sources and Scope of Authority

In its broadest sense, subdivision regulation is merely a form of zoning and planning, a function of the police power--the power to regulate for the health, safety and welfare of the citizens of the state.ⁿ¹ More specifically, the power to enact subdivision controls is linked to the zoning and planning powers of local government.

In their enabling legislation, most states either give the power to regulate subdivisions of land directly to the local planning boardⁿ² or authorize the local governing body to delegate that responsibility to the board.ⁿ³ Other states may direct that the planning board serve in an advisory capacity to the local legislative body. In such capacity, the board could make recommendations concerning what controls or regulations should be enacted and also provide input regarding the administration of the subdivision regulations in specific situations.ⁿ⁴ Still another method is to provide that the legislative board adopt the regulations, but the planning board administer the regulations.ⁿ⁵

[3] What Is a Subdivision?

An important preliminary issue is that of defining the term "subdivision." One author would define it as the "division of raw land into building lots."ⁿ¹ Another authority notes that some define it as a division of a lot for the purpose of sale or building development or as a division of land into a minimum number of lots.ⁿ² Yet another states that it is the division of a parcel of land into more than one parcel, for purposes of sale, lease or building.ⁿ³

States usually define a subdivision in terms of the division of one tract of land into two or more lots, tracts or parcels, for purposes of sale or development. The exact number of lots required in order to make the subdivision control laws applicable varies from state to state--from as few as two to as many as five.ⁿ⁴

[4] Procedures for Subdivision Approval

[a] In General

The power to approve subdivision plans is usually vested in the local planning body.ⁿ¹ Subdivision approval is normally a three-step process:

- (1) the preapplication conference;
- (2) the preliminary plat approval; and
- (3) the final plat approval.ⁿ²

[b] Preapplication Conference

Although most states do not require it, a developer will normally meet with local planning officials for a preapplication conference. This may even occur before the developer buys the land for the proposed subdivision. At the conference, the local officials will discuss the local subdivision control laws with the developer. The developer will also usually bring a sketch plan or sketch plat, a rough design layout of the proposed development. It would include streets, lands dedicated for public use, open space, number and position of lots, location of utilities, etc. The developer can then get some feedback from planning officials, other governmental bodies and possibly community groups before actually having detailed drawings prepared and incurring large expenses. The dedication of land for public use requires the developer to follow a statutory procedure usually spelled out by state and local statutes, under which the developer signs an agreement to convey the land to the public entity for a specified purpose, and joins in the execution of a dedication plat which is recorded in the plat records of the county to properly describe the dedicated land. The governmental authority will also sign the plat to evidence its acceptance of the land and obligation to maintain it as public property.

[c] Preliminary Plat

The next step in the process is the submission of a preliminary plat which is a detailed drawing of the subdivision plan. This is the first formal step in the approval process. Many states require a public hearing at this stage of the application process,ⁿ³ while others provide for an optional hearing.ⁿ⁴ Normally, the planning board is the initial reviewing body and it conducts the hearings. Some states may permit or require several other local governing boards or local officials to review proposed subdivisions and to make recommendations concerning them.ⁿ⁵ Several states provide simplified or streamlined review for certain types of subdivisions, usually those with a small number of lots.ⁿ⁶

At a public hearing before the planning board, the developer will make an oral presentation, describing the site plan and the nature and scope of the development project. Typically, the developer will also use visual aids. These will usually consist of the site plan map, photographs, sketches, slides, charts, etc. Where the development project will consist of a small number of buildings, an artist's sketch of the buildings and their layout--including parking areas, lighting and sidewalks--will suffice. If the proposed project will be much larger and consist ultimately of many structures, then the architect will often supply a scale model of the development for the board's inspection.

At the conclusion of the presentation, the members of the board are given an opportunity to ask questions and raise issues and concerns. The developer and its representatives are permitted to respond to these questions. In the event that a question cannot be answered readily, the developer may request, or the board may direct, that the application be tabled and a further hearing scheduled to give the developer time to collect necessary information and data.

Where the board is assisted by a professional planning staff, a report is typically generated by the staff before the hearing. A copy is then given to the developer prior to the hearing. The report may set forth issues which the staff feels

have not been adequately addressed in the developer's application for approval. These issues may focus on small items omitted from the application or site plan which can be addressed quickly and easily during the oral presentation.

On the other hand, the issues requiring further exploration may be very significant ones, such as traffic control, expected increased burdens on municipal services, or concerns about whether the project is appropriate for the location. These larger issues may require the direct testimony of the developer's experts during the presentation. For example, the developer's engineering consultant should be prepared to testify regarding potential traffic problems and the proposed solutions for such problems. The engineer should also be prepared to discuss the issue of increased burdens on municipal services and the methods proposed to reduce or eliminate such burdens. If further data is needed by either the developer or the board which cannot be provided at the hearing, the application will likely be tabled. Accordingly, the developer's team must try to anticipate issues that will arise at the hearing and be prepared for them, so that tabling will not be necessary. In many communities, the planning board meets only once each month; thus, tabling of an application can unduly delay the progress of the project. This delay, in turn, can prove quite costly, especially if the developer is paying interest during the interim on land acquisition loans.

At the conclusion of the developer's response to questions by the board and its professional planning staff, the hearing will be opened up for comments and questions from the public. If the developer has previously met with members of the community to allay their fears, if any, about the proposed project, the opposition may be minimal. If the developer has not, there may be a great deal of opposition. Some boards will permit the developer to respond to each speaker. However, most boards prefer to have the developer respond at the end of the question-and-answer session. If members of the public have raised serious issues which cannot be responded to immediately, the developer should request that the application be tabled. During the period between hearings, the developer may consider meeting with those community members who raised the issues in order to discuss potential solutions for their concerns. The developer will be in a much stronger position going into the next board meeting if he or she has already reached agreement with a former opponent.

At the conclusion of the developer's rebuttal, the board members engage in a discussion of the merits of the application. Additional questions may be asked of the developer at this time. Next, a member of the board will make a motion to either approve or reject the application. (The motion to approve may be conditioned upon the developer agreeing to make certain modifications to his plan.) The members of the board will then vote on the motion, and the secretary will record the motion and the vote thereon in the minutes of the board.

If the developer's application has been accepted, then the development can proceed and later, final plat approval will be sought. If the developer's application has been denied, the developer may request that the application be reconsidered at a future meeting. In the meantime, the developer should consider possible revisions to the project which may induce the board to approve his application at its next hearing.

These revisions should be submitted to the board in the form of an amended application. The procedure at the second hearing would be identical to the procedure at the first: an oral presentation, followed by questions from the board and its professional staff, questions and comments from community members, rebuttal by the developer, and another vote by the board.

This revision process may be repeated a number of times until either the project is approved, the developer withdraws the application, or the application is again disapproved.

[d] Appeals Process

Some states provide for an appeal process for either a disappointed developer whose proposal is rejected or an aggrieved landowner who objects to the plan.ⁿ⁷ Otherwise, the parties might challenge the rejection or approval via a lawsuit in the state courts. The grounds typically raised during the appeal process or in a lawsuit include:

1. *The planning board exceeded its jurisdiction in making its determination.* This would require an unusual set of facts and circumstances, such as where the planning board was seeking to interfere in some area of law that has been preempted by the state or federal government. For example, if the board required the draining of a wetland as a condition for receiving plan approval, the developer could not legally perform such draining without prior approval of the U.S. Army Corps of Engineers, an arm of the federal government.ⁿ⁸ Thus, such a condition would be beyond the scope of jurisdiction of the planning board.

2. *The determination of the planning board was made in violation of lawful procedure.* This ground envisions a situation where the board failed to follow its own procedures in making a ruling on the application. For example, perhaps the board refused to allow the developer to make a presentation, or refused to allow persons in favor of the proposal to speak at the public hearing.

3. *The determination of the planning board was arbitrary and capricious, or an abuse of discretion.* This is one of the most common grounds raised on appeal. It would be used in a situation where all the information submitted to the planning board would clearly indicate that the project should be approved, but the board rejects the project nonetheless.

4. *The decision of the planning board was not supported by substantial evidence.* This ground is frequently used and somewhat similar to the ground discussed above in Paragraph 3, above. This ground would be properly raised in a case where all of the evidence at the public hearing showed that the project would be a great benefit to the community and pose very few disadvantages, but the board rejected the application on the basis that the project would constitute a detriment to the community.

Typically, the reviewing court has the right to affirm, reverse or modify the determination of the planning board. In addition, the court may direct the board to take certain action, such as holding a new hearing or making further findings of fact. The appeals process may take a lengthy period of time and can be quite costly in terms of both legal fees and time lost. As the appeal slowly makes its way through the courts, the developer may lose out on one or more construction seasons for the project. The interest paid on any acquisition loans during that time can jeopardize the financial success of the project.

Legal Topics:

For related research and practice materials, see the following legal topics:

Environmental Law Zoning & Land Use Comprehensive & General Plans Real Property Law Subdivisions General Overview Real Property Law Subdivisions Local Regulation Real Property Law Subdivisions State Regulation Real Property Law Zoning & Land Use Administrative Procedure Real Property Law Zoning & Land Use Local Planning

FOOTNOTES:

(n1)Footnote 1. See Rohan, *Zoning and Land Use Controls*, Ch. 45, *Subdivision Controls* (Matthew Bender 2001), for an in-depth discussion of subdivision controls; see also Juergensmeyer & Roberts, *Land Use Planning and Control Law* § 3.13 (West 1998); Yokley, *The Law of Subdivisions* § 1 (2d ed. Michie 1981).

(n2)Footnote 2. For an excellent discussion of the purposes of subdivision control, see Melli, *Subdivision Control in Wisconsin*, 1953 *Wis. L. Rev.* 389, 392-397; see also Korngold, *Symposium on the Seventy-Fifth Anniversary of Village of Euclid v. Ambler Realty Co.: The Emergence of Private Land Use Controls in Large-Scale Subdivisions: The Companion Story to Village of Euclid v. Ambler Realty Co.*, 51 *Case W. Res.* 617 (Summer 2001).

(n3)Footnote 3. See generally Juergensmeyer & Roberts, N. 1 *supra*, at §§ 7.3 & 7.4.

(n4)Footnote 4. *Id.* at §§ 2.7, 3.11.

(n5)Footnote 5. *Id.* at § 2.8. However, some states do require that the zoning ordinances be consistent with the comprehensive plan. *See, e.g., Fasano v. Board of County Comm'rs*, 264 Or. 574, 507 P.2d 23 (1973) for an early example of this requirement.

(n6)Footnote 6. *See* Yokley, n. 1 *supra*, at §§ 12, 15 (arguing that subdivision control is clearly and specifically a function of planning).

(n7)Footnote 7. *See, e.g., Coffey v. Maryland-Nat'l Capital Park and Planning Comm'n*, 293 Md. 24, 441 A.2d 1041 (1982); *Mayor and Council of Rockville v. Rylyns Enterprises, Inc.* 372 Md. 514, 814 A.2d 469 (2002).

(n8)Footnote 1. *See generally* Rohan, *Zoning and Land Use Controls*, Ch. 35, *Sources of Zoning Power* (Matthew Bender 2001); Nowak & Rotunda, *Constitutional Law* (6th ed. West 2000). The Supreme Court recognized the existence of such a power in *Charles River Bridge v. Warren Bridge Co.*, 36 U.S. (11 Pet.) 420 (1837).

(n9)Footnote 2. *E.g., Ala. Code § 11-52-31* (2004); *Conn. Gen. Stat. Ann. § 8-25* (2003); *La. Rev. Stat. Ann. § 33:112* (2004); *Mo. Ann. Stat. § 64.060* (2004); *Tenn. Code Ann. § 13-4-302* (2004).

(n10)Footnote 3. *E.g., Fla. Stat. § 163.3174* (2003); *Ill. Ann. Stat. ch. 24, § 65 ILCS 5/11-12-8* (2004); *Pa. Stat. Ann. tit. 53, § 10501* (2004).

(n11)Footnote 4. *E.g., Ariz. Rev. Stat. Ann. § 11-806.01A* (2004); *Cal. Gov. Code § 66411* (2004) (primary responsibility in legislative body); *S.D. Codified Laws Ann. §§ 11-6-26, 11-6-27* (2004).

(n12)Footnote 5. *E.g., Ark. Stat. Ann. § 14-56-417(a)(1)* (2003); *Ind. Code § 36-7-4-701* (2004).

(n13)Footnote 1. *See* Melli, *Subdivision Control in Wisconsin*, 1953 *Wis. L. Rev.* 389.

(n14)Footnote 2. *See* Mandelker, *Land Use Law § 9.04* (5th ed. Matthew Bender 2003).

(n15)Footnote 3. *See* Juergensmeyer & Roberts, *Land Use Planning and Control Law* (West 1998).

(n16)Footnote 4. *See* Rohan, *Zoning and Land Use Controls*, § 45.02 (Matthew Bender 2001) *citing* *Del. Code Ann. tit. 9, § 3001(10)* (1974) (two lots); *Me. Rev. Stat. Ann. tit. 30-A, § 4401(4)* (Supp. 1993) (three lots); *Nev. Rev. Stat. § 278.32.1* (1995) (five or more lots).

(n17)Footnote 1. *See generally* Rohan, *Zoning and Land Use Controls*, Ch. 49, *Zoning and Planning Agencies*; Ch. 50, *Legislative Procedure, the Enactment and Amendment of Zoning Ordinances*; Ch. 51, *Administrative Zoning Procedures* (Matthew Bender 2001).

(n18)Footnote 2. *See* Mandelker & Cunningham, *Planning and Control of Land Development* 499-502 (2d ed. Michie 1985), *quoting* Lamont, *Subdivision Regulation and Land Conversion*, in *The Practice of Local Government Planning* 389, 402-411 (So., Stollman, Beal & Arnold eds. 1979).

(n19)Footnote 3. *E.g., Colo. Rev. Stat. § 31-23-215* (2004); *Minn. Stat. Ann. § 462.358 3b* (2003); *N.M. Stat. Ann. § 3-20-7* (2004); *Tenn. Code Ann. § 13-4-304* (2004).

(n20)Footnote 4. *E.g., Fla. Stat. § 163.3215* (2003); *Ind. Code § 36-7-4-701(d)* (2004).

(n21)Footnote 5. *E.g., Or. Rev. Stat. § 92.100* (2003).

(n22)Footnote 6. *E.g., La. Rev. Stat. Ann. § 33:113* (2004); *Mont. Code Ann. § 76-3-609* (2004); *N.M. Stat. Ann. § 3-20-8* (2004).

(n23)Footnote 7. *E.g.*, R.I. Gen. Laws §§ 45-23-16, 17, 18 (2004).

(n24)Footnote 8. 33 U.S.C.A. § 1344; *Loveladies Harbor, Inc. v. U.S.*, 15 Ct. Cl. 381 (1988) ; *United States v. Ciampitti*, 615 F. Supp. 116 (D. N.J. 1984) ; *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121 (1985) ; *cf. United States v. Rueth Development Co.*, 335 F.3d 598 (7th Cir. 2003) .



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26-22 Current Legal Forms for Real Estate § 22.30

§ 22.30 Financing

The financing of a real estate development project is often done in several phases. Generally, financing is required for:

- (1) acquisition of the land;
- (2) construction of the infrastructure; and
- (3) construction of the project's buildings and other features (e.g., swimming pool, tennis courts, etc.).

In addition, permanent financing will be necessary where the developer will own the completed project. Each phase of the financing has its own unique problems and considerations.

[1] Acquisition Financing

Acquisition financing involves raising sufficient funds to acquire fee title to the land on which the project will be located. This may be done by seeking investors who will contribute certain sums of money for an ownership interest in the project. Alternatively, loans for acquisition may be sought from financial institutions.

Institutional lenders generally will not finance the acquisition of vacant land using the land as security for the loan. However, an institutional lender may loan money toward the cost of acquisition if the developer has other collateral which can be offered as security. This may include:

- (1) equity in another real estate development project;
- (2) the developer's home;
- (3) equipment;
- (4) stocks and bonds;

- (5) certificates of deposit;
- (6) works of art; or
- (7) a combination of the above.

Of course, the developer may be understandably reluctant to tie up personal assets for the acquisition of a piece of vacant land which may not produce a return on the investment for a number of years. Moreover, commitment of collateral to this particular acquisition may reduce the ability to obtain short-term financing for improvements to other development projects.

Frequently, developers will seek acquisition financing from the seller of the land via a purchase money mortgage. That is, the seller would hold the mortgage to the property himself, rather than a financial institution such as a bank or savings and loan.

[2] Construction Financing

In many real estate development projects, the construction actually occurs in two phases. The first involves the installation of the infrastructure. The second involves the construction of the buildings. The infrastructure includes the roads, sidewalks, water mains, sewer lines, storm sewers and other utilities which will be used in common by the future owners or tenants of the development. Installation of the infrastructure is quite costly and frequently involves serious disruption throughout the entire parcel of land.

Institutional lenders are much more enthusiastic about construction financing than they are about acquisition financing. Construction financing, like the construction itself, is usually done in phases through the use of a building loan agreement, coupled with a bond, or a note and mortgage.

The building loan agreement describes how the funds will be advanced to the developer. Typically, the lender and developer will negotiate a schedule of cash advances which are tied to the progress of the development project. The schedule will provide that a particular percentage of the total loan amount, or a specified sum of money, will be released to the developer upon completion of each stage of construction. The lender will usually inspect the development periodically to determine whether that stage has, in fact, been completed. Alternatively, the lender may request certification from the developer's design professional when each stage has been finished.

Most building loan agreements provide that the lender is not obligated to release any additional funds if there has been a default under the terms of the loan documents, or if any liens have been filed against the project. Accordingly, most lenders will request that the title company providing title insurance for the project recertify title before each advance is made. If a lien is found, the developer will need to obtain a release from the lienor before receiving the next advance from the lender. This may often be accomplished by making part of the advance payable to the lienor.

Typically, the interest rate on a construction loan is variable and tied to the prime rate or a similar index. The frequency of adjustments and the maximum rate of interest that may be charged are matters for negotiation between the parties.

Usually, the collateral for a construction loan will be the land and the improvements made thereon, together with the plans, specifications, maps, drawings and other items prepared for use in the project. Most agreements between design professionals and developers provide that the design professional retains ownership of the plans, drawings, etc. Accordingly, the lender will need to have the design professional join in the security agreement so that, in the event of a default by the developer on the loan, the lender will have the right to make use of the plans and drawings.

If the lender and developer agree to any material change in the terms of the building loan agreement, a written amendment should be executed by the parties and filed with the county clerk. For example, any change in the amount or frequency of loan repayments should be considered material.

Frequently, construction loan documents for subdivided properties will contain provisions allowing for "releases" of lots or sections of the property upon payment to the lender of a specified sum per lot or section, together with an amount necessary to cover the lender's cost of preparing and recording a release of part of the mortgaged premises. The purpose of such a provision is to allow sales of individual houses or buildings before the entire development project is complete. This allows the developer to reduce the interest costs by paying off principal, lot by lot. In calculating the amount for each lot, the lender generally takes the total amount of the loan and multiplies that amount by a fraction whose numerator is the number of lots to be released and whose denominator is the total number of lots in the development. Some lenders will require the use of a smaller number as the numerator, such as 90 percent of the number of lots to be released.

Lenders generally will not release lots if the developer is in default. If the developer is in default, there may be an accumulation of expenses incurred by the lender--such as legal fees, court fees and related foreclosure costs--which are secured by the lien of the mortgage. Without a provision in the loan documents barring releases if a default occurs, the developer could theoretically obtain releases of all lots while still owing the lender a significant sum of money. The lender would then have no security for such costs.

Where it is the intention of the developer to retain ownership of the development at the completion of the project, such release provisions are, of course, unnecessary. Instead, many developers request provisions whereby the construction financing will be automatically rolled into permanent financing.

[3] Permanent Financing

The term "permanent financing" generally refers to financing provided at the completion of a real estate development project, where the developer intends to retain ownership. (The classic example is a development to be leased to tenants--whether residential or commercial--by the developer.) Institutional lenders tend to be even more enthusiastic about this type of financing than they are about construction financing. The risk for them is less than it is with construction financing because there are no fears about whether the project will ever be completed, and it is relatively easy to ascertain the value of the completed project. (Value is traditionally determined by examining the sales price of comparable properties in the surrounding area in the recent past.)

Most lenders will offer only adjustable interest rates on commercial loans, with the rates tied to the prime rate or a similar index. The developer may be able to negotiate with the lender about the frequency of interest rate adjustments. The current trend among lenders is to adjust the interest rate immediately upon a change in the prime rate or other index. However, where the developer will be dependent on rents as the source of loan repayments, the developer should insist upon an annual or semi-annual interest rate adjustment to correspond with periodic increases in the rental revenues. (The disadvantage to this method, however, is that, if interest rates suddenly drop, the developer may have to wait as much as a year before the interest rate is adjusted downward.)

The collateral for permanent financing will generally be the land and structures, together with an assignment of leases and rents. In addition, the lender may take a security interest in fixtures and any equipment which is necessary or useful for the operation of the project. The assignment of leases and rents will provide that, in the event of a default, the lender may give notice of the default to the tenants and begin collecting rents directly from them. Such rents would be used first to eliminate the loan repayment amounts in arrears and then to cover regular future loan repayments. Where the developer's own business occupies the project, the lender could collect a reasonable rental fee from the developer.

The term of the loan and the amortization period are subject to negotiation between the lender and the developer. The

lender is under no obligation to extend the term of the loan. However, if the lender agrees to extend the term, it may condition the extension upon the payment of "points," an adjustment in the interest rate, or other similar arrangement.

If the lender does not agree to extend the loan, the developer must be prepared to pay off the loan at the end of the loan term. Typically, this would be accomplished by borrowing funds from another lender and paying these funds to the original lender. Again, the developer may be required to pay points, closing costs and other fees in this situation to the new lender.

Legal Topics:

For related research and practice materials, see the following legal topics:

Real Property LawConstruction LawGeneral OverviewReal Property LawFinancingGeneral OverviewReal Property LawFinancingConstruction LoansReal Property LawFinancingMortgages & Other Security InstrumentsPurchase-Money Mortgages



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§ 22.31 Construction Phase

Once all governmental approvals have been obtained and financing has been arranged, the developer is ready to begin construction of the real estate development project. Many very large real estate developers have their own in-house construction crews. Smaller developers must either hire a general contractor, or act as their own general contractors and hire subcontractors.

[1] General Contractor

[a] Selection

Where the developer must hire either a general contractor or subcontractors, the design professional generally will prepare bid specifications for use by the developer. A notice soliciting bids may then be placed in local newspapers and may be sent to general contractors. The notice typically indicates:

- (1) the general nature and scope of the project;
- (2) where a copy of the bid specifications may be obtained;
- (3) the date on which the bids are due; and
- (4) the time and place at which the bids will be opened.

Because the bid specifications are lengthy and costly to reproduce, often bidders will be required to place a refundable deposit to guarantee the return of the bid specifications to the developer. The specifications consist of construction-related documents, including the site plan, specifications regarding the types of materials to be used and detailed instructions to bidders about how the construction work must be performed. The instructions include such information as:

- (1) whether performance bonds will be required;

- (2) estimated dates for completion of the project;
- (3) schedules of payments to be made to the contractors; and
- (4) warranties required of the bidders.

The bids are opened at the time and place advertised in the notices. The developer generally will award the bid to the lowest bidder who satisfies all the bid requirements. Most developers reserve the right to reject all bids if they are unacceptably high, or if the bidders lack the proper qualifications or experience to handle the project. In such case, the project will then be "rebid."

Of course, the developer is not required to use a bidding process at all. Instead, the developer may simply select a contractor with whom the developer is comfortable and negotiate a price. However, the bidding process is more popular in this country because there is a widespread perception that it results in the lowest possible price for a given development project.

[b] Contract

Once the developer has selected a general contractor, a contract is negotiated between the two parties and executed. The bid documents form an integral part of the contract. Where the design professional is closely involved in the construction process, the American Institute of Architects' (AIA) standard form contract is frequently used. The AIA is a private, non-profit organization which undertakes to draft in market form contracts commonly used in the construction industry. The forms are copyrighted and therefore need to be purchased if used. The sale of the form documents generates substantial revenue for the organization. The use of AIA forms is advantageous to the extent that the basic terms of the commonly used documents are familiar to the participants in the construction process, and utilization of the terms saves time and expense in document preparation. Also, because the forms have been in use for more than 100 years, many of the clauses have been judicially reviewed and interpreted. Because the AIA documents are drafted with an eye toward protecting architects, the developer would be well-advised to have his or her attorney carefully review the contract before the developer signs it. If the AIA contract does not seem adequate, the developer's attorney should draft an agreement from scratch.

The form contracts are rarely used without significant modification, at least on complex commercial construction projects. A listing of the various AIA forms of contract can be found on its website at www.AIA.org.

[c] Insurance

A developer faces significant risk exposure each time construction is undertaken on the developer's behalf. The law is full of instances where someone suffers an injury on the job and sues the property owner-developer under various liability theories, such as the failure of the property owner to maintain safe premises. In addition, damage to the work-in-progress can cause delays in the construction project if those issues are not addressed by a comprehensive and integrated insurance program. At a minimum, the contract should require that the general contractor carry general liability insurance coverage against bodily injury, property damage to third-party property (not the property of the insured), personal injury, medical payments, defense costs and certain liabilities assumed by the contractor. Each project must be looked at individually with the developer's insurance agent, but generally the minimum limits for commercial general liability should be \$1 million per occurrence, with an annual aggregate of \$2 million.

Evidence of adequate worker's compensation and employer's liability insurance is also necessary so that injuries that occur to the contractor's employees while performing work are covered by that type of insurance. The developer should require that the contractor's insurance be endorsed to be primary to any comprehensive general liability insurance carried by the developer. The developer will want to assure that it is named as an additional insured to the contractor's

general liability policy. This can only be done by endorsement to that policy. The designation of the developer as an additional insured on a certificate of insurance does not make the owner an additional insured on the policy. The developer should not rely on the certificate, but should require a copy of the endorsement to the policy. In addition, the developer will want to assure that it is given prior written notice of cancellation or non-renewal of the insurance policy.

The other major type of insurance required to be covered in the contract of the general contractor is the builder's risk property insurance which covers the structure as it is being constructed during the progress of construction. The builder's risk coverage is separate from the permanent property insurance obtained once the project is completed. The forms of covered perils are the same as those that are covered under the permanent property insurance. For example, the "special form" type of builder's risk insurance covers risks of direct physical loss unless excluded, formerly known as "all-risk" protection. The developer will typically want to maintain the builder's risk insurance but there are occasions where savings can be obtained by having the general contractor obtain this insurance. In either event, the parties will want to be sure that materials and equipment that are designated for the project stored off-site or in transit are covered under the builder's risk policy. Generally, this insurance is issued on a replacement cost basis as opposed to actual cash value. Regardless of which party carries the builder's risk insurance, the policy should cover the property interests of the owner, contractor and subcontractors, as their interests may appear. This assures that all materials and equipment will be covered regardless of whether title is technically passed to the developer or general contractor, as the case may be.

[d] Bonds

The developer may require that the general contractor obtain bonds as a guarantee that the work will be completed. If so, this requirement should be included in the bid specifications, since the cost of obtaining bonds may add considerably to the amount of the contractor's bid. Two types of bonds are commonly required: (1) material and labor bonds; and (2) performance or completion bonds. The first guarantees that all costs for materials used in the development project and for all labor expended on the project will be paid in the event that the general contractor either refuses or fails to do so. The second guarantees that the project will be completed. In other words, if the contractor fails to complete the project, the insurance company will pay the sums necessary to complete the job in accordance with the plans and specifications.

The bonds will provide a great measure of comfort to the developer. They assure that the project will be completed regardless of the general contractor's future acts or omissions. However, bonds are quite costly and cannot be obtained by all general contractors. Thus, the developer may not want to exclude from the bidding process those general contractors who are unable to acquire bonds. In addition, the bonds, by their terms, may prevent changes from being made to the construction plans during the course of construction. If the developer wishes to make any changes, the approval of the bonding company may be required, which is a potentially time-consuming process. Also, the bonding company may charge an additional premium if the change increases the total cost of the project. In short, the bonds may prove to be an unnecessary and costly complication for the developer.

[2] Subcontractors

[a] Selection

Where the developer employs a general contractor, the developer will not be greatly involved in the process of selecting subcontractors. However, where the developer acts as general contractor, he or she will be very actively involved with subcontractors.

The process of obtaining subcontractors is very similar to the process of obtaining a general contractor. The developer may resort to the bidding process, or may simply select subcontractors with whom the developer is comfortable and negotiate agreements with them.

[b] Contracts

The contract between a developer and a subcontractor will specify the subcontractor's price and a schedule of payments to be made to the subcontractor by the developer. It should also contain those portions of the bid documents pertaining to the part of the project to be completed by the subcontractor. Such documents should include:

- (1) a detailed description of the subcontractor's duties;
- (2) specifications regarding the materials that must be used;
- (3) an estimated date of completion of the work;
- (4) any warranties required of the subcontractor by the developer; and
- (5) the insurance required to be carried by the subcontractor, including the amount of commercial general liability insurance required to be carried and the named insured parties, and the requirement to carry adequate worker's compensation insurance so that injuries to the subcontractor's employees while performing work are covered by such worker's compensation insurance.

Legal Topics:

For related research and practice materials, see the following legal topics:

Contracts LawTypes of ContractsGuaranty ContractsInsurance LawGeneral Liability InsuranceGeneral OverviewReal Property LawConstruction LawGeneral OverviewReal Property LawConstruction LawBidsReal Property LawConstruction LawContractsReal Property LawConstruction LawContractors & SubcontractorsWorkers' Compensation & SSDICoverageEmployment RelationshipsContractors



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§ 22.32 Marketing Phase

The marketing phase will often begin before or during the construction phase. To illustrate, in the case of a residential subdivision, the construction of individual houses usually does not occur until the infrastructure is complete and the lots have been chosen by particular purchasers, who then select the desired model home to be constructed. In the case of a shopping mall, the construction plans often are not finalized until "anchor tenants" are located and sign leases. ("Anchor tenants" are those tenants who are most likely to attract large numbers of consumers to the mall, such as Macy's, Sears, etc.) Where the commercial development is an office park or industrial park, buildings are often constructed to suit the needs of particular tenants. Additional tenants are later located to fill up empty, additional space.

[1] Marketing Agent

Some developers use their own in-house marketing staff, while others hire licensed real estate brokers to act as marketing agents. The marketing agent establishes the developer's first contact with a potential purchaser or tenant. Accordingly, the selection of an appropriate agent is extremely important.

The developer should seek someone with vast experience in marketing the particular type of product which the developer is planning to offer to the general public. A person with many years' experience in the residential real estate market may not be helpful in marketing office space.

In selecting a real estate agent, the developer should be certain that the agent possesses the required state license to act as a real estate agent. The developer should also ask for references. He or she should then contact the references to discuss the qualifications and ability of the real estate agent, and the developer should also inquire about any problems encountered, how they were solved, and the degree of satisfaction received by the reference from the agent's efforts. The developer should also be certain that the agent has sufficient staff to cover for the agent when he or she is ill or on vacation.

The role of the agent is to locate prospective purchasers or tenants for the developer's project. This is frequently done through advertising on radio and television, and in local newspapers and magazines. In addition, brochures are often mailed to targeted groups of people and businesses. Open houses may be held to showcase models that have already

been constructed. The agent may also rent tables at trade shows or conferences to further advertise the development.

Frequently, the real estate agent will negotiate, on behalf of the developer, the terms of the lease or sales contract with the prospective tenant or purchaser. The agent may also be called upon to help locate financing for a prospective purchaser.

The professional services contract between the developer and the real estate agent should clearly delineate all of the responsibilities of the agent and the developer. Typically, costs for advertising the development are allocated between the parties, and these costs and allocation are set forth in the agreement. The agreement should also specify whether the development will be included in multiple listing services. If so, the agreement should specify which services will be used, the cost, and the party or parties responsible for this expense.

Many real estate brokers' associations have their own standardized professional services agreements. These contracts typically protect the broker's interests far more than the developer's. Accordingly, the developer should consider having his or her attorney draw up an agreement tailored to the particular project.

The agreement between the developer and the real estate agent must also contain compensation provisions. Real estate agents are typically paid on a commission basis; they may be paid a percentage of the purchase price of a house or unit in the development, or a percentage of the gross rents to be paid by a tenant in the future. Alternatively, they may be paid a flat fee per house or unit sold, or per square foot rented.

Developers tend to make significant profits on the many "extras" which a homeowner or tenant sometimes requests to have added to the standard unit purchased or leased. Frequently, real estate agents are given a commission fixed at a different rate for these items, as an added incentive to the agents to "push" them. "Extras" may include upgrades in the carpeting and appliances offered, special lighting or fixtures, and other items.

[2] Revision of Marketing Strategy

There may come a time in the history of a real estate development project where sales and/or rentals are simply not living up to expectations. This situation, in turn, may place a severe financial strain on the developer. In such a case, the developer must assess the nature of the problem. The problem may include one of the following:

- (1) a general weakness in the local or regional real estate market;
- (2) the cost of units far exceeds the price most prospective purchasers or tenants are able to pay; or
- (3) there may be an over-abundance of comparable units available in the surrounding area.

Accordingly, the developer may need to revise the marketing strategy before he or she becomes unable to meet future financial obligations.

In a sales situation, the developer may consider personally offering low-interest financing to new purchasers for a short period of time, such as three to five years. At the end of the period, the purchaser could then refinance. Presumably, at that point in time, the purchaser will have more savings and a greater income, thus enabling him or her to qualify for a mortgage loan through a bank. The developer might also offer tenants a "rent-to-own" program, whereby part of the rent paid in the past is applied against the purchase price when the tenant is ready to buy at a future date.

The developer might also offer a "stripped-down" model home for less affluent purchasers. In such case, the purchasers, rather than the developer, would do their own painting, landscaping, etc., in order to save money on the purchase price.

In a commercial lease situation, the developer may offer incentives to attract tenants. The developer may offer an increased "fit up" allowance to cover a large portion of the tenant's cost of adapting the rental area for its specific use. Alternatively, the developer might offer free rent for a month or two, or the developer might offer a year's use of the premises at a reduced rent. The developer might also consider offering to restructure the rental payments in order to permit lower rents in the early years when the business is starting up, and higher rents later, resulting in the same *total* rent over the life of the lease.

Legal Topics:

For related research and practice materials, see the following legal topics:

Real Property LawBrokersBrokerage AgreementsReal Property LawBrokersRight to CommissionsReal Property LawConstruction LawGeneral OverviewReal Property LawLandlord & TenantLease AgreementsCommercial LeasesGeneral OverviewReal Property LawLandlord & TenantLease AgreementsCommercial LeasesShopping Center LeasesReal Property LawPurchase & SaleGeneral Overview



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[Reserved]

§§ 22.33[Reserved]



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§ 22.42 Research Checklist

[A] Model Acts

- Model Real Estate Time Share Act..... ☐
- Uniform Common Interest Ownership Act (1994)..... ☐
- Uniform Condominium Act (1980)..... ☐

[B] Annotations

- "Validity and Construction of Zoning Ordinance Requiring Developer to Devote Specified Part of Development to Low and Moderate Income Housing," 62 ALR 3d 880 (1975) ☐
- "Eminent Domain: Industrial Park or Similar Development as Public Use Justifying Condemnation of Private Property," 62 ALR 4th 1183 (1988) ☐
- "Change in Character of Neighborhood as Affecting Validity or Enforceability of Restrictive Covenant," 76 ALR 5th 337 (2000) ☐
- "Conservation: Validity, Construction and Application of Enactment Restricting Land Development by Dredging or Filling," 46 ALR 3d (1972)..... ☐
- "Modern Status of Rules Governing Interference with Drainage of Surface Waters," 93 ALR 3d 1193 (1979) ☐

-- "Enforceability, by Landowner, of Subdivision Developer Oral Promise to Construct or Improve Roads," 41 ALR 4th 573 (1985) ☐

-- "Validity in Construction of Statute or Ordinance Requiring Land Developer to Dedicate Portion of Land for Recreational Purposes, or Make Payment in Lieu Thereof," 43 ALR 3d 862 (1972) ☐

-- "Zoning: Planned Unit, Cluster, or Greenbelt Zoning," 43 ALR 3d 888 (1972) ☐

-- "Construction and Application of Zoning Laws Studying Minimum Lot Size Requirements," 2 ALR 5th 553 (1992) ☐

-- "Easement, Servitude, or Covenant As Affected by Sale for Taxes," 7 ALR 5th 187 (1992) ☐

[C] Law Reviews and Periodicals

-- Ashbrook, "Land Development, The Graham Doctrine, And The Extinction Of Economic Substantive Due Process," University of Pennsylvania, *150 U. Pa. L. Rev.* 1255 (2002)..... ☐

-- Baldwin, "Conservation Easements: A Viable Tool for Land Preservation," Land and Water Law Review, *32 Land & Water L. Rev.* 89 (1997)..... ☐

-- Brown, "A Heads Up On Recent Development: Entering 2000 With Fewer Sovereign Powers and Expanded Compensable Property Rights: Dilemmas for Local Government," Stetson Law Review, *29 Stetson L. Rev.* 733 (2000)..... ☐

-- Bueschen, "Do Isolated Wetlands Substantially Affect Interstate Commerce?", The American University Law Review, *46 Am. U.L. Rev.* 931 (1997)..... ☐

-- Bush, "Beware the Associations: How Homeowners' Associations Control You and Infringe Upon Your Inalienable Rights!," Western State University Law Review, *30 W. St. U.L. Rev.* 1 (2003)..... ☐

-- Davis, "Reasonable Use Has Become The Common Enemy: An Overview Of The Standards Applied To Diffused Surface Water And The Resulting Depletion Of Aquifers," Albany Law Environmental Outlook, *9 Alb. L. Env't'l Outlook* 1 (2004) ☐

-- Giantomasi, "A Balancing Act: The Foreclosure Power Of Homeowners' Associations," Fordham Law Review, *72 Fordham L. Rev.* 2503 (2004)..... ☐

-- Grassmick, "Minding The Neighbor's Business: Just How Far Can Condominium Owners'

Associations Go In Deciding Who Can Move Into The Building?," *University of Illinois Law Review*, 2002 *U. Ill. L. Rev.* 185 (2002)..... ☐

-- Hammes, "Development Agreements: The Intersection of Real Estate Finance and Land Use Controls," *University of Baltimore Law Review*, 23 *U. Balt. L. Rev.* 119 (1993)..... ☐

-- Holloway & Donald C. Guy, "A Limitation on Development Impact Exactions to Limit Social Policy-Making: Interpreting the *Takings Clause* to Limit Land Use Policy-Making for Social Welfare Goals of Urban Communities," *Dickinson Journal of Environmental Law & Policy*, 9 *Dick. J. Env. L. Pol.* 1 (2000) ☐

-- Johnston, "The Tragedy of Centralization: The Political Economics Of American Natural Resource Federalism," *University of Colorado Law Review*, 74 *U. Colo. L. Rev.* 487 (2003)

-- Kealy, "The Hudson River Valley: A Natural Resource Threatened by Sprawl," *Albany Law Environmental Outlook*, 7 *Alb. L. Envtl. Outlook* 154 (2002) ☐

-- Kersten, "Exactions, Severability and Takings: When Courts Should Sever Unconstitutional Conditions from Development Permits," *Boston College Environmental Affairs Law Review*, 27 *B.C. Envt'l Aff. L. Rev.* 279 (2000) ☐

-- Korngold, "Symposium On The Seventy-Fifth Anniversary Of Village Of Euclid v. Ambler Realty Co.: The Emergence of Private Land Use Controls in Large-Scale Subdivisions: The Companion..... ☐

-- Story to Village of Euclid v. Ambler Realty Co.," *Case Western Reserve Law Review*, 51 *Case W. Res.* 617 (2001) ☐

-- Levin, "When Forever Proves Fleeting: The Condemnation And Conversion Of Conservation Land," *Environmental Law Journal*, 9 *N.Y.U. Envt'l L.J.* 592 (2001) ☐

-- Lewyn, "Twenty-First Century Planning And The Constitution," *University of Colorado Law Review*, 74 *U. Colo. L. Rev.* 651 (2003)..... ☐

-- Lewynn, "Suburban Sprawl: Not Just An Environmental Issue," *Marquette Law Review*, 84 *Marq. L. Rev.* 301 (Winter, 2000) ☐

-- Mandelker, "Evolving Voices In Land Use Law: A Festschrift In Honor Of Daniel R. Mandelker: Part II: Discussions On The National Level: Chapter 2: Property Rights: Entitlement To Substantive Due Process: Old Versus New Property In Land Use Regulation," *Washington University Journal of Law & Policy*, 3 *Wash. U. J.L. & Pol'y* 61 (2000) ☐

-- Manderscheid, Q.C., "Caveat Emptor and the Sale of Land: The Erosion of a Doctrine," *The Alberta*



-- Ryan, "Zoning, Taking, and Dealing: The Problems and Promise of Bargaining in Land Use Planning Conflicts," *Harvard Negotiation Law Review*, 7 *Harv. Negotiation L. Rev.* 337 (2002)



-- Schwartz, "Development Agreements: Contracting for Vested Rights," *Boston College Environmental Affairs Law Review*, 28 *B.C. Env'tl Aff. L. Rev.* 719 (2001) ☐

-- Shibata, "Access To Justice: The Social Responsibility Of Lawyers: Land-Use Law in the United States and Japan: A Fundamental Overview and Comparative Analysis," *Washington University Journal of Law & Policy*, 10 *Wash. U. J.L. & Pol'y* 161 (2002) ☐

-- Silliman, "Risk Management for Land Use Regulations: A Proposed Model," *Cleveland State Law Review*, 49 *Clev. St. L. Rev.* 591 (2001) ☐

-- Sturm, "Nonprofit Organizations in Brownfields Redevelopment: Leveling the Playing Brownfield," *Buffalo Environmental Law Journal*, 8 *Buff. Env'tl L.J.* 99 (2000) ☐

-- Williams, "Do Smart Growth Policies Invite Regulatory Takings Challenges? A Survey of Smart Growth and Regulatory Takings in the Southeastern United States," *Alabama Law Review*, 55 *Ala. L. Rev.* 895 (2004)..... ☐

-- Witten, "Twists In The Path From Mount Laurel: Article: The Cost of Developing Affordable Housing: At What Price?," *Boston College Environmental Affairs Law Review*, 30 *B.C. Env'tl Aff. L. Rev.* 509 (2003) ☐

-- Wright, "Eminent Domain, Exactions, and Railbanking: Can Recreational Trails Survive the Court's *Fifth Amendment* Takings Jurisprudence?," *Columbia Journal of Environmental Law*, 26 *Colum. J. Env'tl L.* 399 (2001) ☐

-- Ziegler, "Urban Sprawl, Growth Management and Sustainable Development in the United States: Thoughts on the Sentimental Quest for a New Middle Landscape," *Virginia Journal of Social Policy & the Law*, 11 *Va. J. Soc. Pol'y & L.* 26 (2003) ☐

Legal Topics:

For related research and practice materials, see the following legal topics:

Environmental Law Zoning & Land Use General Overview Real Property Law Common Interest Communities General Overview Real Property Law Construction Law General Overview Real Property Law Subdivisions General Overview Real Property Law Zoning & Land Use General Overview



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§ 22.43 Overview of Drafting Guidelines

From the developer's prospective, much of the work will be completed before the attorney gets involved. That is, by the time that the attorney gets a call from his client, the developer will already have expended a significant amount of time and effort in reaching a preliminary conclusion that the project is viable. As a practical matter, a developer will review and investigate many potential projects before he selects a project to pursue. Even after the developer decides to pursue a project, there is still a high probability that the project still can't be completed economically. Given all of this initial time and effort that will be invested by the developer, it is easy to understand why clients are anxious to get the ball rolling. In any event, unless the lawyer is also a trusted business advisor, the experienced developer will usually call his attorney when he is ready to get serious about pursuing the project, and committing significant financial resources.

Generally, the first task of the attorney will be to draft a letter of intent or a purchase agreement. (See Chapter 21 Sales and Exchanges in Volume 25 of Current Legal Forms with Tax Analysis). The first document set forth in these Drafting Guidelines is a purchase agreement. The purchase agreement is a key step in the development of a parcel of real estate. A purchase agreement for property to be developed will probably contain a large number of pre-closing conditions. These conditions will require the developer to fully and completely investigate the property to confirm that the property can be developed in the manner desired by the developer. A developer must be concerned about wetlands, environmental contamination, zoning, ability to get permits, financing, signing leases, obtaining construction bids, obtaining subdivision approvals, etc. If the developer purchases the property prior to the complete and final resolution of all outstanding issues, he is taking a large risk. Additionally, in connection with the purchase and development of the property, the attorney must advise the developer as to whether an entity should be used to complete the purchase, construct the improvements and own the project. (See, Chapter 1 Partnerships in Volume 1, Chapter 2 Joint Ventures in Volume 2, Chapter 17 Corporate Organization in Volume 22, Chapter 18A Limited Liability Companies in Volume 22, and Chapter 20 Real Estate Entities in Volume 24 in Current Legal Forms with Tax Analysis).

The second document addressed in these Drafting Guidelines is the construction contract. Obviously, the developer has decided to pursue the project because he believes that he can make money. However, if the projected costs exceed the developer's budget, the project may fail, or the developer will not make as much money. Also, if the improvements are not properly constructed, or if they are not timely completed, the developer will face numerous problems such as, the loss of tenants, failure to obtain permanent financing, inability to obtain an occupancy permit, etc. For additional

construction contracts see Part IV, Forms, Section C, *infra*.

If the developer desires to have the building certified as a "green" building, there should be a provision in the documents requiring the building to be built so that it achieves a certain level under the rating system used for such certifications. That system is often the certification system put together by the U.S. Green Building Council known as the LEED system. The term "LEED" stands for "Leadership in Energy & Environmental Design." LEED is one of several voluntary, third party verification systems designed to quantify the application of green building concepts in several categories, including sustainable sites, water efficiency, energy efficiency and atmosphere, building materials and resources, and indoor air quality.

The third document addressed is an easement and restriction agreement. In large and sophisticated development transactions there will probably be many different parties which will be involved in one or more aspects of the project. A municipality or an adjacent property owner might approve a site plan or a change in use or zoning provided the developer agrees to certain conditions. These conditions are set forth in a restriction agreement which must be recorded. Purchasers of outlots might be concerned about parking, access or sight lines. Prospective tenants might be concerned about restricting the types of activities that can be undertaken at the development. A homeowner's association might want access through a property for purposes of installing utilities or accessing green space or common area. Owners of adjacent property may want to use common facilities, such as a retention pond. Further, they may want to make sure that each owner maintains their property, since a drop in value of one property would likely affect the other. The more parties that are involved and the more issues that are addressed, the more difficult it will be to finalize the agreement. As a practical matter, a complicated easement and restriction agreement involving several parties might be the most difficult document in the development process to finalize. The document addressed in these Drafting Guidelines is a very complex agreement involving only two parties. For additional restriction and easement agreements see Part IV, Forms, Sections D and E.

As with any legal document, the practitioner must review and become familiar with the applicable laws and practices in the state where the project is located. This is especially true in a real estate project where local recording laws, case law and customs vary widely from state to state. In fact, it is not uncommon to find that local customs and practices differ significantly among counties within a state.

Legal Topics:

For related research and practice materials, see the following legal topics:

Real Property Law Construction Law Contracts Real Property Law Limited Use Rights Easements General Overview Real Property Law Purchase & Sale Contracts of Sale General Overview Real Property Law Restrictive Covenants General Overview Real Property Law Zoning & Land Use General Overview



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§ 22.44 Purchase Agreement for Property with Purchase Price to be Determined by Survey with a Temporary Lease Provision

.....

CONTRACT

PURCHASE AGREEMENT

THIS PURCHASE AGREEMENT is made at _____ [city], _____ [state], this _____ [day] day of _____ [month], _____ [year], by and between _____ [name], a(n) _____ [state] _____ [entity] (hereinafter referred to as "Seller"), and _____ [name], a(n) _____ [state] _____ [entity] (hereinafter referred to as "Buyer").

WHEREAS, Seller owns the Property (as hereinafter defined) and Seller desires to sell the Property to Buyer; and

WHEREAS, Buyer desires to purchase the Property and redevelop it as an automotive dealership;

NOW, THEREFORE, in consideration of the promises and covenants hereinafter set forth, the parties agree as follows:

1. Purchase and Sale. Seller agrees to sell and convey to Buyer, and Buyer agrees to purchase and pay for, the premises outlined on Exhibit A, consisting of approximately ____ (____) acres of vacant land (the "Property"). Upon completion of the survey referred to in subparagraph 2.C., the parties agree to prepare an accurate legal description to the Property. The Property shall include the land and any and all rights, privileges, and easements appertaining thereto.
(n1)COMMENT

2. Purchase Price. Subject to the provisions of subparagraph 2.C., below, the total purchase price for the Property is

_____ Dollars (\$ _____) per acre, which price shall be payable by Buyer as follows: (n2)COMMENT

A. Earnest Money. Upon execution hereof, Buyer will deposit the sum of _____ Dollars (\$ _____) into escrow with the escrow agent (the amount will be referred to as the "Deposit"). The Deposit shall be non-refundable, unless Seller shall breach this Agreement or be unable to perform hereunder, or one of the conditions described in Paragraph 4 hereunder shall not be satisfied, in which case, the Deposit shall be returned to Buyer in its entirety, with interest, if any. The Deposit will be credited against the purchase price. (n3)COMMENT

B. Balance of Purchase Price. The balance of the purchase price shall be deposited into escrow on or before the Closing Date of this transaction.

C. Calculation of Purchase Price. The purchase price will be based upon the aggregate amount of acreage being purchased by Buyer. For purposes of this Agreement, acreage will be the amount of acreage of the Property determined by a survey. Upon execution hereof, Buyer shall commission a licensed engineer or surveyor to prepare a survey of the Property in accordance with the Minimum Standard Detail Requirements of ALTA/ASCM, showing all easements, restrictions, reservations, conditions, encroachment and appurtenances affecting the Property, which shall be sufficient in all respects to have the standard general exceptions removed from the Owner's Policy of Title Insurance. In addition, the surveyor or engineer shall be instructed to calculate the acreage upon which the purchase price will be calculated. Notwithstanding the foregoing to the contrary, the purchase price will not exceed the sum of _____ Dollars (\$ _____). (n4)COMMENT

3. Closing Date. The closing date of this transaction shall be fifteen (15) days after the conditions set forth in Paragraph 4 have been satisfied (the "Closing Date"). The Closing Date may be accelerated by agreement of the parties. (n5)COMMENT

4. Conditions. This Agreement, and Buyer's obligation to purchase the Property hereunder, is subject to the following:

A. Due Diligence Investigation. Buyer satisfactorily completing a diligent inspection of the Property, and satisfying itself as to the feasibility of the Property for use as a car dealership. Buyer's inspection may include, without limitation, tests of the subsurface soil conditions of the Property, boundary surveys, engineering reports, feasibility studies, and environmental inspections. Buyer and Buyer's agents shall have access to the Property for such inspections. Buyer hereby agrees to defend, indemnify and hold Seller harmless from the acts of Buyer or Buyer's agents resulting from access to the Property during the Due Diligence Period. (n6)COMMENT

B. Zoning and Permits. Buyer obtaining all final, irrevocable, uncontestable and unappealable permits and approvals as may be required to be issued by any governmental body having jurisdiction over the Property, including, without limitation, use permits, curb cut approval, building permits, zoning changes and approvals, permits and approvals for the construction and installation of sanitary storm sewers and other appurtenant systems to serve the Property (all of the foregoing being hereinafter called the "Permits"), as may be required by Buyer to permit the lawful construction, installation, maintenance and operation on the Property as a car dealership as Buyer contemplates. Seller agrees to reasonably cooperate with Buyer to obtain such Permits, including, without limitation, execution of an application to change the zoning of the Property to a classification which allows car dealerships. (n7)COMMENT

C. Approval of American Motors. Buyer obtaining the consent of American Motors (and any other required third parties) for the operation of a an American Motors car dealership on the Property. (n8)COMMENT

If for any reason any of the conditions set forth above are not satisfied by _____ [month]
_____ [day], _____ [year] (the "Due Diligence Period"), then this Agreement shall be null and void. In the event that Buyer shall notify Seller in writing that it is unable to satisfy any of the conditions set forth above prior to such date, then Buyer may extend the Due Diligence Period until _____ [month]

_____ [day], _____ [year]. Notwithstanding the foregoing to the contrary, Buyer may notify Seller in writing at any time that it is unable to satisfy the conditions set forth above, in which case this Agreement will be immediately null and void. (n9)COMMENT

5. Warranties.

A. Seller hereby warrants, which warranties shall be effective as of the Closing Date and shall survive the transfer of title to Buyer, or Buyer's nominee, as follows:

(i) that, to the best of Seller's knowledge, all improvements made by the local governmental authority that now benefit the Property have been assessed against the Property as of the execution date of this Agreement, and there are no pending or proposed assessments against the Property;

(ii) that, to the best of Seller's knowledge, there are no unrecorded easements, leases or other rights affecting the Property;

(iii) that there are no pending or, to the best of Seller's knowledge, threatened actions, suits or proceedings against Seller with respect to the Property, including, without limitation, condemnation proceedings or environmental proceedings;

(iv) that there are no outstanding notices or orders from any governmental authority with respect to the condition of the Property, or with respect to any claim of violation of any laws, ordinances, zoning codes, including, without limitation, all environmental laws, rules and regulations;

(v) that, to the best of Seller's knowledge, the Property is not in violation of any environmental laws, rules or regulations, whether federal, state or local, and that, to the best of Seller's knowledge, the Property is free from any form of contamination in or on the Property, including, without limitation, petroleum, crude oil, toxic or radioactive materials and that the Property does not contain any condition that is a public or private nuisance;

(vi) that, to the best of Seller's knowledge, there are no encroachments from adjoining properties affecting all or any part of the Property;

(vii) that, to the best of Seller's knowledge, there are no underground storage tanks, oil and gas wells, or other underground facilities affecting the Property;

(viii) that Seller has delivered originals and/or accurate copies of all documents, summaries, reports and tests which Seller has in his possession with respect to the Property, including, without limitation, environmental surveys, soil reports, boundary surveys and engineering reports; and

(ix) that Seller owns, and will own on the Closing Date, the fee simple ownership interest in the Property.
(n10)COMMENT

B. Buyer hereby warrants, which warranties shall be effective as of the closing date and shall survive the transfer of title to Buyer, or Buyer's nominee, as follows:

(i) This Agreement has been duly executed and delivered by Buyer and constitutes the legal, valid and binding obligation of Buyer, enforceable in accordance with its terms except to the extent that the enforcement of this Agreement may be limited by bankruptcy, insolvency, reorganization, moratorium or other similar laws affecting the enforcement of creditors' rights generally. The performance of this Agreement, and the consummation of the transactions contemplated by this Agreement, will not result in a breach or violation by Buyer of any of the terms or provisions of, or constitute a default by Buyer under any other agreement or instrument to which Buyer is a party or by

which Buyer is bound. Buyer is not a party to, or subject to or bound by, any judgment, injunction, order decree of any court or governmental authority, or any arbitration award, which may materially restrict or interfere with the performance of Buyer of this Agreement or such other documents or instruments which may be executed or delivered by Buyer in connection with this Agreement.

(ii) There is no action, suit, proceeding or investigation pending (or, to the Buyer's knowledge, threatened) against or related to Buyer which might adversely affect or restrict Buyer's ability to consummate the transactions contemplated by this Agreement. (n11)COMMENT

6. Title Provisions.

A. Title. Seller shall convey marketable title to the Property to Buyer, or Buyer's nominee, by good and sufficient general warranty deed, with the general warranty covenants, warranting title to be free and clear of all liens, charges and encumbrances, clouds and defects whatsoever, except such restrictions, reservations, limitations, easements and conditions of record, if any, which are approved by Buyer as hereinafter provided, zoning ordinances, and taxes and assessments, both general and special, which are a lien but not yet due and payable. Said deed shall be deposited into escrow on or before the Closing Date. Prior to the deposit of said deed into escrow, a copy of said deed shall be submitted to Buyer's counsel for approval. (n12)COMMENT

B. Title Insurance. Seller shall accompany Seller's deed with an ALTA Owner's Policy of Title Insurance in the amount of the purchase price issued by Stewart Title Agency of Ohio, Inc. (hereinafter called "title company"), in its customary form, with the "so-called" standard exceptions deleted, insuring marketable title to the Property to be good in Buyer, subject only to the exceptions to be contained in the deed.

C. Title Report. A preliminary title report, with a special tax search included, in the form of a commitment to issue the required title policy requested by Buyer ("title report") shall be ordered from the title company by Buyer immediately upon the execution of this Agreement, a copy of which shall be delivered to Seller. Within ten (10) working days from the receipt of the survey and the title report by Buyer, Buyer shall notify Seller and the title company of any restrictions, reservations, limitations, easements and conditions of record (together herein called "title defects") disclosed in said title report which are objectionable to Buyer. In the event Buyer so notifies Seller of any such title defects, Seller shall have until the Closing Date to cure or remove said title defects. Seller shall be obligated to remove all such title defects objected to by Buyer that may be removed by the payment of money, and Seller shall take whatever reasonable steps may be necessary to remove any other title defects. If Seller is unable to satisfy Buyer with respect to non-monetary items which Buyer has objected to, then this Agreement will be null and void, and the Deposit shall be immediately returned to Buyer. (n13)COMMENT

7. Condition of Property. Subject to the satisfactory completion of the Due Diligence inspection herein-above described and the representations and disclosures herein, Buyer agrees that it is purchasing the Property in "As Is" condition. Buyer further stipulates that other than herein specified there have been no express or implied representations, warranties, or statements concerning the condition of the Property, the value of same, the improvements thereon, the use that can be made of the Property, or anything concerning same including any environmental hazard or condition other than what is included in this written Purchase Agreement, upon which Buyer has relied. (n14)COMMENT

8. Possession. Subject to Paragraph 15, Seller shall deliver possession of the Property as of the Closing Date, in the condition as warranted by Seller.

9. Proration. All real estate taxes shall be prorated by the escrow agent as of the date the deed is filed for record, using for such purpose the rate and valuation shown on the latest available tax duplicate. If the aforesaid proration shall not fully reimburse Buyer for all real estate taxes accrued and unpaid with respect to the Property as of the record date of transfer of title, Seller shall promptly reimburse Buyer that amount accrued in excess of the proration credit upon the

official certification of the real estate tax duplicate for the year in which transfer of title occurs. All assessments, both general and special, shall be prorated as of the date of the filing of the Deed for record. (n15)COMMENT

10. Broker. Seller and Buyer represent, which representation shall survive the transfer of title, that no real estate broker was involved in this transaction and that no brokerage fees or other compensation is due any real estate broker or any other person because of this transaction.

11. Escrow Agent. This transaction shall be placed in escrow with the title company ("escrow agent"). An executed counterpart of this Agreement shall be deposited with the escrow agent by Buyer, and this Agreement shall serve as the escrow instructions. The escrow agent may attach its standard conditions of acceptance thereto; provided, however, that in the event said standard conditions are inconsistent or in conflict with the terms of this Agreement, then this Agreement shall control.

12. Closing. On the Closing Date, the escrow agent shall file for record the deed, and any other instruments required to be recorded and shall thereupon deliver to each of the parties the funds and documents to which they shall be respectively entitled, together with its escrow statement, provided that the escrow agent shall then have on hand all funds and documents necessary to complete the within transaction and provided the title company has stated that it shall be in a position to, and will issue and deliver upon the filing of the deed for record, the title insurance required hereunder.

In closing this transaction, the escrow agent shall charge Seller with the following:

- (a) the amount of real estate taxes prorated up to and including the date of transfer of title and the full amount of any assessments;
- (b) the cost of any transfer tax;
- (c) the cost of a title report, title search, and one-half (1/2) of the title insurance in the amount of the purchase price;
- (d) the cost of paying off and satisfying any mortgage indebtedness for which Seller is liable, together with the cost of any mortgage cancellation, recording fee or other costs incident to the satisfaction of any such indebtedness;
- (e) one-half (1/2) of the escrow fee; and
- (f) all other charges properly borne by Seller consistent with the terms of this Agreement;

and immediately thereafter shall deliver to Seller the balance of the funds in escrow due under the terms hereof, including any prorations due Seller, and any documents due Seller.

On closing, the escrow agent shall charge Buyer with the following:

- (a) the cost of filing the deed for record;
- (b) one-half (1/2) of the escrow fees, and one-half (1/2) of the cost of the title insurance;
- (c) the cost of any inspections completed during the Due Diligence Period, including, without limitation, the survey referred to in subparagraph 2.C., above; and
- (d) all other charges properly borne by Buyer consistent with the terms of this Agreement;

and immediately thereafter, the escrow agent shall deliver to Buyer any prorations to which Buyer is entitled and any other funds or documents due Buyer and, as soon as available, the recorded deed and the title insurance.

(n16)COMMENT

13. Notice. Any notice which may be or is required to be given pursuant to the provisions of this Agreement shall be deemed to be sufficiently given if personally delivered, or sent by a nationally recognized overnight courier, or sent by certified or registered mail, postage prepaid, return receipt requested, and addressed as follows:

If to Seller, to:

With a copy to:

If to Buyer, to:

With a copy to:

14. Binding Effect. This Agreement shall be binding upon and inure to the benefit of Seller and Buyer and their respective legal representatives, successors and assigns.

15. Sale Lease Back. At the closing, Seller and Buyer will enter into a triple net lease for the Property. The lease will be prepared by Buyer's counsel after the execution hereof, and will include the following terms and conditions:

A. Term. Not less than _____ (____) months or to exceed _____ (____) months. Lease may be terminated by Buyer in months _____ (____) through _____ (____) upon _____ (____) days written notice to Seller.

B. Rent. _____ Dollars (\$ _____) per month. Rent will be prorated on a daily basis for partial months.

C. Net/Net/Net. Taxes, maintenance and insurance and any other costs or expenses associated with the Property will be paid by Seller during the term of the lease. (n17)COMMENT

16. Demolition. Prior to the expiration of the lease set forth in Paragraph 15, above, Seller will demolish the improvements located on the Property. The improvements will be demolished and all debris will be removed in accordance with all applicable laws, rules, ordinances, and/or regulations. The condition of the Property after the

demolition will be such that Buyer will be able to complete the construction of its anticipated improvements without having to resort to extraordinary construction measures which are caused by the demolition, or demolition debris not being properly removed from the Property. At closing, the escrow agent will holdback the sum of _____ Dollars (\$ _____) pending compliance with the provisions of this Paragraph 16.

(n18)COMMENT

17. 1031 Exchange. The parties agree that Seller may assign its interest in the Agreement to a qualified intermediary for purposes of undertaking a like-kind exchange. All costs associated therewith will be Sellers' responsibility.

(n19)COMMENT

IN WITNESS WHEREOF, the parties hereto execute this Purchase Agreement the day and year first above written.

SELLER:

By: _____

Title

Federal I.D. Number _____

BUYER:

By: _____

Title

Federal I.D. Number _____

Legal Topics:

For related research and practice materials, see the following legal topics:

Insurance LawProperty InsuranceTitle InsuranceReal Property LawDeedsTypesWarrantyReal Property LawPurchase & SaleClosing & SettlementReal Property LawPurchase & SaleContracts of SaleGeneral OverviewReal Property LawPurchase & SaleContracts of SalePeriod Between Execution & ClosingGeneral OverviewReal Property LawPurchase & SaleEscrowReal Property LawPurchase & SaleRemediesDuty to DiscloseReal Property LawTitle QualityMarketable TitleGeneral OverviewReal Property LawZoning & Land UseGeneral Overview

FOOTNOTES:

(n1)COMMENT(n1) This provision sets forth the agreement of the parties to obtain an accurate legal description for the property upon completion of a survey. An accurate legal description will be required to transfer the property.

(n2)COMMENT(n2) This provision sets forth an anticipated purchase price per acre.

(n3)COMMENT(n3) This provision provides for an earnest money deposit. The buyer will receive a credit for the deposit at closing. The deposit is returned to buyer only upon the breach by seller of a condition of closing not satisfied.

(n4)COMMENT(n4) This provision sets forth the calculations as to how the final purchase price will be

determined. It also sets a maximum limit on the purchase price. Most developers allocate a portion of the project costs to land acquisition, and if the land cost exceeds a certain amount, the developer knows that the project will fail.

(n5)COMMENT(n5) This provision sets forth the buyer's condition of closing.

(n6)COMMENT(n6) The buyer cannot purchase the property if there is a condition on or about the property which will prevent the property from being developed in accordance with buyer's expectations or will significantly increase the cost of construction of the development over buyer's budgeted or anticipated cost.

(n7)COMMENT(n7) This provision allows buyer to obtain all governmental permits and approvals before buyer is required to purchase the property. Obviously, this mitigates any risks that the buyer will purchase the property only to find out that there is a problem completing the project.

(n8)COMMENT(n8) Since the location and use of the property is subject to approval of a third party, the agreement is conditioned upon such third party's approval.

(n9)COMMENT(n9) This provision allows the buyer to back out if a condition is not satisfied. It also allows buyer to obtain an extension if it takes longer than expected to satisfy all conditions at closing.

(n10)COMMENT(n10) This provision is designed to obtain the agreement from seller that the property can be used for buyer's intended purpose. In this agreement, most of the representations are subject to seller's knowledge. The representations are designed to discover everything that the seller knows regarding the property or any existing circumstances which would adversely affect buyer's development of the property. As a result, buyer should become aware of most conditions regarding the property before buyer spends significant money conducting its due diligence or obtaining financing commitments.

(n11)COMMENT(n11) The buyer's warranties are relatively modest and the seller's primary concern is about any circumstance that would prevent buyer from purchasing the property.

(n12)COMMENT(n12) This provision sets forth the type of deed to be delivered, which restrictions and conditions will remain in place after closing. It should specifically require that buyer will receive title insurance at closing.

(n13)COMMENT(n13) This provision requires a post signing title report be given to buyer. This report, typically referred to as a title commitment, can also be done in advance of signing.

(n14)COMMENT(n14) Seller desires to limit its liability to buyer for any post closing problems with the property. Therefore, the seller is requiring the use of an "AS IS" clause. The use of this clause is somewhat misleading given the extensive representations that seller is giving buyer.

(n15)COMMENT(n15) It will be difficult to match up the payment of the real estate taxes with the closing date. Therefore, in most cases the real estate taxes have to be prorated at closing so that one party does not pay more than their fair share.

(n16)COMMENT(n16) These provisions direct the escrow agent as how to close the transaction, including the payment of the closing costs.

(n17)COMMENT(n17) This property involves a property which contains an existing structure. The seller cannot relocate to a new location until it has the proceeds from this sale. Therefore, seller will lease back the property for a period of time until the seller finds a new location.

(n18)COMMENT(n18) This buyer is not interested in the improvements. Further, the buyer may not want to get involved with the demolition (i.e., there might be asbestos or some other condition for which the buyer does not want the liability). The seller may want to salvage a portion of the property for incorporation into its new facility or for the

salvage value. Lastly, in order assure that the salvage will be completed, the buyer is requiring that the anticipated cost of salvage be escrowed.

(n19)COMMENT(n19) Because the seller is moving to a new facility, the seller may want to reinvest the sales proceeds into the new property. If seller complies with the requirements of a like-kind exchange, seller can defer the amount of taxes payable upon the sale of the subject property until the sale of the replacement property.



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Current Legal Forms for Real Estate

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Current Legal Forms for Real Estate
Chapter 22 DEVELOPMENT AND SUBDIVISION
Part III. Drafting Guidelines

26-22 Current Legal Forms for Real Estate § 22.45

§ 22.45 Analysis of Construction Contract for a Building

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CONTRACT

THIS CONTRACT is made this ____ day of _____ [date], by and between MAGNA, LLC, an Ohio limited liability company, hereinafter called OWNER, and ROUDABUSH ASSOCIATES, INC., a Wisconsin corporation duly licensed to do business in the State of Ohio, hereinafter called BUILDER. The situs of the Contract and performance of the Contract is in the State of Ohio. (n1)COMMENT

WHEREIN IT IS MUTUALLY AGREED, AS FOLLOWS:

1. Scope of Work. The Owner herewith employs the Builder to construct and complete on a turn key basis, completely ready for Owner's use and occupancy, a medical office building in accordance with plans and specifications prepared by Builder and approved by Owner which are attached hereto and which are specifically made a part of this Contract by incorporation herein. The Builder accepts such employment and agrees to furnish all necessary labor and materials and to construct said building in a good and workmanlike manner.

The Builder acknowledges that the building has been designed to be eligible for certification through the U.S. Green Building Council's Leadership in Energy & Environmental Design ("LEED") program. The level to be achieved is that which is called "LEED Certified." Builder acknowledges that it is familiar with such rating system, and shall complete the construction so as to meet such certification. (n2)COMMENT

2. Completion. Prior to commencement of the construction work to be performed hereunder, the Owner agrees to furnish Builder with evidence that Owner has fee simple title to the premises on which the medical office building, as presented in this Contract, is to be constructed. Owner further agrees to furnish Builder with evidence that Owner has a firm financing commitment to provide the necessary funds for construction of the medical office building. In the absence of circumstances beyond its direct control, such as strikes, inability to obtain materials, Acts of God and similar

causes, the Builder agrees to complete the construction to be performed hereunder on or before the 31st day of May, _____[date], providing that the Owner supplies the foregoing title evidence and financing commitment forthwith. (n3)COMMENT

3. Building Site. The medical office building, as presented in this Contract, shall be constructed upon the Owner's premises located on the south side of Sidley Road, East of Baintree Boulevard, in the City of Cincinnati, Hamilton County, Ohio, and more particularly described on Exhibit A attached hereto and made a part hereof.

4. Contract Price and Terms of Payment. The Owner shall pay to the Builder for the Builder's performance of this Contract a total contract price of Nine Hundred Sixty-two Thousand Dollars (\$962,000.00). The contract price shall be paid in the following manner: (n4)COMMENT

A. Three percent (3%) of the total contract price, being: Twenty-eight Thousand Eight Hundred Sixty Dollars (\$28,860.00), shall be paid upon the signing of this Contract. Two percent (2%) of the total contract being: Nineteen Thousand Two Hundred Forty Dollars (\$19,240.00), shall be paid upon completion of the working drawings by the Builder. (n5)COMMENT

B. Before a statement is presented requesting any further payment of the contract price as hereinafter set forth, Builder shall submit to Owner a schedule of values of various portions of the work aggregating the total remainder of the contract price, divided so as to facilitate progress payments. The foregoing schedule of values shall be in a form acceptable to Owner, and each item therein shall include a proper share of overhead and profit and be supported by such data to substantiate its correctness as the Owner may require. Such schedule of values, when approved by the Owner, shall be used as the basis for Builder's request for payment. On or about the 10th day each month, the Builder shall prepare a statement showing the value of all labor and materials incorporated in the work to the first day of that month, and the sum of all prior payments. The Owner, within 10 days after presentation of such statement, shall pay the Builder 90 percent of the amount indicated as owing by such statement until 50 percent of the remainder of the contract price has been paid. Thereafter, 100 percent of the amount indicated as owing by such statement shall be paid to the Builder by the Owner. Builder will not include in any request for payment the value of materials delivered to and stored at the site, but not incorporated into the building.

C. The entire remaining balance of the total contract price shall be paid after substantial completion and final inspection and acceptance of the work by Owner. Final payment shall also be conditioned upon certification of the building as "LEED Certified." In the event there is any dispute between Owner and Builder as to whether the work has been substantially completed, the issuance of a certificate of occupancy by the City of Cincinnati shall be deemed to be conclusive evidence that the work has been substantially completed. Prior to final payment, Builder agrees to submit evidence satisfactory to Owner that all payrolls, material bills and other indebtedness connected with the work have been paid, and to submit, on behalf of itself or any subcontractors or materialmen, affidavits, certificates, sworn statements, or any other documentation as shall be required by the Ohio Mechanic's Lien Act. Final payment shall include all amounts and holdbacks set forth above, save and except for any punchlist items then remaining to be completed. If any such punchlist items exist, Builder shall submit to Owner an estimate of the cost to complete such items, which estimate must be reasonably satisfactory to Owner. Owner shall be permitted to hold from the final payment a sum equal to said costs until such items are completed. Builder agrees to complete the same as soon as reasonably possible. (n6)COMMENT

5. Performance Bond. If the Owner should request that the Builder furnish a performance and payment bond, the Owner agrees to pay the premium therefor. This bond shall be supplied by the Builder through its agent and the American Employers' Insurance Company of Boston, Massachusetts, or Employers Insurance Company of Wausau, Wisconsin. (n7)COMMENT

6. Survey, Zoning, and Permits. It is understood that the Owner has provided, at Owner's expense, a current

topographical survey prepared by a registered surveyor. The Owner represents that such survey shows all existing restrictions and easements of record, and other pertinent data regarding utilities and existing structures. It is understood that the Builder has prepared the building plans relying upon the accuracy of the survey. The Owner shall be responsible for and provide for the accurate placement and staking of all property corner posts and property lines of the premises on which the medical office building is to be constructed. The Owner represents that the premises are zoned for medical office building use. It is the responsibility of the Builder to conform to all state and local codes, including zoning and fire codes, in effect at the date of this Contract. The Builder, at Builder's expense, shall provide the building permit required for the performance of this Contract, and shall also make all local utility and service connections at Builder's expense. The Builder shall prepare all necessary documents and make application for the building permit at Builder's expense. (n8)COMMENT

7. Insurance. Throughout the term of this Contract, the Builder shall maintain workmen's compensation insurance which is in compliance with the laws of the state in which this Contract is being performed. Public liability insurance coverage will be maintained in the face amount of two hundred fifty thousand dollars per person, five hundred thousand dollars per accident, and two hundred fifty thousand dollars property damage, and Builder shall furnish evidence of this insurance. In addition, blanket umbrella coverage in the amount of five million dollars shall be provided for over and above the insurance herein specified. Throughout the term of this Contract, the Builder shall provide and pay for a Builders Risk policy in the full amount of the contract price issued in the name of both the Owner and the Builder. This policy shall be written on what is commonly called an "All Risk" basis and shall cover, but not necessarily be limited to, the hazards of fire, extended coverage, vandalism and malicious mischief, collapse, water damage, earth movement, boiler explosion, theft, and glass damage. (n9)COMMENT

8. Arbitration. In the event that any dispute shall arise between the parties in connection with the quality of either workmanship or materials furnished by the Builder, such dispute shall, upon the written demand of either party, be referred for arbitration to the American Arbitration Association to be arbitrated in accordance with the rules of said association. It is understood that any such arbitration will be conducted within the geographical limits of the county in which the building is to be constructed. (n10)COMMENT

9. Guaranty. The Builder warrants to the Owner that all materials and equipment incorporated in the project will be new and that all work will be of good quality and in conformance with the contract documents. All work not so conforming to these standards may be considered defective. The foregoing warranty shall be in addition to and not in limitation of any other warranty or remedy required by law or by the Contract. Without in any way limiting the warranties imposed by law, the Builder agrees to repair or replace at its own expense any articles, materials, or equipment furnished hereunder, or any parts thereof, found to be defective in engineering design, workmanship, or material, or found not to perform in accordance with the requirements of the attached specifications for a period of one (1) year after the date of final completion and acceptance by Owner of the work.

Standard manufacturers' service contracts and guarantees, if any, that apply to any appliances furnished by the Builder and all warranties and guarantees on the roof and heating and cooling systems, and all other warranties and guarantees shall be assigned by the Builder to the Owner. (n11)COMMENT

10. Amendments. This Contract, together with the attached plans and specifications, represents the entire agreement between the parties and all previous agreements of every kind and nature between the parties are merged herein. No amendment to this Contract, or the attached plans and specifications, shall be valid unless the same is reduced to writing over the signatures of the respective parties. This Contract contains all the terms and conditions agreed on by the parties hereto, and no other agreements, oral or otherwise, regarding the subject matter of this Contract, shall be determined to exist or to bind any of the parties hereto. (n12)COMMENT

11. Taxes. It is understood that a sales tax or use tax, or other similar tax, may arise under state, county, or local laws. These taxes are to be paid by the Builder and are included in the contract price as specified in Section 4 hereof. The

amount as estimated in the contract price shall be deemed as full payment by the Owner to the Builder for any and all sales or use taxes which may be due and payable on completion by the Builder and/or any of its subcontractors or suppliers. If requested by the Owner, information regarding the amount of taxes actually paid by the Builder will be available after completion of the building. (n13)COMMENT

12. Other Provisions:

A. This Contract has been prepared based on a topographical survey prepared by Johnson Associates, Registered Surveyor #5514 and dated _____ [date]. The price of this Contract is based upon the accuracy of this information. Additional cost, if any, due to error or omissions in this information will be the responsibility of the Owner. (n14)COMMENT

B. This Contract has been prepared without a written soil boring report which is to be obtained by Builder at Builder's expense. Footings for the building in this Contract are designed for a minimum soil bearing capacity of 3,000 pounds per square foot. If additional cost is incurred due to rock, ground water, or inadequate soil bearing capacity, such cost shall be paid by the Owner.

C. Cost of MRI equipment purchase, shipping, and installation are not included in this Contract. Contract does include all necessary plumbing and electrical final connections per standard Siemens drawings on file with Builder.

D. Schedule: In order to maintain the project schedule, and completion date for the building, Builder assumes that Owner will see that:

(1) the RF shielding manufacturer's shop drawings shall be approved within 14 days after their submission to the Owner.

(2) the MR equipment manufacturer shall deliver the MR system (except magnet) no later than March 1, _____ [year], if requested by Builder.

(3) the power conditioner shall be delivered to the job site no later than February 1, _____ [year], if requested by Builder. (n15)COMMENT

E. With respect to and supplementing Section 1 of this Contract, entitled Scope of Work, Builder acknowledges that it has the knowledge and expertise to construct the special purpose medical office building described in the plans and specifications attached hereto, and Builder warrants that the design and engineering of the building will be performed by it free from faults and defects and in accordance with sound professional standards utilizing the services of competent design professionals, to assure that the building as designed will meet all applicable laws, ordinances and codes, that the structure and foundation will be adequate to meet the floor loads, particularly for the magnet to be installed, and the usual design wind loads, roof loads, and other criteria utilized in the locale of the building, that the electrical and mechanical systems and lead and RF shielding systems will be adequate to meet the design criteria established by the manufacturer of the magnet and other medical diagnostic equipment to be installed in the medical office building, that the Halon fire suppression system in the computer and equipment rooms shall be adequate for such purpose, and that the building shall be constructed so as to be suitable for the purposes for which it is intended.

Builder agrees that included in the scope of the work shall be all architectural, engineering and construction supervision fees, the preparation of schematic and preliminary design documents, preparation of all drawings and specifications setting forth the requirements for construction of the work in detail sufficient to enable workmen of ordinary skill to construct the building, the documentation of changes in the plans and specifications, if any, during the course of construction of the building, and provision of a complete set of as-built drawings at the conclusion of the building construction. (n16)COMMENT

F. With respect to and supplementing Section 3 of this Contract, entitled Building Site, Builder acknowledges that it is familiar with the site and all site conditions as referred to in the Site Development Contract being signed between the parties hereto of even date herewith, save and except for the subsurface conditions to be determined by soil boring tests to be obtained by Builder at Builder's expense. (n17)COMMENT

G. With respect to and supplementing Section 4 of this Contract, entitled Contract Price and Terms of Payment, subparagraph (b) thereof, it is understood that Builder shall furnish with each request for payment, waivers of lien or affidavits for itself and any of its subcontractors and suppliers for whom payment is being requested, and such other documents as are required under the Ohio Mechanics Lien Act to insure that the premises remain lien-free at all times. Owner shall not be obligated to make any payment to Builder hereunder if any one or more of the following conditions exist:

(1) Builder is in default of any of its obligations hereunder or otherwise is in default under any of the Contract documents;

(2) any part of such payment is attributable to work which is defective or not performed in accordance with the plans and specifications; provided, however, such payment shall be made as to the part thereof attributable to work which is performed in accordance with the plans and specifications and is not defective;

(3) Builder has failed to make payments promptly to Builder's subcontractors or suppliers for labor or material used in the work for which Owner has made payment to Builder, unless a good-faith dispute shall exist between Builder and a subcontractor, in which event Builder shall have a reasonable amount of time in which to settle such dispute before Owner may invoke this provision; (n18)COMMENT

(4) If Owner, in its good-faith judgment, determines that the portion of the contract price then remaining unpaid will not be sufficient to complete the work in accordance with the plans and specifications, whereupon no additional payment will be due Builder hereunder unless and until Builder, at its sole cost, performs a sufficient portion of the work so that such portion of the contract price then remaining unpaid is determined by Owner to be sufficient to so complete the work. Builder shall promptly pay all bills for labor and material performed and furnished by others in connection with the construction, furnishing and equipment of the work and the performance of the work, provided, however, that no provision hereof shall be construed to require Owner to see to the proper disposition or application of the money so paid to Builder. Payments made under Section 4, subparagraph (B) shall not be construed as final acceptance or approval of that part of the work to which such partial payment relates or relieve Builder of any of its obligations hereunder with respect to such work. Any payment not made when due for reasons other than due to a default by Builder is subject to a late payment charge of 8 percent per annum.

Owner shall have the right to designate an agent to represent Owner in connection with the performance of any or all of the duties of Owner hereunder. If such agent is used, Owner shall notify Builder in writing of the name of such agent. (n19)COMMENT

H. With respect to and supplementing Section 7 of this Contract, entitled Insurance, the following paragraph is added at the end of Section 7, to wit:

To the fullest extent permitted by law, Builder shall indemnify, defend and hold harmless Owner and Owner's agents and employees from and against all claims, damages, losses and expenses, including but not limited to attorney's fees arising out of or resulting from the performance of the work, provided any such claim, damage, loss or expense (i) is attributable to bodily injury, sickness, disease or death, or to injury to or destruction of tangible property (other than the work itself), including the loss of use resulting therefrom, and (ii) is caused in whole or in part by any act or omission, negligent or otherwise, of Builder, any subcontractor, anyone directly or indirectly employed by any of them, or anyone

for whose acts any of them may be liable. In addition, Builder agrees that as part of the comprehensive public liability insurance coverage required hereunder, that Builder shall cause each subcontractor and supplier employed by it to carry liability insurance similar to that which Builder is required to carry hereunder, and to furnish Owner with copies of the certificates of insurance obtained by Builder to evidence that such subcontractors and suppliers have such coverage. The Builder's insurance required hereunder shall also include contractual liability insurance applicable to the Builder's obligations hereunder. A certificate evidencing all insurance required hereunder shall be filed with the Owner prior to the commencement of any work. The certificates shall contain a provision that the coverage under the insurance shall not be cancelled until at least 10 days prior written notice has been given to Owner. In the event Builder fails to carry any insurance required hereunder, Owner shall have the right to obtain such insurance at Builder's cost and expense.

(n20)COMMENT

I. From time to time, Owner may authorize changes in the work, issue additional instructions, require additional work, or direct the omission of work previously ordered; provided, however, that Builder shall not proceed with any change involving an increase or decrease in cost without prior written authorization from Owner in accordance with the following procedures. Owner shall order changes in the work by giving Builder a written change order request ("Change Order Request"), setting forth in detail the nature of the requested change. Upon receipt of the Change Order Request, Builder shall forthwith furnish to Owner a statement setting forth in detail, with a simple breakdown by trades and work classifications, Builder's estimate of the changes in the contract price, and the proposed adjustment to the scheduled completion date, if any, resulting from such Change Order Request. If Owner or Builder approve in writing such estimate by the Builder, such Change Order Request and such estimate shall constitute a Change Order, and the contract price and scheduled completion date shall be adjusted as set forth in such estimate. Agreement on any Change Order shall constitute a final settlement on all items covered therein, subject to performance thereof, and payment therefor, pursuant to the Contract. It is understood and agreed that refinement and detailing will be accomplished from time to time with respect to the plans and specifications. No adjustment in the contract price or the scheduled completion date shall be made unless such refinement or detailing results in changes in the scope, quality, function or intent of the plans and specifications not capable of being reasonably inferred or anticipated by a reasonably prudent contractor of experience and expertise comparable to that of Builder. (n21)COMMENT

J. In the event of any dispute, claim or controversy between Owner and Builder relating to the work, Builder covenants and agrees to continue construction without delay and in accordance with any progress schedule provided Owner; said dispute, claim or controversy shall be resolved without prejudice to the completion of the work in a timely manner.

(n22)COMMENT

K. If laws, ordinances, rules, regulations or orders of any public authority having jurisdiction over the work require any portion of the work to be inspected, tested or approved, Builder shall give Owner timely notice of Builder's readiness to do so and Owner shall have the right to observe such inspection, testing or approval. Builder shall bear all costs of such inspections, tests or approvals. If the Owner determines that any work requires special inspection, testing or approval, other than that described in the two immediately preceding sentences, the Owner will instruct the Builder to order such special inspection, testing or approval, or Owner may undertake to cause such inspection, testing or approval. If such special inspection or testing reveals a failure of the work to comply with the requirements of the contract documents or with the laws, ordinances, regulations or orders of any public authority having jurisdiction over the work, the Builder shall bear all costs thereof, including compensation for any additional services made necessary by such failure; otherwise Owner shall bear all such costs, and Owner shall pay such costs directly or an appropriate Change Order shall be issued. (n23)COMMENT

L. If Builder is adjudged bankrupt, applies for reorganization under the Bankruptcy Laws of the United States, makes a general assignment for the benefit of creditors, if a receiver is appointed on account of Builder's insolvency, if Builder persistently or repeatedly fails except in cases where extension of time is provided to supply enough properly skilled workmen or to obtain proper supplies (other than lack of workmen or materials not available due to circumstances beyond the Builder's control), if Builder fails to make prompt payment to subcontractors or to suppliers, Builder fails to

remedy any work found to be defective, disregards laws, ordinances, rules, regulations or orders of any public authority having jurisdiction, or otherwise breaches this Contract, Owner may, after 14 days written notice to Builder, terminate the employment of Builder and take possession of the site and all materials, equipment, tools, construction equipment and machinery thereon owned by Builder and thereafter may finish the work by whatever method Owner may deem expedient. If the cost of finishing the work, as described in this paragraph, including compensation for additional services made necessary thereby, exceed the unpaid balance of the contract price, Builder shall pay the difference to Owner. This obligation for payment shall survive the termination of the Contract. Any dispute arising between Owner and Builder regarding Owner's right to terminate Builder's employment shall be subject to the arbitration provisions set forth in Section 8 of this Contract. (n24)COMMENT

M. Builder agrees that the work shall be completed lien free. Builder shall not suffer or permit any mechanics or other liens to be filed or exist against the site by reason of work, labor, services or materials supplied or claimed to have been supplied to, for or in connection with the work. If any such liens shall at any time be filed, Builder shall, within 30 days after notice of the filing thereof, cause the same to be discharged of record by payment of a deposit, bond, order of a court of competent jurisdiction or otherwise. If Builder shall fail to cause such lien to be discharged as aforesaid, then in addition to any other right or remedy of Owner, Owner may, but shall not be obligated to, discharge the same either by paying the amount claimed to be due or by procuring the discharge of such lien by deposit or by bonding. Any amount paid by Owner shall forthwith be reimbursed by Builder to Owner on demand, and if not so reimbursed on demand, may be deducted from any amount remaining outstanding on the contract price. Such amount so paid by Owner shall bear interest at the rate of 8 percent per annum until reimbursed to Owner or until it can be deducted from the balance, if any, remaining on the contract price. (n25)COMMENT

N. Builder is signing with Owner of even date herewith a Site Development Contract (the "Site Development Contract"). Completion of the work provided for in the Site Development Contract in accordance with its terms and conditions is necessary to provide Owner with a turn key project, and accordingly, it is agreed between Owner and Builder, that any default by Builder hereunder shall constitute a default under the terms and conditions of the Site Development Contract, and any default by Builder under the terms and conditions of the Site Development Contract shall constitute a default hereunder. This Contract shall be binding upon the parties hereto, their successors and assigns, provided however, that this Contract shall not be assignable except to the extent that the Builder may let subcontracts within the scope hereof. In the event of any conflict between the terms of this Contract and the matters attached hereto and made a part hereof, the terms of this Contract shall be controlling. (n26)COMMENT

MAGNA, LLC, has caused these presents to be signed by it at Cincinnati, Ohio the day and year first above written, and ROUDABUSH ASSOCIATES, INC. has caused these presents to be signed at Madison, Wisconsin this ____ day of _____, _____ [date].

MAGNA, LLC

By: _____
Managing Member

ROUDABUSH ASSOCIATES, INC.

By: _____

Title: _____

Legal Topics:

For related research and practice materials, see the following legal topics:

Contracts Law Remedies Liquidated Damages Real Property Law Construction Law Contracts Real Property Law Construction Law Contractors & Subcontractors Real Property Law Construction Law Defects Real Property Law Construction Law Design Professionals Real Property Law Nonmortgage Liens Mechanics' Liens

FOOTNOTES:

(n1)COMMENT(n1) This is a contract for the construction of a specifically designed medical building intended to hold a piece of equipment known as a magnetic resonance imaging ("MRI") machine.

(n2)COMMENT(n2) This Section 1 should set out as clearly and definitively as possible the scope of the work to be performed by the Builder. If space is not adequate enough to describe the work, an addendum should be attached, or in this case, the actual plans and specifications are attached.

(n3)COMMENT(n3) The time for completion should be clearly spelled out in this section so that the Owner can hold the Builder to a certain time commitment. Although in this section there is no financial penalty imposed on the Builder for nonexcusable delays, the Owner should consider one. This is called a liquidated damage clause. In turn, if the Owner asks for one, the Builder should ask for a financial bonus if the Builder completes the project prior to the contractual completion date. In all cases, the Builder needs to be sure that there is no penalty for delays beyond the Builder's control, such as due to bad weather, or due to changes in the work requested by Owner.

(n4)COMMENT(n4) This Contract is an example of a fixed price contract in contrast to the cost plus type of contract in which the Contractor is paid for the Contractor's costs of labor and materials, plus a percentage for profit and overhead.

(n5)COMMENT(n5) After the initial payments referred to in Section 4.A. are made, the balance of the payments are made in monthly installments as the work progresses, based on a schedule of values which breaks down various portions of the work. The Owner will almost always require a retainage of a portion of amounts payable to the Builder. A retainage is important to protect the Owner in case of a default by the Contractor in completing the structure, and to provide an incentive to the Builder to complete as soon as possible in order to obtain a release of the amounts retained. In this contract, the retainage is ten percent of the amount owed until fifty percent of the balance of the contract sum has been paid, after which 100% of a draw request is paid for the remaining work.

(n6)COMMENT(n6) The retainage is paid upon substantial completion and final inspection and acceptance by the Owner of the work. Because such a standard is open to disputes, it is a good practice to have an independent third person verify completion. In this Section 4.C., that is done by the City, which must inspect and be satisfied that the completion is sufficient enough to issue a certificate of occupancy.

Even if there is substantial completion, there will be minor items to complete referred to as punchlist items. Those are not paid for until those items are completed by the Builder so that there is an incentive for the Builder to complete those items.

(n7)COMMENT(n7) The Owner may require the Builder to furnish a payment bond to minimize financial loss to the Owner in the event the Builder fails to perform its contract. In certain public projects, the state statutes may require bonds to be obtained by the contractors. Bonds are usually written in the full amount of the contract price. The penal limit of the bond should be increased to reflect increases in the contract price pursuant to change orders. The Owner may insist that the bond also covers the warranty obligations of the Builder that extend beyond completion of the contract.

(n8)COMMENT(n8) Section 6 spells out that the Owner is responsible for obtaining a topographical survey, and for locating the boundaries of the property and all restrictions and easements affecting the property so that the Builder can prepare the Builder's plans in reliance thereon. The Builder is allocated the responsibility for obtaining and paying for the building permit. That cost will be included in the contract price.

(n9)COMMENT(n9) The Owner should require the Builder to carry workmen's compensation insurance to make sure the Builder's employees cannot make claims against the Owner. General liability coverage should be adequate to cover claims from third parties against the Builder and Owner due to the acts or omissions of the Builder and its agents and employees. The Builders Risk policy is to cover damages to the building while being constructed due to perils ordinarily insured under an All Risk casualty policy.

(n10)COMMENT(n10) Many construction contracts, including the AIA forms, promote the use of arbitration for the resolution of disputes that arise during the course of construction. Whether to follow the arbitration approach as in this Section 8, to pursue litigation, or to use one of many recent innovations in alternative dispute resolution (such as mediation or mini-trials) is typically a matter of philosophical preferences to the parties and their counsel.

(n11)COMMENT(n11) The warranty of the Builder for new construction usually is for at least a one year period from the date of substantial completion and acceptance by the Owner. Separate parts of the building and equipment will usually have a longer warranty which should be assigned to the Owner. In this contract, because the Builder has held itself out as having the expertise to build this type of medical facility, the warranty includes a warranty against defects in design engineering.

(n12)COMMENT(n12) This Section 10 requires all amendments to be in writing and signed by both parties, in order for it to be binding.

(n13)COMMENT(n13) Taxes such as sales and use taxes are usually paid by the Builder but are a part of the Builder's costs recouped through payment of the contract price.

(n14)COMMENT(n14) A major risk in construction is the danger of encountering unknown surface conditions or other concealed conditions. Sections 12.A. and 12.B. are intended to allocate this risk in an equitable manner. Section 12.A. protects the Builder if there were errors made in the topographical survey. Section 12.B. protects the Builder if unknown subsurface soil conditions are found.

(n15)COMMENT(n15) Section 12.D. is included to make clear that the Contractor can only complete its work on time if other drawings and pieces of equipment incorporated in the building are timely received.

(n16)COMMENT(n16) The Builder has held itself out as having the expertise to build this type of specialized medical facility. Therefore, if there is a design flaw, it will be the Builder's responsibility to correct such flaw, all at the Builder's expense.

(n17)COMMENT(n17) This paragraph makes clear that the architectural services required for this project are part of the service included in the contract price. The Builder in this case has in-house architects and engineers who specialize in designing medical office buildings.

(n18)COMMENT(n18) To protect the project from mechanics' liens, the Owner should require lien waivers with each application for payment, not just for final payment. The Builder will want to be sure that the waiver only applies to work performed by the Builder and subcontractors to the date of the waiver.

This section also protects the Owner from having to make payments if the Builder is in default or otherwise has done things which might jeopardize the project.

(n19)COMMENT(n19) The Owner may be required to have a representative of its lender inspect the project and approve the work done prior to disbursements being made to the Owner for payments to the Builder. This paragraph will allow that to be done.

(n20)COMMENT(n20) This clause calls for a broad indemnity clause from Builder for the protection of Owner, and it covers matters not necessarily covered by the general liability insurance policy. This contractual indemnity

provision can also be backed by insurance in the form of contractual liability insurance referred to in this Section H. Proof of such insurance and any other insurance required to be carried by the Builder should be provided to the Owner prior to the start of any work.

(n21)COMMENT(n21) This Section 12.I. requires all changes to be agreed to in writing and signed by both parties in the form of written Change Orders.

(n22)COMMENT(n22) This Section 12.J. makes clear that work continues while disputes or claims are being resolved so that additional costs due to delays can be minimized.

(n23)COMMENT(n23) This Section 12.K. places the burden of failure of the work to comply with all laws and ordinances on the Builder. If tests disclose such noncompliance, the Builder at its expense, must correct the failure of the work to comply.

(n24)COMMENT(n24) Section 12.L. allows the Owner to terminate the Contract if certain major events occur to the Builder, or in the event of certain major defaults, upon fourteen (14) days' notice. If terminated, this Section 12.L. allows Owner to invoke certain self-help remedies to finish the project itself.

(n25)COMMENT(n25) This Section 12.M. requires Builder to remove any mechanic's liens filed against the site because of the work being done under the Contract. This requirement is usually also a requirement of the loan documents signed by the Owner to pay for the cost of the project. If the lien is not removed within thirty days of its filing, Owner may invoke self-help measures to remove it.

(n26)COMMENT(n26) Section 12.N. is to acknowledge that this Contract is tied to another contract for the site development work. Because they are related and the Builder in both is the same entity, there are cross-default clauses in both which causes a default in one to be a default on the other.



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Current Legal Forms for Real Estate

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Current Legal Forms for Real Estate
Chapter 22 DEVELOPMENT AND SUBDIVISION
Part III. Drafting Guidelines

26-22 Current Legal Forms for Real Estate § 22.46

§ 22.46 Easement, Restriction and Operating Agreement between Developer and Big Box Retailer

Easement, Restriction and Operating Agreement between Developer and Big Box Retailer

CONTRACT

EASEMENT, RESTRICTION AND OPERATION AGREEMENT

THIS AGREEMENT made as of the _____[day] day of _____[month],
_____[year], by and between DEVELOPER LIMITED PARTNERSHIP, a(n)
_____[state] _____[entity] ("Developer"), have its principal offices at
_____[address], and BIG BOX RETAILER, INC., a(n) _____[state]
_____[entity] ("Big Box"), having its principal offices at _____[address].
(n1)COMMENT

WITNESSETH:

WHEREAS, Big Box is the owner of the real property in _____[city], _____[state],
described in Exhibit A-I attached hereto and made a part hereof (said real property being hereafter referred to as the
"Big Box Property"); and

WHEREAS, Developer is the owner of the real property in _____[city],
_____[state], described in Exhibit A-2 attached hereto and made a part hereof (said real property being
hereinafter referred to as the "Developer Property"); and

WHEREAS, Developer and Big Box intend to develop the Developer Property and the Big Box Property as an
integrated retail shopping center in accordance with the Site Plan attached hereto and made a part hereof as Exhibit B;
and

WHEREAS, Developer and Big Box desire hereby to fix and establish certain easements, restrictions and operating
agreements regarding the Developer Property and the Big Box Property and the improvements to be constructed

thereon.

NOW, THEREFORE, Developer and Big Box, for good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, do hereby declare and establish the following easements, restrictions and operating agreements regarding the Developer Property and the Big Box Property and the improvements to be constructed thereon:

1. Definitions. (a) "Building Areas" shall mean that portion of the Property developed or to be developed for retail store space as depicted on Exhibit B attached hereto. (n2)COMMENT

(b) "Common Areas" shall mean all public and common facilities erected on the Property exclusive of the Building Areas including but not limited to, all entrances, exits, driveways, parking areas, walks, service drives, utilities, storm water drainage and retention or detention pond facilities, shopping center identification and directional signs and lighting facilities, exclusive of any improvements constructed on any Building Areas.

(c) "Outlots" shall mean that portion of the Property (as defined below) designated on Exhibit B as "Outlot A", "Outlot B", and "Outlot C". (n3)COMMENT

(d) "Property" shall mean the Big Box Property and the Developer Property.

(e) "Property Owner" shall mean any person or entity owning all or a portion of the Property.

(f) "Shopping Center" shall mean the Property, Common Areas, and Building Areas, together with the improvements erected thereon.

(g) "Street Access Extension" shall mean that portion of the Big Box Property extending south from Vine Street, 50 feet wide and 564.44 feet deep, as shown by cross-hatch on Exhibit B.

(h) "Tract" shall mean that portion of the Property owned by a Property Owner.

2. (a) The Property shall be developed in the manner depicted on Exhibit B hereto. The location and configuration of the parking lot and drives (including parking lot striping) shall not be changed or modified without the consent of Developer and Big Box. Except as otherwise provided herein, no structures, buildings, fences or barriers shall be erected (whether permanent or temporary in nature) on any portion of the Common Areas except (i) parking lot paving, landscaping and lighting facilities, (ii) such directional traffic signs as are required to facilitate the orderly and free flow of pedestrian and vehicular traffic, and (iii) the pylon sign in the location indicated on Exhibit B. (n4)COMMENT

(b) There is hereby granted in favor of all Property Owners, their respective successors, assigns, mortgagees, lessees, sub-lessees, employees, agents, customers, licensees and invitees, a permanent, non-exclusive easement and right to use the Common Areas for the purposes for which they are provided, including, but not limited to, ingress, egress, access, parking, utilities, storm water drainage and retention or detention; provided, however, the use of the Common Areas for ingress, egress, access and parking shall not cause the obstruction nor the impediment of vehicular or pedestrian traffic, upon or across the parking areas, entrances, exits, driveways, walks or service drives located within the Common Areas. (n5)COMMENT

(c) There is hereby specifically granted to all Property Owners, their respective successors, assigns, mortgagees, lessees, sub-lessees, employees, agents, customers, licensees and invitees, a permanent non-exclusive easement for a service drive of not less than thirty-five (35) feet in width along the back of all buildings erected or to be erected on the Property (except buildings erected on the Outlots), in the location shown on Exhibit B, so as to at all times provide for truck and other vehicle traffic behind such buildings.

(d) There is hereby granted in favor of all Property Owners, their respective successors, assigns, mortgagees, lessees, sub-lessees, employees, agents, customers, licensees and invitees, a perpetual non-exclusive easement and right to use the Common Areas for utilities, which shall to the extent possible be located underground; provided, however, such utilities shall not be located in any of the Building Areas, nor shall any utility lines be constructed in any manner as to impede or restrict vehicular or pedestrian traffic upon and across the parking areas, entrances, exits, driveways, walks or other drives located within the Common Areas. No utility lines shall be installed without the prior approval of the owners of the property affected thereby, which approval shall not be unreasonably withheld or delayed, and the party installing the line shall complete installation as soon as possible following the commencement of installation and restore any property affected thereby to as good (or better) condition as existed prior to installation. Any installation shall be performed in a manner so as not to unreasonably interfere with the operation of the Shopping Center.

(n6)COMMENT

(e) In order to accommodate any footings, foundations, columns or walls which are or may be constructed or reconstructed near or immediately adjacent to a common boundary line, Developer and Big Box each grants to the other a non-exclusive easement in, to, over, under, and across that portion of its Tract adjacent to such common boundary line in space not occupied by any then existing structure for the construction, maintenance and replacement of such footings, foundations, columns, or walls. This grant of easement shall include the reasonable right of access necessary to exercise and enjoy such grant. Prior to utilizing the easement right set forth above, the grantee shall notify the grantor of its intention to use the same. (n7)COMMENT

3. Each Property Owner shall cause the Common Areas located on its Tract to be continually repaired and maintained in a safe, sightly and serviceable condition which repair and maintenance shall include but not be limited to cleaning, painting, striping, landscaping, removing garbage and trash from the Common Areas; removing obstructions, snow (which shall be piled away from the retail areas of the Property to the extent possible), water and ice; repairing, repaving and servicing the parking areas, curbs, walks, driveways, utilities, retention pond and drainage facilities, shopping center identification and directional signs and lighting facilities as necessary from time to time. Each Property Owner shall cause the Common Areas located on its Tract to be adequately lighted during normal business hours which for purposes of this paragraph shall mean the hours during which a majority of the retail space in the Shopping Center (expressed in square feet of total ground floor area) shall be open to the public for business and for one-half hour thereafter. Notwithstanding the foregoing, the owner of the Developer Property (or the owner of more of the Developer Property than any other Property Owner) shall cause the Common Areas located on the Street Access Extension to be repaired, maintained, and lighted, in accordance with the foregoing. (n8)COMMENT

4. (a) If any Property Owner shall fail to perform its obligations under this Agreement, any other Property Owner may send a notice to the non-performing party setting forth the obligations that the non-performing party has failed to perform. If such obligations are not performed within thirty (30) days after receipt of such notice (unless the non-performing party shall have commenced to perform the same within such period and shall be diligently proceeding to perform the same), then the party (or parties) giving notice may perform the same. A Property Owner shall not be deemed to have failed to perform its obligations hereunder for so long as such performance is prevented due to strikes, lockouts, inability to procure materials, power failure, Acts of God, governmental restrictions, enemy action, civil commotion, fire, unavoidable casualty, inclement or extraordinary weather conditions or other causes beyond the control of the non-performing party, provided that lack of funds shall not be deemed a cause beyond the control of the non-performing party.

(b) If a failure by any Property Owner to perform any of its obligations under this Agreement causes an emergency or if performance of such obligation is necessary to prevent or relieve an emergency, then the notice required to be given hereunder need only be such reasonable notice, if any, as is warranted by the nature of the specific condition involved. If appropriate action is not timely taken by the non-performing party, any other Property Owner shall be entitled to immediately perform such obligations.

(c) If any Property Owner performs any of the obligations of the non-performing party as aforesaid, and the cost of such performance is not paid by the non-performing party within thirty (30) days of receipt of a written statement therefor, interest shall accrue on the unpaid amount from the time it was expended to the time of payment by the non-performing party at the rate of _____ percent (_____) per annum or the highest rate permitted by law, whichever is lower. (n9)COMMENT

5. Except as provided in Paragraph 2(a) hereof, no free-standing signs may be erected or placed on the Property except as have been approved by Developer and Big Box, which approval shall not be unreasonably withheld or delayed. No building erected on the Property shall exceed one story (excluding mezzanines) or eighteen (18) feet in height, except for (a) the building to be erected by Big Box on the Big Box Property in the location shown on Exhibit B, which shall not exceed twenty-three (23) feet in height and (b) buildings erected on the Outlots, which shall not exceed twenty (20) feet in height. No construction activity on the Property shall materially interfere with the operation and use of the Shopping Center. (n10)COMMENT

6. The Property Owners shall establish and maintain the maximum number of parking spaces on the Common Areas as reasonably possible, giving due regard to the need for an orderly and efficient traffic flow on the Common Areas, employee parking and loading and unloading of merchandise. In no event shall there be less than five (5) parking spaces for each 1,000 square feet of leasable floor area contained in the buildings of the Shopping Center. The employees of the businesses operated on the Property shall park only in the areas designated on Exhibit B hereto, if any, or such other areas as the Property Owners may collectively designate. Each Property Owner shall take such action as may be necessary and appropriate to enforce this parking restriction. (n11)COMMENT

7. There are hereby declared and established the following restrictions and operating standards regarding the Shopping Center:

(a) The Shopping Center may be used for any lawful commercial retail purpose; provided, however, that no portion thereof shall be occupied or used, directly or indirectly, for a car wash, bowling alley, arcade, game room, billiard room, massage parlor, adult book store, or other dealer in pornographic materials, a so-called "head shop," firearms shooting range, funeral parlor, flea market, discotheque, movie or other theater, offices or warehouses (except where incidental to a permitted use), or civic center.

(b) The Shopping Center shall be subject to the following use restrictions: (n12)COMMENT

(i) So long as the lease between Developer and Food Stop Supermarkets, Inc., dated _____ [month] _____ [day], _____ [year], is in effect, as it may be amended or extended from time to time, no part of the Big Box Property may be leased or used as a retail food store (including but not limited to a bakery), or for the sale for off-premises consumption of food and/or food products, except for carry-out restaurants.

(ii) So long as the lease between Developer and The Wholesale Store Company dated _____ [month] _____ [day], _____ [year], is in effect, as it may be amended or extended from time to time (the "Wholesale Store Lease"), no part of the Big Box Property may be leased or used as a supermarket or health or exercise club without the prior written consent of Developer and the tenant under the Wholesale Store Lease.

(iii) So long as the lease between Developer and Video Entertainment Corp. dated _____ [month] _____ [day], _____ [year], is in effect, as it may be amended or extended from time to time, no more than 500 square feet of retail area within the Big Box Property shall be used for the sale, rental and/or distribution of prerecorded video tapes.

(iv) So long as the lease between Developer and Photo Corporation dated _____ [month] _____ [day], _____ [year], is in effect, as it may be amended or extended from

time to time, no part of the Big Box Property may be used to sell or provide one-hour mini lab photo film processing.

(v) The uses of the Big Box Property shall not violate any exclusive use restriction hereafter granted by Developer, or its successors or assigns, to a tenant or occupant of 15,000 square feet or more of gross loadable space in the Shopping Center, provided Big Box, or its successors or assigns, is given notice of such exclusive use prior to commencement of such use on the Big Box Property and provided such exclusive use restriction shall not directly conflict with Big Box's uses described in Paragraph 7(b)(vi), below. Developer may modify this Agreement by unilaterally recording an instrument giving notice of any exclusive use restriction granted under this provision. Big Box will, if required for recording purposes, execute an appropriate instrument provided by Developer in order to so modify this Agreement.

(vi) Developer shall not sell or lease any portion of the Developer Property to firms directly competing with existing major sales departments of Big Box's two existing _____ [city] stores as they are on the date of this Agreement operated by Big Box (i.e., [insert use restrictions]); provided, the foregoing restriction shall not apply if, at the time such use is commenced, the Big Box Property is not being used for such purpose.

(c) No building, structure or business shall be constructed or operated in the Shopping Center which shall be inconsistent with the operation of a family-type retail shopping center and any building, structure or business shall be attractive, both in its physical characteristics and in appeal, to customers and retail trade.

(d) No use of the Shopping Center shall interfere with the use of the Common Areas or impede the free flow of pedestrian or vehicular traffic thereon.

(e) No use of the Shopping Center shall increase the fire hazard or fire insurance rating for the Shopping Center or in any way present a danger or hazard to the employees and customers of the Shopping Center. All buildings constructed in the Shopping Center shall either be equipped with such automatic sprinkler systems as meet all of the standards of the Fire Insurance Rating Authority (or other similar organization having jurisdiction) or shall be constructed in such a manner that the building may be fire rated as a separate and distinct unit from any other building built in the Shopping Center.

(f) Each Property Owner shall keep, or cause to be kept, all buildings and other improvements on its Tract (including the improvements constructed on the Common Areas), insured, at its expense, against loss or damage by fire, windstorm, hail, explosion, damage from aircraft, vehicles, smoke damage and such other risks which are from time to time included in the "Extended Coverage" endorsements in _____ [name of county] County, _____ [state], and in an amount not less than one hundred percent (100%) of the actual replacement cost of the respective buildings and improvements (excluding foundation and excavation costs of underground flues, pipes and drains) which amount shall be sufficient to restore the same to, or replace with buildings and improvements of, at least the size as existed before and to as good of condition as such were immediately preceding such destruction.

(g) Each Property Owner shall, at its expense, maintain, or cause to be maintained, comprehensive general liability insurance against claims for personal injury or death and property damage occasioned by accident occurring on its respective Tract, such insurance in each case to afford protection to the limit of not less than \$3,000,000 in respect of the injury or death to any number of persons arising out of anyone accident, such insurance against property damage to afford protection to the limit of not less than \$500,000 in respect to any instances of property damage. In addition to the foregoing, said policy or policies shall include the other Property Owners as named or additional insureds and shall recognize and insure the liability arising out of the indemnity hereinafter set forth. (n13)COMMENT

(h) Each Property Owner and lessee of any of portion of the Shopping Center shall indemnify, defend and hold harmless the other Property Owners and lessees of any' portion of the Shopping Center, their respective agents, servants, employees, officers and directors, from and against any and all claims, actions, damages, liability and expenses (including reasonable investigative and discovery costs, court costs, attorney fees and other sums which they may

become obligated to pay) incurred in connection with loss of life, personal injury or damage to property or any of them occasioned wholly by any act or omission of such Property Owner or lessee, its agents, servants, contractors or employees.

(i) All such insurance provided for in Paragraphs 7(f) and 7(g) hereof shall be effected under valid and enforceable policies issued by insurers of recognized responsibility. Any insurance required to be maintained by any Property Owner may be taken up under a blanket insurance policy or policies covering other premises, properties or insureds. Certificates of such insurance shall be delivered to any other Property Owner upon request. Any policy required under Paragraphs 7(f) and 7(g) hereof shall provide that such policy shall not be cancelled or materially amended without at least thirty (30) days prior written notice to any other Property Owner and such other parties as may be reasonably designated by such other Property Owner.

(j) In the event of destruction or damage from fire or any other casualty to any buildings or improvements erected on the Property, the Property Owner having its buildings or improvements destroyed or damaged, at its sole cost and expense, shall within six (6) months of the date of such fire or casualty have (i) started to rebuild or repair the same to at least substantially the same size and as good of a condition as such was in immediately preceding such fire or casualty and, within one (1) year of the date of such fire or casualty, have rebuilt or repaired the same to at least substantially the same size and as good of a condition as such was in immediately preceding such fire or casualty, or (ii) leveled and paved the buildings or improvements destroyed or damaged so that the affected area conforms substantially to the Common Areas surrounding it.

(k) If more than twenty percent (20%) of the parking spaces on the Property are condemned or taken by any right of eminent domain, or the points of ingress and egress to the public roadways as depicted on Exhibit B hereto shall be materially impaired by public or quasi-public authority (herein referred to as "condemnation") so as to affect the reasonable use and operation thereof, and Property Owner of a Tract affected thereby shall have the right to withdraw from the obligations set forth in Paragraphs 7(f) and 7(g) hereof upon serving written notice to the other Property Owners, as of the date of taking such property by the condemning authorities. If any condemnation results in taking of less than twenty percent (20%) of the parking spaces on the Property or if such condemnation does not affect the reasonable use and operation of the buildings affected thereby, then all provisions of the Declaration shall continue in full force and effect, except that the proceeds of any award received by any Property Owner shall be applied toward the immediate (i) repair and reconstruction of any building or other improvement affected thereby and (ii) repair and reconstruction of the parking area so as to maximize the number of parking spaces. Any condemnation award shall belong solely to the Property Owner whose property is affected by such condemnation.

8. Each Property Owner shall pay, before any fine, penalty, interest or cost may be added for non-payment, all taxes and assessments on its Tract. If any such owner shall fail to so pay such taxes and assessments, any other Property Owner, or the tenant of the Property Owner, may pay the taxes and assessments and the paying Property Owner or tenant may then bill the defaulting Property Owner for the expense incurred, and the defaulting Property Owner shall pay said bill within fifteen (15) days of receipt thereof. Notwithstanding the foregoing, a Property Owner shall not be required to pay, discharge or remove any tax or assessment on its property so long as it shall contest at its own expense the existence, amount or validity thereof by appropriate proceedings which shall prevent the collection of or other realization upon the tax or assessment so contested, and the sale, forfeiture or loss of the property subject to the tax or assessment to satisfy the same.

9. Each Property Owner shall, from time to time, upon ten (10) days prior written request by any other Property Owner, cause to be executed, acknowledged and delivered a certificate stating that this Agreement is unmodified and in full effect (or, if there have been modifications, that this Agreement is in full effect as modified, and setting forth such modifications) and either stating that to the knowledge of the signer of such certificate no default exists hereunder or specifying each such default of which the signer has knowledge. (n14)COMMENT

10. Each easement, restriction, covenant and operating standard contained herein shall be appurtenant to and for the benefit of all portions of the Shopping Center and shall be a burden thereon for the benefit of all portions of the Shopping Center, and shall run with the land.

11. This Agreement and the restrictions, easements, covenants, benefits and obligations created hereby shall inure to the benefit of and be binding upon the parties hereto and their respective successors, transferees; lessees and assigns; provided, however, that if any Property Owner transfers or sells any portion or all of its interest in the Shopping Center and obtains from the purchaser thereof an agreement by which the purchaser assumes and agrees to be bound by this Agreement, the vendor shall thereupon be released and discharged from any and all further obligations hereunder as such Property Owner in connection with the property sold by it. (n15)COMMENT

12. Except for the modification referred to in Paragraph 7(b)(v), this Agreement may not be modified in any respect whatsoever, or rescinded, in whole or in part, except with the consent of one hundred percent (100%) of the Property Owners (excluding Property Owners having only an ownership interest in one or more of the Outlots) at the time of such modification or rescission, and then only by a written instrument duly executed and acknowledged by the required parties, duly recorded in the Office of the Recorder of _____[name of county] County, _____[state].

13. All notices, requests, waivers and other communications required or permitted under this Agreement shall be in writing and shall be deemed properly served upon delivery by hand or upon receipt if sent, postage prepaid by United States registered or certified mail, return receipt requested, or by overnight express mail courier, addressed to the last known address of the intended recipient.

14. Nothing herein contained shall be deemed to be a gift or dedication of any portion of the Shopping Center to the general public or for the general public or for any public purposes whatsoever, it being the intention of the parties that this Declaration shall be strictly limited to and for the purposes herein expressed.

15. In the event of any violation or threatened violation by any Property Owner, or lessee or occupant of any portion of the Shopping Center, of any of the terms, covenants, restrictions and conditions contained herein, in addition to the other remedies herein provided, any or all of the Property Owners, lessees and occupants of the Shopping Center shall have the right to enjoin such violation in a court of competent jurisdiction.

16. No violation of the provisions of this Agreement shall entitle any Property Owner to cancel, rescind or otherwise terminate this Agreement, but such limitation shall not affect in any manner any other rights or remedies which such Property Owner, or any lessee or occupant, may have hereunder by reason of any violation of this Agreement. Any violation of any such provision, however, shall not defeat or render invalid the lien of any mortgage or deed of trust made in good faith for value, but such provisions shall be binding upon and effective against any Property Owner whose interest in the Property is acquired by foreclosure, trustee sale or otherwise. (n16)COMMENT

17. If any clause, sentence or other portion of this Agreement shall become illegal, null or void for any reason, or shall be held by any court of competent jurisdiction to be so, the remaining portions thereof shall remain in full force and effect.

18. The ownership of the entire Shopping Center at any time by the same party shall not effect the termination of this Agreement. (n17)COMMENT

19. No provision of this Agreement shall be deemed or construed to require the continuous use for any purpose of the Shopping Center or the continuous occupation by any occupant of any portion of the Shopping Center.

20. This Agreement shall be governed by and construed in accordance with the laws of the State of Ohio.

21. This Agreement may be executed in any number of counterparts, each of which shall be deemed an original and

all of which together shall be deemed to constitute one and the same instrument, and shall be effective upon execution of any one (1) or more of such counterparts by each of the parties hereto and delivery of one (1) or more of such counterparts (or a telecopy thereof) to the other party. (n18)COMMENT

IN WITNESS WHEREOF, the parties have fully executed this Agreement as of the day of the year first hereinabove set forth.

DEVELOPER LIMITED PARTNERSHIP,

a(n) _____ [state] _____ [entity]

By: _____

Its: _____

BIG BOX RETAILER, INC.

a(n) _____ [state] _____ [entity]

By: _____

Its: _____

STATE OF _____ [state]

SS:

COUNTY OF _____ [county]

BEFORE ME, a Notary Public in and for said County and State, personally appeared DEVELOPER LIMITED PARTNERSHIP, a(n) _____ [state] _____ [entity], by

_____ [name], its _____ [title], who acknowledged that he did sign the foregoing instrument for and on behalf of said _____ [entity], being thereunto duly authorized, and that the same is his free act and deed individually and as such member and the free act and deed of _____ [entity].

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed my official seal at

_____ [city], _____ [state], this _____ [day] day of
_____ [month] _____ [year].

Notary Public

STATE OF _____ [state]

SS:

COUNTY OF _____ [county]

BEFORE ME, a Notary Public in and for said County and State, personally appeared BIG BOX RETAILER, INC., a(n) _____ [state] _____ [entity], by _____ [name], its

_____ [title], who acknowledged that he did sign the foregoing instrument for and on behalf of said _____ [entity], being thereunto duly authorized, and that the same is his free act and deed individually

and as such member and the free act and deed of _____[entity].

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed my official seal at
 _____[city], _____[state], this _____[day] day of
 _____[month] _____[year].

 Notary Public (n19)COMMENT

Legal Topics:

For related research and practice materials, see the following legal topics:

Real Property LawConstruction LawContractsReal Property LawLandlord & TenantLease AgreementsCommercial
 LeasesGeneral OverviewReal Property LawLandlord & TenantLease AgreementsCommercial LeasesShopping Center
 LeasesReal Property LawLimited Use RightsEasementsGeneral OverviewReal Property LawRestrictive
 CovenantsCovenants Running With Land

FOOTNOTES:

(n1)COMMENT(n1) This Agreement is between a developer and a national retailer. In order to attract the retailer to its center, the developer was required to sell a portion of the center to the retailer. The retailer intends to construct its store at the site. In order for the developer to protect the integrity of the balance of the center, it is requiring the retailer to comply with various agreements and restrictions. The retailer has the same concerns as the developer. It will also require the developer to comply with certain agreements and restrictions. Additionally, the retailer will want to maintain a competitive advantage in the center by restricting the developer's right to place certain types of tenants at the center.

(n2)COMMENT(n2) The definition of Building Areas is important because it limits where the parties can locate improvements. As a result, site lines, cross access, parking, etc. will be protected.

(n3)COMMENT(n3) The designation of outlots restricts the developer's ability in the future to parcel off the center. It specifically designates those areas where the developer can place single use facilities.

(n4)COMMENT(n4) This provision designates an approved site plan. The site plan designates the common area including parking and driveways, the outlots, building areas, location of pylon or monument signs, access roads, loading areas, retention ponds, light poles, etc.

(n5)COMMENT(n5) This provision grants non-exclusive use to use the common areas located on each property.

(n6)COMMENT(n6) This provision grants each property owner utility access through each other's property.

(n7)COMMENT(n7) Because the center is to be constructed with the look of a contiguous strip center, it will be necessary to have common footers and other aspects of the buildings which encroach on the other property. It also gives the right to each party to maintain and repair such improvements.

(n8)COMMENT(n8) This provision requires each property owner to keep their property in good condition and repair. This is critical because if one of the properties is not sufficiently maintained it will adversely affect the value and viability of the adjacent property and the success of the center as a whole.

(n9)COMMENT(n9) This provision gives each owner the right to use self-help if the other owner does not fulfill its obligations under the agreement. It provides for interest on any expenses made by one party which should have been incurred by the other.

(n10)COMMENT(n10) This limits the right of the property owners to erect signs. It also places requirements on the

signs which will be utilized by the parties.

(n11)COMMENT(n11) This provision restricts parking density, traffic flow, employee parking and loading of merchandise.

(n12)COMMENT(n12) This provision restricts the types of uses which each party (or its tenants) may undertake at the center. Paragraph 7(a) sets forth a list of unsavory uses or uses which may disrupt the center for one reason or another, such as tenants with high parking requirements. Paragraph 7(b) sets forth the exclusive uses which protect the tenants which have signed leases to occupy the center.

(n13)COMMENT(n13) This provision requires each owner to carry insurance. This provision is intended to avoid the circumstance where the center is destroyed by a casualty and one of the owners does not have sufficient capital to rebuild its portion. It also requires each owner to replace the existing improvements in such event.

(n14)COMMENT(n14) This provision requires the owners to deliver estoppel certificates setting forth any known defaults. This provision is helpful in the event that an owner desires to refinance its parcel or to sell its parcel.

(n15)COMMENT(n15) Provisions 10 and 11 make the Agreement binding upon each party's successor. This insures that this agreement will run with the land, and that it will not be voided by a sale. In most states, this agreement will have to be recorded in the public records to give the world constructive notice of its contents and affect on the land.

(n16)COMMENT(n16) This provision prevents a breach of the agreement by one party from negating the entire agreement. For example, if the retailer fails to adequately light its parking lot, the developer will not have the right to cancel the agreement.

(n17)COMMENT(n17) This is an anti-merger clause. In most jurisdictions the joint ownership of two parcels has the effect of canceling any agreement which applies to both parcels. This provision is extremely important because the tenants may be relying upon this agreement when they agree to lease a suite at the center.

(n18)COMMENT(n18) Because this agreement should be recorded, the agreement must be executed and delivered in compliance with applicable conveyance and recording requirements.

(n19)COMMENT(n19)



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Chapter 22 DEVELOPMENT AND SUBDIVISION
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26-22 Current Legal Forms for Real Estate §§ 22.47through 22.55

[Reserved]

§§ 22.47[Reserved]



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Current Legal Forms for Real Estate
Chapter 22 DEVELOPMENT AND SUBDIVISION
Part III. Drafting Guidelines

26-22 Current Legal Forms for Real Estate § 22.56

§ 22.56 Checklist for Sale/Purchase of Real Estate

A. Information about seller..... ☐

1. Name of seller..... ☐

2. If seller is an individual, name of seller's spouse (if any)..... ☐

3. If Seller is not an individual, what type of entity is seller
(corporation, partnership, trust)..... ☐

4. Mailing address and phone number of seller (in the case
of an entity, the contact person and the relationship to
entity)..... ☐

5. Reason seller desires to sell subject property..... ☐

B. Information about buyer..... ☐

1. Name of buyer..... ☐

2. If buyer is an individual, name of buyer's spouse (if any)..... ☐

3. If Buyer is not an individual, what type of entity is buyer (corporation, partnership, trust)?..... ☐

4. Mailing address and phone number of buyer (in the case of an entity, the contact person and the relationship to entity)..... ☐

5. A new owner of property can be held financially responsible for the cleanup of a prior owner's environmental contamination. Accordingly, the following steps are essential conditions to the acceptance of any property..... ☐

6. Seller's use of property (vacant, residential, farm, business)..... ☐

C. Information about property..... ☐

1. Mailing address of property..... ☐

2. Number of acres..... ☐

3. Lot or plat number..... ☐

4. Notable conditions or defects of property pursuant to preliminary walk through of property (i.e., oil/gas wells, wetlands, gas tanks, encroachments, etc.)..... ☐

5. Title search..... ☐

6. Is a formal inspection, appraisal and/or survey required or appropriate? If not, why?..... ☐

a. water potability test, if water is supplied by well..... ☐

b. soil test..... ☐

c. core tests..... ☐

d. termite and other pest inspections..... ☐

e. condition of building systems, structural integrity of building if they are to remain (i.e., roof, walls,

parking lots, etc.), including without limitation,
electrical wiring, plumbing, heating, air conditioning,
elevators and septic systems..... ☐

f. environmental concerns..... ☐

i. Phase I..... ☐

ii. Phase II..... ☐

iii. Wetlands..... ☐

7. Nature of improvements, if any, on property (i.e., house, store, shopping center, warehouse, factory, etc.) Do the improvements located on the property or to be located on the property meet green building standards sufficient to be certified as a green building under any of the voluntary rating systems?..... ☐

8. Is property occupied?..... ☐

9. Proposed use of property..... ☐

10. Is construction of building or additions anticipated?..... ☐

11. Current zoning classification of property..... ☐

12. Rezoning or issuance of permits required for proposed use?
If so, length of time normally required to process applications..... ☐

13. Any liens on property (mortgage lien, tax lien, judgment lien, attachment lien, execution lien, mechanics' lien)?..... ☐

14. Any litigation affecting or involving the property (such as bankruptcy, divorce or probate proceedings)?..... ☐

15. Property subject to any leases, easements, rights of way?..... ☐

16. Does the subject property have access to required utilities?..... ☐

- a. Sewer (if no, will septic be a problem?)..... ☐
- b. Water (if no, will well water be a problem?)..... ☐
- c. Gas..... ☐
- d. Electric..... ☐
- e. Cable..... ☐
- f. DSL..... ☐

17. Will any personal property be part of the sale (appliances, furniture, cranes, etc.)? If yes, provide list and describe condition..... ☐

18. Obtain copies of the following documents..... ☐

- a. Seller's occupancy and inspection certificates from municipal and state governmental authorities..... ☐
- b. Recent utility bills..... ☐
- c. Most recent tax bill (look for amount of taxes, special assessments and tax value)..... ☐
- d. Copy of seller's deed by which seller acquired property..... ☐
- e. Copy of seller's title guarantee or title insurance policy..... ☐
- f. Leases or other contracts concerning the subject property (i.e., service contracts, warranties, etc.)..... ☐
- g. Survey of property and plat showing location of all improvements, highways, roads, railroads, rivers, creeks or other water courses, fences, easements or rights of way on or adjacent to the property..... ☐

☐

1. Agreed purchase price..... ☐
2. Amount of earnest money (deposit) requested by seller..... ☐
3. Earnest money refundable if sale not consummated..... ☐
4. Cash at closing..... ☐
5. Anticipated closing date..... ☐
6. Is purchase to be financed? If so, how much, by whom
and what terms?..... ☐
7. Any special timing concerns with respect to closing
date (i.e., date when remodelling or construction must be
completed or date when occupancy must be
obtained)..... ☐
8. Are any brokers involved? If so, give name(s) and
address(es)..... ☐
9. Is other party represented by an attorney?..... ☐
10. Is there a preference for a particular title company or
escrow agent?..... ☐
11. Are there any contingencies?..... ☐
 - a. Financing..... ☐
 - b. Environmental..... ☐
 - c. Zoning changes..... ☐
 - d. Approval of subdivision of consolidation..... ☐
 - e. Wetlands..... ☐

f. Soil conditions..... ☐

g. Issuance of building permit..... ☐

h. Engineer report..... ☐

i. Survey..... ☐

j. Buyer's ability to purchase other property..... ☐

k. Third party approvals..... ☐

12. Who will pay for the following?..... ☐

	Seller	Buyer	Split Equally	
a. Title search	_____	_____	_____	...
	_____	_____	☐	
b. Title insurance	_____	_____	_____	...
	_____	_____	☐	
c. Escrow fee	_____	_____	_____	...
	_____	_____	☐	
d. Inspec- tion(s)	_____	_____	_____	...
	_____	_____	☐	
e. Environmental audit	_____	_____	_____	...
	_____	_____	☐	
f. Survey	_____	_____	_____	...
	_____	_____	☐	
g. Transfer taxes	_____	_____	_____	...
	_____	_____	☐	
h. Recording fees	_____	_____	_____	...
	_____	_____	☐	
i. Accrued prop- erty taxes	_____	_____	_____	...
	_____	_____	☐	
j. Special assess- ments and li- ens	_____	_____	_____	...
	_____	_____	☐	

k.	Preparation of warranty deed	_____	_____	_____	...
		_____	_____	☐	
l.	Survey	_____	_____	_____	...
		_____	_____	☐	
m.	Real Estate Commission	_____	_____	_____	...
		_____	_____	☐	

E. Environmental concerns..... ☐

1. Interview Seller as to the property's history, including prior owners and uses. Information should be gathered as to:..... ☐

a. Air emissions..... ☐

b. Wastewater discharges..... ☐

c. Tanks used for the storage of hazardous substances or petroleum..... ☐

d. Barrels, containers, or other receptacles containing any hazardous substances, pollutant, contaminant, pest control chemicals, chemical substances or mixtures..... ☐

e. Hazardous wastes (ignitable, corrosive, reactive or toxic)..... ☐

f. Buried waste..... ☐

g. Chemical storage shed..... ☐

h. Underground storage tanks..... ☐

i. Polychlorinated biphenyl (PCB) equipment..... ☐

j. Asbestos in buildings..... ☐

k. Radon..... ☐

l. Stained soil..... ☐

m. Areas of stressed vegetation..... ☐

n. Odors..... ☐

o. Any spilling, leaking, pumping, pouring, emitting, emptying, discharging, bleaching, dumping or other disposing into the environment..... ☐

2. Visit the property and search for indications of any of the above-listed contamination..... ☐

3. Where warning signs of possible environmental problems have been uncovered through this initial review, and property is placed in a moderate risk category, then some or all of the following steps should also be taken..... ☐

a. Neighbors and prior owners should be interviewed..... ☐

b. Chain of title search..... ☐

c. EPA and other government records should be reviewed to determine whether the property has been subject to any permitting or enforcement procedures..... ☐

d. An outside specialist in environmental risk assessment should visit the property and conduct a thorough physical inspection of the property, which may include testing of soil and water (a Phase I environmental audit)..... ☐

e. In the case of business property, all employees familiar with operations conducted on the property should be interviewed, and all company records relating to the treatment, storage or disposal of potentially hazardous material should be examined..... ☐

4. If a potential for contamination is identified, but the cost of undertaking a more extensive environmental evaluation is not economical, then the property cannot be accepted..... ☐

5. Where contamination is confirmed or property is placed in a high risk category for other reasons, the property cannot be

accepted..... ☐

F. Miscellaneous contractual provisions..... ☐

1. Representations of seller..... ☐

a. Pending assessment..... ☐

b. Unrecording instruments affecting title..... ☐

c. Pending or threatened actions or orders..... ☐

d. Existing conditions (i.e., environmental wetlands,
encroachments, gas tanks, etc.)..... ☐

e. Seller has disclosed all material matters affecting
property..... ☐

f. Duly authorized..... ☐

2. Representations of buyer..... ☐

a. Duly authorized..... ☐

3. Selection of title company..... ☐

4. Type of title insurance..... ☐

5. Type of deed..... ☐

G. Miscellaneous..... ☐

1. Any other special or extenuating circumstances not noted..... ☐

Legal Topics:

For related research and practice materials, see the following legal topics:

Real Property Law Construction Law General Overview Real Property Law Environmental Regulation General
Overview Real Property Law Environmental Regulation Underground Storage Tanks Real Property Law Ownership &
Transfer Business & Corporate Entities Real Property Law Purchase & Sale Contracts of Sale General Overview



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Current Legal Forms for Real Estate
Chapter 22 DEVELOPMENT AND SUBDIVISION
Part III. Drafting Guidelines

26-22 Current Legal Forms for Real Estate § 22.57

§ 22.57 Checklist for Real Estate Development

- A. Planning phase..... ☐
 - 1. Define nature and scope of project..... ☐
 - a. Residential housing development..... ☐
 - (1) Single-family/owner-occupied..... ☐ - (2) Multi-unit/developer-owned..... ☐
 - b. Commercial development..... ☐
 - (1) Retail..... ☐ - (2) Office..... ☐ - (3) Mixed use..... ☐
 - c. Industrial..... ☐
 - (1) Light industry..... ☐

(2) Heavy industry..... ☐

2. Select site..... ☐

a. Determine feasibility of each possible site ☐

(1) Determine availability of utilities and cost of
installation or hook-up..... ☐

(a) Natural gas..... ☐

(b) Electricity..... ☐

(c) Potable water..... ☐

(d) Sewer system..... ☐

(e) Cable television..... ☐

(f) Telephone..... ☐

(g) DSL..... ☐

(h) Satellite tower and/or dish..... ☐

(2) Assess access of site to public roadways ☐

(3) Assess property tax rates..... ☐

(4) Determine availability of quality public
schools ☐

(5) Estimate number of units/lots that can be placed on
parcel ☐

b. Review environmental aspects of each site ☐

(1) Determine present and past uses..... ☐

(2) Perform Phase I environmental site assessment if
such assessment has not been done in recent

years..... ☐

(3) Perform Phase II environmental site assessment if
Phase I reveals evidence of adverse environmental
impact on property ☐

(4) Bodies of water on or near site?..... ☐

(a) Rivers..... ☐

(b) Lakes..... ☐

(c) Streams..... ☐

(d) Springs..... ☐

(e) Ponds..... ☐

(f) Wells..... ☐

(g) Aquifers..... ☐

(h) Other..... ☐

(5) Wetlands on or near site?..... ☐

(6) Other significant environmental features of the
site ☐

(a) Pine barrens..... ☐

(b) Seashore..... ☐

(c) Other..... ☐

(7) Protected wildlife in the area?..... ☐

c. Is site located within or near a special district? ☐

(1) Historic preservation district..... ☐

(2) Environmental conservation district..... ☐

(3) Federal or state park..... ☐

(4) Other..... ☐

3. Assembly of real estate development team ☐

a. Contractor or project manager..... ☐

(1) Determine scope of duties..... ☐

(2) Review qualifications..... ☐

(3) Investigate references..... ☐

(4) Review other projects completed by contract..... ☐

(5) Reach agreement on compensation..... ☐

(6) Prepare construction contract..... ☐

(a) Turnkey or determine exclusions..... ☐

(b) Timeline/deadlines..... ☐

(i) Interim and final deadline..... ☐

(ii) Determine penalty for failure or bonus for
early completion..... ☐

(c) Compensation..... ☐

(i) Fixed price..... ☐

(ii) Time and materials..... ☐

(iii) Other method..... ☐

(d) Risk of loss and insurance..... ☐

(e) Performance bonds..... ☐

(f) Interim payments..... ☐

(g) Risk of unknown conditions..... ☐

(h) Dispute resolution..... ☐

(i) Architect..... ☐

(ii) Mediation..... ☐

(iii) Arbitration..... ☐

(iv) Selection of jurisdiction of court..... ☐

(v) Other..... ☐

(i) Warranty..... ☐

b. Engineer..... ☐

(1) Determine scope of duties..... ☐

(2) Review qualifications..... ☐

(3) Investigate references..... ☐

(4) Reach agreement on compensation..... ☐

(5) Prepare contract for services..... ☐

(a) Specify in detail services to be rendered,
e.g., ... ☐

(i) Preparation of site plan, drawings, etc. ☐

(ii) Appear at all governmental hearings for
project approval ☐

(iii) Supervise building of infrastructure ☐

(iv) Other duties..... ☐

(b) Deadlines..... ☐

(c) Developer reserves right to terminate
contract ☐

(d) Developer reserves right to make use of
engineer's work product even if contract is
terminated..... ☐

(e) Compensation..... ☐

(i) Hourly rate?..... ☐

(ii) Percentage of total cost of construction? ☐

(iii) Other method?..... ☐

(f) Does engineer carry sufficient malpractice
insurance? ☐

(g) Other contract provisions..... ☐

c. Surveyor..... ☐

(1) Determine scope of duties..... ☐

(2) Review qualifications..... ☐

(3) Investigate references..... ☐

(4) Reach agreement on compensation..... ☐

☐

(a) Specify in detail services to be rendered ☐

(b) Deadlines..... ☐

(c) Developer reserves right to terminate contract ☐

(d) Developer reserves right to make use of surveyor's work product even if contract is terminated..... ☐

(e) Compensation..... ☐

(i) Hourly rate?..... ☐

(ii) Flat fee?..... ☐

(iii) Other method?..... ☐

(f) Other contract provisions..... ☐

d. Architect, if needed..... ☐

(1) Determine scope of duties, including whether the architect will ensure that the construction is done in accordance with certain defined "green building" standards as specified in the plans..... ☐

(2) Review qualifications..... ☐

(3) Investigate references..... ☐

(4) Review other project designed by architect..... ☐

(5) Reach agreement on compensation..... ☐

(6) Prepare contract for services..... ☐

(a) Specify in detail services to be rendered ☐

(b) Deadlines..... ☐

(c) Developer reserves right to terminate contract ☐

(d) Developer reserves right to make use of architect's work product even if contract is terminated..... ☐

(e) Compensation..... ☐

(i) Hourly rate?..... ☐

(ii) Percentage of total cost of construction? ☐

(iii) Flat fee?..... ☐

(iv) Other method?..... ☐

(f) Does architect carry sufficient malpractice insurance? ☐

(g) Other contract provisions..... ☐

e. Financial advisor (independent contractor) ☐

(1) Determine scope of duties..... ☐

(2) Review qualifications..... ☐

(3) Investigate references..... ☐

(4) Reach agreement on compensation..... ☐

(5) Prepare contract for services..... ☐

(a) Specify in detail services to be rendered ☐

(i) Accounting services..... ☐

(ii) Bookkeeping services..... ☐

(iii) Tax advice..... ☐

(iv) Make projections regarding project costs &
revenue..... ☐

(v) Other..... ☐

(b) Deadlines..... ☐

(c) Developer reserves right to terminate
contract..... ☐

(d) Developer reserves right to make use of advisor's
work product even if contract is terminated..... ☐

(e) Compensation..... ☐

(i) Hourly rate?..... ☐

(ii) Flat fee?..... ☐

(iii) Other method?..... ☐

(f) Non-competition clause..... ☐

(g) Confidentiality clause..... ☐

(h) Other contract provisions..... ☐

f. Other consultants, e.g., marketing advisor/real estate
broker. ☐

(1) Determine scope of duties..... ☐

(2) Review qualifications..... ☐

(3) Investigate references..... ☐

(4) Reach agreement on compensation..... ☐

(5) Prepare contract for services..... ☐

(a) Specify in detail services to be rendered ☐

(b) Deadlines..... ☐

(c) Developer reserves right to terminate
contract ☐

(d) Developer reserves right to make use of
consultant's work product even if contract is
terminated..... ☐

(e) Compensation..... ☐

(i) Hourly rate?..... ☐

(ii) Flat fee?..... ☐

(iii) Commission..... ☐

(iv) Other method?..... ☐

(f) Other contract provisions..... ☐

B. Form of ownership of real estate development project ☐

1. Limited partnership..... ☐

a. Identify partners..... ☐

(1) One or more general partners with unlimited
liability ☐

(2) One or more limited partners with limited
liability ☐

b. Identify partner(s) responsible for management and control of project..... ☐

c. Specify the powers and responsibilities of the managing partner(s) ☐

d. Capital contributions of partners..... ☐

(1) Amount of cash to be provided by each partner ☐

(2) Non-cash contributions..... ☐

(a) Land..... ☐

(b) Services..... ☐

(c) Personal Property..... ☐

(d) Other..... ☐

(3) Specify ownership interest of each partner ☐

e. Tax considerations, e.g., appointment of tax matters partner ☐

f. Buy-out considerations, e.g., whether partnership or partners shall be required to buy, or have option to buy, the partnership interest of a partner in the event of his..... ☐

(1) Death..... ☐

(2) Physical or mental disability..... ☐

(3) Retirement..... ☐

(4) Desire to withdraw from firm..... ☐

(5) Dispute..... ☐

- (6) Other reasons..... ☐
- g. Causes of partnership termination..... ☐
- h. Draft partnership agreement..... ☐
2. Corporation..... ☐
- a. Identify shareholder(s)..... ☐
- b. File articles of incorporation..... ☐
- c. Determine purchase price for stock..... ☐
- (i) Cash price..... ☐
- (ii) Non-cash contributions..... ☐
- (a) Land..... ☐
- (b) Services..... ☐
- (c) Personal property..... ☐
- (d) Other..... ☐
- d. Issue shares to shareholders..... ☐
- e. Restrictions on transfer of shares?..... ☐
- f. Meeting of shareholders..... ☐
- g. Control and operation of corporation..... ☐
- (1) Election of board of directors..... ☐
- (2) Adoption of corporate by-laws..... ☐
- (3) Appointment of officers..... ☐

(4) Specification of powers of board..... ☐

(5) Specification of powers of officers..... ☐

h. Tax considerations..... ☐

(1) Tax on corporate income..... ☐

(2) Tax on corporate dividends..... ☐

(3) S corporation election?..... ☐

(4) Other..... ☐

i. Buy-out considerations, e.g., whether corporation or shareholders shall be required to buy, or shall have option to buy, the stock of a shareholder in the event of his..... ☐

(1) Death..... ☐

(2) Physical or mental disability..... ☐

(3) Retirement..... ☐

(4) Desire to withdraw from firm..... ☐

(5) Dispute..... ☐

(6) Other reasons..... ☐

j. Causes of corporate dissolution..... ☐

k. Draft appropriate shareholder agreements ☐

(1) Redemption agreement..... ☐

(2) Cross-purchase agreement..... ☐

(3) Corporate control/close corporation agreement..... ☐

(4) Voting trust agreement..... ☐

(5) Other..... ☐

3. General partnership..... ☐

a. Identify partners..... ☐

(1) General partners..... ☐

b. Identify partner(s) responsible for management and control of project..... ☐

c. Specify the powers and responsibilities of the managing partner(s) ☐

d. Are there any limitations on the actions of any partners? ☐

e. Capital contributions of partners..... ☐

(1) Amount of cash to be provided by each partner ☐

(2) Non-cash contributions..... ☐

(a) Land..... ☐

(b) Services..... ☐

(c) Personal property..... ☐

(d) Other..... ☐

(3) Specify ownership interest of each partner ☐

f. Tax considerations, e.g., appointment of tax matters partner ☐

g. Buy-out considerations, e.g., whether partnership or partners shall be required to buy, or shall have option to buy, the partnership interest of a partner in the event of his..... ☐

(1) Death..... ☐

(2) Physical or mental disability..... ☐

(3) Retirement..... ☐

(4) Desire to withdraw from firm..... ☐

(5) Dispute..... ☐

(6) Other reasons..... ☐

h. Causes of partnership termination..... ☐

i. Draft and file partnership agreement..... ☐

4. Limited liability company..... ☐

a. Identify members..... ☐

b. File articles of organization..... ☐

c. Identify management, roles of members, if not equal..... ☐

d. Capital contributions..... ☐

(1) Amount of cash to be provided by each members..... ☐

(2) Non-cash contributions..... ☐

(a) Land..... ☐

(b) Services..... ☐

(c) Personal property..... ☐

(d) Other..... ☐

(3) Specify ownership..... ☐

e. Tax considerations, e.g., appointment of tax
matter member..... ☐

f. Buy-out considerations, e.g., whether members or
company will be required to buy, or have an option
to buy the interest of a member..... ☐

(1) Death..... ☐

(2) Physical or mental disability..... ☐

(3) Retirement..... ☐

(4) Desire to withdraw from company..... ☐

(5) Dispute..... ☐

(6) Other reasons..... ☐

g. Reason for dissolving company..... ☐

h. Draft operating agreement..... ☐

5. Sole proprietorship considerations..... ☐

a. Personal liability for all debts arising from project ☐

b. Personal liability for all tort claims for injury to person
or property arising from project..... ☐

c. Income, deductions, gains, losses, etc., to be reported on
sole proprietor's individual tax return..... ☐

d. Continuity of project if sole proprietor dies or becomes

ill ☐

e. Difficulty in raising investment capital ☐

C. Land acquisition phase..... ☐

1. Draft option agreement giving developer option to purchase land ☐

a. Time period of option..... ☐

b. Extensions of option period..... ☐

(1) Automatic upon request of developer..... ☐

(2) Automatic upon payment of extra consideration by developer ☐

c. Consideration for option..... ☐

(1) To be applied to purchase price..... ☐

(2) To be applied to purchase price if sale is closed by specified date..... ☐

(3) Not to be applied to purchase price..... ☐

d. Events triggering exercise of option..... ☐

(1) Passage of fixed amount of time..... ☐

(2) Developer obtains governmental approval of project ☐

(3) Completion of survey..... ☐

(4) Satisfactory results of environmental site assessment ☐

(5) Developer obtains acceptable financing for

☐

(6) Other..... ☐

e. Purchase price of land..... ☐

(1) Set forth in option..... ☐

(2) Set per acre..... ☐

(3) Based on appraisal at closing of sale ☐

2. Purchase agreement..... ☐

a. Contingencies..... ☐

(1) Purchase contingent upon developer obtaining
governmental approvals..... ☐

(a) Planning board..... ☐

(b) Zoning board..... ☐

(c) Subdivision approval..... ☐

(d) Environmental impact study..... ☐

(e) Other..... ☐

(2) Purchase contingent upon locating adequate source
of potable water..... ☐

(a) Well water..... ☐

(b) Water company..... ☐

(3) Purchase contingent upon devising means of
disposing of sewage ☐

(a) Individual septic system for each house in
residential development..... ☐

(b) Use municipal sewer system..... ☐

(c) Build private sewage treatment facility for use by development. ☐

(d) Obtain all necessary governmental approvals for whatever method chosen..... ☐

(e) Conduct geological and other studies to determine feasibility of method chosen..... ☐

(4) Purchase contingent upon acquiring basic utilities for development..... ☐

(a) Natural gas..... ☐

(b) Electricity..... ☐

(c) Telephone..... ☐

(d) Cable television..... ☐

(e) DSL..... ☐

(5) Purchase contingent upon acquiring land acquisition financing ☐

(a) Seller to provide financing..... ☐

(b) Investors to provide financing..... ☐

(c) Commercial lender to provide financing ☐

(i) List loan terms and conditions acceptable to developer, e.g., interest rate, repayment period, collateral, etc. ☐

(6) Purchase contingent upon results of environmental site assessment ☐

(7) In the case of a rehabilitation project, purchase is

contingent upon the following..... ☐

(a) Structural inspection..... ☐

(b) Pest inspection..... ☐

(c) Insect inspection (e.g., termites, carpenter ants,
etc.). ☐

(d) Radon gas inspection..... ☐

(e) Lead-based paint inspection..... ☐

(f) Urea formaldehyde insulation inspection ☐

(g) Other..... ☐

b. Title insurance must be obtained..... ☐

c. Time of sale..... ☐

d. Place of sale..... ☐

e. Warranties granted to developer..... ☐

f. Detailed description of property being conveyed ☐

g. Purchase price..... ☐

(1) Fixed amount..... ☐

(2) Price per acre based on survey..... ☐

h. Other provisions..... ☐

3. Financing..... ☐

a. Owner-financed sale..... ☐

(1) Down payment..... ☐

(2) Purchase money mortgage for balance..... ☐

(3) Mortgage subordination clause so developer
can more easily obtain financing for
infrastructure..... ☐

(4) Provision allowing for partial release of mortgage
as units in development are built and sold..... ☐

(a) Per lot..... ☐

(b) Per acre..... ☐

(c) Per section..... ☐

(d) Release for infrastructure..... ☐

(i) Roads..... ☐

(ii) Sidewalks..... ☐

(iii) Water System..... ☐

(iv) Other..... ☐

(5) Payment provisions..... ☐

(a) Amortization period and loan term are the
same ☐

(b) Long amortization period, shorter loan term with
balloon payment ☐

(c) Interest payments only, followed by balloon
payment ☐

(d) Payment of portion of principal upon release of
each lot ☐

(e) How often are payments to be made to seller? ☐

(f) Amount of each payment..... ☐

(g) Portion of each payment to be applied to principal and portion to be applied to interest..... ☐

(h) Personal guaranty..... ☐

(i) Other provisions..... ☐

(6) Interest on mortgage..... ☐

(a) Fixed rate..... ☐

(b) Variable rate..... ☐

(i) If variable rate, is it tied to the prime rate or some other index?..... ☐

(ii) How frequently may rate be adjusted? ☐

(iii) What is maximum rate?..... ☐

(7) Seller's remedies upon default..... ☐

(a) Reclaim full title to property..... ☐

(b) All foreclosure costs, including attorney's fees, to be paid by developer..... ☐

b. Institutional financing (usually not available for vacant land) ☐

(1) Developer must satisfy conditions to receive loan commitment letter..... ☐

(a) Obtain title insurance..... ☐

(b) Obtain survey..... ☐

(c) Other..... ☐

(2) Loan amount..... ☐

(3) How and when loan funds will be disbursed ☐

(4) Recourse or nonrecourse loan?..... ☐

(5) Collateral..... ☐

(6) Loan guarantees..... ☐

(7) Provision allowing for partial release of mortgage as
units in development are built and sold..... ☐

(a) Per lot..... ☐

(b) Per acre..... ☐

(c) Per section..... ☐

(d) Release for infrastructure..... ☐

(i) Roads..... ☐

(ii) Sidewalks..... ☐

(iii) Water system..... ☐

(iv) Other..... ☐

(8) Repayment provisions..... ☐

(a) Amortization period and loan term are the
same ☐

(b) Long amortization period, shorter loan term with
balloon payment ☐

(c) Interest payments only, followed by balloon payment ☐

(d) Payment of portion of principal upon release of each lot ☐

(e) How often are payments to be made to lender? ☐

(f) Amount of each payment..... ☐

(g) Portion of each payment to be applied to principal and portion to be applied to interest..... ☐

(h) Escrow account for real property and school taxes ☐

(i) Other provisions..... ☐

(9) Interest on mortgage loan..... ☐

(a) Fixed rate..... ☐

(b) Variable rate..... ☐

(i) If variable rate, is it tied to the prime rate or some other index?..... ☐

(ii) How frequently may rate be adjusted? ☐

(iii) What is maximum rate?..... ☐

(10) Lender's remedies upon default..... ☐

(a) Claim full title to property..... ☐

(b) Claim full title to collateral..... ☐

(c) All foreclosure costs, including attorneys' fees, to

be paid by developer..... ☐

4. Closing..... ☐

a. Deed..... ☐

b. Note..... ☐

c. Mortgage..... ☐

d. Title insurance..... ☐

e. Title affidavits..... ☐

f. Escrow letters of instruction, if needed ☐

g. Survey..... ☐

D. Construction phase..... ☐

1. Agreement with general contractor..... ☐

a. If government funds are used..... ☐

(1) Provision requiring use of some minority
subcontractors ☐

(2) Provision requiring use of some female
subcontractors ☐

(3) Provisions requiring payment of prevailing
wages ☐

b. Define scope of general contractor's services, including whether
the contractor will be required to use "green building" methods
and comply with standards necessary to obtain a green building
certification..... ☐

c. Provisions pertaining to selection of subcontractors by
general contractor..... ☐

d. Amount of compensation..... ☐

e. Method of compensation..... ☐

(1) Schedule of "progress" payments..... ☐

(2) Lump sum payment upon completion of work ☐

f. Penalties for missed deadlines..... ☐

g. Provision allowing developer to make changes in site
plan and in contractor's responsibilities after construction
has begun ☐

h. Will general contractor be required to produce
bonds? ☐

(1) Performance bond..... ☐

(2) Material and labor bond..... ☐

i. Warranties made by general contractor to developer ☐

j. Risk of loss to be assumed by general contractor in the
event of a strike by construction workers..... ☐

k. Insurance to be obtained by contractor ☐

(1) Workers' compensation..... ☐

(2) Liability..... ☐

(3) Builders' all risk coverage..... ☐

(4) Hold harmless provision protecting developer ☐

l. Completion date..... ☐

m. Other provisions..... ☐

2. Construction financing..... ☐

a. Developer must satisfy conditions to receive loan
commitment letter..... ☐

(1) Obtain title insurance..... ☐

(2) Obtain survey..... ☐

(3) Other..... ☐

b. Land acquisition loan must be paid off or subordinated
to construction loan..... ☐

c. Loan amount..... ☐

d. How and when loan funds will be disbursed ☐

(1) Advances must correspond with builder's
contract ☐

e. Recourse or nonrecourse loan?..... ☐

f. Collateral..... ☐

g. Loan guarantees..... ☐

h. Provision allowing for partial release of mortgage as
units in development are built and sold..... ☐

(1) Per lot..... ☐

(2) Per acre..... ☐

(3) Per section..... ☐

(4) Release for infrastructure..... ☐

(a) Roads..... ☐

(b) Sidewalks..... ☐

(c) Water system..... ☐

(d) Other..... ☐

i. Repayment provisions..... ☐

(1) Amortization period and loan term are the same ☐

(2) Long amortization period, shorter loan term with balloon payment ☐

(3) Interest payments only, followed by balloon payment ☐

(4) Payment of portion of principal upon release of each lot ☐

(5) How often are payments to be made to lender? ☐

(6) Amount of each payment..... ☐

(7) Portion of each payment to be applied to principal and portion to be applied to interest..... ☐

j. Interest on mortgage loan..... ☐

(1) Fixed rate..... ☐

(2) Variable rate..... ☐

(a) If variable rate, is it tied to the prime rate or some other index?..... ☐

(b) How frequently may rate be adjusted?..... ☐

(c) What is maximum rate?..... ☐

k. Lender's remedies upon default..... ☐

(1) Claim full title to property..... ☐

(2) Claim full title to collateral..... ☐

(3) All foreclosure costs, including attorneys' fees, to
be paid by developer..... ☐

3. Approval of municipal building inspector ☐

a. Building permit..... ☐

b. Certificate of occupancy..... ☐

E. Marketing phase..... ☐

1. Select marketing staff..... ☐

a. In-house (employees)..... ☐

(1) Commission..... ☐

(2) Salaried..... ☐

(3) Other method of compensation..... ☐

b. Independent contractor..... ☐

(1) Flat fee..... ☐

(2) Commission..... ☐

(3) Other method of compensation..... ☐

2. Prepare marketing agreement..... ☐

a. Advertising..... ☐

(1) Frequency..... ☐

(2) Medium..... ☐

(a) Television..... ☐

(b) Radio..... ☐

(c) Newspapers..... ☐

(d) Magazines..... ☐

(e) Billboards..... ☐

(f) Telemarketing..... ☐

(g) Mass mailing..... ☐

(h) Other methods..... ☐

(3) Who will prepare advertisements?..... ☐

(4) Of what size or length shall they be? ☐

(5) Who is responsible for expense?..... ☐

(6) Who is responsible for content of
advertisements? ☐

b. Termination provision..... ☐

(1) For cause..... ☐

(2) Without cause..... ☐

(3) Specify notice required..... ☐

(4) Specify consideration due to marketing advisor(s)
on termination ☐

c. Specify whether following will be made available to marketing staff..... ☐

(1) Office space..... ☐

(2) Equipment..... ☐

(3) Supplies..... ☐

(4) Other..... ☐

d. Specify scope of representations marketing staff may make on behalf of developer..... ☐

e. Specify any obligation to supply information to buyers prior to executing purchase contracts..... ☐

f. Specify other duties of marketing staff ☐

3. Develop standard sales contract..... ☐

a. Description of unit to be purchased..... ☐

b. Location in development..... ☐

c. Price..... ☐

d. Down payment..... ☐

e. Standard features of unit..... ☐

f. Optional features of unit..... ☐

g. Set forth construction period..... ☐

h. State whether purchaser has right to inspect during construction period..... ☐

i. Form of title purchaser will be receiving, e.g., fee

simple absolute, etc..... ☐

j. Any restrictions or easements to use of property ☐

k. Requirement that transfer of title occur immediately
after issuance of certificate of occupancy..... ☐

l. Other provisions..... ☐

4. Transfer of title..... ☐

a. Prepare deed..... ☐

b. Obtain mortgage releases for acquisition and
construction loans ☐

c. Attend closing, deliver deed and receive certified
funds ☐

5. For property to be leased, rather than sold ☐

a. Establish rental amount..... ☐

b. Establish term of lease..... ☐

c. Establish frequency of payments..... ☐

(1) Monthly..... ☐

(2) Quarterly..... ☐

(3) Semi-annually..... ☐

(4) Annually..... ☐

(5) Other..... ☐

d. Specify leased area..... ☐

(1) Unit number..... ☐

(2) Diagram..... ☐

(3) Other description..... ☐

e. Set forth repair and maintenance obligations of
landlord ☐

(1) Structural and heating, ventilation, air
conditioning ☐

(2) Non-structural..... ☐

f. Set forth repair and maintenance obligations of
tenant ☐

g. Security deposit..... ☐

(1) Amount..... ☐

(2) Bank where it will be held..... ☐

(3) Interest-bearing account?..... ☐

h. Termination provision..... ☐

(1) Upon failure to make rental payment..... ☐

(2) Fire or other casualty..... ☐

(3) Other reasons..... ☐

i. Lease renewal provision..... ☐

Legal Topics:

For related research and practice materials, see the following legal topics:

Insurance LawProperty InsuranceTitle InsuranceReal Property LawConstruction LawContractsReal Property
LawFinancingConstruction LoansReal Property LawFinancingMortgages & Other Security
InstrumentsPurchase-Money MortgagesReal Property LawPurchase & SaleContracts of SaleGeneral OverviewReal
Property LawSubdivisionsGeneral OverviewReal Property LawZoning & Land UseGeneral Overview



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Current Legal Forms for Real Estate

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Current Legal Forms for Real Estate
Chapter 22 DEVELOPMENT AND SUBDIVISION
Part III. Drafting Guidelines

26-22 Current Legal Forms for Real Estate § 22.58

§ 22.58 Checklist for Purchaser of Development

Part 1: Pre-Contract Stage

A. Determine status of governmental approvals..... ☐

1. Determine which approvals were necessary for development
to be built..... ☐

a. Zoning board..... ☐

b. Planning board..... ☐

c. Environmental impact study..... ☐

d. Approval of site plan and subdivision..... ☐

e. Historic review commission..... ☐

f. Conservation district..... ☐

g. Other..... ☐

h. Have "green building" standards required by local
ordinances been met and approved?

2. Determine status of approval process..... ☐

a. Has it been completed?..... ☐

b. What conditions were imposed by the governmental authority? ☐

(1) Have these conditions been met?..... ☐

(2) What time limits were imposed on the developer for compliance? ☐

(3) Has there been any notice of violation sent to the developer? ☐

(a) Currently?..... ☐

(b) Previously?..... ☐

(4) Are there any violations that have gone unnoticed by the governmental authority?..... ☐

(5) What conditions, if any, remain to be met? ☐

(a) Too costly to comply?..... ☐

(b) Too difficult to comply?..... ☐

c. Completion bonds and letters of credit ☐

(1) Required by governmental authority?..... ☐

(2) Are they currently in full force and effect? ☐

(3) Are they transferable?..... ☐

(4) What would be the cost to replace or renew them? ☐

d. If roadways have been constructed, do they meet municipal standards so as to be eligible for dedication to the municipality as public roads?..... ☐

B. Environmental issues..... ☐

1. Has a Phase I environmental site assessment been completed? ☐

a. Are complete written results of the assessment available? ☐

b. What is the reputation of the company that performed or will be performing the assessment?..... ☐

(1) Licensed and in good standing?..... ☐

(2) How much experience does it have in performing assessments? ☐

c. Was any testing performed?..... ☐

(1) Air..... ☐

(2) Surface water..... ☐

(3) Groundwater..... ☐

(4) Soil..... ☐

(5) Other..... ☐

(6) Is data available for review?..... ☐

(7) What was the scope and nature of the testing? ☐

(8) What was the reason for performing the testing? ☐

(9) Were satisfactory results achieved?..... ☐

(10) Were any limitations placed on the testing or on the resulting report?..... ☐

(11) Is further testing needed?..... ☐

2. Wetlands..... ☐

a. Has a wetlands study been performed?..... ☐

b. What is the reputation of the company that performed
or will be performing the study?..... ☐

(1) Licensed and in good standing?..... ☐

(2) How much experience does it have in performing
such studies? ☐

c. Were any wetlands found?..... ☐

d. How much land is affected?..... ☐

e. What restrictions on use affect the wetlands area? ☐

f. Has the municipality considered and approved the site
plan and the wetlands designation?..... ☐

3. Does real estate development project include the rehabilitation
of existing structure(s)?..... ☐

a. Determine whether asbestos exists..... ☐

(1) Has licensed asbestos handler been found? ☐

(2) Cost of asbestos removal project..... ☐

(3) Location and amount of asbestos to be
removed ☐

(4) Will asbestos be removed or encapsulated? ☐

b. Determine whether urea formaldehyde insulation
exists ☐

(1) Has company been found to remove insulation? ☐

(2) Cost of removal project..... ☐

(3) Location and amount of insulation to be removed ☐

(4) Will removal be too difficult to perform? ☐

c. Determine whether wood-boring organisms exist ☐

(1) Has licensed exterminator been found? ☐

(2) Nature of infestation..... ☐

(a) Termites..... ☐

(b) Carpenter ants..... ☐

(c) Other..... ☐

(3) Extent of infestation..... ☐

(4) Location of infestation..... ☐

(5) Nature of damage..... ☐

(6) Extent of damage..... ☐

(7) Location of damage..... ☐

(8) Cost to repair..... ☐

(9) Difficulty of repair..... ☐

d. Other site-specific concerns..... ☐

e. Will the site and improvements to be constructed comply with "green building" standards?

C. Title issues..... ☐

1. Survey..... ☐

a. Was it certified by a licensed land surveyor? ☐

b. Was it performed recently?..... ☐

c. Does it show all improvements made to date? ☐

d. Does it show all major natural features of the
land? ☐

(1) Bodies of water..... ☐

(2) Wooded areas..... ☐

(3) Other..... ☐

e. Determine whether any encroachments exist. ☐

f. Determine whether any easements and other restrictions
are included..... ☐

g. Does it include the location of wetlands found on the
property? ☐

h. Are individual lot lines shown?..... ☐

(1) Is number of lots consistent with the government
approvals already granted?..... ☐

(2) Is size of lots consistent with the government
approvals already granted?..... ☐

(3) Are any lots unusable?..... ☐

i. Have setback requirements been met?..... ☐

j. Have green space requirements been met? ☐

2. Covenants and restrictions..... ☐a. Determine whether covenants and restrictions exist on the use or transfer of the property..... ☐(1) Determine whether they are filed with county clerk or other appropriate governmental authority..... ☐(2) Determine whether they are violative of law ☐(a) Discriminatory?..... ☐(b) Unreasonably restrictive?..... ☐(c) Other basis..... ☐(3) Determine whether any violations of the covenants or restrictions have already occurred..... ☐b. Determine whether additional covenants and restrictions are needed ☐(1) Regarding use of land?..... ☐(2) Regarding type of construction permitted in the development? ☐(3) Regarding quality of construction required in the development? ☐(4) Regarding transfer of property?..... ☐(5) Regarding rental of property?..... ☐(6) Regarding membership in homeowners' association? ☐(7) Regarding membership in merchants' association? ☐

(8) Other types of covenants and restrictions

necessary? ☐

(9) Determine method of amending these covenants
and restrictions ☐

(a) Permission of developer required?..... ☐

(b) Permission of any existing owners
required? ☐

D. Municipal services..... ☐

1. Determine whether municipal water and sewer services are
available for the site..... ☐

a. Determine cost to hook up the site..... ☐

b. Determine need for, and cost of, any development-
wide equipment prior to installation..... ☐

c. Determine cost of receiving services..... ☐

2. Determine whether private water and sewer services are
available for the site..... ☐

a. Determine who provides the services..... ☐

b. Determine whether provider has all necessary licenses
and governmental approvals necessary to
provide services ☐

c. Determine cost to hook up the site..... ☐

d. Determine need for, and cost of, any development-
wide equipment prior to installation..... ☐

e. Determine the fees to be charged for these services ☐

f. Determine whether there are limits on fees for these
services ☐

g. Determine whether provider is obligated to provide services to site..... ☐

(1) Is this obligation mandated by operation of state law? ☐

(2) Is the obligation contractual?..... ☐

(a) Determine whether contract is assignable to purchaser of development..... ☐

(b) Determine terms and conditions of assignment ☐

3. Determine whether other municipal services are available ☐

a. Trash removal..... ☐

b. Police protection..... ☐

c. Fire protection..... ☐

d. Primary and secondary schools..... ☐

e. Emergency medical services..... ☐

f. Other services..... ☐

E. Marketing considerations..... ☐

1. Location of the development..... ☐

a. Easy access to roadways?..... ☐

b. Is there a need in the surrounding area for a development of this type?..... ☐

c. Does a similar development already exist in the area, and, if so, does it meet the community's needs?..... ☐

d. Is the development in close proximity to a major population center?..... ☐

2. What is the general character of area surrounding the development? ☐

a. Residential/affluent..... ☐

b. Residential/middle class..... ☐

c. Residential/blue collar workers..... ☐

d. Residential/low income..... ☐

e. Heavy industrial..... ☐

f. Light industrial..... ☐

g. Retail..... ☐

h. Offices..... ☐

i. Mixture of the above..... ☐

j. Rural..... ☐

3. What is the reputation of the local schools? ☐

4. Are local property taxes high?..... ☐

5. Are there recreational facilities near the development? ☐

6. Will recreational facilities be made a part of the development? ☐

7. Are there shopping areas near the development?. ☐

F. Other considerations..... ☐

1. Determine whether any lots in the development have been sold already..... ☐

a. Are the structures already built, if any, fully compatible with their intended use?..... ☐

b. Will use of such lots be sufficiently restricted to protect value, style and use of lots under consideration?..... ☐

Part 2: Contract Stage

G. Contract of sale and purchase..... ☐

1. Identify seller(s)..... ☐

a. Name..... ☐

b. Address..... ☐

2. Capacity of seller..... ☐

a. Individual..... ☐

(1) Meets age of majority..... ☐

(2) Is competent..... ☐

b. Corporation..... ☐

(1) Obtain proof from representative of corporation that he has authority to act on behalf of corporation (e.g., letter from president) ☐

(2) Obtain copy of board of directors' resolution authorizing sale ☐

(3) Is approval of court (e.g., bankruptcy court) required? ☐

(4) Is approval of any state or local government agency required? ☐

c. Partnership..... ☐

(1) Obtain proof from representative of partnership that
he has authority to act on behalf of partnership..... ☐

(2) Obtain copy of partners' decision authorizing
sale ☐

(3) Is approval of court (e.g., bankruptcy court)
required? ☐

(4) Is approval of any state or local government agency required? ☐

d. Fiduciary..... ☐

(1) Obtain proof of appointment..... ☐

(2) Determine source of appointment..... ☐

(a) By law..... ☐

(b) By court order..... ☐

(c) By document (e.g., will or trust agreement) ☐

(3) Determine whether court order is required for
sale ☐

e. Attorney-in-Fact or Agent..... ☐

(1) Obtain proof of appointment..... ☐

(2) Obtain proof that appointment has not been
revoked ☐

(3) Is principal alive?..... ☐

(4) Is principal competent?..... ☐

(5) Does grant of authority include sale of real
property? ☐

3. Identify purchaser(s)..... ☐

a. Name..... ☐

b. Address..... ☐

4. Capacity of Purchaser..... ☐

a. Individual..... ☐

(1) Meets age of majority..... ☐

(2) Is competent..... ☐

b. Corporation..... ☐

(1) Obtain proof from representative of corporation that he has authority to act on behalf of corporation (e.g., letter from president) ☐

(2) Obtain copy of board of directors' resolution authorizing purchase..... ☐

(3) Is approval of court (e.g., bankruptcy court) required? ☐

(4) Is approval of any state or local government agency required? ☐

c. Partnership..... ☐

(1) Obtain proof from representative of partnership that he has authority to act on behalf of partnership..... ☐

(2) Obtain copy of partners' decision authorizing purchase ☐

(3) Is approval of court (e.g., bankruptcy court) required? ☐

(4) Is approval of any state or local government agency required? ☐

d. Fiduciary..... ☐

(1) Obtain proof of appointment..... ☐

(2) Determine source of appointment..... ☐

(a) By law..... ☐

(b) By court order..... ☐

(c) By document (e.g., will or trust agreement) ☐

(3) Determine whether court order is required for purchase ☐

e. Attorney-in-Fact or Agent..... ☐

(1) Obtain proof of appointment..... ☐

(2) Obtain proof that appointment has not been revoked ☐

(3) Is principal alive?..... ☐

(4) Is principal competent?..... ☐

(5) Does grant of authority include purchase of real property? ☐

5. Identify the subject premises..... ☐

a. Describe location by county and by municipality ☐

b. Describe location by street address..... ☐

c. Describe location by reference to filed map(s) of subdivision ☐

d. Describe location by real estate tax map number ☐

e. Describe location by prior recorded deed(s) ☐

f. Describe location by metes and bounds..... ☐

6. Identify all structures which are located on premises, e.g., ... ☐

a. Office building(s)..... ☐

b. House(s)..... ☐

c. Garage(s)..... ☐

d. Storage shed(s)..... ☐

e. Barn(s)..... ☐

f. Other..... ☐

7. Identify fixtures which are included in sale price ☐

8. Identify personal property included in sales price, e.g., ... ☐

a. Appliances..... ☐

b. Furniture..... ☐

c. Swimming pool..... ☐

d. Window shades/blinds..... ☐

e. Other..... ☐

f. Which items will be transferred in "as is" condition? ☐

g. Which items will be transferred in good working

order? ☐

h. Who will bear risk of loss between contract date and transfer of title?..... ☐

9. Identify fixtures which are excluded from sale price ☐

10. Identify personal property excluded from sale price ☐

11. Identify fixtures to be transferred at additional cost to purchaser..... ☐

a. Which will be transferred in "as is" condition? ☐

b. Which will be transferred in good working order? ☐

c. Who will bear risk of loss between contract date and transfer of title?..... ☐

12. Identify personal property to be transferred at additional cost to purchaser..... ☐

a. Which will be transferred in "as is" condition? ☐

b. Which will be transferred in good working order? ☐

c. Who will bear risk of loss between contract date and transfer of title?..... ☐

13. Purchase price..... ☐

a. Total amount..... ☐

b. Additional cost to purchaser for fixtures listed above ☐

c. Additional cost to purchaser for personal property listed above ☐

d. Will purchaser assume existing mortgage(s)? ☐

e. Deposit..... ☐

(1) Amount..... ☐

(2) When due..... ☐

(3) Form of payment (e.g., cashier's check) ☐

(4) Where funds are held..... ☐

f. Adjustments to purchase price..... ☐

(1) Property taxes..... ☐

(2) Fuel oil..... ☐

(3) Prepaid services (e.e., trash collection) ☐

(4) Water and sewer levies..... ☐

(5) Special assessments..... ☐

(6) Other..... ☐

14. Contingencies: specify date by which each contingency must be resolved and standard to be used in determining whether contingency is satisfied..... ☐

a. Inspection for wood-boring insects..... ☐

b. Structural inspection..... ☐

c. Test for radon gas..... ☐

d. Inspection for asbestos insulation..... ☐

e. Inspection for urea formaldehyde insulation ☐

f. Attorney's approval of sale-purchase..... ☐

- g. Environmental site assessment..... ☐
- h. Locating source of potable water..... ☐
- i. Locating sewage treatment service..... ☐
- j. Has the structure been certified as a "green" building under the applicable rating system.

15. Type of mortgage..... ☐

- a. Will seller provide financing?..... ☐
- b. Will institutional lender provide financing? ☐
- c. Will some combination of the foregoing methods of financing be used?..... ☐
- d. Determine whether mortgage will be recourse or nonrecourse ☐
- e. Determine security for debt..... ☐
- f. Fixed rate?..... ☐
- g. Adjustable rate?..... ☐
- h. Balloon?..... ☐
- i. Convertible?..... ☐
- j. Term of mortgage..... ☐
- k. Maximum interest rate..... ☐
- l. Maximum points purchaser will pay..... ☐

16. Existing mortgages to be assumed..... ☐

a. Review all loan documents..... ☐

(1) Determine whether loan is assumable..... ☐

(2) Determine whether approval of assumption is
required ☐

(3) Determine conditions for assumption..... ☐

b. Obtain certifications from lender regarding ☐

(1) Amount still due..... ☐

(2) Existing defaults, if any..... ☐

c. Determine whether original mortgagor will remain liable
for debt ☐

d. Determine whether mortgage provides for releases upon
sale of individual lots..... ☐

17. Existing mortgages to be paid from proceeds of sale and
purchase? ☐

a. Determine whether sufficient proceeds will exist to
satisfy mortgages..... ☐

18. Environmental considerations..... ☐

a. Site conditions..... ☐

(1) Warranty by seller that site does not contain
adverse environmental condition..... ☐

(2) Disclaimer by seller regarding whether site
contains adverse environmental condition..... ☐

(3) Representations by seller..... ☐

(a) Present condition of site..... ☐

(b) Past use of site..... ☐

(c) Present use of site..... ☐

(d) Property is in compliance with all environmental
laws and regulations (federal, state and
local)..... ☐

(4) Hold harmless clause..... ☐

(5) Indemnification clause..... ☐

b. Special governmental approvals from agencies, districts
or boards ☐

(1) Conservation district..... ☐

(2) Historic district..... ☐

(3) Zoning board..... ☐

(4) Wetlands protection..... ☐

c. Environmental site assessment..... ☐

19. Type of deed to be given..... ☐

a. Warranty..... ☐

b. Bargain and sale..... ☐

c. Executor's..... ☐

d. Administrator's..... ☐

e. Trustee's..... ☐

f. Referee's..... ☐

g. Quitclaim..... ☐

20. Purchaser will take property subject to following conditions ☐

a. Zoning laws..... ☐

b. Environmental laws..... ☐

(1) Federal..... ☐

(2) State..... ☐

(3) Local..... ☐

c. Covenants in the deed..... ☐

d. Any restrictions..... ☐

e. Easements..... ☐

f. Tenancies..... ☐

g. Licenses..... ☐

21. Warranties and representations by seller ☐

a. Title is free and clear..... ☐

b. All governmental approvals obtained..... ☐

c. No violations of governmental approvals ☐

d. Covenants and restrictions are valid and enforceable ☐

e. No existing violations of covenants and restrictions ☐

f. No restrictions exist on seller's ability to transfer title ☐

22. Title..... ☐

a. Easements..... ☐

(1) Determine what easements exist and affect the property to be conveyed..... ☐

(a) Ingress and egress..... ☐

(b) Utility easements..... ☐

(c) Gas and mineral rights..... ☐

(d) Other..... ☐

(2) Determine what easements may be needed ☐

(a) Natural gas lines..... ☐

(b) Electrical transmission lines..... ☐

(c) Telephone cables..... ☐

(d) Cable television..... ☐

(e) Access to public roadways..... ☐

(f) Access to public water and sewer lines ☐

(g) Other..... ☐

23. Title review (abstract or insurance)..... ☐

a. Specify who prepares abstract update..... ☐

b. Specify who provides title insurance..... ☐

c. Specify party responsible for payment..... ☐

24. Specify date of transfer of title..... ☐

a. Whether date is approximate..... ☐

b. Time is of the essence..... ☐

c. Where transfer will occur..... ☐

25. Specify when possession will be granted to purchaser ☐

a. Prior to transfer of title..... ☐

(1) Insurance considerations..... ☐

(2) Allocation of risk of loss..... ☐

(3) Rent owed by purchaser to seller..... ☐

b. At transfer of title..... ☐

c. After transfer of title..... ☐

(1) Insurance considerations..... ☐

(2) Allocation of risk of loss..... ☐

(3) Time of inspection..... ☐

(4) Amount of purchase price held back to cover any
damages ☐

(5) Rent owed by seller to purchaser..... ☐

26. Miscellaneous clauses..... ☐

a. Waiver provision (e.g., "the waiver of any provision of
this agreement shall not be valid unless it is in writing
and signed by the party granting the waiver")..... ☐

b. This agreement represents entire agreement of the

parties ☐

c. Any modifications of agreement must be in written form
and signed by both parties..... ☐

d. Agreement is to be construed in accordance with the laws
of the State of ☐

e. Agreement is binding on both parties and their successors
and assigns..... ☐

f. Determine that all documents have been properly
executed, acknowledged, delivered and recorded..... ☐

g. Notice requirements (including whether facsimile
transmission is acceptable)..... ☐

h. All provisions in agreement should be gender
neutral ☐

i. Include provision for compensation of broker, if
any ☐

j. Specify which terms and representations survive the
closing ☐

k. Other..... ☐

27. Execution..... ☐

a. Signed by parties or their representatives ☐

b. Dated..... ☐

c. Witnesses..... ☐

d. Acknowledged..... ☐

Legal Topics:

For related research and practice materials, see the following legal topics:

Environmental Law Assessment & Information Access Audits & Site Assessments Real Property Law Environmental

RegulationGeneral OverviewReal Property LawOwnership & TransferBusiness & Corporate EntitiesReal Property
LawPurchase & SaleGeneral OverviewReal Property LawRestrictive CovenantsGeneral OverviewReal Property
LawSubdivisionsGeneral OverviewReal Property LawZoning & Land UseGeneral Overview



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Current Legal Forms for Real Estate
Chapter 22 DEVELOPMENT AND SUBDIVISION
Part III. Drafting Guidelines

26-22 Current Legal Forms for Real Estate § 22.59

§ 22.59 Checklist for Construction Loan

A. Documents to be prepared by lender/lender's counsel..... ☐

1. Loan application..... ☐

2. Construction loan and security agreement..... ☐

3. Mortgage note for construction loan..... ☐

4. Open-end mortgage, assignment of rents and leases and
security agreements..... ☐

5. Environmental representations, release, hold harmless and
indemnity agreement..... ☐

6. Collateral assignment of construction contract(s)..... ☐

7. Transaction guaranty..... ☐

8. Certificate of borrower..... ☐

9. Financing statement [UCC-1] for _____ secretary

of state..... ☐

10. Financing Statement [UCC-1] for _____ county recorder..... ☐

11. Escrow instruction letter..... ☐

12. FEMA flood zone certification..... ☐

13. Borrower's counsel legal opinion..... ☐

14. Notice of commencement..... ☐

15. Lender's internal documents..... ☐

(a) Loan application..... ☐

(b) IRS Form W-9 with borrower's TIN..... ☐

(c) Credit approvals for loan amount..... ☐

(d) Signature cards..... ☐

(e) Company authorization..... ☐

B. Documents to be prepared/provided by borrower's counsel..... ☐

1. Plans and specifications for the subdivision construction [as approved by County Auditor and City]..... ☐

(a) Plat approval..... ☐

(b) Subdivision approval..... ☐

(c) Evidence of dedicated roadway bond..... ☐

(d) Lot split approval..... ☐

2. Construction contract for new home construction..... ☐

3. Current property location survey(s); site plans;
Surveyor's certifications..... ☐
4. Lot-based maps..... ☐
5. Phase I environmental site assessment..... ☐
- (a) Wetland delineation study..... ☐
- (b) Reliance letter..... ☐
6. Current project appraisal..... ☐
7. Evidence of proper zoning for the Project..... ☐
8. Evidence of public utilities availability (electric, gas, water,
sewer) for the Project..... ☐
9. Borrower's organizational documents..... ☐
- (a) Articles of Organization..... ☐
- (b) Operating Agreement..... ☐
- (c) Certificate of full force and effect for borrower..... ☐
- (d) Company resolution authorizing borrowing..... ☐
10. ALTA mortgagee title insurance policy with standard
exceptions deleted equal to full principal amount of loan(s)
including the following endorsements..... ☐
- (a) Comprehensive endorsement (affirmative access
insurance)..... ☐
- (b) Zoning endorsement..... ☐
- (c) Pending disbursements provision..... ☐
- (d) Variable rate endorsement..... ☐

(e) Contiguity endorsement..... ☐

(f) Subdivision endorsement..... ☐

(g) Insured closing letter..... ☐

11. Insurance policies and certificates of insurance..... ☐

(a) Builder's risk..... ☐

(b) Property..... ☐

(c) Liability..... ☐

12. Evidence of compliance with US Army Corps of Engineers
permit directive..... ☐

13. Copies certified by Borrower of all authorizations including
sewer permits, zoning variances, building and other permits,
etc..... ☐

14. Copies certified by borrower evidencing subdivision
roadway dedication..... ☐

C. Miscellaneous..... ☐

1. UCC-11 Search Results [State]..... ☐

2. UCC-11 Search Results [Recorder]..... ☐

3. Preliminary Title Commitment..... ☐

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC)General Provisions (Article 1)General OverviewContracts LawTypes of ContractsConstruction
ContractsInsurance LawProperty InsuranceTitle InsuranceReal Property LawConstruction LawContractsReal Property
LawConstruction LawContractors & SubcontractorsReal Property LawFinancingConstruction LoansReal Property
LawSubdivisionsGeneral Overview



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Current Legal Forms for Real Estate

Chapter 22 DEVELOPMENT AND SUBDIVISION

Part IV. FORMS

A. ACQUISITIONS FOR DEVELOPMENT AND SUBDIVISION

26-22 Current Legal Forms for Real Estate FORM 22.01

FORM 22.01 Option to purchase land for development--provision for partial releases from purchase money mortgage

COMMENT

This chapter illustrates various types of contracts in transactions for the acquisition of real estate where the buyer's principal objective is the improvement of the property. As in all matters relating to real estate, the law applicable to transfers varies considerably from state to state, so that no single set of forms can possibly meet the requirements of the real property and contract law of every state. Each agreement must be tested against the law of the appropriate jurisdiction.

Limit on financial involvement.

Even if substantial improvements are contemplated by the buyer, the transaction may take the form of a simple transfer of unimproved land. But in most large scale projects, the buyer is anxious to put a limit on his financial involvement, with the result that the seller must often retain a stake in the enterprise. This stake may be in the form of a purchase money mortgage with provisions for the release of specific parcels as improvements on these parcels are completed by the buyer.

The seller's interest in the type of improvements and in the time for their completion may come not only from a desire to protect his purchase money mortgage but from his concern over the effect the improvements may have on other land held by the seller. In many cases, the first step in the transaction is merely an option to the buyer, giving him a chance to investigate the potentialities of the property. In some cases, a sale may be made of one parcel with the understanding that additional parcels are to be made available to the purchaser when prior commitments with respect to other parcels are fulfilled. Frequently, the seller may want to retain temporary control over the property, or he may want to preserve a permanent interest by way of

an easement or other encumbrance. On the other hand, the seller may undertake to make certain basic improvements in the land, such as streets, sewers, water mains, etc., before the buyer is required to take title. These and other contractual variations are illustrated by the forms in this group.

Partial release from mortgage.

This form is an option to acquire land, but with no special undertakings or limitations. However, it does illustrate the usual technique employed in the sale of acreage for development and subdivision. The important provision is the one that permits partial releases from the purchase money mortgage (see Paragraph 7(c)). With such a provision, the developer can sell unencumbered segments of the property as improvements on these segments are completed. Without such freedom, the developer's selling program would be inhibited since he could not convey clear title to any part of the property without satisfying the lien on all the acreage created by the purchase money mortgage.

Under this form, the developer, at the closing, is to be given a release of specific acreage in consideration for the down payment. Thereafter, the developer may obtain releases upon the payment of a specified amount for each acre, with the payments applied against the mortgage debt. Releases are to be granted only for acreage contiguous to previously release acreage. As a corollary to the release provision, the agreement provides for the prepayment of the mortgage debt without penalty.

Recording of plats.

Under the provisions of this form, the seller agrees to join in any plats that the purchaser may wish to record under local law. The agreement states that any such collaboration by the seller is only for the purpose of registering its consent to the subdivision, and is not to be construed as subdivision activity by the seller which might cause it to be classified as a "dealer" in real estate.

FORM

OPTION AGREEMENT made December 10, ____[year], between Hames Realty, Inc., a Florida corporation (the "Seller"), and James Baron, of St. Petersburg (the "Purchaser").

In consideration of the covenants hereinafter contained, and of other good and valuable consideration, it is agreed as follows:

1. *Grant of option.* The Seller grants to the Purchaser the exclusive option to purchase, upon the terms and conditions set forth below, the property situated in Sarasota County, Florida, particularly described as follows:

[Insert description]

2. *Exercise of option.* The Purchaser shall exercise this option within 90 days from the date of this agreement, by notice in writing to the Seller addressed in care of Harris & Harris, Esqs., 100 Professional Building, Sarasota, Florida. Said notice shall be either hand delivered or sent certified mail, return receipt requested. Notice shall be deemed given when received. Notice may not be given by facsimile transmission. Any attempt to give notice by facsimile transmission shall be void and of no effect.

3. *Default by purchaser.* If the Purchaser fails to exercise this option, or makes any default after he exercises it, the Seller shall retain all money paid to it by the Purchaser upon the execution of this agreement as consideration for the grant of the option to the Purchaser, and all rights of the Purchaser under this agreement shall terminate.

4. *Title Commitment.* Within 30 days after the Purchaser exercises this option as provided, the Seller, at its own expense, shall cause to be delivered to the Purchaser, or to the Purchaser's attorney, a Title Commitment for an Owner's Fee Policy of Title Insurance ("Title Commitment") from a reputable title company covering the property described in Paragraph 1 continued down to date showing the Seller's title to be good and marketable or insurable. The Purchaser shall then have 30 days in which to review the Title Commitment and to accept it if the title is good and marketable or insurable. If the Title Commitment fails to disclose the Seller's title to be good and marketable or insurable, the Purchaser shall notify the Seller in writing of any defects within the 30-day period, and the Seller shall have a reasonable time (but not more than 25 days) in which to make the title good and marketable or insurable, and shall use due diligence in an effort to do so. If, after using due diligence, the Seller is unable to make the title good and marketable or insurable within such reasonable time, the Purchaser may either accept the title in its existing condition with no further obligation by the Seller to correct any defect, or cancel this agreement. If this agreement is cancelled, all money paid by the Purchaser to the Seller upon the execution of this agreement shall be returned to the Purchaser, and this agreement shall terminate without further obligation between the parties.

5. *Environmental site assessment.* Within thirty (30) days after the Purchaser exercises this option, as herein provided, the Purchaser shall obtain an environmental site assessment at his own expense, and a wetlands delineation showing the existence of any wetlands. The environmental site assessment and wetlands delineation shall be performed by Cosmic Geo-Science, Inc., or by such other qualified environmental consulting company acceptable to both parties, in the event that Cosmic is not available. A copy of the environmental site assessment and wetlands delineation shall be provided to both Purchaser and Seller. In the event that the assessment report finds a need for testing of soil, water and/or air, or that there is an indication of a potential adverse environmental condition existing on the premises, or the existence of wetlands areas, Purchaser shall have the right to terminate this option agreement by giving written notice to Seller, as set forth in Paragraph 2 above, within ten (10) days after receipt of the assessment report from Cosmic.

In the event that Purchaser decides to terminate the agreement based on the assessment report, all funds on deposit, including the deposit of \$2,000 paid upon the execution of this agreement, shall be refunded to Purchaser immediately. The parties shall also exchange mutual releases.

In the event that Purchaser elects to terminate the agreement, Purchaser agrees not to disclose the contents of the assessment report to anyone. Purchaser acknowledges that breach of this covenant may subject him to damages for any loss suffered by Seller as a result of such disclosure.

Notwithstanding the foregoing, Seller may delay the effective date of the termination of the agreement for sixty (60) days by giving written notice to Purchaser, as set forth in Paragraph 2, and by arranging for any additional testing and/or remediation suggested in the assessment report during the said sixty (60) day period, at Seller's expense. Seller shall be required to obtain from Cosmic written evidence that the testing showed no evidence of unsatisfactory environmental conditions and/or that all remediation has been completed in compliance with all federal, state and local laws and regulations. In the event that Seller complies with the provisions of this Paragraph, Purchaser shall remain obligated to complete the purchase of said property under the terms of this agreement.

6. *Purchase price.* The purchase price for the property described in Paragraph 1 is \$165,000, to be paid by the Purchaser to the Seller as follows:

(a) \$2,000 upon the execution of this agreement, which is the consideration for the granting of this option to the Purchaser, but which shall be applied against the purchase price if this transaction closes in accordance with the terms of this agreement.

(b) \$46,000 in cash upon the closing.

(c) \$117,000 by a purchase money note and first mortgage to be executed by the Purchaser and delivered to the Seller at the closing. The note and mortgage shall contain the provisions enumerated in paragraph 7, and all other consistent provisions reasonably required for the mortgagee's protection.

7. Purchase money note and mortgage. The purchase money note and mortgage referred to in paragraph 6(c) shall contain the following provisions:

(a) The amount of the purchase money note and mortgage shall be \$117,000, which shall be payable in five installments: the first installment of \$25,000 one year from the date of closing, and the remaining four installments of \$23,000 each successively two, three, four, and five years from the date of closing. Interest at 15 percent per annum on unpaid balances shall be payable semiannually.

(b) The purchase money note and mortgage shall provide for the standard 30-day default clause, and for prepayment, in whole or in part, at any time without penalty, after January 1, ____[year].

(c) The purchase money mortgage shall provide that land subject to the lien of the mortgage may be released, in portions, under the following conditions:

(1) The Purchaser must be current on all required payments of principal and interest.

(2) Purchaser must not be in default on any of the terms and conditions of this contract, the note or the mortgage.

(3) Purchaser must tender the sum of \$1,500 per acre.

(4) The land sought to be released must be contiguous to a previously released parcel. For the first release only, the land must be adjacent to a public roadway. All acreage for release purposes shall include land used for parks, waterways and easements.

(5) The Purchaser must tender a proposed release for review and approval by Seller's attorney, together with the sum of \$150 as legal fees for said review.

Purchaser shall have the obligation to record all releases at Purchaser's sole expense.

Streets, as shown on the subdivision map, when completed and ready for dedication to the municipality, shall be released without the payment of any release fee.

(d) The purchase money mortgage shall provide that the Seller will join in any plat or plats which the Purchaser may place on record, so long as the same meets with the approval of proper governmental agencies having jurisdiction over such plats, for the purposes of evidencing the Seller's consent to such platting and of dedicating the streets, waterways, and easements as shown on such plat or plats. This provision is made at the Purchaser's request and it is not the Seller's intention to engage in or have any part in the subdividing or platting of the property as a dealer in real estate or otherwise.

(e) The purchase money mortgage shall provide that the digging of canals or lakes and the use of fill excavated on the property shall not constitute waste.

(f) Upon complete payment of the purchase money note and mortgage, the Seller shall execute and deliver to the

Purchaser a satisfaction in recordable form.

8. *Closing.* The closing under this agreement shall take place at 10 a.m. in the office of the Seller's attorneys, Harris & Harris, Esqs., 100 Professional Building, Sarasota, Florida on the fifth day after the Purchaser's acceptance of the title (or on the fifth day after the Seller has made the title good and marketable or insurable, as provided above). If the fifth day falls on a Saturday or Sunday, the closing shall take place on the following Monday.

9. *Deed.* At the closing, the Seller shall convey the property described in Paragraph 1 to the Purchaser by good and sufficient warranty deed, subject only to the lien of the purchase money mortgage executed by the Purchaser and delivered to the Seller.

10. *Release at closing.* At the closing, after the payment of \$46,000 in cash to the Seller as required by Paragraph 6(b), the Seller shall release from the purchase money mortgage a parcel of land in the northern end of the property described in Paragraph 1 consisting of a strip across the north side of the SE 1/4 of Section 28, Township 40 South, Range 19 East, 330 feet wide, containing 20 acres.

11. *Expenses.* The Seller shall pay for the documentary stamps on the warranty deed, the intangible tax on the purchase money mortgage, and the fees for recording the purchase money mortgage, and for the cost of the title insurance policy to be issued to Purchaser upon closing. The Purchaser shall pay for state stamps on the promissory note delivered to the Seller at the closing, and for the cost of recording any partial releases from the lien of the purchase money mortgage.

12. *Entire agreement.* This agreement supersedes all agreements previously made between the parties relating to its subject matter. There are no other understandings or agreements between them.

13. *Notices.* All notices or other documents under this agreement shall be in writing and delivered personally or mailed by certified mail, postage prepaid, addressed to the parties at their last known addresses.

14. *Non-waiver.* No delay or failure by either party to exercise any right under this agreement, and no partial or single exercise of that right, shall constitute a waiver of that or any other right, unless otherwise expressly provided herein.

15. *Headings.* Headings in this agreement are for convenience only and shall not be used to interpret or construe its provisions.

16. *Governing law.* This agreement shall be construed in accordance with and governed by the laws of the State of Florida.

17. *Counterparts.* This agreement may be executed in two or more counterparts, each of which shall be deemed an original but all of which together shall constitute one and the same instrument.

18. *Binding effect.* This agreement shall be binding upon and inure to the benefit of the parties, and their respective heirs, representatives, successors, and assigns.

The parties have executed this agreement the day and year first above written.

SELLER:

Homes Realty, Inc.

By: _____

President, Seller

PURCHASER:

James Baron



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Current Legal Forms for Real Estate

Chapter 22 DEVELOPMENT AND SUBDIVISION

Part IV. FORMS

A. ACQUISITIONS FOR DEVELOPMENT AND SUBDIVISION

26-22 Current Legal Forms for Real Estate FORM 22.02

FORM 22.02 Option to purchase land for subdivision development--partial releases by acre or by homesite

COMMENT

Under this agreement, the purchaser may obtain partial releases from the purchase money second mortgage on either a per acre or a homesite basis. Since the property is being acquired subject to an existing first mortgage, partial releases are probably also obtainable under that mortgage. Otherwise, the purchaser could not proceed with a piecemeal development of the land without first refinancing the existing first mortgage to provide for partial releases.

It should be noted that the seller, as the second mortgagee, agrees to join in the subdivision platting so that the lien of his mortgage becomes subordinate to any necessary dedications of streets, easements, and canals. The same subordination provision should also be contained in the existing first mortgage.

FORM

OPTION AGREEMENT made September 29, ____[year], by and between John S. Jacobs ("the Optionor"), and Central Land Company, a Florida corporation (the "Optionee").

Recitals

The Optionor has entered into a contract of sale to purchase a tract of land consisting of approximately 295 acres, more or less, in Lee County, State of Florida, and is preparing to purchase the tract under the contract of sale.

The Optionee desires to obtain an option to purchase the tract of land in order to determine to its satisfaction certain

features of usability for its intended purposes.

Now, therefore, for good and valuable considerations, the parties agree as follows:

1. *Grant of option.* The Optionor grants to the Optionee the right to purchase under the terms and conditions hereinafter set forth, a tract of land consisting of approximately 295 acres, more or less, as described in a contract of sale dated September 29, ____[year], between Jones Holding Company, as seller, and John S. Jacobs, as purchaser. The contract of sale is attached to and made part of this agreement as if incorporated herein. The parties acknowledge that, in the event the Optionor is unable to complete the purchase of the subject land from the current owner by January 31, ____[year], this option shall become null and void, and the deposit of \$1,000 shall be returned to Optionee.

2. *Consideration for option.* The Optionee has paid to the Optionor at the time of the execution and delivery of this agreement, the sum of \$1,000, receipt of which the Optionor acknowledges. If the Optionee does not exercise the option herein granted, the Optionor may retain the \$1,000 as liquidated damages, and this agreement shall then be null and void.

3. *Term and exercise of option.* This option shall continue from the date this agreement is executed to and including January 31, ____[year], and shall be exercisable only by the delivery, on or before its expiration, of written notice to the Optionor at 200 South Street, Palm Beach, Florida. Closing of the purchase transaction under this agreement shall take place at the office of William Borden, Esq., 100 Beach Drive, Palm Beach, Florida, at 10 a.m. on the tenth day (or on the next business day if the tenth day is a Sunday or legal holiday) after written notice of exercise is delivered to the Optionor.

4. *Purchase price.* If the Optionee exercises this option, it shall pay to the Optionor, against delivery of the deed as provided below, the sum of \$190,000 as follows:

(a) \$1,000 by the application of the consideration paid by the Optionee for the grant of this option.

(b) \$114,000 by taking title subject to a first mortgage in that amount, which is recorded in the Public Records of Lee County, Florida, in Mortgage Book 20 at page 150.

(c) \$75,000 by executing and delivering to the Optionor a purchase money note and second mortgage in that amount, payable in installments as follows: \$25,000 on August 28, ____[year], and \$12,500 each on February 28, ____[year], August 28, ____[year], February 28, ____[year], and August 28, ____[year]. The purchase money note and mortgage shall bear interest at 15 percent per year, payable with each installment of principal. The Optionee shall pay all required federal and state documentary stamps on the purchase money note, as well as the intangible tax on the purchase money mortgage.

5. *Additional terms of purchase money note and mortgage.* In addition to the terms set forth in Paragraph 4, the purchase money note and second mortgage shall be in form acceptable to the Optionor and shall contain the other customary and usual covenants contained in second purchase money mortgages on real estate in the State of Florida. The purchase money note and second mortgage shall also contain the following provisions:

(a) If the Optionee defaults in any payment or action required under the first mortgage referred to in Paragraph 4(b), the entire unpaid principal and interest on the purchase money note and second mortgage shall immediately become due and payable. Alternatively, the Optionor, at his option, may cure the default on the first mortgage by paying whatever sums may be necessary to cure such default and by adding such sums to the second mortgage. Said sums, together with any legal fees incurred in connection therewith, shall be deemed secured by the lien of the second mortgage.

(b) If the Optionee defaults under the purchase money note or second mortgage, the entire unpaid principal and interest

thereon shall become due and payable after a 30-day grace period.

(c) The Optionee shall be entitled to releases from the lien of the second mortgage by paying \$250 for each acre so released. The Optionee shall not be required to request releases of contiguous acres of land, but shall be entitled to releases of any tract it selects.

(d) If any part of the property is platted into lots of less than one acre, the Optionee shall be entitled to releases from the lien of the second mortgage by paying \$100 for each homesite so released. For this purpose, one homesite shall be deemed to consist of two lots, together measuring 40 feet by 125 feet.

(e) All payments made on account of releases shall be applied to the next installment of principal due under the purchase money note and second mortgage. Upon the payment of each installment of principal under the purchase money note and second mortgage, the Optionee shall be entitled to releases in accordance with the foregoing terms, to the extent not previously granted to the owner.

(f) All the preceding release provisions shall be subject to the rules and regulations for subdivisions issued by the Florida Real Estate Commission.

(g) The Optionor will, from time to time, join in a plat or plats of unreleased portions of the property encumbered by the second purchase money mortgage. The joinder by the Optionor will acknowledge, in effect, that the lien of the second purchase money mortgage, as to dedicated portions, is subordinate and subject in all respects to the plat or plats and to any dedications expressed therein. The joinder by the Optionor shall not be deemed or construed to render him liable for the paving of any streets shown on the plat or plats, or for any other obligations assumed by the owner in connection with the plat or plats, and all streets, easements, and canals shall be released without cost or charge to the owner.

(h) The Optionee may, at any time and without penalty, prepay in whole or in part the purchase money note and second mortgage, but no partial prepayment shall be made during the calendar year ____[year].

(i) The Optionee shall pay the Optionor's attorneys' fees for the preparation of partial releases, at the rate of \$25 for each acre of homesite released. Upon satisfaction of the entire purchase money note and second mortgage, the Optionee shall pay the Optionor's attorney a fee of \$100 for the preparation of a satisfaction in recordable form.

(j) The Optionee shall not assume any personal liability on the purchase money note and second mortgage, and in the event of any default thereunder no deficiency judgment will be taken against it.

6. *Deed.* At the closing, upon the payment of the purchase price by the Optionee, the Optionor shall execute and deliver to the Optionee a deed to the tract of land referred to in Paragraph 1. The deed shall convey good and merchantable title to the Optionee, its successors and assigns, free and clear of all liens and encumbrances, but subject to the first and second mortgages referred to in Paragraphs 4(a) and 4(b) and to the covenants and restrictions contained in the contract of sale referred to in Paragraph 1. Except as herein otherwise provided, the usual practices in connection with sales of real estate in the State of Florida shall govern as to adjustments, prorations, documentary stamps, recording fees, and similar items.

7. *Brokerage.* Each party represents to the other that no broker is entitled to commissions by reason of this transaction.

8. *Entire agreement.* This agreement supersedes all agreements previously made between the parties relating to its subject matter. There are no other understandings or agreements between them.

9. *Notices.* All notices or other documents under this agreement shall be in writing and delivered personally or mailed by certified mail, postage prepaid, addressed to the parties at their last known addresses, return receipt requested. Notice

shall be deemed given when received, as evidenced by the United States Postal Service return receipt. Notice given by any other method, including, but not limited to, facsimile transmission, shall not be deemed effective.

10. *Non-waiver.* No delay or failure by either party to exercise any right under this agreement, and no partial or single exercise of that right, shall constitute a waiver of that or any other right, unless otherwise expressly provided herein.

11. *Headings.* Headings in this agreement are for convenience only and shall not be used to interpret or construe its provisions.

12. *Governing law.* This agreement shall be construed in accordance with and governed by the laws of the State of Florida.

13. *Counterparts.* This agreement may be executed in two or more counterparts, each of which shall be deemed an original but all of which together shall constitute one and the same instrument.

14. *Binding effect.* This agreement shall be binding upon and inure to the benefit of the parties, and their respective heirs, representatives, successors, and assigns.

Witness the hands and seals of the respective parties the day and year first above written.

OPTIONOR:

John S. Jacobs

OPTIONEE:

Central Land Company

By: _____

President



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Chapter 22 DEVELOPMENT AND SUBDIVISION

Part IV. FORMS

A. ACQUISITIONS FOR DEVELOPMENT AND SUBDIVISION

26-22 Current Legal Forms for Real Estate FORM 22.03

FORM 22.03 Option with purchase agreement attached--provision for releases from purchase money mortgage and prior mortgage

COMMENT

If a purchaser assumes or takes property subject to a prior mortgage, the seller's agreement to deliver partial releases from a subordinate purchase money mortgage will not in itself enable the purchaser freely to sell unencumbered parcels as development progresses. As long as the prior mortgage is outstanding, the consent of that mortgagee will have to be obtained for the sale of any portion of the property. This would generally be an impossible limitation on a program for the gradual development of a large tract.

Release from all mortgages.

A feature of this agreement is an arrangement by which the purchaser's periodic payments to the seller will result in releases from the prior mortgage as well as from the subordinate purchase money mortgage given as part of the consideration in this transaction. The seller is required to apply payments received on the subordinate purchase money mortgage to reduce the prior mortgage, and to cause parcels of land released from the purchase money mortgage to be released simultaneously from the prior mortgage. Thus, while the tract of land remains subject to the lien of the prior mortgage, payments made by the purchaser to the seller will in effect reduce both mortgages. It is a condition of the transaction that the seller will deliver to the purchaser, at the closing, an agreement from the first mortgagee, in recordable form, which will provide for the necessary releases and which will protect the purchaser from any foreclosure of the first mortgage so long as the subordinate mortgage is not in default.

The option agreement in this form is followed by a purchase agreement that is to be used if the parties decide to proceed with the sale. The release from the two mortgages is provided in

Paragraphs 3 and 5 of the purchase agreement.**FORM**

OPTION AGREEMENT made November 30, ____[year], between James Kane and Mary Kane, his wife (the "Sellers"), and Southern Realty Corporation, a New York corporation, authorized to do business in the State of Florida (the "Buyer").

Whereas the Sellers are the owners of the fee simple title in and to 7,000 acres of land, more or less, in Brevard County, Florida, and more particularly described in an agreement attached as Exhibit A to this Option Agreement and made a part of it; and

Whereas the Buyer wishes to obtain an option to purchase such property, pursuant to terms and conditions set forth;

Now, therefore, for and in consideration of the sum of \$10,000 in cash paid by the Buyer to the Sellers, receipt of which is acknowledged, the Sellers give and grant to the Buyer the right to purchase the property described in the attached Exhibit A pursuant to the following terms and conditions:

1. *Term of option.* This option expires on the 2nd day of June, ____[year].
2. *Exercise.* Buyer may exercise this option by dating and executing an original and three copies of the attached Exhibit A and forwarding the same, no later than the 2nd day of June, ____[year], by Registered or Certified Mail, or delivery by hand, to the Sellers, in care of the office of Bernard Sims, Attorney, 1000 Hollywood Boulevard, Hollywood, Florida, together with a check in an amount equal to the down payment required by the attached Exhibit A, which shall constitute the down payment provided for in that Exhibit. The option shall be deemed exercised when the executed original and three copies of Exhibit A are received (if hand delivery is used), or, if mail delivery is used, when they are mailed, as evidenced by the United States Postal Service's certified receipt. Delivery by facsimile transmission or by private delivery service shall not be deemed a substitute for mail delivery.
3. *Expiration.* This option shall expire and be null and void after the 2nd day of June, ____[year], if the attached Exhibit A has not been executed and delivered and the down payment made as set forth in the preceding paragraph. In such event, the \$10,000 herewith paid shall remain the Sellers' property.

The Sellers have set their hands and seals, and the Buyer has caused this agreement to be executed by its duly authorized President, attested by its Secretary and its official seal affixed hereto, as of the day and year first above written.

SELLERS:

_____ L.S.

James Kane

_____ L.S.

Mary Kane

BUYER:

Southern Realty Corporation

By: _____

President

[Acknowledgments]

Exhibit A

AGREEMENT made this day of _____[date], by and between James Kane and Mary Kane, his wife (the "Sellers"), and Southern Realty Corporation, a New York corporation authorized to do business in the State of Florida (the "Buyer").

In consideration of the mutual covenants and undertakings hereinafter set forth, the parties hereto agree as follows:

1. *Sale.* The Sellers agree to sell and the Buyer agrees to buy, on the terms and conditions hereinafter set forth, the real property located in Brevard County, Florida, consisting of 7,000 acres of land, more or less, more particularly described as follows:

(Insert description)

The above description shall be modified subsequently to conform to the survey to be performed under the terms of Paragraph 9, below.

2. *Purchase price.* The purchase price for the above-described 7,000 acres of land, more or less, is \$555,000, which shall be paid by the Buyer in the following manner:

(a) \$105,000 in cash simultaneously with the execution of this agreement, the receipt of which the Sellers shall acknowledge.

(b) The balance of the purchase price, the sum of \$450,000, shall be evidenced by a promissory note duly executed by the Buyer to the order of the Sellers, dated as of the date of this agreement, providing for six equal installment payments of principal, each in the amount of \$75,000. These installment payments of principal shall be due each November 30 for the years ____[year], ____[year], respectively. The note shall bear interest at 15 percent per year, payable on November 30, ____[year], and semiannually thereafter, computed on the unpaid principal balance. The note shall contain a prepayment privilege, in part or in full and at any time, without premium or penalty. It shall also contain a provision for acceleration in the event of default in the payment of any installment of principal or interest. The note shall be secured by a purchase money mortgage on all of the property sold hereby.

3. *Release terms in purchase money mortgage.* The purchase money mortgage referred to in Paragraph 2(b) shall contain a provision for partial releases to be executed by the Mortgagee (Sellers) upon request and payment by the Mortgagor (Buyer) in accordance with the release schedule attached hereto and made a part hereof, marked Release Schedule, as follows:

(a) The Mortgagee shall release from the lien of the purchase money mortgage parcels of land in accordance with the Release Schedule attached hereto, and simultaneously shall cause the release from the lien of the Harris Mortgage, more

fully described below, of the same parcels of land being released from the purchase money mortgage, upon payment by the Mortgagor to the Mortgagee of \$90 per acre.

(b) All principal payments made by the Mortgagor to the Mortgagee, whether made on or before the due date or during the grace period, shall entitle the Mortgagor to partial releases at the above described release price of \$90 per acre in accordance with the Release Schedule attached hereto. All principal payments made by the Mortgagor prior to the due date thereof shall be credited by the Mortgagee on the next due installment payment of principal on the note secured by the purchase money mortgage.

4. *Additional terms of purchase money mortgage.* The purchase money note and mortgage shall provide that the liability of the maker is limited to the land secured by the purchase money mortgage, and that the holder of the purchase money note and mortgage shall not be entitled to seek or obtain a judgment against the maker, but shall only be entitled to foreclose against the lands covered by the purchase money mortgage. The purchase money mortgage shall also provide that the Mortgagee (Sellers) will join with the Mortgagor (Buyer) for the purpose of causing plats to be recorded, and that the Mortgagee will join in the dedication for canals, streets, rights-of-way, and utility easements to the extent reasonably necessary to properly subdivide an area and obtain admission to record of the proposed plat.

5. *Reduction of first mortgage.* The Sellers shall apply 90 percent of the cash paid this day by the Buyer and all principal payments on the purchase money mortgage made by the Buyer to the Sellers to the Harris Mortgage until all of the land involved in this transaction has been released from the Harris Mortgage. For all such payments made by the Sellers to the holders of the Harris Mortgage the Sellers shall obtain releases from the lien of the Harris Mortgage. All such releases will be recorded and obtained in the same order as the Sellers have hereunder agreed to release land from the lien of the purchase money mortgage being given by the Buyer to them, all as set forth in the Release Schedule attached hereto. In the event that Sellers fail to apply payments to the Harris Mortgage as described above, Buyer shall have the right to make payments directly to the holders of the Harris Mortgage.

6. *Expenses relating to purchase money mortgage.* The Sellers shall pay the recording fee of the purchase money mortgage executed by the Buyer. The Sellers and the Buyer shall divide equally the tax on the purchase money mortgage and the documentary stamps on the note secured by the mortgage. Buyer shall pay all fees in connection with any releases granted pursuant to the Harris Mortgage or the purchase money mortgage herein.

7. *Abstract of title.* On or before April 1, ____[year], the Sellers shall deliver to the Buyer one abstract of title on the property involved in this transaction. This abstract of title shall show a good, marketable, and insurable title vested in the Sellers subject only to the following exceptions:

(a) ____[year] real property taxes.

(b) The lien of that certain mortgage hereinabove referred to as the Harris Mortgage, dated May 25, ____[year], recorded in Mortgage Book 190, Page 200, of the Public Records of Brevard County, Florida.

(c) Easements of record held by The Florida Power & Light Company and road rights-of-way.

Within 30 days after receipt of the abstract of title, the Buyer shall notify the Sellers in writing of any alleged defect or cloud, other than those set forth above, and the Sellers shall have a reasonable time thereafter within which to cure the alleged defect or cloud. If the Sellers fail to cure the defect or cloud within a reasonable time after such notice, the Buyer may either take title as is and close the transaction, or terminate and cancel this agreement. If the Buyer chooses to terminate and cancel, the Sellers shall immediately return to the Buyer all of its payments made hereunder to Sellers, and the parties shall be released and relieved of all further obligations hereunder. Notwithstanding the above, if the Seller's title to less than 100 acres of land proves to be unmarketable or uninsurable, the purchase price set forth in this agreement shall be reduced by \$81 for each such acre, the amount of the purchase money note and mortgage shall be

reduced accordingly, and this transaction shall be closed in accordance with all the other terms of this agreement. Notwithstanding the foregoing, if Buyer, in its sole discretion, deems any of the less than 100 acres of land to be critical to its effective use of the remaining acreage, then Buyer may terminate and cancel this agreement as described above.

8. *Closing.* This transaction shall be closed, subject to all of the provisions hereof, at the office of Bernard Sims, Attorney, 1000 Hollywood Boulevard, Hollywood, Florida, on July 1, ____[year]. At the closing, ____[date], real property taxes shall be prorated to the date of closing. At the closing, the Sellers shall execute a general warranty deed, with documentary stamps affixed, conveying the property described in Paragraph 1 to the Buyer, subject only to the exceptions herein set forth. The Sellers shall also deliver to the Buyer an instrument in recordable form duly executed by the holders of the Harris Mortgage which will provide in substance as follows: (a) so long as the Buyer makes all required payments of principal and interest on the purchase money mortgage given by it to the Sellers, then in the event of foreclosure of the Harris Mortgage, the land involved in this transaction will not be included in such foreclosure; and (b) releases of land from the lien of the Harris Mortgage will be furnished by the holders of that mortgage on the basis of one acre for each \$75 of principal received by them; and (c) Sellers certify that there are no defaults under the terms of the Harris Mortgage, and Sellers agree to provide prompt notice to Buyer in the event Sellers fail to fulfill the terms of the said Harris Mortgage.

9. *Survey of land.* The Buyer may employ Jones & Gordon, Surveyors, or any other registered surveyor mutually agreed upon by the parties, at the Buyer's expense, to make a survey of the property involved in this transaction. The parties agree to be bound by the results of such survey as to the determination of the number of acres in each section of land involved in this transaction. If, as a result of the survey, the number of acres in the aggregate differs from the number of acres set up in Paragraph 1, the purchase price will be increased or decreased accordingly, at the rate of \$81 per acre. A certified copy of the survey shall be delivered to the Sellers' attorney at least ten days before the scheduled closing date of this transaction. If the survey is not so delivered to the Sellers' attorney, this transaction shall be closed on the scheduled closing date, and the number of acres provided for in Paragraph 1 shall be used as the basis for the closing. Notwithstanding the foregoing, in the event that the delay in providing the survey is due to the surveyor not having completed the survey, the closing shall be postponed to a date agreeable to both parties which is at least ten (10), but not more than twenty (20), days after completion of the survey.

10. *Brokerage.* The parties agree that Darwin Realty Company of Melbourne, Florida, is the real estate broker who negotiated this agreement. The Buyer agrees to pay the broker the real estate broker's commission in accordance with a separate agreement made this day between the Buyer and the broker. The Buyer shall hold and save harmless the Sellers from any and all claims, demands, or obligations to the broker arising out of this transaction.

11. *Environmental site assessment.* Sellers agree to provide Buyer with an environmental site assessment report at least ten (10) days prior to the scheduled date of the closing. The assessment must be performed by one of the companies listed below and contain a provision stating that there is no evidence of the existence of any adverse environmental condition due to the release of any substance listed as hazardous in the Resource Conservation Recovery Act (RCRA), the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), or the Toxic Substances Transportation Act, or any other environmental condition that would cause the land to be in violation of any federal, state or local environmental laws.

The assessment shall also include a wetlands delineation evidencing that there are no wetlands located within the land.

The companies include:

(a) Accu-Environmental Services, Inc.

(b) Tenzer Labs, Inc.

(c) Mercury Geo-Science, Inc.

12. *Assignment.* The Buyer may assign this agreement to any person, firm, or corporation, prior to the closing date. The Buyer shall deliver to the Sellers an executed copy of any such assignment, in which event the Sellers shall close the transaction with the Buyer's assignee.

13. *Entire agreement.* This agreement supersedes all agreements previously made between the parties relating to its subject matter. There are no other understandings or agreements between them.

14. *Notices.* All notices or other documents under this agreement shall be in writing and delivered personally or mailed by certified mail, postage prepaid, addressed to the parties at their last known addresses.

15. *Non-waiver.* No delay or failure by either party to exercise any right under this agreement, and no partial or single exercise of that right, shall constitute a waiver of that or any other right, unless otherwise expressly provided herein.

16. *Headings.* Headings in this agreement are for convenience only and shall not be used to interpret or construe its provisions.

17. *Governing law.* This agreement shall be construed in accordance with and governed by the laws of the State of Florida.

18. *Counterparts.* This agreement may be executed in two or more counterparts, each of which shall be deemed an original but all of which together shall constitute one and the same instrument. At the trial of any matter relating to this instrument, only one counterpart need be produced. There shall be no presumption that the inability or failure to produce all alleged counterparts indicates a revocation or nullification of this agreement.

19. *Binding effect.* This agreement shall be binding upon and inure to the benefit of the parties, and their respective heirs, representatives, successors, and assigns.

The Sellers have set their respective hands and seals and the Buyer has caused this agreement to be executed by its duly authorized officers and has affixed its corporate seal, the day and year first above written.

SELLERS:

_____ L.S.

James Kane

_____ L.S.

Mary Kane

BUYER:

Southern Realty Corporation

By: _____

President

[Acknowledgments]



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Chapter 22 DEVELOPMENT AND SUBDIVISION

Part IV. FORMS

A. ACQUISITIONS FOR DEVELOPMENT AND SUBDIVISION

26-22 Current Legal Forms for Real Estate FORM 22.04

FORM 22.04 Options to purchase land for development--separate options exercisable progressively

COMMENT

A program of land development may require the owner of the land to retain at least a temporary stake in the enterprise. Frequently, this stake is represented by a purchase money mortgage from which the developer may periodically obtain partial releases. In contrast, the owner's stake under this agreement is represented by long-term options to which he has subjected his property. The developer is never obligated to purchase the entire tract of land from the owner, although he has an option to do so. In addition to the option to purchase the entire tract, the developer has a series of separate options to purchase the various parcels which make up the entire tract. At each stage in the program, the developer can preserve his option over the balance of the entire tract only by purchasing one parcel and by paying an additional consideration for an extension of the option period.

Purchase of separate parcels of land.

Upon each purchase of a parcel, the developer must pay in cash the full price for that parcel. Thus, as with the purchase of an entire tract with the right in the purchaser to obtain partial releases, this arrangement provides for the gradual acquisition of unencumbered land. In either case, the purchaser may subdivide, develop, and rent or sell according to a plan of gradual free and clear acquisition of property. However, in contrast with the purchase of an entire tract, this arrangement permits the purchaser to judge his future needs for additional land as his development progresses, without committing himself in advance to purchase the entire tract.

Many development programs start with an option in favor of the developer in order to give him time within which to check out the soundness and feasibility of the venture. Under this agreement, three preliminary requirements are introduced by the developer (see Paragraph 5). No obligation

of any kind is to be incurred by him unless before a fixed date prescribed conditions are fulfilled with respect to mortgage loans, zoning restrictions, and water and sewer services.

FORM

OPTION AGREEMENT made November 25, ____[year], between Smith Realty Corporation, a Colorado corporation (the "Seller"), and William M. Adkins, of Denver, Colorado (the "Purchaser").

1. *Grant of option.* In consideration of the sum of \$25,000 paid by the Purchaser to the Seller, the receipt of which the Seller acknowledges, the Seller grants to the Purchaser the rights and option, upon the terms and conditions set forth below, to purchase a tract of 640 acres of real property in the County of Arapahoe, State of Colorado, described as follows:

(Insert description)

The consideration of \$25,000 is solely for the grant of this option. It shall not be applied against any purchase price that the Purchaser is required to pay under this agreement, and it shall not be repaid to the Purchaser except as specifically provided below.

2. *Option price for single purchase.* If the Purchaser exercises the option to purchase the entire tract of 640 acres on or before April 15, ____[year], the purchase price shall be the sum of \$1,000,000.

3. *Option and option prices for progressive purchases.* If the Purchaser does not elect to purchase the entire tract of 640 acres as provided in Paragraph 2, he may elect to purchase a minimum of 40 acres, to be designated by him, upon the payment of \$68,000 on or before April 15, ____[year]. Thereafter, the Purchaser shall have the following options to purchase a part or all of the balance of the tract, to be designated by him, upon the payment of the following amounts on or before the following dates, and such options shall continue as specified herein:

Date	Payment	Pays for
April 15, [year]		\$ 26,250 Option on 600 acres to October 15, [year]
October 15, [year]		68,000 40 acres land purchase
October 15, [year]		42,000 Option on 560 acres to October 15, [year]
October 15, [year]		136,000 80 acres land purchase
October 15, [year]		36,000 Option on 480 acres to October 15, [year]
October 15, [year]		36,000 Option on 480 acres to October 15, [year]
October 15, [year]		136,000 80 acres land purchase
October 15, [year]		30,000 Option on 400 acres to October 15, [year]
October 15, [year]		136,000 80 acres land purchase
October 15, [year]		24,000 Option on 320 acres to October 15, [year]
October 15, [year]		136,000 80 acres land purchase
October 15, [year]		18,000 Option on 240 acres to October 15, [year]
October 15, [year]		381,000 240 acres land purchase

4. *Condition of title.* Title to all property shall be conveyed by good and sufficient warranty deed, free and clear of all liens and encumbrances, except the current year's general taxes which shall be prorated to the date of the delivery of the deed, and except any and all special taxes levied or assessed for special improvements on such property after the date hereof. The Seller shall make a satisfactory settlement with the tenant farmer presently on the property, release the Purchaser from any obligation to such tenant farmer, and deliver possession upon closing.

5. *Conditions attached to option.* The consideration paid by the Purchaser for the options granted under this agreement is subject to the following conditions:

(a) The Seller shall cooperate with the Purchaser in his negotiations with the Arapahoe County Bank, so as to obtain loan approval on or before April 15, ____[year].

(b) The Seller shall cooperate with the Purchaser in his efforts to obtain zoning, including approval for 9,000 square foot lots for approximately 25 percent of the area of Section 30, Township 6 South, Range 68 West of the 6th P.M.; and zoning approval for 13,500 square foot lots for approximately 50 percent of the area of such Section 30; and zoning approval for one-half acre lots for approximately 25 percent of the area of such Section 30.

(c) Water and sewer service shall be available to such Section 30, Township 6 South, Range 68 West of the 6th P.M. at the present tap charge of \$250 for sewer taps and \$200 for water taps for each residential lot, plus any connection fees, inspection fees, or tap fees made by the water district or sanitation district of the City of Englewood. However, the Purchaser shall at his own expense run the water and sewer lines from the present facilities to the property purchased or to be purchased by him under this agreement.

In the event that water service is not available as described above, Purchaser, at his own expense, may drill wells and install storage tanks, pumping stations and such other facilities as are needed to supply water to the land. In such case, Seller shall extend the time in which to exercise each option described above in Paragraph 3 by one (1) year.

In the event that, after installation of a water system, Purchaser does not exercise some or all of the options described above in Paragraph 3, then Seller shall require all future purchasers of the land that was not purchased by the Purchaser to obtain water services from Purchaser.

If the Purchaser cannot meet or does not waive the above conditions regarding loan approval, zoning, and water and sewer service before April 15, ____[year], the \$25,000 paid for the option shall be immediately returned to the Purchaser and both parties shall be completely released from this agreement.

6. *Wetlands.* Seller shall provide Purchaser with proof that no wetlands--as defined by federal or state laws or regulations--exist within the optioned areas. In the event that wetlands do exist, the purchase price shall be reduced by \$1,000 for each acre, or part thereof, containing such wetlands. In the event that 5 percent or more of any optioned section, as set forth in Paragraph 3, is designated as wetlands, Purchaser shall not be obligated to purchase that section, but may purchase other sections instead.

7. *Environmental audit*

(a) Purchaser shall be entitled to obtain, at his own expense, a Phase I environmental site assessment. The assessment shall be completed on or before April 15, ____[year]. In the event that the Phase I assessment indicates that there is evidence of an adverse environmental condition, Purchaser shall be relieved of his obligation to purchase, the \$25,000 shall be returned to him, and both parties shall be released from this agreement.

(b) In the event that the Phase I assessment indicates that further testing is needed, Purchaser may either terminate this agreement and obtain a refund of the \$25,000 or have additional testing performed. Seller shall pay for half of the cost

of such additional testing. If the testing reveals no adverse environmental condition, Purchaser shall remain obligated under the terms of this agreement. If the testing reveals an adverse environmental condition, then Purchaser may terminate the agreement and the \$25,000 paid for the option shall be returned to him.

(c) Unless presented with a valid subpoena or court order, each party shall not reveal the outcome of the Phase I environmental site assessment, or the outcome of any additional testing, to any third person without the prior written permission of the other party. Notwithstanding the foregoing, Purchaser may reveal the results once he is the owner of the optioned parcels. Seller may reveal the results in the event Purchaser terminates the agreement and receives a refund of the \$25,000 payment.

8. *Right of entry.* The Seller grants to the Purchaser the right to enter upon the tract at any time prior to the closing for the purpose of making surveys, engineering studies, soil tests, and other tests or studies which the Purchaser may deem necessary in connection with the development of the property, but such work shall not interfere with the tenant farmer's farming activities.

9. *Title report.* The Seller shall furnish a preliminary title commitment satisfactory to the Purchaser for the entire tract on or before 20 days from the date hereof, and also an owner's title policy for each parcel of land purchased under this agreement.

10. *Exercise of option and closing.* The Purchaser shall notify the Seller if he desires to exercise any option granted herein and shall designate in the notice the acreage to be conveyed to him. The Purchaser shall furnish a copy of the notice to Mountain Title Company, Denver, Colorado, accompanied by his check in an amount equal to the purchase price of the designated parcel. Within ten days after receipt of the notice, the Seller shall deliver to the title company a good and sufficient warranty deed conveying the designated parcel to the Purchaser. The deed shall be free and clear of all liens and encumbrances, except the current year's general taxes which shall be prorated, and special improvement taxes as of the date of closing the escrow, plus any special taxes paid by the Seller after the date of this agreement. The closing shall take place upon the receipt by the title company of the Purchaser's check in the amount of the purchase price and of the Seller's warranty deed. Simultaneously therewith, the title company shall issue its policy of title insurance covering the designated parcel and shall record the warranty deed and disburse the net proceeds from the sale to the Seller.

11. *Time of the essence.* Time is expressly declared to be of the essence of this agreement. If the Purchaser does not make, tender, or perform any payment or other condition as provided herein, this agreement shall be void and of no effect. In that event, both parties shall be released from all obligations hereunder, the Seller shall retain any and all payments made to it by the Purchaser, and the Purchaser shall retain all property paid for in full.

12. *Assignment.* The Purchaser may assign this agreement in whole or in part by giving written notice to the Seller. The Purchaser and his assigns, by the execution of this agreement, shall incur no personal liability.

13. *Notices.* Any notice required under the terms of this agreement shall be deemed to have been given within 48 hours after the notice has been deposited in the United States mails, postage prepaid, addressed to the Seller at 100 Main Street, Denver, Colorado, and to the Purchaser at 200 South Street, Denver, Colorado, until the parties shall designate any other address. Notice sent by facsimile transmission shall not be deemed effective. Notices sent by private delivery service or by overnight courier shall be deemed effective if a receipt of delivery is obtained.

14. *Commissions.* The Seller shall pay the commissions, as and when parcels are purchased and paid for by the Purchaser under this agreement, in accordance with the separate letter agreement made with Hayes Realty Company of Denver, Colorado. Seller shall hold Purchaser harmless against claims for commissions due.

15. *Entire agreement.* This agreement supersedes all agreements previously made between the parties relating to its

subject matter. There are no other understandings or agreements between them.

16. *Non-waiver.* No delay or failure by either party to exercise any right under this agreement, and no partial or single exercise of that right, shall constitute a waiver of that or any other right, unless otherwise expressly provided herein. A valid waiver by either party shall not be deemed to extend the amount of time available to perform any other act required hereunder.

17. *Headings.* Headings in this agreement are for convenience only and shall not be used to interpret or construe its provisions.

18. *Governing law.* This agreement shall be construed in accordance with and governed by the laws of the State of Colorado.

19. *Counterparts.* This agreement may be executed in two or more counterparts, each of which shall be deemed an original but all of which together shall constitute one and the same instrument. At the trial of any matter relating to this instrument, only one counterpart need be produced.

20. *Binding effect.* This agreement shall be binding upon and inure to the benefit of the parties, and their respective heirs, representatives, successors, and assigns.

In witness whereof the Seller has caused its corporate officers to execute this option, and the Purchaser has set his hand and seal at Denver, Colorado, this 25th day of November, ____[year].

Attest:

Secretary

Smith Realty Corporation

By: _____
President

William M. Adkins



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Current Legal Forms for Real Estate

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Current Legal Forms for Real Estate

Chapter 22 DEVELOPMENT AND SUBDIVISION

Part IV. FORMS

A. ACQUISITIONS FOR DEVELOPMENT AND SUBDIVISION

26-22 Current Legal Forms for Real Estate FORM 22.05

FORM 22.05 Option to purchase land for long-term development program--basic option and successive suboptions--temporary rights in land reserved by seller

COMMENT

This agreement involves a large tract of land which is to become the subject of a long-range development program. The technique used to provide the developer with a continuing interest in the entire tract involves a basic option together with a series of suboptions. Under the basic option, the developer is required to make a down payment and monthly payments over a seven-year period. While these payments may be applied in a prescribed manner toward the ultimate purchase price, their basic function is to keep alive the option on the entire tract during the extensive development period.

The function of the eight suboptions is to permit the developer to spread his purchases over an eight-year period. Each suboption covers a separate parcel in the tract and each provides a specific purchase price and method of payment for that particular parcel. Because of the length of this program, the agreement encompasses the obligations of the parties with respect to such matters as special assessments, damages to the property, and condemnation.

Exercise of suboptions.

The suboptions are exercisable in a prescribed order, with final exercise dates spaced from one to eight years. If the developer fails to exercise any suboption, the suboptions as to all remaining parcels are cancelled. Moreover, any default in the notes and mortgages given by the developer on property previously purchased likewise results in a termination of all unexercised suboptions. On any exercise of a suboption, the developer is required to make a prescribed down payment and to execute a note and purchase money mortgage for the balance.

Periodic release from lien.

As in the case of many subdivision development ventures, this agreement provides for the periodic release of property from the lien of the purchase money mortgage upon the payment of prescribed amounts. Such releases may be obtained either on an acreage basis or on a platted subdivision basis. In each case there are conditions attached to the granting of releases. On a subdivision basis, these conditions include a platting that measures up to a specific standard, the furnishing of a bond for the construction of streets and other facilities, and the satisfaction of a minimum scale of progress in the development program.

Easements and other restrictions.

Particularly in large long-range programs, the seller of undeveloped acreage may want to use the property temporarily for himself, or may choose to impose permanent restrictions on its use by the purchaser. The motivation may be the seller's ownership of adjacent land; his desire to continue farming, forestry, or some other business on the land; or his intention to exploit valuable interests in the property. Conditions or limitations that survive the passage of title to property may be imposed by covenants restricting the buyer's use; by easements permitting use of the land by the seller; by reservations of mineral, timber, or other specific rights; or by contractual provisions obligating the purchaser to fulfill a prescribed development program with respect to the property.

This agreement illustrates provisions for easements to be reserved in deeds, which will allow the seller extensive use of the property and will cause minimum interference with the purchaser. The seller has retained the right to the exclusive use of the property for an initial three-year period. During this time the purchaser may engage in the necessary preliminaries to construction: surveying, mapping, engineering, and taking soundings on the land. Following this initial period, the seller's right continues for two more years, but only with respect to land not physically under development.

Partial releases of some of the property from the lien of any purchase money mortgage will not affect the seller's right to his exclusive use. For the benefit of those parcels that are only under option, the seller has retained various easements and rights-of-way over those parcels which do in time become the property of the purchaser. The purpose here is to preserve access to and utility privileges for those parcels that are in fact never sold to the purchaser because the project ultimately is not completed as planned. In addition, the seller has reserved limited timber rights.

FORM

OPTION AGREEMENT executed as of September 28, ____[year], between Charles Franklin (the "Seller"), residing at 100 Fifth Avenue, New York, New York, and Seaside Realty Company, a Florida corporation, having its principal office at 100 Northeast 2nd Street, Miami, Florida (the "Purchaser").

The Seller grants to the Purchaser, for the period or periods herein provided, the exclusive right and option to purchase the land described in Schedule A hereto attached, under the following conditions:

1. *Form of deed and reservations by seller.* The seller shall make all conveyances of land by fee simple deeds subject to the exceptions and reservations set forth in Schedule B hereto attached that apply to the particular land then being conveyed; together with any exceptions that may hereafter occur not as a result of acts or volition of the Seller, provided that he will reduce the sale price, as hereinafter set forth, of the particular parcel or parcels containing the land affected

by any such future exception to the extent of the net amount of money that he may have received on account thereof prior to conveying the land to the Purchaser. Such reduction shall be applied in the manner set forth in Paragraph 7, below, but no return of, or credit for, any option money, or other money, received by the Seller from the Purchaser under this Option shall be required. Notwithstanding the above, at the time of conveyance hereunder the Seller shall reserve the following reservations, which shall be expressed in the deeds:

(a) Ingress and egress easements for highway and travel purposes and for installation and maintenance of water, power, telephone, and other utilities over, along, and across all now existing and future roads and waterways on or through the land, public or private, for the benefit of the Seller's land not theretofore conveyed to the Purchaser. However, the Purchaser may relocate any such easement if the relocation meets the following conditions: it provides for substantially similar access; the relocation, including that of the utilities, is at the Purchaser's sole expense; and it occurs with the Seller's written consent, which he shall not unreasonably withhold.

(b) Such reasonable right-of-way reservations or provisions for the benefit of the Seller's land not previously conveyed to the Purchaser as may assure to the land public road access to Bayview Road.

(c) For a period of three years after the date of this agreement and free of rent or charge, the exclusive possession for use, as the land subject hereto is presently being used, of all of the land described in Schedule A even if some, or all, of it shall have been released or discharged from the lien of the mortgage or mortgages hereinafter mentioned, including possession of and title to crops in the ground. This reservation shall continue in like manner for the fourth and fifth years after the date hereof but only as to land not then physically under development by the Purchaser.

(d) All stumps and dead and down timber on all of the land described in Schedule A, free of charge, for a period of three years after the date of this agreement; provided that if the same is not removed from the land within the three years, this reservation shall cease; and provided further that the Seller shall not cut any growing timber after the date hereof.

The Purchaser may at any time hereafter survey, map, engineer, make and take soundings on any land subject to this Option, even during the period the Seller has exclusive possession as set forth above, provided such acts do not unreasonably interfere with such exclusive possession and use, and provided further that the Purchaser shall indemnify and hold the Seller harmless from any and all damage and liability occasioned thereby. The form of fee simple deed to be used by the Seller is attached as Exhibit 1 and the appropriate date, land description, and exceptions and reservations shall be inserted into each deed.

2. *Title objections.* If title to the premises shall be unmarketable by reason of any material objections other than those to which title is to be taken, the Seller shall pay to the Purchaser the amount actually expended by it in removing such objections, provided, however, that the Seller's total obligation pursuant hereto shall not exceed \$5,000. In the event that the removal of such objections to title can reasonably be expected to exceed \$5,000, Purchaser may, in its sole discretion, terminate this agreement, and receive a refund of any option funds paid or, alternatively, Purchaser may complete the removal of said objections, paying all expenses beyond \$5,000. This shall be the Purchaser's only remedy for any material objection, and this Option shall remain in full force and effect, unless so terminated.

3. *Exclusion of personal property.* No sale of any personal property now or hereafter located on the land described herein is included in this Option or is to be included in any deeds given to the Purchaser pursuant hereto, including, but not limited to, harvested crops. All buildings (and improvements thereto), barns, and fences shall be considered real estate and included in this Option. However, any removal thereof other than as set forth in Paragraph 6, shall not be or constitute a breach of this Option or default thereunder by the Seller, but shall only reduce the option sales price of that parcel from which the real estate was so removed by the appraised value of that property so removed, the reduction to be applied in the manner set forth in Paragraph 7. No return of, or credit for, any option money, or other money, received by the Seller from the Purchaser under this Option shall be required.

4. *Use of land prior to conveyance.* The Seller makes no representations or warranties whatsoever as to his continued use or maintenance of the land described herein prior to delivery of deeds hereunder. It is expressly understood that prior to the delivery of a deed to land, the Seller may use and maintain the land as set forth in Paragraph 1, above.

5. *Special assessments on land prior to conveyance.* If any land not yet conveyed to the Purchaser is affected by any special assessment or assessments caused by and attributable to improvements made by it or others to or on the land theretofore conveyed by the Seller, the Purchaser shall reimburse the Seller for the amount of the special assessment or assessments paid by him at the time of conveyance. A special assessment shall not be deemed to be any ad valorem tax levied on the land or any increase therein.

6. *Damage to property.* From and after the date hereof, the Seller shall not be liable for any damage to the real estate, including, but not limited to the buildings, improvements, barns, fences, and timber thereon, by fire, the elements, or any other cause, however occasioned, including damage by fire or otherwise occasioned by the use of the premises by the Seller, his employees, agents, servants, guests, invitees, and family, whether occurring prior to conveyance hereunder or during the period of his reservation of exclusive use and possession, as hereinbefore set forth. On account of any such damage, there shall be no reduction in or return of sale price, nor return of, or credit for, any option money, or other money, received by the Seller from the Purchaser. In addition, all payments for such losses made under policies of insurance owned by the Seller shall belong to him.

7. *Condemnation.* If any land subject to this Option is condemned or taken by eminent domain before it is conveyed by the Seller and while the Option is in full force and effect, the Purchaser shall be made a party to the proceedings. If the parties cannot agree as to the award to be accepted, the amount shall be determined by trial in any court of competent jurisdiction. Any award shall be paid to the Seller, but the net amount received after payment of all expenses and fees which he incurs shall reduce the sale price, as set forth below, of the parcel or parcels that would have contained the land so condemned or taken by eminent domain. The reduction shall first be applied to the principal balance of the mortgage on the parcel in inverse chronological order of the installment payments thereof. In no event shall there be any return of, or credit for, any option money payments, or other money, theretofore received or thereafter to be received by the Seller under this Option.

8. *Environmental assessment.* Purchaser may obtain an environmental site assessment at any time before the exercise of the first suboption hereunder. In the event the assessment shows that a need exists for testing of soil, water and/or air, or that there is an indication of a potential adverse environmental condition existing on the premises, Purchaser may terminate this agreement and shall be entitled to a full refund of any funds already paid to Seller to date. Seller shall have no obligation to correct or remediate any adverse environmental condition. An adverse environmental condition shall be deemed to exist if any of the following exist on or below the optioned parcels:

(a) underground storage tanks;

(b) hazardous substances, as defined in the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), the Resource Conservation Recovery Act (RCRA), and/or the regulations promulgated pursuant thereto; or

(c) buried refuse.

9. *Definitions.* For the purposes of this agreement: "Option" is defined to mean this entire agreement; "suboption" is defined to mean the right to purchase one parcel pursuant to the terms hereof; and "fiscal option year" is defined to mean a year beginning with the date hereof or any subsequent annual anniversary date hereof, and ending one year thereafter; i.e., if the date hereof is September 28, ____[year], the first fiscal option year shall be September 28, ____[year], to and including September 27, ____[year] and "annual anniversary date" is defined to mean a date occurring one year after the date hereof; i.e., if the date hereof is September 28, ____[year], the first annual anniversary date hereof shall be September 28, ____[year], the second September 28, ____[year], etc.

10. *Option periods and prices.* For the purpose of exercising suboptions hereunder, the land is divided into eight Parcels as particularly described in Schedule C hereto attached, which also sets forth the agreed number of acres of land in each Parcel. The sale price of each Parcel and the date by which the suboption for its purchase must be exercised are as follows:

Parcel Number	Sale Price	Exercise Date
1	\$ 573,000	First annual anniversary date hereof
2	950,000	Second annual anniversary date hereof
3	965,000	Third annual anniversary date hereof
4	1,204,000	Fourth annual anniversary date hereof
5	1,210,000	Fifth annual anniversary date hereof
6	1,203,000	Sixth annual anniversary date hereof
7	1,360,000	Seventh annual anniversary date hereof
8	935,000	Eighth annual anniversary date hereof
Total Sale Price of All Parcels		\$8,400,000

11. *Exercise of options and terms of payment.* The Purchaser may exercise its suboption to purchase any Parcel on or before the annual anniversary date hereof by which it must be exercised as set forth above. Suboptions may be exercised only in the order of the numerical descriptions of the Parcels, i.e., the suboption for the purchase of Parcel 1 must be exercised prior to the exercise of the suboption for the purchase of Parcel 2, the suboption for the purchase of Parcel 2 must be exercised prior to the exercise of the suboption for Parcel 3, etc. If the last day for the exercise of any suboption is a Saturday, Sunday, or legal holiday, it may be exercised on the next full business day. The exercise of any suboption shall be by written notice thereof delivered or mailed by registered mail to the Seller by the Purchaser. The notice shall state a date and time not less than 15 days nor more than 30 days thereafter (other than a Saturday, Sunday, or legal holiday) for the exchange of the deed, mortgage, and note necessitated by such exercise. If the Purchaser fails to exercise its suboption to purchase any Parcel of land, this option shall immediately cease as to that Parcel and all remaining parcels. Except as otherwise hereinafter provided, the terms of payment for the land upon the exercise of each suboption shall be as follows:

Parcel Number	Required Cash Payment at Time of Exercise of Subscription	Amount of Deferred Balance Required to be Evidenced by Note and Secured by Mortgage	Maturity Date of Deferred Balances
1	\$ 40,000	\$ 533,000	\$40,000 payable on or before the second annual anniversary date hereof; \$120,000 payable on or before the third annual anniversary date hereof; \$240,000 payable on or before the fourth annual

			anniversary date hereof; and the remaining principal balance of \$133,000 payable on or before the fifth annual anniversary date hereof.
2	80,000	870,000	\$264,000 payable on or before the fifth annual anniversary date hereof; \$560,000 payable on or before the sixth annual anniversary date hereof; and the remaining principal balance of \$46,000 payable on or before the seventh annual anniversary date hereof.
3	120,000	845,000	\$650,000 payable on or before the seventh annual anniversary date hereof; and the remaining principal balance of \$195,000 payable on or before the eighth annual anniversary date hereof.
4	160,000	1,044,000	\$625,000 payable on or before the eighth annual anniversary date hereof; and the remaining principal balance of \$419,000 payable on or before the ninth annual anniversary date hereof.
5	160,000	1,050,000	\$525,000 payable on or before the ninth annual anniversary date hereof; and the remaining principal balance of \$525,000 payable on or before the tenth annual anniversary date hereof.
6	160,000	1,043,000	\$280,000 payable on or before the tenth annual anniversary date hereof; and the remaining principal balance of \$763,000 payable on or before the 11th annual anniversary

			date hereof.
7	160,000	1,200,000	\$60,000 payable on or before the 11th annual anniversary date hereof; \$850,000 payable on or before the 12th annual anniversary date hereof; and the remaining principal balance of \$290,000 payable on or before the 13th annual anniversary date hereof.
8	160,000	775,000	\$400,000 payable on or before the 13th annual anniversary date hereof; and the remaining principal balance of \$375,000 payable on or before the 14th annual anniversary date hereof.
Totals	\$1,040,000	\$7,360,000	

The notes and mortgages provided for above, shall bear interest at the rate of 8 percent per year on their unpaid principal balance, payable one year after the date thereof and annually thereafter. Anything in this Option to the contrary notwithstanding, if the Purchaser exercises a suboption to purchase any Parcel of land prior to the annual anniversary date, for exercising such suboption, the Purchaser shall first pay to the Seller all principal installment payments, together with interest thereon to the date of such payment, on notes and mortgages securing same given as part of the sales price of land with respect to which suboptions have been theretofore exercised as would be due and payable had the purchaser awaited the exercise of the suboption until such annual anniversary date by which it must be exercised.

The deferred balance owing on the exercise of the suboption for the purchase of each Parcel shall be evidenced by an installment promissory note in the form of Exhibit 2, attached hereto. The note shall be dated as of the date on which the suboption is exercised or is delivered, whichever is the earlier, with appropriate principal payments and dates to be inserted therein. The note shall be secured by a first purchase money mortgage on the Parcel, the purchase of which occasioned the note, and both the purchase money mortgage and the deed for such Parcel shall be dated the date of the note. The form of the first purchase money mortgage shall substantially conform to Exhibit 3 hereto attached and the appropriate date, land description, description of the indebtedness secured thereby, and provisions for partial releases as hereinafter set forth shall be inserted in each such mortgage.

If at any time there is a default in any term, covenant, or condition of a note or mortgage, no remaining suboption may be exercised until the default is cured. If there is any such default for a period of 30 days after the Seller gives written notice thereof to the Purchaser: (a) this Option shall immediately cease and terminate as to all Parcels for which the Purchaser has not exercised its suboption to purchase at the time of the default, and the Seller shall retain all option money then in his hands; and (b) anything in a note or mortgage to the contrary notwithstanding, the mortgagee of any

mortgage may declare all sums of money, including accrued interest, remaining unpaid on the mortgage and the note to be immediately due and payable.

12. *Limitation on prepayments.* The Purchaser may not, without the Seller's consent, make any additional cash payments on the exercise of a suboption, prepayments of mortgage, or release payments, or exercise any suboption prior to the date by which it must be exercised if the additional payment or exercise will cause the Seller to receive more than 30 percent of the selling price of any parcel in the Seller's then tax year. The Purchaser may prepay any note and mortgage, without penalty, except as provided herein, provided that interest accrued to date of such prepayment is also paid. The notes and mortgages shall contain appropriate provisions to give effect to this paragraph. In addition, each note and mortgage shall contain an appropriate provision to the effect that no deficiency judgment may be taken against its maker in any suit to foreclose the mortgage, and that any judgment on the note resulting from an action brought thereon shall provide that the same shall not be a lien or charge against any property of the maker other than the premises mortgaged to secure the payment thereof.

13. *Consideration for basic option and method of application.* The Purchaser herewith pays to the Seller \$50,000 in partial consideration of the granting of this Option, and the Seller acknowledges receipt thereof. In further consideration of the Seller keeping this Option in full force and effect, the Purchaser must each month hereafter make further payments ("Option Money") to the Seller as follows:

(a)	During the first fiscal option year after date hereof \$10,000 per month, being a total of	\$120,000
(b)	During the second, third, fourth, and fifth 720,000 fiscal option years after date hereof \$15,000 per month, amounting to \$180,000 per year and being a total of	720,000
(c)	During the sixth fiscal option year after date hereof \$10,000 per month, being a total of	120,000 and
(d)	During the seventh fiscal option year after date hereof \$2,500 per month, being a total of	30,000

\$990,000

The first monthly option money payment shall be made one month after the date hereof, and all subsequent payments shall be made on the same day of each month thereafter until all required monthly option money payments have been made. Anything in this Option to the contrary notwithstanding, if the Purchaser exercises a suboption to purchase any Parcel of land prior to the annual anniversary date by which it must be exercised, as a prerequisite and condition to exercise, the Purchaser shall first pay to the Seller all option money that would have been required to be paid had the Purchaser awaited the exercise of the suboption until the annual anniversary date by which it had to be exercised. If the Purchaser is not in default under any term, covenant, or condition of this Option, as and when the suboptions are exercised, it may apply out of the option money already paid amounts sufficient to make the "Required Cash Payment at Time of Exercise of Suboption" as set forth in Paragraph 11; that is, \$40,000 to make the required cash payment as to Parcel 1, \$80,000 as to Parcel 2, \$120,000 as to Parcel 3, and \$160,000 as to each of Parcels 4, 5, 6, 7, and 8. However, the Purchaser may not apply the option money toward or as all of any other payments required hereunder, including, but not limited to, additional cash payments on the exercise of a suboption, or payments required by notes and mortgages given pursuant hereto. The Seller is not obligated to keep the option money segregated, to hold it as a trust fund for the performance of this agreement, or to pay any interest on it.

14. *Acts of default by purchaser.* Each of the following shall be deemed a default by the Purchaser and a breach of this

Option:

- (a) The filing of a petition by or against the Purchaser under Chapters 7, 11 or 13 of the United States Bankruptcy Code, as it now exists or as it is hereafter amended.
- (b) The dissolution or commencement of any action or proceeding for the dissolution or liquidation of the Purchaser whether instituted by or against it or for the appointment of a receiver or trustee of its property.
- (c) The taking possession of the Purchaser's property by any governmental officer or agency under statutory authority for the Purchaser's dissolution, rehabilitation, reorganization, or liquidation.
- (d) The making by the Purchaser of any assignment for the benefit of creditors.
- (e) A default by the Purchaser in making any monthly option money payments required hereunder as and when they become due.
- (f) Default by the Purchaser under any other term, covenant, or conditions of this Option.

The Purchaser may not exercise this Option or any suboption hereunder to purchase any property while any default exists hereunder. If there is any default under (a), (b), (c), or (d) above, or any default under (e) above for a period of ten days, or of any default under (f) above for a period of 30 days after notice, this Option shall terminate and all option money then in the hands of the Seller shall be retained by him as option money for the value of this Option and in consideration of the granting hereof.

15. *Release provisions in purchase money mortgages on acreage basis.* Each mortgage given by the Purchaser to the Seller shall contain provisions for the release of parts of the encumbered land on an acreage basis upon the following conditions:

- (a) No release of property, from under a particular mortgage, will be granted while there is a default in any of its terms, covenants, and conditions or those of any other mortgage given pursuant hereto. The release amounts to be paid by the Purchaser to the Seller per acre of land released for each Parcel are as follows:

Parcel Number	Land Description	Release Amount Per Acre
1	All land in the Parcel	\$1,100
2	The Sections 1 and 11 land	950
	All remaining land in the Parcel	800
3	The Section 35 land	730
	All remaining land in the Parcel	625
4	All land in the Parcel	625
5	All land in the Parcel	625
6	All land in the Parcel	625
7	All land in the Parcel	730
8	All land in the Parcel	730

In addition, accrued interest on release amounts must be paid to date of payment.

(b) As nearly as may be, the land will be released only in 40-acre square blocks described according to United States Government Survey.

(c) The Seller shall subordinate the mortgage held by him to a dedication of streets built by the Purchaser in Parcels 1, 2, or 3 between land owned by the Purchaser at the date hereof adjoining Parcels 1, 2, or 3 on the east and any 40-acre blocks released under this Paragraph 15 in Parcel 1, that part of Sections 1 and 11, Township 50 South of Range 32 East in Parcel 2 and that part of Section 14, Township 50 South of Range 32 East in Parcel 3, and to a dedication of streets built by the Purchaser in any other Parcel between 40-acre blocks released under this Paragraph 15 in that particular Parcel upon the Purchaser causing a plat or plats to be lawfully recorded among the Public Records of Lee County, Florida, and complying with the requirements of Paragraph 16(c) hereof.

(d) For the purpose of granting releases from any one particular mortgage, the following moneys, when paid, shall be considered as having been paid for releases from that mortgage: (1) except in the case of mortgages on Parcels 1 and 2 and the "Required Cash Payment at Time of Exercise of Suboption" made on the purchase of such Parcels 1 and 2, the amount of the "Required Cash Payment at Time of Exercise of Suboption" made on the purchase of the parcel for which the particular mortgage is security as set forth in Paragraph 11 hereof, that is, \$120,000 as to Parcel 3 and \$160,000 as to each of the Parcels 4, 5, 6, 7, and 8 (but such payment shall not reduce the unpaid principal balance of that mortgage or the note for which it is security); and (2) all principal installment payments made on that particular mortgage and the note for which it is security.

(e) All moneys paid for releases from a mortgage, other than as set forth under subparagraph (d) of this Paragraph 15, shall be credited on the next principal installment payment due on the mortgage and the note for which it is security.

16. *Release provision in purchase money mortgages on subdivision basis.* Each mortgage given by the Purchaser to the Seller shall also contain provisions for the release of parts of the encumbered land on a platted subdivision basis upon the following conditions:

(a) No such release of property will be granted from under a particular mortgage while there is a default in any of its terms, covenants, and conditions or those of any other mortgage given pursuant hereto.

(b) No such release will be granted until the land which is to be so released has been platted which, as nearly as may be, shall be in 40-acre square blocks described according to United States Government Survey. The plat for each block of land so platted must show a subdivision of land and roads generally like the plats recorded at the date hereof for the development known as Point Star, Lee County, Florida. In addition, the Purchaser shall have caused such plat or plats to be lawfully recorded among the Public Records of Lee County, Florida.

(c) Prior to the recording of such plat or plats, the Purchaser shall have furnished to the Seller a bond in a penal sum of not less than 125 percent of the estimated cost of the construction of all streets and the construction and installation of other facilities shown on the plat (or plats), or required to be constructed by Lee County, Florida, the construction and installation to be at least according to a standard equivalent to the present specifications of Lee County, Florida. The bond shall be conditioned for the faithful construction by the Purchaser of such streets and construction and installation of all such other facilities within two years after the acceptance of such plat or plats by the County Commissioners of Lee County, Florida, (the "County Commissioners"), and for the prompt payment by the Purchaser of the cost of all labor, services, and materials furnished therefor, and for the discharge of all liens arising therefrom. However, the term of such bond may be extended for a period of one year if there is then no default in any term, covenant, or condition of the mortgage covering the land, the platting of which necessitated such bond, or of any other mortgage given pursuant hereto, and further, if the County Commissioners so extend for a like period any and all bonds furnished to Lee County covering the same platted land. If the County Commissioners shall require such a bond identical to that required herein

for all or any part of the penal sum required by the Seller prior to the recording of such plat or plats, and, if in the opinion of the Seller's counsel, it can be so arranged without prejudice to the Seller's rights and remedies, and the County Commissioners consent thereto, the Seller may be made a joint obligee of the bond instead of having it furnished directly to him, but only to the extent of the penal sum of the bond. The Purchaser shall furnish an additional bond to the Seller for any difference between the penal sum of the bond furnished to Lee County and that required hereunder. The surety on any such bond or bonds furnished directly to the Seller or on which he is joint obligee with Lee County shall be a company with at least an "A" Policyholder's Rating and an "AA" Financial Rating as those ratings are defined in the Sixty-Fourth Annual Edition of Best's Insurance Reports (Fire and Casualty), ("Best's"). The penal sum of each bond shall be satisfactory to the Seller and shall be based on estimates submitted to and approved by his engineers.

(d) Each subdivision plot released pursuant hereto may contain up to 10,000 square feet. The basic release amounts to be paid by the Purchaser to the Seller per plot of land released from each Parcel are as follows:

Parcel Number	Land Description	Base Release Amount Per Plot
1	All land in the Parcel	\$ 375
2	The Sections 1 and 11 land	325
	All remaining land in the Parcel	275
3	The Section 35 land	250
	All remaining land in the Parcel	210
4	All land in the Parcel	210
5	All land in the Parcel	210
6	All land in the Parcel	210
7	All land in the Parcel	250
8	All land in the Parcel	250

For each additional 1,000 square feet or major fraction thereof contained in any subdivision plot in excess of 10,000 square feet, the release price for such plot shall be increased by 10 percent of the basic release amount for such subdivision plot as set forth above. For these purposes, a major fraction is defined to be one half or more. In addition, accrued interest on the release amount must be paid to date of payment.

(e) No release of subdivision plots from the lien of the mortgage covering Parcel 2 shall be given under Paragraph 16 until 50 percent of Parcel 1 has been platted under subparagraphs (b) and (c) of Paragraph 16 or released under Paragraph 15. No release of subdivision plots from the lien of the mortgage covering Parcel 3 shall be given under Paragraph 16 until 50 percent of each of Parcels 1 and 2 has been platted under subparagraphs (b) and (c) of Paragraph 16 or released under Paragraph 15. No release of subdivision plots from the lien of the mortgage covering Parcel 4 shall be given under this Paragraph 16 until 50 percent of each of Parcels 1, 2, and 3 has been platted under subparagraphs (b) and (c) of Paragraph 16 or released under Paragraph 15. No release of subdivision plots from the lien of mortgage covering Parcel 5 shall be given under Paragraph 16 until 75 percent of Parcel 1 and 50 percent of each of Parcels 2, 3, and 4 have been platted under subparagraphs (b) and (c) of Paragraph 16 or released under Paragraph 15. No release of subdivision plots from the lien of the mortgage covering Parcel 6 shall be given under Paragraph 16 until 75 percent of each of Parcels 1 and 2 and 50 percent of each of Parcels 3, 4, and 5 have been platted under subparagraphs (b) and (c) of Paragraph 16 or released under Paragraph 15. No release of subdivision plots from the lien of the mortgage covering

Parcel 7 shall be given under Paragraph 16 until 75 percent of Parcels 4, 5, and 6 have been platted under subparagraphs (b) and (c) of Paragraph 16 or released under Paragraph 15. No release of subdivision plots from the lien of the mortgage covering Parcel 8 shall be given under Paragraph 16 until 75 percent of each of Parcels 1, 2, 3, and 4 and 50 percent of each of Parcels 5, 6, and 7 have been platted under subparagraphs (b) and (c) of Paragraph 16 or released under Paragraph 15.

(f) For the purpose of granting releases from any one particular mortgage the following payments shall be considered as having been paid for releases from that mortgage: (1) Except in the case of mortgages on Parcels 1 and 2 and the "Required Cash Payment at Time of Exercise of Suboption" made on the purchase of Parcels 1 and 2, the amount of the "Required Cash Payment at Time of Exercise of Suboption" made on the purchase of the parcel for which the particular mortgage is security as set forth in Paragraph 11, that is, \$120,000 as to Parcel 3 and \$160,000 as to each of the Parcels 4, 5, 6, 7, and 8 (but such payment shall not reduce the unpaid principal balance of that mortgage or the note for which it is security); and (2) All principal installment payments made on that particular mortgage and the note for which it is security.

(g) All amounts paid for releases from a mortgage, other than as set forth under subparagraph (f) of Paragraph 16, shall be credited on the next principal installment payment due on the mortgage and the note for which it is security.

(h) When the Purchaser shall have complied with the requirements of Paragraph 16(b) and (c) the Seller will subordinate the mortgage held by him to a dedication of the platted streets without the payment of any release amount.

(i) If the Purchaser complies with Paragraph 16, such compliance will be its voluntary act to the end of the Purchaser qualifying for partial releases on a platted subdivision plot basis; and the Seller in no manner requires such qualification.

17. *Seller's obligation to furnish releases.* Money paid to the Seller for which releases are obtained under either Paragraphs 15 or 16 may not be applied to obtain releases under the other paragraphs. The Seller shall furnish a release not more than 14 days after receipt of notice from the Purchaser that the release is desired, provided, however, that the Purchaser shall comply with all prerequisite conditions and terms for obtaining the release on or before the day set for its delivery. If that date falls on a Saturday, Sunday, or legal holiday the release shall be given on the following business day. The Seller may reasonably change the time by which a release must be given by giving written notice to the Purchaser.

18. *Surveys and other expenses.* The Purchaser shall, at its own expense, furnish the Seller with surveys of all blocks of land or subdivision plots to be released under this Option. The surveys shall be made by a surveyor qualified and licensed in the State of Florida and approved by the Seller, but approval shall not be unreasonably withheld. In addition, the Purchaser will pay all recording fees, documentary stamps, and intangible personal property taxes required in carrying out this Option or in recording documents given hereunder, except that the Seller will pay for the required documentary stamps on all deeds to Parcels. All releases required hereunder will be drafted by Seller's counsel. The Purchaser shall pay the Seller \$200 for any such release releasing five or less subdivision plots and \$150 for any such release releasing more than five subdivision plots for the Seller's expenses in connection therewith.

19. *Notices.* For the purpose of giving any notice hereunder, the address of the Seller is 100 Fifth Avenue, New York, New York; and the address of the Purchaser is 100 Northeast 2d Street, Miami, Florida. Either party may change that address by giving the other written notice of the change by United States Registered Mail. Whenever any suboption to purchase is exercised hereunder, the purchase shall be consummated in the offices of James Harrison, Esq., 100 Ocean Drive, Palm Beach, Florida, unless and until the Seller shall notify the Purchaser to the contrary by United States Registered Mail. Notice sent by facsimile transmission shall not be deemed effective unless the parties shall agree in writing to accept such transmissions as notice.

20. *Use of seller's name.* The Purchaser shall not use the Seller's name in its publicity and news releases, printed promotional material, and other printed matter or paid advertising in connection with the use of the property to be conveyed.

21. *Death or incompetency of seller.* If the Seller dies or becomes incompetent, the date for the performance of all his acts shall be postponed and adjourned until a reasonable time after the appointment of the proper personal representative competent to perform such act or acts. Neither the Seller nor his estate shall in any way be in default hereunder or liable for any damages or penalty by reason of such postponement or adjournment.

22. *Binding effect.* The covenants herein made shall be binding upon the Seller and the Purchaser and their respective heirs, devisees, personal representatives, successors, and assigns, and shall survive the exercise of all or any part of this Option.

23. *Schedules and exhibits.* Schedules A, B, and C and Exhibits 1, 2, and 3 have been identified in the margins thereof by the signatures of the Seller and the Purchaser and are made a part of this agreement as if set forth in full herein.

24. *Extent of agreement.* This Option is nothing more than an agreement by the Seller granting to the Purchaser the right to purchase land under the conditions set forth and in no manner creates a partnership or joint venture between the parties.

25. *Broker.* The Purchaser represents and warrants that no broker brought about this Option or is interested herein on account of the Purchaser's acts, but the parties recognize that Robins & Company, has claimed to be the broker who brought about this Option. The Purchaser agrees that if any claim is made for commissions by any broker other than Robins & Company, on account of any acts of the Purchaser, the Purchaser will indemnify and hold the Seller free and harmless from any and all liabilities and expenses in connection therewith. The foregoing provisions of this paragraph shall survive any termination of this Option.

26. *Entire agreement.* All understandings and agreements previously existing between the parties are merged into this Option which alone fully and completely expresses their agreement. No change may be made in this Option except by instrument, duly executed with the same formalities of this Option.

27. *Governing law.* This Option shall be governed by and construed under the laws of the State of Florida.

28. *Non-waiver.* No delay or failure by either party to exercise any right under this Option, and no partial or single exercise of that right, shall constitute a waiver of that or any other right, unless otherwise expressly provided herein. A waiver of any act or requirement by either party shall not be deemed a waiver of any other act or requirement under this agreement, nor shall it be deemed to extend the time in which to perform any other act or requirement hereunder.

29. *Headings.* Headings in this Option are for convenience only and shall not be used to interpret or construe its provisions.

30. *Counterparts.* This Option may be executed in two or more counterparts, each of which shall be deemed an original but all of which together shall constitute one and the same instrument. At the trial of any matter relating to this agreement, only one such counterpart need be produced.

In witness whereof the Seller and the Purchaser have caused this Option to be properly executed, in Palm Beach, Florida, as of the day and year first above written, the Seller being joined by his wife, Mary Franklin.

Signed, sealed, and delivered
in the presence of:

As to the Seller and his wife

Attest:

_____ (Seal)

Charles Franklin _____

(Seal)

Mary Franklin

Seaside Realty Company by _____ (Seal)

President

by _____ (Seal)

Secretary



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Chapter 22 DEVELOPMENT AND SUBDIVISION

Part IV. FORMS

A. ACQUISITIONS FOR DEVELOPMENT AND SUBDIVISION

26-22 Current Legal Forms for Real Estate FORM 22.06

FORM 22.06 Option to purchase land for construction of motel and office building--purchaser to submit architect's plans and guaranty completion of project

COMMENT

This option agreement makes use of provisions requiring the optionee to submit and adhere to specific plans for the development of the property. As a condition to the exercise of this option the optionee must submit architect's plans and other specifications and details for the development of a motel and office building in accordance with certain green building standards. In addition, the optionee must ensure the completion of the project as planned. To satisfy this latter requirement, the optionee may select one of three alternatives: a bonded building contract, an escrow deposit arrangement, or a noncancellable financing commitment. The necessary documents must be delivered to the seller at the closing, if the option is exercised.

Appended to this option agreement is a statement of basic conditions and restrictions relating to the proposed improvements and to the use of the premises. Title to the property is to be conveyed subject to these conditions and restrictions, so that the plans and specifications will necessarily have to be consistent with these provisions.

The seller has assumed the obligation to have the entire property rezoned for commercial use prior to the closing. If the property is not completely zoned for commercial use by the deadline fixed in the agreement, the agreement terminates.

FORM

OPTION AGREEMENT made by and between Riverside Realities, Inc., a Louisiana corporation, represented by Colin E. Smith, its President (the "Seller"), and Orleans Motel Corp., a Louisiana corporation, represented by William Baker,

its Vice President (the "Buyer"), both duly authorized.

In consideration of Buyer's payment to the Seller of \$5,000, by check subject to collection, receipt of which is acknowledged, and of the mutual covenants hereinafter set forth, the parties agree as follows:

1. *Grant of option.* The Seller grants to the Buyer, without right of assignment, until midnight, November 16, ____[year], the exclusive right to purchase for the sum of \$325,000 in cash the following described land situated in the City of New Orleans, Parish of Orleans, State of Louisiana:

(Insert description)

2. *Additional payment upon exercise of option.* If the Buyer timely exercises this option it shall simultaneously deposit with the Seller \$29,000 as part of the purchase price, and the Seller shall credit the Buyer with the \$5,000 previously paid for this option as part of the purchase price. If the Buyer does not timely exercise this option, it shall lose all further rights or claims to the price paid for this option and to the property.

3. *Exercise of option.* The Buyer shall execute this option by giving notice of its intention to do so by registered mail addressed to the Seller at 100 American Bank Building, New Orleans, Louisiana. The required notice shall be posted in the U.S. mail on or before the termination date of this option. If the Buyer timely exercises this option, a formal act of sale for the transfer of title to the property shall be passed before the Buyer's Notary within 60 days after this option is exercised. At the act of sale the Buyer shall pay the balance of the purchase price in cash against the delivery of a duly executed instrument of transfer of title.

[Alternative Paragraph for P 3]

3. *Exercise of option.* The Buyer shall exercise this option by delivering notice of its intention to do so to the Seller at 100 American Bank Building, New Orleans, Louisiana. Notice must reach Seller on or before the termination date of the option. Notice may be delivered in person, by certified mail (return receipt requested), or by facsimile transmission. If the Buyer timely exercises the option, the closing and transfer of title shall occur within sixty (60) days thereafter. At the closing, the Buyer shall pay the balance of the purchase price in cash in exchange for delivery of a duly executed instrument of transfer of title.

4. *Additional conditions to exercise of option.* As a condition to the exercise of this option, the Buyer shall submit to the Seller, together with the notice required by Paragraph 3, the following:

(a) An architect's rendering of the proposed front and rear elevations for a high class motor hotel and office building which the Buyer proposes to erect on the property site.

(b) Preliminary plans and specifications for the motor hotel and office complex, including a schedule of materials, and a schedule of the green building standards to be followed to reach a level of "LEED Certified" as set by the U.S. Green Building Council.

(c) A plot plan for the entire development layout of the complex.

(d) The cost breakdown for site preparation, architects' fees, engineering charges, cost of building and improvements, all other charges directly attributable to the cost of erecting the premises as herein required, and the on-site cost, exclusive of any fees for franchises, and any interest, but inclusive of financial commitment fees, expert fees, testing laboratory fees, and other direct charges.

The Buyer's failure to comply with the foregoing provisions to submit plans and specifications shall constitute a breach of this option. The Seller's failure or refusal to approve or disapprove the plans within 20 days after their receipt shall constitute approval. If the Seller rejects the plans it shall state in writing the reasons therefor. If such objections are reasonable and consistent with the provisions of this option, the Buyer shall have an additional 15 days in which to amend its plans and specifications to meet the Seller's objections. Seller may not unreasonably withhold its approval of the plans and specifications.

5. *Guaranty of completion of proposed improvements.* At the time of the act of sale for the purchase of the property, the Buyer shall be required to do one of the following:

(a) To enter into a written bonded building contract for the erection of the improvements, in accordance with the Seller's final plans and specifications, provided that the amount of the bond is equal to the full contract price and that the surety will have the liability prescribed by the Statutes of Louisiana. The bond shall name the Seller as co-obligee to the extent that it shall be assured that the building will be constructed and completed substantially in accordance with the contract, and further, that the Buyer shall comply with all its obligations under the building contract, including the timely payment of all moneys due the contractor thereunder. A copy of the written bonded building contract shall be submitted to the Seller;

(b) To provide the Seller with a duly executed escrow agreement among the Buyer, a national bank located in the New Orleans area as escrow agent, the contractor and surety on the building contract and surety agreement. Under the terms of this escrow agreement the Buyer shall have deposited with the escrow agent a sum equal to the full amount of the building contract, and the escrow agent shall be authorized to make disbursements to the contractors, from time to time, as they become due and eligible under the building contract; or

(c) To provide the Seller with a noncancellable "Commitment to Provide Interim Financing" by a national bank located in the New Orleans area, a life insurance company, a pension trust, or other lending agency, without qualifications to pay to the contract a sum equivalent to the stipulated contract price, in accordance with the terms of the building contract, provided that in the building contract and the "Commitment to Provide Interim Financing," the Seller is granted full rights of subrogation and substitution in lieu of and in place of the Buyer, with the right to exercise all of the Buyer's rights insofar as the building contract and "Commitment to Provide Interim Financing" is concerned. The terms and provisions of the "Commitment to Provide Interim Financing" shall be those customarily used by national banks and other financing institutions in the New Orleans area.

6. *Conditions as to zoning.* The parties understand that the property which is the subject of this option is presently zoned "A" residential in part and "F" commercial in part. The Buyer desires the zoning of all of the property to be "F" commercial, and the Seller binds itself to apply to the City Planning and Zoning Commission of the City of New Orleans for such rezoning. If, at the time for the act of sale, the property has not been already rezoned to "F" commercial by the Commission, the parties shall extend the deadline for the passing of the act of sale for an additional 60 days. If, at the expiration of such additional period, the property is not then wholly rezoned "F" commercial by the Commission, this agreement shall terminate and all obligations whatsoever growing out of it shall expire, without notice or action by either party, except that the Seller shall return to the Buyer all sums previously paid to the Seller.

7. *Condition as to environmental site assessment.* The Seller shall obtain, at its own expense, an environmental site assessment at least ten (10) days prior to the transfer of title. The assessment shall be performed by a reputable environmental consulting company, licensed to do business in the State of Louisiana. In the event that the assessment indicates that there is, or there may be, evidence of an adverse environmental condition existing on the subject premises, the Buyer may terminate this agreement by giving written notice of termination to Seller. In such case, all obligations growing out of this agreement shall immediately expire. Seller shall promptly return to Buyer all sums paid to Seller under this agreement.

Alternatively, Buyer may request a delay in the transfer of title for ninety (90) days in order to allow further testing to be done at Buyer's expense. At any time during the ninety (90) day period, Buyer may give notice to terminate this agreement and obtain the return of all sums paid to Seller hereunder.

In the event that Buyer proceeds to accept title following receipt of an unfavorable environmental site assessment report, Buyer shall have no right of recourse against Seller for contribution toward the cost of remediation, unless it can be shown that Seller itself created the condition requiring remediation.

Buyer acknowledges that it is aware of the provisions of the Federal Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) and the laws of the state of Louisiana regarding remediation of sites contaminated by hazardous substances.

8. *Title exceptions and reservations.* The sale of the property shall be made subject to the following encumbrances, limitations, and conditions:

(a) The reservation of all of the minerals, provided that the Seller shall waive all surface rights in and to the property sold to the Buyer.

(b) Any and all restrictive covenants, servitudes, or rights-of-way of record.

(c) All of the restrictions, conditions, and limitations set forth in Exhibit A, attached to and made a part hereof.

(d) Real estate taxes for the year _____[year], which shall be prorated between the Buyer and the Seller.

9. *Expenses.* The Seller will bear the expenses of conveyance, paving and local improvement certificates, tax research certificates, and revenue stamps. The Buyer will bear the cost of any desired survey.

Signed at New Orleans, Louisiana, this 21st day of May, _____[year].

Witnesses

Riverside Realties, Inc.

_____ by _____

President

Secretary

Orleans Motel Corp.

_____ by _____

Vice President

Secretary



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Chapter 22 DEVELOPMENT AND SUBDIVISION

Part IV. FORMS

A. ACQUISITIONS FOR DEVELOPMENT AND SUBDIVISION

26-22 Current Legal Forms for Real Estate FORM 22.07

FORM 22.07 Offer to purchase land for subdivision--purchase price secured by deed of trust--subordination and partial release provisions

COMMENT

The initial phase of planning a subdivision includes a preliminary investigation and a final site evaluation of the property. The preliminary investigation of the developer consists of his determining whether the particular parcel of property he intends to subdivide is in a favorable location, has adequate access routes to the nearest major highways, and has adequate sewer, storm drainage, and water systems, and whether lots in the property, if subdivided, will sell.

After the developer has completed his preliminary investigation of the property, he must still determine whether the property in fact can be economically subdivided. Many questions will, at this point, remain unanswered. What construction problems will the soil structure of the property create? How can lots best be laid out on the property? What requirements for subdivision of the property will governmental agencies impose on the developer? Can the developer obtain adequate financing for the proposed subdivision?

Finding the answers to the above questions, or what may be referred to as making the final site evaluation of the property, may require reports from experts such as civil engineers and planners, take a great deal of time, and cost a considerable amount of money. It would be unwise for a developer to order the reports and spend the money and time involved in making a final site evaluation unless he were certain that if the results of such evaluation were favorable he could obtain the property. Consequently, after completing his preliminary investigation but before starting his final site evaluation, the developer will wish to tie up the property; that is, to prevent its sale to someone else while he is making his final subdivision plans and preparations.

Offer of contract of sale.

Preventing a sale to another can be accomplished in either of two ways: the granting of an option to the developer, or the execution of a binding contract for the sale of such property to the developer if the answers to the questions involved in the final site evaluation indicate that he can subdivide the property economically. This form provides the second of these alternatives, an offer for a binding contract to sell the property to the developer if it in fact can be economically subdivided.

FORM

Bayview Estates Corporation
14 Market Street
San Francisco, California

1. *Offer.* I offer to purchase from you on the following terms and conditions the real property (the "Property"), in Redwood City, San Mateo County, California, described as follows:

(Insert description)

2. *Purchase price.* The purchase price for the Property shall be \$530,000, payable as follows:

(a) \$30,000 on the close of escrow as herein provided; and

(b) The balance according to the terms of a promissory note in the usual form being supplied at the date of this offer by the Central Title Company for use in San Mateo County, California, to be executed by me and payable to your order in monthly installments, commencing one month after close of escrow, of \$2,000 or more plus the interest then due at the rate of 8 percent per year on the remaining unpaid principal balance.

3. *Security for purchase price.* The promissory note described in Paragraph 2(b) shall be secured by a Deed of Trust on the Property. It shall provide that at any time an unrescinded Notice of Default of the Deed of Trust is not of record, the trustee shall, at my request, grant partial reconveyances from the lien or charge of the Deed of Trust of:

(a) Any one or more of the lots shown on any final subdivision plat of the Property that may hereafter be approved by San Mateo County, California, and recorded in the office of the County Recorder, on payment to the trustee, to be applied toward payment of the principal amount of such note, of the sum of \$10,000 for each lot to be so reconveyed plus the interest accrued to the date of such request at the rate of 8 percent per year on the unpaid principal balance of note and the costs of executing and recording the partial reconveyance;

(b) Prior to the recording of any final subdivision map, any one or more acres of the Property on payment to the trustee, to be applied toward payment of the principal amount of such note, of the sum of \$25,000 per acre for each acre or fraction of an acre to be so reconveyed plus the interest accrued to the date of such request at the rate of 8 percent per year on the unpaid principal balance of such note and the costs of executing and recording the partial reconveyance. Provided, however, prior to the recording of any such final subdivision map no portion of the Property less than one acre in size may be so reconveyed at any one time and no portion of the Property will be so reconveyed if its remaining portions would by reason of such reconveyance be left without frontage on a public street or road.

4. *Subordination provision.* The Deed of Trust referred to in Paragraph 3 shall be subordinate to subsequent Deeds of Trust executed by me or my successors in interest to secure loans ("construction loans"), for the purpose of constructing improvements on the Property or portions thereof, provided:

- (a) The total amount of all such construction loans shall not exceed \$2,000,000;
- (b) All funds derived from any construction loan placed on any portion of the Property shall be used only for the construction of improvements on the portion of the Property which it encumbers;
- (c) No construction loan placed on any portion of the Property shall exceed 80 percent of the anticipated value of such portion after completion of the improvements that the construction loan was obtained to finance;
- (d) No portion of any such construction loan shall be used to pay loan fees, interest, or other charges not directly connected with the construction of improvements on the portion of the Property encumbered by any such construction loan;
- (e) No such construction loan shall bear interest, exclusive of late charges, penalties, or fees payable in case of default, greater than 9 percent per annum;
- (f) Each construction loan shall be payable during a period of not less than 12 months or more than three years;
- (g) The total payments due on all construction loans shall not exceed \$40,000 per month;
- (h) Each construction loan shall be made by a bank, life insurance company or correspondent thereof, building and loan association, savings and loan association, or other institutional lender.

The Deed of Trust shall contain all other terms and conditions that are contained in the usual form of Deed of Trust supplied on the date of this offer by the North American Trust Company for use in San Mateo County, California.

5. *Opening of escrow.* An escrow shall be opened to consummate the sale of the Property pursuant to this offer at the Redwood City office of the Central Title Company at 15 Pacific Street, Redwood City, California, within five days after the date you accept this offer.

6. *Conditions of escrow.* The close of the escrow and my obligations under this offer to purchase the Property are expressly conditioned on:

- (a) The conveyance to me or my nominee of good and marketable title to the Property, as evidenced by a standard form C.L.T.A. title insurance policy in the full amount of the purchase price issued by the Central Title Company, subject only to such liens, encumbrances, easements, clouds, and other matters as I may approve in writing.
- (b) Determination by my soil test or civil engineer that all of the Property is free from filled ground or other geological or engineering conditions that would preclude its use and development in the usual and customary manner as a residential subdivision without extra expense for precautionary, corrective, or remedial measures.
- (c) Determination by an environmental engineer that all of the property is free from contamination by any environmentally hazardous substance which would require remediation under any federal, state or local law, regulation, rule or policy.
- (d) Delivery of possession of the Property to me or my nominee immediately on the close of escrow free and clear of all uses and occupancies except as I may waive in writing.
- (e) Final and conclusive approval by San Mateo County of a tentative tract map, to be submitted by me to the county within 60 days after the opening of the escrow as provided in this offer, depicting the subdivision of all of the Property.

Such final and conclusive approval shall incorporate the limitations, conditions, and provisions for subdivision of the Property as proposed in the tentative tract map and the documents presented by me to the county in support of such map.

(f) Determination by an environmental engineer or hydrologist that the Property does not contain any wetlands as defined in regulations issued by the United States Army Corps of Engineers or the Environmental Protection Agency.

7. *Failure of conditions.* If any condition specified in Paragraph 6 fails to occur within 120 days after the opening of the escrow as provided in Paragraph 5, I may, by giving written notice to the escrow holder, cancel the escrow and terminate the agreement created by your acceptance of this offer. If I exercise that right the agreement shall become null and void, all parties thereto shall be released from further performance of its terms and conditions, no party thereto shall be liable for the costs of performance or partial performance of such agreement theretofore incurred by any other party to the agreement, and I shall forthwith be entitled to prompt return of all amounts paid to you or to the escrow holder on account of the purchase price of the Property less any reasonable charges the escrow holder may make for opening and canceling the escrow.

8. *Right of entry.* You hereby grant to me, my agents, and my employees the right to enter the Property or any portion thereof at any time after the opening of the escrow for the purposes of conducting at my own expense all soil, geologic, and engineering investigations that are desired by me or required by any public agency for its approval of the subdivision. I shall indemnify you and hold you, your property, and the property covered by this offer free and harmless from all costs or liability incurred by reason of such investigations and, if the escrow is canceled for any reason not caused by you, I shall repair all damages caused to the Property by reason of any such investigation or investigations.

9. *Execution of subdivision plat.* You agree to sign and execute any and all documents that may be required to gain approval of San Mateo County of the tentative tract map to be submitted to the county under the subparagraph 6(e). You further agree that should the county require the inclusion of such proposed subdivision of adjoining land owned by you and not otherwise subject to this offer, you shall on my written request comply with the county requirement at your own expense, and I shall not be liable for any expenses or other liabilities resulting from the inclusion of such adjoining land retained by you or sold by you to other persons in the proposed subdivision.

10. *Proration of taxes.* Real property taxes on the Property, including any tax or charge levied against it for the furnishing of water or sewer service thereto, shall be prorated between us as of the date of close of escrow. However, you shall pay all bonds or special assessments that are a lien on the Property.

11. *Expenses of escrow.* The expenses of escrow described in this offer shall be paid in the following manner. You shall pay:

(a) The full cost of securing the title insurance policy described in Paragraph 6(a).

(b) The cost of preparing, executing, and acknowledging any deeds or other instruments required to convey title to me or my nominee in the manner described in subparagraph 6(a).

(c) Any tax imposed on the conveyance of title to the Property to me or my nominee under any transfer tax legislation.

I shall pay:

(a) The cost of preparing, executing, and acknowledging the promissory note described in subparagraph 2(b) and the Deed of Trust described in Paragraph 3.

(b) The cost of recording a grant deed required to convey title to the Property to me or my nominee and the Deed of

Trust described in Paragraph 3.

You and I shall pay in equal proportions any escrow fee, in addition to the cost of the title insurance policy required by this offer, charged by the escrow holder.

12. *Brokers' commissions.* You shall pay any and all commissions due to real estate or other brokers because of this transaction.

13. *Sole agreement.* This offer, when accepted by you shall constitute the sole and only agreement between us respecting the Property, and any promises, representations, inducements, or conditions respecting it not herein expressly set forth shall be of no force or effect.

14. *Expiration of offer.* Unless accepted by you on or before midnight Pacific Standard Time on July 15, _____[year], this offer shall automatically be revoked and be of no force or effect. You are requested to accept this offer by signing your name in the space provided therefor on the copy of this letter, entering the date of your signature, and returning the same to me at 15 Palmetto Street, Redwood City, California.

Dated: June 15, _____[year]

William Bradley

The foregoing offer is hereby accepted.

Dated: _____[date]

Seller



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Chapter 22 DEVELOPMENT AND SUBDIVISION

Part IV. FORMS

A. ACQUISITIONS FOR DEVELOPMENT AND SUBDIVISION

26-22 Current Legal Forms for Real Estate FORM 22.08

FORM 22.08 Contract of sale--commercial property--tract of vacant land--sale is made contingent upon results of environmental site assessment--seller to take back a purchase money mortgage--release provisions for subdivision development

COMMENT

This agreement can be used in a transaction in which the purchaser of vacant real property envisions the subdivision of the land and construction of a residential development upon it.

Environmental considerations.

Whenever such a major project is undertaken, it is imperative that the prospective purchaser have a thorough environmental site assessment performed before accepting title to the land. The purchase of the property should be made contingent upon the results of the testing. By having an environmental site assessment performed, the prospective purchaser would be able to cancel the contract and walk away from the deal if a serious environmental problem were discovered. In so doing, the prospective purchaser would accomplish three important goals:

(1) It would escape liability under federal law for the cost of remediating environmental problems after taking title to the contaminated land.

(2) The prospective purchaser would be shielded from suit by future homeowners within the development and by owners of adjacent properties whose lands might be contaminated by seepage emanating from the purchased property.

(3) The prospective purchaser would escape the expenditure of vast sums of money on: purchasing the property, obtaining municipal subdivision approval, and constructing the infrastructure for

the subdivision, including roads, water lines, sewer lines, storm sewers, etc.

Accordingly, before making any investment in vacant land and incurring potential liability, a developer should elicit the services of a qualified environmental consultant to perform an environmental site assessment. (The reader is directed to Volume 33, Chapter 25, "Environmental Considerations in Real Estate Transactions," *infra*. The Practice Background at the beginning of the chapter provides an extensive discussion of this issue. See § 25.03P).

In addition, the prospective purchaser should undertake to have a wetlands delineation done to ascertain the existence of any wetlands and the extent of their boundaries. If there are wetlands, then the purchaser must determine whether they will interfere with the residential development plan. If there are wetlands, and they will be impacted, then the purchaser will need to decide whether he is willing to obtain the necessary permits from the United States Army Corps of Engineers or the state Environmental Protection Agency to allow the plan to proceed.

Purchase money mortgage.

In this particular form, the seller has agreed to take back a purchase money mortgage covering the cost of acquisition. (In other words, the seller will hold the mortgage on the property, rather than a lending institution such as a bank.)

It should be noted that if the purchaser-developer later seeks commercial financing to cover the cost of constructing the development's infrastructure, the lender would almost certainly require the purchaser-developer to obtain an environmental site assessment as a prerequisite for obtaining the financing. Thus, by making this purchase agreement contingent upon the results of an environmental site assessment, the purchaser-developer will be aware of any potential environmental problems long before committing itself to the purchase and making any sizeable financial investment.

Releases of individual parcels.

This agreement gives the purchaser-developer the right to obtain the release of individual parcels from the lien of the mortgage by making specific principal payments which are then applied against the mortgage debt. These releases are necessary in order for the purchaser-developer to transfer title to lots to future home buyers.

The agreement contains a specified geographical order in which parcels will be released from the purchase money mortgage. This geographical order is designed to prevent the developer from building upon and selling the most desirable lots within the development and then defaulting on the mortgage, thereby saddling the seller-mortgagee with the least desirable parcels--parcels which may even be difficult to gain access to in light of prior development.

Other provisions in the purchase agreement.

Finally, the seller-mortgagee is obligated to join in the execution of any subdivision documents or any instruments necessary to transfer roads, sewers, sidewalks and other parts of the infrastructure for public use.

FORM

AGREEMENT made this _____ [day] day of _____ [month],
 _____ [year], between _____ [insert name of seller], residing at
 _____ [address, city, state] (the "Seller"), and _____ [insert name of
 purchaser-developer], a corporation organized under the laws of the State of _____ [state], with
 offices for the transaction of business at _____ [address, city, state] (the "Buyer").

1. *Sale.* The Seller agrees to sell and the Buyer agrees to purchase the following _____ [insert number,
 e.g., four] parcels of property, located in the City of _____ [city], County of
 _____ [county], State of _____ [state], and described as follows:

_____ [insert description]

The approximate acreage listed in the description above for each parcel is as shown on the county tax map for that parcel. The Seller makes no representations as to the exact number of acres contained in any of the parcels. The purchase price set forth in this Agreement is a firm price and will in no way be affected by any variance between the actual number of acres in a particular parcel and the estimated number of acres within that same parcel as set forth above. Buyer has had an opportunity to inspect and survey all parcels prior to entering into this Agreement.

2. *Sale is contingent upon results of environmental site assessment and wetlands delineation.* This Agreement is contingent upon Buyer obtaining satisfactory results of a Phase I Environmental Site Assessment. The assessment shall be conducted by an environmental consultant of Buyer's choosing and at Buyer's expense. It shall demonstrate that the premises are free from all hazardous substances and are in compliance with all federal, state and local environmental laws and regulations. This contingency shall be deemed waived unless Buyer shall notify Seller--in writing and by certified or registered mail, return receipt requested, postmarked no later than _____ [date], or by facsimile transmission or personal service by such date--of the unsatisfactory results of the site assessment report. Buyer must also supply a written copy of the site assessment report as part of said notice. If notice of unsatisfactory results is timely given, this Agreement shall be deemed canceled, null and void. All deposits made pursuant to this Agreement shall be returned to the Buyer immediately.

This Agreement is also contingent upon Buyer obtaining a determination by an environmental engineer or hydrologist that the premises do not contain any wetlands as defined in regulations issued by the United State Army Corps of Engineers, or any wetlands which will interfere with Buyer's proposed development. If so determined by Buyer, Buyer shall have the right to cancel this Agreement by giving written notice to Seller, along with a copy of the delineation report. In such event, this Agreement shall be null and void and all deposits shall be returned to the respective parties.

3. *Purchase price.* The purchase price for the property described above shall be the sum of _____ Dollars (\$ _____) _____ [e.g., \$500,000]. The purchase price shall be paid as follows:

(a) As earnest money, the Buyer, upon execution of this Agreement, will pay to the law firm of _____ [insert name of firm], as Escrow Agent, the sum of _____ Dollars (\$ _____) _____ [e.g., \$10,000].

(b) On or before _____ [date], the Buyer shall pay to the Escrow Agent the additional sum of _____ Dollars (\$ _____) _____ [e.g., \$40,000] on account of the purchase price.

(c) The closing shall occur on or before _____ [date]. Time is of the essence. At that time, the Buyer shall pay to the Seller the additional sum of _____ Dollars (\$ _____)

_____ [e.g., \$50,000], plus or minus prorations for property and school taxes and interest as hereafter set forth. The Buyer shall also assume the existing mortgage on the property with a balance of _____ Dollars (\$ _____) _____ [e.g., \$200,000], and the remainder of the purchase price, in the sum of _____ Dollars (\$ _____) _____ [e.g., \$200,000], shall be paid by means of execution and delivery of a promissory note secured by a purchase money mortgage, from Buyer to Seller.

4. *Nonrecourse note and mortgage.* The promissory note shall be payable in _____ [insert number, e.g., ten (10)] equal semi-annual installments, on June 30th and December 31st of each year, of principal, with the first installment due and payable on June 30th, _____ [year], and shall bear interest at the rate of _____ percent (_____ %) _____ [e.g., eight (8) percent] per annum, due and payable with each installment of principal.

Such purchase money mortgage shall be in the usual form, shall contain a grace period for the payment of any installment of principal and interest of _____ [e.g., ten (10)] days, shall provide for prepayment without penalty at any time after December 31st, _____ [year], and shall further provide that, in the event the mortgagor shall fail to meet any installment of mortgage debt when due, the mortgagee may not accelerate the unpaid balance of principal and interest unless and until there has first been given to the mortgagor notice of the existence of a default by registered or certified mail (return receipt requested), and such default has not been cured within the _____ [e.g., ten (10)] days next following receipt thereof.

The purchase money note and mortgage shall also provide that the obligation of the Buyer with respect to the indebtedness secured thereby shall be limited wholly and solely to the value of the land encumbered thereby, without the Seller being entitled to any deficiency claim or judgment.

5. *Closing.* This Agreement shall be consummated and the purchase and sale concluded on or before _____ [date], at the office of _____ [insert attorney's name], located at _____ [address, city, state], attorney for the _____ [Seller or Buyer].

6. *Title insurance or abstracts.* At least _____ [e.g., thirty (30)] days prior to the closing date, the Seller shall furnish to the Buyer, at the Seller's own expense, either a commitment of title insurance issued by a recognized title company, or abstracts of title extended to such date, showing title to the property to be good and marketable and vested in the Seller, free and clear of all encumbrances, except:

- (a) the mortgage encumbrance to be assumed by the Buyer as part of the purchase price;
- (b) real property and school taxes and assessments for the year _____ [year] and thereafter;
- (c) conditions and restrictions of record that are common to the neighborhood;
- (d) any oil, gas and mineral leases of record, and reservations to receive royalties, rentals and other receipts therefrom; and
- (e) applicable zoning ordinances, if any.

7. *Objections to title.* The Buyer shall have _____ [e.g., ten (10)] days from the date of receipt of either the commitment or the abstract in which to examine it and make written objections. If the Buyer has valid objections to the state of the title, the Seller shall have a period of time, not to exceed _____ [e.g., thirty (30)] days from the receipt of the Buyer's written objections, within which the Seller may cause the objections to be removed, and the date of closing shall be extended for that purpose. If, at the end of the period set forth in the

preceding sentence, the objections have not been eliminated, the Buyer may, at its option, refuse to accept title, or accept the same in its then-existing condition without any diminution in the purchase price. In the event of refusal by the Buyer to take title, all money paid on account of the purchase price shall immediately be refunded. In the event that there are valid objections to the condition of the title, then the closing will be held within _____[e.g., ten (10)] days after either elimination of the objections or receipt of notice from Buyer that it will accept title despite the existence of valid objections, but in no event later than _____[date].

8. *Adjustments.* Real property and school taxes and interest on the existing mortgage shall be prorated as of the date of closing.

9. *Deed.* At the closing, the Seller shall convey good and marketable title to the Buyer by warranty deed, conveying the property free and clear of all liens and encumbrances, except as herein noted. The deed shall be prepared at the expense of the Seller.

10. *Tracts released from mortgage.* The purchase money mortgage to be delivered to the Seller shall provide that property in one-acre tracts shall be released from the lien of the mortgage upon payment to the Seller, at the rate of \$5,000 per tract, for tracts in Parcels No. 1, 2 and 3, and on payment to the Seller, at the rate of \$10,000 per tract, for tracts in Parcel No. 4.

The Buyer must obtain releases of all tracts in Parcel No. 1 prior to seeking a release in any other parcel. Buyer must obtain all releases in Parcel No. 2 prior to seeking releases in Parcels No. 3 or 4. Buyer may obtain releases of tracts in Parcels No. 3 and 4 at the same time; provided, however, that all such releases in either Parcel No. 3 or 4 shall commence at the southern boundary of such parcel and shall sequentially migrate toward the northern boundary of the parcel. All subsequent releases of tracts in a given parcel shall be contiguous to previous releases in the same parcel.

11. *Easements over released parcels.* In the event parcels released from the lien of the mortgage separate the still-encumbered property from access to an existing public road, then the Buyer, upon request of the Seller, shall grant an easement to the Seller, thereby furnishing access from the property still encumbered by the mortgage to a then-existing public road. However, the easement shall not be more than _____[e.g., forty (40)] feet in width, the location thereof shall be selected by the Buyer, and, where possible, the easement shall follow the location of a planned, future road, if any, as shown on the subdivision map.

12. *Releases for public facilities.* The roads, green spaces and lots reserved for wells, water storage tanks, sewage treatment stations or other utilities shall be released either upon their dedication to the municipality or upon Buyer's payment in full of the mortgage, whichever event occurs first. The Seller shall join with the Buyer in the execution of any subdivision document or instrument dedicating to public use any and all roads, rights-of-way, easements for drainage, waterways, and similar public facilities after receipt of approval of the subdivision application and maps by the appropriate governmental authorities. The Buyer shall not be required to pay any release price for areas dedicated for public use as described above. However, the Buyer shall pay to the Seller the sum of _____ Dollars (\$_____) per acre for any bodies of water created by the Buyer.

13. *Releases after mortgage default.* Nothing contained herein shall obligate Seller to release any lot from the lien of the mortgage in the event that Buyer is in default under any of the terms of the new or assumed promissory notes or mortgages or this Agreement.

14. *Application of release payments.* Payments made on account of releases shall be applied by the Seller to the next principal installment payment due and payable pursuant to the terms of the purchase money note and mortgage.

15. *Release preparation expenses.* All mortgage releases shall be prepared by Buyer for review by Seller's attorney. The Buyer shall pay to the Seller the additional sum of _____ Dollars (\$_____) for each

release requested in order to cover the attorney examination fee incurred by Seller.

16. *Broker.* The Seller represents to the Buyer that this Agreement was procured only by and through the efforts of _____ [insert broker's name], a licensed real estate broker, and that it has dealt with no other salesperson or broker in connection with this purchase. The Seller agrees to indemnify and hold the Buyer harmless against any claim for real estate brokerage commissions by _____ [insert broker's name], but assumes no responsibility or obligation with respect to any other claim or claims with respect to this Agreement by any other broker or salesperson. Seller agrees to pay _____ [insert broker's name] the commission set forth in the listing agreement dated _____ [date].

17. *Benefit.* This Agreement shall be binding upon and inure to the benefit of the respective heirs, legal representatives, successors and assigns of the Seller and the Buyer.

18. *Entire agreement.* This Agreement, together with the other written agreements and instruments executed concurrently herewith or pursuant to the provisions hereof, contains the entire agreement between the parties respecting the matters herein set forth and supersedes all prior agreements between them respecting such matters.

19. *Counterparts.* This Agreement may be executed in two (2) or more counterparts, each of which shall be deemed an original, but all of which together shall constitute one (1) and the same instrument. At the trial of any matter arising under this Agreement, only one (1) counterpart need be produced.

20. *Headings.* Paragraph headings are for purposes of convenience and identification only and shall not be used to interpret or construe this Agreement.

21. *Gender and number.* Whenever the singular or plural number, or masculine or feminine gender, is used herein, it shall equally include the other.

22. *Governing law.* This Agreement shall be construed and enforced in accordance with the laws of the State of _____ [state].

23. *Modifications.* This Agreement may be modified only by a written document signed by both parties. A purported oral modification shall not be effective.

The parties hereto have set their hands and seals the day and year first above written.

SELLER

CORPORATION

by _____

BUYER



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Chapter 22 DEVELOPMENT AND SUBDIVISION

Part IV. FORMS

A. ACQUISITIONS FOR DEVELOPMENT AND SUBDIVISION

26-22 Current Legal Forms for Real Estate FORM 22.09

FORM 22.09 Contract of sale--progressive options to purchase additional parcels--purchaser to undertake prescribed development--disposition of existing improvements

COMMENT

As distinguished from options held by a developer to purchase land, this agreement contains an obligation to purchase one parcel of land with long-term options to acquire three additional parcels. Though the purchaser is committed to the first stage of the development program, his decision to move into any subsequent stage will depend upon the results of prior purchases. To prevent the developer from overextending himself, the agreement provides that no option may be exercised with respect to any one parcel unless certain minimum payments have been made and minimum developments have been achieved on each purchased parcel. Progressive options of this type are appropriate where extensive development is contemplated and where the seller wants to be sure that the developer will engage in an orderly financial program.

Valuation.

In view of the long-term periods over which these options extend, the purchase price of each parcel is fixed in terms of its fair market value at the time the option is exercised. For this purpose, fair market value is to be determined by means of a prescribed appraisal procedure, if the parties cannot agree upon the price. In no event, however, is the price to be less than a fixed minimum per acre. The entire valuation procedure is described in Paragraph 5.

Need for development plan.

Before construction is to begin on any parcel, a comprehensive development plan must be approved by the seller. Such a plan will contain the proposed division of the property into residential, commercial, and other uses, the location of streets, the nature and capacity of public

utilities, the platting of subdivisions, and the terms of building and use restrictions in the various areas. This is described in Paragraph 8. Changes in such plans can be made only with the approval of the seller, and all such plans are to be approved by the proper governmental officials. Because the development is to extend over a long period of time and because substantial areas are involved in each parcel, the agreement permits the exchange of acreage in a parcel owned by the purchaser for acreage in a parcel still owned by the seller. See Paragraphs 9 and 10.

Improvements.

Improvements on land that is purchased for development are likely to be unsuitable for continued use. Under this agreement the seller reserves the right to remove all improvements. Those improvements not removed by the seller become the property of the purchaser. Frequently, such improvements have to be demolished by the developer.

FORM

AGREEMENT made May 1, _____[year], between Dane Land Company, a California corporation ("Dane"), and Home Development Corporation, a California corporation ("Home");

Dane is the owner of the real property situated in Kern County, California, designated as Parcels 1, 2, 3, and 4, particularly described in Exhibit A attached hereto, subject to the title exceptions set forth in Exhibit B attached hereto.

The parties agree as follows:

1. *Conveyances of Parcel 1.* Within 30 days from the date hereof, Dane shall deposit in escrow with Pacific Title Insurance Company, Los Angeles, California (the "Title Company"), a grant deed to Parcel 1 ("Parcel 1"), in the form attached as Exhibit C; and Home shall, within the same period, deposit in escrow with the Title Company a note in the principal amount of \$1,000,000 (the purchase price of Parcel 1) in the form attached as Exhibit D and a deed of trust covering Parcel 1 in the form attached as Exhibit E. The parties shall instruct the Title Company within such 30-day period:

(a) to close the escrow if and when it is prepared to issue its standard coverage policy of title insurance with liability in the principal amount of \$1,000,000, insuring the interests of both Home and Dane, as such interests may appear, subject only to (1) the exceptions applicable to Parcel 1 as set forth in Exhibit B, (2) the exceptions contained in its customary printed form of standard coverage policy of title insurance, and (3) the reservations in such deed;

(b) to record the deed in Kern County, California, and deliver it to Home;

(c) to date the note and the deed of trust as of the closing of the escrow; and

(d) to record the deed of trust in Kern County, California, and deliver it and the note to Dane.

Upon the closing of such transaction, Dane shall pay (1) the recording fees, (2) the premium for the policy of title insurance, and (3) one half of the escrow fee; and Home shall pay the other one half of the escrow fee. Property taxes shall be prorated as of the date of closing. Each party shall pay to the title company its part of the foregoing charges upon receipt of the title company's statement thereof.

2. *Option to purchase Parcel 2.* Dane grants to Home an option to purchase Parcel 2 ("Parcel 2") at the price determined in accordance with the provisions of Paragraph 5. Home may exercise this option at any time within seven years after

the date of this agreement by giving written notice of its' intention to purchase. However, the exercise of this option is subject to the following conditions:

(a) At least 45 percent of the total number of acres in Parcel 1 conveyed to Home by Dane shall have been (1) released by Dane from the deed of trust given to secure the payment of the purchase price of Parcel 1, and (2) sold by Home or leased by it to others for a term of not less than 20 years. For this purpose, property sold shall include property sold on a deferred payment basis when full payment of the purchase price has not been made.

(b) Home shall have paid to Dane at least 60 percent of the purchase price for Parcel 1 in accordance with the provisions of the note given in connection with the purchase of Parcel 1.

3. *Option to purchase Parcel 3.* Dane hereby grants to Home an option to purchase Parcel 3 ("Parcel 3"), at a purchase price determined in accordance with the provisions of Paragraph 5. Home may exercise this option at any time within ten years after the date of this agreement by giving written notice of its intention to purchase. However, exercise of this option is subject to the following conditions:

(a) The option granted in Paragraph 2 shall have been validly exercised;

(b) At least 45 percent of the total number of acres in Parcel 2 conveyed to Home by Dane shall have been (1) released by Dane from the deed of trust given to secure the payment of the purchase price for Parcel 2, and (2) sold by Home or leased by it to others for a term of not less than 20 years. For this purpose, property sold shall include property sold on a deferred payment basis when full payment of the purchase price has not been made.

(c) Home shall have paid to Dane at least 60 percent of the purchase price for Parcel 2 in accordance with the provisions of the note given in connection with the purchase of Parcel 2.

4. *Option to purchase Parcel 4.* Dane hereby grants to Home an option to purchase Parcel 4 ("Parcel 4"), at the price determined in accordance with the provisions of Paragraph 5. Home may exercise this option at any time within 13 years of the date of this agreement by giving written notice of its intention to purchase. However, the exercise of the option granted in this paragraph is subject to the following conditions:

(a) The option granted in Paragraph 3 shall have been validly exercised;

(b) At least 45 percent of the total number of acres in Parcel 3 conveyed to Home by Dane shall have been (1) released by Dane from the deed of trust given to secure the payment of the purchase price for Parcel 3, and (2) sold by Home or leased by it to others for a term not less than 20 years. For this purpose, property sold shall include property sold on a deferred payment basis, when full payment of the purchase price has not been made.

(c) Home shall have paid to Dane at least 60 percent of the purchase price for Parcel 3 in accordance with the provisions of the note given in connection with the purchase of Parcel 3.

5. *Purchase price for optioned parcels.* The purchase price for each of Parcels 2, 3, and 4 shall be the fair market value of the land included in the parcel as to which the option is exercised, determined as of the date on which the option is exercised but in no event to be less than \$3,500 per acre. If the parties are unable to agree in writing on the fair market value within 30 days of the exercise of each option, the fair market value shall be determined by a board of three appraisers as follows:

(a) Within 40 days of the exercise of each such option each party shall notify the other in writing of the name and address of an appraiser selected by it. If either party fails to notify the other within the time provided, the appraiser already selected shall select a second appraiser. The two appraisers shall select a third appraiser, and if the two

appraisers fail, within ten days after their selection, to agree upon the third, the Presiding Judge of the Superior Court of the County of Kern shall, upon the request of either party, appoint a third appraiser within ten days after such request.

(b) The appraisers so selected or appointed shall promptly proceed to determine the fair market value of the land included in the parcel. However, in no event shall such fair market value be determined to be less than \$3,500 per acre. Any valuation agreed upon by a majority of the appraisers (not less than \$3,500 per acre) shall be accepted as final and conclusive between the parties hereto and shall be the purchase price for such parcel.

(c) The appraisers shall make their report in writing, which any two of them shall sign in duplicate. A copy shall be delivered to each party and to the title company within 15 days of the selection of the third appraiser. The parties shall divide equally the expenses of the appraisal.

6. *Closing title to optioned parcels.* Within 30 days of the determination of the purchase price of any of Parcels, 2, 3, or 4 by agreement of appraisal under Paragraph 5, Dane shall deposit in escrow with the Title Company a grant deed to the parcel as to which an option has been exercised, in the form attached as Exhibit C. Home shall, within the same period, deposit in escrow with the Title Company (1) a note which, if the option granted in Paragraph 2 is exercised, shall be in the form attached as Exhibit F, and which, if the option granted in Paragraphs 3 or 4 is exercised, shall be in the form attached as Exhibit G (it being understood that at the time of its execution all blank spaces shall be appropriately completed, including, without limitation, the principal amount of the purchase price for the particular parcel determined in accordance with the provisions of Paragraph 5), and (2) a deed of trust covering the parcel in the form of Exhibit E. The parties shall instruct the Title Company within the period above specified in this paragraph:

(a) to close each such escrow if and when it is prepared to issue its standard coverage policy of title insurance with liability in the principal amount of the purchase price for the particular parcel, insuring the interests of both Home and Dane, as such interests may appear, subject only to (1) the exceptions applicable to the particular parcel as set forth in Exhibit B, (2) the exceptions contained in its customary printed form of standard coverage policy of title insurance, (3) the reservations in the deed, and (4) the rights of any subsequent lessee or licensee of Dane to the extent provided in Paragraph 7;

(b) to record the deed in Kern County, California, and deliver it to Home;

(c) to date the note and deed of trust as of the closing of the escrow;

(d) to record the deed of trust in Kern County, California, and deliver it and the note to Dane.

Upon the closing of each escrow, Dane shall pay (1) the recording fees, (2) the premium for the policy of title insurance, and (3) one half of the escrow fee; and Home shall pay the other one half of the escrow fee. Property taxes shall be prorated as of the date of closing. Each party shall pay to the Title Company its part of the foregoing charges upon receipt of the Title Company's statement of them.

7. *Temporary leasing of optioned parcels.* Dane may from time to time lease or grant licenses to use portions of Parcels 2, 3, and 4 not then conveyed to Home. Each lease or license shall contain a specific provision which acknowledges the rights of Home under this agreement. Each lease or license shall provide that it may be terminated by Home after the lands affected by the lease or license are conveyed to Home, upon the giving of thirty (30) days' written notice to the lessee or licensee by Home. Home shall not be obligated to pay any fee or penalty to the lessee or licensee for such early termination.

8. *Development plans.* Home shall develop and subdivide each of Parcels 1, 2, 3, and 4 which it may acquire from Dane substantially as provided in the land use plan attached hereto marked Exhibit H and in development plans approved in writing by both parties. Home may from time to time submit to Dane for approval, which shall not be unreasonably

withheld, amendments to the land use plan.

Within 90 days after the recordation of a deed from Dane to Home for each of Parcels 1, 2, 3, and 4, Home shall prepare and submit to Dane a development plan for the parcel described in the deed. The plan shall be subject to written approval by Dane, which shall not be unreasonably withheld. At any time prior to the full development and subdivision of any of Parcels 1, 2, 3, or 4, Home may submit to Dane for approval, which shall not be unreasonably withheld, an amendment to any development plan then in effect. The initial development plan for each parcel may be in narrative form, general in nature, and may be approved by Dane subject to supplemental material being submitted and approved at a later date. Before construction begins, a development plan for the area must have been submitted and approved which sets forth among other things the following:

- (a) Division of the property into areas for single family residences, multifamily residences, professional, administrative, commercial, and industrial uses, and also areas for schools, parks, golf courses, playgrounds, and other community purposes.
- (b) The location of rights of way for all streets and highways, including both width of right-of-way and width of paved surface from curb to curb, paving and sidewalk plans.
- (c) The nature and capacity of sewage disposal, storm drainage, water, gas, electric, telephone, and street lighting facilities.
- (d) The lots into which the property is to be divided for subdivision purposes.
- (e) The terms of building and use restrictions to be imposed in the various areas.

Home shall present the development plan for each parcel for approval by the County Planning Commission or any other state, city, or county governmental authority required by law for subdivision and development of the parcel in accordance with the development plan. The term "development plan" with respect to any parcel shall mean the development plan for the parcel as the plan may originally have been approved by Dane as provided herein or may subsequently have been amended by any amendments approved by Dane as provided herein.

9. *Exchange of land proposed by seller.* If at any time Dane deems it advisable (a) to revise or amend the description of any portion of Parcels 2, 3, or 4 not yet acquired by Home under this agreement, or (b) to exchange land owned by Dane for land acquired by Home under this agreement, Dane may, from time to time submit to Home a written request that the revision or exchange take place. If Home consents to the requested revision, which it shall not unreasonably withhold, the revision shall be deemed to have been made forthwith; and if Home consents to the requested exchange, which it shall not unreasonably withhold, the exchange shall be made as provided in Paragraph 11. Notwithstanding the above, Home need not consider any such requested revision or exchange unless it is on an acre for acre basis. It shall not be deemed unreasonable for Home to withhold consent if the land which is to be exchanged cannot be reasonably used by Home for a specific purpose which is necessary to the development plan.

10. *Exchange of land proposed by purchaser.* If at any time after Home has acquired one or more of Parcels 1, 2, or 3, Home deems it advisable to exchange acreage in a parcel so acquired for acreage included in any portion of Parcels 2, 3, or 4 not yet acquired by it under this agreement, Home may submit to Dane a written request that the exchange take place. If Dane consents to the requested exchange, which it shall not unreasonably withhold, the exchange shall be made as provided in Paragraph 11. Notwithstanding the above, Dane need not consider a requested exchange unless (a) it is on an acre for acre basis, (b) it is for property of a like character (i.e., residential for residential and commercial for commercial as designated on the land use plan attached hereto marked Exhibit H), and (c) after the exchange, the parcels as reconstituted would each be a contiguous unit.

11. *Closing title to exchanged property.* If either party consents to a requested exchange under Paragraph 9 or 10, it shall so notify the other party in writing. Within 30 days thereafter, Dane shall deposit in escrow with the Title Company a grant deed to the acreage to be exchanged by it, in the form attached as Exhibit C. Home shall, within the same period, deposit in escrow with the Title Company a grant deed to the acreage to be exchanged by it, in the form attached as Exhibit K. The parties shall each execute and deposit in escrow with the Title Company within such 30-day period all documents and instruments that may be necessary (1) to release the acreage to be exchanged and conveyed by Home from any and all deeds of trust given under this agreement to secure the payment of a purchase money note, and (2) to include the acreage to be exchanged and conveyed by Dane among the acreage subject to any and all such deeds of trust. The parties shall instruct the Title Company within such 30-day period:

(a) to close each escrow if and when it is prepared to issue its standard coverage policies of title insurance with respect to the acreage exchanged by each party with liability equal in amount to its fair market value as agreed to by the parties insuring the interests of both Home and Dane as their interests may appear, subject only to (1) the exceptions applicable to such acreage as set forth in Exhibit B, (2) the exceptions contained in its customary printed form of standard coverage policy of title insurance, (3) the reservations in any deed from Dane, and (4) the right of any subsequent lessee or licensee of Dane to the extent provided in Paragraph 7.

(b) to record the deeds in Kern County, California, and deliver them to the respective grantees.

Upon the closing of any escrow provided for in this paragraph the party requesting the exchange shall pay to the Title Company, upon receipt of its statement, (a) the recording fees, (b) the premiums for the policies of title insurance, and (c) the escrow fee.

12. *Amendment of descriptions.* Upon the recordation of the deeds referred to in Paragraph 11, or Home's consent to a revision of the description of Parcels 2, 3, or 4 as provided in Paragraph 9, the descriptions set forth in Exhibit A attached hereto and the description of Parcels 2, 3, and 4 as the description may be fixed pursuant to this agreement shall be deemed to be revised and amended to the extent necessary to reflect the changes made in the parcels as a result of the revision or exchange. All references herein to Parcels 1, 2, 3, or 4 shall be deemed to refer to the parcels as they may be reconstituted from time to time under this agreement.

13. *Condemnation.* If any part of Parcels 2, 3, or 4 is condemned or taken for a public or quasi-public use prior to its acquisition by Home, the proceeds of any award or compensation arising from the condemnation shall belong to and be the property of Dane, and the description of such Parcels as set forth in Exhibit A attached hereto shall be deemed to be revised to exclude the portion so condemned or taken. If any action is filed in a court of competent jurisdiction for the condemnation or taking for a public or quasi-public use of any portion of Parcels, 2, 3, or 4 prior to its acquisition by Home, Dane may settle the action on any terms it deems reasonable, and may convey to the plaintiff in such action the property free and clear of any rights of Home. In that event, all the proceeds of the conveyance shall belong to and be the property of Dane and the description of such Parcels as set forth in Exhibit A attached hereto shall be deemed to be revised to exclude the portion so conveyed.

14. *Removal of improvements and personal property.* Dane reserves the right to remove from the lands any buildings, fences, cattle watering facilities, pole lines, pipelines, tanks, pumps, irrigation facilities, and other improvements, whether similar or dissimilar to the foregoing, and any personal property belonging to it. Dane may exercise this right at any time either before or after the lands are conveyed to Home. However, any improvements or personal property remaining upon lands conveyed to Home more than 60 days after it gives notice to Dane requesting their removal shall be deemed abandoned and shall become Home's property. Dane shall not be required to remove all or any part of the improvements or personal property, or to restore the surface of any lands from which it removes improvements or personal property. Dane shall fill in any holes or trenches dug in the course of such removal and, in the case of water wells from which equipment is removed, the well shall be properly capped and the casing left intact.

15. *Canals.* Lands included in Parcels 1, 2, 3, and 4 are bounded or crossed by lands occupied by various canals owned by canal companies (the "Canal Companies"). If as a result of, or in aid of, development of lands in such Parcels it shall become necessary to fence off all or any part of the canals or to construct or install any road, bridge, pipeline, conduit, or other improvement across or along any of the canals, the fencing or other improvement shall be constructed without cost to Dane or any of the Canal Companies, and Home shall hold Dane and the Canal Companies free and harmless of such costs regardless of who constructs or installs the fencing or other improvement. Home shall not be required to reimburse Dane or any of the Canal Companies for the cost of any fencing done or improvements made by them unless the work has been ordered or required by governmental authority, Home has consented to the work, or the work has been agreed to by arbitration. If the parties disagree that the work is necessary, either party may initiate arbitration by giving written notice to the other party naming one arbitrator, and the other party shall have ten days after receipt of such notice to give notice to the first party naming its arbitrator. If the other party fails to give such notice within such period the first arbitrator shall select a second arbitrator. The two arbitrators shall select a third arbitrator, and if they shall fail, within ten days after their selection, to agree upon a third, the Presiding Judge of the Superior Court of the County of Kern shall, upon the request of either party, appoint, within ten days after such request, a third arbitrator. The three arbitrators so selected or appointed shall promptly proceed to determine whether or not the work is necessary and report their findings to the parties. All findings agreed upon by a majority of the arbitrators shall be final and conclusive between the parties.

16. *Assignment.* No assignment of this agreement or of any right accruing hereunder shall be made, in whole or in part, by either party without the other party's prior written consent. Nothing in this section shall impair Home's right to convey lands acquired from Dane which have been released from all existing deeds of trust given under this agreement.

17. *Default and termination.* Each of the following shall constitute an event of default hereunder:

- (a) If Home fails or omits to make, on or before the date on which it is due, any payment to be made to Dane of principal or interest pursuant to the provisions of any note given pursuant to this agreement;
- (b) If Home fails to perform or observe any covenant or agreement of any deed of trust given pursuant to this agreement;
- (c) If Home develops or subdivides such Parcels, or any portion thereof, in a manner not in substantial accordance with a development plan previously approved in writing by Dane;
- (d) If Home fails to perform any other acts to be performed by it pursuant to the provisions of this agreement;
- (e) If any petition is filed against Home in any court, whether or not pursuant to any statute of the United States or of any state, in any bankruptcy, reorganization, composition, extension, arrangement, or insolvency proceedings, and Home is thereafter adjudicated bankrupt, or such petition is approved by the court, or the court assumes jurisdiction of the subject matter, or such proceedings are not dismissed within 90 days after the institution of the same; or any such petition is so filed by Home;
- (f) If any proceeding, a receiver or trustee shall be appointed for all or any portion of Home's property, and such receivership or trusteeship shall not be vacated within 90 days after the appointment;
- (g) Home shall make an assignment for the benefit of its creditors;
- (h) Home shall be dissolved in accordance with the provisions of the Corporations Code of the State of California.

If an event of default shall occur, Dane may elect, then or at any time thereafter while the default continues, to give Home notice that on the date specified in the notice, which shall not be less than ten days after the notice is given, all of

Home's rights under Paragraphs 2, 3, 4, 5, 6, 9, 10, 11, and 12 shall terminate. On the date specified in the notice, all of Home's rights under such paragraphs shall terminate and come to an end unless the default is cured within the period specified in the notice, or unless the default (other than the failure to pay money or the failure to submit to Dane any development plan within the 90-day period provided in Paragraph 8) is curable but cannot reasonably be cured within ten days after the giving of the notice and Home commences within the ten-day period to cure such default and prosecutes the same to conclusion with reasonable diligence.

18. *Notices.* All notices required or permitted to be given or delivered hereunder shall be in writing and sent by certified first-class mail, postage prepaid, addressed to the party intended at its address set forth below or any other address it may designate by notice given to the other party in the manner aforesaid.

To Dane: Dane Land Company
 100 West 6th Street
 Los Angeles, California

To Home: Home Development Corporation
 200 Bayview Street
 San Francisco, California

All such notices shall be deemed to have been given and delivered 72 hours after deposit in the United States mail in the manner provided.

19. *Costs and expenses of litigation.* If either party shall institute legal proceedings against the other based upon a cause of action arising out of this agreement, the prevailing party shall recover from the other party all costs and expenses incurred by it in such proceedings, including reasonable attorneys' fees to be fixed by the court.

20. *Entire agreement.* This agreement supersedes all agreements previously made between the parties relating to its subject matter. There are no other understandings or agreements between them.

21. *Non-waiver.* No delay or failure by either party to exercise any right under this agreement, and no partial or single exercise of that right, shall constitute a waiver of that or any other right, unless otherwise expressly provided herein.

22. *Headings.* Headings in this agreement are for convenience only and shall not be used to interpret or construe its provisions.

23. *Governing law.* This agreement shall be construed in accordance with and governed by the laws of the State of California.

24. *Counterparts.* This agreement may be executed in two or more counterparts, each of which shall be deemed an original but all of which together shall constitute one and the same instrument.

25. *Binding effect.* This agreement shall be binding upon and inure to the benefit of the parties, and their respective successors and assigns.

26. *Recording memorandum.* A memorandum of this agreement in the form of Exhibit L attached hereto shall be executed and acknowledged by the parties for the purpose of recording. If Home fails to exercise any of the options granted in Paragraphs 2, 3, or 4 within the time provided in such paragraphs, or if Home's rights under such paragraphs are terminated as provided in Paragraph 17, Home shall promptly execute and deliver to Dane a document relinquishing to Dane Home's rights to acquire the portion of Parcels 2, 3, and 4 not yet acquired by Home. Such document shall be in the form that Dane requires.

In witness whereof this instrument has been executed by the parties hereto as of the date first hereinabove written.

(Corporate Seal)

Attest:

Secretary

Dane Land Company

by _____

President

(Corporate Seal)

Attest:

Secretary

Home Development Corporation

by _____

President



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Current Legal Forms for Real Estate

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Chapter 22 DEVELOPMENT AND SUBDIVISION

Part IV. FORMS

A. ACQUISITIONS FOR DEVELOPMENT AND SUBDIVISION

26-22 Current Legal Forms for Real Estate FORM 22.10

FORM 22.10 Contract of sale--progressive options to purchase additional parcels--another form

COMMENT

This form provides the purchaser of land with the right to exercise options to purchase two additional portions of land in the future that are contiguous to the parcel currently being purchased through this agreement.

Under the terms of the agreement, the seller will hold the mortgage to the parcel now being purchased. The seller is not required to finance the purchase of parcels two and three; however, if the seller is willing to finance the purchase of those parcels, the maximum mortgage amount for each parcel is already set forth in the agreement. (Such a provision eliminates a great deal of future negotiating between the parties.)

The purchase price for parcels two and three is also set forth. The price is stated as a flat fee, plus an extra amount designed to compensate the seller for the effects of inflation. The extra amount begins to accrue on the date of execution of this agreement. The amount does not function as a penalty, but simply safeguards the seller's land values.

FORM

AGREEMENT made this _____[day] day of _____[month],
 _____[year], between _____[name of entity] CORPORATION, a(n)
 _____[state] corporation, with offices for the transaction of business at _____[address,
 city, state] (hereafter referred to as "Seller"), and _____[name of entity] DEVELOPERS, INC., a(n)
 _____[state] corporation, with offices for the transaction of business at _____[address,
 city, state] (hereafter referred to as "Purchaser").

W I T N E S S E T H:

WHEREAS, Seller is the owner of three (3) parcels of land located in the Town of _____ [town], County of _____ [county], State of _____ [state]; and

WHEREAS, Seller desires to sell and Purchaser desires to purchase the premises,

NOW, in consideration of the mutual promises contained herein, it is agreed as follows:

1. Purchase and sale of first parcel

(a) Purchaser agrees to purchase and Seller agrees to sell Parcel Number One (1), as described in Exhibit A, which is annexed hereto and made a part hereof, for the sum of _____ Dollars (\$ _____) [e.g., \$400,000]. The purchase price shall be paid as follows:

(1) a _____ Dollars (\$ _____) [e.g., \$10,000] deposit paid by certified check upon execution of this Agreement;

(2) _____ Dollars (\$ _____) [e.g., \$40,000] paid by certified check at the closing;

(3) _____ Dollars (\$ _____) [e.g., \$350,000] paid via a purchase money mortgage and note to be held by the Seller for a maximum of _____ (_____) [e.g., five (5)] years, at a floating rate of interest which shall be _____ [e.g., two (2)] percent more than the prime lending rate announced by _____ [name of bank] from time to time. The interest rate shall be adjusted monthly on the first day of each month. The borrowed sum shall be repaid in monthly installments of principal and interest amortized over a period of _____ [years] years.

(b) Purchaser may prepay principal at any time. Upon a prepayment of principal, the remaining payments shall be recalculated in order to amortize the remaining balance over the remaining amortization period.

(c) Purchaser shall pay a late fee of _____ [e.g., six (6)] percent for any payment not made within _____ [e.g., ten (10)] days of its due date.

(d) If any payment is not made within _____ [e.g., thirty (30)] days of its due date, Seller may elect to declare the entire remaining principal balance and accrued interest, if any, immediately due and payable.

(e) Purchaser shall be entitled to a release of the lien of the mortgage upon the payment of _____ Dollars (\$ _____) per lot to be released. Purchaser may obtain such a release only if it is not in default under the terms of this Agreement, the note and the mortgage as of the time the release is sought. Any amount paid for a release shall be in addition to the regular periodic payments required of Purchaser.

(f) Purchaser shall provide the proposed release document and payment to Seller. Seller shall then execute and deliver the release document to Purchaser. Purchaser shall thereafter record the release at its sole expense.

(g) The areas reserved for streets and utilities shall be released by Seller for dedication to the municipality upon request by Purchaser.

(h) Seller may include other standard or commonly accepted provisions in the mortgage and note.

2. *Seller's conveyance of title to first parcel.* Seller shall convey title free and clear of all liens and encumbrances, except restrictions and easements of record, provided that such restrictions and easements do not render the title unmarketable or unusable by Purchaser. Purchaser shall obtain an abstract of title or title insurance policy at its own expense. Seller shall cooperate by providing copies of any existing title and survey information. In the event that Seller is unable to deliver clear title, Purchaser's sole remedy is to terminate this Agreement and obtain a refund of its deposit.

3. *Option granted to purchaser to buy second parcel*

(a) Seller hereby grants to Purchaser the option to purchase Parcel Number Two (2), as described in Exhibit B, which is annexed hereto and made a part hereof. The purchase price shall be the sum of _____ Dollars (\$ _____) _____ [e.g., \$200,000], plus interest at the rate of _____ [e.g., six (6)] percent per annum from the date hereof until the date on which the option is exercised.

(b) The option may be exercised by giving written notice thereof (as set forth in Paragraph 12) after the occurrence of the following events, but in no event later than _____ [e.g., thirty (30)] months from the execution of this Agreement:

(1) Purchaser has taken title to Parcel Number One (1);

(2) the remaining principal balance on the mortgage on Parcel Number One (1) does not exceed

_____ Dollars (\$

_____) [e.g., \$200,000];

(3) at least

_____ [e.g., twenty (20)] lots in Parcel Number One (1), with houses constructed thereon, have been sold to bona fide purchasers;

(4) at least

_____ [e.g., five (5)] lots in Parcel Number One (1) have contracts of sale pending on them; and

(5) there exists no default under this Agreement or under the note and mortgage on Parcel Number One.

(c) Seller shall not be obligated to provide acquisition financing to Purchaser for the purchase of Parcel Number Two (2). However, in the event that Seller shall elect to provide such financing, the terms shall be the same as for Parcel Number One (1), except that the maximum mortgage shall be _____ Dollars (\$ _____) _____ [e.g., \$160,000].

(d) Failure of the Purchaser to timely exercise this option shall eliminate any obligation of Seller to sell Parcel Number Two (2) to Purchaser.

4. *Option granted to purchaser to buy third parcel*

(a) Seller hereby grants to Purchaser the option to purchase Parcel Number Three (3), as described in Exhibit C, which

is annexed hereto and made a part hereof. The purchase price shall be the sum of _____ Dollars (\$ _____), plus interest at the rate of _____ [e.g., six (6)] percent per annum from the date hereof until the date on which the option is exercised.

(b) The option may be exercised by giving written notice thereof (as set forth in Paragraph 12) after the occurrence of the following events, but in no event later than _____ [e.g., thirty (30)] months from the execution of this Agreement:

(1) Purchaser has exercised the option to purchase Parcel Number Two (2) and has taken title thereto;

(2) the remaining principal balance on the mortgage on Parcel Number One (1) does not exceed

_____ Dollars (\$

_____) [e.g., \$50,000];

(3) ninety percent (90%) of the lots in Parcel Number One (1) have been sold or are under contract to be sold to bona fide purchasers who have received mortgage approval;

(4) Purchaser has received subdivision approval for Parcel Number Two (2); and

(5) there exists no default under the terms of this Agreement or under the terms of the note and mortgage on Parcel Number One (1) or Parcel Number Two (2).

(c) Seller shall not be obligated to provide acquisition financing to Purchaser for the purchase of Parcel Number Three (3). However, in the event that Seller shall elect to provide such financing, the terms shall be the same as for Parcel Number One (1), except that the maximum mortgage shall be _____ Dollars (\$ _____) [e.g., \$132,000].

(d) Failure of the Purchaser to timely exercise this option shall end any obligation on the part of Seller to sell Parcel Number Three to Purchaser.

5. *When Purchaser must accept transfer of title.* The Purchaser shall accept transfer of title within _____ [e.g., ninety (90)] days after exercise of any option contained herein.

6. *Seller must convey clear title.* Seller shall provide clear title, as set forth in Paragraph 2 above.

7. *Eminent domain.* In the event any land subject to the options in Paragraphs 3 or 4 shall be taken by eminent domain, the purchase price shall be reduced by the amount of the condemnation award granted to Seller.

8. *Seller's warranty regarding environmental condition of property.* Seller warrants that it has had an environmental site assessment performed by a reputable company. The results of the assessment have been provided to Purchaser. If, during the course of Purchaser's activities on the land described in Exhibits A, B and C, a pre-existing adverse environmental condition is discovered, Seller shall have the option of remediating that condition at its own cost, or terminating this Agreement as to the parcel which contains the adverse condition. In the event that Seller opts to terminate the Agreement, it shall take all steps necessary and appropriate to return the parties to their respective positions at the time this Agreement was executed.

This warranty is personal to Purchaser and may not be transferred to any other party without the written consent of Seller.

9. *No assignment of agreement by purchaser without written consent of seller.* This Agreement and the rights accruing hereunder may not be assigned by the Purchaser without the prior written approval of the Seller. Seller may condition its approval on receipt of a satisfactory report on the proposed assignee's credit-worthiness. In the event that Seller agrees to an assignment of any part of this Agreement, Purchaser shall remain liable for any payments due hereunder, unless Seller, in writing, specifically releases Purchaser from any further obligation.

10. *Subordinate financing.* Purchaser may not obtain subordinate financing on any parcel on which Seller holds a mortgage without the prior written permission of Seller.

11. *Events of default.* Purchaser shall be deemed to have defaulted under this Agreement, if any of the following events occurs:

- (a) Purchaser fails to make a payment on or before the date on which it is due;
- (b) Purchaser fails to fulfill any covenant and/or obligation contained in the notes or mortgages held by Seller;
- (c) Purchaser fails to fulfill any covenant and/or obligation contained in any note or mortgage held by any other party on Parcels One (1), Two (2) or Three (3);
- (d) Purchaser makes any assignment for the benefit of creditors;
- (e) a voluntary or involuntary petition in bankruptcy is filed by or against Purchaser;
- (f) a receiver is appointed for any property owned by Purchaser; or
- (g) the purchaser is dissolved.

12. *Notice.* Any notice to be given hereunder shall be in writing, signed by the party giving notice, and delivered by any one of the following methods:

- (a) personal delivery;
- (b) facsimile transmission;
- (c) certified or registered mail, return receipt requested; or
- (d) overnight courier service, provided that a receipt is maintained in the ordinary course of business.

Notices shall be given at the following addresses:

If to Seller:

Attn: _____

If to Purchaser:

 Attn:_____

Either party may designate a new address by giving notice thereof to the other party.

13. *Benefit.* This Agreement shall be binding upon and inure to the benefit of the respective heirs, legal representatives, successors and assigns of the Seller and the Purchaser.

14. *Entire agreement.* This Agreement, together with the other written agreements and instruments executed concurrently herewith or pursuant to the provisions hereof, contains the entire agreement between the parties respecting the matters herein set forth and supersedes all prior agreements between them respecting such matters.

15. *Counterparts.* This Agreement may be executed in two (2) or more counterparts, each of which shall be deemed an original, but all of which together shall constitute one (1) and the same instrument. At the trial of any matter arising under this Agreement, only one (1) counterpart need be produced.

16. *Headings.* Paragraph headings are for purposes of convenience and identification only and shall not be used to interpret or construe this Agreement.

17. *Gender and number.* Whenever the singular or plural number, or masculine or feminine gender, is used herein, it shall equally include the other.

18. *Governing law.* This Agreement shall be construed and enforced in accordance with the laws of the State of _____[state].

19. *Modifications.* This Agreement may be modified only by a written document signed by both parties. A purported oral modification shall not be effective.

20. *Waiver.* Any failure or delay by either party to enforce any right arising hereunder shall not be deemed a waiver of such right. A waiver may only be created by a written document signed by the party who is waiving the performance of the other party.

The parties hereto have set their hands and seals the day and year first above written.

CORPORATION

DEVELOPERS, INC.

By _____
 Its president

By _____
 Its President

[Acknowledgments]



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Chapter 22 DEVELOPMENT AND SUBDIVISION

Part IV. FORMS

A. ACQUISITIONS FOR DEVELOPMENT AND SUBDIVISION

26-22 Current Legal Forms for Real Estate FORM 22.11

FORM 22.11 Contract of sale--apartment complex to be constructed

COMMENT

This is an agreement pursuant to which the owner of a parcel of land agrees to sell the same to the buyer. The seller then agrees to construct an apartment complex in accordance with certain green building standards specified in the contract on the land after title to the land has been conveyed to the buyer. The contract provides for an allocation of the purchase price between the land and improvements, construction of the improvements, financing, management, and the rights of the parties upon the occurrence of various events of default.

Capital cost recovery.

The Accelerated Cost Recovery System (ACRS) allows the recovery of capital costs of depreciable assets over specified recovery periods. The cost of residential rental property is recovered over 27.5 years, and the cost of nonresidential real property is recovered over 39 years. The straight line method is used for both categories, for property placed in service after 1986. Alternatively, the taxpayer may elect to recover the cost of the property by using the straight-line method of recovery over 40 years.

FORM

AGREEMENT made August 20, _____[year], between Chelsea Development Company, a general partnership consisting of Henry S. Bick, Louis Freed, Harold S. Gold, Jerry McCoy, and Alan Ross (the "Seller"), and Cort Real Estate Limited Partnership--VI, a limited partnership (the "Buyer").

Whereas the Seller represents to the Buyer that the Seller is the owner of that certain real property located in the County

of Harris, State of Texas, more particularly described in Exhibit A, hereunto annexed and made part hereof, on which it has commenced or will forthwith commence the construction of a 492 unit garden apartment complex; and

Whereas the Buyer desires to purchase such real property together with the improvements, structures, and fixtures now or hereafter thereon and the tangible and intangible personal property hereinafter described, provided the Seller agrees to complete the construction of the apartment complex and makes the other agreements hereinafter set forth. The Seller is agreeable to such sale and to making such agreements.

Now, therefore, in consideration of the above and the respective undertakings of the parties set forth below, it is hereby agreed as follows:

1. *Sale of property.* For the purchase price and upon the terms and conditions hereinafter set forth, the Seller shall sell to the Buyer and the Buyer shall purchase from the Seller:

(a) That certain real property described in Exhibit A hereof (the "Land");

(b) All improvements, structures, and fixtures ("Improvements") now existing or at any time or times hereafter placed, constructed, or installed on the Land, including, but not limited to, the apartment complex constructed and completed pursuant to Section 3 hereof;

(c) All tangible personal property (the "Personal Property") now existing or at any time or times hereafter placed or installed on or about the Land or Improvements and used in connection with the apartment house business now or hereafter conducted thereon, including, but not limited to, the items described in Exhibit B, hereunto annexed and made a part hereof; and

(d) All intangible property (the "Intangible Property") now or hereafter owned or held by the Seller in connection with the Land, the Improvements, or the Personal Property, or any business or businesses now or hereafter conducted thereon or with the use thereof, including, but not limited to, any trade style or trade name hereafter used in connection with the same and all leases, rental agreements, contract rights, agreements, business licenses, catalogs, customer lists, correspondence with tenants and suppliers, booklets and manuals, advertising material, utility contracts and telephone exchange numbers relating to the same.

The Land, Improvements, Personal Property and Intangible Property are collectively called the "Apartment House Property."

2. *Purchase price of apartment house property.* (a) *Purchase price.* The total purchase price of the Apartment House Property shall be \$7,125,700.

(b) *Allocation of purchase price.* The purchase price of the Apartment House Property shall be allocated as follows:

(1) \$745,000 to the Land;

(2) \$100 to the Intangible Property;

(3) \$571,500 to the Personal Property; and

(4) The balance for the Improvements.

3. *Construction.* (a) Without additional consideration to the Seller (the consideration for the same being included in the purchase price for the Apartment House Property), the Seller shall, at its sole expense, furnish or cause to be furnished

all of the materials, provide or cause to be provided all of the fixtures, equipment, and personal property, and per form or cause to be performed all of the work:

- (1) Required to construct, complete, and provide the structures, improvements, fixtures, and property shown or referred to in Exhibit C, hereunto annexed and made a part hereof, in accordance with the plans and specifications (the "Plans") described in Exhibit C;
- (2) Required under or in connection with any "Center Agreement" (as hereinafter defined);
- (3) Required to place the apartment buildings and other structures and improvements included in the Improvements in position to lease to tenants and to be fully utilized by tenants as contemplated by this agreement and the other agreements provided herein. This shall include, but not be limited to, procuring a certificate of occupancy or compliance from the municipality and procuring a certification of the building as "LEED Certified" as determined by the standards set by the U.S. Green Building Council; and
- (4) Required to complete or provide all offsite improvements, streets (including access streets and road), roadways, and utility services and installations (including the "Utility Facilities" as hereinafter defined) incidental to or connected with the use or improvement of the Apartment House Property or any part thereof.

As used herein, "Utility Facilities" means all utility equipment and facilities (including, but not limited to, the water system, sewer and drainage systems, and gas and electric distribution facilities) serving the Apartment House Property or any part thereof or required for its operation or use in the manner contemplated by this agreement, whether or not included in the Apartment House Property. The buildings, structures, improvements, and property, and the fixtures, equipment, and personal property, referred to in this Paragraph (a) (whether or not now in existence) are the "Apartment Structures."

"Center Agreement" means any "Tenant Lease" (as hereinafter defined), loan agreement, deed of trust, mortgage or, without limitation, any other covenant, agreement, or instrument affecting or relating to the Apartment House Property or any part thereof.

(b) In addition to its other representations, warranties, and agreements under this agreement, the Seller represents and warrants to the Buyer, and agrees:

- (1) The Seller shall pursue the completion of the Apartment Structures with due diligence after the date thereof and shall complete the same as soon as reasonably possible. In any event, not later than January 31, _____ [year], it shall complete same and cause the issuance of all certificates of occupancy, notices of completion, permits, and approvals, or their equivalent, that the procedures of the applicable governmental authorities provide relating to the same, including, but not limited to, all certificates of occupancy, utilities releases, permits, and approvals which under the applicable law are required before tenants may occupy the entire Apartment House Property. However, should the Seller experience delay in construction because of acts of God, riot, civil construction, strikes, labor or material shortage, governmental delays or conditions reasonably beyond its control, the time within which the Seller shall complete the Apartment Structures and cause the issuance of such certificates of occupancy, notices of completion, permits, and approvals, shall be extended by the amount reasonably necessary to allow for such delays, but in no event shall such time be extended by more than 30 days (or such additional period as may be permitted under the "Institutional Commitment" or any extension thereof (as hereinafter defined)). Notwithstanding the foregoing provisions of this subparagraph (b)(1), if the provisions of any Center Agreement shall require the completion of the Apartment Structures or any part

thereof or the filing of such notices of completion or the issuance of such certificates of occupancy, permits, or approvals, earlier than the times or times provided in this subparagraph (b)(1), the Seller shall complete the Apartment Structures and file the notices of completion and cause the issuance of the certificates of occupancy, permits, and approvals by the earlier time or times.

(2) The construction, completion, and providing of the Apartment Structures has been and will be accomplished in a good workmanlike and substantial manner, free from liens, claims, or material defects of any kind or nature and so as to achieve a green building rating of LEED Certified. In addition, whenever the Buyer acquires the Apartment House Property or any part thereof in accordance herewith, it will be in good condition and repair and free from material defects of any kind or nature. The period of survival of the warranties contained in this subparagraph (b)(2) is limited as hereinafter provided in Section 16 hereof. The warranties contemplated hereby shall relate to the circumstances which exist on the Completion Date (or any subsequent installation of acquisition date) and shall not include any repair or replacements resulting from or necessitated by normal wear and tear. This warranty is intended by the parties to replace any warranty afforded to the Buyer under any state or local law or ordinance. The parties hereby waive any rights to other or different warranty protections in favor of the provisions in this subparagraph (b)(2), which were negotiated by the parties at arm's length.

(3) The Business Structures and the materials, equipment, and labor incorporated therein and used in connection therewith has and shall in no material way vary or differ or depart from the descriptions, requirements, and features set forth or referred to in Exhibit C hereof (including, but not limited to, the Plans) except to the extent otherwise agreed in writing by the Buyer).

(4) The Seller shall at all times keep the premises reasonably free from accumulation of waste, materials, or rubbish and from its tools, scaffolding, and materials, except as required for the construction and completion then being performed by it hereunder. After such construction and completion the Seller shall leave the Apartment House Property in good, orderly, clean, safe and sanitary repair and condition and ready for the use and occupancy by tenants of the Apartment House Property and the conduct of the apartment house business contemplated hereby.

(5) The Apartment Structures include, and the Seller shall complete hereunder, all offsite improvements, streets (including access streets and roads), roadways, and utility services and installations (including the Utility Facilities) incidental to or connected with the use or improvement of the Apartment House Property or any part thereof.

(6) The access streets and roads as shown on the Plans and Utility Facilities constructed and completed by the Seller hereunder include all Utility Facilities that are reasonably required and all streets and roads that may be required by any public authority, in connection with the orderly and proper development and use of the Apartment House Property consistent with the provisions of this agreement. Where applicable, all streets, roadways, and Utility Facilities have been or will be built to the standards required by the applicable governmental authorities for streets, roadways, and Utility Facilities accepted for dedication, and except as otherwise may be agreed by the Buyer, all of the same shall be dedicated as promptly as possible to the applicable governmental authorities. At all times prior to such dedication, the Buyer shall have the irrevocable right of way and easement (free and clear of all liens and encumbrances) covering such streets, roadways, and Utility Facilities, of such nature, form, and location, as it shall approve.

(c) The Seller shall furnish Buyer on the "Closing Date" (as hereinafter defined), and monthly thereafter on or before the tenth day of each calendar month (commencing the month following the Closing Date), copies of all loan requests, supporting documents, vouchers, certificates, title insurance endorsements, plans, and specifications and, without limitations, other papers, documents, and items theretofore presented to any lender or proposed lender in connection

with the Apartment House Property or any part thereof or any construction thereon or loans made in connection therewith, and not precisely delivered to the Buyer.

(d) The Seller shall furnish Buyer (at the Seller's sole expense) on or before the tenth day of each calendar month (commencing with the month following the Closing Date) copies of current construction progress reports submitted to any construction lender, prepared by a licensed engineer or a registered architect, detailing the construction progress to the dates of such reports on the Apartment Structures.

(e) At all times during the construction of the Apartment Structures, the Buyer or its authorized agent may enter upon and inspect the same for the limited purpose of determining whether the work performed or being constructed confirms with Exhibit C and the terms of this agreement including its certification as a LEED Certified apartment. The Seller shall keep at the construction site a complete set of the Plans and all shop drawings related to the construction of the Apartment Structures, which Buyer or its authorized agent may examine at all reasonable times. If during such construction, the Buyer reasonably determines that the construction is not proceeding substantially in accordance with Exhibit C or this agreement and gives notice to the Seller specifying the particular deviation, deficiency, or omission, the Seller immediately shall take all necessary steps to correct the deviation. None of the following acts or omissions by the Buyer shall relieve the Seller of its liability or responsibility hereunder for defective materials or workmanship: the exercise of the Buyer's right to examine the Apartment structures during construction or its failure to exercise that right; any direction, request, or notice by the Buyer relating to the Apartment; or the Buyer's acceptance (in whole or in part) of the Apartment structures. Moreover, the Seller shall not be relieved of its liability or responsibility, without limitation, for any failure to comply with its obligations hereunder.

(f) Without limitation on its other obligations hereunder, the Seller shall pay, at its sole expense, at or before the time the payment of the same shall be due,

(1) All assessments, bonds, and special assessments constituting a lien or encumbrance against the Land or Improvements or any part thereof as of the Closing Date; and

(2) All assessments, bonds, and special assessments constituting a lien or encumbrance against the Land or Improvements or any part thereof at any time or times after the Closing Date and relating to or resulting from the construction, completion, and providing of the Apartment Structures as contemplated hereby;

However, the Seller shall pay in full all such assessments, bonds, and special assessments now existing or later placed against the Land or Improvements prior to the completion of the Apartment Structures. Such payment shall be made at or before its due date or the date on which the Apartment Structures are completed, whichever is earlier.

(g) Within 30 days after the Apartment Structures, but in no event later than January 31, _____[year] or any later date that may be permitted under the provisions of subparagraph (b)(1) above, the Seller shall cause to be delivered to the Buyer the following:

(1) A certificate or certificates duly executed by the architect or architects in charge of or connected with the construction of the buildings and improvements (or any part thereof) included in the Apartment Structures certifying that the buildings and improvements have been LEED Certified and constructed and completed in a good, workmanlike, and substantial manner, in conformity with good construction and engineering practice, and in substantial accordance with the Plans, that the Plans are complete in all respects, and that the Plans and the Apartment Structures fully comply with all applicable laws, ordinances, rules, and regulations (including, but not limited to, building codes and zoning ordinances and regulations).

(2) Notices of completion (if the local procedures provide or allow for the same) verifying that all construction included in the Apartment Structures has been completed, and the building permits and all authorizations and any special permits or licenses required in connection with the Apartment Structures (including, but not limited to, those authorizing the construction of the Apartment Structures and all offsite improvements in accordance with the Plans, and all permits or approvals required under any applicable federal, state or local law, ordinance, rule or regulation relating to the environment or the control of land use) and all authorizations for the operation of the Apartment House Property for the purposes contemplated by this agreement, issued by the municipality or governmental entity in which the Land is located or other appropriate federal, state, or local governmental agency.

(3) Except for any of the same previously delivered to Buyer, evidence reasonably satisfactory to it that:

(A) All streets and roads necessary for access to or full utilization of the Apartment House Property or any part thereof of their intended purpose and all Utility Facilities have been completed, dedicated, and accepted for maintenance and public use by the appropriate governmental authorities; and

(B) All necessary utilities service for the Apartment House Property or any part thereof is available and is in operation. Letters from local utility companies or municipal authorities stating that gas, electric, sewer, water, and telephone facilities are available to the Apartment House Property will be considered satisfactory evidence that necessary utility service is available.

(4) The Seller's statement verifying the payment in full of all work, labor, services, and materials used or employed in connection with the construction and completion of the Apartment Structures together with all supporting documents (including executed mechanic's lien waivers and evidences of payments) that the Buyer shall reasonably request.

(5) Final, unqualified, and unconditional certificates of occupancy in their usual form issued by the applicable governmental authorities relating to the entire Apartment Structures affirming, among other things, that the same are completed in accordance with the applicable governmental laws, rules, and regulations.

(6) Letters from governmental authorities having jurisdiction over the Land and Improvements stating that the Apartment Structures are built in conformance with all applicable environment quality acts and green building acts then in effect or an opinion of counsel that there are no such applicable acts.

(7) Surveys of the Land and Improvements prepared and certified by a licensed surveyor selected by the Seller and approved by the Buyer (which qualify as the Texas equivalent of an ALTA certified completion survey) showing the Improvements to be located and completed in accordance with Exhibit C, and, without limitation on the foregoing, demonstrating that the Improvements do not encroach onto adjoining land or onto any easements and that there are no encroachments of improvements from adjoining land onto the Apartment House Property and, in addition, showing the perimeter legal description of the Land, the dimensions and total square foot area of the Land, the dimensions and total square foot area of the Land, the interior lot lines, if any, the dimensions and location of the Improvements, the parking areas, easements, location of adjoining streets and the distance to and names of the nearest intersecting streets, and containing indemnifications of easements and rights of way by endorsements on the survey of the recording data of the instruments creating the same.

(8) Full plans and specifications showing the location of all utilities in or on or serving the Improvements and the location and detail of all the Improvements.

(9) Schedules in such detail as the Buyer shall reasonably request showing the percentage breakdown of the cost of construction to the components of the Improvements.

(10) Title insurance in favor of Buyer and showing that title is vested in Seller, free and clear of all liens and encumbrances, except those previously described herein.

(11) Certification of a licensed environmental engineer or equally qualified expert, stating that the land is free of any evidence of an adverse environmental impact or condition relating to the existence of any hazardous substance which may require remediation under the Federal Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), or any other federal, state or local law, rule, regulation or policy.

As used herein, "Completion Date" means the date as of which the Apartment Structures shall have been substantially completed in accordance with the foregoing provisions of this Section 3 and the "Endorsement" and the items hereinabove specified in this Paragraph (g) shall have been delivered to the Buyer and the "Prior Trust Deed" (as hereinafter defined) shall have been recorded and the permanent loan secured or to be secured thereby shall have been fully funded.

(h) The Seller's relation to the Buyer shall be that of independent contractor. Neither the Seller nor any subcontractor or supplier shall be the agent of the Buyer, nor shall any person employed by the Seller or any subcontractor or supplier be deemed an employee of or under the direction of the Buyer. Nothing contained in this agreement or otherwise shall create any contractual relationship between any subcontractor or supplier and the Buyer.

(i) In addition to and not in limitation of its other rights and remedies provided in this or in any other agreement or bylaw, the Buyer shall have certain additional rights stated below if at any time or times hereafter any one or more of the following ("Events of Default") occurs:

(1) The Seller fails or neglects to diligently prosecute its performance hereunder or in any material respect defaults in the performance of or breaches any covenant, warranty, condition, or restriction of this agreement, or any warranty made in this agreement proves to be untrue in any material way, and the failure, neglect, default, breach, or untruth is uncured or unrectified within ten days after the Buyer gives written notice of it. If the failure, neglect, breach, or default cannot be fully cured or rectified within the ten-day period, the Seller shall commence the cure or rectification within that period and thereafter diligently prosecute it to completion;

(2) Any judgment is entered against, or settlement agreed to by, the Seller or any of its General Partners, which in the Buyer's reasonable opinion could substantially impair the Seller's or any General Partner's ability to perform each and every one of their obligations hereunder, or any suit is filed against the Seller or a General Partner which, if adversely determined, could substantially impair their ability to perform hereunder, except such suits as to which the Seller or a General Partner (in the reasonable opinion of counsel satisfactory to the Buyer) has meritorious defenses and should prevail;

(3) The making by the Seller or any General Partner of any general assignment for the benefit of creditors, the filing by or against the Seller or any General Partner of a petition to have any of them adjudged bankrupt or for reorganization or arrangement under any bankruptcy law, the appointment of a trustee or receiver to take possession of substantially all the assets of the Seller or a General Partner or their interest in the Apartment House Property, or the attachment, execution, or other judicial seizure of substantially all of the assets of the Seller or a General Partner or their interest in the Apartment House Property;

(4) In any legal proceeding the Seller or any General Partner is adjudicated as being, or stipulates to being, insolvent or unable to pay its debts as they become due;

(5) Cessation of the work occurs prior to completion of the Apartment Structures for a continuous period

of ten days or more for causes other than those beyond the control of the Seller or consented to by it in writing, any delay occurs in completion of construction for any reason that would prevent or preclude the construction or completion of the Apartment Structures in an orderly and expeditious manner or within the times provided, or the Seller fails to commence with reasonable diligence and diligently carry to completion all necessary repair and restoration of any damage or loss to the Apartment House Property or the Apartment Structures or any part thereof;

(6) Any person obtains an order or decree in any court enjoining the construction of the Apartment Structures or enjoining or prohibiting the Seller from performing this agreement and such order or decree is not vacated within 60 days after it is granted;

(7) The Seller neglects, fails, or refuses to keep in force and effect any required permit or approval for the construction of the Apartment Structures; or

(8) Any part of the Apartment Structures is damaged or destroyed by casualty not fully covered by insurance for the property's repair and restoration unless, within 20 days after the damage or destruction occurs, the Seller deposits with the "Permanent Lender," (as defined below) sufficient funds to cover the uninsured loss upon terms and conditions reasonably satisfactory to the Buyer. If the loss is covered by insurance, an agreement from the Permanent Lender that the insurance proceeds will be made available for repair and restoration will be sufficient.

If any of the above Events of Default occurs, the Buyer (without prejudice to or limitation of its other rights and remedies) may, at any time after the Closing Date, with or without terminating the Seller's employment hereunder, take possession of the premises on which any portion of the work under this Section 3 is to be performed and of all materials, tools, or appliances thereon and finish the work provided in this Section by whatever reasonable method it may deem expedient. In that connection, it may perform or cause to be performed any and all work and labor necessary to complete the Apartment Structures substantially in accordance with the Plans and may do and perform all other acts and things that shall be necessary or useful in connection with the same. For this purpose, but without limitation on the other rights and remedies of the Buyer, the Seller (as a partnership but not its individual partners) hereby constitutes and appoints the Buyer, its true and lawful attorney-in-fact with full power of substitution to complete the construction of the Apartment Structures in the Seller's name and hereby empowers the Buyer, as such attorney, to take all actions necessary in connection therewith, including; but not limited to, the following: To use any funds of the Seller, including any balance which may be held in escrow or subject to any security agreement and any funds which may remain unadvanced under any construction loan, for the purpose of completing the Apartment Structures in the manner provided in the Plans; to make all additions and changes and corrections in the Plans that shall be necessary or desirable to complete the Apartment Structures in substantially the manner contemplated by the Plans; to employ all contractors, subcontractors, agents, architects, and inspectors required for such purposes; to pay, settle, or compromise all existing or future bills and claims which are or may be liens against the Apartment House Property or may be necessary or desirable for the completion of the Apartment Structures or the clearance of title to the Apartment House Property; to execute all applications and certificates in the name of the Seller which may be required to any construction contract and to do any and every act with respect to the construction of the Apartment Structures which the Seller may do in its own behalf. It is understood and agreed that this power of attorney shall be deemed to be a power coupled with an interest which cannot be revoked by death, dissolution, or otherwise. The Buyer may also prosecute and defend all actions or proceedings in connection with the construction of the Apartment Structures and take any action and require any performance as it deems necessary. The Seller shall pay to the Buyer upon demand the Buyer's expense of completing the Apartment Structures (including, but without limitation on the generality of the above, compensation for additional architectural, managerial, and administrative services and all loss or damages to the Buyer resulting from the Seller's default or breach or failure to complete its performance hereunder and all costs and expenses of all matters authorized to be done by the Buyer under the above power of attorney). Without limitation on its rights and remedies, the Buyer may deduct all or any part of its expense from any current or future sums payable to the Seller.

4. *Payment of purchase price.* The purchase price of the Apartment House Property shall be paid as follows:

(a) \$150,000 of the purchase price shall be paid on the "Closing Date" (as hereinafter defined);

(b) The balance of the purchase price shall be evidenced by and paid in accordance with the terms of a promissory note in the form of Exhibit D, hereunto annexed and made a part hereof (the "Purchase Price Note"). The Purchase Price Note shall be secured by a deed of trust (the "Purchase Price Trust Deed"), in the form of Exhibit E, hereunto annexed and made a part hereof. As provided therein, the Purchase Price Trust Deed is an all-inclusive deed of trust and may hereafter become subject and subordinate to the "Construction Encumbrance" and the "Prior Trust Deed" (as such quoted phrases are defined in the Purchase Price Trust Deed). The Buyer shall be required to comply with the requirements of the Prior Trust Deed pertaining to use and maintenance of the Apartment Structures.

5. *Additional payments.* In addition to the payments provided in Section 4 hereof, the parties shall pay the following:

(a) In accordance with and subject to the limitations specified in a promissory note (the "Loan Fee Note"), in the form of Exhibit F-1, hereunto annexed and made a part hereof, the Buyer shall pay the Seller a loan fee (i.e., points) of \$69,300 in connection with the Purchase Price Note. The Loan Fee Note shall be secured by a deed of trust (the "Loan Fee Trust Deed"), in the form of Exhibit F-2, hereunto annexed and made a part hereof. The Loan Fee Note and the Loan Fee Trust Deed shall be, respectively, delivered to the Seller and recorded on the Closing Date. The parties agree that the loan fee of \$69,300 is an additional charge solely for the use or forbearance of money during the period between the Closing Date and December 31,

_____ [year], inclusive (the Purchase Price Note being due and payable on January 31,

_____ [year] unless, as provided therein, the same is purchased by a "Permanent Lender" on or before January 31,

_____ [year], but shall not be credited against or reduce any other payment or sums payable to the Seller under this agreement or the Purchase Price Note or the Purchase Price Trust Deed.

(b) In accordance with and subject to the limitations specified in a promissory note (the "Covenant Fee Note"), in the form of Exhibit G-1, hereunto annexed and made a part hereof, the Buyer shall pay the Seller \$95,000 as consideration for the execution and delivery by the Seller to the Buyer of a covenant not to compete (the "Covenant"), in the form of Exhibit G-2, hereunto annexed and made a part hereof. The Covenant Fee Note shall be secured by a deed of trust (the "Covenant Fee Trust Deed"), in the form of Exhibit G-3, hereunto annexed and made a part hereof. The Covenant shall be delivered to the Buyer and the Covenant Fee Note and Covenant Fee Trust Deed shall be, respectively, delivered to the Seller and recorded on the Closing Date. The parties agree that such \$95,000 is consideration solely for the giving by the Seller to the Buyer of the Covenant, and shall not be credited against or reduce any other payment or sums payable to the Seller under this agreement or the Purchase Price Note or the Purchase Price Trust Deed.

(c) The Seller shall pay to MB Realty Corporation, a Delaware corporation ("MB"), the sum of \$427,500 in installments as follows: \$222,500 on or before the date on which shall be paid the installment of principal provided in Section 2, Paragraph (a) of the Purchase Price Note (i.e., the installment of \$248,700 therein provided); and \$205,000 on or before the date on which shall be paid the installment of

principal provided in Section 2, Paragraph (b) of the Purchase Price Note (i.e., the installment of \$327,000 therein provided).

All payments made or payable by either party or their successors or assigns under this agreement or under any agreement or instrument herein provided or entered into in connection herewith (whether or not the payment is payable to a party hereto) shall be made concurrently with each other payment which is due on the same date, and the obligation to make each payment is conditioned on the concurrent payment of each other payment.

6. *Management agreement.* The Seller shall cause Chelsea Management Company, a corporation ("Management"), to enter into a management agreement (the "Management Agreement") with the Buyer, in the form of Exhibit H, hereunto annexed and made a part hereof. As more particularly set forth in the Management Agreement, Management, as manager, shall manage the Apartment House Property under and pursuant to the provisions of the Management Agreement.

7. *Guarantee.* The Seller shall cause to be delivered to the Buyer, concurrently with the execution hereof, a guarantee, duly executed by Harold S. Gold, Alan Ross, Henry S. Bick, Louis Freed, and Jerry McCoy (individually and collectively the "Guarantor"), in the form of Exhibit I, hereunto annexed and made a part hereof.

8. *Closing conference.* The sale and purchase herein provided shall be consummated through a closing conference (the "Closing Conference") which shall be held on the Closing Date at 11:00 a.m., Central Time, at the office of Chicago Title Insurance Company, 1500 Austin, Houston, Texas 77002. As used herein, "Closing Date" means September 1, _____[year], or any other date the parties may hereafter agree upon for the transfer, assignment, and conveyance herein provided. The Seller, Chelsea Financial Services ("CFS") and MB shall each be represented at the Closing Conference. The parties will follow the following procedure in connection with the Closing Conference:

(a) Prior to the Closing Date, the parties shall cause to be delivered to Chicago Title Insurance Company ("Title"), at its or its agent's office in Houston, Texas, the following:

(1) By the Seller, a warranty deed in favor of the Buyer, covering the Land and Improvements, duly executed and acknowledged by the then record owner or owners of the Land and Improvements.

(2) By the Buyer, the following:

(A) Purchase Price Trust Deed,

(B) Loan Fee Trust Deed,

(C) Covenant Fee Trust Deed,

(D) "Commitment Fee Trust Deed" (as defined in the "Loan Commitment" referred to in Section 13 hereof), and

(E) "Management Fee Trust Deed" (as defined in the Management Agreement), each duly executed and acknowledged by the Buyer.

(b) At the Closing Conference, each party shall satisfy itself that the other is in position to deliver at the Closing Conference the items hereinafter specified to be delivered by such party in Paragraph (c) hereof. Upon being so satisfied, the parties shall obtain the advice of Title as to whether it is in position to:

(1) Cause the instruments described in Paragraph (a) hereof to be immediately recorded with the County

Recorder of the County of Harris, Texas; and

(2) Upon such recordation, to issue the "Initial Policy" and commitments specified in Paragraph (d) hereof. If Title shall advise affirmatively on all the aforesaid matters, then the parties shall give Title their instructions to:

(A) Cause the instruments described in Paragraph (a) to be immediately recorded in the order set forth in Paragraph (a) and to issue the Initial Policy and such commitments;

(B) Advise the County Recorder to return such deed to the Buyer, and the Purchase Price Trust Deed, the Loan Fee Trust Deed, and the Covenant Fee Trust Deed to Seller, and the Commitment Fee Trust Deed to CFS following such recordation, at their addresses hereafter specified in this agreement; and

(C) Advise the parties when the recordation of such instruments in accordance with the foregoing instructions shall have taken place.

(c) Upon receiving the advice from Title that it has recorded the instruments described in Paragraph (a) hereof in accordance with the foregoing instructions and is issuing the Initial Policy and commitments, and is immediately confirming all of the foregoing the following shall be delivered at the Closing Conference:

(1) The Seller shall deliver or cause to be delivered to the Buyer:

(A) A bill of sale and assignment in favor of the Buyer, as transferee, covering the Personal Property and Intangible Property, duly executed by the Seller;

(B) Two counterpart copies of the Management Agreement, duly executed by Management;

(C) The certificate of the Beneficiary under the Construction Encumbrance (in the form attached hereto as Exhibit J and incorporated herein) if the Construction Encumbrance has been recorded prior to the recordation of the documents described in Paragraph (a) hereof;

(D) Certificates of insurance evidencing the insurance policies provided in Section 10, Paragraph (e) hereof and showing the Buyer as an additional insured under each of such policies (at the time of the closing conference only Builder's Risk and Liability Insurance shall be required);

(E) An opinion of the attorneys for the Seller, CFS, and Management, addressed to the Buyer, in form reasonably satisfactory to counsel for the Buyer, dated as of the Closing Date, to the effect that

(i) This agreement, the Management Agreement, the Loan Commitment, and all agreements, instruments, and documents herein provided to be executed, or herein provided to be caused to be executed, by the Seller, CFS, Management, or the Guarantor are duly executed by and are binding upon the same;

(ii) The Seller is a partnership, duly organized, validly existing and in good standing under the laws of the State of Texas, consisting of Henry S. Bick, Louis Freed, Harold S. Gold, Jerry McCoy, and Alan Ross as general partners, and duly authorized, qualified, and licensed under any and all applicable laws, regulations, ordinances, and orders of

federal, state, and local authorities to carry on its business in the places and in the manner in which it is presently conducted, and to do all things required of it under or in connection with this agreement;

(iii) CFS is a partnership, duly organized, validly existing and in good standing under the laws of the State of Texas, consisting of Cap Exchange Corporation, Harold S. Gold Co., Inc., and Alan Ross, Inc., as general partners, and duly authorized, qualified, and licensed under any and all applicable laws, regulations, ordinances, and orders of federal, state, or local authorities to carry on its business in the places and in the manner in which it is presently conducted, and to do all things required of it under or in connection with this agreement;

(iv) Management is a corporation, duly organized, validly existing and in good standing under the laws of the State of Texas, and duly authorized, qualified, and licensed under any and all applicable laws, regulations, ordinances, and orders of federal, state, and local authorities to carry on its business in the places and in the manner in which it is presently conducted, and to do all things required of it under or in connection with this agreement;

(v) The transfer of the Apartment House Property to the Buyer and the other transactions contemplated by this agreement will not violate the terms of the Construction Encumbrance or any obligations secured thereby nor cause the acceleration of maturity of any obligation secured thereby;

(vi) The Land is zoned for the Apartment House Property and commercial businesses included and to be included in the Apartment House Property and the use of the Land for such purposes does not violate any covenant or agreement (including Restrictive Covenants) applicable to the Land or any party thereof or a statement that there is no zoning applicable to the Apartment House Property;

(F) Certified copies of resolutions of the Board of Directors of Management, in form and substance reasonably satisfactory to counsel for the Buyer, authorizing Management to enter into the Management Agreement and to consummate the transactions therein provided;

(G) Copies of all building permits and all authorizations and any special permits or licenses required in connection with the Apartment Structures (including, but not limited to, those authorizing the construction of the Apartment Structures and all offsite improvements in accordance with the Plans, and all permits or approvals required under any applicable federal, state, or local law, ordinance, rule, or regulation relating to the environment or the control of land use) and all authorizations for the operation of the Apartment House Property for the purposes contemplated by this agreement, issued by the municipality or governmental entity in which the Land is located or other appropriate federal, state, or local governmental agency.

(H) Evidence reasonably satisfactory to the Buyer that:

(i) All streets and roads necessary for access to the Apartment House Property or any part thereof for their intended purpose and all Utility Facilities have been or will be completed, and if applicable dedicated and accepted for maintenance and public use by the appropriate governmental authorities; and

(ii) All necessary utilities service for the Apartment House Property or any part thereof

is available. Letters from local utility companies or municipal authorities stating that gas, electric, sewer, water, and telephone facilities are available to the Apartment House Property will be considered satisfactory evidence that necessary utility service is available.

If for any reason the Buyer waives the requirement of the delivery at the Closing Conference of any of the items hereinabove specified in this Paragraph (c)(1), the Seller shall nevertheless cause such items to be delivered to the Buyer promptly following the Closing Date unless otherwise agreed.

(2) The Buyer shall deliver to the Seller:

(A) A certified or cashier's check payable to the Seller for \$150,000 (as the down payment on the purchase price of the Apartment House Property);

(B) The Purchase Price Note, the Loan Fee Note, and the Covenant Fee Note, each duly executed by the Buyer;

(C) Two counterpart copies of the Management Agreement, duly executed by the Buyer; and

(D) An opinion of the Buyer's attorneys, addressed to the Seller, in form reasonably satisfactory to the Seller to the effect that the Buyer's corporate general partner is a duly organized and existing corporation in the State of Illinois and in good standing in such state; that the Buyer is a duly organized and existing limited partnership under the laws of the State of Illinois; that this agreement and all other agreements executed concurrently herewith or in connection with the transaction contemplated hereby and the instruments delivered pursuant hereto, purporting to be executed by the Buyer, are duly executed by the Buyer and fully binding upon it and that all of the instruments are valid, binding, and fully enforceable against the Buyer in accordance with their terms, without contravening any laws, subject only to applicable bankruptcy laws.

(3) The Buyer shall deliver to CFS the Commitment Fee Note.

(4) CFS shall deliver to the Buyer the Loan Commitment.

(d) The Seller shall cause Title to issue the following:

(1) The Seller shall cause Title to issue to the Buyer, on the Closing Date, a Texas Owner's Policy of Title Insurance (the "Initial Policy"), with liability limits of \$7,125,700, insuring the Buyer as owner. In addition, upon the substantial completion of the Apartment Structures, the Seller shall issue a certificate warranting that title thereto is free and clear with the exception of:

(A) Parties in possession (other than tenants under Tenant Leases, solely as such tenants);

(B) Unrecorded easements;

(C) Taxes or special assessments not shown by the public records; and

(D) Exceptions which a correct survey would disclose (including the absence of any exception for any foundations in place as of the date of such policy not being within the lot lines and applicable setback lines, and any portion of the Improvements encroaching onto adjoining land or onto any easements, and any encroachments of improvements from adjoining land onto the Apartment House Property or any part thereof).

(2) The Seller shall cause Title to issue to Buyer on the Closing Date:

(A) A six-month commitment to issue to the Buyer and to its successors and assigns the Endorsement; and

(B) Title's agreement that it will, without additional consideration and without any request or direction from any party or person, automatically reissue the commitment for successive six-month periods at least 30 days prior to the expiration of the six-month period covered by the previous commitment, until issuance of the Endorsement, but not to exceed a total period of 24 months or such longer period as permitted under Section 3, Paragraph (b)(1) hereof.

(e) Without limitation on its other obligations hereunder, the Seller shall pay:

(1) Any documentary or transfer tax payable in connection with the delivery of any instrument or document provided in or contemplated by this agreement or any agreement or commitment described or referred to herein;

(2) All expenses of or related to the issuance of the title insurance commitments and the policies of title insurance herein provided (including, but not limited to, the premiums for the same and the costs of any surveys required in connection with the same);

(3) The charges of the County Recorder for or in connection with the recording of any instrument or document provided herein or contemplated by this agreement or any agreement or commitment described or referred to herein; and

(4) The cost of all opinions, pertaining to the Seller, certificates, instruments, documents, and papers required to be delivered, or to cause to be delivered, by the Seller hereunder, and, without limitations, the cost of all performances by the Seller of its obligations hereunder.

The Seller shall deposit with Title on the Closing Date a sum sufficient to pay all premiums for the Initial Policy, Endorsement, and title insurance commitment. However, if Title should be unwilling or unable to accept all or any part of the deposit, the Seller shall deposit such sums with the Buyer on the Closing Date (Buyer agreeing to apply the sum so deposited with it against such premiums and, to the extent the same shall not be so used, to return the balance to Seller).

9. Institutional commitment; existing encumbrance. The Apartment House Property may become subject to a certain deed of trust (the "Construction Encumbrance"), securing a certain promissory note (the "Construction Note"), having an original principal amount of not more than \$6,400,000. The Construction Note will evidence loans made for the purpose of constructing the Apartment Structures. In addition, the Seller has obtained from New Life Insurance Company ("New"), a loan commitment (the "New Commitment"), dated September 1, _____[year], as amended September 10, _____[year] and September 13, _____[year], under

which New agrees to make a permanent take-out loan on the Apartment House Property in the maximum amount of \$6,400,000 in replacement of the Construction Encumbrance and Construction Note. The New Commitment and any other loan commitment hereafter obtained by the Seller for a permanent or long term loan on or with respect to the Apartment House Property or any part thereof (not including, however, the "Loan Commitment" described in Section 13 hereof) is individually and collectively called the "Institutional Commitment." The Seller shall use its best efforts to obtain the consent of New to the assignment to the Buyer of the New Commitment, without the payment of any sum or amount by the Buyer and without any additional consideration to New thereunder. In addition, any future Institutional Commitment obtained by the Seller shall provide that it shall be assignable to the Buyer without the Buyer's payment and without any additional consideration to the lender thereunder. The Institutional Commitment (i.e., the New Commitment or any future loan commitment obtained by the Seller) shall be deemed automatically assigned to the Buyer upon delivery of notice to the Seller that the Buyer elects to have the Institutional Commitment assigned to it. The Seller shall pay all commitment fees, charges, costs, and expenses of or related to the Institutional Commitment. Nothing contained herein shall be deemed an acknowledgment or agreement by the Buyer that a loan made or note or mortgage given in accordance with the terms of any Loan Commitment will comply with the requirements for a "Prior Promissory Note" or "Prior Trust Deed" (as such quoted terms are hereinafter defined). The Seller shall cause the Prior Trust Deed and Prior Promissory Note to be given and delivered in replacement and in lieu of the Construction Encumbrance and Construction Note prior to the maturity of the Construction Note (and in any event before February 28, _____[year]). The Buyer has reviewed and approved the terms of the Institutional Commitment, a copy of which is attached hereto as Exhibit L.

10. *Representations and warranties of seller.* In addition to the representations and warranties contained in other paragraphs of this agreement, the Seller represents and warrants to the Buyer the following:

(a) On the Closing Date, the Seller will be the owner of the entire right, title, and interest in and to the Apartment House Property, except for that portion of it (the "Post-Closing Apartment House Property"), required hereunder to be provided the Buyer after the Closing Date; except for the Post-Closing Apartment House Property, the Buyer will acquire hereunder the entire right, title, and interest in and to the Apartment House Property on the Closing Date; the Seller will be the owner of (and the Buyer will acquire hereunder) the entire right, title, and interest in and to the Post-Closing Apartment House Property at or before the time the same is required to be provided to the Buyer hereunder; that on or before the Closing Date, or at such times after the Closing Date as shall be required in order to complete its performance in accordance herewith, the Seller will have obtained all required consents, releases, and permissions, and will have complied with all applicable statutes, laws, ordinances, and regulations of any kind or nature, in order to effectively vest in the Buyer good and marketable title (subject to the Permitted Exceptions) to the Apartment House Property; the Buyer will acquire the Apartment House Property (and except for the Post-Closing Apartment House Property, the Apartment House Property will be, on the Closing Date), free and clear of all liens, encumbrances, liabilities, claims, rights, demands, easements, leases, agreements, covenants, conditions, and restrictions of any kind or character (including, but without limitation on the generality of the foregoing, liens or claims for taxes, mortgages, conditional sale contracts or other title retention agreements, deeds of trust, security agreements and pledges) except for the Permitted Exceptions and any leases ("Tenant Leases") made to tenants of individual apartments (all of which comply with the requirements and limitations for leases and rental agreements set forth in the Management Agreement).

(b) Seller shall keep the Apartment House Property at all times (whether before or after the Closing Date) free and clear of all liens, claims, or demands of any kind or character for or in connection with the construction and completion and providing of the Apartment Structures provided in Section 3 hereof, including, but without limitation on the generality of the foregoing, liens for services or materials or for mechanic's liens, and from and against all expense and liability in connection therewith, including, but not limited to, court costs and attorneys' fees. However, if any such lien, claim, or demand is levied, the Seller, within ten days after the levy, shall secure its release by bonding or other appropriate means or shall take any other steps that the Buyer may reasonably require.

(c) The Apartment Structures comply and will at all times comply with all setback requirements (whether imposed by law or any covenant, condition, restriction, or contract relating to or affecting the same) and do not and will not when completed, encroach onto adjoining land or onto any easements, and there are no encroachments of improvements from adjoining land onto the Apartment House Property or any part thereof and there will not be any such encroachments on the Completion Date.

(d) This agreement and all agreements, instruments, and documents herein provided to be executed, or herein provided to be caused to be executed, by the Seller are duly executed by and are binding upon it; that all financial statements of the Seller or the Guarantor or of the Apartment House Property delivered to the Buyer at any time or times heretofore or hereafter or concurrently herewith, are and shall be true and correct in all respects, have been and will be prepared in accordance with generally accepted accounting practice except as noted therein, and have fairly presented and will fairly present the respective financial conditions of the subjects thereof as of the respective dates thereof, and no material adverse change has occurred or shall have occurred in the financial conditions reflected therein from the respective dates thereof to the dates of delivery of the same to the Buyer except as noted on such financial statements; none of the events, occurrences, or circumstances specified in Paragraph (i) of Section 3, hereof, has occurred or shall occur at any time or times on or before the Closing Date.

(e) The Seller will maintain the Builder's Risk Insurance and Liability Insurance on the apartment property and structures until the Apartment Structures are substantially completed and will thereafter maintain at least the coverage specified in Section 4, Paragraph (f) of the Management Agreement.

(f) The Business Property and the business conducted thereon and with the use thereof are accurately described in Exhibit C hereof; all statements and representations contained in Exhibit C hereof are true; the projections of income and expenses are true and correct to the Seller's best knowledge and are based upon the best information available to it; however, such projections are not a guarantee of the results of operation of the Apartment House Property.

(g) Seller has caused to be delivered to the Buyer previously the following financial statements:

(1) Balance sheets of Harold S. Gold, Alan Ross, and Henry S. Bick as of December 31, _____ [year]; and

(2) Balance sheet of the Seller as of August 1, _____ [year]; and

each of such statements are full, true, and correct. Within 120 days after the end of each calendar year during the term of the Management Agreement, the Seller shall cause full, true, and correct balance sheets of the Seller and the Guarantors (as of the end of the just concluded calendar year) of the Seller (but not the Guarantors) to be delivered to the Buyer. In addition, during the term of the Management Agreement, the Seller shall within 30 days after demand by the Buyer, deliver to it:

(A) All supplemental or additional documents or information (including updated Balance Sheets) pertaining to the financial condition of the Seller or Guarantor that the Buyer shall reasonably request; and

(B) Income statements for the operation of the Apartment House Property.

The Buyer shall reimburse the Seller for all actual costs incurred by it in providing any such supplemental or additional documents or information described in clause (A) above.

At all times the Seller has complied and will comply with all laws, ordinances, rules, regulations, and orders (including, but not limited to, those relating to zoning, building, fire, health and safety and environmental control and protection) of any government or any agency, body or subdivision thereof, and all standards and regulations of appropriate supervising

Boards of Fire Underwriters and similar agencies, bearing on the construction, operation, or use of the Apartment House Property or any part thereof; the Seller has not received and will not have received as of the Closing Date any notice or knowledge that any such government, agency, body, subdivision, board or agency, or any employee or official thereof considers the construction or completion of the Apartment House Property or the operation or use of the same to have violated any such law, ordinance, rule, regulation, order, standard, or regulation or that any investigation has been commenced or is contemplated respecting any such possible violation.

(i) Without limitation on any other representation or warranty contained in this agreement:

(1) The Apartment House Property is and will be in compliance with all applicable zoning, building (including green building requirements), and, without limitation, other legal requirements; there is no plan, study, or effort by any governmental authority or agency or any nongovernmental person or entity which in any way affects or would affect to the best of the Seller's knowledge and belief the use or zoning of the Land for such buildings and businesses;

(2) All notices of completion, licenses, permits, certificates, and authority, required or desirable in connection with the construction, completion, use, or occupancy of the Apartment House Property or any part thereof (including, but not limited to, zoning, utility, building, use, health, operating and environmental control permits, certificates of occupancy and business licenses, all permits, authorizations, and exemptions relating to the protection, maintenance, and control of the environment and all Fire Underwriter's certificates) have been obtained and are and on the Closing Date will be in effect and in good standing, except for any of the same not theretofore required or desirable; Seller has complied with and performed and will hereafter comply with and perform all covenants, conditions, and requirements imposed on the owner or developer or contractor under or in connection with such permits, licenses, certificates, and authority; proper procedure was followed and will be followed in procuring all such permits, licenses, certificates, and authority (including, but not limited to, the preparation and submission of complete and adequate environmental impact reports, if applicable);

(3) Seller has taken and will take all reasonable precautions for the safety of all individuals employed on or in connection with any work provided in this agreement and to prevent accidents or injuries to person or property on or about or adjacent to the Apartment House Property and without limitation on the foregoing has erected and maintained and shall erect and maintain at all times as required by the conditions and progress of the work all necessary safeguards for the protection of workmen and the public and has posted and shall post danger signs warning against the hazards created by any feature of the construction or work.

(j) The Apartment Structures have been and will be constructed, completed, and provided substantially in accordance with:

(1) The Plans;

(2) All applicable requirements, restrictions, and limitations of federal, state, and local statute, law, ordinance, rule, and regulation (including, but not limited to, those relating to zoning, building, fire, health and safety and environmental control and protection);

(3) All standards and regulations of appropriate supervising Boards of Fire Underwriters and similar agencies; and

(4) All covenants, conditions, restrictions, and agreements of any kind or nature affecting the Land or Improvements or affecting or related to the development or use of the Land, including, but not limited to, any made to or imposed by the lender under the Construction Encumbrance or any issuer of a permanent loan commitment in connection with the Apartment House Property or any part thereof, or any governmental authorities (including, but not limited to, any of the same imposed or required in connection with any zoning change or variance application or application for building permit), or made to or imposed by any party to any agreement to which the Land or Improvements is subject.

The Plans are substantially the same as the plans and specifications, if any, heretofore or hereafter submitted by the Seller to, and approved by, the lender under the Construction Encumbrance or any issuer of any such permanent loan commitment or any governmental authorities in connection with any zoning change or variance application or application for any license or permit relating to the Apartment House Property or any part thereof; that Seller has fulfilled and performed and complied with or will hereafter fulfill and perform and comply with, at or before the time or times due, all requirements or obligations or restrictions or limitations related to the development, use or operation of the Land or Improvements and imposed under any covenants, conditions, restrictions, easements, rights of way, encumbrances, or agreements to which the Land or Improvements or any part of the same is subject as of the Closing Date or becomes subject after the Closing Date at the request or with the consent of the Seller; that the description of the Apartment House Property contained in Exhibit C hereof is consistent with and complies with all such plans and specifications and covenants, conditions, restrictions, easements, rights of way, encumbrances, and agreements; the Plans have been provided by the Seller and are free from defects and take into account all relevant circumstances and conditions relating to the Land and the Apartment Structures and the construction thereof; that to the best knowledge of the Seller there are no soil conditions adversely affecting the Apartment House Property or the construction, completion, or operation of the same provided herein or contemplated hereby.

(k) On the Completion Date the Apartment House Property will have adequate water supply, storm and sanitary sewage facilities, telephone, gas, electricity, fire protection, means of ingress and egress to and from the Apartment House Property and public highways and, without limitation, other required public utilities; there have been and will be no impediment or delay with respect to the availability of any such facilities by virtue of any requirements under any statutes with respect to environmental protection or control; all streets and roads necessary for access to or full utilization of the Apartment House Property or any part thereof and all Utility Facilities necessary for sewer, water, gas, electric, and, without limitation, all other utilities service required for the Apartment House Property or any part thereof, have been completed, dedicated and accepted for maintenance and public use by the appropriate governmental authorities where necessary or appropriate.

(l) Except for miscellaneous personal property which may from time to time be required, the Apartment House Property constitutes and/or on the Completion Date shall constitute all the property and assets required in order to carry on and conduct the apartment house business conducted on and with the use of the Land and Improvements; and that the heating and air conditioning systems are or will be completed substantially in accordance with the plans and specifications and comparable in capacity to those customarily used in similar apartment projects in Houston, Texas.

(m) Seller is not, and at no time on or before or after the Closing Date will be, in default in respect of any of its obligations or liabilities pertaining to the Apartment House Property, or any part thereof, including, but not limited to, any obligations, or liabilities secured by the Construction Encumbrance; there is not, and on the Closing Date will not be, any state of facts or circumstance or condition or event which, after notice or lapse of time or both, would constitute or result in any such default; that the aggregate amount of principal which will become owing under the Construction Note and the Construction Encumbrances shall at no time or times heretofore or hereafter exceed \$6,400,000; that there are not now and will not be on the Closing Date any contracts, agreements, covenants, or understandings of any kind or nature (including, but not limited to, any amendments to the Permitted Exceptions) relating to the Apartment House Property or any part thereof or the rights or interests now or at any time or times hereafter held or owned by the Seller or the Buyer therein, except for any such contracts, agreements, covenants, or understandings entered by the Buyer, the exceptions permitted pursuant to Paragraph (a) of this Section 10 and construction subcontracts for the construction of the Apartment Structures in accordance herewith.

(n) Neither this agreement nor any agreement, document, or instrument executed or to be executed in connection with it, nor anything provided in or contemplated by this agreement or any such other agreement, document, or instrument, does now or shall hereafter breach, invalidate, cancel, make inoperative, or interfere with (or result in the breach, invalidation, cancellation or inoperativeness of, or the interference with) any contract, agreement, instrument, mortgage,

deed of trust, lease, bank loan or credit agreement, easement, right, interest, covenant, condition, restriction, corporate charter, bylaw or partnership agreement (individually and collectively the "Limitations"), to which the Seller is a party or by which it is bound or affected or which now or hereafter affects or relates to the Apartment House Property or any part thereof, including, but not limited to, the Construction Encumbrance or any present or future permanent loan commitment relating to the Apartment House Property or any part thereof; none of the Limitations have or shall delay or interfere with the construction, completion, operation, or use provided in or contemplated by this agreement or any such other agreement, document, or instrument.

(o) There are no actions, suits, or proceedings pending, or to the knowledge of the Seller threatened, before or by any judicial body or any governmental authority, against or affecting the Seller or the Apartment House Property, and the Seller is not in default with respect to any order, writ, injunction, decree, or demand of any court or any governmental authority; there is no fact, circumstance or condition, and no change in the condition of the Apartment House Property, financial or otherwise, known or suspected to exist by the Seller, which has had or will have a material adverse effect on the Apartment House Property or its operation nor which is likely to materially reduce in the future the gross revenue or net income from the operation of the Apartment House Property below that shown in Exhibit C; without limitation on the generality of the foregoing, to the best of the Seller's knowledge and belief, there is no existing, proposed, or contemplated plan to widen, modify, or realign any street or highway or any existing, proposed, or contemplated eminent domain proceeding that would affect the Land or Improvements in any way whatsoever.

11. *Additional conditions.* (a) In addition to the conditions provided in the other provisions of this agreement, the consummation of the sale hereunder and the Buyer's obligation to perform its undertakings provided in this agreement are conditioned on the fulfillment of each of the following:

(1) The due performance by the Seller of each and every undertaking and agreement to be performed by it under this agreement and the truth of each representation and warranty made in this agreement by the Seller at the time as of which the same is made and as of the Closing Date; without limitation on the generality of the foregoing, that Seller will deliver or cause to be delivered at the times and places provided herein, all instruments, documents, and certificates provided to be delivered or caused to be delivered by it, and the Buyer will acquire hereunder the entire right, title, and interest in and to the Apartment House Property free and clear of all liens, encumbrances, claims, rights, easements, leases, agreements, covenants, conditions, and restrictions, of every kind or character, except as expressly permitted by the provisions of Paragraph (a) of Section 10 of this agreement.

(2) Prior to the Closing Date, the Buyer shall have received a detailed appraisal of the Apartment House Property, at no cost or expense to it, dated between the date hereof and the Closing Date, prepared by an MAI appraiser, in form reasonably satisfactory to the Buyer showing the Apartment House Property, when completed in accordance with Section 3 hereof, to have a value of not less than \$8,600,000. The Seller shall pay the appraiser's fees and expenses.

(3) There shall not have occurred at any time or times on or before the Closing Date any Event of Default described in Section 3, Paragraph (i) hereof.

(4) There shall not have occurred at any time or times on or before the Closing Date any taking or threatened taking of the Apartment House Property or any part thereof by eminent domain.

(5) There shall not have occurred between July 1, _____ [year] and the Closing Date, inclusive, destruction of or damage or loss to the Apartment House Property or any portion thereof from any cause whatsoever, including, but not limited to, fire, flood, accident, or other casualty, which according to the Buyer's best estimate would cost more than \$15,000 to repair.

The Buyer may at any time or times on or before the Closing Date, waive any of the foregoing conditions to its obligations hereunder and the consummation of such sale, but any such waiver shall be effective only if contained in a

writing signed by the Buyer and delivered to the Seller. No such waiver shall reduce the rights or remedies of the Buyer by reason of any breach of any undertaking, agreement, warranty, or representation of the Seller hereunder. However, if such breach is disclosed in writing to the Buyer prior to the Closing Date, and the Buyer specifically consents in writing to the same, it shall be deemed to have waived any other right or remedy it may have against the Seller by reason of such breach. If for any reason any instrument, document, certificate, or paper required to be delivered to the Buyer hereunder shall not be delivered at the time or times required, the Seller shall nevertheless remain obligated to deliver the same to the Buyer and nothing (including, but not limited to, the closing of the transaction hereunder) shall be deemed a waiver by the Buyer of any such requirement unless specifically waived as to future requirements. If despite destruction of or loss or damage to the Apartment House Property, the transaction herein provided shall be consummated (either because such destruction, damage, or loss is not of sufficient size to cause the termination of this agreement or because Buyer elects not to terminate this agreement), the Seller shall, at its sole expense, repair the destruction, loss, or damage as soon as possible, but the Seller shall be entitled to use the proceeds of any insurance covering the destruction, loss, or damage to reimburse it up to the amount of its cost in affecting such repairs. If, despite the taking or threatened taking of the Apartment House Property or any part thereof by eminent domain, the transaction herein provided is consummated, the proceeds shall belong solely to the Buyer, and the Seller shall, at its sole expense, repair, modify, alter, or reconstruct the Apartment House Property in the manner approved by the Buyer so as to make it an economically viable unit in accordance with the purposes and uses contemplated by this agreement. If for any reason the above sale and purchase is not consummated on or before August 31, _____[year], the Buyer may at any later time, by giving written notice to the Seller, terminate this agreement and its obligations hereunder and the obligation of the Buyer to purchase and the Seller to sell the Apartment House Property hereunder, whereupon neither party shall have any further obligation or liability to the other.

12. *Indemnification.* (a) The Seller shall keep and save the Buyer and the Apartment House Property harmless from and hereby indemnifies the Buyer and the Apartment House Property against:

(1) Any and all obligations, liabilities, claims, accounts, demands, liens, or encumbrances, whether direct, contingent, or consequential and no matter how arising, in any way related to, or arising from any act, conduct, omission, contract, agreement, or commitment of the Seller at any time or times on or before or after the Closing Date, in any way related to or arising from the construction or completion or providing of the Apartment Structures or any part thereof except as otherwise limited in this agreement; without limitation on the generality of the foregoing, the Seller indemnifies the Buyer from any claim or judgment under any lawsuit or proceeding filed or pending prior to the Closing Date against the Apartment House Property or the Seller or any predecessor in interest of the Seller as owner of the Apartment House Property or any part thereof and all costs or expenses (including attorneys' fees) heretofore or hereafter incurred in connection with any such lawsuit or proceeding.

(2) Any loss or damage to the Buyer resulting from any inaccuracy in or breach of any written representation or warranty of the Seller or resulting from any breach or default by the Seller under any covenant or agreement of the Seller under this agreement.

(3) All costs and expenses, including attorneys' fees, related to any actions, suits, or judgments incident to any of the foregoing.

If any claim is made against the Buyer against which the Seller has agreed to make indemnification, the Buyer shall notify the Seller of the claim within 20 days after the Buyer has notice of it (unless the Seller already has knowledge of it). However, failure to notify the Seller shall in no case prejudice the Buyer's rights under this agreement unless the Seller is prejudiced by such failure and then only to the extent of such prejudice. Upon learning of such claim (as a result of notice to the Seller as aforesaid, or from any other source), the Seller shall undertake to defend and hold the Buyer free and harmless therefrom. If the Seller fails to discharge or undertake to defend against such liability, the Buyer may settle the same and Seller's liability to the Buyer shall be conclusively established by such settlement. The amount of the liability shall include both the settlement consideration and the reasonable costs and expenses (including

attorney's fees) necessarily incurred by the Buyer in effecting the settlement.

13. *Loan commitment.* As more particularly set forth therein, the Purchase Price Note provides in part that the entire balance of principal and interest thereunder shall become due and payable on March 31, _____[year] unless a "Permanent Lender" (as therein defined) shall purchase the same on or before March 31, _____[year]. Under date of August 25, _____[year], Chelsea Financial Services (the "Lender"), which qualifies as a "permanent Lender" under the Purchase Price Note, issued to the Buyer a written loan commitment (the "Loan Commitment"), under which the Lender agreed to purchase or cause to be purchased the Purchase Price Note on or before March 15, _____[year] upon the terms and conditions therein set forth. The Seller acknowledges that it has examined the Loan Commitment and is fully familiar with its terms. The Seller hereby agrees:

(a) Upon the tender to the Seller or its successor or assign as holder of the Purchase Price Note, of the consideration for the Purchase Price Note specified in the Loan Commitment, the Seller shall cause the Purchase Price Note to be sold to the Lender and shall execute or cause to be executed all assignments and documents and perform all other acts or things that may be required in order to cause the purchase of the Purchase Price Note to be consummated in accordance with the Loan Commitment or that may be requested by the Lender in connection with the consummation of such purchase.

(b) If for any reason whatsoever the Lender fails to purchase the Purchase Price Note on or before March 15, _____[year], then, unless the Buyer gives contrary written notice to the Seller, the Seller shall cause the Purchase Price Note to be purchased from its holder by a "Permanent Lender" (as defined in the Purchase Price Note) on or before March 31, _____[year] and otherwise on the same terms and conditions as are provided in the Loan Commitment for the purchase of the same by the Lender, all without cost, expense, or liability of any kind or nature to the Buyer. Without limitation on the generality of the foregoing, the Seller shall pay all costs, charges, fees, expenses, and reimbursements (including, but not limited to, any commitment fee, loan fee or points) charged by the "Permanent Lender" in connection with such purchase, and Seller shall execute or cause to be executed all assignments and documents and perform or cause to be performed all other acts or things that may be required in order to cause such purchase of the Purchase Price Note to be consummated or as may be requested by the Permanent Lender in connection with the consummation of such purchase. The transfer or assignment of the Purchase Price Note by the Seller or any of its successors or assigns, whether or not the Buyer consents to the sale or assignment, shall in no way and to no extent relieve the Seller of its obligations under this Section 13.

14. *Brokers.* The Seller and the Buyer represent and warrant to each other that neither has engaged any broker or finder in connection with any transaction contemplated by this agreement and that neither to its knowledge is in any way connected with any such transaction. If any claim for a broker's or finder's fee or commissions is made in connection with the negotiation, execution, or consummation of this agreement, either party (the first party) shall indemnify, save harmless, and defend the other party (the second party) from and against such claim if it is based upon any statement, representation, or agreement alleged to have been made by the first party. The provisions of this Section shall not apply to, and nothing herein contained shall be deemed to limit or reduce, the payments to MB provided in this agreement.

15. *Limitation of liability.* No present or future individual general partner of the Buyer or of any partnership which is now or hereafter a general partner of the Buyer shall have any personal liability of any kind or nature for or by reason of any matter or thing whatsoever, under or in connection with this agreement or any agreement, instrument, document, or covenant made or entered into under or pursuant to the provisions of this agreement, or any amendment or amendments to any of the foregoing made at any time or times, heretofore or hereafter, and the Seller hereby waives any and all such personal liability of such individual general partners. In addition, the Seller agrees that the Buyer shall not assume or have at any time or times hereafter, any duties, obligations, or liabilities of any kind or nature (whether arising or accruing on or before or after the Closing Date and including, but not limited to, any of the same based on performances or occurrences after the Closing Date) under or in connection with or secured by any contract, agreement, lease, instrument, encumbrance, claim, or right constituting a part of the Apartment House Property or to which the Apartment

House Property is now or hereafter subject, including, but not limited to, the Existing Encumbrance and Continuing Contracts. The limitation of liability provided in this Section is in addition to, and not in limitation of any limitation on liability applicable to the Buyer provided by law or by any other contract, agreement, or instrument relating to the Buyer.

16. *Survival of covenants, etc.* All warranties, representations, covenants, obligations, and agreements contained in this agreement shall survive the execution and delivery of this agreement and of any and all documents or instruments delivered in connection herewith and shall survive the closing hereunder and any and all performances in accordance with this agreement. Notwithstanding the foregoing, the cause of action of the Buyer or of its successors or assigns against the Seller by reason of any warranties specified in Section 3, Paragraph (b)(2) hereof (relating to the manner of construction of the Apartment Structures) shall continue until, but shall lapse as of, the "Expiration Date," except that the same shall not lapse as to any breach or default with respect to which the Buyer or such successor or assign shall have commenced suit or given written notice to the Seller, on or before the "Expiration Date." As used herein, "Expiration Date" means the later of (a) December 31, _____[year], or (b) six months after the first to occur of:

- (1) The end of the "Primary Term" under the Management Agreement, or
- (2) The termination of the Management Agreement.

Nothing contained herein shall be deemed to cause the limitation herein specified to apply to the Seller's obligations under the Management Agreement. Under no circumstances shall the construction warranty be deemed to include normal wear and tear.

17. *Taxes.* The Seller shall pay all sales or use taxes that are determined to be payable in connection with any transaction contemplated by this agreement.

18. *Further assurances.* Each party will, whenever and as often as the other shall request, execute, acknowledge, and deliver, or cause to be executed, acknowledged, or delivered any and all such further conveyances, assignments, confirmations, satisfactions, releases, powers of attorney, instruments of further assurance, approvals, consents, and any and all such further instruments and documents as may be necessary, expedient or proper, in the opinion of such requesting party, in order to complete any and all conveyances, transfers, sales, and assignments herein provided and to do any and all other acts and to execute, acknowledge, and deliver any and all documents as so requested in order to carry out the intent and purpose of this agreement.

19. *Entire agreement.* This agreement, together with the other written agreements and instruments executed concurrently herewith or pursuant to the provisions hereof, contains the entire agreement between the parties respecting the matters herein set forth and supersedes all prior agreements between them respecting such matters.

20. *Counterparts.* This agreement may be executed in two or more counterparts, each of which shall be deemed an original but all of which together shall constitute one and the same instrument.

21. *Headings.* Section headings are for purposes of convenience and identification only and shall not be used to interpret or construe this agreement.

22. *Time is of essence.* Time is expressly declared to be the essence of this agreement.

23. *Breach.* If either party obtains a judgment against the other by reason of breach of this agreement, the judgment shall include reasonable attorneys' fees as fixed by the court. In addition, if either party is made a party to any litigation commenced by or against the Seller growing out of or related to the construction, completion or providing of the

Apartment House Property (or any part thereof) or to this agreement or the Seller's obligations under it, the Seller shall pay, on demand, all costs and reasonable attorneys' fees incurred by the Buyer in such litigation.

24. *Remedies.* Unless otherwise specified, no remedy conferred upon either party in this agreement is intended to be exclusive of any other remedy provided or permitted in it or by law. Each remedy shall be cumulative and in addition to every other remedy given hereunder or now or later existing at law, in equity, or by statute. The Buyer may exercise concurrently or independently and as often as it deems expedient every power or remedy given by this agreement or to which it may otherwise be entitled, and it may pursue inconsistent remedies.

25. *Waivers.* Except as herein expressly provided, no waiver by the Buyer or any breach of this agreement or of any warranty or representation hereunder by the Seller shall be deemed to be a waiver of any other breach by the Seller of any kind or nature (whether preceding or succeeding and whether or not of the same or similar nature). No acceptance of payment or performance by the Buyer after any such breach by the Seller shall be deemed to be a waiver of any breach of this agreement or of any representation or warranty hereunder by the Seller whether or not the Buyer knows of the breach when it accepts such payment or performance. No failure by either party to exercise any right it may have under this agreement or by law upon the other's default, and no delay in the exercise of that right, shall prevent it from exercising the right whenever the other party continues to be in default. No such failure or delay shall operate as a waiver of any default, or as a modification in any respect of the provisions of this agreement.

26. *Damages.* Notwithstanding the above or any other provision of this agreement, if the Seller fails to complete the Apartment Structures as provided in Section 3, the damages that the Buyer is entitled to recover from the Seller by reason of any such breach of this agreement shall not include recovery for consequential damages.

27. *Gender and number.* Whenever the singular or plural number, masculine or feminine or neuter gender is used herein, it shall equally include the other.

28. *Successors and assigns.* The Seller may not assign or transfer its rights or obligations under this agreement without the Buyer's prior written consent. If its consent is given, the transferee shall assume in writing all of the Seller's obligations hereunder, but the Seller shall not be released from them. The Buyer's consent to a particular transfer or assignment shall not be construed as a consent to any other transfer or assignment of the Seller's rights or obligations. No transfer or assignment in violation of the provisions of this agreement shall be valid or enforceable. Subject to the above, this agreement and its terms and provisions shall inure to the benefit of and be binding upon the parties' successors and assigns. Without limitation on the above, the Buyer and its successors and assigns may, if such action is approved by the Beneficiary of the Construction Encumbrance or the Prior Trust Deed, as the case may be, transfer and assign at any time the assignor's rights and obligations under this agreement. In that event, the transferee and assignee (the "Assignee") will be substituted in place of the assignor in the above-provided-for documents (including, but not limited to, the warranty deed, the Purchase Note, the Purchase Price Trust Deed, the Management Agreement and the policies of and commitments for title insurance) and it shall be entitled to the benefit of and may enforce the Seller's covenants, representations, and warranties hereunder. Upon any such assignment by the Buyer or any of its successors or assigns, the assignor's liabilities and obligations hereunder or under any instruments, documents, or agreements made pursuant hereto (including, but not limited to, the Purchase Price Note, the Purchase Price Trust Deed and the Management Agreement), shall be binding upon the transferee and assignee and the assignor shall be relieved of all of the same. However, the Assignee shall have the benefit of any limitations on such liabilities and obligations applicable to either assignor or Assignee, provided by law or by the terms hereof or such instruments, documents, or agreements, including, but not limited to, any restrictions against personal liability under or specified in the Purchase Price Note.

29. *Operational information.* Without limitation on its other obligations under this agreement or under the Management Agreement, the Seller shall at any time between the date hereof and the termination of the Management Agreement, upon the Buyer's reasonable request, provide the Buyer with information, schedules, and statements concerning the Apartment House Property and the operation thereof (including, but not limited to, descriptions of the Apartment House

Property and statements showing the revenues and expenses therefrom). In addition, if any federal, state, or local government, agency or authority (including, but not limited to, the Securities and Exchange Commission and any state Blue Sky Commissioner) shall require, at any time, that the Buyer file or furnish financial statements or information relating to the Apartment House Property (including its operating history and income and expenses covering a period of not more than five years), the Seller shall furnish the Buyer and such government, agency, or authority with the required financial statements or information. All statements and information shall be in the form and manner required by the appropriate government, agency, or authority, and shall include, but not be limited to, statements and information audited by a firm of certified public accountants. The Buyer hereby agrees, except as otherwise provided herein, to reimburse the Seller for the additional auditor's fees and expenses it incurs in compiling or providing such information for the Buyer. The Seller shall and does hereby warrant that the information, schedules, statements, financial statements, and operating history provided by it (including those furnished in response to the requirements of a government, agency, or authority) shall be true and correct as of the time furnished or delivered.

30. *Notices.* Any notice, demand or document which any party is required or may desire to give or deliver to or make upon any other party shall be in writing, and may be personally delivered or given or made by United States registered or certified mail, addressed as follows:

To Seller

60 Park Place
Houston, Texas 77057

and to

Marvin and Marvin

24 Houston Natural Gas Bldg. Houston Texas 77002

Attention: Jack Marvin, Esq.

To Buyer

85 North LaSalle Street
Chicago, Illinois 60611

and to

Poer & Hall
65 West Street
Los Angeles, California 90015
Attention: Peter Poer, Esq.

However, either party has the right to designate a different address for itself by giving similar notice. Any such notice, demand, or document shall be deemed to have been given, delivered, or made on the day after it is deposited in the United States mail as registered or certified matter, addressed as provided above, with postage fully prepaid. Any notice, demand, or document not given, delivered, or made by registered or certified mail as required above shall be deemed to be given, delivered, or made upon receipt by the party or parties for whom it is intended.

31. *Governing law.* This agreement shall be construed and enforced in accordance with the laws of the State of Texas.

32. *Binding effect.* This agreement shall be binding upon and inure to the benefit of all the parties, and their respective heirs, representatives, successors, and assigns.

33. *Time of essence.* Time is expressly declared to be the essence of this agreement.

The parties have executed this agreement as of the day and year first above written.

Chelsea Development Company, a general partnership

by _____

General Partner

by _____

General Partner

Seller

Cort Real Estate Limited Partnership-VI, a limited partnership by Cort-VI Managers, Inc., an Illinois corporation,
General Partner

by _____

Vice President

Buyer

Exhibits

- A. Description of Land
- B. Description and Listing of Personal Property
- C. Plans
- D. Purchase Price Note
- E. Purchase Price Trust Deed (Construction Mortgage)
- F-1. Loan Fee Note
- F-2. Loan Fee Trust Deed
- G-1. Covenant Fee Note
- G-2. Covenant Not to Compete
- G-3. Covenant Fee Trust Deed
- H. Management Agreement
- I. Guaranty
- J. Construction Encumbrance
- L. Institutional Commitment

Exhibit A

Field notes covering a tract of land containing 17.0977 acres which is located in the James Young Survey, Abstract 944 in Houston, Harris County, Texas and being more particularly described by metes and bounds as follows:

Commencing at a point that marks the intersection of the west line of Antoine Drive, 60.00 feet wide, and the South line of West Tidwell Road, 100.00 feet wide;

Thence S 89 degrees 39 12" W along the south line of West Tidwell Road for 72.89 feet to a point for beginning of a curve;

Thence Northwesterly along the arc of a 2341.83 foot radius curve to the right which marks the south line of West Tidwell Road, said curve having a central angle of 27 degrees 45 55" and a chord that bears N 76 degrees 20 55" W for 1123.77 feet or along the said arc for 1134.84 feet to the end of curve;

Thence N 62 degrees 27 59" W for 247.86 feet to the beginning of another curve;

Thence Northwesterly around the arc of a 2241.83 foot radius curve to the left that marks the south line of West Tidwell Road, said curve having a central angle of 16 degrees 44 26" and a chord that bears N 70 degrees 48 58" W for 652.69 feet or along the said curve arc for 655.01 feet to the PLACE OF BEGINNING of the description of this 17.0977 acre tract of land;

Thence South along this tract's east line for 881.08 feet to the southeast corner that is located in the north line of Cole Creek, also called Harris County Flood Control's 150 foot wide feet strip according to Volume 5402, page 624 of the Harris County Deed Records;

Thence along the south line of this tract and with the meanders of the north line of said Cole Creek as follows:

N 46 degrees 51 32" W for 42.60 feet;
N 62 degrees 12 32" W for 174.59 feet;
N 77 degrees 35 17" W for 87.21 feet;
N 72 degrees 47 52" W for 187.27 feet;
N 63 degrees 10 42" W for 187.17 feet;
N 53 degrees 37 22" W for 187.17 feet;
N 44 degrees 02 07" W for 187.19 feet;
N 39 degrees 14 07" W for 108.15 feet;
N 51 degrees 46 07" W for 216.30 feet;
N 64 degrees 13 32" W for 216.63 feet;
N 76 degrees 49 22" W for 216.44 feet;
N 89 degrees 21 22" W for 108.15 feet;
N 78 degrees 19 12" W for 46.81 feet to a point for corner.

Thence N 00 degrees 10 12" W along the west line of this 17.0977 acre tract of land for 36.18 feet to its northwest corner that is located in the south right-of-way line of West Tidwell Road;

Thence S 89 degrees 55 08" E with the north line of this tract and the said south line of West Tidwell Road, 100.00 feet wide, for a distance of 1278.75 feet to the beginning of a curve;

Thence Southeasterly around the arc of a 2241.83 foot radius curve to the right that has a central angle of 10 degrees 43 13" and a chord that bears S 84 degrees 32 55" E for 418.84 feet or along the said curve arc for a distance of 419.46 feet to the Place of Beginning.

Acreage Breakdown

Total Area		17.0977
Less		
Proposed 30 Storm Sewer Easement	0.0668	
Proposed 30 Storm Sewer Easement	0.5757	
Net Area		16.4552

Exhibit # 1 to A

(a) Thirty foot (30') wide storm sewer easement to the City of Houston as set out in instrument filed under Harris County Clerk's Number D-719670, and as shown on survey by John V. Armstrong, Registered Public Engineer, dated October, _____[*date*], and described in Trustee's Deed dated February 4, _____[*year*], filed under Clerk's File Number E-088710.

(b) Thirty foot (30') wide storm sewer easement to the City of Houston, as set out in instrument filed under Harris County Clerk's File Number D-719671, and as shown on survey by John V. Armstrong, Registered Public Engineer, dated October, _____[*date*], and as described in Trustee's Deed dated February 4, _____[*year*], filed under County Clerk's File Number E-088710.

(c) Building line and utility easements as reflected in plat recorded volume 240, page 17, Harris County Map Records (plat of Forest Village Apartments) and five foot (5) easement is Houston Lighting and Power Company along the east line of the subject property.

Exhibit B

Forest Village

Personal Property

Furniture--Administrative Office

Description	Estimated Value

_____	_____

Furniture--Rental Office

Furniture--Maintenance Office

Furniture--Club

Furniture--Pool Area

[_____]

Total Value of Personal Property	\$13,500

Exhibit C

26-22 Current Legal Forms for Real Estate FORM 22.11

Description of Property

A 492 unit apartment project located on West Tidwell Road and Sun Forest Drive consisting of:

Code	Unit Type	Quantity	Square Feet
A	1 Bedroom/1 Bath	112	577
B	1 Bedroom/1 Bath	40	696
C	1 Bedroom/1 Bath	88	684
D	1 Bedroom/Study/11/4 Bath	44	798
E	2 Bedroom/11/4 Bath	68	928
F	2 Bedroom/2 Bath	60	1,016
G	2 Bedroom/2 Bath	68	1,021
H	3 Bedroom/2 Bath	12	1,231

The 38 buildings are of wood exterior and framing and are two story buildings with a balcony or patio for each unit. Parking is provided for each unit and all exterior parking is to be concrete. There will be a total of 532 parking spaces.

There will be a two story clubhouse, a rental information and two pools.

The project is built in accordance with plans prepared by Arthur D. Stein and Associates, 2444 Tines Blvd., 4635 Southwest Freeway, Houston, Texas AIA, dated September 12, _____[year] pages numbered 1 to 108, inclusive, page P[1] 1 to P[3], and S[1] to S[15] 25 inclusive, and General Instruction and Specification for Forest Village Apartments. Division C[1] to Division 1 to Division 13, inclusive.

Forest Village Apartments

Southwest Corner of West Tidwell and Sunforest
Drive
Houston, Harris County, Texas

Income

No.	Type	Size	Monthly Rental	Rent Sq. Foot	Annual Rental
112	1/1	577	\$180.00	31.2	\$ 241,920.00
88	1/1	684	205.00	30.0	216,480.00
40	1/1	696	210.00	30.2	100,800.00
44	1/1 Den	792	235.00	29.7	124,080.00
68	2/1	928	240.00	25.9	195,840.00
60	2/2	1,016	260.00	25.6	187,200.00
68	2/2 Split	1,021	265.00	26.0	216,240.00

12 3/2	1,231	340.00	27.6	48,960.00
62 Totals	395,768 Sq. Ft.		28.0	\$ 1,311,520.00
Averages	804 Sq. Ft.			
	Less Debt Service			\$ 668,160.00
(assume \$6,400,000 loan @ 93/4 %--28 years 10.43% constant)				
		Adjusted Cash Flow		\$ 183,740.00

Exhibit E

Deed of Trust and Security Agreement
[Construction Mortgage]

State of Texas
County of Harris

Know All Men By These Presents:

That Cort Real Estate Limited Partnership-VI, an Illinois Limited Partnership, hereinafter called Grantors (whether one or more), for the purpose of securing the indebtedness and obligations hereafter mentioned, and for and in consideration of the sum of \$10 paid by the Trustee hereafter named, the receipt of which is hereby acknowledged and confessed, and of the further considerations, uses, purposes and trusts hereinafter set forth and declared, have Granted, Sold, and Conveyed, and by these presents do hereby Grant, Sell, and Convey unto M. Marvin, as Trustee, of Harris County, Texas, and unto his successors and substitutes in the trust hereby created, and his assigns forever, all of the following described real estate, together with all improvements thereon and hereafter placed thereon, situated in the County of Harris, State of Texas:

That certain tract or parcel of land described on Exhibit A attached hereto and by this reference made a part hereof, together with all improvements now or hereafter located thereon.

Together with all improvements thereon and fixtures thereto and all rights, titles, and interests of Grantors in and to all property abutting upon the property hereinabove specifically described, and in and to all easements, streets, and rights-of-way of every character adjoining the property above described and serving such property or affording ingress and egress thereto, and public or private utility connections thereto, whether such easements, rights-of-way, and streets shall be public or private, and all appurtenances, servitudes, rights, ways, privileges, prescriptions, and advantages thereunto belonging, or in anywise appertaining; it being mutually covenanted and agreed that all awnings, door and window screens, storm windows and doors, mantels, cabinets, linoleum, carpeting, other floor coverings, wall and in-a-door beds, stoves, draperies, shades, radiators, furnaces, central and panel heating, oil or other fuel burning systems and equipment, water heaters, dish washers, radiator covers; and all plumbing, heating, lighting, cooking, ventilating, cooling, air conditioning and refrigerating apparatus and equipment, elevators and other mechanical equipment, and such other goods, chattels, and personal property as are ever furnished by landlords in letting or operating an unfurnished building similar to the one located upon the property above specifically described (whether now or hereafter) and which are, or shall be attached to said building adhesively by nails, screws, bolts, pipe connections, masonry, or in any other manner, and all additions thereto and replacements thereof, and such built-in equipment as

shall be shown by the plans and specifications for the building upon the above property, are and shall all be deemed to be fixtures and accessions to the premises, being hereby agreed to be immovable and a part of the realty as between the parties hereto, their heirs, executors, administrators, and assigns, legal successors and representatives and all persons claiming through or under them, and shall be deemed to be a part and portion of the security for the indebtedness herein mentioned and secured by this deed of trust, and not capable of being removed therefrom without substantial damage to the realty. The Beneficiary is also granted a security interest in all timber to be cut from the above-described realty and all minerals or the like (including oil and gas) thereon, and all accounts resulting from the sale of such minerals and the like at the wellhead or minehead.

To have and to hold the above-described property and premises, together with all rights, privileges, easements, hereditaments, and appurtenances thereto in anywise belonging, and all right, title, and interest of Grantors in and to the land lying in the bed of any street, road, or avenue, open or proposed, abutting or adjoining the property described above, unto the Trustee, and to his substitutes, successors, and assigns forever, hereby covenanting and agreeing to forever warrant and defend the property and premises aforesaid, and every part thereof, unto the Trustee above named, and to his substitutes and successors in such trust, and to the assigns of any Trustee or substitute trustee hereunder, against every person whomsoever lawfully claiming or to claim the same or any part thereof, the Grantors, and each of them, covenanting and warranting that they have good and indefeasible title to the above-described property, free of all liens, encumbrances, and adverse claims, and that such Grantors have the full right and authority to make this conveyance.

This conveyance, however, is intended as a trust, and is made to secure, by liens created upon the above-described property first and paramount except as expressly otherwise stated herein, the payment of all notes, indebtedness, and obligations described or referred to hereafter, principal, interest, and attorney's fees, all original indebtedness upon which same are founded, and all extensions, renewals, or rearrangements thereof, or any part thereof, together with all sums that have been or hereafter may be loaned or advanced by Beneficiary to, or for the account of, Grantors, or either of them, or which are or may hereafter become owing to Beneficiary, his heirs, and assigns, by Grantors, or either of them, whether as principals, sureties, or in any other capacity, during the existence of this deed of trust, or which may be paid to, or for the account of said Grantors, or either of them, by Beneficiary, or expended by Beneficiary, his heirs and assigns, in repairing, replacing, improving, caring for, insuring, protecting, or possessing the above-described property, or protecting, defending, or establishing the validity and priority of this lien thereon.

This conveyance secures the payment of a promissory note of even date herewith, executed by Grantors, in the face amount of \$6,975,700, payable to the order of Chelsea Development Company, herein called Beneficiary, in the City of Houston, Texas, which promissory note is due and payable as therein provided, reference being made to such note for full particulars.

Such note containing the usual provision for acceleration of maturity at the option of the holder thereof, in event of any default, and bearing interest at the rate therein provided, all past due principal and interest shall bear interest at the highest lawful rate then authorized by law to be paid by the maker of the note from date of maturity until paid, and for attorney's fees of 10 percent of the amount of principal and interest thereon due if such note is placed in the hands of an attorney for collection by reason of any default, or if collected through the Probate or Bankruptcy Court, or any other judicial proceeding.

In the event of any default in the payment of any indebtedness or obligation secured hereby, or any part thereof, as same shall become due and payable, however the maturity may be brought about, or if Grantors shall breach any of the covenants herein contained to be kept or performed by Grantors, or if the owner of the above-described property shall have filed for or against him or it, any proceeding under the Bankruptcy Act, then, and in any of such events, the entire indebtedness secured by the terms of this instrument, together with all interest and other sums hereby secured, may, at the option of Beneficiary or other holder of the promissory note and indebtedness secured hereby, be immediately matured and become due and payable, without demand, notice, or presentment of any note or other obligation secured

hereby. It shall thereupon, or at any time thereafter, be the duty of the Trustee, or his successor or substitute as hereafter provided, upon the request of the Beneficiary or other holder of the indebtedness hereby secured, or any part thereof (which request is hereby presumed), to enforce this trust, and after giving such notice as may be required by the law of Texas, which notices may be given or posted by the Trustee or substitute trustee acting, or by any other person, to sell such property in accordance with such advertisement, at public auction, in front of the door of the Courthouse of the county designated in such notice, where such real estate, or any portion thereof, is situated, in the State of Texas, on the first Tuesday in any month, between the hours of 10:00 a.m. and 4:00 p.m., to the highest bidder for cash, selling all the property above conveyed as an entirety, or in parcels, as the Trustee or substitute trustee acting may elect, and make due conveyance to the purchaser or purchasers thereof, with general warranty, binding the Grantors, their heirs, and assigns; and such sale shall forever be a perpetual bar against Grantors, their heirs, and assigns. The Beneficiary, or other holder of the indebtedness secured hereby, shall have a right to purchase at such sale, being the highest bidder.

The proceeds of any such sale shall be applied as follows: First to the payment of all charges of such advertising, sale, and conveyance, including a commission of 5 percent to the Trustee or Substitute Trustee then acting, and then to the Beneficiary or any other holder of the promissory note, indebtedness, and obligations secured hereby, the full amount of principal, accrued interest, and attorney's fees due and unpaid on such indebtedness and obligations above described, with the balance of such proceeds to be paid to Grantors herein, upon their furnishing to Trustee a duly executed and acknowledged receipt and release therefor.

If default shall be made in the payment of any installment of the promissory note or other obligations secured by this deed of trust, or of advancements made under the terms of this deed of trust, the holder thereof shall have the option to proceed with foreclosure to satisfy the payment of such items, either through the courts, or by directing the Trustee or his successor or substitute in trust to proceed as above authorized for a foreclosure by Trustee's Sale, conducting the sale as herein provided, and without declaring the whole debt due, and if such sale is made because of such a default, such sale may be made subject to the unmatured part of the note, indebtedness, and other obligations secured by this deed of trust, and any such sale, if so made (and recital in the notice of sale or Trustee's Deed given pursuant thereto shall be prima facie evidence that same was so made) shall not in any manner affect the unmatured part of the debts secured by this deed of trust, but, as to such unmatured part of such indebtedness and obligations, this deed of trust shall thereafter remain in full force and effect, just as though no sale had been made as authorized by the provisions of this paragraph. Several sales may be made under the terms of this deed of trust without exhausting the right or power of sale for any unmatured part of the indebtedness secured hereby, it being the purpose of this paragraph to provide for a foreclosure and Trustee's Sale of the above-described property, or any portion thereof, for the collection and enforcement of any matured portion of the debt secured hereby, without exhausting the power to later foreclose and sell the property securing payment hereof, or any part thereof, to enforce the payment of any other part of the indebtedness or obligations secured hereby, be the same matured at that time or subsequently maturing. An assignee who may hold any installment or installments, or portion of an installment owing upon any note hereby secured, or any advancement or other amount secured hereby, shall have the same powers as are conferred upon the Beneficiary, or holder of any other portion of the notes, indebtedness, or obligations secured hereby, to proceed with foreclosure and Trustee's Sale to enforce a matured installment or installments, or portion thereof, or other obligation or advancement secured hereby, and to request the Trustee or his successor or substitute in trust to sell the property herein conveyed, for such purpose. However, if an assignee of one or more installments, an advancement, or a portion of an installment which shall be less than the full amount owing upon the notes and obligations, payment of which are secured hereby, shall foreclose or cause a Trustee's Sale to be held to satisfy any such matured installment, part of an installment or installment or advancement, then any such foreclosure or Trustee's Sale shall be made subject to the lien of this deed of trust, insofar as same shall secure the payment of any unmature part of a note and indebtedness secured hereby, as well as any part thereof owned by any other party, at such time, matured or unmatured, and the lien of this deed of trust shall continue in full force and effect to secure the payment of such portion or portions of installments, notes, indebtedness, and obligations, which shall continue in force and effect. An assignee of one or more installments, or an obligation secured hereby which arose from an advancement or otherwise, which shall be less than a majority of the amount of the principal and interest then owing upon the total debts and obligations, payment of which is secured hereby, shall have no power to appoint a substitute

trustee, but the right to appoint a substitute trustee shall rest solely in the party holding a majority in amount of the obligations owing hereunder at the time of any such appointment.

The recitals in any conveyance to a purchaser at any Trustee's or Substitute Trustee's Sale held hereunder, or in any conveyance to a purchaser made hereunder pursuant to legal process, shall be full evidence of the truth of the matters therein stated. All prerequisites to the validity of such sale shall be conclusively presumed to have been performed, and such sale and conveyance shall be conclusive as against the Grantors, each of them, their heirs, and assigns, and any one claiming by, through or under them, or either of them, whether or not such prerequisites shall have been performed or shall not have been performed, it being presumed that same were performed from the fact of execution and delivery of any such conveyance.

In case of the absence, death, inability, refusal, or failure of the Trustee herein named to act, or, at the option of Beneficiary, or other holder of the notes, indebtedness, and obligations hereby secured (or a majority in amount thereof), with or without any reason, a successor or substitute may be named, constituted, and appointed by Beneficiary, or other holder of the note and obligations secured hereby (or a majority in amount thereof) or the President or other officer performing the functions of President or Manager of any corporation or other firm holding the indebtedness secured hereby, without other formality than an appointment and designation in writing, and this conveyance shall vest in such successor or substitute, as Trustee, the estate and title in all of the property and premises above described, and he shall thereupon hold, possess, and execute all the rights, titles, powers, and duties herein conferred on the Trustee herein named. Such right to appoint a successor or substitute trustee shall exist as often and whenever from any of such causes any trustee, original or substitute, cannot or will not act, and as often as the Beneficiary or other holder of a majority of the indebtedness and obligations secured hereby shall elect to appoint such a substitute or successor, with or without any cause.

In case any sale shall be held pursuant to the terms hereof, any Trustee named herein, or any substitute or successor trustee may perform any part of the foreclosure proceedings and sale herein provided for, and any other trustee or substitute trustee which may be hereafter appointed may complete any part of the foreclosure proceedings, commencing with the initial act of posting notices or at any subsequent time, through the execution and delivery of the Trustee's or Substitute Trustee's deed to the purchaser.

Grantors covenant and agree as follows:

1. *To pay secured debt.* To make prompt payment of the aforementioned indebtedness and obligations, both principal and interest, as same shall become due and payable, together with all costs, fees, and expenses of this trust.
2. *Taxes and assessments.* To pay, as same shall become due and payable, and before delinquency, all ad valorem taxes and assessments, general and special, now chargeable to or assessed against, or hereafter chargeable to or assessed against the above-described property, or any portion thereof.
3. *Insurance.* At all times, to keep the improvements on such property insured against loss by flood, fire, windstorm and hail, and such other risks or hazards as may be required by Beneficiary, and afford extended coverage, with companies satisfactory to Beneficiary, or other holder of the indebtedness secured hereby. Such policies shall have, at all times, loss payable clauses in favor of Beneficiary or other holders of the note and indebtedness secured hereby, as mortgagee, and such original policy or policies of insurance shall be held by Beneficiary, or other owner and holder of the indebtedness secured hereby. Such insurance shall be in an amount equal to the full insurable value of the improvements upon the above-described property, or in an amount not less than the balance owing upon all indebtedness and obligations, payment of which is secured by this deed of trust, whichever is lesser.
4. *No waste.* Grantors shall keep such improvements in good condition and repair, and shall not permit any waste, active or permissive, on such property, or do or permit to be done any act or thing that would tend to depreciate the value of

the above-described property; nor shall they permit or cause the removal of any fixtures, improvements, soil, gravel, minerals, trees, shrubs, or sod, without prior written permission of Beneficiary, nor alter, demolish, or remove any buildings on the premises without such written permission.

5. *No lien impairment.* Grantors shall in no manner suffer or cause the impairment of any lien securing the aforementioned indebtedness.

6. *Taxes on note and lien.* Grantors shall pay, as the same shall become due and payable, all taxes that shall be chargeable to or assessed against this mortgage and the note or notes hereby secured, which tax payments on this mortgage and the note or notes hereby secured, together with the interest payments, are not to exceed the highest lawful rate the maker of the note secured hereby may be required to pay as interest on the principal amount of the indebtedness hereby secured.

7. *Mortgagee's protective payments.* Beneficiary may, at its or his option, without demand or notice, and without waiver of any right whatsoever, including the right of foreclosure through Trustee's Sale or otherwise, pay or discharge any lien or claim upon the above-described property, pay any delinquent tax or assessment thereon, and upon any such payment, Beneficiary shall be subrogated to all rights of the holder of such lien or claim and to the rights of any taxing authorities so paid. Beneficiary may advance any unpaid insurance premiums, and may effect insurance which is not provided by Grantors as provided elsewhere herein; may maintain the improvements, making repairs necessary for the proper preservation of the security in the event Grantors fail to do so; and in any of such events, Grantors hereby expressly agree to pay to Beneficiary, upon demand, any and all amounts disbursed in payment of any or all such items herein named, together with interest thereon at the highest lawful rate, from the date of such disbursements and all such disbursements shall be added to and become a part of the indebtedness secured hereby, payable at the same place as is specified for payment of the promissory note above described and specifically secured hereby.

8. *Other documents.* To execute and deliver (and pay the costs of preparation and recordation thereof) to Beneficiary and to any subsequent holder from time to time, upon demand, any further instrument or instruments, including, but not limited to, deeds of trust, mortgages, security agreements, financing statements, assignments, and renewal and substitution notes, so as to reaffirm, correct, and perfect the evidence of the obligation hereby secured and the right of Beneficiary to all or any part of the premises intended to be hereby conveyed whether now conveyed, later substituted for, or acquired subsequent to the date of this deed and extensions or modifications thereof.

Upon request, made either personally or by mail, to certify by a writing, duly acknowledged, to Beneficiary or to any proposed assignee of the interest of Beneficiary, the amount of principal and interest then owing on the secured indebtedness, and whether or not any offsets or defenses exist against the secured indebtedness, within six days in case the request is made personally, or within ten days after the mailing if such request is made by mail.

9. *Repairs.* Beneficiary and any persons authorized by Beneficiary shall have the right to enter and inspect the premises at all reasonable times and access thereto shall be permitted for that purpose and for the purpose of making any repairs with interest thereon from the date of expenditure at the augmented rate called for in the note. All sums so expended and interest thereon shall be secured hereby. Provided, however, Beneficiary shall not be under any duty to make any repairs whatsoever. Beneficiary shall be the sole judge of what constitutes a good state of repairs or reasonable depreciation.

10. *Payments.* Any payment made in accordance with the terms of this deed by any person at any time liable for the payment of the whole or any part of the sums now or hereafter secured by this deed, or by any subsequent owner of the premises, or by any other persons whose interest in the premises might be prejudiced in the event of a failure to make such payment, or by any stockholder, officer, or director of a corporation which at any time may be liable for such payment, or may own or have such an interest in the premises, shall be deemed, as between Beneficiary and all persons who at any time may be liable as aforesaid or may own the premises, to have been made on behalf of all such persons.

11. *Costs.* To reimburse Beneficiary for Beneficiary's reasonable expenses, including attorneys' fees, incurred in any defense of the priority of the lien contained herein in any litigation in which it becomes necessary in the Beneficiary's judgment for the Beneficiary to participate because of its holding of this deed of trust and security agreement.

To the extent the proceeds of the aforesaid promissory note were utilized to take up and pay any outstanding balances upon notes and indebtedness taxes or other amounts secured by a lien or charge against the land above described, or any portion thereof, such amounts have been advanced by Beneficiary at the special instance and request of Grantors, and upon the representation by Grantors that such amounts are owing, are secured by good and valid liens against the above-described land, and with the express understanding and agreement that Beneficiary shall be subrogated to all rights, remedies, superior titles, liens and equities, rights and remedies owned and claimed by the owners and holders of the outstanding liens, charges, and indebtedness, however remote, so retired and paid from the proceeds of the above-described note, regardless of whether such liens, charges, or indebtedness are acquired by Beneficiary by assignment, or are expressly released by the holder thereof, upon receipt of such payment, each such lien and indebtedness and all remedies and process for the enforcement thereof in all instruments pertaining thereto being hereby expressly renewed and extended until the full recount of the indebtedness hereby accrued, and all renewals and extensions thereof shall be fully paid.

12. *Partial release.* Beneficiary, his heirs, and assigns, or any holder of any part of the indebtedness secured hereby, may release any portion or portions of the property or other security covered hereby, without affecting or impairing any liens, rights, or remedies of Beneficiary, or other holder of such indebtedness or a portion thereof, with respect to the remainder of such security. No indulgence or failure of Beneficiary, his heirs, or assigns, or other holder of the indebtedness secured hereby, or any part thereof, to properly or promptly enforce any right or remedy hereunder shall constitute any waiver or bar to the subsequent enforcement thereof, during the continuance of any such default or breach, or during any subsequent default or breach on the part of Grantors, or either of them.

13. *Duration.* This deed of trust shall remain in full force and effect until the full final and complete payment of all of the indebtedness and sums, payment of which is hereby secured, as above recited, as well as all sums hereafter owing by Grantors, or either of them, to Beneficiary or other holder or holders of the above-mentioned indebtedness, or any part thereof, during the existence hereof, whether same be evidenced by the original note or notes, any extension, renewal, or rearrangement thereof, by open account, or in whatever form any such indebtedness or obligation may take. Any other mortgage, lien, or security of any character, now or hereafter had or taken by Beneficiary, his heirs, or assigns, either on the property herein described, or on any other property, real or personal, as well as any endorsements, guaranties or the like, shall be supplemental to, and cumulative of this deed of trust, until this deed of trust is formally released, and the taking of any such additional security, of any character, now or hereafter, shall not be construed to in any manner waive the lien of this deed of trust or any right or remedy conferred hereunder. All constitutional, statutory, vendor's, contract, and other liens now or hereafter held, taken, or perfected by Beneficiary, his heirs, or assigns, on the property covered by this instrument are expressly retained and maintained in full force and effect. Each Grantor, for himself, further specifically waives all rights to any marshalling of assets, sale of properties in inverse order of alienation, or in any other particular order, and all other equitable claims which might otherwise be asserted by Grantors or those holding under Grantors, if more than one tract or parcel of land, or more than one character of property shall be held as security for the payment of any of the notes, indebtedness, or obligations, payment of which is secured by the terms of this deed of trust.

14. *Assignment of rentals.* Grantors hereby transfer, assign, and set over unto Beneficiary all rentals, leases, and other payments and compensation now or hereafter owing, or to become owing, for the use of the above-described property, or any part thereof, it being intended by Grantors that this shall be an absolute assignment unto Beneficiary, and Grantors do hereby irrevocably constitute and appoint Beneficiary as their true and lawful attorney in their name and stead to rent, lease, or let the property described herein, or any part thereof as hereinafter set forth; provided, however, that any person renting, leasing, hiring, or using such property shall be privileged to pay to the Grantors any rentals or other charges for the past or current month's use or hiring thereof until notified otherwise by Beneficiary, his heirs, or

assigns, in writing; but no prepayment of rentals or other compensation, covering more than one month in advance, shall be binding upon Beneficiary, his heirs, and assigns, and Beneficiary shall be entitled, upon any default in the payment of any of the obligations, payment of which is secured hereby, with or without having matured such obligations, to collect such rent or other compensation for the use of such property, directly from any tenant or lessee and apply same to the obligations secured hereby, in such order as Beneficiary shall determine, without waiving the right to proceed with other remedies provided hereunder, simultaneously. Upon any default hereunder, Beneficiary shall be entitled, at its option, to the appointment of a Receiver to take possession of such property, operate, receive, and collect all rentals therefrom pending foreclosure, hereby expressly waiving all defenses and objections thereto.

15. *Beneficiary in possession.* Beneficiary, his heirs, or assigns, after obtaining possession of the above-described property, or any part thereof, with or without legal process, and pending any foreclosure or sale thereof, and without prejudice to any rights of sale or other remedies available to Beneficiary hereunder, may rent or hire such property in his possession, and make application of any rentals collected therefrom first to the payment of the expenses of such renting, hiring, and collection of rentals, and then to the indebtedness and obligations secured hereby, in such order of priority as Beneficiary shall determine.

16. *No exemptions or encumbrances.* Grantors represent, covenant, and warrant to Beneficiary that none of the property above described constitutes exempt property, or property that is in any manner exempted from execution, forced sale, or other process, and all exemption laws in force in the State of Texas and in any state wherein the property covered hereby is situated, are hereby expressly waived in favor of the indebtedness and liens evidenced and secured hereby. Grantors further expressly represent, covenant, and warrant to Beneficiary, his heirs, and assigns, that they have never lived upon, used, or claimed, and that they do not now live upon, use, or claim, and have no present intention of ever living upon, using, or claiming all or any part of the above-described property, premises, or the improvements thereon, as their residence or business homestead, and they do hereby expressly waive, renounce, and release any and all homestead rights, claims, and other exemptions in and to the above described property which they may have or be entitled to, in and to such property under and by virtue of the laws and constitution of the State of Texas, or any other laws.

17. *Beneficiary not liable.* Beneficiary, his heirs, and assigns, shall not be liable for the care of upkeep of any property given as security hereunder, for failure to collect any rental or other income therefrom, for neglect or failure to sue or take any action in connection therewith, for any depreciation in the value thereof, whether before or after obtaining possession thereof, nor shall Beneficiary, his heirs, and assigns, agents or attorneys, be liable for any interest, rental, or other compensation for use or detention thereof. Any seizure or sale, with or without legal process, of all or any part or parts of the properties and premises above described (which is hereby made permissible) shall not exhaust any power, or affect the power to thereafter seize and sell the remainder, or any part thereof.

18. *Grantors' duty of care.* Grantors, and each of them, further promise and covenant they will care for and use all property described herein with care and caution, and keep same in a good state of repair and will not permit same to be neglected, damaged, injured, or depreciated, ordinary wear and tear excepted, and that Grantors will not place, permit, or suffer to be placed, any lien, voluntary or involuntary, of any character, upon or against such property or any part thereof, other than the liens to Beneficiary herein. Grantors further expressly covenant and agree that they will not use or permit the use of the above-described property and premises, or any part thereof, in violation of the revenue laws, custom laws, or any other laws, ordinances, rules, or regulations of the United States, the state wherein the property is situated, or any municipality or other political subdivision of any such state, or of any competent governmental authority having jurisdiction thereof.

19. *No usury.* All other provisions herein or in any other note or instrument of indebtedness secured hereby to the contrary notwithstanding, that nothing herein contained, nor in any such note or instrument secured hereby, shall be so construed, or shall so operate in any event, so as to require Grantors to pay interest on the indebtedness secured hereby, or on any other liability or indebtedness now existing, or hereafter to exist and secured hereby, at a rate greater than the

highest lawful rate of interest permitted by the laws then in force and governing this transaction for the period of time that same remains unpaid.

20. *Foreclosure; tenancy at will.* In the event of any foreclosure under the power granted in this deed of trust, the owner in possession of the above-described property, or any portion thereof, or any person holding by, through or under such owner, shall thereupon become the tenant at will of the purchaser at such foreclosure sale, and if such tenant shall refuse to surrender possession of such property upon demand, the purchaser at any such sale shall thereupon be entitled to institute and maintain the statutory action of forcible detainer, and procure a writ of possession thereunder.

21. *Failure of security.* If any part of the indebtedness or obligations purporting to be secured, evidenced by, or arising under, this deed of trust, or the above-described promissory note, cannot be or are not lawfully secured by the terms of this deed of trust, or if any part of the above-described property purported to be hereby conveyed in trust cannot be lawfully subject to the lien hereof to the full extent of such indebtedness and obligations, then, at, and to the extent of the beneficiary's election, and notwithstanding any prior application of payments, agreement, or rule of law to the contrary, all applications of payments on such indebtedness theretofore effected shall be held for naught, and all payments theretofore and thereafter made shall be applied on such indebtedness and obligations in the manner and order most advantageous to Beneficiary, being first applied in discharge of any portion of such indebtedness and obligations which is unsecured, or is least secured, by the terms of this deed of trust, and of the accrued interest on such portion or portions.

22. *Personal liability survives.* The Beneficiary may, at any time, without notice, release portions of the above-described property from the lien of this deed of trust, without affecting the personal liability of any person or persons for the payment of the full amount of the indebtedness and obligations then remaining unpaid, and without affecting the lien of this deed of trust upon the remainder of the property above described.

23. *Extension not deemed waiver.* Any indulgence by Beneficiary or extension of time for payment of any sums due hereunder, or acceptance by Beneficiary of any sum less than the amount due hereunder at the time of such payment shall not act as a waiver of any rights granted to Beneficiary herein, including the right to accelerate the maturity of the indebtedness secured hereby. No delay in the exercise or failure to exercise any remedy or right accruing on any default shall impair any such remedy or right or be construed as a waiver by Beneficiary of such default or an acquiescence therein, nor shall it affect the rights and remedies of Beneficiary upon any subsequent default of the same or a different nature.

24. *Waiver of notice of foreclosure.* Grantors own other real estate, and are familiar with and experienced in borrowing money upon the security of real estate, and particularly, the execution and delivery of Deeds of Trust and Security Agreements. Grantors have been advised by their counsel that certain recent decisions of the Supreme Court of the United States accord a delinquent debtor the opportunity of prior notice and/or a judicial hearing, after reasonable notice, before the creditor may be permitted to proceed with his statutory or contractual remedies, but that a debtor, with a full understanding of his rights, may, in advance, waive his rights to the opportunity of receiving prior notice of a proposed foreclosure sale or other foreclosure action by the creditor or the opportunity of a prior judicial hearing, after reasonable notice thereof, in the event the creditor proposes to undertake enforcement of his statutory or contractual remedies by reason of the default of the debtor, as specified above. **UNDERSIGNED GRANTORS FULLY UNDERSTAND THEIR RIGHTS IN THIS REGARD AND HEREBY WAIVE THEIR RIGHTS TO:**

(a) RECEIVE PRIOR NOTICE OF ANY PROPOSED SALE BY THE TRUSTEE OR OTHER FORECLOSURE SALE UNDER THIS DEED OF TRUST (AND SECURITY AGREEMENT) AND/OR

(b) THEIR RIGHT TO A PRIOR JUDICIAL HEARING, AFTER REASONABLE NOTICE, ATTENDANT TO THE ENFORCEMENT BY THE BENEFICIARY, ITS SUCCESSORS, OR ASSIGNS, OF ANY OF THE CONTRACTUAL OR STATUTORY REMEDIES OF THE BENEFICIARY, IN THE EVENT OF ANY

UNCORRECTED DEFAULT BY THE GRANTORS IN THE PERFORMANCE OF ANY OF THE TERMS, PROVISIONS, OR CONDITIONS OF THIS DEED OF TRUST (AND SECURITY AGREEMENT) OR THE ABOVE-DESCRIBED NOTE. Such waiver shall not be deemed to preclude Grantors from contesting the occurrence or nonoccurrence of any event of default.

25. *Late charge.* Grantors hereby agree to pay a "late charge" not to exceed four cents for each dollar of each payment more than ten days in arrears to cover the extra expense involved in handling delinquent payments.

26. *Status as construction mortgage.* This Deed of Trust (and Security Agreement) is a "Construction Mortgage," securing an obligation incurred for the construction of improvements upon and the acquisition of the above-described land.

27. *Default.* The term "default" or "event of default" whenever used herein shall mean any one or more of the following events:

(a) Failure by Grantors to pay the secured indebtedness or any part thereof, when and as the same shall become due and payable.

(b) Any warranty of Grantors herein contained, or contained in any instrument, transfer, conveyance, assignment, or loan agreement given with respect to the indebtedness, proving to be untrue or misleading in any material aspect.

(c) The premises being or becoming subject to actual or threatened waste, or any part thereof being removed, demolished, or materially altered so that the value of the premises becomes diminished except as provided for in the paragraph on condemnation.

(d) Any federal tax lien or claim of lien for labor or material being filed of record against Grantors or the premises and not removed by payment or bond within 30 days from date of recording.

(e) Any claim of priority to this deed by title, lien, or otherwise, not consented to by beneficiary being asserted in any legal or equitable proceeding which is not dismissed within 30 days after its institution.

(f) Any assignment made by Grantors for the benefit of creditors or appointment of a receiver, liquidator, or trustee of Grantor or of any of Grantors' property, or the filing of any petition for the bankruptcy, reorganization, or arrangement of Grantors pursuant to the Federal Bankruptcy Code or any similar statute (and, in respect of any such petition filed against Grantors and not consented to by Grantors, the failure to obtain dismissal of such petition within 50 days after the filing thereof) or adjudication of Grantors as a bankrupt or insolvent, or liquidation or dissolution of Grantors or expiration or revocation of Grantors' charter.

28. *Undertakings of grantor (debtor).* Without limiting any of the provisions of this instrument, the Grantors, as Debtors and being sometimes referred to herein as Debtors, expressly:

(a) Grant unto the holder of all indebtedness described herein, as Secured Party and referred to herein sometimes as Beneficiary, and sometimes as Secured Party, a security interest in all the properties hereinabove described (including both those now and those hereafter existing) to the full extent that same may be subject to the Uniform Commercial Code. The goods above described are or are to become fixtures on, or the timber above described is standing on, and all minerals or the like (including oil and gas) or accounts arising from sale thereof at the wellhead or minehead above mentioned are located on, the real property above described and this instrument is to be filed for record in the real estate records. In addition, Debtors grant unto Secured Party a security interest in and to all stoves, ovens, refrigerators, dishwashers, disposals, trash compactors, water softeners, intercoms, window coverings and draperies, light fixtures, shelving, counters, appliances of whatever kind or character, and display units now or hereafter located or situated in or

upon the real property described herein or the improvements located thereon.

(b) Agree that, in addition to any other remedies granted in this instrument to the Secured Party or Trustee, the Secured Party may, in the event of any default, proceed under the Uniform Commercial Code as to all or any part of the personal property (tangible or intangible) and fixtures included in the properties described herein, such portion of the properties being herein referred to as Collateral, all the rights, remedies, and powers of a secured party under the Uniform Commercial Code, including, without limitation, the right and power to sell, at public or private sale or sales, or otherwise dispose of, lease or utilize the Collateral and any part or parts thereof in any manner authorized or permitted under the Uniform Commercial Code after default by a debtor, and to apply the proceeds thereof toward payment of any costs and expenses and attorney's fees and legal expenses thereby incurred by Secured Party, and toward payment of the Debtors' obligations including the promissory note and all other indebtedness described in this instrument in such order or manner as Secured Party may elect. Among the rights of Secured Party in the event of default, and without limitation, Secured Party shall have the right to take possession of the Collateral and to enter upon any premises where same may be situated for such purpose without being deemed guilty of trespass and without liability for damages thereby occasioned, and to take any action deemed necessary or appropriate or desirable by Secured Party, at its option and in its discretion, to repair, refurbish, or otherwise prepare the Collateral for sale, lease or other use or disposition as herein authorized. To the extent permitted by law, Debtors expressly waive any notice of sale or other disposition of the Collateral and any other rights or remedies of a debtor or formalities prescribed by law relative to sale or disposition of the Collateral or exercise of any other right or remedy of Secured Party existing after default hereunder; and to the extent any such notice is required and cannot be waived, Debtors agree that if such notice is mailed, postage prepaid, to the Debtors at the address shown herein at least five days before the time of the sale or disposition such notice shall be deemed reasonable and shall fully satisfy any requirement for giving of such notice.

(c) Grant to the Secured Party the right, at its option, to transfer at any time, to itself or to its nominee, the Collateral, or any part thereof, and to receive the moneys, income, proceeds, or benefits attributable or accruing thereto, and to hold the same as security for the Debtors' obligations, or to apply it on the principal and interest or other amounts owing on any of the Debtors' obligations, whether or not then due, in such order or manner as Secured Party may elect. All rights to marshalling of assets of Debtors, including any such right with respect to the Collateral, are hereby waived.

(d) Covenant, stipulate, and agree that all recitals in any instrument of assignment or any other instrument executed by secured Party incident to sale, transfer, assignment, lease, or other disposition or utilization of the Collateral or any part thereof hereunder shall be full proof of the matters stated therein and no other proof shall be requisite to establish full legal propriety of the sale or other action taken by Secured Party or of any fact, condition, or thing incident thereto and all prerequisites of such sale or other action or of any fact, condition, or thing incident thereto shall be presumed conclusively to have been performed or to have occurred.

(e) Covenant and agree that Secured Party may require Debtors to assemble the Collateral and make it available to Secured Party at a place to be designated by Secured Party that is reasonably convenient to both parties. All expenses of retaking, holding, preparing for sale, lease or other use or disposition, selling, leasing, or otherwise using or disposing of the Collateral and the like which are incurred or paid by Secured Party as authorized or permitted hereunder, including also all attorney's fees, legal expenses, and costs, shall be added to the Debtors' obligations and the Debtors shall be liable therefor.

(f) Covenant and agree that the Secured Party may, at its election, at any time after delivery of this instrument, sign one or more copies of this instrument in order that such copies may be used as a Financing Statement under the Uniform Commercial Code. Such signature by the Secured Party may be placed between the last sentence of the instrument and the Debtors' acknowledgment or may follow the Debtors' acknowledgment. The Secured Party's signature need not be acknowledged and is not necessary to the effectiveness of this instrument as a deed of trust, mortgage, assignment, pledge, or security agreement.

29. *UCC financing statement.* Any photographic reproduction of this deed of trust which is signed by the Debtors may also serve as a Financing Statement under the Uniform Commercial Code between the Debtors and the Secured Party. Except for the security interest granted hereby in the Collateral, or as is herein expressly otherwise stated, Debtors are the owners and holders of the Collateral free of any adverse claim, security interest, or encumbrance, and Debtors will defend the Collateral against all claims and demands of any person at any time claiming the same or any interest therein. Except as may be expressly otherwise specifically stated therein, Debtors have not heretofore signed any financing statement and no financing statement signed by Debtors is now on file in any public office except those statements true and correct copies of which have been delivered to the Secured Party. So long as any amount remains unpaid on any indebtedness described in this deed of trust, debtors will not execute and there will not be filed in any public office any such financing statement or statements affecting the Collateral other than financing statements in favor of Secured Party hereunder, unless the prior written specific consent and approval of Secured Party shall have first been obtained. Debtors authorize Secured Party to file, in jurisdictions where this authorization will be given effect, a financing statement signed only by Secured Party covering the Collateral, and at the request of Secured Party, Debtors will join Secured Party in executing one or more financing statements, pursuant to the Uniform Commercial Code, in form satisfactory to Secured Party, and will pay the cost of filing the same or filing or recording this instrument, as a financing statement, in all public offices at any time and from time to time whenever filing or recording of any financing statement or of this instrument is deemed by Secured Party to be necessary or desirable.

30. *Miscellaneous; definitions.* (a) The term "Grantors" includes all Grantors hereinabove named and all endorsers, sureties, guarantors, other persons now or hereafter becoming liable, primarily, secondarily, or in any manner, for the indebtedness and obligations secured by the terms of this deed of trust, or any part thereof.

(b) "Beneficiary" includes not only the Beneficiary above named, but all persons who may hereafter acquire the indebtedness hereby secured, or any part or parts thereof.

(c) As used herein, the masculine gender includes the feminine and neuter; the singular and plural number shall include the other, unless otherwise expressly provided; and the word "person" and the words "Grantors" and "Beneficiary" shall include corporations, partnerships, associations, and other entities or groups, as well as natural persons, and the phrase "their heirs and assigns" or "his heirs and assigns" shall also include the successors and assigns of any such corporation, partnership, association, or other entity or group.

(d) The words "Grantors," "Beneficiary," "Trustee," and "person," whether singular or plural, shall also include the assignees, vendees, heirs, successors, and assigns of such Grantor, Beneficiary, Trustee, or person, whether natural or artificial.

Executed September 1, _____[year].

Cort Real Estate Limited Partnership-VI, a limited partnership by Cort-VI Managers, Inc., an Illinois Corporation,
General Partner

by _____

Attest:

Address of Beneficiary and Se-
cured Party:

Address of Grantors and Debtors:

[Acknowledgments]

Exhibit I

Guarantee

GUARANTEE made August 20, _____[year], by Henry S. Bick, Harold S. Gold, Alan Ross, Louis Freed, and Jerry L. McCoy, hereinafter called individually the Guarantor, and collectively the Guarantors, in favor of Cort Real Estate Limited Partnership-VI, an Illinois limited partnership, hereinafter called Cort.

Whereas:

A. Concurrently with the execution hereof, the following agreements have been entered into:

(1) That certain agreement which, as the same may be amended at any time or times hereafter, will be herein called the Sale Agreement, dated August 20, _____[year], by and between Chelsea Development Company, a general partnership, therein and hereinafter called the Seller, and Cort, as party of the second part, whereunder, among other things, the Seller agrees to sell to the Buyer certain real and personal property located in Harris County, Texas, commonly known as "Forest Apartments," and the Seller agrees to cause Chelsea Management Company, hereinafter called Management, to enter into a management agreement, as manager, with the Buyer, as owner, which, as the same may be amended at any time or times hereafter will be herein called Management Agreement, whereunder Management, as a manager, agrees to operate and manage the "Apartment House Property" (as defined in the Sale Agreement).

(2) Certain loan commitment which, as the same may be amended at any time hereafter, will be herein called Loan Commitment, dated September 1, _____[year] by and between Chelsea Financial Services, a general partnership, therein and hereinafter called Financial, and Cort whereunder, among other things, Financial agrees to purchase (or cause to be purchased or acquired) the "Purchase Price Note" (as defined in the Sale Agreement) from the Seller.

B. The Guarantors are partners of the Seller and the owner of all of the outstanding common stock of Management and of the partners of Financial.

C. The Sale Agreement requires the delivery of this Guarantee concurrently with the execution of the Sale Agreement.

Now, therefore, in consideration of the premises it is hereby agreed as follows:

1. *Unconditional guarantee.* The Guarantors, jointly and severally, hereby absolutely and unconditionally guarantee each and all of the obligations and liabilities of the Seller, Management, and Financial and of each successor or assign of the Seller, Management, and Financial of whatever kind or nature, under or in connection with the Sale Agreement or the Loan Commitment or any agreement, instrument, or document, hereinafter called the Collateral Agreement,

including, but not limited to, the Management Agreement, as such obligations may hereafter be amended or modified, regardless of whether the Guarantors have notice or knowledge of such amendment or modification, including, but without limitation on the generality of the foregoing, the obligations and liabilities of the Seller under the covenants, warranties, and indemnities set forth in the Sale Agreement, the obligations of the Seller to sell the Apartment House Property (as defined in the Sale Agreement) to Cort on the terms set forth in the Sale Agreement, the obligations and liabilities of Management as manager under the Management Agreement and the obligations of Financial to purchase or cause to be purchased the Purchase Price Note on the terms set forth in the Loan Commitment.

2. *Unconditional promise.* This Guarantee is in no way conditional or contingent and constitutes a valid, present, continuing, and absolute obligation of payment and performance of each of the Guarantors which shall not be impaired or affected in any way by any matter or thing whatsoever, including, but not limited to, the following (whether or not any of the Guarantors shall have any notice or knowledge of the same):

(a) Any extension or indulgence by Cort or by any other person, partnership, corporation, or entity in respect of the performance of or compliance with any obligation of the Seller, Management or Financial or of any other person, partnership, corporation, or entity, under or in connection with the Sale Agreement, Management Agreement, Loan Commitment, or any Collateral Agreement or under or in connection with any modification or amendment of the same;

(b) Any failure or omission to enforce any right, power, or remedy in respect of the Sale Agreement, Management Agreement, Loan Commitment, or Collateral Agreement or any such amendment or modification of any waiver of rights, powers, or remedies or of any default by the Seller, Management, or Financial or by any other person, partnership, corporation, or entity in respect to the Sale Agreement, Management Agreement, Loan Commitment, or Collateral Agreement or any such amendment or modification;

(c) Any receipt of security of any release of security;

(d) Any action or inaction by Cort or by any other person, partnership, corporation, or entity, in respect of the Sale Agreement, Management Agreement, Loan Commitment, or Collateral Agreement; or

(e) Any change in the name or identity of the Seller, Management, Financial, or Cort or any other person, partnership, corporation, or entity referred to in this Guarantee or any assignment or transfer of the Sale Agreement, Management Agreement, Loan Commitment, or Collateral Agreement or any rights or obligations thereunder.

The obligations of each Guarantor hereunder are absolute and unconditional. Without limitation on the obligations of each Guarantor hereunder, the Guarantors shall, if the Seller, Management, or Financial shall fail to comply with any of the obligations or liabilities covered by this Guarantee, immediately and without demand upon the Guarantors, the Seller, Management, or Financial, comply with and fulfill such obligation or liabilities of the Seller, Management, and Financial. The Guarantors hereby waive any right Guarantors may have to require Cort to proceed against the Seller, Management, or Financial or to pursue any other remedy in Cort's power which the Guarantors cannot pursue. However, the aggregate obligations of the Guarantors hereunder shall not be greater than the obligations of the Seller, Management, and/or Financial, as the case may be, reduced by any amounts which the Buyer may actually receive from the Seller or from letters of credit provided by the Seller.

3. *Other liability of guarantors.* Nothing contained herein shall be deemed to limit in any way the liability or obligations of any of the Guarantors in favor of Cort under or pursuant to any other agreement, instrument, contract, or document or by operation of laws, except as specified in the agreements which the Guarantors are guaranteeing, or any amendments or modifications thereof.

4. *Successors and assigns.* This Guarantee and the terms and provisions hereof shall inure to the benefit of Cort and of the successors and assigns of Cort and shall be binding upon each Guarantor and the individual and collective

successors and assigns of each Guarantor. Without limitation on the generality of the foregoing:

(a) No change in the name or identity of any person, partnership, corporation, or entity referred to in this Guarantee by reason of any matter or thing whatsoever shall impair or affect in any way the obligations of the Guarantors under this Guarantee.

(b) In the event Cort assigns the interest of Cort under the Sale Agreement, Management Agreement, Loan Commitment, or Collateral Agreement to any other person, partnership, corporation, or entity, then such assignee shall be entitled to the benefit of and may enforce the covenants and obligations of the Guarantors under this Guarantee.

5. *Miscellaneous.* The Section headings herein contained are for purposes of identification only and shall not be considered in construing this Guarantee. Time is of the essence of this Guarantee. If Cort obtains a judgment against any of the Guarantors by reason of breach of this Guarantee, a reasonable attorneys' fee as fixed by the court shall be included in such judgment.

6. *Notices.* Any notice, demand, or document which any party is required or may desire to give or deliver to or make upon any other party shall be in the same form and manner as is required by the applicable instrument or document being guaranteed, addressed as follows:

To Guarantors

60 Park Place Houston Texas 77057

and to:

Marvin and Marvin

24 Houston Natural Gas Building Houston Texas 77002

Attention: Jack Marvin, Esq.

To Cort

85 North La Salle Street Chicago Illinois 60611

and to:

Poer & Hall

65 West Street Los Angeles California 90015

Attention: Peter Poer, Esq.

subject to the right of any part to designate a different address for itself by notice similarly given. Any notice, demand, or document so given, delivered, or made by United States mail shall be deemed to have been given or delivered or made at the same time as is provided in the applicable instrument or document being guaranteed.

7. *Consequences of default.* In the event of any default under the terms of the Management Agreement, Cort shall not exercise its rights to terminate, accelerate, or assume the management of the Apartment House Property, so long as the Guarantors, or any of them, are otherwise complying with the terms and provisions of such Management Agreement in a timely manner.

The Guarantors have executed this Guarantee as of the day and year first above written.

General Partner

General Partner

General Partner

General Partner

General Partner



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Chapter 22 DEVELOPMENT AND SUBDIVISION

Part IV. FORMS

A. ACQUISITIONS FOR DEVELOPMENT AND SUBDIVISION

26-22 Current Legal Forms for Real Estate FORM 22.12

FORM 22.12 Contract of sale--office building to be constructed by seller on turnkey basis

COMMENT

In this contract of sale and purchase, the seller is engaged in the real estate construction business. The purpose of the contract is to elicit the services of the seller in constructing an office building for the purchaser's law office. The building is to be erected on land which the purchaser is buying from the seller, after the building is constructed. In other words, it is being constructed on a turnkey basis, meaning that the purchaser does not close until all work is completed by the seller and the building is in "move in" condition, ready for occupancy and use by the purchaser.

The purchaser anticipates the steady growth of the law firm over an extended period of time; however, at the outset, the newly built structure will be too large for the firm's immediate needs. Accordingly, part of the building will be set aside initially for leasing to third parties. In addition, the contract contains a provision granting the seller the option to rent part of the building for its own use.

Under the terms of the contract, the seller will obtain construction financing, a debt which the purchaser will later assume when the building is completed. Such a provision will save the purchaser considerable time and expense upon the transfer of title since no mortgage "points" or mortgage tax will have to be paid by the purchaser. Nor will there be any delays in the transfer of title since the purchaser will not have to await mortgage approval.

The contract contains both a "time is of the essence" clause and a statement of penalties to be imposed on the seller if it fails to complete construction within the deadlines set forth in the document. These stringent provisions are necessary since the purchaser is required to vacate the rental space it currently occupies by a specified date. Its failure to do so will subject the purchaser to payment of "holdover" rent equal to twice its current rent. The seller agrees to cover that

expense if the new building is not ready on time.

FORM

AGREEMENT made this _____[day] day of _____[month], _____[year], between _____[name of entity] DEVELOPMENT, INC., a corporation existing under the laws of the State of _____[state], with offices for the transaction of business at _____[address]; (hereafter referred to as "Seller"), and the _____[name of entity] LAW FIRM, a partnership organized under the laws of the State of _____[state], with offices for the transaction of business at _____[address] (hereafter referred to as "Purchaser").

WITNESSETH:

WHEREAS, the Seller is the owner of a certain parcel of land commonly known as _____[insert address or other description of the property's location, including city, state and zip code] and more particularly described in Exhibit A, which is annexed hereto and made a part hereof; and

WHEREAS, the Seller is in the business of constructing office buildings; and

WHEREAS, Purchaser is in need of space for its law practice;

NOW, in consideration of the mutual promises contained herein, it is agreed as follows:

1. Construction

(a) Seller agrees to construct a first-class, four-story office building with a basement, in conformance with the plans and specifications set forth in Exhibit A, which is annexed hereto and made a part hereof. Said plans and specifications have been prepared by _____[name of architect], a licensed architect, and have been signed by both parties to indicate their acceptance thereof.

(b) Construction shall be commenced within _____[e.g., twenty (20)] days after execution of this Agreement and issuance of a building permit by the City of _____[city], State of _____[state]. Seller shall apply for the building permit within _____[e.g., forty-eight (48)] hours after execution of this Agreement. In the event that planning board approval is required, Seller shall take all steps necessary and proper to obtain such approval. If planning board approval is not obtained within _____[e.g., thirty (30)] days of the date of this Agreement, Purchaser may terminate this contract by giving written notice any time after the _____[e.g., thirty (30)] days has expired and before approval is received from the planning board.

(c) Construction shall be completed on or before _____[date]. Completion shall be deemed to have occurred when the City of _____[city] issues a final certificate of occupancy for the structure.

(d) In the event that completion does not occur by _____[insert same date as used in preceding paragraph], Seller shall be responsible for the following expenses of Purchaser if they are actually incurred by Purchaser:

(1) any rent charged by Purchaser's landlord in excess of that amount typically being paid by Purchaser on the date of execution of this Agreement;

- (2) the purchaser's cost of moving, but only in the event that more than one move is required;
- (3) the cost of storing items that cannot be moved directly into the new structure because said structure is not completed on time; and
- (4) other expenses directly caused by the late completion of the structure.

Seller shall also pay Purchaser a penalty of _____ Dollars (\$_____) per day for each day after _____ [insert same date as used in preceding paragraph], until completion occurs. Seller shall not be relieved of this obligation unless the failure to complete is caused by riot, war, natural disaster, or other causes beyond the reasonable control of Seller.

2. *Purchase.* Seller shall transfer title to the real property and premises, including the office building commonly known as _____ [insert address or other description of the property's location, including city, state and zip code] immediately upon completion of construction. Transfer shall be free and clear of all liens except the assumable construction mortgage from _____ [name of bank] Savings Bank.

3. *Purchase price.* The purchase price for the land and building shall be the sum of _____ Dollars (\$_____) [e.g., \$580,000]. Purchaser shall pay the said sum as follows: by depositing _____ Dollars (\$_____) [e.g., \$20,000] with the Seller's broker upon execution of this Agreement. The balance of the purchase price shall be paid upon transfer of title through the Purchaser's assumption of Seller's construction mortgage of _____ Dollars (\$_____) [e.g., \$400,000] and by the Purchaser paying _____ Dollars (\$_____) [e.g., \$160,000] in cash or by certified check.

4. *Adjustments.* Adjustments to the purchase price shall be made for property taxes, school taxes, and any other levies which are liens on the property on the date of closing and transfer of title. Such adjustments will be made on a per diem basis in favor of the party who has paid, or who will have to pay, said taxes. Interest on the _____ [name of bank] Savings Bank loan shall be adjusted in the same manner.

5. *Expenses.* Seller shall pay all expenses in connection with obtaining the building permit and planning board approval. Seller shall also pay all expenses in connection with obtaining the assumable construction loan. Seller shall further pay for deed stamps and for the filing fee on transfer of title. Purchaser shall pay all other recording and filing fees. Purchaser shall also pay for title insurance, if it desires such coverage.

6. *Survey.* Seller, at its expense, shall provide Purchaser with a survey of the land and building as they exist immediately before transfer of title to Purchaser. The survey shall show all improvements within the property's boundaries and all applicable setbacks. The survey shall be certified to Purchaser, to the Purchaser's title insurance company, and to _____ [name of bank] Savings Bank.

7. *Deed.* Seller shall provide a warranty deed with lien covenants to Purchaser. The deed shall contain a clause whereby Purchaser assumes Seller's obligation owed to _____ [name of bank] Savings Bank and holds Seller harmless therefor.

8. *Financing.* Seller has obtained a construction loan from _____ [name of bank] Savings Bank. This loan is assumable by Purchaser without further approval of _____ [name of bank] Savings Bank. At the closing and transfer of title, Seller shall provide Purchaser with a certification from _____ [name of bank] Savings Bank stating that no defaults on the loan have occurred and specifying the current principal amount of the loan. Copies of the note, mortgage and other loan documents shall be provided to Purchaser within _____

_____ [e.g., thirty (30)] days after execution of this Agreement.

9. *Default by Seller.* Seller shall be deemed to be in default upon the occurrence of any of the following events:

- (a) failure to complete construction by _____ [year], regardless of cause;
- (b) the filing of a petition in bankruptcy by or against Seller, whether voluntary or involuntary;
- (c) failure to pay, when due, any installment of principal or interest on the _____ [name of bank] loan, or the occurrence of any default under the _____ [name of bank] note, mortgage or building loan agreement;
- (d) failure to pay, when due, any tax levied against the subject real property;
- (e) failure to obtain a building permit or planning board approval by _____ [date];
- (f) failure to work on the construction site for any five (5) consecutive days after _____ [date];
- (g) breach of any covenant contained in this Agreement;
- (h) transfer of any interest in the property;
- (i) creation of any lien against the property other than the _____ [name of bank] mortgage; or
- (j) failure to comply with the plans and specifications contained in Exhibit A.

In the event of a default, Purchaser shall send written notice to Seller, advising of the nature of the default and demanding correction within _____ [e.g., three (3)] business days. In the event that the default is not corrected, Purchaser may exercise any of the following options:

- (k) terminate this Agreement and receive a full refund of the deposit;
- (l) demand transfer of title immediately (in such case, Seller shall be paid only for the value of work completed and the land, as calculated by the architect, and Purchaser shall make arrangements for completion of construction at its own expense; however, exercise of this option shall not relieve Seller of any penalties set forth in Paragraph 1(d) above); or
- (m) correct the default at Seller's expense.

10. *Default by Purchaser.* Purchaser shall be deemed to be in default upon the occurrence of any of the following events:

- (a) failure to make any payment due hereunder;
- (b) failure to execute the deed with the assumption clause; or
- (c) failure to perform any other act required hereunder.

In the event of a default, Seller shall send written notice to Purchaser, advising of the nature of the default and demanding correction within _____ [e.g., three (3)] business days. In the event that the default is not corrected, Seller may exercise any of the following options:

(d) terminate the agreement and keep the deposit of _____ Dollars (\$_____) [e.g., \$20,000] as liquidated damages;

(e) terminate the agreement and charge Purchaser for any loss which occurs upon sale of the land and building; or

(f) seek specific performance of the contract.

11. *Warranty.* Seller warrants the entire structure against any defects for a period of one year from the date of completion. Seller warrants the roof, the heating, ventilation and air conditioning (HVAC) system, and the plumbing against any defects for a period of _____ [e.g., five (5)] years from the date of completion. Seller agrees to make any warranty repairs within _____ [e.g., five (5)] days of receipt of notice of defect. If Seller fails to make such repairs in a timely fashion, Purchaser may arrange for such repairs to be made at Seller's expense. Seller shall not be responsible for any consequential damages.

12. *Option to lease.* Seller shall have the option to lease the _____ [e.g., fourth] floor in the subject building for a term of _____ [e.g., three (3)] years from the date of completion. Seller shall give Purchaser notice of intent to exercise the option at least _____ [e.g., sixty (60)] days prior to _____ [date]. The rent shall be _____ Dollars (\$_____) per square foot for a maximum of _____ [insert number] square feet. Seller shall be responsible for payment of all separately metered utilities supplied directly to the leased space. Seller may freely sublet any or all space covered by this option, but Seller shall remain liable for the rent. Seller shall pay for all utilities associated with said space. Seller shall sign a lease containing the above provisions and other generally accepted commercial lease provisions as reasonably determined by Seller and Purchaser, and their respective counsel.

13. *Turnkey Condition.* Seller shall deliver the premises to Purchaser in "move in" condition, with all construction debris removed and the premises thoroughly vacuumed and dusted.

14. *Entire agreement.* This Agreement, together with the other written agreements and instruments executed concurrently herewith or pursuant to the provisions hereof, contains the entire agreement between the parties respecting the matters herein set forth and supersedes all prior agreements between them respecting such matters.

15. *Counterparts.* This Agreement may be executed in two or more counterparts, each of which shall be deemed an original, but all of which together shall constitute one and the same instrument. At the trial of any matter arising under this Agreement, only one counterpart need be produced.

16. *Headings.* Paragraph headings are for purposes of convenience and identification only and shall not be used to interpret or construe this Agreement.

17. *Waivers.* Except as herein expressly provided, no waiver by the Purchaser of any breach of this Agreement, or of any breach of any warranty or representation hereunder, by the Seller shall be deemed to be a waiver of any other breach by the Seller of any kind or nature (whether preceding or succeeding the first breach and whether or not of the same or similar nature).

No acceptance of payment or performance by the Purchaser after any such breach by the Seller shall be deemed to be a waiver of any breach of this Agreement, or of any representation or warranty hereunder, by the Seller, regardless of whether the Purchaser knows of the existence of the breach when it accepts such payment or performance.

No failure by either party to exercise any right it may have under this Agreement or under law upon the other's default, and no delay in the exercise of that right, shall prevent it from exercising the right whenever the other party continues to

be in default. No such failure or delay shall operate as a waiver of any default, or as a modification with respect to the provisions of this Agreement.

18. *Gender and number.* Whenever the singular or plural number, or the masculine, feminine or neuter gender, is used herein, it shall equally include the other(s).

19. *Notices.* Any notice which any party is required or may desire to give hereunder shall be in writing and may be personally delivered, transmitted by facsimile machine, or delivered by the United States Postal service or private delivery service to the above addresses. Notice is deemed given when received.

20. *Governing law.* This Agreement shall be construed and enforced in accordance with the laws of the State of _____[state].

21. *Binding effect.* This Agreement shall be binding upon, and inure to the benefit of, all the parties, their respective heirs, representatives, successors and assigns.

22. *Modifications.* This Agreement may be modified only by a written document signed by representatives of both parties. A purported oral modification shall not be effective.

The parties hereto have set their hands and seals the day and year first above written.

DEVELOPMENT, INC.

By _____

Its President

THE _____ LAW FIRM

By _____

Its Managing Partner

EXHIBIT A

_____[Attach construction blue prints, specifications and list of materials]



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Chapter 22 DEVELOPMENT AND SUBDIVISION

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A. ACQUISITIONS FOR DEVELOPMENT AND SUBDIVISION

26-22 Current Legal Forms for Real Estate FORM 22.13

FORM 22.13 Contract of sale of land for development--specified acreage excluded from mortgage--remainder subject to partial releases

COMMENT

This form is a basic contract for the sale of five parcels of land for development and subdivision. In many respects, its provisions cover the same items as those involved in option transactions. The objective here, however, is to permit the developer to free parts of the property from the lien of the purchase money mortgage as these parts are improved and become ready for resale.

Under this contract part of the property is to be excluded from the purchase money mortgage in consideration for the deposit money and the down payment at the closing. The balance of the property is to be controlled by the release provisions of the mortgage. The parties recognize that these release provisions will have to comply with the regulations issued by the governmental agency in charge of protecting the ultimate purchasers of subdivision homes. In addition, the seller agrees to join with the developer in any platting for subdivision purposes so that there is a proper dedication of streets, easements, and other public uses.

The purchase money mortgage in this transaction is subordinate to an existing first mortgage on each of the five parcels covered by the contract. The developer will have to arrange to satisfy the first mortgage on each separate parcel as soon as he is ready to resell any of the property in that parcel.

Use of partial releases.

Releases from the purchase money mortgage may also be obtained on the payment of a specified amount per acre or per platted homesite. These release amounts, however, are not uniform. In the case of the more valuable parcel, a larger amount per acre must be paid for releases.

FORM

AGREEMENT entered into November 10, _____[year], between Frank Haley, (the "Seller"), and Edward Smith, (the "Purchaser").

In consideration of the covenants hereinafter contained, the parties agree as follows:

1. *Sale.* The Seller shall sell and the Purchaser shall purchase five parcels of land situated in the County of Lee, State of Florida, more particularly described as follows:

[Insert description]

2. *Purchase price.* The purchase price is \$300,000, payable by Purchaser in the following manner:

(a) \$30,000 in cash simultaneously with the execution and delivery of this agreement. This sum shall be held in escrow by the Central National Bank, Fort Myers, Florida, as Escrow Agent, as a deposit to bind this agreement (the "Deposit").

(b) \$35,000 at the time of closing as hereinafter provided.

(c) \$150,000 by assuming the outstanding principal balance on the five first mortgages covering each of the parcels, the details of which are set forth in Schedule A attached hereto and made part hereof.

(d) The balance of the purchase price, \$85,000, shall be evidenced by a purchase money second mortgage and note in customary form, which shall also provide for a 30-day grace period, notice of payments due, and release provisions, as hereinafter set forth. The note shall be payable in four equal annual payments after date thereof, with interest at 8 percent per year payable semi-annually. The note shall be secured by all of the five parcels of land with the exception of 170 acres which shall be excluded from the terms and conditions of the mortgage and note but which shall not be Parcel 2, Parcel 3, or Parcel 4. The 170 acres shall be contiguous, insofar as is possible. The Purchaser may at any time prepay all or any part of the mortgage and note without penalty. In the event of a default of the mortgage and note, the Seller will look for recovery only to the property, and no deficiency judgment will be taken against the Purchaser.

3. *Taxes, interest, and expenses.* Taxes, interest, and other items of expenses of sale shall be prorated as of the date of closing. The Purchaser shall pay for all documentary stamps on the purchase money mortgage and note. The Seller shall pay the intangible tax on the mortgage and for the documentary stamps on the deed. Ad valorem taxes and interest due on first mortgages shall also be prorated as of the date of closing.

4. *Abstract of title.* The Seller shall furnish to the Purchaser a current abstract of title or title insurance within 30 days from the date of the execution of this agreement, showing title to be good and marketable or insurable without exceptions except as to taxes for the current year and the mortgages set forth in Schedule A. The Purchaser shall have 20 days after delivery of the abstract or title insurance commitment within which to notify the Seller of any defects in the title. If the Seller is unable to furnish evidence of good and marketable or insurable title, the Purchaser may elect to have the Deposit repaid to him or may take such other action as may be available to him in accordance with law. This transaction shall close and the Purchaser shall pay the balance of the purchase price and execute all papers required for the completion of this purchase on or before August 1, _____[year]. The transaction shall be closed at the office of Charles Harris, Attorney at Law, 100 Broadway, Fort Myers, Florida. If for any reason, other than failure of title, the Purchaser does not close this transaction as herein provided, the Seller shall retain the Deposit as liquidated damages.

5. *Environmental site assessment.* The parties hereto acknowledge that the Purchaser has had the opportunity to complete an environmental site assessment prior to entering into this agreement. Purchaser waives any objection to the condition of the property based on any environmental concerns of any nature whatsoever.

6. *Release and other provisions in purchase money mortgage.* In addition to the usual and customary covenants, the purchase money mortgage shall also provide that the Seller shall release property from the terms and conditions of the mortgage and note upon the following conditions:

- (a) 170 acres shall be excluded from the mortgage at the time of closing.
- (b) Property selected by the Purchaser shall be released at the rate of \$150 per acre, provided that all released property within any section shall be contiguous, and further that the release price for property in Parcel 4 shall be \$500 per acre.
- (c) If the Purchaser causes a plat to be recorded in the Public Records of Lee County, Florida, subdividing the property into lots, the Seller shall release them upon the payment of \$125 for each lot released. A lot shall consist of a homesite comprising two lots approximately 40 by 125 feet each.
- (d) For each principal payment made under the mortgage and note, the Purchaser shall be entitled to a pro rata release of either acreage or homesite on the basis set forth above.
- (e) If the property is platted, the Seller shall join in the platting for the purpose of dedicating all streets, easements, canals, or other public uses or ways on such plat.
- (f) All payments made for releases shall be applied toward the next principal payment due under the mortgage and note.
- (g) All releases shall be prepared and recorded at the Purchaser's expense.

7. *Entire agreement.* This agreement supersedes all agreements previously made between the parties relating to its subject matter. There are no other understandings or agreements between them.

8. *Notices.* All notices or other documents under this agreement shall be in writing and delivered personally or mailed by certified mail, postage prepaid, addressed to the parties at their last known addresses.

9. *Non-waiver.* No delay or failure by either party to exercise any right under this agreement, and no partial or single exercise of that right, shall constitute a waiver of that or any other right, unless otherwise expressly provided herein.

10. *Headings.* Headings in this agreement are for convenience only and shall not be used to interpret or construe its provisions.

11. *Governing law.* This agreement shall be construed in accordance with and governed by the laws of the State of Florida.

12. *Counterparts.* This agreement may be executed in two or more counterparts, each of which shall be deemed an original but all of which together shall constitute one and the same instrument.

13. *Binding effect.* This agreement shall be binding upon and inure to the benefit of the parties, and their respective heirs, legal representatives, successors, and assigns.

14. *Time of essence.* Time is expressly declared to be the essence of this agreement.

The parties have set their hands and seals on this the _____ [day] day of
_____ [month], _____ [year].

Signed, sealed, and delivered:

Frank Haley

Edward Smith



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Chapter 22 DEVELOPMENT AND SUBDIVISION

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26-22 Current Legal Forms for Real Estate FORM 22.14

FORM 22.14 Contract of sale of land for development--use of trustee--general release provisions--special release provisions

COMMENT

This is a transaction for the sale of development property in those jurisdictions where deferred purchase money obligations are secured by trust arrangements rather than mortgage liens. Two separate properties are involved in this transaction: one is a parcel already in the possession of the trustee and held for the benefit of the seller (as the equitable owner) and a third party (as mortgagee); the other is an unencumbered parcel owned by the seller. Both parcels will be held by the trustee under the terms of this agreement. However, the outstanding indebtedness on the first parcel remains a prior lien. This indebtedness is not passed on to the buyer. Rather, the seller agrees to perform all obligations with respect to this indebtedness and to discharge it out of his own funds when it becomes due.

As in most development projects, the buyer is given the right to release parts of the property from the terms of the trust by paying specific sums against the deferred portion of the purchase price. These sums generally go to the owner. Here, however, because of the existing lien on the first parcel, all sums paid to obtain releases from that lien are to be paid to the mortgagee of that parcel. All other sums paid for releases, as well as installments due on the deferred portion of the purchase price, are to be paid by the trustee to the seller.

Restriction on construction.

Under most subdivision programs the developer (the buyer) may construct improvements on the purchased property and may defer obtaining a release from the purchase money mortgage until he is ready to resell the improved property to the homeowner. Under this agreement there is a basic provision prohibiting any construction of dwellings on property that has not been released from

the terms of the trust. However, to compensate for this provision and to enable the developer to get his program under way, the trustee is authorized to release 35 of the lots solely to enable the developer to obtain construction mortgages, provided that the lots are immediately conveyed back to the trust. In addition, the lots are to be reconveyed to the developer so that a sale can be made to the ultimate homeowner, but only on condition that the release price for the lots is paid to the trustee when the sale to the homeowner is consummated (see Paragraph 7).

The developer is also given the right to instruct the trustee to sell unimproved lots or parcels, provided the price in each case is sufficient to pay the release amount due to the seller on that lot or parcel, and provided the price is due no later than the date on which the last payment of purchase price is to be made by the developer to the seller. This appears at Paragraph 8.

FORM

PURCHASE AND TRUST AGREEMENT made and entered into August 20, _____[year], by and among Southwestern Properties, Inc., an Arizona corporation, (the "Seller"), Mason Construction Co., an Arizona corporation, (the "Buyer") and Desert Title and Trust Company, an Arizona corporation, (the "Trustee").

RECITALS

Title to the property described as Parcel 1 in Exhibit A, which is attached hereto and made a part hereof, is held by the Trustee pursuant to the terms and conditions contained in Trust No. 2000.

Title to the property described in Parcel 2 in Exhibit A is held by the Seller.

The Buyer desires to purchase Parcel 1 and Parcel 2 (collectively the "Property"), and the Seller desires to sell the Property upon the terms and conditions hereinafter set forth.

Therefore, in consideration of the mutual covenants hereinafter set forth, the parties agree as follows:

1. *Trust of property.* The Seller shall convey to the Trustee, by separate instrument, Parcel 2 of the Property described in Exhibit A in trust for the purposes set forth below. Until this trust is terminated, the legal title to all of the Property shall be vested in the Trustee, except as hereinafter provided, and no legal interest or title in and to the Property shall be vested in either the Seller or the Buyer. The rights of the Seller and Buyer consist only of the right to enforce performance of the terms and conditions of this agreement. The Property together with all of the proceeds from its sale to the Buyer, and all moneys that may be paid to the Trustee under the provisions hereof, shall constitute and be designated the "Trust Estate."

2. *Purpose of trust.* The trust herein provided for is established for the purpose of consummating the sale of the Property to the Buyer in a single transaction, and for such purpose the Trustee shall have the powers, rights, and obligations provided for herein.

3. *Purchase price.* The purchase price to be paid by the Buyer to the Trustee for the Seller's account shall be \$500,000, payable as follows:

(a) \$10,000 upon the execution of this agreement, the receipt of which is acknowledged.

(b) \$25,000 each year on the anniversary date of this agreement, until and including August 20,

_____[year].

(c) The balance payable on or before July 31, _____[year], with interest at the rate of 12 percent per year from the date hereof, on the unpaid balance, and with no premium or penalty for prepayment of all or part of the principal sum at any time.

4. *Outstanding indebtedness.* The Buyer understands that Parcel 1 of the Property is subject to the above mentioned Trust No. 2000 of the Title Company (the "Smith Trust") under which the Seller and a third party are respectively designated Second Beneficiary and First Beneficiary. The Seller warrants that the present total indebtedness against Parcel 1 of the Property under the Smith Trust is \$10,000 plus interest at 8 percent per year on the unpaid balance, and that the debt is payable in two annual installments: \$50,000 plus interest on July 1, _____[year], and \$50,000 plus interest on July 1, _____[year]. The Seller also warrants that no default has occurred nor has any act occurred that would constitute a default under Trust No. 2000. The Seller further agrees to faithfully perform and discharge all of the Trust's duties, liabilities, and obligations and to hold the Buyer harmless with respect thereto.

5. *Option to subdivide.* The Buyer may cause the Property to be subdivided and improved, provided that any subdivision plat complies with all existing governmental rules and regulations. The Trustee may dedicate all roads, alleys, rights-of-way, parkways, and easements necessary for such subdivision, and convey the dedicated portions to the County of Maricopa or the City of Phoenix. The Trustee may also file for record all restrictions submitted by the Buyer, provided they do not limit the sale or occupancy of the Property on account of race, color, or creed. All expenses in connection with such subdividing and improvement, including, but not limited to, installing streets, water lines, or other public utilities shall be the Buyer's obligation.

6. *Release price of lots.* Whenever the Buyer is not in default under this agreement, any lots into which the Property has been subdivided shall be released from any further right, title, interest, claim or demand of the Seller upon payment to the Trustee for the Seller's benefit of \$5,000 per gross acre of the Property described in Parcel 1, and \$6,000 per gross acre of the Property described in Parcel 2. All the lots in each parcel will be given a gross acreage figure, and the amount to be paid for their release shall be determined on the basis of the release price per acre specified above. The Buyer shall furnish for each lot in each parcel a schedule of the gross acreage amounts, to be made by a registered civil engineer. In addition to the release prices provided above, accrued interest shall be paid with respect to the principal balance represented thereby for each lot so released. All annual payments required to be made hereunder are to apply toward the release of lots in accordance with the release prices.

7. *Release of lots for construction mortgages.* If the Buyer is not in default in the payment of the purchase price, or in the performance of any other obligation under this agreement, the Trustee may convey 35 of the lots into which the Property shall have been subdivided to the Buyer or its nominee, either singly or in groups. Such conveyance shall be for the purpose of enabling construction mortgages (including any refinancing, renewal, or increase thereof) to be placed upon the lot or lots for the purpose of obtaining financing for the construction of homes, provided an escrow is set up in the Trustee's Escrow Department wherein such lot or lots will be immediately reconveyed to the Trustee after the placing of the construction mortgage of record (including any refinancing, renewal, or increase thereof) without any recorded liens or encumbrances having intervened other than the construction mortgage. The Trustee shall have no liability or responsibility for mechanic's or materialmen's liens which may attach to the property subject to transfer under this paragraph. Such lot or lots shall be reconveyed to the Buyer or its nominee whenever an escrow has been set up in the Trustee's Escrow Department under which the grantee in such deed is purchasing the Property, provided the escrow instructions require the payment of the release price for the lot or lots to the Trustee not later than the final distribution of funds on the sale to an approved buyer in such escrow. This amount must be paid not later than the date on or before which the purchase price for all of the trust property is to be paid in full. If payment is not so made, the Trustee shall thereafter hold any such lot or lots, together with all improvements thereon, subject to the forfeiture provisions set forth in this agreement covering default by the Buyer.

8. *Sale of lots to third parties.* The Buyer, if not in default in any obligation under this agreement, may instruct the Trustee to sell any of the lots into which the property has been subdivided, or any parcel of the trust property which has not been platted or subdivided, for cash or part cash with the balance on deferred payment. However, until the release price of the specified lot or lots as set out in Paragraph 6 has been paid in full, the sale price of any such lot or parcel sold on the deferred payment plan of purchase, or for cash, (excluding interest thereon), shall be sufficient to pay the release price due the Seller hereunder and expenses of sale, including, but not limited to, any real estate commission involved in such sale. Any such agreement for sale shall provide that the entire purchase price shall be payable in full not later than July 31, _____[year]. Any such agreement for sale shall be binding on the Seller, even though subsequently it may effect a forfeiture and cancellation as set forth in Paragraph 13. Upon completion of all payments and performance of all the terms and provisions required to be made or performed by the vendee of any agreement for sale entered into by the Trustee pursuant to the provisions hereof, the Trustee shall execute and deliver a deed to the vendee conveying the title to the parcel or lot sold free of this Trust and any lien or encumbrance created hereby.

9. *Disposition of trust money.* All moneys received by the Trustee under the provisions hereof shall be promptly paid and applied by it as follows:

(a) To the First Beneficiary of Trust No. 2000, the release price necessary to release any such lot to the Second Beneficiary thereunder (the Seller herein).

(b) To the Seller, all payments made for the conveyance out of the Property of lots or parcels either to the Buyer or to third parties as specified in Paragraph 8, and all payments made by the Seller into the Trust for the Seller's benefit until the Buyer's indebtedness to the Seller has been paid in full. In no event, however, shall the Trustee be entitled to receive on behalf of the Seller more than the specified price for each lot conveyed, sold, or released from this Trust.

(c) To the Trustee, its fees, costs, and expenses.

(d) All other moneys received by the Trust shall be paid to the Buyer.

10. *Title policy.* The Seller shall procure an owner's policy of title insurance issued by the Trustee at Phoenix, Arizona, insuring the Buyer in the full amount of the purchase price, subject only to the liens, encumbrances, and normal printed exceptions shown on the Trustee's Preliminary Title Report Number 25000.

11. *Taxes and assessments.* The Buyer shall pay all taxes, assessments, and special assessments, including but not limited to, water district assessments, and all other impositions of every kind and nature which may be levied, assessed, or imposed upon the property or any part thereof, or on any buildings or improvements situated thereon. Such payments shall be paid as they become due, but shall be prorated for the year _____[year] as of the date hereof. The Buyer shall advise the Trustee in writing on or before the due date for the payment of each installment of taxes, assessments, and special assessments that payment has been properly made including any penalties or interest thereon. The Seller may pay any delinquent taxes or assessments, and all amounts so expended shall be payable by the Buyer upon demand and shall be added to the purchase price hereunder and bear interest at 8 percent per year until paid.

12. *Trustee's fees.* As compensation for its services under this Trust, the Trustee shall receive its usual and customary trust fees and charges, 70 percent of the existing publicized owner's rates on title insurance policies and escrow charges at the date hereof, an acceptance fee of \$400, and existing collection charges, all of which the Buyer shall pay upon demand. However, the Trustee may retain the above fees and charges from any funds that would otherwise be payable to the Buyer under this Trust.

13. *Default by buyer.* If the Buyer defaults in the payment of the purchase price as specified in Paragraph 3, and the

default continues for a period of 30 days after the Trustee gives written notice thereof to the Buyer, the Seller may enforce a cancellation and forfeiture of the interests of the Buyer under this agreement. Any such cancellation and forfeiture shall be made in the following manner: By depositing in the United States mail, postage prepaid, by certified mail, the written declaration of cancellation and forfeiture, addressed to the Buyer at 100 West Adams Street, Phoenix, Arizona, and to the Trustee at 200 West Monroe Street, Phoenix, Arizona. Upon such declaration of cancellation and forfeiture by the Seller, all rights, estates, and interests hereby created or then existing in favor of the Buyer, or anyone who claims under it, in and to all portions of the Property not released to the Buyer or to third parties (as provided in Paragraph 8) prior thereto shall terminate, and become null and void, and all equitable and legal interests and estates in all the unreleased portions of the Property, together with all sums of money theretofore paid by the Buyer shall revert to and become the sole property of the Trustee for the Seller's benefit, free and clear of any right, title, lien, or claim of the Buyer. The Seller's rights to retain all sums previously received by it under this agreement, and to declare such cancellation and forfeiture and to receive all portions of the Property not released to the Buyer prior thereto, shall be its sole and exclusive remedy in the event of default by the Buyer, and the Buyer shall not be liable for any deficiency or for the payment of any balance due on the purchase price. In the event of a cancellation and forfeiture of the Buyer's rights, the Trustee shall upon written demand of the Seller and after payment of all the Trustee's costs, fees, expenses, and advances, convey the remaining trust property or any part thereof to the Seller or its nominee, or shall otherwise handle, manage, or dispose of the Property as the Seller may direct.

14. *Liability of trustee.* The Trustee shall not be liable to the Seller, the Buyer, or to anyone else for any act or omission to act under this agreement or the administration of the Trust Estate. Its sole liability hereunder shall be to act for and pay over to the Seller and the Buyer all sums to which they shall become entitled hereunder.

15. *Protection of trustee.* The Seller and the Buyer shall fully pay, indemnify, protect, save and hold harmless the Trustee from any and all suits, claims, demands, judgments, costs, and expenses, including attorney's fees and other obligations and liabilities of every kind and character that the Trustee may for any reason or at any time suffer, incur, or expend by reason of or in connection with this agreement or the administration thereof, other than through its own misconduct or willful neglect. As between the Seller and the Buyer, the obligations of the parties in this paragraph are the obligations of the Buyer. However, the Trustee may look to both of the parties or any property or funds in its hands to effect compliance therewith and to indemnify it and hold it harmless on account of any failure to make any payment or to do any act herein set forth.

16. *Adverse acts of buyer.* Until the Seller and the Trustee are fully paid hereunder, the Buyer will not create or permit the creation of, any lien against the trust property or any part thereof upon which the release price has not been paid, subject, however, to the provisions of Paragraph 8.

17. *Termination of trust.* This agreement shall terminate upon the conveyance of all of the trust property and the distribution of all funds in the hands of the Trustee to the person or persons entitled thereto in accordance with the terms hereof.

18. *Statements by trustee.* The Seller and the Buyer shall be furnished statements of account and statements of settlement from the Trustee annually; provided, however, that such statements shall supplement and not duplicate the preceding ones. The Trustee's accounting records shall at all reasonable times be open to the inspection of the Seller and the Buyer.

19. *Entire agreement.* The Seller and the Buyer certify that this agreement fully and correctly sets out the trust and the agreement between the parties and the conditions under which the Trustee is to hold, manage, or dispose of the property. There are no other understandings or agreements between the parties.

20. *Arbitration.* Any dispute or controversy arising between the parties involving the interpretation or application of any provision of this agreement, or arising out of this agreement, shall be submitted to and determined by arbitration in

accordance with the rules of the American Arbitration Association or of any other comparable organization if the American Arbitration Association is not then in existence. The arbitration award shall be subject to enforcement in any court of competent jurisdiction.

21. *Other documents.* Each party shall perform all such other acts and things and execute such other and further documents as may be necessary to carry out the intent and purposes of this agreement.

22. *Instructions to trustee.* Wherever in this instrument it is provided that the Trustee shall do a certain act upon the request or instruction of any party, that act, or a document evidencing it, shall be in the form and done in the manner satisfactory to the Trustee.

23. *Conveyances to third parties.* All property conveyed out of this Trust to persons not parties to this agreement shall be free of this Trust, and no purchaser shall in any way be obligated to see to the application of the proceeds by the Trustee.

24. *Possession of property.* The Buyer, upon written request of the Trustee and consent of the Seller, shall be allowed possession of the Property for the purpose of its development and sale during the term of this agreement. However, except as provided in Paragraph 7, no construction of dwellings shall begin until the property on which construction is contemplated has been released from this agreement, unless with the Seller's written consent and approval. The Buyer, however, shall be permitted to go upon the Property, without having received the Seller's written consent and approval, for the purpose of preparing surveys, master planning, engineering, and making soil tests as long as such work does not unreasonably interfere with the Seller's peaceful possession of the property.

25. *Trust number.* This agreement shall be known as Trust Number 5525 upon the records of the Trustee.

26. *Notices.* All notices or other documents under this agreement shall be in writing and delivered personally or mailed by certified mail, postage prepaid, addressed to the parties at their last known addresses.

27. *Non-waiver.* No delay or failure by a party to exercise any right under this agreement, and no partial or single exercise of that right, shall constitute a waiver of that or any other right, unless otherwise expressly provided herein.

28. *Headings.* Headings in this agreement are for convenience only and shall not be used to interpret or construe its provisions.

29. *Governing law.* This agreement shall be construed in accordance with and governed by the laws of the State of Arizona.

30. *Counterparts.* This agreement may be executed in two or more counterparts, each of which shall be deemed an original but all of which together shall constitute one and the same instrument.

31. *Binding effect.* This agreement shall be binding upon and inure to the benefit of the parties, and their respective legal representatives, successors, and assigns.

32. *Time of essence.* Time is expressly declared to be the essence of this agreement.

In witness whereof the Trustee, the Seller, and the Buyer have caused this instrument to be duly executed by their respective officers thereto duly authorized.

Attest:

Southwestern Properties, Inc.

by _____

Secretary

President

Attest:

Mason Construction Co.

by _____

Secretary

President

Attest:

Desert Title and Trust Company

by _____

Secretary

President



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Current Legal Forms for Real Estate

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Current Legal Forms for Real Estate

Chapter 22 DEVELOPMENT AND SUBDIVISION

Part IV. FORMS

A. ACQUISITIONS FOR DEVELOPMENT AND SUBDIVISION

26-22 Current Legal Forms for Real Estate FORM 22.15

FORM 22.15 Contract of sale and leaseback of land for development--trustee holds property--seller as beneficiary--installment payments of purchase price

COMMENT

This is another agreement for the sale of property on a deferred payment basis where the security device is a trust created by the seller and the buyer. In this type of transaction, the seller is the beneficiary and the purchaser is the trustor. Generally, a financial institution or title company acts as trustee. Payments of the purchase price, releases, platting and required recordations, installation of utilities, and other incidentals of the transaction are performed through the trustee as if he were an escrow agent. Legal title is conveyed to the purchaser as the property is released from the debt to the seller. The trustee is an agent of the parties and does not have to file a fiduciary return.

Advantages of sale and leaseback.

In many long-term land development programs, the landowner will frequently reserve for himself some temporary rights in the property. The technique used in this transaction to secure such rights for the landowner is a sale and leaseback. This technique offers a number of advantages to both parties.

From the seller's standpoint, the sale provides some immediate cash. At the same time, the leaseback insures the continued use of the property by the seller as the lessee. Thus, in this case, the seller may continue his farming operations on a gradually decreasing scale as the property is developed by the purchaser. The rent paid by the seller for the use of the land will be deductible for income tax purposes.

For the purchaser, a leaseback to the seller will provide temporary income from property that

would otherwise be unproductive. As soon as the purchaser is ready to develop a specific parcel, he may, upon reasonable notice and upon the required payment, release that parcel from the burdens of the trust and the lease. As in all similar development programs, a schedule for partial releases from the purchase-money debt is a basic feature of the transaction. But in this case, development cannot even be begun on any parcel until that parcel has been released from the trust.

FORM

PURCHASE AND TRUST AGREEMENT, entered, July 15, _____[year], by and among Camelback Title Guarantee & Trust Company, an Arizona corporation (the "Trustee"); and Farnsworth Company, a California corporation (the "Beneficiary"); and Mountain Development Co., an Arizona corporation (the "Trustor").

Recitals The trustee has received a deed from the Beneficiary conveying to it, as Trustee, the bare legal title to that certain real property (excluding all crops now growing on it), located in Maricopa County, Arizona, known as Sunrise Ranch, and described in Schedule I, which is attached to this agreement and made a part of it (the "property"),

The Trustor desires to purchase the property from the Beneficiary and the Beneficiary desires to sell the property to the Trustor upon the terms and conditions set forth herein, and

The Trustee holds title to all of the property in trust for the uses and purposes and upon the terms, conditions, and covenants contained in this agreement,

Therefore, in consideration of the mutual covenants and agreements set forth to be by them kept and performed, the parties agree as follows:

1. *Sale.* The Beneficiary agrees to sell to the Trustor the property for the full sum of \$1,500,000, payable at the time and in the manner set forth, and the Trustor agrees to purchase the property from the Beneficiary for that sum, payable as herein set forth.

2. *Trust estate:*

(a) The Trustor assigns and conveys to the Trustee all of the property described in Schedule I (excluding all crops now growing on it). Title to the property, together with all of the proceeds from this sale to the Trustor and all moneys that may be paid to the Trustee under these provisions, shall constitute and be designated the Trust Estate. Throughout the term of this agreement and the duration of the Trust hereby created, the legal title to the property shall be vested in the Trustee, except as herein provided, and no legal interest in the property shall be vested in either the Beneficiary or the Trustor. The rights of the Beneficiary and the Trustor under this agreement are personal, consisting only of the right to enforce performance on the terms and conditions by the other parties. This agreement, and the rights under it, shall not be assignable for any purpose by either the Beneficiary or the Trustor.

(b) The Beneficiary reserves the right to itself, its employees, agents and invitees to enter onto the property to be conveyed herein to harvest any crops which may be growing on the land at the time of transfer of title. This right to enter shall expire upon the completion of the harvest. Beneficiary agrees to promptly harvest all crops consistent with ordinary standards in the farming industry.

(c) The Beneficiary agrees to indemnify the other parties hereto for any claim for injury to person or property which arises out of, or in the course of, the entry onto the property and the harvesting of crops. This indemnity shall be interpreted broadly and shall include any judgment, settlement and other related payments (such as prejudgment and post-judgment interest), as well as all costs of defense, attorneys' fees and disbursements.

3. *Payment of purchase price.* The purchase price shall be paid to the Trustee for the account of the Beneficiary as follows:

- (a) \$100,000 or more, on or before one month from the date of this agreement.
- (b) An additional \$400,000 or more, on or before five years from the date of this agreement.
- (c) An additional \$500,000 or more, on or before eight years from the date of this agreement.
- (d) An additional \$500,000 or more, on or before ten years from the date of this agreement.

Interest at 8 percent per year from the date of this agreement to the date of payment shall be payable with respect to every portion of the unpaid balance of the purchase price.

4. *Taxes and assessments.* The Trustor shall pay all taxes, assessments, special assessments including, but not limited to, water district assessments, and all other impositions of every kind and nature, which may be levied, assessed, or imposed upon the property or any part of it, or on any buildings or improvements situated on it. Such payments shall be paid as they become due. The Trustor shall advise the Trustee in writing on or before the due date for the payment of each installment of taxes, assessment, and special assessments that payment has been properly made including any penalties or interest.

5. *Lease to seller.* The Trustee shall lease the property to the Beneficiary by lease of even date for the purpose of conducting a farming operation for a term of ten years commencing upon the date of execution hereof, subject to the right of the Trustor to request release of parcels of the property from the lease and this Trust upon payment of installments of the purchase price as set forth. The Beneficiary may sublease for periods not exceeding 15 months any or all of the property leased by it, except that subleases for a longer period may be made only with the Trustor's written consent. The Trustee shall not be required to execute such lease until the Trustor approves its form and contents in writing. The Beneficiary may terminate all or any part of the lease by giving six months' written notice to the Trustor.

6. *Purpose of trust.* This Trust is established and shall be operated for the purpose of consummating the sale by the Beneficiary to the Trustor of the property as a single transaction, and for this purpose, the Trustee shall have the power, rights, and obligations that are provided.

7. *Development of property.* The Beneficiary authorizes the Trustee, upon the Trustor's written request, to dedicate all easements and rights of way that are necessary to enable the property to be adequately served by gas, electricity, water, sewers, telephone, and other utilities. The Trustor is liable to the Beneficiary for all damages that may arise to crops, wells, cement ditches, pipelines, or buildings from construction of these easements. The Beneficiary further authorizes the Trustee, upon the Trustor's written request and with the Beneficiary's written consent and approval not to be unreasonably withheld or delayed, from time to time to:

- (a) Plat the property into an appropriate number of lots or parcels under some suitable designation or designations.
- (b) Execute and cause to be placed of record the plat or plats and to make dedication of streets, roads, alleys, easements, and parkways thereon subject to the provisions of Paragraph 8.
- (c) Cause to be placed of record appropriate building restrictions and other restrictive covenants to run with the title to the property.
- (d) Cause appropriate zoning changes to be made as the Trustor may desire.

All platting and recordation of plat or plats, dedications, easements, preparation, and recordation of restrictive covenants shall:

- (a) Comply with the rules and regulations of the State of Arizona Real Estate Department and all other applicable municipal and governmental rules, regulations, and ordinances, including, but not limited to, those of any County or Municipal Planning and Zoning Commissions having jurisdiction over the property.
- (b) Be executed by the Trustee whenever necessary to comply with the provisions of law; provided, however, any such execution shall be on behalf of the Trustor and shall not constitute the Trustee's independent act.
- (c) Be, together with all other expenses incidental to the development and sale of the property, including, without limitation, the installation, if any, of irrigation and domestic water lines, utilities, streets, gutters, sidewalks, and other improvements, at the Trustor's sole expense and free of all expense to the Beneficiary or the Trustee.

8. *Release of parcels.* Whenever the Trustor is not in default in the performance of any covenant or condition contained in this agreement, parcels of the property shall be released from any further right, title, interest, claim, or demand of the Beneficiary, and the Trustee shall execute deeds of conveyance without warranty, except as to its own acts, to the Trustor upon payment to the Trustee of an amount or amounts as set forth in Schedule II, which is attached to this agreement. The Trustor may designate any parcel of the property for release, provided that the parcel contains not less than 50 acres in any one section with the following exception: The Trustor may designate any parcel which amounts to less than 50 acres for release for dedication of streets, roads, alleys, easements, and parkways to the extent approved in writing by the Beneficiary as provided in Paragraph 7, provided that the Trustor gives the Beneficiary and Trustee reasonable written notice of its intent to have the parcel released. Three to fifteen months shall be considered reasonable written notice, depending upon the nature of the crop that is being grown upon the parcel. Installments of the purchase price to be paid by the Trustor to the Trustee under Paragraph 3 shall entitle the Trustor to the release of acreage in accordance with this Paragraph 8. All amounts paid into this Trust as Release Price will be applied to the next minimum installment of principal and interest to become due on the unpaid purchase price, and thereafter to successive minimum installments.

9. *Brokerage.* The Trustor shall not be liable for any real estate or brokerage commission resulting from or arising within the sale of the property.

10. *Title policy.* The Beneficiary shall procure an ALTA extended coverage Owner's Title Insurance Policy issued by Camelback Title Guarantee & Trust Company insuring the Trustor in the full amount of the purchase price, free and clear of all liens and encumbrances except those shown as exceptions on that certain Preliminary Title Report No. 5000 of Camelback Title Guarantee & Trust Company, Phoenix, Arizona. The Beneficiary shall deposit with the Trustee within 60 days from the date hereof a boundary survey of the property prepared by a registered civil engineer. The Beneficiary shall pay for the cost of the boundary survey and the Title Insurance Policy.

11. *Disposition of trust money.* The Trustee shall promptly account for and pay and apply all moneys received into this Trust under the provisions of this agreement, in the following order:

- (a) To the Beneficiary, all payments made for the conveyance of parcels out of the property, and all payments made by the Trustor into the Trust for the benefit of the Beneficiary until the Trustor's indebtedness to the Beneficiary has been paid in full.
- (b) To the Trustee, its fees, costs, and expenses.
- (c) All other moneys received into the Trust shall be paid to the Trustor.

12. *Trustee's fees.* As compensation for its services under this Trust, the Trustee shall receive its usual and customary trust fees and charges, 70 percent of the existing publicized owner's rates on title insurance policies and escrow charges at the date of this agreement, an acceptance fee of \$400, and existing collection charges, all of which the Trustor shall pay upon demand, and for which the Trustor acknowledges itself liable. However, the Trustor may retain the fees and charges from any funds that would otherwise be payable to the Trustor under this agreement. A schedule of fees is attached as Schedule III.

13. *Time of essence; default by buyer.* Time is of the essence in regard to this agreement and all its terms and conditions. Full performance by the Trustor of all of its obligations is a condition precedent to its right to a conveyance of the property held under this agreement and to its right to the performance of this agreement. If the Trustor defaults upon the payment of the purchase price due under Paragraph 3, and the default remains uncorrected for a period of 30 days after receipt of written notice from the Trustee, the Beneficiary may enforce a cancellation and forfeiture of the Trustor's interest. Cancellation and forfeiture may be made in the following manner:

By serving upon the Trustor and the Trustee a written declaration of cancellation and forfeiture, or by depositing in the United States mail, by registered mail, postage prepaid, such written declaration addressed to the Trustor at Post Office Box 2000, Phoenix, Arizona, or at any other post office address that the Trustor shall have filed with the Trustee, and to the Trustee at 200 West Adams Street, Phoenix, Arizona. Upon the declaration of cancellation and forfeiture by the Beneficiary as provided, all rights, estates, and interests hereby created or then existing in favor of the Trustor or anyone who claims under it to all portions of the property not released to the Trustor beforehand, shall cease, terminate, and become null and void. All equitable and legal interests and estates in all the unreleased portions of the property, together with all sums of money already paid by the Trustor hereunder, shall revert to, be vested in, and become the sole property of the Trustee for the benefit of the Beneficiary, free and clear of any right, title, lien, or claim of the Trustor. The Trustor shall have no right, either in law or in equity, to reclaim or recover any compensation for moneys paid or services performed. The Beneficiary's right to retain all sums previously received by it under this Trust and to declare such a cancellation and forfeiture and to receive all portions of the property not previously released to the Trustor shall be its sole and exclusive remedy if the Trustor defaults. If the Trustor's rights are forfeited, the Trustee shall, upon the Beneficiary's written demand, and after payment of all of the Trustee's costs, fees, expenses, and advances, deed all or any part of the remaining trust property to the Beneficiary or its nominee, or shall otherwise handle, manage, or dispose of the property as the Beneficiary may direct.

14. *Liability of trustee.* The Trustee shall not be liable to the Beneficiary or the Trustor or to anyone else for any act or omission to act under this Trust or the administration of the Trust Estate. Its sole liability hereunder shall be to account for and pay over to the Beneficiary and the Trustor all sums to which they shall become entitled hereunder.

15. *Protection of trustee.* The Beneficiary and the Trustor will fully pay, indemnify, protect, save, and hold harmless the Trustee from any and all suits, claims, demands, judgments, costs, and expenses, including attorneys' fees and other obligations and liabilities of every kind and character that the Trustee may for any reason or at any time suffer, incur, or expend by reason of or in connection with this Trust or its administration, other than through its own misconduct or willful neglect.

16. *Adverse acts of buyer.* The Trustor will not, before the Beneficiary and the Trustee are fully paid hereunder, create or attempt to create, or permit the creation of, any lien against the trust property, or any part of it upon which the Release Price has not been paid, due to any act or omission by it. However, with the Beneficiary's prior written consent, the Trustee shall execute all subordination instruments required by a financial institution lending moneys to the Trustor.

17. *Termination of trust.* This Trust shall terminate upon conveyance of all of the trust property and distribution of all funds in the hands of the Trustee to the person or persons entitled to them in accordance with the terms of this agreement.

18. *Statements by trustee.* The Beneficiary and the Trustor will be furnished statements of account and statements of settlement from the Trustee annually. The statements shall supplement and not duplicate the preceding ones. The Trustee's accounting records shall at all times be open to inspection by the Beneficiary and the Trustor.

19. *Entire agreement.* The Beneficiary and the Trustor certify that this agreement fully and correctly sets out the trust and the agreement between the parties and the conditions under which the Trustee is to hold, manage, or dispose of the property, and that there are no other understandings or agreements between them.

20. *Binding Effect.* This agreement shall be binding upon and inure to the benefit of the parties, and their respective heirs, representatives, executors, successors, and assigns.

21. *Arbitration.* Any dispute or controversy arising between the parties involving the interpretation or application of any provision of this agreement, or arising out of this agreement, shall be submitted to and determined by arbitration in accordance with the rules of the American Arbitration Association or of any other comparable organization if the American Arbitration Association is not then in existence. The arbitration award shall be subject to enforcement in any court of competent jurisdiction.

22. *Construction of agreement.* Wherever the context of this agreement so requires, words used in the neuter gender include the masculine and feminine; the singular includes the plural and the plural singular. The word "person" includes a corporation, company, partnership, association, or society, as well as a natural person.

23. *Possession of property.* Except for the leases and subleases provided for in Paragraph 5, the Trustor, upon its written request and with the Beneficiary's written consent and approval, shall be allowed possession of the property for the purpose of developing and selling it during the term of this Trust. However, no construction of dwellings or other buildings shall be commenced until the property on which the construction is contemplated has been released from this Trust, except with the Beneficiary's express written consent and approval.

24. *Conveyances to third parties.* All property conveyed out of this Trust to persons not parties to this agreement shall be free of this Trust, and no purchaser shall in any way be obligated to see to the application of the proceeds by the Trustee.

25. *Continuation of trust.* When all of the Trustee's fees, costs, and expenses have been fully paid, and all of the Trustor's indebtedness to the Beneficiary has been fully liquidated, the Trustor may allow the Trust to be continued for the Trustor's benefit, under appropriate instructions, only as to the conveyance of the Trust property to persons it may in writing direct.

26. *Liability and property damage insurance.* The parties in possession from time to time of the property under this agreement shall carry adequate public liability and property damage insurance insuring all parties to this agreement as is required by the other parties.

27. *Instructions to trustee.* Whenever this instrument provides that the Trustee shall do a certain act upon the request or instruction of any party, that act, or a document evidencing it, shall be in the form and done in the manner satisfactory to the Trustee.

28. *Trust number.* This agreement shall be known as Trust No. 1000 upon the records of the Camelback Title Guarantee & Trust Company.

29. *Notices.* All notices or other documents under this agreement shall be in writing and delivered personally or mailed by certified mail, postage prepaid, addressed to the parties at their last known addresses.

30. *Non-waiver.* No delay or failure by a party to exercise any right under this agreement, and no partial or single exercise of that right, shall constitute a waiver of that or any other right, unless otherwise expressly provided herein.

31. *Headings.* Headings in this agreement are for convenience only and shall not be used to interpret or construe its provisions.

32. *Governing law.* This agreement shall be construed in accordance with and governed by the laws of the State of Arizona.

33. *Counterparts.* This agreement may be executed in two or more counterparts, each of which shall be deemed an original but all of which together shall constitute one and the same instrument.

The Trustee, the Beneficiary, and the Trustor have caused this instrument to be duly executed by their respective duly authorized officers and their corporate seals to be affixed.

Attest: Camelback Title Guarantee & Trust Company

Secretary by _____
President

Attest: Farnsworth Company

Secretary by _____
President

Attest: Mountain Development Company

Secretary by _____
President

[Attach description of real property, as Schedule I]

[Attach Schedule II]

[Attach schedule of fees as Schedule III]



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Current Legal Forms for Real Estate

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Current Legal Forms for Real Estate

Chapter 22 DEVELOPMENT AND SUBDIVISION

Part IV. FORMS

A. ACQUISITIONS FOR DEVELOPMENT AND SUBDIVISION

26-22 Current Legal Forms for Real Estate FORM 22.16

FORM 22.16 Contract of sale of land--seller obligated to plat and improve building lots--sites for commercial development and amenities to be selected--force majeure clause

COMMENT

Under this plan, the seller must convert raw land into finished building lots. The land is actually sold to the purchaser, but it is the seller who prepares the lots so that they are ready for residential construction. This means that the property is to be platted and subdivided, that drainage structures, sewerage, water systems, and streets and street signs are to be installed, and that easements are to be granted for electrical power. These obligations of the seller are all carefully defined, and a schedule is provided setting out the timetable for the seller's obligations.

If the seller defaults, there is a reduction in the deferred portion of the purchase price, measured by the reasonable costs of making the promised improvements plus damages in a restricted amount suffered by the purchaser. A force majeure clause relieves either party from timely compliance with contractual obligations during the period it is prevented by certain specified events (see Paragraph 13). In all, despite the outright sale of the property, the seller remains contractually involved in the initial aspects of the development program.

FORM

AGREEMENT entered into as of October 1, _____[year] between Eastern Estates, Inc., a Florida corporation (the "Seller"), and Viewpoint Homes, Inc., a Florida corporation (the "Purchaser").

Whereas the Seller is the owner of certain property in Dade County, Florida, and

Whereas the Seller desires to sell and the Purchaser desires to purchase certain lots from such property on the terms and

conditions set forth,

Now, therefore, for Ten Dollars and other valuable consideration including these mutual covenants, the parties do covenant and agree as follows:

1. *Description of lots.* The Seller agrees to sell and the Purchaser agrees to purchase 1,200 lots (the "premises"), to be subdivided and platted from the following described property:

(Insert description)

Out of the premises the Seller may retain areas (the size, location, and proportion of which it alone determines) for church sites, school sites, park sites, utility sites, and shopping center sites, that it may deem necessary or convenient. The above-described property will be platted in accordance with Dade County and Federal Housing Administration requirements. If the area conveyed at the time of closing exceeds an area equal to a minimum of 1,200 lots (plus the area necessary for rights-of-way, canal rights-of-way, streets, and easements), the Purchaser will reconvey to the Seller the excess portion either by joinder in platting or by good and sufficient instrument of reconveyance, whichever means may be appropriate, such reconveyance to occur when the area has been so platted and contains 1,200 lots. The Seller may from time to time change the size, location, and description for the church sites, school sites, park sites, utility sites, and shopping center sites set forth above. Accordingly, the Purchaser covenants to execute conveyances to accomplish such changes. However, this right to change may not be exercised when or to the extent intervening rights of institutional lenders or individual home purchasers have become vested. The Seller retains the right to award any or all utility franchises in connection with the premises and to receive all the benefits and profits therefrom. The Purchaser covenants to sign, execute, and deliver all forms, applications, documents, and other writings necessary or proper for the Seller to use and enjoy such franchises. The Seller will furnish the legal description for the area comprising the premises prior to the date of closing.

2. *Purchase Price.* The purchase price is \$4,225,000, payable as follows:

(a) \$25,000 on the signing of this contrast, the receipt of which is acknowledged;

(b) \$4,200,000 by the Purchaser or its assigns executing, acknowledging, and delivering to the Seller a note secured by a purchase money mortgage on the demised premises, in that amount. The note and mortgage shall be in substantially the form and content and contain substantially the terms, provisions, covenants, and conditions set forth in Exhibit A, which is attached to, and made a part of, this agreement.

3. *Closing.* The closing of this transaction shall take place on December 18, _____[year], at the office of Frank Baker, Attorney for the Seller, 10 S.E. 2d Street, Miami Beach, Florida, commencing at 10 a.m. and continuing until completed.

4. *Deed.* The Seller at the time of closing shall deliver to the Purchaser the ownership of the premises by executing in favor of the Purchaser a warranty deed, in statutory form, subject only to the following:

(a) Taxes for the current year;

(b) Zoning ordinances of Dade County, Florida;

(c) Restrictions and limitations of record common to the neighborhood;

(d) Existing easements for public utilities;

(e) Reservations as contained in the deed recorded in Deed Book 50 at page 100 of the Public Records of Dade County, Florida; and

(f) The lien of the purchase money mortgage as set forth in Exhibit A.

The Seller shall record the warranty deed and the purchase money mortgage, and shall pay for all recording fees, documentary stamps on the warranty deed, and the intangible tax and state stamps applicable to the purchase money mortgage. There shall be no prorations except as provided in Exhibit A.

5. *Seller's obligations to prepare lots.* The Seller shall, in accordance with Federal Housing Administration and Dade County requirements and as required herein, as its own expense except as otherwise provided:

(a) Plat and improve the premises so that the plat shall be recorded as part of the public records of Dade County, Florida, and the subdivision or subdivisions so platted will be improved so as to be approved by the Federal Housing Administration and Dade County as finished lots ready for use in the building of private residences, and for mortgages guaranteed by the Federal Housing Administration. However, the Seller need not plat all of the premises at any one time, but may cause as many different plats at as many different times and from time to time as it may deem advisable.

(b) Fill and compact the premises.

(c) Provide drainage, drainage structures and facilities, streets, sewerage, water distribution system, rough graded swales, and street signs.

(d) Grant adequate easements for electrical power lines and do all possible to facilitate the installation of electrical power lines by the Florida Power and Light Company, except that the Seller does not guarantee the installation of such power lines.

(e) Join in reasonable restrictions to be placed upon the premises acceptable to the Seller, the Purchaser, and the Federal Housing Administration.

6. *Details relating to seller's obligations.* With respect to the Seller's obligations as set forth in Paragraph 5, the following shall apply:

(a) The premises shall be so filled that the Purchaser will be able to build on top of the fill by use of monolithic footing and slab construction as approved by the Federal Housing Administration. Lots are to be filled to elevations equal to the crown of the street that abuts each lot. If the Purchaser gives prior written notification to the Seller that it desires the Seller to cause any lots to be filled and compacted to an elevation four inches higher than the crown of the abutting street, as to the area between the front and rear county setback lines, the Seller will cause such fill and compaction to be done in that manner, provided such notice is accompanied by the Purchaser's cash payment to the Seller of \$75 for each such lot. The compacted embankments are to be constructed of such size and in such manner as to give adequate safety berms so as to allow construction of footings within the full limits of the front and rear County setbacks. All filling is to be approved by the Federal Housing Administration and a registered engineer doing business in Dade County, Florida.

(b) The Seller shall lay water and sewer mains in the streets or in the rear of each lot with laterals to lot lines, but such mains shall not interfere with the construction of a one-family house on each lot. The Purchaser shall install and pay for the lateral lines leading from each house to its lot line. The Seller shall pay any tapping fee in connection with the water lines or sewer lines. The Purchaser shall not pay for any water meters or other meters that may be used in connection with the homes to be built on the premises.

(c) Notwithstanding the foregoing, the Seller or anyone to whom it gives a utility franchise in connection with the

premises may obtain utility deposits for all installations prior to installing them in and to the homes to be built by the Purchaser on the premises. The Purchaser shall, before making any such installation, advance the amounts of all these utility deposits to the Seller or any holder of any such utility franchise received from the Seller. The Seller or holder shall return to the Purchaser each deposit as it is received from the individual home owner. If the home owner does not pay the utility deposit to the Seller or the holder, neither shall be obligated to return the deposit to the Purchaser. The Federal Housing Administration shall approve the amount of each individual deposit.

(d) The platting and improvements of the first 180 acres shall be completed by April 1, _____[year] (the "initial time of completion"). Final approval of the sewage disposal plant and the water system need not be obtained before the initial time of completion, but shall, in any event, be obtained before the Purchaser is ready to deliver finished homes. The Seller shall thereafter complete platting and improvements as follows:

150 lots (Group 2) within six months from the initial time of completion.
 200 lots (Group 3) within one year from the initial time of completion.
 200 lots (Group 4) within 18 months from the initial time of completion.
 200 lots (Group 5) within 24 months from the initial time of completion.
 200 lots (Group 6) within 30 months from the initial time of completion.
 70 lots (Group 7) within 36 months from the initial time of completion.

(e) All work required to be done on the premises shall be inspected from time to time by the Seller's engineer, Carver, Smith & Associates. The Seller may at any time change its engineer and appoint another. However, any engineer the Seller appoints must be registered with the State of Florida and have a certification acceptable to the Federal Housing Administration. A valid and good faith certification by the engineer that the improvements to the premises have been completed shall be deemed conclusive compliance with the Seller's obligations under this agreement.

7. Default by seller. If the Seller fails, neglects, or refuses to make and complete the improvements to the premises as provided on or before nine months after the respective times of completion required under this agreement, the principal amount of the purchase money note and mortgage (Exhibit A) shall be reduced by an amount equal to the damages suffered by the Purchaser. This amount shall in no event exceed the total of the following:

(a) The reasonable cost to the Purchaser of making the improvements that the Seller failed to make or perform; and

(b) Actual damages of any nature whatsoever suffered by the Purchaser as a result of such defaults, which shall in no event exceed \$200,000.

These damages shall be determined by a court of competent jurisdiction. After deducting the damages the remaining balance due under the note and mortgage shall be paid in five equal annual installments, the first installment to be due and payable three months after entry of a final decree by the court.

8. Abstract of title. The Seller shall within seven days from the date of the execution of this agreement deliver to the attorney for the Purchaser, William Payne, Esq., 100 Lincoln Road, Miami, Florida, an abstract showing the title of the property described in Paragraph 1 to be good and marketable or insurable. The Purchaser shall have seven days from the date of delivery of the abstract within which to give written notice to the Seller of any defect in the title. If the Purchaser fails to give such notice it shall be conclusively presumed at the end of the seventh day that the Purchaser has waived any right to object to the abstract through the date of its continuation.

9. Default by purchaser. If the Purchaser, without the Seller's fault, fails to comply with any of its obligations in this agreement, specifically including, but not limited to, the covenants to pay moneys either under the provision of this agreement or the purchase money note and mortgage executed by the Purchaser, the Seller shall retain as liquidated damages all moneys that the Purchaser has paid to it up to that time. Upon the Purchaser's reconveyance to the Seller of

all unreleased portions of the mortgaged premises and cancellation of the unpaid portions of the purchase money mortgage and note, this agreement shall be at an end and neither party shall have any further liability or obligation against the other.

10. *Notice.* If either party desires to give notice to the other, the notice shall be in writing, and shall be deemed given when it is mailed by certified mail, return receipt requested, addressed to the party for whom it is intended as follows:

To the Purchaser:

c/o William Payne, Esq.
100 Lincoln Road
Miami, Florida

To the Seller:

c/o Frank Baker, Esq.
10 S.E. 2d Street
Miami Beach, Florida

Either party shall have the right to change its designee for the receipt of notices.

11. *Entire agreement.* All understandings between the parties have been expressed in this agreement. This agreement shall not be changed, modified, or altered unless the changes, modifications, or alterations are in writing and executed by the parties.

12. *Time of essence.* Time is expressly declared to be of the essence of this agreement.

13. *Force majeure.* If by reason of acts of God, floods, storms, explosion, fires, labor troubles, strikes, insurrection, riots, acts of the public enemy, or federal, state or local law, order, rule, or regulation, either party is prevented from complying with any condition of this agreement, or of the mortgage given in connection with it, or from complying with any express or implied covenant in the agreement, then while so prevented the condition shall be suspended and the party shall be relieved of the obligation of complying with such covenant and shall not be liable for damages for failure to comply with it. Any obligation of either party shall be extended for as long as it is so prevented from complying with any condition or covenant in the agreement.

14. *Survival of obligations.* All undertakings of the Seller and the Purchaser which are executory in nature at the time of the delivery of the deed shall survive delivery. All undertakings and obligations provided in Exhibit A shall be deemed to be fully set forth at length herein.

15. *Binding effect.* The provisions of this agreement shall be binding upon and inure to the benefit of both parties and their respective successors and assigns.

16. *Non-waiver.* No delay or failure by either party to exercise any right under this agreement, and no partial or single exercise of that right, shall constitute a waiver of that or any other right, unless otherwise expressly provided herein.

17. *Headings.* Headings in this agreement are for convenience only and shall not be used to interpret or construe its provisions.

18. *Governing law.* This agreement shall be construed in accordance with and governed by the laws of the State of Florida.

19. *Counterparts*. This agreement may be executed in two or more counterparts, each of which shall be deemed an original but all of which together shall constitute one and the same instrument.

In witness whereof the parties have set their hands and seals the date and year above written.

Eastern Estates, Inc.

by _____

President

Attest: _____

Secretary

Viewpoint Homes, Inc.

by _____

President

Attest:

Secretary

[Attach example of note and mortgage, referred to in paragraphs 2(b) and 14, as Exhibit A.]



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Current Legal Forms for Real Estate

Chapter 22 DEVELOPMENT AND SUBDIVISION

Part IV. FORMS

A. ACQUISITIONS FOR DEVELOPMENT AND SUBDIVISION

26-22 Current Legal Forms for Real Estate FORM 22.17

FORM 22.17 Contract of sale of land for subdivision--purchase price designated as specified amount per usable acre--deed of trust--subordination and release provisions--allocation of expenses

COMMENT

This is a formal contract for the sale and purchase of undeveloped land for subdivision purposes. An interesting feature of this form is the manner of computing the purchase price (see Paragraph 2). It is determined by multiplying the number of acres suitable for subdivision by a specified amount per acre. The purchase price is secured by a deed of trust containing subordination and release provisions. The deed of trust is subordinated to subsequent deeds of trust that are used to finance the construction of improvements on lots. A limit is placed on potential construction loans (see Paragraph 6).

The contract calls for the release of lots as they are ultimately sold to the home owners and provides for the release to the buyer at the close of the escrow term of a specified fraction of the property free of the deed of trust. This type of provision, together with the subordination of the deed of trust to construction loans, minimizes the amount of money that the developer will have to invest.

The buyer must submit plans for the development of the property to the appropriate government agencies. The buyer's obligation to purchase the property is conditioned on those plans being approved. This agreement specifies which party bears the costs of deeds, title insurance, surveys, and brokers.

FORM

AGREEMENT entered into April 28, _____[year], between Eli Gold and Lillian Gold, of San

Francisco County, California, (the "Sellers"), and James Burns of Los Angeles County, California (the "Buyer").

Recitals

The Sellers who own certain property in Contra Costa County, California, and

The Sellers desire to sell and the Buyer desires to purchase that property,

Therefore, in consideration of the terms and conditions contained in this agreement, the parties agree as follows:

1. *Description.* The Sellers agree to sell to the Buyer and the Buyer agrees to purchase from the Sellers the real property (the "property") in Contra Costa County, California, described as follows:

(Insert description)

2. *Amount of purchase price.* The Buyer shall pay as the purchase price for the property \$15,000 per acre for each acre included in the property, determined as follows:

(a) The number of acres included in the property as well as its exact boundaries and legal description shall be determined by a survey. The survey shall be made at the Buyer's sole expense, by a registered civil engineer or licensed land surveyor selected by the Buyer and approved by the Sellers.

(b) For the purpose of computing the purchase price, any portion of the property disclosed by the survey to be unsuitable for subdivision or other development purposes because it is within the boundaries of any presently recorded road, street, highway, right-of-way, or easement shall be excluded in determining the number of acres included in the property.

3. *Payment of purchase price.* The Buyer shall pay the purchase price for the property to the Sellers as follows:

(a) \$50,000 on the execution of this agreement, receipt of which the Sellers acknowledge.

(b) An additional sum that, when added to the amount paid on the execution of this agreement, equals 25 percent of the purchase price of the property on the close of escrow as provided.

(c) The balance of the purchase price according to the terms of a promissory note in the usual form supplied by the California Title Company for use in Contra Costa County, California, executed by the Buyer, and containing provisions for the payment to the Sellers or their order of:

(1) The principal balance of the note in minimum annual installments of \$100,000 commencing three years after the close of escrow as provided.

(2) Interest at the rate of 12 percent per year from the close of escrow as provided on the unpaid principal balance of the note, payable annually commencing one year after close of escrow as provided.

4. *Security for purchase price.* The promissory note described in Paragraph 3 of this agreement shall be secured by a Deed of Trust on the property in the usual form supplied by the California Title Company for use in Contra Costa County, California, which shall also provide as set forth in Paragraph 5 below.

5. *Release of property.* Immediately after the recordation of the Deed of Trust, the trustee therein named shall reconvey

to the Buyer free and clear of the lien or charge of the Deed of Trust the portion of the property, not exceeding 10 percent, that the Buyer may select and designate in a writing delivered to the trustee. However, the portion of the property selected and designated by the Buyer for reconveyance must be situated in the northeast half of the property and cannot have a frontage on the public road providing access to the property of more than 100 feet.

6. *Subordination provisions.* After the recordation of a subdivision map for the property or any portion of it, the Deed of Trust (the "purchase money Deed of Trust") shall automatically be subordinated to subsequent Deeds of Trust executed by the Buyer from time to time to secure loans (construction loans) to finance the construction of improvements on lots shown on such subdivision map, provided:

(a) The purchase money Deed of Trust shall not be subordinated to any Deed of Trust securing a construction loan, if at the time of recordation of the construction loan Deed of Trust an unrescinded Notice of Default of the purchase money Deed of Trust is of record in the office of the County Recorder of Contra Costa County;

(b) The total amount of all such construction loans shall not exceed \$1,500,000;

(c) No portion of any construction loan shall be used to pay loan fees, interest, or other charges not directly connected with the construction of improvements on the lot or lots encumbered by the Deed of Trust securing the construction loan;

(d) Any construction loan does not exceed 75 percent of the anticipated value, as determined by the lending institution making the loan, of the lot or lots encumbered by the Deed of Trust securing the loan after completion of the improvements the loan was obtained to finance;

(e) No construction loan bears interest, exclusive of late charges and penalties or fees payable in case of default, greater than 18 percent per year;

(f) Each construction loan is payable over a period of not less than 12 months or more than three years from its date;

(g) The promissory note or other instrument executed by the Buyer to evidence any construction loan requires the proceeds to be distributed as progress payments for the construction of specified improvements on the lot or lots encumbered by the Deed of Trust securing the loan through a joint control agent.

7. *Partial reconveyances of raw acreage.* On the Buyer's written request at any time when an unrescinded Notice of Default of the Deed of Trust is not of record, the trustee shall reconvey to the Buyer free and clear of the lien or charge of the Deed of Trust any portion of the property designated in such request, provided:

(a) The written request contains a legal description of the portion of the property, (the "requested parcel") requested to be so reconveyed to the Buyer and a certificate by a civil engineer licensed to practice in California specifying in acres and fractions of acres the amount of land contained in the requested parcel;

(b) There has been paid to the trustee for the Seller's account an amount equal to the interest then due on the remaining unpaid principal balance of the promissory note secured by the Deed of Trust, the costs of executing and recording the requested reconveyance, and an amount to be applied toward payment of the unpaid principal balance of the promissory note secured by the Deed of Trust equal to \$10,000 per acre for each acre or fraction of acre of the property requested to be reconveyed. In computing the amount it is to receive under this provision, the trustee may rely on the certificate of the civil engineer contained in the Buyer's written request for reconveyance, as provided in subparagraph (a) above.

(c) The trustee shall not be required to reconvey the requested parcel to the Buyer if it is less than one

acre in size. The trustee under no circumstances shall reconvey the requested parcel to the Buyer if the reconveyance would leave the remainder of the property still subject to the Deed of Trust without frontage on a county maintained public road or street.

8. *Partial reconveyance of subdivided lots.* After recordation of a subdivision map for the property or any portion of it, on the Buyer's written request at any time when an unrescinded Notice of Default of the Deed of Trust is not of record, the trustee shall reconvey to the Buyer free and clear of the lien or charge of the Deed of Trust any one or more of the lots shown on the subdivision map designated by the Buyer on receipt by the trustee for the Sellers' account of:

(a) An amount equal to the interest then due on the remaining unpaid principal balance of the promissory note secured by the Deed of Trust;

(b) The costs of executing and recording the reconveyance; and

(c) An amount for each lot requested to be so reconveyed determined by dividing the amount, exclusive of interest, required under Paragraph 7 for the reconveyance to the Buyer of all of the property covered by the subdivision map by the number of lots shown on the subdivision map. The Sellers shall apply the amounts received by the trustee under this paragraph to the reduction of the remaining unpaid principal balance of the promissory note the Deed of Trust secures.

9. *Opening of escrow.* Within ten days after the date of this agreement, an escrow shall be opened to consummate the sale of the property pursuant to this agreement at the Walnut Creek office of the California Title Company.

10. *Preliminary report.* Within 15 days after the date of this agreement, the Sellers shall cause to be prepared by the California Title Company and delivered to the Buyer a preliminary report of the title to the property. All items, exceptions, or conditions shown on the preliminary report of title not objected to by the Buyer in a writing delivered to the title company and the Sellers within 15 days after receipt of the report by the Buyer shall be deemed accepted by him and he shall thereafter have no right to complain of title being conveyed or insured pursuant to this agreement subject to any such item, exception, or condition.

11. *Development plans.* Within 30 days after receipt of this preliminary report of title, the Buyer shall submit to the appropriate governmental agencies complete plans or maps for the subdivision or development of the property by him.

12. *Conditions of escrow.* The close of the escrow described in this agreement and the Buyer's obligation to purchase the property pursuant to the terms of this agreement are expressly conditioned on:

(a) The conveyance to the Buyer of good and marketable title to the property, as evidenced by a standard title insurance policy in the full amount of the purchase price issued by the California Title Company, subject only to the Deed of Trust described in Paragraph 4 of this agreement and all other liens, encumbrances, clouds, and other matters that may appear on the preliminary report of title and to which the Buyer has not objected.

(b) A determination by the Buyer's soil test or civil engineers that all of the property is free from filled ground or other geological or engineering conditions that would preclude its use and development in the usual and customary manner as a residential subdivision without extra expense for precautionary, corrective, or remedial measures.

(c) Completion and deposit in escrow of the survey of the property described in Paragraph 2(a) of this agreement.

(d) Final approval of the plans or maps submitted by the Buyer under Paragraph 11 of this agreement by all governmental agencies required to give approval.

(e) The property to be transferred hereunder must be free of all adverse environmental conditions. The condition of the property shall be determined by a licensed environmental engineer or other individual or corporation with comparable qualifications. Buyer shall be responsible for ordering all testing and for the cost of such testing. Buyer shall provide to Sellers a copy of the environmental site assessment report. In the event that Buyer exercises his right to cancel the escrow under Paragraph 13 herein, Buyer agrees not to disclose to anyone who is not a party to this agreement any information contained in the report.

13. *Failure of conditions.* If any condition specified in Paragraph 12 of this agreement fails to occur within 120 days after the opening of the escrow as provided in Paragraph 9, the Buyer may, by giving written notice to the escrow holder and the Sellers, cancel the escrow, terminate this agreement, and recover all amounts paid by him to the Sellers or the escrow holder on account of the purchase price of the property. The exercise of this power by the Buyer shall not, however, constitute his waiver of any other rights he may have against the Sellers for breach of this agreement. The escrow holder shall be and hereby is irrevocably instructed by the Sellers on the failure of condition and the receipt of notice from the Buyer to immediately refund to the Buyer all moneys and instruments deposited by him in escrow under this agreement.

14. *Proration of taxes.* The Buyer and the Sellers shall prorate all ordinary real property taxes levied or assessed against the property on the basis of the latest available tax bills and 30-day months as of the close of escrow.

15. *Bonds and assessments.* The Sellers shall pay in full, on close of escrow, all bonds or improvement assessments that are alien on the property.

16. *Broker's commissions.* The Sellers shall pay all commissions due to real estate or other brokers resulting from the sale of this property.

17. *Expenses of escrow.* The expenses of the escrow shall be paid in the following manner:

(a) The Sellers shall pay:

- (1) The full cost of securing the title insurance policy described in Paragraph 12(a) of this agreement;
- (2) The full cost of preparing, executing, and acknowledging all deeds or other instruments required to convey good and marketable title to the property to the Buyer in the manner described in Paragraph 12(a) of this agreement;
- (3) All taxes that may be imposed on the conveyance of title to the property to the Buyer.

(b) The Buyer shall pay:

- (1) The full cost of preparing, executing, acknowledging, and recording the promissory note and Deed of Trust described in Paragraphs 3 and 4 of this agreement;
- (2) The cost of recording the grant deed or other instrument executed by the Sellers conveying good and marketable title to the Buyer's property.

(c) The Buyer and the Sellers shall pay in equal proportions all escrow fees charged by the escrow holder in addition to the cost of the title insurance policy required by this agreement.

18. *Entry on property*

(a) The Buyer and his agents, employees, servants, or nominees, may immediately enter on the property for the purpose of making the survey provided for in this agreement and perform all further engineering, geological, or surveying work that may be required for their preparation of plans and maps for the subdivision or development of the property for residential and other uses.

(b) The Buyer shall have an affirmative duty to restore the land to its previous condition at the completion of the work contemplated under this agreement. This shall include filling holes, reseeding, leveling and any other activities needed to restore the land to its physical appearance prior to commencement of the work. All restoration work shall be done to Sellers' satisfaction.

19. *Duty to disclose.* The Sellers shall have an affirmative duty to disclose to Buyer any information which they may have about the land, including, but not limited to: prior use of the land; prior owners of the land; and any other information which a prudent buyer of land would want to know. Buyer agrees to hold all such information disclosed by Sellers in strict confidence until the closing of escrow has been completed. Buyer may disclose such information as is reasonably necessary to complete the resolution of the conditions contained in Paragraph 12. Buyer shall notify each person to whom such information is disclosed of the duty of confidentiality regarding such information. Buyer shall obtain a written statement from each such person, acknowledging said confidentiality and agreeing not to further disclose such information without prior authorization from Buyer.

20. *Costs of survey.* The Buyer shall pay for all costs, expenses, liabilities, or charges incurred in or related to the making of the survey provided for in this agreement, the performance of any engineering, geological, or surveying work on the property by the Buyer, the preparation by him of all plans or maps for the subdivision or development of the property, and the costs of filling, recording, or gaining approval by any governmental agencies of any such surveys, reports, plans, or maps. The Buyer shall indemnify and hold the Sellers, their property, and the property subject to this agreement free and harmless from these costs, expenses, liabilities, or charges. Further, if this agreement is terminated or canceled for any reason not the Sellers' fault at any time before good and marketable title has been conveyed to the Buyer, he shall, at the Sellers' written request, repair all damage done to the property by any engineering, geological, or surveying work performed on it by him and restore the property and title to it to the same condition they were in on the date of this agreement.

21. *Execution of development plans.* The Sellers shall sign and execute, at the Buyer's expense, any and all documents that the Buyer is required under this agreement to submit to governmental agencies for their approval of plans or maps for the subdivision or development of the property.

22. *Possession of property.* Possession of the property free and clear of all uses and encroachments, except those shown on the preliminary report of title described in Paragraph 10 of this agreement and not objected to in writing by the Buyer, shall be delivered to the Buyer on the close of escrow as provided.

23. *Default by buyer.* If the Buyer defaults in the performance of this agreement, the Sellers shall be released from their obligation to sell the property to him or to further perform this agreement and may proceed against him on any cause of action or for any remedy given them by law or equity.

24. *Notices.* Any and all notices or other communications required or permitted by this agreement or by law to be delivered to, served on, or given to the Buyer or the Sellers by the other party to this agreement or by the California Title Company as escrow holder shall be in writing and shall be deemed properly delivered, given, or served when personally delivered to the addressee or in lieu of such personal service when deposited in the United States mail, first-class postage prepaid, addressed to the Buyer at 100Wilshire Boulevard, Los Angeles, California, or to the Seller at

8 Locksley Avenue, San Francisco, California. Either party may change its address by giving written notice of such change to the other in the manner provided herein.

25. *Time of essence.* Time is expressly declared to be the essence of this agreement.

26. *Binding effect.* The provisions of this agreement shall be binding upon and inure to the benefit of both parties and their respective heirs, legal representatives, successors and assigns.

27. *Non-waiver.* No delay or failure by either party to exercise any right under this agreement, and no partial or single exercise of that right, shall constitute a waiver of that or any other right, unless otherwise expressly provided herein.

28. *Headings.* Headings in this agreement are for convenience only and shall not be used to interpret or construe its provisions.

29. *Governing law.* This agreement shall be construed in accordance with and governed by the laws of the State of California.

30. *Counterparts.* This agreement may be executed in two or more counterparts, each of which shall be deemed an original but all of which together shall constitute one and the same instrument.

31. *Entire agreement.* This instrument supersedes all agreements previously made between the parties relating to its subject matter. Any agreement or representation respecting the property or the duties of either party in relation to it, unless expressly set forth in this instrument, is null and void.

The parties have executed this agreement the day and year first above written.

Eli Gold

Lillian Gold

James Burns



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Chapter 22 DEVELOPMENT AND SUBDIVISION

Part IV. FORMS

A. ACQUISITIONS FOR DEVELOPMENT AND SUBDIVISION

26-22 Current Legal Forms for Real Estate FORM 22.18

FORM 22.18 Contract of sale of subdivided lots to a builder--option to buy additional lots from seller

COMMENT

In large land subdivisions, the land developer who subdivides the land and puts in the infrastructure needed to make the lots "buildable" will want to sell multiple lots to reputable builders so that the developer can recover its costs and make a profit. In this form the seller is a land developer which enters into a contract for the sale of 18 lots or "envelopes" as referred to in the form to a home builder. There is some flexibility in how the builder can pay for the lots, whether in all cash or by a lump sum cash payment plus an interest bearing note for the balance of the purchase price for the lot, secured by a purchase money mortgage deed. The seller has agreed to subordinate its purchase money mortgage deed to a construction loan mortgage obtained by the builder, subject to certain conditions being met.

In this form the builder has some flexibility on when he can acquire the lots, provided all 18 lots are acquired within 18 months after the first building permits become available from the city, and the private roadway serving the lots is completed. In Section 12 of this agreement, provided certain conditions are met and provided the seller and buyer can reach an agreement on the terms of the sale, the builder is given an option to acquire additional building lots in the overall subdivision. Finally, in Section 15, the seller asks for the right of first refusal to repurchase any lots, except those on which homes have been constructed, from the builder if the builder decides to sell the lots. In this way, the seller can control who the builders will be, and can prevent the initial buyer from just buying the lots on speculation for ultimate resale as vacant lots.

FORM

PURCHASE AGREEMENT

This Purchase Agreement (this "Agreement") is made this _____[day] day of _____[month], _____[year] by and between Suburban Development Corp., an Ohio corporation ("Seller") and Joseph Roudabush, d/b/a Joseph Homes ("Buyer").

1. Premises

Seller agrees to sell and Buyer agrees to buy for the consideration and upon the terms and conditions hereinafter set forth, the following described property (hereinafter referred to as the "Premises"):

Situated in the City of _____[city], County of _____[county] and State of _____[state], and known as being part of Original Township Lot No. 24, Tract 1, and further known as Building Envelopes Nos. 1 through and including 18 (the "Building Envelopes"), in proposed Green Subdivision as shown by the Map prepared by the Jones Surveying Co. dated December 1, _____[year], be the same, more or less, but subject to all legal highways (the "Subdivision Plat").

2. Purchase Price

The purchase price for the Premises shall be Sixty Thousand Dollars (\$60,000.00) per Building Envelope payable as follows:

(a) On or before each Closing Date (as defined in Section 8 hereof), Buyer shall pay to Seller, as provided in Section 2(b) hereof, an amount determined by multiplying the number of Building Envelopes being conveyed by Seller to Buyer on said Closing Date by Sixty Thousand Dollars (\$60,000.00) (the "Purchase Price").

(b) The Purchase Price shall be payable in cash on each Closing Date, or if Buyer elects, the Purchase Price shall be paid on each Closing Date as follows:

(i) Cash in the amount determined by multiplying the number of Building Envelopes being conveyed by Seller to Buyer on said Closing Date by Thirty-Five Thousand Dollars (\$35,000); and

(ii) Promissory note (the "Note") in the principal sum equal to the balance of the Purchase Price for such Building Envelopes, executed by Buyer and payable to Seller, bearing interest at the rate of eight percent (8%) per annum accruing to maturity, and the principal and all unpaid accrued interest shall be due and payable on the earlier of eighteen (18) months from the date of the Note, or the date of transfer of title to the Building Envelope to which the Note is applicable from Buyer to a third party. The Note shall be secured by a purchase money mortgage (the "Mortgage") executed by Buyer in favor of Seller covering the Building Envelopes being conveyed by Seller to Buyer on the Closing Date. The Note and Mortgage shall in all material respects be identical to the promissory note and mortgage attached hereto as Exhibit A and Exhibit B, respectively, and made a part hereof.

(c) If Buyer is in compliance with all terms and conditions of this Agreement, then, upon written request, Seller agrees to waive the priority of the Mortgage in favor of a bona fide construction loan mortgage on the applicable Building Envelope obtained by the Buyer from a bank, savings and loan association or other recognized financial institution, subject to Seller's approval of said mortgage and the amount of the construction loan.

3. Warranty Deed

On each Closing Date, Seller shall deliver to the Escrow Agent (as hereinafter defined) a Limited Warranty Deed (the "Deed") conveying to Buyer good and marketable title to the Building Envelope(s) then being conveyed by Seller to

Buyer, free and clear of all liens and encumbrances, except restrictions, conditions, reservations, limitations and easements of record, real estate taxes and assessments which are not yet due and payable, zoning ordinances, and, without limiting the generality of the foregoing, the restrictions, easements, conditions, reservations, liens and encumbrances contained in the Master Declaration of Covenants, Easements and Restrictions for Green Subdivision recorded in Volume _____ [volume], Page _____ [page], of the _____ [county] County Official Records, and in the Declaration of Covenants, Easements and Restrictions for Neighborhood Association No. _____ of the Green Subdivision recorded in Volume _____ [volume], Page _____ [page], of the _____ [county] County Official Records (all of said matters hereinafter collectively referred to as the "Permitted Exceptions").

4. Title Guaranty

On each Closing Date, Seller shall furnish Buyer with a title guaranty issued by the Escrow Agent in the full amount of the Purchase Price, guaranteeing record title to the Building Envelopes then being conveyed by Seller to Buyer to be good at the time of transfer of title in the Buyer subject only to the Permitted Exceptions. In the event that Buyer wishes to acquire a policy of title insurance, Seller shall pay that portion of the premium for said policy which is equal to the cost of a title guaranty, and Buyer shall pay the balance of the premium.

5. Improvement Plans

Prior to the date of this Agreement, Seller and Buyer have cooperated in the preparation of a site plan (the "Site Plan") which provides for eighteen (18) building Envelopes, and which provides the detail for the private roadway, underground utilities, elevations and the landscaping in respect of the property described in the Subdivision Plat. Seller and Buyer shall cooperate to obtain the approval of the Site Plan by the City of _____ [city].

6. Conditions Precedent

Seller's obligation to sell the Premises to Buyer and Buyer's obligation to purchase the Premises from Seller shall be conditioned upon the satisfaction of each of the following:

(a) Seller shall have obtained all required governmental approvals for the construction of Green Boulevard as shown on the Development Plan (the "Development Plan") submitted by Seller to the City of _____ [city], and approved by the City of _____ [city], on _____ [date], and Seller shall have commenced construction of Green Boulevard. "Commenced construction" shall be deemed to mean the date on which valid, binding and enforceable agreements for the construction of Green Boulevard are executed by Seller and Seller's contractor(s) and excavation shall have commenced.

(b) Seller shall have obtained final approval of the Site Plan by the City of _____ [city] and commenced construction of the private roadway and the underground utilities contemplated by the Site Plan. "Commenced construction" shall be deemed to mean the date on which valid, binding and enforceable agreements for the construction of each of such improvements are executed by Seller and Seller's contractor(s) and excavation shall have commenced.

(c) Building permits for the construction of dwelling units on at least two (2) Building Envelopes become available from the City of _____ [city] on or before _____ [date].

(d) In the event any of the conditions described above shall not have been satisfied or waived by both Seller and Buyer on or before _____ [date], this Agreement shall be null and void and of no further force or effect and Seller and Buyer shall have no obligations or rights hereunder. The periods set forth herein for satisfying the foregoing conditions shall not be extended or otherwise modified by force majeure.

7. Escrow Agent

(a) On or before each Closing Date, all documents and any necessary funds in addition to those which shall be paid to Seller pursuant to Section 2 hereof, shall be delivered to Standard Title Agency, which shall be designated as "Escrow Agent," and this Agreement shall constitute the escrow instructions to Escrow Agent.

(b) The Escrow Agent shall accept the escrow subject only to its Standard Conditions of Acceptance of Escrow, provided, however, that the provisions of this Agreement shall govern in the event of any conflict therewith.

(c) Upon the Escrow Agent's receipt of all of the documents and funds necessary to consummate each of the transactions contemplated hereby, unless otherwise instructed by the parties in writing, the Escrow Agent shall take all necessary acts to consummate each of the transactions contemplated hereby in the manner set forth in this Agreement.

(d) The Escrow Agent shall charge Seller, in respect of the Building Envelopes then being conveyed by Seller to Buyer, with the cost of the title search, title guaranty, the cost of transfer or conveyance taxes or fees, if any, and an amount equal to one-half (1/2) the escrow fee, if any; the Escrow Agent shall charge the Buyer with the cost of filing the Deed and Mortgage, if any, for record and the remaining one-half (1/2) of the escrow fee, if any. If no funds are escrowed, the Escrow Agent shall not charge either party any escrow fee.

8. Closing

(a) Provided the conditions set forth in Section 6 above have been satisfied or waived, Buyer shall have the right to cause Seller to convey to Buyer all, or any, of the Building Envelopes at any time during the term of this Agreement, on one or more Closing Dates, so long as:

(i) Buyer shall not be in default in the performance of its obligations under this Agreement, the declarations affecting the Premises or the Builders Manual (as hereinafter defined);

(ii) Buyer shall notify Seller in writing (the "Purchase Notice") of Buyer's desire to cause Seller to convey certain Building Envelopes to Buyer, which Building Envelopes shall be identified in the Purchase Notice; and

(iii) Buyer shall, on or before the Closing Date with respect to such Building Envelopes, deposit into escrow with the Escrow Agent the Purchase Price, including the fully executed Note and Mortgage, if applicable, and such additional monies and other documents and instruments as Escrow Agent may reasonably require.

(b) Seller shall, on or before the Closing Date with respect to the Building Envelopes identified in the Purchase Notice, deposit into escrow with the Escrow Agent the Deed and such other documents as Escrow Agent may reasonably require. The "Closing Date" shall be deemed to mean a date selected by Seller and Buyer for closing the sale and purchase of the Building Envelopes identified in the Purchase Notice, which date shall be no later than the thirtieth (30th) day after the delivery of the Purchase Notice.

(c) On each Closing Date, all general taxes shall be prorated by the Escrow Agent as of the date of transfer of title to the applicable Building Envelopes on the basis of the calendar year using the figures on the latest available tax duplicate.

9. Buyer's Timetable for Acquiring Title to Building Envelopes

(a) Buyer covenants to acquire fee simple title to at least two (2) Building Envelopes within ten (10) days following the later of (1) the date building permits for the construction of dwelling units on the Premises become available from the City of _____ [city], or (ii) the date on which paving of the private roadway contemplated by the Site

Plan is completed (the "Commencement Date"). Buyer further covenants to acquire fee simple title to all of the Premises within eighteen (18) months following the Commencement Date.

(b) If Buyer shall breach either of the foregoing covenants, and if Buyer shall fail to cure such breach within thirty (30) days after written notice of such breach from Seller, Seller shall have the right to elect one of the following remedies: (i) terminate this Agreement, including Buyer's right to acquire the remaining Building Envelopes comprising the Premises and Buyer's right to exercise its option to acquire Additional Building Envelopes (as hereinafter defined) to be created on the Additional Premises (as hereinafter defined); or (ii) without terminating this Agreement, terminate only Buyer's right to exercise its option to acquire the Additional Building Envelopes to be created on the Additional Premises in which case Buyer shall continue to have the right to cause Seller to convey to Buyer, in accordance with this Agreement, the Building Envelopes comprising the Premises which have not theretofore been conveyed by Seller to Buyer. In the event Seller exercises the remedy described in (i) above, upon Seller's termination of this Agreement, Seller and Buyer shall have no further obligations or rights hereunder, except as to matters which may have accrued prior to such termination. The "commencement of construction" on a Building Envelope shall be deemed to mean the date on which all of the following have been satisfied (i) Buyer shall have obtained a building permit for the dwelling unit on such Building Envelope; and (ii) Buyer shall have commenced excavation of the Building Envelope.

10. Buyer's Responsibility for Improvements

Buyer shall, at Buyer's sole cost and expense, strictly comply with the terms and conditions set forth in the Builders Manual (the "Builders Manual") attached hereto as Exhibit C and made a part hereof for all purposes. Buyer acknowledges that the Builders Manual requires, among other matters, that Buyer improve the land constituting common area adjacent to the Premises, as shown on the Site Plan, with certain improvements, including without limitation, the installation of landscaping and sprinkler systems. Buyer's failure to comply with the Builder's Manual shall be a default under this Agreement.

11. Seller's Responsibility for Improvements

In the event the conditions set forth in Section 6 hereof have been satisfied, and provided further that the Buyer shall have commenced construction of a dwelling unit on at least two (2) Building Envelopes, Seller covenants with Buyer that Seller shall complete (i) the clubhouse, tennis courts and swimming pool to be located in the Homeowner's Park (as described in the Development Plan) together with landscaping associated with the foregoing, and (ii) the private roadway and underground utilities shown on the Site Plan.

12. Option to Acquire Additional Building Envelopes

Seller and Buyer contemplate that the land described on Exhibit D attached hereto and made a part hereof (the "Additional Premises") may from time to time and in a manner acceptable to Seller and Buyer be subdivided to create additional building envelopes (the "Additional Building Envelopes"). Seller hereby grants to Buyer and Buyer hereby accepts from Seller the option to purchase, from time to time, the Additional Building Envelopes created within the Additional Premises upon the following terms and conditions:

(a) The following are conditions precedent to the effective exercise of Buyer's option hereunder:

(i) Buyer shall be in compliance with the timetable for acquiring fee simple title to the Building Envelopes as set forth in Section 9 of this Agreement.

(ii) Buyer shall not be in default under any other provision of this Agreement, or under any Note or Mortgage.

(iii) Seller and Buyer shall have agreed upon the configuration of the Additional Building Envelopes, the private streets,

underground utilities, elevations, the proposed dwelling units and such other matters as shown on the Preliminary Site Plan for Additional Envelopes (as hereinafter defined).

(iv) Seller and Buyer shall have agreed upon the purchase price for the Additional Building Envelopes which Buyer desires to purchase, in accordance with Section 12(c) below.

(v) Seller and Buyer shall have agreed upon the timetable for acquiring the Additional Building Envelopes which Buyer desires to purchase, in accordance with Section 12(c) below.

(b) To exercise its option to purchase the Additional Building Envelopes, Buyer shall notify Seller, in writing (the "Exercise Notice"), of Buyer's election to purchase the Additional Building Envelopes identified on the Concept Plan (as hereinafter defined) attached to such notice, which notice must be received by Seller on or before the end of the twelfth month after the date fee simple title to the first Building Envelope is conveyed to Buyer. If Buyer's initial Exercise Notice does not include all of the Additional Premises, then Buyer's option shall continue with respect to the balance of the Additional Premises. Buyer's option with respect to the balance of the Additional Premises may be exercised by Buyer's delivery to Seller of Buyer's Exercise Notice(s) with respect to all or any portion of the balance of the Additional Premises. Buyer's option with respect to the balance of the Additional Premises may be exercised by Buyer's delivery to Seller of Buyer's Exercise Notice(s) with respect to all or any portion of the balance of the Additional Premises, which notice(s) must be received by Seller at least six (6) months prior to the expiration of the period for acquiring the Additional Building Envelopes covered by the preceding Exercise Notice. Buyer shall have successive rights to exercise its right to purchase Additional Building Envelopes to be established on the Additional Premises in the same manner as provided above. Each Exercise Notice shall be accompanied by an architect's rendering of the approximate location of the Additional Building Envelopes, the approximate location of the private street(s) and the elevations and proposed dwelling units in respect of the Additional Building Envelopes (the "Concept Plan").

(c) Within sixty (60) days of Seller's receipt of any Exercise Notice together with the Concept Plan:

(i) Seller and Buyer shall attempt to agree upon the price of the Additional Building Envelopes identified in such Exercise Notice, any other terms of such sale, and the timetable for Buyer's acquisition of fee simple title to the Additional Building Envelopes;

(ii) Seller and Buyer shall endeavor to agree upon the exact number of Additional Building Envelopes, the configuration of the Additional Building Envelopes, the private roads, the types of dwelling units to be constructed on the Additional Building Envelopes and such other relevant aspects of the development of the applicable portion of the Additional Premises, and if Seller and Buyer shall agree on the foregoing details, a preliminary site plan acceptable to Seller and Buyer shall be prepared by Seller and submitted to the City of _____ [city] for approval (the "Preliminary Site Plan for Additional Envelopes").

If within said sixty (60) day period, Seller and Buyer shall fail to agree upon the price of the Additional Building Envelopes or the terms of such sale, the timetable for Buyer's acquisition of fee simple title to the Additional Building Envelopes, or any other matter concerning such Additional Building Envelopes which requires the agreement of Seller and Buyer, or if Seller and Buyer shall fail to agree upon and submit the Preliminary Site Plan for Additional Building Envelopes to the City of _____ [city], or if within one hundred twenty (120) days of Seller's receipt of such Exercise Notice and Concept Plan, Seller shall be unable, after using reasonable efforts, to obtain final approval of the City of _____ [city] with respect to the Preliminary Plan for Additional Envelopes, this option shall be null and void and of no further force or effect with respect to any portion of the Additional Premises (including the portion affected by such Exercise Notice and Preliminary Site Plan for Additional Envelopes) not yet acquired by Buyer.

(d) In the event the foregoing conditions have been satisfied, Buyer shall have the right to cause the Additional Building

Envelopes established on the Additional Premises under the terms of this purchase option to be conveyed by Seller to Buyer at the price and on the terms agreed upon by Seller and Buyer pursuant to this Section 12, and in accordance with Sections 3, 4, 7, 8, 9 (except that the timetable shall be modified in accordance with the agreement of Seller and Buyer and any reference therein to the Building Envelopes shall be deemed to include the Additional Building Envelopes), 10 and 13 through 22 hereof.

13. No Partnership

Seller and Buyer are not and shall not become partners or joint venturers by this Agreement or by any rights or obligations set forth herein.

14. Force Majeure

If either Seller or Buyer is prevented or hindered from timely satisfying any provisions set forth herein because of a shortage or inability to obtain materials or equipment, strikes or other labor difficulties, governmental restrictions, fire, casualties, Acts of God, or any other cause beyond such party's reasonable control, said party shall be permitted an extension of time of performance by the number of days during which such performance was prevented or hindered.

15. Seller's Right of First Refusal

Buyer agrees that none of the Building Envelopes or the Additional Building Envelopes (herein collectively the "Envelopes"), except those on which residential dwellings have been erected, will be sold or offered for sale unless said Envelopes are first offered to Seller for purchase at the original price paid by Buyer to Seller plus Buyer's carrying costs. Seller shall have thirty (30) days after receipt of written notice from Buyer to repurchase the Envelopes. If Seller elects to make such repurchase, Buyer shall convey to Seller the Envelopes by Limited Warranty Deed, free and clear from all liens, restrictions, reservations, easements, conditions or other encumbrances, except such restrictions, reservations and easements which existed at the time of the conveyance of the Envelopes to Buyer hereunder and any Note and Mortgage in respect of such Envelopes shall be cancelled by Seller.

16. Real Estate Commission

Buyer represents and warrants that Buyer has not dealt with any real estate broker or agent in connection with this transaction and no real estate commission is payable in connection herewith which is due to any act by him.

17. Binding Effect

Buyer may not transfer, convey or assign its rights and interests under this Agreement without the prior written consent of Seller; provided, however, Buyer may designate, as his nominee, a partnership, limited liability company, or corporation owned or controlled by Buyer to acquire title to any Building Envelope or Additional Building Envelope which Buyer shall be entitled to acquire hereunder. Subject to the immediately preceding sentence, the covenants, conditions and agreement made and entered into by the parties hereto shall be binding upon and inure to the benefit of the heirs, successors, administrators, representatives and assigns of the respective parties hereto.

18. Entire Agreement

This Agreement contains the entire agreement between the parties and no statement or representation of the respective parties hereto, their agents or employees, made outside of this Agreement and not contained herein shall form a part hereof or be binding upon the other parties hereto. This Agreement shall not be changed or modified except by written instrument signed by the parties hereto.

19. Notices

Any notice and other communication required or permitted to be given hereunder by either party hereto to the other party hereto shall be in writing and shall be deemed to have been properly given, upon personal delivery, or three (3) days after deposit in the United States mail, certified, registered or express mail, postage prepaid, return receipt requested, and addressed to such other party hereto as follows:

Seller: Suburban Development Corp.

 Attn:

Buyer: Joseph Roudabush

or to such other address or such additional party as may be designed from time to time by such other party hereto by notice given in the manner provided in this Section 19.

20. Remedies

Upon Buyer's failure to perform any term, condition, covenant or obligation of this Agreement on the part of Buyer to be performed, and if such failure shall continue for ten (10) days after Buyer receives written notice of such failure from Seller, Buyer shall be in default hereunder, and Seller shall be entitled to all of the remedies available to Seller at law or in equity, including without limitation, the remedies set forth in Section 9(b); provided, however, the period during which Buyer may cure defaults under Section 9(a) hereof and Seller's remedies for Buyer's default in the performance of its obligations under Section 9(a) shall be limited to and governed by Section 9(b) hereof.

21. Governing Law

This Agreement shall be governed by and enforceable in accordance with the laws of the State of Ohio. The representations, warranties and covenants contained herein shall survive each Closing Date.

22. Replat of Premises or Additional Premises

Without the prior written consent of Seller, Buyer shall not, after acquiring title to any portion of the Premises or Additional Premises, replat, or institute any proceedings or take any action whatsoever to replat, any portion of the Premises or the Additional Premises.

The parties have executed this Agreement as of the date first written above.

SELLER:

Suburban Development Corp.

By _____

BUYER:

Joseph Roudabush

ACCEPTANCE OF ESCROW

Receipt of a copy of the foregoing agreement is hereby acknowledged and the undersigned hereby agrees to act as Escrow Agent in accordance therewith.

STANDARD TITLE AGENCY

By _____

EXHIBIT A
FORM OF PROMISSORY NOTE

EXHIBIT B
FORM OF MORTGAGE

EXHIBIT C
BUILDERS MANUAL



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Chapter 22 DEVELOPMENT AND SUBDIVISION

Part IV. FORMS

A. ACQUISITIONS FOR DEVELOPMENT AND SUBDIVISION

26-22 Current Legal Forms for Real Estate FORM 22.19

FORM 22.19 Modification agreement for a real estate development contract

COMMENT

Many real estate development contracts contain contingency provisions which allow the purchaser or tenant to be relieved of its obligations under the contract if a particular problem or some unfavorable condition is found to exist on the premises, or if a specified event occurs or does not occur. Typically, the contingency clause provides that the contract may be cancelled if an inspection reveals some highly unfavorable condition or other problem.

The following is a list of items that commonly form the basis of a contingency provision in a real estate contract for the construction, sale or lease of a structure(s):

- (1) results of a radon gas inspection;
- (2) results of an asbestos insulation inspection;
- (3) results of a urea formaldehyde insulation inspection;
- (4) results of a wood-boring insect inspection;
- (5) results of a mold or fungal growth inspection;
- (6) results of a lead-based paint inspection;
- (7) results of an environmental site assessment;
- (8) results of a septic system inspection;

- (9) results of well water quality and quantity tests;
- (10) results of soil suitability tests;
- (11) the purchaser or tenant is unable to secure a means of solid waste removal;
- (12) the purchaser or tenant is unable to secure access to the public sewer system;
- (13) the purchaser or tenant is unable to secure access to the public water system;
- (14) a potable source of water is unavailable at the development site;
- (15) the transaction is contingent upon the parties receiving approval from the federal government to drain or fill a protected wetland;
- (16) the transaction is contingent upon the parties receiving all necessary governmental approvals (e.g., zoning and planning board, historic district, environmental conservation district, subdivision approval, etc.).

Frequently when a contingency fails, the parties are still interested in completing the transaction, but only if the terms of the original contract are modified. A modification agreement is the vehicle by which the parties change the relevant terms of the original contract that now require adjustment. Modification agreements typically provide for the remediation of the problem or adverse condition that triggered the failure of the contingency in the first place. The modification agreement normally sets forth, at a minimum:

- (1) the identity of the party responsible for taking the necessary remedial action;
- (2) when the action is to occur;
- (3) the identity of the party responsible for payment;
- (4) standards which the repairmen must meet;
- (5) an allocation of risk of loss while the repair work is being done; and
- (6) insurance requirements.

Generally speaking, when a modification agreement to a real estate sale contract is drafted, one of two approaches is followed by the parties. Either the purchaser agrees to handle the cost of repairing whatever is wrong with the property (with the purchase price lowered in an amount equal to that cost), or the seller agrees to assume the cost, with no increase in the sale price. Both of these approaches are demonstrated in the form that immediately follows.

FORM

AGREEMENT made this day of _____ [date] between _____ [name], residing at _____ [address] (hereafter referred to as "Seller"), and _____ [name], residing at _____

_____ [address] (hereafter referred to as "Purchaser").

W I T N E S S E T H:

WHEREAS, the parties hereto entered into an earlier agreement dated _____ [date], for the purchase and sale of the real property and premises commonly known as _____ [insert description of property and/or its street address, including city, state and zip code] (hereafter "property"); and

WHEREAS, the agreement contains a contingency in Paragraph No. _____ thereof for a _____ [e.g., satisfactory asbestos inspection]; and

WHEREAS, the inspection report dated _____ [date], shows _____ [e.g., the presence of friable asbestos]; and

WHEREAS, Purchaser has the right to cancel the agreement, but instead the parties desire to modify the agreement,

NOW, in consideration of the mutual promises contained herein, it is agreed as follows:

Alternative One: Purchaser Responsible for Remedial Action

1. The agreement dated _____ [insert date of original contract], shall be amended as follows:

(a) The purchase price, as set forth in Paragraph No. _____ thereof, shall be reduced by _____ Dollars (\$ _____) to the sum of _____ Dollars (\$ _____). Purchaser shall accept the property in its "as is" condition. Purchaser shall be fully responsible for taking whatever action may be required to repair the condition set forth in the inspection report dated _____ [date], after the transfer of title occurs.

(b) Purchaser shall indemnify and hold Seller harmless for any and all claims for injury to person or property occurring from the date of transfer of title onward and arising out of, or in any way related to, the condition of the property, the repair thereof, or the failure to repair.

2. All other provisions of the said agreement dated _____ [insert date of original contract], shall remain in full force and effect, except as amended herein. In the event of any conflict, the provisions of this modification shall supersede and take precedence over any provisions contained in the original agreement dated _____ [date].

OR:

Alternative Two: Seller Responsible for Remedial Action

1. The Agreement dated _____ [insert date of original contract], shall be modified as follows:

(a) It shall be the responsibility of Seller to _____ [e.g., remove the friable asbestos insulation located on the premises], as noted in the inspection report dated _____ [date].

(b) The parties shall obtain an estimate for the work to be performed from a contractor to be agreed upon. If the parties cannot agree upon a contractor, they shall each obtain a sealed estimate from a reputable contractor. The contractor submitting the lower bid shall be selected. Seller shall enter into an agreement for the work to be performed within

_____ [e.g., five (5)] days after the opening of the bids.

(c) The work to be performed is described in Schedule "A", which is annexed hereto and made a part hereof.

(d) Seller shall be responsible for the cost of work to be performed, up to the sum of _____ Dollars (\$_____). Any cost above that shall be the responsibility of Purchaser. In the event that Purchaser shall have financial responsibility hereunder, he/she shall be a party to the agreement with the contractor. The liability of the parties hereto for payment to the contractor shall be specified in the agreement with the contractor.

(e) The agreement with the contractor shall require that he/she/it maintain liability insurance in at least the amount of _____ Dollars (\$_____) [e.g., \$1,000,000]. That agreement shall further provide that Seller--and Purchaser, should he/she be a party to the contract--shall be an additional named insured. That agreement shall further contain a hold harmless provision protecting Seller and Purchaser from any liability for injury to person or property arising out of the contractor's work. The contractor shall be required to provide a certificate of insurance prior to commencing work.

(f) Upon completion of the contractor's work and prior to his/her/its receipt of payment, an additional inspection shall be performed by the same party who performed the inspection dated _____ [date]. This new inspection shall be performed at the expense of Purchaser. If the inspection shows the problem to be fully remediated, the contractor shall be paid. The parties hereto shall then proceed toward transfer of title as set forth in the original agreement.

If the problem has not been fully eliminated, the contractor shall be required to continue his/her/its performance until he/she/it has fully eliminated the problem, or until a good faith effort shows that the problem cannot be eliminated even though the work in Schedule A has been properly completed. Purchaser shall pay for all inspections required under this paragraph.

If, after the work described in Schedule A has been completed and all good faith efforts have been expended, the problem still has not been eliminated, Purchaser may elect to terminate this modification agreement and the original agreement. Purchaser shall give notice of election to terminate as specified in the original agreement dated _____ [date], at page no. _____. Purchaser shall nevertheless be obligated to pay any sums due under Paragraph 1(d) hereof.

(g) Seller agrees to provide access to the property to the contractor, the inspector, their agents and employees at all reasonable hours.

2. All other provisions of the said original agreement dated _____ [date], shall remain in full force and effect, except as modified herein. In the event of any conflict, the provisions of this modification shall supersede and take precedence over any provisions contained in the original agreement dated _____ [date].

The parties hereto have set their hands the day and year first above written.

Seller

Purchaser

[Attach description of work, as Schedule A]



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Chapter 22 DEVELOPMENT AND SUBDIVISION

Part IV. FORMS

A. ACQUISITIONS FOR DEVELOPMENT AND SUBDIVISION

26-22 Current Legal Forms for Real Estate FORM 22.20

FORM 22.20 Release agreement terminating existing real estate contract

COMMENT

The parties to an agreement often include one or more contingencies in the contract. For example, an agreement for the sale of real property will typically be made contingent upon the buyer obtaining a mortgage loan with an interest rate and other terms acceptable to buyer, and a commercial lease may be made contingent upon the tenant securing a favorable contract with a private trash hauler.

If contingencies cannot be fulfilled within a particular time period, the purchaser or tenant will have the right to terminate the agreement and walk away from the deal. Upon the failure of a contingency, the parties will often negotiate a modification agreement, in effect "resurrecting" the original transaction with certain changes in the terms. (See the preceding form, No. 22.19, for a sample modification agreement.)

However, the nature of certain contingencies is such that if the contingency fails, the purchaser or tenant will probably have no interest in negotiating a modification agreement. Examples include: (1) where the transaction is contingent upon the purchaser or tenant obtaining certain necessary governmental approvals, and such approvals are not granted; and (2) where the transaction is contingent upon the results of an environmental site assessment, which ultimately reveals the existence of a severe environmental problem on the premises.

The form that follows is intended for use under such circumstances in order to terminate the existing real estate sale agreement. It also contains a confidentiality provision requiring the erstwhile purchaser or tenant to remain silent about its reason for terminating the deal. Such a clause is designed to protect the seller or lessor from the ill effects of adverse publicity. The seller or lessor will be hard pressed to find a new buyer or tenant for the property if word spreads

throughout the community about the reason why the deal failed.

FORM

RELEASE made this day of _____ [date], between _____ [insert name of seller], residing at _____ [address] ("Seller"), and THE CORPORATION, a corporation existing under the laws of the State of _____ [state], with offices for the transaction of business at _____ [address] ("Purchaser").

WHEREAS, the parties hereto entered into an earlier agreement dated _____ [insert date of original contract], for the purchase and sale of property commonly known as _____ [insert street address or other description of the property's location, including city, state and zip code] and more particularly described in said agreement; and

WHEREAS, said agreement contained a contingency in Paragraph No. _____ for _____ [e.g., an environmental site assessment ("ESA") to be performed by Worldwide Scientific Company (Worldwide)]; and

WHEREAS, _____ [e.g., the ESA was timely performed by Worldwide, but Worldwide was unable to render an opinion that there did not exist any evidence of an adverse environmental impact]; and

WHEREAS, Purchaser gave timely notice of the failure of the contingency, pursuant to Paragraph No. _____; and

WHEREAS, the parties wish to release each other and clarify their rights and obligations;

It is, therefore, agreed as follows:

1. *Release.* The parties, for themselves, their heirs, successors and assigns, hereby release each other from any further obligation under said agreement dated _____ [date].
2. *Parties have no more rights under original contract.* Each party acknowledges that it has no further rights under the said agreement dated _____ [date].
3. *Return of deposit.* Upon execution of this release, the Purchaser's deposit of _____ Dollars (\$ _____) shall be delivered to Purchaser by the real estate broker, namely, Realty, Inc.
4. *Confidentiality clause.* Purchaser agrees for itself, its successors, heirs and assigns to refrain from disclosing to any individual, partnership, corporation or other entity any information _____ [e.g., that is contained in the Worldwide report or any information learned as a result of the inspections made by Worldwide]. Purchaser acknowledges that release of such information could have a serious impact on the value of Seller's property and upon Seller's ability to conduct business. Seller shall be entitled to injunctive relief and monetary damages in the event that Purchaser violates the provisions of this Paragraph 4.
5. *Seller to make best efforts to remedy problem plaguing property.* Seller represents that he/she will make his/her best efforts to learn more about the problem with the property and take steps to remediate the problem, if possible. However, Seller is not committed to take any particular course of action. Failure of Seller to take action does not relieve Purchaser of the confidentiality requirements under Paragraph 4 hereof.

_____ [Add, if appropriate:]

6. *Purchaser has returned copy of environmental site assessment.* Purchaser represents that it has returned its copy of the ESA report to Seller. Purchaser further represents that it has not made any photocopies or disseminated any copies or information to any third party.

The parties hereto have set their hands the day and year first above written.

Seller

THE CORPORATION

Purchaser

By: _____

President



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Chapter 22 DEVELOPMENT AND SUBDIVISION

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A. ACQUISITIONS FOR DEVELOPMENT AND SUBDIVISION

26-22 Current Legal Forms for Real Estate FORM 22.21

FORM 22.21 Mutual easement agreement between purchaser and seller of land--each party may travel across other party's land in order to gain access to its own land and to public roadway

COMMENT

Nature and purpose of easement.

The parties to this agreement are the seller and purchaser of land named in a separate, earlier agreement. That agreement provides for the sale and purchase of raw land which the purchaser intends to develop into a residential real estate project. Under that separate agreement, the purchaser is entitled to pay for, and take title to, the seller's land in *sections*. However, the parties have recognized their mutual need to be able to cross the land owned by the other in order to gain access to their respective properties and to a public roadway serving the entire development. Accordingly, the agreement below provides for such mutual access until the time when: (1) the purchaser owns all of the land in question; or (2) all of the land--including any retained by the seller--has access to the public roadway serving the development.

Termination of agreement.

Each party also has the right to terminate this easement agreement upon the giving of notice to the other; that notice, however, must be provided long before the termination takes effect. This clause protects each party from unfair or abusive treatment at the hands of the other. It also allows the parties a substantial amount of time in which to renegotiate this easement agreement and (hopefully) resolve whatever dispute led to the termination. Alternatively, the lengthy span between notice and termination may provide the non-terminating party with enough time to find another access route to the public roadway.

Use of roads in the development.

This agreement allows each party free access across the other's property until such time as roadways are laid out on subdivision maps. In other words, each party may drive or walk across the other's undeveloped land for the time being. However, once the development's roads have been clearly delineated on subdivision maps, access must be confined to these areas. This provision will prevent damage to lots which are due to be marketed soon to prospective home buyers. It will also protect future home buyers from having the seller or the purchaser (as well as their employees and agents) drive or march through the newly-sold lots on the way to their property.

Insurance, indemnification and hold harmless provisions.

Each party also agrees to obtain liability insurance in case anyone is injured while crossing that party's property in route to the other party's property. The parties also exchange hold harmless and indemnification clauses.

Recording the easement.

The easement is recorded with the county clerk's office so that it will run with the land. It is to be recorded against both the purchaser and the seller as grantees and grantors. In this way, the recording will serve as notice to all future purchasers of lots within the development.

FORM

AGREEMENT made this day of _____ [date], between ENTERPRISES, INC., a corporation existing under the laws of the State of _____ [state], with offices for the transaction of business at _____ [address] (hereafter referred to as "Seller"), and DEVELOPMENT, LTD, a corporation organized under the laws of the State of _____ [state], with offices for the transaction of business at _____ [address] (hereafter referred to as "Purchaser").

W I T N E S S E T H:

WHEREAS, the parties hereto have entered into an agreement dated _____ [date], whereby Seller agrees to sell and transfer certain property located in the Town of _____ [town], State of _____ [state], to Purchaser; and

WHEREAS, the Purchaser has the ability to accept transfer of title on portions of the property at various times; and

WHEREAS, Seller may, from time to time, need to cross land which has been transferred to Purchaser in order to reach land which the Seller has retained; and

WHEREAS, Purchaser may, from time to time, need to cross land which the Seller has retained in order to reach land which the Purchaser owns; and

WHEREAS, it is the desire of the parties to establish their mutual rights and responsibilities,

NOW, in consideration of the mutual promises contained herein, it is agreed as follows:

1. *Easement established for Seller's benefit.* Until such time as Purchaser has completed its subdivision maps and provided copies thereof to Seller, Seller may cross and recross Purchaser's land at any spot in order to reach land retained by Seller.

Upon completion of the subdivision maps and regardless of whether such maps have received municipal approval, Purchaser shall provide copies of said maps to Seller. Upon receipt of such maps, Seller shall confine itself, its agents and invitees to crossing Purchaser's land at the approximate location of future roadways. Once such roadways are physically staked out on the land, Seller shall confine itself, its agents and invitees to the staked-out roadways for such crossings.

Purchaser shall have the right to alter the subdivision maps from time to time as its plans are altered, or as directed by the municipality. Seller shall abide by the modified plans upon receipt of them.

2. *Easement established for Purchaser's benefit.* It is Seller's expectation that it will not be making subdivision plans at any time during the near future. However, Seller reserves the right to do so at any time. So long as Seller has not made any subdivision plans, Purchaser, its agents and invitees may cross and recross Seller's land at any spot. However, in the event that Seller does make subdivision plans, Seller may follow the provisions of Paragraph 1 above in order to restrict the location of Purchaser's crossings of Seller's land.

3. *Neither party to interfere with other party's use and enjoyment of its land.* Each party, for itself, its successors, assigns, agents and invitees, agrees to cross the land of the other party without interfering with any use or enjoyment which such other party is making of said land.

4. *Neither party to damage other party's land.* Each party, for itself, its successors, assigns, agents and invitees, agrees not to cause or allow damage to the land of the other party as a result of its crossings. In the event that damage to the land of the other party does occur, the party causing or allowing the damage to occur shall promptly repair the damage at its sole expense.

5. *Indemnification and hold harmless granted by Seller to Purchaser.* Seller, for itself, its successors, assigns, agents and invitees, shall indemnify and hold Purchaser, its successors, assigns, agents and invitees, harmless against any claim for injury to person or property which occurs, or is alleged to have occurred, during the course of a crossing of Purchaser's land by Seller, its successors, assigns, agents and invitees. This shall include any settlement, judgment and costs of defense, including legal fees and disbursements.

6. *Indemnification and hold harmless granted by Purchaser to Seller.* Purchaser, its successors, assigns, agents and invitees, shall indemnify and hold Seller, its successors, assigns, agents and invitees, harmless against any claim for injury to person or property which occurs, or is alleged to have occurred, during the course of a crossing of Seller's land by Purchaser, its successors, assigns, agents and invitees. This shall include any judgment, settlement and costs of defense, including legal fees and disbursements.

7. *Duration of easement.* This easement shall continue until such time as Seller shall have transferred to Purchaser all land specified in the sale and purchase agreement dated _____[date], or until such time as all land subject to this agreement shall have its own direct access to a publicly owned roadway.

8. *Termination of easement by either party.* This easement may be terminated by either party, through the giving of written notice to the other party of the first party's intent to terminate, no earlier than _____[e.g., six (6)] months prior to the effective date of termination. Said notice shall specify the effective date of termination.

9. *Automatic termination of easement.* This easement agreement shall automatically terminate in the event that the sale

and purchase agreement dated _____[*date*], is terminated without the transfer of title to any parcel of land to Purchaser.

10. *Each party to carry liability insurance.* Each party shall carry liability insurance on the subject premises in at least the amount of _____ Dollars (\$_____) _____[*e.g.*, \$250,000] for any single injury, and at least in the amount of _____ Dollars (\$_____) _____[*e.g.*, \$1,000,000] in the aggregate. Each policy shall name the other party as an additional insured.

11. *Recording of easement.* This easement agreement shall be recorded in the office of the County Clerk. The real property subject to the terms of this easement is described in Schedule A, which is annexed hereto and made a part hereof. The Clerk shall index this agreement against Seller and Purchaser, both as grantors and as grantees. The fees for recording shall be shared equally by both parties.

12. *Entire agreement.* This Agreement, together with the other written agreements and instruments executed concurrently herewith or pursuant to the provisions hereof, contains the entire agreement between the parties respecting the matters herein set forth and supersedes all prior agreements between them respecting such matters.

13. *Counterparts.* This Agreement may be executed in two or more counterparts, each of which shall be deemed an original, but all of which together shall constitute one and the same instrument. At the trial of any matter arising under this Agreement, only one counterpart need be produced.

14. *Headings.* Paragraph headings are for purposes of convenience and identification only and shall not be used to interpret or construe this Agreement.

15. *Waiver.* The failure of any party hereto to demand performance of any act required hereunder shall not be deemed a waiver of the right to enforce such performance or any other performance required later. A waiver can only be made if it is in writing and signed by the party excusing performance. Any attempted oral waiver shall not be valid.

16. *Gender and number.* Whenever the singular or plural number, or the masculine, feminine or neuter gender, is used herein, it shall equally include the other(s).

17. *Notice.* Any notice to be given hereunder shall be in writing, signed by the party giving notice, and delivered by any one of the following methods:

- (a) personal delivery;
- (b) facsimile machine transmission;
- (c) certified or registered mail, return receipt requested; or
- (d) overnight courier service, provided that a receipt is maintained in the ordinary course of business.

Notices shall be given at the following addresses:

If to Seller:

Attn: _____

If to Purchaser:

Attn: _____

Either party may designate a new address by giving notice thereof to the other party.

18. *Governing law.* This Agreement shall be construed and enforced in accordance with the laws of the State of _____[*state*].

19. *Binding effect.* This Agreement shall be binding upon, and inure to the benefit of, the parties, their respective heirs, representatives, successors and assigns.

20. *Modifications.* This Agreement may be modified only by a written document signed by representatives of both parties. A purported oral modification shall not be effective.

The parties hereto have set their hands and seals the day and year first above written.

ENTERPRISES, INC.

By: _____

President

DEVELOPMENT, LTD.

By: _____

President

[Acknowledgments]



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B. DEVELOPMENT VENTURES

26-22 Current Legal Forms for Real Estate FORM 22.22

FORM 22.22 Agreement for acquisition of property as tenants in common--transfer restrictions--waiver of partition--three owners

COMMENT

Of special importance in the real estate joint venture, apart from financing the operation, is the assigning of responsibility for completing the construction of the improvements and for managing the property post-consultant. This may include a broad range of activities, such as subdividing and platting the property, formulating construction plans, supervising construction, installing utilities, locating tenants, hiring professionals, paying invoices, etc. A typical venture agreement deals with other subjects normally covered in partnership agreements. These are: (1) name and business; (2) terms; (3) capital; (4) profit and loss; (5) salaries and drawings; (6) interest on capital; (7) management duties and restrictions; (8) banking; (9) books; (10) voluntary liquidation; (11) retirement; and (12) death.

For additional forms relating to joint ventures and joint ownership, see Chapter 2, Joint Ventures and Business Trusts, in Volume 2, *supra*, and Chapter 20, Real Estate Entities, in Volume 24, *supra*.

FORM

AGREEMENT made this _____[date], by and among _____[insert name], residing at _____[address], _____[city], _____[state] _____[zip code]; _____[insert name], residing at _____[address], _____[city], _____[state] _____[zip code]; and _____[insert name], residing at _____[address], _____[city], _____[state] _____[zip code], hereinafter sometimes collectively referred to as the "Tenants in Common."

RECITALS

The Tenants in Common have jointly acquired the fee title to premises described on Exhibit A (the "Premises").

Each of the Tenants in Common has an equal and undivided one-third interest in the Premises.

The parties have agreed to limitations on the right and power to transfer their undivided interests and also to provide for anticipated future contributions to such common fund for the purpose of improving the premises with a suitable building.

Now, therefore, the parties agree as follows:

1. *Transfer restriction.* Each of the Tenants in Common will not dispose, transfer, devise, convey, lease, mortgage, or otherwise encumber his undivided interest in the Premises, without the written consent of the other Tenants in Common, except as provided in this paragraph and in Paragraph 2.

(a) Upon the death of a Tenant in Common, his undivided interest may be transferred to a "related individual" or to "related individuals" upon such terms as may be agreed upon with the executor or administrator of the deceased Tenant's estate or as may be provided in his will or in a separate agreement duly signed by the Tenant. Notwithstanding any such transfer to a related individual, the transferee shall not have any rights in and to the Premises except through the transferor Tenant.

(b) In the event that no transfer is made as provided in subparagraph (a) within 60 days after the appointment of an executor or administrator of the deceased Tenant's estate, then the executor or administrator shall offer the undivided interest for sale to the other Tenants in Common at the "computed value." Each Tenant in Common shall have the right to purchase a "proportionate share" of the undivided interest. Payment for the undivided interest shall be made within 30 days after the determination of the "computed value" unless within the 30-day period arrangements for deferred payment are agreed upon. In the event that the undivided interest of the seller are not purchased by the other Tenants in Common, then the undivided interest shall be free of all restrictions under this agreement. Nothing herein contained shall be deemed to waive the provisions of Paragraph 3.

2. *Transfer to related individual.* Each of the Tenants in Common shall have the right to transfer to a "related individual" or to "related individuals" a share or all of his undivided interest in the Premises, in which event the party making the transfer shall deliver to the other parties to this agreement within 30 days of the making of the transfer, a copy of each and every instrument providing for the transfer. In the event of such transfer, the other parties to this agreement need not consult with or seek the approval of the transferee, and in all matters the consent of the transferor Tenant shall be binding and conclusive upon all such transferees.

3. *Partition.* Each of the Tenants in Common irrevocably waives any and all right that he may have to maintain any action for partition with respect to his undivided interest in the Premises or to compel any sale thereof under any applicable laws now existing or subsequently enacted.

4. *Improvement of premises.* Any improvement, sale, or mortgaging of the Premises may be made only of the entire Premises and then only upon the written consent of all Tenants in Common. However, if two (2) of the Tenants in Common vote to improve, sell or mortgage the Premises, said two (2) may acquire the interest of the remaining Tenant in Common by paying him the computed value as set forth in subparagraph (b) of Paragraph 1, above. Each of the Tenants in Common shall from time to time advance or cause to be advanced, on a pro rata basis, moneys to a common fund as such moneys shall from time to time be required to pay for the maintenance and operation of the Premises,

including interest and principal on mortgage liens, and for the cost of any improvement. Should any Tenant in Common for any reason fail or refuse to advance or cause to be advanced his pro rata share of moneys required, then and in that event, the other Tenants or Tenant in Common, as the case may be, shall have the right to acquire the interest of the delinquent Tenant in Common at "computed value" as provided in subparagraph (b) of Paragraph 1, above. In the computation for this purpose the value of any real estate and interests in real estate, including mortgages and leasehold improvements, shall be the book value as shown on the regular books of account without any adjustment for any agreed or appraised value.

5. *Profit and loss.* The profits and losses from the operation of the Premises shall be shared equally by the Tenants in Common.

6. *Voting.* In all matters coming before the Tenants in Common for a vote, each Tenant in Common shall have a vote that is directly proportionate to his right to share in the profits and losses from the operation of the Premises. (Thus, for example, if there are three Tenants in Common, each of whom is entitled to an equal, one-third share of the profits and losses, then each such Tenant in Common receives a single vote.) In the event of a transfer of the interest held by a Tenant in Common to related individuals, the transfer shall include voting rights in direct proportion to the interest transferred to each such related individual.

All matters which must be acted upon shall be decided by a simple majority vote, except as otherwise set forth in this agreement.

7. *Termination.* This agreement shall terminate on the sale of the Premises and the distribution to the Tenants in Common of the net proceeds of the sale, or at such other times as the parties may agree in writing.

8. *Definitions of terms.* The following terms shall have the meanings and definitions as set forth below:

(a) "Related individual" or "related individuals" shall mean brothers, sisters, spouses, lineal descendants, spouses of lineal descendants, trustees for the benefit of any such persons, and corporations owned or controlled by any of the foregoing.

(b) "Proportionate share" shall mean that portion of the undivided interest in the Premises offered for sale which the undivided interests owned by a Tenant in Common and his "related individuals" bears to all of the undivided interests in the Premises, other than that offered for sale.

(c) "Computed value" shall mean the value of the undivided interests in the Premises as computed by the regularly retained certified public accountants of the Tenants in Common. Such computation shall be binding and conclusive upon the parties. The computation shall be made in accordance with generally accepted accounting practices consistently applied and the following shall be observed:

(1) The computation shall be made as at the last day of the month preceding the month in which the event occurred conferring the right to purchase.

(2) No allowance of any kind shall be made for goodwill or any similar intangible asset.

(3) All accounts payable shall be taken at face amount, less deductible discounts, and all accounts receivable shall be taken at face amount, less discounts to the payors and a reasonable reserve for bad debts.

(4) Inventory of merchandise and supplies shall be computed at cost or market value, whichever is lower.

(5) All unpaid and accrued federal, state, city, or other local taxes and assessments, including, but not limited to, sales, payroll, unemployment insurance, excise, franchise, income, capital stock, real estate, sewer, and water taxes, shall be deducted as liabilities.

(6) All of the assets shall be valued as shown on the regular books of account, except that real estate and interests in real estate, including mortgages and leasehold improvements, shall be computed at a value to be agreed upon by the participants.

(7) In the event that the participants do not or cannot, for any reason, agree upon a value for real estate and interests in real estate, including mortgages and leasehold improvements, then and in that event, the following procedure shall be adopted for the determination of the "computed value" of those assets and for the payment thereof: The parties shall first determine if they have at any time within the preceding five months executed any agreement in writing or certificate in writing fixing the value as among themselves for the particular assets, or for any portion thereof. If there is such a writing, then as to the covered assets, the value fixed in the controlling agreement shall be controlling for the purpose of fixing "computed value" with respect thereto. As to the assets for which a "computed value" is thus determined, payment shall be made within 30 days after the determination of "computed value," and that payment shall be made within such period notwithstanding the fact that an appraisal may be required in order to fix the "computed value" of other assets.

(8) As to any real estate and interest in real estate, including mortgages and leasehold improvements, for which there is no controlling agreement of "computed value," an appraisal shall be made as promptly as feasible in the following manner: The Seller shall designate one of the following five appraisal firms:

_____ [insert name of any appraisal firms]. The Purchaser shall designate a second appraiser from the above list. These two appraisers shall fix a value for the real estate and interests in real estate. If they cannot agree, then they, together, shall appoint a third appraiser from the above list, or if they are unable to agree upon a third appraiser, then the President of the Real Estate Board of the City of

_____ [city] shall designate the third appraiser from the above list, or if he should fail or refuse to act, then the President of the Bar Association of the City of

_____ [city] shall designate the third appraiser from the above list. The decision of the majority of the three appraisers so selected shall be conclusive and binding upon the parties. All fees and expenses of all the appraisals shall be shared equally by the Seller and the Purchaser.

(9) The parties acknowledge that the prompt determination of "computed value" is of great importance to all concerned. Any action required by them, or any of them, with respect to the determination of "computed value" will be taken with the utmost dispatch and diligence.

9. *Effect on transferee.* Whenever any party to this agreement or any "related individual" or any other person acquires any interest in the Premises, the interest acquired shall be subject to all of the terms of this agreement with the same force and effect as if the party, "related individual," or person had owned the interest at the time of the execution of this agreement and had in fact signed this agreement at that time.

10. *Binding effect.* This agreement contains the entire understanding between the parties and may not be changed or modified orally. Except as otherwise provided in this agreement, this agreement shall inure to the benefit of and shall be binding upon the heirs, personal representatives, and assigns of the parties.

The parties have caused these presents to be duly signed and sealed the day and year first above written.

[insert name]

[insert name]

[insert name]

[Acknowledgments]



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26-22 Current Legal Forms for Real Estate FORM 22.23

FORM 22.23 Tenancy in common--ownership by two entities--income--producing property

COMMENT

This form is an agreement between two entities. This agreement provides that each owner shall have an equal say in management without regard to the percentage of ownership which each owner has in the enterprise. Given this management structure, the agreement contains dispute resolution provisions. This agreement also provides for a forced buy-out in the event the parties cannot get along. Furthermore, this agreement provides one of the owners with a development fee in connection with certain improvements which are anticipated at the property.

For additional forms relating to joint ventures, see Chapter 20, Real Estate Entities, in Volume 24, *supra*.

FORM

JOINT OWNERSHIP AGREEMENT

THIS JOINT OWNERSHIP AGREEMENT is entered into this _____[day] day of _____[month], _____[year] by and between CAB PARTNERSHIP, a(n) _____[state] partnership ("Cab") and TREND COMPANY, LLC, a(n) _____[state] limited liability company ("Trend"). Cab and Trend are hereinafter sometimes referred to singularly as an "Owner" and collectively as the "Owners."

WHEREAS, the Owners have purchased the real estate located at _____[address], _____[city], _____[state] (the "Property"); and

WHEREAS, the Owners desire to set forth their agreements, including their joint obligations and responsibilities with respect to the Property;

NOW, THEREFORE, in consideration of the mutual covenants hereinafter set forth, the parties hereby agree as follows:

1. Principal Place of Business and Office. The principal place of business and the office of Cab is _____[address], _____[city], _____[state] or such other place as may be designated by Cab written notice to the Trend. The principal place of business and the office of the Trend is _____[address], _____[city], _____[state] or such other place as may be designated by the Trend by written notice to Cab.

2. Lease. The Owners agree to enter into the lease (or separate leases) with CLIP COMPANY (the "Tenant"), a copy of which is attached hereto as Exhibit A (the "Lease"). The Owners agree that the Lease(s) will not be amended, modified, extended or terminated without the express written consent of each of the Owners. Further, each Owner agrees that when dealing with the Tenant, they will require strict adherence to the terms and conditions of the Lease.

3. Purposes of the Relationship; Powers. The sole purpose of the Owners' relationship and this Agreement is to own, develop, maintain, operate, manage, lease and otherwise deal with the Property. The parties' joint ownership of the Property is not to be construed as a partnership. Except as is specifically set forth herein, an Owner shall not have the right with respect to their interest in the Property to enter into contracts, borrow money, issue evidences of indebtedness, mortgage, pledge or otherwise grant a security interest in their interest in the Property or to sell, refinance, lease, exchange or otherwise dispose of their interest in the Property, or to bind the other owner in any way.

4. Initial Contributions. Each Owner will initially contribute towards the purchase, ownership, construction and/or maintenance of the Property the amount set forth below:

Cab	\$ _____

Trend	\$ _____

5. Cash Calls. The Owners recognize that income produced from the Property may be insufficient to pay the costs of operating the Property. If, in the reasonable judgment of the Manager (as defined below) additional funds are required in connection with the ownership of the Property, such funds shall be called for by the Manager and shall be contributed by the Owners, in proportion to their ownership interests in the Property. All funds called for by the Manager shall be due on the date prescribed in the notice of the call; provided, however, that the due date shall be not less than fifteen (15) days after the call date. If any Owner fails to timely make any or all of its proportionate contribution, then the other Owner will have the option, but not the obligation, to contribute the funds in excess of its ownership interest. The Owner who makes such additional contribution in response to a call shall be a creditor of the other non-contributing Owner in the amount of the excess. The amount outstanding will be payable on demand, and will bear interest at the rate of two percent (2%) in excess of the prime lending rate as published in the Wall Street Journal.

6. Percentage of Ownership. Each Owner will initially own in fee simple the percentage of the Property set forth below, which interest will be reflected on the Deed which conveys the Property to the Owners:

Cab	_____
	____%
Trend	_____
	____%

7. Cash Flow. Subject to the cash flow preference described in Paragraph 9, below, the joint cash flow generated by the Property (if any), less any cash reserves which the Manager reasonably determines should be maintained with respect to the Property, will be distributed to the Owners at least annually, in proportion to their fee simple ownership interest in the Property. The cash flow will be computed by the Certified Public Accounting firm engaged by the Owners to maintain the books and records relating to the Property.

8. Control and Operation of the Company; Voting

A. Except as is specifically set forth herein, the Owners will each own control and manage their interest in their portion of the Property, however any action taken by either Owner which will affect the entire Property must be expressly approved by the other Owner.

B. The day-to-day ministerial management of the Property will be the responsibility of _____ [name] (the "Manager"). The Manager shall not be paid any compensation, but shall be reimbursed from the income from the Property for all reasonable out-of-pocket expenses incurred on behalf of the Property. The rights and duties of the Manager are as follows:

(i) to take any action with respect to the Property on an emergency basis; provided time does not permit consultation with the other Owner;

(ii) to open, maintain and close bank accounts and to draw checks and other orders for the payment of money;

(iii) to collect rent and to pay expenses of the Property (provided that the Manager will not pay any expense relating to the Property in excess of _____ Dollars (\$_____) without the consent of the other Owner);

(iv) to make the cash flow distributions described in Paragraph 8, above; and

(v) to maintain or cause to be maintained complete and accurate records, and to make such records and books of account available for inspection at any reasonable time by the Owners.

C. The Manager will not have any liability to the other Owner for any mistakes or errors in judgment, or for any act or omission believed in good faith to be within the scope of authority conferred by this Agreement. The Manager shall be liable only for acts and/or omissions involving intentional wrongdoing or gross neglect. Actions or omissions taken in reliance upon the advice of legal counsel approved by the Manager as being within the scope conferred by this Agreement shall be conclusive evidence of good faith; provided, however, the Manager will not be required to procure such advice to be entitled to the benefit of this and the preceding sentences.

9. Development and Development Fee. Cab will supervise the improvements to the existing building on the Property, and construction of the addition (collectively, the "Development"), which are required by the Lease. The Owners will jointly approve all budgets, contracts and financing, but Cab will be responsible for the implementation and supervision thereof. For its services hereunder, Cab will be entitled to receive a development fee equal to _____ percent (_____) of the cost of the Development, which development fee will be paid from the rents of the Property prior to the distribution of any cash flow to the Owners. In addition, Cab is hereby authorize to engage _____ [name] as the inspection and supervising agent for the Development, whose fee will be paid for by the Owners from the initial contributions, financing proceeds, or rents.

10. Dispute Resolution

A. Generally. In the event that a dispute of any kind arises in connection with this Agreement or the operation or management of the Property (including, without limitation, an allegation by one of the Owners that they are deadlocked because they are unable to reach a unanimous decision on an issue), the Owners will attempt to resolve the dispute as set forth in Paragraph B, below, before proceeding to arbitration as provided in Paragraph C, below. The Owners waive all rights to seek remedies in any court (except to enforce the decision or award of the Arbitrators) and the right to jury trial. All documents, discovery and other information related to any such dispute, and the attempts to resolve or arbitrate such dispute, shall be kept confidential to the fullest extent possible.

B. Notice of Desire for Arbitration. If a dispute arises, an Owner may give written notice to the other Owner of its desire to have the dispute resolved by arbitration. After such notice has been given, the Owners, in good faith, shall attempt to negotiate a resolution of the dispute through an independent mediator selected by the parties, or if no agreement can be reached, by an independent mediator selected by _____[name].

C. Arbitration. If, within twenty (20) days after the notice provided in Paragraph B, above, has been given, the dispute is not resolved through negotiation or mediation, the dispute shall be arbitrated. The Owners agree to settle the dispute exclusively by binding arbitration in accordance with the following provisions:

1. Selection of Arbitrator. The Owners shall unanimously agree to the selection of one arbitrator. If no such agreement is reached within thirty (30) days after the notice provided in Paragraph B, above, has been given, the Owners shall request that the American Arbitration Association submit a panel of ten arbitrators who are qualified in such matters from which the choice shall be made. The Owners shall draw straws and the Owner drawing the shortest straw shall strike first, then each Owner will alternatively strike. Each Owner shall strike a name until one name remains. The Owners may, by unanimous agreement, reject one entire list and request a second list. If selection by the above method is not completed within forty-five (45) days after the notice provided in Paragraph B, above, has been made, then an arbitrator shall be selected by the American Arbitration Association. That arbitrator shall then arbitrate the dispute in _____[city], _____[state], and issue a decision.

2. Rules for, and Effect of, Arbitration. The arbitration shall be conducted under the Commercial Arbitration Rules of the American Arbitration Association. The arbitrator shall have no ability to add, change or delete provisions of this Agreement, and shall be required to interpret the terms of this Agreement as they exist. The decision of the arbitrator shall be final, binding and non-appealable, absent fraud or manifest error on the part of the arbitrator. Judgment on the decision may be entered in, and enforced by, any court, state or federal, having jurisdiction.

3. Costs. The cost of any arbitration, including the fees and expenses of the arbitrator, shall be shared equally by the Owners. Each Owner shall bear its own costs, expenses and attorney's fees.

11. Forced Sale. If an Owner desires to sell any portion of its interest in the Property, then the Owner desiring to sell such interest will establish a price and terms upon which the selling Owner is willing to sell such interest. The selling Owner shall then present such proposal to the other Owner. The other Owner will have thirty (30) days to either accept or reject such offer. Failure to respond to a notice hereunder will be deemed to be a rejection of such offer. If the other Owner accepts such offer, then the interest will be purchased pursuant to such terms. If the other Owner rejects such offer, then the selling Owner will be required to purchase and the rejecting Owner will be required to sell, the rejecting Owner's interest on the same terms and conditions of the original proposal, save and except any adjustment which must be made to the purchase price in order to reflect the differing ownership percentages, if any, in the Property. In addition, any money owed to an Owner pursuant to Paragraph 5, above, will be paid at the closing of the sale of the interest hereunder. Such purchase shall take place within thirty (30) days of the rejection of the original offer. The provisions of this Paragraph constitute the only method or means under which an Owner may sell or convey such Owner's interest in the Property without obtaining the express written consent of the other Owner. The provisions of this Paragraph 11 may not be invoked before the two (2) year anniversary hereof. In addition, the Owners acknowledge that the Lease contains

a Right of First Refusal in favor of the Tenant, and that the operation of this Paragraph 11 is not subject to the Right of First Refusal contained in the Lease.

12. Prohibition Against Liens and Encumbrances. Each Owner agrees that they will not allow their interest in the Property to become subject to any lien or encumbrance, without the express written consent of the other Owner. In the event that an interest in the Property becomes encumbered, including, without limitation, becomes subject to a judgment lien, the Owner whose interest becomes so encumbered, will within thirty (30) days from the perfection of such encumbrance, take whatever action is necessary to have such encumbrance released with respect to the Property.

13. Amendments. This Agreement may be amended only with the written approval of the Owners. Any such amendment shall be set forth in a writing, signed by all of the Owners.

14. Notices. All notices, consents or other instruments hereunder shall be in writing and mailed by United States mail, postage prepaid, and shall be directed to the parties hereto at the last addresses of the parties furnished by them. The Owners shall have the right to designate a new address for receipt of notices by notice addressed to the Owner and mailed as aforesaid.

15. Other Activities of the Owners. The Owners may engage in or possess an interest in any other business venture of any nature and description, independently or with others, including, but not limited to, the real estate business in all its phases, which shall include, without limitation, ownership, operation, management and development of real property. Neither party shall have any rights in and to such independent ventures or the income or profits derived therefrom.

16. Obligations and Rights of Transferees. Any person who acquires in any manner whatsoever any interest in the Property, irrespective of whether such person has accepted and assumed in writing the terms and provisions of this Agreement, shall be deemed by the acceptance of the ownership of their interest in the Property to have agreed to be subject to, and to be bound by, all the obligations of this Agreement with the same force and effect as any predecessor in interest of such person. The parties may prepare a Memoranda of this Agreement and file it with the _____ [name of county] County Recorder's Office in order to give any transferee of any interest in the Property constructive notice of the terms hereof.

17. Binding Effect. This Agreement shall inure to the benefit of, and be binding upon, the parties hereto and their respective next of kin, legatees, administrators, executors, legal representatives, nominees, successors and permitted assigns.

18. Integration; Terminology. This Agreement constitutes the entire agreement among the parties hereto pertaining to the subject matter hereof, and supersedes all prior and contemporaneous agreements and understandings of the parties in connection therewith. All of the terms and provisions used in this Agreement shall be deemed and construed to include any other number, singular or plural, or any other gender, masculine, feminine or neuter, as the context or sense of this Agreement may require, unless specifically stated otherwise.

19. Governing Law. This Agreement and the rights of all parties hereunder shall be construed in accordance with the laws of the State of _____ [state].

20. Waiver of Partition. Each of the Owners hereby waive any right that such Owner may have to cause the Property to be partitioned or to file a complaint at law or in equity to cause the Property to be partitioned, sold or otherwise divided.

21. Execution. This Agreement may be executed in several counterparts, each of which shall be considered an original when executed by the Owners.

The parties hereto have executed this Joint Ownership Agreement or a counterpart hereof as of the day first written

above.

CAB PARTNERSHIP

By: _____

[name and title]

And: _____

[name and title]

TREND COMPANY, LLC

By: _____

[name and title]

And: _____

[name and title]

[Attach a copy of the lease as Exhibit A]



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Current Legal Forms for Real Estate
Chapter 22 DEVELOPMENT AND SUBDIVISION
Part IV. FORMS
B. DEVELOPMENT VENTURES

26-22 Current Legal Forms for Real Estate FORM 22.24

FORM 22.24 Agreement between current fee owner and purchaser of half interest including provision for buy--out

COMMENT

The transaction illustrated in this form involves the sale of a half interest in property with the understanding that the seller and purchaser will hold title to the entire parcel as tenants in common. The sale by the original owner will result in the realization of gain or loss, measured by the difference between one half of his adjusted basis and the purchase price received by him. The other half of his adjusted basis will be applicable to his remaining interest in the parcel. The basis to the new owner will be his cost in acquiring his half interest.

Buy--out arrangement.

One of the most important aspects of a joint ownership agreement is the arrangement for the disposition by one of the parties of his interest in the venture. Generally, a prerequisite to any such disposition is an option to purchase in favor of the other party. One of several methods may be used. Sometimes this purchase option is established in terms of a predetermined price. Generally, the option imposes an obligation to meet a bona fide offer made by a third party. This agreement approaches the buy-out problem from a different viewpoint. It gives either party the right to buy the interest of the other, but it establishes a procedure which is designed to insure a fair price. Either party may make an offer to purchase the other party's interest, provided the offer meets certain minimum conditions. The offeree has two choices: he may accept the offer; or, if he thinks the price proposed is not sufficient, he may purchase the interest of the offeror at that price. Thus, if one of the parties offers to purchase the interest of the other he runs the risk that he may become a seller, not a purchaser, if the price he proposes is too low.

For additional forms relating to joint ventures, see Chapter 2, Joint Ventures and Business Trusts,

in Volume 2; Chapter 20, Real Estate Entities, in Volume 24; and Chapter 21, Real Estate Sales and Exchanges, in Volume 25, *supra*.

FORM

THIS AGREEMENT is made _____[month] _____[day],
 _____[year], between STAN SMITH, of _____[address],
 _____[city], _____[state] ("Smith"), and GREG WILLIAMS, of
 _____[address], _____[city], _____[state] ("Williams").

WHEREAS, Smith is about to purchase from Williams an undivided one-half interest in a parcel of land consisting of 75 acres, more or less, situated in the County of _____[name of county], State of _____[state] (the "premises"), and more particularly described on Exhibit A attached hereto.

WHEREAS, the parties desire to establish certain provisions, conditions, and limitations with reference to their rights and privileges in the ownership of the premises.

IT IS THEREFORE AGREED AS FOLLOWS:

1. Declaration of Intention. Upon the closing of the transaction between them, in accordance with the terms of the Purchase Agreement, the relationship of the parties in the premises shall be as tenants in common with all the rights and privileges of such relationship in accordance with the laws of the State of _____[state], subject, however, to the terms and conditions in this agreement.

2. Appointment of Agent. The parties hereby appoint _____[name], _____[address],
 _____[city], _____[state], their agent in order to accept service of process, to receive all notices from the various governmental agencies, and for such other purposes as the parties hereto may from time to time designate.

3. Indemnity. Each party shall indemnify and hold harmless the other against all debts, liens, judgments, or charges of any nature accruing against the premises by reason of any act of the indemnifying party.

4. Payment of Taxes. Each party shall deposit his proportionate share of all taxes and other assessments that may be levied against the premises with their agent at least thirty (30) days before the due date. If either party shall fail to deposit his proportionate share of the taxes and assessments within the time specified, the other party may make the payment in full, and the amount of such payment shall then become a lien upon the share of the premises owned by the defaulting party.

5. Options to Purchase. Each party shall have the right to purchase the interest of the other party in the premises on the following terms and conditions:

(a) If either party desires to purchase the interest of the other, he may offer to do so at any time during the tenancy in common, provided the offer to purchase is based upon a minimum price of at least _____ Dollars (\$_____) per acre.

(b) The offer to purchase shall provide for a down payment of at least twenty percent (25%) of the total purchase price, with the balance payable in equal annual installments over a five-year period, with interest on unpaid balances at _____ percent (_____) per annum payable annually.

(c) If such an offer is made, the party receiving the offer shall, within thirty (30) days, either accept the offer, or make a counter-offer on the same terms and conditions as the offer.

(d) If such counter-offer is made, the party to whom it is made shall accept the counter-offer immediately.

(e) The party making an offer or counter-offer shall simultaneously deposit with _____[name], their agent, as a condition to the offer or counter-offer, an amount equal to ten percent (10%) of the proposed purchase price as earnest money for the consummation of the offer or counter-offer. If the offer or counter-offer is consummated, the earnest money shall be applied against the down payment. If either party fails to consummate his offer or counter-offer, the earnest money deposited by him shall be paid to the other party as liquidated damages.

6. Entire Agreement. This agreement supersedes all agreements previously made between the parties relating to its subject matter. There are no other understandings or agreements between them.

7. Notices. All notices under this agreement shall be in writing and delivered personally or mailed by certified mail, postage prepaid, addressed to the parties at their last known addresses.

8. Non-waiver. No delay or failure by either party to exercise any right under this agreement, and no partial or single exercise of that right, shall constitute a waiver of that or any other right, unless otherwise expressly provided herein.

9. Headings. Headings in this agreement are for convenience only and shall not be used to interpret or construe its provisions.

10. Governing Law. This agreement shall be construed in accordance with and governed by the laws of the State of _____[state].

11. Counterparts. This agreement may be executed in two or more counterparts, each of which shall be deemed an original but all of which together shall constitute one and the same instrument.

12. Binding Effect. The provisions of this agreement shall be binding upon and inure to the benefit of each of the parties and their respective heirs, executors, administrators, and assigns.

In witness whereof the parties have signed and sealed this agreement _____[month]
_____[day] _____, _____[year].

Stan Smith

Greg Williams

[Attach Exhibit A]



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Chapter 22 DEVELOPMENT AND SUBDIVISION
Part IV. FORMS
B. DEVELOPMENT VENTURES

26-22 Current Legal Forms for Real Estate FORM 22.25

FORM 22.25 Tenancy in common--equal ownership by two individuals--unimproved property

COMMENT

This group of forms illustrates various joint ventures for the co-ownership of property. Generally, a joint venture is a union of two or more persons or corporations in an enterprise with well-defined restrictions on its activities. If the joint venture is involved in real estate, one of the first questions that arises is the form in which title to the real estate is to be held by the joint venturers. In many instances, title is taken in the name of all of the participants as tenants in common. In other cases, title is taken in the name of the joint venture. In some cases a nominee is designated to hold title for the benefit of the joint venture. This technical problem as to how title is to be held will often depend upon the number of participants in the joint venture and the extent of the proposed real estate activity, and must be governed by rules of local real estate law, considerations of title, control, and the practice of title insurance companies.

For additional forms relating to joint ventures, see Chapter 20, Real Estate Entities, in Volume 24, *supra*.

FORM

THIS AGREEMENT entered into on _____[*month*] _____[*day*],
_____[*year*], between Max Herald, a married man dealing with his sole and separate property
("Herald"), and David Pito ("Pito").

WHEREAS, the parties are purchasing as tenants in common the property described in Exhibit A attached hereto (the
"Property").

WHEREAS, each of the parties has an individual one-half interest in the Property.

WHEREAS, the parties desire to provide for the management and disposition of such Property.

IT IS, THEREFORE, AGREED AS FOLLOWS:

1. Down Payment and Title. The down payment, including closing costs with respect to the purchase of the Property shall be contributed equally by the parties in accordance with their respective ownership interest. Title to the Property shall be conveyed to each party as tenants in common.

2. Subsequent Contributions. Subsequent contributions of principal, interest, taxes, and all other costs or expenses on such Property shall be paid equally by each party.

3. Special Contribution. Pito shall contribute amounts not exceeding an aggregate of _____ Dollars (\$_____), for the surveying and platting thereof, and for the improvement of the access road thereon. Expenditures for such work in excess of _____ Dollars (\$_____), if any, shall be authorized only with the consent of and shall be paid equally, by both parties.

4. Sale of Property. Any decision to sell all or part of such Property shall be made by both parties. Except as hereinafter otherwise provided, the net proceeds of any sale or sales shall be distributed equally between both parties.

5. Default. Each party shall promptly contribute, when and as the same becomes due, his equal share of all future payments required to be made pursuant to the trust agreement under which the Property is being purchased, including principal, interest, taxes, and all other costs with respect to such Property. If either party is unable to pay his share of such costs, the other party is authorized to make such payment or payments so as to avoid a default under the trust agreement. All amounts so advanced by either party on behalf of the other party shall bear interest at the rate of _____ percent (_____%) per year from the date of advance, and shall be due immediately upon written demand for payment in the manner hereinafter provided. If the full amount of such advance or advances, together with interest thereon is not paid by the party for whom such advance was made, within ten days after receipt of such notice of demand for payment, then such party shall be a defaulting party hereunder. In the event of any sale of such Property, the proceeds shall be distributed equally between both parties, but a defaulting party shall in no event be entitled to receive an amount in excess of the total contributions made by such party, without interest. All other proceeds of sale shall belong to the nondefaulting party. In the event of a sale at a loss such defaulting party shall bear his one-half (1/2) share of such loss.

6. Management. All matters relating to the management and sale of the Property shall be decided by both parties, except that if either of the parties becomes a defaulting party, the other party shall have full power to make all decisions relating to the management and sale of such Property.

7. Restrictions. Neither party shall sell, transfer, mortgage, or otherwise dispose of, or encumber his undivided interest in such Property without first giving written notice to the other party of his intention to do so. The notice shall set forth the terms on which the offering party proposes to sell, transfer, mortgage, or otherwise dispose of or encumber his interest, and the identity of the person or persons to whom it is proposed to sell, transfer, or encumber such interest. The other party shall have ten (10) days after the giving of notice in which to elect to acquire the interest on the same terms and conditions that offering party desires to purchase. The purchase price shall be paid on the same terms as the original price paid by the parties pursuant to the escrow referred to in Paragraph 1, including percentage of down payment, amortization of principal balance, and interest rate. If the party to whom the notice is given does not elect to acquire the interest on the terms provided herein within the ten-day period, then the party giving the notice shall have the right to sell, transfer, mortgage, or otherwise dispose of, or encumber his interest, on the same terms as provided in the notice, for a period of thirty (30) days after the expiration of the ten-day period. After the expiration of the 30-day period, the

party giving the notice shall not sell, transfer, mortgage, or otherwise dispose of, or encumber his interest without again complying with the terms of this paragraph. If the party to whom notice is given elects to purchase, an escrow shall be established forthwith with a title company having an office in Flagstaff, Arizona, for the purpose of consummating the purchase. The escrow shall, by its terms, provide for a closing not more than thirty (30) days after its establishment.

8. Notices. Any and all notices and demands given under this agreement shall be given by registered or certified mail, return receipt requested, postage prepaid, addressed to the parties at the following addresses or at such other addresses as either or both may designate on written notice:

9. Binding Effect. This agreement shall be binding upon and shall inure to the benefit of each of the parties, and their respective heirs, executors, administrators, legal representatives, successors, and assigns.

10. Entire Agreement. This agreement supersedes all agreements previously made between the parties relating to its subject matter. There are no other understandings or agreements between them.

11. Non-waiver. No delay or failure by either party to exercise any right under this agreement, and no partial or single exercise of that right, shall constitute a waiver of that or any other right, unless otherwise expressly provided herein.

12. Headings. Headings in this agreement are for convenience only and shall not be used to interpret or construe its provisions.

13. Governing Law. This agreement shall be construed in accordance with and governed by the laws of the State of _____[state].

14. Counterparts. This agreement may be executed in two or more counterparts, each of which shall be deemed an original but all of which together shall constitute one and the same instrument.

Max Herald

David Pito

[Attach Exhibit A]



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Chapter 22 DEVELOPMENT AND SUBDIVISION
Part IV. FORMS
B. DEVELOPMENT VENTURES

26-22 Current Legal Forms for Real Estate FORM 22.26

FORM 22.26 Tenancy in common--acquisition of leasehold by a group--operation of property--provisions for sale by owner

COMMENT

The purpose of this agreement is to govern the relationship of a group of unrelated individuals who are involved in the common ownership of property. This agreement is designed to set out the various duties and operating details. This agreement includes restrictive provisions on transfers and on sales, a provision setting up a technique for the sale of the entire property, a provision permitting a participant to borrow against his ownership interest, and a provision to take care of the possibility that an owner's interest may become subject to an involuntary lien.

For additional forms relating to joint ventures, see Chapter 20, Real Estate Entities, in Volume 24, and Chapter 2, Joint Ventures and Business Trusts, in Volume 2, *supra*.

FORM

THIS AGREEMENT made _____ [month] _____ [day],
_____ [year], among _____ [list owners] (collectively the "Owners").

WHEREAS, the Owners are about to acquire the property described in Schedule A (the "Property"), subject to the mortgage and other encumbrances recited in such Schedule A.

WHEREAS, the Owners desire to provide for the holding of title to the Property, division of the profits and losses thereon, restrictions upon disposition, management of the property, and other matters relating to their common ownership.

IT IS THEREFORE AGREED

1. Ownership. Title to the Property shall be taken in the names of the Owners as tenants in common, and the instrument of conveyance shall be duly recorded in the appropriate recording office.

2. Profits and Losses. The interests of the Owners in the Property and in its profits and losses shall be as follows:

(a) Capital. The capital interest of each of the Owners in the Property is the amount of his investment in this joint venture as set opposite his name under the heading Capital Investment in Schedule B.

(b) Profit and Loss Share. All profits and losses in the operation of the Property shall be shared and borne by the Owners in the percentages set opposite their respective names under the heading Share of Profits in Schedule B. In the event that there is a deficit at any time in the operations of the Property and it becomes necessary to obtain contributions from the Owners, each Owner shall be required, within five days after receipt of notice of such deficit, to pay an amount equivalent to his pro rata share of the deficit based upon his share of profits.

(c) Distribution on Sale. In the event of the sale of the Property, the net proceeds of sale shall be distributed as follows:

(1) Adjusted Capital Investment. Each of the Owners shall first receive a return equal to his adjusted Capital Investment. For all other purposes of this agreement, the adjusted Capital Investment of each Owner shall be the amount set opposite his name under the heading Capital Investment in Schedule B, as reduced, at any given time, by his proportionate share of amortization as reflected on the books of the joint venture. Amortization shall be allocated to each Owner on the basis of his proportionate interest in the total Capital Investments of all the Owners. If the net proceeds of sale are less than the adjusted Capital Investments of all the Owners, distribution shall be made among the Owners on the basis of their proportionate interests in the total adjusted Capital Investments.

(2) Special Payment. All additional net proceeds of sale, but in no event in excess of _____ Dollars (\$ _____), shall then be paid to _____ [name] (in addition to all net proceeds of sale distributable to him as an Owner under subdivision (1) above).

(3) Profits. All remaining net proceeds of sale shall then be shared by the Owners, including _____ [name], in the proportions set opposite their respective names under the heading Share of Profits in Schedule B.

3. Restrictions on Transfer. Except as hereinafter set forth, none of the Owners shall sell, dispose of, transfer, or encumber the Property or any interest therein. Notwithstanding the foregoing:

(a) Any partnership which is a party to this agreement may at any time dissolve such partnership and distribute its interest in kind to the individuals who comprise it.

(b) Any partnership which is a party to this agreement may transfer all of its interest to a successor partnership in which its present members have more than a 50 percent interest in capital and profits.

(c) Each individual Owner may, during his life time, transfer all or any part of his interest to his spouse, his adult issue, or the adult spouses of his issue.

(d) Each individual Owner may, at death, either by will or by operation of law, transfer his interest to one or more persons, provided that if a fiduciary, including but not limited to a testamentary trustee, guardian, executor, or administrator, shall be the holder of legal title to such interest, such fiduciary shall be subject to all of the terms of this agreement.

4. Sale of Interest of Owner. In the event that any Owner shall receive an acceptable offer from a competent adult, who is not a fiduciary, for the purchase of all of such Owner's interest in the Property, such Owner shall have the right to sell his interest only after complying with the following requirements:

(a) Notice. Such Owner shall procure and deposit with the Mailing Agent, as designated in Paragraph 7, a certified check for ten percent (10%) of the amount of the offer and the written offer signed by the prospective purchaser.

(b) Option to Purchase. The Mailing Agent shall forthwith notify all of the Owners of the terms of the offer. Each of the other Owners shall then have the option to purchase the interest of the offering Owner upon the same terms set forth in the offer, provided notice of purchase in writing is mailed to the Mailing Agent within twenty (20) days after the initial receipt by the Mailing Agent of the offer. Each Owner who exercises his option to purchase shall set forth in his letter of acceptance the amount of the interest he is willing to purchase. If the total interests which the Owners offer to purchase are in excess of the interest offered, each Owner shall then purchase that proportion of the offered interest which that acceptor's offer to purchase bears to the total offers of all the acceptors. If the total interests which the acceptors have offered to purchase shall be less than the interest offered, the Mailing Agent shall immediately give notice in writing to the acceptors of the amount of the difference. If within thirty (30) days after the initial receipt by the Mailing Agent of the offer, the acceptors do not make satisfactory arrangements for the purchase of the difference, then the offer of the entire interest shall be deemed to have been rejected. In the latter event, the Owner offering his interest shall have the right to sell to the person named in the offer, provided that the sale is concluded within thirty (30) days of the date upon which he is notified by the Mailing Agent that his offer has been rejected, and provided further that the sale is made strictly in accordance with the terms of the offer and at no less favorable terms.

(c) Purchase. If the interest of the offering Owner is purchased pursuant to the option referred to in subparagraph (b) of this paragraph, payment for the interest shall be made by certified check to the order of the Owner within thirty (30) days after the initial receipt by the Mailing Agent of the offer, against the delivery to the purchasers of appropriate instruments transferring title to the interest of the Owner.

5. Assumption by Assignee. All permitted transferees or other persons to whom an interest in the Property may be transferred by the terms of this agreement, and any assignee receiving an interest pursuant to the terms of this agreement, shall automatically take that interest subject to all of the terms and conditions of this agreement, and shall not be considered to have title to that interest until they and each of them have signified their acceptance and assumption of the terms and conditions of this agreement in writing.

6. Sale of Property.

(a) Offers to Purchase. If any Owner acting individually or jointly with other Owners (the "offering party"), shall receive a bona fide offer in writing acceptable to him to purchase the Property, he shall obtain from the prospective customer and deposit with the Mailing Agent, designated in this agreement, a certified check in the amount of _____ Dollars (\$ _____), an agreement to hold all Owners of the Property harmless in respect to any brokerage commissions in the event that the sale is not consummated, and an executed contract for the purchase of the Property providing for the payment of the purchase price in the form of all cash above mortgages and conditioned upon the acceptance of the offer within forty-five (45) days by all of the Owners of the Property.

(b) Option to Purchase. The Mailing Agent shall forthwith notify all of the Owners of the terms of the offer. The offering party and any Owner accepting the offer (the "offerors") shall be deemed to have offered their interests for sale to the other Owners upon the same terms set forth in the offer. (Any Owners rejecting the offer shall be referred to as "rejectors").

(c) Acceptance of Offer. Each Owner other than the offering party shall notify the Mailing Agent in writing, within twenty (20) days after the initial receipt of the offer by the Mailing Agent, whether he accepts or rejects the offer. If the

Mailing Agent does not receive any notice within the 20-day period, the Owner shall be deemed to have accepted the offer. If no Owner shall reject the offer, then it shall be deemed accepted by all of the Owners. In such event, the Owners shall take any and all steps necessary and proper to pass title pursuant to the offer.

(d) Rejection of Offer. Any rejector shall set forth in his letter of rejection, the amount of the interest of the offerors that the rejector is willing to purchase if available, provided, however, that in any case any rejector shall be obligated to purchase, if available, from the offerors an interest equal to a percentage of the interest then held by the rejector. If the total interests which the rejectors offer to purchase are in excess of the total interests of the offerors, each rejector shall then purchase that proportion of the interests offered that the total interests which the rejector has offered to purchase bears to the total offers to purchase made by all rejectors. If the total interests which the rejectors have offered to purchase shall be less than the total interests of the offerors, the Mailing Agent shall immediately give written notice to the rejectors of the amount of the difference. If within thirty-five (35) days after the initial receipt by the Mailing Agent of the offer, the rejectors do not make satisfactory arrangements for the purchase of the difference, then the offer shall be deemed accepted by all of the parties, and they shall take all of the steps necessary and proper to pass title pursuant to the offer.

(e) Sale. In the event of a sale of the Property pursuant to the offer, each Owner shall share in the net proceeds of the sale in accordance with the terms of Paragraph 2(c). In the event that, pursuant to the provisions of subparagraph (d) above, any rejectors shall purchase the interests of any offeror, the price to be paid to each offeror shall be such offeror's pro rata share of the difference between the selling price (less brokerage) set forth in the offer and the outstanding principal of any mortgages, plus or minus all usual real estate adjustments, in accordance with the interest of each offeror. Payment for the interest shall be made by certified check to the order of the offeror within sixty (60) days after the initial receipt of the offer by the Mailing Agent, against the delivery to the purchasers of appropriate instruments transferring title to the interests of the offerors.

7. Mailing Agent. _____[name] is designated Mailing Agent, and all notices to him shall be sent to _____[address], _____[city], _____[state], or to such other address as he shall, from time to time, designate in a notice given to all the Owners. The Mailing Agent or such other Owner or Owners as may be required to give notice under the terms of this agreement shall mail all notices required herein by registered or certified mail to the addresses of the Owners set forth in this agreement, or to the last address as the Owners or any of their transferees shall, from time to time, give in writing to the Mailing Agent. The Mailing Agent hereby is relieved of all liability by virtue of his undertaking herein, except for malfeasance or fraud.

8. Loan to Owners. Any Owner may borrow money on his interest in the Property on the following terms and conditions:

(a) The amount of the loan may be no more than seventy-five percent (75%) of the Owner's investment in the Property, less any capital returned to the Owner.

(b) The hypothecation of the Owner's interest in the Property, whether in the form of a mortgage or pledge, shall provide for prepayment of the loan without penalty.

(c) The Owner's pro rata share of the proceeds on any new mortgage placed upon the Property may be applied toward the payment of the loan made to the Owner, and any payment may be made directly to the lender.

(d) The unpaid balance of any mortgage or pledge by an Owner shall be subordinate to any mortgage placed upon the entire Property, and the lender shall undertake to execute all documents necessary and proper to effectuate the subordination of his loan to any mortgage on the entire Property.

(e) The Owner's pro rata share of the proceeds of the sale of the Property may be applied towards the payment of the

loan made by an Owner, and any proceeds may be paid directly to the lender.

(f) The terms of any mortgage or pledge shall in no manner prevent or unreasonably delay the sale or mortgage of the entire Property.

(g) The lender shall undertake to be bound by the terms and conditions of this agreement whenever required to carry out the purposes of this agreement.

(h) Any owner's mortgage or pledge shall provide that, in the event there is any default in the mortgage or pledge (provided the default is not a default on the part of the Owners as lessees under the terms of the Property) the lender, his successors, heirs, and assigns, shall give immediate notice of the default to the Mailing Agent. The notice shall constitute an irrevocable offer for a period of thirty (30) days, on the part of the lender and the Owner to sell the Owner's interest in the Property, and any interest of the lender in the Owner's Property, to all other Owners for the amount of the loan then outstanding plus interest to the date of payment.

9. Partition. No Owner shall, either directly or indirectly, make application to or petition any court for a partition of the Property.

10. Managing Agent

(a) Commission and statements. The Owners appoint _____ [insert name], as agent to supervise and manage the Property. _____ [insert name] shall pay all employees engaged in the operation of the Property out of the sums paid to it by the Owners. In full consideration of its services, _____ [insert name] shall be paid a yearly sum not to exceed _____ percent (____%) of the collected rents, the sums to be paid monthly within 20 days after the end of each month. Brokerage payable to outside brokers shall not be deemed included in the _____ percent (____%) item payable to _____ [insert name]. Monthly statements of the Property's operation shall be submitted by _____ [insert name] to each of the Owners within twenty (20) days after the end of each month, and the statements shall include an itemized list of all income and expenses in connection with the Property.

(b) Term. _____ [insert name] shall be employed for a term of one (1) year from the date of the execution of this agreement. Such term shall be automatically extended from year to year thereafter unless written notice of termination signed on behalf of the Owners is served upon _____ [insert name], at least sixty (60) days prior to the termination of any yearly period.

(c) Profit Payments. Enterprises, Inc. shall from time to time during the year, but at intervals of no more than three months, distribute to the various Owners their share of all profits earned from the operation of the Property.

11. Meetings. Meetings of the Owners may be called, upon five days notice, by the Mailing Agent or by Owners who have a ten percent (10%) or greater interest in the capital of the Property as set out under the heading Capital Investment in Schedule B. Meetings shall be held in _____ [city], _____ [state], at the office of the Mailing Agent, or at the office of any Owner who has a five percent (5%) or greater interest in the capital of the Property. The power to make all decisions with respect to the management of the Property is vested in the Owners. The decisions of the Owners shall be binding upon all the Owners if made by Owners who have a fifty percent (50%) or greater interest in the capital of the Property, at a meeting called pursuant to the provisions of this paragraph.

12. Separability. If any part or provision of this agreement shall be determined to be invalid or unenforceable under the laws of the State of _____ [state], the remaining portions of this agreement which can be separated from the invalid, unenforceable provisions shall nevertheless continue in full force and effect.

13. Arbitration. Any dispute or controversy arising under or as a result of this agreement shall be settled and determined by arbitration held in New York, New York, in accordance with the governing rules of the American Arbitration Association. Any award pursuant to such arbitration may be entered in any court of competent jurisdiction.

14. Modification. This agreement embodies the full understanding of the Owners. This agreement may not be changed orally. Any modifications of this agreement must be in writing signed by all of the parties hereto.

15. Binding Effect. Except as herein otherwise specifically stated, this agreement shall bind and inure to the benefit of the parties to this agreement, their legal representatives, successors, and assigns.

16. Entire Agreement. This agreement supersedes all agreements previously made between the parties relating to its subject matter. There are no other understandings or agreements between them.

17. Notices. All notices under this agreement shall be in writing and delivered personally or mailed by certified mail, postage prepaid, addressed to the parties at their last known addresses.

18. Non-waiver. No delay or failure by a party to exercise any right under this agreement, and no partial or single exercise of that right, shall constitute a waiver of that or any other right, unless otherwise expressly provided herein.

19. Headings. Headings in this agreement are for convenience only and shall not be used to interpret or construe its provisions.

20. Governing Law. This agreement shall be construed in accordance with and governed by the laws of the State of _____[state].

21. Counterparts. This agreement may be executed in two or more counterparts, each of which shall be deemed an original but all of which together shall constitute one and the same instrument.

The parties hereto have signed and sealed this agreement.

[Signature Lines for Owners]

[Attach Schedule A]

[Attach Schedule B]



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Current Legal Forms for Real Estate
Chapter 22 DEVELOPMENT AND SUBDIVISION
Part IV. FORMS
B. DEVELOPMENT VENTURES

26-22 Current Legal Forms for Real Estate FORM 22.27

FORM 22.27 Joint venture--simple agreement

COMMENT

This joint venture agreement is designed to be very simple agreement. It specifically sets forth the role of each party. The venture is very limited in scope and duration. Each party has a very specific limited role.

For additional forms relating to joint ventures and joint ownership, see Chapter 2, Joint Ventures and Business Trusts, in Volume 2, and Chapter 20, Real Estate Entities, in Volume 24, *supra*.

FORM

_____ [month] _____ [day], _____ [year]

Mr. David Gil, President
The Gil Companies, Inc.

_____ [address]
_____ [city], _____ [state]

Dear Mr. Gil:

This letter is intended to set forth the agreement between The Gil Companies ("Gil") and Debut Builders, Inc. ("Debut") relating to the construction of a model home. The model home will be constructed on a joint venture basis consisting of the following terms:

1. Purpose. Gil and Debut shall be joint venturers for the purpose of constructing and selling a home on lot No. 1 (the "Lot") in the _____[*insert name of subdivision*] subdivision located in the City of _____[*city*], _____[*county*] County, _____[*state*].

2. Name. The joint venture will be conducted in the name of "Debut Builders." Gil acknowledges that Debut has a propriety interest in the use of the name "Debut Builders" and that Debut is granting to the joint venture a limited license to use the name in the conduct of the joint venture's business, and that Gil shall have no right to use the name "Debut Builders" except in connection with the joint venture.

3. Duties of Gil. Gil shall perform the following duties in connection with the joint venture:

A. Supervise and manage the day-to-day activities associated with the construction of the home, including, without limitation, the scheduling of delivery of materials and subcontractors required to construct the home, supervising the activities of the subcontractors and obtaining the necessary permits and consents.

B. Provide the construction and design expertise necessary for the construction of the home.

4. Duties of Debut. Debut shall perform the following duties in connection with the joint venture:

A. Maintain the books and records of the joint venture. Such books and records shall be available at all reasonable times for inspection and copying by Gil at the principal place of business of Debut (which shall also be the principal place of business of the joint venture).

B. Pay on behalf of the joint venture (from the proceeds of the sale of the home or from funds advanced to the joint venture by Debut) all reasonable costs and expenses incurred by the joint venture in furtherance of the purpose of the joint venture.

C. Enter into contracts on behalf of the joint venture including, without limitation, contracts for subcontractors and materials, contracts for the sale of the home and contracts with real estate brokers for listing the home for sale. Prior to entering into a contract on behalf of the joint venture, Debut shall consult with Gil regarding the advisability or necessity of such contract.

D. Use its best efforts to acquire the Lot for the benefit of the joint venture. If Debut shall not be able to acquire the lot within one (1) month after the date hereof, then this joint venture shall terminate. The lot shall be purchased in the name of Debut.

5. Division of Profits. Upon sale of the home, the net profits of the joint venture shall be divided equally between Gil and Debut. For purposes of this joint venture, the term net profits shall mean the gross sales price received for the model home, less the costs and expenses incurred in constructing and selling the model home. Included in the costs and expenses shall be the cost of the Lot, plus an interest factor of ten percent (10%) per annum from the date of acquisition payable to Debut until the lot is sold.

6. Division of Losses. If the computation described in Paragraph 5 results in a negative balance, each party shall be responsible for an equal share of the loss.

7. Limits of the Venture. The relationship between Gil and Debut is limited to the undertaking described herein. Nothing herein shall be construed to create a general partnership between the parties or to authorize either party to act as general agent for the other.

8. Non-assignability. Neither party shall have the right to assign their interest hereunder (including their right to receive

the net profit hereunder).

9. Miscellaneous

A. All leads received by either party for the construction of a new home as a result of the joint venture shall be the property of the joint venture and upon termination of the joint venture shall become the sole property of Debut.

B. The parties will use their best efforts to complete the home within sixty (60) days of the acquisition of the Lot.

C. The parties agree that they will jointly determine the design of the home; however, if the parties cannot agree prior to the time that the Lot is acquired, then this joint venture shall terminate, and the Lot shall belong solely to Debut.

If our agreement is accurately set forth in this letter, please have an authorized officer of Gil execute the enclosed copy of the letter and return it to the undersigned.

Very truly yours,

DEBUT BUILDERS, INC.

By: _____

[name and title]

Accepted and agreed to this _____[*day*] day of _____[*month*],
_____[*year*].

THE GIL COMPANIES

By: _____

[name and title]



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Current Legal Forms for Real Estate
Chapter 22 DEVELOPMENT AND SUBDIVISION
Part IV. FORMS
B. DEVELOPMENT VENTURES

26-22 Current Legal Forms for Real Estate FORM 22.28

FORM 22.28 Joint venture between land owner and real estate developer

COMMENT

The form that follows is a joint venture agreement between an owner of a property and a developer. They agree to jointly develop a residential real estate development. The value of the parties' respective contributions is reflected in their split of the expected profits. The developer has control over the management and operation of the project. The land owner's interests are protected by the ability to audit the accounting books and records at any time and to have the audit costs paid by the developer if significant discrepancies are found.

For additional forms relating to joint ventures and joint ownership, see Chapter 2, Joint Ventures and Business Trusts, in Volume 2, and Chapter 20, Real Estate Entities, in Volume 24, *supra*.

FORM

AGREEMENT made this day of _____ [date], between _____ [insert name]
(hereafter referred to as "Land Owner"), and _____ [insert name] (hereafter referred to as
"Developer").

WITNESSETH:

WHEREAS, Land Owner is the owner of a certain parcel of land containing approximately
_____ [e.g., three hundred (300) acres], located in the Town of _____ [town], County
of _____ [county], and State of _____ [state], which parcel is more particularly
described in Schedule A, which is annexed hereto and made a part hereof; and

WHEREAS, Developer is in the business of constructing residential multi-unit developments; and

WHEREAS, the parties wish to enter into an agreement whereby they will form a joint venture for the purpose of building a residential multi-unit development on the real property described in Schedule A,

NOW, therefore, in consideration of the mutual promises contained herein, it is agreed as follows:

1. *Joint venture.* The parties hereby form a joint venture under the name and style of _____[*insert name*]. The joint venture shall have an office on the site of the development and a mailing address of _____[*address*].

2. *Preliminary plans*

(a) The parties, in the name of the joint venture, shall engage the architectural firm of _____[*insert name*] located at _____[*insert address*], in order to prepare preliminary plans for the development. These plans shall show the general location of:

- (1) roads within the development;
- (2) access to public water and sewer lines;
- (3) the approximate location of lots;
- (4) the approximate location of any wetlands or other environmentally sensitive areas.

These plans shall include a survey of the boundaries of the real property described in Schedule A. The preliminary plans shall be completed on or before _____[*date*].

(b) Upon receipt of the preliminary plans, the parties shall meet to review the plans. The parties shall make a list of changes which need to be made prior to finalization of the plans. If the parties cannot agree on a particular change, the dispute-resolution procedure set forth in Paragraph No. 11 hereof shall be used. The changes shall be provided to the architectural firm of on or before _____[*date*], with instructions that final drawings, sufficient for subdivision approval in the Town of _____[*town*] shall be completed within _____[*days*] days thereafter.

(c) Upon receipt of the final plans, the parties shall review the plans. Both parties shall sign the application for subdivision approval in the name of the joint venture. The application, together with all supporting documentation, shall be filed before _____[*date*].

3. *Subdivision approval.* Developer shall be responsible for taking all further steps necessary for obtaining subdivision approval. This shall include securing whatever expert assistance Developer deems necessary, including, but not limited to:

- (a) legal services;
- (b) engineering services;
- (c) architectural services; and
- (d) environmental services.

Developer shall appear at any zoning or planning board meetings held by the Town of _____ [town]. Developer shall arrange for appropriate testimony at such meetings. Developer shall pursue whatever appeals may be necessary in the event governmental approval is either not granted, or is granted subject to conditions that are unacceptable to the parties. In the event that subdivision approval cannot be obtained after exhausting all appellate remedies, this Agreement shall terminate. Either party may terminate the Agreement if the subdivision approval is not obtained within _____ [months] months of the date of this Agreement.

4. *Infrastructure*

(a) Once subdivision approval is obtained, Developer shall make arrangements for the installation of sewers, water mains, storm sewers and roadways for each phase of the development.

(b) Developer shall have authority, on behalf of the joint venture, to negotiate a loan from a commercial lender for up to _____ percent (_____ %) of the estimated cost of the infrastructure. The loan shall be structured so that funds may be drawn upon as needed. The interest rate shall not exceed the prime lending rate plus _____ percent (_____ %) per annum, without the consent of both partners.

(c) Land Owner agrees to allow the lender to secure the infrastructure loan with a mortgage on the Property.

(d) Developer shall contribute the balance of the cost of the infrastructure, up to the amount of _____ Dollars (\$ _____).

(e) All loan documents shall be executed in the name of the joint venture by Land Owner and Developer.

5. *Plans.* Developer shall secure a licensed architect to draw up plans for the improvements to be used in the development. Such plans shall be ready for preliminary review within _____ [number of days] days after subdivision approval is obtained. The parties shall transmit required changes to the architect within _____ [number of days] days thereafter. Final plans shall be ready to display to home buyers within _____ [number of days] days thereafter. All plans shall comply with the building code of the State or County of _____ [name of state or county], and with any additional requirements of the Town of _____ [town]. If any plans or changes thereto cannot be agreed upon between the parties, the dispute resolution procedure of Paragraph No. 11 hereof shall be used.

6. *Planned unit development*

(a) Developer shall be responsible for having covenants and restrictions drawn up and filed for the benefit of all lots to be contained in the development. The preliminary covenants and restrictions shall be available upon submission of the subdivision application. The final form of the covenants and restrictions shall be filed with the _____ [county] County Clerk before any lots are marketed to the public.

(b) At a minimum, the covenants and restrictions shall provide for the following:

- (1) minimum house size;
- (2) controls on exterior style of house and on further construction on houses or lots;
- (3) prohibition on the conduct of commercial activities within the development;
- (4) prohibition on the harboring of animals, except cats, dogs or domestic birds;

- (5) prohibition on the erection of exterior clothes' lines;
- (6) prohibition on the storage of vehicles, boats, or recreational vehicles;
- (7) prohibition on the erection of other structures on the premises; and
- (8) any other restrictions designed to protect property values.

(c) Developer may call for the creation of an association if Developer should so desire. Developer shall obtain any approvals which may be needed for such covenants, restrictions and/or homeowners' association.

7. *Marketing*

(a) Developer shall locate and engage a marketing firm to market the various phases of the Project in the development. The marketing agent shall enter into a contract which is terminable by the joint venture on _____ [days] days' written notice without cause, or on _____ [hours] hours' written notice with cause. The marketing agent shall be an independent contractor and shall be paid no more than _____ percent (_____) of the purchase price of each house and lot as a commission.

(b) The marketing agent shall be given written instructions as to representations which may be made to purchasers. All purchasers shall be given a copy of the covenants and restrictions at least _____ [days] business days before a contract may be signed.

(c) The marketing agent may do advertising. The text of all advertisements shall be approved by Developer in writing prior to use. The joint venture will do advertising as well.

8. *Representations of Land Owner*

(a) Land Owner owns the Property free and clear of any and all liens and encumbrances, except for certain power-line easements set forth in Schedule B, which is also annexed hereto and made a part hereof.

(b) Land Owner will allow agents and employees of the joint venture to enter upon the Property for the purpose of making improvements thereon and to otherwise fulfill the purposes of the joint venture.

(c) Land Owner has engaged a reputable and skilled environmental engineer to perform a Phase I environmental site assessment. The true and accurate results of the assessment have been provided to Developer. There have been no changes on the Property since the date of the assessment, to the best of Land Owner's knowledge.

(d) Land Owner will give a deed to any lot included in Schedule A upon the request of the joint venture, provided that all terms and conditions of this Agreement have been met, and the agreement is still in full force and effect at that time.

(e) The value of the Property which Land Owner is contributing to the joint venture is _____ Dollars (\$_____).

9. *Representations of Developer*

(a) Developer is skilled in the creation of a mixed use development.

(b) Developer will deposit the sum of _____ Dollars (\$_____) in the joint venture's checking account upon execution of this Agreement. Developer will deposit additional sums, as needed, to arrive at a maximum total of _____ Dollars (\$_____).

10. *General provisions*

(a) Neither party may bind the joint venture to any obligation without the consent of the other party. Both parties shall sign all contracts, notes, mortgages, checks and other obligations of the joint venture. Neither party shall make any representation to the contrary to any third party.

(b) Developer shall be the manager of the project. Developer shall have the right to hire and fire staff, and purchase inventory and supplies in the ordinary course of business. Developer shall conduct all negotiations with any third party. Land Owner shall not interfere in any way. Developer shall run the day-to-day operations and supervise construction.

(c) The parties shall have the ability to review the accounting books and records of the joint venture and make copies thereof for personal use at any time. Either party may audit the financial records at any time at his/her own expense. If a discrepancy appears in excess of _____ Dollars (\$_____), then Developer shall pay the cost of the audit.

(d) All financing shall be non-recourse, unless Land Owner agrees to recourse financing.

(e) The profits of the joint venture shall be divided between the parties in the following manner:
 _____ [e.g., one-third (1/3) to Land Owner, two-thirds (2/3) to Developer]. Profits shall be defined as the net proceeds from the sale of any lot, after deduction of all construction and other costs attributable to that lot, and payment of any lot release fees.

11. *Dispute resolution.* Any disputes between the parties may be fatal to the project. In the event that a dispute arises which cannot be settled within _____ [days] days, the parties agree to submit the dispute to a mediator within _____ [days] business days thereafter to resolve the dispute. The mediator shall be _____ [insert the name of the person or dispute resolution firm that will mediate the dispute]. The mediator may attribute mediation costs to either or both parties, or to the joint venture. The parties agree to be bound by the results of the mediation.

12. *Death or disability*

(a) In the event of the death of Land Owner, Developer and the executor of Land Owner's estate shall continue to adhere to the terms of this Agreement. Land Owner agrees to create a will with provisions which bind his/her executor to the terms of this Agreement.

(b) In the event of Developer's death, Land Owner may withdraw from the joint venture or secure a new joint venturer to replace Developer. Payment to Developer's estate shall be as set forth in Paragraph No. 14 ("Termination").

(c) In the event of the disability of Land Owner, Developer shall continue to pursue the goals of the joint venture pursuant to the terms of this Agreement.

(d) In the event of the disability of Developer, Land Owner shall have the same rights as set forth in Subparagraph (b) above. The term "disability" shall mean the inability of the Developer or Land Owner, due to physical or mental incapacity, to fulfill his/her obligations under this Agreement.

13. *Bankruptcy.* In the event that either party files a petition in bankruptcy, this Agreement would be considered

executory by the court. In the event that the debtor-party chose to reject the contract, he/she would be bound by the termination provisions contained in Paragraph No. 14 hereof.

14. *Termination*

(a) This Agreement may not be terminated by either party except for cause. The term "cause" shall be limited to the following:

- (1) defalcation or fraud committed by one party against the other;
- (2) failure of one party to fulfill a material obligation under the terms of this Agreement;
- (3) failure to obtain approval for the subdivision from the Town of _____[town];
- (4) death or disability of Developer; and
- (5) sale of the project.

(b) The party seeking to terminate the Agreement shall give the other party written notice of intention to terminate this Agreement. The written notice shall specify the basis for the termination and the date on which the termination shall become effective. Such date shall be at least _____[days] days after delivery of the notice. If the other party agrees to the termination, he/she shall so state in a writing delivered to the party seeking to terminate. If the other party does not agree to terminate, the matter shall be submitted to dispute resolution under Paragraph No. 11 hereof.

(c) Upon termination in the pre-development phase (*i.e.*, before any of the Property has been disturbed), Land Owner shall receive his/her Property back free and clear of the terms of this Agreement. After payment of all outstanding obligations of the joint venture, Developer shall receive a refund of any funds remaining which he/she contributed. If any obligations of the joint venture remain unpaid, they shall be the sole responsibility of Developer.

(d) Upon termination of the Agreement during the development phase (*i.e.*, after the Property has been disturbed, but prior to construction of any improvements), Developer shall have the right to buy the Property for the sum of _____ Dollars (\$_____).

In the event Developer chooses not to purchase the Property, Developer shall take whatever steps are needed to release any liens from the Property. Land Owner shall receive the Property back free and clear of all liens and any obligations under this Agreement. Developer shall not be entitled to any credit for improvements on the Property. After payment of all obligations of the joint venture, Developer shall receive a refund of any funds remaining which it contributed. If any obligations of the joint venture remain unpaid, they shall be the sole responsibility of Developer.

(e) Upon termination of the Agreement in the late development stage, rights upon termination shall be the same as in Subparagraph (d) above, except that Developer shall be obligated to complete any structure then under construction. In the event Developer purchases the Property, Developer shall receive a credit against the purchase price for any profit distributions previously made to Land Owner. In the event Developer does not purchase the Property, Developer shall be entitled to a lien against the Property of Land Owner equal to the value of any improvements made by Developer.

(f) Upon the sale of the entire project, payments shall be made in the following order: Land Owner shall receive _____ Dollars (\$_____). All debts of the joint venture shall be paid in full by Developer. Developer shall receive payment of all sums contributed by him/her. Any balance remaining shall be divided _____[*e.g.*, one-third (1/3) to Land Owner and two-thirds (2/3) to Developer]. If a shortfall

exists, Developer shall be solely responsible for any debts of the joint venture.

15. *Taxes.* Upon execution of this Agreement, all taxes which are levied against the Property shall be paid by the joint venture until said Property is sold to a third party.

16. *Insurance.* The joint venture shall, at its expense, maintain liability insurance on the Property. When construction begins, builder's all-risk insurance shall be obtained. Developer shall determine appropriate policy limits. The joint venture and the parties shall be named insureds on all policies of insurance.

17. *Tax returns.* Developer shall cause income tax returns to be prepared and filed for the joint venture in each year of its existence.

18. *Miscellaneous*

(a) *Entire agreement.* This Agreement, together with the other written agreements and instruments executed concurrently herewith or pursuant to the provisions hereof, contains the entire agreement between the parties respecting the matters herein set forth and supersedes all prior agreements between them respecting such matters.

(b) *Counterparts.* This Agreement may be executed in two or more counterparts, each of which shall be deemed an original, but all of which together shall constitute one and the same instrument. At the trial of any matter arising under this Agreement, only one counterpart need be produced.

(c) *Headings.* Paragraph and subparagraph headings are for purposes of convenience and identification only and shall not be used to interpret or construe this Agreement.

(d) *Notice.* Any notice to be given hereunder shall be in writing, signed by the party giving notice, and delivered by any one of the following methods:

(1) personal delivery;

(2) facsimile machine transmission;

(3) certified or registered mail, return receipt requested; or

(4) overnight courier service, provided that a receipt is maintained in the ordinary course of business.

Notices shall be given at the following addresses:

If to Land Owner:

Attn: _____

If to Developer:

Attn: _____

Either party may designate a new address by giving notice thereof to the other party.

(e) *Governing law.* This Agreement shall be construed and enforced in accordance with the laws of the State of _____[*state*].

(f) *Binding effect.* This Agreement shall be binding upon and inure to the benefit of the parties, their respective heirs, representatives, successors and assigns.

(g) *Amendments.* Any amendment of this Agreement must be made in writing and signed by both parties. Any attempted oral modification will not be valid.

(h) *Waiver.* Any failure by either party to enforce any right arising under this Agreement shall not be deemed a waiver of the ability to later enforce that right. Any waiver must be in writing and signed by the person waiving the right in order to be enforceable.

The parties hereto have set their hands the day and year first above written.

[*Name and Title*]

[*Name and Title*]

[*Acknowledgments*]

[Attach Schedule A]

[Attach Schedule B]



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Chapter 22 DEVELOPMENT AND SUBDIVISION
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B. DEVELOPMENT VENTURES

26-22 Current Legal Forms for Real Estate FORM 22.29

FORM 22.29 Joint venture between two corporations--acquisition of land and buildings--additional capital to be furnished by one venturer

COMMENT

The participants in this joint venture are two corporations. A singular feature of this agreement is the obligation of one of the venturers to make or arrange all loans required by the venture. In consideration for this, special protections are provided for the potential creditor, including a special termination provision. The venture is to continue at least until all of its properties are sold or until a specified date, whichever is earlier. If the venture is in operation and has not repaid its loans by the termination date, the lending venturer may elect either (1) an immediate termination of the venture, the sale of assets, and the payment of outstanding debts, or (2) a continuation of the venture from year to year until the repayment of its loans. Capital contributions of the venturers are not to be returned until debts are satisfied, and upon final dissolution each venturer is to bear equally the cost of repaying outstanding debts in excess of the proceeds from the sale of assets.

For additional forms relating to joint ventures and joint ownership, see Chapter 2, Joint Ventures and Business Trusts, in Volume 2, and Chapter 20, Real Estate Entities, in Volume 24, *supra*.

FORM

THIS AGREEMENT made and entered into _____[month] _____[day],
_____[year], by and between JAMES, INC., a(n) _____[state] corporation
("James"), and REALTY CORP., a(n) _____[state] corporation ("Realty").

WHEREAS, The parties have agreed to form a joint venture for the purpose of acquiring and owning, as an investment, certain property located in _____[County] County, _____[State], consisting of

approximately _____ [*number of acres*] acres of land and certain buildings and other improvements thereon (the "Property").

WHEREAS, the Property is described in and forms the subject matter of an Agreement for Sale and Purchase of Real Property, dated _____ [*month*] _____ [*day*], _____ [*year*], entered into by James, as buyer, and as nominee for the joint venture.

NOW, THEREFORE IT IS HEREBY AGREED AS FOLLOWS:

1. Formation of Joint Venture. The parties hereby form a joint venture upon the terms and conditions herein set forth (the "Venture").
2. Name of Venture. The name of the Venture shall be the ArrowVenture.
3. Purpose of Venture. The purpose of the Venture shall be to acquire, own, operate, maintain, and lease the Property as an investment.
4. Initial Capital. The initial capital of the Venture shall be _____ Dollars (\$ _____) to be contributed by the parties in equal shares. An individual capital account shall be maintained for each party to the Venture, and no interest shall be paid or shall accrue on the capital account of either party.
5. Percentages of Interest. The respective interests of the parties in and to the Venture, and in and to the net profits and losses shall be as follows:

James	50%
Realty	50%
6. Loans to Venture. Arnold shall lend or cause to be lent to the Venture all additional funds necessary or required in connection with the acquisition, ownership, operation, maintenance, and leasing of the Property, as and when required. (Each of such loans is herein referred to as a "Venture Loan" and all of such loans are herein collectively referred to as "Venture Loans.") Simultaneously with the making of each such loan to the Venture, the Venture shall execute and deliver to James or to the entity making such loan a promissory note in the principal amount of the loan, payable to the order of the entity making such loan. Each of the notes shall be in the form and contain the provisions of the form of note attached hereto, marked Exhibit A, and made a part hereof.
7. Title to Property. The title to the Property shall be acquired and held in the name of the Joint Venture. The Venture will file a fictitious name certificate with the _____ [*County*] County Recorder's Office indicating that James and Realty are "doing business" in the name of the Joint Venture. The parties may from time to time, jointly designate other persons and entities to act as nominee for the Venture.
8. Assignment. The respective interests of the parties in the Venture shall not be transferred or assigned in whole or in part.
9. Books of Account. Accurate books and accounts shall be kept by the Venture, showing all of its assets, liabilities, operations, transactions, and financial condition. Arnold shall keep or cause to be kept such books and accounts. As soon as practicable after the end of each fiscal year of the Venture (but in no event later than _____ [*number of days*] days after the end of such fiscal year), a general accounting and audit shall be taken and made by certified public accountants, covering the assets, properties, liabilities, and net worth of the Venture, and its transactions and operations during the preceding fiscal year. All matters and things customarily included in such

accounts and audits, and a full detailed statement shall be furnished to each party to the Venture, showing such assets, properties, and net worth and the profits and losses of the Venture, for the preceding fiscal year. Each party to the Venture shall have the right to object to such statement by giving written notice to the other party within sixty (60) days after such statement is received, setting forth in reasonable detail the objections of such party and the basis for such objections. If either party shall fail to give notice within the 60-day period, such statement and the contents thereof shall be deemed conclusive and binding upon the party so failing to give written notice. Each party to the Venture shall have the right to examine, at any and all reasonable times, its books, records, and accounts. The fiscal year of the Venture shall end on December 31 of each year.

10. Repayment of Venture Loans. All receipts, income, and proceeds of and from the Property and the Venture, except funds required for the operation and maintenance of the Property, shall be paid by the Venture in repayment of the Venture Loans. So long as any part of the Venture Loans shall remain unpaid, Realty shall not be entitled to any distributions or loans from the Venture, except with the express written consent of James.

11. Term of Venture. This venture shall continue until all of the Property shall have been sold or otherwise disposed of or until _____[month] _____[day], _____[year], whichever is sooner, unless sooner terminated by mutual agreement in writing of both of the parties. If, by _____[month] _____[day], _____[year], all of the Venture Loans shall not have been fully repaid by the Venture, James shall have the exclusive right to exercise either of the following options within thirty (30) days thereafter:

(a) To require the termination and dissolution of the Venture. Within ninety (90) days after any exercise of such option, all of the Venture's then noncash assets shall be sold for cash at the highest cash prices then available. If after such sale the cash assets shall not be sufficient to pay all of the Venture's liabilities, James and Realty shall each contribute, as capital contributions, one half of the aggregate cash amount required to pay and discharge in full all of such liabilities. The Venture shall thereupon fully pay all of its liabilities, including without limitation all unpaid amounts on the Venture Loans. All remaining assets of the Venture shall be distributed as provided in Paragraph 12; or

(b) To continue the Venture from fiscal year to fiscal year until such time as the Venture shall have fully repaid all of the Venture Loans. If James shall exercise the option provided for in this subparagraph (b) to continue the Venture, the maturity date of all then unpaid Venture Loans shall be deemed extended to the end of such fiscal year.

12. Distribution Upon Dissolution. Upon the dissolution of the Venture, the assets of the Venture, after full payment of all liabilities, including the repayment of all Venture Loans, shall be distributed to the parties as follows: first, in discharge and to return the respective capital contributions of the parties, and second, in proportion to the respective rights of the parties to share net profits and losses of the Venture, as set forth in Paragraph 5. In the event the assets of the Venture are insufficient to return to the parties all or any part of their respective capital contributions (including the contributions made under the provisions of subparagraph (a) of Paragraph 11), neither party shall have any claim or recourse against the other therefor. In the event that upon such dissolution the assets of the Venture are insufficient to pay and discharge all of its obligations and liabilities (including without limitations all of the obligations of the Venture under the Venture Loans), each of the parties shall forthwith contribute as capital contributions one half of the aggregate amount required to pay and discharge in full all of such obligations and liabilities.

13. Compensation. No salary, fees, commissions, or other compensation shall be paid by the Venture to either party or to any of the officers or employees of either party, for any services rendered to the Venture, or in connection with any of its business or property, except as may be expressly agreed to in writing by both of the parties.

14. Management. All questions relating to activities and operations of the Venture, and all questions relating to the sale or other disposition of its property, shall be determined by mutual agreement of the parties.

15. Notice. All notices and demands hereunder shall be in writing, and shall be deemed to have been given and received forty-eight (48) hours after the same shall have been deposited in the United States Registered or Certified Mail, postage prepaid, addressed to the parties hereto as follows:

To James: _____

To Realty: _____

James and Realty shall each have the right by notice in writing given to the other pursuant to the provisions of this Paragraph 15 to change, from time to time, the respective addresses at which such notices hereunder shall be given.

16. Office. The principal office of the Venture shall be at _____[address], _____[city], _____[state].

17. Governing Law. This agreement and the Joint Venture created hereunder shall be construed in accordance with and governed by the laws of the State of _____[state].

18. Grace Periods. The parties shall be deemed to have the following grace periods with respect to defaults in their respective obligations hereunder:

(a) With respect to any default in any other obligation to pay any sum of money, there shall be a grace period of ten days after written notice of such default.

(b) With respect to any default in any other obligation, there shall be a grace period of thirty (30) days after written notice of such default; provided, however, that (1) if such default cannot with due diligence and in good faith be cured within such thirty (30) days, and (2) if the defaulting party forthwith upon notice of such default commences and proceeds with due diligence and good faith to cure such default, the grace period with respect to such default shall be extended for only such period as may be necessary for the curing of such default with due diligence and in good faith.

19. Entire Agreement. This agreement supersedes all agreements previously made between the parties relating to its subject matter. There are no other understandings or agreements between them.

20. Non-waiver. No delay or failure by either party to exercise any right under this agreement, and no partial or single exercise of that right, shall constitute a waiver of that or any other right, unless otherwise expressly provided herein.

21. Headings. Headings in this agreement are for convenience only and shall not be used to interpret or construe its provisions.

22. Counterparts. This agreement may be executed in two or more counterparts, each of which shall be deemed an original but all of which together shall constitute one and the same instrument.

23. Binding Effect. Except as herein otherwise provided, the terms and conditions of this agreement shall be binding upon, and inure to the benefit of, both parties and their respective successors and assigns.

The parties hereto have executed this Joint Venture Agreement the day and year first above written.

JAMES, INC.

By _____

[name and title]

REALTY CORP.

By _____

[name and title]



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26-22 Current Legal Forms for Real Estate FORM 22.30

FORM 22.30 Joint venture for property development--funds and financing by one party--development by other party

COMMENT

The division of functions between joint venturers is shown in this Property development arrangement. Here one of the parties agrees to lend the joint venture the money needed to carry out the project, in excess of the initial capital contributed equally by the coventurers. The other party agrees to formulate and execute the development program. The list of duties assumed by the developing coventurer is indicative of the broad range of activities involved from the inception to the completion of the project.

Developer's obligations and expenses.

The developer's responsibilities (Paragraph 6 of the agreement) include: (1) the preparation of an economic analysis to determine the nature and extent of housing and commercial facilities; (2) the formulation of Property use plans and environmental impact statements; (3) the development of police, fire, and utility services; (4) the supervision of construction; and (5) the promotion and sale of improved lots. Plans concerning the proposed development, its estimated cost, and its sales programs are to be approved by the lending venturer (Paragraph 7). The work performed by the developing venturer is to be charged to the joint venture at cost without compensation for office overhead or profit (Paragraphs 6 and 16). Actual direct costs of construction are to be expenses of the venture.

For additional forms relating to joint ventures and joint ownership, see Chapter 2, Joint Ventures and Business Trusts, in Volume 2, and Chapter 20, Real Estate Entities, in Volume 24, *supra*.

FORM

AGREEMENT made and entered into _____[*date*] by and between MONEY MAN, INC., a(n) _____[*state*] corporation ("Money"), and DEVELOPER CONSTRUCTION CORP., a(n) _____[*state*] corporation ("Developer").

Recitals

The parties have agreed to form a Joint Venture for the purpose of acquiring and developing certain property, "Sunset Property," located in _____[*County*] County, _____[*State*], consisting of approximately 1,200 acres of land and certain personal property.

The Sunset Property is described in and is the subject matter of a Purchase Agreement dated _____[*date*] between Money, entered into by Money as nominee for this Joint Venture as Buyer and _____[*insert name of Seller*] a Seller (the "Purchase Agreement").

This agreement is also made for the purpose of owning, maintaining, operating, leasing, developing, and selling the Sunset Property.

Now, therefore, it is agreed as follows:

1. *Formation of joint venture.* The parties hereto hereby form a Joint Venture (the "Venture"), upon the terms and conditions herein set forth.

2. *Name of venture.* The name of the Venture shall be the Sunset Venture.

3. *Purpose of venture.* The purpose of the Venture shall be to acquire, own, operate, maintain, lease, develop, and sell the Sunset Property, and to engage in such operations and business as may be determined necessary or appropriate to these purposes. Money (as nominee for and on behalf of the Venture) shall consummate the purchase of the Sunset Property pursuant to the Purchase Agreement dated _____[*date*].

4. *Initial capital.* The initial capital of the Venture shall be _____ Dollars (\$_____) to be contributed by the parties in equal shares which shall constitute the capital of the Venture. An individual capital account shall be maintained for each party to the Venture and no interest shall be paid or shall accrue on the capital account of any party to the Venture.

5. *Interests in venture.* The respective interests of the parties as members of the Venture, in and to the Venture, and in and to the net profits and losses of the Venture, shall be as follows:

Money 50%

Developer 50%

6. *General development program.* Subject to the specific development plans of Paragraph 7, the management and operation of the affairs, activities, and business of the Venture in connection with the development and sale of the residential lots and the commercial development shall be in Developer. Developer will (at Developer's actual direct cost, without any allowance for main office overhead or profit) do, accomplish, and complete, or cause to be done, accomplished, and completed for and on behalf of the Venture with reasonable diligence all of the following with respect to the Sunset Property:

- (a) The development of an overall Property development program plus a detailed budget and cash flow estimate.
- (b) Land use, master plan and environmental impact studies for the entire project.
- (c) Economic studies of the trade area determining the nature and extent of the housing and commercial market requirements, price brackets, and the like.
- (d) Master plan, detailing residential, commercial, recreational, and service areas for the entire project.
- (e) Negotiations with municipal and public utility bodies for the proper servicing of the project with police, fire, and utility services.
- (f) The performance of all construction work, including the furnishing of all labor, materials, and equipment, necessary to accomplish finished residential and commercial lot development, including grading, leveling, installation of utility trunk lines, streets, curbs, gutters, and other on-site and off-site improvements.
- (g) The sale of improved residential lots, including formulation of advertising and other promotional activities, through television, radio, and other media.
- (h) The formulation and implementation of the commercial development program, including shopping centers, designation of proper areas, planning of commercial development, attraction of commercial tenants, negotiation of leases, construction of facilities, and management of completed improvements.
- (i) A master plan detailing residential, commercial, recreational, and service areas for each unit to be developed in the project.
- (j) The development of an estimated operating statement of profit and loss for each unit to be developed, and estimated costs and income, and cash flow for each unit.

In addition Developer shall furnish Money periodically, but not less than monthly, written reports, disclosing in reasonable detail the status and progress of the Sunset Property and its development, including without limitation receipts and disbursements, sales, rentals, status of development, construction costs, schedules and current financial requirements. Together with each report, all net receipts and income not then required for the development of the Sunset Property shall be paid by Developer to the Venture.

7. *Specific development plans.* It is contemplated that the residential lots will be developed in phases of not less than 100 lots, and that the commercial area will be developed either in portions or as a whole. Prior to proceeding with the development of any such unit of residential lots or with the development of the commercial property or any portion thereof, Developer shall submit to Money, in reasonable detail, the following:

- (a) Plans and specifications with respect to the proposed development of the unit of residential lots, or of the commercial property.
- (b) Estimated costs of the development of the residential unit or of the commercial property, together with budget or budgets and cash flow estimates with respect to it.
- (c) Proposed sales program with respect to the residential unit or proposed lease program with respect to the commercial development.

(d) Such other relevant data with respect to the residential unit or commercial development as may be then reasonably available.

Within a reasonable period, not to exceed _____ [number of days] days, after the above data and matters have been submitted by Developer to Money, Money and Developer will meet and determine whether or not to proceed with the proposed development. Money shall not unreasonably refuse to approve a development plan or other items required to be submitted by Developer. If the parties agree to proceed with the development, Developer will construct and complete the development and the sale of the residential unit or the lease of the commercial property, with reasonable diligence, pursuant to and in accordance with the plans, specifications, development program, and sale or lease program, approved by the parties. Developer shall have authority to construct and complete the development of residential unit or the commercial property pursuant to and in compliance with the mutually approved plans, specifications, budgets, and program. The refusal or failure of either Money or Developer to approve any proposed development of any unit of residential lots or of commercial property shall not affect or limit in any manner or to any extent any of Developer's or of Money's obligations or liabilities under this agreement or under any other agreements or instruments implementing or relating to this agreement or its subject matter.

8. *Loans to venture.* Money shall loan or cause to be loaned to the Venture all funds necessary or required in connection with the acquisition (including all mortgage payments and interest), ownership, operation, maintenance, leasing, development, and sale of the Sunset Property, as and when required and in substantial conformance with the cash flow estimates (the "Money Venture Loan" or the "Money Venture Loans"). Simultaneously with the making of each such loan to the Venture, the Venture shall execute or deliver to Money or to the entity making the loan a Note in the principal amount of the loan, payable to the order of the lender, in the form and containing the provisions of the form of Note attached and marked Exhibit A.

9. *Title to property of venture.* The Sunset Property and all other property of any kind which shall be owned, held, operated, or developed by the Venture shall be owned, held, operated, or developed in the name of the person or entity designated by the parties, as nominee solely for the benefit of the Venture pursuant to the terms, conditions, and provisions of this agreement.

The parties agree to hold the nominee harmless against any liability which may be imposed on the nominee for remediation of any adverse environmental condition existing upon any properties of the venture, where such remediation is required by federal, state or local law or regulation.

10. *Covenant against assignment.* The respective interests in the Venture of the parties shall not be transferred or assigned in whole or in part.

11. *Accounting and fiscal year.* Accurate books and accounts shall be kept by the Venture, showing all of its assets, liabilities, operations, transactions, and financial condition. Developer shall keep or cause the books and accounts to be kept. As soon as practicable after the end of each fiscal year of the Venture (but in no event later than _____ [number of days] days after the end of the fiscal year), a general accounting and audit shall be taken and made by certified public accountants, covering the assets, properties, liabilities, and net worth of the Venture, and its dealings, transactions, and operations during the preceding fiscal year, and all matters and things customarily included in such accounts and audits, and a full and detailed statement shall be furnished to each party to the Venture, showing the assets, properties, and net worth and the profits and losses of the Venture, for the preceding fiscal year. Each party shall have the right to object to the statement by giving written notice to the other party within sixty (60) days after receipt, setting forth in reasonable detail the objections and the basis for the objections. If either party shall fail to give notice within the 60-day period, the statement and its contents shall be deemed conclusive and binding upon the party failing to give written notice. Each party to the Venture shall have the right and power to examine and inspect, at any and all reasonable times, the books, records, and accounts of the Venture. The fiscal year of the Venture shall end on December 31 of each year.

12. *Repayment of loans made to venture.* All receipts, income, profits, and proceeds of and from the Sunset Property and the Venture, except funds then required for the development or sale of the Sunset Property and (except for the loans which the Venture shall then be required to make to Developer as provided in Paragraph 13), shall, as and when received by the Venture, be paid by the Venture in repayment of the Money Venture Loans.

13. *Tax loans to one joint venturer.* So long as any part of the Money Venture Loans shall remain unpaid, Developer shall not be entitled to any distributions or loans from the Venture, except loans as follows: As and when required by Developer for actual payment by Developer of federal and state taxes on or measured by net income, the Venture shall loan to Developer a sum equal to: (a) the net amount of the taxes which Developer shall then be required to pay on account of its share of the distributable taxable income of the Venture, less (b) the aggregate amount of all tax benefits previously realized by Developer from or on account of the Venture, including, without limitation, deductions on account of such items as losses, plus (c) the aggregate amount of such taxes previously actually paid by Developer on account of its share of the distributable taxable income of the Venture, less (d) the aggregate amount of all loans previously made by the Venture to Developer for the payment of such taxes under the provisions of this paragraph. In no event shall the amount of the loan to Developer exceed the net amount of the taxes which Developer shall then be required to pay on account of its share of the distributable taxable income of the Venture (the "Developer Tax Loan" or the "Developer Tax Loans"). Simultaneously with the making of each Developer Tax Loan by the Venture to Developer, Developer shall execute and deliver to the Venture a Note in the amount of the loan, in the form and containing the provisions of the form attached and marked Exhibit B.

14. *Term of venture.* This Venture shall continue until all of the Sunset Property acquired by the Venture is developed and sold or otherwise disposed of or until _____[date], if sooner, unless sooner terminated in writing of both of the parties. In the event development of the Sunset Property is delayed by any of the events listed in the next sentence, then the _____[date] date shall be deemed extended for a period equal to the time during which such event shall occur and continue but in no event later than _____[extended date] (the "Extended Date"). The events referred to and provided for in the preceding sentence are: strikes, lockouts, work stoppages, war, riot, insurrections, civil commotions, fire, flood, earthquake, act of God, or other causes beyond the control of Developer.

15. *Option to terminate or continue venture.* If prior to _____[date] or the Extended Date, all of the Money Venture Loans have not been fully repaid by the Venture, or if on or prior to _____[date] or the Extended Date, all of the Developer Tax Loans have not been fully repaid to the Venture, then in either event (in addition to all rights under the Notes), Money may exercise either of the following two options, which options shall be exercised by Money within thirty (30) days after _____[date] or the Extended Date:

(a) Money shall have the right and option to require the termination and dissolution of the Venture. Upon Money exercising the option for termination and dissolution of the Venture, then within ninety (90) days after the exercise by Money, all of the then noncash assets of the Venture shall be sold for cash at the highest cash prices then available. If after the sale of all of the noncash assets, or ninety (90) days after the exercise by Money, if sooner, the cash assets of the Venture shall be insufficient to pay and discharge all of the liabilities of the Venture, including without limitation, all of the then unpaid amount of the Money Venture Loans, Money and Developer each shall forthwith contribute, as capital contributions to the Venture, one-half of the aggregate cash amount required by the Venture to pay and discharge in full in cash all of the liabilities of the Venture. The Venture shall then fully pay all of its liabilities, including, without limitation, all unpaid amounts on the Money Venture Loans. All remaining assets of the Venture, after the payment in full of all liabilities, shall be distributed as provided in subparagraph (b)(1) of this paragraph, or

(b) Money shall have the right and option to continue the Venture from fiscal year to fiscal year until such time as the Venture shall have fully repaid all of the Money Venture Loans. If Money shall exercise the option to continue the Venture, the maturity date of all then unpaid Money Venture Loans shall be deemed extended to the end of the fiscal

year.

(1) Upon the dissolution of the Venture, the assets of the Venture, after full payment of all liabilities, including the repayment of all Money Venture Loans, shall be distributed to the parties as follows: first, in discharge and to return the respective capital contributions of the parties, and second, in proportion to the respective rights of the parties to share net profits and losses of the Venture.

(2) If the assets of the Venture are insufficient to return to the parties all or any part of their respective capital contributions, including the contributions made by the parties under the provisions of subparagraph (a) of this paragraph, neither party shall have any claim or recourse against the other therefor. In the event that upon dissolution the assets of the Venture are insufficient to pay and discharge all obligations and liabilities of the Venture (including the obligations under the Money Venture Loans), each of the parties shall forthwith contribute as capital contributions to the Venture one half of the aggregate amount required by the Venture to pay and discharge in full in cash all of such obligations and liabilities of the Venture.

16. *Salaries and fees.* No salary, fees, commissions, or other compensation shall be paid by the Venture to either party or to any of the officers or employees of any party, for any services rendered to the Venture, or in connection with any of its business or property, except as may be expressly agreed to in writing by both of the parties to the Venture.

17. *Large sales.* All questions concerning the sale of more than 100 acres of residential property in any one transaction, or the sale of the commercial acreage shall be determined by mutual agreement of the parties to the Venture.

18. *Notices.* Any notices and demands under this agreement shall be in writing, and shall be deemed given and received 48 hours after deposited with the United States Postal Service, registered or certified mail, postage prepaid, addressed to the parties as follows:

To Money: _____

To Developer: _____

Developer and Money shall each have the right by notice in writing given to the other pursuant to the provisions of this paragraph to change, from time to time, the respective addresses at which notices or demands shall be given.

19. *Office of Venture.* The principal office of the Venture shall be at _____[address],
_____ [city], _____ [state] _____ [zip code].

20. *Applicable law.* The Venture shall be governed by the laws of the State of _____ [state].

21. *Grace periods.* The parties shall have the grace periods below with respect to defaults in their respective obligations:

(a) With respect to any default in any obligations under this agreement to pay any sums of money, there shall be a grace period of ten days after written notice of default.

(b) With respect to any default in any other obligations under this agreement, there shall be a grace period of thirty (30) days after written notice of default; provided, however, that (1) if the default cannot with due diligence and in good faith be cured within thirty (30) days, and (2) if the defaulting party forthwith upon notice of default commences and

proceeds with due diligence and good faith to cure the default and thereafter to complete the full cure of the default with due diligence and in good faith, the grace period with respect to such default shall be extended for only such period as may be necessary for the curing of such default with due diligence and in good faith.

22. *Binding effect.* The terms and conditions of this agreement shall be binding upon, and inure to the benefit of, the parties hereto and their respective successors and (except as herein otherwise provided) assigns.

The parties have executed this Joint Venture Agreement the day and year first above written.

MONEY MAN, INC.

By: _____

[name, title]

DEVELOPER CONSTRUCTION CORP.

By: _____

[name, title] _____

[Attach Exhibit A]

[Attach Exhibit B]



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FORM 22.31 Joint venture for Property development--finances by one party--development by other party

COMMENT

In this form a construction corporation and an investing corporation combine in a joint venture to purchase acreage for development. The areas of responsibility assigned to each venturer follow a pattern in which one venturer is to provide the necessary funds, while the other is to arrange for the construction of the improvements.

Funds and financing.

Since funds will be required to purchase the Property to be developed, a significant contribution to initial capital is to be made by the investing venturer. Additional funds are first to be obtained through nonrecourse loans secured by the property, upon which neither coventurer will be individually liable. Any additional financing is to be arranged by the investing venturer, either by direct interest bearing loans to the venture or by guaranteeing outside loans for which it will receive a guarantor's premium. The investing venturer is to handle all other financial matters, including bookkeeping, purchasing, insurance, and banking.

Development and construction.

Responsibilities of the developing venturer include the formulation of a master development plan, the securing of governmental permits, the demolition of existing buildings, the installation of utilities, the construction and completion of improvements, and the lease or sale of the improved property.

For additional forms relating to joint ventures and joint ownership, see Chapter 2, Joint Ventures and Business Trusts, in Volume 2, and Chapter 20, Real Estate Entities, in Volume 24, *supra*.

FORM

AGREEMENT made by Global Realty Corp., a(n) _____ [state] corporation having its principal office at _____ [address], _____ [city], _____ [state] _____ [zip code] ("Global"), and MICRO CONSTRUCTION COMPANY, a(n) _____ [state] corporation having an office at _____ [address], _____ [city], _____ [state] _____ [zip code] ("Micro").

Global and Micro hereby enter into a joint venture upon the following terms and conditions:

1. *Name.* The name of the joint venture is Fox Run.

2. *Capital.* The capital of the joint venture, to be contributed by Global, shall consist of _____ Dollars (\$ _____) which shall be paid in as required. It is intended that funds required for the purposes of the joint venture, in addition to those for which commitments have been entered into prior to the closing, shall, to the extent reasonably possible, be supplied by loans from institutional lenders without personal liability on either Global or Micro and from retained earnings. To the extent that such funds are not reasonably available from those sources, Global shall either lend such funds to the joint venture at _____ percent (_____ %) interest and upon terms which are mutually satisfactory to Global and Micro, or shall guarantee loans by third parties to the joint venture and be entitled to guarantor's premium of the excess, if any, of percent over the interest rate on such loans. No loans to the joint venture, whether by Global or others, shall impose any personal liability on either Global or Micro unless expressly assumed.

3. *Purposes.* The purposes of the joint venture are:

(a) To purchase or otherwise acquire the property consisting of approximately 800 acres located in _____ [city], _____ [state], which is presently owned by Fox Run Corporation ("Fox Run Property").

(b) To develop and improve the Fox Run Property.

(c) To operate, maintain, lease, sell, or otherwise dispose of the Fox Run Property, in whole or in part, and the improvements made thereon.

(d) To carry on any other activities necessary or incidental to the foregoing purposes, including the establishment of offices and the employment of personnel.

The joint venture shall not engage in any other business or activity without the written consent of Global and Micro.

4. *Responsibilities of Micro.* Micro shall be responsible for:

(a) The preparation of a master plan for the development of and improvements to the Fox Run Property, including the selection, subject to Global's prior written approval, of architects and engineers for this purpose.

(b) The preparation for development of the Fox Run Property including (1) the securing of all necessary governmental permits, (2) the demolition of any buildings presently on the Fox Run Property, and (3) the construction of roads and installation of utilities.

(c) The design, preparation of plans and specifications, construction, and completion of developments and improvements in accordance with green building standards which are required by local ordinance or as appropriate for the development agreed upon, to those portions of the Fox Run Property which Global and Micro mutually agree to develop and improve.

(d) The operation, maintenance, leasing, sale, or other disposition of the Fox Run Property, in whole or in part, and the improvements made thereon.

(e) The preparation of an environmental site assessment and the supervision of the remediation of any adverse environmental condition which may be found, including, but not limited to: removal of underground storage tanks, removal of contaminated soils, and removal of hazardous substances and materials, as is needed to comply with applicable federal, state and local laws and regulations.

5. *Responsibilities of Global.* Global shall be responsible for:

(a) All financial matters involved in carrying on the business of the joint venture, including the negotiation of loans, maintenance of bank accounts, and payment of all obligations and expenses of the joint venture.

(b) Keeping all books and records and undertaking all accounting services.

(c) All purchasing by the joint venture.

(d) The insurance of the joint venture and its properties. The Fox Run Property and its improvements and all other tangible property of the joint venture shall be insured against fire, wind-storm, and other risks protected by extended coverage of the kind usually carried for comparable properties in the general vicinity of the Fox Run Property. The joint venture shall be insured against liability arising from its operations and activities, to the extent and of the kinds of insurance coverage normally carried for similar operations. All insurance shall be placed with responsible insurance companies and in the amounts determined by Global and Micro.

6. *Management representatives.* For convenience of operation, Global and Micro shall each designate management representatives to carry out the decisions of their principals and to serve as the channels of communication for disseminating information to and securing necessary action by their principals.

7. *Reimbursements.* The joint venture shall reimburse Micro and Global for all costs and expenses incurred by each in performing its duties pursuant to Paragraphs 4 and 5, including all allocation of compensation of employees performing substantial services for the joint venture, but not including any part of the compensation of management personnel (including management representatives) of either Micro or Global. The reimbursement of costs and expenses incurred by Micro and Global prior to closing on the Fox Run Property shall include interest at _____ percent (_____%) per annum.

8. *Limitations.* The performance by Micro and Global of their responsibilities under Paragraphs 4 and 5 shall be subject to the following limitations:

(a) The plans and specifications referred to in Paragraph 4 for the development of and improvements to the Fox Run Property, in whole or in part, shall be approved in writing by Global before any commitment is made by the joint venture with respect to them.

(b) No part of the Fox Run Property and its improvements and no other property or assets of the joint venture may be leased, sold, or otherwise disposed of without the prior written consent of both Global and Micro.

(c) No steps shall be taken by Micro which may result in a substantial change in the operation or policies of the joint venture without the prior written consent of Global.

(d) The office manager or other person in charge of the activities of the joint venture shall be selected by Micro, but if he or any successor is not satisfactory to Global, he shall, at Global's written request, be replaced by Micro.

(e) Micro shall only receive renting and management agent fees with respect to the Fox Run Property or parts thereof as shall be agreed to in writing by Global and Micro.

(f) No financing shall be committed by Global without the prior written consent of Micro as to the terms of the financing commitment.

(g) No purchase commitment exceeding

_____ Dollars (\$

_____) shall be made by Global without the prior written consent of Micro.

(h) The joint venture shall not mortgage, pledge, create a security interest in, encumber, or otherwise subject to any lien any property or assets owned or used by the joint venture or confess any judgment against the joint venture without the prior written consent of Global and Micro.

(i) No legal action shall be commenced to enforce the rights of the joint venture without the prior written approval of Global and Micro.

9. *Books and records.* There shall be kept for the joint venture accounts and complete books and records, on the accrual basis, in accordance with generally accepted accounting principles (which shall not be changed without mutual consent), showing all costs, expenditures, sales, receipts, assets, and liabilities, and profits and losses, and all other records necessary, convenient or incidental to recording the joint venture's business and affairs and sufficient to record the division of profits or losses as provided for in Paragraphs 14 and 15.

10. *Fiscal year.* The fiscal year of the joint venture shall be the calendar year.

11. *Reports.* Promptly, after the end of each month, there shall be prepared and delivered to each party a statement showing the results of operations during such month and for the year to date and a balance sheet. Promptly, after the end of each fiscal year, there shall be prepared a balance sheet showing the assets and liabilities of the joint venture at the close of the year and a statement of income showing the results of operations for the year. The joint venture shall have an audit of its books made immediately after the close of each year by a nationally recognized firm of public accountants mutually agreed to from year to year. On or before February 1, following the close of each year, the joint venture shall furnish each party copies of the annual balance sheet and statement of income, together with the certificate of the public accountants covering the results of the annual audit.

12. *Bank accounts.* All moneys of the joint venture shall be deposited in the joint venture's account in banks selected by Global. Withdrawals from bank accounts shall be made by signatures only of such person or persons as shall be authorized by Global.

13. *Accounting decisions.* All decisions as to accounting principles, whether for book or tax purposes (and such decisions may be different for each such purpose), shall be made by Global, including all elections to be made by or for the joint venture under the provisions of the Internal Revenue Code or under any superseding Revenue Code or federal income tax legislation.

14. *Division of profits and losses.* (a) As used in this paragraph, the following definitions shall apply:

(1) "Capital" is defined as the amounts contributed as capital by Global under Paragraph 2.

(2) "

_____ [percentage] percent annual return" is defined as

_____ [percentage] percent of the daily average of the capital remaining in the joint venture during the year.

(3) "Cumulative

_____ [percentage] percent annual return" is defined as the sum from the beginning of the joint venture of all of the

_____ [percentage] percent annual returns.

(4) "Cumulative tax profit" or "cumulative tax loss" is defined as the sum from the beginning of the joint venture of all of its annual tax profits and annual tax losses as reported in its annual United States income tax returns, adjusted to reflect any changes resulting from Internal Revenue Service audits which the parties have mutually accepted or with respect to which a final determination has been made.

(b) The current year's tax profit shall be shared as follows:

(1) Up to the amount of any cumulative tax loss at the beginning of the year previously shared two-thirds by Global and one-third by Micro, the current year's tax profit shall be shared two-thirds by Global and one-third by Micro.

(2) Up to the amount of any remaining cumulative tax loss at the beginning of the year previously allocated entirely to Global and any unearned cumulative

_____ [percentage] percent annual return at the end of the year, the current year's tax profit shall be allocated to Global.

(3) Any balance shall be shared two-thirds by Global and one-third by Micro.

(c) The current year's tax loss shall be shared as follows:

(1) Up to the amount of any cumulative tax profit at the beginning of the year previously shared two-thirds by Global and one-third by Micro, the current year's tax loss shall be shared two-thirds by Global and one-third by Micro.

(2) Up to the amount of any remaining cumulative tax profit at the beginning of the year previously

allocated entirely to Global and all capital and loans to the joint venture on which Global is the lender, co-maker, or guarantor, remaining in the joint venture at the end of the year, the current year's tax loss shall be allocated to Global.

(3) Any balance shall be shared two-thirds by Global and one-third by Micro.

15. *Distributions.* As mutually determined by Global and Micro, any excess assets of the joint venture not needed to carry out the purposes of the joint venture (whether in the form of cash, securities, or other property, and whether arising from operations, loans on the security of assets of the venture, or proceeds from sales or other dispositions) shall first be used to repay the obligations of the joint venture on which Global or the joint venture is personally liable as Global shall determine. As mutually determined by Global and Micro, any excess assets of the joint venture not needed to carry out the purposes of the joint venture and which are not used to repay obligations of the joint venture pursuant to the preceding sentence shall be distributed in the following priority:

(a) To the extent of the previously undistributed cumulative

_____ [percentage] percent annual return, all to Global.

(b) To the extent of previously undistributed capital, all to Global.

(c) Any remaining assets shall be distributed two-thirds to Global and one-third to Micro.

Except as required in subparagraph (b) of paragraph 19, neither Global nor Micro shall be required to return to the joint venture any amounts distributed pursuant to this Paragraph 15.

16. *Events of termination.* The joint venture shall terminate upon the first to occur of the following events:

(a) Upon the expiration of

_____ (

_____) [number of years] years from the date of this agreement.

(b) Upon notice by either party if the other party shall fail to perform its obligations hereunder and such failure shall continue for a period of at least three months after written notice from the party claiming the default. The party desiring to terminate under this provision shall, after the expiration of the three-month period, give one month's written notice of its intention to terminate.

(c) Upon three months' written notice by either party that such party elects to terminate the joint venture because of the failure of the parties to agree upon any proposed action or nonaction by the joint venture resulting in the inability to carry on the business of the joint venture under normal standards of commercial reasonableness, provided that at the end of the three-month period the parties still fail to agree.

(d) Upon the sale of all of the Fox Run Property and its improvements.

(e) At the option of the other party, upon the purported assignment of rights or delegation of obligations under this agreement or upon the voluntary liquidation or dissolution of either party.

(f) At the option of either party within a reasonable time after notice that the other party shall have had

filed against it pursuant to a statute of the United States or of any state, a petition in bankruptcy or insolvency or for reorganization or for the appointment of a receiver, custodian, or trustee of all or a portion of such other party's property and within

_____ (

_____) [number of days] days thereof such other party fails to secure a discharge thereof or that such other party shall make an assignment for benefit of creditors or petition for or voluntarily enter into an arrangement, or be unable to meet its obligations as they become due.

(g) By mutual agreement of the parties.

17. *Distributions on termination.* Upon termination of the joint venture, a final audit shall be made by a mutually agreeable nationally recognized firm of public accountants and all of the property and assets of the joint venture shall be distributed as follows:

(a) All of the property and assets, if any, other than cash, shall be sold or collected and turned into cash or purchase money obligations within a period of three years from the date of such termination. Both Global and Micro shall have the right to bid on and purchase any or all of the property and assets being sold.

(b) All of the debts and obligations of the joint venture on which the joint venture is separately and personally liable or on which Global is separately and personally liable shall be paid in full.

(c) The remaining cash and other property, if any, shall be distributed to the parties as provided in Paragraph 15.

18. *Title.* Legal title to the Fox Run Property shall be held by Global as nominee of and for the benefit of the joint venture or by such other nominee or nominees as Global and Micro shall hereafter mutually designate. Global or the other nominee or nominees shall execute all deeds, leases, and other documents and instruments relating to the Fox Run Property or any part thereof as required by the joint venture, and shall not lease, sell, mortgage, pledge, create a security interest in, encumber, lien, or otherwise dispose of the same without the prior written consent of both Global and Micro.

19. *Liability.* (a) The liability of the joint venture or of Global or Micro as joint venturers arising out of any of the activities of the joint venture shall be covered by appropriate policies of insurance to be purchased by the joint venture as provided in subparagraph (d) of Paragraph 5.

(b) In the event that any liability shall not be adequately covered by insurance, the uninsured liability shall first be satisfied out of the assets of the joint venture. If the assets of the joint venture are not sufficient to fully satisfy the uninsured liability, Global and Micro shall return to the joint venture in the ratio of two-thirds by Global and one-third by Micro prior distributions made pursuant to subparagraph 15 (c) to the extent needed to satisfy such liability. Global shall, in accordance with Paragraph 2 and subparagraph 8(f), be responsible for obtaining for or furnishing to the joint venture any additional funds necessary to satisfy the balance of the uninsured liability.

(c) Global and Micro shall each be indemnified by the other and held harmless against and from all claims, demands, actions, and rights of action which shall or may arise by virtue of anything done or omitted to be done by the other (through or by agents, employees, or other representatives) outside the scope of, or in breach of the terms of this agreement provided the other shall be promptly notified of the existence of the claim, demand, action, or right of action and shall be given reasonable opportunity to participate in the defense thereof.

(d) Nothing contained in this agreement shall be construed to constitute either party the general partner of the other party or the agent of the other party other than in connection with the activities included within the scope of the joint venture nor in any manner to limit the parties in the carrying on of their other respective businesses or activities.

(e) If, on partial or complete termination of the joint venture, or at a time of any distribution to the parties, there are insufficient assets to repay any part or all of the capital contributions or the cumulative percent annual return which is then unpaid, Micro shall not be liable to Global for any deficiency in any such unpaid amounts nor shall Micro be required to make any capital contributions to the joint venture or payments to the other party in order to cover such deficiencies, it being expressly understood that Global' capital contribution is made at its sole risk.

20. *Inspection.* Each party or its authorized representatives may examine any of the books and records of the joint venture or the Fox Run Property or its improvements at any time and without notice.

21. *Integration.* This agreement is the entire agreement between the parties with respect to its subject matter hereof and supersedes all prior agreements between the parties with respect thereto. No alteration, modification, or interpretation hereof shall be binding unless in writing and signed by both parties.

22. *Interpretation.* This agreement shall be interpreted and construed in accordance with the laws of the State of _____[state]. The titles of the paragraphs have been inserted as a matter of convenience of reference only and shall not control or affect the meaning or construction of any of the terms and provisions hereof.

23. *Assignment.* Neither Global nor Micro may assign or pledge any of its right, title, or interest in this joint venture.

24. *Notices.* All notices required or permitted by this agreement shall be in writing and shall be sent by registered or certified mail addressed:

To Global: _____

To Micro: _____

or to such other address or to the attention of such other person as shall be supplied in like manner.

The parties have caused this joint venture agreement to be executed in duplicate this _____[day] day of _____[month], _____[year].

Global Realty Corp.

By: _____

[name and title]

Micro Construction Company

By: _____

[name and title]



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Current Legal Forms for Real Estate

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Current Legal Forms for Real Estate
 Chapter 22 DEVELOPMENT AND SUBDIVISION
 Part IV. FORMS
 B. DEVELOPMENT VENTURES

26-22 Current Legal Forms for Real Estate FORM 22.32

FORM 22.32 Pre--incorporation Agreement

COMMENT

This agreement illustrates the basic terms in a program to organize a corporation which is to take over a contract with a redevelopment agency in an urban renewal area. The organizers consist of a builder, a developer, and a financial organization. A major portion of the corporation's financing is to be arranged through the financial organization. While each incorporator is to make an investment in the corporation, the financial organization agrees to lend a substantial additional sum to the corporation. In addition, it is to arrange for a commitment which will be the source of a major portion of the cash required for construction.

For additional forms relating to corporations, see Chapter 15, Shareholders' Agreements, in Volume 18, and Chapter 20, Real Estate Entities, in Volume 24, *supra*.

FORM

AGREEMENT made this _____ [day] day of _____ [month],
 _____ [year], among Jumbo Corp., a(n) _____ [state] corporation, with offices at
 _____ [address], _____ [city], _____ [state] _____ [zip
 code] ("Jumbo"), Harold Jamison, of _____ [address], _____ [city],
 _____ [state] _____ [zip code] ("Jamison"), and James Bindel, of
 _____ [address], _____ [city], _____ [state] _____ [zip
 code] ("Bindel").

Recitals

The parties (the "Shareholders") wish to form an S corporation to engage in the acquisition and construction of real property in the City of _____ [city], State of _____ [state] (the "Corporation"); and

There is presently outstanding, a contract (the "redevelopment contract"), between the Redevelopment Agency of the City of _____ [city], a public body organized and appointed under the provisions of the General Statutes of _____ [organization] (the "Agency"), with United Development Corp., or its nominee ("United"); and

The Shareholders wish that the Corporation to be formed acquire the redevelopment contract from United and perform the terms thereof; and

Jamison is experienced in the real estate construction field and Bindel has had extensive experience in the urban redevelopment field; and

The Corporation will commence business with the sum of _____ Dollars (\$ _____) as working capital; and

The parties wish to obtain a letter of credit of _____ Dollars (\$ _____) in addition to the working funds of _____ Dollars (\$ _____);

Now, therefore, it is agreed as follows:

1. *Formation of corporation.* The shareholders shall organize a corporation (the "Corporation"), under the laws of the State of _____ [state] upon such authorized capitalization as may be mutually agreeable, but with shares all of one class, and all of whose shareholders shall have equal rights with respect to earnings, dissolution, or distributions of property, subject only to the pro rata interest of the shares owned. The Code of Regulations attached hereto will be adopted by the Corporation as soon as practicable after its formation. Further, the parties agree to execute and deliver the Close Corporation Agreement attached hereto as soon as reasonably practicable after the issuance of the shares of the Corporation.

2. *Name of corporation.* The name of the Corporation shall be _____ [name of corporation], or in the event that name is not readily available, then such other name as may be mutually agreeable to the parties.

3. *Acquisition of contract.* The Shareholders, individually and collectively, shall use their best efforts to obtain the assignment to the Corporation of the redevelopment contract.

4. *Contributions and loans.* (a) Each of the Shareholders shall contribute to the Corporation the sum of _____ Dollars (\$ _____), to be comprised of debt and equity in such proportion as shall be mutually agreeable. That portion which shall be debt shall be repayable only upon the completion of the redevelopment contract and shall bear interest at the rate of _____ percent (_____ %) per annum payable quarterly.

(b) Jumbo shall, upon the transfer of the redevelopment contract to the Corporation, lend the Corporation the sum of _____ Dollars (\$ _____), which shall bear interest at the rate of _____ percent (_____ %) per annum payable quarterly and which shall be repayable as the proceeds of permanent mortgages are available to the Corporation.

(c) Each of the Shareholders shall lend the Corporation an additional sum of _____ Dollars (\$ _____) repayable with interest in the manner provided in subparagraph (b) of this paragraph or,

alternatively, shall each execute such guarantees of corporate obligations up to _____ Dollars (\$ _____) as will permit the Corporation to borrow a total sum of _____ Dollars (\$ _____).

5. *Outside loans.* Jumbo shall use its best efforts to obtain a letter of commitment in the sum of not less than _____ Dollars (\$ _____) from recognized lending institutions. Jamison and Bindel shall each guarantee the sum of _____ Dollars (\$ _____) of the letter of credit, which shall be at the usual interest rates and contain terms and conditions normally consistent with this transaction.

6. *Directors.* The Board of Directors of the Corporation shall consist of either three members, or such larger number as is divisible by three, and each of the Shareholders shall nominate its designee or designees so that each shareholder shall be equally represented on such Board of Directors. Each party shall vote for the nominee of the other Shareholders so long as the share ownership of the Shareholders continues. All actions by the Board of Directors shall be taken only at a meeting duly called on at least five (5) days prior written notice, unless notice is waived in writing by the members of the Board of Directors.

7. *Officers.* The officers of the Corporation shall consist of a president, vice president, secretary, and treasurer. To the extent permissible, the Shareholders agree to use their best efforts to vote for the election of Jamison and Bindel as president and vice president, or as the vice president and president, as Jamison and Bindel may agree, and the election as secretary and treasurer of a nominee of Jumbo. All checks, notes, loans, commitments, mortgages, and contracts shall be incurred only upon execution of the president and vice president and countersigned by the secretary or treasurer.

8. *Formation of related corporations.* The Shareholders shall form subsidiary or independent corporations, in which their respective interests shall parallel their interests in the Corporation, required to qualify for benefits under the federal law and regulations in the construction of the residential apartment units required under the terms of the redevelopment contract. The Shareholders will execute corporate certificates and documents and other necessary papers required under the law and the applicable rules and regulations to give the Federal Housing Administration an equity interest in the Corporation or in any subsidiary or independent corporation.

9. *Information by individuals.* Whenever required by the Agency, Jamison and Bindel shall submit to the Agency their personal financial statements, and the financial statements of corporations which they may control if the values of the corporations are set forth in the personal statements.

10. *Restriction against pledge.* None of the Shareholders may create a security interest in, hypothecate, pledge, or otherwise encumber the shares to be issued by the Corporation or any other corporation which may be formed pursuant to the terms of this agreement. This restriction shall be endorsed onto the share certificates.

11. *Arbitration.* Any disputes, controversies, or disagreements under this agreement shall be resolved by arbitration to be conducted by and under the rules of the American Arbitration Association, to be held in the County and State of _____ [county], _____ [state]. Arbitration shall be commenced by the sending of a written notice by the aggrieved party to the other parties at the addresses first above listed, setting forth in brief a statement of the grievance. The mailing of such notice shall commence the arbitration, and the award or decision in arbitration shall be binding upon the parties. The arbitration award or decision may be entered as a judgment in any court or courts having jurisdiction in the matter. Any controversy arising under this agreement shall be determinable only by this arbitration procedure.

12. *Binding effect.* This agreement may not be altered, modified, or revoked except by similar instrument in writing signed by the Shareholders, and it shall inure to the benefit of and bind their heirs, executors, administrators, successors, and assigns.

The parties have set their hands and seals the day and year first above written.

JUMBO CORP.

By: _____

[name and title]

Harold Jamison

James Bindel



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Current Legal Forms for Real Estate
 Chapter 22 DEVELOPMENT AND SUBDIVISION
 Part IV. FORMS
 B. DEVELOPMENT VENTURES

26-22 Current Legal Forms for Real Estate FORM 22.33

FORM 22.33 Joint venture for development of private water system

COMMENT

The following form is a joint venture agreement among three parties. Together they will construct and operate a private water system that will supply water to a housing development. One of the three joint venturers has substantial experience in the design and construction of a private water system and in its management once the system is "up and running."

Finally, there are strong restrictions on the sale of interests in the joint venture. Like a small, closely held corporation with only a few shareholders, a joint venture consisting of only three investors can easily be thrown into serious disruption if one member suddenly sells his or her interest to a stranger whose ideas about running the venture differ from those of the remaining investors. However, there are also protections built into the agreement to shield the investor who wishes to sell his or her interest: for example, in the event a proposed sale of an investor's interest is unreasonably vetoed by the joint venture, its remaining members must purchase the interest at the purchase price contained in the rejected offer.

For additional forms relating to joint ventures and joint ownership, see Chapter 2, Joint Venturers and Business Trusts, in Volume 2, and Chapter 20, Real Estate Entities, in Volume 24, *supra*.

FORM

AGREEMENT made this _____[day] day of _____[month],
 _____[year], among JOE RIGLEY ("Rigley"), residing at _____[address, city, state,
 zip code]; STEVE PINCE ("Pince"), residing at _____[address, city, state, zip code]; and JAMES

FOCUS ("Manager"), residing at _____[address, city, state, zip code].

W I T N E S S E T H:

WHEREAS, Rigley and Pince are in the process of obtaining municipal approvals for a residential subdivision to be located within the Town of _____[town], County of _____[county], State of _____[state]; and

WHEREAS, the Town of has no municipal water system which serves the area in which the development will be located; and

WHEREAS, neither Rigley nor Pince has any experience operating a water system or making a government application therefor; and

WHEREAS, Manager is the operator of several private water systems,

NOW, in consideration of the mutual promises contained herein, it is agreed as follows:

1. *Joint venture.* The parties hereto agree to form a joint venture for the purpose of building and operating a private water system. Eventually, a corporation may be formed that will own and operate the water system. In such case, the joint venture will own all the shares of the corporation. The name of the joint venture will be the _____[name of entity] Water Company.

The office of the joint venture will be located at _____[address, city, state, zip code].

2. *Authority.* Manager shall have the authority to bind the joint venture to any obligation up to the amount of _____ Dollars (\$ _____). Any obligation above _____ Dollars (\$ _____) and up to _____ Dollars (\$ _____) may be incurred with the concurrence of Manager and at least one other member of the joint venture. Any obligation in excess of _____ Dollars (\$ _____) shall require the unanimous consent of all members of the joint venture. No member of the joint venture shall make any representation to the contrary to any person who is not a party to this Agreement.

The sale of all or substantially all of the assets of the joint venture or of the water company may be done only upon the consent of all members of the joint venture, or pursuant to court order.

3. *Management.* Manager shall be responsible for ordinary operations of the joint venture and of the water company which the joint venture intends to operate. He may be discharged as manager upon his death or disability by unanimous action of the remaining members of the joint venture or pursuant to court order. Manager shall have the ability to hire and dismiss such staff as he/she deems necessary or appropriate in order to operate both the joint venture and the water company. Manager has authority to purchase such inventory and supplies as are necessary or appropriate for the ordinary operation of the joint venture and the water company. Manager shall be responsible for taking any and all actions required to achieve and maintain compliance with any and all governmental requirements for the existence and operation of the joint venture and the water company. These shall include, but not be limited to, making applications for approval through _____[list all applicable federal, state and local government agencies whose approval is necessary for the joint venture and water company].

Manager shall be responsible for maintenance of the physical plant and keeping it in good working order at all times. He shall be responsible for reading meters, billing customers and collecting amounts due.

4. *Books and records.* Manager shall be responsible for maintaining accurate books and records for the joint venture or the water company. He shall cause all necessary tax forms to be prepared and filed with any governmental agency having jurisdiction over the joint venture and the water company. In the event that any tax is due, Manager shall pay the same from joint venture or water company funds, as the case may be.

Manager shall make reports to the other joint venture members regarding the financial condition of the joint venture and water company no less often than quarterly. More frequent reports shall be made on the request of any two joint venturers. Said reports, at a minimum, shall set forth all income and expenses of the joint venture and water company and show increases or decreases (if any) from the applicable projected or budgeted amounts.

All joint venturers shall have access to the books and records of the joint venture and water company during regular business hours. The joint venturers shall not exercise this right to access in such a way as to interfere with the business operations of either the joint venture or the water company.

Any member of the joint venture may request an audit of the records of the joint venture and/or the water company. In the event that the audit shows no discrepancies, the audit shall be paid for by the party requesting it. In the event that a discrepancy is found, the audit shall be paid for by the joint venture or the water company, as the case may be. In any year in which an audit is required in order to comply with governmental regulations, another audit in that same year will not be granted at the request of a member, except for good cause shown.

5. *Capital contributions.* The members shall contribute to the joint venture such capital as is necessary to establish the joint venture and construct the water supply facilities needed. The initial contribution shall be the sum of _____ Dollars (\$_____) per member. Notwithstanding the foregoing, where deemed appropriate by the members, amounts needed for construction may be borrowed by the joint venture or water company.

From time to time, members shall make further contributions which they determine are needed. All contributions shall be made within _____ [days] days after the decision is made to require a further contribution, unless the resolution specifies a different time period.

6. *Professional consultants.* Manager shall have the right to hire professional consultants where he deems such assistance necessary or appropriate for accomplishing the goals of the joint venture and water company. Manager shall negotiate with the professional consultant the fee to be paid and the nature and scope of his duties. A letter agreement setting forth this information shall be maintained in the business records of the joint venture and water company. Such professional consultants may include, but are not limited to, attorneys, engineers, certified public accountants, and other similar assistants. Manager shall provide the members of the joint venture with the name and address of each such professional consultant so engaged.

7. *Construction.* It is anticipated that the joint venture will construct a water storage facility, several wells, a water pumping station, and a building which will contain office space for billing and operations, as well as space for maintenance work and storage of supplies.

Manager shall obtain engineering drawings adequate for use in making application to appropriate governmental authorities for permits and approvals necessary for said construction.

He shall also obtain estimates from licensed contractors experienced in this type of construction. Manager shall award the contract to the lowest responsible bidder after consultation with the other members. Approval of the other members is not required. Manager shall act as the general contact person for the contractor. Manager shall make periodic reports to the members on the status of the construction.

8. *Financing construction.* In the event it is decided by the members to seek outside financing for all or part of the construction costs, Manager shall contact commercial lenders. He shall provide to the members a proposal for obtaining the necessary financing. The loan amount should not exceed the probable value of the system being constructed. The loan may encumber the system as security, if required. The members shall consider the financing package, and upon approval by the members, the loan shall be consummated.

9. *Compensation.* Manager shall be entitled to a salary for management services rendered to the joint venture and water company. The joint venture and water company shall set his salary in December of each year for the following calendar year. As manager, he may determine when such salary shall be payable.

Other members may be compensated for their services rendered to the joint venture and/or water company upon the unanimous agreement of the members.

10. *Profits and losses.* The members shall share profits of the joint venture equally. Profits shall be paid at such time and in such manner as Manager shall determine is in the best interests of the joint venture. Manager shall be entitled to retain in the joint venture so much of the profits as he deems necessary for the operation of the joint venture.

Losses of the joint venture shall be shared equally by members of the joint venture.

11. *Dissolution.* The joint venture shall be dissolved upon the unanimous consent of the members. In the event that the members disagree on dissolution, the parties hereto agree to submit to the jurisdiction of _____ [insert name of arbitration or mediation service] to decide the matter.

Upon dissolution of the joint venture, its debts shall be paid and any remaining assets shall be distributed to the joint venturers *pro rata*. If the debts cannot be fully satisfied, the joint venturers shall assume liability for the debts *pro rata*. Each shall hold the others harmless for his *pro rata* share.

12. *Actions of the joint venture.* Except as otherwise noted herein, the joint venture may act on the vote of two-thirds of its members at any meeting of the joint venturer's members.

13. *Meetings.* The joint venture shall hold meetings on _____ [e.g., the first Friday of each month] at its office located in the City of _____ [city]. Other meetings shall be held at the request of any joint venturer. A meeting shall be held within _____ [number of days] days after the request of any member. Requests for meetings shall be delivered to Manager. Each member shall have one vote at the meeting.

14. *Death or disability.* The joint venture shall not be affected by the death or disability of any member. The personal representative of any such member shall be substituted in place of the deceased member. In the event that Manager dies or becomes disabled, the members shall hire a new manager who is qualified to fulfill the duties assigned to him/her herein.

15. *New members.* The joint venture may admit new members upon a unanimous vote of approval of the members. (The preceding sentence shall not apply in the event of the death or disability of a member.) The new member shall be deemed admitted upon payment of a capital contribution fixed by the existing members. The new member shall be provided with a copy of this Agreement and shall execute an acknowledgment thereof. The new member shall be bound by the terms of this Agreement, as amended from time to time, as if he/she were an original signatory.

16. *Sale of interest.* No member may sell his/her interest in the joint venture without the approval of the other members of the joint venture. If the members unreasonably reject such a proposed sale, the members shall purchase the interest at the price contained in the disapproved proposal. It shall not be deemed unreasonable to disapprove a sale to a party

who:

- (a) has a demonstrable lack of financial ability to purchase the interest;
- (b) has been convicted of a crime;
- (c) has been penalized by any state agency with regulatory authority over water supply companies; or
- (d) has had a professional license revoked.

17. *Amendment.* Amendments to this agreement may be made upon the unanimous consent of all parties. The amendment shall be in writing and signed by all parties. A copy of the amendment shall be appended to this agreement.

18. *Entire agreement.* This Agreement, together with the other written agreements and instruments executed concurrently herewith or pursuant to the provisions hereof, contains the entire agreement among the parties respecting the matters herein set forth and supersedes all prior agreements among them respecting such matters.

19. *Counterparts.* This Agreement may be executed in two or more counterparts, each of which shall be deemed an original, but all of which together shall constitute one and the same instrument. At the trial of any matter arising under this Agreement, only one counterpart need be produced.

20. *Headings.* Paragraph headings are for purposes of convenience and identification only and shall not be used to interpret or construe this Agreement.

21. *Waivers.* Except as herein expressly provided, no waiver by any party of any breach of this Agreement, or of any breach of a warranty or representation hereunder, shall be deemed to be a waiver by the same party of any other breach of any kind or nature (whether preceding or succeeding the first breach, and whether or not of the same or similar nature).

No acceptance by a party of payment or performance after any such breach shall be deemed to be a waiver of any breach of this Agreement or of any representation or warranty hereunder (whether or not the party knows of the breach when it accepts such payment or performance).

No failure by a party to exercise any right it may have under this Agreement or under law upon another party's default, and no delay in the exercise of that right, shall prevent it from exercising the right whenever the other party continues to be in default. No such failure or delay shall operate as a waiver of any default or as a modification of the provisions of this Agreement.

22. *Gender and number.* Whenever the singular or plural number, or masculine, feminine or neuter gender, is used herein, it shall equally include the other(s).

23. *Notices.* Any notice which any party is required or may desire to give hereunder shall be in writing and may be personally delivered, transmitted by facsimile machine, or delivered by the United States Postal Service or private delivery service to the above addresses. Notice is deemed given when received.

24. *Governing law.* This Agreement shall be construed and enforced in accordance with the laws of the State of _____[state].

25. *Binding effect.* This Agreement shall be binding upon, and inure to the benefit of, all the parties, and their respective heirs, representatives, successors and assigns.

26. *Modifications.* This Agreement may be modified only by a written document signed by all parties. A purported oral modification shall not be effective.

The parties hereto have set their hands the day and year first above written.

Joe Rigley

Steve Pince

James Focus

[Acknowledgments]



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Current Legal Forms for Real Estate

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Current Legal Forms for Real Estate
Chapter 22 DEVELOPMENT AND SUBDIVISION
Part IV. FORMS
B. DEVELOPMENT VENTURES

26-22 Current Legal Forms for Real Estate FORM 22.34

FORM 22.34 Sale of undivided interest in joint tenancy--property

COMMENT

In this agreement, the venture takes the form of a tenancy in common. This is accomplished through the sale, by one party to the other of a one half interest in the project. The selling price consists of two components: the fair market value of the property and the costs already invested in the initial stages of the development. This aspect of the transaction will result in taxable gain or loss to the seller based upon one half of his adjusted basis for the entire property. As part of the sale, there is an assignment to the purchaser of a one half interest in all existing contracts, commitments, and other collateral rights in the building project.

The other aspect of the transaction is an agreement between the parties to complete the construction of a hotel and then to lease the hotel in a net lease arrangement to a specific lessee. In order to complete the construction each party agrees to make additional contributions up to a specific maximum. If additional investment is needed, the original venturer agrees to furnish the capital necessary to complete the project. The original venturer also agrees to manage the hotel and to subordinate all management fees to the rental payments due under the lease.

For additional forms relating to the purchase and sale of real estate, see Chapter 20, Real Estate Entities, in Volume 24 and Chapter 21, Real Estate Sales and Exchanges, in Volume 25, *supra*.

For additional forms relating to joint ventures and joint ownership, see Chapter 2, Joint Venturers and Business Trusts, in Volume 2, and Chapter 20, Real Estate Entities, in Volume 24, *supra*.

FORM

AGREEMENT made and entered into on _____[*month and day*], _____[*year*],
between Union Hotel, a(n) _____[*state*] corporation ("Union"), and Club Real Estate Company, a(n)
_____ [state] corporation ("Club").

Recitals

Union is the owner in fee of certain land in _____[*city*], _____[*state*], more
particularly described on the attached Exhibit A, the agreed value of which land as of this date is
_____ Dollars (\$ _____) (the "Agreed Land Value").

Union has caused plans and specifications to be prepared by _____[*name of entity*] of
_____ [city], _____[*state*], for the construction on this land of a hotel (the "Hotel")
which plans and specifications (the "Plans") more particularly described on the attached Exhibit B have been shown to,
initialed, and approved by Club.

Union has expended, as of the date hereof, on architectural services, excavations, foundations, steel work, and other
building activities approximately _____ Dollars (\$ _____), the exact amount of
which (the "Verified Improvement Cost"), will be certified by Union and can be verified by Club by examination of the
books of account of Union.

Union has obtained a first mortgage commitment from _____[*insert name of lender*], under a letter
agreement dated _____[*date*], for this land and improvements when completed, in the amount of
_____ Dollars (\$ _____).

No interim construction loan has as yet been secured or sought.

Union has entered into a construction contract (the "Construction Contract"), dated _____[*month and*
day], _____[*year*], with _____[*name of entity*], covering the Hotel, a copy of which
contract has been shown to, initialed, and approved by Club.

The total cost of the land and completed building, exclusive of furniture, furnishings, and other personal property,
according to the Construction Contract and other commitments and contractual obligations listed on the attached
Exhibit C has been estimated at approximately _____ Dollars (\$ _____).

Club wishes to acquire a fifty percent (50%) interest, as a tenant in common, in the land and improvements and the
contracts, commitments, and contractual obligations, completing, as co-owner and tenant in common, the structure on a
50-50 basis with Union, and leasing the Hotel to a lessee company (the "Lessee"), with furniture, furnishings, and other
personal property to be made available by Union.

Union wishes to sell to Club as a tenant in common an undivided fifty percent (50%) interest in the land and
improvements and the contracts, commitments, and contractual obligations and retaining the other fifty percent (50%)
as a tenant in common, completing, as co-owner and tenant in common, the structure on a 50-50 basis with Club, and
leasing the Hotel to the Lessee, with furniture, furnishings, and other personal property to be made available by Union.

The land not occupied by the Hotel will be developed in the manner decided to be most appropriate and profitable by
Union and Club.

Now, therefore, the parties agree as follows:

1. *Sale of one-half interest.* Union will sell and convey to Club, as tenant in common, an undivided one half of Union's fee interest in the property described in Exhibit A, together with all improvements thereon. Such conveyance shall be made by virtue of a grant deed which shall include all right, title, and interest, if any, of Union in and to the land of any adjacent streets, and shall be subject only to the encumbrances reflected on Exhibit B annexed hereto. The sale and conveyance shall be made against payment to Union in _____ [describe funding] funds of fifty percent (_____%) of (a) the Agreed Land Value, plus (b) the Verified Improvement Cost as of the date of such sale and conveyance, which sale and conveyance shall be settled on a date and in a place in _____ [city] to be mutually agreed upon (if no agreement on a date or place is reached, then on the 60th day after the date hereof at the offices of _____ [name of entity], _____ [address], _____ [city], _____ [state]). The merchantable fee title to be conveyed shall be covered by a title insurance policy in appropriate and satisfactory form. A short form of the Project Agreement, in form satisfactory for recording in the office of the County Recorder of the City and County of _____ [county], _____ [state], shall be executed by Union and Club and recorded.

2. *Assignment of one-half interest in existing contracts.* Simultaneously, with the sale and conveyance in Paragraph 1, Union will also assign to Club subject to the assumption by Club of a commensurate share of the obligations thereunder, a fifty percent (50%) interest in all Union's rights under all existing contracts, commitments, contractual obligations, assignable insurance policies, if any, licenses, and permits with respect to the Hotel and will use its best efforts to secure any and all consents which may be required or appropriate from the other parties thereto. As to any nonassignable or blanket insurance policies, Union will cause Club to be named as an assured or an insured, as its interest may appear.

3. *Project agreement.* As tenants in common and not as copartners or joint venturers, Union and Club will enter into a Project Agreement in which, among other things, they will agree:

(a) To complete the construction of the Hotel in accordance with the contracts, commitments, and contractual obligations listed in Exhibit C, with such modifications, improvements, and changes as may be agreed upon, on a 50-50 or dollar-for-dollar basis until each party has invested, including for each party an amount equal to the price paid to Union in accordance with paragraph 1, but excluding any computation under paragraph 5, the sum of _____ Dollars (\$ _____) (the total amount thus invested by each party plus as to each party all computations pursuant to paragraph 5 being called the Individual Equity Investment).

(b) If any additional investment is needed, Union will complete, at its cost, the Hotel.

(c) Union will cause the furniture, furnishings, and other personal property, necessary for the appropriate operation of the Hotel, to be made available either under a lease providing a fair return on cost basis to the lessor of the furniture, furnishings, and other personal property, or by a sale at cost to the Lessee, upon such terms and conditions, however, as will comply with the terms of the security agreement to be made with the lender, subject to the payment of any charges for the lease or sale, and will insure continued availability of the furniture, furnishings, and other personal property for the operation of the Hotel, irrespective of any default by the Lessee.

(d) Union and Club, by their execution hereof, do severally waive, during the lesser of (1) the term of the Project Agreement, or (2) the period commencing on the date of execution hereof and ending with the Measuring Life (as hereinafter defined), plus 21 years, all of the rights inconsistent with the provisions of the Project Agreement accruing to each of them by virtue of the ownership by each of them of an undivided one-half interest in the Hotel as tenants in common, including, without limiting the generality of the foregoing, the right to possession and management of the respective undivided one-half interests in the Hotel and the right of each to partition the property. It is the intent that the tenants in common, their respective successors and assigns, shall act unanimously with respect to the Hotel in accordance with the terms and conditions contained in this Agreement and the Project Agreement. The term "Measuring Life" shall mean the lifetime of whomever of the following persons alive at the date of execution of the Project

Agreement shall live the longest: (1) any of the directors of Union, or the spouses of such directors, or (2) any of the directors of Club, or the spouses of such directors.

(e) Neither Union nor Club will offer for sale, or sell or otherwise dispose of, any part of their respective interests in the Hotel within the first five years after the opening of the Hotel to the public and thereafter, subject to specific terms to be included in the Project Agreement, only after first offering to the other party for a period of at least thirty (30) days the right of first refusal; but in no event shall the period within which either Union or Club may exercise the right of first refusal exceed the period commencing on the date of execution hereof and ending with the Measuring Life plus twenty-one years. At no time will Union sell any part of its interest in the Hotel if such sale will accelerate or require the repayment of the first mortgage loan to be made by the lender any more rapidly than now provided in the loan commitment without Union making provision for such acceleration or repayment on terms no less burdensome to the parties than as now provided in the loan agreement, subject to a right of subrogation in favor of Union in respect of any provision thus made.

(f) The tenants in common will lease the Hotel on a net basis, in the form customarily used for such properties, to the Lessee. Such lease shall be for a term of twenty (20) from the date of the completion and furnishing of the Hotel (provided, however, that the term of such lease must commence within the period beginning with the date of execution hereof and ending with the Measuring Life plus 21 years) at the following rent per annum:

(1) In each year, the Lessee will pay, as and when they become due and payable, all real estate, personal property, business, and other (except income) taxes which may be assessed against the land, the Hotel, and its operation; and

(2) To Union and Club, respectively, as tenants in common, whatever amounts (when and as they become due and payable) may be required to service (interest and amortization) their respective shares of the mortgage loan; and

(3) To Union and Club, respectively, as further rent, an amount per annum equal, during the first four (4) 12-calendar-month periods of the lease, to _____ percent (_____%) and, during the remainder of the lease and any extension thereof, to _____ percent (_____%), of the Individual Equity Investment of each such party.

The Lessee may renew the lease for three successive periods of _____ (_____) _____[years] years each on the same terms and conditions except the annual rent to be paid during each renewal period shall be determined in the light of the then fair value of the Hotel, including the land, by agreement of the parties or failing such agreement by arbitration.

(g) When and as the Hotel is ready to be opened to the public, Union and Club will each loan the Lessee, if so requested, equal amounts up to the sum of _____ Dollars (\$_____) each to be evidenced by notes secured by a first mortgage or first trust deed on the above-described leasehold, such loans to bear interest at the rate of percent per annum, to be amortized in equal annual installments commencing at the beginning of the fourth year of the loan over the fourth year and the next eleven years, and to be repayable in part or in full at any time without premium by the Lessee.

(h) Union will supply the management of the Hotel for the term of the Project Agreement on the terms described in the following subparagraph.

(i) The Lessee will enter into a management contract with Union under which Union will provide all necessary managerial and supervisory services for the Hotel for a fee per annum of _____ percent (_____%) of the gross revenues of the Hotel, payable monthly subject to year end adjustments, plus
(1) in the event the percentage of rooms occupied by guests in the Hotel in any year should equal or exceed _____ percent (_____%) but be less than _____ percent

(_____%), _____ percent (_____%) of the gross operating profit of the Hotel in that year, or (2) in the event the percentage of rooms occupied by guests in the Hotel in any year should equal or exceed _____ percent (_____%), _____ percent (_____%) of the gross operating profit of the Hotel in that year. The management contract shall contain other reasonable and applicable terms and conditions set forth in the Union Standard Management Agreement, not inconsistent with the terms of this Agreement and the Project Agreement.

(j) The term of the Project Agreement shall continue in full force and effect for a term of years expiring on the later to occur of (1) a date _____ (_____) _____[years] years after the last day of the month in which the date of opening of the Hotel shall occur, or (2) the expiration of the term of the Lease, as extended by the exercise of the option or options to renew to be contained therein.

(k) The provisions of the Project Agreement shall inure to the benefit of and be binding upon the respective successors or assigns of the parties.

4. *Guarantee of rent.* If in any year during the term of the management agreement, as described in subparagraph 3(i), the Lessee is unable to pay all its obligations and the total amount of the rent for the Hotel as described in subparagraph 3(f), Union will waive and forgive whatever part of its management fee and all percentages of gross operating profit in that year under the management contract (up to and including the entire amount), as is necessary to be waived and forgiven in order to provide funds for the Lessee to pay the rent.

5. *Interest on invested capital.* In determining the Individual Equity Investment of each party but without any obligation of either party to accrue or pay the same, there shall be added to all sums, computed in respect of each party as provided in subparagraph 3(a), an interest percentage (not in excess of percent per annum) equal to the highest rate per annum paid by either party for any borrowing made during the period of construction of the Hotel for use as invested capital under this and the Project Agreement or, if no such borrowing is made, at percent per annum. Any borrowings which may be made by either party in aid of this project shall be solely on the credit of the borrower and, if secured by any of the rights of the borrower in this project, expressly subject to or limited by all covenants, disabilities, and obligations of the borrower hereunder and under the Project Agreement.

6. *Conditions to agreement.* The obligation of the parties under paragraphs 1 and 2 shall be subject to the following conditions precedent:

(a) The parties shall have obtained (1) direct consent of the lender to the assignment of the Commitment from Union to Union and Club, and (2) an amendment to the Commitment whereby the lender agrees to look solely to the mortgaged property and the property covered by the security agreement as security for the payment of the mortgage indebtedness and the amount due under the security agreement.

(b) The consent of the other party when and if required to the assignment by Union of its rights under the construction contract and the other commitments and contractual obligations.

(c) The Project Agreement provided for in paragraph 3, the lease referred to in subparagraph 3(f), and the management contract referred to in subparagraph 3(i) shall have been executed and delivered.

(d) The assignment and assumption agreements provided for in paragraph 2 shall have been executed and delivered.

7. *Entire agreement between parties.* The foregoing sets forth the understanding and agreements of the parties as of the date hereof.

Wherefore the parties have caused this Agreement to be executed and delivered on their behalf by an officer of the

respective parties as of the date above written.

Union Hotel

By: _____

Club Real Estate Company

By: _____

[Attach Exhibit A]

[Attach Exhibit B]

[Attach Exhibit C]



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Current Legal Forms for Real Estate
Chapter 22 DEVELOPMENT AND SUBDIVISION
Part IV. FORMS
B. DEVELOPMENT VENTURES

26-22 Current Legal Forms for Real Estate FORM 22.35

FORM 22.35 Partnership for land development--land contributed to partnership by owners--construction and financing assumed by developers--provision for admitting new partners for additional equity money

COMMENT

The owners agree to lease the property to the venture, and later to make piecemeal contributions of the property to the venture as improvements on it are planned. The other parties to this venture are developers. Beginning with the year in which the first project is completed, the owners are to receive a guaranteed annual amount as a first charge against the income of the venture. If the venture fails to make this guaranteed payment for a three-year period, the owners may declare a default unless the other two venturers, the developers, make additional contributions to the capital of the venture to enable all past due guaranteed payments to be made to the two owners.

Except for the initial capital contribution of property, the parties do not anticipate any other capital contributions. It is expected that all funds needed in the development program will be obtained through conventional first mortgage financing. If this financing does not produce all the required funds, equity money may be drawn into the venture through the sale to third parties of general or limited partnership interests in the venture. While the admission of such new members into the partnership will reduce the profit percentages of the original venturers, the agreement provides that the guaranteed annual payment to the owners can not be affected.

For additional forms relating to partnerships, see Chapter 1, Partnerships, in Volume 1, and Chapter 20, Real Estate Entities, in Volume 24, *supra*.

FORM

PARTNERSHIP AGREEMENT made and entered into _____[date], by and between Sharon Lake and

Harold Lake (husband and wife) (the "Owners"), and Kathleen Brad (the "Developer").

Recitals

The Owners own that certain real property described on Exhibit A (the "premises").

The parties desire to form a partnership to operate the premises and to plan the improvement of, and to improve, the premises.

Now, therefore, the parties form a partnership upon the following terms and conditions:

1. *Name and business.* The name of the partnership shall be Lake-Brad Development Co. Its business shall be to operate the premises and the present or future improvements and to collect all rents and other income which shall belong to the partnership during the term of this agreement; and to plan the improvement of the premises with multistoried office buildings or other commercial developments and to improve the premises pursuant to such plan, if proper financing is obtained.

2. *Term.* The partnership shall commence on _____[*date*], and shall continue until terminated by the mutual agreement of the partners or until dissolved.

3. *Lease of premises.* The Owners shall lease the premises to the partnership for a term commencing _____[*date*], pursuant to the terms and conditions of a Lease Agreement to be executed contemporaneously herewith.

4. *Place of business.* The business of the partnership shall be conducted and carried on, and its principal place of business shall be, at _____[*address*], _____[*city*], _____[*state*], and at such other places as from time to time may be determined by the partnership.

5. *Preliminary development work.* The Developer shall proceed with reasonable diligence to do the following the "preliminary development work," all at the Developer's initial expense:

- (a) Prepare an environmental impact study and an engineering survey of the premises showing, among other things, the present improvements thereon and the location of all streets, alleys, and public utilities.
- (b) Prepare a master plan of the premises showing the layout of the improvements. The master plan shall provide for the subdivision of the premises into four parcels, approximately equal in size, and for multistoried office building improvements upon the premises. With the Owners' consent, the master plan or any amendment may provide for other or additional commercial improvements upon the premises.
- (c) Prepare preliminary plans and specifications for the improvements to be included in the first project.
- (d) Prepare a brochure with respect to the first project. The brochure should be so prepared that it may be used in obtaining mortgage and equity financing.
- (e) Commence a leasing program designed to obtain commitments from prospective tenants for the improvements to be included in the first project.
- (f) Prepare a schedule showing how the improvements in the first project will achieve a green building rating of LEED Certified as determined by the U.S. Green Building Council.

The Developer shall be entitled to reimbursement from the partnership of their costs of the preliminary development work immediately upon completion of construction of the first project. Preliminary development work with respect to each succeeding project shall also be undertaken by the Developer at her initial expense, but subject to similar reimbursement upon completion of construction. The Developer shall not expend in excess of _____ Dollars (\$_____) for the preliminary development work pertaining to any one project; provided, however, that real estate brokerage fees incurred, if any, shall not be included in this computation, but shall, for all other purposes, be considered part of the cost of the preliminary development work.

6. Financing of improvements

(a) Upon completion of the preliminary development work, the Developer shall apply for commitments for conventional first mortgage financing for the first project with reasonable diligence. The Developer shall attempt to obtain commitments for amounts which, in the aggregate, shall be sufficient to pay for all estimated costs of the improvements. The cost of the preliminary development work shall be included in the estimated costs of the improvements of the first project. At the same time, the Developer shall commence trying to obtain commitments for additional funds in an amount equal to the difference, if any, between the estimated costs of the improvements and the amount of the mortgage financing commitments expected to be obtained, the "equity money." The equity money may be in the form of loans to the partnership, either unsecured or secured by a mortgage or deed of trust of the portion of the premises allocated to the first project and of the improvements to be erected thereon, or of contributions to the capital of the partnership in exchange for an interest, either general or limited or both, in the partnership, or of a combination of loans and contributions. The Developer shall keep the Owners advised of their progress in trying to obtain financing commitments. Upon the receipt by the Owners of notice from the Developer of the terms and conditions of any financing commitment or commitments obtained by the Developer, the Owners shall forthwith approve the same or, at their election, by notice within ten days thereafter to the Developer. The Owners shall have a period of ninety (90) days after the date of receipt of such notice from the Developer in which to try to obtain other commitments upon terms and conditions more advantageous to the partnership than those obtained by the Developer. Upon the expiration of the 90-day period the partnership shall accept the commitment or commitments most favorable to it.

(b) If the terms and conditions of the equity money commitments so require, the person or persons making the commitments, the "investors," shall be admitted to the partnership, provided, however, that the partnership interests of the Developer and of the Owners, including the right to share in the annual net profits of the partnership, shall be reduced in the same proportion in order to make partnership interests available to the investors. If the investors desire to become limited partners, the partners shall form a limited partnership for this purpose, subject to substantially the same terms and conditions as this partnership, and shall otherwise cooperate as necessary to meet the conditions of the equity money commitments. No equity money shall be obtained by the partnership from any person, firm, or corporation with whom any of the partners is directly or indirectly associated in business without the approval of the other partners, which approval shall not be unreasonably withheld.

(c) Notwithstanding anything implied to the contrary in this agreement, the Owners' right to the full sum of their guaranteed annual withdrawal shall in no way be affected by the admission of any investors to the partnership and shall take precedence over any obligations of the partnership to any other partner or any investors, unless the Owners shall otherwise consent.

(d) Each of the projects in the development shall be financed in the manner and pursuant to the procedure outlined above for the first project.

7. Construction of improvements

(a) If the Developer does not cause the commencement of construction of the first project within seven years from the

date of this agreement, the Owners may dissolve the partnership by giving the Developer notice of their election at any time prior to commencement of construction, and the partnership then shall deliver a quitclaim deed of the premises to the owners of the reversionary interest. If construction of any succeeding project is not commenced within five years after completion of the preceding project, the Owners may require the partnership to deliver a quitclaim deed of all unimproved portions of the premises to the owners of the reversionary interest by giving the Developer notice of their election at any time prior to commencement of construction of the next succeeding project. If construction of all projects has not been completed within _____ (_____) _____[years] years after the date of this agreement, the Owners may require the partnership to deliver a quitclaim deed of all unimproved portions of the premises to the owners of the reversionary interest by giving the Developer notice of their election at any time within _____ (_____) _____[days] days after the date this option first exists. In either such event, the Owners' guaranteed annual withdrawal shall be reduced to a sum to which it bears the same relation as the square footage of the entire premises bears to the square footage of the improved portions of the premises. The Developer's annual withdrawal shall be similarly reduced.

(b) If commencement of construction of any project is delayed by reason of war, civil riot, strikes, weather, government regulations, shortages or unavailability of labor or materials, or Acts of God, or other similar causes beyond the control of the Developer, all the periods in subparagraph 7(a) shall be extended for the period of the delay.

(c) The Developer shall cause all construction work of improvements for the partnership to be done by the general contractor at its actual cost of labor, materials, and subcontracts, excluding any allowance to the general contractor for profit or for costs not directly allocable to such construction work. The following items shall be excluded in computing the costs directly allocable to the construction work:

(1) Salaries of executive officers who will direct and supervise the work to be performed under the construction contract.

(2) Salaries and expenses of accounting and auditing staff, clerical staff, legal counsel, and other functions of the general contractor's organization, except any salaries or expenses which may be incurred on the job site.

(3) All other overhead expenses of the general contractor's office organization.

(d) The Developer shall require the general contractor to use its best efforts to generate competition among bidders for the subcontracting and material-supplying phases of the construction work in order to obtain low costs for such construction work and to furnish the Owners with the cost breakdown of the work. The Owners shall have the right to audit the general contractor's books any time within six months after completion of construction of any project to verify the costs of construction.

(e) _____[name of entity], a(n) _____[state] corporation, or its successor, will be the general contractor.

8. *Capital contributions.* (a) Within _____ (_____) _____[days] days after the date of this agreement, the partners shall make the following contributions in cash to the capital of the partnership in order to set up the books of account:

Sharon Lake	\$ _____

Harold Lake	\$ _____

Kathleen Brad	\$ _____

(b) The Developer, from time to time, shall make such contributions to the capital of the partnership as may be necessary, over and above the income of the partnership, to enable the partnership, until completion of construction of the first project, to pay the following: the rent, taxes, and assessments required to be paid by the Lease Agreement, and the operating expenses of the partnership. The Developer shall not be entitled to any reimbursement for such contributions.

(c) Within ten days after completion of the plans and specifications for each project, the approval of financing commitments for the project, and the receipt by the Owners of a request from the Developer, the Owners shall convey to the partnership by grant deed that portion of the premises allocated to the project. The conveyance shall be treated upon the books of the partnership as a contribution by the Owners to the capital of the partnership of an amount equal to the tax basis of the contributed land in the hands of the Owners.

(d) Upon each contribution of land to the capital of the partnership, the Developer shall become obligated to commence within _____ (_____) [days] days, and to complete with reasonable diligence, the construction of the improvements planned for the land and to complete the same with the funds available from the mortgage and equity financing commitments. If subsequently the partnership should obtain any financing commitments more favorable than those described in the notice of commitments obtained by the Developer, then the commitments more favorable to the partnership shall be accepted.

(e) The Owners shall not be required to make any contribution to the capital of the partnership other than as provided in the preceding subparagraphs 8(a) and 8(c). Notwithstanding the foregoing, if the owners of _____ percent (_____) of the partnership interests determine that an additional capital contribution is needed, the partners shall contribute the amount specified within _____ (_____) [days] days after such determination is made. Any partner who fails to contribute the specified amount shall be assessed an interest charge, at the rate of _____ percent (_____) per annum, until such capital contribution and accrued interest charges are paid in full. No distribution of profits shall be made to any partner who is in default on the payment of capital contributions, unless the distribution is first reduced by an amount equal to the unpaid capital contributions and accrued interest thereon.

(f) No interest shall be paid or shall accrue on the capital account of any partner.

9. *Profits and losses.* (a) The net profits or net losses of the partnership shall be credited or charged to the partners at the end of each fiscal year in the following ratios:

Sharon Lake _____ %
 Harold Lake _____ %
 Kathleen _____ %
 Brad _____ %

(b) To the extent of any contributions made by the Developer pursuant to subparagraph 8(b), any deduction for income tax purposes allowable to the partnership prior to the completion of the first project resulting from the payment by the partnership of its operating expenses and the rent, taxes and assessments pursuant to the Lease Agreement shall be allocated in equal amounts to Developer.

(c) If there is not sufficient cash available to enable the Owners and the Developer to each withdraw, _____ (_____) [days] days after the end of each fiscal year,

the respective sums to be withdrawn by them pursuant to subparagraphs 12(a), 12(b), and 12(c), then the net profit of the partnership for that fiscal year (and each fiscal year thereafter until the deficiency is made up) shall be allocated between the Owners and the Developer in the same ratio as the amount of their respective withdrawals for the fiscal year bears to the total withdrawals relating to the fiscal year.

(d) If the partnership sells the premises, the net sale price shall be allocated by the partners between land and improvements on a reasonable basis. In the event the partners are unable to agree on an allocation, the allocation shall then be determined by arbitration. Any loss on the land (but not the improvements) shall be charged to the Owners in equal amounts. Any gain on the land (but not the improvements) shall be credited among the partners in the following order:

(1) Any gain resulting from the first

_____ Dollars (\$

_____) or less of net selling price allocated to the land shall be credited in equal amounts to Sharon Lake and Harold Lake. In the event only a portion of the premises is sold, then any gain resulting from so much of the selling price allocated to the land which bears the same relation to

_____ Dollars (\$

_____) as the square footage of the portion sold bears to the square footage of the entire premises shall be credited in equal amounts to Sharon Lake and Harold Lake.

(2) Any gain resulting from the next

_____ Dollars (\$

_____) or less of net selling price allocated to the land shall be credited in equal amounts to Developer. In the event only a portion of the premises is sold, then any gain resulting from so much of the selling price allocated to the land which bears the same relation to

_____ Dollars (\$

_____) as the square footage of the portion sold bears to the square footage of the entire premises shall be credited in equal amounts to Developer.

(3) Any gain in excess of that referred to in the preceding subdivisions (1) and (2) shall be credited to the partners in the ratios set forth in subparagraph 9(a).

10. *Management of firm business.* (a) The Developer shall devote the time to the partnership business required for its proper conduct, or as is agreed upon by the partners. While the Developer shall consult with the Owners with respect to major matters of partnership policy, the Developer shall have the exclusive control and management of the business of the partnership, including the sole right to sign contracts and to assume direction of business operations, except as provided in this agreement. No salary or other remuneration shall be paid to any partner except by mutual agreement. However, all costs incurred with respect to management, operation, and maintenance of the premises and any improvements, including, but not limited to, the salaries of any managerial personnel hired as employees of the partnership, shall be expenses of the partnership.

(b) No partner may, except by the mutual agreement of the partners or except as authorized by this agreement:

- (1) Borrow money in the firm name or utilize collateral owned by the partnership as security for such loans.
- (2) Assign, transfer, pledge, compromise, or release any of the claims of or debts due the partnership except upon payment in full, or arbitrate or consent to the arbitration of any of the disputes or controversies of the partnership.
- (3) Make, execute, or deliver any assignment for the benefit of creditors, or any bond, confession of judgment, security interest, deed, or guarantee with respect to this partnership or its assets, or contract to sell, or contract of sales of all or substantially all of the assets of the partnership.
- (4) Sell or contract to sell the premises or any part.
- (5) Lease or mortgage any partnership assets or any interest therein, or enter into any contract for any such purposes.
- (6) Except as specifically provided in this agreement, pledge or hypothecate or in any manner transfer his interest or any part interest in the partnership.
- (c) The partnership shall pursue such maintenance and repair policies, shall maintain such reserves for present and future obligations (other than reserves for depreciation), and shall follow such accounting procedures as are consistent with good accounting and business practices.
- (d) The partnership shall not execute any promissory note or other document in connection with the mortgage and equity financing anticipated by this agreement if the effect would be to subject the partnership or any partner to any liability for any deficiency judgment in the event of the foreclosure of any mortgage, deed of trust, or other loan documents securing the note or document. However, the partnership and the partners shall execute whatever loan documents or other instruments may be necessary to hypothecate their interests in the premises and any improvements as required by the financing commitments. None of the partners either directly or indirectly shall be required to assume any personal liability for the repayment of any mortgage loans or equity money obtained as contemplated by this agreement. In the event it should become necessary or advisable, in order for the partners to avoid personal liability on any mortgage loan or on any lease, the parties shall cause the partnership to form a corporation, the stock of which would be owned by the Owners and the Developer in the same ratios as their respective percentage rights to share in the profits of the partnership, or which would be owned by the partnership, and to have the corporation own the interests of the parties in one or more of the projects.
- (e) The terms "mutual agreement" or "mutual agreement of the partners" shall mean agreement by the partners then entitled to _____ percent (_____%) or more of the profits of the partnership.
11. *Records and accounts.* (a) Full, true, and accurate records and accounts of the transactions of the partnership shall be kept in proper books, and each partner shall cause to be entered in such books an accurate accounting of all of his transactions in behalf of the partnership.
- (b) The books of the partnership shall be kept at _____ [name of entity], _____ [city], _____ [state], or at such place as shall be determined by mutual agreement of the partners.
- (c) The books of the partnership shall be open to inspection by any of the partners or by their accredited representatives at any reasonable time during business hours.

(d) The partnership shall be operated on a fiscal year ending December 31 of each year.

(e) At the end of each fiscal year of the partnership, an accurate accounting shall be made in writing of all of the assets and liabilities of the partnership, the books of the partnership shall be properly balanced, and the capital account of each partner shall be adjusted as of such date. A financial statement, including a balance sheet and profit and loss statement, as of the close of the fiscal year, shall be prepared and certified by a certified public accountant at the expense of the partnership, and a copy of such certified statement shall be furnished to each partner within 75 days after the end of the fiscal year. The certified public accountant to perform such work shall be determined by mutual agreement of the partners.

(f) An account in the name of the partnership shall be maintained in the bank from time to time determined by mutual agreement of the partners. All moneys of the partnership and all instruments for the payment of money to the partnership shall, when received, be deposited in the bank account of the partnership. Checks shall be signed with the firm name, and may be drawn by the person or persons determined from time to time by mutual agreement of the partners.

12. *Withdrawals.* Subject to the retention of reserves necessary to meet the requirements of any loan or loans secured by any assets of the partnership and to provide for current operating expenses, any cash that the partnership may have shall be subject to withdrawal, as follows:

(a) _____ (_____) _____ [days] days after the end of each fiscal year of the partnership, commencing with the fiscal year during which construction of the first project is completed, the Owners shall have the right to make a withdrawal, the "guaranteed annual withdrawal." The amount of the first of the guaranteed annual withdrawals shall bear the same relation to _____ Dollars (\$ _____) as the number of days in the fiscal year following the date of such completion shall bear to 365. The amount of each subsequent guaranteed annual withdrawal shall be _____ Dollars (\$ _____). The right to make guaranteed annual withdrawals shall be cumulative so that any portion which is not withdrawn for one year shall increase pro tanto the amount of the Owners' guaranteed annual withdrawal for the ensuing year. In the event the guaranteed annual withdrawal is not paid in full for three consecutive years, the Owners, by notice to the Developer within _____ (_____) _____ [days] days after the end of the third such year, may declare the partnership in default for failure to pay the Owners' guaranteed annual withdrawals. Within ten days thereafter, the Developer, at their option, by notice to the Owners, may make additional contribution to the capital of the partnership necessary to enable the partnership to make all past due payments of the Owners' guaranteed annual withdrawals. Such additional contribution shall be made at the time of exercise of the option. If the Developer does not exercise such option, the Developer shall relinquish to the Owners all rights to participate in the control and management of the business of the partnership, and in the event the Owners should cause the partnership to employ a manager to perform the active management of the business of the partnership, reasonable compensation may be paid by the partnership to the manager. However, when all payments of the Owners' guaranteed annual withdrawals are current, control and management of the business of the partnership shall revert to the Developer.

(b) The Developer shall have the right, at any time, to withdraw an amount equal to the amount contributed by them pursuant to subparagraph 12(a) provided all payments of the Owners' guaranteed annual withdrawals are current.

(c) _____ (_____) _____ [date] days after the end of each fiscal year of the partnership, commencing with the fiscal year during which construction of the first project is completed, the Developer shall have the right to make a withdrawal, but this right may be exercised only in the event that all payments of the Owners' guaranteed annual withdrawals are current. The amount of the first of the Developer' withdrawals shall bear the same relation to _____ Dollars (\$ _____) as the number of days in such fiscal year following the date of completion shall bear to 365. The amount of each subsequent annual withdrawal shall

be _____ Dollars (\$_____). The right to make annual withdrawals shall be cumulative so that any portion which is not withdrawn for one year shall increase pro tanto the amount which may be withdrawn for the next ensuing year.

(d) Any further withdrawals shall be made by mutual agreement of the partners but shall be in the same ratio as the partners' respective percentage rights to share in the profits of the partnership on the date of the withdrawals.

(e) It is the intention of the partners that if sufficient cash reserves are or will be available to provide for all reasonably contemplated expenses of the partnership, arrangements shall be made, subject to mutual agreement of the partners, for periodic cash withdrawals more frequent than the annual withdrawals.

13. *Transfer of partnership interests.* (a) None of the prohibitions or limitations in this paragraph or elsewhere in this agreement shall apply to the admission of any investor as a partner, general or limited, or to the sale or transfer by the Developer of their interest in the partnership to _____ [name of entity] ("Assignee") or a subsidiary, or to the sale or transfer by the Owners of their interest in the partnership to a corporation wholly owned by them or any child or children of them, or to the transfer by any partner of his interest in the partnership to or in trust for any child or children of any partner, or to the transfer by either of the Owners of their interest in the partnership in trust for the benefit of their respective wives, or any religious, scientific, educational, or charitable institution. In the event of a sale or transfer by the Developer of their interest in the partnership to Assignee or a subsidiary, the Owners agree that if Assignee expressly assumes all of the Developer's obligations under this agreement the Developer shall be released from all further obligations under this agreement and the Owners shall look solely to the responsibility of Assignee with respect to all matters in connection with this agreement.

(b) Until the expiration of a _____ (_____) _____ [number of year(s)] year period after completion of construction of the first project, the partners, except with the consent of the other partners, will not sell, assign, mortgage, pledge, or otherwise encumber or transfer their interest in this partnership.

(c) Any partner who shall desire to sell, assign, mortgage, pledge, create a security interest in, or otherwise encumber or transfer any part of his interest in the partnership after the period defined in subparagraph 13(b), the "transferring partner", shall notify the other partners of the terms and conditions of the proposed disposition. The date of receipt of the notice is an option date. The following options shall then exist to acquire the interest of the transferring partner upon the same terms and conditions as are stated in the notice. In the event that the transferring partner desires to make a gift of his interest the remaining partners shall have the right to acquire the interest at its market value.

(1) If the transferring partner is an investor, the Owners and the Developer shall have an option to acquire the interest of the transferring partner. The option shall be exercised by giving notice to the transferring partner within thirty (30) days after the option date.

(2) If the transferring partner is an Owner, the other Owner shall have an option to acquire the interest of the transferring partner. The option shall be exercised by giving notice to the transferring partner within thirty (30) days after the option date. In the event the option is not exercised, the Developer shall have a similar option to acquire the Owner's interest which shall be exercised by giving notice to the transferring partner within 30 days after expiration of the prior 30-day period.

(3) If the transferring partner is a Developer, the Owners shall have a similar option to acquire the Developer's interest which shall be exercised by giving notice to the transferring partner within thirty (30) days after expiration of the prior 30-day period.

(4) Each eligible partner desiring to participate in the acquisition of the interest of the transferring partner shall be

entitled to acquire that portion of the interest as his percentage right to share in the partnership profits on the option date shall bear to the aggregate percentage rights of all eligible partners desiring to participate in the acquisition. In the event the entire interest that the transferring partner desires to dispose of pursuant to the terms and conditions of the proposed disposition is not acquired pursuant to any of the above options, the transferring partner shall have the right during the 30-day period following the expiration of the option periods to complete the disposition to the person and upon the terms and conditions stated in the notice.

(d) Upon the death or adjudication either as a bankrupt or as an incompetent of any partner, the following options to purchase the interest in the partnership of such partner shall then exist:

(1) Upon the death or adjudication of any investor, who shall own an interest in the partnership, the Developer and the Owners shall have an option to purchase the interest then owned by the investor. The option shall be exercised by giving notice to the legal representative of the investor within sixty (60) days after his appointment.

(2) Upon the death or adjudication of either Owner, the survivor shall have an option to purchase all interest in the partnership then owned by the deceased or adjudicated Owner. The option shall be exercised by giving notice to the legal representative of the deceased or adjudicated person within sixty (60) days after his appointment. In the event the option is not exercised, the Developer shall have a similar option to purchase the interest which shall be exercised by giving notice to the legal representative of the deceased or adjudicated person within sixty (60) days after expiration of the prior 60-day period.

(3) Upon the death or adjudication of the surviving Owner, the Developer shall have an option to purchase all interest in the partnership then owned by the survivor. The option shall be exercised by giving notice to the legal representative of the survivor within sixty (60) days after his appointment.

(4) Upon the death or adjudication of the Developer, Owners shall have an option to purchase the interest which shall be exercised by giving notice to the legal representative of the deceased or adjudicated person within sixty (60) days after expiration of the prior 60-day period.

(5) Upon the death or adjudication of the surviving Developer, or the adjudication of Assignee, or a subsidiary to which the Developer may have transferred any part of her interest in the partnership, the Owners shall have an option to purchase the interest then owned by the survivor or corporation. The option shall be exercised by giving notice to the legal representative of the survivor or corporation within sixty (60) days after his appointment.

(6) Each eligible partner desiring to participate in the acquisition of the interest of the deceased or adjudicated partner shall be entitled to acquire that portion of the interest as his percentage right to share in the partnership profits on the option date shall bear to the aggregate percentage rights of all eligible partners desiring to participate in the acquisition. The legal representative of the deceased or adjudicated partner shall be required to sell the interest only in the event the entire interest is acquired by exercise of any of the above options.

(7) On or before January 31 of each year, the partners shall agree upon and state in writing the market value of the interest of each partner in the partnership. The purchase price to be paid for any partnership interest during the remainder of the year shall be the so determined market value of that partnership interest, with an appropriate adjustment for the subsequent period. In fixing the market value of the interest of each partner, consideration shall be given to any unpaid withdrawals due the partner. In the event no market value has been determined by the partners, no liability shall result from such failure and

the value shall be determined by arbitration.

(8) Any sale contemplated by this paragraph shall be deemed to be consummated upon the occurrence of the death or adjudication giving rise to the sale, and as of that date the purchaser shall succeed to all rights of the seller pursuant to this agreement.

(9) Within thirty (30) days after the exercise of any of the options arising upon the death or adjudication of any partner, the purchaser shall deliver to the seller or to the legal representative of the seller an amount of cash equal to

_____ percent (

_____ %) of the purchase price. The remainder of the purchase price shall bear interest at the rate of

_____ (

_____ %) percent per annum from the date of sale, computed on the unpaid balance, compounded annually, and principal and interest due on such remainder shall be amortized by ten equal annual installment payments, commencing one year after the date of sale, payments to apply first to interest due and the balance to principal. The purchaser may prepay all or any part of the unpaid balance without penalty. The obligation of the purchaser shall be evidenced or represented by the purchaser's promissory note payable to the seller and delivered to the seller or the legal representative of seller, and shall be secured by an appropriate assignment, as collateral security, of the entire partnership interest being acquired by the purchaser.

(e) The death or adjudication of any partner, or the transfer of the interest of any parties as permitted or required by this agreement, shall not cause a dissolution of the partnership, but the business shall continue without interruption and upon the same terms and conditions as are provided in this agreement, except that the successor in interest shall succeed to the rights of his predecessor in interest in this agreement, including the right to share in the profits and losses and in the right to make withdrawals from the capital of the partnership.

(f) Any attempted sale, transfer or other disposition of any interest in this partnership, except as specifically permitted by this agreement, shall be null and void.

14. *Sale of partnership assets.* In the event the partnership shall make a sale of the premises, either improved or unimproved, the net proceeds of sale shall be paid to the partners in the following order of preference:

(a) Any unpaid guaranteed withdrawals due to the Owners shall first be paid.

(b) The next _____ Dollars (\$ _____) or less of net proceeds shall be paid to the Owners. In the event only a portion of the premises is sold, then the amount to be paid to the Owners pursuant to this subparagraph shall bear the same relation to _____ Dollars (\$ _____) as the square footage of the portion sold shall bear to the square footage of the entire premises.

(c) Any unpaid withdrawals due to the Developer pursuant to subparagraphs 12(b) and 12(c) shall next be paid.

(d) The next _____ Dollars (\$ _____) or less of net proceeds shall be paid to the Developer. In the event only a portion of the premises is sold, then the amount to be paid to the Developer pursuant to this subparagraph shall bear the same relation to _____ Dollars (\$ _____) as the

square footage of the portion sold shall bear to the square footage of the entire premises.

(e) Any remaining net proceeds of sale shall be distributed in the same ratio as the partners' respective percentage rights to share in profits of the partnership on the date of the sale.

(f) The priorities provided in subparagraphs 14(a) and 14(b) shall take precedence over any obligations of the partnership to any investors, unless the Owners shall otherwise consent.

15. *Dissolution of partnership.* (a) At any time after one year from the date hereof and following substantial compliance by the Developer with the requirements of Paragraph 5 pertaining to preliminary development work with respect to the first project, the Developer shall have the right to dissolve the partnership by giving all other partners thirty (30) days' notice of such election. However, subsequent to the commencement of construction of any project, the Developer shall cause the completion of construction prior to dissolution.

(b) The partners agree that the partnership shall not otherwise be dissolved, except as specifically provided in this agreement.

(c) Upon dissolution of the partnership, an accurate accounting shall be made, the assets and liabilities of the partnership shall be determined, and the debts of the partnership shall be discharged.

(d) If dissolution shall occur subsequent to the conveyance of any part of the premises by the Owners to the partnership, but prior to the commencement of construction of the first project, the premises shall be distributed to the Owners in dissolution.

(e) Upon dissolution of the partnership, the partnership shall engage in no further activity other than that necessary to wind up its business. The assets of the partnership, including the premises and improvements, shall be liquidated and the cash resulting from the liquidation shall be distributed as provided in Paragraph 14.

16. *Notices.* Any notice required to be given pursuant to this agreement, or desired to be given in connection with this agreement or the business of the partnership, shall be in writing and shall be sent by registered or certified mail, postage prepaid, and properly addressed, and shall be deemed to have been received 24 hours after its deposit with the United States Postal Service at Phoenix, Arizona. Any notice intended for any partner shall be addressed to him at the address specified unless he shall subsequently specify some other address for the service of notices:

Developer: _____

Owners: _____

17. *Successors in interest.* This agreement shall be binding upon and inure to the benefit of the heirs, executors, administrators, assigns, and successors in interest of the parties, subject to the provisions of Paragraph 13.

In witness whereof the parties have executed this agreement as of the day and year first above written.

Owners:

Sharon Lake

Harold Lake

Developer:

Kathleen Bill

[Attach Exhibit A]



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Current Legal Forms for Real Estate

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Current Legal Forms for Real Estate
Chapter 22 DEVELOPMENT AND SUBDIVISION
Part IV. FORMS
C. PLANNING AND CONSTRUCTION

26-22 Current Legal Forms for Real Estate FORM 22.36

FORM 22.36 Contract to prepare and implement master plan for subdivision of property

COMMENT

The forms in this group are for planning and completing a development program. In the form illustrated here, the owner of a large tract of undeveloped land hires an engineering company to prepare a master plan for the property and supervise all the details for carrying out the plan. The engineering company is in effect taking over all the responsibilities of the developer. In addition to preparing the master plan, the company is to arrange for and supervise the necessary engineering, negotiate with utility companies, direct and manage the required construction, plan and promote sales and leases, and perform general management and administrative services. The owner has therefore turned over to the engineering company full control of the development program even to the sale and lease of the finished land sites.

Tax accounting.

Compensation for the services to be rendered by the engineering company generally falls into two classes. For its general services the company receives a fixed monthly payment. For its engineering services it is reimbursed for specified categories of costs plus a fixed percentage of certain of these costs as its fee. The fixed monthly payment is reportable by the engineering company when received or accrued depending upon its accounting method. If the company is on the accrual basis, its fee for performing the engineering services should be accrued as the costs for those services are incurred.

Cost allocation of future expenses.

Improvement costs are allocated to individual land sites for the purpose of determining gain or loss on each separate sale or other disposition. But in the sale of the first lots there may also be

included in their tax basis an allocation of the estimated costs of future development which may benefit those lots. In order to sustain the allocation of an estimate of such future expenses on the basis of lots first sold, the owner must submit information supporting the following: (a) the cost of the entire tract on which the lots are located, and the suitable allocation of such costs to each lot; (b) a description of the proposed improvements, with evidence that the owner is contractually obligated to make such improvements; (c) an explanation of the method of estimating the costs of the future improvements; (d) an allocation of the estimated costs to each lot, accompanied by a plat map; and (e) if estimates have been allocated to lots sold in prior years, complete information as to the allocation, including actual expenditures for the improvements and their proper allocation. Estimates may be corrected in the light of actual experience.

FORM

AGREEMENT dated and entered into on _____[date], between Land East Corporation, a California corporation, (the "Owner"), and Hodges & Harrison Company, Inc., a New York corporation (the "Company").

The Owner and the Company agree as follows:

1. *Managerial services.* The Company will, subject to the general direction and control of the Owner, perform for the Owner the following services:

(a) Prepare a master plan for the entire property of the Owner (in coordination with an environmental impact study) which will set forth the proper relationship of residential areas, golf courses, beach and recreational facilities, apartment houses, hotels, shopping centers, industrial parks, highways and road networks, and sewer, water, and power systems.

(b) Arrange for and supervise the engineering necessary to execute the master plan including detailed design of utilities, streets, subdivisions, and prepared building sites, and to suggest, arrange for and supervise the implementation of green building techniques and green alternatives into all improvements made as part of the Master Plan so as to maximize energy and water use efficiencies and minimize the environmental impact of the construction.

(c) Negotiate with each of the various utility companies to obtain installation of power, rail, gas, and telephone facilities required to implement the master plan on the most favorable terms and conditions, and coordinate the scheduling and installation of such facilities.

(d) Arrange for and supervise the construction necessary to execute the master plan, and prepare budgets for various stages of development and specific projects.

(e) Coordinate with the various municipal, county, and state agencies in design of services required to implement the master plan including schools, fire stations, locations of roads, access to existing roads, and major drainage systems.

(f) Plan, coordinate, and supervise all sales, promotion, and advertising to facilitate, at the earliest date possible, the sale or lease of bulk land sites, individual land sites, and all finished uses which might be deemed to be the highest and best use of the land involved.

(g) Negotiate sales and leases, and work with tenants and prospective purchasers.

(h) Negotiate for temporary and permanent financing of land development and building construction.

(i) Arrange for and supervise on a coordinated program all necessary insurance.

(j) Perform general management and administrative services for the Owner including, but not limited to, the following:

- (1) Manage all property;
- (2) Propose projects for sale or investment and make complete financial analysis and recommendations on each project to the Owner;
- (3) Investigate and make financial analysis and recommendations on all proposals submitted to the Owner by other parties;
- (4) Keep accounting books and records;
- (5) Offer tax advice, consult with tax attorneys and advisers, and prepare tax returns;
- (6) Review all legal documents, including land purchase and sale agreements, leases, construction loan agreements, notes, mortgages, and deeds;
- (7) Represent the Owner at public functions, as required, and recommend policies to be followed on public matters affecting the Owner;
- (8) Work with municipal, county, and state officials and with municipal bodies, such as planning boards, water boards, board of appeals, and board of assessors;
- (9) Seek short-term loans as needed, and offer financial advice;
- (10) Handle advertising and public relations for the Owner, including preparation of press releases, opening ceremonies, releases of special sales and large sales, and the handling of magazine articles, trade publication articles, and anything else deemed to be in the best interests of the Owner.

2. *Compensation for managerial services.* The Owner shall pay the Company for the services in Paragraph 1 the sum of \$30,000 a month, payable in advance, the first payment to be due _____[date], and each payment to be made on the first day of each and every calendar month thereafter to and including _____[date]. In addition, the Company shall be entitled to a monthly reimbursement for costs and expenses incurred in rendering the services. Without limiting the generality of the foregoing, the Company shall be reimbursed for the following:

- (a) All direct costs of any branch office that may be opened and operated by the Company in relation to the performance of the terms and conditions of this agreement, including but not limited to payroll, office overhead, advertising and promotion, legal fees, consulting fees, and transportation.
- (b) Out-of-pocket expenses of Company personnel, including but not limited to travel, lodging, and communication expenses.
- (c) The costs and expenses shall not include salaries of officers or employees of the Company, or general overhead expenses of the Company.

3. *Engineering services.* The Company shall have its Engineering Division perform engineering services required by the Owner, including site engineering and planning for the land owned by the Owner, preparation of necessary site development plans and specifications, environmental impact studies and statements, propose green building alternatives and such other engineering services as directed by the Owner, all to be in accordance with state Codes and Ordinances.

Any such work may be cancelled at any stage by the Owner.

4. *Compensation for engineering services.* In consideration of the performance of the engineering services in Paragraph 3, the Owner shall make monthly payments to the Company as follows:

(a) All direct costs of the work, including wages, supplies, blueprints, payroll taxes, and insurance. Direct costs, however, shall not include items such as rent, lights, clerical services, salaries of officers of the Engineering Division or of the Company, or other expenses of a similar nature.

(b) 70 percent of direct wages for overhead expenses. The premium portion of salaries and wages for overtime work shall be a reimbursable expenditure but shall not be included as a part of direct wages for the computation of overhead expenses.

(c) 20 percent of the total of the above two items as its fee for performing the work.

(d) Costs of any outside engineering services. The Engineering Division shall submit to the Owner for approval any contracts for outside engineering services amounting to more than \$60,000.

(e) Travel expenses.

(f) Living expenses incurred by personnel of the Engineering Division while away from their homes in connection with the rendering of the services required under Paragraph 3 of this agreement.

5. *Term.* Services under this agreement shall commence _____[date], and terminate _____[date].

6. *Monthly statements.* The Owner may request and receive, from the Company on request, a detailed report of all or any item or items contained in any other usual monthly statement covering costs and expenses. Each monthly statement shall be subject to the approval of the Owner, such approval not to be unreasonably withheld.

7. *Assignment.* The Company may assign or transfer this agreement or any part to any other person, firm, trust, association, or corporation, hereinafter called the Assignee, only provided that:

(a) The Company receives the Owner's prior written consent to such assignment; and

(b) The principal owners of the Company have at the date of the assignment and at all times during the term of this agreement (1) full and complete management and controls of the Assignee; and (2) are the owners of a majority interest in the Assignee.

8. *Personal liability.* No director, shareholder, officer, or agent of the parties shall be held to any personal liability under this agreement, but only the property of each party shall be liable hereunder or by reason hereof.

9. *Licenses and registration.* The Company shall procure, and thereafter during the term of this agreement maintain in effect, all necessary licenses and registrations for the performance of the activities to be engaged in under this agreement, or the Company shall have duly associated with it personnel duly licensed to perform the activities on behalf of the Company. Notwithstanding any other provision, this agreement shall not be deemed to have taken effect with respect to any activities which would be unlawful without proper licensing or registrations until the same have been procured, or the personnel having and maintaining the licenses to engage in the activities on behalf of the Company are associated with the Company.

Executed in duplicate as of the date first above written.

Land East Corporation

by _____

President

Hodges & Harrison Company, Inc.

by _____

President



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26-22 Current Legal Forms for Real Estate FORM 22.37

FORM 22.37 Contract with engineer to plan, map, and supervise development of subdivision--compensation based upon professional fee plus multiple of direct expenses

COMMENT

After an owner or purchaser of undeveloped land decides upon subdividing, he will normally retain a registered civil engineer. The engineer's services ordinarily may be divided into three parts: (1) making a survey and conducting soil tests of the property; (2) preparing and gaining approval of the tentative and final subdivision maps; and (3) supervising the construction of the requisite off-site improvements. Because the agreement illustrated here is entered into before a subdivision map has been prepared and before the cost of constructing the subdivision is known, it is provided that the engineer will be paid a specified professional fee plus an amount equal to a multiple of his direct personal expenses. The professional fee will be paid in progress payments and the direct personal expenses will be paid monthly.

FORM

AGREEMENT made _____[*date*] between Kenneth Young of Placerville, California (the "Owner"), and Frank Wagner of Placerville, California (the "Engineer").

Recitals

The Owner wishes to develop a planned community subdivision on certain real property situated in El Dorado County (the "property") described as follows:

(Insert description)

and

The Engineer wishes to perform professional services in connection with the property,

Now, therefore, it is agreed between the parties as follows:

1. *Duties.* The Engineer will furnish and perform the following professional services:

(a) Prepare a complete boundary survey of the property showing all rights-of-way, easements, and other physical burdens now encumbering the land, and stake out all corners of the property.

(b) Make such soil-bearing tests, investigations, and reports as may be required to determine the soil-bearing capacity of the property, the types of soil contained in the property, and the amount of filling and other remedial work that may be necessary to render the property suitable for the purposes intended by the Owner.

(c) Prepare a tentative subdivision map for the property as required by California law and any local ordinances pertaining to such a tentative subdivision map for the property.

(d) Do all things reasonably required to gain approval or conditional approval of the tentative subdivision map by the governmental agencies required by California law and local ordinances to approve the tentative subdivision map. This shall include the responsibility of engaging legal counsel and other professional consultants, as may be deemed necessary and appropriate by Engineer.

(e) Prepare a survey and final subdivision map for the property as required by California law and any local ordinances pertaining to the property.

(f) Do all things reasonably required by him as a licensed Civil Engineer to gain approval of the final subdivision map by the governmental agencies required by California law or local ordinances to approve such map. Provided, however, nothing herein shall require the Engineer to post or become bound on or for any bond or other security required by any such governmental agency as a condition to the approval of such map.

(g) Prepare detailed plans, specifications, and cost estimates for all streets, utilities, and other improvements (the "off-site improvements") required by law or otherwise to be installed on the property by the Owner.

(h) Prepare, subject to the Owner's approval, invitations for bids, instructions to bidders, and bid forms reasonably required to enable the Owner to award a beneficial contract for construction and installation of the off-site improvements.

(i) Receive and assist the Owner in evaluating any bids received for the construction and installation of the off-site improvements.

(j) Exercise general supervision over the work of any contractor employed by the Owner to construct and install the off-site improvements, but the Engineer does not guarantee the performance of any contract or contracts for the construction and installation of the off-site improvements awarded by the Owner to any such contractor or contractors.

2. *Compensation.* The Owner shall pay to Engineer, as compensation for his services under this contract:

(a) A professional fee of \$30,000.

(b) An amount equal to two and one-half times the direct personal expenses incurred by Engineer in performing this contract. The term direct personal expenses incurred by the Engineer shall mean the cost to him of time spent by himself or his employees, including engineers, designers, draftsmen, specification writers, surveying crews, computers operators, typists, and project representatives, in performing services required by this contract. In determining such costs, the Engineer's own time shall be valued at \$225 per hour and the time of his employees calculated according to their regular rates of pay and the costs of vacation, sick leave, and other employee benefits furnished such employees pursuant to union contracts or the Engineer's normal employment practices.

(c) Actual expenses incurred by the Engineer in performing this contract for:

(1) Travel by himself or his employees to locations more than 100 miles from the property including transportation costs not exceeding thirty cents per mile and living expenses while on such trips of \$60 per day;

(2) Long distance telephone calls and electronic mail;

(3) Telegrams and express mail;

(4) Fees paid pursuant to statute or ordinance to governmental agencies or bodies required to approve the tentative or final subdivision maps for the property.

3. *Manner of payment of costs.* On or before the 15th day of each calendar month, the Engineer shall prepare, certify as correct, and deliver to the Owner an itemized statement of all expenses described in Paragraph 2 incurred by him during the preceding calendar month. Within ten days after delivery to him of the itemized statement, the Owner shall pay to the Engineer the full amount of all the expenses shown on the statement.

4. *Manner of payment of fee.* The Owner shall pay to the Engineer the professional fee specified in this contract in installments as follows:

(a) Ten percent on the execution of this contract, receipt of which is acknowledged by the Engineer.

(b) Twenty percent on completion of the boundary survey, soil-bearing tests, investigations, and reports specified in subparagraphs (a) and (b) of Paragraph 1.

(c) Twenty percent on approval of the tentative subdivision map for the property by all governmental agencies or bodies required to approve the same.

(d) Twenty-five percent on approval of the final subdivision map by all governmental agencies and bodies required to approve the same.

(e) Twenty-five percent on completion of construction and installation of all the off-site improvements.

5. *Indemnity.* The Engineer shall indemnify and hold the Owner and the property of the Owner harmless from any claims, losses, damages, injuries, and liabilities arising from the death or injury of any person or persons including employees of the Engineer, or from the damage or destruction of any property caused by or connected with the performance of this contract by the Engineer, his agents or employees. For the purposes of this paragraph, legal counsel and other professional consultants engaged by Engineer pursuant to the provisions of Paragraph 1(d) shall not be deemed agents or employees of the Engineer, but instead of the Owner.

6. *Worker's compensation insurance.* The Engineer shall procure and maintain during the continuance of this contract a policy of workers' compensation or employer's liability insurance for the protection of his employees, including

executive, managerial, and supervisory employees, engaged in work required by this contract, and shall, on demand, deposit a certificate evidencing the policy with the Owner.

7. *Ownership of plans, maps, drawings.* All maps, plans, drawings, specifications, and other instruments prepared by the Engineer pursuant to this contract shall remain the property of the Engineer and may not be used by the Owner for any project or purpose other than the construction and development of the subdivision described in this contract.

8. *Termination.* If the requirements imposed on the Owner by any governmental agency or body required to approve the tentative or final subdivision map for the property render the subdivision of the property as anticipated by this contract economically unfeasible, the Owner may cancel this contract by giving 30 days' written notice of cancellation to the Engineer. If this contract is cancelled by the Owner, the Engineer shall be entitled to be paid all expenses described in subparagraphs 2(b) and 2(c) incurred by him prior to expiration of the notice period and the percentage of his professional fee specified in Paragraph 4 applicable to the services furnished or performed by him under this contract prior to the date of the notice. The subdivision of the property as anticipated by this contract shall be economically unfeasible if, after the sale of all lots in the subdivision proposed or allowed for the property at prices not exceeding \$7,500 per lot, the net profit to the Owner would be less than 10 percent of the cost of acquiring the property and creating the subdivision.

(b) If either party to this contract is declared a bankrupt, makes a general assignment for the benefit of creditors, is unable to meet obligations as they become due, or commits a substantial breach of this contract, the other party to this contract, the Owner or the Engineer, shall be excused from rendering or accepting any further performance under this contract.

9. *Assignment.* Neither this contract nor any rights or duties hereunder may be assigned or delegated to any other person or entity by either party without the express written consent of the other party.

10. *Arbitration.* Should any dispute arise between the parties concerning this contract or the rights and duties of either in relation thereto, the dispute shall be settled by arbitration held in accordance with the Construction Industry Rules of the American Arbitration Association in effect at the time a demand for arbitration is filed with that association. Either party may file, in the manner provided by the rules of the association, a demand for arbitration at any time. The arbitrator or arbitrators appointed by the association shall have power to award to either party to the dispute such sums, costs, expenses, and attorney's fees as the arbitrator or arbitrators may deem proper.

11. *Notices.* Any notices or other communications required or permitted by this contract or by law to be served on, given to, or delivered to either party, by the other party shall be in writing and shall be deemed duly served, given, or delivered when personally delivered to the party to whom it is addressed or in lieu of personal service, when deposited in the United States mail, first-class postage prepaid, addressed to the Owner at 10 Pembroke Street, Placerville, California, or to the Engineer at 15 Washington Avenue, Placerville, California. Either party may change his address by giving written notice of the change to the other party in the manner provided in this paragraph.

12. *Entire agreement.* This instrument constitutes the entire agreement between the parties relating to the property and sets forth the rights, duties, and obligations of each to the other as of its date. Any prior agreements, promises, negotiations, or representations not expressly set forth in this contract are of no force and effect.

13. *Binding agreement.* This contract shall inure to and be binding on the heirs, executors, administrators, successors, and assigns of the parties.

The parties have executed this contract the date first above written.

Kenneth Young

Frank Wagner



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26-22 Current Legal Forms for Real Estate FORM 22.38

FORM 22.38 Contract with engineering firm to obtain its services in connection with real estate development project--services include surveying and mapping work necessary to prepare preliminary subdivision map, preparing applications for site plan approval and subdivision approval, etc.

COMMENT

The form below is an agreement between an engineering firm and the purchaser of land that will be used in a real estate development project. The purchaser is seeking the professional services of the firm in connection with obtaining project approval from the municipality where the development will be located.

Services to be performed.

The agreement sets forth in detail the services to be rendered by the firm and approximate deadlines. Specifically, the firm will be providing these services, among others:

- (1) all surveying and mapping work necessary to prepare a preliminary subdivision map;
- (2) making whatever amendments to the preliminary map the purchaser requests;
- (3) preparing the applications for site plan approval and subdivision approval;
- (4) testing soil, ground water and surface water, as may be necessary to obtain government approval of the plan;
- (5) testifying at all hearings of the planning and zoning boards; and
- (6) preparing "green" alternatives for the construction of the improvements to achieve energy

savings and water use efficiencies.

Compensation.

The purchaser has paid a substantial deposit to the engineering firm. Initially, the firm will draw against this sum in compensation for its services. Thereafter, once the deposit is exhausted, the purchaser will be billed at an hourly rate, but will pay no more than the sum of \$10,000. Any expenses beyond that are not due until subdivision approval is obtained from the municipality.

In an earlier, separate agreement entered into by the purchaser, it agreed to buy the land in question on condition that it received subdivision approval for the development project. In the event approval cannot be obtained, the contract of sale and purchase will be terminated. On the date that the contingency for subdivision approval expires, any further payments earned by the engineering firm will become due and payable.

Finally, the agreement is terminable at any time by either party.

FORM

AGREEMENT made this _____ [day] day of _____ [month],
 _____ [year], between _____ [insert name of purchaser of land/real estate developer], a corporation existing under the laws of the State of _____ [state], with offices for the transaction of business at _____ [address] (hereafter referred to as "Purchaser"), and _____ [insert name of engineering firm], a corporation organized under the laws of the State of _____ [state], with offices for the transaction of business at _____ [address] (hereafter referred to as "Engineering").

WITNESSETH:

WHEREAS, Purchaser is the contract vendee of a certain parcel of land located in the Town of _____ [town], County of _____ [county], State of _____ [state], and more particularly described in Schedule A, which is annexed hereto and made a part hereof; and

WHEREAS, one of the conditions in the aforementioned contract provides that Purchaser may be relieved of its obligation to purchase in the event that it does not receive residential subdivision approval from the Town of _____ [town] on or before _____ [date]; and

WHEREAS, Engineering is in the business of preparing maps and other materials needed to obtain such subdivision approval,

NOW, in consideration of the mutual promises contained herein, it is agreed as follows:

1. *Engineering firm to provide following services.* Engineering will undertake the following work on behalf of Purchaser:

(a) All surveying and mapping work needed to prepare a preliminary subdivision map for Purchaser's approval. Said map shall comply with all laws, rules and regulations of the State of _____ [state], County of _____ [county] and Town of _____ [town] for obtaining residential subdivision approval.

(b) Amending said map to reflect changes requested by Purchaser, so long as such amendments do not render the map out of compliance with the above-mentioned legal requirements.

(c) Completing the site plan application and subdivision approval application.

(d) Performing soil, ground water and surface water testing (and other testing of the subject land) that may be required as part of the approval process.

(e) Attending and testifying at all hearings of the planing and zoning boards that may be required to obtain subdivision approval.

(f) Conducting necessary research and testing on environmental conditions appearing on or below the land, including, but not limited to, wetlands and deposits of hazardous wastes, and preparing "green" alternatives for the purpose of achieving energy and water efficiencies.

(g) Performing such other services as may be reasonably necessary to accomplish the preceding tasks.

2. *Services to be supervised by licensed engineer.* All services performed by Engineering will be supervised by a professional engineer licensed by the State of _____[state]. All services performed will be in keeping with the standards of professional engineers practicing in the State of _____[state].

3. *Deadlines for performing services.* Services shall be rendered in a timely fashion. Engineering has been made aware that Purchaser must obtain subdivision approval on or before _____[date]. The parties have agreed upon the following as an approximate timetable for completion of tasks hereunder:

(a) testing to be completed within four (4) to six (6) weeks after execution of this Agreement;

(b) surveying and preliminary map to be completed within four (4) to six (6) weeks thereafter;

(c) Purchaser's comments to be provided within two (2) weeks after completion of the preliminary map;

(d) revisions required by Purchaser to be completed within two (2) weeks after comments are provided to Engineering;

(e) applications for site plan and subdivision approval to be completed for attorney review six (6) weeks thereafter;

(f) attorney's comments to be provided within two (2) weeks thereafter; and

(g) applications to be submitted to the Town of _____[town] within two (2) weeks after receipt of the attorney's comments.

The parties understand that this timetable is not binding and may be subject to change, depending on factors over which Engineering has no control, such as weather conditions and the speed with which third parties provide their comments. Time is not of the essence. However, Engineering will complete its tasks in a timely and efficient manner.

4. *Engineering firm to cooperate with Purchaser's counsel in preparation of documents.* Engineering agrees to fully cooperate with Purchaser's counsel in the preparation and submission of documents. Engineering also agrees to fully cooperate in the preparation and submission of testimony and other evidence to the zoning and planning boards.

5. *Engineering firm to have access to all documents and information relating to subject property.* Purchaser agrees to

provide Engineering with access to all information and existing documents with respect to the subject land, including, but not limited to, maps, surveys, title abstracts, and the results of the environmental site assessment.

6. *Engineering firm may subcontract work with Purchaser's approval.* Engineering may subcontract work to be completed by it hereunder, but only with the prior written approval of Purchaser. Engineering shall be responsible for the payment of such subcontractor, and it may bill Purchaser for the subcontractor's services at the rates contained herein. Notwithstanding the foregoing, the letter containing Purchaser's approval may modify the provisions of this paragraph.

7. *Engineering firm to have access to subject property.* Purchaser shall secure from the owner free access to the property for Engineering, its subcontractors, employees, agents and invitees in order that they might complete the tasks required under this Agreement.

8. *Compensation for engineering firm.* Engineering shall be compensated for services as follows:

(a) for field work:

by a licensed surveyor, _____ Dollars (\$ _____) per hour,

by an unlicensed assistant, _____ Dollars (\$ _____) per hour;

(b) for mapping services:

by a licensed engineer, _____ Dollars (\$ _____) per hour,

by an unlicensed engineer, _____ Dollars (\$ _____) per hour,

by a licensed surveyor, _____ Dollars (\$ _____) per hour,

by a draftsman, _____ Dollars (\$ _____) per hour;

(c) for consultations with the project engineer, _____ Dollars (\$ _____) per hour;

(d) for preparation of applications, _____ Dollars (\$ _____) per hour;

(e) for preparation for, and attendance at, hearings, _____ Dollars (\$ _____) per hour;

(f) for testing and evaluation services:

by lab technician, _____ Dollars (\$ _____) per hour,

by engineering staff, _____ Dollars (\$ _____) per hour;

(g) for disbursements:

mileage, _____ \$ per mile,

facsimile, _____ \$ per page,

photocopies, _____ \$ per page, and

postage, as required.

Payment for services rendered shall be made as follows:

Purchaser has deposited the sum of _____ Dollars (\$ _____) _____ [e.g., \$5,000] with Engineering. Receipt of the same is hereby acknowledged. Itemized monthly bills shall be rendered by Engineering for Purchaser. Services shall be billed against the deposit on a monthly basis.

When the deposit is exhausted, Purchaser shall pay all sums billed, up to an additional _____ Dollars (\$ _____) _____ [e.g., \$10,000]. Thereafter, Purchaser may delay further payment until either subdivision approval is received or until _____ [date], whichever date is earlier. At that time, all outstanding sums shall be due and payable in full. Any further statements for work performed thereafter shall be sent monthly and shall be due and payable within _____ [e.g., thirty (30)] days of receipt of the statement. An interest charge of _____ [e.g., one (1)] percent per month shall be assessed on any payment not made when due.

9. *No guarantee that subdivision approval will be obtained.* Nothing contained herein shall be construed by Engineering as a guarantee that the Town of _____ [town] will approve the subdivision application.

10. *Purchaser's representations.* Purchaser makes the following representations:

(a) It is authorized by the owner of the subject property to apply for subdivision approval.

(b) The premises are expected to be served by municipal water and sewer services.

(c) The premises have been examined by a reputable environmental consulting firm and have received a favorable Phase I environmental site assessment report. The copy of such report, furnished to Engineering by Purchaser, is a true and accurate copy.

11. *Plans prepared by engineering firm remain its property until all services have been compensated.* All plans prepared by Engineering shall remain the property of Engineering until all services have been paid for in full.

12. *Termination.* This Agreement may be terminated by either party at any time, either with or without cause, by giving written notice of termination to the other party. The termination shall be effective upon receipt. Upon termination, all services rendered to date by Engineering shall be billed by Engineering. Payment shall be due within _____ [e.g., ten (10)] days of billing. All documents shall be released to Purchaser upon payment.

13. *Entire agreement.* This Agreement, together with the other written agreements and instruments executed concurrently herewith or pursuant to the provisions hereof, contains the entire agreement between the parties concerning the matters herein set forth and supersedes all prior agreements between them respecting such matters.

14. *Counterparts.* This Agreement may be executed in two or more counterparts, each of which shall be deemed an original, but all of which together shall constitute one and the same instrument. At the trial of any matter arising under this Agreement, only one counterpart need be produced.

15. *Headings.* Paragraph headings are for the purposes of convenience and identification only and shall not be used to interpret or construe this Agreement.

16. *Waivers.* Except as herein expressly provided, no waiver by either party of any breach of this Agreement, or of any warranty or representation hereunder, shall be deemed to be a waiver by the same party of any other breach of any kind or nature (whether preceding or succeeding the first breach, and whether or not of the same or similar nature).

No acceptance by a party of payment or performance after any such breach shall be deemed to be a waiver of any breach of this Agreement or of any representation or warranty hereunder, whether or not the party knows of the breach when it accepts such payment or performance.

No failure by a party to exercise any right it may have under this Agreement or under law upon another party's default, and no delay in the exercise of that right, shall prevent it from exercising the right whenever the other party continues to be in default. No such failure or delay shall operate as a waiver of any default or as a modification of the provisions of this Agreement.

17. *Gender and number.* Whenever the singular or plural number, or the masculine, feminine or neuter gender, is used herein, it shall equally include the other(s).

18. *Notices.* Any notice which any party is required or may desire to give hereunder shall be in writing and may be personally delivered, transmitted by facsimile machine, or delivered by the United States Postal Service or private delivery service to the above addresses. Notice is deemed given when received.

19. *Governing law.* This Agreement shall be construed and enforced in accordance with the laws of the State of _____[state].

20. *Binding effect.* This Agreement shall be binding upon, and inure to the benefit of, both parties, and their respective heirs, representatives, successors and assigns.

21. *Modifications.* This Agreement may be modified only by a written document signed by representatives of both parties. A purported oral modification shall not be effective.

The parties hereto have set their hands and seals the day and year first above written.

[Purchaser's name]

By: _____

President

[Name of engineering firm]

By: _____

President

[Acknowledgments]



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26-22 Current Legal Forms for Real Estate FORM 22.39

FORM 22.39 Proposal for Phase I Environmental Site Assessment

COMMENT

This form is an agreement between an environmental engineering firm and the prospective purchaser of vacant land that will be used in a real estate development project. The purchaser is seeking the professional services of an environmental engineering company in connection with performing a Phase I Environmental Site Assessment of the property.

The services to be performed are listed under items 1 through 7 of the agreement. Those services are the services to be provided in connection with a Phase I Environmental Site Assessment. If any questionable conditions are found as a result of this Environmental Site Assessment, then the environmental engineer should be able to inform the prospective purchaser of the potential problem, and may recommend additional testing be done in connection with the problem areas. If additional testing is done, it is advisable that the purchaser use a company independent of the environmental engineering company doing the Phase I Environmental Site Assessment to avoid any conflicts of interest.

It is usually important that these reports be kept confidential and this form offers one way in which to do so, namely by protecting the report under the attorney/client privilege. It is important for legal counsel to interface with the environmental engineering company to establish this attorney/client privilege on the report.

FORM

_____ [Date]

Name of Owner ("Client")

RE: Proposal for Phase I Environmental Site Assessment

Gentlemen:

Environmental Engineering Company ("Engineer") is pleased to submit this proposal to conduct a Phase I Environmental Site Assessment ("ESA") of the land located in _____[city], _____[state] (more fully described on Exhibit A, attached hereto and made a part hereof). It is my understanding that the site consists of approximately 250 acres of vacant land. The Phase I assessment is designed to establish whether the subject property is likely to have suffered environmental degradation. The assessment typically involves non-intrusive investigative techniques to discover potential environmental impacts to the subject property as well as adjacent properties.

Scope of Services

The following items constitute the 7 principal tasks to be performed throughout the Phase I ESA. Item 8 represents the typical expenses associated with a project of this nature.

1. Research and preparation for field work, including conducting document searches and reviewing all client provided documents, scheduling local file reviews, personal interviews and arranging site visits and travel accommodations.
2. Travel to and from site, local file reviews and interviews.
3. Conduct site walkover and on-site interviews, which typically include bordering properties as well as related facilities such as rail lines or barge operations. The interviews include site owners who have historical knowledge of past practices and operations. The time estimate for covering approximately 250 acres and interviews is 3 days. It may be beneficial to have representatives of your company accompany Engineer personnel throughout the site walkover.
4. Identify and, if practical, map (not to scale) any potential areas of concern for future sample collection. This does not include detailed AutoCad type mapping.
5. Conduct appropriate local file reviews and interviews. This typically includes discussions with local fire, hazmat and health department personnel. A reasonable search and review of readily available aerial photographs will also be conducted.
6. Conduct and review an environmental record search of the subject property and surrounding area.

This typically includes the following records and data sources:

Federal Sources: NPL, CERCLIS, RCRIS, ERNS, NPDES and FINDS.

State Sources: CONFIRMED DISPOSAL SITES, SPILLS, LANDFILLS, UST, PUBLIC WATER

SUPPLY, AQUIFERS and AREAS OF CRITICAL ENVIRONMENTAL CONCERN.

This will include a USGS site map of the subject area.

Note: All sources may not be available.

7. Prepare and deliver three copies of the report for your distribution:

All reports can be marked, *"Documentation has been prepared at the direction and request of Counsel and is protected by Attorney Client Privilege and/or the Work Product Doctrine or other applicable law,"* if so desired.

A typical report includes the following:

- Introduction
- Site Location and Description
- Description of Current and Prior Site Use
- Site Reconnaissance
- Document Review
- Summary of Findings and Conclusions
- Recommendations (optional)
- Limitations
- Attachments

8. Estimated Expenses

- Federal Document Search Service (a rush fee may be required)
- Hotel, food and transportation costs
- Field supplies such as film and development, delivery service costs and all necessary copies

TOTAL ESTIMATED PROJECT COST IS: _____ Dollars (\$_____). Engineer has estimated approximately _____ (_____) _____ [hours] hours to complete these tasks and approximately _____ Dollars (\$_____) for related expenses. We will make every effort to keep all costs to a minimum throughout the project.

Services not Included

The following services are not included in this scope of work:

- Sampling of soils, water, air and building materials will not be conducted or analyzed under this scope of work.
- Extensive research into economic geology and hydrogeology will not be conducted under this scope of work.
- Researching of Deeds, Title and Zoning information and mapping will not be conducted under this scope of work.
- Remediation plans, cost estimates and compliance analysis will not be conducted under this scope of work.

Time Schedule

Engineer understands that your company would like to have this project completed within a short time frame. We are prepared to initiate the *research work immediately* upon your authorization and sharing of any available documents. Currently we can schedule the *site visit and local file reviews* to begin on _____[*date*] and extend through _____[*date*] (if need be). We expect the entire project can be completed and the reports submitted to you by _____[*date*], assuming authorization to proceed is received by _____[*date*].

Background Materials

If at all possible, Engineer requests that your company supply the following background materials prior to the start of the investigation to allow for maximum efficiency of time and money.

- Permission for right of entry to the subject property and a list of contacts including names, addresses and phone numbers.
- Copies of the most recent survey maps of the subject properties. (If none are available, any subject site maps will greatly assist)
- An accurate address along with the latitude and longitude coordinates for the subject property.
- Copies of any available reports such as soils, hydrologic, geologic, property evaluations, past ESAs or zoning records will be of assistance.

Terms and Conditions

The Terms and Conditions attached hereto are a part of this proposal the same as if incorporated herein.

We appreciate the opportunity to provide your company with this proposal. Should you decide to award this project to Engineer, please sign and date one copy of this letter and return it to me. If you wish to discuss any elements of this proposal, please feel free to call me at (_____) _____[*telephone number*].

Sincerely,

ENVIRONMENTAL ENGINEERING COMPANY

By: _____

[name and title]

We hereby accept your proposal and authorize you to proceed.

NAME OF OWNER ("CLIENT")

By: _____

Date: _____ Title: _____

Exhibit A

STANDARD TERMS AND CONDITIONS

1. **STANDARD OF CARE.** Services shall be performed in accordance with the standard of professional practice ordinarily exercised by the applicable profession at the time and within the locality where the Services are performed. Professional services are not subject to, and Engineer cannot provide, any warranty or guarantee, express or implied, including warranties or guarantees contained in any uniform commercial code. Any such warranties or guarantees contained in any purchase orders, requisitions or notices to proceed issued by client are specifically objected to.
2. **CHANGE OF SCOPE.** The Scope of Services set forth in the Agreement is based on facts known at the time of execution of this Agreement including, if applicable, information supplied by Client. For some projects involving conceptual or process development services, scope may not be fully definable during initial phases. As the Project progresses, if facts discovered by Engineer indicate that the scope must be redefined, Engineer will promptly provide Client with an amendment to this Agreement to recognize such change, which shall be deemed approved if not objected to within 15 days of receipt by Client.
3. **INVOICING AND PAYMENT.** Invoice statements will be issued not less than monthly, with net payment due in 30 days. A 2% discount may be taken for invoices paid within 10 days of invoice date. Past due invoices will be subject to a service charge at the rate of 11/2% per month beginning 30 days from date of invoice. The monthly bill shall consist of a summary of direct labor hours, plus a listing of reimbursable costs incurred. Payments shall be sent to the address appearing on the invoice. Unless Client provides Engineer with a written statement of any objections to the bill within 15 days of receipt, Client shall be deemed to accept the bill as submitted. An administrative fee will be added to all expenses billed through Engineer, including subcontracted services.
4. **ESTIMATED COST.** Engineer will perform the work and accomplish the objectives defined within the estimated costs and schedule proposed. The estimated costs and schedule proposed are based on our best judgment of the requirements known at the time of the proposal. Successful completion within cost and schedule limits can be influenced--favorably or adversely--by changes in work scope and schedule as dictated by Client's needs and by presently unforeseen circumstances. Engineer will notify the Client in advance if schedule or costs are expected to exceed the estimate. In such event, the Client may wish to (1) authorize additional funds to complete the work as

originally defined, (2) redefine the scope of work in order to fit the remaining funds, or (3) request that work be stopped at the specific expenditure level. If option 3 is chosen, Engineer will turn over such data, results, and materials completed at the authorized level without further obligation or liability to either party except for payment for work performed.

5. SAFETY. Unless specifically included as a service to be provided under this Agreement, Engineer specifically disclaims any authority or responsibility for general job site safety and safety of persons other than Engineer employees.

6. DELAYS. If events beyond the control of Client or Engineer, including, but not limited to, fire, flood explosion, riot, strike, war, process shutdown, Act of God or the public enemy, and act or regulation of any government agency, result in delay to any schedule established in the Agreement, such schedule shall be amended to the extent necessary to compensate for such delay. In the event such delay exceeds 90 days, Engineer shall be entitled to an equitable adjustment in compensation.

In the event Engineer is delayed by Client and such delay exceeds 30 days, Engineer shall be entitled to an extension of time equal to the delay and an equitable adjustment in compensation.

7. TERMINATION/SUSPENSION. Either party may terminate this Agreement upon 30 days written notice to the other party. Client shall pay Engineer for all Services, including profit relating thereto, rendered prior to termination, plus any expenses of termination.

In the event either party defaults in its obligations under this Agreement (including Client's obligation to make the payments required hereunder), the non-defaulting party may, after 7 days' written notice state its intention to suspend performance under the Agreement if cure of such default is not commenced and diligently continued, and failure of the defaulting party to commence cure within such time limit and diligently continue the cure, shall suspend performance under this Agreement.

8. OPINIONS OF REMEDIATION/CONSTRUCTION COST. Any opinion of remediation/construction costs prepared by Engineer is supplied for the general guidance of the Client only. Since Engineer has no control over competitive bidding or market conditions, Engineer cannot guarantee the accuracy of such opinions as compared to contract bids or actual costs to Client.

9. RELATIONSHIP WITH CONTRACTORS. Engineer shall serve as Client's professional representative for the Services, and may make recommendations to Client concerning actions relating to Client's contractors, but Engineer specifically disclaims any authority to direct or supervise the means, methods, techniques, sequences or procedures of remediation/construction selected by Client's contractors.

10. REMEDIATION/CONSTRUCTION REVIEW. For projects involving remediation/construction, Client acknowledges that under generally accepted professional practice, interpretations of remediation/construction documents in the field are normally required, and that performance of remediation/construction-related services by the design professional for the project permits errors or omissions to be identified and corrected at comparatively low cost. Client agrees to hold Engineer harmless from any claims resulting from performance of remediation/construction-related services by persons other than Engineer.

11. INSURANCE. Engineer will maintain insurance coverage for Professional, Comprehensive General, Automobile, Worker's Compensation, and Employer's Liability in amounts in accordance with legal and Engineer's business requirements. Certificates evidencing such coverage will be provided to Client upon request. For projects involving remediation/construction, Client agrees to require its remediation/construction contractor, if any, to include Engineer as an additional insured on its policies relating to the Project. Engineer's coverages referenced above shall, in such case, be the excess over contractor's primary coverage.

12. INDEMNITIES. Both Engineer and Client agree to and hereby do defend, hold harmless, and indemnify each other and their officers, directors, employees, agents, and representatives from and against any and all claims, damages, demands, costs and expenses, including attorney's fees, and other losses of any kind or nature whatsoever relating in any manner to any and all personal injuries, deaths, and/or property damage by whomsoever suffered including, but not limited to, the other party or its officers, directors, employees, agents, or representatives arising out of, resulting from or in any manner connected with any negligent act or omission or any intentional misconduct by the other party, its agents or employees under the services provided hereunder.

In no event shall Engineer, its officers, directors, employees or agents be liable for, and Client agrees to defend, indemnify and hold harmless, all at its costs and expense, Engineer, its officers, directors, employees or agents from and against all liabilities, claims, demands, losses, costs, damages, actions, suits or other proceedings (including, but not limited to, any air, ground or water pollution or environmental impairment) by whomsoever made, including claims for bodily injuries, death and physical property loss or damage brought or prosecuted in any manner based upon, occasioned by, or attributable to, arising out of or in any manner connected with or related to Engineer's performance of work that may be made or brought against Engineer of (i) any claims or causes of action arising out of the ownership, transportation, and/or disposal of any contaminated materials; (ii) any claims or causes of action arising out of subsurface conditions or damage to subsurface structures whether owned by Client or any third party, the presence or location of which were not revealed to Engineer by the Client in writing prior to the commencement of Engineer's performance; (iii) any claims or causes of action arising under the Resource Conservation and Recovery Act as amended, the Toxic Substances and Control Act, as amended, the Comprehensive Environmental Response, Compensation and Liability Act, as amended; (iv) any third party claims or causes of action; and (iv) any expenses incurred by Engineer in connection therewith (including reasonable attorney's fees), as such expenses are incurred.

13. LIMITATIONS TO LIABILITY. No employee or agent of Engineer shall have individual liability to Client. Client agrees that, to the fullest extent permitted by law, Engineer's total liability to Client for any and all injuries, claims, losses, expenses or damages whatsoever arising out of or in any way related to the Project or this Agreement from any causes including, but not limited to, Engineer's negligence, errors, omissions, strict liability, or breach of contract shall not exceed the liability insurance limits under the policies described in Paragraph 11, above, as represented and disclosed in writing to Client. If Client desires a limit of liability greater than that provided above, Client and Engineer shall include in this Agreement the amount of such limit and any additional compensation to be paid to Engineer for assumption of such additional risk. IN NO EVENT AND UNDER NO CIRCUMSTANCES SHALL ENGINEER BE LIABLE TO CLIENT FOR CONSEQUENTIAL, INCIDENTAL, INDIRECT, SPECIAL, OR PUNITIVE DAMAGES.

14. ACCESS. Client shall provide Engineer safe access to any premises necessary for Engineer to provide the Services.

15. REUSE OF PROJECT DELIVERABLES. Reuse of any documents or other deliverables, including electronic media, pertaining to the Project by Client for any purpose other than that for which such documents or deliverables were originally prepared, or alteration of such document or deliverables without written verification or adaptation by Engineer for the specific purpose intended, shall be at the Client's risk. Client agrees to defend, indemnify, and hold harmless Engineer from all claims, damages, and expenses, (including reasonable litigation costs), arising out of such reuse or alteration by Client or others acting through Client.

16. AMENDMENT. This Agreement, upon execution by both parties hereto, can be amended only by a written instrument signed by both parties.

17. ASSIGNMENT. The agreement to which these terms and conditions relate and the rights and obligations hereunder may not be assigned or otherwise transferred by either the Client or Engineer without prior written consent of the other party and any such attempted assignment or transfer shall be void.

18. **STATUTES OF LIMITATION.** To the fullest extent permitted by law, parties agree that, except for claims for indemnification, the time period for bringing claims under the Agreement shall expire one year after Project completion.

19. **PREVAILING PARTY LITIGATION COSTS.** In the event any actions are brought to enforce this Agreement, the prevailing party shall be entitled to collect its litigation costs from the other party.

20. **NO WAIVER.** No waiver by either party of any default by the other party in the performance of any particular section of this Agreement shall invalidate any other section of this Agreement or operate as a waiver of any future default, whether like or different in character.

21. **NO THIRD-PARTY BENEFICIARY.** Nothing contained in this Agreement, nor the performance of the parties hereunder, is intended to benefit, nor shall inure to the benefit of, any third party, including Client's contractors, if any.

22. **SEVERABILITY.** The various terms, provisions and covenants herein contained shall be deemed to be separate and severable, and the invalidity or unenforceability of them shall not affect or impair the validity or enforceability of the remainder.



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Chapter 22 DEVELOPMENT AND SUBDIVISION
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26-22 Current Legal Forms for Real Estate FORM 22.40

FORM 22.40 Contract between consulting firm and non-profit corporation which supplies housing for low-income senior citizens--consulting firm to assist corporation in locating potential sites for construction of housing development--firm will also negotiate purchase agreement on behalf of corporation, locate government financing for project, and recruit architect, surveyor, engineer and attorney for project

COMMENT

Many states throughout the country provide some form of financing for non-profit real estate developers who supply affordable housing for elderly Americans with low or moderate incomes. In the agreement below, the developer is a non-profit corporation authorized by law to own and operate housing projects for senior citizens of such economic means. Most projects of this kind must be owned by non-profit entities, since the financing provided by the state usually takes the form of either outright grants, low-interest loans, or loans that are forgiven after a lengthy period of time (*e.g.*, 99 years). Such funding is obviously not available to profit-making companies.

In this agreement, the non-profit corporation has the ability to operate the project once it is built, but it does not have the ability to find an appropriate site for the proposed development, to secure financing, and to organize and supervise the construction of the project. The other party to the contract is a consulting firm which will provide those services for the non-profit corporation. Specifically, the consulting firm agrees to do the following:

- (1) Identify the towns within a particular county that have the greatest need for affordable housing for the elderly.
- (2) Locate potential sites within those towns for erection of the housing development.
- (3) Prepare, for each site, an analysis of its access to: (a) basic utilities (*e.g.*, water, gas, electricity, sewer services, etc.); and (b) necessary services for the elderly (*e.g.*, mass transportation,

supermarkets, drugstores, doctors' offices and hospitals, etc.).

(4) Negotiate, on the developer's behalf, a purchase agreement with the owner of the site chosen by the developer.

(5) Complete and file an application, again on the developer's behalf, to obtain government financing for the construction. (The consulting firm is also responsible for guiding the developer through the entire process, from filing the application and gaining financing approval through closing.)

(6) Assemble a "development team" (i.e., architect, engineer, surveyor and attorney) for the project and negotiate professional service contracts with them on the developer's behalf.

(7) Complete and file an application for a real property tax abatement on the developer's behalf.

In some instances, the consulting firm may also supervise the actual construction of the housing project. That is not the case here. However, in such cases, the level of supervision exercised by the consulting firm often rises to such a high level that the firm basically functions as the general contractor for the project.

FORM

AGREEMENT made this _____ [day] day of _____ [month],
 _____ [year], between _____ [name of entity], a non-profit corporation existing
 under the laws of the State of _____ [state], with offices for the transaction of business at
 _____ [address] (hereafter referred to as "Client"), and _____ [name of entity], a
 corporation organized under the laws of the State of _____ [state], with offices for the transaction of
 business at _____ [address] (hereafter referred to as "Consultant").

WITNESSETH:

WHEREAS, Client is in the business of operating housing for senior citizens; and

WHEREAS, Consultant is in the business of providing consulting services to housing corporations; and

WHEREAS, Client intends to provide approximately _____ [e.g., one hundred (100)] units of new
 senior-citizen housing in _____ [county] County,

NOW, therefore, in consideration of the mutual promises contained herein, it is agreed as follows:

1. *Consultant to prepare market demand study.* Consultant shall prepare a market demand study for
 _____ [county] County. This study shall seek to determine which towns within the county have the
 greatest need for affordable housing for senior citizens of low to moderate income, as defined by state and federal
 guidelines.

2. *Consultant to locate potential sites for senior citizen housing development.* Consultant shall next locate potential sites
 in those towns within _____ [county] County shown to have the highest need for affordable senior
 citizen housing. Each site must be able to accommodate at least _____ [e.g., one hundred (100)] units of

new senior citizen housing]. Consultant shall analyze each site for ease of access to: (1) basic utilities (*e.g.*, water, gas, electricity, sewer services, etc.); and (2) necessary services for the elderly (*e.g.*, mass transportation, supermarkets, drugstores, doctors' offices and hospitals, etc.).

3. *Selecting the site; Consultant to negotiate purchase agreement for Client.* Upon receipt of Consultant's list of potential sites and Consultant's analysis of the pros and cons of each site, Client shall indicate the site upon which it wishes to build the project. Consultant shall negotiate a purchase agreement for that site, subject to the following limitations:

- (a) The contract shall be subject to approval by Client's legal counsel before it is binding upon Client.
- (b) The contract shall be contingent upon Client's obtaining all necessary government financing. (Client shall provide Consultant with a range of acceptable purchase prices and with information regarding necessary financing.)
- (c) The contract shall be contingent upon the results of a Phase I environmental site assessment, and wetlands delineation showing the extent of any wetlands.
- (d) The contract shall be contingent upon receipt of all governmental approvals needed to construct the intended number of units on that site.
- (e) The contract shall be contingent upon the Client's receiving marketable title, free and clear of all encumbrances, with a policy of title insurance to be provided by the seller.

4. *Consultant to prepare application for government financing.* Consultant shall prepare the application to obtain funding from _____ [*insert name of state or local government agency that will supply financing*]. The application shall first be reviewed and approved by Client. Consultant shall make any changes required by Client. Consultant shall attend all meetings between _____ [*insert name of state or local government agency that will supply financing*] and Client as Client's advocate.

5. *Consultant to obtain services of project architect, engineer, surveyor and attorney.* Consultant shall seek the services of a project architect, engineer, surveyor and attorney and make recommendations to Client regarding the individuals who are best qualified for these positions. Client shall select the professionals whose services it intends to use. Consultant shall negotiate professional service agreements with each, subject to Client's approval.

6. *Consultant to make application for real property and other tax abatements.* Consultant shall make application on behalf of Client for real property and other tax abatements for the site.

7. *Compensation for Consultant.* Consultant shall be compensated as follows:

- (a) For the market study, the sum of _____ Dollars (\$_____). This sum shall be paid upon completion and delivery of the study.
- (b) For site acquisition, _____ [*e.g., five (5)*] percent of the purchase price, to be paid at the closing.
- (c) For preparing and filing the application for government financing of the project, negotiating the professional service contracts with the architect, engineer, surveyor and attorney, and filing the applications for real property and other tax abatements, _____ Dollars (\$_____) per unit, payable upon receipt of government funds by Client.
- (d) All other services which are not specified in this Agreement, but which Client may request of Consultant hereafter,

shall be billed at the rate of _____ Dollars (\$_____) per hour, billable monthly and payable within _____ [e.g., ten (10)] days after billing.

8. *Termination.* This Agreement may be terminated by either party at any time through the giving of written notice to the other party. The termination shall be effective upon receipt of such notice, unless some other date of termination is specified. Consultant shall be paid for all services completed as of the effective date of termination. Consultant shall not be entitled to payment for any services which are still in progress, but which are not completed as of the effective date of termination.

9. *Entire agreement.* This Agreement, together with the other written agreements and instruments executed concurrently herewith or pursuant to the provisions hereof, contains the entire agreement between the parties concerning the matters herein set forth and supersedes all prior agreements between them respecting such matters.

10. *Counterparts.* This Agreement may be executed in two or more counterparts, each of which shall be deemed an original, but all of which together shall constitute one and the same instrument. At the trial of any matter arising under this Agreement, only one counterpart need be produced.

11. *Headings.* Paragraph headings are for the purposes of convenience and identification only and shall not be used to interpret or construe this Agreement.

12. *Waivers.* Except as herein expressly provided, no waiver by either party of any breach of this Agreement, or of any warranty or representation hereunder, shall be deemed to be a waiver by the same party of any other breach of any kind or nature (whether preceding or succeeding the breach in question, and whether or not of the same or similar nature).

No acceptance by a party of payment or performance after any such breach shall be deemed to be a waiver of any breach of this Agreement or of any representation or warranty hereunder, whether or not the party knows of the breach when it accepts such payment or performance.

No failure by a party to exercise any right it may have under this Agreement or under law upon another party's default, and no delay in the exercise of that right, shall prevent it from exercising the right whenever the other party continues to be in default. No such failure or delay shall operate as a waiver of any default or as a modification of the provisions of this Agreement.

13. *Gender and number.* Whenever the singular or plural number, or the masculine, feminine or neuter gender, is used herein, it shall equally include the other(s).

14. *Notices.* Any notice which any party is required or may desire to give hereunder shall be in writing and may be personally delivered, transmitted by facsimile machine, or delivered by the United States Postal Service or private delivery service to the above addresses. Notice is deemed given when received.

15. *Governing law.* This Agreement shall be construed and enforced in accordance with the laws of the State of _____ [state].

16. *Binding effect.* This Agreement shall be binding upon, and inure to the benefit of, both parties and their respective heirs, representatives, successors and assigns.

17. *Modifications.* This Agreement may be modified only by a written document signed by representatives of both parties. A purported oral modification shall not be effective.

The parties hereto have set their hands and seals the day and year first above written.

[*Client's name*]

By: _____

President

[*Consulting firm's name*]

By: _____

President

[*Acknowledgments*]



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26-22 Current Legal Forms for Real Estate FORM 22.41

FORM 22.41 Contract to locate and negotiate funding for real estate development project

COMMENT

The form that follows is an agreement between a real estate developer and a mortgage broker, in which the latter agrees to locate and negotiate a source of funding for a project to be undertaken by the developer. Specifically, the developer is planning to gut an existing school building and redesign it as residential housing units.

The developer here is unsure whether the units will be turned into owner-occupied condominiums, or whether they will be rented out as low-income apartments for senior citizens. The developer is considering selling the project, once it is completed, to a non-profit corporation which will own and operate the facility under a federal or state housing program for the elderly. (As noted in the Comment to the preceding form, Form 22.40, in many states, non-profit corporations provide low-cost housing for elderly citizens of limited financial means. Typically, a government agency would make funds available to these corporations in order to acquire housing for senior citizens; such funding may be in the form of a grant, low-interest loan, etc.) Accordingly, in the contract below, a great deal of flexibility is given to the mortgage broker in determining the most appropriate form of funding available for this project.

Broker's compensation.

The broker will be compensated for finding a loan which either meets the developer's guidelines, or which the developer finds acceptable--even though the loan terms may not satisfy all of the guidelines. The fee in this form is a fixed fee, but in many instances the fee will be a percentage of the amount of the loan. To protect the broker from an untimely termination of this agreement by the developer, the right to compensation is fixed at the time of issuance of a loan commitment letter by a lender. If the broker is negotiating with a lender at the time of termination and the lender

subsequently grants the loan, then the broker receives a *quantum meruit* payment for work already done.

The broker will receive payment either at the time of settlement of the loan, or 60 days after issuance of the loan commitment letter, whichever comes first. This provision will guarantee that the developer will move rapidly toward settlement of the loan transaction so that it can pay off the broker with loan proceeds, rather than with the corporation's own operating funds.

FORM

AGREEMENT made this _____[day] day of _____[month],
 _____[year], between _____[name of entity], INC., a corporation existing under the
 laws of the State of _____[state], with offices for the transaction of business at
 _____[address] (hereafter referred to as "Investor"), and _____[name of entity], a
 partnership organized under the laws of the State of _____[state], with offices for the transaction of
 business at _____[address] (hereafter referred to as "Broker").

WITNESSETH:

WHEREAS, Investor is about to undertake a project to renovate a former school into housing units; and

WHEREAS, the purchase agreement between Investor and the owner is contingent upon Investor obtaining suitable mortgage financing on or before _____[date]; and

WHEREAS, Investor may desire to immediately sell the project upon completion to a non-profit corporation for use as low-income housing or, alternatively, as condominiums; and

WHEREAS, Broker is in the business of locating and negotiating financing,

NOW, in consideration of the mutual promises contained herein, it is agreed as follows:

1. *Loan.* Broker agrees to use its best efforts to locate financing for Investor which has the following features:

(a) *Loan amount.* The total loan amount must be at least _____ Dollars (\$_____)
 _____[e.g., \$2.5 million]. The loan may be advanced in stages pursuant to a building loan agreement.
 The initial release must be at least _____ Dollars (\$_____) _____
 _____[e.g., \$500,000] in order to cover acquisition and closing costs.

(b) *Interest rate.* The interest rate may be variable; however, it must have a cap of no more than
 _____[e.g., eight (8)] percent. The rate should vary in accordance with the prime lending rate. Under
 no circumstances may the interest rate increase more than _____[e.g., three (3)] percent in any
 calendar year. Adjustments may be made monthly or quarterly.

(c) *Loan term.* The loan term must extend for at least a period of _____[e.g., ten (10)] years. The loan
 term must be automatically renewable for at least _____[e.g., ten (10)] additional years at the option of
 Investor, provided that Investor has had no adverse changes in its financial condition during the initial loan period.

(d) *Loan repayment.* The loan should be repayable as follows: (i) during the construction period, interest only will be

payable monthly; and (ii) amortized payments of both principal and interest shall begin _____ [e.g., sixty (60)] days after the last advance of loan funds or after the issuance of the certificate of occupancy, whichever event occurs first.

(e) *Environmental site assessment.* The lender shall not require an environmental site assessment as a condition precedent to making the loan.

(f) *Loan assumable.* The loan must be assumable if Investor transfers the property to a non-profit corporation.

(g) *Principals need not personally guarantee loan.* The principals of Investor will not have to personally guarantee repayment of the loan.

(h) *Security for loan.* The loan may be secured by a mortgage on the real property. The lender may request a conditional assignment of leases and rents.

(i) *Prohibited loan terms.* The loan shall not include any of the following provisions:

(i) a prohibition on secondary financing;

(ii) the imposition of liens against bank accounts belonging to Investor;

(iii) cash security from Investor for the loan;

(iv) the charging of more than _____ [e.g., two (2)] loan "points";

(v) the imposition of liens on Investor's inventory or supplies; and

(vi) the imposition of liens on plans and maps prepared for the project.

(j) *Other terms required by lender are subject to Investor's approval.* Any provisions required by lenders which are not discussed herein shall be subject to approval of Investor.

2. *Financial information.* Broker may provide copies of Investor's financial statement, credit report and economic projections for the project to prospective lenders. Lender must agree to maintain Investor's privacy with regard to the information revealed in the aforesaid documents. Copies of financial information shall not be released to anyone by lenders without either prior written permission from Investor or a subpoena. Potential lenders who decline to make the loan shall return all financial documents to Broker.

3. *Time is of the essence.* Time is of the essence. Broker agrees to complete its duties hereunder on or before _____ [date].

4. *Compensation.* In the event that Broker is able to secure a loan commitment letter for Investor which meets the conditions set forth in Paragraph 1 hereof, or which does not meet all such conditions but is nonetheless acceptable to Investor, Broker shall be entitled to compensation. Broker shall be paid the sum of _____ Dollars (\$_____) _____ [e.g., \$2,500] by Investor. Said sum shall be paid either at the settlement of the loan or _____ [e.g., sixty (60)] days after issuance of the loan commitment letter by a lender, whichever event occurs first.

In the event that a fully-negotiated loan does not reach settlement, Broker shall still be entitled to payment, provided that the lack of settlement does not stem from any act or omission on Broker's part, including, but not limited to, neglect

of its duties or intentional misrepresentations made by Broker.

5. *Termination.* Either party may terminate this Agreement upon the giving of _____ [e.g., *twenty-four (24) hours' or five (5) days'*] written notice. In the event that Broker has entered into negotiations with a lender who ultimately makes the loan to Investor, Broker shall be entitled to a *quantum meruit* payment by Investor.

6. *Representations by Investor.* Investor makes the following representations to Broker, intending Broker to rely thereon:

- (a) All financial statements of Investor are true and accurate.
- (b) There have been no material changes in Investor's financial condition since issuance of the financial statements.
- (c) Neither Investor nor any principal of Investor has ever filed a petition in bankruptcy or made an assignment for the benefit of creditors.
- (d) Investor is a duly-formed corporation in good standing, organized under the laws of the State of _____ [state].

7. *Representations of Broker.* Broker makes the following representations to Investor, intending Investor to rely thereon:

- (a) Broker is experienced in the area of locating financing for commercial real estate development projects.
- (b) Broker is very familiar with the lending requirements and practices of commercial lenders in the State of _____ [state].
- (c) Broker has secured all licenses, if any, needed to engage in the activities required of it under this Agreement.

8. *No guaranty.* Nothing herein shall be construed as a guaranty by Broker that it will be able to find financing meeting Investor's requirements. Broker covenants to use its best efforts to secure such financing. Broker will present all offers of financing received from potential lenders to Investor for review.

9. *Entire agreement.* This Agreement, together with the other written agreements and instruments executed concurrently herewith or pursuant to the provisions hereof, contains the entire agreement between the parties concerning the matters herein set forth and supersedes all prior agreements between them respecting such matters.

10. *Counterparts.* This Agreement may be executed in two or more counterparts, each of which shall be deemed an original, but all of which together shall constitute one and the same instrument. At the trial of any matter arising under this Agreement, only one counterpart need be produced.

11. *Headings.* Paragraph headings are for the purposes of convenience and identification only and shall not be used to interpret or construe this Agreement.

12. *Waivers.* Except as herein expressly provided, no waiver by either party of any breach of this Agreement, or of any warranty or representation hereunder, shall be deemed to be a waiver by the same party of any other breach of any kind or nature (whether preceding or succeeding the breach in question, and whether or not of the same or similar nature).

No acceptance by a party of payment or performance after any such breach shall be deemed to be a waiver of any breach of this Agreement or of any representation or warranty hereunder, whether or not the party knows of the breach when it accepts such payment or performance.

No failure by a party to exercise any right it may have under this Agreement or under law upon another party's default, and no delay in the exercise of that right, shall prevent it from exercising the right whenever the other party continues to be in default. No such failure or delay shall operate as a waiver of any default or as a modification of the provisions of this Agreement.

13. *Gender and number.* Whenever the singular or plural number, or the masculine, feminine or neuter gender, is used herein, it shall equally include the other(s).

14. *Notices.* Any notice which any party is required or may desire to give hereunder shall be in writing and may be personally delivered, transmitted by facsimile machine, or delivered by the United States Postal Service or private delivery service to the above addresses. Notice is deemed given when received.

15. *Governing law.* This Agreement shall be construed and enforced in accordance with the laws of the State of _____[state].

16. *Binding effect.* This Agreement shall be binding upon, and inure to the benefit of, both parties and their respective heirs, representatives, successors and assigns.

17. *Modifications.* This Agreement may be modified only by a written document signed by representatives of both parties. A purported oral modification shall not be effective.

The parties hereto have set their hands and seals the day and year first above written.

_____, INC.

[Investor's name]

By: _____

President

[Brokerage firm's name]

By: _____

Managing Partner

[Acknowledgments]



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26-22 Current Legal Forms for Real Estate FORM 22.42

FORM 22.42 Contract to plat and subdivide land and construct housing development--terms favorable to contractor--contractor's work furnished at cost

COMMENT

Many development ventures are a combination of a landowner and a builder or developer. The venturers may join as mere co-owners, as joint venturers, as partners, or as shareholders in the corporation holding title to the property. In such case, the organization agreement will frequently provide that the builder or developer will perform the general contracting services. In this case, the relationship between the owner and the developer is through corporation ownership. The developer corporation owns 50 percent of the shares of the owner corporation. The contract provides that all services by the developer corporation are to be furnished at cost. To complement these services by the developer the owner is responsible for the planning, financing, and sales aspects of the venture.

Since all work for the venture is to be performed by both parties at cost, the basic purpose of this contract is simply to define the financial and working responsibilities of the venturers. The developer is to plat all properties designated by the owner for improvement and is to construct the roads. Building construction is to be initiated by the erection of model homes, followed by the construction of homes in groups of not less than 25. The contract defines in precise terms the construction costs and overhead and office expenses for which the developer is to be reimbursed by the owner. At the same time, it requires the owner to work out in advance a satisfactory financial program to insure the developer that the reimbursement will in the first instance be made by way of progress payments from construction mortgages. If these are not sufficient, payments are to be made from the proceeds of permanent mortgages or by the owner itself if full payment has not otherwise been made within a fixed time after the completion of each home.

FORM

AGREEMENT made and entered into at Miami, Dade County, Florida, _____[date], by and between Central Development Co., Inc., a Florida corporation (the "Owner"), and General Building Corporation, a Florida corporation, (the "Contractor").

Recitals

The Contractor is the owner of one half of the outstanding stock of the Owner, and is beneficially interested in the development of the properties now owned or hereafter acquired by the Owner. By reason of the ownership of such stock by the Contractor, the parties have agreed that the Owner would employ the Contractor as a general contractor to develop all properties now owned or hereafter acquired by the Owner,

Now, therefore, the parties agree as follows:

1. *Employment.* The Owner employs the Contractor to do the work covered by this contract and the Contractor accepts such employment.

2. *Preliminary work.* When the Owner has designated properties for improvement, the Contractor will then be authorized, empowered, and directed to let all contracts and take all actions on behalf of the Owner which may be necessary for the doing of all preliminary work of laying out the properties, constructing roads and streets, platting the property or properties on behalf of the Owner and hiring of architects to propose "green" alternatives during the schematic design phase of the proposed improvements. The Owner, on its behalf, will, upon the demand of the Contractor, execute any and all instruments and do any and all things which may be necessary or incidental to the performance of the work by the Contractor pursuant to the foregoing provisions.

3. *Model homes.* The Contractor will erect model homes on the properties that the Owner designates, and the homes will be constructed in accordance with plans and specifications which the Owner will furnish, for the purpose of offering homes for sale in the respective subdivisions and areas which the Owner proposes to develop.

4. *Group construction.* After the Contractor has erected the model homes, the work covered by this contract will consist in the construction by the Contractor of homes in groups of not less than 25 in number. The homes will be built on the lots or sites that the Owner designates, in accordance with plans and specifications furnished by the Owner prior to the commencement of the construction work. The Contractor will continue to build homes for the Owner, in groups of not less than 25 homes, as long as the Owner designates the homes to be built by the Contractor. Nothing herein contained shall be construed as precluding the Owner from terminating construction work if, in the judgment of the Owner, the construction of additional homes is unwarranted.

5. *Financial assurances to contractor.* Before making it obligatory upon the Contractor to do any work, pursuant to the terms of this contract, the Owner shall:

(a) Satisfy the Contractor that the Owner can and will pay for the cost of platting and subdividing the portions of the lands to be platted and subdivided, and pay for all cost of constructing the roads and streets in the platted portions of the property; and

(b) Satisfy the Contractor of the ability of the Owner to pay for the work of constructing the homes, by having procured financing from an institution which will cover both the making of progress payments and the final payment to be made in each instance hereunder, and by having procured a permanent mortgage commitment covering each home. The permanent mortgage commitment and the proceeds therefrom shall be in an amount sufficient to enable the Owner to

pay the Contractor its overhead as provided for in Paragraph 7(f) and the then unpaid amount which the Contractor should receive for the cost of constructing the home.

6. *Progress of work.* After financing is arranged as required by Paragraph 5, the Contractor shall proceed with the work of construction, and shall perform or cause to be performed, all of the work and furnish or cause to be furnished, all of the materials shown on the plans and specifications. In each instance the work to be performed shall be commenced as quickly as possible after the Owner has notified the Contractor of the homes to be constructed and the lots upon which the homes are to be situated. The work, when commenced, shall be carried through expeditiously and continuously to completion as rapidly as the proper doing of the work, the employment of available crews of labor, the prompt placing of orders by the Contractor, and the availability of materials will permit. Nothing herein contained shall require the Contractor to employ overtime labor. The Contractor shall exercise its best efforts to cause the work to be done as promptly as possible. In no event shall the Contractor be deemed liable to the Owner for any delay in the final completion of the work caused by Act of God, casualty, strike, governmental restriction upon the availability or use of labor or materials, or by reason of any other fact which is not caused by the act or default of the Contractor or of any employee or agent of the Contractor.

7. *Amounts to be paid contractor.* The Owner shall pay to the Contractor for the performance of the contract, the following sums:

(a) The actual cost to the Contractor for the work, labor, and services performed and materials furnished in connection with the platting and subdividing of the various properties and the construction of the roads and streets and, in general, the actual cost of all work of laying out and preparing the property for development purposes prior to the actual commencement of constructing homes. Payment for the work referred to in this subparagraph (a) shall be made by the Owner promptly upon the rendition and presentation of bills covering the work, whether bills have been rendered to the Owner or the Contractor.

(b) The actual cost to the Contractor for the work, labor, and services performed and materials furnished upon and incorporated in the job.

(c) The term "job" means any and all construction work done or caused to be done by the Contractor pursuant to the provisions of this contract. "Actual cost" does not include any rebate, discount, or allowance which the Contractor obtains from the subtrades or from the purchase of materials, which items shall be promptly reported by the Contractor to the Owner and shall accrue to the benefit of the Owner. "Actual cost" includes the actual expense of all work, labor, services, and materials, and all utilities' bills rendered to the job during the performance of this contract; the premiums for or the cost of all insurance which the Contractor carries on the job, including any bond which the law may require the Contractor to carry for the job; drayage, cartage, gasoline, and oil used for or in connection with work on the job; and salary or wages of employees, superintendents, foremen, supervisors, timekeepers, expeditors, and additional personnel actually agreed upon for work performed under this contract.

(d) If any dispute shall arise between the parties as to the manner in which the Contractor has computed "actual cost," then the matter shall be resolved by Arnold & Smith, Certified Public Accountants, DuPont Building, Miami, Florida, who shall determine the "actual cost" in accordance with the provisions herein contained.

(e) All of the items referred to in subparagraphs 7(a) and 7(b) will be collectively referred to as "cost."

(f) In addition to cost, the Owner will pay to the Contractor a sum equivalent to 4 percent of the cost of the work referred to in subparagraphs 7(a) and 7(b) for the Contractor's overhead and office expense, which the parties have estimated as being an amount which will represent the actual cost of the Contractor's overhead and office expense. If in any tax year of the Contractor, and during the term of this contract, the Contractor's actual overhead and office expense is in excess of or less than 4 percent of the cost of the work referred to in subparagraphs 7(a) and 7(b), then within 90

days from the last day of the Contractor's tax year, the parties will readjust the amount due the Contractor for its actual cost of overhead and office expense, and whichever party owes the other any sums of money as a result thereof will pay the same upon demand. The Contractor's actual cost of overhead and office expense will be computed in the first instance from the date of this contract up to the end of the Contractor's tax year, and thereafter the cost will be computed for each tax year of the Contractor. If any dispute arises between the parties as to the matters set forth in this subparagraph, then it shall be resolved by Arnold & Smith, Certified Public Accountants, DuPont Building, Miami, Florida.

(g) The Owner shall at all times have the right to check the Contractor's records covering the work under this contract.

8. *Method of payment.* The Contractor will receive payment of the compensation provided for in Paragraph 7 in the following manner and at the following times:

(a) Progress payments shall be made to the Contractor out of the proceeds of the construction financing in the manner and in the amounts permitted under the construction mortgages. The term "progress payments" includes the final payment by way of reimbursement for "cost" and "Contractor's overhead" if the disbursing agent for the construction mortgagee consents to final payment made in advance of the time when the improved lot is sold or the permanent mortgage is closed and its proceeds disbursed. If the total of all progress payments by way of reimbursement to the Contractor for "cost" and "Contractor's overhead" is less than the total of all items of "cost" and "Contractor's overhead," then the final payment of reimbursement for "cost" and "Contractor's overhead" shall be made to the Contractor in a transaction which is simultaneous with the closing of the permanent mortgage, but in no event later than 60 days after the construction work is completed. Irrespective of the provisions herein contained, the Owner shall pay to the Contractor, upon statements being presented therefor, all bills for all materials, supplies, and equipment purchased by the Contractor and stored either on or off of the site of the job, which materials, supplies, and equipment are or will be used in connection with the construction work.

(b) The provisions contained in subparagraph 8(a) relating to payment for work and the time when "the construction work is completed" mean, in each instance, payment for work on a particular home (as distinguished from the entire group) and the time when a particular home is completed. The parties anticipate that homes will be sold, the sale concluded, and the permanent mortgage closed as quickly as a home is finished and the details of the sale and closing can be completed. Irrespective of whether or not a sale is completed, all unpaid balances due the Contractor in connection with the construction of a particular home shall be paid not later than 60 days after that particular home is completed.

(c) It shall be the duty of the Owner to see that payments earned under the terms of this contract are paid to the Contractor by the disbursing agent of the construction mortgagee as and when they become due. If for any reason other than the Contractor's own default the payments are not made by the disbursing agent, then it shall be the duty of the Owner to make the payments to the Contractor as and when they become due.

(d) At any time on or after the date when the Contractor has completed a particular home and while any balances due to the Contractor still remain unpaid, the Contractor may require the Owner to join with the Contractor in the execution of a recordable instrument which will identify the particular home by lot and block number and will contain the statement that there remains unpaid to the Contractor a portion of the amount due by reason of or in connection with the work of construction. The instrument will further state that the Contractor is granted a lien to secure the payment of all sums in connection with the construction of the home, and that the lien is granted by contract and will not expire by the ordinary limitations of the mechanics' lien law. It is the duty of the Contractor to satisfy of record any such recorded instrument, when the Contractor is actually paid all sums which are due by reason of the construction of the home.

9. *Insurance.* During the continuance of this contract, the Contractor shall carry public liability, subcontractors' liability, property damage, worker's compensation, social security, unemployment insurance, and any other forms of insurance

required by the law or customarily carried by a general contractor. The cost of the insurance shall be included in the computation of the Contractor's cost under this contract. The Owner shall carry fire and windstorm insurance. If any loss is compensated for by fire and windstorm insurance, then that amount shall be paid to the Contractor to repair the actual damage sustained on the job. The amount of the insurance compensation shall not determine the actual cost of repairing the damage. If the cost of repairing the damage is more than the insurance compensation, then the Owner shall make good the deficiency by prompt payment to the Contractor. If the insurance compensation is more than the cost of repairing the damage, then the excess shall be refunded by the Contractor to the Owner.

10. *Quality of work.* All work under this contract is to be performed in all respects in compliance with applicable building laws, ordinances, and regulations; and all such work shall be done in a good and workmanlike manner. Upon the payment by the Owner of all sums due the Contractor under this contract, the Contractor will hold the Owner harmless against any claims which may be made against the Owner or the Owner's properties for work, labor, services, or materials furnished to the Owner by or on behalf of the Contractor.

11. *Mortgage requirements.* It shall be the duty of the Owner to comply with all requirements of governmental agencies which grant, insure or acquire permanent mortgages on the homes constructed under this contract. It shall be the duty of the Contractor to construct the homes in accordance with all requirements of governmental agencies which grant, insure or acquire permanent mortgages on the homes, and in accordance with all requirements of construction mortgages on the homes.

12. *Right of termination.* Either party to this contract shall have the right to terminate this contract upon giving six months' written notice to the other. Upon termination, the Contractor shall complete all homes then under construction as expeditiously as possible. Upon receipt of notice of termination, the Contractor shall not commence construction on any homes not yet begun.

13. *Marketing.* Owner shall be responsible for the pricing of all homes to be sold. Owner shall actively market homes. Owner shall have the right to engage a real estate broker or use its own staff, at its sole discretion.

14. *Entire agreement.* This agreement, together with the other written agreements and instruments executed concurrently herewith or pursuant to the provisions hereof, contains the entire agreement between the parties respecting the matters herein set forth and supersedes all prior agreements between them respecting such matters.

15. *Counterparts.* This agreement may be executed in two or more counterparts, each of which shall be deemed an original, but all of which together shall constitute one and the same instrument. At the trial of any matter arising under this agreement, only one counterpart need be produced.

16. *Headings.* Paragraph headings are for purposes of convenience and identification only and shall not be used to interpret or construe this agreement.

17. *Waivers.* Except as herein expressly provided, no waiver by either party of any breach of this Agreement, or of any warranty or representation hereunder, shall be deemed to be a waiver by the same party of any other breach of any kind or nature (whether preceding or succeeding the breach in question, and whether or not of the same or similar nature).

No acceptance by a party of payment or performance after any such breach shall be deemed to be a waiver of any breach of this Agreement or of any representation or warranty hereunder, whether or not the party knows of the breach when it accepts such payment or performance.

No failure by a party to exercise any right it may have under this Agreement or under law upon another party's default, and no delay in the exercise of that right, shall prevent it from exercising the right whenever the other party continues to be in default. No such failure or delay shall operate as a waiver of any default or as a modification of the provisions of

this Agreement.

18. *Gender and number.* Whenever the singular or plural number, or the masculine, feminine or neuter gender, is used herein, it shall equally include the other(s).

19. *Notices.* Any notice which any party is required or may desire to give hereunder shall be in writing and may be personally delivered, transmitted by facsimile machine, or delivered by the United States Postal Service or private delivery service to the above addresses. Notice is deemed given when received.

20. *Governing law.* This Agreement shall be construed and enforced in accordance with the laws of the State of Florida.

21. *Binding effect.* This agreement shall be binding upon, and inure to the benefit of, all the parties and their respective heirs, representatives, successors and assigns.

22. *Modifications.* This agreement may be modified only by a written document signed by both parties. A purported oral modification shall not be effective.

The Owner and the Contractor have caused these presents to be executed by their proper officers, who are duly authorized, and their corporate seals to be affixed, all of which has been done at the place and on the day and year first above written.

Central Development Co., Inc.

By: _____

President

General Building Corporation

By: _____

President

[Acknowledgments]



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Current Legal Forms for Real Estate

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Current Legal Forms for Real Estate
Chapter 22 DEVELOPMENT AND SUBDIVISION
Part IV. FORMS
C. PLANNING AND CONSTRUCTION

26-22 Current Legal Forms for Real Estate FORM 22.43

FORM 22.43 Contract to plat and subdivide land and construct homes and other buildings--separate categories for contractor's cost plus percentage compensation--owner to pay construction costs

COMMENT

In this form, the owner of a large tract of undeveloped land employs a contracting corporation to supervise the platting and subdivision of the land and to construct homes and other buildings in accordance with plans and specifications furnished by the owner. There is a careful definition of the areas of activity for each of the parties. Essentially, the owner has reserved control over the planning and financing of the venture while passing on to the contractor the responsibility for substantially all of the construction work.

Since the development program involves the sale of building lots, the construction and sale of residences, and the construction of other buildings, the compensation of the contractor takes these various factors into account. Compensation to the contractor is to consist of the following: a percentage of the sales price of each building lot; a percentage of the cost of each residence, but not in excess of one-half the profit resulting from the sale of the residence; a percentage of the cost of each building (other than a residence) constructed by the contractor; and all of the overhead incurred by the contractor. The agreement carefully defines the terms "cost," "profit resulting from the sale of a residence," and "overhead," and the times and manner in which compensation payments are to be made to the contractor. In addition, the owner is obligated to pay all construction costs incurred under the contract, whether incurred in the name of the owner or the contractor. Rights to inspect books of account are allowed to each party to permit verification of financial matters.

FORM

THIS AGREEMENT is made on _____[*date*], in Miami, Florida, by and between General Realities Corporation, a Florida corporation ("General"), and Central Construction Corporation, a Delaware corporation authorized to do business in Florida ("Central").

The parties agree as follows:

1. *Definitions.* For the purposes of this agreement, the following terms have the following meanings:

- (a) "Lots" or "tracts" or "plots" mean property owned and hereafter acquired by General which are contained in a proposed unrecorded plat or a recorded plat of land.
- (b) "Land" or "property" means property owned and hereafter acquired by General which is not contained in a proposed unrecorded plat or a recorded plat.
- (c) "Residence" means a single-family residence.
- (d) "Building" means any structure other than a residence.

2. *Employment.* General employs Central to perform the work covered by this agreement and Central accepts such employment.

3. *Contractor's obligations.* Central shall perform the following work:

- (a) Supervise the platting and subdividing of the land General designates, from time to time, into lots, tracts, or plots; supervise the preparation of plats of the land and cause the plats to be recorded; and supervise the improvement of and development of land designated by General from time to time;
- (b) Construct residences and buildings on the land or the lots, tracts, or plots General designates, from time to time, in accordance with plans and specifications furnished by General, which plans and specifications shall comply with all building code provisions covering the construction of the residences and buildings covered by the plans and specifications, including any codes requiring the improvements to meet certain green building standards. The construction of residences and buildings shall be at actual cost though subject to the payment by General to Central of the compensation and other moneys provided in Paragraph 6, and its accompanying subparagraphs; and
- (c) Any and all other work necessary or incidental to accomplish any of the foregoing.

4. *Owner's obligations.* In connection with the work referred to in Paragraph 3, General shall:

- (a) Construct and install the roads and other improvements on and across the land to enable Central to do and perform the work provided for under this agreement;
- (b) Execute all plats, procure all bonds, and pay all bond premiums, and make all disbursements which may be necessary or requisite to the preparation and recording of plats of the land;
- (c) File all applications and pay all fees and expenses necessary to procure the approval of lots for financing under Federal Housing Administration or conventional mortgages;
- (d) Furnish all financing and supply all funds for the construction of residences and buildings; in order to assure Central that all construction costs will be paid promptly;

- (e) Do all things, award all contracts with subcontractors and materialmen, and place all orders, all of which shall be done in the name of General, to enable Central to perform the work provided in Paragraph 3;
- (f) Pay all bills for work, labor, services, and materials furnished for the doing of the work, and to pay the same within 30 days after Central has made demand that payment be made;
- (g) Make the advances necessary for the purchase of materials, supplies, machinery, and equipment for the work;
- (h) Indemnify and hold Central harmless from liability for the payment of any or all of the foregoing; and
- (i) Pay Central its compensation and overhead hereinafter provided for.

5. *Time of performance.* In each instance, the work to be performed, under this agreement, shall be commenced as quickly as possible after General has notified Central of the particular work to be done. The work, when commenced, shall be carried through expeditiously and continuously to completion as rapidly as the proper doing of the work and the availability of crews of labor and materials permit. In no event shall Central ever be deemed liable to General for any delay in the completion of any work caused by Act of God, or the public enemy, or by casualty, or by strike, or by governmental restriction upon the availability or use of labor or materials, or by reason of any other fact which shall not have been caused by the act or default of Central or any employee or agent of Central.

6. *Compensation to contractor.* General shall pay Central for the work performed under this agreement the following sums:

(a) A sum equivalent to 22/3 percent of the sales price of each lot, tract, or plot sold or contracted to be sold by General between and including _____[date], and _____[date], and payment shall be made in the following manner, and at the following times:

(1) If any lots, tracts, or plots are sold under sales contracts or agreements for deed, the compensation to be paid Central shall be paid in equal installments concurrently with the first 36 payments made by the purchasers under the sales contracts or agreements for deed; but if any of the sales contracts or agreements for deed are payable over a period of less than 36 months, then the compensation to be paid Central shall be paid in equal installments out of the payments received by General during the term of such sales contracts or agreements for deed; but

(2) If any lots, tracts, or plots are sold for cash or sold partially for cash and the balance of the purchase price is evidenced by a purchase money mortgage, or other instrument evidencing the unpaid balance of the purchase price, and a deed of conveyance is delivered to the purchaser, General shall pay Central the compensation simultaneously with the execution and delivery of the deed of conveyance by General to the purchaser; and

(3) Payment of the compensation provided for in subparagraph (1) hereof is contingent upon payments being made under the sales contracts and agreements for deed, and if a purchaser defaults, and as a result of a default the sales contract or agreement for deed is cancelled, then General shall only be liable to pay Central the compensation out of the installments paid on contracts and agreements for deed up to the date of the cancellation of the sales contract or agreement for deed.

(b) A sum equivalent to 5 percent of the cost of each residence constructed by or for General between and including _____[date], and _____[date], but such sum equivalent to 5 percent of the cost of each residence shall not exceed one half of the profit resulting from the sale of the residence.

(1) The compensation for each residence shall be paid by General to Central within 30 days from the date of the execution and delivery to the purchaser of a deed of conveyance. If a residence is sold under an agreement providing for

the payment of the purchase price in installments and the delivery of a deed to the purchaser after payment of installments in accordance with the agreement, then the compensation for the residence shall be paid by General to Central within 30 days from the date of the execution and delivery of the agreement.

(2) In the event the compensation to be paid Central, as herein provided, cannot be determined with mathematical precision at the time the compensation is required to be paid, then the compensation shall be estimated by the then Certified Public Accountants of General and the estimated amount shall be paid to Central. When such compensation can be accurately computed the parties will account to each other for the exact amount to be paid to Central.

(3) In the event General is unable to dispose of any residences, then General shall not be obligated to pay Central the sum of 5 percent of the cost of the residence for any residence remaining unsold. If a purchaser under a sales contract or agreement for deed purchases a residence from General and in connection with such purchase surrenders the sales contract and receives a credit on the purchase price of the residence for the amounts paid under the sales contract, then there shall be credited against the compensation to be paid Central upon the sale of the residence the amount of the compensation General previously paid Central on the sales contract surrendered in exchange for part payment on the purchase of a residence.

(c) A sum equivalent to 5 percent of the cost of each building constructed by or for General between and including _____[date], and _____[date]; and for the purposes of this paragraph, the parties have agreed that the cost of each building shall be determined by taking the sum total, in the aggregate, of the lot improvement cost, actual cost of constructing, and overhead. Compensation for buildings shall be paid within 30 days from the date of the completion of the building. "Completion of the building" has occurred when the governmental agency having jurisdiction over the approval of the construction work issues a certificate of occupancy. If there is no governmental agency having authority to issue a certificate of occupancy then completion means the actual completion of all of the work required to be done by or through Central pursuant to the terms of this contract for the completion of the building. The fact that there may remain minor items of touching up to be done, which can be done after the occupancy of the building by General, or parties claiming by, through, or under General, will not prevent the building from being considered completed for the purpose of determining whether Central has completed the building and is entitled to payment.

(d) All of Central's overhead covering the work provided for under this agreement.

(e) The cost of each residence shall be determined in the following manner:

(1) First, the number of acres contained in and covered by the plat in which the lot, tract, or plot where the residence is to be constructed is located shall be determined; and then the actual cost paid by General per acre for the land included in the plat shall be determined; and then the total acreage covered by such plat shall be multiplied by the amount paid per acre and the resulting figure shall then be divided by the number of lots, tracts, or plots included in the plat, and the quotient shall be the "base cost" of the lot, tract, or plot. When the base cost of a lot, tract, or plot, is inequitable by reason of location and size of particular lots, tracts, or plots, then the base cost may be increased or diminished in accordance with sound accounting and business practices, agreed to by the parties, and upon their failure to agree to such change, then the same shall be resolved in the manner provided for in Paragraph 15 hereof.

(2) The cost shall be determined of surveying, platting, and laying out of the land contained in and covered by the plat in which the lot, tract, or plot is located, upon which the residence or building is to be constructed, including engineering and architect's fees, (other than the fees of engineers and architects employed by General or Central) and the cost of laying out and building all roads, streets, sidewalks, and parkways, and the cost of preparing the property for the construction of residences and buildings, and the cost of installing water and sewer mains to service all of the property included in the plat, and the cost of installing drainage systems, street signs, subdivision gates, and all other improvements necessary or required to create a complete subdivision of the land covered by the plat. The aggregate of

all of these costs shall be divided by the number of lots, tracts, or plots included in such plat and the quotient shall be the "lot improvement cost." If there are any lots, tracts, or plots in such plat abutting on a canal or waterway, then the entire cost of creating the canals and waterways contained in such plat shall be divided by the number of lots, tracts, or plots, abutting the canals and waterways and the quotient shall be added to and included as a part of the lot improvement cost of each canal or waterfront lot, tract, or plot.

(3) The actual cost of constructing the residence or building shall then be determined. The term "actual cost of constructing" shall include the actual cost of all work, labor, services, and materials furnished for the construction of the residence or building, and all utilities furnished to the residence or building in connection with the construction work; and the cost of all machinery, equipment, and appliances installed in the residence or building; and the premiums for or the cost of comprehensive-liability insurance and worker's compensation insurance and all other insurance carried on the residence or building being constructed, including any bond which the law may require, including drayage, cartage, gasoline, and oil used for or in connection with the doing of the work, and salaries or wages of employees, superintendents, foremen, supervisors, timekeepers, expeditors, and other personnel engaged upon and being paid wages for the construction of the residence or building; and all other improvements or installations on the lot, tract, or plot which are not included in the lot improvement cost; and including, in general, everything which, for example, under the terms of an A.I.A. cost-plus contract would be cost. The actual cost of constructing shall also include sales commissions paid for the sale of a residence and direct advertising costs applicable to a residence and interest paid on a construction mortgage on a residence.

(4) The overhead of Central in the proportions provided in this agreement shall be included in and deemed a part of the cost of each residence or building. In each "taxable year" of Central, the overhead of Central for the taxable year shall be ascertained by taking the sum total of Central's cost (not included in actual cost of constructing) of maintaining and operating its construction equipment, automobiles, trucks, and rolling stock, salaries and bonuses paid to Central's employees, charitable donations and contributions not exceeding \$30,000, dues, subscriptions for services, periodicals, and literature, premiums paid for general comprehensive-liability insurance, workers' compensation insurance, employees' health and accident insurance, legal and professional fees, lights, water, and all utility charges, salaries paid to the officers of Central which shall not exceed \$200,000 rent, in each year, office supplies, promotion, travel, and entertainment expenses, and all other items of expense which under sound accounting principles are included in and considered as overhead. The method of charging overhead against the work performed for General shall be as follows: there shall first be determined the entire amount of land development costs for General and actual cost of constructing residences and buildings for General in each taxable year of Central, but for the purposes of this subparagraph only, actual cost of constructing residences shall not include sales commissions, advertising, or interest on construction loans; and that proportion of the entire overhead allocable to work performed under this contract which the actual cost of constructing residences and buildings bears to the entire amount of land development costs and actual costs of constructing residences and buildings will be the overhead allocable to residences and buildings, and the balance of the overhead will be the overhead allocable to land development work. That proportion of the overhead (allocable to residences and buildings) which the actual cost of constructing the buildings bears to the actual cost of constructing residences and buildings shall be charged against the buildings constructed by Central for General, and the balance will be charged against the residences constructed by Central for General, and the overhead allocable to residences shall be divided by the number of residences constructed by Central for General in Central's taxable year and the quotient will be the overhead charged to each residence constructed by Central for General. The overhead allocable to buildings shall be divided by the number of buildings constructed by Central for General in Central's taxable year and the quotient will be the overhead charged to each building constructed by Central for General. In determining the overhead and its allocation, consideration shall be given to uncompleted residences and buildings being constructed at the time the overhead and allocation is determined.

The sum total, in the aggregate, of the base cost of the lot, tract, or plot and the lot improvement cost and actual cost of constructing and the overhead of Central shall be the cost of each residence constructed by or for General; and the sum total, in the aggregate, of the lot improvement cost and actual cost of constructing and overhead of Central shall be the

cost of each building constructed by or for General.

(f) The "profit resulting from the sale of a residence" shall be computed as follows:

(1) For a minuend or gross figure, there shall be first computed the net proceeds of the sale of the residence. The "net proceeds" are the sum total of the gross selling price of the residence less the actual deductions made at the time of the closing to give effect to the actual closing costs, including abstracting bills, mortgage loan creation costs, proration of taxes, and any other actual prorations or adjustments made upon the occasion of the closing; and

(2) The subtrahend will constitute the cost of each residence, determined under subparagraph (e) and its accompanying subparagraphs; and

(3) The subtrahend shall be subtracted from the minuend and the amount of the remainder shall be and constitute the profit resulting from the sale of a residence, for the purposes of subparagraph (b).

7. *Statements and books.* General will, at the time of making the payments to Central, furnish a statement to Central showing the manner in which the compensation has been determined, and the particular sales contracts and sales upon which the compensation is being paid. Central shall have the right to examine General's books and records, from time to time, for the purpose of determining the names of purchasers, and the lots, residences, and buildings being purchased and the amounts being paid; and General shall have a corresponding right to examine Central's books and records for the purpose of determining Central's overhead, and for any purpose germane to this agreement.

8. *Payments by owner.* In addition to the payments provided for in subparagraphs (a), (b), and (c) of Paragraph 6, General will pay Central, upon demand, all moneys advanced or paid by Central for work, labor, services, and materials furnished in connection with the work covered by this agreement which, by the terms of this agreement, General is obligated to pay; and General will pay Central its overhead in the manner and at the times provided in Paragraph 9.

9. *Time of payments.* The parties acknowledge that from an accounting standpoint it may be impractical to determine with mathematical precision the amounts to be paid to Central under subparagraphs (b) and (c) of Paragraph 6, until the end of Central's taxable year in which the residences or buildings are completed; and, therefore, the parties agree as follows:

(a) General shall, on or before the tenth day of each calendar month, commencing with the calendar month next succeeding the date of the execution of this agreement, pay to Central a sum equivalent to 1/12 of Central's annual overhead as estimated by General and Central, and upon any failure to agree upon the annual overhead the matter shall be resolved as provided for in Paragraph 15.

(b) Within 60 days after the end of each taxable year of Central, the overhead of Central will be determined for the taxable year, and if the overhead is in excess of or less than the amount paid by General to Central, then the overhead will be readjusted and whichever party owes the other any sums by reason thereof, will pay the same upon demand.

(c) General shall pay Central a sum equivalent to 5 percent of the cost of each residence and building constructed by or for General within the time provided for in subparagraphs (b) and (c) of Paragraph 6 but with the understanding that the amount or amounts so paid shall be subject to adjustment to give effect to the provisions of such subparagraphs. The adjustment will be made within 60 days after the end of the taxable year of Central in which payment has been made, and whichever party owes the other any sums by reason of the adjustment, will pay the sums upon demand. For the purpose of determining the cost of each residence and cost of each building a sum equivalent to 4 percent of the actual cost of constructing shall be included as "overhead" until the actual overhead is determined in accordance with the provisions of subparagraph (e)(4) of Paragraph 6.

10. *Exclusive services of contractor.* During the term of this agreement, Central will confine its efforts and work exclusively to the performance of the work provided for under this agreement. Anything in this agreement to the contrary notwithstanding, if, at any time, the construction of the residences and buildings by Central for General is insufficient to use Central's building and construction personnel normally used by Central, then Central shall have the right to construct residences and buildings for itself and other parties without being in default hereunder. If Central does so construct residences and buildings for itself and other parties, then the overhead of Central allocable to work performed under this agreement shall be that proportion of Central's overhead which the actual cost of land development work and the actual cost of constructing residences and buildings by Central for General bears to the actual cost of land development work and the actual cost of constructing residences and buildings by Central for itself, for General, and for other parties. General will not, during the term of this agreement, enter into any agreement or employ any party to do any of the work provided for by this agreement without the consent, in writing, of Central, and Central shall have the exclusive right to do and perform, for General, its successors and assigns, all of the work contemplated and provided for under the terms of this agreement.

11. *Term of agreement.* The term of this agreement shall be from the date hereof up to and including _____[date]. General shall be obligated to continue to pay Central the compensation provided for in subparagraph 6(a), after the expiration date, on those lots, tracts, or plots sold or contracted to be sold up to and including the expiration date. In the event there are any uncompleted residences, and buildings on the expiration date, Central shall be obligated to complete the construction of such residences and buildings, and General shall be obligated to pay Central the compensation provided for in subparagraphs 6(b) and 6(c) for all work completed subsequent to the expiration date. The compensation on any unsold residences completed prior to or subsequent to the expiration date shall be paid to Central when such residences are sold.

12. *Additional obligations of owner.* General agrees that:

(a) General shall pay Central the sums of money required under this agreement as and when they become due and payable in accordance with the terms of this agreement.

(b) General will take all actions, do all things, let all contracts, and make all payments and disbursements which, under the terms of this agreement, General is obligated to do and perform.

(c) General shall carry fire, windstorm, and extended coverage insurance on all residences and buildings constructed by Central, and shall pay all the premiums, and the insurance shall be taken out upon the commencement of the construction work and carried continuously until General sells the residences and buildings.

(d) From and after the completion of the construction of a residence and building by Central, General shall be responsible for the maintenance and repair of the residence and building; but the provisions herein contained shall not relieve Central of the obligation to make repairs to residences or buildings which become necessary as a result of defective materials and workmanship.

(e) General will hold Central harmless against any claim made against Central by reason of the use by General of Central's name in connection with the development and sale of General's properties; and

(f) Upon the termination or expiration of this agreement, General shall not in any manner use Central's name in connection with the development and sale of General's properties, and shall not in any manner make reference to the fact that Central, prior to termination or expiration, developed General's properties. Upon a breach of the provisions herein contained, Central shall have such rights and remedies as the law permits to enforce the provisions herein contained and to recover damages for such breach.

13. *Additional obligations of contractor.* Central agrees that it:

- (a) Shall cooperate with General in the preparation and filing of the applications referred to in Paragraph 4(c).
- (b) Will procure bids from subcontractors and materialmen to enable General to award the contracts referred to in subparagraph 4(e), and Central will do all necessary work to procure such bids.
- (c) Will supervise the work of all parties furnishing work, labor, services, and materials for the doing of the work provided for under this agreement.
- (d) Will represent General, if requested by General, in any and all disputes arising between General and parties furnishing work, labor, services, and materials for the doing of the work provided for under this agreement.
- (e) Will not assign this contract.
- (f) Will indemnify and hold General harmless against damages for injury to persons or property that may arise by reason of the work being performed by Central under this agreement.
- (g) Will execute such receipts, waivers, and releases as are appropriate and necessary to acknowledge payments made under this agreement upon the payment by General to Central of the sums due Central in accordance with the terms of this agreement; and
- (h) Will perform all work required under this agreement in compliance with any and all building laws, ordinances, and regulations of any and all governmental agencies entitled to impose such laws, ordinances, and regulations; and all such work shall be done in good and workmanlike fashion.

14. *Relationship between parties.* The relationship between the parties is that of owner and contractor, and the law relating to such relationship shall govern the rights of the parties.

15. *Settlement of disputes.* If any dispute shall arise between the parties as to the manner of computing the amounts due Central under this agreement, then the same shall be resolved by the certified public accountants then representing General and Central. If the certified public accountants are unable to resolve the dispute, then the accounting firms shall designate an independent certified public accountant who shall have the authority to resolve the dispute. If the accounting firms then representing General and Central are unable to agree upon an independent accountant to resolve the dispute, either of the parties shall have the right to procure the appointment of an independent accountant by filing an action in the Circuit Court of Dade County, Florida, for the appointment of a certified public accountant to resolve the dispute. The fees to be paid the independent certified public accountant, shall be borne equally by the parties, and the costs of procuring the appointment of the independent certified public accountant shall be borne equally by the parties hereto.

16. *Entire agreement.* This agreement contains the entire agreement between the parties, and supersedes, and extinguishes all previous agreements, contracts, and undertakings heretofore existing between the parties.

17. *Notice.* If either party desires to give notice to the other in connection with and according to the terms of this agreement, such notice shall be given by registered or certified mail, and it shall be deemed given when deposited, with sufficient prepaid postage to carry it to its addressed destination. Notices shall be addressed as follows:

For General:

For Central:

18. *Waivers.* Except as herein expressly provided, no waiver by either party of any breach of this agreement, or of any warranty or representation hereunder, shall be deemed to be a waiver by the same party of any other breach of any kind or nature (whether preceding or succeeding the breach in question, and whether or not of the same or similar nature).

No acceptance by a party of payment or performance after any such breach shall be deemed to be a waiver of any breach of this agreement or of any representation or warranty hereunder, whether or not the party knows of the breach when it accepts such payment or performance.

No failure by a party to exercise any right it may have under this agreement or under law upon another party's default, and no delay in the exercise of that right, shall prevent it from exercising the right whenever the other party continues to be in default. No such failure or delay shall operate as a waiver of any default or a modification of the provisions of this agreement.

19. *Amendment.* This agreement may be modified only by a written document signed by both parties. A purported oral modification shall not be effective.

20. *Governing Law.* This agreement shall be construed and enforced in accordance with the laws of the State of Florida.

In witness whereof the parties have caused these presents to be executed by their proper officers, who are duly authorized, and their corporate seals to be affixed, all of which has been done at the place and on the day and year first above written.

General Realities Corporation

By: _____

President

Central Construction Corporation

By: _____

President

[Acknowledgments]



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26-22 Current Legal Forms for Real Estate FORM 22.44

FORM 22.44 Contract between real estate developer and construction company--developer plans to build residential development--construction company will build houses within development--developer will be responsible for creation of infrastructure

COMMENT

The form below is an agreement between a real estate development corporation and a construction company. The developer owns a tract of land upon which a residential development will be built. The construction company will serve as the builder of homes within the development, while the developer will be responsible for creation of the infrastructure.

The developer has already obtained government approval for the construction of 200 single-family homes, as well as architectural plans for five different model homes. Purchasers may choose from the five models and, if they wish, order one or more pre-priced options from the developer. If a buyer wants any other modifications made to his or her home, the developer must obtain a price quote from the construction company. In such cases, the developer must be sure that its marketing agents or real estate brokers do not quote final prices until the written quote is returned from the construction company.

Warranty from construction company to developer.

The construction company must provide a warranty to the developer that may be assigned later to a home buyer. The warranty must protect against defects in workmanship and materials for certain minimum time periods, for example, the roof must be warranted for five years, the plumbing and heating for two years, etc. Should the agreement between the developer and construction company be terminated, the warranties must survive the termination.

FORM

AGREEMENT is made this _____[day] day of _____[month], _____[year], between _____[name of entity] DEVELOPMENT, LTD, a corporation existing under the laws of the State of _____[state], with offices for the transaction of business at _____[address] (hereafter referred to as "Developer"), and _____[name of entity] CONSTRUCTION COMPANY, INC., a corporation organized under the laws of the State of _____[state], with offices for the transaction of business at _____[address] (hereafter referred to as "Contractor").

W I T N E S S E T H:

WHEREAS, Developer is the owner of a certain parcel of land located in the Town of _____[town], commonly known as _____[insert name of future development, e.g., Pleasantdale Acres]; and

WHEREAS, the Developer has obtained subdivision approval for the construction of _____[insert number and type of homes to be built in development, e.g., two hundred (200) single-family] homes on lots measuring _____[e.g., one and one-half] acres in size; and

WHEREAS, Developer has obtained completed and approved architectural plans for _____[e.g., five (5)] standard homes to be used exclusively in this development; and

WHEREAS, Contractor is in the business of constructing such homes,

NOW, in consideration of the mutual promises contained herein, it is agreed as follows:

1. *Scope of work.* The Developer has caused or will cause all roads, sewers, water mains and storm sewers to be installed in the development, as needed. The Contractor agrees to construct single-family homes in accordance with the architect's plans and specifications, as contained in Schedule A, which is annexed hereto and made a part hereof. Also contained in Schedule A is a list of modifications which may be made to the homes by the Contractor and at the request of the Developer.

The Contractor is guaranteed to receive orders to build at least _____[insert number, e.g., ten (10)] such homes per calendar year. The Contractor shall not be required to build any more than _____[insert number, e.g., forty (40)] such homes in any calendar year. While this Agreement is in effect, Contractor shall be the only person permitted to construct homes in the development known as _____[insert name of future development, e.g., Pleasantdale Acres].

2. *Materials.* The Contractor shall construct all homes in a workmanlike manner and strictly in accordance with the architect's plans and specifications. Contractor shall make no changes in the types of materials used without the written prior consent of the Developer. Contractor acknowledges that Developer has made representations to the purchasers of such homes regarding the materials to be contained therein.

3. *Warranty.* Contractor shall supply a new home warranty substantially in the form contained in Schedule B, which is annexed hereto and made a part hereof. Said warranty, by its terms, shall be assignable to future owners of the subject premises. The warranty shall warrant against defects in labor and materials for the following minimum periods:

(a) roof: _____[e.g., five (5)] years;

(b) plumbing and heating systems: _____[*e.g., two (2)*] years;

(c) foundation, beams, joists and framing: _____[*e.g., five (5)*] years;

(d) all other items: _____[*e.g., one (1)*] year.

The warranty may exclude liability for consequential damages.

All warranty claims shall be acknowledged by Contractor within _____[*insert number, e.g., two (2)*] days of receipt. Contractor shall inspect the premises and make arrangements for repairs within _____[*insert number, e.g., ten (10)*] days thereafter. In the event Contractor rejects a warranty claim on the ground that, for example, the problem falls outside the scope of the warranty or the warranty has expired, Contractor's reason for rejecting the claim shall be put in writing and submitted to the party making the claim.

4. *Punchlists.* At least _____[*insert number, e.g., three (3)*] days prior to transfer of title to a new-home purchaser, Developer or its agent shall inspect the new home with purchaser. A list of all unfinished items, missing items, and items requiring repair or "touch-up" shall be made by Developer. A copy of this list shall be provided to Contractor immediately. Contractor shall remedy all such matters within _____[*insert number, e.g., thirty (30)*] days thereafter. A reasonable extension shall be granted for obtaining any materials which are back ordered with a supplier.

5. *Subcontractors.* Contractor may engage the services of subcontractors for portions of the work contemplated hereunder. Contractor must obtain written approval from Developer as to each subcontractor before using such subcontractor's services. Developer shall not unreasonably withhold approval. All subcontracts shall contain a provision acknowledging that said subcontractors are the agents of Contractor and not the agents of Developer. Subcontractors shall be required to look to Contractor alone for compensation. All subcontractors shall provide a waiver of lien as to each lot when work is completed.

6. *Insurance.* Contractor shall carry builder's all-risk insurance with a property damage limit set at _____ Dollars (\$ _____) _____[*e.g., \$250,000*] per unit and a personal injury limit set at _____ Dollars (\$ _____) _____[*e.g., \$1,000,000*]. Contractor shall carry worker's compensation insurance and disability insurance as required under the law of the State of _____[*state*]. The risk of loss for each new home will rest with the Contractor until title is transferred to the new-home purchaser.

7. *Hold harmless.* The Contractor shall hold the Developer harmless for any claim for injury to person or property arising out of, or in the course of, the construction of new homes as contemplated by this Agreement. This shall include all costs of defense (such as attorneys' fees, court costs, fees of expert witnesses, etc.), as well as the amount of any settlement or judgment.

8. *Consideration.* The Contractor shall be paid in accordance with Schedule C, which is annexed hereto and made a part hereof. The consideration shall include: (a) the base fee for building the house, as therein specified, (b) together with the fee for making any of the standard modifications requested by the purchaser. Consideration to be paid to Contractor for each type of standard modification is also set forth in Schedule C. For any modifications not contained in Schedule C, Contractor shall provide Developer with a written fee proposal. Developer shall then have _____[*insert number, e.g., ten (10)*] days in which to accept or reject the proposal in writing.

The Contractor shall be paid the full price for each house built within _____[*insert number, e.g., twenty-four (24)*] hours after transfer of title to the new-home purchaser, or within _____[*insert number, e.g., five (5)*] days after issuance of a certificate of occupancy, whichever event occurs first.

Developer shall have the right to withhold funds for any incomplete items, the aggregate of which exceeds _____ Dollars (\$_____) [e.g., \$500] to complete. The funds shall be held in an escrow account and shall be released upon satisfactory completion of the work.

The pricing in Schedule C shall be reviewed and modified by the parties no less often than quarterly. Modifications shall be made based on actual price increases imposed on Contractor by its suppliers, laborers and subcontractors. Contractor shall not be entitled to any price increases on existing orders.

9. *Orders.* Upon execution of a purchase contract with a purchaser, Developer shall prepare and deliver to Contractor an "order." Said order shall contain the following information:

- (a) lot number, as derived from subdivision maps;
- (b) model number, as derived from Schedule A, and price, as derived from Schedule C;
- (c) a list of standard modifications desired by the purchaser and the price for each such modification, as derived from Schedule C;
- (d) a list of non-standard modifications desired by the purchaser, if any, and a request to the Contractor for a price quote;
- (e) color selections made by purchaser; and
- (f) a requested date of completion.

Upon receipt, Contractor shall review the order. If any prices are incorrect, Contractor shall notify Developer immediately. A copy of the order--as corrected, if necessary--shall be signed by Contractor and returned to Developer.

10. *Completion.* Upon signing the order, Contractor shall schedule the house to be built based upon the requested date of completion. Contractor shall next obtain a building permit. Construction shall be commenced in accordance with the above-mentioned schedule. Upon completion, Contractor shall obtain a certificate of occupancy. Approximately _____ [insert number, e.g., ten (10)] days prior to the expected date of completion, Contractor shall notify Developer so that inspections and the closing may be scheduled.

11. *Change orders.* Contractor shall be under no obligation to accept change orders after it has signed the original order. However, where Contractor agrees to accept a change order, it may demand full payment for the cost of making such change at the time of its acceptance of the change order.

12. *Marketing.* Contractor shall have no responsibility for marketing. All marketing shall be the sole responsibility of Developer. Developer may request Contractor, its agent or employee to appear at no more than _____ [insert number, e.g., three (3)] open houses or marketing seminars per year. Contractor agrees to provide professional autobiographical material to developer for use in marketing.

13. *Purchasers.* Contractor shall have no responsibility for meeting with, or authority to meet with, purchasers directly. All direct inquiries received by Contractor from purchasers shall be forwarded immediately to Developer. Developer shall not be bound by any discussions and agreements between Contractor and purchasers.

14. *Termination.* Either party may terminate this Agreement upon the giving of _____ [insert number, e.g., six (6)] months' written notice to the other party. During the _____ [insert number, e.g., six (6)]

month period, Contractor shall complete all houses for which it has already received orders. Contractor shall not receive new orders during this period. Developer shall be entitled to forward new orders to other contractors. The provisions of this Agreement regarding warranties and punchlist work shall survive this Agreement.

15. *Disputes.* Any disputes which may arise under this contract shall be arbitrated before the project architect, _____[insert name of architect], at his/her offices, located at _____[address]. His/her decision shall be binding on all parties. Either party may request arbitration of any matter by writing to the arbitrator and by forwarding a copy of the writing to the other party. The arbitration shall be scheduled for hearing within _____[insert number, e.g., forty-eight (48)] hours thereafter. A written decision shall be issued within _____[insert number, e.g., forty-eight (48)] hours after completion of the hearing.

16. *Entire agreement.* This Agreement, together with the other written agreements and instruments executed concurrently herewith or pursuant to the provisions hereof, contains the entire agreement between the parties concerning the matters herein set forth and supersedes all prior agreements between them respecting such matters.

17. *Counterparts.* This Agreement may be executed in two or more counterparts, each of which shall be deemed an original, but all of which together shall constitute one and the same instrument. At the trial of any matter arising under this Agreement, only one counterpart need be produced.

18. *Headings.* Paragraph headings are for the purposes of convenience and identification only and shall not be used to interpret or construe this Agreement.

19. *Waivers.* Except as herein expressly provided, no waiver by either party of any breach of this Agreement, or of any warranty or representation hereunder, shall be deemed to be a waiver by the same party of any other breach of any kind or nature (whether preceding or succeeding the breach in question, and whether or not of the same or similar nature).

No acceptance by a party of payment or performance after any such breach shall be deemed to be a waiver of any breach of this Agreement or of any representation or warranty hereunder, whether or not the party knows of the breach when it accepts such payment or performance.

No failure by a party to exercise any right it may have under this Agreement or under law upon another party's default, and no delay in the exercise of that right, shall prevent it from exercising the right whenever the other party continues to be in default. No such failure or delay shall operate as a waiver of any default or as a modification of the provisions of this Agreement.

20. *Gender and number.* Whenever the singular or plural number, or the masculine, feminine or neuter gender, is used herein, it shall equally include the other(s).

21. *Notices.* Any notice which any party is required or may desire to give hereunder shall be in writing and may be personally delivered, transmitted by facsimile machine, or delivered by the United States Postal Service or private delivery service to the above addresses. Notice is deemed given when received.

22. *Governing law.* This Agreement shall be construed and enforced in accordance with the laws of the State of _____[state].

23. *Binding effect.* This Agreement shall be binding upon, and inure to the benefit of, both parties and their respective heirs, representatives, successors and assigns.

24. *Modifications.* This Agreement may be modified only by a written document signed by representatives of both parties. A purported oral modification shall not be effective.

The parties hereto have set their hands and seals the day and year first above written.

_____ DEVELOPMENT, LTD.

[Developer's name]

By: _____

President

CONSTRUCTION COMPANY, INC.

[Contractor's name]

By: _____

President

[Acknowledgments]

[Attach Schedule A]

[Attach Schedule B]

[Attach Schedule C]



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26-22 Current Legal Forms for Real Estate FORM 22.45

FORM 22.45 Demolition agreement--insurance and performance bond provided by contractor

COMMENT

This form is an agreement between a property owner and a demolition company for the demolition of existing improvements.

FORM

AGREEMENT made on _____[*date*], between Golden State Demolition Company, Inc. (the "Contractor"), and Dane Land Company (the "Owner").

Recitals

The Owner is the owner of real property situated in Kern County, California, designated as Parcels 1, 2, 3, and 4 (the "land"), more particularly described in the attached Exhibit A.

The Owner wishes to demolish all of the buildings and other improvements on the land (collectively the "Improvements").

The Owner wishes to engage the Contractor to demolish the Improvements.

It is therefore agreed as follows:

1. *Demolition.* The Contractor shall demolish the Improvements, beginning on or before _____[*date*], and to be completed no later than _____[*date*].

2. *Labor, materials, and equipment.* The Contractor shall provide all labor, materials, and equipment necessary to demolish the Improvements and contact all utility companies necessary to provide for the discontinuance and disconnection of service to the property in accordance with the requirements of all authorities having jurisdiction thereof. The Contractor shall coordinate all activities concerning the demolition of the Improvements.

3. *Permits and licenses.* The Contractor shall obtain all necessary permits and licenses and pay all fees connected with the demolition in accordance with the requirements of the respective municipal agencies and other authorities having jurisdiction.

4. *Removal of debris.* The Contractor shall remove from the land all materials and debris resulting from the razing of the Improvements, the materials and debris so removed to become the property of the Contractor. All materials so removed shall be disposed of at the Contractor's expense and in strict compliance with all state, federal and local laws and regulations. In the event that any regulated material is included (e.g., asbestos insulation), proof of proper disposal shall be provided to the Owner.

5. *Combustible and noncombustible materials.* The Contractor may leave noncombustible materials, such as brickbats and plaster, in the basements. All combustible materials, such as wood, tar paper, wood furring, lathe, etc., shall be completely removed from the land. The basements shall be back-filled with the noncombustible material, no higher than curb elevation. Contractor shall not use any organic fill which could decompose and settle, or which could produce methane gas. Contractor shall install vents, where necessary, in the event that methane gas is found during demolition and fill operations.

6. *Bridge.* The Contractor shall provide a bridge, if and as required by local agencies, and provide the necessary bonds and permits with respect to the maintenance of the bridge. The Contractor shall install and maintain necessary lights in the bridge area.

7. *Extermination and protection.* The Contractor shall do all necessary extermination work, provide adequate and required fire protection in accordance with the regulations of the agencies having jurisdiction, maintain and provide adequate protection of the area, and not create any hazardous conditions.

8. *Evidence of compliance with requirements.* The Contractor shall furnish to the Owner the necessary bonds, permits, insurance certificates, and other evidence of compliance with the requirements of the various agencies or departments having jurisdiction over demolition of buildings before proceeding with the demolition.

9. *Performance bond.* The Contractor shall provide a performance bond for the faithful performance of this agreement in all its particulars, in the sum of \$300,000, duly executed with a surety company in form and substance acceptable to the Owner, the premium to be paid by the Owner.

10. *Insurance.* The Contractor shall provide for itself and maintain at its own cost and expense until the completion of the demolition the following forms of insurance: workers' compensation insurance in accordance with the laws of the State of California, public liability insurance with limits of liability in the sum of \$1,000,000 for injury to any one person and \$3,000,000 for any one accident, and property damage liability in the sum of \$250,000. The Contractor shall furnish certificates of insurance to the Owner for the coverages referred to above, each of which insurance policy shall contain an endorsement requiring the carrier to give at least ten days' prior notice of cancellation to the Owner.

11. *Right of way.* The Contractor acknowledges that Clinton Realty Corp. has and maintains a right of way on the property owned by the Owner, and warrants that proper precautions and measures will be taken by the Contractor not to endanger or cause any damage to such right of way.

12. *Indemnification.* The Contractor warrants that it is an independent contractor and shall indemnify and hold harmless the Owner against any loss or expense arising out of any liability imposed by law upon the Owner for damages because of bodily injuries, including death at any time resulting therefrom, or because of accidents sustained by any person or persons on account of damage to property arising out of or in consequence of the performance of this agreement, whether such injuries to persons or damage to property are due or claimed to be due to any negligence of the Contractor, the Owner, their agents, servants, or employees, or of any other person.

13. *Assignment.* The Contractor shall not assign or subcontract any part of the work to be performed under this agreement.

14. *Payment.* The Owner shall pay the Contractor for the work to be performed the sum of \$180,000, payable as follows: \$60,000 within two weeks after the commencement of the demolition of the Improvements, \$60,000 one month after such commencement, and the balance of \$60,000 within 30 days after the completion of the demolition in accordance with the terms and conditions of this agreement.

15. *Binding effect.* This agreement shall be binding upon the successors and assigns of the parties.

The parties have executed this agreement as of the day and year first above written.

Golden State Demolition Company, Inc.

By: _____

President

Dane Land Company

By: _____

President

[Acknowledgments]

[Attach Schedule A]



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26-22 Current Legal Forms for Real Estate FORM 22.46

FORM 22.46 Contract do to site work for new building

COMMENT

This form is being entered into with a builder for the purpose of doing all of the site work required prior to the construction of a building on the land owned by the owner. The commencement of this contract is tied to the acquisition of a building permit by the builder for the actual construction of the building to be constructed on the site.

In Section 4 of this particular contract, the owner has inserted a clause in which the builder acknowledges being familiar with the site, its topographical features and the surface conditions of the site, in an attempt to avoid any claims from the builder for additional compensation because of a lack of familiarity with such matters. The builder will probably object to such a provision unless the builder has done its due diligence and verified such matters. However, in this form, the builder is not responsible for out of the ordinary subsurface conditions relating to the subsurface conditions of the soil because the builder has not yet taken soil boring tests.

FORM

SITE DEVELOPMENT CONTRACT

THIS SITE DEVELOPMENT CONTRACT made this _____[day] day of _____[month], _____[year], by and between MAGNUM LIMITED PARTNERSHIP, hereinafter called "Owner," and BUILDER ASSOCIATES, INC., a Pennsylvania corporation duly licensed to do business in the State of Ohio, hereinafter called "Builder." The situs of the contract and performance of the contract is in the State of Ohio.

WHEREIN IT IS MUTUALLY AGREED AS FOLLOWS:

1. *Scope of Work.* The Owner herewith employs the Builder to demolish the existing house and other structures and improvements on the site, including removal of demolished materials and waste resulting therefrom, and to supervise, direct, and install the site improvements insubstantial conformity with plans and specifications dated _____[date], and attached hereto and made a part of this Contract by incorporation herein. The Builder accepts such employment and agrees to construct or subcontract the site improvements in accordance with the plans and specifications attached hereto and made part of this agreement by incorporation.

2. *Location.* The site covered by this contract is located on the south side of James Road, east of Sill Road, in the City of Salem, State of Ohio, and more particularly described on Exhibit A attached hereto and made a part hereof.

3. *Insurance.* The Builder, at Builder's expense, will carry Worker's Compensation coverage in conformity with state requirements and Public Liability coverage in the amount of Two Hundred Fifty Thousand Dollars (\$250,000) per person, Five Hundred Thousand Dollars (\$500,000) per accident, and Two Hundred Fifty Thousand Dollars (\$250,000) property damage. In addition, blanket umbrella coverage in the amount of Five Million Dollars (\$5,000,000) for over and above the insurance herein specified shall be provided by Builder.

4. *Other Provisions.*

A. Builder acknowledges that it has inspected the site, including the 25 foot driveway easement appurtenant thereto, as shown on the survey prepared by Johnson and Associates, copies of which have been delivered to Builder, and the topographical features of the aforesaid site as set forth in the topographical survey prepared by Johnson and Associates and delivered to Builder. Builder represents and warrants that except for subsurface conditions at the site to be determined by soil boring tests, to be obtained by Builder, it is fully familiar with the site, including the surface conditions thereof, and is satisfied with the same. Claims for additional compensation or extensions of time because of the failure of the Builder to familiarize itself with the conditions of the Contract or the conditions at the site (except for subsurface conditions to be determined by soil boring tests) will not be allowed.

B. Owner shall not be responsible for any costs due to the negligence of Builder, any subcontractor or supplier, anyone directly or indirectly employed by any of them, or anyone for whose action they may be liable, including but not limited to the correction of defective or nonconforming work.

C. Builder agrees to commence the site preparation work as soon as a building permit is obtained by Builder pursuant to the Building Contract of even date herewith and to diligently prosecute the performance of the site preparation work so as to complete the same as soon as reasonably possible. All landscaping work required to be done after construction of the building to be constructed on the site shall be completed as soon as reasonably possible, weather permitting.

D. Builder agrees that all work shall be completed free of any mechanics' or materialmen's liens. If any such liens are filed, they shall be removed by Builder by payment, bonding or otherwise within 30 days of the time they are filed of record; otherwise, Owner shall have the right to remove the same and charge the costs thereof to Builder. As progress payments are made, Builder agrees to provide to Owner the same lien waivers and other documents as are required to be provided by the terms of the Building Contract of even date herewith.

E. Any default under this Contract on the part of Builder shall be considered a default under the terms of the Building Contract between the parties hereto dated of even date herewith, and shall entitle Owner to the same rights and remedies as Owner shall have under the Building Contract or at law or in equity.

5. *Warranty:* The Builder guarantees that the site work shall be constructed in accordance with this Contract and the

attached plans and specifications which have been made a part of this Contract. If, during the period of one year after the completion of work hereunder, any defect is discovered which is the result of faulty workmanship or materials, it will be promptly remedied by Builder at Builder's expense.

6. *Contract Price and Terms of Payment*: The Owner shall pay to the Builder for the latter's performance of this Contract a total contract price of One Hundred Thousand Dollars (\$100,000).

This contract price includes all federal, state and local taxes. The contract price shall be paid in the following manner:

A. On or about the 10th day of each month, the Builder shall prepare a statement showing the value of all labor and materials incorporated in the work to the last day of the next preceding month. The Owner, within five days after presentation of such statement, shall pay the Builder ninety percent (90%) of the amount indicated as owing by such statement until fifty percent (50%) of the full contract price has been paid. Thereafter, one hundred percent (100%) of all progress billings shall be paid to the Builder.

B. The entire remaining balance of the total contract price shall be paid upon completion of this contract.

Any payment not made when due is subject to a late payment charge calculated at the maximum penalty rate permitted under governing law, or if no maximum is applicable, at the rate of one and one-half percent (1 1/2%) per month.

MAGNUM LIMITED PARTNERSHIP has caused these presents to be signed by it at Salem, Ohio on the day and year first above written, and BUILDER ASSOCIATES, INC. has caused these presents to be signed by it at Pittsburgh, Pennsylvania and its corporate seal to be affixed this _____[day] day of _____[month], _____[year].

MAGNUM LIMITED PARTNERSHIP

By: _____

[name and title]

BUILDER ASSOCIATES, INC.

By: _____

[name and title]

[Attach Schedule A]



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Current Legal Forms for Real Estate
Chapter 22 DEVELOPMENT AND SUBDIVISION
Part IV. FORMS
C. PLANNING AND CONSTRUCTION

26-22 Current Legal Forms for Real Estate FORM 22.47

FORM 22.47 Long-term contract to construct building to specifications--terms favorable to owner

COMMENT

This is a contract between an owner of land and a contractor for the construction of a motor hotel for occupancy in "turnkey" condition. The contract price is a fixed sum, but is subject to reduction if the aggregate costs incurred for certain subcontracts fall below a specified amount. Progress payments to the contractor are to be made monthly upon the basis of the value of acceptable work in place and acceptable inventory suitably stored. The balance is to be paid after completion in two installments. All rights of the subcontractor are subject to the priority and the terms of the building loan agreement. Both the lender and the owner have the right to pass on the acceptability of the contractor's work. The contractor is required to complete construction within 15 months or pay damages in a liquidated amount for each extra day.

FORM

AGREEMENT made on _____[*date*], by and between Motel Ownership Corp., a corporation organized in the District of Columbia (the "Owner"), and Shoreline Construction Corp., a corporation organized in the State of Maryland (the "Contractor").

Recitals

The Owner has title to a tract of land containing approximately two acres situated at the southwest corner of Main Street and 16th Street South, Arlington County, Virginia (the "Tract"), and

The Owner has secured a commitment from the Capital Trust Company of Washington, D.C., for a construction and

permanent loan to finance the construction of improvements on the Tract; the Capital Trust Company (or such other lending institution from which the Owner may ultimately secure a loan to finance the improvements on the Tract) is referred to in this agreement as the "Lender," and

The Owner wishes to employ the Contractor to construct the improvements on the Tract, and the Contractor wishes to accept the employment.

Now, therefore, the parties agree as follows:

1. *General scope of work.* The Contractor shall furnish all of the labor and materials and perform all of the work on the Tract as set forth in plans and specifications prepared by Harrison, Smith and Associates, Architects and Engineers, of Baltimore, Maryland, dated _____[date], consisting of 38 pages of plans and 130 pages of specifications (the "Plans"). Copies of the Plans, initialed by each of the parties, are in the possession of each of the parties and are incorporated in this agreement to the same extent and effect as if such Plans were fully set out herein. The Plans have been prepared at the Contractor's request and have been furnished by the Contractor to the Owner upon the express warranty and representation of the Contractor that the Plans cover all items of work, labor, and materials needed for the construction of improvements and appurtenances on the Tract consisting of a four-story motor hotel and appurtenances including a swimming pool, parking areas, and all necessary utilities. The Contractor shall perform all necessary work and furnish all necessary materials in order to erect on the Tract a completed motor hotel, with appurtenances, in "turnkey" condition so that, upon completion of the Contractor's obligations, the Owner will not be required to perform any work or furnish any material or labor (other than the installation of furniture) in order to make use of the improvements as a fully equipped and integrated motor hotel which is ready to be occupied and opened for business. If anything is omitted from the Plans which may be required in order to furnish a motor hotel and appurtenances, complete in every respect and ready to be occupied and opened for business (with the exception of the necessary furniture to be supplied by the Owner), the omitted items will be deemed to be included within the scope of the work to be performed by the Contractor, and the Contractor shall furnish all work materials, and labor as may be necessary to provide, furnish, and install the same, without additional cost to the Owner.

2. *Independent contractor.* The Contractor warrants and represents to the Owner that it is fully experienced and properly qualified as an expert to perform the work provided for herein and that it is properly equipped, organized and financed to perform such work. The Contractor shall finance its own operations, shall operate as an independent contractor and not as the agent of the Owner, and shall indemnify and hold the Owner free and harmless from all liabilities, costs, and charges by reason of any act, omission, or representation of the Contractor or of its subcontractors, agents, or employees.

3. *Compliance with requirements of lender.* All work, labor, and materials to be furnished and performed by the Contractor shall be to the satisfaction of both the Owner and the Lender, and payment shall be made only for such work and materials as are accepted by the Owner and the Lender; provided, however, that the Owner and the Lender shall not arbitrarily withhold acceptance of such work and materials or payment so long as the Contractor makes satisfactory progress and performs all of its obligations in accordance with and pursuant to all the terms and conditions of this agreement.

4. *Contract price.* The total contract price for all work, materials, and labor to be furnished and performed by the Contractor shall be in the fixed or "lump sum" amount of \$3,600,000, provided, however, that the total contract price shall be subject to reduction as hereinafter provided. In the event the aggregate sum of the Contractor's subcontracts for the following items, viz:

(a) Masonry,

(b) Roofing,

- (c) Lathing and plastering,
- (d) Acoustical treatment,
- (e) Tile, terrazzo, and marble.
- (f) Resilient floor,
- (g) Glass and glazing,
- (h) Painting and decorating,
- (i) Electrical wiring and fixtures,
- (j) Plumbing, heating, and air conditioning,
- (k) Elevators and dumbwaiter,
- (l) Asphaltic paving,

is less than \$1,800,000, the total contract price shall be reduced by the difference between \$1,800,000 and the aggregate sum of the Contractor's subcontracts for the above listed items; provided further, however, that in no event shall the total contract price of \$3,600,000 be increased regardless of the subcontract prices for the above listed items. For purposes of verification by the Owner of the subcontract amounts for the above listed items, the Contractor shall submit to the Owner true copies of each of the subcontracts, and the Contractor shall permit the Owner, its agents, and accountants, to examine and make copies of all books and records of the Contractor pertaining to the work, labor, and materials to be performed and furnished by the Contractor pursuant to this agreement. The contract price shall be payable in installments.

5. *Method of payment.* The Owner's agreement with the Lender provides that the Lender will advance moneys to the Owner to finance the construction of the work at designated stages of construction of the improvements. Subject to the provisions of the construction loan agreement, the Owner shall make the following payments to the Contractor:

(a) Monthly, on or about the tenth day of each month (commencing ten days after the first full month following the commencement of construction), an amount equal to 90 percent of the value of the acceptable work in place and acceptable inventory suitably stored and protected on the Tract as of the 25th day of the preceding month, less all amounts previously paid, and less any reserves necessary to correct faulty work or to replace unsuitable materials; provided the Contractor's monthly estimate of progress and inventory, in such form as may be required by the Owner, is submitted to the Owner (and to the Lender if it so requires) on or before the 26th day of the preceding month and provided further, that the Owner has received a progress payment from the Lender in an amount sufficient to make the monthly payment.

(b) Ten days after substantial completion of all work, materials, and labor to be performed by the Contractor and its acceptance by the Lender, an additional payment in an amount sufficient to bring the total payments to an aggregate sum equal to 95 percent of the full contract price, provided the Owner has received from the Lender an amount sufficient to make the payment, and provided further, that the Contractor has furnished to the Owner a complete release of all liens, in form satisfactory to the Owner and the Lender, from all persons, firms, and corporations who have performed work or supplied materials for or in connection with this agreement as well as an affidavit by the Contractor that the releases include all the labor and materials for which any lien could be filed, and provided further, that all work

requiring inspection by any governmental authorities having jurisdiction has been duly inspected and approved by such authorities and by the applicable Board of Fire Underwriters, and all requisite certificates of occupancy and other governmental approvals, licenses, and permits have been duly issued.

(c) The remainder of the contract price on the 30th day following final completion and acceptance by the Owner and the Lender.

6. *Performance and payment bond.* The Contractor shall furnish a bond in favor of the Owner and the Lender assuring completion and faithful performance of all work under this agreement and the payment of all obligations arising hereunder, in the form and with the surety or sureties that are approved by the Owner and in an amount equal to the contract price. The premium for the bond shall be paid by the Owner. If the bond is furnished prior to the execution of the deed of trust or mortgage securing the construction loan, the form of the bond and the surety or sureties thereunder shall also be subject to the approval of the Lender and changes in the form of the bond and sureties shall be made as required by the Lender.

7. *Time for completion.* The Contractor shall commence performance of its obligations under this agreement immediately (or in the event the mortgage or deed of trust securing the construction loan has not been executed at the time this agreement is executed, the Contractor shall commence construction upon written notification by the Owner of the execution of the construction mortgage or deed of trust) and the Contractor shall complete construction not later than 15 months from the date of this agreement (or not later than 15 months from the date of such notice). If for any reason all construction is not completed in full upon the expiration of the 15-month period, there shall be deducted from the contract price an amount equal to \$750 per day for each day in excess of the 15-month period counting from the first day following the expiration of the 15-month period until the day upon which all construction is fully completed and accepted in accordance with this agreement; provided that in the event the delay in completion of construction beyond the 15-month period is caused by or results from labor difficulties (including but not limited to strikes, walk-outs, picketing, boycotts, shutdowns, or inability to obtain a sufficient number of competent laborers or mechanics) or from Acts of God, including, but not limited to, extreme weather conditions and/or other natural causes that lie beyond the reasonable control of Contractor, then there shall be deducted from the contract price an amount equal to \$300 per day for each day in excess of the 15-month period counting from the first day following the expiration of the 15-month period until the day upon which all construction is fully completed and accepted in accordance with this agreement. If the unpaid amount of the contract price following the expiration of the 15-month period is less than the total amount to be deducted as above provided, the Contractor shall promptly pay to the Owner, upon the Owner's demand, the amount by which such sum exceeds the unpaid balance of the contract price. The foregoing \$300 or \$750 per day sum represents the amount of liquidated damages which the parties have agreed upon as compensation to the Owner for any delay in completion of construction in excess of the 15-month period, and the parties acknowledge that such sum represents a fair and equitable amount of compensation for delay in view of the impossibility of ascertaining actual damages. The foregoing liquidated damages clause shall, however, be in addition to and not in substitution for any other rights or remedies which the Owner may have under this agreement or otherwise against the Contractor by reason of its failure to complete construction within the time set forth in this paragraph.

8. *Best efforts of contractor.* Notwithstanding the time set forth in Paragraph 7 for completion of construction, the Contractor will at all times exert its best efforts to complete the construction at the earliest possible time, will at all times furnish sufficient labor and materials to assure the most efficient and speediest construction progress, will have a competent foreman or superintendent on the job at all times, and will at all times have a watchman or watchmen present on the Tract to protect and safeguard all construction work and materials.

9. *Default by contractor.* If the Contractor fails to perform the work diligently, or to make the progress required by the Lender, or abandons or ceases work for a period of five or more days, or fails in any way to perform the conditions hereof, or fails to pay laborers, mechanics, materialmen, and suppliers when due (provided the failure to pay is not caused by the Owner's failure to make payments to the Contractor in accordance with Paragraph 5), or shall become

insolvent, or unable to meet its obligations as they become due, or shall make an assignment for the benefit of creditors, or shall commence any proceeding in bankruptcy, or if any such proceedings are commenced against it (and are not discharged within ten days), the Owner may, and without prejudice to any other rights it may have, by giving 48 hours' written notice of its election to the Contractor, take over all work, or any part thereof, and all tools, equipment, and supplies and finish the work by whatever method it deems expedient. In such event, the Contractor shall not be entitled to receive any further payment until the work is finished. If the unpaid balance of the contract price exceeds the Owner's expense of completion of the work, the excess shall be paid to the Contractor. If the expense exceeds the unpaid balance, the Contractor shall promptly pay the difference to the Owner on demand. The Owner's expense of completion shall be established as the actual cost of construction plus 10 percent additional for overhead and supervision (and in the event the construction is not completed until after the 15-month period referred to in Paragraph 7, there shall be added to such "expense of completion" the \$300 per day, or \$750 per day, liquidated damage amount referred to in such Paragraph 7).

10. *Clean-up.* Before the Contractor is entitled to the payment provided for in subparagraph 5(b), the improvements on the entire Tract, as well as all parking areas and appurtenances, shall be in "broom clean" condition, completely free of all trash, rubbish, debris, boxes, wrappings, etc., and all of the Contractor's equipment as well as any leftover materials and inventory. In the event the Contractor does not perform this clean-up operation to the Owner's satisfaction, the Owner may, after 48 hours' written notice to the Contractor, perform the clean-up operations with owner's own contractor or agents, charging the Contractor with the cost thereof, plus 10 percent, and deducting the same from the payments provided for in Paragraph 5.

11. *Permits and licenses.* The Contractor shall, at its own cost and expense, apply for and obtain all necessary building, occupancy, and other governmental permits and licenses required in connection with the construction and for the use and occupancy of the improvements as a completed motor hotel, with the appurtenances. The Contractor shall, at all times, strictly comply with and conform to all rules and regulations of the applicable Board of Fire Underwriters and to all laws, ordinances, and regulations (including but without limitation all applicable building codes and requirements) of all governmental authorities relating to the manner of doing the work to be performed under this agreement.

12. *Temporary construction.* The Contractor shall provide and furnish, at its own-cost, its own office and temporary construction trailer and shall provide at the Contractor's own cost all light, heat, telephone, water, and other utilities as well as all necessary sanitary facilities for the same during the period of construction.

13. *Indemnity.* The Contractor shall indemnify the Owner and hold it harmless against all liabilities, claims, and demands for personal injury or property damage arising out of or caused by any act or omission of contractor, its subcontractors, agents, or employees, or arising in or about the Tract at any time from the date of this agreement until final completion of construction. The Contractor shall use proper care in the performance of its work so as not to cause damage to any adjacent property, and the Contractor shall indemnify and hold the Owner harmless from any liabilities, claims, or demands for damage to such adjoining or adjacent property.

14. *Insurance.* The Contractor shall, at all times, commencing with the date upon which construction begins, carry the following types of insurance with an insurance carrier or carriers acceptable to the Owner and the Lender and in policies approved by the Owner and the Lender:

(a) Workers' compensation insurance fully covering all persons engaged in the performance of this agreement in accordance with Virginia Law.

(b) Public liability insurance covering death or bodily injury with limits of not less than \$1,000,000 for one person and \$3,000,000 for any one accident or disaster and property damage coverage with limits of not less than \$500,000 which insurance shall name the Owner as an additional insured.

(c) "Builder's risk" insurance against damage or destruction by fire and full extended coverage including vandalism and malicious mischief, covering all improvements to be erected and all materials for the same which are on or about the Tract, in an amount equal to the full insurable value of the improvements and materials, such insurance to be made payable to the Owner and the Contractor, as their interests may appear, with standard mortgagee endorsement to the Lender or its assigns as mortgagee.

The Contractor shall furnish to the Owner and the Lender, five days prior to the date construction commences, duplicate policies of insurance as set forth in this paragraph, together with certificates or receipts showing that the insurance is in force and fully paid. Each of the policies shall contain a provision to the effect that it may not be cancelled except upon ten days prior written notice to the Owner and the Lender.

15. *Liens.* The Contractor shall indemnify and hold the Owner harmless from all liens, or claims of rights to enforce liens, against the Tract or the improvements arising out of any work to be performed or labor or materials to be furnished under this agreement. Neither final payment by the Owner nor acceptance of the improvements shall constitute a waiver of this indemnity, and if any lien or claim for lien shall, at any time, be filed the Contractor shall refund to the Owner all moneys the Owner may be compelled to pay in discharging the lien including all costs and a reasonable attorney's fee.

16. *Assignment.* The Contractor shall not assign this agreement or any amount payable hereunder without the prior written consent of the Owner. The Contractor shall, upon request of the Owner, disclose to the Owner the names of all subcontractors or other persons with whom it contracts or intends to contract with or hereafter contracts with in connection with the performance of this agreement.

17. *Correction of defaults.* The Contractor will, for a period not to exceed one (1) year after completion of the building, at the request of the Owner (or of the managing agent employed by the Owner to manage the motor hotel), correct any defaults due to faulty materials or workmanship, without cost to the Owner, and neither the final payment by the Owner nor the final acceptance by the Owner of the improvements shall relieve the Contractor from responsibility for any defect in materials or workmanship.

18. *Extras.* No claim for payment (in excess of the amount set forth in Paragraph 4) for extra labor or materials of any kind shall be made by the Contractor or shall be payable by the Owner unless the same is performed or furnished pursuant to a written agreement executed by both the Owner and the Contractor.

19. *Unemployment insurance and taxes.* The Contractor shall pay, at the Contractor's own cost, all taxes and impositions in connection with the work or materials to be performed or furnished, including, but not limited to, state and federal unemployment and old age benefit taxes, income tax, sales taxes, use taxes, and excise taxes.

20. *Notices.* All notices to the parties shall be in writing and shall be sent by registered or certified mail to the addressees and addresses specified below:

All notices to the Owner shall be sent to:

Motel Ownership Corp.
1317 F Street, N.W.
Washington, D.C.

All notices to the Contractor shall be sent to:

Shoreline Construction Corp.

500 River Road Baltimore Maryland

21. *Owner's option to cancel.* If settlement of the Owner's construction loan commitment with the Capital Trust Company of Washington, D.C., is not made on or before _____[*date*], the Owner may cancel and terminate this agreement by giving the Contractor written notice on or before _____[*date*]. In the event of such cancellation, this agreement shall automatically be null and void and of no effect, and there shall be no liability on the part of either party to the other. If, on the other hand, the loan is consummated, the Owner shall give the Contractor notice in accordance with Paragraph 7 and upon the giving of the notice the Contractor shall commence construction as provided in Paragraph 7.

22. *Entire agreement.* This agreement constitutes the entire agreement between the parties and neither of the parties shall be bound by any promises, representations, or agreements except as are herein expressly set forth. Time is of the essence of this agreement. All warranties and representations of the Contractor hereunder shall survive final payment and acceptance of the work.

The parties have caused this agreement to be executed by their duly authorized officers, with their seals hereunto affixed, the day hereinabove written.

Motel Ownership Corp.

By: _____

[*name and title*]

Shoreline Construction Corp.

By: _____

[*name and title*]

[*Acknowledgments*]



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Chapter 22 DEVELOPMENT AND SUBDIVISION
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C. PLANNING AND CONSTRUCTION

26-22 Current Legal Forms for Real Estate FORM 22.48

FORM 22.48 Contract to construct a manufacturing building to specifications of tenant--option in tenant to purchase outright or to lease and acquire title upon expiration of lease

COMMENT

In this agreement, arrangements for construction are made between a landlord and a tenant. The landlord is a nonprofit corporation devoted to increasing the industry in the community. The tenant is a manufacturing company which has been induced to locate in that community partly because a plant is being made available to it on favorable terms. One of these terms is an option in the manufacturing company either to purchase the land and building as soon as the plant is completed, or to enter into a lease-purchase agreement at a rental which will pay off the cost of construction plus interest after 20 years at which time the lessee will be entitled to a deed to the property.

Lease treated as sale.

Lease-purchase or lease-option arrangements often raise the question of their proper characterization for tax purposes. If the transaction is held to be essentially a lease, the lessee may deduct periodic payments as rent. If the transaction is considered to be a sale, the lessee's periodic payments are not deductible in full. The lessee may deduct an allowance for cost recovery, and for the interest factor in the periodic payments of selling price. Although the decision in each case depends upon the particular circumstances of that case, there is little doubt, however, that when the total payments for rent plus any purchase optional costs of acquiring the property equal the price for which the property could have been purchased initially, plus interest, a sale rather than a lease will be recognized. This is apparently the result under this agreement. The purchase price is the sum of land acquisition and development costs. Total rental payments equal the purchase price plus an interest factor. Moreover, the parties have indicated their intention to treat the transaction as a sale by providing that the lease-purchase is to be set up so that the manufacturing company

will be able to deduct cost recovery of the building. This type of lease is sometimes referred to as a synthetic lease. Synthetic leases are discussed in Section 22.27[3] of the Practice Background.

Regardless of the option chosen by the manufacturing company, it is obligated to pay for the property in one way or another, and therefore, has a direct stake in the costs of construction. The agreement defines the costs to be included for this purpose, and provides for procedures by which the construction records may be inspected by the manufacturing company. A maximum amount for construction costs is stipulated, but a special protection to assure minimal costs is afforded by a provision prescribing procedures for submission of bids by contractors.

FORM

AGREEMENT made on _____[date], by and between Penwick Development Organization, Inc., a nonprofit industrial development corporation with its principal offices in the Central Building, in the City of Penwick, County of Luzerne, Commonwealth of Pennsylvania ("Penwick"), and Standard Computer Corporation, a corporation organized under the laws of the Commonwealth of Pennsylvania, with its office at 100 Elm Avenue, in the City of Penwick, County of Luzerne, Commonwealth of Pennsylvania ("Standard").

Recitals

Penwick primarily desires to increase employment and develop a more stable economic base in the City of Penwick, Pennsylvania, and

Penwick has developed a property known as Central Industrial Park in the City of Penwick, and

Penwick desires to erect a building in Central Industrial Park and desires also to give Standard the right to use the building under a lease-purchase agreement or the right to purchase the building, and

Standard, through its authorized officers has inspected and approved the site for the building, and

In order to obtain necessary financing, the parties have made various applications for loans from the Area Redevelopment Administration ("ARA"), Pennsylvania Industrial Development Authority ("PIDA"), and appropriate financial institutions in the City of Penwick ("local banks");

Now, therefore, the parties agree as follows:

1. *Description of property.* The site for the building shall contain 30 acres, more or less, in accordance with the legal description and plot plan drawn by the City Engineer of the City of Penwick, both of which are annexed as Exhibits A and B respectively. Penwick shall erect on the site a building containing dimensions of 300 feet by 250 feet for manufacturing space, and 50 feet by 125 feet for office space, of a structural steel frame, masonry walls, steel roof decking, and built-up roof, complete with plumbing, heating, electric wiring and lighting, sprinkler system, air conditioning, humidity control, exterior paving and landscaping, and conforming in all respects to the building rules and requirements of the authorities having jurisdiction and to the plans and specifications prepared at the request of Standard by William Carlin Associates, Registered Professional Engineers and Architects.

2. *Proposed financing.* This agreement shall not become effective until it has been approved by the ARA and the PIDA, nor shall it be effective until such time as it has been approved by the local banks which have tentatively made commitments to aid and assist in the financing of the building (collectively, the "lending institutions"). For the exclusive

purpose of purchasing the land and constructing the building, Penwick has applied for the following loans for a term of 20 years with interest only to be paid during the first year and the total loan to be amortized over the remaining 19 years:

<i>Amount</i>	<i>Source</i>
\$1,968,000	ARA
1,574,400	PIDA
393,600	Local banks
\$3,936,000	Total

In addition to joining in the foregoing applications for loans, Standard shall execute and deliver to the lending institutions such other necessary assurances and instruments, such as notes and mortgages, as may be required for the purpose of carrying out this agreement and the applications for loans. Standard shall promptly make the principal and interest payments due on the foregoing loans from ARA, PIDA, and the local banks whenever such payments shall become due, at the places and in the manner specified in the respective loan commitments, whether such payments are made directly to the lenders or by payment to Penwick under the terms of the lease-purchase agreement.

3. *Maximum costs.* Considering the foregoing "Proposed financing" as the maximum financing available, the following maximum costs shall not be exceeded:

Land acquisition	\$150,000
Building construction	\$3,786,000

The "Building construction" figure shall be the aggregate of the following costs:

(a) Amounts paid by or for the account of Penwick and which Penwick shall be obligated to pay for the construction of the building and other facilities in accordance with the approved plans and specifications (and any modifications made by the parties) including, without limiting the generality of the foregoing, the cost of rock removal, a driveway and parking lot, sewer and water lines leading from the building and connected to the public sewer and water lines, and the cost of any clearing or improvements made by Penwick with on or near the site.

(b) The fee of William Carlin Associates, or its successor, for architectural and engineering services (which shall not exceed 4 percent of item (a) above).

(c) Special engineering consulting services requested by Standard, not to exceed \$15,000.

(d) Penwick's out-of-pocket costs of permits and licenses required by public authorities in connection with the construction.

(e) The cost of surveying the site.

(f) The cost of fire, worker's compensation, and public liability insurance (and other insurance approved by Standard) which Penwick may carry during and in connection with such construction, with provisions that loss shall be payable to Penwick, Standard, and the financial institutions which finance the construction, as their interests may appear.

(g) Title insurance at actual cost to Penwick, and legal fees not to exceed \$30,000.

(h) Any transfer taxes or recording fees imposed upon the delivery or recording of any of the instruments connected with this transaction.

(i) Real estate taxes on the site, prorated for the period from the commencement of construction until the "date of occupancy."

(j) Interest at a rate not in excess of ____% (____ percent) per annum until the "date of occupancy," which Penwick may pay on moneys it borrows for construction purposes hereunder.

4. *Determination of construction costs.* Within 30 days after the "date of occupancy," Penwick shall furnish to Standard a statement, certified as correct by its principal accounting officer, itemized in reasonable detail, of the elements of the construction costs and of the amounts of mortgage loans, but not exceeding the maximum construction cost determined in accordance with Paragraph 3. Penwick grants to Standard the right and privilege at any time, either by itself or its authorized agents or employees, to inspect the invoices, evidences of payments, and other books and records of Penwick, to ascertain the exact costs of the items mentioned in Paragraph 3 and in the other paragraphs of this agreement. If Standard determines that these amounts are greater than the amount expended by Penwick, or shall be improper charges against the premises, then the costs to Standard shall be reduced accordingly. If there is any dispute between the parties as to these costs, such dispute shall be referred to arbitration. The agreed cost of the land is \$150,000.

5. *Construction specifications.* Penwick shall construct or have constructed on the site an industrial-office building and related construction, in accordance with the final plans and specifications being drawn by William Carlin Associates (or such substitute or successor selected by either party with the approval of the other), approved by Standard and Penwick together, with such changes as the parties agree upon (the final revised plans and specifications and changes being the "approved plans and specifications"). The building, when completed, (a) will conform to the approved plans and specifications, except that if specific materials or supplies shall be unavailable, Penwick may, with the approval of Standard and the architect, use substitute materials or supplies of an equivalent quality; (b) will conform with the conditions of all licenses and permits issued for its construction; and (c) will not violate any applicable law, or regulation, of any governmental authority or agency having jurisdiction thereof, including any laws requiring certain green building alternatives to be used. Penwick will deliver to Standard the certificate or certificates of the architect, in usual form, that construction has been completed in accordance with the approved plans and specifications.

6. *Roadway, water lines, and sewer lines.* Without cost to Standard, Penwick shall hard-surface the roadway shown on Exhibit B as Central Drive at least beyond the area of the building site. Such hard surface shall be of a quality required for a roadway which is to be dedicated to a municipality. Sewer lines and water lines shall be brought to Standard's property line without cost to Standard. Standard is given, in common with other lessees or owners, the right to use sewer lines, water lines, and the road adjacent to the building and leading to the county road in common with all other users of the land in Central Industrial Park. Penwick represents that it will maintain the road until such time as the road is taken over by a public authority and will continue to maintain the sewer lines and water lines until taken over by a proper public utility or municipal authority. Nothing herein contained, however, shall limit the right of Penwick to convey the road, sewer lines, or water lines to proper public authority, public utility, or municipal authority. No assessment for the construction of the road, sewer lines, or water lines shall be made against Standard. Without limiting the foregoing, the facilities for the discharge, run-off, or other disposition of sewage, industrial wastes, and other fluid discharges from the site and buildings will be discharged into the common sewage system used by Penwick. Penwick shall secure all necessary licenses and permits and the facilities, when constructed and in use, shall satisfy the conditions of the licenses and permits, and the representations and descriptions of the facilities in the applications for the licenses and permits. This shall not prohibit Penwick or the municipal or other government authority from charging a sewage rent.

7. *Access during construction period.* Penwick will permit Standard and its agents access to the site during construction, and will permit them to make such examinations, tests, and checks which they may deem advisable, provided the same do not unduly interfere with construction. Penwick will also make the site and the building available to Standard for the installation of its facilities and equipment, and for such other related uses, provided the same do not unduly interfere with construction, but Standard shall not be deemed in possession of the premises or any part thereof until the "date of occupancy."

8. *Date of occupancy.* The "date of occupancy" shall be the date of receipt by Standard of the certificate of the architect addressed to it, that the building and related construction have been substantially completed in accordance with the approved plans and specifications and is available for occupancy and use, except that the date shall not, subject to delays permitted under this paragraph, be later than _____[date]. In addition to the architect's certificate, the building shall previously have been certified by the Commonwealth of Pennsylvania as being approved for the purposes for which the building is to be used and for the number of people to be employed therein. Notwithstanding the foregoing, the completion date shall be extended for the number of days during which construction is interrupted by reason of strikes, other labor disturbances, unavailability of supplies and materials not occasioned by the fault of Penwick or its contractors, civil disturbances, action or inaction of any governmental authority notwithstanding the diligence by Penwick, unusual weather conditions, breach by Standard, or acts of God.

9. *Insurance after construction.* After completion of the building, Standard shall keep the building insured against fire, with extended coverage, for not less than 80 percent of the full replacement value of the building, exclusive of the cost of excavation, foundations, and footings, less physical depreciation, and in any event not less than the amount due on any mortgages thereon. The insurance shall be carried with insurance companies approved by Penwick and by the lending institutions, and each such policy shall contain appropriate mortgage clauses.

10. *Bidding and instructions to bidders.* When appropriate, and after the approved plans and specifications are completed, bids will be sought from reputable contractors, by public advertisement, for the construction and completion of the building within the specified time. Standard shall have the right to approve or reject the bids and will direct the awarding of the bids to the successful bidders before the same are awarded by Penwick. Bidders shall be instructed to conform to the following:

(a) Each bidder shall submit data regarding the education and experience of the key men of its organization, minority employment, the construction equipment available for use, the projects previously completed, and its financial status.

(b) Each bidder shall submit a deposit on receipt of copies of the drawings and specifications to insure their prompt return in good condition.

(c) Completion dates shall be made a part of all bids with a liquidated damage clause for failure to complete within the specified time. (The liquidated damage amount shall be an amount which shall be arrived at between Standard and the architect, with the approval of counsel for Penwick.)

(d) Upon the awarding of bids, there shall first be secured from all contractors bonds for the full amount of the bid, which bonds shall cover the following items:

(1) Completion bond with liquidated damage clause, guaranteeing completion of the work.

(2) Bond guaranteeing the structure for one year from date of completion against structural defects.

(3) Labor and material bond and indemnification against claims for labor or material by the contractor or subcontractor.

In addition, each contractor will be required to file, at the contractor's expense before any work is done on the building,

a Stipulation Against Liens in accordance with the laws of the Commonwealth of Pennsylvania, further to protect the parties against liens that may be filed for labor and material.

(e) Bids shall be made upon the form provided, and all blank spaces in the form shall be fully filled in; numbers shall be stated in both writing and figures; the signatures shall be in longhand; and the completed form shall be without interlineation, alteration, or erasure.

(f) Bids shall not contain any recapitulation of the work to be done. No oral, telegraphic, or telephonic bids or modifications will be considered.

(g) Bids shall be addressed to Penwick in care of the architect and shall be delivered to the architect enclosed in an opaque sealed envelope addressed to him, marked "Bid" and bearing the title of the work and the name of the bidder.

(h) Should a bidder find discrepancies in, or omissions from, the drawings or other documents, or should a bidder be in doubt as to their meaning, the bidder should at once notify the architect, who will send written instructions to all bidders. Neither Penwick, Standard, nor the architect will be responsible for any oral instructions.

(i) Before submitting a bid, bidders should carefully examine the drawings and specifications, visit the site of work, and fully inform themselves as to all existing conditions and limitations. They shall include in the bid a sum to cover the cost of all items included in the proposal.

(j) The competency and responsibility of bidders and of their proposed subcontractors, and minority employment, will be considered in making the award. Penwick and Standard do not obligate themselves to accept the lowest or any other bid.

(k) Any bulletins issued during the time of bidding are to be covered in the bid and in closing a contract they will become a part of it.

11. *Assignment of bonds.* If any work of a contractor or subcontractor is not completed within the dates specified for completion, Penwick shall assign to Standard the bonds given by such contractor or subcontractor, giving to Standard, in addition to other rights, the right to collect liquidated damages for failure to complete the building within the specified time. In consideration of this assignment, Standard releases Penwick from any and all claims for failure to complete the building within the specified time, and warrants that it will look to the bonds for liquidated damages for its entire recovery of damages for failure to complete the building within the specified time.

12. *Agreement to enter into lease or to purchase property.* Standard shall have the option either to lease or to purchase the land and building, either of which options shall be exercised at any time after the date hereof, but not later than immediately after the closing of the permanent mortgages on the land and building with the ARA and PIDA.

(a) If Standard desires to lease, Penwick and Standard will enter into a lease-purchase agreement for the land and building, which agreement, beginning as of the date of occupancy, will provide for equal monthly payments so that the entire cost of the land and building, together with all interest payable to the lending institutions, whether incurred during the period of construction or during the period of the mortgages, will be amortized on or before the expiration of such agreement. The lease agreement will be for a term of 20 years, and shall contain a judgment clause. The lease agreement shall further provide that Penwick will convey to Standard a good and marketable title in fee simple to the premises at the end of the term of the lease agreement, provided that Standard is then in possession and all sums of money due under the lease agreement, whether specified as rent or not, have been paid. At the time of this or any other transfer of title, all costs, taxes, and legal fees or any other item necessary for the cost of transfer shall be borne exclusively by Standard. An appropriate prepayment clause shall be inserted in the lease agreement.

(b) If Standard desires to purchase the land and building, then Penwick shall sell and convey to Standard a good and marketable title in fee simple to the premises, together with the improvements, easements, and other rights therein belonging to Penwick or in which Penwick may have any right, title, or interest. The purchase price shall be the aggregate actual cost for the land acquisition and for the building construction, as set forth in Paragraph 3, but in no event shall the aggregate purchase price exceed \$3,936,000. Upon purchase, the closing of title shall be consummated within thirty (30) days after receipt by Penwick of Standard's election to purchase.

(c) Consummation of this transaction by lease or by purchase shall be subject to the requirements of the ARA and the PIDA. However, regardless of which alternative is eventually selected, the parties shall cooperate so that the transaction is consummated in such a manner as to enable Standard to take cost recovery and depreciation of the building construction cost.

13. *Cooperation between parties.* The parties shall cooperate with each other in the performance of any work required to be performed by them respectively, to the end that neither shall cause the other any delay nor interfere with the due prosecution of the work of the other.

14. *Applicable law.* This agreement shall be interpreted in accordance with the laws of the Commonwealth of Pennsylvania.

15. *Notices.* All notices and consents shall be in writing, mailed registered or certified mail, and addressed to the parties as specified above, unless a change of address is given in writing.

16. *Arbitration.* If any controversy shall arise between the parties with respect to any of the matters set forth in this agreement the dispute shall be settled by arbitration in accordance with the rules of the American Arbitration Association, and judgment upon the award rendered by the arbitrator, or arbitrators if there be more than one, may be entered in any court having jurisdiction.

The parties have caused this agreement to be executed by their proper corporate officers and their corporate seals to be affixed, duly attested by their proper corporate officers, the day and year first above written.

Penwick Development Organization, Inc.

By: _____

[name and title]

Standard Computer Corporation

By: _____

[name and title]

[Acknowledgments]

[Attach Exhibit A]

[Attach Exhibit B]



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Current Legal Forms for Real Estate

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Current Legal Forms for Real Estate
Chapter 22 DEVELOPMENT AND SUBDIVISION
Part IV. FORMS
C. PLANNING AND CONSTRUCTION

26-22 Current Legal Forms for Real Estate FORM 22.49

FORM 22.49 Lease and contract to construct building to specifications of tenant--loan for construction made to landlord by tenant--percentage rent on restaurant receipts

COMMENT

This form illustrates a combined lease and building agreement, which includes preliminary plans, specifications for the lessor's construction, provision for the lessee's approval of final plans and specifications, as well as conventional lease provisions.

Tax aspects of related loan and rental payments.

Part of the funds required by the owner for construction are to be obtained through a loan made by the lessee. This loan is to be repaid by offsetting the percentage rental under the lease which is due in addition to a basic rental. No repayments are to be made except from the percentage rental. The agreement provides that the loan is granted specifically to finance construction costs. If this amount is received by a lessor without restriction, and subject to repayment from future rentals, the Service would be likely to treat it as an advance rental taxable to the lessor in the year received. Although a limited deferral of some prepaid income items by an accrual basis taxpayer is allowed, the deferment of prepaid rent is not permitted. If the amount is treated as a loan, the lessor would report rental income each year to the extent that the loan is reduced by offsetting percentage rental. To the extent that the lessor has not repaid the loan at the termination of the lease, it would realize debt cancellation income.

The owner's costs of construction are recovered over the recovery period of the improvement, regardless of the length of the term of the lease. The provisions of this agreement are guaranteed by the individual shareholders of the lessee corporation.

FORM

AGREEMENT executed this _____[day] day of _____[month], _____[year], by the Smith Construction Company, a California corporation (the "Company"); Southwest Restaurant, Inc., a California corporation (the "Restaurant"); and Howard Parnell and James Thacher (the "Guarantors").

Recitals

The Company is the owner of a certain parcel of land, located on the westerly side of Hermosa Avenue in Los Angeles, California, the portion of that property which is material to this agreement having been examined by both the Restaurant and the Guarantors.

The Restaurant desires to lease from the Company a portion of that property, have the Company erect a building thereon, and conduct a restaurant business in such building.

The Guarantors are financially interested in the Restaurant and are becoming guarantors on the Restaurant's obligations for the purpose of inducing the Company to enter into this agreement.

This instrument contains all the various agreements between the Company, the Restaurant, and the Guarantors concerning this transaction.

Now, therefore, it is agreed as follows:

1. *Construction of improvement.* The Company shall construct on the premises hereinafter leased a one-story modern restaurant or coffee shop-type commercial building, containing approximately 4,500 square feet, substantially in accordance with the preliminary plans and specifications attached hereto and marked Exhibit A. The general quality of construction and appearance shall approximate the existing restaurant building known as Southwest Restaurant, located at 100 Bayview Avenue, Los Angeles. The building will include the following, whether or not shown in the preliminary plans and specifications: refrigerated air conditioning, exhaust system, ceiling fans, exterior window coverings, exterior lighting for the building and adjacent parking area, parking lot striping, bumper guards, asphalt covering the parking area, glazing, lighting fixtures, exterior and interior decorative masonry, tile, stone or ornamental wall treatment, acoustically treated ceilings, floor covering, distinctive type restaurant roof, exterior walls, if needed, and Kalman floor in kitchen area. The Company shall cause its architect to complete final plans and specifications with due diligence upon the execution of this agreement. Upon completion of the final plans and specifications, together with any modifications or amendments, they shall be approved by the Company and by the Restaurant. If there are any changes of substance from the preliminary plans and specifications, and either the Company or the Restaurant refuses to approve such changes in the final plans and specifications, the Company and the Restaurant shall submit immediately the resolution of such changes to arbitration, and shall share equally the costs of arbitration, and shall be bound by the decision of the arbitrator or arbitrators appointed. The rules and regulations of the American Arbitration Association shall govern the appointment of any arbitrator or arbitrators required and any hearing or decision with respect to the changes. Upon approval of the final plans and specifications by the Company and the Restaurant, the Company shall immediately commence construction of the improvements on the property described in Paragraph 5 in accordance with the final plans and specifications and shall proceed diligently to complete the same.

2. *Landscaping.* The Company shall provide exterior landscaping on the premises substantially in accordance with the preliminary plans and specifications attached hereto and marked Exhibit B. However, the Company's obligation for landscaping shall be limited to \$30,000. If the cost of landscaping shall exceed \$30,000, the Restaurant shall have the option either to pay the excess or to curtail the amount of landscaping so that the total cost thereof does not exceed

\$30,000.

3. *Installation of trade fixtures.* In order to facilitate the early occupancy and commercial use of the building by the Restaurant, the Restaurant shall have the right to install its trade fixtures during the course of the construction of the building, so long as such installation does not unreasonably interfere with the progress of the construction work. However, during the course of the installation, the Restaurant shall be liable for all loss, damage, or other liability arising from the installation.

4. *Loan from tenant to landlord.* To assist in financing the construction of the building, the Restaurant shall loan the Company the sum of \$450,000, together with an amount equal to the Company's expenditures for landscaping as provided in Paragraph 2 (the "loan"), without interest. The Company acknowledges receipt of \$30,000 of the loan simultaneously with the execution of this agreement. The Restaurant will loan the remaining \$420,000 to the Company at the time the actual construction of the improvement is commenced. For this purpose, actual construction will be deemed to have been commenced at the time when the first contract for actual construction work is executed by the Company if the Company and the Restaurant have approved the final plans and specifications, or any dispute between the Restaurant and the Company with respect to the final plans and specifications has been finally resolved and determined by arbitration. If the building is not completed by the Company within 12 months after the approval of the final plans and specifications, and if the completion is not delayed by strike, Act of God, or war, then the loan will be repaid 12 months after the approval. If the building is completed by the Company within 12 months after the approval of the final plans and specifications, (exclusive of delays caused by strike, Act of God, or war), the loan shall be repaid in the manner provided in subparagraph 9(f) and solely from the percentage rent provided for in subparagraph 8(d). The obligation of the Company to repay the loan shall be limited to the amount of percentage rent due under subparagraph 8(d), and if the percentage rent due the Company under the terms of this lease is insufficient to repay the loan, there will be no obligation of the Company to make any further repayment.

5. *Lease.* The Company hereby leases to the Restaurant that certain property situated in the City and County of Los Angeles, State of California, described as follows (the "premises"):

(Insert description)

6. *Term of lease.* The property is leased for a term ending on _____[date], and commencing on the earliest of the following dates:

(a) Forty-five days after the filing for record of a notice of completion of the building. The Company shall not file a notice of completion until such time as the building has been constructed and completed in accordance with the final plans and specifications.

(b) Seven days after the date of issuance by the proper city authorities of a certificate of occupancy for the building.

(c) The day upon which the Restaurant commences doing business as a restaurant in the building.

(d) _____[date].

If the building has not been completed and the notice of completion filed within 12 months after the approval of the plans and specifications, the Restaurant shall have the right to terminate this lease upon 30 days' notice to the Company, unless construction is delayed by strikes, Acts of God, or war. If the building has not been completed in accordance with the final plans and specifications on or before _____[date], the Restaurant shall have the right to terminate this lease upon 15 days' written notice to the Company, and the Company shall, at the expiration of the 15-day period, refund and repay to the Restaurant, forthwith, any moneys advanced or loaned to the Company by the Restaurant. The right of termination on the part of the Restaurant shall inure to the Restaurant, regardless of strikes,

Acts of God, or war, or other delays in the construction of the building.

7. *Options to renew.* If, at the end of the initial term of the lease, the Restaurant is not in default in any of its obligations imposed in the lease, the Restaurant shall have the right to extend the term of the lease for an additional five-year term at the rental provided for in Paragraph 8, payable in a like manner, and subject to all the remaining terms contained in the lease. The Restaurant shall exercise this first option by giving the Company notice of its intention to do so at least one year prior to the expiration of the original term. If the Restaurant has exercised the right to extend the term, and at the end thereof is not in default in any of its obligations imposed in the lease, it shall have the additional right to extend the term of the lease for an additional five-year term beyond the end of the first extension at the rental provided for in Paragraph 8, payable in a like manner, and subject to all the remaining terms contained in the lease. The Restaurant shall exercise this second option by giving the Company notice of its intention to do so at least one year prior to the expiration of the first five-year extension. If the Restaurant has exercised both of the foregoing rights to extend the term, and at the end thereof is not in default in any of its obligations imposed in the lease, it shall have the additional right to extend the term of the lease for an additional five-year term beyond the end of the second extension at the rental provided for in Paragraph 8, payable in a like manner, and subject to all the remaining terms contained in the lease. The Restaurant shall exercise this third option by giving the Company notice of its intention to do so at least one year prior to the expiration of the second five-year extension.

8. *Rent.* The rent and additional rent for the premises shall be the following:

(a) The Restaurant shall pay to the Company in advance on the first day of each and every month of the term a minimum rent for the demised premises computed as follows:

[Insert rent schedule]

The first month's rent shall be prorated for the actual number of days between the commencement of the term and the end of the first calendar month thereafter.

(b) As additional rent, the Restaurant shall pay all real estate taxes assessed against the demised premises before the taxes become delinquent. For the first year of the term, the amount of the taxes which will be paid as additional rent shall be equitably prorated between the Company and the Restaurant.

(c) As additional rent, the Restaurant shall provide and pay premiums on a fire insurance policy with extended coverage endorsement with an insurer in an amount satisfactory to the Company covering the demised premises. The amount of insurance shall be not less than the replacement value of the building and improvements at all times. The policy shall show the Company as a beneficiary. The Restaurant shall, from time to time, deposit with the Company, in duplicate, a certificate of the insurance carrier as to each policy of insurance.

(d) The Restaurant shall pay to the Company additional annual rent computed as follows:

(1) 6 percent of the gross annual receipts derived by the Restaurant from the operation of the business on the demised premises.

(2) Minus the minimum rent as provided for in subparagraph (a).

(3) Minus the amount of real property taxes assessed against the demised premises and paid by the Restaurant as provided in subparagraph (b), and

(4) Minus the premiums on the fire and extended coverage insurance paid by the Restaurant as provided in subparagraph (c).

9. *Provisions relating to additional rent.* With respect to additional rents required to be paid under Paragraph 8, the following shall apply:

(a) "Gross receipts" shall mean the gross amount received by the Restaurant from all sales and services from the operation of the business upon the demised premises (except receipts from the sale of tobaccos, candies, postcards, and stamps) both for cash and on credit, and in case of sales on credit, whether or not payment is actually made therefor. It shall include all receipts received by the Restaurant for merchandise sold pursuant to orders received on the demised premises although filled elsewhere. The amount collected on behalf of the State of California and the County of Los Angeles and representing California and County sales tax shall not be deemed to be receipts for this purpose.

(b) The Restaurant shall keep full, complete, and proper books, records, and accounts of its gross receipts. The books, accounts, and records, including any sales tax reports that the Restaurant may be required to furnish to any governmental agency, shall at all reasonable times be open to the inspection of the Company and any of its authorized agents.

(c) Within ten days after the end of each calendar month, commencing with the first month after the beginning of the term, the Restaurant shall furnish the Company with a statement, certified by an officer of the Restaurant to be correct, which shall set forth the gross receipts received by the Restaurant for the preceding calendar month. Annually, the Restaurant shall furnish the Company with an audit of the Restaurant's business for the preceding year certified by a Certified Public Accountant. The Company may, once in any calendar year, cause an audit of the Restaurant's business to be made by an accountant of the Company's own selection. If the statement of gross sales previously made by the Restaurant to the Company shall be found to be less than 97 percent of the amount of the Restaurant's gross sales, shown by such an audit, the Restaurant shall immediately pay the cost of the audit as well as the additional rent shown to be payable. Otherwise, the cost of the audit shall be paid by the Company.

(d) Acceptance by the Company of moneys from the Restaurant as additional rent shall not be an admission of the accuracy or sufficiency of the amount of the additional rent payment. The Company may, at any time within two years after the receipt of any additional rent payment, question the sufficiency and accuracy of the amount thereof. The Restaurant shall, for a period of two years after payment to the Company of any additional rent, keep safe and intact all of the Restaurant's records, books, and accounts which bear upon or are required to establish the Restaurant's gross sales, and shall make the same available to the Company upon the Company's request at any time during the two-year period.

(e) For purposes of this paragraph, the crediting of rent on the unpaid balance of the loan shall be deemed to be receipt and acceptance of the additional rent.

(f) The additional rent required by Paragraph 8(d) shall be computed annually and shall be paid on or before the 15th day of January in each successive year. Until the loan is repaid in full, the additional rent provided for in Paragraph 8(d) shall be paid by crediting the amount thereof to the unpaid balance of the loan and notifying the Company of the amount of the credit. When the loan has been paid in full, the additional rent provided for in Paragraph 8(d) shall be paid by the Restaurant to the Company at the Company's offices.

10. *Use of premises.* The Restaurant shall use the premises only for the purpose of conducting a restaurant or coffee shop business together with other uses normally and customarily incident to the operation of a restaurant or coffee shop. The Restaurant shall not sell alcoholic beverages (except beer and wine if licensed) upon the premises.

The Restaurant shall only use the premises in a manner consistent with the certification of the building by the U.S. Green Building Council LEED rating system, and in accordance with the Company's sustainability policies or practices adopted by Company from time to time. All such policies and practices shall be made known to Restaurant in writing.

11. *Compliance with law.* The Restaurant shall comply with all federal, state, or municipal laws, ordinances and regulations dealing with the use of the premises, and will save the Company harmless from any damage, penalty, or charge imposed or incurred for the violation of any such laws, ordinances, or regulations, whether occasioned by the Restaurant, its agent, or any other person using or present upon the demised premises.

12. *Waste and quiet conduct.* The Restaurant shall not commit or suffer to be committed any waste or any nuisance upon the premises. The Restaurant shall keep the premises reasonably clean and free of trash, waste paper, and other litter.

13. *Conduct of business.* The Restaurant shall, during the entire term hereof, continuously conduct a restaurant business on the premises, and shall keep the premises open for business during each and every business day for the number of hours customary for businesses of a like character in the City of Los Angeles. The Restaurant shall operate such business with diligence and efficiency and in a like manner as comparable businesses in Los Angeles so as to produce all the gross sales which may reasonably be produced by such a restaurant.

14. *Utilities and services.* The Restaurant shall, throughout the term of this lease, pay for all electricity, gas, water, and every other service, commodity, or article which may be furnished and supplied to it or to the premises.

15. *Personal property taxes.* The Restaurant shall pay all personal property taxes levied against personal property of any kind or nature located on the premises.

16. *Alterations and improvements.* The Restaurant shall make no structural alterations or structural improvements upon the premises without first having secured the written approval of the Company.

17. *Repairs.* The Restaurant shall, throughout the term of the lease, at its own expense keep the building to be erected on the premises and the pavement surrounding the building in good repair at all times. At the end of the term, the Restaurant will return the building and the premises to the Company in good repair, reasonable wear and tear and damage by fire, acts of God, and war excepted. The Restaurant acknowledges that the Company's obligation to repair the premises is limited to that set forth in Paragraph 39.

18. *Mechanic's liens.* The Restaurant shall not permit any mechanic's, materialman's, contractor's, or subcontractor's liens arising from any construction work, repair, restoration, or removal or any other claims or demands to be enforced against the premises or any part thereof. The Company shall have the right at any time to post and maintain upon the premises such notices as may be necessary to protect the Company against liability for all such liens or otherwise. The Restaurant shall give the Company prior notice of the start of any work or the delivery of any materials connected with any such work of construction, repair, restoration, or removal occurring after the commencement of the term of the lease.

19. *Trade fixtures and equipment.* The Restaurant shall provide, at its own expense, all restaurant and kitchen equipment, including but not limited to booths, stools, counters, refrigeration equipment, stoves, stainless steel equipment, dishwasher, food preparation equipment, tables, and chairs. The Restaurant shall install or cause to be installed all such equipment in such position as it desires. The Company shall make at its expense all initial electrical and plumbing connections. Thereafter, changes in the electrical and plumbing connections will be at the expense of the Restaurant.

20. *Security agreement.* The Restaurant may finance the purchase of the restaurant fixtures and equipment installed in the premises by the execution of a security agreement. Except for such a purchase money security agreement, the Restaurant shall permit no liens or encumbrances to be levied or placed against the trade fixtures and equipment, except for that provided in Paragraph 37.

21. *Landlord's right to enter.* The Restaurant shall permit the Company at all reasonable times during the period of the lease to enter upon the premises for the purpose of inspecting them, or making repairs as provided in Paragraph 39, or of posting notices of non-liability for alterations, additions, or repairs. The Restaurant shall permit the Company, at any time, within 30 days prior to the expiration of the lease to place upon the demised premises any usual or ordinary "To Let" or "To Lease" signs.

22. *Indemnification of landlord.* The Restaurant shall indemnify the Company and hold it harmless from damage by reason of the death of or injuries sustained by or property damage suffered by any person on the premises, or the street or sidewalk adjacent thereto in any manner whatsoever. If the Company is made a party to any litigation on account of any such damage or alleged damage, the Restaurant shall pay all damage and costs recovered against the Company. Such damage and costs shall be due forthwith after notice thereof from the Company. The Restaurant shall also pay to the Company all reasonable attorneys' fees and other expenses which the Company may incur in connection with such litigation or threatened litigation, provided that the Company retains for such purpose, such attorney as may be recommended by the Restaurant. If the Company elects to have its own attorney defend any action which may be brought against it by reason of any matter covered by this paragraph, the Company shall pay for the same, and the Restaurant shall have no liability with respect to such attorneys' fee. The Restaurant's liability shall not be released or affected if the Company elects to have its own attorney defend any action which may be brought against it by reason of any matter covered by this paragraph.

23. *Public liability insurance.* The Restaurant shall carry with an insurer satisfactory to the Company a comprehensive public liability insurance policy with insurance limits of not less than \$1,000,000/\$3,000,000. The Restaurant will name the Company as an additional insured under the policy and will pay all premiums.

24. *No assignment.* The Restaurant shall not assign the lease or any interest in it, and shall not sublet the premises or any part thereof, or permit another person to occupy or use the premises or any portion thereof without the written consent of the Company. No purported encumbrance, assignment, or transfer of any right or interest in the lease, whether voluntary or involuntary, by operation of law, under legal process, in bankruptcy, or otherwise shall be valid or effective without the prior written consent and approval of the Company. The consent to one assignment, subletting, occupation or use by another person shall not be deemed to be a consent to any subsequent assignment, subletting, occupation, or use by another person.

25. *Signs.* The Restaurant shall not place any sign or signs of any kind on the premises without the Company's prior written approval.

26. *Surrender.* Upon the last day of the term (as extended, if extended) or sooner termination of the lease, the Restaurant shall surrender to the Company all of the premises, including the building in the same condition as when received, reasonable use and wear thereof and damage by fire, Act of God, or war excepted; and the Restaurant shall remove all of its signs from the premises.

27. *Abandonment of premises; trade fixtures.* The Restaurant shall not vacate or abandon the premises at any time during the term. If the Restaurant does abandon, vacate, or surrender the premises or is dispossessed by process of law or otherwise, any personal property belonging to the Restaurant and left on the premises shall be deemed to be abandoned at the option of the Company, except such property in which the Company has a security interest.

28. *Right to lease.* The Company warrants to the Restaurant that the Company has the right to enter into the lease containing the terms and conditions set forth herein.

29. *Other restaurants.* The Company shall not permit the operation of a public eating establishment other than that operated by the Restaurant upon any of the property now owned by the Company on the westerly side of Hermosa

Avenue in Los Angeles, California without the prior written approval of the Restaurant. This shall not preclude the operation by any tenant of such property of a lunchroom, cafeteria, or other similar eating facility for the sole use and benefit of its own employees and their guests.

30. *Quiet possession.* The Company warrants that the Restaurant shall have quiet possession of the premises during the term of this lease, subject however, to the right of forfeiture and reentry in the event of the Restaurant's failure to perform its covenants and conditions under the lease.

31. *Default by tenant.* Each of the following shall be deemed to be both a default by the Restaurant and a breach of the lease:

(a) A default in the payment of the rent or any part thereof for a period of ten days, after the Company gives to the Restaurant written notice of such default.

(b) A default in the performance of any other covenant or condition of the lease by the Restaurant for a period greater than that reasonably required to cure such default by diligent action after the giving of written notice thereof by the Company to the Restaurant.

(c) The appointment of a receiver, custodian or trustee to take possession of all or substantially all of the assets of the Restaurant.

(d) The general assignment by the Restaurant for the benefit of creditors.

(e) The dissolution or the commencement of any action for the dissolution or liquidation of the Restaurant.

(f) The inability of the Restaurant to meet its obligations as they fall due, or any action taken or suffered by the Restaurant under any insolvency or bankruptcy act.

32. *Landlord's right to cure tenant's default.* In the event of any breach under the lease by the Restaurant, the Company may immediately or at any time thereafter without notice cure the breach for the account and at the expense of the Restaurant. If the Company at any time by reason of such breach is compelled or elects to pay any sum of money or incurs any expenses, including reasonable attorneys' fees, in instituting, prosecuting, or defending any action to enforce or protect the Company's rights, the sum and expenses, together with interest, costs, and damages, shall be deemed to be additional rent and shall be due from the Restaurant to the Company on the first day of the month following the Company's payment of such sums or expenses.

33. *Landlord's remedies.* The remedies of the Company for any default by the Restaurant shall include the following:

(a) Upon any default by the Restaurant, and at any time thereafter, the Company may give written notice to the Restaurant that the Company elects to terminate the lease upon a specified date not less than five days after the mailing of such notice. The lease shall then expire on the date so specified.

(b) Upon any default by the Restaurant, or if, during the term (or any extension) the premises are abandoned by the Restaurant or become vacant, the Company may immediately or any time thereafter reenter and resume possession of the premises. The Company may remove all persons and property from the premises and may store the property in a public warehouse or elsewhere at the expense and for the account of the Restaurant, and without liability for any damages on account of such removal. The Company's reentry shall not be deemed either an acceptance of a surrender of the lease or termination thereof.

(c) If the Company shall reenter the demised premises under subparagraph (b) or take possession pursuant to legal

proceedings or pursuant to any notice provided for by law, the Company may, without terminating the lease, relet the demised premises or any part thereof. Such reletting may be for such term or terms, including a term extending beyond the term of the lease, at such rental, for such use, and upon such other terms and conditions (including the right to make alterations and repairs) as the Company in its sole discretion may deem advisable. Upon such reletting, at the option of the Company:

(1) Either the Restaurant shall be immediately liable to pay to the Company, in addition to any indebtedness other than rent due hereunder, the amount by which the rent reserved under this lease for the period of reletting (up to the end of the term of this lease) exceeds the cost and expenses of such reletting and the alterations and repairs incurred by the Company; or

(2) The Company may apply rents from such reletting first to the payment of any indebtedness other than rent due hereunder from the Restaurant to the Company; second, to the payment of any costs and expenses of such reletting and of such alterations and repairs; third, to the payment of rent due and unpaid hereunder; and the remainder, if any, shall be held by the Company and applied in payment of future rent as the same may become due and payable hereunder.

If the Restaurant has been credited with any rent to be received by reletting under option (1), and rent is not promptly paid to the Company by the new tenant, or if rentals received from reletting under option (2) during any month are less than that to be paid during that month by the Restaurant, the Restaurant shall pay any such deficiency to the Company. Each deficiency shall be calculated and paid monthly. Notwithstanding any reletting without termination, the Company may at any time thereafter elect to terminate the lease for the previous breach. Should the Company at any time terminate this lease for any breach, the Company may recover from the Restaurant all damages the Company may incur by reason of such breach, including the cost of recovering the premises, and including the worth at the time of such termination of the excess, if any, of the amount of rent and charges equivalent to rent in the lease for the remainder of the stated term over the then reasonable rental value of the demised premises for the remainder of the stated term, all of which amounts shall be immediately due and payable from the Restaurant to the Company.

34. *Attorneys' fees.* If action shall be brought to recover the premises or for the recovery of any rent due under the provisions of the lease or because of the breach of any of the Restaurant's other covenants in the lease, the Restaurant shall pay to the Company reasonable attorneys' fees which shall be fixed by the court. If action is brought by either party under the lease, or by reason of any claim or cause of action against the other party, arising out of or in connection with this lease, the successful party in any such action shall be entitled to reasonable attorneys' fees, which shall be fixed by the court.

35. *Waiver.* The waiver by the Company of any breach of any term, covenant, or condition herein shall not be deemed to be a waiver of such term, covenant, or condition or any subsequent breach, or of any term, covenant, or condition. The subsequent acceptance of rent by the Company shall not be deemed to be a waiver of any preceding breach by the Restaurant of any term, covenant, or condition other than the failure of the Restaurant to pay the particular rent so accepted, regardless of the Company's knowledge of such preceding breach at the time the Company accepts such rent.

36. *Remedies cumulative.* The rights given to the Company herein are in addition to any rights which may be given to the Company by statute or otherwise.

37. *Security.* The Restaurant shall secure the performance of its agreements under this lease by the execution of a security agreement upon all of its trade fixtures and equipment to the Company. The Company shall subordinate its security interest to any purchase money security interest executed by the Restaurant to finance the purchase of fixtures as provided in Paragraph 20 and the Company shall execute any and all instruments necessary to effect such subordination. The Restaurant has no obligation to purchase signs or ice machines, but may lease these from suppliers.

38. *Guarantors' undertaking.* The Guarantors jointly and severally guarantee the faithful performance of all the

agreements made by the Restaurant hereunder. Whenever the security interest or interests described in Paragraph 20, covering all trade fixtures and equipment installed upon the demised premises (except signs and ice machines which are leased by the Restaurant), become security interests that are first in priority and the complete beneficial title to all property included in such security interests is vested in the Restaurant free and clear of all liens and encumbrances except the security interests running in favor of the Company, then the personal guaranty and liability of the Guarantors hereunder shall cease.

39. Damage or destruction of premises. (a) If the building to be built in accordance with Paragraph 1 shall, by reason of fire or other unavoidable casualty, is destroyed or damaged to such an extent that the cost of restoring or repairing the same would amount to 50 percent or more of its total value immediately prior to the destruction or damage, and the destruction or damage occurs

(1) prior to _____[date]; or

(2) prior to _____[date], and the Restaurant has exercised its first option to extend under Paragraph 7; or

(3) between _____[date], and _____[date], inclusive and the Restaurant gives to the Company within 30 days after such destruction or damage written notice of its exercise of the second option to extend under Paragraph 7; or

(4) prior to _____[date], and the Restaurant has exercised its second option to extend under Paragraph 7; or

(5) between _____[date], and _____[date], inclusive, and the Restaurant gives to the Company within 30 days after such destruction or damage written notice of its exercise of the third option to extend under Paragraph 7,

the Restaurant shall give to the Company immediate notice of the destruction or damage and the Company shall thereupon, at its own expense, cause such damage to be repaired, so that the building shall be in as good a condition as immediately prior to the fire or other unavoidable casualty. If the damage shall be so extensive as to interfere with the conduct of the Restaurant's business in the demised premises, there shall be a just and proportionate abatement of the rent until such time as the damage is repaired. If the destruction or damage occurs under any circumstance not above provided for then this lease shall be terminated as of the date of the destruction or damage, and the Company and the Restaurant shall be freed of and from all obligation hereunder with respect to anything arising thereafter.

(b) If the building shall be damaged by fire or other unavoidable casualty, at the time during the term of the lease, but not to the extent mentioned in subparagraph (a) the Restaurant shall give immediate notice to the Company and the Company shall thereupon, at its own expense, cause the damage to be repaired, so that the demised premises shall be in as good condition as immediately prior to the fire or other unavoidable casualty, and if the damage shall be so extensive as to interfere with the conduct of the Restaurant's business in the demised premises, there shall be a just and proportionate abatement of the rent until such time as the damage is repaired.

(c) In no event are trade fixtures to be considered any part of the building which the Company is obligated to repair under this paragraph. Restaurant shall insure, repair and replace its trade fixtures at its sole expense. All trade fixtures visible to the public shall be maintained in good condition at all times.

40. Condemnation. If, at any time, during the term of the lease the premises or any part thereof are taken or condemned by public authority, then the leasehold estate and interest of the Restaurant in the part of the demised premises taken shall forthwith cease and terminate. All compensation awarded by reason of the taking of the leased land and

improvements shall be payable to and be the sole property of the Company. All compensation awarded by reason of the taking of any fixture or for the value of the restaurant business as a going business (i.e., goodwill) shall be payable to and be the sole property of the Restaurant. If less than one-half of that portion of the premises described in Paragraph 5 shall be taken or condemned, the Company shall forthwith repair any damage to the building, if taken, or substitute another building and the lease shall continue and the rent thereafter payable for the rest of the term shall be reduced in the proportion that the area of land so taken shall bear to the remainder of the area described in Paragraph 5. If more than one-half of that part of the premises described in Paragraph 5 is taken or condemned, the Company or the Restaurant shall have the option to terminate this lease.

41. *Notices.* All notices required to be given to the Company shall be given by mailing the same by registered or certified mail, return receipt requested, addressed to:

Smith Construction Company

5000 Wilshire Boulevard Los Angeles California.

All notices required to be given to the Restaurant shall be given by mailing the same by registered or certified mail, return receipt requested, addressed to:

Southwest Restaurant, Inc.

100 National Bank Building
Beverly Hills, California.

All notices required to be given to the Guarantors shall be given by mailing the same by registered or certified mail, return receipt requested, addressed to:

Howard Parnell, 400 Central Avenue,

North Hollywood, California.
James Thacher, 600 Taft Street, Los Angeles California.

Any party may from time to time give the others written notice of a change in the address to which notices are to be sent.

42. *Time.* Time is of the essence in this agreement.

43. *Binding on successors.* The covenants and conditions herein contained shall, subject to the provisions as to assignment, apply to and bind the heirs, successors, and assigns of all the parties. All of the parties shall be jointly and severally liable hereunder.

Witness the following signatures and seals.

Smith Construction Company

By: _____

[name and title]

Southwest Restaurant, Inc.

By: _____

[name and title]

_____ L.S.

Howard Parnell

_____ L.S.

James Thatcher

[Acknowledgments]

[Attach Exhibit A]

[Attach Exhibit B]



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Chapter 22 DEVELOPMENT AND SUBDIVISION
Part IV. FORMS
C. PLANNING AND CONSTRUCTION

26-22 Current Legal Forms for Real Estate FORM 22.50

FORM 22.50 Contract by lessee to construct building--lessor to approve plans and construction--demolition by lessee

COMMENT

A lease arrangement which contemplates the construction of an improvement by the lessee to be conveyed to the lessor upon termination of the lease offers attractions to both parties. The lessor obtains periodic income plus the eventual tax-free acquisition of the improvement. The lessee obtains possession of land for development for less than the cost of a fee interest, with periodic tax deductions for rent.

Construction agreement.

In this transaction, two documents encompass the contractual arrangements between the parties. One is the lease of the property. The other, illustrated in this form, is the agreement requiring the tenant to construct the improvement. The purpose, as in all other construction agreements, is to define precisely the improvements to be constructed and the various details relating to their financing and completion. The lessor reserves the right to approve plans for the construction and all work performed pursuant to those plans. Deadlines are established for completing the various stages of the project. The lessee is to deliver a bond for faithful performance and payment.

Lessee improvements are not lessor income.

Improvements constructed by the lessee do not constitute income to the lessor, either while the lessee is in possession under the lease, or when the lessor acquires the improvements upon the termination of the lease. These exclusions from gross income do not apply, however, when either the construction or the conveyance is in lieu of rental obligations.

FORM

AGREEMENT made this _____ [day] day of _____ [month], _____ [year], between Madison Realty Corporation, a New York corporation, having its principal office at 500 Fifth Avenue, New York, New York (the "Landlord"), and Third Avenue Corporation, a New York corporation, having its principal office at 100 Broadway, New York, New York (the "Tenant").

Recitals

The Tenant has by agreement of lease (the "Lease"), bearing even date and to be delivered simultaneously herewith, taken and hired from the Landlord certain real property (the "Premises"), and

The Tenant wishes to construct within the Premises certain buildings and structures for the purposes described in the Lease (the "Building"), and

The parties desire by this agreement to provide for the construction by the Tenant of the Building upon the Premises,

Now, therefore, the Landlord and the Tenant agree as follows:

1. *Plans and specifications.* The Tenant shall no later than four months from the delivery of the Lease cause an architect (the "Architect"), satisfactory to the Landlord to prepare plans and specifications (the "Plans and Specifications"), for the project, which shall include for consideration any green building alternatives for consideration by Landlord. The term "project" includes all work to be performed on the Premises pursuant to this agreement, including, but not limited to, any work of demolition, construction, or relocation and whether or not the work is embodied in the Plans and Specifications. The Plans and Specifications shall conform to the requirements of governmental bodies having jurisdiction over the project. Before any work is begun on the project, the Plans and Specifications, and every modification, shall be approved in writing by the chief engineer (the "Engineer of Landlord"), and such approval shall not be unreasonably withheld. Two copies of the Plans and Specifications shall be furnished to the Landlord by the Architect promptly after their preparation and upon completion of the project. One copy of all original design, contract, detail, and shop drawings, together with one copy of the reproducible Plans and Specifications corrected by the Tenant for work as built, shall be delivered to the Landlord. If the Lease is terminated for any reason before completion of the project, the Tenant shall deliver to the Landlord copies of all plans, reports, estimates, and models.

2. *Construction.* If any demolition within the Premises is required prior to or during construction of the Building, the Tenant, at its own cost and expense, shall commence and complete the demolition in a manner satisfactory to governmental bodies having jurisdiction over the demolition and in accordance with such reasonable regulations and requirements as the Engineer may impose. Unless prevented by a change in any statute or ordinance or by any cause beyond the control of the Tenant, but in no event later than one year from the delivery of the Lease, the Tenant, at its own cost and expense and in accordance with the Plans and Specifications as approved in writing by the Engineer shall proceed to construct or cause to be constructed the Building. All construction work shall be done in a good and workmanlike manner and shall at all times be subject to inspection by and approval of the Architect and the Engineer and all work shall be done in accordance with the Plans and Specifications and in accordance with the requirements of governmental bodies having jurisdiction, including all sustainability requirements of the governmental jurisdiction which shall include for consideration any green building alternatives. The materials used shall be approved by the Architect and the Engineer and shall meet the requirements of all governmental bodies having jurisdiction, including all sustainability requirements of the governmental jurisdiction.

In the event that asbestos is found, Tenant shall consult with a qualified asbestos consultant who is licensed by the State

of New York to remove asbestos. Said consultant shall be asked to make a recommendation as to whether the asbestos should be removed or contained. Tenant, at its sole expense, shall engage a licensed asbestos handler to perform the recommended work. All work shall be performed in full compliance with the New York State Labor Law and regulations promulgated thereunder. The asbestos handler shall procure insurance covering all risks to person and property in at least the amount of \$1 million. Landlord and Tenant shall be named as additional insureds under the policy or policies. A certificate evidencing the existence of such insurance shall be provided to Landlord by Tenant prior to the commencement of any work.

All removal or containment plans shall be subject to review and written approval by Landlord, its architect or engineer prior to the commencement of work. Approval shall not be unreasonably withheld.

3. *Violations.* In case of the filing of a notice of violation of any applicable rule or regulation, the Tenant, at its own cost and expense, shall cause the cancellation of the notice of violation and shall obtain all certificates required by governmental bodies in relation to completion and occupancy of the Building. The Tenant shall, however, have the right, in good faith and at its own expense, to contest the validity or legality of any notice of violation filed with respect to such work, and pending such contest actively conducted by the Tenant, the failure to comply with the requirements of the notice shall not be deemed a default of the Tenant's covenant, provided the Tenant shall have furnished the Landlord indemnity in form and substance reasonably satisfactory to the Landlord protecting against any loss by the Landlord by reason of the failure to comply with the requirements of the notice.

4. *Indemnity.* The Tenant shall indemnify the Landlord and hold it harmless against any mechanics' or other liens, security agreements, or other encumbrances which may be imposed upon the Premises or any materials, fixtures, or articles used in the construction of the Building, and the Tenant shall bond, satisfy, or discharge all such liens, security agreements, and other encumbrances, and in the event of the Tenant's failure to do so, the Landlord may bond, satisfy, or discharge same and the cost of so doing shall be considered Additional Rent payable pursuant to the terms of the Lease ten days after receipt of a bill from the Landlord. Paragraph 5 of the Lease providing for the Tenant's indemnification of the Landlord shall apply to all phases of work, of whatever description, relating to this Agreement or the project.

5. *Completion of project.* The Tenant shall construct the project and shall complete the same, in accordance with the Plans and Specifications free from any liens, and shall acquire certificates of occupancy for Building within two years after the delivery of the Lease. In the event of failure of the Tenant to complete the project within such time by reason of causes beyond the control of the Tenant or its subcontractors or licensees, the Tenant shall complete the project within a period after the completion date that is equal to the time the Tenant was delayed by the causes beyond its control; provided, however, that in no event shall the completion date be extended beyond a date which is three years after the delivery of the Lease. The project shall be completed when:

(a) The Architect shall certify to the Landlord in writing that the project has been completed in accordance with the Plans and Specifications and in accordance with this agreement;

(b) A certificate of occupancy shall have been duly issued by the Department of Housing and Buildings of the City of New York (or governmental body exercising comparable functions) for each structure of the project susceptible of occupancy; and

(c) No mechanics' lien or security agreement shall affect the Premises or any property located therein within four months after the issuance of the last of the certificates of occupancy mentioned in (b) above.

6. *Payment and performance bond.* Prior to the commencement of any demolition, construction, or other work upon the project, the Tenant shall execute and deliver to the Landlord a payment and performance bond or bonds, in form and substance satisfactory to the Landlord, in the total amount of \$3,000,000, with respect to the Building to be erected

upon the Demised Premises, with a surety or sureties approved by the Landlord conditioned upon the completion of the project pursuant to this agreement in accordance with the Plans and Specifications and within the time limited herein free and clear of all mechanics' liens or security agreements, and conditioned further upon the due and prompt payment by the Tenant of all sums required to construct and complete the Building pursuant to the Plans and Specifications. As an alternative to the above, the Landlord may accept such other security as the Tenant may provide which may be satisfactory in form and substance to the Landlord in the Landlord's sole discretion.

7. Assignments to landlord. The Tenant as additional security shall promptly deliver to the Landlord assignments of all financing commitments made to the Tenant with respect to the construction of the Building, together with the written consents of the respective lending institutions to such assignment, and an assignment of any leases or agreements to lease space in the Building, such assignments to take effect only upon the taking over by the Landlord of the work of construction pursuant to the provisions of Paragraph 8. The Landlord shall reassign to the Tenant the leases and agreements to lease upon the completion of the project by the Tenant pursuant to this agreement; provided, however, that the Landlord shall reassign any lease or agreement to lease space in the Building which the Tenant is required to assign to a lending institution in connection with obtaining a financing commitment made to the Tenant in relation to the project.

8. Failure to complete. Subject to the provisions of Paragraph 5, if the Tenant shall fail to prosecute any work required on the project or shall abandon such work before completion or shall fail to bond, satisfy, or discharge any lien or security agreement or shall fail to comply with any notice of a governmental body having jurisdiction, the Landlord may serve upon the Tenant a notice, in the manner provided for in the Lease, that the Landlord intends to take over the completion of the project, and within 60 days from the service of the notice, unless the default has been remedied, the Landlord may take over the work of construction. If the default cannot be cured within 60 days, the time within which the Tenant may cure shall be extended for a period reasonably necessary, provided the Tenant proceeds in good faith and with due diligence and deliberate speed to cure the same. In the event the Landlord intends to take over the work of construction, the Lease shall terminate ipso facto in the same manner and with the same effect as a termination pursuant to Paragraph 15 of the Lease, and the Landlord shall be entitled to exercise all rights under the payment and performance bond or other security and the sureties thereunder shall remain liable to the Landlord upon the bond or other security and the proceeds of the bond or other security shall be and become the property of the Landlord.

9. Remedies. Any breach of this agreement shall constitute a breach of the Lease, and the Landlord may exercise any rights pursuant to the Lease in the event of a breach hereunder. All rights and remedies of the Landlord hereunder are separate, distinct, and cumulative and in addition to, and not in substitution of or waiver of, any other rights or remedies of the Landlord contained either in this agreement or the Lease.

The parties have caused the execution of this agreement the day and year first above written.

Madison Realty Corporation

By: _____

[name and title]

Third Avenue Corporation

By: _____

[name and title]



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Chapter 22 DEVELOPMENT AND SUBDIVISION
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C. PLANNING AND CONSTRUCTION

26-22 Current Legal Forms for Real Estate FORM 22.51

FORM 22.51 Urban renewal project--sale of land by municipal agency--improvement by purchaser in accordance with redevelopment plan

COMMENT

Public redevelopment programs involving the purchase of land and construction of improvements by private developers are generally organized under state or municipal laws, which provide for detailed regulation of the activities of the developer in order to insure that the intended public improvement is accomplished. Consequently, the contents of an agreement for the acquisition of property for redevelopment are to a large extent dependent upon the requirements of the applicable statutes and underlying regulations. The developer is likely to be considerably circumscribed in the use of land acquired from a public agency and in his construction procedures.

Agency responsibilities.

Under this agreement the public agency, which has undertaken a broad urban renewal project, agrees to sell part of its property on condition that the purchaser (the developer) improve that portion in accordance with the municipality's redevelopment plan. At no cost to the developer and prior to the transfer of title, the public agency is to prepare the property for the construction program. This includes the demolition of existing structures, and the filling, grading, and leveling of the land. After construction has begun and before its completion, the public agency is to pave streets, provide street lighting, install sewers, drains, and water lines, and set up or relocate all other public utility appurtenances.

Developer responsibilities.

Before the developer can acquire title to the property, the developer is required to submit for the agency's approval construction and design plans in sufficient detail to show that the improvements

will conform to the redevelopment plan and when constructed, meet the requirements necessary to be certified as LEED Certified as set by the U.S. Green Building Council. In addition, the developer must satisfy the agency that the developer has the financial strength to complete the improvements. As soon as title is transferred, the developer must begin construction. The project must be completed within a prescribed time. In the interval the developer is required periodically to make detailed progress reports to the agency.

Transfer restrictions.

Any assignment of the land or any transfer of ownership in the developer prior to completion of the improvements is subject to the approval of the agency. A proposed transferee must agree to complete the project and must establish its capacity to do so. So that the developer will not obtain speculative profits from any sale of the property prior to completion of the improvements, the consideration received from a sale may not exceed the developer's cost of the land and cost of construction. The agency is authorized to increase the developer's purchase price to achieve this result.

Default and remedies.

The agreement contains elaborate provisions relating to possible defaults by the developer. These provisions take into account the rights of any mortgagee, the remedies available to the public agency, and the obligations of the public agency on any reacquisition of the property.

FORM

AGREEMENT entered into on _____ [date], between the Redevelopment Agency of the City of Bedford, together with any successor public agency designated by or pursuant to law (the "Agency"), a public body organized and appointed under the provisions of the General Statutes of the State of Connecticut, and Holz Development Corp. (the "Redeveloper").

Recitals

In furtherance of the objectives of the State Redevelopment and Urban Renewal Laws, the Agency has undertaken a program for the clearance and reconstruction of slum and blighted areas in the City of Bedford (the "City") in the area bounded as follows:

(Insert description)

The Agency has prepared, and the City, acting through the City Council, has approved a plan (the "Redevelopment Plan"), providing for the clearance, redevelopment, and future uses of the land comprising such area, a copy of which plan is attached as Exhibit A; and

In order to enable the Agency to achieve the objectives of the Redevelopment Plan, and particularly to make such land available, after acquisition and clearance by the Agency, for redevelopment by private enterprise in accordance with the uses specified in the Redevelopment Plan, both the federal government and the City have undertaken to provide, and have provided, substantial aid and assistance to the Agency through a Contract for Loan and Capital Grant in the case of the federal government, and two bond ordinances, in the case of the City; and

The Redeveloper has offered to purchase that part of the land described in Exhibit B attached hereto, (the "Property"), and to redevelop the Property in accordance with the Redevelopment Plan; and

The Redeveloper has deposited with the Agency the amount of \$150,000 as security for the performance of the obligations of the Redeveloper pursuant to this agreement, which deposit is to be retained by the Agency without obligation to pay interest thereon until completion of the improvements to be constructed; and

The Agency on the basis of the foregoing, and the undertakings of the Redeveloper pursuant to this agreement, is willing to sell the Property to the Redeveloper,

Now, therefore, it is agreed as follows:

1. *Purchase price.* Subject to all terms, covenants, and conditions of this agreement, the Agency will convey the Property to the Redeveloper for the purchase price of \$3,000,000. The purchase price will be paid in cash or certified check in the following installments, subject to adjustments resulting from the survey:

On or before _____ [date] \$300,000

On or before _____ [date] 1,500,000

On or before _____ [date] 600,000

On or before _____ [date] 600,000

2. *Restrictions on title.* The agency will convey marketable fee simple title to the Property to the Redeveloper by quitclaim deed. The conveyance and title, in addition to the conditions hereinafter provided for, shall be subject to easements necessary to the Redevelopment Plan, and which are more specifically described in the property description contained in the attached Exhibit B, and easements for sewers, drains, water, and gas distribution lines, electric, telephone, and telegraph installations, rights-of-way and access, and other public or private utilities and facilities, provided the easements shall not interfere with buildings or parking structures as set forth in the Redeveloper's Final Proposal.

3. *Conveyance of parcels.* The Agency will deliver the deed and possession of portions of property to the Redeveloper as described in the attached Exhibit C on the date specified by Exhibit C or earlier as agreed upon by the Agency and the Redeveloper. The Agency shall not be required to convey later scheduled parcels until title has been taken by the Redeveloper to the prior scheduled parcels, provided any delay in transfer of title is not caused by fault of the Agency. Each conveyance shall be made at the principal office of the Agency, at 128 State Street, Bedford, Connecticut. The Agency shall, prior to the transfer of possession or title, permit the Redeveloper to make soil boring and bearing tests and detailed surveying activities on property owned by the Agency, provided the work does not interfere with demolition or site improvement activities of the Agency or business use of any tenant in possession.

4. *Taxes and other expenses.* The Redeveloper shall be responsible for the following:

(a) A payment in lieu of taxes to the City from the date of transfer of title until the date it becomes responsible for taxes under normal assessing procedures. The payment shall be in an amount equal to the then current tax rate multiplied by the value of the land, excluding the value of preexisting improvements that have been demolished. For this purpose, the value of the land shall be an amount equal to the assessed value of the land as determined by the City Tax Assessor at the next regular assessment date following the recording of the deed, subject to appeal as provided by statute. The payment in lieu of taxes shall be payable to the City within 30 days after notice of the amount due. In computing the payment for the tax year in which the transfer of title occurred, the amount shall be prorated and apportioned as of the

date of closing.

(b) Recording of all documents pursuant to this transaction on the date of closing, and payment of recording costs.

(c) The costs of having the Property title searched for title insurance. The Agency through its counsel shall make available such information and evidence as it may have as to the condition of title to the Property for the use and benefit of the Redeveloper, its counsel, and title searchers. However, the responsibility of investigating title shall be upon the Redeveloper. The Agency makes no guarantees respecting title except that it will cooperate through its counsel in making available title notes and evidence.

5. *Agency's preparation of property.* The Agency shall, prior to the conveyance of the Property and without expense to the Redeveloper, prepare the Property for development by the Redeveloper. Such preparations shall consist of the following:

(a) Demolition and removal to grade of all existing buildings, structures, and nonnatural obstructions on the Property, including the removal of any debris resulting from demolition in accordance with the Agency's Demolition Contract, with the exception of trees, shrubs, and retaining walls which the Redeveloper has requested the Agency to retain and walls required for support of existing or planned improvements.

(b) Removal by the Agency or by appropriate public bodies or public utility companies of all paving, including curbs and gutters, sidewalks, and utility lines, installations, facilities, and related equipment, within or on the Property which are to be eliminated or removed pursuant to the Redevelopment Plan, except for items specifically requested to be retained by the Redeveloper.

(c) The filling, grading, and leveling of the land (but not including top soil, landscaping, or any natural outcropping of ledge or rock) necessary to make it ready for construction of the improvements by the Redeveloper, it being intended that such filling, grading, and leveling conform generally to the respective surface elevations of the land prior to demolition.

(d) The Agency shall fully inspect all areas for underground storage tanks. In the event that any such tanks are found, such tanks and any contaminated soil shall be removed and disposed of in strict compliance with all federal, state and local laws, rules and regulations.

The Redeveloper, at its own expense, shall be entitled to inspect and test all areas from which tanks and soil were removed. In the event that the Redeveloper believes that tanks and/or contaminated soil remain, it shall notify the Agency and provide the Agency with any written reports which it may possess. If the Agency fails to complete removal of all remaining tanks and/or contaminated soil within sixty (60) days after notification, the Redeveloper may terminate this agreement. The Redeveloper shall be entitled to a refund of all sums paid hereunder and shall have no further obligation under this agreement.

6. *Additional improvements by agency.* The Agency shall, without expense to the Redeveloper or public assessment against the Property, prior to the completion of the improvements by the Redeveloper and without impeding the progress of the construction of improvements by the Redeveloper, provide for the following:

(a) Paving and improving of streets in accordance with the usual technical specifications and standards of the City, including the installation of gutters, curbs, and catch basins; the removal of trees and shrubs; street lighting; sidewalks; and paving and improving public rights-of-way to be provided under the Redevelopment Plan.

(b) Installing and relocating sewers, drains, water and gas distribution lines, and electric, telephone, and telegraph installations to be installed or relocated under the Redevelopment Plan.

(c) Vacating present streets, alleys, other public rights-of-way, and plats, and dedicating new streets, alleys, other public rights-of-way in the project area and the rezoning of the area in accordance with the Redevelopment Plan; provided that the Redeveloper will, upon request by the Agency, subscribe to and join with the Agency in any petitions and proceedings required for such vacations, dedications, and rezoning.

7. Redeveloper's improvement plans. Plans and specifications and all work by the Redeveloper with respect to the Redevelopment of the Property and the construction of improvements shall be in conformity with the Redevelopment Plan and this agreement, and all applicable state and local laws and regulations, including all sustainability requirements. As promptly as possible after execution of this agreement, and, in any event, no later than the dates specified in Exhibit C, and as a condition precedent to the obligation of the Agency to convey the Property to the Redeveloper, the Redeveloper shall submit to the Agency, for approval by the Agency, plans (the "Construction Plans"), for the improvements to be constructed by the Redeveloper on the Property, in sufficient completeness and detail to show that the improvements and their construction will be in accordance with the provisions of the Redevelopment Plan, in substantial agreement with proposals made by the Redeveloper to the Agency, and designed to meet the requirements to be certified as LEED Certified as set by the U.S. Green Building Council. Redeveloper shall do all work necessary to apply for such certification by registering the Redevelopment Plan with a professional at the U.S. Green Building Council to track the progress of construction and document achievement levels required to obtain the LEED Certification. Each set of Construction Plans shall include the following:

(a) A landscaping plan showing approximate location and types of plantings, seeded areas, walkways, and the treatment plan for such. High-style outdoor furniture of concrete or other durable construction is permitted. Marine artifacts shall be constructed of durable material and placed in locations inconvenient to destruction. The plan shall include a cost estimate and item breakdown.

(b) A lighting plan demonstrating that all walkways, malls, parking areas, and other areas accessible to pedestrians during the hours of darkness will be adequately lighted to insure pedestrian safety. The plan will demonstrate the amount, placement, type, and construction of the lighting. Decorative metal or treated wood standards will be used.

(c) A safety plan demonstrating the location, size, and construction material to be used in all fencing. Chain link fencing will not be permitted. Sufficient safety precautions will be taken for residential promenade decks, pedestrian walks near parking and service areas, pedestrian overpasses, and parking decks. Attractive wrought iron, concrete, and metal are acceptable. Treated wood posts are also acceptable providing that railings between posts are of one of the materials.

(d) A vehicular traffic plan indicating traffic flows within the parcels and their relation to the proposed street patterns. The plan must be acceptable to the Agency's consulting engineer.

(e) A parking plan indicating the location of parking areas, the means of access and egress, and the placement of curbing. The construction plan accompanying the parking plan will demonstrate that all at grade parking will be paved with a durable surface of at least bituminous concrete, over a sufficient base to prevent differential settlement. All parking areas, including decked areas, will be properly drained, and all internal parcel and private road curbing will be constructed of granite or concrete; each parking space will have a minimum of 270 square feet which includes a portion for access and egress. Parking decks will be of concrete, and supports for the decks will be concrete or steel with a concrete protective covering or the combination of such. In addition, the parking plan will show the number of covered parking spaces in the residential section. The plan shall show the location of all open parking in the residential section (one per apartment), and the location of the 1500 free and convenient parking spaces to serve commercial structures.

(f) A recreation plan showing areas to be devoted, type of facilities to be included, supervision and policing to be provided. The motel to be constructed pursuant to subparagraph (h)(3) of this paragraph will contain a 1000-square-foot, indoor-outdoor swimming pool. A 25-yard, six-lane swimming pool and at least two regulation

composition or clay tennis courts will be provided in the housing area. Central television antennas and satellite dishes for each residential structure will be provided over the total residential area, and sufficient apartment television and telephone jacks will be placed in each apartment. The plan shall include a cost estimate and item breakdown.

(g) A pedestrian movement plan showing malls, walkways, and pedestrian bridges, to be constructed of concrete or some other equally durable and attractive construction. Pedestrian ramps and overpass bridges will be a minimum width of ten feet. The pedestrian walkway from the pedestrian bridge to the specialty shops shall have a minimum width of 50 feet and shall be broken up by permanent potted plants and shade trees, marine artifacts, brassed areas, outdoor furniture, and other landscaping and decorative items which will provide a pleasant setting. The pedestrian walkway adjacent to the specialty shops will have a minimum width of 15 feet and will be given a landscaping treatment similar to that given the 50-foot wide pedestrian walkway. Outdoor furniture, however, need not be included in the 15-foot walkway.

(h) Design plans which shall show, in addition to the usual elements of design plans, the following structures:

(1) A department-food store combination of not less than 125,000 square feet of floor space, with at least 100,000 square feet of floor space for the department store.

(2) An office building with at least 38,000 square feet of floor space, not less than three stories high.

(3) A motel of at least ten stories and 100 units in a separate tower structure with a connected restaurant of at least 12,500 square feet of floor space, containing conference-banquet facilities.

(4) A residential housing plan including 700 units.

(5) A utility plan indicating the type of utility, the proposed connections with existing utilities, and the underground location of all utility lines within the parcel.

Construction of all buildings will meet the specifications set forth in the attached Exhibit D.

8. *Prior approvals.* If the Construction Plans conform to the provisions of the Redevelopment Plan and proposals made by the Redeveloper, the Agency shall formally approve the plans, and no further filing by the Redeveloper or approval by the Agency shall be required. The plans shall, in any event, be deemed approved unless formal rejection thereof by the Agency, in full or in part, setting forth in detail the reasons therefor, shall be made within 45 days after their submission to the Agency. If the Agency rejects the Construction Plans in whole or in part as not being in conformity with the Redevelopment Plan, the Redeveloper shall submit new or corrected plans which are in conformity with the Redevelopment Plan within 45 days after written notification to it of the rejection, and the provisions of this section relating to approval, rejection, and resubmission of corrected Construction Plans for the original Construction Plans shall continue to apply until the Construction Plans have been approved by the Agency; provided that the Redeveloper submit satisfactory Construction Plans no later than 150 days after the original submission of Construction Plans. The term "improvements" means the improvements specified in the Construction Plans as so approved. The approval referred to in this paragraph shall be at the discretion of the Agency but shall not be unreasonably withheld.

As promptly as possible after approval by the Agency of the Construction Plans, and, in any event, no later than 30 days prior to the delivery of the deed and the possession date set forth in Exhibit C and as a condition precedent to the obligation of the Agency to convey the Property to the Redeveloper, the Redeveloper shall submit to the Agency, for approval by the Agency, evidence satisfactory to the Agency that the Redeveloper has the equity, capital, and commitments for mortgage financing necessary for the construction of the improvements.

9. *Performance of construction.* (a) The Redeveloper shall promptly begin and diligently perform to completion the

redevelopment of the Property, and shall begin construction within 60 days from the date of the deed. Construction shall be completed within 24 months from such date; provided that if a mortgage to finance the improvements, or any part thereof, is insured by the Federal Housing Administration, then the completion deadline shall not apply. In such case, the construction of such improvements or part thereof shall be completed within the time specified in the applicable building loan agreement approved by the Federal Housing Administration, but in any event within four years from the date of execution of the building loan agreement. The provisions of this subparagraph shall be included in the deed, and shall be covenants running with the land and shall, except as otherwise specifically provided in this agreement itself, be binding for the benefit of the community and the Agency and enforceable by the Agency against the Redeveloper and its successors and assigns to or of the Property, any part thereof, or any interest therein.

(b) Prior to delivery of possession of the Property to the Redeveloper, the Agency shall permit the Redeveloper access, to the extent necessary to fulfill this agreement. Subsequent to such delivery, the Redeveloper shall permit access to the Property to the Agency, the United States of America, and the City to the extent necessary to fulfill this agreement. In either case, there shall be no compensation payable by or to any party for access.

(c) Subsequent to conveyance of the Property or any part thereof to the Redeveloper, and until construction of the improvements has been completed, the Redeveloper shall make, in such detail as may reasonably be required by the Agency, a report in writing to the Agency every six months as to the actual progress of the Redeveloper in construction. During such period the work of the Redeveloper shall be subject to inspection by representatives of the Agency.

10. *Certificate of completion.* (a) Promptly after completion of the improvements in accordance with the provisions of this agreement, including certification of the construction as LEED Certified, the Agency will furnish the Redeveloper with an instrument certifying completion. The certification of the Agency shall be a conclusive acknowledgment by the Agency of satisfaction by the Redeveloper of the obligations of the Redeveloper under this agreement to complete improvements. The certification shall not constitute evidence of compliance with or satisfaction of any obligation of the Redeveloper to any holder of a mortgage, or any insurer of a mortgage, securing money loaned to finance the improvements, or any part thereof.

(b) With respect to the individual parts or parcels of the Property which the Redeveloper is to convey or lease as the improvements to be constructed are completed, the Agency will also, upon proper completion of the applicable improvements and provided the Redeveloper is not in default, certify to the Redeveloper that the improvements have been completed in accordance with the provisions of this agreement. The certification shall provide that any party purchasing or leasing the individual part or parcel shall not because of such purchase or lease incur any obligations for the construction of the improvements relating to such part or parcel or to any other part or parcel of the Property. The certification shall further provide that neither the Agency nor any other party shall thereafter have or be entitled to exercise any rights, remedies, or controls that it may otherwise have or be entitled to exercise with respect to the Property as a result of a default by the Redeveloper in any provisions of this agreement or the deed.

(c) All certifications provided for in this Paragraph 10 shall be in such form as will enable them to be recorded with the City and Town Clerk of the City of Bedford. If the Agency shall refuse or fail to provide any certification in accordance with the provisions of this paragraph, the Agency shall within 60 days after written request by the Redeveloper provide the Redeveloper with a written statement, indicating in adequate detail in what respects the Redeveloper has failed to complete the improvements in accordance with the provisions of this agreement or is otherwise in default, and what measures will be necessary, in the opinion of the Agency, for the Redeveloper to take or perform in order to obtain such certification.

11. *Restrictions on assignment prior to completion.* (a) The Redeveloper represents that its purchase of the Property, and its other undertakings pursuant to this agreement are for the purpose of redevelopment of the Property and not for speculation.

(b) Prior to completion of the improvements as certified by the Agency there shall be no transfer by any party owning 10 percent or more of the shares in the Redeveloper without approval of the Agency. There shall not be, without approval of the Agency, any other similarly significant change in the ownership of such stock or in the relative distribution thereof, or with respect to the identity of the parties in control of the Redeveloper by any other means, whether by increased capitalization, merger with another corporation, corporate or other amendments, issuance of additional or new shares or classification of shares, or otherwise.

(c) During the period between execution of this agreement and completion of the improvements as certified by the Agency, the Redeveloper will promptly notify the Agency of any and all changes whatsoever in the ownership of shares, legal or beneficial, or of any other act or transaction involving or resulting in any change in the ownership of such shares or in the relative distribution thereof, or with respect to the identity of the parties in control of the Redeveloper or the degree thereof, of which it or any of its offices have been notified or otherwise have knowledge. The Redeveloper shall, whenever the Agency shall so request, furnish the Agency with a complete statement, subscribed and sworn to by the Secretary of the Redeveloper, setting forth all of the shareholders of the Redeveloper and the extent of their respective holdings, and in the event any other parties have a beneficial interest in such shares, their names and the extent of such interest. The list, data, and information shall in any event be furnished the Agency immediately prior to the delivery of the deed to the Redeveloper and as a condition precedent thereto, and annually thereafter on the anniversary of the date of the deed.

(d) The restrictions and reporting requirements with regard to the sale, transfer, or exchange of securities in subparagraph (b) shall not apply to any sale or transfer of securities of the Redeveloper occurring or taking place in the ordinary course of business in the over-the-counter market or on any exchange in the event of a listing of its stock thereon, nor to its right to acquire corporations by an exchange of its shares.

(e) The Redeveloper shall not, prior to the proper completion of the improvements as certified by the Agency, make any sale, assignment, conveyance, or lease, or any trust or power, or transfer in any other form with respect to this agreement or the Property, without the prior written approval of the Agency. Any proposed transferee shall have the qualifications and financial responsibility, as determined by the Agency, necessary and adequate to fulfill the obligations of the Redeveloper, and if the proposed transfer relates to a part of the Property, such obligations to the extent that they relate to such part. Any proposed transferee shall, by instrument in writing, for itself and its successors and assigns, and expressly for the benefit of the Agency, assume all of the obligations of the Redeveloper under this agreement and agree to be subject to all the conditions and restrictions to which the Redeveloper is subject (or, in the event the transfer is of or relates to part of the Property, such obligations, conditions, and restrictions to the extent that they relate to such part). The fact that any transferee of or any other successor in interest to the Property, or any part thereof, shall not assume such obligations or so agree, shall not, unless and only to the extent otherwise specifically provided in this agreement or agreed to in writing by the Agency, relieve such transferee or successor from such obligations, conditions, or restrictions, or deprive or limit the Agency of any rights with respect to the Property or the construction of the improvements. The consideration payable for the transfer by the transferee or on its behalf shall not exceed an amount representing the actual cost, including carrying charges, to the Redeveloper of the property, or allocable to the part thereof or interest therein transferred, and any improvements made thereon by the Redeveloper. If the consideration upon any such assignment or transfer exceeds this limitation, the Agency may increase the purchase price to the Redeveloper of the property by the amount of such excess. Notwithstanding the provisions of this subparagraph, the Redeveloper may assign all its interest in and to this agreement to its wholly owned subsidiary. However, such assignment shall not relieve the Redeveloper of any of its obligations or liabilities under this agreement. The Agency shall be notified of any such assignment.

12. Mortgages prior to completion of improvements. (a) Prior to the completion of the improvements as certified by the Agency, neither the Redeveloper nor any successor in interest to the Property or any part thereof shall engage in any financing or any other transaction creating any mortgage or any other encumbrance or lien upon the Property, whether by express agreement or operation of law, or permit any encumbrance or lien to be made on or attached to the Property,

except for the purposes of obtaining funds necessary for making improvements and additional funds not to exceed the purchase price of the Property paid by the Redeveloper to the Agency. The Redeveloper shall notify the Agency in advance of any mortgage financing it proposes to enter into with respect to the Property, and of any encumbrance or lien that has been created on or attached to the Property, whether by voluntary act of the Redeveloper or otherwise. For the purposes of such mortgage financing as may be made pursuant to this agreement, the Property may, at the option of the Redeveloper or successor in interest, be divided into several parts or parcels, provided that such subdivision, in the opinion of the Agency, is not inconsistent with the purposes of the Redevelopment Plan and this agreement.

(b) The holder of any mortgage authorized by this agreement, including any such holder who obtains title to the Property or any part thereof as a result of foreclosure proceedings or action in lieu thereof, shall not be required to construct or complete the improvements or to guarantee construction or completion. No covenant or any other provision in any deed shall be construed so to obligate any such holder. However, such holder shall not be authorized to devote the Property or any part thereof to any uses, or to construct any improvements thereon, other than those uses or improvements provided or authorized in this agreement.

13. *Notice of default to mortgagee.* (a) Whenever the Agency shall give any notice to the Redeveloper of any breach or default by the Redeveloper in its obligations or covenants under this agreement, the Agency shall at the same time deliver to each holder of record of any mortgage authorized by this agreement a copy of the notice or demand. Each holder shall, insofar as the rights of the Agency are concerned, have the right at its option to cure the breach or default and to add the cost thereof to the mortgage debt and the lien of its mortgage. However, if the breach or default is with respect to construction of the improvements, the holder may not undertake or continue the construction or completion of the improvements beyond the extent necessary to conserve or protect improvements or construction already made without first having expressly assumed in writing the obligation to the Agency to complete, in the manner provided in this agreement, the improvements on the Property or the part thereof to which the lien or title of such holder relates, and having submitted evidence satisfactory to the Agency that it has the qualifications and financial responsibility necessary to perform such obligation. Any such holder who shall properly complete the improvements relating to the Property or applicable part thereof shall be entitled, upon written request made to the Agency, to a certification by the Agency to the effect provided in Paragraph 10. The certification shall, if so requested by the holder, provide that any remedy with respect to revesting of title to the Property that the Agency shall have because of failure of the Redeveloper to cure any default with respect to the construction of the improvements on other parts or parcels of the Property, or because of any other default in or breach of this agreement by the Redeveloper, shall not apply to the part or parcel of the Property to which the certification relates.

(b) If subsequent to default by the Redeveloper under this agreement, the holder of any mortgage on the Property or part thereof does not exercise the option to construct or complete the improvements relating to the Property or part thereof covered by its mortgage or to which it has obtained title within 60 days after the holder has been notified of the default or undertakes completion of the improvements but does not complete construction within the period as agreed upon by the Agency and the holder, the Agency shall have the option of paying to the holder the amount of the mortgage debt and obtaining an assignment of the debt and of the mortgage. If ownership of the Property or part thereof has vested in such holder by way of foreclosure or action in lieu thereof, the Agency shall be entitled to a conveyance of the Property or part thereof upon payment to such holder of an amount equal to the sum of the mortgage debt at the time of foreclosure or action in lieu thereof less all appropriate credits, including those resulting from collection and application of rentals received during foreclosure proceedings; all expenses with respect to the foreclosure; the net expenses, exclusive of general overhead, incurred by the holder in and as a direct result of the subsequent management of the Property; the cost of any improvements made by such holder; and an amount equivalent to the interest that would have accrued on the aggregate of the amounts had all the amounts become part of the mortgage debt and the debt had continued in existence until the acquisition by the Agency.

(c) In the event of a default by the Redeveloper in its obligations under any mortgage or other instrument creating an encumbrance upon the Property or part thereof prior to completion of improvements, the Agency may at its option cure

the default or breach. In such case, the Agency shall be entitled, in addition to and without limitation upon any other remedy to which it shall be entitled by this agreement, operation of law, or otherwise, to reimbursement from the Redeveloper or successor in interest of all costs and expenses incurred by the Agency in curing the default or breach, and to a lien upon the Property or part thereof to which the mortgage, encumbrance, or lien relates to secure the reimbursement.

(d) The term "holder" in reference to a mortgage includes any insurer or guarantor of any obligation secured by the mortgage.

14. *Availability of remedies.* (a) In the event of any default under this agreement by either party, the defaulting party shall, upon written notice from the other, proceed immediately to cure the default and shall cure the default within 60 days after receipt of the notice. In case such action is not taken, or diligently pursued, or the default shall not be cured or remedied within the 60-day period, the aggrieved party may institute such proceedings as may be necessary in its opinion to cure the default, including, but not limited to, proceedings to compel specific performance by the party in default of its obligations and in the case of the Agency, the right to apply the Redeveloper's deposit in payment of the damages suffered by it or by the City. The loss may be measured by the loss of tax revenue from the Property or the anticipated improvements, or otherwise, resulting from the default.

(b) The rights and remedies of the parties to this agreement, whether provided by law or by this agreement, shall be cumulative, and the exercise by either party of any one or more of such remedies shall not preclude the exercise by it, at the same or different times, of any other remedies for the same default or breach. No waiver made by either party shall apply to obligations beyond those expressly waived.

(c) The Redeveloper (for itself and its successors and assigns, and all other persons who are or who shall become liable, by express or implied assumption or otherwise, upon or subject to any obligation or burden under this agreement), waives to the fullest extent permitted by law and equity all claims or defenses otherwise available on the ground of being or having become a surety or guarantor, whether real, personal, or otherwise, or whether by agreement or operation of law. This waiver includes, but is not limited to, all claims and defenses based upon extensions of time, indulgence, or modification of terms of contract.

15. *Agency's failure to convey.* (a) If the Agency does not tender the conveyance or possession of the Property, in the manner and condition, and by the date provided in this agreement, and the failure is not cured within 120 days after written demand by the Redeveloper, then this agreement shall, at the option of the Redeveloper, be cancelled, the Redeveloper shall be entitled to a return of its deposit, and neither the Agency nor the Redeveloper shall have any further rights against or liability to the other under this agreement, except as to any parcels previously conveyed.

(b) If prior to or at the time of closing, a cloud, encumbrance, or other defect in title is noted by the Redeveloper which makes the title being conveyed to the Redeveloper not marketable, and such cloud, encumbrance, or defect can be eliminated by the Agency through the power of condemnation, then the cloud, encumbrance, or defect shall be eliminated by the Agency at the Agency's own expense within 120 days of notification by the Redeveloper, and the Redeveloper need not accept title prior to such elimination. In the event the cloud, encumbrance, or defect on property subject to condemnation cannot be eliminated or cured within the 120-day period, then the Redeveloper may accept such title as the Agency may convey or may reject the acceptance of such title. If the Redeveloper rejects such title, then the Redeveloper may terminate this agreement and receive a return of its deposit, or the Redeveloper may terminate only as to the portion of land involved, in which case a return to the Redeveloper of the portion of its deposit applicable to such portion shall be made by the Agency.

(c) If it is finally determined that the Agency is unable to secure title to property not subject to its power of condemnation, such inability shall be made known to the Redeveloper immediately. The right to terminate this agreement shall apply only to the parcel affected, and the relevant portion of Exhibit C shall be renegotiated. If it is

undetermined if the Agency will be able to secure title to the noncondemnable property, and negotiations are continuing, such fact will be made known by the Agency to the Redeveloper at least six months prior to the delivery of deed and possession date for such parcel. If title is subsequently obtained by the Agency then the relevant deadline in Exhibit C shall be extended so that the timetable of delivery of deed and possession date shall be six months after notice of ability to convey title. If the Agency is unable to secure title to the noncondemnable property prior to _____[date], then, in any event the relevant portion of Exhibit C shall be renegotiated.

16. *Inability to obtain mortgage financing.* If the Redeveloper furnishes satisfactory evidence that the Redeveloper is unable, after diligent effort for a period of at least 60 days after approval by the Agency of design plans, to obtain mortgage financing, on a basis and on terms that would generally be considered satisfactory by builders or contractors for improvements of the nature and type provided in the design plans, and the Redeveloper shall, if so requested by the Agency, continue to make diligent efforts to obtain such financing for a period of 60 days after such request, but without success, then this agreement shall be canceled, except as to any parts or parcels previously conveyed, and the Redeveloper shall be entitled to a return of the deposit. Upon such cancellation neither the Agency nor the Redeveloper shall have any further rights against or liability to the other under this agreement except as to any such parts or parcels previously conveyed.

17. *Default by redeveloper prior to conveyance.* If prior to conveyance of the Property to the Redeveloper and in violation of this agreement the Redeveloper assigns this agreement or any rights therein or in the Property; or there is any change in the ownership or distribution of the shares of the Redeveloper or with respect to the identity of the parties in control of the Redeveloper; or the Redeveloper does not submit Construction Plans, or evidence that it has the necessary equity capital and mortgage financing, in satisfactory form and in the manner and by the dates respectively provided in this agreement; or the Redeveloper does not pay the purchase price for and take title to the Property upon tender of conveyance by the Agency pursuant to this agreement; and any such default or failure shall not be cured within 60 days after written demand by the Agency, then this agreement may, at the option of the Agency, be terminated by the Agency, except as to parcels previously conveyed where improvements have been certified by the Agency or where improvements are being constructed in conformity with this agreement. In the event of such termination, the deposit may be retained by the Agency as liquidated damages and as its property without any deduction, offset, or recoupment whatsoever, and neither the Redeveloper nor the Agency shall have any further rights against or liability to the other under this agreement.

18. *Defaults by redeveloper following conveyance.* The Agency may recover title and possession of the Property on behalf of the City in the event that subsequent to a conveyance of property to the Redeveloper and prior to completion of the improvements as certified by the Agency, any of the following occurs:

(a) The Redeveloper defaults in or violates its obligations with respect to the construction of the improvements, or abandons or substantially suspends construction, and any such default or violation, abandonment, or suspension is not cured within three months (six months, if the default is with respect to the date for completion of the improvements) after written demand by the Agency so to do.

(b) The Redeveloper fails to pay real estate taxes, assessments, or payments in lieu of taxes, on the Property or any part thereof when due, or places thereon any encumbrance or lien unauthorized by this agreement, or suffers any levy or attachment to be made, or any materialman's or mechanic's lien or any other unauthorized encumbrance or lien to attach, and such taxes, assessments, or payments in lieu of taxes, are not paid, or the encumbrance or lien not removed and discharged, or provisions satisfactory to the Agency made for such payment, removal, or discharge, within 90 days after written demand by the Agency so to do.

(c) There is, in violation of this agreement, any transfer of the Property or any part thereof, or any change in the ownership or distribution of the stock of the Redeveloper, or with respect to the identity of the parties in control of the Redeveloper or the degree thereof, and such violation is not cured within 60 days after written demand by the Agency to

the Redeveloper.

The right of the Agency to recover title and possession shall be subject to and limited by the lien of any construction mortgage authorized by this agreement, and any rights or interests provided in this agreement for the protection of the holder of such mortgage. This right of the Agency shall not apply to individual parts or parcels of the Property on which the improvements have been completed and which have, pursuant to authorization contained in this agreement, been sold or leased to other parties. Such right of the Agency shall not apply to individual parts and parcels upon which construction has commenced and is proceeding according to schedule, and as to which there has been no default under this agreement, unless a default described in subparagraph (c) of this paragraph has taken place.

Upon recovery of title and possession by the Agency under this paragraph, the Agency shall, in addition, have the right to retain the deposit as its property without any deduction, offset, or recoupment. The Agency may institute any action or proceedings to carry out this paragraph. The Agency shall have the right to execute and record or file with the Town Clerk of the City of Bedford a written declaration of the termination of all rights and title of the Redeveloper in the Property, and the vesting of title in the City. Any delay by the Agency in instituting or prosecuting any such actions or proceedings or otherwise asserting its rights under this paragraph shall not operate as a waiver of such rights or limit them in any way. No waiver in fact made by the Agency of any specific default by the Redeveloper shall be considered or treated as a waiver of the rights of the Agency with respect to any other defaults by the Redeveloper, or with respect to the particular default except to the extent specifically waived.

19. *Agency's obligations on reacquisition.* In the event that title to the Property or a part thereof shall vest again in the City, the Agency shall use its best efforts to resell the Property as soon as the Agency shall find it feasible, consistent with the objectives of the State Redevelopment and Urban Renewal Law and of the Redevelopment Plan, to a qualified and responsible party or parties, as determined by the Agency, who shall assume the obligation of making or completing the improvements in accordance with the uses specified in the Redevelopment Plan. The proceeds of resale shall be applied as follows:

(a) To reimburse the Agency, on its own behalf or on behalf of the City, for all costs and expenses incurred by the Agency in connection with the reacquisition, management, and resale of the Property or part thereof, but less any income derived by the Agency from the Property or part thereof in connection with its management; for all taxes, assessments, and water and sewer charges of the Property or in the event the Property is exempt from taxation or assessment or such charges during the period of ownership by the Agency, an amount equal to the taxes, assessments, or charges, as determined by the City assessing official, that would have been payable if the Property were not so exempt; for any payments made or necessary to be made to discharge any encumbrances or liens existing on the Property at the time of vesting again of title in the Agency or to discharge or prevent from attaching or being made any subsequent encumbrances or liens attributable to obligations, defaults, or acts of the Redeveloper, its successors, or transferees; for any expenditures made or obligations incurred with respect to the making of improvements on the Property; and for any amounts otherwise owing to the Agency by the Redeveloper, its successor, or transferee; and

(b) To reimburse the Redeveloper up to the amount equal to the sum of the purchase price paid for the Property or allocable to the part thereof and the cash actually invested by it in making any of the improvements on the Property, less any gains or income withdrawn or made by it from this agreement or the Property.

(c) Any balance remaining after such reimbursements shall be retained by the Agency.

20. *Effect of unavoidable delays.* In the event of enforced delay in the performance by either party of obligations under this agreement due to unforeseeable causes beyond its control and without its fault or negligence, including, but not restricted to, Acts of God, acts of the government, acts of the other party, fires, floods, strikes, freight embargoes, unusually severe weather, or delays of subcontractors due to such causes, the time for performance of such obligations shall be extended for the period of the enforced delay; provided that the party seeking the benefit of the provisions of

this paragraph shall, within 30 days after the beginning of any such enforced delay, have first notified the other party in writing of the causes and requested an extension for the period of the enforced delay.

21. *Nondiscrimination in course of development.* The Redeveloper will not discriminate against any employee or applicant for employment because of race, creed, color, or national origin in the construction of the improvements in accordance with the provisions of this agreement. The Redeveloper will, in all solicitations or advertisements for employees placed by or on behalf of the Redeveloper, state that all qualified applicants will receive consideration for employment without regard to race, creed, color, or national origin. The Redeveloper shall include the terms of this paragraph in every contract into which it enters, and shall require the inclusion of these provisions in every subcontract entered into by any of its contractors, so that such provisions shall be binding upon each such contractor or subcontractor, as the case may be.

22. *Nondiscrimination in use of property.* The Redeveloper shall not discriminate upon the basis of race, color, creed, or national origin in the sale, lease, or rental or in the use or occupancy of the Property or any improvements thereon, and shall not effect or execute any agreement, lease, conveyance, or other instrument whereby the Property or any part thereof is restricted upon the basis of race, religion, color, or national origin in the sale, lease, or occupancy thereof. The Redeveloper shall comply with all state and local laws, in effect from time to time, prohibiting discrimination or segregation by reason of race, religion, color, or national origin in the sale, lease, or occupancy of the Property. Such provisions shall be included in the deed as covenants running with the land and shall, except only as otherwise specifically provided in this agreement, be binding for the benefit of, and enforceable by, the Agency, its successors and assigns, the City, the Redeveloper, or any successor in interest, the owner of any other land or of any interest in such land in the project area which is subject to the land use requirements and restrictions of the Redevelopment Plan, and any party in possession or occupancy of the Property.

The Agency shall be deemed a beneficiary of the covenants provided in this paragraph both in its own rights and for the purposes of protecting the interest of the community and the other parties, public or private, in whose favor or for whose benefit such covenants have been provided. The covenants shall run in favor of the Agency for the entire period during which such covenants shall be in force and effect, without regard to whether the Agency has at any time been an owner of any land or interest therein in favor of which the covenants relate. The Agency shall have the right, in the event of any breach of any such covenant, to exercise all the right and remedies and to maintain any actions at law or suits in equity or other proper proceedings to enforce the curing of such breach of covenant, to which it or any other beneficiary of such covenant may be entitled.

23. *Notice.* A notice or communication under this agreement by either party to the other shall be sufficiently given if sent by registered or certified mail, postage prepaid, return receipt requested, addressed as follows:

(a) To the Redeveloper:

Holz Development Corp.

400 Central Avenue Staten Island New York

(b) To the Agency:

Redevelopment Agency of the City of Bedford
Bedford, Connecticut

Any other address may be designated by either party by notice in writing dispatched as provided in this paragraph.

24. *Effect of deed.* None of the provisions of this agreement shall be affected by reason of any deed transferring title to the Property from the Agency to the Redeveloper.

The Agency has caused this agreement to be duly executed in its behalf and its seal to be affixed and attested, and the Redeveloper has caused the same to be duly executed in its behalf, on or as of the day and year first above written.

Redevelopment Agency of the City of Bedford

By: _____

[name and title]

Holz Development Corp.

By: _____

[name and title]

[Attach Exhibit A]

[Attach Exhibit B]

[Attach Exhibit C]

[Attach Exhibit D]



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Current Legal Forms for Real Estate
Chapter 22 DEVELOPMENT AND SUBDIVISION
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C. PLANNING AND CONSTRUCTION

26-22 Current Legal Forms for Real Estate FORM 22.52

FORM 22.52 Contract to clear land and construct roads and similar improvements--compensation on cost-plus basis--contractor's individual services required

COMMENT

This is an agreement between the owner of land which is to be developed and a contractor in which the latter undertakes to clear land and construct roads, rights-of-way, canals, and drainage ditches. The specific work to be performed by the contractor and the maximum costs which are to be incurred each month are subject to the owner's prior approval. Either party may terminate the agreement on short notice.

The contractor is to be paid on the basis of the gross costs incurred on the job plus 10 percent of the net costs. The difference between gross costs and net costs is the cost of financing and amortizing the loans on the equipment used on the job. The contractor is to be paid on a weekly or a monthly basis, depending upon the classification of the expenditure as set forth in the agreement.

FORM

AGREEMENT made and entered into at Miami, Dade County, Florida on _____[date], by and between Homes Construction, Inc., a Florida corporation (the "Owner"), and Smith Engineering Co., Inc., a Florida corporation (the "Contractor").

The parties agree as follows:

1. *Employment.* The Owner hires the Contractor to clear land and construct all roads, road rights-of-way, canals, and drainage ditches desired by the Owner to be cleared and constructed on the land of the Owner located in Brevard County, Florida, and the Contractor agrees to and accepts such employment.

2. *Extent of work.* All work done, pursuant to this agreement will be performed in accordance with plans and specifications contained in written instructions that will be issued and signed by the Owner and accepted in writing by the Contractor. These written instructions will specify the nature, extent, location, type, and specifications of all of the work to be performed.

3. All refuse created in the clearing contemplated hereunder shall be disposed of in accordance with all federal, state and local laws, regulations and rules. No organic material shall be burned on or about the premises.

4. The Contractor shall obtain all permits which may be necessary or appropriate in the event that wetlands (as described in federal and state regulations) are discovered on the premises. No land shall be drained or filled without a valid permit. The Contractor shall fully comply with all regulations dealing with wetlands in clearing the land and constructing the improvements thereon.

5. *Quality of work.* The Contractor shall furnish all equipment, machinery, tools, and labor and shall furnish and deliver all materials required to be furnished and delivered in completing all work performed in a proper and workmanlike manner. The Contractor warrants that Martin Smith, one of its officers, will personally direct and supervise all work performed under this agreement and that he will be physically present at the work site at least one day each week (and more often if the job so requires) during the entire term of this agreement.

6. *Compensation.* In consideration of the foregoing, the Owner shall pay to the Contractor and the Contractor shall accept as full compensation for all work done and materials furnished under the terms of this agreement, the Contractor's gross costs, plus 10 percent of the Contractor's net costs.

7. *Definitions.* When used in this agreement:

(a) "Gross costs" means the actual cost of all labor paid for, including payroll, insurance, and taxes, and materials furnished by the Contractor, including amortization and interest on equipment loans and the cost of insuring, operating, maintaining, repairing, and financing the machinery utilized by the Contractor necessary and incident to its performance of this agreement. All equipment loans will be amortized over a period of at least 36 months and shall bear interest at a rate not in excess of 6% (six percent) per annum.

(b) "Net costs" means the gross costs as reduced by and specifically excluding interest and finance charges on equipment loans, amortization of equipment loans, and taxes of any type or description whatsoever.

8. *Work procedure.* The following procedure applies to the performance of the work under this agreement and full compliance is conclusively a condition precedent to any liability for payment by the Owner of the compensation to the Contractor: Ten days prior to the first day of each calendar month of the term of this agreement, the Contractor will submit to the Owner for its written approval a schedule of the work to be accomplished and the maximum gross costs to be expended in the next succeeding month, which maximum gross costs shall in no event be exceeded by the Contractor. Written approval of the Owner will be a condition precedent to the performance of any work by the Contractor. The Owner reserves the right to approve each monthly schedule and, at its option and in its unlimited discretion, the right to limit and decrease the work and the maximum gross costs planned to be expended in each and every month of the term of this agreement, provided, however, that in no event shall the Owner limit or decrease the maximum gross costs planned for any one month below \$10,000. Upon written approval of a monthly schedule by the Owner, the Contractor shall commence and complete each month's work.

9. *Method of payment.* The Contractor shall be reimbursed and paid the compensation as follows:

(a) The costs of all labor paid for, including payroll insurance and taxes, by the Contractor will be reimbursed by the

Owner to the Contractor weekly and forthwith upon receipt by the Owner of a statement of the Contractor's labor expenses for the preceding week.

(b) On the last day of each calendar month, the Contractor will submit to the Owner a schedule of work accomplished together with an itemized statement of gross costs incurred during that month. The Owner will reimburse the Contractor for such gross costs not previously reimbursed on or before the tenth day of the next succeeding month.

(c) The 10 percent of net costs will first be paid at the end of the sixth month of this agreement. Thereafter, such payments will be made monthly, simultaneously with the payments referred to in subparagraph (b).

10. *Books and records.* The Contractor shall keep and maintain accurate books of account and records of all of its business transactions under this agreement. These books and records shall be kept in the Contractor's place of business and, at all times, the Owner or its duly authorized agents shall have access to such books and records and may transcribe or may cause to be transcribed such extracts as may be deemed necessary by the Owner. At the expense of the Contractor, a semi-annual audit shall be made of such books and records of the Contractor by a certified public accountant, agreeable to both parties, on the 30th day of June and 31st day of December of each year of this agreement, and a copy of such audit, unqualifiedly certified to by such certified public accountant, will be delivered to the Owner within 15 days from the date of each audit.

11. *Termination.* This agreement may be terminated by either of the parties, without cause, upon the giving of 45 days' notice, in writing, to the other. This agreement shall terminate 45 days from the delivery of such notice, and be of no further force or effect. Within 30 days after termination, the Owner will pay to the Contractor all moneys due and owing.

12. *Entire agreement.* This agreement represents the entire understanding of the parties and supersedes all previous negotiations, written or oral, and may not be altered, changed, amended, or modified except by an agreement in writing signed by the parties.

13. *No assignment.* Part of the consideration and inducement offered to the Owner for the execution of this agreement is the personal character, reputation, integrity, and experience of the Contractor. For this reason, the parties agree that the Contractor shall not be permitted to assign either its rights or its duties under the terms of this agreement, or to subcontract any of the work contracted for hereunder.

The parties have caused these presents to be signed by their proper officers and their corporate seals to be affixed, attested by their secretaries, the day and year first above written.

OWNER:

Homes Construction, Inc.

By: _____

[name and title]

CONTRACTOR:

Smith Engineering Co., Inc.

By: _____

[name and title]



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26-22 Current Legal Forms for Real Estate FORM 22.53

FORM 22.53 Contract to construct a warehouse-office building on a cost plus basis but with a not to exceed price limit

COMMENT

To provide an incentive to the builder to try to build the warehouse-office building for less than the not to exceed price set forth in the contract, a formula is provided in Paragraph 3 of the agreement to allow the builder to share in a portion of the savings if the total contract price is done for less than the not to exceed price. The not to exceed price is referred to as the upset price in this form. In this case, the builder receives 60% of the savings.

In this agreement, the builder has attempted to protect itself from unknown subsurface conditions it might run into by the provisions set forth in Paragraph 5 of the agreement. It states that if such conditions are encountered, the upset price shall be adjusted by a change order agreed to by both parties.

FORM

AGREEMENT BETWEEN CONTRACTOR AND OWNER

THIS AGREEMENT is made and entered into at _____[city], _____[state], this _____[day] day of _____[month], _____[year], by and between _____[insert name of owner], hereinafter called the "Owner," and _____[insert name of contractor], hereinafter called the "Contractor."

WITNESSETH THAT:

In consideration of the mutual covenants and promises hereinafter contained, the parties agree as follows:

1. The Owner hereby employs the Contractor and the Contractor does hereby agree to construct on certain premises now owned or to be acquired by the Owner, located on the land described on Exhibit A, attached hereto and made a part hereof, an industrial warehouse/office building with site improvements, all in accordance with certain plans and specifications identified on Exhibit B, attached hereto and made a part hereof. Two (2) sets of said plans and specifications shall be initialed by Owner and Contractor and one (1) set kept by each, on or before the execution of this Agreement. This Agreement, said plans and specifications, and all modifications thereto agreed to in writing by the parties as hereinafter provided, shall hereinafter be referred to as the "contract documents," and the work prescribed therein as the "contract work."

It is understood that the Owner may enter into other contracts for various other work at the premises. With respect to said other work, Contractor agrees that Contractor, and Contractor's agents and employees, will not unreasonably interfere with such other work and will cooperate with the Owner, Owner's other contractors, and their respective agents and employees, so as to insure that the contract work required herein shall be coordinated with said other work. Owner shall require that any such other contractors, their agents and employees, shall similarly agree to cooperate with Contractor and agree not to unreasonably interfere with the contract work of Contractor. Owner further agrees that the Contractor shall not be held responsible for any loss or damage sustained by Owner because of delays caused directly or indirectly by the employment of such other contractors of Owner, including, without limitation, delays due to jurisdictional disputes between the competing unions of the various contractors and subcontractors doing work at the premises.

2. The Contractor agrees to provide and pay for all labor, materials, equipment, tools, construction equipment and machinery and other facilities and services necessary for the proper execution and completion of the contract work and warrants to the Owner that all materials and equipment furnished under this contract will be new, unless otherwise specified, and that all work will be performed in a good and workmanlike manner, free from faults and defects.

3. The Owner agrees to pay the Contractor for the contract work hereinbefore described a contract amount equal to the sum of hard costs, as hereinafter defined, plus fifteen (15%) thereof, plus Fifteen Thousand Dollars (\$15,000) for supervision, plus Five Thousand Dollars (\$5,000) as a landscaping allowance charge, but in no event to exceed _____ Dollars (\$ _____) (which sum includes the aforesaid supervision fee and landscaping allowance except for certain costs hereinafter set forth to be directly reimbursed to Contractor, not considered part of the upset price. If the total of the hard costs, plus fifteen percent (15%) thereof, plus the supervision fee and landscaping allowance charge is less than the upset price, the amount payable by Owner shall be the upset price less an amount equal to sixty percent (60%) of the difference between (i) the sum of the hard costs, plus fifteen percent (15%) thereof, plus the supervision fee and landscaping allowance charge, and (ii) the upset price.

The Contractor's hard costs are hereby defined to include all costs incurred by Contractor for:

(a) all wages paid for labor in the direct employ of the Contractor in the performance of the contract work, and the cost of contributions, assessments or taxes paid for Unemployment Compensation, Workers' Compensation, Social Security and other similar benefits paid with respect thereto;

(b) materials and equipment incorporated in the contract work and materials suitably stored at the site thereof or at some other location agreed upon in writing, by Owner and Contractor;

(c) subcontracts performed by other contractors or materialmen in the performance of the contract work;

(d) cost, including transportation and maintenance, of all materials, supplies, equipment, temporary facilities and hand

tools not owned by the workmen, which are consumed in the performance of the work, and cost, less salvage value, on such items used but not consumed which remain the property of the Contractor;

(e) salaries of Contractor's personnel when stationed at the field office, in whatever capacity employed (personnel engaged, at shops or on the road, in expediting the production or transportation of materials or equipment, shall be considered as stationed at the field office and their salaries paid for that portion of their time spent on the contract work);

(f) rental charges of all necessary machinery and equipment used at the construction site, exclusive of hand tools, at prevailing rates;

(g) sales, use or similar taxes related to the contract work, and the proportion of reasonable transportation, traveling and hotel expenses of Contractor or of its officers and employees incurred in discharge of duties connected with the contract work;

(h) the cost of removal of all debris;

(i) costs incurred due to an emergency affecting the safety of persons and property; and

(j) other cash disbursements made or required to be made by the Contractor in order to perform the contract work, exclusive of those with respect to which there is provision herein for reimbursement to Contractor by Owner as hereinafter provided and except for the aforesaid supervision fee and landscaping allowance charge.

4. The Owner shall make payment to the Contractor on account of the contract work as follows:

A. On or about the twenty-fifth (25th) day of each month, the Contractor shall submit a request or invoice for progress payment to the Owner equal to ninety percent (90%) of the Contractor's hard costs incurred to invoice date, plus fifteen percent (15%) thereof, plus a pro rata share of the supervision fee based upon the percentage of the contract work completed, plus a pro rata share of the landscaping allowance charge based upon the estimated percentage of the landscaping work completed, less the aggregate of previous payments. Contractor agrees to provide such documentation to substantiate the amount of its request for progress payments as may reasonably be requested by Owner or Owner's lender.

B. Upon substantial completion of the contract work, the Contractor shall submit an invoice for progress payment in an amount sufficient to increase the total progress payments to one hundred percent (100%) of the Contractor's hard costs, plus fifteen percent (15%) thereof, plus the balance of the supervision fee and plus the pro rata share of the landscaping allowance charge required to increase such charge to an amount equal to the estimated percentage of the landscaping work completed.

C. All progress payments are due and shall be paid to the Contractor, as hereinbefore and hereinafter provided, on or before the tenth (10th) day following the invoice date. Payments due and unpaid hereunder shall bear interest from the date payment is due at the rate of seven (7%) per annum.

D. Final payment is to be made sixty-one (61) days after substantial completion of the contract work. Prior to final payment, the Contractor agrees to (i) submit evidence satisfactory to the Owner that all payrolls, material bills and other indebtedness connected with the contract work have been paid, and (ii) furnish Owner, with the affidavit or sworn statement of Contractor, and the affidavits, certificates of materialmen (or lien waivers) of the major subcontractors and major suppliers of Contractor, for the purposes of the Ohio Mechanic's Lien Act; provided, however, that no certificates of materialmen or statements of subcontractors shall be required with respect to whom there shall be attached to the Contractor's sworn statement a waiver of lien for all work done or material supplied by such subcontractor or

materialmen.

E. In the event Contractor submits to the Owner the documentation required by subparagraph D, above prior to said 61-day period, final payment shall be made at that time.

F. If there is any dispute between Owner and Contractor as to whether the contract work has been "substantially completed," as used herein, the issuance of a certificate of occupancy or the taking of possession by Owner shall be deemed to be conclusive evidence that the contract work has been substantially completed. If exterior items, such as landscaping, cannot be completed due to inclement weather conditions, or interior punchlist items remain to be completed, such items shall not be considered items required to be substantially completed before the payments required by subparagraphs 4.B, and 4.D are made. Rather, if such items cannot be or are not completed at the time, Contractor shall submit to Owner an estimate of the costs to complete the same, which estimate must be reasonably satisfactory to Owner, and Owner shall be permitted to withhold a sum equal to said costs until such items can be completed by Contractor. Contractor agrees to complete the same as soon as reasonably possible.

5. Changes in the contract work planned and specified, as hereinbefore described, provided the same do not materially alter the scope of the contract work, shall be made only by written agreement or change order signed by both parties. The Contractor covenants and agrees that Contractor will perform said changes on the basis of Contractor's hard costs thereof, plus fifteen percent (15%). Said changes shall be paid for by Owner in compliance with the provisions set forth in Paragraph 4, hereinabove. The upset price shall be increased or decreased to take into account any such changes in the contract work.

Should concealed conditions encountered in the performance of the contract work below the surface of the ground, or should concealed or unknown conditions in an existing structure be at variance with the conditions indicated by the contract documents, or should unknown physical conditions below the surface of the ground or should concealed or unknown conditions in an existing structure of an unusual nature, differing materially from those ordinarily encountered and generally recognized as inherent in work of the character provided for in this contract, be encountered, the upset price shall be equitably adjusted by change order upon claim by either party made within twenty (20) days after the first observance of the conditions.

6. The Contractor shall secure all permits, governmental fees and licenses necessary for the proper execution and completion of the contract work covered by this contract and shall comply with all laws, ordinances, rules, regulations, and orders of any proper public authority bearing on the performance of said contract work. In the event that any of the contract work is at variance with any applicable governmental laws, ordinances, rules and regulations, the Contractor shall promptly notify the Owner in writing, and any necessary changes shall be adjusted by proper change orders as hereinbefore provided. Owner shall reimburse Contractor for the cost of all such permits, governmental fees and licenses secured by Contractor within ten (10) days of submission by the Contractor to the Owner of a receipt for the payment of the same by Contractor, which reimbursement shall be in addition to the contract amount required to be paid pursuant to Paragraph 3, above and shall not be considered part of the upset price.

7. The Owner shall have the right to require the Contractor to furnish bonds covering the faithful performance of the contract work. However, in such event Owner shall reimburse Contractor for the costs of any such bonds within ten (10) days of submission to the Owner by Contractor of the receipt evidencing payment therefor, which reimbursement shall be in addition to the contract amount required to be paid pursuant to Paragraph 3, above, and shall not be considered part of the upset price.

8. The Owner agrees to carry Builders Risk Insurance during construction, at Owner's expense, insuring the contract work under construction to one hundred percent (100%) of the insurable value thereof, including material therefor stored on the site or elsewhere, which shall insure against the perils of fire and extended coverage and shall include "all risk" insurance for physical loss or damage including, without duplication of coverage, theft, vandalism and malicious

mischief. Said policy shall name Contractor thereunder as Contractor's interest may appear. A certificate of such insurance shall be filed with the Contractor prior to commencement of the contract work.

9. The Contractor agrees to maintain during the period of construction, at Contractor's expense, public liability insurance in the minimum amount of Three Hundred Thousand Dollars/Five Hundred Thousand Dollars (\$300,000/\$500,000) and property damage in the amount of One Hundred Thousand Dollars (\$100,000) covering Contractor and the Owner, and any additional insured requested by Owner, for negligent acts or omissions of Contractor during construction. A certificate of such insurance shall be filed with the Owner prior to commencement of the contract work.

10. The Contractor shall register and make proper contributions and maintain insurance in compliance with all laws regulating Workers' Compensation, old-age benefits and Ohio and federal Unemployment Compensation, and all other employee benefit laws, with respect to any employees of Contractor.

11. Owner and Contractor agree that Contractor shall commence the contract work. Contractor shall diligently perform the contract work in order to substantially complete the contract work on or before provided, however, that said contemplated completion date shall be extended by such time as shall be occasioned by delay caused by any act or neglect of the Owner, by changes ordered in the contract work in writing, material shortages, or by strike, public authority or lockout, fire, unavoidable acts or casualty, Acts of God, or for any other reason beyond the control of Contractor.

12. The Contractor agrees that at all times Contractor shall keep the premises free from the accumulation of waste materials or rubbish caused by Contractor's operations. At the completion of the contract work, the Contractor shall remove all waste materials and rubbish from and about the site of the contract work as well as Contractor's tools, construction equipment, machinery and surplus materials, and shall deliver the premises in "broom-clean" condition to Owner.

13. The Contractor further warrants and agrees that:

(a) title to all work, materials and equipment covered by a request for a progress payment as hereinbefore provided in Paragraph 3, whether incorporated in the project at that point or not, will pass to the Owner upon the receipt of such payment by the Contractor, free and clear of all liens, claims or encumbrances of any kind whatsoever;

(b) if within one (1) year after the date of substantial completion of the contract work herein specified any of the contract work to be performed hereunder is found to be defective or not in accordance with the contract documents, or if a defect is found with respect to contract work covered by a guarantee or warranty not assignable to Owner within such longer period of time as may be prescribed by the terms of said guarantee or warranty obtained by the Contractor from any of Contractor's subcontractors or suppliers, the Contractor shall correct, or cause to be corrected, such situation promptly after receiving written notice from the Owner specifying the nature of such defect (the Owner agrees that Owner shall give such notice promptly after discovery of any such condition); and

(c) Contractor shall assign to Owner any and all warranties or guaranties of workmanship and/or materials that are assignable relating to the contract work performed hereunder. Any defective work performed or materials covered by said warranties or guaranties shall be corrected or caused to be corrected by Owner.

14. Contractor shall keep reasonably full and detailed accounts as may be necessary for proper financial management under this Agreement. Owner and Owner's authorized agents shall have the right to inspect all books, contracts and records of Contractor insofar as they relate to the contract work, commencing with substantial completion of the contract work, and for a period of six (6) months thereafter.

15. Whenever Owner or Contractor shall make any demand or serve any notice which is required to be in writing under the terms of this Agreement upon the other, the same shall be in writing and shall be sufficiently given if sent, postage prepaid, by United States registered or certified mail, addressed to Owner at _____[*street address*], _____[*city*], _____[*state*] _____[*zip code*], and addressed to Contractor at _____[*street address*], _____[*city*], _____[*state*] _____[*zip code*], or at such other address as Owner or Contractor may therefore by written notice to the other have designated for the service of such notice.

16. This Agreement and the contract documents referred to herein represent the entire agreement between the parties. The parties agree that no verbal agreement or undertaking before the execution of this Agreement shall alter, amend or modify any of the terms of this Agreement.

17. This Agreement shall be binding upon the Owner and the Contractor and the respective successors, heirs and assigns of each.

The parties have hereunto set their hands the day and year first above written.

OWNER:

[*insert name of owner*]

By: _____

[*insert name and title*]

CONTRACTOR:

[*insert name of contractor*]

By: _____

[*insert name and title*]



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26-22 Current Legal Forms for Real Estate FORM 22.54

FORM 22.54 Contract for services with a construction manager

COMMENT

This is a form of agreement for the hiring of a construction manager. Construction management is a construction method in which the construction manager (usually a qualified general contracting organization) is paid a professional fee, like a project architect, for management and consulting services. With this method, the project planning, design, and construction phases are treated as integrated tasks assigned to a team consisting of the owner, an architect-engineer, and the construction manager, all of whom work together from project inception to completion.

The construction manager should be selected at the same time the architect is selected so that the construction manager's expertise can be used at the outset before the building concept is set in place. The parties can then work together to develop the best and most economical building project. The architect-engineer and the construction manager can engage in value analysis of alternative design and construction procedures from the early stages of design development including the possible incorporation of green alternatives in the design schematic phase to increase the energy and water use efficiency of the Project. This will enable the architect-engineer to make design decisions based on accurate information relative to cost and time, as well as to function and aesthetics.

The construction manager is usually compensated for the construction manager's services with a professional fee instead of the traditional contractor's markup. The fee is intended to include home office overhead and profit.

FORM

CONSTRUCTION MANAGEMENT AGREEMENT

THIS CONSTRUCTION MANAGEMENT AGREEMENT is made at _____[city],
 _____[state], this _____[day] day of _____[month],
 _____[year], by and between THE JOHNSON COMPANY (hereinafter "Owner"), and DONNELLY
 CONSTRUCTION MANAGERS, INC. (hereinafter "Manager").

WITNESSETH:

WHEREAS, Owner intends to construct the Project (as defined below) and desires to engage Manager to render general management services with respect thereto; and

WHEREAS, Manager has significant expertise in connection with the management of construction projects and desires to manage the Project;

NOW, THEREFORE, in consideration of the mutual covenants and promises hereinafter contained, the parties agree as follows:

1. Management of Project. In connection with the construction and remodeling of the Frantz Medical Clinic (the "Project") located at _____[street address], _____[city], _____[state]
 _____[zip code], Owner hereby employs Manager and Manager does hereby agree to undertake all construction management obligations and services with respect to the project.

2. Duties. Manager's duties shall include, without limitation, the following:

- (a) consult and advise Owner on all aspects of the Project including the consideration of green alternatives proposed by the architect in the schematic design phase;
- (b) review agreements which Owner may desire to enter into with respect to the Project;
- (c) consult with Owner in connection with the preparation of budgets, reports, scheduling, evaluations, cost estimates, bid packages in connection with the selection of contractors, materials, and issuance of permits;
- (d) approve invoices and issue payments for contractors, subcontractors, materialmen and other ordinary expenses related to the Project;
- (e) advise Owner obtaining necessary permits, complying with applicable laws, and making sure that all necessary safety precautions have been obtained; and
- (f) advise Owner as to the types and amounts of insurance that Owner should carry with respect to the Project.

The parties acknowledge that Manager will devote a least twenty-four (24) hours per week during the remodeling phase and forty (40) hours per week during the new construction phase.

3. Contract Price. Owner agrees to pay Manager for its duties hereunder the sum of One Hundred Twenty-Five Dollars (\$125) per hour. Manager shall keep track of, and account to Owner for, the number of hours which he works directly

for the Project.

4. Indemnity. To the fullest extent permitted by law, Manager shall indemnify, defend and hold harmless Owner and Owner's agents and employees from and against all claims, damages, losses and expenses, including, but not limited to, attorneys' fees arising out of or resulting from the performance or non-performance of his duties hereunder. Manager will obtain errors and omissions insurance with respect to his duties hereunder in such amounts as Owner shall reasonably designate.

5. Debris. Manager agrees that at all times Manager shall keep the premises free from accumulation of waste materials or rubbish caused by any contractor's operations.

6. Default. If Manager is adjudged a bankrupt, makes a general assignment for the benefit of creditors, if a receiver is appointed on account of Manager's insolvency, if Manager persistently or repeatedly fails to diligently perform his obligations hereunder to Owner's satisfaction, Owner may, after seven (7) days' written notice to Manager, and without prejudice to any other remedy Owner may have, terminate the services of Manager.

7. Notices. Whenever Owner or Manager shall make any demand or serve any notice which is required to be in writing under the terms of this Agreement upon the other, the same shall be in writing and shall be sufficiently given if sent, postage prepaid, by United States registered or certified mail addressed

If to Owner: The Johnson Company

If to Manager: Donnelly Construction Managers, Inc.

or at such other address as Owner or Manager may theretofore by written notice to the other have designated for the service of such notice.

8. Assignment. This Agreement shall not be assigned by Manager without Owner's written consent.

9. Binding Effect. This Agreement shall be binding upon and inure to the benefit of Owner and Owner's successors or assigns, and shall be binding upon and inure to the benefit of Manager and Manager's heirs, personal representatives, successors or permitted assigns.

The parties have hereunto set their hands the day and year first above written.

OWNER:

THE JOHNSON COMPANY

By: _____

[insert name and title]

MANAGER:

DONNELLY CONSTRUCTION MANAGERS, INC.

By: _____

[insert name and title]



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26-22 Current Legal Forms for Real Estate FORM 22.55

FORM 22.55 Contract for sale of on-site water and sewage facilities--purchaser to erect off-site water supply and sewage disposal plants

COMMENT

Generally, the portions of a water distribution and sewage collection system on the site of a housing development will be constructed by the developer in the course of erecting the houses. However, the additional work that is inevitably necessary to make these systems operative is likely to be shifted by the developer to a separate entity, when they are not already available as public services. This will even be the case when the off-site facilities to which the on-site lines are to be connected are not yet in existence. Water wells, pumping and purification plants, and sewage treatment and disposal plants are generally constructed by separate water and sewage companies which own and operate them.

In this case, the owner is to construct such on-site water mains, valves, hydrants, water meters, and sewage collection lines. The owner will sell these facilities to separate water and sewage companies which will erect the necessary off-site supplementary installations and provide water and sewage services to the residences in the housing development.

FORM

AGREEMENT made this _____[day] day of _____[month],
_____[year], by and between Riverdale Construction Corp., a New Jersey corporation ("the Seller"),
and Water Supply Corporation, a New Jersey corporation, and Sanitation Corporation, a New Jersey corporation,
(hereinafter jointly referred to as the "Buyer").

Recitals

The Seller is the owner of certain tracts of land in the Township of Weston, Brewster County, New Jersey, and is presently engaged in the initial stages of constructing a new residential community, designated as Riverdale, New Jersey.

An extensive system of water supply and distribution, and of sewage treatment and collection must be constructed contemporaneously with the construction of the Riverdale community in order that water and sewer service shall be available to the residents of Riverdale, New Jersey as they occupy the houses therein.

The Seller is engaged primarily in the construction and sale of houses, and finds it neither feasible nor advisable to construct or own the water supply and sewage treatment facilities necessary to serve Riverdale, New Jersey.

Water Supply Corporation has been created for the purpose of constructing and acquiring water supply and distribution facilities, designed to serve Riverdale, New Jersey, and is making arrangements for the construction of a water supply system consisting of wells, pumps, and treatment facilities, which facilities have been designed with a view to supplying adequate service for a predominantly residential community containing approximately 5,000 houses.

Sanitation Corporation has been created for the purpose of constructing and acquiring sewage treatment and collection facilities, designed to serve Riverdale, New Jersey, and is making arrangements for the construction of a sewage treatment and disposal plant, which facilities have been designed with a view to supplying adequate service for a predominantly residential community containing approximately 5,000 houses.

The Seller is about to commence construction of the necessary water distribution and sewage collection facilities to serve Riverdale, New Jersey, to be connected to the water supply and sewage treatment facilities, respectively, which the Buyer will construct.

The Buyer desires to buy, and the Seller is willing to sell, the water distribution and sewage collection facilities, for the price and upon the terms and conditions hereinafter set forth.

Now, therefore, the parties agree as follows:

1. *Sale.* The Seller agrees to sell, and the Buyer agrees to buy:

(a) The complete water distribution system to be constructed by the Seller to serve Riverdale, New Jersey, and all easements, rights, equipment, and installations appurtenant thereto, including, but not by way of limitation, the water mains, the valves, the hydrants, the water storage facilities, the water meters to be installed in the houses, and the service lines between the mains and the water meters, all of which are the "water distribution facilities," and

(b) The complete sewage collection system to be constructed by the Seller to serve Riverdale, New Jersey, and all easements, rights, equipment, and installations appurtenant thereto, including, but not by way of limitation, the laterals and the wye branches appurtenant thereto, the collector lines, the trunk sewers up to the site of the Buyer's sewage treatment and disposal facilities, the force mains, and the pumping stations other than the main pumping station to be erected at the site of such sewage treatment and disposal facilities, all of which are the "sewage collection facilities."

2. *Method of conveyance.* On the first (1st) day of _____[month], _____[year], and on the first (1st) day of _____[month] of each year thereafter, so long as Seller shall continue the construction of Riverdale, New Jersey, (conveyance dates), the Seller shall transfer and convey to the Buyer all of the Seller's right, title, and interest in and to the portions of the water distribution and sewage collection facilities that are completed by the Seller as of the conveyance date and not previously acquired by the Buyer; provided, however, that in

the case of any such facilities located within a numerically designated section of Riverdale, New Jersey (pursuant to subdivision maps filed with the appropriate township authorities), such facilities shall not be conveyed to the Buyer unless on the conveyance date not less than one half of the houses planned to be constructed in the section are completed and occupied. However, during the period prior to conveyance thereof, all water distribution and sewage collection facilities connected to occupied houses in Riverdale, New Jersey shall be and remain available, without charge, for the use of the Buyer and of the Buyer's assignees, lessees, and successors in interest, for the purpose of furnishing water and sewer service to such houses.

3. *Purchase price.* The purchase price for the sale of the water distribution and sewage collection facilities shall be an amount equal to \$450 multiplied by the total number of houses constructed by the Seller, connected to the water distribution and sewage collection facilities, and delivered to the Seller's customers, which sum shall be paid in the following manner, to wit:

Commencing _____[date], and on the first day of June, September, December, and March of each year thereafter until the entire purchase price is paid, the Buyer shall pay to the Seller an amount equal to \$11.25 multiplied by the number of houses so delivered; provided, however, that when 40 installment payments have been made for any house, so that the full amount of the \$450 has been paid for the house, that house shall not thereafter be counted in computing succeeding installment payments. Upon default in the payment of any installment of the purchase price on the date due, the entire unpaid balance of the purchase price (or, if the unpaid balance cannot be ascertained because the Seller has not completed the construction of houses in Riverdale, New Jersey, then the unpaid balance of that portion of the purchase price based upon houses delivered prior to the date of default) shall, at the Seller's option, become immediately due and payable, and the Seller, at its option, shall be relieved of any further obligation to convey portions of the water distribution and sewage collection facilities to the Buyer.

4. *Buyer's obligations.* The Buyer shall:

(a) Construct, on land owned by the Buyer, wells and pumping and treatment facilities that shall be capable of providing potable water, of chemical content conforming to the standards of all governmental authorities having jurisdiction, in quantity at least sufficient to meet the reasonable requirements of all houses constructed by the Seller in Riverdale, New Jersey, as they shall become occupied, and also to meet the reasonable requirements of all fire-fighting facilities constructed by the Seller in connection with the development of Riverdale, New Jersey.

(b) Construct, on land owned by the Buyer, sewage treatment and disposal facilities that shall be capable of providing sewage treatment and disposal, conforming to the standards of all governmental authorities having jurisdiction, and at least sufficient to meet the reasonable requirements of all houses constructed by Seller in Riverdale, New Jersey, as they shall become occupied.

(c) Make suitable arrangements, which shall become effective no later than _____[date], and which shall remain effective thereafter for a period of not less than 40 years, to assure that the water supply and sewage treatment and disposal facilities, and the water distribution and sewage collection facilities, shall continuously be available for water and sewer service to the occupants of houses in Riverdale, New Jersey. Such service shall be rendered by one or more corporations subject to the jurisdiction of the Board of Public Utility Commissioners of the State of New Jersey, or by one or more duly organized municipal utilities authorities, or by the Township of Weston, or by a combination of the foregoing. In the event of the Buyer's failure to comply with the provisions of this subparagraph (c), the Seller, at its option, shall be relieved of any further obligation to convey portions of the water distribution and sewage collection facilities to the Buyer.

(d) In concluding the arrangements referred to in subparagraph 4(c), it will use its best efforts to provide assurance that the rates charged to consumers of water and sewer services in Riverdale, New Jersey, shall compare favorably with rates prevailing in comparable communities in Northern New Jersey.

5. *Good title.* The Seller shall furnish on each conveyance date appropriate instruments of conveyance sufficient to vest in the Buyer, subject to no prior liens or encumbrances, good and marketable title to all of the physical components of the portions of the water distribution and sewage collection facilities then being conveyed, together with all such rights-of-way and easements as shall be necessary and appropriate for the operation, maintenance, and improvement of the portions of the facilities conveyed.

6. *Quality of work.* The Seller covenants, represents, and warrants that the water distribution and sewage collection facilities will be constructed in good workman-like manner in accordance with generally accepted engineering practice, and that when completed they will be adequate for the furnishing, respectively, of water and sewer service at least for the houses constructed by the Seller in Riverdale, New Jersey and connected to such facilities.

7. *Place of conveyances.* Conveyances shall be made on each conveyance date (or if any conveyance date be a Sunday or legal holiday, then on the next ensuing day that is not a Sunday or legal holiday), at 11 a.m., at the Seller's executive offices, or at such other place as may be mutually agreed upon by the Seller and the Buyer.

8. *Assignment.* No assignment of this agreement by either party shall be valid unless consented to in writing by the other party.

9. *Survival of covenants.* All of the promises, covenants, terms, and conditions of this agreement shall survive the conveyances hereunder.

10. *Binding effect.* This agreement, subject to the provisions of Paragraph 8 shall extend to and bind the successors and assigns of the respective parties.

The parties have executed this agreement the day and year first above written.

Riverdale Construction Corp.

By: _____

[insert name and title]

Water Supply Corporation

By: _____

[insert name and title]

Sanitation Corporation

By: _____

[insert name and title]



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26-22 Current Legal Forms for Real Estate FORM 22.56

FORM 22.56 Trust agreement for water and sewage facilities--trustee to provide temporary facilities and arrange for central facilities

COMMENT

This trust agreement illustrates a technique for providing first temporary and then permanent water and sewage facilities to the homeowners in a housing development. It sets forth the basic terms between a developer and a servicing organization. In certain circumstances more elaborate trust provisions may be desirable.

The developer is to collect fees from the homeowners and turn them over to the trustee. The trustee is to use the funds to furnish and maintain temporary water and septic tank facilities for each homeowner until central water and sewage facilities become available. The trustee is then to pay the cost of connecting each home to these central facilities.

The developer under this type of arrangement incurs no burden for the water and sewage facilities, and therefore, has no costs to allocate to his property. Each homeowner must capitalize the fees he pays as part of the tax cost of his property, and may not take the fees as deductions at the time they are paid. The future obligation of a lot owner to pay the fees will be contained either in his deed, or in a set of recorded restrictions, or in both.

FORM

DECLARATION OF TRUST made between Waterside Land Corporation, a Florida corporation, the Developer, and Homes Service Corporation, a Florida corporation, the Trustee.

Recitals

The Developer is the developer of Red Sand Subdivision, according to the maps or plats recorded among the public records of Lee County, Florida.

It is desirable and necessary to establish an improvement fee against the properties being developed, in order to assure to the persons residing therein adequate water and sewage facilities which will be connected to a central system when such system becomes available.

A general deed of restriction has been recorded in Miscellaneous Book 460, Page 100, Public Records, Lee County, Florida, providing for the charge of the improvement fees and that the Trustee act as trustee of the funds thereby collected.

The Trustee has agreed to act as trustee of the funds, upon the terms and conditions as hereinafter set forth.

Now, therefore, it is agreed between the Developer and the Trustee as follows:

1. *Collection of fees.* From and after the effective date of this Declaration of Trust, the Developer shall pay to the Trustee all improvement fees previously collected or subsequently collected by it from the purchasers of land in Red Sand Subdivision, and hereafter to collect an improvement fee of \$3,000 per homesite and pay the same to the Trustee.
2. *Trustee's obligation.* The Trustee shall furnish to each owner of property in Red Sand Subdivision who pays the improvement fee the following: (a) water; (b) septic tank; (c) the reasonable maintenance cost of the same during the term of this trust, or until central water and sewage facilities are available; (d) when central water and sewage facilities become available, the cost of connecting each such owner with the facilities, including the cost of all necessary materials, but not required meter or other deposits or connection charges.
3. *Investment of fees.* During the term of this trust, the Trustee shall invest and reinvest all funds paid to it under the terms and conditions of this trust in such manner as to obtain a reasonable return, and shall maintain full and complete records of accounts of all the funds and furnish to the Developer an annual accounting of the funds.
4. *Trustee's expenses.* The Trustee may charge against the trust funds only the expenses necessary and proper for the administration of this trust including, but not limited to, salaries, investment counsel, and legal fees.
5. *Substitution of trustee.* The Trustee, in its discretion, may designate a person or persons to act in its place and stead under this trust, subject, however, to the same terms and conditions hereof, and after first obtaining the written consent of the Developer. In the event of a failure of the Trustee to act, or to designate someone to act in its place, the Developer reserves the right to designate a new trustee, and in such event, all sums then in the hands of the Trustee or person designated by it, shall immediately be turned over to the Developer or to such person as it may designate, together with all records relating thereto.
6. *Term of trust.* This trust shall terminate 20 years from the date hereof or upon the installation of central water and sewage facilities in and to all of Red Sand Subdivision, whichever shall first occur, unless extended by the Developer.

The respective parties have caused this instrument to be executed by their respective presidents and attested to by their respective secretaries, and their respective corporate seals affixed hereto, this _____[*day*] day of _____[*month*], _____[*year*].

Waterside Land Corporation

By: _____

President

Homes Service Corporation

By: _____

President



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26-22 Current Legal Forms for Real Estate FORM 22.57

FORM 22.57 Contract through which municipality acquires private water company presently serving residential real estate development

COMMENT

In many rural areas of the country, it is often necessary for a real estate developer to build its own water system to meet the future needs of the purchasers and/or tenants who will be moving into the developer's newly-built residential project. The construction of such a system becomes necessary when no municipal water system yet exists.

Of course, the developer can opt for drilling a well and installing pumping equipment for each home. However, such individual wells are often unattractive to home buyers who are already accustomed to the trouble-free convenience of using municipal water. In addition, it may be less costly in the long run for the developer to drill several large wells that will serve the entire development rather than--for example--200 small, individual wells, each serving a single home. Finally, a development-wide water system tends to provide a far more steady and reliable level of service than many individual wells.

With the passage of time, the municipality surrounding the real estate development will gradually grow. Residents outside the development, who in the past have relied on their own wells for water, may want the municipality to begin meeting their water-supply needs. In such cases, many municipalities have found that, rather than constructing a new water system from scratch, it is far easier and less expensive to purchase existing water systems presently serving local real estate developments, expand these systems (if necessary), and link them together. Area residents can then be tied into the system and charged a monthly or quarterly fee for the service. Funding necessary to finance the cost of acquisition can usually be raised if the municipality floats a bond at a low rate of interest. This approach allows the impact of the cost of acquisition to be spread over a considerable period of time.

The form below is an agreement through which a municipality acquires a private water system.

FORM

AGREEMENT made this _____[day] day of _____[month],
 _____[year], between _____[insert name of entity] WATER COMPANY, INC.
 (hereafter referred to as "Company"), a corporation existing under the laws of the State of
 _____[state], with offices for the transaction of business at _____[address], and THE
 TOWN OF _____[insert name of town] (hereafter referred to as "Town"), a municipal corporation
 organized under the laws of the State of _____[state], with offices for the transaction of business at
 _____[address].

WITNESSETH:

WHEREAS, Company is the owner and operator of a private water system located in the Town; and

WHEREAS, the Town has decided to acquire the water system owned by Company as part of the Town's municipal water system;

NOW, in consideration of the mutual promises contained herein, it is agreed as follows:

1. *Transfer.* Company agrees to transfer to the Town all its right, title and interest in and to the water franchise and operating permits held by Company. In addition, Company agrees to transfer to the Town all equipment, fixtures and supplies used in the operation of the Company. A complete list of such personalty is set forth in Exhibit A, which is attached hereto and made a part hereof. Company also agrees to transfer to Town all real estate owned by Company. A metes and bounds description of said real estate is annexed hereto as Exhibit B and made a part hereof.

2. *Purchase price.* The Town shall pay the sum of _____ Dollars (\$_____)
 _____[insert number, e.g., two (2) million] for the purchase of the items set forth in Paragraph 1
 above. Said sum shall be paid in _____[insert number, e.g., four (4)] equal installments of
 _____ Dollars (\$_____) _____[e.g., \$500,000] on the following
 dates:

(a) date of closing and transfer of title;

(b) _____[insert number, e.g., four (4)] months thereafter;

(c) _____[insert number, e.g., eight (8)] months after closing; and

(d) _____[insert number, e.g., twelve (12)] months after closing.

No interest shall be payable on these installments, unless they are not paid when due. The interest rate, where applicable, shall be _____[insert number, e.g., six (6)] percent per annum and shall be due and payable with the overdue installment.

3. *Conditions precedent*

(a) *State approval of agreement.* This agreement shall be contingent upon receipt of approval of the transfer from the _____ [insert name of applicable government agencies that must approve deal, e.g., Public Service Commission and the Department of Environmental Conservation] of the State of _____ [state]. Company shall make application for approval within _____ [insert number, e.g., thirty (30)] days after execution of this Agreement. The Town shall cooperate by providing any and all information required for the application to win approval. In the event that approval is not received by _____ [date], either party may terminate this Agreement.

(b) *Town to sell bonds to finance acquisition.* This Agreement shall also be contingent upon the Town's ability to sell municipal bonds in the amount of _____ Dollars (\$ _____) [insert number, e.g., two (2) million]. Upon execution of this Agreement, Town shall commence the legal work needed to sell said bonds. The Town shall use its best efforts to have at least _____ [insert number, e.g., twenty-five (25)] percent of the proceeds available on or before _____ [date]. In the event that _____ [insert number, e.g., twenty-five (25)] percent of the proceeds are not available by such date, either party may terminate this Agreement.

4. *Inspections.* The Town acknowledges that it has had an opportunity to inspect the entire physical plant of Company. The Town acknowledges that it has had an opportunity to test equipment and to test water quality and quantity. Company shall allow the Town continuing access to do further tests and inspections prior to the closing and the transfer of title. The parties acknowledge that the sole purpose of further testing is to allow the Town to be completely familiar with the condition and the use of the operating equipment, so as to be fully prepared to assume its obligations upon transfer of title. The Town may not use the results of inspections or testing to renegotiate the purchase price.

5. *Repairs.* Company shall keep the system in good working order until the date of closing and transfer of title. All repairs and ordinary maintenance shall be performed at the sole expense of Company. The Town shall be entitled to a final inspection on the date of closing and transfer of title in order to be certain that the system is in good working order.

6. *Notice to customers.* When the conditions precedent contained in Paragraph 3 hereof have been satisfied, Company shall send a notice to all customers:

- (a) notifying them of the imminent transfer to the Town and the expected date thereof; and
- (b) providing a telephone number and address to use in order to obtain further information.

Company shall maintain a knowledgeable staff to respond to telephone calls between the hours of _____ [e.g., 8:00 a.m. and 6:00 p.m.] from _____ [e.g., Monday through Friday], beginning on the date notice is sent and continuing until the closing and transfer of title.

7. *Billings*

(a) One week prior to the closing and transfer of title, Company shall do a final reading of all water meters. Company shall prepare and send a final water bill to each customer. Company shall be entitled to collect all revenues generated from said final reading.

(b) Company shall reset all water meters to the "zero" setting and affix a new seal to each meter when performing the final reading.

(c) Company shall be entitled to retain all past billing records. Company shall provide access to such records if requested by the Town.

8. *Closing.* The closing and transfer of title shall take place within _____ [insert number, e.g., sixty (60)] days after the satisfaction of the conditions precedent contained in Paragraph 3 hereof. The parties shall set a mutually-convenient date for the closing upon satisfaction of the conditions precedent. The closing and transfer of title shall take place at the office of the Town Attorney, _____ [insert name], located at _____ [address]. The time of the closing shall be _____ a.m./p.m. _____ [insert time], or such other time as the parties may agree upon.

9. *Adjustments.* The parties shall make adjustments for real property and school taxes levied against the property as of the date of closing and transfer of title.

10. *Representations by Company.* Company hereby represents and warrants the following:

- (a) it shall provide its customer list, including names and addresses, to the Town on the date of closing and transfer of title, and that such customer list shall be true and accurate;
- (b) Company has not and will not accept any prepayment of water bills for services to be provided following the closing and transfer of title;
- (c) Company is a corporation in good standing with the Department of State of the State of _____ [state];
- (d) Company has paid all outstanding franchise taxes and income taxes as of the date of closing and transfer of title;
- (e) Company has given UCC bulk sales tax notices to all of its creditors;
- (f) Company is not subject to the sales tax of the State of _____ [state];
- (g) Company is duly authorized to operate its water system by the _____ [insert names of applicable government agencies, e.g., Public Service Commission and the Department of Environmental Conservation] of the State of _____ [state];
- (h) the water rates charged by Company have been duly approved by the _____ [insert name of applicable government agency, e.g., Public Service Commission] of the State of _____ [state];
- (i) Company has not charged any customer a rate in excess of the rate approved by the _____ [insert name of applicable government agency, e.g., Public Service Commission] of the State of _____ [state];
- (j) there are no unresolved disputes with any customers over the amount of any water bill, the quality of service, the rate charged, or any other matter;
- (k) all properties serviced by Company have water meters installed and that, to the best of Company's knowledge, all such meters are in good working order; and
- (l) Company has the requisite power and authority to transfer the assets of the corporation.

These representations and warranties shall survive the closing and transfer of title.

11. *Representations by the Town.* The Town hereby makes the following representations and warranties:

- (a) the Town is fully authorized to purchase from Company the water system described in Paragraph 1 hereof, at the

price set forth herein;

(b) the Town Council, at a regular or special meeting and when a legal quorum was present, unanimously approved this purchase during the public session of such meeting; and

(c) there is no litigation pending or threatened which would prevent this sale or the sale of bonds contemplated hereunder.

These representations and warranties shall survive the closing and transfer of title.

12. *No representations.* Company makes no representation or warranty with respect to the following matters:

(a) the state of any equipment or of any water lines, except that all equipment shall be in good working order on the date of transfer of title;

(b) whether any customer or other person has tampered with any water meter;

(c) the adequacy of any wells or pieces of equipment; and

(d) whether there are any adverse environmental conditions on any properties owned by Company which are to be transferred to Town hereunder.

13. *Entire agreement.* This Agreement, together with the other written agreements and instruments executed concurrently herewith or pursuant to the provisions hereof, contains the entire agreement between the parties concerning the matters herein set forth and supersedes all prior agreements between them respecting such matters.

14. *Counterparts.* This Agreement may be executed in two or more counterparts, each of which shall be deemed an original, but all of which together shall constitute one and the same instrument. At the trial of any matter arising under this Agreement, only one counterpart need be produced.

15. *Headings.* Paragraph headings are for the purposes of convenience and identification only and shall not be used to interpret or construe this Agreement.

16. *Waivers.* Except as herein expressly provided, no waiver by either party of any breach of this Agreement, or of any warranty or representation hereunder, shall be deemed to be a waiver by the same party of any other breach of any kind or nature (whether preceding or succeeding the breach in question, and whether or not of the same or similar nature).

No acceptance by a party of payment or performance after any such breach shall be deemed to be a waiver of any breach of this Agreement or of any representation or warranty hereunder, whether or not the party knows of the breach when it accepts such payment or performance.

No failure by a party to exercise any right it may have under this Agreement or under law upon another party's default, and no delay in the exercise of that right, shall prevent it from exercising the right whenever the other party continues to be in default. No such failure or delay shall operate as a waiver of any default or as a modification of the provisions of this Agreement.

17. *Gender and number.* Whenever the singular or plural number, or the masculine, feminine or neuter gender, is used herein, it shall equally include the other(s).

18. *Notices.* Any notice which any party is required or may desire to give hereunder shall be in writing and may be

personally delivered, transmitted by facsimile machine, or delivered by the United States Postal Service or private delivery service to the above addresses. Notice is deemed given when received.

19. *Governing law.* This Agreement shall be construed and enforced in accordance with the laws of the State of _____ [state].

20. *Binding effect.* This Agreement shall be binding upon, and inure to the benefit of, both parties and their respective heirs, representatives, successors and assigns.

21. *Modifications.* This Agreement may be modified only by a written document signed by representatives of both parties. A purported oral modification shall not be effective.

The parties hereto have set their hands and seals the day and year first above written.

WATER COMPANY, INC.

By: _____

[insert name and title]

THE TOWN OF _____

By: _____

[insert name and title]

[Acknowledgements]

EXHIBIT A

The following is a list of all equipment, fixtures, supplies and other personalty which is used by the Company in its operations and is being transferred to the Town:

(1) all water mains and laterals lying beneath the ground in that housing development commonly known as _____ [insert name of development, e.g., Piccard Glen];

(2) a water storage tank;

(3) _____ [insert number, e.g., six (6)] wells;

(4) _____ [insert number, e.g., three (3)] pumps;

(5) a pumping station, including all fixtures and equipment;

(6) spare parts for pumps; and

(7) chemicals for water treatment.

EXHIBIT B

[Insert here a legal description of all real property that is being transferred to the Town as part of the sale]



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26-22 Current Legal Forms for Real Estate FORM 22.58

FORM 22.58 Preservation covenants and easements--historic property

COMMENT

Covenants and restrictions variously include true easements, negative easements or restrictions, or affirmative easements or restrictions.

True easements.

A true easement runs with the land. It is perpetual and thus all grantees and future conveyances are automatically subject to the easement in perpetuity, with or without notice, unless it is extinguished or abandoned.

The vast majority of negative easements and restrictions (which are easements which prohibit the grantee from doing something with his property) are true easements: they run with the land automatically and they are created by the grantor who spells them out in his grant or deed.

Affirmative easements and restrictions.

An affirmative restriction ordinarily does not run with the land unless the grantee expressly assumes performance. This is why it is necessary to have the grantee assume and assent to these affirmative obligations in the contract of sale, coupled with a security deposit to insure the faithful performance of these covenants and obligations by the grantee. Thereafter they are recited in the grantee deed and are declared to bind him and his successors, be they purchasers, assigns, tenants, or heirs. At common law there are essentially three methods to create covenants and restrictions (easements).

Adjacent land covenants and restrictions.

The most common type of covenant or restriction is created when the grantor retains contiguous or adjacent land and creates easements or restrictions on the land conveyed which burden this land for the benefit of the grantor. Examples: The grantor has the right to go across the land conveyed; the grantor has the right to use the grantee's underground water; the grantor may have the right to restrict the subdivision of the same, to prohibit the grantee from erecting anything but a single family dwelling and various other uses of the property; a grantor reserves the right-of-way or a driveway through a grantee's land in favor of the grantor as a contiguous owner. (An easement should always be spelled out in the deed from the grantor to the grantee.)

Subdivision covenants and restrictions.

The second common type of covenant or restriction involves the subdivision of a tract of land. The land is subdivided and mutual covenants and restrictions are created for the benefit of all the future owners of the parcels. Whole developments have been created in this manner.

Area covenants and restrictions.

A third common method is to create covenants and restrictions and to expressly declare that they are to run with the land for the benefit of other parcels in an area or the owners of these other parcels. By creating these types of easements, the grantor expressly gives a right at law or in equity to the grantor, his legal representatives or assigns or to other persons thereafter owning or possessing any lot or property fronting on the street or area upon which the property conveyed is situated, to sue any person violating the covenants and restrictions or to otherwise enforce the covenants and restrictions. An example is a setback restriction which is the number of feet a person must build from the property line fronting a street or avenue.

Accomplishing preservation society purposes.

The creation of covenants and restrictions by this third method is not necessarily advantageous to a preservation society because it would not wish to give strangers the right to enforce the society's covenants and restrictions which were granted for a specific purpose. For example, in conveying the land upon which an historical house is situated, the owner and future owners may be prohibited from subdividing this parcel of land which contains more than one conforming building plot. At some time in the future the society might wish to waive this restriction if it were able to persuade the present or future owner to do so for the purpose of moving and placing a dwelling or building worthy of preservation on a subdivided plot on this land. If adjacent or neighboring property owners, however, had the right to enforce this restriction, this worthwhile project, however remote, could never be achieved.

Personal covenants to ensure preservation.

In view of the fact that a preservation society seldom, if ever, owns contiguous or adjacent land and a preservation society is rarely, if ever, in the business of subdividing large tracts of land, the most effective tool or vehicle through which a preservation society can create covenants and restrictions is a personal covenant or restriction. Ordinarily, personal covenants or restrictions are contracts, such as a contract between a builder and an owner. Generally, personal preservation covenants are assignable, fixed in duration, and terminated at the death of the grantor and/or grantee. However, if the grantee binds heirs and assigns to preservation covenants, the preservation society can continue to enforce the obligations and restrictions over a much longer

period of time.

Preparing effective preservation covenants.

Certain practices enhance the ability of a preservation society to enforce preservation covenants and restrictions. Incorporation of the preservation society, as a not-for-profit or similar corporation, will establish it as a separate legal entity with perpetual existence. Tax-exempt status should be obtained if the society is qualified. The covenants and restrictions should be expressly enforceable and survive the death of the grantee or any future conveyance of the property. The covenants and restrictions can also be included in the deed to the grantee (as well as the contract) with the grantee's assumption and assent to them. As an additional precaution, the preservation society could require a cash security, held in escrow, to insure performance of any affirmative obligations of the grantee. The funds would be used by the preservation society to complete the work required by the grantee or refunded to the grantee on satisfactory completion of the requirement.

FORMS

(1) Negative easements

1. *House, building and construction.* No building or construction as hereinafter described and specified, shall be commenced by the Grantee until the plans and specifications have been approved by the Grantor.
2. *Exterior of house.* No exterior doors or windows shall be relocated without the express permission of the Grantor. No exterior doors shall be placed in this wall without the express permission of the Grantor.
3. *Subdivision.* The land shall not be subdivided, now or hereafter, in order that the aims set forth in the above declarations shall not be placed in jeopardy, except certain portions of the land are not to be considered to be essential to the accomplishment of the above aims and declarations, and may be sold, if desired, subject to conditions annexed hereto.
4. *New construction.* No new construction, other than replacement of existing construction, shall be completed between the east facade of the house and Old Northern Boulevard and including the entire distance from the north to the south boundary. This area shall not be used for parking and its general garden-like quality shall be preserved and enhanced.
5. *New residence and/or accessory building.* No new residence or accessory buildings, such as garages, tool sheds or decorative garden structures or additions thereto shall be built upon or made to the existing buildings without the written permission of the Grantor corporation, its successors or assigns. If the corporation is no longer in existence, approval must be granted by the Board of Trustees of the Baymont Landmark Society, or if this group is not in existence, by the Historic District Board of the Incorporated Village of Baymont.

(2) Affirmative easements

1. *Exterior of house.* Exterior siding shingles shall be retained so far as is feasible. Replacement shingles shall be made of wood and shall have the same overlap exposure as existing shingles.

The garage doors shall be removed from the west wall of the house, and this wall shall be closed in to conform to the remainder of the structure. Two ground floor windows shall be installed in this wall which shall be symmetrically placed and which shall conform as closely as feasible to the surviving nine-over-six window in the north wall of the

house. The two loft windows in the west wall shall be made symmetrical in position by the relocation of the northerly window. If this window requires replacement, the replacement shall conform to the southerly window. A chimney shall be constructed at the west end of the house. This shall conform, approximately, in size and position to the existing chimney at the east end of the house. All exposed portions of the chimney, interior as well as exterior, shall be constructed of used brick, or of brick acceptable to the grantor.

Two porches, approximately 6 to 8 feet in width, originally were situated at the clapboarded areas of the north and south walls of the nineteenth century part of the house. The porch on the south wall shall be replaced. The Grantee is encouraged to replace the porch on the north wall of the house, but is not required to do so. In the event the Grantee elects not to replace the north porch, the existing clapboards shall be removed, and replaced with wooden shingles having the same overlap as do the existing shingles on this wall of the house.

The front porch shall be restored in conformity with the Grantor corporation's architectural drawings and specifications which will provide for the restoration of the original "broken-front" contour of the porch; the utilization of appropriate porch columns, and the restoration of the medallioned porch cornice.

The Corinthian pilasters at each side of the principal entrance shall be stripped of their later shingles and refurbished as required. The front doors and doorway shall be stripped of later, reticulated paint prior to repainting.

2. Interior of house. Four of the interior rooms are considered to have special architectural merit and shall be restored, as closely as possible, to their original appearances. In each of these rooms the original flooring and all other surviving architectural panelling and trim shall be preserved and utilized.

In the restoration of the Center Hall, the stairway structure shall be jacked up to or near level. The ceiling shall be restored in accordance with the specifications. The stair-rail and balusters shall be stripped of finish, carefully, and refinished with an approved finish. The condition of the artificially grained panelling, beneath the stairway, shall be discussed with the Grantor corporation, and retained, if feasible.

In the restoration of the front parlor the cracked mantel facing shall be removed, repaired and replaced. The firebox opening shall be trimmed with brass, temporarily, with the understanding that this trim will be replaced by a more proper installation if and when the Grantor corporation is able to find one.

(3) Restrictions running with the land

SUBJECT to the following Declaration of Covenants, Conditions, Limitations, Restrictions and Easements, which said declarations shall constitute covenants to run with all of the aforesaid described land and shall be binding upon the grantee herein and all other persons and parties claiming through the grantee herein and for the benefit of and limitation upon all future owners of said land and premises, this declaration of restrictions being designed for the purpose of assuring the preservation of the rural wooded character of the land and the restoration of the Jonas Williams House (which was built about 1770 and enlarged about 1825) for use as a residence; and during such restoration to preserve to as great a degree as possible its original architectural character and detail which has not been substantially altered; to permit modernization, to that end with the intention that the traditional architectural quality of the early buildings and parts of Baymont Village shall be contributed to and maintained.

(4) Enforcement of above provisions

The provisions contained herein shall be enforceable at law or in equity by the Grantor, by the Board of Trustees of the Baymont Landmark Society, and/or the Historic District Board of the Incorporated Village of Baymont. In any action to enforce the provisions herein, the Grantor, or other enforcing party, shall be entitled to recover its legal fees and expenses in the event that a court shall determine that Grantee has committed or suffered one or more violations of the

provisions herein contained.

This Declaration shall be recorded in the office of the clerk of the county in which the subject property is situated.

Grantor

Grantee

[Acknowledgments]



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Chapter 22 DEVELOPMENT AND SUBDIVISION

Part IV. FORMS

D. COMMERCIAL DEVELOPMENT Shopping Centers, Industrial Buildings and Office Buildings

26-22 Current Legal Forms for Real Estate FORM 22.59

FORM 22.59 Lease in shopping center to be constructed by lessor--tenant's building requirement to be satisfied--minimum and percentage rentals

COMMENT

A basic attraction of the regional shopping center is the potential increase in the business of each tenant by reason of the proximity of other successful tenants. The center contains a variety of stores and services, thus providing the consumer the opportunity for "one stop" and comparative shopping. Another major factor in shopping centers is the easy flow of traffic and the availability of parking facilities. Each tenant is not only concerned with the adequacy of access roads and parking areas, but also with their maintenance and repair.

Necessity for long term commitments.

The successful development of a regional shopping center is dependent to a large extent on the developer obtaining long term lease commitments, prior to construction, of one or more prime tenants as major tenants of the center. This is necessary for two reasons:

(1) The reputation, quality, and merchandising ability of a major store are strong factors in attracting smaller stores which will be dependent on the consumer traffic generated by the prime tenant; and

(2) Long term leases with major tenants are a prerequisite to the developer obtaining the financial backing of lending institutions in order to construct the shopping center. However, this puts the major tenants in a strong bargaining position with the developer enabling them to obtain concessions in their leases which would not otherwise be in the developer's best interest since his freedom of choice in selecting other tenants is thereby restricted.

Exclusionary provisions.

Whether or not certain exclusionary provisions in a shopping center lease will be held in violation of the antitrust statutes would depend on many factors including the tenant mix of the shopping center, the competitive area involved, the market serviced, as well as whether the legitimate economic or business justification for the particular provision outweighs its anticompetitive effects.

Approval right provisions are especially suspect because of the broad anticompetitive possibilities created thereby. Such provisions confer upon the lessee the power to exclude potential entrants for any reason whatsoever, including the fact that such entrants may compete with the lessee on the basis of price or other factors. The lessee may also condition the entry of a competitor upon its adoption of suitable pricing policies.

However, a provision in a lease requiring the lessor to select as tenants, businesses which are financially sound and of good reputation will not be in violation of the antitrust statutes. Nor would lease clauses requiring the developer to consider the objective of maintaining a balanced and diversified grouping of stores, merchandise, and services in the shopping center, or clauses which prevent a developer from leasing space to a tenant who would create undue noise, litter, or odor be objectionable.

Regulatory provisions.

The successful operation of a shopping center depends, to a large degree, upon its attractiveness as a whole. Provisions requiring that reasonable standards of appearance, signs, maintenance, and housekeeping be maintained in the center would not be precluded.

A lease requirement that a tenant join an association and pay dues for the maintenance of the shopping center should, in itself, be considered as justifiable and fair. The question in determining the reasonableness of the requirement is not the means by which the money is collected but the use to which it is put. It can be seen that the regulation of the price range of the merchandise sold or the prohibition of discount advertising, whether by a lease provision or the regulations of a merchant's association, may create the same anticompetitive results as the prohibition of discount houses and covenants not to compete.

"Exclusive use" provision.

The idea of a shopping center as a "one stop" shopping place for the consumer presupposes that the various businesses will be complementary to each other, rather than overlapping and competitive. Protection against competition by neighboring tenants is afforded in the lease illustrated by an "exclusive use" provision which, however, may be in violation of the antitrust statutes as previously discussed. The tenant, who in this case will operate a supermarket, is assured that food departments will not be operated elsewhere in the shopping center.

Should this provision not be challenged, judicially or administratively, the remedies available to the tenant when another tenant conducts competing activities in violation of its lease vary considerably. Since there is no privity of contract among the tenants, the injured tenant is limited in its right of action against offending tenants. In this case, the tenant may select one or more of several remedies vis-a-vis the landlord, including termination of the lease, payment of only the percentage rent, and recovery from the landlord of the expenses incurred in eliminating the prohibited activity. In addition, the tenant is given the right to enjoin the prohibited use in its own

name or in the name of the landlord.

Right of tenant to terminate lease in absence of other tenants.

To insure the proximity of other business enterprises, the tenant is given the right to terminate the lease unless within a specified time leases are entered into with other types of tenants, and stores are constructed and are ready for occupancy by them.

Parking facilities.

Provisions in the lease dealing with parking facilities afford ample protection to the tenant. The ratio of parking space to floor space is adequate. The tenant is permitted to recover for its expenses to correct the landlord's defaults as well as to elect to pay only percentage rent or terminate the lease.

Construction of tenant's premises.

To attract some tenants, especially where leases are to be executed before construction begins, the developer may have to formulate his plans to satisfy the special needs of those tenants. This type of tenant will insist upon various standards and guarantees of construction, and upon protection against mortgagees and other lienors. In the lease illustrated, provision is made for the tenant to approve the proposed and final plans, and to verify that such plans are complied with in the construction. The lease term is to begin when construction is completed, but the landlord is required to keep the heating plant and equipment and all mechanical installations in repair for the first year of the lease.

Rental; minimum rental.

Rent under shopping center leases frequently consists of two components: a guaranteed or minimum rent, and a percentage rent determined on the basis of income from the tenant's use of the premises. The percentage rent provision is designed to enable the landlord to benefit from the center's commercial growth, to give it a stake in the center's future potential, and to counteract the effects of economic fluctuations. The arrangement for minimum rent in this lease is distinctive. Minimum rentals are based on the cost of the land and the improvements. These rentals are calculated so that the landlord will receive as minimum rent the amount required to meet the self-liquidating provisions of the first mortgage on the property. It should be noted, however, that under this lease the landlord must bear the burden of real estate taxes, certain repairs, and insurance.

Percentage rental.

As percentage rent the landlord will receive a fixed percentage of the lessee's gross sales to the extent that such amount exceeds the guaranteed rent. If the lessee exercises the renewal options available under the lease, guaranteed rentals are reduced, so that the percentage rent is likely to become a more significant component of the total annual rent. All rent received by the landlord, regardless of how it is applied by the landlord, constitutes ordinary income. Percentage rent is reported by a cash basis taxpayer when received, but is reported by an accrual basis taxpayer as income for the period in which the sales are made.

Cash flow of landlord.

The cash flow of the landlord will depend upon the relationship between his deductions for depreciation and the mortgage amortization payments, and will fluctuate depending upon the effect of the percentage rental provisions in the lease and the terms of the leases made with other tenants.

FORM

AGREEMENT made and entered into this _____[day] day of _____[month], _____[year], by and between Central Realty corporation, a New York corporation (the "Landlord"), and Mountain Supermarkets, Inc., a New Jersey corporation (the "Tenant").

The Landlord does hereby let unto the Tenant, for a term of 25 years upon the covenants and conditions set forth below, and the Tenant does hereby hire from the Landlord, premises located at _____[address],

_____ [insert description]

as outlined in red on the sketch annexed hereto and made a part hereof as Exhibit A, together with the building to be built thereon by the Landlord as provided below (sometimes hereinafter the "Building"), such premises and any improvements now or hereafter erected thereon sometimes hereinafter called the Demised Premises or Premises. The Premises together with the right to use the property outlined in yellow and marked Parking Area on the annexed Exhibit A are located within the project known as Central Shopping Center (the "Shopping Center") as outlined in green on the annexed Exhibit A.

1. *Building to be constructed.* The Landlord shall erect, at its own cost and expense, upon the Demised Premises at the location outlined in red on Schedule A, a Building containing at least 20,000 square feet on the street level floor, with a basement of at least 10,000 square feet thereunder. Such Building and Parking Area shall be constructed in accordance with the plans and specifications to be prepared by the Landlord and to be approved, in writing, by the Landlord and the Tenant. The Building shall be substantially similar to the Mountain Supermarket being operated at Newark, New Jersey, as to quality and kind of materials and workmanship. A general synopsis of such proposed plans and specifications is annexed hereto, made a part hereof, and marked Schedule B, it being agreed that the final plans and specifications shall embody substantially the items set forth in such general synopsis.

2. *Time of completion.* Immediately upon written approval by the Landlord and the Tenant of plans and specifications for the Building and Parking Area, the Landlord shall apply to all municipal, federal, and other governmental agencies having jurisdiction for permission to erect the Building and to make all the improvements required by this Lease, and the Landlord shall proceed diligently with such applications for such permits. The Tenant shall cooperate with the Landlord and furnish the Landlord with all necessary information and data in its possession required in connection with such applications. The Landlord shall proceed with diligence to complete construction of the Building and the other improvements to be erected and performed by the Landlord hereunder. If the Building is not commenced within 12 months of date hereof or is not completed ready for use and occupancy by the Tenant and possession thereof actually delivered to the Tenant within 12 months of the date of commencement (barring unavoidable delays either arising from strikes affecting construction generally in or about Trenton, New Jersey, or in procuring materials, the availability of which is restricted by governmental action), the Tenant shall have the right, at any time thereafter so long as the construction of the Building has not been commenced or the Building and Parking Area have not been completed within the time hereinabove set forth, to (a) terminate this Lease by giving the Landlord ten days' written notice, and thereupon the Tenant shall be relieved and released of all its obligations hereunder as if this agreement had never been drawn; or (b) extend the Landlord's time for completion thereof and delivery of possession to the Tenant. If the Tenant terminates this Lease pursuant to this Paragraph 2, or any other provision of this Lease, the Landlord shall not, for a period of three

years after such termination, permit, suffer, or consent to the use of any portion of the Shopping Center, of which the Demised Premises are a part, as a supermarket; and this clause shall be self-operative and no further instrument shall be required of the Landlord to make the same effective. In confirmation thereof, the Landlord shall execute any instrument that the Tenant may request, hereby constituting and appointing the Tenant the Landlord's attorney-in-fact to execute any such instrument for and on behalf of the Landlord.

3. *Quality of construction.* Construction of the Building and Parking Area, and any other work to be performed by the Landlord hereunder at any time, shall be undertaken, performed, and completed in a good and workmanlike manner and in full compliance with all provisions of all federal, state, and local authorities having jurisdiction, including all sustainability provisions adopted by the local jurisdiction.

4. *Tests for completion.* For the purposes of this agreement, the Building shall be deemed to have been completed when the Landlord furnishes the Tenant with written proof that:

(a) All the work provided for by the plans and specifications mentioned in Paragraph 1 hereof has been fully completed in accordance therewith.

(b) The certificate of the architects of both the Landlord and the Tenant that the plans and specifications have been complied with are issued to the Landlord and notice thereof given to the Tenant.

(c) A certificate of occupancy is issued by the governmental agency in authority.

(d) The Building and Parking Area shall have been examined and accepted by the municipal or other governmental authorities having jurisdiction.

(e) All streets and highways shown on Schedule A shall have been fully opened as public streets with public sewers installed therein and shall have been fully paved.

(f) Stores for those other tenants of the Shopping Center (of which Demised Premises are a part) referred to in Paragraph 30 hereof shall have been completed ready for occupancy as therein provided, under leases providing for occupancy and opening of business by such other tenants and payment of rentals by such other tenants no later than the commencement date of this lease, and sufficient proof thereof shall have been given to the Tenant herein, as provided in Paragraph 30.

5. *Certificate of occupancy.* The certificate of occupancy referred to in Paragraph 4(c) hereof at the time of the completion of the Building by the Landlord shall authorize the use of the Demised Premises for supermarket and for general retail purposes. The Landlord warrants that at the time of the completion of the Building the street level floor of the Demised Premises when completed may be occupied by the Tenant as a supermarket and for the sale, storage, and processing of items sold in such supermarket, that the basement of the Demised Premises may be used for the storage and processing of items sold in such supermarket, and that the Building will comply with all provisions of all federal, state, and municipal governments.

6. *Rent.* The Tenant shall pay, and the Landlord shall accept, as rental for each lease year (as hereinafter defined) of this Lease the sums hereinafter set forth in this paragraph; provided, however, that for and with respect to each full lease year the Tenant shall pay a minimum annual rental as set forth in Paragraph 41 hereof. Such rental shall be payable as follows: On the first day of each month, in advance, the Tenant shall pay a sum representing one twelfth of the minimum annual rental. On or before the tenth day after the expiration of each three-month quarterly period of each lease year the Tenant shall deliver to the Landlord a statement certified by an executive officer indicating the amount of gross sales during the preceding quarterly period, the first quarterly statement to have added thereto the gross sales during the hereafter mentioned initial interim period, if any, and same shall constitute for that purpose a part of the first

lease year. The Landlord shall have the right to inspect, audit, and verify the Tenant's permanent books of account and records of gross sales relating to the Demised Premises only at the Tenant's office in the City of Newark, at reasonable times during the course of each lease year, upon notice, but not more than twice in any such lease year. If, during but before the expiration of any such lease year, such gross sales exceed 100 times the minimum annual rental, then the Tenant shall pay to the Landlord 1 percent of such excess gross sales above 100 times the minimum annual rental accrued to the end of each quarterly period of such lease year at the time of and together with delivery of such quarterly statement. Any claim by the Landlord for revision of any statement of gross sales which is not made to the Tenant within 30 days after the date when such statement of gross sales is mailed or delivered to the Landlord shall be deemed and hereby is waived by the Landlord. The Landlord shall hold in confidence all gross sales figures and other information obtained from the Tenant's records. The Tenant makes no representation or warranty in regard to gross sales or excess rentals.

For the purposes of this agreement, "gross sales" shall mean the selling price of all goods, wares, and merchandise sold in, upon, or from any part of the Demised Premises by the Tenant or any of its licensees, at retail, on credit, or any other terms, without any deduction or allowances, except that the following shall not be included in gross sales and shall be deducted therefrom:

- (a) Returns or refunds, or credits received in settlement of claims for loss or damage to goods, wares, or merchandise.
- (b) All sales taxes, excise taxes, gross receipts taxes, and similar taxes, whether imposed under any existing or future rules, regulations, laws, or ordinances.
- (c) All receipts from the transfer of goods, wares, or merchandise from the Demised Premises to any other store or warehouse in the chain of stores operated by the Tenant or its affiliates.
- (d) All receipts from the delivery of goods, wares, or merchandise from the Demised Premises to any manufacturers or suppliers thereof, for any purpose except a sale.
- (e) All receipts from vending machines, weighing machines, stamp machines, telephones, and the like, except such portion thereof as the Tenant may retain.
- (f) All receipts from sales to employees made at a discount.

The term "lease year" as used above shall mean a period of 12 calendar months commencing on any anniversary date of the commencement of the term of this Lease. The "first lease year" as used above shall mean a period of 12 calendar months commencing on the commencement date of the term hereof as defined in Paragraph 7.

7. Beginning of term. The commencement date of the original term of this Lease shall be the first day of the month following the expiration of 60 days after completion of the Building as defined in Paragraph 4.

8. Tenant's entry into premises. The Tenant may enter upon the Demised Premises during the course of construction of the Building, to do such work in the Demised Premises as it deems necessary, and may commence business operations thereon prior to the commencement date of the term hereof as defined in Paragraph 7 hereof. The Tenant's taking of possession and commencement of business operations or payment of any rentals or other sums under any provision of this Lease shall not relieve or release the Landlord from any obligations imposed on the Landlord under this Lease, and shall not be deemed a waiver of any such obligations imposed upon the Landlord under this Lease, or an acceptance by the Tenant of the Building as fully completed, or cause the term hereof to begin or the rent hereunder to accrue prior to the time herein mentioned as the commencement date of the term. The Tenant's gross sales, as defined in Paragraph 6 hereof, during the interim period prior to the commencement of the term shall be deemed a part of the gross sales during the first lease year of the term hereof. During such interim period, both parties shall be governed by all other provisions

of this Lease, but the term of this Lease for the purpose of any renewal options or any other provisions measured by the term shall be deemed to commence on the date fixed for the commencement of the term as defined in Paragraph 7 hereof.

9. *First renewal option.* The Tenant may renew the term of this Lease for an additional period of five years commencing upon the expiration of the original term hereof under the same terms and conditions as are set forth herein for the original term hereof (the "First Renewal Period"), except that the annual rental shall be as set forth in Paragraph 42. If the Tenant decides to exercise this option, it shall give the Landlord written notice of such intention not later than two months preceding the termination of the original term hereof.

10. *Second renewal option.* The Tenant may further renew the term of this Lease for an additional period of five years commencing upon the expiration of the First Renewal Period, under the same terms and conditions as are herein set forth for the First Renewal Period (the "Second Renewal Period"). If the Tenant decides to exercise this option, it shall give the Landlord written notice of such intention not later than two months preceding the termination of the First Renewal Period.

11. *Third renewal option.* The Tenant is herewith given the further option to renew the term of this Lease for an additional period of five years commencing upon the expiration of the Second Renewal Period, under the same terms and conditions as are herein set forth for the First Renewal Period (the "Third Renewal Period"). If the Tenant decides to exercise this option, it shall give the Landlord written notice of such intention not later than two months preceding the termination of the Second Renewal Period.

12. *Fourth renewal option.* The Tenant is herewith given the further option to renew the term of this Lease for an additional period of five years commencing upon the expiration of the Third Renewal Period, under the same terms and conditions as are herein set forth for the First Renewal Period (the "Fourth Renewal Period"). If the Tenant decides to exercise this option, it shall give the Landlord written notice of such intention not later than two months preceding the termination of the Third Renewal Period.

13. *Limitations on renewal.* Notwithstanding the foregoing provisions contained in Paragraphs 9, 10, 11 and 12, Tenant shall not be entitled to renew if, at the time of giving notice, Tenant is in default under any of the terms of this agreement. In addition, in the event Tenant is in default at the time any renewal period is due to commence, the right to renew shall be voidable at the option of Landlord.

14. *Use of premises.* The Tenant may use the Demised Premises for any lawful purposes, including, but not limited to, all of the following: the sale and marketing of groceries, meats, seafoods, fruits, produce, poultry, vegetables, delicatessen, dairy products, baked goods, beverages, food products of all kinds, pharmaceuticals, cosmetics, toiletries, drugs which can be sold without the presence of a registered pharmacist, soap powders, shampoos, babies' needs, books, magazines, kitchen and household supplies, beer for off-premises consumption and wine for off-premises consumption (if beer license includes the sale of wine, and if Tenant procures license therefor), and other articles sold in any supermarket at any time during the term of this Lease, and for the sale, storage, warehousing, and processing of such items in the basement of the Demised Premises and the incidental storage and processing of such items on the first floor of the Demised Premises. If at any time after the execution hereof it shall become unlawful to use any part of the Demised Premises for food merchandising purposes as ordinarily conducted in supermarkets of the Tenant or any of its affiliates at such time, then, and in that event, the Tenant shall have the right to declare this Lease to be at an end and for nothing holden, on giving written notice thereof to the Landlord, and, in such event, both parties shall be relieved of all further obligations hereunder except obligations accruing prior to such termination.

In its use of the Demised Premises, Tenant shall at all times comply with Landlord's sustainability policies adopted from time to time and made known to Tenant by a writing delivered to Tenant.

15. *Mortgage of premises.* The Landlord covenants that the Demised Premises, the Shopping Center, and the Parking Area during the term hereof shall be free and clear of all liens, encroachments, restrictions, encumbrances, mortgages, judgments, and claims of any kind whatsoever which may be prior in lien to the lien of this Lease, except a first mortgage, which is at all times held by a so-called Public Institution such as a bank, savings institution, cemetery, annuity, trust or retirement fund, insurance company, or a recognized financial institution ("Permanent Mortgage"), provided that the conditions hereinafter set forth in this paragraph with respect to subordination of this Lease are agreed to by any holder of such Permanent Mortgage. The Landlord shall pay all installments of interest and principal due or to grow due on such Permanent Mortgage and to maintain the same in good standing without default. This Lease shall, without requiring the execution of any further instrument, be deemed subordinate to such Permanent Mortgage, and the Tenant shall execute and deliver to the holder of such Permanent Mortgage any instrument of subordination reasonably requested by such mortgagee; provided, however, that such subordination of this Lease to such Permanent Mortgage is conditioned upon the following provisions against the disturbance of the Tenant's possession:

(a) So long as the Tenant continues to pay the rent provided for in this Lease and otherwise complies with the terms and provisions of this Lease, the right of possession of the Tenant to the Demised Premises and the use of the Parking Area and the terms and provisions of this Lease otherwise shall not be affected or disturbed by the Permanent Mortgagee in the exercise of any of its rights under such Permanent Mortgage, or the bond or debt secured thereby, or otherwise by law provided.

(b) If the Permanent Mortgagee comes into possession of or ownership of the title of the Demised Premises or the Parking Area by foreclosure of such Permanent Mortgage, or by proceedings on such bond, or otherwise, this Lease shall not be terminated by such foreclosure or any of such proceedings.

(c) If the Demised Premises or the Parking Area are sold or otherwise disposed of pursuant to any right or any power contained in such Permanent Mortgage or such bond, or as a result of proceedings thereon, or as otherwise authorized by law, the purchaser of the Demised Premises or the Parking Area at such sale, or any person acquiring title through or by virtue of such sale, shall take title subject to this Lease.

(d) If any building upon the Demised Premises is damaged or destroyed by fire or other casualty, for which under any of the insurance policies the loss is payable to the Permanent Mortgagee, the Permanent Mortgagee agrees that such insurance funds, if and when payable to it, shall be made available for the purpose of repair or rebuilding of the Demised Premises, as provided in this Lease.

(e) The Permanent Mortgagee shall give the Tenant at least ten days' advance written notice of any default under such Permanent Mortgage, and the Tenant shall have the right to cure any such default and to deduct the cost and expense incurred by reason thereof from any sums due under this Lease.

(f) This agreement shall be binding upon and inure to the benefit of such Permanent Mortgagee, the Landlord, and the Tenant, and their respective successors and assigns.

16. *Taxes.* The Landlord shall pay all real estate taxes, real estate assessments, and any and all other governmental charges, assessments, or taxes payable in respect to the Demised Premises, the Shopping Center, and the Parking Area or any part thereof. In default thereof, the Tenant shall have the right to pay the same, and the amount so paid shall be payable by the Landlord to the Tenant on demand with lawful interest thereon. The Tenant may deduct or retain the amount so paid out of any rents (minimum and percentage rentals) or other sums then due or which may thereafter become due from the Tenant hereunder.

17. *Repairs.* The Landlord shall, from time to time, at its own cost and expense, maintain and keep in good repair the outside walls, roof, and all other outer portions of the Demised Premises, and the appurtenances to the Demised Premises, including, but not limited to, the sidewalks and curbs adjacent to the Demised Premises and all facilities

servicing the Demised Premises. The Landlord shall also promptly execute and comply with all statutes, ordinances, rules, orders, regulations, and requirements of the federal, state and municipal governments and of any and all their departments and bureaus and of the Board of Fire Underwriters and Board of Health applicable to the Building, the Demised Premises, appurtenances thereto, and all facilities servicing the Demised Premises. The Landlord shall from time to time, at its own cost and expense, make all structural repairs to the Building, and repair any damage to any portion of the interior of the Building resulting from the Landlord's failure to repair or maintain the outer portions of the Building, including, without limitation, damage to the interior arising from defective construction or maintenance of other portions of the Building, damage to the interior and exterior of the Building arising from defective workmanship in the original construction, and damage arising from the settling of the Building and the laying of the concrete foundations and floors. If the Landlord shall fail, neglect, or refuse to keep or place in repair such outside walls, roof, or other outer portions, or fail to repair any interior damage arising from a failure to repair or maintain other portions, as hereinabove provided, or fail to comply with any of such statutes, ordinances, etc., or fail to make any repairs required to be made by the Landlord under and of the provisions of this Lease, the Tenant shall have the right to make such repairs and comply with such statutes, ordinances, etc. In such event, the Landlord shall pay the cost thereof to the Tenant on demand with lawful interest thereon, and the Tenant may deduct or retain the amount so paid out of any rents (minimum and percentage rentals) or other sums that may then be due or that may thereafter become due hereunder. In the event of an emergency requiring immediate action, i.e., fire, water seepage, sewer back-up, cessation, or interruption of any facility servicing the Demised Premises, and the like ("Emergency"), the Tenant may make such repairs at the Landlord's expense, prior to giving any written notice to the Landlord; provided, however, that the Tenant notifies the Landlord in writing within three business days after the expiration of the Emergency.

18. *Heating plant and equipment.* The Landlord covenants that the heating plant and equipment to be installed in the Building on the Demised Premises shall be, at the commencement of the term, in good working order capable of producing temperature in the Building on the Demised Premises of at least 70 degrees Fahrenheit at 0 degrees outside, and shall be in compliance with all federal, state, and municipal orders, regulations, and requirements. The Landlord shall at all times during the first lease year of the term hereof, at its own cost and expense, keep such heating plant and equipment in good order and make any and all necessary repairs to and replacements thereto. If the Landlord fails to make such repairs or replacements the Tenant shall have the right to make such repairs or replacements. In such event, the Landlord shall pay the cost thereof to the Tenant on demand with lawful interest thereon, and the Tenant may deduct or retain the amount so paid out of any rents (minimum and percentage rentals) or other sums that may then be due or that may thereafter become due hereunder. In the event of an emergency, the Tenant may make such repairs at the Landlord's expense, prior to giving any written notice to the Landlord; provided, however, that the Tenant notifies the Landlord in writing, within three business days after the expiration of the emergency.

19. *Mechanical installations.* The Landlord covenants that the storage boxes, electrical, sprinkler, plumbing, sewerage systems, air conditioning systems and ducts, and other mechanical installations and facilities installed or to be installed in the Building on the Demised Premises or servicing the Demised Premises shall be, at the commencement of the term, in good working order, and shall be in compliance with all federal, state, and municipal orders, regulations, and requirements. The Landlord shall at all times during the first lease year of the term hereof, at its own cost and expense, make all repairs or replacements thereto. If the Landlord fails to make such repairs or replacements, the Tenant shall have the right to make such repairs and replacements. In such event, the Landlord shall pay the cost thereof to the Tenant on demand with lawful interest thereon, and the Tenant may deduct or retain the amount so paid out of any rents (minimum and percentage rentals) or other sums that may then be due or that may thereafter become due hereunder. In the event of an emergency, the Tenant may make such repairs at the Landlord's expense, prior to giving any written notice to the Landlord; provided, however, that the Tenant notifies the Landlord in writing, within three business days after the expiration of the emergency.

20. *License to use.* When completed, the Tenant may occupy the Demised Premises as a supermarket of substantially the same type and operated in substantially the same manner as the supermarket now being operated by the Landlord at Newark, New Jersey, with an unlimited number of employees therein. The Landlord further warrants that the Demised

Premises and such supermarket therein, shall, on the commencement date of the term of this Lease, be in full compliance with all provisions of all federal, state, and municipal authorities having jurisdiction, including, without limitation, all applicable municipal zoning, building, and licensing ordinances, rules, and regulations. The Building shall not be deemed completed until the Landlord has fully complied with all the provisions of this paragraph, and (if a license for supermarket operations is required) the Landlord has delivered to the Tenant a certification from the appropriate licensing authority that such licenses will be issued to the Tenant for such supermarket. Anything herein contained to the contrary notwithstanding, this Lease and any and all obligations on the part of the Tenant hereunder are contingent and conditioned upon the Landlord's full compliance with all the provisions of this paragraph.

21. *Water, gas, and electricity.* The Landlord shall install a separate water meter for the Tenant at the Landlord's own cost and expense. The Tenant shall pay for all water, gas, and electricity consumed by it on the Demised Premises. If the Tenant shall fail, refuse, or neglect to pay such water, gas, and electricity charges, the Landlord shall have the right to pay the same and add the amount thereof to the rent which may be due and which may become due hereunder.

22. *Repairs by tenant.* Except as herein otherwise provided, the Tenant shall keep the interior of the Demised Premises in tenantable repair, at its own cost and expense, and at the end or other expiration of the term hereof shall deliver up the Demised Premises in substantially as good condition as they are at the beginning of the term hereof, damage by reasonable wear and tear, fire, war, civil riot and commotion, casualty, the elements, and acts beyond the control of the Tenant excepted. The Tenant shall promptly execute and comply with all statutes, ordinances, rules, orders, regulations, and requirements of the federal, state and municipal governments and of any and all their departments and bureaus and of the Board of Fire Underwriters and Board of Health; provided, nevertheless, that same are applicable solely to the Tenant's use of the Demised Premises. The Tenant's obligation to make repairs shall at all times be limited to the making of ordinary repairs and not structural repairs or repairs necessary to remedy damages caused by wear and tear, fire, war, civil riot and commotion, casualty, the elements, and acts beyond the control of the Tenant, whether or not such repairs shall be ordered by any municipal, county, state, federal, or other governmental authority. All of such repairs shall be made by the Landlord at its own expense. The Landlord shall at the commencement of and during the term of this Lease assign and transfer to the Tenant all warranties, guarantees, or other representations received by it from all parties who may have supplied the Landlord with labor or materials with respect to any portion of the Demised Premises which the Tenant is required to repair or maintain pursuant to this Lease.

23. *Consent to repairs.* The Tenant shall have the right to make such repairs, alterations, additions, and improvements to the Demised Premises (including alterations, additions, and improvements to store fronts or in connection with the installation of the Tenant's fixtures, facilities, and equipment), as it may desire without the necessity of obtaining the Landlord's prior consent thereto. However, the Tenant shall not make any other structural repairs unless the Landlord's prior written consent is obtained, which consent the Landlord shall not unreasonably withhold, or unless and until the Landlord shall have failed to comply with the making of any structural repairs pursuant to any provision of this Lease. Nothing contained in this Lease shall require the Tenant to restore the Demised Premises, at the expiration of the term of this Lease, to the condition in which they were prior to any repairs or alterations, additions, or improvements made by it pursuant to the terms hereof or with the Landlord's consent.

24. *Signs.* The Tenant shall have the right to paint or erect in, on, or about the Demised Premises and the Parking Area such signs as it shall in its discretion deem to its advantage, and to remove such sign or signs at any time during the term of this Lease or at the expiration thereof.

25. *Fixtures.* At any time during or after the original or any renewal term hereof, the Tenant may remove any and all property, fixtures, refrigeration, and other equipment and improvements placed, installed, supplied or made on the Demised Premises, notwithstanding any law, rule or regulation to the contrary. However, the Tenant shall repair, at its expense, any damage caused to the Demised Premises by such removal.

26. *Insurance.* The Landlord shall at all times during the term of this Lease, at its own cost and expense, insure and keep

in effect on the Building on the Demised Premises, fire insurance (with additional coverage commonly known as supplemental contract or extended coverage) covering the Landlord's and Tenant's interests written by an insurance company or companies authorized to do business in the state in which the Demised Premises are situated, in an amount or amounts sufficient to pay in full all losses covered thereby. If the Landlord shall fail, refuse, or neglect to obtain such insurance or to maintain same, and furnish the Tenant with proof of same upon demand, the Tenant shall have the right to procure such insurance and to deduct the cost thereof from any rental or other sums payable hereunder. In such event, the Landlord shall pay the amount thereof on demand with lawful interest thereon. All proceeds of such insurance if and when received by the Landlord shall be considered as having been received by it in trust, and the Landlord shall use the same first to restore the Demised Premises and the Building thereon to the condition in which they were prior to the occurrence of the damage. The Landlord shall procure endorsements on the policies required to be maintained by it under the provisions of this paragraph wherein and whereby:

(a) the insurance company shall agree to give the Tenant ten days advance written notice of any cancellation or reduction of insurance under any such policy, and to forward to the Tenant copies of all endorsements issued after the date of such policy, all endorsements and notices to be given the Tenant at 100 Railroad Avenue, Newark, New Jersey, and

(b) the insurance company shall agree to waive any right of subrogation against the Tenant on any claim that the Landlord, or any other party having an interest in such insurance policies or proceeds, may have against the Tenant, in connection with fire or other risks or casualty covered by such insurance.

27. Damage to premises. In the event that the Building on the Demised Premises or any or all of other buildings in the Shopping Center shall be damaged by fire or other casualty, the Demised Premises and such other buildings shall forthwith be repaired, restored, or rebuilt, as the case may be, by the Landlord, at the Landlord's expense, to their condition immediately prior to such damage or destruction as speedily as possible. If the Landlord fails forthwith to commence or to complete the same with diligence, the Tenant shall have the option to make any such repairs, restoration, or rebuilding and charge the cost thereof to the Landlord. In such event, the Landlord shall pay the amount of such cost to the Tenant on demand with lawful interest thereon, and the Tenant may deduct such amount from any rent or other sums due or to grow due under this Lease. Until such repairs are completed, all provisions in this Lease with respect to the payment of any guaranteed minimum annual rental shall be eliminated, and the Tenant's only obligation with respect to rental shall be the payment of the percentage on gross sales in the amounts set forth in Paragraph 6 hereof, payable only after the expiration of the lease year in which such repairs are completed. In any case where such repairs are not proceeded with diligently by the Landlord, or in the case of substantial damage are not fully completed within four months after the date of damage, the Tenant may, at any time after such default, in addition to any other remedy available to it, terminate this Lease. In such event, this Lease shall terminate and both parties shall be relieved and discharged of and from any further liability hereunder, subject, however, to the provisions of Paragraph 2 hereof. The Landlord shall make no claim nor authorize any claim to be made against the Tenant, its employees, servants, or agents in connection with or as a result of fire, explosion, or other casualty damaging the Demised Premises.

28. Liability insurance. Tenant shall obtain liability insurance at Tenant's own expense. The minimum limits of such insurance shall be \$500,000 for any single injury, and \$1,000,000 in the aggregate. The policy shall name Landlord and Tenant as insured parties. Tenant may obtain coverage under a blanket policy, provided that limits affecting the demised premises are met. Tenant shall provide Landlord with a certificate of insurance prior to taking possession of the demised premises. Renewal certificates shall be provided each year during the term of the lease and extensions thereof, prior to the expiration of the previous certificate. Failure to provide a certificate of insurance shall be an event of default under the terms of this lease.

Tenant may not self-insure the demised premises for liability without first obtaining written permission from Landlord. Landlord may condition such permission on a review of Tenant's financial statements of its self-insurance program.

Landlord may withhold permission without cause.

In the event that Tenant fails to provide a certificate of insurance, Landlord, without prejudice to any other of its rights, may obtain such insurance and charge the cost thereof back to Tenant. Tenant shall reimburse Landlord upon receipt of the bill. Any policies of insurance obtained hereunder shall include a provision requiring the carrier to notify Landlord, in writing, of cancellation of the policy at least ten (10) days prior to the effective date of cancellation.

29. *Plate glass.* The Tenant shall replace any plate glass broken or damaged upon the Demised Premises at its own cost and expense, excepting that it shall not be obligated to replace any plate glass broken or damaged by or as a result of any casualty included as a risk in the insurance policies maintained or required to be maintained by the Landlord under this Lease. The Tenant may replace any plate glass broken or damaged by or as a result of a casualty included as a risk in any insurance policies maintained or required to be maintained by the Landlord under this Lease. However, in such event, the Landlord shall reimburse the Tenant for the cost or expense thereof together with interest thereon at the legal rate, on demand, and the Tenant may deduct such amounts from all rents or other sums due or to become due hereunder.

30. *Other leases.* The Landlord warrants that within six months of the signing of this agreement, it shall exhibit to the Tenant signed lease agreements covering other portions of the Shopping Center of which the Demised Premises are a part (the "Other Leases"), made with other tenants who meet the qualifications and requirements set forth in Schedule C annexed hereto (the "Other Tenants"). The Landlord warrants that the Other Leases shall contain its obligation to erect and complete stores for such Other Tenants and that such stores shall be ready for occupancy by the Other Tenants at or prior to the commencement date of this Lease. The Landlord also warrants that the Other Leases shall contain obligations by the Other Tenants requiring each of them to occupy their respective stores, open for business, and pay rentals under their respective Other Leases no later than the commencement date of this Lease. The Landlord shall furnish the Tenant, simultaneously with the furnishing of the various proofs referred to in Paragraph 4 hereof, certificates by the Landlord's architect as to the completion of the stores required by the Other Leases ready for occupancy by such Other Tenants and copies of the certificates of occupancy, if any, relating to the stores included in such Other Leases issued by any governmental agency in authority. At the same time, the Landlord shall also notify the Tenant herein that the Other Tenants are required to occupy their respective stores, open for business, and pay rental no later than the commencement date of this Lease.

If the Landlord fails to exhibit the Other Leases within the time hereinabove set forth, or if the Landlord or any of such Other Tenants fails to comply with any of the foregoing provisions respectively applicable to them relating to completion of stores, occupancy, and opening for business, the Tenant shall have the right at its option to:

(a) occupy the Demised Premises and commence or continue with business operations except that the Tenant's only obligation with respect to rental shall thereupon be the payment of percentage rentals only, with no guaranteed minimum annual rentals, on the basis of the percentages of gross sales set forth in Paragraph 6 hereof, such percentage rentals to be payable only after the expiration of each 12-month period of such business operation, so long as such condition shall continue. If the Tenant elects to exercise this option, the provisions of this subparagraph shall supersede all inconsistent provisions with respect to the payment of rental otherwise provided in this Lease, and the Landlord shall continue liable to perform all obligations imposed upon it under this Lease without being relieved or released therefrom by the Tenant's exercise of such option; or

(b) terminate this Lease at any time on written notice so long as such condition continues, which right to terminate may be exercised notwithstanding the Tenant's exercise of the option of preceding subparagraph (a). Such options are not mutually exclusive, and this option (b) may be exercised at any time so long as the Landlord or the Other Tenants have not complied with the provisions set forth above.

31. *Exclusive right of tenant.* The Landlord contemplates the erection of additional stores in the Shopping Center of which the Demised Premises constitute a part. The Landlord shall not during the term or any renewal of this lease, use,

permit, suffer, or consent to the use of any portion of the Shopping Center as a supermarket or for the retail sale of meats, groceries, produce, fruits, vegetables, seafood, dairy, delicatessen, poultry, or any other article of food unless the Tenant consents in writing thereto, subject to applicable regulations and statutes.

In the event that there is a breach of any provision of this paragraph, the Tenant shall have the following rights and remedies, none of which shall be exclusive of the others or any other remedy otherwise available to the Tenant:

- (a) The Tenant may institute proceedings to enjoin the violation in its name or in the name of the Landlord.
- (b) If such conflicting use continues for a period of ten days after the Tenant gives written notice thereof to the Landlord, the Tenant may, at any time thereafter, elect to terminate this Lease. If the Tenant so elects, this Lease shall, on the date fixed in the notice of such election, be terminated, and the Tenant shall be released and discharged of and from any and all further liability hereunder.
- (c) So long as such condition exists, the Tenant's only obligation with respect to rental shall be the payment of percentage rentals only, with no guaranteed minimum annual rentals, on the basis of the percentages of gross sales set forth in Paragraph 6. Such percentage rentals shall be payable only after the expiration of each lease year of the term, so long as such condition continues.
- (d) The Tenant may hold the Landlord liable for all costs and expenses, including counsel fees, sustained or incurred in connection with any proceedings instituted by the Tenant. If the Landlord does not institute and proceed diligently with suit to enjoin such conflicting use, the Tenant may hold the Landlord liable for any and all other damages sustained or to be sustained by reason of the violation of such covenant.

32. *Landlord's title.* The Landlord covenants that it is the owner in fee simple of the Shopping Center, the Demised Premises, and the Parking Area. The Landlord further covenants that the Tenant shall have quiet possession and enjoyment of the Demised Premises and the Parking Area during the term of this Lease. Simultaneously herewith the Landlord has furnished the Tenant with a certificate from a reputable title insurance company evidencing the Landlord's title to the Shopping Center, the Demised Premises, and the Parking Area, and that the Tenant can use same for the purposes herein stated, knowing that the Tenant relies thereon in executing this Lease. A similar certificate from the same title insurance company shall be furnished to the Tenant on the day that the Landlord notifies the Tenant that the Building is completed, which certificate, however, shall be dated as of the time of such completion notice. The premises indicated as the Loading Area on Schedule A annexed hereto and cross-hatched in red shall be deemed a part of the Demised Premises leased to the Tenant hereunder for its sole and exclusive use and shall not be deemed a part of the Parking Area.

33. *Parking area.* The Landlord represents, warrants, and agrees and this Lease is upon the express condition that:

- (a) The Landlord shall at all times during the term of this Lease or any extension or renewal thereof maintain a general Shopping Center upon the premises outlined in green on Schedule A. Such Shopping Center shall always have as a part thereof, or upon premises immediately contiguous or adjacent thereto, a Parking Area to furnish parking space without charge to all customers of the Shopping Center seeking parking, so that there shall be maintained at all times a ratio of at least three square feet of parking space for each square foot of floor area in the Shopping Center.
- (b) The Tenant shall at all times have the nonexclusive and nonrevocable right, together with the Other Tenants and occupants of stores in the Shopping Center, to the use of the Parking Area and driveways appurtenant thereto for purposes of egress, ingress, parking of motor vehicles for itself and its customers, and loading and unloading of vehicles in connection with and incidental to the business conducted by the Tenant on the Demised Premises, all without charge.
- (c) The Parking Area shall not be made available for use by employees of the Tenant or of Other Tenants or occupants

of the Shopping Center. A provision to that effect shall be included in all leases with all tenants or occupants of the Shopping Center.

(d) The Landlord shall, at its own cost and expense, grade, drain, and suitably hard surface the Parking Area to conform with the Tenant's requirements at or prior to the commencement of the term hereof.

(e) The Landlord shall at all times, during the term of this Lease, at its own cost and expense:

(1) Maintain floodlights and other means of illumination sufficient to illuminate the Parking Area during all twilight and evening hours that the Tenant's store is open for business and in operation;

(2) Maintain and keep the Parking Area in good condition with a hard-top surface pavement and properly striped, and clean and remove debris, ice, and snow therefrom, and provide suitable and sufficient traffic direction personnel as required;

(3) Permit free parking on the Parking Area at all times by the Tenant, its customers, and persons dealing with the Tenant; and

(4) Obtain and maintain public liability insurance covering the interests of the Landlord and the Tenant, indemnifying the Tenant and holding it harmless from any liability for personal injury, death, or property damage arising on or about the operations on the Parking Area. Such insurance shall be within limits of \$200,000/\$1,000,000 for personal injury and death, and \$50,000 for property damage. The Landlord shall also furnish the Tenant on demand with certificates evidencing the existence of such insurance.

(f) If at any time during the term of this Lease there shall be a default in or other noncompliance with any provision of this Paragraph 33, then, and in any such event, the Tenant shall have the following rights and remedies, none of which shall be exclusive of the others or any other remedy otherwise available to the Tenant:

(1) The Tenant may remedy or attempt to remedy any such default or other noncompliance and expend all sums necessary therefor at the Landlord's cost and expense. The sums so expended shall be payable to the Tenant on demand with lawful interest thereon, and may be deducted by the Tenant from all rents or other sums due or to become due hereunder;

(2) So long as any such default or other noncompliance continues, all provisions in this Lease with respect to the payment of any guaranteed minimum annual rental shall be eliminated, and the Tenant's only obligation with respect to rental shall be the payment of the percentage rentals on gross sales in the amounts set forth in Paragraph 6 hereof, payable only after the expiration of each lease year of the term so long as such condition shall continue;

(3) So long as any such default or other noncompliance continues, the Tenant may, on written notice, at its option, terminate and cancel this Lease, in which event the Tenant shall be relieved of any further liability hereunder.

34. *Condemnation*

(a) If any competent authority takes or condemns for any period of time the whole of the Demised Premises, or less than the whole of the Demised Premises but the remaining portions thereof are not sufficient in the Tenant's judgment to conduct its normal business operations, and the Tenant so notifies the landlord within one month after such taking, then this Lease shall thereupon terminate. In such event, the parties shall be relieved and discharged of all further liability hereunder accruing after the date of such taking, except that the rental accruing during the month of such taking shall be apportioned pro rata on a daily basis. In any such event, each party shall keep its own award (if separate awards are given by the condemning authority), or, if only one award is given for all interests in the Demised Premises, such award

shall be apportioned between the parties as their respective interests shall appear. For the purpose of any award, however, the value of the Tenant's interest in the Demised Premises shall be at all times determined as though all options to renew afforded the Tenant under this Lease had been unconditionally exercised.

(b) If the Tenant does not exercise the option to terminate arising upon a condemnation in the manner set forth in subparagraph (a) of this paragraph, or the taking on condemnation does not terminate this Lease, then, and in any event, this Lease shall continue in full force and effect, and the Landlord shall forthwith and diligently proceed to restore the Demised Premises to a condition as nearly as possible to that in which the Demised Premises were, prior to such taking, in the light of any reduced area of the Demised Premises. Such restoration shall be made under the supervision of any architect to be selected by the Landlord and the Tenant in accordance with plans and specifications to be prepared by the Landlord and to be approved by the Tenant, and to be prepared in such manner as to comply with the requirements of the Tenant in its business operations, the Tenant agreeing to cooperate in the preparation thereof. Until such restoration is completed, all provisions in this Lease with respect to the payment of any guaranteed minimum annual rental shall be eliminated, and the Tenant's only obligation with respect to rental shall be the payment of the percentage of gross sales in the amounts set forth in Paragraph 6 hereof, payable only after the expiration of the lease year in which such restoration is completed. Thereafter, such guaranteed minimum annual rental shall be equitably adjusted, taking into consideration the proportion and area of the Demised Premises taken, and the period of time of such taking. The Landlord and the Tenant shall bear the cost of such restoration pro rata in proportion to the amount of their respective awards, but in no event shall the Tenant's share thereof exceed the amount of its award. The Tenant shall pay the Landlord its share of the cost of the restoration as soon as all of the following events shall occur: the restoration is completed; a certificate therefor is issued by the architect selected by the Landlord and the Tenant to take charge of the work; and proper proof is submitted that all labor and materials in such work of restoration have been paid for and that no liens exist against the Demised Premises by reason thereof. Any controversy under this subparagraph (b) shall be submitted to three arbitrators, one selected by each party and the third by the other two arbitrators. The decision of a majority of the arbitrators shall be conclusive and binding. If the arbitrators are not so chosen or fail to render decision, either party may apply for relief to a court of competent jurisdiction of the state where the Demised Premises are located for the enforcement thereof.

35. *Union labor.* The Landlord agrees that whenever any repairs, alterations, or other work, including original construction of the Building, are to be performed by or for the Landlord on the Demised Premises, such work shall be performed only by recognized building trade union labor. However, in the event that union labor is unavailable, for any reason, Landlord shall be entitled to use non-union labor, provided that Landlord shall pay the prevailing wage as defined in the New York Labor Law and its accompanying regulations.

36. *Short form of lease.* For the purpose of recording some of the basic terms and conditions of this Lease, the Landlord shall execute, simultaneously upon the execution of this Lease, a short form of lease agreement for recording. It is understood that the agreement mentioned in this paragraph is for purposes of recordation only and is not intended to and shall not in anywise modify, amend, supersede, or otherwise affect this Lease.

37. *Enforcement of remedies.* Many of the foregoing provisions of this Lease contain obligations on the part of the Landlord or the Tenant or both. In many instances, various rights are granted to each party consequent upon default by the other party in the performance of such obligations. It is expressly understood and agreed that, notwithstanding anything herein contained to the contrary (except as otherwise provided in this Paragraph 37), each and every one of such rights on the part of either party to take advantage of a failure on the part of the other party to fulfill its such obligations shall be subject to the following limitations:

(a) The Tenant shall not have the right to declare this Lease at an end by reason of any default of the Landlord or to proceed with any suit or to avail itself of any remedy whatsoever provided for in this Lease or under the law, unless the Tenant shall have given to the Landlord written notice of the alleged default, and the Landlord for a period of ten days thereafter shall have failed to correct the alleged default. If the alleged default is of such a nature that it cannot be

completely remedied or cured within such ten-day period, then such default shall not be an enforceable default against the Landlord, if the Landlord shall have commenced curing such default within such ten-day period and shall proceed with reasonable diligence and good faith to complete the curing thereof. The ten-day notice provision herein set forth shall be inapplicable to any emergency.

(b) The Landlord shall not have the right to declare this Lease at an end by reason of any default of the Tenant or to proceed with any suit or to avail itself of any remedy whatsoever provided for in this Lease or under the law, nor shall the Tenant's right to exercise any option granted herein be deemed to have expired, unless the Landlord shall have given to the Tenant written notice of the alleged default or the failure to exercise any option, and the Tenant for a period of ten days thereafter shall have failed to correct the alleged default or to exercise such option. If the alleged default or failure to exercise any option is of such a nature that it cannot be completely remedied or cured or exercised within such ten-day period, then such default or failure to exercise shall not be deemed an enforceable default or failure of the Tenant, if the Tenant shall have commenced during such default or undertaken to exercise such option within such ten-day period and shall proceed with reasonable diligence and good faith to complete the curing or exercising thereof, as the case may be.

38. *Tenant's remedies.* Notwithstanding anything herein contained, in the event of any default on the part of the Landlord under this Lease, the Tenant shall, in addition to all other remedies available to it, have the right at its option:

(a) to continue this Lease in full force and effect, except that the Tenant's only obligation with respect to rental shall be the payment of the percentage rentals on gross sales in the amounts set forth in Paragraph 6 hereof during such period, in lieu of any guaranteed minimum rental set forth in this Lease, payable after the expiration of each lease year of the term hereof so long as such condition shall continue. If the Tenant shall elect this option (a), the provisions of this subparagraph shall supersede all inconsistent provisions with respect to the payment of any rental. Notwithstanding the Tenant's election to continue this Lease pursuant to this option (a), the Tenant may, at any time while such condition exists, by giving ten days' written notice, terminate this Lease;

(b) to terminate this Lease by giving ten days written notice, in which event the Tenant shall be relieved of and from any further liability hereunder.

39. *Notice to tenant.* The mailing of a written notice of demand by registered mail in a sealed, postpaid envelope addressed to the Tenant at 100 Railroad Avenue, Newark, New Jersey, shall be sufficient notice or demand in any case arising under this agreement.

40. *Notice to landlord.* The mailing of a written notice or demand by registered mail in a sealed, postpaid envelope addressed to the Landlord at 100 Fifth Avenue, New York, New York, shall be sufficient notice or demand in any case arising under this agreement.

41. *Minimum annual rental.* The minimum annual rental shall be based upon the cost to Landlord of the land comprising the Demised Premises and the cost of construction of the Building and that portion of the cost of site improvements upon the Shopping Center as shall be allocable to the Demised Premises.

The "cost of the land" allocable to the Demised Premises shall bear the same ratio to the cost of all land comprising the Shopping Center as the square footage of building area (exclusive of basement area not used for sales) contained in the Demised Premises bears to the total square footage of all building areas (exclusive of basement areas not used for sales) from time to time contained in all units (including the Demised Premises) located within the Shopping Center. The cost of construction of the Building shall be the actual cost of all general contract work generally included within a general contract for a building where a lump-sum price is obtained and where the scope of the work is within the building lines of the exterior store walls, including, but not limited to labor, materials, contractors' profits, supervision, surveys, tests and borings, permit fees, architects' and engineers' fees, completion bonds, insurance during construction, and cost of

construction loans or any funds used in lieu thereof at a rate not exceeding 4 percent per annum for construction loans or funds in lieu thereof. The cost of site improvements (as defined below) allocable to the Demised Premises shall bear the same ratio to the cost of all site improvements within the Shopping Center as the square footage of building area (exclusive of basement area not used for sales) contained in the Demised Premises bears to the total square footage of building areas (exclusive of basement areas not used for sales) from time to time contained in all units (including the Demised Premises) located within the Shopping Center.

The term site improvements shall mean all work outside the building lines of the exterior walls of any of the store units (including the Demised Premises) located in the Shopping Center.

All contracts for the construction of the Building and for any site improvements for the Shopping Center shall be subject to the Tenant's written approval. The cost of any work done or to be done by the Landlord, without contract, where the Tenant is chargeable with any portion thereof, shall also require the Tenant's written approval. The Landlord shall furnish the Tenant with satisfactory proof of all costs so incurred.

The minimum annual rental payable by the Tenant hereunder shall be a sum equal to 7.94 percent of the Rental Factor (as defined below).

The term "Rental Factor," as used in this Lease, shall mean the sum of the cost of (a) land, (b) construction, and (c) site improvements, as any of the foregoing may be allocable to the Tenant hereunder.

Such figure of 7.94 percent has been used by the parties hereto to conform with the Landlord's proposed mortgage financing of the Shopping Center through a Permanent Mortgage complying with the provisions of Paragraph 15 hereof, or other type of Permanent Financing selected by the Landlord, it being contemplated that the Landlord will procure a Permanent Mortgage or other Permanent Financing which would be fully amortized in 25 years through constant annual payments of combined principal and interest equal to 7.94 percent of the original principal amount of such mortgage, the interest on such mortgage being at the rate of 6.25 percent. In the event, however, that the annual constant payment under the mortgage or other financing as actually procured by the Landlord is changed by reason of a change in interest rates above or below 6.25 percent, the final constant percentage figure reflecting such changed interest rate shall be substituted for 7.94 percent of the Rental Factor in determining the minimum annual rental payable hereunder.

42. *Minimum annual rental during renewal periods.* During any renewal period set forth in Paragraphs 9 through 12 hereof, the annual rental payable by the Tenant shall be as follows:

(a) The minimum annual rental shall be a sum equal to 3 percent of the Rental Factor (as defined in Paragraph 41 hereof) in lieu of the minimum annual rental provided for the original term hereof.

(b) If during, but before the expiration of, any lease year during any renewal period, the gross sales (as defined in Paragraph 6) exceed $133\frac{1}{3}$ times the minimum annual rental payable during such renewal period, then $\frac{3}{4}$ of 1 percent of such excess gross sales above $133\frac{1}{3}$ times such minimum annual rental accrued to the end of each quarterly period of such lease year during such renewal period shall be paid by the Tenant to the Landlord at the time of the together with delivery of any quarterly statement deliverable during the balance of such lease year.

(c) Except as herein modified, all the provisions of Paragraph 6 shall be applicable to each lease year of such renewal period.

43. *Assignment.* The Tenant shall have the right to assign this Lease or sublet all or any part of the Demised Premises without the Landlord's consent. The Tenant, however, shall continue to remain liable under this Lease in accordance with the terms and conditions thereof.

44. *Entire agreement.* This Lease sets forth all the promises, inducements, agreements, conditions, and understandings between the Landlord and the Tenant relative to the Demised Premises, and there are no promises, agreements, conditions, or understandings, either oral or written, express or implied, between them other than are herein set forth. Except as herein otherwise provided, no subsequent alteration, amendment, change, or addition to this Lease shall be binding upon the Landlord or the Tenant unless reduced to writing and signed by them.

45. *Binding effect.* This agreement is binding upon and shall inure to the benefit of the respective parties hereto, their respective successors, legal representatives, and assigns.

46. *Non-waiver.* No delay or failure by either party to exercise any right under this Agreement, and no partial or single exercise of that right, shall constitute a waiver of that or any other right, unless otherwise expressly provided herein.

47. *Headings.* Headings in this Agreement are for convenience only and shall not be used to interpret or construe its provisions.

48. *Governing law.* This Agreement shall be construed in accordance with and governed by the laws of the State of New Jersey.

49. *Counterparts.* This Agreement may be executed in two or more counterparts, each of which shall be deemed an original but all of which together shall constitute one and the same instrument.

The parties hereto have caused these presents to be signed by their proper corporate officers and cause their proper corporate seals to be hereunto affixed the day and year first above written.

Central Realty Corporation

By: _____

[insert name and title]

Mountain Supermarkets, Inc.

By: _____

[insert name and title]

[Acknowledgments]

[Attach Exhibit A]

[Attach Schedule A]

[Attach Schedule B]

[Attach Schedule C]



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Current Legal Forms for Real Estate

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Current Legal Forms for Real Estate

Chapter 22 DEVELOPMENT AND SUBDIVISION

Part IV. FORMS

D. COMMERCIAL DEVELOPMENT Shopping Centers, Industrial Buildings and Office Buildings

26-22 Current Legal Forms for Real Estate FORM 22.60

FORM 22.60 Commercial lease--shopping center--common area maintenance charges imposed on tenants

COMMENT

This is a commercial lease for a "strip" mall containing a variety of retail businesses. A strip mall is a group of stores built alongside each other on a strip of land that runs parallel to a heavily-traveled roadway.

Typically, when a commercial lease is executed, the landlord is compensated in one of two ways. The first method is the payment of a fixed rental fee on a monthly, quarterly or annual basis. The second method provides for the payment of a percentage of either the tenant-business's gross receipts or net income (the "percentage-of-income" model).

The form below utilizes the first method: the tenant agrees to pay a monthly rental which is tied to the number of square feet included in the leased premises. This lease also contains a provision charging the tenant for the tenant's share of common area maintenance ("CAM"). Today, many real estate developers and other landlords are imposing CAM charges upon their commercial tenants. The term "common area maintenance" charges is very broadly defined to include nearly any operating expense the landlord incurs which is not tied to just one rental unit. It includes the following expenses, among others:

(1) cleaning the building;

(2) maintaining the building in good working condition, e.g., changing light bulbs, replacing worn carpeting, etc.

(3) repairing the building;

- (4) removing snow and ice;
- (5) repairing sidewalks, streets and parking areas;
- (6) providing for the removal of trash;
- (7) real property taxes;
- (8) liability and casualty insurance;
- (9) landscaping; and
- (10) lighting, electricity, gas, water and sewer service.

In stark contrast to the rental arrangement known as the "percentage-of-income" model, CAM charges guarantee that the landlord will receive a complete return of out-of-pocket expenses which benefit the entire mall. CAM charges also appear to be much fairer to tenants, who will each pay their pro-rata share of the expenses based on the number of square feet which they occupy within the mall.

In addition, CAM charges are very easy to calculate, seldom (if ever) requiring an accounting audit. The "percentage-of-income" model, on the other hand, always creates the potential for nasty disagreements between landlord and tenant, which can only be resolved through often lengthy, expensive and frustrating audits in which competing accountants analyze the tenant's business expenses and income.

FORM

AGREEMENT made this _____ [day] day of _____ [month],
 _____ [year], between _____ [insert name of entity] MANAGEMENT CORP., a
 corporation organized under the laws of the State of _____ [state] with offices for the transaction of
 business at _____ [address], in the City of _____ [city], County of
 _____ [county], and State of _____ [state] (hereafter referred to as "Landlord"), and
 _____ [insert name of entity], a general partnership with offices for the transaction of business at
 _____ [address], in the City of _____ [city], County of
 _____ [county], and State of _____ [state] (hereafter referred to as "Tenant").

WITNESSETH:

WHEREAS, Landlord is the owner of a retail strip mall commonly known as _____ [insert name of
 mall], located in the City of _____ [city], County of _____ [county] and State of
 _____ [state] (hereafter referred to as "premises"); and

WHEREAS, Tenant desires to lease Unit No. _____ [insert unit number] of said strip mall;

NOW, in consideration of the mutual promises contained herein, it is agreed as follows:

1. *Identification of leased premises.* Landlord hereby leases to Tenant the following premises at

_____ [insert name of mall]: _____ [e.g., one thousand (1,000)] square feet of floor space, as shown in the attached drawing as Unit No. _____ [insert unit number], for a term of _____ [number of years] years, to commence on _____ [date], and to end on the _____ [date], and to be used and occupied only as a _____ [e.g., gift shop specializing in monogrammed items].

2. *Rental fee.* Tenant shall pay the annual rent at the rate of _____ [e.g., twelve dollars (\$12.00)] per square foot, equaling _____ Dollars (\$ _____) _____ [e.g., twelve thousand dollars (\$12,000)] per year. This annual rent is to be paid in twelve (12) equal monthly payments of _____ Dollars (\$ _____) _____ [e.g., one thousand dollars (\$1,000)], each on the first day of each and every month.

(a) At the expiration of the term, if this Lease shall then be in full force and effect and Tenant shall have fully performed all of the terms and conditions of the Lease, Tenant shall have the right to extend this Lease upon the same terms and conditions contained herein, for an additional term of _____ [e.g., five (5)] years, to commence on _____ [date], and to end on _____ [date]. Notwithstanding the foregoing, the annual rental shall be adjusted as hereafter provided.

The option for the additional term shall be exercised by Tenant through the giving of written notice of intention to renew the Lease to the Landlord. Such notice shall be given at least _____ [e.g., six (6)] months prior to the expiration of the current term. In order to be eligible to extend the term of this Lease, Tenant must have fully performed all of the terms and conditions of said Lease. In the event Tenant is in default in any manner at the time notice is given to renew, or at any time prior to the commencement of the new term, the right to an additional term is automatically revoked.

(b) There shall be no right to extend the term of this Lease for any period of time beyond the expiration of the renewal term that is specified above.

(c) The annual rental amount for the renewal term shall be increased only if the interest rate which the landlord is paying on the mortgage note for the property containing the mall has increased by the date on which the new term commences. As of the date of execution of this Lease, the Landlord is paying _____ [e.g., the prime lending rate plus one (1) percent, which equals 7.5] percent per annum. The annual rental amount for the renewal term shall be increased by a percentage equal to the percentage increase in the interest rate which the Landlord pays. The Landlord will provide written proof of the increased interest rate if requested to do so by Tenant. The rental rate shall not decrease under any circumstances.

3. *Condition of leased premises*

(a) The premises to be leased shall be delivered to Tenant in the following manner:

- (1) the interior walls will be sheetrocked, taped, primed and ready for painting;
- (2) acoustical tile ceilings will be installed;
- (3) recessed lighting fixtures will be installed in ceilings and fully operational;
- (4) exit lights and electrical outlets will be installed and fully operational;
- (5) ventilation and air conditioning systems will be installed and fully operational;

(6) meters for water, gas and electric usage will be installed and fully operational;

(7) restrooms will be installed and fully operational;

(8) a gas or electric heating system will be installed and fully operational;

(9) a standard store front, with one front and one rear door, shall be in place; and

(10) a concrete floor covered with plastic floor tiles shall be in place.

(b) All other preparation expenses shall be the sole cost and responsibility of Tenant. All preparation plans of the Tenant shall be approved in writing by Landlord prior to the commencement of work. In such case, Tenant shall provide to Landlord proof of insurance, running from Tenant or his contractor to Landlord, as follows:

Workers' Compensation: statutory limit;

Liability: \$_____ [e.g.,
\$1,000,000 per claim/\$3,000,000 in
aggregate coverage];

Casualty: \$_____ [e.g.,
\$300,000].

The policies shall provide that notice of cancellation shall be given to Landlord at least _____ [e.g., ten (10)] days prior to the effective date of cancellation. Landlord and Tenant shall be named as additional insureds.

(c) Tenant shall take good care of the premises and shall, at Tenant's own cost and expense, make all necessary interior repairs, alterations, decorations and improvements to the leased premises during the period covered by this Lease. Tenant shall only use the premises in a manner consistent with Landlord's sustainability policies now adopted or adopted in the future, as and when made available to Tenant. Tenant agrees to make all its repairs and alterations so as not to violate Landlord's sustainability policies adopted for improvements made to the premises. All repairs, alterations, decorations or improvements made in or to the leased premises by Tenant shall become the property of Landlord and shall be surrendered with the premises at the termination of the Lease. However, Tenant shall have the right to remove or replace its movable trade fixtures, provided Tenant repairs any damage caused by such removal. The failure of Tenant to remove its fixtures or any of its other property at the termination of this Lease shall be deemed abandonment of such property, at the option of Landlord. If Landlord must remove such property, the cost of removal shall be deducted from Tenant's security deposit.

(d) At the end or other expiration of the lease term or any extensions thereof, Tenant shall deliver the leased premises to Landlord in good order and condition, damages by the elements and reasonable wear and tear excepted.

4. *Tenant shall comply with all relevant laws and ordinances.* Tenant, at its sole cost and expense, shall promptly comply with all statutes, ordinances, rules, orders, regulations and requirements of the federal, state and local governments which are applicable to said premises. Tenant shall promptly provide Landlord with a copy of any notice received from any such authority.

5. *Signs.* Landlord shall provide an identification sign for the _____ [insert name of mall] Mall, which shall include a smaller sign containing the name and logo of Tenant's business. Landlord shall seek approval from the Town of _____ [town] for the mall sign.

Tenant shall be obligated to obtain approval from the Town of _____ [town] for the sign to be placed

on the building directly above the entrance to Tenant's store. The size, content and appearance of the sign may be as prescribed by the Town of _____[town], but the sign must also be approved in advance by Landlord. The maximum size of the sign above Tenant's premises shall not exceed _____[e.g., two (2) feet by ten (10) feet]. The sign may contain only the name and logo of the Tenant. The cost of the sign application filed with the Town of _____[town] will be borne by Tenant alone. The cost of the sign shall be Tenant's sole expense. The signs for the individual tenants in the _____[insert name of mall] Mall shall be as uniform as practicable.

6. *No assignment or sublease without Landlord's consent.* Tenant shall not assign this Lease or sublease the premises, or any part thereof, without Landlord's prior written consent. Such consent shall not be unreasonably withheld. Landlord may condition such consent upon review of the assignee or sublessee's credit history. Upon receipt of the written consent, Tenant shall be released from all further liability for rent, provided that the sublessee or assignee first signs a new lease with Landlord.

7. *Leased premises are newly-constructed.* Landlord hereby represents that the space to be leased to Tenant is newly constructed. The space has not been previously leased or otherwise occupied. All plumbing, heating and mechanical systems are in good working order as of the date of this Lease.

8. *Environmental considerations.* Landlord represents that none of the present tenants in the _____[insert name of mall] Mall uses, stores or produces any substance in its business which may be deemed hazardous under state or federal laws and regulations. Landlord agrees, during the term of this lease and any extensions thereof, not to lease any space to any tenant who uses, stores or produces any substance deemed hazardous, as defined above. In the event of a breach of this covenant, Tenant shall be entitled to terminate this Lease agreement without penalty. However, nothing contained herein shall be deemed to render Landlord liable to Tenant for any expenses incurred in terminating the Lease and in relocating, including, but not limited to, moving expenses, "fit-up" costs, loss of business, or injury to person or property. Landlord agrees to include a provision in each tenant's lease specifically prohibiting the use, storage, creation or disposal of hazardous substances in the mall.

9. *Tenant does not use, store or produce hazardous substances.* Tenant represents that Tenant does not use, store or produce hazardous substances in the course of Tenant's business. Tenant agrees not to allow or suffer the use, storage or production of hazardous substances, as defined above, on the leased premises. A breach of this covenant will allow Landlord to terminate this Lease and will render Tenant liable for any damage sustained by Tenant's unit or by any other unit due to said usage, storage or production. Tenant agrees to comply at all times with Landlord's Environmental Management Plan attached hereto as an Exhibit, and made a part hereof.

10. *Tenant to notify Landlord of fire, accident, etc., on leased premises.* Tenant must give Landlord prompt notice of fire, accident, damage, or dangerous or defective condition on the leased premises. If the leased premises cannot be used because of fire or other casualty, Tenant is not required to pay rent for the time the premises are unusable. Landlord shall have the right to decide whether and which part of the premises are unusable. Landlord need only repair the damaged structural parts of the premises. Landlord shall return the leased premises in the same condition in which Landlord was required to deliver the premises to Tenant at the commencement of this Lease under Paragraph 3(a). Landlord is not required to repair or replace any equipment, fixtures, furnishings or decorations unless they were originally installed by Landlord. Landlord is not responsible for delays due to settling insurance claims, obtaining estimates, labor or supply problems, or any other matter that is not fully under Landlord's control. Tenant shall be responsible for the remainder of the repairs.

If there is substantial damage caused by fire or other casualty, Landlord has the right to demolish the building. Landlord may cancel this Lease within _____[e.g., thirty (30)] days after a fire or casualty that causes substantial damage by giving Tenant written notice of Landlord's intention to demolish. This Lease shall end upon Landlord's giving of the demolition notice to Tenant. Tenant shall then surrender the premises to Landlord immediately.

Tenant shall pay all rent due up to the date of the fire or casualty. If this Lease is so canceled, Landlord shall have no obligation to repair the premises or building, or to re-lease the premises to Tenant should Landlord make such repairs. Landlord, in its sole discretion, shall determine whether substantial damage has occurred.

11. *Landlord's right to examine leased premises during lease term.* Tenant shall permit Landlord and Landlord's agents and representatives to enter into and upon said premises, or any part thereof, at any reasonable hour, for the purpose of examining the same, or making such repairs or alterations as Landlord deems appropriate. In the event Landlord needs access to Tenant's space during non-business hours, Landlord shall give notice of its intention to enter at least _____ [e.g., twenty-four (24)] hours prior to entry. Tenant shall have the right to be present during such entry. In the event of an emergency, Landlord may enter the leased premises without having first received Tenant's permission.

12. *Landlord's rights when Tenant vacates premises during lease term or fails to pay rent.* If the premises become vacant during the term of this Lease, or if Tenant fails to pay the rent in full when due, or if Tenant violates any other provision of this Lease, Landlord or its duly-authorized representatives may re-enter the said premises, following issuance of an order of eviction by a court of competent jurisdiction, and remove all persons therefrom, without being liable to criminal or civil prosecution therefor. Tenant hereby expressly waives its right to the service of any written notice of Landlord's intention to re-enter upon default. Tenant shall remain responsible for all rent payments as they become due and payable under the terms of this Lease. Landlord may rent the premises on behalf of Tenant. Without releasing Tenant from any liability for rent, Landlord may rent the premises for a longer period of time than fixed in the original lease, or for a lower rental payment. Landlord shall apply any rent collected:

- (a) first, to the expense of obtaining possession, including court costs and reasonable attorneys' fees;
- (b) second, to restoring the premises to a rentable condition;
- (c) third, to the broker's fee for re-renting; and
- (d) fourth, to the payment of the rent and any other charges which may be due from Tenant.

Tenant shall remain liable for any deficiency.

13. *Lease is subordinate to any mortgage on the building.* This Lease shall be subordinate to any mortgage that is now on, or that hereafter may be placed against, said premises. The recording of such mortgage shall create a superior and prior lien to this Lease, regardless of the date of recording. Tenant agrees to execute, without cost to Landlord, any instrument which may be deemed necessary or desirable to further effect the subordination of this Lease to a mortgage. A failure to execute such instrument, after reasonable request by Landlord, shall be a violation of this Lease and shall entitle Landlord to commence proceedings to evict Tenant.

14. *Eminent domain.* If the whole or any part of the leased premises shall be taken by eminent domain, this Lease shall terminate on the date of the vesting of title to the said premises in the governmental body exercising its power of eminent domain. Tenant shall have no claim against Landlord for the value of any unexpired term of this Lease. No part of any award shall belong to Tenant.

15. *No right to trial by jury for any claim arising under lease.* Landlord and Tenant waive the right to trial by jury on any cause of action arising out of this Lease.

16. *Tenant's duty to pay rent is unconditional.* The obligation of Tenant to pay rent hereunder and to perform all other covenants shall not be excused because Landlord is unable to supply, or is delayed in supplying, any service or repair to be supplied by Landlord under the terms of this Lease, unless such inability or delay is due to gross negligence on the

part of Landlord. No diminution or abatement of rent or other compensation shall be claimed by or allowed to Tenant for any inconvenience, discomfort or other loss arising from the making of repairs or improvements to the building by Landlord. No interruption or curtailment of any service shall be deemed a constructive eviction.

17. *Utilities.* Tenant shall be responsible for payment of all utility bills relating to the leased premises, including gas, electricity, water, sewer and telephone. In the event that water and sewer usage are not separately metered for the leased premises, the cost of such services shall be included in the common area maintenance charges.

18. *Common area maintenance charge.* Landlord shall maintain the mall's common areas at all times. Tenant shall pay its proportional share of the cost of:

- (a) outdoor repairs, maintenance and landscaping;
- (b) common area maintenance and repairs;
- (c) snow and ice removal from the sidewalks and parking areas in and about the mall;
- (d) collection and disposal of rubbish and other refuse;
- (e) exterior lighting;
- (f) water and sewer charges not individually metered;
- (g) real property taxes; and
- (h) insurance and any other expenses which benefit all tenants,

together with a _____ [e.g., five (5)] percent overhead charge for bookkeeping and management expenses. Tenant is responsible for _____ [e.g., eight (8)] percent of the common area charges, as defined above, since Tenant presently occupies an equal percentage of the total leased area of the mall. Landlord shall compute the amount due from Tenant pursuant to this paragraph on a monthly basis and give notice to Tenant in writing. The bill shall be paid within _____ [e.g., fifteen (15)] days of the date of delivery of notice.

19. *Parking.* Tenant and employees of Tenant shall park their automobiles in the rear parking area designated by Landlord for employees. Landlord shall provide appropriate lighting and security for said area. Landlord shall be entitled to tow improperly-parked vehicles at the owners' expense and without notice.

20. *Tenant responsible for cleaning its unit.* Tenant shall be responsible for the cleaning and maintenance of Tenant's own unit. Tenant shall maintain its unit in a clean and orderly fashion. Tenant shall repaint, at least once per year, all areas visible to the public.

21. *Plate glass insurance.* Tenant, at its own cost and expense, shall maintain full coverage plate glass insurance on the premises. Landlord shall be named as an additional insured on all policies. Plate glass shall be cleaned at least weekly by Tenant.

22. *Security deposit.* Tenant shall pay to Landlord a security deposit in the amount of _____ Dollars (\$_____) _____ [e.g., \$1,000]. Said sum shall be returned to Tenant after the expiration of the term of this Lease and any additional terms, provided Tenant has fully performed all of the terms, covenants and conditions required hereunder.

23. *Arbitration.* Any disagreement between the parties with respect to the interpretation or application of this Lease, or the obligations of the parties hereunder, shall be determined by arbitration conducted under the auspices of the _____ [insert name of arbitrator, e.g., *Alternative Dispute Resolution Center*], located at _____ [address]. The arbitrator designated and acting under this Lease shall make the award in strict conformity with the terms of this Lease and applicable law, and shall have no power to depart from, or change any of, the provisions of this Lease. The expense of arbitration proceedings conducted hereunder shall be borne equally by the parties. All arbitration proceedings hereunder shall be conducted in the county in which the leased premises are located.

24. *Entire agreement.* This Agreement, together with the other written agreements and instruments executed concurrently herewith or pursuant to the provisions hereof, contains the entire agreement between the parties concerning the matters herein set forth and supersedes all prior agreements between them respecting such matters.

25. *Counterparts.* This Agreement may be executed in two or more counterparts, each of which shall be deemed an original, but all of which together shall constitute one and the same instrument. At the trial of any matter arising under this Agreement, only one counterpart need be produced.

26. *Headings.* Paragraph headings are for the purposes of convenience and identification only and shall not be used to interpret or construe this Agreement.

27. *Waivers.* Except as herein expressly provided, no waiver by either party of any breach of this Agreement, or of any warranty or representation hereunder, shall be deemed to be a waiver by the same party of any other breach of any kind or nature (whether preceding or succeeding the breach in question, and whether or not of the same or similar nature).

No acceptance by a party of payment or performance after any such breach shall be deemed to be a waiver of any breach of this Agreement or of any representation or warranty hereunder, whether or not the party knows of the breach when it accepts such payment or performance.

No failure by a party to exercise any right it may have under this Agreement or under law upon another party's default, and no delay in the exercise of that right, shall prevent it from exercising the right whenever the other party continues to be in default. No such failure or delay shall operate as a waiver of any default or as a modification of the provisions of this Agreement.

28. *Gender and number.* Whenever the singular or plural number, or the masculine, feminine or neuter gender, is used herein, it shall equally include the other(s).

29. *Notices.* Any notice which any party is required or may desire to give hereunder shall be in writing and may be personally delivered, transmitted by facsimile machine, or delivered by the United States Postal Service or private delivery service to the above addresses. Notice is deemed given when received.

30. *Governing law.* This Agreement shall be construed and enforced in accordance with the laws of the State of _____ [state].

31. *Binding effect.* This Agreement shall be binding upon, and inure to the benefit of, both parties and their respective heirs, representatives, successors and assigns.

The parties hereto have set their hands and seals the day and year first above written.

_____ MANAGEMENT CORP.

"Landlord"

By: _____

[insert name and title]

"Tenant"

By: _____

[insert name and title]

[Acknowledgments]



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Chapter 22 DEVELOPMENT AND SUBDIVISION

Part IV. FORMS

D. COMMERCIAL DEVELOPMENT Shopping Centers, Industrial Buildings and Office Buildings

26-22 Current Legal Forms for Real Estate FORM 22.61

FORM 22.61 Memorandum of lease

COMMENT

In many states around the nation it is customary for a commercial landlord to file a "memorandum of lease" once it has executed a commercial lease. Typically, the memorandum is filed with the clerk of the county where the leased premises are located.

The memorandum is usually considerably shorter than the lease itself, but it still contains the vital information found in the lease:

- (1) lease term;**
- (2) rental fee;**
- (3) whether the tenant has the right to renew;**
- (4) whether the rental fee for the renewal period may be increased;**
- (5) common area maintenance charges, if any;**
- (6) grounds for terminating the lease; and**
- (7) any other provisions which may affect title to the property.**

The reason for filing a brief memorandum is that recording fees are generally calculated on a per-page basis--which is, of course, an incentive for filing only the lease's material terms, rather

than the entire lease. In addition, the lease may contain provisions which the parties may not wish to make public.

The purpose of recording a memorandum of lease is to give the general public notice that the lease exists. For example, the tenant may wish to make known its rights under the lease to anyone who may want to purchase the property from the landlord. (This is especially true where the lease extends for a very long period of time.) And the landlord may wish to use the memorandum as proof to a commercial lender or title company of the terms of the lease.

The following memorandum assumes that the landlord is the owner of a retail shopping mall and that the tenant is one of the businesses leasing space within the mall.

FORM

MEMORANDUM OF LEASE

AGREEMENT between _____ [insert name of entity] MANAGEMENT CORP., a corporation organized under the laws of the State of _____ [state], with offices for the transaction of business at _____ [address], in the City of _____ [city], County of _____ [county], and State of _____ [state] (hereafter referred to as "Landlord"), and _____ [name of entity], a general partnership with offices for the transaction of business at _____ [address], in the City of _____ [city], County of _____ [county], and State of _____ [state] (hereafter referred to as "Tenant").

WITNESSETH:

WHEREAS, the parties hereto entered into a lease agreement dated _____ [date]; and

WHEREAS, the parties desire to record a memorandum of lease;

NOW, THEREFORE, the parties hereby record the following memorandum of lease:

1. The lease applies to Unit No. _____ [unit number] of _____ [insert name of mall, e.g., Heritage Village] Mall. The mall is more particularly described in Schedule A, which is annexed hereto and made a part hereof.
2. The term of the lease is for _____ [e.g., five (5)] years, commencing on _____ [date], and terminating on _____ [date].
3. The lease contains a right to renew for an additional term of _____ [e.g., five (5)] years, commencing on _____ [date], and terminating on _____ [date]. No other rights to renew are included.
4. The annual rent may increase during the renewal term.
5. The lease provides for the payment by Tenant of its *pro rata* share of common area maintenance charges.

6. The lease is subordinate to all mortgages now or hereafter in effect which are, or shall become, a lien against the subject premises.

7. The lease may not be orally amended.

8. Tenant has no right to purchase the mall or the unit included in the lease.

The parties hereto have set their hands and seals the day and year first above written.

_____ MANAGEMENT CORP.

"Landlord"

By: _____

[insert name and title]

"Tenant"

By: _____

[insert name and title]

[Acknowledgments]

[Attach Schedule A]



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Current Legal Forms for Real Estate

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Current Legal Forms for Real Estate
Chapter 22 DEVELOPMENT AND SUBDIVISION
Part IV. FORMS

D. COMMERCIAL DEVELOPMENT Shopping Centers, Industrial Buildings and Office Buildings

26-22 Current Legal Forms for Real Estate FORM 22.62

FORM 22.62 Lease in shopping center to be constructed by lessor--minimum and percentage rental--proportionate share of maintenance of common areas and tax increases borne by lessee

COMMENT

The planning and the leasing of space in a shopping center is often the handiwork of a developer. In working out the planning and leasing, the developer's primary concern is with the mortgagee and the principal large-store tenants who, typically, must be signed up first. Frequently, the economic power and the bargaining position of a large-store tenant greatly exceed that of the developer. In order to attract such a tenant, the developer must consult with him in the planning of the shopping center and its lease must be tailored to its specific requirements. On the other hand, smaller satellite tenants generally have no voice in planning the shopping center and little bargaining power when it comes to securing lease protection. What lease protection a satellite tenant can obtain will depend upon such factors as the size of the shopping center, the tenant's economic strength, the stage of development of the shopping center at the time the lease is executed, and the tenant's value based upon an estimate of its ability to attract shoppers to the shopping center.

Tenant restrictions.

In the following form, the relative strength of the parties is indicated by the degree of control retained by the landlord. The lease imposes minimum standards for the tenant's operation, stringent requirements for alterations and repairs, tight control over the tenant's signs and appearance, and a radius clause, which effectively protects the landlord's percentage rent by prohibiting the tenant from operating other stores in the area. The tenant is required to join a merchants' association and pay a proportionate part of the association's advertising and promotional expenses.

Use restriction.

In addition, at least 75 percent of the leased space must be devoted to the business of the tenant, as distinguished from licensees or concessionaires. This use restriction is intended to maintain the intended use of the satellite store in conformity with the character of the shopping center as well as protect the landlord's interest in percentage rent, which is based on the tenant's gross receipts.

Common charges for operation and taxes.

The tenant is required to pay a proportionate share of the operating cost of the common facilities, including sustainability costs incurred to keep the common facilities in compliance with Landlord's sustainability policies and a proportionate share of any increase in real estate taxes over taxes levied during the base period. Taxes of a landlord paid by a tenant are taxable as rent to the landlord and deductible by the tenant since the tenant is using the rental property for business purposes.

FORM

LEASE made this _____[day] day of _____[month],
 _____[year], by and between D & S Realty Company (the "Landlord") and Carker Stores, Ltd., a Delaware corporation (the "Tenant").

1. *Premises.* The Landlord demises unto the Tenant, and the Tenant leases from the Landlord, for the term and upon the terms and conditions hereinafter set forth certain parts of Building 12 consisting of approximately 10,000 square feet, to be erected (the "demised premises"), in the Charlottesville Shopping Center in Charlottesville, Virginia, the Shopping Center shown on Exhibit A attached hereto and made part hereof, and the demised premises being outlined in red on Exhibit B which is attached hereto and made part hereof, together with the right to the nonexclusive use, in common with others, of all such automobile parking areas, driveways, footways, and other facilities designed for common use, as may be installed by the Landlord and the other fee owners of the property comprising in total the Shopping Center (jointly and severally the "Owner"), and of such other facilities as the Owner may from time to time provide or designate for the common use, subject to the terms and conditions of this Lease and to the rules and regulations for the use thereof, set forth in Exhibit C, attached hereto and incorporated as a portion of this Lease as if it had been fully set forth within the body hereof.

2. *Possession.* (a) The Landlord warrants that it is the owner of the tract of land shown on Exhibit A (the "Landlord's property"), and shall develop upon such tract commercial buildings with parking areas and improvements generally in accordance with such Exhibit and that, subject to any delays caused by governmental restrictions, scarcity of labor or materials, strikes, or for reasons beyond its control, it shall proceed with due diligence to complete the project.

(b) The Landlord shall construct the demised premises substantially in accordance with the specifications set forth in Exhibit D attached hereto and made part hereof, and shall notify the Tenant in writing at least ten days prior to the completion thereof, and such notification shall constitute delivery of possession at the end of the ten-day period. At any time prior to the delivery of possession of the demised premises, the Tenant, its agents, servants, and contractors shall have the right at their own risk to enter thereon for the purpose of taking measurements, but for no other purpose, provided, however, that such entry shall not interfere with or obstruct the progress of the work being done by the Landlord.

(c) Upon receiving possession of the demised premises from the Landlord, the Tenant shall proceed with due diligence to install such stock, fixtures, and equipment and perform such other work necessary or appropriate to prepare the

demised premises for the opening of business. In the event that the Tenant does not open the demised premises for the conduct of its business within 90 days after receiving possession thereof, as provided in subparagraph (b), the Landlord shall have, in addition to all other remedies it may have, the right at its option to collect not only the minimum rent herein provided, but additional rent at the rate of one fifteenth of the minimum monthly rental per day for each day that the Tenant shall fail to commence to do business as herein provided. Such additional rental shall be deemed to be in lieu of any percentage rent that might have been earned during such period of the Tenant's failure to open. The Landlord shall have the right at any time thereafter to terminate this Lease by giving the Tenant written notice of such termination, whereupon this Lease shall be terminated, except for the Landlord's rights and remedies upon termination, as hereinafter provided. The Tenant shall submit to the Landlord, on or before 60 days after the signing of this Lease, plans and specifications covering all work which the Tenant proposes to do in the demised premises. Such plans and specifications shall be prepared in such detail as the Landlord may require, and the Tenant shall not commence any work until the Landlord has approved such plans and specifications in writing. The Landlord shall act with reasonable promptness with respect to such plans and specifications. In no event shall the Tenant be required to open for business nor shall the rent commence before Rudge's Department Store is open for business in the Shopping Center.

(d) By occupying the demised premises after the delivery of possession to install fixtures, facilities, or equipment, or to perform finishing work, the Tenant shall be deemed to have accepted the same and to have acknowledged that the premises are in the condition required by this Lease.

3. *Use.* (a) The Tenant shall use and occupy the demised premises solely for the conduct of a store for the retail sale of furniture and furnishings, and for no other purpose.

(b) The Tenant shall continuously, during the full term of this Lease, and every extension or renewal thereof, keep the entire demised premises occupied and open for business during the hours hereinafter specified. At least 75 percent of the sales floor area of the demised premises shall at all times be devoted to the business of and be operated by the Tenant, as distinguished from the Tenant's licensees, concessionaires, etc. Tenant shall use the demised premises in a manner consistent with the Landlord's sustainability practices or policies adopted by the Landlord from time to time, and promulgated to Tenant in writing.

4. *Term.* The term of this Lease shall commence on the date when the Landlord shall deliver possession of the demised premises to the Tenant, as provided in Paragraph 2, and shall end (unless sooner terminated as hereinafter provided) at midnight on the date of the expiration of 15 full years from the first day of the calendar month next succeeding the Rental Commencement Date, as defined in Paragraph 5. The parties hereto shall execute, within 30 days after the Rental Commencement Date, a Supplement to this Lease, in the form attached hereto as Supplement 1, fixing the definite date of the ending of the term of this Lease.

5. *Rental.* (a) The Tenant shall pay to the Landlord minimum annual rentals as follows:

During the 1st year: \$3,000 per year;

During the 2d year: \$4,000 per year;

During the 3rd to 15th \$5,000 per year;

payable in advance in equal monthly installments on the first day of each calendar month during the term hereof. Such minimum rental shall start to accrue on the date that the Tenant opens the demised premises for business but, in any event, no later than 60 days after the Landlord delivers possession of the demised premises to the Tenant (the "Rental Commencement Date"). The first rental payment date hereunder shall be the first day of the first calendar month following the Rental Commencement Date. On that date the Tenant shall pay to the Landlord a prorated amount applicable to the period from the Rental Commencement Date to such first rental payment date.

(b) For each lease year during the term hereof, the Tenant shall pay, in addition to minimum rent, percentage rental which shall be the amount by which 3 percent of the Tenant's gross receipts exceeds the minimum rental paid for such period; provided, however, that for the first lease year the Tenant shall pay, in addition to minimum rent, percentage rental which shall be the amount by which 3 percent of the Tenant's gross receipts during the first lease year exceeds the minimum rent paid in the first lease year.

(c) Each lease year shall be divided into four quarterly periods, ending respectively on the last day of March, June, September, and December. The first lease year shall begin on the Rental Commencement Date, and shall extend through the balance of the current quarterly period and through the three next ensuing quarterly periods. Thereafter, each lease year shall commence on the day following the expiration of the preceding lease year and shall end at the expiration of 12 calendar months thereafter.

(d) (1) Within 30 days after the end of each quarterly period during the term of this Lease, the Tenant shall submit to the Landlord an accurate, unaudited, written statement signed by the Tenant or on its behalf by a duly authorized officer or representative, showing by month the full amount of the Tenant's gross receipts in the demised premises during such quarterly period.

(2) Within 30 days after the end of each lease year, commencing with the first lease year, the Tenant shall submit to the Landlord a complete statement certified by an independent certified public accountant and also certified by the Tenant or on its behalf by a duly authorized officer or representative, showing accurately and in reasonable detail the full amount of the Tenant's gross receipts in the demised premises during the immediately preceding lease year and the percentage rental for such lease year. At the same time, the Tenant shall pay to the Landlord the percentage rent payable for such lease year, if any. The receipt by the Landlord of any payment of percentage rent for any period or the failure of the Landlord to make an audit for any period shall not bind it as to the correctness of the Tenant's statement of percentage rental due hereunder or the correctness of the Tenant's payment of percentage rental, nor bind the Landlord from collecting at any time thereafter the percentage rental actually due for such period.

(e) The term gross receipts as used herein means gross receipts of the Tenant and of all its licensees, concessionaires, and tenants, from all business conducted upon or from the demised premises, whether such receipts be obtained at the demised premises or elsewhere, and whether such business be conducted by the Tenant or by its licensees, concessionaires, or tenants, and whether such receipts be evidenced by check, credit, charge account, exchange, or otherwise. The term gross receipts shall include, but not be limited to, the amounts received from the sale of goods, wares, and merchandise and for services performed, together with the amount of all orders taken, received, or filled at the demised premises. If any one or more departments or other divisions of the Tenant's business shall be sublet by the Tenant or conducted by any person, firm, or corporation other than the Tenant, there shall be included in gross receipts for the purpose of fixing the percentage rent payable hereunder all the gross receipts of such departments or divisions, whether such receipts be obtained at the demised premises or elsewhere, in the same manner and with the same effect as if the business or sales of such departments and divisions of the Tenant's business had been conducted by the Tenant itself. Provided, and to the extent the sales price of merchandise has originally been included in gross receipts, there may be deducted from gross receipts allowances made on merchandise claimed to be defective or unsatisfactory, refunds for merchandise returned, and the sales price of merchandise delivered to the customer in exchange. Gross receipts shall not include the amount of any sales or gross receipts tax levied directly on sales and collected from customers, provided that specific record is made at the time of each sale of the amount of such sales or gross receipts tax and the amount thereof is separately charged to the customer.

(f) The business of the Tenant and of any sublessee, licensee, or concessionaire upon the demised premises shall be operated so that a duplicate sales slip, invoice, or nonresettable cash register receipt, serially numbered, shall be issued with each sale or transaction, whether for cash, credit, or exchange. The Tenant shall keep at all times during the term hereof, at the demised premises or at its general office, full, complete, and accurate books of account and records in

accordance with accepted accounting practices with respect to all operations of the business to be conducted in or from the demised premises, including the recording of gross receipts and the receipt of all merchandise into and the delivery of all merchandise from the demised premises during the term hereof. The Tenant shall retain such books and records, as well as all contracts, vouchers, checks, inventory records, and other documents and papers in any way relating to the operation of such business, for at least two years from the end of the lease year to which they are applicable, or, if an audit is required or a controversy should arise between the parties hereto regarding the rent payable hereunder, until such audit or controversy is terminated. Such books and records shall at all reasonable times during the retention period referred to above be open to the inspection of the Landlord or its duly authorized representatives, who shall have full and free access thereto and the right to require of the Tenant, its agents, and employees such information or explanation with respect thereto as may be necessary for a proper examination, and, further, shall have the right to copy and duplicate, at the Landlord's expense, such information as the Landlord may require.

(g) If it is determined that the actual gross receipts for any period covered by the statement required pursuant to subparagraph (d)(2) of this Paragraph 5, shall exceed the amount thereof shown in such statement by 5 percent or more, the Tenant shall pay all the expenses incurred in determining the actual gross receipts for such period. If any audit by the Landlord or its agents of the Tenant's records shall reveal a deficiency in any payment of percentage rental, the Tenant shall, within five days of being notified of any such deficiency, pay to the Landlord the amount of such deficiency, plus interest at 6 percent per year from the date when such payment should have been made.

(h) The relationship of the parties during the term of this Lease shall at all times be that of landlord and tenant. Neither the Landlord nor the Tenant shall be deemed to be a partner or engaged in a joint venture with or an associate of the other in the conduct of its business, nor shall the Tenant or the Landlord be liable for any debts incurred by the other in the conduct of its business, nor shall anything contained herein be deemed or construed to confer upon the Landlord or the Tenant any interest in the other's business.

(i) Tenant shall pay all rentals and other charges to the Landlord's agent, S. Nipper Corp., and render all statements herein prescribed to such agent at 10 Paradise Lane, Charlottesville, Virginia, or to such other person or corporation and at such other place as the Landlord shall designate in writing at least ten days prior to the next ensuing rental payment date.

6. *Common use areas and facilities.* (a) All facilities furnished in the Shopping Center and designated for the general use, in common, of occupants of the Shopping Center, including the Tenant, its officers, agents, employees, and customers, shall at all times be subject to the Owner's exclusive control and management. Such facilities shall include, but not be limited to, parking areas, streets, sidewalks, canopies, roadways, loading platforms, washrooms, shelters, ramps, landscaped areas, and other similar facilities. The Owner shall have the right from time to time: to change the area, level, location, and arrangement of such parking areas and other facilities above referred to; to restrict parking by tenants and their employees to employee parking areas in accordance with the provisions of Exhibit C; to do such things as in the Owner's sole discretion may be necessary regarding such facilities; and to make all rules and regulations pertaining to and necessary for the proper operation and maintenance of the common facilities, all in accordance with the provisions of Exhibit C. Subject to the provisions of Paragraph 7, the Landlord warrants that during the term hereof there shall be available for the use of the customers of the Shopping Center parking spaces for 500 American-made automobiles.

After the Rental Commencement Date, the Landlord shall not, nor permit others, including the Owner, to build any sign, fence, building, parking ramp, or garage or parking level, which shall unreasonably obstruct the view of the demised premises.

(b) In each lease year, the Tenant shall pay to the Landlord as additional rent such proportion of the Landlord's respective operating cost of common facilities as the gross floor area of the demised premises bears to the gross rentable floor area of all the Landlord's buildings in the Shopping Center.

(c) For the purposes of this paragraph, the Landlord's respective operating cost of common facilities is defined as including all of the Landlord's portion of the cost and expenses of operating and maintaining the common facilities in the Shopping Center, either individually or jointly with the other owners of the Shopping Center, and shall be deemed to include, without limitation, landscaping, sanitary control, cleaning, lighting, snow removal, resurfacing, painting, fire protection, public liability and property damage insurance, repairs, policing, costs incurred to carry out Landlord's sustainability practices with respect to the common facilities, and the Landlord's overhead expense for administering the same.

(d) The annual charge shall be computed on the basis of periods of 12 consecutive calendar months as designated by the Landlord, and shall be paid by the Tenant in equal installments in advance on the first day of each calendar quarter in an amount estimated by the Landlord. Within 60 days after the end of each such 12-month period, the Landlord shall furnish to the Tenant a statement showing in reasonable detail the amount of the Landlord's portion of such operating costs for the preceding period, any necessary adjustments thereupon to be made, and the quarterly payments to be made by the Tenant for the ensuing year estimated accordingly. Changes in applicable floor areas shall result in corresponding pro rata adjustments.

7. *Tenants' association.* The Tenant shall maintain a membership in a Tenants' Association authorized and recognized by the Landlord and established by the tenants in the Shopping Center, and shall pay to the Tenants' Association each lease year, when bills are rendered, an amount not less than two cents per square foot of total area of the demised premises for promotional and advertising purposes. The Tenant shall use the name Charlottesville Shopping Center prominently as part of its address in all of its advertising and promotional literature, but the name shall not be used at any location other than the demised premises.

8. *Public utilities.* The Tenant shall pay for all utilities, used or consumed in or upon the demised premises, and all sewer charges, as and when the charges therefor become due and payable. If the Landlord elects to furnish any utility services to the Tenant, the Tenant shall purchase the same from the Landlord, provided the Landlord shall charge therefor the same consumer rate as is charged by the public service corporation or municipal authority, as the case may be, supplying similar services in the general area in which the demised premises are situated. The Landlord shall not be liable to the Tenant for any damages should the furnishing of any utilities by the Landlord be interrupted or required to be terminated because of necessary repairs or improvements or any cause beyond its reasonable control. Nor shall any such interruption or cessation relieve the Tenant from the performance of any of its covenants hereunder.

9. *Taxes.* (a) Commencing with the calendar year next following the calendar year for which the total real estate tax assessment upon the Landlord's property in the Shopping Center shall reflect the completion of the building of which the demised premises are a part, the Tenant shall pay to the Landlord each year on demand, as additional rent, the Tenant's share of excess real estate taxes, if any, as hereinafter described.

(b) The Tenant's share of excess real estate taxes for any such calendar year shall be the sum equal to the product obtained by multiplying the number of square feet of gross floor area leased to the Tenant by the amount, if any, that the current tax per square foot for such calendar year exceeds the basic tax per square foot. The basic tax per square foot shall be computed by dividing the amount of the total real estate taxes levied on the Landlord's buildings, land, and land improvements for the first calendar year for which the assessment thereof reflects the completion of the building of which the demised premises are a part by the total number of square feet of mall-level rentable floor area of the Landlord's property in the Shopping Center reflected in such assessment. The current tax per square foot for any calendar year shall be computed by dividing the amount of the total real estate taxes levied on the Landlord's buildings, land, and land improvements in the Shopping Center for such calendar year by the total number of square feet of mall-level rentable floor area in the Landlord's property in the Shopping Center reflected in the real estate tax assessment thereof for such calendar year.

10. *Repairs.* The Landlord shall keep the roof and the exterior walls of the premises, excepting any work done by the Tenant and any glass or doors, in proper repair, provided that in each case the Tenant shall have given the Landlord prior written notice of the necessity of such repairs; and provided, further, that if any such repair is required by reason of the Tenant's negligence or the negligence of any of its agents, employees, or customers, or other person using the premises with the Tenant's consent, express or implied, the Landlord may make such repair and add the cost thereof to the first installment of minimum rent which shall thereafter become due. The Tenant shall keep the interior of the demised premises, which includes, but is not limited to, all electrical, plumbing, heating, air conditioning, and other mechanical installation therein, all doors, and all plate glass and door and window glass, in good order, making all repairs, alterations, replacements, and modifications at its own expense and using materials and labor of a kind and quality equal to the original work. The Tenant shall surrender the demised premises at the expiration or earlier termination of this Lease in as good condition as when received, excepting only deterioration caused by ordinary wear and tear and damage by fire or other casualty of the kind insured against in standard policies of fire insurance with extended coverage. Except as hereinabove provided, the Landlord shall have no obligation to repair, maintain, alter, replace, or modify the demised premises or any part thereof, or any electrical, plumbing, heating, air conditioning, or other mechanical installation therein.

11. *Tenant's right to make alterations.* The Tenant shall not make any alterations, improvements, or additions to the demised premises during the term of this Lease or any extension thereof without first obtaining the Landlord's written consent. The Tenant shall not cut or drill into, or secure any fixture, apparatus, or equipment of any kind to any part of the demised premises without first obtaining the Landlord's written consent. All such alterations, improvements, and additions made by the Tenant shall remain upon the premises at the expiration or earlier termination of this Lease and shall become the property of the Landlord, unless the Landlord shall, prior to such termination, have given written notice to the Tenant to remove the same. In such event, the Tenant shall remove such alterations, improvements, and additions and restore the premises to the same good order and condition in which they were at the commencement of this Lease. Should the Tenant fail so to do, the Landlord may so do, collecting the cost and expense thereof from the Tenant as additional rent, or, at the Landlord's option, by application of the security deposit required hereunder.

12. *Affirmative covenants of tenant.* The Tenant covenants that it shall:

- (a) Comply with the terms of any state or federal statute or local ordinance or regulation applicable to the Tenant or its use of the demised premises, and save the Landlord harmless from penalties, fines, costs, expenses, or damages resulting from its failure so to do.
- (b) Comply with the terms and conditions set forth in Exhibit C attached hereto relating to the use, operation, and maintenance of the common facilities.
- (c) Give to the Landlord prompt written notice of any accident, fire, or damage occurring on or to the demised premises and the common area.
- (d) Arrange for loading and unloading of goods to be done only at such times, in the areas, and through such entrances as the Landlord may designate for such purposes. Subject to the provisions of Exhibit C, trailers or trucks shall not be permitted to remain parked overnight in any area of the Shopping Center, whether loaded or unloaded.
- (e) Keep all garbage and refuse in the kind of container specified by the Landlord and place the same outside of the premises prepared for collection in the manner and at the times and places specified by the Landlord, and in accordance with municipal regulations.
- (f) Keep the premises sufficiently heated to prevent freezing of water in pipes and fixtures.
- (g) Keep the outside areas immediately adjoining the premises clean and free from ice and snow, and not burn, place, or

permit any rubbish, obstructions, or merchandise in such areas.

(h) Keep the demised premises clean, orderly, sanitary, and free from objectionable odors and from insects, vermin, and other pests.

(i) Require the Tenant's employees to park their cars only in those portions of the parking area or at such other places as the Landlord shall designate for that purpose. The Tenant shall from time to time, upon written notice, furnish the Landlord with the state automobile license numbers assigned to the Tenant's cars and the cars of all the Tenant's directors, officers, employees, agents, contractors, subtenants, licensees, and concessionaires.

(j) Keep its display windows, including window and shadow boxes, in the demised premises dressed and illuminated and its exterior signs and lights continuously well-lighted every day of the term of this Lease from dusk and thereafter during such time as the store occupied by Rudge's Department Store maintains illumination for its display windows, exterior signs, and exterior advertising displays. The Tenant shall open for business at least six days and five nights in each week, opening by at least 10 a.m. each morning, and remaining open each night so long as Rudge's Department Store remains open for business to the general public, and such additional hours as may become the standard as maintained by a majority of the tenants in the Shopping Center.

(k) Conduct its business in the demised premises in a dignified manner and keep the demised premises in first-class condition in accordance with high standards of store operation, maintaining a full and complete stock of seasonable merchandise so as to attain the highest possible sales volume.

(l) Comply with all the Landlord's rules and regulations in effect at the time of the execution of this Lease or at any time and from time to time promulgated by the Landlord, which the Landlord in its sole discretion shall deem necessary in connection with the demised premises, the building of which the demised premises are a part, or the Shopping Center, including the installation of such fire extinguishers and other safety equipment as the Landlord may require; and comply with the recommendations of the Landlord's insurance carriers and their rate-making bodies.

(m) Do all things necessary to prevent the filing of any mechanics' or other liens against the demised premises or any part thereof by reason of work, labor, services, or materials supplied or claimed to have been supplied to the Tenant, or anyone holding the demised premises, or any part thereof, through or under the Tenant. If any such lien shall at any time be filed against the Tenant's interest in the demised premises, the Tenant shall either cause the same to be discharged of record within 20 days after the date of filing of the same, or, if the Tenant, in the Tenant's discretion and in good faith, determines that such lien should be contested, the Tenant shall furnish such security as may be necessary or required to prevent any foreclosure proceedings against the Tenant's interest in the demised premises during the pendency of such contest. If the Tenant shall fail to discharge such lien within such period or fail to furnish such security, then, in addition to any other right or remedy of the Landlord resulting from the Tenant's default, the Landlord may, but shall not be obligated to, discharge the same either by paying the amount claimed to be due or by procuring the discharge of such lien by giving security or in such other manner as is, or may be, prescribed by law. Nothing contained herein shall imply any consent or agreement by the Landlord to subject its estate to liability under any mechanics' or other lien law.

(n) Repay the Landlord, as additional rent, on demand, all sums disbursed or deposited by it pursuant to the foregoing provisions of this Article, including the Landlord's costs, expenses, and reasonable attorneys' fees incurred by it in connection therewith.

13. *Negative covenants of tenant.* The Tenant covenants that it shall not do any of the following without the Landlord's prior written consent:

(a) Use or operate any machinery that, in the Landlord's opinion, is harmful to the building or disturbing to other tenants in the building of which the demised premises are a part or use any loudspeakers, televisions, phonographs, radios, or

other devices in a manner so as to be heard or seen outside of the demised premises, or display merchandise on the exterior of the demised premises either for sale or for promotional purposes.

(b) Do or suffer to be done, anything objectionable to the fire insurance companies whereby the fire insurance or any other insurance now in force or hereafter to be placed on the demised premises or any part thereof, or on the building of which the demised premises may be a part, shall become void or suspended, or be rated as a more hazardous risk than at the date when the Tenant receives possession hereunder. In case of a breach of this covenant, in addition to all other remedies of the Landlord hereunder, the Tenant shall pay to the Landlord as additional rent any increase of premiums on insurance carried by the Landlord on the demised premises, or any part thereof, or on the building of which the demised premises may be a part, caused in any way by the Tenant's occupancy.

(c) Attach any awning, antenna, or other projection to the roof or the outside walls of the demised premises or the building of which the demised premises are a part.

(d) Conduct any auction, fire, bankruptcy, selling out, or going out of business sale on or about the demised premises.

(e) Commit or suffer to be committed by any person any waste upon the demised premises or any nuisance or other act which may disturb the quiet enjoyment of (1) any other tenant in the Shopping Center, or (2) any person within 500 feet of the boundaries of the Shopping Center.

(f) Solicit business for itself, or permit its licensees or concessionaires to solicit business in the parking or other common areas, nor shall any of them distribute any handbills or other advertising matter in or on automobiles parked in a parking area or in other common areas.

14. *Signs.* The Tenant shall not decorate, paint, or in any other manner alter the demised premises, and shall not install or affix any sign, device, fixture, or attachment on or to the exterior of the demised premises, or any building thereon, including the roof or the canopy thereof, without first obtaining the Landlord's written consent and complying in all respects with the standards set for such signs, or other decoration in Exhibit C, attached hereto. If the Tenant shall do any of the foregoing acts in contravention of this provision, the Landlord shall have the right to remove any such decoration, paint, alteration, sign, device, fixture, or attachment and restore the demised premises to their condition prior to such act, and the Tenant shall pay the cost of such removal and restoration as additional rental payable for the month next following such removal or restoration.

15. *Rights of landlord.* The Landlord reserves, in addition to all other rights reserved herein, the following rights with respect to the demised premises:

(a) At all reasonable times, by itself or its duly authorized agents, to go upon and inspect the demised premises, and at its option to make repairs, alterations, and additions thereto or to the building of which the demised premises are a part. If the Tenant shall not be personally present to open and permit an entry by the Landlord into the demised premises, at any time, and for any reason an entry therein shall be necessary in the sole discretion of the Landlord, the Landlord or the Landlord's agents may enter the same by a master key, or make forcible entry without rendering the Landlord or such agents liable therefor and without in any manner affecting the obligations and covenants of this Lease.

(b) To display a "For Sale" sign at any time, and also, after notice from either party of intention to terminate this Lease, or at any time within three months prior to the expiration of this Lease, to display a "For Rent" sign. Such signs shall be placed upon such part of the demised premises as the Landlord shall require, except on display windows or doors leading into the demised premises. Prospective purchasers or tenants authorized by the Landlord may inspect the premises at reasonable hours at any time.

(c) To install or place upon, or affix to, the roof and exterior walls of the demised premises equipment, signs, displays,

antennas, and any other object or structure of any kind, provided the same shall not materially impair the structural integrity of the building.

The exercise of any right reserved to the Landlord in this paragraph, or otherwise, shall not be deemed an eviction or disturbance of the Tenant's use and possession of the demised premises and shall not render the Landlord liable in any manner to the Tenant or to any other person.

16. *Damage to premises.* If the demised premises shall be damaged by fire or other casualty of the kind insured against in standard policies of fire insurance with extended coverage, but are not thereby rendered untenable in whole or in part, the Landlord shall promptly, at its own expense and to the extent required in Exhibit D, cause such damage to be repaired, and the rent shall not be abated. If, by reason of such occurrence, the premises shall be rendered untenable only in part, the Landlord shall promptly at its own expense cause the damage to be repaired to the extent required by its original obligation to build as set forth in Exhibit D attached hereto, and the minimum rent, meanwhile, shall be abated proportionately as to the portion of the premises rendered untenable. If the premises shall be rendered wholly untenable by reason of such occurrence, the Landlord shall promptly at its own expense cause such damage to be repaired to the extent required by its original obligation to build as set forth in Exhibit D, and the minimum rent meanwhile shall be abated in whole, provided, however, that there shall be no extension of the term of this Lease by reason of such abatement. If the demised premises shall be rendered wholly untenable after the beginning of the last two years of the term of this Lease, the Landlord may terminate this Lease by notice to the Tenant, such notice to be given within 30 days of the event rendering the demised premises wholly untenable, provided that such termination shall not affect any rights theretofore accrued to the Landlord hereunder because of the Tenant's prior defaults. Except as herein provided, the Landlord shall have no obligation to repair or rebuild in case of fire or other casualty.

17. *Indemnification and public liability insurance.* The Tenant shall: (a) Indemnify the Owner and save it harmless from and against any and all claims, actions, damages, liability, and expense in connection with loss of life, personal injury, or damage to property occurring in or about, or arising out of, the demised premises and adjacent sidewalks and loading platforms or areas, or occasioned wholly or in part by any act or omission of the Tenant, its agents, subtenants, licensees, concessionaires, contractors, customers, or employees. In case the Owner shall be made a party to any litigation commenced by or against the Tenant, its agents, subtenants, licensees, concessionaires, contractors, customers, or employees, then the Tenant shall protect and hold the Owner harmless and shall pay all costs, expenses, and reasonable attorneys' fees incurred or paid by the Owner in connection with such litigation. The Tenant shall also pay all costs, expenses, and reasonable attorneys' fees that may be incurred or paid by the Owner in enforcing the covenants and conditions of this Lease, whether incurred as a result of litigation or otherwise.

(b) At all times during the term hereof keep in force at its own expense public liability insurance in companies acceptable to the Owner and naming as insured both the Landlord and the Tenant, with minimum limits of \$500,000 on account of bodily injuries to or death of one person, and \$1,000,000 on account of bodily injuries to or death of more than one person as the result of any one accident or disaster, and \$50,000 on account of damage to property.

(c) At all times during the term hereof keep in force at its own expense plate glass insurance in companies acceptable to the Owner and naming as insured both the Landlord and the Tenant.

(d) At all times during the term hereof keep in force at its own expense fire insurance with extended coverage in companies acceptable to the Owner, equal to the replacement costs of the Tenant's betterments and improvements on the demised premises, and naming the Landlord as an insured, to the extent of such betterments and improvements.

(e) Furnish to the Landlord, within 30 days after the Tenant receives notice of intention to deliver possession as set forth in subparagraph 2(b), copies of policies or certificates of insurance evidencing coverages required by this Lease. All policies required hereunder shall contain an endorsement providing that the insurer will not cancel or materially change the coverage of such policies without first giving ten days' prior written notice thereof to the Landlord.

(f) Tenant shall not self-insure in order to obtain coverage for the risks described above. All policies shall be obtained from an insurance carrier with a "AA" or better rating.

(g) In the event Tenant fails to insure, Landlord may obtain insurance and charge the cost thereof--plus ten (10) percent of the premium charge to cover administrative expenses--to Tenant. Tenant shall reimburse Landlord with the payment of the next installment of rent.

18. *Waiver of claims.* (a) The Owner and the Owner's agents, employees, and contractors shall not be liable, and the Tenant hereby releases all claims, for damage to person or property sustained by the Tenant or any person claiming through the Tenant resulting from any fire, accident, occurrence, or condition in or upon the demised premises or building of which they shall be a part, including, but not limited to, claims for damage resulting from (1) any defect in or failure of plumbing, heating, or air conditioning equipment, electric wiring or installation thereof, water pipes, stairs, railings, or walks; (2) any equipment or appurtenances becoming out of repair; (3) the bursting, leaking, or running of any tank, washstand, water closet, waste pipe, drain, or any other pipe or tank in, upon, or about such building or premises; (4) the backing-up of any sewer pipe or downspout; (5) the escape of steam or hot water; (6) water, snow, or ice being upon or coming through the roof or any other place upon or near such building or premises or otherwise; (7) the falling of any fixture, plaster, or stucco; (8) broken glass; and (9) any act or omission of cotenants or other occupants of such building or of adjoining or contiguous property or buildings.

(b) In the event the demised premises or its contents are damaged or destroyed by fire or other insured casualty, the rights, if any, of owner and tenant against each other with respect to such damage or destruction are waived. All policies of fire and extended coverage or other insurance covering the demised premises or its contents shall contain a clause or endorsement providing in substance that the insurance shall not be prejudiced if the assureds have waived their right of recovery from any person or persons prior to the date and time of loss or damage, if any.

19. *Trade fixtures.* All trade fixtures installed by the Tenant in the demised premises shall remain its property and shall be removable at the expiration or earlier termination of this Lease or any renewal or extension thereof, provided the Tenant shall not at such time be in default under any covenant or condition contained herein; and provided, further, that in the event of such removal, having repaired the damage caused by such removal, the Tenant shall promptly restore the premises to their original order and condition. Any such trade fixture not removed at or prior to such termination shall become the property of the Landlord. Lighting fixtures and air conditioning equipment, whether or not installed by the Tenant, shall not be removable at the expiration or earlier termination of this Lease, or at the expiration of any renewal or extension thereof, and shall become the property of the Landlord.

20. *Assigning, mortgaging, subletting.* (a) The Tenant shall not assign, create a security interest in, pledge, or encumber this Lease, in whole or in part, or sublet the whole or any part of the demised premises, or permit the use of the whole or any part thereof by any licensee or concessionaire, without first obtaining the Landlord's written consent. In the event of any such assignment, subletting, licensing, or granting of a concession, the Tenant shall nevertheless remain liable for the performance of all the terms, conditions, and covenants of this Lease. If the Tenant is a corporation, and if control thereof changes at any time during the term hereof, the Landlord, at its option, may, by giving 60 days' prior written notice to the Tenant, declare such change an event of default under this Lease. Any transfer, sale, pledge, or other disposition, in any single transaction or cumulatively during the term of this Lease, or any renewal or extension thereof, of 50 percent of the shares of the Tenant shall be deemed an assignment of this Lease, and prohibited without the Landlord's express written consent.

(b) The Landlord hereby consents to the assignment of this Lease, or the subletting of the demised premises to a wholly-owned subsidiary of the Tenant, on condition that (1) any such assignee or sublessee shall agree with the Landlord in writing, prior to any such assignment or subletting, to be bound by and to perform all covenants and conditions of this Lease applicable to the Tenant; (2) that the Tenant shall remain liable for the observance and

performance of all of the covenants and conditions of this Lease; and (3) that notice of such assignment or subletting is given to the Landlord no less than 15 days prior thereto. Any assignment by the Tenant of this Lease, or subleasing of the demised premises, shall forever terminate all rights of the Tenant to possession of the demised premises notwithstanding any provision in any such assignment or sublease to the contrary, and notwithstanding the Landlord's consent to such assignment or sublease. Thereafter, the Landlord may exercise against any subtenant or assignee all the rights and remedies herein provided upon default, without notice of any kind to the Tenant, and the Tenant shall have no right to reenter the demised premises upon default of the assignee or sublessee, but the Tenant shall remain liable, jointly and severally, with any assignee or subtenant for the performance of all of the covenants and conditions of this Lease, including, but not being limited to, the payment to the Landlord of all payments due or to become due to the Landlord hereunder.

21. *Subordination.* This Lease is subject and subordinate to any and all mortgages or deeds of trust now or hereafter placed on the property of which the demised premises are a part, provided, however, that in each such case the holder of the mortgage or the trustee of such deed of trust shall agree that this Lease shall not be divested or in any way affected by foreclosure or other default proceedings under such mortgage, deed of trust, or obligation secured thereby, so long as the Tenant shall not be in default under the terms of this Lease. This Lease shall remain in full force and effect notwithstanding any such default proceedings under such mortgage, deed of trust, or obligation secured thereby.

22. *Performance of tenant's covenants.* The Tenant shall perform all of the covenants and conditions on its part to be performed, and it shall immediately, upon receipt of written notice, where notice of nonperformance is required by this Lease, comply with the requirements of such notice. Further, if the Tenant shall violate any covenant or condition herein, whether or not notice is required, the Landlord may at its option do or cause to be done any or all of the things required by this Lease, and in so doing the Landlord shall have the right to cause its agents, employees, and contractors to enter upon the demised premises and in such event shall have no liability to the Tenant for any loss or damage resulting in any way from such action. The Tenant shall pay within five days of demand all moneys paid or expenses incurred by the Landlord in taking such actions, including counsel fees, any such sum to be collectible from the Tenant as additional rent hereunder.

23. *Financing agreement.* The Tenant shall not enter into, execute, or deliver any financing agreement that can be considered as a priority to any mortgage or deed of trust pertaining to the demised premises. If the Tenant does so execute or deliver such financing agreement, such action on its part shall be considered an event of default under this Lease entitling the Landlord to such remedies as are provided for herein.

24. *Custom and usage.* Any law, usage, or custom to the contrary notwithstanding, the Landlord shall have the right at all times to enforce the covenants and conditions of this Lease in strict accordance with the terms hereof, notwithstanding any conduct or custom on the part of the Landlord in refraining from so doing at any time or times. The failure of the Landlord at any time to enforce its rights under such covenants and conditions strictly in accordance with the same shall not be construed as having created a custom in any way or manner contrary to the specific covenants and conditions of this Lease or as having in any way or manner modified or waived the same.

25. *Surrender and holding over.* (a) The Tenant, upon expiration or termination of this Lease, either by lapse of time or otherwise, shall peaceably surrender to the Landlord the premises in broom-clean condition and in good repair as required by Paragraph 10. In the event that the Tenant shall fail to surrender the demised premises upon demand, the Landlord, in addition to all other remedies available to it hereunder, shall have the right to receive, as liquidated damages for all the time the Tenant shall so retain possession of the premises or any part thereof, an amount equal to twice the minimum and percentage rent specified in Paragraph 5 of this Lease, as applied to such period.

(b) If the Tenant remains in possession of the premises with the Landlord's consent but without a new Lease reduced to writing and duly executed, the Tenant shall be deemed to be occupying the premises as a tenant from month to month, but otherwise subject to all the covenants and conditions of this Lease.

26. *Additional construction.* The Landlord reserves the right at any time, and from time to time, to make alterations or additions to, and to build additional stories on, the building in which the premises are contained, and to build adjoining the same. The Landlord also reserves the right to construct other or add to other buildings or improvements in the Shopping Center, and to permit others to do so from time to time. In the event of such additional construction, the Landlord shall not unreasonably interfere with the Tenant's occupancy.

27. *Condemnation.* The Tenant waives any loss or damage to the Tenant as the result of the exercise of the power of eminent domain by any governmental body, and the right to receive any portion of any condemnation award, as a participant in the condemnation proceedings or otherwise, whether such loss or damage results from condemnation of part or all of the demised premises or any portion of the parking area or service entrances and exists. Should any power of eminent domain be exercised after the Tenant is in possession, such exercise shall not void or impair this Lease unless the demised building shall be substantially taken. Upon the happening of such event the rental herein provided shall proportionately abate as of the date that possession is required by the condemning authority.

28. *Cancellation of lease.* The Tenant shall have the option, if construction of the demised premises is not completed by _____ [date], of cancelling this Lease by giving written notice thereof to the Landlord within 15 days after such date; provided that if such failure to complete is caused by a strike, picketing, Act of God, war emergency, or cause beyond the Landlord's control, such completion date shall be extended for a period equal to the period necessary to cure such cause. If, for any reason whatsoever, the Landlord does not commence construction of the demised premises by _____ [date], or if the Landlord does not complete construction by _____ [date], the Landlord shall have the option of cancelling the Lease by giving similar written notice to the Tenant, within 15 days after either of the applicable dates.

29. *Notices.* Wherever in this Lease it shall be required or permitted that notice or demand be given or served by either party to or on the other, such notice or demand shall not be deemed to have been duly given or served unless in writing and either personally delivered or forwarded by registered mail, postage prepaid, to the respective addresses hereinafter set forth. Such addresses may be changed from time to time by either party by serving notice as above provided.

To Landlord at: c/o S. Nipper Corp. 15 Paradise Lane Charlottesville, Virginia

The Tenant shall appoint during the term of this Lease, or any extension thereof, and hereby designates the following, as its agent within the State of Virginia for purposes of receiving all notices required to be given and any service of process:

To Tenant at: Edward Cuttle 50 Main Street Arlington, Virginia

30. *Agency.* It is understood that S. Nipper Corp. is the sole and exclusive agent of the Landlord in negotiating and having this Lease consummated, and is entitled to compensation pursuant to an agreement with the Landlord.

31. *Successors and assigns.* All rights, obligations, and liabilities given to, or imposed upon, the parties hereto shall extend to and bind their respective heirs, executors, administrators, successors, sublessees, licensees, concessionaires, and assigns, subject to the provisions of Paragraph 21. No rights, however, shall inure to the benefit of any assignee of the Tenant unless the Landlord has approved the assignment in writing as set forth above.

The term Landlord, as used in this lease, so far as covenants and conditions on the part of the Landlord are concerned, shall be limited to mean the D & S Realty Company, its successors, and assigns. In the event of any transfer of title to the demised premises the Landlord (and in case of any subsequent transfers or conveyances, the then grantor) shall be automatically freed and relieved from and after the date of such transfer or conveyance of all liability as respects the performance of all covenants and conditions on the part of the Landlord thereafter to be performed, provided that any

amount then due and payable to the Tenant by the Landlord, or the then grantor, under any provision of this Lease, shall be paid to the Tenant, it being intended hereby that the covenants and conditions contained in this Lease on the part of the Landlord shall be binding on the Landlord, its successors, and assigns, only during and in respect of their respective successive period of ownership. Further, the Landlord's liability under this Lease shall be limited to and include only the interests of the Landlord in the real estate comprising the Shopping Center.

32. *Scope and interpretation of agreement; governing law.* This Lease shall be considered to be the only agreement between the parties hereto pertaining to the demised premises. All negotiations and oral agreements acceptable to both parties are included herein. The laws of the State of Virginia shall govern the validity, interpretation, performance, and enforcement of this Lease.

33. *Short form lease.* At the option of either party, a short form of this Lease, suitable for recording purposes, but in no way varying the provisions of this Lease, shall be entered into by the Landlord and the Tenant, and in the event either party desires to record such short form of this Lease, such party shall pay the expense of recording.

34. *Force majeure.* In the event that the Landlord shall be delayed, or hindered, or prevented from the performance of any act required hereunder, by reason of governmental restrictions, scarcity of labor or materials, strikes, or for reasons beyond its control, the performance of such act shall be excused for the period of delay, and the period for the performance of any such act shall be extended for the period necessary to complete performance after the end of the period of such delay.

35. *Offset statement.* Within ten days after request therefor by the Landlord or any mortgagee, or if in the event that upon any sale, assignment, or hypothecation of the demised premises or the land thereunder by the Landlord an offset statement shall be required from the Tenant, the Tenant shall deliver in recordable form a statement to any proposed mortgagee or purchaser, or to the Landlord, certifying (if such be the case) that this Lease is in full force and effect, that the Tenant is in possession, that the Tenant has commenced the payment of rent, and that the Tenant claims no defenses or offsets to this Lease.

36. *Events of default.* The occurrence of any of the following shall, in addition to all other events of default provided herein, constitute an event of default hereunder:

(a) Failure of the Tenant to commence business within the time period specified by Paragraph 2.

(b) Discontinuance by the Tenant of the conduct of its business in the demised premises.

(c) The filing of a petition by or against the Tenant or its surety for adjudication as a bankrupt or insolvent, or for its reorganization or for the appointment of a receiver or trustee of the Tenant or the Tenant's property; or an assignment by the Tenant for the benefit of creditors; or the taking possession of the property of the Tenant by any governmental officer or agency pursuant to statutory authority for the dissolution or liquidation of the Tenant; or if a temporary or permanent receiver or trustee shall be appointed for the Tenant or for the Tenant's property and such temporary or permanent receiver or trustee shall not be discharged within 30 days from the date of appointment; or any other execution, levy, attachment, or other process of law upon the Tenant's interest in the leasehold estate, or any part thereof.

(d) Failure of the Tenant to pay when due any installment of rent hereunder, or any other sum herein required to be paid by the Tenant, within ten days after written notice of failure from the Landlord.

(e) Vacation or desertion of the demised premises or permitting the same to be empty and unoccupied, or the failure to open and actively conduct its business for a period of ten consecutive calendar days.

(f) The Tenant's removal or attempt to remove or manifesting an intention to remove the Tenant's goods or property from or out of the demised premises otherwise than in the ordinary and usual course of business, without having first paid and satisfied the Landlord for all rent which may become due during the entire term of this Lease.

(g) The transfer or devolution, whether by operation of law or otherwise (except as hereinabove permitted), of this Lease or the Tenant's estate or any of the Tenant's interest to anyone other than the Tenant, or any such attempted transfer or devolution.

(h) The Tenant's failure to perform or observe any other covenant or condition of this Lease, after written notice and demand, provided that, if such failure is of such a character as not to permit immediate compliance, then the Tenant's failure to proceed diligently and immediately upon receipt of notice to commence the cure of such failure, and thereafter to complete such cure with all reasonable dispatch within ten days after written notice from the Landlord.

37. Landlord's remedies upon default by tenant. (a) If any rent or any charges herein included as rent shall remain unpaid on any day on which the same are due, as provided in Paragraph 36(d) hereof, then the Landlord, or any person acting under the Landlord, or any officer of any court acting on behalf of the Landlord, may enter the premises and without further demand proceed by distress or sale of the goods there found to levy the rent and all other charges herein payable as rent, and all costs and officers' commissions, including watchmen's wages, shall be paid by the Tenant. In such case all costs, officers' commissions, and other charges shall immediately attach and become a part of the Landlord's claim for rent, and any tender of rent without such costs made after the issuance of a warrant of distress shall not be sufficient to satisfy its claim. The Tenant hereby waives the benefit of all present or future laws regarding any limitation of time within which distress may be levied after removal of goods from the demised premises, and relieves the Landlord of any obligation of proving or identifying or appraising such goods. The Tenant shall not lease goods of any kind for use on the demised premises with the understanding that such goods shall be exempt from levy for rent, and other charges herein reserved as rent.

(b) Upon the occurrence of an event of default as set forth in Paragraph 36, and in any of such events, the Landlord, at its option, may at such times as it may determine in its sole discretion, concurrently or successively, without being deemed to have waived any rights or to have made an election in any circumstance, do any or all of the following:

(1) The Landlord may serve upon the Tenant notice that this Lease and the then unexpired term hereof shall terminate and become absolutely void on a date specified in such notice, to be not less than ten days after the date of such notice. On the expiration of the time limited in such notice, this Lease and the term herein granted, as well as all of the right, title, and interest of the Tenant hereunder, shall, except as to the rights and remedies of the Landlord upon termination as provided herein, terminate and become void in the same manner and with the same force and effect as if the date fixed in such notice were the date originally specified for the expiration of the term herein demised. The Tenant shall then immediately quit and surrender to the Landlord the demised premises, including any and all buildings and improvements thereon, and the Landlord may then, or at any time thereafter, without judicial proceedings of any kind, enter into and repossess the demised premises, breaking open locked doors if necessary, and may use such force as it may deem necessary to effect such entrance and may remove all occupants and any property thereon without being liable to any action or prosecution of any kind for such entry or the manner thereof or loss of or damage to any property upon the demised premises.

(2) Without terminating this Lease and without notice, the Landlord may, without judicial proceedings of any kind, enter into and repossess the demised premises, breaking open locked doors if necessary, and may use such force as it may deem necessary to effect such entrance and may remove all occupants and any property thereon without being liable to any action or prosecution of any kind for such entry or the manner thereof or loss of or damage to any property upon the demised premises.

In the event of either (1) or (2), the Landlord may, but shall not be obligated to, obtain possession of the demised

premises by unlawful detainer or any other judicial proceeding which it may, in its sole discretion, institute for such purpose. The Landlord's obtaining of possession of the demised premises, either with or without judicial proceedings for that purpose, shall not, of itself, terminate this Lease.

(3) With or without terminating this Lease and with or without reentering and obtaining possession of the demised premises, the Landlord may lease the demised premises to any other person upon such terms as the Landlord may deem reasonable, in its sole discretion, and for a term within or beyond the term of this Lease. The Tenant shall be liable for any loss in rent for the balance of the then current term together with all expenses or costs incurred by the Landlord in rerenting the premises, such as the payment of commissions, the making of alterations, or otherwise, whether the recovery of the Landlord shall be classed as rent, or damages, or otherwise, and the Landlord may recover such loss at any time, or from time to time, after any of the foregoing events, whether prior to the end of the term herein granted or otherwise.

Without limitation of or by the foregoing, the Tenant waives any and all demands and notices of any kind which may be required by law to be given prior to any entry or reentry by the Landlord, by means of judicial proceedings for that purpose or otherwise. In the event the Landlord shall terminate this Lease, prior to the date of expiration originally fixed, or in the event the Landlord shall repossess the demised premises, by judicial process or otherwise, with or without termination of this Lease, the Tenant waives all right to recover or regain possession of the demised premises to save forfeiture, of possession or of this Lease, as the case may be, by payment of rent due or by other performance of the covenants and conditions hereof. Without limitation of or by the foregoing, the Tenant waives all right to reinstate or redeem this Lease notwithstanding any provisions of any statute, law, or decision now or hereafter in force or effect.

The parties hereto waive trial by jury in any action, proceeding, or counterclaim brought by either party against the other on all matters arising out of or in any way connected with this Lease, the relationship of the Landlord and the Tenant, the Tenant's use or occupancy of the demised premises, and any claim of injury or damage. In the event the Landlord commences any proceedings for nonpayment of rent, minimum rent, percentage rent, additional rent, or damages for breach of this Lease, the Tenant shall not interpose any counterclaim in such proceedings. This shall not, however, be construed as a waiver of the Tenant's right to assert such claims in any separate action brought by the Tenant. The words entry and reentry as used in this Lease shall not be deemed restricted to their technical legal meaning.

In the event of a breach or threatened breach by the Tenant of any covenant or condition hereof, the Landlord shall have the right of injunction to restrain the same and the right to invoke any remedy allowed by law or in equity whether or not other remedies, indemnity, or reimbursements are herein provided. The various rights and remedies, powers, options, and elections of the Landlord reserved, expressed, or contained in this Lease are distinct, separate, and cumulative, and no one of them shall be deemed to be exclusive of the other rights, remedies, powers, or options provided herein, or are now or may hereafter be conferred upon the Landlord by statute or by state law.

If any of the foregoing acts of default shall occur, the whole rent for the balance of the term and all other sums payable hereunder as rent for the balance of the term, or any part thereof, at the option of the Landlord, shall immediately without action or notice become due and payable as if by the terms of this Lease it were payable in advance. The Landlord may immediately proceed to collect or bring action for the whole rent, or such part thereof as aforesaid, as rent being in arrears, or may file a proof of claim in any bankruptcy or insolvency proceedings for such rent, or may institute any other proceedings to enforce payment thereof. Rent for the balance of the term after the happening of any of the foregoing occurrences shall be computed as equal to the yearly average of the minimum and percentage rent paid by the Tenant upon the gross sales in the demised premises, from the commencement of the term of this Lease to the end of the lease year next preceding the date of such occurrence.

No such termination of this Lease, nor taking nor recovering possession of the premises with or without termination of this Lease, shall deprive the Landlord of any remedies or actions against the Tenant for rent or for damages due or to

become due for the breach of any covenant or condition herein contained, nor shall the bringing of any such action for rent, or breach of any covenant or condition, nor the resort to any other remedy herein or otherwise provided for the recovery of rent or damage for such breach, be construed as a waiver of the right to insist upon the forfeiture and to obtain possession in the manner herein provided.

No payment by the Tenant or receipt by the Landlord of a lesser amount than the monthly rent herein stipulated shall be deemed to be other than on account of the earliest stipulated rent, nor shall any endorsement or statement on any check or any letter accompanying any check or payment as rent be deemed an accord and satisfaction. The Landlord may accept such check or payment without prejudice to its right to recover the balance of such rent or pursue any other remedy provided in this Lease.

38. *Security.* The Tenant has deposited with the Landlord the sum of \$10,000 as security for the performance by the Tenant of the terms of this Lease. The Landlord may use, apply, or retain the whole or any part of the security so deposited to the extent required for the payment of rent, additional rent, and charges herein reserved as rent or other sum as to which the Tenant is in default or for any sum which the Landlord may expend or be required to expend by reason of the Tenant's default in the performance or observance of any of the other covenants and conditions of this Lease. Such sum shall be returned to the Tenant after the expiration of this Lease and after delivery of possession of the demised premises to the Landlord, provided the Tenant shall have complied with all of the terms hereof. In the event of any transfer of title to the demised premises, the Landlord shall have the right to transfer the security to the grantee or transferee and the Landlord shall thereupon be released from all liability for the return of such security to the Tenant. The Tenant shall not assign or encumber the money deposited as security.

39. *Invalid provision.* If any provision of this Lease shall be determined to be void by any court of competent jurisdiction, then such determination shall not affect any other provision hereof, all of which other provisions shall remain in full force and effect. It is the intention of the parties hereto that if any provision of this Lease is capable of two constructions, one of which would render the provision void and the other of which would render the provision valid, then the provision shall have the meaning which renders it valid.

40. *Binding effect.* All rights accruing to the Landlord under this Lease shall be deemed and are to accrue to the benefit of the Owner, its successors, and assigns, and any action brought by the Owner shall be deemed to be brought on behalf of the Landlord.

41. *Captions.* Any headings preceding the text of the several articles and subparagraphs hereof are inserted solely for convenience of reference and shall not constitute a part of this Lease, nor shall they affect its meaning, construction, or effect.

42. *Non-waiver.* No delay or failure by either party to exercise any right under this Lease, and no partial or single exercise of that right, shall constitute a waiver of that or any other right, unless otherwise expressly provided herein.

43. *Counterparts.* This Lease may be executed in two or more counterparts, each of which shall be deemed an original but all of which together shall constitute one and the same instrument.

The parties hereto have caused this Lease to be executed and Carker Stores, Ltd., has caused its corporate seal to be affixed the day and year first above written.

D & S Realty Company

By: _____

[insert name and title]

Carker Stores, Ltd.

By: _____

[insert name and title]

[Acknowledgments]

[Attach Exhibit A]

[Attach Exhibit B]

[Attach Exhibit C]

[Attach Exhibit D]



100 of 181 DOCUMENTS

Current Legal Forms for Real Estate

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Chapter 22 DEVELOPMENT AND SUBDIVISION

Part IV. FORMS

D. COMMERCIAL DEVELOPMENT Shopping Centers, Industrial Buildings and Office Buildings

26-22 Current Legal Forms for Real Estate FORM 22.63

FORM 22.63 Lease to developer for purpose of constructing shopping center--construction in three stages--fixed and percentage rentals

COMMENT

There are several reasons why a lease from a landowner to a developer can become the technique used for setting up a shopping center project. The landowner may be reluctant to sell his property because of its potential long-term value, especially if he can receive a reasonable and assured return on its present value in the form of a minimum rent and an interest in its increased future value in the form of a percentage rent. The developer may prefer a long-term lease over a purchase because it reduces the capital investment otherwise required to be made in the land. From the tax viewpoint such an investment in land is nondepreciable, while the rent paid for its use is deductible.

Initial rent.

Under this lease the construction of the shopping center is to be completed by the developer in three stages. The rent is initially levied at a reduced rate on unimproved acreage. Rental increases become effective as each of the three stages of development is completed. If construction of any unit is not concluded on schedule, the lessor may elect to terminate the lease as to all units not completed.

Percentage rent.

In this agreement, the rental after completion is a percentage rental or a specified amount, whichever is greater. The percentage rental is based on gross rents received by the developer from his store tenants. In turn, the developer would normally insert a percentage rental clause in his leases with the store tenants.

Mortgage.

When land is unimproved it is often necessary for the owner to join in the execution of a mortgage in order to enable the developer to finance construction. This agreement obligates the owner to execute any mortgage necessary for this purpose, and provides several forms of protection for the owner. First, no personal liability is to be assumed by the owner. Second, the developer agrees to indemnify the owner for losses from any default under the mortgage. Finally, two named shareholders of the developer are to guarantee the mortgage debt if the list of prospective tenants submitted prior to execution of the mortgage does not appear to the owner to offer the prospect of sufficient income to satisfy the mortgage debt.

Improvements.

In light of the length of the lease the developer has been allowed considerable flexibility to alter and improve the premises after construction has been completed. It may demolish and rebuild improvements, in which case the annual rent during rebuilding is to be based on the rent paid in previous years. However, the developer is to convey all improvements to the owners at the termination of the lease in the same condition as they were at the completion of construction, reasonable wear and tear excepted. Any expense incurred in order to restore the property as required by this provision would be deductible by the developer, as would any cash payment to the owner in lieu of such restoration. Moreover, the lessee may deduct the cost of current repairs.

Developer expenses.

In addition to the obligation to keep the premises in repair, the developer is to maintain fire and liability insurance. The developer is also required to pay all taxes, assessments, and water charges against the property. However, during the period of construction such taxes, assessments, and charges on the undeveloped land are to be borne by the owner, except to the extent of any increase in these items over the rate fixed for the year in which the lease is executed.

FORM

LEASE, made in Tucson, Arizona, this _____[day] day of _____[month], _____[year], between Dale Morrison and Henrietta Morrison, residing at 100 East First Street, Tucson, Arizona (the "Lessor"), and Center Development Co., an Arizona corporation (the "Lessee").

The Lessor, in consideration of the rentals herein agreed to be paid by the Lessee and the other agreements herein agreed to be performed by the Lessee, hereby leases unto the Lessee, and the Lessee leases from the Lessor, the following described real property:

_____ [Insert description]

upon and subject to the following terms, covenants, and conditions:

1. *Term.* The term of this Lease shall be for a period of 99 years commencing on the date hereof, and expiring on _____[date].

2. *Plat of property.* Within six months after the commencement of the term hereof, the Lessee shall prepare and file

with the Lessor a plat of the premises, which plat shall divide the same into three units numbered Unit No. 1, Unit No. 2, and Unit No. 3. Unit No. 1 shall contain not more than 60 acres; Unit No. 2 shall contain not more than 20 acres and shall be contiguous to Unit No. 1; and Unit No. 3 shall contain not more than 20 acres.

3. *Construction of shopping center.* The Lessee shall construct upon the premises a first-class, modern shopping center with adequate parking and other facilities, and to complete the same within seven years after the commencement of the term hereof. The Lessee may perform such development and construction in three separate, successive stages, as follows:

(a) On or before _____ [date], the Lessee shall commence on Unit No. 1 the construction of a shopping center building or buildings to provide at least 360,000 square feet of floor space, and shall complete such construction not later than _____ [date].

(b) On or before _____ [date], the Lessee shall commence on Unit No. 2 the construction of an additional building or buildings and shall complete such construction not later than _____ [date].

(c) On or before _____ [date], the Lessee shall commence on Unit No. 3 the construction of an additional building or buildings and shall complete such construction not later than _____ [date].

If the Lessee shall develop Unit No. 1 but shall fail to develop Unit No. 2, or shall develop Unit No. 1 and Unit No. 2 but shall fail to develop Unit No. 3, in the manner above provided, the Lessor shall have the following exclusive options, which options shall continue, and may be exercised at any time so long as the Lessee has not developed any Unit: (1) to cancel this Lease as to the Unit or Units which have not been so developed, in which case the Lessee shall continue to pay rent, at the rates provided in Paragraph 4, on the Unit or Units the Lessee has developed; or (2) to continue the Lease in effect as to all Units, in which case the rent on the Unit or Units which have not been so developed shall thereafter be \$50 per acre in such Unit or Units per year. Notwithstanding the exercise of option (2) above, if the Lessee thereafter shall develop such Unit or Units, then the rent on each thereof shall increase to the amounts provided in Paragraph 4. If the Lessor shall elect to cancel this Lease as to the Unit or Units which have not been developed as provided in (1) above, the Lessee shall have the option to continue this Lease for a period not to exceed five years from and after the date of cancellation by the Lessor with respect to such Unit or Units upon the payment to the Lessor of an annual rental, at the times provided for in Paragraph 4, of a sum equal to \$900 per acre per year for the land in the Unit or Units not so developed.

4. *Rental.* The Lessee shall pay to the Lessor as rent during the term hereof the following sums:

(a) From the commencement of the term until the completion of construction as required by Paragraph 3(a), the sum of \$50 per acre in the premises per year, less all real property taxes, assessments, or water charges paid by the Lessee during such period, plus any increase in such taxes, assessments, or charges in excess of the _____ [year] rate.

(b) From the date of the completion of construction as required by Paragraph 3(a) and until the date construction as required by Paragraph 3(b) is completed, whichever of the following sums is the greater:

(1) The sum of \$54,000 per year, plus \$50 per acre per year for the land in Unit No. 2 and Unit No. 3 upon which required construction has not been completed, less all real property taxes, assessments, or water charges paid by the Lessee during such period on such undeveloped land, plus any increase in such taxes, assessments, or charges in excess of the _____ [year] rate; or

(2) A sum equal to 10 percent of the gross rents received by the Lessee from tenants of space in the shopping center, plus \$50 per acre per year for the land in Unit No. 2 and Unit No. 3 upon which required construction has not been completed, less all real property taxes, assessments, or water charges paid by the Lessee during such period on such

undeveloped land, plus any increase in such taxes, assessments, or charges in excess of the _____ [year] rate.

(c) From the date of completion of construction required by paragraph 3(b) and until the construction required by Paragraph 3(c) is completed, whichever of the following sums is greater:

(1) The sum of \$72,000 per year plus \$50 per acre per year for the land upon which construction required by Paragraph 3(c) has not been completed, less all real property taxes, assessments, or water charges paid by the Lessee during such period on such undeveloped land, plus any increase in such taxes, assessments, or charges in excess of the _____ [year] rate; or

(2) A sum equal to 10 percent of the gross rents received by the Lessee from tenants of space in the shopping center plus \$50 per acre per year for the land in Unit No. 3 upon which construction has not been completed, less all real property taxes, assessments, or water charges paid by the Lessee during such period on such undeveloped land, plus any increase in such taxes, assessments, or charges in excess of the _____ [year] rate.

(d) From the date of the completion of construction required by Paragraph 3(c) and during the remainder of the term, whichever of the following sums is greater:

(1) The sum of \$90,000 per year, or

(2) 10 percent of the gross rents received by the Lessee from tenants of space in the shopping center.

All fixed amounts of rent payable by the Lessee shall be paid in equal quarterly installments in advance on or before January 31, April 30, July 31, and October 31 of each year. Within 60 days after the end of each calendar year, the Lessee shall furnish to the Lessor a written statement showing the amount of gross rents received by the Lessee with respect to such calendar year. If the percentage rent due shall exceed the minimum rent, then the Lessee shall pay such excess to the Lessor at the time of delivery of such statement. During the one-year period after the furnishing of such statement by the Lessee, the Lessor shall have the right to commence, and thereafter with reasonable diligence shall complete, an audit of the Lessee's books and records with respect to such calendar year to determine the correctness of such statement. If the Lessor shall fail to commence such audit within such one-year period, then such statement shall be conclusively deemed to be correct as between the Lessee and the Lessor excepting however, fraud by the Lessee or its tenants. The Lessee shall keep true and accurate books and records which shall reflect the gross rents received. If such audit discloses that the Lessee owes an additional \$1,000 or more in rent, the Lessee shall pay for the cost of such audit. If such audit discloses that the Lessee owes less than an additional \$1,000 in rent, the Lessor shall pay for the cost of such audit.

5. *Mortgage of premises.* To enable the Lessee to obtain financing for the construction of the improvements and subsequent enlargements, alterations, and modifications thereof, and financing for any improvements made pursuant to Paragraphs 7 or 8, the Lessor shall execute all mortgages, deeds of trust, security agreements, or subordination agreements, secured by the premises or part thereof, and all improvements thereon, as any lending institution may require as a condition of making a loan to the Lessee. The Lessor agrees to execute, from time to time, such documents and forms of agreement as any lending institution may require as a condition of making a loan to the Lessee. The Lessor, however, shall not be required to execute any document that shall directly or indirectly impose personal liability upon the Lessor for the repayment of any loan made to the Lessee, as provided for in this Paragraph 5. The Lessee shall pay in full any loan made as contemplated by this paragraph, and shall indemnify and save harmless the Lessor from any and all liabilities, loss, costs, obligations, expenses, claims, demands, suits, causes of action, or damages of any kind or character and by whomsoever claimed, arising from or in any manner connected with or related to any such mortgages, deeds of trust, security agreements, or subordination agreements, and the Lessee shall pay to the Lessor all reasonable attorneys' fees incurred by the Lessor in connection with the protection of the Lessor's right, title, and

interest in and to the premises and improvements thereon to the extent that the same may be affected by claims arising out of or related to such mortgages, deeds of trust, security agreements, or subordination agreements. The Lessee covenants that any such mortgage, deed of trust, or security agreement shall contain a provision that notice shall be given to the Lessor by the mortgagee or holder of the security interest 30 days prior to the commencement of any foreclosure proceedings against the Lessee. In the event the Lessee fails to remedy any default in the payment of any obligation properly due from the Lessee and secured by a mortgage, deed of trust, security agreement or any other security with respect to the premises within 15 days after written notice thereof from the Lessor, the Lessor may make any such defaulted payments. In such event, the Lessee shall repay to the Lessor, upon demand, the full amount so paid and expended by the Lessor, together with interest thereon at the rate of 7 percent per year. Before the Lessor shall be required to sign any mortgage, deed of trust, or security agreement pursuant to this Paragraph 5, the Lessee shall submit to the Lessor the names of tenants who will occupy space in the shopping center, the terms of the leases with such tenants, any information in the Lessee's possession concerning the financial responsibility of such tenants, and the terms of any mortgage, deed of trust, or security agreement required to be signed by the Lessor. In the event the Lessor is not satisfied that (a) the leases with such tenants will yield sufficient rent to make all payments required by such mortgage, deed of trust, or security agreement, or (b) the financial responsibility of such tenants is sufficient to guarantee sufficient rental income to make all such mortgage or security agreement payments, then the Lessor may require the Lessee to cause James Watson and Lawrence Mann, who have a financial interest in the Lessee, to guarantee jointly and severally to the Lessor that all such payments shall be made.

6. *Insurance*

(a) The Lessee shall at all times during the term of this Lease keep all buildings, improvements, and fixtures on the premises insured to the extent of 90 percent of the net sound insurable value thereof against loss or damage from fire, and such policy or policies shall be standard policies and shall contain extended coverage provisions. Such policy or policies shall be taken out with such responsible and solvent insurance company or companies as the Lessee shall determine. The proceeds of such policies shall be payable to any mortgagee, or beneficiary of any deed of trust if required by the mortgagee or beneficiary and, if not so required, then to the Lessor and the Lessee as their interests may appear.

(b) The Lessee shall at all times during the term of this Lease maintain in force an insurance policy or policies which will name the Lessor and the Lessee as insureds against all liability resulting from injury occurring to persons in or about the premises. The liability under such insurance shall be not less than \$500,000 for any one person injured, \$1,000,000 for any one accident, and \$50,000 for property damage. The original of such policy or policies shall remain in possession of the Lessee provided, however, that the Lessor shall have the right to receive from the Lessee, upon written demand, a duplicate policy or policies of any such insurance. The Lessee shall also maintain and keep in force all employees' compensation insurance on its employees required under the applicable Workers' Compensation Act.

7. *Alterations and improvements.* The Lessee may, at any time, make any alteration or addition to the improvements or fixtures constructed on the premises, or erect additional improvements or fixtures on such premises. In connection with any action which the Lessee may take with respect to the Lessee's rights pursuant to the preceding sentence, the Lessee shall pay all costs, expenses, and liabilities arising out of or in any way connected with such alterations, improvements, or additions made by it and hold harmless and indemnify the Lessor from or against all such costs, expenses, and liabilities including, but not by way of limitation, all or any liabilities from any mechanics', laborers' or materialmen's liens, or other liens of a similar nature. The Lessor shall not be called upon or be obligated to make any improvements, alterations, or repairs whatsoever in or about such premises, and the Lessor shall not be liable or accountable for any damages to such premises or any property located thereon. The Lessee shall have the right at any time to demolish or substantially demolish the improvements upon the premises, provided, however, that the Lessee shall thereafter construct or reconstruct upon the premises improvements of a nature then consistent, in the Lessee's opinion, with the highest and best use thereof as the Lessee shall determine, and that the value of such substituted improvements when completed shall not be disproportionate to the replacement cost of the improvements demolished. In the event the

Lessee exercises its right to demolish the shopping center and erects improvements other than in the nature of a shopping center, then the minimum guaranteed annual rent for the period subsequent to the demolition shall be an amount equal to the average total annual rent received by the Lessor for the two years prior to the demolition.

8. *Total and partial destruction.* The Lessee shall, at its own cost and expense, rebuild or repair any or all buildings, improvements, or fixtures on the premises that are totally or partially destroyed or damaged by fire or other casualty. In such event, the Lessee shall proceed with the work of repair or reconstruction thereof with all reasonable diligence and as often as such buildings, improvements, or fixtures subsequently constructed on such premises, or any part or portion thereof, shall be damaged or destroyed. Subject to the rights of the Lessee as set forth in Paragraph 7, in rebuilding after destruction of any such buildings, improvements, or fixtures, the Lessee shall reconstruct upon the premises buildings, improvements, or fixtures of like type and purpose and of substantially the same design and construction as those so destroyed, or buildings, improvements, or fixtures then consistent, in the Lessee's opinion, with the highest and best use thereof, as the Lessee shall determine. If the Lessee shall elect to repair the existing building, improvement, or fixture, such repairs shall be such as to restore the same to at least an equivalent condition as it was in before such damage thereto by fire or other casualty.

9. *Repairs.* Subject to the provisions of Paragraphs 7 and 8, the Lessee at its sole cost and expense shall maintain and keep in good and sanitary condition and repair the premises and all buildings and improvements constructed by it, reasonable wear and tear excepted. Upon termination of this Lease, the Lessee shall peacefully surrender possession of the premises and all buildings, improvements, and fixtures thereon in as good condition as the same are at the time of completion of construction, reasonable wear and tear excepted, subject, however, to the rights of removal set forth in Paragraph 20.

10. *Use of premises.* The Lessee shall continuously operate the improvements on the premises as described in Paragraph 3 during the entire term of this Lease following completion of construction, subject, however, to the Lessee's right to demolish as set forth in Paragraph 7. If the Lessee elects to demolish as provided in such paragraph, then in that event the Lessee shall continuously operate and maintain the substituted works of improvements. The Lessee shall not knowingly permit any part of the premises to be used for unlawful or immoral purposes or for any purpose or use which may constitute a nuisance. Tenant shall, at all times, comply with Landlord's sustainability practices as identified on Exhibit [____], attached hereto and made a part hereof.

11. *Taxes and assessments.* The Lessee shall pay and discharge all taxes, assessments, and water charges assessed against the premises, subject to the Lessee's right of deduction therefor as provided in Paragraph 4.

12. *Mechanics' liens.* The Lessee shall hold harmless and indemnify the Lessor from or against all costs, expenses, and liabilities from all mechanics', laborers', or materialmen's liens which may be filed against the premises during the term of this Lease. The Lessee shall have the right to contest any such liens in the name of the Lessor as the Lessee may deem necessary, provided, however, that the Lessee shall pay for the expenses incurred by reason thereof.

13. *Lessor's access to premises.* The Lessor, or its agent or nominee, at all reasonable times shall have free access to the premises for the purpose of examining or inspecting the condition thereof, to exhibit the premises to prospective purchasers, and to determine if the Lessee is performing the covenants and agreements of this Lease, and to post such reasonable notices as the Lessor may desire to protect the Lessor's rights, including, but not by way of limitation, notices of nonresponsibility for lien claims.

14. *Assignment and sublease.* This Lease and any interest therein shall be subject to assignment or sublease at any time or from time to time to any person or persons, subject, however, to the following provisions:

(a) Such right of assignment shall be specifically conditioned upon the assignor's notifying the Lessor of each such assignment and furnishing the Lessor with a copy of such assignment.

(b) Each such assignment shall provide that the assignee takes subject to the provisions of this Lease.

(c) No assignment or sublease shall release the Lessee or its successors from any obligation which it is bound to perform pursuant to the provisions of this Lease.

15. *Liability.* Lessor shall not be liable for any damages by reason of any injury to any person or persons, including the Lessee, or property of any kind whatsoever and to whomsoever belonging, including the Lessee's, from any cause whatsoever while in, upon, or in any way connected with the premises during the term of this Lease or any extension hereof, or any occupancy hereunder. The Lessee shall indemnify and save harmless the Lessor from all liability, loss, costs, and obligations on account of or arising out of any such injuries or losses, however occurring. The Lessee shall have the right to contest the validity of any and all such claims and defend, settle, and compromise any and all such claims of any kind or character and by whomsoever claimed, in the name of the Lessor, as the Lessee may deem necessary, provided that the Lessee shall pay the expenses thereof.

16. *Zoning.* The Lessee shall commence proceedings to have the premises zoned to permit the construction and operation of a shopping center of a type and of a size contemplated in Paragraph 3. The Lessor shall cooperate with and assist the Lessee in its dealings with the city, county, and state agencies and make application in its name for the benefit of and at the request of the Lessee to any of such agencies. If the Lessee is unable to obtain such zoning by _____[date], it may terminate this Lease by giving written notice thereof to the Lessor at any time within six months after such date.

17. *Easements and dedications for utilities and streets.* The Lessor shall at the Lessee's request grant such easements as may be necessary to enable the premises to be adequately served by gas, electricity, water, sewer, and telephone utilities, and dedicate to public use such portions of the premises as may be required by any governmental authority for streets, alleys, parkways, or other use as a condition of permitting the Lessee to erect improvements upon the premises.

18. *Force majeure.* In the event that the obligation of any party to this Lease shall be impossible of performance by reason of an Act of God, or the elements, shortage or unavailability of necessary materials, supplies, or labor, shortages or interruptions of transportation facilities, or because of applicable governmental regulations or restrictions, including zoning ordinances applicable to the premises, or other cause beyond the affected party's control, then in such event the time for performance of the obligation of the party so affected shall be extended until the termination of such cause beyond such party's control.

19. *Title policy.* Within 30 days after receipt of written request from the Lessee, the Lessor shall furnish the Lessee with a policy of title insurance insuring the Lessee in an amount not less than \$150,000, showing the property to be free and clear of all liens and encumbrances except taxes for the current year.

20. *Termination of lease.* Upon any termination of this Lease, ownership and possession of all buildings and improvements located upon the premises as of such date of termination shall pass to the Lessor. The Lessee may, however, within a reasonable time after such termination, remove any and all personal property belonging to it and trade fixtures installed by it, but it shall repair any damage caused to the improvements on the premises by such removal.

21. *Removal of personal property and tenants' and trade fixtures.* Upon the expiration of the term of this Lease, and at any time, and from time to time, prior to such expiration or termination, the Lessee, its tenants, agents, and employees, if not then in default as to any term of this Lease, shall have the right to remove from the premises any and all of their personal property and any and all tenants' and trade fixtures theretofore placed thereon, except fixtures and equipment which are attached to the building or the premises. The Lessee shall repair any damage caused to the premises by the removal of such property.

22. *Default.* In the event that the Lessee, within 30 days after receipt from the Lessor of notice of any default by the Lessee, shall fail to commence correcting such default with reasonable diligence, then the Lessor shall have the right immediately to terminate this Lease. In such event, the Lessor shall have the immediate right of reentry and repossession of all the premises and all buildings, fixtures, and improvements located thereon, without any obligation to compensate the Lessee in any manner therefor, and all of such buildings, fixtures, and improvements shall thereupon become the property of the Lessor and the Lessee shall have no further right, title, or interest therein. The Lessee, however, shall only have ten days after written notice from the Lessor to correct any default in the payment of rent.

23. *Waiver of breach.* No waiver by either party of its right to enforce any provision hereof after any default on the part of either party shall be deemed a waiver of its right to enforce each and all of the provisions hereof upon any further or other default on the part of either party.

24. *Notices.* Any notice required to be served by either party to the other respecting this Lease shall be served by registered mail addressed to the Lessee at 300 West College Road, Tucson, Arizona, or the Lessor, 100 East First Street, Tucson, Arizona, unless and until different addresses may be furnished in writing by either party to the other. Such notice shall be deemed to have been served within 24 hours after it has been deposited in the United States Post Office at Tucson, Arizona, which shall be a valid and sufficient service of notice for all purposes.

25. *Arbitration.* Any dispute or controversy arising between the parties involving the interpretation or application of any provision of this Lease, or arising out of this Lease, shall be submitted to and determined by arbitration, in accordance with the governing rules of the American Arbitration Association, or the rules of any other comparable organization in the event that the American Arbitration Association is not then in existence.

26. *Attorneys' fees.* If either party shall institute any suit or arbitration against the other in any way connected with this Lease or for the recovery of possession of the premises, the successful party shall recover from the other a reasonable sum for its attorneys' fees in connection with such suit or arbitration. The amount of such attorneys' fees shall be fixed by the court or arbitrators, as the case may be. If any person who is not a party to this Lease shall institute an action against the Lessee in which the Lessor shall be involuntarily and without cause joined as a party, the Lessee shall reimburse the Lessor for all attorneys' fees incurred by the Lessor in connection therewith.

27. *Prohibited assignments.* If the Lessee shall make a general assignment for the benefit of its creditors, or if the Lessee shall be finally adjudicated a voluntary or involuntary bankrupt by final order of a bankruptcy court of competent jurisdiction or is finally adjudicated an insolvent by a final order of a court of competent jurisdiction, at the option of the Lessor and after 15 days' written notice from the Lessor to the Lessee, this Lease shall terminate. In such event, the Lessor shall have the immediate right to reenter and take possession of all the premises and all of the buildings, improvements, and fixtures located thereon.

28. *Quiet enjoyment.* Conditioned upon the Lessee's paying the rent herein provided and performing and fulfilling all the covenants, agreements, conditions, and provisions herein to be kept, observed, or performed by the Lessee, the Lessee shall and may at all times during the term hereby granted peaceably, quietly, and exclusively have, hold, and enjoy the demised premises.

29. *Recordation of lease.* The parties prefer to record a memorandum of this Lease, rather than the Lease itself, and contemporaneously with the execution hereof they have executed a Memorandum of Lease in the form of Exhibit A, which is attached hereto and which may be recorded by either party. In the event it should be so required by any title company insuring title for the Lessor or the Lessee, or by any lending institution from which the Lessee proposes to make a loan, then the Lessee may cause this Lease to be placed of record.

30. *Titles.* The titles which are used following the number of each paragraph are so used only for convenience in locating various provisions of this Lease, and shall not be deemed to affect the interpretation or construction of such

provisions.

31. *Binding effect.* Subject to the other provisions of this Lease, all of the terms, covenants, and conditions of this Lease shall inure to the benefit of and shall bind, as the case may be, not only the parties hereto but the heirs, executors, administrators, successors, assigns, and legal representatives of the respective parties hereto.

32. *Entire agreement.* This Lease supersedes all agreements previously made between the parties relating to its subject matter. There are no other understandings or agreements between them.

33. *Non-waiver.* No delay or failure by either party to exercise any right under this Lease, and no partial or single exercise of that right, shall constitute a waiver of that or any other right, unless otherwise expressly provided herein.

34. *Governing law.* This Lease shall be construed in accordance with and governed by the laws of the State of Arizona.

35. *Counterparts.* This Lease may be executed in two or more counterparts, each of which shall be deemed an original but all of which together shall constitute one and the same instrument.

The parties have executed this Lease the day and year first above written.

Lessor:

Dale Morrison

Henrietta Morrison

Lessee:

Center Development Co.

By: _____

[insert name and title]

Exhibit A

Memorandum of Lease

This Memorandum of Lease made and entered into as of this _____[*day*] day of _____[*month*], _____[*year*], between Dale Morrison and Henrietta Morrison, the Lessor, and Center Development Co., an Arizona corporation, the Lessee, for the purposes of recording,

That the Lessor has leased to the Lessee, and the Lessee has leased from the Lessor, the following described real property:

_____ [*Insert description*]

for the term commencing on the date hereof and continuing thereafter for a period of 99 years upon the terms and conditions set forth in that certain lease of even date between the parties, an executed copy of which is in the possession of each party.

The parties have executed this Memorandum of Lease the date first above written.

Lessor:

Dale Morrison

Henrietta Morrison

Lessee:

Center Development Co.

By: _____

[insert name and title]

[Acknowledgments]



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D. COMMERCIAL DEVELOPMENT Shopping Centers, Industrial Buildings and Office Buildings

26-22 Current Legal Forms for Real Estate FORM 22.64

FORM 22.64 Contract for sale of land to be developed by purchaser as shopping center--provision for leaseback of part of space to seller--control of seller over building plans

COMMENT

The "sale and leaseback" transaction is a common real estate technique. A sale is made by the owner of property on condition that the purchaser lease it back to the former owner. The former owner may operate the property by subleasing it to various subtenants, or may occupy the property because it suits the former owner's special requirements. In most of these transactions, the property involved has already been improved with income-producing structures.

Illustrated here is a situation in which a retail chain store organization has acquired vacant land as part of an expansion program and wants this land developed into a shopping center in which it will occupy one of the buildings. The retail organization has obviously taken the initial risk in selecting the site for the shopping center, and is willing to back up its judgment by committing itself to a long-term lease. The retail organization has also formulated the concept of the entire shopping center and because of this has retained considerable control over the plans and details of the entire project. But the basic financial risk of constructing and owning the shopping center has been passed on to the developer who agrees to buy the land and carry out the development program conceived by the retail organization. This includes an obligation on the part of the developer to enter into leases with other tenants for certain minimum floor areas.

It should be noted that this agreement encompasses the two aspects of the transaction dealing with the sale of the land and the construction of the improvements. The actual lease between the new owner and the retail organization is a separate document.

FORM

AGREEMENT made _____[*date*], between Worldwide Stores, Inc., a Delaware corporation having its principal office at 100 East 34th Street, New York, New York ("Worldwide"), and Eastern Shopping Center, Inc., a Delaware corporation, having its principal office at 100 Fifth Avenue, New York, New York (the "Developer").

Whereas Worldwide acquired the real estate hereinafter described for development and use as a one-stop regional shopping center as more fully in this agreement and the accompanying documents described; and

Whereas the Developer, having been fully informed of Worldwide's intent and desires with respect to the development and use of such real estate, on its own initiative proposed that if Worldwide would sell such real estate to the Developer, the Developer would cause the same to be developed and used in the manner hereinafter and in the accompanying documents mentioned and would give Worldwide the assurances so to do provided hereinafter and in the accompanying documents,

Now, therefore, it is agreed between the parties as follows:

Article I

Sale of the Center

Section 1.1. *Sale.* Worldwide agrees to sell and convey, and the Developer agrees to purchase, upon the terms and conditions herein provided, that certain parcel of land situate, lying, and being in Nassau County, State of New York, that is described in Appendix A annexed hereto and made a part hereof (the "Center"), subject to the exceptions set forth in Appendix B annexed hereto and made a part hereof.

Section 1.2. *Purchase price.* The purchase price for the Center is \$500,000, payable as follows:

(a) Upon the execution and delivery of this agreement a down payment of \$100,000 by check subject to collection; and

(b) Upon the closing date, as defined in Section 3.2:

(1) by delivery to Worldwide of a check of the Developer drawn to Worldwide's order upon a bank which is a member of the New York Clearing House and duly certified by such bank or official or cashier's check of a New York City bank to Worldwide's order for \$150,000; and

(2) by the Developer duly executing, acknowledging, and delivering to Worldwide a purchase money note and purchase money mortgage covering the Center in the form and substance set forth in Appendices C and D annexed hereto, completed as indicated in such Appendices, such note to be for the sum of \$250,000.

Section 1.3. *Deed.* The deed conveying the Center to the Developer and required to be delivered hereunder shall be the usual bargain and sale deed with covenant against grantor's acts in proper short statutory form for record; shall be duly executed, acknowledged, and have revenue stamps in the proper amount affixed thereto by Worldwide, at Worldwide's expense, so as to convey to the Developer the fee simple to the Center, free of all encumbrances, except as herein and in Appendix B annexed hereto stated; and shall also contain the covenant required by subdivision 5 of Section 13 of the Lien Law. Except for the revenue stamps, the Developer shall, on the closing date, pay all expenses in connection with the recording of the deed, including, but not limited to, the recording charges.

Section 1.4 *Purchase money mortgage.* The attorneys for Worldwide shall draw, at its expense, the purchase money note and the purchase money mortgage to be delivered hereunder. The Developer shall, on the closing date, pay the mortgage recording tax and recording fees.

Section 1.5. *Prorations.* All taxes (including town, village, and school taxes) and water charges for the Center shall be apportioned as of the closing date. If the closing date shall occur before the tax rate is fixed, the apportionment of taxes shall be based upon the tax rate for the next preceding year applied to the latest assessed valuation. If there are any water meter or meters on the Center, Worldwide shall furnish a reading to a date not more than 30 days prior to the closing date, and the unfixed meter charge for the intervening time shall be apportioned on the basis of such last reading.

Section 1.6. *Condition of property.* Worldwide has not made and does not make any representations as to the quality or nature of the Center's ground or subsurface. Developer acknowledges that it has had a full and fair opportunity to examine the site and its history of use. Such examination included the ability to take and analyze soil samples. Developer acknowledges that it is satisfied with site conditions and accepts the site in its "as is" condition.

Section 1.7. *Right of entry.* From and after the date hereof and so long as the Developer is not in default under any provision of this agreement, the Developer (and the Developer's designees) may, from time to time, at the Developer's sole cost, expense, and risk, enter upon all or any part of the Center for the purpose of performing the Developer's obligations hereunder.

Section 1.8. *Title examination.* (a) The Developer shall order an examination of title to, and survey of, the Center and shall deliver a copy of the report and survey to Worldwide's attorneys, Smith and Brown, Esqs., 200 Madison Avenue, New York, New York, no later than 20 days after the date hereof. If any defects, encumbrances, or encroachments appear upon such report or survey (other than those to which the Developer has agreed to take subject by the terms of this agreement) which render the title unmarketable, the Developer shall send notice to Worldwide's attorneys of such alleged defects, encumbrances, and encroachments within five days after the above specified date. The Developer shall take title subject to all defects, encumbrances, and encroachments which are set forth in such report or survey and not included in such notice. Within 20 days after receipt of such notice, Worldwide shall notify the Developer that it will cure the defects, encumbrances, and encroachments of which the Developer shall have so notified Worldwide (other than those to which the Developer has agreed to take subject to) or Worldwide shall notify the Developer that Worldwide elects to cancel this agreement. If Worldwide shall have failed to so notify the Developer that it will cure such defects, encumbrances, and encroachments, this agreement shall be cancelled. In the event of any such election to cancel or cancellation, neither party hereto shall have any liability to the other hereunder; but Worldwide shall promptly thereafter refund to the Developer its down payment to Worldwide upon the execution and delivery of this agreement, and shall pay to the Developer the cost of title examination, the Developer's reasonable attorneys' fees, and the reasonable value of all work performed by James Baker which the Developer shall have paid or be obligated to pay to James Baker for work performed to the date of such cancellation in accordance with agreements theretofore made by and between the Developer and James Baker for performance of architectural and engineering services as provided in Article II of this agreement. The term cost of title examination is defined, for the purposes of this agreement, as the expense actually incurred by the Developer for title examination, in no event, however, to exceed the charges fixed by the New York Board of Title Underwriters for title examination of the Center, without the issuance of a policy, plus the cost to the Developer of any survey actually obtained, such cost not to exceed, however, the amount which would be charged by Guarantee Title Company for a similar survey.

(b) The Developer shall also order a continuation of the examination of title, and a survey, of the Center and deliver a copy of such continuation report and of such survey to the attorneys for Worldwide between ten and 20 days before the closing date.

(c) Worldwide shall be entitled to an adjournment of the time fixed for the closing date for 20 days in order to eliminate any of the defects, encumbrances, and encroachments contained in such continuation report or survey.

Section 1.9. *Failure of title.* If Worldwide shall be unable to convey title to the Center to the Developer, subject to and

in accordance with the terms of this agreement, the Developer shall have only the following rights:

(a) to accept whatever title Worldwide is able to convey without any abatement of the purchase price and without any other liability on the part of Worldwide, provided, however, that if it shall be an objection to the title that the same is encumbered by any lien dischargeable by the payment of money (except such lien as the Developer has agreed by the terms of this agreement to take subject to), Worldwide agrees that it shall either present a proper discharge thereof to the Developer at the closing and pay the cost of recording and filing such instruments, or the Developer may, but shall not be obligated to, deduct the amount thereof with costs of discharge from the purchase price; or

(b) to reject title.

The Developer shall not be entitled to any other rights or remedies. If the Developer shall reject title, neither party shall have any liability to the other hereunder; but Worldwide shall promptly thereafter refund to the Developer the down payment made by the Developer to Worldwide upon the execution and delivery of this agreement and shall pay to the Developer the cost of title examination and the Developer's reasonable attorneys' fees. If title shall have been rejected by the Developer by reason of any defects, encumbrances, or encroachments appearing on such report or such continuation report, or on such surveys, which render title unmarketable, or if title shall have been rejected pursuant to Section 1.14 hereof, Worldwide shall pay to the Developer, in addition to and at the time of the payments specified above, the amount of all architects' and engineers' fees and other expenses in connection therewith which the Developer shall have paid or be obligated to pay to such architects and engineers to the closing date in accordance with agreements theretofore made by and between the Developer and such architects and engineers for performance of architectural and engineering services as provided in Article II of this agreement. It is understood and agreed, however, that if the defects, encumbrances, or encroachments which render title unmarketable shall have appeared in the continuation report or survey but not in the original report or survey and if such defects, encumbrances, or encroachments were in existence when the original report of title was issued or when the original survey was made and should have been disclosed therein, Worldwide shall not be required to pay to the Developer the architectural and engineering fees and expenses specified in this Section 1.9.

The existence of any conditions to which the Developer agrees to take subject under this agreement shall not be deemed or construed to render Worldwide's title unmarketable; and, notwithstanding that such conditions may render title unmarketable, the Developer shall not have the right to refuse to take title by reason thereof, and the purchase price shall not in any respect be reduced nor shall the Developer be entitled to damages.

Section 1.10. *Test of good title.* Worldwide shall give, and the Developer shall accept, a title such as Guarantee Title Company will approve and insure, subject, however, to any objection to title that the Developer has agreed by the terms of this agreement to take subject to. If at the closing date the Center is subject to any liens, including but not limited to judgments, licenses, or taxes, the amount of which are the subject of litigation or negotiation, or shall not have been finally fixed (other than those to which the Developer is to take subject under this agreement), the same shall not be deemed an objection to title, provided that Guarantee Title Company will, at the time of the delivery of the deed thereto, issue or bind itself to issue its fee title policy which will insure the Developer against the collection of such liens from the Center.

Section 1.11. *Customs.* Except as otherwise in this agreement provided, the customs in respect of title closings adopted by the Real Estate Board of New York, Inc., as amended, shall apply to the apportionments and other matters in this Article I mentioned.

Section 1.12. *Fire and condemnation.* If, prior to the closing date, all or any part of the Center is taken by eminent domain, neither party shall have the right to cancel this agreement and Worldwide, upon the closing of title and the receipt of the purchase price, shall assign, transfer, and set over to the Developer all of Worldwide's right, title, and interest in and to any awards that may be made for such taking.

Section 1.13. *Purchaser's lien.* The cost of title examination and the \$100,000 down payment by check subject to collection delivered by the Developer simultaneously with the execution and delivery of this agreement shall, upon collection, become a lien upon the Center. Such lien shall not continue after default by the Developer hereunder or after payment to the Developer of all of the moneys provided for in Sections 1.8 or 1.9 hereof.

Section 1.14. *Zoning and other restrictions.* (a) The Developer shall take title subject to existing zoning and building laws, ordinances, restrictions, and regulations imposed by any public authority ("zoning laws") affecting the Center. If, between the date hereof and the closing date, such zoning laws are so changed as to prevent the construction, operation, maintenance, and use of the Center as a one-stop regional shopping center as more fully in this agreement and the accompanying documents described (except to the extent, if any, such construction, operation, maintenance, or use may be prevented by such currently existing zoning laws), the Developer shall have only the rights at the closing date to accept title (and thereby waive any objections to such change in zoning laws) or to reject title, in which case the Developer's only rights and remedies shall be as provided in Section 1.9 hereof.

(b) If any governmental authority having jurisdiction over the Center shall have obtained, at the closing date, any rights in and to streets, roads, or avenues (whether dedicated or not), if any, in, upon, or across the Center which may be plotted or laid out on any map or plan issued and filed by such governmental authority or shall have imposed any restrictions against building upon the bed of such streets, roads, or avenues, and if such rights or restrictions would prevent the construction, operation, maintenance, and use of the Center as a one-stop regional shopping center as more fully in this agreement and the accompanying documents described, the Developer shall have only the rights, at the closing date, to accept title (and thereby waive any objections to such rights and restrictions) or to reject title, in which case the Developer's only rights and remedies shall be as provided in Section 1.9 hereof.

Article II

Development of the Center

Section 2.1. *Outline plans.* Worldwide has previously prepared and delivered to the Developer, and each has approved and initialed, outline plans and specifications for the construction of Worldwide's building. As used in this agreement, Worldwide's building means the Tenant's building--including building equipment--to be erected and installed as provided in Article II of the lease attached as Appendix G hereto. The plans and specifications for Worldwide's building shall be so drawn and written that it will be capable of supporting and servicing four stories, including basement.

Section 2.2. *Preliminary architectural and structural engineering plans.* Within 30 days after the date hereof, and at no cost to Worldwide, the Developer shall commence and thereafter diligently pursue the preparation of preliminary architectural and structural engineering plans and specifications for Worldwide's building (including building equipment therefor) and upon completion thereof, deliver the same to Worldwide. (As used in this agreement, building equipment shall have the meaning specified in Section 17.6 of the lease attached as Appendix G hereto.) Such plans and specifications and those referred to hereafter in Section 2.3 hereof shall be consistent with and reasonably inferable from both Worldwide's outline plans and specifications referred to in Section 2.1 hereof and Appendix F hereto and shall provide for first-class workmanship and materials and shall be designed to meet the requirements to be certified as LEED Certified as set by the U.S. Green Building Council; the parties contemplate that Worldwide's building will be of the same quality of workmanship and materials as is contained in, but may otherwise differ substantially from, Worldwide's Bronxville, New York, store. (As used in this agreement, Appendix F means the design concept and site plan annexed hereto as Appendix F, as they may be modified from time to time as provided by Section 2.7 hereof and by agreement of the parties.) Such preliminary plans and specifications and all other plans and specifications and drawings hereinafter referred to shall be prepared by such architects and engineers as the Developer shall from time to time select as in this Section provided. The Developer shall select only such architects or engineers as Worldwide shall from time to time approve to perform any services with respect to the demised premises. (As used in this agreement,

demised premises shall have the meaning specified therefor in Section 1.1 of the lease attached as Appendix G hereto.) Before selecting an architect or engineer to perform any services with respect to the remainder of the Center, excluding demised premises, the Developer shall deliver to Worldwide a list of one or more architects or engineers the Developer is considering selecting. Worldwide shall, within 20 days after receipt of such list, advise the Developer of any architect or engineer named therein disapproved by Worldwide, and agree not to disapprove any architect or engineer unreasonably. The Developer may, after the expiration of 20 days after Worldwide has received such list, select any architect or engineer named therein to perform services with respect to the remainder of the Center, excluding demised premises, except such, if any, as Worldwide has advised the Developer it disapproves as provided herein. The Developer shall pay all fees and expenses of all architects and engineers selected in accordance with this Section. The Developer agrees that it shall, upon completion of each unit or part of the preliminary architectural and structural engineering plans and specifications for Worldwide's building, submit same to Worldwide and covenants to complete and submit to Worldwide on or before _____, _____[date], all of such preliminary plans and specifications. Worldwide shall have full right and authority to object to, and require changes, modifications, and corrections which it deems necessary or desirable in, all such plans and specifications, provided that any and all such objections and requirements shall be made in writing within 30 days after receipt of such plans and specifications and provided that such objections and requirements shall be consistent with and reasonably inferable from both Worldwide's outline plans and specifications above referred to in Section 2.1 hereof and Appendix F. The Developer shall, without cost or expense to Worldwide, revise such preliminary plans and specifications and make all of the changes, modifications, and corrections, if any, so required by Worldwide, with diligence, promptly after receipt of Worldwide's written request therefor. Worldwide's failure to make such request within 30 days after receipt of such preliminary plans and specifications shall constitute its approval thereof. Three copies of all such preliminary plans and specifications as so revised and corrected shall be supplied to Worldwide without charge promptly after completion thereof.

Section 2.3. *Preliminary mechanical engineering plans.* The Developer shall diligently prepare, without cost or expense to Worldwide, and deliver to Worldwide preliminary mechanical engineering plans and specifications for Worldwide's building. The Developer agrees that it shall, upon completion of each unit or part of the preliminary mechanical engineering plans and specifications for Worldwide's building, submit same to Worldwide and covenants to complete and submit to Worldwide on or before _____[date], all of such preliminary plans and specifications. Worldwide shall have full right and authority to object to, and require changes, modifications, and corrections which Worldwide deems necessary or desirable in, all such plans and specifications, provided that any and all such objections and requirements shall be made in writing within 30 days after receipt of such plans and specifications and provided that such objections and requirements shall be consistent with and reasonably inferable from both Worldwide's outline plans and specifications above referred to in Section 2.1 hereof and Appendix F. The Developer agrees, without cost or expense to Worldwide, to revise such preliminary plans and specifications and to make all of the changes, modifications, and corrections, if any, so required by Worldwide, with diligence, promptly after receipt of Worldwide's written request therefor. Worldwide's failure to make such request within 30 days after receipt of such preliminary plans and specifications shall constitute its approval thereof. Three copies of all such preliminary plans and specifications as so revised and corrected shall be supplied to Worldwide without charge promptly after completion thereof.

Section 2.4. *Final plans.* The Developer shall, no later than 30 days after:

(a) Worldwide's approval of such preliminary plans and specifications originally submitted by the Developer to Worldwide in accordance with Section 2.3 hereof; or

(b) (if Worldwide, in accordance with Section 2.3 hereof, shall have requested any changes, modifications, and corrections) the Developer shall have made all such requested changes, modifications, and corrections and shall have supplied Worldwide with such plans and specifications as so revised and corrected, as the case may be, commence to prepare and thereafter diligently prepare, without cost or expense to Worldwide, and deliver to Worldwide detailed final architectural and engineering plans and specifications, including working drawings, for Worldwide's building. Such

final plans, specifications, and drawings shall be consistent with and reasonably inferable from both Appendix F hereto and the preliminary plans and specifications, as revised and corrected pursuant to Sections 2.2 and 2.3 hereof. The Developer covenants that it shall, upon completion of each unit or part of the final plans, specifications, and working drawings for Worldwide's building, submit same to Worldwide and covenants to complete and submit to Worldwide all of such plans, specifications, and drawings on or before the expiration of eight months following the applicable date provided in the first sentence of this Section 2.4 for the Developer to commence to prepare such plans, specifications, and drawings. Worldwide shall have the full right and authority to object to, and require changes, modifications, and corrections which Worldwide deems necessary or desirable in, all such final plans, specifications, and drawings, provided that any and all such objections and requirements shall be made in writing within 30 days after receipt of such plans, specifications, and drawings and provided that such objections and requirements shall be consistent with and reasonably inferable from both Appendix F hereto and the preliminary plans and specifications, as revised and corrected pursuant to Sections 2.2 and 2.3 hereof. The Developer agrees, without cost or expense to Worldwide, to revise such final plans, specifications, and drawings, and to make all of the changes, modifications, and corrections, if any, so required by Worldwide, with diligence, promptly after receipt of Worldwide's written request therefor. Worldwide's failure to make such request within 30 days after receipt of such plans, specifications, and drawings shall constitute its approval thereof. Five copies of all such final plans, specifications, and drawings, as so revised and corrected, shall be supplied to Worldwide to retain as its property without charge promptly after completion thereof.

Section 2.5. *Costs in excess of items in specific building.* If the plans, specifications, and drawings for Worldwide's building pursuant to Sections 2.2, 2.3, and 2.4 hereof include any items of equipment or material which are more or less expensive than the items of equipment and material designed to serve the corresponding functions in Worldwide's Bronxville, New York, store, the Developer shall prepare the plans, specifications, and drawings with such items included, subject to the provisions of Sections 2.2, 2.3, and 2.4 hereof; provided that if the cost of all such items included therein as the result of such requests by Worldwide will result, as shown in the estimate hereinafter provided for this Section, in a net increase in the aggregate of the construction costs for Worldwide's building as compared with what such costs would have been had the items designed to serve the corresponding functions in Worldwide's Bronxville, New York, store been included in the plans, specifications, and drawings for Worldwide's building instead of the requested items, the Developer shall advise Worldwide of any such net increase as follows. Whenever Worldwide shall make any such request, the Developer shall promptly cause to be prepared and submitted to Worldwide a bona fide written estimate by the architects or engineers responsible for preparation of such plans, specifications, and working drawings of any increase or decrease in architects' and engineers' fees and in such construction costs that would result from any such request; such estimate shall itemize separately the estimated cost of any item of material Worldwide so requested the Developer to include. Such estimate, as submitted, may be approved in writing by Worldwide and returned to the Developer within 15 days after receipt thereof by Worldwide, in which case Worldwide agrees to reimburse the Landlord under the lease attached hereto as Appendix G for the aggregate net increase in architects' and engineers' fees and in construction costs, if any, shown on all of such approved estimates promptly upon receipt of a statement therefor following completion of the construction of the work involved; or such estimate, as submitted, may be revised by Worldwide by deducting from any increase in such fees and costs stated therein the difference between the estimated cost of any item of material included therein and the lower written bid for the identical item of material from a reliable supplier, provided Worldwide submits such bid to the Developer within 15 days after receipt of such estimate by Worldwide. Such estimate, as so revised, may be approved in writing by Worldwide and returned to the Developer within 15 days after receipt thereof by Worldwide, in which case Worldwide agrees to reimburse the Landlord under the lease attached hereto as Appendix G for the aggregate net increase in architects' and engineers' fees and in construction costs, if any, shown on all of such approved estimates, as so revised, promptly upon receipt of a statement therefor following completion of the construction of the work involved. If such estimate, whether or not so revised, is not approved in writing by Worldwide and returned to the Developer so approved within 15 days after receipt thereof by Worldwide, the request shall be considered to have been withdrawn by Worldwide, but Worldwide shall reimburse the Developer for reasonable architects' and engineers' fees for the preparation of such estimate.

Section 2.6. *Preliminary plans for other buildings.* The Developer shall no later than 30 days after the date hereof

commence to prepare and thereafter diligently prepare, without cost or expense to Worldwide, and deliver to Worldwide preliminary architectural plans and preliminary outline specifications, including isometric drawings and elevations, for the construction of at least 200,000 square feet, and not more than 400,000 square feet, of building floor area of the buildings (other than Worldwide's building) shown on Appendix F and the other improvements (including the paving, landscaping, and lighting of the driveways, roads, malls, and parking areas shown on Appendix F and the sidewalks, service areas, and other common facilities required for a complete shopping center). (As used in this agreement floor area and building floor area shall be defined, respectively, as they are respectively defined in Section 4.1 of the lease attached as Appendix G hereto.) Such plans, specifications, drawings, and elevations shall be consistent with and reasonably inferable from Appendix F hereto, shall provide for good quality workmanship and materials, and shall provide that all vehicular and pedestrian traffic ways shall be hard-surfaced and that all parking areas shall be finished with a permanent surface at least equal in quality to blacktop. The Developer covenants to complete and submit to Worldwide without charge three copies of such plans, specifications, drawings, and elevations no later than 90 days after the date hereof. If Worldwide shall, within 30 days after receipt of such plans, specifications, drawings, and elevations give notice in writing to the Developer that any of them do not comply with this Section 2.6, the Developer shall, without cost or expense to Worldwide, diligently make all changes, modifications, and corrections therein required to make them comply with this Section 2.6, promptly after receipt of such notice from Worldwide. Worldwide's failure to give such notice within 30 days after receipt of such plans, specifications, drawings, and elevations shall constitute its approval thereof. Three copies of all such plans, specifications, drawings, and elevations, as so revised and corrected, shall be supplied to Worldwide to retain as its property without charge promptly after completion thereof.

Section 2.7. *Plans for service areas.* The Developer shall prepare, without cost or expense to Worldwide, and deliver to Worldwide no later than 60 days before the closing date, preliminary architectural plans for screened service courts for all buildings (other than Worldwide's building) shown on Appendix F (unless prior to such delivery date Worldwide has agreed with the Developer on a substitute arrangement to replace such screened service courts). Upon such delivery, Appendix F hereto shall be modified solely to the extent required to incorporate such preliminary architectural plans therein.

Section 2.8. *Other leases.* The Developer agrees that on or before _____ [date], tenants (other than Worldwide) shall have entered into commitments to lease stores aggregating at least 200,000 square feet of floor area in the Center, and shall be obliged thereunder to open for business in such stores on or before the later of the date on which Worldwide shall open for business in Worldwide's building or _____ [date]. The Developer further agrees that such commitments for leases, a true copy of each of which the Developer shall deliver to Worldwide on or before _____ [date], shall comply with Article X of the lease attached as Appendix G hereto (as if such lease governed such commitments for leases) and shall include commitments for leases of at least: (a) 5,000 square feet of floor area to a drug store for an initial term of at least ten years; (b) 15,000 square feet of floor area to a supermarket for an initial term of at least 15 years; (c) 20,000 square feet of floor area to one or more variety stores for initial terms of at least 20 years each; and (d) 40,000 square feet of floor area to apparel stores (including shoe stores) for initial terms of at least 15 years each. The Developer shall deliver to Worldwide, within ten days after the execution thereof, a true copy of each lease or commitment to lease space in the Center.

Article III The Closing

Section 3.1. *Place of closing.* All matters to be performed under this agreement on the closing date shall be performed at the office of Smith and Brown, Esqs., 200 Madison Avenue, New York, New York, at 10 a.m., New York City time, on the closing date.

Section 3.2. *Date of closing.* The closing date shall be _____ [date]. Provided (a) the Developer is not

in default under this agreement and (b) at the time of giving the notice next mentioned (if the Developer gives such a notice) all matters hereunder to be done or performed prior to the closing date (except those to be done or performed by Worldwide) have been done or performed, the Developer upon 20 days' prior written notice to Worldwide setting forth an earlier closing date, may accelerate the closing date, in which event the earlier date mentioned in such notice shall be the closing date hereunder. The closing date may be extended as provided in Sections 1.8 or 3.3 hereof.

Section 3.3. *Default by developer.* If Developer shall default in performing any of its obligations hereunder, and fail to cure the same within 20 days after Worldwide shall have given Developer written notice which specifies the nature of such default, Worldwide, in addition to all other rights it may have hereunder, or otherwise, may cancel this agreement and retain the down payment made by Developer to Worldwide upon the execution hereof.

Section 3.4. *Completion bond.* On the closing date, the Developer shall deliver to Worldwide a bond wherein the general contractor to be employed by the Developer to construct Worldwide's building (as contemplated by Appendix G) and the Developer shall be the Principals, Worldwide shall be the Obligee, and any one of the following companies shall be Surety:

Eastern Surety Company Fidelity Company of New York Central Insurance Company United States Guaranty Co.

Such bond shall be in the amount of \$3,000,000 unless such amount shall be changed as hereinafter provided, and shall guarantee the construction and completion of Worldwide's building (as defined in Appendix G) fully paid for. Between 60 and 90 days prior to the closing date, if either party is of the opinion that the cost of such construction and completion will be more or less than \$3,000,000, such party may be written notice to the other request that such amount of \$3,000,000 be changed. If the parties cannot agree upon a mutually satisfactory amount within ten days after such notice shall have been given, either party may refer the dispute to the architect selected to perform services with respect to the demised premises as provided in Section 2.2 hereof not later than 45 days prior to the closing date. Such architect shall, not later than 15 days prior to the closing date, advise the parties of the amount which in his opinion would be required to construct and complete Worldwide's building (as defined in Appendix G) by a responsible contractor and the bond shall be in the amount so determined. If then obtainable from the applicable surety company the bond shall be substantially in the form of Appendix E hereto.

Section 3.5. *Authority of seller.* On the closing date, Worldwide shall deliver to the Developer (a) certified resolutions of Worldwide's Board of Directors authorizing the execution of this agreement and performance of its obligations (including the execution and delivery of the deed and the lease) hereunder, and (b) an opinion of Smith and Brown, Esqs., to the effect that the execution and delivery of this Agreement and the execution and delivery of this Agreement and the execution and delivery of the deed and the lease then required to be executed and delivered to consummate this agreement have been duly authorized by Worldwide, have been duly executed and delivered on behalf of Worldwide by an officer or officers thereunto duly authorized, and are legal, valid, and enforceable in accordance with their terms.

Section 3.6. *Authority of developer.* On the closing date, the Developer shall deliver to Worldwide (a) certified resolution of the Developer's Board of Directors authorizing the execution of this agreement and performance of its obligations (including the execution and delivery of the purchase money mortgage, purchase money note, the bond referred to in Section 3.4 hereof, and the lease) hereunder, and (b) an opinion of James Warwick, Esq., attorney for the Developer, to the effect that the execution and delivery of this agreement and the execution and delivery of the purchase money mortgage, purchase money note, such bond, and the lease then required to be executed and delivered to consummate this agreement have been duly authorized by the Developer, have been duly executed and delivered on behalf of the Developer by an officer or officers thereunto duly authorized, are (except for such bond) legal, valid, and enforceable in accordance with their terms, and such bond is (except with respect to the applicable surety company concerning which no opinion need be expressed) legal, valid, and enforceable in accordance with its terms, and (c) a certificate, executed by the Developer's chief executive officer, to the effect that no leases or written commitments to lease any part of the Center have been entered into by or on behalf of the Developer except in conformity with this

agreement and the accompanying documents.

Section 3.7. *Documents.* On the closing date, provided that all matters hereunder to be done or performed then or prior thereto shall have been duly done and performed:

- (a) Worldwide shall deliver to the Developer the deed required to be delivered to the Developer hereunder; and
- (b) Concurrently, Worldwide and the Developer shall duly execute, acknowledge, and deliver, as Tenant and Landlord, respectively, the lease attached as Appendix G hereto, after it has been completed as hereinafter in this Section 3.7 provided.

On the closing date prior to such execution of such lease by the Developer and Worldwide:

- (a) Both parties shall approve, date, and initial (and each shall receive an initialed copy of): (1) the final plans, specifications, and drawings, as revised and corrected pursuant to Section 2.4 hereof, and (2) the preliminary plans, specifications, drawings, and elevations, as revised and corrected pursuant to Section 2.6 hereof.
- (b) The lease attached as Appendix G hereto shall be completed as therein indicated.
- (c) Such lease shall have attached thereto as Exhibit 2 thereto Appendix F hereto.
- (d) Both parties shall initial each page of each exhibit to such lease.

Article IV Miscellaneous

Section 4.1. *Notices.* Any notice, request, or demand given or required to be given under this agreement shall, except as otherwise expressly provided herein, be in writing and shall be deemed to have been given when mailed by United States registered mail postage prepaid to the other party at the address stated below or at the last changed address given by the party to be notified as hereinafter specified:

To the Developer by addressing the same to:

Eastern Shopping Center, Inc., 100 Fifth Avenue New York, New York 10012

To Worldwide by addressing the same to:

Worldwide Stores, Inc., 100 East 34th Street New York, New York 10016

Either party may, however, at any time change its address for notification purposes by mailing, as herein provided, a notice stating the change and setting forth the new address.

Section 4.2. *Assignment; binding effect.* Any reference in this agreement to the Developer shall mean Eastern Shopping Center, Inc. provided that if Eastern Shopping Center, Inc., shall assign all of its right, title, and interest in this agreement to any person, firm, or corporation, the Developer shall mean the person, firm, or corporation which for the time being owns all of the right, title, and interest of Eastern Shopping Center, Inc., under this agreement, provided that (a) such assignee shall in writing expressly assume all of the obligations of Eastern Shopping Center, Inc., hereunder, (b) a duplicate copy of such assignment and assumption shall be delivered to Worldwide no later than five days prior to the closing date, and (c) such copy shall state the assignee's business address, and, if the assignee be a corporation, the

state of its incorporation. Except as herein otherwise expressly provided, this agreement and the several covenants, restrictions, conditions, agreements, stipulations, and provisions herein contained shall be binding upon the legal representatives, successors, and assigns of the respective parties hereto.

Section 4.3. *Relationship between parties.* It is the intention of this agreement to create the relation of Vendor and Purchaser between the parties hereto and no other relation whatsoever (except as provided in the Appendices hereto). Nothing herein (or in such Appendices) contained shall be construed to make the parties hereto partners or joint venturers, or to render either party liable for any of the debts or obligations of the other party. The provisions of Sections 1.6, 4.3, and 4.5 and Article II hereof shall survive the delivery of the deed and lease.

Section 4.4. *Non-waiver.* No delay or omission by either party hereto to exercise any right or power accruing upon any noncompliance or default by the other party with respect to any of the terms of this agreement shall impair any such right or power to be construed to be a waiver thereof, except as otherwise herein provided. A waiver by either of the parties hereto of any of the covenants, conditions, or agreements hereof to be performed by the other shall not be construed to be a waiver of any succeeding breach thereof or of any other covenant, condition, or agreement herein contained.

Section 4.5. *Broker.* The parties hereto agree that Johnson and Berger, 300 Third Avenue, New York, New York, brought about this agreement as broker. The Developer assumes the obligations for itself, its successors, and assigns (and Worldwide shall have no obligation of any kind) for the payment of any commissions or brokerage with respect to this agreement or the negotiation thereof, including the lease attached as Appendix G hereto and any extensions or renewals thereof and any additions to Worldwide's building.

Section 4.6. *Article and section headings.* The article and section headings herein are for convenience and reference only, and in no way define or limit the scope and content of this agreement or in any way affect its provisions.

Section 4.7. *Applicable law.* This agreement shall be governed by and construed in accordance with the laws of the State of New York.

Section 4.8. *Entire agreement.* This agreement contains the entire agreement between the parties, except as provided in other written agreements between the parties, and any agreement hereafter made shall be ineffective to change, modify, or discharge this agreement or any other existing written agreement in whole or in part unless such agreement hereafter made is in writing and signed by the parties hereto.

Section 4.9. *Short forms for recording.* The Developer agrees that the Developer shall execute and deliver such a short form of this agreement and the Appendices hereto as Worldwide, in its discretion, shall request from the Developer in order to record the provisions of this agreement and the Appendices hereto which Worldwide may deem necessary or desirable to make a matter of record. The Developer and Worldwide, however, hereby agree that, as between themselves, their respective successors and assigns, their relations shall be governed solely by the provisions of this agreement and the Appendices annexed hereto and not by any short form thereof which may be executed, delivered, and recorded for the purposes of record. Each party agrees to execute, in recordable form, any such certificate as the other reasonably requests concerning the rights and obligations of the parties under this agreement, or, if any of such rights or obligations have been waived, cancelled, or released, concerning their waiver, cancellation, or release.

Section 4.10. *Execution in counterparts.* This agreement may be executed in several counterparts, each of which shall be deemed an original, and all such counterparts shall together constitute but one and the same instrument.

Worldwide and the Developer have duly executed this agreement as of the day and year first above mentioned.

Eastern Shopping Center, Inc.

By: _____

[insert name and title]

Worldwide Stores, Inc.

By: _____

[insert name and title]

[Acknowledgments]

[Attach Exhibit A]

[Attach Exhibit B]

[Attach Exhibit C]

[Attach Exhibit D]

[Attach Exhibit E]

[Attach Exhibit F]

[Attach Exhibit G]



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Chapter 22 DEVELOPMENT AND SUBDIVISION
Part IV. FORMS

D. COMMERCIAL DEVELOPMENT Shopping Centers, Industrial Buildings and Office Buildings

26-22 Current Legal Forms for Real Estate FORM 22.65

FORM 22.65 Joint venture between developer and retailer to develop and operate shopping center

COMMENT

A retail organization with a dominant position in its trade may be able to exert considerable control over the plans for a shopping center, even though its only obligation will be that of a tenant of one of the various stores in the center. Such an organization can exercise similar control by first selecting and acquiring the vacant land and then engaging in a sale-leaseback transaction in which the purchaser undertakes to construct improvements in accordance with a prearranged plan. In either case, such a retail organization can obtain possession of premises constructed to its own special requirement without tying up any of its operating funds in fixed real estate assets. A less formidable organization may have to acquire a proprietary interest in the real estate if it wants to select its own business location and supervise the design and construction of the shopping center. In this type of situation, it may be necessary for the retail organization to join forces with a real estate developer who can offer his specialized experience in planning and constructing the project. From the standpoint of the developer, such a combination of forces may be ideal, for it assures the availability of a major tenant at an early stage in the venture.

This agreement illustrates a joint venture between a real estate developer and a retail organization to acquire property for the construction of a shopping center. Prior to commencement of construction, the retail organization is to enter into a lease with the joint venture for space in the shopping center. If this lease is not executed by the retail organization, the developer has the option to sell his interest in the joint venture to the retail organization for an amount equal to the developer's investment. This provision indicates that a principal inducement to the developer to join in the venture is the certainty of a tenant for substantial space.

This agreement sets forth the guidelines for the lease to be entered into with the retail organization and for the construction contract to be entered into with the developer. As to the

lease, the size of the store, the rent, the general obligations of the tenant, and the provisions relating to exclusive use are defined. As to the construction contract, the cost of the improvements to the venture, the starting and completion dates, and the other basic provisions are spelled out.

FORM

AGREEMENT entered into _____[date], between Samuel Knight, residing at 74 Dodge Road, Staten Island, New York ("Knight"), and Crossroads Stores Corporation, a New York Corporation ("Crossroads").

RECITALS

Knight and Crossroads wish to form a joint venture for the purpose of acquiring and developing certain property more fully described in Exhibit A annexed hereto and made a part hereof (the "property").

Crossroads has entered into a contract to purchase the property, and title is to be held by Welldone Realty Co., or such other entity which the joint venture may designate as its nominee.

It is contemplated that the property will be developed as a shopping center (the "Center"), to be constructed by Samuel Knight Construction Co., Ltd., which will include a 60,000 square foot store to be leased to Crossroads.

Now, therefore, in consideration of the foregoing, it is hereby agreed as follows:

1. *Formation of venture.* The parties hereto form a joint venture (the "Venture"), upon the terms and conditions herein set forth.

2. *Purpose of venture.* The purpose of the Venture is to develop the property as a first-class, modern shopping center consisting of approximately 100,000 square feet of ground floor space, including a store with approximately 60,000 square feet of ground floor space to be leased to Crossroads. Leases of the remaining space in the Center are to be made with tenants conducting businesses which are complementary to the business of Crossroads but not competitive.

3. *Initial capital.* The initial capital of the Venture will be \$200,000, consisting of the amount necessary to purchase the property, and the cost of on-site improvements preparatory to construction. Such initial capital shall be contributed equally by the parties no later than the closing of the purchase of the property. Separate capital accounts shall be maintained for each venturer, and no interest shall be paid on balances in such accounts.

4. *Interest in venture.* The respective interests of the parties hereto as members of the Venture, in and to the Venture, and in and to the net profits and losses of the Venture, shall be as follows:

Knight	50%
Crossroads	50%

5. *Lease to one party.* Prior to _____[date], Crossroads, as tenant, shall enter into a lease with the Venture, as landlord, covering a store with approximately 60,000 square feet of ground floor space (the "Store"), to be constructed by the Venture on the property. The Store shall be constructed in accordance with the provisions of Paragraph 7 hereof. The rent shall be \$1.20 per annum for each square foot of ground floor space in the Store. Such rent shall be a "net" rental, with all expenses in connection with the property, including, but not limited to, repairs, maintenance, insurance, and a pro rata share of real estate taxes (but excluding any interest or amortization on

mortgages) to be borne by the tenant. Other terms of the lease shall be similar to the terms of the lease between Hartsdale Realty Co. and Crossroads, dated _____[*date*], on property located in Bedford, Pennsylvania, a copy of which lease is attached hereto as Exhibit B. The provisions of the lease attached as Exhibit B dealing with the business activities to be permitted to the tenant and to be denied to other tenants shall be included in the lease to be entered into between Crossroads and the Venture.

6. *Option if lease not executed.* If Crossroads does not execute the type of lease described in Paragraph 5 before _____[*date*], Knight shall have the right, for a period of 60 days thereafter, to require Crossroads to purchase his interest in the Venture for the total amount that Knight previously contributed to the Venture. The option may be exercised by Knight's giving written notice thereof to Crossroads no later than _____[*date*]. If the option is exercised, the closing of the sale shall take place within 60 days thereafter, at which time the interest in the Venture shall be transferred and the purchase price therefor paid.

7. *Construction of center.* Within 30 days after the execution of the lease provided for in Paragraph 5 hereof, the Venture shall enter into a contract with Samuel Knight Construction Co., Ltd., for the construction of the Center substantially in accordance with the following terms:

(a) The contract shall be similar to the standard form of construction contract employed by the American Institute of Architects.

(b) Construction of the Center consisting of approximately 100,000 square feet of ground floor space shall commence no later than _____[*date*], and shall be completed by _____[*date*]; but such deadline for completion shall be postponed by the number of days during which construction is prevented by causes or events beyond the control of Samuel Knight Construction Co., Ltd., and provided further that if the contract to construct the Center is entered into after _____[*date*], the starting date and completion deadline shall be two months and 15 months, respectively, after the date such construction contract is entered into.

(c) The Center shall be constructed by Samuel Knight Construction Co., Ltd., for an amount equal to the actual cost of construction (with no allowance for overhead) plus 12 percent of the actual cost of construction.

(d) The Venture and an authorized employee of Crossroads shall have the right to audit the books of Samuel Knight Construction Co., Ltd., at any time after commencement of construction until one year after completion of construction in order to verify the actual cost of construction.

(e) The Venture shall make payment to Samuel Knight Construction Co., Ltd., of the amount provided for in subparagraph (d) of this paragraph according to the schedule attached as Exhibit C.

(f) The Store shall be similar to Crossroads' store located at Bedford, Pennsylvania.

(g) The lease to be executed between Crossroads and the Venture shall give Crossroads the right to approve preliminary and final plans and specifications for the Center and to verify that final plans and specifications have been complied with in the construction, provided such approval and verification is not to be unreasonably withheld.

8. *Term of venture.* The term of the Venture shall commence on the date hereof and continue until the earliest of the following:

(a) The sale or other disposition of the property.

(b) The exercise of an option to terminate by Knight following the termination or expiration of the lease between the Venture and Crossroads as a result of the default by Crossroads under such lease.

(c) The exercise by Knight of the option under Paragraph 6 hereof.

(d) The death of Knight.

(e) The mutual agreement of both parties to terminate the Venture.

9. *Distribution upon dissolution.* Upon the dissolution of the Venture, its noncash assets shall be liquidated, and the total assets, after full payment of all obligations and liabilities, shall be distributed to the parties as follows: first, in discharge and to return the respective capital contributions of the parties, and, second, in proportion to the respective rights of the parties to share net profits and losses of the Venture, as set forth in Paragraph 4. If, upon such dissolution, the assets of the Venture are insufficient to pay and discharge all of its obligations and liabilities, each of the parties hereto shall forthwith contribute as capital contributions to the Venture one-half of the aggregate amount required by the Venture to pay and discharge in full in cash all of such obligations and liabilities. If the assets of the Venture are insufficient to return to the parties all or any part of their respective capital contributions, neither party shall have any claim or recourse against the other therefor.

10. *Binding effect.* This agreement shall be binding upon and inure to the benefit of the parties hereto, their successors and assigns, and to any executor or administrator of Knight; provided that neither party, without the written consent of the other party, may transfer or assign an interest in the Venture in whole or in part, except to a nominee or a wholly owned subsidiary.

11. *Books.* The books and records of the Venture shall be kept in Knight's office at the address to which notice is to be sent to Knight under Paragraph 13 hereof. Such books and records shall be audited regularly by a certified public accountant employed by the Venture for such purpose. Certified financial statements shall be made available to each party at least annually. The designation of the certified public accountant and the compensation to be paid to him shall be subject to the agreement of both parties. The method of depreciation of fixed assets belonging to the Venture and its fiscal year shall be determined by mutual agreement of both parties.

12. *Management.* All questions relating to the conduct, management, or operation of the affairs, activities, or business of the Venture, and all questions relating to any asset or property of the Venture, or the disposition thereof, shall be determined by mutual agreement of Crossroads and Knight.

13. *Notices.* Notices hereunder shall be deemed to have been given when mailed by United States Registered or Certified mail, postage prepaid, addressed to the parties as follows:

To Knight:	Samuel Knight 74 Dodge Road Staten Island, New York 10314
To Crossroads:	Crossroads Stores Corporation 3150 Broadway New York, New York 10027

14. *Entire agreement.* This Agreement supersedes all agreements previously made between the parties relating to its subject matter. There are no other understandings or agreements between them.

15. *Non-waiver.* No delay or failure by either party to exercise any right under this Agreement, and no partial or single exercise of that right, shall constitute a waiver of that or any other right, unless otherwise expressly provided herein.

16. *Headings.* Headings in this Agreement are for convenience only and shall not be used to interpret or construe its provisions.

17. *Governing law.* This Agreement shall be construed in accordance with and governed by the laws of the State of New York.

18. *Counterparts.* This Agreement may be executed in two or more counterparts, each of which shall be deemed an original but all of which together shall constitute one and the same instrument.

The parties hereto have signed this agreement this _____[*day*] day of _____[*month*],
_____[*year*].

Samuel Knight

Crossroads Stores Corporation

By: _____

[*insert name and title*]

[*Acknowledgments*]

[*Attach Exhibit A*]

[*Attach Exhibit B*]

[*Attach Exhibit C*]



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Chapter 22 DEVELOPMENT AND SUBDIVISION

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26-22 Current Legal Forms for Real Estate FORM 22.66

FORM 22.66 Operating and Easement Agreement for strip shopping center where big box retailer acquires its own parcel

COMMENT

In this agreement, the developer has purchased a large tract of land on which it intends to construct a large strip center. One of the keys to the success of the strip center development is the developer's ability to attract one or more stores. An anchor tenant is typically a store that generates a large number of shoppers for the center. In many cases, this may be a big box retailer. That is a retailer that has a large store and shoppers go to the store as one of the shoppers destinations. The smaller stores in the center feed off of the shopping traffic generated by the big box retailer. A typical big box retailer might be a department store. The shoppers can drive to the center to shop at the department store. Before or after they visit the department store, they might visit a jewelry store, drop off dry cleaning, sit at a coffee shop, etc.

Most of the big box retailers are sophisticated in real estate matters. As such, they understand the benefits of owning real estate, and the benefit of being able to control the real estate the big box retailer is intending to utilize. As a result, it is sometimes necessary for the developer to sell the portion of the strip center that the big box retailer will occupy in order to attract it to the center. In the case where the ownership of the strip center is being divided, both the developer and the big box retailer have a significant interest in making sure that the development of each party's parcel is compatible with their own use of the property. For example, the big box retailer may not want to be located next to a flea market. Additional concerns are likely to be common points of access from dedicated roads, maintenance of parking and other improvements, joint use of utilities and common signage, competing uses, and hours of operation.

The following Operating and Easement Agreement involves the development of a strip center when the big box retailer purchased the land from the developer to construct its store.

FORM**OPERATING AND EASEMENT AGREEMENT**

THIS AGREEMENT ("OEA") is made and entered into as of the _____[day] day of _____[month], _____[year], among BIG BOX RETAILER, INC., a(n) _____[state] _____[insert name of entity] (Big Box") and Development Company L.L.C., a(n) _____[state] _____[insert name of entity] ("Developer"). Big Box and Developer are sometimes collectively called "Parties" and sometimes individually called a "Party."

WITNESSETH:

WHEREAS, Big Box is the owner of a certain tract of land described in Exhibit A attached hereto ("Big Box Tract") and identified as such on Exhibit X (the "Site Plan") attached hereto; and

WHEREAS, Developer is the owner of a certain tract of land described in Exhibit B attached hereto ("Developer Tract") and identified as such on the Site Plan; and

WHEREAS, the Big Box Tract is contiguous with and adjacent to the Developer Tract (collectively the "Shopping Center") as shown on the Site Plan; and

WHEREAS, Big Box and Developer intend to develop and operate their respective Tracts in conjunction with each other as integral parts of a retail shopping complex and in order to effectuate the common use and operation thereof they desire to enter into certain covenants and agreements as a part of a general plan, and to grant to each other certain reciprocal easements, in, to, over, under and across their respective Tracts.

NOW, THEREFORE, in consideration of the premises, the covenants and agreements hereinafter set forth and in furtherance of the Parties' understanding, it is agreed as follows:

ARTICLE I
DEFINITIONS

1.1 Building Area. "Building Area" shall mean the limited areas of the Shopping Center within which buildings (including canopies, supports, truck docks and/or receiving docks, truck ramps and other outward extensions, pilasters and overhangs, and footings projecting into the Common Area) are shown on the Site Plan.

1.2 Common Area. "Common Area" shall mean all areas within the exterior boundaries of the Shopping Center, exclusive of Building Area, all as shown on the Site Plan.

1.3 Final Plans. "Final Plans" shall mean the plans and specifications consisting of the Site Plan (attached hereto as Exhibit X) and the various plans and specifications prepared to comply with the Big Box CPR Book and Notes.

1.4 Floor Area. "Floor Area" shall mean the actual number of square feet of space contained on each floor within any building as measured from the exterior faces of the exterior walls or store front and/or the center line of any common walls; provided, however, that the following areas shall not be included in such calculations: mezzanine storage space,

mezzanine office space, loading docks which are not heated and/or air conditioned, building canopies, pilasters, overhangs, unenclosed recessed openings and any unenclosed utility and/or unenclosed mechanical equipment room or space. Garden shop and outdoor sales areas shall be part of Floor Area, but only to the extent counted as floor area by local code without variances in determining parking ratios. Each Party shall direct its architect to make a determination of the total Floor Area of any building on such Party's Tract within one hundred twenty (120) days of the date of completion of such building subject to verification by the other party's Architect. Within a reasonable time thereafter, such Party shall certify to the other Party the Floor Area applicable to such building.

During any period of rebuilding, repairing, replacement or reconstruction (including any addition or expansion allowed hereunder) of a building, the Floor Area of that building shall be deemed to be the same as existed immediately prior to that period. Upon completion of such rebuilding, repairing, replacement or reconstruction (including any addition or expansion allowed hereunder), the Party upon whose Tract such building is located, shall cause a new determination of Floor Area for such building to be made in the manner described above, and such determination shall be sent to the other Party.

1.5 Occupant. "Occupant" shall mean any Person from time to time entitled to the use and occupancy of any portion of a building in the Shopping Center under any lease, sublease, license, concession, or other similar agreement.

1.6 Party. "Party" shall mean Big Box and Developer, and after compliance with the notice requirements set forth below, shall mean their respective successors and assigns who become owners of the entirety of any one of the Tracts forming the Shopping Center. Until the notice requirement is complied with, the transferring Party shall (for the purpose of this OEA only) be the transferee's agent. Each Party shall be liable for the performance of all covenants, obligations and undertakings herein set forth with respect to the portion of the Shopping Center owned by it which accrue during the period of such ownership, and such liability shall continue with respect to any portion transferred until the notice requirement set forth below is complied with, at which time the transferring Party's personal liability shall terminate. The transferee Party shall automatically become liable for all obligations arising after compliance with the notice requirement. A Party transferring all or any portion of its interest in the Shopping Center shall give notice to the other Party of such transfer and shall include therein at least the following information:

- (a) the name and address of the transferee; and
- (b) a copy of the survey showing the location and indicating the legal description of the portion of the Shopping Center transferred.

Nothing contained herein to the contrary shall affect the existence, priority, validity or enforceability of any lien permitted hereunder which is placed upon the transferred portion of the Shopping Center prior to receipt of the notice.

1.7 Permittee. "Permittee" shall mean all Occupants and the officers, directors, employees, agents, contractors, customers, vendors, suppliers, visitors, invitees, licensees, subtenants, and concessionaires of Occupants insofar as their activities relate to the intended use of the Building Area of the Shopping Center. Among others, Persons engaging in the following activities on the Common Area shall not be considered to be Permittees:

- (i) Exhibiting any placard, sign, or notice;
- (ii) Distributing any circular, handbill, placard, or booklet;
- (iii) Soliciting memberships, contributions or signatures;
- (iv) Parading, picketing, or demonstrating; and

(v) Failing to follow regulations relating to the use of the Shopping Center which regulations will be applied to equally and in a nondiscriminatory manner to all tenants off the Shopping Center and will. not require payments of money to Developer by any tenant.

1.8 Person. "Person" shall mean any individual, partnership, firm, association, corporation, trust, or any other form of business or government entity.

1.9 Scope of Work. "Scope of Work" shall mean the narrative description of Developer's obligations relating to the Common Area as described in the Big Box CPR Book and Notes.

1.10 Big Box CPR Book and Notes. "Big Box CPR Book and Notes" shall mean the narrative description of Developer's obligations relating to the Common Area as described in Exhibit Z attached hereto.

1.11 Tract. "Tract" shall mean that portion of the Shopping Center owned by a Party.

ARTICLE II EASEMENTS

2.1 Ingress and Egress and Parking.

(A) During the term of this OEA, each Party hereby grants and conveys to the other Party for its use and for the use of its Permittees, in common with others entitled to use the same, a non-exclusive easement for the passage and parking of passenger, service and delivery vehicles over and across the parking and driveway areas of the grantor's Tract as shown on the Site Plan for such use and for the passage and accommodation of pedestrians over and across the parking, driveways and sidewalk areas of the grantor's Tract as shown on the Site Plan. The foregoing easement rights shall be subject to the following reservations as well as other provisions contained in this OEA:

(i) Except for situations specifically provided for in the following subparagraphs, no fence or other barrier which would prevent or obstruct the passage of pedestrian or vehicular travel for the purposes herein permitted shall be erected or permitted within or across the easement areas; provided, however, that the foregoing provision shall not prohibit the installation of convenience facilities (such as mailboxes, public telephones, benches, trash deposit enclosures and containers, and transformers), of landscaping, berms or planters, nor of limited curbing and other forms of traffic controls only to such extent shown on the Site Plan.

(ii) In connection with any construction, reconstruction, repair or maintenance on its Tract, each Party reserves the right to create a staging and/or storage area in the Common Area on its Tract at the location shown on the Site Plan.

(iii) No Party shall, without obtaining the consent or approval of all other Parties, make any material change, modification or alteration in its portion of the Common Area. Either party may make changes which do not materially affect the traffic patterns or direction of parking, or reduce the amount of parking.

(iv) Each Party reserves the right to close off its portion of the Common Area for such reasonable period of time as may be legally necessary, in the opinion of such Party's counsel, to prevent the acquisition of prescriptive rights by anyone; provided, however, that prior to closing off any portion of the Common Area, as herein provided, such Party shall give written notice to all other Parties of its intention to do so, and shall attempt to coordinate such closing with the other Parties so that no unreasonable interference in

the passage of pedestrians or vehicles shall occur (it being understood and agreed by the Parties that without the prior written consent of the other Parties and except for a bona fide emergency no such closing shall take place during the time period between April 1 and July 4; August 1 and September 15; November 1 and December 31; and the thirty (30) calendar day period before Easter).

(v) Each Party reserves the right at any time and from time to time to exclude and restrain any Person who is not a Permittee from using its Common Area.

(vi) The grant of the foregoing easements over that part of the Common Areas identified as the 'Perpetual Drives' shall be perpetual and nonexclusive; provided, however, the owner of the Developer Tract and the owner of Big Box Tract shall have the right to relocate such portion of the Perpetual Drives as is located on their respective Tract from time to time during the Term of this Agreement in accordance with the terms hereof and after the Term hereof as each Party may reasonably desire; provided, however, that (i) in no event shall such Perpetual Drives be less than thirty (30) feet in width; (ii) in no event shall a curb cut connecting a Perpetual Drive to a public roadway be relocated without the consent of the owner of the other Tract, which consent shall not be unreasonably withheld or delayed; (iii) such perpetual Drives shall at all times provide access to such curb cuts in a manner not materially more burdensome than that provided by the Perpetual Drives, as now existing (in the event of any dispute with respect to this clause, the parties shall, within ten (10) days after one party objects to such relocation, submit drawings of the proposed relocation to _____ [insert name of mediator], or if such organization is nonexistent the president of such other similar organization as may be existing at such time, and such president shall approve a certified traffic consultant to determine whether such relocation is more burdensome, which determination shall be made within thirty (30) days of submission to such traffic consultant and which determination shall be final, foil-appealable, and binding); and (iv) the Big Box Tract shall at all times benefit from an insurable, nonexclusive, perpetual easement over such portion of the Perpetual Drives as is located on the Developer Tract, and the Developer Tract shall at all times benefit from an insurable, nonexclusive, perpetual easement over such portion of such Perpetual Drives as is located on the Big Box Tract,

(v) Those portions of the Developer Tract identified as "Outlots" shall not have reciprocal parking rights.

2.2 Utilities.

(A) Each Party hereby grants and conveys to all other Parties non-exclusive perpetual easements in, to, over, under, along and across those portions of the Common Area (exclusive of any portion located within a Building Area) located on the grantor's Tract necessary for the installation, operation, flow, passage, use, maintenance, connection, repair, relocation, and removal of lines or systems for utilities serving the grantee's Tract, including but not limited to, sanitary sewers, storm drains, cable TV, water (fire and domestic), gas, electrical, telephone and communication lines. Except with respect to ground mounted electrical transformers and emergency generators at the rear of a building or as may be necessary during periods of construction, repair, or temporary service, all utilities shall be underground unless required to be above ground by the utility providing such service. Prior to exercising the right granted herein, the grantee shall first provide the grantor with a written statement describing the need for such easement, shall identify the proposed location of the utility, and shall furnish a certificate of insurance showing that its contractor has obtained the minimum insurance coverage required by Section 5.4(C) hereof. Any Party installing utilities pursuant to the provisions of this subparagraph shall plan such installation and use in a manner so as to minimize interference with existing utilities previously installed by any other Party, shall pay all costs and expenses with respect thereto and shall cause all work in connection therewith (including general clean-up and proper surface and/or subsurface restoration) to be completed as quickly as possible and in any event in not more than ten (10) calendar days and in a manner so as to minimize interference with the use of the Common Area by any other Party hereto. If any Party elects to install common utilities, all costs and expenses thereof may be set forth in a separate agreement between the Parties.

(B) The initial location and width of any utility shall be subject to the prior written approval of the Party whose Common Area is to be burdened thereby, and such approval shall not be unreasonably withheld or delayed. The easement area shall be no larger than whatever is necessary to reasonably satisfy the utility company as to a public utility or five feet (5') on each side of the centerline as to a private line. The grantee shall provide to the grantor a copy of an as-built survey meeting the basic requirements of the American Land Title Association showing the location of such utility. The grantor shall have the right at any time to relocate a utility line upon thirty (30) days' prior written notice, provided that such relocation:

- (i) shall not interfere with or diminish the utility services to the grantee;
- (ii) shall not reduce or unreasonably impair the usefulness or function of such utility;
- (iii) shall be performed without cost or expense to grantee;
- (iv) shall be completed, using materials and design standards which equal or exceed those originally used;
- (v) and the appropriate governmental or quasi-governmental agencies having jurisdiction thereover;
- (vi) shall not materially interfere with the use of the Common Area; and
- (vii) except in the case of an emergency and/or during the course of initial construction, shall not be constructed during the four (4) time periods set out in Section 2.1 (iv).

Documentation of the relocated easement area shall be the grantor's expense and shall be accomplished as soon as possible. Grantee shall have a right to require an as-built survey of such relocated utility be delivered to it at grantor's expense. The grantor expressly covenants and agrees to restore the surface of the easement area and to repair any damage caused to the Common Area by such work in a good and workmanlike manner.

2.3 Construction, Maintenance and Reconstruction.

(A) In order to accommodate any footings, foundations, columns or walls which may be constructed or reconstructed immediately adjacent to a common boundary line and which may overlap that common boundary line, and should any Parties owning adjacent Tracts elect to use common footings, Developer and Big Box mutually, as to their respective Tracts, grant to each other a nonexclusive easement in, to, over, under and across that portion of its Tract adjacent to such common boundary line in a space not theretofore occupied by any then existing structure for the construction, maintenance and replacement of footings to a maximum of a three feet (3') distance as between the Developer Tract and the Big Box Tract, and an easement onto the grantor's tract for incidental, encroachments for the construction, replacement and maintenance of foundations, columns, or walls not to exceed six (6) inches. This grant of easement shall include the reasonable right of access necessary to exercise and enjoy such grant. The Party availing itself of such easement shall pay any additional expense incurred by the owner of the burdened Tract caused by such encroaching footing when such owner constructs its building. Furthermore, the owner of the burdened Tract shall have the right to approve and monitor the placement of such encroaching footing and to approve the quality of construction of such footing. The easement shall continue in effect for the term of this OEA and thereafter so long as the building utilizing the easement area exists, including a reasonable period to permit reconstruction or replacement of such building if the same shall be destroyed, damaged, or demolished.

(B) Prior to utilizing the easement right set forth in (A) above, the grantee Party shall advise the grantor Party of its intention to use the same, shall provide plans and specifications and proposed construction techniques for the

improvements to be located within the easement area approved by a certified structural engineer, and shall give the grantor Party an opportunity to commence any construction activities which such Party contemplates undertaking at approximately the same time to the end that each Party involved shall be able to utilize subterranean construction techniques which will permit the placement above ground of a building on each Tract immediately adjacent to the common boundary line. If a common subterranean construction element is used by the Parties, it is specifically understood that each shall assume and pay its reasonable share of the cost and expense of the initial construction and, so long as both Parties are benefitting therefrom, subsequent maintenance thereof. In the event any building utilizing a common subterranean element is destroyed and is not replaced or is removed, the common subterranean construction element shall be left in place for the benefit of any building utilizing the same located on the adjoining Tract. No Party is obligated to utilize a common subterranean element and each Party may utilize a zero lot line subterranean element.

2.4. Restriction. No Party shall grant any easement for the purpose set forth in this Article for the benefit of any property not within the Shopping Center except Developer may grant easements for the benefit of property owned by Developer or acquired by Developer to the South of the Developer Tract for all purposes except parking so long as such parcels are burdened by all of the covenants and restrictions set forth in this OEA; provided, however, that the foregoing shall not prohibit the granting or dedicating of utility easements by a Party on its Tract to governmental or quasi-governmental authorities or to public utilities. Furthermore, Developer shall have the right to grant an access easement for the benefit of the property identified as "Sunlight" on the Site Plan over the drives of the Shopping Center.

ARTICLE III CONSTRUCTION

3.1 General Requirements.

(A) All construction activities performed by a Party within the Shopping Center shall be performed in compliance with this OEA and all laws, rules, regulations, orders, and ordinances of the city, county, state, and federal governments, or any department or agency thereof, affecting improvements constructed within the Shopping Center.

(B) The construction activities of a Party shall not:

- (i) cause any unreasonable increase in the cost of constructing improvements upon any other Party's Tract (provided, however, no Party shall have any obligation to take any action to minimize the cost of constructing improvements upon another Party's Tract);
- (ii) unreasonably interfere with construction work being performed on any other part of the Shopping Center;
- (iii) interfere with the use, occupancy or enjoyment of any part of the remainder of the Shopping Center by any other Party or its Permittees;
- (iv) cause any other Party to be in violation of any law, rule, regulation, order or ordinance applicable to its Tract of the city, county, state, federal government, or any department or agency thereof; and
- (v) violate this OEA.

(C) Each Party shall defend, indemnify and hold harmless the other Parties from all claims, actions and proceedings and costs incurred in connection therewith (including reasonable attorneys' fees and costs of suit) resulting from any accident, injury or loss or damage whatsoever occurring to any Person or to the property of any Person arising out of or resulting from the performance of any construction activities performed or authorized by such indemnifying Party.

(D) Following initial construction of the building upon the Big Box Tract, each Party shall utilize the "Staging and Storage Area" on its Tract located as shown on the Site Plan. If substantial work is to be performed, such constructing Party shall, at the request of any other Party, fence off the Staging and Storage Area. Upon completion of such work, the constructing Party shall restore the affected Common Area to a condition at least equal to that existing prior to commencement of such work. The constructing Party shall cause its contractors to park construction equipment in the Staging and Storage Area on its Tract or in other areas mutually agreed upon by the Parties.

(E) Each Party hereby grants and conveys to each other Party and to its respective contractors, material men and laborers a temporary license to enter upon the Common Area of the grantor's Tract as shall be reasonably necessary for the grantee to construct and/or maintain improvements upon the grantee's Tract; provided, however, that such license shall be in effect only during periods when actual construction and/or maintenance is being performed and provided further that the use of such license shall not be exercised so as to unreasonably interfere with the use and operation of the Common Area by others, especially if any other Party is open for business. Prior to exercising the rights granted herein, the grantee shall first provide the grantor with a written statement describing the need for such license and why it is impossible to use the Tract of the requesting Party, and shall furnish a certificate of insurance showing that the first Party's contractor has obtained the minimum insurance coverage required by Section 5.4(C) hereof. Any Party availing itself of the temporary license shall promptly pay all costs and expenses associated with such work, shall diligently complete such work as quickly as possible, and shall promptly clean the area and restore the affected portion of the Common Area to a condition which is equal to or better than the condition which existed prior to the commencement of such work. Notwithstanding the foregoing, in the event a dispute exists between the contractors, laborers and/or others connected with construction activities, each Party shall have the right to prohibit the contractors, laborers and/or others working for another Party from using the Common Area on its Tract.

(F) Other than: (i) initial construction as contemplated by this OEA; (ii) reconstruction made necessary by casualty damage or condemnation; (iii) any construction or reconstruction made necessary by an emergency; or with the prior written consent of all Parties; all exterior construction and/or reconstruction and/or major repair or replacement (including expansions and additions) shall be done only during the months of February and from and after Easter until September 15. Notwithstanding the foregoing, any exterior construction may take place at any time so long as: (i) such construction is limited to a fenced area not to extend beyond five (5) feet into the asphalt driveway located adjacent to the Building Area; and (ii) that all construction materials are stored in a location approved by the Parties or as shown on the Site Plan.

3.2 Common Area. Except as set forth in the Site Development Agreement of even date herewith between the Parties, Developer shall cause the Common Area on the Developer Tract and Big Box Tract to be improved as shown on the Site Plan in accordance with the Final Plans and Big Box CPR Book and Notes and in accordance with that portion of the schedule attached hereto as Exhibit ZZ labeled "Site Construction." Such work shall be done by Developer in a good and workmanlike manner and in accordance with good engineering standards, including, but not limited to, the following minimum general design standards:

(A) The lighting system shall be designed to produce a minimum maintained lighting intensity at grade at all points in the Common Area of 2.00 foot candle; provided however, that the extreme edge of the parking or drive areas may have not less than a minimum maintained lighting intensity measured at grade of 0.5 foot candle, and provided further that the drive areas immediately in front of the entrance to any building shall have not less than a minimum maintained lighting intensity measured at grade of 5.0 foot candles. Each Party may elect to control the light standards located on its Tract. Until a building on the Developer Tract is opened for business all Shopping Center lighting shall be wired to Big Box's control panel and the electricity paid for by Big Box. Thereafter, the circuitry shall be changed to permit Developer to control the lighting on the Developer Tract and Developer shall pay for the electricity to operate such lighting. All light poles and fixtures on all Tracts shall be of an identical design, which design shall be designated by Developer and consented to by Big Box, which consent shall not be unreasonably withheld or delayed.

(B) The slope in the parking area shall not exceed a maximum of _____ percent (_____%), nor be less than a minimum of _____ percent (_____%). All parking spaces shall be at least nine (9) foot spaces.

(C) All sidewalks shall be concrete or other material approved by the Parties. The paved portions of the Common Area shall be paved in accordance with a paving recommendation obtained from a reputable engineering firm approved by the Parties.

(D) Utilities that are placed underground shall be at depths of not less than that designated by consultants approved by the Parties. Design and working drawings may be prepared by the utility company providing the service.

(E) The parking area on each Tract shall contain sufficient ground level, standard automobile size, parking spaces in order to comply with the greater of: (i) governing municipal standards as modified by any obtained variance; or (ii) the following:

(a) five (5.0) parking spaces for each one thousand (1,000) square feet of Floor Area located on the Big Box Tract;

(b) five (5.0) parking spaces for each one thousand (1,000) square feet of Floor Area located on the Developer Tract;

plus, with respect to each Tract,

(c) if a business use contains a drive-up unit (such as remote banking teller or food ordering/dispensing facility), then there shall also be created space for stacking not less than five (5) automobiles for each drive-up unit;

(d) if a business use includes a restaurant which has less than five thousand (5,000) square feet of Floor Area, then five (5) additional parking spaces for each one thousand (1,000) square feet of Floor Area devoted to such use; or

(e) if a business use includes a restaurant which has five thousand (5,000) square feet of Floor Area or more, then ten (10) additional parking spaces for each one thousand (1,000) square feet of Floor Area devoted to such use;

provided, however, if a restaurant is operated incidentally to another business operation (gross sales of ten percent (10%) or less of the total gross sales of such business operation), then the Floor Area occupied by such restaurant shall be excluded from the operation of (d) and (e) above, and provided, further, that in determining if the foregoing parking ratios are met, the total Floor Area on all Outlots and the total Floor Area located upon the Developer Tract may be aggregated, and the total number of parking spaces on all Outlots and the Developer Tract may be aggregated, and so long as the aggregate of such numbers meet the cumulative parking ratio set forth herein, the parking ratios as set forth in this OEA shall be deemed satisfied.

The foregoing requirements as well as all governmental regulations, ordinances and similar orders relating to parking shall be satisfied without reliance on the parking spaces that may be available on another Tract, subject to the immediately foregoing sentence. In the event of condemnation of part of a Tract or sale or transfer in lieu thereof that reduces the number of usable parking spaces below that which is required herein, the Party whose Tract is so affected shall use its best efforts (including using proceeds from the condemnation award or settlement) to restore and/or substitute parking spaces in order to comply with the parking requirements set forth above. If such compliance is not

reasonably possible, such Party shall not be deemed in default hereunder, but shall not be permitted to expand the amount of Floor Area located upon its Tract. If such Floor Area is thereafter reduced, then it may not be subsequently increased unless the parking requirement is satisfied.

(F) During the term of this OEA, no Party shall materially change any of the foregoing from those established by the Final Plans, subject to Section 2.l(A)(iii).

3.3 Building Improvement.

(A) The Parties hereby agree that all buildings may be located only within the Building Area designated on the Site Plan.

(B) In order to produce an architecturally compatible Shopping Center, Developer and Big Box agree to cooperate in developing architectural plans and specifications for materials and the exterior facades of the buildings for the Shopping Center and agree that the initial building construction and any additions, exterior remodeling or reconstruction of existing improvements thereafter shall be performed only in accordance with plans and specifications approved by Developer and Big Box. Notwithstanding anything contained herein to the contrary, subject to the approval of Chesterfield Township of the plans and specifications (including the exterior elevations), Developer and Big Box agree that said plans and specifications shall provide for the construction by Big Box upon its Tract of a building that is typical in size, configuration, design (including exterior elevations) and utility for its retail business operations in the State of _____[state]. Approval of Final Plans by Developer and Big Box shall not constitute assumption of responsibility or the accuracy, sufficiency, or propriety thereof, nor shall such approval constitute a representation or warranty that the Final Plans comply with applicable laws. No material deviation shall be made from the approved Final Plans. Approval of any additions, exterior remodeling or reconstruction shall be granted as same is either: (i) architecturally harmonious with the existing improvements; or (ii) in accordance with the prototypical plans of any national or regional retail operation in excess of twenty thousand (20,000) square feet of Floor Area.

(C) The Parties hereby specifically consent to the placement of buildings along their respective common boundary lines and each agrees to support any request by the other for a side-yard or setback variance if the same is required in order to accommodate such construction.

(D) The Parties acknowledge that Big Box intends to construct on its Tract a building which is generally classified under applicable building code regulation as an "unlimited area" building. (By way of explanation, but not limitation, such building classification is designated II-N or SN under the Uniform Building Code and 2c under the BOCA code.) So long as Big Box plans to construct a building of such classification, or so long as a Building of such classification exists on the Big Box Tract (including any restoration or reconstruction thereof), Developer agrees that any building to be placed or constructed on the Shopping Center that is located any closer than fifty (50') feet to the Building Area on the Big Box Tract shall be fully fire sprinklered with an approved sprinkler system for fire protection and shall be in compliance with the BOCA code for unlimited area. In order to confirm the existence of a fifty (50') foot yard or clear area around Building Area on the Big Box Tract, it may be necessary to place of record an instrument establishing the same. Each Party shall join in the execution of such instrument in a form satisfactory to such Parties. In addition to the requirements set forth above, no building located on the Shopping Center shall be placed or constructed in a manner which will itself preclude the construction of a building of such classification on the Big Box Tract and the Developer Tract.

(E) The second Party to construct a building along the common boundary line shall do so in a manner that does not result in damage to the improvements in place on the adjoining Tract, and further shall undertake and assume at its sole cost the obligation of completing and maintaining the nominal attachment (flashing and seal) of its building to that of the existing building on the other Tract, it being the intent of the Parties to establish and maintain the appearance of one continuous building complex. In performing such attachment, the wall of one building shall not receive support from

nor apply pressure to the wall of the other building.

(F) If a portion of any Building Area is at one point in time paved or landscaped and used as Common Area, such portion may be subsequently used as Building Area provided that all parking requirements and other provisions of this OEA for such Tract are also complied with. Likewise, if an area is at one point in time occupied by a building, such building may be subsequently razed, and until replaced, the area shall thereafter be paved or landscaped and maintained as though it were a part of the Common Area, but at the sole expense of the owner thereof.

(G) The following building height restrictions measured from the upper side of the finished floor slab on the applicable Tract shall be applicable to the Shopping Center:

Tract	Building Height Restriction
(i) Big Box Tract	30';
(ii) Developer Tract	30' except for any building occupied by a single tenant occupying at least 30,000 square feet of the Floor Area, in which case such building height will not exceed 36';
(iii) Outlots	24'

No mechanical equipment, penthouse or similar appurtenant structure located on the roof of a building shall extend upward above the top of the building more than thirty-six feet (36') as measured from the upper side of the finished floor slab. No building shall contain more than one (1) floor and a mezzanine level.

Notwithstanding anything to the contrary contained herein, Big Box and Occupants of the Developer Tract shall be permitted to install, operate, maintain, repair and replace a television, radio and cable antenna and/or receiver which shall be affixed to the rear exterior of the Big Box building or the building utilized by such Occupant respectively, and which shall be covered or screened by an attractive facade so that same will not be visible from any direction. In addition, all rooftop equipment shall be screened from view from all directions but not enclosed.

(H) The following restrictions shall apply to construction of buildings of less than fifty thousand (50,000) square feet in the Shopping Center: (i) all of the individual buildings located within the Shopping Center shall be constructed using materials approved by Developer and Big Box ("Approved Materials"), in a manner which provides for an integrated and consistent architectural appearance, including, without limitation, architectural detailing; (ii) all exterior materials and elevations shall be Approved Materials and be compatible with the other buildings located with the Shopping Center; and (iii) all elevations shall be subject to the prior written approval of Developer but approval will be granted if it is the prototype of a national or regional chain of over twenty thousand (20,000) square feet of Floor Area. In the event a disagreement between Developer and Big Box arises with respect to such materials or elevations, the Parties shall appoint a mutually satisfactory architect to arbitrate and resolve any such conflict. The decision of such arbitrator shall be final and binding upon the parties to such disagreement and a judgment on such decision may be entered in a court of competent jurisdiction.

ARTICLE IV MAINTENANCE AND REPAIR

4.1 Utilities.

(A) Each Party shall repair and maintain in first-class condition all utility facilities, lines, and systems located on its

Tract that serve only its Tract unless the same are dedicated to and accepted by a public or quasi-public utility or authority and failing to maintain and repair such facilities shall give the other Parties the right, after giving reasonable notice or in the case of an emergency without any notice, to make such repairs and charge the Party upon whose Tract the repairs are made.

(B) The grantee of a utility easement referred to in Section 2.2(A) shall maintain and repair at its cost any facilities installed pursuant to such grant which exclusively serve such grantee's Tract unless the same are granted or dedicated to and accepted by a utility or a governmental agency acceptable to the grantor which agrees to maintain and replace the same. Any maintenance and repair of non-dedicated utilities located on another Party's Tract shall be performed in a lien-free manner following two (2) weeks' notice to the grantor (except in an emergency the work may be immediately initiated, provided notice is given as soon as reasonably possible) and shall be done after normal business hours whenever possible and shall otherwise be performed in such a manner as to cause as little disturbance in the use of the grantor's Tract as is practicable under the circumstances. Any Party performing or causing to be performed maintenance or repair work agrees to promptly pay all costs and expenses associated therewith, to diligently complete such work as quickly as possible and to promptly clean the area and restore the affected portion of the Common Area to a condition equal to or better than the condition which existed prior to the commencement of such work.

(C) All utility lines which serve more than one Tract shall be maintained as part of Common Area, including, but not limited to, the private storm water trunk line servicing the Shopping Center.

4.2 Common Area.

(A) Developer and Big Box agree to individually maintain or cause to be maintained the portion of the Common Area on their respective Tracts in first-class condition at all times and in compliance with all applicable governmental laws, rules, regulations, orders, and ordinances and the provisions of this OEA.

(B) Until the Common Area on a Tract is initially improved, the Party owning the same shall plant such Tract with sufficient vegetation to reduce dust and thereafter keep it mowed and free of debris, and otherwise maintained so as to prevent erosion and present an attractive appearance.

(C) The minimum standard of maintenance for the improved Common Area shall be comparable to that followed in other first-class retail developments of comparable size in the metropolitan area where the Shopping Center is located and shall include, but not be limited to, the following:

(i) Maintain, repair and all drive and parking areas to keep the same in a smooth and evenly covered condition and periodically sweep, clean and restripe the same. Such activities shall, to the extent possible, be scheduled to occur prior to or after normal business hours of the Shopping Center.

(ii) Remove papers, debris, filth, refuse, ice and snow from the drive and parking areas and adequately drain the drive and parking area to the extent necessary to keep the same in a first-class, clean, and orderly condition.

(iii) Install and maintain appropriate directional signs and markers, and replace the same as necessary.

(iv) Illuminate the drive and parking areas, and maintain and replace lighting facilities, bulbs and ballasts.

(v) Maintain all landscaped areas, including the replacement of shrubs and other landscaping as necessary, and maintain any automatic sprinkler system serving the landscaped areas.

(vi) Clean, sweep, maintain, and repair all sidewalks.

(vii) Store all trash and garbage in adequate, screened containers and provide for regular collection of same.

(D) In the event any of the Common Area is damaged or destroyed by any cause other than normal wear and tear, whether insured or uninsured, during the term of this OEA, the Party upon whose Tract such Common Area is located shall with reasonable dispatch and subject to adjustment of any insurance claims, which claims the affected Party agrees to promptly file and diligently prosecute, repair or restore such Common Area at its sole cost and expense with all due diligence; provided, however, that no Party shall be required to expend more than _____ Dollars (\$_____) (which amount shall be increased on the fifth anniversary of this OEA and each five (5) year period thereafter by _____ Dollars (\$_____)) in excess of insurance proceeds which may be available for such repair or restoration. Notwithstanding the foregoing, in the event such damage or destruction of Common Area is caused in whole or in part by another Party or third Person, the Party obligated to make such repair or restoration reserves and retains the right to proceed against such other Party or third Person for indemnity, contribution or damages.

4.3 Building Improvements.

(A) After completion of construction, each Party covenants and agrees to maintain and keep the building improvements located on its Tract in first-class condition and state of repair, in compliance with all governmental laws, rules, regulations, orders, and ordinances excluding jurisdiction thereover, and in compliance with the provisions of this OEA and in compliance with all ordinances requiring certain sustainability standards to be met. Each Party further agrees to store all trash and garbage in adequate containers, to locate such containers so that they are not readily visible from the parking area, and to arrange for regular removal of such trash or garbage.

(B) In the event any of the building improvements are damaged by fire or other casualty (whether insured or not), the Party upon whose Tract such building improvements are located shall immediately remove the debris resulting from such event and provide a sightly barrier and within one hundred eighty (180) days after delivery of the notice provided for In the next sentence of this paragraph shall either: (i) commence to and diligently complete repair or restore the building improvements so damaged, such repair or restoration to be performed in accordance with all provisions of this OEA; (ii) commence to and diligently complete erection of other building improvements in such location, provided all provisions of this OEA are complied with; or (iii) demolish the damaged portion or all of such building improvements and have restored the area to an attractive condition in which event the area shall be Common Area until a replacement building is erected. Such Party shall have the option to choose which of the foregoing alternatives to perform, but such Party shall be obligated to perform one of such alternatives. Such party shall give notice to the other Party within ninety (90) days from the date of such casualty of which alternative it elects, provided, however, that due allowance for delivery of such notice shall be made for collection of insurance proceeds.

4.4 Additional Obligations. In addition to each party's obligation to maintain their respective Tracts, the owner of the Big Box Tract and any portion of the Developer Tract designated by Developer shall pay its pro rata share of all costs incurred by Developer in maintaining (i) any private off-site utilities servicing the Shopping Center Site and (ii) the Storm System servicing the Shopping Center Site (and such other parcels of land as Developer may elect) and storm lines servicing such Storm System. Each Party shall pay its proportionate share of such costs, and each Party's proportionate share of such costs shall be calculated by multiplying such costs by a fraction, the numerator of which is the square foot area of each Party's respective Site which has been improved with either Common Areas or Buildings or other structures, and the denominator of which is the sum of the square foot area of all parcels of land (except for the portions of the Developer Site containing retention or detention ponds) which have the right to use such Storm System and storm lines, to the extent that such parcels of land have been improved. For purposes of this Section 4.4, such maintenance costs shall include all of the actual costs of maintaining such improvements in the same manner as the Common Areas must be maintained pursuant to this Article IV, and shall also include (i) all costs of insuring same,

which insurance shall meet the requirements of Section 5.4 of this OEA; (ii) all costs of paying real estate taxes and assessments assessed against same; and (iii) an administrative charge in the amount of ten percent (10%) of all costs (except taxes and insurance) set forth in this Section 4.4.

ARTICLE V

OPERATION OF TOTAL SHOPPING CENTER

5.1 Uses.

(A) Except as specifically provided for herein, no part of the Shopping Center shall be used for other than retail sales or services, provided any retail services located on the Shopping Center shall be of the type defined below and shall in no event be located in more than fifteen percent (15%) of the total Floor Area on such Tract as the case may be. Retail services shall mean retail financial institutions, real estate and stock brokerage offices, travel agencies, post office, copy business and other uses providing services directly to the public for retail fees which are commonly found within first class retail shopping centers in the Detroit Metropolitan Area.

Notwithstanding the foregoing, no use or service shall be permitted in the Shopping Center which is inconsistent with the operation of a first-class retail shopping center. Without limiting the generality of the foregoing, the following uses or services shall not be consistent with the concept of a first-class retail shopping center:

- (i) Any use which emits a noxious odor, noise, or sound which can be heard or smelled outside of any building in the Shopping Center;
- (ii) Any operation used as a warehouse operation (other than in connection with on-premises retail sales and other than a warehouse club such as Sam's, Pace, etc.) and any assembling, manufacturing, distilling, refining, smelting, agricultural, or mining operation;
- (iii) Any "second hand" store or store selling surplus merchandise as a principal method of doing business, but this prohibition shall not exclude a store selling antiques or used books in a first class manner;
- (iv) Any mobile home park, trailer court, labor camp, junkyard, or stockyard (except that this provision shall not prohibit the temporary use of construction trailers during periods of construction, reconstruction, or maintenance);
- (v) Any dumping, disposing, incineration, or reduction of garbage (exclusive of garbage compactors located in the rear of any building);
- (vi) Any fire sale (other than merchandise actually damaged by fire on the premises), bankruptcy sale (unless pursuant to a court order) or auction house operation;
- (vii) Any central laundry, dry cleaning plant, or laundromat; provided, however, this prohibition shall not be applicable to on-site service oriented to pickup and delivery by the ultimate consumer, including nominal supporting facilities, as the same may be found in retail shopping districts in the Detroit Metropolitan Area;
- (viii) Any automobile, truck, trailer or R.V., sales, leasing, display or repair;
- (ix) Any bowling alley;

- (x) Any skating rink;
 - (xi) Any living quarters, sleeping apartments, lodging rooms;
 - (xii) Any veterinary hospital or animal raising facilities;
 - (xiii) Any mortuary;
 - (xiv) Any establishment selling, leasing or exhibiting pornographic materials or selling or exhibiting obscene performances;
 - (xv) Any bar, tavern, restaurant or other establishment whose reasonably projected annual gross revenues from the sale of alcoholic beverages for on-premises consumption exceeds fifty percent (50%) of gross revenues arising out of such business;
 - (xvi) Any flea market, amusement arcade, pool or billiard hall, car wash, or dance hall;
 - (xvii) Any health club or health spa except one located in the rear of the Shopping Center, with an entrance facing East or South and with a parking ratio of ten (10) cars for each one thousand (1,000) square feet of Floor Area in the health club or health spa;
 - (xviii) Any live performance or movie theater; or
 - (xix) Any training or educational facility, including but not limited to: beauty schools, barber colleges, reading rooms, places of instruction or other operations catering primarily to students or trainees rather than to customers; provided, however, this prohibition shall not be applicable to on-site employee training by an occupant incidental to the conduct of its business at the Shopping Center.
- (B) The following use and occupancy restrictions shall be applicable to the Shopping Center: No restaurant shall be located thereon within one hundred fifty (150') feet of the building on the Big Box Tract, nor may any restaurant occupy more than ten percent (10%) of the Floor Area on any Tract (except on Outlot).
- (C) The name "Big Box" shall not be used to identify the Shopping Center or any business or trade conducted on the Shopping Center.
- (D) No merchandise, equipment or services shall be displayed, offered for sale or lease, or stored within the Common Area; provided, however, that the foregoing prohibition shall not be applicable to (i) the storage of shopping carts on the Big Box Tract and/or the Developer Tract; and (ii) temporary Shopping Center promotions, except that no promotional activities will be allowed without the prior written approval of the Parties, and such approval may be withheld in their sole and absolute discretion except sales and promotional events may be allowed on an intermittent basis in areas shown on the Site Plan.
- (E) No Permittee shall be charged for the right to enter or use the Common Area.
- (F) Each Party shall use its best efforts to cause the employees of the Occupants of its Tract to park their vehicles only on such Tract.

5.2 Lighting.

(A) After completion of the Common Area lighting system on its Tract, each Party hereby covenants and agrees to keep its Tract fully illuminated each day from dusk to at least thirty (30) minutes after the last business operation on its Tract has closed, and further agrees to keep any exterior building security lights on from dusk until dawn.

(B) It is recognized that business establishments within the Shopping Center may be open for business at different hours, and that the owner or principal Occupant of one Tract upon which a business establishment is open later may wish to have the Common Area lights on another Tract continue to burn beyond the required period. Accordingly, the owner or principal Occupant of such Tract ("Requesting Owner") shall have the right at any time to require the owner or principal Occupant of any other Tract ("Requested Owner") to keep its Common Area lights on for additional hours at night as stipulated by the Requesting Owner; provided that the Requesting Owner notifies the Requested Owner of such request not less than fifteen (15) days in advance. The Requesting Owner shall state the period during which it wishes the lights to be kept on to a later hour and shall pay to the Requested Owner a prepayment deposit as follows:

1. If the period is less than thirty (30) days, then the deposit shall be one hundred ten percent (110%) of the reasonable cost (as estimated by the Requested Owner) of electrical power for such later hours to be incurred by the Requested Owner.
2. If the period is greater than or equal to thirty (30) days, then the deposit shall be one hundred ten percent (110%) of the reasonable cost (as estimated by the Requested Owner), of electrical power during the first thirty (30) days of the period for such later hours to be incurred by the Requested Owner. If the period is greater than thirty (30) days, then the Requesting Owner shall renew such prepayment deposit at the end of each thirty (30) day period.

The Requesting Owner agrees to pay one hundred ten percent (110%) of the cost to the Requested Owner of electrical power to provide such extra-hours illumination. If the Requested Owner is of the opinion that the deposits made by the Requesting Owner do not cover one hundred ten percent (110%) of such costs, the Parties shall attempt to agree to the cost of such electrical power and if they cannot do so, then the amount the Requesting Owner is obligated to pay shall be determined from the power costs as estimated by the electrical utility company furnishing such power, or if the utility fails to do so, by a reputable engineer. Upon the failure of a Requesting Owner to pay the aforesaid amount or renew a deposit as required hereby, the Requested Owner shall have the right to discontinue such additional lighting and to exercise other remedies herein provided. Any such request for additional lighting may be withdrawn or terminated at any time by written notice from the Requesting Owner; and a new request or requests for changed hours may be made from time to time. If more than one Party elects to remain open and request additional lighting, such Parties shall share the cost of such additional lighting on a basis agreed to by such Parties.

(C) As an alternative to the process of lighting another Party's Tract as set forth in (B) above, a Party ("Constructing Party") may install, with the consent of the other Party ("Consenting Party"), a secondary wiring system, from the Constructing Party's Tract to the light standards on the Consenting Party's Tract, which would permit a portion or all of the lighting on the Consenting Party's Tract to be operated contemporaneously with the lighting on the Constructing Party's Tract. All costs and expenses associated with the installation, maintenance, replacement, and operation of such secondary wiring, including the cost of energy to light any portion of the Consenting Party's Tract, shall be assumed and promptly paid by the Constructing Party. The Constructing Party shall submit to the Consenting Party appropriate plans and specifications for the installation of such secondary wiring systems. The Consenting Party shall have thirty (30) days to approve or disapprove of such submission, such approval not to be unreasonably withheld or delayed. If the Consenting Party does not disapprove of the submission within the thirty (30) day period, approval shall be deemed given. If disapproval is given, the Constructing Party shall revise the submission to accommodate the reasonable objections of the Consenting Party and then may resubmit such plans and specifications to the Consenting Party for its approval.

5.3 Signs.

No exterior identification signs shall be allowed within the Shopping Center except as set forth hereinafter.

(A) No freestanding sign shall be permitted within the Shopping Center unless constructed in areas designated on the Site Plan.

Notwithstanding anything above to the contrary, each Party shall be permitted to place within the Common Area located on its Tract directional signs or informational signs such as "Handicapped Parking", the temporary display of leasing information and the temporary erection of one sign identifying each contractor working on a construction job.

(B) Any Occupant occupying less than twenty thousand (20,000) square feet of Floor Area may not have more than one (1) identification sign placed on the exterior of the building it occupies; provided, however, that if any such Occupant is located at the corner of a building, then such Occupant may have an identification sign on each side of such corner. Any Occupant occupying at least twenty thousand (20,000) square feet of Floor Area and any Occupant of any Outlot shown on the Site Plan may have more than one identification sign placed on the exterior of the building it occupies.

No exterior identification sign attached to a building shall be of the type set forth below:

- (i) placed on canopy roofs extending above the building roof, placed on penthouse walls, or placed so as to project above the parapet, canopy, or top of the wall upon which it is mounted;
- (ii) placed at any angle to the building; provided, however, the foregoing shall not apply to any sign located under a sidewalk canopy if such sign is at least eight (8) feet above the sidewalk; or
- (iii) painted on the surface of any building;

provided, however, this paragraph shall not prohibit the placing of exterior identification sign on the face of an architectural facade constructed at an angle to the front of any building and extending above the normal roof line of a building, such architectural facade being commonly known as a "Sign Tower." No exterior sign shall identify leased departments, concessionaires, products or services. Exterior signs attached to a building shall not be of the "box" or "canned type."

(C) Neither exterior identification signs attached to buildings nor freestanding signs shall be of the type set forth below:

- (i) signs using exposed neon tubes, flashing, moving or audible signs;
- (ii) signs employing exposed raceways, exposed ballast boxes, or exposed transformers;
- (iii) paper or cardboard signs other than professionally prepared interior window signs advertising special sales within the premises, temporary signs (exclusive of contractor signs), stickers or decals; provided, however, the foregoing shall not prohibit the placement at the entrance of each Occupant's space a small sticker or decal, indicating hours of business, emergency, telephone numbers, and other similar information.

All exterior signs not in compliance with the provisions of Exhibit Y shall be subject to the approval of Big Box and Developer except standard signs of national or regional retail tenants or occupants. Nevertheless, all signs shall comply with the provisions of Section 5.3(C)(i), (ii) and (iii). The foregoing sentence shall not apply to the Big Box Tract or any Occupant of the Shopping Center occupying at least twenty thousand (20,000) square feet of Floor Area and their successors and assigns. All exterior signs shall be subject to the approval of Chesterfield Township.

(D) Prior to the date Big Box opens the store to the public, Developer shall, subject to applicable governmental laws, statutes, and ordinances, at its sole cost and expense, install two (2) Shopping Center pylon signs at the locations shown therefor on Exhibit X. Such signs shall be designed to permit the installation of other identification on same and Big Box shall have the right to install or have install its identification sign on such pylon. The pylon signs shall be constructed in accordance with the design set forth on Exhibit C attached hereto and made a part hereof. In the event Big Box shall elect to install or have installed its identification sign on the pylon, Big Box shall reimburse Developer for a portion of the cost of maintaining, repairing, insuring and replacing such pylons; Big Box's portion of said costs shall be equal to the cost of said insurance, maintenance, repairs and replacement multiplied by a fraction, the numerator of which shall be the square footage of Big Box's signs upon such pylon, and the denominator of which shall be the total square footage of all identification signs installed on such pylon, including the Shopping Center identification sign, if one is installed. The pylon sign shall have three (3) panels below the Big Box sign.

5.4 Insurance.

(A) Each Party shall, with respect to the Common Area on its Tract, maintain or cause to be maintained in full force and effect Comprehensive General Liability Insurance, including Personal Injury Liability Insurance and Contractual Liability Insurance with a financially responsible insurance company or companies licensed in _____ [state], with a minimum Best's rating of AX; such insurance to provide for a limit of not less than _____ Dollars (\$____) per occurrence with a _____ Dollar (\$____) annual aggregate. Additionally, such insurance shall include the following minimum requirements:

- (i) shall provide coverage on an occurrence basis;
- (ii) shall provide that the policy may not be cancel led or materially reduced in amount or coverage without at least 30 days prior written notice by the insurer to the other Parties;
- (iii) shall include the other Parties as additional insured;
- (iv) shall provide for severability of interests; and
- (v) shall provide that an act or omission of one of the insureds or additional insureds which would void or otherwise reduce coverage, shall not reduce or void the coverage as to the other additional insureds or the insured, respectively.

Such insurance shall specifically extend to the contractual obligation of the insured Party arising out of the indemnification obligations set forth in this OEA. Each Party ("Indemnitor") shall indemnify, defend and hold harmless each other Party ("Indemnitor") from and against all claims, costs, expenses and liability (including reasonable attorney's fees and cost of suit incurred in connection with all claims) including any action or proceedings brought thereon, arising from or as a result of the injury to or death of any person, or damage to the property of any person or entity which shall occur on the Tract owned by each Indemnitor, except for claims caused by the negligence or willful act or omission of such Indemnatee, its licensees, concessionaires, agents, servants, or employees, or the agents, servants, or employees of any licensee or concessionaire thereof. The Parties shall review the minimum limits set forth above every five (5) years and further agree to adjust such limits if circumstances warrant.

(B) Effective upon the commencement of construction of improvements, the constructing Party, and after the completion of construction of improvements the owner of each Tract, will carry or cause to be carried fire insurance with an extended coverage endorsement with a financially responsible insurance company or companies licensed in _____ [state], with a minimum Best's rating of AX, in an amount at least equal to the replacement cost (exclusive of the cost of excavation, pavement, foundations, and footings) of the buildings and improvements on such Tract, such coverage extending at least to the following perils: loss or damage by fire, windstorm, cyclone, tornado,

hail, explosion, riot, riot attending a strike, civil commotion, malicious mischief, vandalism, aircraft, vehicle, smoke damage, and sprinkler leakage.

Each Party (the "Releasing Party") hereby releases and waives for itself and on behalf of its insurer, each other Party (the "Released Party") from any liability for any loss or damage to all property of such Releasing Party located upon any portion of the Shopping Center, which loss or damage is of the type generally covered by fire insurance with an extended coverage endorsement, irrespective either of any negligence on the part of the Released Party which may have contributed to or caused such loss, or of the amount of such insurance required or actually carried. Each Party agrees to use its best efforts to obtain, if needed, appropriate endorsements to its policies of insurance with respect to the foregoing release; provided, however, that failure to obtain such endorsements shall not affect the release hereinabove given.

Each Party ("Indemnitor") covenants and agrees to indemnify, defend and hold harmless each other Party ("Indemnitee") from and against all claims asserted by or through any Permittees of the Indemnitor's Tract for any loss or damage to the property of such Permittee located upon the respective Indemnitor's Tract, which loss or damage is of the type generally covered by fire insurance with an extended coverage endorsement irrespective of any negligence on the part of the Indemnitee which may have contributed to or caused such loss.

(C) Prior to commencing any construction activities within the Shopping Center, each Party shall obtain or require its contractor to obtain and thereafter maintain so long as such construction activity is occurring, at least the minimum insurance coverages set forth below:

(i) Workers' Compensation - statutory limits

(ii) Employers Liability - _____ Dollars (\$____)

(iii) Comprehensive General and Comprehensive Auto Liability as follows:

(a) Bodily Injury - _____ Dollars (\$____) per occurrence;

(b) Property Damage - _____ Dollars (\$____) per occurrence;

(c) Independent Contractors Liability or Owner's Protective Liability; same coverage as set forth in (a) and (b) above;

(d) Products/Completed Operations Coverage which shall be kept in effect for two (2) years after completion of work;

(e) "XCU" Hazard Endorsement, if applicable;

(f) "Broad Form" Property Damage Endorsement;

(g) "Personal Injury" Endorsements;

(h) "Blanket Contractual Liability" Endorsement.

If the construction activity involves the use of another Party's Tract, then the owner of such Tract shall be named as an additional insured and such insurance shall provide that the same shall not be canceled without at least thirty (30) days prior written notice to the named insureds. If such insurance is canceled or expires then the constructing Party shall immediately stop all work on or use of the other Party's Tract until either the required insurance is reinstated or

replacement insurance obtained.

(D) Each Party with respect to the portions of its Tract not part of the Common Area shall maintain or cause to be maintained in full force and effect Comprehensive General Liability Insurance, including Personal Injury Liability Insurance and Contractual Liability Insurance with a financially responsible insurance company or companies licensed in _____[state], with a minimum Best's rating of AX such insurance to provide for a limit of not less than _____ Dollars (\$____) for bodily injury or death to any one person, for a limit of not less than _____ Dollars (\$____) for bodily injury or death to any number of persons arising out of any one occurrence, and for a limit of not less than _____ Dollars (\$____) for any property damage. Additionally, such insurance shall include the following minimum requirements:

- (i) shall provide coverage on an occurrence basis;
- (ii) shall provide that the policy may not be cancelled or materially reduced in amount or coverage without at least 30 days' prior written notice by the insurer to each other Party;
- (iii) shall include each other Party as additional insured;
- (iv) shall provide for severability of interests; and shall provide that an act or omission of one of the insureds or additional insureds which would void or otherwise reduce coverage, shall not reduce or void the coverage as to the other additional insureds or the insured, respectively.

Such insurance shall specifically extend to the contractual obligation of the insured Party arising out of the Indemnification obligations set forth in the next sentence. Each Party ("Indemnitor") covenants and agrees to indemnify, defend and hold harmless each other Party ("Indemnitee") from and against all claims, costs, expenses and liability (including reasonable attorney's fees and cost of suit incurred in connection with all claims) including any action or proceedings brought thereon, arising from or as a result of the injury to or death of any person, or damage to the property of any person or entity which shall occur on the Tract owned by each Indemnitor, except for claims caused by the negligence or willful act or omission of such Indemnitee, its licensees, concessionaires, agents, servants, or employees, or the agents, servants, or employees of any licensee or concessionaire thereof. The Parties agree to review the minimum limits set forth above every five (5) years and further agree to adjust such limits if circumstances warrant.

(E) The insurance described above may be carried under: (i) an individual policy covering this location; (ii) a blanket policy or policies which includes other liabilities, properties and locations of such Party; (iii) a plan of self-insurance, provided that the Party so self-insuring, or its guarantor, a Party's assignee if such Party shall guarantee said assignee's insurance obligations, has and maintains 50,000,000 or more of net current assets as evidenced by a certificate of such Party's or guarantor's chief financial officer; or (iv) a combination of any of the foregoing insurance programs. To the extent any deductible is permitted or allowed as a part of any insurance policy carried by a Party in compliance with Section 5.4, such Party shall be deemed to be covering the amount thereof under an informal plan of self-insurance; provided, however, that in no event shall any deductible exceed _____ Dollars (\$____) unless such Party qualifies for self-insurance pursuant to (iii) above. Each Party agrees to furnish to any Party requesting the same, a certificate(s) of insurance evidencing that the insurance required to be carried by such requested Party is in full force and effect and any Party electing to self insure shall so advise the other Parties in writing.

5.5 Taxes and Assessments. Each Party shall pay, or cause to be paid prior to delinquency, all taxes and assessments with respect to its Tract, including, without limitation, the buildings and improvements located thereon and any personal property owned or leased by such Party in the Shopping Center, provided that if the taxes or assessments or any part thereof may be paid in installments, the Party may pay each such installment as and when the same becomes due and payable. Nothing contained in this subsection shall prevent any Party from contesting at its own cost and expense any such taxes and assessments with respect to its Tract in any manner such Party elects, so long such contest is maintained

with reasonable diligence and in good faith. At the time as such contest is concluded (allowing for appeal to the highest appellate court), the contesting Party shall promptly pay all such taxes and assessments determined to be owing, together with all interest, penalties and costs thereon. The easements granted in this OEA shall survive the imposition of any tax lien on the individual Tracts and the Shopping Center. In order to accomplish the foregoing, from time to time, but not more than twice in any calendar year, any Party ("Requesting Party") may request in writing that another Party ("Taxpayer") furnish written evidence that all real property taxes and installments of assessments and special assessments upon the Taxpayer's Tract then due have been paid in full. Upon such request, the Taxpayer shall furnish such evidence to the Requesting Party.

If a Party ("Defaulting Party") shall fail to pay any real property taxes or installments of assessments or special assessments ("Taxes") on its Tract before any penalties and statutory interest accrue, another Party ("Non-Defaulting Party") may pay the Taxes, penalties and statutory interest if such amounts are not paid by the Defaulting Party within thirty (30) days after written notice from the Non-Defaulting Party to the Defaulting Party demanding the payment of such amounts. In such event, the Defaulting Party shall reimburse the Non-Defaulting Party upon demand for all Taxes, penalties, and statutory interest paid by the Non-Defaulting Party for the property in the Shopping Center owned by the Defaulting Party, plus interest at the Default Rate (as defined in Section 6.2, below). Upon payment of the Taxes by the Non-Defaulting Party, such Party shall have a lien on the Defaulting Party's Tract which shall be subject only to any then existing mortgage, if any, until such time as the Defaulting Party pays in full to the Non-Defaulting Party the amounts provided for above.

5.6 Liens. In the event any mechanic's lien is filed against the Tract of one Party as a result of services performed or materials furnished for the use of another Party, the Party permitting or causing such lien to be so filed agrees to cause such lien to be discharged prior to entry of final judgment (after all appeals) for the foreclosure of such lien and further agrees to indemnify, defend, and hold harmless the other Party and its Tract against liability, loss, damage, costs or expenses (including reasonable attorneys' fees and cost of suit) on account of such claim of lien. Upon request of the Party whose Tract is subject to such lien, the Party permitting or causing such lien to be filed agrees to promptly cause such lien to be released and discharged of record, either by paying the indebtedness which gave rise to such lien or by posting bond or other

security as shall be required by law to obtain such release and discharge. Nothing herein shall prevent a Party permitting or causing such lien from contesting the validity thereof in any manner such Party chooses so long as such contest is pursued with reasonable diligence. In the event such contest is determined adversely (allowing for appeal to the highest appellate court), such Party shall promptly pay in full the required amount, together with any interest, penalties, costs, or other charges necessary to release such lien.

ARTICLE VI MISCELLANEOUS

6.1 Default.

(A) If any Party fails to comply with any provision herein ("Defaulting Party"), then each other Party ("Non-defaulting Party") may, upon forty-five (45) days' prior written notice to the Defaulting Party (with a copy to such Party's mortgagee if the provisions of Section 6.4 hereof have been met), proceed to cure the default (and shall have a license to do so) by the payment of money or performance of some other action for the account of the Defaulting Party. The foregoing right to cure shall not be exercised if within the forty-five (45) day notice period: (i) the Defaulting Party or its mortgagee cures the default; or (ii) if the default is curable, but cannot reasonably be cured within that time period, the Defaulting Party or its mortgagee begins to cure such default within such time period and diligently pursues such action to completion. The forty--five (45) day notice period shall not be required if, using reasonable judgment, a Non--defaulting Party deems that an emergency exists which requires immediate attention. In the event of such an

emergency, the Non-defaulting Party shall give whatever notice to the Defaulting Party as is, reasonable under the circumstances.

(B) Within ten (10) days of written demand (including providing copies of invoices reflecting costs) the Defaulting Party shall reimburse the Non-defaulting Party for any sum reasonably expended by the Non-defaulting Party due to cure the default, together with interest thereon at the Default Rate.

(C) In the event any Party shall institute any action or proceeding against the other Party relating to the provisions of this OEA, or any default hereunder, or to collect any amounts owing hereunder, or if an arbitration proceeding is commenced by agreement of the Parties to any dispute, the unsuccessful litigant in such action or proceeding shall reimburse the successful litigant therein for costs and expenses incurred by the successful litigant in connection with such action or proceeding and any appeals therefrom, including attorneys' fees and court costs.

(D) All remedies are cumulative and shall be deemed additional to any and all other remedies to which any Party may be entitled in law or in equity. Each Party shall also have the right to restrain, by injunction, any violation or threatened violation by the other Party of any of the terms, covenants, or conditions of this OEA, or to obtain a decree to compel performance of any such terms, covenants, or conditions, it being agreed that the remedy at law for a breach of any such term, covenant, or condition (except those, if any, requiring the payment of a liquidated sum) is not adequate.

6.2 Interest. Wherever and as often as one Party shall not have paid any sum payable hereunder to the other Party within five (5) days after the due date, such delinquent Party shall pay interest on such amount from the due date to and including the date such payment is received by the Party entitled thereto, at the lesser of (the "Default Rate"):

(A) The highest rate permitted by law to be paid on such type of obligation by the Party obligated to make such payment or the Party to whom such payment is due; or

(B) Three (3%) percent per annum in excess of the prime rate from time to time publicly announced by _____ [name of bank] Bank, or its successor.

6.3 Estoppel Certificate. Each Party agrees that upon written request (which shall not be more frequent than three (3) times during any calendar year) from time to time of another Party, it will issue at no charge to a prospective mortgagee of such other Party or to a prospective successor Party to such other Party, an estoppel certificate stating:

(A) whether the Party to whom the request has been directed knows of any default by any Party under this OEA, and if there are known defaults, specifying the nature thereof;

(B) whether this OEA has been assigned, modified or amended in any way by such Party (and if it has, then stating the nature thereof);

(C) that to the best of the requested Party's knowledge this OEA as of that date is in full force and effect; and

(D) that to the best of the requested Party's knowledge there are/are not any sums owed by any Party.

Such statement shall act as a waiver of any claim by the Party furnishing it to the extent such claim is based upon facts contrary to those asserted in the statement and to the extent the claim is asserted against a bona fide encumbrances or purchaser for value without knowledge of facts to the contrary of those contained in the statement, and who has acted in reasonable reliance upon the statement; however, such statement shall in no event subject the Party furnishing it to any liability whatsoever, notwithstanding the negligent or otherwise inadvertent failure of such Party to disclose correct and/or relevant information.

6.4 Notices.

All notices, demands, statements, and requests ("Notice") required or permitted to be given under this OEA must be in writing and shall be deemed to have been properly given or served as of the date the same is deposited in the United States mail, prepaid, by registered or certified mail, return receipt requested or delivered to a private express package courier prepaid. The address of the signatories to this OEA is set forth below. In the event a Party shall encumber its Tract by a first mortgage and Notice of such fact has been given to the Party issuing such Notice, then a copy of any Notice directed to such mortgaging Party shall also be sent to its first mortgagee.

Big Box:

To Seller:

With a copy to:

Any Party shall have the right from time to time and at any time, upon at least ten (10) days' prior written Notice thereof in accordance with the provisions hereof, to change its respective address and to specify any other address within the United States of America; provided, however, notwithstanding anything herein contained to the contrary, in order for the Notice of address change to be effective it must actually be received; and further provided such address may not be a post office box.

The refusal of a Party to accept certified or registered mail or of a private courier package delivery service shall be deemed delivery on the date of such refusal.

Upon receipt of a written Notice complying with the provisions of this Section 6.4 from a mortgagee having an interest in one of the Tracts within the Shopping Center, the Parties agree that from and after such date a copy of any Notice given will be sent to such mortgagee. Such Notice from a mortgagee must clearly state the Tract in which such mortgagee has an interest.

6.5 Approval Rights. Unless otherwise herein provided, whenever approval is required, such approval shall not be unreasonably withheld or delayed. Unless provision is made for a specific time period, approval shall be given or withheld within fifteen (15) business days of the receipt of the request for approval. The request for approval shall be delivered in accordance with the provisions of Section 6.4 hereof and shall clearly reference that approval deemed given if disapproval is not noted within fifteen (15) business days as provided in the preceding sentence. If a disapproval is not given within the required time period, the requested Party shall be conclusively deemed to have given its approval. If a Party shall disapprove, the reasons therefor shall be stated. Except with respect to an approval given by lapse of time, all approvals and disapprovals shall be in writing. The "right to approve" herein reserved by the Parties, respectively, shall be assignable by each, but only to a successor that owns a majority in area of the original Tract owned by the transferring party. Any entity who owns less than such majority agrees to be bound by the decision of such majority owner. Each successor assignee may also assign such "right to approve" on the same condition. If the holder of the "right to approve" transfers its entire ownership interest prior to assigning such "right to approve," then the transferee Party shall immediately become vested with such "right to approve."

6.6 Condemnation. In the event of a condemnation or a sale in lieu thereof concerning a portion or all of the Shopping Center, the award or purchase price paid for such taking shall be paid to the Party owning such Tract or portion thereof

so taken; it being the intent of the other Parties who might have an easement or other property interest or right under this OEA in the Tract so taken, to release and/or waive such property interest or right with respect to such award or purchase price; provided, however, such other Party shall have the right to seek an award or compensation for the loss of its easement right or property interest to the extent such award or compensation paid or allocated for such loss does not reduce or diminish the amount paid to the Party owning such Tract. Notwithstanding the above, this Section 6.6 is not intended to alter any other agreement which may exist between the owner of the Tract so taken and any person having an interest in said Tract pursuant to other contractual relationships.

In the event of a condemnation or a sale in lieu thereof which in either event reduces the parking ratio on any Tract or on the Shopping Center as a whole below a ratio of four and one-half (4.5) cars per one thousand (1,000) square feet of Floor Area on any Tract or on the Shopping Center as a whole, the Parties agree to meet and discuss substitute and/or alternative methods of creating additional parking spaces and the division of cost of providing such spaces. If for any reason the Parties cannot reach a mutually acceptable agreement within ninety (90) calendar days of the date of the taking, thereafter any Party may as to itself terminate this OEA by giving the other Parties written notice, and effective as of the date of such notice the Party giving such notice shall be released from any liability under this OEA after such date and this OEA shall be terminated as to such Party's Tract but for those easements designated in Article II to continue after termination or expiration of this OEA.

6.7 Binding Effect. The terms of this OEA shall constitute covenants running with the land within the Shopping Center and shall be binding upon any person or entity acquiring an interest in the Shopping Center or any part thereof. The terms of the OEA shall inure solely to the benefit and shall be binding upon the signatories hereto and their successors and assigns who become Parties hereunder in accordance with the terms of the OEA. This OEA is not intended to supersede, modify, amend, or otherwise change the provisions of any prior instrument affecting the land burdened hereby.

6.8 Singular and Plural. Whenever required by the context of this OEA, the singular shall include the plural, and vice versa, and the masculine shall include the feminine and neuter genders, and vice versa.

6.9 Counterparts and Signature Pages. This OEA may be executed in several counterparts, each of which shall be deemed an original. The signatures to this OEA may be executed and notarized on separate pages, and when attached to this OEA shall constitute one complete document.

6.10 Negation of Partnership. None of the terms or provisions of this OEA shall be deemed to create a partnership between or among the Parties in their respective businesses or otherwise, nor shall it cause them to be considered joint venturers or members of any joint enterprise. Each Party shall be considered a separate owner, and no Party shall have the right to act as an agent for another Party, unless expressly authorized to do so herein or by separate written instrument signed by the Party to be charged.

6.11 Not a Public Dedication. Nothing herein contained shall be deemed to be a gift or dedication of any portion of the Shopping Center or of any Tract or portion thereof to the general public, or for any public use or purpose whatsoever. Except as herein specifically provided, no right, privileges or immunities of any Party hereto shall inure to the benefit of any third-party Person, nor shall any third-party Person be deemed to be a beneficiary of any of the provisions contained herein.

6.12 Excusable Delays. Whenever performance is required of any Party hereunder, that Party shall use all due diligence to perform and take all necessary measures in good faith to perform; provided, however, that if completion of performance shall be delayed at any time by reason of Acts of God, war, civil commotion, riots, strikes, picketing, or other labor disputes, unavailability of labor or materials, damage to work in progress by reason of fire or other casualty or any cause beyond the reasonable control of a Party (excluding however the inability to secure financing or a temporary shortage of cash), then the time for performance as herein specified shall be appropriately extended by the

amount of the delay actually so caused. The provisions of this Section shall not operate to excuse any Party from the prompt payment of any movies required by this OEA.

6.13 Severability. Invalidation of any of the provisions contained in this OEA, or of the application thereof to any Person by judgment or court order shall in no way affect any of the other provisions hereof or the application thereof to any other Person and the same shall remain in full force and effect.

6.14 Amendments. This OEA may be amended by, and only by, a written agreement signed by all of the then current Parties and shall be effective only when recorded in the county and state where the Shopping Center is located. No consent to the amendment of this OEA shall ever be required of any Occupant or Person other than the Parties, nor shall any Occupant or Person other than the Parties have any right to enforce any of the provisions hereof.

6.15 Captions and Capitalized Terms. The captions preceding the text of each article and section are included only for convenience of reference. Captions shall be disregarded in the construction and interpretation of the OEA. Capitalized terms are also selected only for convenience of reference and do not necessarily have any connection to the meaning that might otherwise be attached to such term in a context outside of this OEA.

6.16 Minimization of Damages. In all situations arising out of this OEA, all Parties shall attempt to avoid and minimize the damages resulting from the conduct of any other Party. Each Party hereto shall take all reasonable measures to effectuate the provisions of this OEA.

6.17 OEA Shall Continue Notwithstanding Breach. It is expressly agreed that no breach of this OEA shall: (1) entitle any Party to cancel, rescind or, otherwise terminate this OEA; or (ii) defeat or render invalid the lien of any mortgage made in good faith and for value as to any part of the Shopping Center. However, such limitation shall not affect in any manner any other rights or remedies which a Party may have hereunder by reason of any such breach.

6.18 Time. Time is of the essence of this OEA.

6.19 Non Waiver. The failure of any Party to insist upon strict performance of any of the terms, covenants or conditions hereof shall not be deemed a waiver of any rights or remedies which that Party may have hereunder or at law or equity and shall not be deemed a waiver of any subsequent breach or default in any of such terms, covenants or conditions.

6.20 Perpetual Easement. Those easements designated as being perpetual or as continuing beyond the term of this OEA shall continue indefinitely but can be extinguished only by: (1) a written termination agreement signed by all the Parties; or (2) a written affidavit by a Party hereto filed among the land records of Macomb County stating that: (i) such Party is an owner of a Tract within the Shopping Center; (ii) such Party has given written notice to the owner of each other Tract that it desires to terminate the easement in question and that such termination shall be effective automatically unless such Party receives written objection of such termination within sixty (60) days; (iii) such Party has not received any notice of objection to such termination from any other Party within sixty (60) days following delivery of such notice; and (iv) that such easement has not been used for two (2) years. Upon filing of such affidavit, the easement in question shall be deemed terminated.

6.21 Name of Shopping Center. The name of the Shopping Center shall be _____[*name of shopping center*]. If any advertising shall make reference to the Shopping Center, such advertising shall use only the name of the Shopping Center for identification purposes, and shall not use the name of Big Box.

6.22 Mortgages on Shopping Center. Any mortgage or similar instrument securing financing upon any Tract, or portion thereof, shall be subject to and subordinate to the terms and conditions of this OEA.

6.23 Transferees. Within fourteen (14) days after a Party shall convey to a third party ("Transferee") any of the property

subject to this OEA, the Transferee shall furnish to any tenant of the Developer Tract identified by Developer ("Beneficiary") an agreement providing that:

- (i) the OEA is in full force and effect at such time and the property acquired by the Transferee is subject to this OEA; and
- (ii) Transferee will recognize Beneficiary's rights of ingress, egress and parking over and across the Common Area notwithstanding any early termination of this OEA, but not after the expiration of the term hereof.

6.24 Exculpation. If Developer or Big Box shall fail to perform any covenant, term or condition of this Agreement upon Developer's or Big Box's part to be performed, and if as a consequence of such default any other party hereto shall recover a money judgment against Developer or any partner thereof or Big Box or any officer or shareholder thereof, such judgment shall be satisfied only out of the proceeds of sale received upon execution of such judgment and levy thereon against the right, title and interest of Developer or any partner thereof in the Developer Site, or of Big Box or any shareholder thereof in the Big Box Site, or of Developer's or Big Box's, as the case may be, interest in the rents, income or insurance proceeds derived therefrom from and after the date of such judgment, and Developer and its partners or Big Box and its officers, directors, and shareholders shall not be liable for any deficiency.

ARTICLE VII

TERM

7.1 Term of this OEA. This OEA shall be effective as of the date first above written and shall continue in full force and effect until 11:59 p.m. on February 1, 2076; provided, however, that the easements referred to in Article II hereof which are specified as being "perpetual" or as "continuing beyond the term of this OEA" shall continue in force and effect as provided therein. Upon termination of this OEA, all rights and privileges derived from and all duties and obligations created and imposed by the provisions of the OEA, except as relates to the easements mentioned above, shall terminate and have no further force or effect; provided, however, that the termination of this OEA shall not limit or affect any remedy at law or in equity that a Party may have against any other Party with respect to any liability or obligation arising or to be performed under this OEA prior to the date of such termination.

The Parties have caused this OEA to be executed effective as of the day and year first above written, which execution may appear on separate pages.

DEVELOPMENT COMPANY,

a(n) _____ [state] _____ [entity]

By: _____

[insert name and title]

BIG BOX RETAILER, INC.

a(n) _____ [state] _____ [entity]

By: _____

[insert name and title]

[Acknowledgments]

[Attach Exhibit A]

[Attach Exhibit B]

[Attach Exhibit C]

[Attach Exhibit X]

[Attach Exhibit Y]

[Attach Exhibit Z]

[Attach Exhibit ZZ]



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Current Legal Forms for Real Estate

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Current Legal Forms for Real Estate
Chapter 22 DEVELOPMENT AND SUBDIVISION
Part IV. FORMS

D. COMMERCIAL DEVELOPMENT Shopping Centers, Industrial Buildings and Office Buildings

26-22 Current Legal Forms for Real Estate FORM 22.67

FORM 22.67 Shopping center with enclosed mall--reciprocal easement grant--multiple owners

COMMENT

Historically, the shopping center was developed or owned by a single entity. In recent years, shopping centers have become increasingly more expensive to launch in terms of both land and construction costs. One answer is for the ownership interests at the site of the shopping center to pool their resources in order to carry the plan for the shopping center to completion.

In order to integrate the variously owned properties into a coordinated shopping center, an agreement among the property owners is required. In such an agreement, the covenant will typically run with all parts of the land affected until such time as the then current owners agree otherwise or until the agreement terminates by its own provisions. It is not enough to cover just the problem of reciprocal easements in parking areas, although this is a very important concern. There are other considerations to be covered such as uniform design standards and supervision, management of the common areas, restrictions on or exclusives for certain types of businesses, especially where key tenants are involved as owners, and required membership in a merchants' association.

The following form illustrates a multiple owner's agreement directed to a situation in which a developer and the shopping center's key tenants join in the construction of the shopping center, each on its own parcel of land.

FORM

AGREEMENT made this _____[day] day of _____[month],
_____[year], by and among Arthur Rubinstein, Inc., a California corporation (the "Developing

Party"), Universal Variety Stores, Inc., an Idaho corporation, Great Value Food Corporation, an Idaho corporation, Big Sky Drug Corporation, an Idaho corporation, and Associated Industries, Inc., a Washington corporation (collectively the "Parties").

Recitals

The Parties wish to establish a general plan for the development, maintenance, and improvement of certain real estate as an integrated retail shopping center. The shopping center is to be designed for the mutual benefit of the Parties, and is more fully identified and described in Exhibit A annexed hereto (the "Shopping Center").

The Parties wish to establish protective provisions, covenants, restrictions, and setback lines, and provide for liens and charges (collectively called "restrictions"), with respect to which all or any part of such property is to be improved, held, used, occupied, leased, sold, or conveyed. It is intended that such restrictions run with the land and apply to and bind the respective successors in interest.

All of such restrictions are imposed on each portion of such property as a mutual, equitable servitude in favor of all other portions of such property.

Now, therefore, the parties agree as follows:

Article 1

Definitions

Section 1.01. These restrictions relate to Parcels 15 through 35, inclusive, in the County of Ada, State of Idaho (the "Shopping Center").

Section 1.02. The term "occupant" means each of the parties and any person from time to time entitled to the use and occupancy of commercial area in the Shopping Center under any lease, license, or concession agreement, or other instrument or arrangement under which each occupant acquires his status as such.

Section 1.03. The term "party" means each of the persons executing this instrument, or their respective successors in interest, as later provided, of their respective interests in the Shopping Center, as shown by the records of the County of Ada, as of the date of the exercise of powers or the performance of or failure of performance by such parties of obligations created by this instrument, who fit within the following classifications:

(a) The person or persons holding fee title to all or any portion of the parcels comprising the Shopping Center, except as provided in (b); or

(b) The lessee or lessees under a ground lease of all or a portion of the parcels comprising the Shopping Center for a fixed term of 50 years, or longer, in which event the fee owner of the real property covered by such lease will not be deemed to be a party as to such property for the purposes of this agreement during the duration of such ground lease.

Section 1.04. The word "person" means and includes individuals, partnerships, firms, associations, and corporations, or any other form of business entity.

Section 1.05. The term "permittees" refers to all occupants and all customers, employees, and other business invitees of occupants.

Section 1.06. All common areas used for the parking of motor vehicles, including incidental and interior roadways, perimeter sidewalks, walkways, curbs, and landscaping within or adjacent to areas used for parking of motor vehicles, together with all improvements which at any time are erected on such, subject to the provisions of Article 4, will be referred to as motor vehicle parking area.

Section 1.07. All areas within the Shopping Center, subject to nonexclusive use and not exclusively appropriated for the use of any single occupant, will be improved, operated, and maintained, and will be referred to as common areas. Such areas include motor vehicle parking areas including employee parking areas, roadways, walkways, malls, landscaped areas, public restrooms, which are both directly accessible from pedestrian passageways and not within space leased to any tenant, and all other similar facilities provided for the convenience of such permittees. Such areas do not include buildings, areas, or facilities which are constructed and used for commercial use as defined herein.

Section 1.08. Plans and specifications prepared for the development of certain common areas in the Shopping Center, as more particularly set forth in Articles 5 and 6 of this agreement, will be referred to as improvement plans.

Section 1.09. All areas used or constructed for use for commercial purposes will be referred to as commercial area.

(a) Commercial area includes:

- (1) Sales and service areas.
- (2) Warehousing and storage areas.
- (3) Clerical or office areas.
- (4) Employee facilities, except as provided in (b)(7).

(b) Commercial area does not include:

- (1) Truck ramps, loading and delivery areas, whether or not situated within a building or enclosure.
- (2) Equipment rooms or areas to house heating, air conditioning, and other mechanical equipment, and meter room.
- (3) A common meeting room of not more than 100 square feet, which is available for use by the parties, tenants, and merchants' association.
- (4) A Shopping Center office of not more than 200 square feet for the administration and supervision of the maintenance and operation of the Shopping Center.
- (5) Common areas.
- (6) Signs.
- (7) Employee motor vehicle parking.

Section 1.10. The parties shall designate the project architect to prepare plans and specifications for the integrated development of certain common areas of the Shopping Center and to perform for them such architectural services as are herein provided. The project architect may be removed by a majority of the parties. The parties, acting unanimously, shall have the right from time to time to designate and redesignate the project architect.

Section 1.11. The term "allowable gross square feet" means the maximum number of square feet of permitted commercial area, plus the areas defined in Section 1.09(b)(2), (3), and (4) of each of the parties on its parcel or combined parcels of land, whether the entire amount is initially used, or whether part is initially used and the balance held for expansion.

Section 1.12. The term "common building component" means any single improvement which is located partly on a parcel of land in the Shopping Center owned by one party and partly on a parcel of land in the Shopping Center owned by another party.

Section 1.13. All sidewalk areas lying between two or more buildings within the Shopping Center are referred to as malls, and are part of the common areas.

Section 1.14. The term "enclosed mall" refers to and includes the mall enclosure as provided for in Article 6, which is designated "enclosed mall," delineated on Exhibit A, and is part of the common areas.

Article 2

Regulation of Improvements

Section 2.01. No building, structure, or improvement of any kind, other than common area improvements, will be constructed, installed, and maintained above the surface of the ground area lying between setback line No. 3 and setback line No. 4, all as shown on Exhibit A, except in those areas specifically designated on Exhibit A for building sites.

The parties each have the right to place footings, signs, canopies, cornices, and other building features attached to a commercial building which project over the building setback lines, sidewalks, or walkways, provided the same are architecturally approved as provided in Article 11 and if the same project over the parcel of another party, the other party has approved them in writing.

Section 2.02. No sign, symbol, advertisement, or billboard shall be constructed, used, maintained, erected, posted, pasted, displayed, or permitted on or about any portion of the Shopping Center except one or more signs for each retail facility operating in the Shopping Center, which identifies the name, business, or symbol of such retail facility, which does not advertise any particular item of merchandise, which is harmonious to the general exterior architectural treatment of the buildings in the Shopping Center, which is of a type, size, and design commonly found in first-class regional shopping centers in Idaho, and which complies with the sign criteria approved by the parties, attached as Exhibit C.

Section 2.03. No hedge, fence, wall, or other like barrier shall be constructed on the line separating one parcel from another parcel, other than the improvements expressly permitted here.

Section 2.04. No building shall at any time be constructed or maintained on, under, or above the surface of any parcels of the Shopping Center which exceeds the allowable gross square feet for such parcel or parcels.

Section 2.05. (a) Each party owning any improvements in the Shopping Center which contains a common building component, if such common building component is utilized by another improvement in the Shopping Center owned in whole or in part by another party (as owner of a benefitted improvement):

(1) Shall maintain, at its own cost and expense, the common building component in such state of repair that it will continue to have the capacity to be so used in common by the benefitted improvement in question (subject to the provision of (1) of subparagraph (b) of this section).

(2) Shall not cause or permit to occur any damage, loss, or injury to the owner of the benefitted improvements or his

tenants by or as a result of any act or negligence on its part with respect to the common building component in question, or any other portion of the improvement owned by it which contained the common building component in question.

(b) Each party owning any benefitted improvement which utilizes any common building component contained in an improvement which is not owned in whole or in part by it:

(1) Shall not place on the common building component in question any burden which at the time of placement is in excess of the capacity of the common building component for such or will prevent the use of the improvement contained in the common building component in question for its intended purposes; and

(2) Shall not cause or permit to occur any damage, loss, or injury to the improvement which contains the common building component in question by or as a result of any act or negligence on its part with respect to the benefitted improvement.

Section 2.06. Nothing in Section 2.05 shall be deemed to preclude any party owning either an improvement containing a common building component or a benefitted improvement, as the case may be, from doing or causing to be done any work (whether of repair, alteration, restoration, or otherwise) with respect to any such improvement (notwithstanding that during the course of performing such work a condition otherwise prohibited by the provisions of this Article may result) if:

(a) During the course of performance of such work the party by whom or on whose behalf such work is being done will, at its own cost and expense, provide such temporary facilities as may be necessary:

(1) To perform the function performed by the common building component in question, if such work is performed with respect to the improvement containing the common building component in question; or

(2) To increase the capacity of, or supplement, the common building component in question to the extent necessary so that the benefitted improvement will not, during the course of the performance of such work, either place on the common building component a burden in excess of its capacity for such purpose or otherwise prevent the use of the improvement containing the common building component in question for its intended purposes, if the work is performed with respect to the benefitted improvement in question; and

(b) At the conclusion of work there is full compliance with the provisions of (1) of whichever subparagraph (a) or (b) of Section 2.05 is appropriate to the improvement with respect to which the work in question was done.

Notwithstanding the provisions of (2) of subparagraphs (a) and (b) of Section 2.05 appropriate to the improvement with respect to which the work in question was done, the owner of the improvement with respect to which the work in question was being performed shall not be liable to the owner of the other improvement affected by such work for any inconvenience, annoyance, disturbance, or loss of business to the owner of the improvement affected by the performance of such work (or his tenants) arising out of and during the performance of such work (unless occasioned by the negligence of the owner of the improvement with respect to which the work in question was being performed, or its agents). The owner of the improvement with respect to which such work is being performed, however, shall make all reasonable efforts to keep any such inconvenience, annoyance, disturbance, or loss of business to the minimum reasonably required by the work in question.

Section 2.07. No building or other improvement will be constructed or maintained on any party's parcel, unless and until provision is made for the construction and maintenance of a minimum ratio of not less than 2.5 square feet of motor vehicle parking area for each square foot of commercial area. For the purposes of this Section, truck ramps, loading and delivery areas, not situated within a building or enclosure, will be considered motor vehicle parking area.

Article 3

Operations and Use

Section 3.01. Neither the Shopping Center nor any part of it will be used and no building or other improvement will be constructed, maintained, or used for any purpose other than the following: retail, office, and service establishments, including without limitation, financial institutions, brokerage offices, restaurants, automotive service stations, travel and other agencies, automotive sales display area, bowling alley, skating rink, motion picture theater, car washing establishment, veterinary hospital, mortuary, commercial laundry plant, and similar service establishments, unless specifically approved in writing by the parties.

Section 3.02. Except as otherwise prohibited by this agreement any part of the Shopping Center may be used for any commercial or business operation, use or purpose, which is expressly authorized here or which is common to first-class regional shopping centers and which is not prohibited by this agreement or by law.

Section 3.03. No use or operation will be made, conducted, or permitted on or with respect to all or any part of the Shopping Center, which use or operation is obnoxious to or out of harmony with the development or operation of a first-class shopping center including the following:

- (a) Any public or private nuisance;
- (b) Any noise or sound that is objectionable due to intermittence, beat, frequency, shrillness, or loudness;
- (c) Any obnoxious odor;
- (d) Any noxious, toxic, caustic, or corrosive fuel or gas;
- (e) Any dust, dirt, or fly ash in excessive quantities;
- (f) Any unusual fire, explosion, or other damaging or dangerous hazard;
- (g) Any warehouse, assembly, manufacture, distillation, refining, smelting, agriculture, or mining operations;
- (h) Any "second hand" store, Army, Navy, or government "surplus" store;
- (i) Any trailer court, labor camp, junk yard, stock yard, or animal raising other than a pet shop;
- (j) Any drilling for a removal of subsurface substances;
- (k) Any dumping, disposal, incineration, or reduction of garbage or refuse; and
- (l) Any fire or bankruptcy sale or auction house operation.

Section 3.04. No retail or business establishment will be located within any mall, including the enclosed mall, without the consent of the parties hereto.

Article 4

Easements

Section 4.01. The parties grant each to the other the following reciprocal easements:

(a) Nonexclusive easements appurtenant to the party's property for the purpose of parking vehicles of the party; the tenants, concessionaires, or owners of any portion of the party's property; and the customers, licensees, and invitees of the party and the tenants, concessionaires, or sublessees; limited, however, for purposes connected with or incidental to any use being made of any portion of the party's property. The parking area easements are easements on each and all of the one or more portions of the Shopping Center property as is or are improved by any party from time to time for the parking or accommodation of vehicles.

(b) Nonexclusive easements appurtenant to the party's property for the purpose of pedestrian traffic of customers, invitees, and licensees of the party; the tenants, concessionaires, or owners of any portion of such party's property; and the customers, officers, employees, licensees, and invitees of the party and the tenants, concessionaires, or owners; limited, however, for purposes connected with or incidental to any use then being made of such party's property. The common area easements are easements on each and all of the one or more portions of the Shopping Center property (other than the motor vehicle parking areas) as is or are provided or available for general use and the convenience of tenants of the Shopping Center and concessionaires, employees, and customers of the Shopping Center as such portions may be made available and designated from time to time for these purposes by any party, as each such portion or portions so made available and designated may from time to time be reduced or increased in size or relocated by any party.

(c) Nonexclusive easements appurtenant to the party's property for the purpose of furnishing access and the right of access between the public streets and any parking areas situated on the Shopping Center property and between the public streets and parking areas and the party's property, including any and all improvements from time to time located on or in the party's property.

(d) Nonexclusive easements appurtenant to such party's property for the purpose of furnishing connection, support, or attachment including, without limitation, walls, slabs, and structural systems of an improvement to any building component owned by another party where such building component constitutes a common building component.

(e) Nonexclusive easements for the benefit of and appurtenant to each portion of the Shopping Center, for the conveyance of water, all as described in Exhibit B, labeled "water line easements," attached and incorporated here by reference, and the maintenance, removal, and replacement of water pipes and systems.

(f) Nonexclusive easements for the benefit of and appurtenant to each portion of the Shopping Center for telephone lines in, on, and under portions of the Shopping Center, all as described in Exhibit B, labeled "telephone line easements," attached and incorporated here by reference, and the maintenance, removal, and replacement of the lines.

(g) Nonexclusive easements for the benefit of and appurtenant to each portion of the Shopping Center for the conveyance of gas in, on, and under the Shopping Center, all as described in Exhibit B, labeled "gas lines," attached and incorporated here by reference, and the maintenance, removal, and replacement of gas pipes and systems.

(h) Nonexclusive easements for the benefit of and appurtenant to each portion of the Shopping Center for sewage disposal in, on, and under the Shopping Center, all as described in Exhibit B, labeled "sewer lines," attached and incorporated here by reference, and the maintenance, removal, and replacement of sewers.

(i) Nonexclusive easements for the benefit of and appurtenant to each portion of the Shopping Center for the conveyance of electricity in, on, and under the Shopping Center, all as described in Exhibit B, labeled "electric lines," attached and incorporated here by reference, and the maintenance, removal, and replacement of electric power conduits, lines, and wires.

(j) Nonexclusive easements for the benefit of and appurtenant to each portion of the Shopping Center for drainage lines and systems in, on, and under the Shopping Center, all as described in Exhibit B, labeled "drainage lines," attached and

incorporated here by reference, and the maintenance, removal, and replacement of drainage lines and systems.

Section 4.02. The parties agree that at all times free access between the parcels owned by each party and the remainder of the Shopping Center shall not be impeded and shall be maintained.

Section 4.03. Subject to the rules and regulations adopted for the use of such areas as provided in this instrument, the use of all easements provided for in this Article and all other improved common areas in the entire Shopping Center shall, in each instance, be nonexclusive, and for the use and benefit of all of the parties or their respective successors or assigns to all or any part of their parcels, and to the extent any party may see fit to grant the same, for the use and benefit of other persons who are permittees as defined in Article 1.

Section 4.04. The common areas, on completion of the improvement of such areas, may be jointly managed, controlled, and operated by the parties or their respective successors or assigns to all or any part of their parcels, for their mutual benefit.

Section 4.05. The parties, or their respective successors or assigns to all or any part of their parcels, shall jointly have the general possession of all common areas of the Shopping Center. Such parties jointly or individually may, at any time and from time to time, remove, exclude, and restrain any person from the use or occupancy of such, excepting bona fide permittees who make use of such areas in accordance with the rules and regulations established from time to time for such use as provided in this instrument. If unauthorized use is being made of any of such common areas, any of the parties may also restrain or terminate such unauthorized use by appropriate proceedings after written notice to the owner of such parcel and failure to abate such use.

Section 4.06. None of the common areas shall be used for commercial purposes by any individual party, tenant, or lessee, or other permittee, except in accordance with the provisions of this agreement and rules and regulations adopted as provided herein.

Section 4.07. In the operation of the common areas, the parties from time to time shall adopt rules and regulations pertaining to the use of all common areas by the permittees of the Shopping Center, which may include the validation of customer parking tickets, provided that all such rules and regulations and other matters affecting the users of the common areas will apply equally and without discrimination to all permittees of parties in the Shopping Center. Such rules and regulations must, subject to the provisions of this agreement, be adopted by unanimous vote of the parties. Until modified by subsequent agreement, the rules and regulations attached and marked Exhibit D and incorporated herein will be in force and effect.

Section 4.08. When utility facilities have been installed, each party may relocate such utility facilities within its own parcel from time to time, at its own expense. Such relocation, however, shall be performed only if the party gives 60 days' written notice to all other parties using the utility facilities, and if the relocation will not reduce or impair the usefulness or function of the utility facilities and will be performed at the sole cost and expense of the party so relocating.

Section 4.09. (a) Within the separate areas of the parcels of each individual party, such party from time to time shall have the right to designate, withdraw, and redesignate as motor vehicle parking or commercial areas such areas as it will select from time to time, provided that within such parcels, there will not be maintained commercial areas in excess of the allowable gross square feet permitted by Section 1.12 within such parcels, or commercial areas within the setback areas, except as otherwise permitted by Section 2.01.

(b) All areas not used as commercial areas or used for other purposes permitted by this Article will be improved, used, and maintained as common area, and there are established nonexclusive easements for ingress and egress, parking of motor vehicles, and other incidental uses during each period that the areas are so used, improved, and maintained as

common area.

Section 4.10. Prior to commencement of and during construction of any commercial structure on the premises of any party, the party will erect and maintain a solid panel fence, ten feet in height, to protect existing facilities from the dust and other inconvenience occasioned by the unimproved character of such premises or the construction. The design, location, construction, maintenance, and painting of the fence will be approved by the project architect.

Article 5

Improvement Plans

Section 5.01. Eugene Thomas of Boise, Idaho, is designated as the project architect.

The parties will cause the project architect to prepare the improvement plans for all commercial buildings, the enclosed mall, and all parking and common areas to be constructed, all as provided for in Article 17, including the general architectural concept, and for the integrated development of all common areas of the Shopping Center. The parties will be consulted during the course of the preparation of such improvement plans, and if any party has a preference as to a particular type of installation, it will furnish to the project architect detailed drawings of such installation or portion of such for its consideration, and for incorporation in the improvement plans if approved by the other parties. From time to time during the course of the preparation of such plans, the project architect will cause progressive working drawings of the plans to be submitted to the parties for review and recommendation. Such improvement plans will include:

(a) Schematic improvement plans, which will within 30 days following the execution of this agreement be submitted by the project architect to the parties of their review and approval. Such schematic improvement plans will include elevations, perspective renderings reflecting design concepts, layout of parking and other common area improvements.

(b) Preliminary improvement plans which will within 30 days following the above approval of the schematic improvement plans, be submitted to the parties by the project architect for their review. The preliminary improvement plans will be developed from Exhibit A and the approved schematic improvement plans and will conform to the schematic improvement plans and to the requirements of this agreement and will include, without limitation:

(1) All access roadways, exterior boundary walls or fences, project signs, malls, curbs, curb cuts, entrance driveways, interior roadways, motor vehicle parking areas, utility loop systems, and lines to serve common improvements and such commercial improvements as the parties may designate, also sewer, storm, and other drainage lines or systems, including extensions, fire hydrants, lighting facilities, and other similar facilities for common use.

(2) The location of all facilities for common use where the fixing of such location is reasonably possible, and if precise location cannot be shown, then specifications for such location.

(3) A composite parking layout for the entire Shopping Center, including paving, striping, bumpers, curbs, location of electroliers and lighting systems, with designation of areas which may be separately illuminated from time to time at the request of any party.

(4) A composite landscaping plan as prepared by a landscape architect specifying overall plant materials and planting, but excluding planting areas adjacent to buildings.

(5) The conditions, standards, and architectural treatment under which such improvements will be located, constructed, or installed. Such conditions, standards, or architectural treatment are not to be less than the minimum requirements of the County of Ada or other governmental agency having jurisdiction of the performance of such work in the Shopping Center.

(6) The improvement plans are not to include any commercial area but will designate the general location of the commercial areas where such locations have been established.

If a party whose approval is required does not specify any objection or make a proposal that would add to or change the schematic or preliminary improvement plans to the project architect, with a copy to each other party, within 30 days from the date of submission, the plans will be deemed to be satisfactory for further development. If there is an objection or proposal from any party, the project architect will call a meeting of all parties whose approval is required, to be held within 45 days from the date of submission, to resolve and adjust any objection or proposal with reference to such improvement plans. All objections or proposals will be considered at the meeting with a view to developing such improvement plans in their final form at the meeting. If at such meeting the parties are unable to agree unanimously, all matters of disagreement will be resolved by the arbitration procedures of Article 8.

Within 90 days from the date of approval of the preliminary improvement plans, the project architect will submit final improvement plans to the parties for review; such final improvement plans will be developed from the approval preliminary improvement plans.

If a party whose approval is required does not specify any objection to the project architect or make a proposal that would add to or change the final improvement plans, with a copy to each such party, within 30 days from the date of submission, the plans will be deemed to be satisfactory for final development. If there is an objection or proposal from any party, the project architect will call a meeting of all such parties to be held within 45 days from the date of submission, to resolve and adjust all objections or proposals with reference to the final improvement plans. All objections or proposals will be considered at the meeting with a view to developing the final improvement plans in their final form at the meeting. If at the meeting the parties are unable to agree unanimously, all matters of disagreement will be resolved by the arbitration procedures of Article 8.

(c) Additional improvement plans may be developed by the project architect for the future development of the common areas or may be developed by others and submitted to the project architect for approval. On preparation or approval by the project architect, as the case may be, such plans will be submitted to the parties for their approval in writing.

To provide continuity and harmonious architectural treatment in the development or approval of such plans, prior approved improvement plans will be followed as a guide in any such additional plans and in the establishment of conditions, standards, and architectural treatment under which unimproved areas will be improved or additional improvements will be made.

Changes may be made in approved improvement plans only by written agreement of the parties whose approval is required, representing not less than 80 percent of such parties in interest as to each parcel of land within the Shopping Center at the time of the execution of such written amendment to the improvement plans, subject, however, to the provisions of Section 1.03.

All improvement plans shall be stamped approved, dated, and certified by the project architect and maintained by it in a safe and convenient place. In the event of designation of another project architect, all improvement plans and other records relating thereto will be delivered to the new project architect at the time of such designation.

Article 6

General Design Data

In the preparation of any improvement plan, the following general design data, without limitation, will be followed, as minimums, unless governmental specifications for such work establish higher standards; provided, however, that the existing motor vehicle parking areas are approved in their existing condition.

Section 6.01. Sewer drainage and utility lines, conduits, or systems will not be constructed or maintained above the ground level of the Shopping Center unless such installations are within approved enclosed structures, and will conform with requirements of the County of Ada or other applicable governmental or private agency having jurisdiction of the work.

Section 6.02. Concrete walkways, not less than ten feet in width, will be constructed along the outer perimeter of the commercial buildings in the development of the Shopping Center as shown on Exhibit A. The walkways, including any planting, when installed, will become a part of the common area. Such walkways, however, will be constructed as part of the construction of the buildings adjacent to each such walkway.

Section 6.03. Lighting for motor vehicle parking areas will be provided by mercury vapor fixtures with area controls with electric time switches on a seven-day program, sufficient to produce a minimum of one and one-half foot candle of lighting, or such other minimum as may be mutually approved by the parties.

Section 6.04. Each parking space regardless of angle of parking, will have a width of nine feet on center, measured at right angles to the side line of the parking space. Parking lanes or bays will have the following minimum and preferred widths at the angle of the parking designated below:

Degrees	Minimum	Preferred
45 degrees	46.6	52
52.5 degrees	50	52
60 degrees	52	54
90 degrees	60	62

The maximum slope in parking areas will not exceed 4 percent.

Section 6.05. All fire protective systems will be installed in accordance with the requirements of the Western Board of Fire Underwriters or other qualified inspection firm, and any additional requirements of local authorities having jurisdiction over the installation.

Section 6.06. The finished surface of the enclosed mall will be established at the same elevation as the first floor of the adjoining retail store building at all points adjoining such building.

Section 6.07. The surface of that portion of the enclosed mall devoted to pedestrian traffic will be installed in a continuous plane without steps. The maximum slope in such surface will not exceed 1 percent.

Article 7

Improvement Plan of Enclosed Mall

Section 7.01. Arthur Rubinstein, Inc., the developer, will cause the project architect to prepare a schematic plan for the enclosed mall, showing:

- (a) Principal interior and exterior dimensions, including ceiling elevations and height of principal components.
- (b) Design concepts.
- (c) Materials selection.

- (d) Outline specifications for heating, ventilation, and air conditioning, including performance specifications.
- (e) Lighting.
- (f) Landscaping.
- (g) Signing.
- (h) Any structural facilities, decorative, or architectural treatment in the mall.

Such schematic plans will be submitted to the parties for their written approval. The procedures for such approval will follow the procedures for the approval of improvement plans provided for in Section 5.01.

Section 7.02. The developer will complete the construction of the enclosed mall in accordance with working drawings and specifications developed from and implementing the approved schematic plans. Such working plans will be submitted to the parties, whose approval is required, for their review. The written approval of the parties must be obtained if a change is made in the basic design, appearance, location, or components of the approved schematic plans, and with respect to the structural attachments of the mall enclosure to the common area building of any such party. The plans for the attachment need only be approved by the party to whose building such attachment is to be made. In the development of plans for attachment, insurance requirements, building code requirements, increased or decreased costs of construction of the structure to which attachment is to be made will be relevant circumstances in resolving questions that may arise respecting such attachment.

Article 8

Arbitration of Disputes

Any dispute, controversy, or disagreement including lack of approval of the project architect or the party arising under this agreement will be resolved under the procedures set forth here. In the event that any party does not notify the project architect in the case of any plan or proposal prepared by or requiring the approval of the project architect, or the party making the proposal (if approval of such project by the project architect is not required) of its objection to such in writing within 30 days from the date of submission, the plan or proposal will be deemed to be approved by such party. On written objection being given to all required parties to any plan or proposal submitted, in cases where approval of the project architect is required, the project architect on his own motion or at the request of any such party will, and in all cases where the project architect's approval is not required the party making the proposal will, by written notice call a meeting to be held within ten days from such date to be attended by all the parties, and if necessary by the project architect, to resolve and determine the matter. The project architect will not vote. A unanimous decision of the parties in attendance will be required. In the event the meeting is not called or held within such period, or if the matter is not thus finally determined, any party will have the right on written notice to each of the other parties to have the matter determined by arbitration. Each such party within ten days after mailing of the notice will select, in cases when approval of the project architect is required, an architectural engineering firm experienced in and having an established reputation in the development of shopping centers, and in all cases where the project architect's approval is not required, a recognized expert experienced in the operation of such shopping centers. These firms, and if necessary, the project architect, will meet within ten days after selection is completed to study and consider the plans or proposals and objections to them. A majority decision of the participants will be final. Each participant party will bear its own expenses except those relating to the services of a project architect or any nonparty arbitrator, which expense will be divided and borne equally among the participant parties.

Article 9

Operation and Maintenance of Common Areas

Section 9.01. The Developing Party will maintain all the common areas and all of the improvements of the common areas located within the Shopping Center, or portions of these, and keep them in good condition, repair, clean, and free of rubbish and other hazards to persons using such areas. It will have the right to select from time to time a person or persons to operate and maintain the common areas, provided that such selection will not diminish its obligations to maintain and operate the common areas. The remaining parties will each pay to the Developing Party as their respective share of each of the costs of maintenance and operation of the common areas a pro rata share of such costs based on the ratio of the allowable gross square feet of commercial area on its parcel to the allowable gross square feet in all parcels within the Shopping Center. Such maintenance will include, without limitation:

- (a) Maintenance of the surface of the area and sidewalks level, smooth, and evenly covered with the type of surfacing material originally installed on such, or such substitute as will in all respects be equal to it in quality, appearance, and durability.
- (b) Removal of all papers, debris, filth, and refuse from the Shopping Center, and washing or thoroughly sweeping paved areas as required.
- (c) Maintenance within the Shopping Center of such appropriate parking area entrance, exit, and directional signs, markers, and lights in the Shopping Center as will be reasonably required and in accordance with the practices prevailing in the operation of shopping centers in Idaho.
- (d) Cleaning of lighting fixtures of the Shopping Center and relamping as needed.
- (e) Repainting of striping, markers, directional signs, etc., as necessary to maintain in first-class condition.
- (f) Performance of maintenance of landscaping necessary to keep in first-class condition and to provide the general effect contemplated by the improvements. For example, trees and shrubbery will be properly pruned or otherwise controlled to prevent any condition of over-growth.
- (g) Cleaning of signs of the Shopping Center and including relamping and repairs being made as required.
- (h) Maintenance of all of the common areas free from any obstructions not required for their intended use, including the prohibition of the sale or display of merchandise outside the exterior limits of improved commercial areas within the Shopping Center, except in areas specifically designated within the Shopping Center for such purposes. It is expressly understood and agreed, however, that in the event of promotional activities in the Shopping Center, approved by the parties, these provisions may be waived during the period of the promotional event.
- (i) Payment of all electrical, water, and other utility charges or fees for services furnished to the common areas, except as to the illumination of common areas within its parcel, which is provided at the request of any other parties.
- (j) Maintenance of utility lines or a system which is to be used in whole or in part to provide service for common or commercial facilities erected, constructed, or installed on the parcel of one or more of the other parties.

The cost of maintenance and operation of common areas referred to means the total of all items of direct cost and expense necessarily expended for the supervision, operation, maintenance, and repair of the common area, determined in accordance with generally accepted accounting principles on the accrual method of accounting, but which costs will exclude any real property taxes or assessments. The cost includes maintenance, replacements, and reconstruction work as required to preserve the utility of the common area and its equipment, in the same condition and status as it was as of the time of the completion of the original construction and installation, and further includes all rental charges for equipment, the cost of small tools and supplies, all costs for police security protection, traffic direction and control, and parking regulations; costs of cleaning and removal of rubbish, dirt, and debris from the common area; the cost of

landscaping, and supplies incidental to such; all charges for utility services used in connection with such, together with all costs of maintaining lighting fixtures in the automobile parking areas and all premiums for public liability and property damage insurance covering the common area. In addition there may be expended for replacement of capital improvements in any one calendar year the sum of not to exceed \$25,000, and no capital expenditure in excess of such amount in any one calendar year may be made without the prior approval of the remaining parties.

Section 9.02. The Developing Party will, in addition to the foregoing, provide heating, cooling, ventilation, and illumination for the enclosed mall and will maintain its air conditioning system and keep the enclosed mall illuminated at all times when the retail operations are open for business and in such manner so that the temperature and humidity throughout the enclosed mall is at a reasonably comfortable level, and in any event, in accordance with minimum design standards as recommended for the area in which the Shopping Center is located, by the American Society of Heating, Refrigeration, and Air Conditioning Engineers guide and data books current at the time of construction; and will maintain the glass, floors, walls and roof of the enclosed mall in good condition and repair, and will clean such areas, wash all such glass and replace all electric lamps as may be required.

The other parties will each pay to the Developing Party, as its respective share of the cost of maintenance and operation of the enclosed mall, including air conditioning, such sums, at such times, as Arthur Rubinstein, Inc., and each of them shall, by separate agreement executed simultaneously with this, provide.

Section 9.03. Each party will pay all real estate taxes, assessments, and other charges which may be levied, assessed, or charged against its parcel in the Shopping Center or any part of such.

Section 9.04. In the event the other parties jointly, at any time, or from time to time, are dissatisfied with the Developing Party's, performance of its obligations under this Article 9, such parties will have the right to give it written notice of such dissatisfaction, specifying the particulars in respect to which its performance is deemed by such parties to be unsatisfactory. If during the 30-day period from the date of such notice such performance continues to be unsatisfactory, the notifying parties will have the right to give a second notice of such dissatisfaction in the same manner, specifying the particulars in respect of which the performance is deemed by such parties to be unsatisfactory, and if during the 15-day period from the date of such second notice the performance continues to be unsatisfactory, the notifying parties will have the right to cause to be taken over from the Developing Party by means of an entity created for such purpose by the notifying parties or by means of an entity hired for such purpose by such parties, effective on the first day of the next succeeding calendar month, the maintenance, management, and operation of the common areas and of any and all improvements located on these; provided, however, that anything herein to the contrary notwithstanding, such takeover of the maintenance, management, and operation of the common area will not relieve the Developing Party of its obligation to pay all costs and expenses of maintenance, management, and operation of any such areas to the extent obligated under this agreement; and provided further that the takeover by such entity will not relieve the Developing Party of the obligation to keep, perform, and observe any of the other terms, provisions, and conditions contained in this agreement to be kept, performed, and observed by such party, other than those relating to the maintenance, management, and operation of the common areas. The Developing Party shall promptly pay to the entity, on demand, any sum which it will be obligated to pay with respect to the maintenance, management, and operation of the common area pursuant to this paragraph. In the event that the maintenance, management, and operation of the common area are taken, as provided in this paragraph, then any and all sums payable to the Developing Party by any and all occupants of the Shopping Center in respect of its or their pro rata share of common area maintenance cost, together with the right to enforce payment of and to collect the same, will stand assigned to such entity without the necessity of the execution of any further instrument of assignment; and the entity will thereafter perform such maintenance, management, and operation of the common area throughout the remainder of the term of this agreement, unless the Developing Party, at any time thereafter, resumes maintenance, management, and operation of the common area with the consent of the remaining parties.

Section 9.05. Whatever party or entity is charged with the responsibility of performing the maintenance, management,

and operation of such common area will during the time it is performing the maintenance, management, and operation of the common area, and so long thereafter as any charge for such remains unpaid, have a lien on the parcel of the party in performing its maintenance, management, and operation to secure the payment by the party of all sums payable to the managing entity. Any such lien will be perfected only by adhering to the provisions of Section 12.02. The lien will be junior to and will in no way impair the lien or charge of any first mortgage or first deed of trust, recorded prior to or subsequent to the recording of the notice.

Article 10

Insurance

Section 10.01. Each party shall hold harmless all other parties, and all tenants, lessees, and occupants of the parcels of the other parties from all claims or judgments arising from the use of common areas located within its respective parcel or portion of such, unless the claim, demand, or judgment is caused by the negligence of the other party, tenant, lessee, or occupant. The parties each will provide public liability insurance with limits of not less than \$1,000,000 for each individual, \$2,000,000 for each accident, and \$250,000 for property damage in the performance of its obligations under this Section. The other parties will be named as an additional assured. Such obligation may also be discharged by self-insurance, if approved in writing by the other parties.

Section 10.02. Each party releases each of the other parties from any liability for any loss or damage of the type provided by fire insurance with extended coverage, and grants to the other parties, respectively, on behalf of any insurer providing such insurance, a waiver of any right of subrogation which any such insurer of any one party may acquire against any other party or parties by virtue of payment of any loss covered by such insurance.

Section 10.03. Arthur Rubinstein, Inc., covenants to and with the other parties, each severally, that in the event of any damage or destruction to all or any portion of the improvements it will, at its own expense, restore, repair, or rebuild such improvements with all due diligence.

Except as provided below, The Developing Party will be released from its obligations to restore, repair, or rebuild under the provisions of this subparagraph if:

- (a) Such damage or destruction was caused by a peril other than one enumerated in a fire insurance policy with standard extended coverage endorsement attached; or
- (b) The stores of the other parties are not, after the occurrence of such damage or destruction, open for retail business; or
- (c) Such damage or destruction occurs during the term of this agreement, as provided in Section 13.01 and the Developing Party is not assured of the continuation of the agreement and the operating covenants referred to below.
- (d) Such damage or destruction occurs at a time when The Developing Party is not assured, under the terms and provisions of this agreement, of ten years (the commencement of such period to be the date of completion of such restoration, repair, or rebuilding) of operation under this agreement.

However, if there is not such assurance, then the provisions of this subparagraph will not apply, if within 30 days after the occurrence of such damage or destruction, the other parties jointly give the Developing Party written assurance in recordable form that it will have such a ten-year period of operation.

All restoration, repair, or rebuilding under Section 10.03, and all conditions of the requirements of such restoration, repair, or rebuilding, will be subject to the applicable provisions of this agreement.

Article 11

Commercial Area Development

Before any exterior surface of any building or other commercial facility is erected, altered, repaired, or restored, or before any unenclosed or uncovered area is used for commercial purposes in the Shopping Center, accurate plans of the exterior design; color; finish; and signing of such sign, building, or facility; or screening of unenclosed or uncovered areas will be submitted for approval of the other parties for the purpose of achieving a harmonious relationship among the various buildings, facilities, and signing which will comprise the commercial areas of the Shopping Center. In the event such plans are submitted and not disapproved within 30 days from date of submission, the plans will be deemed to have been approved. In the event any such plans are disapproved, such disapproval will indicate the particulars for such disapproval. If the parties are unable to agree, the matter will be determined in accordance with the procedures established in Article 8.

Article 12

Enforcement

Injunctive Relief

Section 12.01. In the event of any violation or threatened violation by any party, lessee, or occupant of any part of the Shopping Center of any of the terms, restrictions, covenants, and conditions provided here, either of the parties, or their respective successors or assigns to all or any part of their parcels, will have in addition to the right to collect damages, the right to enjoin such violation or threatened violation in a court of competent jurisdiction. Prior to the commencement of any such action, written notice of the violation will be given to the other party or other person responsible for such.

Section 12.02. If performance of any act or obligation of any party is prevented or delayed by Act of God, war, labor disputes, or other cause or causes beyond the reasonable control of such party, the time for the performance of the act or obligation will be extended for the period that such act or performance is delayed or prevented by any such cause.

Section 12.03. A party will not be in default under this agreement except under such provisions as require the performance of an act on or before a specific date or within a specified period of time, unless the party has been given a written notice specifying the default and fails to cure it within the period of 30 days, except that under Section 13.02 the period of time is ten days, or commences to cure the default within such period of time, and if the default cannot be cured within the times specified above, if he thereafter does not diligently proceed to complete the curing of the default.

Section 12.04. It is expressly agreed that no breach of this agreement will entitle any party to cancel, rescind, or otherwise terminate this agreement, but this limitation will not affect, in any manner, all other rights or remedies which the parties may have by reason of any breach of this agreement.

Section 12.05. A breach of any of the terms, conditions, covenants, or restrictions of this agreement will not defeat or render invalid the lien of any institutional first mortgage or institutional first deed of trust, made in good faith and for value, but such term, condition, covenant, or restriction will be binding on and effective against any of the parties whose title to the property or any portion of such is acquired by foreclosure, trustee's sale, or otherwise.

Article 13

Duration, Extinguishment, Continuation, and Modification Duration

Section 13.01. This agreement and each easement, setback line, covenant, restriction, and undertaking of this agreement will be for a term of 50 years from its date, and will continue in full force and effect thereafter so long as 50 percent of the allowable gross square feet of the commercial area of the Shopping Center are used for the uses permitted under this

agreement, except that each easement granted pursuant to Article 4 will continue so long as such easement is used by any party and will terminate on nonuse for a consecutive 12-month period, unless notice has been given by any party to the other parties during such period of its intention, to resume use within 18 months following the date on which nonuse commenced.

Section 13.02. This agreement and any provision, covenant, condition, or restriction contained within it may be terminated, extended, modified, or amended as to the whole of the Shopping Center or any portion of it, with the consent of the parties in interest of 80 percent of the total number of square feet of the land then subject to this agreement, based on the number of square feet of land owned, as compared to the total number of square feet of land then subject to this agreement, provided that whenever any parcel of land is owned or ground leased by more than one in the manner covered by Section 1.03(a), then the consent of such parties to any termination, extension, modification, or amendment will be determined as follows:

(a) Each party sharing multiple ownership of a parcel will be entitled to one vote for each square foot of land in such parcel of land owned or leased by him multiplied by his fractional interest in any undivided interest.

(b) Any interest owned by any person who is a minor or is otherwise suffering under any legal disability will be disregarded in the making of such determination, unless there is, at the time, a duly appointed guardian or other legal representative fully empowered to cast a vote on behalf of such person.

No termination, extension, modification, or amendment will be effective until a written instrument setting forth its terms has been executed, acknowledged, and recorded in the Office of the Recorder of Ada County.

No such amendment, modification, extension, or termination will affect the rights of any mortgagee under a mortgage or the trustee or beneficiary under any deed of trust constituting a lien on the Shopping Center at the time unless the mortgagee, or beneficiary and trustee consent to such, nor will any amendment, modification, extension, or termination be effective against such mortgagee, trustee, or beneficiary subsequent to its securing title to its encumbered parcel by foreclosure, trustee's deed, or deed in lieu of foreclosure, unless the mortgagee, or trustee and beneficiary have consented in writing.

No lessee, licensee, or other person having a possessory interest, other than a party, will be required to join in the execution of or consent to any act of the parties taken subject to this Section.

Article 14

Not a Public Dedication

Nothing contained in this agreement will be deemed to be a gift or dedication of any portion of the Shopping Center to the general public or for the general public or for any public purpose whatsoever, it being the intention of the parties that this agreement will be strictly limited to and for the purpose expressed here.

Article 15

Severability

If any clause, sentence, or other portion of the terms, conditions, covenants, and restrictions of this agreement become illegal, null, or void for any reason, or be held by any court of competent jurisdiction to be so, the remaining portions will remain in full force and effect.

Article 16

Notices

Except to the extent otherwise provided in Section 1.03(a) all notices, statements, demands, approvals, or other communications to be given under or pursuant to this agreement will be in writing, addressed to the parties at their respective addresses as provided below, and will be delivered in person, or by certified or registered mail, postage prepaid, return receipt requested. Notice may also be sent by facsimile transmission, provided that all parties have facsimile machines and have provided the transmission numbers to all other parties. The placing of a facsimile number on letterhead shall be deemed to be provision of the transmission number to all parties.

If mailed, the notice will be deemed to have been given 24 hours after the date of mailing. A notice sent by facsimile transmission shall be deemed given when received, if it is received during normal business hours. If received after normal business hours, it shall be deemed given at 9:00 a.m., recipient's local time, on the next business day.

The addresses of the parties to which such notices are to be sent will be those of which the other party or parties actually receive notice, and until further notice are as follows:

Arthur Rubinstein, Inc.	8400 Beverly Boulevard, Los Angeles, California
Universal Variety Stores, Inc.	800 LeMot Avenue, Boise, Idaho
Great Value Food Cor- poration	55 Irving Street, Boise, Idaho
Big Sky Drug Corpora- tion	200 Washington Avenue, Pocatello, Idaho
Associated Industries, Inc.	401 West Broadway, Seattle, Washington

Article 17

Commencement of Construction and Opening

Section 17.01. The parties each will commence construction on their parcels of retail store facilities on or before _____[*date*]. Once construction has commenced, the same will be diligently prosecuted to completion.

Section 17.02. The Developing Party will commence construction of the enclosed mall, motor vehicle parking areas, and other common areas on all parcels and as soon as reasonably practicable after the commencement of construction of the buildings as above, so that they will be completed and available for the general public not less than 30 days prior to the opening for business of the retail store facilities.

Section 17.03. A party will be deemed to have commenced construction of its improvements at such time as any concrete is poured on its parcel by a contractor acting under a contract with the party providing for the construction of its commercial area in accordance with approved plans and specifications for such commercial use.

Section 17.04. The parties will each construct retail facilities in the location shown for such on Exhibit A.

Section 17.05. During the course of such construction the parties will each submit to the other, from time to time on request, reports in reasonable detail regarding the progress of construction and give the other party, its agents, employees, representatives, and contractors access to its parcel, at all reasonable times.

Section 17.06. The Developing Party shall use all diligent efforts to procure binding leases with and executed by tenants approved by the other parties appropriate in mix and experience for shopping centers for occupancy in sufficient time so that they may be opened for business simultaneously with the opening of the establishments of the other parties.

Section 17.07. Prior to the commencement of any work of improvement on the enclosed mall, or any other work jointly under the contract for such improvement, The Developing Party will file the contract for such work and record the bond covering it.

Article 18

Approvals

Whenever approval is required, unless otherwise provided here, it will not be unreasonably withheld. Unless provision is made for a specific period of time, it will be deemed to be 30 days, and if any party neither approves nor disapproves within that period, the party will be deemed to have given its approval. If a party disapproves, the reason must be stated.

Article 19

Condemnation

Any award, whether the same be obtained by agreement prior to, or during the time of any court action or by judgment, verdict, or order resulting from or entered after any such court action, resulting from a taking or damaging by condemnation of the Shopping Center, or any portion or portions of such, or the enclosed mall, or any rights or interests in the Shopping Center or any portion or portions of such, or the enclosed mall, or resulting in a requisitioning of any part by military or other public authority for any purpose arising out of a temporary emergency or other temporary circumstances, will be distributed among the parties, or any other person having an interest in the award, in accordance with the terms and conditions of such agreement, judgment, verdict, or order; provided, however, that the parties or any other person having an interest in the award, or any of them, will have the right to appeal any judgment, verdict, or order with respect to their or its respective interests. If any portion of the total award is made for a taking of any portion of any party's parcel which at the time of such taking was common area, then the portion of such award (which will include the reciprocal easement interests of other parties) will be used to the extent necessary to:

- (a) Replace common area improvements, other than motor vehicle parking area, so taken;
- (b) Replace motor vehicle parking area, so taken, on such party's parcel, to the extent required to bring the motor vehicle parking area to the minimum parking ratios required by this agreement; and
- (c) Replace motor vehicle parking area so taken so as to maintain up to the parking ratio existing on the party's parcel prior to the taking, if the party, a portion of whose parcel is so taken, elects to so restore the motor vehicle parking area. In the event any replacement of a motor vehicle parking area requires the construction of a parking structure on any parcel, no such construction will be commenced until all the parties first have approved both their location and architecture.

Article 20

Liens

Wherever, under the terms of this agreement, any party is permitted to perform any work upon the parcel of another party, it is expressly understood and agreed that such party will not permit any mechanics', materialmen's, or other similar liens to stand against the parcel on which such labor or material has been furnished in connection with any work performed by any such party. The party may bond and contest the validity of any lien, but on final determination of the validity and the amount of such, the party will immediately pay any judgment rendered, with all proper costs and charges, and will have the lien released at such party's expense.

Article 21

Mutuality, Reciprocity Runs with Land

Section 21.01. Each and all of the easements and rights granted or created here are appurtenances to the applicable portions of the Shopping Center and none of the easements and rights may be transferred, assigned, or encumbered except as an appurtenance to such portions. For the purposes of the easements and rights, the property benefitted will constitute the dominant estate, and the particular area in the Shopping Center which respectively is burdened by such easements and rights will constitute the servient estate.

Section 21.02. Each and all of the covenants, restrictions, conditions, and provisions contained in this agreement (whether affirmative or negative in nature) are made for the direct, mutual, and reciprocal benefit of each parcel of land in the Shopping Center; will create mutual equitable servitudes upon each parcel of land in the Shopping Center in favor of every other parcel; will constitute covenants running with the land; will bind every person having any fee, leasehold, or other interest in any portion of the Shopping Center at any time or from time to time to the extent that such portion is affected or bound by the covenant, restriction, condition, or provision in question, or that the covenant, restriction, condition, or provision is to be performed on such portion; and will inure to the benefit of the parties and their respective successors and assigns as to their respective parcels of land in the Shopping Center.

Section 21.03. The parties covenant that in each instance in which either of them ever conveys all or any part of their interest as parties to all or any portion of the Shopping Center to a grantee or lessee who will become thereby a new party, the grantor in such instance will require the prospective new party to agree not to use, occupy, or allow any lessee of such to use or occupy the premises in any manner which would constitute a violation or breach of any of the affirmative or negative covenants in this agreement and require the new party to assume and agree to perform each and all of the obligations of the conveying party under this agreement with respect to the portion of the Shopping Center conveyed in fee to such new party, in each case by a written instrument executed, acknowledged, and recorded in the Office of the Recorder of Ada County, notice of each such conveyance and agreement to be given to each person owning fee title to any part of the Shopping Center by the conveying party involved within ten days after its making, which notice is to be accompanied by a copy of the conveyance and agreement. On such assumption by a new party and notice of such, the conveying party will thereafter be released from any further obligation under this document arising thereafter with respect to the part of the Shopping Center so conveyed to the new party in compliance with this document, provided Arthur Rubinstein, Inc., will be released by such assumption, whenever executed, only at or after compliance as may be required of it by the provisions of Sections 17.02 and 17.06 from the date of such compliance, and if such assumption will have been executed before compliance, will be released at the time when such conditions will have been fully accomplished, without the necessity of any further act by any party. Each party agrees to execute and deliver any necessary or appropriate further documents or assurances to evidence the release for the purpose of recording or otherwise, which documents or assurances will be duly executed by the parties or any grantee or lessee of either, as the case may be, to any such grantor or lessor.

Section 21.04. If any party sells part or all of its parcel for the purpose of financing the improvements on such parcel, and simultaneously enters into a leaseback of not less than 50 years with the fee owner, by which the seller has the possessory rights in the real property, subject to the terms of the lease, then so long as the lease remains in existence, the fee owner of the parcel, or portion of such, will be given all of the same rights and privileges as the holder of a first mortgage of the real property, and the fee interest will not be subject to any lien which might be created pursuant to any of the provisions of this agreement to any greater extent than would be the holder of a mortgage. In the event of any termination of the leasehold interest, and notwithstanding any language in the lease preventing a merger of title in the fee owner, the provision will not be operative to relieve the fee owner and its respective successors or assigns of the obligations under and pursuant to the terms of this agreement, provided, however, that the fee interest will not be subject to liens as provided for here which are superior to the fee ownership during the first 12 months in which the leasehold interest and the fee interest are held by the same party, but thereafter will be so subject unless a new lease will have been entered into which would otherwise comply with the provisions of this paragraph or the lease will have been assigned to a new person, in which event the rights of the fee owner will continue as though no default had taken place under the lease. In the event of the merger of the title to the fee interest and the leasehold interest in an institutional owner as provided for above, then and in that event as respects such institutional owner the provisions of this paragraph

will be of no force or effect whatsoever. The lessee under any qualifying lease, as provided here, will be deemed a party so long as the lease is in existence. As used in this Section 21.04, the term "sell" or "sale and leaseback" will be deemed to include any lease by any party of all or part of its parcel for the purposes of financing the improvements on its parcel and simultaneous leaseback, and the provisions of this paragraph will apply to such; and the terms "owner" and "fee" will include a lessee and leasehold under such lease and leaseback transaction in the same manner and with like effect.

Article 22

Merchants' Association

Section 22.01. The Developing Party shall organize and sponsor a merchants' association for membership and the mutual benefit of the parties and all merchants and businesses in the Shopping Center, and to require membership in such as a condition to occupancy in the Shopping Center complex. The Developing Party shall actively participate in the operation of the merchants' association, and will contribute annually to the merchants' association not less than 10 percent of the aggregate amount of the annual contribution payable by all members during such year to the merchants' association.

It is expressly understood and agreed that as to nontenant parties, each will contribute annually to the merchants' association an amount based on a direct pro rata of square footage of gross allowable square feet of commercial area on its own parcel to the gross allowable square feet of commercial area on all parcels multiplied by any fractional interest he may have in an undivided interest as to any parcel.

Section 22.02. The parties will become and remain throughout the term of this agreement members of the merchants' association, composed of operators of stores in the Shopping Center; provided, however, that such parties each need remain a member of such merchants' association only so long as at least 90 percent of all tenants in the Shopping Center are members.

Section 22.03. The merchants' association by a majority vote will make its own rules and regulations with respect to such matters. The Bylaws of the association will provide that the parties to this agreement will each have a permanent member on the Board of Directors which will consist of not more than 11 members.

Article 23

Covenants of the Developer

Arthur Rubinstein, Inc., covenants and agrees, subject to the provisions of the agreement that it will continuously manage and operate, or cause to be managed and operated, during the term of this agreement, the Shopping Center in the following manner:

(a) As a complex of retail stores and commercial enterprises which are a part of the Shopping Center development, with related common facilities.

(b) Use its best efforts to:

(1) Have the commercial area occupied in its entirety; and

(2) Have at all times a proper mix and balance of occupants; and

(3) Maintain the quality of management and operation not less than that generally adhered to in other similar shopping centers in Idaho.

(c) Under the name of Boise Mall and under no other name without the prior approval of the other parties, so long as

any of the parties is the occupant of its own parcel, as respects such party, which approval will be granted or withheld in the sole and absolute judgment of such parties, respectively.

(d) So as not to enter into any lease of any premises located within 1,000 feet of the Shopping Center without the prior written approval of two thirds of the parties as to the tenant and location, or any lease in the balance of such buildings without the prior written approval of the parties as to the tenant, which approval will not be unreasonably withheld.

(e) Subject to the provisions of this agreement, the Developing Party will, at all times during the term of this agreement, from and after the completion of the construction of its improvements and the common area, keep and maintain (or cause to be kept and maintained in good condition and repair) all completed portions of the center, including all landscaping.

The parties have executed this agreement on the date first above written.

Arthur Rubinstein, Inc.

By: _____

[insert name and title]

Universal Variety Stores, Inc.

By: _____

[insert name and title]

Great Value Food Corporation

By: _____

[insert name and title]

Big Sky Drug Corporation

By: _____

[insert name and title]

Associated Industries, Inc.

By: _____

[insert name and title]

[Attach Exhibit A]

[Attach Exhibit B]

[Attach Exhibit C]

[Attach Exhibit D]



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D. COMMERCIAL DEVELOPMENT Shopping Centers, Industrial Buildings and Office Buildings

26-22 Current Legal Forms for Real Estate FORM 22.68

FORM 22.68 Bylaws of shopping center association

COMMENT

Associations of shopping center tenants are organized, in general, to enhance the business reputation of the center, to conduct advertising campaigns on behalf of all members, to maintain the appearance of the center, and otherwise to stimulate commercial activity in the center as a whole. This form illustrates the bylaws for an association whose membership is open to business tenants in a shopping center and their landlord.

Membership in such an association may be voluntary, or may be required by the terms of the shopping center leases. Substantial tenants in shopping centers frequently oppose compulsory membership in a merchants' association, and often possess sufficient bargaining power to negotiate a lease without such a requirement. Since the failure of the principal tenants to join such an association would make it largely ineffective, the leases for other tenants generally provide that membership is not required unless a specified minimum number or percentage of tenants joins the association. The landlord's interest in joining such an association stems from his direct financial interest in the quality and success of the shopping center tenants.

Under these bylaws, dues are to be levied at the annual meeting of the association. Assessments are apportioned among tenants according to their respective proportions of total floor space in the center. Owner-members may be assessed up to a specified maximum amount. If there are two or more owner-members, their total assessment is apportioned among them according to the amount of area owned by each of them. Dues paid to merchants' associations are deductible by both owners and tenants as ordinary and necessary business expenses.

FORM

Bylaws

of

Seaview Center Merchants Association, Inc.

Article I Name

The name of this corporation is Seaview Center Merchants Association, Inc., (the "Association").

Article II Members

1. Any person owning or having a regular and currently operating place of business within the Seaview Shopping Center, Centerville, Massachusetts, (the "Center"), and the landlord of such person, shall be eligible for membership in the Association upon his application therefor to the Association's Board of Directors and upon his subscription to these Bylaws. Any such person shall be admitted as a member only upon approval of his application by vote of the Board of Directors. The term "person," as used in these Bylaws, shall include an individual, association, partnership, corporation, and business trust.

2. Members may be expelled by the Board of Directors, in its discretion, for nonpayment of dues or assessments within such reasonable time as it may fix, or for any other good and sufficient cause. Except for nonpayment of dues or assessments, however, no member may be expelled until he has been given a hearing before the Board of Directors after reasonable notice of the proposed time and place thereof. A member expelled for any reason other than nonpayment of dues or assessments shall have the right to appeal from the action of the Board of Directors to the entire membership. Upon written request of such member to the President, the latter shall call a special meeting of the Association within 30 days after such request for the purpose of hearing such appeal. A vote of the Board of Directors expelling a member shall be overruled only on the vote of at least two-thirds of the membership of the Association present and voting at such meeting.

3. The resignation or expulsion of a member, or the termination of a member's business in the Center, shall automatically terminate such member's membership in the Association. Upon termination of a membership all interest of such member in and to the Association's property shall terminate and such member shall thereafter have no right thereto or to any part thereof. Such termination shall not relieve such member of any indebtedness to the Association, including indebtedness with respect to dues and other payments assessed in advance, prorated for the period ending with the date of termination of such membership. Any member who shall resign but who shall continue to own or have a regular and currently operating business within the Center, and any member who shall be expelled for nonpayment of dues or assessments or breach of any other rule, regulation, or Bylaw of the Association, shall also pay to the Association, upon such resignation or expulsion, an additional sum equal to one-quarter of such member's share of dues and assessments assessed to such member for the year in which he shall have resigned or been expelled.

Article III Meetings

1. Meetings of the Association shall be held annually at such time and place as the Board of Directors may decide. Notice of each annual meeting shall be sent to each member at least 15 days prior thereto.

2. Special meetings of the Association shall be called by the President at any time, either upon the order of the Board of Directors or the President, or upon the written request of any seven members. Notice of each such meeting, stating its purpose, shall be sent to each member at least 15 days prior thereto.

3. Any member of the Association whose dues and assessments have been paid in full may be represented at any meeting by any number of duly appointed delegates. No member shall be entitled to more than one vote, which shall be

cast by one of the delegates duly authorized by such member to cast such member's vote. In the absence of specific authority granted to a particular delegate, such member's vote shall be cast by a majority of the delegates present representing such member.

4. One-half of the members of the Association entitled to vote, including members represented by delegates, shall constitute a quorum at any meeting of the Association, and, except as otherwise specifically provided herein, any action shall be effective and valid if taken or authorized by at least a majority of all votes cast at a meeting.

5. The Board of Directors shall meet annually immediately after the annual meeting of the Association. Regular meetings of the Board of Directors shall be held at least once every three months and shall be called by the President. Notice of each meeting shall be sent to each Director at least four days prior thereto.

6. The President may call special meetings of the Board of Directors at any time, either upon the President's order or upon the written request of any three Directors. Notice of such meeting, stating its purpose, shall be sent to each Director at least two days prior thereto.

7. It shall not be requisite to the validity of any meeting of the Association or of the Board of Directors that notice thereof shall have been given to any member of the Association or of the Board of Directors who shall attend such meeting, or who, if absent, waives notice thereof in writing either before or after it is held.

Article IV Officers

The officers of the Association shall consist of a President, a Vice President, a Secretary, and a Treasurer, all of whom shall be either individual members, or officers, partners, or employees of members. All officers shall be elected at each annual meeting of the Association and shall serve until their successors have been elected and qualified. The offices of Secretary and Treasurer may be held by the same person. The duties of the officers shall be as follows:

1. The President shall be the chief executive officer. He shall, when present, preside at all meetings of the Association and the Board of Directors, and shall, in general, perform all duties incidental to the office of president of similar organizations, and such other duties as the Board of Directors may assign to him.

2. The Vice President shall perform the duties of the President in his absence or disability and shall perform such other duties as the Board of Directors may assign to him.

3. The Treasurer shall have charge of the Association's corporate seal, deposit all of the Association's funds in such depositories as the Board of Directors may select, pay all of the Association's bills, collect all moneys due the Association, and keep full and accurate books of account of all moneys received and paid out for the Association. Such books and accounts shall be constantly open to the inspection of each officer and Director. The Treasurer shall upon request of the Board of Directors, and in any event at least once in each year, render to the Board of Directors and the Association a complete statement of the Association's financial position. In addition, the Treasurer shall perform all other duties incidental to the office of treasurer of similar organizations, and all duties that the Board of Directors may assign to him. The Treasurer shall give a bond for the faithful discharge of his duties if and when the Board of Directors so requires.

4. The Secretary shall attend all meetings of the Board of Directors and the Association, shall keep full and accurate records of all proceedings at such meetings, and shall perform all other duties incidental to the office of secretary of similar organizations and all duties which the Board of Directors may assign to him. He shall have custody of the Association's record books, and shall give notice of all meetings of the Association and the Directors in the manner prescribed by these Bylaws.

Article V
Board of Directors

The Board of Directors shall consist of the elected officers of the corporation and those persons elected as Directors by the members. There shall be no more than eight Directors, including the officers, and no member shall have more than one representative on the Board of Directors. The elected Directors shall serve for a term of one year. The Board of Directors shall have supervision of the affairs and interests of the Association and shall perform such duties as may from time to time be referred to it. The Board of Directors may fill the vacancies caused by the death or resignation or ineligibility of any officer or Director. Any such substitute appointee shall serve for the unexpired term. A majority of the Board of Directors shall constitute a quorum.

Article VI Committees

There shall be a standing committee of the Association, called the Advertising Committee. The members of this committee shall be the officers of the Association and such other members as shall be elected at the annual meeting of the Association. There shall be such other committees as the Board of Directors shall from time to time determine to be desirable in the operation of the Association. Such committees shall serve for one year or until their successors are appointed. Such committees shall have such duties and responsibilities as the Board of Directors may assign to them, and shall make reports at least semi-annually to the Board of Directors and annually at the meeting of the Association.

Article VII Dues

1. The total annual dues payable by all tenant members shall be assessed annually by the Association at its annual meeting. The portion of such total dues payable by each tenant member shall be determined according to the proportion of the total square foot area of floor space in the Center occupied by such member.

Article V Board of Directors

The Board of Directors shall consist of the elected officers of the corporation and those persons elected as Directors by the members. There shall be no more than eight Directors, including the officers, and no member shall have more than one representative on the Board of Directors. The elected Directors shall serve for a term of one year. The Board of Directors shall have supervision of the affairs and interests of the Association and shall perform such duties as may from time to time be referred to it. The Board of Directors may fill the vacancies caused by the death or resignation or ineligibility of any officer or Director. Any such substitute appointee shall serve for the unexpired term. A majority of the Board of Directors shall constitute a quorum.

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Article VII Dues

1. The total annual dues payable by all tenant members shall be assessed annually by the Association at its annual meeting. The portion of such total dues payable by each tenant member shall be determined according to the proportion of the total square foot area of floor space in the Center occupied by such member. Annual dues shall be payable in

equal monthly installments on or before the first day of each month.

2. Members who are owners of premises in the Center may be assessed for a total amount not greater than \$5,000 per year. If there are two or more members who are owners, the portion of such total amount payable by each such member shall be in proportion to the respective areas owned by such member in the Center.

Article VIII Use of funds

The funds of the Association shall be used only for the purposes specified in the articles of organization, in behalf of its members as a whole, and for its necessary expenses. The primary purpose for the expenditure of funds shall be to increase the sale of merchandise or services by the members of the Association by general advertising and promotional activities. Funds shall not be used for entertainment of the members, or to pay business expenses or charitable contributions on behalf of individual members. No profits or dividends shall be distributed to any member of the Association.

Article IX Fiscal year

The fiscal year of the Association shall be the calendar year, except that the first fiscal year shall begin as of the date of the articles of organization of the Association and shall end on the succeeding December 31st.

Article X Amendments

These Bylaws may be amended at any meeting of the Association by a two-thirds vote of the members represented at the meeting, provided that an explanation of the proposed amendment shall have been included in the notice of the meeting.



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D. COMMERCIAL DEVELOPMENT Shopping Centers, Industrial Buildings and Office Buildings

26-22 Current Legal Forms for Real Estate FORM 22.69

FORM 22.69 Mandatory merchants' association--constitution and by-laws

COMMENT

Leases for space in retail shopping malls routinely provide that all tenants must join a new or pre-existing merchants' association, consisting of all the tenants in the development, both present and future. The purpose of these associations is to promote all of the businesses within the mall without any advertising expense accruing to the landlord.

In the form below, the merchants are assessed a fee each month, based on the size of each tenant's space when compared to the total amount of space rented to all merchants in the association. The board of managers of the association must use the funds for advertising at least once each month. The funds may also be used for promotional activities, such as hiring actors to play Santa Claus and his elves at Christmas time, or the Easter Bunny. Funds may not be used for other purposes without the approval of the membership at large.

The board of managers must account to the members on a quarterly basis for its use of the funds. The monthly assessment amount can only be changed at the end of each year, with the new amount taking effect in the new year. Under the terms of the constitution and by-laws, the change goes into effect shortly before the annual election of members to the board of managers. Thus, the first adjusted payment of the new year will be due only a few days before the election. This timing can serve as an effective way of making certain that assessment amounts remain reasonable. Obviously, managers who support increases that are too high will not be re-elected.

The landlord retains one seat out of five on the board of managers. This fact gives the landlord some control over the types of promotions and advertising to be used. Such a measure of control is important to landlords who will, of course, want to maintain a certain atmosphere at their malls. For example, certain shopping malls are considered "upscale," while others are geared towards

discount shopping. Accordingly, the landlord and its tenants will undoubtedly want to guard against any "blurring of the lines" that can be caused by inappropriate advertising and promotions.

The landlord collects the monthly assessments along with the rent. Failure to pay an assessment can render the tenant liable for interest payments on the unpaid amount and subject the tenant to an eviction action.

Finally, the constitution and by-laws may be amended by a two-thirds vote of the membership. The amended constitution and by-laws must be provided to the landlord for distribution to future tenants. However, amendments cannot impair the existing rights of the landlord.

FORM

_____ [insert name of mall, e.g., MIDDLEGROVE MALL] **MERCHANTS' ASSOCIATION: CONSTITUTION AND BY-LAWS**

WHEREAS, the leases for each of the stores in the retail shopping center known as _____ [insert name of mall, e.g., Middlegrove Mall] provide that the tenant shall be a member of the _____ [insert name of mall, e.g., Middlegrove Mall] Merchants' Association; and

WHEREAS, the _____ [insert name of mall, e.g., Middlegrove Mall] Merchants' Association requires a set of organizational documents under which to operate,

It is hereby declared as follows:

1. *Name.* The name of the association shall be the _____ [insert name of mall, e.g., Middlegrove Mall] Merchants' Association.

2. *Address.* The association shall have offices at _____ [insert address; the address will usually be the same as that of the mall]. The merchants' association shall be entitled to use one office in the mall's administrative center.

3. *Form of association.*

(a) The association shall not incorporate, but shall instead operate as an unincorporated association.

(b) Each tenant shall be a member of the association pursuant to the terms of its lease.

(c) Each tenant shall have one vote for every _____ [e.g., 1,000] square feet of space contained in its unit. However, no tenant, regardless of the space in its unit, shall have more than _____ [e.g., ten (10)] votes.

(d) The association shall be governed by a board of managers which shall be elected annually. There shall be _____ [e.g., five (5)] members on the board of managers. One of the _____ [e.g., five (5)] seats shall belong to the landlord and shall not be subject to election. This provision 3(d) may not be amended without the consent of the landlord. The annual election of the board shall be held on _____ [e.g., the first Friday of January occurring after January 10th].

4. Elections.

(a) Any member may nominate another member for election to the board of managers by sending a written nomination to the exiting board of managers.

(b) Any member may nominate a member for election to the board of managers at the annual meeting to be held on _____ [e.g., the Friday before the election].

(c) One written ballot per vote allowed shall be provided to each member on the day of the election. Ballots shall be placed in the ballot box, located in the association office, by _____ [e.g., 5:00 p.m.] on the day of the election. The existing board of managers shall count and tally the ballots. The _____ [e.g., four (4)] members receiving the greatest number of votes shall be deemed elected. The new members shall take office the following day.

5. Annual membership meetings.

(a) There shall be an annual meeting of the members on _____ [e.g., the Friday before the election].

(b) There shall be such other meetings as shall be called by the board of managers.

(c) Any _____ [e.g., three (3)] members of the association may request the board of managers to call a meeting. Such a meeting shall be held within _____ [e.g., ten (10)] days thereafter.

(d) Notice of all meetings shall be mailed to all members at least _____ [e.g., five (5)] days before any meeting. The notice shall specify the date, time and place of the meeting. Members may, through a signed writing, waive their right to receive notice of upcoming meetings.

6. Board meetings.

(a) The board of managers shall meet in the association office on _____ [e.g., the first Monday of each month, at 6:00 p.m.].

(b) There shall be such other meetings as shall be called by the board of managers from time to time.

(c) Oral notice of a special meeting shall be given at least _____ [e.g., twenty-four (24)] hours prior to the special meeting. Members of the board of managers may waive the right to receive notice of special meetings through a signed writing.

7. Duties of board of managers.

(a) The board of managers shall determine the monthly assessment fee for advertising and promotions at the mall. For the first year, the monthly assessment shall be: _____ [e.g., not less than \$ _____ per square foot of the member's unit, nor more than \$ _____ per square foot]. The board of managers may adjust the assessment in _____ [e.g., December] of each year. Such adjustment shall take effect the following year.

(b) The board of managers shall prepare, or cause to be prepared, advertising circulars to be placed in local newspapers, or to be distributed through direct mail, no less often than once per month. All advertisements shall contain at least one prominent reference to each tenant's business, both by name and product.

(c) The board of managers shall sponsor seasonal promotional events--such as hiring an actor to portray Santa Claus at Christmas--as needed.

(d) The board of managers may hire such staff or consultants as are deemed necessary or appropriate to carry out the duties set forth herein.

(e) The board of managers shall provide a quarterly accounting of the assessment payments received and expenses paid.

8. Assessments.

(a) The assessment fee shall be billed by the landlord with the monthly rent. The failure to pay assessments is a default under Paragraph _____ [e.g., 2(b)] of each and every lease. The association may sue the defaulting tenant-member directly, or landlord may seek to evict tenant for non-payment. Interest, at the rate of _____ [e.g., nine (9)] percent per annum, shall be added to any assessment not received by _____ [e.g., the 10th day of the month in which it is due].

(b) Assessment fees may only be used for advertising and promotional activities, unless some other usage is approved by a majority of members at a meeting.

9. Amending the constitution and by-laws.

(a) The constitution and by-laws may be amended by a _____ [e.g., two-thirds (2/3)] vote of the entire membership at any meeting. However, notice of the proposed amendment shall be sent to all members at least _____ [e.g., five (5)] days prior to the meeting.

(b) No amendment may impair the right of the landlord to one seat on the board of managers.

(c) The text of any amendment which is approved shall be provided to landlord immediately for attachment to future leases.

(d) The amendment, by its terms, shall state the date on which it becomes effective.

I have set my hand and seal this _____ [day] day of _____ [month],
_____ [year].

President and Owner

_____ [insert name of mall, e.g., MIDDLEGROVE MALL]

[Acknowledgment]



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D. COMMERCIAL DEVELOPMENT Shopping Centers, Industrial Buildings and Office Buildings

26-22 Current Legal Forms for Real Estate FORM 22.70

FORM 22.70 Contract for sale of land to be developed by purchaser as industrial park, and for office or commercial purposes--parcels sold for different prices and at different times

COMMENT

The seller owns a large tract of land that is located in the same general area, but is separated into different parcels, some of which are geographically separate because of roadways running through the property. The purchaser is a developer who wants to tie up the entire tract, but reserve the right to take down the parcels at different times as needed for the overall development. The seller has required the purchaser to submit a Master Plan for the overall project, subject to the seller's approval and to the approval of the city in which the property is located.

The seller has allowed the purchaser to tie up the entire parcel because there are time limits imposed on the purchaser within which the parcels must be purchased. The time periods can be extended, but only by the payment of additional deposits by the purchaser.

The purchase price per acre in a particular parcel varies because the acreage in certain parcels is more valuable because of its location and usability. Because the price is tied to the amount of acreage, Section 2(c) defines acreage to mean the number of acres calculated to the nearest 1/100 th of an acre, but excluding acreage lying in a right of way used for any highway, road, access easement or railroad right of way. In addition, depending on the parcel being acquired, the price is tied to the "Total Number of Buildable Acres" as defined in Section 2(d). The term Total Number of Buildable Acres as defined in Section 2(d) means the total number of acres reduced by the number of acres in the parcel which are determined to be unbuildable because of adverse soil conditions or the existence of wetlands unless such acreage can be used as open or green space by the purchaser. As stated in Section 13, a registered surveyor or professional engineer must make this determination.

FORM**AGREEMENT**

THIS AGREEMENT is by and among all persons executing the signature page hereof as a seller (collectively, "Seller"), and MAX TURNER, TRUSTEE ("Purchaser").

WITNESSETH:

WHEREAS, Seller is the owner of approximately 201.73 acres of real property (the "Land") situated in the City of Streetsboro, County of Portage, State of Ohio, and depicted on the map attached hereto as Exhibit A and made a part hereof (the "Map"); and

WHEREAS, Purchaser desires to obtain rights to purchase the Property, and Seller has agreed to grant such rights, all on and subject to the terms, conditions, and provisions set forth in this Agreement;

NOW, THEREFORE, Seller and Purchaser hereby agree as follows:

1. The Property; the Master Plan. (a) The term the "Property," as used in the Agreement, shall mean the Land and all buildings and improvements thereon, together with all rights, privileges, easements, and appurtenances thereunto belonging, all mineral, oil, and gas rights, and all rights, if any, to adjacent roads, streets, and highways.

(b) For purposes of this Agreement the Property shall be considered divided into parcels, as preliminarily depicted on the Map and generally described herein as follows:

(i) "Parcel A" shall be the approximately 20 acres of the Property designated as "A" on the Map.

(ii) "Parcel B" shall be the approximately 20 acres of the Property designated as "B" on the Map.

(iii) "Parcel C" shall be the approximately 76 acres of the Property designated as "C" on the Map.

(iv) "Parcel C1" shall be the approximately 5.6 acres of the Property designated as "C1" on the Map.

(v) "Parcel D" shall be the approximately 15 acres of the Property designated as "D" on the Map.

(vi) "Parcel E" shall be the approximately 65.13 acres of the Property designated as "E" on the Map.

Each of the Parcels identified in this subsection sometimes is referred to individually as a "Parcel" and two or more of such Parcels sometimes are referred to together as "Parcels."

(c) Each of Seller and Purchaser recognizes that the Map is not to scale and the delineations of the Parcels is representative and preliminarily descriptive only. The final locations of the Parcels shall be as set forth on the Master Plan defined in Section 1(d) below. The legal description of the Property and each of the Parcels shall be prepared by the Surveyor, as hereinafter defined, in the manner set forth in Section 13 below.

(d) Within 30 days of Purchaser's receipt of a counterpart of this Agreement executed by each person (and such person's spouse, if any) who owns a fee simple interest in and to all or any part of the Property (such date of receipt hereinafter

sometimes is referred to as the "Effective Date"), Purchaser shall prepare and submit to Seller a conceptual master land-use plan which at a minimum shall depict the Property, each of the Parcels and such subparcels ("Subparcels") of Parcel C as elected by Purchaser. Such plan shall be subject to approval by Seller, which approval shall not be unreasonably withheld. In the event such plan is not disapproved by Seller in a writing specifying Seller's objections within ten days of Seller's receipt of such plan (or any revision made by Purchaser at Seller's request), Seller shall be deemed to have approved such plan (or the revision in question). Such plan as agreed upon by Seller and Purchaser and as thereafter revised by Purchaser from time to time in order, in its judgment, to obtain approval of the plan (or of Purchaser's use or development of any part of the Property) by the City of Streetsboro (and/or any of its agencies or authorities from whom approval is required) is referred to herein as the "Master Plan."

2. Purchase Price. (a) The purchase price for the Property shall be established as follows:

(i) The purchase price for Parcel A shall be equal to the product of multiplying \$30,000 by the Total Number of Acres, as hereinafter defined, in Parcel A, unless Purchaser theretofore has completed the purchase of Parcel B in which case the purchase price for Parcel A shall be equal to the product of multiplying \$32,500 by the total Number of Acres in Parcel A.

(ii) The purchase price for Parcel B shall be equal to the product of multiplying \$30,000 by the Total Number of Acres in Parcel B, unless Purchaser theretofore has completed the purchase of Parcel A in which case the purchase price for Parcel B shall be equal to the product of multiplying \$32,500 by the Total Number of Acres in Parcel B.

(iii) If Purchaser elects to purchase the entirety of Parcel C at one time, the purchase price for Parcel C shall be equal to the product of multiplying \$15,000 by the Total Number of Buildable Acres in Parcel C. If Purchaser elects to purchase less than the entirety of Parcel C at one time (i.e., in Subparcels as depicted on the Master Plan), the purchase price for the first 30 acres in Parcel C purchased hereunder shall be equal to the product of multiplying \$20,000 by the Total Number of Buildable Acres within such gross acreage, and the purchase price for the balance of the acreage in Parcel C shall be equal to the product of multiplying \$11,000 by the Total Number of Buildable Acres in such gross acreage.

(iv) The purchase price for Parcel C1 shall be equal to the product of multiplying \$30,000 by the Total Number of Acres in Parcel C1.

(v) The purchase price for Parcel D (including Land, buildings, and improvements) shall be \$600,000.

(vi) The purchase price for Parcel E shall be equal to the product of multiplying \$10,000 by the Total Number of Buildable Acres in Parcel E.

(b) The parties hereto agree that, subject to expiration of Purchaser's rights to purchase the Property or parts thereof as set forth in Sections 4 and 5 below, Purchaser shall have the right to purchase any Parcel (or Subparcels of Parcel C) in any order and at any time.

(c) As used herein, the term "Total Number of Acres" means the total number of acres (calculated to the nearest 1/100 th of an acre) contained in the Parcel or Subparcel at issue, exclusive of any land lying within the right-of-way of any highway, road, access easement, or railroad right-of-way, determined by the Surveyor and certified by the Surveyor to Seller and Purchaser.

(d) As used herein, the term "Total Number of Buildable Acres" means the Total Number of Acres contained in the Parcel or Subparcel at issue, reduced by the number of acres in such Parcel or Subparcel which are determined to be unbuildable because soil conditions are inadequate for Purchaser's intended use thereof (without commercially unreasonable expense as determined by Purchaser) and/or because they are classified as "wetlands," as either are determined by qualified soil testing agencies, wetland delineation experts, and/or the U.S. Army Corps of Engineers;

provided, however, that any acreage which otherwise could be classified as unbuildable pursuant to the preceding shall not be deducted from the Total Number of Acres as aforesaid if such acreage reasonably can be considered usable as open or green space areas as part of Purchaser's unmodified intended use or plan for the particular Parcel or Subparcel as set forth on the Master Plan.

3. Initial Deposit; Investments. (a) Within five days following the Effective Date, Purchaser shall deposit with Cleveland Title Corp. (the "Escrow Agent"), the sum of \$10,000 as an earnest money deposit applicable to the entirety of the Property other than Parcel E (the "Major Earnest Money Deposit") and the sum of \$500 as an earnest money deposit applicable to Parcel E (the "Parcel E Earnest Money Deposit"). (The Major Earnest Money Deposit and the Parcel E Earnest Money Deposit hereinafter sometimes collectively are referred to as the "Earnest Money Deposit.") Such sums shall be held and applied by the Escrow Agent in the manner specified in this Agreement.

(b) The Earnest Money Deposit, together with any other deposits made by Purchaser from time to time pursuant to Section 4 or Section 5 below shall be held by the Escrow Agent and invested from time to time in obligations of the United States of America or as otherwise directed jointly by Seller and Purchaser. Interest on such funds shall belong to Purchaser, shall not become part of the Earnest Money Deposit, shall be reported as Purchaser's taxable income, and may be paid to Purchaser from time to time upon demand.

4. Rights to Purchase Major Property. (a) Unless Purchaser has given Notice of Closing, as hereinafter defined, with respect to all or any portion of the Property other than Parcel E (the "Major Property"), Purchaser's right to purchase any of the Major Property shall expire at 11:59 p.m. on the 90th day following the Effective Date (said 90 day period being "Major Property Period One"), unless Purchaser elects to extend its rights as set forth in Section 4(b), below.

(b) At any time prior to expiration of Major Property Period One, Purchaser may elect to extend its right to purchase all or any part of the Major Property for an additional period of 90 days ("Major Property Period Two") commencing immediately upon expiration of Major Property Period One. Such election may be made only by giving written notice prior to expiration of Major Property Period One and depositing an additional \$10,000 ("Major Property Deposit Two") with the Escrow Agent. If Purchaser has elected to extend as provided in this Section, then, unless Purchaser has given Notice of Closing with respect to all or any portion of the Major Property by 11:59 p.m. of the last day of Major Property Period Two, Purchaser's rights to purchase the Major Property shall expire on such date at such time unless Purchaser elects to extend its rights as set forth in Section 4(c) below.

(c) At any time prior to expiration of Major Property Period Two, all or any part of the Major Property Period Two for an additional period of 180 days ("Major Property Period Three") commencing immediately upon expiration of Major Property Period Two. Such election may be made only by giving written notice prior to expiration of Major Property Period Two and depositing an additional \$15,000 ("Major Property Deposit Three") with the Escrow Agent. If Purchaser has elected to extend as provided in this section, then, unless Purchaser has given Notice of Closing with respect to all or any portion of the Major Property by 11:59 p.m. of the last day of Major Property Period Three, Purchaser's rights to purchase the Major Property shall expire on such date at such time unless Purchaser elects to extend its rights as set forth in Section 4(d) below.

(d) At any time prior to expiration of Major Property Period Three, Purchaser may elect to extend its right to purchase all or any part of the Major Property for an additional period of 180 days ("Major Property Period Four") commencing immediately upon expiration of Major Property Period Three. Such election may be made only by giving written notice prior to expiration of Major Property Period Three and depositing an additional \$50,000 ("Major Property Deposit Four") with the Escrow Agent.

(e) Notwithstanding the foregoing provisions of this Section 4, Purchaser shall have no right to give Notice of Closing with respect to Parcel D prior to January 31, _____[date].

(f) Notwithstanding any of the foregoing provisions of this Section 4, if Purchaser gives Notice of Closing at any time with respect to either Parcel A or Parcel B, Purchaser's right to give Notice of Closing with respect to the remaining parcel of Parcel A or Parcel B, as the case may be, shall be extended automatically for a 365-day period commencing on the Closing Date of the first to be conveyed hereunder of Parcel A or Parcel B without the need for any further earnest money or other deposits being made during such period; provided, however, such automatic extension shall not be applicable to Parcels C, C1 or D which shall remain governed by the provisions of subsections 4(a) through 4(d) above and subsection 4(g) below with respect to Parcel C.

(g) Notwithstanding any of the foregoing provisions 4(a) through 4(d) above, Purchaser's right to give Notice of Closing with respect to the remaining acreage of Parcel C shall be extended automatically for a period of three years commencing on the Closing Date of the tenth acre of Parcel C to be conveyed hereunder without the need for any further earnest money or other deposits being made during such period; provided, however, such automatic extension shall not be applicable to Parcels A, B, C1 or D.

5. Rights to Purchase Parcel E. (a) Unless Purchaser has given Notice of Closing with respect to Parcel E, Purchaser's right to purchase Parcel E shall expire at 11:59 p.m. on the 90th day following the Effective Date (said 90 day period being "Parcel E Period One"), unless Purchaser elects to extend its rights as set forth in Section 5(b) below.

(b) At any time prior to expiration of Parcel E Period One, Purchaser may elect to extend its right to purchase Parcel E for an additional period of 90 days ("Parcel E Period Two") commencing immediately upon expiration of Parcel E Period One. Such election may be made only by giving written notice prior to expiration of Parcel E Period One and depositing an additional \$2,500 ("Parcel E Deposit Two") with the Escrow Agent. If Purchaser has elected to extend as provided in this section, then, unless Purchaser has given Notice of Closing with respect to Parcel E by 11:59 p.m. of the last day of Parcel E Period Two, Purchaser's rights to purchase Parcel E shall expire on such date at such time unless Purchaser elects to extend its rights as set forth in Section 5(c) below.

(c) At any time prior to expiration of Parcel E Period Two, Purchaser may elect to extend its right to purchase Parcel E for an additional period of 180 days ("Parcel E Period Three") commencing immediately upon expiration of Parcel E Period Two. Such election may be made only by giving written notice prior to expiration of Parcel E Period Two and depositing an additional \$5,000 ("Parcel E Deposit Three") with the Escrow Agent. If Purchaser has elected to extend as provided in this section, then, unless Purchaser has given Notice of Closing with respect to Parcel E by 11:59 p.m. of the last day of Parcel E Period Three, Purchaser's rights to purchase Parcel E shall expire on such date at such time unless Purchaser elects to extend its rights as set forth in Section 5(d) below.

(d) At any time prior to expiration of Parcel E Period Three, Purchaser may elect to extend its right to purchase Parcel E for an additional period of 180 days ("Parcel E Period Four") *commencing* immediately upon expiration of Parcel E Period Three. Such election may be given only by written notice prior to expiration of Parcel E Period Three and the deposit of an additional \$15,000 ("Parcel E Deposit Four") with the Escrow Agent.

6. Anti-Forfeiture Provision; Independence of Purchase Rights. (a) It is agreed between Seller and Purchaser that it is the intention of the parties hereto to avoid forfeiture of Purchaser's right to elect to extend the term of this Agreement as set forth in Sections 4 and 5 by reason of Purchaser's inadvertent or negligent failure to give notice of election of extension of the periods set forth in Sections 4 and 5 hereof. Seller agrees that if Purchaser shall fail to give any such notice of extension to Seller as permitted by any provision of Section 4 or 5, Purchaser's right to extend nevertheless shall remain in effect until 11:59 p.m. on the 90th day following the applicable deadline, subject, however, to Seller's right to notify Purchaser that Seller has not received Purchaser's notice of extension, whereupon Purchaser's right to extend shall expire ten days following such notice unless, prior to expiration of said ten day period, Purchaser either gives Notice of Closing or extends the applicable period as otherwise permitted in this Agreement.

(b) The provisions of Sections 4 and 5 are separate and distinct and not conditional upon one another. Purchaser may

elect not to make any of the extensions of the Major Property Periods permitted in Section 4, and such failure to extend shall not affect or impair Purchaser's rights to extend the Parcel E Property Periods permitted in Section 5. Purchaser may elect not to make any of the extensions of the Parcel E Periods permitted in Section 5, and such failure to extend shall not affect or impair Purchaser's rights to extend the Major Property periods permitted in Section 4.

7. Payment of Purchase Price; Purchase Money Financing. (a) The purchase price (the "Purchase Price") for any portion of the Property for which Notice of Closing has been given (such portion sometimes referred to herein as a "Designated Parcel") shall be determined as provided in Section 2 above and shall be payable, through an escrow established with the Escrow Agent, on the Closing Date, as hereinafter defined.

(b) Upon the closing of the purchase and sale of a Designated Parcel which comprises part of the Major Property, the Major Earnest Money Deposit and any other sums theretofore paid into escrow by Purchaser pursuant to Section 4 above shall be applied by the Escrow Agent in payment of the Purchase Price of such Designated Parcel (to the extent not previously paid to Seller with respect to the Purchase Price of a Designated Parcel which comprises part of the Major Property).

(c) Upon the closing of the purchase and sale of Parcel E, the Parcel E Earnest Money Deposit and any other sums theretofore paid into escrow by Purchaser pursuant to Section 5 above shall be applied by the Escrow Agent in payment of the Purchase Price of Parcel E.

(d) There shall be deducted from the cash portion of the Purchase Price otherwise due to Seller on any Closing Date hereunder the amount of credits authorized to Purchaser hereunder, the amount of Seller's costs and expenses hereunder, and the amount of any Purchase Note, as hereinafter defined, to be delivered to Seller on the Closing Date in question.

(e) In the event Purchaser at any time or times gives Notice of Closing to Seller with respect to a Designated Parcel which is either the entirety of Parcel C or the entirety of Parcel E, Purchaser shall have the right, but not the obligation, to pay 75% of the Purchase Price allocable thereto by delivering a non-recourse purchase money promissory note (the "Purchase Note") executed by the grantee of the Designated Parcel made payable to the order of Seller (but with provisions pertaining to an Agent similar to those set forth in Section 35 below) which shall (i) bear interest at the rate of eight percent per annum, (ii) be payable in equal quarterly installments of principal and interest in such amount as would amortize the original principal amount thereof by equal quarterly installments over a period of 30 years, (iii) provide for the entire unpaid principal balance thereof to be due and payable in full on the fifth anniversary of its date, (iv) be prepayable in full or in part at any time without prepayment penalty or premium, (v) contain notice and cure provisions of not less than 15 days for monetary defaults, and (vi) not contain provision for any non-monetary defaults. At Seller's election, the Purchase Note shall be either (x) secured by a non-recourse mortgage deed encumbering the Designated Parcel in question, or (y) guaranteed as to payment by Max Turner individually. In the event of such a mortgage deed encumbering Parcel C (but not Parcel E), the terms of the mortgage deed shall provide that its lien shall be partially released from individual Subparcels upon payment of a release price equal to \$20,000 per acre in such Subparcel, such release price to be applied in prepayment of the Purchase Note.

(f) The Earnest Money Deposit and other deposits, if any, made pursuant to Sections 4 and 5 above which are not either (a) credited and applied to the Purchase Price as provided in Subsections 7(b) and 7(c) above, or (b) returned to Purchaser pursuant to the provisions of this Agreement, shall be paid to and become the sole property of Seller upon expiration of Purchaser's right to give any further Notice of Closing. The Major Earnest Money Deposit and all deposits, if any, made pursuant to Section 4 above, sometimes collectively are referred to herein as the "Major Deposits." The Parcel E Earnest Money Deposit and all other deposits, if any, made pursuant to Section 5 above sometimes collectively are referred to herein as the "Parcel E Deposits." The Major Deposits and the Parcel E Deposits sometimes collectively are referred to as the "Deposits."

8. Purchaser's Access to the Property. (a) Purchaser, and Purchaser's agents, architects, contractors, engineers, and

environmental consultants, shall have the right at any and all times to enter upon the Property for the purposes of inspecting, surveying, and testing the physical condition of the Property, including but not limited to the right to take samples of the soil by means of test borings or otherwise for analysis. In the event Purchaser disturbs the surface of the Property, Purchaser shall restore the surface of the Property to a condition reasonably equivalent to that existing immediately prior to such disturbance.

(b) Purchaser agrees to indemnify and hold harmless Seller from and against any loss or damages arising from damage to property and injury or death to persons caused by Purchaser's entry upon the Property in exercise of its rights set forth in Section 8(a) above; provided, however, that notwithstanding the foregoing, neither Purchaser nor its agents, architects, engineers, or environmental consultants shall have any liability or responsibility arising or resulting from the release of hazardous wastes or toxic materials presently located upon or within the Property caused by any testing, sampling, or inspection performed by Purchaser, or Purchaser's agents, architects, engineers, or environmental consultants.

9. Title to be Conveyed. (a) Seller shall convey good and marketable indefeasible fee simple absolute title to each Designated Parcel to Purchaser or Purchaser's nominee by full warranty deed (the "Deed") on the Closing Date, free and clear of rights of dower and all liens and encumbrances whatsoever, except for the following exceptions (collectively, the "Permitted Exceptions"):

(i) real estate taxes, both general and special, which are a lien but not then due and payable;

(ii) zoning regulations and ordinances; and

(iii) such additional exceptions to title to the Designated Parcel (other than a lien or liens for the payment of money only) which Purchaser, pursuant to the provisions of Sections 10 or 12 hereof, shall waive or approve.

(b) The Permitted Exceptions shall be specifically, and not categorically, excepted from the covenants of warranty in the Deed and the legal description of the Designated Parcel shall be the legal description prepared by the Surveyor and certified to Seller and Purchaser as provided in Section 13 below.

10. Title Commitment. (a) Promptly following the Effective Date, Purchaser shall request Escrow Agent to issue and deliver to Purchaser a Commitment for Issuance of an Owner's Fee Policy of Title Insurance (the "Commitment") covering the entirety of the Property issued by First American Title Insurance Company (the "Title Company").

(b) In the event that Purchaser shall disapprove any exceptions or matters ("Additional Matters") shown in the Commitment other than the Permitted Exceptions (other than a mortgage lien or other lien or liens for the payment of money only, any encumbrance or encumbrances which may be released or discharged by the payment of a definite sum of money, or any exception or exceptions to title, if any, which occurred after the date hereof as a result of the acts or volition of Seller, for any and all of which Seller in all events shall have the unconditional obligation on or prior to the Closing Date to release, discharge, or satisfy at no cost to Purchaser), Purchaser shall notify Seller of such disapproval in writing within 30 days after Purchaser's receipt of the Commitment. If Purchaser shall fail to give notice of such disapproval to Seller within said 30-day period, Purchaser shall be deemed to have disapproved such Additional Matters.

(c) In the event Purchaser shall give notice to Seller of Purchaser's disapproval of any Additional Matters within said 30-day period, Seller shall have 35 days from the date of Purchaser's notice of disapproval in which to cure or remove such disapproved Additional Matters or to advise Purchaser in writing that Seller is unable or unwilling to cure such disapproved Additional Matters. If (i) all such disapproved Additional Matters are not cured or removed, or (ii) all such disapproved Additional Matters are not waived in writing by Purchaser, Seller shall not be liable for breach of contract for failure to convey such title to the Property as is described in Section 9 above, and Purchaser shall have the right

(which right shall be exercised by written notice given to Seller within ten days after the earlier of the expiration of said 35-day period or Purchaser's receipt of Seller's notice that it is unable or unwilling to cure such disapproved Additional Matters) either: (i) to accept title to the Property subject to such disapproved Additional Matters with no abatement in the Purchase Price therefor and with additional exceptions for such disapproved Additional Matters shown in the Title Policy referred to in Section it below and with the covenants of warranty in the Deed modified accordingly, or (ii) to terminate this Agreement. If Purchaser shall fail to give notice of its election within said ten day period, Purchaser shall be deemed to have elected to proceed in accordance with the immediately preceding subclause (ii). In the event of the termination of this Agreement pursuant to this subsection 10 (c), the Escrow Agent shall return the Deposits to Purchaser.

11. Title Evidence. It shall be a condition precedent to Purchaser's obligation to consummate the purchase of any Designated Parcel hereunder that the Title Company can and will, upon filing the Deed for record, issue its ALTA Owner's Fee Policy of Title Insurance Form B-1970 (Amended 10-17-70) (the "Title Policy") in the amount of the Purchase Price for the Designated Parcel insuring Purchaser or Purchaser's nominee as the owner in fee simple absolute of the Designated Parcel subject only to the Permitted Exceptions and without exception for rights or claims of parties in possession not shown by the public records, for any matter which would be disclosed by an accurate survey and inspection of the Property, or for any lien, or right to a lien, for services, labor, or material furnished before the Closing Date, imposed by law and not shown by the public records (Seller hereby agreeing to deliver to the Title Company such statements and affidavits required to enable the Title Company to issue its Title Policy as aforesaid). The Title Policy affirmatively shall insure contiguity of the Designated Parcel with any contiguous portions of the Property theretofore conveyed by Seller pursuant to this Agreement.

12. Title Defect. If at any time prior to the filing of the Deed for a Designated Parcel for record, examination of title to the Designated Parcel shall disclose any matter affecting title to the Designated Parcel which is not included in the Permitted Exceptions (other than a mortgage lien or other liens for the payment of money only, any encumbrance or encumbrances which may be released or discharged by the payment of a definite sum of money, or an exception or exceptions to title, if any, which occurred after the date hereof as a result of the acts or volition of Seller, if any, for any and all of which Seller in all events shall prior to the Closing Date secure releases, discharges, or satisfactions at no cost to Purchaser), and which has not theretofore been approved by Purchaser as set forth in Section 10 above or is not waived by Purchaser in writing, Purchaser shall notify Seller of such defect ("Defect"), and Seller shall have 35 days thereafter in which to cure or remove such Defect. If within said 35 day period such Defect is not removed or cured by Seller (Seller hereby agreeing to use its best efforts to cause such removal or cure), or waived in writing by Purchaser, Seller shall not be liable for breach of contract for failure to convey such title to the Designated Parcel as is described in Section 9 hereof, and Purchaser shall have the option (which option shall be exercised by written notice given to Seller within 25 days after the expiration of said 35 day period) either:

(a) to accept title to the Designated Parcel subject to such Defect with no diminution in the Purchase Price, in which event such Defect shall be permitted as an additional exception to Seller's covenants in the Deed and to the Title Policy; or

(b) to terminate this Agreement; or

(c) to cure or remove the Defect by its own efforts, in which case Purchaser shall be entitled to an offset against the Purchase Price for Purchaser's costs and expenses in curing or removing such Defect; or

(d) to rescind the Notice of Closing pertaining to the Designated Parcel.

If Purchaser shall fail to give notice of its election to Seller within said 25-day period, Purchaser shall be deemed to have elected to proceed in accordance with subsection 12(d), in which event this Agreement shall remain in full force and effect as to all other portions of the Property. In the event of termination of this Agreement pursuant to subsection

12(b), the Escrow Agent shall return to Purchaser the Deposits, and any other amounts paid on account of the Purchase Price, whereupon, except as otherwise provided herein, this Agreement shall be null and void and neither party hereto shall have any further right, obligations or liability hereunder. The Closing Date shall be postponed a sufficient number of days, if necessary, to permit Seller and Purchaser to exercise their respective rights under this Section 12.

13. Survey. (a) Purchase, at Purchaser's cost, shall have the right to obtain (i) an accurate survey (the "Survey") of the Property prepared in accordance with minimum standard detail requirements for ALTA/ACSM Land Title Surveys, certified by a registered surveyor or professional engineer licensed to do business in Ohio (the "Surveyor"), which Survey shall indicate thereon the boundaries of the Property, each Parcel, and each Subparcel as well as the existence and location of (A) any existing buildings and improvements (including roadways, paved areas, and light standards), (B) all existing easements and rights-of-way (setting forth the volume and page number of the recorded instrument creating the same and showing the metes and bounds thereof), (C) any encroachments upon or over the Property, (D) all dedicated streets, roads and highways providing access to or adjacent to, the Property, and (E) whether or not any part of the Property is in an area considered designated as a flood plain area by the United States Department of housing and Urban Development; (ii) an accurate metes and bounds legal description of the entirety of the Property, each Parcel, and each Subparcel prepared by the Surveyor (which shall be imprinted upon the Survey); and (iii) the written certification of the Surveyor of the total number of acres (calculated to the nearest 1/100 of an acre) contained in the entirety of the Property, each Parcel, and each Subparcel, exclusive of any land lying within the right of way of any existing or proposed highway, roadway, access easement, or railroad spur track right of way. The Survey shall have imprinted upon it a statement to the effect that the Survey was prepared at the instance of Seller, Purchaser, the Escrow Agent, the Title Company, and any other party designated by Purchaser.

(b) In the event the Survey discloses any encroachment, overlap, boundary line dispute, strip, gore, any matter adversely affecting title to the Property or which violates any law, rule, or regulation, or any other matter whatsoever which is unacceptable to Purchaser, such shall be considered to be a Defect and the relative rights and obligations of the parties with respect thereto shall be governed by the provisions of Section 12, above.

(c) In the event any portion of any Parcel or Subparcel is determined to be unbuildable (within the meaning set forth in Section 2(d) above), Purchaser shall cause the Surveyor to revise the Survey to indicate thereon the portion or portions of such Parcel or Subparcel so determined to be unbuildable. Based thereon, the Surveyor shall certify to Seller and Purchaser the Total Number of Buildable Acres within such Parcel or Subparcel, it being agreed that the Surveyor, in making such certification, is certifying only to the accuracy of the Survey and such acreage calculations and not as to whether any acreage actually is unbuildable.

(d) Purchaser shall have the right to obtain the Survey at any time prior to the first Notice of Closing and shall have the further right to have an update of the Survey made with respect to each Designated Parcel for which a Notice of Closing is given from time to time.

14. Cooperation Regarding Zoning; Subdivision; and Other Matters. Seller agrees to cooperate with Purchaser at all times in Purchaser's efforts to rezone the Property to the extent required for Purchaser's Intended Use of the Property, as hereinafter defined; in obtaining all necessary governmental approvals for the subdivision or "split" of the Property so that each Parcel or Subparcel may be conveyed and reconveyed as a separate parcel with its own tax identification number; and in agreeing to such easements, road rights-of-way, and other matters pertaining to Purchaser's Intended Use of the Property required by Purchaser in order to provide such accommodations to the City of Streetsboro, the County of Portage, and other governmental and quasi-governmental authorities and agencies as is necessary, in Purchaser's judgment, for installation and relocation of utility lines and rights of way.

15. Purchaser's Intended Use. Seller acknowledges that Purchaser presently intends, without being committed to do so, to improve either or both of Parcel A and Parcel B as an industrial park, and to improve the balance of the Property for office or commercial purposes as determined by Purchaser from time to time ("Purchaser's Intended Use of the

Property"). In the event that there are any private restrictions affecting the use or development of the Property which require, as a condition to the use of the Property for Purchaser's Intended Use of the Property, the approval or consent of Seller or any person or entity directly or indirectly controlled by Seller, Seller will, or will cause such other party to, consent to or approve such use and development.

16. Leases. Seller represents that there presently are no leases, agreements to lease, license agreements, or other rights granted to any third parties to use or occupy all or any part of the Property or any interest therein now or in the future (collectively, "Leases") other than leases for portions of Parcel D ("Parcel D Leases"). Seller warrants that Seller has provided Purchaser with full, true, and correct copies of all Parcel D Leases and covenants that Seller will not, during the continuance of this Agreement, enter into any further Leases for any portion of the Property; provided, however, that Seller may enter into additional Parcel D Leases; provided further; however, that Seller covenants not to enter into any Parcel D Leases, the terms of which (including option and renewal terms) extend beyond January 31, _____[date] without first obtaining Purchaser's written approval, which approval shall not be unreasonably withheld.

17. Liabilities Assumed. Except as expressly provided for in this Agreement, or as hereinafter agreed in writing and except for (i) general and special real estate taxes (but not assessments) not yet due and payable on the Closing Date, and (ii) the obligations of the owner of the Property to comply from and after the Closing Date with covenants and easements of record, provisions of law, and the terms and conditions of all other agreements and contracts affecting the Property, Purchaser shall not, by the execution or performance of this Agreement, or otherwise, assume, become responsible for, or incur any liability or obligation of any nature of Seller, matured or contingent, known or unknown, and Seller shall indemnify Purchaser and Purchaser's successors and assigns, against, and save each of them and the Property harmless from, such liabilities and obligations and against and from all claims, costs and expenses (including reasonable attorneys' fees) with respect to the same, arising prior to the Closing Date. With respect to those liabilities expressly assumed by Purchaser, Purchaser shall indemnify Seller and Seller's successors and assigns, against, and save each of them harmless from, such liabilities and against and from all claims, costs, and expense (including reasonable attorneys' fees) with respect to the same, arising subsequent to the Closing Date.

18. Notice of Closing; Closing Date. Purchaser shall have the right at any time and from time to time, prior to expiration of its rights as set forth in Sections 4 and 5 above, to give notice to Seller ("Notice of Closing") that Purchaser has elected to consummate the purchase and sale of all or any portion of the Property. Each Notice of Closing shall specify the Designated Parcel (which must be one or more Parcels or Subparcels) and designate the date for the closing of the purchase and sale thereof (the "Closing Date") which must be not less than 30 nor more than 60 days following the giving of Notice of Closing.

19. Closing. (a) The closing of the purchase and sale of each Designated Parcel provided for in this Agreement shall be completed by the Escrow Agent on the Closing Date (provided that the Title Company can and will issue to Purchaser the Title Policy in the form and in the manner provided in Section 11 above) by doing the following:

(i) by delivering the Deed to Purchaser by filing it for record with the County Recorder and by delivering to Purchaser all other documents required to be delivered to it hereunder; and

(ii) by delivering to Seller the Purchase Price less Seller's closing costs and prorations and credits to which Purchaser is entitled, and by delivering to Seller all other documents required to be delivered to it hereunder.

(b) At or prior to the Closing Date, Seller shall deliver the following:

(i) the executed Deed for the Designated Parcel;

(ii) a FIRPTA Certificate;

(iii) such certificates and affidavits required of Seller to permit the Title Company to issue the Title Policy in the form required by Section 11 above;

(iv) evidence of Seller's authority; and

(v) such other funds and documents due from Seller pursuant to the terms of this Agreement.

(c) At or prior to the Closing Date, Purchaser shall deliver the following:

(i) Grantee's Statement; and

(ii) such other funds and documents due from Purchaser pursuant to the terms of this Agreement.

20. Expenses. (a) The following costs and expenses of closing the purchase and sale of each Designated Parcel shall be chargeable to, and paid by, Seller (or, where appropriate, allowed as a credit against the Purchase Price) at closing:

(i) prorated real estate taxes as set forth below;

(ii) all transfer taxes and conveyance fees required to be paid in connection with the transfer of the Property to Purchaser hereunder;

(iii) one-half of the Escrow Agent's fees for its services as escrow agent;

(iv) cost of title examination of the Designated Parcel;

(v) an amount equal to the premium charge for issuance of a title guaranty in the full amount of the Purchase Price;

(vi) all special assessments, if any, against the Designated Parcel; and

(vii) all other items which are the Seller's obligation hereunder.

(b) The following costs and expenses of this transaction shall be chargeable to, and paid by, Purchaser at closing:

(i) the cost of recording the Deed;

(ii) all premium charges of the Title Company applicable to issuance of the Title Policy other than those which are Seller's obligation as set forth in paragraph 20(a) above, including the premium difference between a title guaranty and an owner's fee policy of title insurance in the full amount of the Purchase Price; and

(iii) all other items which are the Purchaser's obligation hereunder.

21. Taxes. All real estate taxes; both general and special ("Taxes"), with respect to each Designated Parcel shall be prorated and adjusted between Seller and Purchaser as of the Closing Date on a calendar year basis (Seller to pay for the Closing Date). If the tax bill for any proration period has not been issued, Taxes shall be prorated using the most recently certified tax rate and a presumed assessed value of the Designated Parcel equal to the Purchase Price. Seller and Purchaser agree to re-prorate Taxes for each Designated Parcel outside of escrow upon issuance of the actual tax bill therefor. Unless the Escrow Agent provides evidence satisfactory to Purchaser that Purchaser will receive separate tax bills for the Designated Parcel (not including any other land) commencing with the next semi-annual bill for Taxes, special tax escrow account shall be established at the time of closing in an amount sufficient to pay Taxes as they

become due and payable for the next three semi-annual installments, with Seller depositing all estimated amounts required for the entire tax parcel except for the amount determined to be Purchaser's estimated responsibility with respect to the Designated Parcel, such latter amount to be deposited by Purchaser.

22. No Further Encumbrance. Following the date hereof, no contract for or on behalf of or affecting any portion of the Property shall be negotiated or entered into by Seller, and Seller shall not further encumber any portion of the Property without Purchaser's prior written consent (except to the extent permitted in Section 16 above).

23. Representations and Warranties of Seller. Seller represents and warrants to Seller that:

(a) This Agreement constitutes the valid and binding obligation of Seller enforceable in accordance with its terms.

(b) Seller has no knowledge of any litigation, proceeding or action pending or threatened against Seller relating to the Property or any part thereof which might adversely affect Purchaser or which questions the validity of this Agreement or any action taken or to be taken by Seller pursuant hereto.

(c) Neither the execution of this Agreement nor the consummation of the transactions contemplated hereby will constitute a violation of or be in conflict with or constitute a default under any term or provision of any agreement, instrument or lease to which Seller is a party.

(d) Seller has not been notified of possible future improvements by any public authority, any part of the cost of which would or might be assessed against the Property, or of any contemplated future assessments of any kind.

(e) To the best of Seller's knowledge and belief, there are no condemnation proceedings pending or contemplated which would affect any or all of the Property.

(f) Seller has no knowledge of any toxic or radioactive materials of any kind being located on, disposed of, buried, or accumulated on the Property.

All of the foregoing representations and warranties shall be true on the Closing Date and deemed to have been remade thereon with respect to each Designated Parcel.

24. Representations and Warranties of Purchaser. Purchaser represents and warrants to Seller that:

(a) This Agreement and the transactions contemplated hereby constitute the valid and binding obligation of Purchaser enforceable in accordance with its terms.

(b) Purchaser has no knowledge of any litigation, proceeding or action pending or threatened against Purchaser which might adversely affect Seller or which questions the validity of this Agreement or any action taken or to be taken by Purchaser pursuant hereto.

(c) Neither the execution of this Agreement nor the consummation of the transactions contemplated hereby will constitute a violation of or be in conflict with or constitute a default under any term or provision of any agreement, instrument or lease to which Purchaser is a party.

All of the foregoing representations and warranties shall be true on the Closing Date and deemed to have been remade thereon with respect to each Designated Parcel.

25. Conditions to Purchaser's Obligations. The obligation of Purchaser to consummate the transactions contemplated by this Agreement is subject to the satisfaction at the time of Closing of each of the following conditions with respect to

the closing of the Designated Parcel in question (any or all of which may be waived in whole or in part by Purchaser at or prior to Closing):

- (a) All of the representations and warranties by Seller set forth in this Agreement shall be true and correct as of the Closing Date in all respects as though such representations and warranties were made at and as of the Closing Date;
- (b) Seller shall have performed, observed, and complied with all covenants, agreements and conditions required by this Agreement to be performed, observed and complied with prior to or as of the Closing Date; and
- (c) All other contingencies in this Agreement to Purchaser's obligations hereunder being satisfied.

26. Conditions to Seller's Obligations. The obligation of Seller to consummate the transactions contemplated by this Agreement is subject to the satisfaction at the time of closing of each of the following conditions with respect to the closing of the Designated Parcel in question (any or all of which may be waived in whole or in part by Seller at or prior to closing): Purchaser shall have performed, observed, and complied with all of the covenants, agreements, and conditions required by this Agreement to be performed, observed, and complied with prior to or as of the Closing Date.

27. Purchaser's Rights to Terminate Agreement.

(a) In addition to Purchaser's right to terminate this Agreement as elsewhere expressly provided herein, Purchaser shall have the right to terminate this Agreement by written notice to Seller given at any time following the Effective Date of this Agreement in the event of any of the following conditions (all of which shall be determined by Purchaser in its sole and absolute discretion):

(i) The Survey discloses any condition or conditions which, in Purchaser's sole opinion, would render the project contemplated by Purchaser economically unfeasible or impractical.

(ii) All utilities, including, without limitation, sanitary and storm sewers, water (of sufficient pressure to accommodate sprinkler systems satisfactory to Purchaser), gas and electricity are not available at the perimeter of the Property for connection to the Property (in capacity satisfactory to Purchaser) at reasonable cost and expense, or that Purchaser will be unable to obtain agreements from appropriate public or private utilities and governmental authorities providing for the supply of such utilities without unreasonable expense and at rates which in Purchaser's sole opinion, would not render the project contemplated by Purchaser economically unfeasible or impractical.

(iii) Soil and underground conditions (other than wetlands) of the Property are found by Purchaser to be such that the project contemplated by Purchaser, in Purchaser's sole opinion, would be economically infeasible or impractical.

(iv) The Property is located in any flood hazard area, flood plain, or similar area as designated by any authority (governmental or otherwise) having jurisdiction over the Property.

(v) There is a violation of any laws, ordinances, orders, or requirements affecting the Property.

(vi) Purchaser determines, or receives any test results from soil samples or environmental testing reports, or air and/or noise tests; that any hazardous waste, toxic materials, or other environmentally hazardous or adverse conditions exist at the Property other than as identified in Section 27(d) and subject to Seller's rights set forth in Section 27(e).

(vii) Purchaser determines that it will be unable, through the use of reasonable efforts, to obtain final rezoning of the Property (subject to no possibility of appeal and without the requirement for referendum voting) to a classification permitting, in Purchaser's sole judgment, such use or uses as will permit Purchaser's Intended Use of the Property, including such height, area, setback, and density provisions as are completely acceptable to Purchaser.

(viii) Purchaser determines that it will be unable to obtain all final, irrevocable, uncontestable and unappealable permits and approvals which may be required to be issued by any local, state or federal governmental body having jurisdiction over the Property, including, without limitation, use, curb cut, building permits and approvals, permits and approvals for the construction and installation of sanitary and storm sewers and appurtenant systems to service the Property, licenses, subdivisions and other approvals, certificates, exceptions, and authorizations, (all of the foregoing being hereinafter called the "Permits") as may be required or desired by Purchaser to permit the lawful construction, installation, maintenance and operation on the Property of such improvements as Purchaser contemplates for Purchaser's Intended Use of the Property.

(b) If Purchaser determines to terminate this Agreement on or before the last day of Major Property Period One by reason of the existence of any of the conditions specified in Section 27 (a) Purchaser shall receive a refund of all Deposits and shall pay the fees of the Escrow Agent, whereupon neither party shall have any further obligation or liability to the other hereunder.

(c) If Purchaser determines to terminate this Agreement after the last day of Major Property Period One (but prior to expiration of Purchaser's right to give Notice of Closing pursuant to Sections 4 or 5 above) by reason of the existence of any of the conditions specified in Section 27(a), the Escrow Agent shall pay to Seller the sum of \$5,000 from the Deposits as a termination fee, the Escrow Agent shall refund the balance of the Deposits to Purchaser, and Purchaser shall pay the fees of the Escrow Agent, whereupon neither party shall have any further obligation or liability to the other hereunder.

(d) Purchaser acknowledges that Seller has advised Purchaser that Parcel C1 previously was used as the site of a retail gasoline service station. Notwithstanding the provisions of Section 27 (a) (vi), the contamination of Parcel C1 with hydrocarbons shall not be deemed to be a failure of condition and shall not give Purchaser the right to terminate this Agreement. Seller agrees to cooperate with Purchaser in remediating any such contamination prior to transfer of title thereof and agrees to make demand upon those persons (other than Seller) who may be liable under the laws of either the United States or Ohio for cleanup and remediation.

(e) In the event that Purchaser has the right to terminate this Agreement because of the existence of the condition described in Section 27(a)(vi), Seller shall have the right to void any notice of termination by agreeing to entirely remediate such contamination to Purchaser's satisfaction prior to the Closing Date.

(f) In the event that Purchaser terminates this Agreement pursuant to either subsection 27 (b) or 27(c), Purchaser shall provide to Seller, without cost to Seller, copies of all engineering plans and all written reports issued with respect to Purchaser's inspection and testing of the Property (collectively, the "Plans and Reports"). Purchaser's delivery of copies of the Plans and Reports shall be without recourse to Purchaser or to the generator of any of the Plans and Reports, Purchaser hereby specifically disclaiming the accuracy or adequacy of any of the same. In addition, delivery of copies of the Plans and Reports to Seller shall not, by implication or otherwise, give Seller the right to use the same to the extent that any third party has any proprietary interest therein.

28. Casualty Loss. (a) All risk of loss to the Property or any part thereof, including the buildings and improvements on Parcel D, shall be and remain upon Seller until the filing of the Deed pertaining to a Designated Parcel for record. If the buildings on Parcel D shall be damaged or destroyed by reason of any cause whatsoever, Purchaser shall have the right to and shall elect within 30 days of such damage or destruction either (i) to close the purchase and sale of Parcel D and receive the proceeds of insurance payable to Seller in connection with such damage or destruction plus a cash payment by Seller of the deductible amount, if any, under such insurance, in which event the obligation of the parties hereto shall not be affected by reason of such damage or destruction and they shall proceed to consummate the purchase and sale of Parcel D in accordance with the terms of this Agreement and there shall be no abatement or reduction in the Purchase Price, or (ii) to withdraw Parcel D from this Agreement in which latter event this Agreement shall continue with respect

to all portions of the Property other than Parcel D.

(b) Seller shall maintain fire and extended coverage insurance with respect to the improvements on the Property until the Closing Date at which time such insurance pertaining to the Designated Parcel shall be cancelled. Purchaser shall be responsible for obtaining its own insurance from and after the Closing Date.

29. Condemnation and Eminent Domain. If, prior to Closing, the Property shall be subjected to a taking, either total or partial, by eminent domain or other proceedings, for any public or quasi-public use, or if any notice of intent of taking is received by Seller or Purchaser, Purchaser may elect to (i) terminate this Agreement, in which event this Agreement shall be deemed cancelled and the Escrow Agent shall promptly refund to Purchaser all Deposits theretofore paid by Purchaser into escrow pursuant hereto or (ii) keep this Agreement in effect, in which event Purchaser shall be entitled to participate in any such condemnation or eminent domain proceedings and to receive all of the proceeds attributable to any portion of the Property then or thereafter identified as a Designated Parcel by Purchaser in a Notice of Closing. Such election shall be by written notice within 30 days after such taking or notice. Seller and Purchaser each agree promptly to forward to the other any notice of intent received pertaining to a taking of all or a portion of the Property by way of condemnation, eminent domain or similar procedure for a taking of the Property in connection with any public or quasi-public use.

30. Recording. This Agreement shall not be recorded by either party, but, upon request of Purchaser, Seller promptly agrees to execute a memorandum of Agreement (which may contain all provisions other than Purchase Price) which Purchaser shall be entitled to file for record.

31. Possession. Undisputed possession of each Designated Parcel shall be delivered by Seller to Purchaser on the Closing Date.

32. Right to Grant Possession. Seller represents and warrants to Purchaser that there are no outstanding written or oral leases covering or in any way affecting the Property (other than Parcel D), and that no person or entity has any right with respect to the Property (whether by option to purchase, contract, or otherwise) which would prevent or interfere with Purchaser's taking title to, and possession of, the Property pursuant to the terms of this Agreement.

33. Computation of Time. Wherever any period of time is specified in this Agreement for the taking of any action or the giving of any notice or notification, said period shall be computed by excluding the day upon which said period is specified to commence and including the last day of the period specified.

34. Parties Comprising Seller. The parties executing this Agreement as a Seller on the signature page hereof jointly and severally warrant to Purchaser that, to the best of their knowledge and belief, they constitute all of the owners of the fee simple interest in the entirety of the Property and that none of the persons comprising Seller has a spouse who is not (i) either also a person who has executed this Agreement as a Seller or (ii) a person who has executed this Agreement as a Seller's Spouse on the signature page hereof.

35. Actions by and Payment to Seller. (a) All persons comprising Seller agree that Purchaser and Escrow Agent only shall be required to deal with one person designated to act on their behalf, which designated person (the "Agent") initially shall be Christopher Smith. No notice from or on behalf of Seller shall be effective unless executed by the Agent and neither Purchaser nor Escrow Agent shall be required to send any notices required or permitted to be given to Seller hereunder to any person other than the Agent.

(b) The Agent, who always must be a person comprising Seller, may be changed from time to time, but only by written notice to both Purchaser and the Escrow Agent executed by all persons comprising Seller, including the resigning Agent and the substitute Agent.

(c) All payments required to be made to Seller hereunder by Escrow Agent shall be by check payable to the order of Agent, unless Escrow Agent is directed otherwise in writing by all persons comprising Seller. Payment to Agent (or as directed in such a writing) shall be full acquittance of Purchaser and satisfaction of Purchaser's and Escrow Agent's obligations to all persons comprising Seller with respect to such payment in full.

36. Waivers. Either party hereto, by written notice to the other may (a) extend the time for the performance of any of the obligations or other actions of the other party, (b) waive any inaccuracies in the warranties or representations of the other party contained herein, (c) waive compliance with any of the other agreements of the other party contained herein or waive performance of any of the obligations of the other party, or (d) waive satisfaction of any condition to its obligations hereunder.

37. Notices. All notices, requests and other communications under this Agreement shall be in writing and shall be sent by registered or certified mail, postage prepaid, return receipt requested, or overnight delivery service addressed as follows:

If to Seller, to:

 —

 —

 —

If to Purchaser, to:

 —

 —

 —

or at such other address of which Seller or Purchaser shall have given notice as herein provided. All such notices, requests and other communications shall be deemed to have been sufficiently given for all purposes hereof as of the second day after the date of mailing thereof, if mailed, or upon delivery, if sent by overnight delivery service or hand-delivered.

38. Broker's Commission. Seller and Purchaser each represents and warrants to the other that the warranting party has had no dealing with any real estate agent or broker so as to entitle such agent or broker to any commission or fee in connection with the sale of the Property to Purchaser, other than Meisner Investment Company which is recognized as the procuring broker hereunder. If for any reason any such commission or fee shall become due to any person or entity other than Meisner Investment Company, the party dealing with such agent shall pay any such commission or fee and agrees to indemnify and save the other party harmless from any and all claims for any such commission or fee and from any attorneys' fees and litigation or other expenses relating to any such claim. Seller agrees to pay all commissions and fees which may become due and payable to Meisner Investment Company in connection with this Agreement and the transactions contemplated hereby, all on such terms and conditions as may be agreed upon by Seller and Meisner Investment Company, and Seller shall indemnify, defend, and hold harmless Seller from and against any and all claims of Meisner Investment Company pertaining to this Agreement or the Property.

39. Remedies. In the event of breach of contract by Seller hereunder, Purchaser shall have all rights and remedies available at law and in equity, including the right of specific performance, to compel Seller to transfer title to the Property to Purchaser. In the event of breach of contract by Purchaser hereunder, Seller shall be paid all Deposits, if any, then held by Escrow Agent hereunder as liquidated damages, and not as a penalty, in lieu of all other remedies

hereunder.

40. Survival of Agreement. This Agreement shall survive the closing of the sale and purchase of the Designated Parcels and the delivery and recording of the Deed and other instruments.

41. Entire Agreement. This Agreement, together with the exhibits attached hereto, embodies and constitutes the entire understanding between the parties with respect to the transactions contemplated herein, and all prior or contemporaneous agreements, understanding, representations, and statements, oral or written, are merged into this Agreement. Neither this Agreement nor the provisions hereof may be waived, modified, amended, discharged, or terminated except by an instrument in writing signed by the party against which the enforcement of such waiver, modification, amendment, discharge, or termination is sought, and then only to the extent set forth in such instrument.

42. Joinder by Spouses. Individuals signing on the signature page as a Seller's spouse join in the execution of this Agreement solely for the purpose of agreeing, and each does hereby covenant and agree, to join in the execution of each Deed hereunder for the purpose of releasing, remising and forever quit-claiming to the grantee named in the Deed all right and expectancy of dower in and to each Designated Parcel.

43. Successors and Assigns. This Agreement shall be binding upon, and inure to the benefit of, the parties hereto and their respective successors, heirs, and permitted assigns.

44. Escrow Instructions. A signed counterpart of this Agreement shall serve as escrow instructions to the Escrow Agent and may be accepted by the Escrow Agent subject to its standard conditions of acceptance of escrow to the extent they are not inconsistent herewith.

The parties hereto have caused this Agreement to be duly executed as of the _____[day] day of _____[month], _____[year]; provided, however, that the Effective Date shall be that date which is determined pursuant to the provisions of Section 1(d) above.

PURCHASER:

Max Turner, Trustee

SELLER:

Christopher Smith Company

By: _____ Christopher
Smith, President

_____ Christopher Smith

_____ Spouse of Chris-
topher Smith

[Attach Exhibit A]



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Current Legal Forms for Real Estate

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Current Legal Forms for Real Estate

Chapter 22 DEVELOPMENT AND SUBDIVISION

Part IV. FORMS

D. COMMERCIAL DEVELOPMENT Shopping Centers, Industrial Buildings and Office Buildings

26-22 Current Legal Forms for Real Estate FORM 22.71

FORM 22.71 Lease option agreement with ground lease attached containing option to purchase upon death of lessor.

COMMENT

This form contains an option to ground lease a large parcel of land from an elderly gentleman who does not want to outright sell the land because of his very low cost basis and the potential gain resulting from the sale. However, the optionee is willing to ground lease the property so that it may be developed for commercial or industrial purposes, assuming the condition of the property is satisfactory to the optionee, which will be found out during the term of the option and any extensions of that term. If the option is exercised, the land will be leased pursuant to the terms of the ground lease attached as an exhibit to the lease option agreement.

In the event the lessor should die, then pursuant to the terms of the ground lease, the lessee has the right and option to purchase the land for the price set forth in the purchase agreement attached as an exhibit to the ground lease. The reason the purchase option cannot be exercised until after the death of the lessor is because upon lessor's death, the cost basis of the land will be stepped up to date of death value pursuant to *Internal Revenue Code Section 1014*. Therefore, if the option is exercised after the date of death, there should be no gain on the sale because of the step up of the basis in the land. The fact that there will be no taxes to pay on the sale should provide additional funds to the estate of the lessor to pay estate taxes if estate taxes are required to be paid because of the size of the estate.

FORM

LEASE OPTION AGREEMENT

THIS LEASE OPTION AGREEMENT is executed at _____[city], Ohio, this _____[day] day of _____[month], _____[year], by and between ROBERT STONE, an individual ("Optionor"), and MILLER DEVELOPMENT CO., LTD., an Ohio limited liability company, or its nominee ("Optionee").

WITNESSETH:

In consideration of the promises and covenants hereinafter set forth, the parties mutually

agree as follows:

1. A. Grant of Option. In consideration of the payment of Two Hundred Thousand Dollars (\$200,000) in cash or by certified check, which sum shall be deposited with City Title Company as escrow agent for this transaction ("Escrow Agent"), the Optionor hereby grants to the Optionee the sole and exclusive right and option to lease the premises described on Exhibit A, attached hereto and made a part hereof. The parties agree that the Escrow Agent shall deposit such sum into an interest-bearing account, the interest to accrue for the benefit of the Optionee. The premises shall include the land consisting of approximately 100 acres, and all rights, privileges and easements appurtenant thereto, all of which shall hereinafter be referred to as the "Property." Upon the execution hereof the parties shall order a current and complete ALTA survey and metes and bounds legal description of the Property from a registered surveyor designated by Optionor and approved by Optionee, showing the exact boundary lines of the Property. In addition, the survey shall show the location of all improvements, driveways, paved and unpaved areas, curb cuts, ditches, ponds, gas wells, water wells, adjacent streets and ways, easements, restrictions, encroachments and water courses on or affecting the Property (including all matters set forth in Schedule B of the Commitment referred to in Paragraph 3.A. below), certifying the number of acres, to four (4) decimal places (exclusive of rights of way), within the Property (excluding any portions of the Property within rights-of-ways) and representing that all boundaries within the Property are contiguous with the boundaries of adjoining parcels, and showing what portion of the Property, if any, is within a flood plain, floodway or wetland or similarly restricted area (the "Survey"). The parties agree that at least 500 feet of frontage shall be left for the approximately 45 acre parcel located immediately east of the Property. The cost of the Survey shall be split equally between Optionor and Optionee.

If the aforesaid option is exercised by the Optionee, the Property shall be leased in accordance with the terms and provisions set forth in the Indenture of Lease set forth on Exhibit B, attached hereto and made a part hereof, hereinafter referred to as the "Ground Lease," which shall be executed by the parties hereto if and when the option is exercised, to be effective and to commence as of the date the option is exercised by Optionee. The metes and bounds legal description obtained from the surveyor shall be used as Exhibit A-1 to the Ground Lease for the purpose of identifying the land to be leased.

B. Warranty of Optionor. To Optionor's knowledge no Hazardous Substances (as hereinafter defined) have been used, manufactured, released, treated, stored or disposed of beneath, on or at the Property or off-site so as to affect the Property by Optionor and to the best of Optionor's knowledge no Hazardous Substances have been used, manufactured, released, treated, stored or disposed of beneath, on or at the Property or off-site so as to affect the Property by Optionor's predecessors-in-interest or by any other person from any other source whatsoever. The term Hazardous Substances includes, without limitation, those substances included within the definitions of "Hazardous Substances," "Hazardous Materials," "Toxic Substances," "Hazardous Waste" or "Solid Waste" in any Environmental Law as hereinafter defined. The term Environmental Law includes any federal, state or local law, statute, ordinance or regulation including without limitation, the Comprehensive Environmental Response, Compensation and Liability Act, the Resource Conservation Recovery Act, and the Hazardous Material Transportation Act. Notwithstanding the aforesaid, it is understood that this warranty does not apply to oil and gas, petroleum products or any by-product

thereof.

2. Initial Term of Option. Subject to the rights to extend the option term as set forth in Paragraph 5, below, this option may be exercised commencing on the date of execution of this Agreement (signed by both parties), and terminating as of midnight on the one hundred twentieth (120th) day thereafter.

3. A. Approval of Title to Property by Optionee. Upon the execution hereof, Optionor shall order a Commitment for a Leasehold Policy ("Commitment") from City Title Company, hereafter called the "Title Company," for the review and approval by Optionee of the condition of title to the Property. Within thirty (30) days of receipt of both the Survey and the Commitment, Optionee shall notify Optionor of any items shown therein which are objectionable to Optionee. If so notified, Optionor shall have thirty (30) days to cure the same. If not cured by Optionor within such 30-day period, Optionee shall either notify Optionor that such items are acceptable or shall terminate this Agreement by written notice to Optionor. If such items objected to are cured by Optionor, a new Commitment shall be issued showing only those items not objected to by Optionee, and all such items shall be deemed to have been approved by Optionee. The cost of the leasehold policy shall be split equally between Optionor and Optionee. During the term of the option, as it may be extended, Optionor agrees not to further encumber the Property without Optionee's prior written consent, not to be unreasonably withheld or delayed.

3. B. Exercise of Option. If the Optionee decides to exercise this option, the Optionee shall exercise said option by written notice signed by the Optionee and telecopied by facsimile (fax) communication or delivered or sent, postage prepaid, by United States registered or certified mail, with return receipt requested, or by a recognized national overnight courier service, delivered, telecopied or addressed to the address of the Optionor hereinafter set forth. If said notice is sent by United States mail, it shall be deemed to have been exercised within the aforesaid option period if it is postmarked as of a date on or before the expiration of the aforesaid option period.

4. Application of Payments. If the Optionee does not exercise this option as herein provided for any reason whatsoever, the sum of Ten Thousand Dollars (\$10,000) paid by the Optionee for this option shall be paid to the Optionor by the Escrow Agent, free of all claims of the Optionee, and neither party shall have any further rights or claims against the other. The balance of the funds on deposit plus the accrued interest thereon shall be paid to Optionee. If said option is exercised as herein provided, the consideration paid for the option as set forth in Paragraph 1, above shall be credited against the future rental payments for the Property, in the order in which they accrue under the terms of the Ground Lease. If the option is exercised, the Escrow Agent shall release funds to the Optionor from the funds on deposit in the amount of each monthly rental payment due under the terms of the Ground Lease as it accrues, until such funds (exclusive of the interest accrued thereon) have been fully expended. Thereafter, the accrued interest shall be paid to Optionee.

5. Right to Extend. Optionee shall have the right to extend the option term for three (3) additional consecutive periods of seventy-five (75) days each at a cost of Twenty-Five Thousand Dollars (\$25,000) for the first extension period, Twenty-Five Thousand Dollars (\$25,000) for the second extension period, and Fifty Thousand Dollars (\$50,000) for the third extension period. Such sums shall be considered a charge against the \$200,000 deposited into escrow pursuant to the terms of Paragraph 1, above, each charge to be effective as of the first day of each of the 75-day extension periods to which it applies. If Optionee elects not to exercise its option to lease for any reason whatsoever during any of the extended terms, the aforesaid sums held in escrow shall be paid to Optionor by the Escrow Agent after the expiration of the extended term then in effect, except for the interest accrued thereon which shall be paid to Optionee.

6. Delivery of Documents; Access. Optionor agrees to deliver, upon the execution of this Agreement, all surveys, reports of soil-bearing tests, environmental studies and reports, architectural drawings and other work relating to the Property, if any, as Optionor may have. If this option is not exercised such reports, if any, shall be returned to Optionor. During the term of the option agreement as it may be extended, Optionee, or its agents and employees, shall have access to the Property for the purpose of making such surveys, soil tests, studies and reports as Optionee shall determine, all at

Optionee's sole risk and expense. In consideration thereof, Optionee agrees to indemnify, defend and hold harmless Optionor from any claims, actions, causes of action, liabilities, expenses or liens resulting from or arising out of the exercise of such rights by Optionee, its agents and employees. After such studies or tests are completed, Optionee agrees to restore the Property to its prior condition.

Subsequent to the execution of this Agreement, it is the intention of Optionee to make application to obtain site plans and other necessary approvals for the development of the Property, in accordance with plans submitted by Optionee to the Township of Troy and other governmental authorities having jurisdiction over the Property. Optionor consents to such application and Optionor agrees to cooperate with Optionee at all stages of the proceedings in order to enable Optionee to obtain such approvals by signing applications therefor and performing such other acts as are reasonable under the circumstances; provided, however, Optionee shall pay all application fees and shall pay for the cost of preparation of all plans that Optionee feels are necessary in order to obtain such approvals. Furthermore, upon the execution of this Agreement, Optionor shall furnish Optionee upon request with an affidavit, in proper form prepared by Optionee's attorney for approval by Optionor's attorney, empowering Optionee to make application for approval for the development of the Property.

Although not a part of the Property which is the subject of this option to lease, Optionee shall have the same rights as are set forth in this Paragraph 6 with respect to the 25 acre parcel, hereinafter called the "Adjoining Parcel" located immediately west of the Property. Said Adjoining Parcel is the subject of a purchase option granted to Optionee pursuant to the terms of Paragraph 4.C. of the Ground Lease.

7. Time of Essence. Both of the parties hereto agree that time shall be of the essence for the exercise of the option rights that are granted herein.

8. Assignment. This option and all rights hereunder may not be assigned without the express written consent of Optionor; provided, however that Optionor agrees that this Agreement may be assigned to an entity which shall be controlled by Optionee or by the owners of Optionee provided that Optionee notifies the Optionor of such assignment and of the name and address of the assignee and sends to the Optionor a copy of such assignment plus a written agreement by the assignee to perform all the terms, promises and conditions of this option on the part of the Optionee.

9. Notices. Whenever the Optionor or the Optionee shall serve any notice which is required to be in writing under the terms of this Agreement upon the other, the same shall be sent as follows:

To Optionor at: Mr. Robert Stone

 Fax No.: (_____) _____

To Optionee at: Miller Development Company, Ltd.

 Fax No.: (_____) _____

or at such other address as the Optionor or the Optionee may theretofore by written notice to the other have designated for the service of such notice.

10. Recording. An executed counterpart of this Lease Option Agreement may be recorded at the election of either party, excluding Exhibit B attached to this Lease Option Agreement. Any costs incurred in connection therewith shall be at the expense of the party requesting the recording.

11. Broker's Commission. The parties represent each to the other that Green Real Estate Group ("Broker") is the only broker either has dealt with in connection with this Lease Option Agreement. The commission shall be due and payable only if and when the option is exercised. Optionor agrees to indemnify Optionee and hold Optionee harmless from and against any brokerage commission due Green Real Estate Group with respect to the lease of the Property by Optionee, and, by its execution of this Lease Option Agreement, Broker hereby agrees to look solely to Optionor for any such brokerage commission from this transaction in accordance with a separate agreement between Optionor and Broker. Optionor and Optionee each further agree to indemnify the other from and against all loss, cost, damage or expense arising out of or resulting from any act or acts of the indemnifying party which gives rise to any claim of any broker or agent other than Broker in connection with this transaction.

12. Death Prior to Exercise of Option. In the event of the death of Robert Stone during the term of this option, as it may be extended, in the event Optionee elects to exercise its option as set forth herein, the exercise of such option shall be considered an option to purchase the Property as set forth in Paragraph 4.B. of the Ground Lease, and to purchase the Adjoining Property as set forth in Paragraph 4.C. of the Ground Lease. Said option to purchase shall be governed by Paragraphs 4.B. and 4.C. of the Ground Lease and the Agreement of Sale and Purchase referred to therein.

13. Binding Effect. This Lease Option Agreement and the covenants and conditions herein contained shall inure to the benefit of and be binding upon the Optionor, and the Optionor's heirs and assigns, and shall be binding upon and inure to the benefit of the Optionee, and the Optionee's successors, nominee and permitted assigns of the Optionee. Any such assignee or nominee of Optionee shall be an entity related or affiliated with Optionee.

The parties hereto have signed this Lease Option Agreement as of the date first above written.

OPTIONOR:

Robert Stone

OPTIONEE:

MILLER DEVELOPMENT COMPANY, LTD.

By: _____

[insert name and title]

[Acknowledgments]

EXHIBIT "A-1"
Legal Description

TO BE ATTACHED

EXHIBIT "B"
INDENTURE OF LEASE

THIS INDENTURE OF LEASE is made and entered into at _____[city], Ohio, this _____[day] day of _____[month], _____[year], by and between ROBERT STONE, an individual, hereinafter called "Lessor," and MILLER DEVELOPMENT CO., LTD., an Ohio limited liability company, or its nominee, hereinafter called "Lessee."

WITNESSETH

WHEREAS, Lessor and Lessee previously executed a certain Lease Option Agreement dated _____[date] ("Lease Option Agreement") pursuant to which Lessee was granted an option to lease the Property hereinafter described; and

WHEREAS, Lessee has exercised its option to lease;

NOW, THEREFORE, Lessee and Lessor agree as follows:

1. Demised Premises. For the rents and upon the terms and conditions hereinafter set forth, Lessor hereby leases unto Lessee the parcel of real estate described on Exhibit A, attached hereto and made a part hereof, and all easements, rights and privileges appurtenant thereto. An exact metes and bounds legal description of the parcel of real estate shall be obtained from a registered surveyor approved by Lessor and Lessee, and such legal description shall be marked Exhibit A-1, attached hereto and made a part hereof. All of the aforesaid shall hereinafter be referred to as the "Property."

2. Term. To have and to hold the above Property and appurtenances thereto belonging unto Lessee, for the term of ninety-nine (99) years, commencing on the _____[day] day of _____[month], _____[year], and expiring on the ninety-ninth (99th) annual anniversary of said date, unless the term hereby demised shall be sooner terminated as hereinafter provided.

3. A. Rent. In consideration of said demise, Lessee covenants and agrees to pay to Lessor, as rent for the use of the Property each year during the term hereof, the sum of One Million Four Hundred Thousand and 00/100 Dollars (\$1,400,000.00), in equal monthly installments of One Thousand One Hundred Seventy-Eight and 45/100 Dollars (\$1,178.45) each, payable in current legal tender of the United States of America, as the same is then by law constituted. Notwithstanding the aforesaid, in the event Robert Stone dies, thereafter the monthly rent payable hereunder shall be adjusted to _____ Dollars (\$_____) per month for the balance of the term of the lease commencing on the first day of the thirteenth calendar month following such date of death. All such sums are due and payable in advance, on the first day of each and every calendar month during said term, at the office of Lessor at _____[address], _____[city], _____[state] _____[zip code], or at such other place as Lessor may in writing designate.

The aforesaid rent is based on an assumed acreage of one hundred (100) acres in the parcel being leased hereunder. In the event the total acreage excluding any portions which are within rights of way, measured to four decimal places, is determined by the surveyor to be more or less than 100 acres, the base rate of rent shall be adjusted up or down, as the case may be, by \$15,000 per acre per year for each acre (or fraction thereof) more or less than 100 acres (exclusive of rights of way).

Lessor shall cause the title company, City Title Company, to make a special tax search of the Property, both of record

and with appropriate municipal and county authorities, in order to ascertain the existence of any assessments which constitute a lien against the Property. Except for current real estate taxes and assessments against the Property, Lessor shall satisfy any liens against the Property and agrees not to further encumber the Property without the consent of Lessee, which consent shall not be unreasonably withheld or delayed.

4. A. Net Lease Provision. This lease shall be deemed and construed to be a "net lease." Lessee assumes the sole responsibility for all costs related to the condition, operation, maintenance and management of the Property and improvements to be constructed thereon and for the performance and observance of the obligations under all instruments to which the Property is subject as hereinabove stated, and Lessee shall indemnify, defend and hold Lessor harmless from any claims thereunder.

4. B. Option to Purchase the Property. Provided Lessee is not in default hereunder with due allowance given to any grace periods for the correction of said defaults, Lessee shall have the right to purchase the Property at any time during the term hereof after the death of Robert Stone. In order to properly exercise such option, Lessee shall give written notice to Lessor of Lessee's intention to purchase the Property, and shall concurrently execute and deliver to Lessor at least three (3) fully executed counterparts of the Agreement of Sale and Purchase, a copy of which is marked Exhibit B, attached hereto and made a part hereof. In such event, Lessor shall execute such Agreement of Sale and Purchase and return one (1) fully executed counterpart to Lessee, and deposit one (1) counterpart with the Escrow Agent designated therein for the purpose of opening an escrow for such transaction. The Agreement of Purchase and Sale shall govern the terms of the purchase and sale of the Property pursuant to this option to purchase. In the event this option is exercised, Lessee agrees that it shall concurrently exercise the option to purchase the 25 acre parcel described in Paragraph 4.C. next following.

4. C. Option to Purchase Adjoining Parcel. In consideration of Lessee exercising its option to lease the Property, Lessor hereby grants to Lessee the right and option to purchase the land consisting of 25 acres as described on Exhibit C attached hereto and made a part hereof, hereafter called the "Adjoining Parcel", any time during the term hereof after the death of Robert Stone, for a purchase price of Two Million Five Hundred Thousand and 00/100 Dollars (\$2,500,000.00). During the term of the option to lease the Property as set forth in the Option Lease Agreement, as it may be extended, and prior to the exercise of the purchase option Lessee, or its agents and employees, shall have access to the Adjoining Parcel for the purpose of making such surveys, soil tests, studies and reports as Lessee shall determine, all at Lessee's sole risk and expense. In consideration thereof, Lessee agrees to indemnify, defend and hold harmless Lessor from any claims, actions, causes of action, liability, expenses or liens resulting from or arising out of the exercise of such rights by Lessee, its agents and employees.

If Lessee decides to exercise such option, Lessee shall exercise such option by written notice signed by Lessee and delivered or sent postage prepaid by U.S. registered or certified mail, with return receipt requested, or by a recognized national overnight courier service, delivered or addressed to the address of Lessor set forth herein. If said notice is sent by U.S. mail, it shall be deemed to have been exercised within the aforesaid option period if it is postmarked as of a date on or before the expiration of the lease term. If exercised, the purchase and sale shall be closed in accordance with the terms of the Agreement of Sale and Purchase marked Exhibit B, attached hereto, except Lessor agrees to convey title subject only to those restrictions, reservations, limitations, easements and conditions of record as are identified on Exhibit D, attached hereto and made a part hereof, zoning ordinances, and taxes and assessments, both general and special, which are a lien but not yet due and payable.

5. Use. The Property shall be used for the construction at Lessee's option of a commercial or industrial building or buildings or other improvements on the Property consistent with the building and zoning codes applicable to the Property, including all codes and ordinances relating to the sustainability of the Property, and for any other legal purpose thereat. Such uses shall not require the consent of Lessor. In connection therewith, if requested by Lessee, Lessor shall promptly execute any consents required by any governmental authority to develop or construct any improvements on the Property. Any buildings or other improvements constructed by Lessee on the Property shall be and

remain the sole and absolute property of Lessee during the term of this lease and any extensions thereof. Lessee shall not use or occupy, or permit the use or occupancy of, the Property, or any part thereof, in any unlawful manner, or for any illegal purpose, or in such manner as to constitute a nuisance or violate the terms and conditions of any certificate of occupancy applicable to the improvements to be located on the Property.

The Lessee shall throughout the term of this lease, at the Lessee's sole cost and expense, but subject to Lessee's right to contest the validity thereof as set forth in Paragraph 7, below, promptly comply with all laws and ordinances and the orders, rules, regulations or requirements of all applicable governmental authorities and their agencies, and appropriate departments, commissions, boards and officers thereof, and the orders, rules and regulations of the applicable Board of Fire Underwriters, or any other body now or hereafter constituted exercising similar functions, foreseen or unforeseen, ordinary as well as extraordinary, and whether or not the same require structural repairs or alterations, which may be applicable to the improvements to be constructed by Lessee on the Property, or the use or manner of use of said improvements. Such compliance includes, without limitation, compliance with all environmental laws and with the American's with Disabilities Act, and all regulations issued thereunder; provided, however, that Lessee shall not be responsible to Lessor for environmental claims which are the result of a breach of Lessor's warranty regarding environmental claims as set forth in Paragraph 1.B. of the Lease Option Agreement..

6. Taxes and Other Charges Payable by Lessee. Lessee agrees, in addition to the rent hereinbefore provided and as a part of the consideration for this lease, to bear, pay and discharge, at Lessee's own cost and expense, and as promptly as the same shall become due (and before any penalty is added thereto or imposed thereon because of nonpayment), all legal taxes, assessments (both general and special), levies, license fees, dues, ministerial rents, water rents, excises, rates, charges, imposts, penalties and charges, general and special, ordinary and extraordinary, of whatever name, nature and kind, which are now, or may hereafter be, levied, assessed, charged or imposed, or which are or may hereafter become a lien upon the Property, the use or occupation thereof, the buildings and improvements constructed by Lessee, by virtue of any present or future law, ordinance, resolution or enactment of the United States of America, State of Ohio, County of Lewis, Township of Troy, or any other legal authority whatsoever. This paragraph shall apply to all taxes, assessments, etc., attributable to the term of this lease. Lessor shall pay all taxes attributable to the period prior to the commencement of this lease (even though payable during the term of the lease). However, Lessor agrees and understands that Lessee shall not hereby be liable for nor chargeable with any income tax, inheritance, succession, estate, excess profit, corporation or capital levy tax, or tax of a similar nature, which Lessor may be called upon to pay on account of Lessor's ownership of the Property.

7. Lessee's Right to Contest Taxes, Etc. Lessee, upon prior written notice to Lessor, shall be entitled to contest, in good faith, in the name of Lessor or Lessee, by appropriate proceedings diligently conducted, the validity or applicability, as the case may be of any:

- (a) law or requirement or any proposed law or requirement of any governmental authority,
- (b) tax, assessment or other governmental charge,
- (c) lien or encumbrance,
- (d) requirement of insurance carrier, or
- (e) other expense or charge,

which during the term of this lease shall be levied, assessed, imposed, demanded or threatened to be levied, assessed or demanded by any governmental authority or insurance carrier or with respect to, or alleged by any person to have been imposed, in connection with the possession, occupation, alteration, maintenance, repair or use of the Property or any part thereof or any improvements thereon. Lessor shall be obliged reasonably to cooperate with Lessee in any such

contest which Lessee shall elect to undertake and to that end shall make available to Lessee all books and records of the Lessor and all employees and agents of Lessor with personal knowledge of facts relating to any such contest. The period of any such permitted contest shall be excluded in computing the period during which a default shall be deemed to be in existence if such default would not have occurred before such contest. Lessee agrees that Lessee will indemnify and save harmless Lessor from any and all loss, cost, damage, expense, penalty or any liability whatsoever resulting from or in any manner arising out of the delay or failure to pay when due, discharge or comply with any such law, tax, assessment or other governmental charge, lien or encumbrance, requirement of any insurance carrier or other expense or charge as aforesaid which Lessee shall so contest. Any such contest which the Lessee shall elect to undertake shall be at the Lessee's expense.

8. Utilities. The Lessee shall, during the continuance of this lease, pay for all heat, electric current, water, gas, telephone and other utilities used by Lessee in or upon the Property, such payment to be made directly to the utility company or department furnishing the same, and Lessee agrees to indemnify Lessor and save Lessor harmless against any liability or damages on such account. Lessee shall also at Lessee's sole cost and expense procure any and all necessary permits, licenses or other authorizations required for the lawful and proper installation and maintenance upon the Property of wires, pipes, conduits, tubes and other equipment and appliances for use in supplying any such service to and upon the Property. Lessor agrees to cooperate with Lessee in obtaining the same. Lessee shall have the right to enter into agreements with utility companies or governmental authorities creating such easements as may be required to provide utilities and other services to the Property, and improvements constructed thereon, at Lessee's expense. Lessor agrees to execute any documents needed to effectuate the same, subject to the prior reasonable approval of Lessor's counsel.

9. A. Public Liability Insurance. Lessee shall, at Lessee's cost and expense, secure and keep in force and effect during the term hereof, for the protection of Lessor, comprehensive general liability insurance against claims for bodily injury or death occurring upon, in or under the Property and the sidewalks adjacent thereto, to the extent of not less than One Million Dollars (\$1,000,000) in respect of bodily injury or death to any one person, to the extent of not less than Two Million Dollars (\$2,000,000) for bodily injuries or death to any number of persons arising out of one accident or disaster, and property damage with limits of not less than Five Hundred Thousand Dollars (\$500,000).

9. B. Indemnity. Lessee agrees that no representations or warranties, either express or implied, have been made with reference to the condition of the Property or their fitness for the use of any purpose whatsoever. Lessee assumes the sole responsibility for the condition, operation, maintenance and management of the Property, and Lessee shall indemnify, defend and save harmless Lessor from any and all liabilities, damages, penalties, costs, expenses, claims, suits or actions due to or arising out of (i) any breach, violation or nonperformance of any covenant, condition or agreement in this lease contained on the part of Lessee to be fulfilled, kept, observed and performed; (ii) any contest by Lessee authorized by Paragraph 7 hereof; (iii) any damage to property or any injury to persons (including death) resulting at any time therefrom in, on, under or about the Property or the adjacent streets, sidewalks and other adjoining or adjacent areas caused by the negligence, willful acts or omissions of Lessee, or of the employees, agents, invitees, visitors, assignees and sublessees of Lessee, and the employees, agents, invitees and visitors of said assignees and sublessees.

10. Fire and Extended Coverage Insurance and Waiver of Subrogation.

A. Lessee covenants that Lessee will, at Lessee's own cost, immediately insure, and keep insured at all times, against fire and extended coverage risks and additional perils, all buildings now or hereafter placed upon the Property by Lessee, in an amount equal to the full insurable value thereof, exclusive of the cost of foundations, excavations and other underground improvements.

Said policy or policies of insurance shall be secured from responsible and solvent insurance companies admitted to do business in the State of Ohio, and the benefits shall be made payable to the Lessee, and, if required, to any mortgagee, as the interest of each may appear. Said policy or policies shall contain an agreement by the insurer that such policy shall not be canceled without at least ten (10) days' prior written notice to any mortgagee to whom a loss thereunder

may be payable.

B. Lessor agrees to, and does hereby, waive all rights of recovery and causes of action against Lessee and all parties claiming through or under Lessee for any insured damage or destruction to property of Lessor on or about the Property caused by any of the perils insurable by fire and extended coverage insurance policies available in the State of Ohio, and Lessee does hereby waive all rights of recovery and causes of action against Lessor and all parties claiming through or under Lessor for any damage or destruction to the buildings and improvements to be located on the Property or personal property of Lessee located on or about the Property caused by any of the perils insurable by fire and extended coverage insurance policies available in the State of Ohio. Said waivers shall apply notwithstanding that any such damage or destruction may be due to the negligence of either party, or the agents or employees of either party, and for which either party may be reimbursed as a result of insurance coverage affecting any loss suffered by either party. Lessor and Lessee agree that any such insurance policies shall include standard waiver of subrogation clauses therein.

11. Lessee to Give Insurance Notices. It shall be the duty of Lessee to give all notices of loss and make all proofs of loss and render all services of every kind as may be necessary and proper in the collection of any and all insurance monies. Lessor agrees to cooperate with Lessee in connection with the aforesaid matters.

12. Insurance Policies to Remain With Lessee. The policy or policies of insurance shall remain in the possession of Lessee, but upon demand Lessee shall furnish Lessor from time to time with satisfactory proof that the amount and type of insurance hereby required is actually being carried by Lessee.

13. Mortgagee Entitled to Use Insurance Proceeds. Subject to the terms of any leasehold mortgage obtained by Lessee which shall control the use of insurance proceeds resulting from damage or destruction of the improvements, in the event of any damage or destruction of the improvements constructed by Lessee, provided Lessee is not in default hereunder, with due allowance given to any grace periods applicable to such default, Lessee shall promptly rebuild and restore such improvements and the insurance proceeds shall be made available for such purpose. Regardless of the availability of the use of the insurance proceeds by the mortgagee of Lessee, Lessee shall not be relieved of liability for rent and the other covenants herein. Should Lessee fail promptly to repair, restore or rebuild the building or buildings upon the Property, and Lessor does not undertake to do so, such repairing, restoring or rebuilding may be undertaken by any mortgagee or mortgagees appearing as such upon the mortgage records in the office of the Recorder of the county wherein the Property is located, who shall have notified Lessor in writing of their mortgage or mortgages. In such event, the mortgagee or mortgagees shall be entitled to use for those purposes any insurance monies which may be available for such uses to the same extent and in the same manner as the Lessee might have done.

14. Delay in Building on Account of Strikes, Etc. If Lessee should proceed in good faith and with reasonable diligence with the repair, restoration or rebuilding of any building or buildings upon the Property under any of the provisions of this lease permitting or requiring such steps, and should be delayed in the progress thereof on account of any strike, Act of God, shortages of material, actions of a public enemy, or for any reason beyond the control of Lessee, whereby Lessee shall be unable to procure the necessary building materials or labor, the Lessee shall not be deemed in default by reason thereof. During such delays, however, Lessee shall in no way be relieved of liability for rent and upon other covenants.

15. Condemnation. In case of a taking of all or any part of the Property, or the commencement of any proceedings or negotiations which might result in such taking, Lessee will promptly after learning of same give written notice thereof to Lessor and any mortgagees of the Property (of which Lessee has actual notice) or leasehold created hereby, generally describing, to the extent known by Lessee, the nature and extent of such taking or the nature of such proceedings and negotiations, and the nature and extent of the taking which might result therefrom, as the case may be. Lessor and Lessee shall separately file and prosecute at their own expense their respective claims for an award, subject to the terms of this lease.

In case of a taking (other than for temporary use) of the fee of the entire Property, this lease shall terminate as of the date of such taking. In case of a taking (other than for temporary use) of (a) such perpetual easement on the entire Property, or (b) such a substantial part of the Property as shall result, in the good faith judgment of Lessee, in the property remaining after such taking (even if restoration were made) being unsuitable for the use contemplated in this lease, Lessee may, at Lessee's option, terminate this lease by written notice to Lessor given within ten (10) days after such taking, as of a date specified in such notice within thirty (30) days after such taking. Any taking of the Property of the character referred to in this paragraph is referred to as a "total taking."

In case of a taking of the Property other than a total taking, (a) this lease shall remain in full force and effect as to the portion of the Property remaining immediately after such taking, with a just and equitable abatement or reduction of rent or any other sum payable hereunder, and (b) Lessee, at Lessee's expense, will subject to the prior rights of Lessee's leasehold mortgagee under the terms of Lessee's leasehold mortgage, promptly commence and complete, subject to unavoidable delays, restoration of the Property as nearly as possible to its value, condition and character immediately prior to such taking, except for any reduction in area caused thereby, provided that, in case of a taking for temporary use, Lessee shall not be required to effect restoration until such taking is terminated.

Awards and other payments on account of a taking shall be applied as follows:

A. Net awards and payments received on account of a taking other than a taking for temporary use or a total taking shall (subject to the rights of Lessee's mortgagee, to participate in the Lessee's award to the full extent of its indebtedness) be held and applied to pay the cost of restoration of the Property, such application to be made substantially as provided in this lease with respect to insurance proceeds. Thereafter, the remainder of the net award, if any, shall be applied as set forth in subparagraph B, below.

B. Subject to the provisions of Paragraph 5, above, net awards and payments received on account of a total taking, and the remainder of any net award computed pursuant to subparagraph A, above, shall be divided between Lessor and Lessee (subject to the rights of Lessee's mortgagee, to participate in the Lessee's award to the full extent of its indebtedness) in the ratio, as nearly as practicable, which (a) the then value of Lessor's interest in the Property (including Lessor's interest hereunder) bears to (b) the then value of Lessee's interest in the Property (including the value of all improvements) and in the remainder of the lease term, in each case determined by three independent appraisers.

Lessor and Lessee shall each appoint one appraiser not more than thirty (30) days after any total taking, and shall notify the other of such appointment. A third appraiser shall be appointed by each of the previously appointed appraisers. If either party shall fail or refuse to appoint an appraiser within such 30-day period, the Chief Justice of the Common Pleas Court of Lewis County shall select the appraiser or appraisers not then appointed. The determination of the appraisers shall be binding upon the parties. Each of the appraisers shall be disinterested and shall be members in good standing in the American Institute of Real Estate Appraisers or its successor. The cost of the appraisal shall be borne equally by Lessor and Lessee.

In the event of a partial taking which does not result in a termination of this lease, the rent payable hereunder shall be reduced in the same proportion as the portion of the Property bears to the total Property, as of the date title to the portion taken is no longer in Lessor; provided, however, that if Lessee deems that such a proportionate reduction is inequitable, Lessee may within thirty (30) days following such partial taking, give Lessor written demand for appraisal. In the event of such demand, the rent reduction shall be determined by an appraisal as set forth in the immediately preceding paragraph.

16. A. Repairs. Lessee shall at all times during this term, at the Lessee's own expense, maintain the buildings and other improvements which may hereafter be erected on the Property in such repair as may be required by law or applicable government ordinances and making all necessary replacements thereof.

Lessee shall have the right, at Lessee's expense, to alter, demolish, remove, remodel, add to or rebuild, fail to replace all or any part in case of damage by fire or other casualty, any building or buildings to be constructed on the Property.

B. Mechanic's Liens. Lessor does not consent to the filing of any mechanic's lien or notice thereof against the Property or Lessee's interest therein. If, because of any act or omission of Lessee, any mechanic's lien or other similar lien shall be filed against any portion of the Property or Lessee's interest therein, Lessee shall, whether or not defective, within ninety (90) days after the filing thereof, cause the same to be discharged of record by bonding or otherwise. Lessee may contest the validity of such liens by legal proceedings, diligently conducted, in good faith, without expense to Lessor, and Lessee shall defend, indemnify and hold Lessor harmless from all loss, cost, liability, expense, penalty, claims and demands arising therefrom. If Lessee shall fail to cause any such lien to be discharged of record or bonded within the aforesaid 90-day period, then Lessor shall have the right to cause the same to be discharged. Lessee shall, immediately upon written demand, reimburse Lessor for all amounts paid by Lessor to cause such lien to be discharged.

17. Inspection of Premises. Lessor reserves the right during all business hours, after giving reasonable advance written notice to Lessee, to enter the Property to examine the state of repair and structural safety of the Property, subject to the rights of Lessee's subtenants under the terms of their subleases with Lessee, which rights Lessee shall make known to Lessor.

18. New Building Permits. Lessor shall cooperate with Lessee for the purpose of securing building and repair permits as may be necessary from time to time to remove, alter, remodel or construct the buildings and improvements contemplated by this lease, but without expense to Lessor.

19. Fire or Other Casualty Shall Not Affect Payments of Rentals. No partial or complete destruction or disability to occupy the buildings or improvements hereafter situated upon the Property caused by fire, flood or other casualty shall in any way affect the payment of the rental hereinbefore prescribed or the validity of this lease or any portion thereof.

20. Personal Property of Lessee. All property belonging to Lessee located in or about the Property shall be at the sole risk of Lessee, and Lessor shall not be liable for the theft or misappropriation thereof, nor for any damage or injury thereto, nor for any damage or injury to Lessee, or any of the Lessee's officers, agents or employees, or to other persons or to any property caused by fire, explosion, wind, water, rain, snow, frost, steam, gas, electricity, any acts of God, heat or cold, dampness, falling plaster and/or ceilings, sewers or sewage odors, noise, leaks from any part of said building or by the bursting or leaking of pipes, plumbing, electrical wiring and equipment and fixtures of all kinds, or by any act or neglect of a tenant or of any person or caused in any manner whatsoever; provided, however, nothing herein shall be deemed a waiver of Lessor's responsibility for Lessor's negligence or wrongful acts, or those of its agents and employees.

21. Surrender to Lessor. At the expiration of the term, or in the event of a forfeiture or termination before the normal expiration, Lessee shall peaceably and quietly deliver up the Property, together with all improvements thereon, to the Lessor.

22. Quiet Possession. Lessor covenants with Lessee that the rents being paid in the manner and at the time herein provided, and the covenants, conditions and agreements herein being all and singular kept, fulfilled and performed, the Lessee shall lawfully, peaceably and quietly have, hold, possess and enjoy the Property during the term hereby granted, without any hindrance, disturbance or molestation whatsoever from the Lessor or anyone claiming under Lessor. Lessor hereby warrants and agrees to defend the Property against the lawful claims of all persons whomsoever, excepting such as may result from the acts or defaults of the Lessee, and excepting any and all installments of taxes, assessments and other current charges payable after the first half of _____[year] installment, which taxes, assessments, and current charges the Lessee hereby assumes and agrees to pay, subject to the provisions of Paragraph 6, provided, however, that the installment for the second half of _____[year] shall be prorated as of the

commencement date of the lease term, and the portion owed by Lessor applicable to the period prior to the commencement date shall be credited against the base rent due hereunder.

23. Waivers to Be in Writing. Neither Lessor nor Lessee shall be held to have waived any of the rights, privileges, powers or immunities under this lease unless the waiver thereof be made in writing. No waiver of any breach of any covenant, term or condition herein shall be construed to be a waiver of any succeeding or any future breach of the same or any other covenant, term or condition of this lease.

24. Default in Rent, Etc.

A. In the event any monthly installment of rent or any part thereof, or any other payments herein provided for, shall not be paid when due and shall continue unpaid for a period of thirty (30) days from receipt of written demand therefor, or in the event Lessee shall fail to perform any of the other covenants, terms or conditions of this lease to be performed by the Lessee, and such failure shall continue for a period of thirty (30) days after written demand on Lessee for such performance, or if such failure by its nature cannot reasonably be corrected within such 30-day period, then if Lessee shall not within such period have commenced in good faith to correct such failure and shall not have diligently pursued such action to completion, then the Lessor may at the Lessor's option elect one or more of the following remedies: (1) sue for payment of the unpaid rents or other payments as they become due; (2) subject to the terms of Paragraph 24.C., below, terminate this lease and work a forfeiture thereof, in which event every covenant, term and condition on the part of the Lessor to be performed, fulfilled and kept shall terminate as to all purposes whatsoever, and it shall be lawful for the Lessor to re-enter, repossess and enjoy the Property and Lessor's interest therein; and (3) enter upon the Property and improvements thereon, sublet the Property and improvements thereon to third parties, and apply the net rents in partial or complete satisfaction of the obligations of the Lessee without causing a forfeiture of this lease. The election of remedies (2) and (3) above provided shall not bar Lessor from recovery of the full amount of any sums of money due Lessor under this lease up until the date of the termination of this lease.

B. In no event shall Lessor be entitled to exercise Lessor's rights set forth in subparagraphs 24. A.(2) and (3) above, except after written notice of said default setting forth the default complained of, and after the Lessee shall have failed to cure said default within thirty (30) days of the delivery of said notice.

C. Lessor shall give like written notice of said default to Lessee's mortgagee or mortgagees appearing as such upon the mortgage records in the office of the Recorder of the county wherein the Property is located who shall have notified the Lessor in writing of the mortgage or mortgages, by mailing such written notice to the address furnished in writing to Lessor by such mortgagee or mortgagees. Thereupon, said mortgagee or mortgagees shall have like opportunity to cure said default within said 30-day period, or if not curable within thirty (30) days, within such longer period of time as shall reasonably be required, provided such mortgagee acts in good faith to correct such default and diligently pursues such correction to completion. Copies of any notices sent to mortgagee(s) hereunder shall be sent to Lessee simultaneously, and notice of such default shall not be deemed to be effective until both Lessee and such mortgagee shall have received such notice.

Notwithstanding the above, if any notice from Lessor to Lessee and Lessee's mortgagee states that Lessor is electing to terminate this lease and work a forfeiture, the mortgagee of Lessee shall have the right (i) to nullify the notice of termination as fully as though no default had occurred by giving Lessor notice with ten (10) days after receipt of Lessor's notice, notice of its intent to cure the default within ten (10) days thereafter, paying all rent and other payments then in default, or (ii) indefinitely postponing the termination of this lease by giving Lessor, within ten (10) days of Lessor's notice, notice of its intent to foreclose its leasehold mortgage, and within ten (10) days thereafter, paying all rent and other payments in default, and thereafter promptly commencing and proceeding with reasonable diligence to foreclose its leasehold mortgage, meanwhile paying all rent and other payments due under the lease. Such postponement shall continue until confirmation of the foreclosure sale, whereupon such notice of termination shall be deemed nullified.

D. Lessor agrees, notwithstanding anything herein to the contrary, that in the event of termination of this lease by reason of a default by Lessee, and upon notice from the leasehold mortgagee given within fifteen (15) days after the date upon which this lease terminates, Lessor will enter into a new lease for the Property with such leasehold mortgagee, or its designee, for the remainder of the term, effective as of the date of termination, at the rent and otherwise upon the same terms and provisions as are herein contained, subject to the same conditions of title that this lease is subject to on the date of termination and subject to the rights of any parties then in possession of any part of the Property.

Notwithstanding the foregoing, it shall be a condition of Lessor's obligation to enter into such a new lease, that the leasehold mortgagee or its designee pay to Lessor at the time of execution of said new lease all sums due Lessor by reason of Lessee's default in the payment of rent and other sums due hereunder, together with Lessor's costs and expenses incurred in termination of this lease and in preparing the new lease, including without limitation, attorneys' fees. Upon the execution and deliver of such new lease, the tenant thereunder shall have the same right, title and interest in and to the improvements then on the Premises as Lessee had under this lease.

25. Lessor's Title Upon Forfeiture and Re-Entry. In the event of a forfeiture and re-entry as hereinbefore provided, the title and interest of the Lessor in the Property shall be the same as the title and interest owned by Lessor at the date of the execution and delivery of the within lease, and shall include all appurtenant property now on the Property or hereafter placed upon the Property. In addition, all liens, claims and mortgages created or given by the Lessee upon Lessee's leasehold interest in the Property shall terminate upon such forfeiture, unless Lessor in Lessor's sole discretion shall have subordinated Lessor's interest to the interest of said mortgage or encumbered the fee by joining in the execution of such leasehold mortgage.

26. Assignment. Subject to the provisions of Paragraph 27 hereof, Lessee shall have the right to mortgage this lease to secure an actual indebtedness or contractual obligation of Lessee arising from Lessee's interest in the Property up to the full appraised value of Lessee's interest, the improvements to be constructed and Lessor's fee interest in the Property. Notwithstanding the foregoing, Lessee will not, except by such mortgage, assign or transfer this lease without the written consent of the Lessor which consent shall not be unreasonably withheld or delayed, provided that (1) there be at the time of such assignment or transfer no existing default on the part of the Lessee in the performance and observance of the covenants and conditions hereof; (2) the assignee of the Lessee in writing shall expressly assume all of the Lessee's engagements and obligations hereunder and agree to perform all and singular the covenants of this indenture; (3) the Lessee shall have first submitted for inspection by the Lessor a legal and sufficient instrument of assignment and transfer of assumption of this indenture by the assignee five (5) days before the execution, which instrument shall thereafter be duly filed and recorded in the office of the Recorder of the county wherein the Property is located, within ten (10) days after its execution, and a duplicate original thereof filed with the Lessor; and (4) Lessee shall pay the reasonable amount of any expense incurred by Lessor by reason of any assignment, including reasonable attorneys' fees in the case of any assignment. No assignment hereof, unless conforming to the above conditions, shall be of any validity or effect and no such assignment shall release Lessee from its obligations hereunder unless Lessee provides Lessor with all financial statements and other information reasonably requested by Lessor with respect to the assignee, and such financial data and information indicates that the assignee's financial condition and reputation is at least equal to that of Lessee. Such release, if granted, shall only release Lessee from obligations accruing from and after the effective date of the assignment.

Notwithstanding the above restrictions on assignment, in the event the Lessee's leasehold mortgagee, its designee or nominee, shall acquire ownership of the leasehold estate, either following foreclosure of such mortgage or by transfer or assignment in lieu of foreclosure, the Lessee's leasehold mortgagee, its designee or nominee, shall have the right, without the consent of Lessor, to further assign this lease, but thereafter all subsequent assignments (except by a leasehold mortgagee acquiring ownership through foreclosure or by transfer or assignment in lieu of foreclosure), shall be subject to the provisions of this Paragraph 26.

27. Mortgage of Leasehold; Subordination of Fee. It is expressly agreed that the Lessee may at any time, by mortgage

or conveyance in trust, mortgage or hypothecate Lessee's leasehold interest in the Property. The mortgagee or trustee, upon exhibiting to the Lessor such mortgage or deed of trust, and serving written request for notices, with the address to which the same shall be sent, shall thereafter during the existence of said mortgage or deed of trust be entitled to have mailed to the address so designated duplicate copies of notices which the Lessor may serve on the Lessee pursuant to the provisions of this indenture, such notices to be sent simultaneously with the notices sent to Lessee. The mortgagee or trustee may prevent or cure a default of the Lessee in any way that the Lessee might lawfully do; and such action shall be as effective to prevent forfeiture of the Lessee's interest hereunder as if done by the Lessee, and any such mortgage or deed of trust so given by the Lessee may, if the Lessee so desires, be so considered as to provide that, as between any such mortgagee or trustee and the Lessee, said mortgagee or trustee, upon making good and performing any such default or defaults on the part of the Lessee, shall thereby be subrogated to all rights of the Lessee under the terms of this lease.

In the event Lessee shall mortgage Lessee's leasehold interest as set forth above, Lessor shall, upon the request of Lessee and subject to the terms and conditions hereinafter set forth, execute any documents which may be required to subordinate Lessor's fee to said leasehold mortgage, or to join in the execution of any first mortgage of Lessee's leasehold interest and any refinancing thereof, to encumber Lessor's fee interest in the Property in the repayment of a first mortgage loan by a federal or state chartered bank or savings and loan association, insurance company or other institutional lender (collectively hereafter referred to as a "Lending Institution"), in the principal amount not to exceed 100 percent of the appraised value of Lessee's leasehold estate, the improvements to be constructed by Lessee on the Property and Lessor's fee interest in the Property, with interest not to exceed the then current rate of the Lending Institution for similar loans, for a term not to exceed thirty (30) years or the then remaining term of this lease, whichever is less. Lessor agrees to subordinate Lessor's fee interest or to join in such mortgage provided the fee mortgage shall contain the following provisions, among others, in form reasonably satisfactory to Lessor and the Lending Institution:

(a) a provision requiring the application of insurance and condemnation proceeds to the debt secured by the mortgage, or, unless waived by Lessee, providing that such proceeds shall be released to Lessee or any sublessee authorized by Lessee, in a manner satisfactory to the Lending Institution, only for repair, rebuilding, replacement or restoration of the improvements in the event of damage or destruction, or a public taking thereof;

(b) a provision exculpating Lessor and all partners of Lessor from personal liability for any default under the mortgage beyond Lessor's fee interest in the Property, providing that the Lending Institution shall look solely to such interest in the Property, and that the Lending Institution shall not seek or enforce any deficiency or other personal judgment against Lessor or any partner of Lessor, except to the extent necessary solely to realize on the interest of Lessor in the Property. If the Lending Institution shall not be able or willing to include such a provision in the fee mortgage, then, provided to do so does not cause a zoning violation, the Property shall be conveyed subject to this lease to either an individual or corporate (as Lessee shall desire) so-called "nominee" or "dummy" for the purpose of executing the fee mortgage, and immediately thereafter reconveyed to Lessor subject to this lease and the mortgage, all at the sole cost and expense of Lessee; and

(c) a provision that both Lessor and Lessee shall receive all notices given by the Lending Institution and that, if any default is not cured by Lessee within the period of time permitted under the fee mortgage, the Lending Institution shall accept performance of the covenant in default by Lessor if performed within a reasonable specified time.

28. Subletting. Lessee shall have the right to sublet for all lawful purposes all or any part of the Property, subject to the terms of this lease.

29. Nondisturbance of Sublessees; Right to Cure

A. Upon request by Lessee with respect to any of its sublessees, Lessor agrees to provide a nondisturbance agreement in

which Lessor covenants that so long as any sublessee agrees to attorn to Lessor as lessor pursuant to its sublease, such termination shall not result in the termination of any sublease of the Property or any part thereof so long as the sublessee thereunder is not in default, or the period for remedying any such default has not expired. Such nondisturbance agreement shall provide that any such sublease shall continue for the duration of its term and any extensions thereof, as fully as though originally entered into between such sublessee and Lessor (subject, however, to the prior right to any leasehold mortgagee or fee mortgagee). No sublessee who has attorned to Lessor shall be named or joined in any action or proceeding by Lessor to recover possession of the Property or for any other relief in connection with the termination of this lease. Lessor shall, at no expense to Lessee, execute, acknowledge and deliver such instruments evidencing and agreeing to the foregoing as any sublessee shall require.

B. Any act required to be performed by Lessee pursuant to the terms of this lease may be performed by any sublessee of Lessee, and the performance of such act shall be deemed to be performed by Lessee. Any rights or benefits accruing to Lessee under this lease may be exercised or enjoyed by any sublessee of Lessee to the extent provided in the sublease from Lessee to such sublessee.

30. Estoppel Certificate by Lessee. Lessee will execute, acknowledge and deliver to Lessor, promptly upon request, a certificate certifying that (a) this lease is unmodified and in full force and effect (or, if there have been modifications, that the lease is in full force and effect, as modified, and stating the modifications), (b) the dates, if any, to which rent and other sums payable hereunder have been paid, and (c) no notice has been received by Lessee of any default which has not been cured, except as to defaults specified in the certificate. Any such certificate may be relied upon by any prospective purchaser or mortgagee of the property or any part thereof.

31. Estoppel Certificate by Lessor. Lessor will execute, acknowledge and deliver to Lessee or any mortgagee of Lessee's leasehold interest or prospective purchaser of Lessee's interest under this lease, promptly upon request, a certificate certifying (a) that this lease is unmodified and in full force and effect (or, if there have been any modifications, that this lease is in full force and effect as modified, and stating the modifications), (b) the dates, if any, to which rent and other sums payable hereunder have been paid, and (c) whether or not, to the knowledge of Lessor, there are then existing any defaults under this lease (and, if so, specifying the same). Any such certificate may be relied upon by any prospective transferee or mortgagee of Lessee's interest under this lease.

32. Limitation of Lessor's Liability. The term "Lessor," as used in this lease, so far as covenants or obligations on the part of Lessor are concerned, shall be limited to mean and include only the owner or owners at the time in question of the fee of the Property. In the event of any transfer or transfers of the title to such fee, provided Lessor notifies Lessee in writing of such transfer and the name and address of the transferee the Lessor herein named (and in case of any subsequent transfers or conveyances, the then grantor) shall be freed and relieved from and after the date of such transfer and conveyance of all liability with respect to performance of any covenants or obligations on the part of Lessor contained in this lease thereafter to be performed. Without further agreement, the transferee of such title shall be deemed to have assumed and agreed to observe and perform any and all obligations of the Lessor hereunder during Lessor's ownership of the Property. Lessor may transfer Lessor's interest in the Property without the consent of Lessee, and such transfer or subsequent transfer shall not be deemed a violation on Lessor's part of any of the terms and conditions of this lease.

33. Notices. All notices required under this lease shall be deemed to be properly served if delivered in writing personally or sent by registered mail or by certified mail with return receipt requested to the Lessor c/o Robert Stone, _____ [address], _____ [city], _____ [state] _____ [zip code], unless otherwise specified by Lessor, and to Lessee c/o Miller Development Company, Ltd., _____ [address], _____ [city], _____ [state] _____ [zip code], or to any subsequent address which the Lessee may designate for that purpose. Date of service of notice served by mail shall be the date on which such notice is deposited in a post office of the United States Post Office Department.

34. Withholding. Should Lessee withhold from Lessor possession of the premises after the expiration or termination of this lease, then in that event such withholding shall constitute only a month-to-month tenancy.

35. Lease Binding Upon Heirs, Personal Representatives. Each and all of the terms, agreements, covenants, warranties, conditions and stipulations herein contained to be performed or observed by the Lessor and the Lessee, or by either of them, shall apply to, bind and embrace not only said Lessor and said Lessee, or either of them, but also their respective successors and permitted assigns.

36. Short Form. At either party's request, Lessor and Lessee agree to execute a "memorandum of lease," which memorandum of lease shall be suitable for recording and which Lessor or Lessee may promptly record. Payment for said recording shall be by the party requesting same. Said memorandum shall be amended to reflect the actual commencement and expiration date of the lease.

37. Headings. The headings hereinabove inserted are for convenience and reference only and are not intended, and shall not be construed, to define or limit or in any manner affect the scope or meaning of any paragraph or provision of this lease, and such headings shall not be considered in any construction of this lease.

38. Definitions. Where necessary or appropriate herein, the singular and plural shall be interchangeable, and words of any gender shall include all genders.

39. No Merger. There shall be no merger of the leasehold estate created by this lease with the fee estate in the Property by reason of the fact that the same person or entity may own or hold (a) the leasehold estate created by this lease or any interest in such leasehold estate, and (b) the fee estate in the Property or any interest in such fee estate; and no such merger shall occur unless and until all persons, including any mortgagees having any interest in (i) the leasehold estate created by this lease, and (ii) the fee estate in the Property, shall join in the written instrument effecting such merger and shall duly record the same.

40. Partial Invalidity. If any provision of this lease or the application thereof to any person or circumstances shall at any time or to any extent be invalid or unenforceable, the remainder of this lease or the application of such terms or provisions to persons or circumstances other than those as to which it is held invalid or unenforceable shall not be affected thereby.

41. No Broker. Each of Lessor and Lessee warrant to the other that no broker was involved in this transaction or is due any commission hereunder save and except for Green Real Estate Group who shall be paid by Lessor. Each agrees to indemnify, defend and hold harmless the other from any breach of this warranty.

42. Lessor's Warranties. Lessor represents, warrants and covenants to Lessee that:

(a) Any mortgage against the fee interest or reversionary interest of Lessor in the Property shall be subject and subordinate in all respects to the Lessee's rights under this lease, and to the rights of the leasehold mortgagee contemplated by Paragraph 27, above, of which Lessor has been notified. Except for such mortgage liens against the fee as permitted aforesaid, Lessor shall discharge any liens filed against the Property (other than liens due to the acts or omissions of Lessee or occupancy of the Property by Lessee or those holding under Lessee), within sixty (60) days after the filing thereof. If Lessor shall fail to cause any such lien to be discharged of record or bonded within the aforesaid sixty (60)-day period, then after ten (10) days' prior written notice to Lessor, Lessee shall have the right to cause said lien to be discharged by the payment thereof. Lessee shall have a dollar-for-dollar set-off against the payment of the rent hereunder for any amount paid pursuant to the preceding sentence.

(b) Lessor shall reasonably cooperate with Lessee in obtaining any permits, approvals, easements, etc., necessary to

enable Lessee to develop the Property.

(c) Lessor shall cooperate to make any necessary changes to this lease reasonably requested by a mortgagee of Lessee to enable Lessee to develop the Property, provided the changes do not affect the economics of the transaction described herein and are reasonably acceptable to Lessor's counsel.

(d) Lessor and the individual signing below for the Lessor have the power and authority to enter into this lease as the sole general partner of Lessor, an Ohio limited partnership.

(e) Lessor has all necessary power and authority to enter into this lease and the execution of this lease constitutes the valid and binding obligation of Lessor, enforceable against Lessor in accordance with its terms.

(f) The execution, delivery and performance by Lessor of this lease and all acts contemplated under the terms of this lease have been fully authorized.

(g) Lessor has received no notice of citations for the violation of any zoning, building code or any other law, ordinance, regulation or directive of any governmental authority or authorities having jurisdiction related to the Property, or any part or parts thereof.

(h) There is no litigation, proceeding or action pending against Lessor or notice received by Lessor or threatened litigation against Lessor relating to the Property being leased to Lessee hereunder which might adversely affect the Property or which questions the validity of this lease or action taken or to be taken by Lessor pursuant hereto.

(i) Lessor is not a party to any contracts for services, supplies or the like relating to the Property which cannot be terminated by Lessor or Lessee as of the commencement date of the lease.

(j) There are no options or purchase agreements in effect with respect to the Property or any part thereof except as set forth in this lease, and no leases affecting the Property except as may be disclosed in the title Commitment obtained by Lessee in connection with the Lease Option Agreement and approved by Lessee, if any.

(k) To Lessor's knowledge no Hazardous Substances (as hereinafter defined) have been used, manufactured, released, treated, stored or disposed of beneath, on or at the Property or off-site so as to affect the Property by Lessor and to the best of Lessor's knowledge no Hazardous Substances have been used, manufactured, released, treated, stored or disposed of beneath, on or at the Property or off-site so as to affect the Property by Lessor's predecessors-in-interest or by any other person from any other source whatsoever. The term Hazardous Substances includes, without limitation, those substances included within the definitions of "Hazardous Substances", "Hazardous Materials", "Toxic Substances", "Hazardous Waste" or "Solid Waste" in any Environmental Law as hereinafter defined. The term Environmental Law includes any federal, state or local law, statute, ordinance or regulation including without limitation, the Comprehensive Environmental Response, Compensation and Liability Act, the Resource Conservation Recovery Act, and the Hazardous Materials Transportation Act. Notwithstanding the aforesaid, it is understood that this warranty does not apply to oil and gas, petroleum products or any by-product thereof.

(l) No notice of condemnation or appropriation proceeding affecting the Property exists or to the best of Lessor's knowledge is contemplated.

(m) Lessor has no notice of mechanic's liens or materialmen's liens filed or threatened against the Property for work requested by Lessor, and as to work requested by Lessor no work has been performed or materials furnished for which a lien could be filed.

43. Lessee's Warranties. Lessee represents and warrants to Lessor that:

(a) Lessee has all necessary power and authority to enter into this lease and that the execution of this lease and the consummation of the transaction contemplated hereby constitutes the valid and binding obligation of Lessee enforceable against it in accordance with its terms.

(b) The execution, delivery and performance by Lessee of this lease and the acts contemplated hereby have been duly authorized by all requisite legal actions.

(c) Neither the execution of this lease by Lessee nor the consummation by Lessee of the transactions contemplated hereby will violate any provision of law or violate or be in conflict with or constitute a default under term or provision of the documents establishing the legal existence of Lessee or of any agreement, lease or other contract or obligation to which Lessee is a party.

44. Entire Agreement. Lessor and Lessee agree that neither is relying on any representations or agreements other than those set forth herein, and that this lease is the entire agreement between them.

The parties hereto have executed this Indenture of Lease as of the date first hereinabove mentioned.

LESSOR:

Robert Stone

LESSEE:

MILLER DEVELOPMENT COMPANY, LTD.

By _____

[insert name and title]

[Acknowledgments]

EXHIBIT A TO LEASE
DRAWING OF THE PROPERTY

TO BE ATTACHED

EXHIBIT A-1 TO LEASE
LEGAL DESCRIPTION FROM SURVEYOR

TO BE ATTACHED

EXHIBIT B TO LEASE

AGREEMENT OF SALE AND PURCHASE

THIS AGREEMENT entered into by and between ROBERT STONE, or his legal representative ("Seller") and MILLER DEVELOPMENT CO., LTD., an Ohio corporation, or its nominee ("Buyer").

W I T N E S S E T H:

WHEREAS, the Seller is the owner of land containing approximately 100 acres described on Exhibit A, together with all appurtenances, hereditaments, rights, privileges, easements, rights-of-way now or hereafter belonging or in any way appertaining thereto, including, without limitation, all right, title and interest of Seller in any street, all rights and estates in reversion or remainders, and all rights to the proceeds of any condemnation award pertaining thereto or compensation in lieu thereof (the "Property"). A survey of the Property shall be attached hereto and made a part hereof as Exhibit B. Pending the receipt of said description and survey, a drawing showing the Property is attached hereto and made a part hereof as Exhibit C;

WHEREAS, Seller and Buyer entered into a Lease Option Agreement dated _____[date] ("Lease Option Agreement") granting to Buyer an option to ground lease the Property pursuant to the terms of a certain Indenture of Lease dated _____[date], hereafter called the "Ground Lease";

WHEREAS, as part of the Ground Lease, Seller previously granted Buyer an option to purchase the Property; and

WHEREAS, in the event the purchase option is exercised the parties agree that the terms of this Agreement shall control;

NOW, THEREFORE, in consideration of the sum of Ten Dollars (\$10.00) paid by each party to the other, the receipt of which is hereby acknowledged, and in further consideration of the mutual promises, covenants and agreements hereinafter set forth, the parties agree as follows:

1. Agreement to Buy and Sell. Seller agrees to sell and convey the Property to Buyer, or Buyer's nominee, and Buyer agrees to buy and take title to the Property, under the terms and conditions set forth herein. Seller and Buyer have previously obtained a complete metes and bounds survey and legal description of the Property prepared by a registered surveyor approved by Buyer, showing the exact boundary lines of the Property, the location of all improvements, driveways, paved and unpaved areas, curb cuts, ditches, ponds, gas wells, water wells, adjacent streets and ways, easements, restrictions, encroachments and water courses on or affecting the Property (including all matters set forth in Schedule B of the Title Commitment referred to in Section 5 of this Agreement), certifying the number of acres (exclusive of rights-of-way) within the Property (excluding any portions of the Property within rights-of-ways), and representing that all boundaries within the Property are contiguous with the boundaries of adjoining parcels, and showing what portion of the Property if any, is within a flood plain, floodway or wetland or similarly restricted area, which survey is satisfactory to Buyer (the "Survey"). The Survey is in compliance with the requirements of the American Land Title Association and the American Congress of Surveying and Mapping and is sufficient to permit the Title Company (hereafter designated) to issue the Title Policy (hereafter defined) to Buyer with no exception for matters of survey. The surveyor has delivered a copy of the Survey to Buyer, Buyer's lender, Seller and the Title Company, certifying the same to such entities, together with all necessary or appropriate inspections, supporting reports and certificates. The legal description of the Property shall be used in the Deed (hereafter defined).

2. Appurtenances. The parties agree that the Property being purchased and sold hereunder includes the land, all landscaping, all appurtenant rights, easements and privileges, and any other improvements of whatsoever kind and nature currently existing on the land, together with all title policies, engineering, surveys, reports of soil-bearing tests,

environmental studies and reports, architectural drawings, and other work relating to the Property and the proposed development thereof, or the status of Seller's title thereto, if any, which Seller has previously delivered to Buyer.

3. Purchase Price. The Purchase Price for the Property is Two Hundred Thousand Dollars (\$200,000) per acre for the Property. The Purchase Price shall be deposited by the Buyer into escrow with the Escrow Agent (hereafter defined) on or before the Closing Date.

4. General Warranty Deeds. Seller shall deposit in escrow a good and sufficient general warranty deed (the "Deed"), conveying good, indefeasible, marketable and insurable fee simple title to the Property to Buyer or Buyer's nominee, free and clear of all liens and encumbrances whatsoever except the following: (a) zoning ordinances and regulations; (b) real estate taxes and assessments, both general and special, which were a lien but which were not yet due and payable as of the date of the commencement of the Ground Lease and (c) restrictions, conditions, reservations, limitations, and easements of record which were approved by Buyer pursuant to the terms of the Lease Option Agreement prior to the exercise by Buyer of its option to ground lease the Property, and any liens or encumbrances created pursuant to the terms of the Ground Lease or arising out of the use or occupancy of the Property by Buyer, its agents, employees, tenants and invitees.

On or before ten (10) days prior to the Closing Date, Seller agrees to submit to Buyer's attorney for approval the form of Deed and other documents of conveyance proposed to be executed by Seller.

5. Title Insurance. Seller shall furnish to Buyer an owner's fee policy of title insurance on ALTA Form B-1970 (Revised) from the office of City Title Company (the "Title Company") in the amount of the Purchase Price (with each of the Title Company's standard printed exceptions deleted) insuring the title to the Property to be good in Buyer or Buyer's nominee, subject only to the exceptions permitted under Section 4 hereof (the "Title Policy"). The Title Policy shall insure any easements that are for the benefit of the Property. The cost of the owner's fee policy shall be split equally between Seller and Buyer. Each of the parties hereto shall be equally entitled to any reissue credit based on the previous issuance of the leasehold policy of title insurance with respect to the Property at the time it was leased.

6. Escrow Agent. The Escrow Agent shall be the Title Company (the "Escrow Agent"). Buyer shall cause the escrow to be opened within three (3) days after the exercise of Buyer's option to purchase the Property. A copy of this Agreement shall serve as escrow instructions. The Escrow Agent shall be entitled to attach hereto its "Standard Conditions of Acceptance of Escrow" ("Standard Conditions"), provided, however, if there is a conflict between the terms and conditions of this Agreement, and the terms and conditions of the Standard Conditions, the terms and conditions of this Agreement shall prevail.

7. Closing Date and Possession. Unless the parties otherwise agree in writing, this transaction shall be closed thirty (30) days after Buyer's exercise of its option to purchase the Property (the "Closing" or the "Closing Date"), subject only to the provisions of Section 5 (relating to the extensions of time to cure defects in title disclosed by the Title Commitment). All necessary funds (or commitments therefor) and documents shall be deposited in escrow no later than the Closing Date. On the Closing Date, the Escrow Agent shall file for record the Deed, provided that the Title Company is prepared to issue its Title Policy in the amount of the Purchase Price and in the form as aforesaid.

8. Prorations and Charges. The Escrow Agent shall not be required to prorate and apportion, as of the close of business on the Closing Date, the real estate taxes in view of Buyer's obligation to pay the same under the terms of the Ground Lease. Any prepaid rent payable pursuant to the terms of the Ground Lease shall be prorated as of the Closing Date.

(a) From the funds to be deposited in escrow by Buyer, Seller shall be charged with the following closing costs (unless Seller deposits with the Escrow Agent a receipt or other evidence showing any of said costs were previously paid by Seller):

- (i) cost of the title examination;
- (ii) one-half (1/2) of the cost of the Title Policy;
- (iii) one-half (1/2) of the Ohio Real Estate Transfer Tax and conveyance fees;
- (iv) cost of discharging any and all mortgages on the Property; and
- (v) one-half (1/2) of the escrow fee.

(b) Buyer shall be charged with the following closing costs:

- (i) cost of the recording of the Deed;
- (ii) one-half (1/2) of the Title Policy;
- (iii) one-half (1/2) of the Ohio Real Estate Transfer Tax and conveyance fees; and
- (iv) one-half (1/2) of the escrow fee.

9. Representations and Warranties of Seller. Seller represents and warrants to Buyer that:

- (a) Seller has all necessary power and authority to enter into this Agreement and that the execution of this Agreement and the consummation of the transactions contemplated hereby constitute the valid and binding obligations of Seller enforceable against it in accordance with its terms.
- (b) The execution, delivery and performance by Seller of this Agreement and the delivery and recording of the Deed have been fully authorized.
- (c) No notices or citations for the violation of any zoning, building or other law, ordinance, regulation or directive of any governmental authority or authorities having jurisdiction relating to the Property, or any part or parts thereof, have been received by Seller or any agent or employee of Seller.
- (d) There is no litigation, proceeding or action pending against Seller or notice received by Seller of threatened litigation against Seller relating to the Property being conveyed, transferred and assigned to Buyer hereunder which might adversely affect the Property or which questions the validity of this Agreement or any action taken or to be taken by Seller pursuant hereto.
- (e) Neither the execution of this Agreement by Seller nor the consummation by Seller of the transactions contemplated hereby will violate any provision of law or violate or be in conflict with or constitute a default under any term or provision of the enabling documents of Seller or of any agreement, lease, or other obligation to which Seller is a party.
- (f) Seller is not a party to any contracts for services, supplies or the like relating to the Property which cannot be terminated by Seller or Buyer at Closing.
- (g) There are no options or purchase agreements in effect with respect to the Property or any part thereof (except as set forth in the Ground Lease), and no leases affecting the Property except the Ground Lease to Buyer and the leases, if any, which may be approved by Buyer after review of the Title Commitment obtained by Buyer pursuant to the terms of the Lease Option Agreement.

(h) No notice of condemnation or appropriation proceeding affecting the Property exists or, to the best of Seller's knowledge, is contemplated.

(i) Seller has no notice of mechanic's liens or materialmen's liens filed or threatened against the Property for work requested by Seller, and as to work requested by Seller, no work has been performed or materials furnished for which a lien could be filed.

(j) Seller is not a "foreign person" within the meaning of *Section 1445 of the Internal Revenue Code of 1954*, as amended.

All of the representations and warranties set forth above in this Section 9: (i) shall be deemed renewed by Seller on the Closing Date as if made at such time; (ii) shall survive the Closing of this transaction and the recording of the Deed; and (iii) do not and will not include any untrue statement of fact or omit to state any material fact necessary to make the statements made not misleading.

10. Representations and Warranties of Buyer. Buyer represents and warrants to Seller that:

(a) Buyer has all necessary power and authority to enter into this Agreement and that the execution of this Agreement and the consummation of the transaction contemplated hereby constitutes the valid and binding obligation of Buyer enforceable against it in accordance with its terms.

(b) The execution, delivery and performance by Buyer of this Agreement have been duly authorized by all requisite corporate action.

(c) Neither the execution of this Agreement by Buyer nor the consummation by Buyer of the transactions contemplated hereby will violate any provision of law or violate or be in conflict with or constitute a default under any term or provision of the articles of incorporation or code of regulations of Buyer or of any agreement, lease or other obligation to which Buyer is a party.

All of the representations and warranties set forth in this Section 10: (i) shall be deemed renewed by Buyer on the Closing Date as if made at such time; (ii) shall survive the Closing of this transaction and the recording of the Deed; and (iii) do not and will not include any untrue statement of fact or omit to state any material fact necessary to make the statement made not misleading.

11. Delivery and Payment. Upon consummation of this transaction, the Escrow Agent shall make delivery and payment as follows:

(a) To the Seller, _____ [address], _____ [city],
_____ [state] _____ [zip code];

(i) two (2) copies of the escrow statement; and

(ii) cash deposited by Buyer, less prorations and amounts hereinbefore mentioned to be charged to Seller, by check or wire transfer payable pursuant to payment instructions delivered by the Seller to the Escrow Agent prior to the Closing Date.

(b) To the Buyer _____ [address], _____ [city],
_____ [state] _____ [zip code];

- (i) Two (2) copies of the escrow statement;
- (ii) the recorded Deed;
- (iii) the Title Policy; and
- (iv) the balance, if any, in the escrow account to the credit of Buyer by check payable to Buyer.

12. No Outside Representations. This Agreement shall be deemed to contain all of the terms and conditions agreed upon, it being understood that there are no outside representations or oral agreements. Any and all prior discussions, correspondence, oral agreements or representations of any kind are hereby superseded in their entirety and are of no further force or effect. This Agreement may not be amended, modified or altered except by a writing signed by both parties.

13. Notices. All notices, requests, consents and other communications required or permitted under this Agreement shall be in writing (including telex, telegraphic and facsimile [fax] communication on weekdays between 9:00 a.m. and 5:00 p.m., at destination) and shall be (as elected by the person giving such notice) delivered, telecommunicated, faxed or mailed by registered or certified mail (postage prepaid), return receipt requested, addressed to:

As to Seller: c/o Executor of the Estate of Robert Stone

 Fax No.: (_____) _____ -

As to Buyer: Miller Development Co., Ltd.

 Fax No.: (_____) _____ -

14. Broker's Commission. The parties represent each to the other that Green Real Estate Group ("Broker") is the only broker either has dealt with in connection with this Agreement. Seller agrees to indemnify Buyer and hold Buyer harmless from and against any brokerage commission due Green Real Estate Group with respect to the purchase of the Property by Buyer, and, by its execution of this Agreement, Broker hereby agrees to look solely to Seller for any such brokerage commission from this transaction in accordance with separate agreement between Seller and Broker. Buyer and Seller each further agree to indemnify the other from and against all loss, cost, damage or expense arising out of or resulting from any act or acts of the indemnifying party which gives rise to any claim of any broker or agent other than Broker in connection with this transaction.

15. Escrow. This Agreement shall serve as escrow instructions and the Escrow Agent may attach hereto its standard form of acceptance of escrow instructions; provided, however, that in the event of any inconsistency between this Agreement and the Escrow Agent's form of acceptance, this Agreement shall govern. Upon the execution hereof, a fully executed copy of this Agreement shall be delivered to the Escrow Agent.

16. Conditions to Buyer's Obligations. Buyer's obligations under this Agreement are expressly conditioned upon the completion, occurrence or satisfaction of the following matters, and Buyer shall have no obligation under this

Agreement unless and until such conditions have been satisfied or waived by Buyer:

(a) The Title Company shall be in a position to issue the Title Policy to Buyer on the Closing Date in accordance with Section 5 hereof.

(b) All warranties and representations of the Seller shall be true and correct on the Closing Date, and shall survive the "Closing."

(c) The Seller shall have delivered all other items required by this Agreement to be delivered by it and shall have performed each and every term, covenant and condition required of it under this Agreement.

If all of the conditions of this Section 16 have not been satisfied or waived in writing by Buyer on or before the Closing Date, this Closing Date shall be delayed until Seller shall satisfy such conditions, not to exceed a delay of thirty (30) days.

17. Binding Effect. This entire Agreement shall be binding upon and inure to the benefit of the parties hereto and their respective successors and assigns. Buyer shall have the right to hereafter designate a nominee or nominees to take title to the Property, provided, however, any such nominee(s) shall assume, in writing, Buyer's obligations hereunder and thereupon Buyer shall be released therefrom.

18. Agreement for Further Execution. Prior to, at and after the Closing Date, Seller and Buyer shall execute and deliver to the Escrow Agent, Seller or Buyer (or Buyer's nominee), as the case may be, such other further instruments of conveyance, sale, assignment or transfer, and shall take or cause to be taken such other or further action that shall be reasonably requested at any time or from time to time in order to: (a) vest, confirm or evidence in Buyer title to all or part of the Property; or (b) effectuate, in any other manner, the terms and conditions of this Agreement.

19. Survival of Warranties, Etc. The warranties, representations and agreements contained in this Agreement shall survive the acceptance and recording of the Deed and shall not be merged therein.

20. Counterpart Copies. This Agreement may be executed in multiple counterparts, each of which shall be deemed an original and all of which together shall constitute one agreement, and the signature of any party to any counterpart shall be deemed to be a signature to, and may be appended to, any other counterpart.

21. Fax Signatures. The parties agree that this Agreement may be transmitted between them by facsimile machine. The parties intend that faxed signatures constitute original signatures and that a faxed Agreement containing the signatures (original or faxed) of all of the parties is binding on the parties.

This Agreement is executed the _____[day] day of _____[month],
_____ [year].

BUYER:

MILLER DEVELOPMENT CO., LTD.

By: _____

[insert name and title]

SELLER:

Executor of the Estate of Robert Stone

The undersigned hereby agrees to Section 14 of this Agreement:

BROKER:

GREEN REAL ESTATE GROUP

By: _____

[insert name and title]

The undersigned hereby agrees to the terms hereof as they relate to the rights and obligations of the Escrow Agent:

ESCROW AGENT:

CITY TITLE COMPANY

By: _____

[insert name and title]

EXHIBIT A TO PURCHASE AGREEMENT
LEGAL DESCRIPTION

TO BE ATTACHED

EXHIBIT B TO PURCHASE AGREEMENT
SURVEY

TO BE ATTACHED

EXHIBIT C TO PURCHASE AGREEMENT
DRAWING OF THE PROPERTY

TO BE ATTACHED



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Chapter 22 DEVELOPMENT AND SUBDIVISION

Part IV. FORMS

D. COMMERCIAL DEVELOPMENT Shopping Centers, Industrial Buildings and Office Buildings

26-22 Current Legal Forms for Real Estate FORM 22.72

FORM 22.72 Sale of land for office and warehouse facility after construction of the improvements by seller's general contractor

COMMENT

This form is for the sale of land to be used for an office and warehouse facility. The land and improvements are to be conveyed to the buyer after the seller has the office and warehouse facility constructed by a general contractor, to be hired by seller. In other words, it is a turnkey project meaning that the seller will cause the entire project to be built before it is conveyed. The land is being sold at an agreed upon price, and the improvements are to be sold on a cost plus basis with an upset or not to exceed price applicable to the improvements.

The only twist from the buyer's point of view is that the land and improvements built thereon will be owned by separate but related entities. The reason for this is because the owner of the land intends to enter into a long-term ground lease of the land with the entity which will own the improvements, and will collect a ground rent commensurate with the cost and value of the land. The owner of the improvements, which is an operating business, will be able to deduct the ground rent as a business expense and will be able to depreciate the cost of improvements as a business expense because it is the owner of those improvements during the term of the ground lease.

FORM

THIS PURCHASE AGREEMENT, entered into by and among SHANAFELT DEVELOPMENT COMPANY ("Seller"), and ABC LAND PARTNERS, LTD., a limited liability company, and ABC BUILDING COMPANY, LTD., a limited liability company (collectively, "Buyer").

WITNESSETH THAT:

Seller and Buyer have agreed, and by these presents do agree, as follows:

1. Seller agrees to sell and convey to Buyer or nominee, and Buyer agrees to purchase from Seller, for the purchase price and upon the terms and conditions hereinafter set forth, a parcel of land, containing approximately 4.12 acres, located on Buchtel Road, Akron, Ohio, together with the improvements to be constructed thereon, as herein provided, and tentatively to be known as 7400 Buchtel Road, together with all easements, rights and appurtenances thereunto appertaining. The land is more fully described in Exhibit A, attached hereto and made a part hereof, and the land and improvements to be constructed thereon are hereinafter collectively referred to as "Premises." The parties hereto acknowledge and agree that the two entities constituting Buyer are acquiring the land and the improvements separately, and that ABC LAND PARTNERS, LTD. shall become the owner of the land and ABC BUILDING COMPANY, LTD. shall become the owner of the improvements to be constructed thereon.

2. The Seller agrees to construct or cause to be constructed on the land described on Exhibit A at Seller's cost and expense, an office and warehouse facility, with site improvements, in strict accordance with certain drawings and specifications initialed by both Seller and Buyer and identified on Exhibit B, attached hereto and made a part hereof. The office and warehouse facility shall be designed to meet the requirements to be certified as LEED Certified as set by the U.S. Green Building Council. Seller shall take all necessary steps to apply for such certification. Certified Any changes in the construction work planned and specified, as hereinbefore mentioned, shall be made only by written agreement signed by both parties, specifying the addition to or subtraction from the purchase price occasioned by each change. With respect to those matters that shall be considered as additions to the construction work, the Seller covenants and agrees that Seller will perform such additions on the basis of their contractor's hard costs for such additions, as hereinafter defined, plus fifteen percent (15%). Such additions to the purchase price shall be paid upon the closing date set forth below. Seller agrees as follows with respect to construction of the aforementioned improvements:

A. Seller shall commence construction of the improvements not later than the execution date of this Agreement and shall thereafter diligently and in good faith prosecute such construction so that the same shall be completed on or before _____ [date]; provided, however, that said contemplated completion date shall be extended by such time as shall be occasioned by delays due to any act or neglect of Buyer or Buyer's agents and nominees, by changes ordered in the plans and specifications in writing, or by strike, public authority or lockout, fire or other casualty, material shortages, or any other cause beyond the control of Seller. The parties hereto agree that time is of the essence in the performance of this Agreement.

B. Seller shall cause all work in connection with construction of the improvements to be completed in accordance with all local ordinances, building codes, statutes and regulations of proper public authorities bearing on the construction of the improvements. If any of the construction work required herein is at variance with any applicable governmental laws, rules and regulations, Seller shall promptly notify Buyer in writing and any necessary changes shall be adjusted by proper change orders as hereinabove provided.

C. All materials and supplies used in connection with construction of the improvements shall be new and both workmanship and materials shall be of good quality.

D. Seller shall, upon discovery that any work in connection with construction of the improvements fails to conform to the requirements of this Agreement, correct the same without delay at Seller's cost and expense.

E. If within one (1) year after the date of final payment of the purchase price herein specified, any of the construction work to be performed hereunder is found to be defective or not in accordance with the plans and specifications hereinabove specified in Paragraph I. (or proper change orders with respect thereto), or if a defect is found with respect to work covered by guaranty or warranty not assignable to Buyer within such longer period of time as may be

prescribed by the terms of said guaranty or warranty obtained by the Seller from the general contractor or the subcontractors or suppliers of the general contractor, the Seller shall correct, or cause to be corrected, such situation promptly after receiving written notice from the Buyer specifying the nature of such defect. The Buyer agrees that it shall give such notice promptly after discovery of any such condition. Seller shall within a reasonable time after receipt of written notice thereof make good any defects in materials or workmanship which may develop during said one (1) year period and any damage to other work caused by the repairing of such defect at Seller's own expense and without cost to the Buyer. Seller shall assign to Buyer any and all warranties or guaranties of workmanship and/or materials that are assignable relating to the work to be performed hereunder.

F. Seller shall allow Buyer, and Buyer's duly authorized agents, at all reasonable times during construction of the improvements, (i) the right of entry and free access to the improvements, (ii) the right to inspect all work done, labor performed and materials furnished in and about the improvements, and (iii) the right to inspect all books, contracts and records of Seller's general contractor insofar as they relate to the construction of the improvements upon substantial completion of the improvement prior to and as a condition precedent to the closing of the transaction. Buyer agrees not to interfere with or in any way hamper Seller's general contractor's business or performance under this Agreement in the pursuance of the provisions of this subparagraph.

G. Seller shall purchase and maintain during construction of the improvements property insurance insuring the improvements under construction including any materials stored on the site or elsewhere, to the full insurable value thereof, against the perils of fire, extended coverage, vandalism and malicious mischief. Upon construction of the improvements being completed in accordance with the requirements of this Agreement, and prior to transfer of title to Buyer, Seller shall purchase and maintain property insurance on the improvements against loss or damage by fire and other perils normally included within extended coverage insurance policies, in an amount not less than the full replacement value of the improvements. Buyer shall be named as an additional insured under said insurance policies as its interest may appear. Certificates of such insurance shall be delivered to Buyer by Seller. In addition to the amounts payable by Buyer to Seller pursuant to Paragraph 4, hereof, Buyer shall reimburse Seller for the cost incurred to obtain such insurance, upon substantial completion of the construction work required herein.

H. Seller shall arrange the construction financing necessary by reason of this Agreement. In addition to the amounts payable by Buyer to Seller pursuant to Paragraph 4, hereof, all costs incurred in connection with such construction financing shall be paid by Buyer to Seller in addition to the purchase price set forth below, upon substantial completion of the construction work required herein. Seller agrees that concurrent with the construction loan draws to submit to Buyer for Buyer's review during the period of construction copies of the construction loan draw requests. Seller shall also assist Buyer in arranging permanent financing upon the request of Buyer, at no additional cost to Buyer from Seller.

I. Seller shall secure all permits, governmental fees and licenses necessary for the proper execution and completion of the construction work required herein. The cost of said permits, governmental fees and licenses shall be paid by Buyer to Seller in addition to the amounts set forth in Paragraph 4, below, upon substantial completion of the construction required herein.

J. At Buyer's request, Seller shall cause Seller's general contractor to obtain bonds satisfactory to Buyer covering the faithful performance of the construction work required herein. In such event, however, in addition to the amounts payable by Buyer to Seller pursuant to Paragraph 4, hereof, Buyer shall reimburse Seller for the costs of any such bonds within thirty (30) days of submission to the Buyer by Seller of the receipt evidencing payment therefore or upon substantial completion of the construction required herein, whichever shall first occur.

K. Upon substantial completion of the construction work required herein, and prior to the closing date of this Agreement, Seller agrees to submit to Buyer mechanic's lien affidavits from Seller's general contractor and the subcontractors and materialmen of the general contractor, for the purpose of satisfying Buyer that there will be no

mechanic's liens filed.

If the Seller should be adjudged a bankrupt, or if Seller should make a general assignment for the benefit of creditors of Seller, or if a receiver should be appointed on account of insolvency of Seller, or if Seller should persistently or repeatedly refuse or should fail, except in cases for which extension of time is provided or for reasons beyond the control of Seller, to supply enough properly skilled workmen or proper materials, should fail to make payment to Seller's general contractor, or persistently disregard laws, ordinances, or otherwise be guilty of a substantial violation of any provision of the Agreement, then the Buyer may, upon giving the Seller ten (10) days prior written notice, terminate this Agreement and prosecute any and all rights and claims of Buyer, including without limitation, the right of specific performance, accruing by law or equity.

3. A. The purchase price for the land to be paid by ABC LAND PARTNERS, LTD., to Seller shall be One Hundred Twenty Thousand Dollars (\$120,000), payable as follows:

(i)	Earnest money deposit, receipt of which is hereby acknowledged.	\$10,000.00
(ii)	Balance to be paid at closing dated as hereinafter defined.	110,000.00
	Total	\$120,000.00

B. The purchase price for the improvements being constructed as required herein to be paid by ABC BUILDING COMPANY, LTD., to Seller shall be the sum of the hard costs incurred by Seller's general contractor, as hereinafter defined, plus fifteen percent (15%) thereof, plus Twenty Thousand Dollars (\$20,000) for supervision, plus Five Thousand Dollars (\$5,000) for landscaping, but in no event shall the purchase price for the improvements being constructed exceed the sum of Five Hundred Fifty-Five Thousand Dollars (\$550,000) (which sum includes the said Twenty Thousand Dollars (\$20,000) for supervision and Five Thousand Dollars (\$5,000) allowance for landscaping), hereinafter referred to as the "upset price." In the event the total of the hard costs, plus fifteen percent (15%) thereof, plus supervision and landscaping allowance, is less than the upset price, the amount payable by Buyer for the aforesaid improvements shall be the upset price less an amount equal to sixty percent (60%) of the difference between (i) the sum of the hard costs, plus fifteen percent (15%) thereof, plus supervision and landscaping allowance, and (ii) the upset price. The maximum cost to the Buyer for said improvements is guaranteed not to exceed the sum of Five Hundred Fifty-Five Thousand Dollars (\$550,000.00) and Seller agrees to complete construction of the improvements in accordance with the provisions of this Agreement for such amount.

The hard costs of Seller's general contractor are hereby defined to include all costs incurred by Seller for:

- (i) direct labor and materials incorporated in the contract work;
- (ii) subcontracts performed by other contractors or materialmen in the contract work;
- (iii) engineering services;
- (iv) all work performed by the Seller's general contractor's employees and/or material supplied when said work is done in lieu of subcontracts and/or outside materials; provided, however, that there shall not be included in such hard cost any cost for supervision of construction or allowance for landscaping, which amounts shall be separately accounted for by Seller to Buyer; and
- (v) the cost of contributions, assessments, or taxes paid for unemployment compensation, workmen's compensation, and

social security, insofar as the same are based on wages, salaries or other remuneration paid to employees of the general contractor;

(vi) rental charges of all necessary machinery and equipment, exclusive of hand tools, used at the site of the construction work, including installation, minor repairs and replacements, dismantling, removal, transportation and delivery costs thereof, at rental charges consistent with those prevailing in the area;

(vii) sales, use or similar taxes related to the construction work for which the general contractor is liable, imposed by any governmental authority;

(viii) the cost of removal of all debris; and

(ix) other cash disbursements made or required to be made by Seller's general contractor in order to perform the contract work, exclusive of those with respect to which there is provision for direct reimbursement to Seller by Buyer as otherwise provided in this Agreement.

4. Seller shall convey the land to Buyer, ABC LAND PARTNERS, LTD., by general warranty deed in recordable form satisfactory to Buyer, good marketable title to the land in fee simple, free and clear of all defects, liens, encroachments, and encumbrances, except, general taxes and assessments, both general and special, which are due but not yet payable, and building and zoning ordinances existing upon the premises.

Seller shall convey the improvements to Buyer, ABC BUILDING COMPANY, LTD., by bill of sale in form satisfactory to Buyer, to evidence its ownership of the improvements.

5. Seller shall pay all delinquent taxes, penalties and interest applicable to the land being conveyed. Buyer shall receive a credit against the purchase price for all unpaid real estate taxes and assessments, both general and special, for years prior to the closing, and a portion of such unpaid taxes for the year of closing, prorated through the date of closing. The proration of undetermined taxes shall be based on the value of the land without any improvements constructed pursuant hereto on a 365-day year and on the last available duplicate showing the tax rate and valuation, and the amounts so computed and adjusted shall be final. Until closing date, taxes shall be paid as they become due by Seller. If any split tax bills are required, Buyer's credit as provided herein shall be estimated on a per-acre basis, and funds due the Seller shall be held in escrow pending receipt of the actual split tax bill issued by the County Auditor, at which time the proration shall be completed using said split tax bill.

6. At closing, Seller shall provide to Buyer a Title Insurance Policy issued by Beta Title Insurance Company ("title company") with mortgage protection, if required, in the full amount of the Buyer's costs pursuant to this contract, insuring marketable title as specified in Paragraph 5, above.

7. Save and except as provided in Paragraph 9, hereof, closing shall be on a date not more than thirty (30) days after the improvements required hereunder have been substantially completed, at a closing date mutually agreeable to the parties. Seller shall notify Buyer at such time as they deem the Premises to be substantially completed and if same is then acceptable to Buyer, an escrow shall be opened at Beta Title Insurance Company or at Buyer's lending institution, at Buyer's election within ten (10) days after such notice, and the same shall act as escrow agent for this transaction. If there is any dispute as to whether the Premises are substantially completed and acceptable to Buyer, occupancy of the Premises by the Buyer or the issuance of a conditional certificate of occupancy by the City of Akron permitting Buyer to occupy the Premises shall be deemed to be conclusive that the Premises are substantially completed and acceptable to Buyer. Prior to occupancy of the Premises, Buyer may advise Seller of certain items which it deems incomplete and which items shall be completed as soon as practicable after the closing by Seller. An executed counterpart of this Agreement shall be deposited with the escrow agent, and this Agreement shall act as the escrow instructions for said escrow agent. The escrow agent may attach its standard conditions of escrow, but in cases where they are inconsistent

herewith, this Agreement shall control.

All funds due and payable by Buyer to Seller pursuant hereto and not paid by Buyer to Seller pursuant to Paragraph 2, hereof, shall be deposited in escrow by Buyer on or before the closing date.

8. If on the closing date, title to all or part of the real estate to be conveyed hereunder is subject to any liens, encumbrances, easements, conditions or restrictions other than those set forth in Paragraph 5, above, or in the event of any encroachment, Seller shall have a reasonable time, not to exceed thirty (30) days after written notice thereof within which to remedy or remove any such defect, lien, encumbrance, easement, condition, restriction, or encroachment, or obtain title insurance against the same. If Seller is unable to cure or eliminate such objections or defects within said 30-day period, then Buyer may, by written notice to Seller and the escrow agent, either (i) terminate this Agreement whereupon this Agreement shall be null and void and the obligations of the parties hereunder shall cease, except that Seller shall be charged with all title fees, (ii) waive such objections or defects, or (iii) extend the time for curing or eliminating such objections or defects for an additional period not to exceed sixty (60) days. In the event (iii) is elected, then at the end of the 60-day period, if Seller has been unable to cure or remove said defects or obligations, Buyer will, by notice to Seller, either elect to terminate the within Agreement as provided in option (i) or waive the designated objections or defects as provided in option (ii). The closing date shall be postponed to a date five (5) days after resolution of title problems as set forth in this paragraph.

9. Possession of the premises shall transfer from Seller to Buyer as of the closing date in "broom clean" condition. Notwithstanding the foregoing, Buyer shall have the right at such time as the warehouse facilities are substantially completed to enter the premises for purposes of erecting and assembling shelves and accessories, and Buyer agrees that it shall be solely responsible for and agrees to save Seller harmless from any and all claims or damages resulting to Buyer's property occasioned by such early use and entry of the warehouse facilities. Buyer agrees not to interfere with or in any reasonable way hamper Seller's general contractor in the performances of its responsibilities for the timely completion of the construction of the improvements.

10. Seller shall be charged with and pay out of the funds due Seller any and all costs of: the conveyance fee required by law applicable to the value attributable to the land and improvements, the title search, the cost of a title insurance policy in the amount of the total costs of land and improvements paid by Buyer hereunder, the full amount of the proration of taxes and assessments, both general and special, and any delinquent taxes and assessments. Buyer shall be obligated to pay for the cost of filing the deed for record. Each of Seller and Buyer shall pay one half (1/2) of the escrow fee.

11. A. In the event that the premises, or such part of them as would necessitate a substantial alteration of the building plans referred to hereinabove, or make it economically unfeasible for Buyer to have constructed the improvements required hereunder, are taken for public or quasi-public purposes by the government of the United States, State of Ohio, or any government or power whatsoever, or by any corporation by the right of eminent domain, or be condemned by any court, state, city, county or governmental authority or office, department or bureau of any city, state or the United States, prior to transfer of record title, Buyer shall have the option of accepting any and all proceeds from any award or damages or otherwise and completing the purchase and sale without a reduction in the purchase price, or of withdrawing from this Agreement in which case all proceeds and any award or damages or otherwise shall belong to Seller and Buyer agrees to neither interfere with the claim made by Seller nor to make any claim itself. Buyer's exercise of the option to accept proceeds and complete the purchase or withdraw from the Agreement as provided in this paragraph shall be made in writing and delivered to Seller within ten (10) days after notice to Buyer of the appropriation. If Buyer fails to so notify Seller within said ten day period, Buyer shall be deemed to have withdrawn from the Agreement. In the event that Buyer withdraws from the Agreement as provided for in this paragraph, Buyer shall be without further liability to Seller and Seller shall pay all title costs incurred to such date.

B. In the event that any damage or destruction shall occur to the improvements being constructed at any time (whether during construction or after construction shall have been completed) prior to the Deed conveying title to the premises to

Buyer being filed for record with the County Recorder, Seller shall repair or reconstruct the improvements to the same condition as existed prior to the occurrence of such damage or destruction. Seller agrees that, upon the occurrence of any such damage or destruction, Seller shall promptly commence and diligently prosecute the repair or reconstruction thereof so that the same shall be completed as soon as reasonably possible. The closing date shall be postponed a sufficient period of time to permit Seller to complete the repair or reconstruction of the improvements in the manner contemplated by this paragraph.

12. All warranties, representations, covenants and options herein contained shall survive the closing, and if said deed and this Agreement are inconsistent, the provisions of this Agreement shall control.

13. This Agreement contains the entire understanding between the parties hereto and shall be governed by the laws of the State of Ohio.

14. Seller and Buyer warrant that no real estate broker has been involved in this transaction except for Simon Brokerage Company, whose commission shall be paid entirely by Seller outside of escrow, if and when this Agreement is consummated.

15. Any notices given or to be given by the parties must be in writing and delivered or mailed by United States mail, certified with return receipt requested, and addressed as follows:

If to the Seller: Shanafelt Development Company

If to the Buyer: ABC Land Partners, Ltd.

ABC Building Company, Ltd.

or addressed to such other address as the other party shall be notified in accordance with the terms of this paragraph.

16. Any disagreement arising out of this Agreement or from the breach thereof which relates to the construction of the improvements referred to herein shall be submitted to arbitration. Judgment upon the award rendered may be entered in any state or federal court having jurisdiction. It is mutually agreed that the decision of the arbitrators shall be a condition precedent to any right of legal action that either party may have against the other. The arbitration shall be held under the standard form of construction arbitration procedure of the American Arbitration Association of Akron, Ohio.

17. This Agreement and any rights hereunder, except as otherwise provided herein, shall not be assigned without the prior written consent of the other party.

Seller and Buyer have executed this Agreement as of the day and year first shown below.

SELLER:

Shanafelt Development Company

By: _____

[insert name and title]

BUYER:

ABC Land Partners, Ltd.

By: _____

[insert name and title]

ABC Building Company, Ltd.

By: _____

[insert name and title]

[Attach Exhibit A]

[Attach Exhibit B]



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Chapter 22 DEVELOPMENT AND SUBDIVISION

Part IV. FORMS

D. COMMERCIAL DEVELOPMENT Shopping Centers, Industrial Buildings and Office Buildings

26-22 Current Legal Forms for Real Estate FORM 22.73

FORM 22.73 Restrictions on use and appearance of buildings in office park

COMMENT

Like the developer of a residential real estate project, the developer of a commercial project--such as an office park or industrial park--routinely files covenants and restrictions before the sale of the first building within the development. One common reason for filing such covenants and restrictions is to regulate the future use and appearance of the buildings by owners and tenants. In this way, the value of the individual buildings--and the development as a whole--can be maintained.

The developer in the form below clearly wants to maintain a particular "look" for its development. For example, the developer has required the use of red-brick exteriors and gray-tinted windows only. Buildings may not exceed ten stories in height, and there are strict rules limiting the number, size and content of signs that may appear on buildings. Indeed, all signs are subject to prior approval by the developer.

The developer also wants to maintain a very neat, orderly atmosphere throughout the office park. Accordingly, smokers are prohibited from smoking both inside the buildings and anyplace on the grounds where they can be spotted from the street. Building owners must erect "shelters" located behind their buildings where smokers can have a cigarette.

In addition, parked cars must also be kept out of sight. All parking areas must be screened by natural plantings--such as trees and shrubbery--so that cars are not readily visible from roadways. The grounds surrounding each building must be fully landscaped with a lawn and either hardwood or flowering trees.

Specific types of uses of the buildings are clearly prohibited in order to maintain the atmosphere

of an office complex. For example, the following types of businesses, among others, are expressly banned from the development:

- (1) manufacturing businesses;**
- (2) retail restaurants, bars and grills;**
- (3) retail sales businesses;**
- (4) mobile food vendors;**
- (5) operators of X-ray and magnetic resonance imaging (MRI) equipment; and**
- (6) laboratories of any kind, including chemical, medical, etc.**

Finally, the environmental concerns of the developer are addressed as well. For instance, no toxic or hazardous substances may be used, stored or disposed of on the premises. Nor may waste water be dumped onto the grounds. Instead, it must be disposed of through sewers.

FORM

DECLARATION OF RESTRICTIONS

by _____ [*insert developer's name*], INC.

WHEREAS, _____ [*insert developer's name*], INC. is the owner of a certain tract of land commonly known as _____ [*insert name of office park*] Office Complex, which land is more particularly described in Schedule A, which is annexed hereto and made a part hereof; and

WHEREAS, the said tract of land has received subdivision approval for sale of lots for use as office buildings; and

WHEREAS, _____ [*insert developer's name*], INC., desires to subject the land described in Schedule A to certain covenants and restrictions,

NOW, _____ [*insert developer's name*], INC. hereby declares that the tract of land described in Schedule A shall be conveyed subject to the following restrictions, covenants and conditions:

1. *Hazardous and toxic substances prohibited.* The storage, use or disposal of any hazardous or toxic substance on any lot herein shall be strictly prohibited.
2. *Equipment, materials and supplies used in purchaser's business.* All equipment, materials and supplies used in the operation of purchaser's business shall be stored in secure enclosures, so as not to be visible from roadways and so as not to be hazardous to the public. Notwithstanding the foregoing, picnic tables may be placed on the lawn areas for use by owners and their employees. All trash receptacles in the picnic area shall be covered and screened.
3. *Animals prohibited on premises.* No animals, except guide dogs, shall be permitted in any of the buildings or on the grounds. The preceding sentence shall not be interpreted as requiring owners to remove any wild animals from the grounds unless they pose a present danger to the public.

4. *Parking.* Each building shall be constructed with adequate parking. Owners shall be required to provide a minimum of _____[e.g., fifteen (15)] parking spaces in excess of the amount required by the zoning law in effect at the time of construction.

All parking areas shall be screened by trees and shrubbery, so that cars are not readily visible from the roadways.

All parking areas shall be supervised during regular business hours, in order to provide for the safety of users.

5. *Grounds must be landscaped.* The grounds surrounding each building shall be fully landscaped and include a lawn and at least _____[e.g., six (6)] mature hardwood or flowering trees per acre or part thereof.

6. *Signs on buildings.* Each building shall be entitled to one (1) sign, measuring no more than _____[insert number] feet by _____[insert number] feet and advertising the name and business of the owner or occupant. In addition, each building may have one (1) sign, measuring no more than _____[insert number] feet by _____[insert number] feet and setting forth the building's number. All signs shall be subject to prior written approval by _____[insert developer's name], INC., in order to maintain uniformity and aesthetic quality. No other signs of any nature shall be erected.

7. *Smoking.* There shall be no smoking in any building constructed on the land described in Schedule A. Each owner shall be required to provide a shelter for smoking behind the building. The shelter shall be regularly cleaned. Smoking shall only take place in the shelter.

8. *Building maintenance.* All buildings shall be maintained in a first-class manner. Public areas shall be cleaned daily. Public areas shall be repainted as needed, but no less often than annually.

9. *Discharge of waste water.* Owners shall not permit the discharge of used water outside of the buildings, except through municipally-approved sewers.

10. *Height of buildings.* No building shall exceed _____[e.g., ten (10)] stories in height. Basements and sub-basements shall not be counted as stories.

11. *Exterior design of buildings.* All buildings shall have red-brick exteriors with gray-tinted windows.

12. *Areas where parking is banned.* There shall be no parking permitted on roadways or in front of buildings. Notwithstanding the foregoing, a maximum of _____[e.g., five (5)] spaces for the handicapped may be placed near a doorway that is accessible by the handicapped, provided that the spaces are adequately screened with greenery. _____[insert developer's name], INC., in its sole discretion, shall determine whether screening is adequate.

13. *Trash receptacles.* Trash receptacles for ordinary waste and recyclables shall be maintained in a locked storage shed. They shall not be permitted to constitute a nuisance or danger to neighboring properties or users.

14. *Manufacturing prohibited.* No manufacturing or fabricating of any kind shall be performed in any lot listed in Schedule A.

15. *No laboratories permitted.* No laboratories may be housed in any building constructed on any lot described in Schedule A.

16. *Certain medical equipment prohibited.* X-ray and magnetic resonance imaging (MRI) machinery are prohibited from use on the premises described in Schedule A.

17. *No eating or drinking establishments allowed.* No retail restaurant, bar or grill may be located on the premises. However, the owners may provide one cafeteria per building for the use of employees only.

18. *No mobile food vendors allowed.* No owner shall permit mobile food vendors to stop or park along roadways, curbs or sidewalks in the _____[insert name of office park] Office Complex.

19. *Gambling prohibited.* No gambling, gaming or betting parlors shall be permitted in any building constructed in the _____[insert name of office park] Office Complex.

20. *Retail sales businesses prohibited.* No retail sales businesses shall be located in the _____[insert name of office park] Office Complex.

21. *Restrictions to run with land.* All restrictions, conditions and covenants herein shall run with the land and continue as such for _____[e.g., twenty (20)] years from the date hereof. They shall be extended from that time automatically for successive periods of _____[e.g., twenty (20)] years, unless the owners of _____[e.g., ninety (90)] percent of the lots shown on Schedule A shall covenant to alter, modify or eliminate any or all of these restrictions.

22. *Enforcement, waiver and binding effect of restrictions.* The provisions herein contained shall bind and be to the benefit of, and be enforceable at law and in equity by, _____[insert developer's name], INC., its successors and assigns, or by the grantee of any lot described in Schedule A. Failure by _____[insert developer's name], INC., its successors and assigns, or any grantee to enforce any of the restrictions, conditions and covenants herein contained shall in no event be deemed a waiver of the right to do so thereafter, and shall not subject _____[insert developer's name], INC., to any liability for failure to enforce.

_____ [insert developer's name], INC.

By: _____

[insert name and title]

[Attach Schedule A]



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Chapter 22 DEVELOPMENT AND SUBDIVISION

Part IV. FORMS

D. COMMERCIAL DEVELOPMENT Shopping Centers, Industrial Buildings and Office Buildings

26-22 Current Legal Forms for Real Estate FORM 22.74

FORM 22.74 Statement of restrictions--industrial property

COMMENT

This set of restrictions has been prepared for use in a development designed for industrial purposes. It therefore covers items as construction materials, loading docks, storage yards, parking areas, building-site ratios, and the obligation to maintain each site in a clean and safe condition. There is also a provision requiring all plans and specifications to be approved by a planning advisory board. The purchaser of a lot is obligated to begin permanent construction within a specified time. Otherwise, the developer may return the purchase price and rescind the purchase contract.

FORM

Deed Restrictions
Central Industrial District

State of Texas)
)
County of Tarrant)

Know All Men By These Presents that Central Realty Corporation, a Texas corporation, having its principal place of business in the City of Dallas, State of Texas, herein the Corporation, owner of 200 acres of land lying within the corporate limits of the City of Arlington, Tarrant County, Texas, all of the land being the Central Industrial District, and more particularly described in a certain plat, to wit: "Plat of Central Industrial District, an Addition to the City of Arlington, Texas" the plat being recorded in Volume 600, page 10 of the Plat Records of Tarrant County, Texas,

reference to the plat being made for a metes and bounds description of the land and for all other purposes, by this instrument adopts and places the following restrictions upon any and all sites and lots within the Central Industrial District.

1. *Construction materials.* The exterior walls of all buildings shall be of masonry construction, its equivalent, or better. The use of materials shall be subject to the approval of the Planning Advisory Board of the Corporation.

2. *Prohibited uses.* No site or lot shall be used for any purpose or business which is considered dangerous or unsafe, or which constitutes a nuisance, or is noxious or offensive by reason of emission of dust, odor, gas, smoke, fumes, or noise.

3. *Loading docks.* No loading dock shall be constructed facing on any public street or highway unless the loading dock and every part of it is at least 100 feet inside the right-of-way line of the street or highway on which the loading dock fronts.

4. *Storage yards.* Outdoor storage yards shall be screened from public view and shall be placed so as to conform with the building line restrictions.

5. *Parking.* Owners of lots shall not permit their employees or tenants to regularly park during business hours on public streets within the Central Industrial District. It will be the responsibility of the owners, their successors, assigns, or other persons holding under them to provide adequate off-street parking for employees and visitors within their property lines. All parking areas shall be covered with a hard, dust-free, paved surface.

6. *Building-site ratio.* The ratio of building coverage to the total site area will be subject to the approval of the Planning Advisory Board of the Corporation, but in no case may the ratio exceed 40 percent.

7. *Approval of plans.* Before commencing the construction or alteration of all buildings, enclosures, fences, loading docks, parking facilities, storage yards, or any other structures or permanent improvements on or to any site or lot within the Central Industrial District, the property owner shall first submit site plans or plans and specifications to the Planning Advisory Board of the Corporation for its written approval. The Planning Advisory Board of the Corporation shall be appointed by the Corporation and composed of an officer of the Corporation, a representative of the Architectural Consultants to the Corporation, and a representative of the property owners of lots within the Central Industrial District. The Board will be guided by the "C.I.D. Planning Standards," which will be kept on file at the offices of the Corporation. In the event that the Board, or its designated representative, shall fail to approve or disapprove the building plans, specifications, or site plans within 60 days after they have been submitted to the Board, the approval will not be required and this covenant will be deemed to have been complied with. Neither the members of the Board nor its designated representative shall be entitled to any compensation for services performed pursuant to this covenant.

8. *Setbacks.* No building shall be constructed on any lot nearer than 30 feet to the right-of-way line of streets. In the case of corner lots both 30-foot front setbacks will apply. There must be maintained a strip of 10 feet minimum of landscaped ground along and within the street property lines, exclusive of drives and walks. Minimum side yards shall be 25 feet and shall aggregate 50 feet on each individually owned lot, provided, however, that where suitable the 25-foot minimum may be waived by the Planning Advisory Board. In the event more than one lot is owned by one person or entity and in the improvement of the lot or tract a building shall be erected on more than one lot, then the side line restriction on the interior line or lines shall be waived. If a part of a tract or lot is sold before any improvement is erected, then the line between the part sold and the part retained shall be the property line to which this setback restriction applies.

9. *Condition of property.* The owner of any site or lot shall at all times keep the premises, buildings, improvements, and appurtenances in a safe, clean, wholesome condition and comply in all respects with all government, health, fire, and

police requirements and regulations; and the owner will remove at his or its own expense any rubbish of any character whatsoever which may accumulate on the site or lot. In the event the owner fails to comply with any or all of the specifications or requirements, then the Corporation shall have the right, privilege, and license to enter upon the premises and make any and all corrections or improvements that may be necessary to meet the standards and to charge the owner the expenses incurred in doing so.

10. *Construction period.* If, after the expiration of one year from the date of execution of a contract for the sale of any lot lying within the Central Industrial District, or after the expiration of one year from the date of completion of utilities, whichever is later, any purchaser shall not have begun in good faith the construction of a permanent building upon the acquired lot, the Corporation retains the option to rescind the contract, refund the purchase price, and enter into possession of the land. However, the Corporation, its successors or assigns, may extend in writing the time at which construction may be begun.

11. *Signs.* Plans and specifications for the construction, installation, or alteration of all outdoor signs shall be first submitted to and have the written approval of the Corporation, its successors or assigns.

12. *Partial invalidity.* The invalidation of any one of the restrictions in this instrument or the failure to enforce any of the restrictions at the time of its violation shall in no event affect any of the other restrictions nor be deemed a waiver of the right subsequently to enforce the unenforced restriction.

13. *Term and extensions.* Each condition and covenant in this instrument shall terminate and be of no further effect on _____[date]. However, at any time prior to _____[date], the then owners of a majority of the area in square feet within the Central Industrial District may by written declaration, signed, acknowledged by them, and duly recorded in the Deed Records of Tarrant County, Texas, extend the restrictions, conditions, and covenants for a period of ten additional years, and this right to extend for additional ten-year periods by the then owners shall exist as long as the owners of a majority of the area in square feet within the Central Industrial District affirmatively vote to so extend them.

14. *Beneficiaries.* These restrictions and covenants are made for the benefit of any and all persons who may now own, or who may hereafter own, property in the Central Industrial District. Such persons are specifically given the right to enforce these restrictions and covenants by injunction or other lawful procedure, and to recover damages resulting from any violation thereof.

Executed at Dallas, Texas, this _____[day] day of _____[month],
_____[year].

Central Realty Corporation

By: _____

[insert name and title]

[Acknowledgment]



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Current Legal Forms for Real Estate
Chapter 22 DEVELOPMENT AND SUBDIVISION
Part IV. FORMS
E. RESIDENTIAL DEVELOPMENT

26-22 Current Legal Forms for Real Estate FORM 22.75

FORM 22.75 Master declaration of covenants, conditions, easements and restrictions--residential golf community

COMMENT

In connection with the development of a residential community, the developer will usually file a plat or subdivision map which subdivides a large parcel into small parcels. The plat will typically show the location of each lot. It will also show easements, setback lines, common areas, etc. However, a developer will also want to place restrictions upon the subsequent purchasers of the lots to assure that the integrity of the development is maintained.

The typical homeowner declaration will contain some or all of the following restrictions:

- (1) limit the use of lots to residential;
- (2) place standards on the size of the house;
- (3) restrict type of house (i.e., no ranch homes or garages facing the street);
- (4) place standards on the type of construction material that may be utilized in connection with the construction of the house;
- (5) limit out buildings;
- (6) limit type of pets which an owner may keep;
- (7) restrict or limit the construction and/or use of fences or swimming pools, types of mail boxes,

etc. (i.e., no chain link fences or above ground pools);

(8) limit vehicle storage in the driveway (i.e., no mobile homes);

(9) specify a time period in which the house must be constructed;

(10) place limitations on landscaping (i.e., must use Kentucky Blue Grass sod in front yard), sod must be in place within a certain period after occupancy permit is issued;

(11) provide for maintenance assessments for common expenses and for liens, and enforcement procedures for failing to pay.

The developer can be as creative as he wants, provided he does not violate any applicable laws (i.e., equal protection). The declaration is typically recorded in the public office where land conveyances are recorded. As a result, all the parties dealing with a property within a development have constructive notice of the restrictions.

A typical declaration will include a provision that the developer is entitled to make reasonable changes to the declaration until a certain number of lots are sold.

The following form is a good example of a very detailed and comprehensive residential community. It is for a large golf community. The declaration imposes many restrictions upon the homeowners and allows the developer to add land to the development as phases are completed.

Further, this declaration is a "Master Declaration." That is, it provides for additional declarations to be imposed on various phases of the development. This declaration allows for a portion of the property to be developed as a condominium-type cluster homes. Prior to selling any units, the Master Declaration contemplated that additional condominium-type declarations and restrictions will be imposed.

Lastly, the developer maintains control until a certain number of lots are sold.

For additional forms relating to homeowners' associations and residential development, see Chapter 20, Real Estate Entities, in Volume 24, *supra*.

FORM

MASTER DECLARATION OF COVENANTS, CONDITIONS, EASEMENTS AND RESTRICTIONS OF GOLF MEADOW

_____ [city or township], _____ [county], _____ [state]

BEING DEVELOPED AND BUILT BY:

GOLF MEADOW DEVELOPMENT LIMITED PARTNERSHIP,
a(n) _____ [city] _____ [entity]

[address]

[telephone number]

MASTER DECLARATION OF COVENANTS, CONDITIONS
EASEMENTS AND RESTRICTIONS OF GOLF MEADOW,

("Master Declaration")

THIS MASTER DECLARATION made as of the _____[day] day of _____[month],
_____[year] by GOLF MEADOW DEVELOPMENT LIMITED PARTNERSHIP, a(n) _____[city]
_____[entity] (referred to herein as the "Declarant").

PREAMBLE

A. The Declarant is the owner of real property in _____[city or township],
_____[state], legally described in Exhibit "A" (the "Property"), and desires to create thereon a planned
community in accordance with the Master Site Plan (hereafter defined) and in accordance with the R4 Controlled
Density Residential Development with Sewer and Water under the requirements of the Zoning Resolution of
_____[city or township], _____[state].

B. The Property consists of Sublots, Common Green Space, Cluster Sublots and Cluster Common Areas, including
Green Space, all as hereafter defined.

C. The Property may be developed in whole or in part: (a) as one or more residential communities; (b) for open space
and/or recreational purposes; or (c) any combination of the foregoing.

D. The Declarant desires to provide for: (a) the orderly development of the Property; (b) the establishment and
maintenance of architectural and design controls and standards; (c) the preservation of Common Green Space (hereafter
defined) and Cluster Green Space (hereafter defined); (d) the use and maintenance of the Areas of Common
Responsibility (hereinafter defined); (e) the compliance with the zoning requirements of _____[city]
(the "Township") and the _____[county] County Subdivision Regulations; and (f) the protection of
values within the Property. The foregoing is being provided so that the residents of the Property may enjoy a fine
environment for themselves and their families. For such purposes, the Declarant has prepared this Master Declaration to
define the manner in which the Property shall be governed and administered.

E. A central association will be required to regulate, administer and govern the Property (including the ownership of
Common Green Space) for the fulfillment of the foregoing purposes with the power to levy and collect assessments
from Owners (hereafter defined) within the Property and to pay the cost and expense of operating, staining, repairing
and replacing the Areas of Common Responsibility. The Declarant has assigned such functions to Golf Meadow Master
Association, Inc., a corporation not-for-profit, that Declarant has caused to be created under the laws of the State of
_____[state] (the "Master Association"). In addition, Cluster Associations will be required to regulate,
administer and govern the Cluster Areas (hereafter defined) of the Property and to own and administer the Cluster
Common Areas (hereafter defined), including the Cluster Green Space (hereafter defined).

NOW, THEREFORE, Declarant declares the Property and any other property as may by Subsequent Amendment

(hereafter defined) be added to and subjected to this Master Declaration shall be owned, held, transferred, sold, conveyed, used and occupied subject to the covenants, conditions, restrictions, easements, assessments, charges and liens (collectively, the "Covenants and Restrictions") provided in this Master Declaration, which Covenants and Restrictions shall run with the land and shall be binding on and inure to the benefit of all Persons (hereafter defined) having any right, title or interest in or to any part of the Property, or any other property as may by Subsequent Amendment be added to and subjected to this Master Declaration and certain of which Covenants and Restrictions shall inure to the benefit of the Township (hereafter defined), their (such Persons' and the Township's) respective heirs, personal representatives, successors and assigns.

ARTICLE I

PREAMBLE; PROPERTY SUBJECT TO THIS DECLARATION;

DECLARANT'S RIGHT TO ADD AND DELETE LAND

Section 1.1 - Preamble

The Preamble is incorporated in and made a part of this Master Declaration.

Section 1.2 - Property

The Property which is and shall be owned, held, transferred, sold, used and occupied subject to this Master Declaration is the, real property described in Exhibit "A" and is shown on the plot plan attached as Exhibit "B."

Section 1.3 - Expansion and Contraction of the Property

(a) The Declarant reserves the right from time to time to add additional property to the Property and to subject the same to the provisions of this Master Declaration. To add any additional property, the Declarant shall execute and record a Subsequent Amendment to this Master Declaration which expressly provides that the land described therein shall become a part of the Property and shall be subject to the Covenants and Restrictions set forth in this Master Declaration, except as the same may be modified by the Subsequent Amendment.

(b) The Declarant reserves the right from time to time to delete lands from the Property and thereby to free such lands from the provisions of this Master Declaration. Lands not owned by Declarant may be deleted from the Property only with the written consent of the title owner thereof. To delete such lands, the Declarant shall execute and record a Subsequent Amendment to this Master Declaration which expressly provides that the land described therein shall no longer be a part of the Property and shall no longer be subject to the Covenants and Restrictions set forth in this Master Declaration. No deletion of lands from the Property shall occur unless both the portion(s) of the land deleted and the remaining Property comply with Township zoning requirements.

ARTICLE II

EXHIBIT AND DEFINITIONS

Section 2.1 - Exhibit

The following Exhibits are attached to and made a part of this Master Declaration:

EXHIBIT "A"--A legal description of the Property.

EXHIBIT "B"--A plot plan of the Property.

Section 2.2 - Definitions

For the purposes of brevity and clarity, certain words and terms used in this Master Declaration are defined as follows:

(a) "AREAS OF COMMON RESPONSIBILITY." The Areas of Common Responsibility shall mean and refer to: (i) the Common Areas, including Common Green Space, but excluding the Golf Course Property; (ii) the entrances to the Property situated off of existing and future public streets that abut the Property (the "Entrances") and landscaping, irrigation systems (if any), lighting and other improvements operated by the Master Association at the Entrances and elsewhere within the Property; (iii) any security facilities, including walls and fences; (iv) signs, street lights (if any) and walks or pathways (if any); (v) storm drainage that generally serves the Property; (vi) real and personal property owned by the Master Association; (vii) real and personal property not owned by the Master Association but determined by the Board to be the responsibility of the Master Association; (viii) together with those areas, if any, which by contract with any Neighborhood (hereafter defined) or Cluster Association (hereafter defined), the Golf Club (hereafter defined), with any commercial establishment or association, or with any local governmental authority become the responsibility of the Master Association; (ix) the berms around the Property; and (x) the Lake and the ponds within the Property and any boat ramp that may serve Owners residing within the Property and may serve Golf Club Members. Any portions of public rights-of-way within or adjacent to the Property (i.e., boulevard entrances and cul-de-sac islands) may be part of the Areas of Common Responsibility.

(b) "ASSESSMENTS." The Assessments levied against all Owners of Living Units, Vacant Sublots, Cluster Blocks and Vacant Cluster Sublots to fund Common Expenses. The Assessments payable for a Cluster Block shall be determined by the number of Cluster Sublots that may be created within the Cluster Block as stated on the Plat.

(c) "BUILDER." A Person acquiring title to a portion or all of the Property for the sole purpose of engaging in the business of improving the Property with Living Units for sale.

(d) "CLASS "B" CONTROL PERIOD." The period of time during which the Class "B" Member (the Declarant) is entitled to appoint a majority of the members of the Board, as provided in Article III, Section 2 of the Master Code.

(e) "CLUSTER AREA." A land development concept under the Township's Controlled Density Residential Development zoning classification whereby single-family detached dwellings are grouped closely together to allow for common open space.

(f) "CLUSTER ASSOCIATION." A non-profit _____[state] _____[entity] created to own, govern, operate, control and administer the Cluster Common Areas, including the Cluster Green Space. All Owners of Cluster Living Units shall be members of the Cluster Association. A Cluster Association shall not be dissolved nor shall it dispose of any Cluster Common Areas or Cluster Green Space or recreation facility without: (i) having established a successor entity to take over said property pursuant to the Township's zoning resolution; and (ii) the approval of the Township's trustees.

(g) "CLUSTER BLOCK." A Cluster Block shall mean, at any given time, any portion of the Property; (i) that is platted as a Cluster Block; (ii) that had not been subdivided into Cluster Sublots; and (iii) which has been conveyed to a person or entity other than the Declarant (i.e., a Builder). For the purpose of imposing Assessments, the number of Cluster Sublots that may be created within a Cluster Block as stated on a Plat are treated as Vacant Sublots (hereafter defined).

(h) "CLUSTER COMMON AREAS." All portions of a Cluster Area exclusive of Cluster Sublots. Cluster Common Areas include private drives off of dedicated streets to serve Cluster Living Units and Cluster Green Space.

(i) "CLUSTER GREEN SPACE." Land that is set aside in a Cluster Area for the primary use of Cluster Living Units pursuant to the Township's Controlled Density Residential Development zoning classification that is not utilized for Cluster Sublots and Cluster Roads.

(j) "CLUSTER LIVING UNITS." A single-family detached dwelling situated within a Cluster Sublot. Cluster Living Units are included in the definition of "Living Units" set forth herein.

(k) "CLUSTER OWNER." The Owner of a Cluster Living Unit. Unless the context clearly indicates to the contrary, the term "Owner" (hereafter defined) includes a Cluster Owner.

(l) "CLUSTER ROADS." Private roads within a Cluster Common Area serving the Living Units situated on the Cluster Sublots. The Cluster Roads are owned and administered by the Cluster Association.

(m) "CLUSTER SUBLOT." A platted lot within which a single-family detached dwelling may be constructed.

(n) "COMMON AREAS." All real property (including Common Green Space, but excluding Cluster Common Green Space) and personal property now or hereafter owned by the Master Association or otherwise held for the common use and enjoyment of the Owners or Occupants. Common Areas shall include the Entrances of the Property referred to in subparagraph (a) of this Section and those areas of land intended for the common use, benefit and enjoyment of all Occupants of the Property. Common Areas does not include the Golf Course Property, nor is the Golf Club governed by the provisions of this Master Declaration, except as specifically provided herein. Any Owner may delegate, in accordance with the Master Code and subject to reasonable rules, regulations, and limitations as may be adopted in accordance therewith, his or her right of enjoyment to the Common Areas and facilities to the members of his or her family, tenants, and social invitees and shall be deemed to have made a delegation of all such rights to the Occupants of any leased Living Unit. Common Areas does not mean or imply that the public at large acquires any easement of use or enjoyment therein.

(o) "COMMON EXPENSES." The actual and estimated expenses of operating the Master Association, both for general or special purposes, including reasonable reserves, all as may be found to be necessary and appropriate by the Master Board pursuant to this Master Declaration, the Master Code, and the Articles of Incorporation of the Master Association.

(p) "COMMON GREEN SPACE." Undeveloped land or land developed for recreational uses which are designed primarily for the use of Owners within the Property pursuant to the Township's Zoning Resolution. Common Green Space does not include the Golf Course Property nor does it include Cluster Green Space. The Common Green Space is to be owned and administered by the Master Association. The Common Green Space shall remain as such in accordance with the Township's requirements.

(q) "COMMUNITY-WIDE STANDARD." The standard conduct, maintenance, or other activity generally prevailing within the Property. Such standard may be more specifically determined and set forth by the Design Review Committee and the Master Board.

(r) "COUNTY." _____ [county] County, _____ [state].

(s) "DECLARANT." GOLF MEADOW DEVELOPMENT LIMITED PARTNERSHIP, a(n) _____ [state] _____ [entity], and the specifically designated successors or assigns of any of its rights as Declarant under this Master Declaration or under any supplement to this Master Declaration involving the Property as the same may be expanded or contracted from time to time. No person, real or corporate, shall be deemed to be a successor, alternate or additional Declarant for the purposes of this Master Declaration unless and until such person or entity has been specifically so designated by Declarant herein, by instrument in writing and placed of record, and shall be deemed a successor and assign of Declarant only to the particular rights and interests of Declarant under this Master Declaration or under a supplement to this Master Declaration. The Declarant is also sometimes referred to herein as the "Original Declarant."

(t) "DESIGN REVIEW COMMITTEE." The board created by this Master Declaration and granted original jurisdiction to review and approve or disapprove all exterior and structural improvements, additions and changes within the Property.

(u) "ELIGIBLE MORTGAGE HOLDERS." Eligible Mortgage Holders shall mean banks, savings and loan associations, insurance companies and other institutional lenders, holders, insurers or guarantors of first mortgages on the Property or portions thereof.

(v) "GOLF MEADOW." An R-1 Controlled Density Residential Development with Sewer and water under the zoning requirements of _____[city] consisting of the Property.

(w) "GOLF CLUB." Golf Meadow Golf Limited Partnership, a(n) _____[state]
_____[entity], dba Golf Meadow Golf and Country Club.

(x) "GOLF CLUB MEMBER." A Person having a membership in the Golf Club.

(y) "GOLF COURSE." The 18-hole golf course and the golf cart paths situated on the Golf Course Property.

(z) "GOLF COURSE ENTRANCE." The drives and related improvements, including signs, golf, lighting, landscaping, irrigation systems, ponds, fountains and pumps, situated off of Golf Meadow Drive that serves the clubhouse, golf course maintenance area and the tennis/swimming pool area of the Golf Club.

(aa) "GOLF COURSE PROPERTY." Golf Course Property shall mean land and facilities adjacent to or in the vicinity of the Property which are (or will be) privately owned by the Golf Course Property Owner, its successors, successors-in-title, or assigns upon which land and facilities there is, or shall be situated, inter alia, (i) an 18-hole golf course; (ii) golf driving range, practice putting green acid golf cart paths; (iii) tennis courts and swimming pool; and (iv) a clubhouse facility, tennis and golf pro shops, locker room facilities, food and beverage facilities, parking lots and over facilities which are or will be operated as part of the Golf Club. The Golf Course Property is not part of the Property, nor is it governed by the provisions of this Master Declaration, except as expressly and specifically provided herein. No Owner or Occupant, nor the Master Association, shall have any rights in and to, or obligations with respect to, the Golf Club, except as expressly and specifically provided herein. Portions of Common Green Space and Cluster Green Space adjacent to the Golf Course Property and appearing to be part of the Golf Course Property may be maintained exclusively by the Golf Course Property Owner.

(bb) "GOLF COURSE PROPERTY OWNER." Golf Course Property Owner shall mean the record title holder, whether one or more persons or legal entities (including, specifically, the Declarant) of the fee simple title to the Golf Course Property; provided, however, at such time as the boundaries of the Golf Course Property are specifically located, it is anticipated that the Golf Course Property Owner will be Golf Meadow Golf Limited Partnership, an _____[state] _____[entity]. The term "Golf Course Property Owner" shall not mean or refer to any mortgagee of the Golf Course Property unless and until such mortgagee has acquired title to the Golf Course Property pursuant to foreclosure or any proceeding in lieu of foreclosure.

(cc) "LAKE." Golf Meadow Lake consisting of approximately 55 acres and situated within Golf Meadow.

(dd) "LIVING UNIT LOT." A platted single-family subplot upon which a Living Unit (including a Cluster Living Unit) has been constructed.

(ee) "LIVING UNITS." All units of residential housing to be situated on the Property, whether they are single family homes, Cluster Living Units, residential condominium units or any other type of living unit permitted to be constructed

or created upon the Property under any applicable zoning code that now exists or may hereafter be amended. Without limiting the generality of the foregoing, Living Unit shall mean a portion of the Property intended for any type of independent ownership for use and occupancy as a single family residence and shall, unless otherwise specified, include within its meaning (by way of illustration, but not by way of limitation) condominium units, patio or zero lot line homes, and single family houses or Cluster Living Units on separately platted lots, as may be developed, used and defined as herein provided or as provided in Subsequent Amendments; provided, further, the term shall also include all portions of the lot owned as a part of any structure thereon.

For the purposes of this Master Declaration, a Living Unit shall come into existence when the improvements constructed thereon are sufficiently complete to reasonably permit the habitation thereof, whether or not a certificate of occupancy has been issued for the Living Unit by the governmental authority having jurisdiction over the same.

(ff) "MASTER ARTICLES" or "MASTER ARTICLES OF INCORPORATION." The Articles of Incorporation of the Master Association which are filed with the Secretary of State of _____[state] to create the Master Association.

(gg) "MASTER ASSOCIATION." Golf Meadow Master Association, Inc., a(n) _____[state] _____[entity], its successors and assigns, created to govern, operate, control and administer the Areas of Common Responsibility for the benefit of the Living Units (including Cluster Living Units) and the Vacant Sublots (including vacant Cluster Sublots), and to supervise and enforce this Master Declaration. The Master Association shall not be dissolved nor shall it dispose of any Common Green Space or recreation facility without: (i) having established a successor entity to take over said property pursuant to the Township's zoning resolution; and (ii) the approval of the Township's trustees. Membership in the Master Association shall be mandatory of all Owners.

(hh) "MASTER BOARD." The Board of Trustees of the Master Association. The Board is sometimes also referred to as the "Trustees."

(ii) "MASTER CODE." The Code of Regulations of the Master Association.

(jj) "MASTER SITE PLAN." The preliminary site plan of the Property and adjacent lands which currently shows a total of _____[number] dwelling units, including _____[number] Sublots and _____[number] Cluster Sublots, as the same may be supplemented, modified and amended from time to time. Phase I of the Property consists of _____[number] Sublots and Cluster Block I upon which it is anticipated _____[number] Cluster Sublots will be platted.

(kk) "MEMBER." A person or entity entitled to membership in the Master Association, as provided herein. The Golf Club Property Owner is not a Member of the Master Association.

(ll) "NEIGHBORHOOD." Neighborhood shall mean and refer to each separately developed and denominated residential area comprised of _____ (_____) or more housing types subject to this Master Declaration, whether or not governed by an additional owners' association, in which owners may have common interests other than those common to all Master Association Members, such as a common theme, entry feature, development name, and/or common areas and facilities which are not available for use by all Master Association Members. Where the context permits or requires, the term Neighborhood shall also refer to the Neighborhood Committee (established in accordance with the Master Code) or Neighborhood Association (as defined in Article V, Section 5.1(c) of this Master Declaration) having jurisdiction over the property within the Neighborhood. Neighborhoods may be divided or combined in accordance with Article V, Section 5.1(c), of this Master Declaration. A Cluster Area is not a Neighborhood.

(mm) "NEIGHBORHOOD ASSESSMENTS." Neighborhood Assessments shall mean assessments levied against the

Living Units in a particular Neighborhood or Neighborhoods to fund Neighborhood Expenses.

Any Neighborhood Assessment shall be levied equally against all Living Units in the Neighborhood benefitting from the services supported thereby, provided that in the event of assessments (if any) for exterior maintenance of structures, or insurance on structures, or replacement reserves which pertain to particular structures, such assessments for the use and benefit of particular Living Units shall be levied on an equal basis among the benefitted Living Units.

(nn) "NEIGHBORHOOD EXPENSES." Neighborhood Expenses shall mean and include the actual and estimated expenses incurred by the Master Association for the benefit of Owners of Living Units within a particular Neighborhood, which may include a reasonable reserve for capital repairs and replacements, all as may be specifically authorized from time to time by the Master Board and as more particularly authorized herein.

(oo) "OCCUPANT." A person in possession of a Living Unit including, without limitation, an Owner or any guest, invitee, lessee, tenant, or family member of an Owner occupying, or otherwise using a Living Unit.

(pp) "ORIGINAL DECLARANT." GOLF MEADOW DEVELOPMENT LIMITED PARTNERSHIP, a(n)
 _____[state] _____[entity], as more fully described in paragraph (s) hereof.

(qq) "OWNER." The record Owner of fee simple title to (a) any Living Unit, including the Declarant and a Builder (except as otherwise provided herein) with respect to any unsold Living Unit, and (b) any Vacant Sublot (including a Vacant Cluster Sublot and a Cluster Block), but Owner shall exclude in all cases any party holding an interest merely as security for the performance of an obligation. If a Living Unit is sold under a land installment contract, the purchaser (Vendee) (rather than the fee Owner) will be considered to be the Owner. For the purpose of this Master Declaration, the Owner of Living Units that are rented to others shall be as follows: for the purpose of votes and Assessments, the record Owner of the Living Unit; for the purpose of use and enjoyment of common facilities and amenities which are part of the Common Areas, the Tenant residing in the Living Unit. Every Owner shall be treated for all purposes as a single Owner for each Living Unit held irrespective of whether such ownership is joint or in common. Where such ownership is joint or in common, the majority vote of such Owners shall be necessary to cast any vote to which such Owners are entitled.

(rr) "OWNERSHIP INTEREST." The entire right, title and interest of any Owner in all of the freehold and leasehold estates of such Owner in his Living Unit.

(ss) "PERSON." A natural individual, corporation, partnership, limited partnership, trust or other entity to which the law attributes the capacity of having rights and duties.

(tt) "PERSONAL VOTE." The circumstances under the Master Declaration and under the Master Code where a Class "A" Member is entitled personally to exercise the vote for his Living Unit or Vacant Sublot rather than having such vote exercised by the Voting Member representing such Member. Furthermore, until a Subsequent Amendment is filed which creates a Cluster Area or Neighborhood and provides for Voting Members, a Personal Vote shall be used in all instances where the vote of Class "A" Members is required.

(uu) "PLAT." The subdivision plat for the portion of the Property designated as Golf Meadow Subdivision--Phase I and additional plats of the Property.

(vv) "PROPERTY." The land described in Exhibit "A", as the same may from time to time be amended.

(ww) "RULES." Rules and regulations that govern the operation and use of the Living Units and the Areas of Common Responsibility, including the Common Areas and any other property owned by the Master Association, as such rules and regulations may be adopted from time to time by the Master Board or the Design Review Committee to implement

and carry out the provisions and intent of this Master Declaration.

(xx) "SUBSEQUENT AMENDMENT." An amendment to this Master Declaration which adds additional property (including Cluster Areas) to that covered by this Master Declaration or deletes property from that which is covered by this Master Declaration. A Subsequent Amendment may, but is not required to: (i) impose, expressly or by reference, additional restrictions and obligations on the land submitted by such Subsequent Amendment to the provisions of this Master Declaration; and/or (ii) create a Neighborhood and provide for Voting Member(s) for such Neighborhood; and/or (iii) otherwise amend this Master Declaration and/or the Master Code.

(yy) "SUBSIDY PERIOD." The Subsidy Period for Assessments attributable to the Areas of Common Responsibility shall be for a period beginning as of the date of this Master Declaration and ending _____ [month] _____ [day], _____ [year] or when there are _____ (_____) Living Units, whichever shall first occur.

(zz) "TENANT." Any person(s) having a possessory leasehold estate in a Living Unit, other than an Owner.

(aaa) "TOWNSHIP." _____ [name], a(n) _____ [state] municipal corporation.

(bbb) "VACANT SUBLLOT." Vacant Sublot shall mean, at any given time, any portion of the Property: (i) that is either a Sublot or a Cluster Sublot for which a plat has been recorded designating such portion of the Property as a lot upon which only one single family residence may be constructed; (ii) which has been conveyed to a person or entity other than the Declarant; and (iii) upon which no Living Unit is situated. For the purposes of Assessments, the term Vacant Sublot includes Cluster Sublots that may be created within a Cluster Block.

(ccc) "VACANT SUBLLOT OWNER." Vacant Sublot Owner shall mean the record titleholder (other than the Declarant), whether one or more persons or entities, of the fee simple title to any Vacant Sublot. The term "Vacant Sublot Owner" shall not mean or refer to any mortgagee of any Vacant Sublot unless and until such mortgagee has acquired title to such Vacant Sublot pursuant to foreclosure or any proceeding in lieu of foreclosure.

(ddd) "VOTING MEMBER." Voting Member shall mean and refer to the representative selected by the Members of each Cluster Area or Neighborhood to be responsible for casting all votes attributable to Living Units in the Cluster Area or Neighborhood for the election of Trustees to the Master Board, amending this Master Declaration or the Master Code, and all other matters provided for in this Master Declaration and in the Master Code which are not required to be determined by Personal Vote. The Voting Member from each Cluster Area or Neighborhood shall be the senior elected officer (e.g., Cluster Association President or Neighborhood Committee chairman or Neighborhood Association president) from that Cluster or Neighborhood; the alternate Voting Member shall be the next most senior officer. Neighborhood Voting Members shall not be elected until there are two (2) or more Neighborhoods and the Subsequent Amendment creating any such Neighborhood provides for the establishment of Voting Members. Until then, to the extent such vote is required, the Class "A" Members shall, by Personal Vote, elect the Trustees of the Master Board and vote on the other matters provided in this Master Declaration and in the Master Code.

ARTICLE III EASEMENTS

Section 3.1 - Utility Easements

There is hereby reserved in favor of Declarant and granted to the Master Association and each Builder, their successors and assigns, an easement upon, across, over, through and under the Property for ingress, egress, installation, replacement, repair and maintenance of all utilities and service lines and systems including, but not limited to, water, sewer, energy, drainage, gas, telephone, electricity, television, cable and communication lines and systems. By virtue of

this easement, it shall be expressly permissible for Declarant and the Master Association and their successors and assigns, or the providing utility or service company, to install and maintain facilities and equipment on the Property provided that such facilities shall not materially impair or interfere with any Living Units or the Golf Course Property and provided that any areas disturbed by such installation and maintenance are restored to substantially the condition in which they were found. Notwithstanding anything to the contrary contained in this Section, no sewers, electrical lines, water lines, or other utility service lines or facilities for such utilities may be installed or located except as approved by the Design Review Committee unless the same are shown on a recorded plat. There is hereby reserved in favor of the Declarant to grant the Golf Course Property Owner easements for utility purposes for the Golf Course Property and there is hereby reserved in favor of the Declarant and the Master Association the right (but not the obligation) to grant other neighboring property owners easements for utility purposes so long as the granting of such easements does not overburden the utilities serving the Property.

Section 3.2 - Easement for Ingress and Egress

There is hereby created an easement upon, across, over and through Cluster Roads and any sidewalks, walkways, bike paths; all-purpose trails and parking areas in favor of Declarant and the Master Association, all Owners, Occupants, and their respective guests, licensees and invitees for pedestrian and vehicular ingress and egress, as the case may be, to and from all of the various portions of the Property. Notwithstanding the foregoing, the Declarant and/or the Master Association may limit this right of ingress and egress by a Subsequent Amendment, provided, however, that any such amendment that limits or affects access to or from the Golf Course Property by the Golf Course Property Owner, members of the Golf Club, and guests, licensees and invitees of such parties shall require the prior written consent of the Golf Course Property Owner and the mortgagee, if any, of the Golf Course Property Owner.

Section 3.3 - Common Areas

Declarant, all Owners, Occupants and the guests of such parties shall have the right to enter upon, use and enjoy the Common Areas (including Common Green Space) for their intended purposes in accordance with this Master Declaration and the applicable Rules.

Section 3.4 - Easements for Construction. Alteration. etc.

Easements are hereby created upon portions of the Common Areas necessary in connection with the construction, alteration, rebuilding, restoration, maintenance and repair of any Living Unit or other structures and improvements within the Property or serving the Property; provided, however, that in the exercise of any rights under this easement, there shall be no unreasonable interference with the use of any Living Unit or other structure or improvement on the Property. Any Person benefitting from the foregoing easement shall indemnify and save harmless the Declarant, the Master Association and each Owner and Occupant from and against any and all losses, damages, liabilities, claims and expenses, including reasonable attorneys' and paralegals' fees resulting from any such construction, rebuilding, alteration, restoration, maintenance and shall repair any damage caused in connection with such activities to substantially the condition that existed prior to such activities.

Section 3.5 - Emergency and Service Easements

Easements are created in favor of fire, police, health, sanitation, medical, ambulance, school buses, utility company, mail service and other public or quasi-public emergency and service personnel and their vehicles shall have an easement for ingress and egress over and across the roads or drives within the Property for the performance of their respective duties. Included in the easements created by this Section is the grant of easements to the Township and other appropriate governmental bodies of the right of entrance to the Common Green Space, Cluster Green Space and recreation facilities (if any) for emergency purposes or in the event of nonperformance of maintenance of improvements affecting the public interest. Such governments shall have the right, after proper notice, to make improvements and perform maintenance functions with the costs levied in accordance with Section 9.10 hereof against (a) the Master

Association and its Members with respect to the Common Green Space; or (b) a Cluster Association and its members with respect to a Cluster Green Space. Advance notice is not necessary for emergency entrance onto such Common Green Space, Cluster Green Space or recreation facilities.

Section 3.6 - Easements for Watering Purposes: Damming Rights

(a) Easements are hereby created in favor of the Golf Course Property over the Property and the Common Areas (including the Common Green Space and Cluster Green Space) to use the water from the Lake or ponds situated on such properties for the purpose of watering the Golf Course Property and easements are hereby created in favor of the Association over the Golf Course Property to use the water from the Lake and ponds situated on the Golf Course Property for the purpose of watering the areas of the Common Areas so long as such usage does not create a shortage of water for the needs of the Golf Course Property. No restriction is placed upon the Golf Course Property Owner's right to use such Lake and the ponds for watering the Golf Course Property. Easements are also created in favor of the Golf Course Property Owner to maintain the lakes and ponds within the Property, including removal of silt, control of aquatic vegetation (including introduction of fish that control such vegetation) and maintenance of wetland areas along the perimeter of the Lake. The Master Association shall reimburse the Golf Course Property Owner for _____ percent (_____) of any such maintenance costs. The use of the above-described easements shall be in compliance with all applicable laws, including without limitation, those laws and regulations governing "wetlands."

(b) Declarant grants to the Golf Course Property Owner the right and privilege of damming the Lake and the outlet thereof, and of impounding the waters of the Lake and raising and drawing the same, together with the right of ingress and egress for the purpose of constructing, repairing and maintaining the dam, or any part or portion thereof, and any and all conduits, raceways or pipes connected therewith or leading therefrom, which now exist or may hereafter be constructed. The foregoing shall be done in accordance with all applicable laws.

Section 3.7 - Easements for the Golf Course Property

There is hereby reserved for the benefit of Golf Course Property Owner, its successors, assigns, and successors-in-title with respect to the Golf Course Property, the following transferable and alienable rights and easements:

(a) Golf Paths and Golf Course Maintenance. The right and easement on, over, and across the Common Areas (including Common Green Space) and Cluster Common Areas situated adjacent to the Golf Course, for all members, guests and other authorized users of the Golf Course for the pedestrian, golf cart and maintenance vehicle use of golf paths located in such portions of the Property and serving the Golf Course and the right and easement on, over, and across those same Common Areas not to exceed _____ (_____) feet in width for access from one golf hole to the next if such access is not shown on a Plat.

(b) Construction, Maintenance and Repair. The right and easement on, over, through, under, and across the Common Areas and Cluster Common Areas adjacent to the Golf Course Property for the purpose of constructing such improvements on the Golf Course Property or such portions of such Common Areas and Cluster Common Areas as the Golf Course Property Owner shall desire from time to time and for maintaining, repairing, and replacing such improvements, provided the Golf Course Property Owner shall not use such easement so as to unreasonably interrupt or interfere with any Owner's use of the Common Areas or Cluster Common Areas and shall promptly repair and restore any damage to said Common Areas and Cluster Common Areas caused by the use of the right and easement granted herein. In addition, there is hereby reserved for the benefit of the Golf Course Property Owner, its agents, employees, successors, and assigns, the right and easement to enter upon the Vacant Sublots, the proved portions of Living Unit Lots, Common Areas and Cluster Green Space which are located within _____ (_____) feet from the water's edge of the Lake, any pond, or other body of water located on the Golf Course Property, for the purpose of mowing such area and keeping the same free and clear from unsightly growth and

trash, as well as for the purpose of maintaining such bodies of water, such maintenance to include, without limitation, dredging and the maintenance of reasonable water quality standards and maintenance of wetland areas.

(c) Golf Course Maintenance. The non-exclusive right and easement over and across the portions of the Common Areas, Cluster Green Space, the Vacant Sublots and all unimproved portions of a Living Unit Lot which are adjacent to the Golf Course. This reserved right and easement shall permit, but shall not obligate, the Golf Course Property Owner and its agents, employees, successors, and assigns with respect to the Golf Course Property, to go upon any such portions of the Common Areas, Cluster Green Space and such Vacant Sublot or unimproved portions of such Living Unit Lot to maintain or landscape the area encumbered by such easement. Such maintenance and landscaping shall include planting of grass, watering, application of fertilizer, mowing, and the removal of underbrush, stumps, trash or debris, and trees of less than two (2) inches in diameter. The area encumbered by this easement with respect to Vacant Sublot and the unimproved portions of Living Unit Lots shall be limited to the portion of such Vacant Sublots and unimproved portion of Living Unit Lots within _____ (_____) feet of those boundary lines of the Common Areas and such Vacant Sublots and Living Unit Lots which are adjacent to such roughs, fairways or greens or adjacent to the Lake, ponds, or other bodies of water abutting the Golf Course; provided, however, that the entire Vacant Sublot and all unimproved portions of such Living Unit Lot shall be subject to such easement until the landscaping plan for such lot has been approved and implemented pursuant to Article VIII hereof. The area encumbered by this easement with respect to Common Areas and Cluster Green Space adjacent to roughs, fairways or greens or adjacent to the Lake, ponds or other bodies of water abutting the Golf Course that appears to be part of the Golf Course shall encumber the entire amount of such Common Areas and Cluster Green Space.

(d) Entry by Golfers. Each Vacant Sublot and Living Unit Lot and any portion of the Common Areas and Cluster Green Space which are adjacent to the Golf Course shall be subject to the right and easement on the part of Golf Course players and their caddies to enter upon the: (i) Vacant Sublot and the unimproved portion of any Living Unit Lot, or Common Area which is within _____ (_____) feet of the Golf Course; and (ii) the Common Area or Cluster Common Area adjacent to the Golf Course, to remove a golf ball, subject to the official rules of the Golf Course, and any such entering shall not be deemed to be a trespass. Golf Course players or their caddies shall not be entitled to enter on any such Vacant Sublot or Living Unit Lot, with a golf cart or other vehicle, nor to spend an unreasonable amount of time on any such Vacant Sublot or Living Unit Lot, or in any way commit a nuisance while on any such property.

(e) Landscaping Plan Approval. In addition to the provisions of Article VIII hereof, the landscaping plan for any (i) Vacant Sublots and Living Unit Lots adjacent to any portion of the Golf Course shall, for that portion of such Vacant Sublots and Living Unit Lots, which is within twenty _____ (_____) feet of the Golf Course, including any portion of the Common Areas or Cluster Common Areas that are between such Vacant Sublots and Living Unit Lots and the Golf Course which appear to be a part of the Golf Course; and (ii) Common Areas or Cluster Common Areas adjacent to any portion of the Golf Course, be in general conformity with the overall landscaping plan of the Golf Course, and shall be subject to Golf Course Property Owner's prior right of approval, which approval shall not be unreasonably withheld or delayed. To promote a suitable and attractive open space atmosphere, no fence, wall, shrubbery, building, or other structure will be permitted within said twenty (20) foot portion of those Vacant Sublots and Living Unit Lots, or portions of the Common Areas and Cluster Common Areas which are adjacent to the Golf Course, without the prior written approval of the Design Review Committee and the Golf Course Property Owner. There is hereby reserved over and across said twenty (20) foot portion of said Vacant Sublots and Living Unit Lots, and the Common Areas and Cluster Common Areas, the right and easement of light, air, and view for the benefit of the adjacent Golf Course.

(f) Water and Sanitary Sewer Tie-ins. The Golf Course Property Owner shall have the right to tie restrooms, snack shops and other facilities situated or to be situated on the Golf Course Property into the waterlines and/or sanitary sewer lines situated on the Property so long as: (1) such tie-ins are made in accordance with the requirements of the County or other governmental authority or utility company having jurisdiction; (ii) such tie-ins do not overburden the water and/or

sanitary sewer lines; (iii) such tie-ins are at the expense of the Golf Course Property Owner; (iv) such tie-ins and cost of usage shall not impair or interfere with any Living Units or with Master Association usage; (v) the lines installed by the Golf Course Property Owner through the Property are maintained by the Golf Course Property Owner; and (vi) any areas disturbed by such tie-ins and the repair and maintenance thereof are restored to substantially the condition in which they were found.

Section 3.8 - Cross--Easements

The right is hereby reserved by the Declarant to grant cross-easements for: (a) the creation and/or preservation of lakes and ponds which may tie in part on the Golf Course Property and/or in part on the Property; and (b) for and utilities or other facilities that will serve both the Golf Course Property and the Property or either of said properties.

Section 3.9 - Easements for Community Signs

Easements are created over the Common Areas to install, maintain, repair, replace and illuminate signs that are for the general benefit of the Property or for the identification of the public roads, the Neighborhoods, Cluster Areas, Cluster Roads and the Golf Club. The type, size and location of the sites shall meet the requirements of the Township, and shall be subject to the approval of the Design Review Committee and Golf Course Property Owner if such sites affect the Golf Club.

Section 3.10 - Easement to Maintain Sales Offices, Models, etc.

Notwithstanding any provisions contained in this Master Declaration to the contrary, so long as construction and sale of Living Units, and the sale of memberships in the Golf Club shall continue, it shall be expressly permissible for Declarant and/or a Builder authorized in writing by Declarant to maintain and carry on upon portions of the Common Areas such facilities and activities as, in the sole opinion of Declarant and/or such Builder, may be reasonably required, convenient, or incidental to the construction or sale of Living Units and memberships in the Golf Club, including, but not limited to, administrative/customer services, construction offices/trailers, parking signs, identification signs, model units, and sales and resales offices, and the Declarant, its guests, licensees and invitees shall have an easement for access to all such facilities. The right to maintain and carry on such facilities and activities shall specifically include the right to use Living Units owned by the Declarant and/or such Builder, as models and sales offices. Declarant further reserves the right for itself and its successors, assigns, contractors, material suppliers and others performing work and furnishing materials to construct Living Units and other improvements upon the Property to conduct business and carry on construction/site development activities during business hours that are customary within the _____[state] area. This Section may not be amended or modified without the express written consent of the Declarant.

Section 3.11 - Maintenance Easement

There is hereby reserved for the benefit of the Master Association and its agents, employees, successors, and assigns, an alienable, transferable, and perpetual right and easement to enter upon any Vacant Sublot, upon the unimproved portions of Living Unit Lots and upon any Cluster Green Space for the purpose of mowing, removing, clearing, cutting or pruning underbrush, weeds, stumps, or other unsightly growth and removing trash and debris in order to maintain reasonable standards of health, fire safety, and appearance within the Property, provided that such easements shall not impose any duty or obligation upon Declarant or the Master Association to perform any such actions; and provided, further, that in the exercise of its rights hereunder the Master Association shall be entitled to be reimbursed by such Owner pursuant to Article VII hereof.

Section 3.12 - Environmental Easement

There is hereby reserved for the benefit of Declarant, the Master Association, the Golf Course Property Owner and their

respective agents, employees, successors, and assigns, an alienable, transferrable, and perpetual right and easement on, over, and across all Vacant Sublots, all unbuilt portions of Living Unit Lots, Common Areas and Cluster Green Space for the purpose of taking any action necessary to effect compliance with environmental rules, regulations, and procedures from time to time promulgated or instituted by the Master Board, the Design Review Committee, the Golf Course Property Owner or by any governmental entity, such easement to include, without limitation, the right to implement erosion control procedures and practices, the right to drain standing water, and the right to dispense pesticides and the right to maintain any designated "wetland" areas.

Section 3.13 - Scope of Easements and Dedication of Roadways and Utilities

As the improvements to be located within the Property for the easement rights granted or reserved under Sections 3.1, 3.2, 3.7(f) and 3.8 are definable within specific areas, the Declarant or the Master Association (with the Declarant's prior written consent so long as Declarant is a Class "B" Member) shall have the right (but not the obligation) to: (a) limit such easements to specific areas and purposes, and record a document or documents releasing the balance of the lands from the burden of such easements; and/or (b) record a plat or other document or documents setting forth the specific areas subjected to such easements; and/or (c) dedicate to public or private use specific areas (and the improvements contained therein) within the Property to meet the requirements of the Township, the County and other public authorities having jurisdiction over the same. The Declarant or the Master Association may exercise any of such rights without the necessity of obtaining the consent or approval of Owners and other Persons for whose benefit the easement rights are granted or reserved

Section 3.14 - Easements to Run with the Lands

All easements and rights described herein are easements appurtenant to the Property (including the Living Units) and the Common Areas and the Cluster Green Space shall run with said lands, perpetually and at all times shall inure to the benefit of and be binding upon the Declarant, its successors and assigns, and any Owner, Tenant, Occupant, purchaser, mortgagee or other Person having an interest in the Property, or any part or portion thereof and to the benefit of the Golf Course Property Owner with respect to those easements and rights specifically created herein for the benefit of the Golf Course Property Owner and the Golf Club. Reference to the easements and rights described in any part of this Master Declaration, in any deed of conveyance, lease, mortgage, trust deed, declaration for another type of residential association, or other evidence of obligation, shall be sufficient to grant such easements and rights to the respective grantees, lessees, mortgages or trustees of such property, or any portion thereof and to reserve to the grantor or lessor therein, their successors and assigns, as easements appurtenant to the remainder of the such properties, easements created by this Master Declaration for the benefit of any Owner, Tenant, Occupant, purchaser, mortgagee or other Person in respect to any portion of the Property as fully and completely as though such easements and rights were recited fully as set forth in their entirety in such document.

ARTICLE IV OWNERSHIP AND OPERATION OF COMMON AREAS

Section 4.1 - Conveyances of Common Areas

Declarant shall convey the Common Areas to the Master Association. Such conveyance shall have priority over all liens and encumbrances whatsoever except the easements, covenants, restrictions and provisions of this Master Declaration; easements, covenants, restrictions, conditions and other similar matters of record; real estate taxes and assessments which are a lien, but are not due and payable at the time of said conveyance; and zoning and other ordinances, if any. Declarant shall cause such Common Areas to be released from any mortgage encumbering the same or shall cause the mortgagee of such areas to subordinate its mortgage on such areas in favor of this Master Declaration. The Master Association shall hold title to said parcels subject to the provisions of this Master Declaration. The Golf Course Property is not a Common Area.

Section 4.2 - Use of Common Areas

Any Owner may delegate, in accordance with the Master Code of the Master Association and subject to reasonable rules, regulations, and limitations as may be adopted in accordance therewith, his or her right of enjoyment to the Common Areas to the members of his or her family, tenants, and social invitees and shall be deemed to have made a delegation of all such rights to the Occupants or Tenants of any leased Living Unit.

ARTICLE V THE MASTER ASSOCIATION

Section 5.1 - Existence

The Master Association is a(n) _____[state] _____[entity]. The Declarant and all Owners (including Builders) shall be members of the Master Association.

Section 5.2 - Membership and Voting Rights

(a) Classes of Membership.

The membership of the Master Association is and shall be divided into two (2) classes:

(1) Class "A" Membership. Each Owner of a Living Unit (including, without limitation, the Declarant or a Builder if the Declarant or a Builder is the record titleholder of a Living Unit), each Vacant Sublot Owner and each Cluster Block Owner shall automatically be a Class "A" Member of the Master Association. The Class "A" Membership is appurtenant to the ownership of each Living Unit and each Vacant Sublot and each Cluster Block and shall not be separable from the ownership of any Living Unit or Vacant Sublot or Cluster Block and shall be deemed to have begun terminated with any voluntary or involuntary conveyance of any Living Unit or Vacant Sublot or Cluster Block, whether or not such membership is expressly referred to in the instrument effecting such conveyance, at which time the new Owner or other successor in interest shall immediately and automatically become a Member of the Master Association with all rights and responsibilities relative thereto. No Owner, whether one or more persons, shall have more than one membership per Living Unit owned.

(2) Class "B" Membership. The Declarant shall automatically be the sole Class "B" Member of the Master Association.

(b) Voting Rights.

(1) Class "A" Member. Class "A" Members shall be entitled to one (1) equal vote for each Living Unit and each Vacant Sublot (including Vacant Sublots that may be created within a Cluster Block) in which they hold the interest required for membership under Section 5.2(a)(1) hereof; there shall be only one (1) vote for each Living Unit and for each Vacant Sublot (including Vacant Sublots that may be created within a Cluster Block). Until there is a Cluster Area or until there is a Neighborhood and the Subsequent Amendment creating any such Cluster Area or Neighborhood provides for the establishment of Voting Members, the vote for each Living Unit and Vacant Sublot (including Vacant Sublots that may be created within a Cluster Block) may be exercised by the Personal Vote of the Owner of each Living Unit and Vacant Sublot (including Vacant Sublots that may be created within a Cluster Block). After the establishment of Voting Members, the vote of each Living Unit or Vacant Sublot shall be exercised by the Voting Member representing the Cluster Area or Neighborhood of which the Living Unit and Vacant Sublot is a part, unless a Personal Vote is specified by this Master Declaration or the Master Code or unless the Class "A" Member elects by notice to the Voting Member and the Secretary of the Master Association to exercise his or her Personal Vote.

In any situation where a Member is entitled to exercise a Personal Vote and more than one (1) Person holds the interest

in such Living Unit or Vacant Sublot required for membership, the Personal Vote for such Living Unit or Vacant Sublot shall be exercised as those Persons determine among themselves and advise the Secretary of the Master Association in writing prior to any meeting. In the absence of such advice, the vote of the Living Unit or the Vacant Sublot shall be suspended if more than one (1) Person seeks to exercise it.

(2) Class "B" Member. The Class "B" Member shall be the Declarant. The rights of the Class "B" Member, including the right to approve actions taken under this Master Declaration and the Master Code, are specified elsewhere in the Master Declaration and the Master Code. The Class "B" Member shall be entitled to appoint a majority of the members of the Master Board during the Class "B" Control Period, as specified in Article III, Section 2 of the Master Code. After termination of the Class "B" Control Period, the Class "B" Member shall have a right to disapprove actions of the Master Board and any committee as provided in Article III, Section 3, of the Master Code. The Class "B" membership shall terminate and become converted to Class "A" membership in accordance with Article III, Section 2 of the Master Code.

(c) Cluster Areas and Neighborhoods. Living Units and Vacant Sublots may be located within a Cluster Area or Neighborhood designated by the Declarant or the Master Board in a Subsequent Amendment. No other Person shall have the right to designate a Cluster Area or Neighborhood. The Living Units and Vacant Sublots within a particular Cluster Area or Neighborhood may be subject to additional covenants and/or the Owners of Living Units and Vacant Sublot Owners within a particular Cluster Area shall be members of a Cluster Association in addition to the Master Association, and the Owners of Living Units and Vacant Sublots within a particular Neighborhood may be members of another owners' association (the "Neighborhood Association") in addition to the Master Association, but no such Neighborhood Association shall be required. Any Neighborhood which does not have a Neighborhood Association shall elect a Neighborhood Committee, as described in Article V, Section 3, of the Master Code, to represent the interests of Owners of Living Units and Vacant Sublot Owners in such Neighborhoods.

The Voting Member for each Cluster Area shall be the President of the Cluster Association for such Cluster Area.

Each Neighborhood Association or Neighborhood Committee, upon the affirmative vote, written consent, or any combination thereof of a majority of Owner of Living Units and Vacant Sublots within the Neighborhood, may request that the Master Association provide a higher level of service or special services for the benefit of Living Units in such Neighborhood, the cost of which shall be assessed against the benefitted Living Units as a Neighborhood Assessment pursuant to Article IX of this Master Declaration.

If Voting Members are established by a Subsequent Amendment, the senior elected officer of each Neighborhood Association or the Neighborhood Committee shall serve as the Voting Member for such Neighborhood and shall cast all votes attributable to Living Units in the Neighborhood on all Master Association matters requiring membership vote, unless otherwise specified in this Master Declaration or the Master Code.

Upon a petition sided by a majority of the Owners of Living Units in the Neighborhood, any Neighborhood Association or Neighborhood Committee may also apply to the Master Board to divide the property comprising the Neighborhood into two (2) or more Neighborhoods or to combine two (2) Neighborhoods into one (1) Neighborhood. Any such application shall be in writing and shall include a survey plat of the entire parcel which indicates the boundaries of the proposed Neighborhoods. A Neighborhood division requested by the Neighborhood shall automatically be deemed granted unless the Master Board denies such application in writing within _____ (_____) days of its receipt thereof. The Master Board may deny an application in its sole discretion, including, without limitation, a determination that there is no reasonable basis for distinguishing between the areas proposed to be divided into separate Neighborhoods. All applications and copies of any denials shall be filed with the books and records of the Master Association and shall be maintained as long as this Master Declaration is in effect.

The creation of Neighborhood Voting Members pursuant to the provisions of this Subsection (c) shall not come into

operation until there is a Neighborhood and the Subsequent Amendment creating any such Neighborhood provides for the establishment of Voting Members. Until then, to the extent a vote is required, the Class "A" Members shall, by Personal Vote, elect the Trustees of the Master Board and vote on the other matters provided for in this Master Declaration and in the Master Code.

Section 5.3 - Board and Officers of the Master Association

The Trustees of the Master Board and the Officers of the Master Association shall be elected as provided in the Master Code and shall exercise the powers, discharge the duties and be vested with the rights conferred by operation of law, the Articles of Incorporation and Master Code, except as otherwise specifically provided.

Section 5.4 - Rights of the Master Association

Notwithstanding the rights and easements of enjoyment and use created in Article III of this Master Declaration, and in addition to any right the Master Association shall have pursuant to this Master Declaration or in law, the Master Association shall have the right:

- (a) To borrow money from time to time for the purpose of improving the Common Areas, and may secure said financing with a mortgage or mortgages upon all or any portion of property owned by the Master Association in accordance with its Articles and Master Code and subject to the provisions of this Master Declaration.
- (b) To take such steps as are reasonably necessary to protect the Common Areas from foreclosure.
- (c) To convey the Common Areas or a portion thereof, to a successor, provided, however, that any such conveyance shall require the Personal Vote of a majority of the Class "A" Members and the vote of the Class "B" Member; provided further that such successor shall agree, in writing, to be bound by the easements, covenants, restrictions and spirit of this Master Declaration; and provided further that such successor complies with the requirements of the Township's zoning rules and that the conveyance is approved by the Township's Trustees.
- (d) To enter or authorize its agents to enter on or upon the Property, or any part thereof, when necessary in connection with any maintenance, repair or construction for which the Master Association is responsible or has a right to maintain, repair or construct. Such entry shall be made with as little inconvenience to the Owner and Occupants thereof as practicable and any damage caused thereby shall be repaired by the Master Association.
- (e) To grant or obtain or dedicate to public use easements and rights-of-way (i) for access and easements for the construction, extension, installation, maintenance or replacement of utility services and facilities; or (ii) to or from a public utility or governmental authority, and to or from any body or agency which has the power of eminent domain or condemnation over any portion of the Property.

ARTICLE VI RESPONSIBILITIES OF THE MASTER ASSOCIATION

The Master Association shall have the exclusive duty to perform the following functions:

Section 6.1 - Maintenance of Areas of Common Responsibility

The Master Association shall maintain the Areas of Common Responsibility in a clean, safe, neat, healthy and workable condition, and in good repair, and shall promptly make all necessary repairs and replacements, structural and nonstructural, ordinary as well as extraordinary, subject only to the provisions of this Master Declaration. The Master Association shall provide equipment and supplies necessary for the maintenance (including landscape maintenance) and

enjoyment of such property. All work performed by the Master Association under this Article shall be performed in a good and workmanlike manner. The following are included among such Areas of Common Responsibility:

(a) Entranceway Areas. To operate, and to maintain, repair and replace, any now-existing or hereafter-created entranceway area at or in the vicinity of any entrance to the Property from public or private roads, together with all associated landscaping and other related facilities such as gatehouses, irrigation systems, signs, lighting, traffic control devices, decorative or screening walls and fences, ponds and fountains and pumps, provided, however, that the Golf Course Property Owner (and not the Master Association) shall maintain the Golf Club Entrances. The Master Association shall also pay or reimburse the Declarant for any real estate taxes assessed with respect to any such entranceway area and the improvements thereon, and if Declarant at any time requests, the Master Association shall (except the Golf Club Entrances, which shall be the responsibility of the Golf Course Property Owner), unconditionally and for a nominal consideration of _____ Dollars (\$_____), accept a deed to and hold title to such areas and the improvements thereon that are the Master Association's responsibility to maintain.

(b) Perimeter Fends and Walls. To maintain, repair and replace all fences and walls situated at or near the perimeter of the Property.

(c) Berms Along Public Roads, Median Strips and Cul-de-Sacs. With respect to the berms (including berms within public right-of-ways) and landscaping thereon which are desired or required to be maintained adjacent to the perimeter of the Property to maintain such berms, and any landscaping on such portions of such berms, in good and attractive condition; and with respect to landscaping, irrigation systems and other improvements within median strips and cul-de-sacs (including median strips and cul-de-sacs within public rights-of-way) to maintain the same in a good and attractive condition.

(d) Street Lighting. With respect to all parts (including, but not limited to, poles, standards, fixtures, transformers, wires, bulbs and cables) of any street lighting system which are now or hereafter installed by or at the direction of Declarant or the Master Association (with the approval of the Township and/or the County) in the median strips of or in the rights-of-way of any portion of any roads, to maintain the same in good order and condition, to make all replacements and renewals necessary to so maintain the same, and to operate and to pay all costs of operating the same, including, but not limited to, costs of electricity.

(e) Security. To provide such security for the Property as the Master Association may from time to time deem desirable, in such fashion as the Master Association may from time to time determine, including, but not limited to, if the Master Association shall deem the same desirable, the maintenance of guards and gatehouses. The Master Association will strive to maintain Golf Meadow as a safe, secure residential environment HOWEVER, NEITHER THE MASTER ASSOCIATION NOR THE DECLARANT SHALL BE HELD LIABLE FOR ANY LOSS OR DAMAGE BY REASON OF FAILURE TO PROVIDE ADEQUATE SECURITY OR BY REASON OF THE INEFFECTIVENESS OF SECURITY MEASURES UNDERTAKEN. ALL OWNERS, TENANTS, GUESTS, AND INVITEES OF ANY OWNER, ACKNOWLEDGE THAT THE MASTER ASSOCIATION, THE MASTER BOARD, THE DECLARANT, AND ANY COMMITTEES ESTABLISHED HEREUNDER, ARE NOT INSURERS AND THAT EACH OWNER, TENANT, GUEST, AND INVITEE ASSUMES ALL RISK OF LOSS OR DAMAGE TO PERSONS, TO LIVING UNITS, AND TO THE CONTENTS OF LIVING UNITS AND FURTHER ACKNOWLEDGE THAT DECLARANT HAS MADE NO REPRESENTATIONS OR WARRANTIES, NOR HAS ANY OWNER, TENANT, GUEST, OR INVITEE RELIED UPON ANY REPRESENTATIONS OR WARRANTIES, EXPRESSED OR LIMITED, INCLUDING ANY WARRANTY OF MERCHANTABILITY OR FITNESS FOR ANY PARTICULAR PURPOSE RELATIVE TO ANY SECURITY MEASURES RECOMMENDED OR UNDERTAKEN BY THE MASTER ASSOCIATION.

(f) Drainage System. To maintain all lakes, ponds, canals, piping, culverts, drains, and other facilities now or hereafter situated upon any portion of the Property which are intended for the collection, retention, detention, transmittal or

disposal of stormwater (other than gutters, downspouts and other facilities attached to building), in clean and sanitary condition and in good order and repair and to make all replacements and renewals necessary to so maintain the same. The Golf Club Property Owner shall be responsible for maintenance of the portion of drainage facilities situated within the Golf Course Property and for the Lake situated within the Property and ponds and "wetland" areas (if any) that are situated in whole or in part within the Golf Club Property.

(g) Common Areas. To maintain the Common Areas in good and attractive condition, for the use and enjoyment of Owners. The Master Association shall also pay for any real estate taxes and assessments assessed with respect to any such Common Areas. The obligations set forth in this subsection shall be deemed to run with and burden the Master Association by its acceptance of a deed and title to the Common Areas.

(h) Community Signs. To install, maintain, repair, replace and illuminate all signs located on any portion of the Property which are for the general benefit of the Property and which comply with the requirements of the Township and other governmental authorities having jurisdiction.

(i) Maintenance of Non-Master Association Property. The Master Association shall maintain property which it does not own, including, without limitation, property dedicated to the public, if the Master Board determines that such maintenance is necessary or desirable to maintain the Community-Wide Standard.

(j) Right of the Master Association to Contract with Golf Club. The Master Association is authorized to contract with the Golf Club for the maintenance of some or all of the Areas of Common Responsibility.

(k) Rubbish Removal. The Master Association may (but is not obligated to) provide rubbish removal services, the cost of which services shall be a Common Expense. At the present time it is not contemplated that the Master Association will provide rubbish removal services.

(1) Township and County Not Obligated. If the Master Association is dissolved or otherwise ceases to function, the Township or County shall have the right, but not the obligation, to provide those municipal services to Living Units situated within Golf Meadow that are provided by the Township or County to homes situated on publicly dedicated streets. In no event, however, is the Township or County obligated to provide such services (except for fire, police, ambulance and other emergency services that are provided by the Township or County for all residents of the Township) to the residents of Golf Meadow, or to otherwise perform the functions of the Master Association under this Master Declaration.

Section 6.2 - Cluster Areas; Neighborhoods

The Master Association may, in the discretion of the Master Board, assume the maintenance responsibilities of a Cluster Area or Neighborhood set out in this Master Declaration or in any Subsequent Amendment or declaration subsequently recorded which creates any Cluster Area or Neighborhood Association upon all or any portion of the Property. In such event, all costs of such maintenance shall be assessed only against the Living Units within the Cluster Area or Neighborhood to which the services are provided. This assumption of responsibility may take place either by contract or agreement or because, in the opinion of the Master Board, the level and quality of service then being provided is not consistent with the Community-Wide Standard for the Property. The provision of services in accordance with this Section shall not constitute discrimination within a class.

Furthermore, upon resolution of the Master Board, each Cluster Area or Neighborhood shall be responsible for paying, through Cluster Area or Neighborhood Assessments, costs of maintenance of certain portions of the Area of Common Responsibility within or adjacent to such Cluster Area or Neighborhood, which may include, without limitation, special amenities and services within the Cluster Area or Neighborhood, the costs of maintenance of any right-of-way and Cluster Green Space or between the Cluster Area or Neighborhood and adjacent public roads, private streets within the

a Cluster Area or Neighborhood, and lakes or ponds within a Cluster Area or Neighborhood, regardless of ownership and regardless of the fact that such maintenance may be performed by the Master Association.

Any Cluster Association or Neighborhood Association having responsibility for maintenance of all or any portion of the property within a particular Cluster Area or Neighborhood pursuant to a declaration of covenants affecting the Cluster Area or Neighborhood shall perform such maintenance responsibility in a manner consistent with the Community-Wide Standard. If any such Cluster Association or Neighborhood Association fails to perform its maintenance responsibility as required herein and in any additional declaration, the Master Association may perform it and assess the costs against all Living Units within such Cluster Area or Neighborhood as provided in Article VII, Section 7.23 of this Master Declaration.

Section 6.3 - Taxes and Assessments

The Master Association shall pay all taxes and assessments levied against portions of the Property (including Common Green Space) owned by the Master Association or levied against the Areas of Common Responsibility, including, without limitation, personal property taxes, general real estate taxes and special assessments certified by the applicable public authority.

Section 6.4 - Utilities

The Master Association shall pay all charges for waxen, gas, sewer, electricity, light, heat or power, telephone and other services used, rented or supplied to or in connection with any property owned and/or operated by the Master Association. All such utility services shall be contracted for, metered and billed by and through the Master Association.

Section 6.5 - Insurance

(a) Insurance. The Master Board, or the Master Association's duly authorized agent, shall have the authority to and shall obtain insurance for all insurable improvements on the Common Areas (excluding Cluster Common Areas, unless the Cluster Association contracts with the Master Association for such insurance) against loss or damage by fire or other hazards, including extended coverage, vandalism, and malicious mischief. This insurance shall be in an amount sufficient to cover the full replacement cost of any repair or reconstruction in the event of damage or destruction from any such hazard.

The Master Board shall also obtain a public liability policy covering the Common Areas (excluding Cluster Common Areas, unless the Cluster Association contracts with the Master Association for such insurance), the Master Association and its Members for all damage or injury attributable to gay acts or omissions of the Master Association or any of its Members or agents. The public liability policy shall have a limit of at least _____ Dollars (\$_____) for bodily injury (including death) and property damage.

Premiums for all insurance on the Common Areas shall be a Common Expense of the Master Association. The policy may contain a reasonable deductible, and the amount thereof shall be added to the face amount of the policy in determining whether the insurance at least equals the full replacement cost. The deductible shall be paid by the party who would be responsible for the repair in the absence of insurance and in the event of multiple parties shall be allocated in relation to the amount each party's loss bears to the total loss or damage.

The cost of insurance coverage obtained by the Master Association shall be included in the Master Assessments.

All such insurance coverage obtained by the Board shall be written in the name of the Master Association as trustee for the respective benefitted parties, as further identified in (ii) below. Such insurance shall be governed by the provisions hereinafter set forth:

(i) All policies shall be written with a company licensed to do business in _____ [state] and holding a rating of B/VI or better in the Financial Category as established by A. M. Best Company, Inc., if reasonably available, or, if not available, the most nearly equivalent rating.

(ii) All policies on the Common Areas shall be for the benefit of the Owners and their mortgagees as their interests may appear. All policies secured at the request of a Cluster Area or Neighborhood shall be at the expense of such Cluster Area or Neighborhood for the benefit of such Cluster Area or Neighborhood Association, if any, the Owners within the Cluster Area or Neighborhood and their mortgagees, as their interests may appear.

(iii) Exclusive authority to adjust losses under policies obtained by the Master Association shall be vested in the Master Board; provided, however, no mortgagee having an interest in such losses may be prohibited from participating in the settlement negotiations, if any, related thereto.

(iv) In no event shall the insurance coverage obtained and maintained by the Master Board hereunder be brought into contribution with insurance purchased by individual Owners, Occupants, or their mortgages.

(v) All casualty insurance policies shall have an "inflation guard" endorsement, if reasonably available, and an "agreed amount" endorsement if reasonably available with an annual review by one or more qualified persons, at least one of whom must be in the real estate industry and familiar with construction in the _____ [state] area.

(vi) The Master Board shall be required to make every reasonable effort to secure insurance policies that will provide for the following:

(A) a waiver of subrogation by the insurer as to any claims against the Master Board, its manager (if any), the Owners, and their respective tenants, servants, agents, and guests;

(B) a waiver by the insurer of its rights to repair, and reconstruct, instead of paying cash;

(C) that no policy may be cancelled, invalidated, or suspended on account of the conduct of any Master Board member; officer, or employee of the Master Association or its duly authorized manager without prior demand in writing delivered to the Master Association to cure the defect and the allowance of a reasonable time thereafter within which the defect may be cured by the Master Association, its manager, any Owner, or mortgagee;

(D) that any "other insurance" clause in any policy exclude individual Owners' policies from consideration;

(E) that no policy may be cancelled or substantially modified without at least _____
(_____) days prior written notice to the Master Association; and

(F) directors (trustees) and officers liability coverage, if reasonably available.

In addition to the other insurance required by this Section, the Master Board shall obtain, if and to the extent necessary, as a Common Expense, worker's compensation insurance, and a fidelity bond or bonds on Board Members, officers, employees, and other persons handling or responsible for the Master Association's funds. The amount of fidelity coverage shall be determined in the Master Board's best business judgment, but may not be less than _____ (_____) months assessments, plus reserves on hand. Bonds shall contain a waiver of all defenses based upon the exclusion of persons serving without compensation and may not be cancelled or substantially modified without at least _____ (_____) days' prior written notice to the Master Association.

(b) Individual Insurance. By virtue of taking title to a Living Unit subject to the terms of this Master Declaration, each Owner covenants and agrees with all other Owners and with the Master Association that each individual Owner shall carry blanket all-risk casualty insurance on the Living Units (other than Living Units in a condominium development) and structures constructed thereon. Each individual Owner further covenants and agrees that in the event of a partial loss or damage and destruction resulting in less than total destruction, the individual Owner shall proceed promptly to repair or to reconstruct the damaged structure in a manner consistent with the original construction. In the event that the structure is totally destroyed and the individual Owner determines not to rebuild or to reconstruct, the individual Owner shall clear the Living Unit of all debris and return it to substantially the natural state in which it existed prior to the beginning of construction. A Cluster Association or Neighborhood Association may impose more stringent requirements regarding the standards for rebuilding or reconstructing structures on the Living Unit and the standard for returning the site of the Living Unit to its natural state in the event the Owner decides not to rebuild or reconstruct.

(c) Disbursement of Proceeds. Disbursement of Proceeds of insurance policies shall be disbursed as follows:

(i) If the damage or destruction for which the proceeds are paid is to be repaired or reconstructed, the proceeds, or such portion thereof as may be required for such purpose, shall be disbursed in payment of such repairs or reconstruction as hereinafter provided. Any proceeds remaining after defraying such costs of repairs or reconstruction to the Common Areas or, in the event no repair or reconstruction is made, after making such settlement, shall be retained by and for the benefit of the Master Association and placed in a capital improvements account.

(ii) If it is determined, as provided for in Subsection (a) of this Section, that the damage or destruction to the Common Areas for which the proceeds are paid shall not be repaired or reconstructed, such proceeds shall be disbursed in the manner as provided for excess proceeds in Subsection (c)(i) above.

(d) Damage and Destruction.

(i) Immediately after the damage or destruction by fire or other casualty to property covered by insurance written in the name of the Master Association, the Board, or its duly authorized agent shall proceed with the filing and adjustment of all claims arising under such insurance and obtain reliable and detailed estimates of the cost of repair or reconstruction of the damage or destruction. Repair or reconstruction, as used in this paragraph, means repairing or restoring the damaged or destroyed property to substantially the same condition in which it existed prior to the fire or other casualty.

(ii) Any damage or destruction to the Common Areas shall be repaired or reconstructed unless the Class "B" Member and at Least _____ percent (_____) of the Class "A" Members by Personal Vote shall decide within _____ (_____) days after the casualty not to repair or reconstruct. If for any reason either the amount of the insurance proceeds to be paid as a result of such damage or destruction, or reliable and detailed estimates of the cost of repair or reconstruction, or both, are not made available to the Master Association within said period, then the period shall be extended until such information shall be made available; provided, however, such extension shall not exceed _____ (_____) days. No mortgagee shall have the right to participate in the determination of whether the Common Areas so damaged or destroyed shall be repaired or reconstructed. Notwithstanding the foregoing, damage or destruction to any utility, including any sewer plant or sewage lift station, or other utility serving the Property shall, in any event, be repaired and/or reconstructed by the Master Association.

(iii) In the event that it should be determined by the Master Association in the manner described above that the damage or destruction of the Common Areas shall not be repaired or reconstructed and no alternative improvements are authorized, then and in that event such property shall be restored to its natural state and maintained as an undeveloped portion of the Common Areas by the Master Association in a neat and attractive condition.

(e) Repair and Reconstruction. If the damage or destruction for which the insurance proceeds are paid is to be repaired

or reconstructed, and such proceeds are not sufficient to defray the cost thereof, the Master Board shall, without the necessity of a vote of the Members, levy a special assessment against all Owners in proportion to the number of Living Units owned by such Owners. Additional assessments may be made in like manner at any time during or following the completion of any repair or reconstruction.

Section 6.6 - Management

The Master Association shall provide the management and supervision for the operation of the Areas of Common Responsibility. The Master Association shall establish and maintain such policies, programs and procedures to fully implement this Master Declaration for the purposes intended and for the benefit of the Members and may, but shall not be required to:

(a) Adopt Rules;

(b) Engage employees and agents, including without limitation, security personnel, attorneys, accountants and consultants, maintenance firms and contractors;

(c) Delegate all or any portion of its authority and responsibilities to a manager, managing agent, or management company. Such delegation may be evidenced by a management contract which shall provide for the duties to be performed by the managing agent and for the payment to the managing agent of a reasonable compensation. Upon the expiration of each management agreement, the Master Association may renew said management agreement or enter into a different agreement with the same or a different managing agent, provided that no management agreement or renewal thereof shall be for a period longer than _____ (_____) years, and provided, further, that the Master Board may designate a different managing agent with whom the Master Association shall enter into an agreement after the end of the then existing management agreement; and

(d) The management agreement may be with an entity owned by or associated with Original Declarant or owned by, associated with, controlled or employed by any partner, shareholder, officer, director, agent or employee of Original Declarant, and may be for a period of time not to exceed _____ (_____) years, in Original Declarant's sole discretion.

Section 6.7 - Upgrading

The Master Association shall continuously attempt to upgrade the Areas of Common Responsibility for the good and welfare of all of its Members. In so doing the Master Association is authorized to expend reasonable sums of money for such purpose and intent, subject to the provisions of this Master Declaration and reasonable monetary considerations.

Section 6.8 - Enforcement

The Master Association shall take all actions reasonably necessary under the circumstances to enforce the covenants and restrictions set forth in Article VII hereof.

Section 6.9 - Disputes Between Cluster Areas or Neighborhoods

The Master Association shall have the right (but not the obligation) to mediate or arbitrate disputes between Cluster Areas or between Neighborhoods, provided, however, no members of the Cluster Area or Neighborhood involved in such disputes shall mediate or arbitrate the same on behalf of the Master Association. Any fees, costs and expenses incurred by such mediation or arbitration shall be payable equally by the Cluster Areas or Neighborhoods involved in such disputes.

Section 6.10 - Rules and Regulations

The Master Association, through the Master Board, may make and enforce reasonable rules and regulations governing the Areas of Common Responsibility, which rules and regulations shall be consistent with the rights and duties established by this Master Declaration. Sanctions may include reasonable monetary fines and suspension of the right to vote. The Master Board shall, in addition, have the power to seek relief in any court for violations or to abate nuisances. Imposition of sanctions shall be as provided in the Master Code of the Master Association. An Owner shall be subject to the foregoing sanctions in the event of a violation by such Owner, his family, guests, Tenants or by his co-Owners or the family, guests or Tenants of such co-Owners. Furthermore, the Master Association, through the Master Board, may, by contract or other agreement, enforce Township ordinances or request the Township or other governmental authority having jurisdiction to enforce ordinances on the Property for the benefit of the Master Association and its Members. This Section shall in no way impair or prohibit the Township or other governmental authority from enforcing their ordinances and other regulations.

Section 6.11 - General

The Master Association shall perform and carry out all other duties and acts reasonably necessary to give effect to and implement the intent of the provisions of this Master Declaration.

Section 6.12 - Original Declarant's Rights

During the Class "B" Control Period, the Original Declarant shall exercise all or any of the powers, rights, duties and functions of the Master Association, including, without limitation, the right to levy special assessments as authorized herein, the right to enter into a management contract, the right to obtain insurance under Original Declarant's blanket policy (if any), the right to perform each duty and obligation of the Master Association set forth herein, the right to collect assessments and disburse all funds of the Master Association, and the right to have a lien (and to foreclose said lien) on a Living Unit and on a Vacant Sublot for unpaid assessments in the manner and to the extent granted to the Master Association as herein provided.

Section 6.13 - Zoning Complaint

Compliance with Zoning Requirement of the _____[city], _____[county], _____[state] with Respect to Common Green Space (minimum of _____ percent (_____%)) of the Property, and the Golf Course Property).

The following provisions are being imposed upon the Property in accordance with R-1 "Controlled Density Residential Development with Sewer and Water" requirements of the zoning requirements of _____[city] Township (the "Zoning Resolution").

(a) This Master Declaration guarantees that the Common Green Space shown as Common Area on the final development plan will remain as such (see also Section 2.2(P)).

(b) Common Green Space and any recreation facilities that comprise the Common Areas shall be deeded to the Master Association. The Master Association shall not be dissolved nor shall it dispose of any Common Green Space or any recreation facilities without having established a successor entity to take over said property pursuant to the terms of the Zoning Resolution and the approval of the _____[city] Trustees. Furthermore, membership in the Master Association and any homeowner's association is mandatory of all owners within the Property comprising the Golf Meadow development.

(c) This Master Declaration hereby conveys to the Township and other appropriate governmental bodies the right of entrance to the Common Green Space and recreation facilities encompassed by the Common Area for emergency

purposes or in the event of nonperformance of maintenance or improvements affecting the public interest. Such governments have the right, after proper notice, to make improvements and perform maintenance functions. In addition, the Township shall have the right to proceed against the Master Association and its Members for reimbursement of said costs in accordance with Section 9.10 hereof. Advance notice is not necessary for emergency entrance onto such Common Area (see also Section 3.5 hereof).

(d) Common Green Space shown as Common Area in each phase of Golf Meadow for which a Plat is filed must equal the minimum percentage _____ percent (_____%) required for the entire development. Where Common Green Space is not provided in proportionate amounts for each phase, the Township Board of Zoning Appeals shall specify an appropriate financial guarantee in the Conditional Zoning Certificate issued by the Township. On or before the date of recording of this Master Declaration the Declarant shall impose a restriction on the entire Golf Meadow development of 563.4 acres (including the Golf Course), as the same may be expanded or contracted, that no less than _____ percent (_____%) thereof shall be devoted to Common Green Space.

(e) The Declarant will conform in all ways to the _____ [county] County Subdivision Regulations applicable to any specific area of the Property.

(f) All utility lines shall be installed underground.

Section 6.14 - Zoning Compliance

Compliance with Zoning Resolution of _____ [city], _____ [county],
_____ [state] with Respect to the Cluster Green Space of Cluster Areas.

The following provisions are being imposed upon the Cluster Areas of the Property in order to comply with the
_____ [city]'s zoning requirements.

(a) Any land set aside for Cluster Area and not utilized for the actual construction of Living Units will be dedicated to Cluster Green Space primarily for the single-family Cluster Area. The Cluster Green Space shall be controlled by a Cluster Association. The Cluster Green Space in the Cluster Areas shall be in addition to the Cluster Green Space provided for in Section 126f of the _____ [city]'s zoning requirement and provided for in Section 6.13(d) hereof. Membership in the Cluster Association is mandatory for Owners of Cluster Living Units and Cluster Sublots. The Cluster Green Space referred to in this Section does not include any streets, non-recreational building or individually-owned Land. Each Cluster Living Unit within a Cluster Area will be designed to abut Cluster Green Space.

(b) Cluster Green Space areas may be improved with appropriate recreation facilities and structures, such as tennis courts, pools, pavilions or other recreation features, subject to review and approval by the Township's Board of Zoning Appeals and by the Design Review Committee.

(c) Significant natural amenities, such as outcroppings, tree stands, ponds, ravines and stream channels will be left in their natural state and considered part of the required Cluster Green Space.

(d) Cluster Green Space and the adjacent circulation system has been designed to limit through traffic on local streets. Any Cluster Green Space developed as a major activity center such as a swimming pool or recreation center will be located on a thoroughfare designed to accommodate the resulting traffic volume.

(e) No portion of the Cluster Green Space will have a dimension of less than _____
(_____) feet, unless it is used as a connecting green space link, subject to modification by the Township's Board of Zoning Appeals for smaller sections which are particularly designed and meet the objectives of

this Section.

(f) This Master Declaration hereby conveys (and of the Cluster Association documents shall convey) to the Township and other appropriate governmental bodies the right of entrance to the Cluster Green Space and recreation facilities encompassed by the Cluster Green Space for emergency purposes or in the event of nonperformance of maintenance or improvements affecting the public interest. Such governments have the right, after proper notice, to make improvements and perform maintenance functions. In addition, the Township shall have the right to proceed against the Cluster Association and its Members for reimbursement of said costs in accordance with Section 9.10 hereof. Advance notice is not necessary for emergency entrance onto such Cluster Green Space.

The Declarant shall require each Builder acquiring a Cluster Block to incorporate the above provisions in his Cluster Association documents.

ARTICLE VII COVENANTS AND RESTRICTIONS

The intent of this Master Declaration is to cause the Property to be kept and maintained as a high quality residential golf club community. Therefore, the covenants and restrictions provided in this Article shall be applicable to the Owners, Land Contract Venders, Lessees, Tenants and Occupants of the Property. The following Covenants and Restrictions shall be broadly construed and interpreted in furtherance of this intent. Any Subsequent Amendment, declaration or other document for any Cluster Area or Neighborhood may impose stricter standards than those contained in this Article so long as such standards do not conflict with Community-Wide Standards. The Master Association, acting through its Board, shall have standing and the power to enforce such standards.

The Master Association, acting through the Master Board, shall have authority to make and to enforce standards and restrictions governing the use of the Property in addition to those contained herein, and to impose reasonable user fees for use of Common Area facilities. Such regulations and use restrictions shall be binding upon all Owners, Land Contract Vendees, Lessees, Tenants and Occupants.

Section 7.1 - Covenant of Good Maintenance

Each Owner, the Master Association, Cluster Association and a Neighborhood, as the case may be, shall keep and maintain the property owned, leased to or controlled by or in the possession of such person and all improvements, buildings and structures therein or thereon, in a clean and safe condition and in good order and repair, including but not limited to the seeding, watering and mowing of all lawns; the pruning of trees, shrubbery and amass, the painting (or other appropriate external care) of all buildings, structures and other improvements located thereon, and the absence of conditions constituting violations of applicable building, fire and health codes and the Master Declaration, all in a manner and with such frequency as is consistent with good property management. As provided in Section 7.23 hereof each Owner, Cluster Association or Neighborhood shall be obligated to pay the costs incurred by the Master Association for repairing, replacing, maintaining or cleaning any item which is the responsibility of such Owner, Cluster Association or Neighborhood, but which responsibility such Owner, Cluster Association or Neighborhood fails or refuses to discharge.

Section 7.2 - Trailers

No temporary buildings, mailer, recreation vehicle, garage, tent, shack, barn, or any similar structure shall be used, temporarily or permanently, as a residence on any part of the Property at any time.

Section 7.3 - Fences, Walls and Hedges

Fences, walls, tress, hedges, and shrub plants shall be maintained in a sightly and attractive manner, and shall not obstruct the right-of-way sight lines for vehicular traffic. Fences, walls of any kind and landscaping of any kind shall not be erected, begun or permitted to remain upon any portion of the Property unless approved by the Design Review Committee or unless originally constructed by Declarant. The provisions of this Section are subject and subordinate to the provisions of Section 3.7 of this Master Declaration.

Section 7.4 - Nuisance

No noxious or any activity constituting an unreasonable source of discomfort or annoyance shall be carried on upon any portion of the Property (including the Living Units situated thereon), nor shall anything be done thereon that may be or become a nuisance or annoyance to other Owners. Loud speakers that cause a hazard or annoyance shall not be permitted. The Master Board shall have absolute power to determine what is "reasonable" and what is "unreasonable" under this Section.

Section 7.5 - Animals

No animals, livestock, reptiles or poultry of any kind shall be raised, bred or kept on any portion of the Property (including the Living Units situated thereon) without the approval of the Master Board, except that dogs, cats, birds and other customary household pets approved by the Master Board may be kept, subject to Rules adopted by the Master Board, provided that they are not kept, bred or maintained for any commercial purpose and provided, further, that any such pet causing or creating a nuisance or unreasonable disturbance or annoyance shall be permanently removed from the Property upon _____ (_____) days' written notice from the Master Board. Dogs shall at all times whenever they are outside a Living Unit be confined on a leash held by a responsible person. The Rules may limit the number of pets which may be kept in any one Living Unit. The Master Board shall have absolute power to prohibit a pet from being kept on the Property or within a Living Unit if the Master Board finds a violation of this Section. Additional covenants affecting the property within a Neighborhood may impose more stringent restrictions on animals.

Section 7.6 - Signs

No sign or other advertising device of any nature shall be placed upon any portion of the Property except for signs and advertising devices installed by or at the direction of the Design Review Committee, or which the Design Review Committee approves as to color, location, nature, size and similar characteristics. All signs shall comply with the Township's requirements. "For Rent" and "For Sale" signs are prohibited. Notwithstanding the foregoing, the restrictions of this Section 7.6 shall not apply to Declarant or to a Builder or real estate company authorized by Declarant.

Section 7.7 - Storage of Material and Trash Handling

No lumber, metals, bulk material, refuse or trash shall be burned, whether in indoor incinerators or otherwise (excluding the burning of firewood in a fireplace), kept, stored or allowed to accumulate on any portion of the Property, except normal residential accumulation pending pick-up and except building materials during the course of construction or reconstruction of any approved building or structure, except firewood may be stored within Living Units, on patio areas or other areas designated by the Master Board. If trash or other refuse is to be disposed of by being picked up and carried away on a regular recurring basis, containers may be placed in the open on any day that a pick up is to be made, thereby providing access to persons making such pick-up. At all other times, such containers shall be stored in such manner that they cannot be seen from adjacent and surrounding property. No dumping of rubbish shall be permitted on any portion of the Property. Anything herein to the contrary notwithstanding, the Master Association or the Master Board may adopt a Rule or Rules which permit burning, incineration or storage of refuse or trash if the same becomes reasonably necessary for the safety, health or welfare of the Occupants, and is permitted by law.

Section 7.8 - Commercial or Professional Uses

Except as expressly permitted in this Master Declaration, or by Rules adopted in accordance with this Master Declaration, no industry, business, trade or full-time occupation or profession of any kind, commercial, educational, or otherwise, designated for profit, altruism, exploration or otherwise, shall be conducted, maintained or permitted on any part of the Property; provided, however, an Occupant may use a portion of his or her Living Unit for his office or studio, so long as the activities therein shall not interfere with the quiet enjoyment or comfort of any other Occupant and that such use does not result in the Living Unit becoming principally an office, school or studio as distinct from a Living Unit. Furthermore, no trade or business may be conducted in or from any Living Unit without the written approval of the Master Board (or Covenants Committee referred to in the Master Code) first obtained. Such approval may be granted so long as: (a) the existence or operation of the business activity is not apparent or detectable by sight, sound or smell from outside the Living Unit; (b) the business activity conforms to all zoning requirements for the Property; (c) the business activity does not involve persons coming onto the Property who do not reside in the Property except by appointment only; (d) the business activity does not involve door-to-door solicitation of Occupants of the Property; and (e) the business activity is consistent with the residential character of the Property and does not constitute a nuisance, or a hazardous or offensive use, or threaten the security or safety of other residents of the Property, as may be determined in the sole discretion of the Master Board (or Covenants Committee referred to in the Master Code). The Master Board may adopt Rules which intensify, relax or amend the prohibitions of this Article. Nothing in this Section shall preclude the leasing of a Living Unit by the Declarant or an Owner, the right of the Declarant or the Master Board (or a firm or agent employed by the Declarant or Master Board) to approve commercial activities such as charity events, sporting events requiring admission, temporary food and beverage operations and brokerage offices for sales of Vacant Sublots and for new sales of Living Units and resales of Living Units.

Section 7.9 - Storage of Vehicles and Machinery: No Parking on Dedicated Roads

No truck (except a two-axle truck with no more than four tires), camper, camper trailer, recreation vehicle, boat, boat trailer, all terrain vehicle, airplane, snowmobile, commercial vehicle, van, mobile home, tractor, bus, farm equipment, off-road vehicles or other vehicle of any kind, licensed or unlicensed, shall be stored on any driveway or other area in or upon the Property, except in the confines of garages, maintenance buildings or parking areas approved by the Design Review Committee. No machinery of any kind shall be placed or operated upon any Portion of the Property except such machinery which is customarily required for the maintenance of the Property, related improvements, lawns and landscaping. Such permitted machinery shall be stored in garages and maintenance buildings approved by the Design Review Committee. Furthermore, on-street parking of motor vehicles shall be in accordance with the Township's Zoning Resolution and County requirements, if any.

Section 7.10 - Firearms; Preservation of Wildlife

Firearms, ammunition and explosives of every kind shall not be discharged nor shall any traps or snares be set, nor shall any hunting or poisoning of wildlife of any kind be permitted in or upon the Property, except for rodent control, and the control of such other animals as constitute a nuisance or cause damage to the Property or Golf Course Property, or except with the prior written approval of the Master Board.

Section 7.11 - Control of Trucks, Commercial Vehicles

No tractor trailers, commercial tractors, commercial vehicles, road machinery or excavating equipment shall be permitted to remain on any portion of the Property or on the public right-of-way adjoining any portion of the Property for any period of time whatsoever, except while making deliveries or performing services thereon and except as necessary for the construction, reconstruction or repair of buildings or structures on the Property.

Section 7.12 - Traffic Regulations; Golf Carts

All vehicular traffic on dedicated roads shall be subject to the provisions of the laws of the State of _____[state], the County, and the Township concerning operation of motor vehicles on public streets. All vehicles of any kind and nature which are operated on the Property shall be operated in a careful, prudent, safe, and quiet manner. Golf carts will not be permitted to operate on the public roads serving the Property.

Section 7.13 - Poles, Wires, Antennae and Satellite Dishes

Subject to applicable easement rights, no facilities, including poles and wires, for the transmission or receipt of electricity, telephone messages, ham radio messages and the like shall be placed or maintained above the surface of the mound in any portion of the Property without the prior approval of the Design Review Committee. No antennae or satellite dishes shall be permitted within the Property without the approval of the Declarant and the Design Review Committee. This provision shall not apply for temporary facilities for the construction or repair of any building or other structure.

Section 7.14 - Exterior Appearance and Lights on Exteriors of Residences

The exterior of any building or structure in the Property shall not be altered, modified, changed or redecorated in such a way as to change the appearance or decor of the structure, nor shall any of the landscaping appurtenant to such building or structure be materially changed without the express written authorization of the Design Review Committee. The type and location of mailboxes shall be prescribed by the Design Review Committee. The provisions of this paragraph are subject to the provisions of Section 8.2 of this Master Declaration.

For the purpose of providing security, each Owner of a Living Unit shall provide and operate one (1) gas light of a kind designated by the Design Review Committee which shall automatically go on at dusk and remain on until dawn. Each Owner shall utilize said light, and shall keep and maintain said light in good condition and repair.

Section 7.15 - Grading

No Person shall change the grade on any portion of the Property without first obtaining the consent of the Design Review Committee.

Section 7.16 - Drainage Ditches

No Person shall interfere with the free flow of water through any drainage ditches or storm sewers within the Property. The Township or other governmental authority having jurisdiction and the Golf Course Property Owner shall have the right to enter upon the Common Areas of the Property to repair and maintain all storm, drainage, courses, ditches, structures and appurtenances, including, without limitation, the Lake and ponds within the Property, for the purpose of relieving any flooding condition or threatened flooding condition which might be harmful to the Golf Course Property and to other property within the Township.

Section 7.17 - Resubdivision of Lots

No subplot shall be subdivided or its boundary lines changed except with the proper written approval of the Master Board or except as expressly authorized herein. Declarant, however, hereby expressly reserves the right to replat any lot or lots owned by Declarant. Any such division, boundary line change, or replatting shall not be in violation of the applicable subdivision and zoning regulations.

Section 7.18 - Golf Course Property

Owners of Living Units and Vacant Sublots adjacent to the Golf Course Property, as well as their families, tenants, guests, invitees and pets, and users of the Common Areas or Cluster Green Space, adjacent to the Golf Course Property

shall be obligated to refrain from any actions which would distract from the playing qualities of the Golf Course. Such prohibited activities shall include, but not be limited to, burning materials where the smoke will cross the Golf Course, maintenance of dogs or other pets under conditions which interfere with Golf Course play due to their loud barking or other actions, playing of loud radios, televisions, stereos, or musical instruments, running or walking on the Golf Course, picking up balls, or similar interference with play.

Section 7.19 - Use of Golf Course Property

Memberships authorizing use of the Golf Course Property are being offered by the Golf Club in accordance with the Plan for the Offering of Memberships in Golf Meadow Golf and Country Club (the "Membership Plan"), as it may be amended from time to time. Use of the Golf Course Property is only available to members, guests and invitees of the Golf Club. Owners and other persons who do not own property in Golf Meadow may apply for membership in the Golf Club in accordance with the terms and conditions of the Membership Plan. Ownership of a Living Unit or other property within Golf Meadow and membership in the Master Association does not give to any Owner any vested right or easement, prescriptive or otherwise, to enter or use the Golf Course Property and does not grant any ownership or membership interest in the Golf Club or Golf Course Property.

Section 7.20 - Lakes, Water Bodies and Wetlands

Subject to the restrictions provided herein and the rules and regulations of the Master Association, as the same may from time to time be promulgated, each Owner and Golf Club Member shall be permitted to use the Lake for the purposes set forth herein. All ponds, streams, water courses and wetlands, other than the Lake, shall be for aesthetic purposes only, and no other use thereof including, without limitation, swimming, boating, fishing, wading, playing, or use of flotation devices, shall be permitted. This Section shall not apply to prohibit use by the Golf Club of the Lake, ponds, streams and water courses within the Golf Course Property for irrigation of the Golf Course Property and other Golf Course purposes.

(a) Launching Ramp. The Declarant and/or the Master Association (and no one else) may provide the Owners and Golf Club Members with access, over or through a Common Area(s) to be designated by the Declarant and/or the Master Association, to provide said Owners and Golf Club Members access to the Lake for the purpose of launching and retrieving watercraft permitted pursuant to subparagraph (b) of this Section 7.20. All Owners, Golf Club Members, their guests, tenants, invitees, and licensees shall defend and hold harmless the Declarant, Master Association and Golf Club from any and all actions, suits, proceedings, injuries or damages arising out of or related to the use of the launching ramp and facilities.

(b) Permitted Watercraft. Subject to the rules and regulations of the Master Association, as the same may from time to time be promulgated, sail boats, row boats, and canoes shall be permitted on the Lake. No boat shall exceed the length of _____ (_____) feet, as measured in a straight line from the center of the bow to the center of the stem. Boats may be powered by electric motors; however, no boat shall be powered by gasoline or other petroleum derivative engines. During the boating season, no boats may be stored on the Lake except at an approved dock. No boat shall be beached on any Living Unit Lot or Vacant Lot or tied to any Living Unit Lot or Vacant Lot. All boats shall be removed from the Lake or dock between November 1 and March 1 of each year. No boat shall be operated within _____ (_____) feet of the shoreline of any Living Unit Lot or portion of the Golf Course unless such boat is in the process of entering or exiting an approved dock.

(c) Docks. Following Design Review Committee approval, the Owners of Living Unit Lots (but not Cluster Sublots) abutting the Lake may construct a maximum of one (1) dock from their property into the waters of the Lake. In addition, following Design Review Committee approval, a Cluster Association for a Cluster Area abutting the Lake may construct one or more docks to serve the members of such Cluster Association. All docks approved by the Design Review Committee shall be constructed parallel to the shoreline, shall not extend more than _____

(_____) feet into the Lake, shall not have a shoreline length of more than _____
 (_____) feet, shall be natural in color, and shall have decking of weather/pressure-treated
 (wolmanized) boards. No boat lifts, dock boxes, or canopies shall be permitted on any dock. The provisions of this
 Section 7.20(c) are subordinate to Section 7.20(g) entitled "Alteration of Wetlands."

All approved docks shall be maintained in a first-class condition. The Owner of any dock that is in a state of disrepair, as determined by the Master Association or the Design Review Committee, shall repair or replace such dock within _____ (_____) days after receipt of written notice from the Master Association that said dock is in a state of disrepair. All repairs to docks or replacements of docks must be approved, prior to repairing or replacing, as the case may be, by the Design Review Committee. If the Owner fails to complete the repairs or replacement of a dock within _____ (_____) days after receipt of written notice as provided above, the Master Association may, but is not obligated to, repair or remove said dock. The cost of any such repair or removal together with an administrative fee equal to _____ percent (_____) % of such cost shall be paid to the Master Association by the Owner within _____ (_____) days after receipt of a bill therefore. All unpaid amounts shall bear interest at the rate of _____ percent (_____) % per annum (or highest rate allowed by law if lesser) and shall upon perfection as provided in Section 9.5 become a lien on the Living Unit Lot. The rights and powers granted the Master Association pursuant to this Section 7.20 shall be in addition to all rights and powers granted the Master Association elsewhere in the Declaration, including, but not limited to, those rights and powers set forth in Section 7.23 of the Declaration.

(d) Fishing. Fishing is permitted in the Lake. All persons fishing in the Lake shall comply with the rules and regulations of the Master Association and the laws and regulations of the State of _____[state]. No guest of an Owner or Club Member may fish in the Lake unless accompanied by such Owner or Club Member. No fish cleaning is allowed on the docks. All fish remains must be sealed in plastic bags and disposed of in appropriate trash containers.

(e) Swimming. There shall be no swimming, diving, wading, playing or use of flotation devices in the Lake, except that the Master Association or the Golf Club may establish a beach and swimming area.

(f) Assumption of Risk. Those persons engaging in activities, whether permitted or not permitted, upon, in, around or above the Lake, ponds, streams and water courses of the Property, expressly assume the risk of the inherent dangers of said activities and agree that the Declarant, Master Association or Golf Club shall not be responsible for any loss, damage, or injury to any person or property arising out of the authorized or unauthorized use of Lake, ponds, streams and water courses within the Property.

(g) Alteration of Wetlands. No activity (including, without limitation, the construction of and docks pursuant to Section 7.20(c), "weed-eating," mowing, plant removal, plant trimming, dredging or filling) shall be conducted at the Property which would in any manner disturb or potentially disturb either (i) designated "wetlands" within the Property; or (ii) wetland vegetation within _____ (_____) feet of the high water mark of any water body within the Property, without the prior written consent of both the Master Association and the Golf Course Property Owner and unless all permits required to conduct such activity have been first obtained from any governmental authorities having jurisdiction over "wetlands."

Section 7.21 - Use of the Name "Golf Meadow"

No Person shall use the words "Golf Meadow" or any derivative thereof in any printed or promotional material without the prior written consent of Declarant. However, Owners may use the name "Golf Meadow" in printed and promotional material where such words are used solely to specify that particular property is located within Golf Meadow.

Section 7.22 - Waiver of Subrogation

Each Person as a condition of accepting title and/or possession of a Living Unit and the Master Association agree for themselves, and their respective successors, heirs, executors, administrators, personal representatives, assigns, and lessees, provided said agreement does not invalidate or prejudice any policy of insurance, that in the event that any building, structure or improvement within the Property or the fixtures or personal property of anyone located therein or thereon are damaged or destroyed by fire or other casualty that is covered by insurance, the rights, if any, of any of them against the other, or against the employees, agents, licensees or invitees of any of them with respect to such damage or destruction and with respect to any loss resulting therefrom are hereby waived.

Section 7.23 - Violation of This Article

If any Person required to comply with the foregoing Covenants and Restrictions is in violation of any one of same, including, but not by way of limitation, design review criteria or standards established by the Design Review Committee, the Declarant (as long as the Declarant is a Class "B" Member of the Master Association) or the Master Board and/or the Design Review Committee shall have the right to give written notice to such Person to terminate, remove or extinguish such violation. Such notice shall expressly set forth the facts constituting such violation.

Except in the case of an emergency situation, the violating party shall have _____ (_____) days after written notice of the violation to take reasonable action to cause the removal, alleviation or termination of same. In the case of an emergency situation, or in the case of the failure of the violating party to comply with the provisions hereof after notice, the Declarant and/or the Master Association shall have the right, through their respective agents and employees, to enter upon the land where the violation exists and to summarily terminate, remove or extinguish the violation. In addition to the foregoing, the Declarant and/or the Master Association shall have the right to obtain an injunction from any Court having jurisdiction for the cessation of such violation or attempted violation of this Article. The rights and remedies of the Master Association and Declarant contained in this Article shall be nonexclusive and in addition to any other right or remedy available at law or in equity, including a claim or action for specific performance and/or money damages (including punitive damages), together with attorney's fees, paralegal's fees and other costs of such actions. Furthermore, the failure or neglect to enforce any term, covenant, condition, restriction, right or procedure herein shall in no event and under no circumstances be construed, deemed or held to be a waiver with respect to any subsequent breach or violation thereof. Subject to the provisions of the Section of the Master Code entitled, "Hearing Procedure," a Person in violation of this Article VII shall be obligated to the Master Association and/or Declarant for money damages and for the full amount of all costs and expenses, including attorneys' and paralegals' fees, incurred to remedy any such violation. If said amounts are not paid within _____ (_____) calendar days following said notification, then said amount shall be deemed "delinquent," and shall, upon perfection as provided in Section 9.5, become a continuing lien upon the portion of the Property owned or occupied by such Person(s) and a personal obligation of the Person(s) violating this Article. In addition, the Owner of any portion of the Property shall be liable jointly and severally for any obligations of any Occupant of such Owner's property.

Section 7.24 - Restrictions of Other Documents

Nothing contained in these Covenants and Restrictions shall preclude the imposition of more stringent restrictions imposed elsewhere in this Master Declaration, restrictions imposed on Cluster Areas, restrictions in a Neighborhood, restrictions imposed on sublots within subdivisions, restrictions imposed in deeds conveying the Property or portions thereof and restrictions imposed by the Design Review Committee so long as such restrictions are not inconsistent with Community-wide Standards created by this Master Association or adopted by the Master Board.

Section 7.25 - Certificate of Compliance with Restrictions

Upon the conveyance of a Living Unit or an interest therein, the grantor shall have the right to request the Master

Association to issue a Certificate of Compliance stating that it has no record of a violation of this Article. A Certificate of Compliance may be relied upon by all persons for all purposes. Neither the Master Board, nor such officer or agent shall have any liability to the grantor, grantee or mortgagee of a Living Unit or to others if the Certificate of Compliance issued hereunder is not correct. The Master Association may require the advance payment of a processing fee in the amount established by the Master Association for the issuance of the Certificate of Compliance.

ARTICLE VIII DESIGN REVIEW COMMITTED

Section 8.1 - Structure of Design Review Committee

The Design Review Committee (sometimes referred to as the "DRC") shall be composed of up to five (5) natural persons (but not less than three (3) natural persons) who need not be Members of the Master Association or Occupants. It is recommended, but not required, that one (1) member of the DRC be an architect. The size of the DRC and the persons who shall serve on the DRC shall be designated from time to time by (a) Declarant for so long as the Declarant is a Class "B" Member of the Master Association (unless Declarant shall sooner notify the Board in writing that Declarant has waived its rights under this subsection) and (b) the Board of the Master Association thereafter. After the Initial term of each member of the DRC, the regular term of office for such member shall be _____ (_____) years with terms staggered so that one of three members (or no more than two of five member's) terms expiring each year. Accordingly, one member (or two members if there are five members of the DRC) shall be designated for an initial term of _____ (_____) years, one member (or two members if there are five members of the DRC) shall be designated for an initial term of _____ (_____) years, and the remaining member will be designated for an initial term of _____ (_____) year(s). A member of the DRC may be removed with or without cause by the Declarant or the Master Board, as the case may be, by written notice to such appointee, and a successor or successors appointed to fill such vacancy shall serve the remainder of the term of the former member. The DRC shall elect a chairman and he or she, or in his or her absence, the vice chairman, shall preside at the meeting of the DRC. The affirmative vote of a majority of the members of the DRC shall be required in order to adopt or promulgate any Rule or to issue any permit, authorization or approval pursuant to this Article. The DRC is authorized to retain the services of consulting architects, landscape architects, engineers, inspectors and/or attorneys in order to advise and assist the DRC in performing its functions set forth herein.

Section 8.2 - Approval of Plans

(a) Architectural Approval. No building or structure shall be commenced, erected, placed, moved onto or permitted to remain on the Property nor shall any building or structure be altered, modified or changed in any way which changes the exterior or the appearance thereof, nor shall any new use be commenced or made on the Property or any part thereof unless an application, plans and specifications for the proposed construction, installation or change, including the description of any proposed new use thereof, shall have been submitted to and approved in writing by the DRC. Furthermore, following approval of any plans and specifications by the DRC, representatives of the DRC shall have the right at reasonable hours to enter upon the building site and inspect the improvements with respect to which construction is underway to determine whether or not the previously approved plans and specifications are being complied with.

(b) Landscaping Approval. No landscaping, grading, excavation, or filling of any nature whatsoever shall be implemented, installed or altered by any Builder or Owner, other than Declarant, unless and until the plans therefor have been submitted to and approved in writing by the DRC. Such plans shall include a calculation of the ratio of the area to be covered by grass lawns versus the area to be left in a natural state, and the DRC shall be entitled to promulgate standards with respect to such ratios. In addition, the landscaping plan for any area adjacent to the Golf Course Property shall be subject to the rights of the Golf Course Property Owner set forth in Section 3.7 hereof.

Furthermore, no hedge or shrubbery plantings or trees which obstructs sight-lines of any road shall be placed or permitted to remain on any Vacant Sublot or Living Unit Lot where such hedge, shrubbery, tree or other planting interferes with traffic sight-lines, including sight-lines at the intersection of a driveway and any road. Unless located within _____ (_____) feet of a Living Unit, no Builder or Owner, other than Declarant, shall be entitled to cut, remove, or mutilate any trees, shrubs, bushes, or other vegetation having a trunk diameter of _____ (_____) inches or more at a point of _____ (_____) feet above mound level, without obtaining the prior approval of the DRC that dead or diseased trees which are inspected and certified as dead or diseased by the DRC or its representatives, as well as dead or diseased shrubs, bushes, or other vegetation, shall be cut and removed from any Vacant Sublot or Living Unit Lot by the Builder or Owner of the same.

(c) Design Review Committee Policies and Guidelines. Plans and specifications for building and other structures and for landscaping shall conform to a document entitled "Design Review Committee Policies and Guidelines" on file with the Master Association, as the same may be amended from time to time by the DRC. Any conflict between the provisions of the DRC Policies and Guidelines, and the provisions of this Master Declaration shall be resolved in favor of this Master Declaration. The plans and specifications submitted to the DRC shall be in such form and shall contain such information as may be reasonably required by the DRC. PROVIDED, HOWEVER, the provisions of this subsection requiring submission of plans and specifications to, and approval by the DRC, shall not be applicable to the Declarant nor any entity related to or affiliated with the Declarant and shall not be applicable to the Golf Club Property.

Declarant or the Master Association may at any time cause design and construction criteria for other structures within the Property including, without limitation, recreation structures, to be prepared and made applicable to the Property.

The decision of the DRC shall be based upon the applicable manual (as then amended) in effect at the time that the plans and specifications are submitted to the DRC.

Section 8.3 - Grounds for Disapproval

The DRC shall have the right to disapprove any plans and specifications submitted hereunder because of any of the following: (a) failure of such plans and specifications to comply with any Covenants and Restrictions contained in this Master Declaration or with design and construction criteria adopted by Declarant or the Master Association or the DRC; (b) failure to include information in such plans and specifications as may have been reasonably requested; (c) incompatibility of design or appearance of any proposed structure or building with any existing or contemplated structures or buildings upon the same or other nearby property; (d) objection to the location of any proposed structures or buildings upon any portion of the Property with reference to any other area in the vicinity; (e) objection to the grading plan; (f) objection to the landscape plan; (g) objection to the color scheme, finish, proportions, style or architecture, height, bulk or appropriateness of any proposed building or structure; (h) objection based solely on aesthetic reasons; or (i) any other matter, in the reasonable judgment of the DRC, that will render the proposed building or structure or use inharmonious with the general plan of the improvement for the Property, or with the building, structures or uses located upon other parts of the Property or in the vicinity of the proposed building, structure or use.

In any case where the DRC shall disapprove any plans and specifications submitted hereunder or shall approve the same only as modified or under specified conditions, such disapproval or qualified approval shall be accompanied by a written statement of the grounds upon which such action was based. In any such case, the DRC shall, if requested, make reasonable efforts to assist and advise the applicant to enable the applicant to provide an acceptable proposal for submission for approval.

Section 8.4 - Right of Appeal

If the DRC shall disapprove any plans and specifications submitted hereunder, there shall be a right to appeal such

decision to the Master Board. Such appeal must be submitted to the Master Board by the applicant, in writing, within _____ (_____) days after receipt of notice of the decision from the DRC. No later than _____ (_____) days after receipt of notice of appeal, the Master Board shall examine the plans and specifications submitted, as well as the grounds upon which the DRC disapproves such plans and specifications. The affirmative vote of at least two-thirds (2/3) of the members of the Master Board shall be required to reverse or modify a decision of the DRC.

Section 8.5 - Variances

The DRC may authorize variances from compliance with any of the provisions of the Design Review Committee Policies and Guidelines when circumstances such as topography, natural obstructions, hardship, aesthetic, or environmental considerations require, but only in accordance with duly adopted rules and regulations. Such variances may only be wanted, however, when unique circumstances dictate and no variance shall (a) be effective unless in writing; (b) be contrary to the restrictions set forth in the body of this Master Declaration; or (c) prevent the DRC from denying a variance in other circumstances. For purposes of this Section, the inability to obtain approval of any governmental agency, or the issuance of any permit, or to comply with the terms of any financing shall not be considered a hardship warranting a variance.

Section 8.6 - Approval Expiration

Applicants must begin construction within _____ (_____) days after final approval by the DRC in accordance with the DRC Policies and Guidelines. Failure to do so will automatically revoke approval without prior notice from the DRC. Time extensions may be requested from the DRC if written requests are received prior to the expiration of the _____ (_____) days after final approval by the DRC. The DRC shall have the right to grant or reject a request for an extension of time in its sole and absolute discretion.

Section 8.7 - Violation of Article

(a) If any building or structure shall be altered, erected, placed or maintained upon any portion of the Property, or any new use is commenced on any portion thereof other than in accordance with plans and specifications approved by the DRC (unless exempt pursuant to the provisions of this Article VIII), such alteration, erection, placement, maintenance or use shall be deemed to have been undertaken in violation of this Article and without the approval required herein. Upon written notice from either the DRC, any Board member or officer of the Master Association or the Declarant, any such building so altered, erected, placed or maintained upon any portion of the Property in violation hereof shall be promptly removed or altered and any such use shall be terminated as to extinguish such violation.

(b) If within _____ (_____) days after written notice of such a violation, reasonable steps have not been taken by the violator toward the alleviation or termination of the same or if such remedial action is not prosecuted with due diligence until satisfactory completion thereof, the Master Association and/or Declarant shall have the right, through agents and employees, to enter upon the land and/or Living Unit and to summarily abate and/or remove any building or structure, or to take such steps as may be necessary to extinguish such use, or to otherwise cure the violation. In addition to the foregoing, the Master Association and/or Declarant shall have the right to file to obtain an injunction from any court having jurisdiction for the cessation of such alteration, erection, maintenance or use which is in violation of this Article. The rights and remedies of the Master Association and Declarant pursuant to the Article shall be non-exclusive and in addition to any other rights or remedies available at law or in equity. Moreover, the failure or neglect to enforce any term, covenant, condition, restriction, right or procedure herein shall in no event and under no circumstances be construed, deemed or held to be a waiver with respect to any subsequent breach or violation thereof. Subject to the provisions of the Master Code entitled "Hearing Procedure," a Person in violation of this Article VIII shall be obligated to the Master Association and/or Declarant for the amount of all costs and expenses, including attorneys' and paralegals' fees, incurred to remedy any such violation. If said amounts are not paid within

_____ (_____) calendar days following said notification, then said amount shall be "delinquent" and shall, upon perfection as provided in Section 10.1, become a continuing lien upon the portion of the Property owned or occupied by such Person(s) and a personal obligation of the Person(s) violating this Article. In addition, the Owner of any portion of the Property shall be liable jointly and severally for any obligations of any Occupant of such Owner's property.

Section 8.8 - Cost of Design Review Committee

The Declarant and the Master Association shall establish an annual budget for the cost and expenses of the DRC which may include, among other things, compensation for its members, support staff and the employment of professional consultants. The budget shall be part of the Common Expenses. The Board and/or the DRC shall have the right to charge fees sufficient to cover the expense for processing applications; reviewing plans, specifications and related data, whether or not the same are approved or disapproved; and compensating any consulting architects, landscape architects, designers, inspectors and/or attorneys retained in accordance with the terms hereof. The Declarant shall be exempt from any such fees.

Section 8.9 - Liability of Members of the Design Review Committee

No Member of the DRC shall be liable to the Association, any Member or any Person for his acts or omissions or failure to act in any particular manner.

ARTICLE IX ASSESSMENTS

Section 9.1 - Definition of Assessments

As used in this Master Declaration, Assessments shall mean all of the costs and expenses incurred by the Master Association in the exercise of its obligations with respect to the Areas of Common Responsibility, including, without limitation:

- (a) All expenditures required to fulfill the responsibilities of the Master Association;
- (b) All amounts incurred in collecting Assessments, including all legal and accounting fees;
- (c) Reserves for uncollectible Assessments, unanticipated expenses, replacements, major repairs and contingencies;
- (d) Annual capital additions and improvements and/or capital acquisitions (but not repairs or replacements) having a total cost in excess of _____ Dollars (\$_____), without in each case the prior approval of the Class "B" Member and the Personal Vote of at least a majority of the Class "A" Members. In case of an emergency requiring prompt action to avoid further loss, the Master Board shall have the discretion to expend whatever is necessary to mitigate such loss;
- (e) Such other costs, charges and expenses which the Master Association determines to be necessary and appropriate within the, meaning and spirit of this Master Declaration;
- (f) The Assessments are separate and distinct from Cluster Assessments or Neighborhood Assessments.

Section 9.2 - Responsibility for Payment of Assessments

The Declarant or the Master Board shall prepare or cause the preparation of an annual operating budget for the Master Association and shall fix the amount of the Assessments. Written notice of the Assessments shall be sent to the Owner

of each Living Unit, each Vacant Sublot Owner and the Owner of each Cluster Block. Payment of Assessments shall be on an annual basis or on another basis established by the Master Board.

(a) The Assessments during the Subsidy Period shall be shared as follows:

(i) Initial Share of Assessments. The Assessments to be paid by the Owner of each Living Unit and Vacant Sublot (including the maximum number of Cluster Lots that may be created within a Cluster Block) shall be in an equal amount. During the Subsidy Period the Assessments per Living Unit and per Vacant Sublot (including the maximum number of Cluster Lots that may be created within a Cluster Block) shall be the following amounts:

Calendar Year	Full Year	Half Year
_____	Assessment Per Living Unit and	Assessment Per Living Unit and
_____	Vacant Lot acquired between	Vacant Lot acquired between Ju-
_____	January 1 and June 30	ly 1 and December 31

If a Living Unit or Vacant Sublot (including a Cluster Block) is acquired from the Declarant between January 1 and June 30 of a year, the purchaser of such Living Unit or Vacant Sublot shall pay through escrow the Full Year Assessment. If such Living Unit or Vacant Sublot is acquired between July 1 and December 31 of a year, the purchaser of such Living Unit or Vacant Sublot shall pay through escrow the Half Year Assessment.

(ii) Share of Owners of Two or more Sublots. If an Owner acquires two (2) or more Sublots and has a Living Unit constructed on one (1) or more of the lots, such Owner shall pay an Assessment for each Sublot as originally platted. Furthermore, the Owner of a Cluster Block shall be required to pay an Assessment for the maximum number of Cluster Sublot that may be created within such Cluster Block as stated on the Plat for such Cluster Block.

(iii) Share of the Declarant. During the Subsidy Period, Declarant shall pay all Common Expenses which are not covered by the annual Assessments payable by Owners of Living Units, Vacant Sublots (including Cluster Blocks) as set forth above. This obligation may be satisfied in the form of a cash subsidy or by "in kind" contributions of services or materials, or a combination of both. The Master Association is specifically authorized to enter into subsidy contracts or contracts for "in kind" contribution of services or materials or a combination of services and materials with Declarant or other entities for the payment of some portion of the Common Expenses during the Subsidy Period.

(b) Rate of Assessments After the Subsidy Period. After the Subsidy Period, the amount of the annual Assessment attributable to the Living Units and the Vacant Sublots (including Cluster Blocks) shall be established as of January 1 of each year and shall be payable by January 10 of each year. If a Living Unit or Vacant Sublot (including a Cluster Block) is acquired from the Declarant between January 1 and June 30 of a year, the purchaser of such Living Unit or Vacant Sublot shall pay through Escrow the Full Year Assessment. If such Living Unit or Vacant Sublot is acquired between July 1 and December 31 of a year, the purchaser of such Living Unit or Vacant Sublot shall pay through escrow the Half Year Assessment.

(c) In addition to the above Assessments, Neighborhood Assessments shall be levied against the Living Units and Vacant Sublots in particular portions of the Property for whose benefit Common Expenses are incurred, if such Neighborhood Assessments benefit less than all Members of the Master Association as a whole. Neighborhood Assessments shall be levied in accordance with the provisions of Subsequent Amendments submitting the Neighborhoods to the same or in accordance with contractual arrangements between a Neighborhood on one hand, and the Master Association on the other hand.

Section 9.3 - Computation of Neighborhood Assessments

It shall be the duty of the Master Board, at least _____ (_____) days before the beginning of each fiscal year, to prepare a separate budget covering the estimated Neighborhood Expenses to be incurred by the Master Association for each Neighborhood on whose behalf Neighborhood Expenses are expected to be incurred during the coming year. The Master Board shall be entitled to set such budget only to the extent that this Master Declaration or the Master Code specifically authorizes the Master Board to assess certain costs as a Neighborhood Assessment. The Neighborhood Association or Committee for each Neighborhood may request that additional services or a higher level of services be provided by the Master Association, and in such case, any additional costs shall be added to such budget. Such budget may include a capital contribution establishing a reserve fund for repair and replacement of capital items within the Neighborhood, as appropriate. Neighborhood Expenses shall be allocated on an equal basis as Assessments among all Living Units and Vacant Sublots within the Neighborhood benefitted thereby and levied as a Neighborhood Assessment. The Master Board shall cause a copy of such budget and notice of the amount of the Neighborhood Assessment to be levied on each Living Unit in the Neighborhood for the coming year to be delivered to each Owner in the Neighborhood at least _____ (_____) days prior to the beginning of the fiscal year. Such budget and assessment shall become effective unless disapproved by a majority of the Owners in the Neighborhood which the Neighborhood Assessment applies; provided, there shall be no obligation to call a meeting for the purpose of considering the budget except on petition signed by at least _____ percent (_____) of the Owners in such Neighborhood. Meeting of Neighborhood Committees, if called, shall be conducted in accordance with Article V, Section III of the Master Code.

In the event the proposed budget for any Neighborhood is disapproved or the Master Board fails for any reason to determine the budget for any year, then and until such time as a budget shall have been determined as provided herein, the budget in effect for the immediately preceding year shall continue for the current year.

Section 9.4 - No Exemption for Non-Use of Facilities; No Refund of Reserves

A Member not otherwise exempt from the Assessments may not exempt himself from liability for Assessments levied against him by waiver of the use of the Common Areas that are owned and/or operated by the Master Association. Furthermore, no Member shall be entitled to any portion of the funds held for reserves; nor shall any Owner have a claim against the Master Association with respect thereto.

Section 9.5 - Creation of Lien and Personal Obligation

Each Owner acquiring a Living Unit or Vacant Sublot (including a Cluster Block) covenants and agrees by acceptance of the deed to such Living Unit or Vacant Sublot (including a Cluster Block) whether or not it shall be so expressed in any such deed or other conveyance, to pay to the Master Association all Assessments levied against such Owner in accordance with this Master Declaration on or before the due date for any such Assessment. In the event that the Assessment is not paid by the _____ (_____) day after which it is due, then such Assessment shall be "delinquent" and the Assessment, together with the Costs of Collection, as hereinafter defined in Section 11.3 hereof shall, upon "Perfection" as provided in Section 10.1, become a continuing lien upon the interest of such Person in his Living Unit or Vacant Sublot (including a Cluster Block), as the case may be, and shall bind such Owner, his heirs, devisees, personal representatives, successors and assigns. A co-Owner of a Living Unit or a Vacant Sublot shall be personally liable, jointly and severally, with all other co-Owners for all Assessments made by the Master Association with respect to said Living Unit or Vacant Sublot.

Section 9.6 - Non-Liability of Foreclosure Sale Purchaser for Past Due Assessments

Where the mortgagee of a first mortgage of record acquires an Ownership Interest as a result of foreclosure of the mortgage or an acceptance of a deed in lieu of foreclosure, such mortgagee, its successors and assigns, shall not be

liable for the Assessments levied against file Owner of such Ownership Interest prior to the acquisition of the Ownership Interest. The Owner or Owners of an Ownership Interest prior to the judicial sale thereof shall be and remain personally liable, jointly and severally, for the Assessments accruing against the judicially sold Ownership Interest prior to the date of the judicial sale as provided in Section 10.3, but any unpaid part of the Assessments shall be assessed and levied against all of the Owners, including the Owner of the Ownership Interest foreclosed, his successors or assigns, at the time of the first Assessment next following the acquisition of title by such mortgagee, its successors and assigns.

Section 9.7 - Liability for Assessments on Voluntary Conveyance

Upon the voluntary conveyance of an Ownership Interest, the grantee of the Ownership Interest shall be jointly and severally liable with the grantor for all unpaid Assessments levied pursuant to this Master Declaration against the grantor of his Ownership Interest prior to the time of the grantor's conveyance, without prejudice to the grantor's right to recover from the grantor the amounts paid by the grantee therefor. However, any such prospective grantee, upon written request delivered to the Master Association, shall be entitled to a statement from the Trustees of the Master Board or an officer of the Master Association setting forth the amount of all unpaid Assessments due the Master Association with respect to the Ownership Interest to be conveyed and such grantee shall not be liable for, nor shall the Ownership Interest conveyed be subject to a lien, for any unpaid Assessments which become due, prior to the date of the making of such request if the same are not set forth in such statement. The statement referred to herein may be included in the Certificate of Compliance with Restrictions referred to in Section 7.25 of this Master Declaration. The Master Association may require the advance payment of a processing fee for the issuance of the Certificate of Compliance. A devise of an Ownership Interest or the distribution of said Ownership Interest pursuant to the Statute of Descent and Distribution shall be deemed to be a voluntary conveyance. An unpaid Assessment shall not be deemed a charge or lien against the Ownership Interest until perfected as such pursuant to Article X.

Section 9.8 - Additional Assessments

After the Subsidy Period, if the Assessments shall for any reason prove to be insufficient to cover the actual expenses incurred by the Master Association, the Master Association shall, at such time as it deems it necessary and proper, levy an additional assessment (the "Additional Assessment") against the Living Unit Owners and the Vacant Sublot Owners. Each such Owner shall pay a share of each such Additional Assessment determined in accordance with Section 9.2 hereof as if the Additional Assessment were part of the original Assessment.

Section 9.9 - Exempt Property

Except as provided in Sections 6.13 and 6.14 hereof the Common Areas and Cluster Green Space shall be exempt from payment of Assessments, Additional Assessments, Cluster Area Assessments and Neighborhood Assessments.

Section 9.10 - Township's Right to Collect Assessments

The Township shall have the right to proceed against (a) the Master Association for reimbursement of costs expended by the Township pursuant to Section 6.13 hereof; and (b) a Cluster Association for reimbursement of costs expended by the Township pursuant to Section 6.14 hereof; in which event the Master Association or Cluster Association, as the case may be, shall collect Assessments from their respective members to reimburse the Township for such costs. If the Master Association and/or Cluster Association(s) fail to so collect Assessments from their respective members and remit such Assessments to the Township, the Township shall have the right to proceed against the Master Association and/or Cluster Association(s) to collect said Assessments. In addition, the Township shall have the rights accorded said associations to collect the costs expended by the Township pursuant to Sections 6.13 and 6.14 hereof directly against the members of said associations, including the right to file liens against the Living Units and Vacant Sublots (including Cluster Blocks) of such members.

ARTICLE X

LIENS

Section 10.1 - Perfection of Lien

If any Owner or a Builder shall fail to pay as Assessment, Additional Assessment, Cluster Area Assessment or Neighborhood Assessment levied in accordance with this Master Declaration (such Owner hereinafter referred to as the "Delinquent Owner") when due and such Assessment, Additional Assessment, Cluster Area Assessment or Neighborhood Assessment is delinquent, or if an Owner or a Builder shall violate any rule or breach any restriction, covenant or provision contained in this Master Declaration or in the Master Code, the Master Board may authorize the perfection of a lien on the Ownership Interest of the delinquent and/or violating Owner or Builder by filing for record with the Recorder of _____ [county] County, a Certificate of Lien. The Certificate of Lien shall be in recordable form and shall include the following:

- (a) The name of the delinquent Owner or Builder.
- (b) A description of the Ownership Interest of the delinquent Owner or Builder.
- (c) The entire amount claimed for the delinquency and/or violation, including interest thereon and Costs of Collection (defined in Section 11.2 and Section 11.3).
- (d) A statement referring to the provisions of this Master Declaration authorizing the Certificate of Lien.

Section 10.2 - Duration of Lien

Said lien shall remain valid for a period of _____ (_____) years from the date of filing of said Certificate of Lien, unless sooner released or satisfied in the same manner provided by law for the release or satisfaction of mortgages on real property, or discharged by the final judgment order of a court in action to discharge such lien. A lien may be renewed by the subsequent filing of a Certificate of Lien prior to the expiration of the _____ (_____) year period referred to above.

Section 10.3 - Priority

A lien perfected under this Article X shall take priority over any lien or encumbrance subsequently arising or created, except liens for real estate taxes and assessments and liens of bona fide mortgagees which have been heretofore filed for record. A lien perfected pursuant to this Article may be foreclosed in the same manner as a mortgage on real property in an action brought by the Master Association after authorization from the Master Board. In any such foreclosure action, the affected Owner shall be required to pay reasonable rental for such Ownership Interest during the pendency of such action and the plaintiff in such action shall be entitled to the appointment of a receiver to collect the same. Any funds received at the judicial sale of the delinquent Owner or Builder's Ownership Interest in excess of mortgage liens, court costs and the taxes and assessment liens shall be paid over to the Master Association to the extent of its lien.

Section 10.4 - Dispute as to Assessment

The Declarant or any Owner or Builder who believes that an Assessment, Cluster Area Assessment or Neighborhood Assessment levied by the Master Association against him for which a Certificate of Lien has been filed by the Master Association has been improperly determined, may bring an action under the Arbitration Provisions contained in Section 15.9 of this Master Declaration for the discharge of all or any portion of such lien; but the lien shall continue until the actual amount of the lien so determined is paid in full or otherwise be fully discharged.

Section 10.5 - No Waiver Implied

The creation of a lien upon an Ownership Interest owned by a delinquent Owner shall not waive, preclude or prejudice the Master Association for pursuing any and all other remedies granted to it elsewhere in this Master Declaration, whether at law or in equity.

Section 10.6 - Personal Obligations

The obligations created pursuant to this Article X shall be and remain the personal obligations of the delinquent Owner until fully paid, discharged or abated and shall be binding on the heirs, personal representatives, successors and assigns of such delinquent Owner.

ARTICLE XI REMEDIES OF THE ASSOCIATION

Section 11.1 - Denial of Voting Rights

If any Owner fails to pay an Assessment, Additional Assessment, Cluster Area Assessment or a Neighborhood Assessment when due, such Owner and the Occupants of any and all Living Units of such Owner or the Owner or Builder of a Vacant Sublot shall not be entitled to vote on Master Association matters until said Assessment, Additional Assessment, Cluster Area Assessment or Neighborhood Assessment is paid in full.

Section 11.2 - Specific Remedies

The violation of any Rule, or the breach of any restriction, covenant or provision contained in this Master Declaration or in the Master Code, shall give the Master Association and the Original Declarant the right, in addition to all other rights set forth herein and provided by law, (a) to enter upon the Living Unit or Vacant Sublot or portion thereof upon which, or as to which, such violation or breach exists, and summarily abate and remove, at the expense of the Owner or Builder of the Ownership Interest where the violation or breach exists, any structure, thing, or condition that may exist thereon, which is contrary to the intent and meaning of this Master Declaration, the Master Code, or the Rules, and the Master Association, or its designated agent shall not thereby be deemed guilty in any manner of trespass; (b) to enjoin, abate or remedy by appropriate legal proceedings, either at law or in equity, the continuance of any breach; (c) to commence and prosecute an action for specific performance or an action to recover any damages which may have been sustained by the Master Association or any of its Members as well as an action for punitive damages if warranted; and/or (d) to collect costs of suit and reasonable attorneys' and paralegals' fees incurred in connection with the exercise by the Master Association of any remedies hereunder, the same to be deemed "Costs of Collection" under Section 11.3 hereof.

Section 11.3 - Cost of Collection

If any Owner fails to pay any Assessment, Additional Assessment, Cluster Area Assessment or Neighborhood Assessment when due or upon delinquency in the payment of any sums or cost due under this Master Declaration, the Master Association may pursue any or all of the following remedies, which remedies shall be in addition to any other remedy available in this Master Declaration, or at law or in equity:

(a) Sue and collect from such Owner the amount due and payable, together with interest thereon at the rate of _____ percent (_____%) per annum (but in no event shall said interest rate exceed the highest interest rate chargeable to individuals under applicable law) and Costs of Collection (hereafter defined).

(b) In addition to the amount referred to in (a) above, the Master Association may assess against such Owner, liquidated damages, not to exceed _____ percent (_____%) of the amount of the delinquency or _____ Dollars (\$ _____), whichever amount is greater, said amount to be determined by the Master Board providers, however, in no event shall said amount exceed the highest interest rate chargeable to individuals under applicable law. Said liquidated damages shall be in addition to interest, the expenses of

collection incurred by the Master Association, such as attorneys' fees, paralegals' fees, court costs and filing fees. The actual expenses of collection and the liquidated damages shall hereinafter be referred to as "Cost of Collection."

(c) Foreclose a lien filed in accordance with Article X of this Master Declaration in the same manner as provided by the laws of the State of _____ [state] for the foreclosure of real estate mortgages.

Section 11.4 - Binding Effect

The remedies provided in this Article XI against a Delinquent Owner or Builder may also be pursued against the heirs, executors, administrators, successors and assigns and grantees of such Owner or Builder, except as specifically provided in Section 9.6 of this Master Declaration.

ARTICLE XII NO PARTITION

Except as is permitted in this Master Declaration or in any amendments thereto, there shall be no physical partition of the Common Areas or any part thereof, nor shall any person acquiring any interest in the Property or any part thereof seek any such judicial partition. This Article shall not be construed to prohibit the Master Board from acquiring and disposing of tangible personal property nor from acquiring title to real property which may or may not be subject to this Master Declaration.

ARTICLE XIII CONDEMNATION

Whenever all or any part of the Common Areas shall be taken (or conveyed in lieu of and under threat of condemnation) by any authority having the power of condemnation or eminent domain, the Master Association shall give each Owner notice thereof. The award made for such taking shall be payable to the Master Association as trustee for all Owners to be disbursed as follows:

If the taking involves a portion of the Common Areas on which improvements have been constructed, then, unless within _____ (_____) days after such taking the Declarant (so long as the Declarant is a Class "B" Member), and at least _____ percent (_____%) of the Class "A" Members of the Master Association shall otherwise agree by Personal Vote, the Master Association shall restore or replace such improvements so taken on the remaining land included in the Common Areas to the extent lands are available therefor, in accordance with plans prepared by the Design Review Committee and approved by the Master Board. If such improvements are to be repaired or restored, the provisions in Section 6.5 hereof regarding the disbursement of funds in respect to casualty damage or destruction shall apply. If the taking does not involve any improvements on the Common Areas, or if there is a decision made not to repair or restore, or if there are net funds remaining after any such restoration or replacement is completed, then such award or net funds shall be disbursed to the Master Association and used for such purposes as the Master Board shall determine in its sole and absolute discretion.

ARTICLE XIV MORTGAGEES' RIGHTS

The following provisions are for the benefit of holders, insurers, or guarantors of first mortgages on Living Units and Vacant Sublots. To the extent applicable, necessary, or proper, the provisions of this Article shall apply to both this Master Declaration and to the Master Code. Where indicated, these provisions apply only to Eligible Mortgage Holders; provided, however, that voting percentages set forth herein are subject to and controlled by higher percentage

requirements, if any, set forth elsewhere in this Master Declaration for specific actions.

Section 14.1 - Notices of Action

An Eligible Mortgage Holder who provides written request to the Master Association (such request to state the name and address of such holder, insurer, or guarantor and the address of the Living Unit or Vacant Sublot), will be entitled to timely written notice of:

- (a) any proposed termination of the Master Association;
- (b) any condemnation or casualty loss which affects a material portion of the Property or which affects any Living Unit on which there is a first mortgage held, insured, or guaranteed by an Eligible Mortgage Holder;
- (c) any delinquency in the payment of assessments or other charges owed by an Owner subject to the mortgage of such Eligible Mortgage Holder, insurer, or guarantor, where such delinquency has continued for a period of _____ (_____) days;
- (d) any lapse, cancellation, or material modification of any insurance policy or fidelity bond maintained by the Master Association; or
- (e) any proposed action which would require the consent of Eligible Mortgage Holders, as required in Sections 14.2 and 14.3 of this Article.

Section 14.2 - Other Provisions for First Lien Holders

To the extent possible under _____ [state] law:

- (a) Any restoration or repair of the Property following a partial condemnation or damage due to an insurable hazard shall be substantially in accordance with this Master Declaration and the original plans and specifications unless the approval of the Eligible Holders of first mortgages on Living Units to which at least _____ percent (_____) of the votes of Living Units and Vacant Sublots and the Eligible Mortgage Holders of first mortgages of the Class "A" Members and the Class "B" Member, subject to mortgages held by such Eligible Mortgage Holders, are allocated, is obtained to act otherwise.
- (b) Any election to terminate the Master Association after substantial destruction or a substantial taking in condemnation shall require the approval of the Eligible Mortgage Holders on Living Units and Vacant Sublots of at least _____ percent (_____) of the votes of Living Units and Vacant Sublots, and the Eligible Mortgage Holders of first mortgages of the Class "A" Members and the Class "B" Member, subject to mortgages held by such Eligible Mortgage Holders, are allocated.

Section 14.3 - Amendments to Documents

The following provisions apply to amendments to the constituent documents or termination of the Master Association made as a result of destruction, damage, or condemnation pursuant to Section 14.2(a) and (b) of this Article:

- (a) The consent of at least _____ percent (_____) of the Class "A" Members and of the Class "B" Member and the approval of the Eligible Mortgage Holders on Living Units and Vacant Sublots to which at least _____ percent (_____) of the votes of Living Units and Vacant Sublots subject to a mortgage appertain, shall be required to terminate the Master Association.

(b) The Personal Vote of at least _____ percent (_____%) of the Class "A" Members and the consent of the Class "B" Member and the approval of Eligible Mortgage Holders on Living Units and Vacant Sublots to which at least _____ percent (_____%) of the votes of Living Units and Vacant Sublots subject to a mortgage appertain, shall be required to materially amend any provisions of the Declaration, Master Code, or Articles of Incorporation of the Master Association, or to add any material provisions thereto, which establish, provide for, govern, or regulate any of the following:

(i) voting;

(ii) Assessments, Additional Assessments, Cluster Area Assessments, Neighborhood Assessments, assessment liens, or subordination of such liens;

(iii) reserves for maintenance, repair, and replacement of the Common Area;

(iv) insurance for fidelity bonds;

(v) rights to use of the Common Areas; (vi) leasing of Living Units;

(vi) imposition of any right of first refusal or similar restriction of the right of any Owner to sell, transfer, or otherwise convey his or her Living Unit (this provision is subject and subordinate to any provision in documents creating a Cluster Area or Neighborhood or in an agreement for the sale by the Declarant of Vacant Sublots.);

(vii) establishment of self-management by the Master Association where professional management has been required by an Eligible Mortgage Holder, or

(viii) any provisions included in this Master Declaration, Master Code, or Articles of Incorporation which are for the express benefit of Eligible Mortgage Holders on Living Units and Vacant Sublots.

Section 14.4 - Special Federal National Mortgage Association Provisions

So long as required by the Federal National Mortgage Association, the following provisions shall apply to this Master Declaration:

(a) Amendments of a material nature must be agreed to by Owners who represent at least _____ percent (_____%) of the total allocated votes in the Master Association and by Eligible Mortgage Holders who represent at least _____ percent (_____%) of the votes of unit estates that are subject to mortgages held by Eligible Mortgage Holders. A change to any of the provisions governing the following would be considered as material: (i) voting rights; (ii) increases in assessments that raise the previously assessed amount by more than _____ percent (_____%), assessment liens, or the priority of assessment liens; (iii) reduction in reserves for maintenance, repair, and replacement of common elements; (iv) responsibility for maintenance and repairs; (v) reallocation of interests in the general or limited common elements or rights to their use; (vi) redefinition of any Living Unit boundaries; (vii) convertibility of Living Units into common elements or vice versa; (viii) expansion or contraction of the project, or the addition, annexation, or withdrawal of property to or from the project; (ix) hazard or fidelity insurance requirements; (x) imposition of any restrictions on the leasing of units; (xi) imposition of any restrictions on a unit owner's right to sell or transfer his or her unit; (xii) a decision by the Master Association of a project that consists of fifty (50) or more Living Units to establish self-management if professional management had been required previously by the project documents or by an Eligible Mortgage Holder; (xiii) restoration or repair of the project (after damage or partial condemnation) in a manner other than that specified in the documents; or (xiv) any provisions that expressly benefit mortgage holders, insurers, or guarantors.

(b) Any action to terminate the legal status of the project after substantial destruction or condemnation occurs must be agreed to by Owners who represent at least _____ percent (_____) of the total allocated votes in the Master Association and by Eligible Mortgage Holders who represent at least _____ percent (_____) of the votes of the unit estates that are subject to mortgages held by Eligible Mortgage Holders.

(c) Termination of the legal status of the project for reasons other than substantial destruction or condemnation of the property must be agreed to by the Eligible Mortgage Holders that represent at least _____ percent (_____) of the votes of the mortgaged Living Units. However, implied approval may be assumed when an Eligible Mortgage Holder fails to submit a response to any written proposal for an amendment within _____ (_____) days after it receives proper notice of the proposal, provided the notice was delivered by certified or registered mail, with a "return receipt" requested.

(d) The provisions of this Section shall not be construed to reduce the percentage vote that must be obtained from mortgagees or Owners or a larger percentage vote as otherwise required for any of the actions contained in this Article.

Section 14.5 - Special Federal Home Loan Mortgage Corporation Provisions

So long as required by the Federal Home Loan Mortgage Corporation, the following provisions shall apply to this Master Declaration:

(a) Unless _____ (_____) of the first mortgagees or Owners give their consent, the Master Association shall not (i) by act or omission seek to abandon, partition, subdivide, encumber, sell or transfer any portion of the Property owned by the Master Association (the granting of easements for public utilities or for public purposes or the dedication to public use of utilities or roads consistent with the intended use of the property shall not be deemed a transfer); (ii) change the method of determining the obligations, Assessments, dues or other charges which may be levied against an Owner, (iii) change the method of allocating hazard insurance proceeds or condemnation awards; (iv) fail to maintain fire and extended coverage insurance as required by the Master Declaration; or (v) use hazard insurance proceeds for any Common Area losses for other than repair, replacement or reconstruction of such properties.

(b) The provisions of this Section shall not be construed to reduce the percentage vote that must be obtained from mortgagees or owners or a larger percentage vote as otherwise required for any of the actions contained in this Article.

(c) First mortgagees may, jointly or singularly, pay taxes or other charges which are in default or which may or have become a charge against the Common Area and may pay overdue premiums of casualty insurance policies or secure new casualty insurance coverage upon the lapse of a policy, for the Common Areas and first mortgagees making such payments shall be entitled to immediate reimbursement from the Master Association.

ARTICLE XV GENERAL PROVISIONS

Section 15.1 - Covenants Run with the Property; Binding Effect

All of the Easements, Covenants and Restrictions which are imposed upon, granted and/or reserved in this Master Declaration constitute Easements, Covenants and Restrictions running with the Property and are binding upon every subsequent transferee of all or any portion thereof, including, without limitation, grantees, Tenants, Owners and Occupants.

Each grantee accepting a deed or Tenant accepting a lease (whether oral or written) which conveys any interest in any portion of the Property that is submitted to all or any portion of this Master Declaration, whether or not the same incorporates or refers to this Master Declaration, covenants for himself, his heirs, personal representatives, successors and assigns to observe, perform and be bound by all provisions of this Master Declaration and to incorporate said Master Declaration by reference in any deed, lease or other agreement of all or any portion of his interest in any real property subject hereto.

Section 15.2 - Duration

Unless sooner terminated as hereinafter provided, the Covenants, Conditions and Restrictions of this Master Declaration shall continue for a term of _____ (_____) years from the date this Master Declaration is recorded, after which time, said covenants and restrictions shall automatically be extended for successive periods of _____ (_____) years each unless terminated by an instrument sided by: (i) Members (individually and not Voting Members) entitled to exercise not less than _____ percent (_____%) of the Class "A" Members; (ii) the Class "B" Member, and (iii) the Township.

Section 15.3 - Notices

Any notices required to be given to any Person under the provisions of this Master Declaration shall be deemed to have been given when personally delivered to such Person's Living Unit or mailed, postage prepaid, to the last known address of such Person or principal place of business if a corporation, provided, however, that a notice of "delinquency" of any payment due hereunder shall be made by personal delivery to such Living Unit or principal place of business if a corporation, or by certified or registered mail, return receipt requested, or by telegram. The effective date of such a notice shall be the date said notice is personally delivered, or postmarked, or the date the telegraph company receives the message, as the case may be.

Notices to the Declarant shall be deemed given only when received and must be either hand delivered or mailed by certified or registered mail, postage prepaid, to Declarant, _____[address], with a copy to _____[address].

Any notices to the Township pursuant to Sections 6.13 or 6.14 hereof shall be deemed given only when received and must be either hand delivered or mailed by certified or registered mail, postage prepaid, to the Township at _____[address], with a copy to _____[address].

Section 15.4 - Enforcement--Waiver

Enforcement of the Easements, Covenants and Restrictions may be by any proceeding at law or in equity against any Person or Persons violating or attempting to violate any Easement, Covenant or Restriction, either to restrain violation or to recover damages and against the Person or Ownership Interest, or to enforce any lien perfected pursuant to this Master Declaration. The failure by the Master Association or any one permitted by this Master Declaration to enforce any Easement, Covenant or Restriction herein contained shall in no event be deemed a waiver of the right to do so thereafter.

Section 15.5 - Construction of the Provisions of this Master Declaration

The Declarant, the Master Association or the Design Review Committee, where specifically authorized herein to act, shall have the right to construe and interpret the provisions of this Master Declaration and in the absence of an adjudication by arbitrator(s) or a court of competent jurisdiction to the contrary, its construction or interpretation shall be final and binding as to all Persons or property which benefit or which are bound by the provisions hereof. Any conflict between any construction or interpretation of the Declarant, the Master Association or the Design Review Committee and that of any Person or entity entitled to enforce the provisions hereof shall be resolved in favor of the

construction or interpretation by the Declarant, the Master Association or the Design Review Committee, as the case may be.

The Master Association and the Design Review Committee to the extent specifically provided herein may adopt and promulgate Rules regarding the administration, interpretation and enforcement of the provisions of this Master Declaration. In so adopting Rules and in making any finding, determination, ruling or order, or in carrying out any directive contained herein relating to the issuance of permits, authorizations, approvals, rules or regulations, the Master Association and the Design Review Committee, as the case may be, shall take into consideration the best interests of the Declarant(s), Owners, Tenants and Occupants to the end that Golf Meadow shall be preserved and maintained as a high quality, residential golf club community.

Section 15.6 - Reservations by Original Declarant--Exempt Property

(a) Original Declarant reserves the right and easement for itself and owners of nearby lands to whom Original Declarant, in Original Declarant's sole discretion, may grant the same right and easement to tie into, use, repair, maintain and replace without charge any and all common lines, pipes, utilities, conduits, ducts, wires, cables, private roads and rights-of-way in, on, or over the Property (as the Property may be expanded by a Subsequent Amendment) or any part thereof that will not materially interfere with the use or operation of a building or structure or other improvement thereon or the Golf Course Property in connection with the development and/or operation of the Property. Any damage to buildings, improvements and real estate (including landscaping, if any) caused thereby shall be promptly repaired and restored to its prior condition by the party to whom such right and easement had been wanted.

(b) Original Declarant hereby reserves the right to enter into any easements or covenants for the installation, maintenance, service or operation of any and all common lines, pipes, utilities, conduits, ducts, wires, cables, private roads and rights-of-way in, on, or over the Property (as the Property may be expanded), or any part thereof that will not materially interfere with the use or operation of a building, structure or other improvement thereon or the Golf Course Property. Any damage caused thereby shall be promptly repaired and the land shall be restored to its prior condition.

(c) Original Declarant reserves the right to enter into covenants and easements with any utility or public authority which Original Declarant believes, in its sole discretion, to be in the best interests of the development of the Property (as the Property may be expanded).

(d) Original Declarant reserves the right to perform or cause to be performed such work as is incident to the completion of the development and improvement of the Property (as the Property may be expanded by a Subsequent Amendment), owned or controlled by the Original Declarant, notwithstanding any covenant, easement, restriction or provision of this Master Declaration or its exhibits, which may be to the contrary.

(e) Original Declarant reserves the right to impose, reserve or enter into additional covenants, easements and restrictions with grantees of Living Units and Vacant Sublots as long as such additional easements, covenants and restrictions are not in conflict with the rights, duties and obligations of Owners as set forth in this Master Declaration.

(f) Each reservation, right and easement specified or permitted pursuant to this Article shall include the right of ingress and egress for the full utilization and enjoyment of the rights reserved and/or granted herein. The word "common" as used in this paragraph shall mean any and all lines, pipes, utilities, conduits, ducts, wires, cables, private roads and rights-of-way intended for the use of or used by more than one Owner. Any easements or rights referred to in this Article, whether granted by Original Declarant prior to the filing of this Master Declaration or subsequent thereto, shall at all times have priority over the provisions of this Master Declaration and any lien created under this Master Declaration.

(g) So long as Declarant has an Ownership Interest in the Property, no Person (including a Builder) shall record any

declaration of covenants, conditions and restrictions, or declaration of condominium or similar instrument affecting any portion of the Property (including a Cluster Area) without Declarant's review and written consent thereto, and any attempted recordation without compliance herewith shall result in such declaration of covenants, conditions and restrictions, or declaration of condominium or similar instrument being void and of no force and effect unless subsequently approved by recorded consent signed by the Declarant.

(h) So long as Declarant continues to have rights under this Subsection, all sales, promotional, and advertising materials, and all forms for deeds, contracts for sale and other closing documents for the subdivision and sale of Vacant Sublots by any Builder, or the sale or lease of a Living Unit by any Builder, shall be subject to the written approval of Declarant, which approval shall not be unreasonably withheld. Declarant shall deliver notice to any Builder of Declarant's approval or disapproval of all such materials and documents within _____ (_____) days of receipt of such materials and documents and, if disapproved, the specific reasons therefore or changes required to obtain such approval. If Declarant fails to so notify any Builder within such, _____ (_____) day period, Declarant shall be deemed to have waived any objections to such materials and documents and to have approved the foregoing. Upon disapproval, the foregoing procedure shall be repeated until approval is obtained or deemed to be obtained or the request to use such materials or documents is withdrawn or abandoned.

Section 15.7 - Assignability by Original Declarant

The Original Declarant, and its successors, shall have the right, from time to time, to assign all or any part of its rights as a Declarant under this Master Declaration (but not the rights expressly conferred upon the Original Declarant), provided that the deed or other writing selected by Original Declarant, in Original Declarant's sole discretion, shall expressly state that the rights of a Declarant shall be assigned. Any such assignment may provide that said assignee shall have the rights of a Declarant (other than those rights reserved by the Original Declarant in any such assignment) set forth in this Master Declaration with respect to the Living Units and/or real property owned by such designee.

Section 15.8 - Severability

Invalidation of any one of the easements, covenants, restrictions or provisions contained herein shall in no way affect any other provision which shall remain in full force and effect.

Section 15.9 - Arbitration

Unless otherwise provided in this Master Declaration, any controversy, dispute or claim arising out of or relating to this Master Declaration or the breach thereof shall be settled by arbitration in _____[city], _____[state] in accordance with the Commercial Rules of the American Arbitration Association and the judgment upon the award rendered by the arbitrator(s) may be entered in any court having jurisdiction hereof.

Section 15.10 - Litigation

No judicial or administrative proceeding shall be commenced or prosecuted by the Master Association unless approved by the Personal Vote of _____ percent (_____%) of the Class "A" Members or by a vote of _____ percent (_____%) of the Voting Members. In the case of such a vote, and notwithstanding anything contained in this Master Declaration or the Master Articles of Incorporation or Master Code of the Master Association to the contrary, a Voting Member shall not vote in favor of bringing or prosecuting any such proceeding unless authorized to do so by a vote of _____ percent (_____%) of all Members of the Cluster Area or Neighborhood represented by the Voting Member. This Section shall not apply, however, to (a) actions brought by the Master Association to enforce the provisions of this Master Declaration (including, without limitation, the foreclosure of liens); (b) the imposition and collection of assessments as provided in Articles IX and X hereof; (c) proceedings involving challenges to real estate taxation; or (d)

counterclaims brought by the Master Association in proceedings instituted against it. This Section shall not be amended unless such amendment is made by the Declarant or approved by the percentage votes, and pursuant to the same procedures, necessary to institute proceeding as provided above.

Section 15.11 - Validity of Mortgage

No violation of any Easement, Covenant or Restriction of this Master Declaration shall defeat or render invalid the lien of any mortgage made in good faith and for value upon any portion of the Property; provided, however, that any mortgagee in actual possession, or any purchaser at any mortgagees' foreclosure sale shall be bound by and subject to this Master Declaration as fully as any other Owner of any portion of the Property.

Section 15.12 - Amendment of Master Declaration

Except as expressly provided to the contrary in this Master Declaration, this Master Declaration may be amended as follows:

(a) For so long as the Declarant or a successor designated by the Declarant is the Owner of a fee simple interest in the Property, the Original Declarant shall be entitled from time to time to amend or modify any of the provisions of this Master Declaration or to waive any of the provisions, either generally or with respect to particular real property, if in its judgment, the development or lack of development of the Property requires such modification or waiver, or if in its judgment the purposes of the general plan of development of the Living Units and Vacant Sublots will be better served by such modification or waiver; provided no such amendment, modification or waiver shall materially and adversely affect the value of existing Living Units or Vacant Sublots or shall prevent a Living Unit or Vacant Sublot from being used by the Owner in the same manner that said Living Unit or Vacant Sublot was used prior to the adoption of said amendment, modification or waiver; and provided, further, that no such amendment, modification or waiver shall be made of Sections 6.13 and 6.14 and other sections of this Master Declaration granting rights to the Township without the prior written consent of the Township first obtained. To modify the Master Declaration in accordance with this paragraph, Original Declaration shall file a supplement to this Declaration setting forth the Amendment, which supplement need not be but shall, at Original Declarant's request, be executed by the Master Association and all Owners of real property within the Property. Each such Owner, by accepting a deed to his Living Unit or other real property, hereby appoints Original Declarant his attorney-in-fact, coupled with an interest, to execute on his behalf any such amendments. Each amendment shall be effective when signed by the Original Declarant and filed for record with the Recorder of _____[county] County.

(b) This Master Declaration may also be amended by Original Declarant or a successor designated by Declarant or the Master Association at any time and from time to time for the purpose of: (1) complying with requirements of the Federal National Mortgage Association, the Government National Mortgage Association, the Federal Home Loan Mortgage Corporation, the Department of Housing and Urban Development, the Federal Housing Association, the Veteran's Administration, or any other governmental agency or any other public, quasi-public entity, or private insurance company which performs (or may in the future perform) functions similar to those currently performed by such entities; or (2) inducing any of such agencies or entities to make, purchase, sell, insure, or guarantee first mortgages; or (3) correcting clerical or typographical or obvious factual errors in this Master Declaration or any Exhibit hereto or any supplement or amendment hereto; or (4) complying with the underwriting requirements of insurance companies providing casualty insurance, liability insurance or other insurance coverages for the Master Association; or (5) bringing any provision hereof into compliance or conformity with, the provisions of any applicable governmental statute, ordinance, resolution, rule or regulation or any judicial determination; or (6) correcting obvious factual errors or inconsistencies between this Master Declaration and other documents governing Golf Meadow, the correction of which would not materially impair the interest of any Owner or Eligible Mortgage Holder; or (7) enabling a title insurance company to issue title insurance coverage with respect to the Property or any portion thereof. In furtherance of the foregoing, a power coupled with an interest is hereby reserved and granted to Declarant and/or to the Master Board to

vote in favor of, make, or consent to a Subsequent Amendment on behalf of each Owner as proxy or attorney-in-fact, as the case may be. Each deed, mortgage, trust deed, other evidence of obligation, or other instrument affecting any portion of the Property and the acceptance thereof shall be deemed to be a grant and acknowledgment of, and a consent to the reservation of the power to the Original Declarant to vote in favor of, make and record a Subsequent Amendment To effect said amendment, Original Declarant shall file a supplement to the Declaration setting forth the Subsequent Amendment which shall be sided by Original Declarant and shall be effective upon the filing of the Subsequent Amendment with the _____[county] County Recorder.

(c) Original Declarant shall have the right to amend this Master Declaration at any time and from time to time in accordance with or in implementation of any of the rights wanted to or reserved by Original Declarant in this Master Declaration.

(d) Except as expressly provided in this Master Declaration, and after expiration of the period set forth in (a) of this Article, any provision of this Master Declaration may be amended or repealed following a meeting of the Members held for such purpose, by the affirmative vote of the Class "B" Member and the Personal Vote of at least a majority of the voting power of the Class "A" Members unless a greater percentage of vote is required pursuant to this Master Declaration or in accordance with the statutes of the State of _____[state]; provided, however, that any amendment which would terminate or materially affect the easements set forth in Article III of this Master Declaration shall not be amended (except as expressly provided to the contrary in this Master Declaration) unless all persons whose rights are terminated or materially affected shall affirmatively consent in writing to such amendment; provided further, that any amendment affecting the rights of Declarant in this Master Declaration shall not be effective without the prior written consent of Declarant; and provided further, that any amendment which would terminate or materially affect the rights of the Township under this Master Declaration shall not be effective without the prior written consent of the Township. Written notice shall be given each Member at least _____ (_____) days in advance of the date of the meeting held for the purpose of amending this Master Declaration, which notice shall expressly state the modification to be considered at such meeting. Each amendment shall be effective when signed by the President and one other officer of the Master Association, signed by the Declarant if the amendment affects the rights of the Declarant and filed for record with the _____[county] County Recorder.

(e) Notwithstanding anything in this Master Declaration to the contrary, no amendment to this Master Declaration shall affect or modify in any way any of the provisions of this Master Declaration concerning the use of the Golf Course Property and the use of all roadways necessary to enable members, guests and invitees of the Golf Course Property Owner to have access to and from the Golf Course Property unless such amendment shall receive the prior written consent of the Golf Course Property Owner.

Section 15.13 - Interest Rates

After this Master Declaration shall have been recorded for _____ (_____) years or more, the Board shall have the right to change any interest rates or late payment charge referred to herein by majority vote, but in no event shall said interest rate or late payment charge exceed the highest interest rate chargeable to individuals under applicable law.

Section 15.14 - Headings

The heading of each Article and of each paragraph in this Master Declaration is inserted only as a matter of convenience and for reference and in no way defines, limits or describes the scope or intent of this Master Declaration or in any way affects this Master Declaration.

Section 15.15 - Rule Against Perpetuities

If any of the options, privileges, covenants or rights created by this Master Declaration shall be unlawful or void for violation of (a) the rule against perpetuities or some analogous statutory provision, (b) the rule restricting restraints on alienation, or (c) any other statutory or common law rules imposing time limits, then such provision shall continue only until twenty-one (21) years after the death of the survivor of the now living descendants of

_____[name], President of the United States of America, and _____[name] Vice President of the United States of America.

Golf Meadow Development Limited Partnership has signed this document this _____[day] day of _____[month], _____[year].

GOLF MEADOW DEVELOPMENT LIMITED PARTNERSHIP

By: _____

Print Name: _____

Title: _____

STATE OF _____[state])
COUNTY OF _____[county]) SS:

BEFORE ME, a Notary Public in and for said County and State, personally appeared FOX MEADOW DEVELOPMENT LIMITED PARTNERSHIP, a(n) _____[state] _____[entity], by _____[name], its _____[title], who acknowledged that _____[he/she] did sign the foregoing instrument for and on behalf of said corporation, being thereunto duly authorized, and that the same is _____[his/her] free act and deed individually and as such officers and the free act and deed of said _____[entity].

IN TESTIMONY WHEREOF, I have hereunto set my hand and official seal at _____[city], _____[state], this _____[day] day of _____[month], _____[year].

Notary Public

This instrument prepared by:



113 of 181 DOCUMENTS

Current Legal Forms for Real Estate

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Current Legal Forms for Real Estate
Chapter 22 DEVELOPMENT AND SUBDIVISION
Part IV. FORMS
E. RESIDENTIAL DEVELOPMENT

26-22 Current Legal Forms for Real Estate FORM 22.76

FORM 22.76 Policies and guidelines for design review committee

COMMENT

Many associations establish a design review committee to insure that all new construction and additional improvements are done in a manner which is consistent with the development. The following is an example of guidelines which have been established for a residential community which are intended to govern construction of improvements in the development.

FORM

DESIGN REVIEW COMMITTEE POLICIES AND GUIDELINES
(SINGLE FAMILY SUBLOTS ON DEDICATED STREETS)

GOLF MEADOW, _____ [city], _____ [state]

PURPOSE

In order to assure an attractive, compatible and a aesthetically pleasing community, Golf Meadow has established an on-going committee designated as the Design Review Committee (DRC). The purpose of the DRC is to guide the residential development of single-family sublots on dedicated public streets with a view to maximum compatibility of construction and landscaping with the natural beauty and topography of the land within the Golf Meadow community.

The DRC seeks to assume that overall high grade superior quality construction with emphasis on good design and use of green building alternatives to achieve energy savings and water use efficiencies based on that existing in the region will be provided and that natural materials such as stone, wood or brick will be utilized.

These Policies and Guidelines have been prepared by the DRC for builders and homeowners in their selection of concepts for construction within the Golf Meadow community. These Policies and Guidelines do not include all building, use and other deed restrictions associated with Golf Meadow and, accordingly, builders and homeowners should familiarize themselves with the provisions of the Master Declaration (hereafter defined), Subdivision Declaration (hereafter defined), and Rules and Regulations of the Master Association. The inclusion of any recommendation in these Policies and Guidelines shall not preclude the DRC's right to disapprove any proposed matter for any reason.

AUTHORITY

The authority of the Design Review Committee (DRC) is set forth in Master Declaration of Covenants, Conditions, Easements and Restrictions of Golf Meadow (the "Master Declaration"), which governs the development of every building site. The DRC is responsible for carrying out its duties on behalf of all members of Golf Meadow Master Association, Inc. (the "Master Association") for the benefit of the total community.

MEMBERS

The DRC is composed of up to _____ (_____) natural persons (but not less than _____ (_____) natural persons). The size of the DRC and the persons who shall serve on the DRC shall be designated from time to time by (a) the Declarant (i.e., Golf Meadow Development Limited Partnership) so long as the Declarant is a Class "B" Member of the Master Association and (b) the Board of Trustees of the Master Association thereafter. Members will be selected to create a balance of lay people and professionals with experience in architecture, construction, and landscaping. It is recommended, but not required, that one member of the DRC be an architect. The DRC is authorized to retain the services of consulting architects, landscape architects, engineers, inspectors and attorneys in order to advise and assist the DRC in performing its functions.

MAJORITY VOTE

Each member of the DRC shall have an equal vote and the majority of all members of the DRC shall constitute a decision for approval or denial of a DRC.

MEETINGS

The DRC shall meet as necessary to review Applications for DRC approval received within _____ (_____) days after receipt.

APPROVAL PROCESS

The following outline of steps may be further augmented and detailed by Design Review Procedures to be approved by the DRC from time to time. No construction or site disturbances of any nature whatsoever may take place until required approvals are obtained from the DRC.

Preliminary Design Review

The applicant must submit a letter of application and preliminary schematic plans (three sets), consisting of the following:

1. Site Plan - including Grading and Utility Plan
2. Floor Plans
3. Exterior Elevations (All Sides)
4. Exterior Materials, Colors and Finishes
5. Request for any Variances

The DRC will review the design documents within _____ (_____) days and return one set of plans to the applicant with appropriate comments.

Final Design Review

The applicant must submit the final construction plans (three sets), together with actual material samples, product photographs, and color chips to be utilized, supplemented with the following minimum plans and materials:

1. Site Plan; Topography and Landscape Plan
2. Floor Plans
3. Building Sections
4. Exterior Elevations (All Sides)
5. Window Schedule Listing Manufacturer, Type size and Finish
6. Door Schedule
7. Patio/Decks: Materials and Finish
8. Screen Enclosures
9. Mechanical Equipment: Location and Screening Detail
10. Driveway: Materials and Finish

The DRC will review all design documents, sample materials, color chips and return one set of plans to the applicant within _____ (_____) days with the necessary approval or appropriate comments in the event of conditional approval or disapproval.

Grounds for Disapproval

The DRC shall have the right to disapprove any plans and specifications submitted hereunder because of any of the following: (a) failure of such plans and specifications to comply with any Covenants and Restrictions contained in the Master Declaration or the Subdivision Restrictions (hereafter defined) or with design and construction criteria adopted by Declarant or the Master Association or the DRC; (b) failure to include information in such plans and specifications as may have been reasonably requested; (c) incompatibility of design or appearance of any proposed structure or building with any existing or contemplated structures or buildings upon the same or other nearby property; (d) objection to the location of any proposed structures or buildings upon any Sublot with reference to any other area in the vicinity; (e) objection to the grading plan; (f) objection to the landscape plan; (g) objection to the color scheme, finish, proportions, style or architecture, height, bulk or appropriateness of any proposed building or structure; (h) objection based solely on aesthetic reasons; or (i) any other matter, in the reasonable judgment of the DRC, that will render the proposed building or structure or use inharmonious with the general plan of the improvement for the Sublot, or with the buildings, structures or uses located upon other parts of the Sublot or in the vicinity of the proposed building, structure or use.

In any case where the DRC shall disapprove any plans and specifications submitted hereunder or shall approve the same only as modified or under specified conditions, such disapproval or qualified approval shall be accompanied by a written statement of the grounds upon which such action was based. In any such case, the DRC shall, if requested, make reasonable efforts to assist and advise the applicant to enable the applicant to provide an acceptable proposal for submission for approval.

Right of Appeal

If the DRC shall disapprove any plans and specifications submitted hereunder, there shall be a right to appeal such decision to the Master Board. Such appeal must be submitted to the Master Board by the applicant, in writing, within _____ (____) days after receipt of notice of the decision from the DRC. No later than _____ (____) days after receipt of notice of appeal, the Master Board shall examine the plans and specifications submitted, as well as the grounds upon which the DRC disapproves such plans and specifications. The affirmative vote of at least two-thirds (2/3) of the members of the Master Board shall be required to reverse or modify a decision of the DRC.

Variances

The DRC may authorize variances from compliance with any of the provisions of the Design Review Committee Policies and Guidelines when circumstances such as topography, natural obstructions, hardship, aesthetic, or environmental considerations require, but only in accordance with duly adopted rules and regulations. Such variances may only be granted, however, when unique circumstances dictate and no variance shall (1) be effective unless in writing; (2) be contrary to the restrictions set forth in the body of this Master Declaration; or (3) prevent the DRC from denying a variance in other circumstances. For purposes of this section, the inability to obtain approval of any governmental agency, or the issuance of any permit, or to comply with the terms of any financing shall not be considered a hardship warranting a variance.

Approval Expiration

Applicants must begin construction within _____ (____) days after final approval by the DRC in accordance with the DRC Policies and Guidelines. Failure to do so will automatically revoke approval without prior notice from the DRC. Time extensions may be requested from the DRC if written requests are received prior to the expiration of the _____ (____) days after final approval by the DRC. The DRC shall have the right to

grant or reject a request for an extension of time in its sole and absolute discretion.

Approval of Building Department

The applicant must submit the DRC approved final construction plans to the Medina County Department of Building Inspection and any other agency having jurisdiction for the issuance of required permits and fees.

Design Document Changes

The applicant must notify the DRC prior to making any changes to approved plans. A letter with the applicable supporting data (as required) must be submitted for the file. Any deviations (as determined solely by the DRC) may require DRC approval prior to commencement of work with respect to any changes. The DRC reserves the right to inspect construction in progress for conformity with approved design documents and applicant is expected to fully cooperate with the DRC and Board Members at all times.

Design Documents

In order to provide a systematic and uniform review of the proposed construction, the design document should adhere to the criteria outlined below.

SITE PLAN: SCALE 1" - 20'

Property Lines
Building Setback Lines
"Easements"
Right-Of-Ways
Driveways
Patios/Decks
Walkways
Culverts and Drainage Plan
Dwelling Overhangs (1st/2nd Floor)
Trees (Existing Min. 5" Dia. 03' Above Grade)
Topography (Finish and Existing Grade)
Equipment
Retaining Walls and Screening

FLOOR PLANS: SCALE 1/4" - 1' - 0"

Note: List Gross Square Footage of Living Space Per Floor
Basement
Ground Floor
Additional Upper Floors

EXTERIOR ELEVATIONS: SCALE 1/4" - 1' - 0"

Existing Grade - Fill
All Exterior Views of all Structures Including Materials, Textures, and Color

BUILDING SECTION: SCALE 3/4" - 1' - 0" (MIN.)

Wall/Roof Section

Roof Pitch/Materials/Color

EXTERIOR COLORS, FINISHES, MATERIALS

Materials/Finishes/Model Samples/Colors

KEY DESIGN GUIDELINES

The following list summarizes those design elements which the DRC requires, recommends, and/or encourages:

1. Use of professionals qualified in the fields of planning, architecture landscape design, engineering, and surveying.
2. Compliance with all deed restrictions as found in the Master Declaration and Declaration of Covenants, Conditions and Easements for the Subdivision (the "Subdivision Declaration").
3. Preservation of the natural character of the site.
4. Emphasis on the aesthetics of exterior architectural and landscape design.
5. Minimum square footage shall conform to those set forth in the Master Declaration.
6. Requirements for a minimum 7/12 roof pitch with cedar shakes, cedar shingles, natural slate, tile or asphalt roofing.
7. Requirements for each house to be pre-wired for cable TV.
8. Minimum two-car garage with automatic door openers.
9. Conformance with the standard mailbox design.
10. Overall, high-grade, superior quality construction with emphasis on good design and the use of natural materials such as stone, wood, and brick.
11. Sign control in conformance with the criteria set forth in the DRC.
12. Whenever possible, use of green building alternatives to achieve energy savings and water use efficiencies.

DWELLING SIZE/MINIMUM STANDARDS

All residences to be constructed on Sublots fronting on dedicated public streets shall conform to the following standards:

1. No more than one Dwelling may be erected on any lot.
2. All Dwellings shall be used only for private single-family residential purposes.
3. The Declarant shall prescribe a minimum square footage of habitable space for each Dwelling within

each identified neighborhood of the community. All Dwellings should bear a reasonable relationship to the size and shape of the lot upon which a Dwelling is situated, as well as the anticipated character of the Neighborhood where such Dwelling will be located, and the Declarant reserves the right to establish higher or lower minimum square footages for specific lots in its sole and absolute discretion.

4. Enclosed Garage: _____ (____) car minimum, attached to Dwelling. No garage doors shall face any street, except the DRC shall have the right to waive this restriction with respect to corner lots.

5. Electrical Garage Door Openers: Required

6. Driveways: _____ (____) foot minimum width at entrance to garage. All driveways shall be concrete and shall be installed within _____ (____) months after the owner takes possession of his Dwelling.

7. Each Dwelling will be completed at a finished floor elevation compatible with its surroundings.

8. Each Dwelling shall have a basement equal to a minimum of _____ percent (____%) of the ground floor area of such dwelling.

9. Minimum Square Footage: _____ (____) sq. ft. Ranch; _____ (____) sq. ft. 1 1/2 or 2 story home.

10. Setbacks, except as may be otherwise shown on the Setback Guidelines attached as Exhibit "A" of the Subdivision Declaration for the relevant Subdivision Phase:

A. Front yard. _____ (____) feet to _____ (____) feet as shown on the subdivision plat. For corner lots the DRC has the authority to determine fronting street.

B. Rear yard. See above-referenced Setback Guidelines.

C. Side yard. See above-referenced Setback Guidelines.

EXTERIOR ELEVATIONS

1. Exterior elevations will be reviewed for architectural design/materials and for aesthetic appearance in terms of the overall dwelling and its relationship to other homes.

2. Approval of exterior design will be based on overall design themes and will consider mass and scale; materials, textures, colors and finishes, continuity between primary design elements and secondary surface treatments; placement of windows, doors, and openings; vertical and horizontal lines; roof pitches, and the like.

3. Depending on the architectural style, preferred exterior features and materials include horizontal or vertical wood siding, stone, brick, stucco, high-pitch roofs, brick chimneys, and the like.

4. The DRC may bar any proposed new construction or changes to existing homes on purely aesthetic grounds, where, in its sole judgment, such action is required to maintain the desire for good architecture.

5. Side entry garages required on all homes.

6. Awnings and canopies shall not be permitted or affixed to the exterior of the Dwelling unless approved by the DRC.

EXTERIOR MATERIALS

1. The selection of exterior materials shall be harmonious with the architectural style of each dwelling unit and the community development as a whole. Natural materials are preferred over synthetic materials however synthetic materials are allowed pending DRC approval. _____ percent (____%) of a front elevation, excluding windows and glazing, must be brick, stone or "Dryvit" (see below). Elevations shall include a maximum of two materials: e.g., brick and stone, brick and cedar, stone and vinyl, with the use of brick veneers, a minimum of _____ (____) foot return at front corners must be included. "Dryvit" or other approved stucco-type materials may be used if applied to a minimum of _____ percent (____%) of all elevations.

2. The following exterior materials are not approved for construction: Decorative concrete block; concrete block (except for sub-surface walls); fiberglass, logs (imitation or otherwise except for landscaping purposes); fiberglass garage doors; aluminum mill finish doors and windows; exterior storm sash/doors; and certain types of imitation stone and brick; fiberglass or asphalt shingles used as siding. High quality simulated stone and brick from natural materials will be considered on their own merit by the DRC, but are subject to disapproval. Modular prefabricated homes and home designs will not be permitted while pre-fabricated subassemblies are acknowledged as the industry norm and are an acceptable method of construction. Exposed portions of foundation walls shall be brick or stone.

3. The DRC shall have final approval of all exterior color submittals and each applicant must submit to the DRC as part of final design review, a sample board showing the color and specific material of the roof, exterior walls, shutters, trim and other exterior construction items, most earth-tone colors work well to tie together.

4. The continuity of buildings. The intent is for individual houses to blend into the total Golf Meadow community image. Pastel hues do not work well, stains are preferred to paint. Roof colors should not contrast sharply with the rest of the house.

5. All chimneys must be masonry.

ROOF PITCH/ROOFING MATERIALS

1. Generally, the roof lines should follow the slope of the land, roof should slope a minimum of 7/12 pitch. Flat roofs are not indigenous to the development concept and are not permitted. Roof textures and materials shall be cedar shake or sawn shingles; natural slate; or three dimensional asphalt/fiberglass shingles. Gutters and downspouts are required. Overhangs are encouraged.

2. All roof stacks, flashing, and metal chimney caps shall be painted to match the approved roof color. Roof stacks and plumbing vents shall be placed on rear slopes of roof.

3. Solar roof panels are not permitted unless designed to be mounted flush with roof plane and approved

by the DRC in writing in advance.

DESIGN DUPLICATION

1. Applicants should select building sites and home plans which will not result in the construction of repetitious designs within close proximity of each other. Similar designs or design duplications will not be approved on contiguous lots and must be spaced a minimum four sub lots apart. Designs are subject to disapproval without sufficient variation in exterior colors, materials finishes, trim and detailing.
2. Elevations that are similar in appearance are prohibited on any four adjacent home sites, any three home sites immediately across the street, or any three home sites on a cul-de-sac.
3. The approval of plans for a specific site does not automatically imply approval by the DRC of identical or similar plans for another building site within the development.

GENERAL COMMUNITY STANDARDS

1. Attempts to establish property lines through individual fencing are not approved. Every effort must be made to retain the feeling of open space.
2. No wall, fence, coping or other device installed for the purpose of separating lots (other than natural shrubbery) shall be maintained on any lot, unless approved in writing by the DRC.
3. No wall, fence, coping or boundary planting may be constructed on the boundary line on any lot where it adjoins a natural resource or the golf course.
4. No wall, fence, coping or boundary planting may be constructed or maintained in such a manner as to interfere with the vision of drivers at any intersection of streets or roads.
5. No chain link fences shall be permitted unless required variance is approved in writing in advance by the DRC.
6. All mailboxes shall be of common design and shall include only the surname and house number. Mailboxes shall be located as prescribed by the United States Postal Service. The type, design and color of a mailbox shall be approved by the DRC.
7. All Living Units shall have a standard specific gas exterior light in a prescribed location that assures lighting during hours of darkness. No exterior lighting shall be permitted which in the opinion of the DRC would create a nuisance to the adjoining property owners or would otherwise be incompatible with the overall residential development and landscaping plan for Golf Meadow. No interval lighting shall be installed along driveways since a "runway" effect is to be avoided.

LANDSCAPING

1. All easements and right-of-ways shall be landscaped in accordance with the DRC specifications.
2. All homes must be landscaped prior to obtaining a Certificate of Occupancy issued by the

_____ [county] County Building Department, unless temporary waiver is granted by DRC because of weather. The type of brass seed or sod shall be subject to DRC approval.

3. Trees with a diameter of _____ (_____) inches or more (measured _____ (_____) feet above grade) must be noted on the site plan, tree survey, and landscape plan. Specimens scheduled for removal must be included on plans and tagged with colored ribbons on-site for inspection along with the final stakeout. In no case shall trees with a diameter of 4 inches or more (measured _____ (_____) feet above glade) be removed without the prior approval of the DRC. Nor shall fill be placed within dripline diameter to threaten the life of trees. Fill shall not be deposited at any location without prior DRC approval.
4. All Applicants shall make a diligent effort to protect all remaining trees during construction, to provide staked-off areas to protect root systems from heavy vehicles and equipment, to install tree wells, and to take other precautions in cases where fill is required around trees.
5. Each Applicant shall be responsible for removal of dead or fallen trees or wood or other obstructions from the Lot and the abutting tree lawn and restoration of the surface, including seeding of the tree lawn. Burning of trees, stumps and brush is prohibited. These items must be removed from the lot and disposed of outside the Subdivision.
6. The following represents mandatory landscaping and irrigation requirements prior to submission of the Certificate of Compliance:

Minimum Shrubs: 40 one-gallon or greater, 25 two-gallon or greater, 25 three-gallon or greater or balled or burlaped. Minimum trees: 7 deciduous, ornamental or evergreens as designed to individualize house.

ACCESSORY STRUCTURES/UTILITIES/SERVICE AREAS

1. Accessory structures, such as playhouses, tool sheds, doghouses, or dogruns, shall not be permitted unless the specific written approval of the DRC is obtained.
2. All playground equipment shall be placed to the rear of the residence and only with the prior approval of the DRC.
3. No decorative objects such as sculptures, birdbaths, fountains and the like shall be placed or installed on the building site without the prior approval of the DRC.
4. No tent, trailer, shack, barn or other out-building, nor any form of living quarters of a temporary nature shall be permitted, except as permitted by the DRC and by the Subdivision Declaration.
5. Outside antennas and satellite dishes shall not be permitted.
6. A flagpole for display of the American Flag shall be permitted, subject to DRC approval of the size, placement, color, finish, and design. No flagpole shall be used as an antenna.
7. No clothes lines shall be allowed.
8. All garbage containers, AC compressors, pool pump equipment, etc., shall be located in rear yards or side yards within the setback line and shall be screened or walled from front streets, adjoining properties,

and from the golf course as required by the DRC.

9. Applicant shall be responsible for all utility services from the point of utility company connections underground to the Applicant's home. All utilities shall be underground except temporary electrical service for homes under construction. Meters, transformers, and other utility service equipment/gear shall be shielded by screening, walls or landscaping approved by the DRC.

10. The elevation of the top of any swimming pool construction on any lot may not be over _____ (_____) feet above the natural grade unless integrated into terraced construction upon approval of the DRC. No above-ground swimming pools are permitted. The location of a swimming pool is subject to the approval of the DRC and no swimming pool is permitted on the street side of any Dwelling.

11. Screen enclosures must not be visible from the street in front of the Dwelling unless same is approved by the DRC. All screen enclosure materials and colors must be approved by the DRC. Pool enclosures must be neutral in color.

12. No tennis courts shall be permitted on a Dwelling lot unless approved by the DRC.

CONSTRUCTION SITE REQUIREMENTS

1. All job sites will be kept in a clean and orderly condition. No materials will be stored or placed in the swale or right-of-way areas. Debris shall be collected into a dumpster or wire cage and shall be removed weekly at a minimum. Care shall be exercised on storage of materials (and debris) on golf course frontages.

2. The Applicant shall control silt, erosion or other runoff in accordance with the requirements of the _____ [state] E.P.A. and other governmental authorities having jurisdiction and in accordance with the requirements of the DRC and the Declarant. No drainage ditches, cuts, swales, streams, ponds or lakes; no bounds, knobs, dams or hills; and no other physical improvements or elements of landscape or terrain which control or determine the location or flow of surface water or drainage patterns shall be created, destroyed, altered or modified without the prior written consent of the DRC, whether on private property or common area. Under no circumstances shall silt be permitted to run onto the golf course or into the lake.

3. No signage is permitted at any job site unless required by law or approved by the DRC.

4. Construction hours: 7 a.m. to 7 p.m. Monday through Friday and 8:00 a.m. to 4:30 p.m. Saturday. Hours are subject to change once residents move in.

5. All builders are required to keep on record with the Declarant and the DRC a 24 hour emergency phone number.

6. No alcoholic beverages or illegal drugs are permitted on job site.

7. The playing of loud music that may be annoying to residents or golfers is prohibited.

8. Any agents, subcontractors and employees of builders who violate construction site requirements or any other criteria may be removed and prohibited from entering Golf Meadow by the Declarant and the

DRC.

9. The DRC may require a rough stakeout of the Sublot prior to the commencement of any improvements, alterations or additions. Any and all inspections are at the discretion of the DRC or its duly appointed representatives. Any inspections shall not constitute a trespass.

10. No signs, flags, banners and the like shall be permitted unless approved by the DRC. If so approved, they shall be installed in locations approved by the DRC, and shall be promptly removed at the request of the DRC.

11. The interior and exterior of all homes shall be kept clean and free of debris and all landscaping and other site improvements shall be well manicured at all times. No builder shall use a model home other than for the selling and marketing of homes in Golf Meadow. Refuse shall be placed in containers and regularly and properly disposed of.

VIOLATION OF MASTER DECLARATION, SUBDIVISION DECLARATION OR DRC REQUIREMENTS

1. If any building or structure shall be altered, erected, placed or maintained upon any portion of the Sublot, or any new use is commenced on any portion thereof other than in accordance with plans and specifications approved by the DRC, such alteration, erection, placement, maintenance or use shall be deemed to have been undertaken in violation of the Master Declaration, the Homeowners' Declaration and these Policies and Guidelines above documents and without the approval required therein. Upon written notice from either the DRC, any Board member or officer of the Master Association or the Declarant, any such building so altered, erected, placed or maintained upon any portion of the Sublot in violation thereof shall be promptly removed or altered and any such use shall be terminated as to extinguish such violation.

2. If within _____ (____) days after written notice of such a violation reasonable steps have not been taken by the violator toward the alleviation or termination of the same or if such remedial action is not prosecuted with due diligence until satisfactory completion thereof, the Master Association and/or Declarant shall have the right, through agents and employees, to enter upon the Sublot and/or Living Unit and to summarily abate and/or remove any building or structure, or to take such steps as may be necessary to extinguish such use, or to otherwise cure the violation. In addition to the foregoing, the Master Association and/or Declarant shall have the right to obtain an injunction from any court having jurisdiction for the cessation of such alteration, erection, maintenance or use which is in violation of the foregoing. The rights and remedies of the Master Association and Declarant pursuant to the Article shall be non-exclusive and in addition to any other rights or remedies available at law or in equity. Moreover, the failure or neglect to enforce any term, covenant, condition, restriction, right or procedure herein shall in no event and under no circumstances be construed, deemed or held to be a waiver with respect to any subsequent breach or violation thereof. Subject to the provisions of the Code of Regulations of the Master Association entitled "Hearing Procedure," a person in violation of the DRC Article of the Master Declaration shall be obligated to the Master Association and/or Declarant for the amount of all costs and expenses, including attorneys' and paralegals' fees, incurred to remedy any such violation. If said amounts are not paid within _____ (____) calendar days following said notification, then said amount shall be "delinquent" and shall, upon perfection as provided in the Master Declaration, become a continuing lien upon the portion of the Sublot owned or occupied by such person(s) and a personal obligation of the violating person(s). In addition, the Owner of the Sublot shall be liable jointly and severally for any obligations of any occupant of such Owner's Sublot.

COST OF DRC

The Declarant and the Master Association shall establish an annual budget for the cost and expenses of the DRC which may include, among other things, compensation for its members, support staff and the employment of professional consultants. The Master Board and/or the DRC shall have the right to charge fees sufficient to cover the expense for processing applications; reviewing plans, specifications and related data, whether or not the same are approved or disapproved, and compensating any consulting architects, landscape architects, designers, inspectors and/or attorneys retained in accordance with the terms hereof. The Declarant shall be exempt from any such fees.

LIABILITY OF MEMBERS OF DRC

No member of the DRC shall be liable to the Association, any Owner or any other person for his acts or omissions or failure to act in any particular manner.



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Current Legal Forms for Real Estate
Chapter 22 DEVELOPMENT AND SUBDIVISION
Part IV. FORMS
E. RESIDENTIAL DEVELOPMENT

26-22 Current Legal Forms for Real Estate FORM 22.77

FORM 22.77 Statement of reservations and restrictive covenants--single family residential development

COMMENT

This form is a simple declaration of reservations and restrictive covenants applicable to residential property. The declaration is recorded, and subsequently incorporated by reference in each separate deed. Each purchaser has the right to enforce violations of the covenants by any other owner.

For additional forms relating to homeowners' associations and residential development, see Chapter 20, Real Estate Entities, in Volume 24, *supra*.

FORM

Reservations and Restrictive Covenants South Beach Shores

_____[*name*], a(n) _____ [*state*] _____ [*entity*], referred to in this instrument as the Subdivider.

The Restrictions and Covenants in this instrument are to run with the land described on Exhibit A and shall be binding upon all parties and all persons owning lots in the development commonly known as South Beach Shores (the "Development") or claiming under them until _____ [*month*] _____ [*day*], _____ [*year*].

If the owners of any Development lots, or their heirs or assigns, shall violate any of the covenants in this instrument, it shall be lawful for any other person owning real property situate in the subdivision to prosecute any proceedings at law

or in equity against the person or persons violating any of the covenants, and either to prevent him from so doing or to recover damages for the violation, or both.

Invalidation of any of these covenants by judgment or court order shall in no wise affect any of the other provisions, which shall remain in full force and effect.

1. *Residence "AA" district.* Applicable to all of Blocks 1, 3, 4 and Blocks 9 through 36 inclusive; Lots 2 through 28 inclusive and Lots 38 through 43 inclusive of Block 2; Lots 17 through 23 inclusive of Block 7 and Lots 29 through 42 inclusive of Block 7.

(a) No lot or lots embraced in the Residence "AA" District shall be used for other than single-family residence purpose. There shall not exist on any lot at any time more than one residence. No trailer, tent, shack, barn, temporary building, outbuildings, or guest house shall be erected on any of the lots in the subdivision without approval in writing from the Committee. No garage shall be constructed except as an integral part of the residence it is intended to serve.

(b) No one story buildings shall be constructed on lots with a fully enclosed first floor area of less than _____ (_____) square feet, exclusive of carport, garage, and open porches. No one story buildings shall be constructed on lots bordering on the Golf Course with a fully enclosed first floor area of less than _____ (_____) square feet, exclusive of carports, garage, and open porches. No two-story or higher buildings shall be constructed with a fully enclosed first floor area of less than _____ (_____) square feet. No one and one-half story building shall be constructed with a fully enclosed first floor area of less than _____ (_____) square feet.

2. *Residence "A" district.* Applicable to Lot 1 and Lots 29 through 37 inclusive and Lots 44 through 50 inclusive of Block 2; all of Blocks 5, 6, 8; Lots 1 through 16 inclusive in Block 7, Lots 24 through 28 inclusive in Block 7 and Lot 43 in Block 7. The restrictions in this district shall be exactly the same as single family dwellings except that duplexes, for no more than two families each, may be built on lots in this district.

3. *Setback lines.* No building or any part thereof, including garages and porches, shall be erected on any lot closer than _____ (_____) feet to the front street line, or closer than _____ (_____) feet to either side lot line, or closer than _____ (_____) feet to the rear lot line. However, in the case of corner lots the set back from the side street line shall not be less than _____ (_____) feet). When one and one-half, two, or more lots are acquired as a single building site, the side lot lines shall refer only to the lot lines bordering the adjoining property owners. The Committee shall have the right to permit reasonable modifications of the setback requirements where in the discretion of the Committee strict enforcement of these setback provisions would work a hardship.

4. *Approval of plans.* For the purpose of further insuring the development of the lands so platted as an area of high standards, the Subdivider reserves the power to control the buildings, structures, and other improvements placed on each lot, as well as to make such exceptions to these Reservations and Restrictions as the Subdivider or the Committee, shall deem necessary, appropriate, or proper.

Whether or not specifically stated in any conveyance of a lot made by the Subdivider, the owner or occupant of each and every lot, by acceptance of title or by taking possession, covenants and agrees that no building, wall, or other structure shall be placed upon the lot unless and until the plans and specifications therefor and plot plan have been approved in writing by the Committee. Each building, wall, or structure shall be placed on the premises only in accordance with the approved plans and specifications and the approved plot plan. Refusal to approve plans and specifications by the Committee may be based on any ground, including purely aesthetic grounds which, in the sole and uncontrolled discretion of the Committee shall seem sufficient. No alteration in the exterior appearance of the buildings or structures shall be made without like approval. If no Committee exists or if the Committee shall fail to approve or

disapprove the plans and specifications within _____ (_____) days after written request, then approval shall not be required; provided that no building or other structure shall be erected which violates any of the Covenants contained in this instrument.

5. *Committee.* The Subdivider shall appoint one or more persons to the Committee and a Successor Committee or Committees shall also be appointed by the Subdivider. After _____ [month] _____ [day], _____ [year], all privileges, powers, rights, and authority shall be exercised by and vested in a Committee to be selected by the owners of a majority of the lots in the subdivision.

6. *Commercial vehicles.* No trucks, except pick-up trucks or similar size vans or recreational vehicles, and no commercial type vehicles shall be stored or parked on any Residence "AA" or Residence "A" lot, unless parked in a closed garage, nor parked on any residential street in the subdivision, unless engaged in transporting to or from a residence in the subdivision.

7. *Filling in and removing.* No lot or parcel shall be increased in size by filling in the water it abuts. The elevation of a lot shall not be changed so as to materially affect the surface elevation or grade of the surrounding lots. No rock, gravel, or clay shall be excavated or removed from any property for commercial purposes.

8. *Nuisances.* No horses, cattle, swine, goats, poultry, fowl or other farm animals shall be kept on any lot. No clotheslines or drying yards shall be permitted unless concealed by hedges, lattice work, or screening acceptable to the Committee. No signs or other advertising, except standard real estate "for sale" signs, shall be displayed on any lot unless the size, form, and number of same are first approved in writing by the Committee. No weeds, underbrush, or other unsightly growths shall be permitted to grow or remain upon the premises, and no refuse pile, unused motor vehicles, or unsightly objects shall be allowed to be placed or to remain anywhere on the premises. In the event that any owner of any property in the subdivision shall fail or refuse to keep the premises free from weeds, underbrush, refuse piles, unused motor vehicles, or other unsightly growths or objects, then the subdivider or the Committee may enter upon the lands and remove the same at the expense of the owner and such entry shall not be deemed a trespass. In the event of such a removal a lien shall arise and be created in favor of the Subdivider or the Committee and against the owner's lot for the full amount chargeable to the lot and that amount shall be due and payable within _____ (_____) days after the owner is billed for it.

9. *Walls.* No boundary wall shall be constructed with a height of more than _____ (_____) feet and no boundary line hedge or shrubbery shall be permitted with a height of more than _____ (_____) feet. No wall of any height shall be constructed on any lot until after the height, type, design, and approximate location are approved in writing by the Committee. The heights or elevations of any wall shall be measured from the existing elevations of the property at or along the applicable points or lines. Any question as to heights may be completely determined by the Committee.

10. *Taxes and government limitations.* Any conveyance of property is made subject to taxes and other assessments if any levied or assessed against the property in the year in which it is conveyed and subject to all restrictions and limitations imposed by governmental authority.

11. *Subdivision of lots.* None of the lots shall at any time be divided into as many as two building sites and no building site shall be less in area than the area of the smallest lot platted in the block of which the building site is a part. A single lot together with contiguous portion or portions of one or more lots in the same block may be used for one building site, and no building or structure or any part thereof shall be erected or maintained nearer the side boundary lines of such integral unit than _____ (_____) feet.

12. *Sewers.* In the event governmental authority should require the installation of sanitary sewers and appurtenances in part or in all of the subdivision, the purchasers or owners of the lots in the subdivision shall pay their proportionate

share of the cost and expense of installing the sewer system. This proportionate share will be computed by the total number of lots served by the sewer system or section of the sewer system and dividing the total number of lots served into the total cost of the system. All buildings must be connected to the sewer system, if any are connected, as soon as constructed and thereafter further use of septic tanks or other sanitary disposal systems shall be prohibited. Owners of lots shall pay a monthly minimum and monthly charge for the use of the sewage system.

13. *Remedies for violations--invalidations.* For a violation or a breach of any of these Reservations and Restrictions by any person claiming by, through, or under the Subdivider, or by virtue of any judicial proceedings, the Subdivider, and the lot owners, or any of them severally, shall have the right to proceed at law or in equity to compel a compliance with the terms hereof or to prevent the violation or breach of any of them. In addition to the foregoing right, the Subdivider shall have the right, whenever there shall have been built on any lot any structure which is in violation of these restrictions, to enter upon the property where the violation of these Reservations and Restrictions exists and summarily abate or remove the same at the expense of the owner, and any such entry and abatement or removal shall not be deemed a trespass. The failure promptly to enforce any of the Reservations and Restrictions shall not bar their enforcement. The invalidation of any one or more of the Reservations and Restrictions by any Court of competent jurisdiction in no wise shall affect any of the other Reservations and Restrictions, but they shall remain in full force and effect.

Should the owner fail, neglect, or refuse to satisfy and discharge any lien arising hereunder within _____ (_____) days, the Subdivider, its successors and assigns, shall have the right to interest on the liens at the rate of _____ percent (_____%) per annum and shall be entitled to receive all costs of collection, including a reasonable attorney's fee.

14. *Utility easements and lines.* Reserved for the purpose of installing and maintaining municipal and public utility facilities, and for such other purposes incidental to the development of the property, are the easements shown upon the plat of the Development, as recorded in the Public Records of _____[county] County, _____[state]. All claims for damages, if any, arising out of the construction, maintenance, and repair of utilities or on account of temporary or other inconvenience caused thereby against the Subdivider, or any utility company or municipality, or any of its agents or servants are waived by the owners. The Subdivider further reserves the right to change, lay out a new, or discontinue any street, avenue, or way shown on the plan of development not necessary for ingress or egress to and from an owner's premises, subject to the approval of the County of _____[county], if approval is required.

15. *Temporary wells.* Temporary wells are permissible for lawn and outside use. However, it is understood that as soon as the water mains are installed property owners are required to connect at their own expense to the mains for water for household use and thereafter shall not use well water for household purposes. The Owners of lots shall pay a monthly minimum and monthly charges for water used.

16. *Exteriors and roofs.* All structures shall be painted with two coats of paint unless constructed of ornamental masonry or brick. No roofs shall be constructed unless they are tiled or poured Bermuda type.

IN WITNESS WHEREOF, _____[name] has caused these presents to be signed in its name by its President, and its corporate seal affixed, attested by its Secretary, the _____ day of _____[month] _____[day], _____[year].

"SUBDIVIDER"

a(n) _____[state] _____[entity]

26-22 Current Legal Forms for Real Estate FORM 22.77

By: _____

Print Name: _____

Title: _____

STATE OF _____)
COUNTY OF _____) SS:

BEFORE ME, a Notary Public in and for said County and State, personally appeared _____ [name],
a(n) _____ [state] _____ [entity], by _____ [name], its
_____ [title], who acknowledged that _____ [he/she] did sign the foregoing
instrument for and on behalf of said corporation, being thereunto duly authorized, and that the same is
_____ [his/her] free act and deed individually and as such officers and the free act and deed of said
_____ [entity].

IN TESTIMONY WHEREOF, I have hereunto set my hand and official seal at _____ [city],
_____ [state], this _____ [day] day of _____ [month], _____ [year].

Notary Public

[Attach Exhibit A]



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Current Legal Forms for Real Estate
Chapter 22 DEVELOPMENT AND SUBDIVISION
Part IV. FORMS
E. RESIDENTIAL DEVELOPMENT

26-22 Current Legal Forms for Real Estate FORM 22.78

FORM 22.78 Statement of reservations and restrictive covenants--residential subdivision--limiting style of home

COMMENT

In the subdivision depicted in this form, the developer desires that only a certain style of home be constructed. Accordingly, in the statement of reservations and restrictive covenants below, the developer states that the only permitted style of home design is Spanish. The developer has also specified that the proposed exterior design of any home must receive the developer's written approval prior to commencement of construction. The developer has also provided that there will be no appeal from its decision on the issue of style.

The developer intends to have very expensive houses constructed within this subdivision, some of which may include separate quarters for domestic employees. Consequently, some of the lots to be sold exceed five square acres. Only those lots may include stables for horses and kennels for dogs.

The developer also wishes to maintain a quiet and staid atmosphere throughout the development. Consequently, the statement of reservations and restrictive covenants provides that children may not play in the front yards or driveways of homes, or on the streets and sidewalks of the development. In addition, all motorized vehicles, other than passenger cars, must be kept out of sight.

For additional forms relating to homeowners' associations and residential development, see Chapter 20, Real Estate Entities, in Volume 24, *supra*.

FORM

DECLARATION OF RESTRICTIONS

by _____ [developer's name]

WHEREAS, _____ [name], is the owner and developer of a certain tract of land known as _____ [name of development, e.g., Spanish Fork], more particularly described in Schedule A, which is annexed hereto and made a part hereof; and

WHEREAS, the said _____ [name], is expecting to sell residential lots within said tract to individual homeowners and desires to subject the land and purchasers thereof to certain restrictions, conditions and covenants for the purpose of maintaining the value and atmosphere desired for the subdivision,

NOW, THEREFORE, _____ [name], hereby declares that all lots shown on the tract of land described in Schedule A are held and shall be conveyed subject to the following restrictions, conditions and covenants:

1. *Use of lots in development.* All lots in the residential subdivision known as _____ [name of development, e.g., Spanish Fork] shall be used solely for residential purposes. No business activities of any kind or nature shall be carried on in any of the homes constructed therein.

2. *Style of homes.* All homes shall be constructed with a _____ [name of acceptable style of exterior design, e.g., Spanish] motif exterior. [Discuss any specific architectural features that must be included, e.g.: Roofs shall be constructed of clay tile or of a similar-appearing material. Exteriors shall be stucco or brick.] All exterior plans must be approved, in writing, by _____ [name], prior to the commencement of construction. The determination of this issue by _____ [name], shall be made in its sole discretion and shall not be subject to review.

3. *Patio decks.* Homes may possess outdoor patio decks. Such decks must not be visible from the street, however.

4. *Lot may contain only house and garage.* Each lot may contain only one single-family residence and a detached garage. The garage may contain a two-bedroom apartment for domestic employees on the second level. The garage exterior shall match that of the residence.

5. *Number of stories.* Homes may not exceed _____ (_____) levels. Each level must contain between _____ (_____) square feet of living space.

6. *Water and sewer services.* All homes must be connected to public water and sewer systems. However, each home may install a maximum of _____ (_____) point-type wells for lawn and garden maintenance.

7. *Stables.* Stables shall be permitted only on lots exceeding _____ (_____) acres in size. Only horses may be housed in such stables. Cattle, swine, chickens and other livestock are prohibited on lots in _____ [name of development, e.g., Spanish Fork].

8. *Dog kennels.* Dog kennels shall be permitted only on lots exceeding _____ (_____) acres in size. Kennels shall not be visible from the street. Dogs shall not be allowed to disturb neighbors. Kennels shall be fully fenced-in. The kennels shall be constructed to match the exterior of the main house.

9. *Manufacture and sale of alcoholic beverages.* Manufacture and sale of alcoholic beverages is prohibited in _____ (name of development, e.g., Spanish Fork). Consumption of alcoholic beverages must not be visible from the street.

10. *Prohibited vehicles.* Use of "all terrain" motorized recreational vehicles (whether of two, three, four or more wheel design) is forbidden; use of trail bikes, dirt bikes, motorcycles and other motorized off-road vehicles is forbidden; use of snow mobiles or other motorized snow or ice recreational vehicles is prohibited.

11. *No noxious or offensive activity permitted.* No noxious or offensive activity shall be carried on upon any lot or lots, nor shall anything be done thereon which may be or may become an annoyance or nuisance to the neighborhood.

12. *Tents, etc.* Tents, shacks, trailers or other motorized vehicles shall not be used as a dwelling, either temporarily or permanently. No motorcycle, truck, trailer or boat shall be stored on any lot unless it is garaged.

13. *Portable air conditioners, satellite dishes, and antennae.* Portable air conditioners, satellite dishes, and television, radio, citizens' band (C.B.) and short wave antennae are not to be visible from the street or from any lot within the development.

14. *Means of advertising.* No signs, billboards or advertising media shall be erected or maintained on any lot.

15. *Refuse.* Trash, lawn cuttings, branches and other refuse shall not be burned or buried on any lot. Refuse shall be removed no less often than _____ (_____) per week. Refuse shall be stored in locked sheds between collections.

16. *Clothes lines.* Outdoor clothes lines are prohibited, except in fenced-in areas which cannot be viewed from the street or adjoining lots.

17. *Mowing of grass.* Grass on all lawns shall be allowed to grow to a height of no more than _____ (_____) inches in height. Lawns shall be fertilized as needed and treated for pests and weeds at least _____ (_____) annually. Shrubbery shall be trimmed no less often than _____ (_____) annually.

18. *Activities of children.* Children may not play in the front yards or driveways of homes, or on the streets and sidewalks of the development.

19. *Survival clause.* Invalidation of any one of these covenants, conditions and restrictions, whether by judgment or court order, shall not affect any of the remaining provisions, which shall remain in full force and effect.

20. *Duration of restrictions, conditions and covenants.* All restrictions, conditions and covenants herein shall run with the land and continue as such for _____ (_____) years from the date hereof. They shall be extended from that time for successive periods of _____ (_____) years, unless the owners of _____ percent (_____) of the lots shown on Schedule A shall agree to alter, modify or eliminate any or all of these restrictions.

21. *Binding effect.* The provisions herein contained shall bind, inure to the benefit of, and be enforceable at law and in equity by _____ [name], its successors and assigns, or by the grantee of any lot described in Schedule A. Failure by _____ [name], its successors, assigns or any grantee to enforce any of the restrictions, conditions and covenants herein contained shall in no event be deemed a waiver of the right to do so thereafter, and shall not subject _____ [name], to any liability for failure to enforce.

"DEVELOPER"

Title: _____

STATE OF _____ [state])
COUNTY OF _____ [county]) SS:

IN TESTIMONY WHEREOF, I have hereunto set my hand and official seal at _____[city],
 _____[state], this _____[day] day of _____[month], _____[year].

Notary Public



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Current Legal Forms for Real Estate
Chapter 22 DEVELOPMENT AND SUBDIVISION
Part IV. FORMS
E. RESIDENTIAL DEVELOPMENT

26-22 Current Legal Forms for Real Estate FORM 22.79

FORM 22.79 Statement of reservations and restrictive covenants--club style residential development

COMMENT

This declaration sets forth special provisions unique to a club style project which may include a golf course, a country club, and a homeowners' association. The homeowners' association will exercise control over common areas and over prospective purchasers. Plans for the construction of roads and driveways and all building plans whether in the nature of new construction or remodeling or alteration require the approval in writing of the developer.

For additional forms relating to homeowners' associations and residential development, see Chapter 20, Real Estate Entities, in Volume 24, *supra*.

FORM

Declaration and Establishment of Conditions, Reservations, and Restrictions
for Cactus County Club Estates

_____[name], a[n] _____[state] _____[entity], as Trustee, being
the owner of the following described premises, situate within the County of _____[county], State of
_____[state]:

(Insert legal description)

has established a general plan for the improvement and development of the premises, and declares the covenants, conditions, reservations, and restrictions upon which and subject to which all lots and portions of lots shall be improved,

sold and conveyed by it as owner. Each and every one of these covenants, conditions, reservations, and restrictions is for the benefit of each owner of land in the subdivision, or any mortgage or other interest therein, and shall inure to and pass with each and every parcel of the subdivision, and shall bind the respective successors in interest of the present owner. These covenants, conditions, reservations, and restrictions are each imposed upon the lots, all of which are to be construed as restrictive covenants running with the title to the lots and with each and every parcel:

1. *Residential use.* The lots, and each and every one of them, are for single-family residential purposes only. No building or structure intended for or adapted to business purposes, and no apartment house, double house, lodging house, rooming house, hospital, sanatorium or professional office, or other multiple-family dwelling shall be erected, placed, permitted, or maintained on any lot, or on any part of any lot. No improvement or structure whatever, other than a first class private dwelling house, patio walls, swimming pool, and customary outbuildings, garage, carport, servants' quarters, or guest house may be erected, placed, or maintained on any lot in the premises.

2. *Preservation of natural environment.* The native growth of the premises shall not be permitted to be destroyed or removed except as approved in writing by the reversionary owner. In the event such growth is removed, except as approved, the reversionary owner may require the replanting or replacement of same, at the cost of the lot owner. Bermuda grass, except that of a variety recognized to be pollen free and approved in writing by the reversionary owner, shall not be grown on any lot.

3. *Tanks, and other storage.* No elevated tanks of any kind shall be erected, placed, or permitted on any part of the premises, provided, that nothing herein shall prevent the reversionary owner, his heirs and assigns, from erecting, placing, or permitting the placing of tanks and other water system apparatus on the premises for the use of the water company serving the premises. Any tanks for use in connection with any residence, including tanks for the storage of fuels, must be buried or walled sufficiently to conceal them from the view from neighboring lots, roads, or streets. All clotheslines, garbage cans, equipment, coolers, wood piles, or storage piles shall be walled in to conceal them from the view of neighboring lots, roads, or streets. Plans for all enclosures of this nature must be approved by the reversionary owner prior to construction.

4. *Setback lines.* No building, structure, fence, hedge, outbuilding, or appurtenance of any nature shall be located closer than _____ (_____) feet from any lot or property line.

5. *Horses and pets.* No horses shall be kept or stabled on any of the lots. This shall not be construed to prevent lot owners from keeping horses in the community stable which is proposed for the subdivision. No more than two pets of the customary household variety (including birds) may be kept on any lot in such premises, except upon the express written permission of the reversionary owner; provided, however, that the provisions hereof shall not be deemed to permit the keeping of domestic fowl or farm animals.

6. *Utility lines, and radio and television antennas.* All electrical service and telephone lines shall be placed underground and no outside electrical lines shall be placed overhead. This restriction may be waived by the reversionary owner. No exposed or exterior radio or television transmission or receiving antennas shall be erected, placed, or maintained on any part of the premises. This restriction also may be waived by the reversionary owner. Any waiver of these restrictions shall not constitute a waiver as to other lots or lines or antennas.

7. *Nuisances.* No lot shall be used in whole or in part for the storage of rubbish of any character whatsoever, nor for the storage of any property or thing that will cause such lot to appear in an unclean or untidy condition or that will be obnoxious to the eye; nor shall any substance, thing, or material be kept upon any lot that will emit foul or obnoxious odors, or that will cause any noise that will or might disturb the peace, quiet, comfort, or serenity of the occupants of surrounding property.

8. *Signs.* No billboards or advertising signs of any character shall be erected, placed, permitted, or maintained on any lot

or improvement except as herein expressly permitted. A name and address sign, the design of which shall be furnished to the lot owner on request by the reversionary owner, shall be permitted. No other sign of any kind or design shall be allowed. The provisions of this paragraph may be waived by the reversionary owner, only when in his discretion the same is necessary to promote the sale of property in the subdivision area. Nothing herein shall be construed to prevent the reversionary owner from erecting, placing, or maintaining sign structures and offices as may be deemed necessary by him for the operation of the subdivision.

9. *Mining.* No derrick or other structure designed for use in boring for oil or natural gas shall be erected, placed, or permitted upon any part of such premises, nor shall any oil, natural gas, petroleum, asphaltum, or hydrocarbon products or minerals of any kind be produced or extracted.

10. *Construction requirements.* Each private dwelling house erected upon any lot shall be constructed of stucco masonry or burnt adobe or clay brick or part redwood and other materials as shall be approved in writing by the reversionary owner, with either a gravel, shake, or mission tile roof, or such other materials as are approved by the reversionary owner. No white or light-colored roofs shall be permitted unless approved by the reversionary owner. No evaporative cooler shall be placed, installed, or maintained on the roof or wall of any building or structure. All coolers shall be concealed.

All construction shall be done in compliance with applicable sustainability ordinances relating to the use of energy efficient systems and water saving systems.

11. *Garage.* No garage or other outbuilding shall be placed, erected, or maintained upon any part of the premises except for use in connection with a residence already constructed or under construction. Nothing herein shall be construed to prevent the incorporation and construction of a garage as a part of a dwelling house.

12. *Occupancy.* No private dwelling house erected upon any lot shall be occupied in any manner while in the course of construction, nor at any time prior to its being fully completed. Nor shall any residence, when completed, be in any manner occupied until made to comply with the approved plans, the requirements herein, and all other covenants, conditions, reservations, and restrictions herein set forth. All construction shall be completed within six months from its start, provided, that the reversionary owner may extend the time when in his opinion conditions warrant an extension. No temporary house, temporary dwelling, temporary garage, temporary outbuilding, trailer home, recreational vehicle, or other temporary structure shall be placed or erected upon any lot unless approved by the reversionary owner. Rental of any guest house is prohibited, the occupancy thereof being limited to either guests or servants.

13. *Approval of plans.* All plans for the construction of private roads and driveways and all building plans for any building, fence, corral, wall, or structure to be erected upon any lot, and their proposed location upon any lot, and any changes after approval, any remodeling, reconstruction, alteration, or addition to any building, road, driveway, or other structure upon any lot in the premises shall require the approval in writing of the reversionary owner. Before beginning the construction of any road, driveway, building, fence, wall coping, or other structure whatsoever, or remodeling, reconstruction, or altering any road, driveway, or structure upon any lot, the person or persons desiring to erect, construct, or modify the same shall submit to the reversionary owner two complete sets of road or driveway plans, showing the locations, course, and width or two complete sets of building plans and specifications for the building, fence, wall coping, or other structure, as is applicable, planned to be erected, constructed, or modified. No structure of any kind, the plans, elevations, and specifications of which have not received the written approval of the reversionary owner, and which does not comply fully with the approved plans and specifications, shall be erected, constructed, placed, or maintained upon any lot. Approval of plans and specifications shall be evidenced by written endorsement on the plans and specifications, a copy of which shall be delivered to the owner of the lot upon which the prospective building, road, driveway, or other structure is planned prior to the beginning of construction. No changes or deviations in or from the plans and specifications as approved shall be made without the prior written consent of the reversionary owner. The reversionary owner shall not be responsible for any structural defects in the plans or specifications or in any

building or structure erected according to the plans and specifications. The reversionary owner may waive the set back provisions contained in paragraph four.

14. *Letter and delivery boxes.* The reversionary owner shall determine the location, color, size, design, lettering, and all other particulars of all mail or paper delivery boxes, and standards and brackets and name signs for the boxes in order that the area be strictly uniform in appearance with respect to these items.

15. *Drainage.* Drainageways shall conform to the requirements of all lawful public authorities, including the County Engineer of _____ County, State of _____, to the full extent of the authority given him by law.

16. *Commercial vehicles.* No commercial vehicles, construction, or like equipment or mobile or stationary trailers of any kind shall be permitted on any lot of the subdivision unless first approved by the reversionary owner and kept in a garage completely enclosed.

17. *Division of lots.* No lot shall be resubdivided except as approved by the reversionary owner.

18. *Golf course.* Easements to permit the doing of every act necessary and proper to the maintenance and playing of golf on the golf course adjacent to the lots which are subject to these restrictions are granted and established. These acts shall include, but not be limited to, the recovery of golf balls from the lots, the flight of golf balls over and upon the lots, the use of necessary and usual equipment upon the golf course, the usual and common noise level created by the playing of the game of golf, together with all the other common and usual activity associated with the game of golf and with all the normal and usual activities associated with the operation of a country club. The reversionary owner shall have the right to prescribe in writing to the governing body charged with operating the golf course and country club the manner and extent to which the rights under this easement shall be exercised. In addition the reversionary owner may, in his sole discretion, limit or withdraw or prohibit certain of the acts authorized by this easement, and he may limit the manner or place of doing all or certain of the acts authorized by this easement.

19. *Homeowners' association.* For the purpose of maintaining roads, traffic control, general planting within roadway areas, and all common community services of every kind and nature required or desired within the subdivision for the general use and benefit of all lot owners, each and every lot owner, in accepting a deed or contract for any lot in the premises, agrees to and shall be a member of and be subject to the obligations and duly enacted Bylaws and rules of the Cactus Country Club Estates Improvement Association, a nonprofit corporation.

20. *Approval of purchaser.* No lot shall be sold or resold unless the name of the prospective purchaser has been submitted in writing to the membership committee of the Cactus Country Club Estates Improvement Association and such prospective purchaser has been approved for membership by the membership committee. This provision shall not defeat or render invalid the lien of any mortgage or other encumbrance made in good faith for value as to any lot or lots or portions of lots in the premises.

21. *Reversionary owner.* The reversionary owner is _____, his personal representatives and assigns. The reversionary owner shall have the right to grant and convey all his rights to enforce these covenants, conditions, reservations, and restrictions to the _____ Improvement Association, at such time as in the sole judgment of the reversionary owner the Improvement Association is ready to undertake the obligation of enforcing them. Upon the conveyance and grant the Improvement Association shall have and shall succeed to all rights and duties with the same powers as if the Association had been named as reversionary owner.

22. *Term, extensions.* All of the foregoing covenants, conditions, reservations, and restrictions shall continue and remain in full force and effect at all times as against the owner of any lot in the premises, regardless of how he acquired title, until the commencement of the calendar year _____, on which date these covenants, conditions,

reservations, and restrictions shall terminate and end, and thereafter be of no further legal or equitable effect on the premises or any owner. However, these covenants, conditions, reservations, and restrictions shall be automatically extended for a period of _____ (_____) years, and thereafter in successive _____ (_____) year periods, unless on or before the end of one of the extension periods or the initial period the owners of a majority of the lots in the subdivision shall by written instrument duly recorded declare a termination of the same. Although these covenants, conditions, reservations, and restrictions may expire, any and all reversions for breach of these covenants, conditions, reservations, or restrictions committed or suffered prior to expiration shall be absolute.

23. *Reversion, reentry.* A breach of any of the covenants, conditions, reservations, or restrictions established by this instrument shall cause the real property upon which the breach occurs to revert to the reversionary owner, and the reversionary owner shall have the right of immediate reentry upon the real property in the event of a breach. As to each lot owner in the premises these covenants, conditions, reservations, and restrictions shall be covenants running with the land and the breach of any of them or the continuance of any breach may be enjoined or remedied by appropriate proceedings by the reversionary owner or by the owner of another lot in the premises but by no other person.

24. *Expenses.* If the reversionary owner hires counsel to enforce any of the foregoing covenants, conditions, reservations, or restrictions, or to reenter, by reason of a breach, all costs incurred in the enforcement, including a reasonable fee for counsel, shall be paid by the owner of the lot or lots and the reversionary owner shall have a lien upon the lot or lots to secure payment of all such accounts.

25. *Mortgages.* The breach of any of the foregoing covenants, conditions, reservations, or restrictions, or any reentry by reason of a breach, shall not defeat or render invalid the lien of any mortgage or deed of trust made in good faith for value as to any lot or lots or portions of lots in the premises, but these covenants, conditions, reservations, and restrictions shall be binding upon and effective against any mortgagee or trustee or owner, whose title or whose grantor's title is or was acquired by foreclosure, trustee's sale, or otherwise.

26. *Waiver.* No delay or omission on the part of the reversionary owner or the owners of other lots in the premises in exercising any rights, power, or remedy herein provided, in the event of any breach of the covenants, conditions, reservations, or restrictions herein contained, shall be construed as a waiver thereof or acquiescence therein, and no right of action shall accrue nor shall any action be brought or maintained by anyone whatsoever against the reversionary owner for or on account of his failure to bring any action on account of any breach of these covenants, conditions, reservations, or restrictions, or for imposing restrictions herein which may be unenforceable by the reversionary owner.

27. *Severability.* In the event any one or more of the foregoing covenants, conditions, reservations, or restrictions is declared for any reason, by a court of competent jurisdiction, to be null and void, the judgment or decree shall not in any manner whatsoever affect, modify, change, abrogate, or nullify any of the covenants, conditions, reservations, and restrictions not declared to be void or unenforceable, but all of the remaining covenants, conditions, reservations, and restrictions not expressly held to be void or unenforceable shall continue unimpaired and in full force and effect.

28. *Perpetuities rule.* In the event the provisions hereunder are declared void by a court of competent jurisdiction by reason of the period of time herein stated for which the same shall be effective, then in that event the terms shall be reduced to a maximum period of time which shall not violate the rule against perpetuities as set forth in the laws of the State of _____[state].

29. *Dedicated rights.* The premises shall be subject to any and all rights and privileges which the City of _____[city] or the County of _____[county], State of _____[state], may have acquired through dedication or the filing or recording of maps or plats of such premises, as authorized by law, and provided further, that no covenants, conditions, reservations, or restrictions, or acts performed shall be in conflict with any County Zoning Ordinance or Law.

_____ [name] a(n) _____ [state] _____ [entity], as Trustee, has caused this instrument to be executed by its duly authorized officer, and its corporate seal to be hereunto affixed on _____ [month] _____ [day], _____ [year].

"TITLE COMPANY"

_____ a(n) _____ [state] _____ [entity]

By: _____

Print Name: _____

Title: _____

STATE OF _____ [state])
COUNTY OF _____ [county]) SS:

BEFORE ME, a Notary Public in and for said County and State, personally appeared _____ [name], a(n) _____ [state] _____ [entity], by _____ [name], its _____ [title], who acknowledged that _____ [he/she] did sign the foregoing instrument for and on behalf of said corporation, being thereunto duly authorized, and that the same is _____ [his/her] free act and deed individually and as such officers and the free act and deed of said _____ [entity].

IN TESTIMONY WHEREOF, I have hereunto set my hand and official seal at _____ [city], _____ [state], this _____ [day] day of _____ [month], _____ [year].

Notary Public



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Current Legal Forms for Real Estate
Chapter 22 DEVELOPMENT AND SUBDIVISION
Part IV. FORMS
E. RESIDENTIAL DEVELOPMENT

26-22 Current Legal Forms for Real Estate FORM 22.80

FORM 22.80 Statement of restrictions and covenants--ocean-front residential property--assessments--owners' membership corporation

COMMENT

This form illustrates the statement of restrictions and covenants for an ocean-front residential development, and the articles of incorporation and the bylaws for a corporation set up by the owners for general community improvement. In addition to the more usual terms, there are provisions dealing with assessments and problems indigenous to ocean-front property. Assessments are to be levied for a large number of facilities and services, including roads, lighting system, and the cost of municipal services (such as fire and police protection, and garbage collection) until the responsibility for such items is assumed by a public body. The association formed by the homeowners may levy these assessments.

FORMS

(1) Covenants and restrictions

General Covenants and Restrictions

I. Permitted and Prohibited Uses

1.1. *Single family residences.* The premises may be used only for single family residences with the usual outbuildings. One lot, as shown on the plat of Surf Village, shall be the minimum building area upon which a single family residence and the usual outbuildings may be constructed. One or more lots may be utilized as a single building plot.

1.2. *Garages.* Garages, which shall be for the use only of the occupants of the residence to which they are appurtenant, may be attached or detached from the residence and may not have entrances facing the street.

1.3. *Use and dimensions.* The premises shall not be used or occupied by other than a single family and family servants and shall not be used for other than residential use. The ground floor area of the main dwelling shall not be less than _____ (_____) square feet for a one story dwelling and _____ (_____) square feet for two stories, exclusive of garage, covered walks, and open porches. The height of any building shall be not more than two full stories above street level. The main roof of the dwelling shall have a pitch of not less than _____ (_____) to _____ (_____) feet.

1.4. *Construction period.* When the construction of any building is once begun, work must proceed diligently and must be completed within a reasonable time. No building shall be occupied during construction. No construction shall commence between December 15 and April 1. All construction must be substantially completed by December 15 following commencement. If not substantially completed by that date, construction work shall be suspended until April 1.

1.5. *Outbuildings.* No outbuilding, garage, shed, tent, trailer, or temporary building of any kind shall be erected, constructed, permitted, or maintained prior to commencement of the erection of a residence, and no outbuilding, garage, shed, tent, trailer, basement, or temporary building shall be used for permanent or temporary residence purposes; provided, however, that this paragraph shall not be deemed or construed to prevent the use of a temporary construction shed during the period of actual construction of any structure on the property, nor the use of adequate sanitary toilet facilities for workmen which shall be provided during such construction.

1.6. *Nuisance.* No owner of any part of the property will do or permit to be done any act upon his property which may be, is, or may become a nuisance.

1.7. *Signs* No sign of any character shall be displayed or placed upon any part of the property except "For Rent" or "For Sale" signs, referring only to the premises on which displayed and not to exceed _____ (_____) square feet in size and one sign to a property.

1.8. *Pets.* No animals, birds, or fowl shall be kept or maintained on any part of the property, except dogs, cats, and pet birds which may be kept thereon in reasonable numbers as pets for the pleasure and use of the occupants but not for any commercial use or purpose. Birds shall be confined in cages.

1.9. *Clothes lines.* Clothes lines or drying yards shall be so located as not to be visible from the street serving the premises or from the waterfront or golf course.

1.10. *Trash receptacles.* Trash receptacles shall be in complete conformity with sanitary rules and regulations. No trash or garbage incinerators shall be permitted. Trash receptacles are not to be visible from the street, ocean or golf course. All trash is to be removed from the premises no less often than once each week.

1.11. *Trucks, trailers.* No trailers or habitable motor vehicles of any nature shall be kept on or stored on any part of the property except within an enclosed garage. No trucks of any nature shall be parked overnight on any lot except in an enclosed garage. A pleasure boat on its trailer may be parked or stored on that portion of the lot away from the street lying beyond the front building line.

1.12. *Private water supply.* No individual water supply system shall be permitted except solely for irrigation purposes, swimming pools, or for other nondomestic use.

1.13. *Boat docks.* No boathouses shall be permitted. Boat docks, the highest projection of which shall not exceed the elevation of the land adjoining the docks, shall be permitted to be constructed adjoining any waterfront lot. No such

boat docks shall be erected, constructed, maintained, or permitted which will extend beyond _____
(_____) feet from the lot line paralleling and adjoining the waterfront.

1.14. *Boat size.* No boat exceeding in length 50 percent of bulkhead length (property water frontage) of the lot shall be docked at the back of any waterfront lot.

1.15. *Trees and shrubs.* No trees shall be maintained on any golf course or water frontage lots having substantial foliage lower than _____ (_____) feet from the ground within _____
(_____) feet of the golf course or bulkhead, and no walls, fences, hedges, plants or shrubs higher than _____
(_____) feet shall be maintained on golf course or water frontage lots within _____
(_____) feet of the property line or bulkhead.

1.16. *Weeds and refuse.* No weeds, underbrush, or other unsightly growths shall be permitted to grow or remain upon any part of the property and no refuse pile or unsightly objects shall be allowed to be placed or suffered to remain anywhere on the property. All organic yard waste shall be composted in an approved enclosed container. A list of approved containers may be obtained from the Homeowners' Association. Such containers shall be stored so as not to be visible from the street, ocean or golf course.

1.17. *Land elevation.* No substantial changes in the elevations of the land shall be made on the premises.

1.18. *Waterfront obstructions.* No structure except docks, piers, or pilings permitted by paragraph 1.13 shall be constructed nor any fill used to extend the property beyond the lot and bulkhead line on any waterfront property.

1.19. *Sewage disposal.* Until a sewage treatment plant shall be provided, a septic tank and drain field shall be placed on each lot by the property owner in accordance with the requirements of the Public Health Department having jurisdiction over the premises. When and if a sewage treatment plant and collection system for the service of the premises is provided it shall be used as the sole means of sewage disposal for such premises. When and if the sewage treatment plant is provided, the cost of connection to the plant shall be the sole expense of each homeowner.

1.20. *Beach sand dunes.* The elevation of the ridge on ocean front property shall be maintained at not less than _____ (_____) feet above mean sea level as fixed by the U.S. Coast and Geodetic Survey datum. The natural vegetation on the slope of the ridge to the beach level shall not be disturbed. Seawalls may be constructed only on the seawall line shown on the plat of Surf Village. Groins shall not be permitted. No structures shall be permitted east of the seawall line. Pipe lines for swimming pool water intake and drainage must be buried and concealed below the beach level.

II. Setbacks and Building Lines

2.1. *Building defined.* For the purpose of this paragraph, building shall mean the main residence, the garage, and related outbuildings and all projections thereof such as bay, bow, or oriel windows, exterior chimneys, covered porches, porticos, loggias, and the like, but shall not include the eaves of structures, open pergolas, uncovered porches, open terraces, stoops, steps, or balustrades, the sides of which do not extend more than _____
(_____) feet above the level of the ground floor of the main building.

2.2. *Setbacks and building lines.* No building shall be erected nearer than _____
(_____) feet to the street line or bulkhead line of the lake, or _____
(_____) feet to the property line of the golf course, or _____
(_____) feet to the ocean ridge line established on the plats, or _____
(_____) feet to the lot side line.

2.3. *Pools.* Swimming pools shall not be nearer than _____ (_____) feet to any lot line and shall not project with their coping more than _____ (_____) feet above the established grade.

2.4. *Walls, fences, and hedges.* Walls and fences may be erected and hedges grown but shall be no higher than _____ (_____) feet from the street to the building line and _____ (_____) feet from the building line to the rear property line. Walls, fences, or hedges may be erected or grown at any height within the building lines except that none may be erected or grown nearer than _____ (_____) feet from the bulkhead on lake lots, or _____ (_____) feet from the property line along the golf course or easterly from the ridge line on ocean front lots.

III. Streets, Easements, and Rights of Way

3.1. *Easements reserved.* The grantor has not conveyed to any lot owner any of the land in any platted street and reserves all easements for utilities or drainage shown on the recorded plat and full rights of ingress and egress for itself, its agents, employees, and assigns over any part of the property for the purpose of installing and servicing the utilities and drains for which the easements are reserved.

3.2. *Obstructions.* No structures, including walls, fences, paving, or planting, shall be erected upon any part of the property which will interfere with the rights of ingress and egress provided in paragraph 3.1.

IV. Duration of Covenants, Restrictions, Reservations, and Servitudes

4.1. *Term.* The covenants, restrictions, reservations, and servitudes herein set forth shall continue in full force and effect until _____ [date]. The covenants, restrictions, reservations, and servitudes may be extended for successive (_____) year periods by the execution and filing of a document of extension, signed and acknowledged by the owners of _____ percent (_____) of the properties located within Surf Village.

V. Assessment for Maintenance of Roads, Streets, and Other Public Services

5.1. *Annual assessment.* The lot owner, for himself, his heirs, executors, and assigns, covenants and agrees to pay annually his pro rata share of the cost to maintain the roads, streets, and lighting system and the cost of providing other reasonable and necessary public services including but not limited to fire protection, police protection, and garbage collection. The lot owner's assessment in this regard shall be paid promptly when same becomes due.

5.2. *Nonpayment remedies.* In the event of the lot owner's failure to pay the annual assessment promptly when due, the amount of the assessment shall be a lien against the lot owner's premises to which the assessment applies. The assessment lien may be enforced in equity as in the case of any lien foreclosure. The annual assessment shall accrue to the benefit of and may be enforced jointly and severally by the other property owners in the subdivision of Surf Village or an association of property owners in Surf Village subdivision, if one is formed, by the grantor, or by the Building Committee for Surf Village subdivision.

5.3. *Termination of assessments.* At such time as any public body shall undertake to maintain the roads and streets and provide the other public services described in paragraph 5.1, this covenant shall cease, terminate, and be held for naught.

VI. Building Plans Shall be Approved by Building Committee

6.1. *Building plans approval.* All plans for buildings and other improvements shall first be approved by a Building

Committee to be appointed by grantor, its successors, or assigns.

VII. Covenants and Restrictions to Run With Land

7.1. *Binding effect.* All of the covenants, restrictions, reservations, and servitudes set forth in this instrument shall run with the land and grantee, by accepting the deed to the premises, accepts the same subject to the covenants, restrictions, reservations, and servitudes and agrees for himself, his heirs, administrators, and assigns to be bound by each of the covenants, restrictions, reservations, and servitudes jointly, separately, and severally.

VIII. Covenants and Restrictions, Enforceable Severally

8.1. *Severability.* Each and every one of the covenants, restrictions, reservations, and servitudes contained herein shall be considered to be an independent and separate covenant and agreement and in the event any one or more of the covenants, restrictions, reservations, and servitudes shall for any reason be held to be invalid or unenforceable all remaining covenants, restrictions, reservations, and servitudes shall nevertheless remain in full force and virtue.



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Chapter 22 DEVELOPMENT AND SUBDIVISION
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E. RESIDENTIAL DEVELOPMENT

26-22 Current Legal Forms for Real Estate FORM 22.81

FORM 22.81 Declaration of residential homeowners' association--simple form

COMMENT

In this form the developer of a residential housing project establishes a homeowners' association, which is essentially responsible for the upkeep and operation of common areas within the development.

This form would be used typically by an attorney on behalf of a real estate developer who has built a residential subdivision with many common areas intended for recreational use. These common areas might include parks, a swimming pool, a club house, riding trails, walking and jogging paths, tennis courts and a boat launch. The homeowners' association has the ability to add to the variety of recreational facilities available to tenants and homeowners.

To support the existing facilities, an annual fee is charged to all lot owners, covering the cost of operations, insurance, and maintenance of the common area. The amount is fixed for the first year and may be raised thereafter upon a vote of the lot owners. The lot owners have the ability to impose additional assessments in order to cover the cost of further improvements.

For additional forms relating to homeowners' associations and residential development, see Chapter 20, Real Estate Entities, in Volume 24, *supra* .

FORM

DECLARATION OF HOMEOWNERS' ASSOCIATION

THIS DECLARATION is made on the _____[day] day of _____[month],
 _____[year], by _____[name], hereinafter referred to as "Grantor."

W I T N E S S E T H:

WHEREAS, Grantor is the owner of certain real property in the City of _____[city], County of
 _____[county] and State of _____[state], which is more particularly described in
 Schedule A, which is annexed hereto and made a part hereof;

Grantor hereby declares that all of the properties described in the annexed Schedule A shall be held, sold and conveyed subject to the following easements, restrictions, covenants and conditions, which are intended for the purpose of protecting the value and desirability of the said property. Each of these easements, restrictions, covenants and conditions shall run with the real property. The easements, restrictions, covenants and conditions shall be binding upon all parties having any right, title or interest in the real property described in Schedule A, or any part thereof. These easements, restrictions, covenants and conditions shall bind their heirs, successors and assigns forever. These easements, restrictions, covenants and conditions shall inure to the mutual benefit of each owner hereafter.

ARTICLE I DEFINITIONS

1. "Association" shall mean the _____[name] HOMEOWNERS' ASSOCIATION, INC., its successors and assigns.
2. "Grantee" shall mean the record owner or owners of the fee simple title to any lot which is part of the properties. It shall not include mortgagees until such time as title is transferred by deed. Each lot shall be deemed to have one grantee for voting purposes, regardless of the number of actual owners.
3. "Properties" shall mean all of that certain real property described in Schedule A, which is annexed hereto and made a part hereof, and such additional real property as may hereafter be brought under the jurisdiction of the Association by purchase, gift or devise.
4. "Common Area" shall mean all real property (including the improvements thereon) owned by the Association for the common use and enjoyment of the Grantees. This shall include, but not be limited to, parks, swimming pools, tennis courts, jogging and walking trails, club house, and boat launch.
5. "Lot" shall mean and refer to any plot of land set aside for residential construction, as shown upon the subdivision map which was recorded in the office of the _____[county] County Clerk on
 _____[month] _____[day], _____[year], as Map No.
 _____[number].
6. "Grantor" shall mean the _____[name], its successors and assigns.
7. "Family members" shall include the mother, father, spouse, son, daughter, sister or brother of any Grantee, provided that the person shall have his or her primary residence with the Grantee.
8. "Annual maintenance and insurance expenses" shall mean any expenses incurred by the Association for the care of the common areas. These may include, but shall not be limited to, landscaping, snow removal, general repairs, equipment and supply expenses, overhead and other expenses deemed necessary or appropriate by the Association for

the full use and enjoyment of the common areas. Insurance shall include casualty and liability insurance for the common areas.

ARTICLE II GRANTEE'S RIGHT TO USE COMMON AREA

1. Every Grantee shall have the right to use and enjoy the common area as hereinafter described. Said right of use shall be appurtenant to the Grantee's lot and shall pass with title to every lot, subject only to the following provisions:

(a) the right of the Association to impose annual maintenance and insurance charges to the Grantees; and

(b) the right of the Association to dedicate, sell or transfer all or any part of the common area to the City of _____ [city] for public use by residents of the City. Such a transfer, sale or dedication shall be approved by the Grantees as herein provided.

2. The family members of any Grantee may exercise his/her right to use the common area.

3. A Grantee shall forfeit his/her right of use in the event that he/she fails to make any payment described in Paragraph 1(a) above when due. Rights of use shall be reinstated upon payment in full of any past due amount.

ARTICLE III GRANTEE SHALL BE MEMBER OF HOMEOWNERS' ASSOCIATION

1. Every Grantee of a lot shall be a member of the Association. Membership shall be appurtenant to ownership.

2. Every Grantee shall be entitled to cast one (1) vote upon any matter taken up by the Association. This shall apply regardless of any difference in lot size or value. Any Grantee who owns more than _____ (_____) lot may cast _____ (_____) vote for each such lot.

3. Written notice of any meeting called for the purposes of taking any action authorized under this Declaration shall be sent to all members not less than _____ (_____) days nor more than _____ (_____) days prior to the scheduled date. A quorum shall be necessary for the transaction of business and shall be deemed to exist if _____ percent (_____) of the Grantees are present. No proxy voting shall be permitted. In the event that a quorum does not exist, the only action which may be taken is to adjourn the meeting to another date and direct the secretary to send notice of the new meeting date to all members.

4. To take effect, any matter brought before the Association must be approved by a majority of those Grantees who are present and voting. On any proposition to sell or acquire land, the approval of _____ (_____) of those Grantees who are present and voting shall be required. A quorum must be present at the time any vote is taken. Loss of quorum requires immediate adjournment of the meeting.

ARTICLE IV ASSESSMENTS

1. The Grantees shall establish the annual maintenance and insurance expense in January of each year. This amount shall be divided equally among and assessed against the lots. A notice of assessment shall be sent to each Grantee. Payment terms shall be specified in the notice. At least _____ (_____) days shall be given for payment. Interest shall accrue on assessments at the rate of _____ percent (_____) per annum from the date on which they are due, as set forth in the assessment.

2. The assessment shall be a lien against the lot of the Grantee as of the date on which the Grantees determine the amount of the assessment. The Association shall be entitled to foreclose its lien and shall be entitled to collect reasonable legal fees and expenses in such a foreclosure action. The Association may also personally sue the Grantee for the amount of the assessment, together with legal fees and interest.

3. For the year ____[year], the maximum assessment shall not exceed _____ Dollars (\$_____) per lot.

4. The Association, upon approval of _____ (_____) of the Grantees present and voting at a meeting at which a quorum exists, may establish additional assessments for other purposes. Collection shall be as set forth in Paragraphs 1 and 2 above.

5. Transfer of any lot, by whatever means, shall not extinguish any lien for an unpaid assessment.

ARTICLE V

OFFICERS OF HOMEOWNERS' ASSOCIATION

1. These declarations may be amended by approval of _____ percent (_____) of the Grantees. The secretary of the Association shall cause such an amendment to be signed and acknowledged by all such Grantees. The secretary shall record the amendment in the office of the _____ County Clerk. A copy of Schedule A shall be annexed thereto.

2. The Grantees shall elect a secretary annually. The secretary shall send notice of the meetings and take minutes at said meetings. The secretary shall maintain the records of the Association. The secretary shall be an officer of the Association.

3. The Grantees shall elect a treasurer annually. The treasurer shall send notice of and collect assessments. The treasurer shall also have the authority to pay expenses of the Association. The treasurer shall make a report at each meeting. The treasurer shall be an officer of the Association.

4. The Grantees shall elect an executive director annually. The executive director shall preside at meetings and observe the business of the Association. The executive director shall be an officer of the corporation.

5. No elected officer shall receive a salary. Officers may be reimbursed for out-of-pocket expenses in connection with the duties they perform for the Association.

6. All elected officers shall be Grantees. In the event an officer ceases to be a Grantee, he/she shall immediately forfeit his/her office.

7. Elections shall occur at the meeting in January of each year when the annual maintenance and insurance expense is determined. Each officer shall hold office until a successor is elected. In the event of a vacancy, an interim election shall be held at a special meeting. The newly-elected officer shall complete the term of the officer he/she is replacing.

8. Special meetings shall be called at the request of any Grantee.

ARTICLE VI
MISCELLANEOUS

1. The Association shall have the right to enforce, by any proceeding at law or in equity, all restrictions, conditions, covenants, reservations, liens and charges now or hereafter imposed under the provisions of this Declaration. Failure by the Association to enforce any covenant or restriction herein contained shall in no event be deemed a waiver of the right to do so hereafter.

2. Invalidation of any one of these restrictions, conditions, covenants or reservations by judgment or court order shall in no way affect any other provisions, all of which shall remain in full force and effect.

3. The restrictions, conditions, covenants and reservations of this Declaration shall run and bind the land for a term of _____ (_____) years from the date this Declaration is recorded, after which time they shall be automatically extended for successive periods of _____ (_____) years.

The Grantor hereto has set its hand and seal the day and year first above written.

"GRANTOR"

a(n) _____ [state] _____ [entity]

By: _____

Print Name: _____

Title: _____

[Attach Schedule A]

STATE OF _____ [state])
COUNTY OF _____ [county]) SS:

BEFORE ME, a Notary Public in and for said County and State, personally appeared _____ [name], a(n) _____ [state] _____ [entity], by _____ [name], its _____ [title], who acknowledged that _____ [he/she] did sign the foregoing instrument for and on behalf of said corporation, being thereunto duly authorized, and that the same is _____ [his/her] free act and deed individually and as such officers and the free act and deed of said _____ [entity].

IN TESTIMONY WHEREOF, I have hereunto set my hand and official seal at _____ [city], _____ [state], this _____ [day] day of _____ [month], _____ [year].

Notary Public



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26-22 Current Legal Forms for Real Estate FORM 22.82

FORM 22.82 Statement of restrictions--mixed use subdivision with both residential and commercial property

COMMENT

Generally, the restrictions imposed on residential property differ from those for commercial property. Nevertheless, an owner planning or constructing both types of improvements may file a single document stating the restrictions for all properties in the tract.

This document is divided into three sections. First, it lists the restrictions applicable to all properties. These include items relating to easements, building plans, utility betterment fees, signs, animals, fences, and waterways. In a separate section dealing with residential property, it defines lot sizes, setback lines, and a schedule of the minimum number of square feet in all single-family and multiple dwellings. The final section is devoted to restrictions relating to commercial and mixed commercial areas.

For additional forms relating to homeowners' associations and residential development, see Chapter 20, Real Estate Entities, in Volume 24, *supra*.

FORM

DECLARATION OF RESTRICTIONS

_____ [name]

To

All Future Owners Of Lots In _____ [city], _____ [county], _____
[state].

Recitals

_____[name], a[n] _____[state] _____[entity], is the owner and developer of certain lands situated in _____[county], _____[state], and known and designated as _____[subdivision], and

_____[name] desires to establish and secure the enforcement of uniform restrictive covenants upon the use and development of lots within the _____[subdivision],

Now, therefore, by this instrument there are created, declared, and established in _____[city], _____[county], _____[state], the following restrictive covenants, easements, reservations, and requirements upon the lands within such subdivision, which restrictive covenants, easements, reservations, and requirements shall run with the land and remain in full force and effect for a period of _____ (_____) years from the date hereof, or until Garden Ridge Subdivision shall become part of an incorporated municipality, or until amended or rescinded upon the written consent of the owners of record of a majority of the lots in the subdivision, whichever event shall first occur.

Restriction A

Uniform General Requirements

1. *Easements.* Easements and rights-of-way are reserved for the creation, construction, and maintenance of utilities, including gas, water, telephone, electricity, sewers, storm drains, public, quasi-public, and private, as well as for any public, private, or quasi-public utility or function necessary or expedient for the public health and welfare. The easements and rights-of-way shall be confined to the rear _____ (_____) feet of every lot and _____ (_____) feet along the side of every building plot, and along every street of the subdivision.

2. *Building plans.* Plans and specifications for all structures must be submitted to _____[name], or its duly authorized agent, or to its successors or assigns, for written approval as to quality of workmanship and materials, harmony of external design, size, and existing structures, and as to location with respect to topography and finish grade elevation prior to the commencement of any construction in the subdivision.

3. *Utility installation fee.* No construction of any kind shall be commenced until the utility installation fee has been paid, or arrangements for payment satisfactory to _____[name] have been made. The utility installation fee has been fixed and established by a Declaration of Trust declared and executed by _____[name] as trustee and properly recorded in the Public Records of _____[county] County, _____[state].

4. *Signs.* No sign of any kind shall be exhibited in any way on or above the property of the subdivision without the written approval of _____[name] or its duly authorized agent, except one professional sign of not more than one square foot, one sign of not more than _____ (_____) square feet advertising the property for sale or rent, or signs used by a builder to advertise the property during the construction and sales period, and except for signs in commercial or mixed commercial zones advertising accredited businesses.

5. *Animals.* No husbandry of either animals or fowls shall be conducted or maintained in the subdivision provided, however, that house pets only shall be excluded from this restriction.

6. *Fences.* No fence or hedge shall be erected or maintained on the property of the subdivision which shall unreasonably restrict or block the view from an adjoining lot or which shall materially impair the continuity of the general landscaping plan of the subdivision. For this purpose, a hedge or fence should, if possible, be maintained at no greater height than _____ (_____) feet, and no wall or fence shall be erected or placed within the front setback lines of any lot, unless the wall or fence shall be ornamental and a desirable feature and shall not in any manner impair the general scheme of the subdivision area. The subdivision may, in its discretion, approve minor projections above the restricted heights for architectural features. No wall or fence of any kind whatsoever shall be constructed on any lot until after the height, type, design, and location has been approved in writing by _____ [name], or its duly authorized agent.

7. *Water and sewage.* The laws of the State of _____ [state] and County of _____ [county], as well as the rules and regulations of their administrative agencies, now or in the future in effect with regard to sewage disposal, water supply, and sanitation apply to the subdivision under this instrument. All buildings shall connect with central water and sewer utilities within _____ (_____) days when made available. However, wells may be maintained for outside use, including watering of lawns, swimming pools, etc., subject to approval of duly constituted public health authorities.

8. *Trucks and trailers.* No trailers shall be allowed on any of the lots. No lot shall be used as a junkyard or auto graveyard. No trucks or house trailers of any kind shall be permitted to be parked in the subdivision for a period of more than four hours, unless the same is present in the actual construction or repair of buildings located on the land, and no trucks shall be parked overnight in areas zoned residential.

9. *Waterways.* Boat landings, docks, piers, and mooring posts shall be constructed only in accordance with plans and specifications, approved in writing by _____ [name], or its duly authorized agent. The owners and occupants of land in the subdivision shall have an easement in common for the purposes of navigation on all waterways. No boathouse or boat canal or slip shall be constructed, dug, or excavated into any of the waterfront lots until the plans have been approved by _____ [name], or its duly authorized agent. No vessel or boat shall be anchored off shore in any of the waterways adjacent to the subdivision so as to interfere in any way with navigation.

Restriction B Single and Multiple Dwellings

In addition and supplemental to the Uniform General Restrictions, the following restrictive covenants, easements, reservations, and requirements shall apply to and govern the erection and maintenance of single and multiple dwellings:

1. *Limitation on buildings.* There shall not be erected or maintained on the property of that part of the subdivision which is zoned exclusively for residential purposes any structure of any kind other than a one-family dwelling and suitable accessory building or ground improvements, such as a garage or carport for not more than two cars, except garden house and trellises, on estate-size homesites, to be used by the family and bona fide guest occupants of the dwelling. No garage or accessory building shall be used as living quarters, except for employees, and the garage or accessory building shall not be used or occupied as living quarters prior to the erection of the dwelling. All garages must be built on rear half of lot or attached to the house.

2. *Lot size and setbacks.* No single family dwelling shall be constructed on less than two lots or its equivalent of at least _____ (_____) square feet, and no building shall be located on any lot closer than _____ (_____) feet, or further than _____ (_____) feet to the front lot line (except for pie-shaped lots of less than _____ (_____) feet of street frontage which permit setbacks to a depth of the point where lot becomes _____ (_____) feet wide), _____ (_____) feet to the rear lot line, or

_____ (_____) feet to a side lot line. For the purpose of these covenants open or screened porches, garage, or carports, shall not be subject to side setbacks.

3. *Location and size of building.* The minimum size of all single-family dwellings (exclusive of homesite, carport, breezeways, patios, and porches) shall conform to the following schedule:

Nonwaterfront

Homesite Location	Minimum Size
A Section	_____ (_____) Square Feet
B Section	_____ (_____) ""
C Section	_____ (_____) ""
D Section	_____ (_____) ""
E Section	_____ (_____) ""

Waterfront

Homesite Location	Minimum Size
F Section	_____ (_____) Square Feet
G Section	_____ (_____) ""
H Section	_____ (_____) ""
I Section	_____ (_____) ""
J Section	_____ (_____) ""

4. *Multiple dwellings.* Multiple dwellings shall be erected in accordance with the following minimum schedule:

Minimum Area	Type of Multiple Dwelling
_____ (_____) x _____ (_____)	Duplex
_____ (_____) x _____ (_____)	Three or more apartments provided the building erected conforms with the subdivision's front and side setback restriction of record.
_____ (_____) x _____ (_____)	

Multi-storied multiple dwellings may be erected in areas where complete blocks are zoned for multiple dwellings, but

only a single-story or split-level multiple dwelling may be erected in a block where the remainder of its sites are zoned exclusively residential, except for "Finger" Blocks where the entire fingertip is multiple dwelling.

Restriction C
Commercial and Mixed Commercial

In addition and supplemental to the Uniform General Restrictions, the following restrictive covenants, easements, reservations, and requirements shall apply to and govern the erection and maintenance of commercial and mixed commercial buildings, all of which are limited and restricted to those sections and areas of such subdivision as are zoned for that purpose.

1. *Setbacks.* No front setback shall be required for buildings erected on sites zoned for business, but a _____ (_____) foot rear setback must be maintained to enable delivery trucks to load and unload without blocking traffic in alleyways. However, buildings erected on corner lots may be built to the alley lot line. Those not built to the alley lot line must leave a minimum lot width of _____ (_____) feet to permit erection of another building fronting on the side street. When buildings in such cases are erected fronting on side streets, there shall be left open an easement _____ (_____) feet in width for access to the rear of buildings facing the front street.

2. *Sidewalks, curbing, etc.* As part of the construction of each building erected in a commercial area, there shall be included a sidewalk in front of the buildings of eight-foot minimum width. The sidewalk or such part thereof as shall be required for such purpose may extend into the platted street in front of the building. Likewise, as part of the construction of each building, there shall be constructed concrete curbing and gutters, and storm sewers, plus that portion of the unpaved street fronting on each building lying between the curb and gutter and the street as paved by _____ [name] shall be paved. All of the construction required by this paragraph shall be at the expense of the lot owner and shall be paid for by the lot owner concurrently with the erection of a building or buildings. Lot owners who erect buildings on only a fractional portion of a lot must provide curbs, sidewalks, gutters, and paving for the entire lot.

3. *Commercial restrictions.* The following restrictions shall apply to areas zoned 100 percent commercial:

(a) Buildings shall be limited to stores, offices, business buildings, commercial enterprises, hotels, restaurants, bars, theaters, and light industry.

(b) All structures erected must be of brick, concrete block, or cement masonry construction, or a combination of these, and must include adequate toilet facilities for owners and occupants and their employees. No building shall be used or occupied as living quarters, except bona fide hotels.

(c) All buildings erected by the owner of only one lot must be built flush to both of its side lot lines. All buildings erected by owners of two or more contiguous lots must be built with at least one of its sides flush with an end-lot side line, and if it is not built flush to the side lot lines of both end lots, the minimum width that can be left vacant must be at least _____ (_____) feet to permit the erection of another acceptable building at a later date.

(d) When and where the use of a party wall is not in conflict with the laws and regulations governing fire protection, party walls are permissible by the mutual consent of all parties concerned.

4. *Mixed commercial restrictions.* Restrictions for areas zoned mixed commercial are identical to those covering the areas zoned _____ percent (_____) commercial, except that motels are

permissible, and business enterprises are permitted living quarters on the premises provided the living quarters are located either in the rear or above the street level of the business buildings which in all other respects must conform to the restrictions set up for the _____ percent (_____) commercial zones as to construction, street front appearance, and architecture.

_____ [name] has caused these presents to be signed and its corporate seal to be affixed at _____ [city], in the County of _____ [county] and State of _____ [state], this _____ [day] day of _____ [month], _____ [year].

"OWNER/DEVELOPER"

_____ a(n) _____ [state] _____ [entity]

By: _____

Print Name: _____

Title: _____

STATE OF _____ [state])
COUNTY OF _____ [county]) SS:

BEFORE ME, a Notary Public in and for said County and State, personally appeared _____ [name], a(n) _____ [state] _____ [entity], by _____ [name], its _____ [title], who acknowledged that _____ [he/she] did sign the foregoing instrument for and on behalf of said corporation, being thereunto duly authorized, and that the same is _____ [his/her] free act and deed individually and as such officers and the free act and deed of said _____ [entity].

IN TESTIMONY WHEREOF, I have hereunto set my hand and official seal at _____ [city], _____ [state], this _____ [day] day of _____ [month], _____ [year].

Notary Public



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26-22 Current Legal Forms for Real Estate FORM 22.83

FORM 22.83 Sublot Purchase Agreement With Builder

COMMENT

This form is an example of a purchase agreement that would be used by a developer in order to sell lots to a residential home builder. The agreement anticipates that more than one sublot will be purchased. The agreement requires the builder places, in any sale or construction agreement, various provisions which are important to the developer/golf course owner. The agreement also provides for the builder to become a "Featured Builder." Essentially, if the builder agrees to comply with certain restrictions, the developer will include the builder in its promotional campaign and sales efforts.

For additional forms relating to sale and exchange of property, see Chapter 21, Real Estate Sales and Exchanges, in Volume 25, *supra* .

For additional forms relating to homeowners' associations and residential development, see Chapter 20, Real Estate Entities, in Volume 24, *supra* .

FORM

SUBLOT PURCHASE AGREEMENT
(Golf Meadow Subdivision, Phase 1)

THIS AGREEMENT MADE AND ENTERED INTO at _____ [city], _____ [state]
this _____ [day] day of _____ [month], _____ [year], by and
between GOLF MEADOW DEVELOPMENT LIMITED PARTNERSHIP, a(n) _____ [state]

_____ [entity], hereinafter referred to as SELLER, whose address is _____ [address];
 _____ [telephone number], and _____ [name] hereinafter referred to as BUILDER
 whose address is _____ [address]; _____ [telephone number].

WITNESSETH:

1. PREMISES

Seller agrees to sell and Builder agrees to buy for the consideration and on the terms and conditions hereinafter set forth, the following described subplot(s), hereinafter referred to herein as either the SUBLOTS or the PREMISES:

Situated in the _____ [city], _____ [county], _____ [state] and known as being Sublots Nos. _____ in Golf Meadow Subdivision, Phase 1 ("Subdivision") as shown by plat recorded in Volume _____, Page _____ of _____ [county] County Plat Records.

2. PURCHASE PRICE AND EARNEST MONEY

Purchase Price. The Purchase Price (the "Purchase Price") to be paid by Builder for the Sublots is _____ Dollars (\$_____). The Purchase Price for each Sublot is set forth in Schedule "A" attached hereto and made a part hereof. The Purchase Price shall be payable as follows:

- (a) Earnest money deposit ("Earnest Money") equal to \$_____
 _____ percent
 (_____%) of
 the Purchase Price due and payable by Builder to Seller upon the signing of this Agreement
- (b) The Balance of Purchase Price \$_____
 shall be due at Closing (hereafter defined), and shall be in the form of a wire transfer, cashier's or certified check payable to the order of the Title Company (hereafter defined), acting as escrowee, and shall be deposited into the escrow
- Total Purchase Price \$_____

3. WARRANTY DEED

Seller shall furnish a general warranty deed (the "Deed") conveying to Builder indefeasible fee simple title to the Premises, free and clear of all liens and encumbrances whatsoever except Master Declaration of Covenants, Conditions, Easements and Restrictions of Golf Meadow ("Master Declaration"); Code of Regulations ("Master Code") of Golf Meadow Master Association, Inc. ("Master Association"); Declaration of Covenants, Conditions and Restrictions for Golf Meadow Subdivision No. 1 ("CCRs"); Seller's "Right to Repurchase" the Sublot(s) under Section 13 hereof; restrictions, conditions, reservations, limitations and easements of record; zoning ordinances, if any; and real estate taxes and assessments currently a lien, but not yet due and payable.

4. TITLE COMMITMENT AND TITLE POLICY

A title commitment and an owner's fee policy of title insurance ("Title Policy") for the Premises shall be furnished to Builder. Seller and Builder shall each pay one-half (1/2) the cost of the Title Policy.

5. TITLE DEFECTS

If title defects appear of record, other than permitted exceptions as provided in Section 3 of this Agreement, then in such event, Builder shall have _____ (_____) days upon receipt of the title commitment to serve written notice to Seller of Builder's objections to title. Seller shall have sixty _____ (_____) days following receipt of Builder's written notice to remove all properly objectionable title defects other than liens of liquidated amount required to be removed which may be removed by payment of cash at Seller's expense on or before the Closing Date. If Seller fails to remove the title defect(s) within the time allowed, and such defect(s) render(s) title to a Sublot(s) unmarketable, Builder may cancel this Agreement by written notice to Seller within _____ (_____) days following the expiration of said _____ (_____) day period receive a refund of the portion of the Earnest Money attributable to such Sublot and thereupon the parties shall be released from further liability with respect to such Sublot; otherwise Builder shall be deemed to accept title to such Sublot "as is" without reduction of the Purchase Price.

6. MASTER DECLARATION; CCRs; DESIGN REVIEW

(a) Master Declaration, Master Code and CCRs

Builder acknowledges that the Premises are part of a planned residential community known as Golf Meadow, the development, use and enjoyment of which is principally governed by the Master Declaration, the Master Code and CCRs, and that Builder shall automatically become a member of the Master Association and shall be subject to the Master Declaration, Master Code, the CCRs, amendments thereto and rules and regulations adopted thereunder. Reference is hereby made to the Master Declaration, Master Code and CCRs for a statement of the rights and obligations of Builder as an owner of the Premises; for a description of the easements, covenants, conditions and restrictions created by the Master Declaration, Master Code and CCRs; insurance requirements; and for other matters affecting Builders use and enjoyment of the Premises and other property and amenities located within Golf Meadow.

(b) Design Review

Builder agrees to comply with all of the requirements of the Design Review Committee Policies and Guidelines. Prior to Seller conveying any Premises to Builder, the Builder agrees to execute and deliver the Featured Builder Agreement in the form attached hereto as Exhibit C.

(c) Feature Builder Program

Builder agrees to comply with the terms and conditions of "Feature Builder Program" established by Seller for the Subdivision.

(d) Setbacks

Builder acknowledges that Seller may impose setback restrictions on each Sublot that exceeds the minimum setback requirements of the

_____ [city] zoning rules. Builder agrees to comply with the Setback Guidelines as shown on Exhibit A, attached hereto and made a part hereof.

(e) Provisions to be Incorporated by Builder in its New Home Sales/Construction Contract

Builder agrees to incorporate in its standard form New Home Sales/Construction Contract for sales of new homes to be constructed by Builder on the Sublots certain contract provisions to be furnished by Seller to Builder ("New Home Contract Provisions"). A copy of the New Home Contract Provisions is attached hereto and made a part hereof as Exhibit B.

Builder acknowledges receipt of the Master Declaration, Master Code, CCRS, plat of the Subdivision, "Information Book for Golf Meadow" containing copies of the Design Review Committee Policies and Guidelines, the Seller's Feature Builder Program and the New Home Contract Provisions, and other documents governing Builder's acquisition, use and ownership of the Premises, and Builder covenants and agrees to comply with the requirements of the same. Seller reserves the right to amend said documents; provided, however, if Seller amends said documents in a manner which would have a materially adverse effect on Builder, then Builder shall have _____ (_____) days after receipt of notice from Seller of such amendment to give notice to Seller of Builder's election to either (i) approve the amendment; or (ii) terminate this Agreement and receive a refund of the Earnest Money, and thereupon the parties shall be relieved of any further liability hereunder. The failure by Builder to notify Seller under (i) or (ii) above shall be deemed an election by Builder to approve the amendment under (i) above. The covenants and agreements contained in this Section shall survive the closing of this transaction and the recording of the Deed.

7. IMPROVEMENT PLANS AND CONDITION OF PREMISES

(a) Builder acknowledges and represents that Builder has inspected the Premises and has had an opportunity to review the improvement plans and specifications for the Premises. Except as provided in (c) of this Section, Builder agrees to take title to the Premises in "AS IS" condition. Builder's representation hereof shall survive the closing of this transaction and the recording of the Deed. Furthermore, Seller makes no representation or warranty whatsoever as to the soil conditions of the Premises, including, but not by way of limitation, the existence of rock and/or fill and/or other unstable soil conditions. In addition, Builder acknowledges that the building envelope area (i.e., the portion of the Sublot upon which the home will be constructed of approximately 80' X 60'), starting at the front setback line as set forth on Exhibit A, of this Agreement (the "Setback Guidelines") may contain "engineered fill" pursuant to Seller's mass grading plan, a copy of which mass grading plan is available for Builder's review. If the Sublot contains "engineered fill," Seller will furnish Builder soils compactions reports of the "engineered fill" area and a copy of Seller's master grading plan prior to the Closing Date and will permit Builder to make soils tests of the engineered soil areas. Builder shall have a period of

_____ (_____) days after the date of this Agreement to perform soil tests on the Sublots. If the soils tests indicate unstable soils conditions, Builder shall have a period of

_____ (_____) days after the expiration of said

_____ (

_____) day period to elect, by notice to Seller, to terminate this Agreement with respect to the affected Sublot(s), in which event Seller shall refund to Builder the portion of the Earnest Money Deposit attributable to the affected Sublot and this transaction shall Close with respect to any remaining Sublots. The failure by the Builder to give such notice of termination to Seller within said

_____ (

_____) day period shall be an acceptance by Builder of all the Sublots.

(b) Builder acknowledges that the Premises may contain an abandoned gas well capped and plugged in accordance with the requirements of the State of

_____ [state]. The plat of the Subdivision and Exhibit A of this Agreement (the Setback Guidelines) indicate if the Premises contains an abandoned gas well.

(c) Seller agrees that it has not used any portion of the building envelope of the Premises (i.e., the Sublots) as a "burial pit," i.e., a place for burial of tree stumps and other construction debris.

8. PAYMENT TO MASTER ASSOCIATION; PROBATION OF TAXES AND ASSESSMENTS

All real estate taxes and assessments, both general and special, levied on the Premises, shall be prorated as of the Closing Date on the basis of the calendar year using the figures shown on the latest available tax duplicate. If the amount of the tax proration cannot be determined as of the Closing Date, the Escrow Agent (hereafter defined) shall estimate the proration amount (the "Estimated Proration Amount"). If the real estate tax bill for the year of transfer differ from the Estimated Proration Amount, the parties shall adjust the difference outside of escrow. The common charges attributable to each Sublot under the Master Declaration (specifically Section 9.2) and Master Code shall be paid by the Escrow Agent to the Master Association on the Closing Date.

9. ESCROW; CLOSING DATE

(a) Within

_____ (

_____) days after execution of this Agreement, a copy of this Agreement shall be delivered to

_____ [name],

_____ [address],

_____ [telephone number]; which shall be designated as escrow agent ("Escrow Agent"). This Agreement shall thereupon constitute the escrow instructions.

(b) The Escrow Agent shall accept this escrow subject only to its "standard conditions of acceptance of escrow," provided, however, that the provisions of this Agreement shall govern in the event of any conflict therewith.

(c) With the exception of the amount set forth in Section 2(a) of this Agreement, Seller and Builder shall

deposit all funds and documents required in connection with this transaction in escrow on or before

_____ [month]

_____ [day],

_____ [year].

(d) The closing of this transaction (the "Closing") shall take place in escrow when all funds and documents have been deposited in escrow and when all parties are in compliance with all terms and conditions of this Agreement. The "Closing Date" shall be the date on which the parties have deposited into escrow all funds and documents necessary for the Closing, on which date the Escrow Agent shall cause the Deed and other necessary documents to be filed for record. The Builder shall be entitled to possession of the Premises on the Closing Date.

(e) If this sale and purchase is not closed within

_____ (

_____) months after the date of execution of this Agreement, and Builder is not then in default, Seller shall return the Earnest Money, or cause the same to be returned, and this Agreement shall thereupon be null and void and of no further force and effect Seller's liability hereunder at all times shall be limited to the return of the Earnest Money.

10. CLOSING COSTS

(a) The Escrow Agent shall make the required prorations, and charge the expenses of the transactions as follows.

TO SELLER: (1) One-half (1/2) the real property conveyance fee; (2) Prorated real estate taxes and assessments to be credited to Builder; (3) Cost of removing any lien or encumbrance as required by this Agreement; (4) One-half (1/2) of the escrow fee; and (5) One-half (1/2) the cost of the Title Policy.

TO BUILDER: (1) Funds due in accordance with this Agreement; (2) One-half (1/2) the real property conveyance fee; (3) Cost of recording the Deed; (4) One-half (1/2) of the escrow fee; (5) One-half (1/2) the cost of the Title Policy; and (6) The sum payable to the Master Association (c/o Seller) in accordance with Section 8 of this Agreement.

(b) Upon closing of this transaction, the Escrow Agent shall deliver the documents and funds as follows:

TO SELLER: (1) All funds due, less deductions; (2) duplicate copies of the escrow statement; (3) duplicate copies of the

_____ [state] E.P.A. Individual Lot Notice of Intent form sided by Builder; and (4) signed Acknowledgment and Agreement by Builders and Purchasers of Homes in Golf Meadow that No Homes Shall be Occupied Prior to Completion by

_____ [county] County of the Golf Meadow Water Tower.

TO BUILDER: (1) The recorded Deed, (2) All funds on deposit to the credit of Builder, (3) Duplicate

copies of the escrow statement; and (4) the Title Policy.

11. CONSTRUCTION INDEMNITY

Builder shall, at its expense, install or accomplish, and indemnify and hold harmless the Seller against the cost of the following;

(a) Removal of dead or fallen trees or wood or other obstructions from the Premises and the abutting tree lawn and restoration of the surface, including seeding of the tree lawn. Burning of trees, stumps, brush and construction debris is prohibited. These items must be properly removed from the Premises and disposed of outside of Golf Meadow.

(b) Planting of shrubs or trees on the Premises in accordance with the Master Declaration and in accordance with the Design Review Committee Guidelines and Procedures.

(c) Installing yard drainage in addition to that shown on the improvement plans in accordance with the Master Declaration and in accordance with the Design Review Committee Guidelines and Procedures.

(d) Controlling of silt, erosion or other runoff in accordance with the requirements of the

_____ [state] E.P.A. and other governmental authorities having jurisdiction over the same and in accordance with the requirements of Seller. Specifically, Builder acknowledges that upon the Closing Date, Builder is responsible for compliance of the Premises with all federal, state and local stormwater control regulations including, without limitation, compliance with

_____ [state] NPDES permitting requirements for construction sites and, if applicable, the NPDES permit for Golf Meadow, Permit No.

_____ . Upon the Closing Date or

_____ (

_____) days prior to initiating construction activities at the Premises, whichever comes first, Builder shall submit to

_____ [state] EPA an Individual Lot Notice of Intent for Coverage under

_____ [state] E.P.A. Storm Water Construction General Permit Builder agrees to indemnify Seller for any costs and expenses reasonably incurred by Seller resulting from Builder's failure to perform its obligations pursuant to this Section.

(e) Keeping the Premises and the streets giving access to the Premises free from accumulations of mud and debris occasioned by work on or about the Premises by Builder, Builders employees, contractors or agents. If Builder fails to perform his duty within

_____ (

_____) days after written notice from Seller (unless an emergency exists in which event no notice is required), Seller may clean the Premises and streets including cleaning and flushing of sewers, catch basins and inlet basins at Builder's expense.

(f) Repairing any damage caused by Builder to the streets, curbing (if any), berms, open ditches, common lands or the golf course within or abutting Golf Meadow.

(g) If Builder fails to comply with the repair and maintenance requirements of this Section within a period of

_____ (

_____) days after written notice from Seller (unless an emergency exists in which event no notice is required), or if Builder fails to comply with the completion requirements of this Section within a period of

_____ (

_____) days after the issuance of a certificate of occupancy for each house constructed on a Sublot (unless such failure is weather related in which event builder shall promptly comply when weather permits), Seller shall have the right to complete such work after written notice to Builder and Builder's failure to perform such work within

_____ (

_____) days after such notice, and charge Builder for the cost thereof, together with interest thereon at the maximum rate permitted by law, court costs and/or legal fees incurred by Seller. Furthermore, Seller shall have the right to cancel any option granted to Builder to purchase additional Sublots in the Subdivision.

12. INSURANCE

The Builder shall maintain liability and other insurance on the Premises in accordance with the requirements of the Master Declaration. The liability insurance policy shall name the Seller, the Master Association as additionally insured parties, and the Builder shall furnish evidence of such insurance to such parties.

13. REPURCHASE RIGHTS OF SELLER RELATING TO BUILDER'S COMMENCEMENT OF CONSTRUCTION; RESALE OF SUBLOTS

(a) Commencement of Construction

If Builder fails to commence construction of a single-family home (i.e., the pouring of footers for the home) on any Sublot being purchased hereunder within a period of

_____ (

_____) months after the Closing Date, Seller shall have the right (but not the obligation) at any time thereafter by notice to Builder to repurchase such Sublot for a repurchase price equal to the original Purchase Price for each such Sublot paid by Builder to Seller.

(b) Resale of Sublots

To maintain the high quality of homes within the Subdivision, Builder acknowledges that Seller has

reserved the right to designate the builders that may construct houses within, the Subdivision. For this reason, Builder covenants and agrees not to resell any or all of the Sublots without Seller's prior, written consent, which consent Seller may withhold in its absolute discretion. Furthermore, if Builder desires to sell any or all of the Sublots with respect to which construction has not commence, Builder shall promptly give notice to Seller to that effect and Seller shall have the right to repurchase any or all of such Sublots for a repurchase price equal to the original sales price for each Sublot paid by Builder to Seller.

(c) Closing of Repurchase

The rights of Seller under (a) and (b) above are referred to herein as the Seller's "Right to Repurchase." If Seller exercises its Right to Repurchase, Builder shall reconvey any such Sublot to Seller or Seller's nominee by general warranty deed, free and clear of all liens and encumbrances whatsoever except the matters in Section 3 hereof. All funds and documents necessary to effect such reconveyance shall be deposited with the Escrow Agent within

_____ (

_____) days after the date of notice by Seller to Builder of the exercise by Seller of the Right to Repurchase. Builder shall furnish Seller with a Title Policy in the amount of the repurchase price insuring title to be in accordance with Section 3 hereof. The Escrow Agent shall prorate real estate taxes and assessments (on the basis of the then last available tax duplicate) and the payments to the Associations as of the date of reconveyance. The Builder shall pay all expenses involved in the reconveyance including, but not limited to, the cost of the title search and Title Policy, the conveyance fee tax and escrow and recording fees.

(d) The repurchase rights of Seller set forth in this Section shall be contained in the Deed and shall survive the recording of the Deed.

14. MEMBERSHIP PLAN FOR GOLF MEADOW GOLF AND COUNTRY CLUB

Builder acknowledges that memberships entitling use of recreational facilities ("Club Facilities") are presently being offered by Golf Meadow Golf and Country Club (the "Club") in accordance with Membership Plan for Golf Meadow Golf and Country Club (the "Plan"). Builder acknowledges receipt of the Plan, and that it may be amended from time to time in accordance with its terms. The Plan provides that each initial purchaser of a home from Builder may apply for membership in accordance with the Plan. Builder acknowledges that, by purchasing or paying for the Sublot(s), or by acquiring a membership in the Master Association, Builder and any subsequent purchaser do not acquire any vested right or easement, prescriptive or otherwise, to use the Club Facilities, nor do they acquire any ownership or membership interest in the Club Facilities. Builder acknowledges that no representations have been made to Builder regarding use of the Club Facilities now or in the future, other than as set forth herein or in the Plan.

Builder represents and warrants that it shall make no statements or representations regarding the availability of memberships entitling use of the Club Facilities to purchasers or prospective purchasers of the Sublot(s) unless the prior written approval of Seller is obtained. The terms of this Section shall survive the delivery of the Warranty Deed and the closing of this transaction.

15. REAL ESTATE COMMISSION

Builder warrants and represents that Builder has not dealt with any real estate broker or agent in connection with this transaction except for _____ [name] (IF NONE, WRITE "NONE") ("Broker") and that no other real estate commission is payable in this transaction due to Builder's act. Builder shall indemnify and hold Seller harmless

from payment of any real estate commission and for all costs and expenses, including reasonable attorney's fees, arising in connection with the defense of any claim caused by Builder's acts. This warranty and representation shall survive delivery of the Deed and closing of this transaction. Seller **shall** pay real estate commission to the Broker (or a co-broker, if any, agreed to by Seller and Broker) in accordance with the terms of a separate agreement between Seller and Broker, provided, however, such commission shall be deemed to be earned only upon closing of the escrow and transfer of record title to the Premises to Builder. Said commission shall be paid from Seller's escrow proceeds.

16. DEFAULT BY BUILDER

If Builder fails to close on the purchase of the Premises as provided herein for reasons other than Seller's default or the failure of any of the conditions set forth in Sections 5 and/or 7 above, Seller, in addition to any other rights or remedies available to Seller, shall have the right to terminate this Agreement, in which event the Earnest Money shall be delivered to and retained by Seller as agreed upon liquidated damages, and Seller and Builder shall have no further rights or obligations hereunder.

17. SUBORDINATION

In order for Seller to obtain a loan for the development of the Premises, it will be necessary for Seller to execute and deliver to its lender a mortgage encumbering the Premises. The lender will require that said mortgage be a first and best lien on the Premises, superior to Builder's interest in the Premises, and, therefore, Builder hereby postpones, subordinates and waives to such lender the priority of any right, equitable lien or interest which Builder may have or claim to have as a result of payments made or to be made by Builder prior to Closing for the purchase of the Premises. Title to the Premises shall be transferred to Builder in accordance with Section 3 hereof, free and clear of any mortgage placed on the Premises by Seller.

18. NOTICES

Any notice to be given by either party to the other shall be in writing and either hand-delivered or sent by registered or certified mail, postage prepaid, return receipt requested, to the respective addresses set forth above; or to such other address as either party may hereafter designate to the other in writing. Hand-delivered notices shall be effective upon actual receipt. Mailed notices shall be deemed to have been given not later than forty-eight (48) hours after the date that such notice is deposited in the U.S. Mail as provided above, except that the date of actual receipt of notice shall be deemed to be the date of the giving of any notice of change of address.

19. FIRPTA CERTIFICATION

Seller hereby certifies and affirms that Seller is not a "foreign person" within the meaning of *Section 1445 of the Internal Revenue Code of 1986*, as amended.

20. SECTION HEADINGS

The section headings of the paragraphs contained herein are for convenience only and do not limit, enlarge or define the contents of such paragraphs.

21. BINDING EFFECT

The covenants, conditions and agreement made and entered into by the parties hereto shall be binding upon and inure to the benefit of the heirs, executors, administrators, successors and assigns of the respective parties hereto. Builder shall not assign its interest under this Agreement without Seller's prior written consent.

22. EXAMINATION OF AGREEMENT

Submission of this instrument of examination or signature by Builder does not constitute an option to purchase the Premises, and this instrument shall have no force as a purchase agreement or otherwise until said Agreement has been signed by Seller.

23. ENTIRE AGREEMENT

This Agreement contains the entire agreement between the parties and no statement or representation of the respective parties hereto, their agents or employees, made outside this Agreement and no contained herein, shall form a part hereof or be binding upon the parties hereto. This Agreement shall not be changed or modified except by written instrument signed by the parties hereto.

The parties have set their hands on the date first written above.

"SELLER"

GOLF MEADOW DEVELOPMENT LIMITED PARTNERSHIP,

a(n) _____ [state] _____ [entity]

By: GOLF MEADOW DEVELOPMENT CO.,

a(n) _____ [state] _____ [entity], its General Partner

By: _____

Name: _____

Title: _____

"BUILDER"

[Name]

By: _____

Name: _____

Title: _____

SCHEDULE A

Purchase	Price
Sublot No. _____	\$ _____
Sublot No. _____	\$ _____
Sublot No. _____	\$ _____
Sublot No. _____	\$ _____

EXHIBIT B

GOLF MEADOW, _____ [county], _____ [state]

PROVISIONS TO BE INCORPORATED BY BUILDER
IN ITS NEW HOME - SALES/CONSTRUCTION
CONTRACTS WITH RETAIL PURCHASERS

GOLF MEADOW GOLF AND COUNTRY CLUB MEMBERSHIP

1. Golf Meadow Golf and Country Club Membership. Purchaser shall have a period of _____ (_____) days after acquiring title to the home to apply for a membership in Golf Meadow Golf and Country Club (the "Club"). Purchaser acknowledges that if Purchaser does not make such application within said _____ (_____) day period, the Club will be free to offer such membership to a non-resident of the Golf Meadow residential community. Furthermore, if Purchaser elects not to apply for a membership, Purchaser shall provide the Club with a written waiver of such right on a form to be furnished to Purchaser by the Club.
2. Use of Club Facilities. Purchaser acknowledges that memberships entitling use of the Club's recreational facilities ("Club Facilities") are presently being offered by the Club in accordance with the Plan for the Offering of Memberships in Golf Meadow Golf and Country Club (the "Plan"). Purchaser acknowledges receipt of the Plan, and that the Plan may be amended from time to time in accordance with its terms. The Plan provides that Purchaser may apply for membership in accordance with the Plan. Purchaser acknowledges that, by purchasing or paying for the Property, or by acquiring membership in the Master Association, a Neighborhood Association, or a Cluster Association, Purchaser does not acquire any vested right or easement, prescriptive or otherwise, to use the Club Facilities, nor does Purchaser acquire any ownership or membership interest in the Club Facilities. Purchaser acknowledges that no representations have been made to Purchaser regarding use of the Club Facilities now or in the future, other than as set forth herein or in the Plan, and that Purchaser has not relied on any statements made by the Seller of the Property with respect thereto. The terms of this paragraph shall survive the delivery of the Warranty Deed and the closing of this transaction.
3. Proximity of Sublot to Golf Course. Purchaser acknowledges that the Property is located adjacent or in close proximity to the Golf Meadow Golf and Country Club golf course and that Purchaser has assessed the location of the Property in relation to the layout and operation of the golf course. Purchaser further acknowledges that owning property adjacent or in close proximity to a golf course, and the Property in particular, involves certain risks which may have an effect on Purchaser's enjoyment of the Property. Purchaser acknowledges that such risks may include (as examples and not as a limitation on the generality of such risks) golf balls being hit into Purchaser's Property, with the potential of causing bodily injury or physical damage to property, and golfers coming into Purchaser's Property to look for errant golf balls. Purchaser hereby expressly assumes such risk and agrees that neither Seller nor any other entity owning or managing the golf course shall be liable to Purchaser or anyone claiming any loss or damage, including, without limitation, indirect, special or consequential loss or damage arising from personal injury, destruction of property, trespass or any other alleged wrong or entitlement to remedy based upon, due to, arising from or otherwise related to the proximity of Purchaser's Property to the golf course, including, without limitation, any claim arising in whole or in part from the negligence of the Club, or Golf Meadow Development Limited Partnership ("Developer") or any other entity owning or managing the golf course. Purchaser hereby agrees to indemnify and hold harmless Seller, the Developer, the

Club, or any other entity owning or managing the golf course against any and all claims by Purchaser's guests, invites or licensees with respect to the above. Purchaser further acknowledges that the covenants of this provision have been required by Developer as a condition of Seller's purchase of the Property from Developer and that these covenants shall survive closing and inure to the benefit of Seller, the Developer, the Club, and any other entity owning or managing the golf course, and their respective successors and assigns. Nothing in this paragraph shall restrict or limit any power of the Developer, Builder or any entity owning or managing the golf course to change the design of the golf course, and such changes, if any, shall not nullify, restrict or impair Purchaser's covenants and duties contained herein. The terms of this paragraph shall survive the delivery of the Warranty Deed and closing of this transaction.

EXHIBIT C

FEATURED BUILDER AGREEMENT

The following Terms and Conditions are included in the FEATURED BUILDERS Program for Golf Meadow Golf and Lake Community as of the _____ [day] day of _____ [month], _____ [year]. Declarant reserves the right to change, alter or amend this Featured Builders Agreement prior to its execution by FEATURED BUILDER.

LIMITATION OF FEATURED BUILDERS

Golf Meadow Development Limited Partnership (the "Declarant") will identify up to six designated builders to participate in the Golf Meadow "FEATURED BUILDERS" program. These builders will be expected to sell a minimums of five (5) homes within the first twelve months of closing on their initial lots. FEATURED BUILDERS will also be expected to sell a minimum of eight (8) homes within the second 12 months and each 12 month period thereafter.

INITIAL RELEASE AND LOT DEPOSITS

To qualify as a "FEATURED BUILDER" at Golf Meadow, FEATURED BUILDER agrees to make an initial purchase of not less than _____ (_____) lots from the Declarant and may option an additional lot for each lot purchased. All options shall be exercised within _____ [number] months after the signing of the Option Addendum. Concurrently with the signing of this Agreement FEATURED BUILDER shall sign the Sublot Purchase Agreement and Option Addendum and FEATURED BUILDER shall make specific homesite selections from the lots currently being developed by the Declarant in Golf Meadow. FEATURED BUILDER will pay an Earnest Money Deposit equal to _____ percent (_____) of the purchase price of each of the first _____ (_____) lots upon signing the Sublot Purchase Agreement. An option deposit of _____ Dollars (\$) (_____) per option lot is also payable at the time of signing the Option. Addendum.

Declarant has set aside Sublots _____ in Phase I as "Enclave" lots which will be represented by _____ [broker] and sold to individual purchasers ("Retail Purchasers"). To induce Retail Purchasers of the Enclave lots to select a FEATURED BUILDER to construct their homes within the "Enclave," Declarant will offer such Retail Purchasers a _____ percent (_____) rebate off the retail price of the "Enclave" lot when such Retail Purchaser contracts with FEATURED BUILDER to construct a home on said lot and commences construction of the home based on the terms of the Purchase Agreement between FEATURED BUILDER and the Retail Purchasers.

FINANCIAL CONDITIONS

Prior to executing a Sublot Purchase Agreement with FEATURED BUILDER, Declarant shall have the right to review, and FEATURED BUILDER shall submit to Declarant upon request, all pertinent financial information relating to FEATURED BUILDER. FEATURED BUILDER warrants and represents to Declarant that all financial information submitted will be complete and correct and will warrant to Declarant as a condition to each lot closing that there has been no material adverse change in FEATURED BUILDER'S financial condition from the date of FEATURED BUILDER'S last submission of such information to Declarant.

MODEL HOMES/SPEC HOMES

Within _____ (_____) days following the closing on initial purchase, FEATURED BUILDER is required to start and diligently complete construction of one model home and, additionally, shall at all times have at least one speculative home under construction, or completed and available for sale. The model home shall be fully furnished and landscaped, and shall remain unoccupied and serve as a model as long as FEATURED BUILDER has available lots. for sale. All design, construction and landscaping will be required to be installed under the terms of the Golf Meadow Design Review Policies and Guidelines and shall be subject to Declarant's prior approval.

INFORMATION CENTER

A temporary information center will be established on-site by Declarant. Declarant's on site sales representative will provide home-site and golf membership information to prospective purchasers. FEATURED BUILDER acknowledges that Declarant's sales personnel may, but are not obligated to, provide information about FEATURED BUILDERS at Golf Meadow.

Golf Meadow "FEATURED BUILDERS" may at their option, elect to establish a sales trailer on one of their lots during the period of model home construction only. Such sales trailer must meet requirements of the Declarant. However, FEATURED BUILDER understands that all preliminary site improvements to sustain a free standing sales trailer may not be immediately available.

MARKETING & ADVERTISING

In addition to the marketing through the information center, Declarant will provide print advertising for FEATURED BUILDERS in appropriate local publications. All costs and expenses of such advertising and promotion shall be borne by Declarant until the earlier of (i) the date which is _____ (_____) months after the first model permit becomes available or (ii) _____ [month] _____ [day] _____ [year]. Thereafter, FEATURED BUILDERS agree to reimburse Declarant for a portion of such expenses by payment of an amount equal to _____ percent (_____) of the sale price of each home sold by FEATURED BUILDER, payable out of escrow to Declarant at time of title transfer of the house by the Featured Builder to its Purchaser. FEATURED BUILDER is encouraged to also advertise on its own; provided, however, that Declarant must approve all sales, promotional and advertising materials. All advertising materials and promotions must refer to Golf Meadows as a "Natural Choice Home" community.

FEATURED BUILDER understands that Golf Meadow is a "Broker Friendly" community. Therefore, by becoming a "FEATURED BUILDER" at Golf Meadow, FEATURED BUILDER is required to pay commissions to brokers who

present bona fide purchasers of homes. Such commission will be due and payable upon completion of the residence and successful transfer of title.

Declarant recognizes that all commissions are negotiable between FEATURED BUILDER and the broker; however, for the sake of fair competition, Declarant suggests that current and acceptable industry prevailing rates be offered. Additional bonuses, promotional incentives and advance commission payouts are acceptable practices to encourage marketing and sales momentum.

PLAN REVIEW

FEATURED BUILDERS will be expected to submit a minimum of three floor plans and site plans to be pre-approved by the Design Review Committee referred to in the Master Declaration of Covenants, Conditions, Easements and Restrictions for Golf Meadow (the "DRC"). FEATURED BUILDER must be willing to build these plans on any adaptable lot in Golf Meadow. Plan packages submitted for approval must include all information required in Design Review Policies and Guidelines. Further, each FEATURED BUILDER agrees not to duplicate another FEATURED BUILDER'S plans at Golf Meadow.

FEATURED BUILDER acknowledges and agrees that any and all plans used by FEATURED BUILDER, its architects, subcontractors and landscapers, in connection with the construction of any home (whether custom or speculative) in Golf Meadow shall be submitted to Declarant and are subject to the review and approval of the DRC prior to the use thereof or the commencement of any site work or construction at any homesite.

NATURAL CHOICE COMMUNITY

Declarant has entered into an agreement with _____ [name] ("Gas Company") to develop Golf Meadow as a Natural Choice Home Community. By entering into the Featured Builder Agreement, all FEATURED BUILDERS agree to install at each single-family home and at each cluster home area a Trim-Gas Gaslight to be provided by Gas Company. The cost of the installation of the Trim-Gas Gaslight shall be reimbursed to FEATURED BUILDERS by Gas Company. The reimbursement will be limited to incremental costs incurred by the FEATURED BUILDER and will be at a pre-determined rate that is mutually agreeable to Gas Company and the FEATURED BUILDERS. All model homes constructed by FEATURED BUILDERS shall adhere to the "Natural Choice Home" program, a copy of which is available from Gas Company. FEATURED BUILDER agrees all competitive utility programs, signage, brochures and/or advertising by FEATURED BUILDER will be prohibited in reference to Golf Meadow or within the Golf Meadow community itself.

TERMINATION

Either party shall have the right to terminate this Agreement upon the occurrence of any of the following events: (i) immediately upon receipt of notice that the other party has been adjudicated bankrupt or insolvent, or has filed or is the subject of a petition in bankruptcy or for reorganization, or has made an assignment of all or substantially all its assets for the benefit of its creditors, or has sought to have or permitted a temporary or permanent receiver to be appointed to administer such party's affairs or (ii) upon any default by the other party hereunder which default remains uncured for _____ (_____) days following receipt of notice from the other party of such default, including non-compliance with The Model Homes/Spec Homes provision of this agreement and including a default under the Sublot Purchase Agreement and/or the Option Addendum

FEATURED BUILDER acknowledges that it has been selected by Declarant to participate in the Golf Meadow

"FEATURED BUILDERS Program" due to its reputation in the community as a quality home builder and its representations to Declarant that it is in sound financial condition and is a professional builder of the highest quality and integrity. As a consequence thereof, FEATURED BUILDER acknowledges and agrees that, (a) it shall have no right to assign any agreement or contract entered into between FEATURED BUILDER and Declarant or

_____ [broker] or a customer of FEATURED BUILDER, or any of FEATURED BUILDER'S obligations thereunder, and (b) in the event this Agreement is terminated or FEATURED BUILDER violates any of the terms, provisions or intent of any agreement entered into between FEATURED BUILDER or Declarant or

_____ [broker] or a customer of FEATURED BUILDER, and such violation is not cured within _____ (_____) days after receipt of written notice thereof from Declarant, in addition

to all rights and remedies available to the non-defaulting party under this Agreement or such other agreements, Declarant shall have the right to any or all of the following: (i) terminate this Agreement and all other agreements between Declarant and FEATURED BUILDER; (ii) repurchase all homesites held by FEATURED BUILDER, as specified in the Sublot Purchase Agreement at the original purchase price; (iii) retain all funds of FEATURED BUILDER held by Declarant; and (iv) terminate all rights of FEATURED BUILDER to continue to participate in the Golf Meadow FEATURED BUILDER Program.

TOTALITY OF AGREEMENT

This Agreement contains the sole and entire understanding between Declarant and FEATURED BUILDER with respect to the FEATURED BUILDER'S participation in the FEATURED BUILDERS Program. All promises, inducements, representations and warranties previously made by Declarant are merged into this Agreement. This Agreement shall not be modified except by a subsequent written agreement executed by both Declarant and FEATURED BUILDER.

Declarant and FEATURED BUILDER each agree that they will execute and deliver to the other such additional documents, certificates, resolutions and other matters as may be reasonably requested by either party or their counsel after the execution of this Agreement.

This Agreement may be signed in counterparts, all of which shall be deemed originals. Declarant and *FEATURED BUILDER* each represent and warrant to the other that such party has not dealt with any real estate broker, real estate agent or finder in connection with FEATURED BUILDER'S selection as a "FEATURED BUILDER" in Golf Meadow, and each agrees to indemnify and save the other harmless from any loss, cost, liability or expense incurred in connection with any claim for any real estate commission or fee which may arise by reason of the actions of such party.

ACCEPTED BY: _____
"Featured Builder"

DATE: _____
[month] [day], [year]

Golf Meadow Limited Partnership

A(n) _____ [state]
_____ [entity]

By: Golf Meadow Development Co.,

A(n) _____ [state]
_____ [entity], its General
Partner

By: _____ "Declarant"

DATE: _____
[month] [day], [year]



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Current Legal Forms for Real Estate

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Current Legal Forms for Real Estate
Chapter 22 DEVELOPMENT AND SUBDIVISION
Part IV. FORMS
E. RESIDENTIAL DEVELOPMENT

26-22 Current Legal Forms for Real Estate FORM 22.83A

FORM 22.83A Sublot Purchase Agreement With Homeowner

COMMENT

This form is an example of a purchase agreement that would be used by a land developer in order to sell lots to the ultimate homeowner, as opposed to a residential home builder. In other words, in this form the purchaser will have the home built for the purchaser and has the option to hire a builder, subject to the approval of the seller. Attached to this purchase agreement as Exhibit A is a Declaration of Covenants and Restrictions which are imposed on all lots located in this subdivision. The purchase agreement itself is contingent on approval of those restrictions within ten (10) days from the date the purchase agreement is executed by the purchaser.

In this particular case, the purchase agreement is also contingent upon the developer's submission and approval by the local governing authority of its subdivision plat, the approval for which will be dependent upon the seller's compliance with the local subdivision statute and installation of all infrastructure, such as roads and utilities, to serve the lots. If the plat is not approved by a certain date, the purchaser has the right to terminate the agreement and receive the refund of the purchaser's earnest money deposit.

Because there is an oil and gas well on a portion of the property, there is an acknowledgment by the purchaser of that fact and that there is an oil and gas well tailings pit and debris contained within the subdivision resulting from the oil and gas drilling previously conducted, as described in Paragraph 1.C. of the purchase agreement.

This agreement is also unique in that some of the lots border on a lake, as referred to in Paragraph 6.D. in the Declaration of Covenants and Restrictions for Winton Heights, attached as Exhibit B to the purchase agreement. That Paragraph 6.D. imposes certain restrictions on the use of the lake by the lot owners

which adjoin the lake, such as the type of watercraft permitted to be used on the lake to limit noise, and also restrictions on any owner administering any chemical treatment into the lake or releasing any fish stock or other wildlife into the lake, or any portion thereof, without the consent of the other owners in the subdivision having Lots which adjoin the lake.

FORM

WINTON HEIGHTS

SUBLOT PURCHASE AGREEMENT WITH HOMEOWNER

THIS SUBLOT PURCHASE AGREEMENT WITH HOMEOWNER ("Agreement") is made and entered into this _____ day of _____, between _____, an Ohio limited liability company ("Seller"), or its assignee, whose address for notice purposes is _____, and _____ and _____ (collectively "Buyer"), whose address for notice purposes is _____.

1. A. Premises. Seller agrees to sell to Buyer and Buyer agrees to purchase from Seller upon the terms, provisions and conditions set forth in this Agreement, the vacant lot owned by Seller, situated in the Township of Winton, County of _____, State of _____, and generally described as follows ("Premises"):

Known as being proposed Sublot No. _____ in Winton Heights Subdivision, Township of Winton, State of _____, as shown on the Preliminary Plan for Winton Heights, as set forth on **Exhibit A**, attached hereto and made a part hereof, subject to the final record subdivision plat to be recorded with the _____ County Recorder. Once recorded, the legal description of the Sublot shall make reference to such recorded plat.

Buyer acknowledges that the Preliminary Plan has not been finalized or approved. Buyer further acknowledges that sublots depicted on the Preliminary Plan, including the Premises, may be changed or eliminated as determined by Seller to be in the best interest of the subdivision or as required to obtain necessary government approvals for the subdivision and each sublot therein. In the event the Premises shown on the Preliminary Plan are eliminated or materially changed in the final plan of the subdivision, or in the event any necessary government approval for building on the Premises cannot be obtained, Seller shall refund all money paid by Buyer, this Agreement shall be void, and neither party shall have any liability or obligation to the other.

B. Easements Reserved. Seller reserves the right to create all necessary easements affecting the Premises as shall be required for the installation, operation and maintenance of drainage and water retention facilities, for landscaping installation and maintenance, and for other utilities and related services.

C. Seller hereby discloses to Buyer, and Buyer acknowledges and agrees that Seller previously disclosed to Buyer, that the Premises that is the subject of the Agreement contains an oil and gas well tailings pit and debris in connection with oil and gas drilling conducted on one or more of the parcels comprising the Winton Heights Subdivision or on land adjacent thereto. Buyer further acknowledges and agrees that Seller has provided Buyer sufficient access to the Premises for Buyer to inspect the Premises for any defects relating to said tailing pit and debris, and Buyer accepts the Premises in its AS IS, WHERE IS CONDITION, WITH ALL FAULTS. Buyer agrees that Seller shall not be liable for any costs, expenses or other liabilities relating to said tailings pit and debris and releases Seller from any liability relating thereto.

2. Purchase Price. The purchase price for the Premises is _____ Dollars (\$_____) ("Purchase Price") and shall be payable as follows:

(a) The sum of Five Thousand Dollars (\$5,000) by certified or bank check shall be delivered to Seller concurrently with the execution of this Agreement by Buyer. The aforesaid sum is to be earnest money to be applied against the purchase price at closing. Seller shall deposit the earnest money with the Escrow Agent, as hereafter defined.

(b) The balance of the Purchase Price or the sum of _____ Dollars (\$_____) by certified or bank check drawn on a local bank shall be deposited with the Escrow Agent no later than seventy-two (72) hours prior to the Closing Date as hereafter defined.

3. Conveyance.

A. Seller shall convey fee simple title to the Premises to Buyer by Seller's general warranty deed ("Warranty Deed") warranting title to the Premises to be free and clear of all liens and encumbrances whatsoever except: (i) easements, rights of way, restrictions, conditions, reservations and limitations of record which are approved by Buyer in the manner set forth in Paragraph 3.B. below, (ii) the Deed of Declaration of Covenants and Restrictions, to be prepared by Seller, as the same may be further amended from time to time (collectively, the "Deed of Declaration of Restrictions") a copy of which is described on Exhibit B, attached hereto and made a part hereof; (iii) zoning and building ordinances; (iv) any matters that might be disclosed by an accurate survey or inspection of the Premises; (v) real estate taxes and assessments, both general and special, which are a lien but not yet due and payable; and (vi) all necessary easements for drainage, water retention and landscaping.

The conveyance of title and closing of this transaction shall be contingent upon Buyer approving the Deed of Declaration of Covenants and Restrictions marked Exhibit B attached hereto. Within ten (10) days of the execution of this Agreement, Buyer shall notify Seller if it consents to the Deed of Declaration of Covenants and Restrictions, which consent shall not be unreasonably withheld by Buyer. If Buyer does not consent to the Deed of Declaration of Covenants and Restrictions within ten (10) days of the execution hereof, this Agreement shall terminate and Seller shall return the earnest money to Buyer.

B. Upon the execution hereof or as soon as the Plat referred to in Paragraph 6.A. has been recorded, whichever is later, Seller shall order a Commitment for Title Insurance ("Commitment") from Chicago Title Insurance Company, sometimes hereafter called the "title company," a copy of which shall be sent or delivered to Buyer for review. Within ten (10) days from receipt of such Commitment Buyer shall notify Seller of any restrictions, reservations, limitations, easements and conditions of record (other than the Declaration) which are reasonably objectionable to Buyer, hereafter collectively called "title defects." If any such title defects cannot be cured by Seller by the Closing Date as referred to in Paragraph 6.A. below, or within thirty (30) days after Seller is notified of such title defects by Buyer, whichever is later, which latter date shall then become the Closing Date (other than title defects which Seller can clear at the closing from funds deposited into escrow), this Agreement shall be automatically terminated unless Buyer agrees to take subject to such title defects. In the event of termination, all funds and documents shall be returned to the respective parties without further liability to either party. Failure of Buyer to object within the aforesaid 10-day period shall be deemed an acceptance of the condition of title as shown in the Commitment.

C. Any liens or encumbrances affecting the Premises not specified in Paragraphs 3.A. and 3.B. hereof shall not be grounds for rejecting title provided Seller causes the title company without cost to Buyer, to insure against the collection thereof out of the Premises.

D. Buyer acknowledges that Buyer shall automatically become a member of the Homeowners Association, subject to its Code of Regulations, upon acquisition of title.

4. Title Insurance. Seller and Buyer shall each pay one-half (1/2) of the cost to furnish Buyer with an Owner's Fee Policy of Title Insurance issued by the title company in the amount of the purchase price, in its customary form, which

shall insure marketable title to the Premises upon the filing of the Warranty Deed for record to be good in Buyer subject only to (i) the matters permitted as exceptions in the Warranty Deed as provided in Paragraph 3.A. hereof, (ii) those matters which Buyer shall have agreed to or shall have been deemed to have agreed to pursuant to Paragraph 3.B. hereof, if any, (iii) those matters which the title insurance company will insure against as provided in Paragraph 3.C. hereof, if any, and (iv) the printed schedules, conditions and stipulations of the customary form of title insurance issued by the title company in its usual form of title policy.

5. Escrow. Within ten (10) days after the execution of this Agreement, an escrow shall be established with the Chicago Title Insurance Company, who shall serve as the Escrow Agent and perform the title work required for this transaction. No later than seventy-two (72) hours prior to the Closing Date, each of the parties shall deposit with the Escrow Agent all documents required of each hereunder.

A signed copy of this Agreement shall constitute the escrow instructions of the parties to the Escrow Agent who is authorized hereby to attach its standard conditions of acceptance of escrow, but if any provisions of this Agreement conflict with the provisions thereof, then the provisions of this Agreement shall govern, it being understood and agreed that the parties hereto do not intend that either said escrow instructions or the acts or actions of the parties hereto in executing the same shall supersede or be construed as superseding this Agreement.

6. A. Closing Date. The transaction contemplated hereby shall be closed within thirty (30) days from the date of execution of this Agreement or if the subdivision plat for Winton Subdivision (the "Plat") has not been filed by such date, within fifteen (15) days after such Plat is recorded, subject, however, to Seller's right to extend such date in accordance with the provisions of Paragraph 3.B. hereof (such date, as the same may be extended from time to time, being herein referred to as the "Closing Date"). Seller agrees to use commercially reasonable efforts to cause the public roads within the subdivision to be installed and to be dedicated as soon as is practicable. To that end, Seller shall construct the roadways, install underground utilities and landscape the entrance to Winton Heights Subdivision as soon as is practicable.

In the event Seller is unable to obtain approval of the Plat and to have it recorded by _____, _____, notwithstanding Seller's commercially reasonable efforts, Seller or Buyer shall be entitled to terminate this Agreement, in which case Seller will refund the earnest money to Buyer. On the Closing Date, the Escrow Agent shall file for record with the County Recorder the Warranty Deed and shall proceed to close this transaction, provided that: (a) all funds and documents to be deposited with the Escrow Agent for the consummation of this transaction have been so deposited (b) upon such filing, it is in a position to and will issue its Title Insurance Policy as provided in Paragraph 4. hereof; and (c) it will observe, comply with and perform the other provisions hereof on its part to be observed, complied with and performed.

7. Prorations. The Escrow Agent shall prorate as of the Closing Date all real estate taxes and assessments based on the then last available tax duplicate, provided, however, that if the Premises is not valued as a separate tax parcel for real estate purposes as of the Closing Date, then the Escrow Agent shall estimate the taxes applicable to the Premises based on the last available tax duplicate using the amount of acreage in the Premises to the total amount of acreage in the tax parcel of which it is a part.

8. Closing Costs. The Escrow Agent shall charge to Seller the following costs: (a) one-half (1/2) of the cost of the title examination and the premium for the Title Insurance Policy; (b) one-half (1/2) the cost of the conveyance tax for transfer of real estate imposed by the County and/or State of _____; (c) the amount of the proration of real estate taxes and assessments chargeable to Seller as hereinbefore provided; and (d) one-half (1/2) of the escrow fee.

The Escrow Agent shall charge Buyer with the following costs: (a) one-half (1/2) of the cost of the title examination and the premium for the Title Insurance Policy; (b) one-half (1/2) the cost of the conveyance tax for transfer of real estate imposed by the County and/or State of _____; (c) the cost of recording the Warranty Deed; (d)

one-half (1/2) of the escrow fee; and (e) the fees or costs in connection with Buyer's mortgage financing, if any.

9. Delivery of Funds and Documents. The Escrow Agent shall deliver to Seller on the Closing Date, the following: (a) its check for the purchase price, less any charges, costs, credits or prorations required to be charged to Seller; and (b) an Escrow Statement reflecting the prorations and charges to Seller's account.

The Escrow Agent shall deliver to Buyer, the following: (a) the receipt for the recorded Warranty Deed; (b) the Title Insurance Policy, as the case may be, as soon as it is available; (c) any balance of funds deposited by Buyer or to which Buyer is entitled remaining to Buyer's credit; and (d) an Escrow Statement reflecting the prorations, credits and charges to Buyer's account.

10. Broker. Seller and Buyer mutually represent that no broker was involved in this transaction except _____ whose commission shall be paid through escrow only if and when this transaction closes.

11. No Representations by Seller.

A. Buyer acknowledges that Buyer has inspected the Premises and is fully familiar with the physical condition thereof and all other matters affecting or relating to this transaction as Buyer deems necessary.

B. Buyer agrees to accept the Premises in "as is," "where is" condition, with all faults.

C. In entering into this Agreement, Buyer has not been induced by and has not relied upon any representations, warranties or statements, whether express or implied, made by Seller or any agent, employee or other representative of Seller or by any broker or any other person representing or purporting to represent Seller, which are not expressly set forth in this Agreement, whether or not any such representations, warranties or statements were made in writing or orally.

12. Assignment. Buyer agrees that Buyer shall not assign or otherwise transfer any of Buyer's rights or interest under this Agreement. The benefit afforded Buyer hereunder is intended to run to Buyer's sole benefit and shall not devolve by law, and any assignment or transfer attempted to be made by Buyer shall be void.

13. Buyer's Default. In the event that Buyer shall have failed to perform and comply with Buyer's obligations under this Agreement on the Closing Date, Seller shall have the following rights:

(a) The earnest money deposited may at Seller's option be retained by Seller as liquidated damages and applied by Seller as reimbursement for attorneys' fees, title costs, lost time, effort and profits, and all other expenses incurred by Seller or on its behalf, retaining the balance, if any, for itself;

(b) Seller may enforce this Agreement by specific performance or otherwise; and

(c) Seller shall have any and all other remedies available to it at law or in equity.

Each and every right, remedy and power of Seller hereunder shall be cumulative and in addition to any other right, remedy or power herein specifically granted or hereafter existing in equity, at law, or by virtue of statute or otherwise and may be exercised by Seller from time to time concurrently or independently and as often and in such order as Seller may deem expedient. Any failure or delay on the part of Seller in exercising any such right, remedy or power or abandonment or discontinuance of steps to enforce the same, shall not operate as a waiver thereof or affect Seller's rights thereafter to exercise the same. No failure or delay on the part of Seller in exercising any right hereunder shall operate as a waiver of the same and no single or partial exercise of any such rights shall preclude any other or further exercise thereof or the exercise of any other such power or right.

14. Notices. All notices, demands, elections, requests, consents and other communications hereunder shall be in writing and shall be delivered or sent by certified or registered mail, postage prepaid, return receipt requested and addressed to the parties at their respective addresses mentioned at the beginning of this Agreement, or at such other address as Seller or Buyer may hereafter designate by notice to the other, and shall be effective as of the date of the postmark or mailing.

15. Release of Seller. It is anticipated that Seller will be assigning this Agreement to an affiliated company. In the event it does, as of the date of such assignment, Seller shall be released from all obligations hereunder and the assignee shall thereafter assume all obligations and rights of the Seller under this Agreement.

16. Miscellaneous.

A. All understandings and agreements heretofore had between the parties hereto are merged into this Agreement, which alone fully and completely expresses their understanding.

B. This Agreement shall not be modified or amended except by a written instrument duly executed by the parties hereto.

C. If any provisions of this Agreement or the application thereof to any part or circumstances shall, to any extent, be invalid or unenforceable, the remainder of this Agreement shall be valid and enforceable to the fullest extent permitted by law.

D. Subject to the terms of Paragraph 15. above, this Agreement shall be binding upon and shall inure to the benefit of the Seller and its successors and assigns, and shall be binding upon and inure to the benefit of the Buyer and the Buyer's heirs, personal representatives and permitted assigns.

E. The paragraph headings contained in this Agreement are for reference purposes only, and shall not affect in any way the meaning or interpretation of this Agreement.

F. The use herein of the singular number shall be deemed to mean the plural and the use of the masculine gender shall be deemed to mean the feminine or neuter gender, whenever the sense of this Agreement so requires.

G. Time is of the essence of this Agreement and in the performance of the covenants and provisions hereof.

H. If there is more than one individual comprising Buyer then all such persons shall be jointly and severally liable under all obligations, covenants and agreements of Buyer contained herein.

I. All exhibits, if any, referred to in and attached to this Agreement are hereby made a part of this Agreement.

WHEREFORE, the parties hereto have executed this Agreement as of the day and year first above written.

SELLER:

By: _____

BUYER:

EXHIBIT A
Preliminary Plan

EXHIBIT B
DECLARATION OF COVENANTS AND RESTRICTIONS
FOR WINTON HEIGHTS

THIS DECLARATION is made this ____ day of ____, ____, by ____, an Ohio limited liability company ("Declarant").

WHEREAS, Declarant is the owner of certain real property situated in the Township of Winton, _____ County, _____, known as Winton Heights, and further described on Exhibit A, attached hereto (the "Subdivision"); and

WHEREAS, Declarant wishes to impose certain covenants and restrictions upon all real property in the Subdivision to insure uniformity of development as a residential subdivision;

NOW THEREFORE, Declarant hereby declares that the Subdivision and each parcel therein (each such parcel hereinafter referred to as a "Lot") is and shall be held, used, owned, occupied, transferred, sold and conveyed subject to the covenants, restrictions, obligations, easements, reservations, conditions, limitations, agreements, charges and liens set forth below:

1. Residential Use. Each Lot shall be limited in use to single family residence purposes only, except that an owner of a Lot ("Owner") may use a portion of his or her residence constructed on a Lot for office or studio use, provided (i) the activities conducted therein shall not interfere with the quiet enjoyment or comfort of any other Owner, (ii) such use does not violate any local zoning ordinance, and (iii) no more than three (3) outside, non-resident employees are present at any time.

2. Approval by Committee.

A. Plan Approval. No construction, including, but not limited to, the construction of any residence, garage, deck, gazebo, outbuilding, patio, swimming pool, landscaping, grading or other improvement to the Lot, may be commenced or erected on any Lot unless the complete plans, specifications (including brand, style and color of the brick, shingles, and all other exterior surfaces) and building grades for such construction be first submitted to and approved in writing by an architectural committee (the "Committee") selected by Declarant, its successors, or any person or persons hereafter designated by Declarant or its successors. Any material changes made subsequent to the written approval by the Committee must be resubmitted and approved in writing prior to the commencement of changes.

B. Builder Approval. No general contractor, subcontractor, corporation, sole proprietorship, partnership, limited liability company, individual or any other party or combination of parties (the "Builder") may commence or erect any construction described in Paragraph A. hereof, or assist or participate in such construction, unless the Committee shall first approve such Builder for such purpose.

C. Committee. It will be the purpose of the Committee to insure the integrity and harmony of the Subdivision and each building constructed therein for the benefit of each Owner. The Committee will have sole and absolute discretion in its decisions. Refusal of approval of plans, specifications or locations by the Committee may be based on any ground, including purely aesthetic grounds. No action or conduct by the Committee in furtherance of these restrictions, or

Declarant in establishing the Committee, shall be grounds for any liability whatsoever against the Committee or Declarant by any Owner, such Owner's heirs, successors or assigns, or any third party. Nothing herein shall be construed as relieving any Owner, such Owner's heirs, successors or assigns from any obligation to comply with all applicable local, state and federal laws and regulations.

3. Building Restrictions.

A. Number of Residence Buildings. No more than (1) residence building may be erected on any Lot, provided, however, a guest house conforming to the same architectural standards and of similar design to the main residence building is permitted.

B. Size of Residence. No residence erected on any Lot may contain less than 3,500 square feet for a two-story residence, less than 3,200 square feet for a two-story residence with a first floor master bedroom, or less than 3,000 square feet for a one-story residence. The area of any residence shall be computed on the outside foundation of the first floor and, if applicable, the exterior dimensions of the second floor. In the case of a Cape Cod, the second floor area shall be computed from the outside dimension of the knee walls. Basement and garage area shall not be included in the computation. Any guest house constructed on a Lot shall not be required to meet the requirements of this subparagraph, provided, however, the area of any such guest house shall not be included in the computation for the residence.

C. Garages. Except as provided herein, all garages shall be affixed to their respective residence building, shall have side or rear entry, and, except as otherwise provided in this subparagraph, shall have minimum inside dimensions of 23 feet by 32 feet so as to accommodate a minimum of three (3) automobiles. Detached garages are permissible but may not replace the required attached garage. Detached garages must conform to the same architectural standards as residence buildings and must be similar to the residence in design. In the event that a detached garage accommodating three (3) or more automobiles is constructed, the attached garage may be built so as to accommodate only three (3) automobiles. No garage doors may face or open toward the front of any Lot. In the case of corner Lots, the front of the Lot shall be considered the side of the Lot running along the residential building face with the longest dimension exclusive of the garage. All garage doors must face away from traffic traveling in the Subdivision, except where, in the discretion of the Committee, topographical conditions and/or aesthetic considerations prohibit such compliance.

D. Foundation. No exposed foundation may be constructed with cement or cinder block as the completed face. Exterior foundation surfaces must be brick, stone, stucco, wood, aluminum or vinyl siding, or any natural material.

E. Exposed Surfaces. No exposed surface may be constructed with unfinished masonry material (i.e., cement or cinder block) as the completed face. Exposed exterior walls must be entirely covered in natural materials of brick, stone, stucco/dryvit, or wood, or any similar natural materials. Notwithstanding the foregoing, upon the prior written consent of the Committee, which consent may be withheld or granted in the Committee's sole and absolute discretion, (i) up to 50% of the front exposed exterior wall(s) may be covered with vinyl shakes or vinyl products having the appearance of six to eight inch wide cedar planks ("Approved Substitutes"), and (ii) up to 100% of all other exposed exterior walls may be covered with Approved Substitutes. Fascia and soffits may be constructed from aluminum or vinyl materials.

F. Roof Pitch. All residence buildings, guest houses, and garages (attached or otherwise) shall have a sloping roof with a minimum pitch of 7/12 side facing and 10/12 forward facing peaks and hips. All roofs of residence buildings, guest houses, and garages shall have a maximum pitch of 15/12 for 70% of the roof area. Shingles for roofs shall be architecturally textured shingles, shakes, or slate.

G. Outbuildings. Outbuildings must conform to residence's architecture, including color and material. Outbuildings must be a minimum of 20 feet from the side property line or 30 feet from the rear property line.

H. Utilities. All electrical, television or telephone cables and any other utility lines and facilities which are to extend from outside a Lot to any residence or other structure located on the Lot or between structures on the Lot shall be placed underground.

I. Front Set Back. No building may be erected on any Lot, Lots or parts thereof nearer than 90 feet to the front of the Lot line, unless otherwise specified on plans which the Committee has approved pursuant to Paragraph 2., above. The Committee may increase or decrease the required front set back if it deems, in its sole discretion, that topography and Lot configuration so require.

J. Fireplaces and Chimneys. Fireplaces shall be of masonry, metal inserts, or direct vent flue type. Chimneys on the exterior or roof of any building shall be covered in brick, stone, or stucco/dryvit. All Chimneys on exterior walls shall extend to the ground and have a separate foundation. Protruding vinyl-covered boxes enclosing direct vent fireplaces are not permitted on any exterior walls other than the rear exterior wall(s). Direct vent termination caps are not permitted on any exterior wall, other than side exterior walls if approved by the Committee. Protruding firebox covers are not permitted.

4. Construction and Maintenance.

A. Timing for Completion. Once construction on any structure on a Lot has commenced, it must be completed within 18 months of commencement.

B. Construction Debris. During construction, the Owner shall keep the Lot free from construction debris and shall not allow the burial of such debris on the Lot or its use as fill material at any location on the Lot.

C. Construction Mud and Damage. Each Owner shall keep such Owner's Lot and the streets providing access thereto free of accumulations of dirt, mud and debris, and shall be responsible for all repairs of damage to the swales, ditches, storm sewers and streets occasioned by work on or around the Lot by the Owner or the Owner's contractor, or their agents, representatives, subcontractors or employees. If the Owner shall fail to keep such Owner's Lot and the streets free of such accumulations, or shall fail to repair any damage to the swales, ditches, storm sewers and streets, then in addition to all other rights and remedies Declarant may have (including the right to specific performance), Declarant shall have the right to remove such dirt, mud and debris and repair all damage and shall charge the cost of such removal or repair to the Owner. Such costs shall be payable by the Owner upon demand and shall constitute an assessment, as set forth in Paragraph 8. below, against the Lot.

D. Building Maintenance. Each Owner shall, at such Owner's sole cost and expense, maintain and keep the residence building and all other buildings or structures on the Lot in a state of good repair.

E. Building Casualties. If all or any portion of a residence on a Lot is damaged or destroyed by fire or other casualty, the Owner shall promptly rebuild, repair or reconstruct such residence or raze the structure, remove all rubble and debris, fill in any basement areas or excavation areas with clean fill, and grade the Lot in accordance with any applicable improvement plans for the Subdivision or Lot.

F. Storm Sewer Maintenance on Lots. Each Owner shall maintain the ditches, storm sewers, culverts, water management areas and basins, swales and grading for the Lots owned by them in accordance with the improvement plans approved for the Subdivision.

5. Landscaping and Lot Appearance.

A. Lawns and Vegetation; Existing Trees. Lawns shall be kept properly trimmed at all times. No grains, underbrush, excessive weeds or other unsightly vegetation shall be permitted to grow or remain on any Lot or in any ditches in

whole or in part on a Lot or in the street right-of-way in front of any Lot. All grass on any unbuilt lot must be kept at a maximum height of twelve (12) inches. Vegetables may be grown on a lot, provided they are not grown for commercial purposes and provided they are restricted to an area which is situated to the rear of the Lot and is at least 20 feet from any Lot line.

All plans for the clearing of a Lot which include removal of any tree with a trunk diameter greater than five (5) inches must be approved by the Committee prior to commencement of work.

B. Timing of Landscaping. All landscaping must be completed within one (1) year of the occupancy of the residence, including the replacement of any landscaping that does not survive initial and subsequent plantings.

C. Fences. No freestanding fences, solid or living, may be erected, placed, or permitted on any Lot from the street to the front building line, provided, however, that an entrance gate, the design and construction material of which must be approved by the Committee in writing, may be constructed. Fences may be installed from the building line to the rear property line for safety, decorative and/or aesthetic value only if approved in writing by the Committee. Chain link fences will not be permitted except for dog runs contiguous to and in the rear of the residence which are not visible from the street.

D. Driveways. All driveways must either be concrete, asphalt or brick and must be installed within one (1) year of commencement of construction.

E. Signs. No nuisance or advertising signs, billboards, or banners will be permitted, erected, or maintained on any Lot. Signs offering the sale of Lots or residences in the Subdivision shall be limited to twelve (12) square feet in area. Subdivision signs at the entrances shall be a maximum of 60 square feet. All construction and realty signs shall be removed upon the occupancy of the building or sale of the Lot or Lots to which they relate. In the case of signs erected for the purpose of resale of Lots or residences, the same shall be removed at such time as the Lot or residence offered for sale is sold or is taken off the market.

F. Mailboxes. All mailbox stands or posts shall be of uniform design which shall be designed by and which shall be available from the Committee.

G. Re-grading. No re-grading of any Lot that affects drainage or construction work on any building shall be performed by any Owner, builder or contractor prior to receiving written approval for such grading, filling or excavating from the Committee.

H. Vehicles. No recreational vehicles, boats, buses, dump trucks or any other vehicle may be parked on any portion of a Lot beyond a period of 24 hours unless completely enclosed in a garage. Commercial vehicles are permitted during the period of time during which they are necessary to perform specific duties. No abandoned or non-operational vehicles may be parked on a Lot beyond a period of 24 hours unless it is parked in a garage so as to be concealed from public view.

I. Trash. No rubbish, trash, garbage, or waste material shall be kept or permitted on any Lot except in sanitary containers which shall be placed within enclosed areas so as to be concealed from public view, except when placed for collection.

J. Satellite Dishes. No satellite dish is permitted on any Lot in front of the rear line of any structure. If a satellite dish is installed, it shall be screened so as not to be visible from any adjoining Lots or from the street right-of-way.

K. Above-Ground Swimming Pools. No above-ground swimming pools are permitted.

L. Fuel Storage. All fuel storage containers on a Lot must be placed within the residence or underground, subject to applicable laws and regulations.

M. Clothes Lines. No clothes lines or clothes poles or other device or mechanism for hanging clothes shall be maintained on any building lot, unless totally screened from both public view and neighboring lots.

6. Use Restrictions.

A. Pets. No poultry or livestock of any kind shall be raised, bred or kept on any Lot, except for dogs, cats and other common household pets provided they are not kept, bred or maintained for commercial purposes.

B. Hazardous Substances. No Owner shall release, store or bury or permit the release, storage or burial of any hazardous substance on any Lot. "Hazardous substance" and "release" shall have the meanings given them in the Federal Comprehensive Environmental Response, Compensation, and Liability Act (42 U.S.C. 9601).

C. Oil and Gas Leases. No oil or gas lease will be permitted within the Subdivision other than _____ recorded on _____, _____ at Volume _____, Page, _____ in the _____ County Recorder's Office. No Lot or portion of any Lot shall be used in any way for oil and/or gas drilling, exploration or production, including consolidation of any Lot or any portion of any Lot with any other property for purposes of oil and/or gas drilling, exploration or production.

D. Lake Facilities. The provisions of this subparagraph 6.D. shall apply solely with respect to Lot Nos. _____ through _____, which adjoin and partly comprise the inland water reservoir commonly referred to as Blue Lake located in _____, _____ (the "Lake"). No owner of Lot Nos. _____ to _____ (individually a "Lake Owner" and collectively the "Lake Owners") shall use or permit the use of any sailboat or other watercraft whatsoever, other than sailboats and other watercraft not exceeding eighteen (18) feet in length and power by an electric motor not exceeding two (2) horsepower (if at all), and in no event shall any Lake Owner use or permit the use of any internal combustion engine powered watercraft. No Lake Owner shall administer any chemical treatment to the Lake or any portion thereof, nor release any fish stock or other wildlife into the Lake or any portion thereof, without the express written consent of the other Lake Owner(s), all of which shall be conducted in strict accordance with all applicable laws, rules, regulations, ordinances, rulings, and other requirements or restrictions of all governmental authorities having jurisdiction thereof.

7. Homeowners' Association.

A. Membership. All Owners shall be members of Winton Heights Homeowners' Association (the "Association"). Each Owner shall participate in and be subject to all rules, regulations, assessments and contractual obligations of the Association which may be established or enacted by its governing body. Each Owner shall have one (1) vote for each Lot owned by such Owner in all matters requiring approval of the Owners, whether such approval is required pursuant to this Declaration or the rules and regulations of the Association.

B. Governing Body. The governing body shall be established by the Owners after three-fourths (3/4) of the Lots in the Subdivision have been deeded to Owners other than Declarant. At such time as the governing body is created and the requisite number of Lots have been sold, the Association shall succeed to all rights and obligations of the Declarant under this Declaration, except Declarant's rights under Paragraph 10., which Declarant shall retain.

8. Assessments.

A. Covenant to Pay Assessments. Declarant, for each Owner of a Lot within the Subdivision, hereby covenants and each Owner of a Lot by acceptance of a deed, whether or not it shall be so expressed in the deed, is deemed to covenant

and agree to pay the Association annual assessments or charges and special assessments for capital improvements, such assessments to be established and collected by the Association. The annual and special assessments, together with interest, costs and reasonable attorneys' fees, shall be a charge on the land and shall be a continuing lien on the Lot against which each assessment is made. Each assessment, together with interest, costs and reasonable attorneys' fees, shall also be a personal obligation of the person or persons who are the titleholders to such Lot at the time the assessment falls due. Personal obligation for delinquent assessments shall not pass to successors in title unless expressly assumed by them, but the assessments shall continue as a charge on the Lot conveyed to the successor in title. The assessments levied by the Association shall be used for the improvement and maintenance of those portions of Lots which are subject to landscaping or other easements for the benefit of Declarant and/or the Association ("Easement Areas"), and for the maintenance of the private road and any other common areas within the Subdivision.

B. Allocation of Assessments. Each Owner of a Lot, including the Declarant, shall be responsible for the payment of his, her or its respective share of each assessment and charge established by the Association. Each Owner's share shall be determined by dividing the amount of such assessment or charge by the total number of Lots in the Subdivision. In the event that any Lot shall be jointly owned by two (2) or more Owners, all such Owners shall be treated collectively as one (1) Owner for purposes of determining the share allocated to such Lot hereunder.

C. Interest on Assessments. Any assessments not paid within thirty (30) days after the date due shall bear interest at the rate of ten percent (10%) per annum and shall include costs and reasonable attorneys' fees incurred in collection. The Association will bring an action of law against the owner personally obligated to pay the same, or foreclose the lien against the Lot in accordance with the laws of the State of _____. No Owner may waive or otherwise escape liability for the assessments by non-use of the Easement Areas or abandonment of the Lot.

D. Commencement of Assessments. The Association's responsibility and obligation to collect assessments and maintain any Easement Areas shall commence as of the date of creation of the Association's governing body. Prior to such date, maintenance of any Easement Areas shall be the responsibility of Declarant.

E. Maintenance of Common Areas and Easement Areas. The Association shall provide for the maintenance and repair of all common areas and all Easement Areas. In furtherance thereof, Declarant, for each Owner of a Lot within the Subdivision, hereby grants to the Association, its agents, employees, and contractors, such easements of access to all common areas and all other Easement Areas, as shall be required for the purpose of carrying out the maintenance and repair thereof. In consideration thereof, the Association hereby indemnifies, defends, and holds harmless Declarant, and the Owners of any other Easement Areas, are or will be located, from all claims, actions, causes of action, liens, costs, expenses (including reasonable attorneys fees), and damages to persons or property caused by or growing out of the exercising of any of the rights granted under the aforesaid easements of access. In addition, to insure against the aforesaid risks, the Association shall carry comprehensive general public liability insurance in such amounts as the Association shall reasonably determine, naming the Association, Declarant, and future owners of the Lots on which Easement Areas are or will be located, as insured parties thereunder. The Association shall provide proof of such insurance to the named insureds upon request.

F. Failure to Maintain Common Areas and Easement Areas. In the event the Association fails to make reasonable and necessary maintenance and repairs to any common area or Easement Area and to correct such failure within ten (10) days of receipt of notice of such failure, the Owners shall have the right to maintain and repair such common area or Easement Area and to recover the costs so incurred from the Association, and, in the event the Association shall fail to make such payment within sixty (60) days after written request therefor, from the Owners in proportion to each Owner's respective share of such costs determined in accordance with subparagraph 8.B., above. In addition, in the event the Association and the Owners fail to make reasonable and necessary maintenance or repairs to any common area or Easement Area, the Township of Sharon, after prior written notice upon the Association and the failure of the Association or the Owners to make such maintenance or repair within ten (10) days of receipt of said notice, shall have the right to perform such maintenance or repair at the expense of the Association and Owners. In furtherance thereof,

Declarant, for each Owner of a Lot within the Subdivision, hereby grants to the Township of _____ and County of _____, and their respective agents, employees, and contractors, such easements of access to all common areas, and to all Easement Areas as shall be required for the purpose of carrying out the maintenance and repair thereof. The Township of _____ shall have the right to assess the costs of such maintenance and repair against the Association, and, in the event the Association shall fail to make such payment within sixty (60) days after written request therefor, may collect such assessment from the Owners, provided however that each Owner shall be liable solely for such Owner's respective share of such assessment, which share shall be determined in the manner described in subparagraph 8.B., above.

9. Remedies. The remedies described in this Paragraph 9. shall be in addition to any other remedies provided for in this Declaration.

A. Correction of Violations. Declarant shall provide written notice to any Owner whose Lot is in violation of this Declaration. The Owner shall have fifteen (15) days from receipt of written notice to take reasonable steps to correct the violation. If reasonable steps have not been taken toward the alleviation or termination of the violation within said fifteen (15) days, Declarant shall have the right, through agents and employees, to enter the Lot for the purpose of taking such steps as are necessary to abate and/or remove the violation. The Owner of the Lot in violation shall pay all costs incurred by Declarant in abating and/or removing the violation, including, without limitation, reasonable attorneys' fees and expenses, within fifteen (15) days of receipt of an invoice for same from Declarant. Beginning on the sixteenth (16th) day after receipt of such invoice, the outstanding balance of the costs incurred shall accrue interest at the rate of ten percent (10%) per annum until paid.

B. Lien. Declarant shall have a perpetual lien upon the Lots to secure, as to any specific Lot, the payment of assessments levied pursuant to Paragraph 8. above and costs incurred by Declarant in maintaining any specific Lot, and such costs shall also be the personal responsibility of the Owner, other than Declarant (and the joint and several obligation of all parties comprising an owner, if applicable) as of the time the assessment or costs come due pursuant to subparagraphs 8.A. and 9.A. respectively. If default in payment continues for a period of forty-five (45) days after the same shall become due and payable, Declarant shall have the right to declare the entire balance of such assessments or costs and any interest thereon to be immediately due and payable and may cause a "Notice of Lien" to be filed with the County Recorder. Such lien shall remain valid for ten (10) years from the time of filing thereof, unless extended or unless sooner released or satisfied in the manner provided by law or discharged by the final judgment or order of the court in an action brought to discharge such lien as hereinafter provided. In the event any such costs are not paid when due, the Declarant may, when and as often as such delinquencies occur, proceed by process of law to collect the amount then due by foreclosure of the above described lien or otherwise, and in such event shall also be entitled to recover and enforce against each Lot a lien for its costs and expenses, including attorneys' fees.

C. Priority of Declarant's Lien. The lien of Declarant may be foreclosed in the same manner as a mortgage on real property in an action brought by Declarant. In any such foreclosure action, Declarant shall be entitled to become a purchaser at the foreclosure sale. Sale or transfer of any Lot shall not affect the Declarant's lien; provided, however, that the sale or transfer of any Lot pursuant to foreclosure of a first mortgage shall, to the extent provided by laws as to liens, extinguish the lien of Declarant as to payments which became due prior to such sale or transfer. No sale or transfer shall relieve such Lot from liability for any costs thereafter becoming due or from the lien thereof.

D. Court Enforcement. Declarant shall have the right to have any breach of the covenants and restrictions contained herein enjoined by order of any court having jurisdiction and the right of specific performance with respect to the provisions of each such covenant or restriction.

10. Amendment. This Declaration may be amended only as follows:

A. Addition or Deletion of Real Property. So long as Declarant owns at least (1) Lot in the Subdivision, this

Declaration may be amended by an instrument in writing signed by Declarant for the purpose of adding real property to the Subdivision, which shall then be subjected to the provisions of this Declaration, or deleting real property from the Subdivision, which shall then not be subjected to the provisions of this Declaration.

B. Amendment by Declarant. So long as Declarant owns at least one (1) Lot in the Subdivision, Declarant reserves the right to add to, modify or waive any or all of the covenants or restrictions set forth herein as to any individual Lot or as to all Lots, as Declarant, in its sole discretion, deems advisable.

C. Other Amendments and Termination. Provided Declarant does not own any Lot in the Subdivision, this Declaration may be amended or terminated for any reason by written instrument signed by Owners owning, in the aggregate, at least two-thirds (2/3) of the Lots in the Subdivision.

D. Amendment Regarding Duties of Association. Notwithstanding the foregoing provisions of this Paragraph 10., no amendment to this Declaration shall materially affect the provisions of subparagraph 8.F. unless such amendment shall be submitted to and approved by the Township of _____ and County of _____.

Any amendment shall become effective from and after the date of filing with the County Recorder an instrument stating the amendment and signed with the formalities required by law for recording by either (i) Declarant, in the case of amendment pursuant to subparagraph 10.A. or 10.B., or (ii) the requisite number of Owners in the case of amendment pursuant to subparagraph 10.C.

11. Miscellaneous Provisions.

A. No Waiver. No covenant, restriction, condition, obligation or provision contained herein shall be deemed to have been abrogated or waived by reason of any failure to enforce the same, regardless of the number of violations or breaches which may occur.

B. Lot Division. Except for Lots owned by Declarant, no Lot shall be further divided, nor shall any portion less than the whole Lot be conveyed, either voluntarily or involuntarily, without prior approval of Declarant.

C. Severability. Invalidation of any one of these covenants or restrictions by judgment or court order shall in no way affect any other provisions, which shall remain in full force and effect.

D. Application of Zoning Code. In the event that the local zoning code or other governmental regulation is more restrictive than this Declaration with regard to matters addressed herein, the local zoning code or applicable regulation shall control; otherwise the provisions of this Declaration shall control.

E. Covenants Binding on Owners. The covenants, rights, terms, reservations, limitations, agreements and restrictions contained in this Declaration shall be deemed to be covenants running with the Subdivision and each Lot therein, and not conditions, and shall bind Declarant and all Owners, their respective heirs, successors and assigns. This Declaration shall create privity of contract and/or estate with and among all Owners of any part of the Subdivision and/or any Lot therein, their heirs, executors, administrators, successors or assigns. It is understood and agreed that the covenants, rights, terms, reservations, limitations, agreements and restrictions herein are part of a uniform plan of development for the Subdivision as a whole, and the recording of this Declaration shall be constructive notice to any present or future Owner or Owners of any interest in the Subdivision and/or any Lot therein of the terms of this Declaration, whether or not specific reference is made in the deed or instrument of transfer to such Owner or Owners. By the acceptance of a deed or other instrument of conveyance, the Owner accepting such instrument automatically thereby consents to and approves of this Declaration and agrees to be bound by its provisions.

F. Duration. This Declaration and the covenants and restrictions set forth herein shall remain binding from the date of

the filing of this Declaration for record in the County Recorder's office and for fifty (50) years thereafter, subject to termination pursuant to subparagraph 10.C. above, and shall automatically extended for successive five (5) year periods thereafter unless on or before expiration of any one (1) such extension period the owners of a majority of the Lots shall by written instrument, duly recorded, declare a termination of the same.

G. Notice. Any notice to be delivered to an Owner hereunder shall be deemed received when mailed, postage prepaid, to the last address of such Owner as such address appears on the records of the County Auditor.

WHEREFORE, Declarant has executed this Declaration of Covenants and Restrictions as of the date first above written.

DECLARANT:

By: _____
_____, Managing Member

STATE OF _____)
COUNTY OF _____) ss:

Before me, a Notary Public in and for said County and State, personally appeared _____, an Ohio limited liability company, by _____, its _____, who acknowledged that he did execute the foregoing and that the same was his free act and deed as such member and the free act and deed of said limited liability company.

IN TESTIMONY WHEREOF, I have hereunto set my hand and official seal at _____,
_____, this _____ day of _____,
_____.

Notary Public

This instrument prepared by:

Address _____
Telephone: _____



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Current Legal Forms for Real Estate

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Current Legal Forms for Real Estate
Chapter 22 DEVELOPMENT AND SUBDIVISION
Part IV. FORMS
E. RESIDENTIAL DEVELOPMENT

26-22 Current Legal Forms for Real Estate FORM 22.84

FORM 22.84 Contract between real estate developer and purchaser of housing development which developer will build--project will provide housing for low-income persons--purchaser of housing project is non-profit corporation--funds to purchase housing project will be provided by government program--developer will transfer housing project to non-profit corporation, which will own and operate project

COMMENT

Some states throughout the nation offer programs that provide funding to non-profit corporations which use the money to purchase housing for low-income Americans. Once purchased, the corporations then own and operate the housing. In the agreement below, a real estate developer agrees to construct a housing development for a non-profit corporation which, in exchange, agrees to purchase it with government-supplied funds, and then own and operate it for the benefit of low-income citizens.

In such cases, the developer will typically file the application for the funds with the applicable state agency. In so doing, the developer must: (1) estimate its costs in acquiring the underlying land and constructing the housing project; and (2) calculate a reasonable profit. Should there be an error in these calculations or a cost overrun during construction, then the developer itself would absorb any loss.

For its part, the non-profit corporation agrees to accept title to the property before completion of the project. In exchange, the developer provides the non-profit corporation with a "hold harmless" covenant in case there is any injury to person or property after title has been transferred to the non-profit corporation and during completion of construction. The developer "backs up" the hold harmless with liability insurance which names the non-profit corporation as the insured.

The construction loan documents, such as the mortgage and the building loan agreement, must be signed by the president of the non-profit corporation as its representative; however, the non-profit

corporation does not sign the promissory note. All documents must provide that the mortgage obligation is non-recourse as to the non-profit corporation.

Under the terms of this agreement, the architect is paid by the developer, but she still has a fiduciary duty that extends to the non-profit corporation. The architect must make certain that, during construction, the drawings, plans and specifications she prepared earlier are fully implemented by the developer. This provision is necessary in order to protect the non-profit corporation, which is not free to terminate the contract if it dislikes the construction job done by the developer.

For additional forms relating to joint ventures, see Chapter 20, Real Estate Entities, in Volume 24, *supra*.

FORM

AGREEMENT made this _____ [day] day of _____ [month], _____ [year], between _____ [name], a non-profit corporation existing under the laws of the State of _____ [state] (hereafter "Transferee"), with offices for the transaction of business at _____ [address], and _____ [name], a(n) _____ [state] _____ [entity], with offices for the transaction of business at _____ [address], (hereafter referred to as "Developer").

WITNESSETH:

WHEREAS, Developer is the contract vendee of a certain parcel of land which is located at _____ [insert geographical location of parcel], in the City of _____ [city], County of _____ [county], and State of _____ [state], more particularly described in Schedule A, which is annexed hereto and made a part hereof; and

WHEREAS, Developer has received preliminary approval from the Department of [_____ insert name of government department or agency that is providing funding for development] of the State of _____ [state] (hereafter referred to as "State") for the construction of _____ (_____) unit project of new construction, which will consist of housing for low-income senior citizens]; and

WHEREAS, the State requires that the owner and operator of a real estate development project for which it grants financing must be a non-profit corporation; and

WHEREAS, Transferee is a non-profit corporation established to assist low-income citizens;

NOW, in consideration of the mutual promises contained herein, it is agreed as follows:

1. *Environmental concerns.* Developer shall engage an experienced and licensed environmental consulting firm to perform a Phase I environmental site assessment. This assessment shall consist of the following, at a minimum:

(a) identification of all prior owners and users of the subject property in order to determine the likelihood that any prior owner may have used or disposed of toxic or hazardous substances on the premises;

(b) a physical inspection of the entire area in order to search for physical indications of the prior use or disposal of toxic

or hazardous substances;

(c) a review of state and federal databases (both computer and otherwise) in order to locate the sites nearest the subject premises which have been previously cited for releasing or disposing of toxic or hazardous substances;

(d) an evaluation of the likelihood of migration of toxic or hazardous substances from such sites to the subject premises; and

(e) a review of current uses of sites adjacent to the subject premises in order to determine the likelihood of current or future contamination of those adjacent sites due to the discharge of toxic or hazardous substances, and the likelihood of migration of such substances from the sites to the subject premises.

In the event that the environmental consulting firm informs the Developer that the results of the Phase I assessment indicate that actual testing of soil, water and/or air samples may be necessary, Developer shall engage the said firm to perform the sampling and testing. In the event that any toxic or hazardous substances are located, Transferee shall have the right to terminate this agreement for good cause. In such case, all expenses incurred pursuant to the provisions of this Paragraph 1 shall be the sole cost and expense of Developer.

Transferee shall be entitled to receive from Developer a copy of a written report prepared by the environmental consulting firm, indicating that there is no evidence of any adverse environmental condition existing on the subject premises due to the disposal or release of toxic or hazardous substances on or near said premises, as described in Schedule A. If such a report is not received by Transferee on or before _____[month] _____[day], _____[year], Transferee may terminate this Agreement for good cause. In such case, all expenses incurred pursuant to the provisions of this Paragraph 1 shall be the sole cost and expense of Developer.

2. *Approvals.* Developer shall prepare and submit all necessary applications to the City of _____[city] in order to obtain zoning and planning board approvals. Transferee shall attend and testify at any hearing, upon the request of Developer. Transferee shall review all applications prior to submission, if requested to do so by Developer.

3. *Transfer of title.* Transferee agrees to accept transfer of title prior to completion of construction. Upon transfer of title, Developer shall provide to Transferee the following items at Developer's sole cost and expense:

(a) An abstract of title or a title insurance policy evidencing marketable title, which is free and clear of any and all liens. The title must also be free of any easements, except for water, sewer, electric, gas, telephone and cable television easements. In the event that other easements exist, Developer will obtain a release prior to transfer of title.

(b) An assignment of the contract entered into by Developer for the purchase and sale of the undeveloped property described in Schedule A, which assignment shall include the written consent of the contract vendor to the assignment.

(c) A warranty deed.

(d) A preliminary survey certified to Transferee and showing all existing easements. A final survey showing the project as completed shall be provided by Developer upon completion of construction. The "as built" survey shall be certified to Transferee and to the State

4. *Mortgage.* Developer shall arrange for construction financing. Developer shall be obligated on the note. Transferee shall sign only the mortgage. The loan documents shall specifically provide that the loan shall be without recourse to Transferee. Developer shall pay all costs associated with the mortgage closing, including, but not limited to:

(a) state mortgage tax (if any);

(b) mortgage and deed recording fees;

(c) building loan agreement filing fee;

(d) mortgage loan points;

(e) appraisal fee;

(f) application fee; and

(g) legal fees to lender and Transferee.

5. *Insurance.* Developer shall obtain the following types of insurance for the benefit of Transferee and the construction lender:

(a) liability insurance in at least the amount of _____ Dollars (\$_____) for any single incident, and _____ Dollars (\$_____) in the aggregate;

(b) casualty insurance in at least the amount of _____ Dollars (\$_____);

(c) a completion bond with a value equal to at least the amount of the construction contract; and

(d) contractual liability insurance to fund the hold harmless clause contained herein.

All insurance policies shall name Transferee and the construction lender as additional insureds. Copies of the policies shall be delivered to Transferee at the time of transfer of title. All policies shall have a provision requiring written notice of cancellation to be sent by the insurer to the Transferee at least _____ (_____) days prior to the effective date of such cancellation, regardless of the reason for such cancellation.

6. *Hold harmless.* Developer shall indemnify and hold Transferee harmless from and against any and all claims and losses--including costs of defense, attorneys' fees, judgments, settlements, etc.--for any injury to persons or property occurring on or about the premises described in Schedule A, which injury occurs during the period extending from the transfer of title until the acceptance of the building by Transferee or issuance of a certificate of occupancy by the City of _____[city], whichever is later, regardless of when the claim is actually brought.

7. *Scope of the project.* The project shall consist of _____ (_____) units of housing designed in the "townhouse" style.

Each unit shall be on ground level and shall be accessible to the handicapped. Each unit shall contain:

(a)

_____) bedroom;

(b)

_____ (_____) full bathroom;

(c) a kitchen with an eating area measuring no less than

_____ (_____) feet by _____ (_____) feet;

(d) a living room; and

(e) a porch or deck area.

Each unit shall also contain storage space and a driveway large enough to park a single car.

The project shall also contain a community building with laundry facilities, an office for the manager, and a meeting room with kitchen facilities attached.

Units may be attached to each other in groups of no more than _____ (_____) units. If attached units are constructed, then common parking areas may be used, instead of driveways.

8. *Construction.* Developer shall engage a reputable contractor to construct the project described herein. All work shall be of superior quality and shall strictly comply with all state and local building codes. The architect's drawings, plans and specifications are annexed hereto as Schedule B and made a part hereof. Said Schedule B shall form part of this contract. The construction shall conform in all respects to said Schedule B. The architect shall determine whether the construction meets the standards set forth herein. Developer shall make all modifications required by the architect in order to be certain that the construction conforms to the architect's drawings, plans and specifications.

9. *Warranty.* Developer shall obtain from the contractor a warranty on the project. The warranty shall cover defects in labor and materials for at least _____ (_____) years on the entire project. The warranty shall run to Transferee and shall not allow for consequential damages. In addition, the following major items and systems shall be warranted for a period of at least _____ (_____) years:

- (a) the roof;
- (b) the plumbing system;
- (c) the heating, ventilation and air conditioning system (HVAC); and
- (d) the foundation.

Transferee shall be the beneficiary on any manufacturer's warranty on household appliances. The warranty provided by the contractor shall state that the contractor shall be responsible for repair of any defect in the household appliances, and

shall act as Transferee's subrogee on any manufacturer's warranty.

The warranty provided by the contractor shall also state that the contractor shall act within twenty-four (24) hours of receipt of notice of any defect in the plumbing system or the HVAC system.

10. *Completion of construction.* Upon the completion of construction, Developer shall obtain a certificate of occupancy from the City of _____[city]. Developer shall also obtain certification from the architect that the project has been completed in accordance with the architect's plans and specifications.

In the event that minor items still remain to be completed or repaired, a list of such items may be prepared by Transferee and the architect. Developer shall complete or repair the list items within _____ (_____) days after receipt of the list. (The term "minor items" shall mean any single item which costs less than _____ Dollars (\$_____) to complete or repair; the term shall also mean all such items together, the aggregate cost of which to complete or repair may not exceed _____ Dollars (\$_____). If the list items are not completed or repaired by the Developer before the closing with the State, then the sum of _____ Dollars (\$_____) shall be withheld from Developer's fee until all such items are completed or repaired to the satisfaction of Transferee and the architect.

11. *Architect.* The architect or firm shall be _____[name]. The architect shall be paid by Developer. However, the architect shall be the agent of Transferee. The architect shall not be changed without the prior written consent of Transferee. The architect shall be provided with a copy of this Agreement, and any amendments thereto, by Developer.

12. *License.* Transferee shall give Developer, its agents, employees, and invitees a limited revocable license to enter onto the property described in Schedule A during the period of construction, for the purpose of performing the tasks required hereunder.

13. *Closing with State.* Developer shall be paid the purchase price of _____ Dollars (\$_____) at the closing with the State. Such payment is to be paid from the State funds allocated to this project, based on the application made by Developer prior to the date of this Agreement. There is no obligation on the part of Transferee to make any payment to Developer from its own funds. Any shortfall shall reduce the amount of funds due to Developer. Developer shall pay off the construction mortgage from the purchase price funds.

14. *Transferee to own and operate housing project.* Transferee agrees to own and operate the project in full compliance with all applicable State regulations for the period of _____ (_____) years. Throughout this entire period, this housing project must be used to provide affordable housing to persons of low and moderate income, as defined by the State.

15. *Entire agreement.* This Agreement, together with the other written agreements and instruments executed concurrently herewith or pursuant to the provisions hereof, contains the entire agreement between the parties concerning the matters herein set forth and supersedes all prior agreements between them respecting such matters.

16. *Counterparts.* This Agreement may be executed in two or more counterparts, each of which shall be deemed an original, but all of which together shall constitute one and the same instrument. At the trial of any matter arising under this Agreement, only one counterpart need be produced.

17. *Headings.* Paragraph headings are for the purposes of convenience and identification only and shall not be used to interpret or construe this Agreement.

18. *Waivers.* Except as herein expressly provided, no waiver by either party of any breach of this Agreement, or of any

warranty or representation hereunder, shall be deemed to be a waiver by the same party of any other breach of any kind or nature (whether preceding or succeeding the breach in question, and whether or not of the same or similar nature).

No acceptance by a party of payment or performance after any such breach shall be deemed to be a waiver of any breach of this Agreement or of any representation or warranty hereunder, whether or not the party knows of the breach when it accepts such payment or performance.

No failure by a party to exercise any right it may have under this Agreement or under law upon another party's default, and no delay in the exercise of that right, shall prevent it from exercising the right whenever the other party continues to be in default. No such failure or delay shall operate as a waiver of any default or as a modification of the provisions of this Agreement.

19. *Gender and number.* Whenever the singular or plural number, or the masculine, feminine or neuter gender, is used herein, it shall equally include the other(s).

20. *Notices.* Any notice which any party is required or may desire to give hereunder shall be in writing and may be personally delivered, transmitted by facsimile machine, or delivered by the United States Postal Service or private delivery service to the above addresses. Notice is deemed given when received.

21. *Governing law.* This Agreement shall be construed and enforced in accordance with the laws of the State of _____[state].

22. *Binding effect.* This Agreement shall be binding upon, and inure to the benefit of, both parties and their respective heirs, representatives, successors and assigns.

23. *Termination.* This Agreement may only be terminated by a party for good cause. Termination shall only become effective upon receipt of the written consent of the State to the termination. In the event the State fails to consent to the termination, then the parties shall be obligated to fulfill the terms of this Agreement in their entirety.

The parties hereto have set their hands and seals the day and year first above written.

"TRANSFeree"

a(n) _____ [state] _____ [entity]

By: _____

Print Name: _____

Title: _____

[Attach Schedule A]

[Attach Schedule B]

STATE OF _____ [state])
) SS:

26-22 Current Legal Forms for Real Estate FORM 22.84

COUNTY OF _____ [county])

BEFORE ME, a Notary Public in and for said County and State, personally appeared _____ [name],
 a(n) _____ [state] _____ [entity], by _____ [name], its
 _____ [title], who acknowledged that _____ [he/she] did sign the foregoing
 instrument for and on behalf of said corporation, being thereunto duly authorized, and that the same is
 _____ [his/her] free act and deed individually and as such officers and the free act and deed of said
 _____ [entity].

IN TESTIMONY WHEREOF, I have hereunto set my hand and official seal at _____ [city],
 _____ [state], this _____ [day] day of _____ [month], _____ [year].

 Notary Public

"DEVELOPER"

 a(n) _____ [state] _____ [entity]

By: _____

Print Name: _____

Title: _____

STATE OF _____ [state])
 COUNTY OF _____ [county]) SS:

BEFORE ME, a Notary Public in and for said County and State, personally appeared _____ [name],
 a(n) _____ [state] _____ [entity], by _____ [name], its
 _____ [title], who acknowledged that _____ [he/she] did sign the foregoing
 instrument for and on behalf of said corporation, being thereunto duly authorized, and that the same is
 _____ [his/her] free act and deed individually and as such officers and the free act and deed of said
 _____ [entity].

IN TESTIMONY WHEREOF, I have hereunto set my hand and official seal at _____ [city],
 _____ [state], this _____ [day] day of _____ [month], _____ [year].

 Notary Public



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Current Legal Forms for Real Estate

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Current Legal Forms for Real Estate
Chapter 22 DEVELOPMENT AND SUBDIVISION
Part IV. FORMS
E. RESIDENTIAL DEVELOPMENT

26-22 Current Legal Forms for Real Estate FORM 22.85

FORM 22.85 Contract between real estate developer and purchaser of housing development which developer will build--project will provide housing for low-income persons--purchaser of housing project is non-profit corporation--funds to purchase housing project will be provided by government program--developer will transfer housing project to non-profit corporation, which will own and operate it--alternate form

COMMENT

As noted in the Comment to the immediately preceding Form 22.84, some states throughout the nation offer programs that provide funding to non-profit corporations which use the money to purchase housing for low-income Americans. Once purchased, the corporations then own and operate the housing project.

In the agreement below, a real estate developer agrees to rehabilitate an abandoned public school building and turn it into rental units. The rehabilitated structure will then be transferred to a non-profit corporation, which agrees to purchase it with government-supplied funds and then own and operate it for the benefit of low-income citizens for a fixed number of years.

In the form below, the developer files the application for funds with the applicable state agency. In so doing, the developer must: (1) estimate its costs in acquiring the property and rehabilitating it; and (2) calculate a reasonable profit for itself. Should there be an error in these calculations or a cost overrun during construction, then the developer itself would absorb any shortfall.

For its part, the non-profit corporation agrees to accept title to the property. Typically, the government agency providing the financing covers all expenses of the non-profit corporation--including, among others, attorneys' fees and title review costs--as a further incentive for the non-profit corporation to participate in the program. The non-profit corporation is contractually obligated to own and operate the rental property for a fixed number of years. After that time period has expired, the corporation will own the property free and clear of any further

duty owed to the state.**FORM**

AGREEMENT made this _____ [day] day of _____ [month], _____ [year], between _____ [name], a non-profit corporation existing under the laws of the State of _____ [state], with offices for the transaction of business at _____ [address] (hereafter referred to as "Non-profit corporation"), and _____ [name] a(n) _____ [state] _____ [entity], with offices for the transaction of business at _____ [address] (hereafter referred to as "Developer").

WITNESSETH:

WHEREAS, Developer is the contract vendee for a parcel of real property commonly known as _____ [identify the property that is being rehabilitated into housing units, e.g., Public School No. 19, located in the City of _____ [city] and State of _____ [state]], and more particularly described in Schedule A, which is annexed hereto and made a part hereof; and

WHEREAS, it is the intention of Developer to rehabilitate _____ [e.g., the former school building] into rental housing units for low-income persons; and

WHEREAS, it is the intention of Developer to seek funding for the project from the Department of _____ [insert name of state department or agency that is providing funding for project, e.g., Housing and Community Development] of the State of _____ [state] (hereafter referred to as the "State"); and

WHEREAS, the State requires that the ultimate owner of the project be a non-profit corporation; and

WHEREAS, the Non-profit corporation has experience in owning and operating rental housing for low-income persons, and is willing to accept this project;

NOW, in consideration of the mutual promises contained herein, it is agreed as follows:

1. *Developer to file application for State funding for rehabilitation project.* Developer shall make and file a funding application with the State for the rehabilitation project described above. This application shall comply in all respects to the regulations and departmental policies issued by the State. The application shall be subject to review and approval by the Non-profit corporation prior to filing. The Non-profit corporation shall not unreasonably withhold approval. Developer shall promptly make all changes reasonably requested by the Non-profit corporation. The parties shall cooperate so that the completed application will be filed on or before _____ [month] _____ [day], _____ [year].

2. *Obtaining architectural plans for rehabilitation project.* Developer shall engage the architectural firm of _____ [name], located at _____ [address], to prepare all architectural plans needed for the project. These plans shall include construction drawings, site plans and other materials that will be necessary to win municipal approval of the project, as well as approval from the State agency that is providing funding. The fee charged by the architectural firm shall be the expense of the Developer.

3. *Developer to seek municipal approval for project.* Upon receipt of preliminary notice from the State that it will grant funding for the project, Developer shall make application for any municipal approvals required from the City of

_____[city]. As requested by Developer, the Non-profit corporation shall assist in the preparation of the application and at any hearings conducted pursuant to the application.

4. *Developer to obtain bids from contractors for construction of project.* Upon receipt of the municipal approvals, Developer shall obtain bids from contractors for construction of the project. Developer shall not be obligated to accept the lowest bid. Developer may select any reputable bidder whose bid falls within the project budget submitted to the State by Developer as part of Developer's application for funding. Developer may select a related bidder provided that the bid falls within said budget.

5. *All work by contractor must be performed in first-class manner.* Developer shall require, in its construction contract with the successful bidder, that all work be performed in a first-class manner, in compliance with state and local building codes, and pursuant to the construction drawings prepared by the architectural firm.

6. *Contractor must provide warranty.* Developer shall require the successful bidder to provide a written warranty that incorporates the following provisions. All systems and items described below shall be warranted to be free of any defects in labor and materials for the following periods of time, measured from issuance of the certificate of occupancy:

(a) the roof, _____ (_____) years;

(b) the plumbing system, _____ (_____) years;

(c) the heating, ventilation and air conditioning system (HVAC), _____ (_____) years; and

(d) all other work, _____ (_____) years.

The warranty shall run from the contractor to the Developer and shall be transferable to the Non-profit corporation. The warranty shall not exclude consequential damages.

7. *Completion bond.* Developer shall require a completion bond from any contractor who is awarded the contract. The completion bond shall be delivered to Developer prior to the commencement of construction.

8. *Builder's all-risk insurance.* Developer shall require the successful bidder to obtain builder's all-risk insurance, including personal injury insurance with a limit of _____ Dollars (\$_____), and property damage coverage with a limit of _____ Dollars (\$_____). The certificate of insurance evidencing coverage shall be delivered to Developer prior to the commencement of construction. The policy of insurance shall contain a provision requiring notice of cancellation to be sent to Developer at least _____ (_____) days prior to the effective date of cancellation.

9. *Historic preservation considerations.* Developer acknowledges that all aspects of the existing structure that are designated as historically significant by the State of _____ [state] shall be preserved during construction. These shall include, at a minimum, _____ [e.g., the classroom blackboards, school bell, and the iron cupola on the roof].

10. *Construction financing.* Developer shall be entitled to procure whatever construction financing it shall deem necessary or appropriate to facilitate completion of the project. All expenses in connection with such financing shall be the sole responsibility of Developer.

11. *Certificate of occupancy.* Upon completion of construction, Developer shall obtain a certificate of occupancy from the City of _____ [state] for the structure as a whole and one for each dwelling unit contained therein.

Copies of the certificates of occupancy shall be provided to the Non-profit corporation and to the State.

12. *Environmental considerations.* In the event that any environmental problems are discovered during the course of construction, such problems shall be remediated at the sole expense of Developer. Such remediation activities shall be in strict compliance with all federal, state and local laws, regulations and policies.

13. *Asbestos.* The parties acknowledge that there is asbestos insulation in the structure. Such asbestos insulation is located in the following places in the building: _____ [*designate areas*]. All asbestos shall be removed from the premises. Developer shall not be entitled to use "asbestos containment" procedures. Developer shall use only licensed asbestos handlers in conducting such removal. Once removal is completed, the premises must undergo an air quality test, indicating that the premises then meet or exceed State regulatory standards for acceptable levels of friable asbestos fibers in an enclosed area. Copies of all air-testing results shall be provided to the Non-profit corporation within _____ (_____) hours of receipt by Developer.

14. *Closing.* Upon receipt of the certificates of occupancy, the parties shall schedule a closing with representatives of the State. At the closing:

(a) Developer shall provide to the Non-profit corporation releases of liens from all subcontractors and materialmen.

(b) Developer shall provide evidence that title is marketable. Title shall be free of all liens. The only acceptable easements shall be for water, sewer, gas, electric, telephone and cable television service. In the event that any other easements burden the property, Developer shall obtain a release at the request of the Non-profit corporation.

(c) Developer shall provide the Non-profit corporation with a survey certified to both the Non-profit corporation and the State, showing the property described in Schedule A as having been completely built.

(d) Developer shall provide a warranty deed, with deed stamps affixed in the proper amount, so as to convey fee title to the Non-profit corporation.

(e) Developer shall receive from the State a check in the sum of _____ Dollars (\$_____).

15. *Non-profit corporation to own and operate housing project for fixed term of years.* The Non-profit corporation agrees to own and operate the project, in full compliance with all State regulations, for a period of _____ (_____) years. During said period, the Non-profit corporation agrees that this project shall be used solely to provide affordable rental housing to persons of low and moderate incomes, as defined by applicable State regulations.

16. *Entire agreement.* This Agreement, together with the other written agreements and instruments executed concurrently herewith or pursuant to the provisions hereof, contains the entire agreement between the parties concerning the matters herein set forth and supersedes all prior agreements between them respecting such matters.

17. *Counterparts.* This Agreement may be executed in two or more counterparts, each of which shall be deemed an original, but all of which together shall constitute one and the same instrument. At the trial of any matter arising under this Agreement, only one counterpart need be produced.

18. *Headings.* Paragraph headings are for the purposes of convenience and identification only and shall not be used to interpret or construe this Agreement.

19. *Waivers.* Except as herein expressly provided, no waiver by either party of any breach of this Agreement, or of any

warranty or representation hereunder, shall be deemed to be a waiver by the same party of any other breach of any kind or nature (whether preceding or succeeding the breach in question, and whether or not of the same or similar nature).

No acceptance by a party of payment or performance after any such breach shall be deemed to be a waiver of any breach of this Agreement or of any representation or warranty hereunder, whether or not the party knows of the breach when it accepts such payment or performance.

No failure by a party to exercise any right it may have under this Agreement or under law upon another party's default, and no delay in the exercise of that right, shall prevent it from exercising the right whenever the other party continues to be in default. No such failure or delay shall operate as a waiver of any default or as a modification of the provisions of this Agreement.

20. *Gender and number.* Whenever the singular or plural number, or the masculine, feminine or neuter gender, is used herein, it shall equally include the other(s).

21. *Notices.* Any notice which any party is required or may desire to give hereunder shall be in writing and may be personally delivered, transmitted by facsimile machine, or delivered by the United States Postal Service or private delivery service to the above addresses. Notice is deemed given when received.

22. *Governing law.* This Agreement shall be construed and enforced in accordance with the laws of the State of _____[state].

23. *Binding effect.* This Agreement shall be binding upon, and inure to the benefit of, both parties and their respective heirs, representatives, successors and assigns.

24. *Termination.* This Agreement may only be terminated by a party for good cause. Termination shall only become effective upon receipt of the written consent of the State to the termination. In the event the State fails to consent to the termination, then the parties shall be obligated to fulfill the terms of this Agreement in their entirety.

The parties hereto have set their hands and seals the day and year first above written.

"NON-PROFIT CORPORATION"

a(n) _____[state] _____[entity]

By: _____

Print Name: _____

Title: _____

STATE OF _____[state])
COUNTY OF _____[county]) SS:

BEFORE ME, a Notary Public in and for said County and State, personally appeared _____[name],
a(n) _____[state] _____[entity], by _____[name], its

_____[title], who acknowledged that _____[he/she] did sign the foregoing instrument for and on behalf of said corporation, being thereunto duly authorized, and that the same is _____[his/her] free act and deed individually and as such officers and the free act and deed of said _____[entity].

IN TESTIMONY WHEREOF, I have hereunto set my hand and official seal at _____[city], _____[state], this _____[day] day of _____[month], _____[year].

Notary Public

"DEVELOPER"

a(n) _____[state] _____[entity]

By: _____

Print Name: _____

Title: _____

STATE OF _____[state])
COUNTY OF _____[county]) SS:

BEFORE ME, a Notary Public in and for said County and State, personally appeared _____[name], a(n) _____[state] _____[entity], by _____[name], its _____[title], who acknowledged that _____[he/she] did sign the foregoing instrument for and on behalf of said corporation, being thereunto duly authorized, and that the same is _____[his/her] free act and deed individually and as such officers and the free act and deed of said _____[entity].

IN TESTIMONY WHEREOF, I have hereunto set my hand and official seal at _____[city], _____[state], this _____[day] day of _____[month], _____[year].

Notary Public

[Attach Schedule A]



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Current Legal Forms for Real Estate
Chapter 22 DEVELOPMENT AND SUBDIVISION
Part IV. FORMS
E. RESIDENTIAL DEVELOPMENT

26-22 Current Legal Forms for Real Estate FORM 22.86

FORM 22.86 Declaration of expandable condominium-housing for older persons

COMMENT

In connection with the development of a residential condominium community, the developer will "declare" that the land is a condominium. The declaration is a written document which is filed in the public office where deeds are typically filed. It puts the world on constructive notice that the property is governed by a condominium declaration.

The contents of a declaration of condominium are determined principally by two factors: the items required under the applicable condominium statute and the draftsman's decision as to whether other items should be covered in the declaration or in the bylaws. The following form is an expandable condominium. As expandable condominium is typically when an adjacent parcel is being held back to see if the project is successful. If the project is successful, the condominium declaration is expanded to cover the adjacent parcel. Further, this declaration is intended to limit the occupants of the units to persons that are fifty-five (55) years of age or older.

For additional forms relating to condominium development and condominium associations, see Chapter 20, Real Estate Entities, in Volume 24, *supra*.

FORM

BAYVIEW CONDOMINIUMS

DECLARATION OF CONDOMINIUM OWNERSHIP
AN EXPANDABLE CONDOMINIUM

This will certify that a copy of this Declaration, together with Bylaws, drawings, legal descriptions and other documents attached hereto as exhibits, have been filed in the Office of the County Auditor, _____[county]
County, _____[state].

Date: _____[month] _____[day], ____[year]

COUNTY AUDITOR

By: _____

[name]

**DECLARATION OF CONDOMINIUM OWNERSHIP
FOR
BAYVIEW CONDOMINIUMS**

This Declaration of Condominium Ownership ("Declaration") is made this _____[day] day of
_____ [month], ____ [year], by Bayview, Ltd., the "Declarant," a(n) _____[state]
_____ [entity], for the purpose of submitting certain property to condominium use and ownership in
accordance with the provisions of the Condominium Act.

WHEREAS, Declarant is the owner in fee simple of the premises described on Exhibit A, attached hereto and made a part hereof.

WHEREAS, it is the desire and intention of Declarant to enable the premises described on Exhibit A, together with all buildings, structures, improvements, and other permanent fixtures of whatsoever kind situated or to be situated thereon, and all privileges belonging or in any way appertaining thereto (hereafter called the "Condominium Property"), to be owned under and pursuant to that certain type of ownership commonly known as "CONDOMINIUM" and to subject and submit such property to the provisions of Chapter _____[number] of the Condominium Act, as now in effect and as hereinafter amended.

WHEREAS, Declarant reserves the right and option to submit all or any part of the additional property described on Exhibit B, attached hereto and made a part hereof (the "Additional Property") to the Bayview Condominiums in its sole discretion as set forth hereinbelow.

WHEREAS, Declarant is further desirous of establishing for the mutual benefit of all future owners, mortgagees or occupants of the Condominium Property or any part thereof, certain easements and rights in, over and upon such Condominium Property and certain mutually beneficial restrictions and obligations with respect to the use, conduct and maintenance thereof.

WHEREAS, Declarant desires and intends that several owners, mortgagees, occupants and other persons hereinafter acquiring any interest in the Condominium Property shall at all times enjoy the benefits of, and shall hold their interests therein subject to the terms of this Declaration, and all exhibits or other documents referred to herein, all of which are declared to be in furtherance of a plan to promote and protect the condominium aspect of ownership and to facilitate the proper administration of the Condominium Property and are established for the purpose of enhancing the value, desirability, financial stability, harmony and attractiveness of the Condominium Property.

NOW, THEREFORE, Declarant hereby makes the following Declaration as to the provisions, covenants, restrictions limitations, conditions and uses to which the Condominium Property may be put, hereby specifying that said Declaration shall constitute covenants to run with the land and shall be binding on Declarant, its successors and assigns, and all subsequent owners of all or any part of the Condominium Property, together with their respective grantees, heirs, executors, administrators, devisees, successors and assigns:

ARTICLE I

A. Definitions. The following terms used herein are defined as follows.

1. "Act" means the _____ Condominium Act as contained in _____ [citation to relevant statute], as the same may be amended or supplemented from time to time.

2. "Additional Property" means the parcels described on Exhibit B, attached hereto, or so much thereof as may hereafter be submitted to the provisions of the Act, the additional residential buildings and all other structures, improvements and facilities that may hereafter be constructed or installed on the parcel described on Exhibit B, all easements, rights and appurtenances thereto belonging, and all articles of personal property that may be owned by Declarant and may be located on the land described on Exhibit B, for the common use of the Unit Owners.

3. "Additional Drawings" means the drawings that shall accompany any Amendment of this Declaration pursuant to which the Additional Property or any portion thereof may be submitted to the provisions of the Act.

4. "Additional Residential Buildings" means the part of the Additional Property which will consist of such additional single-family residential buildings as may be constructed from time to time upon the land described on Exhibit B, pursuant to the provisions of Article XIV hereof.

5. "Assessments" means regular and special assessments charged proportionately against all Units for accounting purposes.

6. "Association" means the Bayview Condominium Unit Owners Association, Inc., a non-profit corporation to be formed under the State of _____ [state], which shall be a unit owners' association as defined in Section _____ [number] of the Act.

7. "Board" means the Board of Managers of the Association as the same may be constituted from time to time.

8. "Bylaws" means the Bylaws of the Association, marked Exhibit C, attached hereto and made a part hereof.

9. "Common Areas and Facilities" or "Common Areas" means all parts of the Condominium Property except the Units.

10. "Common Surplus" means the amount by which common assessments collected during any period, exceed expenses.

11. "Common Expenses" means all costs, expenses and charges which the Association may charge against a Unit or a Unit Owner as Assessments, pursuant to this Declaration, Bylaws or the Act.

12. "Common Losses" means the amount by which the common expenses during any period of time exceeds Common Assessments and Common Profits during that period.

13. "Common Profits" means the amount by which the total income received from assessments charges for special benefits to specific Units, rents received from rentals of equipment or space in Common Areas, and any other fee, charge or income other than Common Assessments, exceeds expenses allocable to the income, rental, fee or charge.

14. "Condominium Ownership Interest" means a fee simple estate in a Unit, together with its appurtenant, undivided interest in the Common Areas and Facilities.

15. "Condominium Property" means the land described on Exhibit A, attached hereto, and the appurtenant easement for ingress and egress and utilities described in Exhibit A, if any, the Single-Family Buildings located thereon, all other structures, improvements and facilities that have been or may hereafter be constructed or installed on the land described on Exhibit A, and all easements, rights and appurtenances thereto belonging, and all articles of personal property owned by Declarant or the Association and now or hereafter located on the land described on Exhibit A for the common use of the Unit Owners, provided, however, that if Declarant submits the Additional Property to the provisions of the Act by amending this Declaration, references herein to Condominium Property shall include the Additional Property or so much thereof as is added to the Condominium Property.

16. "Condominium Roadway" means the private roadway to be called Bayview Court upon which the Single-Family Buildings front, and which roadway connects the driveways of the Units to the dedicated roadway known as _____[name], and such private roadway is part of the Common Areas and Facilities.

17. "Declaration" means this instrument and all of the Exhibits hereto, as originally executed, or if amended, as so amended, by which the Condominium Property is submitted to the provisions of the Act.

18. "Drawings" means the drawings prepared and certified a registered surveyor, which Drawings are to be filed with this Declaration; provided, however, that if the Additional Property is submitted to the provisions of the Act by amending this Declaration, reference herein to Drawings shall include the Additional Drawings.

19. "Expandable Condominium Property" means a Condominium Property in which this Declaration reserves the right to add Additional Property.

20. "General Provisions" means the covenants, restrictions and easements imposed pursuant to the documents identified in Exhibit E hereof.

21. "Limited Common Areas and Facilities" or "Limited Common Areas" means the Common Areas and Facilities reserved for the use of a certain Unit or Units to the exclusion of all other Units.

22. "Occupant" means the natural person or persons in possession of a Unit.

23. "Par Value" means a number expressed in points attached to a Unit by this Declaration; each Unit is assigned the equal par value of one (1).

24. "Single-Family Buildings" means that part of the Condominium Property consisting of the single-family residential buildings constructed on the land described on Exhibit A and further depicted on Exhibit B; provided, however, that if the Additional Property is submitted to the provisions of the Act by amending this Declaration, references herein to Single-Family Buildings shall include the Additional Single-Family Buildings.

25. "Rules" means such rules and regulations as the Association may periodically adopt relative to the use of all or any part of the Condominium Property.

26. "Special Charges" means all costs, expenses and charges (excluding Assessments) which the Association shall

charge against a Unit or a Unit Owner pursuant to this Declaration, the Bylaws or the Act.

27. "Unit" means that part of the Condominium Property designated in Article II hereof and delineated on the Drawings, provided, however, that if Declarant submits the Additional Property or any portion thereof to the provisions of the Act, the references herein to "Unit" shall include each Unit comprised as part of the Additional Property.

28. "Unit Owner" or "Owner" means a person or persons, natural or artificial, owning the fee simple estate in a Unit, together with its appurtenant, undivided interest in the Common Areas and Facilities.

29. All other terms and/or words used herein that are defined in Chapter _____[number] of the Act have the same meaning as set forth therein.

B. Name. The Condominium Property shall be known as the BAYVIEW CONDOMINIUMS.

ARTICLE II

Establishment of Condominium Ownership,
Division and Declaration of Condominium Property

Declarant, in order to establish a plan of Condominium ownership for the Condominium Property, hereby submits the Condominium Property, hereinbefore described, to the provisions of Chapter _____[number] of the Act. The Condominium Property shall include the structures separately designed and legally described freehold estates, hereinafter described and referred to as "Units," and underlying freehold estate, hereinafter described and referred to as the "Common Areas and Facilities" (including Limited Common Areas and Facilities).

A. Units. The Condominium Property will initially be comprised of four (4) Single-Family Units (identified as Building Nos. _____[number] and _____[number] in the Drawings. Each Unit bears the identifying number as shown on the Drawings. The addresses, type of Units, square footage of each Unit and description of the Units are set forth on Exhibit D, attached hereto and made a part hereof. Each such Unit has appurtenant to it a two-car attached garage.

Subject to the provisions of subparagraph B, next following, each Single-Family Unit consists generally of the entire residential building (with attached garage) including the foundation, walls, and roof together with everything contained within the building such as heating, electrical and plumbing equipment and fixtures, appliances, and that portion of the utility systems as are located fully within and/or servicing solely that Unit, to which the same are appurtenant.

No Unit Owner shall, by deed, plat or otherwise, subdivide or by any other means cause his Unit to be separated into tracts or parcels as the whole Unit is shown on the Drawings. Each Unit Owner shall be entitled to the exclusive ownership and possession of his Unit, and to the ownership of an undivided interest in the Common Areas and Facilities, in the percentage designated on Exhibit D, attached hereto.

B. Common Area and Facilities

1. (a) Description of Common Areas and Facilities. That part of the Condominium Property which comprises the Common Areas and Facilities consists of all parts of the Condominium Property which have not been designated nor delineated as part of the Units in this Declaration or in the Drawings, including the Limited Common Areas and Facilities described in subparagraph (b) next following, and the Condominium Roadway.

(b) Limited Common Areas and Facilities. The Limited Common Areas and Facilities consist of the following:

- (i) The driveway and apron which is accessory to each Unit and which connects to the Condominium Roadway.
- (ii) Any utility pipe, line or system connecting a single Unit to a main or trunk, which main or trunk serves more than a single Unit; and any sump pump serving a single Unit.
- (iii) That portion of the real property (land) surrounding the foundation of the Unit as depicted on the Drawings.
- (iv) That portion of the real property (land) upon which a Unit is situated.

2. Use of Common Areas and Facilities. Each owner of a Unit shall own an undivided interest in the Common Areas and Facilities as a tenant in common with all other such owners, and, except as otherwise limited in this Declaration and in the Bylaws attached hereto as Exhibit C, shall have the right to use the Common Areas and Facilities for all purposes incident to the use and occupancy of his Unit for the purposes described in Article V below, subject to the right of other Unit Owners to the use and enjoyment of the Common Areas and Facilities and for ingress and egress to and from the respective Units, which rights shall be appurtenant to and shall run with his Unit. The extent of such ownership in the Common Areas and Facilities is hereby deemed and expressed by the Par Value of the Unit and shall be filed for record. Each Unit is being assigned an equal par value of 1. The percentages in the Common Areas and Facilities applicable to a Unit set forth on Exhibit D, attached hereto, is based upon the par value of 1 assigned to each Unit divided by the total of the par values for all the Units. The procedures whereby the aforesaid percentage interest may be altered are set forth in Article XV, Section H, below. Except as permitted by Article XV, the percentages of interest cannot be altered or amended except by an amendment to this Declaration unanimously approved by all the Unit Owners affected. Where a Unit is owned by more than one person, whether fiduciaries, tenants in common or otherwise, each shall be entitled to exercise the proportion of the voting power for such Unit as is equivalent to such person's proportionate interest in the Unit.

3. Ownership of Common Areas and Facilities. The percentage of ownership interest in the Common Areas and Facilities attributable to the ownership interest in each Unit, together with the percentage of interest in the division of common profits and expenses, as hereinafter described in Section B, of Article VI of this Declaration, are set forth on Exhibit D, attached hereto. The voting rights of the Unit Owners shall be in accordance with their respective interests in the Common Areas and Facilities.

4. Parking Areas. A Unit Owner shall have the right to use the outdoor parking spaces within the Condominium Property as shown on the Drawings, which are not designated as Limited Common Areas and Facilities, on a non-exclusive basis in common with other Unit Owners, and their respective guests and invitees. Such use shall be subject to Rules from time to time established by the Association.

5. Regulation of Common Areas and Facilities

(a) Regulation by Association. No person shall use the Common Areas and Facilities or any part thereof in any manner contrary to or not in accordance with such Rules pertaining thereto as from time to time may be adopted by the Association, which Rules shall not be in conflict with the provisions hereof. Without in any manner intending to limit the generality of the foregoing, the Association shall have the right, but not the obligation, to promulgate Rules limiting the use (subject to all easements) of the Common Areas and Facilities to members of the Association and their respective families, guests, invitees and servants, as well as to provide for the exclusive use by a Unit Owner and his guests for special occasions, of recreational areas and other similar facilities, if any. Such use may be conditioned upon, among other things, the payment by the Unit Owner of such assessment as may be established by the Association for the purposes of defraying costs thereof.

(b) Use of Common Areas and Facilities. Subject to the Rules from time to time promulgated by the Association, all

owners may use the Common Areas and Facilities in such manner as will not restrict, interfere or impede the use thereof by the other Unit Owners.

ARTICLE III

General Provisions as to Units and Common Areas and Facilities

A. Maintenance of Units

1. By the Association. Except as otherwise provided in Section 2, next following, the Association at all times, at its cost and expense, shall maintain the Common Areas and Facilities in good order, condition, replacement and repair, shall maintain, plant, seed, reseed, fertilize, cut and trim all of the lawns comprised as part of the Condominium Property, including the Limited Common Areas defined in Article II, Section B. 1.(b)(ii) above and shall edge and mulch all landscape beds and shall trim all shrubs, bushes and trees. The Association shall plow snow from the driveways and all front sidewalks, which sidewalks are on areas designated as Limited Common Areas in Article II, Section B. 1.(b) hereof, as well as from the Condominium Roadway.

2. By the Unit Owner. Each Unit Owner at all times shall:

(a) Except as set forth in subparagraph A.1., immediately above, clean, maintain, repair and replace, at his cost and expense, his Unit and the Limited Common Areas and Facilities appurtenant to his Unit, in good order, condition, replacement and repair, subject however, to the provisions of Article VIII below.

(b) Maintain, repair and replace, at his cost and expense, that portion of the utility systems appurtenant to his Unit, designated as Limited Common Areas in Article II, Section B.1.(b) above, as well as that portion of the utility systems located wholly within and/or servicing only his Unit, subject however to the provisions of Article VIII below.

(c) Perform his responsibilities in such a manner as shall not unreasonably disturb the Occupants of other Units.

(d) Pay all costs for utility services furnished to his Unit, and for the Limited Common Areas and Facilities appurtenant to his Unit.

(e) Promptly report to the Association (or the managing agent, if any) employed by it, the need for any repairs to any portion of the Condominium Property which are the obligations of the Association to maintain hereunder.

(f) Reimburse the Association for such costs, if any, in excess of proceeds of insurance, if any, as the Association shall incur for maintaining, repairing or replacing any portion of the Common Areas and Facilities (including those portions thereof designated in this Declaration as Limited Common Areas and Facilities) which may be damaged or destroyed by his act or negligence, or by the act or negligence of any of his tenants, invitees, licensees or guests.

3. No Contractual Liability of Association. Nothing herein contained, however, shall be construed so as to impose a contractual liability upon the Association for maintenance, repair and replacement, except to the extent funds shall be available and said maintenance, repair and replacement shall be deemed necessary by the Board of the Association.

B. Right to Correct. If any Unit Owner fails to perform any act required of such Owner by this Declaration, the Bylaws or the Rules of the Association, the Association may, but shall not be obligated to, undertake such performance or cure such violation, and shall charge and collect from the defaulting Unit Owner the entire cost and expense, including reasonable attorneys' fees incurred by the Association in effecting such performance or cure. Any such amount shall be

deemed to be an additional assessment upon the Owner and such Owner's Unit, and shall be due and payable with the payment for Common Expenses which falls due next following notification by the Association of such assessments. The Association may obtain a lien for said amount against such Owner and such Owner's Unit, to the extent as if it were a lien for common expenses.

C. Construction Defects. The obligations of the Association and of Unit Owners to repair, maintain and replace the portions of the Condominium Property for which they are respectively responsible shall not be limited, discharged or postponed by reason of the fact that any maintenance, repair or replacement may be necessary to cure any latent or patent defects in material or workmanship in the construction of the Condominium Property.

D. Effect of Insurance or Construction Guarantees. Notwithstanding the fact that the Association and/or any Unit Owner may be entitled to the benefit of any guarantee of material and workmanship furnished by any construction trade responsible for any construction defects, or to benefits under any policies of insurance providing coverage for loss or damage for which they are respectively responsible, the existence of said construction guarantee or said insurance coverage shall not excuse any delay by the Association or any Unit Owner in performing the obligations hereunder. The undertaking of repair, maintenance or replacement by the Association or any Unit Owner shall not constitute a waiver of any rights against any warrantor, but such rights shall be specifically reserved. The Association shall have the right to enforce, on behalf of the Unit Owners, any warranty, oral or written, express or implied, or any other contractual obligation, arising from construction defects, if the Association shall repair the same. It may institute litigation in the name of the Unit Owners and a release executed by the Association shall be binding upon all Unit Owners.

E. No Severance of Ownership. No Unit Owner shall execute any deed, mortgage, lease or other instrument affecting title to his Condominium Ownership Interest without including therein both his interest in the Unit and his corresponding percentage of ownership in the Common Areas and Facilities, it being the intention hereof to prevent any severance of such combined ownership and rights. Any such deed, mortgage, lease or other instrument purporting to affect the one without including all shall be deemed and taken to include the interest so omitted, even though the latter is not expressly mentioned or described therein. For purposes of conveyance of title to a purchaser of a Unit, description by Unit number and reference to this Declaration and to the Drawings shall be adequate to convey the fee simple title thereto, together with the percentage interest in and to the Common Areas and Facilities and voting rights with respect thereto.

F. Easements

1. Encroachments. In the event that, by reason of the construction, settlement or shifting of any Single-Family Building, or by reason of the partial or total destruction and rebuilding of any Single-Family Building, any part of the Common Areas and Facilities presently encroaches or shall hereafter encroach upon any part of a Unit, or any part of a Unit presently encroaches or shall hereafter encroach upon any part of the Common Areas and Facilities, or another Unit or Units, or if by reason of the design or construction of any Units it shall be necessary or advantageous to an owner to use or occupy, for formal uses and purposes, any portion of the Common Areas and Facilities consisting of unoccupied space within the building and adjoining his Unit, or, if by reason of the design or construction of utility systems, any main pipes, ducts or conduits serving more than one Unit presently encroaches or shall hereafter encroach upon any part of any Unit, valid easements for the maintenance of such encroachment and for the use of such adjoining space are hereby established and shall exist for the benefit of such Unit and the Common Areas and Facilities, as the case may be, so long as all or any part of the Single-Family Building containing such Unit shall remain standing; provided, however, that in no event shall a valid easement for any encroachment be created in favor of the Unit Owner of any Unit or in favor of the Common Areas and Facilities if such encroachment occurred due to the willful conduct of said Owner.

2. Limited Common Areas. The owner of each Unit with respect to any Limited Common Area appurtenant to his Unit shall have, for himself, his heirs and successors in interest, an exclusive easement for his use and enjoyment of such Limited Common Area; provided, however, that no Unit Owner shall decorate, landscape, change the appearance of the

exterior thereof or otherwise adorn such Limited Common Area in any manner contrary to the Rules as may be established therefor by the Association, unless he shall first obtain the written consent of the Association. In no event shall the appearance of said exterior area be changed except in accordance with the provisions hereof.

3. Maintenance Easements. The ownership of each Unit shall be subject to easements for access arising from necessity of maintenance or operation of the Common Areas and Facilities and the Single-Family Building in which his Unit is located. The Owner of each Unit shall have the permanent rights and easements to and through the Common Areas and Facilities to the use of utilities now or hereafter existing within the walls.

4. Easements for Certain Utilities. The Association may hereafter grant easements for utility purposes for the benefit of the Condominium Property, including the right to install, lay, maintain, repair and replace cable television wires and facilities, water mains and pipes, sewer lines, gas mains, telephone wires and equipment, and electrical conduits and wires over, under, along and on any portion of the Common Areas and Facilities, and each Unit Owner hereby grants the Association an irrevocable power of attorney to execute, acknowledge and record, for and in the name of such Unit Owner, such instruments as may be necessary to effectuate the foregoing. Said power of attorney is coupled with an interest.

5. Easements for Additional Property. Developer reserves to itself easements over such portions of the property described on Exhibit A, attached hereto, or over the property which then constitutes the Condominium Property, as shall be necessary for the purpose of providing means of ingress and egress to the Additional Property and utilities for the benefit of the Additional Property, or any portion thereof.

6. Easements to Run with Land. All easements and rights described herein are easements appurtenant, running with the land, perpetually in force and effect, and at all times shall inure to the benefit of and be binding upon the undersigned, its successors and assigns, and any Owner, purchaser, mortgagee and other person having an interest in said land, or any part or portion thereof.

7. Reference to Easements in Deed. Reference in the respective deeds of conveyance, or in any mortgage or trust deed or other evidence of obligation, to the easements and rights described in this Declaration, shall be sufficient to create and reserve such easements and rights to the respective grantees, mortgagees and trustees of such parcels as fully and completely as though such easements and rights were recited fully and set forth in their entirety in such document.

ARTICLE IV

Unit Owners' Association

A. Membership. Declarant shall cause to be formed a corporation not for profit to be called the BAYVIEW CONDOMINIUM UNIT OWNERS ASSOCIATION (herein called the "Association") which shall act as the manager of the Condominium Property. Each Unit Owner, upon acquisition of title to a Unit, shall automatically become a member of the Association. Such membership shall terminate upon the sale or other disposition by such member of his Condominium Ownership Interest, at which time the new Owner of such Unit shall automatically become a member of the Association. Any membership shall be terminable by the Association in accordance with the Association's Bylaws. The Board and officers of the Association elected as provided in the Bylaws of the Association attached hereto as Exhibit C shall exercise the powers, discharge the duties, and be vested with the rights conferred by operation of law, by the Bylaws, and by this Declaration upon the Association, except as otherwise set forth herein; provided, however, that in the event any such power, duty or right shall be deemed exercisable or dischargeable by, or vested in, an officer or member of the Board, solely in his capacity as an officer or a member of the Board, he shall be deemed to act in such capacity to the extent required to authenticate his acts and to carry out the purposes of this Declaration and the Bylaws attached hereto as Exhibit C.

B. Administration of Condominium Property. The administration of the Condominium Property shall be in accordance with the provisions of this Declaration and the Bylaws of the Association which are attached hereto as Exhibit C. Each Owner, tenant or occupant of a Unit shall comply with the provisions of this Declaration, the Bylaws, decisions and resolutions of the Association or its representative, as lawfully amended from time to time, and failure to comply with any such provisions, decisions or resolutions shall be grounds for an action to recover sums due for damages, or for injunctive relief.

C. Service of Process. Service of summons or other process upon the Association may be made in accordance with the provisions of _____[statute], Section _____[number]. The statutory agent for service of summons or other process shall be _____[name], _____[address]. Any successor statutory agents shall be designated by the Board and shall be the statutory agent of the Association. Such change may be effected by filing with the _____[state] Secretary of State the appropriate forms for the subsequent appointment of a statutory agent for a(n) _____[state] _____[entity].

ARTICLE V

Covenants and Restrictions as to Use and Occupancy

The following covenants, restrictions, conditions and limitations as to the use and occupancy of a Unit or the Common Areas and Facilities which shall run with the land shall be binding upon each Unit Owner, his heirs, tenants, licensees, successors and assigns.

A. Purpose of Property. No part of the Condominium Property shall be used for other than residential housing and the common recreational purposes for which the Condominium Property was designed. Each Unit shall be used as a residence for a single family and for no other purpose; provided, however, the Declarant shall be allowed to utilize one or more Units together with such portion of the Common Areas and Facilities as it shall require as a place of business, construction office, sales office and for demonstration purposes so long as Declarant shall retain ownership of one or more Units or shall retain the right to add all or portions of the Additional Property to the Condominium Property, and further provided that a Unit Owner may incidentally use an immaterial portion of such Owner's Unit for such Owner's office or studio, provided the activities therein shall not interfere with the quiet enjoyment of any other Owner.

B. Obstruction of Common Areas and Facilities. There shall be no obstruction of the Common Areas and Facilities, nor shall anything be stored in the Common Areas and Facilities without the prior consent of the Association, except as hereafter expressly provided; provided, however, that during construction and for a reasonable period thereafter, the Declarant shall have the right to store construction equipment and material thereon so long as the same shall not unreasonably interfere with the rights of others.

C. Hazardous Uses and Waste. Nothing shall be done or kept in any Unit or in the Common Areas and Facilities which will increase the rate of insurance of the Single-Family Buildings, or contents thereof, without the prior written consent of the Association. No Unit Owner shall permit anything to be done or kept in his Unit or in the Common Areas and Facilities which will result in the cancellation of insurance on the Single-Family Buildings, or contents thereof, or which would be in violation of any law. No waste will be committed in the Common Areas or Facilities or in a Unit. Each Unit Owner shall abide by all rules and regulations of governmental authorities and rules and requirements of the issuer of all insurance policies with respect to the Common Areas and Facilities.

D. Exterior Surface of Buildings. Unit Owners shall not cause or permit anything to be hung or displayed in or on windows or placed on the outside walls of a Single-Family Building, and no sign, awning, canopy, or shutter shall be affixed to or placed upon the exterior walls or roof or any part thereof, or in the Common Areas and Facilities contrary to the Rules as may be established thereof by the Association, other than those originally provided by the Declarant, if any. Unit Owners may, at their sole cost and expense, install or affix radio or television antenna, or satellite dish, for

their personal use only, upon the exterior walls or roof or any part thereof. No Unit Owner shall paint, decorate, remodel, or in any manner change or improve the appearance of the exterior of the Single-Family Buildings or other structures, or the driveways, parking areas or walkways, or any other portions of the Common Areas and Facilities or any improvements thereto contrary to the Rules as may be established thereof by the Association, other than those original provided by the Declarant, if any.

E. Animals and Pets. No animals, rabbits, livestock, fowl or poultry of any kind shall be raised, bred or kept in any Unit or in the Common Areas and Facilities, except that dogs, cats, or other household pets, not collectively to exceed three (3), may be kept in Units, subject to Rules regulating the number of pets per Unit and other matters adopted by the Association, provided that they are not kept, bred or maintained for any commercial purpose; and provided further that any such pet causing or creating a nuisance or disturbance shall be permanently removed from the Condominium Property subject to these restrictions upon _____ (_____) days prior written notice from the Board of the Association.

F. Nuisances. No noxious or offensive activity shall be carried on in any Unit or in the Common Areas and Facilities, nor shall anything be done therein, whether willfully or negligently or by omission, which may be or become an annoyance or nuisance to the other Unit Owners or occupants.

G. Impairment of Structural Integrity of Buildings. Nothing shall be done in any Unit or in, on or to the Common Areas and Facilities which will impair the structural integrity of the Single-Family Buildings, or which would structurally change same.

H. Laundry or Rubbish in Common Areas and Facilities. No clothes, sheets, blankets, laundry of any kind or other articles shall be hung out or exposed on any part of the Common Areas and Facilities. The Common Areas and Facilities shall be kept free and clear of rubbish, debris and other unsightly materials.

I. Lounging or Storage in Common Areas and Facilities. There shall be no playing, lounging, parking of baby carriages or playpens, bicycles, wagons, toys, vehicles, benches or chairs on any part of the Common Areas and Facilities except in accordance with the Rules therefor adopted by the Association.

J. Prohibited Business Activities. Except as provided in Article V, Section A, above, no industry, business, trade, occupation or profession of any kind, commercial, religious, educational, or otherwise, designated for profit, altruism, or otherwise shall be conducted, maintained or permitted on any part of the Condominium Property. The right is reserved by the Declarant, or its agent, to place "for sale" or "for rent" signs in Common Areas and Facilities and on any unsold or unoccupied Units for the purpose of selling unsold or unoccupied Units. In addition, the right is hereby given to the Association to establish Rules to place or authorize a Unit Owner or his agent to place "for sale" signs on any Unit or on the Condominium Property for the purpose of facilitating the disposal of Units by any Unit Owner, a mortgagee, or the Association.

K. Alteration of Common Areas and Facilities. Nothing shall be altered or constructed in or removed from the Common Areas and Facilities except as hereinafter provided and except upon the written consent of the Association. No decoration, placement of statuary or yard ornamentation of any kind shall be permitted in the Common Areas and Facilities unless done pursuant to prior written approval of the Board. No free-standing basketball sets, swing sets, slides, playground equipment, sheds, barns, tents, treehouses or other such structures or devices shall be permitted in the Common Areas without the prior written approval of the Board.

No change, alteration, construction or redecoration of any kind shall be permitted to the exterior of any Unit or its appurtenant deck, porch, patio, driveways or walks, including any change of color of the exterior of any Unit, unless done pursuant to prior written approval of the Board. Landscaping within Limited Common Areas shall be tastefully done and with the exception of lawns, shall be maintained by the Unit Owner of that Unit to which the Limited

Common Area is appurtenant.

No natural, artificial or man-made fence or hedge, or natural, artificial or man-made wall (other than any wall which is part of a Unit), trellis, arbor or any similar nature, artificial or man-made means of screening or physically separating one Unit from another shall be permitted without the prior written approval of the Board.

L. Rental of Units. The respective Units shall not be rented by the owners thereof for transient or hotel purposes, which shall be defined as (i) rental for any period less than twelve (12) months, or (ii) any rental if the occupants of the Units are provided customary hotel service, such as for food and beverage, or maid service, or furnishing of laundry and linen. The Owners of the respective Units may lease the same only in conformity with the terms and conditions set forth in Article XIV below and the Bylaws attached hereto as Exhibit C. Each lease shall be made subject to the covenants and restrictions in this Declaration and further subject to the Bylaws of the Association attached hereto as Exhibit C. Units which are unsold and which are owned by the Declarant may be leased by the Declarant, as determined by Declarant, and leases made by the Declarant shall not require the approval of the Board of the Association and shall not be subject to other provisions in the Bylaws of the Association relating to leasing and rental.

M. Use of Units by Declarant. During the period in which sales of Units by the Declarant or its agents are in progress, Declarant may occupy or grant permission to any person or entity to occupy, with or without rental, as determined by Declarant, one or more Units in such apportions of the Common Areas and Facilities as Declarant considers necessary, for business or promotional purposes, including clerical activities, sales offices and model units for display and the like.

N. Use of Parking Areas. Any unenclosed parking areas (being those parking areas designated on the Drawings other than the parking spaces in the garages) shall only be used for the periodic parking of automobiles and non-commercial trucks, not for the parking of any other kind of vehicle nor for the storage of any automobile or other vehicle or item. No boats, campers, mobile homes, trailers, commercial trucks, recreational vehicles or the like shall be parked or stored between the hours of 12:00 a.m. and 6:00 a.m. either (i) on any street or driveway within the Condominium Property, or (ii) otherwise outside of any Unit or any unenclosed parking area. The foregoing parking and storage restrictions shall not apply to the parking and storage of construction vehicles and equipment reasonably necessary to construct any Unit or other improvement in or to the Condominium Property. Any automobile (other than an automobile periodically parked, as permitted herein), vehicle or other item occupying such a space (or any portion thereof) may be removed and/or stored at the sole expense of the Unit Owner who shall have caused or permitted the improper use of said unenclosed parking area.

O. Motor Vehicles. There shall be no driving or riding of any motor vehicles upon any non-paved area of the Condominium Property, except for normal landscaping or maintenance purposes. Without limiting the generality of the foregoing, specifically prohibited within any non-paved area are motor vehicles such as motorcycles, motorbikes, minibikes, mopeds, all-terrain vehicles and snow mobiles.

P. Repair of Vehicles. No powered vehicle of any kind shall be constructed or repaired on the Condominium Property, except for normal maintenance performed by an Owner entirely within the garage that is appurtenant to the Unit of such Owner.

Q. Liquor. No spirits, vinous and/or fermented liquor shall be manufactured (except so-called "home manufacture" for on-premises consumption by the Owner) or sold, either at wholesale or retail, in any Unit or Common Area, and no place of public entertainment of any character shall be established, conducted or suffered to remain upon any part of the Condominium Property.

R. No Refuse Materials. No lumber, metals, bulk materials, refuse or trash shall be burned, whether in indoor incinerators or otherwise (excluding the burning of wood in a fireplace), kept, stored or allowed to accumulate on any portion of the Condominium Property, except normal residential accumulation pending pick-up, reasonable amounts of

racked firewood for normal residential use and building materials during the course of construction or reconstruction of any approved building or structure.

S. Housing for Older Persons. The Developer intends to construct, market, and sell the Units as "housing for older persons" in such a manner as to fall within the exemption provided in the Federal Fair Housing Act. The Federal Fair Housing Act (Title VIII of the Civil Rights Act of 1988, as amended, 42 U.S.C. Sections 3601-3619) prohibits discrimination in the sale or rental of housing because of familial status. However, 42 U.S.C. Section 3607 provides that anti-discrimination provisions concerning familial status do not apply with respect to "housing for older persons." This exemption under Section 3607 allows housing communities that are intended and operated for occupancy by persons fifty-five years of age or older. Generally, the following are the requirements to qualify as "housing for older persons:" (1) at least _____ percent (_____) of the occupied units are occupied by at least one person who is fifty-five years of age or older; (2) the housing facility publishes and adheres to policies and procedures that demonstrate the intent to provide housing for persons age fifty-five years of age or older; and (3) the housing facility complies with HUD Rules and Regulations for verification of occupancy. In addition, the exemption allows the restriction against permanent occupancy by any resident under the age of eighteen (18) years of age. The Developer and the Association may establish and implement Rules to consistently enforce this exemption.

The Developer reserves, however, the right to change this method of development, marketing and sales so that the Condominium Development will no longer conform to the exemption allowed under Section 3607. Similarly, the Declaration, Bylaws and the Rules of the Association may also be amended, as provided therein, to no longer comply with the exemption. In either such event, the Condominium Development could no longer be classified as "housing for older persons" under the exemption provided for in Section 3607.

Solely to comply with the exemption provided in the Federal Fair Housing Act, any Unit Owner, other than the Development, who wishes to transfer, sell or lease (which term shall include any type of lease or rental arrangement) his or her Unit shall give the Association no less than _____ (_____) days prior written notice of the terms of any contemplated transfer, sale or lease, together with the name and address of the proposed transferor, purchaser or lessee, together with an affidavit, if applicable, in form approved by the Association, of the transferee, buyer or lessee that after the transfer, sale or lease (a) that at least one person who is fifty-five (55) years of age or older will occupy the Unit and (b) that no person under the age of eighteen (18) years shall be a permanent occupier of the Unit. The Association will make reasonable inquiry as to the truth of such affidavit and if the statements contained therein are true, shall immediately consent to the contemplated transfer, sale or lease. If, however, the proposed transferee, purchaser or lessee is unable to make such an affidavit, or if the Association determines that such facts contained therein are not true, then the Association, acting on behalf of the association, shall have the first right and option to purchase or lease the Unit upon the same terms and conditions contained therein, which option may be exercised during the period of _____ (_____) days following the date of receipt of such notice. Provided, however, that if the proposed transfer, purchase or lease shall be for a consideration which the Association deems inconsistent with the bona fide market value of such Unit ownership or leasehold, the Association may elect to exercise such option in the manner, within the period, and on the following terms relative to price: The cash fair market value shall be determined by arbitration. Within _____ (_____) days receipt of said written notice by the Association, the Association and the owner desiring to make such transfer, sale or lease, shall each appoint a qualified real estate appraiser to act as arbitrators. The two arbitrators so appointed shall, within _____ (_____) days after their appointment, appoint another qualified real estate appraiser to act as the third arbitrator. Within _____ (_____) days after the appointment of said arbitrator, the three arbitrators shall determine, by majority vote, the fair market value of the unit ownership or interest therein which the owner contemplates conveying by transfer, sale or lease, and shall thereupon give written notice of such determination to the owner and the Association. If said option is not again exercised by the Association within _____ (_____) days after this determination, the Unit owner may, at the expiration of said 10 day period, contract to transfer, sale or lease such Unit to the proposed transferee, purchaser or lessee named in such notice upon the terms specified therein. The Association may adopt rules to implement the first

right and option to purchase or lease contained in this Section.

T. Rules. The use of the Unit or common area shall be subject to such additional restrictions as may be set forth in the Rules.

ARTICLE VI

Assessments

A. General. Assessments for the maintenance, repair and insurance of the Common Areas and Facilities, together with the payment of the common expenses, shall be made in the manner provided herein and in the manner provided in the Bylaws. Assessments for renewals or renovations may be made by the Association as set forth in Article X, below.

B. Division of Common Profits and Common Expenses. The percentage proportionate shares of the separate owners of the respective Units in the Common Profits and the Common Expenses of the operation of the Condominium Property, as well as their representation for voting purposes in the Association, shall be as referred to in Article II, Section B. 3.

C. Nonuse of Facilities. No owner of a Unit may exempt himself from any liability for his contribution toward the Common Expenses by waiver of the use or enjoyment of any of the Common Areas and Facilities, or by the abandonment of his Unit or by any other act whatsoever.

D. Lien of Association. The Association shall have a lien upon the estate or interest in any Unit of the then owner thereof and the percentage of interest of that owner in the Common Areas and Facilities for the payment of the portion of the common expenses chargeable against such Unit which remain unpaid for _____ (_____) days after the same have become due and payable, together with the amount of any costs, including without limitation, reasonable attorneys' fees, court costs, title reports and recording costs incurred by the Association. A certificate therefor, subscribed by the President, Secretary or other officer of the Association, may be filed with the Recorder of _____ [county] County, _____ [state], pursuant to authorization given by the Board. Such certificate shall contain a description of the Unit, the name or names of the record Owner or Owners thereof, and the amount of such unpaid portion of the common expenses. Upon the filing of such certificate, notification thereof shall be by regular mail to the Unit Owner and his mortgagee as shown on the books of the Association. Said lien shall be effective as of the date it is filed with the Recorder of _____ [county] County, _____ [state]. Such lien shall remain valid for a period of _____ (_____) years from the time of filing thereof, unless sooner released or satisfied in the same manner provided by law for the release and satisfaction of mortgages on real property or discharged by the final judgment or order of the court in an action brought to discharge such lien, as hereinafter provided.

E. Priority of Association's Lien. The lien provided for in Section D, of this Article VI shall take priority over any lien or encumbrance subsequently arising or created, except liens for real estate taxes and assessments and liens for bona fide first mortgages which have been filed for record, and may be foreclosed in the same manner as a mortgage on real property in an action brought by the Association. In any such foreclosure actions the owner or owners of the Unit affected shall be required to pay a reasonable rental for such Unit during the pendency of such action, and the plaintiff in such action is entitled to the appointment of a receiver to collect the same. In any such foreclosure action, the Association shall be entitled to become a purchaser at the foreclosure sale. The Unit Owner shall pay all costs of said proceedings, including the Association's reasonable legal fees. In addition, the Unit Owner and any occupant thereof shall be personally liable for the amount secured by such lien and any fees incurred to enforce such lien.

F. Dispute as to Common Expenses. Any Unit Owner who believes that the portion of common expenses chargeable to his Unit, for which a certificate of lien has been filed by the Association, has been improperly charged against him/her

or his/her Unit, may bring an action in the Court of Common Pleas of _____[county] County, _____[state], for the discharge of such lien, or may contest the same in a foreclosure action brought by the Association.

G. Nonliability of Judicial Sale Purchaser for Past Due Common Expenses. Where the holder of a first mortgage of record or other purchaser of a Unit acquires title to the Unit as a result of a judicial sale resulting from litigation to which the Association has been made a party, or if the mortgagee accepts a deed in lieu of foreclosure, such person acquiring title, his successors and assigns, shall not be liable for the share of the Common Expenses or other assessments by the Association chargeable to such Unit which became due prior to the acquisition of title to such Unit by such person. Such unpaid share of Common Expenses or assessments shall be deemed to be Common Expenses collectible from all of the Units, including that of the person purchasing at the judicial sale, his successors or assigns.

H. Liability for Assessments Upon Conveyance. In the event of a conveyance of a Unit other than by judicial sale, the transferee of the Unit shall be jointly and severally liable with the transferor for all unpaid assessments, dues and other charges levied by the Association against the transferor and the Unit for his share of common expenses up to the time of the grant or conveyance attributable to that Unit. Such joint and several liability shall be without prejudice to the transferee's right to recover from the transferor the amounts paid by the transferee therefor. Any such transferee shall be entitled to a statement from the Board setting forth the amount of all unpaid assessments against the transferor due the Association as of the date of the transferee's acquisition, and such transferee shall not be liable for, nor shall the Unit conveyed be subject to a lien for, any unpaid assessments made by the Association against the transferor in excess of the amount set forth in such statement for the period reflected in such statement.

I. Common Profits. The Common Profits shall be distributed among the Unit Owners in accordance with their respective percentages of interest in the Common Areas and Facilities appurtenant to their respective Units.

J. Transfer of Funds to Grantee. Upon the conveyance of transfer of title to a Unit (whether voluntarily or involuntarily) all funds, credits and Common Profits then pertaining to such Unit shall automatically inure to the sole benefit of the Grantee or Transferee of such Unit.

ARTICLE VII

Insurance

A. Casualty Insurance. Each Unit Owner of a Single-Family Unit shall maintain at his own cost and expense, fire and extended coverage insurance with vandalism and malicious mischief endorsements (known commonly as "all risk" insurance) with respect to the Single-Family Unit he owns, with respect to Limited Common Areas and Facilities, and with respect to any patio, porch or deck accessory thereto. All such insurance shall be in an amount equal to the full replacement costs of the property covered thereby. The Association and each mortgagee in whose favor a mortgage with respect to such Single-Family Unit shall be named as insured parties in such policies as their interest may appear and such casualty insurance policies shall provide that all proceeds payable as a result of losses shall be paid jointly to the respective mortgagees and the Unit Owners as their interests may appear. Such insurance policies shall provide for the issuance of certificates of insurance to the Association and to the holders of mortgages on the Single-Family Units and shall further provide that coverage shall not be terminated, canceled or materially modified without _____ (_____) days prior written notice to the Association and the mortgagees.

The Association, as a Common Expense, shall maintain for the benefit of each Unit Owner, such insurance as it deems necessary for the buildings, if any, structures and improvements comprising the Common Areas and Facilities and the Limited Common Areas and Facilities of the Condominium Property.

In respect of all policies of insurance obtained by the Association and by the Unit Owners, the Association and each

Unit Owner do hereby waive (to the extent permitted by such policy, but only the extent of the proceeds payable in connection therewith) all rights of recovery and causes of action against each other, the Owners of Units, the members of the family of each Owner of a Unit, and their tenants and other occupants of the Condominium Property, the Association, the Board, and the managing agent, if any, for any loss which may result from any of the perils insured against under any such policies; and each such policy shall provide for release by the insurance company issuing such policy of such of its rights of subrogation thereunder as shall be coextensive with the foregoing waivers.

B. Public Liability Insurance. The Association shall insure itself, all Unit Owners and members of their respective families and other persons residing with them in the Condominium Property, their tenants, and all persons lawfully in possession or control of any part of the Condominium Property, against liability for bodily injury, disease, illness or death, and for any injury to or destruction of property occurring upon, in or about, or arising from, the Common Areas and Facilities, or from activities or acts or omissions of the Association, its agents and employees. Such insurance shall afford protection to a limit of not less than a combined single limit of _____ Dollars (\$_____) with respect to bodily injury, disease, illness, death or property damage. Such policy shall not insure against liability for personal injury or property damage arising out of or relating to ownership, maintenance or use of individual Units, and any automobiles or motor-driven vehicles driven by or on behalf of such individual Owner. All liability insurance shall contain cross-liability endorsements to cover liabilities of the Unit Owners as a group to a Unit Owner. The Association shall also obtain such other insurance as the Board in its discretion may determine.

In the event that the public liability insurance shall not fully protect and indemnify the Unit Owners from all cost and liability arising from a loss insured thereunder or other loss not insured against, or from a negligent act or omission of an employee or agent of the Association occurring in the course and scope of his employment or agency, there shall be a right of contribution amongst the Unit Owners with respect to such unprotected or uninsured cost or liability. It is the intention of this paragraph that a Unit Owner paying or required to pay more than his respective percentage interest of said cost or liability shall have the right to cause the other Unit Owners to reimburse him for such excessive payment.

C. Insurance Premiums. Insurance premiums for the policies obtained by the Association shall be a common expense.

D. Unit Owner's Insurance. Each Unit Owner shall obtain insurance at his own expense, affording coverage upon his personal property, including any insurance not insured under the Association's policies described above, and for his personal liability as may be required by law or with respect to liability affecting his own Unit.

ARTICLE VIII

Damage or Destruction and Restoration of Buildings

A. Single Family Units. In the event a Single-Family Unit shall be damaged or destroyed, the Single-Family Unit Owner shall make all necessary repairs and restorations and shall apply in payments thereof the insurance proceeds received by him. In the event such damage or destruction results from any peril not insured against, or if the insurance proceeds shall not be available to pay the entire cost of such repairs and restoration, the entire cost of such repairs and restoration or the amount of the difference between the insurance proceeds available therefor and the cost for such repairs and restoration (as the case may be) shall be borne by the Single-Family Unit Owner. In the event the Single-Family Unit Owner fails or refuses to make the necessary repairs or restoration within a reasonable time, the Association may after reasonable notice, make such necessary repairs and restoration and shall apply in payment thereof the insurance proceeds made available to the Single-Family Unit Owner and in the event such damage or destruction results from any peril not insured against, or if the insurance proceeds shall not be available to pay the entire cost for such repairs and restoration, the entire cost for such repairs and restoration, or the amount of the difference between the insurance proceeds available therefor and the cost for such repairs and restoration (as the case may be) shall be borne by and assessed against the Single-Family Unit Owner. In the event a Single-Family Unit Owner shall refuse or fail after

reasonable notice to pay such cost and assessments, the Association shall have a lien upon the estate or interest of such Unit Owner, enforceable to the same extent and the same manner as any other assessments made by the Association.

B. Nonrestoration of Damage or Destruction

1. Common Areas. If the damaged improvement is a part of the Common Areas and Facilities, the damaged improvement in the Common Areas and Facilities shall be reconstructed and repaired unless the Unit Owners entitled to exercise not less than _____ percent (_____) of the total voting power determine not to repair the damaged or destroyed improvement. Thereupon, the proceeds of any insurance shall be utilized to eliminate or remove the damaged or destroyed improvement. The balance of any proceeds shall be (i) utilized to construct or acquire additional common improvements, or (ii) distributed to the Unit Owners (subject to the rights of their respective lien holders) in proportion to their respective percentage interests in the common profits and expenses, all as determined by the Unit Owners entitled to exercise _____ percent (_____) of the total voting power.

2. Units. Notwithstanding the foregoing provisions of Article VIII, Section A, above, in the event that Single-Family Units and the buildings, structures and improvements comprising the Common Areas and Facilities of the Condominium Property shall be damaged or destroyed to the extent of _____ percent (_____) or more of the insurable replacement cost thereof, the Owners, by the affirmative vote of those entitled to exercise not less than _____ percent (_____) of the voting power, may elect not to repair or restore the Condominium Property. Upon such election, all of the Condominium Property shall be subject to an action for sale as upon partition at the suit of any Owner. In the event of any such sale, the net sales proceeds, the net insurance, if any, and any other indemnity arising because of such damage or destruction shall be considered as one fund and shall be distributed to all Owners of a Unit in proportion to their respective percentages of interest in the Common Areas and Facilities. No Unit Owner, however, shall receive any portion of his share of such proceeds until all liens and encumbrances on his Unit shall have been paid, released or discharged.

ARTICLE IX

Condemnation

In the event that the entire Condominium Property is taken by eminent domain or condemned, or sold, or otherwise disposed of in lieu of or in avoidance thereof, the Condominium Property shall be withdrawn from the provisions of Chapter _____ [number] of the Act. The condemnation award shall be apportioned among the Unit Owners in accordance with their respective percentage interests in the common profits and expenses, subject to the right of their respective lienholders. The Association shall as soon as practicable determine the share of the condemnation award to which each Unit Owner is entitled, and such shares shall be paid into separate accounts and disbursed as soon as practicable to the Unit Owners entitled to same, subject to the right of their respective lienholders.

In the event that less than the entire Condominium Property is taken or condemned, or sold or otherwise disposed of in lieu of or in avoidance thereof, the Condominium Property hereunder shall not be terminated. Each Unit Owner shall be entitled to a share of the condemnation award to be determined in the following manner: As soon as practicable the Association shall, reasonably and in good faith, allocate the condemnation award between compensation, damages, or other proceeds, and shall apportion the amounts so allocated among the Unit Owners, as follows: (a) the total amount allocated to taking of or injury to the Common Areas and Facilities (excluding Limited Common Areas and Facilities) shall be apportioned among all Unit Owners in proportion to their respective percentages of interest in the Common Areas and Facilities, (b) the total amount allocated to severance damages shall be apportioned to those Units which were not taken or condemned, (c) the respective amounts allocated to the taking of or injury to a particular Unit and/or improvements a Unit Owner has made within his Unit or to the Limited Common Areas appurtenant to such Unit shall be apportioned to the particular Unit involved, and (d) the total amount allocated to consequential damages and any

other takings or injuries shall be apportioned as the Association determines to be equitable under the circumstances. If an allocation of the condemnation award is already established in negotiation, judicial decree, or otherwise, then in allocating the condemnation award the Association shall employ such allocation to the extent it is relevant and applicable. Distribution of apportioned proceeds shall be made by checks payable jointly to the respective Unit Owners and the respective lienholders holding liens against their Units.

In the event a partial taking results in the taking of a complete Unit, the Owner thereof shall automatically cease to be a member of the Association. Thereafter the Association shall reallocate the ownership, voting rights and assessment ratio determined in accordance with this Declaration according to the same principles employed in this Declaration at its inception and shall submit such reallocation to the Owners of the remaining Units for amendment of this Declaration and the amended Declaration shall be filed as required by law.

Any reconstruction and repair necessitated by condemnation shall be governed by the procedures specified in Article VIII hereinabove.

ARTICLE X

Renovation and Subsequent Improvements of Existing Buildings, Structures and Other Improvements

The Association may, by the affirmative vote of the Single-Family Unit Owners entitled to exercise not less than _____ percent (_____) of the voting power of the Single Family Unit Owners, determine that the portion of the Condominium Property zoned for single-family homes is obsolete or in need of renovation, in whole or in part, and elect to have the same renewed and renovated. The Association shall thereupon proceed with such renewal and renovation and the cost thereof shall be a Special Charge of the Single-Family Unit Owners, subject to assessment in the same as set forth in Article VI above. Any Single-Family Unit Owner who does not vote for such renewal and renovation may elect, in a writing served by him on the Association within _____ (_____) days after receiving notice of such vote, to receive the fair market value of his Unit, less the amount of any liens and encumbrances thereon as of the date such vote is taken, in return for a conveyance of his Unit, subject to such liens and encumbrances, to the Association. In the event of such election, such conveyance and payment of the consideration therefor, which shall be a Special Charge to the Single-Family Unit Owners who have not so elected, shall be made within _____ (_____) days thereafter, and if such owner and a majority of the Association cannot agree upon the fair market value of such Single-Family Unit within _____ (_____) days after such election, such determination shall be made by the majority vote of three appraisers, one of which shall be appointed by such Single-Family Unit Owner, one of which shall be appointed by the Association, and the third of which shall be appointed by the first two appraisers. Each party shall pay for the cost of its own appraiser, and the cost of the third appraiser shall be split between the Single-Family Unit Owner and the Association.

ARTICLE XI

Removal from Condominium Ownership

To the extent the removal of the Condominium Property from the provisions of the Act shall not, in and of itself, violate the local zoning and building codes applicable thereto, the Unit Owners, by the affirmative vote of not less than _____ percent (_____) of the voting power, may elect to remove the Condominium Property from the provisions of Chapter _____ [number] of the Act. In the event of such election, all liens and encumbrances, except taxes and assessments not then due and payable, upon all or any part of the Condominium Property, shall be paid, released, or discharged, and a certificate setting forth that such election was made

shall be filed with the Recorder of _____ [county] County, _____ [state]. Such certificate shall certify therein under oath that all liens, except taxes and assessments not then due and payable, upon all or any part of the Common Areas and Facilities, have been paid, released or discharged, and shall also be signed by the Unit Owners, each of whom shall certify therein under oath that all such liens on his Unit or Units have been paid, released or discharged. The Board may, at their discretion, require as a condition precedent to the filing of said certificate the issuance of a policy of title insurance evidencing the nonexistence of any liens as aforesaid. The Board shall designate the amount and issuer of said title insurance, and the cost thereof shall be a common expense.

ARTICLE XII

Amendment of Declaration and Bylaws

A. Reservation of Rights to Amend. Declarant shall have the right, exercisable in its sole discretion at any time during the _____ (_____) year period following the date this Declaration is filed for record, and the Board shall have the right thereafter to amend, from time to time, this Declaration, the Bylaws and/or the Drawings in such respects as Declarant may consider necessary, convenient or appropriate for the purpose of (i) complying with any regulations of the Federal Home Loan Bank Board, the Federal National Mortgage Association, the Federal Housing Administration, the Federal Home Loan Mortgage Corporation, the Veteran's Administration, the Department of Housing and Urban Development and/or the Mortgage Guaranty Insurance Corporation (as such regulations may be amended periodically), (ii) complying with any regulations of any federal, state or local governmental agency or instrumentality (as such regulation may be amended periodically), (iii) correcting any scrivener's error or curing any ambiguity, inconsistency or form of defect or omission in this Declaration, the Bylaws and/or the Drawings, and/or (iv) effecting any other changes not adverse to the Unit Owners or to the holders of the mortgages encumbering the Units. Each Unit Owner, by accepting a Deed conveying title to his Unit, and each mortgagee accepting a mortgage encumbering any Unit, automatically consents and approves the provisions of this Section A and all Unit Owners and their respective mortgagees shall perform such actions and shall promptly execute and deliver to Declarant and/or the Board from time to time, as the Declarant and/or the Board shall request, all instruments as Declarant and/or the Board shall consider necessary, convenient or appropriate to effectuate the provisions of this Section A. In addition, each Unit Owner, by acceptance of a Deed in respect to his Unit, and each mortgagee, by accepting a mortgage encumbering any Unit, automatically hereby irrevocably appoints Declarant and/or the Board as the proxy of such Unit Owner and mortgagee coupled with an interest, to act and vote for on behalf of each such Unit Owner and each such mortgagee in such manner as shall enable Declarant and/or the Board to effectuate the rights reserved by Declarant and/or the Board pursuant to this Section A and to that end, each such Unit Owner and each such mortgagee hereby authorizes, directs and empowers Declarant and/or the Board, as the holder of such proxy, to execute, and to have witnessed, acknowledged and recorded, for and in the name of such Unit Owner and each such mortgagee, such amendments of the within Declaration, the Bylaws and/or the Drawings, together with such consents thereto as Declarant and/or the Board shall consider necessary, convenient or appropriate to comply with the provisions of this Section if Declarant shall exercise the rights reserved to it in this Section. Any documents requiring execution by any person, firm, corporation, or other entity (other than Declarant) shall be in full compliance if executed by Declarant and/or the Board on behalf of such person, firm, corporation or other entity.

B. Procedure for Amendments. This Declaration and the Bylaws attached hereto as Exhibit C may be amended upon the filing for record with the Recorder of _____ [county] County, _____ [state], an instrument in writing setting forth specifically the item or items to be amended and any new matter to be added, which instrument shall have been duly executed by the Unit Owners entitled to exercise at least _____ percent (_____%) of the voting power of the Association. Such amendment must be exercised with the same formalities as this instrument and must refer to the volume and page in which this instrument and its attached exhibits are recorded and must contain an affidavit by the Secretary of the Association that a copy of the amendment has been mailed by certified mail to all mortgagees having bona fide liens of record against any Unit. However, no amendment shall have any effect upon a bona fide first mortgagee until the written consent to such amendment of such

mortgagee has been secured. No amendments may diminish or alter the security or rights of any existing lienholder. Such consents shall be retained by the Secretary of the Association and his certification in the instrument of amendment as to the names of the consenting and nonconsenting mortgagees of the various Units shall be sufficient for reliance by the general public. If less than all mortgagees consent to an amendment to the Declaration and/or the Bylaws, said amendment or modification shall nevertheless be valid among the Unit Owners, *inter sese*, provided that the rights of a nonconsenting mortgagee shall not be abrogated thereby. No provision in this Declaration or Bylaws may be changed, modified or rescinded, however, which, after such change, modification or rescission, would conflict with the provisions of Chapter _____[*number*] of the Act, as now in effect or as hereafter amended.

Notwithstanding the above, no consent of any mortgagee shall be required with respect to an amendment by the Declarant, its successors and assigns, if said amendment shall be made pursuant to Article XV, irrespective of the fact that said amendment shall affect the Unit Owners' percentage interest in the Common Areas and Facilities and their voting representation.

C. Exceptions. Notwithstanding the foregoing, for purposes of amending this Declaration:

(i) to submit the Additional Property to the provisions of the Act, the Declarant need only comply with the provisions of the Act pertaining to the right to add "Additional Property" (as defined in the Act) in respect of an "Expandable Condominium Property" as defined in the Act; and

(ii) to effect the rights reserved to Declarant pursuant to Section A, above, Declarant need only comply with the provisions of such Section A and the Act.

ARTICLE XIII

Remedies for Breach of Covenants and Regulations

Abatement and Enjoyment. The violation of any restriction or condition or regulation adopted by the Association or the breach of any covenant or provision contained in this Declaration or in the Bylaws of the Association shall give the Association the right, in addition to all other rights in law or in equity, to (i) enter upon the land or Unit or portion thereof upon which, or as to which, such violation or breach exists and to summarily abate and remove, at the expense of the defaulting Owner, any structure, thing or condition that may exist thereon contrary to the intent and meaning of the provisions of this Declaration and the Bylaws of the Association, and the Association or its agents shall not thereby be deemed guilty in any manner of trespass; or to (ii) enjoin, abate or remedy by appropriate legal proceedings, either at law or in equity, the continuance of any breach. All expense and costs thereof, including reasonable attorneys' fees, shall be paid by the Unit Owner guilty of the breach and constitute the basis for a lien upon his Unit and interest in accordance with Article VI thereof.

ARTICLE XIV

Expansion of Condominium Property by Declarant

A. This Condominium, as planned and envisioned by the Declarant, is intended to be an Expandable Condominium Property. Therefore, in accordance with Chapter _____[*number*] of the Act, Declarant reserves the right, at Declarant's exclusive option, to expand the Condominium Property by submitting all or a portion, as provided below, of the Additional Property to the provisions of Chapter _____[*number*]. Except as otherwise provided in this Section, there are no limitations on the exercise of said option, including, but not limited to, no limitation requiring the consent of any Unit Owner. Said option shall expire _____
(_____) years after the Declaration is filed for record unless said _____
(_____) year period is extended in accordance with the provisions of Section _____

of the Act. There are no circumstances under which said option will terminate prior to the expiration of the above-described time limit, except that Declarant may elect at any time to terminate said option.

B. All or a portion of the Additional Property, as described in Exhibit B, may be added to the Condominium Property in connection with the complete development of the Condominium. Different portions of the Additional Property may be added to the Condominium Property at different times, in phases, so that the entire contemplated development may proceed in an orderly fashion. However, the Declarant is under no legal obligation or duty to add any of such Additional Property to the Condominium Property and may add or decline to add any such portion of the Additional Property within the unrestricted and uncontrolled discretion of Declarant. There are no limitations with respect to the boundaries of portions of the Additional Property that may be added, or with respect to the order in which portions may be added; provided, however, that each portion added shall be contiguous, at some point, to what then constitutes the Condominium Property. There are no limitations as to the location of any improvements contemplated to be constructed on any portion of the Additional Property. Declarant reserves the right to change the design of structures and buildings to be constructed and the order of additions to the Condominium Property of portions of the Additional Property.

C. The Additional Property consisting of the real property set forth on Exhibit A, attached hereto, is owned by Declarant and zoned for single-family residences on which a total of fifteen (15) additional Single-Family Units may be constructed. The Additional Property described on Exhibit B, attached hereto, is zoned for single family-residences and an additional forty (40) Single-Family Units may be constructed. As stated in Article V, subparagraph A, above, all of the land and Units thereon which are added to the Condominium Property are restricted to residential use.

D. With respect to improvements, other than structures, to any portion of any of the Additional Property to be added to the Condominium Property, the Declarant reserves the right to make such improvements as Declarant deems necessary, if any. There are no restrictions or limitations upon improvements that may be made except that Declarant intends that such improvements, if made, will be of substantially the same kind, style and quality as exist with respect to the Condominium Property.

E. With respect to all Units to be constructed on any portion of the Additional Property, all such Single-Family Units are intended to be compatible with the Single-Family Units contained within the Condominium Property when and if initially constructed, as submitted to the provisions of Chapter _____ [number] of the Act in accordance with this Declaration. Design shall not be deemed to be incompatible because of changes in the number of Units, changes in interior layout of Units, or variances in set-backs or relations of structures to other improvements.

F. All or any portion of the Common Areas and Facilities designated on any portion of the Additional Property may be assigned as Limited Common Areas and Facilities by the Declarant. It is anticipated that the type of Limited Common Areas will be substantially of the same type as those designated on the Condominium Property. The size and number of such newly created Limited Common Areas cannot be ascertained precisely because those facts will depend on how large each portion to the Additional Property added to the Condominium Property may be, the size and location of the buildings and other improvements on each portion, and other factors presently undetermined.

G. All or any portion of the Additional Property shall be submitted to the provisions of Chapter _____ [number] of the act, by the Declarant, by filing an amendment to this Declaration, which contains the information, Drawings and other items required by Section _____ [number] of the Act, and which allocates and reallocates the fractions of undivided interest in the Common Areas and Facilities appurtenant to each Unit on the real estate previously submitted to provisions of Chapter _____ [number] and for each Unit constructed or to be constructed on a portion of the Additional Property being submitted to the provisions of Chapter _____ [number] by said amendment. Said amendment shall uniformly reallocate said undivided fractional interests in the Common Areas and Facilities pursuant to the formula described below.

H. The fractional interest of each Unit Owner in the Common Areas and Facilities shall be allocated and reallocated so

that at all times the interest shall be based on the relative Par Values assigned to Units being added to the Condominium Property to the Par Value of all Units. It is intended that the Single-Family Units, once and if added to the Condominium Property, shall be assigned an equal par value of one (1). Such amendment shall be executed by the Declarant in recordable form and filed for record, and shall be effective on the date on which it is filed for record.

ARTICLE XV

Certain Disclosures Required by the Act

In accordance with Section _____ [number] of the Act and in connection with the sale or offer to sell Condominium Ownership Interests by the Declarant, the Declarant agrees that:

A. Any deposit or down payment made in connection with the sale of a Unit will be held in trust or escrow until delivered at settlement or returned to or otherwise credited to the purchaser of a Unit or forfeited to the Declarant, and if a deposit or down payment of _____ Dollars (\$_____) or more is held for more than _____ (_____) days, interest at the rate of at least _____ percent (_____%) per annum for any period exceeding _____ (_____) days shall be credited to the purchaser of a Unit at settlement or upon return or other credit made to such purchaser, or added to any forfeiture to the Declarant. Deposits and down payments held in trust or escrow pursuant to this paragraph shall not be subject to attachment by creditors of the Declarant or a purchaser of a Unit.

B. Except in its capacity as a Unit Owner of unsold Condominium Ownership Interests, the Declarant will not retain a property interest in any of the Common Areas and Facilities after control of the Condominium Property is assumed by the Association, except that the Declarant may retain an interest consistent with this Declaration for the purpose of insuring a means of ingress and egress from and to the Common Areas and Facilities by the prospective Unit Owners in the Additional Property.

C. The owners of Condominium Ownership Interests that have been sold by the Declarant or his agent will assume control of the Common Areas and Facilities and of the Association in the following manner:

(1) The Association shall be established not later than the date the deed or other evidence of ownership is filed for record following the first sale of a Condominium Ownership Interest in the development. Membership in the Association shall be limited to Unit Owners, and all Unit Owners shall be members. Until the Association is established, the Declarant shall act in all instances where action of the Association or its officers is authorized or required by law or the Declaration.

(2) Not later than the time that Condominium Ownership Interests to which _____ percent (_____%) of the undivided interest in the Common Areas and Facilities appertain have been sold and conveyed by the Declarant, the Association shall meet and the Unit Owners, other than the Declarant shall elect not less than _____ percent (_____%) of the members of the Board. Not later than the time that Condominium Ownership Interests to which _____ percent (_____%) of the undivided interests appertain have been sold and conveyed, such Unit Owners shall elect not less than _____ percent (_____%) of the members of the Board. Since the Condominium is an Expandable Condominium, the percentage interest in the Common Areas and Facilities is to be computed by comparing the number of Units sold and conveyed to the maximum number of Units that may be created, as stated in the Declaration.

(3) Except as stated in subparagraph (2) above, the Declarant or person authorized by Declarant may appoint and remove members of the Board and other officers of the Association and exercise the powers and responsibilities otherwise assigned by law or the Declaration to the Association, the Board or other officers. Such authorization shall

extend from the date of the establishment of the Association until the earlier of:

- (a) _____ (_____) years; or
- (b) _____ (_____) days after the sale and conveyance of Condominium Ownership Interests to which appertain _____ percent (_____) of the undivided interests in the Common Areas and Facilities to purchasers in good faith for value.

Within _____ (_____) days of the expiration of control by the Declarant as aforesaid, the Association shall meet and elect all members of the Board and all other officers of the Association. The persons so elected shall take office upon election.

D. Neither the Association nor the Unit Owners will be subject to any management contract or agreement executed prior to the assumption of control as required by the preceding paragraph of this Article for more than _____ (_____) year(s) subsequent to the date of that assumption of control, unless such contract or agreement is renewed by a vote of the Unit Owners pursuant to the Bylaws of the Association.

E. Solely and only to the extent such warranties are or may be required by the provisions of Section _____ [number] of the Act, Declarant will furnish a _____ (_____) year warranty covering the full cost of labor and materials for any repair or replacement of roof and structural components and mechanical, electrical, plumbing and common service elements serving the Condominium Property, as a whole, occasioned or necessitated by a defect in material or workmanship and a _____ (_____) year warranty covering the full cost of labor and materials for any repair or replacement of structural, mechanical and other elements pertaining to each Unit, occasioned or necessitated by a defect in material or workmanship commencing as follows:

- (1) The _____ (_____) year warranty shall commence on the date that the deed is filed for record following the first sale of the first Condominium Ownership Interest to a purchaser in good faith for value, except in the case of Expandable Condominium Property, the _____ (_____) year warranty with respect to Units located on the Additional Property shall commence from the date the deed is filed for record following sale of the first Condominium Ownership Interest on the Additional Property.
- (2) The _____ (_____) year warranty shall commence on the date the deed is filed for record following the first sale of a Condominium Ownership Interest to a purchaser in good faith for value.
- (3) In the case of ranges, refrigerators, washing machines, clothes dryers, hot water heaters and other similar appliances, if any, installed and furnished as part of the Unit by Declarant, the valid assignment, if permitted, of any express or implied warranties, if any, of the manufacturer satisfies the Declarant's warranty under this Section E. with respect to such appliances, and the Declarant's warranty shall be limited to the installation of the appliances.
- (4) All warranties made to the Declarant that exceed the time periods set forth hereinabove with respect to any part of the Units or Common Areas and Facilities shall be assigned to purchasers of Units, provided that such warranties are assignable.

None of the foregoing warranties shall cover repairs or replacements necessitated or occasioned by ordinary wear and tear or by the negligent or wanton acts of any Unit Owner or occupant or any tenant, guest or invitee of a Unit Owner or occupant or occasioned or necessitated for any reason whatsoever except by reason of defects in materials and workmanship. Any dispute in defining what constitutes a defect in materials and/or workmanship in the aforesaid items and the above warranties shall be mandatorily referred to the American Arbitration Association, and the determination thereby shall be final and binding.

F. The Declarant shall assume the rights and obligations of a Unit Owner with respect to Units not yet sold, including the obligation to pay common expenses attaching to such Units, from the date the Declaration is filed for record.

ARTICLE XVI

Special Declarant Rights

The Declarant hereby reserves unto itself, its successors and assigns, the following rights for the benefit of the Declarant:

(i) to complete all improvements that serve the Condominium Property, including without limitation, the right and easement through the Common Areas and Facilities for the purpose of making the improvements within the Condominium Property or within the Additional Property, if and when all or portions thereof are added to the Condominium Property; and

(ii) to maintain sales offices, management offices, signs, advertising and models at such places as Declarant shall determine.

ARTICLE XVII

Miscellaneous Provisions

A. Binding Effect. Each grantee of the Declarant, by acceptance of a deed of conveyance, accepts the same subject to all restrictions, conditions, covenants, reservations, liens and charges, and the jurisdiction, rights and powers created or reserved by this Declaration, and all rights, benefits and privileges of every character hereby granted, created, reserved or declared, and all impositions and obligations hereby imposed, shall be deemed and taken to be covenants running with the land, and shall bind any person having at any time any interest or estate in said real property, and shall inure to the benefit of such owner in like manner as though the provisions of the Declaration were recited and stipulated at length in each and every deed of conveyance. All of the provisions of this Declaration are in furtherance of a common plan to develop, promote and protect the desirability and value of the property described herein for the benefit of each owner thereof.

B. Nonwaiver. No covenants, restrictions, conditions, obligations or provisions contained in this Declaration shall be deemed to have been abrogated or waived by reason of any failure to enforce the same, irrespective of the number of violations or breaches which may occur.

C. Separability. The invalidity of any covenant, restrictions, condition, limitation or other provisions of this Declaration, or of any part of the same, shall not impair or affect in any manner the validity, enforceability or effect of the rest of this Declaration.

D. Statute of Perpetuities. If any of the privileges, covenants or rights created by this Declaration shall be unlawful or void for violation of (a) the Rule Against Perpetuities or some analogous statutory provision, (b) the rule restricting restraints on alienation, or (c) any other statutory or common law rules imposing time limits, then such provision shall continue only until twenty-one (21) years after the death of the survivor of the now living descendants of the United States Senator representing the State of _____[state], the Honorable _____[name].

E. Sales by Declarant. So long as Declarant, its successors and assigns, own one or more of the Units established and described herein, the Declarant, its successors and assigns, shall be subject to the provisions of this Declaration and of the Drawings, except that Declarant may lease, sell, exchange and transfer Units owned by Declarant without approval

of the Board.

F. Nonliability Of Declarant. Neither Declarant nor its principals, members, shareholders, officers or other representatives, successors or assigns shall be liable for any claim whatsoever arising out of or by reason of any actions performed pursuant to any authorities granted or delegated to it by or pursuant to this Declaration in the management and operation of the Condominium and the Condominium Property and the Association, whether or not such claim (i) shall be asserted by a Unit Owner, occupant, the Association, or by any person or entity claiming through any of them; or (ii) shall be on account of injury to person or damage to or loss of property wherever located and however caused; or (iii) shall arise ex contractu or (except in the case of gross neglect) ex delicto. Without limiting the generality of the foregoing, the foregoing enumeration includes all claims for, or arising by reason of, the Condominium Property or any part thereof being or becoming out of repair or containing any patent or latent defects, or by reason of any act or neglect of any Unit Owner, occupant, the Association, and their respective agents, employees, guests, invitees, or by reason of any neighboring property or personal property located on or about the Condominium Property, or by reason of the failure to function or disrepair of any utility services (heat, air conditioning, electricity, gas, water, sewage, etc.). The foregoing exculpatory language shall not include claims against the Declarant arising from Declarant's capacity as a developer, builder and seller.

G. Section Headings; Gender. The heading of each Article and to each Section hereto are inserted only as a matter of convenience and for reference and in no way define, limit or describe the scope or intent of this Declaration nor in any way affect this Declaration.

The use of the masculine gender herein or in the Bylaws shall be deemed to include the feminine and the neuter genders, as the case may be, and the use of the singular shall be deemed to include the plural, wherever the context so requires.

H. Uniform Plan. The provisions of this Declaration shall be liberally construed to effectuate its purpose of creating a uniform plan for the establishment and operation of a proper and harmonious condominium development.

I. Service of Notices. Any notice by the Association or by the Declarant to a Unit Owner shall be deemed to be duly given, and any demand upon him shall be deemed by him to have been duly made, if delivered in writing to him personally, or if sent to him by United States certified mail, return receipt requested, addressed to him at the Unit owned by him, and any notice by a Unit Owner to the Association shall be deemed to be duly given and made, if in writing and delivered to the Secretary of the Association.

Each Unit Owner shall furnish written notice to the Secretary of the Association of the name and address of such Unit Owner's first mortgagee and of any change in the name and address of such mortgagee.

THIS DECLARATION executed by the undersigned Declarant at _____, _____[city]
_____[state], on the _____[day] day of _____[month] _____[year].

BAYVIEW, LTD.

By: _____

Print Name: _____

Title: _____

STATE OF _____[state])
) SS:

COUNTY OF _____ [county])

BEFORE ME, a Notary Public in and for said County and State, personally appeared _____ [name],
 a(n) _____ [state] _____ [entity], by _____ [name], its
 _____ [title], who acknowledged that _____ [he/she] did sign the foregoing
 instrument for and on behalf of said corporation, being thereunto duly authorized, and that the same is
 _____ [his/her] free act and deed individually and as such officers and the free act and deed of said
 _____ [entity].

IN TESTIMONY WHEREOF, I have hereunto set my hand and official seal at _____ [city],
 _____ [state], this _____ [day] day of _____ [month], _____ [year].

 Notary Public

This Instrument Prepared by:

[Attach Exhibit A]

[Attach Exhibit B]

[Attach Exhibit C]

[Attach Exhibit D]

[Attach Exhibit E]



125 of 181 DOCUMENTS

Current Legal Forms for Real Estate

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Current Legal Forms for Real Estate
Chapter 22 DEVELOPMENT AND SUBDIVISION
Part IV. FORMS
E. RESIDENTIAL DEVELOPMENT

26-22 Current Legal Forms for Real Estate FORM 22.87

FORM 22.87 Typical disclosure statement

COMMENT

In several jurisdictions, in addition to requirements concerning the recording of a declaration and bylaws before a condominium is established, a disclosure statement must be used. In some states the disclosure statement and/or the public report must be filed with a governmental agency. The disclosure statement is intended to provide purchaser's full and adequate disclosure of all material aspects of the development.

For additional forms relating to condominium development and condominium associations, see Chapter 20, Real Estate Entities, in Volume 24, *supra*.

FORM

BAYVIEW CONDOMINIUMS

_____ [city], _____ [state]

DISCLOSURE STATEMENT

Introduction

BAYVIEW CONDOMINIUMS (the "Condominium") constitutes condominium property under the _____ [state] Condominium Act (the "Act") and this Disclosure Statement is provided to prospective

purchasers of Units in the Condominium in compliance with the Act. This Disclosure Statement is intended to be a fully and accurate presentation of all material circumstances or features affecting the Condominium, without the omission of any material facts or the inclusion of any untrue statement of a material fact. It is requested and encouraged that each prospective purchaser of a unit carefully read this Disclosure Statement.

In addition to the information furnished in this Disclosure Statement, copies of the original condominium instruments are available for review at the offices of the Condominium, as required by the Act. The Condominium instruments (the "Condominium Instruments") include the Declaration of Condominium Ownership of the Condominium, as amended (the "Declaration") and the accompanying drawings, as amended (the "Drawings"), the Bylaws of the Bayview Condominium Unit Owners Association (the "Bylaws"), and any other documents, contracts or instruments establishing ownership of or exerting control over the condominium property or any unit.

THE CONDOMINIUM INSTRUMENTS ARE BINDING AND LEGAL DOCUMENTS IMPOSING RIGHTS AND OBLIGATIONS UPON THE PARTIES. SHOULD THEY NOT BE CLEARLY UNDERSTOOD, THE PROSPECTIVE PURCHASERS ARE TO SEEK COMPETENT LEGAL ADVICE

This Disclosure Statement is intended to be relied upon only by prospective purchasers of Units in the Condominium who purchase their units from the Developer. Prospective purchasers should rely only upon the information, data, or representations referred to in this Disclosure Statement or contained in the various Condominium Instruments described above. No person has been authorized by Bayview, Ltd. (the "Developer") to make any representation which is not expressly contained in this Disclosure Statement or in any of the other Condominium Instruments. This presentation may not be changed or modified orally, but only in a writing signed by the Developer.

The information regarding the Condominium that is required to be furnished to the purchaser of a Unit has been assembled in this Disclosure Statement in a manner which is intended to be informative and useful. The Disclosure Statement includes both a narrative statement and attached Exhibits. The narrative statement provides an explanation of the significant features of the Condominium, as well as additional information of interest to prospective purchasers. The exhibits include projections and other estimates which should be closely reviewed by prospective purchasers.

Unless otherwise defined herein, the terms used in this Disclosure Statement should be interpreted to have the meanings given to them in the Declaration and Bylaws. In case of any inconsistency between this Disclosure Statement and the Declaration or Bylaws, the Declaration and Bylaws shall control.

NATURE OF CONDOMINIUM FORM OF PROPERTY OWNERSHIP

The term "condominium" refers to a form of property ownership which combines features of individual home ownership with features of apartment or other multi-family living. The owner of a residential condominium unit ("Unit Owner") is the sole owner of the portion of the single-family residential building that contains his residence or Unit, and has exclusive use of his residence or Unit, in the same manner that a tenant would have exclusive use of a leased apartment.

However, in contrast to the Owner of a single-family home, who owns his yard and driveway, the owner of a Condominium Unit is one of many co-owners, the lawns, roadways and sidewalks, and all other parts of the condominium development necessary or convenient to its existence, maintenance and safety, or normally in common use. Such common owned portions are referred to as "Common Areas and Facilities." All Unit Owners share the right to use the Common Areas and Facilities, as would be the case in an apartment building, except certain portions of the Common Areas and Facilities designated as Limited Common Areas are designated for the exclusive use of the owner of the Unit near which they are physically located. In this Condominium, these areas include the areas surrounding the Unit such as driveways and sidewalks, and decks and patios, if any. The Unit Owners also share the right to manage the

Common Areas and Facilities, subject to the terms of the Declaration and Bylaws, and share the obligation to pay the expenses of operating, maintaining, repairing and replacing the Common Areas and Facilities (the "Common Expenses") and Limited Common Areas, save and except that some of such expenses as they relate to the Limited Common Areas shall be borne solely by the Unit Owner to which those Limited Common Areas pertain as enumerated in Article III of the Declaration.

Each Unit Owner owns an undivided, fractional fee simple interest in all of the Common Areas and Facilities. This fractional interest is expressed as a fraction or its percentage equivalent and, in accordance with the Declaration, is determined by the Developer on the basis of par value assigned to the Unit. As later discussed, each Unit (which Unit consists of a "Single-Family Building" as more fully described in the Declaration), shall be assigned the same par value.

Each Unit Owner receives and is responsible for paying an individual real estate tax bill just as would the owner of a single-family home, but the real estate taxes are based upon the assessed value of the Unit and the assessed value of the Unit's percentage interest in the Common Areas and Facilities. Each Unit Owner may mortgage his Unit, together with its percentage interest in the Common Areas and Facilities. In addition, each Unit Owner may sell his Unit to anyone without restrictions or limitations except for those certain restrictions or limitations set forth in the Declaration or which are imposed by rules and regulations adopted by the Unit Owners' Association.

The Condominium is an expandable condominium, which means that in the Declaration the Developer has reserved the right to expand the Condominium Property by adding a parcel of vacant land more fully described below and buildings and improvements which may be constructed thereon from time to time in the future. The current construction, development and sales program now being undertaken by the Developer is referred to in this Disclosure Statement as "Phase I." Future expansion may happen on the land described in Exhibit B-1 which is referred to in this Disclosure Statement as "Phase II."

The remainder of this Disclosure Statement follows generally the specific requirements of Section _____[number] of the _____[state] Revised Code, and each portion of this Disclosure Statement bears the alphabetical and numerical designations of that Section _____[number].

A. NAME AND ADDRESS OF THE CONDOMINIUM DEVELOPMENT AND OF THE DEVELOPER

The name of the Condominium Development is the "Bayview Condominiums." The Condominium will be an expandable residential condominium situated along a new private roadway to be constructed and called Bayview Court, ending in a cul-de-sac. Bayview will run north off of Smith Road. The Developer of the Condominium is Bayview, Ltd., a(n) _____[state] _____[entity]. The Developer's address is _____[address], and its telephone number is _____[number].

The Developer is the manager of the actual construction and development of the Condominium, and will initially manage the Condominium on a month-to-month basis until Unit Owners other than the Developer control the Unit Owners' Association to be established.

B. GENERAL NARRATIVE DESCRIPTION OF CONDOMINIUM DEVELOPMENT

Phase I of the Condominium includes _____ (_____) parcel(s) of land zoned for single-family purposes, _____ (_____) parcels consisting of approximately _____ (_____) acres of land and zoned to allow the construction thereon of Single-Family Buildings on which the Developer has approval to construct _____

(_____) Single-Family Buildings or Units. The Units shall be either a ranch plan consisting of approximately _____ (_____) square feet or a two-story plan consisting of approximately _____ (_____) square feet. In either case, they will be of frame construction, with vinyl siding and constructed with basements. Under the Act, the Condominium cannot be formed until at least some of the Units in it have been substantially completed. Therefore, the Condominium will be created in stages as sales and construction of Units are completed. As Units are constructed and added, the Condominium Instruments will be amended to include such improvements so constructed. At the time the Condominium Instruments are first recorded, it is anticipated that just 3 or 4 of the Units will be substantially completed and described in the Drawings to be filed. As additional Units are constructed, the Condominium Instruments will be amended accordingly.

Phase II may consist of _____ (_____) additional Single-Family Unit on approximately _____ (_____) acres of land located across the street from Phase I. Phase II is zoned single-family and the Developer has not determined the size, architectural design or building materials which may be utilized.

The numerical designation, location, layout, dimensions, number of rooms in each Unit and the location of the immediate Limited Common Areas to which each Unit has access shall be graphically shown on the Drawings, or shall be set forth elsewhere in the Declaration and/or the exhibits thereto. The Limited Common Areas to the Units are as follows: driveways, sidewalks, patios and decks (if any), and planting beds adjacent to the structure. In addition to the Limited Common Areas, the Common Areas and Facilities and for use by all the Unit Owners.

Unit Owners will share ownership of the Common Areas and Facilities and will share the responsibility for paying all of the Common Expenses relating to the Common Areas and Facilities. The option to expand the Condominium extends for a _____ (_____) year period from the time the Condominium is created, unless Unit Owners vote to extend that time. There is no provision for the merger of the Condominium with any other condominium.

The initial base price range at which each Unit to be located in Phase I of the Condominium is listed on Exhibit A to this Disclosure Statement. However, economic circumstances may result in price changes from time-to-time after the initial base price list is established. Therefore, prospective purchasers are to contact the Developer to make certain that the price schedule contained in this Disclosure Statement is effective as of the date it is received by the prospective purchaser. Changes in the standard features of the Units will affect the base price.

The portion of the Condominium that is to be exclusively owned by a Unit Owner is called a "Unit." Each Unit Owner will own the entire "fee simple" interest in the Unit that the Unit Owner purchases. A fee simple interest in a Unit is the full legal title to that Unit. Each Unit consists of the single-family building, including the attached garage. The precise location of each Unit is shown on the Drawings.

C. STATUS OF CONSTRUCTION, ZONING, SITE PLAN, ETC. AND THE ACTUAL OR SCHEDULED DATES OF COMPLETION OF THE UNITS AND OTHER COMMON AREAS AND FACILITIES

As of the date of this Disclosure Statement, the status of construction of the Units is that none have been started but they are in the planning stages. The Condominium Property is presently zoned for single-family residences under the ordinances of the City of _____ [city], _____ [state]. The Developer has not received notice of violation of any federal, state or local statutes, ordinances or regulations applicable to the Condominium, and to the best of its knowledge it is in compliance with the requirements of such governmental authorities and its statutes, ordinances and regulations.

The estimated schedule dates of completion of the Condominium is as follows: the first _____

(_____) Units should be done by _____[month] _____[day],
_____[year].

D. FINANCING

As of the date of this Disclosure Statement, there is no financing offered by or through the Developer to purchasers of Units in the Condominium. Upon request, Developer will be able to suggest a lending institution which may, but is not obligated to, finance a portion of the purchase price of Units in the Condominium. Such a suggestion will not obligate or commit any purchaser to obtain financing for such source and each Purchaser is free to obtain financing wherever financing is available.

E. DESCRIPTION OF WARRANTIES

The Developer will furnish to each Purchaser of a Unit, but to no other person or party, certain limited warranties, solely and only to the extent such warranties are required by Section _____ of the Act. Those warranties, which will be included in the written sales agreement between the Developer and the purchaser(s) of each Unit, are a _____ (_____) year warranty covering the full cost of labor and materials for any repair or replacement of roof and structural components, and mechanical, electrical, plumbing and common service elements serving the Condominium Property or Additional Property as a whole, occasioned or necessitated by a defect in material or workmanship and a _____ (_____) year(s) warranty covering the full cost of labor and materials for any repair or replacement of structural, mechanical and other elements pertaining to each Unit, occasioned or necessitated by a defect in material or workmanship, commencing as follows:

(a) The _____ (_____) year warranty shall commence for property submitted by the original Declaration on the date the deed or other evidence of ownership was filed for record following the first Sale of a Condominium Ownership Interest (defined as the execution by both parties of an agreement for the conveyance or transfer for consideration of a fee simple interest in a Unit) in the Condominium Property, and for any Additional Property submitted by Amendment to the Declaration, on the date the deed or other evidence of ownership is filed for record following the sale of the first Condominium Ownership Interest in the Additional Property; in either case to a purchaser in good faith for value.

(b) The _____ (_____) year warranty shall commence on the date the deed or other evidence of ownership is filed for record following the first sale of a Condominium Ownership Interest to a purchaser in good faith for value.

The limited warranties given by the Developer in the written sales agreement, which will include those set forth above, are the only warranties, expressed or implied, made by the Developer to the purchaser of a Unit with respect to the construction or physical condition of the Condominium Property, including, without limitation, the Unit that is the subject of the written sales agreement, and any Additional Property and improvements thereon. None of the warranties set forth above cover repairs or replacements necessitated or occasioned by ordinary wear and tear or by the negligent or wanton acts of any Unit Owner, occupant, guest or invitee, or for any reason whatsoever other than by a defect in material or workmanship. All warranties made to the Developer that exceed the period specified in the warranties described above and included in the written sales agreement with respect to any part of the Units or Common Areas and Facilities shall be assigned to the Unit Owners, if assignable.

F. PROJECTION OF ANNUAL EXPENDITURES NECESSARY TO OPERATE AND MAINTAIN THE COMMON AREAS AND FACILITIES AND THE ESTIMATED MONTHLY COST PER UNIT

The Developer has prepared and has attached to this Disclosure Statement on Exhibit B a _____ (_____) year projection of annual expenditures necessary to operate and maintain the Common Areas and Facilities of the Condominium, specifically stating the assumptions and basis of the projection. The annual and monthly projections will be updated every _____ (_____) months.

The projections are merely estimates based on limited available information and cannot be viewed as assurances or representations that actual expenditures will not exceed projected figures. The actual Common Expenses will be determined by operating experience and by services contracted for, charges made by, and decisions of, the Board of Managers of the Association. These matters are in many respects beyond the control of the Developer and could materially affect the projections from the date of this Disclosure Statement. Updated projections will cover at least _____ (_____) years.

Based on the projections set forth on Exhibit B, attached hereto, the estimated monthly cost per Unit of annual expenses necessary to operate and maintain the Common Areas and Facilities (exclusive of Limited Common Areas and Facilities) is _____ Dollars (\$_____) per month for the first year and _____ Dollars (\$_____) per month for the second year. Each Unit's annual share of Common Expenses is calculated on the basis of the Unit's percentage interest in the Common Areas and Facilities which shall be proportional to the par value. In this instance, because the primary Common Areas and Facilities for which expenses will be incurred exclude Limited Common Areas and Facilities appurtenant to a Unit (which Limited Common Areas and Facilities are maintained by each Unit Owner, not by the Association) and therefore consist primarily of the private roadway and lift station facility, each Unit shall have the same par value of one (1) assigned to it. The percentage interest of a Unit will therefore be the percentage equivalent of one (1) divided by the total number of Units.

The Association does not own any real estate, and will not be liable for real estate taxes. Real estate taxes will be levied individually against each Unit, and will be the responsibility of each Unit Owner. Association assessments will not include amounts to pay these taxes.

G. REPORT BY DEVELOPER STATING THE AGE, CONDITION AND DEVELOPER'S OPINION OF THE REMAINING USEFUL LENGTH OF STRUCTURAL ELEMENTS AND MECHANICAL AND SUPPORTING SYSTEMS AND DEVELOPER'S ESTIMATE OF REPAIR AND REPLACEMENT COSTS PROJECTED FOR _____ (_____) YEARS FROM RECORDING OF THE DECLARATION

Not applicable to this Condominium.

H. MANAGEMENT OF THE CONDOMINIUM DEVELOPMENT

1. Formation of Association. The Association that will be created is a(n) _____ [state] nonprofit corporation, for the purpose of managing and maintaining the Condominium. Each Unit Owner is a member of the Association and will continue to be a member so long as such ownership continues. The Association shall manage the Condominium and the affairs of the Condominium with the right, however, to delegate its authority to a management company. The Association shall be established by the Developer not later than a date the deed or other evidence of ownership is filed for record following the first sale of a Unit in the Condominium. Until the Association is established, the Developer shall act in all instances where action of the Association or its officers is authorized or required by law or the Declaration.

2. Voting Rights. Each purchaser, upon acquisition of a fee simple title interest ("Condominium Ownership Interest") in

a Unit within the Condominium automatically becomes a member of the Association. Such membership shall automatically terminate upon the sale or the disposition by such member of his Condominium Ownership Interest, at which time the new owner of such Unit automatically becomes a member of the Association. Each member constituting the entire Condominium Ownership Interest in the Unit shall be entitled to exercise in person or by proxy that percentage of the total voting power of the Association which is equivalent to the percentage interest of such member's Unit in the Common Areas and Facilities. If two or more persons, whether fiduciaries, tenants in common or otherwise, own individual interests in the Condominium Ownership Interests, each shall be entitled to exercise the proportion of the voting power for such Unit as is equivalent to such person's proportionate interest in the Condominium Ownership Interest of such person.

3. Responsibility of the Unit Owners' Association

(a) Management. The administration, management, maintenance, repair, alterations and improvements of the Condominium Property shall be the responsibility of the Association; provided, however, that the Association may delegate all or any portion of its authority to discharge such responsibility as hereinafter provided.

(b) Common Areas. Except as otherwise expressly provided herein or in the Declaration or Bylaws, the Common Areas and Facilities and driveways (excluding the other Limited Common Areas and Facilities) are required to be maintained in good repair and condition by the Association and the cost thereof shall be Common Expenses.

(c) Improvements Within Units. All maintenance, repairs and replacements to the Units are required to be made by the Owners of the Units, respectively, at their own expense. However, excluding the driveways, Limited Common Areas designated for the exclusive use of the Owner of a Unit, must be maintained, repaired and replaced solely by such Unit Owner. The Board of Managers has the right of access to any Unit for the purpose of making any repairs or replacements to any of the Common Areas and Facilities contained in such Unit or to remedy any condition which would result in damage to any other Unit or to the Common Areas and Facilities, or for the purpose of complying with any laws, orders, rules or regulations of any governmental body having jurisdiction thereof. In addition, if a Unit or a Limited Common Area, excluding the driveways, designated for the exclusive use of a Unit Owner becomes impaired, in a neglected state or otherwise in need of repair or restoration and if the Unit Owner fails after notice from the Association to correct the condition, the Association may but is not obligated to correct the situation at the expense of the responsible Unit Owner.

(d) Bylaws. The Bylaws of the Association provide that the Board of Managers will consist of _____ (_____) persons, each of whom shall be the owner of a Unit or the spouse of such Owner elected by the Owners of the Units. The term of office of the members of the Board of Managers is _____ (_____) years and members of the Board of Managers serve without compensation. It is anticipated that the _____ (_____) members of the Board of Managers will be _____ [name], _____ [name], and _____ [name]. The Bylaws provide that the officers of the Association will include a President, Vice President, Secretary and a Treasurer, each of whom is elected by and is a member of the Board of Managers. Officers serve without compensation. The officers are _____ [name], President, _____ [name], Vice President and _____ [name], Secretary-Treasurer.

(e) Rights of the Developer. Pursuant to the provisions of the Bylaws and the Declaration, the Developer presently possesses all of the powers, rights, duties and functions of the Association and of the Board of Managers. Accordingly, through the exercise of this authority, the members of the Board of Managers and the officers of the Association have been designated by the Developer. The Developer will continue to have the right to exercise the powers, rights, duties and functions of the Association and of the Board of Managers until the earlier of: (i) _____ (_____) years from the date of the establishment of the Condominium Owners' Association; or (ii) _____ (_____) days after the sale and conveyance of Condominium Ownership

Interests to which appertain _____ percent (_____%) of the undivided interests in the Common Areas and Facilities to purchasers in good faith for value. Prior to the earlier of the aforesaid, the Developer shall under certain instances as provided in the Declaration provide for certain minority representation on the Board of Managers, but not majority control.

(f) Delegation of Authority. The Developer, prior to formation of the Association, and the Association thereafter may, but shall not be required to, delegate all or any portion of its authority and responsibilities to a manager, managing agent, or managing company (herein called the "Managing Agent"). Such delegation may be evidenced by a management agreement which shall provide for the duties to be performed by the Managing Agent and for the payment to the Managing Agent of a reasonable compensation as a common expense. Upon the expiration of each management agreement the Association may renew said agreement or enter into a different agreement with a different Managing Agent. The Managing Agent, whether selected by the Developer or the Association, may be an entity owned, in whole or in part, associated with in whole or in part or in any other manner connected or associated with any owner, partner, agent, contractor or employee of Developer without in any manner restricting, limiting or affecting the validity of said agreement; provided, however, that any contract entered into by the Developer with a Managing Agent shall be in accordance with the provisions of Section _____ [number] of the Act which limits the duration of any management contract entered into prior to the assumption of control of the Association by the Unit Owners to _____ (_____) years following such assumption of control, unless such contract is renewed by a vote of the Unit Owners. The holders of first mortgages on Units shall be given notice by the Association of the name and address of any new management company at least _____ (_____) days prior to the employment of said new management company. In the event the Association decides or elects to terminate the employment of a Managing Agent or management company with the intent to manage the Condominium itself and no longer employ a Managing Agent or management company, and the terms of any first mortgage on a Unit provides that said termination shall be a default sufficient to accelerate and immediately call due and payable the entire principal balance of said mortgage, that said termination must be approved by said mortgagee(s) prior to the effective date of the termination.

4. Condominium Instruments --Binding Legal Documents-- Alterations or Amendments. The Condominium Instruments are binding legal documents. All amendments to the Declaration to change percentages of interest in Common Areas and Facilities must be approved by all Unit Owners, except that the Developer reserves the right in the Declaration to amend the Declaration to change percentages of interest, without the consent of the Unit Owners, upon the addition of Units to the Condominium Property.

All other amendments to the Declaration or the Bylaws may be made only by the affirmative vote of Unit Owners entitled to exercise not less than _____ percent (_____%) of the voting power of the Association, except that the Developer reserves the right to amend the Declaration, without the consent of the Unit Owners, in connection with the addition of Additional Property and Units thereon to the Condominium, and except that no amendment shall affect the rights of the Developer under the Declaration and the rights of bona fide first mortgagees until the written consent to such amendment has been obtained from the Developer and if required, from such mortgagees.

I. NO MANAGEMENT AGREEMENT

The Association has not entered into any management contract or other agreement affecting the operation, use or maintenance of or access to all or part of the Condominium. As mentioned, it is the Developer's present intention to manage the Condominium on a month-to-month basis until the Unit Owners meet and determine who will manage the Association's affairs, and on what basis.

J. PURCHASER'S RIGHTS

Set forth on Exhibit C attached hereto, is a statement in twenty-point boldface type of the purchaser's right to review the Condominium Instruments, to void the contract for the purchase and sale of the Unit which is the subject of such contract, the conditions for the return of the purchase deposit made by the purchaser, and the statement of the rights of purchasers under Section 5311.27 of the Revised Code.

K. ESTABLISHMENT OF RESERVE FUND FOR REPAIR OR REPLACEMENT OF COMPONENTS OF CONDOMINIUM AREAS AND FACILITIES

The Bylaws of the Association provide that the Association shall build up and maintain a reasonable reserve for contingencies and replacements, to finance the cost of repair and replacement of the components of the Common Areas and Facilities. The projected Common Expenses set forth on Exhibit B to this Disclosure Statement include a reserve for repairs and replacements. In addition, the Association may assess each Unit Owner for payments to be made into the reserve account on the basis of the budgeted or actual costs.

L. SIGNIFICANT TERMS OF ANY ENCUMBRANCES, EASEMENTS, LIENS, AND MATTERS OF TITLE AFFECTING THE CONDOMINIUM DEVELOPMENT

Attached as Exhibit D to this Disclosure Statement is a list of any encumbrances, easements, liens, and matters of title affecting the Condominium Development. To the best of the Developer's knowledge, none of the items listed on Exhibit D to this Disclosure Statement constitutes an impairment to the use and enjoyment of the common development as a residential property. The mortgages referred to on Exhibit D to this Disclosure Statement will be released as to each Unit and its percentage of interest in the Common Areas and Facilities at the time of the sale of each such Unit and interest in the Common Areas and Facilities.

M. ESCROW DEPOSITS

Any deposit or down payment made in connection with the sale will be held in trust or escrow until delivered at closing, returned to or otherwise credited to the purchaser or forfeited to the Developer. If a deposit or down payment of _____ Dollars (\$ _____) or more is held for more than _____ (_____) days, interest at the rate of _____ percent (_____%) per annum for any period exceeding _____ (_____) days shall be credited to the purchaser at closing or upon return or other credit made to the purchaser, or added to any forfeiture to the Developer. Deposits and down payments held in trust or escrow shall not be subject to attachment by creditors of the Developer or of the purchaser.

N. RESTRICTIONS ON ALIENABILITY

No Unit shall be rented by the respective Unit Owner thereof for transient or hotel purposes, which shall be defined as (i) rental for any period less than twelve (12) months, or (ii) any rental if the occupants of the Units are provided customary hotel service, such as room service for food and beverage, maid service, or the furnishing of laundry and linen and bellboy service. Other than the foregoing obligations, the Unit Owners shall have the right to lease the same, provided that said lease is made subject to the covenants and restrictions in the Declaration, the Bylaws and the Rules, as amended.

O. LITIGATION

There is no present litigation concerning the Condominium.

P. ATTACHED EXHIBITS

As an integral part of this Disclosure Statement, there are attached hereto the following Exhibits, which are incorporated herein and made a part hereof:

Exhibit A - Price List of Units

Exhibit B - Projection of Costs and Expenses

Exhibit B-1 - Description of Expansion Land (Exhibit not attached)

Exhibit C - Statutory Rights of Condominium Purchasers

Exhibit D - List of Title Encumbrances



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Current Legal Forms for Real Estate

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Current Legal Forms for Real Estate
Chapter 22 DEVELOPMENT AND SUBDIVISION
Part IV. FORMS
E. RESIDENTIAL DEVELOPMENT

26-22 Current Legal Forms for Real Estate FORM 22.88

FORM 22.88 Townhouse/condominium disclosure statement

COMMENT

The development of townhouses is very similar to condominiums. The following form is an expandable condominium offering relating to townhouses.

For additional forms relating to condominium development and condominium associations, see Chapter 20, Real Estate Entities, in Volume 24, *supra* .

FORM

Huntington Townhouses Condominium Presentation

Huntington Development Corporation, (the "Sponsor"), herewith presents its proposal for condominium ownership of land adjacent to Hunting Lake Park, _____[city], _____[state] (the "Land"), and the buildings and other improvements to be constructed thereon, (the "Buildings"). The condominium thus established will be known as Huntington Townhouses. This Presentation is intended only as a summary of the main features proposed by Huntington Townhouses and of the legal documents required for the creation of the Condominium. Because of the complexity and interdependence of those legal documents, all of the Sponsor's sales and other representatives are prohibited from changing any of the terms and conditions thereof or attempting to interpret their legal effect. You are urged to consult your own counsel in connection with a review of these documents. The Sponsor's counsel, in turn, will be available to discuss any matters that your counsel may wish to discuss. The Exhibits which follow this Presentation provide a more detailed description of the Condominium and the rights and obligations of the Unit Owners. If there is any inconsistency between the Exhibits and this Presentation, the Exhibits will govern.

The Condominium Concept

Condominium ownership yields the investment and tax advantages of homeowning without the attendant concerns of maintenance. A Condominium Unit Owner buys his own residence in fee simple and is entitled to the exclusive possession thereof. Through the Unit Deed, he acquires not only the physical apartment itself, but the right to use the facilities which all the Condominium participants own in common, such as the grounds, parking areas, and recreational facilities.

In order to insure full enjoyment of the common facilities, a Board of Managers is elected from among the Unit Owners to oversee the operation and maintenance of the Condominium. The cost of that operation and maintenance is shared by the individual Unit Owners in proportion to their respective interests in the common facilities, which proportion is established at the outset of the Condominium. Huntington Townhouses, however, may consist of one, two, or three Sections as more fully described in this Presentation.

As the Unit Deed makes each purchaser an owner in his own right, he bears no responsibility for the mortgage obligations or real estate taxes of his neighbors (just as the owner of a private home is unaffected by the mortgage responsibility or tax liability of the family next door). Each Unit Owner may mortgage his Unit or not, as he sees fit, and in such amount as he chooses, with any bank or other institutional lender. Each Unit Owner is free to resell his Unit, at such price as he determines, to any buyer subject only to the right of first refusal of the Board of Managers as specified in the Bylaws. The interior of one's Unit may be decorated in any way desired, except that in order to assure an aesthetically pleasing exterior, the color of the reverse side of draperies and curtains must meet with the approval of the Board of Managers.

As in the case of all other homeowners, a Unit Owner receives a federal income tax deduction for real estate tax and mortgage interest payments made in connection with his Unit, subject however, to applicable provisions of the Internal Revenue Code with regard to the deduction of interest under certain circumstances.

For these reasons the Sponsor believes that the creation of Huntington Townhouses as a condominium will offer many advantages not available elsewhere in the community.

Huntington Townhouses

The Sponsor proposes to establish the Condominium in three Sections. However, the Sponsor retains the option to complete only one, two, or all three Sections, as market and other relevant considerations dictate.

Section A will consist of _____ (_____) Townhouse Units with surface parking facilities, together with the security and recreational facilities hereinafter described. Section B will consist of _____ (_____) Townhouse Units with surface parking facilities. Section C will consist of _____ (_____) Townhouse Units with parking facilities and a Unit for a resident manager.

Section A of the Condominium will be created by the recording of the Master Deed of the Section A portion of the land, which deed will be in the form attached hereto as Exhibit E. The Master Deed permits the Sponsor to amend its provisions to include either or both of Sections B or C, without the approval or consent of Unit Owners. Simultaneously with the recording of the Master Deed, the Sponsor will also record a Declaration of Easements to reserve for the benefit of Sections B and C certain utility and access easements in the event the Master Deed is not amended to include either or both of those Sections. If Sections B or C are not included in the Condominium, they will have the benefit of those easements only if developed as single family or multifamily residential projects. In no event will Section B or C

have the benefit of the recreational facilities unless the respective Section is included in the Condominium. Unless and until Section C is included in the Condominium, the Board of Managers will have to provide, outside of the Condominium, an office for the Board and a residence for the resident manager or pay him a larger salary. So long as the existing structures remain on the Section C land, the Sponsor is willing to make suitable space available for such office and residence to the Board of Managers at a nominal cost, but the Sponsor reserves for itself, its successors, and assigns, the right to terminate such arrangement at any time on _____ (_____) days' written notice.

You will note in the attached Exhibits the alternative proportionate interests and estimated expenses which will be appropriate depending on which of the Sections are included in the Condominium.

The Land

The Land, consisting of slightly wooded and gently sloping area, is located on the westerly side of Max Lane in _____ [city], _____ [state], only a short walk from Huntington Square. It abuts directly on Huntington Park, a town forest and park surrounding Huntington Lake. The Sponsor, in planning the site and placement of the buildings, has taken advantage of these features to preserve the character of the neighborhood.

All utilities, including electric and telephone lines, will be underground.

The roads and drives that the Sponsor will construct on the Land will be owned by the Condominium and the obligation to maintain them will be that of the Condominium unless and until they are dedicated to, and accepted by, the governmental authority having jurisdiction.

Transportation, Shopping, and Services

_____ [name] is a well-planned, progressive community offering a full range of municipal services and programs. Full police, fire, recreation, park, sewer, and water services are combined with one of the state's best known secondary school systems. Excellent youth and senior citizen programs assure a full life in Huntington Townhouses. Library, post offices, churches, professional offices, convenience stores, and the Marshall Inn are within easy walking distance to support day-to-day activities or to aid when unexpected guests arrive for dinner or the weekend. All these features combine to provide the utmost in ease and convenience.

The Townhouses, Units, and Utilities

Each Townhouse will be a duplex structure constructed primarily of concrete and masonry material in substantial accordance with the specifications contained in Exhibit A attached hereto.

The Units will contain either two bedrooms, three bedrooms, or three bedrooms and a library. Each Unit shall be used only as a residence for a single family. A more complete description of the Units and the specifications for their construction is set forth in said Exhibit A.

Each Unit Owner will pay for all electricity consumed within his Unit, including electricity for heating and for the distribution of air conditioning. Electrical consumption will be measured by a separate meter for each Unit. Water and air conditioning coolant supplied to each Unit will be paid for by the Board of Managers as a part of the services for which the common charge is paid.

Parking Facilities

Each Unit Owner will have the exclusive right to use one designated parking space within the Section in which his Unit is located. The exclusive right to use some additional parking spaces will also be available for purchase as follows:

Section A	_____	[number] spaces
Section B	_____	[number] spaces
Section C	_____	[number] spaces

So long as additional spaces in a particular Section remain unsold, any purchaser in that Section may acquire the exclusive right to use an additional designated parking space or spaces in such Section. If rights in such additional space are acquired, the percentage interest attributable to the Unit will be increased as indicated in the Exhibits annexed hereto so that the user of such additional space pays an additional common charge. Thereafter the Unit may be sold or mortgaged only with the benefit of the rights in the additional space or spaces. The owner of an additional space may, however, license such space to another Unit Owner without the consent or approval of the Board of Managers provided notice of such license is given to the Board of Managers.

Recreational Facilities

One of the common facilities of the Condominium will be an architecturally designed outdoor swimming pool surrounded by a pool deck area and located on the Land. A cabana with toilet facilities will be located adjacent to the pool. The pool will be available only for the exclusive use of Unit Owners and their invited guests. The estimated expenses for the _____ (_____) year of operation as set forth in the Exhibits annexed hereto include the salary of a lifeguard at the pool for _____ (_____) months, the estimated pool season. There will be a clubhouse available for the use of Unit Owners and their invited guests.

Security Facilities

The Condominium can be approached by car only from Evergreen Road. A gate house is to be constructed at that entranceway with a manned gate.

Expenses in Connection with the Creation, Construction, and Sale of the Condominium

The Sponsor will bear all costs and expenses incurred in connection with the creation of the Condominium and the sale of Units, including selling expenses and commissions upon the initial sale of Units, advertising and printing expenses, architects' fees, Sponsor's attorneys' fees, organization costs, and engineering and surveying costs, whether incurred by the Sponsor prior or subsequent to the effective date of the Condominium. The Sponsor will pay all brokerage commissions, if any, on initial sales of Units by the Sponsor's affiliated corporation, Townhouse Management Corp.. At the time of conveyance of a Unit to a Purchaser, there will be no liens or liabilities against such Unit, except the lien for current real estate taxes not then due and payable.

Purchase Agreement and Payments

If a prospective purchaser decides to purchase a Unit, a Purchase Agreement in the form attached hereto will be executed and a down payment toward the total price of the Unit shall be made in an amount which will equal _____ percent (_____) of the full purchase price.

Deposits

The Sponsor will place all deposits in its account at the _____ [name]. If the Sponsor does not complete the contemplated transaction for any reason, such moneys will be returned to the purchasers. It is intended, however, that when a respective Section becomes effective, such deposits as are attributable to that Section will be used by the Sponsor in connection with the construction of the Condominium. Therefore, a purchaser should understand that just as in a situation where a builder is to build single family homes, if the Sponsor fails to complete the construction of a Unit and has no financial resources, the purchaser may lose all or part of his deposit. You should consult your attorney in order to best evaluate the nature and extent of that risk. For purposes of this paragraph, the term "effective" means that Purchase Agreements for _____ percent (_____) in interest of the Units (or such lesser percentage as the Sponsor may determine) in the respective Section have been executed and accepted by the Sponsor. If the Plan does not become effective by _____ [month] _____ [day], _____ [year], with respect to Section A, _____ [month] _____ [day], _____ [year], with respect to Section B, or _____ [month] _____ [day], _____ [year], with respect to Section C, all moneys paid by a purchaser of a Unit in the affected Section will be returned by the Sponsor.

Sale of Units

The Townhouse Units will be sold by the Sponsor, in fee simple, to purchasers who may be individuals, partnerships, corporations, or fiduciaries. Units will be sold together with their respective undivided interests in the Common Elements and exclusive rights and easements. Good record and insurable title to each Unit and its appurtenant interests in the Common Elements will be conveyed by the Sponsor by quitclaim deed, free and clear of all liens and encumbrances other than:

1. A state of facts as shown on the subdivision plan made by _____ dated _____ [month] _____ [day], _____ [year], which indicates a utility easement to the Town of _____. Any additional state of facts which a subsequent survey would show, provided such additional facts do not render title uninsurable or materially interfere with the use of the Property as contemplated in this Presentation.
2. Zoning and Building Bylaws and any amendments thereto now or hereafter adopted. The Sponsor represents and warrants that the contemplated improvements comply with present zoning and building bylaws of the City of _____ [city].
3. Site Plan approval by the Board of Appeals of the City of _____ [city], and conditions, if any, imposed in connection therewith.
4. Easements in favor of utility companies for the construction and maintenance of utility and telephone lines, which easements may or may not have yet been recorded.
5. Easements in favor of the City of _____ [city], for use of sewer, drainage, and water lines, which easements may or may not have yet been recorded.
6. The Master Deed, Bylaws, Map, and Floor Plans to be recorded in _____ [county] County Registry

of Deeds, as the same may be amended from time to time as provided in this Presentation, the Master Deed, or the Bylaws.

7. Any state of facts which an accurate survey of the Unit would show, provided that such state of facts would not render title unmarketable or materially interfere with the use of the Unit as contemplated in this Presentation.

8. Easements in favor of adjoining Units and in favor of the Common Elements for the continuance of all encroachments of such adjoining Units or Common Elements on the Unit, existing as a result of construction of the Units, or which may come into existence as a result of settling or shifting of the Units, or as a result of repair or restoration of the Units or of any adjoining Unit or of the Common Elements made by or with the consent of the Board of Managers, after damage or destruction by fire or other casualty, or after a taking in condemnation or eminent domain proceedings, or by reason of an alteration or repair to the Common Elements, made by or with the consent of the Board of Managers, so that any such encroachments may remain so long as the Units shall stand.

9. Easements in favor of the other Units to use the pipes, wires, flues, ducts, conduits, cables, public utility lines, roads, and other Common Elements located in the Unit or elsewhere on the Property and serving such other Units.

10. Exclusive rights in favor of other Units for the exclusive use of designated underground and surface parking spaces and storage cubicles.

11. Real estate taxes attributable to such Unit for the then current year as are not due and payable on the date of closing of the sale.

Section A shall have the benefit of a ten-foot utility easement and a seven-foot parking easement over Section B and two-foot drainage easements over land adjacent to the Premises.

Closing of Sales

The closing of the sale of each Unit shall take place only after, or concurrently with, the following events:

1. The issuance of a temporary or permanent Certificate of Occupancy permitting occupancy of the Unit under contract.
2. The Master Deed, Bylaws, floor plans, and architects' certification required by general laws shall be recorded as required by law.
3. Release of the Unit from the lien of all mortgages except the purchaser's mortgage, if any.
4. The issuance of a title insurance policy, if purchaser has applied for such title insurance, insuring fee title to the Unit in the purchaser, free and clear of all liens and encumbrances except those set forth or referred to in the Purchase Agreement and purchaser's mortgage, if any.
5. Assignment of all applicable warranties to the Board of Managers as set forth in the Exhibits annexed hereto.
6. Delivery to the purchaser of all applicable warranties on kitchen appliances and air conditioning equipment in his Unit as set forth in the Exhibits annexed hereto.

Closing Costs and Expenses

The estimated closing costs and expenses to be borne by each purchaser of a Unit will be as follows:

1. An Owner's title insurance policy, if ordered from _____ [title company], will cost approximately _____ Dollars (\$ _____) through a special arrangement made by the Sponsors with the title insurer.
2. Recording fees for recording the Unit Deed and accompanying plans and certificate.
3. The fees and expenses of the purchaser's own attorney, if any.
4. The purchaser will be required to pay to the Board of Managers common charges allocable to his Unit monthly in advance. Common charges assessed during the month in which the sale of a Unit closes shall be adjusted on a per diem basis as of the closing date. The percentage of common charges to be assessed against each Unit is fixed by the Master Deed. The estimated common charges for the _____ (_____) years of operation for each Unit are set forth in the Exhibits annexed hereto.
5. In addition to the regular monthly charge, the purchaser will be required to pay at the closing to the Board of Managers an amount equal to _____ percent (_____%) of the estimated annual common charges to provide the Condominium with working capital and a contingency reserve.
6. Current real estate taxes attributable to the Unit shall be adjusted as of the closing date.

Obligations of the Sponsor

The Sponsor will deliver to the Board of Managers, at the time of conveyance of the first Unit, an agreement requiring the Sponsor to perform the following:

1. The Sponsor will pay or cause to be paid all contractors, subcontractors, and materialmen and all others involved in the construction of the Units and Common Elements for work performed and fixtures, material, and equipment supplied or installed in the construction of the Condominium.
2. The Sponsor, at its sole cost and expense, will with reasonable diligence perform or cause to be performed such work, or will supply or cause to be supplied all materials necessary to complete the Units and Common Elements, including the recreational facilities, substantially in accordance with the provisions of this Presentation. The construction of the recreational facilities will be substantially completed within _____ (_____) months after the time _____ percent (_____%) of the Units in Section A have been occupied.
3. The Sponsor will cause any and all mechanic's liens arising out of the construction of the Units or Common Elements to be discharged by bonding or otherwise, promptly after the filing of such liens.
4. If a permanent Certificate of Occupancy shall not have been issued at the date of closing of any Unit, the Sponsor will use its best efforts to secure such permanent Certificate of Occupancy and will, at its sole cost and expense, perform or cause to be performed all work and supply or cause to be supplied all materials necessary therefor, consistent with the standards of this Presentation.
5. The Sponsor will pay the indebtedness secured by the construction loan mortgage and will comply with all the other terms and provisions of such mortgage and the note which it secures.

6. The Sponsor will promptly correct any defects in the construction of a Unit, or in the installation or operation of any mechanical equipment therein, that is due to improper workmanship or materials substantially at variance with this Presentation, provided it is notified of such defects in writing within _____ (_____) years from the date of occupancy of such Unit by the Unit Owner. The Sponsor will correct any defects in the construction of the Common Elements, or in the installation or operation of any mechanical equipment therein, due to improper workmanship or materials substantially at variance with this Presentation, provided it is notified of such defects in writing by the Board of Managers (or by any three Unit Owners if the Board of Managers fails to give such notice) within _____ (_____) years from the date of conveyance of the first Unit in the respective Section. The quality of construction shall be comparable to local standards customary in the particular trade. The Sponsor makes no warranties as to fixtures or equipment except that it will deliver to purchasers any manufacturer's warranties thereon received by the Sponsor. In no event shall the Sponsor be responsible for any nail pops, normal settlement, or any consequential damage resulting therefrom.

7. The Sponsor will deliver to the Board of Managers, when the Board takes over the management of the Condominium, heating, electrical, plumbing, roofing, and appliance warranties to the extent the same are given by the subcontractors and manufacturers.

The Sponsor makes no other undertakings or warranties except as otherwise set forth in this Presentation and none should be implied.

The Sponsor has no obligation to make any repair to the Units or Common Elements except as set forth in this paragraph, and shall not be liable for or required to defend any suit arising out of any occurrence except claims arising out of acts of the Sponsor.

No bond or other security has been furnished to secure the performance of the Sponsor's obligations. The ability of the Sponsor to perform its obligations will depend upon its financial resources at the time it is called upon to perform.

Change in Number and Location of Units, Size, Layout, and Percentage of Common Interest of Units and Substitution of Materials, Etc.

In order to meet possible unforeseen or varying demands for the number and type of Units, or to meet particular requirements of prospective purchasers, lending institutions, or title insurance companies or for any other reason, the Sponsor reserves the right to change the size, number, and location of Units and other improvements in each Section (and the size, layout, location, and percentage interest in the Common Elements, of any Unit for which a Purchase Agreement has not been executed by the Sponsor or with respect to which the purchaser is in default), provided such changes do not change the percentage interest in the Common Elements of any Unit already sold or under an executed Purchase and Sale Agreement as to which the purchaser is not in default; increase the earlier purchaser's proportionate share of common expenses; alter the Sponsor's responsibilities and warranties; or diminish the assessments against unsold Units when Section A becomes effective. The Sponsor also reserves the right to substitute for any of the materials, equipment, and appliances specified in the Exhibits annexed hereto, materials, equipment, and appliances of equal or better quality.

Estimate of Common Charges

Annexed hereto are estimated annual budgets for the Condominium based respectively upon occupancy of all Units in Section A, upon occupancy of all Units in Sections A and B, and upon occupancy of all Units in Sections A, B, and C.

The Sponsor has prepared the estimates in the Exhibits annexed hereto. The Sponsor believes these estimates to be dependable, but because of actual expenditures differing from estimated expenditures, possible changes in the future income or expenses of the Condominium, and other variable factors, such estimates are not intended nor should they be considered as guarantees or warranties of any kind whatsoever.

Liens for Nonpayment of Common Charges.

Under the provisions of the _____ [state] General Laws, the Board of Managers, on behalf of the Unit Owners, shall have a lien on each Unit for unpaid common charges assessed against such Unit by the Board of Managers. Such lien, however, shall be subordinate to the liens for taxes on the Unit and any sums unpaid on a first mortgage of record on such Unit.

No Unit Owner may exempt himself from liability for his common charges by waiving use of any of the Common Elements or by abandonment of his Unit. Subject to the provisions of the Bylaws, a Unit Owner may, by conveying his Unit and his interest in the Common Elements to the Board of Managers, exempt himself from common charges thereafter accruing.

Other Liens

Until the Condominium is terminated, no lien of any kind may be created against the Common Elements after the Master Deed is recorded unless all Unit Owners consent thereto. During such period, liens may arise only against the Units and their respective interests in the Common Elements. A lien for labor performed on or materials furnished to a Unit may not be filed against the Unit or any Unit Owner not expressly consenting to or requesting such labor or materials, except in the case of emergency repairs.

Bylaw Provisions

The following is a summary of important provisions of the Bylaws of the Condominium.

1. Management. Under the Bylaws of the Condominium, the affairs of the Condominium will be managed by a Board of Managers ultimately consisting of six members. The Board of Managers is authorized to employ a manager or a managing agent for the buildings and grounds on such terms as the Board of Managers may deem proper. The services to be rendered by the Board of Managers or any such manager or managing agent shall include billing and collecting common charges, hiring and discharging employees, supervising repairs and alterations, purchasing supplies, maintaining the Condominium's books, and attending meetings of the Board of Managers and of the Unit Owners when reasonably requested.

In order to assure professional management for the Condominium during the initial years of its operation, Huntington Townhouse Management Corp., an affiliate of the Sponsor, has been employed to act as managing agent for the Condominium for a period of _____ (_____) years following the conveyance of the first Unit at a maximum compensation equal to _____ percent (_____) per annum of the actual cumulative initial sales prices of the Units in the respective Section pursuant to the terms and provisions of a Management Agreement. The Management Agreement may not be cancelled without the consent of two-thirds (2/3) of the Unit Owners in each Section. A copy of the Management Agreement is available for inspection at the office of the Sponsor's counsel.

2. Board of Managers and Officers. The term of office of members of the Board of Managers shall be _____ (_____) years, with the term of _____ (_____) of the Board of Managers expiring each year.

The officers shall consist of the President, the Vice President, the Secretary, and the Treasurer, all of whom shall be elected by the Board of Managers at its annual meeting. All members of the Board of Managers and officers shall serve without compensation from the Condominium. The Board of Managers and Officers need not be Unit Owners, until the Board of Managers is elected by the Owners and all Units in all Sections have been sold by the Sponsor.

3. Control by Sponsor. The first Board of Managers shall consist of six members who shall be designated by the Sponsor, one of whom shall be a Unit Owner. At the first annual meeting of Unit Owners which will take place within _____ (_____) days after title to _____ percent (_____) of the Units in Section A have been conveyed, or _____ (_____) years following the date of conveyance of the first Unit, whichever is sooner, two of the original Managers will resign and be replaced by Managers elected by the Unit Owners. At each of the next two annual meetings, two of the Managers designated by the Sponsor will resign and be similarly replaced. Prior to the second annual meeting, the Sponsor will have voting control of the Board which shall be responsible for maintenance, the facilities and services to be provided, and will determine the common charges to be paid by all Unit Owners, including the Sponsor. So long as the Sponsor owns one or more Units, the Sponsor will be entitled to elect at least one member of the Board of Managers and can vote as owner of all Units still held by the Sponsor.

4. Voting. Each Unit Owner shall be entitled to cast one vote at all meetings of the Unit Owners for each _____ percent (_____) of interest in the Common Elements belonging to the Unit or Units owned by him. The presence in person or by proxy of a majority of Unit Owners shall constitute a quorum at all meetings of the Unit Owners and, unless otherwise provided, the vote of a majority in interest of Unit Owners at a meeting at which a quorum shall be present shall be binding upon all Unit Owners. To amend or modify the Bylaws, a vote of _____ percent (_____) in number and in common interest of all Unit Owners entitled to vote, cast at a meeting duly held for such purpose, shall be necessary. Special meetings of Unit Owners may be held from time to time, whenever necessary to conduct the affairs of the Condominium.

If the Sponsor duly amends the Master Deed so as to cause the Condominium to be enlarged by the addition of Section B, Units in Section B shall be entitled to vote and shall be chargeable with their share of common charges from and after the date of conveyance of the first Unit in such Section. If the Sponsor duly amends the Master Deed so as to cause the Condominium to be enlarged by the addition of Section C, Units in Section C shall be entitled to vote and shall be chargeable with their share of common charges from and after the date of conveyance of the first Unit in such Section.

5. Common Charges. The common charges payable by each Unit Owner from time to time shall be based upon budgets prepared annually by the Board of Managers and in accordance with such Unit Owner's proportionate interest in the Common Elements. Each Unit Owner shall be advised promptly after the adoption of each budget of the amount of common charges payable by him for the period covered by such budget. The Sponsor shall pay _____ percent (_____) of the common charges allocable to Units that it owns but are unoccupied.

No Unit Owner shall be liable for the payment of any part of the common charges assessed against his Unit subsequent to a permissible transfer by him of such Unit, or subsequent to his conveyance of such Unit to the Board of Managers on behalf of all Unit Owners, in accordance with the provisions of the Master Deed and Bylaws. The latter conveyance may be made only if his Unit is free and clear of liens and encumbrances other than statutory lien for common charges.

6. Repairs. All painting, decorating, maintenance, repairs, and replacements to the Common Elements shall be made by the Board of Managers, and the cost thereof shall be charged to all Unit Owners as a common expense, except to the

extent that the same are necessitated by the negligence, misuse, or neglect of a Unit Owner, as determined by the Board of Managers, in which case such expense shall be charged to such Unit Owner. The estimate of common charges for the first year covers the projected cost of upkeep of grounds and snow plowing.

All painting, decorating, maintenance, repairs, and replacements to any Unit shall be at the Unit Owner's expense, except as otherwise provided herein.

The Board of Managers and the manager or managing agent shall have the right of access to any Unit, at reasonable times and in the case of emergency, in the performance of their duties.

7. Insurance. The Board of Managers shall obtain and maintain, to the extent obtainable, fire insurance with extended coverage, insuring the Units (including the bathroom and kitchen fixtures initially installed in all of the Units by the Sponsor, but excluding wall covering, fixtures, furniture, furnishings, or other personal property supplied or installed by Unit Owners), together with all service machinery contained therein and covering the interests of the Condominium, the Board of Managers, and all Unit Owners and their mortgagees, as their respective interests may appear. Each of such policies shall contain a standard mortgagee clause in favor of each mortgagee of a Unit which shall provide that the loss, if any, thereunder, shall be payable to such mortgagee as its interest may appear, subject, however, to the loss payment provisions in favor of the Board of Managers hereinafter set forth. The cost of all such insurance shall be paid by the Board of Managers and shall constitute a common expense. The proceeds of all policies of physical damage insurance shall be payable to the Board of Managers, to be applied for the purpose of repairing, restoring, or rebuilding the Buildings unless otherwise determined by the Unit Owners in accordance with the Bylaws and the provisions of Chapter _____ [number] of _____ [state] General Laws. All policies of physical damage insurance shall, to the extent obtainable, contain waivers of subrogation, or reduction of pro rata liability of the insurer as a result of any insurance carried by Unit Owners, and of invalidity arising from any acts of the insured or any Unit Owners, and shall provide that such policies may not be cancelled or substantially modified without at least _____ (_____) days prior written notice to all of the insured, including all mortgagees of Units.

The public liability insurance policy to be maintained until the first meeting of the Board of Managers following the first annual meeting of the Unit Owners will be in limits of _____ Dollars (\$_____) for bodily injury to any one person and _____ Dollars (\$_____) covering all claims for bodily injury arising out of any one occurrence and _____ Dollars (\$_____) for property damage arising out of any one occurrence in the Common Elements and covering cross liability claims of one insured against another. However, such policy does not cover the individual liability of a Unit Owner arising from occurrences within his own Unit. A Unit Owner should insure himself against such liability by purchasing insurance for this purpose at his own expense.

Unit Owners should also carry insurance for their own benefit insuring their carpeting, parquet flooring, wall covering, fixtures, furniture, furnishings, and other personal property, provided that such policies contain waivers of subrogation and further provided that the liability of the carriers issuing insurance procured by the Board of Managers shall not be affected or diminished by reason of any Unit Owner's other insurance.

The Board of Managers will arrange for repair of the Units and Common Elements in the event of casualty loss. If the insurance proceeds are not sufficient to cover the cost of repairs to the Units, the balance of such cost will be assessed against all Unit Owners.

8. Improvements; Costs. If _____ percent (_____) or more but less than _____ percent (_____) of the Unit Owners agree to make an improvement to the Common Elements, the cost of such improvement shall be borne solely by the Unit Owners so agreeing. _____ percent (_____) or more of the Unit Owners may agree to make an

improvement to the Common Elements and assess the cost thereof to all Unit Owners as a common expense, but if such improvement shall cost in excess of _____ percent (_____%) of the then value of the Condominium, any Unit Owner not so agreeing may apply to the superior court, on such notice to the Board of Managers as the court shall direct, for an order directing the purchase of his Unit by the Board of Managers at the fair market value thereof as approved by the court. The cost of any such purchase shall be a common expense.

No Unit Owner shall make any structural alteration, addition, or improvement in his Unit without the prior written approval of the Board of Managers, but this provision shall not apply to Units owned by the Sponsor until such Units have been initially sold by the Sponsor.

9. Liability of Board of Managers and Unit Owners. Any contract or other commitment made by the Board of Managers, the managing agent, or the manager shall be made only as agent for the Unit Owners, and none of them shall be personally liable on any such contract or commitment (except as Unit Owners). The liability of any Unit Owner on any such contract or commitment shall be limited to such proportionate share of the total liability thereunder as the common interest of such Unit Owner bears to the aggregate common interest of all Unit Owners. The Board of Managers shall have no liability to the Unit Owners for errors of judgment, negligence, or otherwise, except for willful misconduct or bad faith. The Unit Owners shall severally indemnify the members of the Board of Managers against any liability or claims except those arising out of bad faith or willful misconduct of the members of the Board of Managers, but the liability of any Unit Owner on account of such indemnification shall be limited to such proportionate share thereof as the common interest of such Unit Owners bears to the aggregate common interest of all Unit Owners. Members of the Board of Managers shall not be required to be bonded.

10. Easements. Each Unit Owner shall have, in common with all other Unit Owners, an easement to use all pipes, flues, ducts, cables, wires, conduits, public utility lines, or other Common Elements located in other Units and serving his Unit and an easement for the continuance of any encroachment by his Unit on an adjoining Unit or on any Common Element, existing as a result of construction of the Units, or which may come into existence thereafter as a result of the Units settling or shifting, or as a result of restoration of the Units or a Unit after damage by fire or other casualty, or as a result of condemnation or eminent domain proceedings, or as a result of repairs or alterations made or approved by the Board of Managers or the Unit Owners as hereinabove provided, so that any such encroachment may remain undisturbed so long as the Units stand. Each Unit shall be subject to these easements in favor of all other Unit Owners. The Board of Managers, through the manager, managing agent, or their employees, shall have a right of access to each Unit to inspect and make repairs to the Unit to prevent damage to the Common Elements or any other Unit. The owner or owners of Sections B and C, or either, shall have the easement set forth in the Declaration of Easements.

General Information Concerning the Parties Involved

The Sponsor

Huntington Development Corporation is a(n) _____ [state] _____ [entity].

The Builder

Blue Construction Company, a(n) _____ [state] _____ [entity] having a place of business in _____ [city], _____ [state], will construct the Units and improvements on the Land, pursuant to a general contract with the Sponsor. The builder has no financial relationship, past or present, to the Property or the Sponsor, except as builder.

The Attorneys for the Sponsor

The Sponsor has retained the law firm of _____ [name] of _____ [city], _____ [state], who have drafted the Master Deed, the Bylaws, the form of Purchase Agreement, the form of Unit Deed, and all other documents necessary in connection with the formation of the Condominium, and who are advising the Sponsor in connection with all legal matters incidental thereto. The Condominium may retain its own counsel following the filing of the Master Deed.

The Architect

_____ [name] of _____ [city], _____ [state], have been retained by the Sponsors as architects for the project. The architects have no financial relationship, past or present, to the Property or to the Sponsor, except as architects.

Sales and Managing Agent

Huntington Management Corp., a(n) _____ [state] _____ [entity] which owns a majority of the stock of the Sponsor, has been engaged to act as sales agent for the Sponsor and has been employed to act as managing agent for the Condominium for a period of _____ (_____) years following the conveyance of the first Unit.

Termination of Condominium

The Condominium shall continue (unless terminated by casualty loss or by condemnation) until such time as the Property shall be withdrawn from the provisions of the _____ [state] General Laws, as a result of the vote to do so of at least _____ percent (_____) in number of the Unit Owners. At that time the Property shall be subject to an action for partition by any Unit Owner or any lienor, as if owned in common. In that event the net proceeds of the sale resulting therefrom shall be divided among all Unit Owners in proportion to their respective common interests after first applying the share of the net proceeds of such sale otherwise payable to any Unit Owner, to the payment of any liens on his Unit, in the order of the priority of such liens.

The Exhibits which follow this Presentation provide a more detailed description of the Condominium and the rights and obligations of the Unit Owner. Please consider the Exhibits carefully and discuss your questions with your own counsel. Your counsel should direct his inquiries to the Sponsor's counsel.

Any information, data, or representation not referred to in this Presentation and not contained in the various Exhibits and documents mentioned herein, must not be relied upon. No person has been authorized by the Sponsor to make any representation which is not expressly contained herein. This Presentation may not be changed or modified orally.

The Sponsor reserves the right to change the terms of this Presentation as they affect potential purchasers not then under contract provided any such change shall not affect the substance of the Presentation with respect to prior purchasers or purchasers under contract, or their undivided interest in the Condominium.

Dated: _____ [month] _____ [day], _____ [year] _____ [city], _____ [state]

Huntington Townhouse Condominium Presentation

Description of Units, Common Elements, Utilities,
Appliances, and Pool Area

1. Description of units. _____[*Description of Units, i.e., number of bedrooms, bathrooms, etc.*]

2. Description of Common Elements. The Common Elements consist of the entire Property not located within any Unit. They include, without limitation, the following:

(a) The land on which the buildings are erected;

(b) All roofs, foundations, pipes, ducts, flues, chutes, conduits, wires, and other utility installations to outlets, bearing walls, perimeter walls, columns, and girders to the interior surfaces thereof, regardless of location;

(c) All land, lawns, gardens, gatehouse, pool, cabana, clubhouse, roads, parking, and other improved or unimproved areas not within the Units, provided, however, that each Unit owner shall have an easement for the exclusive use of one designated parking space and may have an easement for the exclusive use of one or more additional parking spaces as designated in his Unit Deed;

(d) All installations of power, lights, gas, hot and cold water, and heating existing for common use and all other parts of the property necessary or convenient to its existence, maintenance, and safety or normally in common use;

(e) All sewer and drainage pipes;

(f) All storage rooms located outside of the Units, provided, however, that each Owner shall have an easement for the exclusive use of one storage cubicle to be designated in his Unit Deed; and

(g) All other apparatus and installations existing in the Units for common use or necessary or convenient to the existence, maintenance, or safety of the buildings.

3. Types of Units. The dimension and sizes given below are approximate dimensions or sizes, and are subject to variation due to field conditions. The following floor areas are taken from inside finish to inside finish. They include the partition walls with the Unit and the area of the patio to which the Unit has access and exclusive use.

[Description for types of Units, i.e., description of floor plans for types of Units]

4. Utilities and Appliances

(a) Water supply. Water will be supplied by the _____[*name*] and is a common expense of the Condominium. Meters will be supplied and installed by the City of _____[*city*].

(b) Sewers. All building waste lines will be connected to sewer lines which connect to public sewers at the property lines.

(c) Waste disposal. Waste will be picked up several times weekly. There will be a compactor to compact and wrap the waste for transporting out of the Condominium. The cost of the pick up is included in the estimated annual operating expenses.

(d) Plumbing. Interior water lines will be copper. Interior waste lines will be cast iron.

(e) Plumbing Fixtures. All fixtures will be white.

(1) Bathtub will be a five-foot, standard width, cast iron unit with a nonskid bottom surface, nonscald shower control, shower head, and tub spout.

(2) Water closet will be a tank-type, floor mounted unit of a vitreous china material.

(3) Lavatory will be a counter mounted, oval unit of vitreous china with a wide spread faucet.

(4) Stall showers, where applicable, will have a nonscald shower control and head set.

Bathrooms will have high pressure laminate vanity tops and cabinet bases. There will be a combination unit with three dimensional mirrors and two medicine cabinets. The unit will be 36 inches high and the width of the vanity top. Each bathroom will contain two or more chrome towel bars and a flush mounted chrome toilet paper holder. There will be ceiling high ceramic tile around the bathtub and a ceramic tile floor in all bathrooms that have bathtubs or showers. There will be combination ceramic soap dish and grab bar for each bathtub and shower stall. Stall showers will have 2'0" glass shower doors.

(f) Kitchen Sink. Kitchen sinks will be a stainless steel duplex sink with a single lever faucet.

(g) Kitchen Cabinets and Countertops. All kitchen cabinets will be wood. All countertops will be high pressure laminate.

(h) Heat. Each Unit will contain electric baseboard radiation with individual room control provided by wall thermostats. The cost of operating and maintaining the heating system is a Unit expense.

(i) Air Conditioning. Each Unit will contain its own compressor and air handler with control from a wall thermostat within the Unit. Coolant will be provided to each compressor. The cost of operating and maintaining the compressor and air handler is a Unit expense. The cost of operating and maintaining the central cooling equipment will be included in the common charge.

(j) Hot Water Heaters. Hot water heaters will be electric. The cost of operating and maintaining the water heater is a Unit expense.

(k) Electrical Equipment. Each Unit will be metered separately from a central location in the garage area. A 150 amp feeder will be installed to a 150 amp 120/208 volt single phase, three wire circuit breaker panel. Common area electricity will be separately metered and will be included in the common charge.

(l) Electrical Outlets. All outlets are duplex receptacles. In all rooms where there are no ceiling fixtures, two duplex outlets will be wired to a switch. There will be special outlets for range, dishwasher, disposal, refrigerator, dryer, washer, air conditioning, or electric heat.

(m) Telephone and Television. All Units will be prewired for telephone in accordance with current _____[city] requirements. Each Unit will contain at least two television antenna jacks connected to a master antenna system.

(n) Appliances. The following appliances or equal are included in every Unit at no extra cost:

- Electric range: Double oven with self-cleaning lower master oven and built-in two level exhaust system
- Refrigerator-freezer: 15 cu. ft. no frost refrigerator-freezer with icemaker.
- Dishwasher: Built in with push button selection of washing cycles.
- Food waste disposer: 1/2 hp. motor, insulated for sound control.

The above appliances come in the standard manufacturer's colors.

(o) Light Fixtures. Above-counter light fixtures will be supplied in kitchens and bathrooms. Stall shower will have recessed fixtures. Standard fixtures will be provided in the entry hall and hallways. Porcelain socket fixtures will be provided in walk-in closets and clothes closets. Electric outlet boxes for light fixtures will be provided as follows: kitchen--one; dining room--one.

(p) Floor Covering. In each Unit the floor will be covered with wood parquet in all areas except baths and lavatory which will be covered with ceramic tile and the kitchen which will be covered with sheet vinyl.

(q) Warranties and Reservations. At the time of conveyance of title to the first Unit in each Section, the plumbing, heating, central air conditioning, roofing, and electrical subcontractor's guaranties, covering for each Building a _____ (_____) years period subsequent to the conveyance of title to the first Unit in each Building, shall be delivered to the Board of Managers. At the time of conveyance of each Unit, the kitchen appliances and Unit air conditioning equipment manufacturer's warranties covering a period subsequent to conveyance of title as outlined in each warranty, shall be delivered to the purchaser thereof.

All Buildings and facilities will conform to the applicable governmental codes. Sponsor reserves the right to substitute for any of the materials or equipment specific materials or equipment of equal or better quality.

5. Pool Area. The pool area contains a rectangular swimming pool of approximately _____ (_____) square feet surrounded by an attractive deck with an adjoining cabana. Pool water will be filtered to comply with local health codes.

6. Clubhouse. The clubhouse is a two-story brick and concrete building with basement, containing meeting rooms, game rooms, and party rooms with a six-lane bowling alley in the basement.

Rules and Regulations

of
Huntington Townhouses

1. The greens and walkways in front of the entranceways to the Townhouses shall not be obstructed or used for any purpose other than ingress and egress from the Townhouses.
2. No owner shall in any manner decorate the exterior of any Townhouses without the prior written consent of the Board of Managers.
3. No article shall be hung or shaken from the doors or windows or placed upon the window sills of the Townhouses.

4. No bicycles, scooters, baby carriages, or similar vehicles or toys, or other personal articles shall be allowed to stand in any of the common areas.
5. No owner shall make or permit any noises that will disturb or annoy the occupants of any of the Townhouses or do or permit anything to be done which will interfere with the rights, comfort or convenience of other owners.
6. Each owner shall keep such owner's Townhouse in a good state of preservation and cleanliness and shall not sweep or throw or permit to be swept or thrown therefrom, or from the doors or windows thereof, any dirt or other substance.
7. No shades, awnings, window guards, ventilators, fans, or air conditioning devices shall be used in or about the buildings except such as shall have been approved by the Board of Managers.
8. All garbage and refuse from the Townhouses shall be deposited with care in garbage containers intended for such purpose only at such times and in such manner as the Board of Managers may direct.
9. Water closets and other water apparatus in the buildings shall not be used for any purposes other than those for which they were constructed nor shall any sweepings, rubbish, rags, paper, ashes, or any other article be thrown into the same. Any damage resulting from misuse of any water closets or other apparatus shall be paid for by the owner in whose Townhouse it shall have been caused.
10. No owner shall send any employee of management out of the development on any private business of the owner.
11. No bird or animal shall be kept or harbored in the development unless the same in each instance is expressly permitted in writing by the Board of Managers. In no event shall dogs be permitted in any of the public portions of the development unless carried or on leash. The owner shall indemnify the Board of Managers and hold it harmless against any loss or liability of any kind or character whatsoever arising from or growing out of having any animal in the development.
12. No industry, business, trade, occupation, or profession of any kind, commercial, religious, educational, or otherwise, designed for profit, altruism, or otherwise, shall be conducted, maintained, or permitted on any part of the Property, nor shall any "For Sale," "For Rent," or "For Lease" signs or other window displays or advertising be maintained or permitted on any part of the Property or in any Unit therein nor shall any Unit be used or rented for transient, hotel, or motel purposes. The right is reserved by the Sponsor and the Board of Managers, or its agent, to place "For Sale," "For Rent," or "For Lease" signs on any unsold or unoccupied Units, and the right is hereby given to any mortgagee, who may become the owner of any Unit, to place such signs on any Unit owned by such mortgagee, but in no event will any sign be larger than _____ (_____) foot by _____ (_____) feet.
13. Nothing shall be altered or constructed in or removed from the Common Elements, except upon the written consent of the Board of Managers.
14. All radio, television, or other electrical equipment of any kind or nature installed or used in each Unit shall fully comply with all rules, regulations, requirements, or recommendations of the Board of Fire Underwriters and the public authorities having jurisdiction, and the Unit Owner alone shall be liable for any damage or injury caused by any radio, television, or other electrical equipment in such Unit.
15. The agents of the Board of Managers or the managing agent, and any contractor or workman authorized by the Board of Managers or the managing agent, may enter any room or Unit in the Buildings at any reasonable hour of the day after notification (except in case of emergency) for the purpose of inspecting such Unit for the presence of any

vermin, insects, or other pests and for the purpose of taking such measures as may be necessary to control or exterminate any such vermin, insects, or other pests.

16. The Board of Managers, or its designated agent, may retain a pass key to each Unit. No Unit Owner shall alter any lock or install a new lock or a knocker on any door of a Unit without the written consent of the Board of Managers. In case such consent is given, the Unit Owner shall provide the Board of Managers, or its agent, with an additional key pursuant to its right of access to the Unit.

17. No vehicle belonging to an owner or to a member of the family or guest, tenant, or employee of an owner shall be parked in such manner as to impede or prevent ready access to another owner's space. The owners, their employees, servants, agents, visitors, licensees, and the owner's family shall obey the parking regulations posted at the private streets, parking areas, and drives and any other traffic regulations promulgated in the future for the safety, comfort and convenience of the owners.

18. The owner shall not cause or permit the blowing of any horn from any vehicle of which he or his guests or family shall be occupants, approaching or upon any of the driveways or parking areas serving the development.

19. An owner must not permit his guests, tenants, or members of his family to use parking spaces owned by other owners.

20. All damage to the Townhouses caused by the moving or carrying of any article therein shall be paid by the owner responsible for the presence of such article.

21. Water shall not be left running for any unreasonable or unnecessary length of time.

22. No owner shall use or permit to be brought into the Townhouses any inflammable oils or fluids such as gasoline, kerosene, naphtha, or benzine, or other explosives or articles deemed extra hazardous to life, limb, or property, without in each case obtaining written consent of the Board of Managers.

23. The owners shall not be allowed to put their names on any entry of the Townhouses, except in the proper places provided for such purpose.

24. The owners shall close all windows when necessary, to avoid possible damage from storm, rain, or freezing.

25. No owner shall do any painting of the exterior of the Townhouses or to the patio, fences, parking spaces, or storage areas.

26. The swimming pool may be used by owners or their guests. No alcoholic drinking shall be permitted in the pool area. The owners and their guests must abide by the swimming pool rules as posted in the pool area. Personal copies shall be available upon request.

27. The Board of Managers may charge guests for the use of the swimming pool and may restrict the number of guests that may use the swimming pool.

28. The swimming pool may not be used unless a qualified lifeguard is present.

29. Rules of behavior for the swimming pool and pool area will be promulgated by the Board of Managers, and all Unit Owners and their families and guests must abide by such rules.

30. Draperies or curtains must be installed by each Unit Owner on all windows of his Unit and must be maintained in

such windows at all times. No blinds may be installed or used without draperies. The color of the portion of such draperies, blinds, or curtains visible from the exterior shall conform to standards specified by the Board of Managers.

31. The Board of Managers shall, from time to time, promulgate a list of service and convenience individuals and firms such as dry cleaners, launderers, milkmen, repairmen, etc., who are authorized to do business on the Property. No owner shall authorize other such individuals or firms on the Property without the approval of the Board of Managers.

32. Any owner wishing to plant flowers, trees, or shrubs outside of his patio area must obtain written permission from management before doing so.

33. Any damage to the buildings, recreational facilities, or other common areas or equipment caused by children or their guests shall be repaired at the expense of the Unit Owners.

34. Complaints regarding the management of the Townhouses and grounds or regarding actions of other owners shall be made in writing to the Board of Managers.

35. Any consent or approval given under these Community Rules by the Board of Managers shall be revocable at any time.

36. These community rules may be modified, added to or repealed at any time by the Board of Managers.

Huntington Townhouses Swimming Pool Regulations and Administration

1. The swimming pool and swimming pool area are for the use of the Huntington Townhouses residents and their invited guests.

2. All guests 18 years of age or under must be accompanied by a resident at all times.

3. All guests over 18, when not accompanied by a resident, must present a guest card. Guest cards may be obtained from the manager by the residents.

4. Except by prior arrangement with the lifeguard, the number of guests in one group in the pool at any one time will not exceed four.

5. No group of guests over four will be allowed on Saturday and Sunday.

6. Every Tuesday from one p.m. to nine p.m., the pool will be open only to persons over 18 years of age.

7. Residents are reminded that they are responsible for the conduct of their guests at all times.

8. Residents will sign the register for themselves and their guests when entering the pool area for swimming.

9. Swimming pool hours will be from nine a.m. to nine p.m.

10. The swimming pool attendant is in charge of bathing and safe conduct in the swimming pool area. Please respect his judgment and authority in enforcing safety and sanitation regulations.

11. Any person having any apparent skin disease, sore or inflamed eyes, cough, cold, nasal, or ear discharges, or any

communicable disease shall be excluded from the pool.

12. No boisterous or rough play, except supervised water sports, is permitted in the pool, on diving board, or in the pool area.

13. Spitting, spouting water, and blowing nose in the pool, etc., are prohibited.

14. Solo swimming (swimming alone when no other person is in the immediate pool area) is prohibited.

15. Double bouncing on diving board is prohibited.

16. Drinking alcoholic beverages in the pool area is prohibited.

17. No horseplay... . No running... . Please walk.

18. The use of glassware or glass bottles, etc., in the pool area is prohibited.

19. Please observe swimming hours as posted.

20. All individuals will take a shower in their Townhouse or in facilities provided for that purpose before entering the swimming pool and will provide their own towels.

21. Attire will conform to conventional swimming suits. Full trunks or swimming suits will be worn.

22. It is requested that all individuals cooperate in maintaining maximum cleanliness and tidiness in the swimming pool area.

23. Tobacco, beverages, or food may not be taken within _____ (_____) feet of the swimming pool.

24. No children in diapers are allowed in the pool.

25. No pets are allowed in the swimming pool or the clubhouse area.

Clubhouse Regulations

1. The Clubhouse is for the use of Huntington Townhouse residents and their invited guests.

2. The Clubhouse shall be used in accordance with the rules and regulations as posted therein.

3. Any persons using the Clubhouse shall be responsible for keeping it clean and presentable.

4. Each owner shall be responsible for any damage caused to the Clubhouse or its contents by the owner or any of the owner's family, tenants, or guests. The owner shall pay for any such damage.



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Current Legal Forms for Real Estate

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Current Legal Forms for Real Estate
Chapter 22 DEVELOPMENT AND SUBDIVISION
Part IV. FORMS
E. RESIDENTIAL DEVELOPMENT

26-22 Current Legal Forms for Real Estate FORM 22.89

FORM 22.89 Agreement for Sale of Condominium

COMMENT

The following agreement is for the sale of a new condominium under construction. It includes many of the typical provisions that one would find in a purchase agreement (i.e., price, closing date, title insurance, etc.). It also includes some provisions that are specific to the offering of a new condominium unit, which is usually governed by the condominium statute of the state in which the condominium is located, and because this unit is in the process of being built, it includes provisions which you would also see in a construction contract. The purchase of a condominium includes not only the purchase of the unit itself, but also the purchase of an undivided interest in the common areas, and provides that the buyer is buying the condominium subject to the governing condominium documents and provisions. Therefore, the buyer should always review those governing condominium documents in advance of signing the purchase agreement. Many states provide that a disclosure statement must be given to the buyer prior to the sale of the condominium, disclosing the essential facts which the buyer should know prior to purchasing that condominium and provide for a right of rescission for a period of time after the buyer is in receipt of the disclosure statement. As set forth in Paragraph 7.A., the sale of a new condominium will also typically require certain statutory warranties to be given by the seller, a warranty relating to the construction of the condominium unit itself and its contents, and to the common areas.

In this particular purchase agreement, the buyer is required to make a down payment which would be applied against the purchase price of the unit, but provides at the end of Paragraph 2.A. that the earnest money deposit may be used by the seller as opposed to being deposited into escrow, as long as the funds are used towards the actual construction of the unit and it is fully disclosed in the purchase agreement that the earnest money deposit can be used for that purpose. Obviously, if that is the case, the buyer should make sure that the buyer is dealing with a reputable condominium developer, otherwise the buyer could lose that down payment if the buyer uses it for unallowed purposes or otherwise gets into financial

trouble and cannot complete the unit. Another way to possibly protect the interest of the buyer is to require that the down payment be deposited into an escrow account, to be disbursed only upon receipt by the escrow agent of evidence of paid invoices for actual expenditures made with respect to the construction of the unit. That may or may not be possible to negotiate, depending on the bargaining position of the buyer.

It is important that the buyer of a new condominium unit have the right to inspect it prior to closing the transaction and taking occupancy of the unit. That is provided for in Paragraph 6.C. of this Agreement. Obviously, the condominium statutes of each state are different and the laws of the jurisdiction should be reviewed prior to entering into the agreement.

FORM

AGREEMENT FOR SALE OF CONDOMINIUM

for

Aspen Condominiums

THIS AGREEMENT is made this ____ day of ____, 20____, by and between Meaden Homes, Ltd., an Ohio limited liability company ("Seller"), and _____ and _____ (collectively "Buyer").

1. Definitions. Except as otherwise set forth herein, all terms used herein shall have the same respective meanings as specified in the Declaration of Condominium Ownership for Aspen Condominiums (the "Declaration").

2. Agreement to Purchase. Seller hereby agrees to sell to Buyer, and Buyer hereby agrees to purchase from Seller, a condominium unit known as Unit ____ (the "Unit"), to be located on Site No. _____ as shown on the Plot Plan marked Exhibit "A," attached hereto and made a part hereof, to be known by the street address _____, _____, _____, together with an undivided percentage interest (the "percentage interest") in the Common Areas and Facilities appurtenant to the Unit, and all of Seller's right, title and interest in and to any fixtures, built-in appliances and equipment located in the Unit, all of which shall hereinafter sometimes be referred to collectively as the "Premises." The Premises shall be constructed in accordance with the terms of Paragraph 6. below.

3. A. Purchase Price. Buyer shall pay to Seller for the Premises the sum of:

Purchase Price of Unit \$_____

The purchase price consists of the allowances set forth on Exhibit B, attached hereto.

The purchase price shall be paid as follows:

Earnest Money Received \$_____

Balance Due Per P 6.C. \$_____

Any deposit or down payment made by Buyer with Seller in connection with the sale of a condominium ownership interest shall be held in trust or in an escrow account. If this transaction is closed as provided herein, the earnest money deposit together with interest, if any, which may be due Buyer shall be applied at closing as a credit against the purchase price.

Notwithstanding the above, Seller may at its option withdraw the aforesaid deposit or down payment held in trust or in escrow upon commencement of construction of the Unit and site work and use the monies in the actual construction and development of the Premises, it being understood that the Seller shall not use the monies for advertising purposes or for the salaries, commissions or expenses of agents.

PURCHASER ("BUYER") ACKNOWLEDGES THAT, PURSUANT TO THIS CONTRACT, THE DEVELOPER ("SELLER") MAY WITHDRAW AND THEN USE FOR CONSTRUCTION AND DEVELOPMENT OF THE CONDOMINIUM PROPERTY ANY DEPOSIT OR DOWN PAYMENT THAT THE PURCHASER ("BUYER") MAKES PRIOR TO CLOSING.

B. Other Payments. In addition to the above purchase price, Buyer shall also pay Seller for any extras, alterations or additions not provided for by this Agreement, but requested by Buyer and approved in writing by Seller, hereafter referred to as the "Change Orders." Such amounts shall be deposited in escrow on or before the date specified in Paragraph 6. C. below

C. Financing. If Buyer is unable, after exercising Buyer's commercially reasonable efforts, to obtain a commitment for mortgage financing for the purchase of the Premises, within thirty (30) days after the date of this Agreement, which mortgage loan shall be an amount equal to not less than _____ percent (____%) of the total purchase price payable under this Agreement with a term of not less than _____ (____) years at the then prevailing interest rate in _____ County, Ohio, then either party shall have the right to terminate this Agreement by notice to the other. In the event of termination, the earnest money shall be refunded to Buyer. A copy of Buyer's loan commitment shall be delivered to Seller promptly upon receipt by Buyer from the lending institution.

4. Governing Documents. The sale and purchase of the Premises, together with the percentage interest shall be subject to:

- (i) the Declaration and any amendments thereto made pursuant to the authority granted therein or reserved herein;
- (ii) the Bylaws of the Aspen Condominium Unit Owners Association (the "Bylaws"), and any amendments thereto made pursuant to the authority granted therein or reserved herein;
- (iii) the Aspen Condominium Drawings (the "Drawings"), and any amendments thereto made pursuant to the authority granted therein or reserved herein;
- (iv) The Condominium Statute of the State of Ohio (the "Act"); and
- (v) the matters set forth in the Disclosure Statement ("Disclosure Statement"), required by the Act and furnished to Buyer.

Seller reserves the right to make such modifications, additions or deletions in or to the Declaration, the Bylaws and the Drawings as shall be deemed appropriate or necessary by Seller or its counsel, or as may be required by Seller's lender or the title company hereafter designated, provided that none of the same shall increase the purchase price specified in Paragraph 3. above or require a material physical modification of the Unit.

5. Title.

A. Deed. Seller shall furnish a general warranty deed (the "Deed") conveying to Buyer good fee simple title to the Premises, together with the percentage interest, free and clear of all liens and encumbrances whatsoever except:

(i) the terms, provisions, obligations and conditions contained in (1) the Act, (2) the Declaration and any amendments thereto made pursuant to the authority granted therein or reserved herein, and (3) the Bylaws and any amendments thereto made pursuant to the authority granted therein or reserved herein;

(ii) the Drawings and any amendments thereto made pursuant to the authority granted therein or herein;

(iii) conditions, restrictions, covenants, reservations and easements of record;

(iv) zoning and other building ordinances; and

(v) taxes and assessments, both general and special, which are a lien but not due and payable on the date the Deed is filed for record.

B. Title Evidence. After closing, Seller shall also furnish Buyer with an Owner's Fee Policy of Title Insurance (with a condominium endorsement) issued by Chicago Title Insurance Company (the "Title Company") in the amount of the purchase price which shall insure marketable title to the Premises and its percentage interest to be good in Buyer, free and clear of all liens and encumbrances, except the exceptions in the Deed set forth in Paragraph 5.A. above.

6. Construction.

A. Description of Work. It is acknowledged that Buyer previously selected and paid for a certain set of architectural plans for this Unit, which plans describe the model known as _____ (the "Model"), containing approximately _____ (_____) square feet. Such Model contains the Detailed List of Features described on Exhibit C, attached hereto and made a part hereof, and is modified by the document captioned Optional Items Selected by Buyer as set forth on Exhibit D, attached hereto and made a part hereof.

Upon the execution hereof, or as soon as Seller can obtain a building permit therefor, Seller shall cause the Premises to be constructed in accordance with the Plans and Specifications dated _____, 20____, prepared by _____ Architects, more fully identified on Exhibit D, attached hereto and made a part hereof. Two (2) full sets of the Plans and Specifications shall be initialed by Seller and Buyer and each shall keep one set.

No Change Orders should be made in the Plans and Specifications, except upon a written order signed by both Seller and Buyer. If there is more than one Buyer, the signature of the Buyer on such change order shall be deemed obtained when signed by any one (1) Buyer. Buyer agrees to direct all communication concerning the Plans and Specifications for the construction of the Premises to the attention of Seller in writing, and expressly agrees not to communicate or negotiate directly with the vendors or subcontractors before or during the construction of the Premises. Buyer agrees to make all selections necessary for substantial completion of the Premises on a timely basis, on a schedule to be provided by Seller to Buyer.

B. Estimated Completion Date. The estimated date for substantial completion is _____, 20____. Seller shall use commercially reasonable efforts to substantially complete the Premises by such date, subject to delays due to Acts of God, strikes, material shortages, or other reasons beyond the control of Seller, including without limitation, delays due to the acts or omissions of Buyer. In no event, however, shall Seller be liable to Buyer for any damages or inconveniences suffered by Buyer for Seller's delay in construction and delivery of possession and title, or for Seller's failure to substantially complete and deliver by said date.

C. Closing Date. Seller will notify Buyer when Seller has substantially completed construction of the Premises. The closing date shall occur on or before seven (7) business days after Seller gives such notice ("Closing Date"), whether or not the decorating, floor coverings and electric fixturing have then been substantially completed. The consummation of

this transaction shall be evidenced by the filing of the Deed with the County Recorder. If any of the decorating, floor coverings and electric fixturing work required to be done by Seller is not done on the Closing Date, or if there is need for "touch up" or minor repairs to Seller's other work on the Closing Date, Buyer agrees not to use such failure to complete, need for touch up or need for repair, either to defer the Closing Date or to refuse to deposit the entire balance of the purchase price with the escrow agent hereafter designated. If the Premises are substantially completed by the Closing Date except for the completion of certain interior and/or exterior items, including such items as exterior concrete, driveways, exterior paving, final grading and landscaping, provided that a Certificate of Occupancy or a Conditional or Temporary Occupancy Permit is issued for the Premises, the parties agree that the escrow will be closed without any holdback of funds from the purchase price to Seller, except for the estimated cost to complete such punch list items as reasonably determined by Seller. It is understood and agreed by Seller that such punch list items will be promptly completed by Seller as soon as reasonably possible.

If Seller is unable to obtain the exact materials specified in the Plans and Specifications, or option items selected by Buyer, through Seller's ordinary use or sources of supply, Seller shall have the right to substitute materials of similar pattern and design and of the same or higher quality. The parties agree that the Premises shall be substantially completed upon issuance of a Certificate of Occupancy or a Conditional or Temporary Occupancy Permit, at which time Buyer agrees to immediately sign and deliver to Buyer's mortgage lender, if any, all necessary mortgage loan papers pertaining to Buyer's financing, and Buyer agrees to immediately sign and deliver to Seller and the escrow agent duplicate copies of Seller's standard form acceptance letter ("Acceptance Letter") accepting the Premises and authorizing the disbursement to Seller of the balance of the purchase price save and except for an amount agreed to cover the cost of finishing the punch list items, if any, and setting forth additional escrow instructions, if any, and the Closing Date. Buyer acknowledges receipt of a copy of the Seller's standard form Acceptance Letter.

As of the Closing Date, Buyer acknowledges there may be construction and other improvements still under way at or near the Condominium Property, and the Common Areas and Facilities may not be fully completed. Furthermore, Buyer acknowledges that Seller may add additional land to the Condominium Property ("Additional Property") as more fully described in the Declaration, and will be required to use the existing road within the Condominium Property for ingress and egress and to deliver construction materials, equipment, vehicles and the like to construct other Units and improvements on the Condominium Property and on such Additional Property, if added. Buyer agrees to and accepts such use. None of the foregoing conditions or rights of Seller will relieve Buyer of Buyer's obligation to close, or having closed, will give to Buyer any claim against Seller.

7. Limited Warranty.

A. Statutory Limited Warranty. Solely and only to the extent that such warranties are required by the provisions of the Act, Seller hereby furnishes, solely to Buyer, and to no other person or party, a two-year warranty covering the full cost of labor and materials for any repair or replacement of roof and structural components, and mechanical, electrical, plumbing and common service elements serving the Condominium Property or Additional Property as a whole, occasioned or necessitated by a defect in material or workmanship and a one-year warranty covering the full cost of labor and materials for any repair or replacement of structural, mechanical, and other elements pertaining to the Premises being purchased by Buyer, occasioned or necessitated by a defect in material or workmanship, commencing as follows:

(1) The two-year warranty shall commence for property submitted by the original Declaration on the date the Deed or other evidence of ownership was filed for record following the sale of the first condominium ownership interest in the Condominium Property, and for any Additional Property submitted by amendment to the Declaration, on the date the deed or other evidence of ownership is filed for record following the sale of the first condominium ownership interest in the Additional Property, to a purchaser in good faith for value.

(2) The one-year warranty shall commence on the date the Deed or other evidence of ownership is filed for record

following the first sale of a condominium ownership interest to a purchaser in good faith for value.

With respect to any fixtures, appliances or equipment installed in the Unit by Seller, Seller agrees to and does hereby assign the express and/or implied warranty of the manufacturer to Buyer effective as of the Closing Date, to the extent assignable. Buyer acknowledges that Buyer shall not look to Seller for any defects in material or workmanship with respect to such items, but solely to the manufacturer.

B. Seller's Only Warranties. The limited warranties set forth in Paragraph 7.A. above are the only warranties, expressed or implied, made by Seller to Buyer with respect to the construction or physical condition of the Condominium Property, including, without limitation, the Premises. None of the warranties set forth in Paragraph 7.A. above shall cover repairs or replacements necessitated or occasioned by ordinary wear and tear or by the negligent or wanton acts of any unit owner, occupant, guest or invitee, or for any reason whatsoever other than by a defect in material or workmanship.

8. Closing Procedure.

A. Escrow Instructions. The escrow agent for this transaction shall be Chicago Title Insurance Company ("Escrow Agent"). This Agreement constitutes joint escrow instructions to the Escrow Agent, instructing it to complete the purchase and sale of the Premises in accordance with the terms and conditions set forth herein. The Escrow Agent may accept this Agreement as escrow instructions subject to the standard conditions of acceptance of the Escrow Agent to the extent that the same are not inconsistent with the provisions of this Agreement.

B. Closing Procedures. All documents and funds necessary for the completion of this transaction shall be placed in escrow with the Escrow Agent on or prior to the Closing Date. Time is of the essence under this Agreement. Buyer acknowledges that prior to and after the Closing Date, Seller will incur substantial continuing expense for construction interest, insurance, taxes, and maintenance ("Carrying Costs"), and that for these reasons time is the essence for closing this transaction. If Buyer shall fail to deposit with the Escrow Agent the entire balance of the purchase price within the time herein provided, or should Buyer delay Seller's completion of the Premises (e.g., delays caused by Buyer's selections or caused by Buyer's decorators), Buyer shall pay to Seller at or prior to closing an amount equal to the Carrying Costs for the period of such delay. Seller shall not be obligated to accept such delayed payments (i.e., Carrying Costs), and may at any time after the date on which the deposit should be made but before the deposit is in fact made, proceed in accordance with Paragraph 14. of this Agreement.

Upon receipt by the Escrow Agent of the following:

- (i) the funds required to be deposited in escrow by Buyer pursuant to Paragraph 3. of this Agreement;
- (ii) the Conveyance Fee Statement as required by Ohio law;
- (iii) the Deed; and
- (iv) any other funds or documents required to close this transaction, then, the Escrow Agent shall complete this transaction by filing the Deed for record, crediting or charging each party with the prorations and expenses authorized in this Agreement and by disbursing the amounts due respectively to each party, but only when the Escrow Agent can and will issue to Buyer the Title Insurance required under Paragraph 5.B. of this Agreement.

Notwithstanding the above, if on the Closing Date the Title Company informs the Escrow Agent that it cannot issue the Title Insurance required hereunder, and if the Buyer does not forthwith waive the title defects that the Title Company shall recite as preventing such issuance, or if the Seller does not forthwith cure the same, then the closing of this transaction shall be postponed for a period of 30 days until the Seller removes said title defects.

9. Prorations.

A. Taxes. The Escrow Agent shall prorate between the parties all real estate taxes and assessments, both general and special, which are a lien but not yet due and payable as of the Closing Date, attributable to the Premises and its percentage interest. The proration shall be made as of the Closing Date.

In prorating real estate taxes and assessments, the amount shown on the last officially certified tax duplicate shall be used. If, however, the last officially certified tax duplicate was not based upon an assessment which includes the Unit as substantially completed, then such taxes and assessments shall be prorated between the parties outside of escrow based upon the actual assessment for the year of closing, provided Buyer shall request such proration within ninety (90) days after such information becomes available.

B. Condominium Association Assessments. Condominium Association assessments shall be paid semi-annually in advance. At the time of closing, the Escrow Agent shall prorate the assessment attributable to the Premises for the semi-annual period in which the closing occurs, and in addition Buyer shall be required to pay into escrow the next succeeding semi-annual assessment. The Escrow Agent shall forward directly to the Condominium Association the assessments collected at the closing.

10. Closing Charges.

A. To Seller. The Escrow Agent shall charge to Seller and pay out of the funds otherwise due Seller the following:

- (i) the amount of any state or county fees and taxes levied on or in connection with the transfer of title to the Premises and its percentage interest;
- (ii) the cost of the title examination and the premium for the Title Insurance required hereunder;
- (iii) one-half (1/2) of the Escrow Agent's fee;
- (iv) any amount due Buyer by reason of the proration of real estate taxes and assessments required hereinabove;
- (v) all other charges properly borne by Seller consistent with the terms hereof.

B. To Buyer. The Escrow Agent shall charge to Buyer and pay out of the funds otherwise due Buyer the following:

- (i) one-half (1/2) of the Escrow Agent's fee;
- (ii) the cost of recording the Deed;
- (iii) the Condominium Association assessment as referred to above;
- (iv) all costs related to the financing of this transaction by Buyer, if any; and
- (v) all other charges properly borne by Buyer consistent with the terms hereof.

11. Utilities and Insurance Not Prorated at Closing.

A. Utilities. Seller shall pay all utilities applicable to the Premises until transfer of record title, after which all such charges shall accrue to and be paid by Buyer. Any energy rebates shall be paid to Seller.

B. Insurance. The Buyer is responsible from and after the date title transfers for obtaining and maintaining such insurance coverage with respect to the Premises as the Buyer deems appropriate.

12. Possession. Buyer shall be entitled to possession of the Premises from and after the date the Deed is filed for record in the office of the County Recorder. Subject to the provisions of Paragraph 6. C. above, Buyer shall be deemed to have accepted the condition of the Premises in "as is" condition as of the date record title to the Premises is transferred to Buyer, or as of the date Buyer takes possession of the Premises, whichever is first to occur, as to all matters which are apparent upon a visual inspection, such as scratches, dents, blemishes and similar defects in any part of the Premises, provided Buyer obtains from Seller prior to taking possession or prior to transfer of record title, whichever is first to occur, a written statement signed by Seller acknowledging the exact items claimed to be faulty and defective by Buyer and stating exactly what remedial work, if any, Seller will perform. Seller agrees to execute such statement and to correct such items listed thereon as soon as reasonably possible. Buyer shall have the right to examine the Premises before title transfer or before Buyer takes possession of the Premises as fully as Buyer reasonably desires, and Seller makes no implied warranties with regard to defects which such an examination ought under the circumstances to reveal.

13. Fire or Other Casualty. The risk of loss by fire or other casualty shall remain on Seller until the filing of the Deed for record. In the event of substantial damage to or total destruction of the Premises by fire or other casualty prior to said Deed being filed for record, Seller shall, within thirty (30) days following such damage or destruction, give notice to Buyer as to whether the Premises will be rebuilt or restored. In the event that the Premises is to be rebuilt or restored, this Agreement shall remain in full force and effect (except that if the Premises has been damaged or destroyed, the date on which the Deed is to be filed for record shall be postponed until the Premises has been rebuilt or restored); otherwise, either party may declare this Agreement null and void, in which case all money paid to Seller or deposited by Buyer with the Escrow Agent and all documents deposited by Seller with the Escrow Agent shall be returned to the depositing party, and each party shall be released from all liability hereunder. In the event of any unsubstantial damage to the Premises by fire or other casualty prior to the Deed being filed for record, the same shall be rebuilt or restored at Seller's expense, and this Agreement shall remain in full force and effect.

14. Default. If this transaction does not close in escrow at the time and otherwise as provided by this Agreement, then:

(i) If caused by default of Seller, Buyer shall be entitled to prompt return of all payments made to Seller or into escrow, together with interest, if any, which may be due Buyer. Except as provided in Paragraph 23. below, the aforesaid shall be Buyer's sole remedy upon such default, and Buyer shall not be entitled to seek damages or specific performance and all rights of Buyer in the Premises and all other rights of Buyer under this Agreement shall thereupon terminate.

(ii) If caused by default of Buyer, Buyer and Seller agree that Seller's damages would be difficult or impractical to ascertain. Therefore, Buyer and Seller agree that Seller may terminate this Agreement by giving written notice to both Buyer and the Escrow Agent of Buyer's default, stating that Seller has performed all of the terms, provisions and conditions on Seller's part to be performed hereunder and that Seller has elected to terminate this Agreement. Upon any such termination, the following shall apply:

(1) Seller shall have the right to retain, as liquidated damages and not as a penalty, the earnest money deposit referred to in Paragraph 3.A. of this Agreement and previously paid to Seller by Buyer.

(2) The Escrow Agent shall pay to Buyer any sums previously deposited in escrow by Buyer pursuant to Paragraph 8.B. of this Agreement, less the amount of all expenses then incurred for title work and escrow services, which expenses shall be charged to Buyer and paid with escrow funds otherwise due Buyer.

Notwithstanding the above, in the event of Buyer's default, Seller at Seller's option shall have the right to waive its right to the liquidated damages above, and in lieu thereof invoke any other remedy available to Seller in law or in equity.

15. Broker's Commission. The Seller and the Buyer warrant, which warranty shall survive the transfer of title, that no real estate broker was involved in this transaction and that no brokerage fees or other compensation is due any real estate broker or brokerage firm because of this transaction.

16. No Assignment. Buyer shall not assign this Agreement or any of Buyer's rights under this Agreement, without the prior written consent of Seller.

17. Notices. All notices required or permitted under this Agreement shall be deemed sufficiently given if personally delivered or sent by United States mail, postage prepaid, registered or certified mail, addressed to the respective parties at the address set forth in the signature page, or to such other address as either party may specify by written notice to the other delivered as provided above.

18. Survival of Terms. The terms, covenants, and conditions contained in this Agreement shall survive the delivery of the Deed and remain in effect.

19. Successors and Assigns. Except as otherwise expressly provided in this Agreement, this Agreement shall inure to the benefit of, and be binding upon, the parties hereto and their respective heirs, executors, administrators, successors and assigns.

20. Severability. In case any one or more of the provisions contained herein shall for any reason be held to be invalid, illegal or unenforceable in any respect, such invalidity, illegality or unenforceability shall not affect any other provision of this Agreement, but this Agreement shall be construed as if such invalid, illegal or unenforceable provisions had not been contained herein.

21. Arbitration; Subordination of Buyer's Rights.

A. Buyer and Seller agree that any controversy or claim arising out of or relating to this Agreement, or the breach thereof, shall be settled by arbitration in accordance with the Construction Industry Arbitration Rules of the American Arbitration Association, and that the judgment upon the award rendered by the arbitrator(s) may be entered in any court having jurisdiction thereof. Such arbitration shall be administered by the nearest office of the American Arbitration Association.

B. In order for Seller to obtain a construction loan for the construction of the Premises, it will be necessary for Seller to execute and deliver to its lender a mortgage encumbering the Condominium Property. The lender will require that said mortgage be a first and best lien on the Condominium Property, superior to Buyer's interest in the Premises. Therefore, Buyer hereby postpones, subordinates and waives to such lender the priority of any right, equitable lien or interest which Buyer may have or claim to have as a result of payments made or to be made by Buyer to Seller prior to closing. Title to the Premises shall be transferred to Buyer at the closing in accordance with this Agreement, free and clear of any mortgage placed on the Premises by Seller.

22. Entire Agreement. This Agreement and the matters expressly referred to herein constitute the entire agreement between the parties. No representations, warranties, undertakings or promises, whether oral, implied or otherwise, have been made by either Seller or Buyer to the other unless expressly stated in this Agreement, or unless mutually agreed upon in writing by Seller and Buyer. All amendments and supplements to this Agreement, if any, shall be in writing executed by both Buyer and Seller.

Seller and Buyer have executed this Agreement the day and year first above written.

PURCHASER ("BUYER") ACKNOWLEDGES THAT, PURSUANT TO THIS

CONTRACT, THE DEVELOPER ("SELLER") MAY WITHDRAW AND THEN USE FOR CONSTRUCTION AND DEVELOPMENT OF THE CONDOMINIUM PROPERTY ANY DEPOSIT OR DOWN PAYMENT THAT THE PURCHASER ("BUYER") MAKES PRIOR TO CLOSING.

Address:

Address:

SELLER:

Meaden Homes, Ltd.

By: _____

BUYER:



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Current Legal Forms for Real Estate

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Current Legal Forms for Real Estate
Chapter 22 DEVELOPMENT AND SUBDIVISION
Part IV. FORMS
E. RESIDENTIAL DEVELOPMENT

26-22 Current Legal Forms for Real Estate FORM 22.90

FORM 22.90 Plan of organization for cooperative apartment house

COMMENT

A cooperative has the look and feel of a condominium, except that the unit owners own stock in a corporation which in turn owns the real estate. The typical venture is one in which a corporation is organized to hold fee title to real estate and to lease apartments to its shareholders/owners.

The organization of a cooperative is usually initiated by a "developer" who, apart from arranging the preliminary corporate matters, undertakes to provide improved real estate for acquisition by the cooperative. All the details of the program of acquisition, improvement, and sale are usually set forth in a plan of cooperative organization which is made available to prospective tenant-shareholders. A copy of the stock purchase agreement and the proprietary lease is also provided with the plan. The forms included in this group are those required in the various stages of the organization of a particular cooperative, including (1) the plan of organization, (2) the certificate of incorporation, (3) the bylaws, (4) the contract with an agent to sell the corporation's stock, (5) the stock purchase agreement, and (6) the proprietary lease. Also included is a contract for the sale by a tenant-shareholder of his stock and the accompanying lease.

In the plan of cooperative organization illustrated, the sponsor sets forth in complete detail a description of the building which he undertakes to make available to the cooperative corporation and all aspects of the cooperative organization. Among the elements to be described are: (1) the property, (2) financing of the purchase of the fee, (3) proprietary lease, (4) conditions for the purchase of stock, (5) estimated completion date, (6) procedure for occupancy, (7) arrangement for management of the property, (8) parties involved in the enterprise, (9) corporate charter, and (10) corporate bylaws and other relevant information.

Appended are schedules of estimated income and expenses for the cooperative corporation, the

selling price of the stock of the cooperative corporation, and estimated charges and income tax deductions attributable to each apartment. (In some states, such as New York, special statutes prescribe strict procedures and disclosures in the sale of cooperative real estate ventures.)

The plan of organization is intended to incorporate every essential detail of the venture. Its significance is evident from the fact that it is incorporated by reference in the purchase agreement with every prospective tenant-shareholder.

Cooperative plans may provide that, unless a minimum percentage of shares are contracted for sale by a given date, the plan will not become operative, but that, after a certain percentage of shares are contracted for sale, the plan must be declared operative.

The sponsor's obligation to provide responsible individuals to purchase the shares which are unsold at the time the premises are ready for occupancy, and to enter into proprietary leases for all apartments to which the unsold shares are allocated is a vital element. This insures that each tenant-shareholder will bear only his expected proportionate share of the operating and other expenses of the property. In addition, it insures compliance with the requirement that at least 80% of the gross income of the cooperative corporation be from individual tenant-shareholders. The cooperative corporation may merely hold a long-term lease on the real property, in which case the shareholders merely receive subleases to their respective apartments.

Tenant's rights and duties:

As a shareholder in the owning corporation, the tenant has a voice in the management of the cooperative building. But under the proprietary lease, the tenant is further obligated to make periodic rent payments in amounts established annually by the directors of the cooperative corporation. These payments are designed to cover the tenant's proportionate share of the following recurring expenses:

- (1) Interest;
- (2) Taxes;
- (3) Maintenance;
- (4) Special assessments;
- (5) Operating expenses; and
- (6) Mortgage amortization.

For additional forms relating to cooperatives, see Chapter 20, Real Estate Entities, in Volume 24, *supra*.

FORM

PLAN OF COOPERATIVE ORGANIZATION

HOLLANDER REALTY GROUP, (the "Sponsor") submits through SMITH REAL ESTATE BROKERS, INC. (the "Agent"), this Plan of Cooperative Organization with respect to premises _____ [address], (the "Building"), and the new apartment building to be erected thereon.

Hollander Apartments, Inc., hereinafter called the Apartment Corporation, has been organized for the purpose of acquiring the fee ownership of the land and completed Building. The land is presently owned by Hollander, Inc., hereinafter called the Builder, which will erect the Building from plans prepared by Harold Associates, Inc., hereinafter called the Architect and/or Consulting Architect, which plans have been filed with the Department of Buildings in the _____ [city]. The shares of the Apartment Corporation are being offered for sale through the Agent on the terms and conditions herein set forth. The Sponsor will guarantee to the Apartment Corporation the completion of the Building and the payment of costs of construction.

As hereinafter set forth, the Sponsor is a publicly owned corporation and is the holder of all of the stock of the Builder.

1. Property and Improvements. The property is described on Exhibit A. The Building will have _____ (_____) floors and Penthouse containing _____ (_____) residential apartments, a superintendent's apartment, _____ (_____) separate servants' rooms, each with its own bath. The apartments will range in size from _____ (_____) to _____ (_____) rooms. There will be a garage in the basement which will accommodate about _____ (_____) automobiles and there will also be an area on the ground floor, west of the main entrance, which will be leased as an office. No shares are being allocated to this space. The Building will be centrally air-conditioned and will be heated by steam. The entrance and lobby as well as the public portions of the Building will be decorated and furnished under the supervision of Bob Flee, designer. There will be twenty-four (24) hour doorman service and the passenger elevators will be operated by tenant owners but a day and evening hall man will be available to assist tenant owners. The plan anticipates _____ (_____) employees including superintendent, doorman, service elevator, porter, and handyman.

As set forth in Schedule B, _____ (_____) shares of the Apartment Corporation have been allocated to the _____ (_____) residential apartments plus nine separate servants' rooms. No shares are being allocated to the superintendent's apartment, the garage, or the rentable space on the ground floor. A lease has been entered into by the Sponsor with a garage operator to rent the garage space for a _____ (_____) year term at _____ Dollars (\$_____) per annum. The garage operator in turn will rent space in the garage to the tenant-shareholders and others, with priority to the tenant-shareholders at prevailing rates. The garage may be closed between the hours of 2 a.m. and 7 a.m. It is also proposed to lease the rentable space on the ground floor at not less than _____ Dollars (\$_____) per annum. Copies of these leases when executed will be on file with the Agent and the income therefrom will be received by the Apartment Corporation. The Sponsor will pay or cause to be paid the estimated income from the garage and the doctor's office for the first year starting from the time the plan is put into full force and effect. There will be a laundry on the service level, which is leased for _____ (_____) years to a concessionaire, and the laundry equipment is to be coin-operated by the tenant-shareholders. The concessionaire is a wholly owned subsidiary of the Sponsor.

A general description of the Building is attached hereto. This description is for information purposes only and to assist in the examination of the Building plans and specifications. A copy of the plans and specifications are on file with the Agent. The Sponsor and Builder reserve the right, up to the time of the completion of the Building, to make such changes or amendments in the plans and specifications, construction contract, equipment, materials, furnishings, and supplies, as any governmental department or bureau or as may be deemed necessary or advisable by the Architect, or such may deem necessary or advisable, or such as may only affect particular apartments and are contracted for by the individual purchasers or such as are minor. Where alternatives are specified or where a particular practice or method of

construction or equipment, material, or supplies is not specified, the choice and decision of the Architect and Consulting Architect shall be final.

Construction was started in _____ [month] of _____ [year]. It is anticipated that the Building will be substantially completed on or about _____ [month] _____ [day], _____ [year], unless delayed by strikes or other causes over which the Sponsor, the Builder, or the Apartment Corporation have no control.

2. Cooperative Organization. The aggregate number of shares which the Apartment Corporation shall have authority to issue is _____ (_____) shares of the par value of _____ Dollars (\$_____) each, of which _____ (_____) shares have been allocated to the residential apartments and separate servants rooms. The balance of the shares will be authorized and unissued. Ownership of the respective blocks of shares will entitle the purchasers to proprietary leases of the apartments and servants' rooms to which such blocks of shares are allocated.

The Apartment Corporation proposes to offer its shares to suitable purchasers, hereinafter called The Purchasers. In order to meet possible demands for greater or less space than is shown on any floor plan, the Apartment Corporation reserves the right to change the size and number of apartments and to vary the amount of shares to accompany each proprietary lease. No change, however, will be made with respect to shares allocated to any apartment for which a purchase agreement has been accepted, nor will any such change have the effect of increasing or decreasing the total number of shares allocated to the residential apartments and separate servants' rooms.

The proceeds from the sale of shares will be used for the acquisition of the land with the completed Building thereon, on the terms and conditions hereinafter outlined.

If, when the Plan is put into full force and effect, any shares are unsold, the Sponsor guarantees to provide responsible individuals to take over such unsold shares and to enter into proprietary leases for all the apartments in the Building to which the unsold shares are allocated. These purchasers may not be purchasing for personal occupancy and may assign the shares and proprietary leases or sublet the apartments, subject only to the approval of the Agent, but such purchasers will be responsible for the maintenance and carrying charges thereunder until any such shares and proprietary leases are resold, and the Sponsor will guarantee the same. Thus, when the Plan is put into full force and effect proprietary leases outstanding for all the apartments and separate servants' rooms in the Building to which shares are allocated.

An estimate of the Apartment Corporation as prepared by the Agent and approved by the Sponsor is set forth in Schedule A hereto attached. The location of the respective units, the allocation and purchase price of the shares, the estimated annual maintenance charges, and the estimated income tax deductions are set forth in Schedule B attached hereto.

Financial Plan

The financial plan under which the land and completed Building will be acquired by the Apartment Corporation is as follows:

Acquisition of the land and completed

Building	\$ _____
Working Capital	\$ _____
Sub-Total	\$ _____
Mortgage Indebtedness	\$ _____
_____ shares @	\$ _____

\$_____ per share

The mortgage indebtedness of _____ Dollars (\$_____) above referred to, will have constant annual charges to the Apartment Corporation of _____ Dollars (\$_____), payable in equal monthly installments to be applied to the interest at the effective rate of _____ percent (_____%) per annum and the balance to the reduction of principal. The total mortgage indebtedness will be self-liquidating and will be fully paid in approximately _____ (_____) years or sooner. On the maturity of the mortgage indebtedness, the Apartment Corporation will have no further obligations with respect thereto and will be relieved of the annual charges thereon.

A mortgage commitment has been obtained from the _____ [lender] in the City of _____ [city] for a first mortgage loan on the land and completed building of _____ Dollars (\$_____), with constant quarter-annual charges of _____ Dollars (\$_____) or a total annual payment of _____ Dollars (\$_____), to be applied first to interest at the rate of _____ percent (_____%) per annum and the balance to reduction of principal, which will fully liquidate the loan within a period of _____ (_____) years. There will be a prepayment privilege after the _____ (_____) year with a _____ percent (_____%) penalty declining _____ percent (_____%) annually to a minimum penalty of _____ percent (_____%) of the then outstanding amount of the first mortgage. The Builder will take back a second purchase money mortgage in the amount of _____ Dollars (\$_____) providing for interest at the average rate of _____ percent (_____%) per annum until the first mortgage is fully paid or refinanced as hereinafter provided. Thereafter, the interest on the purchase money second mortgage will be at the rate of _____ percent (_____%) per annum.

As previously stated, the total amount of interest and amortization payment that the Apartment Corporation will be obligated to pay in any _____ (_____) years is _____ Dollars (\$_____). This sum is insufficient to pay all of the interest accruing on the second purchase money mortgage. Such mortgage will provide that the difference between the amount accruing and the amount annually paid will be added to the principal of the second mortgage. After the first mortgage is fully paid, then the sum of _____ Dollars (\$_____) per year will be applied towards payment of interest and amortization on the second mortgage and it will be fully liquidated in _____ (_____) years from the date of the mortgages. The purchase money second mortgage may be prepaid at any time without penalty.

The holder of the second mortgage, so long as all or part of such indebtedness is unpaid, shall have the right at its expense to refinance the entire mortgage indebtedness provided the then unpaid principal is not increased, the annual interest or amortization charges are not increased, and the mortgage indebtedness remains self-liquidating within _____ (_____) years. Such refinancing may be in the form of one mortgage with senior or junior interests or in the form of two or more mortgages.

The Builder has obtained from the _____ [lender] a commitment for a building loan in the principal amount of _____ Dollars (\$_____). This will be fully paid before the Plan becomes effective, and no other mortgage indebtedness will be placed on such property in excess of _____ Dollars (\$_____) before the Plan becomes effective.

Up to the time the Plan is put into full force and effect and when the rent commences to accrue under the proprietary leases, hereinafter called Effective Date, the Sponsor has agreed to pay all expenses of the Apartment Corporation, other

than the principal of the mortgage indebtedness, including mortgage fees and taxes, legal fees, architect's charges, fee equity title policy, organization expenses, original issue stamps, advertising, printing, sales commissions, and all other expenses or debts and liabilities of the Apartment Corporation. It is estimated that these expenses will be not less than _____ Dollars (\$_____). The Apartment Corporation will retain _____ Dollars (\$_____) as working capital in the form of cash or prepaid expenses such as real estate taxes and insurance.

As a consideration for having transferred to the Apartment Corporation title to the land and completed Building, the Sponsors will be entitled to receive and retain the proceeds of the permanent mortgage financing of _____ Dollars (\$_____) as well as the balance of the proceeds from the sale of the shares of the Apartment Corporation, which is _____ Dollars (\$_____), as set forth in Schedule B. The Apartment Corporation has entered into a contract of sale with the Sponsor and Builder embodying the provision of the Plan and copy thereof is on file with the Agent.

3. Ownership. After the land and completed Building have been transferred to the Apartment Corporation and upon the Effective Date, the Apartment Corporation will have:

(a) Good and marketable title to the land and completed Building thereon and all equipment therein free and clear of all liens and encumbrances (and all of its debts will have been paid or provided for) except:

- (1) Mortgage indebtedness above described;
- (2) Accrued interest on such mortgage indebtedness, subject to an apportionment on closing;
- (3) Accrued real estate taxes, water charges, and sewer rent and prepaid insurance, subject to apportionment on closing;
- (4) Proprietary leases made to its shareholders;
- (5) Leases, if any, for garage, ground floor rentable space, and laundry space;
- (6) Restrictive covenants and agreements of record and such state of facts which an accurate survey would show, provided that neither prevents the proposed use of the land and Building;
- (7) Zoning regulations;
- (8) Service contracts.

(b) Title policy insuring the fee equity in the Apartment Corporation in an amount of not less than _____ Dollars (\$_____), subject to normal title exceptions which will not prevent the proposed use of the land and Building.

(c) Working capital of _____ Dollars (\$_____) in cash or prepaid expenses.

(d) All of the authorized shares of the Apartment Corporation allocated to residential units and separate servants' rooms will be issued and outstanding and proprietary leases will have been executed with respect to each such apartment and separate servants' room.

(e) Assignment to the Apartment Corporation of all assignable guarantees.

(f) Guaranty by the Sponsor that if within _____ (_____) years from the date of the

issuance of the permanent Certificate of Occupancy, it shall be notified in writing by registered or certified mail and addressed to the Sponsor by the Apartment Corporation of the existence of then known defects in the construction of the Building or in the installation or operation of the Building's mechanical equipment, which shall be due to improper workmanship or materials supplied by the Builder, the Sponsor, at its own cost and expense, shall repair and correct such defects.

(g) Certificate by the Architect and Consulting Architect that the Building has been erected and completed generally in accordance with the plans filed with the Agent, subject to such changes or omissions as may be permitted.

(h) Temporary Certificate of Occupancy for the Building and a _____ Dollars (\$_____) escrow fund pending issuance of permanent Certificate of Occupancy.

(i) Management contract with Agent, hereinafter described.

4. Corporate Details. The Certificate of Incorporation of the Apartment Corporation provides among other things that its primary purpose is to provide homes for its shareholders, and that its shareholders, solely by reason of their ownership of shares in it, shall be entitled to proprietary leases entitling them to occupancy of apartment or servants' rooms in the Building to which their shares have been allocated. The Apartment Corporation shall have not less than three (3) nor more than eleven (11) directors.

The Bylaws of the Apartment Corporation provide among other things that the shares accompanying each proprietary lease shall be in the amount allocated to the particular apartment or servants' rooms described in such proprietary lease as shown in Schedule B; that the shares accompanying each proprietary lease shall be represented by a single certificate; that such shares shall not be sold or transferred except as an entirety to a person who has acquired such proprietary lease or new lease in place thereof with proper approval; and that the Apartment Corporation shall at all times have a lien upon the shares owned by each shareholder to secure his payment of all rent and maintenance charges to become payable by him under the provisions of the proprietary lease issued by the Apartment Corporation and at any time held by him and to secure his performance of all the covenants and conditions of the proprietary lease.

Each share certificate issued by the Apartment Corporation will contain reference to such restrictions upon the sale and transfer of shares and to such lien.

All shares shall have equal voting privileges of one vote per share. The Apartment Corporation will submit annual reports to all of its shareholders including an annual balance sheet and profit and loss statement, certified by an independent certified public accountant. Even if less than _____ percent (_____%) of the shares are sold at the time the Plan is put into full force and effect, the Purchasers will have the right to elect a majority of the Apartment Corporation's directors.

5. Proprietary Lease. The printed form of proprietary lease intended to be used has been prepared and is on file with the Agent. All proprietary leases of apartments and servants rooms in the Building will be in the same form, subject to the provisions of the proprietary lease regarding possible future changes therein. The term and accrual of rent under the proprietary lease will begin when the Building has been completed as hereinafter described. The term of the proprietary lease will expire _____[month] _____[day] in the year ____[year] unless sooner terminated as provided in the proprietary lease. The Lessee may not sublet the apartment or assign the proprietary lease or sell the accompanying shares at any time, unless the terms and conditions of such sublease or assignment and the sublessee or the purchaser-assignee are first approved by the Board of Directors or shareholders of the Apartment Corporation. The proprietary lessee may pledge his shares and lease with the seller thereof or a bank or lending institution, but no assignment of the shares or lease shall be made on the Apartment Corporation's books except as above provided in the proprietary lease. The proprietary lease also gives each lessee the right to cancel the lease on _____[month] _____[day], ____[year], or on any _____[month]

_____ [day] thereafter by giving at least _____ (_____) months prior written notice and by surrendering to the Apartment Corporation the shares accompanying such proprietary lease and complying with the other provisions of the proprietary lease respecting cancellation. In the event of such cancellation the lessee shall have no further rights or liabilities in or to the shares and proprietary lease and will receive no cash payment. Rent under the proprietary lease will be determined by apportioning among the proprietary lessees the cash requirements of the Apartment Corporation in amounts proportionate to the number of shares held. The shares and leases allocated to apartments taken by persons provided by the Sponsor may be assigned or such apartments may be sublet, subdivided, or combined without the Apartment Corporation's consent. Gas will be included in the annual maintenance charges, but electricity will be separately metered and charged to each proprietary lessee. This charge will include electricity for the fans in the units in the apartments which will circulate the warm or cooled air. Reference should, of course, be made to the printed form of the proprietary lease for the details of the features above mentioned and the other provisions thereof. As provided in the purchase agreement each Purchaser shall sign two copies of such lease after the Plan has been declared operative, one copy of which is to be for the Purchaser.

As more specifically set forth in the description of the Building, attached hereto, the apartments and servants' rooms will be delivered in white plaster and the painting, decorating, and installation of additional fixtures and equipment will be the obligation of the proprietary lessee to be performed by a contractor or contractors to be approved by the Sponsor. The Lessee shall continue to do his own painting and decorating and maintain the equipment in the apartment at his expense, as provided in the proprietary lease.

6. Income Tax Deductions. The Internal Revenue Code and Section _____ [number] of the _____ [state] Tax Law allow certain income tax deductions to tenant-shareholders of cooperative housing corporations. The Apartment Corporation has been advised by counsel that the tenant-shareholders entitled to occupancy may deduct from their gross income for federal and _____ [state] income tax purposes, their proportionate share of the interest with respect to the mortgage indebtedness and of the real estate taxes on the land and Building and paid by the Apartment Corporation, when _____ percent (_____) of the Apartment Corporation's gross income is derived from qualified tenant-shareholders. The estimated deduction at the inception of the Plan is as set forth in Schedule B. The exact amount of the actual tax savings to each individual will depend on the amount allowable by the Treasury Department and the _____ [state] Department of Taxation and Finance, and will further depend upon the tenant-shareholder's own income tax bracket. The Apartment Corporation, the Sponsor, the Agent, and counsel can make no warranties or representations that the United States Treasury Department or the _____ [state] Department of Taxation and Finance will allow the deductions, and they shall not be liable, if, for any reason, it is held that the Apartment Corporation does not meet, or at any future date ceases to meet, the requirements of the sections above enumerated, or any amendments thereof.

7. Completion of Building. It is estimated that the Building will be completed and ready for occupancy on or about _____ [month] _____ [day], _____ [year], subject, of course, to delays by strikes, lockouts, government restrictions on operations or materials, or other causes beyond the control of the Sponsor, the Apartment Corporation, or the Builder. This Plan and all agreements shall continue in effect notwithstanding any such delays. The Building will be deemed completed as soon as all the following conditions are met:

- (a) The Department of Buildings of the City of _____ [city] has issued a temporary or permanent Certificate of Occupancy permitting the use for residential purposes of all of the apartments and servants' rooms to which shares are allocated, except for unsold apartments or where delayed for special work in individual apartments.
- (b) The financing has been completed as provided herein.
- (c) The Architect and Consulting Architect have certified to the Apartment Corporation and the Sponsor that the Building has been erected and completed substantially in accordance with the plans and specifications filed with the

Agent and the general description of the Building, subject to such modifications and changes as may be permitted under this Plan, and the Building is ready for occupancy, except for special work in individual or unsold apartments, or such work in the public portions or rentable area of the Building as is customarily left uncompleted until after its occupancy.

(d) Certification from the Sponsor to the Apartment Corporation that the completed Building has been fully paid for or adequate reserves have been made by the Sponsor for all unpaid items.

When the four (4) events above mentioned have occurred, this shall be deemed and considered by all parties as conclusive proof that the Building has been fully completed in accordance with the provisions of any agreement or obligation of the Builder or the Sponsor, subject to their obligations as otherwise herein specifically provided. The sole obligation of the Builder or Sponsor is to complete the Building in accordance with the plans and specifications, as amended or modified, and as approved by the Architect and Consulting Architect.

If title is transferred to the Apartment Corporation prior to the issuance of a permanent Certificate of Occupancy, the Apartment Corporation shall retain _____ Dollars (\$_____) pending the issuance thereof.

8. Plan in Operation. In order that the Purchasers as well as the Sponsor and the Apartment Corporation may have assurance that this Plan will be truly cooperative, the following safeguards have been established:

(a) The Sponsor will not declare the Plan operative unless and until contracts for the sale to Purchasers of at least _____ percent (_____) of the shares have been procured.

(b) The Sponsor agrees to declare the Plan operative when contracts for the sale to Purchasers of at least _____ percent (_____) of the shares have been procured.

(c) The Sponsor reserves the right to declare the Plan abandoned prior to the time the _____ percent (_____) quota described in subparagraph (b) above has been reached and the Plan has not previously been declared operative.

If the Plan is abandoned all Purchasers will be promptly notified and all moneys paid by them under their purchase agreements will be promptly returned by the Escrow Agent, without interest. The Sponsor has agreed that all such moneys will be repaid in full to the Purchasers in the event of abandonment.

If the Plan is declared operative, all Purchasers will be promptly notified. The Apartment Corporation shall call a meeting of all Purchasers in ample time before the completion of the Building so that they can receive a report on the estimated date of the Building's completion, select a Board of Directors in preparation for the passing of title, and attend to other organization matters.

9. Purchase Agreement and Payments to Sponsor. A form of purchase agreement is annexed hereto as Exhibit I. When a prospective purchaser has indicated his decision to purchase the shares allocated to an apartment or servants' room, a form of purchase agreement in similar form will be prepared in duplicate for his signature. Such agreement will not be binding on the Apartment Corporation until accepted by it and approved by the Sponsor, in writing at the end thereof.

The Purchase Agreement will provide for the following payments:

(a) a down payment of _____ percent (_____) of the purchase price of the shares as specified in Schedule B;

(b) _____ percent (_____) thereof after the Plan has been declared operative and

the Architect and Consulting Architect certify that the outside brick work has been completed, except such portions thereof as are customarily left to be completed after the interior portions are erected;

(c) _____ percent (_____%) thereof when the Architect and Consulting Architect certify that the white plaster in the apartments above the ground floor has been completed (except such portions thereof as are left incomplete due to individual tenant changes); and (d) the balance of _____ percent (_____%) thereof when the Department of Buildings has issued a temporary certificate of occupancy. The Apartment Corporation or the Agent shall give purchasers not less than _____ (_____) days prior written notice of the anticipated date for such payments. Prices of the several blocks of shares as shown on Schedule B, are subject to change or withdrawal at the Sponsor's direction without notice at any time, before acceptance by the Apartment Corporation of a purchase agreement for any such block of shares.

All payments are to be made by the Purchaser's personal check to the order of the _____ [name], as Escrow Agent. The proceeds are to be held in trust as required by law. The Sponsor and the Apartment Corporation have entered into an Escrow Agreement with the Trust Bank, a copy of which is attached hereto as Exhibit II, which provides that if the Plan is abandoned all moneys so deposited will be returned by the Escrow Agent to the several purchasers, without interest. After the Plan has been declared operative, the moneys received by the Escrow Agent from purchasers will be paid in the following installments:

(a) To the Sponsor, _____ percent (_____%) of the moneys then or thereafter received by the Escrow Agent after the Architect and Consulting Architect have certified to the Apartment Corporation that the outside brick work has been completed, except such portions as are customarily left to be completed after the interior partitions are erected.

If, after any such payments provided for above have been made, additional shares shall be sold and additional payments shall be received by the Escrow Agent, it shall pay to the Sponsor _____ percent (_____%) of such additional funds.

(b) When the Architect and the Consulting Architect have certified to the Apartment Corporation that the Building has been erected and completed substantially in accordance with the plans and specifications, subject to such modifications and changes as may be permitted under the Plan, and all of the apartments and servants' rooms to which shares are allocated are ready for occupancy except for unsold apartments and special work in individual apartments, or such work in the public portions or rentable area of the Building as is customarily left uncompleted until after occupancy of the Building. Upon transfer of the land and completed Building to the Apartment Corporation, as acknowledged by it, the Escrow Agent shall pay the balance of the moneys received by it from Purchasers as follows:

(1) _____ Dollars (\$ _____) to the Apartment Corporation for its working capital.

(2) _____ Dollars (\$ _____) to the Apartment Corporation if the permanent Certificate of Occupancy has not then been issued.

(3) The balance of all moneys to the Sponsor.

The Apartment Corporation shall pay the Sponsor the _____ Dollars (\$ _____) referred to in (2) above when the permanent Certificate of Occupancy has been issued.

If the Plan is not declared operative by _____ [month] _____ [day], _____ [year], any Purchaser may, within _____ (_____) days thereafter, elect to cancel the purchase agreement by giving written notice to the Apartment Corporation. In the event of any such cancellation, the Purchaser shall receive back all moneys paid under any such purchaser agreement, without interest.

10. Attorneys and Architects. The law firm of _____ has been retained to represent the Apartment Corporation in connection with the Plan and at the closing.

The Sponsors are being represented by _____ [name].

If the Attorney, Architect, or Agent above named shall cease to act in such capacity the Sponsor and the Apartment Corporation may appoint a substitute or substitutes.

11. Management. The Apartment Corporation will enter into an agreement with Agent for it to act as Managing Agent of the Building for a period of _____ (_____) years commencing from the date on which it is completed and ready for occupancy. The Agent may not cancel, renew, or assign the management contract except with the Apartment Corporation's written consent. The Agent will receive an annual fee of _____ Dollars (\$_____). The Managing Agent's services shall include the billing and collection of rent, the hiring of help, and the operation of the Building, all under the supervision of the Apartment Corporation's Board of Directors, and the other usual services rendered by managing agents of cooperative apartment house buildings. The officers and employees of the Agent who will handle the moneys received from purchasers are bonded.

The only interest of Agent in the successful consummation of this Plan is as follows:

If the Plan is put into effect it will receive from the Sponsors a commission of _____ percent (_____%) of the funds paid by Purchasers for the purchase of shares under this Plan and a management fee from the Apartment Corporation as above provided.

It has no other financial interest and acts merely as Agent under this Plan, which has been formulated and issued by the Sponsor and Apartment Corporation.

The Agent has been in the real estate business since 1930 and manages many buildings in the area.

12. Parties and Agreements. The Sponsor is a publicly owned corporation which has shares listed on the American Stock Exchange. The Sponsor or its subsidiaries or predecessor companies have been in the building business for over _____ (_____) years, and they have built or caused to be built many residential apartment house buildings.

The land was acquired in _____ [month], _____ [year], by the Builder at a cost of _____ Dollars (\$_____) plus accrued expenses, and the construction work is on an actual cost basis plus the builder's fee of _____ Dollars (\$_____). The Builder will receive a profit in the form of a _____ Dollars (\$_____) second mortgage or junior participation, previously described. This mortgage is self-liquidating in approximately _____ (_____) years.

The Apartment Corporation was organized on _____ [month] _____ [day], _____ [year]. The Apartment Corporation will be under the Sponsor's control up until the time the plan is put into full force and effect.

The Sponsor, as Seller, and the Apartment Corporation, as Buyer, have entered into a contract of sale which embodies the provisions of this Cooperative Plan, and the Sponsor agrees to comply with all of their obligations as set forth herein or therein. The Sponsor will cause the Building to be erected and will pay the full cost thereof.

13. Schedules and Exhibits. Annexed hereto are the following:

- General description of Building.
- Exhibit A
- Schedule A - Estimated annual income and expenses.
- Schedule B - Description of apartments, share allocations, selling prices and additional equity payments, estimated annual maintenance charges, estimated annual tax deductions, and other data.
- Exhibit I - Purchase Agreement.
- Exhibit II - Escrow Letter.

Copies of the contract of sale between the Sponsor and the Apartment Corporation, plans and specifications, the management contract, the proprietary lease, the Certificate of Incorporation and Bylaws of the Apartment Corporation are on file with the Agent and may be examined by prospective purchasers.

The estimates in Schedules A and B have been prepared by the Agent based on past experience with cooperative buildings of a substantially similar type. The estimates are believed to be correct and dependable. However, they are not intended to be representations, guaranties, or warranties of any kind whatsoever, including, without limitation, that the actual expenses or income for any period of operation may not vary from the amounts shown or that the Apartment Corporation may not incur additional expenses, or its Board of Directors may not provide for reserves not reflected in such schedules, or that the annual maintenance charges for any period of the proprietary leases may not vary from the amounts shown on Schedules A and B due to economic conditions, increased taxes or wages, or other causes. The Agent is not a builder, engineer, or architect, and assumes no responsibility with respect to the building plans or specifications, the general description thereof as hereinafter set forth, the equipment, materials, decoration, workmanship, or completion of the Building.

Any information, data, or representation not referred to in this plan or contained in the various documents mentioned herein must not be relied upon. There are no suits pending or judgments outstanding against any party mentioned herein which might become a lien against the property.

No person has been authorized to make any representations other than those set forth herein. This Plan may not be modified orally. This offer is made only to individuals over the age of twenty-one (21) years who are residents of the State of _____[state].

This plan does not omit any material fact or contain any untrue statement of a material fact.

Dated: _____[month] _____[day], _____[year]
 _____[city]

"SPONSOR"

 a(n) _____[state] _____[entity]

By: _____

Print Name: _____

Title: _____

[Attach Exhibit A]

[Attach Schedule A]

[Attach Schedule B]

[Attach Exhibit I]

[Attach Exhibit II]



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Current Legal Forms for Real Estate

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Current Legal Forms for Real Estate
Chapter 22 DEVELOPMENT AND SUBDIVISION
Part IV. FORMS
E. RESIDENTIAL DEVELOPMENT

26-22 Current Legal Forms for Real Estate FORM 22.91

FORM 22.91 Purchase agreement for status in a cooperative

COMMENT

This is an agreement by which a prospective tenant-shareholder commits himself to purchase the cooperative's shares allocated to a specific apartment. It provides for the payment of the purchase price in installments as various stages in the completion of the building are achieved, with the final installment due after the architect and consulting architect have certified that a temporary certificate of occupancy for the building has been issued. All payments made on account of the purchase price are to be held in escrow. At the time of the completion of the building, the purchaser will receive the proprietary lease for the designated apartment.

For additional forms relating to cooperatives and the purchase and sale of real estate, see Chapter 20, Real Estate Entities, in Volume 24, and Chapter 21, Real Estate Sales and Exchanges, in Vol. 25, *supra*.

FORM

1. Approval of Plan. The undersigned (the "Purchaser") has read and hereby approves the Plan of Cooperative Organization dated _____[*month*] _____[*day*], _____[*year*], and the Schedules and Exhibits attached thereto and the documents referred to therein (collectively the "Plan"), and on file with _____[*name*] (the "Agent"), and made a part hereof with respect to the land and building (the "Hollander") and by the street number _____, _____, _____[*address*] (the "Building").
2. Desire to Participate. The Purchaser desires (a) to obtain a proprietary lease for Apartment _____[*number*] (the "Apartment") in the Building, and (b) to purchase _____

(_____) common shares of Hollander Apartments, Inc. (the "Apartment Corporation"), which shares have been allocated to the Apartment.

3. Purchase Price. The Purchaser hereby irrevocably offers to purchase from the Apartment Corporation _____ (_____) of its common shares with a par value of _____ Dollars (\$_____) per share for a total purchase price of _____ Dollars (\$_____) per share payable by good checks drawn to the order of _____ [name] (the "Escrow Agent") and delivered to the Agent as follows:

- (a) _____ percent (_____) thereof at the time of execution of this agreement;
- (b) _____ percent (_____) thereof after the Plan has been declared operative and the Architect and Consulting Architect have certified that the outside brickwork has been completed (except such portions thereof as are customarily left to be completed after the interior portions are erected) and upon at least _____ (_____) days prior written notice to the Purchaser;
- (c) _____ percent (_____) thereof when the Architect and Consulting Architect have certified that the white plaster in the apartments above the ground floor has been completed (except such portions thereof as are left uncompleted due to individual purchasers' changes) and upon at least _____ (_____) days prior written notice to the Purchaser; and
- (d) the balance of _____ percent (_____) thereof when the Architect and the Consulting Architect have certified that a temporary certificate of occupancy for the Building has been issued and upon at least _____ (_____) days prior written notice to the Purchaser.

The time of each payment is hereby made the essence of this agreement. The shares shall not be issued and delivered nor shall the Purchaser acquire any rights therein or pertinent thereto until the full payment of all the amounts above provided have been duly made.

The Escrow Agent shall hold and dispose of all such payments made hereunder as provided in an Escrow Agreement in the form of an Exhibit attached to the Plan, and the Purchaser agrees to be bound thereby.

4. Proprietary Lease. At the time of the completion of the Building, as referred to in the Plan, or as soon thereafter as may be practicable, if the Purchaser shall have made the full payments provided for herein, then the Purchaser shall be entitled to receive a proprietary lease from the Apartment Corporation for the Apartment in the form adopted by the Apartment Corporation as well as a share certificate for the Apartment Corporation's fully paid and nonassessable common shares hereby purchased. The Purchaser shall at the request of the Apartment Corporation, before or after the time of closing, execute such proprietary lease in duplicate. The Purchaser hereby authorizes the Apartment Corporation or the Agent to insert in the proprietary lease the date of the Building's completion as the date of the commencement of the term of such proprietary lease.

5. Abandonment of Plan. If the Plan is declared abandoned, the Purchaser shall be entitled thereupon to receive back all moneys paid pursuant hereto, without interest, and this agreement shall be deemed terminated and of no further force and effect, and no party shall have any claim against any other party with respect hereto.

6. Escrow. All moneys paid hereunder are to be paid by good checks to the order of the Escrow Agent, which shall hold the proceeds until paid out as provided in this agreement, the Plan, and the Escrow Agreement.

7. Default by Purchaser. If the Purchaser shall fail to perform any provision of this agreement that he is required to perform, the Apartment Corporation may elect to cancel this agreement by giving the Purchaser written notice of such

proposed cancellation. Such notice shall contain the effective date (not less than _____ (_____) days after the giving of such notice) of such cancellation. If the Purchaser shall cure his default prior to the effective cancellation date the cancellation notice shall be deemed withdrawn. If the Purchaser shall fail to cure his default prior to the cancellation date, then the cancellation shall be effective and the Sponsor named in the Plan shall be entitled to receive all payments made by the Purchaser hereunder and all of the parties hereto shall be relieved and discharged of any further liability and obligation hereunder, except as herein provided. The Sponsor shall then have the right to list the Apartment and to sell the shares and lease covered hereby to any other person at public or private sale, and shall only account to the Purchaser for the net proceeds after payment of all expenses including repairs, decorations, commissions, legal fees, loss of rent, and purchase price.

8. Default by Others. If the Apartment Corporation, the Sponsor, or the Builder shall have failed to substantially perform their obligations hereunder or under the Plan, the Purchaser's sole rights and remedy shall be to proceed within 12 months from the date of the issuance of the permanent Certificate of Occupancy for the Building against the Apartment Corporation for the return of the moneys paid by the Purchaser for the purchase price of his shares, upon the surrender to the Apartment Corporation of such shares and the accompanying proprietary lease, and possession of the Apartment. The parties hereto waive trial by jury in any action or proceeding hereunder or arising by reason of this agreement or the Plan.

9. Outside of Effective Date. If the Plan is not declared operative by _____ [month] _____ [day], _____ [year], then the Purchaser may within _____ (_____) days thereafter elect to cancel this agreement by giving written notice to the Apartment Corporation. In that event the Purchaser shall be entitled to receive back all moneys paid hereunder, without interest.

10. Acceptance of Agreement. This agreement shall not be effective or binding on the Apartment Corporation until it accepts in writing a duplicate hereof, which is approved by the Agent and delivered to the Purchaser.

11. Notices. Any notice to be given hereunder shall be made to the Purchaser, in writing, at the address given below, and to the Apartment Corporation, care of _____ [address]. The date of mailing shall be deemed the date of the giving of such notice.

12. Errors. The statements contained in the Plan are believed by the Apartment Corporation, the Sponsor, and the Agent to be correct, and the expressions of opinion therein are likewise believed to be well founded, but no liability shall attach in the event of error.

13. Assignment. The Purchaser shall not assign this agreement or the Purchaser's rights hereunder, without the Apartment Corporation's prior written consent.

14. Examination of Facts. The Purchaser acknowledges that he has had full and free opportunity to investigate and examine all of the facts and documents referred to herein and in the Plan of Organization; and that he has not relied on any representations, warranties, or statements of any nature or kind, including but not limited to estimated date of completion, general description attached to Plan, maintenance charges, or right to any tax deduction, whether contained in any advertisement, selling brochure, or made orally.

15. Binding Effect. Subject to the provisions hereof, this agreement shall bind and apply to the parties hereto and their respective personal representatives, successors, and permissible assigns.

16. Entire Agreement. This agreement contains the full understanding and agreement of the parties and may not be amended, altered, or discharged except by another agreement, in writing, signed by the party sought to be charged therewith.

17. Purchaser's Residence. The Purchaser represents that he is a resident of the State of _____ [state].

18. Governing Law. This agreement shall be construed in accordance with and governed by the laws of the State of _____ [state].

19. Non-waiver. No delay or failure by a party to exercise any right under this agreement, and no partial or single exercise of that right, shall constitute a waiver of that or any other right, unless otherwise expressly provided herein.

20. Headings. Headings in this agreement are for convenience only and shall not be used to interpret or construe its provisions.

21. Counterparts. This agreement may be executed in two or more counterparts, each of which shall be deemed an original but all of which together shall constitute one and the same instrument.

Dated: _____ [month] _____ [day], _____ [year]

[Purchaser]

[Address]

[Purchaser]

[Address]

ACCEPTED:

"HOLLANDER APARTMENTS, INC."

a(n) _____ [state] _____ [entity]

By: _____

Print Name: _____

Title: _____

APPROVED:

"HOLLANDER REALTY CORP."

a(n) _____ [state] _____ [entity]

By: _____

Print Name: _____

Title: _____



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Current Legal Forms for Real Estate

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Current Legal Forms for Real Estate
Chapter 22 DEVELOPMENT AND SUBDIVISION
Part IV. FORMS
E. RESIDENTIAL DEVELOPMENT

26-22 Current Legal Forms for Real Estate FORM 22.92

FORM 22.92 Declaration for time share project

COMMENT

In order to develop a time share project, the property must be dedicated. By filing a Declaration, each purchaser purchases his or her interest subject to the terms and conditions of the Declaration and they are, therefore, bound by it. Time share declarations are subject to the same criteria as other real estate declarations (i.e., easement agreements, condominium declarations, etc.). They must be filed with the public record. As such, they are subject to the recording agreements of the local jurisdiction where the real estate is located. The content of the time share declaration must be disclosed to the buyer of the time of the purchase of the share, along with all other title conditions.

Furthermore, the Declarations are typically provided to the buyer, along with the Disclosure Statement. As a result, they will generally be reviewed by the governmental body which regulates time shares in the jurisdiction where the project is located. The terms of a declaration vary widely depending on the project, the requirements of the local jurisdiction and the nature of the real estate which is being dedicated. The following form is a typical Declaration for time share.

For additional forms relating to time sharing, see Chapter 20, Real Estate Entities, in Volume 24, *supra*.

FORM

DECLARATION OF DEDICATION FOR
HUNTINGTON RESORT, A TIMESHARE RESORT

WHEN RECORDED, RETURN TO:

_____[name]
_____[address]

THIS DECLARATION FOR HUNTINGTON RESORT (the "Declaration") is made this _____[day]
day of _____[month], _____[year], by HUNTINGTON RESORT, INC., a(n)
_____[state] _____[entity] ("Resort") and HUNTINGTON CORPORATION, a[n]
_____[state] corporation ("Huntington") (individually and collectively "Declarant").

WHEREAS, Resort is or was the Owner of certain real property (the "Phases 1 and 2") located in
_____[county] County, _____[state], which is more particularly described on Exhibit
"A" attached hereto and incorporated herein by this reference; and

WHEREAS, Resort has or intends to transfer, convey, and assign all of its remaining right title, and interest in Phases 1
and 2, and all rights as Declarant, to Huntington, whereupon Huntington shall be the sole Declarant under this
Declaration; and

WHEREAS, Sunshine II is the owner of certain real property ("Phases 3, 4, and 5") located in
_____[county] County, _____[state], which is more particularly described on Exhibit
"B" (Phase 3), Exhibit "C" (Phase 4), and Exhibit "D" (Phase 5) attached hereto and incorporated herein by this
reference; and

WHEREAS, except for intervening public or private streets, Phases 3, 4, and 5 are adjacent to Phases 1 and 2 and/or to
one another; and

WHEREAS, Declarant has obtained land use approvals from the City of _____[city] for construction
and operation of a timeshare resort on Phases 1, 2 3, 4, and 5; and

WHEREAS, Declarant intends to establish a common scheme and plan for the use, enjoyment, repair, maintenance,
restoration and improvement of the Property (as hereinafter defined), and for the payment of taxes, assessments,
insurance premiums and other expenses pertaining thereto.

NOW, THEREFORE, in furtherance of such intent, Declarant hereby declares that the Property is and shall be held,
conveyed, hypothecated, encumbered, leased, rented, used and occupied subject to the following limitations, easements,
covenants, conditions and restrictions set forth in this Declaration, as this Declaration may from time to time be further
amended, and in such other rules and regulations as are instituted pursuant to the provisions of this Declaration, and all
of which declarations, easements, limitations, covenants, conditions and restrictions and rules and regulations are
declared to be in furtherance of a plan established for the purpose of enhancing and perfecting the value, desirability and
enjoyment of the Property. All such declarations, easements, limitations, covenants, conditions and restrictions and
rules and regulations shall constitute covenants running with the land and equitable servitudes and liens, and shall be
binding upon and for the benefit of Declarant, and all parties having or acquiring any right, title or interest in the
Property including, without limitation, the heirs, executors, administrators, successors and assigns of any such parties
and all subsequent Owners and lessees of all or any part of the Property.

1. DEFINITIONS

1.1. The following terms used in this Declaration, shall have the following meanings:

1.2. "Property" means Phases 1, 2, 3, 4 and 5 together with any other real property which Declarant may acquire and

which is adjacent to the Property (or adjacent to intervening public or private roads, public lands, open space, or eleemosynary institutions or properties), all or any part of which may at some time be annexed hereto. Phases 1, 2, 3, 4 and 5 are more particularly described on Exhibits "C" and "D" attached hereto and incorporated herein by this reference, but no part of Phases 1, 2, 3, 4 or 5 or any other Property shall be subject to this Declaration unless annexed as provided in paragraph 7.1 below.

1.3. "Annual Interval Ownership Interest" means that form of undivided fee interest in the Property subject to this Declaration, by which an Owner is entitled to occupy a Unit for one (1) Interval Week on an annual and recurring basis, along with the non-exclusive right to use and enjoy the Common Area and to use and enjoy the Common Furnishings contained in such Unit during such Owner's Use Period as provided in this Declaration. Each Annual Interval Ownership Interest is Floating and the exact Interval Week of use shall be established each year by reservation (unless Fixed Time) according to the Rules and Regulations. Each Annual Interval Ownership Interest shall constitute an Undivided Interest in the Property. The number of Annual Full Interval Ownership Interests (counting each Annual Partial Interval Interest Interval Interest as one-half (1/2) an Annual Full Interval Interest) available for sale shall not exceed (a) _____ (_____) times the number of Units which are not dedicated to Flex Interval Ownership interests, minus (b) the greater of (x) the number of Biennial Interval Ownership Interests sold for use in even numbered Use Years, or (y) the number of Biennial Interval Ownership Interests sold for use in odd numbered Use Years. For convenience in inventory control, conveyancing, and titling, an Annual Interval Ownership Interest may be allocated to a specific Unit; however, this interest does NOT carry with it the right to use that specific Unit, only the right to use a Unit.

1.4. "Articles" means the Articles of Incorporation of the Association as they may be amended from time to time.

1.5. "Assessments" means the Basic Assessments, Special Assessments and Personal Expenses as provided in Article 5 below, and any other amounts due the Association pursuant to the terms of this Declaration.

1.6. "Association" means Huntington Resort Owners Association, a(n) _____[state]
_____ [entity].

1.7. "Biennial Interval Ownership Interest" means that form of undivided fee interest in the Property subject to this Declaration by which an Owner is entitled to occupy a Unit for one (1) Interval Week on a biennial (every other year) and recurring basis, along with the non-exclusive right to use and enjoy the Common Area and to use and enjoy the Common Furnishings contained in such Unit during such Owner's Use Period as provided in this Declaration. Each Biennial Interval Ownership Interest is Floating and the exact Interval Week of use shall be established every other year by reservation (unless Fixed Time) according to the Rules and Regulations. Each Biennial Interval Ownership Interest shall constitute an Undivided Interest in the Property. The number of Biennial Full Interval Week Ownership Interests (counting each Biennial Partial Interest as one-half (1/2) a Biennial Full Interval Interest) available for sale for each of even-numbered Use Years and odd-numbered Use Years shall not exceed (a) _____ (_____) times the number of Units which are not dedicated to Flex Interval Ownership Interests, minus (b) the total number of Annual Interval Ownership Interests sold. For convenience in inventory control, conveyancing, and titling, a Biennial Interval Ownership Interest may be allocated to a specific Unit; however, this interest does NOT carry with it the right to use that specific Unit, only the right to use a Unit.

1.8. "Board" means the Board of Directors of the Association.

1.9. "Building" means one of the structures on the Property containing Units.

1.10. "Bylaws" means the Bylaws of the Association, as they may be amended from time.

1.11. "Common Area" means all portions of the Property except the Units and Common Furnishings, but including the

Buildings in which the Units are located. Any Declarant Building (as defined in paragraph 2.9 below), ownership and control of which is reserved to Declarant by this Declaration shall not be part of the Common Area, shall be maintained by Declarant rather than the Association, and Declarant shall pay all operating costs, utilities, taxes and assessments relating to such Declarant Building.

1.12. "Common Furnishings" means all furniture, furnishings, appliances, fixtures, equipment, telephone system and all other personal property from time to time owned, leased or held by the Owners in Undivided Interests, or by the Association for use by Owners or the Association, and which are located in or upon the Property.

1.13. "Date" means a Fixed Time Interval Interest where the Fixed Use Period is related to a calendar date or period (e.g., birthday, holiday, school vacation, anniversary, etc.) and where the numbered Use Period used by the Owner may vary from year to year to match the calendar date or period.

1.14. "Declarant" means Sunshine Resorts, Inc., a(n) _____[state] _____[entity], and/or Sunshine Corporation, a(n) _____[state] _____[entity], or any successor-in-interest by express assignment of the rights of the Declarant hereunder in writing.

1.15. "Declaration" means this instrument, as this instrument maybe amended from time to time in the manner herein provided.

1.16. "Event means a Fixed Time Interval Interest where the Fixed Use Period is related to an activity or celebration (e.g., music festival, pageant, show, parade, tournament, etc.) and where the numbered Use Period used by the Owner may vary from year to year to match the activity date.

1.17. "Fiscal Year" means the one year period set forth from time to time in the Bylaws as the fiscal year for the Association.

1.18. "Fixed" means an Interval Interest that is limited to, and carries with it the right to, use a particular Unit, a particular Use Period, or both.

1.19. "Fixed Time" means an Interval that is Fixed as to Use Period.

1.20. "Fixed Unit" means an Interval Interest that is Fixed as to Unit.

1.21. "Flex Interval Ownership Interest" means that form of undivided fee interest in the Property subject to this Declaration in the percentage or fractional interest indicated in the Owner's warranty deed, by which an Owner is entitled to occupy a Unit during a Use Period properly reserved by the Owner in accordance with Section 2.2 of this Declaration on an annual recurring basis, along with the non-exclusive right to use and enjoy the Common Area and to use and enjoy the Common Furnishings contained in such Unit during the reserved Use Period. Each Flex Interval Ownership Interest shall constitute an Undivided Interest in the Property. The maximum number of Interval Interests to be conveyed will depend on the total number of Units subject to this Declaration and the respective number of Annual Interval Ownership Interests, Biennial Interval Ownership Interests, and Flex Interval Ownership Interests conveyed to Owners, but in no event shall Declarant convey Interval Interests in excess of a "one-to-one" accommodation ratio.

1.22. "Floating" means an Interval Interest that is not limited to, and carries with it no right to use of either a particular Unit or a particular Use Period; the specific Use Period and Unit used being determined by availability and reservation according to the Rules and Regulations. All Interval Interests under this Declaration are Floating as to Unit and Use Period, unless otherwise specified on the deed conveying the Interval Interest to the Owner, except for Large Fraction Interests which shall be subject to special reservation and Use Period provisions set forth in the Rules and Regulations which may include, without limitation, rotating use by calendar periods, and which may, by designation in the deed

transferring a Large Fraction Interest to an Owner, fix or limit usage to a particular Unit or Building.

1.23. "Full" means an Interval Interest entitling the Owner to use of all of a Unit; unless specified on the deed of the Interval Interest to an Owner, all Interval Interests are Full.

1.24. "Huntington Resort Bonus Time" means an Owner's use of a Unit pursuant to the provisions of the Rules and Regulations governing its use (a) which is in addition to such Owner's Use Period under its Annual Interval Ownership Interest or Biennial Interval Ownership Interest, (b) which is subject to availability, (c) which is to subject the Rules and Regulations governing its use which may, from time to time, be changed in the best interest of the membership of the Association in the discretion of the Board.

1.25. "Interval Week" means a floating period of approximately one week, commencing on a set day of the week at 4:00 p.m., local time, _____[county] County, _____[state], and ending the same day of the following week at 11:00 a.m., local time, _____[county] County, _____[state]. The exact dates, and starting and ending day, of each Interval Week for a particular calendar year may be determined by reference to the Association's chart of Use Periods for that year. The specific period(s) during which an owner may use his Interval Week is determined by reservation made each year. Check in and check out times may be changed by the Association without amendment to this Declaration. Without amendment to this Declaration, the Association may allow an owner to divide his Interval Week into two or more separate Use Periods.

1.26. "Interval Interest" means any Annual Interval Ownership Interest, Biennial Interval Ownership Interest, or Flex Interval Ownership Interest.

1.27. "Interval Ownership Plan" means the entire plan for Interval Interest ownership as described and set forth in this Declaration and for the development, improvement and sale of Interval Interests.

1.28. "Large Fraction" means two or more Annual or Biennial Interval Interests or Interval Weeks combined into a single block for ownership by one Owner.

1.29. "Lockout" means the double-locking door in each Unit that allows division of occupancy of the Unit into a Master Suite and a Privacy Suite.

1.30. "Managing Agent" means the agent engaged by the Board pursuant to paragraph 4.4 hereof, which Managing Agent may be an affiliate of Declarant.

1.31. "Owner" means the Owner or co-Owner of an Interval Interest.

1.32. "Partial" means an Interval Interest entitling the Owner to use only the Master Suite or the Privacy Suite portion of a Unit.

1.33. "Permitted User" means any person occupying a Unit or utilizing the Common Area by or under any Owner, including, but not limited to, such Owner's family members, invitees, guests or licensees.

1.34. "Person" means a natural person, corporation, partnership, association, joint venture, limited liability company, trust, or other legal entity, or any combination thereof.

1.35. "Property" means Phases 1, 2, and 3 as more particularly described on Exhibits "A" and "B" attached hereto and incorporated herein by this reference, together with all improvements thereon and any rights incident thereto and the Additional Property to the extent all or any portion thereof is annexed to the Property pursuant to the terms of paragraph 1 of this Declaration.

1.36. "Rights" means the units of symbolic value used as the basis for determining the interest of an Owner of a Flex Interval Ownership Interest and such Owner's occupancy rights at the Property in any calendar year.

1.37. "Rules and Regulations" means the rules and regulations adopted and promulgated from time to time by the Association relating to the possession, use and enjoyment of the Property.

1.38. "Service Period" means, with respect to each Unit, a period reserved by the Association as a Service Period. The Association shall determine which days and nights will comprise the Service Period for each Unit, which determination may be changed from time to time, provided, however, that the Service Period shall not be during any properly reserved Use Period, unless the Owner is provided reasonably similar replacement accommodations.

1.39. "Site Plan" means the drawings and lists attached as Exhibits "E" and "F" to this Declaration.

1.40. "Unit" means one of the apartment units within the Property (or the Additional Property if annexed hereto).

1.41. "Undivided Interest(s)" means the undivided ownership scheme described in this Declaration. As an Undivided Interests plan of ownership, this Declaration establishes an undivided fractional tenancy in common in favor of each Owner in the entire Property.

1.42. "Use Period" means the time period or periods for which an Owner is entitled to use and occupy a Unit as set forth in paragraph 2.1 of this Declaration, and which the Owner has reserved consistent with the class of Interval Interest owned in accordance with the provisions of this Declaration and the then current Rules and Regulations.

1.43. "Use Year" means each one-year period commencing on the first Saturday in January of each calendar year and ending on the Saturday at the end of the fifty-second week thereafter, except for years with fifty-three weeks, in which case the year shall end on the Friday at the end of the fifty-third week thereafter. The Use Year for a Biennial Interval Ownership Interest (odd year) shall commence in January of odd-numbered years and the Use Year for a Biennial Interval Ownership Interest (even year) shall commence in January of even-numbered years. The day of the week commencing and ending the Use Year may be changed from time to time by the Association without amendment of this Declaration, and for Flex Interval Ownership interests the Association may use the same Use Year for all Owners or use an anniversary.

1.44. "Visible from Neighboring Property" means, with respect to any given object, that such object is or would be visible to a person _____ (_____) feet tall, standing on any part of such neighboring property at an elevation no greater than the elevation of the base of the object being viewed.

2. RESERVATION RIGHTS, USE RIGHTS AND USE RESTRICTIONS

2.1 Reservation and Use Rights of Annual or Biennial Interval Ownership Interval Owners. Subject to all of the terms and conditions contained elsewhere in this Declaration, an Annual or Biennial Interval Ownership Interval Owner shall have the right, for each Interval Week owned (and in the case of Declarant, during all periods not timely reserved by other Owners) to use and occupy, pursuant to the reservation procedures set forth in the Rules and Regulations, a Unit, and the Common Furnishings contained within such Unit, and the non-exclusive right to use and enjoy the Common Area for one Interval Week during such Owner's Use Year; provided, however, that such Owner shall have reserved such use and occupancy in accordance with the requirements and procedures for the making of reservations set forth in the Rules and Regulations. The timing and details of the reservation procedure are subject to change by the Board in the best interest of the Owners. No use or occupancy by any Annual or Biennial Interval Ownership Interest Owner or Flex Interval Ownership Interest Owner will be permitted if such Owner is delinquent in the payment of any amounts owed to the Association. If, because of an error by the Association or Managing Agent, a Unit is not available for the Use

Period to which an Owner was entitled by a properly made reservation, the Owner shall receive a compensating use of the next available Use Period selected by the Owner, together with such monetary compensation, if any, as the Board may elect to make, either on a case by case basis, or by established policy and schedules.

2.2. Flex Plan. An Owner who owns a Flex Interval Ownership Interest shall have the right, every Use Year, to reserve, use and occupy an assigned Unit(s) within the Property (though not necessarily any Unit identified in their deed) to the extent the number of Rights allocated to such Owner in such Use Year does not exceed the number of Rights required to reserve the subject Unit(s) during the desired Use Period(s) as properly reserved in accordance with the Rules and Regulations. Declarant shall record an amendment or supplement to this Declaration identifying each Unit dedicated to Flex Interval Ownership, which Declarant may do without the vote or assent of other Owners. Each Unit of the Property dedicated to Flex Interval Ownership shall have a total Rights allocation as set forth in the following chart (i.e., the number of Rights it would take to reserve a particular Unit for 52 Intervals in any Use Year):

Unit	Total Rights Allocation
Select Suite	_____ [number] Rights
Master Suite	_____ [number] Rights
Total Unit	_____ [number] Rights

If the Total Rights Allocation table set forth above in this paragraph contains blanks and does not reflect the number of Rights allocated to a Select Suite, Master Suite, and total Unit, Declarant shall not offer for sale or sell any Flex Interval Ownership Interest in the Property before first executing and recording an amendment or supplement to this Declaration setting forth the number and allocations of Rights. Notwithstanding other provision herein to the contrary, Declarant may unilaterally add such amendment or supplement to this Declaration without the Vote or assent of the Owners.

The undivided interest of an Owner of a Flex Interval Ownership Interest shall be expressed in terms of a fraction, the numerator of which is the number of Rights associated with Flex Interval Ownership Interest, and the denominator of which is the total number of Rights allocated to the particular Unit (or group of Units). Each deed conveying a Flex Interval Ownership Interest shall also include a contract number assigned by the Developer. The contract number and Rights allocated must appear on all subsequent deeds, deeds of trust and other documents affecting the subject Flex Interval Ownership Interest. In the event an Owner desires to purchase an additional Flex Interval Ownership Interest, such purchase shall be evidenced by a separate deed, which shall include a separate designation of allocated Rights and a separate contract number, and in no event shall such subsequent purchase be consolidated with the purchaser's original or subsequent purchase; provided, however, that the foregoing restrictions shall not prohibit the Owner from combining his Rights for reservation or occupancy purposes. In the event the Declarant reacquires title to a Flex Interval Ownership Interest (whether by deed, foreclosure or otherwise), (a) the Rights allocated to such Flex Interval Interest shall be deemed reacquired by the Declarant and the Declarant shall be free to reallocate such Rights in its discretion in connection with the conveyance of another Flex Interval Interest, and (b) the contract number originally assigned to the Flex Interval Ownership Interest by Declarant shall cease to exist. A new contract number shall be assigned by the Declarant in connection with any subsequent sale of the Flex Interval Ownership Interest by the Declarant. All Flex Interval Ownership Interests in a Unit shall have been conveyed when the sum of the fractional undivided tenant-in-common fee interests allocated to such Unit equals the whole number one (1). A Flex Interval Ownership Interest shall be Floating unless the deed indicates that the Use Period, Unit or both, associated with such Flex Interval Ownership Interest is Fixed. The Use Period may be Fixed by Date or Event.

2.3. Service Periods. To the extent reasonably feasible, the Association shall perform required maintenance between periods of occupancy of Units. However, the Association may reserve up to a total of _____ (_____) days and nights (not necessarily consecutive) in each calendar year as Service Period(s) for each Unit. Upon sellout of a Unit, the Association shall use reasonable efforts to reserve Service Period(s) when such Unit will not be occupied (e.g., when an Owner exchanges his interest through an exchange company). To the extent

possible, if a reserved Use Period conflicts with any required Service Period, the Managing Agent shall use reasonable efforts to move the reservation to an unoccupied Unit of the same type within the Property, or to a Unit which holds at least as many occupants, or, if no Units are then available, to alternate accommodations pursuant to paragraph 2.1 of this Declaration. The Association and its agents shall have free access to each Unit during its reserved or designated Service Period(s) for the purpose of effecting any necessary or appropriate maintenance, repair, modifications, alterations, replacements and additions to such Unit and to the Common Furnishings therein. The Service Period(s) for a particular Unit may vary from time to time in the Board's sole discretion and need not occur at the same time for each Unit. The Association shall use reasonable efforts to reserve Service Periods in Units so as to reasonably maximize the use and enjoyment thereof by Owners and reasonably minimize any scheduling problems under the reservation system established by the Rules and Regulations.

2.4. Occupancy. No Owner shall occupy a Unit or the Common Area or exercise any rights of ownership with respect to the Property during any time period other than his Use Period(s) unless expressly authorized by the Owner entitled to such use rights during such time period. Each Owner shall keep the Unit occupied by him and the Common Furnishings therein in good condition and repair during his Use Period(s), vacate the Unit at the expiration of his Use Period(s), remove all persons and property therefrom, excluding only the Common Furnishings, leaving the Unit and the Common Furnishings therein in good and sanitary condition and repair and otherwise comply with such check-out and other procedures and regulations as may from time to time be contained in the Rules and Regulations. Any Owner may permit a Unit which he is entitled to occupy to be occupied by other persons (not in excess of the number of occupants permitted by the Rules and Regulations) for the purposes permitted by this Declaration during his Use Period(s), but such Owner shall be responsible for any loss, damage, destruction or violation of this Declaration, the Bylaws, the Articles or the Rules and Regulations which occurs during such occupancy as if such Owner were occupying the Unit.

2.5. Holdover User. In the event any Owner or Permitted User occupying a Unit with or without the permission of an Owner fails to vacate a Unit at the expiration of its Use Period in accordance with the provisions hereof, or at such earlier time as may be fixed by the Rules and Regulations adopted by the Association from time to time, such Owner or Permitted User shall be deemed a "Holdover Owner." It shall be the responsibility of the Association or the Managing Agent, if so provided in the Management Agreement, to take all steps necessary to remove the Holdover Owner from a Unit and assist the person entitled to occupy the Unit during the subsequent Use Period to find alternative accommodations during such holdover period, but neither the Association nor the Managing Agent is liable for the acts of a Holdover Owner. In addition to other remedies available to it, the Association may assist any Owner or Permitted User entitled to occupy a Unit, and denied occupancy due to a Holdover Owner's failure to vacate, in seeking alternate accommodations. Such accommodations should be as comparable as possible to the Unit to which occupancy is denied. A Holdover Owner shall be responsible for the cost of such alternate accommodations, travel expenses incurred by the Owner or Permitted User if an alternate Unit is not available, and any other expense incurred due to the Holdover Owner's failure to vacate. In addition, a Holdover Owner shall be charged an administrative fee, as determined by the Board, of not less than _____ Dollars (\$_____) per day, for each day of the, holdover period. If the Association is required to contract for a period greater than the actual period of holding over in order to secure alternate accommodations as set forth above, the expense of the entire period shall be the responsibility of the Holdover Owner, although any daily administrative fee shall cease upon the day following that upon which the Holdover Owner vacates the Unit. The Association shall submit a bill to the Holdover Owner in accordance with this paragraph. In the event the Holdover Owner fails to pay the bill within _____ (_____) days of the bill's date, the Association shall have a lien against the Holdover Owner's Interval Interest, which may be enforced in accordance with the provisions hereof. The provisions of this paragraph shall not abridge the Association's right to take such other action(s) available to it at law or in equity, including, but not limited to, eviction proceedings.

2.6. Use Restrictions - Owners. Except for Units used by Declarant for sales, marketing or management purposes, a Unit shall be used solely for resort or vacation use. Except as required to prevent damage or injury to person or property in an emergency, no Owner shall: make or authorize any alterations, additions or improvements to the Property; repair,

tile, paper or otherwise refinish or redecorate the inner surfaces of the walls, ceilings, floors, windows or doors bounding the Property; or remove, alter or replace any portion of the Common Furnishings; or use his Unit in any way which will interfere with, or unreasonably disturb the rights of the other Owners without the prior written consent of the Association. The right to perform all of the foregoing acts has been delegated to the Association by this Declaration. The foregoing prohibitions, however, shall not modify or affect the obligation of each Owner for the prudent care and ordinary maintenance and upkeep of all property subject to his use.

2.7. Easement for Sales, Customer Service and Related Purposes. Declarant, on behalf of itself, its successors and assigns, and its and their respective agents, employees, contractors, subcontractors, invitees and other authorized personnel, reserves, for an initial period of _____ (_____) years from the date of the sale of the first Interval Interest, a non-exclusive easement, in, over and through the Units and the Common Area, for the purpose of: (1) marketing and selling the Intervals and any other travel or vacation products offered by Declarant or any of its affiliates; (2) maintaining customer relations and providing post-sale service to Owners; (3) displaying signs and erecting, maintaining and operating, for sales and administrative purposes, model Units and customer relations, customer service and sales office complex(es) on the Property; (4) showing the Units and Common Area; and (5) arranging for the use of any recreational facilities within the Common Area by prospective purchasers. The use of such easement shall not materially interfere with or unreasonably diminish the rights of Owner(s) to use and occupy Units and Common Area amenities in accordance with this Declaration and the Rules and Regulations. Upon expiration of the initial _____ (_____) year term of this easement, Declarant's easement shall automatically be extended for so long as Declarant: (i) pays the Association an annual extension fee of _____ Dollars (\$_____) (against which Declarant shall receive a credit equal to _____ percent (_____) of all Assessments paid by Declarant the previous twelve (12) months) on or before January 31 of each year (commencing with the year following expiration of the initial _____ (_____) year term); (ii) paying the Association on or before January 31 of each year (commencing with the year following expiration of the initial _____ (_____) year term) the fair rental value (to be determined by a licensed real estate broker practicing in _____ [city], _____ [state], and not affiliated with or representing Declarant or the Association) of any building or improvement (or space within any building or improvement) controlled or occupied by Declarant on the Property; and (iii) paying the Association, within _____ (_____) days of written request by the Association, all operating costs, utilities cost, and taxes and assessments for such building or improvement (to be prorated in an equitable manner if not separately billed or assessed).

2.8. Use of Units by Declarant. Declarant shall have the right, with respect to all unsold Interval Interests owned by Declarant, to reserve any Unit for use by Declarant or for use and occupancy by prospective purchasers of Interval Interests who have been brought to the Property as a result of the promotional efforts of the Declarant (the "Promotional Program") or for use and occupancy by members of the public for hotel use or other transient accommodations. Declarant may make such reservations in the same manner as reservations made by other Owners and consistent with the established Rules and Regulations for use and occupancy of the Property. The Declarant shall reimburse the Association for expenses incurred by and allocated to the Association in connection with the Promotional Program or such hotel use or other transient accommodations to the extent such expenses are not included in the Basic Expenses used by the Association in calculating Assessments. Declarant may use any Unit not registered for sale as part of the Interval Interest Program with the _____ [state] Department of Commerce or other applicable regulatory agency for any lawful purpose, including without limitation for models, offices, sales, or administrative purposes, whether related to the Property or not.

2.9. Declarant Control and Use of Sales Center and other Declarant Buildings.

Declarant has or intends to construct a sales center on Phase 3 of the Property. Declarant may also construct one or more maintenance buildings, service buildings, additional or replacement sales centers, or other buildings (the "Declarant Buildings"). Declarant hereby reserves and retains all right, title, interest, and control in, to, and over the

improvements of the Phase 3 sales center and other Declarant Buildings, together with an exclusive easement over, under, and upon the land underlying the Declarant Buildings and non-exclusive easements, in bulk, over all the Property, for construction, repair, maintenance of the Declarant Buildings, vehicular and pedestrian ingress and egress to and from the Declarant Buildings, public and private utility lines providing service to the Declarant Buildings (and the construction, repair, and maintenance of such lines), and for parking. Declarant's ownership and control of the Declarant Buildings, and the exclusive and non-exclusive easements, shall run for a period of _____ (_____) years from the date the certificate of occupancy or other final construction inspection approval is issued for the particular Declarant Building. During such _____ (_____) year period the particular Declarant Building shall not be part of the Common Area, shall be maintained by Declarant rather than the Association, and Declarant shall pay all operating costs, utilities, taxes and assessments relating to such Declarant Building, either directly, by prompt reimbursement of the Association, or through any other fair and reasonable payment or subsidy arrangement with the Association. Upon expiration of said _____ (_____) year period for any particular Declarant Building, the Declarant Building shall revert to the Owners in undivided interests, with the same fractional ownership as the Owners' interest in the other Common Areas, provided, however, Declarant may continue to use and occupy the Declarant Building and extend the exclusive and non-exclusive easement reserved by this paragraph by paying the annual fee, rental, and other charges set forth in paragraph 2.7 above. Declarant may use, discontinue the use, or modify the use of any Declarant Building at Declarant's sole discretion, and may elect to terminate use of any Declarant Building and transfer the ownership and control of a Declarant Building to the Owners and the Association at any time, including any time prior to expiration of the initial _____ (_____) year easement period established under this paragraph. If Declarant elects to let any Declarant Building revert to or be transferred to use and occupancy by the Association, Declarant shall surrender such Declarant Building broom clean, in reasonably good condition, ordinary wear and tear excepted.

2.10. Additional Amenities in New Phases. To preserve the Owners use and enjoyment of the amenities of the Common Area, Declarant will provide additional amenities in each new phase of the Property. Declarant has or will provide, as part of the Common Area in Phase 3, a large spa and water feature, and will expand the existing laundry and exercise facilities in Phases 1 and 2 to accommodate additional demand from expansion of the Property. If Developer builds out Phases 4 and/or 5, Phase 4 will include a swimming pool and a spa, and Phase 5 will include a swimming pool and a spa.

2.11. Declarant's Right to Modify Site Plan. Declarant is under no obligation to complete any or all of the planned Units or other improvements of Phases 3, 4, or 5 beyond those registered as part of the Interval Interest Ownership Plan. Declarant will complete the additional amenities set forth in the previous paragraph of this Declaration, if, but only if, Declarant builds some or all of the Units in the respective Phases for which the additional amenities have been promised. The location, configuration and other details regarding the amenities may be modified in Declarant's sole and absolute discretion. Declarant may also add, delete, modify, or otherwise change all other particulars of the Site Plan for unbuilt portions of the Property, including without limitation, the number, size, location, configuration, appearance, floor plans, and elevations of the Units and the location, configuration and appearance of driveways, sidewalks, landscape areas, parking areas and other portions of the Common Area, subject only to compliance with applicable laws and ordinances and public approval processes.

2.12. Separate Mortgages. Each Owner shall have the right to mortgage or otherwise encumber all, but not less than all, of his Interval Interest. Any mortgage encumbering an Interval Interest shall be subordinate to all of the provisions of this Declaration, and in the event of foreclosure, the provisions of this Declaration, shall be binding upon any Owner whose title is derived through foreclosure by private power of sale, judicial foreclosure, assignment in lieu of foreclosure or otherwise. Notwithstanding any other provision of this Declaration, no breach of the provisions herein contained, nor the enforcement of any lien created pursuant to the provisions hereof shall defeat or render invalid the lien of any mortgage of any Owner's Interval Interest if such mortgage is recorded in the Office of the County Recorder of _____ [county] County, _____ [state], and is given in good faith and for value.

2.13. Transfer of Interest. No Owner shall sell, convey, hypothecate or encumber less than all of his Interval Interest. Any sale, conveyance, hypothecation or encumbrance by any Owner of less than all of his Interval Interest, shall be null, void and of no effect. The transfer of any Interval Interest shall operate to transfer to the new owner of the Interval Interest the interest of the prior Owner in all funds in the hands of the Association even though not expressly mentioned or described in the instrument of transfer and without further instrument of transfer.

2.14. Waiver of Right of Partition and Subordination of Tenancy-In-Common Attributes.

2.14.1. It is intended that this Declaration shall govern all rights with respect to the use, possession, enjoyment, management and disposition of the Interval Interests. Accordingly, all rights with respect to the use, possession, enjoyment, management or disposition of an Interval Interest which an Owner might otherwise have as a tenant-in-common (including, but not limited to, any common law or statutory right jointly to use, possess or manage commonly owned property) are hereby unconditionally and irrevocably waived and subordinated to this Declaration for so long as this Declaration shall remain in effect.

2.14.2. Except as provided in Subparagraph 2.14.1 above and paragraph 8.3 below, every Owner or other person or entity acquiring any right, lien or interest in any of the Property, hereby waives any and all right as a concurrent owner to any common law or statutory right of partition and no such party shall seek or obtain, through any legal procedures, judicial partition of the Property or the sale thereof in lieu of partition. If, however, any Interval Interest is owned by two or more persons as tenants in common, joint tenants or community property, nothing herein contained shall prohibit a judicial sale of the Interval Interest in lieu of partition as between such co-tenants.

2.15. Protection of Interest. Except as provided in paragraph 2.14.2, above, no Owner shall permit his Interval Interest to be subject to any lien (other than the liens of current real property taxes), claim or charge, the enforcement of which may result in a sale or threatened sale of the Interval Interest of any other Owner or any part thereof or result in any interference in the use or enjoyment thereof by any other Owner. In the event of a threatened sale of the Interval Interest of any Owner or any part thereof, or should the use and enjoyment of any portion thereof by any Interval Owner be threatened by reason of any lien, claim or charge against the Interval Interest of any other Owner, or should proceedings be instituted to effect any such sale or interference, any Owner acting on his behalf or through the Association or the Association acting on behalf of any one or more Owners (if promptly indemnified to his or its satisfaction) may, but shall not be required to, pay or compromise the lien, claim or charge without inquiry into the proper amount or validity thereof and, in such event, the Owner whose interest was subjected to such lien, claim or charge shall forthwith pay the amount so paid or expended to Owner or the Association, whomsoever shall have paid or compromised the lien, claim or charge, together with such reasonable attorneys' fees and related costs as he or it may have incurred. No Owner shall permit his interest in any funds from time to time in possession of the Association to be subjected to any attachment, lien, claim or charge or other legal process and each Owner shall promptly restore any funds held by the Association in respect of his Interval Interest to the extent depleted by the reason of the assertion of any such attachment, lien, claim, charge or process and shall reimburse the Association for all reasonable attorneys' fees or other costs incurred in respect thereof.

2.16. Easement for Maintenance and Project Use. The Association, for itself, its successors and assigns, and its and their agents, employees, contractors, subcontractors, and other authorized personnel, shall have the right and is hereby granted, for so long as the Association or its successors and assigns shall be required hereunder to manage and maintain the Property, an exclusive easement in gross in, over and through the Property for the repair and maintenance of the Units, the Common Area and the Common Furnishings during Service Periods; provided, however, that use of such easement shall not unreasonably interfere with or diminish the rights of Owners, Permitted Users, or Declarant to occupy the Units and the Common Area, and to use the Common Furnishings.

2.17. Owner's Easement. Each Owner is hereby granted a non-exclusive easement for use during such Owner's Use Period as may be required for the purposes of access and ingress and egress to, the respective Unit reserved by such

Owner, and Owner shall have the right to use the Common Furnishings in said Unit. Such rights shall extend to each Owner and Permitted Users. Such easements rights and rights to use and possess the personal property in each Unit shall be subject to this Declaration, the Articles and Bylaws of the Association and the Rules and Regulations.

2.18. Identification of Interval Interest in Deed. Each deed transferring one or more Interval Interests to an Owner shall identify the Interval Interest being For example, the deed designation: "Interval 0003, Unit 201 Full Even Fixed Event New Year" would describe a Biennial Full Interval Ownership Interest counted against Unit 201 inventory (assigned number 0003 for record keeping purposes) and entitling the Owner to use a Full Unit in even-numbered years during the Use Period including New Years. "Interval 0600, Unit 102 Privacy Annual Floating Time" would describe an Annual Interval Ownership Interest counted against Unit 102 inventory (assigned number 0600 for record keeping purposes) entitling the Owner to use the Select Suite of a Unit annually with the specific Use Period to be determined by availability and reservation." "Interval 15764, Unit 125 Flex Floating Fixed 7800" would describe a Flex Interval Ownership Interest (counted against Unit 125 inventory and assigned number 15764 for record-keeping purposes) and entitling the Owner to reserve Floating Time in Unit 125 (because Fixed Unit) commensurate with the Owners' 7,800 Rights.

2.19. Not All Combinations May be Available. While Declarant has reserved the right under this Declaration to sell Partial Interval Interests, Fixed Time Interval Interests, and Flex Interval Interests, Declarant is not obligated to do so and such interests may or may not actually be sold. Declarant may also elect to place limits on the number of such Interval Interests sold.

2.20. Automatic Adjustment of Undivided Interests. An Owner's Undivided Interest shall remain proportional to the total number of Interval Interests in the Property should more or less Units be constructed on the Property than anticipated or if some or all of the Additional Property is annexed to this Declaration. The Undivided Interests fractional ownership of each Owner shall be established at any given time by the following formulas:

Full Annual Interval Interest =	_____
	Total Units times 52
Full Biennial Interval Interest =	_____
	Total Units times 104
Partial Annual Interval Interest =	_____
	Total Units times 104
Partial Biennial Interval Interest =	_____
	Total Units times 208

"Units" as used in the foregoing formulas shall mean the number of Units actually and completely constructed on the Property subject to this Declaration, including any annexed portions of the Additional Property, less the number of Units for Flex Interval Ownership Interests, the numerator shall be the number of Rights shown in the deed to the Interval Interest and the denominator shall be the Total of all Units (whether or not dedicated to Flex Interval Ownership Interests) times the Total Rights allocated per Unit.

2.21. Structural Support. Every portion of a Unit or the Common Area which contributes to the structural support of another Unit or the Common Area shall be burdened with an easement of structural support. No Owner shall be permitted to demolish their Unit except to the extent that such demolition may be required to repair or rebuild the Unit when the same has been partially or totally destroyed.

2.22. Utility Easement. Notwithstanding any other provision hereof, there is hereby created a blanket easement in favor

of the Association and each Owner, including Declarant and any foreclosing Construction Lender, upon, across, over and under the entire Property, except any Unit. This easement shall be for ingress, egress, installation, replacing, repairing and maintaining all utility and service liens and systems, including without limitation water, sewer, gas, telephone, electricity, television, cable and communication lines and systems. By virtue of this easement, it shall be expressly permissible for the providing utility or service company to install and maintain facilities and equipment on the Property and to affix and maintain wires, circuits and conduits on, in and under the roofs and exterior walls of the Property; provided, that no such utility and service liens or system may be installed or relocated on the Property except as initially installed to each Unit or other improved portion of the Property, or as thereafter approved by Declarant (during any period of Declarant control of the Association) and the Association. This easement shall in no way affect any other recorded easements on the Property.

2.23. Encroachments. If any portion of the Common Area encroaches upon any Unit, or if any Unit encroaches upon any other Unit or upon any portion of the Common Area, as a result of the construction, reconstruction, repair, renovation, restoration, shifting, settlement or movement of any portion of the Property, an easement for the encroachment and for the maintenance, repair and replacement thereof shall exist so long as the encroachment exists. In the event that any Building, any Unit, any adjoining Unit, or any adjoining portion of the Common Area shall be partially or totally damaged or destroyed as a result of fire or other casualty or as a result of condemnation or eminent domain proceedings, and then be repaired or reconstructed, encroachments of portions of the Common Area upon any Unit, or of any Unit upon any other Unit or upon any portion of the Common Area, due to such repair or reconstruction, shall be permitted, and easements for such encroachments and the maintenance, repair and replacement thereof shall exist. This easement is intended to apply to minor unintentional encroachments that are reasonable in extent and do not deprive another Person of a substantial property right or use.

2.24. Maintenance and Repair. There shall be an easement in favor of the Association and the Owners through the Units and the Common Area as may be reasonably necessary for the installation, maintenance, repair and replacement of Units and the Common Area. Use of this easement shall be only upon prior notice during normal business hours, except that access may be had at any time in case of emergency.

2.25. Use of Units. Each Unit shall be used primarily for residential purposes for transient vacation lodging. No business activity is permitted, except for the activities of Declarant, its agents and employees, in selling or renting the Units or any time-share interest in the Units.

2.26. Use of Common Area. There shall be no obstruction of the Common Area, nor shall anything be kept or stored on any part of the Common Area without the prior written consent of the Association except as specifically provided herein. Nothing shall be altered on, constructed on, or removed from the Common Area except upon the prior written consent of the Association.

2.27. Animals. Unless permitted by the Rules and Regulations of the Association, and except for animals that assist persons with disabilities (e.g., seeing eye dog, etc.), no Owner shall raise, breed or keep any animal in any Unit or on the Common Area or any part thereof Unless provided for by the Rules and Regulations, no pet shall be kept in a Unit or in the Common Area.

2.28. Antennas. No antenna, satellite television dish antenna or other device for the transmission or reception of television or radio signals or any other form of electromagnetic radiation, including, but without limitation, Citizen's Band or Ham Radio signals, shall be erected, used or maintained outdoors on any Unit. Any satellite dish other than those that are serving the entire property and maintained by Declarant or the Association must be ground mounted and not Visible from Neighboring Property.

2.29. Trucks, Trailers, Campers and Boats. No truck, mobile home, travel trailer, tent trailer, trailer, camper shell, detached camper, recreational vehicle, boat, boat trailer, or other similar or vehicle may be parked, maintained,

constructed, reconstructed or repaired on Property except for parking of (i) pickup trucks of less than _____ (_____) ton capacity with camper shells not exceeding _____ (_____) feet in height measured from ground level or (ii) mini-motor homes not exceeding _____ (_____) feet in height and _____ (_____) feet in length, which pickup trucks and minimotor homes are parked as otherwise permitted in this Declaration and are used on a regular and recurring basis for basic transportation.

2.30. Motor Vehicles. No automobile, motorcycle, motorbike or other motor vehicle shall be constructed, reconstructed or repaired upon the Property, and no inoperable vehicle may be stored or parked on any Unit or street, so as to be Visible from Neighboring Property or to be visible from any street; provided, however, that the provisions of this Section shall not apply to emergency vehicle repairs.

2.31. Parking: All vehicles of Owners and of their Permitted Users shall be parked only as permitted by the Rules and Regulations; provided, however, this Section shall not be constructed to permit the parking in a marked parking space of any vehicle whose parking is otherwise prohibited by this Declaration or the parking of any inoperable vehicle. Street parking is restricted to approved deliveries, pickup, or short-term guests or invitees and then only if permitted by law.

2.32. Nuisances. No nuisance (either public or private) shall be permitted to exist or operate upon any Unit so as to be offensive or detrimental to any other property in the vicinity thereof or to its occupant. Without limiting the generality of the foregoing provisions, no exterior speakers, horns, whistles, bells or other sound devices, except fire detection and security devices used exclusively for such purposes, shall be located, used or placed on any Unit.

2.33. Trash Containers- and Collection. No garbage or trash- shall be placed outside of any building, except in containers. In no event shall such containers be maintained so as to be Visible from Neighboring Property except to make the same available for collection and then only for the shortest time reasonably necessary to effect such collection. All rubbish, trash, and garbage shall be regularly removed from each Unit and shall not be allowed to accumulate thereon.

2.34. Clothes Drying Facilities. Outside clotheslines or other outside facilities for laundering, drying or airing clothes shall not be erected, placed or maintained on any Unit.

2.35. Encroachments. The Common Area and all Units shall be subject to an easement for overhangs and encroachments by walls, fences or other structures upon adjacent Units as constructed by the Declarant or as reconstructed or repaired in accordance with the original plans and specifications or as a result of repair, shifting, settlement or movement of any such structure, and the easement shall be an addition to and not in derogation of any easement under applicable law.

2.36. Machinery and Equipment. No machinery or equipment of any kind shall be placed, operated or maintained upon any Unit or the Common Area except such machinery or equipment as is usual and customary in connection with the use, maintenance or repair of Improvements or other appurtenant structures constructed by the Declarant.

2.37. Diseases and Insects. No Owner shall permit any thing or condition to exist upon any Unit which might induce, breed or harbor infectious plant diseases or noxious insects.

2.38. Burning and Incinerators. No open fires or burning shall be permitted on any Unit at anytime, and no incinerators or like equipment shall be placed, allowed, or maintained upon any Unit. The foregoing shall not be deemed to preclude the use, in customary fashion, of outdoor noncommercial barbecues or grills, subject to applicable laws and the Rules and Regulations.

2.39. Misuse and Mismaintenance. No Unit shall be maintained or utilized in such a manner as to constitute an

unreasonable annoyance to, or as to endanger the health of, other Owners or Units; no noxious or otherwise offensive condition or activity shall be allowed to exist or be conducted on any Unit or the Common Areas. All Units shall be kept clean so as to present a neat and sightly appearance.

2.40. Declarant's Exemption. Nothing contained in this Declaration shall be construed to prevent the erection, maintenance, use or operation by Declarant, or its duly authorized agents, of structures, improvements or signs necessary or convenient to the construction, development, identification, or sale of Interval Interests or other travel or vacation products by Declarant or any of its affiliates within the Property. Declarant shall have the right, during the period of construction, development, and sale, to have reasonable and specifically limited exemptions from these restrictions and to grant reasonable and specifically limited exemptions from these restrictions to any builder or contractor, or agent of Declarant. Any such exemption shall be enjoyed by Declarant or granted by Declarant to others only "upon specific written notice to the Association. No such exemption shall be broader in terms of activity, location, or time than is reasonably required.

2.41. Large Fraction Owners Right. Notwithstanding any provision in this Declaration to the contrary, the Owner of a Large Fraction- may, subject to compliance with reservation requirements under the Rules and Regulations, lease its Use Periods to one or more third parties, may divide its Use Periods into smaller periods of occupancy by successive Permitted Users, and may lease its Use Periods for transient lodging. Large Fraction Owners may retain a property manager of their choice, which may be the Managing Agent, to perform all management functions not required to be performed by the Association under this Declaration.

3. THE ASSOCIATION

3.1. Association. Huntington Resort Owners Association, a(n) _____ [state]
_____ [entity], has been organized to operate and manage the Huntington Resort.

3.2. Membership in Association. Each Owner (including Declarant as to all Interval Interests not conveyed by Declarant to third parties) shall be a member of the Association and shall remain a member thereof until he ceases to be an Owner.

3.3. Transfer of Membership. The membership of each Owner in the Association is appurtenant to and inseparable from his ownership of an Interval Interest and shall be automatically transferred upon any authorized transfer or conveyance of the ownership of his Interval Interest to any transferee or grantee, and said membership apart from the ownership of an Interval Interest shall be nontransferable whether by gift, bequest, assignment or otherwise.

3.4. Voting. In accordance with the provisions of the Bylaws, the Association shall have _____
(_____) classes of voting membership.

3.4.1. Class "A" Memberships. Class "A" Members shall be all Owners, except Declarant, and shall be entitled to _____ (_____) votes for each Annual Full Interval Ownership Interest owned, _____ (_____) votes for each Annual Partial or Biennial Full Interval Ownership Interest owned, and _____ (_____) vote for each Biennial Partial Interval Ownership Interest owned, and one "fractional vote" for each Flex Interval Ownership Interest owned; provided, when more than one person or entity owns an Interval Interest, all such persons and entities shall be members and the vote(s) for such Interval Interest shall be exercised as they among themselves determine, but in no event shall more than the number of votes allocated above be cast with respect to any Interval Ownership Interest. Owners of Large Fractions shall have multiple votes in proportion to the number and kind of Interval Ownership Interests their Large Fraction represents. Owners of Flex Interval Ownership Interests shall have a "fractional vote," the numerator of which shall be the Owners number of Rights times 208, and the denominator of which shall be the total number of Rights allocated to the Unit referenced in the Owner's deed.

3.4.2. Class "B" Memberships. The Class "B" Member shall be Declarant, who shall be entitled to _____ (_____) votes for each Annual Full Interval Ownership Interest owned, _____ (_____) votes for each Annual Partial or Biennial Full Interval Ownership Interest owned, and _____ (_____) votes for each Biennial Partial Interval Ownership Interest owned. Said Class "B" Membership shall cease and be converted to Class "A" Membership _____ (_____) years after the total votes outstanding in the Class "B" Membership fall below _____ percent (_____) of the total voting power of the Association. However, if Additional Property is annexed to this Declaration within such _____ (_____) year period, the additional Units built or proposed to built in the annexed Additional Property shall be counted in determining Class "B" Membership, but if the additional Units are not completed within eighteen (18) months of annexation, they shall no longer be counted in determining Class "B" Membership. Declarant also shall have a Class "B" Member vote for dedicated but unsold Flex Ownership Interval Interests equal to the number of allocated but unsold Rights times 624, divided by the total number of Rights (sold and unsold) allocated to all Units dedicated to Flex Ownership Interval Interests.

Interval Interests owned by the Association shall not have appurtenant voting rights.

3.5. Board of Directors. The affairs and control of the Association shall be governed by the Board in accordance with the Articles and Bylaws. The Board shall initially consist of the persons appointed by Declarant. The initial Board and any replacements thereof shall be appointed by the Declarant without the necessity of any meeting of members and shall serve for a period commencing upon the incorporation for the Association and terminating no later than the date upon which the Declarant or its successor has sold and conveyed _____ percent (_____) of the maximum number of Interval Interests created by this Declaration, the _____ percent (_____) to be calculated based upon the maximum number of Interval Interests in Sunshine Resort, including the Units proposed for the Additional Property, such period hereinafter referred to as the "Initial Board Term." Until expiration of the Initial Board Term, the Declarant, in its sole discretion, may appoint, remove and replace any Director and the Board shall consist solely of Directors appointed and determined by the Declarant. The Board shall consist of Directors appointed by the Declarant until termination of the Initial Board Term, the election of successor Directors, and the qualification of such Directors. At the first annual or special meeting of the Association following termination of the Initial Board Term, the Board of Directors shall be elected by all then eligible members of the Association pursuant to the election procedures set forth in the Bylaws. The rights of Declarant under this paragraph 3.5 shall inure to any person or entity succeeding to all of Declarant's interest in the Property.

3.6. Transfer of Common Area. The legal title to the Common Area shall be held in common by the Owners as part of their Undivided Interest in the Property.

4. MANAGEMENT

4.1. Powers and Duties Generally. Administration of the Interval Ownership Plan, operation, maintenance, repair and restoration of the Property and the Common Furnishings, and any alterations and additions thereto, shall be vested in the Association. The Association, acting alone (through its Board, its officers, or other duly authorized representatives) may, subject to the provisions of the Articles, the Bylaws and this Declaration, exercise any and all rights and powers herein, and all the rights and powers of a nonprofit corporation under the laws of the State of _____ [state].

4.2. Specific Powers and Duties of the Association. The management, operation, maintenance and repair of the Units and Common Area, the acquisition (by purchase or lease), maintenance, repair and replacement of the Common Furnishings, and the administration of the affairs of Owners, the use and occupancy of the Units and payment, as agent, of expenses and costs enumerated in this Declaration shall be under the direction and control of the Association. The Association shall have the duty to maintain and repair the Units, all Buildings and other structures, and the Common

Area, to acquire (by lease or purchase), maintain, repair and replace Common Furnishings as needed, to administer the Interval Ownership Plan as provided herein and to levy, collect and enforce the Assessments (as provided in Article 5 below) enumerated in this Declaration. The Association shall have the exclusive possession of each Unit during the Service Periods for the performance of maintenance and repairs on such Unit. The Association shall have the power to do all things that are required to be done by it pursuant to this Declaration. Without limitation of the foregoing powers and duties, the Association is expressly authorized in its discretion and on behalf of the Owners to do any or all of the following:

4.2.1. Maintenance and Repair. To repair, maintain, repaint, furnish or refurnish the Units and the Common Area or any part thereof, to establish reserves for anticipated costs, including the costs of acquisition and replacement of Common Furnishings; and to acquire and pay for materials, supplies, furniture, furnishings, labor or services which the Association deems necessary or proper for the operation, maintenance and repair of the Property and the Common Furnishings.

4.2.2. Taxes and Assessments. As agent and not as principal, to pay all taxes and assessments, and other costs affecting or relating to the Property, the Common Furnishings and/or the Common Area (as applicable), including without limitation any special tax under any Development Agreement(s) affecting the Property; and to discharge, contest or protest liens or charges affecting the Property. The Association is expressly authorized in its discretion and on behalf of each Owner to represent each Owner in any tax appeal process.

4.2.3. Utilities. To obtain and pay the costs of electrical, telephone, gas and other utility services for the Property.

4.2.4. Rules and Regulations. To adopt, publish and enforce, from time to time, Rules and Regulations relating to the possession, use and enjoyment of the Property, which Rules and Regulations shall be consistent with the provisions of this Declaration.

4.2.5. Legal and Accounting. To obtain and pay the cost of legal and accounting services necessary or proper in the operation, maintenance and repair of the Property and the enforcement of this Declaration, the Bylaws and the Rules and Regulations.

4.2.6. Insurance. To obtain and pay the cost of:

4.2.6.1. Insurance against property damage as a result of fire and other hazards commonly insured against, covering all real and personal property comprising the Property in an amount not less than _____ percent (_____%) of the full replacement value naming the Association, as agent for each of the Owners, as a coinsured party under such policy.

4.2.6.2. Liability insurance against death, bodily injury and property damage arising out of or in connection with the use, ownership or maintenance of the Units. Such insurance shall be in such amounts and with such coverage as shall be required by the Board of Directors. Such insurance policy shall provide that all Owners as a class are named as additional insureds in the policy issued to the Association. The policy shall also include a waiver by the insurer of its right to subrogation under the policy against any Owner or member of a Owner's household. Lastly, the policy shall provide that no act of an individual Owner, unless acting within the scope of his authority on behalf of the Association, will void the policy or operate as a condition to the recovery under the policy by any other person; and

4.2.6.3. Any other insurance, including but not limited to worker's compensation insurance, deemed necessary or desirable by the Board.

4.2.7. Levy and Collection of Assessments. To levy, collect and enforce assessments against the Owners in the manner provided in Article 5 hereof in order to pay the expenses of the Interval Ownership Plan including the fee of the

Managing Agent; and to do all things necessary to enforce each Owner's obligations hereunder.

4.2.8. Bank Accounts. To deposit: (a) all funds collected from Owners pursuant to Article 5 hereof and paragraph 4.2.7 and (b) all other amounts collected by the Association in connection with its rights and duties provided herein, as follows:

4.2.8.1. All funds shall be deposited in a separate account or accounts (the "General Account") with a bank or savings and loan association located in the State of _____ [state] selected by the Association. Funds deposited in the General Account(s) may be used by the Association only for the purposes which such funds have been collected.

4.2.8.2. Funds which the Association shall collect for "Reserve Expenses" (as defined pursuant to paragraph 5.1.1 shall, within _____ (_____) days after deposit in the General Account, be deposited in an interest bearing account with a bank or savings and loan association selected by the Association or invested in Treasury Bills or Certificates of Deposit (said interest bearing bank or savings and loan account or Treasury Bills or Certificates of Deposit are all herein collectively referred to as the "Reserve Account"), and the Association shall keep accurate books and records reflecting the amount in the Reserve Account attributable to each Owner. Funds deposited in the Reserve Account shall be held in trust and may be used by the Association only for the specific purposes for which such funds have been collected.

4.2.9. Statements of Status. Upon the request of any Owner, purchaser or other prospective transferee of an Interval Interest, to issue a written statement setting forth any amounts unpaid with respect to the Interval Interest, the use entitlement for the remainder of the Use Year and the reservation status respecting such Interval Interest.

4.2.10. Cleaning and Maid Service. To provide for cleaning and maid service upon the departure of each Owner or other occupant of the Unit and during Service Periods so that the Units are maintained in good order and repair. In addition to cleaning and maid service that is normally provided to each Unit, to provide such cleaning and maid services as shall reasonably be requested and paid for by an Owner.

4.2.11. Right to Entry. During Service Periods and at any other reasonable time, upon giving reasonable notice, if a Unit is occupied, to enter the Unit for the purpose of cleaning, maid service, painting, maintenance and repair, and to enter upon and within any Unit, at any reasonable time, whether or not during a Service Period and whether or not in the presence of an Owner, for the purpose of (i) making emergency repairs therein, (ii) abating any nuisance or any dangerous, unauthorized, prohibited or unlawful activity being conducted or maintained in such Unit, (iii) protecting property rights and welfare of the other Owners, or (iv) for any other purpose reasonably related to the performance by the Association of its responsibilities under the terms of this Declaration. Such right of entry shall be exercised in such a manner as to avoid any unreasonable or unnecessary interference with the possession, use and/or enjoyment of the Owner, his Permitted User or other occupant of such Unit and shall be preceded by reasonable notice to the Owner or occupant thereof whenever the circumstances permit.

4.2.12. Relocation of Easements. To execute and cause to be recorded any and all documents and instruments required, in the discretion of the Association, to relocate utility easements within the Property to assure the use and enjoyment of the Common Area and the Units by all Owners with the least possible interference by the holders of such easements, and each Owner, by accepting the conveyance of an Interval Interest, hereby confers upon the Association, as trustee for all Owners, the power and authority to relocate such easements on behalf of all Owners.

4.3. Books and Records; Financial Information. The Association shall maintain complete and current copies of the Declaration, the Articles, the Bylaws, the Rules and Regulations, and all amendments to any of the foregoing, and the books, records, budget and financial statements of the Association, and, upon the prior written request to the Association by any Owner, shall make the same available for inspection at reasonable times and under reasonable circumstances by such Owner. In the event any Owner submits to the Association a request for an audited financial

statement of the Association for the most recently concluded Fiscal Year, the Association shall promptly deliver such audited financial statement to such Owner, and in the event no such audited financial statement has been prepared for the most recently concluded Fiscal Year, the Association shall cause the same to be prepared and delivered to such Owner as soon as reasonably possible. The cost of having such an audited financial statement prepared shall be a Basic Expense under paragraph 5.1.1 below.

4.4. Authority and Duty to Engage Managing Agent. The Association shall have the authority to engage and maintain a Managing Agent, which Managing Agent may be an affiliate of Declarant, for the Interval Ownership Plan pursuant to a written agreement (the "Management Agreement") and to provide for compensation to be paid to the Managing Agent. Pursuant to the Management Agreement, the Association may delegate to the Managing Agent the power to perform all the duties and obligations of the Association specified in paragraph 4.2 above. The Managing Agent will be terminated in accordance with the provisions of the Management Agreement. Each Owner, his heirs, successors and assigns, by acquiring title to an Interval Interest, shall be deemed to:

4.4.1. adopt, ratify, confirm and consent to the execution of such Management Agreement by the Association;

4.4.2. adopt, ratify, confirm and approve each and every provision of such Management Agreement and acknowledge that all of the terms and provisions thereof are reasonable;

4.4.3. covenant and promise to perform each and every covenant, promise and undertaking to be performed by Owners as provided in that Management Agreement;

4.4.4. recognize that some or all of the persons comprising the original Board are or may be stockholders, officers and directors of the Declarant or the Managing Agent, and acknowledge that such circumstances shall not and cannot be construed or considered as a breach of their duties and obligations to the Association, nor as possible grounds to invalidate such Management Agreement, either in whole or in part;

4.4.5. agree that the persons acting as officers and directors of the Association entering into such Management Agreement have not breached any of their duties or obligations to the Association; and

4.5.6. adopt, ratify, confirm and consent to the acts of the persons acting as officers and directors of the Association in entering into the Management Agreement.

5. ASSESSMENTS

5.1. Creation of Personal Obligations for Assessments. Each Owner except Declarant, by acceptance of a deed for an Interval Interest and by virtue of such ownership, is deemed to covenant and agree to pay its Proportionate Share (as defined below) of the following assessments (the "Basic Assessments"):

5.1.1. Basic Expenses. As used herein "Basic Expenses" means the estimated aggregate amount of expenses to be incurred by the Association during the applicable Fiscal Year (i) to operate, manage, maintain, improve and repair the Property including the Units, the Common Area, and the Common Furnishings, and to administer the Interval Ownership Plan; (ii) to provide for reserves to ensure payment when due of the cost of capital expenditures relating to the repair or restoration of the Units, the Common Areas and the Common Furnishings, and for such other purposes as are required by good business practice (the "Reserve Expenses"); (iii) to provide for a fund to account for the possibility that some Assessments may not be paid on a current basis; (iv) to pay all real and personal property taxes on the Property and the Common Furnishings; and (v) to provide for the payment of the fee of the Managing Agent. Without limiting the generality of the foregoing, Basic Expenses shall include: all charges, costs and expenses whatsoever incurred by the Association for or in connection with the administration and operation of the Property; assessments and other similar governmental charges levied on or attributable to the Property, including, without limitation, any hotel or

bed tax or any governmental charge levied in lieu of such hotel or bed tax; insurance, including fire and other casualty and liability insurance, obtained pursuant to this Declaration; and liability whatsoever for loss or damage arising out of or in connection with the Property, or any fire, accident, or nuisance therein; cost of repair, reinstatement, rebuilding and replacement of the Property, or the Common Furnishings therein; the cost of all basic utility services, including water, electricity, garbage disposal, telephone and any other similar service attributable to the Units and the Common Areas; the unpaid share of any Assessments levied during the previous Fiscal Year against any Owner who has defaulted in payment thereof to the extent that the same becomes uncollectible; wages, accounting and legal fees, management fees, maid service, and cleaning fees, and other necessary expenses of upkeep, maintenance, management and operation actually incurred with respect to the Property. Basic Expenses shall not include any expenses constituting Personal Expenses. Basic Expenses shall not include any operating cost, utilities cost, or taxes and assessments paid by Declarant under paragraphs 2.7 or 2.9 above. The Basic Assessments for each Interval Interest shall commence, and be due and payable for, the year in which the Owner has the first right to use his Interval Week. If the Owner may use his Interval Week in the year of purchase, the Proportionate Share his Interval Week until the year following purchase, the Proportionate Share of the first annual Basic Assessments shall be paid on January 1 following closing. Subsequent annual Basic Assessments shall be due and payable on January 1 of each year. No Owner may waive or otherwise avoid liability for the Basic Assessments by non-use of his Interval Interest or any part thereof or any abandonment thereof. "Proportionate Share" for Owners of an Annual Full Interval Ownership Interest shall be determined by dividing the total Basic Expenses attributable to such Fiscal Year by (a) fifty-two (52) times (b) the number of Units included in the Property (the "Annual Interval Assessment"). "Proportionate Share" for each Owner of an Annual Partial or Biennial Full Interval Ownership Interest shall be _____ percent (_____%) of the Annual Full Interval Assessment, and "Proportionate Share" for each owner of a Biennial Partial Interval Ownership Interest shall be _____ percent (_____%) of the Annual Full Interval Assessment. "Proportionate Share" for each owner of a Flex Interval Ownership Interest shall be one annual Full Interval Assessment times a fraction, the numerator of which is the Owner's number of Rights and the Denominator of which is the total number of Rights allocated to the Unit referenced in the Owner's deed. So long as Flex Interval Ownership Interest Owners pay an Assessment that is proportionately equal to or greater than that paid by Owners of other types of Interval Interests, the Association or Declarant may adopt an assessment system for Flex Interval Ownership Interests charging a flat and uniform amount per Right.

5.2. Payment of Special Taxes under Development Agreement(s). There shall be added to the Basic Expenses paid by the Association and to the Basic Assessment charged to each Owner who is deeded an Interval Interest in one of the Units of Phase 3 (and, to the extent annexed, in one of the Units of Phases 4 and 5 or any other Additional Property), any "special tax" imposed by the City of _____[city] under any Development Agreement, including without limitation the _____ Dollars (\$_____) per "interval week" special tax (subject to annual increase based on the Consumer Price Index) provided for in the Development agreement dated _____[month] _____[day], _____[year], between Declarant (or its predecessor) and the City of _____[city]. Any special tax shall be allocated on the basis of 52 "interval weeks" per Unit, and an Owner's share of the special tax shall equal the total special tax assessed per Unit multiplied by the Owner's Undivided Interest in the Unit to which the Owner's Interval Interest relates.

5.3. Special Assessments. If the Basic Assessments are, or will become, inadequate to meet all expenses incurred by the Association hereunder (other than for items constituting Personal Expenses) for any reason, including non-payment by any Owner of its Proportionate Share of the Basic Assessments on a current basis, the Association shall immediately determine the approximate amount of such inadequacy, prepare and distribute a supplemental budget and levy a special assessment (the "Special Assessment") in an amount sufficient to provide for such inadequacy; provided, however, that without the vote or written assent of a majority of the voting power of the Association residing in members other than the Declarant, Special Assessments shall not, in the aggregate, exceed: (1) _____ percent (_____%) of Basic Expenses for the applicable Fiscal Year, or (2) for a Special Assessment for repair or rebuilding of Unit(s), _____ percent (_____%) of the Basic Expenses. Any Special Assessment shall be payable in one lump sum or periodically, as determined by the Association, and shall be

payable within _____ (_____) days after receipt of a statement therefor. The amount of Special Assessments payable by an Owner shall be based upon the Owner's Proportionate Share.

5.4. Personal Expenses. Each Owner of any Interval Interest, by acceptance of a deed for an Interval Interest and by virtue of such ownership, is deemed to covenant and agree to pay all Personal Expenses. The term "Personal Expenses" mean's any expense resulting from the act or omission of any Owner, or Permitted User, including, without limitation: the cost of long-distance telephone charges or telephone message unit charges, any optional maid service and other special services or supplies attributable to the occupancy of the Unit during such Owner's Use Period; the cost to repair any damage to the Unit, to repair or replace any Common Furnishings located therein or within the Common Area on account of loss or damage occurring during such Owner's Use Period; the cost to satisfy any expenses to any other Owner(s) or to the Association due to any intentional or negligent act or omission of such Owner, or a Permitted User relating to, and any expenses necessary to reimburse the Association for costs incurred in bringing the Owner into compliance with the provisions of this Declaration, the Bylaws or the Rules and Regulations, specifically including, but not limited to, charges pursuant to paragraphs 2.5 and 5.8 of this Declaration.

5.5. Purpose of Assessments. Assessments shall be used exclusively to promote the recreation, health, safety and welfare of the Owners, to operate, maintain and improve the Property, and to pay for the administration of the Interval Ownership Plan and reimbursement of expenses incurred by the Association and other expenditures incurred in the performance of the duties of the Association as set forth in this Declaration.

5.6 Declarant's Exemption. The Declarant shall not be required to pay any Basic Assessments or Special Assessments for any Interval Interest owned by the Declarant within the Property. However, for so long as Declarant elects not to pay Assessments and Special Assessments, the Declarant shall subsidize the Association by paying the lesser of: (a) the amount necessary to make up any short-fall between budgeted Association expenses and actual income received from other Owners based on the Basic Assessments and the Special Assessments; or (b) the amount which would otherwise be payable as individual Owner's Basic Assessments and Special Assessments for the Interval Interests owned by the Declarant.

5.7 Increased or Decreased Expenses Due to Annexation of Additional Property. In the event of annexation of all or any portion of the Additional Property pursuant to Article 7, the Board shall, not later than _____ (_____) days following the date of such annexation (the "Annexation Date"), cause to be prepared a supplemental budget showing any increase or decrease in the Basic Expenses for the applicable Fiscal Year, prorated for the remainder of the Fiscal Year from the Annexation Date, multiplied by the fraction (i) the numerator of which is the total number of Units subject to this Declaration immediately following the Annexation Date and (ii) the denominator of which is the total number of Units subject to this Declaration on the date immediately prior to the Annexation Date; provided, however, that no increase in the Proportionate Share of Basic Assessments due to annexation of all or any portion of the Additional Property shall exceed _____ percent (_____%) of the Proportionate Share of Basic Assessments for the preceding Fiscal Year unless a majority of the members of the Association, excluding Declarant, shall consent thereto by vote or written assent.

5.8 Unpaid Association Assessments. All Association Assessments, including Basic Assessments, Special Assessments and Personal Expenses, which remain unpaid for a period of _____ (_____) days after the due date shall bear interest at the rate of _____ percent (_____%) per annum from the due date until paid. The Basic Assessments, Special Assessments and Personal Expenses, together with interests, costs and reasonable attorneys' fees shall be a lien on the Interval Interest and all tangible personal property owned by the Owner and located in a Unit, and such lien shall be deemed effected upon the filing in the office of the Recorder of _____[county] County, Arizona, of a notice of claim of lien, in such form as the Association may deem appropriate. The Basic Assessments, Special Assessments and Personal Expenses shall also be the personal obligation of the Owner of such Interval Interest at the time such assessments were levied. The lien may be foreclosed by appropriate action in court or in the manner provided by law with respect to the exercise of powers of sale

in deeds of trust or in any other manner provided by law. The Association shall be entitled to bid at any sale held pursuant to foreclosure of such lien, and to apply as a cash credit against its bid all sums due as provided herein and covered by the lien to be enforced. The lien against an Owner shall be limited to the Interval Interest owned by that Owner and shall not encumber the property, real or personal, of any other Owner. No use or occupancy by any Owner will be permitted if such Owner is delinquent in the payment of any Assessments.

5.9 Subordination of Lien. The lien provided for in Section 5.8 above shall be subordinate to the lien of any first mortgage made in good faith and for value, and recorded in the office of the Recorder for _____ [county] County, _____ [state], prior to the recordation of a notice of claim of lien hereunder ("Prior Mortgage"). The sale or transfer of any Interval Interest shall not defeat or affect the assessment lien provided for herein; provided, however, that the sale or transfer of any Interval Interest which is subject to any Prior Mortgage pursuant to a foreclosure or any proceeding or deed in lieu of foreclosure under such Prior Mortgage shall extinguish the lien provided for herein as to payments which became due prior to such sale or transfer. No such sale or transfer shall relieve any Owner from liability for any assessment(s) thereafter becoming due or from the lien thereof. No breach of the covenants, conditions or restrictions contained herein nor the enforcement of any lien provisions herein shall affect, impair, defeat or render invalid the lien or charge of any mortgage made in good faith and for value encumbering any Interval Interest, but all of said covenants, conditions and restrictions shall be binding upon and effective against any Owner whose title is derived through foreclosure or a trustee's sale or otherwise, with respect to an Interval Interest. It is intended that any loan to facilitate the resale of any Interval Interest after judicial foreclosure, deed in lieu of foreclosure or trustee's sale is a loan made in good faith and for value and entitled to all the rights and protections afforded to other mortgagees. Nothing in this section shall be construed to release any Owner from his personal obligation to pay the Assessments levied pursuant to this Declaration.

5.10. Adjusted Assessments for Owners of Large Fractions. If the Board or the Managing Agent reasonably determines that Basic Expenses or Reserve Expenses are higher or lower for Large Fractions or Whole Units (as a result of items such as owner-provided furniture, owner-contracted outside management, reduced or increased turnover or occupancy, etc.), then the Managing Agent may recommend and the Board may adopt higher or lower Basic Assessments or Reserve Assessments for Large Fraction or Whole Unit Owners.

6. DAMAGE, DESTRUCTION, CONDEMNATION

6.1. In General. In the event of any damage or destruction, whether resulting from an insured casualty, uninsured casualty or a partial taking in eminent domain proceedings to the Property and/or the Common Furnishings other than by ordinary wear and tear, the Association shall, subject to the provisions of paragraph 6.2, forthwith cause such damage or destruction to be repaired and shall use any available insurance or condemnation proceeds for such purpose. If the damage is not covered by condemnation proceeds or by insurance proceeds, or if the available insurance or condemnation proceeds are insufficient, the Association shall, subject to the provisions of paragraph 6.2, levy a Special Assessment at a uniform rate against all Owners for the amount required to meet the cost of such repair or restoration. In the event the damage or destruction was caused by the intentional or negligent act or omission of an Owner or his Permitted User(s), the cost of such repair or the amount of such deficiency shall be a Personal Expense and paid by such Owner as provided in paragraph 5.4, above.

6.2. Extensive Damage or Destruction. In the event the amount of the Special Assessment which is required to be levied pursuant to paragraph 6.1 above is not so approved or if no action is taken with respect to such Special Assessment within _____ (_____) days following the date of such damage or destruction, such disapproval or inaction shall be deemed to be an election to terminate this Declaration in the manner provided for in paragraph 8.3, in which event this Declaration shall terminate pursuant to the recordation of an amendment stating that the Declaration has been terminated in accordance with the provisions of paragraph 8.2. The proceeds arising from such sale, together with any insurance proceeds or condemnation proceeds received as a result of such damage or destruction, shall be distributed by the Association to each Owner (subject to the rights of each Owner's mortgagee) in accordance

with the undivided percentage interest in the Property owned by each Owner; provided, however, that there shall be deducted from the amount due any Owner the amount, if any, of all sums due to the Association from such Owner.

6.3. Excess Insurance Proceeds. Any excess insurance or condemnation proceeds over the cost of repair or restoration or any insurance or condemnation proceeds available in the event the Property or the Common Furnishings are not rebuild, restored, repaired or replaced pursuant to the provisions of this Declaration, shall be distributed to the Owners (subject to the rights of such Owners' mortgagees) in accordance with the undivided percentage interest in the Property owned by each Owner, provided, however that there shall be deducted from the amount due any Owner, the amount, if any, of all sums due to the Association from such Owner.

7. ANNEXATION

7.1. Annexation of Additional Property. Declarant, or any successor in title to Declarant owning all or any portion of the Additional Property as a result of foreclosure or proceeding or deed in lieu of foreclosure, may, at any time and from time to time, dedicate to the Interval Ownership Plan all or any portion of the Additional Property subject to this Declaration from time to time without the consent of any Owner. The dedication of all or any portion of the Additional Property shall be effective by recording in the office of the County Recorder of _____[county], _____[state], a declaration of annexation executed and acknowledged by Declarant.

7.2. Deannexation. Declarant may deannex all or any portion of the Additional Property which is annexed to the Property pursuant to paragraph 7.1 from coverage of this Declaration and jurisdiction of the Association, so long as Declarant is the owner of such portion of the Additional Property, and provided that a declaration of termination is recorded in the office of the _____[county] County Recorder, in the same manner as this Declaration was recorded, and that no escrow is closed for the sale of any Interval Interest affecting the annexed portion of the Additional Property.

8. MISCELLANEOUS

8.1. Amendment by Declarant. This Declaration may be amended by the Declarant by a written instrument in recordable form may:

8.1.1. Any time prior to the recordation of a deed to an Interval Interest allocated to a Unit or Units to be affected by the amendment; or

8.1.2. At any time where the amendment modifies the provisions of this Declaration relating to Flex Time Ownership Interests and Declarant has not previously sold Flex Time Ownership Interests, or where the amendment affects only Flex Time Ownership Interest not yet sold, or where the amendment does not materially adversely affect the rights of existing Owners of Flex Time Interests; or

8.1.3. Any time following the recordation of a deed conveying an Interval Interest, when necessary to correct errors or eliminate ambiguities; or

8.1.4. When necessary to comply with state, county, city or federal law, or regulations of any housing authority and agency which purchases, guarantees or insures mortgage loans; or

8.1.5. At any time that the Declarant holds not less than _____ percent (_____%) of the total votes of the Association, the Declarant being given a three to one weighted voting advantage as set forth above.

8.2. Other Amendments. This Declaration may be amended, at any time, by the vote or written assent of

_____ percent (_____) of the voting power of the members of the Association.

8.3. Termination. Subject to the provisions of paragraph 6.2 and the provisions of this paragraph, this Declaration shall remain in effect for a period of _____ (_____) years from the date of recordation thereof, and thereafter shall remain in effect for successive periods of _____ (_____) years each. This Declaration may be terminated at any time after _____ (_____) years after the date of recordation of this Declaration by the vote or written consent of _____ percent (_____) of the members of the Association electing to terminate the Declaration and authorizing the Association to sell the Property and the Additional Property, if subsequently annexed; in which event, this Declaration shall terminate upon the consummation of such sale and the recordation of an amendment stating that this Declaration is terminated pursuant to this paragraph. Each Owner, by accepting the conveyance of an Interval Interest, hereby constitutes and appoints the Association his attorney-in-fact in his name, place and stead, and for his use and benefit, to execute, acknowledge and deliver on behalf of each Owner any instrument or document which is required in order to effect a sale, conveyance, or transfer of the Property pursuant to this paragraph. Each Owner does further give and grant unto the Association, as his attorney-in-fact, full power and authority to do and perform any act necessary and proper to be done in the exercise of the foregoing power including, without limitation, the power and authority to sell and convey, and to petition for sale in lieu of partition if necessary to effect such conveyance, as fully as each Owner might or could do. The power of attorney is coupled with an interest, irrevocable and binding on the successors and assigns of each Owner. Proceeds obtained from such sale, conveyance or transfer shall be paid to each Owner (subject to the rights of each Owner's mortgagee) in the same proportion as the undivided interest of each Owner bears to the aggregate of all undivided interest in the Property; provided, however, that there shall be deducted from the amount due any Owner, the amount, if any, of all sums due to the Association from such Owner. Declarant may terminate the Declaration at any time prior to the conveyance of the first Interval Interest.

8.4. Notices. Notices provided for in this Declaration shall be in writing and shall be deemed sufficiently given when delivered personally at the appropriate address set forth below (in which even such notice shall be deemed effective only upon such delivery or forty eight (48) hours after deposit of same in any United States post office box, postage prepaid, addressed as set forth below). Any notice to an Owner required under this Declaration shall be addressed to the Owner at the last address for such Owner appearing in the records of the Association or, if there be none, at the address of the Property. Notices to the Association shall be addressed to the address designated by the Association by written notice to all Owners. Notices to the Managing Agent shall be addressed to the address designated by the Managing Agent by written notice to Owners. Notices to Declarant shall be addressed: Sunshine Corporation, _____[address]. The addresses and addressees for purposes of this paragraph may be changed by giving written change in the manner herein provided for giving notice. Unless and until such written notice is received, the last address and addressee as stated by written notice or as provided herein, if no written notice of change has been sent or received, shall be deemed to continue in effect for all purposes hereunder.

8.5. Notification of Sale of Interval Interest. No later than _____ (_____) days prior to the sale or transfer of any Interval Interest under circumstances whereby the transferee becomes the Owner thereof, the transferor shall notify the Association or the Management Agent in writing and in whatever form, if any, required by the Association of such pending sale or transfer. Such notice shall set forth the name and address of the transferee and transferor, and the date on which such sale or transfer is to be consummated. Unless and until such notice is given, the Association shall not be required to recognize the transferee for any purpose; and any action taken by the transferor as an Owner may not be recognized by the Association. Prior to receipt of any such notification by the Association or the Managing Agent, any and all communications required or permitted to be given by the Association shall be deemed duly given and made to the transferee if duly and timely made and given to such transferee's transferor.

8.6. Declarant's Right of First Refusal to Purchase. Declarant hereby reserves and shall hold, as to any Interval Interest or Undivided Interest or Undivided Interest in or relating to any Unit in Phase 3 of the Property (and, to the extent annexed, in one of the Units of Phases 4 or 5 or any other Additional Property) and as to any Interval Interest or

Undivided Interest in or relating to any Unit in Phases I and 2 of the Property that has not been sold to an Owner prior to the date of this Declaration or which is reacquired by Declarant (by foreclosure, deed in lieu of foreclosure, or otherwise) after the date of this Declaration, a right of first refusal as to the, resale by an Owner of any Interval Interest (collectively, a "First Right Interval Interest"). If an Owner of an First Right Interval Interest desires to sell, convey or otherwise transfer ownership of such Owner's First Right Interval Interest, and such Owner receives an offer to purchase such First Right Interest ("Purchase Offer") which such Owner desires to accept, the Owner, prior to accepting such offer or otherwise transferring such First Right Interval Interest ownership, shall notify the Declarant and provide the Declarant with a copy or summary of such Purchase Offer. Developer shall then have the right and option to purchase such First Right Interval Interest at the same price and on the same terms as set forth in the Purchase Offer. If the Declarant elects to purchase the Owner's Interval Interest as provided herein, such election shall be made by notice, sent to such Owner within _____ (_____) calendar days beginning with the day following receipt by Declarant of such Owner's notice. Such notice from the Declarant of its intent to purchase the Owner's First Right Interval Interest shall be deemed to create a binding contract between such Owner and the Declarant that the Developer will purchase the Owner's First Right Interval Interests) in accordance with the terms an provisions of such Purchase Offer. If the Declarant does not notify such Owner of its election to purchase such First Right Interval Interest within such _____ (_____) day period, such Owner shall thereafter be free to sell such First Right Interval Interest to the person or entity submitting such Purchase Offer in accordance with the terms and provisions of such Purchase Offer. Should, however, such sale not be closed within four (4) months after the date such Purchase Offer is communicated to the Declarant at the price and terms equal or more favorable to such Owner, the terms of this Paragraph shall once again be imposed on any sale by such Owner. There is no guaranty that the Developer will buy back any Owner's First Right Interval Interest pursuant to this right of first refusal, and the Association may establish additional reasonable requirements for the noticing and processing of transfers of Ownership of Interval Interests, including without limitation, the assessment of reasonable transfer fees, and may establish separate requirements for transfers of Flex Interval Ownership Interests.

8.7. Severability and the Rule Against Perpetuities. If any provision of this Declaration, or any section, sentence, clause, phrase, or word or the application thereof in any circumstances, shall be held invalid, the validity of the remainder of this Declaration and of the application of such provision, sentence, clause, phrase or word under any other circumstances shall not be affected thereby. If any provision of this Declaration would violate the Rule Against Perpetuities or any other limitation on the duration of the provisions contained herein imposed by law, then such provisions shall be deemed to remain in effect only for the maximum permissible period permitted by law or until twenty-one (21) years after the death of the last survivor of the now living descendants of either President _____[name] or Governor _____[name], whichever is later.

8.8. Successors. The provisions of this Declaration shall be binding upon all parties having or acquiring any Interval Interest or any right, title, or interest therein and shall be for the benefit of each Owner and his heirs, successors and assigns. Each Owner (including Declarant) shall be fully discharged and relieved of liability on the covenants herein insofar as such covenants relate to each Interval Interest upon ceasing to own such Interval Interest and paying all sums and performing all obligations hereunder, insofar as, the same relate to each Interval Interest up to the time his ownership interest terminated.

8.9. Violation or Nuisance. Every act or omission whereby any provision of this Declaration, the Bylaws or the Rules and Regulations is violated, in whole or in part, is hereby declared to be a nuisance and may be enjoined or abated whether or not the relief sought is for negative or affirmative action, by Declarant, the Association or any Owner.

8.10. Interpretation. The captions of the Articles, paragraphs and subparagraphs hereof are of convenience only and shall not be considered to expand, modify or aid in the interpretation, construction or meaning of this Declaration. As used herein the singular shall include the plural and the masculine shall include the feminine and neuter.

8.11. Enforcement: No Waiver. The Association or any Owner shall have the right to enforce by proceedings at law or

in equity, all restrictions, conditions, and covenants now or hereafter by the Declaration. The failure to enforce any provision of this Declaration shall not constitute a waiver thereof or of the right to enforce such provision thereafter.

8.12. Waiver of Homestead Protections. Each Owner, to the extent permitted by law, shall and hereby waives any protections of any homestead or homestead exemption available to said Owner under the laws of the State of _____[state].

8.13. Disclaimer of Representations and Warranties. Declarant specifically disclaims any intent to have made any representations or warranties in connection with Sunshine Resort or the Interval Interests except as specifically set forth herein, and no person shall rely upon any representation or warranty not specifically made herein.

8.14. Approval of Declaration. Owners of Interval Interests, by virtue of their execution of a purchase contract and/or by acceptance of a deed to an Interval Interest, approve the foregoing and all of the terms and conditions, duties and obligations of this Declaration, and agree to be bound thereby. Each Owner shall be responsible for compliance with this Declaration, by that Owner's agents, guests, invitees, lessees, licensees, and their respective servants and employees, as this Declaration may be amended from time to time. The Owner's failure to so ensure compliance by any such person shall be grounds for the same action available to the Association as though by reason of said Owner's non-compliance.

The Declarant has caused this Declaration to be executed this _____[day],
_____ [month], _____[year].

HUNTINGTON RESORT, INC.

a(n) _____ [state] _____ [entity]

By: _____

Print Name: _____

Title: _____

HUNTINGTON CORPORATION

a(n) _____ [state] _____ [entity]

By: _____

Print Name: _____

Title: _____

[Attach Exhibit A]

[Attach Exhibit B]

[Attach Exhibit C]

[Attach Exhibit D]



131 of 181 DOCUMENTS

Current Legal Forms for Real Estate

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Current Legal Forms for Real Estate
Chapter 22 DEVELOPMENT AND SUBDIVISION
Part IV. FORMS
E. RESIDENTIAL DEVELOPMENT

26-22 Current Legal Forms for Real Estate FORM 22.93

FORM 22.93 Purchase agreement for time share

COMMENT

The following is a purchase agreement for a time share unit. Many of the provisions are similar to a standard purchase agreement. However, a significant number of provisions are unique to time shares.

For additional forms relating to time sharing, see Chapter 20, Real Estate Entities, in Volume 24, and Chapter 21, Real Estate Sales and Exchanges, in Vol. 25, *supra* .

**FORM
PURCHASE AGREEMENT**

THIS PURCHASE AGREEMENT (this "Agreement") is made and entered into this _____[day]
_____[month], _____[year], by and between HUNTINGTON DEVELOPMENT, LLC, a(n)
_____[state] _____[entity] (hereinafter referred to as "Seller"), the address of which
is c/o _____[name], and _____[name] (hereinafter referred to as "Purchaser"):

WITNESSETH:

That for and in consideration of the mutual covenants contained herein, Seller does hereby agree to sell unto Purchaser and Purchaser does hereby agree to purchase from Seller the following described real property (the "Interval Interest") upon the price, terms, and conditions hereinafter set forth, including but not limited to Paragraphs 1 through 26 of the Terms and Conditions set forth herein:

An undivided interest in Huntington Resort (the "Project"), according to the Declaration of Dedication and Covenants,

Conditions, Restrictions and Easements for Sunset Resort, duly recorded in the Official Records of _____ [county] County, _____ [state], in Book _____ [number], Page _____ [number], and all annexations, amendments, and supplements thereto (the "Declaration"), and as shown on Arbitrary Plat _____ [number], Page _____ [number], together with the recurring (i) exclusive right to reserve, use, and occupy a Full Unit or Units or Partial Unit or Units within the Project; and (ii) nonexclusive right to use and enjoy the Project's Common Area and Common Furnishings, for their intended purposes, during such Fixed Use Period as is set forth below (if Grantee has purchased a Fixed Use Period) or such Use Periods as shall properly have been reserved in accordance with the provisions of the then current Rules and Regulations promulgated by Sunset Resort Owners Association, all pursuant to the Declaration. For convenience in inventory control, conveyancing, and titling, the Interval Interest is allocated to one or more specific Unit(s); however, the Grantee shall NOT have the right to use and occupy such specific Unit(s), only the right to use and occupy a Unit.

Unit No.:

Flex

(Floating)

Initial Use Year:

Fixed Unit (if applicable):

Floating Time

Fixed Use Period (if applicable):

Fixed Event (if applicable):

Suite (if applicable):

Number of Rights (if applicable):

Interval Interest No. (if applicable):

Undivided Interest:

PURCHASE TERMS

1. Purchase Price of Time Share Interest: \$ _____
2. Initial Cash Deposit: \$ _____
3. Ascribed Equity Value of Timeshare Interest Conveyed to Seller (applicable to Upgrade Transactions only): \$ _____
4. Additional Cash Depositions Due:
 - a. On or before _____ \$ _____
 - b. On or before _____ \$ _____
5. Total Down Payment (line 2 plus line 3 plus lines 4.a. and 4.b.) \$ _____
6. Credits (if any): \$ _____
7. Balance of Purchase Price to be Financed at Closing (line 1 minus line 5 minus line 6): \$ _____
8. Closing Costs:
 - A. Initial Year's Association Assessments (estimated): \$ _____
 - B. Initial Year's Ad Valorem Taxes \$ _____

(estimated):

C. Initial Year's club Sunshine Dues \$ _____
and Club Processing Fee (if applicable)

D. Initial Year's External Exchange Company Membership fee \$ _____

E. Other Closing Costs: \$ _____

F. Total Estimated Closing Costs: \$ _____

Purchaser desires to pay for the aforescribed Interval Interest, in lawful currency of the United States, by using the following method (check one), subject to the Terms and Conditions contained herein:

☐

Cash Payment

☐

Seller Financing

Credit Card Type: _____ Number: _____ [number] Expiration Date:
_____ [month] _____ [day] _____ [year]

In addition to the financial obligations of Purchaser set forth above, Purchaser will be required to pay all Assessments described in Paragraph 8, below. Purchaser will also be required to pay any ad valorem taxes separately assessed and levied against his or her Interval Interest.

If Purchaser obtains purchase money financing, Purchaser will also be responsible for the payment of all charges incident to the extension of credit, which charges are specified in the Truth-in-Lending Disclosure Statement furnished to Purchaser, including but not limited to monthly installments of principal and interest, late charges (if applicable), and a monthly collection fee of _____ Dollars (\$ _____). Finally, Purchaser will be required to pay the fixed amount of _____ Dollars (\$ _____) to cover all recording costs, documentary fees, title insurance premiums, maintenance assessments, and other closing costs as specified on the HUD-1 Settlement Statement provided to Purchaser at or prior to Closing, as hereinafter defined, and/or above (collectively "Closing Costs"). All Closing Costs in connection with the purchase of the above-described Interval Interest must be paid by Purchaser prior to or at the time of Closing.

In the event that Purchaser consists of more than one person, then title shall be vested among them as Sole and Separate Property.

Monthly Payment Method

☐

Coupon

☐

SurePay (Credit or Debit Card)

☐

SurePay (Checking or Savings Account)

PURCHASER MAY CANCEL THIS AGREEMENT WITHOUT A PENALTY OR OBLIGATION WITHIN _____ (_____) CALENDAR DAYS AFTER PURCHASER SIGNS THIS AGREEMENT. IF PURCHASER DECIDES TO CANCEL THIS AGREEMENT, PURCHASER MUST NOTIFY SELLER IN WRITING OF PURCHASER'S INTENT TO CANCEL. PURCHASER'S NOTICE OF CANCELLATION WILL BE EFFECTIVE ON THE DATE THAT IT IS SENT TO SELLER C/O _____. SELLER'S TELEPHONE NUMBER FOR INQUIRIES IS (_____) _____. HOWEVER, ALL CANCELLATION NOTICES MUST BE IN WRITING AS AFOREDESCRIBED. PURCHASER MAY EXECUTE

ALL CLOSING DOCUMENTS IN ADVANCE. HOWEVER, THE CLOSING, AS EVIDENCED BY DELIVERY OF THE DEED, IS PROHIBITED BEFORE THE _____ (_____) CALENDAR DAY CANCELLATION PERIOD EXPIRES.

The Purchaser has executed this Agreement on the day and year first written above.

PURCHASER:

_____ Social Security Number
 _____ Printed Name _____ Street Address
 _____ Home Telephone Number _____ City, State, Zip Code
 _____ Business Telephone Number _____

SELLER:

Huntington Development, LLC, a(n)
 _____ [state]
 _____ [entity]

By: _____
 [name and title]

Date: _____
 Acceptance Date

TERMS AND CONDITIONS

1. DEFINITIONS:

Unless expressly indicated herein to the contrary or the context otherwise requires, the capitalized terms used herein shall have the meanings ascribed to them in the Declaration.

2. PAYMENT OF PURCHASE PRICE:

(a) Purchaser may pay for the Interval Interest described herein in cash or by borrowing a portion of the purchase price set forth on line 1 of Page 1 hereof (the "Purchase Price") from Seller. If a portion of the Purchase Price is financed by Seller, then Purchaser will be required to execute a Promissory Note (the "Note") payable to the order of Seller in the amount of the unpaid balance of the Purchase Price, together with a first priority Mortgage (the "Mortgage") that secures the payment of the Note and encumbers Purchaser's Interval Interest, as well as certain other documents and instruments which Seller, in its sole discretion, deems reasonably necessary or appropriate in order to secure Purchaser's payment of the Note. Purchaser will be subject to all of the terms, provisions, and conditions described in and set forth in all such documents and instruments.

(b) If Purchaser requests purchase money financing, Seller may agree to finance Purchaser's purchase but is NOT required to do so. Purchaser agrees that all personal financial information submitted to Seller will be accurate, and Purchaser authorizes Seller to make credit inquiries regarding Purchaser, whether through a consumer credit reporting agency or other means. Purchaser agrees to provide immediate written notice to Seller of any material adverse change in Purchaser's financial condition that occurs prior to Closing. If, despite Purchaser's good faith best efforts to obtain purchase money financing, Purchaser is unable to qualify for such financing within _____

(_____) days following Seller's acceptance of this Agreement due to Purchaser's failure to satisfy completely Seller's credit requirements or for any other reason, then Purchaser shall be entitled to terminate this Agreement and receive a refund of any and all payments theretofore made by Purchaser hereunder (without interest) or, at Purchaser's option, to consummate the transaction contemplated hereby by paying the entire Purchase Price, less the amount of Purchaser's initial deposit and any other payments made to or on behalf of Seller hereunder, in cash at Closing. If Purchaser is unable to qualify for Seller financing within such _____ (_____) day period, Seller shall provide written notice thereof to Purchaser, whereupon Purchaser shall promptly notify Seller whether Purchaser elects to terminate this Agreement or consummate the transaction as provided in the preceding sentence. Seller reserves the right, in its sole discretion, to sell or assign the Note and the Mortgage to another person or entity, whether or not such person or entity is affiliated with Seller.

(c) In the event that the Interval Interest represents an "upgrade" from another Interval Interest in the Project or a timeshare interest in another resort (the "Old Timeshare Interest"), Purchaser agrees to execute and deliver to Seller, on the date hereof, a deed in form and substance satisfactory to Seller, in its sole discretion, pursuant to which all of Purchaser's right, title, and interest in and to the Old Timeshare Interest is conveyed to Seller, free and clear of any liens or encumbrances not expressly approved by Seller (the "Deed-back"). Such Deed-back will be recorded by Seller upon Closing. Pending Closing, Purchaser shall remain fully liable for all costs, expenses, and other obligations of any and every kind related to the Old Timeshare Interest (the "Old Timeshare Interest Obligations"). In the event that the transaction contemplated hereby fails to close for any reason whatsoever, the Deed-back will be returned to Purchaser, and Purchaser will remain fully liable for the Old Timeshare Interest Obligations.

(d) In the event that the Note, the Mortgage, the Deed-back (if applicable), or any other document or instrument which evidences or secures payment of the Purchase Price is misplaced or has not been completely and validly executed by Purchaser for any reason whatsoever, Seller shall have the option, in its sole discretion, to (i) cancel this Agreement at any time prior to closing; or (ii) send Purchaser whatever document(s) and/or instrument(s) that Seller needs Purchaser to re-execute, along with instructions on how to do so. In the event that Seller elects to cancel this Agreement, Seller shall provide written notice thereof to Purchaser and cause any funds held on Purchaser's behalf, without interest, to be refunded by Escrow Agent, as hereinafter defined, to Purchaser in the same manner as provided in Paragraph 5 hereof, in which event this Agreement shall be deemed terminated and of no further force or legal effect. In the event that Seller sends Purchaser any document or instrument for re-execution, Purchaser shall promptly re-execute same, cause his or her signature to be notarized (to the extent indicated), and return such document(s) and/or instrument(s) to Seller in accordance with Seller's written instructions. Purchaser's failure to do so for any reason within _____ (_____) calendar days following Purchaser's receipt thereof shall constitute a default hereunder, entitling Seller to exercise its available rights and remedies pursuant to Paragraph 12 hereof.

3. SELLER'S RIGHT TO ACCEPT OR REJECT THIS AGREEMENT:

It is understood that Seller can accept or reject this Agreement. If Seller rejects this Agreement, Purchaser is only entitled to a refund of his or her down payment and any additional payments made by him or her, without interest. This Agreement will become effective and legally binding upon both parties when signed by Purchaser in the space provided and accepted by Seller and may not be amended or in any manner modified except by a written instrument that is signed by both Seller and Purchaser. If Seller accepts this Agreement, then Seller, subject to Paragraph 2, above, agrees to sell the Interval Interest described herein to Purchaser, and Purchaser agrees to make all of the payments required to be made under this Agreement when due and otherwise to comply fully with all of the terms, provisions, and conditions hereof and of the Project instruments.

4. DEPOSITS:

Purchaser's initial deposit and any subsequent payments made by Purchaser to Seller prior to Closing shall be delivered to and held in escrow by Stewart Title Agency, Inc. (the "Escrow Agent"). PURCHASER AND SELLER AGREE TO

ACCEPT ANY POTENTIAL RISKS THAT MAY ACCRUE AS A RESULT OF THE DEPOSITING OF ESCROWED FUNDS IN A DEPOSITORY LOCATED OUTSIDE OF _____[state]. Any and all interest that accrues on Purchaser's deposit and any subsequent payments shall, except to the extent prohibited by law, be payable to and inure to the sole benefit of Seller and not be credited toward the Purchase Price. Escrow Agent shall hold such deposit and other amounts until the expiration of Purchaser's cancellation period as described herein without such right of cancellation having been exercised by Purchaser. Upon written notice from Seller to Escrow Agent that such cancellation period has expired and Closing has occurred, or alternatively, that Purchaser has breached any term, provision, or condition hereof, Escrow Agent shall deliver any funds held on Purchaser's behalf, together with any interest that has accrued thereon to Seller. Seller shall have no right to use any of the funds held by Escrow Agent until such funds have been delivered to Seller in accordance with the provisions hereof.

5. REFUND PRIVILEGE:

In the event that Purchaser cancels this Agreement during the _____ (_____) calendar day cancellation period described herein, Seller will cause Escrow Agent to refund to Purchaser the total amount of any and all payments made by Purchaser under this Agreement and return any negotiable instruments, other than checks, executed by Purchaser in connection herewith.

6. SELLER'S RIGHT OF SUBSTITUTION:

Purchaser expressly acknowledges and agrees that the actual Interval Interest conveyed by Seller to Purchaser upon Closing may be the same or different from the Interval Interest described on Page 1 hereof, provided that the conveyance of whatever Interval Interest is described in Purchaser's Warranty Deed affords Purchaser substantially the same rights, benefits, and privileges with respect to the Project's Units and Common Areas as the conveyance of the above-described Interval Interest would afford. Purchaser hereby authorizes Seller to modify and initial on Purchaser's behalf any documents or instruments executed by Purchaser in order to reflect such substitution.

7. VACATION OWNERSHIP PLAN:

(a) Purchaser acknowledges that notwithstanding any provision of this Agreement or the Warranty Deed pursuant to which title to the Interval Interest described herein will be conveyed to Purchaser, Purchaser will not have the guaranteed exclusive right to reserve, use, and occupy the above-identified Unit(s) during any specific Use Period(s) (unless a specific Fixed Use Period is set forth on Page 1 hereof). Rather, Purchaser shall be entitled to use and occupy a Full Unit or Units or Partial Unit or Units within the Project during such use Period(s), either every calendar year or during alternate calendar years as indicated on Page 1 hereof, as shall properly have been reserved by Purchaser in accordance with the terms, provisions, and conditions of the Rules and Regulations, as they may be amended or restated from time to time. Because reservations are generally confirmed by the Managing Agent on a first come, first served, space-available basis, Interval Interest owners are encouraged to make their reservation requests as far in advance of their desired Use Periods as the Rules and Regulations permit in order to maximize their chances of obtaining confirmed reservations for the Use Periods of their choice.

(b) The vacation ownership plan created by the Declaration shall be perpetual unless terminated by the owners of Interval Interests and Units in the manner described in the Declaration.

(c) Under no circumstances shall Purchaser be entitled to make a reservation or use and occupy a Unit at the Project unless Purchaser has timely paid any and all Assessments and other amounts levied upon his or her Interval Interest as described in Paragraph 8 below and otherwise fully complied with all of the terms, provisions, and conditions of the Declaration and all other applicable documents and instruments.

8. ASSESSMENTS:

(a) Purchaser understands and agrees that in accordance with the provisions of the Declaration, Purchaser shall be responsible for his or her proportionate share of the Project's Basic Expenses and Reserve Expenses. The initial annual Basic Assessment shall be due and payable to the Association prior to Purchaser's use and occupancy of a Unit during any Use Period in the year in which Closing occurs. Subsequent Basic Assessments shall be due and payable on a calendar year basis at the time(s) and in the manner established from time to time by the Board, written notice of which shall be provided to each owner of an Interval Interest. The amount of Purchaser's Basic Assessment each year may vary and will be determined by the Board, pursuant to an annual budget that will be prepared by the Managing Agent and approved by the Board.

In the event that Purchaser's Initial Use Year as set forth on Page 1 hereof is the year following the year in which Closing occurs, then no Basic Assessment attributable to the current Use Year shall be due and payable by Purchaser. Purchaser's failure for any reason to pay on a timely basis any and all Assessments levied against his or her Interval Interest could result in the foreclosure thereof by the Association and the loss of such Interval Interest. Except with respect to the calendar year in which Closing occurs as described in this paragraph, Purchaser's failure for any reason to use and occupy a Unit within the Project for one (1) or more Use Periods in any given Use Year shall not exempt such Purchaser from his or her obligation to pay in full all Assessments levied against his or her Interval Interest with respect to such Use Year.

(b) In addition to the annual Basic Assessment, Purchaser understands and agrees that he or she will be responsible for the timely payment to the Association of any Special Assessments levied upon his or her Interval Interest by the Association, as well as any Personal Expenses that he or she incurs or for which he or she is responsible, all in accordance with the provisions of the Declaration and all other applicable documents and instruments.

(c) The Association may enforce Purchaser's obligation to pay the aforescribed Assessments in the manner set forth in Article 5 of the Declaration. Under no circumstances shall Purchaser be entitled to reserve, use, or occupy a Unit within the Project or exercise any other rights, benefits, or privileges to which Purchaser would otherwise be entitled, pursuant to the Declaration or any other document or instrument unless and until all Assessments and other amounts that Purchaser owns the Association or Seller have first been paid in full.

9. CLOSING:

Except as otherwise provided by applicable law, for purposes of this Agreement, the term "Closing" shall mean the date following the expiration of Purchaser's _____ (_____) day right of cancellation without such right having been exercised as of which the parties hereto have properly executed and delivered all documents necessary to effect transfer of title to the Interval Interest described herein, including but not limited to this Agreement, a Warranty Deed, and a Promissory Note and Mortgage, if applicable. Upon Closing, Seller shall cause all necessary documents to be recorded in the Official Records of _____ [county] County, _____ [state]. Except as otherwise expressly provided in any of the Project's documents or instruments to the contrary, Purchaser may not reserve, use, or occupy any of the Project's Units or exercise any other rights, benefits, or privileges appurtenant to his or her Interval Interest until Closing occurs.

10. TITLE AND TITLE INSURANCE:

Unless Purchaser elects otherwise by written notice received by Seller prior to Closing, within a reasonable period of time following the date of Closing, Purchaser will be provided with a standard ALTA owner's title insurance policy from a title insurance company of Seller's choosing, paid for by Purchaser out of the Closing Costs, insuring Purchaser's title to his or her Interval Interest, free and clear of all encumbrances except for taxes and assessments for the year of Closing and subsequent years and restrictions, reservations, conditions, limitations, and easements of record prior to Closing or imposed by governmental authorities having jurisdiction or control over the Project, and the lien of the

Mortgage, if any. Purchaser may, at Purchaser's option exercised by written notice to Seller, elect to acquire a policy of title insurance from a title insurance company of Purchaser's choosing, in which event Seller shall refund to Purchaser from the Closing Costs the actual cost to Seller of the title insurance premium.

11. COMPLETION OF CONSTRUCTION:

In the event that construction of any Unit described on Page 1 hereof has not been substantially completed as of the date hereof, Seller agrees, subject to the provisions hereof and excepting delays caused by strikes, inability to obtain labor or materials, governmental restrictions, civil commotion, fire, earthquakes, storms, floods, explosions, Acts of God, and delays caused by conditions or circumstances beyond the reasonable control of Seller, to cause such Unit to be substantially completed no later than _____ (_____) months after the date of execution of the first Purchase Agreement requiring the conveyance by Seller of an Interval Interest in such Unit.

12. DEFAULT:

(a) Purchaser shall be in default under this Agreement if he or she fails to pay on time, keep any promise, or fulfill any agreement or obligation contained herein or in any of the documents or instruments referenced herein. In the event of a default by Purchaser, Purchaser shall not be entitled to reserve, use, or occupy a Unit at the Project, to use and enjoy any of the Project's Common Area, or to exercise any other rights, benefits, or privileges appurtenant to his or her Interval Interest.

(i) Purchaser's default in the performance of any of his or her obligations under this Agreement may result in the immediate and automatic termination of this Agreement and all of Purchaser's rights, benefits, and privileges hereunder. Upon such termination of this Agreement, Seller shall retain or, if such termination occurs prior to Closing, cause Escrow Agent to deliver to Seller, all sums of money previously paid by Purchaser hereunder as liquidated damages and not as a penalty. Furthermore, Seller may pursue any or all other legal and equitable remedies available to it, at law or in equity, including but not limited to specific performance and recovery of Seller's reasonable attorneys' fees and other costs of enforcement of Purchasers' obligations hereunder.

(ii) In the event that Purchaser fails to make any payment required under the terms of the Note or the Mortgage (if applicable) for the unpaid balance of the Purchase Price, Seller's and Purchaser's rights and remedies shall be governed by the provisions of said Note and Mortgage and by the applicable laws of the State of _____ [state].

(b) In the event of a dispute between Purchaser and Seller with respect to Seller's performance hereunder, the matter in question may, in Seller's sole discretion, be settled by arbitration in accordance with the Commercial Arbitration Rules of the American Arbitration Association. If a matter in dispute is referred to Arbitration, Purchaser and Seller shall each pay one-half (1/2) of the fees and expenses required to initiate the arbitration proceedings. The parties agree, however, that the costs and expenses of arbitration, including attorneys' fees, shall ultimately be borne as determined by the arbitrator. The parties further agree that any arbitration proceeding in connection with this Agreement shall be conducted in _____ [county] County, _____ [state], and that the decision of the arbitrator with respect to any such matter in dispute shall be final and determinative of the respective rights and obligations of the parties hereunder.

Notwithstanding the foregoing provisions of this Subparagraph 12(b) to the contrary, if, for any reason, Seller is unable or fails to comply with the material provisions of this Agreement, then the sole obligation of Seller shall be to refund or cause Escrow Agent to refund (whichever is applicable) to Purchaser all payments previously made by Purchaser hereunder, without interest. Upon such refund, this Agreement shall be deemed canceled, and all rights and obligations hereunder shall immediately terminate. PURCHASER HEREBY WAIVES ANY AND ALL RIGHTS AND REMEDIES THAT MIGHT OTHERWISE BE AVAILABLE TO HIM OR HER, AT LAW OR IN EQUITY.

13. ASSOCIATION MEMBERSHIP:

Upon Closing, Purchaser will automatically become a member of Huntington Resort Owners Association, Inc. (the "Association"). Purchaser agrees to be subject to and to comply fully with the Association's Articles of Incorporation, Bylaws, and such Rules and Regulations as the Association's Board of Directors (the "Board") may promulgate, as each such document may lawfully be amended and/or restated from time to time.

14. PURCHASER'S ACKNOWLEDGMENTS:

Purchaser represents and warrants that the persons signing this Agreement have the legal capacity and are duly authorized to do so. Purchaser acknowledges that prior to signing this Agreement, Purchaser received the Timeshare Disclosure Statement, together with the exhibits attached thereto, including the Declaration, the Bylaws, and the Rules and Regulations of the Association, all of which are hereby incorporated herein by this reference, and Purchaser agrees to be strictly bound and to comply fully with the terms, provisions, and conditions of such documents, as each may be amended or restated from time to time. Purchaser further acknowledges and represents that the Interval Interest described herein is being purchased for Purchaser's personal use and not for its investment potential or any possible rent returns, tax advantages, depreciation, or other financial advantages and that no representations of any nature whatsoever have been made to Purchaser concerning investment potential, rent returns, tax advantages, depreciation, or other financial advantages by Seller or any of its salespersons or other agents. Purchaser understands that Seller has no resale or rental program for non-Seller owned Interval Interests and acknowledges that neither Seller nor any of its sales agents, employees, or other representatives has indicated that Purchaser will be assisted in the resale or rental of his or her Interval Interest in the future. Purchaser represents that he or she does not intend to use any Unit at the Project as his or her principal residence. If Purchaser has chosen to finance a portion of the Purchase Price, then Purchaser acknowledges receipt of a completed Truth-in-Lending Disclosure Statement, Good Faith Estimate, HUD-1 Settlement Statement, and Servicing Disclosure Statement, together with a copy of Seller's Privacy Policy, prior to executing this Agreement. Purchaser's acknowledgments set forth in this Paragraph 14 shall survive Closing.

15. EXCHANGE PROGRAMS:

Seller has executed an agreement with Club Huntington, Inc. ("Club Huntington") under which Club Huntington has agreed to offer its reciprocal exchange services to Purchaser and other owners of Timeshare Interests at the Project. If Purchaser becomes a member of Club Huntington, Purchaser will automatically become a member of Interval Brokerage, Inc.'s ("IBI") reciprocal exchange program that is unaffiliated with Seller known as _____[name]. Purchaser's participation in such exchange programs is totally voluntary and subject to the payment by Purchaser of such fees as are required from time to time by IBI and Club Huntington. Seller makes no representations concerning the current or future services to be provided by IBI or Club Huntington or the cost, continued availability, success, or possible failure of either IBI's or Club Huntington's exchange program. Any representations made regarding either exchange program, either orally by IBI's or Club Huntington's agents or within the videos, brochures, and literature prepared or provided by IBI or Club Huntington, as appropriate, the receipt and review of which Purchaser expressly acknowledges, are solely the representations of IBI or Club Huntington, as appropriate, and should not be interpreted or relied upon as being the representations of Seller.

16. RIGHT OF FIRST REFUSAL:

Purchaser's right to sell or otherwise transfer his or her Interval Interest is subject to the right of first refusal in favor of Seller in Section 8.6 of the Declaration.

17. NO WARRANTIES:

Except as otherwise expressly provided herein, in Purchaser's Warranty Deed, or by applicable law, Seller makes NO

WARRANTIES, EXPRESS OR IMPLIED, of any type whatsoever regarding the Units or the Common Area of the Project, including but not limited to warranties of merchantability or fitness for a particular purpose.

18. FURNITURE AND FURNISHINGS:

Although Seller's model Unit(s) and descriptive materials are for display purposes only, all Units within the Project have furniture, furnishings, appliances, and equipment that are substantially similar to, or of equal quality to, those shown or used in the model Unit(s) or descriptive materials.

19. RISK OF LOSS:

Subject to Seller's right of substitution as described in Paragraph 6 above, all risk of loss to the Project's Units and Common Area shall be borne by Seller until Closing occurs. Thereafter, all such risk of loss shall be borne by Purchaser and the other owners of Interval Interests in the Project. In the event that Seller is unable to convey the subject Interval Interest to Purchaser and declines or is unable to exercise its right of substitution as described in Paragraph 6 above, then Seller's sole obligation shall be to cause any funds held on Purchaser's behalf, without interest, to be refunded to Purchaser in the same manner as provided in Paragraph 5 hereof, in which event this Agreement shall be deemed terminated and of no further force or legal effect.

20. NO ORAL OR WRITTEN REPRESENTATIONS:

Seller and Purchaser agree that this Agreement (including the documents and instruments incorporated herein by reference) embodies the entire agreement between them related to the subject matter hereof and supersedes and replaces any and all prior negotiations, representations, agreements, and understandings, both oral and written, in connection therewith.

21. SURVIVAL OF AGREEMENT: ASSIGNMENT:

This Agreement and the agreements and covenants herein set forth shall be binding upon and inure to the benefit of the parties hereto, their respective heirs, successors, assigns, and personal representatives, and the provisions of this Agreement shall survive the Closing of the transaction contemplated hereby and not be deemed merged into the Special Warranty Deed delivered pursuant hereto. Purchaser's Interval Interest cannot be sold, assigned, transferred, conveyed, or encumbered except in accordance with the terms, provisions, and conditions hereof, the Declaration, the Bylaws, and Rules and Regulations. Purchaser acknowledges Seller's right, in its sole discretion, to assign some or all of its rights and interests hereunder. Purchaser may not assign any of his or her rights or interests hereunder.

22. SEVERABILITY:

The terms and provisions hereof shall be deemed independent and severable, and the invalidity of any one provision or portion thereof shall not affect the validity or enforceability of any other provision hereof.

23. CHOICE OF STATE LAW; WAIVER OF JURY TRIAL:

This Agreement shall be governed by and construed in accordance with the laws of the State of _____[state]. Subject to Sub-paragraph 12(b) hereof, any legal action or proceeding arising out of or in any way relating to this Agreement shall be brought in an appropriate court of competent jurisdiction located in _____[county] County, _____[state], and the parties hereto, on behalf of themselves and their respective successors and assigns, hereby irrevocably submit to the jurisdiction of any such court and agree that venue properly lies in such court. EXCEPT AS OTHERWISE PROVIDED BY APPLICABLE LAW, SELLER, PURCHASER, AND ANY OTHER PERSON CLAIMING RIGHTS OR OBLIGATIONS BY, THROUGH, OR

UNDER THIS AGREEMENT SHALL BE DEEMED TO HAVE WAIVED ANY RIGHT THEY MAY HAVE UNDER ANY APPLICABLE LAW TO A TRIAL BY JURY IN CONNECTION WITH ANY SUIT OR LEGAL PROCEEDING THAT MAY BE COMMENCED BY OR AGAINST ANY OF THE FOREGOING PERSONS CONCERNING THE INTERPRETATION, CONSTRUCTION, VALIDITY, ENFORCEMENT, OR PERFORMANCE OF THIS AGREEMENT OR ANY RELATED DOCUMENT OR INSTRUMENT.

24. NOTICES:

Any notice that either party hereto desires or is required to give the other party under this Agreement shall be in writing and shall be deemed to have been duly given upon the earlier to occur of (a) its actual receipt; (b)

_____ (_____) business days after being deposited in the United States mail as first class mail, postage prepaid; or (c) one (1) business day after being sent via overnight courier service such as Federal Express, addressed to the applicable party at the address therefor stated herein or at such other address as the receiving party has previously notified the giving party in the manner prescribed in this paragraph. If Purchaser consists of more than one (1) person, then notice to any of them shall be deemed to constitute notice to all of them. Unless and until written notice of an alternative addressee and address is received by the other party, the last addressee and address as stated by written notice or as provided herein, shall be deemed to continue in effect for all purposes hereunder.

25. NO RECORDATION:

Under no circumstances whatsoever shall this Agreement or any portion hereof be recorded in the Official Records of _____ [county] County, _____ [state], or in the public records of any other county or other jurisdiction.

26. MISCELLANEOUS:

The captions used in this Agreement are for informational purposes only and do not amplify or limit in any way the provisions hereof. Purchaser is advised to read each and every paragraph very carefully and not just the captions alone. Whenever the context so requires, the use of any gender in this Agreement shall be deemed to include both genders, and the use of the singular shall be deemed to include the plural, and the plural shall be deemed to include the singular. Time is of the essence of this Agreement and of each of the terms, provisions, and conditions hereof. No term, provision, condition, restriction, agreement, covenant, or obligation contained herein shall be deemed to have been abrogated or waived by reason of any failure by a party hereto to enforce the same, irrespective of the number of violations or breaches thereof that may occur. The exercise of any right or remedy provided by law and/or the provisions of this Agreement shall not preclude the exercise of other consistent rights or remedies unless they are expressly precluded hereby. Purchaser hereby grants Seller the right, in its sole discretion, to correct any scrivener's, typographic, or clerical errors in connection with this Agreement or any documents or instruments related hereto, provided that no such correction adversely affects any rights, benefits, or privileges afforded to Purchaser hereunder or thereunder or materially alters any duties or obligations of Purchaser hereunder or thereunder. Any such corrections shall be initialed by an authorized representative of Seller and shall be legally binding upon Purchaser, together with its successors and assigns, even though not initialed or otherwise acknowledged by Purchaser.

SELLER:

HUNTINGTON DEVELOPMENT, LLC

By: _____

Print Name: _____

26-22 Current Legal Forms for Real Estate FORM 22.93

Title: _____

PURCHASER:

Print Name: _____

STATE OF _____ [state])
COUNTY OF _____ [county]) SS:

BEFORE ME, a Notary Public in and for said County and State, personally appeared _____ [name],
a(n) _____ [state] _____ [entity], by _____ [name], its
_____ [title], who acknowledged that _____ [he/she] did sign the foregoing
instrument for and on behalf of said corporation, being thereunto duly authorized, and that the same is
_____ [his/her] free act and deed individually and as such officers and the free act and deed of said
_____ [entity].

IN TESTIMONY WHEREOF, I have hereunto set my hand and official seal at _____ [city],
_____ [state], this _____ [day] day of _____ [month], _____ [year].

Notary Public

STATE OF _____ [state])
COUNTY OF _____ [county]) SS:

BEFORE ME, a Notary Public in and for said County and State, personally appeared _____ [name],
a(n) _____ [state] _____ [entity], by _____ [name], its
_____ [title], who acknowledged that _____ [he/she] did sign the foregoing
instrument for and on behalf of said corporation, being thereunto duly authorized, and that the same is
_____ [his/her] free act and deed individually and as such officers and the free act and deed of said
_____ [entity].

IN TESTIMONY WHEREOF, I have hereunto set my hand and official seal at _____ [city],
_____ [state], this _____ [day] day of _____ [month], _____ [year].

Notary Public

_____ [date]



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Current Legal Forms for Real Estate

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Current Legal Forms for Real Estate
 Chapter 22 DEVELOPMENT AND SUBDIVISION
 Part IV. FORMS
 F. REAL ESTATE MANAGEMENT

26-22 Current Legal Forms for Real Estate FORM 22.94

FORM 22.94 Management Agreement--Basic Agreement (I)

COMMENT

In connection with the development and ownership of income producing real estate, the owner of the property may not want to be involved in the day-to-day management of the property. Even if the owner/developer elects to manage the property, it will typically set up a separate management company. There are many reasons that a developer would utilize a management company. The owners may be strictly money managers, and may not have any real estate expertise. It may be a way for a family to have equal ownership in a property and divert income and cash flow to family members that are actively involved with the operation of the property. Typically, a Management Agreement is utilized in connection with a multi-tenant property. Many developers believe that there are separate and distinct liabilities associated with the management of a property. Therefore, setting up a management company may insulate the equity of the property from the liability associated with management.

An agreement for the management of income-producing property generally assigns to the agent two areas of responsibility: the operation of the building and the leasing of space therein. Regardless of whether the property is devoted to residential, office, or commercial use, there are basic rights and duties of the agent which must be set forth in the agreement to insure adequate performance of these two functions.

As to the operation of the property, the obligations normally undertaken by the managing agent include maintaining and repairing the premises, employing necessary help and independent contractors, negotiating for the usual utilities, collecting and depositing rents, maintaining books of account, and submitting periodic financial statements. As to most of these duties the manager is generally given complete authority. However, in many instances the owner's approval is required for repairs and alterations in excess of a specified amount. Normal operating expenses are

generally paid by the agent for the account of the owner.

The second area of an agent's responsibility is the leasing of vacant space and the negotiating of renewals and extensions. Advertising of vacant space is generally at the cost of the owner, but subject to the owner's approval. Other significant provisions deal with the indemnification of the agent by the owner, and the conditions under which the parties may terminate the agreement.

Compensation of the manager may be based on a percentage of income from the property. The parties also recognize the propriety of additional compensation in the event that the agent performs unusual services.

The following form is a relatively comprehensive management agreement, typically for use with unrelated parties.

FORM

THIS MANAGEMENT AGREEMENT, made and entered into as of the _____[day] day of _____[month], _____[year] and between _____[name] a(n) _____[state] _____[entity] (hereinafter referred to as "Owner") and _____[name] (hereinafter referred to as "Manager").

WITNESSETH:

WHEREAS, Owner is the owner of the property located at _____[address], and the surrounding property and improvements (hereinafter referred to as "Property"); and

WHEREAS, Manager is experienced in the management of income properties similar to the Property; and

WHEREAS, Owner wishes to engage Manager, exclusively, as the manager of the Property, and Manager is willing to perform such responsibilities, all in accordance with the terms and provisions hereof.

NOW, THEREFORE, for and in consideration of the mutual promises and covenants herein contained, and for other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the parties hereto agree as follows:

ARTICLE ONE **Definitions**

For the purposes of this Agreement, the following defined terms shall have the meanings ascribed thereto:

1.01 " Agreement:" This Management Agreement.

1.02 " Budget:" The budget for the operation and management of the Property, as prepared and approved pursuant to Article Three hereof.

1.03 " Improvements:" Any improvements now or hereafter erected on the "Property."

ARTICLE TWO

Employment of Manager

2.01 Employment. Owner hereby employs and authorizes Manager to take sole, entire and exclusive charge of the management of the Property, and Manager hereby accepts said employment and authorization and agrees to use the skills and efforts of Manager diligently to effect management of the Property. In the performance of Manager's duties hereunder, Manager agrees to render capable and competent services and to exercise due care in accordance with standard practices acceptable and common in the industry.

2.02 Independent Contractor Status. It is acknowledged that it is the express intent of Owner and Manager, and this Agreement shall be so construed, that the rights and duties hereby granted by Owner to Manager, and assumed by Manager, are those of an independent contractor only, with a fiduciary duty to Owner. Owner has retained Manager in such capacity because of Manager's expertise and experience in the management of income properties similar to the Property. Manager shall devote such portion of Manager's time, energy and skills in the accomplishment of Manager's duties hereunder in such manner as Manager sees fit.

ARTICLE THREE

Duties Of Manager

Manager shall take such actions, and perform such duties, as Manager deems necessary and desirable for the care, protection, operation, maintenance, repair and replacement, subject to the provisions hereof, of the Property, including, but not limited to the following:

3.01 Employment of Personnel. Manager shall investigate, hire, train, supervise and discharge such personnel as Manager deems necessary or desirable for the performance of Manager's duties hereunder. Such supervision and direction shall be the responsibility of Manager. All salaries, wages and other compensation of personnel employed by Manager hereunder, including fringe benefits, medical and health insurance, pension plans, social security, taxes, workman's compensation, et cetera, shall be borne and paid by Manager.

Manager agrees that Manager shall not discriminate against any employee, or applicant for employment, hereunder because of race, color, religion, national origin, ancestry, age or sex.

3.02 Preparation of Annual Report. Within _____ (_____) days prior to the commencement of each succeeding fiscal year, Manager shall prepare and deliver to Owner an operating budget for the Property, setting forth an itemized statement of the estimated receipts and disbursements for the coming fiscal year. Said budget shall include a proposed rent schedule for all space within the Property, inclusive of then currently pending or projected repairs, replacements and additions thereto, and the market for competing properties similar to the Property. Owner and Manager shall jointly adjust, modify or amend said budget in order to fix the standard of operation for the succeeding fiscal year and the budget, as so revised and as it may be subsequently revised by agreement in writing executed by Owner and Manager, shall thereafter constitute the "Budget." Except in the case of emergency repairs permitted by Section 3.11 hereof or items specifically authorized by the Budget, or otherwise, no expenses may be incurred or commitments made by Manager in connection with the operation of the Property which would exceed the sum of _____ Dollars (\$_____), or, in any event, which will, taken together with all additional commitments previously incurred or sums previously made or paid, exceed the line amount contained within said Budget, without the prior written consent of Owner. Provided, however, that written approval by Owner of a contract or other expenditure, capital or otherwise, shall, unless said written approval indicates otherwise on its face, not be included within any such line item and shall constitute an increase in the relevant line item of the Budget by said amount.

3.03 Property Bank Accounts. Manager shall open and maintain, during the term of this Agreement, a separate bank account, or, if Manager deems multiple accounts preferable, accounts, for the exclusive benefit of Owner and the Property, which account or accounts shall be separate from Manager's accounts and any other accounts maintained by Manager and not relating to the Property. Manager shall not mix any funds generated by the Property with any other monies of Manager or generated by other properties. All income and other monies received by Manager as a result of the operation of the Property or received by Manager as a result of the operation of the Property or otherwise delivered to Manager under the terms and provisions hereof shall be deposited in a timely manner by Manager in such separate account or accounts. All such monies shall be and remain the property of Owner and shall be disbursed by Manager, in accordance with the provisions hereof, in payment of the costs and expenses, including sums payable to Manager hereunder, of Owner relating to the Property.

3.04 Collection of Monies. Manager shall collect all rents, and all other amounts, whether in the form of rents, common area maintenance charges or other reimbursable expenses, due to Owner from any tenants within the Property, or licensees authorized to utilize portions of the Property and owe such sums to Owner as a result of the operation of the Property. In connection with enforcement of consumer price index or other escalators and collection of any other variable rent, Manager shall keep all records required to effectuate such collections. Owner hereby expressly authorizes Manager to request, demand, collect, receive and receipt for all such rent and other charges and to institute legal proceedings, either in the name of Manager or, if necessary, the name of Owner for the collection of all such sums and expressly authorizes Manager to file any legal actions to enforce the terms of any lease or leases related to the Property, including, but not limited to, dispossessory actions and actions to terminate leases on space within the Property, if such is deemed necessary by Manager. The authority granted in this section as to lease enforcement shall be absolute except as to those restrictions, if any, placed on Manager, in writing, by Owner.

Any expenses, including attorney's fees, incurred by Manager in connection with its performance under this section shall be borne by and paid by Manager. Manager is expressly authorized to retain counsel of its own choosing to assist Manager in fulfilling its responsibilities hereunder.

3.05 Leasing. Manager shall use its best efforts to lease space in the Property in accordance with guidelines furnished by Owner. Manager shall also negotiate for the renewal of leases; shall conduct all negotiations with tenants; and shall submit for Owner's prior written approval, all lease and/or lease renewal proposals.

3.06 Books and Reports. Manager agrees that it shall, during the terms of this Agreement and immediately thereafter, in accordance with the provisions hereof:

(a) Maintain, at the office of Manager, a comprehensive system of office records, books and accounts relating to the income, expenses and operations of the Property. Owner and those designated by Owner shall have access to such office records, books and accounts and to all vouchers, files and other material relating to the Property and maintained by Manager relating to the Property. Owner shall exercise its rights of inspection hereunder solely during normal business hours and shall do so in such a manner so as not to unreasonably interfere with the operations of Manager.

(b) Deliver to Owner, on or before the _____ (_____) days of each calendar month during the terms hereof, a detailed written report of all receipts and disbursements relating to the Property and made during the preceding calendar month, or any portion thereof. Such report shall be made on a cash, rather than accrual basis and shall include all such transactions, whether or not reimbursable pursuant to the provisions hereof. Said reports shall also include statements of arrearages of any tenant or others within the Property, vacancies, and the balance of sums retained in any escrow accounts maintained pursuant to the provisions hereof.

(c) Deliver to Owner, within _____ (_____) days after the end of each fiscal year the Property, which fiscal year is hereby designated as running from January 1 to December 31 of each calendar year during

the term hereof, a profit and loss statement showing the results of operations for the preceding fiscal year, or any portion thereof, as well as a balance sheet of the Property dated as of the end of such fiscal year. Each such report shall be prepared in accordance with generally accepted accounting principals.

(d) In the event of the termination of this Agreement, whether by normal expiration or otherwise, Manager shall, within the applicable time period set forth herein, deliver to Owner both a monthly report and an annual report, each covering that portion of the relevant time period which is included within the term hereof, prior to such termination.

(e) Execute and file in a timely fashion, all forms, reports and returns required by law relating to the employment of personnel in the operation of the Property (with the exception of income tax returns).

3.07 Compliance with Legal Requirements. Manager shall take such actions as may be necessary to comply with any and all orders or requirements affecting the Property by any federal, state, county or municipal authority having jurisdiction thereof, and order of the Board of Fire Underwriters or similar bodies subject to the limitations set forth in the Budget. Provided Manager is timely notified, Manager shall not, however, take any such actions for so long as Owner is contesting, or has affirmed its intention to contest and promptly institutes proceedings contesting, any such order or requirement, except that, if a failure to comply promptly with any such order or requirement would or might expose Manager to criminal or civil liability, Manager shall cause the same to be complied with. Manager shall promptly, and in no event later than seventy-two (72) hours from time of receipt, send written notice to Owner, including a copy thereof, of all such orders and notices of requirements and of Manager's actions or projected actions in response thereto.

3.08 Assistance in Tax and Awards Negotiations. Manager shall, when requested by Owner and without charge or reimbursement except for actual out-of-pocket costs, render advice and assistance to Owner in the negotiation and prosecution of all claims for the abatement of property taxes and other taxes effecting the Property and for awards for taking by condemnation proceedings or friendly acquisition in lieu thereof of all or portions of the Property.

3.09 Execution of Contracts. Subject to other limitations contained herein, including, but not limited to, those contained in the Budget, Manager shall, in the name of Owner, enter into such contracts and other agreements for the providing of all utilities and other services either required or deemed as desirable by Manager in connection with the operation of the Property. Manager shall order, in the name of Owner, such equipment, tools, appliances, materials and supplies as it deems desirable to properly maintain the Property, subject, however, to other limitations contained herein. If requested by the contracting third party, Owner shall execute such contract in its own name and by its own hand. Any contract in excess of _____ Dollars (\$_____) per fiscal year must be approved in advance by Owner.

In the event that Manager delivers to Owner a written request that Owner approve, in writing, any such contract or order, and Owner does not, within _____ (_____) days of its receipt of such request, disapprove, by telephonic notice to be confirmed in writing, said contract or order, the same shall be considered approved by Owner and all costs, expenses, et cetera, shall be reimbursable to Manager hereunder. Manager shall always respect its fiduciary duty to Owner in the execution of such contracts or orders; provided, however, that Owner shall be required to cause to be made available to Manager such sums of monies as are required in order to enable Manager to obtain prompt payment, cause or similar discounts.

3.10 Maintenance and Repair of Property. Subject to limitations placed on it by the Budget, Manager shall maintain the Property in a first class manner, comparable to similar properties in the area of the Property. Such maintenance shall include, but not necessarily be limited to, interior and exterior cleaning, painting, decorating and maintenance, both preventative and otherwise, of all systems and improvements which are a part of the Property. All expenses incurred in connection with such maintenance shall be reimbursable by Owner to Manager, subject again to the Budget. Manager shall not incur or pay, in connection with said maintenance, any expense in excess of _____ Dollars

(\$ _____), unless such item is contained within the Budget or has otherwise been, specifically authorized by Owner. Provided, however, the Manager is hereby authorized and empowered to incur or pay in excess of such sum in the event that emergency repairs or maintenance are required for the preservation and safety of the Property, to avoid the suspension of any service to the Property, or to avoid danger or damage to life or property. It is understood and agreed that, should any such emergency repairs be required, Manager shall bring same to the attention of Owner as soon as possible.

3.11 Insurance. Manager shall maintain, during the term of this Agreement, insurance in forms, companies and substance reasonably acceptable to Owner, and at Owner's sole cost and expense, as follows:

- (a) Public liability insurance on a comprehensive general liability form in an amount of not less than _____ Dollars (\$ _____) single limit bodily injury and _____ Dollars (\$ _____) property damage;
- (b) Fire and extended coverage insurance in an amount of not less than _____ percent (_____%) of the replacement cost of the Property, exclusive of land and excavation costs;
- (c) Such other insurance as may be required by law or deemed desirable by either Owner or Manager to cover the interest of said parties, including, but not limited to, workman's compensation insurance, boiler insurance, burglary and theft insurance and, at the option of Owner, rent insurance;
- (d) All insurance obtained pursuant to the provisions hereof, as well as any additional insurance which Owner, in its sole discretion, might desire to obtain, shall name both Owner and Manager as insured, as their interests may appear. Each such policy shall contain a waiver of subrogation reasonably acceptable to Owner; and
- (e) Manager shall promptly investigate all accidents, damages and other casualty to the Property or any claims of injury, to property or person, arising out of or related to the ownership, operation and maintenance of the Property. Manager shall promptly submit to Owner a written report regarding such incident including an estimate of the cost of repair of any damage or destruction and its recommendations as to such repair. Manager shall prepare, for approval by Owner, any and all reports required of any insurance companies or other interested entities or governmental bodies regarding such damage, destruction or injury.

3.12 Claims. Manager shall advise Owner promptly, with confirmation in writing, of the service upon Manager of any summons, subpoena, or other similar legal document, as well as receipt of any notices, letters or other communication, setting out or claiming an actual or alleged potential liability of the Owner, the Property or Manager, arising out of the Property. The written confirmation by Manager to Owner shall include a copy of any such summons, subpoena, et cetera.

3.13 Disbursements. Manager shall, to the extent that funds are available from receipts relating to the Property or otherwise received from Owner, cause to be disbursed in a timely fashion;

- (a) Sums reimbursable to Manager pursuant to the provisions hereof,
- (b) Amounts otherwise due and payable as operating expenses of the Property and authorized pursuant to the terms and provisions hereof, inclusive of any compensation due and payable to Manager hereunder.

All such disbursements shall be made from the account, or accounts, maintained by Manager pursuant to the provisions hereof and any sums remaining in said account, subject to a reasonable reserve as agreed upon by Owner and Manager, shall be disbursed in accordance with the written instructions of Owner. Owner shall, in connection with Manager's duties hereunder, promptly forward to Manager any tax statements, payment schedules, invoices or similar notices

received by Owner relating to the Property and requiring payment of sums relating thereto.

3.14 Tenant Relations. Manager shall take such actions as it deems necessary in order to maintain a professional, businesslike relationship with all tenants within the Property. All requests, complaints and notices delivered to Manager by any tenants will be incorporated into the monthly reports required to be delivered by Manager to owner hereunder and such reports shall indicate the action, or proposed action, taken, or to be taken, with respect thereto. Manager shall periodically review all leases and tenant premises within the Property in order to ensure compliance, by both Owner and tenant, with the leases.

ARTICLE FOUR Responsibilities Of Owner

4.01 Contract Execution. Owner agrees that it shall, if requested by Manager or any third party contracting with Owner pursuant to the provisions of Article Three hereof, execute in its own name and by its own hand any such contracts.

4.02 Payments to and Reimbursement of Manager. Owner covenants and agrees that it shall make available to, or otherwise cause to be made available to, Manager such sums as are required pursuant to the provisions hereof to (I) pay to Manager all compensation required by Article Six hereof, and (ii) reimburse (or provide monies) for all expenses incurred pursuant to this Agreement. Manager shall not be required to, although it may in its sole discretion, advance its own funds for the benefit of Owner. This provision shall survive the termination of this Agreement, whether by normal expiration or otherwise.

ARTICLE FIVE Term

5.01 Term; Extension. The term of this Agreement shall commence on _____[month] _____[day], _____[year] and remain in effect for a period of _____ (_____) years. Not later than _____ (_____) days prior to the end of the term, Manager shall notify Owner that the term is about to expire and Owner shall have _____ (_____) days to notify Manager that it wishes the term not to be automatically extended for an extension period of _____ (_____) years. If not so notified, the term shall be automatically renewed for a _____ (_____) year period. Thereafter, this Agreement shall continue on a year-to-year basis unless terminated by either party.

5.02 Termination for Cause. Notwithstanding the foregoing stated term, this Agreement may be terminated by Owner immediately, for cause. For this purpose, "for cause" shall mean (i) Manager's indictment or conviction of a felony, (ii) a material breach by Manager of this Agreement, (iii) Manager's gross neglect of his duties, or commission of an act of dishonesty toward Owner's business, (iv) Manager's addiction to alcohol or any drug or substance (whether or not prescribed by a physician), or (v) the occurrence of any act or omission, or set of facts and circumstances, set forth hereinbelow.

(a) Provided that the necessary funds are available, either through Property receipts or deposits by Owner, Manager fails to pay any sum payable under this Agreement when due or fails to perform or comply with any of its obligations hereunder at the time or times and in the name required under this Agreement, provided that the Owner first gives the Manager prior written notice of such default or breach and the Manager (A) when the default or breach is a failure to pay a sum payable hereunder fails to pay such sum within _____ (_____) days of receipt of such notice; or (B) when the default or breach is other than the failure to pay a sum payable hereunder, fails to commence curing any default or breach within _____ (_____) days of receipt of such

notice, or after commencing the same fails to pursue the curing of such default with due diligence;

(b) Manager files a petition to be adjudicated a bankrupt or for reorganization or arrangement under the bankruptcy laws of any state or of the United States;

(c) A petition is filed against the Manager to have him adjudicated a bankrupt and such petition is not dismissed within _____ (_____) days after filing;

(d) An assignment for the benefit of creditors is made by the Manager; or

(e) A receiver or trustee of the Manager's rights or interests (which include or consist of the rights and interests of Manager hereunder) is appointed pursuant to any judicial proceeding and such proceeding is not dismissed, and the receiver or trustee discharged, within _____ (_____) days after such appointment.

Manager may terminate this Agreement, immediately and at any time (for so long as the default continues), upon giving written notice to Owner after any one of the following:

(a) Owner does not fulfill its obligations hereunder with regard to deposit of any sums required by Manager, as reimbursement of expenses incurred by Manager, on behalf of Owner, hereunder or as compensation to Manager, provided that Manager first gives Owner prior written notice of such sums within _____ (_____) days of receipt of such notice;

(b) Owner files a petition to be adjudicated a bankrupt or for reorganization or arrangement under the bankruptcy laws of any state or of the United States;

(c) A petition is filed against the Owner to have it adjudicated a bankrupt and such petition is not dismissed within _____ (_____) days after filing;

(d) An assignment for the benefit of creditors is made by the Owner;

(e) A receiver or trustee of the Owner's rights or interests (which include or consist of the rights and interests of Owner hereunder) is appointed pursuant to any judicial proceedings and such proceeding is not dismissed, and the receiver or trustee discharged, within _____ (_____) days after such appointment.

5.03 Termination Upon Destruction, Condemnation, Sale. This Agreement shall terminate upon the date of any damage or destruction of the Property which in the reasonable opinion of either party materially affects the operation of the Property for its intended purpose and the Property ceases so to be operated. This Agreement shall also terminate upon the date of the conveyance to or taking by any authorized entity under the threat of or by eminent domain of the Property or any portion thereof which in the reasonable opinion of either party materially affects the operation of the Property for its intended purpose and the Property ceases so to be operated.

5.04 Duties Upon Termination. Upon termination, whether by normal expiration or otherwise, of this Agreement, the parties hereto agree that:

(a) Manager shall deliver to Owner, or to any person or agent designated by Owner:

(i) Cash in the amount equal to all amounts then due Owner hereunder including any security deposits or other payments of tenants in the Property held by Manager;

(ii) An assignment of any escrow accounts in form approved by the depositories of holder thereof;

- (iii) All executed copies of leases related to the Property and all related files;
- (iv) All architectural, mechanical and electrical plans and specifications used in connection with the construction of the Property, to the extent held in the possession of Manager, as well as all sets of keys and all books and records pertaining to the Property;
- (v) All permits issued by appropriate governmental authorities and utilities relative to the Property, if held by Manager;
- (vi) All extra promotional brochures, forms, leases, posters, signs and stationery and all engraved plates and art work used for such promotional items which do not contain references to Manager's name, address or telephone number;
- (vii) Any other papers or items of any kind held by Manager relating to the Property.

Manager shall be entitled to retain copies of all records, documents and other agreements which were in Manager's possession relating to the Property, and Owner shall execute and deliver to Manager a receipt evidencing delivery by Manager to Owner of all papers or items delivered in accordance with the provisions hereof. Additionally, Owner shall expressly indemnify and hold Manager harmless from and against any and all costs, damages or expenses (including attorney's fees) arising out of any claims made or threatened for return of security deposits so delivered to Owner.

(b) Anything contained herein to the contrary notwithstanding, no termination of this Agreement, whether by normal expiration or otherwise, shall release either party from any obligations or liabilities arising under the terms and provisions hereof prior to the date of such termination or pursuant to continuing contracts or other commitments approved, pursuant to the terms and provisions hereof, prior to the date of such termination. It is expressly agreed that no such termination shall effect or modify in any respect the compensation due and payable, or to become due and payable, by Owner to Manager hereunder. In connection with any termination of this Agreement, Manager shall assign to Owner, if same are assignable, all contracts and other agreements, if any, executed in the name of Manager, relating to the operation and maintenance of the Property. Owner shall expressly assume and agree to pay all obligations arising under such contracts or other agreements and shall indemnify and hold Manager harmless from and against any and all costs, damages and expenses (including attorney's fees) arising out of or related to said contracts and other agreements.

(c) Manager shall, in addition to other requirements placed on Manager pursuant to this Article, furnish all additional information and take such further actions, at Owner's expense, as Owner shall reasonably require in order to effectuate an orderly and systematic termination of Manager's duties and activities with regard to the termination of Manager's duties and activities with regard to the Property. Within _____ (_____) days after any such termination, Manager shall deliver to Owner the written reports required by Section 3.06(b) hereof for any periods not covered by prior reports submitted pursuant to such Section and shall, within _____ (_____) days after any such termination, deliver to Owner a profit and loss statement for the fiscal year, or portion thereof, ending on the date of termination, and a balance sheet of the Property as of the date of termination.

ARTICLE SIX

Compensation of Manager

6.01 Management Fee

(a) Owner shall pay to Manager, in consideration of Manager's management services hereunder, an amount equal to _____ percent (_____) of "Gross Receipts," as defined herein, as reflected in the monthly reports delivered by Manager to Owner pursuant to Section 3.06 hereof.

(b) Said Management Fee shall be paid by Owner to Manager on a monthly basis, in arrears, and shall be prorated for any partial month during the term hereof. For the purposes hereto, the term "Gross Receipts" is defined as all amounts actually collected by Manager as minimum rent or other sums collected and from any other persons paying monies to Owner as a result of the operation of the Property, in the ordinary course of business. There shall be included within the definition of Gross Receipts any sums collected as a result of a consumer price index or other escalator applied to any base rents or similar charges payable by tenants or others, but there shall not be included within the term Gross Receipts interest or other income derived from investments or interest bearing accounts, proceeds of claims on account of insurance policies, abatement of taxes, awards arising out of taking by eminent domain (or conveyance in lieu thereof), discounts or dividends on insurance policies, court awards for prospective rents or other damages. In the event that Manager, in accordance with the provisions hereof, receives monies as settlement of claims for past due rent or in consideration of cancellation of a lease, such sums shall be included within the term Gross Receipts, when actually received. Similarly, security deposits shall not be deemed to be within Gross Receipts until retention of same, or any portion thereof, for the sole benefit of Owner, pursuant to the terms and provisions of the lease under which same are retained.

(c) Owner shall also pay to Manager a leasing commission equal to _____ percent (_____%) of Gross Receipts to be collected for any lease renewals or extensions. Owner shall pay to Manager a lump sum equal to the commission upon commencement of such renewal or extension term.

ARTICLE SEVEN Miscellaneous

7.01 Indemnification

(a) Manager agrees to indemnify and hold Owner harmless from and against any and all liabilities, claims, obligations, expenses, losses, damages, judgments or other injuries (including, but not limited to, attorney's fees, costs and expenses of litigation and appeals), which Owner may incur or suffer in connection with grossly negligent acts, willful misconduct or knowing misrepresentations of material fact by Manager, acting as such under the provisions hereof.

(b) Owner agrees to indemnify and hold Manager harmless from and against:

(i) Any and all liabilities, claims obligations, expenses, losses, damages, judgments or other injuries (including, but not limited to, attorney's fees, costs and expenses of litigation and appeals), which Manager may incur or suffer in connection with Owner's failure to discharge its obligations hereunder, actions or inaction's at Owner's directive; and

(ii) Any and all liabilities, claims, obligations, expenses, losses, damages judgments or other injuries (including, but not limited to, attorney's fees and costs and expenses of litigation and appeals) which Manager may incur in the performance of its duties under this Agreement which are not caused in whole or in part by the gross negligence or willful misconduct of, or knowing misrepresentation of a material fact by Manager.

7.02 Survival. The indemnifications contained in Section 7.01 and the agreement contained in Articles Four, Five and Six hereof shall survive any termination of this Agreement.

7.03 Notice. Any notices required or authorized, by this Agreement shall be deemed effective _____ (_____) days after deposit in the United States mail, postage prepaid, registered or certified mail, return receipt requested, when mailed to the following addresses, or to such other addresses as parties hereto may designate, in writing and in accordance with the provisions hereof, or personal service shall be deemed effective when delivered:

To Manager: _____

To Owner: _____

With a copy to
Owner's Attorney _____

7.04 Assignment. Manager shall not, without Owner's prior written approval, assign any of its rights or obligations under this Agreement. Owner may assign its right and obligations to any successor in title to the Property and shall, provided that Owner complies with the terms and provisions of this Section, be relieved of all liability accruing after the effective date of such assignment; provided, however that Owner shall remain secondarily liable to Manager for reimbursement of any expenses incurred by Manager either:

(a) Prior to the date of such assignment; or

(b) Pursuant to Approved Contracts executed prior to the effective date of such assignment Owner agrees that it will obtain, from any such successor in title, an express assumption of all obligations and liabilities of Owner hereunder.

7.05 Competing Activities of Manager. Anything contained herein to the contrary notwithstanding, Owner hereby agrees that, during the term of this Agreement, Manager, affiliated (or wholly owned) companies or related entities of Manager, may render services identical or similar to those required of Manager hereunder to other owner of real property, improved in a similar fashion to the Property or otherwise, and may themselves engage in the acquisition, development, leasing and exploitation of real property for their own account and benefit and without any accountability or liability whatsoever to Owner even though such services or business activities compete with or are enhanced by the business activity of Owner, including Owner's involvement in the Property.

7.06 Time of Essence. Time is of the essence of this Agreement.

7.07 Force Majeure. In the event that any obligation contained herein is not fulfilled within the time period applicable thereto, and such failure is beyond the obligor's reasonable control, including but not limited to, compliance with any regulations, order or instruction of any federal, state or municipal government or any department or agency thereof, acts or omissions of any other party hereto, acts of civil or military authority, fires, strikes, embargoes, war, riots, delays in transportation, tempests, earthquakes, floods and the inability due to causes beyond such obligor's reasonable control to obtain necessary labor, manufacturing facilities or materials (all of the foregoing, without limitation, being herein referred to as "force majeure"), such party shall give the other parties prompt notice of the occurrence of any such force majeure delay or expected delay, specifying the cause thereof and the suspected duration. In the event of any such delay, the date required for fulfillment of such obligation shall be automatically extended for a period equal to the time lost by reason of the delay. In no event, however, shall this provision apply to an obligation requiring solely the payments of money.

7.08 Amendment. Neither this Agreement nor any provision hereof may be changed, waived, discharged or terminated orally, but only by instrument in writing signed by the party against whom enforcement of the change, waiver,

discharge or termination is sought.

7.09 Severability. Whenever possible, each provision of this Agreement shall be interpreted in such manner as to be effective and valid under Ohio law, but if any provision of this Agreement shall be prohibited by or be invalid under such law, such provision shall be ineffective to the extent of such prohibition or invalidity without invalidating the remainder of such provision or the remaining provisions of this Agreement.

7.10 Entire Agreement. This Agreement, and other documents executed in connection with the Property, constitutes and expresses the entire Agreement of the parties hereto and no agreements, warranties, representations or covenants not herein expressed shall be binding upon the parties.

7.11 Counterparts. This Agreement may be executed in several counterparts, each of which shall be deemed an original and all of which counterparts together shall constitute one and the same instrument.

7.12 Captions. The captions appearing before Sections and Articles in this Agreement have been inserted solely for the purposes of convenience and ready reference. They do not purport to, and shall not be deemed to, define, limit or extend the scope or intent of the Sections or Articles to which they appertain.

7.13 Binding Effect and Pronouns. The provisions of this Agreement shall inure to the benefit of, and shall be binding upon, the parties hereto, and their respective heirs, successors and assigns (if permitted hereunder) and the legal representatives of their estates, as the case may apply. The terms "Owner" and "Manager" shall be construed in the plural and the appropriate gender shall be read into all pronouns used herein to reference any of said parties whenever the sense of this Agreement requires.

The parties hereto have set their hands as of the day and year first above written.

"OWNER"

a(n) _____ [state] _____ [entity]

By: _____

Print Name: _____

Title: _____

"MANAGER"

a(n) _____ [state] _____ [entity]

By: _____

Print Name: _____

Title: _____



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Current Legal Forms for Real Estate

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Current Legal Forms for Real Estate
Chapter 22 DEVELOPMENT AND SUBDIVISION
Part IV. FORMS
F. REAL ESTATE MANAGEMENT

26-22 Current Legal Forms for Real Estate FORM 22.95

FORM 22.95 Management Agreement--Basic Agreement (II)

COMMENT

Compensation of the manager is in this case based on a percentage of income from the property. The parties also recognize the propriety of additional compensation in the event that the agent performs unusual services. Commissions paid for leasing are those recommended by the local real estate board, with one-half of the full commission payable upon lease renewals, extensions, and continuations.

Amounts expended by the owner for the management of property are deductible for income tax purposes when paid or incurred. A rental commission represents the cost of acquiring the lease and must be amortized by the owner over the lease term. Both management fees and rental commissions are ordinary income to the manager.

FORM

AGREEMENT made this _____ [day] day of _____ [month],
_____ [year], between _____ [name] (the "Owner") and
_____ [name] (the "Agent").

1. Employment of Agent. The Owner hereby employs the Agent as the sole and exclusive renting and management agent of the property known as _____ [name] (the "Building"), consisting of _____
(_____) number of two (2) bedroom apartment units, and _____
(_____) number of one (1) bedroom apartment units, and all associated facilities and amenities.

2. Leasing Vacant Space. The Agent shall use all reasonable efforts to lease available space in the Building to desirable

tenants. For this purpose, the Agent may employ the services of other real estate brokers. However, in the event that Agent employs other real estate brokers, Agent shall be responsible for the compensation of the other brokers and shall hold Owner harmless against any claim for compensation brought by the other brokers. In order to promote such leasing, the Agent may place newspaper advertising, post renting signs, prepare circulars, and engage in other forms of advertising, subject to the approval of the Owner, at the Owner's expense. The Owner shall refer all inquiries for leases or renewals to the Agent, and all negotiations for leases and renewals shall be conducted or controlled by the Agent.

3. Collection and Remission of Income. The Agent shall collect the rents and other income from the Building promptly when such amounts become due and shall deposit all such amounts in a special bank account maintained by the Agent for the Owner. Such moneys of the Owner shall not be mingled with funds of the Agent. The Agent may withdraw from such bank account all disbursements which under this agreement are to be made at the Owner's expense, including compensation of the Agent as set forth in Paragraph 7. Employees of the Agent who are responsible for moneys of the Owner shall be bonded by a fidelity bond. The Agent shall render to the Owner a monthly statement of receipts and disbursements, and shall from time to time pay to the Owner all amounts in such bank account except a reasonable balance for working cash. All books and records maintained by the Agent shall be the property of the Owner. Owner shall have the right to review and audit the books and records at any time, without prior notice to the Agent.

4. Maintenance and Operation. The Agent is authorized and required, at the expense of the Owner, to purchase necessary supplies; to make contracts for electricity, gas, steam, telephone, window cleaning, refuse disposal, vermin extermination, and for necessary supplies; to make contracts for electricity, gas, steam, telephone, window cleaning, refuse disposal, vermin extermination, and for all other utilities or services which the Agent shall reasonably consider advisable; and to make ordinary repairs and alterations, provided that expenditures for any one item of repair or alteration shall not exceed the sum of _____ Dollars (\$_____) without the written consent of the Owner, unless they are made under circumstances which the Agent shall reasonably consider to constitute an emergency. Any rebate or discount obtained by the Agent in connection with any of the foregoing expenditures shall be the property of the Owner. The Agent shall not pay interest or amortization on mortgages, taxes, assessments, water charges, or premiums on insurance without the Owner's written authorization.

5. Employees. The Agent shall employ, discharge, supervise, and pay, on behalf of the Owner, all servants, employees, or contractors considered by the Agent as necessary for the efficient management of the Building. The Agent shall not be liable to the Owner or to others for any act or omission on the part of such employees if the Agent has taken reasonable care in their employment.

6. General Responsibility and Authority. The Agent shall be authorized and required to perform all services, in addition to the foregoing, necessary for the management of the Building. Such services shall include the institution of legal actions, in the name and at the expense of the Owner, to enforce the collection of rent or other income from the Building, and to dispossess tenants or other persons from the Building. In connection with any such legal action, the Agent may engage counsel at the Owner's expense.

In addition, the Agent shall have a maintenance person on staff to handle minor repairs and maintenance, such as light bulb replacement in hallways and other common areas, lock repairs, and other minor problems. The Agent shall also provide a telephone line, manned twenty-four (24) hours per day, for use by tenants with emergencies. Agent may utilize a commercial answering service and beepers, if so desired. The cost of these services shall belong to Owner.

7. Compensation of Agent. The Owner shall pay to the Agent the following compensation:

(a) For management, _____ percent (_____) of all rent and other income collected from the Building.

(b) If extraordinary repairs are made to the Building, or the Building is extensively reconstructed, or if the Agent is

required to perform services not customarily a part of the usual services performed by a managing agent, additional compensation in an amount to be agreed upon between the parties; provided that prior to performing or arranging any service or activity which would result in such additional compensation, the Agent shall have given written notice thereof to the Owner and have received written approval from the Owner with respect thereto.

(c) For any new lease made by the Agent, a full commission, as provided by the recommended rates and rules of the Real Estate Board of _____ [name]; however, in no event shall the leasing commission exceed the sum of _____ percent (_____%).

(d) For any renewal or extension of a lease, or continuation of tenancy upon a statutory or month to month basis, _____ (_____) of such full commission.

(e) For any lease made while this agreement is in effect by a broker not in the employ of the Agent, the full commission shall be payable. _____ (_____) of such full commission shall be retained by the Agent, and _____ (_____) shall be paid to such broker.

(f) In the event of a termination of this agreement under Paragraph 10 hereof, the Owner shall recognize the Agent as the broker in any pending negotiation for a lease or for a renewal or extension or continuation, and in the event of the consummation thereof shall pay to the Agent a commission as set forth in this paragraph.

8. Indemnification and Insurance. The Owner shall indemnify and hold the Agent harmless from all suits for damages in connection with the management of the Building, and from liability for injuries suffered by any person while in the Building or on the premises upon which the Building is located. However, said indemnification shall not extend to damages or injuries caused by the willful or wrongful acts or omissions of the Agent, including, but not limited to, violations of federal, state and local laws and ordinances prohibiting discrimination in housing. The Owner shall carry, at its own expense, public liability insurance, elevator insurance, boiler insurance, and workmen's compensation insurance, with the Agent designated as one of the insureds, in amounts adequate to protect the interest of the Owner and the Agent.

9. Term. This agreement shall become effective on _____ [month] _____ [day], _____ [year], and shall continue in full force and effect until and including _____ [month] _____ [day], _____ [year]. Thereafter, it shall continue in full force and effect unless either party shall serve written notice of cancellation sent by registered mail to the other party, in which event this agreement shall terminate _____ (_____) days after the service of such notice.

10. Early Termination. Notwithstanding the provisions of Paragraph 9, this agreement may be terminated, and the obligations of the parties hereunder shall thereupon cease, if any of the following circumstances shall occur:

(a) In the event of a bona fide sale or demolition of the Building, the Owner may terminate this agreement upon not less than _____ (_____) days' notice by registered mail to the Agent.

(b) If a petition in bankruptcy is filed by either the Owner or the Agent, or if either shall make an assignment for the benefit of creditors or take advantage of any insolvency act, either party may terminate this agreement by serving written notice by registered mail to the other party.

(c) If the Owner shall fail to comply with any rule, order, determination, ordinance, or law of any federal, state, or municipal authority, the Agent may terminate this agreement by giving _____ (_____) days' written notice by registered mail to the Owner.

11. Notices. Notice hereunder shall be valid if mailed to the Owner at _____[address], and to the Agent at the Building, or to such other addresses as either party shall from time to time designate by appropriate written notice.

12. Entire Agreement. This Agreement supersedes all agreements previously made between the parties relating to its subject matter. There are no other understandings or agreements between them.

13. Non-waiver. No delay or failure by either party to exercise any right under this Agreement, and no partial or single exercise of that right, shall constitute a waiver of that or any other right, unless otherwise expressly provided herein.

14. Headings. Headings in this Agreement are for convenience only and shall not be used to interpret or construe its provisions.

15. Governing Law. This Agreement shall be construed in accordance with and governed by the laws of the State of _____[state].

16. Counterparts. This Agreement may be executed in two or more counterparts, each of which shall be deemed an original but all of which together shall constitute one and the same instrument.

17. Binding Effect. The provisions of this Agreement shall be binding upon and inure to the benefit of both parties and their respective legal representatives, successors, and assigns.

The parties have executed this agreement on the date first above written.

"OWNER"

a(n) _____ [state] _____ [entity]

By: _____

Print Name: _____

Title: _____

"AGENT"

a(n) _____ [state] _____ [entity]

By: _____

Print Name: _____

Title: _____



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F. REAL ESTATE MANAGEMENT

26-22 Current Legal Forms for Real Estate FORM 22.96

FORM 22.96 Management Agreement--Termination at will--related parties

COMMENT

The following form is a simple management agreement, and would likely be utilized in connection with a property when the management is being delegated to a related party. The following form is terminable at the will of the owner and places the risk of negative cash flow from the operations of the property upon the owner.

FORM

THIS MANAGEMENT AGREEMENT is made and entered into this _____[*day*] day of
_____[*month*], _____[*year*], by and between _____[*name*], a(n)
_____[*state*] _____[*entity*] ("Owner"), and _____[*name*], a(n)
_____[*state*] _____[*entity*] ("Manager").

RECITALS

Owner is presently the owner of the property known as _____[*name*] (the "Property").

Owner desires to obtain the services of Manager to manage and operate the Property, and Manager is willing to render such services on the terms and conditions hereinafter set forth.

For good and valuable consideration, the receipt and sufficiency of which are mutually acknowledged, the parties agree as follows:

1. Term. This Agreement may be terminated at any time by Owner upon written notice to Manager. This Agreement may be terminated by Manager upon _____ (_____) days written notice to Owner.

2. Appointment. Owner appoints Manager, and Manager accepts such appointment, to manage, operate, supervise and conduct business of the Property during the term of this Agreement, upon the terms and conditions set forth.

3. Operation. Manager shall conduct business of and operate the Property in a good, efficient and lawful manner, and use its best efforts to preserve and protect the business, operations and goodwill of the Property. Subject to the requirements of this Agreement, Manager shall have reasonable discretion in the management and operation of the Property.

4. Compliance with the Leases. Manager shall, at its own cost and expense, perform Owner's obligations under the leases to tenants of the Property, for which Owner shall be responsible. Subject to the foregoing, neither Owner nor Manager shall, by act or omission, cause any breach or default under, or any termination of, the leases. Manager is authorized, from time to time, to renew and extend existing leases, and to enter into new leases with tenants, as suites become vacant.

5. Management Fee. Manager shall collect the Property's rents received from tenants, and any other miscellaneous income derived from the Property, deduct its management fee of _____ percent (_____%), pay any costs and expenses associated with the Property, and remit the balance (along with the appropriate documentation showing the costs and expenses paid) to Owner not later than the _____ (_____) day of the calendar month following the month in which collections are made. If requested by Owner, Manager shall first make all mortgage, insurance, and real estate tax payments attributable to the Property.

6. Relationship of Parties. This Management Agreement is solely for the purpose of providing for certain management services to be rendered by Manager to Owner in the Property. This Management Agreement is not, nor shall it be deemed to be, a sublease of any Property or any part thereof, or an assignment or transfer of any part of the leasehold estates granted by the leases of the Property's suites.

7. Non-Assignment. This Agreement shall not be assigned or otherwise transferred by either party hereto without the express written consent of the other party, except that no such consent shall be required as to any such assignment or transfer to a parent, subsidiary or other affiliate of Manager (in which event Manager shall remain liable hereunder).

8. Miscellaneous

There are no prior or contemporaneous written or oral agreements, undertakings, promises, warranties, guaranties or covenants between the parties, respecting the subject matter hereof, except as set forth in a writing(s) signed by the parties.

No waiver of any term or condition of this Agreement by any party shall be valid unless set forth in a writing signed by such party. No such waiver shall be deemed to be a waiver of any other or similar provision or condition, or of any future event, act, breach or default.

This Agreement may be modified, supplemented or amended only by a written memorandum executed by all parties.

Headings of sections are for convenience of reference only, and shall not be construed as a part of this Agreement, or as limiting or defining the scope of any section.

All notices and other material communications permitted or required to be given hereunder shall be in writing and shall

be personally delivered or sent by U.S. registered or certified mail, proper postage paid, to the party in question at its address set forth below, or to such other addresses as such party may designate by written notice to the other party;

If to Owner: _____

If to Manager: _____

All such notices shall be deemed given and effective: (a) if personally delivered, upon receipt, and (b) otherwise, upon deposit thereof in the U.S. mail or with a reputable express delivery service in accordance with this Section 8.5, Miscellaneous.

This Agreement shall be construed and enforced in accordance with the laws of the State of _____ [state].

Nothing contained herein is intended, nor shall it be construed, to create, evidence or confirm any relationship between the parties of partnership, joint venture, sublessor and sublessee, or any relationship other than that of Manager and Owner.

This Management Agreement is duly executed on behalf of the parties by their duly authorized officers as of the date first above written.

"OWNER"

a(n) _____ [state] _____ [entity]

By: _____

Print Name: _____

Title: _____

"MANAGER"

a(n) _____ [state] _____ [entity]

By: _____

Print Name: _____

Title: _____



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26-22 Current Legal Forms for Real Estate FORM 22.97

FORM 22.97 Management agreement between owner of retail strip center under construction and real estate agent--agent to manage center once it is built

COMMENT

This form is a management agreement relating to a retail strip center. Obviously, many of the provisions are applicable to any income producing property. Under this agreement, the owner wishes to begin obtaining commitments from prospective tenants as soon as possible. In many circumstances, the owner will have commitments from some of the large tenants prior to commencing construction. This agreement provides the agent with a substantial advertising budget for the first six months covered by the agreement, or until the units are fully rented, whichever comes first. The agent may supplement the budget itself, if it so desires.

In addition to the advertising budget, the landlord offers the agent incentives so that the agent will rapidly lease the premises. For example, the agent's compensation is tied to a percentage of: (1) gross rentals; and (2) the "overhead" charge to be imposed on all tenants.

The agent will be responsible for virtually all aspects of the operation of the shopping center. For that reason, the agent must hold the landlord harmless for any claims arising out of the operation of the shopping center (see the "hold harmless" clause in paragraph 13). The sole exception is where the claim alleges an intentional act on the part of the owner. The agent is also required to provide insurance to order to "fund" the hold harmless provision in the event that a successful claim is brought by an injured party. After all, a hold harmless is only as good as the ability of the party providing it to cover the financial losses suffered by the recipient.

FORM

AGREEMENT made this _____ [day] day of _____ [month],
 _____ [year], between _____ [name], a(n) _____ [state]
 _____ [entity], with offices for the transaction of business at _____ [address]
 (hereafter referred to as "Agent"), and _____ [name], a(n) _____ [state]
 _____ [entity], with offices for the transaction of business at _____ [address]
 (hereafter referred to as "Owner").

W I T N E S S E T H:

WHEREAS, Owner is the owner of a certain strip mall of approximately _____
 (_____) square feet located in _____ [city], _____ [state]; and

WHEREAS, Agent is in the business of managing strip malls;

NOW, in consideration of the mutual promises contained herein, it is agreed as follows:

1. Managing Agent. Agent agrees to act as managing agent for Owner for its strip mall located in
 _____ [city], _____ [state]. In furtherance of its duties, upon execution of this
 Agreement, Agent shall do the following:

(1) seek and secure an anchor tenant which shall be one of the following: a major chain grocery store, a major chain discount department store, or a major discount catalogue store;

(2) seek and secure a discount drug store as a key tenant; and

(3) seek and secure such other tenants as will fill the available space in the mall and attract customers.

2. Leases. Agent shall provide Owner with a proposed lease to be used by all tenants in the mall. The leases shall provide for common area maintenance charges, taxes, overhead and insurance expenses to be paid *pro rata* by the tenants. All rental rates shall be approved by Owner and shall be based on the number of square feet occupied by the tenant.

3. Advertising. Agent shall advertise, as it deems necessary, to locate tenants for the initial rent up. Owner shall contribute the sum of _____ Dollars (\$_____) monthly toward the cost of advertising for _____ (_____) months, or until rent up is complete, whichever event occurs first. Thereafter, when a vacancy occurs, Owner will contribute _____ Dollars (\$_____) per month towards the cost of advertising. Any expenses of locating a tenant above these amounts shall be borne by Agent. Agent shall account to Owner for all sums expended on advertising.

4. Duties. Agent shall perform the following duties:

(1) Collect rent, common area maintenance, insurance, taxes and overhead charges monthly from each tenant. Agent shall also maintain accurate records relating thereto.

(2) Evict tenants where violations of the lease occur. The expenses of an attorney, if needed, shall be charged to Owner. Owner shall have the right to select the attorney.

(3) Locate additional tenants, as needed. This shall include negotiation of the leases, as well as negotiation of fit-up expenses and incentives, if offered by Owner. Agent shall obtain an executed lease from each tenant, which must be

approved by Owner prior to the lease becoming binding upon the Owner.

(4) Minor maintenance and repair, such as changing light bulbs, repairing door handles, and similar things. This shall be done by the Agent staff at Agent's expense.

(5) Arrange for janitorial service, landscaping care, major repairs and maintenance, snow removal and trash removal. This shall be charged to the tenants as part of the common area charges. Funds shall be advanced by Owner, as needed, until such funds are collected from tenants.

(6) Arrange for payment of taxes and insurance. These expenses shall be charged to the tenants. Funds shall be advanced by Owner, as needed, until such funds are collected from tenants.

(7) Inspect the premises on a regular basis to be certain that the terms of all leases are adhered to, and to ascertain the need for maintenance and repair.

(8) Purchase necessary equipment and supplies to carry out the duties set forth herein. Equipment shall be charged to Owner. Supplies shall be charged to the tenants as part of common area charges.

(9) Maintain the shopping center as a first-class establishment, in conformance with the high standards of all Owner-owned malls.

5. Accounting. Agent shall provide monthly, quarterly and annual summaries of income and expenses to Owner. Owner shall be deemed to own all books and records maintained by Agent. Owner may inspect and audit the books of Agent at any time without notice to Agent. Summaries shall be delivered to Owner within _____ (_____) days of the close of the period to which they relate.

6. Term. The term of this agreement shall be for a period of _____ (_____) years, commencing upon the date of execution. The agreement shall be automatically renewed for additional _____ (_____) year periods unless either party shall give the other party notice of termination at least _____ (_____) days prior to the expiration date.

7. Termination. Owner may terminate this agreement for cause upon _____ (_____) days' notice. Upon receipt of notice to terminate by either party, an audit shall be performed by Owner's accountants. Upon completion of the audit, final payments shall be made. Agent shall execute a general release and return all keys to Owner. Agent shall cooperate with its successor by supplying all books and records and responding promptly to all reasonable requests for information.

8. Compensation. Agent shall receive _____ percent (_____) of all gross monthly rents received, plus _____ (_____) of the overhead charges added to all common area maintenance payments. Agent shall take its compensation from the receipts once each month.

9. Payment to Owner. Agent shall pay Owner's mortgage each month from rental funds received after deduction of all expenses, including Agent's compensation. In the event of a shortfall, Agent shall notify Owner of the amount. Owner shall be responsible for the shortfall. In the event that there are excess funds, Agent shall place up to _____ Dollars (\$_____) of such excess funds in a savings account known as a "sinking fund," the purpose of which is to cover future major repairs. Any excess above that sum shall be delivered to Owner.

10. Conditions. Agent shall notify Owner of any damage to the mall caused by fire or other casualty. Agent shall notify Owner of any incident which may give rise to a claim for personal injury. Agent shall promptly notify the insurance

company involved in either event. Agent shall be responsible for all negotiations with the insurance company; however, Owner must approve all settlements. Agent shall arrange for any repairs needed as a result of the fire or other casualty.

11. Laws. Agent shall promptly bring the shopping center into compliance with all laws, rules and regulations of any governmental entity having jurisdiction. The cost of such compliance shall be chargeable to Owner or to the tenants as part of common area charges, depending on the nature of the item.

12. Bond. Agent, at its sole expense, shall bond its employees who will be working to fulfill any aspect of Agent's obligations under this agreement.

13. Hold Harmless. Agent shall indemnify and hold Owner harmless for any claim arising out of the use or operation of the shopping center, except to the extent that the claim shall allege an intentional act on the part of Owner. This indemnification shall include, but not be limited to, costs of defense, legal fees, disbursements, court costs and any monetary judgment or settlement, including interest and penalties, if any. Agent shall provide Owner with a certificate of insurance coverage adequate to fully fund the contractual liability set forth above. The policy shall contain a provision requiring notice to Owner at least _____ (_____) days prior to the effective date of cancellation of the insurance policy.

14. Entire Agreement. This Agreement, together with the other written agreements and instruments executed concurrently herewith or pursuant to the provisions hereof, contains the entire agreement between the parties respecting the matters herein set forth and supersedes all prior agreements between them respecting such matters.

15. Counterparts. This Agreement may be executed in two (2) or more counterparts, each of which shall be deemed an original, but all of which together shall constitute one (1) and the same instrument. At the trial of any matter arising under this Agreement, only one (1) counterpart need be produced.

16. Headings. Section headings are for purposes of convenience and identification only and shall not be used to interpret or construe this Agreement.

17. Waivers. Except as herein expressly provided, no waiver by Owner of any breach of this Agreement or of any warranty or representation hereunder from Agent shall be deemed to be a waiver of any other breach by Agent of any kind or nature (whether preceding or succeeding, and whether or not of the same or similar nature). No acceptance of payment or performance by Owner after any such breach by Agent shall be deemed to be a waiver of any breach of this Agreement or of any representation or warranty hereunder by Agent, whether or not Owner knows of the breach when it accepts such payment or performance.

No failure by either party to exercise any right it may have under this Agreement or under law upon the other's default, and no delay in the exercise of that right, shall prevent it from exercising the right whenever the other party continues to be in default. No such failure or delay shall operate as a waiver of any default, or as a modification in any respect of the provisions of this Agreement.

18. Gender and Number. Whenever the singular or plural number, or masculine or feminine gender, is used herein, it shall equally include the other.

19. Notices. Any notice which any party is required or may desire to give hereunder shall be in writing and may be personally delivered, transmitted by facsimile machine, or delivered by the United States Postal Service or private delivery service to the above addresses. Notice is deemed given when received.

20. Governing Law. This Agreement shall be construed and enforced in accordance with the laws of the State of _____[state].

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21. Binding Effect. This Agreement shall be binding upon, and inure to the benefit of, all the parties, and their respective heirs, representatives, successors, and assigns.

22. Modifications. This Agreement may be modified only by a written document signed by both parties. A purported oral modification shall not be effective.

The parties hereto have set their hands and seals the day and year first above written.

"AGENT"

a(n) _____ [state] _____ [entity]

By: _____

Print Name: _____

Title: _____

"OWNER"

a(n) _____ [state] _____ [entity]

By: _____

Print Name: _____

Title: _____

STATE OF _____ [state])
COUNTY OF _____ [county]) SS:

BEFORE ME, a Notary Public in and for said County and State, personally appeared _____ [name],
a(n) _____ [state] _____ [entity], by _____ [name], its
_____ [title], who acknowledged that _____ [he/she] did sign the foregoing
instrument for and on behalf of said corporation, being thereunto duly authorized, and that the same is
_____ [his/her] free act and deed individually and as such officers and the free act and deed of said
_____ [entity].

IN TESTIMONY WHEREOF, I have hereunto set my hand and official seal at _____ [city],

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_____[state], this _____[day] day of _____[month],
 _____[year].

 Notary Public

 STATE OF _____[state])
 COUNTY OF _____[county]) SS:

BEFORE ME, a Notary Public in and for said County and State, personally appeared _____[name],
 a(n) _____[state] _____[entity], by _____[name], its
 _____[title], who acknowledged that _____[he/she] did sign the foregoing
 instrument for and on behalf of said corporation, being thereunto duly authorized, and that the same is
 _____[his/her] free act and deed individually and as such officers and the free act and deed of said
 _____[entity].

IN TESTIMONY WHEREOF, I have hereunto set my hand and official seal at _____[city],
 _____[state], this _____[day] day of _____[month],
 _____[year].

 Notary Public



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26-22 Current Legal Forms for Real Estate FORM 22.98

FORM 22.98 Exclusive agency--shopping center--varying commissions--payment on early termination

COMMENT

In addition to the exclusive management and leasing responsibilities incorporated in the standard management contract, the shopping center manager frequently performs the additional function of coordinating the activities of business tenants. Under this agreement such duties include assisting in the organization of a tenants' association, formulating bylaws for such an association, collaborating in promotional activities, and aiding in the scheduling of the opening of the businesses of the various tenants. Another important responsibility often assigned to the manager is the prevention of prohibited business activities by the tenants so as to avoid intra-center competition.

By its terms this agreement may operate for a relatively long period of time, since it is to continue until the expiration of all leases procured by the manager, including their extensions and renewals. However, either party may terminate the agreement without cause. If the landlord effects an early termination without cause, the manager is to receive a fixed percentage of all rentals payable over the current terms of leases negotiated by the manager. If the termination is by the manager, the amount payable to the manager is measured by a lesser percentage of such rentals.

FORM

AGREEMENT made this _____[day] day of _____[month],
_____[year], between _____[name] (the "Landlord") and
_____[name] (the "Agent").

Whereas the Landlord is constructing on the property described in Exhibit A attached hereto a shopping center with

approximately _____ (_____) square feet of floor space, known as _____ [name] (the "Shopping Center"), and

Whereas the Agent has negotiated certain leases for portions of the Shopping Center, and

Whereas the Landlord desires that the Agent will be the management agent and leasing agent for the Shopping Center, upon the terms and conditions hereinafter stated,

Now, therefore, it is hereby agreed as follows:

1. Appointment as Management Agent. The Landlord hereby appoints the Agent as the exclusive management agent for the Shopping Center for the term of this agreement.

2. Appointment as Leasing Agent. The Landlord hereby appoints the Agent as the exclusive agent for the original leasing of all space in the Shopping Center. As to each vacancy which occurs in the Shopping Center the Agent shall endeavor to obtain a tenant upon conditions reasonably satisfactory to the Landlord. If the Agent is unable to obtain a replacement tenant upon terms satisfactory to the Landlord within _____ (_____) days after notification that such vacancy is to occur, then the Landlord may lease such vacant space itself or employ another agent.

3. Term of Agreement. This agreement shall remain in full force and effect until all the leases obtained by the Agent in the Shopping Center, including all extensions or renewals of such leases, shall expire, unless there is a termination or sale described in Paragraphs 8 or 9 hereof.

4. Management Functions. During the term of this agreement the Agent shall provide the following services as management agent, subject to the approval of the Landlord:

(a) Collect rental payments, on a monthly basis, from all tenants in the Shopping Center. From each month's collection, the Agent shall first deduct the commissions and all other sums due it hereunder, and remit any balance to the Landlord. If the Landlord revokes the Agent's authority to collect rents, in whole or in part, such revocation shall not constitute a breach of this agreement so long as the Landlord continues to pay the Agent on a monthly basis all sums due it out of such rents.

(b) Make prompt disbursements as directed by the Landlord, provided it first furnishes the funds therefor to the Agent.

(c) Assist in coordinating the opening of the businesses of the several tenants.

(d) Aid in the organization of a merchants' association, including aid in (1) furnishing bylaws for such association; (2) selecting an advertising agency for the Shopping Center; (3) formulating promotional plans; and (4) determining the amount of and collecting the contributions by each member of such association.

(e) Prepare monthly and annual comparative operating statements.

(f) Supervise all maintenance and repairs required to be made by the Landlord. In this connection, the Agent shall have the authority, without the Landlord's further consent or authorization, to arrange, and obligate the Landlord to pay for, any repair or maintenance item costing not more than _____ Dollars (\$_____).

(g) Supervise the maintenance personnel furnished by the Landlord.

(h) Provide liaison between the Landlord and the tenants, and aid in the solution of any problem arising between the

Landlord and any tenant, or among such tenants.

5. Repairs and Maintenance. The Landlord shall provide and pay for such personnel, equipment, and supplies as may be reasonably necessary in order to keep the Shopping Center in good repair and in a clean and orderly condition, provided that payments shall not be made with respect to repairs which the tenants are obligated to make under the terms of their respective leases.

6. Agent's Fees. For the services rendered by the Agent the Landlord shall pay to it the following commissions and fees, which shall be, with respect to the leases negotiated by the Agent, in lieu of all commissions for negotiating such leases:

(a) As to leases negotiated by the Agent, a combined leasing and management fee equal to _____ percent (_____%) of the rents, including percentage rents, becoming due and payable under such leases. Such fees shall be paid as such rents are collected.

(b) As to any lease procured by someone other than the Agent, the Agent shall receive a management fee equal to _____ percent (_____%) of the rents, including percentage rents, becoming due and payable under such leases. Such fees shall be paid as such rents are collected.

7. Agent's Action on Tenant's Default. The Agent shall have the right, in its own name or in the name of the Landlord, to take any and all actions, including distraint, which the Agent deems advisable and which the Landlord might take, in the event of any tenant's breach of any covenant, provision, or condition binding upon such tenant under its lease with the Landlord. Nothing in this paragraph shall be deemed to require the Agent to institute legal action against any tenant. If the Landlord desires such legal action it shall pay for all costs and attorneys' fees in connection therewith.

8. Termination of Agency. In the event that the Landlord terminates the Agent's services under this agreement, the Landlord shall thereupon pay to the Agent a lump-sum commission equal to _____ percent (_____%) of all fixed rents thereafter to become due and payable during the then current terms of all leases negotiated by the Agent for the Shopping Center. In the event, for any reason whatsoever, the Agent terminates its services under this agreement the Landlord shall pay to the Agent a lump-sum commission as hereinabove set forth in the first sentence of this Paragraph 8, except that the rate of such commissions shall be _____ percent (_____%), and except that the Landlord shall have a period of _____ (_____) months after such termination in which to make such payment. Notwithstanding anything hereinabove to the contrary in this paragraph, if either the Landlord or the Agent defaults in performing any of its obligations under this agreement, the other party may terminate this agreement, but for the purpose of this paragraph the defaulting party shall be deemed to have terminated this agreement. In the event of default hereunder by either party, the other party shall have no remedy except to treat this agreement as having been terminated by the defaulting party. The commissions to be paid by the Landlord in the event of the Landlord's default, and the diminution of the Agent's commissions in the event of the Agent's default, shall be treated as liquidated damages.

9. Sale of Property. This agreement shall terminate and the liabilities of the parties hereunder shall terminate upon a sale of the Shopping Center; provided the Landlord, its officers, and shareholders retain no interest, directly or indirectly, in the property, except a lien thereon to secure payment of the purchase money as a condition of sale; and provided further that prior to or contemporaneously with such a sale the Agent shall be paid all sums then due it, together with the lump-sum commission due on any termination of the agency by the Landlord.

10. Binding Effect. This agreement and all the provisions hereof shall be binding upon, and shall inure to the benefit of, the parties hereto and their respective successors and assigns.

11. Entire Agreement. This Agreement supersedes all agreements previously made between the parties relating to its subject matter. There are no other understandings or agreements between them.

12. Notices. All notices under this Agreement shall be in writing and delivered personally or mailed by certified mail, postage prepaid, addressed to the parties at their last known addresses.

13. Non-waiver. No delay or failure by either party to exercise any right under this Agreement, and no partial or single exercise of that right, shall constitute a waiver of that or any other right, unless otherwise expressly provided herein.

14. Headings. Headings in this Agreement are for convenience only and shall not be used to interpret or construe its provisions.

15. Governing Law. This Agreement shall be construed in accordance with and governed by the laws of the State of _____[state].

16. Counterparts. This Agreement may be executed in two or more counterparts, each of which shall be deemed an original but all of which together shall constitute one and the same instrument.

IN WITNESS WHEREOF, Landlord and the Agent have caused this agreement to be executed in their respective names by their proper officers.

"LANDLORD"

a(n) _____ [state] _____ [entity]

By: _____

Print Name: _____

Title: _____

"AGENT"

a(n) _____ [state] _____ [entity]

By: _____

Print Name: _____

Title: _____



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Current Legal Forms for Real Estate

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Current Legal Forms for Real Estate
Chapter 22 DEVELOPMENT AND SUBDIVISION
Part IV. FORMS
F. REAL ESTATE MANAGEMENT

26-22 Current Legal Forms for Real Estate FORM 22.99

FORM 22.99 Exclusive agency--office building--agent's office on premises--mutual termination rights--commission upon sale of property

COMMENT

While this agreement covers the basic points generally required in management agreements dealing with income producing property, it illustrates alternatives for dealing with some of the fundamentals, and contains several features of special interest.

Under most management agreements, a termination during the period of the contract can occur only in specified circumstances. In this agreement either party may terminate at will. However, unless the termination is based upon inexcusable failure of the agent to deposit or account for funds, the owner must pay to the agent liquidated damages based upon the discounted value of a specified monthly sum for the remainder of the term.

This agreement requires the manager to maintain a full-time office at the Building. Under this type of scenario, one would expect the fee to be higher. Another feature of this agreement is the requirement for the preparation by the agent of periodic budgets of expenses, forecasts of rental and occupancy changes, and reviews of the status of leases. Such statements are not intended to impose inflexible standards, but merely to provide guidelines for the agent's activities. In some agreements the agent is required to adhere quite rigidly to the budgets approved by the owner.

As in most cases, the agent's compensation under this agreement is based on a percentage of rent collections and other income collected. A special provision deals with the agent's compensation in the event it negotiates a sale, or a long-term lease of the property.

FORM

26-22 Current Legal Forms for Real Estate FORM 22.99

AGREEMENT made this _____ [day] day of _____ [month],
 _____ [year], between _____ [name], a(n) _____ [state]
 _____ [entity] (the "Owner"), and _____ [name], a(n) _____ [state]
 _____ [entity] (the "Agent").

1. Employment of Agent. The Owner hereby employs the Agent as sole and exclusive managing agent to rent, manage, and operate the building known as _____ [name], (the "Building"), upon the conditions and for the term and compensation herein set forth.

2. Term of Employment. The term of employment shall be from _____ [month]
 _____ [day], _____ [year], to and including _____ [month]
 _____ [day], _____ [year], subject to earlier termination as herein provided. If this contract remains in effect on _____ [month] _____ [day],
 _____ [year], it shall continue thereafter until terminated by either party by giving
 _____ (_____) days notice to the other.

3. Acceptance of Employment. The Agent hereby accepts such employment and agrees to perform all services necessary for the care, protection, maintenance, and operation of the Building, including the following:

(a) Use all reasonable efforts to keep the Building rented by procuring tenants for the Building and negotiating and executing on behalf of the Owner all leases for space in the Building; provided, however, that the Agent shall not execute any lease without securing the Owner's prior written consent. The Agent shall not have the right to cancel or amend any lease without the Owner's written consent.

(b) Collect all rentals and other income from the Building, provided that nothing herein contained shall constitute a guarantee by the Agent of the payment of rent by tenants.

(c) Maintain an office in the Building and pay out of its own compensation the salaries of all employees of the Agent in the Agent's office, including a building manager. The Agent shall also bear all other costs in connection with the operation of the Agent's office, including its telephone, telegraph, stationery, and similar expenses. The Agent shall not be required to pay for heat, light, or rent for the premises occupied as the Agent's office. The Owner shall pay all expenses relating solely to the operation of the Building as distinguished from the maintenance of such office by the Agent. The Owner shall pay for architects' fees relating to space layouts for new tenants or for renewals of present tenants.

(d) Employ, discharge, and pay on behalf of the Owner all servants, employees, or contractors necessary to be employed in the management and operation of the Building. The Agent shall discharge any servant, employee, or contractor whose discharge is demanded in writing by the Owner, except that the Agent shall not be required to respect such demand if it is in violation of any written agreement or contract existing with respect to any such servant, employee, or contractor.

(e) Purchase on behalf of the Owner all equipment, tools, appliances, materials, supplies, and uniforms necessary for the maintenance or operation of the Building.

(f) Contract on behalf of the Owner for and supervise the making of all repairs, alterations, and decorations in the Building. The Agent, however, shall not contract for any repair, alteration, or decoration that costs over
 _____ Dollars (\$_____) without the Owner's prior written approval.

(g) Contract on behalf of the Owner for water, gas, electricity, and other services and commodities necessary in the

operation and maintenance of the Building. The Agent, however, shall not make a contract for any such item involving an expenditure of over _____ Dollars (\$_____) without the Owner's written approval.

(h) Advertise the rental space in the Building, subject to the approval and at the expense of the Owner.

(i) Contract on behalf of the Owner for the sale of drinking water, paper, gas, electric current, repair service, towel supplies, and other miscellaneous supplies. The income from such contracts shall be the property of the Owner and shall be deposited by the Agent in the Owner's accounts.

(j) Prepare and file all returns and other documents required under the Federal Insurance Contributions Act and the Federal Unemployment Tax Act, or any similar federal or state legislation, and all withholding tax returns required for employees of the Building. The Agent shall pay all amounts required to be paid under the Federal Insurance Contributions Act and the Federal Unemployment Tax Act, or any similar federal or state legislation, and all withholding taxes, from the Owner's funds. The Agent shall file such returns and reports as may from time to time be required by the State of _____ with respect to the sale of gas and electricity.

(k) Maintain full books of account with correct entries of all receipts and expenditures of managing the Building. Such books of account shall be the property of the Owner and shall at all times be open to the inspection of the Owner or of any of its officers or duly authorized agents.

(l) Furnish monthly to the Owner a detailed statement of all receipts and disbursements for each month, such statement to be furnished on or before the fifteenth day of each month for the preceding month. Such statement shall show the status of collections and shall be supported by cancelled checks, vouchers, duplicate invoices, and similar documentation covering all items of income and expense, which shall be kept in the Agent's office and be available for inspection of the Owner's representatives at all times. The Agent shall also furnish a monthly operating statement showing the income and expense for the month and year to date and for the same month of the preceding year.

4. Deposits of Rent and Other Income. All sums received from rents, sales of gas, electricity, supplies, and services, and other income from the Building, shall be deposited from time to time as collected by the Agent to the credit of the Owner in such bank or banks as it may designate from time to time in an account to be known as " _____[name]," or by such other name as the Owner shall designate. All such receipts shall at all times remain the Owner's property. The Agent shall have the right to open an account in such bank as the Owner shall designate from time to time.

5. Budget. The Agent shall from time to time, and at least semiannually, prepare and submit to the Owner a tentative budget of expenses. The Agent shall also from time to time and at least annually prepare and submit to the Owner the following schedules:

(a) Forecast of rental and occupancy changes;

(b) Review of lease negotiation;

(c) Annual analysis of leases.

The forecast of rental and occupancy changes, when approved in writing by the owner, shall form the basis on which leases of space in the Building shall be negotiated. Such forecast is not intended to constitute a fixed requirement, but rather to form a basis for the negotiation of such leases, to be modified in particular instances with the Owner's written consent. Such forecast shall remain in effect until the Owner has approved a revised schedule. The budget of expenses submitted by the Agent, when approved by the Owner, shall in general form the basis on which the Agent shall incur

items of expense for the operation of the Building and the procuring of tenants for the Building.

6. Agent's Bond. The Agent shall furnish to the Owner a bond with surety satisfactory to the Owner, in a penal sum approved by the Owner, insuring that the Agent shall perform and comply with all the conditions and provisions of this agreement and faithfully account to and pay over to the Owner all sums held by the Agent which are due to the Owner. The Owner shall pay all premiums and charges on such bond.

7. Insurance. The Owner reserves the right at all times to place all insurance policies with respect to the Building and its operation. The Agent shall be included as an insured in the policies covering general and elevator liability, public liability, and workmen's compensation insurance. In the event the Agent is authorized by the Owner to place insurance policies, the companies, the general agents, the amounts of coverage, and the risks insured shall be subject to the approval of the Owner, and the Agent shall be permitted to receive and retain such insurance commissions as are customarily paid.

8. Exclusiveness of Agency. The Owner during the term of the employment of the Agent hereunder shall not authorize any other person, firm, or corporation to negotiate or act as renting agent with respect to any leases for space in the Building; provided that the Owner shall have the right to negotiate in its own behalf for the leasing of space in the Building. The Owner shall not permit any person, firm, or corporation other than the Agent to have or maintain any rental or "For Rent" sign in or about the Building, and shall keep the Agent informed concerning inquiries for space or negotiations for space by any person, firm, or corporation. The Agent shall have the right to display within the Building suitable signs of the Agent to the effect that Agent is the managing agent of the Building and that space in the Building is for rent.

9. Compensation

(a) The Owner shall pay the Agent, at the close of each year during which this agreement is in effect, as the Agent's entire compensation for services hereunder, an amount equal to _____ percent (_____%) of the total rent collections and other income from the Building during such year. The phrase "rent collections and other income" shall be deemed to include rents paid by tenants and income from the routine operation of the Building, such as the sale of gas, electricity, supplies, and services, work orders, alterations paid by tenants, and other miscellaneous income. Such phrase shall not be deemed to include receipts arising out of the sale of assets, the settlement of fire losses and items of a similar nature, or rebates, discounts, or other credits received by the Agent incident to purchases, contracts, or other arrangements entered into under this agreement for the account of the Owner.

(b) The Agent shall have the right to retain commissions collected by the Agent from tenants in the Building as compensation for its services to such tenants in negotiating subleases, but the Agent shall not negotiate any sublease prejudicial to the interests of the Owner, and any determination by the Owner that any such sublease is prejudicial to its interests shall be final and binding. Nothing herein contained shall authorize any tenant to sublet if subletting is prohibited by such tenant's lease, or is permitted only with the Owner's written consent.

(c) The Agent shall have no right to obligate the Owner for the payment of any commissions to any outside real estate agent or broker without the Owner's written consent.

10. Commission on Sale. If the Agent, alone or working with other real estate agents or brokers, negotiates a long-term lease, sale, or other disposition of the land and the Building, it shall be paid one-half of the regular commission on such disposition, according to the then prevailing rates of the _____ [name] Real Estate Board. In the event other real estate agents or brokers assist in such disposition, the commission payable to the Agent shall not be subject to reduction for amounts payable to such other agents or brokers. All commissions payable to the Agent under this paragraph shall be reduced by the amount of any termination amount received by the Agent under Paragraph 13.

11. Assignment. Neither party hereto shall have the right to assign this agreement without the other party's written consent. If the Agent withholds consent to assignment by the Owner, the Owner may terminate this Agreement by giving not less than _____ (_____) days and not more than _____ (_____) days written notice to the Agent, provided that such notice is given within _____ (_____) days after such consent to assignment is withheld. The Agent shall, if requested by the Owner, continue management for a period up to _____ (_____) days after the date of assignment.

12. Termination. The Owner or the Agent may terminate this agreement at any time, with or without cause, by giving _____ (_____) days written notice. The Owner may terminate this agreement without notice if the Agent shall willfully fail to account for funds belonging to the Owner, or shall fail or refuse to deposit rents and other collections to the credit of the Owner, as provided herein, unless such failure to account for funds or to deposit rents or collections is the result of some act or condition beyond the control of the Agent and its employees.

13. Payment Upon Termination. If this agreement is terminated prior to _____ [month] _____ [day], _____ [year], by either party hereto for any reason whatsoever, except in circumstances where the Owner may terminate without notice as provided in Paragraph 12, the Owner shall pay to the Agent, its successors or assigns, on the termination date an amount equal to the present value, discounted at the annual rate of _____ percent (_____%), of the right to receive _____ Dollars (\$_____) per month for the period between the termination date and _____ [month] _____ [day], _____ [year].

14. Notice. All written notices to be given to the Owner may be addressed and mailed, by United States registered mail, to its designated representatives, and all written notices to be given to the Agent may be addressed and mailed, by United States registered mail, to the Agent at its principal place of business.

15. Entire Agreement. This Agreement supersedes all agreements previously made between the parties relating to its subject matter. There are no other understandings or agreements between them.

16. Non-waiver. No delay or failure by either party to exercise any right under this Agreement, and no partial or single exercise of that right, shall constitute a waiver of that or any other right, unless otherwise expressly provided herein.

17. Headings. Headings in this Agreement are for convenience only and shall not be used to interpret or construe its provisions.

18. Governing Law. This Agreement shall be construed in accordance with and governed by the laws of the State of _____ [state].

19. Counterparts. This Agreement may be executed in two or more counterparts, each of which shall be deemed an original but all of which together shall constitute one and the same instrument.

20. Binding Effect. The provisions of this Agreement shall be binding upon and inure to the benefit of both parties and their respective legal representatives, successors, and assigns.

The parties hereto have caused this agreement to be executed the day and year first above written.

"OWNER"

a(n) _____ [state] _____ [entity]

By: _____

Print Name: _____

Title: _____

"AGENT"

a(n) _____ [state] _____ [entity]

By: _____

Print Name: _____

Title: _____



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 Chapter 22 DEVELOPMENT AND SUBDIVISION
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 F. REAL ESTATE MANAGEMENT

26-22 Current Legal Forms for Real Estate FORM 22.100

FORM 22.100 Hotel management--general services

COMMENT

The management of a hotel involves more than the operation of rental property. The daily problem of attracting guests and supplying them with a variety of services is a complex business operation. It is for this reason that hotel management is generally undertaken by organizations which have developed special personnel and techniques for providing these services. In many circumstances, the manager will be required to maintain the hotel consistent with the guidelines of its licensor or purchaser.

Apart from the physical operation of the property the duties of the manager include a wide range of promotional activities. Thus, the manager must develop policies for introducing new features into the hotel, must create campaigns for publicizing the hotel, and must stimulate the general business of the hotel. Even aside from promotional responsibilities, the manager's general duties are relatively extensive. Repairs are to be made in the discretion of the manager, regardless of the amount involved. The manager has exclusive authority with respect to leases, concessions, and the placing of insurance. In other agency arrangements, the owner often reserves the right of final decision as to these matters. All expenses of the manager, excluding, however, its own overhead and the salaries of its own officers and employees, are to be borne by the owner. Under this agreement, compensation is to be paid on the basis of a fixed percentage of gross income from all business operations in the hotel.

FORM

AGREEMENT made in _____[city], _____[state], on this
 _____[day] day of _____[month], _____[year], between

_____[name], a(n) _____[state] _____[entity] (the "Owner"), and
 _____[name], a(n) _____[state] _____[entity] (the "Managing
 Agent").

Whereas the Owner now owns the property commonly known as _____[name] Hotel in the City of
 _____[city] (the "Hotel"), and

Whereas the Owner desires to employ the Managing Agent to act as General Manager of the Hotel for a period of
 _____ (_____) years from the date hereof, and the Managing Agent is willing to
 accept such employment for such period, subject to the terms and conditions hereinafter set forth,

Now, therefore, in consideration of the foregoing and of the terms and conditions herein set forth, the parties hereto
 agree as follows:

1. Employment of Agent. The Owner hereby employs the Managing Agent for a period of _____
 (_____) years from _____[name], as general operating manager of the Hotel, with
 authority, subject to the limitations and conditions herein set forth, to direct, supervise, and manage its operation.

2. Manager's Duties. The Managing Agent shall manage and maintain the Hotel consistent with the guidelines of
 _____[city] so that the Hotel will maintain its status as a licensee of _____[name].
 Such duties shall include without limitation, the following: supervise and direct the general operations of the Hotel;
 operate the Hotel efficiently and with proper economy; develop policies with respect to the installation of new features
 to the extent that the financial obligations and resources of the Owner permit; develop policies with respect to publicity
 for the purpose of creating the greatest possible net income from the Hotel; supervise and manage the operations of all
 public spaces, including, but without limitation, dining rooms; stimulate the general business of the Hotel; employ at the
 expense of the Owner such resident managers, assistant managers, employees, agents, clerks, and servants at the Hotel
 as may be required to continue the standard and quality of management and operation at a level not lower than that
 heretofore maintained; make leases on behalf of the Owner of rooms, stores, and concessions in or about the Hotel,
 together with renewals, extensions, or modifications thereof; collect income; keep the Hotel and all furniture,
 furnishings, and other equipment therein and appurtenant thereto in repair; arrange for necessary replacements,
 improvements, and changes in the Hotel and in the furniture, furnishings, and other equipment therein; supervise the
 placing of insurance on the Hotel and on all furniture, furnishings, and equipment therein against all risks usually
 covered in the case of similar properties, including, but without limitation, fire, boiler, elevator, plate glass, workmen's
 compensation, liability and fidelity insurance, and all other usual insurance (which shall also cover any liability of the
 Managing Agent); place and supervise all advertising and promotion circular matter; place at the disposal of the Owner
 its engineering, decorating, general purchasing, supervising, and accounting departments; and perform all other acts
 necessary or desirable in the operation of the Hotel. The Managing Agent represents that it controls an organization
 which has adequately equipped departments suitable for the performance of the duties described in this paragraph, and
 that it shall furnish the full use of its organization and personnel without additional charge in the performance of this
 agreement.

3. Expenditures by Manager. The Managing Agent shall have power and authority to make all contracts and
 disbursements necessary to carry out the duties conferred and imposed upon it by this agreement, including, but not
 limited to, the authority to pay for all expenses of leasing, collection of rents, management, operation, maintenance, and
 insurance. The Managing Agent may, in the name and at the expense of the Owner, institute any legal or equitable
 action or proceeding for the collection of rent or other income from the Hotel or the ousting or dispossessing of tenants
 or other persons therefrom. The Managing Agent shall be reimbursed by the Owner for all such expenditures, provided
 that the Managing Agent shall bear the cost of its own overhead and the salaries of its own officers and employees. The
 resident manager, assistant managers, employees, agents, clerks, and servants at the Hotel shall be deemed to be the
 employees of the Owner and not of the Managing Agent for all purposes under this agreement except for the purpose of

determining the efficiency of the Managing Agent under Paragraph 9.

4. Compensation of Managing Agent. The Managing Agent shall be compensated at the rate of _____ percent (_____) of the gross cash income from the Hotel and all of its appurtenant leases and concessions. Such compensation shall be paid on the 15th day of each month on the basis of the gross cash income during the preceding month. The term "gross cash income" as used in this agreement includes all gross income of the Owner, on a cash basis, from all sources, less (a) such amounts as the Owner may receive and hold as security or in other special deposits so long as so held, and (b) amounts returned to payors as having been received by mistake or by reason of overcharges. The gross cash income shall be determined by and certified to by the Owner's regular auditor to certify the accounts of the Hotel in accordance with the "Uniform System of Accounts for Hotels," as from time to time approved by the American Hotel Association.

5. Deposit of Collections. All moneys collected by the Managing Agent out of and from the operation of the Hotel shall be deposited daily in a special account in the name of Monroe Hotels, Inc., in one or more banks or trust companies in appropriately designated and adequately identified accounts. Out of such accounts the Managing Agent may pay or reimburse itself for all obligations and expenditures necessarily and properly incurred for and on account of the Owner in the management and operation of the Hotel, including compensation of the Managing Agent, insurance premiums, taxes, supplies, repairs, maintenance, renewals, replacements, betterments, and improvements. The Managing Agent may keep on hand for the account of the Owner such a fund, but not in excess of _____ Dollars (\$_____), as may be necessary in the opinion of the Managing Agent to provide for working cash for the operation of the Hotel.

6. Accounting Services. The Managing Agent shall furnish the supervisory services of its own accounting department. Subject to the supervision of the Managing Agent, such department shall maintain for the Owner proper and suitable records and books of account to be kept in accordance with the "Uniform System of Accounts for Hotels," as approved by the American Hotel Association, in which there shall be properly recorded all receipts and disbursements connected with the management and operation of the Hotel. All books of account shall at all times be open to the inspection and audit of any of the Owner's officers or duly accredited and authorized representatives. All books, records, bills, receipts, bank books, check books, check vouchers, correspondence, lists, files, index cards, and books of account relating to lessees, concessionaires, guests, and prospective guests and employees of the Hotel for a period of at least _____ (_____) years from time to time last past, and other data and records pertaining or in any manner relating to the management and operation of the Hotel, shall at all times be safely kept and preserved and shall be the property of the Owner, and upon the termination of this agreement shall be retained by the Owner.

7. Indemnification. The Owner shall indemnify and hold harmless the Managing Agent from damages for injuries to persons or property resulting from any cause whatsoever in, on, or about the Hotel premises and, at its own cost and expense, to defend any action or proceeding against the Managing Agent arising therefrom, provided that the Managing Agent shall have fully and faithfully performed all of its duties hereunder. Notwithstanding the foregoing, the Owner shall not be required to indemnify the Managing Agent against damages suffered as a result of gross negligence or willful misconduct on the part of the Managing Agent, its agents, or employees. In addition, the Managing Agent shall indemnify and hold Owner harmless against any claim alleging discrimination in employment or lodging brought by anyone against Owner. This indemnification shall include, but not be limited to, all costs in defending against the suit, attorneys' fees, and any eventual settlement or judgment amount, plus interest.

8. Owner's Termination Rights. If, in the opinion of the Owner reasonably held at any time during the term of this agreement, it shall not deem the management of the Hotel by the Managing Agent to be efficient and to be in accordance with this agreement, the Owner may, by giving at least _____ (_____) days' written notice to the Managing Agent, terminate this agreement. Upon the expiration of the period of the notice, this agreement shall automatically terminate, without any liability to or upon the Owner other than its liability to pay for services rendered pursuant to this agreement.

9. Arbitration. If the Managing Agent shall disagree with an opinion of the Owner that the management services are not efficient and not in accordance with this agreement, the Managing Agent may, within the _____ (_____) day period, serve upon the Owner a written notice demanding that the dispute be submitted to arbitration, pursuant to the Arbitration Law of the State of _____ [state]. If such notice should be so served within the _____ (_____) day period, then this agreement shall not terminate at the expiration of such period, and the Managing Agent shall continue with the performance of its duties under this agreement. The dispute shall thereupon be promptly submitted to arbitration. Such arbitration shall proceed without delay and as rapidly as possible. In the event that such arbitration results in an award, decision, or other determination in favor of the Managing Agent, then the notice of termination theretofore served shall be of no effect, and the parties hereto shall for all purposes whatsoever, anything herein contained to the contrary notwithstanding, be in the same position and have the same rights, powers, and duties under this agreement as if such notice had not been served. In the event that such arbitration should result in an award, decision, or other determination in favor of the Owner, then this agreement shall automatically terminate at the expiration of _____ (_____) days from the making of such award, decision, or determination, without any liability to or upon the Owner other than its liability to pay for services rendered pursuant to this agreement. The Managing Agent shall manage the Hotel pursuant to this agreement until the expiration of such _____ (_____) days. In the event that a motion to vacate such award in favor of the Owner shall be made within _____ (_____) days from the date of the making of such award, then this agreement shall not terminate until the expiration of _____ (_____) days from the date of the entry of the order or judgment to be entered on such motion. Failure to make such motion within _____ (_____) days shall constitute a waiver of the right to make such motion. In the event that an appeal should be taken from such order or judgment, this agreement shall not terminate and the Managing Agent shall continue with the performance of its duties under this agreement until the expiration of _____ (_____) days from the final determination of such appeal. Such appeal shall be prosecuted without delay and as rapidly as possible.

10. Reports to Owner's Board of Directors. The Managing Agent shall make reports to the Owner's Board of Directors concerning all affairs connected with the Hotel under the Managing Agent's control or within its knowledge whenever requested by the Owner's Board of Directors. The Managing Agent shall comply with all specific instructions of the Owner's Board of Directors that may be expressed in formal resolutions communicated to the Managing Agent.

11. Exclusive Application. Nothing in this agreement is intended or shall be construed to confer upon or to give to any person, firm, or corporation other than the parties hereto any right, remedy, or claim under or by reason of this agreement. All terms and conditions in this agreement shall be for the sole and exclusive benefit of the parties hereto.

12. Nonassignability. This agreement is not assignable by the Managing Agent without the Owner's prior written consent.

13. Entire Agreement. This Agreement supersedes all agreements previously made between the parties relating to its subject matter. There are no other understandings or agreements between them.

14. Notices. All notices under this Agreement shall be in writing and delivered personally or mailed by certified mail, postage prepaid, addressed to the parties at their last known addresses.

15. Non-waiver. No delay or failure by either party to exercise any right under this Agreement, and no partial or single exercise of that right, shall constitute a waiver of that or any other right, unless otherwise expressly provided herein.

16. Headings. Headings in this Agreement are for convenience only and shall not be used to interpret or construe its provisions.

17. Governing Law. This Agreement shall be construed in accordance with and governed by the laws of the State of _____[*state*].

18. Counterparts. This Agreement may be executed in two or more counterparts, each of which shall be deemed an original but all of which together shall constitute one and the same instrument.

19. Binding Effect. The provisions of this Agreement shall be binding upon and inure to the benefit of both parties and their respective legal representatives, successors, and assigns.

The parties hereto have duly executed this agreement as of the day and year first above written.

"OWNER"

a(n) _____ [*state*] _____ [*entity*]

By: _____

Print Name: _____

Title: _____

"AGENT"

a(n) _____ [*state*] _____ [*entity*]

By: _____

Print Name: _____

Title: _____



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26-22 Current Legal Forms for Real Estate FORM 22.101

FORM 22.101 Motel management--employment before construction of motel--national management organization

COMMENT

This form is another example of a management agreement in which the manager assumes full responsibility for the conduct of the business of a motel, as well as the responsibility for the operation of the physical plant. Because the manager is a company with extensive experience, the employment arrangement is made even before the motel is constructed. The purpose is to obtain the services of the manager in designing and equipping the motel, in organizing the business and services of the motel, and in testing the operation of the motel prior to its opening. Special compensation is to be paid the manager for these preopening services.

After the opening, the operation of the motel business is left entirely to the manager. Its responsibilities are carefully outlined, beginning with the preparation of an annual operating budget and continuing through the furnishing of an annual profit and loss statement. The numerous specific responsibilities assigned to the manager reflect in general the complexities of hotel management. These complexities and the skills required to handle them have encouraged the growth of large organizations specializing in hotel management. This agreement illustrates an arrangement with such an organization.

FORM

AGREEMENT made this _____ [day] day of _____ [month],
_____ [year], between _____ [name], a(n) _____ [state]
_____ [entity] (the "Owner"), and _____ [name], a(n) _____ [state]
_____ [entity] (the "Manager").

RECITALS

The Owner owns a certain plot of land located in the _____[city] City and State of _____[state], more fully identified and described in Exhibit A annexed hereto and made a part hereof.

The Owner intends to construct a motel on such plot, having approximately _____ (_____) rooms (the "Motel") and to complete the construction and furnishing thereof by _____[month] _____[day], _____[year].

The Owner desires the assistance of the Manager in designing, furnishing, and equipping the Motel and its facilities, in making preliminary plans for the organization of the Motel's business, services and sales prior to its opening, and the operation thereof subsequent thereto.

Now, therefore, in consideration of the mutual promises herein contained, the parties agree as follows:

1. Employment of Manager. The Owner hereby appoints the Manager and the Manager hereby accepts the appointment as exclusive manager of the Motel.

2. Term. The services of Manager shall commence on _____[month] _____[day], _____[year], and shall terminate on _____[month] _____[day], _____[year], unless sooner terminated as herein provided.

3. Manager's Preopening Duties. From the effective date of this agreement until the date when, as publicly announced by the Owner, the Motel shall be formally opened to the public as an operating motel (the "opening date"), the Manager shall perform the following services:

(a) Assist the Owner in designing, furnishing, and equipping the Motel and its facilities and in designing the landscaping for the Motel property. The Manager shall make available to the Owner all information which the Manager has with respect to the costs of furnishings and equipment generally used in motels. The Manager shall prepare a budget for designing, furnishing, and equipping the Motel, but the determination of the Owner as to amounts to be expended for such purpose shall be final. The Manager shall conform to such determination, and shall make contracts and purchases at the best prices available to the Manager. Purchases by the Manager may be either in its name or in the name of the Owner, but, in the event of any purchase in the name of the Manager, the title of any such purchase shall immediately be transferred to the Owner, whereupon the Owner shall pay the actual net purchase price for such equipment, furnishings, and personal property.

(b) Prepare and submit for the Owner's approval, and put into effect as soon as possible after receiving such approval, a plan for the organization of the business, services, and sales of the Motel. Pursuant to such plan, the Manager shall consummate for the benefit of the Owner and subject to its approval arrangements with concessionaires, licensees, tenants, or other intended users of the facilities of the Motel and shall arrange programs and commitments, such as conventions and catering events for the period after the opening date. To accomplish the foregoing, the Manager may, at the expense of the Owner and subject to its approval, employ a General Sales Manager and such assistants for him as may be necessary. The Manager shall submit to the Owner within a reasonable time after the effective date of this agreement a budget of proposed advertising for the Motel.

(c) Test the proposed operation of the Motel by training personnel, furnishing services usually necessary in the operation of a motel, preparing and serving food and beverages, and generally operating the Motel for a test period to be agreed upon by the Owner and the Manager, not in excess of _____ (_____) days,

immediately prior to the opening date.

4. Manager's Preopening Compensation. As compensation for the services to be rendered by the Manager prior to the opening date, the Owner shall pay to the Manager _____ Dollars (\$_____) per month, payable on the first day of the month. In addition to such compensation, the Owner shall, at the times when such compensation is payable, pay to the Manager all reasonable, actual "out-of-pocket expenses" which the Manager has incurred for the Owner prior to the opening date in accordance with the provisions hereof, provided a statement verified by an officer of the Manager shall be submitted monthly to the Owner setting forth the nature of such expenses.

5. Manager's Duties During Operating Period. During the period commencing with the opening date and continuing until the termination of this agreement (the "operating period"), the Manager shall use its best efforts in the management and operation of the business, services, and sales of the Motel so that the Motel and its services will be operated and maintained with the maximum of profit and in a first quality manner and so that the Motel shall remain a first quality motel. In pursuance of the foregoing, the Manager shall perform the following services:

(a) Submit at least _____ (_____) months before the beginning of the operating period and at least _____ (_____) months before the same date of each year thereafter an estimated profit and loss statement for the ensuing operating year, including a schedule of motel room rentals (which statement shall be subject to the Owner's approval) and budget estimates in detail for repairs, maintenance, replacements, and capital expenditures for such ensuing year (collectively the "Annual Plan"). The Annual Plan shall be submitted to the Owner for its approval, and the Owner shall have the right to make any change thereto or to refuse to expend any money suggested by the Annual Plan. The Owner shall inform the Manager of any such change or refusal before the commencement of the period covered by such plan. The Owner shall not increase any budget estimate included in such Annual Plan in an amount exceeding _____ percent (_____) thereof without the Manager's approval. The Manager shall comply with the Annual Plan as amended by the Owner, and shall not deviate substantially therefrom as to any item, incur additional expense, or change the manner of operation of the Motel, without the Owner's written consent, except in case of an emergency or where failure to take a particular action would expose the Owner to the imminent danger of criminal liability other than the payment of fines.

(b) Use its best efforts and due diligence in renting all of the rooms and facilities to desirable guests and tenants. Any lease in connection with a period in excess of _____ (_____) years shall be subject to the approval of and executed by the Owner, but leases of a term of _____ (_____) years or less may be executed by the Manager in the name of the Owner without its consent.

(c) Hire, promote, discharge, and supervise the work of the executive staff, including general manager, assistant managers, and department heads. Through such executive staff the Manager shall supervise the hiring, promotion, discharge, and work of all other operating and service employees performing services in or about the Motel, all in the name of the Owner. All of such employees shall be on the Owner's payroll, and the Manager shall not be liable to such employees for their wages or compensation, nor to the Owner or others for any act or omission on the part of such employees, unless the Manager has failed to use reasonable diligence in their hiring, discharge, or supervision so as to maintain a staff of qualified, competent, and trustworthy employees. The Owner shall have the right to discharge, or require the Manager to discharge, any such employee. The Manager shall negotiate, on the Owner's behalf, with any labor union lawfully entitled to represent such employees, but no collective bargaining agreement or labor contract resulting from such negotiations shall be valid unless executed by the Owner. The Manager shall not at any time enter into any agreement with any employee for a period in excess of _____ (_____) years or for compensation in excess of _____ Dollars (\$_____) per year without the Owner's written consent. The Manager shall procure and maintain adequate workmen's compensation insurance, in the name of and at the expense of the Owner, covering all of the Owner's employees.

(d) Establish and supervise an accounting department, with appropriate motel accounting and cost control systems and personnel, to be maintained by the Owner at the Motel. The Manager shall cause such department to prepare and file all necessary reports with respect to withholding taxes, social security taxes, unemployment insurance, disability insurance, the Fair Labor Standards Act, and all other statements and reports pertaining to labor employed on the Owner's payroll in or about the Motel. The Manager shall establish and supervise all bookkeeping, accounting, and clerical services, including the maintenance of payroll records, incident to the efficient operation and maintenance of the Motel. All personnel engaged in such bookkeeping, accounting, and clerical services shall be the Owner's employees.

(e) Make available to the Owner, without cost to it, the services of the Manager's specialized facilities employed in the performance of its motel management activities generally, including its central buying facilities, its insurance facilities, and its engineering, maintenance, accounting, cost control, taxation, food and beverage control, publicity, advertising, convention, labor relations, and safety departments.

(f) Receive, consider, and handle the complaints of all tenants, guests, or users of any of the Motel's services or facilities.

(g) Enter into contracts in the name of and at the expense of the Owner for the furnishing to the Motel of electricity, gas, water, steam, telephone, cleaning (including window cleaning), vermin exterminators, elevator and boiler maintenance, air conditioning maintenance, master television antennas, and other necessary utilities or services, and purchase all materials and supplies in the name of, for the account of, and at the expense of the Owner.

(h) Arrange for the making or installing, at the Owner's expense and in its name, of alterations, repairs, decorations, replacements, equipment, or installations; provided that the Owner shall at all times have the right to do or arrange any of such work itself.

(i) Deposit in a banking institution or institutions selected by the Owner and in accounts in the Owner's name or, at the Owner's option, in the Manager's name as agent for the Owner all moneys furnished by the Owner as working funds and all moneys received by the Manager for or on the Owner's behalf. The Manager shall pay from such accounts on behalf of the Owner, as required for operation of the Motel, all assessments and charges of every kind imposed by any governmental authority having jurisdiction (other than real estate taxes, sewer rents, and water charges) and interest and penalties thereon, license fees, permit fees, and insurance appraisal fees; fines, penalties, and court disbursements incurred in connection with the operation of the Motel; premiums on policies of insurance; all disbursements authorized by this agreement; and any other charge, item of expense, or other item which the Owner, in writing, directs to be paid. Interest, penalty fines, and other charges payable because of delays in payment not authorized by the Owner shall be reimbursed by the Manager.

(j) Arrange at the Owner's expense for compliance with all statutes, ordinances, laws, rules, regulations, orders, and determinations affecting or issued in connection with the Motel by any governmental authority having jurisdiction thereof. The Manager shall not, without the Owner's prior written consent, make any alterations or repairs so ordered or so required, if not included in the Annual Plan, but if any such alterations or repairs are not made because of the Owner's failure to give its written consent after request therefor, then the Owner shall hold the Manager harmless from any liability that may arise by reason of the failure to make such alterations or repairs. Notwithstanding the foregoing, in case of an emergency or if failure promptly to comply with any order or to cure any violation shall expose the Owner or the Manager to the imminent danger of criminal liability other than payment of fines, then in such event the Manager shall cause such order or violation to be complied with or cured without awaiting the Owner's written consent. Unless otherwise directed by the Owner, the Manager shall, at the Owner's expense, protest or litigate to final decision in any appropriate court or forum any violation, order, rule, or regulation affecting the Motel. The Owner shall designate or approve any counsel engaged under this subparagraph.

(k) Institute, in its own name or that of the Owner, at the Owner's expense, all necessary legal actions or proceedings to

collect charges, rent, or other income from Motel, to oust or dispossess guests, tenants, or other persons in possession, or to cancel or terminate any lease for the breach thereof or default thereunder by the tenant. The Manager, however, shall not institute any legal actions with respect to any lease of _____ (_____) years or more without the Owner's prior consent. The Owner shall designate or approve any counsel engaged under this subparagraph.

(l) Cause the Motel to comply with all the terms, conditions, and obligations contained in any mortgage, lease, or other agreement executed by the Owner which relates to the Motel. The Owner shall notify the Manager of any such mortgage, lease, or other agreement, but the Manager shall be deemed to have notice of all such documents prepared or negotiated by it.

(m) Include the name of the Motel in the Manager's institutional advertising in the same manner and on the same basis as other motels owned or managed by the Manager, in accordance with the current Annual Plan submitted by the Manager and approved by the Owner.

6. Statements and Payments to Owner. The Manager shall render statements and make payments to the Owner as follows:

(a) On or before the _____ (_____) day of each calendar month the Manager shall render to the Owner, and to all persons designated by the Owner, a detailed profit and loss statement of the Motel's operations for the preceding calendar month and for the portion of the operating year ended on the last day of such preceding calendar month, a detailed statement, for such calendar month and for such portion of such operating year, of all capital expenditures made by the Manager for the account of the Owner, and a detailed statement of the "adjusted net sales" of the Motel (as defined in paragraph 7 hereof) for such calendar month and for such portion of such operating year. Such statements shall be prepared by the Manager and certified by one of its authorized financial officers.

(b) The Manager shall render to the Owner, and to all persons designated by the Owner, within _____ (_____) months after the end of each operating year, a detailed profit and loss statement of the Motel's operations for such operating year, a detailed statement for such operating year of all capital expenditures made by the Manager for the account of the Owner, and a detailed statement of the Motel's adjusted net sales for such operating year, all prepared by and certified at the Owner's expense by a certified public accountant reasonably designated by the Owner.

(c) The Manager shall render to the Owner and all persons designated by the Owner, at the Owner's expense, all other statements reasonably required by the Owner.

(d) Within _____ (_____) days after the end of each calendar month, and simultaneously with the delivery of the statements mentioned in subparagraph (a) above, and without intending in any manner to restrict the Owner in the use or right of withdrawal of any of the funds on deposit in the bank accounts described in subparagraph (i) of Paragraph 5, the Manager shall remit to the Owner from such bank accounts the amount collected by the Manager during the preceding calendar month, less disbursements and advances made on behalf of and for the Owner's account, and less also such reasonable sums as the Manager may reasonably deem necessary or appropriate as reserves to meet obligations which will or may become due thereafter, taking into account estimated future income.

(e) The Manager shall promptly remit to the Owner all discounts, rebates, profits, commissions, or other emoluments received by the Manager or any of its Affiliates in connection with any purchase of materials or supplies delivered to or for the Motel or in connection with any contract or agreement entered into on the Owner's behalf or in connection with the Motel. For the purpose of this subparagraph, the Manager's "Affiliate" shall mean any corporation or other entity controlling, controlled by, or under common control with the Manager, or any officer, director, employee, or

shareholder of the Manager, excluding however any entity or person owning less than _____ percent (_____%) of the outstanding shares of the Manager or Affiliate, or owning less than _____ percent (_____%) of the beneficial interest in such other entity. This subparagraph is intended to ensure that neither the Manager nor any Affiliate shall receive, directly or indirectly, any compensation, consideration or profits, other than the compensation to be paid hereunder by the Owner to the Manager. The provisions of this paragraph shall not apply to any charges which the Owner may consent to in connection with its participation in a credit plan or a hotel referral system operated by the Manager or any of its Affiliates.

7. Manager's Compensation During Operating Period. As compensation for the services to be rendered by the Manager during the operating period, the Owner shall pay to the Manager a sum equal to _____ Dollars (\$_____) per annum plus _____ percent (_____%) of the "adjusted net sales" of the Motel. The term "adjusted net sales" for any period shall mean all net sales during such period from all operations of the Motel (less a reasonable reserve for bad debts), but shall exclude net sales of guest rooms; receipts from telephone service or telephone facilities; receipts for sales taxes, amusement taxes, excise taxes; and receipts of tenants, licensees, or concessionaires, provided that net rents, fees, or charges received from such tenants, licensees, or concessionaires shall be included in adjusted net sales. The first payment shall be made by the Owner to the Manager on the _____ (_____) day of the month following the first _____ (_____) calendar months of the operating period. Quarter-annually thereafter, on the _____ (_____) day of the respective month, the Owner shall pay to the Manager the compensation payable for the _____ (_____) calendar months previous thereto.

8. Insurance

(a) The Manager shall maintain, in companies and through brokers selected by the Owner, insurance of such kinds and amounts as the Owner shall be required to carry pursuant to the provisions of any mortgage outstanding affecting the Motel or the plot of land upon which it is erected, as well as any other insurance that the Owner shall require.

(b) Concurrently with the submission of the first Annual Plan, the Manager shall furnish the Owner with a schedule setting forth the kinds and amounts of insurance the Manager intends to procure in connection with the operation of the Motel. Such schedule shall include, in addition to the kinds and amounts of insurance required to be maintained pursuant to any mortgage, such other kinds and amounts of insurance as the Manager shall deem necessary or advisable for the protection of the Manager and the Owner. Promptly following receipt of such schedule, the Owner shall notify the Manager of all changes which the Owner shall elect to make in such schedule, and the Manager shall thereupon forthwith apply for and obtain, if obtainable, all such insurance from such companies and through such brokers as the Owner shall direct.

(c) Concurrently with the submission of each subsequent Annual Plan, the Manager shall furnish the Owner with a schedule setting forth the kinds and amounts of insurance then in force and the names of the insurers, and also setting forth such additional kinds and amounts of insurance which the Manager then intends to procure. Promptly following the submission of each such schedule, the Owner shall notify the Manager of any change in the kinds and amounts of insurance then in force or intended to be procured by the Manager which the Owner shall elect to make and the Manager shall forthwith apply for and obtain, if obtainable, endorsements to reflect any such change in the insurance then in force and such additional kinds and amounts of insurance. All such additional insurance shall be obtained from such companies and through such brokers as the Owner shall direct.

(d) All policies of insurance shall name the Owner, the Manager, and such other parties as may be required by the provisions of any mortgage as the insureds thereunder, as their respective interests may appear. All policies of hazard insurance shall include loss payment clauses in the form required by any mortgage. All insurance shall be obtained at the Owner's expense. The originals of all policies of insurance and duplicates thereof shall be delivered to the Owner

and to the holder of any mortgage as the Owner shall direct.

(e) Provided the Manager shall procure and keep in force all of the procurable insurance required to be obtained by the Manager pursuant to the foregoing provisions of this Paragraph 8, neither the Owner nor the Manager shall assert against the other any claims for any losses, damages, liability, or expenses (including attorneys' fees) incurred or sustained by the Manager or the Owner and not fully reimbursed by insurance proceeds.

(f) The Manager shall maintain throughout the term of this agreement such fidelity and other bonds as the Owner shall require from time to time for the full protection of the interests of the Owner and the Manager. Any such bond or bonds may also protect the interests of the holder of any mortgage and shall be in such amounts and obtained from such surety companies as the Owner shall direct.

(g) The Owner shall give prompt notice of all claims made against it or against it and the Manager and shall cooperate fully with the Manager and with any insurance carrier to the end that all such claims will be properly investigated and defended. The Manager shall not hire any attorneys to defend any such claim against the Owner without the Owner's consent.

9. Restrictive Covenant. As long as this agreement is in full force and effect, the Manager shall not, directly or indirectly, or by an Affiliate of the Manager, own, operate, manage, or otherwise have an interest in any other motel, inn, hotel, or similar establishment within a radius of _____ (_____) miles of the Motel.

10. Early Termination of Agreement. This agreement and the employment of the Manager shall be terminated, and except as to liabilities or claims which shall have accrued or arisen prior to such termination, all obligations hereunder shall cease if any of the following events shall occur:

(a) If, pursuant to any statute of the United States or of any state, the Manager files in any court a petition in bankruptcy or insolvency, or for a reorganization, or for the appointment of a receiver or trustee of all or a substantial portion of the Manager's property, or if the Manager makes an assignment for or petitions for or enters into an arrangement for the benefit of creditors, or if a petition in bankruptcy is filed against the Manager which is not discharged within _____ (_____) days thereafter.

(b) The giving of notice by the Owner upon its sale of the Motel.

(c) If the Manager shall cease to be actively engaged in the business of operating and managing motels and inns, and notice of termination shall have been given to it by the Owner, provided such notice shall fix a date of termination at least _____ (_____) days after the date it was given. The Manager shall be deemed to have ceased to be actively engaged in the business of operating and managing motels and inns if less than _____ percent (_____) of its total gross income and that of its subsidiary corporations shall be derived from the motel, inn, catering, restaurant, beverage, and related businesses.

(d) The taking of the entire or a substantial portion of the Motel, or its services, through lawful condemnation proceedings by any governmental authority.

(e) The Owner gives notice that it has elected, for any reason whatsoever, not to build the Motel.

(f) The loss by the Owner of the Motel or of the right of possession or the right to collect the income from the Motel due to any cause whatsoever, including, without limitation, its default on any mortgage or other obligation, or by operation of law.

(g) The Owner gives notice, within _____ (_____) months after substantial damage or destruction of the Motel by fire or other casualty, that it has elected not to rebuild or restore the Motel.

(h) The Owner gives notice if the Manager, in the Owner's opinion, shall have committed a material breach of this agreement, and the Owner shall have served written notice upon the Manager setting forth the details of such alleged breach, and the Manager shall not, within _____ (_____) days after the mailing of such notice, have cured such breach, or if such breach is of a nature that it cannot be cured within such _____ (_____) day period, the Manager shall not within such _____ (_____) day period have commenced and at all times thereafter have diligently proceeded with all acts required to cure such breach. Any such termination shall be without prejudice, however, to any and all rights and remedies of the Owner. If the Manager shall, within _____ (_____) days after receipt of the notice of such breach, serve upon the Owner written notice disputing the Owner's claim of material breach and demanding arbitration thereof, then the dispute shall be submitted promptly to arbitration for determination in accordance with the rules of the American Arbitration Association, and such determination shall be binding upon both parties. If the Manager shall not serve timely demand for arbitration, or if such arbitration, having been timely demanded, shall result in a determination that the Manager has committed a material breach of this agreement, all costs and expenses incurred in connection with such arbitration shall be borne solely by the Manager. If such arbitration, having been timely demanded, shall result in a determination that the Manager has not committed a material breach of this agreement, then the Owner shall bear all costs and expenses incurred in connection with such arbitration.

11. Casualty. In the event of any damage or loss to the Motel by fire or other casualty, the Manager shall act as follows:

(a) If the damage or loss involves more than _____ Dollars (\$_____), the Manager shall give immediate written notice thereof to the Owner.

(b) As agent for the Owner, the Manager shall promptly apply for the insurance covering such damage or loss, and in the Owner's name shall prosecute and negotiate for payment of such proceeds, employing counsel (to be selected by the Owner) if necessary for such purposes.

(c) The Manager shall give written notice of any proposed settlement to the Owner, and shall settle such claim and in behalf of the Owner collect the proceeds thereof; provided that the Owner's written consent shall be required to validate the settlement of any claim in excess of _____ Dollars (\$_____).

(d) The Manager shall cause the premises, in the Owner's name and at the Owner's expense, to be repaired and restored as nearly as practicable to the condition existing immediately prior to such damage or destruction, but if such repair or restoration involves the expenditure of more than _____ Dollars (\$_____), the Owner's written consent thereto shall first be obtained.

(e) The provisions of this paragraph and the rights and obligations of the Owner and the Manager hereunder are expressly subject to all mortgages from time to time outstanding, and the Manager shall cause to be taken all such actions with respect to such damage or loss, and the insurance proceeds thereon, as may be required by such mortgages.

12. Prohibition of Assignment. The Manager shall not assign this agreement or any of its rights hereunder; nor shall this agreement or any of the Manager's rights or obligations hereunder be transferable on the Manager's part by operation of law or otherwise, except by its merger or consolidation with a corporation if the operating personnel of such corporation at the time of such merger or consolidation shall be substantially the same as the operating personnel of the Manager, and if such corporation shall be actively engaged in the business of managing and operating motels and inns as defined in Paragraph 10(c) hereof.

13. Agreement Not an Interest in Real Property. This agreement shall not be deemed at any time to be an interest in real estate or a lien of any nature against the Motel or the land upon which it is erected. The rights of the Manager shall at all times be subject and subordinate to all mortgages which may now or hereafter be outstanding, and to all renewals, modifications, consolidations, replacements, and extensions thereof. This clause shall be self-operative and no further instrument of subordination shall be required by any mortgagee. The Manager shall execute promptly any certificate or other document that the Owner or any mortgagee may request as to such subordination, and the Manager hereby irrevocably constitutes and appoints the Owner as the Manager's attorney-in-fact to execute any such certificate or document for and on behalf of the Manager.

14. Notices. Any and all notices, consents, or directives by either party intended for the other shall be sent by registered or certified mail, return receipt requested, to the Owner at _____[address], and to the Manager at _____[address], unless either party shall have designated different addresses by serving written notice of change of address on the other party by registered or certified mail.

15. Entire Agreement. This Agreement supersedes all agreements previously made between the parties relating to its subject matter. There are no other understandings or agreements between them.

16. Non-waiver. No delay or failure by either party to exercise any right under this Agreement, and no partial or single waiver shall constitute a waiver of other rights or remedies which a party may have hereunder or under common law or statute.

17. Headings. Headings in this Agreement are for convenience only and shall not be used to interpret or construe its provisions.

18. Governing Law. This Agreement shall be construed in accordance with and governed by the laws of the State of _____[state].

19. Counterparts. This Agreement may be executed in two or more counterparts, each of which shall be deemed an original but all of which together shall constitute one and the same instrument.

20. Binding Effect. The provisions of this Agreement shall be binding upon and inure to the benefit of both parties and their respective legal representatives, successors, and assigns.

21. Miscellaneous

(a) In the event of the sale of the Motel, the Owner may assign this agreement to the purchaser. Upon such assignment and the purchaser's written assumption of the Owner's obligations hereunder, the Owner shall be fully released and relieved of all obligations hereunder.

(b) Any consent required of the Owner shall be ineffective unless it is in writing and signed by a duly authorized officer of the Owner.

(c) The Owner has made no representation of any nature in connection with the design or facilities of the Motel, and the Owner shall have the right to construct, equip, and furnish the Motel in any manner it desires.

(d) The term "mortgage" as used in this agreement shall be deemed to mean mortgage, deed of trust, or similar document, and the term "mortgagee" shall be deemed the holder of a mortgage.

(e) This agreement cannot be changed or modified except by another agreement in writing signed by the party sought to be charged therewith or by its duly authorized agent.

The parties hereto have caused this agreement to be executed the day and year first above written.

"OWNER"

a(n) _____ [state] _____ [entity]

By: _____

Print Name: _____

Title: _____

"MANAGER"

a(n) _____ [state] _____ [entity]

By: _____

Print Name: _____

Title: _____

[Attach Exhibit A]



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Current Legal Forms for Real Estate

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Current Legal Forms for Real Estate
Chapter 22 DEVELOPMENT AND SUBDIVISION
Part IV. FORMS
F. REAL ESTATE MANAGEMENT

26-22 Current Legal Forms for Real Estate FORM 22.102

FORM 22.102 Multiple Properties--agent as "independent contractor"

COMMENT

In this agreement the owner of various properties places the responsibility for managing all of them in a single agent. The properties include multi-tenant units and units leased in their entirety to a single tenant. Under this agreement, the manager is to collect all rentals, procure tenants, pay operating expenses, and employ necessary personnel.

FORM

AGREEMENT entered into this _____[day] day of _____[month],
_____[year], between _____[name], a(n) _____[state]
_____[entity] in business trust form (the "Trust"), and _____[name], a(n)
_____[state] _____[entity] (the "Manager").

RECITALS

The Trust is either the owner of the fee or the long-term lessee of various properties and interests therein, all located in the State of _____[state].

Certain properties are leased to a single tenant who is responsible for their maintenance, and certain other properties are multitenant properties which the Trust may not manage or operate directly.

Management contracts with independent contractors for the supervision and management of such properties expire on _____[month] _____[day], _____[year].

The Trust desires uniform and continuous management of all such properties by a single qualified organization.

Now therefore, in consideration of the mutual promises herein contained, the parties agree as follows:

1. Employment of Manager. The Trust hereby employs the Manager and the Manager hereby accepts the employment, under the terms and conditions set forth herein, to manage and operate the properties owned by the Trust which are described in Schedule A attached hereto.

2. Duties of Manager. Subject to the conditions or limitations set forth herein, and to the requirements of any law or administrative enactment applicable to the properties described in Schedule A, the Manager shall perform the following:

(a) Collect all rentals due to the Trust under the terms of any lease or rental agreement presently in effect or hereinafter entered into.

(b) Use its best efforts to secure tenants for any rentable space now vacant, or becoming vacant during the term of this agreement by reason of lease expirations or otherwise, at the best possible rentals and lease terms.

(c) Negotiate leases, licenses, and concession agreements, and upon receipt of written authority of the Trust, execute and deliver the same, together with all modifications, cancellations, renewals, and extensions.

(d) Incur and pay or cause to be paid, from its own funds, all normal and routine charges and operating expenses of such properties, for which expenditures the Manager shall be reimbursed by the Trust upon proof of account and payment. The Manager shall pay without right of reimbursement from the Trust all expenses of advertising and renting vacant space, including, but not limited to, the payment of fees or commissions to other brokers.

(e) Employ such personnel as are required in the proper maintenance and operation of such properties, including at least one person to be resident on the premises of each apartment property. The Manager shall pay from its own funds all salaries and wages, payroll taxes, and all premiums and charges for workmen's compensation insurance, and shall not be entitled to reimbursement for any amounts so incurred or paid. The Manager shall have the authority to discharge such personnel in its discretion.

(f) Maintain one or more bank accounts for the deposit of funds received pursuant to this agreement and, subject to the provisions of Paragraph 3(c) hereof, make disbursements from such account.

(g) Make reports to the Trust, not less often than monthly, as to income, expense, and any other material information which may be requested by the Trust, including a description of any repair, alteration, or improvement which the Manager deems necessary in order to preserve or improve the appearance and tenantability of such properties.

(h) Maintain authorized representatives available at all reasonable times, upon or in close proximity to such properties, for the purpose of maintaining good tenant relations.

(i) Take any other action, not specifically prohibited or limited by this agreement or by law or administrative enactment, which may be required in the Manager's judgment in order to obtain the maximum benefits from each of such properties.

3. Restrictions and Conditions Limiting Agent. The following are conditions governing the Manager in the performance of its duties and responsibilities with respect to such properties:

(a) The Manager shall not, without written authorization from the Trust, make, cause to be made, contract for, or agree

to any expenditure for repair or maintenance, the total cost of which will exceed _____ Dollars (\$_____). This restriction shall apply to the total cost of any such repair or maintenance even though undertaken on a partial completion, or other basis, where individual statements or vouchers would not exceed such sum, but where the entire expenditures will, when the repair or maintenance job is completed, exceed such sum.

(b) The Manager shall not make any payment which is the obligation of the Trust regarding any mortgage, mortgage note, open or installment note, real estate or personal property tax levy, assessment, or any contract or policy of insurance covering any property or any item of personal property located thereon, or regarding any item which may be considered other than normal operating expense of any property. The Manager shall, upon receipt of any statement, invoice, bill, or other notification of any such items, immediately forward such notification to the Trust.

(c) The Manager's reimbursement of expenses may, at its option, be in cash payment from the Trust or be discharged by payment from the account or accounts described in Paragraph 2(f) hereof. The Manager shall, in its reports to the Trust, fully itemize all such disbursements, and provide the Trust with a copy of all statements, invoices, bills, or other evidence of amounts which have been so discharged, together with a description of the property to which the expenditure was applicable.

(d) The Manager shall cause all persons under its control, whether employees or not, with authority to collect, handle, or disburse any rentals from such properties, to be bonded in an amount adequate to insure the return of any such moneys which may be lost due to loss, theft, embezzlement, or other cause generally included in coverage under fidelity bonds.

4. Insurance. The Trust shall at its own cost maintain adequate insurance on each of such properties against loss by fire or other hazard. The Manager shall at its own cost maintain adequate public liability insurance on such properties. The Manager shall indemnify the Trust against any liability, incurred by the Trust as owner or lessee of any of such properties, which results from any act or omission on the part of the Manager, its agents, servants, employees, or contractors.

5. Manager's Compensation. The Trust shall pay the Manager, as compensation for its services hereunder, the sum of _____ Dollars (\$_____) annually, in installments of _____ Dollars (\$_____) payable on the last day of each month. In addition, the Trust shall pay the Manager an amount equal to _____ percent (_____) of the first year's rental under any new lease, not including renewals or extensions, negotiated or obtained by or through the Manager's efforts. As further compensation, the Trust shall allow the Manager to house the resident manager of each apartment building in an apartment located in such building, without obligation to pay rent thereon. The Trust or its officers may procure leases upon space other than by or through the Manager. The Manager shall not receive any additional amount in connection with any new lease not procured by it.

6. Term

(a) This agreement shall take effect on _____ [month] _____ [day], _____ [year], and shall continue in full force and effect to and including _____ [month] _____ [day], _____ [year], at which time it shall terminate unless extended, continued, or renewed in writing by both parties. Any such extension, continuation, or renewal shall specify the term, together with all amendments in the provisions thereof.

(b) In the event of a bona fide sale of any of such properties, or a lease of any of such properties to a single tenant for a term of not less than _____ (_____) years, or the destruction, demolition, or condemnation of any of such properties, either party may terminate this agreement in its entirety or as to any such property or properties, by giving not less than _____ (_____) days' notice to be served by registered or certified mail upon the other party. No partial termination of this agreement shall be effective

unless within such _____ (_____) day period the parties execute a written amendment thereto.

(c) This agreement shall terminate immediately and without notice in the event a petition in bankruptcy is filed by or against either party, or in the event either party shall make an assignment for the benefit of creditors or take any action for relief under statutes or rules relating to insolvency.

7. Limitation on Assignment. The Manager shall not transfer, assign, sell, or in any manner hypothecate or pledge this agreement. This agreement shall terminate automatically upon any such transfer, assignment, sale, hypothecation, or pledge, except that it shall not terminate upon any sale or merger of the Manager if the Manager's presently controlling interests continue in control of the purchaser or the resulting company after such sale or merger.

8. Dealing with Manager. The Trust shall not convey, directly or indirectly, an interest in any real property to or through the Manager or any of its officers, directors, employees, or affiliates, nor shall the Trust acquire directly or indirectly any interest in real property from or through the Manager or any of its officers, directors, employees, or affiliates or in which the Manager or any of its officers, directors, employees, or affiliates have any direct or indirect proprietary interest, unless prior written waiver of this provision is first obtained from the Trustees.

9. Independent Contractor. The Manager shall at all times be considered an independent contractor, and it shall be solely responsible for the means, method, tools, employees, and procedures used in connection with the services being rendered hereunder. Manager shall be solely responsible for all federal, state, and local taxes applicable thereto.

10. Entire Agreement. This Agreement supersedes all agreements previously made between the parties relating to its subject matter. There are no other understandings or agreements between them.

11. Notices. All notices under this Agreement shall be in writing and delivered personally or mailed by certified mail, postage prepaid, addressed to the parties at their last known addresses.

12. Non-waiver. No delay or failure by either party to exercise any right under this Agreement, and no partial or single exercise of that right, shall constitute a waiver of that or any other right, unless otherwise expressly provided herein.

13. Headings. Headings in this Agreement are for convenience only and shall not be used to interpret or construe its provisions.

14. Governing Law. This Agreement shall be construed in accordance with and governed by the laws of the State of _____[state].

15. Counterparts. This Agreement may be executed in two or more counterparts, each of which shall be deemed an original but all of which together shall constitute one and the same instrument.

16. Binding Effect. The provisions of this Agreement shall be binding upon and inure to the benefit of both parties and their respective legal representatives, successors, and assigns.

The parties have executed this agreement on _____[month] _____[day],
_____ [year].

"TRUST"

a(n) _____ [state] _____ [entity]

By: _____

Print Name: _____

Title: _____

"MANAGER"

a(n) _____ [state] _____ [entity]

By: _____

Print Name: _____

Title: _____

[Attach Schedule A]



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26-22 Current Legal Forms for Real Estate FORM 22.103

FORM 22.103 Supervisory management agreement

COMMENT

Arrangements for the multi-ownership of real property by such entities as partnerships, syndications, and trusts often require considerable administrative and accounting services to keep the affairs of the entity itself in order. This is because there may be many members in any given entity, and because their various interests may be undergoing constant change as a result of sales, gifts, deaths, etc. It is often considered advisable to separate the responsibility for keeping the affairs of the entity in order from the actual management of the entity's real property. This is generally achieved through the appointment of a supervisory management agent.

The principal activities of the supervisory manager under this agreement are to determine the cash proceeds periodically due to each member of the owning partnership, to make periodic distributions to all members, to calculate each member's taxable income from the property, to prepare annual tax returns of the owning entity, and to record assignments of members' interests.

In some cases the owner and the supervisory manager are related entities. An arrangement of this kind between related entities may be subject to attack as an unwarranted deflection of income. If the compensation bears a realistic relationship to the services performed, the entity's deduction for the cost of such compensation will be sustained. However, where the compensation is not "fair," the deduction may be denied on the ground that the expenditure does not meet the "ordinary and necessary" test for deductions in general.

FORM

AGREEMENT made this _____[day] day of _____[month],

_____[year], between _____[name] a(n) _____[state]
 _____[entity] with offices located at _____[address] ("Owner"), and
 _____[name] a(n) _____[state] _____[entity] with offices located
 at _____[address] ("Manager").

WHEREAS Owner owns the premises known as the _____[name], located at
 _____[address] (the "Building"); and

WHEREAS Owner has agreed to retain Manager in the capacity of supervisory management agent upon the terms and conditions hereinafter set forth,

Now, therefore, in consideration of the foregoing and the covenants hereinafter contained, it is mutually agreed as follows:

1. Employment of Agent. Owner hereby employs Manager to act in the capacity of supervisory management agent to perform the administrative and ministerial functions with respect to the Building set forth herein.
2. Undertaking of Agent. Manager shall devote such time and attention as it considers proper and necessary to act in the capacity of supervisory management agent, to maintain all records of the interest of Owner's partners, to arrange for the preparation and execution of all assignments of partnership interests and to record such assignments, to maintain Owner's financial books and records, and to calculate and make monthly disbursements and distributions. Preparation and recording of assignments of limited partnership interests shall be paid for by the assignees of such interests, as provided in the Owner partnership agreement. In addition, Manager shall cause a certified public accountant to supervise the maintenance of Owner's books and records, to prepare all necessary tax and information returns of Owner, and to prepare and distribute to Owner's various partners an annual profit and loss statement and balance sheet of Owner. The fees of such accountant shall be borne by Manager.
3. Compensation of Agent. Owner shall pay to Manager as full compensation for all services rendered by Manager the yearly sum of _____ Dollars (\$ _____), payable in equal monthly installments at the end of each and every month during the term of this agreement, commencing one month from the date hereof.
4. Direct Management of Property. The services contemplated to be performed by Manager under this agreement are not intended to cover and are separate from those involved in the direct management and operation of the property. The parties contemplate that a separate management organization will be engaged by Owner. All expenses and fees incurred in connection with the direct management and operation of the property shall be borne by Owner, whether incurred directly or through a separate management organization.
5. Termination of Agreement. This agreement shall terminate if any of the following events shall occur:
 - (a) Termination and dissolution of Owner.
 - (b) Bona fide sale of the Building by Owner.
 - (c) Misconduct on the part of Manager.
6. Term. This agreement shall continue for a period of _____ (_____) years from the date hereof, and shall be automatically renewed from year to year unless terminated by either party upon written notice sent to the other party not less than _____ (_____) days before any expiration date.
7. Arbitration. The parties shall submit any dispute as to the application or interpretation of any term of this agreement

to arbitration under the governing rules and regulations of the American Arbitration Association in the City of _____ [city]. Any arbitration hereunder shall be by _____ (_____) arbitrators. The parties shall bear equally the cost of such arbitrators unless the arbitrators determine that either party is acting in bad faith, in which event the arbitrators may require such party to bear the entire cost of the arbitration.

8. Modification. This agreement may not be modified, altered, or amended in any manner except by a written agreement executed by both parties.

9. Assignment. This agreement is assignable by Manager without Owner's consent.

10. Entire Agreement. This Agreement supersedes all agreements previously made between the parties relating to its subject matter. There are no other understandings or agreements between them.

11. Notices. All notices under this Agreement shall be in writing and delivered personally or mailed by certified mail, postage prepaid, addressed to the parties at their last known addresses.

12. Non-waiver. No delay or failure by either party to exercise any right under this Agreement, and no partial or single exercise of that right, shall constitute a waiver of that or any other right, unless otherwise expressly provided herein.

13. Headings. Headings in this Agreement are for convenience only and shall not be used to interpret or construe its provisions.

14. Governing Law. This Agreement shall be construed in accordance with and governed by the laws of the State of _____ [state].

15. Counterparts. This Agreement may be executed in two or more counterparts, each of which shall be deemed an original but all of which together shall constitute one and the same instrument.

16. Binding Effect. The provisions of this Agreement shall be binding upon and inure to the benefit of both parties and their respective legal representatives, successors, and assigns.

The parties hereto have hereunto set their hands and seals the day and year first above written.

"OWNER"

a(n) _____ [state] _____ [entity]

By: _____

Print Name: _____

Title: _____

"MANAGER"

a(n) _____ [state] _____ [entity]

By: _____

Print Name: _____

Title: _____



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26-22 Current Legal Forms for Real Estate FORM 22.104

FORM 22.104 Managing agent account--real estate--apartments--Fair Housing Law compliance

COMMENT

The form illustrated here is typical of the growing involvement of trust departments in managing various types of investments on behalf of trustees. Thus, if the subject property is the corpus of a trust, the trustee may wish to unburden himself of rental collections, etc., and execute such an agreement. The Fair Housing Law compliance clause precludes discrimination actions.

The general tenor of this agreement is also adaptable to contracts with professional nonbanking real property managers with appropriate insertions.

FORM

_____[city], _____[state]
_____[month] _____[day], _____[year]

_____[agent]

Trust Department

_____[city], _____[state]

Gentlemen:

The undersigned, being the owner of the premises located in the City of _____[city], County of _____[county], State of _____[state], hereby appoints you, the _____[name] of _____[city], _____[state] ("Bank"), exclusive agent for the care and management of said premises.

1. Management Duties; Fair Housing Clause. As such agent you are authorized to rent the premises and maintain and operate the same, and, until otherwise instructed, you are directed to:

(a) Advertise any vacant space at owner's expense.

(b) Secure tenants and sign leases for a period not exceeding _____ (_____) years, or rent on month-to-month tenancy. The name of any prospective tenant or purchaser, together with such information as may be available as to his credit rating and reputation, shall be submitted to me. I shall have _____ (_____) days from the date the material is mailed to me to approve or disapprove the prospective tenant or purchaser. My failure to reply in writing within the _____ (_____) day period shall be construed as approval of any action deemed proper by you as Agent and shall be final and binding to the same extent as if written approval had been given. The foregoing provision is incorporated herein because it is understood that the Bank is opposed to discrimination on the basis of race, color, religion, sex, or national origin and will comply with all federal and local statutes including, but not limited to, the Fair Housing Act and local antidiscrimination laws and rules promulgated thereunder.

(c) Collect rents and prosecute suits for rent or possession of said premises or, when you deem it expedient, to settle such suits.

(d) Make, at the owner's expense:

(1) All emergency repairs such as plumbing breaks, roof leaks, basement leaks, etc.

(2) All other repairs, alterations, decorating which you consider necessary or expedient, not to exceed _____ Dollars (\$_____) per job. Above that amount, you must receive written authorization from the owner.

(e) Purchase and pay for all supplies and other necessary materials, including water, gas, and power charges.

(f) Employ, supervise, discharge, and pay all janitors, engineers, and other employees.

(g) Keep the property insured with responsible insurance companies for reasonable amounts against all usual hazards and risks.

(h) Pay taxes and assessments, if any, and perform all other acts incidental to the proper management of the property at owner's expense.

(i) You are to render a statement of income and expenses and make remittances for the net amount in your hands at least as often as once monthly.

2. Owner's Covenants

(a) In case the disbursements are in excess of rents collected by you, the undersigned agrees to pay such excess promptly upon demand.

(b) The undersigned agrees to indemnify and save you harmless from any and all claims, debts, or demands arising in favor of or asserted by any person, firm, or corporation occurring by reason of your said agency, or by reason of any act or thing done in connection with this contract.

3. Fees. Your fees are to be at the rates specified in your regular schedule for Real Estate Managing Agent Accounts in effect from time to time and may be charged to and paid out of any available funds held hereunder.

4. Liability. You shall not be liable for involuntary losses or for any loss or damages except such as may be caused by your own bad faith.

5. Binding Agreement. This agreement shall be binding upon the successors and assigns of the agent, and the heirs, executors, administrators, successors, and assigns of the undersigned.

6. Entire Agreement. This contract and the definitions hereinafter set out constitute the entire agreement between the parties and no other oral or verbal agreement or understanding shall bind either of them.

7. Notices. All notices under this Agreement shall be in writing and delivered personally or mailed by certified mail, postage prepaid, addressed to the parties at their last known addresses.

8. Non-waiver. No delay or failure by either party to exercise any right under this Agreement, and no partial or single exercise of that right, shall constitute a waiver of that or any other right, unless otherwise expressly provided herein.

9. Headings. Headings in this Agreement are for convenience only and shall not be used to interpret or construe its provisions.

10. Governing Law. This Agreement shall be construed in accordance with and governed by the laws of the State of _____[state].

11. Counterparts. This Agreement may be executed in two or more counterparts, each of which be deemed an original but all of which together shall constitute one and the same instrument.

12. Leasing Definitions

(a) *Gross lease*. A gross lease is one in which the Lessor assumes the payment of general taxes, building insurance, and exterior maintenance of the property leased.

(b) *Net lease*. A net lease is one in which the Lessee assumes ownership responsibilities and pays all or the major portion of charges against the property leased which are normally incurred both through ownership and through occupancy.

In net leases, any costs or charges incurred by the tenant for the benefit of the owner will be spread over the entire term of the Lease and considered as additional rental.

(c) *Renewal privilege*. When the Lease or a separate instrument or agreement between the Lessor and Lessee contains a privilege of renewal or extension, the commission is based on the term of the Lease exclusive of the period covered by the renewal or extension privilege. If the Lessee exercises the privilege of renewal or extension or enters into a new Lease during or immediately at the expiration of the original term of the Lease, whether or not said new Lease shall demise the same space upon substantially the terms set forth in the original Lease, a commission is charged on the extended or additional period. The additional commission shall be computed as equaling the difference between the amount of commission due for the entire term, including the extended or additional period and the amount of commission previously paid.

(d) *Option to purchase*. When the Lease or any renewal or extension thereof, or any separate instrument or agreement shall contain a provision giving the Lessee an option to purchase the property and the Lessee does purchase the property

at any time during the period or periods covered by the original Lease, any renewal or extension thereof or any separate instrument, even though on terms and conditions not in accord with those set forth in said option, the commission is based on the rate then in effect for making sales of real estate. If the option to purchase is exercised at any time during the term of said Lease, the Lease commission shall terminate at the date of sale.

(e) *Business property--percentage leases.* A Percentage Lease is one in which payment is measured in full or in part, or is dependent on the gross business in dollars transacted by the Lessee through the use of the property. The term Gross Sales, as used and referred to in all percentage leases, includes all sales of merchandise and/or performance of any service for any customer or patron made by the Lessee, Lessee's employees, subtenants, or anyone whomsoever working in, out, through, or from the demised premises, less credits for returned merchandise.

This contract may be terminated by either party by giving at least _____ (_____) days' written notice.

_____ [name]

_____ [address]

_____ [address]

Dated: _____ [month] _____ [day], _____ [year]

Approved:

"BANK"

a(n) _____ [state] _____ [entity]

By: _____

Print Name: _____

Title: _____

(If the Owner hereunder is a corporation or other organization, there should be attached hereto a certified copy of Resolutions duly adopted by its Board of Directors or other controlling body authorizing the execution of this agreement.)



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26-22 Current Legal Forms for Real Estate FORM 22.105

FORM 22.105 Management Agreement--condominium association

COMMENT

Under the typical scenario, the developer will manage the association until a predetermined number of units are sold. After the threshold number of units are sold, the management is turned over to the association. The association is usually a non-profit corporation in which all the unit owners have an ownership interest and are entitled to vote for the members of the Board.

The management of a condominium property is quite extensive. It is very difficult for a group of condominium owners to handle all of the duties required to keep the association running smoothly. As a result, most associations will engage a professional management company to handle the day to day responsibilities of the association. The Board of Directors will oversee the management company. The following form is a fairly typical agreement between a condominium association and a professional manager.

FORM

CONDOMINIUM MANAGEMENT AGREEMENT

THIS AGREEMENT is made this _____[day] day of _____[month],
_____ [year] between the _____[name] (hereinafter known as the "Association"),
and _____[name], (hereinafter known as the "Agent"). This agreement shall commence on
_____ [month] _____ [day], _____ [year] and terminate on
_____ [month] _____ [day], _____ [year].

WHEREAS, the _____ [name], is a(n) _____ [state] _____ [entity] formed under Section _____ [number] of Condominium Ownership Act, desires to appoint the Agent, as its executive agent to manage the Condominium Property:

NOW, THEREFORE, in consideration of the mutual promises of the parties herein contained, and other consideration as stated, the parties hereby agree as follows:

1.0 APPOINTMENT

The Board, by the authority contained in the Declaration of Condominium Ownership, hereby appoints the Agent as exclusive agent of the _____ [name], to operate and manage the common areas of the Condominium Property, subject to the direction and control of the Board, and the Agent hereby accepts the appointment on the terms and conditions hereinafter provided.

2.0 TERM

The term of this Agreement shall be for _____ (_____) years, beginning on _____ [month] _____ [day], _____ [year] and continuing until _____ [month] _____ [day], _____ [year], unless lawfully terminated before such time as provided in Item 10.0 et seq., below.

3.0 BONDING OF EMPLOYEES

Those employees of the Agent who handle or are responsible for the handling of the _____ monies shall, at Association's expense be bonded by a fidelity bond, in an amount not less than _____ Dollars (\$ _____), evidence of which shall be furnished to the satisfaction of the Board.

4.0 AGENT'S DUTIES--GENERAL

The Agent shall manage, operate and maintain the common areas of the Condominium Property as Agent of the _____ [name] under the direction of the Board and in accordance with instructions issued by said Board from time to time. Specifically, but not by way of limitation, the Agent's duties shall consist of the following:

4.01 Meetings. Agent will attend all regularly scheduled Board meetings during the year as well as the annual meeting of the Association. Agent will assist or chair any or all meetings listed above as requested by the Board. When directed, agent will send formal notification of such meeting(s) at the expense of Association, such expense not to exceed postage and copying costs. Agent will also distribute all meeting documents, i.e., financial statements, meeting minutes, written management reports, etc., to board members no later than _____ (_____) days prior to any meeting so that the Board of Managers have ample time to review said documents before the meeting commences.

4.02 Policies. Agent will assist the Board in the administration of provisions of the Condominium instruments and the policies, rules and regulations promulgated by the Board. Agent will report to the Board and give notice to the violator of any written complaint Agent receives pertaining to violations of the condominium instruments or the Rules and Regulations.

4.03 Insurance. At the Board's direction and under its control, Agent shall assist in the selection of all Association insurance policies, at the Association's expense, including the various coverages enumerated in the Declaration and By-Laws. Agent does not represent that it is an expert concerning insurance matters and therefore denies any liability arising out of inadequate insurance coverage.

4.04 Insurance Claims/Accidents. Upon notification or discovery of an accident or damage to Association property, or any other type of loss, Agent shall promptly investigate said matter and complete a written report describing the exact nature of the accident, damage, or loss. Agent will report to and work closely with the Association's insurance agent and Board of Manager to resolve any and all insurance issues. Upon request, Agent will obtain estimates for the cost of repair(s) and shall cooperate in having made any and all repairs required by any insurance company in connection therewith. Agent shall not be responsible for insurance claims or other matters which are outside scope of Association's coverage as defined by Association's master or other policies of insurance as defined by its underwriter.

4.05 Answering Service. Agent will provide a 24-hour, 7-day a week telephone answering service in order to communicate with unit owners for emergency service(s) within the Association's general responsibilities. Unit owners may contact Agent during regular business hours from 8:30 a.m. to 5:00 p.m. Anyone may contact the Agent by calling _____[number] any time day or night.

4.06 Records File. Agent shall maintain a complete roster of unit owners, tenants, if any, and other data necessary to property administer the Association's affairs. Such roster shall at all times be available to the Board.

Agent shall keep the corporate records of the Association, which shall include, but is not limited to all original minutes, contracts, and financial reports. The original corporate records shall be returned to the Board in its entirety upon request or upon termination of this contract.

4.07 Correspondence File. Agent shall keep the Board advised by written correspondence, of any business matters or obligations the Association may have concerning, governmental matters, independent contracts, unit owners and/or other individuals or entities with which the Association or its representatives have or should have a business relationship. Agent shall also keep accurate and permanent records of all correspondence. All original records will be returned to the Board upon its written request.

4.08 Control Over Independent Contractors/Personnel. Agent shall recommend the hiring and/or discharging of such independent contractors or Association personnel as may be necessary to operate and maintain the Condominium Property. All hiring/discharging and contracting shall be made solely with the Board's prior approval. Outside of hiring/discharging or assigning contracts, the Agent shall have complete control over Association personnel and independent contracts to ensure that the Association property is properly maintained.

4.09 On-Site Responsibility. Agent shall be a property manager on-site a minimum of _____ (_____) hours per month.

5.0 AGENT'S DUTIES--MAINTENANCE

5.01 Repairs. Agent shall, at the Association's expense, and in accordance with standards established by the Board, cause the common areas of the condominium to be maintained and/or repaired. For any one item of repair, replacement or refurbishing he expense incurred shall not exceed the sum of _____ Dollars (\$_____) unless specifically authorized by the Board, excepting, however, that emergency repairs involving manifest danger to persons or property, are immediately necessary for the preservation and safety of the property, or for the safety of persons, or required to avoid suspension of any necessary service to the property, may be made by the Agent irrespective of the above cost limitation. Notwithstanding this authority as to emergency repairs, it is understood that the Agent will, if at all possible, confer immediately with the President of the Board regarding emergency expenditures, or if unavailable, any two Board Members.

5.02 Contract Specifications. When requested by the Board, Agent shall prepare specifications for bids on contracts. Agent shall fully cooperate with consultants that may be retained by the Board to draft specifications for specialized

projects.

5.03 Bidding/Contracts. When requested by the Board, Agent shall solicit bids for Board, Agent shall solicit bids for Board authorized contracts. The Board shall select the contractor. The Board shall execute the contract, which shall be in the name of and on behalf of the Association. Agent shall furnish all Board Members with a copy of every contract within four (4) weeks of its execution.

5.04 Supplies. Agent shall place orders and obtain such equipment, tools, appliances, materials and supplies which are necessary to maintain the Condominium property. All orders shall be in the name of the Association.

5.05 Credits. When taking bids or issuing purchase orders, Agent shall act at all times under the direction of the Board and shall be under a duty to secure for and credit to the Association any discount, commissions or rebates obtainable as a result of such contract or purchase.

5.06 Supervision. All direct contact with association personnel, independent contractors or their personnel should be through the Agent, except in an emergency.

After the selection of a contractor, Agent shall generally oversee the activities of the contractor, review the quality of the independent contractor's workmanship, and enforce the contractual obligations and/or warranties contained therein.

The Board shall notify Agent in writing of any observations, complaints, suggestions, etc., relating to the quality of the performance of an independent contractor or Association employee.

5.07 Inspection of Property. Agent shall inspect the Condominium property and provide written reports to the Board concerning the condition of the property at least twice per year.

5.08 Unit Maintenance. This Agreement does not contemplate nor is the Agent responsible for or required to perform the upkeep and repair of the interior of any units, the responsibility for which under the West Chateau Declaration and/or Chapter 5311 of the Ohio revised code, is that of the unit owner.

6.0 AGENT'S DUTIES--ADVISING

6.01 Standards. Agent shall advise the Board in an attempt to operate and maintain the Condominium according to generally accepted industry standards.

6.02 Agent shall make recommendations for capital and operational improvements that would benefit the Association.

7.0 AGENT'S DUTIES--FISCAL AND ACCOUNTING

Agent will develop and recommend for Board approval a short and long term fiscal program and operating budget.

7.01 Annual Budget. At least _____ (_____) days before the beginning of each new fiscal year, Agent will prepare a proposed budget setting forth an itemized statement of the anticipated receipts and disbursements for the new fiscal year based on the then-current schedule of monthly assessments and taking into account the general condition of the properties. Each such budget, shall be submitted to the Board in a final draft at a board meeting for its approval.

The approved budget shall serve as a supporting document for the schedule of monthly assessments proposed for the new fiscal year. Agent shall operate within said budget and there shall not be any variance therefrom over _____ percent (_____%), unless it has been recognized and specifically authorized

by the Board. By this is meant, no expense may be incurred or commitments made by Agent in connection with the maintenance and operation of the _____ [name], in excess of the amounts allocated to the various classifications of expense in the approved budget without the prior and proper consent of the Board, except that if necessary, because of an emergency or lack of sufficient time to obtain such proper consent as provided in Item 5.01, et seq., above, an overrun may be experienced, provided it is brought promptly to the attention of the Board.

7.02 Financial Records. Agent shall maintain office records, books and accounts, which records shall be subject to examination by Association members or their authorized agents with prior notice and during normal business hours. The original of all records are deemed to be the property of the Association.

7.03 Monthly Reports. Agent shall render to the Board, by the _____ (_____) day of each month, an accrual basis monthly statement of cash receipts and disbursements, a balance sheet, a monthly budget comparison, a listing of all past due accounts, and a listing of all checks issued in the prior month, except that the final year end statement will not be submitted, until all closing information is received, but not later than _____ (_____) days following each calendar year. The year end statement will be in the form of AICPA accrual accounting guidelines. Any audits required or requested by the Association shall be prepared at the sole expense of the Association by an independent accounting firm of its choice.

7.04 Collections. At the direction of the Board, Agent will prepare monthly billings for maintenance fees and other Association charges. The method of billing will include monthly invoicing, which may be done through the issuance of coupon payment booklets, coordination of direct bank to bank payments, or any other method as determined by the Agent with the Board's prior approval. Past due notices will be mailed or delivered each month to each unit owner showing past due balances, late charges if applicable and the total balance due. All payments not received by the due date set by the Board may be assessed an additional late charge based on Board directive. Agent will work with the Association's legal council or otherwise as may be required for the collection of delinquent monthly assessments. The Association or their designee shall be responsible for lien filing expenses and other legal/court costs. Routine costs of monthly billing, including postage, shall be the Agent's responsibility.

7.05 Account Insurance. Upon Board directive, Agent shall establish and maintain, in a bank or Savings & Loan whose deposits are insured by the Federal Deposit Insurance Corporation or Federal Savings and Loan Insurance Corporation, or in a Direct Deposit United States Treasury securities account with the Federal Reserve Bank, and in a manner to indicate the custodial manner thereof, an account as Agent of the Association for the deposit of only Association's monies, with authority to draw thereon for any payments to be made by Agent to discharge the liabilities or obligations incurred pursuant to this Agreement and the payment of Agent's fee. All accounts will be under the Association's Federal Identification number. Furthermore, all payments shall be made by check drawn on the Association's account and require at least one Board Members signature.

7.06 Federal Filings Required. Agent shall prepare for execution and filing by Association all forms, reports and returned required by law in connection with unemployment insurance, disability benefits, Workers' Compensation Insurance, Social Security benefits and other similar taxes now in effect or hereinafter imposed, and also requirements relating to the employment of personnel. Agent reserves the right to engage and pay for a third party to perform these services if it deems it to be in the best interest of both parties. The Agent in conjunction with the Association's independent Certified Public Accountant shall be responsible for the preparation and filing of the Association's annual tax returns.

7.07 Annual Independent Review. A review of the books and records of the Association may be made annually and at such other times as the Board may direct, at the Association's expense, by an independent Certified Public Accountant selected and approved by the Board, which entity will furnish the Board with an annual statement of the financial condition of the Association. The Agent will cooperate with said independent Certified Public Accountants in the performance of their audit.

8.0 RELATED OPERATIONS

Agent from time-to-time may begin affiliated business operations that could be useful to the Association. Said affiliated business operations may be used by the Association provided it is specifically approved at an official Board meeting by the Board of Managers first.

9.0 LIMITATION OF LIABILITY, INDEMNIFICATION

9.01 Agency Relationship. Everything done by Agent under the agreement shall be done as agent of the Association, and all obligations or expenses incurred thereunder shall be for the account, on behalf, and at the expense of the Association, except that the Association shall not be obligated to pay the overhead expenses of Agent's office. Any payments to be made by Agent thereunder shall be made out of such sums as are available in the special account(s) of the Association or may be provided by the Association. Agent shall not be obliged to make any advance to or for the account of Association or to pay any sum except out of funds held or provided as aforesaid, nor shall Agent be obliged to incur any liability or obligations for the account of the Association without assurance that the necessary funds for the discharge thereof will be provided.

9.02 Acts of Agent. Agent agrees to hold Association harmless to the limits and extent of Agent's liability insurance for Agent's own acts or willful or wanton misconduct and/or negligence, errors or omissions, if not covered by the Association's policy of insurance.

9.03 Acts of Others. Association agrees to save Agent harmless to the limits and extent of its liability insurance for any actions or claims of a third party arising out of Agent's performance of its duties under this Agreement. Neither Agent, its officers or its employees shall be responsible for any acts, including the willful or wanton misconduct or gross negligence of contractors or employees of the Association pursuant to this Agreement. Association agrees to save Agent harmless to the limit and extent of Association's liability insurance in any claim or action of third parties arising out of any violation or alleged violation by Association, unit owners or employees, of any law, ordinance, regulation or order of any governmental authority. Association agrees to defend at its own cost any action arising from the foregoing and to indemnify Agent for losses suffered therefrom.

9.04 In order to facilitate efficient operation, Association shall furnish Agent with a complete set of plans and specifications of the Condominium facility, if available, and with the aid of these documents and inspections made by competent personnel, Agent will familiarize itself with regard to the layout, construction, location, character, plan and operation of the lighting, plumbing, and other mechanical equipment in the Condominium if applicable. Copies of guarantees and warranties pertinent to the construction of the condominium or the installation or replacement of equipment or building members, and in force at the time of the execution of this Agreement, shall be furnished to the Agent if available. The Agent may, at the expense of the Association, obtain copies or reproductions of the plans, specifications, or guarantees of the Association, if then are necessary for the operation of the Association and the repairs and maintenance of the building structure and/or equipment.

9.05 Public Liability Insurance. The Association shall cause its public liability insurance to be written so as to protect the Agent in the same manner and extent as the Association, Board of Managers, and Unit Owners.

10.0 TERMINATION

This Agreement may be terminated with or without cause at the end of any calendar month by the unanimous vote of all the Board of Managers. Upon receipt of the termination notice via Certified Mail, the agreement will terminate _____ (_____) days thereafter.

10.01 Upon termination, the contracting parties shall account to each other with respect to all matters outstanding as of

the date of termination. The Association shall furnish Agent security satisfactory to Agent, against any outstanding obligations or liabilities that the Agent may have incurred hereunder.

10.02 After receipt of a notice of termination, and except as otherwise directed by the Board, the Agent shall place no further orders with subcontractors for materials, or services for the facility, except as may be necessary for completion of such portion of the work under the contract as is not terminated.

10.03 A date and time shall be set for a meeting to take place in Agent's principal office on or before the last day of the term of the Agreement, for the purpose of surrendering to the Association all records, funds, and deposit accounts (except for any escrow account established under these provisions), and to execute any agreement and/or releases related to the conclusion of the contractual obligations.

11.0 COMPENSATION

11.01 Base Fee. The base compensation which the Agent shall be entitled to receive from the Association for services performed under this Agreement shall be a fee payable on the first of each month in the amount of _____ Dollars (\$ _____) per month. This fee will remain in effect for the duration of this agreement.

11.02 Services Involving Litigation. The services, for which Agent is to be compensated under 11.01, above, do not include any services involving litigation between any parties whether or not the Association is directly involved. This includes, but is not limited to litigation between the Association and a third party, any small claims court action by or against the Association, any injunctive suit by or against an individual homeowner, any administrative hearing before a zoning or similar Board, City Council, tax appeals commission, any bankruptcy proceeding, or otherwise. Any such service shall be compensated at the rate of _____ Dollars (\$ _____) per hour, and, unless required by Court Order, shall only be rendered by Agent on the prior request and authorization of the Board of Managers. Subject to the exclusion following, where Agent is named Defendant in a litigation as a result of its activities as Agent for the Association, Agent is specifically authorized to defend itself, its Officers, Directors, and employees and shall be compensated for such cost of defense both as to actual costs incurred and at a rate of _____ Dollars (\$ _____) per hour. The Association and Agent further agree that should the highest court of competent jurisdiction hearing the case render a judgment against Agent resulting from Agent's negligent or intentional act or failure to act, Agent shall be entitled to receive no compensation under this Paragraph hereof for service performed in preparation of said litigation for defense or for time actually spent in court, hearings or otherwise. The provisions of this paragraph shall survive the termination of this Agreement.

11.03 Dishonored Negotiable Instruments. Where Agent is required to process NSF or other dishonored negotiable instruments, Agent shall be entitled to a fee of _____ Dollars (\$ _____) per instrument so handled and the charge for such special handling and any bank charge made to the Association's account shall be billed to the owner's account on behalf of the Association.

11.04 Escrow Demand and Transfer Fees. Agent shall process Escrow Demands, rendering information on status of unit owner's account, insurance coverage, closing confirmation of the account and process Association Owner Record changes at fees to be filled to Seller. These fees are _____ Dollars (\$ _____) per escrow demand chargeable to the selling unit owner at closing and shall be paid out of escrow by the escrow agent or other party coordinating the closing.

11.05 Professional Services. Fees for professional services approved by the Board, including but not limited to Legal, Accounting, Architectural and Engineering services and attendant expenses for the direct benefit of the Association shall be an expense of the Association.

11.06 Additional Mailings. Any extra mailings, will be billed to the Association at eight _____
(_____) cents per page plus the actual cost of envelopes and postage if applicable.

11.07 Documents. The Agent may charge Owners, Realtors, Tenants and others a reasonable fee for providing copies of the _____ ("Association's") Declarations, By-Laws, and/or Rules and Regulations. In no case shall a unit owner or tenant be charged for the first copy of a new amendment and/or changes to the Rules and Regulations. Escrow Officers, Bankers, Realtors, and other third parties may be charged for any and all copies of documents permitted to be dispersed by the Board of Manager. Owners may be charged for replacement copies of documents.

12.0 NOTICES

All notices required hereunder shall be in writing and shall be deemed given if delivered in person, or by certified or registered mail addressed as follows:

To the Association: To the Agent:

[name] [name]

[address] [address]

[address] [address]

13.0 ASSIGNABILITY

This Agreement shall inure to the benefit of and constitute a binding obligation upon the parties hereto. This Agreement is not assignable without the prior written consent of the Board.

14.0 ENTIRE AGREEMENT

14.01 This Agreement shall constitute the entire agreement between the contracting parties and no variance or modification thereof shall be valid and enforceable except by supplemental agreement in writing, executed and approved in the same manner as this Agreement.

14.02 For the convenience of the parties, this Agreement has been executed in several counterparts _____ (_____) which are in all respect identical and each of which shall be deemed to be complete in itself so that any one may be introduced in evidence or used for any other purpose without the production of the other counterparts.

The parties hereto have set their hands the date and year first above written.

"ASSOCIATION"

a(n) _____ [state] _____ [entity]

By: _____

Print Name: _____

Title: _____

"AGENT"

a(n) _____ [state] _____ [entity]

By: _____

Print Name: _____

Title: _____



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Current Legal Forms for Real Estate
Chapter 22 DEVELOPMENT AND SUBDIVISION
Part IV. FORMS
F. REAL ESTATE MANAGEMENT

26-22 Current Legal Forms for Real Estate FORM 22.106

FORM 22.106 Cooperative apartment management agreement

COMMENT

This form is a management agreement for a cooperative apartment. The agreement is contemplated by the preceding form. The services that will be performed by the agent are comprehensive and constitute the agent a general building management agent. This is to say that he is authorized to do all acts related to the business for which he was engaged, i.e., the management of the cooperative apartment.

FORM

THIS AGREEMENT made _____[month] _____[day],
_____ [year], between _____[name], (the "Owner") and
_____ [name] (the "Agent").

The parties hereto mutually agree as follows:

1. Employment. The Owner hereby appoints the Agent, and the Agent hereby accepts appointment, on the terms and conditions hereinafter provided, as managing agent of the cooperative apartment house located at _____[address] (the "Building").

2. Duties of Agent. The Agent shall perform the following services with due diligence and care:

(a) Cause to be hired, paid, and supervised all persons necessary to be employed in order to properly maintain and operate the Building who, in each instance, shall be the Owner's and not the Agent's employees, and cause to be discharged all unnecessary or undesirable persons, except that no person presently employed at the Building shall be

discharged without the Owner's prior written consent.

(b) Cause the Building to be maintained in such condition as the Owner may deem advisable, including interior and exterior cleaning, and cause repairs and alterations of the Building to be made, including, but not limited to, electrical, plumbing, steamfitting, carpentry, masonry, elevator, decorating, and such other incidental alterations or changes therein as may be proper, subject only to the limitations contained in this agreement or in any proprietary lease or other agreement with any tenant-shareholder or other tenant. Ordinary repairs or alterations involving an expenditure of over _____ Dollars (\$ _____) for any one item shall be made only with the Owner's prior approval, but emergency repairs, i.e., those immediately necessary for the preservation or safety of the Building or for the safety of tenant-shareholders, or other persons, or required to avoid the suspension of any necessary service in the Building, may be made by the Agent regardless of the cost thereof, without the Owner's prior approval, after consultation with the Owner's President or Vice President.

(c) Recommend, and, with the Owner's approval, cause all such acts and things to be done in or about the Building as shall be necessary or desirable to comply with any and all orders or violations affecting the Building, placed thereon by any federal, state, or municipal authority having jurisdiction thereover. If, however, failure promptly to comply with any such order or violation would or might expose the Owner or the Agent to criminal liability, the Agent may cause such order or violation to be complied with after consultation with the Owner's President or Vice President or, if either officer shall not be available to the Agent, after consultation with the Owner's attorneys. The Agent shall notify the Owner's attorneys promptly after receipt of any order or violation.

(d) Enter into contracts for electricity, gas, steam, air conditioning, water treatment, elevator, telephone, window cleaning, rubbish removal, fuel oil, detective agency protection, vermin extermination, and other services or such of them as shall be advisable. Any such contract, however, having a term longer than _____ (_____) years or requiring annual payments in excess of _____ Dollars (\$ _____) must be authorized by the Owner.

(e) Purchase all supplies which shall be necessary to properly maintain and operate the Building; make all such contracts and purchases in either the Owner's or the Agent's name, as the Agent shall elect; and credit to the Owner any discounts or commissions obtained for purchases or otherwise (except any insurance and other commissions payable to the Agent under the terms of this agreement).

(f) Advise the Owner with respect to proper insurance coverage of the Building, its employees, and tenant-shareholders; if the Owner shall request, cause to be effected and maintained, in such amounts and through such carriers as the Owner shall designate or approve, fire, rent, plate glass, boiler, water damage, liability, workmen's compensation, employer's liability, disability, and any other insurance the Owner may elect to carry; and to cooperate with any independent insurance broker or consultant that the Owner may designate or approve and engage for the purpose of effecting insurance and protecting its interests with respect thereto.

(g) Check all bills received for services, work, and supplies ordered in connection with maintaining and operating the Building, pay or cause to be paid all such bills, mortgage interest, mortgage amortization, water charges, sewer rent, assessments, real estate taxes, and corporate income and other taxes assessed against the Owner or the Building as and when the same shall become due and payable.

(h) If the Owner shall request, list and offer for sale, lease, or sublease through its own organization and, if the Owner shall deem it advisable, through other brokers, space reserved, acquired, or reacquired by the Owner in the Building, and use its best efforts to effect sales, leases, or subleases thereof, and to renew leases and subleases of space reserved, acquired, or reacquired by the Owner in the Building, including the preparation and execution of lease and sublease documents under the supervision of the Owner's attorneys.

- (i) Accept applications and references from all prospective tenant-shareholders, tenants, and subtenants, obtain credit reports relating to prospective tenant-shareholders, tenants, and subtenants of space being leased or subleased by the Owner (and, at its request, for any other space in the Building), obtain from tenant-shareholders proposing to assign their proprietary leases such record searches as the Owner may require, and submit same to the Owner; and facilitate transfers of the Owner's shares and proprietary leases held by its tenant-shareholders.
- (j) Supervise the moving in and out of tenant-shareholders, tenants, and subtenants, and, as far as possible, arrange the dates thereof so that there shall be a minimum of disturbance to the Building's operation and of inconvenience to other tenant-shareholders and tenants.
- (k) Bill or cause to be billed tenant-shareholders, tenants, and subtenants for maintenance charges, rent, and other charges, use its best efforts to collect such maintenance charges, rent, and other charges, and, when and if directed by the Owner, serve notices upon tenant-shareholders, tenants, or subtenants to quit and surrender the space they occupy. When directed by the Owner, and on its behalf, sue for maintenance charges, rent, and other charges which may at any time be or become due to it from any tenant-shareholder, tenant, or subtenant in respect of space in the Building, institute summary proceedings to recover possession thereof and, with the consent of the Owner's attorneys, employ and pay special counsel, if necessary, for any such purposes. No suit or summary proceedings shall be instituted, however, unless the Owner's written authorization is first obtained.
- (l) Consider and, when reasonable, attend to complaints of tenant-shareholders, tenants and subtenants. If the Agent shall deem any such complaint unreasonable, it shall advise the Owner of the complaint and the reason for its opinion that the complaint is unreasonable.
- (m) Cause to be prepared and filed the necessary forms for unemployment insurance, withholding, and social security taxes and all other tax and other forms relating to employment of Building employees and maintenance and operation of the Building required by any federal, state, or municipal authority.
- (n) If the Owner shall request, not later than the _____ (_____) day of each month, render or cause to be rendered regular monthly statements, supported by disbursement vouchers, to the Owner, with remittance of amounts collected during the previous month less disbursements made on behalf and for the account of the Owner and less all such amounts as in the judgment of the Owner's accountants it may be necessary or advisable to reserve or withhold to meet obligations due or which will or may become due thereafter and for which current income will not or may not be adequate. The Agent shall send a copy of each such monthly statement to the Owner's President and Treasurer.
- (o) Establish and keep in good order a separate, accurate, and full set of books, other than books of account maintained by the Owner's accountants, for the Owner, and maintain orderly files containing rent records, insurance policies, proprietary and other leases and subleases, correspondence, receipted bills and vouchers, and all other documents and papers pertaining to the building or the operation thereof. Such books, records, and other documents shall be and at all times remain the Owner's property. The Agent shall upon the Owner's request make them available to the Owner and to its officers, accountants, attorneys, or other representatives, and upon the Owner's demand shall deliver them to the Owner or its agents.
- (p) Cooperate with the Owner's accountants in regard to the annual audit of the Owner's books of account, including the annual report of the Owner's operations for the year then ended. The Agent shall send a copy of each such annual report to all the Owner's tenant-shareholders.
- (q) Cooperate with the Owner's accountants in regard to the preparation and filing on its behalf of federal, state, city, and all other income and other tax returns required by any governmental authority.

(r) Send to all tenant-shareholders of the Owner, each year, copies of a statement furnished by the Owner's accountants which sets forth the deductions available to tenant-shareholders for income tax purposes by reason of their ownership of its shares and other relevant tax data with respect thereto provided by the Owner's accountants.

(s) Prepare and submit annually to the Owner's Board of Directors, prior to its last meeting held in each calendar year, an operating budget setting forth the Owner's anticipated income and expenses for the ensuing year, a comparison of such budget to the income and expenses of the preceding and current years, and all required explanations with respect thereto.

(t) When requested, provide a suitable place for, send notices to directors and shareholders of, prepare agendas for, and cause a representative of its organization to attend meetings of the tenant-shareholders and of the Owner's Board of Directors and, if requested by the Board of Directors, have its representative act as Secretary, and record and keep the minutes of such meetings.

(u) Prepare and send out all letters and reports that the Owner's Board of Directors may request.

(v) When the books of tentatively assessed valuations of the City of New York are opened for public inspection in each year, ascertain the assessment of the land on which the Building is located and the assessment of the Building and report such assessments to the Owner. If the Owner shall consider such assessments excessive, the Agent will, if requested by the Owner, cooperate with the Owner's attorneys to prepare an application for correction of the assessed valuation to be filed with the Tax Commission of the City of New York and, if the Owner shall not have any regular attorneys, retain special counsel to prepare such application and to institute tax certiorari proceedings.

(w) Use its best efforts to keep any commercial or nonproprietary space in the Building rented to desirable tenants on such terms as the Owner may approve. The Agent may enlist the services of other real estate brokers on the Owner's behalf in connection with the rental of such space. The Agent, however, shall not receive any additional commissions by reason of any other broker's services.

(x) Generally, do all things reasonably deemed necessary or desirable by the Owner's Board of Directors for the proper management of the Building.

The Agent may, for the Owner's account and on its behalf, perform any act or do anything necessary or desirable in order to carry out the Agent's agreements contained in this Paragraph 2. Everything done by the Agent under the provisions hereof shall be done as Agent of the Owner. All obligations or expenses incurred thereunder, for which the Agent is not compensated as provided in Paragraph 5, shall be at the Owner's expense.

All payments made by the Agent hereunder shall be made out of such funds as the Agent may from time to time hold for the Owner's account or as the Owner may provide. The Agent shall not be obliged to make any advance to or for the Owner's account or to pay any amount except out of funds held or provided as above set forth, nor shall it be obliged to incur any extraordinary liability or obligation unless the Owner shall furnish the Agent with the necessary funds for the discharge thereof. If the Agent shall voluntarily advance for the Owner's account any amount for the payment of any obligation or necessary expense connected with the maintenance or operation of the Building or otherwise, the Owner shall reimburse the Agent therefor on demand.

3. Deposit of Funds. The Agent shall deposit in a bank or trust company in the City of _____[city], to be designated from time to time by the Owner, all funds which the Agent shall collect for the Owner's account. The Agent shall hold such funds in trust in a special account and shall not commingle the same with other funds that the Agent may receive, whether for its own account or as agent for others. The Agent shall not be liable for any loss resulting from the insolvency of such depository.

4. Liability of Agent. The Agent shall not be liable to the Owner for any loss or damage not caused by the Agent's negligence or failure to comply with its obligations hereunder. The Owner shall indemnify the Agent against and hold the Agent harmless from (a) any liability, damages, costs, and expenses including reasonable attorney's fees, sustained or incurred for injury to any person or property in, about, and in connection with the Building, from any cause whatsoever, unless such injury shall be caused by the Agent's negligence or failure to comply with its obligations hereunder; and (b) any liability, damages, penalties, costs, and expenses, statutory or otherwise, for all acts properly performed by the Agent pursuant to the Owner's instructions; provided, in each of the foregoing instances, that the Agent promptly advises the Owner of its receipt of information concerning any such injury and the amount of any such liability, damages, penalties, costs, and expenses. The Owner will carry liability insurance, workmen's compensation, and employer's liability insurance, will include the Agent as a party insured under the liability policy, and will deliver a copy of such liability policy to the Agent or a certificate evidencing the same.

5. Compensation. The Owner shall pay the Agent as full compensation for its services hereunder the sum of _____ Dollars (\$_____) per annum, payable in equal monthly installments, plus:

(a) Commissions as set forth in Paragraph 3 of the agreement among the Owner, the Agent, and _____ dated _____ [month] _____ [day], _____ [year].

(b) For services in connection with unemployment insurance and social security taxes, a fee based upon an hourly rate of _____ Dollars (\$_____).

(c) For services in connection with labor union relations, withholding taxes, hospitalization, group life insurance, disability insurance, and the like, a fee based upon an hourly rate of _____ Dollars (\$_____).

6. Bond. If requested, the Agent, at the Owner's expense, shall forthwith procure a fidelity bond satisfactory in form to the Owner, and issued by a bonding, insurance, or casualty company satisfactory to the Owner. Pursuant to this bond the surety shall hold the Owner harmless in an amount up to _____ Dollars (\$_____) from any loss of money or other personal property belonging to the Owner or for which the Owner is legally liable, caused by larceny, embezzlement, forgery, misappropriation, wrongful abstraction, or any dishonest or fraudulent acts committed on or after the date hereof, by the Agent, its directors, officers, or employees. The Agent shall keep such bond in full force and effect throughout the term of this agreement.

7. Brokerage. The Agent shall not receive any brokerage commissions for the sale of any shares of the Owner by a tenant-shareholder together with the proprietary lease appurtenant thereto, or for the subletting of any apartment by a tenant-shareholder unless such tenant-shareholder shall directly engage the services of Agent as broker. In no event shall the Owner be liable for any such commissions. Notwithstanding the foregoing, however, the Agent may notify the tenant-shareholders of its willingness to act as broker on their behalf, and, if engaged by any tenant-shareholder for such purpose, the Agent shall exercise its best efforts in such tenant-shareholder's behalf.

8. Representation by Agent. The Agent represents to the Owner that it is duly licensed by the Department of State of the State of _____ [state] as a real estate broker and also by the Department of Law of the State of _____ [state] as a broker-dealer insofar as broker-dealer licensing is required in order to enable it to lawfully perform its duties hereunder.

9. Effective Date. This agreement shall take effect on _____ [month] _____ [day], _____ [year], and shall continue in force until _____ [month] _____ [day], _____ [year]. In the event of a sale, lease, or demolition of the Building, the Owner may terminate this agreement at the end of any calendar month by giving not less than _____ (_____) days prior written notice to the Agent. Upon termination, the parties

shall account to each other with respect to all uncompleted business, and the Agent shall deliver to the Owner all proprietary and other leases, subleases, corporate files, books, and records, and other instruments relating to the Building and the Owner that may be in the Agent's possession. The Owner shall furnish the Agent with reasonable security against all outstanding obligations or liabilities which the Agent may have incurred hereunder.

10. Modification. This agreement may not be changed orally but only in writing signed by both parties.

11. Binding Effect. The provisions of this agreement shall be binding upon and inure to the benefit of both parties and their respective successors and assigns, unless otherwise expressly provided herein.

12. Non-assignment. This agreement may not be assigned by either party.

13. Notices. All notices or other documents under this agreement shall be in writing and delivered personally or mailed by certified mail, postage prepaid, addressed to the parties at their last known addresses.

14. Governing Law. This agreement shall be construed in accordance with and governed by the laws of the State of _____ [state].

15. Entire Agreement. This agreement contains the entire understanding between the parties and supersedes all prior understandings and agreements between them respecting the within subject matter.

16. Non-waiver. No delay or failure by either party to exercise any right under this agreement, and no partial or single exercise of that right, shall constitute a waiver of that or any other right, unless otherwise expressly provided herein.

17. Headings. Headings in this agreement are for convenience only and shall not be used to interpret or construe its provisions.

18. Counterparts. This agreement may be executed in two or more counterparts, each of which shall be deemed an original but all of which together shall constitute one and the same instrument.

The parties hereto have executed this agreement the day and year first above written.

"OWNER"

a(n) _____ [state] _____ [entity]

By: _____

Print Name: _____

Title: _____

"AGENT"

a(n) _____ [state] _____ [entity]

By: _____

Print Name: _____

Title: _____



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Current Legal Forms for Real Estate
Chapter 22 DEVELOPMENT AND SUBDIVISION
Part IV. FORMS
F. REAL ESTATE MANAGEMENT

26-22 Current Legal Forms for Real Estate FORM 22.107

FORM 22.107 Management agreement--time share resort

COMMENT

This form is a management agreement for a time sharing resort. The services to be performed by the agent are comprehensive. The agent is authorized and obligated to do all acts relating to the successful operation of the resort. In many cases, the developer of the time share resort has a related company which is involved in the management of the resort. This form is very detailed and involves the time share association hiring the manager.

FORM

MANAGEMENT AGREEMENT

THIS MANAGEMENT AGREEMENT (the "Agreement"), made and entered into as of the _____[day] day of _____[month], _____[year] by and between _____[name] with a mailing address at: _____[address] (hereinafter referred to as the "Association"), and _____[name] with a mailing address at: _____[address] (hereinafter referred to as "Manager"), regarding the management of the resort development known as: _____[name] which is located at _____[address].

WITNESSETH:

WHEREAS, the Association is responsible for operations of the Development (hereinafter referred to as the "Development").

WHEREAS, the Association and Manager desire to agree on terms for Manager to provide management services to the Development.

NOW, THEREFORE, for and in consideration of the mutual promises contained herein the parties hereto agree as follows:

1. Definitions. The governing documents for the Development establishing the plan for interval vacation ownership for the Development are listed in the attached Exhibit "A" incorporated herein by reference and are herein collectively referred to as the "Project Instruments," unless the context requires otherwise. This Agreement pertains to all residential dwellings (hereinafter referred to as the "Units") now or hereafter submitted to the Project Instruments. The term "Owner" as used in this Agreement shall refer to persons (other than temporary tenants, invitees, licensees, or mortgagees) who are fee or leasehold titleholders of the Units. The term "Vacation Interval" is used in this Agreement to refer to the annual or biennial period of time of less than _____ (_____) years during which an Owner has the right of occupancy of a Unit.

2. Engagement of Manager. The Association hereby engages Manager, to the exclusion of all others, to perform the services described herein to manage the Development, and Manager hereby accepts such engagement on the terms and conditions herein set forth. Manager shall perform its duties and responsibilities hereunder strictly as an independent contractor, and neither the execution of this Agreement nor the performance hereof is intended to be, nor shall it be construed as, evidencing the formation of a partnership, joint venture or similar agreement between the Association and Manager.

3. Term and Renewal. The "Initial Term" of this Agreement shall commence as of the date hereof and continue through December 31 of the year noted in Paragraph 14 as the "Initial Term Expiration Year." This Agreement shall automatically renew for successive Renewal Periods unless either party hereto shall give the other written notice of a nonrenewal not less than _____ (_____) days prior to the Expiration Date; provided, however, that the Association may not give notice of nonrenewal unless such notice is authorized by the vote and consent of not less than a majority of the Units voting at a meeting where not less than two-thirds of the Units are present (unless a lesser vote is required by the Project Instruments or applicable law in which case such lesser vote shall be required). Each "Renewal Period" shall be for the number of years noted in Paragraph 14 hereof as the "Renewal Years." The "Expiration Date" shall be December 31 of the Initial Term Expiration Year or December 31 of the last year of each Renewal Period, as applicable.

Manager shall have the right, at any time either during the Initial Term or thereafter to terminate management under this Agreement upon _____ (_____) days' notice to the Association. The Association shall use commercially reasonable efforts to execute a replacement management agreement within the _____ (_____) day period. If the Association has not entered into a replacement management agreement within such _____ (_____) day period, Manager agrees to continue to perform its obligations hereunder for an additional _____ (_____) days (a total of _____ (_____) days after the initial notice), at which time its management under this Agreement shall terminate.

Failure of Manager to substantially perform its duties and obligations under this Agreement, or to commence to cure any default thereunder, for a continuous period of _____ (_____) days after written notice of default from the Association, specifying the default complained of, shall be grounds for the Association to terminate this Agreement as its sole remedy. In no event shall Manager be liable to the Association or Owners for damages for nonwillful, nonfraudulent or nongrossly negligent acts, errors or omissions exceeding the Management Fee earned by Manager during the _____ (_____) month period immediately prior to the occurrence of Manager's default, except as heretofore provided. Upon termination of this Agreement, for any reason, Manager agrees to promptly prepare a summary of all fees due through termination, and Association agrees to pay such

fees within _____ (_____) days of presentation of the summary.

4. Brand Display. In performing its services under this Agreement, Manager intends to employ the systems, techniques, and expertise developed by it and its affiliates in management of Vacation Interval properties. In the performance of its services, Manager may, but shall not be obligated to, identify the Development as a "Managed Resort."

The parties acknowledge that all of Manager's intellectual property related to its management for the Association and the Owners, including but not limited to any and all computer hardware and software provided by or obtained through Manager (the "Proprietary Materials"), is and always shall be the property of Manager. The parties expressly agree that upon termination of this Agreement due to the expiration of its term, cancellation or default, the Association shall cease using and thereafter abstain from using any licensed or branded (collectively, "Branded Materials") or Proprietary Materials and shall return any Branded Materials and Proprietary Materials in its possession to Manager within _____ (_____) days after termination of this Agreement.

5. Powers and Duties. The Association hereby delegates to Manager, to the exclusion of all persons including the Association and its members, all the powers and duties of the Association as set forth in the Declaration (except those which cannot be delegated as a matter of law). This delegation in no way relieves the Association's officers and directors of the fiduciary obligations owed by them to Owners under applicable law. Manager shall, among other things including those duties set forth on the Fee Addendums attached hereto, perform the following services in the estimated frequency of performance set forth on Exhibit "B" attached hereto, or otherwise as agreed to between Manager and the Association.

5.1 Budget. Manager shall prepare: (i) a recommended operating budget setting forth an itemized statement of the anticipated receipts and disbursements for each year, based upon the then-current schedule of maintenance fees, assessments, Development fees, membership fees and other budgeted amounts due from the Owners to the Association (collectively "Assessments") and taking into account the general condition of the Development and/or Units; (ii) a capital expenditure budget; and (iii) a forecast of cash flow to and from current expense and capital replacement reserve funds (collectively, the "Budget"). The Budget shall be submitted to the Board of Directors in final draft at least _____ (_____) days prior to the commencement of the year for which it has been proposed, or such shorter period of time as may be required by applicable law. Upon approval thereof by the Board of Directors, the Budget shall determine the schedule of Assessments.

5.2 Resale Programs. Association hereby grants to the Manager, or any affiliate of the Manager, as Manager may designate, the exclusive right to occupy the common areas of the Development and access areas of the Development for the purpose of providing any resale program to Owners and the Association, as well as for the provision of guest services, concierge services, time share or other vacation interval sales programs, as well as displaying any advertising or other promotional material with respect to any such programs. The Association agrees not to enter into any agreement with any other party with respect to the provision of such services without the prior written consent of the Manager.

5.3 Collections. Manager shall bill and collect, from the Owners on behalf of the Association, based upon the Budget, all Assessments, real estate and other taxes (unless billed separately to each Owner) and any other amounts due and owing the Association or a third party pursuant to the provisions of any applicable law or the Project Instruments. All Assessment payments by an Owner shall be applied as to interest, delinquencies, costs and attorneys' fees, other charges, expenses and advances as provided herein and in the Project Instruments.

Manager may charge and collect for such purposes and against such parties as Manager determines, to the same extent that the Association is required or permitted by the Project Instruments or applicable law to do so. Manager is authorized to charge and collect from any Owner(s) the cost of providing special services on behalf of and at the request of such Owner.

Manager shall have the authority on behalf of the Association to utilize such means as may be established by law or the Project Instruments for collecting any delinquent amounts. Manager shall furnish the Association with an itemized list of all delinquent accounts overdue more than sixty _____ (_____) days if requested. The Association shall aid and assist Manager in collecting Assessments and other amounts in any reasonable manner requested by Manager. Manager may, on behalf of the Association, file a lien against an Owner's Unit or Vacation Interval should such Owner fail to pay any Assessments or other amounts due, pursuant to the Project Instruments, and may take such other action as is permitted by the Project Instruments, in the name of or as agent of the Association. Manager may compromise liens in such amount(s) as it deems advisable, in its sole discretion, and may satisfy liens of record and render statements as to the current status of an Owner's account. To the extent permitted by law and subject to the requirements of the Project Instruments, Manager may suspend a delinquent Owner's right to use (or allow others to use) such Owner's Unit or Vacation Interval. The Association agrees to defend, indemnify and hold Manager harmless from and against any and all claims asserted against Manager, its agents, employees or affiliates, arising out of or in connection with any such suspension.

5.4 Records. Manager shall maintain the Association's financial record books, accounts and other records as required by the Project Instruments, and issue certificates of account to Owners and their mortgagees and lienors, without liability for errors other than as a result of gross negligence. Such books and records of the Association shall include records of the Association's receipts and disbursements, an individual account for each Owner designating such Owner's name and address and the amount of any assessments or other amounts paid by and/or due from such Owner, and a list of the names and current mailing addresses of all Owners and their mortgagees as provided by the Owners. Manager shall maintain records to describe its services hereunder and such financial books and records to identify the source and the disbursement of all Association funds collected by Manager. Manager shall make the Association's accounting records available for inspection and reproduction by the Owners, at reasonable times, in the office of Manager; provided, however, that Manager may charge the Owner or its authorized representative such reasonable reproduction fee as the Board from time to time establishes.

Manager shall also prepare and have available for each Owner for inspection any financial report required by the Project Instruments within _____ (_____) days following the end of each fiscal year (or such earlier date as may be required by applicable law). In addition, Manager shall make available at the required times to the Association or Owners, as applicable, any reports or other documents as may be required by the Project Instruments or any applicable law.

If required by the Association or by law or the Project Instruments, Manager shall arrange for an annual independent audit of all the books maintained for Association by Manager, to be conducted at the Association's expense by a certified public accountant. Subject to the prior direction and approval of the Board, Manager shall select an accountant to prepare the Association's annual tax returns. True and correct copies of such tax returns shall be available for inspection by the Owners of the Association in the office of Manager during normal business hours.

Manager is authorized to make available for inspection by any applicable governmental agency all books and records of the Association, upon the request of said agency, and file with said agency any and all reports and information requested and required by law. Manager is authorized to provide to any applicable governmental agency, upon request, a complete list of the names and addresses of all purchasers and Owners of interests in the Development.

5.5 Accounts. Manager shall deposit all funds collected from all sources in the accounts of the Association or in special bank accounts (collectively the "Accounts") in federally insured banks and/or savings and loan associations, with suitable designation indicating their source; provided, however, that all sums collected by Manager for Assessments to the Development may be commingled in a single fund or divided into more than _____ (_____) fund, as determined by Manager, but may not be commingled with any other funds or accounts of Manager or otherwise; provided, further, that Manager shall maintain a separate account for reserve funds

and shall not commingle reserve funds with the operating funds for a period in excess of _____ (_____) days. Manager is authorized to withdraw such funds from the Accounts as required to pay expenses pursuant to Paragraph 6. Manager shall maintain fiduciary bonds normally required of management agents as required by law.

5.6 Maintenance. Manager shall arrange for the regular cleaning, maintenance and repair of the common elements of the Development and the Units committed to Vacation Ownership and the contents thereof for which the Association has maintenance responsibility. Manager shall cause such maintenance to be performed in conformity with good maintenance practices; provided, however, that Manager shall not be responsible for any pre-existing condition of any of the Units or the Development or for discovering any such condition which would require maintenance.

For any one (1) item of repair, replacement or refurbishing, the expense incurred as to the Development as a whole shall not exceed the sum of _____ Dollars (\$_____) unless either contemplated in the approved Operating Budget or capital budget, or specifically authorized by the Association. However, in the case of an emergency, Manager is authorized to expend on behalf of the Association any sum necessary to protect and preserve the Development or any of the Units. For purposes of this paragraph, all expenses incurred by Manager on behalf of the Association during any _____ (_____) day period and paid to any single person, entity or affiliates or principals thereof, shall be considered to be a single expense unless reasonably demonstrated by Manager to the contrary.

Manager shall have access to the Development and each Unit during reasonable hours as may be necessary for the upkeep of the Development and Units or for the making of emergency repairs to prevent damage to common areas of the Development, or to any Unit or Units; provided, however, that this right of access shall not be deemed to confer on Manager any affirmative obligation for inspection of, and resulting responsibility for, any repairs to ordinarily inaccessible areas (e.g., balconies). To the extent reasonably convenient, all maintenance, repairs, replacements, additions and/or changes to the interior of Units shall be performed at a time when such Unit is vacant. If it becomes necessary, in the judgment of Manager, to perform maintenance or repairs within an occupied Unit in order to prevent foreseeable personal injury or imminent damage to any of the Units, or personal belongings, of any Unit occupant or the Development, and if such work cannot be performed while the Unit is occupied, in the judgment of Manager, then Manager shall exercise reasonable efforts to relocate the Unit occupant(s) for the duration of such displacement to such reasonably comparable nearby accommodations as possible, at the Association's expense, to the extent so required by the Project Instruments.

If it is determined pursuant to the terms of the Project Instruments that Development property damaged by casualty be reconstructed, Manager shall have the Association's responsibility of reconstruction. In that event, Manager shall have all the rights, obligations and duties granted to the Association, and Manager shall be paid as a fee the sum of _____ percent (_____) of the gross amount of all insurance proceeds received by the Association and Owners resulting from such damage or destruction. Where applicable and permitted under the provisions of the Project Instruments, such sum shall be paid to Manager from such insurance proceeds. If _____ percent (_____) fee cannot be paid entirely from such insurance proceeds under the provisions of the Project Instruments, such fee shall be paid by the Association to Manager from revenues collected by the Association as regular and/or Special Assessments. In the event that for any reason the Project requires unforeseen and unbudgeted renovations or requires repair due to an uninsured casualty loss, and the Association desires for the Manager to have the responsibility for overseeing such renovations or reconstruction, the parties agree that the Manager will be entitled to a reasonable fee for the performance of such services, such fee to be determined by a negotiation between the parties at the time such services are requested. In the event that the Association and the Manager are unable to reach agreement with respect to the amount of the fee or how the fee will be paid, then the Manager shall have no responsibility for the oversight of such renovations or reconstruction, such responsibility in such event remaining with the Association.

5.7 Contracts. Manager may enter into contracts, on behalf of the Association for garbage and trash removal, heating and air conditioning maintenance, pool maintenance, landscaping, telephone service, cable television service, pest control and such other services as it deems necessary or appropriate for the proper maintenance and operation of the Development. To the extent not subcontracted by Manager to third parties, Manager may purchase or lease all tools, equipment, vehicles, appliances, goods, furniture, supplies and other materials that it determines to be reasonably necessary to properly maintain and operate the Development. All such contracts and purchases may be made in either the Association's or Manager's name, as Manager may elect. The Association agrees to honor all agreements and contracts executed by Manager in accordance with the terms and provisions of this Agreement as the agent of the Association for the operation, repair and upkeep of the Development and the Units. Where Manager has executed such contracts for the upkeep, management and administration of the Development and the Units in conformity with the terms and provisions of this Agreement, the Association shall be deemed to have ratified such agreements and contracts, and the Association will fully and completely perform all of its duties and obligations under such agreements for their entire term. Where Manager has entered into agreements and contracts on behalf of the Association in compliance with the terms and provisions of this Agreement, and where Manager has substantially complied with all of the material terms and provisions of such contracts and agreements, the Association shall indemnify and hold harmless Manager from any claims or actions instituted by the other party to such contracts and agreements in accordance with the terms and provisions of Paragraph 11 hereof.

Manager shall engage such attorneys, accountants and other professionals, experts and subcontractors as may reasonably be required, in the discretion of the Manager, in order to enable Manager to effectively perform its duties and exercise its powers hereunder. The foregoing shall not be a limitation upon the right of the Association to employ other such professionals and experts on its own account as it may desire, but the employment of the same by the Association shall in no way affect Manager's rights to employ and continue the employment of the professionals and experts which it has or will employ, nor shall the same in any way relieve the Association of its obligation to pay the cost of professionals and experts retained by Manager; provided that the Association has approved the retainer of specific firms and that the cost thereof either is consistent with the Budget or has been separately approved by the Board.

Except upon the approval of the Board, Manager hereby agrees not to enter into any contract on behalf of the Association with an initial term in excess of _____ (_____) years or which does not permit termination of the contract by the Association without penalty upon no more than _____ (_____) days written notice. Manager shall have the authority to extend, modify or terminate such contracts relating to the upkeep, maintenance and operation of the Development and/or Units, and Manager shall have the additional authority to enter into new service contracts for the upkeep, maintenance and operation of the Development and/or Units, subject to the above-described limitations. Moreover, it is specifically contemplated by Manager that, for an indefinite period of time, Manager may, at its option, subcontract some or all of the duties and responsibilities of Manager under this Agreement to a substitute local manager (or companies, over time) (the "Subcontract Manager"). The Association specifically consents to and approves of such subcontract(s) to the Subcontract Manager, provided that Manager remains contractually obligated to the Association to meet all of Manager's duties and obligations under this Agreement.

5.8 Insurance. Manager shall cause to be placed or kept in force such insurance as the Association requests and is provided for in the Budget provided such insurance is available. To the same extent that the Association is so required or permitted, Manager shall act as agent for the Association, each Owner and for each other insured interest to adjust all claims arising under said insurance policies, to bring suit thereon and deliver releases upon payment of claims, to otherwise exercise all of the rights, powers and privileges of the insured parties, to receive all insurance proceeds on behalf of the insured parties, subject to the provisions of the Project Instruments. Manager and any Subcontract Manager shall be designated as additional insureds in the comprehensive public liability policy obtained by or for the benefit of the Association, and any additional premium therefor shall be the responsibility of the Association.

5.9 Rules and Regulations; Enforcement. Manager shall be authorized to take such action as may be necessary to enforce the provisions of the Project Instruments or Rules and Regulations of the Development adopted pursuant thereto. Manager shall have all the rights and powers of the Association to remedy any violations thereof or to pursue such legal remedies as Manager may deem appropriate. Manager may act upon its own determination, either on its own behalf or on the behalf of the Association. If Manager deems it advisable not to act in any particular situation, Manager shall not be liable or responsible to the Association, its directors or any Owner for the failure to so act. Subject to the prior direction and approval of the Board, Manager is authorized to represent the Association in any action, suit or other proceeding, and any such action may be brought or defended in the name of the Association.

Manager shall have the authority to propose to amend the Rules and Regulations for the use and occupancy of the Development, subject to the approval of the Association. Manager shall ensure that a copy of the then-current Rules and Regulations promulgated by the Association is kept furnished to the Unit Occupant(s), at check-in or otherwise, upon request. Manager shall have the power to regulate all vehicular parking. Manager shall regulate the use of the storage areas on the Development property, if any.

5.10 Direction. Manager shall have the authority to perform such other acts and be responsible for such additional duties as may from time to time be delegated to it by the Association or the Project Instruments, or as may be imposed upon Manager by any applicable provisions of law, rule or regulation (in which event Manager's compensation under Paragraph 9 hereof will be adjusted as appropriate by mutual agreement). Manager shall hire and supervise the employees and/or subcontract for and supervise persons to perform the duties and responsibilities of Manager set forth herein. Such persons shall be under the exclusive supervision and control of Manager. Manager shall have absolute discretion as to the retention or discharge of any such employee or subcontractor. Although all employees shall be employees of the Manager, and not the Association, the Association acknowledges that all expenses of such employees (and an allocable share of the expenses related to Manager's employees who are not present at the Development on a full-time basis), including salary, payroll taxes and other benefits which are paid by the Manager shall be an expense reimbursable to Manager under the Budget.

6. Application of Funds. Manager shall pay the Association's financial obligations to the extent of available Association funds. Funds available shall be applied monthly as follows:

(i) Management Fee. First, to Manager's management Fee and other compensation to Manager, pursuant to Paragraph 9 hereof.

(ii) Reimbursement. Next, to reimbursement of Manager for any reimbursable expenses, including indemnities pursuant to Paragraph 11, or any funds advanced or incurred by Manager, in accordance with the Budget, or to carry out any of Manager's duties or responsibilities under this Agreement or as otherwise allowed under this Agreement on behalf of the Association.

(iii) Insurance. Next, to the payment of premiums on insurance policies for the Development carried by the Association and Manager.

(iv) Utilities. Next, to the payment of all utilities, if any, chargeable to the Association in accordance with either the Budget or otherwise as allowed under this Agreement.

(v) Balance. The balance shall be utilized, applied and disbursed and otherwise expended or reserved by Manager to pay Association expenses.

7. Duties of the Association

7.1 Interference. For so long as this Agreement remains in effect and is not properly terminated by the Association as

herein provided, the Association shall not unlawfully interfere nor permit, allow or cause any of its officers, directors or Owners to interfere unlawfully with Manager in the performance of its duties or the exercise of any of its powers hereunder.

7.2 Amendments of Documents. The Association shall not amend any of the Project Instruments in a manner which might impair or prejudice the rights of Manager without the prior written consent of Manager.

7.3 Permits, Licenses and Quiet Title. The Association will use all commercially reasonable efforts to maintain quiet title to the common facilities in the Development and to obtain and maintain any and all permits and licenses necessary to the operations of the Development.

7.4 Meetings of Association. Manager shall receive written notice of any meeting of the Association's board of directors at least _____ (_____) business days prior to the meeting, and shall have the right to have a representative attend, and shall cause a representative to attend all meetings of the Association and of any board of directors of the same. The minutes of all the Association's meetings, whether of Owners or of any board of directors, shall be taken by the Association's secretary and the minute book shall remain in the custody of said secretary, who shall always be responsible for preparing and furnishing notices of all meetings to the required parties. The Association shall provide Manager with a current roster of the officers and directors of the Association at all times, and with a current copy of any minutes taken of all meetings of both the Association and any board of directors.

At the Association's request, (i) Manager shall organize the meetings of the Owners, including the preparation and delivery of the notice of the meeting and the preparation of proxy forms; (ii) Manager shall prepare the agenda for the meeting, conduct the meetings and oversee the election of any board of directors; and (iii) Manager shall assist with the meetings of any board of directors, including the election of officers.

8. Deficits. Notwithstanding any implication in this Agreement or the Project Instruments to the contrary, Manager shall not be required to undertake to pay any costs or expenses necessary for the maintenance, repair, replacement, restoration, improvement, operation or administration of the Association from its own funds, and shall only be required to perform its services and make disbursements to the extent that; and as long as, the payments of Assessments received by Manager from the Association and its members are sufficient to pay said costs and expenses in full. If it shall appear to Manager that said Assessments are insufficient to pay the same, and to adequately provide full reserves, Manager shall forthwith determine, advise the Association and, subject to the Association's approval, assess and collect from the Association and/or the Owners such additional Assessments as are required to pay expenses and/or maintain reasonable reserves. In the event of an emergency posing imminent danger to the Development or any portion thereof, including but not limited to the Units, the common elements or the common furnishings, or to the health or safety of any Owner or other person, Manager is authorized to expend from its own funds, for the protection of said property or person, an amount necessary to do so in its reasonable judgment, and the Association shall promptly reimburse Manager therefor.

The Manager shall have no obligation or fiduciary responsibility to make up shortfalls in the collection of maintenance fees or other assessments, but shall have the option of making advances, in the form of loans, to the Association as the Manager determines to be appropriate, in its sole discretion. Any such loans will be approved, in advance, by the Board of Directors of the Association. To the extent that the Manager does make loans to the Association, they shall be based upon terms with reasonable interest, the specific terms to be negotiated with the Board of Directors of the Association at the time of such loans.

9. Management Fee. In consideration for its services hereunder, Manager shall be paid the compensation provided for in the Fee Addendums or as specifically set forth herein. It is specifically understood and agreed that Manager shall perform all of the services required of it hereunder at no cost or expense whatsoever to itself, but solely at the cost and expense of the Association and that the compensation provided for in the Fee Schedule is to be after recovery of all sums advanced by Manager to provide the services required by this Agreement. Manager's Management Fee, overhead,

employees and other costs, reimbursable expenses, accounting and administrative expenses, and other expenses necessary to fulfill Manager's obligations will be included in the Budget as Association expenses as reimbursable items. Any other out-of-pocket costs and expenses incurred by reason of special mailings, newsletters, polls and the like, requested by the Association, will also be considered reimbursable costs, which must be paid for by the Association. Nothing contained herein shall be deemed to preclude the payment to Manager or any of its affiliates of any fees, costs or compensation set forth in or contemplated by the Budget, provided that such fees, costs or compensation are for services or goods required by the Association and subject to Paragraph 5 hereof are not in excess of the prevailing rate or fees for such services or goods which would be charged by unaffiliated parties in arm's-length transactions.

10. Assignment. Manager may assign this Agreement in whole or in part with the consent of the Association, which consent shall not be unreasonably withheld, so long as the assignee agrees, in writing, to assume and perform the terms and covenants of this Agreement. Upon an assignment, Manager shall automatically be released from any and all further obligations hereunder for the assigned term. Manager may also assign this Agreement in whole or in part to any affiliate of Manager without the prior consent or approval of the Association. For purposes of this Agreement, an "affiliate" of Manager shall mean any company, partnership or entity in which either Manager or any of its constituent partners or shareholders owns _____ percent (_____) or more of the beneficial ownership interest in such entity.

11. Indemnification. Manager shall not be liable to the Association or Owners for any loss or damage not solely caused by the fraud, gross negligence or willful misconduct of Manager, its employees, officers, directors, shareholders or agents, including the Subcontract Manager (collectively, the "Indemnitees"). The Association will defend, indemnify and hold the Indemnitees harmless from and against any such liability, or claims for damages, costs and expenses, including attorneys' fees, arising out of or related to the administration of the Indemnitees' duties hereunder, or from alleged injury to any person or property in and about, or in connection with the Development from any cause whatsoever, unless such loss or injury shall be solely caused by the fraud, gross negligence or willful misconduct of the Indemnitees not covered by the Association's insurance.

12. Default by Association. If the Association or its members shall interfere with Manager in the performance of its duties and exercise of its powers hereunder, or the Association shall fail to promptly do any of the things required of it hereunder, then Manager may, _____ (_____) days after having given written notice to any officer of the Association, declare this Agreement in default if such default remains then uncured. Unless such default is cured by the Association within _____ (_____) days following its receipt of such notice of default, Manager may, in addition to any other remedy given it by agreement or in law or equity, (i) terminate this Agreement pursuant to paragraph 3 hereof, and (ii) bring an action against the Association for damages and/or injunctive relief. All rights of Manager, upon default, shall be cumulative and the exercise of one or more remedies shall not be deemed to exclude or constitute a waiver of any other additional remedy.

13. Miscellaneous

13.1 This Agreement shall be governed by, and shall be construed in accordance with, the laws of the state identified on the signature page hereto. The parties hereby waive any right they may have under any applicable law to a trial by jury with respect to any suit or legal action which may be commenced by or against the other concerning the interpretation, construction, validity, enforcement or performance of this Agreement or any other agreement or instrument executed in connection with this Agreement.

13.2 Except as otherwise specifically set forth herein, time is of the essence for all terms of this Agreement. In the event that Manager shall be delayed, hindered in or prevented from the performance of any act required hereunder by reason of strikes, lock-outs, labor troubles, inability to procure materials, failure of power, restrictive governmental laws or regulations, riots, insurrection, war or any other reasons beyond Manager's control, then performance of such act shall be excused for the period of the delay, and the period for the performance of any such act shall be extended for a period

equivalent to the period of such delay.

13.3 No modification, release, discharge or waiver of any provision hereof shall be of any force, effect or value unless in writing and signed by the parties to this Agreement. No waiver of a breach of any of the covenants contained in this Agreement shall be construed to be a waiver of any succeeding breach of the same or any other covenant, irrespective of the number of violations or breaches thereof which may occur. This Agreement embodies the entire agreement between the parties hereto relating to the subject matter hereof and supersedes and replaces any and all prior negotiations, representations, agreements and understandings, both oral and written, in connection therewith. The invalidity in whole or in part of any covenant, promise or undertaking, or any section, subsection, sentence, clause, phrase or words, or of any provisions of this Agreement, shall not affect the validity of the remaining portions hereof. Whenever the context hereof so permits, the use of the plural will include the singular, the singular the plural and the use of any gender will be deemed to include all genders.

13.4 Except as may be otherwise provided herein, any notice, demand, request, consent, approval or communication under this Agreement shall be in writing and shall be deemed duly given and made upon receipt. A party may designate a different address for receiving notices hereunder by notice to the other parties.

13.5 In the event either party hereto institutes an action to enforce its rights hereunder or to resolve any dispute arising with respect hereto, the substantially prevailing party in such action shall be entitled, in addition to any other relief granted by the court, to such reasonable attorney's fees and costs as such court may award.

14. Additional Terms. The following additional terms are herein stated:

Initial Term Expiration Year: _____ [year]

Governing State Law: _____ [state]

The parties have executed this Agreement as of the date first written above.

"ASSOCIATION"

a(n) _____ [state] _____ [entity]

By: _____

Print Name: _____

Title: _____

"MANAGER"

a(n) _____ [state] _____ [entity]

By: _____

Print Name: _____

Title: _____

[Attach Exhibit A]

[Attach Exhibit B]



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Current Legal Forms for Real Estate

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Current Legal Forms for Real Estate
Chapter 22 DEVELOPMENT AND SUBDIVISION
Part IV. FORMS
G. FINANCING

26-22 Current Legal Forms for Real Estate FORM 22.108

FORM 22.108 Construction loan and security agreement financing for subdivision of single family lots

COMMENT

This form relates to a developer's purchase of vacant land for subdivision into lots. The Borrower intends to use the proceeds of the loan to acquire the land and to contract the necessary roads, utility lines, etc. After the subdivision is completed, the developer will sell the lots to builders for purpose of the construction of single family residences. The agreement provides for a release of a lot from lenders' mortgage upon the borrower complying with various requirements imposed by the lender. Thus, the borrower can sell if the lots and obtain a partial release of the mortgage without having to pay off the entire principal balance.

As is typical with most construction loans, this agreement provides for periodic disbursements by the lender to pay for the improvements as they are completed. The agreement also provides for an initial disbursement to borrower for acquisition and other soft costs which the borrower has incurred or will incur upon the acquisition of the property and the closing of the loan.

The developer in this transaction will not construct the improvements itself. Rather, this developer has engaged a contractor to do the construction of the improvements. As a result, the lender must be concerned with takes over the project if there is a default.

This agreement also contains confession of judgment provisions that is, that the lender is entitled to summary proceedings in the event of a default. However, the drafter should be aware that many states do not allow such provisions. Therefore, as is the case in any transaction, the practitioner must become familiar with the laws in the jurisdiction where the project is located or where the loan is being made.

FORM

CONSTRUCTION LOAN AND SECURITY AGREEMENT

This Agreement is entered into as of this _____[day] day of _____[month], _____[year] by and between, _____[name], a(n) _____[state] _____[entity], whose business address is _____[address] (the "Borrower") and _____[name], a(n) _____[state] _____[entity], whose business address is _____[address] (the "Bank").

WHEREAS, the Borrower has requested the Bank to make available to the Borrower the credit facility described herein for the purpose of the Borrower acquiring and developing certain land located in the City of _____[city], _____[county] County, _____[state]; and

WHEREAS, the Bank is willing to make the credit facility described herein available to the Borrower on the terms and conditions set forth herein;

NOW, THEREFORE, in consideration of the premises and the mutual promises hereinafter contained, the Borrower and the Bank agree as follows:

Section 1. Definitions

Certain capitalized terms have the meanings set forth on **Exhibit 1** hereto or in the Mortgage. All financial terms used in this Agreement but not defined on **Exhibit 1** or in the Mortgage have the meanings given to them by generally accepted accounting principles. All other undefined terms have the meanings given to them in the _____[state] Uniform Commercial Code.

Section 2. Construction Loan and Terms

2.1 Mortgage Loan. (a) Subject to the terms and conditions hereof, Bank hereby extends to Borrower a construction loan facility under which Bank will make construction advances to Borrower from time to time in the maximum aggregate amount of _____ (\$_____) (individually referred to as a "Construction Loan" and collectively referred to as the "Construction Loans"), subject to the terms and conditions as stated herein.

(b) On the Closing Date hereof, Borrower shall duly execute and deliver to Bank a mortgage note in the principal amount of _____ (\$_____) (the "Note") in the form of **Exhibit 2.1** attached hereto, with appropriate insertions therein and payable to the order of Bank.

(c) So long as no Event of Default has occurred and is continuing, Borrower may request Construction Loans in accordance with the provisions of Section 3.5 hereof until _____[month] _____[day], _____[year] (the "Due Date"). On the Due Date the entire principal balance, plus all other amounts due the Bank hereunder will be due and payable.

2.2 Fees. At closing, Borrower will pay to Bank a fee in the amount of _____ percent (_____%) of the amount of such Construction Loan (i.e., \$_____) (the "Fee").

2.3 Costs. In addition to the Fee, Borrower shall pay to Bank all out of pocket expenses and any other reasonable costs and expenses (including, without limitation, reasonable attorneys' fees, court costs, litigation and other expense)

incurred or paid by Bank in preparing the Loan Documents and establishing, maintaining, protecting or enforcing any of Bank's rights or Borrower's obligations, including, without limitation, any and all such costs and expenses incurred or paid by Bank in inspecting, defending Bank's title or right to the Collateral, or in enforcing its right to the Collateral, and all costs of filing the Mortgage.

Section 3. Disbursement of Loan Proceeds

3.1 Conditions to all Disbursements

(a) Upon execution and delivery of this Agreement and the Loan Documents, Bank shall disburse Loan Proceeds to pay the Bank's costs, fees, the Fee, the mortgage loan title insurance premium, and other initial costs requested by Borrower and approved by Bank, including, without limitation, the purchase price associated with the acquisition of the Property. The obligation of the Bank to disburse any other Loan Proceeds shall be subject to the satisfaction of the following conditions:

(i) That Bank has received all of the items set forth in Section 3.2 hereof, including all building permits for the Project.

(ii) That the representations and warranties made in this Agreement shall be true and correct as and on the date of each disbursement with the same effect as if made on such date.

(iii) That there shall be no continuing defaults or Event of Default under this Agreement or the Loan Documents at the time of any disbursement request.

(iv) That all loan fees are paid as due pursuant to the terms of this Agreement.

(v) That such other reasonable conditions which Bank may request shall be satisfied.

(b) The Bank shall commence disbursing the remaining Loan Proceeds in accordance with subsection 3.5 hereof after the previous conditions listed in 3.1 (a)(i)-(v) have been satisfied, and there are no continuing defaults or Events of Default hereunder.

3.2 Required Items. The obligation of the Bank to disburse any proceeds of the Loan shall be subject to receipt by Bank of the following documents, all of which must be in form and substance acceptable to Bank:

(a) Plans and Specifications for the Project as approved by the Bank (which approval shall not be unreasonably withheld or delayed) and by any necessary governmental authority, along with detailed budget costs to be incurred in connection with the construction of the Project, including, without limitation, a complete description of hard and soft costs associated therewith;

(b) The Construction Contract respecting the Project;

(c) A current property location survey (certified to the Bank and the company issuing the title insurance policy) performed by a registered surveyor reasonably acceptable to Bank containing the information satisfactory to the Bank;

(d) A current appraisal performed by a registered appraiser reasonably acceptable to Bank;

(e) Evidence of permits, proper zoning, compliance with all environmental and other laws applicable to the Project and the availability of adequate public utilities for the Project, reasonably satisfactory to the Bank;

(f) A detailed sources and uses statement for the Project, adequate to demonstrate that sufficient funds are available to

complete construction of the Project, including a breakdown of all costs of the Project;

(g) A Resolution in the form attached hereto as **Exhibit 3.2**;

(h) The executed Mortgage;

(i) The executed Note;

(j) The executed UCC-1 Financing Statements;

(k) The Collateral Assignment of Construction Contract;

(l) A paid ALTA (Form 1990) mortgagee title insurance policy without survey, mechanics' and materialmen's or other significant exceptions in an amount equal to the full principal amount of the Loan and containing a pending disbursements provision, which policy shall be endorsed to the date of each disbursement;

(m) Certificates of insurance, insurance binders, or copies of insurance policies, in form and substance to comply with the provisions of the Mortgage, in regard to property and casualty and liability insurance;

(n) Copies certified by the Borrower of all authorizations including sewer permits and zoning variances, if any, building and other permits required by any governmental authority for the construction of the Project, for the purposes contemplated by the Plans and Specifications in accordance with all applicable building, environmental and zoning codes, laws and regulations.

(o) A Notice of Commencement prepared by Borrower or Borrower's designee, complying with applicable law, which is recorded in the _____ [county] County, _____ [state], Real Estate Records after the recording of the Mortgage and prior to commencement of any construction of the Project;

(p) An executed Environmental Representations, Release, Hold Harmless and Indemnity Agreement;

(q) Evidence of builder's risk and liability insurance coverages for the Project;

(r) Such opinions, certificates and other documents as Bank shall reasonably request.

3.3 Use of Loan Proceeds. Borrower shall use the Loan Proceeds only for the purpose of closing the Loan, paying title insurance, and other closing and professional fees, interest on the Loans, and paying the costs of the Project.

3.4 Loan in Balance. It is expressly understood and agreed that the Loan provided for herein shall at all times be in balance. The Loan shall be deemed to be in balance only when the undistributed proceeds of the Loan (together with Borrower's additional financing sources, if any), after provisions for all retainages, shall equal or exceed the amount necessary, based on the Bank's reasonable estimate of the total remaining cost of the Project, to pay for all work done or to be done and expenses for the completion of the construction, renovation, equipping and installation of the Project. The Borrower agrees that if for any reason the amount of such undistributed Loan Proceeds (together with Borrower's additional financing sources) shall at any time be or become insufficient for such purpose, regardless of how such insufficiency may arise or be caused, the Borrower shall (i) upon the written request of the Bank, within five (5) days of such request, furnish to the Bank evidence reasonably satisfactory to the Bank of such insufficiency; and (ii) not less than ten (10) days prior to the time that the item or expense giving rise to such insufficiency becomes due and payable, or upon the written request of the Bank, deposit in the Bank funds sufficient to satisfy the amount of such insufficiency, which deposit shall then first be exhausted before any further disbursement of the Loan Proceeds shall be made. Alternatively, the Bank may require the Borrower to furnish an amount of money which shall consist of a deposit with

the Bank of cash, certificates of deposit, letters of credit or marketable securities in an amount, and in form, if applicable, reasonably satisfactory to Bank, in which Bank may from time to time apply, or allow the Borrower to apply, to the satisfaction and payment of costs associated with the Project. Portions of any deposit by the Borrower shall be released to the appropriate party when and to the extent that the Bank reasonably determines that the value or the amount thereof is more than the excess, if any, of the total remaining costs of completing the Project over the undisbursed balance of the Loan Proceeds. The Bank makes no warranty, either express or implied, that the moneys from the Loan Proceeds which are available for payment of the costs of the Project will be sufficient to pay such costs. If the Borrower pays any portion of the cost of the Project pursuant to the provisions of this Section, it shall not be entitled to any reimbursement therefor, nor shall it be entitled to any diminution or postponement of the payments required to be made by it hereunder.

3.5 Disbursement Procedure

(a) Except for payment of those amounts described in Section 3.1 of this Agreement, Bank shall not be required to make any disbursements from the balance of the Loan Proceeds, except as the Project is constructed and Requisition Forms from time to time are submitted by Borrower which disbursements shall be made under the Note. Each disbursement made by Bank may be limited, in the Bank's reasonable discretion, to ninety percent (90%) of the total amount of the costs and expenses set forth on such Requisition Form. Bank may at all times withhold disbursements sufficient in its reasonable opinion to complete the Project.

(b) Borrower shall submit from time to time disbursement requests on AIA Form G702 and Form G703 (the "Requisition Form") executed by the Borrower, the Borrower's architect (if any) and the Contractor, together with affidavits signed by the Contractor stating the amounts due or to become due for work and materials to date thereof to subcontractors, material men, and laborers. Upon the reasonable request of the Bank, the Borrower shall also submit with each disbursement request materialmen's certificates or releases or waiver of liens, pursuant to _____[state] mechanics' lien law, satisfactory to Bank. At the Bank's reasonable discretion, the Bank may from time to time require that complete supporting subcontractors affidavits be provided to the Bank along with the Requisition Form. At the Bank's sole discretion, the Bank may at any time designate an independent inspecting architect to submit periodic reports to the Bank and to inspect the Project, at Borrower's expense, which reports and inspections must be reasonably satisfactory to the Bank, prior to any disbursement.

(c) As provided herein, Bank shall then make available for advancement to Borrower the net amount requested, less the amount of any applicable retainage held by Bank pursuant to Section 3.5(a) hereof until the end of construction of the Project, and, less any combination of the following further amounts:

(i) any costs covered by the Requisition Form which are not approved, certified or verified as provided in this Section, any costs for which proof of payment has not been received by Bank, or any costs which the Bank or its agent or designee (including any Bank-appointed independent inspecting architect) has not approved in the exercise of reasonable discretion.

(ii) any costs or expenses greater than ninety percent (90%) of the respective Project Budget amount.

(iii) any Real Estate taxes, mechanics' liens, security interest, claims or other charges against the Project and any interest, fees, or other costs which the Borrower may have failed to pay in accordance with this Agreement or the Loan Documents.

(d) There shall be no more than one request for advancement in any one month. All advances are to be made from the principal office of the Bank or at such other place as the Bank may designate. All disbursement shall be made to or deposited in a demand deposit account established for the Borrower and maintained at the Bank's principal office. Alternatively, at any time at the Bank's reasonable discretion, the Bank may require that all disbursements shall be made

to or deposited in the title insurance company's account, which shall then make further disbursement. In either event, such account shall not be drawn upon except to pay (or to reimburse the Borrower if previously paid) for approved disbursements, which account must be established so that the Bank receives or is entitled to receive, on request, duplicate copies of regular monthly statements of all deposits and withdrawals, including checks. If the Bank considers that its best interests and the best interests of completing the Project lie in accelerating the amounts to be advanced, the Bank shall be entitled to do so and no person dealing with the Borrower or any contractors or any other person shall have standing to demand any different performance from the Bank.

(e) Bank may retain from each disbursement request submitted on its Requisition Form for hard costs prior to substantial completion of the Project, the greater of ten percent (10%) of the amount requested, or the amount to be retained pursuant to the terms of the Construction Contract. Such retainage shall be held by Bank as part of the Loan Proceeds, to be disbursed no earlier than twenty (20) days after to the Completion Date, at a time satisfactory to Bank, and at the first draw request after the completion, as required by Borrower.

(f) Borrower also agrees to furnish to Bank prior to each disbursement hereunder the endorsement of the title company, establishing that the mortgage lien created in accordance with the Mortgage is a valid first lien to the extent of the funds disbursed, such endorsement to contain no mechanics' or materialmen's liens or survey or other significant exceptions. In addition, prior to each disbursement, Borrower will furnish to Bank an architects' report, containing a certification that the funds to be disbursed are to be used as payment for Project costs already complete, and/or related costs, and that the remaining principal not yet drawn is sufficient to cover the costs of the construction not yet completed.

(g) Borrower further agrees that all advancements made by Bank in accordance with the procedure hereinabove referred to, shall be used only for the Project and related costs. The Bank shall require proper evidence of the aforesaid payments before being compelled to make additional payments. Bank shall be entitled to all rights under the provisions of Section 1311.14 of the _____ [state] Revised Code.

(h) The Bank agrees that each disbursement request submitted to it by the Borrower may include an amount equal to the interest then due and payable on the Note, so long as an interest reserve exists in the Project Budget. In the event that the Borrower does not submit a disbursement request on a timely basis in a month in which an interest payment is due, the Bank may in its sole discretion, but shall not be required to, make such an interest payment with the proceeds of the Loan as if the Borrower had submitted a disbursement request in such amount. If the Bank unilaterally makes such an interest payment out of the interest received, Bank shall notify Borrower post facto.

3.6 Release of Lots. From time to time, upon the written request of Borrower, Bank shall release from the lien of the Mortgage with respect to one (1) or more of the lots which the Borrower will develop on the Property (individually, a "Lot"). The release will be given under the following conditions:

(a) There shall then exist no default under the terms of any of the Loan Documents.

(b) For each Lot to be released, Borrower shall have paid to Bank a release price of _____ Dollars (\$_____).

(c) Each such release price shall be applied to payment upon the Note; first to any payment that is overdue, the remainder to principal.

(d) Selection of the Lot(s) to be released shall be at the sole discretion of the Borrower; provided, however, that ingress to and egress from all portions of the Real Estate remaining subject to the Mortgage after such release shall be over fully-dedicated public roads, or by private easements reasonably satisfactory to the Bank; and provided, further, that the configuration of the land remaining subject to the lien of the Mortgage after such release shall at all times be subject to the approval of the Bank, which approval shall not be unreasonably withheld or delayed.

(e) The Bank may require other reasonable documentation to give the release, including, without limitation, a legal description thereof.

Section 4. Security

4.1 Security Interest of Bank. To induce Bank to make the Loan, and as security for the Obligations, Borrower hereby grants to Bank a security interest and continuing lien (subject only to "Permitted Encumbrances" as hereinafter defined) in and to all of the following property of Borrower, whether now owned or existing or hereafter acquired or arising and regardless of where located (the "Collateral"):

(a) all of those items listed on **Exhibit 4.1** hereto that are related to the Project, and

(b) all accessions to, substitutions for and replacements, products and proceeds of any of the Collateral including, without limitation, condemnation or requisition payments and insurance proceeds with respect to all or any of the Collateral.

4.2 Further Assurances. In addition to that which is specifically provided in this Agreement, Borrower shall do all other things and sign and deliver all other documents and instruments to perfect, protect, maintain and enforce the Liens of Bank and the priority of such Liens, and other rights granted hereunder. Borrower authorizes Bank to execute alone, any financing statement or any other document or instrument which Bank may require to perfect, protect or enforce any right or Lien hereunder and authorizes Bank to sign Borrower's name on the same. Upon payment in full by Borrower of all Obligations in accordance with the terms of agreements creating such Obligations, the Liens granted by Borrower hereunder shall terminate, except that if, at any time, all or part of the payment of Obligations theretofore made by Borrower or any other person is rescinded or otherwise must be returned by Bank for any reason whatsoever (including, without limitation, the insolvency, bankruptcy or reorganization of Borrower or such other person), the Liens granted hereunder or under any other present or future agreement between Borrower and Bank, and all rights of Bank and all Obligations shall be reinstated as to Obligations which were satisfied by the payment to rescinded or returned, all as though such payment had not been made, and Borrower shall sign and deliver to Bank all documents and things necessary to re-perfect all terminated Liens.

4.3 Other Amounts Deemed Obligations. In the event that Borrower shall fail to pay any tax, assessment, government charge or levy (except those being contested in good faith by appropriate proceeds in accordance with the Loan Documents where no enforcement or execution action has been taken in respect thereof or where such action has been stayed) or shall fail to purchase and maintain insurance, or shall fail to discharge any Lien prohibited hereby, or shall fail to pay any Obligation when due, or shall fail to comply with any other Obligation, Bank may, but shall not be required to, pay, satisfy, discharge or bond the same for the account of Borrower, and to the extent permitted by law and at the option of Bank all monies so paid out shall be deemed part of the Obligations.

4.4 Borrower Remains Liable. Unless Bank expressly undertakes to complete the Project for its own profit (as opposed to an undertaking to mitigate its losses or damages), Borrower shall remain liable under any contracts and agreements included in the Collateral to the extent set forth therein and agrees to perform all of its duties and obligations thereunder to the same extent as if this Agreement had not been executed, and Bank shall not have any obligation or liability under such contracts and agreements included in the Collateral by reason of this Agreement.

4.5 Mortgage. Borrower shall enter into a Mortgage satisfactory to Bank granting Bank a Lien in the Real Property as security for all Obligations, as more fully set forth in the Mortgage.

4.6 Priority. The liens and security interests granted to Bank pursuant to this Agreement are fully perfected first priority Liens subject to the permitted encumbrances listed in the Mortgage, with priority over the rights of any person other

than Borrower in the Collateral.

4.7 Assets in Possession of Bank. Borrower hereby pledges to Bank and grants Bank a security interest in any deposits or other sums at any time credited by or due from Bank to Borrower and any securities, instruments, documents or other property of Borrower's in the possession of Bank, whether for safekeeping or otherwise, as collateral security and upon the occurrence of an Event of Default, Bank may apply or set the same off against any Obligations of Borrower's to Bank.

4.8 Additional Security. In the event that any grant for the Project is received by an affiliate of Borrower, and such grant is loaned to Borrower, Borrower agrees to cause such affiliate to assign any mortgage and pledge any note evidencing such loan to Bank as additional security for the Loan.

Section 5. Representations and Warranties

5.1 Organization and Qualification. The Borrower is a limited liability company duly organized and validly existing under the laws of the State of _____[state], has the power and authority to own the Project, to carry on its business and to enter into and perform this Agreement, the Note and the other Loan Documents. All information provided to Bank with respect to Borrower and its operations is true and correct.

5.2 Due Authorization. The execution, delivery and performance by the Borrower of this Agreement, the Note and the Loan Documents have been duly authorized by all necessary action, and will not contravene any law or any governmental rule, regulation or order presently binding on the Borrower or the Operating Agreement of Borrower, will not violate any material agreement or instrument by which Borrower is bound or contravene the provisions of, or will not constitute a default under any indenture, mortgage contract or other material agreement or instrument to which the Borrower or its properties may be bound.

5.3 Litigation. There are no suits or proceedings pending or threatened against or materially affecting Borrower or any of its property. There are no proceedings by or before any governmental commission, board, bureau or other administrative agency pending or threatened against Borrower or any of its property.

5.4 Consents. The execution, delivery and performance by the Borrower of this Agreement, the Note and the Loan Documents do not require the consent or approval of, the giving of notice to, the registration with, or the taking of any other action in respect of, any federal, state or other governmental authority or agency, not previously obtained or performed.

5.5 Laws and Taxes. Borrower is in material compliance with all laws applicable to it, has filed all required tax returns and has paid all taxes shown to be due and payable on those returns. No taxing authority has asserted or assessed any additional tax liabilities against Borrower.

5.6 Binding Effect. Assuming the due authorization, execution and delivery thereof by the other parties thereto, this Agreement, the Note and the Loan Documents have been duly executed and delivered by the Borrower and constitute the legal, valid and binding agreements of the Borrower, enforceable against the Borrower in accordance with their respective terms, except as may be limited by bankruptcy, insolvency or other similar laws affecting the enforcement of creditors' rights in general. The enforceability of the Borrower's obligations under said documents is subject to general principles of equity (regardless of whether such enforceability is considered in a proceeding at law or in equity).

5.7 Existing Defaults. No event has occurred and in continuing which with the lapse of time or the giving of notice would constitute an Event of Default under this Agreement, the Note, the Mortgage or the Loan Documents.

5.8 Untrue Statements. This Agreement does not contain any untrue statement of material fact, nor does it omit to state

a material fact necessary to make the statements contained therein not materially misleading or incomplete.

5.9 Use of Real Estate. The Project complies with applicable zoning ordinances, regulation and restrictive covenants effecting the Real Estate as well as all environmental, ecological, landmark and other applicable laws and regulations, and all requirements for such use have been met which need to be met at this time. In the event that Borrower is aware of any problem (or noncompliance) with any of the foregoing, or delays in obtaining permits, approvals or other consents, Borrower shall promptly send Bank a letter disclosing such problem.

5.10 Utilities. All utility services necessary for the construction of the Project for its intended purpose are available at the boundaries of the Real Estate, including water supply, fire protection, storm and sanitary sewer, gas, electric power and telephone facilities. The cost of installation of such utilities has been included in the Project Budget.

5.11 Streets and Roads. All access roads necessary for the full access to the Project have either been completed or the necessary rights-of-way therefore have been acquired by the appropriate governmental authority or dedicated to public use and accepted by the governmental authority, and all necessary steps have been taken by Borrower and any necessary governmental authority to assure the complete construction and installation thereof.

5.12 Notification to Title Insurer. Borrower has advised the title insurer in writing before the title insurance commitment has been issued whether any survey, soil testing, site development, excavation or other work related to the construction of the Project on the Real Estate was begun or done on or at the Real Estate before the Mortgage is or was recorded. Borrower has also furnished the title insurer a copy of those documents which title insurer reasonably requires in order to issue the title insurance required hereunder.

5.13 Solvency. The Borrower is Solvent and each Member of Borrower, if any, is Solvent, and upon consummation of this loan transaction contemplated herein, the Borrower and each subsidiary will be Solvent. "Solvent" means as to any person that: (a) the present fair salable value of the assets of such person is in excess of the total amount of its liabilities (including contingent liabilities); (b) such person does not have unreasonably small capital and is able to pay its debts as they become due; and (c) such person does not intend to or believe it will incur obligations beyond its ability to pay as they mature.

Section 6. Statements and Information

6.1 Financial Statements. So long as any of the Obligations to Bank are outstanding, Borrower shall maintain a standard and modern system for accounting in accordance with generally accepted principles of accounting and shall furnish to Bank or cause to be furnished to Bank:

- (a) Within ninety (90) days after the end of each fiscal year, a copy of Borrower's federal income tax returns (including any extensions) for that year;
- (b) With the statements submitted under (a) above, a certificate signed by a Member of Borrower: (i) stating he is familiar with all documents relating to Bank and that no Event of Default exists as specified in the Agreement, nor, to his knowledge, any event which upon notice or lapse of time or both would constitute such an Event of Default, has occurred, or if, to his knowledge, any such conditions or event existed or exists, specifying it and describing what action Borrower has taken or proposes to take with respect thereto; and (ii) setting forth, in summary form, figures showing the financial status of Borrower;
- (c) Forthwith upon any Member of Borrower obtaining knowledge of any condition or event which constitutes or, after notice or lapse of time or both, would constitute an Event of Default, a certificate of such Member specifying the nature and period of the existence thereof, and what action Borrower has taken or is taking or proposes to take in respect thereof;

- (d) Within ten (10) days after they are filed by Borrower, copies of all federal, state and local income tax returns; and
- (e) With reasonable promptness, such other information as Bank may reasonably request.

Section 7. Covenants

7.1 Existence; Disposition of Assets. Borrower will maintain its existence and will not liquidate or dissolve, sell, lease, transfer or otherwise dispose of all or any substantial part of the assets of Borrower in the ordinary course of business.

7.2 Guarantees and Loans. Borrower will not enter into any direct or indirect guarantees other than by endorsement of checks for deposit or other than in the ordinary course of business nor make any advance or loan other than in the ordinary course of business as presently conducted, including, without limitation, loans and advances to employees of Borrower.

7.3 Indebtedness. Other than Indebtedness owed to Bank, Borrower shall not incur, create, assume or permit to exist any additional Indebtedness for borrowed money or Indebtedness on account of deposits, advances or progress payments under contracts, or other Indebtedness evidenced by capitalized leases, notes, bonds, debentures or similar obligations.

7.4 Transfer, Pledge or Encumbrance of Assets. Borrower agrees that it will not transfer any of its property or assets outside of the ordinary course of its business, and that it will not create, incur, assume or permit to continue in existence any mortgage, lien, charge or encumbrance on, or security interest in, or pledge or deposit of, or conditional sale or other title retention agreement with respect to, any property or asset now owned or hereafter acquired by Borrower and related to the Project, provided that the restrictions of this Section shall not prohibit:

- (a) Liens to Bank under this Agreement and the Loan Documents;
- (b) Liens for taxes, assessments or governmental charges the payment of which is not at the time due and payable, or is being contested in good faith; or
- (c) Liens incurred or deposits made in the ordinary course of business in connection with workmen's compensation, unemployment insurance and other types of social security.

7.5 Insurance. Borrower shall keep its property, including, but not limited to the Property and the Project, insured under policies of the type and amount, and with the provisions and endorsements required by the Mortgage. Borrower shall immediately notify Bank of any loss or damage to, or material diminution in, or any occurrence which would adversely affect the value of, or a material portion of its property. Borrower shall also obtain insurance of types and in amounts reasonably acceptable to Bank.

7.6 Taxes. Borrower will pay all taxes, assessments and other governmental charges imposed upon it or any of its properties or assets or in respect of any of its franchises, business, income or profits before any penalty or interest accrues thereon, and all claims (including, without limitation, claims for labor, services, materials and supplies) for sums which have become due and payable and which by law have or might become a lien or charge upon any of its properties or assets, provided that (unless any material item or property would be lost, forfeited or materially damaged as a result thereof) no such charge or claim need be paid if the amount, applicability or validity thereof is currently being contested in good faith by appropriate proceedings promptly initiated and diligently conducted and if such reserve or other appropriate provision, if any, as shall be required by generally accepted accounting principles shall have been made therefor.

7.7 Compliance with Law. Borrower will comply in all substantial respects, with all statutes, laws, ordinances and

governmental rules, regulations and orders to which it is subject or which are applicable to its business, properties and assets, including, without limitation:

- (a) all provisions of the Employee Retirement Income Security Act of 1974 and the rules and regulations promulgated thereunder, which, if violated, might result in a lien or charge upon any property of Borrower;
- (b) The Occupational Safety and Health Act of 1970 and the rules and regulations promulgated thereto;
- (c) applicable statutes or governmental rules, regulations, orders and restrictions relating to environmental standards or controls; and
- (d) all applicable worker's compensation laws of the State of _____[state].

7.8 Construction Contract. The Construction Contract(s) (assuming the due authorization, execution and delivery thereof by the other parties thereto), will constitute the legal, valid and binding obligation of the Borrower and, to the knowledge of the Borrower, the legal, valid and binding obligation of the other party to the contract. The execution, delivery and performance of the Construction Contract by the other party to the contract does not, to the knowledge of the Borrower, require the consent or approval of, the giving of notice to, the registration with, or the taking of any other action in respect of, any federal, state or other governmental authority or agency, not previously obtained or performed. Further, upon execution of a Construction Contract, Borrower will simultaneously conditionally assign such contract to the Bank and obtain the consent of the contractor to such agreement.

7.9 Plans and Specifications. The Plans and Specifications to be submitted will be satisfactory to the Borrower and will have been reviewed and approved by Borrower, and to the extent required by applicable law or any effective or restrictive covenant, by all governmental authorities.

7.10 Representations. Borrower covenants, for the term of this Agreement, that the representations set forth herein are correct and continuing and Borrower will, within ten (10) days of its knowledge thereof, give written notice to Bank of the existence of any event which would prohibit Borrower from continuing to make the representations set forth in this Agreement.

7.11 Access to Real Estate. Borrower shall permit the Bank and its representatives, agents and designees to enter upon the Real Estate at all reasonable times after notice from Bank to Borrower, inspect the Project and all materials to be used in the construction thereof and examine all detailed plans and shop drawings which all may be kept at the construction site. Borrower shall cooperate and shall use reasonable business efforts to cause the Contractor and all other subcontractors to cooperate with the Bank and its agents or designees to enable such parties to perform their functions hereunder. At the time of each inspection by the Bank or its designee, the Borrower will make available to him, on demand all records relating to the construction of this Project. Bank will conduct its inspections in a manner that will not unreasonably interfere with the Project.

7.12 Construction Progress. Borrower shall diligently and continuously work to complete the construction and development of the Project as follows:

- (a) Borrower shall commence construction of the Project no later than _____[month] _____[day], _____[year]; cause the construction to be prosecuted with diligence and continuity in accordance with the Plans and Specifications except during the existence of delays (for not more than thirty (30) days) caused by events beyond its control (provided, however, that Borrower will promptly give Bank notice if any delay causes construction to stop for fifteen (15) days or more); and complete the Project in accordance with the Plans and Specifications on or before the maturity date of the Note free and clear of defects and liens or claims for liens for material supplied or labor or services performed in connection with the construction of the Project.

(b) Borrower shall upon demand by Bank, correct any defects in the Project or any departures from the Plans and Specifications not approved by Bank, with respect to which the advance of any Loan Proceeds shall not constitute a waiver of Bank's right to require correction of any such defects or departures from the Plans and Specifications not theretofore discovered by, or called to the attention of the Bank.

(c) Borrower shall not permit the performance of any work pursuant to any general contract, subcontract, a change order in excess of _____ Dollars (\$ _____), the Construction Contract or Plans and Specifications until the Bank shall have received copies of such general contract, subcontract, change order, Construction Contract, or Plans and Specifications and, in the case of change orders greater than _____ Dollars (\$ _____) in the aggregate, given specific written approval thereof; it being understood that approval of any change order will not obligate the Bank to increase or advance any additional money on account of any such change order.

(d) Borrower shall pay or authorize the Bank to pay out of the proceeds of the Loan all costs and expenses required for the completion of the Project and the satisfaction of the conditions of this Agreement, including, without implied limitation, the Loan and all costs of title searches and recording expenses, all of the Bank's costs as set forth herein, the Bank's reasonable counsel fees, and the reasonable fees and expenses for any services of any review architect or construction consultant which may be required in addition to those normally and reasonably contemplated by this Agreement.

(e) Borrower shall pay the costs of satisfaction of all conditions of this Agreement to be performed by or imposed upon Borrower.

(f) Borrower shall indemnify Bank against claims or brokers, arising by the reason of the execution hereof and the consummation of the transaction contemplated thereby, except brokers engaged by Bank (if any).

(g) Borrower shall deliver to the Bank or its agents or designees, if requested, copies of all contracts, bills of sales, statements, receipted vouchers or agreements under which Borrower claims title to any materials, fixtures or articles incorporated in the Project, or subject to the Lien of the Mortgage, or under which it has incurred costs for which it is entitled to Loan Proceeds.

(h) Borrower shall upon the request of Bank, take reasonable measures to protect from theft or vandalism all portions of the Project and all tools and building materials stored on the Real Estate.

(i) Borrower shall comply with all restrictions, covenants and easements affecting the Real Estate or the Project.

7.13 Construction Contract. Borrower shall keep the Construction Contract in full force and effect and shall take no action nor omit to take any action that would cause a default thereunder, and Borrower shall take any action reasonably necessary that would effect to cure a default by Borrower thereunder, and Borrower shall keep Bank fully informed of all significant material correspondence relating thereto, including providing copies of same promptly to Bank.

7.14 Banking Relationship. So long as any of the Obligations are outstanding, Borrower shall maintain all of its primary depository and checking accounts at the Bank.

Section 8. Events of Default and Remedies

8.1 Events of Default. Any of the following events shall be an Event of Default:

(a) Any material representation or warranty made by Borrower herein or in any of the Loan Documents is incorrect

when made or reaffirmed; or

(b) Borrower defaults in the payment of any principal or interest on any Obligation when due and payable, by acceleration or otherwise, and such nonpayment remains uncured for a period of ten (10) days thereafter; or

(c) Borrower fails to observe or perform any covenant, condition or agreement herein and fails to cure such default within thirty (30) days of the occurrence thereof, (or if the default is such that it is not reasonably capable of being cured within such thirty (30) day period) and if Borrower (a) initiates corrective action within such period; and (b) diligently, continually and in good faith works to affect a cure as soon as possible, then Borrower shall have such additional time as is reasonably necessary to cure the default prior to the exercise of any remedies hereunder, but in no event shall Bank be precluded from exercising remedies if its security becomes, or is about to become, materially jeopardized by any failure to cure a default, or if the default is not cured within sixty (60) days after the first notice of default is given) provided that such 30 day grace period will not apply to (i) a breach of any covenant which in Bank's good faith judgment is incapable of cure, (ii) any failure to maintain insurance or permit inspection of the Collateral or of the books and records of Borrower, (iii) any breach in any negative covenant set forth in Section 7 hereof, or (iv) any breach of any covenant which has already occurred; or

(d) An event of default shall occur pursuant to the terms of the Note, any of the Loan Documents or any other document evidencing any Obligation of Borrower owed to Bank, subject to any applicable grace period or cure periods; or

(e) Borrower fails to carry on the construction of the Project in accordance with the Plans and Specifications with reasonable dispatch or Borrower discontinues such construction for a continuous period of thirty (30) days; or

(f) Borrower refuses to permit the Bank, or its representatives to enter upon the Real Estate at all reasonable times to inspect the Project, the construction thereof and all materials, fixtures and articles used or to be used in said construction and to examine all detailed plans, shop drawings and Plans and Specifications which relate to the Project and/or fails to furnish to Bank or its representatives copies of such plans, drawings and specifications when requested; or

(g) Borrower uses any materials, fixtures, furnishings or equipment in the construction of the Project or any appurtenances that are used or obsolete or not installed in a good and workmanlike manner in accordance with the Plans and Specifications, and such situation is not corrected within thirty (30) days after notice to correct is given from Bank to Borrower; or

(h) Borrower executes any security instrument other than the Mortgage covering any materials, fixtures, furnishings or equipment intended to be incorporated into the Project, the filing of a financing statement, publishing notice of such security instrument, or failure to purchase any of such materials, fixtures, furnishings or equipment so that the ownership thereof will vest unconditionally in Borrower free from encumbrances on delivery at the Real Estate; or

(i) Borrower fails or refuses to disclose to Bank, upon request, the names of all persons with whom Borrower has contracted or intends to contract for the construction of the Project or for the furnishing of labor or materials therefor, or to obtain the approval of such persons by Bank when required by this Agreement; or

(j) A court enters a decree or order for relief with respect to Borrower or any Guarantor in an involuntary case under any applicable bankruptcy, insolvency or other similar law then in effect, or appoints a receiver, liquidator, assignee, custodian, trustee, sequestrator (or other similar official) of Borrower or any Guarantor for any substantial part of its property, or orders the wind-up or liquidation of its affairs; or a petition initiating an involuntary case under any such bankruptcy, insolvency or similar law is filed and is pending for thirty (30) days without dismissal; or

(k) Borrower or any Guarantor commences a voluntary case under any applicable bankruptcy, insolvency or other similar law in effect, or makes any general assignment for the benefit of creditors, or fails generally to pay its debts as

such debts become due, or takes action in furtherance of any of the foregoing; or

(l) Borrower defaults under the terms of any Indebtedness or lease involving total payment obligations of Borrower in excess of _____ Dollars (\$ _____), and such default gives any creditor or lessor the right to accelerate the maturity of any such indebtedness or lease payments which right is not contested by Borrower or is determined by any court of competent jurisdiction to be valid; or

(m) Final judgment for the payment of money in excess of _____ Dollars (\$ _____) is rendered against Borrower and remains undischarged for ten (10) days during which execution is not effectively stayed; or

(n) Any event occurs which might, in Bank's reasonable opinion, have a material adverse effect on the Collateral or on Borrower's financial condition, operations, assets or prospects, or on any other property securing the repayment of the Obligations; or

(o) Borrower fails to satisfy or bond a lien for the performance of work or the supply of materials filed against the Real Estate before the date of any Loan advance or for a period of thirty (30) days after the filing thereof; or

(p) The dissolution of Borrower; or

(q) The commencement of any foreclosure proceedings in aid of execution, attachment actions, levies against, or the filing by any taxing authority of a lien against any of the Collateral or any property securing the repayment of any of the Obligations; or

(r) The loss, theft or substantial damage to a substantial portion of the Collateral or any property securing the repayment of the Obligations if the result of such occurrence will be, in Bank's reasonable judgment, the failure or inability of Borrower to continue substantially normal operation of its business within thirty (30) days of such occurrence; or

(s) Bank ceases to be Borrower's (i) principal depository bank in which substantially all of Borrower's funds are deposited, and (ii) principal bank of account; or

(t) The validity or effectiveness of any of the Loan Documents or its transfer, grant, pledge, mortgage, or assignment by the party executing such Loan Documents is impaired if: (i) any party executing any of the Loan Documents asserts that any of such Loan Documents is not a legal, valid and binding obligation of the party thereto enforceable in accordance with its terms; (ii) the security interest or Lien purporting to be created by any of the Loan Documents will for any reason cease to be a valid, perfected lien subject to no other liens other than liens permitted by the terms of this Agreement; or (iii) any Loan Document is amended, hypothecated, subordinated, terminated or discharged or if any person is released from any of its covenants or obligations under any of the Loan Documents except as permitted by Bank in writing; or

(u) Bank in good faith deems itself insecure and Borrower fails to reasonably address the situation causing such good faith insecurity within thirty (30) days of Borrower's notice from Bank of its insecurity, which notice will describe the reasons for such insecurity in reasonable detail; or

(v) The filing of any lien or charge against the Property or any part thereof which is not removed to the satisfaction of Bank within a period of thirty (30) days thereafter; or

(w) The abandonment by Borrower of all or any material part of the Property.

8.2 Remedies. If any Event of Default occurs, Bank may (i) cease advancing money hereunder, (ii) declare all

Obligations to be immediately due and payable, whereupon such Obligations will immediately become due and payable, (iii) exercise any and all rights and remedies provided by applicable law and the Loan Documents, (iv) proceed to realize upon the Collateral or any property securing the Obligations, including, without limitation, causing all or any part of the Collateral to be transferred or registered in its name or in the name of any other person, firm or corporation, with or without designation of the capacity of such nominee, all without presentment, demand, protest, or notice of any kind, each of which are hereby expressly waived by Borrower.

8.3 Setoff. If any Event of Default occurs and is continuing, Bank is authorized, without notice to Borrower, to offset and apply to all or any part of the Obligations all moneys, credits and other property of any nature whatsoever of Borrower now or at any time hereafter in the possession of, in transit to or from, under the control or custody of, or on deposit with (whether held by Borrower individually or jointly with another party) Bank including, but not limited to, certificates of deposit.

8.4 Default Rate. After the occurrence of an Event of Default, all amounts of principal outstanding as of the date of the occurrence of such Event of Default will accrue interest at the Default Rate, without notice to Borrower. This provision does not constitute a waiver of any Events of Default or an agreement by Bank to permit any late payments whatsoever.

8.5 Late Payment Penalty. If any payment of principal is paid more than ten (10) days after its due date (whether at maturity, by acceleration or otherwise after the expiration of any applicable notice, grace and cure periods), Borrower agrees to pay to Bank a late payment fee equal to five percent (5%) of the payment amount then due.

8.6 Power of Attorney. Borrower hereby constitutes and appoints Bank and/or another independent contractor selected by Bank as its true and lawful attorney-in-fact with full power of substitution to complete the Project in the name of Borrower, and hereby empowers said attorney-in-fact to do any or all of the following:

- (a) To use any Loan Proceeds which may remain unadvanced hereunder for the purpose of completing the Project in the manner called for by the Plans and Specifications.
- (b) To make such additions, changes and corrections in the Plans and Specifications as shall be necessary or desirable to complete the Project in substantially the manner contemplated by the Plans and Specifications.
- (c) To employ any contractors, subcontractors, agents, architects and inspectors required for said purposes.
- (d) To employ attorneys to defend against attempts to interfere with the exercise of the powers granted hereby.
- (e) To pay, settle, or compromise all existing bills and claims which are or may be liens against the Real Estate or the Project or may be necessary or desirable for the completion of the Project or the clearance of title.
- (f) To execute all applications and certificates in the name of Borrower which may be required by any Construction Contract.
- (g) To prosecute and defend all actions or proceedings in connection with the construction of the Project on the Real Estate and to take such action, require such performance and do any and every other act as is deemed reasonably necessary with respect to the completion of the Project which Borrower might do on its own behalf.

The power of attorney granted in this Section 8.6 shall be a power coupled with an interest which cannot be revoked until the obligations are satisfied. Entering the Real Estate in order to complete the Project and/or exercise the aforesaid power of attorney will not exclude Borrower from possession, custody, ownership or control of the Real Estate or the Project.

8.7 Advances After Default. After the occurrence and during the continuance of an Event of Default by Borrower hereunder, Bank may advance any remaining proceeds of the Loan Proceeds directly to subcontractors, the Contractor and other persons to pay for the completion of the Project but Bank is not under any obligation so to do. No further direction or authorization from Borrower shall be necessary to warrant such direct advances and all such advances shall satisfy pro tanto the obligations of Bank hereunder and shall be secured by the Mortgage as fully as if made to Borrower regardless of the disposition thereof by an subcontractor, general contractor or such other persons. Bank may impose any condition for such direct payment including, but not limited to, receipt of estoppel certificates, waivers of lien, releases and the like.

8.8 No Remedy Exclusive. No remedy set forth herein is exclusive of any other available remedy or remedies, but each is cumulative and in addition to every other remedy given under this Agreement or any of the Loan Documents or now or hereafter existing at law or in equity or by statute. Borrower waives any requirement of marshaling of assets which may be secured by any of the Loan Documents.

8.9 Agreement to Pay Attorneys' Fees and Expenses. In the event Borrower should default under any of the provisions of this Agreement and Bank should employ attorneys or incur other expenses for the collection of the Obligations or the enforcement of performance or observance of any obligation or agreement on the part of Borrower contained in this Agreement or in or represented by the Note, Borrower shall on demand therefor reimburse the reasonable fee of such attorneys and such other expenses so incurred.

8.10 No Additional Waiver Implied by One Waiver. In the event any agreement contained in this Agreement should be breached by either party and thereafter waived by the other party, such waiver shall be limited to the particular breach so waived and shall not be deemed to waive any other breach hereunder.

Section 9. Miscellaneous Provisions

9.1 Waiver. Borrower waives notice of non-payment, demand, presentment, protest, or notice of protest of any accounts or other collateral, and all other notices; consents to any renewals or extensions of time of payment thereof; and generally waives any and all suretyship defenses and defenses in the nature thereof. No delay or omission of Bank in exercising or enforcing any of its rights, powers, privileges, discretion or remedies hereunder shall constitute a waiver thereof; and no waiver by Bank of any default of Borrower hereunder shall operate as a waiver of any other default hereunder. No term or provision hereof shall be waived, altered or modified except with the prior written consent of Bank. All rights and remedies of Bank under this Agreement of every kind and description (without limitation) shall be cumulative and not alternative or exclusive, and may be exercised by Bank at such time or times and in such order as Bank in its sole discretion may determine.

9.2 Severability. If any provision of this Agreement or portion of such provision or the application thereof to any person or circumstance is held invalid, the remainder of this Agreement (or the remainder of such provision) and the application thereof to other persons or circumstances shall not be affected thereby.

9.3 Security. The Obligations are secured as provided herein, in this Agreement, in the Mortgage, in the Loan Documents and in each other document or agreement which by its terms secures the repayment or performance of the Obligations.

9.4 Binding Effect. This Agreement shall be binding upon and inure to the benefit of the respective legal representatives, successors and assigns of the parties hereto. Bank (and any subsequent assignee) may transfer and assign this Agreement and the Collateral to the assignee, who shall thereupon have all of the rights of Bank; and Bank (or such subsequent assignee who in turn assigns as aforesaid) shall then be relieved and discharged of any responsibility or liability with respect to this Agreement and said Collateral.

9.5 Governing Law and Venue. This Agreement has been executed or completed, and is to be performed, in _____[state], and this Agreement and all rights, duties and remedies of the parties thereunder shall be determined in all respects by the laws of _____[state].

9.6 Notices. Any notices under or pursuant to this Agreement shall be deemed duly sent when delivered in hand or when mailed by registered or certified mail, return receipt requested, addressed as follows:

To Borrower: _____

With a Copy to: _____

To Bank: _____

With a Copy to: _____

Either party may change such address by sending notice of the change to the other party.

9.7 Complete Agreement. This Agreement is the complete agreement of the parties hereto and supersedes all previous understandings and agreements relating to the subject matter hereof; neither this Agreement nor any of the terms hereof may be terminated, amended, supplemented, waived or modified orally, but only by an instrument in writing signed by the party against whom enforcement of the termination, amendment, supplement, waiver or modification is sought.

9.8 Time is of the Essence. Time is of the essence in completing the construction of the Project according to the Plans and Specifications and carrying out all of the provisions in this Agreement.

9.9 Governing Law; Jurisdiction. All acts and transactions hereunder and the rights and obligations of the parties hereto shall be governed, construed and interpreted in accordance with the domestic laws of the State of _____[state]. Borrower agrees that the state and federal courts in _____[county] County, _____[state], or any other court in which Bank initiates proceedings have exclusive jurisdiction over all matters arising out of this Agreement, and that service of process in any such proceeding shall be effective if mailed to Borrower at its address described in the Notices section of this Agreement. **BANK AND BORROWER HEREBY WAIVE THE RIGHT TO TRIAL BY JURY OF ANY MATTERS ARISING OUT OF THIS AGREEMENT OR THE TRANSACTIONS CONTEMPLATED HEREBY.**

9.10 Confession of Judgment. Borrower authorizes any attorney of record to appear for it in any court of record in the State of _____[state], after an Obligation becomes due and payable whether by its terms or upon default, waives the issuance and service of process, releases all errors and rights of appeal, and confesses a judgment against it in favor of the holder of such Obligation, for the principal amount of such Obligation plus interest thereon, together with court costs and attorneys' fees. Stay of Execution and all exemptions are hereby waived. Borrower also agrees that the attorney acting for Borrower as set forth in this paragraph may be compensated by Bank for such services, and Borrower waives any conflict of interest caused by such representation and compensation arrangement. If an Obligation is referred to an attorney for collection, and the payment is obtained without the entry of a judgment, the

obligors will pay to the holder of such Obligation its reasonable attorneys' fees.

IN WITNESS WHEREOF, the Borrower and the Bank have executed this Agreement by their duly authorized representatives as of the date first above written.

WARNING

-- BY SIGNING THIS PAPER, YOU GIVE UP YOUR RIGHT TO NOTICE AND COURT TRIAL. IF YOU DO NOT PAY ON TIME, A COURT JUDGMENT MAY BE TAKEN AGAINST YOU WITHOUT YOUR PRIOR KNOWLEDGE AND THE POWERS OF A COURT CAN BE USED TO COLLECT FROM YOU REGARDLESS OF ANY CLAIMS YOU MAY HAVE AGAINST THE CREDITOR WHETHER FOR RETURNED GOODS, FAULTY GOODS, FAILURE ON HIS PART TO COMPLY WITH THE AGREEMENT OR ANY OTHER CAUSE.

"BORROWER"

a(n) _____ [state] _____ [entity]

By: _____

"BANK"

a(n) _____ [state] _____ [entity]

By: _____

EXHIBIT 1

(a) "Closing Date" shall be as of _____ [month] _____ [day] _____ [year], or such other date as the parties hereto shall mutually fix.

(b) Collateral shall include, without limitation, all of Borrower's present and future right, title and interest in or to any and all leases assigned pursuant to the Mortgage and the interest in Borrower in the Project assigned to Bank pursuant to the Mortgage.

(c) "Construction Loans" shall be the advances made under the Note as set forth in Section 2.1 of the Agreement.

(d) "Contractor" shall mean a contractor approved by the Bank.

(e) "Default Rate" means _____ percent (_____ %) in excess of the interest rate otherwise in effect under amounts outstanding under the Note. In no event will the interest rate accruing under such Note be increased to be in excess of the maximum interest rate permitted by applicable state or federal usury laws then

in effect.

(f) "Indebtedness" shall mean (i) all items which in accordance with generally accepted accounting principles would be included in determining total liabilities on a consolidated basis as shown on the liability side of a balance sheet as at the date as of which indebtedness is to be determined, (ii) all indebtedness secured by any mortgage, pledge, lien or conditional sale or other title retention agreement to which any property or asset owned or held is subject, whether or not the indebtedness secured thereby shall have been assumed (excluding non-capitalized leases which may amount to title retention agreements but including capitalized leases), and (iii) all indebtedness of others which Borrower has directly or indirectly guaranteed, endorsed (otherwise than for collection or deposit in the ordinary course of business), discounted or sold with recourse or agreed (contingently or otherwise) to purchase or repurchase or otherwise acquire, or in respect of which Borrower has agreed to supply or advance funds (whether by way of loan, stock purchase, capital contribution or otherwise) or otherwise to become directly or indirectly liable and shall specifically include all indebtedness under this Agreement and the Note.

(g) "Lien" shall mean any security interest, mortgage, pledge, assignment, lien or other encumbrance of any kind, including interests of vendors or lessors under conditional sales contracts or capital leases.

(h) "Loan" shall mean the indebtedness represented by the Note and all extensions, renewals or consolidations thereof, substitutions therefor and amendments thereto.

(i) "Loan Documents" means this Agreement, the Note, the Mortgage, the Environmental Representations, Release, Hold Harmless and Indemnity Agreement, and every other document or agreement executed by any party evidencing, guarantying or securing any of the Obligation; and "Loan Document" means any of the Loan Documents.

(j) "Loan Proceeds" shall mean disbursed and undisbursed principal amounts of the Note.

(k) "Mortgage" shall mean the Open-End Mortgage, Assignment of Rents and Leases and Security Agreement by and between Borrower and Bank, dated of even date herewith.

(l) "Note" shall mean the Mortgage Note referred to in Section 2.1 of the Agreement.

(m) "Obligation(s)" means all loans, advances, indebtedness, liabilities and obligations of Borrower owed to each of Bank and the Affiliates of Fifth Third Bancorp of every kind and description whether now existing or hereafter arising including, without limitation, those owed by Borrower to others and acquired by Bank or any Affiliate of Fifth Third Bancorp, by purchase, assignment or otherwise, and whether direct or indirect, primary or as guarantor or surety, absolute or contingent, liquidated or unliquidated, matured or unmatured, whether or not secured by additional collateral, and including, without limitation, all liabilities, obligations and indebtedness arising under this Agreement, the Note and the other Loan Documents, all obligations to perform or forbear from performing acts, all amounts represented by letters of credit now or hereafter issued by Bank for the benefit of or at the request of Borrower, and all reasonable expenses and attorneys' fees incurred by Bank and any Affiliate of Fifth Third Bancorp under this Agreement or any other document or instrument related to any of the foregoing.

(n) "Person" or "Party" shall include individuals, partnerships, firms, corporations and all other entities.

(o) "Plans and Specifications" shall mean the detailed Plans and Specifications for the construction of Project, approved by Bank and by all necessary governmental authorities.

(p) "Property" shall mean the real property located in _____[county] County,
_____[state], described on **Exhibit A** to the Mortgage, and the development of
_____ (_____) residential lots.

- (q) "Project" shall mean the acquisition of the Property and the development of _____(_____) residential lots pursuant to the Plans and Specifications.
- (r) "Project Budget" shall mean the budgeted sources and uses of funds, costs and expenses for the Project as set forth in Borrower's business plan.
- (s) "Real Estate" shall mean the real property described in **Exhibit A** to the Mortgage.
- (t) "Requisition Form" shall have the meaning assigned to it in Section 3.5 of the Agreement.
- (u) "Security Documents" shall mean the Mortgage and all other documents related to the creation, recording, protection or perfection of the liens.

[Attach Exhibit 2.1]

[Attach Exhibit 3.2]

[Attach Exhibit 4.1]



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Current Legal Forms for Real Estate

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Current Legal Forms for Real Estate
Chapter 22 DEVELOPMENT AND SUBDIVISION
Part IV. FORMS
G. FINANCING

26-22 Current Legal Forms for Real Estate FORM 22.109

FORM 22.109 Building loan agreement to fund construction of residential structure--proceeds to be periodically disbursed as construction progresses

COMMENT

This agreement is a very simple construction loan agreement for the construction of a residence. This agreement provides for periodic disbursements of the loan proceeds. This agreement contemplates a situation where the borrow is constructing the residence. Another typical scenario involves the owner of the lender hiring a contractor to construct the residence. Where an independent builder is interjected into the process, it is likely that a more detailed form will need to be utilized.

FORM

BUILDING LOAN CONTRACT

This Building Loan Contract is made and entered this _____ [day] of _____ [month], _____ [year] between _____ [name], a(n) _____ [state] _____ [entity] having its principal office at _____ [address], (herein "Lender"), and _____ [name], residing at _____ [address], (herein "You" and "Borrower." (If there is more than one Borrower, the words "You" and "Borrower" used in this Contract includes them.)

LOAN

1. Lender agrees to lend to You _____ Dollars (\$_____). The purpose of the loan is

to pay for improvements on your property. You agree to pay interest on money advanced in accordance with the provisions of the note referred to below.

PROPERTY

2. The property is described at Schedule A, which is attached to this Contract and incorporated herein by reference (hereinafter referred to as the "Property").

IMPROVEMENTS, PLANS AND SPECIFICATIONS

3. You agree to construct and complete the improvements described below. Before payment of the first installment, you shall file Plans and Specifications with the government departments having authority to approve them and shall obtain all necessary approvals and building permits. The Plans and Specifications shall be approved by Lender. No changes shall be made thereafter without Lender's consent. The improvements are briefly described as follows: construction of a _____ [insert number, e.g., one] family dwelling on the Property.

ADVANCES

4. The loan is to be advanced by Lender on a monthly basis. A construction budget is set forth on Exhibit B. In no event will Lender be required to make disbursements more than one (1) time per month. On a monthly basis you should make an application for a disbursement. The request shall be accompanied by an affidavit similar in form set forth as Exhibit C. The request shall also contain such other information or confirmations as the Lender shall reasonably determine as necessary or appropriate.

HOW WORK IS TO BE DONE

5. You agree to construct and complete the improvements according to the Plans and Specifications. Work is to begin promptly after the date of this contract. You shall carry on the work with reasonable diligence, and you shall be finished by not more than _____ (_____) _____ [insert weeks/months/years/etc.] from the first day of the month in which this agreement is signed.

NOTE AND MORTGAGE

6. On this date you have signed a note for the loan. The payment of the Note is secured by a Mortgage on the Property made by you on this date. The Mortgage is to be recorded on the date this Contract is filed. This Contract is subject to the terms of the Note and Mortgage.

APPROVAL OF WORK

7. No installment shall be due unless: (a) all work usually done at that stage of construction is done in a good and workmanlike manner; (b) all materials and fixtures usually installed and furnished by that stage of construction are installed and furnished; and (c) all governmental approval respecting the work have been obtained. Lender or its agent shall inspect the work prior to the making of any installment. Work is to be done to Lender's satisfaction. No installment is to be paid unless construction is first approved by an engineer, architect or other party designated by, or satisfactory

to, Lender.

CERTIFICATE OF NO ENCUMBRANCES

8. No installment is due and payable while there is any lien or other encumbrance on the Property (except, the Mortgage securing the Loan). Before any installment becomes due and payable, you shall deliver to Lender a report, furnished by an abstract corporation or title company acceptable to the Lender, stating that no liens, orders or assignments of contract have been filed against the Property after the recording of the Mortgage.

LENDER'S RIGHT TO COMPLETE WORK; MAKE PAYMENTS

9. If the construction work stops or does not proceed at a reasonable speed, Lender may employ workmen and purchase materials to complete or protect the work. If mechanics liens or orders or assignments of contract are filed against the Property, Lender may pay and satisfy them. If any taxes, assessments, sewer rents or water rates charged against the Property are not paid when due, Lender may pay them. Payments made by Lender under this paragraph are secured by the Note and Mortgage as if they were installments paid to you.

INDEMNIFICATION

10. You agree to pay for and indemnify, defend and hold harmless Lender for all damages, causes of action, claims or liens for materials, labor or services furnished to make the improvements on the Property. You shall defend against any action or proceeding brought against Lender on these liens or claims, using an attorney of Lender's choice.

DEFAULTS; REMEDIES

11. The following are events resulting in an immediate default:

- (a) Assignment of this Contract or any installment by you without prior written consent of Lender.
- (b) Your death before receipt of the last installment.
- (c) The improvements on the Property are, in the judgment of Lender, materially injured or destroyed by fire or other casualty.
- (d) A petition in bankruptcy is filed by or against you; a receiver or trustee of your Property is appointed; you file a petition for reorganization under any of the provisions of the Bankruptcy Act or of any other law; you make an assignment for the benefit of creditors; or you are judged insolvent by any state or federal court.
- (e) You do not make the improvements in accordance with the Plans and Specifications.
- (f) The Plans and Specifications are not approved by the government departments having authority to approve them.
- (g) In the sole reasonable judgment of Lender, the work either stops or does not proceed at a reasonable speed.

(h) You give a security interest in any materials, fixtures or articles used in the construction or placed in the improvements.

(i) You fail to produce, on Lender's demand, documents proving your unconditional ownership of the materials, fixtures or articles used in the construction or placed in the improvements.

(j) You fail to make any payment of interest due on any mortgage on the Property.

(k) You fail to keep any other obligation in this Contract, or in the Note and Mortgage.

In the event of a default:

(a) Lender's obligation to pay further installments ceases.

(b) At Lender's option, the Note shall become immediately due and payable.

(c) Lender may continue to pay installments without giving up any of Lender's rights or waiving them.

ADVANCES OF LOAN FUNDS

12. You will receive the advances secured by the Mortgage. The advances will be applied first to pay the cost of the improvements. You will not use the advances for any other purpose without the express written approval of Lender.

ORAL CHANGES

13. This Contract cannot be changed or modified without the express written consent of the parties hereto.

SUCCESSORS

14. This Contract shall apply to and bind Lender's and Your distributees, executors, administrators, successors and assigns.

SIGNATURES

Dated: "BORROWER"

Printed Name:

Dated: "LENDER"

_____ a(n)

 _____ [state]
 _____ [entity]

By:

AFFIDAVIT

)
 STATE OF _____ [state]) SS:
 COUNTY OF _____ [county])

_____ [name], being duly sworn, deposes and says:

I reside at _____ [address]. I am the borrower mentioned in the within building loan contract (the contract).

All expenses incurred or to be incurred in connection with said loan, including the consideration paid or to be paid by the borrower to the lender for the loan described therein, are as follows:

Name of Payee	Amount to be Paid
Broker's Commission	\$ _____
Insurance of Title	\$ _____
Mortgage Tax	\$ _____
Architect's, engineer's and surveyor's fees	\$ _____
Recording fees	\$ _____
Inspections	\$ _____
Appraisals	\$ _____
Attorney's fees	\$ _____
Real estate taxes paid at closing	\$ _____
Real estate taxes, water and sewer rents to be paid during construction period	\$ _____
Estimated interest to be paid during construction period	\$ _____
Premiums on bonds	\$ _____

26-22 Current Legal Forms for Real Estate FORM 22.109

Insurance premiums paid for im- \$ _____
provements

Consideration paid to lender for the \$ _____
loan

Amount paid to discharge or reduce \$ _____
indebtedness under a mortgage or
mortgages, a present encumbrance
upon the real estate described in
Schedule A attached to the contract
(if applicable)

TOTAL: \$ _____

The net sum available to the me for the improvements is \$ _____, of which \$ _____
has already been previously disbursed.

The facts herein stated are true to the knowledge of the deponent.

BORROWER

Printed Name: _____

ACKNOWLEDGMENT

STATE OF _____ [state]) SS:
COUNTY OF _____ [county])

BEFORE ME, a Notary Public in and for said County and State, personally appeared
_____ [name], who acknowledged that _____ [he/she] did sign the foregoing
instrument, and that the same is _____ [his/her] free act and deed.

IN TESTIMONY WHEREOF, I have hereunto set my hand and official seal at _____ [city],
_____ [state], this _____ [day] day of _____ [month], _____ [year].

Notary Public

[Attach Schedule A]

[Attach Exhibit B]

[Attach Exhibit C]



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Current Legal Forms for Real Estate

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Current Legal Forms for Real Estate
Chapter 22 DEVELOPMENT AND SUBDIVISION
Part IV. FORMS
G. FINANCING

26-22 Current Legal Forms for Real Estate FORM 22.110

FORM 22.110 Construction loan security agreement--commercial construction--loan predicated upon commitment for long-term financing--security interest to cover personal property

COMMENT

Frequently, the construction lender may require a commitment for permanent long-term financing. The permanent loan must be committed before construction is started, and the proceeds will provide the funds for repayment of the construction loan. In this case, the construction loan is granted on the condition that a specified permanent loan commitment has been made. The borrower agrees to complete construction by a certain date, and repayment of the construction loan falls due shortly thereafter. Normally, the permanent loan will be closed on or about the date the construction loan is to be repaid. In rare situations, the arrangement between the borrower, the construction lender, and the long-term lender is contained in one instrument.

Security interest in personal property

Additional security for the lender is provided by the fact that personal property to be installed will be part of the mortgaged premises. Upon installation, the personal property may become a part of the real estate. Before the full amount of the loan is made available, the borrower is to install the personal property. The borrower will execute and deliver a security agreement when and if requested by the lender. This clause permits the lender to perfect its security interest in the personal property, and fixtures, pursuant to the jurisdiction's Uniform Commercial Code. Security Agreements and related forms are found in Volume 9, Ch. 6, *Credit and Finance*. A financing statement is filed in the appropriate office to protect the lender against competing security interests and claims.

Lien priority

The relative priority of the liens of contractors, materialmen, and laborers obviously affects the lender's position. The local rules vary from granting such liens preference over interests recorded earlier to basing priority on the order of recording. In this instance, the lender's priority over such liens is protected if no work is commenced prior to the recording of the deed of trust securing the construction loan. Depending upon local law, a different form of protection, such as a separate agreement executed by the contractor, may be secured.

FORM

AGREEMENT made this _____ [day] of _____ [month], _____ [year], between _____ [name], a(n) _____ [state] _____ [entity] with its principal place of business at _____ [address] (the "Borrower"), and _____ [name], a(n) _____ [state] _____ [entity] with its principal place of business at _____ [address] (the "Lender").

WHEREAS, the Borrower owns the land described in Schedule A, hereto annexed and made a part hereof (the "Property"), and has applied to the Lender for a loan of _____ Dollars (\$) to aid the Borrower in erecting and equipping on such land the building and other improvements described in Schedule B, hereto annexed and made a part hereof (the "Building"); and

WHEREAS, the Lender has agreed to make the loan upon the terms, covenants, and conditions hereinafter set forth, and the Borrower has agreed to take such loan; and

WHEREAS, _____ [name], a(n) _____ [state] _____ [entity] with its principal place of business at _____ [address] (the "Long-Term Lender"), has issued a commitment dated _____ [month] _____ [day], _____ [year], to make a _____ Dollars (\$) long-term loan to the Borrower, to be evidenced by a note in that amount and to be secured by a deed of trust conveying the Property, on and subject to the terms and conditions set forth in such commitment;

NOW, THEREFORE, in consideration of the mutual promises herein after contained and of other valuable consideration, the parties hereto agree as follows:

1. Agreement to Make Loan. Subject to the terms hereof, the Borrower shall take, and the Lender shall make a loan in the principal sum of _____ Dollars (\$) (the "Loan"), to be advanced as provided below. Such loan shall be evidenced by the Borrower's promissory note of even date herewith for such amount, and made payable to the order of the Lender on _____ [month] _____ [day], _____ [year], or such earlier date as may be provided in the note. Interest shall accrue from the date of each advance at the rate of _____ percent (____%) per annum, payable monthly on the first day of each and every month until the note is fully paid. The note shall contain such other terms and provisions as the Lender and Long-Term Lender shall determine are needed for their protection. Such note shall be secured by a deed of trust of even date herewith (the "Deed of Trust"), on the fee title to the Property.

2. Construction by Borrower. The Borrower shall erect and complete on the Property on or before _____ [month] _____ [day], _____ [year], the Building substantially in accordance with the plans and specifications therefor to be filed with and duly approved by all governmental authorities having jurisdiction in respect thereof. Such plans and specifications for the Building shall be submitted to and approved by the Lender and the Long-Term Lender and shall be initially for identification by the parties hereto and the Long-Term Lender. The plans and specifications shall not, however, be deemed to be complete or finally approved unless they

include provisions for the installation of all sidewalks, curbs, gutters, landscaping, utility connections, and all essential equipment required by and necessary for the operation of the completed Building. After approval of such plans and specifications, all changes therein must be approved by the Lender, and the Lender may also require the prior approval of the Long-Term Lender.

3. Protection Against Prior Liens. The Borrower represents and promises that no excavating or work of any character has been or will be commenced, nor any material of any description delivered on or near the Property for the erection of the Building, prior to the recording of the Deed of Trust.

4. First Deed of Trust on Land and Personal Property. The Lender shall not be obligated to make any advances hereunder unless the Deed of Trust is a valid and enforceable first lien on the Property and the Building, except for taxes and assessments not yet due and payable and other liens, if any, acceptable to the Lender. All fixtures and articles of personal property to be installed in the Building or on the Property or used in the operation thereof by the Borrower (including, without limitation, all furniture, furnishings, fixtures, decor, business and service equipment, linen, china, silverware, and glassware) shall form part of the mortgaged premises covered by and subject to the lien of the Deed of Trust. The Borrower shall, at its own expense, execute and deliver, as additional security for the payment of the note, when and if requested so to do by the Lender or Long-Term Lender, a Security Agreement, in form and substance acceptable to the Lender and the Long-Term Lender, on all fixtures and articles of personal property that may hereafter be installed or placed in the Building or on the Property.

5. Fees Paid by Borrower. The Borrower, at the time fixed for the delivery of the note and Deed of Trust, shall pay all fees heretofore agreed to be paid to the Lender, the expense of examination of title, mortgagee's title insurance in such amount and form as may be satisfactory to the Lender, the recording fee and tax upon the Deed of Trust, and any present or future assignment or assignments or collateral security, if any, required by the Lender. The Borrower shall, at its expense, furnish a survey to the Lender at the time the first advance is made hereunder and shall also furnish to the Lender such other and additional surveys during the course of construction, including a survey after the completion of construction, as may be required by the Lender, all at the expense of the Borrower. No advances shall be made to the Borrower unless title to the Property is satisfactory to the Lender's counsel at the time such advance is requested and due. In case the Lender pays or advances any money for fees, surveys, recording, recording tax, examination of title, mortgagee's title insurance policies, preparation of loan documents, and any expenses incurred in the procuring and making of the loan, and in the payment of any insurance premiums, encumbrance, tax, assessment or other charge or lien upon the property, and any other amounts necessary for the payment of the cost of improvements, the Lender may reimburse itself out of any subsequent advances to be made in accordance herewith, and such reimbursement shall be deemed an advance under this agreement and secured by the note and Deed of Trust.

6. Disbursements of Loan. Advances upon the note and Deed of Trust shall be made at such times and in such amounts as the Lender shall determine, but shall be substantially in accordance with the schedule contained in Schedule C hereto annexed and made a part hereof. The making of an advance or any part of an advance shall not be deemed an approval by the Lender of the work theretofore done. When requested, the Borrower shall exhibit to the Lender satisfactory evidence, by receipts or other vouchers, that there are no outstanding overdue claims and demands for labor and materials used in the Building, before each or any payment shall be due or demandable under this agreement. The title company shall furnish the Lender with a summary of the title before any payment is made. If any notice of lien be filed against the Property, or any part thereof, under the law commonly called the Mechanics' Lien Law, the Lender may suspend further payments under this agreement until such lien shall have been discharged of record, or may satisfy such lien and deduct the amount paid on account thereof from the money in its hands.

No advance shall be due unless, in the judgment of the Lender, all work usually done at the stage of construction when the advance is made payable is done in a good and workmanlike manner, and all material and fixtures usually furnished and installed at this time are furnished and installed, but the Lender may advance parts or the whole of any installments before they become due if the Lender believes it advisable so to do. All such advances or payments shall be deemed to

have been made in pursuance of this agreement and not in modification thereof.

The Lender may require _____ (_____) working days notice in writing from the Borrower before an advance shall be requested. All advances are to be made at the office of the Lender or at such other place as it shall designate.

7. Extension of Time for Repayment. The Lender or any holder of the note and Deed of Trust referred to above may extend the time of payment of the principal evidenced and secured by such note and Deed of Trust, and any extension so granted shall be deemed to be made in pursuance of this agreement and not in modification thereof.

8. Installation of Personal Property. On or before the making of the final advance hereunder, the Borrower shall install all furniture and equipment required for the operation of the Building as a Class A transient hotel, including, without limitation, all furniture, furnishings, fixtures, decor, business and service equipment, linen, china, silverware, and glassware. Prior to such final advance, the Borrower shall also exhibit to the Lender the final certificates of approval of the various governmental authorities having jurisdiction, including a final certificate of occupancy or a temporary certificate of occupancy for the entire Building, hotel, restaurant, bar, public assembly, and other operating permits, and the certificate of the board of fire underwriters acting in and for the locality in which the Property is situated, and thereafter the Borrower shall furnish the Lender with photocopies of each such certificate and permit.

9. Fire Insurance. The Borrower shall furnish to the Lender, with premiums prepaid, or the Lender may procure at the expense of the Borrower, in companies and in amounts satisfactory to the Lender, insurance policies insuring the Property against loss or damage by fire and other hazards as the Lender may reasonably require. In any event, the amount of insurance in effect at any time shall be no less than the amount advanced under the loan agreement up to that point in time, or the cost of replacement of the improvements made and on-site materials, whichever amount is greater.

10. Effect of Borrower's Default. If the construction of the Building is at any time discontinued (unless such discontinuance is due to strikes or force majeure) or abandoned for a period of twenty (20) consecutive days, or if the Borrower does not proceed continuously with the erection and completion of the Building in such manner as reasonably to insure completion on or before the date herein specified, the Lender may, at its option, at any time thereafter take possession of the Property together with all materials, equipment, and improvements thereon, whether affixed to the realty or not, and perform any and all work and labor necessary to complete the improvements substantially according to the plans and specifications referred to in this agreement, and at the Borrower's expense may employ a watchman to protect the Property from theft or injury. For this purpose, the Borrower hereby appoints the Lender its true and lawful attorney-in-fact with full power of substitution in the premises to complete the project in the name of the Borrower and pay all bills and expenses incurred thereby and hereby empowers such attorney-in-fact to use any funds of the Borrower, including any balance which may not have been advanced for the purpose of completing improvements; to make such additions and changes and corrections in the plans and specifications which shall be necessary or desirable to complete the improvements in substantially the manner contemplated in the plans and specifications; to employ such contractor, subcontractors, agents, architects, and inspectors as shall be required for such purposes; to pay, settle, or compromise all existing bills and claims which may be or become liens against the Property or which may be necessary or desirable for the completion of improvements or for the clearance of title; to retain or deposit with the United States District Court for the District of _____ [name] a sum sufficient to discharge any mechanic's lien or other liens that may be filed against the Property; to execute all applications, certificates, or instruments in the name of the Borrower which may be required by any governmental authority or contract; and to do any act which the Borrower might do in its own behalf. This power of attorney shall be deemed to be a power coupled with an interest and cannot be revoked. The attorney-in-fact shall also have power to prosecute and defend all actions and proceedings in connection with the construction of the Building and to take such action and require such performance under any surety or other bond or other obligation or to execute in the name of the Borrower such further bonds or obligations as may be reasonably required in connection with construction work. The Borrower hereby assigns and quitclaims to the Lender all sums unadvanced under such Deed of Trust conditioned upon the use of such sums in trust for the completion of the

improvements, such assignment to become effective only in case of the Borrower's default. All sums paid or expended in accordance with any of the foregoing provisions shall be deemed advances to the Borrower and secured by such note and Deed of Trust and may be applied at the option of the Lender or any other holder of the note and Deed of Trust to any advances thereafter becoming due. The Lender shall be under no obligation to do any of the things provided in this paragraph, and instead may exercise any of the remedies provided for hereunder or under the Deed of Trust, including, without limitation, the termination of this agreement, in which event the entire indebtedness shall be and become immediately due and payable at the election of the Lender.

11. Assignment by Borrower. In the event the Borrower shall part with or be in any way deprived of title to the Property, the Lender may, at its option, continue to make advances under this agreement, subject to all its terms and conditions, to such persons or corporations as may succeed to the Borrower's title. All sums so advanced by the Lender shall be secured by the note and Deed of Trust.

12. Events of Default. If any of the following events shall occur, all of the Lender's obligations to make the loan or to make any further advance shall, if the Lender so elects, cease and terminate, and the note shall at the option of the holder thereof become immediately due and payable, but the Lender may make advances without becoming liable to make any other advances:

(a) If the Deed of Trust offered by the Borrower shall not give to the Lender a first lien on the Property for the indebtedness to be secured thereby, satisfactory to the Lender's attorney.

(b) If the Property is encumbered in any way without the Lender's consent.

(c) If improvements on the Property shall, in the opinion of the Lender's attorney, materially encroach upon the street or upon adjoining property.

(d) If the Borrower does not take the loan or the advances within thirty (30) days after they are made payable, or the Building is not fully completed and open to the public as an operating hotel by _____ [month] _____ [day], _____ [year].

(e) If the improvements on the Property are, in the Lender's reasonable judgment, materially injured or destroyed by fire or otherwise.

(f) If the Borrower shall fail to comply with any of the covenants contained in this agreement, the note, or the Deed of Trust.

(g) If a petition in bankruptcy is filed by or against the Borrower, or a receiver or trustee of the property of the Borrower is appointed; or if the Borrower files a petition for reorganization under any provision of the Bankruptcy Law or of any other state or federal law, or makes an assignment for the benefit of creditors, or is adjudged insolvent by any state or federal court of competent jurisdiction.

(h) If the Borrower does not erect the Building in accordance with the plans and specifications initialed by the Lender, the Borrower, and the Long-Term Lender and approved by the governmental authorities having jurisdiction, except as such plans and specifications may be changed by mutual consent.

(i) If the Borrower does not permit the Lender, or the Lender's representatives, to enter upon the Property to inspect the Building thereon at all reasonable times and examine all detailed plans, shop drawings, and specifications which are kept at the work, or fails to furnish to them, when requested, copies of such plans, drawings, and specifications.

(j) If the construction of the Building is not carried on with reasonable dispatch, in the judgment of the Lender.

(k) If the Borrower executes any security agreement, except to the Lender, covering any materials, fixtures, or articles used in the construction of the Building or covering articles of personal property placed in the Building, or grants any security interest in the foregoing, except to the Lender, or if any of such materials, fixtures, or articles is not purchased so that the ownership thereof will vest unconditionally in the Borrower, free from encumbrance, on delivery at the Property.

(l) If the Borrower fails to comply with any requirement of any governmental authority having jurisdiction within _____ (_____) days after notice in writing of such requirement shall have been given to the Borrower, or fails to furnish to the Lender, when requested, departmental searches made by governmental authorities having jurisdiction.

(m) If the Borrower does not disclose to the Lender, upon demand, the names of all persons with whom the Borrower contracted or intends to contract for the construction of the Building or the furnishing of labor or materials therefor.

13. Application of Proceeds. The Borrower shall receive the advances to be made hereunder and to be secured by the Deed of Trust as a trust fund to be applied, first, for the purpose of paying the cost of improvement of the Property before using any part of such advances for any other purposes; provided that nothing herein shall impose upon the Lender any obligation to see to the proper application of such advances by the Borrower.

14. Effect of Agreement on Note and Deed of Trust. The note and Deed of Trust to be executed, acknowledged, and delivered pursuant to this agreement shall be subject to all the conditions, stipulations, agreements, and covenants contained in this agreement to the same extent as if the agreement were fully set forth and made part of such note and Deed of Trust, until this agreement is terminated by the completion of the Building described herein and the making of the final advance hereunder as provided for herein.

15. Affidavits by Borrower's Officers. The Borrower shall deliver to the Lender, and the Long-Term Lender, upon demand, and so often as called upon, an affidavit of the president or the secretary or other principal officer of the Borrower to the effect that all the chattels, fixtures, attachments, and equipment and all other personal and other property now or hereafter delivered upon, attached to, or used in connection with the construction of the Building or the operation thereof, except owned or installed by tenants of the Borrower, are free and clear of all security interests and from all liens and encumbrances whatsoever, except the security interest given to the Lender, and that the Borrower is the absolute owner of such chattels, fixtures, attachments, and equipment.

16. Discovery of Adverse Environmental Conditions. In the event that an adverse environmental condition is discovered or occurs upon the premises described in Schedule A, annexed hereto, Lender shall be under no obligation to make further advances to Borrower until such time as the adverse condition is satisfactorily remediated by Borrower or its agents. The determination of whether an adverse environmental condition exists shall be made in the sole discretion of Lender. Lender shall have the right to inspect the site and perform any tests Lender or its consultants may deem necessary or appropriate. The determination of whether the adverse condition has been satisfactorily remediated shall be made by Lender, in its sole discretion. Lender shall be entitled to require Borrower to meet all federal, state and local laws, regulations and policies pertaining to remediation.

Borrower shall also have a fiduciary duty to report to Lender any information in the possession of Borrower, its employees or agents, regarding environmental conditions on the real property described in Schedule A, annexed hereto. Failure to report such information shall be an event of default under the terms of this loan agreement.

17. Right to Receive Advances. The obligation of Lender to make advances hereunder shall be subject to the obligation of Borrower to comply with all of the terms of this agreement. In the event that Borrower is in default in any manner, Lender shall be under no obligation to make further advances until the default is fully cured.

18. Amendment to Agreement. This agreement may not be changed orally, but only by an agreement in writing and signed by the party against whom enforcement of any waiver, change, modification, or discharge is sought.

19. Title Insurance. No advance shall be due unless the Borrower furnishes to the Lender before the execution of this agreement title insurance policies in the amount of the loan, issued by title insurance companies satisfactory to the Lender, insuring the interest of the Lender as a valid first lien on the Property, free and clear of all prior liens, encumbrances, and exceptions to title whatsoever, other than those previously approved in writing by the Lender and the Long-Term Lender. It shall be a condition precedent to each advance that such title companies will continue their searches to the date of each advance and shall certify to the Lender in writing that such continuations disclose no liens, encumbrances, or exceptions to title.

20. Application of Agreement. This agreement is made for the sole protection and benefit of the Borrower, the Lender, and the Long-Term Lender, and no other person shall be deemed to have a right of action of any kind hereunder.

21. Architect. The supervising architect for the erection of the Building shall be _____[name] of _____[address] (the "Architect"). If the Architect shall be, or for any reason may become, disqualified or unable to act or to continue to act as supervising architect, the supervising architect to be named in his place, and any succeeding supervising architect, shall be satisfactory to, and approved by, the Lender and the Long-Term Lender.

22. Long-term Loan. The Borrower represents that it has a commitment from the Long-Term Lender to make a long-term loan of _____ Dollars (\$_____) to the Borrower and the Borrower understands that the Lender is willing to make this loan for the term recited because of such commitment. The Borrower, by its proper officers, shall be present at the closing of the loan provided for in the Long-Term Lender's commitment of _____[month] _____[day], _____[year], and shall execute all such documents and otherwise perform and meet all requirements, conditions, and provisions of such commitment to the end that the loan provided for therein shall be consummated and the proceeds thereof used solely, to the extent required, fully to satisfy and fully to pay the principal and interest of the loan herein provided for. The Borrower shall notify the Lender ten (10) days in advance of the time and place of its closing with the Long-Term Lender.

23. Notice. Notices from the Lender to the Borrower may be given by mailing the same to the Borrower at _____[address], and any notice so given shall be deemed to be sufficient for all purposes.

24. Entire Agreement. This agreement supersedes all agreements previously made between the parties relating to its subject matter. There are no other understandings or agreements between them.

25. Non-waiver. No delay or failure by either party to exercise any right under this agreement, and no partial or single exercise of that right, shall constitute a waiver of that or any other right, unless otherwise expressly provided herein.

26. Headings. Headings in this agreement are for convenience only and shall not be used to interpret or construe its provisions.

27. Governing law. This agreement shall be construed in accordance with and governed by the laws of the State of _____[state].

28. Counterparts. This agreement may be executed in two or more counterparts, each of which shall be deemed an original but all of which together shall constitute one and the same instrument.

29. Binding Effect. The provisions of this agreement shall be binding upon and inure to the benefit of each of the parties and their respective legal representatives, successors, and assigns.

IN WITNESS WHEREOF the parties hereto have caused this instrument to be signed in their respective corporate names and to be attested under their respective corporate seals.

"BORROWER"

a(n) _____ [state] _____ [entity]

By: _____

Print Name: _____

Title: _____

"LENDER"

a(n) _____ [state] _____ [entity]

By: _____

Print Name: _____

Title: _____

[Attach Schedule A]



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Current Legal Forms for Real Estate
Chapter 22 DEVELOPMENT AND SUBDIVISION
Part IV. FORMS
G. FINANCING

26-22 Current Legal Forms for Real Estate FORM 22.111

FORM 22.111 Long-term resort development loan agreement--multiple creditors and multiple debtors--outside United States

COMMENT

This form of long-term loan agreement is directed toward multiple resort development financing by a consortium of institutional lenders. It generally illustrates the complex arrangements necessary to supply construction capital to widespread real estate ventures which have different projects underway in various developmental stages. The proceeds of sales of lots in multiple developments secure this loan. Specified receivables also secure the loan.

This particular venture is particular because it involves a construction subsidiary located outside of the United States, in addition to sites scattered within various jurisdictions located within the continental U.S. Inasmuch as the basic tax problems of commitment fees, interest deductions, prepaid interest and default will generally apply in the same manner as noted in preceding comments.

FORM

LOAN AGREEMENT

THIS LOAN AGREEMENT is made this _____[day] day of _____[month],
_____[year] by and among _____and _____[names] (hereinafter together jointly and
severally sometimes referred to as the "Borrowers"); _____and _____[names]
(hereinafter sometimes referred to as the "Guarantor"); and _____and _____[names]
(hereinafter sometimes referred to as the "Banks");

WHEREAS, the Borrowers are engaged in an integrated business venture which consists of developing and operating resorts, recreation-related enterprises, and planned unit developments. Land for homes, villas, and commercial establishments is sold by the Borrowers to others in accordance with project plans which involve certain integrated planning, financing, and marketing techniques developed by the Borrowers and their parent, _____ [name]. The Borrowers desire to obtain funds for the purpose of financing such integrated business venture, including funds required for mortgage release payments, operational working capital and other purposes. While the Borrowers have financed, and will continue to finance, certain phases of their respective projects independently of each other, the Borrowers represent that they can obtain financing on more favorable terms, which will accommodate their fluctuating credit requirements and preserve the flexibility of their operations, by entering into a global financing arrangement which will provide funds from time to time to various of the Borrowers as required for their continued integrated operations. Each of the Borrowers expects to derive benefit, directly or indirectly, from such credit and the Borrowers and their parent company have requested the Banks to make such global credit available to the Borrowers for the purpose of financing the development of their projects in reliance upon the security to be furnished by some or all of the Borrowers and the guaranty of their parent company as hereinafter provided; and

WHEREAS, each Bank will commit to lend upon the terms and conditions set forth herein up to the amount stated opposite its name in the following schedule (such amount being hereinafter referred to as such Bank's Committed Amount):

Bank	Amount
_____	\$ _____
___ [name]	
_____	\$ _____
___ [name]	

WHEREAS, _____ [name] Bank, so long as it is a Continuing Bank, will act as agent of the other Banks with respect to certain transactions hereunder. _____ [name] Bank, acting in such capacity, or any bank or trust company appointed to succeed _____ [name] Bank in such capacity, pursuant to Article IX, Section 9.10 hereof, is referred to herein as Agent Bank; and

WHEREAS, in consideration of the loans being made hereunder to Borrowers, which are subsidiaries of the Guarantor, Guarantor shall guarantee the prompt and punctual payment when due of all principal, interest, and other moneys becoming due under the Notes and this agreement, and the performance and observance by the Borrowers of all the other terms, covenants, conditions, and agreements of the Notes and this agreement on their part to be performed and observed, under and pursuant to a Guaranty in substantially the form of Exhibit L hereto (the "Guaranty").

NOW, THEREFORE, in consideration of the mutual covenants and promises herein contained, the parties hereto do hereby agree as follows:

Article I Definitions

The terms defined in this Article I shall have the meanings herein specified for all purposes of this agreement, unless the context otherwise specifies or requires.

1.1. *Advance* shall mean an amount loaned by the Banks to the Borrowers.

1.2. *Affiliated Subsidiaries* shall mean those companies set forth on Exhibit A and any other companies which are not

Borrowers hereunder and 51 percent (51%) or more of the capital stock of which is owned by the Guarantor or a Borrower or an Affiliated Subsidiary.

1.3. *Agent Bank* shall have the meaning ascribed to it on Page _____ of this Loan Agreement.

1.4. *Agreement Debt* shall mean all indebtedness, obligations, and liabilities of the Borrowers and Guarantor arising under this agreement.

1.5. *Borrowing Base* shall mean, at any given time, an amount equal to _____ percent (_____%) of the aggregate unpaid principal balance (net of financing charges, credit life insurance, membership fees, dues, utility and maintenance fees and other similar charges) of the Eligible Lot Sales Paper duly pledged as Collateral and _____ percent (_____%) of the Proceeds, if any, in the Escrow Account at such time.

1.6. *Business Day* shall mean a day other than a Saturday, Sunday, or any other day on which commercial banks are authorized by law to close under the laws of the State of _____ [state].

1.7. *Cash Flow Models* shall mean cash flow projections prepared in conformity with Master Plans for Development Projects, as revised from time to time and shall be substantially in the form of Exhibit O.

1.8. *Collateral* shall mean (a) all Lot Sales Paper duly pledged to the Banks by Borrowers as security for the payment and performance of all indebtedness, obligations, and liabilities of the Borrowers hereunder and the Proceeds therefrom; or (b) such other substituted form of Collateral as may be approved by all of the Banks.

1.9. *Committed Amount* shall mean the amount which each Bank will commit to lend upon the terms and conditions set forth herein, such amounts being as follows:

Bank	Amount
_____	\$ _____
___ [name]	
_____	\$ _____
___ [name]	

1.10. *Continuing Bank* shall mean any bank which has not terminated its commitment hereunder and effected a conversion in accordance with the terms of Article II, Section 2.8 hereof, provided, however, that if there are only two or less Banks which have not terminated their commitment hereunder and effected a conversion in accordance with the terms of Article II, Section 2.8 hereof, then all Banks shall be considered Continuing Banks.

1.11. *Contracts* shall mean those written agreements as set forth on Exhibit T pursuant to which the Borrowers have agreed to convey Lots in the _____ [name] and _____ [name] to bona fide third parties and which shall meet the following requirements:

(a) The purchaser shall have paid in cash at least _____ percent (_____%) of the original purchase price of the Lot covered by such Contract;

(b) The deferred portion of the purchase price shall bear interest at a rate of not less than _____ percent (_____%) per year and shall be payable in consecutive equal monthly installment payments of principal and interest, sufficient to amortize in full the principal amount of such deferred portion of the purchase price over a period not exceeding ten years from the date of the execution of the agreement and will be free of any claim

or defense of usury;

(c) The agreement is in compliance with all the terms of this Loan Agreement except that as to not more than _____ percent (_____) of all Contracts pledged as Collateral hereunder, counsel to the Guarantor and the Borrowers does not render an opinion with respect to compliance with applicable state land sales statutes and regulations, so long as the obligation evidenced thereby is not challenged by the purchaser thereunder; and

(d) Fee simple title to the Lot covered by the Contract shall have been conveyed to a Trustee acceptable to the Banks who will hold the said fee simple title to the Lot for the benefit of the Lot purchaser in accordance with the terms of an agreement to be entered into between the Guarantor and the Borrowers, Banks and such Trustee in form and substance satisfactory to the Banks, which shall provide that at such time as the Lot purchaser has paid the full purchase price provided for in the Contract and otherwise fully discharged all of such Lot purchaser's obligations and responsibilities as set forth therein, the Banks and the Borrowers shall direct the Trustee to deliver a deed to the Lot to the Lot purchaser.

1.12. *Development Lenders* shall mean and refer to lenders who make loans of the type referred to in Section 1.28(c) and 1.28(l)(1) and the proceeds of which are to be used in connection with the development of the properties of the Borrowers and shall include, but not be limited to, _____ [name].

1.13. *Development Projects* shall mean:

(a) The following lands and premises as more particularly described in Exhibit B hereto as the same are and are to be developed and improved pursuant to the respective Master Plan therefor, and shall include all such improvements.

(b) Any new or Pending Projects for the development of any other lands and premises for which Master Plans, Cash Flow Models, and such other information as the Banks deem necessary are submitted to the Banks, and which are approved as a Development Project by the Banks in accordance with Article IX, Section 9.10(a) hereof.

1.14. *Eligible Lot Sales Paper* shall mean all Lot Sales Paper in respect of which no payment of principal or interest is more than _____ (_____) days past due, which is otherwise free of default and in compliance with the terms of this agreement and, as to Lot Sales Paper other than Contracts, which meets the following requirements:

(a) The note shall evidence a principal indebtedness no greater than _____ percent (_____) of the purchase price of the Lot; and

(b) The note shall bear interest at a rate of not less than _____ percent (_____) per annum and shall be payable in consecutive equal monthly installment payments of principal and interest, sufficient to amortize in full the principal amount of the note, over a period not exceeding _____ (_____) years from the date of the execution of the note; and

(c) The mortgage shall constitute a first and prior lien upon the Lot described in the said mortgage within _____ (_____) days of its inclusion in the Collateral; provided, however,

(1) That Lot Sales Paper arising from the sale of Lots at the _____ [name] Development Project which would otherwise constitute Eligible Lot Sales Paper shall be considered ineligible to the extent that the aggregate unpaid principal balance thereof causes the aggregate unpaid principal balance of all Eligible Lot Sales Paper from such Development Project pledged as Collateral to exceed _____ percent (_____) of the aggregate unpaid principal balance of all Eligible Lot Sales Paper from all Development Projects, including the

_____ [name] Development Project, pledged as Collateral;

(2) Notwithstanding any other provision herein contained to the contrary, the Borrowers may pledge Lot Sales Paper from each Development Project which would otherwise constitute Eligible Lot Sales Paper except that in connection with the submission of such Lot Sales Paper counsel to the Guarantor and the Borrowers does not render an opinion with respect to compliance with applicable state land sales statutes and regulations and such Lot Sales Paper shall be considered Eligible Lot Sales Paper to the extent that the aggregate principal balance thereof does not exceed at any time _____ percent (_____%) of the aggregate unpaid principal balance of all Eligible Lot Sales Paper from such Development Project, so long as:

(A) The obligation evidenced thereby is not challenged by the maker thereof; and

(B) No direct solicitation has been made for the sale of Lots in the state in which the maker of such Lot Sales Paper resided at the time of purchase by reason of:

(i) Telephone, mail, or advertising solicitations carried out in, or directed to residents of, such state;

(ii) The maintenance of a sales or other office in such state;

(iii) The furnishing of Lot sales literature to residents of such state in response to requests for such information or otherwise in any manner other than the personal delivery of such literature at the site of the Development Project; or

(iv) Visits by sales representatives in such state or the making in any other manner of solicitations in, or directing solicitations to residents of, such state relating to the sale of Lots; and

(3) Contracts shall be considered Eligible Lot Sales Paper and Collateral hereunder so long as the requirements set forth in Section 1.11 are met. Provided further, that should Eligible Lot Sales Paper (other than Contracts become ineligible by reason of the aforesaid limitations in subparagraphs (1) and (2), then that Lot Sales Paper (other than Contracts) most recently pledged to Banks shall be considered ineligible to the extent necessary to comply with the said limitations.

1.15. *Borrower* shall mean those Companies designated as such on page _____ of this agreement and, in addition, any Affiliated Subsidiary designated as a Borrower by the Guarantor provided, however, that in connection with any such designation there shall be provided to the Banks an opinion of counsel satisfactory to the Banks and the Guarantor shall, upon request, execute and deliver, or cause to be executed and delivered, such further instruments and do or cause to be done such further acts as may be reasonably requested by the Banks.

1.16. *Escrow Account* shall mean an account at the Agent Bank in which Proceeds are held until distributed in accordance with Article II, Section 2.4 hereof.

1.17. *Event of Default* shall have the meaning set forth in Article VIII, Section 8.1 hereof.

1.18 *Executive Group* shall mean and refer to _____ [name], _____ [name], and _____ [name].

1.19. *Expiration Date* shall mean and refer to _____ [month] _____ [day], _____ [year], or such later date as the Banks shall agree, pursuant to Article IX, Section 9.10, that the Revolving Credit Notes shall be due and payable.

1.20. *Lot* shall mean a portion of a Development Project specifically allocated and platted on recorded plats and maps for use as a building site for a single family residence and meeting all zoning, building, and other governmental

requirements for such use.

1.21. *Lot Sales Paper* shall mean in the case of real property located at River Plantation, a note and mortgage substantially in the form of Exhibit C-1; in the case of real property located at _____ [name], a note and mortgage substantially in the form of Exhibit C-2; in the case of real property located at _____ [name], a note and mortgage substantially in the form of Exhibit C-3; in the case of real property located at _____ [name], a note and mortgage substantially in the form of Exhibit C-4; and Contracts.

1.22. *Master Plan* shall mean a graphic representation of the development plan for a specific Development Project, as the same may be modified from time to time. Each such Plan will, as a minimum, indicate the approximate location of all major roads, common facilities and amenities and will show the approximate location of land held for sale for single family, condominium and commercial use. Modifications which materially alter the basic concept of the development project, or which materially adversely affect the projected cash flows as previously shown in financial models, whether initiated by the Company or undertaken pursuant to governmental requirements must be approved in accordance with Article IX, Section 9.10.

1.23. *Notes* shall mean the Revolving Credit Notes and Term Notes.

1.24. *Outstanding Loan Balance* shall mean the outstanding principal amount of the Revolving Credit Notes and Term Notes.

1.25. *Pending Projects* shall mean _____ [name] Plantation, the balance of _____ [name], the balance of _____ [name], the balance of _____ [name] and the _____ [name].

1.26. *Permitted Asset Acquisitions* shall mean:

(a) Improvements (as defined by the existing Cash Flow Models and subsequent modifications thereto, and by the Master Plans) to the Development Projects, including off-site improvements where necessary and required for a Development project, provided:

(1) The financing for such off-site improvements to the extent that the cost thereof exceeds a cumulative aggregate amount of _____ Dollars (\$_____) for each Development Project is provided by development loans;

(2) The said off-site improvements are located within the immediate vicinity of the Development Project to which they relate; and

(3) All titles and casements for the installation, maintenance, and use of such off-site improvements shall have been obtained;

(b) Fixed assets or other personal property reasonably necessary to the operation of the business of the Guarantor, Borrowers and Affiliated Subsidiaries;

(c) Real estate having a cumulative aggregate purchase price (consolidated for the Guarantor, all Borrowers and all Affiliated Subsidiaries) not in excess of an amount equal to the sum of:

(1) _____ Dollars (\$_____) or the purchase price of the approximately _____ (_____) acres of land on the _____ [name], and the _____ (_____) acres of land on the _____ [name], whichever is

less; and

(2) The amount by which the total of new equity and long-term Subordinated Debt having no principal repayment requirements for a period of five years from the date of issuance of such debt, issued by the Guarantor and held by persons or entities other than any Borrower or Affiliated Subsidiary, exceeds the sum of:

(A) _____ Dollars (\$ _____), and

(B) the amount paid by the Guarantor to repurchase warrants to purchase Common Stock of the Guarantor held by The Insurance Company.

1.27. *Permitted Contingencies* shall mean:

(a) any guarantee or endorsement of the Guarantor of any Permitted Indebtedness incurred by the Borrowers or any guarantee or endorsement of the Borrowers of any Permitted Indebtedness incurred by the Guarantor;

(b) Any guarantee or endorsement of the Guarantor or the Borrowers of any Permitted Indebtedness incurred by Affiliated Subsidiaries in an aggregate consolidated amount at no time exceeding _____ Dollars (\$ _____);

(c) Any contingent liability of the Guarantor, or any Borrower or any Affiliated Subsidiary incurred in connection with joint venture or co-venture arrangements permitted by Article VII, Section 7.8 hereof, to which it is a party;

(d) Contingencies arising out of the sale of receivables (within the limitations of Article VII, Section 7.18);

(e) Contingencies arising out of the guarantee of employees' home mortgage loans, provided that the original principal amount of the guaranteed loan shall not exceed the fair market value of the said home and provided there shall be no more than one such guarantee at any time for any individual employee;

(f) Contingencies arising out of the endorsement of negotiable instruments for collection in the ordinary course of business;

(g) Contingencies not of a material nature arising in the ordinary course of business, including those arising out of the sale of lots and condominiums, and which contingencies do not materially impair the ability of Guarantor and Borrowers to fulfill their obligations hereunder;

(h) Contingencies arising out of the guarantee of employees' loans (other than home mortgage loans) provided that the guarantee is in lieu of a loan permitted by Section 1.31(c) of this Article I, and provided further that the amount guaranteed does not exceed _____ percent (_____%) of the gross annual salary of the employee to whom such loan is made; and

(i) Contingencies arising out of obligations securing the performance of bids, tenders, contracts (other than for the repayment of borrowed money) or securing statutory obligations or surety or appeal bonds, or securing indemnity, performance or other similar bonds in the ordinary course of business.

1.28. *Permitted Indebtedness* shall mean:

(a) purchase money mortgage obligations for the purchase of land presently outstanding as set forth on Exhibit D-1 hereto, and other mortgage obligations as set forth on Exhibit D-2, but not any future advances thereon nor the refunding, modification or amendment thereof;

(b) Purchase money mortgage obligations, in addition to those shown on Exhibit D-1 of, the Guarantor, the Borrowers and the Affiliated Subsidiaries for the purchase of land permitted by Section 1.26(c) of this Article I.

(c) Indebtedness incurred and to be incurred under presently existing development loan agreements set forth on Exhibit E hereto;

(d) Secured indebtedness under receivable financing commitments (within the limitations of Article VII, Section 7.18);

(e) Indebtedness incurred for the purchase of fixed assets of the type specified in this Article I, Section 1.26(b) pursuant to the provisions of such Section secured by the asset or personal property purchased, to the extent that such assets are reasonably necessary to the operation of the business of the Guarantor, Borrowers, and Affiliated Subsidiaries, and that the indebtedness incurred therefor does not exceed the original cost of the said assets in the case of new assets and in the case of other assets, the fair market value thereof, which such fair market value shall be determined by an independent appraisal (MIA, or equivalent) at the expense of the Borrowers, if such appraisal is requested by Banks;

(f) Short-term secured or unsecured loans (with maturities not in excess of two years and the proceeds of which are to be used as general working capital, including resort operations and corporate overhead expenses, and bridge financing for which the Borrowers do not presently have an existing permanent take out commitment as specified under paragraph (k) hereof) of the Guarantor, the Borrowers and the Affiliated Subsidiaries in an aggregate consolidated amount at no time exceeding, except as set forth in Exhibit P,

(1) _____ Dollars (\$ _____) through _____ [month]
 _____ [day], _____ [year], and _____ Dollars
 (\$ _____) through _____ [month] _____ [day],
 _____ [year] thereafter, and

(2) the lesser of _____ Dollars (\$ _____) or _____ percent
 (_____ %) of the amount by which the total of new equity and long-term Subordinated Debt having no principal repayment requirements for a period of five years from the date of issuance of such debt, issued by the Guarantor and held by persons or entities other than any Borrower or Affiliated Subsidiary, exceeds the sum of

(A) _____ Dollars (\$ _____), and

(B) the amount paid by the Guarantor to repurchase warrants to purchase Common Stock of the Guarantor held by The Insurance Company;

(g) Subordinated Debt of the Guarantor and the Borrowers to the Affiliated Subsidiaries at no time exceeding
 _____ Dollars (\$ _____) except as set forth on Exhibit R;

(h) Subordinated Debt of the Guarantor to the Borrowers or Subordinated Debt of the Borrowers to the Guarantor or Subordinated Debt of any borrowers to any other Borrowers, provided that indebtedness incurred or to be incurred by
 _____ [name] to the Guarantor pursuant to the _____ [name] and
 _____ [name] development loan dated [month] _____ [day],
 _____ [year], shall be permitted and need not be Subordinated Debt.

(i) Indebtedness of the Affiliated Subsidiaries to the Guarantor and the Borrowers in a total aggregate amount at no time exceeding _____ Dollars (\$ _____), except as set forth on Exhibit S;

(j) Subordinated Debt having no principal repayment required for at least _____

(_____) years from the date of the incurrence of such debt;

(k) Bridge financing not in excess of _____ (_____) days term for which Borrowers have a binding permanent take out commitment in the form of a loan permitted under paragraph (l) hereof sufficient in amount to fully repay such bridge financing;

(l) Any other

(1) Development loans secured by land or land improvements to be developed or improved by the proceeds of the loans;

(2) Construction loans for the construction of condominium units, homes, business properties or land improvements secured by the condominium unit, home, business property or land to be constructed or improved; and

(3) Permanent mortgage loans on improvements; provided the proceeds of all of the indebtedness thereby incurred shall be used for activities in and for the direct benefit of the Development Projects; and

(m) Indebtedness incurred under and pursuant to this agreement; provided, however, that, as to all indebtedness permitted by this Section 1.28, the incurrence or existence of any such indebtedness does not result in any default in any agreement to which the Guarantor, any Borrower or any Affiliated Subsidiary is a party or by which it is bound.

1.29. *Permitted Leases* shall mean leases at fair market value of real estate and personal property within the Development Projects or for the purpose of carrying forth development activities within the Development Projects other than among or between the Guarantor, the Borrowers or the Affiliated Subsidiaries.

1.30. *Permitted Liens* shall mean:

(a) liens incurred under or pursuant to this agreement in favor of the Banks;

(b) Liens arising out of judgments or awards in respect of which an appeal or proceeding for review is being prosecuted in good faith and for which a subsisting stay of execution has been secured pending such appeal or proceeding for review, provided adequate reserves with respect thereto are maintained;

(c) Liens for taxes not yet due or which are contested in good faith and by appropriate proceedings if adequate reserves with respect thereto are maintained;

(d) Deposits under workmen's compensation, unemployment insurance and Social Security laws, or to secure the performance of bids, tenders, contracts (other than for the repayment of borrowed money) or leases or to secure statutory obligations or surety or appeal bonds, or to secure indemnity, performance or other similar bonds in the ordinary course of business; and

(e) Liens securing obligations permitted under Permitted Indebtedness.

1.31. *Permitted Loans and Investments* shall mean:

(a) investments in obligations issued or guaranteed by the United States of America or any agency thereof, maturing within one year of the date of acquisition thereof;

(b) Investments in certificates of deposit of any bank;

(c) Insured deposits in federally insured savings and loan associations;

(d) Investments in readily marketable commercial paper having been classified in one of the two highest quality ratings of Standard & Poor's Corporation in an amount at no time exceeding _____ Dollars (\$ _____) as to a single issuer and at no time exceeding an aggregate of _____ Dollars (\$ _____);

(e) Loans to employees in an amount at no time exceeding _____ percent (_____ %) of the gross annual salary of the employee to whom such loan is made;

(f) Loans (complying with Section 1.28(h) of this Article I) or investments to or in the Guarantor or any Borrower from or by the Guarantor or any Borrower;

(g) Loans made to the Affiliated Subsidiaries by the Guarantor and/or the Borrowers in a total aggregate amount at no time exceeding _____ Dollars (\$ _____), except as set forth on Exhibit S;

(h) Investments made in the Affiliated Subsidiaries by the Guarantor and/or the Borrowers in a total aggregate amount at no time exceeding _____ Dollars (\$ _____), except as set forth on Exhibit K;

(i) Loans or investments made to or in any Person or Persons (other than an employee, Guarantor, Borrower or Affiliated Subsidiary) from or by the Guarantor or the Borrowers in a total aggregate amount at no time exceeding _____ Dollars (\$ _____), except as set forth on Exhibit N;

(j) Loans or investments made to or in any joint venture or co-venture arrangements permitted by Article VII, Section 7.8;

(k) Loans made to the Guarantor or the Borrowers by the Affiliated Subsidiaries in a total aggregate amount at no time exceeding _____ Dollars (\$ _____), except as set forth on Exhibit R;

1.32 *Person* shall mean and refer to any individual, firm, corporation, partnership, joint venture, association, or other entity.

1.33. *Proceeds* shall mean all payments made on the Collateral and received by Agent Bank for credit to the Escrow Account.

1.34. *Real Estate Revenues* as utilized in Article VII, Section 7.13 shall mean revenues from the bona fide sale of single family or duplex lots or commercial sites, or land contained in built-for-sale home or villa projects (not including any portion of the sales price attributable to the improvements thereon, if any) or land at its fair market value sold to any other Person in which the Guarantor and/or the Borrowers do not have a consolidated equitable interest of more than _____ percent (_____ %). Solely for purposes of this definition (a) Revenues shall be considered recognized at the time of receipt of the signed contract and down payment equal to at least _____ percent (_____ %) of the sales price of the said single family or duplex lot or commercial site or land contained in built-for-sale home or villa projects or land sold to any Person as aforesaid; and (b) the value of land contained in built-for-sale home or villa projects shall be as shown in the construction financing documents therefor, or by an independent appraisal thereof, or in the absence of either, by mutual agreement of the Borrowers and Banks.

1.35. *Revolving Credit Note* shall have the meaning set forth in Article II, Section 2.7 hereof.

1.36. *Settlement Date* shall mean the _____ (_____) day of each calendar month.

1.37. *Subordinated Debt* shall mean indebtedness deferred in right to the Agreement Debt and as to the payment of which the Agreement Debt shall be preferred. Such indebtedness shall have no repayment rights except (a) to the extent the issuer thereof retains sufficient assets to pay all amounts due and payable on the Agreement Debt, and (b) in case of the dissolution or liquidation of the issuer thereof, subject to the payment in full of the Agreement Debt.

1.38. *Term Note* shall have the meaning set forth in Article II, Section 2.8 hereof.

1.39. *Total Committed Amount* shall mean the aggregate of the Committed Amounts of all Banks at the time in question.

Article II Advances

2.1. Amount of Advances. Each Bank agrees, subject to the terms and conditions of this agreement, and upon the request of the Guarantor as agent for the Borrowers, (the "Request for Advance"), to make Advances, in accordance with its pro rata portion of the Total Committed Amount, to Borrowers at any time and from time to time prior to the earlier of (a) the due date of or (b) the conversion of its Revolving Credit Note, provided that immediately after giving effect to such Advance the aggregate Outstanding Loan Balance does not exceed the lesser of (c) the Borrowing Base, or (d) the Total Committed Amount. No Bank shall have any obligation to make any requested Advance to the extent such Advance would cause the unpaid portion of the Outstanding Loan Balance owed to such Bank to exceed its Committed Amount. Advances shall be made not more than twice each month, and each Advance shall be in an amount of at least _____ Dollars (\$_____).

2.2. Procedure. Upon receipt of a Request for Advance, the submission of Collateral, Agent Bank's determination of the acceptability of such Collateral, compliance with Article V, Section 5.2 and upon the submission by Guarantor of all other documents which Agent Bank may reasonably require, Agent Bank shall promptly notify each Bank of the Request for Advance and each Bank shall make available at the Principal Office of the Agent Bank not later than 12 Noon, _____[city], _____[state], time, on the Business Day following such notice, in immediately available funds its pro rata portion of such Advance. Upon receipt of such funds, the Agent Bank shall transmit to the Guarantor as agent for the Borrowers, or upon its order, the requested Advance.

2.3. Collateral. Lot Sales Paper pledged to the Banks as Collateral shall be held by the Agent Bank for the pro rata benefit of the Banks. The proceeds from such Lot Sales Paper shall be collected on behalf of the Borrowers by _____[name] (the "Collecting Agent") which shall act as agent for the Guarantor and the Borrowers in accordance with an agreement of even date herewith between the Guarantor, Borrowers and the Collecting Agent. Should the Collecting Agent cease to act as agent, the Guarantor and Borrowers shall within _____ (_____) days appoint a new agent satisfactory to Agent Bank. Should the Guarantor and the Borrowers fail to appoint a successor agent satisfactory to Agent Bank within said _____ (_____) day period, then Agent Bank may appoint a successor to _____[name]. It is expressly understood that sole responsibility for collection of proceeds is that of the Guarantor and the Borrowers and that the Banks are in no way responsible therefor.

2.4. Proceeds. As soon as possible after receipt by the Agent Bank, proceeds shall be deposited in the Escrow Account in the same form in which received. On each Settlement Date, the Agent Bank shall (except as provided in Article III, Section 3.7 hereof) allocate Proceeds held in the Escrow Account in the following order:

(a) To the Agent Bank in payment of its service charge (determined in accordance with Article X, Section 10.3) and to the agent designated pursuant to Section 2.3 of this Article II, in payment of its collection fees;

(b) The balance, if any, to Banks in payment of all accrued interest on Notes;

(c) The balance, if any, to Banks holding Term Notes, if any, in payment of the monthly installment thereon in

accordance with Section 2.8 of this Article II.

(d) The balance, if any (in even integral multiples of \$1,000), to banks holding Revolving Credit Notes to be applied, pro rata, to the extent necessary to reduce the Outstanding Loan Balance on such date (as adjusted by any payments made pursuant to paragraph (c) hereof) to an amount equal to the Borrowing Base less the Proceeds held in the Escrow Account on such date before any disbursements required by this Article II, Section 2.4 are made; and

(e) The balance, if any, (in even integral multiples of \$1,000) to the Guarantor as agent for the Borrowers, provided no Event of Default shall have occurred and be continuing.

Within _____ (_____) business days after the receipt by the Agent Bank of the Loan Status Report submitted by the Guarantor pursuant to the provisions of this Article II, Section 2.5, the Proceeds held in the Escrow Account shall be disbursed in accordance with the above allocation.

2.5. Settlement Date. Within _____ (_____) days of each Settlement Date, the Guarantor on behalf of the Borrowers shall submit to the Agent Bank the following:

(a) A Loan Status Report in the form of Exhibit F hereto (or in such form as the Banks shall from time to time reasonably require) setting forth as of the Settlement Date the Borrowing Base and the Outstanding Loan Balance, each as adjusted for the allocation of Proceeds in accordance with Section 2.4 hereof, and such further documents as the Agent Bank shall reasonably require.

(b) To the extent not previously furnished, a mortgage title insurance policy assuring that (1) each note and mortgage pledged to the Banks as Collateral constitutes a first and prior lien on the property described therein; and (2) fee simple title to the Lot covered by each Contract pledged to the Banks as Collateral is vested in the Trustee, subject only to those matters set forth in Schedule B of the Master Policy as approved by the Banks. Except as to Contracts, however, the Borrowers shall have a period of _____ (_____) days from the date of submission of Collateral within which to secure the release of each Lot from any lien or encumbrance and evidence thereof shall be furnished to the Banks, in the form of an endorsement to the Mortgagee's Title Insurance Policy, within _____ (_____) days from the date of submission thereof.

If at any time, on the Settlement Date or otherwise, the Outstanding Loan Balance exceeds the Borrowing Base, as reflected in the Loan Status Report or otherwise, the Borrowers shall forthwith pay to the Agent Bank for credit on the Outstanding Loan Balance the amount, if any, by which the Outstanding Loan Balance exceeds the Borrowing Base. The Agent Bank, however, shall have no obligation to ascertain whether the Outstanding Loan Balance exceeds the Borrowing Base except as of the Settlement Date and when so requested by the Continuing Banks holding at least _____ percent (_____) of the Outstanding Loan Balance held by the Continuing Banks. Any such payment shall be disbursed by the Agent Bank to the Banks pro rata according to the portion of the Outstanding Loan Balance held by them.

2.6. Interest. The Borrowers shall pay interest on the average daily Outstanding Loan Balance (as of the close of each business day), the interest to be computed as of each Settlement Date and paid within _____ (_____) days thereafter. The interest rate effective for the period between Settlement Dates shall be at an annual rate which shall be _____ percent (_____) above the best commercial lending rate of the Agent Bank from time to time generally in effect on unsecured loans for _____ (_____) days to its most responsible and substantial borrowers as in effect on the first day of such period.

2.7. Revolving Credit Notes. The obligations of the Borrowers to repay the Advances made by each Bank shall be evidenced (until the issuance of a Term Note pursuant to Section 2.8 of this Article II) by a note in substantially the

form of Exhibit G hereto (the "Revolving Credit Note"), dated the Closing Date hereunder in the principal amount of the Committed Amount of such Banks and payable to the order of such Bank on the Expiration Date or on the date on which the Revolving Credit Note shall be converted to a Term Note as hereinafter provided. Each Revolving Credit Note shall bear interest at the rate set forth in Section 2.6 above on the unpaid principal amount thereof from time to time from the date of the initial Advances hereunder until the said Revolving Credit Note, both principal and interest, is paid in full or is converted into a Term Note as hereinafter provided.

2.8. Term Notes. The Borrowers shall have the option, to be exercised in writing on or before the Expiration Date, to convert the Outstanding Loan Balance as of such date into Term Notes in substantially the form of Exhibit H hereto (the "Term Notes"), and each Revolving Credit Note shall be replaced by a corresponding Term Note. Each Bank shall have the option to convert into Term Notes the outstanding balance due on Revolving Credit Notes held by it pursuant to the provisions of Article IX, Section 9.10(b) hereof. Each Term Note shall be dated as of the first Settlement Date following such election, shall bear interest at the rate provided in Section 2.6 of this Article II, and shall be payable in _____ (_____) consecutive, but unequal monthly installments of principal and interest, the first monthly installment to be allocated in the Escrow Account as of the next following Settlement Date and due and payable within seven days thereafter. Each such monthly installment payment shall consist of accrued interest thereon and a pro rata portion of the Proceeds credited to the Escrow Account subsequent to the preceding Settlement Date (less amounts disbursed in accordance with Section 2.4(a) and (b) of this Article II). Such portion shall be in an amount which bears the same proportion to the amount so credited to the Escrow Account, as adjusted aforesaid, as the outstanding principal balance due on such Term Note bears to the total Outstanding Loan Balance on such Settlement Date. The Borrowers, however, shall be required to make additional payments on each Term Note to the extent that at the end of the following 12-month periods (from the date of such Term Note) the amounts credited from the Escrow Account as monthly principal installments on such Term Note do not equal:

After 12 months: _____ percent
(_____) (%) of the principal amount of such Term Note.

After 24 months: _____ percent
(_____) (%) of the principal amount of such Term Note.

After 36 months: _____ percent
(_____) (%) of the principal amount of such Term Note.

After 48 months: _____ percent
(_____) (%) of the principal amount of such Term Note.

After 60 months: _____ percent
(_____) (%) of the principal amount of such Term Note.

Said additional payments shall be made to the holder of such Term Note within _____
(_____) business days after the end of each 12-month period.

2.9. Conditions to Conversion. The Borrowers shall not be entitled to convert Revolving Credit Notes into Term Notes as provided in Section 2.8 above, unless, prior to the Expiration Date, the Borrowers shall cause the Banks to be reasonably assured that the Borrowers have obtained written commitments from other lending institutions to purchase, or to make loans collateralized by, lot sales paper arising from the projected lot sales in the ordinary course of business in the Development Projects for the 12-month period immediately subsequent to the date of the exercise of the option to

convert, such projected lot sales to be as reflected in the then existing Cash Flow Models. Said commitment shall further be in an amount sufficient to generate a cash flow to the Borrowers equal to at least _____ percent (_____) of the principal amount of such lot sales paper.

2.10. Further Conditions to Advances. The Banks shall not be obligated to make any Advances in excess of an aggregate amount of _____ Dollars (\$_____) (and no Bank shall be required to make Advances in excess of its pro rata share of such amount) unless and until Guarantor has issued a minimum of _____ Dollars (\$_____) in additional equity and/or long-term Subordinated Debt (with no principal repayment requirements for at least _____ (_____) years) which shall be held by persons other than any Borrower or Affiliated Subsidiary; or in any amount after an Event of Default, not waived by the Banks, shall have occurred and shall not have been cured. No Bank shall be obligated to make Advances in any amount after the earlier of (a) the Expiration Date or (b) the conversion of, its Revolving Credit Note.

2.11. Prepayment. The Borrowers shall have the right at any time and from time to time to prepay the Revolving Credit Notes or Term Notes pro rata in whole or in part without premium or penalty but with accrued interest to the date of prepayment on the amount prepaid. Any voluntary prepayment, however, shall be in a minimum amount of at least _____ Dollars (\$_____) and any prepayment on the Term Notes shall be applied against the monthly installments in the inverse order of their maturity. Any payment received pursuant to the provisions of the final paragraph of Section 2.5 hereof by a Bank holding a Term Note shall be treated as a prepayment.

2.12. Payments Deemed Made When Received. Payments of the principal of and interest on the Notes shall be deemed to have been made when credited to the account of the holder of the Note with the Agent Bank, notwithstanding any provision hereunder whereby collection or disbursement of funds is made by or through the Agent Bank. The Agent Bank shall credit payment immediately upon receipt when payment is made in cash, by certified check or other means whereby funds are immediately available. The Agent Bank shall credit all other forms of payment when the funds are actually available for use at the Agent Bank's depository, but in no event more than _____ (_____) business days after receipt of payment.

Article III Collateral

3.1. Pledge of Collateral. In order to secure the payment and performance of all indebtedness, obligations, and liabilities of the Borrowers and the Guarantor hereunder, the Borrowers hereby grant, convey, and pledge to the Banks, and each of them, in lien upon and a security interest in the Collateral.

3.2. Further Action. The Borrowers agree that they will execute any and all documents, including financing statements under the Uniform Commercial Code, and take any and all such further action as shall be reasonably necessary or desirable in order to protect the security interest of the Banks in any Collateral pledged, assigned, or mortgaged as security for the Advances provided for herein.

3.3. Possession of Collateral. All Collateral shall be held by Agent Bank for the pro rata benefit of the Banks.

3.4. Return of Collateral. The Agent Bank shall return to the Borrowers Lot Sales Paper included in the Collateral which is no longer Eligible Lot Sales Paper, provided that the Outstanding Loan Balance at such time does not exceed the Borrowing Base and provided that no other Event of Default, nor any event which, upon Notice or lapse of time or both, would constitute an Event of Default, has occurred and is continuing.

3.5. Remedies on Default. Upon

(a) the occurrence of any Event of Default not waived by the Banks in accordance with Article IX, Section 9.10; and

(b) the lapse of any period of automatic waiver as provided in Section 8.2 of Article VIII, Agent Bank shall, at the written direction of the Banks holding _____ percent (_____) or more of the Outstanding Loan Balance, (setting forth which of the following) do any one or more of the following:

(1) Foreclose or otherwise enforce Banks' lien upon, and security interest in, all or any part of the Collateral by an available judicial procedure.

(2) Exercise any and all of the rights and remedies of a secured party afforded by the Uniform Commercial Code as in effect in _____ [state], and by any and all other instruments, documents, security agreements, chattel mortgages, deeds of trust, mortgages, and assignments made to secure or assure payment or performance of the Borrowers' indebtedness hereunder or any part thereof.

(3) After notification, as provided in Section 3.6 of this Article III, sell or otherwise dispose of at the principal office of the Agent Bank, or elsewhere, as directed by Banks holding _____ percent (_____) or more of the Outstanding Loan Balance, all or any part of the Collateral. Any such sale ("Sale") may be as a unit or in parcels, by public or private proceedings, to the highest bidder for cash, or, at the election of Banks, by way of one or more contracts, and may be made by the Agent Bank or its agents. At any Sale, the Agent Bank shall not be obligated to accept any bid which is not entirely a cash bid, but the Agent Bank may accept a bid which is not entirely a cash bid if such bid is, in the judgment of the Banks holding _____ percent (_____) or more of the Outstanding Loan Balance, more advantageous than the highest entirely cash bid. If, however, the highest entirely cash bid at any Sale is an amount less than the Agreement Debt, the Agent Bank shall not be obligated to complete such Sale, and may instead pass the Sale, and, after notification as provided in Section 3.6 hereof, hold another Sale at a later date. Moreover, if the highest entirely cash bid is made by a bidder who cannot purchase the Collateral being sold without approval of an administrative body or other tribunal, the Agent Bank shall not be obligated to make the Sale to such bidder unless the Banks are indemnified to their satisfaction against loss during the period in which such approval is being sought.

(4) Buy all or any part of the Collateral at any judicial sale made pursuant to Section 3.5(1) hereof or any Sale made pursuant to Section 3.5(3) hereof (it being understood and agreed that any Bank may also buy all or any part of the Collateral at any judicial sale or Sale pursuant to Section 3.5(3)).

Except as herein set forth, the Guarantor and the Borrowers hereby waive any right to notice or a hearing prior to the exercise by Banks of any of their rights and remedies with respect to the Collateral. Nothing herein contained, however, shall prohibit the Guarantor and the Borrowers from taking such affirmative action as they deem appropriate to contest the exercise of such rights and remedies by the Banks.

3.6. Notice of Sale. Reasonable notification of the time and place of any Sale shall be sent to (a) Guarantor, (b) Borrowers, (c) the Banks, and (d) any other person entitled to notice under the Uniform Commercial Code. Notice sent or given via Registered Mail, Return Receipt Requested, not less than ten calendar days prior to the Sale is reasonable notification and a notice for the purposes of this Article III. In addition, in the case of a public sale, a copy of such notice shall be posted, for a period of _____ (_____) days prior to such sale, at the usual place for posting notices of public sale in or at the courthouse of the county in which such public sale is to be held. Such notice, in the case of a public sale, shall state the time and place fixed for such sale.

3.7. Application of Sale Proceeds. The Banks shall apply the proceeds of any Sale or judicial sale in the following order:

(a) to the payment of all of the Agent Bank's and the Banks' expenses, including but not limited to, reasonable attorney's fees and other legal expenses, incurred in foreclosing, retaking, holding, and preparing all or any portion of the Collateral for a Sale or judicial sale, in arranging for such Sale or judicial sale, and in actually selling the same; and

(b) toward payment of the balance of the Agreement Debt (principal and interest), pro rata. The Banks shall account to the Guarantor and the Borrowers for any surplus. If the proceeds from any Sale or judicial sale are not sufficient to pay the Agreement Debt in full, the Guarantor and the Borrowers shall remain liable for any deficiency.

3.8 Multiple Sales. Any Sale or judicial sale of any part of the Collateral shall not exhaust the Banks' powers of sale, but Sales and judicial sales may be made from time to time until the Agreement Debt is paid in full. At any Sale or judicial sale, it shall not be necessary to exhibit the Collateral or any part thereof.

3.9 Diminution in Value. Neither the Agent Bank nor the Banks shall have any liability or responsibility for any loss or diminution in value of the Collateral or any part thereof.

3.10 Power of Attorney. The Guarantor and each Borrower, jointly and severally, hereby irrevocably constitute and appoint _____[name] ("Agent Bank") as the true and lawful agent and attorney-in-fact for the Guarantor and each Borrower (with full powers of substitution, either generally or for such limited periods or purposes as the Agent Bank may from time to time prescribe). In furtherance of such powers, Agent Bank shall have full power and authority, for and on behalf and in the name of the Guarantor and each Borrower, to execute, acknowledge, and deliver any and all instruments, mortgages, agreements, certificates, applications, transfers, assignments, financing statements, and other documents of every nature, with such covenants, warranties, indemnities, and other provisions, to do all other acts and things to be done by the Guarantor and each Borrower, as may from time to time, in the reasonable opinion of the Banks be necessary or proper to fully effectuate the purposes of this Article III and the intention of the parties hereto. The Guarantor and each Borrower shall be bound thereby as fully and effectively as if an authorized officer of the Guarantor and each Borrower had personally so executed, acknowledged, delivered or done, for and on behalf of the Guarantor and each Borrower. The power and authority conferred on Agent Bank:

(a) are granted to it in its capacity as Agent Bank;

(b) shall automatically pass to each successor Agent Bank, upon its appointment as such by the Continuing Banks, without the necessity of further action by the Guarantor or any Borrower;

(c) may be exercised through any person who, at the time of such execution, acknowledgment, delivery, or action, is the President or a Vice President of the Agent Bank; and

(d) are coupled with an interest and shall be irrevocable except by written instrument executed jointly by the Guarantor, Borrowers, and Banks.

Article IV Representations and Warranties

In order to induce the Banks and each of them to enter into this agreement and make the Advances to be made by them hereunder, each of the Borrowers and the Guarantor, individually, represents and warrants to each Bank as to itself and each of its Affiliated Subsidiaries that:

4.1 Organization and Qualification. It is a duly organized corporation validly existing and in good standing under the laws of the jurisdiction of its incorporation; has full power and authority to carry on its business as it is now being conducted and to own or hold under lease or similar agreement the properties and assets it now owns or holds under lease or such agreement; is duly qualified as a foreign corporation to do business and is in good standing in each jurisdiction, other than the state of its incorporation, where the nature of the business conducted by it or the properties owned or leased by it requires such qualification; and has complied insofar as is required with all applicable laws, rules, and regulations relating to the development and sale of real property located in _____[state], _____[state], and _____[state].

4.2 Corporate Power and Authorization. It has the corporate power to make, deliver, and perform this agreement and, as to each Borrower, to borrow hereunder on the terms and conditions of this agreement and, as to the Guarantor, to guarantee the borrowing hereunder on the terms and conditions of this agreement; and has taken all necessary corporate action to authorize each of the foregoing and to authorize the execution, delivery, and performance of this agreement and, as to each Borrower, the Notes, and, as to the Guarantor, the Guaranty, constitute, or upon execution and delivery in accordance with the terms of this agreement, will constitute, valid obligations of it legally binding upon it and enforceable in accordance with their respective terms. No consent of any other party and no consent, license, approval or authorization of, or registration or declaration with, any governmental commission, authority, bureau or agency is required in connection with the borrowing hereunder, the granting of the security contemplated hereby, or the execution, delivery, performance, validity, or enforceability of this agreement or, as to each borrower, the Notes, or, as to the Guarantor, the Guaranty.

4.3 Lack of Legal Impediments. The borrowing hereunder and the execution, delivery, and performance of this agreement and, as to each Borrower, the Notes, and, as to the Guarantor, the Guaranty will not violate any provision of any existing law or regulation, order or decree of any court, governmental authority, bureau or agency, its Charter or Bylaws, and will not violate any provision of, or constitute a default under, any mortgage, indenture, security agreement, contract, undertaking, other agreement or instrument to which it is a party or which is or purports to be applicable to or binding upon it, the conduct of its business or the ownership of any of its property or assets; and will not result in the imposition or creation of any lien, charge or encumbrance on, or security interest in, any of such property or assets pursuant to the provisions of any such mortgage, indenture, security agreement, contract, undertaking, other agreement or instrument except for any security interest created by or pursuant to this agreement.

4.4 Legal Operation. It is, to the best of its knowledge, in compliance with all existing laws and regulations applicable to it, the violation of which would or could materially adversely affect its operations or would or could adversely affect its ability to fulfill its obligations under this agreement, including, without limitation, laws relating to zoning and pollution control.

4.5 Properties

(a) A complete identification and description of all real properties owned, rented, optioned, or leased, to, by or through it is set forth in Exhibit I hereto. Except as indicated in such Exhibit, it has fee simple marketable and insurable title to all such real properties owned by it subject to no liens, mortgages, security interest, pledge, charge or encumbrances of any kind (collectively "liens"), except liens for taxes not yet due or still payable without penalty or which are being contested in good faith by appropriate proceedings; it enjoys peaceful and undisturbed possession under all material leases of real property relating to the Development Projects under which it is lessee; all such leases are valid and binding obligations of the lessors, and it is not in default under any such leases; and except as disclosed in Exhibit I, none of such leases contains any provision that does or could materially adversely affect its operations.

(b) It owns all personal property reflected in the financial statements referred to in Article IV, Section 4.8 of this agreement (except for such personal property which has been disposed of in the ordinary course of business) free and clear of any material security interests, pledges, liens, or encumbrances of any kind (collectively "security interests"), other than purchase money security interests, liens for taxes not yet due or still payable without penalty or which are being contested in good faith by appropriate proceedings and other security interests incidental to the purchase or conduct of its business or the ownership and development of its properties and assets, or minor imperfections of title, none of which were incurred in connection with the borrowing of money or the obtaining of advances or credit and which do not individually or in the aggregate materially detract from the value of such personal properties or materially impair the use thereof in its business.

4.6 Litigation. No litigation or administrative proceeding of or before any court or administrative body is presently

pending, nor, to its knowledge, is any such litigation or proceeding presently threatened, against it or any of its property, that, if adversely determined, would materially affect its ability to carry out the transactions contemplated by this Agreement and to repay the Agreement Debt.

4.7 Taxes. It has filed or caused to be filed all tax returns required to be filed and except as set forth on Exhibit M,

(a) has paid all taxes shown to be due and payable on said returns or on any assessments made against it;

(b) no tax liens have been filed and no claims or assessments are being asserted with respect to such taxes; and

(c) all of its tax returns have been examined by the Internal Revenue Service through the fiscal year ending _____ [month] _____ [day], _____ [year] and all additional taxes, if any, disclosed thereby have been paid in full.

4.8 Financial Statements. The financial statements dated _____ [month] _____ [day], _____ [year] that have been given to the Banks with respect to it

(a) are complete and correct in all material respects,

(b) accurately present its financial condition as of the dates, and the results of its operations for the periods, for which the same have been furnished, and

(c) have been prepared in accordance with generally accepted accounting principles consistently followed throughout the periods covered thereby; all balance sheets and related footnotes contained therein disclose all known material liabilities, direct and indirect, absolute and contingent, as of their respective dates; and there has been no material adverse change in its condition, financial or otherwise, since the date of the most recent of such financial statements given to the Banks.

4.9 Other Information. All other written information, reports, papers, and data given to the Banks with respect to it are accurate and correct in all material respects and substantially complete insofar as completeness may be necessary to give the Banks a true and accurate knowledge of the subject matter, and all projections of future results are, in its opinion, reasonable.

4.10 Other Agreements. It is not a party to any agreement or instrument materially and adversely affecting its present or proposed business, properties or assets, operation or condition, financial or otherwise, not disclosed to the Banks in writing; and it is not in default in the performance, observance, or fulfillment or any of the material obligations, covenants, or conditions set forth in any agreement or instrument to which it is a party.

4.11 Lot Sales Paper. The Lot Sales Paper pledged as Collateral will consist of Contracts, notes, and mortgages received in connection with the bona fide sale of single family residential land parcels in the Development Projects made in the ordinary course of business by a Borrower; the contracts shall meet the requirements of Section 1.11 of Article I; such notes shall evidence no more than _____ percent (_____%) of the purchase price of the Lot, and shall be payable in consecutive equal monthly installment payments of principal and interest, with interest thereon at a rate of not less than _____ percent (_____%) per year over a period not exceeding ten years from the date of execution of the note and will be free of any claim or defense of usury; and such mortgages shall constitute a first and prior lien upon the Lot described in the said mortgage within

_____ (_____) days of its inclusion in the Collateral. The signatures of all persons named in all Lot Sales Paper will be genuine and none will be forged, fraudulent, or fictitious. All Lot Sales Paper, at the time of its inclusion in the Collateral, will have no past due payments, will be free of default and subject to no prior security interest, liens, charges, or encumbrances or to any agreement purporting to grant to any third party a security

interest in such Lot Sales Paper, will be legally binding upon the parties to it and enforceable in accordance with its terms, will not violate any provisions of any existing law or regulation, order or decree of any court, governmental authority, bureau or agency (including, but not limited to, the Truth-in-Lending Act and Regulation Z thereunder, Interstate Land Sales Full Disclosure Act, Fair Credit Reporting Act, Equal Credit Opportunities Act, any law (whether federal, state or local) prohibiting discrimination on the basis of race, creed, color, gender, national origin, sexual orientation or disability, and all applicable state land sales statutes and regulations, except to the extent provided for in Article I, Section 1.14), and the underlying property with respect to such Lot Sales Paper, within _____ (_____) days of its inclusion in the Collateral, will be free of any lien, charge, or encumbrance on, or security interest in, any of such property, except for any restrictive covenants and easements and security interests represented by such Lot Sales Paper or created by or pursuant to this agreement.

4.12 Patents, Trademarks, and Trade Names. It owns or possesses all patents, trademarks, service marks, trade names, copyrights, licenses, and rights with respect to the foregoing necessary for the present and planned future conduct of its business, without any known conflict with the rights of others.

4.13 Brokerage and Finder's Fees and Commissions. It shall indemnify Banks and hold them harmless in respect of all commissions, fees, judgments, or expenses of any nature and kind which they may become liable to pay by reason of any claims by or on behalf of brokers, finders, or agents incident to this agreement and the transaction contemplated hereby or any litigation or similar proceeding arising therefrom.

4.14 Stock Ownership. The listing of the record owners of all securities issued by Borrowers and Affiliated Subsidiaries, which indicates the name of such record owners, the type of security owned thereby, the number of shares or units of such security, and the issuer thereof, as set forth in Exhibit J hereto, is true and complete in all respects. It has no knowledge of any persons or entities other than the record owners of said securities having any beneficial or other interest therein.

4.15 Cash Flow Projections. Cash Flow Models covering a period of at least four years with respect to its Development Projects provided by it to the Banks were carefully prepared by its management in good faith and represent, subject to the assumptions stated therein, its best estimate of the financial results that would be achieved by it at the end of such period. It knows of nothing on the date hereof which would result in any material adverse change in such Cash Flow Models. It is the practice of the Guarantor and the Borrowers to periodically update such financial models, generally in connection with annual budget reviews. Copies of all such revised cash flow projections will be provided to the Banks pursuant to this Section 4.15. Nothing contained herein shall limit the Banks' right to request and receive information pursuant to Article VI, Section 6.21, including the right to request and receive financial models updated on a more frequent basis than annually.

4.16 Survival of Covenants. All of the covenants, representations, and warranties herein or pursuant hereto shall survive the Closing and the making of any Advances and shall remain in full force and effect regardless of the Closing and the making of any Advance and irrespective of any investigation which the Banks or their counsel or accountants may make in connection with or in reference to transactions contemplated hereby or any matter involved herein. It shall indemnify and hold the Banks harmless from and against, and shall be obligated to pay and reimburse the Banks for, any and all loss and damage which the Banks, or any of them, may sustain or incur as a result of any misrepresentation, breach of warranty or nonfulfillment of any covenant on the part of the Guarantor or any Borrower.

4.17 Repeated on Submission of Collateral. The representations and warranties contained in this Article IV have been made not only herein but shall be deemed to be repeated and made by the Guarantor and the Borrowers to the Banks as and when any Lot Sales Paper is transferred as Collateral to the Banks. The Banks shall be deemed to rely on each of the foregoing representations and warranties in accepting such transfer.

5.1. Conditions to Closing. The obligation of each Bank to effect a Closing hereunder shall be subject to the fulfillment on the closing date of each of the following conditions precedent:

(a) Legal Opinion of Borrowers' and Guarantor's Counsel. There shall have been delivered to the Agent Bank an opinion of Messrs. _____ [name] and _____ [name], counsel to the Borrowers and the Guarantor, dated the closing date, addressed to the Banks, to the effect that

(1) The Guarantor, each Borrower, and each Affiliated Subsidiary is a duly organized corporation validly existing and in good standing under the laws of the jurisdiction of its incorporation, and is duly qualified as a foreign corporation to do business and is in good standing in each jurisdiction, other than in the state of its incorporation, where the nature of the business conducted by it or the properties owned or leased by it requires such qualification;

(2) Each Borrower has the corporate power to borrow under this agreement, to give the security contemplated hereby and to make, deliver and perform this agreement and the Notes, and has taken all necessary corporate action to authorize each of the foregoing;

(3) This agreement and the Revolving Credit Notes have been duly executed and delivered by a duly authorized officer of each Borrower and this agreement and the Revolving Credit Notes constitute valid obligations of each Borrower, legally binding upon and enforceable in accordance with their respective terms;

(4) Each of the Term Notes, when duly executed and delivered by a duly authorized officer of each Borrower in accordance with the terms of this agreement, will constitute a valid obligation of each Borrower, legally binding upon it and enforceable in accordance with its terms;

(5) The Guarantor has the corporate power to make, deliver, and perform this agreement and the Guaranty, and has taken all necessary corporate action to authorize each of the foregoing;

(6) This agreement and the Guaranty have been duly executed and delivered by a duly authorized officer of the Guarantor and this agreement and the Guaranty constitute valid obligations of the Guarantor, legally binding upon it and enforceable in accordance with their respective terms;

(7) The execution, delivery, and performance of this agreement, the Notes, and the Guaranty will not violate any provision of any existing law or regulation, order or decree of any court, governmental authority, bureau or agency, the corporate charter or bylaws of any Borrower or the Guarantor or any Affiliated Subsidiary; or, so far as is known to such counsel, violate any provision of, or constitute a default under, any mortgage, indenture, security agreement, contract, undertaking, other agreement or instrument to which any Borrower or the Guarantor or any Affiliated Subsidiary is a party or which is or purports to be applicable to or binding upon any Borrower or the Guarantor or any Affiliated Subsidiary, or the conduct of the business or ownership of the property or assets of any Borrower or the Guarantor or any Affiliated Subsidiary, and will not result in the creation or imposition of any lien, charge or encumbrance on, or security interest in, any of such property or assets pursuant to the provisions of any such mortgage, indenture, security agreement, contract, undertaking, other agreement or instrument except for any security interest created under this agreement;

(8) No Event of Default, known to such counsel, has occurred and is continuing under this agreement;

(9) So far as is known to such counsel the Borrowers, Guarantor and Affiliated Subsidiaries are in compliance with all pollution control laws, zoning requirements and all other applicable state and federal statutes and regulations applicable to the conduct of the Borrowers', Guarantor's and Affiliated Subsidiaries' businesses as presently being conducted, the violation of which would or could materially adversely affect their operations or would or could adversely affect their

ability to fulfill their obligations under this agreement;

(10) Upon delivery of Collateral to the Agent Bank, the Banks will possess a security interest therein with priority over all other security interests, liens, charges or encumbrances of any type or kind as may affect said Collateral and, based on the facts known to such counsel, and except to the extent provided for in Sections 1.14 and 1.11, will possess all rights and powers necessary to enforce the same (to the extent it consists of Lot Sales Paper) against the persons obligated thereunder in the event it shall acquire the same in any Sale or judicial sale;

(11) Advances made by Banks in accordance with the terms of this agreement will not be in violation of any usury laws of any jurisdiction in which the Guarantor or any one or more of the Borrowers is incorporated or doing business, other than _____ [state]; and

(12) In the event any obligor under any Collateral shall default therein, and the Banks shall seek to enforce their rights thereunder, the Banks shall be entitled to secure under the laws of the applicable jurisdiction deficiency judgments against such obligors. Such opinion shall also cover all matters incident to the transactions contemplated by this agreement as the Banks shall reasonably require.

(b) Legal Opinion of Banks' Counsel. There shall have been delivered to each Bank an opinion of Messrs. _____ [name] and _____ [name], special counsel to the Banks, dated the Closing Date, addressed to the Banks to the effect that:

(1) The Guarantor, each Borrower and each Affiliated Subsidiary is a duly organized corporation validly existing and in good standing under the laws of the jurisdiction of its incorporation, and is duly qualified as a foreign corporation to do business and is in good standing in each jurisdiction, other than in the state of its incorporation, where the nature of the business conducted by it or the properties owned or leased by it requires such qualification;

(2) Each Borrower has the corporate power to borrow under this agreement and to make, deliver, and perform this agreement and the Notes, and has taken all necessary corporate action to authorize each of the foregoing;

(3) This agreement and the Revolving Credit Notes have been duly executed and delivered by a duly authorized officer of each Borrower and this agreement and the Revolving Credit Notes constitute valid and enforceable obligations of each Borrower, legally binding upon it;

(4) The Term Notes, when duly executed and delivered by a duly authorized officer of each Borrower in accordance with the terms of this agreement, will constitute valid and enforceable obligations of each Borrower, legally binding upon it;

(5) The Guarantor has the corporate power to make, deliver and perform this agreement and the Guaranty, and has taken all necessary corporate action to authorize each of the foregoing;

(6) This agreement and the Guaranty have been duly executed and delivered by a duly authorized officer of the Guarantor, and this agreement and the Guaranty constitute valid and enforceable obligations of the Guarantor, legally binding upon it;

(7) The legal opinion referred to in this Article V, Section 5.1(a) is satisfactory in form and substance to said special counsel, and that in their opinion the Banks are justified in relying thereon; and

(8) As to such other legal matters incident to the transactions contemplated by this agreement as the Banks may reasonably request. In giving their opinion, said special counsel may rely, as to questions of fact material thereto, upon certificates of officers of the Guarantor, the Borrowers and/or the Affiliated Subsidiaries and the representations set

forth in this agreement, and may rely, to the extent they consider appropriate, upon an opinion of counsel to the Borrowers and the Guarantor as to matters of _____ [state] and _____ [state] law and as to the due organization, existence, and good standing of the Guarantor, the Borrowers and the Affiliated Subsidiaries.

(c) Officers' Certificate. There shall have been delivered to the Banks certificates signed by the chief executive officer, the Treasurer or chief financial officer of the Guarantor, and each of the Borrowers, dated as of the Closing Date, stating:

(1) That a review of the activities of such company has been made under his immediate supervision with a view to determining whether such company has observed, performed, and fulfilled all of its obligations under this agreement; and

(2) That there existed at such time no Event of Default and no act, condition or event which, with the giving of notice or lapse of time, or both, would constitute such an Event of Default, or if any such Event of Default, act, condition, or event existed, specifying the nature thereof, the period of existence thereof and what action the company proposed to take, or has taken with respect thereto; and

(3) That all representations and warranties contained in Article IV of this agreement, as of the date of such certificate, are true and correct.

(d) Certified Resolutions. There shall have been furnished to the Banks certified copies of resolutions, satisfactory to the Banks in form and substance, duly adopted by the Boards of Directors of the Guarantor and the Borrowers authorizing the execution, delivery, and performance of this agreement, the Revolving Credit Notes, and all other documents and actions contemplated hereunder.

(e) Legal Matters. All legal matters incident to the transactions contemplated by this Agreement shall be satisfactory to counsel for the Banks.

(f) Documents. There shall have been delivered to the Banks all documents reasonably requested by the Banks, satisfactory in form and content to their counsel.

(g) Notes. The Revolving Credit Notes and the Guaranty shall have been delivered to Banks as provided for herein.

5.2. Conditions to Advances. The obligation of each Bank to make each Advance hereunder shall be subject to the fulfillment, prior to each such Advance, of each of the following conditions precedent:

(a) Collateral Documents. There shall have been delivered to the Agent Bank the following:

(1) The original purchase money promissory note duly executed by each purchaser of a Lot;

(2) The original purchase money mortgage (or a copy certified by the Notary before whom the mortgage was executed in the case of a _____ [name] mortgage--Exhibit C-4) executed by each purchaser of a Lot which shall have been duly recorded in the appropriate Registry of the County wherein the Lot is located; or

(3) The originals of all contracts;

(4) Except as to Contracts previously delivered, authenticated copy of sales contract entered into by each purchaser with respect to the particular lot involved;

(5) Certificates evidencing compliance with the Interstate Land Sales Full Disclosure Act and all applicable state and local land sales acts with respect to each transaction;

(6) Evidence of compliance with Regulation Z of the Truth-in-Lending Act with respect to each transaction;

(7) Appropriate Releases from existing mortgages, liens, and other encumbrances (which, except as to Contracts, shall be submitted within 30 days of the inclusion of such Lot Sales Paper in the Collateral);

(8) Appropriate recorded Plats and Boundary Surveys, not previously furnished by the Borrowers to Banks, disclosing the legal description of all of the Lots covered by the Lot Sales Paper being submitted to the Banks as Collateral;

(9) Either an opinion of the Borrowers' and Guarantor's counsel or a policy of title insurance which shall certify or assure that:

(A) Each note and mortgage pledged to the Banks as Collateral constitutes a first and prior lien on the property described therein; and

(B) Fee simple title to the Lot covered by each Contract pledged to the Banks as Collateral is vested in the Trustee, subject only to those matters set forth in Schedule B of the Master Policy as approved by the Banks. Except as to Contracts, however, the Borrowers shall have a period of 30 days from the date of submission of Collateral within which to secure the release of each Lot from any lien or encumbrance.

(10) Opinion of the Borrowers' and Guarantor's counsel in form and substance satisfactory to the Banks

(A) That all Contracts and all purchase money notes and mortgages of which the Collateral is comprised, and except as to Contracts, the related contracts pursuant to which such notes and mortgages were made, are validly executed and enforceable in accordance with their respective terms and that in effecting the sales giving rise thereto the Borrowers and Guarantor (except to the extent provided for in Article I, Section 1.14) have fully complied with all legal requirements under state and federal laws including, without limitation, land sales statutes and regulations, Truth-in-Lending, subdivision ordinances and statutes, and regulations of like import;

(B) That no Event of Default, known to such counsel, has occurred or is continuing under this agreement;

(C) That so far as is known to such counsel, Borrowers, Guarantor, and Affiliated Subsidiaries are in compliance with all pollution control laws, zoning requirements, and all other applicable state and federal statutes and regulations applicable to the conduct of the Borrowers', Guarantor's and Affiliated Subsidiaries' businesses as presently being conducted, the violation of which would or could materially, adversely affect their operations or would or could adversely affect their ability to fulfill their obligations under this agreement;

(D) That upon delivery of Collateral to the Agent Bank, the Banks will possess a valid, first lien security interest therein with priority over all other security interests, liens, charges, or encumbrances of any type or kind as may affect said Collateral;

(E) That Advances made by the Banks in accordance with the terms of this agreement will not be in violation of any usury laws; and

(F) In the event any obligor under any Collateral shall default therein, and the Banks shall seek to enforce its rights thereunder, the Banks shall be entitled to secure under the laws of the applicable jurisdiction deficiency judgments against such obligors.

(b) Officers' Certificates. There shall have been delivered to the Banks certificates dated as of the date of submission of such Collateral and signed by the chief executive officer, the Treasurer or chief financial officer of the Guarantor, and each of the Borrowers stating:

(1) That a review of the activities of such company has been made under his immediate supervision with a view to determining whether such company has observed, performed and fulfilled all of its obligations under this agreement; and

(2) That there existed as of the date of such certificate and during the period from the date of the previous such certificate no Event of Default and no act, condition or event which, with the giving of notice or lapse of time, or both, would constitute such an Event of Default, or if any such Event of Default, act, condition, or event existed, specifying the nature thereof, the period of existence thereof and what action the company proposes to take, or has taken with respect thereto; and further stating;

(3) That all representations and warranties contained in Article IV of this agreement, as of the date of such certificate, are true and correct.

(c) Conditions of Representations and Warranties. The representations and warranties contained in Article IV hereof shall be true and correct as of the date of the making of each such Advance with the same effect as if made on and as of such date, provided that the representations and warranties set forth in Section 4.8 of this agreement shall be deemed to have been made with respect to the most current financial statements delivered to the Banks pursuant to Article VI, Section 6.12 of this agreement.

(d) No Existing Default. No Event of Default, not waived by Banks, shall have occurred or be continuing under this agreement.

(e) Expiration Date. Such Advance shall be prior to the Expiration Date or such earlier date as all the Revolving Credit Notes have been converted into Term Notes.

(f) Legal Matters. All legal matters incident to the transactions contemplated by this agreement shall be satisfactory to counsel for the Banks.

(g) Documents. There shall have been delivered to the Banks all documents reasonably requested by the Banks, satisfactory in form and content to their counsel. The acceptance of each Advance shall constitute a representation and warranty by the Borrowers and Guarantor that all conditions of this Section 5.2 have been satisfied.

Article VI Affirmative Covenants

Each of the Borrowers and the Guarantor, individually, covenants and agrees that, until the Agreement Debt is paid in full, it shall:

6.1. Maintenance of Business and Existence. Continue to engage in business of the same general type as now conducted by it so that its principal business shall continue to be land and resort development, and do all things necessary to preserve, renew and keep in full force and effect its corporate existence and rights and franchises necessary to continue such business, and preserve and keep in force and effect all licenses and permits necessary for the proper conduct of its business.

6.2. Maintenance of Properties. Keep all properties useful and necessary in its business in good working order and condition insofar as not prevented by causes beyond its control.

6.3. Maintenance of Insurance

(a) Keep all of its properties adequately insured at all times with responsible insurance carriers against loss or damage by fire and other hazards, maintain adequate insurance at all times with responsible insurance carriers against liability on account of injury or damage to persons and property and under all applicable workers' compensation laws, and maintain adequate insurance covering such other risks as the Banks may reasonably request. (Additionally, in the event any parcels of land subject to this agreement are located within a federally-designated flood plain, the Borrowers shall obtain adequate flood insurance as well.) For the purposes of this Section 6.3(a), insurance shall be deemed adequate if the same is not less extensive in coverage and amount than is customarily maintained by other persons engaged in the same or similar business similarly situated. All insurance covering real property and tangible personal property subject to a lien or security interest in favor of the Banks granted, or which may be granted, pursuant to this agreement or under any instrument or document given as security pursuant hereto shall provide that, in the case of each separate loss, the full amount of insurance proceeds with respect thereto shall be payable to the mortgagee, Banks, secured parties, or otherwise as their interests may appear, and shall further provide for at least _____ (_____) days prior notice to the Banks of the cancellation or substantial modification thereof. All loss proceeds shall be paid over to the Agent Bank and shall be used and applied by it in the same manner as herein specified with respect to Proceeds.

(b) Promptly furnish or cause to be furnished to the Banks, if requested in writing by the Continuing Banks holding _____ percent (_____) of the Outstanding Loan Balance held by the Continuing Banks, evidence, in form and substance satisfactory to the Banks, of the maintenance of all insurance required by this Section 6.3 to be maintained, including, but not limited to such originals or copies as the Banks may request of policies, certificates of insurance, riders, and endorsements relating to such insurance and proof of premium payments.

6.4. Payment of Obligations. Pay and discharge all its indebtedness for borrowed money, and all liabilities for judgments, taxes, assessments and governmental charges, except where the same may be contested in good faith and maintain adequate reserves for all contingent liabilities. If, however, the Banks have reasonable grounds to believe that the Guarantor and the Borrowers will not timely discharge such obligations, the Banks may, upon written notice to the Guarantor and the Borrowers, at their option and without waiving any of their rights hereunder, pay either before or after delinquency any or all of the said obligations. All sums so advanced or paid by the Banks shall be added to and constitute a part of the Agreement Debt, and every payment so made shall bear interest from the date thereof at the rate specified in Section 2.6 of Article II.

6.5. Books and Reserves

(a) Maintain, at all times, true and complete books, records, and accounts in which true and correct entries shall be made of its transactions in accordance with generally accepted accounting principles consistently applied and consistent with those applied in the preparation of the financial statements referred to in Section 6.12 of this Article VI.

(b) By means of appropriate quarterly entries, reflect in its accounts and in all financial statements furnished pursuant to Section 6.12 proper liabilities and reserves for all taxes and proper reserves for depreciation, renewal and replacement, obsolescence and amortization of its properties and bad debts, all in accordance with generally accepted accounting principles consistently applied as above.

6.6. Notification of Defaults. Promptly notify the Banks of:

(a) any material default, or the acceleration of any debt, under any agreement, lease, or other instrument to which it is a party or by which it is bound, and

(b) any default in the payment or performance of any of its obligations under or pursuant to this agreement, whether or

not any requirement for notice or lapse of time, or both, or any other condition has been satisfied or has occurred.

6.7. Notification of Disputes. Promptly notify the Banks of all material claims, actions or proceedings affecting it or its assets, or any part thereof.

6.8. Notification of Attachments. Promptly notify the Banks of any levy, attachment, execution or other process against its assets, or any part thereof.

6.9. Access to Records and Premises. Afford access by the Banks to any of its properties at all reasonable times for purposes of inspection, permit the Banks, their accountants, attorneys, or agents to inspect and make and take away copies of any and all of its records, and promptly deliver to the Bank such certificates and documents as the Banks may reasonably request.

6.10. Conduct of Business. Conduct and maintain its business in an orderly, efficient, and regular manner and in compliance with all laws, regulations and ordinances applicable to it, the violation of which would or could materially adversely affect its operations or would or could adversely affect its ability to fulfill its obligations under this agreement, and diligently proceed with the operations in the Development Projects in which it is presently engaged with no discontinuance in such operations for a period in excess of _____ (_____) days.

6.11. Compliance with Agreements. Comply with all material provisions of all contracts, agreements, undertakings or other instruments to which it is a party, including, without limitation, those contracts, agreements, undertakings or other instruments to which it is a party relating to the sale of lots, in the Development Projects, or otherwise.

6.12 Financial Statements. Furnish to the banks:

(a) within _____ (_____) days after the end of each fiscal year of the Guarantor, a balance sheet, statement of income, statement of changes in stockholder's equity, and statement of changes in the financial condition for the Guarantor and its subsidiaries. All shall be prepared on a consolidated and consolidating basis, but each Borrower shall be shown separately on an unconsolidated basis in the consolidating portion. All consolidated portions shall be prepared and certified by recognized independent certified public accountants selected by the Guarantor. However, such accountants and the form of their certification shall be acceptable to the Banks. All statements shall be made in accordance with generally accepted accounting principles (GAAP). Such statements shall show the consolidated and consolidating financial condition of the Guarantor and its subsidiaries at the close of such year and the results of operations on a consolidated and consolidating basis of the Guarantor and its subsidiaries during such year, together with a statement of such independent certified public accountants that in making the audit in connection with such financial statements they have obtained no knowledge of the existence of any Event of Default, nor of any event which, upon notice or lapse of time or both, would constitute an Event of Default specified in Article VIII of this agreement, or, if in the opinion of such independent certified public accountants, any such Event of Default or event exists, such statement shall specify the nature and status thereof;

(b) Within _____ (_____) days after the end of each fiscal quarter, similar financial statements to those referred to in paragraph (a) above, unaudited but certified by the chief executive officer, the Treasurer or the principal financial officer of the Guarantor, such balance sheet to be as of the end of such quarter and such statements of income, changes in stockholder's equity and changes in financial position to be for the period from the beginning of the fiscal year to the end of such quarter, in each case subject to audit and year-end adjustments, together with a certificate signed by the party certifying said statements to the effect that no Event of Default specified in Article VIII of this agreement, nor any event which, upon notice or lapse of time or both, would constitute an Event of Default, has occurred, or if any such Event of Default or event has occurred, specifying the nature and extent thereof.

6.13. Maintenance of Security Interests. Maintain valid and perfected the liens and security interests of the Banks in the

Collateral.

6.14. Agency Reports. Maintain for the use of Banks copies of all reports furnished to any state or federal agency or regulatory body.

6.15. Development Lenders' Documents. Promptly furnish the Banks copies of all reports, notices, certifications and other material furnished to the Development Lenders in connection with their loans to it, including, without limitation, copies of all material compliance certificates, waiver requests, draw requests, sales reports, and release requests submitted to such Development Lenders.

6.16. Notification Relating to Development Lenders. Promptly notify the Bank if any Development Lender refuses to make a requested advance, demands escrow amounts under deficiency clauses, declares that default has occurred, or declares that development stage specifications for Development Projects are unacceptable.

6.17. Cash Flow Models. Promptly furnish the Banks with all Cash Flow Models relating to its operations in the Development Projects, as they may be revised from time to time.

6.18. Compliance by Affiliated Subsidiaries. Cause each of its Affiliated Subsidiaries to comply with Sections 6.1 through 6.11 hereof.

6.19. Endorsements. Deliver to the Agent Bank for deposit in the Escrow Account upon receipt, duly endorsed but otherwise in the form received by it, all forms of payment received by it on the Collateral.

6.20. Certain Taxes. The Borrowers shall pay, as additional interest, and shall indemnify the Banks against, and reimburse the Banks on demand for, all present and future income, stamp and other taxes, levies, imposts, deductions, charges and withholdings whatsoever imposed, assessed, levied or collected by or for the benefit of the Commonwealth of Puerto Rico or any political subdivision or taxing authority thereof, together with any interest thereon and penalties with respect thereto (collectively "Taxes"), on or in respect of the loan to be made hereunder, the Notes, and all payments of principal, interest, or premium, or other amounts made on, under, or in respect of any thereof. All payments on account of the principal of, and the interest and premium, if any, on the loan and the Notes and all other amounts payable under this agreement received by the Banks, shall be made without deduction for or on account of any Taxes.

6.21. Further Information. Promptly furnish the Banks, from time to time, such other information regarding its operations, business, affairs and financial condition as any of the Banks may reasonably request.

6.22. Further Assurance. Upon request, execute and deliver, or cause to be executed and delivered, such further instruments and do or cause to be done such further acts as may be reasonably necessary or proper to carry out the intent and purpose of this agreement.

6.23. Lot Sales Paper. Perform and observe, or cause to be performed and observed, all of the terms, covenants, conditions and agreements of the Lot Sales Paper pledged as Collateral, on the part of the Borrower pledging the same to be performed or observed.

Article VII Negative Covenants

Each of the Borrowers and the Guarantor, individually, covenants and agrees that from the date hereof until payment in full of the Agreement Debt, it shall not either directly or indirectly:

7.1. Indebtedness. Incur, create, assume, or permit to exist any indebtedness, except Permitted Indebtedness.

7.2. Liens. Incur, create, assume, or suffer to exist any mortgage, pledge, lien, charge or other encumbrance of any nature whatsoever on any of its assets, now or hereafter owned, other than Permitted Liens.

7.3. Guaranties. Guarantee, endorse, become surety for, or otherwise in any way become or be responsible for the obligations of any other Person, or agreement for the furnishing of funds to any other Person, directly or indirectly, through the purchase of goods, supplies, or services (or by way of stock purchase, capital contribution, advance, or loan) or for the purpose of paying or discharging the indebtedness of any other Person, or otherwise, except Permitted Contingencies.

7.4. Loans and Investments. Purchase or hold beneficially any stock, other securities or evidences of indebtedness of, make or permit to exist any loans or advances to, or make any investment or acquire any interest whatsoever in, any other Person, except Permitted Loans and Investments.

7.5. Asset Acquisitions. Purchase or otherwise acquire any fixed assets or other personal property, other than Permitted Asset Acquisitions.

7.6. Leases. Incur, create, or assume any commitments to make any direct or indirect payment whether as rent or otherwise, under any lease, rental, or other arrangement for the use of property of any other person, other than Permitted Leases. Notwithstanding, however, that any obligation of the Guarantor or of any Borrower or any Affiliated Subsidiary for the rental of any real or personal property is capitalized and reported on its books as a liability constituting an indebtedness, such obligation shall be treated as a rental obligation for purposes of determining compliance with this Section 7.6.

7.7. Amendment of Agreements. Materially amend any material agreement to which it is or becomes a party.

7.8. Joint ventures. Enter into any joint venture or coventure arrangements, whether in the form of equity contributions, profit-sharing arrangements, management or otherwise, for the purpose of engaging in any business or activity other than those specified in Section 7.10, paragraphs (a), (b) or (c) within the Development Projects, or as specified in Exhibit Q.

7.9. Voluntary Prepayments. Voluntarily prepay any of its indebtedness (other than any indebtedness hereunder), or purchase, redeem or otherwise retire or acquire, except within six months of the stated maturity thereof, the whole or any part of any security representing such indebtedness of it, except where such prepayment, purchase, redemption or retirement is required for the release of liens on land in order to accommodate the sale, construction, or development of such land.

7.10. Activities. Engage in any business or activity except:

(a) Developing, improving and selling land and built-for-sale housing within the Development Projects in conformity with Cash Flow Models and Master Plans;

(b) Constructing buildings and facilities typical of its present operations within the Development Projects in conformity with Cash Flow Models and Master Plans;

(c) Developing and operating resort, commercial rental housing and utility facilities within the Development Projects in conformity with Cash Flow Models and Master Plans;

(d) Conducting general, organizational activities, master planning, project programming and environmental research programs for pending development projects and, to the extent permitted by the terms of this agreement, planned

corporate growth in conformity with the Statement of Corporate Goals and Objectives 1983-87 as set forth in Exhibit U; and engaging in general land and access development activities including the construction of buildings, amenities, and utility facilities reasonably necessary to maintain the critical schedules of pending development projects, provided the cumulative, aggregate expenditures for the activities set forth in this paragraph (d) are not in excess of _____ Dollars (\$ _____) consolidated for Guarantor, all Borrowers and all Affiliated Subsidiaries. Expenditures involving projects not defined as Development Projects and included in the aforesaid limitation shall be deducted from and shall no longer be charged as part of the aforesaid limitation should such projects subsequently be included in the definition of Development Project in accordance with the provisions of this agreement. The right of the Guarantor or Borrowers to purchase or otherwise acquire additional real estate is as set forth in Section 1.26(c) of Article I.

7.11. Executive Group. Fail to retain on a full-time basis _____ [name] and _____ [name] and at least one (1) member of each of the following pairs of individuals: _____ [name], _____ [name] _____ [name] and _____ [name]. In the event of the death or disability of any of the previously-named individuals, the Borrowers may substitute another individual by giving prompt notice to the Banks, without creating a default.

7.12. Reasonable Assurance. Fail to reasonably assure the Banks that its cash resources are continually sufficient to meet cash requirements to complete each Development Project in accordance with Cash Flow Models and Master Plans within _____ (_____) days of receiving a written request for such assurance from the Continuing Banks holding _____ percent (_____) of the Outstanding Loan Balance held by all of the Continuing Banks.

7.13. Real Estate Revenues. Fail to receive minimum Real Estate Revenues from each of the below listed Development Projects, or fail to receive minimum Real Estate Revenues from all of such Development Projects in the aggregate, during the following periods in the following amounts:

[Insert Minimum Revenues]

provided, however, that Real Estate Revenues from each Development Project and from the aggregate of all of such Development Projects for any year in excess of the aforesaid minimums may be utilized to reduce by up to _____ percent (_____) the minimum Real Estate Revenues required of each such Development Project and the aggregate required of all such Development Projects, respectively, for subsequent years.

7.14. Subsidiaries. Fail to cause Affiliated Subsidiaries to comply with Sections 7.1 through 7.10 hereof.

7.15. Stock Ownership. Allow to be transferred or issued to any Person any equity interest in any Borrower or any Affiliated Subsidiary.

7.16. Sales Agreements. Enter into any agreement with any Person with respect to the direction, supervision or management of the sales functions of the properties, or portions thereof, of Borrowers which does not provide that such contract shall be cancellable by it in the event of the occurrence and continuance of an Event of Default hereunder.

7.17. Additional Equity. As to the Guarantor only, fail to issue between the date hereof and _____ [month] _____ [day], _____ [year], a minimum of _____ Dollars (\$ _____) in additional equity and/or long-term Subordinated Debt (with no principal repayment requirements for at least _____ (_____) years from the date of issuance) held by Persons other than any Borrower or Affiliated Subsidiary.

7.18. Disposition of Lot Sales Paper. Sell, pledge, grant a security interest in, assign, mortgage, hypothecate or otherwise dispose of more than _____ percent (_____%) of the principal dollar amount of Lot Sales Paper which would qualify as Eligible Lot Sales Paper under this agreement arising from the sale of lots in any Development Project other than to the Banks under the terms of this agreement or of more than _____ percent (_____%) of the aggregate principal dollar amount of Lot Sales Paper which would qualify as Eligible Lot Sales Paper under this agreement arising from the sale of lots at all Development Projects. The above limitations, however, shall not be applicable to the principal dollar amount of Lot Sales Paper arising from the sale of lots at the _____ [name] Development Project in excess of the _____ percent (_____%) limitation set forth in Section 1.14 of Article I, or to Lot Sales Paper from any Development Project which would not qualify as Eligible Lot Sales Paper under this agreement.

7.19. Transfer of Common Facilities. Sell, lease, or otherwise dispose of any of the common facilities in any Development Project (including, without limitation, tennis courts, golf courses, marinas, parking facilities, roads, and utility systems), unless the Borrower disposing of such common facilities or the Guarantor shall retain the operation and control of such facilities under lease agreements at fair market value of a term of at least _____ (_____) years, or, in the absence of any such long-term lease agreements, then under lease agreements satisfactory in form and substance to the Continuing Banks holding at least _____ percent (_____%) of the Outstanding Loan Balance held by the Continuing Banks.

7.20. Requests for Rescission. Unreasonably refuse to honor a request for rescission by the maker of any obligation included in Lot Sales Paper pledged as Collateral, when such request is based upon a claim of noncompliance by it with applicable state land sales statutes and regulations.

Article VIII Defaults

8.1. Events of Default. The occurrence of any one or more of the following events shall constitute an Event of Default:

(a) The failure of the Borrowers to pay, within five business days after having received written notice of failure to pay, an installment of principal of or interest on the Agreement Debt when and as such payment is due;

(b) If any representation or warranty contained in Article IV of this agreement shall prove to be false or misleading in any material respect;

(c) If any representation or warranty or any other statement of fact contained in any writing, certificate, report, or statement at any time furnished to the Banks pursuant to or in connection with this agreement, or otherwise, shall prove to be false or misleading in any material respect;

(d) Default in the performance of any provision or breach of any covenant contained in Article VI of this agreement;

(e) Default in the performance of any provision or breach of any covenant contained in Article VII of this agreement;

(f) Default in the payment of any principal, interest or premium with respect to any other indebtedness of the Guarantor or any Borrower, or permit the acceleration prior to its stated maturity of any debt of the Guarantor or any Borrower;

(g) Default in the payment of any principal, interest or premium with respect to any indebtedness or any Affiliated Subsidiary or permit the acceleration prior to its stated maturity of any debt of any Affiliated Subsidiary;

(h) The sale or transfer, other than to the Guarantor or a Borrower, of more than _____ percent (_____%) of the assets of the Guarantor, a Borrower or an Affiliated Subsidiary, or of more than _____ percent (_____%) of the assets of or equity in any Person held by the

Guarantor, any Borrower or any Affiliated Subsidiary. The Guarantor and the Borrower, however, may sell receivables as permitted in Section 1.28 of Article I, and may enter into agreements for the transfer of common facilities as permitted by Article VII, Section 7.19. Moreover, the sale of real property in the ordinary course of business shall be considered permissible and shall not be included in the aforesaid limitation. It is further understood and agreed that while the Banks are under no obligation to permit the sale or transfer of equity interests in a Borrower or an Affiliated Subsidiary other than as permitted by this agreement, the Banks recognize that the sale of such equity interests is generally a legitimate method of raising capital and the Banks will consider reasonable requests that such sales be permitted.

(i) The declaration, setting aside or payment of a dividend on or the purchase or redemption of the stock of Guarantor or of the stock of any Borrower to or from a Person other than the Guarantor, or of the stock of any Affiliated Subsidiary, to or from a Person other than a Borrower or the Guarantor. The limitations set forth in this paragraph (i), however, shall not be applicable to:

(1) Stock redemptions or purchases by the Guarantor or the Borrowers in an amount not exceeding the lesser of:

(A) _____ percent (_____%) of the aggregate cumulative after tax profits of the Guarantor, the Borrowers and the Affiliated Subsidiaries subsequent to the close of fiscal year _____ [year]; or

(B) _____ Dollars (\$_____); and

(2) Repurchase by the Guarantor of warrants to purchase _____ (_____) shares of the Common Stock of the Guarantor held by _____ [name], provided such repurchase is not effected prior to the issuance by the Guarantor of at least _____ Dollars (\$_____) in additional equity and/or long-term Subordinated Debt having no principal repayment requirements for a period of _____ (_____) years from the date of issuance of such debt to Persons other than any Borrower or Affiliated Subsidiary; and

(3) The dividend and redemption requirements applicable to _____ [name], as set forth in that certain Loan Agreement dated _____ [month] _____ [day], _____ [year], between _____ [name] and _____ [name].

(j) The consolidation or merger of the Guarantor or any Borrower or any Affiliated Subsidiary into any other corporation, or the change in controlling ownership of the Guarantor or any Borrower or any Affiliated Subsidiary. Any Affiliated Subsidiary, however, may be merged into the Guarantor or any Borrower so long as the Guarantor or such Borrower is the surviving corporation.

(k) Notwithstanding anything contained in this agreement to the contrary:

(1) The loan or advance of money or other assets by the Guarantor and the Borrowers to the Affiliated Subsidiaries in excess of an aggregate amount outstanding at any given time of _____ Dollars (\$_____), except as set forth on Exhibit S;

(2) The contribution of capital or other assets to, or investment in, the Affiliated Subsidiaries by the Guarantor and the Borrowers in an aggregate amount in excess of _____ Dollars (\$_____), except as set forth on Exhibit K;

(3) The guaranty or endorsement of any Permitted Indebtedness of any Affiliated Subsidiaries by the Guarantor and/or the Borrowers in an aggregate amount outstanding at any given time in excess of _____ Dollars

(\$ _____); or

(4) The making of payments of any kind or type whatsoever to or for any Affiliated Subsidiary by the Guarantor or by any Borrower outside the ordinary course of business;

(l) Failure to maintain aggregate Subordinated Debt and stockholders' equity in an amount not less than

(1) _____ Dollars (\$ _____) through _____ [month] _____ [day], _____ [year]; and

(2) _____ Dollars (\$ _____) thereafter;

(m) If the Guarantor or any Borrower or any Affiliated Subsidiary files a petition in bankruptcy or for the approval of a plan of reorganization or arrangement under the Bankruptcy Act (as it now exists or as amended) or under any other similar applicable federal or state law, or an admission seeking the relief therein provided, is unable or admits in writing its inability to pay its debts as they become due, makes an assignment for the benefit of creditors, is adjudicated a bankrupt, suspends its business, becomes insolvent however otherwise evidenced, has a receiver appointed voluntarily or otherwise for its property, and such appointment remains in force, undischarged and unstayed for a period of _____ (_____) days, or permits any judgment or any attachment or execution against any of its property for an amount in excess of _____ Dollars (\$ _____) to remain unpaid, unstayed or undismissed for a period of more than _____ (_____) days.

8.2. Occurrence of Defaults. Should any one or more of the above defined Events of Default occur and not be waived by the Banks in accordance with Section 9.10 of Article IX, upon written notice of default given to the Guarantor and the Borrowers by Agent Bank, the commitment of the Banks pursuant to this agreement shall forthwith terminate and the agreement Debt shall be immediately due and payable without presentment, demand, protest or other notice of any kind, all of which are hereby expressly waived, anything contained herein or elsewhere to the contrary notwithstanding. Except as to the commitment of the Banks hereunder, however, the following Events of Default shall be waived automatically for the following periods:

(a) Sections 8.1(d) (but not as to a default in the performance of the covenant set forth in Section 6.19), 8.1(g), 8.1(i), 8.1(k) and 8.1(l) hereof for a period of _____ (_____) days; and

(b) Section 8.1(e) hereof for a period of _____ (_____) days.

All such periods of automatic waiver, however, shall be applied independently and shall not supersede the occurrence of any Events of Default to which no such period of automatic waiver is applicable.

Article IX Agreement Among Banks

9.1. Agent Bank. _____ [name] is hereby appointed as the Agent Bank hereunder, and each of the Banks hereby authorizes said Agent Bank, as the Agent Bank for such Bank, to take such action on its behalf under the provisions of this agreement and to exercise such powers and to perform such duties hereunder as are delegated to or required of the Agent Bank by the terms hereof, together with such powers as are reasonably incidental thereto.

9.2. Delegation of Duties. The Agent Bank may execute any of its duties hereunder by or through agents or employees, and shall be entitled to advice of counsel concerning all matters pertaining to its duties hereunder.

9.3. Reimbursement of Agent Bank. Each Bank shall reimburse the Agent Bank its pro rata share of all expenses incurred on behalf of and for the benefit of the Banks (which expenses shall not include the salary or other

compensation of any employee of Agent Bank or any affiliate of Agent Bank), not reimbursed by the Guarantor or the Borrowers, including, without limitation, all counsel fees and compensation paid to agents for services rendered on behalf of the Banks. The Agent Bank, however, shall not incur expenses of more than _____ Dollars (\$ _____) without the prior written consent of the Continuing Banks holding at least _____ percent (_____%) of the Outstanding Loan Balance held by the Continuing Banks.

9.4. Responsibility for Collateral. The Agent Bank shall establish procedures for determining that the Collateral documents required by Article V, Section 5.2, have been delivered to it by Guarantor or Borrowers, and that the sales contract, purchase money note and purchase money mortgage bear the purported signatures of the purchasers as disclosed by the sales contract. The Agent Bank shall follow these procedures and administer this agreement with the same degree of care that it uses in loans and financings in which it alone is interested. Other than as set forth herein, the Agent Bank shall not be responsible in any manner to any Bank for the effectiveness, enforceability, sufficiency, genuineness, collectibility, validity, or the due execution of any of the Collateral or Collateral documents as described in Section 5.2, this agreement or any Note or certificate, report, or other document used under or in connection with this agreement, or be under any obligation to any Bank to ascertain or inquire as to the performance or observance of any term, covenant, or condition hereof on the part of the Guarantor or the Borrowers.

9.5. No Personal Liability. No officer, director, employee or agent of the Agent Bank shall be liable for any action taken or omitted to be taken by him hereunder or in connection herewith, except for his own gross negligence or willful misconduct. It is expressly understood that no personal liability whatever shall attach to, or is or shall be incurred by any officer, director, employee, or agent of the Agent Bank under or by reason of the representations, obligations, covenants, or agreements contained in this agreement or implied herefrom.

9.6. Reliance by Agent Bank. The Agent Bank shall be entitled to rely on any Note, notice, consent, certificate, affidavit, letter, telegram, teletype message, statement, order, or other document believed by it to be genuine and correct and to have been signed and sent by the proper person or persons and, in respect of legal matters, upon opinion of counsel selected by the Agent Bank. The Agent Bank shall be fully protected in any act taken, suffered, or permitted, or in any act not taken, by it in good faith in reliance on any of the aforesaid. The Agent Bank may deem and treat the payee of any Note as the owner thereof for all purposes hereof.

9.7. Agent in its Individual Capacity. With respect to all Advances made by it and any Note or Notes issued to it, the Agent Bank shall have the same rights and powers hereunder as any Bank and may exercise the same as though it were not the Agent Bank. The term "Bank" or "Banks" shall, unless the context otherwise indicates, include the Agent Bank in its individual capacity.

9.8. Adjustments. If any Bank shall at any time receive a payment on the Notes or obtain any sum by virtue of counterclaim, offset, bank's lien or lien which may be exercised for application on any Notes hereunder, in a greater proportion than the payments or sum received by the other Banks, and if such payment or sum constituted property or other assets of the Guarantor, the Borrowers or the Affiliated Subsidiaries which were in the possession of, or otherwise available to, such Bank by reason of its being a party to this agreement, such Bank shall forthwith pay to the other Banks for application against the unpaid principal amount of Notes held by such other Banks, such amount as shall be required so that after such payment the unpaid principal balance of Notes held by each Bank will bear the same proportion to the Outstanding Loan Balance as immediately before such payment was received. In the event that at any time any Bank shall be required to refund any amounts which have been paid to or received by it on account of any Note held by such Bank and which have been applied to the payment of a portion of Notes held by other Banks pursuant to this Section 9.8, then, upon notice from such Banks, each of such other Banks shall repay said amounts to the extent of their ratable share of such refund.

9.9. Participations. No Bank shall negotiate, endorse, transfer or assign any of its rights, title, or interest in any Note or

Notes held hereunder or sell participations therein to any person. _____ [name] and _____ [name], however, may sell participations in any Note or Notes which they hold hereunder, but the sale of such participation shall not confer on any such Person any rights under this Agreement.

9.10. Amendments, Consents and Waivers

(a) With the written consent of Continuing Banks holding at least _____ percent (_____%) of the Outstanding Loan Balance held by the Continuing Banks, the Agent Bank and the Guarantor and the Borrowers may, subject to the provisions of this Section, from time to time, enter into agreements amendatory or supplemental hereto for the purpose of adding any provisions to this agreement or changing in any manner the rights of the Banks or of the Guarantor or of the Borrowers hereunder, and the Agent Bank may execute and deliver to the Guarantor and the Borrowers written instruments waiving any requirement of this agreement. There shall be required, however, the written consent of the Continuing Banks holding _____ percent (_____%) of the Outstanding Loan Balance held by the Continuing Banks for any amendment, consent, or waiver relating to (a) the definition of Development Projects set forth in Article I, Section 1.13, (b) the Event of Default set forth in Article VIII, Section 8.1(j), and (c) the extension of the Expiration Date set forth in Article I, Section 1.19; and the written consent of Banks holding _____ percent (_____%) of the Outstanding Loan Balance for any amendment, consent or waiver relating to (1) any change in the basic terms of this agreement as set forth in Article II (except Section 2.8) and Article III, and (2) the matters set forth in Article VIII, Sections 8.1(a) and 8.2, and Article IX (other than the removal of the Agent Bank in which event the then Agent Bank shall not be entitled to vote) and Article X of this agreement.

(b) Any Continuing Bank not concurring in any amendment, consent or waiver which requires for its approval the consent of the Continuing Banks holding _____ percent (_____%) of the Outstanding Loan Balance held by Continuing Banks may, within 30 days from the date such amendment, consent or waiver is approved in accordance with the provisions of paragraph (a) of this Section 9.10, elect to terminate its commitment to make further Advances and effect a funding in accordance with the terms of Section 2.8 hereof. Such option to convert shall terminate, however, if not exercised within the aforesaid period of _____ (_____) days.

9.11. Agreement to Confer. Each Bank shall advise each of the other Banks in the event that such Bank becomes aware of any fact which, in its opinion, might or could have a material effect on the ability of the Borrowers to repay the Agreement Debt. The obligation set forth in this paragraph shall be deemed to be fiduciary in nature as among the Banks.

Article X Miscellaneous

10.1. Liens. The Guarantor and each of the Borrowers hereby grants to the Banks a continuing lien for its performance and obligations under this agreement upon any and all of its moneys, securities, and other property, and the proceeds thereof, now or hereafter held or received by it or in transit to, the Banks, from or for it, whether for safe keeping, custody, pledge, transmission, collection or otherwise, and also upon any and all of its deposits (general or special) and credits with said Banks, at any time existing. Upon the occurrence of any Event of Default as specified herein and the lapse of any period of waiver, the Banks, and each of them, is hereby authorized at any time and from time to time, without notice, to set-off, appropriate and apply any or all items hereinabove referred to against all indebtedness of it to the Banks, whether under this agreement or otherwise, whether now existing or hereafter arising.

10.2. Expenses. The Guarantor and the Borrowers shall reimburse the Banks for actual out-of-pocket expenses, including reasonable counsel fees, incurred by such Banks in connection with the development, preparation, execution, administration, or enforcement of, or the preservation of any rights under, this agreement.

10.3. Service Charge. In consideration of the services of National Bank as Agent Bank under this agreement, the Guarantor, on behalf of the Borrowers, shall pay to Agent Bank within _____ (_____) days of each Settlement Date an amount equal to _____ percent (_____) of the average principal amount of Collateral outstanding during the period preceding such Settlement Date from and including the next previous Settlement Date (or, as to the first Settlement Date, from and including the date of the initial advance hereunder) set forth below:

Percentage	Principal Amount of Collateral Outstanding
3/8 of 1%	First \$5 Million or less
1/4 of 1%	Next \$5 Million or part thereof
1/8 of 1%	All over \$10 Million

10.4. Notices. Except as specified in Article III, Section 3.6, all notices, requests, demands, or other communications provided for herein or in any instrument or document delivered pursuant hereto, shall be in writing and shall be deemed to have been given when sent by registered or certified mail, return receipt requested, addressed, in the case of the Banks, to _____[address] or, in the case of the Guarantor or the Borrowers, to _____[address], or to such other addresses as shall be designated from time to time in writing and forwarded in like manner.

10.5. Response. The Banks shall respond to all requests of the Guarantor or the Borrowers relating to consents, waivers or amendments within 30 days after receipt thereof, except that if such requests relate to the definition of Development Project (Article I, Section 1.13), the Event of Default set forth in Article VIII, Section 8.1(j), or any change in the basic terms and conditions of this agreement as defined and set forth in Articles II and III hereof (excluding the Expiration Date), or the provisions of Section 8.2, Article IX and Article X, then, within 60 days. The Banks shall notify the Guarantor and the Borrowers in writing of any refusal to grant such consent, waiver, or amendment because the same would materially impair the ability of the Guarantor and the Borrowers to fulfill their obligations hereunder, or for such other reasons as the Banks in their sole judgment deem advisable. Failure by the Banks to respond to any reasonable requests of the Guarantor or the Borrowers within the aforesaid time periods shall constitute the Bank's consent to any such reasonable request.

It is further understood and agreed that at such time as the Guarantor has caused to be issued additional equity and long-term subordinated debt (with no principal repayment requirements for at least five years) as presently contemplated, the Guarantor and Borrowers shall have the right to seek a modification or amendment of the terms of this agreement. It is understood, however, that the Banks are under no obligation to agree to any such modification or amendment of the terms hereof.

10.6. Governing Law. This agreement and the rights and obligations of the parties hereunder shall be governed by and construed and interpreted in accordance with the laws of the State of _____[state].

10.7. No waiver; Cumulative Remedies. No failure to exercise, and no delay in exercising, on the part of the Agent Bank or any of the Banks, any right, power or privilege hereunder shall preclude any other or further exercise thereof or the exercise of any other right, power, or privilege. The rights and remedies herein provided are cumulative and not exclusive of any rights or remedies provided by law.

10.8. Binding Effect. This agreement shall be binding upon and inure to the benefit of the Guarantor, the Borrowers, the Agent Bank and the Banks, and their respective successors.

10.9. Severability. In case any one or more of the provisions contained in this agreement, or in any instrument or other document delivered pursuant to this agreement, should be invalid, illegal, or unenforceable in any respect, the validity,

legality, and enforceability of the remaining provisions contained herein and therein shall not in any way be affected or impaired thereby.

10.10. Captions. The captions of the Articles and Sections of this agreement are inserted for convenience only and shall not be deemed to constitute a part of this agreement.

10.11. Counterparts. This agreement may be executed in any number of counterparts and all of said counterparts taken together shall be deemed to constitute one and the same instrument. Promptly after the execution hereof, the Agent Bank shall transmit to each Bank a conformed copy of this agreement.

10.12. Singular and Plural, etc.. As used herein, the singular shall include the plural, the plural the singular, and the use of any gender shall be applicable to all genders.

10.13. Entire Agreement. This agreement supersedes all agreements previously made between the parties relating to its subject matter. There are no other understandings or agreements between them.

10.14. Non-waiver. No delay or failure by a party to exercise any right under this agreement, and no partial or single exercise of that right, shall constitute a waiver of that or any other right, unless otherwise expressly provided herein.

IN WITNESS WHEREOF the parties hereto have caused this agreement to be executed by their duly authorized officers and their respective corporate seals to be affixed hereto, all as of the day and year first above written.

"BORROWER"

a(n) _____ [state] _____ [entity]

By: _____

Print Name: _____

Title: _____

"BORROWER"

a(n) _____ [state] _____ [entity]

By: _____

Print Name: _____

Title: _____

"GUARANTOR"

a(n) _____ [state] _____ [entity]

26-22 Current Legal Forms for Real Estate FORM 22.111

By: _____

Print Name: _____

Title: _____

"GUARANTOR"

a(n) _____ [state] _____ [entity]

By: _____

Print Name: _____

Title: _____

"BANKS"

a(n) _____ [state] _____ [entity]

By: _____

Print Name: _____

Title: _____

a(n) _____ [state] _____ [entity]

By: _____

Print Name: _____

Title: _____

*[Attach Exhibit A]**[Attach Exhibit B]**[Attach Exhibit C2]**[Attach Exhibit C4]**[Attach Exhibit D1]*

[Attach Exhibit D2]

[Attach Exhibit E]

[Attach Exhibit F]

[Attach Exhibit G]

[Attach Exhibit J]

[Attach Exhibit K]

[Attach Exhibit M]

[Attach Exhibit N]

[Attach Exhibit O]

[Attach Exhibit P]

[Attach Exhibit Q]

[Attach Exhibit R]

[Attach Exhibit S]

[Attach Exhibit U]



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Current Legal Forms for Real Estate

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Current Legal Forms for Real Estate
Chapter 22 DEVELOPMENT AND SUBDIVISION
Part IV. FORMS
G. FINANCING

26-22 Current Legal Forms for Real Estate FORM 22.112

FORM 22.112 Open-End Mortgage, Assignment of Rents and Leases and Security Agreement (Maximum Amount Unpaid Indebtedness Exclusive of Interest: \$_____) (Construction Loan)

COMMENT

Obviously, one of the most significant documents of a construction loan is the mortgage. The mortgage is given to service the advances of the lender. It creates a lien on the real estate. In most jurisdictions, the mortgage should be filed so as to give the world constructive notice of the lender interest in the property. All other parties dealing with the borrower or the property are deemed to have notice of the lenders interest. The filing of the mortgage gives the lender priority over all subjects subsequent parties dealing with the property. Once notable exception to this rule are mechanics liens. Depending in the jurisdiction a mechanic's lien may relate back to the date that the first work was completed or material delivered. Thus, in some jurisdictions a mechanics lien filed after a mortgage could gain priority over the mortgage because the work started before the mortgage was filed. Again, one must review the laws of the jurisdiction where the project is located. In most circumstances, involving a sophisticated lender, the lender requires mortgagees' inservice which insures the validity of the mortgage.

FORM

THIS MORTGAGE is made this _____[day] day of _____[month], _____[year] by and between the Mortgagor, _____[name], a(n) _____[state] _____[entity], whose address is _____[address], (the "Borrower") and the Mortgagee, _____[name], a(n) _____[state] _____[entity], whose address is _____[address], (the "Bank").

WITNESSETH:

WHEREAS, Borrower is indebted to Bank pursuant to the Mortgage Note, dated of even date herewith, in the principal amount of _____ Dollars (\$ _____), executed by Borrower and made payable to Bank (the "Note").

NOW THEREFORE, to secure (a) the payment of the Indebtedness and Impositions (as defined below) and the interest thereon, (b) the payment of any advances or expenses of any kind incurred by Bank pursuant to the provisions of the Note, the interest on which varies in accordance with the terms of the Note, the Loan Agreement or this Mortgage, (c) the repayment of future advances disbursed by Bank to Borrower in excess of the principal of the Indebtedness, and (d) the performance of the Borrower's obligations under the Loan Agreement, the parties agree as follows:

GRANTING CLAUSE

Borrower does hereby mortgage, warrant, grant, bargain, sell, release, assign, transfer and convey to Bank, its successors and assigns forever, the property located in the County of _____, State of _____, and more particularly described on Exhibit A attached hereto (the "Real Estate"), and all of Borrower's estate, title and interest, in law or equity, of, in and to such Real Estate.

TOGETHER with all buildings and improvements of every kind or description, now or hereafter placed or erected on the Real Estate, including, but not limited to those described on Exhibit B attached hereto, and all easements, rights, licenses, privileges, appurtenances, rents, royalties, mineral, oil and gas rights and profits, water rights, water stock, and personal property of every kind whatsoever owned by Borrower and now or hereafter located on or attached to and used in connection with the operation of the Real Estate and the buildings, structures and improvements thereon, or in connection with any construction being conducted or which may be conducted thereon and all right, title and interest of Borrower in and to the land lying in the streets, alleys and roads, in front of and adjoining the property, all of which, including replacement and additions thereto, shall be deemed to be and remain a part of the Real Estate covered by this Mortgage;

TOGETHER with all of the rents, leases, issues and profits arising out of any of the foregoing including all insurance policies and payments made under insurance policies relating to any of the foregoing, and all judgments, awards and settlements resulting from any condemnation proceeding or similar taking against the Real Estate under the power of eminent domain and all proceeds of the conversion (voluntary or involuntary) of the same into cash or liquidated claims; all of the foregoing, together with said personal property, the Real Estate and fixtures thereto are herein collectively referred to as the "Property;"

TO HAVE AND TO HOLD, the Property hereby conveyed, granted and assigned, unto Bank, and its successors and assigns forever, for the uses and purposes herein set forth, provided, nevertheless, that if Borrower shall keep, observe and perform all of the covenants and conditions of this Mortgage, the Loan Agreement and the Note on its part to be kept and performed and shall pay, or cause to be paid, to Bank the Indebtedness and Impositions and all extensions and renewals thereof, and shall repay any loans and advances hereafter made by Bank under the terms hereof, then this Mortgage shall be void, otherwise it will remain in full force and effect.

REPRESENTATIONS, WARRANTIES AND COVENANTS. Borrower represents warrants to and covenants and agrees with Bank as follows:

1. TITLE. Borrower represents, warrants and covenants that (a) Borrower is the lawful owner in fee simple of the Property, (b) Borrower has the right to mortgage, rent and convey the Property, (c) title to the Property is vested in Borrower and is free, clear and unencumbered except for the Permitted Encumbrances set forth on Exhibit C attached hereto, (d) Borrower has the right and power to convey and encumber the Property and to execute this Mortgage, (e)

Borrower will warrant and defend the title of the Property against all claims and demands, and (f) Borrower will make such further assurances of title as Bank may require.

2. INDEBTEDNESS. (a) This Mortgage is made to secure the prompt payment and performance by Borrower when due of all principal, interest, costs and other amounts owed under, and all of the liabilities, obligations and indebtedness set forth in each of the following agreements, instruments and documents (hereinafter collectively called the "Indebtedness"):

(i) The Note and all extensions, amendments, restatements and renewals thereof; and

(ii) All advances or expenses of any kind made or incurred by Bank on behalf of Borrower pursuant to the provisions of or on account of the Loan Agreement and all payments required to be paid thereunder, the Note or this Mortgage; and

(iii) Payment of all other sums with interest thereon becoming due and payable to Bank herein under the terms hereof or as set forth in any other document evidencing the Indebtedness or arising out of or otherwise related to the Note or this Mortgage (the "Loan Documents"); and

(iv) Performance and discharge of each and every term, provision, condition, obligation, covenant, and agreement of Borrower herein or as set forth in the Loan Agreement or as set forth in any of the Loan Documents; and

(v) Payment and performance of all Obligations as such term is defined in the Loan Agreement.

(b) Borrower will promptly pay or cause to be paid when due all liabilities and Indebtedness, and will perform all obligations and duties arising under the Indebtedness.

3. HAZARD INSURANCE. (a) Borrower will keep the improvements now existing or hereafter erected or located on the Property insured against loss by fire, all hazards included within the term "extended coverage," and such other hazards as Bank may require or as may be required by applicable law, which insurance will be in amounts and for such periods as Bank may require; provided, however, that Bank will not require that the amount of such coverage exceed the amount of coverage required to pay the sums secured by this Mortgage unless required by applicable law.

(b) The insurance carrier providing the insurance will be chosen by Borrower, subject to approval by Bank, which approval will not be unreasonably withheld. Unless otherwise specified, all premiums on insurance policies will be paid by Borrower making payment, when due, directly to the insurance carrier and providing receipt of each payment to Bank if required by Bank. If, however, Borrower defaults on any premium payment, or Bank deems it necessary in its discretion, Bank may require a fund for insurance as provided for in Section 5 of this Mortgage.

(c) All insurance policies and renewals thereof will be in form acceptable to Bank and will include a standard mortgagee clause with a waiver of insurer's right of subrogation against funds paid under such clause and a loss payable clause in favor of and in form acceptable to Bank, and will provide that the policies shall not be amended or canceled without thirty (30) days prior written notice to Bank.

(d) Bank will have the right to hold the original policies and renewals thereof, and Borrower will promptly furnish to Bank all renewal notices and all receipts of premiums. In the event of loss, Borrower will give prompt notice to the insurance carrier and Bank. Bank may make proof of loss if not made promptly by Borrower. Bank is hereby given full power to collect any insurance proceeds or to settle and compromise any insurance claims or bring suit to recover thereunder.

(e) Bank is authorized to apply the net proceeds of any insurance claim, after deducting all costs of collection including attorney's fees, at Bank's sole option, in any one or more of the following ways: (i) to the payment of any sums then in

default to Bank which are secured hereby; (ii) to fulfill any of the covenants contained herein which Borrower has failed to fulfill, as Bank may determine; (iii) unless the insurer denies liability to any insured, to restore the Property to a condition satisfactory to Bank on such terms and conditions as Bank may determine; (iv) released to Borrower; (v) to apply to the Indebtedness, whether the Indebtedness is then matured or unmatured. If, in the sole discretion of Bank, Bank is not satisfied with the adequacy of the collateral for the remaining Indebtedness, Bank may, without further notice or demand, elect to declare the whole of the remaining Indebtedness immediately due and payable and may invoke any of the remedies afforded it by law, and/or by this Mortgage and/or any of the Loan Documents, including those permitted in Section 20 hereof.

(f) If the Property is acquired by Bank in any manner, all right, title and interest of Borrower in and to any insurance policies and in and to the proceeds thereof, resulting from damage to the Property prior to the sale or acquisition, shall pass to Bank to the extent of the sum secured by this Mortgage, immediately prior to such sale or acquisition. Bank is hereby irrevocably appointed by Borrower as attorney-in-fact of Borrower to assign any policy in the event of the foreclosure of the Mortgage or other extinguishment of the Indebtedness, and Borrower will have no right to reimbursement for premiums unearned at the time of any such assignment.

(g) If any part of any of the Property lies within a "special flood hazard area" as defined and specified by the United States Department of Housing and Urban Development pursuant to the Flood Disaster Protection Act of 1973, and Bank determines that flood insurance coverage is required to be obtained for any of the Property in order to comply with the Flood Disaster Protection Act of 1973 as now in effect, Borrower shall (i) promptly purchase and pay the premiums for flood insurance policies as Bank deems required so that Bank shall be deemed in compliance with the rules and regulations and provisions of the Flood Disaster Protection Act of 1973 as then in effect; and (ii) deliver such policies to Bank together with evidence satisfactory to Bank that the premiums therefor have been paid. Such policies of flood insurance shall be in a form satisfactory to Bank, shall name Bank as an insured thereunder, shall provide that losses thereunder be payable to Bank pursuant to such forms of loss payable clause as Bank may approve, shall be for an amount at least equal to the Obligations or the maximum limit of coverage made available with respect to any of the Property under the National Flood Insurance Act of 1968, as amended, whichever is less, and shall be noncancelable as to the Bank except upon thirty (30) days prior written notice given by the insurer to Bank. Within thirty (30) days prior to the expiration date of each such flood insurance policy, Borrower shall deliver to Bank a renewal policy or endorsement together with evidence satisfactory to Bank that the premium therefor has been paid.

4. CHARGES; LIENS. (a) Borrower will promptly pay when due all taxes, liens, assessments and other charges, levies, fines, leasehold payments and ground rents of every kind whatsoever attributable to the Property (collectively the "Impositions"), if any, by Borrower making payment when due directly to the payee thereof. Borrower will promptly furnish to Bank all notices of amounts due under this paragraph, and Borrower will promptly furnish Bank with receipts evidencing such payments. If Borrower defaults on any payment of any tax, assessment or other Imposition which may attain priority over the lien of this Mortgage or the payment of ground rents, if applicable, or if Bank deems it necessary in its sole discretion, Bank may require a fund for such Impositions as provided for in Section 5 hereof.

(b) Borrower will promptly discharge any lien or claim which has or may attain priority over this Mortgage; provided that Borrower will not be required to discharge any such lien so long as Borrower will in good faith contest such lien by, or defend enforcement of such lien in, legal proceedings which operate to prevent the enforcement of the lien or forfeiture of the Property or any part thereof so long as Bank agrees in writing to the contesting of such lien by Borrower, rather than the satisfaction, bonding off, or discharging of same. In the event any such lien or claim is not discharged with thirty (30) days after its recording or inception, Bank may, at its option, require Borrower to deposit with Bank such amounts or such bonds as are acceptable to Bank in Bank's sole discretion to assure the priority of this Mortgage. Borrower further agrees to pay to Bank any costs it may advance in order to protect the priority of its lien, including, but not limited to, court costs and reasonable attorneys' fees.

5. FUNDS FOR TAXES AND INSURANCE. (a) If Borrower is in default of any premium payment on an insurance

policy or if Borrower fails to pay any taxes, assessments or other Impositions when due, or if Bank, in its sole discretion, deems it necessary, Borrower will be required to pay to Bank on the day any installments of interest are payable under the Note, or on such other date as Bank may specify, until the Indebtedness is paid in full, a sum equal to a percentage to be specified by Bank of the yearly taxes, assessments or other Impositions (herein "Funds") which may attain priority over the priority of this Mortgage, and ground rents on the Property, if any, plus a percentage to be specified by Bank of yearly premium installments for mortgage insurance, if any, all as reasonably estimated initially and from time to time by Bank on the basis of assessments and bills and reasonable estimates thereof.

(b) The Funds will be held by Bank, and Bank will apply the funds to pay such taxes, assessments, insurance premiums, ground rents and other Impositions. Bank may not charge for so holding and applying the Funds, analyzing such account, or verifying and compiling such assessments and bills, unless Bank pays Borrower interest on the funds and applicable law permits Bank to make such a charge. Borrower and Bank may agree in writing that interest on Funds shall be paid to Borrower, and unless such agreement is reached or applicable law requires such interest to be paid, Bank will not be required to pay Borrower any interest or earnings on the Funds. Bank will give to Borrower, without charge, an annual accounting of the Funds showing credits and debits to the Funds. The Funds are hereby pledged as additional security for the indebtedness secured by this Mortgage.

(c) If the amount of the Funds held by Bank, together with future monthly installments of Funds payable prior to the due date of taxes, assessments, insurance premiums, ground rents and other Impositions, will exceed the amount required to pay such taxes, assessments, insurance premiums, ground rents and other Impositions as they fall due, such excess will be, at Borrower's option, either promptly repaid to Borrower or credited to Borrower on periodic installments of Funds. If the amount of the Funds held by Bank shall not be sufficient to pay taxes, assessments, insurance premiums, ground rents and other Impositions as they fall due, Borrower will pay to Bank any amount necessary to make up the deficiency within thirty (30) days from the date notice is mailed by Bank to Borrower requesting payment thereof. Nothing in this paragraph will be deemed to obligate Bank to pay such charges when due if the Funds are insufficient or Borrower fails to supply Bank with the proper invoice when payments are due.

(d) Upon payment in full of all sums secured by this Mortgage, Bank will, upon request of Borrower, within thirty (30) days, refund to Borrower any Funds held by Bank. If the Property is sold in foreclosure or the Property is otherwise acquired by Bank, Bank will apply any Funds held by Bank as a credit against the sums secured by this Mortgage.

6. APPLICATION OF PAYMENTS. Unless otherwise agreed by Borrower and Bank in writing, or unless Bank has the option to apply such payments differently hereunder and elects to do so, all payments received by Bank, whether through payment, foreclosure or otherwise, are to be applied in the following order: Impositions advanced by Bank on behalf of Borrower, interest, escrow, late fees or penalties and then to principal.

7. PRESERVATION AND MAINTENANCE OF PROPERTY. Borrower shall keep the Property in good repair and shall not commit waste or permit impairment or deterioration of the Property.

8. PROTECTION OF BANK'S SECURITY. (a) If Borrower fails to perform the covenants and agreements contained in this Mortgage, or if any action or proceeding is commenced which materially affects Bank's interest in the Property, including, but not limited to, eminent domain, foreclosure, code enforcement, deed restrictions and registrations, arrangements or proceedings involving a bankrupt or decedent, Bank, at Bank's sole option, upon notice to Borrower (but such notice need only be given one time to Borrower), may make such appearances, disburse such sums and take such action as Bank deems necessary to protect Bank's interest, including, but not limited to, disbursement of reasonable attorneys' fees and entry upon the Property to make repairs.

(b) Any amounts disbursed by Bank pursuant to this Section 8, with interest thereon, will become additional Indebtedness of Borrower secured by this Mortgage. Unless Borrower and Bank agree to other terms of payment, such amounts will be payable upon notice from Bank to Borrower requesting payment thereof, and will bear interest from the

date of disbursement at the highest applicable rate as prescribed in the Note. Nothing contained in this Section 8 will require Bank to incur any expense or take any action hereunder.

9. INSPECTION. Bank may make or cause to be made reasonable entries upon, and inspections of, the Property, and Bank will have the right to inspect the books and records of the operation of the Property and make copies thereof during normal business hours.

10. CONDEMNATION. (a) The proceeds of any award or claim for damages, direct or consequential, in connection with any condemnation or other taking of the Property or part thereof, or for conveyance in lieu of condemnation, are hereby assigned and will be paid to Bank. No awards or settlements will be accepted by Borrower without Bank's prior consent.

(b) Bank is authorized to settle any claim, collect any award, and apply the net proceeds, after deducting all costs of collection including attorneys' fees, at Bank's sole option, in any one or more of the following ways: (i) to the payment of any sums then in default to Bank secured hereby; (ii) to fulfill any of the covenants contained herein which Borrower has failed to fulfill, as Bank may determine; (iii) to use to restore the Property to a condition satisfactory to Bank on such terms and conditions as Bank may determine; (iv) released to Borrower; (v) to apply to the Indebtedness, whether the Indebtedness is then matured or unmatured. If, in the sole discretion of Bank, Bank is not satisfied with the adequacy of collateral for any remaining Indebtedness, Bank may without further demand or notice elect to declare the whole of the remaining Indebtedness immediately due and payable and may invoke any of the remedies afforded it by law, and/or by this Mortgage, including those permitted by Section 20 hereof.

11. ASSIGNMENT OF RENTS AND LEASES. (a) Borrower hereby transfers and assigns to Bank all present and future leases of all or any part of the Property (the "Leases"), all guarantees of any lessee's performance thereunder, and all rents, income revenues and profits arising out of the Property, all as further security for the payment of the Indebtedness.

(b) Borrower will observe and perform all covenants and conditions to be observed or performed by the lessor under the Leases and enforce the observance or performance of the Leases by the lessees. Borrower will not cancel, surrender, terminate, or materially alter, amend or modify any Leases, release any party liable thereunder or consent to the assignment of the interests of any lessees without the prior written consent of Bank, which consent will not be unreasonably withheld. Borrower will not permit the prepayment of any rents under the Leases for more than thirty (30) days in advance of their due date without the prior written consent of Bank. The form of lease to be used for tenants in the Property will be submitted to Bank.

(c) If Borrower fails to observe or perform any covenant or condition to be observed or performed by Borrower under any of the Leases, Bank, without obligation to do so and without notice to or demand on Borrower and without releasing Borrower from its obligation to do so, may perform such covenant or condition and, to the extent that Bank incurs any costs or pays any monies in connection therewith, including any costs or expenses of litigation, such costs and expenses will be due on demand and will be included in the Indebtedness secured hereby and will bear interest from the incurring or payment thereof at the highest rate set forth in the Note.

(d) Bank will not be obligated to perform or discharge any obligation or duty of Borrower under any of the Leases, and the acceptance of this Assignment does not constitute an assumption of any such obligation or duty. Bank will not be deemed to have any responsibility for the control, care, management or repair of the Property or any responsibility or liability for any negligence in the management, operation, upkeep, repair or control of the Property resulting in loss, injury or death to any lessee, licensee, employee, stranger or other person. Borrower will indemnify, save and hold Bank harmless of and from all liabilities, losses and damages that Bank may incur under the Leases or under or by reason of this Assignment except for the Bank's grossly negligent acts or liabilities, losses and damages arising out of Bank's possession or control of the Property.

(e) Provided that no Event of Default (as hereinafter defined) exists hereunder, Borrower will have the right to collect all rents under any Lease (but not more than thirty (30) days in advance of their due date), provided that upon the occurrence of an Event of Default hereunder, Bank may take such action with respect to the Leases and the rents, issues and profits (including the notification to the lessees to make rent payments directly to Bank) from the Property, as permitted by law or in equity, including but not limited to, the remedies set forth in Section 20 below.

(f) Borrower will not enter into any contract for the management of the Property or appoint a rental agent for the Property without the prior written consent of Bank.

(g) Bank shall be entitled to all rights and remedies available under Section _____[number] of the _____[state] Revised Code.

12. BORROWER NOT RELEASED. Extension of the time for payment or modification of amortization of the sums secured by this Mortgage granted by Bank to any successor in interest of Borrower approved by Bank shall not operate to release, in any manner, the liability of the original Borrower and Borrower's successors in interest. Bank will not be required to commence proceedings against such successor, refuse time for payment or otherwise modify amortization of the sums secured by this Mortgage by reason of any demand by the original Borrower or Borrower's successors in interest.

13. FORBEARANCE BY BANK NOT A WAIVER. Any forbearance by Bank in exercising any right or remedy hereunder, or otherwise afforded by applicable law, shall not be a waiver of or preclude the exercise of any such right or remedy. The procurement of insurance or the payment of taxes or other liens or charges by Bank will not be a waiver of Bank's right to accelerate the maturity of the Indebtedness secured by this Mortgage.

14. REMEDIES CUMULATIVE; AMENDMENTS. All remedies provided in this Mortgage are separate and distinct and cumulative to any other right or remedy under this Mortgage or afforded by law or equity and may be exercised concurrently, independently or successively. No waiver, amendment or modification of this Mortgage shall be valid unless in writing and signed by the parties hereto.

15. SUCCESSORS AND ASSIGNS BOUND; CAPTIONS. The covenants and agreements contained herein shall be construed as covenants running with the land and shall bind, and the rights hereunder shall inure to, the respective successors and assigns of Borrower and Bank, subject to the provisions of Section 19 hereof. The captions and headings of the items of this Mortgage are for convenience only and are not to be used to interpret or define the provisions hereof.

16. NOTICE. Except for a notice required under applicable law to be given in another manner, any notice provided for in this Mortgage will be given by mailing such notice by certified or registered mail, return receipt requested, to the recipient or sending such notice by express delivery service at the address set forth at the beginning of this Mortgage. Either party may change such address by giving written notice of such change to the other party.

17. GOVERNING LAW; SEVERABILITY. This transaction shall be governed by the laws of the State of _____[state]. In the event that any provision or clause of this Mortgage conflicts with applicable law, such conflict will not affect other provisions of this Mortgage which can be given effect without the conflicting provision, and in this regard, the provisions of this Mortgage are declared severable.

18. TRANSFER OF THE PROPERTY AND INTEREST THEREIN. (a) Subject to the Mortgage Rider attached hereto, if all or any part of the Property or an interest therein is sold, transferred, encumbered or otherwise conveyed by Borrower, without Bank's prior written consent, or if any contract to do any of the same is entered into by Borrower without Bank's prior written consent, excluding a transfer by devise, descent, or by operation of law upon the death of a joint tenant, it shall be deemed to increase Bank's risk and Bank may, at Bank's sole option, either declare all the sums

secured by this Mortgage to be immediately due and payable, or may consent to said conveyance in writing and may increase the interest rate of this loan and/or impose whatever conditions it may deem necessary to compensate it for the increased risk. Bank shall have waived such option to accelerate if, prior to the conveyance, (i) Bank agrees that the credit of the person to whom the Property is to be conveyed is satisfactory to Bank (in Bank's sole and absolute discretion), (ii) Bank and such person agree in writing that the interest payable on the sum secured by this Mortgage shall be at such rate as Bank shall request, and (iii) Borrower's successor in interest has executed a written assumption agreement in form and substance acceptable to Bank assuming the indebtedness secured hereby and Borrower's obligations hereunder. Bank expressly consents to Borrower entering into Leases with Tenants that provide for an option to purchase a portion of the Property, provided that such Leases and the Tenants' rights to purchase shall at all times be subordinate to Bank's interest hereunder.

(b) Any change in the legal or beneficial ownership of Borrower which changes the identity of any person or persons having, directly or indirectly, more than ten percent (10%) of either the legal or beneficial ownership of Borrower shall be deemed to be a transfer within the meaning of this Item. Such transfer shall not be made, created, or suffered to be made or created without Bank's prior written consent.

19. EVENTS OF DEFAULT. Each of the following shall be an Event of Default under this Mortgage: (a) the occurrence of an Event of Default under the Loan Agreement, the Note or any of the Loan Documents; (b) if any representation or warranty of Borrower in this Mortgage shall be untrue in any respect when made; (c) a default in the performance of any covenant or agreement of Borrower in this Mortgage; (d) the filing of any lien or charge against the Property or any part thereof which is not removed to the satisfaction of Bank within a period of thirty (30) days thereafter; (e) the institution of any proceeding to enforce the lien or charge upon the Property or any part thereof; (f) the filing of any proceeding by or against Borrower in bankruptcy, or an assignment by Borrower for the benefit of its creditors, or the placing of Borrower's property in receivership, trusteeship or conservatorship with or without action or suit in any court; or (g) the abandonment by Borrower of all or any part of the Property.

20. REMEDIES. Upon the occurrence of an Event of Default: (a) Bank, at Bank's option, may declare all of the sums secured by this Mortgage to be immediately due and payable, and may take all steps Bank deems necessary in its sole and absolute discretion to collect such accelerated amount. The Mortgage shall bear interest at the highest rate permitted to be charged on delinquent installments of principal and interest under the Note or the highest rate allowed by law, and this Mortgage shall become absolute and subject to foreclosure. Bank will be entitled to collect in such proceeding all expenses of foreclosure, including, but not limited to, costs of documentary evidence, abstracts, title reports, environmental assessment and audit expenses, appraisal fees, reasonable attorneys' fees and any costs and fees (including attorneys' fees) incurred by Bank in connection with any bankruptcy involving Borrower or the Property; and (b) Bank will have the right, without notice and without regard to the adequacy of any security for the Indebtedness hereby secured and with or without the appointment of a receiver, to enter upon and take possession of the Property, and Bank may operate, manage, rent and lease the Property and collect any rents, issues, income and profits there from the same being hereby absolutely assigned and transferred to and for the benefit and protection of Bank, contingent only upon the occurrence of an Event of Default. All rents collected by Bank may be applied to the cost of operation, maintenance and repair, and reasonable collection, management and attorneys' fees, and then in reduction of any Indebtedness hereby secured in such other proportions as Bank may determine. Notwithstanding anything contained herein to the contrary, all reimbursement obligations of Borrower in favor of Bank contained in this Mortgage, including obligations concerning the reimbursement of attorneys' fees, shall survive the termination of this Mortgage and/or payment in full of the Indebtedness to the extent of any lender liability or other litigation commenced by Borrower against Bank.

21. BORROWER'S RIGHT TO REDEEM. Borrower will have such rights of redemption as are provided by the laws of the State where the Property is located.

22. RECEIVERS. Upon or at any time after the occurrence of an Event of Default hereunder, Bank may request the

appointment of a receiver of the Property, Borrower hereby consenting to the appointment of a receiver. Such appointment may be made either before or after any foreclosure action or sale, without notice and without regard to solvency or insolvency, at the time of application for such receiver, of the person or persons, if any, liable for the payment of the indebtedness secured hereby without regard to the value of the Property at such time and whether or not the same is then occupied as a homestead and without bond being required by the applicant. Such receiver will have the power to take possession, control and care of the Property and to collect all rents, issues, deposits and profits thereof.

23. RIGHTS OF BANK. If Borrower fails to pay any of the Impositions or to make any other payment required to be paid by Borrower under this Mortgage at the time and in the manner provided in this Mortgage, or if an Event of Default occurs under this Mortgage or the Note, then without limiting the generality of any other provisions of this Mortgage and without waiving or releasing Borrower from any of its obligations hereunder, Bank will have the right, but will be under no obligation, to pay any of the Impositions or other payment, or any sums due under this Mortgage, and may perform any other act or take such action as may be appropriate to cause such other term, covenant, condition or obligation to be promptly performed or observed on behalf of Borrower. In any such event, Bank will give Borrower ten (10) days' prior written notice prior to making any such payment, unless in Bank's judgment the sending of a 10-day notice will impair the security of the lien of this Mortgage. Bank and any person designated by Bank will have, and is hereby granted, the right to enter upon the Property at any time and from time to time for the purpose of performing any such acts or taking any such action, and all monies expended by Bank in connection with making such payment or performing such acts (including, but not limited to, legal expenses and disbursements), together with interest thereon at the highest rate permitted by law, from the date of each such expenditure, will be paid by Borrower to Bank forthwith upon demand by Bank and will be secured by this Mortgage.

24. FUTURE ADVANCES. Borrower and Bank intend and agree that this Mortgage will secure unpaid balances of any loan advances, whether obligatory or not, made by Bank to Borrower after this Mortgage is delivered to the Recorder or Clerk for record and whether made pursuant to the Note and the Loan Agreement or not, to the extent that the total unpaid loan indebtedness, which may be outstanding at any time, exclusive of interest, is _____ Dollars (\$ _____), provided that this Mortgage will also secure unpaid balances of advances made for the payment of taxes, assessments, insurance, costs, attorneys' fees or other Impositions incurred or advanced for the protection of the Property. Borrower further covenants and agrees to repay all such loan advances with interest, and that the covenants contained in this Mortgage shall apply to such loan advances.

25. MORTGAGE AS SECURITY FOR OTHER LIABILITIES. (a) This Mortgage shall serve as security for every other liability, obligation and indebtedness of Borrower to Bank however created, direct or contingent, due or to become due, whether now or hereafter existing and whether the same may have been or shall be participated in, in whole or in part, by another party or entity, by trust agreement or otherwise or in any manner acquired by or accruing the holder hereof, whether by agreement with, or by assignment or endorsement to, the Borrower by anyone whomsoever.

(b) It is the express intent of the parties hereto that this Mortgage, the Note, the Loan Agreement and all other Loan Documents and any amendments, restatements extensions or renewals thereof, will also evidence and secure any additional loan advances to Borrower made after the delivery of this Mortgage to the Recorder for filing or recording.

26. UNIFORM COMMERCIAL CODE SECURITY AGREEMENT. Borrower hereby grants Bank a security interest in all items included in the Property which can be subject to a security interest under the Uniform Commercial Code. Borrower will execute and deliver to Bank all financing statements and other documents requested by Bank to perfect its security interest in such property, and Borrower will pay the expense of filing such documents and of conducting a search of the records in which documents are recorded. The covenants and agreements of Borrower throughout this Mortgage will apply to all items which are subject to the security interest granted herein. Upon the occurrence of any Event of Default under this Mortgage, Bank will have the remedies of a secured party under the Uniform Commercial Code and, at Bank's sole option, may also invoke the remedies provided in this Mortgage. In exercising any of such remedies, Bank may proceed against the items of real property specified above as part of the Property separately or

together and in any order whatsoever, without in any way affecting the availability of Bank's remedies under the Uniform Commercial Code or of the remedies in this Mortgage. The parties agree that if Bank shall elect to proceed with respect to the personal property portion of the Property separately from the Real Property, five (5) days notice of the sale shall be reasonable notice. Borrower hereby authorizes Bank to execute and file financing statements signed only by a representative of Bank covering the security interest of Bank in the Property.

BORROWER AND BANK HEREBY WAIVE THE RIGHT TO TRIAL BY JURY OF ANY MATTERS ARISING OUT OF THIS AGREEMENT OR ANY OTHER DOCUMENT RELATED HERETO.

IN WITNESS WHEREOF, Borrower has executed this Mortgage as of the date set forth above.

a(n) _____ [state] _____ [entity]

By: _____

STATE OF _____ [state])
COUNTY OF _____ [county]) SS:

BEFORE ME, a Notary Public in and for said County and State, personally appeared _____ [name],
a(n) _____ [state] _____ [entity], by _____ [name], its
_____ [title], who acknowledged that _____ [he/she] did sign the foregoing
instrument for and on behalf of said corporation, being thereunto duly authorized, and that the same is
_____ [his/her] free act and deed individually and as such officers and the free act and deed of said
_____ [entity].

IN TESTIMONY WHEREOF, I have hereunto set my hand and official seal at _____ [city],
_____ [state], this _____ [day] day of _____ [month], _____ [year].

Notary Public

JOINDER OF BANK

Executed at _____ [city], _____ [state], on _____ [month]
_____ [day], _____ [year], by _____ [name],
_____ [title], on behalf of the Bank.

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By: _____

Print Name: _____

Title: _____

STATE OF _____ [state])
COUNTY OF _____ [county]) SS:

BEFORE ME, a Notary Public in and for said County and State, personally appeared _____ [name],
a(n) _____ [state] _____ [entity], by _____ [name], its
_____ [title], who acknowledged that _____ [he/she] did sign the foregoing
instrument for and on behalf of said corporation, being thereunto duly authorized, and that the same is
_____ [his/her] free act and deed individually and as such officers and the free act and deed of said
_____ [entity].

IN TESTIMONY WHEREOF, I have hereunto set my hand and official seal at _____ [city],
_____ [state], this _____ [day] day of _____ [month], _____ [year].

Notary Public

EXHIBIT A

(REAL ESTATE)

EXHIBIT B

All of the Borrower's right, title, interest, estate, claim and demand, either at law or in equity, in and to:

(a) All equipment, machinery, apparatus, fittings, building materials, fixtures, inventory and articles of personal property of every kind and nature whatsoever, now or hereafter attached to or placed in or upon the Real Estate or any part thereof and used or procured for use in connection with any present or future operation of said premises or any business conducted thereon or the construction of improvements thereon and now owned or hereafter acquired by the Borrower, and any and all replacements thereof, additions thereto and substitutions therefor, including, without in any manner limiting the generality of the foregoing, all materials, engines, furnaces, boilers, stokers, pumps, tanks, heaters, oil burners, dynamos, generators, scales, motors, maintenance equipment of every kind and nature, switchboards,

furniture, furnishings, telephones, doors and hardware, electrical wiring and equipment, heating, plumbing, washroom, toilet and lavatory fixtures and equipment, lifting, ventilating and incinerating apparatus, sprinkler and other fire extinguishing and fire prevention apparatus or systems, air-conditioning apparatus, gas, electric and steam fixtures, elevators, conveyors, escalators, hoists, vaults and safes, fittings, radiators, chutes, ducts, tools, building supplies, lobby decorations and window washing hoists and equipment, office equipment, and including all equipment installed or to be installed or used or usable in connection with the operation of any improvements and appurtenant facilities erected or to be erected upon said premises or appropriate to the use thereof, and whether affixed or annexed or not; and

(b) All proceeds of the conversion, voluntary or involuntary, of any of the foregoing and following collateral into cash or liquidated claims, including, without limitation, the proceeds of insurance and eminent domain awards; and

(c) All leases, earnings, revenues, rents, issues, profits, avails and other income of and from the Real Estate, whether existing now or hereafter acquired; and

(d) All of the records and books of account now or hereafter maintained by the Borrower in connection with the Real Estate; and

(e) All names, if any, as may now or hereafter be used for the Real Estate and the collateral and the goodwill associated therewith; and

(f) All chattel paper, demands, documents, contract rights, deposit accounts, deposits, accounts receivable accounts, utility deposits and general intangibles of, from and relating to the Real Estate, whether existing now or hereafter acquired; and

(g) All water, water rights, mineral rights, ditches, ditch rights, reservoirs and reservoir rights appurtenant to, located on or used in connection with the Real Estate, whether existing now or hereafter acquired; and

(h) All of the right, title, interest, estate, claim or demand of the Borrower either at law or in equity in and to all architectural, engineering and similar plans, specifications, drawings, renderings, profiles, studies, shop drawings, reports, plats, surveys and the like, and all permits and the like, relating to the Real Estate or any improvements or appurtenant facilities erected or to be erected upon or about the Real Estate; and

(i) All building materials upon the premises, including without implied limitation, bricks, wood, glass, plastic, pipes, tools, concrete block, steel, steel products, iron products, tile, wiring and electrical equipment, materials and parts, all roofing equipment, materials and supplies, and all other building materials; and

(j) All of Borrower's right, title and interest in and to any construction contracts respecting the Real Estate.

This list of Collateral does not cover any items of property described above which are owned by bona fide tenants of the Borrower and which have been installed upon the Real Estate for purposes relating to their respective tenancies, provided, however, that any such tenant has the right to remove the same at or before the expiration of the term of any applicable lease.

EXHIBIT C

(PERMITTED ENCUMBRANCES)

1. Real estate taxes and assessments which are a lien, but not yet due and payable.
2. Zoning ordinances.



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Part IV. FORMS
G. FINANCING

26-22 Current Legal Forms for Real Estate FORM 22.113

FORM 22.113 Purchase money mortgage--arrangement for partial release of portions of mortgaged property

COMMENT

This form illustrates a purchase money mortgage. A purchase money mortgage is simply a mortgage that a buyer of property gives to seller to secure all or a portion of the selling price. In general, a mortgage will contain covenants on the part of the mortgagor to make timely payments of principal and interest, to pay all taxes on the property, to carry adequate insurance, and to prevent waste. Besides specifying these obligations of the mortgagor, this instrument contains certain agreements by the mortgagee which are essential to enable the mortgagor to develop and subdivide the property.

It is important for a developer who intends to subdivide property to be able to obtain partial releases from existing liens. When the developer has this right, it should be incorporated in the mortgage, so that it will become a matter of public record. This purchase money mortgage specifies the conditions for the partial release of acreage.

The mortgagee under this instrument is required to subordinate his interest to temporary construction loan mortgages. This obligation is enforceable only if the mortgagor has obtained a commitment for permanent long-term financing. In many cases, such a commitment will be a condition to the granting of the construction loan. Thus, the requirement for such a commitment in the mortgage should pose no extra burden upon the mortgagor.

This mortgage also contains language which limits the recourse of the mortgagee to the mortgaged property. Additionally, since a portion of the property being purchased from the mortgagee is not subject to the mortgage, the mortgagee is giving up any claim that it would have to that property.

FORM

This mortgage executed at _____ [city], _____ [state], on _____ [month] _____ [day], _____ [year], by _____ [name] (the "Mortgagor"), unto _____ [name] (the "Mortgagee").

1. Grant of Mortgage. For good and valuable consideration and also in consideration of the aggregate sum named in the promissory note of even date herewith, a copy of which is attached as Exhibit A, the Mortgagor does grant unto the Mortgagee, its successors or assigns, in fee simple, all those certain tracts of land owned by the Mortgagor situated in _____ [county], _____ [state], (the "Property"), described on Exhibit A. To have and to hold the same together with the tenements, hereditaments, and appurtenances unto the Mortgagee, its successors or assigns, in fee simple.

2. Exclusion from Mortgage. There is excluded from this purchase money mortgage the premises described on Exhibit B which are part of the property conveyed by the Mortgagee unto the Mortgagor, which, according to the agreement of the parties, was to be conveyed free and clear and not to be encumbered by the lien of this purchase money mortgage.

3. Warranty of Title. The Mortgagor, for itself and its successors or assigns, warrants to the Mortgagee, its successors or assigns, that the Mortgagor is indefeasibly seized of such land in fee simple; that the Mortgagor has full power and lawful right to convey such land in fee simple, as above set forth; that it shall be lawful for the Mortgagee, its successors or assigns, at all times peaceably and quietly to enter upon, hold, occupy, and enjoy such land; that such land is free from all encumbrances; and that the Mortgagor, its successors or assigns, will make such further assurance to perfect the fee simple title in such land in the Mortgagee, its successors or assigns, as may reasonably be required.

4. Payment of Note. If the Mortgagor, its successors or assigns, shall pay unto the Mortgagee, its successors or assigns, the promissory note attached as Exhibit C and shall perform, comply with, and abide by all of the stipulations, agreements, conditions, and covenants of such promissory note and of this instrument, then this instrument and the estate thereby created shall cease and be null and void.

5. Covenants of Mortgagor. The Mortgagor, for itself and for its successors or assigns, hereby covenants with the Mortgagee, its successors or assigns, as follows:

(a) To pay all sums payable by virtue of the promissory note and this instrument promptly when such sums become due.

(b) To pay the taxes, assessments, levies, liabilities, obligations, and encumbrances of every nature on the property. If the same are not promptly paid, the Mortgagee may at any time pay the same without waiving or affecting the option to foreclose or any right hereunder, and every such payment so made shall bear interest from the date thereof at the rate of _____ percent (_____%) per year.

(c) To pay the costs, charges, and expenses, including attorney's fees, reasonably incurred or paid at any time by the Mortgagee because of the Mortgagor's failure to perform, comply with, and abide by the stipulations, agreements, conditions, and covenants of the promissory note and this instrument, and every such payment shall bear interest from the date of such payment at the rate of _____ percent (_____%) per year.

(d) To keep the buildings now or hereafter on the property insured against damage by fire and windstorm in insurance companies authorized to do business as such in _____ [state], in sums sufficient to prevent the parties in interest from being or becoming coinsurers of any part of the risk, and to cause such policies to contain a standard mortgagee form clause naming the Mortgagee as insured, as the Mortgagee's interest may appear. In addition, in the event that the premises are located within a federally-designated flood zone, the Mortgagor shall obtain flood insurance as well. If the Mortgagor fails to keep the buildings insured in the foregoing manner, the Mortgagee may place and pay

such insurance or any part thereof without waiving or affecting the option to foreclose or any rights hereunder, and every such payment shall bear interest from its date at the rate of _____ percent (_____)%) per year.

(e) To commit or allow no waste, impairment, or deterioration of the property provided that the doing of either or both of the following by the Mortgagor: (i) the excavation and digging of canals and the creation of artificial lakes or waterways, or (ii) the removal and transfer of soil, rock, or muck from the bona fide extension or development of the canal, lake, and drainage system of the mortgaged property from one area originally encumbered by this mortgage, will not constitute waste, impairment, or deterioration of the mortgaged property by the Mortgagor.

(f) To perform, comply with, and abide by the stipulations, agreements, conditions, and covenants in the promissory note and in this Mortgage.

6. Acceleration of Amount Due. If any sum of money herein referred to is not paid within _____ (_____) days after the Mortgagee shall have given the Mortgagor written notice specifying a default, or if the stipulations, agreements, covenants, and conditions of the promissory note and of this instrument are not fully performed, complied with, and abided by within _____ (_____) days after the Mortgagee shall have given the Mortgagor written notice specifying the nature of the default, then and in either of such events the aggregate unpaid sum mentioned in the promissory note shall become due and payable on the 31st day after such notice of default shall have been given, as fully and completely as if the aggregate sum were originally stipulated to be paid on such day. Nothing herein contained, however, shall be construed to prohibit the Mortgagor from curing any such default during the period covered by the notice of default and thereupon restoring the mortgage to good standing and, as to such default or defaults so cured, eliminating the effect of the acceleration provided for in this paragraph.

7. Joinder in Platting. This mortgage having been given and accepted in contemplation of the fact that the Mortgagor may desire to cause the property to be subdivided and platted with the plats recorded among the Public Records of _____ [county] County, _____ [state], the Mortgagor is authorized to cause such plat or plats, as it may desire, to be prepared, and as such plat is prepared, the Mortgagee will join with the Mortgagor in the execution or dedication contained in each such plat. At the time of such joinder, there shall be ascertained by the survey of a competent surveyor or engineer the amount of acreage contained in and covered by each such plat. Nothing herein contained shall be construed as making it obligatory upon the Mortgagor to effect a platting.

8. Partial Releases. The Mortgagee shall, upon the Mortgagor's demand, effect, execute, and deliver to the Mortgagor instruments of release releasing from the lien of this mortgage such portions of the property encumbered hereby as the Mortgagor may require. The Mortgagor, to be entitled to the execution of each such release, shall pay to the Mortgagee, simultaneously with the receipt of each such release, an amount equal to _____ Dollars (\$_____) multiplied by the number of acres to be released. Regardless of whether the Mortgagor prepays any part of the principal of the mortgage debt, partial release shall be granted at the rate of one acre for every timely payment of _____ Dollars (\$_____) of the principal of the mortgage debt.

Notwithstanding any provision contained herein, Mortgagee shall not be obligated to provide any partial release where Mortgagor is in default under any of the terms and conditions contained herein. Mortgagor shall be required to cure all defaults in full before a release may issue.

If the Mortgagor sells a lot or lots (or in the case of unplatted property, a portion or portions of the property encumbered hereby) and gives written notice of such sale to the Mortgagee, the Mortgagee shall execute a partial release of such property from the lien of the within mortgage whenever the release amount, computed in accordance with the terms set forth above, is paid to the Mortgagee. The Mortgagor may give notice of such sale to the Mortgagee at any time before a final decree of foreclosure has been entered, which forecloses this mortgage. For the purposes of this paragraph, a sale

will be deemed to have been made when the Mortgagor executes a deed of conveyance to a purchaser or enters into a valid and binding contract to sell and deliver to a purchaser. Any moneys paid to and received by the seller for the execution of releases pursuant to the terms of this paragraph shall not, if paid after foreclosure shall have been instituted, waive the rights of the Mortgagee to continue the foreclosure action, nor shall they have any effect upon the exercise by the Mortgagee of the acceleration privilege contained in Paragraph 6 hereof; nor shall they have any effect upon the pendency of the foreclosure proceedings, except to entitle the person effecting such payment to the release of the property for which the release amount was paid and, insofar as the Mortgagee is concerned, to constitute a credit against the mortgage debt.

The Mortgagee knows that the ability of the Mortgagor to procure releases promptly, if, as, and when the Mortgagor (or a purchaser from the Mortgagor) becomes entitled to receive them, is of the utmost importance. Therefore, the Mortgagee shall at all times maintain at its principal place of business in _____[*county*] County, _____[*state*], a person who is authorized to execute such releases on behalf of the Mortgagee. Such releases shall be executed and delivered, when sought in compliance with the provisions contained herein, not later than five days after written demand for such release has been made upon the Mortgagee.

9. Subordination. This mortgage having been given and accepted in contemplation of the fact that the Mortgagor may decide to develop the property by building or by causing to be built houses or other improvements thereon, and that in connection with any such building it will become necessary for the within mortgage to be subordinated to mortgages which evidence and secure temporary financing, the Mortgagee shall, at the request of the Mortgagor and subject to the provisions hereof, subordinate the lien of this mortgage to temporary construction loan mortgages and execute appropriate instruments evidencing such subordination, without payment of release amounts by the Mortgagor.

The Mortgagor shall not be entitled to require subordination of the within mortgage to a temporary construction loan mortgage unless, at the time of requiring such subordination, the Mortgagor affords the Mortgagee evidence of the fact that the Mortgagor has a commitment for a permanent mortgage loan against the lot or lots covered by the temporary construction loan mortgage to which the Mortgagor is then requiring the Mortgagee to subordinate the lien of this mortgage. Such commitment must show that the Lender has agreed to make the loan and close the mortgage loan transaction when the building on the property has been completed and the sale of it to a purchaser has been consummated and closed.

The Mortgagee shall be required to subordinate the lien of this mortgage to temporary construction loan mortgages only if both the temporary construction mortgagee and the permanent mortgagee are institutional lenders. An institutional lender means a bank, a trust company, a federal savings and loan association, an insurance company, or any other institution (as distinguished from a private individual) which is engaged in whole or in part in the business of making mortgage loans on real property.

When a construction loan is paid off and a lot is released from the lien of the construction loan mortgage, then, simultaneously with the closing of the permanent mortgage loan, the Mortgagee will release the lot from the lien of this mortgage (if it shall not have been theretofore released) upon payment of the release amount computed in accordance with the provisions of Paragraph 8 hereof.

The Mortgagee shall subordinate the lien of this mortgage to easements for public utilities which the Mortgagor may execute or grant to public or quasi-public service companies in connection with the use or development of the property.

10. Miscellaneous. The following additional provisions shall be applicable.

(a) The rights of the Mortgagee under this mortgage are limited to the security the mortgage encumbers. No personal or deficiency judgment may ever be sought or obtained against the Mortgagor.

(b) All benefits and obligations contained herein shall accrue to and be binding upon the respective parties hereto and their respective successors or assigns.

(c) The debt this mortgage secures may be prepaid in whole or in part in advance of its maturity without penalty or premium for such prepayment.

(d) The Mortgagee will at all times specify in writing the place to which notice shall be given by the Mortgagor when requiring partial releases or the execution of instruments of subordination, which place will be in _____ [county] County, _____ [state]. Such place shall also be the place for the delivery of such instruments of partial release and of subordination. A place once specified shall remain such until it shall have been changed by written notice given by the Mortgagee to the Mortgagor. The place for the application for and the delivery of instruments of partial release and instruments of subordination is _____ [address].

(e) Inasmuch as this mortgage imposes certain obligations upon the Mortgagee, the Mortgagee has joined in the execution of this mortgage to evidence it to be the fact that the Mortgagee has in fact agreed to those provisions which impose such duties upon the Mortgagee.

IN WITNESS WHEREOF the Mortgagor and the Mortgagee have caused these presents to be executed under seal on the day and year first hereinabove written.

"MORTGAGOR"

a(n) _____ [state] _____ [entity]

By: _____

Print Name: _____

Title: _____

"MORTGAGEE"

a(n) _____ [state] _____ [entity]

By: _____

Print Name: _____

Title: _____

[Attach Exhibit A]

[Attach Exhibit B]



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26-22 Current Legal Forms for Real Estate FORM 22.114

FORM 22.114 Mortgage

COMMENT

The mortgage contains an interesting provision allowing the release of a lot from the terms of the mortgage upon payment of a specified sum. (See Paragraph 30.) This permits the construction and sale of individual dwelling units upon the released lots. The mortgage provides that the developer must not be in default at the time a release is granted. In the event that a default has already occurred, it must be fully cured before the developer is entitled to a release.

FORM

MORTGAGE

THIS MORTGAGE, made the _____[day] day of _____[month]
_____, _____[year], between _____[name], a(n) _____[state]
_____[entity] with offices for the conduct of business located at _____[address]
(hereafter known as the "Borrower"), and _____[name], a(n) _____[state]
_____[entity] with offices for the conduct of business located at _____[address]
(hereafter known as "Lender").

WITNESSETH, that in order to secure the payment of an indebtedness in the principal sum of _____
Dollars (\$ _____), lawful money of the United States of America, with interest thereon, all to be paid
according to a certain bond or note and building loan agreement bearing even date herewith, and also any and all further
loans or indebtedness owed or to be owed by the Borrower, or any subsequent owner of the mortgaged premises, to the
Lender, the Borrower hereby mortgages to the Lender

ALL THAT CERTAIN PARCEL OF LAND, with the buildings and improvements thereon erected, commonly known as _____[*address*], and more particularly described in "Schedule A", annexed hereto and made a part hereof, being the same premises conveyed to the Borrower herein by deed dated _____[*month*] _____[*day*], _____[*year*], and assigned document number by the _____[*county*] County Clerk.

TOGETHER with all right, title and interest of the Borrower, of, in, and to any land lying in the bed of any street, road or highway, in front, behind, or adjacent to the premises above described;

TOGETHER with all fixtures and articles of personal property, now or hereafter affixed to, or used in connection with, the premises or Borrower's business, all of which are covered by the lien of this Mortgage;

TOGETHER with the appurtenances, and all the estate and rights of the Borrower in and to said premises;

And the Borrower covenants and agrees with the Lender as follows:

1. Mortgage Subject to Building Loan Agreement. This mortgage is subject to the terms of a certain building loan agreement of even date herewith between Borrower and Lender.
2. Borrower to Pay Back Loan. The Borrower will pay the indebtedness, as provided in the accompanying bond or note, in a timely fashion. The terms, conditions and covenants of the bond or note secured hereby are made a part of this Mortgage. Said terms, conditions and covenants are incorporated by reference, with the same legal effect as if fully set forth hereat.
3. Borrower to Keep Mortgaged Premises Insured. The Borrower will keep the buildings and other improvements located on the premises, together with all fixtures and personalty covered hereby, insured for the benefit of the Lender against loss by fire and such other casualties as may be required by the Lender, by such companies as are acceptable to the Lender. Said insurance will be in the amount of the remaining principal balance of the Mortgage or the full replacement value of the buildings, other improvements, fixtures and personalty, and building materials stored on site covered by the lien of this Mortgage, whichever is greater. Borrower will assign and deliver the policies to the Lender, and he will reimburse the Lender for any premium payments for insurance made by the Lender because of the Borrower's failure to so insure as required herein or because of Borrower's failure to so assign and deliver the said insurance policies.
4. Borrower Warrants Title to Premises. The Borrower hereby warrants title to the premises, fixtures and personal property mortgaged hereby and will defend and maintain the lien of this Mortgage as a valid first lien on the premises.
5. Borrower to Maintain Mortgaged Premises in Good State of Repair. The Borrower affirmatively covenants to maintain the buildings on said premises in good repair. Borrower will not alter, demolish or remove any building, fixture or personal property mortgaged hereby, or any part thereof, without obtaining the written consent of the Lender in advance. Borrower will not suffer or permit any waste on the premises. Borrower will comply with all statutes, orders, and requirements of the federal, state, and municipal governments, or any departments or bureaus thereof, having jurisdiction over the premises covered by the lien of this Mortgage. The holder of this Mortgage, its successors, assigns, officers or agents, shall have the right to inspect the mortgaged premises from time to time at any reasonable hour of the day without advance notice to the Borrower.
6. Default and Acceleration of Loan Repayments. The whole of said principal sum and interest shall become due and payable at the option of the Lender: after default in the payment of any installment of principal and/or of interest for thirty (30) days; or after default for thirty (30) days in the payment of any other sum required to be paid by the

Borrower to the Lender under this Mortgage or under the terms of the bond or note secured hereby; or after default in the payment of any tax, special assessment, water rent, sewer rent or other assessment, which may become a lien against the property covered by the lien of this Mortgage, for thirty (30) days after the same becomes due and payable; or after default (following notice and demand) either in assigning and delivering the policies of insurance for the buildings and improvements which insure Lender against loss by fire or other casualty, or in reimbursing the Lender for premiums paid on such insurance, as herein before provided; or after default (following request) in furnishing a statement of the amount due on the Mortgage and whether Borrower has any claim of offsets or defenses against the Mortgage debt, as hereinafter provided; or after any other default under the terms, covenants or conditions of this mortgage, or of the bond or note secured hereby, or upon the commencement by any party of an action or proceeding for the foreclosure or enforcement of any lien alleged to be filed against the mortgaged premises.

7. Receiver of Rents to be Appointed Following Institution of Action to Foreclose. The holder of this mortgage, in any action to foreclose this Mortgage, shall be entitled to the appointment of a receiver of rents without notice to the Borrower and without regard to the adequacy of any security for the debt.

8. Borrower to Surrender Possession of Mortgaged Premises after Default. After any default hereunder, the Borrower shall, upon demand, surrender possession of the premises to the Lender. After any such default, the Lender may enter upon the premises or any part thereof. Lender may lease the same to third parties and collect the rents, income and profits therefrom, which are due or become due, and apply the same, after payment of all charges and expenses of entry and management, to the account of the Borrower. The Borrower hereby assigns to the Lender all of the said rents, income and profits and all the leases existing at the time of such default. This assignment shall act as further security for the payment of the indebtedness. Such entry, by or on behalf of the Lender, shall not be deemed to constitute the Lender a "Lender in possession." If the Borrower remains in possession thereof after any such default, the Borrower shall be a tenant of the Lender. In such case, the Borrower agrees to pay upon demand and in advance to the Lender a reasonable monthly rental fee for the premises or the portion so occupied by Borrower. The Lender may also dispossess, by summary proceedings or otherwise, any tenant of the Borrower, if such party fails to pay the rental fee as herein described. This provision shall, at the option of the Lender, become operative immediately after the happening of any event of default and without regard to whether foreclosure proceedings have been instituted and without application for the appointment of a receiver. In the event that a receiver of such rents, income or profits is so appointed, this provision shall inure to the benefit of such receiver.

9. Borrower to Pay Lender's Attorneys' Fees and Other Related Costs in Event of Foreclosure. If any action or proceeding is commenced by the Lender to foreclose this Mortgage or to collect the indebtedness, the Borrower agrees to pay to the Lender statutory costs, expenses and reasonable attorneys' fees in connection with such action or proceeding. The said costs, expenses and attorneys' fees shall be deemed to be secured by the lien this Mortgage. The said costs, expenses and attorneys' fees may be collected as part of the foreclosure or as part of some other action or proceeding. The said costs, expenses and attorneys' fees shall be a lien on the premises covered by this Mortgage, existing prior to any right or title to, interest in, or claim upon, the premises attaching or accruing subsequent to the lien hereof.

10. Following Foreclosure, Premises May be Sold in One or More Parcels. If the lien of this Mortgage is foreclosed, the premises covered hereunder may be sold in one or more parcels, at the option and discretion of the Lender, subject to any provision of the law.

11. Borrower to Reimburse Lender for Expenses Arising From Certain Types of Litigation. If any action or proceeding is commenced to which the Lender, by virtue of being Lender hereunder, becomes a party, the Borrower will reimburse the Lender for its expenses in connection therewith, including, but not limited to, legal fees and court costs.

12. Borrower to Pay All Taxes, Assessments, Water Rents, etc.. The Borrower will pay all taxes, assessments, water rents or sewer rents when due. If Borrower fails to do so, the Lender may pay the same. Borrower shall reimburse

Lender therefor upon demand, together with interest at the note rate.

13. Upon Request, Borrower Will Furnish Lender With Statement of Amount Due on Mortgage. The Borrower, within five (5) days of request made in person, or within ten (10) days of request made by mail, will furnish a written statement, duly acknowledged before a notary public, of the amount due on this mortgage, and whether any offsets or defenses to payment of the mortgage debt exist.

14. Notice and Demand Must be in Writing. Any notice and demand permitted or required hereunder shall be in writing and shall be served in person or by certified mail, return receipt requested.

15. Abandonment of Mortgaged Premises by Borrower. If the premises covered by the lien of this Mortgage, or any part thereof, shall be abandoned or vacated by the Borrower, or by the then-owner thereof, the Lender shall have the right to enter upon and take possession of the premises to protect and conserve its security. Lender shall be vested with all usual powers of a Lender in possession.

16. Borrower Covenants That it Has Made no Pledge or Assignment of Any Rents, Issues or Profits. Borrower has made no pledge or assignment of any of the rents, issues or profits of the said mortgaged premises, or any part thereof. Borrower has not accepted prepayment of rents. Borrower will not further pledge or assign such rents, or any part thereof, during the term of this Mortgage without the written consent of the Lender, in advance.

17. Tax Law Changes. In the event that any law is passed which changes in any way the laws for the taxation of mortgages or debts secured by mortgages, the Lender shall have the right to give thirty (30) days written notice to the Borrower and require the payment of the indebtedness in full. If such notice is given, the indebtedness secured by the lien of this Mortgage shall become immediately due and payable at the expiration of said thirty (30) days.

18. Failure of Lender to Require Strict Performance is Not Waiver or Release of its Rights. If Lender fails at any time to require the strict performance of any of the terms or covenants of this Mortgage, said failure shall not act as a waiver or release of such terms or covenants.

19. Modifications of Terms Contained in Accompanying Note or Bond. Any of the terms of the bond or note secured hereby may, at any time, be modified or altered by the Lender with the consent of the Borrower or the then-owner of the mortgaged premises, without impairing or affecting the priority of the lien of this Mortgage with respect to any subsequent lien or encumbrance.

20. Release of Portion of Mortgaged Premises. The Lender may, at any time, release any portion of the mortgaged premises, or any fixtures or other personal property pledged or assigned to it as additional security for the payment of the bond or note and indebtedness secured by this Mortgage, without regard to the consideration for such release. Lender may accept other securities or other personal property in place thereof without being accountable to any other lienholder.

21. Certain Other Events That Will Accelerate Repayment of Loan. In the event that the premises subject to the lien of this Mortgage are sold, transferred, made subject to a "land sale" contract, or leased for a period exceeding _____ (_____) years, or are otherwise conveyed, voluntarily or involuntarily, while this Mortgage shall remain a lien thereon, this Mortgage and the bond or note secured thereby shall, at the option of the Lender, become immediately due and payable. A transfer of stock ownership of the Borrower to another entity or to other principals to such an extent as would place the control of the Borrower in other than the current _____ (_____) principal shareholders, or a change in ownership of shares constituting more than _____ percent (_____) of the outstanding and issued shares of the Borrower, shall be deemed a sale of the premises and will entitle Lender to demand payment in full of the outstanding balance.

22. Copy of Annual Operating Statement for Lender. The Borrower will furnish to the Lender the annual operating statement for the premises and/or financial statements of the Borrower in a form satisfactory to Lender within thirty (30) days after the close of Borrower's fiscal year, together with copies of Borrower's state and federal income tax returns.

23. Borrower is Corporation. Borrower represents that it is a corporation. Neither its certificate of incorporation, any amendment thereto, nor its by-laws requires the consent of shareholders to the execution and delivery of this Mortgage. The execution and delivery of this Mortgage and the note or bond secured thereby have been duly authorized by its Board of Directors at a duly-called meeting.

24. Terms in Mortgage Pertaining to Number and Gender of Parties. If more than one person joins in the execution of this Mortgage, the relative words herein shall be read as if written in the plural. If any Borrower be of the female gender, the relative words herein shall be read as if written in the feminine gender. If more than one person joins in the execution of this Mortgage, all the obligations herein contained shall be construed to be the joint and several obligations of all the said persons. If the Borrower is a corporation, all relative words shall be read as if written in the neuter gender.

25. Maximum Amount of Mortgage. The maximum amount secured by this Mortgage is the sum of _____ Dollars (\$ _____). This maximum amount shall be increased by the amount of any statutory costs, expenses and legal fees incurred by the Lender in any foreclosure or lawsuit. The maximum amount shall also be increased by the amount of any taxes or insurance premiums paid by Lender hereunder.

26. Flood Insurance. The Borrower, its heirs, successors and assigns will, if required, keep the mortgaged premises insured against loss by flood under the provisions of the Federal Flood Disaster Protection Act of 1973 for the benefit of Lender, up to the amount of the Mortgage debt or the maximum amount of coverage available. In the event of failure to obtain such insurance, the holder of the Mortgage may, at its option, insure the premises in the above manner and add the premiums therefor to the principal debt secured by this Mortgage.

27. Agreement May Not be Orally Amended, Terminated or Changed. The terms of this Mortgage may not be amended, terminated or otherwise changed orally. The covenants contained in this Mortgage shall run with the land and bind the Borrower, the heirs, personal representatives, successors and assigns of the Borrower, and all subsequent owners, encumbrancers, tenants and subtenants of the premises. The covenants contained herein shall inure to the benefit of the Lender, its successors, assigns and all subsequent holders of this mortgage.

28. Mortgage Secures Note. This mortgage secures a note which has a variable interest rate.

29. Sale of Portion of Mortgaged Premises. Notwithstanding anything to the contrary above stated, nothing herein shall be construed as preventing the sale of a portion of the premises described in Schedule "A", annexed hereto, provided a release is first obtained as herein provided below.

30. Lender Agrees to Release Sections of Mortgaged Premises. The Lender agrees to release sections of the mortgaged premises described in Schedule "A" in one-acre units. Each unit will be released upon the payment of the sum of _____ Dollars (\$ _____) to Lender. The sum is determined by dividing the loan amount by the number of acres contained in Schedule "A." The payment for each release shall be applied to the indebtedness owed by the Borrower, as evidenced by the note and secured by this Mortgage in the manner provided in the note.

All costs and expenses incurred in connection with each release, including Lender's reasonable attorneys' fees for the preparation of the release and the recording fee will be the sole responsibility of Borrower and shall be paid in full upon the delivery of each release.

Notwithstanding the foregoing, Lender shall not be required to accept tender of payment for release or provide a release when Borrower shall be in default under any of the terms of this Mortgage or the note of even date which it secures.

IN WITNESS WHEREOF, this Mortgage has been duly signed and executed by the Borrower.

"BORROWER"

a(n) _____ [state] _____ [entity]

By: _____

Print Name: _____

Title: _____

STATE OF _____ [state])
COUNTY OF _____ [county]) SS:

BEFORE ME, a Notary Public in and for said County and State, personally appeared _____ [name],
a(n) _____ [state] _____ [entity], by _____ [name], its
_____ [title], who acknowledged that _____ [he/she] did sign the foregoing
instrument for and on behalf of said corporation, being thereunto duly authorized, and that the same is
_____ [his/her] free act and deed individually and as such officers and the free act and deed of said
_____ [entity].

IN TESTIMONY WHEREOF, I have hereunto set my hand and official seal at _____ [city],
_____ [state], this _____ [day] day of _____ [month], _____ [year].

Notary Public

"LENDER"

a(n) _____ [state] _____ [entity]

By: _____

Print Name: _____

Title: _____

 STATE OF _____ [state])
 COUNTY OF _____ [county]) SS:

BEFORE ME, a Notary Public in and for said County and State, personally appeared _____ [name],
 a(n) _____ [state] _____ [entity], by _____ [name], its
 _____ [title], who acknowledged that _____ [he/she] did sign the foregoing
 instrument for and on behalf of said corporation, being thereunto duly authorized, and that the same is
 _____ [his/her] free act and deed individually and as such officers and the free act and deed of said
 _____ [entity].

IN TESTIMONY WHEREOF, I have hereunto set my hand and official seal at _____ [city],
 _____ [state], this _____ [day] day of _____ [month], _____ [year].

 Notary Public

[Attach Schedule A]



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Current Legal Forms for Real Estate

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Current Legal Forms for Real Estate
Chapter 22 DEVELOPMENT AND SUBDIVISION
Part IV. FORMS
G. FINANCING

26-22 Current Legal Forms for Real Estate FORM 22.115

FORM 22.115 Deed of Trust

COMMENT

A deed of trust is similar to a mortgage. A deed of trust encumbers the property in the same way a mortgage encumbers property. The main difference between a deed of trust and a mortgage is that the grantor does not convey the lien to the lender, but rather to a trustee. The lender is merely the beneficiary. The trustee has a duty to both the grantor and the beneficiary. If the loan is satisfied, the trustee is obligated to release the deed. If there is a default, the trustee is obligated to pursue foreclosure and possession of the property for the benefit of the lender. In some cases, the trustee is given a power of sale, and as such, can avoid the foreclosure process by selling the property in a summary proceeding. This significant difference notwithstanding, the substantive provisions of a deed of trust are very similar to that of a mortgage.

FORM

DEED OF TRUST, ASSIGNMENT OF RENTS, SECURITY AGREEMENT AND FIXTURE FILING

THIS DEED OF TRUST, ASSIGNMENT OF RENTS, SECURITY AGREEMENT AND FIXTURE FILING (this "Deed of Trust") is made and entered into as of _____[month] _____[day], _____[year], from _____[name], a(n) _____[state] _____[entity] ("Grantor" or "Borrower"), with principal offices at _____[address], in favor of _____[name] ("Trustee"), for the use and benefit of _____[name], a(n) _____[state] _____[entity] ("Beneficiary"), with principal offices at _____[address].

WITNESSETH THAT:

WHEREAS, Beneficiary and Grantor, are parties to a certain Credit Agreement dated as of _____ [month] _____ [day], _____ [year] (which, as the same may be restated, amended, supplemented or otherwise modified from time to time, is hereinafter referred to as the "Credit Agreement"), the terms of which are incorporated herein by reference as if fully set forth at length;

WHEREAS, the Borrower has executed and delivered to Beneficiary a certain Master Revolving Note (Eurodollar Rate) dated _____ [month] _____ [day], _____ [year] in the amount of _____ Dollars (\$ _____) (the "Revolving Credit Note" and, together with the this Deed of Trust, the Credit Agreement and all other notes, instruments, documents, letters of credit and agreements executed pursuant thereto and/or evidencing any of the indebtedness secured hereby, in each case as restated, amended, supplemented or otherwise modified, from time to time, collectively, the "Loan Documents");

WHEREAS, Beneficiary has conditioned extension of the Revolving Credit Maturity Date upon the grant by Grantor of a deed of trust lien on and security interest in certain Property (as defined below), as herein provided, for the purpose of securing all debts, liabilities, and obligations of the Borrowers to Beneficiary under the Revolving Credit Note, the Credit Agreement and any and all other indebtedness, liabilities, and obligations of the Borrowers to Beneficiary of every kind and description, direct or indirect, absolute or contingent, due or to become due, now existing or hereafter arising, including, without limiting the generality of the foregoing, any debt, liability, or obligation of any Borrower to Beneficiary under any guaranty of such Borrower to any other person which Beneficiary may have obtained by assignment or otherwise and all interest, fees, charges, and expenses which at any time may be payable by the Borrowers to Beneficiary and all costs and expenses (including reasonable attorneys' and paralegals' fees and disbursements) arising from or relating to claims or causes of action made or filed against Beneficiary by third parties as a result of the actions or inactions of any Borrower, and any judgments that may hereafter be rendered on such indebtedness or liabilities or any part thereof, with interest according to the rates and terms specified, or as provided by law, and any and all consolidations, amendments, renewals, replacements or extensions of any of the foregoing (collectively the "Indebtedness");

NOW, THEREFORE, for and in consideration of the premises, the sum of _____ Dollars (\$ _____) and other good and valuable consideration, the receipt and sufficiency whereof are hereby acknowledged, and in order to secure prompt payment in full of the Indebtedness, Grantor does hereby grant, bargain, sell, convey, assign, transfer, pledge, warrant and set over unto Trustee, its successors and assigns, in trust with power of sale, for the benefit of Beneficiary, all of the Grantor's right, title and interest in and to the following described property and property rights and all replacements and additions thereto (hereinafter collectively referred to as the "Property"):

(a) all those tracts or parcels of land more particularly described in Exhibit A, attached hereto and incorporated herein by this reference (hereinafter referred to as the "Land"), together with all proceeds from the sale thereof and any other real property exchanged therefor;

(b) all buildings, structures, additions and improvements, and all fixtures, fittings, machinery, apparatus, installations, equipment and other property, real, personal or mixed, which are owned by Grantor and used or adopted for use in the operations thereof, including without limitation, all gas and electric fixtures, radiators, pipes, heaters, furnaces, engines and machinery, escalators, boilers, ranges, elevators, motors, plumbing and heating fixtures, carpeting and other floor coverings, fire extinguishers and any other safety equipment required by governmental regulation or law, water heaters, air conditioning apparatus (including, without limitation humidity control equipment), refrigeration plants, refrigerators, cooking apparatus and appurtenances, window screens, awnings, and storm sashes, alarm devices of any type, automatic sprinkler systems, carpet, cabinets and shelving, partitions, paneling, and wall covering, and windows of every type, which are or shall be attached to the Land and owned by Grantor or said buildings, structures, or improvements and all

other fixtures, machinery, equipment, furniture, furnishings, appliances, building supplies and materials (other than property which may be or deemed to be toxic or Hazardous Materials, as defined herein) now or hereafter owned by Grantor and located in, on, or about, and used or intended to be used with or in connection with the use, operation, or enjoyment of the Property, including all extensions, additions, improvements, betterments, after-acquired property, renewals, replacements and substitutions or proceeds from a sale of any of the foregoing;

(c) all of Grantor's right, title and interest in and to easements, rights-of-way, strips and gores of land, vaults, streets, ways, alleys, passages, sewer rights, waters, water courses, water rights and powers, shrubs, crops, trees, timber and other emblements now or hereafter located on the Land or under or above the same or any part or parcel thereof, and all estates, rights, titles, interests, minerals, royalties, easements, privileges, liberties, tenements, hereditaments and appurtenances, reversions and remainders whatsoever, in any way belonging, relating or appertaining to the Property or any part thereof, or which hereafter shall in any way belong, relate or be appurtenant thereto, whether now owned or hereafter acquired by Grantor; and

(d) all present and future income, rents, issues, profits and revenues of the Property from time to time accruing to Grantor (including, without limitation, all payments under leases or tenancies, unearned premiums on any insurance policy carried by Grantor for the benefit of Beneficiary and/or the Property, tenant security deposits, escrow funds and all awards or payments, including interest thereon and the right to receive same, growing out of or as a result of any exercise of the right of eminent domain, including the taking of any part or all of the Property or payment for alteration of the grade of any street upon which the Property abuts, or any other injury to, taking of or decrease in the value of the Property to the extent of all amounts which may be owing on the Indebtedness at the date of receipt of any such award or payment by Grantor, and the reasonable attorneys' fees, costs and disbursements incurred by Beneficiary and/or Trustee in connection with the collection of such award or payment), and all the estate, right, title, interest, property, possession, claim and demand whatsoever at law or in equity, of Grantor of, in and to the same; reserving only the right to Grantor to collect the same as long as no default or event of default as defined herein shall have occurred;

TO HAVE AND TO HOLD the foregoing Property and all parts, rights, members and appurtenances thereof, whether now owned or held or hereafter acquired by Grantor, for the use and benefit of Trustee and the successors and assigns of Trustee forever; and Grantor covenants that Grantor is lawfully seized and possessed of the Property as aforesaid, and has good right to convey and mortgage the same, that the same are unencumbered except as to those matters expressly set forth in Exhibit B, attached hereto and incorporated herein by this reference and the liens and security interests created or otherwise permitted under the Credit Agreement (hereinafter referred to as the "Permitted Exceptions"), and that Grantor does warrant and will forever defend the title thereto against the claims of all persons whomsoever, except as to the Permitted Exceptions and the liens and security interests created or otherwise permitted under the Credit Agreement.

HOWEVER, this conveyance is made in trust for the following uses and trust, and for no other purposes, to wit:

(a) To secure the payment of any indebtedness for borrowed money evidenced by the Revolving Credit Note, with interest thereon at the rate set forth therein, payable according to the terms and conditions set forth therein to the order of Beneficiary at such place as Beneficiary may designate from time to time, with a maturity date of the Revolving Credit Maturity Date. This instrument secures said Revolving Credit Note, principal and interest, and any extensions, modifications, and/or renewals and substitutions thereof, and notes given in payment of principal or interest, and all reasonable attorneys' fees, court costs, and reasonable expenses of whatever kind incident to the collection of said indebtedness and/or the enforcement and/or protection of the lien of this Deed of Trust.

(b) To secure the payment of all sums advanced by Beneficiary, after the occurrence of any event of default under the terms of any of the Loan Documents to protect the Property, with interest thereon at the rate set forth in the Revolving Credit Note.

(c) To secure the payment of all other indebtedness and obligations of Grantor or any Borrower to Beneficiary, whether now existing or hereafter arising.

Grantor hereby further covenants and agrees with Beneficiary as follows:

ARTICLE I

1.01 Payment of Indebtedness, Covenants and Warranties

(a) Grantor will pay the Indebtedness according to the terms thereof and will pay all other sums now or hereafter secured hereby, including, without limitation, all future advances, at the time and in the manner provided under the Loan Documents or otherwise as mutually agreed. Grantor will otherwise perform, comply with and abide by each and every of the stipulations, agreements, conditions and covenants contained in the Loan Documents and any lease or other agreement with respect to the Property to which Grantor is a party.

(b) Except as may arise out of the gross negligence or willful misconduct of the Beneficiary or Trustee, Grantor shall protect, indemnify and hold Beneficiary and Trustee harmless from and against all liabilities, obligations, claims, damages, penalties, causes of action, costs, and expenses (including, without limitation, reasonable attorneys' fees and court costs) imposed upon or incurred by Beneficiary or Trustee by reason of this Deed of Trust or in exercising, performing, enforcing, or protecting its rights, title, or interests set forth herein, and any claim or demand whatsoever which may be asserted against Beneficiary or Trustee by reason of any alleged obligation or undertaking to be performed or discharged by such party under this Deed of Trust. In addition, Grantor covenants and agrees that it shall:

(i) not initiate, join in or consent to any change in any covenant, zoning ordinance, easement, or other public or private restriction, materially limiting or defining the uses which may be made of the Property, or any part thereof, without Beneficiary's prior written consent, which shall not be unreasonably withheld;

(ii) not take any action or fail to take any action which will result in any imposition materially adversely affecting the Property, this Deed of Trust or the rights of either the Beneficiary or Trustee hereunder;

(iii) indemnify and hold both the Beneficiary and Trustee harmless from any and all reasonable costs, damages or liabilities resulting from, arising out of, or related to, the creation or existence of liens, impositions or encumbrances by or against Grantor, or the Property, which are not otherwise Permitted Exceptions hereunder; and

(iv) execute such additional documents as Beneficiary may require to evidence and confirm this Deed of Trust.

(c) Grantor hereby represents and warrants as follows:

(i) Grantor has neither done any act nor failed to do any act which would prevent either the Beneficiary or Trustee from, or limit the Beneficiary or Trustee in, acting under any of the provisions of this Deed of Trust;

(ii) except to the extent otherwise waived, neither the execution and delivery of this Deed of Trust, nor the performance of each and every covenant of Grantor under this Deed of Trust, nor the satisfaction of each and every condition contained in this Deed of Trust, will conflict with, or constitute a breach or default under, any agreement, lease, indenture, or other instrument to which Grantor is a party or is

subject, or any law, ordinance, administrative regulation, or court decree which is applicable to Grantor;

(iii) no action has been brought or, to the best of Grantor's knowledge, is overtly threatened, which would interfere in any way with the right of Grantor to execute this Deed of Trust and perform all of Grantor's obligations contained in this Deed of Trust; and

(iv) Grantor is the sole owner of all right, title and interest in and to the Property, and, except as relates to any Permitted Exceptions, the Property is not subject to any lease or other like arrangement to which Grantor is a party, whether as lessee or lessor thereunder.

1.02 Taxes, Liens and Other Charges

(a) In the event of the passage of any law, order, rule or regulation subsequent to the date hereof, in any manner changing or modifying the taxation of mortgages or security agreements or debts secured thereby or the manner of collecting taxes so as to affect either the Beneficiary or Trustee adversely, Grantor shall promptly pay any such tax on or before the due date thereof, except any income taxes imposed on the interest paid by Grantor on the Indebtedness.

(b) Grantor shall pay, before the due date thereof, all taxes, levies, license fees, permit fees, liens, judgments, assessments and all other expenses, fees and charges (in each case whether general or special, ordinary or extraordinary, or foreseen or unforeseen) of every character whatsoever now or hereafter levied, assessed, confirmed or imposed on, or with respect to, or which may be a lien upon, the Property, or any part thereof, or any estate, right, or interest therein, or upon the rents, issues, income or profits thereof, or incurred in connection with the Indebtedness or any of the Loan Documents, and all premiums on policies of insurance covering, affecting, or relating to the Property, as required pursuant to Paragraph 1.03 hereof, and shall submit to Beneficiary, upon request therefor, such evidence of the due and punctual payment of all such taxes, assessments, insurance premiums and other fees and charges as Beneficiary may reasonably require; provided, however, that notwithstanding the provisions of this section, so long as an Event of Default shall not have occurred hereunder and be continuing, Grantor shall have the right to contest, in good faith, the amount or validity of any tax, lien, judgment or assessment, by appropriate legal proceedings, diligently pursued, so long as, in the event the amount at issue exceeds _____ Dollars (\$ _____) (i) Grantor notifies Beneficiary of Grantor's intent to contest such tax, lien, judgment, or assessment; (ii) Grantor provides Beneficiary with evidence reasonably satisfactory to Beneficiary that such proceedings shall not operate to prevent the sale of the Property or any portion thereof; (iii) Grantor shall have furnished, if Beneficiary so elects, a bond or other assurances reasonably satisfactory to Beneficiary sufficient to satisfy such tax, lien, judgment, or assessment; and (iv) upon any final determination of such contest which is not appealable or is not being appealed by Grantor, Grantor shall pay the amount of such tax, lien, judgment, or assessment then due.

(c) Unless otherwise bonded in a manner reasonably satisfactory to Beneficiary, Grantor, without the consent of Beneficiary, shall not suffer any mechanic's, materialman's, laborer's, statutory or other similar lien to be filed of record or to remain outstanding upon all or any part of the Property for more than ninety (90) days.

1.03 Insurance

(a) Grantor, at its sole cost and expense, shall insure the Property against loss or damage by fire with extended coverage, theft, burglary, pilferage, loss in transit, and such other hazards as Beneficiary shall reasonably specify, in amounts, under policies and by insurers of sound and adequate financial

responsibility reasonably acceptable to Beneficiary. Grantor shall also maintain flood insurance, in the event of a designation of the area in which the Property is located as "flood prone" or a "flood risk area," as defined by the Flood Disaster Protection Act of 1973, in an amount to be reasonably determined by Beneficiary, and shall comply with the additional requirements of the National Flood Insurance Program as set forth therein. Grantor shall cause Beneficiary to be named in each such policy as mortgagee and loss payee or additional insured, in a manner reasonably acceptable to Beneficiary. Each policy of insurance shall contain a clause or endorsement requiring the insurer to give not less than thirty (30) days' prior written notice to Beneficiary in the event of cancellation of the policy for any reason whatsoever and a clause or endorsement stating that the interest of Beneficiary shall not be impaired or invalidated by any act or neglect of Grantor nor by the use of the Property for purposes more hazardous than are permitted by such policy. All premiums for such insurance shall be paid by Grantor when due and duplicate originals or photocopies of the policies shall be delivered to Beneficiary. If Grantor fails to procure such insurance or to pay the premiums therefor when due, Beneficiary may (but shall not be required to) do so and add the costs thereof to the Indebtedness.

(b) Grantor shall promptly notify Beneficiary of any material loss, damage, or destruction to the Property whether or not covered by insurance. Beneficiary shall have the right to collect all insurance proceeds directly and to apply any such proceeds to the reduction of the Indebtedness, in such order as Beneficiary determines, *provided, however*, that so long as no Default otherwise then exists, Beneficiary shall, subject to such reasonable conditions of disbursement as Beneficiary determines appropriate, permit Grantor to use such money to replace, restore or rebuild the Property in a diligent and expeditious manner with materials and workmanship of substantially the same quality as existed before the loss, damage or destruction.

1.04 Condemnation. If all or any material portion of the Property shall be damaged or taken through condemnation (which term when used in this Deed of Trust shall include any damage or taking by any governmental or quasi-governmental authority and any transfer or grant by private sale made in anticipation of or in lieu thereof), either temporarily or permanently, then any award of damages or other compensation made in connection with such condemnation is hereby assigned and shall be paid to Beneficiary who shall apply or release such award in the same manner as set forth in *Section 1.03 above* with respect to insurance proceeds received subsequent to a fire or other casualty affecting all or a part of the Property. Promptly upon learning of any proposed, contemplated or threatened institution of any condemnation proceeding affecting the Property, Grantor shall notify Beneficiary of the pendency of such proceedings, and no settlement respecting awards in such proceedings shall be effected without the consent of Beneficiary, which shall not be unreasonably withheld. Beneficiary is hereby authorized at its option, to commence, appear in and prosecute, in its own or in the name of Grantor, any action or proceeding relating to any such condemnation, and to settle or compromise any claim in connection therewith. Grantor agrees to execute such further assignment of any compensation, awards, damages, claims, rights of action and proceeds as Beneficiary may require. If, prior to the receipt by Beneficiary of such damages or other compensation, the Property shall have been sold on foreclosure of this Deed of Trust, or as a result of other legal action relating to this Deed of Trust or any of the other Loan Documents, Beneficiary shall have the right to receive such award or proceeds to the extent of any unpaid Indebtedness following such sale, with legal interest thereon whether or not a deficiency judgment on this Deed of Trust or any of the Indebtedness shall have been sought or recovered, and Grantor shall indemnify Beneficiary and hold Beneficiary harmless from and against any and all loss, cost, damage, or expense, including attorney fees and litigation expenses incurred by Beneficiary in connection with the collection of such award or proceeds.

1.05 Care of Property

(a) Grantor shall, subject to the occurrence of any insured casualty, keep all improvements of any kind now or hereafter erected on the Land or any part thereof in the same condition and repair as on the date hereof (ordinary wear and tear excepted), shall not commit or suffer any waste, and shall not do or suffer to be done anything which would or could increase the risk of fire or other hazard to the Property or any part thereof or which would or could result in the cancellation of any insurance policy carried with respect to the Property.

(b) Grantor shall not remove, demolish or alter, enlarge or change any structure or other improvement located on the Land which would materially impair the value of the Property without Beneficiary's consent, which shall not be unreasonably withheld. Grantor shall not remove or permit to be removed from the Land any material part of the Property, constituting a fixture or chattel, without the consent of Beneficiary, except as otherwise permitted under the Credit Agreement or, where the same is obsolete or worn out, appropriate replacements are immediately made which are free of any lien, security interest or claim superior to that of this Deed of Trust and which have a value and utility at least equal to the value and utility of the fixture or chattel removed, which replacement shall, without further action, become subject to the lien of this Deed of Trust.

(c) Subject to the provision by Beneficiary of reasonable prior notice to Grantor, Beneficiary or its representative is hereby authorized to enter upon and inspect the Property at all reasonable times.

(d) Grantor will promptly perform and comply, in all material respects, with, and cause the Property to be maintained, used and operated in accordance with, any and all (i) present and future laws, ordinances, rules, regulations and requirements of every duly constituted governmental or quasi-governmental authority or agency applicable to Grantor or the Property, including without limitation, all applicable federal, state and local laws pertaining to air and water quality, hazardous waste, waste disposal, air emissions and other environmental matters, all zoning and other land use matters, and rules, regulations and ordinances of the United States Environmental Protection Agency and all other applicable federal, state and local agencies and bureaus; (ii) similarly applicable orders, rules and regulations of any regulatory, licensing, accrediting, insurance underwriting or rating organization or other body exercising similar functions; (iii) similarly applicable duties or obligations of any kind imposed under any Permitted Exception, or otherwise by law, covenant, condition, agreement or easement, public or private; and (iv) policies of insurance at any time in force with respect to the Property. If Grantor receives any notice that Grantor or the Property is in default under, or is not in compliance with, any of the foregoing, or notice of any proceeding initiated under or with respect to any of the foregoing, Grantor shall promptly furnish a copy of such notice to Beneficiary.

(e) If all or any part of the Property shall be damaged by fire or other casualty, Grantor shall give immediate written notice thereof to Beneficiary and, subject to the provisions of Section 1.03(b), shall promptly restore the Property to the equivalent of its original condition; and if a part of the Property shall be damaged through condemnation, Grantor, subject to the provisions of Section 1.04, shall promptly restore, repair or alter the remaining portions of the Property in a manner reasonably satisfactory to Beneficiary.

1.06 Security Agreement

(a) With respect to the fixtures, fittings, machinery, apparatus, installations, equipment and other property referred to or described in this Deed of Trust within the definition of the term "Property" (other than any property which may be now or hereafter deemed to be toxic or Hazardous materials) whether now owned or hereafter from time to time acquired, together with all substitutions, replacements, additions, attachments, accessories and all of the rents, issues, income, revenues and profits derived from

the Property (hereinafter collectively referred to as the "Collateral"), this Deed of Trust is hereby also made and declared to be a security agreement encumbering each and every item of such Property comprising a part of the Collateral, in compliance with the provisions of the Uniform Commercial Code as enacted in the State of _____ [state] (the "Code"), and Grantor hereby grants Beneficiary a security interest in all such property. At any time and from time to time, Grantor authorizes Beneficiary or Trustee, as the case may be, to file such financing statement or statements as Beneficiary deems appropriate. The remedies for any violation of the covenants, terms and conditions of the security agreement contained in this Deed of Trust shall include, but not be limited to those (i) prescribed herein or in any of the other Loan Documents relating thereto, or (ii) prescribed by general law, or (iii) prescribed by the Code, all at Beneficiary's sole election. Grantor and Beneficiary agree that the filing of any such financing statement or statements in the records normally having to do with personal property shall not in any way affect the agreement of Grantor and Beneficiary that everything used in connection with the operation of the Property or adapted for use therein or which is described or reflected in this Deed of Trust within the definition of "Property" is, and at all times and for all purposes and in all proceedings, both legal or equitable, shall be, regarded as part of the Land, regardless of whether any such item is physically attached thereto, serial numbers are used for the better identification of certain items capable of being thus identified in an exhibit to this Deed of Trust, or any such item is referred to or reflected in any such financing statement or statements so filed at any time. Similarly, the mention in any such financing statement or statements of the rights in and to (A) the proceeds of any insurance policy relating to such property, or (B) any award in eminent domain proceedings for a taking or for loss of value thereof, or (C) Grantor's interest as landlord in any present or future lease or sublease or rights to income growing out of the use and/or occupancy of such property, whether pursuant to a tenant lease of space in the Property or otherwise, shall not in any way alter any of the rights of Beneficiary as determined by this Deed of Trust or affect the priority of the security interest granted hereby or by any other recorded document, it being understood and agreed that such mention in such financing statement or statements is solely for the protection of Beneficiary in the event any court shall at any time hold with respect to the foregoing clauses (A), (B), or (C) of this sentence, that notice of Trustee's and Beneficiary's priority of interest, to be effective against a particular class of persons, must be filed in the Uniform Commercial Code records. The aforesaid security interest shall attach to the Collateral as soon as Grantor obtains any interest in any of the Collateral and before the Collateral becomes fixtures or before the Collateral is installed or affixed to other collateral for the benefit of Beneficiary to secure the Indebtedness, and all other sums and charges which may become due hereunder or thereunder. The foregoing security interest shall cover cash and non-cash proceeds of the Collateral.

In the event of default under this Deed of Trust, Beneficiary shall have the option of proceeding as to both real and personal property in accordance with its rights and remedies in respect of the real property, in which event the default provisions of the Code shall not apply. The parties agree that, in the event an election is made to proceed with respect to the Collateral separately from the real property, the requirement of the Code as to reasonable notice of any proposed sale or disposition of the Collateral shall be met if such notice is mailed to the Grantor, as hereinafter provided, at least ten (10) days prior to the time of such sale or disposition.

(b) To the extent any of the items of Collateral described herein are goods that are or are to become fixtures related to the real estate described herein, it is intended that, as to those goods, this Deed of Trust shall be effective as a financing statement filed as a fixture filing from the date of its filing for record in the real estate records of the county in which the Land is located. Information concerning the security interest created by this instrument may be obtained from the Beneficiary, as "Secured Party" or Grantor, as "Debtor," at their respective mailing addresses, set out in Paragraph 3.05 hereof.

(c) Grantor further covenants and agrees that all of the Collateral shall be owned by Grantor and shall not

be the subject matter of any lease or other instrument, agreement or transaction whereby the ownership or beneficial interest thereof or therein shall be held by any person or entity other than Grantor, except to the extent Beneficiary consents in writing to any lease of any of such property, which consent may be withheld or delayed in Beneficiary's reasonable discretion; nor shall Grantor create or cause to be created any security interest covering any such property, other than (i) the security interest in favor of Beneficiary, (ii) the rights of tenants lawfully occupying the Property pursuant to leases approved by Beneficiary, (iii) the Permitted Exceptions, and (iv) the liens and security interests otherwise permitted under the Credit Agreement.

1.07 Further Assurances; After-Acquired Property. At any time, and from time to time, at Grantor's expense and upon request by Beneficiary, Grantor shall make, execute and deliver or cause to be made, executed and delivered, to Beneficiary and, where appropriate, cause to be recorded and/or filed and from time to time thereafter to be re-recorded and/or refiled at such time and in such offices and places as shall be deemed desirable by Beneficiary, any and all such other and further deeds to secure debt, mortgages, deeds of trust, security agreements, financing statements, continuation statements, instruments of further assurances, certificates and other documents as may, in the opinion of Beneficiary, be necessary or desirable in order to effectuate, complete or perfect, or to continue and preserve, (i) the obligations of Grantor described in this Deed of Trust and (ii) the lien of this Deed of Trust as a first and prior lien upon and security interest in and to all of the Property, whether now owned or hereafter acquired by Grantor, subject only to the Permitted Exceptions and the liens and security interests otherwise permitted under the Credit Agreement. Upon any failure by Grantor so to do, Beneficiary may make, execute, record, file, re-record and/or refile any and all such deeds to secure debt, mortgages, deeds of trust, security agreements, financing statements, continuation statements, instruments, certificates and documents for and in the name of Grantor, and Grantor hereby irrevocably appoints Beneficiary the agent and attorney-in-fact of Grantor so to do. The lien and security interest hereof shall automatically attach without further act, to all after-acquired Property attached to, and/or used in the operation of the Property or any part thereof, to the extent permitted by law.

1.08 Expenses. Unless caused by the gross negligence or willful misconduct of the Beneficiary or Trustee, Grantor shall (a) indemnify the Beneficiary and Trustee and hold the Beneficiary and Trustee harmless from and against, and (b) pay or reimburse the Beneficiary and Trustee, upon demand therefor, for all reasonable attorneys' fees, costs and expenses incurred by the Beneficiary and Trustee in any suit, action, legal proceeding or dispute of any kind in which Beneficiary or Trustee are made a party or appears as a party plaintiff or defendant, affecting the Indebtedness, this Deed of Trust, or the interest created herein, or the Property, including, without limitation, any foreclosure proceedings, any condemnation action involving the Property, any federal bankruptcy proceeding or state insolvency proceeding involving the priorities or rights of creditors, any action to protect the security hereof, or any action or proceeding commenced by governmental authority with respect to the storage, disposal or clean-up of toxic or Hazardous Materials on, under or about the Property; and any such amounts paid by Beneficiary or Trustee shall be added to the Indebtedness secured by the lien of this Deed of Trust and shall bear interest from and after the date when paid at the Default Rate (as defined in the Credit Agreement) in effect under the Credit Agreement.

1.09 Subrogation. To the full extent of the Indebtedness, Beneficiary is hereby subrogated to the liens, claims and demands, and to the rights of the owners and holders of each lien, claim, demand and other encumbrance on the Property which is paid or satisfied in whole or in part, out of the proceeds of the Indebtedness, and the respective liens, claims, demands and other encumbrances shall be, and each of them, is hereby, preserved and shall pass to and be held by Beneficiary as additional collateral and further security for the Indebtedness, to the same extent they would have been preserved and would have been passed to and held by Beneficiary had they been duly and legally assigned, transferred, set over and

delivered unto Beneficiary by assignment, notwithstanding the fact that any instrument providing public notice of the same may be satisfied and cancelled of record.

1.10 Disposition of Property; Liens and Encumbrances. Grantor covenants and agrees with Beneficiary, as part of the consideration for extending the Indebtedness, that without Beneficiary's prior written consent, Grantor shall not, except as otherwise expressly permitted hereunder or under the Loan Documents, voluntarily or by operation of law: sell, transfer, convey, assign or otherwise dispose of, all or any material part of the Property or any interest therein, nor, except as may relate to any Permitted Exception or lien or security interest otherwise permitted under the Credit Agreement, cause or permit any encumbrance or lien to be placed on the Property.

1.11 Performance by Beneficiary or Trustee of Defaults by Grantor. Grantor covenants and agrees that, if it shall default in the payment of any tax, lien, assessment, or charge levied or assessed against the Property; in the payment of any utility charge, whether public or private; in the payment of any insurance premium; in the procurement of insurance coverage and the delivery of the insurance policies required hereunder; or in the performance or observance of any other covenant, condition or term of this Deed of Trust, then, provided Beneficiary has provided Grantor with reasonable notice of its intention to do so, Beneficiary or Trustee, at its option, but without obligation and without notice, may pay, perform or observe the same, and all payments made or costs incurred by the Beneficiary or Trustee in connection therewith shall be secured hereby and shall be, without demand, immediately repaid by Grantor to Beneficiary with interest thereon, from the date such payment is made or expense is incurred by the Beneficiary or Trustee to the date Beneficiary is reimbursed therefor, at the Default Rate provided in the Credit Agreement. Beneficiary shall be the sole judge, exercised in Beneficiary's reasonable discretion, of the legality, validity and priority of any such tax, lien, assessment, charge, claim and premium, of the necessity for any such actions and of the amount necessary to be paid in satisfaction thereof. Subject to the foregoing, Beneficiary or Trustee are hereby empowered to enter and to authorize others to enter upon the Property or any part thereof for the purpose of performing or observing any such defaulted covenant, condition or term without thereby becoming liable to Grantor or any person in possession of any portion of the Property holding under Grantor. Grantor expressly acknowledges and agrees, however, that notwithstanding anything contained in this Paragraph 1.11 to the contrary, neither the Beneficiary nor Trustee shall be obligated under this Paragraph 1.11 to incur any expense or to perform any act whatsoever. Grantor further acknowledges that no performance by Beneficiary or Trustee of Grantor's obligations shall cure Grantor's default or release Grantor from those or any other obligations under this Deed of Trust. Except as may arise out of any gross negligence or willful misconduct of the Beneficiary or Trustee, Grantor hereby indemnifies the Beneficiary and Trustee against any and all costs, liabilities or damages, arising from or in any way related to the performance of Grantor's obligations by the Beneficiary or Trustee.

1.12 Assignment of Leases and Rents

(a) Without intending to derogate from any provision of this Deed of Trust prohibiting the lease of any of the Property without Beneficiary's express written consent, it is agreed that, as additional collateral and to further secure the Indebtedness and other obligations of Grantor, Grantor does hereby absolutely, presently and irrevocably assign, grant, transfer, and convey to Beneficiary, all of Grantor's right, title, and interest in, to, and under all leases, tenant contracts and other contracts, licenses and permits, whether written or oral, affecting the use or occupancy of all or any part of the Property now existing or which may be made hereafter, including any and all extensions, renewals, and modifications of the foregoing and guaranties of the performance or obligations of any tenants thereunder, and all other arrangements of any sort resulting in the payment of money to Grantor or in Grantor becoming entitled to the payment of money for the use of the Property or any part thereof whether such user or occupier is

tenant, invitee, or licensee (all of the foregoing are hereinafter referred to collectively as the "Leases" and individually as a "Lease", and said tenants, invitees, and licensees are hereinafter referred to collectively as "Tenants" and individually as "Tenant" as the context requires), which Leases cover all or any portion of the Property; together with all of Grantor's right, title, and interest in and to all income, rents, issues, royalties, profits, rights and benefits and all Tenants' security and other similar deposits derived with respect to the Leases and with respect to the Property, including, without limitation, all basic and minimum rents, percentage rents, additional rents, payments in lieu of rent, expense contributions, and other similar such payments (hereinafter collectively referred to as "Income"), and the right to collect the same as they become due.

(b) As to each such Lease, if any, Grantor hereby covenants and agrees as follows:

(i) Grantor will be the sole holder of the landlord's interest under the Leases, will be entitled to receive the Income from the Leases and from the Property, and will have the full right to sell, assign, transfer, and set over the same and to grant to and confer upon Beneficiary the rights, interests, powers, and authorities herein granted and conferred;

(ii) Grantor has made no pledge or assignment of the Leases or Income, prior to the date hereof, and Grantor shall not, after the date hereof, make or permit any such pledge or assignment;

(iii) each Lease will be valid, enforceable, and in full force and effect, and Grantor will deliver to Beneficiary true, complete, and correct copies of all Leases with respect to the Property or any part thereof;

(iv) all Leases will provide for rental to be paid monthly, in advance, and Grantor will not accept or permit payment of rental or other Income under any of the Leases for more than one (1) month in advance of the due date thereof;

(v) no security deposit will be made by any Tenant under any Lease except as set forth in such Lease;

(vi) neither this Deed of Trust nor the exercise of rights hereunder shall be deemed to make Beneficiary a mortgagee in possession;

(vii) Grantor shall (A) fulfill, perform, and observe each and every condition and covenant of landlord or lessor contained in each of the Leases; (B) give prompt notice to Beneficiary of any claim of default under any of the Leases, whether given by a Tenant to Grantor, or given by Grantor to a Tenant, together with a complete copy of any such notice; (C) at no cost or expense to Beneficiary, enforce, short of termination, the performance and observance of each and every covenant and condition of the Leases to be performed or observed by the Tenants thereunder; (D) diligently and in good faith enforce the Leases and all remedies available to Grantor against the Tenants in the event of default under any Lease by any Tenant; (E) diligently and in good faith appear in and defend any action arising out of, or in any manner connected with, any of the Leases, or the obligations or liabilities of Grantor as the landlord thereunder, or of the Tenant or any guarantors thereunder; and (F) execute such additional documents as Beneficiary may require to evidence and confirm the Leases;

(viii) Grantor shall not, without the prior written consent of Beneficiary, which shall not be unreasonably withheld, (A) modify, amend, or alter, or agree to the modification, amendment, or alteration of any of the Leases; (B) terminate the term, accept the surrender of, or otherwise cancel any of the Leases; (C) waive or release any Tenant from the performance or observance by such Tenant of any obligation or condition of any of the Leases; (D) discount any future accruing rents under the Leases or other Income;

(E) give any consent to any assignment or sublease by any Tenant under any of the Leases; or (F) grant any rental concessions in connection with any of the Leases. Any attempt to violate the provisions of this subparagraph (viii) shall be void;

(ix) Grantor shall provide Beneficiary with a fully executed original counterpart of each amendment, modification or alteration thereto;

(x) Grantor shall take no action that will cause or permit the estate of any Tenant under any of the Leases to merge with the interests of Grantor in the Property or any portion thereof;

(xi) Grantor shall not do, or fail to do, any act if such action or failure would constitute a violation of any of the Leases or any guaranty of any Lease which would entitle the tenant or guarantor of any Lease to reduce payment of rent or to terminate its Lease or guaranty or otherwise affect or impair the benefits of this assignment nor shall Grantor commit any act or omission that may create in any Tenant a right to cease or reduce payment of rent or terminate its Lease or otherwise affect or impair the benefits of this Deed of Trust;

(xii) Grantor shall authorize and direct, and does hereby authorize and direct, each and every Tenant of the whole or any part of the Property to pay all rentals to Beneficiary upon receipt of written demand from Beneficiary to do so, provided that an event of default shall have occurred under the Loan Documents;

(xiii) Grantor shall require that each Tenant under any Lease executed hereafter shall execute an estoppel certificate with Beneficiary, in form and content to be supplied by Beneficiary; and

(xiv) Grantor shall furnish to Beneficiary, within twenty (20) days after a request by Beneficiary to do so, a written affidavit sworn to and signed by Grantor setting forth customary rent roll information as shall be reasonably requested by Beneficiary, and stating whether any defaults, offsets or defenses exist or are claimed under or in connection with any of the Leases. Any and all Leases executed hereafter affecting the Property shall provide for the giving by the tenants thereunder of certificates with respect to the status of the Leases and Grantor shall exercise Grantor's right to request such certificates within ten (10) days of any demand therefor by Beneficiary.

(c) Although this Deed of Trust constitutes an absolute, assignment of all Income, as long as no default or Event of Default as defined in Paragraph 2.01 below, on the part of Grantor, shall have occurred, Grantor shall have a license to collect, but not more than one (1) month prior to the due date thereof, all such Income from the Property (including, without limitation, all rental payments under the Leases).

(d) Each Lease pertaining to the Property, or any part thereof, shall provide (or if such Lease does not so provide, shall be deemed to provide) that, in the event of the enforcement by Beneficiary of the remedies provided by law or by this Deed of Trust, the Tenant thereunder will, upon request of Beneficiary or any other person or entity succeeding to the interest of Beneficiary as a result of such enforcement, automatically attorn to and become the tenant of Beneficiary or said successor in interest, without change in the terms or other provisions of said Lease; provided, however, that (i) neither Beneficiary nor any such successor in interest shall be bound by (A) any payment of rental, additional rental or other income for more than one (1) month in advance, or (B) any amendment or modification of said Lease, made without the express written consent of Beneficiary or said successor in interest; (ii) neither Beneficiary nor such successor in interest will be liable for (A) any act or omission or warranties of any prior landlord (including Grantor), or (B) the breach of any warranties or obligations relating to construction of Improvements on the Property or any Tenant finish work performed or to have been performed by any

prior landlord (including Grantor), or (C) the return of any security deposit, and (iii) neither Beneficiary nor such successor in interest shall be subject to any offsets or defenses which the Tenant might have against Grantor. Each Lease pertaining to the Property shall also provide (or if such Lease does not so provide, shall be deemed to provide) that, upon request by said successor in interest, the Tenant thereunder shall deliver an instrument confirming such attornment, and that such Tenant shall give Beneficiary notice of any claim of Grantor's default and a reasonable opportunity to cure such default.

(e) Notwithstanding any other provisions of this Deed of Trust, Grantor shall not enter into any Lease without the prior written consent of Beneficiary, which shall not be unreasonably withheld, and, even if Beneficiary's consent is obtained, only upon the following conditions: (i) each such Lease shall contain a provision that the rights of the parties thereunder are expressly subordinate to all of the rights and title of Beneficiary under this Deed of Trust; (ii) each such Lease shall contain a provision whereby the parties thereunder expressly recognize and agree that, notwithstanding such subordination, Beneficiary may sell the Property in the manner provided herein, and thereby, at the option of Beneficiary, sell the same subject to such Lease; and (iii) at or prior to the time of execution of any such Lease, Grantor shall, as a condition to such execution, procure from the other party or parties thereto an agreement in favor of Beneficiary, in form and substance satisfactory to Beneficiary, under which such party or parties agree to be bound by the provisions hereof, regarding the manner in which the Trustee or Beneficiary may foreclose under this Deed of Trust.

1.13 Estoppel Affidavits. Grantor, upon ten (10) days prior written notice, shall furnish Beneficiary a written affidavit, sworn to and signed by Grantor, setting forth (i) the unpaid principal of, and interest on, the Indebtedness, (ii) whether or not any offsets or defenses exist against such principal and interest, (iii) whether or not any "default" or "event of default" (or any fact or circumstance that, with lapse of time or notice, or both, would constitute a "default" or "event of default") exists under this Deed of Trust or any of the other Loan Documents, and (iv) a statement that the representations and warranties made by Grantor herein are, as of such date, true and correct.

ARTICLE II

2.01 Events of Default

(a) The terms "Default," "default," "Event of Default" or "event of default," wherever used in this Deed of Trust, shall mean any of the following events:

(i) subject to expiration of any grace or cure period applicable thereto as provided in the Loan Documents, the failure by the Grantor or any other Borrower to pay any Indebtedness secured by this Deed of Trust or any other sum that may be due and payable under any of the Loan Documents, on or before the date when due and payable;

(ii) an event shall occur which under the specific terms of Paragraph 1.02 shall give the Beneficiary the option to accelerate the maturity of the Indebtedness;

(iii) subject to expiration of any grace or cure period applicable thereto as provided in the Credit Agreement, the failure by Grantor or any other Borrower to duly observe or perform any other term, covenant, condition or agreement of this Deed of Trust or any of the other Loan Documents; or

(iv) the occurrence of any other Default or Event of Default under any of the Loan Documents.

2.02 Acceleration of Maturity. If an Event of Default shall have occurred and has not been cured

pursuant to the Loan Documents, then the entire Indebtedness shall, at the option of Beneficiary, become immediately due and payable without notice or demand, except as otherwise set forth in the Credit Agreement, which are hereby expressly waived, time being of the essence of this Deed of Trust; and no omission on the part of Beneficiary to exercise such option when entitled to do so shall be construed as a waiver of such right.

2.03 Beneficiary's and Trustee's Right to Enter and Take Possession, Operate and Apply Revenues

(a) If an Event of Default shall have occurred, and in addition to any other rights or remedies of Beneficiary under this Deed of Trust or any of the other Loan Documents, the Beneficiary, or other agent of the Beneficiary, or the Trustee may, unless prohibited by law, enter and take possession of all the Property without applying for or obtaining the appointment of a receiver, and may exclude Grantor and its respective agents and employees wholly therefrom, and may have joint access with Grantor to the books, papers and accounts of Grantor relating to the Property or any portion thereof.

(b) If Grantor shall for any reason fail to voluntarily surrender or deliver the Property, or any part thereof, after demand for surrender of possession by Beneficiary, Beneficiary may obtain a judgment or decree conferring upon the Beneficiary, or other agent of the Beneficiary, or the Trustee the right to immediate possession or requiring Grantor to deliver immediate possession of the Property to Beneficiary or Trustee, to the entry of which judgment or decree Grantor hereby specifically consents. Grantor will pay to the Beneficiary and Trustee, upon demand, all expenses of obtaining such judgment or decree, including reasonable compensation to the Beneficiary and Trustee and their respective attorneys and agents; and all such expenses and compensation shall, until paid, be secured by the lien of this Deed of Trust.

(c) Upon every such entering upon or taking of possession, Beneficiary, or other Agent of the Beneficiary, or Trustee may hold, store, use, operate, manage and control the Property and conduct the business thereof and, from time to time (i) make all reasonably necessary and proper maintenance, repairs, renewals, replacements, additions, betterments and improvements thereto and thereon and purchase or otherwise acquire additional fixtures, personalty and other property; (ii) insure or keep the Property insured; (iii) manage and operate the Property and exercise all the rights and powers of Grantor to the same extent as Grantor could in its own name or otherwise with respect to the same; (iv) let the property, either in Trustee's own name, in the name of the Beneficiary or in the name of Grantor, and receive the rents, incomes, issues and profits of the Property, and otherwise enter into any and all agreements with respect to the exercise by others of any of the powers herein granted Beneficiary and Trustee, all as Beneficiary and Trustee from time to time may determine to be in its best interest; and (v) perform all acts required of Grantor as lessor under any lease of all or any part of the Property, all as Beneficiary may from time to time determine to be to its best advantage. Beneficiary and Trustee may collect and receive all the income, rents, issues, profits and revenues from the Property, including those past due as well as those accruing thereafter, and, after deducting (A) all expenses of taking, holding, managing and operating the Property (including reasonable compensation for the services of all persons employed for such purposes); (B) the cost of all such maintenance, repairs, renewals, replacements, additions, betterments, improvements, purchases and acquisitions; (C) the cost of such insurance; (D) such taxes, assessments and other similar charges as Beneficiary may at its option pay; (E) other proper charges upon the Property or any part thereof; and (F) the reasonable compensation, expenses and disbursements of the attorneys and agents of Beneficiary and Trustee, Beneficiary or Trustee shall apply the remainder of the moneys and proceeds so received by Beneficiary or Trustee to the payment of principal and interest in whatever order or priority Beneficiary may elect. Anything in this Paragraph 2.03 to the contrary notwithstanding, neither Beneficiary or Trustee shall be obligated to discharge or perform the duties of a landlord to any tenant or incur any liability as the result of any exercise by

Beneficiary or Trustee of its rights under this Deed of Trust, and Beneficiary and Trustee shall be liable to account only for the rents, incomes, issues, profits, and revenues actually received by Beneficiary and Trustee.

(d) For the purpose of carrying out the provisions of this Paragraph 2.03, Grantor hereby irrevocably constitutes and appoints Beneficiary and Trustee the true and lawful attorney-in-fact of Grantor to do and perform, from time to time, any and all actions necessary and incidental to such purpose, and Grantor does, by these presents, ratify and confirm any and all such actions of said attorney-in-fact.

(e) In the event that all such interest, deposits and principal installments and other sums due under any of the terms, covenants, conditions and agreements of this Deed of Trust shall have been paid and all Events of Default cured and satisfied, and as a result thereof, Beneficiary or Trustee surrenders possession of the Property to Grantor, the same right of taking possession shall exist if any subsequent Event of Default shall occur.

2.04 Receiver. If an Event of Default shall have occurred, the Beneficiary, or other agent of the Beneficiary, or Trustee, upon application to a court of competent jurisdiction, shall be entitled, as a matter of strict right without notice and without regard to the sufficiency or value of any security for the Indebtedness or the solvency of any party bound for its payment, to the appointment of a receiver to take possession of and to operate the Property and to collect and apply the income, rents, issues, profits, and revenues thereof. The receiver shall have all of the rights and powers permitted under the laws of the state within which the Land is located. Grantor shall pay to Beneficiary upon demand all expenses, including receiver's fees, attorneys' fees, costs, and agent's compensation, incurred pursuant to the provisions of this Paragraph 2.04; and all such expenses shall be secured by this Deed of Trust.

2.05 Foreclosure

(a) If a Default shall have occurred, Beneficiary, at its option, may institute legal proceedings for the foreclosure of this Deed of Trust either by suit or by power of sale pursuant to the _____ [state] statute in such case made and provided. In such event, the Trustee hereunder, or his agent or successors, at the request of the Beneficiary, or the representatives or assigns of the Beneficiary, may sell the Property or any part of the Property, in accordance with Section 89-1-55 of the _____ [state] Code, as amended, at one or more public sales at the courthouse of the county in which the Property is situated or in which any part of the Property is situated, if located in more than one (1) county. Sale of the land shall be advertised, giving notice of the time and place of sale by publication of such for at least three (3) consecutive weeks in some newspaper published in the county in which the Property is primarily situated or, if none is so published, in some paper having a general circulation therein, and by posting one notice at the courthouse of the county where the land is situated, for said time. Such notice and advertisement shall disclose the name of the original mortgagor or mortgagors in this Deed of Trust. The Trustee shall proceed to sell the Property at the front door of the county courthouse where the land is situated or at which foreclosure sales are customarily held, and, at the election of Beneficiary at the Property, at public auction to the highest bidder for cash (or for credit against the Secured Indebtedness if the Beneficiary is the highest bidder) or upon such other terms that are satisfactory to Trustee and Beneficiary, and in bar of the equity of redemption and all rights of redemption, statutory or otherwise (including, without limitation, those rights of redemption contained in _____ [state] Code § _____), homestead, dower, elective share, rights of appraisal or valuation, and all other rights and exemptions of every kind, all of which are hereby waived. The foreclosure sale may be adjourned from time to time by Trustee, or his agent or successors, at the place of sale on the date the sale is originally set, or on the date of any adjournment thereof, and may be reset at a later date or dates, by announcement without any additional publication. The Property

or any part thereof may be sold in one parcel, or in such parcels, manner or order as Beneficiary in its sole discretion may elect, the benefits of Section _____ of the _____ [state] Constitution being hereby waived by Grantor, and one or more exercises of the power herein granted shall not extinguish or exhaust the power unless the entire Property is sold or the Indebtedness paid in full. Trustee may delegate, in his sole discretion, any authority possessed under this instrument, including the authority to conduct a foreclosure sale. Without limiting the foregoing, Trustee may retain a professional auctioneer to preside over the bidding, and the customary charge for the auctioneer's services shall be paid from sale proceeds as an expense of sale. Neither the Beneficiary nor the Trustee shall be required to give any notice of the foreclosure sale to the Grantor other than as specifically required by statute directing posting and publication of notice.

(b) Following a Trustee's sale of the Property, Trustee shall deliver to the purchaser a Trustee's Deed conveying the property so sold without any covenant or warranty, expressed or implied. The recitals in the Trustee's Deed shall be prima facie evidence of the truth of the statements made therein. Grantor agrees that in case of any sale hereunder, it will at once surrender possession of the Property, and will from that moment become and be the tenant at will of the purchaser, and removable by process as upon a forcible and unlawful detainer suit, hereby agreeing to pay such purchaser the reasonable rental value of the Property after such sale plus all expenses, including legal fees, incurred by the purchaser.

(c) Upon any foreclosure sale, Beneficiary may bid for and purchase the Property and shall be entitled to apply all or any part of the Indebtedness as a credit to the purchase price.

(d) In the event of a foreclosure sale of all or any portion of the Property, the Trustee shall apply the proceeds of said sale--First to the payment of all costs and expenses of such sale, including attorney and trustee fees and expenses incurred in connection with the sale and Grantor's default; Second, to the payment of the Indebtedness, including any and all advances made under the terms hereof with interest thereon; Third, the surplus, if any, to the parties legally entitled thereto. In the event the Trustee cannot determine the person or persons to whom the surplus should be paid or a controversy exists with respect to the surplus, the Trustee may pay the surplus into a court of competent jurisdiction in an interpleader action and all expenses of such action, including legal fees incurred by Beneficiary and Trustee, shall be paid from the surplus or, if the surplus is insufficient, by Grantor.

(e) Beneficiary, at its option, is authorized to foreclose this Deed of Trust subject to the rights of any tenants of the Property, and the failure to make any such tenants parties to any such foreclosure proceedings and to foreclose their rights will not be, nor be asserted to be by Grantor, a defense to any proceedings instituted by Beneficiary to collect the Indebtedness.

(f) At the request of Beneficiary, Trustee shall sell any personal property concurrently with and in conjunction with a sale of the Property or any portion thereof, in which case the provisions of this paragraph shall apply to the personal property as well as the Property. Grantor stipulates and agrees that a sale of any personal property in conjunction with the Property or any portion thereof is a commercially reasonable manner of disposing of the personal property. Alternatively, Beneficiary may sell or otherwise dispose of the personal property separately and apart from the Property in the time and manner provided by the Code.

2.06 Other Enforcement Rights. Beneficiary or Trustee shall have the right from time to time to enforce any legal or equitable remedy against Grantor, including, without limitation, suing for any sums, whether interest, principal or any installment of either or both, taxes, penalties or any other sums required to be paid under the terms of this Deed of Trust as the same become due, without regard to whether or not all of the Indebtedness shall then be due, and without prejudice to the right of the Beneficiary or Trustee to

thereafter enforce any other remedy, including, without limitation, an action of foreclosure, whether or not such other remedy be based upon a Default which existed at the time of commencement of an earlier or pending action, and whether or not such other remedy be based upon the same Default upon which an earlier or pending action is based.

2.07 Discontinuance of Proceedings. In case the Beneficiary or Trustee shall have proceeded to enforce any right, power or remedy under this Deed of Trust by foreclosure, entry or otherwise, and such proceeding shall have been withdrawn, discontinued or abandoned for any reason, or shall have been determined adversely to the Beneficiary or Trustee, then in every such case (i) Grantor, Beneficiary and Trustee shall be restored to their former positions and rights, (ii) all rights, powers and remedies of Beneficiary and Trustee shall continue as if no such proceeding had been taken, (iii) each and every Default declared or occurring prior or subsequent to such withdrawal, discontinuance or abandonment shall be deemed to be a continuing Default, and (iv) neither this Deed of Trust, nor the Indebtedness, nor any other of the Loan Documents shall be or shall be deemed to have been released or otherwise affected by such withdrawal, discontinuance or abandonment; and Grantor hereby expressly waives the benefit of any statute or rule of law now provided, or which may hereafter be provided, which would produce a result contrary to or in conflict with the above.

2.08 Remedies Cumulative. No right, power or remedy conferred upon or reserved to Beneficiary or Trustee by this Deed of Trust or any other Loan Document is intended to be exclusive of any other right, power or remedy, but each and every such right, power and remedy shall be cumulative and concurrent and shall be in addition to any other right, power and remedy given hereunder or now or hereafter existing at law or in equity or by statute.

2.09 Suits to Protect the Property. Beneficiary and Trustee shall have the power (i) to institute and maintain such suits and proceedings as it may deem expedient to prevent any impairment of the Property by any acts which may be unlawful or in violation of this Deed of Trust, (ii) to preserve or protect its interest in the Property and in the income, rents, issues, profits and revenues arising therefrom, and (iii) to restrain the enforcement of or compliance with any legislation or other governmental enactment, rule or order that may be unconstitutional or otherwise invalid, if the enforcement of or compliance with such enactment, rule or order would impair the security hereunder or be prejudicial to the interest of Beneficiary.

2.10 Beneficiary or Trustee May File Proofs of Claim. In the case of any receivership, insolvency, bankruptcy, reorganization, arrangement, adjustment, composition or other proceedings affecting Grantor, its creditors or its property, Beneficiary or Trustee, to the extent permitted by law, shall be entitled to file such proofs of claim and other documents as may be necessary or advisable in order to have the claims of Beneficiary allowed in such proceedings for the entire amount of the Indebtedness at the date of the institution of such proceedings and for any additional amount of the Indebtedness after such date.

2.11 Marshalling. At any foreclosure sale, the Property may, at Beneficiary's option, and to the extent permitted by law be offered for sale for one total price, and the proceeds of such sale accounted for in one account without distinction between the items of security or without assigning to them any proportion of such proceeds, Grantor hereby waiving the application of any doctrine of marshalling; and in case the Beneficiary or Trustee, in the exercise of the power of sale herein given, elects to sell the Property in parts or parcels, said sales may be held from time to time, and the power shall not be fully executed until all of the Property not previously sold shall have been sold.

2.12 Security Deposits. If Grantor shall obtain from a tenant or subtenant of the Property, or a part

thereof, a deposit to secure such tenant's or subtenant's obligations, such funds, following any default under this Deed of Trust, shall be deposited with Beneficiary in an account maintained by Beneficiary in its name; but any such deposit upon request by Beneficiary shall be returned to Grantor when required, by the terms of any such lease, sublease or occupancy agreement, to be paid over to the tenant or subtenant; and Grantor represents that the provisions of any applicable laws relating to security deposits have been satisfied with respect to each existing tenant, subtenant or occupant of the Property and agrees that they will be satisfied with respect to each new tenant, subtenant or occupant of the Property; and Grantor will furnish details of such satisfaction from time to time upon the request of Beneficiary in such detail as Beneficiary may require.

2.13 Waiver of Appraisalment, Valuation, Etc.. Grantor agrees, to the full extent permitted by law, that in case of a Default on the part of Grantor hereunder, neither Grantor nor anyone claiming through or under Grantor will set up, claim or seek to take advantage of any moratorium, reinstatement, forbearance, appraisalment, valuation, stay, extension, entitlement or exemption, or redemption laws now or hereafter in force, in order to prevent or hinder the enforcement or foreclosure of this Deed of Trust or the absolute sale of the Property or the delivery of possession thereof immediately after such sale to the purchaser at such sale, and Grantor, for itself and all who may at any time claim through or under it, hereby waives to the full extent that it may lawfully so do, the benefit of all such laws, and any and all right to have the assets subject to the security interest of this Deed of Trust marshalled upon any foreclosure and the right to a trial by jury.

ARTICLE III

3.01 Successors and Assigns. Subject to Paragraph 1.12(a) hereof, this Deed of Trust shall inure to the benefit of and be binding upon Grantor, Beneficiary and Trustee and their respective legal representatives, successors, and assigns. Whenever a reference is made in this Deed of Trust to the Grantor, Beneficiary or Trustee, such reference shall be deemed to include a reference to the heirs, devisees, legal representatives, successors, and assigns of the Grantor, Beneficiary or Trustee, whether so expressed or not.

3.02 Terminology. All personal pronouns used in this Deed of Trust whether used in the masculine, feminine, or neuter gender, shall include all other genders; the singular shall include the plural, and vice versa. Titles of Articles are for convenience only and neither limit nor amplify the provisions of this Deed of Trust itself, and all references herein to Articles, Paragraphs, or Subparagraphs shall refer to the corresponding Articles, Paragraphs, or Subparagraphs of this Deed of Trust.

3.03 Severability. If any provision of this Deed of Trust or the application thereof to any person or circumstance shall be invalid or unenforceable to any extent, the remainder of this Deed of Trust and the application of such provisions to other persons or circumstances shall not be affected thereby and shall be enforced to the greatest extent permitted by law.

3.04 Inconsistency with Credit Agreement; Applicable Law. The validity, construction and effect of this Deed of Trust shall be governed by the laws of the State of _____[state]; provided, however, in the event of any conflict between or inconsistency with the terms and provisions of this Deed of Trust and the Credit Agreement, the terms and provisions of the Credit Agreement shall control, unless such terms and conditions conflict with or are unenforceable under the law of the State of _____[state], in which event the law of the State of _____[state] shall apply.

3.05 Notices, Demands, and Requests. All notices, demands or requests provided for or permitted to be

given pursuant to this Deed of Trust shall be in writing and shall be delivered in person against receipt, or sent by registered or certified United States mail, postage prepaid, return receipt requested, or by recognized overnight courier, or by telex or telecopy to the addresses set out below or to such other addresses as are specified by no less than ten (10) days' prior written notice delivered in accordance herewith:

LENDER:

With a copy to:

BORROWER:

With a copy to:

TRUSTEE:

All such notices, demands and requests shall be deemed effectively given and delivered on the postmark date of mailing, the date of delivery to the overnight courier or, if delivered personally, when received. Rejection or other refusal to accept or the inability to deliver because of a changed address of which no notice was given shall be deemed to be receipt of the notice, demand, or request sent.

3.06 Consents and Approvals. All approvals and consents hereunder shall be in writing and no approval or consent shall be deemed to have been given hereunder unless evidenced in a writing signed by the party from whom the approval or consent is sought.

3.07 Waiver

(a) No delay or omission of Beneficiary the Trustee or of any holder of the Loan Documents to exercise any right, power or remedy accruing upon any default shall exhaust or impair any such right, power or remedy or shall be construed to be a waiver of any such default, or acquiescence therein; and every right, power and remedy given by this Deed of Trust to the Beneficiary or Trustee may be exercised from time to time and as often as may be deemed expedient by the Beneficiary or Trustee, as applicable. No consent or waiver, express or implied, by Beneficiary to or of

any breach or default by Grantor in the performance of the obligations hereunder shall be deemed or construed to be a consent or waiver to or of any other breach or default in the performance of the same or any other obligations of Grantor hereunder. Failure on the part of Beneficiary to complain of any act or failure to act or to declare an Event of Default, irrespective of how long such failure continues, shall not constitute a waiver by Beneficiary of the rights of the Beneficiary or Trustee hereunder or impair any rights, powers or remedies consequent on any breach or default by Grantor.

(b) Except as may otherwise be expressly agreed in connection therewith, if Beneficiary (i) grants forbearance or an extension of time for the payment of any sums secured hereby; (ii) takes other or additional security for the payment of any sums secured hereby; (iii) waives or does not exercise any right granted herein or in the Loan Documents; (iv) releases any part of the Property from the lien of this Deed of Trust or otherwise changes any of the terms, covenants, conditions or agreements of the Loan Documents or this Deed of Trust; (v) consents to the filing of any map, plat or replat affecting the Property; or (vi) makes or consents to any agreement subordinating the lien hereof, no such act or omission shall release, discharge, modify, change or affect the original liability under the Loan Documents, this Deed of Trust or any other obligation of Grantor or any subsequent purchaser of the Property or any part thereof, or any maker, co-signer, endorser, surety or guarantor; nor shall any such act or omission preclude Beneficiary from exercising any right, power or privilege herein granted or intended to be granted in the event of any default then made or of any subsequent default. In the event of the sale or transfer by operation of law or otherwise of all or any part of the Property, Beneficiary, without notice, is hereby authorized and empowered to deal with any such vendee or transferee with reference to the Property or the Indebtedness, or with reference to any of the terms, covenants, conditions or agreements hereof as fully and to the same extent as it might deal with the original parties hereto and without in any way releasing or discharging any liabilities, obligations or undertakings of Grantor.

3.08 Assignment. This Deed of Trust is assignable by Beneficiary, and any assignment hereof by Beneficiary shall operate to vest in the assignee all rights and powers herein conferred upon and granted to Beneficiary.

3.09 Attorneys' Fees. The terms "legal fees" or "attorneys' fees" or any other reference to the fees of attorneys or counsel, wherever used in this Deed of Trust, shall be deemed to mean reasonable legal fees or attorneys' fees, including reasonable fees of paralegals and all reasonable legal fees relating to litigation or appeals at any and all levels of courts and administrative tribunals.

3.10 Covenants Run with the Land. All of the grants, covenants, terms, provisions and conditions herein contained shall run with the land and shall apply to, bind and inure to the benefit of, the successors and assigns of the Grantor, Beneficiary and Trustee.

3.11 Future Advances; Maximum Principal Amount. This Deed of Trust is given for the purpose of securing all Indebtedness, including, without limitation, all loan advances and other extensions of credit which Beneficiary may make to or for Grantor or any Borrower pursuant and subject to the terms and provisions of the Credit Agreement, this Deed of Trust and/or the other Loan Documents. The parties hereto intend that, in addition to any other debt or obligation secured hereby, this Deed of Trust shall secure unpaid balances of loan advances and other extensions of credit made after this Deed of Trust is delivered to the office of the Clerk of _____ [county] County, _____ [state], whether made pursuant to an obligation of Beneficiary to make such advance or otherwise, and in such event, such advances and other extensions of credit shall be secured to the same extent as if such future advances were made on the date hereof, although there may be no advances or other extension of credit made at the time of execution hereof and although there may be no Indebtedness outstanding at the time any advance or other extension of credit is made. Except as otherwise set forth in this Credit Agreement, Beneficiary shall not be obligated to make any additional advance unless Beneficiary has agreed to do so in writing. Such loan advances or other extension of credit may or may not be evidenced by the Loan Documents.

3.12 Other Advances and Disbursements. This Deed of Trust secures all advances or disbursements of Beneficiary with

respect to the Property for the payment of taxes, levies, assessments, insurance, insurance premiums or costs incurred in the protection of the Property.

3.13 Release and Satisfaction. Acquisition of the Property by Beneficiary shall not affect a merger of this Deed of Trust. Upon payment in full, as determined solely by Beneficiary, to Beneficiary in good and sufficient funds satisfactory in all respects to Beneficiary of all amounts due under each of the Loan Documents and the satisfaction, as determined solely by Beneficiary, of all terms, covenants, and conditions of each of the Loan Documents, Beneficiary shall cause Trustee to release this Deed of Trust.

3.14 Mortgage and/or Intangible Tax. Grantor shall, at its sole cost and expense, protect, defend, indemnify, release and hold harmless from and against any and all Losses imposed upon or incurred by or asserted against any Indemnified Parties and directly or indirectly arising out of or in any way relating to any tax on the making and/or recording of this Deed of Trust, the Note or any of the Other Security Documents.

3.15 Fixture Filing. This Deed of Trust constitutes a financing statement filed as a fixture filing with respect to any and all fixtures located on the Land.

3.16 Modification of Deed of Trust. No amendment to or modification of this Deed of Trust shall be valid or effective unless the same is in writing signed by and between Grantor and Beneficiary without necessity of joinder therein by Trustee.

ARTICLE IV

4.01 Concerning the Trustee. Trustee shall be under no duty to take any action hereunder except as expressly required hereunder or by law, or to perform any act which would involve Trustee in any expense or liability or to institute or defend any suit in respect hereof, unless properly indemnified to Trustee's reasonable satisfaction. Trustee, by acceptance of this Deed of Trust, covenants to perform and fulfill the trusts herein created, being liable, however, only for gross negligence or willful misconduct, and hereby waives any statutory fee and agrees to accept reasonable compensation, in lieu thereof, for any services rendered by Trustee in accordance with the terms hereof. Trustee may resign at any time upon giving thirty (30) days notice to Grantor and to Beneficiary. Beneficiary may remove Trustee (and any successor trustee) at any time or from time to time and select one or more successor trustees. In the event of the death, removal, resignation, refusal to act, or inability to act of Trustee, or in its sole discretion for any reason whatsoever Beneficiary may, without notice and without specifying any reason therefor and without applying to any court, select and appoint a successor trustee, by an instrument recorded wherever this Deed of Trust is recorded and all powers, rights, duties and authority of Trustee, as aforesaid, shall thereupon become vested in such successor. Such substitute trustee shall not be required to give bond for the faithful performance of the duties of Trustee hereunder unless required by Beneficiary. The procedure provided for in this paragraph for substitution of Trustee shall be in addition to and not in exclusion of any other provisions for substitution, by law or otherwise.

4.02 Trustee's Fees. Grantor shall pay all reasonable costs, fees and expenses incurred by Trustee and Trustee's agents and counsel in connection with the performance by Trustee of Trustee's duties hereunder and all such costs, fees and expenses shall be secured by this Deed of Trust.

4.03 Certain Rights. With the approval of Beneficiary, and without duplication of sums paid to Beneficiary, Trustee shall have the right to take any and all of the following actions: (i) to select, employ, and advise with counsel (who may be, but need not be, counsel for Beneficiary) upon any matters arising hereunder, including the preparation, execution, and interpretation of the Note, this Deed of Trust or the Other Security Documents, and shall be fully protected in relying as to legal matters on the advice of counsel, (ii) to execute any of the trusts and powers hereof and to perform any duty hereunder either

directly or through his/her agents or attorneys, (iii) to select and employ, in and about the execution of his/her duties hereunder, suitable accountants, engineers and other experts, agents and attorneys-in-fact, either corporate or individual, not regularly in the employ of Trustee, and Trustee shall not be answerable for any act, default, negligence, or misconduct of any such accountant, engineer or other expert, agent or attorney-in-fact, if selected with reasonable care, or for any error of judgment or act done by Trustee in good faith, or be otherwise responsible or accountable under any circumstances whatsoever, except for Trustee's gross negligence or bad faith, and (iv) any and all other lawful action as Beneficiary may instruct Trustee to take to protect or enforce Beneficiary's rights hereunder. Trustee shall not be personally liable in case of entry by Trustee, or anyone entering by virtue of the powers herein granted to Trustee, upon the Property for debts contracted for or liability or damages incurred in the management or operation of the Property. Trustee shall have the right to rely on any instrument, document, or signature authorizing or supporting an action taken or proposed to be taken by Trustee hereunder, believed by Trustee in good faith to be genuine. Trustee shall be entitled to reimbursement for actual expenses incurred by Trustee in the performance of Trustee's duties hereunder and to reasonable compensation for such of Trustee's services hereunder as shall be rendered.

4.04 Retention of Money. All moneys received by Trustee shall, until used or applied as herein provided, be held in trust for the purposes for which they were received, but need not be segregated in any manner from any other moneys (except to the extent required by applicable law) and Trustee shall be under no liability for interest on any moneys received by Trustee hereunder.

4.05 Perfection of Appointment. Should any deed, conveyance, or instrument of any nature be required from Grantor by any Trustee or substitute trustee to more fully and certainly vest in and confirm to the Trustee or substitute trustee such estates rights, powers, and duties, then, upon request by the Trustee or substitute trustee, any and all such deeds, conveyances and instruments shall be made, executed, acknowledged, and delivered and shall be caused to be recorded and/or filed by Grantor.

4.06 Succession Instruments. Any substitute trustee appointed pursuant to any of the provisions hereof shall, without any further act, deed, or conveyance, become vested with all the estates, properties, rights, powers, and trusts of its or his/her predecessor in the rights hereunder with like effect as if originally named as Trustee herein; but nevertheless, upon the written request of Beneficiary or of the substitute trustee, the Trustee ceasing to act shall execute and deliver any instrument transferring to such substitute trustee, upon the trusts herein expressed, all the estates, properties, rights, powers, and trusts of the Trustee so ceasing to act, and shall duly assign, transfer and deliver any of the property and moneys held by such Trustee to the substitute trustee so appointed in the Trustee's place.

IN WITNESS WHEREOF, Grantor has executed, and delivered this Deed of Trust the day, month and year first above written.

"GRANTOR/BORROWER"

a(n) _____ [state] _____ [entity]

By: _____

Print Name: _____

Title: _____

)
 STATE OF _____ [state]) SS:
 COUNTY OF _____ [county])

BEFORE ME, a Notary Public in and for said County and State, personally appeared _____ [name],
 a(n) _____ [state] _____ [entity], by _____ [name], its
 _____ [title], who acknowledged that _____ [he/she] did sign the foregoing
 instrument for and on behalf of said corporation, being thereunto duly authorized, and that the same is
 _____ [his/her] free act and deed individually and as such officers and the free act and deed of said
 _____ [entity].

IN TESTIMONY WHEREOF, I have hereunto set my hand and official seal at _____ [city],
 _____ [state], this _____ [day] day of _____ [month], _____ [year].

 Notary Public



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Current Legal Forms for Real Estate

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Current Legal Forms for Real Estate
Chapter 22 DEVELOPMENT AND SUBDIVISION
Part IV. FORMS
G. FINANCING

26-22 Current Legal Forms for Real Estate FORM 22.116

FORM 22.116 Construction loan deed of trust

COMMENT

In jurisdictions where the deed of trust rather than a mortgage is utilized to provide a security interest in real property, the lender should be afforded the same kinds of protection as those afforded a mortgagee in jurisdictions where a mortgage is the customary security device. The technique for establishing a deed of trust as the security interest is by a conveyance of the fee title by the owner of the fee to trustees designated by the lender. The terms of the trust are set forth in the deed of trust and are fundamentally the same as those contained in a mortgage. While this deed of trust secures a construction loan, the provisions necessarily included in the instrument in order adequately to protect the lender would be appropriate for a long-term security instrument as well.

FORM

THIS DEED OF TRUST is made _____[month] _____[day], _____[year], between _____[name], a(n) _____[state] _____, _____[entity] (the "Borrower"), and _____[name] and _____[name] (the "Trustees").

WHEREAS, the Borrower is indebted to _____[name], a(n) _____[state] _____, _____[entity] ("Trust Company", in the principal sum of _____ Dollars (\$_____), for money loaned, for which amount the Borrower has made and delivered a promissory note of even date herewith (the "Note"), payable to Trust Company, or order, on _____[month] _____[day], _____[year], at its office at _____[address], or at such other place as the holder may in writing direct, together with interest on the principal sum or so much thereof as shall at any time be advanced, at the rate of _____ percent

(_____%) per year, payable monthly on the first day of each month until the Note is paid in full, except that if any interest payment shall be due on a Saturday, Sunday, or public holiday the maker shall pay interest thereon to the next succeeding business day; and

WHEREAS, the Note provides that the principal sum evidenced by the Note shall become due and payable at the option of the holder thereof on the happening of any default or event by which, under the terms of this Deed of Trust or under the terms of the Construction Loan Agreement hereinafter referred to, such principal sum may or shall become due and payable; and that in any event such principal sum or so much thereof as shall have been advanced with interest thereon shall become immediately due and payable at the sole option of Trust Company, its successors and assigns, at any time subsequent to the earlier of (1) _____ [month] _____ [day], _____ [year], or (2) _____ (_____) days subsequent to the date of issuance of a permanent Certificate of Occupancy or an irrevocable temporary Certificate of Occupancy permitting use of the entire building to be erected pursuant to such Construction Loan Agreement; and

WHEREAS, the Borrower desires to secure the prompt payment of such principal and interest and the full performance of the covenants herein contained, as well as the prompt payment of principal and interest on any renewal, extension, or change of such Note, and any note given in substitution thereof, which renewal, extension, change, or substitution shall not impair in any manner the validity or priority of this Deed of Trust; and also to secure reimbursement to any Trustee acting hereunder and to any purchaser or grantee under any sale under the provisions of this Deed of Trust for all money which may be advanced as herein provided, and for all costs and expenses, including reasonable attorneys' fees, incurred or paid on account of any litigation at law or in equity which may arise in respect of this Deed of Trust, or the indebtedness, or the property herein mentioned, or obtaining possession of the property after any sale which may be made as hereinafter provided;

NOW, THEREFORE, under this Deed of Trust, the Borrower in consideration of the premises and _____ Dollars (\$_____) in lawful money to it in hand paid by the Trustees, the receipt of which, before the signing and delivery of these presents, is hereby acknowledged, does hereby grant and convey unto the Trustees, their successors and assigns, in trust in fee simple, property described on Exhibit A attached hereto, together with the improvements, including any building hereafter constructed or placed thereon, easements, rights, ways, and appurtenances, now or hereafter belonging thereto, hereinafter called the Property.

Together with all right, title, and interest of the Borrower in and to all machinery, apparatus, equipment, fittings, and fixtures of every kind and nature whatsoever, now owned or hereafter acquired by the Borrower and now or hereafter placed in, affixed to, or used in connection with the operation of, the Property. Such machinery, apparatus, equipment, fittings, and fixtures shall include, but not be limited to, all engines, furnaces, boilers, stokers, pumps, heaters, tanks, dynamos, motors, generators, fans, blowers, vents, switchboards, electrical equipment, heating, plumbing, lifting and ventilating apparatus, air cooling and air conditioning apparatus, gas and electrical fixtures, elevators, escalators, shades, awnings, screens, radiators, partitions, ducts, compressors, vacuum cleaning systems, call systems, and fire prevention and extinguishing apparatus. All of such machinery, apparatus, equipment, fittings, and fixtures are hereby understood and agreed to be part and parcel of the Property and appropriated to the use of the Property, whether affixed or annexed or not, and shall for the purposes of this Deed of Trust be deemed to be fixtures and accessory to the freehold and a part of the realty as between the parties hereto, and shall be deemed to be a portion of the security for the indebtedness herein mentioned and to be subject to this Deed of Trust, in and upon the following uses and trusts:

1. Borrower's Rights Absent Default. Until any default in the payment of any indebtedness hereby secured, or until the breach of any covenant herein contained, the Borrower, its successors and assigns, shall possess and enjoy the Property, and receive the rents, issues, and profits therefrom. Upon full payment of the Note, and any extension or renewal thereof, and interest thereon, and all sums advanced or expended as herein provided and all other proper costs, charges, expenses, commissions, and half-commissions, incurred at any time before a sale as hereinafter provided for, the Trustees shall release and reconvey the Property, at the Borrower's cost, to the Borrower, or to any party then claiming

through or under it.

2. Obligations of Borrower. The Borrower shall be required to do the following:

(a) In the event of the assessment or imposition of any tax, assessment, or other charge, not including income taxes, pursuant to any laws of the _____ [city], or any subdivision thereof, upon any holder of the Note or such holder's interest in the Property by reason of such indebtedness, or upon this Deed of Trust, or the debt secured hereby, or the note evidencing such indebtedness, as well as any specific mortgage tax or intangible tax now or hereafter imposed by law in such jurisdiction, such holder shall have the right to give written notice to the Borrower requiring the Borrower to pay the debt secured hereby within _____ (_____) days after receipt of such notice. The Borrower shall not be required to pay the debt secured hereby if it or its successors or assigns, without violation of usury laws, pays any such tax, assessment, or charge in full as it becomes due and payable.

(b) The Borrower shall pay the indebtedness secured hereby and the interest thereon at the time and in the manner provided in the Note. Upon default in such payment, the holder of the Note shall have the option to cause the whole indebtedness to become immediately due and payable.

(c) The Borrower shall keep the Property and the fixtures thereon constantly insured against loss or damage by fire and the casualties included under extended coverage and against loss by other casualty including, without limitation, war risk or war damage, if available, in amounts and under types of policies in companies satisfactory to the holder of the Note with losses payable to the holder in such form as the holder may require. The Borrower shall deliver such policy or policies with evidence of the payment of premiums thereon to such holder. In the event the Borrower shall at any time fail to perform such requirements, then such holder may cause the Property to be insured and may pay the premiums for such insurance, and any premium paid or expense incurred in so doing shall be secured by this Deed of Trust and shall be repaid with interest at the rate of _____ percent (_____) per year by the Borrower within _____ (_____) days after demand. The right of such holder to cause the Property to be insured and to pay any such premium shall not be construed to prevent it from exercising an option to cause the whole indebtedness hereby secured to become immediately due and payable upon such default. If, however, such holder shall exercise the right to cause the Property to be insured or to pay any such premium, such holder shall have the option to cause the whole indebtedness to become immediately due and payable only if repayment is not made as above provided. Such holder may, at its option, apply any insurance proceeds received to the payment of the indebtedness secured hereby or make such proceeds available to the Borrower for the replacement and repair of the Property, under such terms and conditions as it shall see fit.

(d) The Borrower shall pay all taxes, assessments, and charges that may be levied or assessed on or against the Property as the same become due and payable, and deliver official receipts to the holder of the Note on demand showing such payment to have been made. Upon default in such payment, the holder may, at its option, pay or cause to be paid the amount due, and such amount, with any expenses of payment, shall be secured by this Deed of Trust, and shall be repaid with interest at the rate of _____ percent (_____) per year by the Borrower within _____ (_____) days after demand. No such right of payment by the holder of the Note shall prevent it from exercising its option to cause the whole indebtedness hereby secured to become immediately due and payable upon such default. If, however, such holder shall pay the amount due, it shall have the option to cause the whole indebtedness to become immediately due and payable only if repayment thereof is not made as above provided.

(e) The Borrower shall at all times maintain the Property and the fixtures thereon in good order and repair, and shall not commit any waste or injury to such an extent as to impair the value of the same as security for the debt. Upon the failure of the Borrower to perform this requirement, or upon actual or threatened demolition or removal of the building hereafter constructed or placed on the Property or the fixtures or any part thereof, the whole indebtedness hereby secured shall become immediately due and payable at the option of the holder of the Note.

(f) The Borrower shall comply with the requirements of all laws and regulations in force in the _____ [city] or any subdivision thereof and with all orders, decrees, or requirements of all governmental bodies having jurisdiction over, or with respect to, the Property. The Borrower may, however, after written notice to the holder of the Note, contest any such law, regulation, order, decree, or requirement, in any reasonable manner which will not affect the title of the Trustees to any part of the Property, or the lien of this Deed of Trust, or the maintenance of that standard of physical condition of the Property which is provided for in subparagraph (e) of this paragraph.

3. Dispossession of Borrower. Upon default by the Borrower in the performance of any requirement provided for in this Deed of Trust or in the Note secured hereby which under this Deed of Trust gives the holder of the Note the option to cause the whole indebtedness to become immediately due and payable, the Trustees, at the written request of such holder, shall have the right forthwith, after any such default, to enter upon and take possession of the Property, to let the Property and to receive all the rents, issues, and profits therefrom which are overdue, due, or to become due, and to apply the same after payment of all necessary charges and expenses against the balance of the then remaining indebtedness hereby secured. For this purpose, such rents and profits are, in the event of any such default, hereby assigned as security to the Trustees. The Borrower or any subsequent owner of the Property shall in such event pay to the Trustees, in advance, a reasonable rent for the property occupied by them. In default of such payment, the Borrower or such subsequent owner may be dispossessed by the usual summary proceedings. Any tenant defaulting in the payment to the Trustees of any rent may be likewise dispossessed. This covenant becomes effective either without or with any action brought to foreclose this Deed of Trust and without applying at any time for a receiver of such rents. Such collection and application of rents shall in no manner be taken or held to interfere with or abridge the power of sale and disposition granted to the Trustees by this instrument, nor shall such collection and application of rents in any manner at law or in equity discharge or relieve the Borrower, its successors or assigns, from the full payment of the balance of the indebtedness hereby secured, in strict accordance with the terms hereof and of the Note hereby secured.

4. Sale upon Borrower's Default. Upon default by the Borrower in the performance of any requirement provided for in this Deed of Trust or in the Note secured hereby which under this Deed of Trust gives the holder of the Note the option to cause the whole indebtedness to become immediately due and payable, the Trustees, at the written request of such holder, may sell the Property at public auction, at such time and place, upon such terms and conditions and after such previous public notice, and with such postponement of sale or resale as to the Trustees shall seem best for the interests of all parties concerned. The Trustees shall convey fee simple title to the purchaser in such sale, and the purchaser shall be discharged from all liability for the application of the purchase money. The Trustees shall apply the proceeds of the sale, after paying all expenses of the sale, all taxes and assessments thereon due, all sums advanced as herein provided for, with interest as above set forth, and a Trustees' commission of 1 percent on the gross amount of the sale, to the payment of the then remaining indebtedness hereby secured whether then due or not, and the interest thereon to the date of payment. Any proceeds of the sale in excess of the amount so applied, less the expenses, if any, of obtaining possession of the Property, shall be paid to the Borrower, its successors and assigns, upon the surrender and delivery to the purchaser of possession of the Property so sold and conveyed. If the Property shall be advertised for sale as provided in this paragraph and not sold, the Trustees shall be entitled to one-half of the above commission to be computed on the amount of the debt then remaining indebtedness.

5. Trustees. The irrevocable power to appoint a substitute Trustee or Trustees hereunder is expressly granted to the holder of the Note, to be exercised at any time, without notice and without specifying any reason therefor, by filing, for record in the office where this instrument is recorded, a deed of appointment. Such power of appointment of a successor Trustee or Trustees may be exercised as often and whenever such holder deems it advisable. Upon the recording of such deed or deeds of appointment, the Trustee or Trustees so appointed shall thereupon without any further act or deed or conveyance become fully vested with identically the same title and estate in and to the Property with all the rights, powers, trusts, and duties of their, his, or its predecessor hereunder, with like effect as if such Trustee or Trustees were originally named as trustee or trustees hereunder. Whenever in this Deed of Trust reference is made to the Trustee or Trustees, it shall be construed to mean the Trustee or Trustees for the time being, whether original or successor or

successors in the trust.

6. Condemnation. Should all or any part of the Property conveyed hereby be condemned or taken through eminent domain proceedings, all such part of any award or proceeds derived from such proceedings, as the holder of the Note in its sole discretion may determine, shall be paid to such holder and applied against the then remaining indebtedness hereby secured, and all such proceeds are hereby assigned to such holder to the extent of the then remaining indebtedness hereby secured.

7. Renewal, Extension, Waiver. The holder of the Note, at its option, may at any time renew or extend this Deed of Trust or the Note secured hereby, or alter or modify the same in any way and (except to the detriment of the Borrower) may waive any of the covenants and conditions of the Note or this Deed of Trust in whole or in part either at the request of the Borrower or of any other person then having an interest in the Property or in any way liable on the indebtedness secured hereby; take other security for the indebtedness or release any portion of the Property, or release any party primarily or secondarily liable on the Note; grant such extensions or indulgences in relation to the Note and this Deed of Trust and the payment thereof; and apply to the principal or interest of the indebtedness secured hereby any part or all of the proceeds obtained by sale or otherwise as herein provided, without resort or regard to other security. Such waivers, renewals, extensions, or other indulgences may be granted without in any way releasing the Borrower from any covenant, agreement, or condition of the Note or this Deed of Trust, or affecting the lien of this Deed of Trust on all Property covered hereby and not specifically released.

8. Subordinate Liens. If the Borrower shall grant any lien on the Property subordinate to this Deed of Trust, such subordinate lien shall be subject to the condition that the time for the payment of the indebtedness hereby secured and the manner and amount of payment thereof, and the benefits of the security afforded hereby and by the Note, or any obligation substituted for the Note, may, without the consent of such subordinate lienor, and without any obligation to give notice of any kind thereto, be extended, re-extended, or suspended on any terms whatsoever without in any manner affecting the priority of the lien hereby created, as security for the payment of the indebtedness secured hereby.

9. Attornment. If the Borrower has leased the Property or any part thereof, any such lease shall be subject to the condition that, in the event of any foreclosure sale hereunder, such lease shall continue in full force and effect and the tenant thereunder will, upon request, attorn to and acknowledge the foreclosure purchaser as landlord, unless the holder of the Note, or such foreclosure purchaser or the Trustees hereunder, shall, at or prior to the time of such sale or within _____ (_____) days thereafter, notify the tenant in writing to vacate and surrender the leased premises within _____ (_____) days from the date of sale. In the event of such notice, any such lease shall fully terminate and expire at the end of such _____ day period. The holder of the Note hereby consents to the creation of such leases subject to such condition.

10. Incorporation of Construction Loan Agreement. This Deed of Trust and the Note secured hereby are executed and delivered to secure moneys advanced or to be advanced in accordance with a Construction Loan Agreement of even date herewith between the Borrower and Trust Company, which Construction Loan Agreement is incorporated herein by this reference. Failure by the Borrower to carry on or complete the construction of improvements in accordance with such Construction Loan Agreement or any other default by the Borrower under such Construction Loan Agreement shall constitute a default under this Deed of Trust and the holder of the Note may at its option cause the entire indebtedness secured by this Deed of Trust to become immediately due and payable. In the event of such default by the Borrower, and whether or not such holder shall cause the indebtedness secured hereby to become immediately due and payable, the Trustees at the written request of such holder, after due notice to the Borrower, may enter upon the Property, employ watchmen to protect the improvements thereon from theft or injury, continue all outstanding contracts for the erection and completion of improvements, enter into any further contracts and obligations wherever necessary, either in their own name as Trustees hereunder or in the name of the Borrower, and pay all debts, obligations, and liabilities incurred thereby. All sums so advanced by the Trustees or by such holder and all sums advanced under such Construction Loan Agreement shall be secured by this Deed of Trust and, to the extent they shall not be included in the

principal amount of the indebtedness secured hereby, shall be due and payable on demand with interest at the rate of _____ percent (_____) per year.

11. Deferral of Tax Payments. Notwithstanding any other provisions of this Deed of Trust, the Borrower, upon giving to the holder of the Note written notice, shall have the right to defer payment of any tax or assessment levied or imposed against the Property so long as the Borrower shall in good faith and with due diligence at its own expense contest the validity thereof by appropriate legal proceedings. Pending any such legal contest, such holder shall not have the right to pay or discharge such taxes or assessments thereby contested unless such payment is necessary to protect the title to the Property. Such delay by the Borrower in paying the same until final determination of such disputed matter shall not be deemed a default in the performance of the conditions of this Deed of Trust; provided that upon such final determination the Borrower pays such tax or assessment as finally determined together with penalties and interest, if any, thereon; and provided further that on demand of such holder the Borrower shall furnish indemnity satisfactory to such holder against loss or damage on account thereof.

12. Notice. Any notice or demand that may be given or made hereunder or with reference to this Deed of Trust shall be sufficient notice or demand if mailed, postage prepaid, addressed to the Borrower at _____ [address], and to the Trust Company at _____ [address]. Such notices shall be considered to have been given at the time they are deposited in any letter box or post office of the United States Government.

13. Binding Effect. All provisions, covenants, and agreements contained in this Deed of Trust shall bind, inure to the benefit of, and equally relate to the Borrower, its successors and assigns, and any other succeeding owners of the Property jointly and severally, and the Trustees, the survivor of them or substituted Trustees or Trustee, or other successor or successors in trust and those claiming by, through, or under them. The provisions herein relating to the Trust Company shall equally relate to its successors and assigns or other holder or holders of the Note secured hereby, including any endorsee, assignee, or pledgee of the Note receiving title thereto by or through Trust Company, its successors or assigns.

14. Warranty of Title. The Borrower warrants specially the Property hereby conveyed, and that it shall execute such further assurances with respect to the Property as may be requisite or necessary for vesting title in the Trustees or Trustee acting hereunder for the time being, in and upon the same trusts hereinbefore declared.

IN WITNESS WHEREOF, the Borrower has caused these presents to be executed in its corporate name as of the day, month, and year first hereinabove written.

"BORROWER"

a(n) _____ [state] _____ [entity]

By: _____

Print Name: _____

Title: _____



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26-22 Current Legal Forms for Real Estate FORM 22.117

FORM 22.117 Consent of mortgagee to declaration

COMMENT

Occasionally, it may be necessary or helpful to file a declaration on property which is subject to a mortgage. In this scenario, the mortgage should be made subordinate to the declarations. If it is not subordinated, then a foreclosure of the mortgage would have the potential to cancel the declarations. Under the normal scenario, as each unit is sold, the mortgagee will agree to release the unit. The following consent is very simple and it can be attached to the declaration before it is filed.

FORM

The undersigned _____ [lender] is the mortgagee of the property described in the foregoing Declaration (the "Declarant" by virtue of a certain Mortgage Deed filed in the mortgage records of the Recorder of _____ [county], _____ [state], in Volume _____ [number], Page _____ [number] (the "Mortgage"). The undersigned hereby consents to the Declarant and to the filing thereof in the Office of the County Recorder of _____ [county], _____ [state], and further, subjects and subordinates the Mortgage to such Declaration and the Drawings attached thereto, and to the provisions of Chapter _____ of the _____ [state] Code. This consent is not a release of the Mortgage, nor is it a waiver of the priority or validity of the Mortgage as it relates to any other agreement, encumbrance, lien, reservation, restriction or condition affecting the Property.

"LENDER"

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a(n) _____ [state] _____ [entity]

By: _____

Print Name: _____

Title: _____

 STATE OF _____ [state])
 COUNTY OF _____ [county]) SS:

BEFORE ME, a Notary Public in and for said County and State, personally appeared _____ [name],
 a(n) _____ [state] _____ [entity], by _____ [name], its
 _____ [title], who acknowledged that _____ [he/she] did sign the foregoing
 instrument for and on behalf of said corporation, being thereunto duly authorized, and that the same is
 _____ [his/her] free act and deed individually and as such officers and the free act and deed of said
 _____ [entity].

IN TESTIMONY WHEREOF, I have hereunto set my hand and official seal at _____ [city],
 _____ [state], this _____ [day] day of _____ [month], _____ [year].

 Notary Public



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26-22 Current Legal Forms for Real Estate FORM 22.118

FORM 22.118 Assignment of Mortgage

COMMENT

Often the permanent lender may elect to take an assignment of the prior mortgage. It may do this in order to avoid the costs associated with filing a new mortgage or in order to obtain the priority of the prior mortgage. The following is a simple assignment which is intended to be filed with the recording offices to reflect the owner of the mortgage.

FORM

KNOW ALL MEN BY THESE PRESENTS, that _____ [name] ("Assignor"), for the consideration of _____ Dollars (\$ _____) and other valuable considerations it has received to its full satisfaction of _____ [name] (the "Assignee"), does hereby sell, assign, transfer and set over to Assignee, its successors and assigns, all of its right, title and interest in and to a certain Open-End Mortgage Deed executed and delivered by _____ [name] as of _____ [month] _____ [day], _____ [year] and recorded in Volume _____ [number], Page _____ [number] of _____ [county] County, _____ [state] Records.

IN WITNESS WHEREOF, Assignor has caused this Assignment of Open-End Mortgage Deed to be executed this _____ [day] day of _____ [month], _____ [year].

"ASSIGNOR"

a(n) _____ [state] _____ [entity]

By: _____

Print Name: _____

Title: _____

STATE OF _____ [state])
COUNTY OF _____ [county]) SS:

BEFORE ME, a Notary Public in and for said County and State, personally appeared _____ [name], a(n)
_____ [state] _____ [entity], by _____ [name], its
_____ [title], who acknowledged that _____ [he/she] did sign the foregoing
instrument for and on behalf of said corporation, being thereunto duly authorized, and that the same is
_____ [his/her] free act and deed individually and as such officers and the free act and deed of said
_____ [entity].

IN TESTIMONY WHEREOF, I have hereunto set my hand and official seal at _____ [city],
_____ [state], this _____ [day] day of _____ [month], _____ [year].

Notary Public



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FORM 22.119 Partial Release of Mortgage

COMMENT

In the case where a borrower is going to obtain a release of the mortgage as lots are sold, the lender must execute and file a document that evidences the release from the mortgage.

FORM

THIS IS TO CERTIFY, That the property described on the attached Exhibit A is hereby released from the mortgage filed with the _____ [county] County Recorder's Office dated _____ [month] _____ [day], _____ [year] bearing document No. _____ (the "Mortgage") given by _____ [name]. This Partial Release shall not invalidate the Mortgage as a lien on the land not being specifically released and shall not affect the priority of the Mortgage.

Signed this _____ [day] day of _____ [month], _____ [year].

"BORROWER"

a(n) _____ [state] _____ [entity]

By: _____

Print Name: _____

Title: _____

 STATE OF _____ [state]) SS:
 COUNTY OF _____ [county])

BEFORE ME, a Notary Public in and for said County and State, personally appeared _____ [name],
 a(n) _____ [state] _____ [entity], by _____ [name], its
 _____ [title], who acknowledged that _____ [he/she] did sign the foregoing instrument
 for and on behalf of said corporation, being thereunto duly authorized, and that the same is
 _____ [his/her] free act and deed individually and as such officers and the free act and deed of said
 _____ [entity].

IN TESTIMONY WHEREOF, I have hereunto set my hand and official seal at _____ [city],
 _____ [state], this _____ [day] day of _____ [month], _____ [year].

 Notary Public



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26-22 Current Legal Forms for Real Estate FORM 22.120

FORM 22.120 Complete Release of Mortgage

COMMENT

Obviously, when a mortgage has been satisfied, either because it has been paid by the borrower or it is being refinanced, the prior mortgage must be released.

FORM

SATISFACTION OF MORTGAGE

THIS IS TO CERTIFY, That the conditions of a certain mortgage bearing date of _____[month]
_____[day], _____[year], given by _____[name] to secure the payment of
_____ Dollars (\$_____) and recorded in Volume _____[number]
Page _____[number] of _____[county] County Records, has been fully complied
with and the same is hereby satisfied and discharged. The undersigned hereby authorizes the Recorder of
_____ [county] County, _____ [state] to discharge the same of record.

Signed this _____[day] day of _____[month], _____[year].

"BORROWER"

a(n) _____ [state] _____ [entity]

26-22 Current Legal Forms for Real Estate FORM 22.120

By: _____

Print Name: _____

Title: _____

 STATE OF _____ [state])
 COUNTY OF _____ [county]) SS:

BEFORE ME, a Notary Public in and for said County and State, personally appeared _____ [name], a(n)
 _____ [state] _____ [entity], by _____ [name], its
 _____ [title], who acknowledged that _____ [he/she] did sign the foregoing instrument
 for and on behalf of said corporation, being thereunto duly authorized, and that the same is
 _____ [his/her] free act and deed individually and as such officers and the free act and deed of said
 _____ [entity].

IN TESTIMONY WHEREOF, I have hereunto set my hand and official seal at _____ [city],
 _____ [state], this _____ [day] day of _____ [month], _____ [year].

 Notary Public



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FORM 22.121 Commercial note

COMMENT

The note provides for an adjustable interest rate that is tied to the prime lending rate. The interest rate adjusts immediately in response to fluctuations in the prime. The borrower "draws down" (i.e., receives gradual disbursements of loan funds) on the note pursuant to a building loan agreement already executed by the lender and the borrower.

The lender should carefully review the developer's title to the property before each disbursement is made in order to be certain that no intervening liens have been filed against the property. Such liens may take precedence over the lender's right to be repaid for any disbursements made after the liens were filed.

FORM

PROMISSORY NOTE

\$ _____

_____ [city], _____ [county],
_____ [state]
_____ [month] _____ [day],
_____ [year]

FOR VALUE RECEIVED, the undersigned ("Makers") jointly and severally promise to pay to the order of _____ [name] (the "Lender") the sum of _____ Dollars (\$ _____),

with interest at the prime rate as announced from time to time in the Financial Section of the *Wall Street Journal* on the unpaid principal balance. With each announced change in the prime rate, the interest payable herein shall be adjusted. Interest shall be payable in arrears on a monthly basis until _____[month] _____[day], _____[year]. Principal and interest shall be payable in _____ (_____) equal monthly installments of _____ Dollars (\$_____) each, commencing on _____[month] _____[day], _____[year] and continuing on the first (1st) day of each month thereafter until this Note is paid in full. All principal and accrued interest shall be paid in full no later than _____[month] _____[day], _____[year].

The Lender shall make advances to Makers hereunder pursuant to the terms and conditions of that certain Construction Loan and Security Agreement between Makers and Lender of even date.

If an installment of principal or interest is not paid when due, then the Makers or endorsers shall pay to the holder hereof a late fee equal to _____ percent (_____) of the amount of the late payment as liquidated damages, such amount being stipulated to by the Makers as the amount necessary to compensate the holder for the holder's reasonable damages. Such late fee shall be immediately payable. All payments made hereunder shall be applied first to accrued late fees, then to accrued interest, then to principal. Notwithstanding any claim, demand or judgments that Makers, or any one or more of them, may have against the holder hereof (or any person or entity related thereto), Makers are and shall be prohibited from setting off any such amount from the amount due hereunder without a court order for same.

This Note may be prepaid in whole or in part at any time or times without penalty. All prepayments shall be applied first against accrued late fees, then against accrued interest, then against the installments of principal payable hereunder in the inverse order of maturity. Any such prepayment shall not defer, delay or excuse the payment of any subsequent installments due hereunder. The Makers represent that this debt arose in a business transaction. This Note is secured by a Mortgage of even date given by the Makers to the initial holder hereof.

In the event of non-payment of any installment (either principal, interest or the late fee) when due, or upon a default under the Purchase Money Mortgage Deed or upon the insolvency of any of the undersigned, the entire balance of principal then remaining unpaid, plus accrued interest and accrued late fees, shall at once become due and payable at the option of the holder hereof, without notice or demand. Failure to exercise any right contained in this Note by the holder shall not constitute a waiver of the right to exercise such right in the event of any subsequent default.

Commencing upon a default hereunder, the entire principal balance outstanding, plus accrued interest and late fees, shall thereafter accrue interest at the rate of _____ percent (_____) per annum in excess of the interest rate provided for hereinabove. If Makers shall default under the terms of this Note, Makers hereby agree to pay and/or reimburse the holder hereof for any costs, expenses and/or fees (including, but not limited to, reasonable attorneys fees) which the holder hereof incurs in enforcing the terms of this Note and collecting the underlying indebtedness.

In case one or more of the provisions contained herein shall for any reason be unenforceable, invalid or illegal in any respect, such unenforceability, invalidity or illegality shall not affect any other provisions of this Note, but this Note shall be construed as if such unenforceable, invalid or illegal provisions had not been contained herein or if it is equitable under the circumstances, such unenforceable, invalid or illegal provisions shall be reformed, amended and/or construed so as to be enforceable, valid or legal. Nothing contained in this Note shall be construed to require Makers, or any endorsers to pay interest at an amount or at a rate that is greater than the highest rate permitted by law. If any interest or other charges paid by Makers or any endorser result in the computation of interest in excess of the highest rate permissible, then such excess is hereby waived (if such excess has not been paid), or if the excess has been paid, then it shall be treated as a reduction in principal. This Note shall be construed and given effect in accordance with the laws of the State of _____[state].

The Makers and endorsers hereof hereby waive presentment, demand, notice of dishonor, protest and notice of non-payment and protest. Each of the undersigned has executed this instrument in the capacity of maker, regardless of the location of his signature.

Printed Name: _____

Social Security No. _____

Printed Name: _____

Social Security No. _____



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26-22 Current Legal Forms for Real Estate FORM 22.122

FORM 22.122 Mortgage Note (Construction Loan)

This is a standard note. The note itself is designed to be short and simple. It incorporates the terms of loan agreement, including the circumstances under which the lender may declare a default, and accelerate the outstanding balance. This note contains confess judgment procedures.

WARNING--BY SIGNING THIS PAPER, YOU GIVE UP YOUR RIGHT TO NOTICE AND COURT TRIAL. IF YOU DO NOT PAY ON TIME, A COURT JUDGMENT MAY BE TAKEN AGAINST YOU WITHOUT YOUR PRIOR KNOWLEDGE AND THE POWERS OF A COURT CAN BE USED TO COLLECT FROM YOU REGARDLESS OF ANY CLAIMS YOU MAY HAVE AGAINST THE CREDITOR WHETHER FOR RETURNED GOODS, FAULTY GOODS, FAILURE ON HIS PART TO COMPLY WITH THE AGREEMENT OR ANY OTHER CAUSE.

FORM

\$ _____

_____, [city], _____ [county],
_____, [state]
_____, [month] _____ [day],
_____, [year]
(Effective Date)

FOR VALUE RECEIVED, _____ [name], a(n) _____ [state]
_____, [entity] (the "Borrower") hereby promises to pay to the order of _____ [name],
a(n) _____ [state] _____ [entity] ("Bank"), the principal sum of _____
Dollars (\$ _____) as such may be advanced by the Bank pursuant to the terms of the Construction
Loan and Security Agreement of even date herewith by and between the Borrower and the Bank, as same may be

amended from time to time (the "Loan Agreement"), together with interest accrued on the unpaid principal balance from the date hereof at the interest rate as described below subject to adjustment.

The principal balance outstanding hereunder, will bear interest from the date of the first advance at a floating rate of interest equal to _____ percent (_____) in excess of the Prime Rate (as defined below) of Bank in effect from time to time and shall remain in effect until _____[month] _____[day], _____[year]. Interest shall be calculated based on a 360-day year and charged for the actual number of days elapsed. Interest will be payable on the first (1st) day of each calendar month during the term hereof. Borrower hereby authorizes Bank to automatically withdraw payments due hereunder from Borrower's bank account at Bank. After maturity, whether by acceleration or otherwise, the Note will bear interest (computed and adjusted in the same manner, and with the same effect, as interest hereon prior to maturity) payable on demand, at a rate per annum equal to the Default Rate, until paid, and whether before or after the entry of judgment hereon.

Accrued and unpaid interest will be due and payable monthly commencing _____[month] _____[day], _____[year] and continuing on the first (1st) day of each calendar month thereafter during the term hereof.

So long as no Event of Default has occurred, Borrower may request advances hereunder until the Maturity Date, on which date Borrower's right to obtain advances hereunder shall terminate.

"Prime Rate" means the rate of interest per annum announced to be its prime rate from time to time by Bank at its principal office in _____[city], _____[state], whether or not Bank will at times lend to borrowers at lower rates of interest or, if there is no such prime rate, then its base rate or such other rate as may be substituted by Bank for the prime rate.

Bank may charge and Borrower agrees to pay a note processing fee of _____ Dollars (\$_____) on the Effective Date of this Note.

The principal amount of each loan made by Bank under this Note and the amount of each prepayment made by Borrower will be recorded in the regularly maintained data processing records of Bank. The aggregate unpaid principal amount of all loans set forth in such records will be presumptive evidence of the principal amount owing and unpaid on this Note. However, failure by Bank to make such entry will not limit or otherwise affect Borrower's Obligations under this Note or the Loan Agreement.

This Note may be prepaid in part or in full at any time without premium or penalty. Any prepayments under this Note in advance of any amortized payments will be applied to reduce the outstanding principal amount of this Note in the inverse chronological order of maturity. To do so, Borrower must give written notice to Bank of its intention to prepay this Note in full or in part pursuant to this paragraph and shall specify therein the principal amount to be prepaid and the date on which such prepayment shall occur.

In no event will the interest rate on this Note exceed the highest rate permissible under any law which a court of competent jurisdiction will, in a final determination, deem applicable hereto. In the event that a court determines that Bank has received interest and other charges under this Note in excess of the highest permissible rate applicable hereto, such excess will be deemed received on account of, and will automatically be applied to reduce the amounts due to Bank from Borrower under this Note, other than interest, and the provisions hereof will be deemed amended to provide for the highest permissible rate. If there are no such amounts outstanding, Bank will refund to Borrower such excess.

If any payment of principal is paid more than ten (10) days after its due date (whether by acceleration or otherwise), Borrower agrees to pay to Bank a late payment fee equal to five percent (5%) of the monthly payment amount then due.

Such late fee shall be immediately payable. Further, in the event that an Event of Default occurs (as defined in the Loan Agreement), the Bank may declare all amounts outstanding hereunder to be immediately due and payable.

All payments received by Bank will be applied first to payment of amounts advanced by Bank on behalf of Borrower, which may be due for insurance, taxes and attorneys' fees or other charges to be paid by Borrower pursuant to the Mortgages or the Loan Agreement, then to accrued interest due on this Note, then to principal, which will be repaid in the inverse order of maturity.

Borrower and all endorsers, sureties, guarantors and other persons liable on this Note hereby waive presentment for payment, demand, notice of dishonor, notice of protest and all other notices in connection with the delivery, performance and enforcement of this Note, and consent to one or more renewals or extensions of this Note.

This Note may not be changed orally, but only by an instrument in writing.

This Note is being delivered in, is intended to be performed in, will be construed and enforceable in accordance with, and governed by the internal laws of the State of _____ [state] without regard to principles or conflicts of law. Borrower agrees that the State and Federal courts in _____ [county] County, _____ [state] will have exclusive jurisdiction over all matters arising out of this Note, and that service of process in any such proceeding will be effective if mailed to Borrower at its address described in the Notices section of the Loan Agreement. BORROWER HEREBY WAIVES THE RIGHT TO TRIAL BY JURY OF ANY MATTERS ARISING OUT OF THIS NOTE.

Borrower authorizes any attorney of record to appear for it in any court of record in the State of _____ [state], after an Obligation becomes due and payable whether by its terms or upon default, waives the issuance and service of process, releases all errors and rights of appeal, and confesses a judgment against it in favor of the holder of such Obligation, for the principal amount of such Obligation plus interest thereon, together with court costs and attorneys' fees. State of Execution and all exemptions are hereby waived. Borrower also agrees that the attorney acting for Borrower as set forth in this paragraph may be compensated by Bank for such services, and Borrower waives any conflict of interest caused by such representation and compensation arrangement. If an Obligation is referred to an attorney for collection, and the payment is obtained without the entry of a judgment, the obligors will pay to the holder of such Obligation its attorneys' fees.

WARNING

-- BY SIGNING THIS PAPER, YOU GIVE UP YOUR RIGHT TO NOTICE AND COURT TRIAL. IF YOU DO NOT PAY ON TIME, A COURT JUDGMENT MAY BE TAKEN AGAINST YOU WITHOUT YOUR PRIOR KNOWLEDGE AND THE POWERS OF A COURT CAN BE USED TO COLLECT FROM YOU REGARDLESS OF ANY CLAIMS YOU MAY HAVE AGAINST THE CREDITOR WHETHER FOR RETURNED GOODS, FAULTY GOODS, FAILURE ON HIS PART TO COMPLY WITH THE AGREEMENT OR ANY OTHER CAUSE.

"BORROWER"

a(n) _____ [state] _____ [entity]

By: _____

Print Name: _____

Title: _____

"BANK"

a(n) _____ [state] _____ [entity]

By: _____

Print Name: _____

Title: _____



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26-22 Current Legal Forms for Real Estate FORM 22.123

FORM 22.123 Note--arrangement for partial release of portions of mortgaged property

COMMENT

This note is intended to relate to a purchase money mortgage. It refers to the provision of the purchase money mortgage which requires the holder of the note to release all portion of the property from the purchase money mortgage. Additionally, this note is a non-recourse note and the holder's right to collect is expressly limited to the mortgage property

FORM

\$ _____

_____ [city], _____ [state]

After date, for value received, we promise to pay to the order of _____ [name],
a(n) _____ [state] _____ [entity], the sum of _____ Dollars
(\$ _____), payable in quarter-annual installments of _____ Dollars
(\$ _____) each, beginning on a day which is three months from and after the date hereof, and on the
same day of each third month thereafter, with a final installment, consisting of the then unpaid balance of principal,
coming due on a day which is _____ (_____) years after the date hereof; together
with interest on the within note from and after the date hereof at the rate of _____ percent
(_____) per year, with interest payable quarter-annually from and after the date hereof and with
interest computed always on the diminishing and unpaid principal balances of the debt evidenced hereby. All sums of
principal and interest coming due hereunder shall be payable at: _____ [name]
_____ [address], or at such other place in _____ [county] County,
_____ [state], as the payee or holder may specify in writing from time to time.

The failure of the maker to pay any installment of principal and interest as and when it matures, with such failure continuing uncured for _____ (_____) days after such maturity date, shall confer upon the payee or holder the privilege or option, then or thereafter to be exercised while such default continues uncured, to accelerate and call due the entire amount of principal and interest evidenced hereby which is unpaid, anything in the within note to the contrary notwithstanding.

The indebtedness evidenced hereby may be prepaid in whole or in part at any time without penalty or premium for such prepayment.

This note is secured by a mortgage given under even date herewith; and all persons to whom these presents may come are referred to the mortgage for its effect upon the within note and the application of the amounts paid pursuant to the mortgage, for the procuring of releases of property from its lien, upon the indebtedness evidenced hereby. Specifically, reference is made to the fact that, as set forth in paragraph 10(a) of such mortgage, the rights of the Mortgagee are limited to the security the mortgage encumbers. There is no personal liability on and no personal judgment may ever be sought or obtained by reason of this note and its execution.

The maker shall waive demand, presentment for payment, protest, and notice of nonpayment and of dishonor. If by reason of default in the payment of the note it becomes necessary for the payee or holder to employ an attorney to enforce the mortgage which secures this note, then there shall be included in the debt evidenced hereby and secured by the mortgage all court costs and attorney's fees reasonably incurred or expended by the payee or holder in effecting such enforcement by reason of such default; provided that court costs or attorney's fees shall not be included in the debt unless the default continues uncured throughout the acceleration period of _____ (_____) days hereinabove set forth.

"BORROWER"

a(n) _____ [state] _____ [entity]

By: _____

Print Name: _____

Title: _____



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26-22 Current Legal Forms for Real Estate FORM 22.124

FORM 22.124 Transaction Guaranty--individual

COMMENT

In many cases, the lender will require the owners of the borrower to personally guaranty the repayment of the loan. Obviously, most owners resist pledging their personal credit. However, if faced with giving a personal guaranty or not obtaining the loan, many owners will give the guaranty. The following form is a guaranty in which the guarantor has negotiated to be responsible for only a portion of the debt. This guaranty has some characteristic of a loan agreement because the guarantor is also required to provide certain financial information about his or her personal finances on a regular basis.

FORM

THIS TRANSACTION GUARANTY is given this _____[day] day of _____[month], _____[year] by _____[name], (hereinafter referred to as the ("Guarantor") to _____[name], a(n) _____[state] _____[entity] (the "Bank").

WHEREAS, _____[name], a(n) _____[state] _____[entity] (hereinafter referred to as "Borrower") has entered into a certain Construction Loan and Security Agreement of even date herewith, as the same may be amended, modified and supplemented (the "Loan Agreement") with the Bank, pursuant to which Borrower executed and delivered a certain note having a face amount of _____ Dollars (\$ _____) of even date herewith (the "Note") in evidence of its obligation thereunder to the Bank; and

WHEREAS, the Guarantor, as a Member of Borrower, has derived and will continue to derive benefits as a result of the

Loan Agreement and the loan to be made thereunder; and

WHEREAS, as a condition precedent to the effectiveness of the Loan Agreement, the Bank required that the Guarantor execute and deliver this Guaranty;

NOW, THEREFORE, in order to induce the Bank to enter into the Loan Agreement, and in consideration of the benefits expected to accrue to the Guarantor by reason thereof, and for other good and valuable consideration, receipt and sufficiency of which is hereby acknowledged, the Guarantor hereby represents and warrants to, and covenants and agrees with the Bank, as follows:

The Guarantor does hereby irrevocably and unconditionally guarantee to the Bank the punctual payment of the Guaranteed Amount (as defined below), when due (whether by demand, acceleration or otherwise), (i) of the principal and interest on the Note given by the Borrower pursuant to the Loan Agreement, and any amendment, modification or supplement thereto whether now outstanding or hereafter issued (including interest accruing thereon after the commencement of any case or proceeding under any federal or state bankruptcy, insolvency or similar law (a "Proceeding") whether or not a claim for such interest is allowable in such Proceeding ("Post-Petition Interest")); and (ii) all other obligations and liabilities of the Borrower to the Bank under the Loan Agreement, whether now or hereafter existing, due or to become due, direct or contingent, joint, several or independent, secured or unsecured and whether matured or unmatured (including Post-Petition Interest) (all of the liabilities included in clauses (i) and (ii) of this Paragraph are hereinafter collectively referred to as the "Guaranteed Obligations"). This is a guaranty of payment and not of collection, and is the primary obligation of the Guarantor; and the Bank may enforce this Guaranty against the Guarantor without any prior pursuit or enforcement of the Guaranteed Obligations against the Borrower, any collateral, any right of set-off or similar right, any other guarantor or other obligor or any other recourse or remedy in the power of the Bank. Notwithstanding anything to the contrary contained herein, Bank agrees that Guarantor's liability hereunder will be limited to _____ Dollars (\$_____) of the principal balance, plus all Loss and Expense (as defined below) (collectively, the "Guaranteed Amount").

All payments made by the Guarantor under or by virtue of this Guaranty shall be paid to the Bank at its offices at _____ [address] or such other place as the Bank may hereafter designate in writing. The Guarantor hereby agrees to make all payments under or by virtue of this Guaranty to the Bank as aforesaid no later than ten (10) days following the date on which the Bank sends written demand hereunder to the Guarantor.

The Guarantor hereby waives (i) notice of acceptance of this Guaranty, notice of the creation, renewal or accrual of any of the Guaranteed Obligations and notice of any other liability to which it may apply, and notice of protest, presentment, demand of payment, notice of dishonor or nonpayment of any of the Guaranteed Obligations, suit or taking other action or making any demand against, and any other notice to the Borrower or any other party liable thereon; (ii) any defense based upon any statute or rule of law to the effect that the obligation of a surety must be neither larger in amount nor in any respects more burdensome than that of the principal; (iii) any defense based upon the Bank's administration or handling of the Guaranteed Obligations, except behavior which amounts to bad faith; and (iv) to the fullest extent permitted by law, any defenses or benefits which may be derived from or afforded by law which limit the liability of or exonerate guarantors or sureties, or which may conflict with terms of this Guaranty.

So far as the Guarantor is concerned, the Bank may, at any time and from time to time, without the consent of, or notice to, the Guarantor, and without impairing or releasing any of the Guaranteed Obligations hereunder, upon or without any terms or conditions and in whole or in part:

- (a) Modify or change the manner, place or terms of, and/or change or extend the time of payment of, renew or alter, any of the Guaranteed Obligations, any security therefor, or any liability incurred directly or indirectly in respect thereof, and this Guaranty shall apply to the Guaranteed Obligations as so modified, changed, extended, renewed or altered;

(b) Request, accept, sell, exchange, release, subordinate, surrender, realize upon or otherwise deal with, in any manner and in any order; (a) any other guaranty by whomsoever at any time made of the Guaranteed Obligations or any liabilities (including any of those hereunder) incurred directly or indirectly in respect thereof or hereof, and/or any offset or right with respect thereto; and (b) any property by whomsoever at any time pledged, mortgaged or otherwise encumbered to secure, or howsoever securing, the Guaranteed Obligations or any liabilities (including any of those hereunder) incurred directly or indirectly in respect thereof or hereof, and/or any offset or right with respect thereto;

(c) Exercise or refrain from exercising any rights against the Borrower or against any collateral or others (including, without limitation, any other guarantor) or otherwise act or refrain from acting;

(d) Settle or compromise any of the Guaranteed Obligations, and security therefor or any liability (including any of those hereunder) incurred directly or indirectly in respect thereof or hereof, and subordinate the payment of all or any part thereof to the payment of any liability (whether due or not) of the Borrower to lenders of the Borrower other than that Bank when, in the Bank's sole judgment, it considers such subordination necessary or helpful in the protection of its interest or the exercise of its remedies, including, without limitation, the sale or other realization upon collateral;

(e) Apply in the manner determined by the Bank any sums by whomsoever paid or howsoever realized to any of the Guaranteed Obligations, regardless of what liability or liabilities of the Borrower remain unpaid; and

(f) Amend or otherwise modify, consent to or waive any breach of, or any act, omission or default or Event of Default under the Loan Agreement or the Note, or any agreements, instruments or documents referred to therein or executed and delivered pursuant thereto or in connection therewith.

This Guaranty and the obligations of the Guarantor hereunder shall be valid and enforceable and shall not be subject to limitation, impairment or discharge for any reason (other than the payment in full of the Guaranteed Obligations), including, without limitation, the occurrence of any of the following, whether or not the Guarantor shall have had notice or knowledge of any of them: (i) any failure to assert or enforce or agreement not to assert or enforce, or the stay or enjoining, by order of the court, by operation of law or otherwise, of the exercise or enforcement of, any claim or demand of any right power or remedy with respect to the Guaranteed Obligations or any agreement relating thereto or with respect to any other guaranty thereof or security therefor; (ii) any waiver, amendment or modification of, or any consent to departure from, any of the terms or provisions (including, without limitation, provisions relating to Events of Default) of the Loan Agreement, the Note or any other agreement at any time executed in connection therewith; (iii) the Guaranteed Obligations or any portion thereof at any time being found to be illegal, invalid or unenforceable in any respect; (iv) the application of payments received from any source to the payment of indebtedness other than the Guaranteed Obligations, even though the Bank might have elected to apply such payment to the payment of all or any part of the Guaranteed Obligations; (v) any failure to perfect or continue perfection of a security interest in any collateral which secures any of the Guaranteed Obligations; (vi) any defenses, set-offs or counterclaims which the Borrower may allege or assert against the Bank in respect of the Guaranteed Obligations; (vii) the avoidance or voidability of the Guaranteed Obligations under the Bankruptcy Code or other applicable laws; and (viii) any other act or thing or omission which may or might in any manner or to any extent vary the risk of the Guarantor as an obligor in respect of the Guaranteed Obligations.

The Guarantor hereby represents and warrants, which representations and warranties shall survive the execution and delivery of this Guaranty that, neither the execution and delivery of this Guaranty nor the consummation of the transactions herein contemplated, nor compliance with the terms and provisions hereof, will contravene any provision of law, statute, rule or regulation to which the Guarantor is subject or any judgment, decree, award, franchise, order or

permit, or will conflict or will be inconsistent with, or will result in any breach of, any of the terms, covenants or provisions of, or constitute a default under, or result in the creation or imposition of any lien, security interest, charge or other encumbrance upon any of the properties or assets of the Guarantor pursuant to the terms of any indenture, mortgage, deed of trust, agreement or other instrument to which the Guarantor is a party or by which he may be bound or to which he may be subject.

The Guarantor covenants that he shall:

(a) Furnish to Bank personal income and earnings statements and balance sheets within

_____ (

_____) days following the expiration of each calendar year, and copies of the Guarantor's individual federal income tax returns (certified by the Guarantor) within

_____ (

_____) days following the expiration of each calendar year.

(b) Furnish Bank such other financial information as Bank may reasonably request; and

(c) Promptly notify Bank of any threatened or pending litigation, the outcome of which could have a material or adverse effect on the finances of the Guarantor.

Any and all rights and claims of the Guarantor against the Borrower or any of its property, arising by reason of any payment by the Guarantor to the Bank pursuant to the provisions of this Guaranty, shall be subordinate and subject in right of payment to the prior and indefeasible payment in full of all Guaranteed Obligations to the Bank, and until such time, the Guarantor shall have no right of subrogation, contribution, reimbursement or similar right and hereby waives any right to enforce any remedy the Bank or the Guarantor may now or hereafter have against the Borrower, any endorser of any other guarantor of all or any part of the Guaranteed Obligations of the Borrower and any right to participate in, or benefit from, any security given to the Bank to secure any guaranteed Obligations. Any promissory note evidencing such liability of the Borrower to the Guarantor shall be non-negotiable and shall expressly state that it is subordinated pursuant to this Guaranty. All liens and security interests of the Guarantor, whether now or hereafter arising and however existing, in any assets of the Borrower or any assets securing Guaranteed Obligations shall be and hereby are subordinated to the rights and interests of the Bank in those assets until the prior and indefeasible payment in full of all Guaranteed Obligations to the Bank and termination of all financing arrangements between the Borrower and the Bank.

The Guarantor hereby agrees to indemnify and hold harmless the Bank from and against any losses, costs or expenses (including, without limitation, reasonable attorneys' fees and litigation costs) ("Loss and Expense") incurred by the Bank in connection with the Bank's collection of any sum due hereunder or its enforcement of its rights hereunder.

All notices, requests, demands or other communications hereunder shall be in writing and will be sent as required by the Loan Agreement.

Any notice, request, demand or other communication hereunder shall be deemed to have been duly given when deposited in the mails, postage prepaid, or in the case of telegraphic notice, when delivered to the telegraph company, addressed to the Bank as aforesaid or to the Guarantor's last known address. The Bank and any the Guarantor may change the address to which notices are to be given hereunder by notice duly given hereunder.

No delay on the part of the Bank in exercising any of its options, powers or rights, and no partial or single exercise thereof, whether arising hereunder, under the Loan Agreement, the Note, or otherwise, shall constitute a waiver thereof or affect any right hereunder. No waiver of any such rights and no modification, amendment or discharge of this Guaranty shall be deemed to be made by the Bank or shall be effective unless the same shall be in writing signed by the Bank, and then such waiver shall apply only with respect to the specific instance involved and shall in no way impair the rights of the Bank or the obligations of the Guarantor to the Bank in any other respect any other time.

The Guarantor acknowledges and agrees that any payment made on the Guaranteed Obligations or any part thereof, whatever the source or form of payment, shall be conditional as to the Guarantor unless and until the payment shall be final and valid and indefeasible as to all the world. Without limiting the generality of the foregoing, the Guarantor agrees that if any check or other instrument so applied shall be dishonored by the drawer or any party thereto, or if any proceeds of collateral so applied shall thereafter be recovered by any trustee in bankruptcy or anyone else, the Bank in each case may reverse any entry relating thereto in its books and the Guarantor shall remain liable therefor even if the Bank may no longer have in its possession any evidence of the Guaranteed Obligations to which the payment in question was applied.

This Guaranty and the respective rights and obligations of the Bank and the Guarantor hereunder shall be construed and enforced in accordance with the laws of the State of _____ [state] applicable to contracts made and to be performed wholly within such state. The Guarantor irrevocably consents that service of notice, summons or other process in any action or suit in any court of record to enforce this Guaranty may be made upon the Guarantor by mailing a copy of the summons to the Guarantor by certified or registered mail, at the address specified above. The Guarantor hereby waives the right to interpose counterclaims or set-offs of any kind and description in any such action or suit arising hereunder or in connection herewith.

This Guaranty shall be binding upon the Guarantor and his heirs and assigns, and shall inure to the benefit of the Bank and its successors and assigns. This Guaranty embodies the entire agreement and understanding between the Bank and the Guarantor and supersedes all prior agreements and understandings relating to the subject matter hereof.

If this Guaranty is held or determined to be void, invalid or unenforceable, in whole or in part, such holding or determination shall not impair or affect the validity and enforceability of any clause or provision not so held to be void, invalid or unenforceable. If this Guaranty would be held or determined by a court or tribunal having competent jurisdiction to be void, invalid or unenforceable on account of the amount of its aggregate liability under this Guaranty, then, notwithstanding any other provision of this Guaranty to the contrary, the aggregate amount of the liability of the Guarantor under this Guaranty shall, without any further action by the Guarantor, the Bank or any other person, be automatically limited and reduced to an amount which is valid and enforceable.

The Guarantor: (i) hereby irrevocably submits to the jurisdiction of the state courts of the State of _____ [state], _____ [county] County, and to the jurisdiction of the United States District Court for the Northern District of _____ [state], for the purpose of any suit, action or other proceeding arising out of or based upon this Guaranty or the subject matter hereof brought by the Bank or its successors or assigns; (ii) hereby waives, and agrees not to assert, by way of motion, as a defense, or otherwise, in any such suit, action or proceeding, any claim that he is not subject personally to the jurisdiction of the above-named courts, that his property is exempt or immune from attachment or execution, that the suit, action or proceeding is brought in an inconvenient forum, that the venue of the suit, action or proceeding is improper or that this Guaranty or the subject matter hereof may not be enforced in or by such court; and (iii) hereby waives and agrees not to seek any review by any court of any other jurisdiction which may be called upon to grant an enforcement of the judgment of any such _____ [state] state or federal court. The Guarantor agrees that his submission to jurisdiction and his consent to service of process by mail is made for the express benefit of the Bank.

Final judgment against the Guarantor in any such action, suit or proceeding may be enforced in other jurisdictions: (i)

by suit, action or proceeding on the judgment; or (ii) in any other manner provided by or pursuant to the laws of such other jurisdiction; *provided, however*, that the Bank may at its option bring suit, or institute other judicial proceedings, against the Guarantor in any state or federal court of the United States or of any country or place where the Guarantor or his property may be found.

Without limiting the effect or intentions of the warrant of attorney contained in the following paragraph, THE GUARANTOR IRREVOCABLY AGREES TO WAIVE ITS RIGHT TO A JURY TRIAL OF ANY CLAIM OR CAUSE OF ACTION BASED UPON OR ARISING OUT OF THE LOAN AGREEMENT, THE NOTE, OR THIS GUARANTY OR ANY DEALINGS BETWEEN THEM RELATING TO THE SUBJECT MATTER OF THE LOAN AGREEMENT, THE TERM NOTE OR THIS GUARANTY AND THE RELATIONSHIPS THEREBY ESTABLISHED. This scope of this waiver is intended to be all-encompassing of any and all disputes that may be filed in any court and that relate to the subject matter of this transaction, including, without limitation, contract claims, tort claims, breach of duty claims, and all other statutory and common law claims. THIS WAIVER SHALL APPLY TO ANY SUBSEQUENT AMENDMENTS, RENEWALS, SUPPLEMENTS OR MODIFICATIONS OF THIS GUARANTY. In the event of litigation, this provision may be filed as a written consent to a trial by the court.

The Guarantor authorizes any attorney at law to appear in any Court of Record in the State of _____[state] or in any other state or territory of the United States of America after the above indebtedness becomes due, whether by acceleration or otherwise, to waive the issuance and service of process, and to confess judgment or judgments against the Guarantor in favor of the Bank for the amount then appearing due together with costs of suit, and thereupon to waive all errors and all rights of appeal and stays of execution. The foregoing warrant of attorney shall survive any such judgment and should any such judgment be vacated for any reason, and the foregoing warrant of attorney nevertheless may thereafter be utilized for obtaining judgment or judgments.

IN WITNESS WHEREOF, the Guarantor has caused this Guaranty to be duly executed as of the date first above written.

WARNING

--BY SIGNING THIS PAPER YOU GIVE UP YOUR RIGHT TO NOTICE AND COURT TRIAL. IF YOU DO NOT PAY ON TIME A COURT JUDGMENT MAY BE TAKEN AGAINST YOU WITHOUT YOUR PRIOR KNOWLEDGE AND THE POWERS OF A COURT CAN BE USED TO COLLECT FROM YOU REGARDLESS OF ANY CLAIMS YOU MAY HAVE AGAINST THE CREDITOR WHETHER FOR RETURNED GOODS, FAULTY GOODS, FAILURE ON HIS PART TO COMPLY WITH THE AGREEMENT, OR ANY OTHER CAUSE.

Printed Name: _____



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Current Legal Forms for Real Estate
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26-22 Current Legal Forms for Real Estate FORM 22.125

FORM 22.125 Personal guaranty of down payment--guaranty is made by principal of real estate development corporation--guaranty is granted to home buyer who makes substantial down payment on home that development corporation has yet to build--down payment reduces amount of money that development corporation will need to borrow from bank to finance construction

COMMENT

Developers generally require outside financing for all or part of the construction cost of homes they build. Frequently, the source of such funds is an institutional lender, such as a bank. However, this arrangement can prove quite costly for the developer, since it will naturally incur both closing costs on the loan and interest expense.

A more fiscally-attractive route for the developer is to use the home buyer as one source of construction funds. In the form that follows, the home buyer has agreed to pay the developer, long before the closing, a significant portion of the total purchase price. The payments are scheduled to be made as construction work progresses. Obviously, this payment will reduce the amount which the developer needs to borrow from the bank. That reduction, in turn, will lower the borrowing expenses (e.g., interest) the developer will incur, expenses that inevitably will be passed along to the home buyer.

Since title remains with the developer until the closing, the home buyer's deposit is at risk. The deposit is essentially an unsecured loan made to the developer by the home buyer. If the developer misappropriates the money or goes into bankruptcy, the home owner will have to stand in line with other unsecured creditors in the hope of recouping at least some of his money. However, in all likelihood, the home buyer would probably not be able to obtain a full recovery.

Accordingly, to induce a home buyer into entering into this type of arrangement, a personal guaranty of the down payment is given to the home buyer. The guaranty is given by one or more of

the principals--i.e., the major shareholders--of the development company. Since most real estate developers are actually corporate entities, the guaranty allows access to the personal assets of the corporate principals in the event that the developer fails to complete the construction of the house and deliver title to the property to the home buyer. Of course, one must hope that the principals have sufficient assets available to satisfy the debt should the need arise. Thus, it would be most prudent for the home buyer's attorney to insist on receiving a personal financial statement from the principal(s) who are offering the guaranty before the home buyer agrees to this arrangement.

Of course, the home buyer and his attorney could also insist on receiving a second mortgage on the building lot in order to have some further security for the deposit. However, it is likely that the infrastructure development loan would contain a prohibition against such secondary mortgages.

FORM

WHEREAS, Mr. and Mrs. _____ [name], as Purchasers, have entered into a contract, dated _____ [month] _____ [day], _____ [year], to purchase a house to be constructed by _____ [name] ("Developer"), on Lot Number _____ [number], located on _____ [address], _____ [city], _____, _____ [county], _____ [state]; and

WHEREAS, the contract, at paragraph number 5 thereof, provides the following payment schedule:

(a)

_____ Dollars (\$
_____) paid as deposit on the lot;

(b)

_____ Dollars (\$
_____) paid as deposit with the contract;

(c)

_____ Dollars (\$
_____) paid upon completion of final plans;

(d)

_____ Dollars (\$
_____) paid upon completion of foundation;

(e)

_____ Dollars (\$

_____) paid upon completion of framing;

(f)

_____ Dollars (\$

_____) paid upon completion of mechanical rough in;

(g)

_____ Dollars (\$

_____) paid upon completion of drywall rough in; and

(h)

_____ Dollars (\$

_____) paid in cash or certified check at closing; and

WHEREAS, the contract, at paragraph 15 thereof, provides that the payments (a) through (g) are to be made prior to the transfer of title, are not to be held in escrow, and may be used by the builder in the construction; and

WHEREAS, purchasers are concerned about the security of the funds paid prior to the transfer of title, _____[name], as sole shareholder of the Builder-Seller, _____[name] has agreed to personally guaranty the funds paid prior to transfer of title,

Now, _____[name], as guarantor, pledges as follows:

1. In the event that Builder-Seller, _____[name], fails to complete the construction of the residential structure as set forth in the above-described contract, dated _____[month] _____[day], _____[year], Guarantor shall promptly, upon written request, pay to Purchasers the sum of _____ Dollars (\$ _____), or so much thereof as Purchasers have advanced.

2. In the event that Guarantor fails to make payment within _____ (_____) days after a request therefor, and Purchasers commence legal action to collect the guaranteed sums, Purchasers shall be entitled to collect their legal fees, costs and disbursements from Guarantor as well.

3. Purchasers shall not be required to seek payment from Seller-Builder prior to demanding payment from Guarantor.

4. All notices required hereunder shall be in writing and sent certified mail, return receipt requested, to the following addresses:

If to Purchasers: _____ [name]
 _____ [address]
 _____ [address]

With a copy to Purchasers' attorney: _____ [name]
 _____ [address]

_____ [address]

If to Guarantor: _____ [name]

_____ [address]

_____ [address]

With a copy to Guar-
antor's attorney: _____ [name]

_____ [address]

_____ [address]

5. This Guaranty shall be binding upon the Guarantor and his heirs, assigns, and successors.

Dated: _____ [month] _____ [day], _____ [year]

"GUARANTOR"

By: _____

Print Name: _____



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26-22 Current Legal Forms for Real Estate FORM 22.126

FORM 22.126 Guaranty of building loan agreement--borrower is real estate development corporation--guarantors are principal shareholders of corporation

COMMENT

When a borrower operates in the form of an entity, the lender may require the borrower to provide a guaranty from the "principals" (i.e., major owners) of the entity.

The guaranty requires many things of the guarantors. The guarantors agree to be personally liable for the full amount of the principal and interest if the borrower becomes unable or unwilling to pay back the loan. The guarantors may also make representations about their own financial condition and any outstanding financial obligations which might affect their ability to pay should the lender need to enforce the guaranty.

FORM

UNLIMITED GUARANTY

THIS GUARANTY executed and delivered this _____[day] day of _____[month], _____[year] by _____[name] (the "Guarantor") to _____[name] ("Bank").

WITNESSETH:

WHEREAS, Bank has executed and delivered the following documents:

- (i) Construction Loan Agreement of even date with

_____ [name] (hereinafter "Borrower"); and

(ii) Mortgage of even date with Borrower; and

WHEREAS, the Guarantor is the sole shareholder of Borrower; and

WHEREAS, Guarantor has agreed to execute and deliver this Guaranty in order to induce Bank to enter into the foregoing agreements and the Guarantor acknowledges that Bank would not have entered into any of the agreements without Guarantor's execution and delivery of this Agreement;

NOW, THEREFORE, in consideration of the premises and other good and valuable consideration, the receipt and sufficiency of which are acknowledged, and to induce Bank to forebear, and for good and other valuable consideration the receipt and sufficiency of which is hereby acknowledged by the Guarantor, the Guarantor does hereby agree with Bank as follows:

1. The Guarantor, absolutely and unconditionally, guarantees to Bank, its successors and assigns, the full and prompt performance of all obligations of Borrower to Bank, including the obligations of Borrower under the foregoing described agreements and for any other agreements (the obligations guaranteed being hereinafter referred to as the "Obligations"). Upon failure of Borrower to fulfill the Obligations, including any amounts due and payable to Bank, when and as the same becomes due and payable and the same is not satisfied by Borrower, Bank may, at its sole option, pursue the Guarantor for the Obligation not satisfied. Bank shall not be obligated to proceed against, or exhaust any other remedies it may have under any of the foregoing agreements, or resort to any other security held by Bank prior to enforcing the obligations of the Guarantor hereunder.
2. The Guarantor agrees to promptly notify Bank of any threatened or pending litigation, the outcome of which could have a material or adverse effect on the finances of the Guarantor.
3. The Guarantor acknowledges that he is the sole shareholder of Borrower, and as such, has an economic interest in the success of Borrower, that he is making this Guaranty in his individual capacity; and that he shall remain liable hereunder regardless of the success of Borrower.
4. The obligations of the Guarantor under this Guaranty is absolute and unconditional, and shall remain in full force and effect until the Obligations shall have been satisfied or paid in full. This Guaranty should not be construed to require Bank to forebear with respect to any defaults under any of the foregoing agreements.
5. The obligations of the Guarantor under this Guaranty shall not be affected, modified or impaired upon the happening of any event, including, without limitation, any of the following, whether or not with notice to or the consent of the Guarantor:
 - (a) The waiver, release or termination of any of the covenants, agreements or obligations of Borrower under any of the foregoing agreements;
 - (b) The modification or amendment (whether material or otherwise) of any obligations, covenants or agreements as set forth in any of the foregoing agreements;
 - (c) Any failure, omission, delay or lack on the part of Bank to enforce, assert or exercise any right, power or remedy conferred upon it in this Guaranty, or any other acts of omissions on the part of Bank;

(d) The voluntary or involuntary liquidation, dissolution, sale or other disposition of all or substantially all of the assets of Borrower, however affected, or receivership, insolvency, bankruptcy, assignment for the benefit of creditors, reorganizations, arrangement, composition with creditors or readjustment or other similar proceedings affecting either Borrower or the Guarantor, or any of the assets of any of them, or any allegation or contest of the validity of this Guaranty, or any of the foregoing agreements;

(e) The invalidity, illegality or unenforceability of or any provision of any of the foregoing agreements;
or

(f) Any other event or action that would, in the absence of this clause, result in the release or discharge by operation at law of the Guarantor from the performance or observance of any obligation, covenant or agreement contained in this Guaranty.

6. Notwithstanding anything herein to the contrary, this Guaranty shall continue to be effective, or be reinstated, as the case may be, if at any time payment, or any part thereto, of any of the amounts secured hereunder is rescinded or must otherwise be restored or returned by Bank upon the insolvency, bankruptcy, dissolution, liquidation or reorganization of Borrower, or upon or as a result of the appointment of a receiver, intervener or conservator of, or trustee or similar officer for, Borrower or any substantial part of his property, or otherwise, all as though such payments had not been made. This Guaranty shall not be affected in any way by the transfer or other disposition of the property secured by the Mortgage, whether by operation of law or otherwise.

7. No setoff, counterclaim or reduction, no diminution of any obligation, and no defense of any kind or nature that a Guarantor has or may have against Borrower, Bank shall affect, modify or impair the obligations hereunder of the Guarantor.

8. The Guarantor hereby expressly waives, releases and discharges, any and every right of exoneration, subrogation, contribution, reimbursement and indemnity whatsoever, and any and every right of recourse to security for the debts and obligations guaranteed hereby, whether against Borrower, any other Guarantor or otherwise, and whether or not the indebtedness has been paid in full. The Guarantor hereby indemnifies Bank and agrees to defend and hold harmless Bank from and against the loss, mitigation, subordination or other consequences adverse to Bank by reason of this Guaranty being challenged as a preference or suffering any other subjugation under any bankruptcy or other law, whether state or federal, affecting debtors, creditors and/or the relationship between and among them. Without limiting the generality of the foregoing, any and all debts and obligations of Borrower to the Guarantor whether past, present or future are hereby waived, satisfied and discharged.

9. The Guarantor hereby expressly waives notice in writing or otherwise from Bank of Bank's acceptance of and reliance on this Guaranty. The Guarantor agrees to pay for all costs, expenses and fees, including all reasonable attorneys' fees, which may be incurred by Bank in enforcing or attempting to enforce this Guaranty against the Guarantor.

10. This Guaranty shall bind Guarantor, his heirs, executors, administrators, successors and assigns, and shall inure to the benefit of Bank and its successors and assigns. The Guarantor's liabilities and other obligations under this Guaranty shall survive the death or legal disability of Borrower and/or the Guarantor.

11. If any clause or provision of this Guaranty is held illegal, invalid or unenforceable by any court, this Guaranty shall be construed and enforced as if such illegal, invalid or unenforceable clause or provision had not been contained herein.

12. This Guaranty is a guaranty of payment and not of collection and shall be deemed to be a Guaranty made under the laws of the State of _____[state] and for all purposes shall be governed by and constructed in

accordance with the laws of said State.

The Guarantor has caused this Guaranty to be executed and delivered to Bank in _____[city],
_____[state], on the date first written above.

Printed Name: _____

Social Security Number



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26-22 Current Legal Forms for Real Estate FORM 22.127

FORM 22.127 Stock pledge to secure guaranty--borrower is real estate development corporation--pledgors/guarantors are principal shareholders of corporation

COMMENT

Occasionally, a mortgage lender will seek more collateral than the property being developed or improved. The following is a stock pledge wherein the lender obtained collateral directly from the guarantor of the loan. Typically, the stock being pledged is somehow involved in the project; however, it does not have to be related to the project.

With this security, the lender has some additional protection in the event that the guarantors personally file petitions in bankruptcy or if the lender needs to take over the borrower in order to complete the project. In a Chapter 7 case, if no security existed, the obligation to guarantee the debt could be extinguished. Thus, where the lender holds security for the guaranty, the obligation to guarantee is protected up to the value of that security.

In this form, instead of readily-marketable securities, the lender has accepted a pledge of a company owned by the principals of the real estate developer.

In the event of a default by the developer on the loan, the lender is not obligated to seek recourse against the developer, or to seize any other collateral, before taking ownership of the company stock. Thus, the pledge of company stock is much like the guaranty itself: just as the lender may pursue the guarantors in the event of a default (rather than pursuing the defaulting borrower), so, too, may the lender sell off the company stock without bothering to first sue the guarantors in their personal capacities.

The pledge contains a long "laundry list" of events that constitute events of default, entitling the lender to take immediate action against the company stock.

The pledge also contains representations by the guarantors. These representations include the following:

- (1) the guarantors are the sole owners of all the stock of the company;
- (2) no further stock will be issued while the pledge is in effect;
- (3) the stock is not otherwise encumbered; and
- (4) the stock will not be sold or otherwise transferred while pledged.

These representations are critical to the lender's secured position. Without these representations, the lender cannot be certain of its ability to transfer the entire company to a potential purchaser following a default on the loan and sale of the stock. Obviously, the purchase price which the lender could expect in the event of a sale of the company would be considerably less if it could not offer the entire company to the purchaser.

Finally, the lender here must take physical possession of the pledged stock. The lender must also obtain an executed stock power to facilitate any transfer which may be necessary later.

FORM

PLEDGE AGREEMENT

THIS PLEDGE AGREEMENT is made this _____ [day] day of _____ [month], _____ [year], between _____ [name], a(n) _____ [state] _____ [entity] existing under the laws of the State of _____ [state], with offices for the transaction of business at _____ [address] (hereafter referred to as the "Creditor"), and _____ [name], residing at _____ [address]; _____ [name], residing at _____ [address]; _____ [name], residing at _____ [address]; (hereafter referred to as the "Pledgors")

WITNESSETH:

WHEREAS, the Creditor has loaned _____ [name], a(n) _____ [state] _____ [entity], with offices for the transaction of business at _____ [address] (hereafter referred to as the "Company"), the sum of _____ Dollars (\$ _____), and the Company and the Creditor are parties to various documents, instruments and agreements in connection with said loan; and

WHEREAS, Pledgors have already executed and delivered to the Creditor a Guaranty (the "Guaranty") unconditionally guaranteeing to the Creditor, to the extent therein set forth, the obligations of the Company to the Creditor, in addition to performance under such documents, instruments and agreements; and

WHEREAS, Pledgors own shares of common stock of _____ [name] (hereinafter the "Company"), a(n)

_____[state] _____[entity], with offices for the transaction of business at _____[address], which shares (the "Pledged Shares") constitute all of the authorized, issued and outstanding shares of capital stock of the Company;

NOW, THEREFORE, in consideration of the promises and for other good and valuable consideration, the receipt and sufficiency of which is hereby expressly acknowledged by Pledgors, it is agreed as follows:

1. Pledge of Shares. Pledgors hereby pledge the Pledged Shares to the Creditor, as security for repayment of the Obligations of the Company to the Creditor and for Pledgors' Obligations under the Guaranty.
2. Transfer of Shares. Pledgors agree that Pledgors will, immediately upon execution of this Agreement, transfer and deliver to the Creditor the Pledged Shares, accompanied by separate stock powers duly endorsed in blank, to be held by the Creditor in accordance with the terms hereof.
3. Creditors' and Pledgors' Rights. The Creditor, at its option and at any time while this pledge remains in effect, may transfer any or all of the securities constituting the Pledged Shares into its own name or the name of any nominee and may receive the income thereon and hold the same as security hereunder to apply it against any principal or interest due on any of the Obligations owed to it by the Company or the Pledgors (hereafter the "Obligations").

Until there is a default hereunder, Pledgors will retain all voting rights incident to ownership of the Pledged Shares, provided that the Pledgors may not vote the securities constituting the Pledged Shares in order to dissolve, liquidate or otherwise defeat the purposes of this Pledge Agreement. After the occurrence of any event of default, as defined hereinafter, the Creditor is expressly empowered to exercise all powers of voting and consent with respect to any securities constituting the Pledged Shares which have been transferred into the Creditor's name or the name of its nominee, and the Creditor is authorized to provide a copy of this Agreement to the transfer agent for the common stock of the Company as conclusive evidence of the voting rights herein granted.

4. Obligations of Creditor. The Creditor shall not be bound to take any steps necessary to preserve any rights in the Pledged Shares against any third parties.

5. Definition of "Pledged Shares." Until the Obligations are discharged in full and the Guaranty has been discharged, the Pledged Shares shall include any and all new, substituted or additional securities issued by reason of any stock dividend, distribution, reclassification, readjustment, merger or other change declared by, or made in the capital structure of, the Company, or issued by reason of the exercise of subscription warrants or other rights or options issued in connection with the ownership of securities constituting the Pledged Shares. All such new, substituted or additional stock, or other securities shall be delivered to the Creditor, endorsed in form satisfactory to the Creditor, and shall be held under the terms hereof.

6. Events of Default. If any of the following events of default occur:

- (a) default in the payment or performance of any of the Obligations;
- (b) sale or encumbrance of any property constituting the Pledged Shares hereunder, or the making of any levy, seizure or attachment thereof or thereon, or the failure to pay when due any tax thereon;
- (c) in the event that any representation and warranty contained in Paragraph 10 below shall be or become untrue or false; or
- (d) dissolution, termination of existence, insolvency, business failure, appointment of a receiver of any part of the property of, or the commencement of any proceeding under any bankruptcy or insolvency

laws by or against, Pledgors,

thereupon or at any time thereafter, the Creditor may, without notice of demand, declare this Agreement to be in default and shall thereafter have, in addition to all other rights and remedies, the rights and remedies of a secured party under the Uniform Commercial Code of the State of _____[state].

7. Notice. The Creditor shall give to Pledgors at least _____ (_____) days prior written notice of the time and place of any public sale of the Pledged Shares, or of the time any private sale or any other intended disposition is to be made. Pledgors recognize that the Creditor may be unable to sell the securities constituting the Pledged Shares at a public sale and agree that the Creditor shall incur no liability as a result of the sale of securities at a private sale, provided that the sale is accomplished in a commercially-reasonable manner. Pledgors recognize that the price which might be obtained at a private sale may be less than the price which might be obtained at a public sale and agree that such lower price shall not be construed as indicating a failure to employ commercially-reasonable methods of private sale.

8. No Waiver. No delay or omission on the Creditor's part in exercising any rights hereunder shall operate as a waiver of such rights or of any other rights under this Agreement. No waiver of any right shall be effective unless it is in writing and signed by the Creditor, and no waiver on one occasion shall be construed as an automatic waiver of any such right on any other occasion.

9. Necessary Action. Pledgors agree to take all such further necessary or appropriate action as may be reasonably required by the Creditor from time to time to effectuate the purposes of this Agreement.

10. Representations and Warranties. Pledgors represent and warrant that:

(a) Pledgors are the owners, free and clear of any encumbrance, of the Pledged Shares, which constitute all the issued and outstanding shares of capital stock of the Company; and Pledgors have the right to pledge, assign and otherwise transfer the Pledged Shares; and Pledgors shall defend the Pledged Shares against each and every claim and demand of any person claiming an interest in the Pledged Shares adverse to the Creditor.

(b) There are no restrictions upon the transfer of any of the Pledged Shares other than under any applicable federal and/or state securities laws.

(c) The pledge of the Pledged Shares to Creditor hereunder is an exempt transaction under the Securities Act of 1933, and may, therefore, be made without compliance with the registration requirements thereof.

(d) The execution, delivery and performance hereof by Pledgors is not in contravention of any prior obligations of Pledgors or of any obligation with respect to the Pledged Shares.

(e) To the best of Pledgors' knowledge and belief, no statement made by Pledgors in this Agreement or in any document delivered thereunder is untrue as of the date hereof, or omits to state a material fact necessary in order to ensure that the statements made are not misleading.

11. Waiver of Presentment; Notice. Pledgors waive presentment, notice, protest, notice of acceptance of this Agreement, notice of any loans made, extensions granted, collateral received or delivered, or any other action taken in reliance thereon, all demands and notices in connection with the delivery, acceptance, performance, default or enforcement of any note or other evidence of indebtedness for which the Pledged Shares are pledged, and all other demands and notices

of any description. Pledgors assent to any extension or postponement of the time of payment or any other indulgence, to any substitution, exchange or release of collateral, and to the addition or release of any party or person primarily or secondarily liable.

12. Binding Effect. This Agreement shall inure to the benefit of the Creditor and its successors and assigns and shall be binding upon Pledgors and their successors and assigns. The obligations of Pledgors under this Agreement shall be unconditional and shall continue until all of the Obligations have been performed or paid in full and the Guaranty has been discharged.

IN WITNESS WHEREOF, the parties hereto have set their hands and seals the day and year first above written.

Dated: _____[month] _____[day], ____[year]

"PLEDGORS"

Print Name: _____

Print Name: _____

Print Name: _____



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26-22 Current Legal Forms for Real Estate FORM 22.128

FORM 22.128 Land development loan commitment--subordination of first mortgage

COMMENT

This is a standard commitment which sets forth the terms and conditions of the proposed loans in significant detail. The form below contemplates subordination of an outstanding first mortgage to the institutional mortgagee.

FORM

_____ [month] _____ [day], _____ [year]

_____ [Insert name of borrower]

_____ [insert street address]

_____ [insert city, state and zip code]

Gentlemen:

The _____ [name] (the "Lender") hereby commit to make the following land development loan. The closing and funding shall be in strict compliance with all the following terms and conditions:

1. Security. First Mortgage on Fee Simple Title to the land described on Exhibit A attached hereto, together with the proposed improvements to be constructed thereon.

2. Borrower. _____ [name].

3. Guarantor. _____ [name].

4. Loan Amount. _____ Dollars (\$_____).

5. Interest Rate. The interest rate shall be equal to a rate of _____ percent (_____%) per year above the highest prime rate (as the same may fluctuate from time to time) charged by either _____ [name], or _____ [name], determined as of the last day of the month preceding the date on which the interest is to be redetermined. The rate, however, shall not be less than _____ percent (_____%) nor greater than _____ percent (_____%). Interest shall be computed based on a 360-day year.

6. Term of Loan. _____ (_____) months from initial closing; however, at Borrower's option, the loan may be extended for _____ (_____) additional 12-month periods.

7. Prepayment. The mortgage to be executed by the parties herewith shall contain a provision for partial releases of the condominium and commercial land from the lien of Lender's mortgage upon payment of a release amount of _____ percent (_____) of either the appraised value or the sales price, whichever shall be the greater. Partial releases shall be allowed on the boat slips upon payment of _____ Dollars (\$_____) per slip released. The Borrower agrees to apply to the loan all funds received as a result of financing the harbor and marina facilities. The privilege will be granted to prepay the loan at any time without penalty, only in full and upon _____ (_____) days' written notice.

8. Fee or Discount. There shall be no finder's fee or discount of the principal hereunder.

9. Conditions of Funding. The obligation of Lender to close and fund this loan shall be subject to the following conditions:

(a) Satisfaction of the attached Standard Loan Conditions.

(b) Receipt by Lender of all documentation, in form acceptable to Lender and its counsel, required by Exhibit A, attached hereto and made a part hereof.

(c) Borrower shall furnish evidence, in form satisfactory to Lender or its counsel, that the plans and specifications for the proposed improvements have been approved by the Planning Board of Puerto Rico and all other applicable governmental authorities.

(d) Lender shall be furnished copies of _____ [name] (the "Subordinated Lender")'s loan agreement, mortgage, note and all other security instruments that may be required by Lender's counsel for review and approval.

(e) Lender shall be furnished the acknowledgment by Subordinated Lender of this first mortgage loan being placed of record and their agreement that its first mortgage, with respect to the subject property, will be subordinated to that of Lender. Further, it is understood and agreed that this commitment is expressly contingent upon said subordination.

(f) Lender shall be furnished the terms of the release provisions under the first mortgage loan of Subordinated Lender, as they apply to the subject property.

(g) The plans and specifications for development of the proposed improvements shall be approved by Lender's inspecting engineer, who shall be designated by Lender prior to closing.

(h) Lender shall require quarterly unaudited financial statements and annual audited financial statements on the

Borrower and guarantor named as such herein.

(i) Lender shall receive, on a quarterly basis, sales and marketing reports on the entire _____ [name] project. These reports shall contain specific data as pertains to the _____ [name].

(j) Lender shall have the right of first refusal for all resulting construction financing of those condominium and commercial projects on which said financing is not being extended by the permanent lender as a condition of the permanent lender's commitment for permanent financing.

(k) Any and all contractors with whom _____ [name] enters into a contract shall be approved by Lender and completely bonded. The form of bond shall be completely satisfactory to Lender or its counsel.

(l) Lender shall receive certification from counsel that the making of this loan on the terms stated will not constitute usury and that Lender is not subject to the _____ percent (_____%) tax on the interest income derived from this loan.

(m) At Lender's option, International Charter Mortgage Corporation will be designated as disbursing agent. All disbursements of development and construction funds shall have the prior approval of Lender's inspecting engineer, to be designated by Lender prior to closing. Any additional disbursement procedures shall be determined solely by Lender, at its sole discretion, prior to closing. All services rendered in this capacity shall be without cost to Lender or its investment adviser, Major Mortgage Advisers, Inc.

(n) Upon consummation of an anticipated _____ Dollars (\$ _____) subordinated debenture issue by _____ [name], Lender shall be furnished with the terms set forth in the indenture.

10. Interest Reserve Account. In consideration for Lender making this loan, the Borrower agrees to establish a _____ Dollars (\$ _____) interest reserve account in the loan fund. Lender shall have the right to charge this account for interest due on the first of each month. Interest will not be charged on the undisbursed portion of this account.

In the event the interest account should become depleted, interest will be billed directly to the Borrower and payable within ten days of the billing date. The loan documents shall provide that in the event interest is billed to the Borrower and payment not received within the ten days stipulated, at the option of Lender, interest may be recomputed at _____ percent (_____%) until such time as the loan is brought current.

11. Time of Closing. All applicable conditions of this commitment must have been fulfilled and the loan closed and funded by _____ [month] _____ [day], _____ [year]. Otherwise, Lender may, at its option, cancel this commitment without further notice and may retain all fees received in connection with this commitment. In the event that this loan is not closed prior to _____ [month] _____ [day], _____ [year], Lender shall have the option to postpone closing to any mutually agreeable date in _____ [month], _____ [year], but in no event earlier than _____ [month] _____ [day], _____ [year], or later than _____ [month] _____ [day], _____ [year].

12. Legal Costs. Upon acceptance of this commitment by all parties, Lender shall retain the firm of _____ [name] as its counsel. All costs for legal services shall be paid by the Borrower.

13. Entire Agreement; Modifications. This commitment letter and its attachments set forth the entire agreement of the parties in respect to the subject matter hereof and supersedes prior written or oral understandings with respect thereto; provided, however, that all written or oral representations made by you to the Trust with respect to the subject matter

hereof shall survive the issuance of this commitment letter. No modification or waiver of any provision of this commitment letter shall be effective unless it shall be in writing and signed by the parties hereto.

14. Copies. This commitment shall not become valid until Lender receives _____
(_____) copies properly executed by the Borrower and all guarantors, to be returned no later than
_____ [month] _____ [day], ____ [year].

Very truly yours,

_____ [lender]

a(n) _____ [state] _____ [entity]

By: _____

Print Name: _____

Title: _____

The undersigned hereby acknowledge and accept all terms and conditions stated herein.

Dated: _____ [Borrower]

By: _____

Printed Name: _____

Attachment to Loan Commitment

Standard Loan Conditions

1. **Trust Only Bound.** This agreement and every undertaking made pursuant hereto is executed in behalf of Lender by one or more Trustees, Officers, or Agents of the Trust, in his or their capacity as such and not individually, under a Declaration of Trust dated _____ [month] _____ [day], ____ [year], as amended. The obligations thereof shall be understood and expressly stated not to be binding upon any of the Trustees, Shareholders, Officers, or Agents of the Trust, personally, but binding only upon the Trust Estate of Lender.

2. **Nonconstruction Costs.** Nonconstruction costs have been scheduled in accordance with Exhibit B attached hereto and made a part hereof. All advances for the listed items shall be made in strict accordance with this schedule. Lender shall be notified immediately of any changes in nonconstruction costs. For all purposes of this commitment, all costs, exclusive of the nonconstruction costs scheduled on Exhibit B, shall be deemed to be construction costs.

3. **Commissions.** This loan shall be made without cost to Lender or its investment adviser, Major Mortgage Advisers, Inc., except for normal and regular overhead expenses. All brokerage and real estate commissions shall be payable by the Borrower and/or the guarantors; and all other costs, fees and expenses incurred in connection with this loan, irrespective of whether it closed, shall be borne by the Borrower and/or the guarantors.

4. Further Assurances. The Borrower and guarantors agree to obtain and submit to Lender or its counsel all documents and items required by Lender or its counsel, in a form satisfactory to Lender or its counsel. In addition, the Borrower and all guarantors agree to execute, or cause to be executed, all loan documents deemed by Lender or its counsel to be necessary to insure that the lien of Lender's mortgage is in accordance with the terms of this commitment and that the note and mortgage are valid and enforceable in accordance with their terms.

5. Additional Funds. In order to assure Lender that sufficient funds are available to pay all costs in constructing this project, including all nonconstruction costs included on Exhibit B, the Borrower and/or guarantors will be required to supply additional funds in the total amount of any existing or future shortage, as determined solely by Lender. All required funds shall be paid over to Lender by the Borrower and/or guarantors to satisfy equity requirements prior to further disbursement of Lender loan funds.

6. No Pledge. The Borrower and/or guarantors cannot and shall not pledge or otherwise grant any security interest in any of this project's real property, improvements, fixtures, or personal property for any other loans without first receiving written consent from Lender.

7. Prior Approval. Any and all change orders which will result in a change in construction costs or a substitution of materials shall first have prior approval by Lender and, if applicable, the permanent mortgage lender.

8. Property Insurance. The buildings and other improvements, furnishings and equipment located on the Property shall be insured against physical damage in the amount of the loan, without provision for co-insurance and under policies issued by companies with a minimum rating of AAA in the most recent *Best's Insurance Guide*. The policy shall contain an endorsement naming Lender as mortgagee, shall contain a loss payable clause in favor of Lender, and shall further contain a provision for not less than ten days written notice to Lender of cancellation of the policy. The Borrower agrees, upon completion of the improvements covered under this loan, to furnish Lender with a permanent insurance policy complying with the above requirements, along with evidence that the first year's premium has been paid.

9. Liability Insurance. In the event it is required pursuant to Exhibit A attached hereto, the Borrower shall maintain a policy of liability insurance in an amount satisfactory to Lender, protecting the Borrower against liability from negligence, intentional acts, or other acts or failures to act which might give rise to a judgment against the Borrower. The Borrower shall obtain this policy from a company acceptable to Lender and in form approved by Lender. Upon approval of the policy, the Borrower shall furnish a copy of the original policy, together with evidence that the premium on said policy has been paid through a period beginning with the closing of this loan and ending one year later. This policy shall be renewed annually, and the Borrower shall furnish evidence of payment.

10. Termination. Lender may terminate this commitment by written or telegraphic notice to Borrower in the event that:

(a) the Borrower shall fail to comply with any term or condition hereof;

(b) the Borrower or any guarantor named as such in this commitment, or the lessee under any lease referred to herein, shall:

(i) apply for, or consent to, the appointment of a receiver, Trustee, or liquidator for it or them or for any of its or their property,

(ii) admit insolvency by failing to pay its or their debts as they mature,

(iii) make a general assignment for the benefit of creditors,

(iv) be adjudicated bankrupt or insolvent, or

(v) file a voluntary petition in bankruptcy, or a petition or an answer seeking reorganization or an arrangement with creditors or to take advantage of any bankruptcy, reorganization, insolvency, readjustment of debt, dissolution or liquidation law or statute, or an answer admitting the material allegations of a petition filed against it or them in any proceeding under any such law, or, if applicable, if corporate action shall be taken by Borrower or any guarantor named as such in this commitment or any such lessee for the purpose of effecting any of the foregoing;

(c) the improvements on the Property shall be materially damaged by fire or other casualty; provided, however, that the Trust will not terminate this commitment by reason of any such casualty if provision satisfactory to the Trust shall have been made

(i) to repair the damage resulting therefrom, and

(ii) for the performance of Borrower's obligations with respect to the loan; or

(d) there is a material adverse change in the financial condition of the Borrower or any guarantors.

11. Other Indebtedness; Default. If the Borrower is now, or hereafter becomes, indebted to Lender on any other loan or extension of credit, it is understood that default by the Borrower under the terms of such other loan or loans shall, at Lender's option, constitute a default under this loan.

12. No Assignment. This commitment shall not be assigned, by operation of law or otherwise.

13. Governing Law. This commitment and all related loan documents shall be construed according to the laws of the _____[state].

Special Loan Conditions

Exhibit A

Prior to closing and funding, the following conditions must be satisfied as indicated:

Legal Requirements

Lender counsel shall contact Borrower's attorney direct to obtain the following:

1. Title insurance policy or binder written by an insurer satisfactory to Lender without title objections, except those approved by Lender counsel.
2. Current, accurate ALTA survey certified to Lender, made by a registered land surveyor, clearly setting forth all boundary dimensions, easements, encroachments and setbacks.
3. Evidence from local governmental authorities that subject property is currently zoned for its intended use.
4. Evidence from appropriate utilities services that water, sewer, electricity, telephone and, if necessary,

natural gas, will be made available to subject property in sufficient quantity to serve the planned improvements.

5. Copy of project's building permit.

6. Notice of Commencement.

7. Such evidence as to Borrower existence, authority to transact business and authority to enter into this loan as may be required.

8. Planning Board Approval.

General Requirements

The following documentation is to be forwarded to Lender.

1. Submit a complete narrative appraisal report made by a professional appraiser whose qualifications have been approved by Lender. Contents of the appraisal report must be satisfactory in every respect. (Required on both the harbor and the

_____ [name].)

2. Certification from a registered engineer or professional soil testing firm that adequate borings have been made and that conditions will permit construction of the planned improvements.

3. Two complete sets of final working plans and specifications, including site plans. Both plans and specs must be signed by Borrower and, if applicable, the project's general contractor and permanent lender.

4. Copy of the fixed price construction contract to be executed between Borrower and project general contractor.

5. Complete bonding information including type bond, surety company, and name and address of issuing agent. Completed dual obligee bond in favor of Lender must be provided prior to closing.

6. All risk hazard insurance (including liability) without provision for co-insurance. Insuror and policy must be acceptable to Lender. Loss payable to read:

7. Current audited or signed financial statements (not over six months old) on the following:

8. Evidence of Borrower's ability and source of funds necessary to satisfy the equity requirements of this

loan.

9. Itemized construction cost breakdown showing all costs necessary to complete the project.
10. Complete cash flow projection prepared by the project general contractor.
11. Accepted copy of permanent mortgage commitment, including all amendments and attachments and compliance with applicable conditions contained therein.
12. Complete itemized breakdown of nonconstruction costs.
13. Satisfactory phase I environmental site assessment performed by an individual or company listed on the annexed approved list. (Lender will consider other individuals or companies, provided they have ability and experience comparable to those on the annexed list.)



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Part IV. FORMS
G. FINANCING

26-22 Current Legal Forms for Real Estate FORM 22.129

FORM 22.129 Construction loan--commitment between construction lender and long-term lender

COMMENT

In certain circumstances, the commitment for permanent long-term financing will precede the obtaining of a loan for commercial construction. Where no immediate sale of the completed building is contemplated the funds required to repay the construction loan will come from the long-term lender. In the situation anticipated by the agreement illustrated here, the borrower has obtained such a long-term loan commitment. Under this agreement, when the conditions of the long-term loan agreement have been met or waived or modified by the borrower the long-term lender agrees to purchase the note given by the borrower to the interim lender in connection with the construction loan.

FORM

_____ [month] _____ [day], _____ [year]

_____ [Insert name of borrower]

_____ [insert street address]

_____ [insert city, state and zip code]

Dear Borrower:

With reference to your commitment dated _____ [month] _____ [day], _____ [year], issued to _____ [name], we propose to act as interim lender for the construction loan of _____ Dollars (\$ _____) on this property (reserving to ourselves the right in our sole

discretion to increase the same to _____ Dollars (\$ _____)). Such loan shall be secured by a first mortgage lien affecting the property in the sum of _____ Dollars (\$ _____).

We understand that in consideration of our making a construction loan to the Borrower in and of incorporating in the construction loan documents certain provisions which will obligate the Borrower to execute an extension agreement with you under the terms of the permanent loan, as provided in your commitment, you do hereby agree to purchase the note of the Borrower from us when the requirements of your commitment have been met, on or before _____ [month] _____ [day], _____ [year], or within the extended period of the commitment, if any, as hereinafter provided; subject, however, to our agreement to the following conditions, and the assent thereto of the Borrower.

1. Assignment of Construction Loan Note and Mortgage by Interim Lender. At such time as the conditions of your commitment have been met, or such conditions shall have been waived or modified by you, on or before _____ [month] _____ [day], _____ [year] (or within the extended period of the commitment, if any, as hereinafter provided), we agree to sell and assign to you (by endorsement of the note to your order, without recourse, and by assignment of the construction loan mortgage), and you agree to purchase, the note and mortgage of the Borrower, for the amount of principal advances made by us thereon (the Borrower to pay us, at the time of such sale, all interest accrued thereon and unpaid up to, but not including, the date of purchase). We agree that all papers regarding the purchase will be forwarded to your home office, upon your request, prior to endorsement for transfer thereof, with allowance of a reasonable time to permit your final examination of such papers and the taking of other actions incidental to the purchase by you and all other persons concerned.

2. Enforcement of Borrower's Obligations Under Construction Loan. If the Borrower shall default in performing its obligations to us, under the loan documents or any collateral documents, prior to _____ [month] _____ [day], _____ [year] (or within the extended period of the commitment, if any, as hereinafter provided), we reserve the right in our sole discretion and without your prior consent to enforce the obligations of the note, mortgage, and construction loan agreement in accordance with the terms of such instruments, but we shall promptly notify you of the nature of such default and of any action we have taken.

3. Extension of Construction Loan. If, on _____ [month] _____ [day], _____ [year], the Borrower shall not have met the requirements of the commitment on which the permanent loan is conditioned, you shall have the option, for _____ (_____) days thereafter, either (a) to purchase the note of the Borrower from us; or (b) to extend the period of the commitment for a reasonable period of time, not to exceed a period of _____ (_____) days from the date such option is exercised, by written notice delivered to us and the Borrower. In the event of such extension, the parties hereto agree that the date on which payment of the note to us is due will be extended for a period equal to the period of such extension; that during such extended period the Borrower will not offer to pay the note held by us, and we will not voluntarily accept payment of the note, either with or without interest to maturity; and that we will take no action to foreclose the lien of the mortgage securing the note, nor voluntarily sell or assign the note to any other person or institution without your assent, during such extended period of the commitment. You, in turn, agree to purchase the note from us, within such extended period of the commitment, when the terms and conditions of the commitment as modified have been fully complied with by the Borrower or waived by you.

4. Acceptance by Borrower. Our agreement to the terms outlined herein is subject to the acceptance of those terms by the Borrower, as to such obligations as these terms impose upon it, and upon an understanding that these obligations of the Borrower will be binding upon it, its successors, and assigns.

5. Execution of Agreement. We request that you indicate your assent to this agreement by your endorsement of a copy of this agreement and returning such copy to us, with a copy to the Borrower, and that the Borrower indicate its assent

to the terms hereof by its endorsement of a copy of this agreement and returning such copy to us.

Very truly yours,

_____ [*Company*]

By: _____

Printed Name: _____

In consideration of your undertakings in the foregoing agreement, we are pleased to accept the terms thereof and agree to be bound by the obligations imposed on us therein.

Dated: _____

_____ [*Borrower*]

By: _____

Printed Name: _____

_____ [*Interim Lender*]

By: _____

Printed Name: _____



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26-22 Current Legal Forms for Real Estate FORM 22.130

FORM 22.130 Commitment for long-term financing--land mortgage technique--construction in progressive stages

COMMENT

A real estate developer will normally attempt to extract the full measure of financing potential derivable from his assets, land included. However, most commercial banks and long-term institutional lenders are reluctant to lend against vacant land, either because of internal policies or federal or state restrictions. Another reason why commercial banks and other institutional lenders may be unwilling to lend against unimproved property is because raw land does not produce a cash flow, thereby making its market value difficult to ascertain.

Nonetheless, a qualified prime lender may be interested in lending against land if it can be assured that the permanent financing of the development will be placed with it. The interests of both sides can be advanced and protected by appropriate measures.

The lender reduces its risk by requiring the principals of the developer to endorse the land mortgage note personally and by insisting that construction proceed on a basis which will demonstrate the economic feasibility of the project. The developer, while committing itself to a long-term financing rate, has the security of knowing that its permanent financing requirements will be met, provided the profitability of the development can be established. Moreover, the principals of the developer can obtain comfort in the knowledge that the requirement of a personal guaranty will not extend to the permanent loan, since long-term institutional lenders normally look solely to the property for satisfaction.

It should be noted that the technique applied here to a garden apartment complex is equally suitable to the development of other long-range projects, such as industrial parks. In the form that follows, the origination of the financing is handled by a mortgage loan broker, which commands a

fee for its services.

The long-term lender's basic concern is that the project will generate enough income to service the debt. The long-term lender is usually reluctant to commit itself unconditionally to the entire financing of a development which may require several years for completion. Accordingly, the institution will require that construction proceed section by section and that its obligation to finance proposed portions come into play only if the parts already completed demonstrate their economic success in the form of a minimum rent roll.

With that objective in mind, the lender lays down certain conditions with respect to its two forms of physical security. As to the land, as illustrated in this form, it will require assurance that sewer and water installation is both feasible and practicable, that necessary utility easements will be obtained, and that the tract is accessible by automobile. Control is further assured by providing that the lien of the land mortgage will be released as to successive sections only upon the issuance and acceptance, at the option of the long-term lender, of a commitment for the permanent mortgage for such section. As to the improvements, the institution views the imposition of conditions from two aspects: positive controls which assure the income-producing quality of the property, and negative features which can adversely affect alienability if foreclosure should eventuate. With respect to the former, the lender will require that the plans and specifications be satisfactory to it, that periodic inspections be made by its designee, and that it will not be obligated to proceed with further financing unless the section completed has attained a stipulated rental level. As to the negative controls, the lender will be intent on making certain that the encumbered tract remains accessible without restriction and that the leases will not contain any provisions which would cut off or impair the lien of the mortgage.

The foundation of the financing structure is the loan commitment for the land mortgage illustrated in this form. It will be noted that this instrument refers only to the sections which will be developed subsequent to the initial section and seemingly overlooks some essential security. However, the design is conscious--the mortgage banker will hold the paramount lien on the section first to be improved and will eventually assign the security to the institutional lender. When construction is about to commence on an additional section, the long-term lender will release that area from the lien of its land mortgage in order to allow the construction lender to have a first lien thereon.

Upon completion of the development, the several mortgages covering the various sections of the tract are consolidated in order to facilitate mortgage payments and to avoid title problems.

FORM

_____ [month] _____ [day], _____ [year]

_____ [Insert name of borrower]

_____ [insert street address]

_____ [insert city, state and zip code]

Gentlemen:

Your request for a land mortgage on the captioned property, further identified below, has been approved subject to the

following terms and conditions:

1. Property. The land is located at _____ [address] on a plan of _____ [name] ("Borrower") situated at _____ [address], designated Section II which lies in the _____ [address]; Section III which lies in the _____ [address]; and Section IV which lies at _____ [address].

2. Borrower. The borrower is _____ [name].

3. Amount and Term of Loan. The loan shall be in the amount of _____ Dollars (\$_____). The term of the loan shall be _____ (_____) years from the date of disbursement, the principal repayable at maturity. The rate of interest shall be _____ percent (_____%) payable in monthly installments.

4. Release of Parcels. The three parcels of land will be released in the following order:

Section II upon the payment of _____ Dollars (\$_____).

Section III upon the payment of _____ Dollars (\$_____), and at our option the issuance and acceptance of a commitment for a permanent mortgage for financing of the garden apartments to be built in such section.

Section IV upon the payment of _____ Dollars (\$_____), and at our option the issuance and acceptance of a commitment for a permanent mortgage for financing of the garden apartments to be built in such section.

5. Submission of Documents. Each document required for this loan shall be delivered to and shall be in form and substance acceptable to the lender's legal counsel. The survey, title report, and drafts of all documents unexecuted are to be submitted to the lender's legal counsel before the loan is closed. The total loan in the sum of _____ Dollars (\$_____) must be insured by a title insurance company acceptable to lender's legal counsel. As soon as possible before the disbursement by us of the funds with respect to this land mortgage, we require a report from the borrower, which report shall show that sewer and water installation is feasible and practicable.

6. Access Roads and Utility Easements. All access roads and utility easements are to be provided in a manner satisfactory to this company and shall afford access at all times to the various parcels including utility easements and a roadway across Section I on the plat (which section will not be under the mortgage). All three parcels will have the right to tie in to the utility easements across the other parcels in addition to the utility easements across Section I. All easements are subject to the approval of the lender's legal counsel.

7. Closing and Closing Costs. _____ [name] is to be the closing and disbursing agent in respect of this case and all legal expenses including survey costs, title costs, recording charges, etc., are to be paid by Borrower.

8. Endorsement of Mortgage Note. The mortgage note is to be personally guaranteed by the principals of Borrower.

9. Financing Fee. The fee for arranging this financing is _____ Dollars (\$_____), payable as follows: _____ Dollars (\$_____) upon the signing of this commitment which indicates your acceptance of the terms hereof, and the balance payable at the time of the disbursement of the funds. In the event, for any reason, this loan does not close, the _____ Dollars (\$_____) deposited on the signing of this commitment will not be refunded to the borrower, but will be deemed to be consideration for its failure to fulfill the commitment.

10. Term of Commitment. This commitment shall expire on _____[*month*]
_____[*day*], _____[*year*], by which time disbursement of the land mortgage must be made.

11. Assignment. This commitment is not assignable without the express written approval of
_____[*name*].

In order that our records may be complete, please acknowledge your acceptance of the terms and conditions of this commitment by signing and returning the duplicate copy enclosed.

Very truly yours,

a(n) _____[*state*] _____[*entity*]

By: _____

Print Name: _____

Title: _____

Accepted:

"BORROWER"

By: _____

Print Name: _____

Title: _____



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26-22 Current Legal Forms for Real Estate FORM 22.131

FORM 22.131 Commitment for long-term financing--loan to be closed upon completion of construction--provision for interest contingent upon earnings--liquidated damages

COMMENT

The availability of a construction loan is often dependent upon whether the prospective borrower has been able to obtain a commitment for long-term financing. This form illustrates the long-term lender's commitment letter which sets forth the promise to make the loan and the obligation to which the borrower will be bound upon countersigning the document.

As with most loan commitment letters, there are many conditions which must be satisfied prior to the lender actually making the permanent loan.

Many of these conditions are the requirements of the construction lender. For example, in order to insure the quality of construction, the lender has the right, before being required to close the loan, to approve final plans and specifications, and to verify that the completed structure conforms to such plans and specifications and to the requirements of applicable law.

Since the lender must arrange to make funds available for an expected closing date, any delay in the completion of construction or other default of the borrower which postpones or cancels consummation of the loan will cause the loss of investment income and other damages to the lender. The letter specifies that upon such postponement or cancellation the lender may receive (a) a specified amount of liquidated damages, and (b) an additional amount for each month of delay between the scheduled closing date and final consummation or cancellation. The borrower must also pay the lender's fees and other expenses incurred in connection with the loan if it is not consummated.

This instrument also affords the lender protection against inflation over the extended period of the

loan. The borrower must pay as "contingent interest" a certain percentage of earnings in excess of a specified amount.

Aside from any special features, the commitment letter covers the following basic essential points: (1) the amount and term of the loan, (2) the deadline for completion of construction, (3) criteria for determining completion of construction, (4) requirement for execution and approval of deeds of trust, including coverage of personal property, (5) assignment rights, and (6) prepayment privileges. Obviously, the commitment contemplates the preparation of one or more extensive loan documents being executed prior to the loan closing.

FORM

_____ [month] _____ [day], _____ [year]

_____ [Insert name of borrower]
 _____ [insert street address]
 _____ [insert city, state and zip code]

Gentlemen:

The Borrower has inquired as to the willingness of this _____ [name] (the "Company") to make a permanent first mortgage loan to the Borrower in connection with the project and upon the security hereinafter mentioned. In connection therewith, the Borrower has warranted and represented to us as follows:

(a) _____ [name] ("Borrower") is a(n) _____ [state] _____ [entity], and has its principal place of business in _____ [city] _____ [state].

(b) Borrower holds fee simple title to a parcel of land described in Exhibit A annexed hereto and made a part hereof (the "Land").

(c) Borrower shall cause a 12-story office building, hereinafter more fully described (the "Building"), to be constructed upon the Land in full compliance with all applicable zoning and other legal requirements of the State of _____ [state], pursuant to detailed plans and specifications to be prepared by _____ [name] (the "Architect").

Borrower has submitted to us certain preliminary architectural drawings and memoranda specifications prepared by the Architect to aid us in arriving at a fair valuation of the Land and the proposed improvements for long-term investment purposes. This material does not contain sufficient detail to enable us to make a definitive valuation, but the Borrower has stated to us that the Building will contain approximately _____ (_____) square feet and approximately _____ (_____) cubic feet.

We are pleased to advise the Borrower that, relying on the foregoing, and subject to the Company's approval of all proceedings to be taken in connection with the transaction herein contemplated, and the form and substance of all documents incident thereto, and subject further to the terms and conditions hereinafter set forth, the Company's Finance Committee has authorized a first lien mortgage loan to be made to Borrower to be evidenced by Borrower's note (the "Note"), and secured by a first lien mortgage (the "Mortgage"), upon a good and marketable fee simple title to the Land and the improvements to be erected thereon, and by a security agreement (the "Security Agreement"), on the personal property hereinafter referred to.

1. Borrower. The Borrower shall be _____ [name].

2. Amount and Term of Loan. The loan shall be in the amount of _____ Dollars (\$ _____). The term of the loan shall be _____ (_____) years from the date of closing, as defined in Paragraph 15 hereof. The loan shall be repaid by monthly payments of _____ Dollars (\$ _____), to be applied first to interest at the rate of _____ percent (_____) per year, and the balance to principal.

3. Contingent Interest Payments. Within _____ (_____) days after the close of each "operating year" (as the same shall be defined in the Mortgage) during which the loan herein contemplated shall be outstanding, and within _____ (_____) days after the close of the operating year during which such loan shall have been fully paid and discharged (other than by prepayment), the Borrower shall deliver to us a statement, prepared in accordance with sound and generally accepted accounting practice and certified as true and correct by one of the firms of accountants listed in Exhibit B attached hereto. Such statement shall set forth, in reasonable detail, the "net earnings" from the Building, as the same are defined in Exhibit C attached hereto, during and with respect to such operating year. Simultaneously with the delivery of each such statement, and in addition to and over and above the required constant monthly payments of fixed interest and amortization and the required monthly deposits in respect of real estate taxes, as herein set forth, the Borrower shall pay to us, as additional interest, an amount equal to _____ percent (_____) of the amount, if any, by which the "net earnings" from the Building for such operating year, as shown by such statement, shall exceed _____ Dollars (\$ _____) (or, in the case of any partial yearly period, the proportionate part of _____ Dollars (\$ _____)). The Company shall have the right, through such agents or employees as the Company may determine, to examine the Borrower's books of account and records for the purpose of verifying the amount of such "net earnings."

4. Tax Deposits. Monthly non-interest bearing deposits of one-twelfth (1/12) of the annual real estate taxes, as estimated by this Company, shall be made to this Company to accumulate for the payment of such taxes when due.

5. Prepayment Privilege. The Note shall grant the privilege to pay the loan in full prior to maturity on any interest date after the end of the _____ (_____) loan year, upon giving not less than _____ (_____) days prior written notice of intention to prepay, and upon paying, in addition to principal then owing, accrued fixed interest, and accrued contingent interest (as estimated, subject to adjustment) a sum equal to _____ percent (_____) of such principal if prepayment is made in the _____ (_____) loan year, _____ percent (_____) if the prepayment is made in the _____ (_____) loan year, _____ percent (_____) if prepayment is made in the _____ (_____) loan year, _____ percent (_____) if prepayment is made in the _____ (_____) loan year, _____ percent (_____) if prepayment is made in the fifteenth loan year, _____ percent if (_____) prepayment is made in the sixteenth loan year, and without prepayment charge thereafter.

6. Security. The following shall constitute security for the loan:

(a) The Land.

(b) The 12-story office Building, fireproof and fully air conditioned, to be constructed in accordance with detailed plans and specifications to be prepared by the Architect and approved by us, and which shall contain retail stores on the ground floor, offices on the remaining floors, and off-street parking facilities for not less than 650 automobiles.

(c) All furniture, furnishings, fixtures, equipment, and articles of personal property (collectively, the Personal Property) required for the operation of the Building, and all future additions thereto and replacements thereof. All of such Personal Property shall be acquired by the Borrower and remain the Borrower's exclusive property, free and clear of any and all liens and encumbrances thereon and security interests therein except the lien of the Mortgage and the Security Agreement to be executed and delivered to this Company pursuant hereto.

7. Plans and Specifications. Borrower shall retain the Architect for the purpose of preparing detailed plans and specifications (the "Plans"), which shall be consistent with, and conform in all material respects with, the preliminary plans and memoranda specifications. The Company reserves the right to retain, at the Borrower's expense, an architect or engineer, or both (the Mortgagee's Architect), for the purpose of passing on such detailed Plans. Prior to the commencement of construction of the Building, the Borrower shall submit copies of the Plans both to us and to the Mortgagee's Architect and shall have obtained the Company's prior written approval thereof, which approval shall not unreasonably be withheld.

8. New Appraisal. After the Company has approved the Plans, the Company is to receive from the Company's Chief Appraiser a new appraisal report (the New Appraisal) which shall show that the fair value of the Land and of the improvements contemplated thereon, as evidenced by the Plans (exclusive of any value attributable to the Personal Property), is not less than _____ Dollars (\$_____). The Borrower are to furnish the Company's Chief Appraiser with all information which he may deem necessary for the purpose of such New Appraisal.

9. Construction of Building. Subject to unavoidable delays, as hereinafter defined, construction of the Building shall be commenced not later than _____[month] _____[day]. _____[year], and construction of the Building shall be completed not later than _____[month] _____[day]. _____[year]. If, by reason of such unavoidable delays, construction of the Building shall not be completed by _____[month] _____[day]. _____[year], the time for such completion shall be extended by a period equal to the period of such delays, but in no event beyond _____[month] _____[day]. _____[year], unless the Company shall have otherwise agreed in writing. Wherever in this letter the term "unavoidable delays" appears, it shall be construed to mean only delays due to strikes, lockouts, Acts of God, inability to obtain labor or materials, governmental restrictions, enemy action, civil commotion, fire, unavoidable casualty, or similar causes, provided such similar causes are beyond the Borrower's control.

Promptly following completion of the foundations and footings for the Building, the Borrower shall furnish us with a survey in form, and prepared by a licensed surveyor, satisfactory to us and to the title insurance companies hereinafter referred to, showing that no part of any foundation or footing encroaches upon any adjoining street or property.

For the purposes of this letter, construction of the Building shall be deemed to have been completed upon the earliest date (the Completion Date) when all of the following conditions shall have been fulfilled:

(a) The Architect and, provided the Company shall have determined to retain such architect or engineer, the Mortgagee's Architect each shall have certified to us that all work in connection with the Building has been substantially completed in substantial accordance with the Plans as approved by us, or in accordance with any modifications thereof which the Company shall have approved, and that all such work has been done in accordance with all applicable requirements of law, including, but without limitation, all applicable zoning requirements.

(b) The Company's Chief Appraiser shall have certified to us that the Building, as completed, and the Personal Property, substantially conform in all material respects to a building of the size and character, and personal property of the character and quality, which the Company's Chief Appraiser projected in arriving at the valuation set forth in the New Appraisal.

(c) We shall have been furnished with a copy of the permanent or temporary certificate of occupancy, certificates of electrical inspection, and such other certificates as are normally and customarily required and issued by the Department of Buildings of the City of _____ [city], or other city, county, and state departments having jurisdiction thereover, in connection with a new building.

(d) The Building shall have been formally opened as an operating office building.

10. Leases and Occupancy Agreements. All leases and other occupancy agreements in existence at the time of the closing with respect to garage and office space and space for sales and service facilities shall have been approved by this Company and its special counsel and shall contain such attornment and other provisions as this Company may require, and the Borrower's right, title, and interest therein shall be assigned to this Company as collateral security to such extent as the Company may require.

11. Security Agreement. This Company shall receive a Security Agreement creating a security interest in the Personal Property together with the certificate of the title companies referred to in Paragraph 12 hereof and a certificate of the Secretary of State of the State of New York that the Security Agreement constitutes a good and valid first lien on the Personal Property.

12. Documents and Title. The form and substance of all documents to be delivered to or received by us at or prior to the closing, including, but not by way of limitation, the Note, Mortgage, and Security Agreement, all leases and other occupancy agreements, and the assignments to this Company of the Borrower's interest therein, surveys, title and other insurance policies, and certifications, shall in all respects be satisfactory to this Company and its special counsel. The title and the evidence thereof shall be satisfactory to this Company and its special counsel and, at the time of closing, there shall have been delivered to us title insurance policies distributed both as to companies and amounts in a manner satisfactory to us, providing for joint and several insurance, or coinsurance if the Company so requires, by such companies, in the aggregate amount of _____ Dollars (\$ _____), insuring that the Mortgage constitutes the valid, direct first lien which it purports to create upon the Borrower's good and marketable fee simple title in and to the Land and the Building subject only to such liens, charges, and encumbrances as shall have been previously approved by us in writing. The Borrower agree to use its best efforts to reach agreement with us, as soon as reasonably possible following the Borrower's acceptance hereof, upon the provisions of the Note, the Mortgage, and the Security Agreement and of such other instruments incident to the transaction contemplated hereby as are presently determinable. It is understood that, without limiting the generality of the first sentence of this paragraph, the Note or the Mortgage shall contain, among other provisions, mutually satisfactory provisions with respect to the several types and amounts of insurance coverages to be maintained by the Borrower; the application of insurance and condemnation proceeds; the maintenance of working capital; the furnishing of financial and other statements by the Borrower, restrictions on the creation of junior liens, creation of additional indebtedness, declaration and payment of dividends, and creation of subsidiaries by the Borrower, the Borrower's other business activities, merger and consolidation by or with the Borrower, the sale, conveyance, or other transfer of the Building, the leasing of the Building, and the modification and termination of leases, licenses, concessions, and other occupancy agreements made with respect to any space in the Building.

13. Environmental Site Assessment. Prior to the closing, the Borrower shall provide us with a Phase I environmental site assessment, which shall state that there is no evidence of any adverse environmental condition existing on the real property which is to secure this loan. The site assessment shall be performed by an experienced environmental engineer who is acceptable to us. Acceptance shall not be unreasonably withheld, conditioned or delayed. In the event that the site assessment does not provide as required above, the Company shall be under no obligation to lend any sum to the Borrower.

14. Legal Opinions. At the time of closing, the Company shall have received from the Company's special counsel, an opinion in scope and substance satisfactory to us.

15. Closing Date. Subject to unavoidable delays, as defined in Paragraph 9 hereof, the closing of the loan shall take place at this Company's home office at _____[address], on a date (the "Closing Date"), subsequent to the Completion Date which shall be fixed by the parties. Unless this Company, in its sole and absolute discretion, shall otherwise agree in writing, the Closing Date shall not be later than the earlier of (a) _____[month] _____[day], _____[year]; or (b) the date which is sixty (60) days subsequent to the Completion Date. In the event of unavoidable delays, the Closing Date shall be such date, subsequent to the Completion Date of the Building, as shall be fixed by the parties and, unless this Company, in its sole and absolute discretion, shall otherwise agree in writing, shall not be later than the earlier of; (c) _____[month] _____[day], _____[year]; or (d) the date which is _____ (_____) days subsequent to the Completion Date. In no event shall the Closing Date be earlier than _____[month] _____[day]. _____[year], unless this Company, in its sole and absolute discretion, shall otherwise decide and so notify the Borrower in writing.

16. Payment of Fees and Expenses. The Borrower's acceptance hereof shall constitute the Borrower's unconditional agreement, whether or not the transaction contemplated hereby shall be consummated, to pay or reimburse us for all reasonable costs and expenses paid or incurred by us or on the Company's behalf in connection with such transaction, including, but not limited to, the reasonable fees and disbursements of the Company's special counsel for their services to us with relation to this agreement, including the furnishing of the opinions referred to herein and all other opinions which the Company may request on questions incident to the proposed transaction, the fees and expenses of the Mortgagee's Architect, printing costs, charges for title examination, and insurance, surveys, recording and filing fees, revenue stamp, mortgage, and other taxes, if any are required, and all other actual out-of-pocket expenses in connection with such transaction. This Company shall not be obligated to pay any premium or other charge, or any brokerage fee or commission, in connection with such transaction and Borrower's acceptance hereof shall constitute the Borrower's further unconditional agreement to pay, and to hold this Company harmless against, any and all claims in connection with the foregoing and with such transaction.

17. Cancellation of Commitment. This Company reserves the right to cancel this commitment and to terminate its obligations hereunder, in any of the following events:

- (a) Failure to conform to the respective time limits specified in Paragraphs 9 and 15 hereof.
- (b) Failure to comply with any of the requirements of Paragraphs 7 to 14, inclusive, hereof.
- (c) Failure to construct the Building substantially in accordance with the Plans as they, including any changes therein, shall have been approved by this Company.
- (d) Nonreceipt by this Company of the Architects' certificates provided for in Paragraph 9(a) hereof and satisfying the requirements of such paragraph.
- (e) Nonreceipt by this Company of the Chief Appraiser's certificate provided for in Paragraph 9(b) hereof and satisfying the requirements of such paragraph.
- (f) Insufficiency of title or lack of approval by this Company or its special counsel of the title to the Land, or of any documents required hereunder to be delivered to this Company at or prior to the closing.
- (g) Substantial damage to the Building which shall not have been repaired or restored to the satisfaction of this Company at the time of closing, or insubstantial damage to the Building, as to which provision for repair or restoration, satisfactory to this Company, shall not have been made at the time of closing.

- (h) If any part of the Land or the Building shall have been taken in condemnation or other like proceedings.
- (i) If there shall be filed by or against the Borrower any petition in bankruptcy or insolvency or for reorganization or for the appointment of a receiver or trustee, or if the Borrower shall make an assignment for the benefit of creditors, or shall file a petition for arrangement, or shall enter into an arrangement, and if, in any such case, such petition is not withdrawn or dismissed or such appointment, assignment, or arrangement is not cancelled and terminated within thirty (30) days after the filing of such petition or the entry into of such arrangement.
- (j) Failure to make any payment required to be paid to or for the account of this Company pursuant to Paragraph 16 hereof.
- (k) Failure to comply with any requirement of law applicable to the construction of the Building, including, without limitation, any zoning requirement or any condition with respect to such construction.
- (l) Nonreceipt by this Company of the New Appraisal as provided in paragraph 8 hereof and satisfying the requirements of such paragraph.

This Company may exercise the foregoing right of cancellation and termination by giving the Borrower written notice thereof, by registered or certified mail addressed as provided in Paragraph 20. Upon the giving of such notice all obligations of this Company hereunder shall come to an end as of the date of such notice. The issuance of such notice shall relieve the Borrower of all obligations hereunder except for the payment of the fees, expenses, and other disbursements mentioned in Paragraph 16 hereof which shall have been paid or incurred by us, any amount which may have become payable under paragraph 18 hereof, and the liquidated damages provided for in Paragraph 19 hereof.

18. Compensation for Loss of Investment Income. In the negotiations preliminary to the delivery of this commitment, the Borrower indicated to us the Borrower's expectation that the Building would be completed by _____[month] _____[day], _____[year], and that it was the Borrower's desire that the funds for the permanent financing of the Building should be available at that time. By reason of this commitment, it will be necessary for us to schedule the Company's funds available for investment accordingly. In consideration of the agreement on the Company's part to continue to make such funds available to the Borrower beyond _____[month] _____[day], _____[year], as, and subject to the conditions, set forth herein, and in recognition of the loss of investment income which would accrue to this Company if the consummation of the loan were to be delayed beyond such date, the Borrower agree that if, for any reason whatsoever, including specifically, but not limited to, unavoidable delays as defined in Paragraph 9 hereof, the closing of such loan shall not have been consummated by _____[month] _____[day], _____[year], and if, and so long thereafter, as such loan shall not have been consummated or this commitment shall not have been terminated by this Company pursuant to the provisions of Paragraph 17 hereof, the Borrower shall pay to this Company, commencing _____[month] _____[day], _____[year], and monthly thereafter, as compensation for the loss of investment income which the Company would sustain in such event, during and with respect to the period from _____[month] _____[day], _____[year], to the date of closing or the date of termination of this commitment, the sum of _____ Dollars (\$_____) for each month that shall elapse between _____[month] _____[day], _____[year], and the date of the actual closing of the loan or the date, if any, upon which the Company shall have notified the Borrower of the Company's determination to cancel and terminate this commitment. If the closing of the loan shall be consummated, or if the date upon which the Company shall have notified the Borrower of any determination on the Company's part to cancel and terminate this commitment, shall be any day other than the first or last day of the month, such monthly sum for the month in which such closing or such notification shall occur shall be prorated, on a per diem basis, from the first day of such month up to and including the actual date of closing or the date of such notification, and shall be payable on such date. The Borrower's obligation for the payments referred to in this paragraph shall be over and above the Borrower's obligation for payment of the fees and expenses referred to in Paragraph 16 hereof, and for the payment of

liquidated damages, if any, as provided for in Paragraph 19 hereof.

19. Liquidated Damages. In consideration of the substantial services and the expense thereof heretofore and which will hereafter necessarily be rendered and incurred by this Company in processing and preparing for the closing of the loan contemplated hereby; the substantial long-term loss of investment income which this Company would sustain, in the event of the Borrower's failure to consummate such loan, above and beyond the portion of such loss, if any, as might be recovered by this Company pursuant to the provisions of Paragraph 18 hereof; the uncertainty, in the event of such failure to consummate such loan, as to the then availability to this Company of other investment opportunities having investment qualities and characteristics, and upon terms, comparable with those represented by the loan contemplated hereby; and in recognition of the difficulty of accurately ascertaining the amount of damages which this Company would sustain in the event of any such failure by the Borrower to take or cause to be taken all action necessary to cause such loan to be consummated, the acceptance hereof by the Borrower shall constitute the Borrower's unconditional agreement to pay this Company, as liquidated damages, the sum of _____ Dollars (\$_____) if for any reason other than the cancellation of this commitment by this Company pursuant to Paragraph 17(h) hereof the transaction hereby contemplated is not consummated and the loan is not closed within the time hereby set for consummation and closing.

20. Notices. Any notice required or desired to be given hereunder shall be deemed to have been properly given if sent by registered or certified mail addressed, if to this Company, to _____[address], or, if to Borrower, to the address to which this letter is addressed. Either party hereto may from time to time designate another address in the _____[city], _____, _____[state], for the receipt of future notices by a notice given as herein provided.

21. Nonassignability. This commitment may not be assigned by Borrower without the Company's written consent, which may be withheld on any reason or no reason.

22. Entire Agreement. This commitment supersedes all agreements previously made between us relating to its subject matter. There are no other understandings or agreements between us.

23. Non-waiver. No delay or failure by either of us to exercise any right under this commitment, and no partial or single exercise of that right, shall constitute a waiver of that or any other right, unless otherwise expressly provided herein.

24. Headings. Headings in this commitment are for convenience only and shall not be used to interpret or construe its provisions.

25. Governing Law. This commitment shall be construed in accordance with and governed by the laws of the State of _____[state].

26. Counterparts. This commitment may be executed in two or more counterparts, each of which shall be deemed an original but all of which together shall constitute one and the same instrument.

27. Binding Effect. The provisions of this commitment shall be binding upon and inure to the Company's benefit and that of the Company's respective legal representatives, successors, and assigns.

If the foregoing is satisfactory to the Borrower, will the Borrower please so indicate by signing and returning to us the enclosed copy of this letter agreement within ten days from the date hereof, whereupon it shall become a binding agreement between us in accordance with its terms. Until the receipt thereof within such ten-day period, there shall be no obligation on the Company's part hereunder.

Very truly yours,

_____ [Company]

By: _____

Printed Name: _____

Accepted:

_____ [Borrower]

By: _____

Printed Name: _____

[Attach Exhibit A]

[Attach Exhibit B]

[Attach Exhibit C]



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Current Legal Forms for Real Estate

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Current Legal Forms for Real Estate
Chapter 22 DEVELOPMENT AND SUBDIVISION
Part IV. FORMS
G. FINANCING

26-22 Current Legal Forms for Real Estate FORM 22.132

FORM 22.132 Loan commitment letter from lender to borrower--infrastructure loan for real estate developer

COMMENT

This form is a typical commercial lender's commitment letter sent to a real estate developer who has sought financing for the construction of the infrastructure of the new development. The loan proceeds will be gradually disbursed as construction work progresses. A schedule annexed to the commitment letter sets forth how much money will be released by the lender to the borrower as each specified stage of the construction is completed.

The commitment letter states that interest only will be paid on the amount advanced until the earlier of: (1) the time when the loan funds are fully disbursed to the borrower; or (2) the arrival of a certain specified date. Thereafter, the principal will begin to amortize. The term of the loan is five years, with amortization over a period of 15 years. This means that after five years a balloon payment is due. The borrower must either pay off the balance of the loan or refinance it. Ideally, by the end of the five-year period, all the units in the development will have already been sold off, and the sums paid by the borrower as lots were released will have covered the full amount of the loan within the five-year term.

FORM

_____ [month] _____ [day], _____ [year]

_____ [Insert name of borrower]

26-22 Current Legal Forms for Real Estate FORM 22.132

_____ [insert street address]
 _____ [insert city, state and zip code]

Re: Real Property and Premises Located at: _____ [address]

Dear Borrower:

_____ (the "Company") hereby offers to the Borrower a loan in the amount of _____ Dollars (\$ _____) at an annual interest rate of _____ percent (_____ %) over the rate announced by us from time to time as our prime lending rate. The rate will change immediately as the prime rate changes. The loan shall be for a term of _____ (_____) years, with amortization over _____ (_____) years. Amortization shall commence on _____ [month] _____ [day], _____ [year], or _____ (_____) days after the loan is fully disbursed in accordance with Schedule A, whichever occurs first. Interest only will be paid monthly until amortization commences.

This commitment to lend shall be withdrawn if not accepted by the Borrower within _____ (_____) days of the date of this letter. To accept this commitment to lend, sign the enclosed copy of this letter and return it to the undersigned with the non-refundable commitment fee of _____ Dollars (\$ _____). This commitment to lend expires _____ (_____) days from the date hereof. Our commitment fee is deemed earned upon production of this commitment letter.

The terms of this letter shall survive the closing of the loan and may only be amended by a written agreement signed by the Borrower and the Bank.

The following conditions must be satisfied at or prior to closing:

1. General Conditions:

- (a) The mortgage shall be a first lien on the real property and premises commonly known as _____. This is vacant land, containing at least _____ hundred (_____) acres. Title to the premises must be deemed marketable in the opinion of the Bank's attorneys.
- (b) The Borrower will grant a first security interest in all equipment, fixtures and personal property which are used in connection with the installation of the infrastructure in and on this land, which items are now or hereafter located on the real property subject to the mortgage.
- (c) The Borrower will assign to the Bank all leases and rents in connection with the real property, if any.
- (d) The Borrower will execute and deliver to the Bank those documents deemed necessary or appropriate by the Bank's attorneys in order to accomplish 1(a), (b) and (c) above, including, but not limited to: a promissory note, a mortgage, a security agreement, authenticated UCC-1 financing statements, and an assignment of leases and rents.
- (e) The Borrower will provide the Bank with an opinion of the Borrower's attorney or other evidence satisfactory to the Bank regarding: the Borrower's authority to enter into this transaction, standing, title, compliance with laws, and such other issues as may be deemed appropriate by the Bank's attorneys.

2. Title Conditions:

- (a) The Borrower will provide to the Bank a survey and legal description by metes and bounds of the real property,

which has been certified by a licensed surveyor within the last six (6) months. This survey shall conform to the American Land Title Association's minimum standard.

(b) The Borrower will provide to the Bank a title insurance policy for the real property from a solvent title insurance company licensed to do business in the State of _____ [state]. This policy shall be free from any exceptions and conditions, except those which are acceptable to our attorneys. Title must be unencumbered and marketable.

(c) The mortgage herein shall constitute a first lien on the property.

3. Financial Conditions:

(a) The Borrower must submit to the Bank annually and within _____ (_____) days after the Borrower's income tax returns have been filed a copy of the Borrower's state and federal income tax returns, the Borrower's personal financial statement, and an operating statement for the real property.

(b) The Borrower will submit to the Bank annually copies of receipts attesting to the payment of real property and school taxes. These shall be submitted within _____ (_____) days after the last day on which such taxes may be paid without penalty.

(c) The Borrower will deliver to the Bank an insurance policy for fire, flood and liability coverage from a solvent insurance company in at least the amount of _____ Dollars (\$_____). This or a comparable policy shall be maintained without lapse during the term of the loan.

(d) The Borrower will pay all expenses in connection with the closing, including, but not limited to: recording fees, mortgage tax, survey, title insurance, Bank's attorneys' fees, engineering or consulting fees for the environmental site assessment, and the loan commitment fee.

4. Miscellaneous Conditions:

(a) This commitment may not be assigned.

(b) During the term of this loan, the Borrower may not obtain secondary financing secured by a mortgage on the real property or otherwise without the written consent of the Bank. The Bank shall have no obligation to grant such consent.

(c) This loan shall become due and payable in full in the event of the sale or other transfer of the property, or any part thereof, during the term of this loan. In the event that the property is subdivided, the Bank shall release lots in exchange for payments of _____ Dollars (\$_____), provided that the Borrower are not in default under the terms of the note and mortgage at the time a release is requested.

(d) The Bank shall not be obligated to close this loan transaction if there is a material change in the condition of the real property or in the financial condition of the borrower as of the date of the closing.

5. Environmental Conditions:

(a) At least _____ (_____) days prior to the closing, the Borrower shall provide to the Bank the results of a Phase I environmental site assessment prepared by a qualified individual or company engaged in the business of environmental consultations. This assessment shall be in a form acceptable to the Bank. The Bank's obligation to lend to the Borrower shall be contingent upon the determination by the consultant that there are no significant environmental concerns associated with the real property, and that there is no direct or circumstantial

evidence of a significant adverse environmental impact due to past or present practices or releases of hazardous materials in, on or about the real property. The Bank reserves the right to have a consultant of its own review the data and site assessment if the Bank deems it appropriate.

(b) The Borrower will provide the Bank with an environmental indemnification in a form satisfactory to us.

(c) The Borrower will provide the Bank with satisfactory evidence that the real property may lawfully be occupied for the proposed use, and that it is in compliance with all federal, state and municipal laws, regulations and restrictions, including, but not limited to, zoning laws and environmental protection laws.

(d) The Bank reserves the right to call this loan due and payable in full immediately upon the occurrence or discovery of any adverse environmental event or condition.

Very truly yours,

_____ [Company]

By: _____

Printed Name: _____

The undersigned hereby agree to the terms and conditions of this commitment letter.

Dated: _____

_____ [Borrower]

By: _____ Printed Name:

SCHEDULE A

Schedule of Fund Advances

The following sums will be advanced upon the completion of the following work:

a.	Excavation (Phase I):	\$ _____
b.	Laying of storm sewer (Phase I):	\$ _____
c.	Laying of water mains (Phase I):	\$ _____
d.	Laying of sewer pipes (Phase I):	\$ _____
e.	Connection of water main to pumping system (Phase I):	\$ _____
f.	Connection of sewer pipes to county-owned lines (Phase I):	\$ _____
g.	Rough grade of road (Phase I):	\$ _____
h.	Finish surface of road (Phase I):	\$ _____
i.	Excavation (Phase II):	\$ _____

- j. Laying of storm sewer (Phase II): \$ _____
- k. Laying of water mains (Phase II): \$ _____
- l. Laying of sewer pipes (Phase II): \$ _____
- m. Connection of water main to pumping system (Phase II): \$ _____
- n. Connection of sewer pipes to county-owned lines (Phase II): \$ _____
- o. Rough grade of road (Phase II): \$ _____
- p. Finish surface of road (Phase II): \$ _____



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Current Legal Forms for Real Estate
Chapter 22 DEVELOPMENT AND SUBDIVISION
Part IV. FORMS
G. FINANCING

26-22 Current Legal Forms for Real Estate FORM 22.133

FORM 22.133 Commitment for permanent real estate loan--offer by a mortgage broker--includes prepayment penalty

COMMENT

In this agreement the institutional lender offers to make a permanent loan for the initial part of a development.

The lender's obligation to proceed with financing the second phase is expressly conditioned upon the achievement of a satisfactory rent roll for the first phase. In this manner, the institution's financial backing is tied to the demonstrated success of the project.

The long-term lender will issue a commitment for the next phase of the project when it is satisfied that the development has demonstrated its financial feasibility. The form of such commitment will be substantially the same as the commitment for the first two phases but will provide for consolidation of all four loans when the final advance is made for the last phase.

FORM

_____ [month] _____ [day], _____ [year]

_____ [Insert name of borrower]

_____ [insert street address]

_____ [insert city, state and zip code]

Gentlemen:

We have received a commitment from the _____ [name] ("Lender") for a permanent mortgage loan covering the captioned property, containing the following provisions:

1. Amount of Loan. The loan shall be in the total amount of _____ Dollars (\$_____).

2. Borrower. The borrower is _____ [name].

3. Term of Loan and Repayment. The term of the loan shall be _____ (_____) years from the date of final payment to the borrower. The loan shall be repaid in equal monthly installments of _____ Dollars (\$_____) each, beginning on the first day of the _____ (_____) month after the date of final payment to the borrower, and each succeeding month thereafter, to be applied first to interest at the rate of _____ percent (_____) per year, and the balance on account of principal.

4. Prepayment. The borrower may pay the entire balance of the loan

(a) on the first day of any month commencing _____ (_____) years from the date of the first monthly payment of principal and interest, by giving _____ (_____) days' written notice and by paying a surrender charge of _____ percent (_____), computed on the balance prepaid; and

(b) on the first day of any month commencing _____ (_____) years from the date of the first monthly payment of principal and interest, by giving _____ (_____) days' written notice and by paying a surrender charge of _____ percent (_____), computed on the balance prepaid, and reducing _____ percent (_____) each year thereafter to a minimum of _____ percent (____%).

5. Location and Size of Lot. The real property affected by the permanent mortgage loan is located at the south side of _____ [name] on a plan of _____ [name] situated in the _____ [city], _____ [county], _____ [state], as revised _____ [month] _____ [day], _____ [year], and designated Phases I and II and which lies in the southwest corner of the plat consisting of approximately _____ (_____) square feet.

6. Improvements. The improvements on the property shall include 15 two-story, frame, apartment buildings consisting of 376 apartments, and on-lot parking for 562 cars.

7. Insurance Value. The insurance value of the property affected by the permanent mortgage loan shall be _____ Dollars (\$_____), including fixtures valued at _____ Dollars (\$_____). We shall be furnished with original fire insurance policies which must be based on the above insurable value, but in no event is the insurance to be less than _____ Dollars (\$_____).

8. Liability. The note shall provide that the sole remedy of the holder shall be foreclosure of the mortgage on the real property in the event of default.

9. Mortgage. The note shall be secured by a mortgage which shall be a first lien on the unencumbered, marketable, fee simple absolute title to the real property, to easements appurtenant thereto (if any), and to all improvements to the property described in this commitment, free of the possibility of all (a) prior mechanics' liens, (b) prior materialmen's

liens, or (c) special assessments for work completed or under construction on the date of the first payment on account of the loan. All title exceptions shall be subject to the approval of the Lender's counsel.

10. Security Interest

(a) The borrower shall grant to Lender a security interest in the personal property located on the property, now owned or hereinafter acquired, including, without limitation, stoves, ranges, microwaves, washers and dryers, and all proceeds of their sale or disposition.

(b) The borrower shall execute alone or together with us or with our designee as the secured party any financing, continuation, or termination statement or other document or procure any document, and pay all connected costs, necessary to protect such security interest against the interest of third persons.

(c) The borrower shall not permit any other security interest to attach to any of such fixtures, permit such fixtures to be levied upon under any legal process, or permit anything to be done that may impair the value of such fixtures or the security intended to be afforded thereby.

11. Survey. We shall be furnished with an acceptable ALTA survey from a licensed surveyor upon completion of all improvements. The survey shall show the dimensions and total square foot area of the plot, interior lot lines, if any, the dimensions and location of all improvements, parking areas, and easements, and the location of adjoining streets and the distance to and name of the nearest intersecting streets.

12. Title Policy. We shall be furnished with a title policy for the loan amount insuring us as the holder of the mortgage from a title company acceptable to us.

13. Taxes. All taxes and assessments affecting the real property or any part thereof shall be paid when due, and the mortgage shall require the borrower to pay concurrently with each installment of principal and interest payable on the note such amount as in the mortgagee's discretion will enable it to pay (out of moneys so paid to the mortgagee), at least _____ (_____) days before due, all taxes, assessments, and similar charges affecting the real property. No interest shall be payable on such deposits.

14. Certificate of Occupancy. We shall be furnished with a certificate of occupancy and other evidence satisfactory to us indicating that all improvements and their use comply with all applicable zoning, building, and other governmental laws and requirements.

15. Leases. All leases to be executed by tenants will contain no rental concessions, nor will the leases contain any provision which would cut off or impair the lien of the mortgage. This must be certified to by the closing attorney at the time of the closing of the permanent loan. In addition, all leases shall contain a clause, satisfactory to our attorney, subordinating the leases to the mortgage contemplated herein, together with any future advances or modifications thereof.

16. Approval of Documents. Each document required in connection with this loan shall be delivered to, and shall be in form and substance acceptable to, the Lender's counsel.

17. Survival of Representations. Except as may be otherwise required by this commitment, the loan, the rental income of the real property, the credit of the borrower, and all other features of the transaction shall be as represented to us without material, adverse change. No part of the real property shall have been damaged and not repaired to our satisfaction nor taken in condemnation or other like proceeding, nor shall any such proceeding be pending. Neither the borrower nor any tenant nor any assignee of such tenant nor any subtenant, nor any guarantor of the loan or any such lease or sublease, shall be involved in any bankruptcy, reorganization, or insolvency proceeding.

18. Plans and Specifications. The building or buildings and all other improvements contemplated by this commitment (including any grading, seeding, and landscaping and all other on-site and off-site improvements) shall be completed in accordance with plans and specifications to be approved in writing by our architect and shall be equipped and paid for to our satisfaction, and each such building shall be ready for occupancy. The representatives of the Lender shall have the right to inspect all such improvements periodically during and after construction. Periodic inspections during construction shall be made, and construction shall be approved, by the architect of the Lender or its designee. All corrections required by them must be complied with prior to the next construction advance. No changes are to be made in the original plans and specifications without our written approval.

19. Signs. By acceptance of this commitment, permission is granted by the owner for the erection of a sign during the construction period, indicating the source and origination of permanent financing.

20. Adjoining Streets. Evidence is to be submitted that all streets adjoining the real property have been completed, dedicated, and accepted for maintenance and public use by the appropriate governmental authorities.

21. Conditions of Commitment. The plans and specifications prepared by _____ [name], Architect, must be reviewed and approved by the Lender. In addition to all requirements of its architect, the following, including the use of the specified materials, are conditions of this commitment:

(a) Compliance with all local codes and ordinances.

(b) Lender is to be furnished with final plans and specifications for its review and approval.

22. Utility Lines. The necessary permanent easements, subject to the approval of the Lender's counsel, must be supplied with all utility lines which are necessary for the operation of the project. These utilities shall include, but not be limited to, gas, electricity, water, and sewerage.

23. Zoning Compliance. Evidence, acceptable to Lender's counsel, must be supplied confirming compliance with all local zoning requirements with regard to, but not limited to, the setbacks of all buildings.

24. Swimming Pool. An additional parcel of land at the southerly end of the property shall be encumbered by the mortgage, and shall have constructed upon it a swimming pool of a minimum size of _____ (_____) square feet. At the time of the final disbursement of either section of this loan, we shall require permanent access to the pool.

25. First Phase of Loan. The loan shall be made as Phase I and Phase II, in accordance with the market plot plan dated _____ [month] _____ [day], _____ [year]. We shall not be obligated for the second section until the first section has been satisfactorily completed and occupied in accordance with the rental condition stated below. The following conditions shall apply to Phase I only:

(a) Amount of Loan. _____ Dollars (\$_____).

(b) Improvement. Completion of construction of _____ (_____) buildings consisting of _____ (_____) apartments constructed in accordance with the Plans.

(c) Term. _____ (_____) years after date of final payment to the borrower.

(d) Interest Rate. _____ percent (_____) per year.

(e) Conditions. Equal monthly payments by the borrower of _____ Dollars (\$_____) each, beginning on the first day of the third month after final payment to the borrower, and each succeeding month thereafter, which are to be applied first to interest and the balance on account of principal.

(f) Mortgage. The note shall be secured by a mortgage upon all of the land heretofore specified.

(g) Insurance Value. _____ Dollars (\$_____). We shall be furnished with the original fire insurance policies which must be based on the insurable policies which must be based on the insurable value, but in no event is the insurance to be less than _____ Dollars (\$_____).

(h) Expiration Date. The commitment in respect of Phase I will expire _____ [month] _____ [day], _____ [year], by which time the final disbursement must be made and the loan assigned to the Lender.

26. Second Phase of Loan. The following conditions shall apply to Phase II only:

(a) Amount of Loan. _____ Dollars (\$_____).

(b) Improvement. Completion of _____ (_____) additional buildings consisting of 176 apartments constructed in accordance with the Plans.

(c) Term. _____ (_____) years after date of final payment to the borrower.

(d) Interest Rate. _____ percent (_____) per year.

(e) Conditions. Equal monthly payments by the borrower of _____ Dollars (\$_____) each, beginning on the first day of the third month after finally payment to the borrower, and each succeeding month thereafter, which are to be applied first to interest and the balance on account of principal.

(f) Mortgage. The note shall be secured by a mortgage upon all of the land heretofore specified.

(g) Insurance Value. _____ Dollars (\$_____). We shall be furnished with the original fire insurance policies which must be based on the insurable value, but in no event is the insurance to be less than _____ Dollars (\$_____).

(h) Rental Condition. The _____ (_____) buildings in Phase I shall have a gross rental income from not more than _____ percent (_____) of the apartments in the buildings on an unfurnished basis of not less than _____ Dollars (\$_____), and the space rented shall be rented on a basis so that if the building were 100 percent rented, the annual rental would be at least _____ Dollars (\$_____). Such apartments shall be occupied by tenants on a current rent paying basis under written leases or rental agreements. Borrower shall give us a rent roll certified to be correct indicating that apartments and the annual rental therefrom relied upon to satisfy this condition. No rental concession to tenants shall have been made, and the Borrower certificate shall so state.

(i) Consolidation. At the time of the final disbursement on Phase II of this loan, it will be consolidated with the loan made pursuant to Phase I. The consolidated loan must be a first lien on the entire property, and the Lender must be furnished with title insurance, satisfactory to its counsel, to this effect.

(j) Expiration Date. The commitment in respect of Phase II will expire _____ [month] _____ [day], _____ [year], by which time the final disbursement must be made, and

the loan assigned to the Lender and consolidated with the loan made pursuant to Phase I.

(k) Interim Subordination. If necessary for construction loan purposes in connection with Phase II of this commitment, only that portion of the land designated as Phase II may be subordinated in order to provide the interim lender with a valid first lien. However, any such subordination shall be in such a manner as not to disturb any easements or other requirements as provided for in other sections of this commitment.

27. Closing. _____[*name*] shall be the closing and disbursing attorney in respect of this case and all legal expenses including survey costs, title costs, recording charges, etc., are to be without charge to this company.

28. Deposit. Upon acceptance of this commitment, you shall deposit with us a check in the amount of _____ percent (_____%) of the amount of the mortgage, as pertains to each section, which will be held in escrow until the time of the first construction advance, at which time this deposit will be considered income earned by us for services rendered. If for any reason this loan is not assigned to the Lender pursuant to the provisions hereof, this deposit must be remitted by us to the Lender as the consideration for the commitment's not having been fulfilled.

29. Disbursements for Material and Labor. The executed forms of the mortgage and mortgage note, together with the necessary title binder, survey, and other papers, as required, will be returned to us. We shall forward them to the Lender's Counsel, and upon approval, we shall disburse against this mortgage from time to time an amount equal to _____ percent (_____%) of the cost of material and labor in place and material on the site as certified by the Architect, and verified by us.

30. Broker's Fee. In consideration of our arranging the construction financing on your behalf, we are to receive a fee of _____ Dollars (\$_____) in respect of each section, payable at the time of our first construction advance on that section.

31. Anticipatory Completion. If at any time before the expiration of this commitment the improvements on the property, in the judgment of the Lender, have been sufficiently completed and you have otherwise complied with the terms of the commitment, the final disbursement is to be made, and amortization is to commence, in accordance with the terms of the commitment.

32. Commencement of Construction. Construction must be started by _____[*month*]
_____[*day*], _____[*year*], or at our option the commitment will be terminated.

33. Assignment. This commitment is not assignable without our express written approval. In order that our records may be complete, we would appreciate your acknowledging your acceptance of the terms and conditions of this commitment on the duplicate copy enclosed.

Very truly yours,

_____ [*Lender*]

By: _____

Printed Name: _____



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FORM 22.134 Consolidation agreement--merger first mortgage with second mortgage

COMMENT

The form below represents the consolidation, by agreement, of the permanent mortgages encumbering the entire development, after construction has been completed. Such consolidation may avoid title problems, extra costs and expenses, and, by integrating the installment payments, facilitates accounting procedures and collection.

FORM

THIS AGREEMENT is made this _____[day] of _____[month], _____[year], between the _____[name], a(n) _____[state] _____[entity] corporation ("Lender A"), and _____[name], a(n) _____[state] _____[entity] corporation ("Borrower").

WHEREAS, Lender A is the holder of a mortgage and the note secured thereby, such mortgage being dated _____[month] _____[day], _____[year], made and executed by Borrower to the _____[name] ("Lender B") in the principal sum of _____ Dollars (\$ _____), and recorded _____[month] _____[day], _____[year], in the Office of the Clerk of _____[county], _____[state], in Book _____[number] of Mortgages, Page _____[number], which mortgage was assigned by the Lender B to Lender A by assignment dated _____[month] _____[day], _____[year], and recorded _____[month] _____[day], _____[year], in the Office of the Clerk of _____[county], _____[state], in Book _____[number] of Assignments of Mortgage, Page _____[number]; and

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WHEREAS, Lender A is the holder, by assignment, of a mortgage dated _____[month]
 _____[day], _____[year], made by Borrower to the Lender B Mortgage Company in the principal sum
 of _____ Dollars (\$ _____), which mortgage was recorded in the Office of the Clerk
 of _____[county], _____[state], on _____[month]
 _____[day], _____[year], in Book _____[number] of Mortgages, Page
 _____[number], and which mortgage was assigned to Lender A by assignment dated
 _____[month] _____[day], _____[year], and recorded in the Office of the Clerk of
 _____[county], _____[state], in Book _____[number] of
 Assignments of Mortgage, Page _____[number], on _____[month]
 _____[day], _____[year]; and

WHEREAS, Lender A is the holder, by assignment, of a mortgage dated _____[month]
 _____[day], _____[year], made by Borrower to the Lender B Mortgage Company in the principal sum
 of _____ Dollars (\$ _____), which mortgage was recorded in the Office of the Clerk
 of _____[county], _____[state], on _____[month]
 _____[day], _____[year], in Book _____[number] of Mortgages, Page
 _____[number], and which mortgage was assigned to Lender A by assignment dated
 _____[month] _____[day], _____[year], and recorded in the Office of the Clerk of
 _____[county], _____[state], in Book _____[number] of
 Assignments of Mortgage, Page _____[number], on _____[month]
 _____[day], _____[year]; and

WHEREAS Lender A is or is about to be the holder, by assignment, of a mortgage dated
 _____[month] _____[day], _____[year], made by Borrower to the Lender B
 Mortgage Company in the principal sum of _____ Dollars (\$ _____), which
 mortgage was recorded in the Office of the Clerk of _____[county], _____[state], on
 _____[month] _____[day], _____[year], in Book _____[number] of
 Mortgages, Page _____[number], and which mortgage was assigned to Lender A by assignment
 dated _____[month] _____[day], _____[year], and recorded in the Office of the
 Clerk of _____[county], _____[state], in Book _____[number] of
 Assignments of Mortgage, Page _____[number], on _____[month]
 _____[day], _____[year]; and

WHEREAS, the mortgage as recorded in Book _____[number], Page
 _____[number], the mortgage recorded in Book _____[number], Page
 _____[number], the mortgage recorded in Book _____[number], Page
 _____[number], and the mortgage recorded in Book _____[number], Page
 _____[number], now cover the property hereinafter described and on which notes and mortgages there
 is now owing the sum of _____ Dollars (\$ _____) with interest thereon at the rate of
 _____ percent (_____%) per year from _____[month]
 _____[day], _____[year]; and

WHEREAS, Lender A, the holder of such notes and mortgages, and Borrower, the owner in fee simple of the premises
 hereinafter described, have mutually agreed to consolidate and coordinate the liens of such mortgages and to modify the
 terms thereof and of the notes secured thereby in the manner hereinafter appearing;

NOW, THEREFORE, pursuant to such agreement and in consideration of the sum of _____ Dollars
 (\$ _____) and other good and valuable consideration, each to the other in hand paid, receipt of which
 is hereby acknowledged, the parties hereto mutually covenant and agree as follows:

1. Consolidation of Mortgages. The liens of the mortgages hereinabove mentioned, as modified, hereby are consolidated and coordinated so that together they shall hereafter constitute in law but one mortgage, a single lien, securing the principal sum of _____ Dollars (\$_____) and interest thereon at the rate of _____ percent (_____) per year from _____ [month] _____ [day], _____ [year], upon the property described on Exhibit A. Together with all right, title, and interest of Borrower in and to the land lying in the street and roads within, in front of, and adjoining such premises.

2. Schedule of Payment on Consolidation. The time of payment of such principal sum secured by such notes and mortgages, as modified by this agreement, hereby is extended so that the sums shall be due and payable as follows:

(a) As to the principal sum of the now outstanding indebtedness of _____ Dollars (\$_____), as secured by the mortgages recorded in Book _____ [number] of Mortgages, Page _____ [number], and Book _____ [number] of Mortgages, Page _____ [number], and Book _____ [number] of Mortgages, Page _____ [number], by the payment of constant monthly payments upon principal and interest thereon in the sum of _____ Dollars (\$_____) on _____ [month] _____ [day], _____ [year]; and

(b) As to the principal sum of the now outstanding indebtedness of _____ Dollars (\$_____) as secured by the mortgage recorded in Book _____ [number] of Mortgages, Page _____ [number], by the payment thereon of interest only until, and no later than _____ [month] _____ [day], _____ [year]; and

(c) On _____ [month] _____ [day], _____ [year], constant monthly payments upon principal and interest upon the consolidated mortgage shall be made in the sum of _____ Dollars (\$_____) and each and every month thereafter the balance of unpaid principal and interest to be due and payable no later than _____ [month] _____ [day], _____ [year], if not sooner paid.

3. Prepayment. Prepayment privileges with respect to this consolidated mortgage are agreed upon as follows: Borrower may pay the entire balance of the principal indebtedness on the first day of any month commencing seven years from the date upon which the first monthly payment of principal and interest shall have been made, but only by giving _____ (_____) days written notice and by paying a prepayment fee of _____ percent (_____), computed on the balance prepaid, and may pay the entire balance of the then outstanding principal indebtedness on the first day of any month commencing _____ (_____) years from the date upon which the first monthly payment of the principal and interest shall have been made, but only by giving _____ (_____) days written notice and by paying a prepayment fee of _____ percent (_____), computed on the balance prepaid, and reducing _____ percent (_____) each year thereafter to a minimum of _____ percent (____%). The above prepayment privileges, however, shall apply only if Borrower complies with all of the other terms of such notes and mortgages as hereby modified.

4. Indebtedness Secured. The parties hereto certify that this instrument secures the same indebtedness secured by the notes and mortgages hereinabove mentioned and secures no further or other indebtedness or obligation. In consideration of this agreement, Borrower hereby assumes, covenants, and agrees to pay the principal sum and interest as above set forth. Such notes and mortgages, as modified by this agreement, shall continue in full force and effect.

5. Taxes and Assessments. Borrower shall pay to Lender A on the first day of each month after date hereof, and until the notes secured hereby are fully paid, a sum equal to the taxes and assessments that will next become due and payable on

the premises (as estimated by the holder of such notes), divided by the number of months to elapse prior to one month before such taxes and assessments shall become due and payable, such sums to be held by the holder of such notes in trust to pay such taxes and assessments. Interest shall not be earned on such deposits nor payable to Borrower.

6. Modification. This agreement may not be changed or terminated orally. The covenants contained in this agreement shall run with the land and bind Borrower, its successors, and assigns, and all subsequent owners, encumbrances, tenants, and subtenants of the premises, and shall inure to the benefit of Lender A, its successors and assigns, and all subsequent holders of this mortgage.

7. Remedies. Notwithstanding anything above to the contrary, in the event of a default or foreclosure under the mortgages referred to above or under the above consolidation agreement, the sole remedy of the holder of the obligation secured thereby shall be foreclosure of such mortgages, and the holder of such notes, its successors and assigns, shall not be entitled to a deficiency judgment thereunder. It is understood that the maker of such notes and mortgages is limited in its liability to the real property only.

8. Grace Period. Notwithstanding anything above to the contrary, Borrower shall have a ten day grace period to correct any default which may arise under the notes and mortgages referred to above.

IN WITNESS WHEREOF, the parties hereto have caused these presents to be signed by their proper corporate officers and caused their corporate seals to be hereto affixed the day and year above written.

"LENDER A"

a(n) _____ [state] _____ [entity]

By: _____

Print Name: _____

Title: _____

"LENDER B"

a(n) _____ [state] _____ [entity]

By: _____

Print Name: _____

Title: _____

"BORROWER"

a(n) _____ [state] _____ [entity]

By: _____

Print Name: _____

Title: _____



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FORM 22.135 Agreement to make annual payments to municipality in lieu of paying real property taxes--development is owned by not-for-profit corporation--development offers low-cost housing to elderly or handicapped

COMMENT

In some states, real estate owned by not-for-profit corporations and used as low-rent housing for the elderly or handicapped is exempt from real estate taxation by the county, municipality and school district in which the property is located. In order to be "good neighbors" and to induce municipalities to give prompt zoning and planning approval to the construction of such projects, an agreement may be entered into between the municipality and the not-for-profit corporation. The agreement would provide for the voluntary payment to the municipality of a stated sum annually in lieu of taxes. It should be noted, however, that the tax exemption at issue here does not typically extend to such things as charges for water and for sewer usage.

FORM

AGREEMENT FOR PAYMENT IN LIEU OF TAXES

THIS AGREEMENT is made this _____[day] day of _____[month], _____[year] between _____[name], a not-for-profit corporation existing under the laws of the State of _____[state], with offices for the transaction of business at _____[address] (hereafter referred to as "Owner"), and THE TOWN OF _____[city], State of _____[state], a municipal corporation organized under the laws of the State of _____[state], with offices for the transaction of business at _____[address] (hereafter referred to as "Town").

WITNESSETH:

WHEREAS, the Owner is duly incorporated under the Not-for-Profit Corporation Law of the State of _____ [state]; and

WHEREAS, Section _____ [number] of the _____ [name of statute granting tax exemption, e.g.,] provides that the real property of corporations so organized, which is used exclusively for housing aged and/or handicapped persons of low income, is exempt from taxation, special ad valorem levies and special assessments to the extent provided in the statute on the condition that the property of such corporation shall, upon dissolution of the corporation, vest in another corporation similarly exempt from taxation under the provisions of the Not-for-Profit Corporation Law, and that no part of the earnings of the dissolved corporation shall inure to the benefit of any private individual, and

WHEREAS, the Owner wishes to avail itself of said tax exemption, but also intends to contribute to the financial well-being of the Town,

NOW, THEREFORE, in consideration of the mutual promises contained herein, it is agreed as follows:

1. The Owner agrees to comply with all conditions required by Section _____ [number] of the _____ [e.g., name of statute granting tax exemption] in order to qualify for the tax exemption.
2. The Town agrees that the Owner is and shall remain exempt from real property taxation and from special ad valorem levies and special assessments to the extent provided in Section _____ [number] of the _____ [e.g., name of statute granting tax exemption]. The Town shall take all steps necessary to prevent taxation and foreclosure by tax sale.
3. The Owner agrees that it shall adhere to all conditions in Section _____ [number] of the _____ [e.g., name of statute granting tax exemption].
4. The Owner agrees that it shall, in accordance with Section _____ [number] of the _____ [e.g., name of statute granting tax exemption], pay all assessments levied to cover the capital costs incurred by the Town sewer district, and such other assessments for improvements as are included in the exceptions listed in Section _____ [number] of the _____ [e.g., name of statute granting tax exemption], as may now or hereafter exist.
5. The Owner agrees that it is responsible for operation and maintenance charges with respect to its housing units connected to the Town sewer district lines.
6. The Owner agrees to make a Payment in Lieu of Taxes (PILOT) of _____ Dollars (\$ _____) per year, payable on or before December 31st of each year.
7. This agreement is in lieu of all prior agreements with respect to the taxation of the subject property, and all such prior agreements are null and void.
8. This agreement is effective immediately and shall apply to _____ [year] and all successive tax years.
9. This agreement may be terminated upon the giving of _____ (_____) year's written notice to the other party.

10. This Agreement, together with the other written agreements and instruments executed concurrently herewith or pursuant to the provisions hereof, contains the entire agreement between the parties respecting the matters herein set forth and supersedes all prior agreements between them respecting such matters.

11. This Agreement may be executed in _____ (_____) or more counterparts, each of which shall be deemed an original, but all of which together shall constitute one and the same instrument. At the trial of any matter arising under this Agreement, only one counterpart need be produced.

12. Except as herein expressly provided, no waiver by either party of any breach of this Agreement shall be deemed to be a waiver of any other breach by the other party of any kind or nature (whether preceding or succeeding the breach at issue, and whether or not of the same or similar nature). No failure by either party to exercise any right it may have under this Agreement or by law upon the other's default, and no delay in the exercise of that right, shall prevent it from exercising the right whenever the other party continues to be in default. No such failure or delay shall operate as a waiver of any default, or as a modification in any respect of the provisions of this Agreement.

13. Whenever the singular or plural number, or the masculine or feminine gender, is used herein, it shall equally include the other.

14. Any notice which any party is required to or may desire to give hereunder shall be in writing and may be personally delivered, transmitted by facsimile machine, or delivered by the United States Postal Service (certified mail, return receipt requested) or by private delivery service to the above addresses. Notice is deemed given when received.

15. This Agreement shall be construed and enforced in accordance with the laws of the State of _____ [state].

16. This Agreement shall be binding upon and inure to the benefit of all the parties, and their respective heirs, representatives, successors, and assigns.

17. This Agreement may be modified only by a written document signed by both parties. A purported oral modification shall not be effective.

IN WITNESS WHEREOF, the parties hereto have set their hands and seals the day and year first above written.

"OWNER"

a(n) _____ [state] _____ [entity]

By: _____

Print Name: _____

Title: _____

"TOWN"

a(n) _____ [state] _____ [entity]

By: _____

Print Name: _____

Title: _____



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FORM 22.136 Letter of credit agreement between real estate developer and bank granting letter of credit--letter of credit may be needed to cover cost of building infrastructure for development

COMMENT

As a condition for granting subdivision approval, municipalities frequently require the real estate developer to produce a letter of credit as security for the completion of the infrastructure in the development. In the event that the developer fails to complete the development's roads, sewers or water system, the municipality may draw on the unconditional letter of credit and complete the improvements using these funds.

The lender who will be obligated on the letter of credit will require a written agreement with the developer, whereby the developer pledges to repay to the lender any sums drawn by the municipality for completion of the infrastructure. The agreement provides for payment of interest by the developer on the sums drawn by the municipality. In addition, the agreement also provides for collateralization of the amount drawn by the municipality. In the event payment is not promptly made, legal fees and expenses are recoverable by the lender.

FORM

STANDBY LETTER OF CREDIT AGREEMENT

TO: _____[name]

RE: _____[name] Subdivision, City of _____[city] _____[state],
Irrevocable Letter of Credit No. _____

In consideration of your opening your Irrevocable Letter of Credit (herein called the "Credits"), dated _____[month] _____[day] _____[year], naming the City of _____[city] as beneficiary of up to an aggregate amount of _____ Dollars (\$ _____), and for other valuable consideration, receipt of which is hereby duly acknowledged, the undersigned (herein called the "Applicant" and "we") hereby agrees as follows with respect to the Credits:

1. Developer to Reimburse Bank for Each Sight Draft. We agree, in the case of each sight draft, to reimburse you at your main office, _____[address] in United States currency in immediately available funds on demand, the amount due on such draft, or, if so demanded by you, to pay at your office in advance the amount to pay such draft. In all instances, you have the right to set off any amount due you under any Credit against any account we may have at any branch of yours, your subsidiaries or affiliates.
2. Developer to Pay Commission and Reimburse Bank for all Charges and Expenses Paid by Bank. At the time you issue the above-mentioned Letter of Credit, we agree to pay you, on demand, your usual commission and all charges and expenses paid or incurred by you in connection therewith, including costs of reserve requirements, if any. If any Credits issued by you provide for an extension or extensions beyond the expiration date, we agree to pay you, on demand, for each extension period, your usual commission in effect at the time of the extension and all charges and expenses as set forth above.
3. Developer to Pay Interest on Funds Disbursed to Municipality. If, for any reason, you make payment under the Credits prior to your receipt of the aforementioned funds from the Applicant, we agree to pay you interest per annum at a rate equal to _____ percent (_____%) over the highest United States Prime Rate, as published in the Wall Street Journal, and in effect at the time you make your payment, and as it may change from time to time, plus customary charges, commencing from the day of your payment and ending upon your receipt of the funds we remit to you for the actual days elapsed, on the basis of a 365 day year. In no event shall the interest rate charged under this Agreement exceed the maximum rate authorized by applicable law or regulation.
4. Extension of Maturity or Time for Presentment of Drafts. We agree that, in the event of any extension of the maturity or time for presentment of drafts, or documents or any other modification of the terms of any Credits, at our request or pursuant to the terms of the Credits, or in the event of any increase in the amount of any Credits at our request, this Agreement shall be binding upon us with regard to such Credits so increased or otherwise modified, to drafts, documents and property covered thereby, and to any action taken by you or any of your correspondents in accordance with such extension, increase or other modification.
5. Users of Credits are Agents of Developer. The users of the Credits shall be deemed our agents, and we assume all risk for their acts or omissions. Neither you nor your correspondents shall assume any liability to anyone for failure to pay, if such failure is due to any restriction in force at the time and place of presentment, and we agree to indemnify you and hold you harmless from any consequences that may arise therefrom. Neither you nor your correspondents shall be responsible for verifying the existence of any act, condition or statement made by any party in relation to their drawing or presentment under the Credits, or in verifying or passing judgment on the reasonableness of any statement made by any party in relation to their drawing or presentment under the Credits: for the validity, sufficiency or genuineness of documents, even if such documents should in fact prove to be in any or all respects invalid, insufficient, fraudulent or forged; or for failure to give any notice; for any breach of contract between the beneficiary of the Credits and us. Furthermore, neither you nor your correspondents shall be responsible for errors, omissions, interruptions or delays in transmission or delivery of any messages by mail, cable, telegraph, wireless or otherwise, nor shall you be responsible for any error, neglect or default of any of your correspondents, and none of the above shall affect, impair or prevent the vesting of any of your rights or powers hereunder. In furtherance and extension, and not in limitation of the specific

provisions hereinbefore set forth, we agree that any action taken or not taken by you or by any correspondent of yours, under or in connection with the Credits or the relative drafts, documents or property, if taken or not taken in good faith, shall be binding on us and shall not put you or your correspondents under any resulting liability to us, except if due solely to your gross negligence or willful misconduct.

6. Developer Supplies Collateral for Letter of Credit. As security for the payment or performance of all of the Applicant's present or future obligations or liabilities of any and all kinds to you, however incurred by us, due or to become due, howsoever or whensoever acquired by us (all of which are herein collectively referred to as Obligations), the Applicant does hereby grant you a security interest and a lien in and upon any of our property, including our bank accounts held by you, or property in which we may have any interest, which is now or may at any time hereafter come into your possession or control, or into the possession or control of any other party acting on your behalf, whether for the express purpose of being used by you as collateral security, or for safekeeping, or for any other different purpose, or covered or affected by any documents in your possession or control, or in the possession or control of any third party acting in your behalf.

7. Developer to Pay Bank's Attorneys' Fees and Related Expenses in Event of Developer's Default. Upon Applicant's failure to pay any Obligations when becoming or made due, as aforesaid, you shall have, in addition to all other rights and remedies allowed by law, the rights and remedies of a secured party under the Uniform Commercial Code as in effect in the State of _____ [state]. We agree that the said collateral secures, and further agree to pay on demand, all expenses--including, but not limited to, reasonable attorneys' fees for legal services of every kind, and the cost of any insurance and payment of taxes or other charges--of, or incidental to, the custody, care, sale or collection of the said collateral, or in any way relating to the enforcement or protection of your rights hereunder.

8. Further Collateral for Letter of Credit. Upon our failure to pay any obligations hereunder when becoming or made due, as aforesaid, you shall have, in addition to all other rights and remedies allowed by law and this agreement, your rights under real estate mortgages held by you and recorded in the _____ [county] County Clerk's Office, in Book of Mortgages No. _____ [number], at Page _____ [number], and covering the premises known as _____ [address], in the City of _____ [city] _____ [county], _____ [state], and the applicant does hereby acknowledge that our obligations hereunder are secured by said mortgage.

9. Waiver of Bank's Rights. You shall not be deemed to have any of your rights waived hereunder unless you or your authorized agent shall have signed such waiver in writing. No failure on your part to exercise and no delay in exercising any right, remedy or power hereunder shall operate as a waiver thereof, nor shall such failure or delay preclude you from any future exercise of any other right, remedy or power.

10. Definition of Property. The word "property", as used in this agreement, includes case proceeds, deposit accounts, goods and documents relative thereto, securities, funds, and any and all other forms of property, whether real, personal or mixed, and any right or interest therein.

11. Obligations in Agreement are Binding on Developer's Personal Representatives, Successors and Assigns. The Obligations hereof shall continue in force and apply notwithstanding any change in the membership or ownership of any partnership or corporation undersigned, and the Obligations hereof shall bind the personal representatives, successors and assigns of the undersigned, and all rights, benefits and privileges hereby conferred on you shall be and hereby are extended to, and conferred upon, and may be enforced by your successors and assigns.

12. We further agree that your rights, remedies, powers, security interest and liens hereunder shall continue unimpaired, and that we shall be and remain obligated in accordance with the terms hereof, notwithstanding the partial exercise by you of any right, remedy or power, or the release or substitution of any of the said interests therein, or any delay, extension of time, renewal, release, substitution or addition of parties, compromise or other indulgence granted by you,

in reference to any of the Obligations, or any promissory note, draft, document or other instrument given in connection therewith, the undersigned hereby waiving all notice of any delay, extension, release, substitution, renewal, compromise or other indulgence, and hereby consenting to be bound as fully and effectually as if we have expressly agreed thereto in advance.

13. Events of Default by Developer. We agree that all Obligations of the undersigned to you, although contingent and not matured, shall become due and payable upon the occurrence of any one of the following events:

(A) admission in writing of our inability to pay any debt when due;

(B) a violation of any of the terms and conditions of this agreement, be it willful or involuntary, not expressly waived by you;

(C) a default in the payment of any interest or fees due and payable to you, and in particular the payments due under the mortgage note executed in connection with the mortgage referred to at No. 8 above;

(D) if the undersigned generally shall not pay its debts as they become due, or be the subject of any insolvency proceedings; or

(E) if the undersigned shall make an assignment for the benefit of its creditors or a trustee, receiver, intervenor, or custodian appointed for the purposes of reorganization or liquidation of the undersigned.

14. Each and every right, remedy and power hereby granted to you or allowed to you by law or other agreement shall be cumulative and not exclusive of any other right, remedy or power that may be exercised by you from time to time.

15. Controlling Law. This agreement shall be construed in accordance with, and governed by, the laws of the State of _____ [state].

16. Notices to Parties. Notices and demands under this agreement shall be in writing and will be sufficient if delivered by hand, by first class mail (postage prepaid) or registered mail, addressed to the undersigned or to you at our respective principal places of business.

17. Credits Issued Shall be Irrevocable. We agree that all Credits issued under this agreement shall be irrevocable.

Dated: _____ [month] **"DEVELOPER"**
 _____ [day],
 _____ [year]

_____ a(n)
 _____ [state]
 _____ [entity]

By: _____ Print Name:

_____ Title:

)
 STATE OF _____ [state]) SS:

COUNTY OF _____ [county])

BEFORE ME, a Notary Public in and for said County and State, personally appeared _____ [name], a(n) _____ [state] _____ [entity], by _____ [name], its _____ [title], who acknowledged that _____ [he/she] did sign the foregoing instrument for and on behalf of said corporation, being thereunto duly authorized, and that the same is _____ [his/her] free act and deed individually and as such officers and the free act and deed of said _____ [entity].

IN TESTIMONY WHEREOF, I have hereunto set my hand and official seal at _____ [city], _____ [state], this _____ [day] day of _____ [month], _____ [year].

Notary Public



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26-22 Current Legal Forms for Real Estate FORM 22.137

FORM 22.137 Rent Roll Certificate

COMMENT

In order for a borrower to obtain permanent financing, the lender will require the borrower to make various representations, disclosures and certifications for it. The following is a rent roll certificate.

FORM

As an inducement to _____ [name] (the "Lender") to make a permanent mortgage loan to _____ [name] (the "Borrower") in the amount of _____ Dollars (\$_____) as more fully described in the Credit Agreement, the Borrower hereby certifies and represents to the Lender the following:

1. The Rent Roll attached hereto as Exhibit A is a true and correct schedule of the tenants and rentals of the Property,
2. The Rent Roll contains a full and complete listing of all security deposits being held with respect to the tenants on the Property.
3. No rent has been paid more than _____ (_____) month in advance of its due date.
4. There is no action, suit or proceeding pending against Borrower with respect to the tenants and the Borrower is in full compliance with all leases and agreements with the tenants and there is no default of the Borrower as landlord under any lease or agreement with a tenant..

IN WITNESS WHEREOF, the Borrower has executed this Certification under penalties of perjury as of the

_____ [day] day of _____ [month], _____ [year].

"BORROWER"

a(n) _____ [state] _____ [entity]

By: _____

Print Name: _____

Title: _____

_____)

STATE OF _____ [state]) SS:

COUNTY OF _____ [county])

BEFORE ME, a Notary Public in and for said County and State, personally appeared _____ [name], a(n) _____ [state] _____ [entity], by _____ [name], its _____ [title], who acknowledged that _____ [he/she] did sign the foregoing instrument for and on behalf of said corporation, being thereunto duly authorized, and that the same is _____ [his/her] free act and deed individually and as such officers and the free act and deed of said _____ [entity].

IN TESTIMONY WHEREOF, I have hereunto set my hand and official seal at _____ [city], _____ [state], this _____ [day] day of _____ [month], _____ [year].

Notary Public

[Attach Exhibit A]



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FORM 22.138 Borrower's certificate

COMMENT

At closing, the lender may require the borrower to certify the accuracy of various documents or to confirm its ownership. One way to do this is to obtain a Borrower's Certificate at closing. The following is a very simple form of Borrower's Certificate.

FORM

CERTIFICATE OF BORROWER

Re: \$_____ Construction Loan

from

The undersigned does hereby certify that he is the Sole Member of _____[*name*], a(n) _____[*state*] _____[*entity*] (the "Borrower"), and the undersigned does hereby further certify as follows:

1. Attached hereto, marked Attachment A, is a true and correct copy of the current Articles of

Organization of Borrower, together with all amendments thereto.

2. Attached hereto, marked Attachment B, is a true and correct copy of the Operating Agreement of Borrower, together with all amendments thereto.

3. Attached hereto, marked Attachment C, is a true and correct copy of a certain resolution of the Company dated

_____ [month]

_____ [day],

_____ [year], which was duly and lawfully adopted by the Borrower. Such resolution has not been amended, altered or rescinded and is in full force and effect on the date hereof.

4. The following individual is the Sole Member of Borrower.

Name	Percentage of Ownership

_____	_____	%

5. The execution of the loan documents by the Member has been duly authorized by the Borrower and such Member is authorized to execute any and all instruments or documents which it may deem necessary or appropriate in connection with this loan transaction.

IN WITNESS WHEREOF, the undersigned hereby certifies the above to be true and have executed this certificate this _____[day] day of _____[month], _____[year].

Printed Name: _____

Title: _____



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26-22 Current Legal Forms for Real Estate FORM 22.139

FORM 22.139 Escrow Agreement

COMMENT

In the course of making a loan, a lender may require that the borrower escrow a portion of the loan proceeds in order to make sure that certain improvements to the project are adequately completed or the lender may simply desire to hold back a portion of the loan proceeds until cash flow on the property reaches a certain level. The following is an example of an escrow which is being established until certain items are completed to the lender's satisfaction.

FORM

THIS COMPLETION ESCROW AGREEMENT ("Agreement") is effective the _____[day] day of _____[month], _____[year] between _____[name] a(n) _____[state] _____[entity] ("Borrower") _____[name] a(n) _____[state] _____[entity] ("Lender").

RECITALS

Lender is making a mortgage loan to the Borrower in the amount of _____ Dollars (\$_____) ("Mortgage Loan"), for the purpose of facilitating the purchase or refinancing by the Borrower of a construction project known as _____[name], located in _____[city] _____[county], _____[state] ("Project").

The Mortgage Loan is evidenced by a certain Note from the Borrower to the Lender ("Note"), dated _____[month] _____[day], _____[year], secured by a certain Mortgage from the

Borrower to the Lender ("Mortgage") of the same date, granting and creating, among other things, a first lien on the Project (which Note and Mortgage, together with certain other documents executed and delivered in connection with the Mortgage Loan, are hereinafter collectively referred to as the "Loan Documents").

Certain of the improvements and/or grounds of the Project and the land pertaining to it need to be repaired and/or completed, as described in Exhibit A thereto.

As a condition precedent to the Lender's making the Mortgage Loan to the Borrower, the Borrower is required to deposit with the Lender funds in the amount of _____ Dollars (\$_____) to establish a repair or completion escrow (the "Escrow") for the Project, to be held as additional security for the Mortgage Loan, and the Borrower wishes to establish such Escrow.

The parties wish to establish the terms and conditions under which the Escrow shall be held and applied.

NOW, THEREFORE, in consideration of the mutual covenants herein and other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the parties agree as follows:

1. Deposit of Funds. The Borrower is furnishing herewith to the Lender the amount of _____ Dollars (\$_____) ("Deposit"). The Deposit shall be held in escrow by the Lender for application or release as herein provided. The Deposit shall be held to guarantee completion of the items of repair or completion work as described in Exhibit A. All such items of repair or completion work are to be completed to the satisfaction of Lender on or before _____[month] _____[day], ____[year].

2. Holding of the Deposit. The Deposit shall be held by the Lender for a period beginning on the date hereof and ending on the date that the Lender has approved the final release of the Deposit as provided herein or the Deposit is otherwise disposed of as provided herein.

3. Investment of Funds. The Lender may invest the Deposit in an interest bearing account in an institution whose accounts are insured by the Federal Deposit Insurance Corporation or the Federal Savings and Loan Insurance Corporation. The Lender shall not be responsible for (i) any losses resulting from the investment of the Deposit, or (ii) obtaining any specific level or percentage of interest earnings on such investment. Any investment earnings on the Deposit shall be added to the Deposit. The Borrower agrees that the Lender may withdraw from the Deposit and keep for itself a reasonable fee for its services in placing and administering any such investments. Borrower hereby agrees to indemnify and hold harmless Lender from any loss, including a loss of any amount deposited or interest earned in connection with this Agreement, liability, costs or expenses, including attorneys' fees, resulting from or arising out of the investment of the Deposit and interest earned.

4. Conditions for Release of the Deposit. Lender may release funds from the Deposit to the Borrower on request periodically in the Lender's discretion, but without obligation to release funds more often than once each month. The remaining amount of the Deposit shall always be at least _____ percent (_____%) of the estimated cost of completing the work. The conditions for such release shall include, without limitation, that Borrower satisfied Lender that the appropriate portion of the repairs or completion work have been completed, that Borrower has furnished Lender with any appropriate costs and architectural certifications and lien waivers, and that Borrower has satisfied Lender that sufficient funds remain undisbursed after the requested release to complete the repairs or completion work. Lender shall have the right to inspect, oversee and monitor the repairs or completion from time to time in whatever manner Lender deems desirable.

Upon the full completion of the repairs or completion work to the satisfaction of Lender or its designee, and subject to receipt of proof reasonably satisfactory to Lender that there is no possibility of the filing of mechanic's or materialmen's liens that would take priority over the lien of the Mortgage, and upon receipt by Lender of any appropriate costs and

architectural certifications, and in the event that there is no default under the terms and conditions of the Loan Documents, the remaining portion of the Deposit will be released to Borrower.

In the event that the repairs or completion work, or any part thereof, are not completed to Lender's satisfaction by the date specified above, Lender is authorized to disburse such funds for the repairs or completion work, or, at its option, apply such funds to payment of the indebtedness secured by the Mortgage, or as otherwise provided in the Guide.

5. Default Under the Loan Documents. Notwithstanding any provision herein to the contrary, in the event of a default under the terms of the Note, the Mortgage or any of the other Loan Documents, or in the event that the specific purpose for which the Deposit was provided to secure performance has not been satisfied, the Lender shall have without limitation each and all of the following rights:

(a) To apply the Deposit to payment of the indebtedness secured by the Mortgage, provided that such payment or allocation of proceeds shall not cure or be deemed to cure any default; and

(b) To utilize the Deposit for such other purposes and uses as may be provided in the Guide.

In the event that part of the Deposit proceeds are applied as described in (a) or (b) above, the remaining proceeds of the Deposit shall be released only upon the furnishing by Borrower of audited financial statements, adjusted as required by Lender, in a form and substance satisfactory to Lender, showing that Borrower has achieved from the operation of the Project, a debt service coverage ratio of _____ percent (_____) for _____ (_____) consecutive calendar months, or _____ percent (_____) on an annualized basis for _____ (_____) consecutive months.

Nothing herein shall obligate the Lender to apply the Deposit on account of any default by the Borrower or to the indebtedness secured by the Mortgage.

6. Default Under This Agreement. A default by the Borrower under this Agreement shall, at the option of the Lender, constitute a default under the Note and the Mortgage.

7. Remedies Cumulative. None of the rights and remedies herein conferred upon or reserved to the Lender is intended to be exclusive of any other rights, and each of every right shall be cumulative and concurrent, and may be enforced separately, successively or together, any may be exercised from time to time as often as may be deemed necessary by the Lender.

8. Enforcement of Agreement. This Agreement is entered into by the parties hereto for the benefit of the Lender, either of which shall have the right to hold the Deposit and enforce the provisions hereof.

9. Borrower Indemnifying Lender. Borrower hereby agrees to indemnify and hold harmless Lender from any loss, including a loss of any amount deposited or interest earned in connection with this Agreement, liability, costs or expenses, including attorneys' fees, resulting from or arising out of the investment of the Deposit and its interest.

10. No Third Party Right of Enforcement. Nothing contained herein shall be deemed or construed to create an obligation on the part of Lender to any third party, nor shall any third party have a right to enforce as against Lender any right which Borrower may have hereunder.

11. Lender's Acknowledgment of Completion. Lender's acknowledgment of the completion of the repair or completion work in a manner satisfactory to Lender shall not be deemed to be an acknowledgment that the repair or completion work has been completed in compliance with any applicable building codes, ordinances, regulations or requirements of

governmental agencies having jurisdiction thereof.

12. Determinations by Lender. In any instance where the consent or approval of the Lender may be given or is required, or where any determination, judgment or decision is to be rendered by the Lender hereunder, the granting, withholding or denial of such consent or approval and the rendering of such determination, judgment or decision shall be made or exercised by the Lender at its sole and exclusive option and in its absolute discretion.

13. Borrower's Records. The Borrower shall furnish such financial statements, records, papers and documents relating to the Project as the Lender may reasonably require from time to time to make the determinations permitted or required to be made by the Lender hereunder.

14. Borrower's Other Obligations Not Impaired. Nothing herein contained shall in any manner whatsoever alter, impair or affect the obligations of the Borrower, or relieve the Borrower of any of its obligations, to make payments and to perform all of its other obligations required pursuant to the Note, the Mortgage and the other Loan Documents.

15. Reimbursement for Lender's Costs. Borrower agrees to pay all costs and expenses incurred by the Lender, including court costs and attorneys' fees, by reason of acting as the holder of the Deposit pursuant to this Agreement.

16. Entire Agreement. This Agreement when executed by the parties hereto contains the complete and entire understanding of the parties with respect to the subject matter hereof, and no changes shall be recognized as valid unless they are made in writing and similarly executed. No specific waiver of any of the terms hereof shall be considered as a general waiver.

17. Successors and Assigns Bound. This Agreement shall be binding upon and inure to the benefit of the respective successors and assigns of the parties hereto. Borrower may not assign its interest under this Agreement without Lender's prior written consent.

18. No Agency or Partnership. Nothing herein contained shall constitute Lender as a joint venturer, partner or agent of Borrower, or render Lender liable for any debts or obligations of Borrower. Nor shall Lender be liable for any acts, omissions, representations or contacts of Borrower.

19. Applicable Law. This Agreement shall be governed by and construed according to the laws of the state where the Project is located.

IN WITNESS WHEREOF, the undersigned parties have executed this Agreement to be effective on the date first written above.

"BORROWER"

a(n) _____ [state] _____ [entity]

By: _____

Print Name: _____

Title: _____

"LENDER"

a(n) _____ [state] _____ [entity]

By: _____

Print Name: _____

Title: _____



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26-22 Current Legal Forms for Real Estate FORM 22.140

FORM 22.140 Environmental indemnity agreement

COMMENT

It is rare for a sophisticated lender to make a mortgage loan without it paying special attention to environmental matters. In many cases, lenders will require special agreements which only address environmental matters. Obviously, these provisions may be included in the loan agreement or the mortgage. However, in most cases the environmental agreements are designed to survive the satisfaction of the loan and the mortgage. Also, in some circumstances a lender may also provide that even if a loan is non-recourse, the owners of the borrower must personally indemnify the lender from environmental conditions. The following agreement does not provide for such a personal guaranty. The agreement addresses the more typical environmental conditions (i.e., pollution) and the existence of wetlands. Further, the agreement allows the borrower to use results of the reports that it conducted in its due diligence in preparation of purchasing the land as a benchmark. However, in such cases, the lender will usually want a reliance of the lender from the environmental inspection company. That is a letter directed to the lender stating that the lender can rely upon the reports, and that it will be liable to the lender for any defects contained in the reports.

FORM

**ENVIRONMENTAL REPRESENTATIONS, RELEASE, HOLD HARMLESS AND
INDEMNITY AGREEMENT**

This Environmental Representations, Release, Hold Harmless and Indemnity Agreement (hereinafter "Environmental Indemnity") is entered into as of the _____[day] day of _____[month], _____[year],

by and between _____ [name], a(n) _____ [state] _____ [entity] (the "Borrower") and _____ [name], a(n) _____ [state] _____ [entity] (the "Bank"), contemporaneously with the execution by the parties of the: (i) the Construction Loan and Security Agreement, dated of even date herewith and executed by and between Borrower and Bank; (ii) the Mortgage Note, dated of even date herewith, in the principal amount of \$ _____, executed by Borrower and made payable to Bank; (iii) an Open-End Mortgage, Assignment of Rents and Leases and Security Agreement executed by Borrower and dated of even date herewith, encumbering the Real Estate defined below (the "Mortgage") (all of the foregoing along with all documentation executed in connection therewith will be collectively referred to as the "Loan Documents").

Section 1. Definitions

1.1 The term "Borrower" shall mean the Borrower named above.

1.2 The term "Bank" shall mean the bank referred to above and all affiliates of the _____ [parent corporation] and shall include all agents, employees, directors, officers, shareholders and insurers thereof.

1.3 The term "Real Estate" shall mean the real estate described on Exhibit A attached hereto.

1.4 The term "Property" shall include all real property which is part of the Real Estate and all surface waters, groundwater, strata, soils, fill, bedrock, sewers, buildings, foundations, piping, and other structures, materials and improvements on, in or under the Real Estate.

1.5 The term "Environmental Laws" shall mean all federal, state and local laws, regulations and ordinances intended to protect or preserve human health, Natural Resources and the Environment.

1.6 The terms "Hazardous Substance," "Release," "Owner," "Operator," "Environment" and "Natural Resources" shall have the same meanings and definitions as set forth in the Comprehensive Environmental Response Compensation and Liability Act as amended, 42 U.S.C. § 9601 *et seq.* and regulations promulgated thereunder (collectively "CERCLA") and any corresponding state or local law or regulations, provided, however, that as used herein the term "Hazardous Substance" shall also include: (i) any Pollutant or Contaminant as defined by CERCLA or by any other Environmental Law; (ii) any solid Waste, Hazardous Constituent or Hazardous Waste as defined by, or as otherwise identified by, the Resource Conservation and Recovery Act as amended 42 U.S.C. § 6901 *et seq.* or regulations promulgated thereunder (collectively "RCRA") or by any other Environmental Law; and (iii) crude oil, petroleum and fractions or distillates thereof; (iv) any other material, substance or chemical defined, characterized or regulated as toxic or hazardous under any applicable law, regulation, ordinance, directive or ruling; and (v) any infectious waste or medical waste as defined by any applicable federal or state laws or regulations.

1.7 The terms "Storage," "Treatment" and "Disposal" shall have the same meanings and definitions as set forth in RCRA.

Section 2. Representations and Warranties

Borrower hereby expressly represents and warrants to the Bank that except as has been disclosed in the report from _____ [name] dated _____ [month] _____ [day], _____ [year], the following are true as of the time of the execution of this Agreement and shall be true as of the Closing:

2.1 There has been no Storage, Treatment or Disposal of Hazardous Substances and no Release or threatened Release, transportation, or migration of Hazardous Substances in, on, onto or from the Property.

2.2 There are no and have been no Underground Storage Tanks (including, without limitation, tanks such as those used to contain heating oil that may be exempt from regulation under RCRA or corresponding state laws or regulations) located on the Property.

2.3 There are no asbestos containing materials incorporated into or otherwise on the Property.

2.4 There has been no, nor is there now, any pending, threatened, ongoing or unresolved administrative or enforcement action, investigation (including, without limitation, information requests pursuant to CERCLA § 103), compliance order, claim, demand or other litigation brought by governmental authorities or other third parties, based on Environmental Laws or otherwise related to Hazardous Substances ever in, on, about or transported from the Property.

2.5 Borrower has at all times operated its business on, and maintained, the Property in full compliance with all applicable laws, regulations and ordinances, including, but not limited to, those pertaining to the protection of human health, welfare and the environment and Borrower has not utilized, accumulated or generated Hazardous Substances on the Property except as permitted, allowed or authorized by such laws, regulations and ordinances.

2.6 Except as has been disclosed in the reports from _____ [name] dated _____ [month] _____ [day], _____ [year], there are no wetlands within the meaning of or as defined by the Clean Water Act, 33 U.S.C § 404 and regulations promulgated thereunder or any other applicable federal, state or local law, regulation or guidance, located on the Property.

Section 3. Covenants

3.1 There shall be no Storage, Treatment or Disposal of Hazardous Substances and no Release, transportation or migration of Hazardous Substances in, on, onto or from the Property.

3.2 There shall be no Underground Storage Tanks located on the Property.

3.3 Borrower shall at all times operate its business on and maintain the Property in full compliance with all applicable laws, regulations and ordinances, including, but not limited to, those pertaining to the protection of human health, welfare and the environment and Borrower shall not utilize, accumulate or generate Hazardous Substances on the Property except as permitted, allowed or authorized by such laws, regulations and ordinances, provided, however, that Borrower shall not engage in or allow the Storage, Treatment or Disposal of Hazardous Substances on the Property irrespective of a governmental permit or authorization therefor.

Section 4. Release, Hold Harmless, Indemnity

4.1 Borrower agrees and covenants that Bank shall not assume any liability or obligation for loss, damage, fines, claims or duty to clean-up or dispose of Hazardous Substances, wastes or materials on or relating to the Real Estate, regardless of any inspections of the Property made by the Bank or its designees or agents prior to the consummation of this transaction or as a result of any conveyance of title of the Real Estate to the Bank by foreclosure, deed in lieu of foreclosure, or conveyance, transaction, or circumstance in which Bank is attempting to minimize its damages or protect its Collateral under the Loan.

4.2 Borrower agrees to remain fully liable and shall indemnify and hold harmless Bank from any costs, expenses, clean-up costs, Hazardous Substances and other waste disposal costs, litigation costs, fines, or penalties, including, without limitation, those costs, expenses, penalties and fines within the meaning of CERCLA, and other related liabilities, upon the occurrence of any environmental-related situation regarding the Property.

4.3 The Borrower hereby agrees to release, hold harmless, defend and indemnify Bank from, for and against all actual or threatened claims, costs (including, but not limited to, the cost of investigation, removal, remediation and other clean up of Hazardous Substances, and reasonable fees of attorneys and other professionals, experts and consultants retained by Bank), demands, orders, losses, lawsuits, liabilities, damages and expenses whether brought collectively or individually by Borrower, a governmental authority or any other third party (all the foregoing hereinafter collectively referred to as "Losses") arising from or related to any of the following:

(a) The past, present or future Release, threatened Release, Storage, Treatment, accumulation, utilization, Disposal, transportation or other handling or migration of any Hazardous Substance on, in, onto or from the Property.

(b) The violation or alleged violation of Environmental Laws occurring on or related to the Property.

(c) Any reasonable action taken by Bank to eliminate, prevent or mitigate the potential adverse impact on the Real Estate or the Bank as a result of or in anticipation of any actual, suspected or threatened violation of Environmental Laws or Release or threatened Release of a Hazardous Substance on, in or from or otherwise affecting the Property; such action may include, but need not be limited to, the disposition, distribution, sale, disclaimer or renunciation of any portion of the Real Estate.

The Clause 4.3 (a), (b) and (c) above being referred to collectively as "Environmental Matters."

4.4 The Borrower hereby agrees that Bank shall be reimbursed directly from the Real Estate or proceeds thereof or from Borrower directly for any Losses suffered or sustained or threatened to be suffered or sustained by Bank as a result of Environmental Matters.

4.5 Nothing contained herein or in the Mortgage, Loan Documents or any other documents or arrangements between the parties hereto shall be deemed to create any right, obligation or authority on the part of the Bank to participate in the management, control, operation or function of Borrower's business, facility or operational affairs, including, without limitation, Borrower's Hazardous Substance handling practices or to otherwise exercise any decision making control over Borrower's environmental compliance or day-to-day operations.

4.6 The provisions of this Agreement shall survive the satisfaction of indebtedness evidenced by the Loan Documents and the release of the Mortgage.

Section 5. Conflicting Provisions, Controlling Law, Counterparts

5.1 Notwithstanding any contradictory, conflicting or inconsistent provision contained in the Loan Documents, the provisions of this Environmental Indemnity shall be controlling and shall govern the relationship between the parties hereto.

5.2 This Environmental Indemnity shall be interpreted pursuant to the laws of the State of _____[state]. If any provisions contained herein are ultimately declared or held by a court of law to be in violation of law, the remaining provisions herein not so declared or held shall remain in full force and effect.

5.3 This Environmental Indemnity may be executed in multiple copies and counterparts, which, when taken together shall constitute a completely executed document.

Section 6. Borrower's Acknowledgment

(a) The Borrower hereby acknowledges that Bank has not and will not create, cause or contribute to the presence, Release or threatened Release of Hazardous Substances on, in or from the Property and further that Bank shall not function as an Owner or Operator or otherwise participate in the management of the Property notwithstanding any conflicting or contradictory provisions contained in this Environmental Indemnity or the Loan Documents. Borrower further acknowledges that the release, hold harmless and indemnity as provided to the Bank herein, are being provided in exchange for good and valuable consideration, including, but not limited to, Bank providing financial accommodations to Borrower. Nothing contained herein or in the Mortgage, Loan Documents or any other documents or arrangements between the parties hereto shall be deemed to create any right, obligation or authority on the part of the Bank to participate in the management, control, operation or function of Borrower's business, facility or operational affairs, including, without limitation, Borrower's Hazardous Substance handling practices or to otherwise exercise any decision making control over Borrower's environmental compliance or day-to-day operations.

(b) Borrower having carefully read the foregoing hereby acknowledges that it fully understands its meaning and content and signs below voluntarily.

"BORROWER"

a(n) _____ [state] _____ [entity]

By: _____

)
 STATE OF _____ [state]) SS:
 COUNTY OF _____ [county])

BEFORE ME, a Notary Public in and for said County and State, personally appeared _____ [name], a(n) _____ [state] _____ [entity], by _____ [name], its _____ [title], who acknowledged that _____ [he/she] did sign the foregoing instrument for and on behalf of said corporation, being thereunto duly authorized, and that the same is _____ [his/her] free act and deed individually and as such officers and the free act and deed of said _____ [entity].

IN TESTIMONY WHEREOF, I have hereunto set my hand and official seal at _____ [city], _____ [state], this _____ [day] day of _____ [month], _____ [year].

 Notary Public

ACCEPTED:

"BANK"

a(n) _____ [state] _____ [entity]

By: _____

STATE OF _____ [state])
COUNTY OF _____ [county]) SS:

BEFORE ME, a Notary Public in and for said County and State, personally appeared _____ [name], a(n) _____ [state] _____ [entity], by _____ [name], its _____ [title], who acknowledged that _____ [he/she] did sign the foregoing instrument for and on behalf of said corporation, being thereunto duly authorized, and that the same is _____ [his/her] free act and deed individually and as such officers and the free act and deed of said _____ [entity].

IN TESTIMONY WHEREOF, I have hereunto set my hand and official seal at _____ [city], _____ [state], this _____ [day] day of _____ [month], _____ [year].

Notary Public

[Attach Exhibit A]



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26-22 Current Legal Forms for Real Estate FORM 22.141

FORM 22.141 Assignment of construction contract

COMMENT

As collateral for the construction loan, a prudent lender will take an assignment of all material construction contracts. As a result of the borrower defaults and the lender must attempt to complete the project, it has the right to enforce the construction contract and force the contract to complete the improvements for the benefit of the lender. This form could be modified to be used in connection with any other material contracts relating to the project (i.e., architect, engineer, etc.)

FORM

COLLATERAL ASSIGNMENT OF CONSTRUCTION CONTRACT

THIS COLLATERAL ASSIGNMENT OF CONSTRUCTION CONTRACT is made this _____[day]
day of _____[month], _____[year], by and between _____[name], a(n)
_____[state] _____[entity], whose business address is _____[address]
(hereinafter referred to as the "Assignor") and _____[name], a(n)
_____[state] _____[entity], whose business address is _____[address]
(hereafter referred to as the "Assignee").

WHEREAS, the Assignor is the owner under the Construction Contract described on Exhibit A (the "Construction Contract") between Assignor and _____[name] (the "Contractor"); and

WHEREAS, pursuant to a Construction Loan and Security Agreement of even date (the "Loan Agreement"), the Assignee has made available to the Assignor a credit facility in the amount of _____ Dollars

(\$ _____) (the "Loan"); and

WHEREAS, as a condition for the Assignee to make the Loan, the Assignor is required to collaterally assign its interest in the Construction Contract to Assignee;

NOW, THEREFORE, in consideration of the mutual promises contained herein the Assignor and the Assignee agree as follows:

1. Assignment. As security for the payment and performance of all obligations and/or amounts due, or to become due, from the Assignor under the Loan Agreement or any of the other Loan Documents (as defined in the Loan Agreement), the Assignor does hereby sell, assign, convey and transfer unto the Assignee and grant to the Assignee a first lien on, and security interest in, all right, title and interest of the Assignor in and to the Construction Contract; provided, this Assignment is conditional and shall become absolute at the option of the Assignee only upon the occurrence of an Event of Default (as defined in the Loan Agreement). In the event of an Event of Default, the Assignee shall have the option of exercising its rights under this Assignment and the Assignee shall thereupon succeed to all of the Assignor's right, title and interest in and to the Construction Contract.

2. Representations and Warranties. The Assignor hereby represents and warrants to the Assignee that: (a) the Construction Contract is in full force and effect and binding upon the parties thereto; (b) neither the Assignor nor the Contractor are in default thereunder; (c) the Assignor has not heretofore assigned or otherwise disposed of the Construction Contract, or any interest of the Assignor therein, or any of the Assignor's rights respect thereto; and (d) this Assignment does not contravene or constitute a default under any provision of applicable law or contract, agreement, indenture, mortgage, financing or other instrument binding upon the Assignor.

3. Covenants. The Assignor hereby covenants and agrees that it will not, without the prior written consent of Assignee, such consent not to be unreasonably withheld, conditioned or delayed: (a) consent to any material modification or amendment of the Construction Contract; (b) waive or release any obligation of the Contractor thereunder or consent or agree to any act or omission to act on the part of the Contractor; (c) create or permit any lien, pledge, assignment, charge, encumbrance or security interest in or on, or with respect to the Construction Contract, nor will it sell, assign, convey, or otherwise dispose of any of its right, title or interest therein; or (d) allow or permit a default by it under the Construction Contract.

4. Appointment. The Assignor does hereby irrevocably constitute and appoint the Assignee its true and lawful attorney-in-fact with full and irrevocable power and authority in the place and stead of the Assignor and in the name of the Assignor, or the name of the Assignee or otherwise, for the purpose of carrying out the terms of this Assignment, to take any and all actions and to execute any and all instruments which may be necessary to accomplish the purposes of this Assignment.

5. No Assignee Liability. The Assignor expressly agrees that it will remain liable under the Construction Contract to perform all of the conditions and obligations therein provided to be observed by it, and neither this Assignment, nor the exercise by the Assignee of its rights hereunder, shall cause the Assignee to be under any obligation or liability with respect to the Construction Contract, or any other agreement for the performance or observance of the representations, warranties, conditions, covenants, agreements or terms of the Construction Contract or any agreement, unless expressly consented to in writing by the Assignee. Further, the Assignor and Assignee agree, and by executing the Agreement, Acknowledgment and Consent set forth below, the Contractor agrees, that in the event that the Assignee exercises its rights hereunder and seeks to enforce the Construction Agreement against Contractor, that Assignee will not be

(a) liable for any act or omission of Assignee; or

(b) subject to any offsets or defenses which the Contractor might have against the Assignee; or

(c) responsible for any defaults under the Construction Contract which accrue prior to the date that Assignee exercises its rights hereunder; or

(d) bound by any agreement or modification of the Construction Contract made without the prior written consent of the Assignee.

6. Miscellaneous

A. The Assignor agrees that it will execute and deliver to the Assignee any such documents and do such other acts and things that Assignee may reasonably request in order to further effect the purposes of this Assignment and that if Assignor fails to do so, Assignee may execute any of the foregoing pursuant to the power of attorney hereunder;

B. All rights, powers, remedies granted to the Assignee hereunder and under the Construction Contract, or under the Loan Documents, shall be cumulative, may be exercised singularly or concurrently, and shall not be exclusive of any rights or remedies provided by law.

C. The Assignee may assign its rights hereunder or in the Construction Contract, without the consent of the Assignor or the Contractor.

IN WITNESS WHEREOF, the Assignor and the Assignee have caused this Agreement to be duly executed in their respective names as of the date first written above.

ASSIGNOR:

a(n) _____ [state] _____ [entity]

By: _____

By: _____

Print Name: _____

Title: _____

ASSIGNEE:

a(n) _____ [state] _____ [entity]

By: _____

Print Name: _____

Title: _____

ACKNOWLEDGMENT AND CONSENT

The undersigned, being the Contractor set forth in the Construction Contract does hereby agree and consent to the terms of the foregoing assignment and agrees to be bound by such terms and conditions. Further, in the event that Assignee shall notify it that an Event of Default (as defined in the Loan Agreement) shall have occurred and that Assignee has assumed the Construction Contract subject to the terms set forth herein, that it will acknowledge Bank, or its assignee as to the successor to the Assignee. Further, Contractor agrees to give the Assignee copies of all notices which are required to be given under the Construction Contract simultaneously with the delivery of the notice to the Assignor, including, without limitation, notices of any defaults by Assignor thereunder.

CONTRACTOR:

Dated: _____

By: _____

Print Name: _____

Title: _____

[Attach Exhibit A]



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26-22 Current Legal Forms for Real Estate FORM 22.142

FORM 22.142 Participation agreement

COMMENT

Illustrated here is a participation agreement pursuant to which the loan correspondent and the institutional permanent lender set forth their respective rights in the collateral. It will be noted that this agreement specifies, among other things, the participation amounts, the priority of liens, and the restrictions placed upon the junior participant.

FORM

THIS AGREEMENT is made this _____[day] of _____[month], _____[year], between _____[name], a(n) _____[state] _____[entity] ("Lender A"), and _____[name], a(n) _____[state] _____[entity] ("Lender B").

Recitals

Lender B holds a mortgage dated _____[month] _____[day], _____[year], executed by _____[name] ("Borrower") in favor of Lender B. The mortgage is in the principal sum of _____ Dollars (\$ _____), and was recorded in the Office of the Clerk of _____[county], _____[state], on _____[month] _____[day], _____[year], in Book _____[number] of Mortgages, Page _____[number], to secure payment of a note for a like amount.

Lender A has agreed to purchase a senior participation in the above described note and mortgage, on condition that the

note is endorsed and the mortgage is assigned to Lender A, and Lender B has agreed to retain a junior participation therein.

The note has been endorsed and the mortgage assigned to Lender A. Lender A is purchasing a senior participation and Lender B is retaining a junior participation in the note and mortgage.

The unpaid principal balance on the note is _____ Dollars (\$_____).

Now, therefore, the parties agree as follows:

1. Participation and Priorities. The participation of Lender A in the ownership of the note and mortgage is in the sum of _____ Dollars (\$_____) with interest thereon at the rate provided, and the participation of Lender B in the ownership of the note and mortgage is in the sum of the balance of such indebtedness with interest thereon at the rate provided. The participation of Lender A is, nevertheless, in all respects prior and superior to the participation of Lender B to the same extent and like effect as if Lender A held a note for the sum of _____ Dollars (\$_____) secured by a first mortgage and the participation of Lender B is in all respects junior, inferior, subject, and subordinate to the participation of Lender A to the same extent and like effect as if Lender B held a separate note for the sum of the balance of the indebtedness secured by a second and subordinate mortgage.

2. Application of Payments. Lender B is authorized to collect payments called for in the note referred to in paragraph 1, so long as it remains servicing agent for Lender A. The same proportion of each payment that _____ Dollars (\$_____) bears to the principal balance of the note as of the date of this agreement shall be applied to Lender A's participation and the balance applied to Lender B's participation.

In the event that, pursuant to the terms of the mortgage, the lien of the mortgage, insofar as it affects any of the _____ (_____) parcels of land within Borrower, is released or subordinated to the lien of a construction mortgage, then, of the consideration of

_____ Dollars (\$_____) for the release of Phase II

_____ Dollars (\$_____) for the release of Phase III

_____ Dollars (\$_____) for the release of Phase IV

paid for such release for subordination, the sum of

_____ Dollars (\$_____) for the release of Phase II

_____ Dollars (\$_____) for the release of Phase III

_____ Dollars (\$_____) for the release of Phase IV

shall be applied to the balance of the participation of Lender A, and the sum of

_____ Dollars (\$_____) for the release of Phase II

_____ Dollars (\$_____) for the release of Phase III

_____ Dollars (\$_____) for the release of Phase IV

shall be applied to the balance of the participation of Lender B.

In the event of a partial prepayment of principal other than in connection with a subordination of the lien on any parcel as provided above, Lender A shall have the right to apply such prepayment to either or both participations in any manner which it may determine.

3. Rights of Senior Participant. Lender A may retain in its possession the note, mortgage, and other instruments securing or evidencing the security of the loan, and may retain this loan in its own name and deal with any person, firm, or organization concerning such loan in the same manner and with the same effect as if it were the sole owner and no participating interest were outstanding. Lender A, without Lender B's consent, may perform or enforce any agreement, condition, or covenant of the note and mortgage in the same manner as if it were the sole owner and no participating interest were outstanding. Lender A shall have the right to accept additional security for the loan and release such additional security, grant partial release or partial subordinations, release persons liable, agree to substitution of liability, and accept full or partial prepayment of the loan with or without the collection of a prepayment charge, all without Lender B's consent.

4. Restrictions of Junior Participant. Lender B shall not modify, extend, assign, pledge, or hypothecate its junior participation nor grant any forbearance in connection therewith, without obtaining Lender A's prior written consent.

5. Rights Upon Foreclosure. In the event of a default in the payment of any principal or interest or in the performance of any agreement, condition, or covenant in the note or the mortgage or other instrument securing the loan, Lender A, at its option, may according to the terms of such note and mortgage accelerate the entire amount due on such note and mortgage and may foreclose such mortgage. Should Lender A institute foreclosure proceedings because of any such default, and judgment or decree of foreclosure be entered, Lender B, at its option, may purchase the rights of Lender A in the judgment for an amount equal to the balance of Lender A's participation plus interest, advances, and all expenses incurred in the foreclosure proceedings. This option may be exercised only after the judgment has been entered and prior to ten days before the date set for the foreclosure sale. If Lender B does not exercise such option, then Lender A may proceed with the foreclosure without protecting Lender B's interest.

In the event of a foreclosure sale, Lender A shall not be obligated to bid in excess of the indebtedness due it under the senior participation, including principal, interest, advances, and costs incurred in the foreclosure proceedings. The proceeds of any foreclosure sale, after the payment of the costs of the foreclosure sale, shall be applied to the total indebtedness due Lender A, and Lender B shall be entitled to share in the proceeds of sale only after the total indebtedness due Lender A has been paid. Nothing contained in this paragraph shall be construed to imply any obligation of Lender A to enter any bid in connection with any foreclosure sale.

In the event that the proceeds of a foreclosure sale are insufficient to satisfy the total indebtedness due Lender A, Lender A shall have the right to pursue a deficiency judgment, and all moneys realized as a result thereof shall be used to satisfy the indebtedness due Lender A before Lender B will have the right to share therein. In the event that the proceeds of a foreclosure sale are sufficient to satisfy the indebtedness due Lender A but not to satisfy the indebtedness due Lender B, Lender A shall on Lender B's request execute any assignment necessary to enable Lender B to pursue a deficiency judgment.

If Lender A is the purchaser at a foreclosure sale, then in the event of a subsequent sale of the property so acquired, Lender A shall not be obligated to account to Lender B, nor shall Lender B be entitled to share in the purchase price of such subsequent sale.

6. Binding Effect. This agreement shall be binding on and shall inure to the benefit of the parties hereto, their successors, and assigns.

7. Entire Agreement. This agreement supersedes all agreements previously made between the parties relating to its subject matter. There are no other understandings or agreements between them.

8. Notices. All notices under this agreement shall be in writing and delivered personally or mailed by certified mail, postage prepaid, addressed to the parties at their last known addresses.

9. Non-Waiver. No delay or failure by either party to exercise any right under this agreement, and no partial or single exercise of that right, shall constitute a waiver of that or any other right, unless otherwise expressly provided herein.

10. Headings. Headings in this agreement are for convenience only and shall not be used to interpret or construe its provisions.

11. Governing Law. This agreement shall be construed in accordance with and governed by the laws of the State of _____[state].

12. Counterparts. This agreement may be executed in two or more counterparts, each of which shall be deemed an original but all of which together shall constitute one and the same instrument.

IN WITNESS WHEREOF, the parties have caused this instrument to be duly executed the day and year first above written.

"LENDER A"

a(n) _____ [state] _____ [entity]

By: _____

Print Name: _____

Title: _____

"LENDER B"

a(n) _____ [state] _____ [entity]

By: _____

Print Name: _____

Title: _____



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26-22 Current Legal Forms for Real Estate FORM 22.143

FORM 22.143 Legal opinion--attorney opinion for construction loan

COMMENT

With respect to a complex commercial real estate loan, many lenders will require the borrower to engage an attorney to provide a legal opinion. The required opinion can address many different subjects and issues. Frequently, the subject matter of the legal opinion is negotiated by borrower's counsel and lender's counsel.

Typically, a lender will require a minimum opinion that the loan is authorized and that the loan documents are enforceable under the laws in the jurisdiction where the project is located. The enforceability opinion may be critical to the lender if the lender and its counsel are not familiar with the laws in the state where the project is located. If this is the case, the lender will require borrower's local counsel to confirm that the documents are enforceable under applicable local law.

The opinion may also address issues such as recording requirements, zoning compliance, issuance of permits, and a disclosure by borrower's counsel of all pending matters being handled by borrower's counsel which might adversely affect borrower's ability to repay the loan or complete the project.

The following opinion is a typical opinion that borrower's counsel would be required to deliver at closing.

FORM

_____ [month] _____ [day], _____ [year]

_____[name]
 _____[address]
 _____[address]

RE: _____ Dollars (\$_____) Loan From _____[name] to
 _____[name]

Gentlemen:

We have acted as counsel to _____[name] ("Borrower") and _____[name] and
 _____[name] _____ Dollars (\$_____) (the "Loan") which is being
 made by you (the "Lender") to Borrower for the purposes set forth in the Loan Agreement as defined herein. At your
 request and pursuant to a certain Loan Commitment Letter dated _____[month]
 _____[day], _____[year] and the Loan Agreement, we are providing this opinion.

We have examined copies of each of the following executed documents:

1. Construction Loan Agreement ("Loan Agreement") of even date with the Note, as defined herein;

2. Commercial Term Note in the principal amount of

_____ Dollars (\$

_____) dated

_____ [month]

_____ [day],

_____ [year] (the "Note");

3. Open-End Mortgage Deed and Security Agreement ("Mortgage") of even date with the Note secured
 by real estate located in the City of

_____ [city], County of

_____ [county],

_____ [state] (the "Premises");

4. Continuing Guaranty of the Guarantors (the "Guaranty") of even date with the Note;

5. Assignment of Leases and Rents ("Assignment of Rents") of even date with the Note;

6. Assignment of Licenses, Permits, Contracts and Warranties of even date with the Note;

7. Environmental Compliance and Indemnification Agreement of even date with Note;

8. Assignment of Construction Contract of even date with the Note;

9. UCC-1 Financing Statement to be filed with the

_____ [state] Secretary of State ("Financing Statement");

10. Articles of Organization of Borrower;

11. Operating Agreement of Borrower;

12. Full Force and Effect Certificate of Borrower;

13. Resolution of Borrower; and

14. Incumbency Certificate of Borrower.

The documents listed as items 1 through 9 are referred to collectively herein as the "Loan Documents." The documents listed as items 10 through 14 are referred to collectively herein as the "Borrower Documents."

Subject to the foregoing and to any other limitation or qualification expressly set forth herein, we are of the opinion that:

1. Borrower is a limited liability company duly organized and validly existing under the laws of the State of _____ [state] and is in good standing and qualified to do business in the State of _____ [state] and has the legal capacity to perform its obligations under the applicable Loan Documents.

2. Borrower has the power and authority to execute, deliver and perform its obligations under the Loan Documents.

3. The Guarantors each have the power and authority to execute, deliver and perform their respective obligations under the applicable Loan Documents.

4. The entering into, execution, delivery of and performance under the Loan Documents by Borrower (i) has been duly authorized by all the requisite action of the Manager/Member of Borrower, (ii) will not (a) violate any federal, state or local law, ordinance, regulation, order or rule or guideline, (b) violate any provision of Borrower's Articles of Organization or Operating Agreement, (c) to our knowledge, cause Borrower to become in default under any existing contract, agreement, understanding or other obligation, document or instrument to which Borrower is subject, or any other governing documents of Borrower, (d) to our knowledge, violate any written agreement, instrument, document or understanding to which Borrower is a party or by which it or any of its assets are bound, (e) to our knowledge, violate any judgment, decree, or order of any court or of any federal, state or other regulatory authority or governmental body having jurisdiction over Borrower, and (iii) does not require the filing with or consent, waiver, approval, license or authorization of any public authority that has not been made or obtained.

5. The entering into, execution, delivery and performance under the Loan Documents by Guarantors (i) will not (a) violate any federal, state or local law, ordinance, regulation, order or rule, (b) to our knowledge, cause them or any one of them to become in default under any agreement, contract, understanding or other obligation, document or instrument to which they are or any one of them is subject, (c) to our knowledge, violate any written agreement, instrument, document or understanding to which they or any one of them is a party or by which they or any one of them or their respective assets are bound, (d) to our knowledge, violate any judgment, decree, or order of any court or of any federal, state or other regulatory authority or governmental body having jurisdiction over them or any one of them, and (ii) does not require the filing with or consent, waiver, approval, license or authority action of any public authority that has not

been made or obtained.

6. The Loan Documents have been duly executed and delivered by Borrower and Guarantors and are the valid and binding obligation of Borrower and Guarantors, enforceable in accordance with their respective terms.

7. To our knowledge, no actions, suits, proceedings, contributions or investigations against Borrower or any of the Guarantors are pending or threatened that if adversely determined would, whether in any single case or in the aggregate, question the validity of or prevent the consummation of the transaction contemplated by the Loan or the use of the Premises or have a material adverse effect on their respective financial conditions, properties, assets or operations.

8. The Loan is not usurious.

This opinion is qualified by the foregoing:

1. The enforceability of any provision of the Loan Documents is subject to applicable bankruptcy, insolvency, reorganization, moratorium, liquidation or other similar laws and equity principles relating to or affecting creditors' rights and remedies or the relief of debtors.

2. Certain other equitable or remedial provisions contained in the Loan Documents referred to in this opinion, such as provisions and agreements respecting the payment by a debtor of a cost of administration, including, without limitation, attorney fees or respecting the exercise of certain powers of entry or appointment of receivership or possession or sale or other forms of "self-help" without notice, hearing or judiciary review, or purporting to waive statutory or common law rights of parties to such documents or instruments or third parties whose rights are affected thereby may be unenforceable in whole or in part.

3. The Assignments of Leases and Rents may not be enforceable unless a foreclosure action is instituted and a receiver is appointed by a competent court having jurisdiction over the Borrower and the property described therein.

4. The opinions expressed below as to compliance with certain laws and regulations and the obtaining or performing of all consents, approvals, authorizations, and filings required thereby are based upon a review of those laws and regulations which are generally applicable to transactions of the type contemplated by the agreements referred to herein.

5. Whenever we assert below that a matter is "to our knowledge" or "known to us," unless otherwise qualified, our knowledge is limited to the actual knowledge of those attorneys in our office who have directly participated in the representation of the Borrower, or either of them, without inquiry.

6. No opinion is expressed concerning the means of granting or perfecting a security interest in deposit accounts or any type of intellectual property or any type of property where perfection may only be obtained by possession, or by making a notation on a Certificate of Title.

7. We have assumed the genuineness of all signatures of all persons on documents reviewed by us and the legal competency of all natural persons executing the same.

8. We have assumed the authenticity of all documents submitted to us as originals and the conformity to authentic originals of all documents submitted to us as certified, conformed or photostatic copies.

9. We have assumed that the Lender is duly organized, validly existing and in good standing in the jurisdiction of its organization and is otherwise qualified or licensed to transact business in all jurisdictions where the failure to be so qualified or licensed would adversely affect the Lender's ability to enter into or consummate the transactions contemplated by the Loan Documents or to enforce its rights or remedies thereunder. We have also assumed that the

Lender has all necessary power and authority to enter into the Loan Documents and to consummate the transactions contemplated thereby, and that the Loan Documents are enforceable against Lender in accordance with their respective terms.

Capitalized terms have the same meaning as used in the Loan Documents.

This opinion is being issued and delivered to you, and is intended solely for your use and may not otherwise be filed publicly or otherwise disclosed or relied upon by any other person or purpose without obtaining our written consent, except for any good faith disclosure made (i) to Lender's certified public accountant and legal counsel, (ii) any financial institution acting as a participant of the Loan, (iii) in compliance with any legal process, order, or decree issued by the court or agency of government of competent jurisdiction, (iv) to any government agency with regulatory authority over Lender. No opinion is expressed with respect to documents, instruments, or agreements not specifically referred to herein. Further, we specifically express no opinion as to the priority of any liens or security interests given to Lender.

We are members of the Bar to the State of _____[*state*], and render our opinion with regard to the laws of the State of _____[*state*] and federal law of the United States of America.

Sincerely,

_____ [*attorney*]

Printed Name: _____



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Current Legal Forms for Real Estate
Chapter 22A REAL ESTATE SECURITIES

28-22A Current Legal Forms for Real Estate 22A.syn

AUTHOR: by Robert M. Nelson

§ 22A.syn Synopsis to Chapter 22A: REAL ESTATE SECURITIES

§ 22A.01 Summary of this Chapter

§ 22A.02 Real Estate Entities: An Overview

§ 22A.03 C Corporations

§ 22A.04 S Corporations

§ 22A.05 Partnerships and Limited Liability Companies

[1] Comparison of Partnership/LLC and Corporation

[2] "At Risk" Loss Deduction Limitation and Passive Loss Limitations

§ 22A.06 Real Estate Investment Trusts (REITs): Qualification Requirements

[1] Qualification for Conduit Tax Status

[2] Organizational Requirements: Corporate Characteristics

[3] Real Estate Assets Requirement

[4] Income Percentage Requirements; the 100 Percent Tax

[a] 75 Percent Gross Income Test; Qualified Real Estate Income

[b] 95 Percent Gross Income Test; Passive Source Income

[c] Primarily for Sale

[5] Distribution of Income

[6] Election and Termination of REIT Status; Recordkeeping

[a] Election; Termination

[b] Recordkeeping Requirements

§§ 22A.07-22A.14 [Reserved]

§ 22A.15 Introduction and Scope of Practice Background

§ 22A.16 Federal Securities Law

[1] Registration Under the Securities Act of 1933

[2] Registration Exemptions Under the Securities Act of 1933

[a] The Intrastate Offering Exemption

[b] The Regulation D Exemptions

[i] Rule 504--Exemption for Limited Offerings and Sales of Securities Not Exceeding \$1,000,000

[ii] Rule 505--Exemption for Limited Offers and Sales of Securities Not Exceeding \$5,000,000

[iii] Rule 506--Exemption for Limited Offers and Sales Without Regard to Dollar Amount of Offering

[3] Summary of Registration and Exemption Provisions of the Securities Act of 1933

§ 22A.17 State Securities Laws

[1] Registration Under the State Securities Laws

[2] Registration Exemptions Under the State Securities Laws

[3] Summary of Registration and Exemption Provisions of the State Securities Laws

§§ 22A.18--22A.28 [Reserved]

§ 22A.29 Federal Securities Law Research Checklist

§ 22A.30 State Securities Law Research Checklist

§ 22A.31 Overview of Drafting Guidelines

§ 22A.32 Analysis of Subscription Agreement

Analysis of Subscription Agreement

FORM 22A.01 Real estate investment trust offering prospectus--acquisition of diversified portfolio of income-producing health-care related real properties and leaseback to health care operators--firm commitment underwriting--Maryland issuer

FORM 22A.02 Real estate investment trust offering--acquisition of diversified portfolio of income-producing health-care related real properties and leaseback to healthcare operators--firm commitment underwriting--Maryland issuer--Exhibits to S-11--exhibit index--underwriting agreement--real estate purchase agreement--appraisal

FORM 22A.03 Real estate investment trust offering--amendment to Form S-11 registration statement

FORM 22A.04 Real estate investment trust offering--amendment to Form S-11 registration statement--exhibits--tax counsel opinion letter--factual representations by issuer

FORM 22A.05 NASAA Small Company Offering Registration (SCOR)--Overview: Introduction, Requirements, and Instructions--NASAA Statement of Policy Regarding Small Company Offering Registrations

FORM 22A.06 NASAA Small Company Offering Registration (SCOR) Manual--Form U-7 Disclosure Document

FORM 22A.07 Small Company Offering Registration (SCOR) Manual--Form U-7--Disclosure Document--State of Minnesota--Limited Liability Company--Acquisition of Land and Construction and Operation of Motel Property

FORM 22A.08 SEC Rule 505 Offering Exemption--Limited Partnership--Private Placement Memorandum

FORM 22A.09 SEC Rule 504 Offering Exemption--Limited Liability Company--Operating Agreement--Securities Exemption Legend and Resale Restrictions

FORM 22A.10 SEC Rule 504 Offering Exemption--Limited Liability Company--SEC Form D--Notice of Sale of Securities Pursuant to Regulation D, Section 4(6), and/or Uniform Limited Offering Exemption

FORM 22A.11 SEC Rule 504 Offering Exemption Limited Liability Company Subscription Agreement Purchaser Representations Securities Exemption Legend and Resale Restrictions

by

Robert M. Nelson**

FOOTNOTES:

(n1)Footnote **. Robert M. Nelson is a member of the Ohio law firm of Cavitch, Familo & Durkin.



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Current Legal Forms for Real Estate
Chapter 22A REAL ESTATE SECURITIES
Part I. The Tax Background

28-22A Current Legal Forms for Real Estate § 22A.01

AUTHOR: by Robert M. Nelson

§ 22A.01 Summary of this Chapter

§ 22A.02 Real Estate Entities: An Overview. Real estate owned for business or investment purposes may be held in many different forms. These forms include sole proprietorships, tenancies in common, joint ventures, corporations, partnerships, limited liability companies, and more specialized types of ownership. In selecting a form of ownership, the taxpayer must weigh the various tax advantages and disadvantages in choosing one type of ownership over another.

§ 22A.03 C Corporations. C corporations result in double taxation. Transfer of property to new or existing corporation solely in exchange for its stock or securities is tax-free, but nonrecognition provision applies only if transferors are in control of transferee corporation immediately after exchange. Corporations, other than closely-held or personal service corporations, are exempt from passive activity loss limitations.

§ 22A.04 S Corporations. S corporations, like C corporations, provide their shareholders with protection from the corporations' liabilities. Unlike C corporations, however, S corporations are not subject to double taxation. Instead, income is passed through directly to the shareholders. S corporations are restricted in the number and type persons they may have as shareholders.

§ 22A.05 Partnerships and Limited Liability Companies. Partnerships and limited liability companies offer tax advantages over corporations. Partnership or limited liability company entity is disregarded for tax purposes, so that only partners or members in individual capacities are liable for payment of income tax.

§ 22A.06 Real Estate Investment Trusts (REITs): Qualification Requirements. A corporation, trust, or association may qualify for status as a real estate investment trust (REIT) if it meets Code requirements for organization, asset ownership, sources and distribution of income, and reporting, and makes a valid election. REIT status permits entity to be treated as a conduit for tax purposes, so that its income is passed through to shareholders without tax at entity level.

Legal Topics:

For related research and practice materials, see the following legal topics:

Real Property LawOwnership & TransferBusiness & Corporate EntitiesReal Property LawTrustsReal Estate Investment
Trusts (REITs)Tax LawFederal Taxpayer GroupsC CorporationsREITs, REMICs, RITs & FASITs (IRC secs.
851-860L, 4981-4982, 6697)Tax LawFederal Taxpayer GroupsS CorporationsShareholders (IRC secs. 1361, 1362,
1366, 1377)General OverviewTax LawFederal Taxpayer GroupsS CorporationsShareholders (IRC secs. 1361, 1362,
1366, 1377)Determination of Tax LiabilityTax LawState & Local TaxesIncome TaxPartnerships



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Current Legal Forms for Real Estate
Chapter 22A REAL ESTATE SECURITIES
Part I. The Tax Background

28-22A Current Legal Forms for Real Estate § 22A.02

AUTHOR: by Robert M. Nelson

§ 22A.02 Real Estate Entities: An Overview

Real estate owned for business use or investment is owned in many different forms. The most common forms of ownership for real estate are sole proprietorships, tenancies in common, joint ventures, partnerships, limited liability companies, and corporations. More specialized types of ownership include real estate investment trusts, cooperatives, condominiums, and time sharing. In deciding what form of ownership to choose when investing in real estate for business or investment purposes, the taxpayer must be guided by both tax and nontax considerations.

The nontax factors relate in large part to conveniences in operation, marketability, liability, transferability of interests, and similar considerations.ⁿ¹ From a tax standpoint, each form of ownership falls into a specific tax pattern recognized by the Internal Revenue Code with varying advantages and disadvantages in different situations. For example, sole proprietorships, partnerships, S corporations, and most limited liability companies are not subject to double taxation, unlike a regular C corporation which pays income tax in addition to income tax paid by separately by its shareholders. A joint venture or tenancy in common also is not subject to double taxation, but a separate issue may arise relating to whether the owners should be treated collectively as a partnership subject to the partnership tax rules.ⁿ²

Relatively few types of real estate entities need be concerned with securities regulation. For example, where property is held by an individual, by a sole proprietorship, or by tenants in common, those owners will not be subject to securities registration requirements. Likewise, the participants in a joint venture usually need not concern themselves with securities regulations. On the other hand, corporations, partnerships, and limited liability companies are frequently used to hold real estate when investment capital is sought. An additional form of real estate ownership, known as a real estate investment trust, may also be used when a company intends to seek outside investors. As a result, it is important to recognize the potentially significant tax differences among corporations, partnerships, limited liability companies, and real estate investment trusts.

Legal Topics:

For related research and practice materials, see the following legal topics:

Business & Corporate Law Limited Liability Companies Members & Other Constituents Real Property Law Ownership & Transfer Business & Corporate Entities Real Property Law Securities Regulation General Overview Real Property Law Trusts Real Estate Investment Trusts (REITs) Tax Law Federal Taxpayer Groups C Corporations REITs, REMICs, RITs & FASITs (IRC secs. 851-860L, 4981-4982, 6697) Tax Law Federal Taxpayer Groups S Corporations Shareholders (IRC secs. 1361, 1362, 1366, 1377) General Overview Tax Law State & Local Taxes Income Tax Partnerships

FOOTNOTES:

(n1)Footnote 1. A more detailed discussion of the nontax considerations in choosing a form of ownership is set forth in the Practice Background contained in Volume 24, Ch. 20, Real Estate Entities, §§ 20.21-20.32, *supra* .

(n2)Footnote 2. A more detailed discussion of the tax considerations in choosing a form of ownership is set forth in the Tax Background contained in Volume 24, Ch. 20, Real Estate Entities, §§ 20.01-20.13, *supra* .



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Chapter 22A REAL ESTATE SECURITIES
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28-22A Current Legal Forms for Real Estate § 22A.03

AUTHOR: by Robert M. Nelson

§ 22A.03 C Corporations

Historically, and prior to the advent of limited liability companies, real estate developers, syndicators and dealers who planned to conduct a business or a venture through an entity most often narrowed their choices down to either corporations or limited partnerships. A corporation had the attractive nontax attribute of complete insulation for shareholders against liability for corporate debts. That benefit was available to the limited partners, but not to the general partner, in a limited partnership. To be able to gain the benefit of that limited liability, the entrepreneur had to tolerate some tax disadvantages of the corporate form. If the corporation was to be a C corporation, its earnings would be subject to one tax imposed on the corporation, and then a second level of tax would be imposed on the shareholders when the earnings were paid out as dividends. This "double taxation" had to be tolerated, however, if all owners were to be insulated from liability.

As a result, the privilege of earning income through the protection of a corporate entity is usually subject to a double tax. The corporation, as a separate legal entity, must pay a corporate income tax when it realizes income;ⁿ¹ the shareholders must pay an individual income tax when the corporation's income is distributed to them in the form of dividends (to the extent of the corporation's earnings and profits).ⁿ²

The double tax is also imposed upon the liquidation of a C corporation. If the assets of the corporation are sold and the sale proceeds distributed to shareholders, or if the assets are distributed in kind to the shareholders, two levels of tax will be imposed. In the sale scenario, tax will be imposed on gain resulting from the asset sales, and then the shareholders will recognize capital gain on the liquidation if the proceeds they receive are greater than their stock basis. In the alternative, if assets are distributed to shareholders in kind, the corporation is deemed to have sold them to the shareholders at the assets' then fair market values, and again the shareholders will have capital gain upon their receipt of the net liquidation proceeds.

There are advantages when a shareholder acquires his or her shares in exchange for the transfer of property to the corporation. This is because gain or loss is not recognized when one or more persons transfer property to a corporation solely in exchange for the corporation's stock, and immediately thereafter such person or persons are in control of the

corporation. One particular advantage relating to securities in this context has been eliminated. In the past, a transferor could transfer appreciated property to a corporation in exchange for stock and a debt obligation of the corporation that was a security, without recognizing gain. Effective for transfers after October 2, 1989, for purposes of the nonrecognition provisions of Code Section 351, if a transferor receives any securities, they are treated as boot in all cases.ⁿ³ A transferor who receives boot is taxed on the lesser of the amount of the boot or the gain realized on the exchange.

Legal Topics:

For related research and practice materials, see the following legal topics:

Business & Corporate Law Limited Liability Companies Members & Other Constituents Business & Corporate Law Limited Partnerships Management Duties & Liabilities Tax Law Federal Income Tax Computation Unearned Income Dividends Tax Law Federal Taxpayer Groups C Corporations Earnings & Profits (IRC secs. 312, 316) General Overview Tax Law Federal Taxpayer Groups C Corporations Reorganizations (IRC secs. 351-368, 381-384)

FOOTNOTES:

(n1)Footnote 1. *IRC § 11(a)*.

(n2)Footnote 2. *IRC §§ 1* (tax imposed on individuals), *61(a)(7)* (individual's gross income includes dividends), 301 (portion of corporate distribution which constitutes dividend is included in shareholder's gross income), and 316 dividend defined to mean distribution to shareholders out of corporations earnings and profits).

(n3)Footnote 3. *IRC § 351(a)*.



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Chapter 22A REAL ESTATE SECURITIES
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28-22A Current Legal Forms for Real Estate § 22A.04

AUTHOR: by Robert M. Nelson

§ 22A.04 S Corporations

In an attempt to remove tax penalties incurred solely by reason of the form of entity chosen for doing business, the Internal Revenue Code enables certain corporations, known as S corporations, to elect to be taxed as a "pass through" entity, similar to partnerships. As a result, the corporation does not pay tax on income it earns. Instead, the shareholders take into account their pro rata shares of items of the corporation's income, loss, deduction, or credit.ⁿ¹ The main feature of this election is that the shareholders, rather than the corporation, immediately realize taxable income from the corporate earnings (in proportion to their holdings), so that corporate income tax is avoided.

A corporation is eligible to be an S corporation only if it is a domestic corporation with 100 or fewer shareholders, all of whom must be natural persons (or an estate or certain trusts and exempt organizations) who are not nonresident aliens. The corporation also generally may only have one class of stock.ⁿ² A corporation must timely file an S election in order to be treated as an S corporation.

If a corporation qualifies as an S corporation, it may be an advantageous vehicle for use in the real estate area because of the pass-through of tax attributes and limited liability features. For example, S corporations pass through losses, such as from the depreciation of real estate, to their shareholders.ⁿ³ On the other hand, several factors may restrict the use of S corporations in real estate transactions. The principal disadvantage is the provision that allows an S corporation shareholder to deduct losses only to the extent of the adjusted basis of the shareholder's stock in the S corporation plus the shareholder's adjusted basis of the corporation's indebtedness to the shareholder.ⁿ⁴ Thus, mortgage liabilities on real property owned by an S corporation cannot be added to the shareholder's basis. The effect of this provision is to limit an S corporation shareholder's ability to take immediate advantage of losses passed through to him or her from the corporation.ⁿ⁵

Legal Topics:

For related research and practice materials, see the following legal topics:

Tax LawFederal Taxpayer GroupsS CorporationsGeneral OverviewTax LawFederal Taxpayer GroupsS

CorporationsComputation of Income & Loss (IRC secs. 1366, 1371-1375)Tax LawFederal Taxpayer GroupsS
 CorporationsElections (IRC secs. 1362-1363)RequirementsTax LawFederal Taxpayer GroupsS
 CorporationsShareholders (IRC secs. 1361, 1362, 1366, 1377)Determination of Tax Liability

FOOTNOTES:

(n1)Footnote 1. The pertinent provisions are contained in subchapter S of Chapter 1 of the Code, *IRC §§ 1361-1379*.

(n2)Footnote 2. The definition of an S corporation, and requirements of S corporation status, are contained in *IRC § 1361(a)* and *(b)*.

(n3)Footnote 3. *IRC §§ 1363(a)* (S corporation exempt from income tax), *1363(b)* (computation of S corporation's taxable income), *1366-1368* (tax treatment of shareholders, including pass-through of items of income, loss, deduction, or credit to shareholders).

(n4)Footnote 4. *IRC § 1366(d)(1)*.

(n5)Footnote 5. Moreover, the at risk limitation rules of *IRC § 465* limit the amount of losses that can be passed through.



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28-22A Current Legal Forms for Real Estate § 22A.05

AUTHOR: by Robert M. Nelson

§ 22A.05 Partnerships and Limited Liability Companies

[1] Comparison of Partnership/LLC and Corporation

The choice of organizing as a partnership (or a limited liability company that is treated as a partnership for federal income tax purposes) often depends upon various tax considerations. One such tax consideration that is important is the fact that partnerships are not taxed as such. Instead, they are treated as "pass through" entities, much like S corporations discussed above. Each partner is taxed on his share of partnership earnings, regardless of whether those earnings are distributed to him. Under this conduit or pass-through theory, all items of income, deduction, loss, and credit are allocated to the partners in proportion to their respective interests in the partnership.ⁿ¹ By contrast, a regular C corporation is itself subject to tax on its net earnings, and those earnings are again taxable to the shareholders if and when they are distributed as dividends to the shareholders.ⁿ²

There are many situations in which the pass-through nature of limited liability companies and partnerships makes one of those forms desirable in order to secure for the members or partners, in proportion to their respective interests in the entity, the pass-through tax benefit of depreciation, operating losses, or other deductions. This consideration is especially important in the context of real estate, where depreciation or cost recovery taken on partnership property often results in losses which may be passed through to the partners and used to offset their personal income from other sources.ⁿ³ Thus, where such pass-through of losses is an important consideration, the taxpayer should consider organizing in the limited liability company or partnership form.

An S corporation also is a pass-through entity for tax purposes. Like partnerships and limited liability companies, it is not subject to tax on its income.ⁿ⁴ Instead, its income flows through to its shareholders and is included on their individual income tax returns, regardless of whether any of the corporation's earnings are actually distributed to the shareholders.ⁿ⁵ S corporations, however, are much less flexible entities taxwise than are limited liability companies and partnerships. S corporations may only have up to 100 shareholders, and they are subject to numerous restrictions on the type of permitted shareholders.ⁿ⁶ Generally, only individuals and certain estates and trusts are eligibleⁿ⁷ and none of the shareholders may be a nonresident alien.ⁿ⁸ Also, an S corporation may only have one class of stock, unless the only

distinguishing feature of the second class is that it is nonvoting stock.ⁿ⁹ So, it is not possible, for example, to offer some of the investing shareholders a preferred return over other owners as an inducement to invest.

Another important difference between partnership and S corporation tax treatment is that a partner's basis in his partnership interest includes not only the amount he contributed to the partnership and his proportionate share of the undistributed earnings of the partnership, but also his proportionate share of the partnership's liabilities.ⁿ¹⁰ The liabilities of an S corporation are not part of an S corporation shareholder's stock basis. That difference can be significant if substantial tax losses are anticipated, because the at-risk rules in the Code limit a partner's and an S corporation shareholder's opportunity to claim those losses on his personal tax return and offset other income, by allowing the losses to be taken only to the extent of the partner's or shareholder's tax basis in his ownership interest.ⁿ¹¹ So, having a greater basis because of the inclusion of partnership liabilities is a potentially great advantage to a partner that is not afforded to an S corporation shareholder.

It should be noted that a special rule applies to certain publicly traded partnerships. A publicly traded partnership (including a master limited partnership) is treated as a corporation for federal income tax purposes unless 90 percent or more of its gross income is qualifying (passive-type) income.ⁿ¹² A publicly traded partnership that is registered under the Investment Company Act of 1940 is generally treated as a corporation. A publicly traded partnership is defined as a partnership the interests of which are (1) traded on an established securities market, or (2) readily tradable on a secondary market (or the substantial equivalent).ⁿ¹³ Relief from classification as a corporation is provided for a partnership that inadvertently fails to meet the 90 percent requirement that its gross income be passive-type income.ⁿ¹⁴ Relief is available if the Treasury Secretary determines that the failure was inadvertent, if within a reasonable time after the discovery of such failure steps are taken so that the partnership once more meets the 90 percent gross income requirements, and if the partnership agrees to make adjustments (including adjustments with respect to the partners) or to pay amounts as required by the Secretary. The Treasury is authorized to withhold the relief allowances if the publicly traded partnership inadvertently fails to meet the 90 percent test in each of several successive years, or in several years within a longer period, thus causing the partnership to be treated as a corporation in these circumstances.ⁿ¹⁵

[2] "At Risk" Loss Deduction Limitation and Passive Loss Limitations

As noted above, the partnership tax rules provide for the pass-through of the partnership's tax deductions to its partners. This provides taxpayers exceptional tax planning opportunities, but in the absence of certain limitations, might also result in certain taxpayer abuses. To curb some of these potential abuses, the Code contains an "at risk" loss deduction limitation, which applies to most types of business activities.ⁿ¹ Unless specifically excluded, certain classes of taxpayers (including individuals, partners, shareholders of S corporations, and closely-held C corporations) engaged in a trade or business or other activity for the production of income are limited to deducting losses only to the extent that the taxpayer is "at risk." The taxpayer is at risk to the extent that he contributes money or property to the enterprise or is personally liable on borrowings used to finance the enterprise. Also at risk is the value of the taxpayer's interest in property which is not used in the enterprise but which secures loans to finance the loss generating activity.ⁿ²

If a taxpayer is engaged in the activity of holding real property and if debt meeting the statutory requirements of "qualified nonrecourse financing" ("QNF") is borrowed to finance the activity, then the taxpayer will be considered at risk with respect to such debt.ⁿ³ Qualified nonrecourse financing must be borrowed from an organization in the business of lending or from a governmental entity, or it must be guaranteed by a governmental entity. A loan from a related person will satisfy the QNF requirements only if it is commercially reasonable and lent on substantially the same terms as loans to unrelated persons. Commercially reasonable terms require a written unconditional promise to pay an ascertainable sum, on demand or on a fixed date, at a reasonable market interest rate.ⁿ⁴ A related person generally includes family members and controlled corporations or partnerships (10 percent ownership interest).ⁿ⁵ Additionally, the QNF must be nonconvertible debt, secured by the real property used in the activity and generally without personal liability.ⁿ⁶

In addition to the at risk rules, the Code imposes certain limitations on the amount a partner may deduct for passive losses. The passive loss limitations generally prohibit current deduction of passive losses or credits in excess of aggregate passive activity income. The disallowed deductions are carried forward indefinitely. A trade or business in which the taxpayer does not materially participate constitutes a passive activity.ⁿ⁷ "Material participation" is defined in the Code with the subjective terms of regular, continuous, and substantial, but the Regulations establish safe harbors that are more objective.ⁿ⁸

Generally speaking, rental activity (i.e., any activity where payments are principally made for the use of tangible property) is considered to be a passive activity.ⁿ⁹ Therefore, deductions and credits from rental activities generally may be used only to offset income from other passive activities. Such deductions and credits cannot be deducted from nonpassive income, such as wages, dividends, interest, etc. However, there are two major exceptions to this general rule.

First, certain eligible taxpayers who materially participate in rental real estate activities may deduct losses from such activities against nonpassive income. These eligible taxpayers include individuals and closely-held C corporations that meet special eligibility requirements. An individual taxpayer meets the eligibility requirements if:

- (1) more than half of the personal services the taxpayer performs during the tax year are performed in real property trades or businesses in which the taxpayer materially participates; and
- (2) such taxpayer performs more than 750 hours of service during the tax year in the real property trades or businesses in which the taxpayer materially participates.ⁿ¹⁰

A second exception to the general rule disallowing deduction of passive losses and credits in excess of passive income is provided for natural persons actively participating in a rental real estate activity.ⁿ¹¹ Up to \$25,000 of net losses and deduction-equivalent credits generated by rental real estate activities may be used to offset nonpassive income of the taxpayer if he actively participates in the activity. The active participation requirement applies both to the year when the loss or credit arose and the year in which the loss or credit is taken. An individual holding less than a 10 percent interest in the value of the activity or a limited partnership interest may not be treated as actively participating in that activity. Beyond this, the only illumination is in the Senate Reports indicating that "active" is less extensive than "material" participation. Congress intends the making of management decisions (i.e., approval of tenants and expenditures) to fulfill the active participation standard.ⁿ¹² With certain exceptions, the \$25,000 exemption is phased-out at adjusted gross income levels between \$100,000 and \$150,000.ⁿ¹³

Legal Topics:

For related research and practice materials, see the following legal topics:

Tax LawFederal Income Tax ComputationDeductions for LossesAt-Risk Limitations (IRC secs. 49, 465)Tax LawFederal Income Tax ComputationDeductions for LossesPassive Activity Loss (IRC sec. 469)Tax LawFederal Taxpayer GroupsLimited Liability Companies & PartnershipsGeneral OverviewTax LawFederal Taxpayer GroupsLimited Liability Companies & PartnershipsDistributions by Partnerships (IRC secs. 731-737)Character of Gains & LossesTax LawFederal Taxpayer GroupsLimited Liability Companies & PartnershipsIncome (IRC secs. 701-703)Partner Distributive SharesTax LawFederal Taxpayer GroupsLimited Liability Companies & PartnershipsIncome (IRC secs. 701-703)Partner Income & CreditsTax LawFederal Taxpayer GroupsLimited Liability Companies & PartnershipsTax Accounting (IRC secs. 701-703, 706)General Overview

FOOTNOTES:

(n1)Footnote 1. The formation and operation of limited partnerships, including the relationship between the general and limited partners and the rights and liabilities of the partners as between themselves and outside parties, are generally governed by the Uniform Limited Partnership Act (ULPA), which has been adopted, in whole or in part, by most

jurisdictions.

(n2)Footnote 2. For a further discussion of the nontax aspects of partnerships (both general and limited), including the governing provisions of the Uniform Partnership Act and the Uniform Limited Partnership Act, see The Tax Background to Chapter 1, in Volume 1.

(n3)Footnote 3. The ability of owners to offset income from other sources with losses arising from a real estate venture are limited both by the "at risk" rules under *IRC § 465* and the passive activity rules under *IRC § 469*. Both are discussed in § 20.07, *infra*.

(n4)Footnote 4. *IRC § 1363*.

(n5)Footnote 5. *IRC § 1366*.

(n6)Footnote 6. *IRC § 1361(b)(1)(A)*.

(n7)Footnote 7. *IRC § 1361(b)(1)(B)*.

(n8)Footnote 8. *IRC § 1361(b)(1)(C)*.

(n9)Footnote 9. *IRC §§ 1361(b)(1)(D) and 1361(c)(4)*.

(n10)Footnote 10. *IRC § 752*.

(n11)Footnote 11. *IRC § 465*.

(n12)Footnote 12. *IRC § 7704*.

(n13)Footnote 13. *IRC § 7704(b)*.

(n14)Footnote 14. *IRC § 7704(e)*.

(n15)Footnote 15. *IRC § 7704(e)*.

(n16)Footnote 1. *IRC § 465*.

(n17)Footnote 2. *IRC § 465(b)*.

(n18)Footnote 3. *IRC § 465(b)(6)*.

(n19)Footnote 4. *IRC § 465(b)(6)(D)*.

(n20)Footnote 5. *IRC §§ 465(b)(6)(D); 49(a)(1)(D)(iv); 465(b)(3)(C)*.

(n21)Footnote 6. *IRC § 465(b)(6)(B)*.

(n22)Footnote 7. *IRC § 469(c)(1)*.

(n23)Footnote 8. *IRC § 469(h)(1); Treas. Reg. § 1.469-5T*.

(n24)Footnote 9. *IRC § 469(c)(2)*.

(n25)Footnote 10. *IRC § 469(c)(7)(B)*.

(n26)Footnote 11. *IRC § 469(i)*.

(n27)Footnote 12. S. Rep. No. 99-313, 99[th] Cong., 2d Sess. 737-738 (1986).

(n28)Footnote 13. *IRC* § 469(i)(2)-(3).



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28-22A Current Legal Forms for Real Estate § 22A.06

AUTHOR: by Robert M. Nelson

§ 22A.06 Real Estate Investment Trusts (REITs): Qualification Requirements

[1] Qualification for Conduit Tax Status

Real estate investment trusts, or REITs, are entities that invest in real estate and distribute most of their earnings to their shareholders-investors. If an organization meets the Code qualification for REIT status, the income of the REIT that is distributed to the investors each year generally is taxed to them without being subjected to a tax at the REIT level.ⁿ¹ In other words, a REIT is a pass-through or conduit entity similar to S corporations, partnerships, and limited liability companies.

In order to qualify for conduit treatment, a REIT must be a corporation, trust, or association that is managed by one or more trustees or directors,ⁿ² and it must satisfy four tests on a year-by-year basis: organizational structure, nature of assets (asset ownership requirements), source of income (income requirements), and distribution of income. These tests are intended to allow special tax treatment for a REIT only if there actually is a pooling of investment arrangement which is evidenced by its organizational structure, if its investments are basically (at least 75 percent) in the real estate field, and if its income is clearly passive income from real estate investment (as contrasted with income from the active operation of business involving real estate). Also, substantially all (at least 90 percent) of the REIT's income must be passed through to its shareholders on a current basis.

In addition to meeting these enumerated requirements and operational tests, the REIT must make a valid election of such status in order to qualify; moreover, the election must not be revoked or the REIT status is terminated for failure to meet one or more of the statutory requirements. If the REIT qualifies, it is exempt from corporate taxes, and the income is taxed only once, in the hands of the REIT's owners.

[2] Organizational Requirements: Corporate Characteristics

In order to qualify as a REIT, an organization must meet certain organizational requirements specified in the Code.ⁿ¹ These requirements must be met during the entire taxable year, except that the requirement for a minimum of 100 shareholders (discussed below) must be complied with for at least 335 days during the year (not necessarily

consecutively), or during a proportionate number of days during a shorter taxable year. However, the REIT need not meet the minimum shareholder requirement during the first tax year of the election.ⁿ²

A REIT must be a corporation, trust, or association that is managed by one or more trustees or directors.ⁿ³ Regardless of the entity used, the beneficial ownership must be evidenced by transferable shares or transferable certificates of beneficial interest that are held by 100 or more persons (shareholders).ⁿ⁴ Ownership is determined without reference to any stock attribution rules.ⁿ⁵ For purpose of the "100 or more persons" requirement, a person includes both natural persons and legal entities.ⁿ⁶ No group of five or fewer persons can own more than 50 percent of the beneficial interest of the REIT at any time during the last half of the taxable year.ⁿ⁷ Also, certain financial institutions and insurance companies subject to specified provisions of the Code are disqualified from REIT status.ⁿ⁸

[3] Real Estate Assets Requirement

In order to maintain its qualification, a REIT must satisfy certain diversification of investment requirements on a quarterly basis. At the end of each quarter of any taxable year, at least 75 percent of the value of a REIT's total assets must be represented by "real estate assets," cash and cash items (including receivables), and government securities and not more than 25 percent of the value of the trust's total assets may be invested in other securities.ⁿ¹ Moreover, the nonqualifying securities of a single issuer may not exceed 5 percent of the REIT's total assets, and the REIT cannot own nonqualifying securities which total more than 10 percent of the outstanding voting securities of the issuer.ⁿ²

The term "real estate assets," for purposes of the 75 percent asset test, means real property, interests in real property, interests in mortgages on real property, and shares (or transferable certificates of beneficial interest) in other qualified REITs. Equity capital derived from stock offerings (other than dividend reinvestment plans) is treated as within the definition of "real estate assets" for a period of one year from the date of receipt by the REIT.ⁿ³ "Interests in real property" include fee ownership and co-ownership of land or leaseholds, options to acquire land or leaseholds, and improvements with respect to any of the preceding, but do not include mineral, oil, or gas royalty interests.ⁿ⁴

"Real property" is defined to mean land or improvements of an inherently permanent nature, including structural components such as plumbing systems, elevators, and the like. State law is not controlling in determining whether an asset comes within the definition of real property.ⁿ⁵

Foreign land and improvements qualify as real property assets. Security interests in foreign real property, which are legally equivalent to mortgages or deeds of trust, qualify as "mortgages on real property."ⁿ⁶ Air rights over real property may also qualify as a real property asset or an interest in real property.ⁿ⁷

An asset is not disqualified for REIT treatment if it consists of both real and personal property. In such a case, however, an allocation of value must be made for purposes of the 75 percent asset test.ⁿ⁸

[4] Income Percentage Requirements; the 100 Percent Tax

In order to disqualify "active" trusts from REIT status, the Code contains two percentage limitations on various types of income realized by a trust in any one tax year. These two tests, which are discussed below, generally are that: (1) at least 75 percent of the trust's gross income must consist of qualified real estate income; and (2) at least 95 percent of the trust's gross income must consist of qualified real estate income and passive source income.ⁿ¹

A trust will not necessarily lose its REIT status if it fails to meet either or both of the 95 percent and 75 percent income source tests. The trust may still qualify if two conditions are met: (1) the nature and amount of each item of its gross income is itemized in a schedule filed with its income tax return; and (2) the failure to meet either or both tests is due to reasonable cause and not to willful neglect.ⁿ² An additional tax is imposed, however, on the gross income, i.e., the net amount by which the trust fails to meet either or both income source tests.ⁿ³ If the trust fails to meet the conditions

under this statutory exception, it cannot qualify as a REIT unless it meets both income source tests.

[a] 75 Percent Gross Income Test; Qualified Real Estate Income

At least 75 percent of the trust's gross income, excluding gross income from prohibited transactions,ⁿ⁴ must be derived from the following items:ⁿ⁵

- (1) rents from all real property;
- (2) real property mortgage interest, i.e., interest earned on obligations secured by mortgages on real property or on interests in real property;ⁿ⁶
- (3) gain from the sale or other disposition of real property (including interests in real property and in mortgages on real property) which is not Section 1221(a)(1) property under the Code;
- (4) dividends or other distributions (and gain on the sale of) shares in other REITs (unless such shares were held primarily for sale in the ordinary course of business);
- (5) abatements and refunds of taxes on real property;
- (6) income and gain derived from foreclosure property (see below);
- (7) commitment fees received under agreements to make loans secured by mortgages on or interests in real property, or to enter into purchase or lease transactions with respect to real property;
- (8) gain from the sale or other disposition of a real estate asset which is not a prohibited transaction solely by reason of Code Section 857(b)(6); and
- (9) qualified temporary investment income.

For purposes of the above provisions, as well as the 95 percent test, gross income has the same meaning as under Code Section 61. Thus, the computation of gross income includes the gross profit from the sale or other disposition of stock, securities, real property, or the like, but does not take into account any loss attributable to such transactions.ⁿ⁷ Income derived from shared appreciation mortgages is considered to be gain from the sale of the property for the purpose of satisfying the qualified real estate income requirements. This characterization permits the REIT to enter such arrangements and to avoid generating nonqualified income.ⁿ⁸

"Rents from real property" include: rents from interests in real property; charges for services customarily furnished in connection with the rental of real property (whether or not they are separately stated); and rent attributable to personal property which is leased in connection with a lease of real property, provided that the amount allocable to the personal property does not exceed 15 percent of the total rent.ⁿ⁹ Percentage rent based on a fixed percentage of gross receipts or sales is deemed qualified rent, but all other percentage rent (rent based on income or profits derived from the leased property) is excluded.ⁿ¹⁰ An example of qualified "percentage rent" is a rent based upon a percentage of gross sales over a base amount, a provision customary in shopping center leases.ⁿ¹¹ Rent received from a lessee in which the trust has at least a 10 percent interest is also disqualified rent,ⁿ¹² as is rent derived from leases under which the trust furnishes services to tenants or manages or operates the property other than through an independent contractor from whom the trust itself does not derive or receive any income.ⁿ¹³ However, services directly performed by the REIT which, if performed by a tax-exempt entity, do not generate "unrelated business income," are excepted from the independent contractor requirement. Therefore, amounts received from sale of such services are treated as qualified rent.ⁿ¹⁴

[b] 95 Percent Gross Income Test; Passive Source Income

At least 95 percent of the REIT's gross income, excluding gross income from prohibited transactions, must be derived from qualified real estate income (i.e., from items which qualify under the 75 percent income source test, discussed above), plus passive source income, such as dividends, interest, and gain on stock or securities.ⁿ¹⁵ Status as a REIT will not be lost for failure to meet the 95 percent test, assuming the other requirements for REIT qualifications are met, if a return was filed with the appropriate schedule and the failure was due to reasonable cause and not to willful neglect.ⁿ¹⁶ In such a case, however, the REIT must pay an additional tax on the nonqualifying income in excess of five percent.ⁿ¹⁷

Note that dividends and interest are defined more broadly under the 95 percent passive source income test than under the 75 percent qualified real estate income test. The 95 percent test permits the inclusion of dividends and interest generally, while the 75 percent test included only dividends from qualified REITs and interest derived from obligations secured by mortgages on or interests in real property.ⁿ¹⁸ Moreover, capital gain qualifies under the 95 percent test even if it is derived from the sale or other disposition of stock or securities, but capital gain from such sources is not included under the 75 percent test.ⁿ¹⁹ Other items of income, however, such as rents from real property and income from foreclosure property, are included under both tests.

[c] Primarily for Sale

A 100 percent tax is imposed on REIT net income derived from property, other than "foreclosure property," held primarily for sale to customers in the ordinary course of its trade or business.ⁿ²⁰⁻²¹ⁿ²² This 100 percent tax on net income derived from prohibited transactions is not assessed against net income derived from the sale of "real estate assets"ⁿ²³ if four conditions are met:

- (1) the REIT has held the property for at least two years;
- (2) aggregate expenditures made by the REIT within the preceding two years, which are includable in the property's basis, do not exceed 30 percent of the property's net selling price;
- (3) during the taxable year the trust does not sell more than seven properties (excluding sales of "foreclosure property") or the aggregate adjusted basis of sold property does not exceed 10 percent of the REIT's total assets at the beginning of the tax year and marketing and development of the sold properties were handled by an independent contractor; and
- (4) the REIT has held the subject property and improvements for at least two years for rental income. (This requirement is not applicable to property acquired by foreclosure, deed in lieu of foreclosure, or lease termination.)ⁿ²⁴

[5] Distribution of Income

A REIT must distribute 90 percent of the sum of its annual real estate investment trust taxable income and 90 percent of the net after tax income derived from foreclosure property, minus any "excess noncash income."ⁿ¹ Excess noncash income is essentially the amount of imputed income, which the REIT was required to recognize before receipt, in excess of 5 percent of the REIT's taxable income. Four types of income are added to produce the gross amount of noncash income: (1) income from deferred rental agreement required to be recognized under IRS Section 467; (2) gain recognized on disposition of a real estate asset due to inadvertent failure to qualify as a like-kind-exchange under *IRC Section 1031*; (3) the amount of original issue discount (OID) includible as income pursuant to *IRC Section 860E(a)* or

1272; and (4) amount includible in income by reason of cancellation of indebtedness.ⁿ² Excess noncash income only reduces the amount required to be distributed in order to maintain REIT status and does not reduce REIT taxable income for other purposes. An excise tax is imposed on REITs that make excessive use of the right to satisfy the 90 percent-of-taxable-income distribution requirement by deferring some or all of that distribution obligation into the year succeeding the year during which the income was earned.

[6] Election and Termination of REIT Status; Recordkeeping

[a] Election; Termination

Even though all the organizational requirements and the asset ownership and income source tests discussed above are satisfied, a taxpayer will not qualify for REIT status unless it files a valid election to be a real estate investment trust.ⁿ¹ The election is made by computing taxable income as a REIT for the first taxable year for which such status is desired.ⁿ² The election may terminate by failure to maintain REIT status, or by revocation. Termination by failure to qualify occurs if the trust fails, either intentionally or inadvertently, to meet the various requirements for REIT status during the taxable year.ⁿ³ Termination by revocation may occur if the trust revokes the election after the first taxable year for which the election is effective. The revocation must be made within the first 90 days of the first taxable year for which the revocation is to be effective, and it continues in effect until a new election is made and qualified.ⁿ⁴

A new election cannot be made for five years after the termination is effective.ⁿ⁵ The waiting period does not apply, however, if the termination was due to reasonable cause and not to willful failure to file a timely return, fraud in the return, or willful neglect.

A REIT must adopt a calendar year as its fiscal year.ⁿ⁶

[b] Recordkeeping Requirements

REITs are required to keep certain records.ⁿ⁷ These recordkeeping requirements are intended to ensure that the REIT complies with all the asset ownership and income source tests discussed above.ⁿ⁸ In addition, the shareholders must submit sufficient information to the REIT to enable it to comply with the recordkeeping requirements, and must file their own information returns.ⁿ⁹

Legal Topics:

For related research and practice materials, see the following legal topics:

Business & Corporate Law Corporations Governing Documents & Procedures Records & Inspection
Rights Recordkeeping Real Property Law Trusts Real Estate Investment Trusts (REITs) Tax Law Federal Taxpayer
Groups C Corporations REITs, REMICs, RITs & FASITs (IRC secs. 851-860L, 4981-4982, 6697)

FOOTNOTES:

(n1)Footnote 1. The taxation of real estate investment trusts is governed by *IRC* §§ 856-859, 860.

(n2)Footnote 2. *IRC* § 856(a)(1).

(n3)Footnote 1. *IRC* § 856(a); *Treas. Reg.* § 1.856-1(a), (b).

(n4)Footnote 2. *IRC* § 856(a), (b) and (h)(2). See also *Treas. Reg.* § 1.856-1(c).

(n5)Footnote 3. *IRC* § 856(a)(1); *Treas. Reg.* § 1.856-1(b)(1).

(n6)Footnote 4. *IRC* § 856(a)(2) and (5); *Treas. Reg.* § 1.856-1(d)(2).

(n7)Footnote 5. *Treas. Reg. § 1.856-1(d)(2)*. See *IRC § 318* for stock attribution rules.

(n8)Footnote 6. See *IRC § 856(c)(5)(F)*, which provides that, for purposes of the REIT qualification rules in *IRC § 856*, all terms not defined therein will have the same meaning ascribed to them in the Investment Company Act of 1940. The Investment Company Act of 1940 defines "person" to be a "natural person or a company," and a "company" as including a corporation, a partnership, an association, and a trust. 15 USC §§ 80(a)-2(a)(28) and 80(a)-2(a)(8).

(n9)Footnote 7. *IRC § 856(a)(6), (h)*; *Treas. Reg. § 1.856-1(b)(7)*.

(n10)Footnote 8. *IRC § 856(a)(4)*; disqualified entities include financial institutions to which *section 582(c)(2) of the Internal Revenue Code* applies and insurance companies to which subchapter L of the Code applies.

(n11)Footnote 1. *IRC § 856(c)(4)*.

(n12)Footnote 2. *IRC § 856(c)(4)(B)*.

(n13)Footnote 3. *IRC § 856(c)(5)(B)*.

(n14)Footnote 4. *IRC § 856(c)(5)(C)*.

(n15)Footnote 5. *Treas. Reg. § 1.856-3(d)*.

(n16)Footnote 6. *Rev. Rul. 74-191, 1974-1 CB 170*.

(n17)Footnote 7. *Rev. Rul. 71-286, 1971-2 C.B. 263*.

(n18)Footnote 8. Where such allocation is required, income derived from the asset must be apportioned also for purposes of the income tests, described below.

(n19)Footnote 1. *IRC § 856(c)*.

(n20)Footnote 2. *IRC § 856(c)(6)*.

(n21)Footnote 3. *IRC § 857(b)(5)*.

(n22)Footnote 4. Income from prohibited transactions is taxed separately at 100 percent. *IRC § 857(b)(6)*.

(n23)Footnote 5. *IRC § 856(c)(3)*.

(n24)Footnote 6. Interest from mortgages originated and owned by the trust as investment constitutes "interest on obligations secured by mortgages." *Rev. Rul. 65-57, 1965-1 CB 56*.

(n25)Footnote 7. *Treas. Reg. §§ 1.856-2(c)(1), 1.61-6(a), (b)*.

(n26)Footnote 8. *IRC § 856(j)*. This provision applies to tax years beginning after 1986, but only in the case of obligations acquired after October 22, 1986. The Technical and Miscellaneous Revenue Act of 1988 (TAMRA), Pub. L. No. 100-647, 100th Cong., 2d Sess. § 1006(p)(2) (Nov. 10, 1988).

(n27)Footnote 9. *IRC § 856(d)(1)*; *Treas. Reg. § 1.856-4(a)*.

(n28)Footnote 10. *IRC § 856(d)(2)(A)*; *Treas. Reg. § 1.856-4(b)(3)*.

(n29)Footnote 11. *Rev. Rul. 74-198, 1974-1 CB 171*; see also *Rev. Rul. 74-134, 1974-1 C.B. 170*.

(n30)Footnote 12. *IRC § 856(d)(2)(B); Treas. Reg. § 1.856-4(b)(4).*

(n31)Footnote 13. *IRC § 856(d)(2)(C); Treas. Reg. § 1.856-4(b)(5).*

(n32)Footnote 14. *IRC § 856(d)(2).*

(n33)Footnote 15. *IRC § 856(c)(2).*

(n34)Footnote 16. *IRC § 856(c)(7).* The same rule applies for failure to meet the 75 percent test. See text accompanying N. 2, *supra*.

(n35)Footnote 17. *IRC § 857(b)(5).* A similar rule applies where there is a failure to meet the 75 percent test. See N. 3, and accompanying text, *supra*.

(n36)Footnote 18. *IRC § 856(c)(2)(A) and (B), (3)(B) and (D).*

(n37)Footnote 19. *IRC § 856(c)(2)(D), (3)(C).*

(n38)Footnote 20-21. [Reserved]

(n39)Footnote 22. *IRC § 857(b)(6)* (100 percent tax imposed on net income from "prohibited transactions").

(n40)Footnote 23. *IRC § 857(b)(6)(C).* "Real estate assets," for purpose of this rule, are defined in *IRC § 856(c)(5)(B).*

(n41)Footnote 24. *IRC § 857(b)(6)(C).*

(n42)Footnote 1. *IRC § 857(a)(1)*, prior to amendment by TRA 1986 §§ 661(b) and 664(a). "Net income from foreclosure property" is defined in *IRC § 857(b)(4)(B).*

(n43)Footnote 2. *IRC § 857(e)(2); § 857(a)(1)(A), (B).* The Service may waive the requirements of paragraph (1) for any tax year if the REIT establishes to the satisfaction of the Service that it was unable to meet such requirements because of distributions previously made to meet the requirements of *IRC § 4981* (excise tax on undistributed income of REIT). *IRC § 857(a)*, amended by TAMRA § 1006(s)(4). For a definition of "real estate investment trust taxable income," see *IRC § 857(b)(2).*

(n44)Footnote 1. *IRC § 856(c)(1).*

(n45)Footnote 2. *IRC § 856(c)(1); e.g., § 1.856-2(b).*

(n46)Footnote 3. *IRC § 856(g)(1); Treas. Reg. § 1.856-8(b).*

(n47)Footnote 4. *IRC § 856(g)(2); Treas. Reg. § 1.856-8(a).*

(n48)Footnote 5. *IRC § 856(g)(3) and (4); Treas. Reg. § 1.856-8(c) and (d).*

(n49)Footnote 6. *IRC § 859.*

(n50)Footnote 7. *Treas. Reg. § 1.857-8; see also Treas. Reg. § 1.856-2(d)(3).* Note that the REIT must also meet the dividend requirements of *IRC § 6042* and file information returns as required by *IRC § 6061 et seq.* See *Treas. Reg. § 1.857-10.*

(n51)Footnote 8. *Treas. Reg. §§ 1.857-9, 1.857-10.*

(n52)Footnote 9. Reg. § 1.857-9(b).



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Chapter 22A REAL ESTATE SECURITIES
Part I. The Tax Background

28-22A Current Legal Forms for Real Estate §§ 22A.07-22A.14

AUTHOR: by Robert M. Nelson

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Current Legal Forms for Real Estate
Chapter 22A REAL ESTATE SECURITIES
Part II. The Practice Background

28-22A Current Legal Forms for Real Estate § 22A.15

AUTHOR: by Robert M. Nelson

§ 22A.15 Introduction and Scope of Practice Background

This Practice Background will review the federal and state securities law aspects of a real estate investment and/or development venture. The securities law aspects of the venture arise as soon as the principal decides that additional financing will be required beyond what the principal is able or desires to commit to the venture personally and/or through various types of bank or other institutional loan financing which may be available. Once the principal who first envisions the proposed venture decides to seek one or more other persons as investors then the principal must take care to comply with a variety of federal and state securities laws and regulations which will likely place conditions and regulatory requirements on the principal's efforts to raise the additional outside financing he or she desires to seek from other investors in the venture.

A new real estate venture may be conducted in a number of different business entities. Where the real estate venture promoter desires to solicit and obtain outside investors, the most common forms of entities chosen are: (1) corporation, (2) partnership (usually a limited partnership), (3) limited liability company or (4) real estate investment trust. A variety of tax and nontax factors will be involved in selecting the business entity deemed to be the most appropriate by the promoter for his or her real estate venture. For a discussion of those factors, see Vol. 24, Chapter 20, Real Estate Entities, §§ 20.02- 20.13, *supra*. The type of entity chosen to be employed by the real estate venture promoter or principal is largely irrelevant to the federal and state securities law aspects of the principal's raising of additional financing from outside investors; it doesn't matter if the choice of entity is a limited partnership, a corporation, a limited liability company, or some other type of business entity. In nearly all cases, each of these entities will involve the sale of an interest of some kind, such as a partnership interest, shares of stock, a membership interest, or some other economic interest which will be deemed to involve the sale of a "security."

Likewise, the type of real estate venture involved does not impact on the securities law aspects of the raising of additional financing to make the venture a reality. The particular venture could involve simply the purchase of undeveloped land for eventual resale, or development or it might involve the construction of a sizeable commercial or residential building or buildings on real estate, or the construction and operation of a retail strip center or mall--it is not the nature of the real estate venture which raises the federal and state securities law implications but rather the fact that a

"security" is being sold.

Legal Topics:

For related research and practice materials, see the following legal topics:

Real Property LawOwnership & TransferBusiness & Corporate EntitiesReal Property LawSecurities RegulationGeneral
OverviewReal Property LawSecurities RegulationReal Estate SyndicatesReal Property LawTrustsReal Estate
Investment Trusts (REITs)Tax LawFederal Taxpayer GroupsC CorporationsREITs, REMICs, RITs & FASITs (IRC
secs. 851-860L, 4981-4982, 6697)



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Current Legal Forms for Real Estate
Chapter 22A REAL ESTATE SECURITIES
Part II. The Practice Background

28-22A Current Legal Forms for Real Estate § 22A.16

AUTHOR: by Robert M. Nelson

§ 22A.16 Federal Securities Law

The primary federal securities statute involved in governing the sale of a security is the Securities Act of 1933,ⁿ¹ as amended (the "Securities Act"). Generally, a security may not be lawfully sold under the Securities Act unless that security is registered under the Securities Act or unless the security being sold or the transaction in which the security is being sold is exempt from registration. Under the Securities Act a "security" includes "any note, ... bond, debenture, evidence of indebtedness, [and] certificate of interest or participation in any profit-sharing agreement..." The economic interest an outside investor in a real estate venture typically receives in return for his or her investment, such as shares of stock in a corporation, partnership interests in a limited partnership or a membership interest in a limited liability company are all securities and, thus, within the ambit of the Securities Act.

[1] Registration Under the Securities Act of 1933

One method of compliance with the Securities Act is to register the securities being sold prior to their sale with the Securities and Exchange Commission (the "SEC"). One SEC registration form typically used for a sale of securities of an issuer engaged in some type of real estate venture is known as an S-11. The General Instructions to the Form S-11 state that it may be used to register: (i) securities issued by a real estate investment trust, or REIT, as defined in *Section 856 of the Internal Revenue Code*ⁿ¹ or (ii) the securities issued by other business entities the business of which is primarily acquiring and holding real estate for investment. The Form S-11 is comprised of two Parts, the first of which is information which is required to be in the Prospectus furnished to prospective investors and the second of which is certain additional information which is not required in the Prospectus but must be furnished in Part II of the Form S-11.

The General Instructions to Form S-11 state that the information required to be in the Prospectus includes:

- Item 1. Forepart of Registration Statement and Outside Front Cover Page of Prospectus.
- Item 2. Inside Front and Outside Back Cover Pages of Prospectus.
- Item 3. Summary Information, Risk Factors and Ratio of Earnings to Fixed Charges.

- Item 4. Determination of Offering Price.
- Item 5. Dilution.
- Item 6. Selling Security Holders.
- Item 7. Plan of Distribution.
- Item 8. Use of Proceeds.
- Item 9. Selected Financial Data.
- Item 10. Management's Discussion and Analysis of Financial Condition and Results of Operations.
- Item 11. General Information as to Registrant.
- Item 12. Policy with Respect to Certain Activities.
- Item 13. Investment Policies of Registrant.
- Item 14. Description of Real Estate.
- Item 15. Operating Data.
- Item 16. Tax Treatment of Registrant and Its Security Holders.
- Item 17. Market Price of and Dividends on the Registrant's Common Equity and Related Stockholder Matters.
- Item 18. Description of Registrant's Securities.
- Item 19. Legal Proceedings.
- Item 20. Security Ownership of Certain Beneficial Owners and Management.
- Item 21. Directors and Executive Officers.
- Item 22. Executive Compensation.
- Item 23. Certain Relationships and Related Transactions and Director Independence.
- Item 24. Selection, Management and Custody of Registrant's Investments.
- Item 25. Policies with Respect to Certain Transactions.
- Item 26. Limitations of Liability.
- Item 27. Financial Statements and Information.
- Item 28. Interests of Named Experts and Counsel.
- Item 28A. Material Changes.
- Item 29. Incorporation of Certain Information by Reference.

Item 29A. Disclosure of Commission Position on Indemnification for Securities Act Liabilities.

The General Guidelines further provide that the information required in Part II of the Form S-11 (but which is not required in the Prospectus) includes:

Item 30. Quantitative and Qualitative Disclosures About Market Risk.

Item 31. Other Expenses of Issuance and Distribution.

Item 32. Sales to Special Parties.

Item 33. Recent Sales of Unregistered Securities.

Item 34. Indemnification of Directors and Officers.

Item 35. Treatment of Proceeds from Stock Being Registered.

Item 36. Financial Statements and Exhibits.

Item 37. Undertakings.

The Form S-11 concludes by requiring the signatures of the issuer, its principal executive officer or officers, its principal financial officer, its controller or principal accounting officer, and a majority of the members of its Board of Directors or persons serving similar functions. Where the issuer is a limited partnership, the Form S-11 requires the signatures of a majority of the members of the Board of Directors of the General Partner of the limited partnership.

The Instructions also call attention to the General Rules and Regulations under the Securities Act, particularly those of Regulation C,ⁿ² containing general requirements relating to the preparation and filing of registration statements. The Instructions also note Regulation S-Kⁿ³ contains details concerning required nonfinancial information. Regulation S-X,ⁿ⁴ contains details concerning financial disclosure required.

It should be noted that the preparation and filing of Form S-11 does not also automatically fulfill the state law securities law requirements of the states in which securities may be offered and sold. Care must be taken to effect the additional state law securities law compliance of all applicable states. Generally, such compliance must be effected in all states in which the securities may be offered for sale and should be effected prior to any offers being made in any state.

[2] Registration Exemptions Under the Securities Act of 1933

Registering securities under the Securities Act is time-consuming and relatively expensive. Probably the great majority of real estate ventures established in the United States do not involve registered offerings of securities. As noted above, securities may be lawfully sold by the principal in a real estate venture without going through the registration process if the securities being sold or the transaction in which the securities are being sold is exempt from registration under the Securities Act. In order to avoid the time, effort, complexity and cost of a full-scale registration of securities, the promoter of a new real estate venture or an existing real estate venture which needs more financing is most likely to attempt to qualify for a registration exemption under the Securities Act (and also under any applicable state securities laws). By far, most real estate securities are sold in exempt *transactions* since the type of real estate security being sold would rarely qualify as an exempt security. The transactional exemptions which most often provide such an exemption are one of: (i) the so-called intrastate exemption provided by Section 3(a)(11)ⁿ¹ of the Securities Act and SEC Rule 147ⁿ² promulgated thereunder, or, (ii) one of the limited offer or small offering Regulation Dⁿ³ exemptions, namely, Rule 504ⁿ⁴ (promulgated under Section 3(b)ⁿ⁵ of the Securities Act), Rule 505ⁿ⁶ (also promulgated pursuant to Section 3(b) of the Securities Act), or Rule 506ⁿ⁷ (promulgated pursuant to Section 4(2)ⁿ⁸ of the Securities Act).

[a] The Intrastate Offering Exemption⁹

One transactional type of exemption which may be available to the real estate promoter is the intrastate offering exemption which Section 3(a)(11)¹⁰ of the Securities Act provides is available where the issuer of the securities and all the purchasers reside in the same state. SEC Rule 147¹¹ expands further on the requirements necessary for the issuer to avail itself of the intrastate offering exemption. Rule 147 provides that:

- (1) the exemption is available only to an issuer;
- (2) all of the securities in the same offering must meet the requirements of Rule 147-- *i.e.*, the intrastate offering exemption is not available if the offering also attempts to include other exemptions;
- (3) the issuer must be resident in, or doing business within, the same state as the residence of all the offerees and purchasers of the securities in the offering;
- (4) all the offerees and purchasers of securities in the offering must be residents of the same state;
- (5) during the period from the last sale of a security in the offering and for nine (9) months thereafter, resales of securities may be made only to persons within the same state;
- (6) the issuer must take certain precautions against interstate offers and sales of the securities being offered, namely:
 - (a) in connection with the sale of any of the securities in the offering made pursuant to Rule 147, the issuer shall:
 - (i) place a legend on the certificate or other document evidencing the security stating that the securities have not been registered under the Securities Act and describing the limitations on resale set forth in (5) above;
 - (ii) give its transfer agent, if any, appropriate stop transfer instructions, or if the issuer transfers its own securities, the issuer must make an appropriate notation in its records; and,
 - (iii) obtain a written representation for each purchaser as to the purchaser's residence;
 - (b) the issuer must, with respect to any securities presented for transfer during the above nine-month time period, take the steps provided in (a)(i) and (a)(ii) above; and,
 - (c) the issuer must disclose, in writing, in connection with any offers of a security in the offering the restrictions on resale described in (5) above and the provisions described in (6)(a)(i) and (ii) and (6)(b) above.

Rule 147 states that it is not exclusive, *i.e.*, the intrastate offering exemption provided in Section 3(a)(11) of the Securities Act may be available even if not all the requirements of Rule 147 are met, although it obviously is most prudent to meet the safe harbor Rule 147 requirements. Finally, Rule 147 makes clear that it provides only an exemption under the Federal Securities Act and does not obviate the necessity of compliance with any state laws which may apply to the sale of the securities being offered.

[b] The Regulation D Exemptions¹²

Other transactional-type registration exemptions are provided by Regulation D, which is comprised of SEC Rules 501-508. Rules 501-503, 507, and 508 are rules having general application to any of the substantive rules which provide

the detailed requirements of meeting the particular exemption covered by one of Rules 504, 505, or 506. Among other things, the Preliminary Notes to Regulation D make clear that these exemptions are not exclusive, are exemptions only from the registration (and not the anti-fraud, civil liability or other) provisions of the Securities Act and do not provide compliance for any state law which also may apply to a given sale of the security. Unlike the intrastate offering exemption of Rule 147, however, the Regulation D exemptions may apply to interstate (*i.e.*, offerings made in two (2) or more states) offerings. Thus, if the real estate venture promoter knows that he or she must make offers or sell securities in more than one state, one of the Regulation D rules may provide a desirable registration exemption while Rule 147 would not. The underlying theory of these exemptions is that the offerings in which the securities are being sold are small enough or being made under conditions or to potential purchasers such that the safeguards provided by the registration process afforded by the Securities Act are not necessary.

Rule 501 contains definitions and terms which may be used generally throughout one or more of the other rules in Regulation D. Rule 502 sets forth certain general conditions which must be met in order to meet the requirements of any of the Rule 504, 505, or 506 exemptions. One of the general conditions is that all of the conditions of Regulation D must be met with respect to all sales of securities that are part of the same offering. Rule 502(b) sets forth the informational requirements pertaining to the Regulation D exemptions, both as to the timing of the delivery of information to prospective purchasers and the content (both non-financial and financial) of the information. Rule 502(c) requires that the offering must be made without any form of general solicitation or advertising (except for certain Rule 504 offerings described below). Rule 502(d) provides that there are restrictions on the resale of securities initially sold in a Regulation D exemption offering (again, except for certain Rule 504 offerings described below) and that, therefore, the securities may not be resold without registration under the Securities Act or pursuant to an available registration exemption for the resale of the securities. In addition, Rule 502(d) requires that the issuer take reasonable care that the purchasers under a Regulation D exempt offering not be underwriters within the meaning of Section 2(11) of the Securities Act. In order to meet the reasonable care requirement, the issuer is directed to: (i) make a reasonable inquiry to determine if each purchaser is purchasing for himself or herself or for other persons; (ii) make written disclosure to each purchaser that the securities being purchased have not been registered under the Securities Act and, therefore, cannot be resold without registration under the Securities Act or an exemption being available; and, (iii) placing a legend on the certificate or other document evidencing the securities that they have not been registered under the Securities Act and setting forth or referring to the transfer restrictions applying to the securities. Rule 503 requires the filing of a notice on SEC Form D within fifteen (15) days after the first sale in the offering. Furthermore, Rule 503a.4.a.1. states that: "A notice of sales on Form D must be filed with the Commission in electronic format by means of the Commission's Electronic Data Gathering, Analysis, and Retrieval System (EDGAR) in accordance with EDGAR rules set forth in Regulation S-T (17 CFR Part 232)." Rule 507 provides that an exemption under Rule 504, 505, or 506 is not available if the issuer, or any predecessor or affiliate, has been subject to any court order enjoining it for failure to file the notice required by Rule 503. Finally, Rule 508 provides that an insignificant deviation from a term, condition or requirement of Regulation D will not be deemed fatal to the claimed exemption.

[i] Rule 504--Exemption for Limited Offerings and Sales of Securities Not Exceeding \$1,000,000

Rule 504(a) provides that the issuer of the securities may not be: (1) a company required to file reports under the Securities Exchange Act of 1934¹³ (*i.e.*, not a "public company"), (2) an investment company, or a (3) development stage company with no specific business plan or purpose. In addition, Rule 504(b)(1) provides that the issuer must comply with all of the requirements of Rules 501 and 502(a), (c) and (d). However, if the offers and sales will be made:

- (a) exclusively in one or more states requiring registration, and require the delivery of a disclosure document to investors before sale, and the offers and sales made meet those requirements;
- (b) in one or more states with no registration or delivery requirements but the securities have been registered in at least one state with such requirements and the disclosure document is delivered before sale to all purchasers, including the ones in the states having no registration or delivery requirements; or

(c) exclusively according to state law exemptions from registration that permit general solicitation and advertising provided sales are made in those states only to "accredited investors" as defined in Rule 501(a);

then the provisions of Rule 502 (c) (*i.e.*, the limitations on the manner of offering) and Rule 502 (d) (*i.e.*, the limitations on resale of the securities) do not apply.

Rule 504(b)(2) sets forth the \$1,000,000 aggregate offering price which applies to any offering made under Rule 504. That dollar limitation applies for the period beginning twelve (12) months before the start of the offering and continues through the offering period. All offerings made within that time period pursuant to the so-called small offering exemption of Section 3(b) of the Securities Act, *i.e.*, all offerings made in reliance on either Rule 504 or 505, must be included in determining the permissible aggregate offering price of the current offering. The Notes at the end of Rule 504 set forth helpful examples illustrating the calculation which must be made. Those Notes provide:

"Note

1: The calculation of the aggregate offering price is illustrated as follows:

If an issuer sold \$900,000 on June 1, 1987 under this § 230.504 and an additional \$4,100,000 on December 1, 1987 under § 230.505, the issuer could not sell any of its securities under this § 230.504 until December 1, 1988. Until then the issuer must count the December 1, 1987 sale towards the \$1,000,000 limit within the preceding twelve months.

"Note

2: If a transaction under § 230.504 fails to meet the limitation on the aggregate offering price, it does not affect the availability of this § 230.504 for the other transactions considered in applying such limitation. For example, if an issuer sold \$1,000,000 worth of its securities on January 1, 1988 under this § 230.504 and an additional \$500,000 worth on July 1, 1988, this § 230.504 would not be available for the later sale, but would still be applicable to the January 1, 1988 sale."n14

[ii] Rule 505--Exemption for Limited Offers and Sales of Securities Not Exceeding \$5,000,000

The first obvious difference between the Rule 504 and Rule 505 exemptions is that the aggregate offering price of the Rule 505 exemption is raised from the \$1,000,000 limit found in Rule 504 to \$5,000,000. Again, Rule 505 itself contains a Note setting forth examples which illustrate how the maximum is to be calculated. The Note provides:

"Note:

The calculation of the aggregate offering price is illustrated as follows:

"Example 1.

If an issuer sold \$2,000,000 of its securities on June 1, 1982 under this § 230.505 and an additional \$1,000,000 on September 1, 1982, the issuer would be permitted to sell only \$2,000,000 more under § 230.505 until June 1, 1983. Until that date, the issuer must count both the prior sales towards the \$5,000,000 limit. However, if the issuer made its third sale on June 1, 1983, the issuer could then sell \$4,000,000 of its securities because the June 1, 1982 sale would not be within the preceding twelve months."

"Example 2.

If an issuer sold \$500,000 of its securities on June 1, 1982 under § 230.504 and an additional \$4,500,000 on December 1, 1982 under this § 230.505, then the issuer could not sell any of its securities under this § 230.505 until June 1, 1983. At that time it could sell an additional \$500,000 of its securities."n15

While Rule 504 does not limit in any way the number of purchasers there may be in an offering exempt under that rule, Rule 505 does contain a limitation of thirty-five (35) on the number of purchasers. However, for purposes of how the number of purchases is to be calculated for purposes of Rule 505(b), Rule 502(e) provides that there is to be excluded from the number of purchasers who count toward the limit:

- (1) any relative, spouse or relative of the spouse of a purchaser who has the same principal residence as the purchaser;
- (2) any trust or estate in which a purchaser and any of the above related persons collectively have more than fifty percent (50%) of the beneficial interests;
- (3) any corporation or other organization of which a purchaser or any of the above related persons collectively are beneficial owners of more than fifty percent (50%) of the equity securities or equity interest; and
- (4) any accredited investor.

Rule 501(a) defines "accredited investor to include, among others:

- (1) any bank or savings and loan association, Securities Exchange Act registered broker or dealer;
- (2) any *Internal Revenue Code 501(c)(3)* organization, corporation, partnership not formed for the specific purpose of acquiring the subject securities and having total assets in excess of \$5,000,000;
- (3) any director, executive officer or general partner of the issuer or any director, executive officer, or general partner of the general partner of the issuer;
- (4) any natural person whose net worth, or joint net worth with his or her spouse, at the time of purchase of the subject security exceeds \$1,000,000;
- (5) any natural person whose income was in excess of \$200,000 in each of the most recent two (2) years or had joint income with that person's spouse in excess of \$300,000 in each of those years and also has an expectation of reaching the same income level in the current year;
- (6) a trust with total assets in excess of \$5,000,000 not formed specifically to purchase the subject security and where the purchase of the subject security is directed by a sophisticated person, as defined in Rule 506(b)(2)(ii); and,
- (7) any entity in which all of the equity owners are accredited investors.

The practical effect of the number of purchasers limitation and the above exclusions is that the issuer may sell to only thirty-five (35) "non-accredited," non-related" purchasers and may include any number of accredited or related purchasers without any number limitation.

Another significant difference between the Rule 504 exemption and that provided by Rule 505 is that Rule 505 requires that a very significant amount of both non-financial and financial information (as described in Rule 502(b)(2)) be delivered to non-accredited investors while there is no such informational requirement for Rule 504. Also, Rule 505 offerings are subject to the limitations on the manner of the offering (set forth in Rule 502(c)) and the limitations on resale of the subject securities (set forth in Rule 502(d)). Finally, Rule 505 also requires that the exemption is not available to any issuer which is disqualified by virtue of the so-called "bad boy" provisions of Rule 262 of Regulation A (with certain specified exceptions).

[iii] Rule 506--Exemption for Limited Offers and Sales Without Regard to Dollar Amount of Offering

The exemption provided by Rule 506 is very similar to the Rule 505 exemption with two (2) important differences. First, there is no dollar limitation placed upon the size of the offering which may be made pursuant to a Rule 506 exemption. Second, each purchaser who is not an accredited investor must be, either alone or in conjunction with a purchaser representative (as defined in Rule 501(f)), a person "who has such knowledge and experience in financial and business matters that he is capable of evaluating the merits and risks of the prospective investment" or at least that the issuer reasonably believes each such non-accredited person (or his or her purchaser representative) meets that requirement. The Rule 506 exemption must also meet the same general conditions (including, limitations on the manner of the offering, resale of the subject security, and numbers of purchasers) as pertains to the Rule 505 exempt offering.

[3] Summary of Registration and Exemption Provisions of the Securities Act of 1933

As a practical matter, most real estate venture promoters will desire to lawfully avoid the time-consuming and expensive federal registration process, particularly for a relatively small regional or local offering. In order to avoid the registration process, the promoter must avail himself or herself of a suitable registration exemption from registration. Probably, the least onerous federal exemption is the intrastate exemption provided by Rule 147 which will be available to the promoter who is able to limit the offer and sale of securities to the same state in which the issuer is resident and doing business. However, if the offering must cross state lines, then the promoter will most likely look to one of the Regulation D exemptions. Of those exemptions, the Rule 504 exemption is often the simplest to achieve. However, the Rule 504 exemption's relatively small offering limit of \$1,000,000 may force the promoter to avail herself or himself of one of the remaining Regulation D exemptions. Of those two, Rule 505 and Rule 506, the Rule 505 exemption is probably the less stringent in that there is no requirement that the non-accredited investors be also sophisticated investors. But again, if the promoter has a need to acquire more than \$5,000,000 of funding, she or he may have no choice but to meet the Rule 506 exemption requirements.

Of course, once the federal side of the securities law issues is complied with, the promoter still must take care to understand, and comply with, any state securities laws which may have application to the promoter's planned offering.

Legal Topics:

For related research and practice materials, see the following legal topics:

Real Property Law Securities Regulation General Overview Real Property Law Securities Regulation Partnerships Real Property Law Securities Regulation Real Estate Syndicates Real Property Law Securities Regulation Transactions Subject to Regulation Securities Law Exemptions From Registration Exempt Transactions Regulation D Exemptions Securities Law Exemptions From Registration Exempt Transactions U.S. Securities & Exchange Commission Rules 146 & 506 Securities Law Exemptions From Registration Intrastate Offerings & Recapitalizations Securities Law Initial Public Offerings & the Securities Act of 1933 Registration of Securities General Overview

FOOTNOTES:

(n1)Footnote 1. 15 U.S.C. §§ 77a et seq. For a more detailed treatment of the provisions of the Securities Act of 1933, see § 19.21 in the Practice Background in Vol. 23, Ch. 19, Corporate Securities, *supra*.

(n2)Footnote 1. I.R.C. § 856.

(n3)Footnote 2. 17 C.F.R. §§ 230.400-494.

(n4)Footnote 3. 17 C.F.R. §§ 229.10 et seq .

(n5)Footnote 4. 17 C.F.R. §§ 210.1-01 et seq .

(n6)Footnote 1. 15 U.S.C. § 77c(a)(11).

(n7)Footnote 2. 17 C.F.R. § 230.147.

(n8)Footnote 3. 17 C.F.R. §§ 230.501-508.

(n9)Footnote 4. 17 C.F.R. § 230.504.

(n10)Footnote 5. 15 U.S.C. § 77c(b).

(n11)Footnote 6. 17 C.F.R. § 230.505.

(n12)Footnote 7. 17 C.F.R. § 230.506.

(n13)Footnote 8. 15 U.S.C. § 77d(2).

(n14)Footnote 9. *See also* § 19.21[2][a][i] in the Practice Background in Vol. 23, Ch. 19, Corporate Securities, *supra*, for a further explanation of the intrastate offering exemption.

(n15)Footnote 10. 15 U.S.C. § 77b(a)(11).

(n16)Footnote 11. 17 C.F.R. § 230.147.

(n17)Footnote 12. *See also* § 19.21[2][b][i] in the Practice Background in Vol. 23, Ch. 19, Corporate Securities, *supra*, for a further explanation of the Regulation D exemptions.

(n18)Footnote 13. 15 U.S.C. § 78 *et seq.*

(n19)Footnote 14. 17 C.F.R. § 230.504, Note 1 and Note 2.

(n20)Footnote 15. 17 C.F.R. § 230.505.



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Current Legal Forms for Real Estate
Chapter 22A REAL ESTATE SECURITIES
Part II. The Practice Background

28-22A Current Legal Forms for Real Estate § 22A.17

AUTHOR: by Robert M. Nelson

§ 22A.17 State Securities Laws

As noted above, the appropriate registration or availability of an exemption of securities for federal securities law purposes does not also effect compliance with the state securities law, or so-called Blue Sky law, of any one or more states the securities laws of which may also apply to the particular offering. All fifty (50) states have some type of state securities law in place. Although the state securities laws have some similarities to the federal Securities Act and also to other state securities law, each state's securities laws must be reviewed to determine the proper compliance with that state's law if it is applicable to a particular securities offering. An organization called the North American Securities Administrators Association ("NASAA") maintains an excellent Internet website which contains links to all fifty (50) state securities websites and also websites of securities administrators in Canada; the NASAA website address containing these links is

http://www.nasaa.org/industry_regulatory_resources/Directory_of_Securities_Laws_Regulations. A detailed treatment of all the state's securities laws is beyond the scope of this Practice Background. However, some general treatment is appropriate to the subject of the offer and sale of real estate securities.

First, a given state's Blue Sky law will generally apply to the offer and sale of the security only if the offer and sale is made to one or more persons within that state. The key factor as to the application of the Blue Sky law is not where any given offeree or purchaser *resides* but *where* the offer or sale of the securities *is made*. Also, as a general rule, the state Blue Sky laws normally provide that no security may be offered or sold within the state unless: (1) the security is registered or is exempt from registration, or (2) the security is offered or sold in a transaction which is exempt from registration. State Blue Sky laws provide for different types of registrations, define exempt securities and exempt transactions, and proscribe fraud in connection with the offer and sale of securities within the state.

[1] Registration Under the State Securities Laws

Whether a particular security offering must be registered in one or more states depends entirely on the securities law of each state. Even where a federal securities law exemption may be available, it may often be the case that there is not available an exemption under one or more of the state securities laws and, thus, the federally exempt securities offering

must, nevertheless, be registered in one or more states. Although the particular registration process required to be availed of in one or more states may be a significant one, state securities registration is normally not as daunting as a federal securities law registration. Nearly all states securities laws provide for some form of full state registration, often called "qualification," and one or more forms of more abbreviated registration. For example, in the State of Ohio, a full registration is called Registration by Qualification;ⁿ¹ Ohio also provides for several more abbreviated forms of registration which are called Registration by Description.ⁿ² In most states, there is a form or registration which may be called something similar to Registration by Coordination or Registration by Notice which is an abbreviated form of registration used where the issuer has filed a federal registration. In such cases, the issuer is required only to file parts or all of the federal registration with or without some additional state forms to effect such an abbreviated state registration. Often, this type of registration will apply where the offering is a rather large national offering being made in all or many states.ⁿ³

In many states,ⁿ⁴ there is permitted a so-called Small Corporate Offering Registration ("SCOR") which is a type of uniform registration on Form U-7 promulgated by NASAA and which may be available where the issuer has availed itself of a federal exemption pursuant to a federal securities law registration exemption provided by Rule 504, Regulation A, or Rule 147. The Form U-7 is presented in a question and answer format and may be used in many states as a disclosure document to be given to prospective investors in lieu of a prospectus or other offering document. A majority of the states participate in the coordinated review of SCOR filings where a filing may be made in two (2) or more states within a geographical region and the review of the offering may be handled by a lead state within that region. At the present time, there are five (5) coordinated review regions, known as CR-SCOR-Mid-Atlantic (comprised of Delaware, Maryland, New Jersey, Pennsylvania, Virginia and West Virginia), CR-SCOR-Midwest (comprised of Illinois, Indiana, Iowa, Kansas, Michigan, Minnesota, Missouri, Nebraska, North Dakota, South Dakota, and Wisconsin), CR-SCOR-New England (comprised of Connecticut, Maine, Massachusetts, New Hampshire, Rhode Island, and Vermont), CR-SCOR-Southwest (comprised of Arkansas, Oklahoma, and Texas), and CR-SCOR-West (comprised of Alaska, Arizona, Colorado, Idaho, Montana, Nevada, New Mexico, Oregon, Utah, Washington and Wyoming). (As of the date of this Release, a sixth (6th) coordinated review region, CR-SCOR-Southeast, is being formed). In order to determine the procedures employed in a region, contact should be made with one of the states in that region, as each CR-SCOR region operates independently and pursuant to procedures adopted by each region's participating states.ⁿ⁵ For the detailed requirements of a SCOR offering as promulgated in NASAA's Statement of Policy on the subject, see Form 22A.05 *below*. The SCOR offering alternative which has been adopted by certain states may vary somewhat in each state's qualifications for use.ⁿ⁶

[2] Registration Exemptions Under the State Securities Laws

The various state blue sky laws provide a myriad of securities and transactions which are exempt from the registration process. Many of those exemptions are "self-effectuating", *i.e.*, do not require any further action or filing by the issuer to claim the exemption other than to meet its requirements. Typical **securities** which are exempt under state blue sky laws include:

(a) any security issued or guaranteed by the United States, any state, or any political subdivision of any state,ⁿ¹ (b) certain foreign government issued or guaranteed securities,ⁿ² (c) certain securities issued or guaranteed by a state,ⁿ³ (d) certain securities issued or guaranteed by a state or nationally chartered bank, savings and loan association, savings bank or credit union,ⁿ⁴ (e) certain securities listed, or authorized for listing, on certain securities exchanges or systems,ⁿ⁵ (f) certain securities issued by any railroad, other common carrier, public utility or holding company,ⁿ⁶ (g) certain equipment trust certificates,ⁿ⁷ (h) any security issued in connection with an employees' stock purchase, pension, savings, option, profit-sharing or similar employees' benefit plan,ⁿ⁸ or (i) certain commercial paper.ⁿ⁹

Transactions often exempted by state blue sky laws include:

(a) an isolated nonissuer transaction,ⁿ¹⁰ (b) any transaction between an issuer and an underwriter or among

underwriters,ⁿ¹¹ (c) certain transactions in a bond or other evidence of indebtedness secured by a real estate mortgage, deed of trust, or security agreement,ⁿ¹² (d) a transaction by an executor, personal representative, administrator, sheriff, marshal, receiver, trustee in bankruptcy, guardian, or conservator,ⁿ¹³ (e) a bona fide pledge or transaction in foreclosure of a pledge executed by a bona fide pledgee without any purpose of avoiding the securities act,ⁿ¹⁴ and (f) certain offerings to limited numbers of purchasers.ⁿ¹⁵

In the 1980s, NASAA proposed a new uniform exemption called the Uniform Limited Offering Exemption ("ULOE") as a state securities registration companion exemption to SEC Rule 505. Most states have adopted a version of the ULOE.ⁿ¹⁶ The primary threshold requirement of NASAA's ULOE is that the offering comply with SEC Rules 501-503 and 505. Furthermore, no commission or remuneration is to be given, directly or indirectly, to any person who is not appropriately registered in the applicable state. The issuer must not be disqualified by certain enumerated "bad boy" provisions. The issuer is to file a notice with the state administrator on SEC Form D.

[3] Summary of Registration and Exemption Provisions of the State Securities Laws

As was noted above with respect to the federal registration/exemption process, most real estate venture promoters will desire to minimize the state securities law compliance complexities relating to their offering. Sometimes the state securities law compliance may be driven or dictated by the federal compliance. For example, if there must be a federal registration of the offering, then normally the offering will be required also to be registered in one or more states as well, but the promoters may avail themselves of the availability of the more stream-lined state law registration by coordination process. Or, if the federal securities law compliance will entail reliance on the SEC Rule 505 exemption, then the relatively less complicated Uniform Limited Offering Exemption may be available in the states relevant to the particular offering.

However, it is important to note that each state's law where the offering will be made must be reviewed to determine the specific compliance issues involved in each state. Care must be taken not to assume that the specific requirements of a registration or exemption available in one or more states will necessarily also be available in other states as each state's securities laws have been adopted independently and any given state may have included or excluded an exemption or requirement commonly found in many other states.

Legal Topics:

For related research and practice materials, see the following legal topics:

Real Property Law Securities Regulation General Overview Real Property Law Securities Regulation Transactions Subject to Regulation Securities Law Blue Sky Laws Exempt Nonissuer & Resale Transactions Securities Law Blue Sky Laws Exempted Issuers Securities Law Blue Sky Laws Securities Registration

FOOTNOTES:

(n1)Footnote 1. The conditions for Ohio's Registration by Qualification are set forth in *Ohio Rev. Code Ann. § 1707.09*.

(n2)Footnote 2. The conditions for Ohio's more abbreviated forms of Registration by Description are set forth in *Ohio Rev. Code Ann. § 1707.06*.

(n3)Footnote 3. As an example, Nevada's requirements for a Registration by Coordination are set forth in *Nev. Rev. Stat. § 90.480*.

(n4)Footnote 4. For a list of the states which have laws providing for a SCOR filing, see 1 Blue Sky L. Rep. (CCH) P 6461 .

(n5)Footnote 5. For information about the SCOR coordinated review program and links to websites available for each region, see sites.state.pa.us/PA_Exec/Securities/cer/crscor.html.

(n6)Footnote 6. For an example, the Minnesota statute setting forth the requirements for a SCOR offering in that state may be found in *Minn. Stat. § 80A.115*.

(n7)Footnote 1. *Ala. Code § 8-6-10(1)*.

(n8)Footnote 2. *Ohio Rev. Code Ann. § 1707.02(B)(1)(b)*.

(n9)Footnote 3. *Ariz. Rev. Stat. § 44-1843A.1*.

(n10)Footnote 4. *Del. Code Ann. tit. 6, § 7309(a)(3)*.

(n11)Footnote 5. *Tenn. Code Ann. § 48-2-103(a)(9)*.

(n12)Footnote 6. *Kan. Stat. Ann. § 17-12a201(5)*.

(n13)Footnote 7. *Okla. Stat. tit. 71, § 1-201.9*.

(n14)Footnote 8. *Kan. Stat. Ann. § 17-12a202(21)*.

(n15)Footnote 9. *Ohio Rev. Code Ann. § 1707.02(G)*.

(n16)Footnote 10. *N.C. Gen. Stat. § 78A-17(1)*.

(n17)Footnote 11. *Wyo. Stat. Ann. § 17-4-114(b)(iv)*.

(n18)Footnote 12. *Idaho Code § 30-14-202(11)*.

(n19)Footnote 13. *N.Y. Gen. Bus. Law § 359-f(1)*.

(n20)Footnote 14. *Ga. Code Ann. § 10-5-11(7)*.

(n21)Footnote 15. *Conn. Gen. Stat. § 36b-21(b)(15)*.

(n22)Footnote 16. For a listing of the states which have enacted some form of the Uniform Limited Offering Exemption, see 1 Blue Sky L. Rep. (CCH) P 6251 .



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AUTHOR: by Robert M. Nelson

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§§ 22A.18[Reserved]



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AUTHOR: by Robert M. Nelson

§ 22A.29 Federal Securities Law Research Checklist

Securities Act of 1933, 15 U.S.C. § 77a et seq. ☐

Section 3, Exempted Securities, 15 U.S.C. § 77c ☐

Section 4, Exempted Transactions, 15 U.S.C. § 77d ☐

Intrastate Offering Exemption, 17 CFR 230.147 ☐

Regulation D, 17 CFR 230.501-508 ☐

SEC Rule 501, Definitions and Terms Used in Regulation D, 17 CFR 230.50
..... ☐

SEC Rule 502, General Conditions to be Met, 17 CFR 230.502 ☐

SEC Rule 503, Filing of Notice of Sales, 17 CFR 230.503 ☐

SEC Rule 504 Exemption, Exemption for Limited Offerings and Sales of Securities Not
Exceeding \$1, 000, 000, 17 CFR 230.504 ☐

SEC Rule 505 Exemption, Exemption for Limited Offerings and Sales of Securities Not

Exceeding \$5, 000, 000, *17 CFR 230.505* ☐

SEC Rule 504 Exemption, Exemption for Offers and Sales Without Regard to Dollar
Amount of Offering, *17 CFR 230.506* ☐

SEC Form S-11, For Registration Under the Securities Act of 1933 of Securities of Certain Real Estate
Companies ☐

SEC Form D, Notice of Sale of Securities Pursuant to Regulation D, Section 4(6), and/or Uniform
Limited Offering Exemption ☐

Legal Topics:

For related research and practice materials, see the following legal topics:

Real Property Law Securities Regulation Transactions Subject to Regulation Securities Law Exemptions From
Registration Exempt Transactions General Overview Securities Law Exemptions From Registration Exempt
Transactions Regulation D Exemptions Securities Law Exemptions From Registration Exempt Transactions U.S.
Securities & Exchange Commission Rules 146 & 506 Securities Law Initial Public Offerings & the Securities Act of
1933 Registration of Securities General Overview



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AUTHOR: by Robert M. Nelson

§ 22A.30 State Securities Law Research Checklist

- Alabama, *Ala. Code* §§ 8-6-1-8-6-60 ☐
- Alaska, *Alaska Stat.* §§ 45.55.010-45.55.995 ☐
- Arizona, *Ariz. Rev. Stat.* §§ 44-1801-44-2126 ☐
- Arkansas, *Ark. Code Ann.* §§ 23-42-101-23-42-509 ☐
- California, *Cal. Corp. Code* §§ 25100-27202 ☐
- Colorado, *Colo. Rev. Stat.* §§ 11-51-101-11-51-908 ☐
- Connecticut, *Conn. Gen. Stat.* §§ 36b-1-36b-34 ☐
- Delaware, *Del. Code Ann. tit. 6*, §§ 7301-7330 ☐
- District of Columbia,
D. C. Code Ann. §§ 31-5601.01-31-5608.04 ☐
- Florida, *Fla. Stat.* §§ 517.011-517.32 ☐

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- Georgia, *Ga. Code Ann. §§ 10-5-1-10-5-24* ☐
- Hawaii, *Haw. Rev. Stat. §§ 485-1-485-25* ☐
- Idaho, *Idaho Code §§ 30-14-101-30-14-703* ☐
- Illinois, 815 Ill. Comp. Stat. §§ 5/1-5/19 ☐
- Indiana, *Ind. Code §§ 23-2-1-1-23-2-1-27* ☐
- Iowa, *Iowa Code §§ 502.101-502.701* ☐
- Kansas, K.S.A. 2005 Supp. 17-12a101-17-12a703 ☐
- Kentucky, *Ky. Rev. Stat. Ann. §§ 292.310-292.550, 292.991* ☐
- Louisiana, *La. Rev. Stat. Ann. §§ 51:701-51:724* ☐
- Maine, *Me. Rev. Stat. Ann. tit. 32, §§ 16101-16702* ☐
- Maryland, *Md. Code Ann., Corps. & Ass'ns §§ 11-101-11-805* ☐
- Massachusetts, *Mass. Gen. Laws ch. 110A §§ 101-417* ☐
- Michigan, *Mich. Comp. Laws. §§ 451.501-451.818* ☐
- Minnesota, *Minn. Stat. §§ 80A.01-80A.31* ☐
- Mississippi, *Miss. Code Ann. §§ 75-71-101-75-71-735* ☐
- Missouri, *Mo. Rev. Stat. Ann. 409.1-101-409.7-703* _____ ☐
- Montana, *Mont. Code Ann. §§ 30-10-101-30-10-326* ☐
- Nebraska, *Neb. Rev. Stat. §§ 8-1101-8-1123* ☐
- Nevada, *Nev. Rev. Stat. §§ 90.211-90.860* ☐
- New Hampshire, *N.H. Rev. Stat. Ann. §§ 421-B:1-421-B:34* ☐

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- New Jersey, N.J. Stat. Ann. §§ 49:3-47-49:3-76 ☐
- New Mexico, *N.M. Stat. Ann. §§ 58-13B-1-58-13B-57* ☐
- New York, N.Y. Gen. Bus. Law §§ 352-359-h ☐
- North Carolina, N.C. Gen. Stat. §§ 78A-1-78A-66 ☐
- North Dakota, N.D. Cent. Code §§ 10-04-01-10-04-19 ☐
- Ohio, *Ohio Rev. Code Ann. §§ 1707.01-1707.99* ☐
- Oklahoma, Okla. Stat. tit. 71, §§ 1-101-1-701 ☐
- Oregon, *Or. Rev. Stat. §§ 59.005-59.996* ☐
- Pennsylvania, *70 Pa. Cons. Stat. §§ 1-101-1-704* ☐
- Rhode Island, R.I. Gen. Laws §§ 7-11-101-7-11-806 ☐
- South Carolina, *S.C. Code Ann. §§ 35-1-101-35-1-703* ☐
- South Dakota, S. D. Codified Laws §§ 47-31B-101-47-31B-703 ☐
- Tennessee, *Tenn. Code Ann. §§ 48-2-101-48-2-201* ☐
- Texas, Tex. Code Ann. §§ 581-1-581-43 ☐
- Utah, *Utah Code Ann. §§ 61-1-1-61-1-30* ☐
- Vermont, Vt. Stat. Ann. tit. 9, §§ 5201-5612 ☐
- Virginia, *Va. Code Ann. §§ 13.1-501-13.1-527.3* ☐
- Washington, *Wash. Rev. Code §§ 21.20.005-21.20.940* ☐
- West Virginia, *W. Va. Code §§ 32-1-101-32-4-418* ☐

Wisconsin, Wis. Stat. §§ 551.01-551.67 ☐

Wyoming, Wyo. Stat. Ann. §§ 17-4-101-17-4-132 ☐

Legal Topics:

For related research and practice materials, see the following legal topics:

Real Property Law Securities Regulation Transactions Subject to Regulation Securities Law Blue Sky Laws General
Overview Securities Law Blue Sky Laws Excluded Transactions Securities Law Blue Sky Laws Exempted
Issuers Securities Law Blue Sky Laws Securities Registration



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Current Legal Forms for Real Estate
Chapter 22A REAL ESTATE SECURITIES
Part III. Drafting Guidelines

28-22A Current Legal Forms for Real Estate § 22A.31

AUTHOR: by Robert M. Nelson

§ 22A.31 Overview of Drafting Guidelines

The Subscription Agreement appearing in the following Section 22A.32 is a typical type of document that would be a part of a securities offering involving an offer of securities in a transaction which is fashioned to be exempt from federal securities law registration provisions pursuant to the so-called "intrastate offering" exemption or one of the Regulation D exemptions. The intrastate offering exemption is based upon section 3(a)(11) of the Federal Securities Act of 1933 (the "1933 Act") and Securities and Exchange Commission ("SEC") Rule 147 promulgated thereunder. *See § 22A.16[2][a] supra* for a detailed discussion of the requirements of the intrastate offering exemption. The Regulation D Rules are SEC Rules 504, 505 (each of which is promulgated pursuant to Section 3(b) the 1933 Act, the so-called "small offering" exemption) or 506 (which is promulgated pursuant to Section 4(2) of the 1933 Act or the so-called "private offering" exemption). *See § 22A.16[2][b] supra* for a detailed discussion of the requirements of the Regulation D exemptions.

The document appearing below is a subscription agreement for units in an Ohio LLC which was formed to establish a relatively small family real estate investment vehicle. There are alternate provisions relating to the intrastate (SEC Rule 147) and the Regulation D (SEC Rules 504, 505, and 506) federal exemptions from registration; there are also provisions relating to several different state exemptions for small or limited offerings. The federal intrastate or SEC Rule 147 exemption does not require that any filing be made with the SEC to claim the exemption. However, reliance on one of the Regulation D exemptions usually involves the filing of a Form D with the SEC to claim the exemption. For an example of an SEC Form D, see Form 22A.10 *infra*. In some cases, the state securities law exemptions require no filings with any state securities agency, *i.e.*, the exemptions are "self-effectuating," while in other cases, the state law exemption requires some type of notice filing with the appropriate state securities agency. Often, filing a copy of the SEC Form D with the appropriate state securities agency is also a sufficient filing to claim the state securities law exemption. The subscription agreement below contains a number of representations from the subscriber which relate to both the federal and state exemptions relied upon. This subscription agreement references the Federal SEC Rule 147 or Regulation D exemption and also the relevant state securities law exemption for small corporate-type equity offerings.

As can be seen below, the subscription agreement is printed in two columns. The left-hand column contains the

subscription document itself, while the right-hand column contains several comments. These comments sometimes set forth some explanation of the provision opposite which it appears, while, at other times, the comment is meant to describe or discuss drafting alternatives to the provision opposite the comment.

Legal Topics:

For related research and practice materials, see the following legal topics:

Business & Corporate LawCorporationsFinanceInitial Capitalization & Stock SubscriptionsGeneral OverviewBusiness & Corporate LawCorporationsFinanceInitial Capitalization & Stock SubscriptionsSubscription AgreementsSecurities LawExemptions From RegistrationExempt Classes of SecuritiesSecurities LawExemptions From RegistrationExempt TransactionsRegulation D ExemptionsSecurities LawExemptions From RegistrationIntrastate Offerings & Recapitalizations



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Current Legal Forms for Real Estate

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Current Legal Forms for Real Estate
Chapter 22A REAL ESTATE SECURITIES
Part III. Drafting Guidelines

28-22A Current Legal Forms for Real Estate § 22A.32

AUTHOR: by Robert M. Nelson

§ 22A.32 Analysis of Subscription Agreement

Analysis of Subscription Agreement

CONTRACT

SUBSCRIPTION AGREEMENT

THIS SUBSCRIPTION AGREEMENT is entered into between CRISTINO FAMILY REAL ESTATE INVESTMENTS LLC, an Ohio limited liability company (the "Company") and FRANCINE CRISTINO ("Subscriber") this _____ [day] of _____ [month], _____ [year].

WHEREAS, the Company is offering for sale to the Subscriber twenty-five (25) units of the Company's membership interests (the "Securities"); and

WHEREAS, the Company is offering to sell the Securities to the Subscriber, and the Subscriber wishes to purchase all of the Securities from the Company; and

WHEREAS, the Company is offering and selling the Securities to the Subscriber pursuant to certain registration exemptions contained in federal and state securities laws;

NOW, THEREFORE, in consideration of the mutual promises contained below and the payment of the purchase price by the Subscriber to the Company for the Securities, the Company and the Subscriber agree as follows:

1. Disclosure by Company. The Company hereby discloses the information set forth in this Paragraph 1 to the Subscriber in connection with the offer and sale of the Securities by the Company: (n1)COMMENT

[Intrastate or SEC Rule 147 Exemption]

(A) The Securities have not been registered under the Federal Securities Act of 1933, as amended (the "Federal Act"), and are being offered and sold by the Company pursuant to a registration exemption contained in Section 3(a)(11) of the Federal Act and/or Securities and Exchange Commission Regulation D and Rule 147, promulgated thereunder.

(n2)COMMENT

[OR]

[SEC Rule 504 Exemption]

(A) The Securities have not been registered under the Federal Securities Act of 1933, as amended (the "Federal Act"), and are being offered and sold by the Company pursuant to a registration exemption contained in Section 3(b) of the Federal Act and/or Securities and Exchange Commission Regulation D and Rule 504, promulgated thereunder.

(n3)COMMENT

[OR]

[SEC Rule 505 Exemption]

(A) The Securities have not been registered under the Federal Securities Act of 1933, as amended (the "Federal Act"), and are being offered and sold by the Company pursuant to a registration exemption contained in Section 3(b) of the Federal Act and/or Securities and Exchange Commission Regulation D and Rule 505, promulgated thereunder.

(n4)COMMENT

[OR]

[SEC Rule 506 Exemption]

(A) The Securities have not been registered under the Federal Securities Act of 1933, as amended (the "Federal Act"), and are being offered and sold by the Company pursuant to a registration exemption contained in Section 4(2) of the Federal Act and/or Securities and Exchange Commission Regulation D and Rule 506, promulgated thereunder.

(n5)COMMENT

(B) The Securities have the status of securities acquired in a transaction under Section 4(2) of the Federal Act and cannot be resold without registration under the Federal Act or an exemption therefrom. (n6)COMMENT

(C) A legend has been, or will be, placed on each certificate or other document evidencing any of the Securities in substantially the following form: (n7)COMMENT

[Legend for Share Certificates in Intrastate Exemption Offering]

THESE SECURITIES HAVE NOT BEEN REGISTERED UNDER THE SECURITIES ACT OF 1933, AS

AMENDED (THE "ACT") AND MAY NOT BE RESOLD UNLESS REGISTERED UNDER THE ACT OR UNLESS AN EXEMPTION FROM REGISTRATION UNDER THE ACT IS AVAILABLE.

THESE SECURITIES HAVE NOT BEEN REGISTERED UNDER THE ACT AND, FOR A PERIOD OF AT LEAST NINE (9) MONTHS FROM THE DATE OF THE LAST SALE BY THE COMPANY OF THE SECURITIES IN THE OFFERING OF WHICH THESE SECURITIES ARE A PART, ALL REALES, PLEDGES, HYPOTHECATIONS, OR OTHER TRANSFERS OF THESE SECURITIES BY ANY PERSON OR BUSINESS ORGANIZATION SHALL BE MADE ONLY TO PERSONS OR BUSINESS ORGANIZATIONS WHO ARE RESIDENT WITHIN THE STATE OF OHIO. (n8)COMMENT

[OR]

[Legend for Share Certificates in Regulation D Exemption Offering]

THESE SECURITIES EVIDENCED HEREBY HAVE NOT BEEN REGISTERED UNDER THE FEDERAL SECURITIES ACT OF 1933, AS AMENDED, OR ANY STATE SECURITIES LAWS, AND MAY NOT BE RESOLD UNLESS REGISTERED UNDER FEDERAL AND STATE SECURITIES LAWS OR, UNLESS AN EXEMPTION FROM REGISTRATION UNDER THE FEDERAL AND STATE SECURITIES LAWS IS AVAILABLE. (n9)COMMENT

THE SECURITIES REPRESENTED BY THIS CERTIFICATE ARE SUBJECT TO THE TERMS AND CONDITIONS OF AN OPERATING AGREEMENT DATED _____
[month]_____[day], _____[year], ("THE AGREEMENT"), WHICH
AGREEMENT RESTRICTS THE FREE TRANSFERABILITY OF SUCH UNITS. ANY PURCHASER OR
TRANSFeree OF THESE SECURITIES IS BOUND BY THE AGREEMENT AND SHALL BE CONSIDERED A
PARTY TO THE AGREEMENT. THE COMPANY WILL MAIL TO THE HOLDER OF THIS CERTIFICATE,
WITHOUT CHARGE, A COPY OF THE AGREEMENT WITHIN FIVE (5) DAYS AFTER RECEIVING A
WRITTEN REQUEST THEREFOR. (n10)COMMENT

[Example of Arizona limited offering transactional exemption]

(D) The Securities have not been registered under the Arizona Securities Act, as set forth in Title 44, Chapter 12 of the Arizona Revised Statutes (the "Arizona Act"), and are being offered and sold by the Company pursuant to the registration exemption contained in Section 44-1844 of the Arizona Act and Rule 14-4-126 promulgated thereunder. (n11)COMMENT

[Example of California transactional exemption]

(D) The Securities have not been registered under Section 25110 of the California Corporations Code (the "California Code") and are being offered and sold by the Company pursuant to the registration exemption contained in Section 25102(f) of the California Code. (n12)COMMENT

[Example of Ohio transactional exemption]

(D) The Securities have not been registered under the Ohio Securities Act, as set forth in Chapter 1707 of the Ohio

Revised Code (the "Ohio Act"), and are being offered and sold by the Company pursuant to the registration exemption contained in Section 1707.03(O) of the Ohio Act. (n13)COMMENT

(E) The Company reasonably believes that the Subscriber is purchasing for investment, has no information to the contrary, and through Paragraph 2. below is hereby obtaining a signed statement to that effect from the Subscriber prior to the purchase of any of the Securities by the Subscriber. (n14)COMMENT

2. Representations and Warranties of the Subscriber. In connection with the Subscriber's purchase pursuant to this Agreement, the Subscriber represents and warrants, which representations and warranties shall survive the consummation of the Subscriber's purchase pursuant to this Agreement, as follows: (n15)COMMENT

(A) The Subscriber's principal residence or principal office, as the case may be, is located within the State of Ohio. (n16)COMMENT

(B) The Subscriber represents that the Subscriber is an accredited investor as that term is defined in SEC Rule 501. (n17)COMMENT

(C) The Subscriber is aware that no market may exist for the resale of any of the Securities purchased under this Agreement.

(D) The Subscriber is purchasing for investment and not for the distribution of any of the Securities purchased under this Agreement.

(E) The Subscriber is aware of any and all restrictions imposed by the Company on the further distribution of the Securities, including, but not limited to, any restrictive legends appearing on the certificate(s) and/or other document(s) evidencing any of the Securities, required holding periods, stop transfer orders, or buy-back rights of the Company or security holders thereof. (n18)COMMENT

(F) The Subscriber is aware of the limitations on the disposition of the Securities, including, the limitations under federal and state securities laws. (n19)COMMENT

(G) The Subscriber acknowledges that the Subscriber has had an opportunity to ask questions and receive answers concerning the terms and conditions of the offering of the Securities and to obtain any additional information which the Company possesses or can acquire without unreasonable effort or expense that is necessary to verify the accuracy of the information furnished to the Subscriber by the Company. (n20)COMMENT

(H) The Subscriber has a preexisting personal or business relationship with the Company's officers and directors, which relationship is of such a nature and duration as to enable the Subscriber to be aware of the character, business acumen and general business and financial circumstances of the persons with whom such relationship exists.

(I) The Subscriber's business or financial experience (or the business or financial experience of the Subscriber's professional advisers) is such that the Subscriber can protect his or her own interests in connection with the purchase of the Securities. (n21)COMMENT

3. Subscription for Securities. The Company hereby offers and agrees to sell to the Subscriber, and the Subscriber hereby accepts such offer and subscribes for the Securities, in exchange for twenty-five (25) Membership Units of the Company, an Ohio limited liability company. The Subscriber agrees to pay the sum of Twenty-five Thousand Dollars (\$25,000) for the units being purchased and agrees to pay the purchase price contemporaneously with the execution of this Agreement by the Company and the Subscriber. The Company, through its Authorized Representative, hereby acknowledges receipt of the foregoing subscription. (n22)COMMENT

IN WITNESS WHEREOF, the Company and the Subscriber have signed this Subscription Agreement on the day and

year first above written.

COMPANY:

CRISTINO FAMILY REAL ESTATE INVESTMENTS LLC

By: _____

Alex Cristino

SUBSCRIBER:

_____ (n23)COMMENT

Legal Topics:

For related research and practice materials, see the following legal topics:

Business & Corporate LawCorporationsFinanceGeneral OverviewBusiness & Corporate LawCorporationsFinanceInitial Capitalization & Stock SubscriptionsSubscriber RightsBusiness & Corporate LawCorporationsFinanceInitial Capitalization & Stock SubscriptionsSubscription AgreementsSecurities LawExemptions From RegistrationExempt TransactionsGeneral OverviewSecurities LawExemptions From RegistrationExempt TransactionsRegulation D ExemptionsSecurities LawExemptions From RegistrationIntrastate Offerings & Recapitalizations

FOOTNOTES:

(n1)COMMENT(n1) The subparagraphs (A) which follow are alternative provisions which the drafter may wish to use depending upon the federal exemption being relied upon. Each references the appropriate statutory section of the Securities Act of 1933 provision which contains the exemption and the SEC Rule which is promulgated under that section. Some drafters may elect not to include such specific references but rather to use only a generic reference to reliance upon an exemption under the Federal Act so as to preserve, to the extent available, reliance upon more than one exemption if an issue later arises as to the availability of one of the exemptions.

(n2)COMMENT(n2) The intrastate offering exemption as authorized by Section 3(a)(11) and Rule 147 generally requires that the issuer and all of the purchasers be located within the same state. For more detailed information about this exemption, see § 22A.16[2][a] *supra*.

(n3)COMMENT(n3) The Rule 504 exemption is limited to offerings made by issuers not exceeding \$1,000,000 and which meet the general applicable requirements set forth in SEC Rules 501-503 of Regulation D. There is no limit on the number of purchasers for this exemption. For more detailed information about this exemption, see § 22A.16[2][b][i] *supra*.

(n4)COMMENT(n4) The Rule 505 exemption is limited to offerings made by issuers not exceeding \$5,000,000 and which meet the general applicable requirements set forth in SEC Rules 501-503 of Regulation D. This offering may be sold to no more than thirty-five (35) "non-accredited" purchasers. For more detailed information about this exemption, see § 22A.16[2][a] *supra*.

(n5)COMMENT(n5) The Rule 506 exemption does not contain any limit on the size of the offering, but is limited to no more than thirty-five (35) "non-accredited" purchasers. Also, the offering must meet the general applicable requirements set forth in SEC Rules 501-503 of Regulation D. For more detailed information about this exemption, see § 22A.16[2][a] *supra*.

(n6)COMMENT(n6) If the offering is being made under Rule 504 and the exception of Rule 504(b)(1) applies, then this provision is not necessary because the Securities will not be deemed restricted securities. See § 22A.16[2][a] *supra*

for more detail.

(n7)COMMENT(n7)

(n8)COMMENT(n8) SEC Rule 147(e) provides that the securities sold in reliance upon the intrastate offering exemption may not be resold by the original purchaser within nine (9) months after the conclusion of the offering to any person who is not a resident in the same state as the original purchasers. Rule 147(f)(1)(i) further provides that this resale limitation must be included in a legend appearing on all certificates or other documents evidencing the securities sold in reliance on the intrastate exemption.

(n9)COMMENT(n9) SEC Rule 502(d) requires that a legend of this type stating that the securities have not been registered under the Securities Act of 1933 and setting forth the restrictions on resale contained in Rule 502(d) (*i.e.*, that the securities may not be resold without registration under the Securities Act of 1933 or the availability of an exemption from registration.

(n10)COMMENT(n10) The subparagraphs (D) which follow are alternative provisions which the drafter may wish to use depending upon the state securities law exemption being relied upon. Each references the appropriate statutory section of the applicable state law provision which contains the exemption. Some drafters may elect not to include such specific references but rather to use only a generic reference to reliance upon an exemption under any state law section so as to preserve, to the extent available, reliance upon more than one exemption if an issue later arises as to the availability of one of the exemptions.

(n11)COMMENT(n11) This provision refers not only to the broad enabling section of the Arizona Revised Statutes which authorize the Arizona corporation commission to create exemptions by rule but also the Rule cite in the Arizona Administrative Code which sets forth the requirements of various exemptions. Rule 126 is Arizona's rough counterpart to the SEC Regulation D exemptions. This exemption requires a notice filing which may be met by the filing of the SEC Form D.

(n12)COMMENT(n12) The California exemption referred to by this provision is a small offering type transactional exemption which requires both a notice filing and contains requirements as to the relationship between the Company and the purchasers or a degree of sophistication and experience on the part of the purchasers.

(n13)COMMENT(n13) One of the exempt transactions under Ohio law is found in *Section 1707.03(O) of the Ohio Revised Code*. This so-called "3-O" exemption is self-effectuating in that no filing is needed to claim the exemption and there are only numerical limits applying to the purchasers but no qualitative requirements for the purchasers.

(n14)COMMENT(n14) A common (but not unanimous) requirement for many of the applicable federal and state exemptions frequently relied upon is that the issuer reasonably believe that the purchasers be purchasing for their own investment and not for the purpose of distribution or resale to others. This requirement is consistent with a private or limited offering which is what most of these exemptions contemplate.

(n15)COMMENT(n15) The federal and various state exemptions require that the issuer have a reasonable belief or make an inquiry regarding certain items relating to the purchasers in an offering based upon the applicable exemption being relied upon. In this paragraph, the drafter is attempting to comply in whole, or part, with these types of requirements.

(n16)COMMENT(n16) For example, subparagraph (A) is meant to comply with the requirement of SEC Rule 147(f)(1)(iii) that the issuer obtain a written representation from each purchaser as to the residence of each purchaser. As noted in Rule 147(d)(2), an individual is deemed to be a resident of the state in which the individual has his or her principal residence.

(n17)COMMENT(n17) Subparagraph (B) elicits a representation that the purchaser is an accredited investor;

obviously, if that is not pertinent to the exemption in a particular offering, that representation can be omitted.

(n18)COMMENT(n18) Subparagraphs (C), (D), and (E), in part, are state-specific items which, in this case, are mandated by Ohio Division of Securities Rule which elaborates on the Section 1707.03(O) exemption requirement that each purchaser is purchasing for investment. *See Ohio Admin. Code § 1301:6-3-03*. Subparagraph (D) as the purchaser's intent to purchase for his or her own investment is also a requirement of many of the federal and state exemptions.

Subparagraph (E) also elicits an acknowledgment from the purchaser that the issuer has disclosed, and thus, met, the requirement of SEC Rule 147(f)(3) (which is not an explicit requirement of the Regulation D exemptions) that the issuer must disclose these restrictions to each purchaser.

(n19)COMMENT(n19)

(n20)COMMENT(n20) Subparagraph (G) is intended to elicit from the purchaser that the issuer has met its requirement set forth in Regulation D (specifically, SEC Rule 502(b)(2)(v) relating to Rule 505 and Rule 506 offerings) to give each purchaser this opportunity to obtain additional information.

(n21)COMMENT(n21) Subparagraphs (H) and (I) address another state-dictated requirement, in this case, being mandated expressly by *Cal. Corp. Code Section 25102(f)* which statutorily requires that each purchaser either have a pre-existing personal or business relationship with the issuer or be a person with sufficient business or financial experience (or be represented by professional advisers having such experience) so that the purchaser can fend for himself or herself with respect to the investment decision to purchase the securities being offered.

Obviously, the representations appearing in the document should be tailored to the set of federal and state law registration exemptions being relied upon. If the offering is not an intrastate offering, then it may be offered in more than one state and the drafter may need to include a variety of purchaser representations to comply with the different requirements of federal law and that of the states where the offering is being made.

(n22)COMMENT(n22)

(n23)COMMENT(n23)



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Current Legal Forms for Real Estate

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Current Legal Forms for Real Estate
Chapter 22A REAL ESTATE SECURITIES
Part IV. FORMS
A. REIT FORM S-11 REGISTERED OFFERING

28-22A Current Legal Forms for Real Estate FORM 22A.01

AUTHOR: by Robert M. Nelson

FORM 22A.01

Real estate investment trust offering prospectus--acquisition of diversified portfolio of income-producing health-care related real properties and leaseback to health care operators--firm commitment underwriting--Maryland issuer

COMMENT

The documents appearing below relate to an interstate offering subject to the registration and other requirements under the Federal Securities Act of 1933 and the Securities and Exchange Act of 1934. These documents are a part of the necessary elements of a full securities registration filed on SEC Form S-11 under the Securities Act of 1933. Generally, a Form S-11 may be used to register securities offered by a real estate investment trust, as defined under *Section 856 of the Internal Revenue Code*, or securities issued by other issuers whose business involves primarily the acquisition and holding of real estate for investment. The Form S-11 registration is comprised of the following:

- (1) required cover sheet information;
- (2) a Part I, which sets forth certain information required to be contained in the Prospectus;
- (3) a Part II, which sets forth certain other information which is required to be filed with the Form S-11 but which is not required to appear in the Prospectus and which contains required financial statements and other required exhibits; and
- (4) required signatures of certain of the issuer's principal executives.

The Instructions to the Form S-11 refer to certain SEC regulations which contain more specific requirements as to information required by each item of the Form S-11. SEC Regulation S-K, 17 C.F.R. § 229.10, *et seq.*, sets forth more specific requirements as to much of the information required in Parts I and II of Form S-11; financial disclosure requirements are set forth in detail in Regulation S-X, 17 C.F.R. § 210.1-01, *et seq.*

It should be emphasized that an effective federal registration statement does not automatically qualify the offering under the Blue Sky laws of every state. Some jurisdictions have even more stringent requirements than the Securities and Exchange Commission for the sale of real estate interests. Accordingly, in any state where sales literature is to be distributed and investments solicited, the particular securities laws must be consulted. Also, because real estate offerings are particularly susceptible to Internal Revenue Service scrutiny, it is imperative that federal tax consequences to the prospective investor be spelled out in readily understandable language. The instructions to Form S-11 require that discussion; the prospective investor should also be alerted to the advisability of seeking expert advice from his or her own tax counsel. For a more detailed treatment of the federal income tax consequences of REITs, see TB §§ 22A.06.

FORM

(a) S-11 registration statement cover sheets

AS FILED WITH THE SECURITIES AND EXCHANGE
COMMISSION ON _____ [month] _____ [day], _____ [year]

REGISTRATION STATEMENT NO. 33-00000

SECURITIES AND EXCHANGE COMMISSION
WASHINGTON, D.C. 20549

FORM S-11

REGISTRATION STATEMENT UNDER THE
SECURITIES ACT OF 1933

AMERICAN CAPITAL TRUST, INC.
(Exact name of Registrant as specified in its charter)

SIX CENTRAL SOUTHERN BLDG., SUITE 101-A,
BIRMINGHAM, ALABAMA 35243,(555) 111-6666

(Address, including zip code, and telephone number, including,
area code, of Registrant's principal executive offices)

MARYLAND
(State of Incorporation)

W. GILL
MCDANIEL
PRESIDENT AND
CHIEF
EXECUTIVE
OFFICER
AMERICAN
CAPITAL TRUST,
INC.
SIX CENTRAL
SOUTHERN BLDG.
SUITE 101-A
BIRMINGHAM,
ALABAMA 35243
(555) 111-6666

11-2233444
(IRS Employer
Identification Number)

(Name, address, including zip code, and telephone number,
including area code, of agent for service)

WELLHEALTH REHABILITATION CORPORATION
(Exact name of Co-Registrant as specified in its charter)

ONE CENTRAL SOUTHERN BLDG., BIRMINGHAM,
ALABAMA 35243
(555) 111-5555

(Address, including zip code, and telephone number, including
area code, of Co-Registrant's principal executive offices)

DELAWARE
(State of
Incorporation)

M. DONAL
RUSHMORE
CHAIRMAN OF
THE BOARD,
(IRS Employer
Identification Number)
PRESIDENT AND
CHIEF EXECUTIVE
OFFICER

63-0860407
(IRS Employer
Identification Number)

WELLHEALTH
 REHABILITATION
 CORPORATION
 ONE CENTRAL
 SOUTHERN BLDG.
 BIRMINGHAM,
 ALABAMA 35243
 (555) 111-5555

(Name, address, including zip code, and telephone number,
 including area code, of agent for service)

COPIES TO:

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 BIRMINGHAM, ALABAMA 35255-5727
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ROBERT M. DOWE, ESQ.
 DOWE & FLOWER CO., L.P.A.
 191 NINTH AVENUE
 NEW YORK, NY 10022
 TEL: 555-537-1000
 FAX: 555-537-9000

APPROXIMATE DATE OF COMMENCEMENT OF PROPOSED SALE TO THE PUBLIC: As soon as practicable
 after the Registration Statement becomes effective.

CALCULATION OF REGISTRATION FEE

TITLE OF EACH CLASS OF SE- CURITIES TO BE RE- GISTERED	AMOUNT TO BE REGISTERED	PROPOSED MAXIMUM OFFERING PRICE PER SHARE (2)	PRO- POSED MAXIM- UM AG- GREGATE OFFERING PRICE (2)	AMOUNT OF REGISTRA- TION FEE

Common Stock	6,670,000 (1)	\$20.00	\$133,400,00 0	\$46,000

(1) Includes up to 870,000 shares of Common Stock that may be purchased by the
 Underwriters to cover over-allotments, if any.

(2) Estimated solely for purposes of determining the registration fee pursuant to Rule 457.

THE REGISTRANT HEREBY AMENDS THIS REGISTRATION STATEMENT ON SUCH DATE OR DATES AS MAY BE NECESSARY TO DELAY ITS EFFECTIVE DATE UNTIL THE REGISTRANT SHALL FILE A FURTHER AMENDMENT WHICH SPECIFICALLY STATES THAT THIS REGISTRATION STATEMENT SHALL THEREAFTER BECOME EFFECTIVE IN ACCORDANCE WITH SECTION 8(A) OF THE SECURITIES ACT OF 1933 OR UNTIL THE REGISTRATION STATEMENT SHALL BECOME EFFECTIVE ON SUCH DATE AS THE COMMISSION, ACTING PURSUANT TO SAID SECTION 8(A), MAY DETERMINE.

AMERICAN CAPITAL TRUST, INC.

CROSS REFERENCE SHEET

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* Omitted as inapplicable.

(b) S-11 Prospectus (Part I information)

Information contained herein is subject to completion or amendment. A registration statement relating to these securities has been filed with the Securities and Exchange Commission. These securities may not be sold nor may offers to buy be accepted prior to the time the registration statement becomes effective.

This prospectus shall not constitute an offer to sell or the solicitation of an offer to buy nor shall there be any sale of these securities in any State in which such offer, solicitation or sale would be unlawful prior to registration or qualification under the securities laws of any such State.

SUBJECT TO COMPLETION, DATED _____ [month] _____ [day],
_____ [year]

PROSPECTUS

5,800,000 SHARES AMERICAN CAPITAL TRUST, INC. COMMON STOCK _____

All of the shares (the "Shares") of Common Stock, \$.001 par value per share (the "Common Stock"), offered hereby (the "Offering") are being issued and sold by American Capital Trust, Inc. (the "Company"), which will invest in a diversified portfolio of income-producing healthcare-related real estate. Concurrently with the consummation of this Offering, the Company intends to acquire an initial portfolio of 20 properties (the "Initial Properties") to be leased and operated by five healthcare operators. The lessees will include subsidiaries of WELLHEALTH Rehabilitation Corporation ("WELLHEALTH"), Oregon HealthCorp ("Oregon"), Total Health Services, Inc. ("Total Health"), Proxy Health Group, Inc. ("Quorum") and Health Surgery Corporation ("Surgical Health"). The Company expects to qualify as a real estate investment trust ("REIT") under the Internal Revenue Code of 1986, as amended (the "Code"), for the year ended _____ [month] _____ [day], _____ [year], and to pay regular quarterly dividends, beginning with a dividend for the remainder of the quarter ended _____ [month] _____ [day], _____ [year]. See "Distributions to Stockholders."

Prior to this offering, there has been no public market for the Common Stock. It is currently estimated that the initial offering price will be between \$18 and \$20 per share. See "Underwriting" for information relating to the factors considered in determining the initial public offering price. The Company intends to apply for listing of the Common Stock on the New York Stock Exchange under the symbol "_____."

See "Risk Factors" for certain factors relevant to an investment in the Common Stock offered hereby, including the following:

--The Company is recently organized and has no operating history. Failure to consummate the purchase of one or more properties could have an adverse effect on the amount of distributions to stockholders.

--The ability of the Lessees of the properties to be acquired by the Company to make lease payments as and when due is dependent in part upon no material adverse change in existing government regulation and reimbursement in the healthcare industry and on the financial condition of such Lessees and the Guarantors of such payments.

--The Company will be taxed as a corporation if it fails to qualify as a REIT. In order to qualify and to maintain the Company's qualification as a REIT, direct and indirect beneficial ownership by any person or entity of more than 9.8% in value of the outstanding Common Stock is restricted. See "Description of Securities." This may have the effect of hindering potential takeovers of the Company.

--The Company's Board of Directors has the authority to change the investment policies of the Company without approval of the stockholders.

--While all of the Initial Properties have been appraised and are being purchased by the Company at purchase prices not more than the appraised value, appraisals are only estimates of value and should not be relied upon as a precise measure

of realizable value.

--The purchasers of the Shares will experience an immediate dilution in the net tangible book value of the Common Stock.

THESE SECURITIES HAVE NOT BEEN APPROVED OR DISAPPROVED BY THE SECURITIES AND EXCHANGE COMMISSION OR ANY STATE SECURITIES COMMISSION, NOR HAS THE SECURITIES AND EXCHANGE COMMISSION OR ANY STATE SECURITIES COMMISSION PASSED UPON THE ACCURACY OR ADEQUACY OF THIS PROSPECTUS. ANY REPRESENTATION TO THE CONTRARY IS A CRIMINAL OFFENSE.

THE ATTORNEY GENERAL OF THE STATE OF NEW YORK HAS NOT PASSED ON OR ENDORSED THE MERITS OF THIS OFFERING. ANY REPRESENTATION TO THE CONTRARY IS UNLAWFUL.

	PROCEEDS TO COMPANY (2)	PRICE TO THE PUBLIC	UNDERWRITING DISCOUNTS AND COMMISSIONS (1)
Per Share			
Total (3)			

(1) See "Underwriting" for indemnification arrangements with the Underwriters.

(2) Before deducting offering expenses payable by the Company, estimated at \$400,000.

(3) The Company has granted the Underwriters a 30-day option to purchase up to an aggregate of 870,000 additional Shares at the Price to the Public, less Underwriting Discounts, solely to cover over-allotments, if any. See "Underwriting." If such option is exercised in full, the total Price to the Public, Underwriting Discounts and Commissions and Proceeds to Company will be \$

_____, \$
_____ and \$
_____, respectively.

The Common Stock is being offered by the several Underwriters named herein, subject to prior sale, when, as and if accepted by them and subject to certain conditions. It is expected that the Common Stock offered hereby will be available for delivery on or about _____[month] _____[day], _____[year], at the offices of Alabama Securities Corp., 833 Sandwich Street, New York, New York 10013.

ALABAMA SECURITIES CORP.

_____ [month] _____ [day], _____ [year]

IN CONNECTION WITH THIS OFFERING, THE UNDERWRITERS MAY OVER-ALLOT OR EFFECT TRANSACTIONS WHICH STABILIZE OR MAINTAIN THE MARKET PRICE OF THE COMMON STOCK AT A LEVEL ABOVE THAT WHICH MIGHT OTHERWISE PREVAIL IN THE OPEN MARKET. SUCH TRANSACTIONS MAY BE EFFECTED ON THE NEW YORK STOCK EXCHANGE, IN THE OVER-THE-COUNTER MARKET, OR OTHERWISE. SUCH STABILIZING, IF COMMENCED, MAY BE DISCONTINUED AT ANY TIME.

For United Kingdom purchasers: The Shares may not be offered or sold in the United Kingdom other than to persons whose ordinary business is to buy or sell shares or debentures, whether as principal or agent (except in circumstances that do not constitute an offer to the public within the meaning of the Companies Act _____ [Year]), and this Prospectus may only be issued or passed on to any person in the United Kingdom if that person is of a kind described in The Financial Services and Markets Act 2000 (Promotion of Collective Investment Schemes) (Exemptions) Order 2001, as amended, or is a person to whom such document may otherwise lawfully be issued or passed on.

LOCATION OF INITIAL PROPERTIES (Map)

(Map)

INITIAL PROPERTY	LOCATION	FACILITY TYPE
1. American Sports Medicine Institute	Birmingham, AL	Research Facility
2. Birmingham Medical Building I	Birmingham, AL	Ancillary Hospital Facility
3. Birmingham Medical Building II	Birmingham, AL	Ancillary Hospital Facility
4. One- 7000 Building	South Miami, FL	Ancillary Hospital Facility
5. Larkin Medical Building	South Miami, FL	Ancillary Hospital Facility
6. Richmond Medical Building I	Richmond, VA	Ancillary Hospital Facility
7. Richmond Medical Building II	Richmond, VA	Ancillary Hospital Facility
8. Little Rock	Little Rock, AR	Outpatient Rehabilitation Facility
9. Coral Gables	Coral Gables, FL	Outpatient Rehabilitation Facility
10. Virginia Beach	Virginia Beach, VA	Outpatient Rehabilitation Facility
11. Midway Medical Plaza	Los Angeles, CA	Ancillary Hospital Facility
12. Mountain View	Greensburg, PA	Long-Term Care Facility
13. Gravois	St. Louis, MO	Sub-Acute Care Facility
14. Goodyear Clinic	Gadsden, AL	Ancillary Hospital Facility
15. Hamiter Building	Gadsden, AL	Ancillary Hospital Facility

16.	Medical Building II	Gadsden, AL	Ancillary Hospital Facility
17.	Desert Springs	Las Vegas, NV	Ancillary Hospital Facility
18.	South County Medical Center	St. Louis, MO	Ambulatory Surgery Facility
19.	Northlake	Tucker, GA	Ambulatory Surgery Facility
20.	North Shore	Evanston, IL	Ambulatory Surgery Facility

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PROSPECTUS SUMMARY

The following summary should be read in conjunction with, and is qualified in its entirety by, the more detailed descriptions and financial information and statements appearing elsewhere in this Prospectus. Except as otherwise noted, the information set forth in this Prospectus assumes (i) the acquisition of and full payment for the 20 Initial Properties and (ii) no exercise of the Underwriters' over-allotment option. As used herein, unless the context requires otherwise, the term "Company" includes American Capital Trust, Inc., a Maryland corporation, and its subsidiaries. For the definition of capitalized terms not otherwise defined herein, including certain proper names of sellers of Initial Properties, Lessees, Guarantors and related parties, see "Glossary."

THE COMPANY

The Company was recently organized to qualify as an indefinite life real estate investment trust. The Company intends to invest in a diversified portfolio of healthcare properties. Upon completion of this Offering, the Company will acquire and lease back the 20 Initial Properties to five healthcare operators. The Lessees will include Subsidiaries of WELLHEALTH Rehabilitation Corporation, Oregon HealthCorp, Total Health Services, Inc., Proxy Health Group, Inc. and Health Surgery Corporation.

The Initial Properties are located in ten states primarily in the southeastern and western regions of the United States and represent a variety of facility types in diverse healthcare industry segments. The Initial Properties will be acquired for an

aggregate purchase price of \$115.1 million and will provide annual Base Rent to the Company of approximately \$12.7 million. All of the Initial Properties have been appraised and will be purchased at prices not more than their respective appraised values. All of the Leases, which are Triple Net Leases, provide for Additional Rent commencing after the first year. All of the Leases have primary terms of 10 to 15 years and options to extend the term at least 10 additional years. WELLHEALTH, Total Health, Oregon, Quorum and Health Surgery are guarantors (the "Guarantors") of the obligations of their respective Subsidiaries under the Leases. Each of the Guarantors has one or more classes of publicly-traded debt or equity securities, except for Surgical Health, which recently filed a registration statement with the Securities and Exchange Commission ("SEC") relating to the issuance of senior subordinated notes. The Company intends to close all of the Initial Properties into escrow on or before the Effective Date of the Offering and to release the Initial Properties from escrow as soon as practical after the closing of the Offering.

The Company's strategy is to become a leading provider of healthcare facility capital by investing in a high quality portfolio of properties managed by established operators, including long-term care, hospital management, rehabilitation and alternate-site care companies. The Company intends to diversify its portfolio by operator, geography, facility type and healthcare industry segment. Its investment criteria emphasize the credit quality of the lessee and any guarantor, competitive position of the property, attractiveness of the industry segment and fit with the Company's existing portfolio. The Company believes that there currently is significant demand for REIT financing capital in the healthcare industry. In addition, the Company believes the substantial healthcare industry experience and industry relationships of its management and directors will help the Company identify, evaluate and complete additional investments.

The Company has a written commitment for a \$30 million line of credit (the "Bank Credit Facility") from AmTrust of Alabama, N.A. ("AmTrust") with which to fund a portion of the purchase price for the Initial Properties and to fund additional investments. The Company may enter into interest rate swaps in order to mitigate the effect of a rising interest rate environment on the cost of the Bank Credit Facility.

The Company will be self-administered and self-managed and will not engage or pay a separate advisor.

The Initial Properties, which will not be subject to any previously existing mortgage debt when acquired, are summarized in the following table by Guarantor:

INITIAL LEASE TERM	GUARANTOR PURCHASE PRICE (2)	PERCENT- AGE OF PORTFO- LIO (3)	INITIAL PROPERTY NAME	INITIAL PROPERTY TYPE (1)
WELLHEALTH				
15	\$ 3,200,000	2.8%	American Sports Medicine In- stitute	RF
15	4,700,000	4.1	Birmingham Medical Build- ing I	AHF
15	9,600,000	8.3	Birmingham Medical Build- ing II	AHF
15	13,250,000	11.5	One-7000 Building	AHF

28-22A Current Legal Forms for Real Estate FORM 22A.01

15	2,250,000	1.9 Larkin Medical Building	AHF
15	2,100,000	1.8 Richmond Medical Building	AHF
15	10,000,000	8.7 Richmond Medical Building	AHF
15	2,060,000	1.8 Little Rock	ORF
15	2,300,000	2.0 Coral Gables	ORF
15	1,460,000	1.3 Virginia Beach	ORF
	50,920,000	44.2	
Oregon			
15	20,400,000	17.7 Midway Medical Plaza	AHF
	20,400,000	17.7	
Total Health			
10	9,775,000	8.5 Mountain View	LTCF
10	8,500,000	7.4 Gravois	SACF
	18,275,000	15.9	
Quorum			
10	1,607,160	1.4 Goodyear Clinic	AHF
10	4,382,520	3.8 Hamiter Building	AHF
10	5,810,320	5.0 Medical Building II	AHF
10	4,700,000	4.1 Desert Springs	AHF
	16,500,000	14.3	
Health Sur-			

gery

15	7,125,000(5)	6.2 South County Medical Center(4)	ASF
13	1,000,000	0.9 Northlake	ASF
15	880,000	0.8 North Shore	ASF
	9,005,000	7.9	
Total	\$115,100,000	100.0%	

(1) RF means research facility, AHF means ancillary hospital facility, ORF means outpatient rehabilitation facility, LTCF means long-term care facility, SACF means sub-acute care facility and ASF means ambulatory surgery facility.

(2) Includes the purchase price for land, improvements, intangibles and fixtures but does not include estimated net capitalized acquisition costs, aggregating approximately \$1.05 million.

(3) Based upon purchase price.

(4) Purchase is subject to completion of construction and the issuance of a certificate of occupancy, which is expected to occur in

_____[month]
 _____[year]. As of
 _____[month]
 _____[day],
 _____[year], leases

had been signed for over 93% of the rentable space.

(5) The purchase price will equal the actual cost of construction plus \$125,000 with a maximum of \$7,325,000. The Company currently estimates a purchase price of \$7,125,000.

Ancillary hospital facilities, which are contiguous or adjacent to a hospital, provide a variety of medical services such as diagnostic, outpatient surgery and rehabilitation services, in addition to physician offices and selected hospital support services. Outpatient rehabilitation facilities offer a comprehensive range of rehabilitative healthcare services, including physical therapy and occupational therapy, and focus predominantly on orthopaedic injuries, sports injuries, work injuries, hand and upper extremity injuries, back injuries and various neurological/neuromuscular conditions. Long-term care facilities generally provide a variety of extended care and services to the elderly. Sub-acute care facilities provide monitoring, specialized care and comprehensive rehabilitative therapy required by sub-acute and medically complex patients. Ambulatory surgery centers provide various surgical procedures, typically on an outpatient basis.

The Company may fund the purchase of additional properties by future equity or debt financing or by reinvestment of proceeds from the sale of properties. The Company may incur indebtedness and mortgage its properties in furtherance of its activities. There are no restrictions on the number of mortgages which may be placed on a single property. The Company's present policy prohibits incurring debt (secured or unsecured) in excess of 50% of its total capitalization. However, this debt limitation policy can be changed by the Board of Directors without stockholder approval. Moreover, there are no Bylaws or other provisions that require such limitation. See "Management's Discussion and Analysis of Financial Condition and Results of Operations--Liquidity and Capital Resources" and "Investment and Other Policies."

The Company has agreed to reimburse the actual costs incurred by American Capital Partners (the "Partnership") on behalf of the Company up to \$1,475,000 from the proceeds of the Offering. American Capital Partners is an Alabama general partnership, the partners of which are M. Donal Rushmore, W. Gill McDaniel and Dee Martin Michaels. These costs relate to the activities of the Partnership prior to the formation of the Company, including organizing the Company, negotiating the acquisitions of the Initial Properties, performing due diligence investigation related to the Initial Properties, performing corporate work in contemplation of the Offering, preparing the Registration Statement, providing interim financing for and closing the acquisition of the Initial Properties, employee compensation (including salaries of the executive officers), travel and overhead. In addition, W. Gill McDaniel, M. Donal Rushmore, Dee Martin Michaels and WELLHEALTH (the "Founding Stockholders") purchased 180,000 Shares for \$.001 per share, which are valued at \$3,420,000 based upon the midpoint of the filing range. See "Management--Certain Transactions" for more detailed information relating to the amounts to be received by affiliates of the Company upon completion of the Offering, and "Principal Stockholders" with respect to the stock ownership of such persons.

The Company's principal executive offices are located at Six Central Southern Bldg., Suite 101-A, Birmingham, Alabama 35243, and its telephone number is (555) 111-6666.

RISK FACTORS

Prospective investors should consider carefully the matters discussed under "Risk Factors" prior to making an investment decision regarding the Shares offered hereby. Some of the significant considerations include:

--Lack of Operating History and Inexperience of Management in Operating a REIT. The Company has been recently organized and has no operating history. The Company will be self-administered and therefore will not have a third-party investment advisor. Management of the Company has not had prior experience in operating a REIT.

--Real Estate Investment Risks. Investments in the Initial Properties and any additional properties in which the Company may invest in the future are subject to risks, including illiquidity, typically associated with investments in real estate. The Company intends to concentrate its investments in healthcare-related properties and will be subject to the risks associated with investing in a single industry.

--Dependence on Lessees and Guarantors and Potential Reduction in Revenues. The success of the Company's investments will be dependent upon the success of the businesses of the Lessees and of the Guarantors of such Leases. There is no assurance that the Company will be able to renew its Leases upon their expiration or that unfavorable economic, demographic or competitive conditions or industry reform will not adversely affect the financial condition of the Lessees and/or the Guarantors and, consequently, Lease revenues and the value of the Company's investment in the Initial Properties.

--Environmental Risks and Cost of Remediation. Under various federal, state and local environmental laws, ordinances and regulations, an owner of real property, such as the Company, may be responsible for certain liabilities relating to environmental risks, including the costs of remediation, which could adversely affect the financial condition of the Company.

--Development Projects. The Company may enter into build-to-suit type agreements that by their terms require conversion to leases upon the completion of the development of the property. Such activities, if undertaken, might subject the Company to risks related to delays in construction, cost of materials, financing availability, volatility in interest rates, labor availability and other property development uncertainties.

--Healthcare Industry Risks. The healthcare industry is highly regulated by federal and state laws, licensing requirements, property inspections, reimbursement policies, regulations concerning capital and other expenditures and certification requirements. The failure of any Lessee to comply with such laws, requirements and regulations could affect its ability to operate the property or properties which it leases from the Company. New federal or state laws or regulations may be enacted or promulgated which would have a material adverse effect on the Lessees, and in turn on the Company. Additionally, the uncertainty associated with current proposals for comprehensive national healthcare reform may adversely affect the Lessees and the Guarantors, and in turn the Company.

--Reduction in Dividends from Failure to Qualify as a REIT. If in any taxable year the Company did not qualify as a REIT, it would be taxed as a corporation and distributions to stockholders would not be deductible by the Company in computing its taxable income. In addition, unless the Company were entitled to relief under certain statutory provisions, the Company would also be disqualified from treatment as a REIT for the four succeeding years following the year in which qualification was lost. Failure to so qualify, even in one taxable year, could cause the Company to dramatically reduce its dividends.

--Restrictions on Transfer and Limitations on Ownership of Shares. In order to assist the Company in meeting certain tests applicable to REITs with respect to the ownership of its capital stock, the Company's Articles of Incorporation contain certain restrictions on the transfers of Common Stock. These restrictions may deter acquisition of control of the Company by third parties.

--Risks of Leverage and Default. Subject to any limitations on borrowings which may be imposed under the Bank Credit Facility, the Company may borrow funds and mortgage its properties in connection with the acquisition of additional properties and for purposes of funding other capital and operating expenditures. If the Company defaults on any loan secured by mortgages or other security interests on any of its properties, the lenders may foreclose on such property and the Company could lose its investment therein.

--Change in Investment Policies. The Company's Board of Directors may change the investment policies of the Company without stockholder approval. Such policy changes may have adverse consequences to the Company.

--Competition. The Company competes for property acquisitions with, among others, healthcare providers, other healthcare-related REITs, real estate partnerships and financial institutions. The Company's properties will be subject to competition from the properties of other healthcare providers.

--Dependence on Key Personnel. The Company is dependent on certain of its executive officers.

--Conflicts of Interest. Two of the nine directors of the Company are executive officers and directors of WELLHEALTH. WELLHEALTH is a stockholder of the Company and will be the Lessee or Guarantor of 10 of the Initial Properties to be acquired from WELLHEALTH or its Subsidiaries (the "WELLHEALTH Initial Properties"). Conflicts of interest exist in such directors' duties to holders of the Company's Common Stock and to stockholders of WELLHEALTH. Two of the nine directors of the Company are also directors of Total Health and Health Surgery. Total Health and Health Surgery will be the Lessee or Guarantor of two and three of the Initial Properties, respectively, to be acquired from Total Health and Health Surgery or their respective Subsidiaries. Conflicts of interest may arise in their duties to holders of the Company's Common Stock and stockholders of Total Health and Surgical Health, respectively.

--Appraisals. While all of the Initial Properties have been appraised and are being purchased by the Company at purchase prices not more than appraised value, appraisals are only estimates of value and should not be relied upon as a precise measure of realizable value. See "Business--Appraisals."

--Dilution. The purchasers of the Shares will experience an immediate dilution in the net tangible book value per share of the Common Stock.

INVESTMENT OBJECTIVES

The Company will seek to generate stable and increasing distributions through a self-administered portfolio management program that will allow the Company to maintain diversity and expand the Company's healthcare properties portfolio. The Company's investment objectives are: (i) to generate current income for stockholders; (ii) to provide increased returns to stockholders through the acquisition and development of additional properties, which may require the use of additional debt or equity financing; (iii) to provide stockholders with the opportunity to realize capital growth resulting from appreciation, if any, in the residual values of properties acquired; and (iv) to preserve and protect stockholders' capital. There can be no assurance that the Company will be successful in meeting these objectives. See "Risk Factors" and "Investment and Other Policies."

THE OFFERING

Common Stock to be offered _____ 5,800,000 shares (1)

Common Stock to be outstanding after the Offering 5,980,000 shares (2)

Proposed New York Stock Exchange Symbol _____

(1) Does not include up to 870,000 shares of Common Stock, if any, that may be purchased by the several Underwriters to cover over-allotments or 418,600 shares reserved for issuance pursuant to the Company's [Year] Stock Incentive Plan. See "Management--[Year] Stock Incentive Plan."

(2) Includes 180,000 shares (the "Founders' Shares"), sold in connection with the organization of the Company to the Company's Founding Stockholders for an aggregate of \$180 on March 31, [Year], of which 82,656 shares are owned by M. Donal Rushmore, 71,280 shares are owned by WELLHEALTH, 18,000 shares are owned by W. Gill McDaniel and 8,064 shares are owned by Dee Martin Michaels.

Each Founding Stockholder paid \$.001 per share for the Founders' Shares. See "Dilution" and "Principal Stockholders."

USE OF PROCEEDS

At the midpoint of the filing range, the net proceeds to the Company from the sale of the Shares offered hereby are estimated to be approximately \$102,115,000 after deduction of estimated underwriting commissions and Offering expenses. The purchase price of the Initial Properties, including net estimated acquisition expenses of approximately \$1,050,000, will be approximately \$116,150,000. All of the net proceeds will be applied against the purchase price of the Initial Properties. The balance of the purchase price required for the Initial Properties will be covered by borrowings of approximately \$14,185,000 under the Bank Credit Facility. The acquisitions of the respective Initial Properties are expected to take place as soon as practical after consummation of the Offering or, in the case of the South County

facility, as soon as practical after the completion of its construction and the issuance by the proper authority of a certificate of occupancy, which is expected to occur in May ____[Year]. As of April 15, ____[Year], leases had been signed for over 93% of the rentable space. See "Business--Initial Properties."

SUMMARY HISTORICAL AND PRO FORMA FINANCIAL INFORMATION

The following table sets forth financial information for the Company which is derived from the Balance Sheet and Pro Forma Financial Statements included elsewhere in this Prospectus. The adjustments for the Offering assume an initial public offering price at the mid-point of the filing range and that the Underwriters' over-allotment option is not exercised.

Pro forma operating data is presented for the year ended December 31, [Year] and the three months ended March 31, [Year], as if the Offering and the acquisitions of the Initial Properties by the Company had occurred, and as if the respective Leases had been in effect, at _____[month] _____[day], _____[year]. The pro forma balance sheet data is presented as of _____[month] _____[day], _____[year], as if the Offering and the transfers of the Initial Properties to the Company had occurred, and as if the respective Leases had been in effect, at that date. The pro forma information incorporates certain assumptions that are included in the notes to the Pro Forma Financial Statements included elsewhere in this Prospectus. See "Selected Historical and Pro Forma Financial Information" and "Pro Forma Financial Statements." The pro forma information does not purport to represent what the actual financial position or results of operations of the Company would have been as of or for the periods indicated nor does it purport to represent any future financial position or results of operations for any future period.

	AT OR FOR THE THREE MONTHS ENDED MARCH 31, [Year]	YEAR ENDED DECEMBER 31, [Year]
	HISTORICAL (1)	AS ADJUSTED FOR THE OFFERING AND THE ACQUISITION OF THE INITIAL PROPERTIES
	AS ADJUSTED FOR THE OFFERING AND THE ACQUISITION OF THE INITIAL PROPERTIES	AS ADJUSTED FOR THE OFFERING AND THE ACQUISITION OF THE INITIAL PROPERTIES
PRO FORMA STATEMENT OF INCOME DATA:		
Revenues	\$ 3,468,176	\$ 13,872,706
Interest expense	-- 234,248	936,993
Net income	-- 2,278,616	9,114,463

Net income per share	--	\$	0.38	\$	1.52

Shares outstanding	180,000		5,980,000		5,980,000

PRO FORMA BALANCE
SHEET DATA:

Real estate properties, net	--	\$	116,150,000

Total assets	\$	180	116,300,000

Bank Credit Facility	--		14,184,820

Total stockholders' equity	180		102,115,180

OTHER DATA:

Cash available for distribution (2)	--	\$	2,667,994	\$	10,671,971

Cash available for distribution per share (2)	--		0.45	\$	1.78

(1) The Company was incorporated on March 31, [Year].

(2) Cash available for distribution is net income plus depreciation, amortization and other non-cash items less accrued rental income. Distributions in excess of net income generally constitute a return of capital. Management considers cash available for distribution to be an informative measure of the performance of an equity REIT and consistent with measures used by analysts to evaluate equity REITs. Cash available for distribution does not represent cash generated from operating activities in accordance with generally accepted accounting principles, is not necessarily indicative of cash available to fund cash needs and should not be considered as an alternative to net income as an indicator of the Company's operating performance or as an alternative to cash flow as a measure of liquidity.

DISTRIBUTIONS TO STOCKHOLDERS

The Company intends to make quarterly distributions to stockholders of approximately 85% to 95% of its cash available for distribution. In any event, the Company intends to pay annual amounts at least sufficient to satisfy the annual distribution requirements imposed on REITs. In general, such REIT distribution requirements provide that at least 95% of the Company's REIT taxable income must be distributed annually to stockholders, which on a pro forma basis would

equal \$1.35 per share. See "Federal Income Tax Considerations--Taxation of the Company." The Company expects to distribute dividends in excess of 95% of its REIT taxable income. Payment of dividends, however, will be at the discretion of the Company's Board of Directors at all times and will depend upon various factors including the Company's financial condition, earnings, anticipated investments, and other relevant factors. Under certain circumstances, it may be necessary for the Company to borrow or liquidate investments to satisfy its REIT distribution requirements. See "Federal Income Tax Considerations" and "Management's Discussion and Analysis of Financial Condition and Results of Operations--Liquidity and Capital Resources."

On a pro forma basis, aggregate Base Rent under the Leases results in cash available for distribution of \$1.78 per Share after deducting interest and operating expenses. Such cash available for distribution does not give effect to any delay in the acquisition of or failure to acquire the Initial Properties, to any payments of Additional Rent, to the acquisition of any properties in addition to those identified in this Prospectus or the incurrence of indebtedness in connection therewith. No assurance can be given that the Initial Properties will perform as expected or that the anticipated cash available for distribution will be obtained. On a [Year] pro forma basis, approximately 11% to 21% of the distributions anticipated to be made by the Company represent return of capital for federal income tax purposes and, therefore, would not be subject to current federal income tax. Such nontaxable distributions would reduce a stockholder's tax basis in its Common Stock and any gain or loss recognized on the subsequent sale of such Shares or upon liquidation of the Company would be increased or reduced accordingly. Any distributions that exceed a stockholder's basis in its Common Stock would be treated as gain from the sale or exchange of such Common Stock for federal income tax purposes. See "Distributions to Stockholders" and "Pro Forma Financial Statements."

For each of the first six quarters in which dividends are paid by the Company, the Founding Stockholders have consented to contribute to the Company the after-tax portion of any dividends distributed to them for such quarter if (i) the annualized dividends paid in such quarter do not exceed \$1.70 per share (\$0.425 per share per quarter) or (ii) the aggregate dividends paid in such quarter on the outstanding shares exceed 95% of the cash available for distribution for the relevant quarterly period.

TAX STATUS OF THE COMPANY

The Company intends to qualify and to make an election to be taxed as a REIT under Section 856(c) of the Code, commencing with its taxable year ending December 31, [Year]. If the Company so qualifies and elects taxation as a REIT, the Company generally will not be subject to federal income tax to the extent that it distributes its REIT taxable income to stockholders. REITs are subject to a number of organizational and operational requirements. If the Company fails to qualify as a REIT in any taxable year, the Company will be subject to federal income tax (including any alternative minimum tax) on its taxable income at regular corporate rates. See "Risk Factors" and "Federal Income Tax Considerations" for a more detailed discussion of the consequences of the failure of the Company to qualify as a REIT. Even if the Company qualifies as a REIT, the Company may be subject to state and local taxes on its income and property and federal income and excise taxes on its undistributed income.

RISK FACTORS

An investment in the Common Stock involves various risks. There can be no assurance that the Company will achieve its investment objectives. In addition to general investment risks and those factors set forth elsewhere in this Prospectus, investors should consider the following factors before making a decision to purchase Shares.

LACK OF OPERATING HISTORY AND

INEXPERIENCE OF MANAGEMENT IN OPERATING A REIT

The Company has been recently organized and has no operating history. The Company will be self-administered and therefore will not have a third-party investment advisor. The Company's Board of Directors and executive officers will have overall responsibility for management of the Company. Although certain of the Company's officers and directors have extensive experience in the acquisition, development, financing and leasing of real properties and certain of the Company's directors have extensive experience in the operation of healthcare facilities and publicly-owned corporations, no officer has prior experience in the healthcare industry nor in operating a business in accordance with the Code requirements for maintaining qualification as a REIT. Failure to maintain REIT status would have an adverse effect on the Company's ability to make anticipated distributions to stockholders. There can be no assurance that the past experience of management will be appropriate to the business of the Company. See "Management."

LESS CASH AVAILABLE FOR DISTRIBUTION FROM FAILURE TO PURCHASE OR DELAY IN PURCHASING THE INITIAL PROPERTIES

The purchase of one or more of the Initial Properties may not be consummated or may be delayed for various reasons, such as the occurrence of significant casualty losses or, in the case of the South County Medical Center facility, any delays in construction. If the acquisition of any of the Initial Properties is not consummated prior to the closing date specified in the respective Purchase Agreements, the seller of such Initial Property may not be obligated thereafter to sell such Initial Property to the Company. The Company intends to close the purchase of the Initial Properties into escrow on or before the Effective Date of the Offering, and such Initial Properties will be released from escrow as soon as practical after the closing of the Offering, except for the South County Medical Center facility, which will be acquired as soon as practical after the completion of its construction and the issuance by the proper authority of a certificate of occupancy, which is expected to occur in May [Year]. As of April 15, [Year], leases had been signed for over 93% of the rentable space in the South County Medical Center. Pending identification and acquisition of alternative properties to purchase, should the consummation of the purchase of any of the Initial Properties not occur as and when planned, the funds intended for such acquisition will be invested in accordance with the Company's investment policies. The anticipated yield on such interim investments, if made, will be substantially less than the expected return on the Initial Properties and the other real estate investments that the Company will seek to make and less than the anticipated level of distributions to the Company's stockholders.

In addition, if the purchase of any of the Initial Properties does not occur, there can be no assurance that the terms of the Lease for any property acquired in substitution for such Initial Properties will be as advantageous to the Company as those pertaining to the property that was not acquired. If this occurs, there may be an adverse effect on the Company's ability to make the anticipated distributions to stockholders.

SPECIFIC RISKS RELATING TO HEALTHCARE FACILITIES

Lessees' Reliance on Government Reimbursement. A significant portion of the revenue of the Lessees and the Guarantors is derived from government reimbursement programs, such as Medicare and Medicaid. Although lease payments to the Company are not directly linked to the level of government reimbursement, to the extent that changes in these programs have a material adverse affect on the Lessees, such changes could have an impact on their ability to make lease payments. The Medicare program is highly regulated and subject to frequent and substantial changes. In recent years, fundamental changes in the Medicare program (including the implementation of a prospective payment

system ("PPS") in which facilities are reimbursed generally a flat amount based on a patient's diagnosis and not based on the facility's cost for inpatient services at medical surgical hospitals) have resulted in reduced levels of payment for a substantial portion of healthcare services. The Medicaid program is a federally-mandated, state-run program providing benefits to low income and other eligible persons and is funded through a combination of state and federal funding. The method of reimbursement under Medicaid varies from state to state, but is typically based on rates negotiated between the provider and the state, or is based on per diem or per diagnosis rates similar to Medicare. Moreover, healthcare facilities have experienced increasing pressures from private payors attempting to control healthcare costs that have reduced reimbursement to levels approaching that of government payors. See "Business--Government Regulation."

Considerable uncertainties surround the future determination of payment levels under government reimbursement programs. In addition, future budget reductions in government financed programs could significantly reduce payments made to Lessees and Guarantors, and there can be no assurance that future payment rates will be sufficient to cover cost increases in providing services to patients. Reductions in payments pursuant to government healthcare programs could have an adverse impact on a Lessee's or Guarantor's financial condition and, therefore, could adversely affect the ability of the Lessee or Guarantor to make rental payments.

Impact of Reduced Occupancy Rates in Hospitals Adjacent to Ancillary Hospital Facilities Being Acquired. Most of the hospitals adjacent to the ancillary hospital facilities being acquired are substantially less than fully occupied on an inpatient basis. Despite such occupancy rates, however, the Company believes that operating cash flow produced by such hospitals will adequately cover rental payments to the Company on a pro forma basis. See information regarding annual coverage ratios under the caption "Business--Initial Properties." If the inpatient occupancy rate at such a hospital were to deteriorate to a level at which operating cash flow would be insufficient to cover the rental payments to the Company on the particular ancillary hospital facility, the Company would have to rely upon the general credit of the Lessee or the related Guarantor.

Healthcare Reform. The healthcare industry is undergoing significant changes as third-party payors attempt to control the cost, utilization and delivery of healthcare services. In addition, President Clinton recently announced a comprehensive healthcare reform proposal which includes such elements as universal coverage and the acquisition of coverage through regional health alliances. Political and other cost-control initiatives regarding the cost and delivery of healthcare are also currently being considered, and reductions in payments to physicians or other changes in reimbursement for healthcare services by other third-party payors could materially adversely affect the financial condition of the tenants of some of the Initial Properties. Substantially all of the tenants of the Initial Properties are in the medical profession and the Company believes that such tenants are dependent on payment for their services by third-party payors. No assurance can be given whether or to what extent, if any, the President's healthcare proposals will be enacted into law, or what effect any such proposals or subsequent legislation, if any, or other changes regarding healthcare would have on the financial condition of the tenants of the Initial Properties and their ability to make lease payments or renew leases.

Proximity to Hospitals. Some of the Initial Properties are in close proximity to one or more hospitals. The relocation or closure of a hospital could make the Company's Initial Properties in such area less desirable to doctors affiliated with such hospital and affect the Lessee's ability to renew leases and attract new tenants.

Government Regulation of Healthcare Industry. The healthcare industry is highly regulated by federal, state and local law, state and local licensing requirements, facility inspections, reimbursement policies, regulations concerning capital and other expenditures, certification requirements and other laws, regulations and rules. The failure of any Lessee or sublessee to comply with such laws, requirements and regulations could affect the Lessee's ability to operate the Initial Property or Initial Properties which it leases from the Company.

Potential Operator Loss of License or Certification. Healthcare operators are subject to federal and state laws and regulations which govern financial and other arrangements between healthcare providers. These laws prohibit certain

direct and indirect payments or fee-splitting arrangements between healthcare providers that are designed to induce or encourage the referral of patients to, or the recommendation of, a particular provider for medical products and services. They also require compliance with a variety of safety, health and other requirements relating to the conditions of the licensed facility and quality of care provided. Possible sanctions for violation of these laws and regulations include loss of license or certification and the imposition of civil monetary and criminal penalties.

In certain circumstances, conviction of abusive or fraudulent behavior with respect to one facility may subject other facilities under common control or ownership to disqualification from participation in the Medicare and Medicaid programs.

Because this area of the law currently is subject to intense scrutiny, additional laws and regulations may be enacted which could require changes in certain operations of the Lessees and sublessees of the Company's Initial Properties. A Lessee's loss of license or Medicare/Medicaid certification could result in the Company having to obtain another Lessee for the affected Initial Property. No assurances can be given that the Company could contract with such a Lessee on a timely basis or on acceptable terms and a failure of the Company to do so could have an adverse effect on the Company's revenues.

Limitations on Transfers and Alternative Uses of Initial Properties. Transfers of operations of certain healthcare facilities are subject to regulatory approvals not required for transfers of other types of commercial operations and other types of real estate. In addition, certain of the Initial Properties are special purpose facilities that may not be easily adaptable to non-healthcare-related uses.

RISKS OF LEVERAGE AND DEFAULT

The Company may incur indebtedness and mortgage its properties in furtherance of its activities. The Company's present policy prohibits incurring debt (secured or unsecured) in excess of 50% of total capitalization. However, this limitation can be changed by the Board of Directors without stockholder approval. Moreover, there are no Bylaws or other provisions which require such limitation.

The Company may borrow funds and mortgage its properties in connection with the acquisition of additional properties and for purposes of funding other capital and operating expenditures, including expenditures relating to the renovation, modification or expansion of Initial Properties. In addition, the Company may be required to borrow money and/or mortgage its properties to fund any cash shortfall in order to meet its cash distribution requirements if 95% of the Company's REIT taxable income exceeds its cash available for distribution. See "Investment and Other Policies." The Company expects that in the definitive agreements for the Bank Credit Facility it will be prohibited from declaring or paying dividends (other than as the Company determines is necessary to maintain its status as a REIT for federal income tax purposes) if at the time of such action an event of default under the Bank Credit Facility has occurred and is continuing or would exist immediately after giving effect to such action. See "Management's Discussion and Analysis of Financial Condition and Results of Operations--Liquidity and Capital Resources."

Any borrowings, including borrowings under the Bank Credit Facility, as well as the resulting interest expense and principal repayments therefrom, could negatively affect the Company's cash available for distribution. If the Company defaults on any loan secured by mortgages the Company may place on any of its properties, the lenders may foreclose on such property and the Company could lose its investment therein. The degree of risk associated with borrowings will increase if the Company borrows on terms involving a variable interest rate or a "balloon" payment at maturity.

BOARD MAY CHANGE INVESTMENT POLICIES

The Company's Board of Directors may change the investment policies of the Company without stockholder approval. Such policy changes may have adverse consequences on the Company.

DILUTION

The purchasers of the Shares offered hereby will experience immediate dilution of \$1.924 per share in the net tangible book value (\$1.846 per share assuming full exercise of the Underwriters' over-allotment option).

REAL ESTATE INVESTMENT RISKS

Illiquidity of Real Estate Investments. Investments in the Initial Properties or properties in which the Company may invest in the future are subject to risks typically associated with investments in real estate. Equity investments in real estate are relatively illiquid, and, therefore, the ability of the Company to vary its portfolio in response to changed conditions will be limited.

Lack of Industry Diversification. While the Company is authorized to invest in various types of income-producing real estate, its current strategy is to acquire and hold, for long-term investment, healthcare-related properties. Consequently, the Company currently has chosen not to include assets selected to reduce risks associated with an investment in real estate in the healthcare industry, and will be subject to the risks associated with investments in a single industry.

Reliance on Lessees and Guarantors. The success of the Company's investments in the Initial Properties will be dependent on the success of the business of the Lessees and on the Guarantors with respect to each Lease. The operating results of the Initial Properties underlying the Company's investments will depend upon various factors over which the Company will have no control and which may affect the present or future cash flows of the Company. Those factors include general economic conditions, changes in the supply of, or demand for, competing healthcare facilities, changes in occupancy levels, the ability of the Lessees through rate increases or otherwise to absorb increases in operating expenses and changes in government regulations and zoning laws.

No assurance can be given that a Lessee will exercise any option to renew its Lease upon the expiration of the initial term. In such an instance, the Company may not be able to locate a qualified purchaser or a qualified replacement tenant, as a result of which it would lose a source of revenue while remaining responsible for the payment of its obligations.

Environmental Risks and Cost of Remediation. Under various federal, state and local environmental laws, ordinances and regulations, an owner of real property (such as the Company will be) may be liable for the costs of removal or remediation of certain hazardous or toxic substances at, under or disposed of in connection with such property, as well as certain other potential costs relating to hazardous or toxic substances (including government fines and injuries to persons and adjacent property). Such laws often impose liability without regard to whether the owner knew of, or was responsible for, the presence or disposal of such substances and may be imposed on the owner in connection with the activities of an operator of the property. The cost of any required remediation, removal, fines or personal or property damages and the owner's liability therefor could exceed the value of the property and/or the aggregate assets of the owner. In addition, the presence of such substances, or the failure to properly dispose of or remediate such substances, may adversely affect the owner's ability to sell or rent such property or to borrow using such property as collateral, which in turn would reduce the Company's revenues and ability to make distributions.

Although the Purchase Agreements and the Leases require the seller or Lessee, as the case may be, to indemnify the Company for certain environmental liabilities, the scope of such obligations may be limited and there can be no assurances that any such seller or Lessee will be able to fulfill its indemnification obligations. Nor can there be any

assurance that those indemnities will be sufficient to cover any liability for any or all of the hazardous substances that may exist at the Initial Properties. See "Business--Environmental Matters."

Development Projects. The Company's investment policies permit it to enter into build-to-suit type agreements that by their terms require conversion to leases upon the completion of the development of the facility. The Initial Properties do not include any development projects. Such activities, if undertaken, might subject the Company to risks related to delays in construction, cost of materials, financing availability, volatility in interest rates, labor availability and other property development uncertainties. Development projects are generally considered to involve greater risks than the sale and lease-back of operating properties. See "Investment and Other Policies--Investment Policy." Although the Company will attempt to minimize the risks associated with development activities, including obtaining additional forms of security and collateral beyond that provided by the Leases, no assurances can be given that such additional security will be effective.

CONSEQUENCES OF FAILURE TO QUALIFY AS A REIT

The Company intends at all times to elect and operate so as to qualify as a REIT. If the Company qualifies as a REIT, it will generally be allowed a deduction for dividends paid to its stockholders in computing its federal taxable income. This treatment substantially eliminates the "double taxation" of corporate earnings. If in any taxable year the Company did not qualify as a REIT, it would be taxed as a corporation and distributions to stockholders would not be deductible by the Company in computing taxable income. In addition, unless the Company were entitled to relief under certain statutory provisions, the Company would also be disqualified from electing treatment as a REIT for the four succeeding years following the year in which qualification was lost. Failure to so qualify, even in one taxable year, could cause the Company to dramatically reduce its dividends.

To qualify as a REIT, the Company will be required, among other things, to distribute at least 95% of its REIT taxable income to stockholders each year. In order to maintain status as a REIT, the Company must satisfy certain requirements on a continuing basis, which requirements may substantially affect day-to-day decision making by the Company. No assurance can be given that the Company will at all times satisfy these tests. Possible timing differences between receipt of income and payment of expenses, and the inclusion and deduction of such amounts in determining taxable income, could require the Company to reduce its dividends below the level necessary to maintain its qualification as a REIT, which would adversely affect the Company's ability to maintain REIT status. See "Federal Income Tax Considerations--Taxation of the Company."

Even if the Company qualifies as a REIT, certain transactions or other events could result in the imposition of federal tax at rates ranging from four percent to 100% on certain types of the Company's income or gains.

RESTRICTIONS ON TRANSFER AND LIMITATIONS ON OWNERSHIP OF CAPITAL STOCK

For the Company to qualify as a REIT in any taxable year (other than the first year for which the Company elects to be taxed as a REIT), no more than 50% in value of its outstanding capital stock may be owned directly, or indirectly by attribution, by five or fewer individuals (as defined in the Code to include certain entities) at any time during the second half of the Company's taxable year. In addition (other than during the first year for which the Company elects to be treated as a REIT), the outstanding stock must be owned by 100 or more persons during at least 335 days of a taxable year of 12 months or during a proportional part of a shorter taxable year. See "Federal Income Tax Considerations."

Because of the stock ownership requirements applicable to REITs, the Company's Articles of Incorporation contain restrictions on transfer of its stock. Such restrictions authorize the Company to refuse to transfer stock to any person, if

as a result of such transfer such person or entity would beneficially own stock in excess of 9.8% in value of the outstanding stock of the Company ("Excess Shares"). Such provisions may inhibit market activity and the resulting opportunity for stockholders to realize a premium for their Common Stock that might otherwise exist if a stockholder were attempting to assemble a block of stock in excess of 9.8% in value of the outstanding stock. Also, there can be no assurance that such provisions will in fact enable the Company to meet the relevant REIT stock ownership requirements.

COMPETITION

The Company will be competing for additional investments with, among other investors, healthcare providers, other healthcare related REITs, real estate partnerships and financial institutions. Certain of these investors may have greater capital resources than the Company.

All of the Initial Properties operate in a competitive environment, and patients and referral sources, including physicians, may change their preferences for a healthcare facility from time to time. The Initial Properties compete with other similar facilities in their various locations for the support of the medical community. Additionally, other healthcare facilities in which the Company may invest will likely compete with similar facilities for the support of the medical community and the general public. Some significant competitive factors for the placing of physicians in ancillary hospital facilities and patients in medical facilities include reputation, physical appearance of the facilities, services offered, quality of care, family preferences, physician services, location and price. See "Business."

BUSINESS COMBINATIONS; ANTI-TAKEOVER

EFFECTS OF CERTAIN ARTICLES OF INCORPORATION AND BYLAW PROVISIONS

The Maryland law regarding Business Combinations (as defined under Maryland law) require that certain transactions be approved by the holders of 80% of the outstanding voting shares of the Company. See "Description of Securities."

In addition, the Company's Articles of Incorporation and Bylaws contain certain provisions that could have the effect of making it more difficult for a third party to acquire, or discouraging a third party from attempting to acquire, control of the Company. Such provisions could limit the price that certain investors might be willing to pay in the future for the Shares. These provisions include blank check preferred stock, super-majority voting provisions and the application of Maryland corporate law provisions on Business Combinations and Control Shares. See "Certain Provisions of Maryland Law and the Company's Articles of Incorporation and Bylaws."

The Company's Articles of Incorporation allow the Board of Directors to classify or reclassify any unissued shares of the Company's capital stock and to determine the terms of the preferred stock, which may be issued by the Company without stockholder approval. If issued, preferred stock would have preference over the Common Stock with respect to dividends, liquidation distributions and other matters as determined by the Board of Directors. The ability of the Company to issue preferred stock in such manner could enable the Board of Directors to prevent changes in management and control of the Company.

RISKS FOR IRAs AND INVESTORS SUBJECT TO ERISA

Fiduciaries of individual retirement accounts or other pension, profit sharing or employee benefit plans subject to the

Employee Retirement Income Security Act of 1974, as amended ("ERISA"), should consider whether an investment in the Shares satisfies the diversification requirements of ERISA and whether the investment is prudent in light of the possible limitations on the marketability of the Shares. See "Employee Plans and Individual Retirement Accounts." In addition, some or all of the distributions by a REIT to a tax-exempt employee's pension fund that owns more than 10 percent in value of such REIT may be treated as unrelated business taxable income ("UBTI") under the Code if the REIT constitutes a "pension-held REIT" and if other conditions are met. The Company does not expect that it will be a "pension-held REIT" for federal income tax purposes. See "Federal Income Tax Considerations--Taxation of Domestic Stockholders--Taxation of Tax Exempt Stockholders."

DEPENDENCE ON KEY PERSONNEL

The Company is dependent on the efforts of its executive officers, Messrs. McDaniel, Johnson and Cuzzins. The loss of the services of any one of these individuals could have a material adverse effect on the performance of the Company.

CONFLICTS OF INTEREST

A conflict of interest exists between the Company and WELLHEALTH with respect to the sale of the WELLHEALTH Initial Properties to the Company and the lease of the WELLHEALTH Initial Properties by the Company to WELLHEALTH and Subsidiaries of WELLHEALTH. The acquisition price of each of the WELLHEALTH Initial Properties has been determined based upon rentals, operating history, age, location and condition of the property and other relevant factors, including appraisals. The appraised value of the WELLHEALTH Initial Properties is approximately \$54,070,000. The Company will pay \$50,920,000 in cash to WELLHEALTH and its Subsidiaries for the WELLHEALTH Initial Properties. See "Business--Appraisals."

Two of the nine directors of the Company are executive officers and directors of WELLHEALTH. Conflicts of interest exist with respect to their duties to Company stockholders and WELLHEALTH stockholders. There may from time to time be disputes between the Company as landlord and WELLHEALTH and Subsidiaries of WELLHEALTH as tenants with respect to maintenance, repairs, defaults, and similar items. It is also possible that the Company will engage in other transactions with WELLHEALTH or its Subsidiaries in addition to acquiring and leasing the WELLHEALTH Initial Properties, such as purchasing additional properties from WELLHEALTH or its Subsidiaries and leasing back all or a portion of such additional properties. As a result, conflicts of interest between the Company and WELLHEALTH may arise under certain circumstances.

Two of the nine directors of the Company are also directors of Integrated Health and Health Surgery. A conflict of interest also exists between the Company and Total Health and Health Surgery with respect to the sale to the Company of certain of the Initial Properties owned by Total Health and Health Surgery or their Subsidiaries, and the lease of those Initial Properties from the Company to Total Health and Health Surgery or their Subsidiaries. The acquisition prices of each of the Initial Properties acquired from Total Health and Health Surgery or their Subsidiaries, have been determined based upon rentals, operating history, age, location and condition of the property and other relevant factors, including appraisals. The appraised values of the Initial Properties acquired from Total Health and Surgical Health or their Subsidiaries, are \$18,300,000 and \$9,212,000, respectively. The Company will pay \$18,275,000 and \$9,005,000 in cash for the Initial Properties acquired from Total Health and Health Surgery or their Subsidiaries, respectively.

The Company's Bylaws require that any transactions (including a property acquisition) between the Company and any of its officers and directors or their affiliates be approved by a majority of the directors not interested in such transaction, including a majority of the Disinterested Directors and such directors must conclude that the terms of the transaction are fair and reasonable and are no less favorable than can be obtained from unaffiliated third parties.

APPRAISALS

While all of the Initial Properties have been appraised and are being purchased by the Company at purchase prices not more than the appraised value, appraisals are only estimates of value and should not be relied upon as a precise measure of realizable value. Investors should exercise caution in evaluating appraisal results. See "Business--Appraisals."

ABSENCE OF PRIOR PUBLIC MARKET FOR COMMON STOCK; EFFECT OF INTEREST RATES

Prior to the Offering, there has been no public market for the Company's Common Stock. There can be no assurance that an active trading market will develop or be sustained following the Offering or that purchasers of the Common Stock in the Offering will be able to liquidate their investments or to resell such Common Stock at or above the initial offering price. The initial public offering price will be determined through negotiations between the Company and the Representatives of the Underwriters and may not be indicative of the market price of the Common Stock after the Offering. See "Underwriting" for a description of the factors to be considered by the Company and the Underwriters in setting the initial public offering price of the Common Stock. The market value of the Common Stock could be substantially influenced by general market conditions. In addition, since the market price of common stock of a publicly-traded REIT such as the Company is determined in part by the attractiveness of the yield on such common stock in relation to prevailing interest rates, an increase in interest rates could adversely affect the market price of the Common Stock. Moreover, numerous other factors, such as government regulatory action and tax laws, could have a significant impact on the future market price of the Common Stock.

USE OF PROCEEDS

At the mid point of the filing range, the net proceeds to the Company from the sale of the Shares offered hereby are estimated to be approximately \$102,115,000 after deduction of estimated underwriting commissions and Offering expenses. The purchase price of the Initial Properties, including net estimated acquisition expenses of approximately \$1,050,000, will be approximately \$116,150,000. All of the net proceeds will be applied against the purchase price of the Initial Properties. The balance of the purchase price required for the Initial Properties will be covered by borrowings of approximately \$14,185,000 under the Bank Credit Facility. The Company intends to close all of the Initial Properties into escrow on or before the Effective Date of the Offering, and such Initial Properties will be released from escrow as soon as practical after the closing of the Offering, except for the South County Medical Center facility which will be acquired as soon as practical after the completion of its construction and the issuance by the proper authority of a certificate of occupancy which is expected to occur in May [Year]. As of April 15, [Year], leases had been signed for over 93% of the rentable space in the South County Medical Center. See "Business--Initial Properties."

Any net proceeds from the exercise of the Underwriters' over-allotment option will be invested in short-term investment grade instruments, interest-bearing bank accounts or certificates of deposit, money market securities, U.S. government securities and mortgage-backed securities guaranteed by U.S. federal agencies, mortgage loans, mortgage participation and certain other similar investments, pending their use. Such funds will be used, along with funds available from the Bank Credit Facility, to acquire additional properties consistent with the Company's investment policies.

The Company has obtained a written commitment from AmTrust for a \$30 million Bank Credit Facility to finance a portion of the purchase price for the Initial Properties, the acquisition of additional properties and for general corporate purposes. The Bank Credit Facility will contain customary financial covenants. See "Management's Discussion and Analysis of Financial Condition and Results of Operations--Liquidity and Capital Resources."

The Company has agreed to reimburse, upon closing of the Offering, the actual costs incurred by the Partnership on behalf of the Company from the proceeds of the Offering. These costs relate to organizing the Company, negotiating the acquisitions of the Initial Properties, performing due diligence related to the Initial Properties, performing corporate work in contemplation of the Offering, preparing the Registration Statement and providing interim financing for and closing the acquisition of the Initial Properties, employee compensation, travel and overhead. The Company estimates that these reimbursements will be approximately \$1,475,000.

DISTRIBUTIONS TO STOCKHOLDERS

The Company intends to make quarterly distributions to stockholders of approximately 85% to 95% of its cash available for distribution. In any event, the Company expects to pay an amount at least sufficient to satisfy the annual distribution requirements of a REIT. In general, such requirements provide that at least 95% of the Company's REIT taxable income must be distributed annually, which distribution, on a pro forma basis, would equal \$1.35 per share. See "Federal Income Tax Considerations--Taxation of the Company." The Company expects to distribute dividends in excess of 95% of its REIT taxable income. Payment of dividends, however, will be at the discretion of the Company's Board of Directors at all times and will depend upon various factors including the Company's financial condition, earnings, anticipated investments, and other relevant factors. Under certain circumstances, it may be necessary for the Company to borrow or liquidate investments to satisfy its distribution requirements as a REIT. See "Federal Income Tax Considerations--Taxation of the Company."

On a pro forma basis the aggregate Base Rent payable under the Leases, net of interest and operating expenses, will result in cash available for distribution of \$1.78 per Share. Such cash available for distribution does not give effect to any delay in the acquisition of or failure to acquire the Initial Properties, to any payments of Additional Rent, to the acquisition of any properties in addition to those identified in this Prospectus or the incurrence of indebtedness in connection therewith, or to the realization of proceeds on the sale or disposition of Initial Properties. No assurance can be given that the properties will perform as expected or the anticipated cash available for distribution will be obtained. On a [Year] pro forma basis, approximately 11% to 21% of the distributions to be made by the Company would represent return of capital for federal income tax purposes and, therefore, would not be subject to current federal income tax. Such nontaxable distributions would reduce a stockholder's tax basis in its Common Stock, and any gain or loss recognized on the sale of such Common Stock or upon liquidation of the Company would be increased or reduced accordingly. Any distributions that exceed a stockholder's basis in its Common Stock would be treated as gain from the sale or exchange of such Common Stock for federal income tax purposes. See "Pro Forma Financial Statements."

Cash available for distribution is expected to exceed the Company's taxable income due to non-cash deductions taken by the Company for income tax purposes, primarily depreciation. Accordingly, certain distributions to stockholders may constitute a return of capital which would not be subject to federal income tax, although such distributions would lower the stockholder's basis in its Common Stock of the Company, as described above. See "Federal Income Tax Considerations."

For each of the first six quarters in which dividends are paid by the Company, the Founders have consented to contribute to the Company the after-tax portion of any dividends distributed to them for such quarter if (i) the annualized dividends paid in such quarter does not exceed \$1.70 per share (\$0.425 per share per quarter) or (ii) the aggregate dividends paid in such quarter on the outstanding shares exceeds 95% of the cash available for distribution for the relevant quarterly period.

DILUTION

As of March 31, [Year], the Founding Stockholders (M. Donal Rushmore, WELLHEALTH, W. Gill McDaniel, and

Dee Martin Michaels) owned 180,000 shares of Common Stock. The net tangible book value of the Common Stock immediately subsequent to this Offering (based on the mid-point of the filing range of \$19.00 per share, after deduction of estimated underwriting discounts and Offering expenses) will be \$17.076 per share, an increase of \$17.075 from the \$.001 net tangible book value per share prior to the Offering (or a net tangible book value per share of \$17.154 and a per share increase of \$17.153, respectively, assuming full exercise of the Underwriters' over allotment option). A \$1.924 per share dilution will be experienced by the purchasers of shares in this Offering (or \$1.846 per share dilution assuming full exercise of the Underwriters' over-allotment option).

CAPITALIZATION

The following sets forth the historical capitalization of the Company as of March 31, [Year], and as adjusted to give effect to the sale of the Shares offered hereby (assuming an initial public offering price at the mid-point of the filing range and after deducting underwriters' discounts and Offering expenses), and the acquisitions of the Initial Properties:

AT MARCH 31, [Year]		AS ADJUSTED FOR THE OFFER- ING AND ACQUIS- ITION OF THE INI- TIAL PROPERTIES	
Indebtedness:			
Bank Credit Facility (1)	\$	----	\$ 14,184,820
Total indebtedness--		----	14,184,820
Stockholders' equity:			
Preferred stock, \$.001 par value; 10,000,000 shares authorized; none outstanding		----	----
Common Stock, \$.001 par value; 50,000,000 shares au- thorized; 180,000 issued and outstanding; 5,980,000 is- sued and outstanding, as adjusted (2)		180	5,980
Additional paid-in capital		----	102,109,200
Total stockholders' equity		180	102,115,180
Total capitalization	\$	180	\$ 116,300,000

(1) For a description of the Bank Credit Facility, see "Management's Discussion and Analysis of Financial Condition and Results of Operations--Liquidity and Capital Resources."

(2) Does not include up to 870,000 shares of Common Stock, if any, that may be purchased by the Underwriters to cover over-allotments, or 418,600 shares of Common Stock reserved for issuance pursuant to

the Company's [Year] Stock Incentive Plan. See "Management--[Year] Stock Incentive Plan."

SELECTED HISTORICAL AND PRO FORMA FINANCIAL INFORMATION

The following table sets forth financial information for the Company which is derived from the Balance Sheet and the Pro Forma Financial Statements included elsewhere in this Prospectus. The adjustments for the Offering assume an initial public offering price at the mid-point of the filing range and that the Underwriters' over-allotment option is not exercised.

Pro forma operating data is presented for the year ended December 31, [Year], and for the three months ended March 31, [Year], as if the Offering and the transfers of the Initial Properties to the Company had occurred, and as if the respective Leases had been in effect, on _____ [month] _____ [day], _____ [year]. Pro forma balance sheet data is presented as of _____ [month] _____ [day], _____ [year], as if the Offering and the transfers of the Initial Properties to the Company had occurred, and as if the respective Leases had been in effect, at that date. See "Pro Forma Financial Statements." The pro forma information does not purport to represent what the actual financial position or results of operations of the Company would have been as of or for the periods indicated, nor does it purport to represent any future financial position or results of operations for any future period.

	AT OR FOR THE THREE MONTHS ENDED MARCH 31, [Year]		YEAR ENDED DECEMBER 31, [Year]
	HISTORICAL (1)	AS ADJUSTED FOR THE OFFER- ING AND THE ACQUISITION OF THE INITIAL PROPERTIES	AS ADJUSTED FOR THE OFFERING AND THE AC- QUISITION OF THE INITIAL PROPERTIES
PRO FORMA STATEMENT OF INCOME DATA			
Revenues	--	\$ 3,468,176	\$ 13,872,706
Interest expense	--	234,248	936,994
Net income	--	2,278,616	9,114,463
Net income per share	--	0.38	\$ 1.52
Shares outstanding	180,000	5,980,000	5,980,000

**PRO FORMA BALANCE
SHEET DATA:**

Real estate properties, net	--	\$	116,150,000	
Total assets	\$	180	116,300,000	
Bank Credit Facility	--		14,184,820	
Total stockholders' equity	180			102,115,180

OTHER DATA:

Cash available for dis- tribution (2)	--	\$	2,667,994	\$	10,671,971
Cash available for dis- tribution per share (2)	--	\$	0.45	\$	1.78

(1) The Company was incorporated on March 31, [Year].

(2) Cash available for distribution is net income plus depreciation, amortization and other non-cash items less accrued rental income. Distributions in excess of net income generally constitute a return of capital. Management considers cash available for distribution to be an informative measure of the performance of an equity REIT and consistent with measures used by analysts to evaluate equity REITs. Cash available for distribution does not represent cash generated from operating activities in accordance with generally accepted accounting principles, is not necessarily indicative of cash available to fund cash needs and should not be considered as an alternative to net income as an indicator of the Company's operating performance or as an alternative to cash flow as a measure of liquidity.

Significant assumptions to the Pro Forma Financial Information are set forth below. This information should be read in conjunction with the Notes to the Company's Pro Forma Financial Statements beginning at page F-10.

--Total rental income from the Initial Properties for the year ended December 31, [Year] is assumed to be \$13,872,706, which represents Base Rent of \$12,728,964 and accrued rent of \$1,143,742 from the Initial Properties under the terms of the Leases. Total rental income from the Initial Properties for the three months ended March 31, [Year] is assumed to be \$3,468,176, which represents Base Rent of \$3,182,241 and accrued rent of \$285,935 from the Initial Properties under

the terms of the Leases. Generally accepted accounting principles require that scheduled rent increases be recognized on a straight-line basis over the term of the lease. Each Lease is a Triple Net Lease and the Lessee is responsible thereunder, in addition to the rent, for all operating expenses, taxes, assessments, ground rents, water, sewer or other rents and charges, excises, tax levies, fees and all other governmental charges, utility charges and insurance premiums.

--Depreciation of buildings and land improvements is calculated using the straight-line method and useful remaining lives of approximately 40 years and 20 years, respectively. Amortization of organization costs is calculated using the straight-line method over a five-year period. The Bank Credit Facility financing commitment fee is amortized using the straight-line method over the 24-month life of the Bank Credit Facility.

--Expected first year operating costs of \$1,200,000 (\$300,000 for three months) consist of compensation and related benefits, legal and accounting, travel, rent and other operating costs. Annual interest expense is calculated at a rate of 6.1875% of the outstanding balance plus 0.375% of the unused portion of the Bank Credit Facility.

--Issuance of 5,800,000 shares of Common Stock for \$110,200,000 at \$19.00 per share, less underwriting discounts and commissions of \$7,685,000.

--Cost of the Initial Properties of \$115,100,000.

--Payment to the Partnership and its affiliates for reimbursement of actual costs incurred related to providing interim financing (\$375,000), negotiating acquisition of the Initial Properties (\$675,000), organizing the Company (\$25,000), and preparing the Offering (\$400,000).

--Borrowings of \$14,184,820 under the Bank Credit Facility. The Company has received a written commitment from AmTrust in the amount of \$30 million to finance, in part, the acquisition of the Initial Properties, the acquisition of additional properties and for other general corporate purposes.

MANAGEMENT'S DISCUSSION AND ANALYSIS OF FINANCIAL CONDITION AND RESULTS OF OPERATIONS

OVERVIEW

The Company was incorporated in Maryland on March 31, [Year], and intends to make an election and qualify under the Code as a REIT commencing with its taxable year ending December 31, [Year]. Substantially all of the Company's revenues are expected to be derived from: (i) Base and Additional Rents received under Triple Net Leases of healthcare related real property facilities; (ii) fees received in connection with property acquisitions and leasing transactions; (iii) interest earned from the temporary investment of funds in short-term instruments; and (iv) property dispositions effected from time to time in accordance with requirements for maintaining status as a REIT. With respect to Leases for the Initial Properties, Base Rent is the minimum annual rental payment set forth in such Leases. All of such Leases also provide for Additional Rent commencing after the first year based on either a set percentage increase or on 67% to 100% of the percentage increase in the applicable consumer price index, with annual increases generally limited to a maximum of 5%.

The Company will incur operating and administrative expenses including, principally, compensation expense for its executive officers and other employees, office rental and related occupancy costs and various expenses incurred in the process of acquiring additional properties. The Company will be self-administered and managed by its executive officers and staff, and will not engage a separate advisor or pay an advisory fee for administrative or investment services, although the Company will engage legal, accounting, tax and financial advisors from time to time.

The Company also expects to leverage its portfolio of real estate equity investments and will incur long and short-term indebtedness, and related interest expense, from time to time.

The Company intends to declare and pay dividends to its stockholders in amounts not less than the amounts required to maintain REIT status under the Code and, in general, in amounts exceeding taxable income. The Company's ability to pay dividends will depend upon its cash available for distribution.

RESULTS OF OPERATIONS

The Company has had no operations prior to March 31, [Year], (the date of its incorporation) through the date of this Prospectus. The Company's future results of operations will depend upon the acquisition of the Initial Properties and other properties and the terms of any subsequent investments the Company may make.

Management believes that inflation should not have a materially adverse effect on the Company.

PRO FORMA FINANCIAL INFORMATION

For The Year Ended December 31, [Year]

On a pro forma basis, after giving effect to the Offering and the acquisition of the Initial Properties, revenues would have been \$13,872,706 and net income would have been \$9,114,463 or \$1.52 per share for the year ended December 31, [Year]. Depreciation, amortization and other non-cash expenses would have been \$2,701,250, accrued rent would have been \$1,143,742 and cash available for distribution would have been \$10,671,971 or \$1.78 per Share.

For The Three Months Ended March 31, [Year]

On a pro forma basis, after giving effect to the Offering and the acquisition of the Initial Properties, revenues would have been \$3,468,176 and net income would have been \$2,278,616 or \$0.38 per share for the three months ended March 31, [Year]. Depreciation, amortization and other non-cash expenses would have been \$675,313, accrued rent would have been \$285,935 and cash available for distribution would have been \$2,667,994 or \$0.45 per share.

LIQUIDITY AND CAPITAL RESOURCES

Management believes that the net proceeds of this Offering along with the Bank Credit Facility will be sufficient to consummate the purchase of the Initial Properties and to reimburse the Partnership for expenses related to organizing the Company, negotiating the acquisition of the Initial Properties, performing due diligence investigation related to the Initial Properties, performing corporate work in contemplation of the Offering, preparing the Registration Statement and providing interim financing for and closing the acquisition of the Initial Properties. Management believes the Company will have adequate remaining credit under the Bank Credit Facility to meet its liquidity needs. See "Business--Initial Properties," "Investment and Other Policies."

The Company may, under certain circumstances, borrow additional amounts in connection with the renovation or expansion of its Initial Properties, the acquisition of additional properties or, as necessary, to meet certain distribution requirements imposed on REITs under the Code. See "Investment and Other Policies." The Company may raise additional capital by issuing, in public or private transactions, equity or debt securities, but the availability and terms of any such issuance will depend upon market and other conditions. There can be no assurance that such additional

financing or capital will be available on terms acceptable to the Company.

Under the terms of the Leases, the Lessees are responsible for all operating expenses and taxes, including property and casualty insurance. See "Business--Initial Properties" and "Business--The Leases." As a result of these arrangements, the Company does not believe it will be responsible for any major expenses in connection with the Initial Properties during the terms of the respective Leases. The Company anticipates entering into similar leases with respect to additional properties. After the terms of the respective Leases, or in the event a Lessee is unable to meet its obligations, the Company anticipates that any expenditures it might become responsible for in maintaining the Initial Properties will be funded by cash from operations and, in the case of major expenditures, possibly by borrowings. To the extent that unanticipated expenditures or significant borrowings are required, the Company's cash available for distribution and liquidity may be adversely affected.

The Company has obtained a written commitment from AmTrust for a \$30 million Bank Credit Facility to finance a portion of the purchase price for the Initial Properties, the acquisition of additional properties and for other general corporate purposes. See "Use of Proceeds." Interest on borrowings under the Bank Credit Facility will be paid at a rate chosen by the Company from either the base rate, which is the higher of (i) the Federal Funds Rate plus 1/2 of 1%, or (ii) the AmTrust prime lending rate, or LIBOR plus 1.75%. In addition, the Company will pay .375% per annum on the unused portion of funds available for borrowings under the Bank Credit Facility. The Company will pay a commitment fee of one-quarter of 1% of the committed amount at the closing of the Bank Credit Facility. The Bank Credit Facility will be available until the second anniversary of the closing of the facility. The Bank Credit Facility will be unsecured and will contain certain representations, warranties and financial and other covenants customary in such loan agreements. The Company may enter into interest rate swaps in order to mitigate the effect of a rising interest rate environment on the cost of the Bank Credit Facility.

Other than to purchase the Initial Properties, the Company has no commitments or understandings with respect to capital expenditures. There can be no assurance that the Company will be able to purchase or lease additional properties or to make mortgage loans to others on suitable terms.

BUSINESS

The Company was organized to invest, either directly or through wholly-owned subsidiaries, in healthcare related properties located throughout the United States. The Company has signed letters of intent to purchase the 20 Initial Properties located in 10 states. The Initial Properties will be leased to 14 Lessees, which are Subsidiaries of WELLHEALTH, Total Health, Oregon, Quorum and Health Surgery, pursuant to long-term, Triple Net Leases that will be guaranteed by the respective parent companies. The Initial Properties consist of 11 ancillary hospital facilities, one research facility, one long-term care facility, one sub-acute care facility, three ambulatory surgery centers and three outpatient rehabilitation facilities.

INITIAL PROPERTIES

The following table sets forth certain information regarding the Initial Properties.

GUARANTOR/INITIAL PROPERTY NAME	INITIAL INITIAL PROP- LEASE TYPE	PURCHASE PRICE (2)	PERCENT- AGE OF PORTFOLIO (3)	ANNUAL BASE RENT	ANNUAL CONTRI BUTION
	(1)				

WELLHEALTH

American Sports Medicine Institute	RF 15	\$ 3,200,000	2.8%	\$ 359,919
Birmingham Medical Building I	AHF 15	4,700,000	4.1	528,664
Birmingham Medical Building II	AHF 15	9,600,000	8.3	1,079,760
One-7000 Building	AHF 15	13,250,000	11.5	1,490,664
Larkin Medical Building	AHF 15	2,250,000	1.9	253,093
Richmond Medical Building I	AHF 15	2,100,000	1.8	236,237
Richmond Medical Building II	AHF 15	10,000,000	8.7	1,125,137
Little Rock	ORF 15	2,060,000	1.8	231,723
Coral Gables	ORF 15	2,300,000	2.0	258,704
Virginia Beach	ORF 15	1,460,000	1.3	164,300(5)
Oregon		50,920,000	44.2	5,728,201
Midway Medical Plaza	AHF 15	20,400,000 20,400,000	17.7 17.7	2,142,223 2,142,223
Total Health Mountain View_____	LTCF 10	9,775,000	8.5	1,060,340
Gravois_____ 	SACF 10	8,500,000	7.4	922,287
		_____	_____	_____
		_____	_____	_____
		—		—
		18,275,000	15.9	1,982,627
QUORUM				
Goodyear Clinic_____	AHF 10	1,607,160	1.4	180,805
Hamiter Building	AHF 10	4,382,520	3.8	493,034

Gadsden Medical Building II	AHF 10	5,810,320	5.0	653,661	
Desert Springs	AHF 10	4,700,000	4.1	528,750	
		16,500,000	14.3	1,856,250	18.31x
Health Surgery					
South County Medical Center(6)	ASF 15	7,125,000 (7)	6.2	801,563	N/A (8)
Northlake	ASF 13	1,000,000	0.9	112,500	N/A (8)
North Shore	ASF 15	880,000	0.8	105,600 (5)	6.86x
		9,005,000	7.9	1,019,663	N/A
TOTAL		\$ 115,100,000	100.0%	\$ 12,728,964	

(1) RF means research facility, AHF means ancillary hospital facility, ORF means outpatient rehabilitation facility, LTCF means long-term care facility, SACF means sub-acute care facility and ASF means ambulatory surgery facility.

(2) Includes the purchase price for land, improvements, intangibles and fixtures but does not include estimated net capitalized acquisition costs, aggregating approximately \$1.05 million.

(3) Based upon purchase price.

(4) Annual coverage is calculated as earnings before depreciation, amortization, taxes, interest on debt to be repaid and certain non-cash intercompany charges of the Lessee divided by the Base Rent. The coverages are derived from the financial information for the most recent fiscal year of the Lessees provided to the Company by the Guarantors. The Company has made no in-

dependent investigation of this information and makes no representation about its accuracy.

(5) Excludes ground rent, which will be paid by the applicable Lessee as sublessee under the land lease.

(6) Purchase is subject to completion of construction and the issuance of a certificate of occupancy, which is expected to occur in May [Year]. As of April 15, [Year], leases had been signed for over 93% of the rentable space.

(7) The purchase price will equal the actual cost of construction plus \$125,000 with a maximum of \$7,325,000. The Company currently estimates a purchase price of \$7,125,000.

(8) Coverage ratios cannot be included for the South County Medical Center facility or the Northlake facility due to the lack of operating history for either facility.

DESCRIPTION OF GUARANTORS, LESSEES AND INITIAL PROPERTIES

The following is a description of each of the Guarantors and Lessees and the Initial Properties to be acquired by the Company. Unless otherwise indicated, all information is given as of December 31, [Year]. All of the Guarantors are subject to the reporting requirements of the SEC and file annual reports containing audited financial information and quarterly reports for the first three quarters of each fiscal year containing unaudited financial information with the SEC, except Health Surgery, which filed a registration statement with the SEC on March 30, [Year]. With respect to such companies, the information provided is derived for the limited purposes of this Prospectus from filings made with the SEC, and the Company makes no representation regarding the financial condition of these entities.

WELLHEALTH INITIAL PROPERTIES

WELLHEALTH, headquartered in Birmingham, Alabama, is the nation's largest provider of rehabilitative healthcare services. In its outpatient and inpatient rehabilitation facilities, WELLHEALTH has established interdisciplinary programs for the rehabilitation of patients experiencing disability due to a wide variety of physical conditions, such as stroke, head injury, orthopedic problems, neuromuscular disease and sports-related injuries. WELLHEALTH's rehabilitation services include physical therapy, sports medicine, work hardening, neurorehabilitation, occupational therapy, respiratory therapy, speech-language pathology and rehabilitation nursing. In addition to rehabilitation services, WELLHEALTH's medical center facilities also provide general and specialty medical and surgical healthcare services.

Effective December 31, [Year], WELLHEALTH acquired substantially all of the assets of the rehabilitation services division of National Medical Enterprises, Inc. ("NME"), consisting of 28 inpatient rehabilitation facilities and 45 outpatient rehabilitation locations. WELLHEALTH currently has 288 locations in 31 states, the District of Columbia and Ontario, Canada, including 172 outpatient rehabilitation centers (including 79 associated satellite clinics), 42 rehabilitation hospitals with 49 associated satellite clinics (including two rehabilitation hospitals under construction), four medical centers and 21 locations providing other patient care services.

Six ancillary hospital facilities, one research facility and three outpatient rehabilitation centers are being acquired from and will be leased to WELLHEALTH or Subsidiaries of WELLHEALTH. The Leases for the WELLHEALTH Initial Properties to Subsidiaries of WELLHEALTH will be guaranteed by WELLHEALTH, whose shares are listed on the New York Stock Exchange under the symbol HRC. As of December 31, [Year] and [Year], WELLHEALTH had assets of \$641,799,00 and \$1,168,068,000 and stockholders' equity of \$290,132,000 and \$294,972,000, respectively, and for the years ended December 31, [Year] and [Year], had revenues of \$406,968,000 and \$482,304,000 and net income of \$29,738,000 and \$6,687,000, respectively.

ANCILLARY HOSPITAL FACILITIES AND RESEARCH FACILITY

Upon completion of the Offering, the Company intends to acquire six ancillary hospital facilities and one research facility from WELLHEALTH, all of which are associated with three of the four medical centers owned and operated by WELLHEALTH.

WELLHEALTH's four medical centers are located in three urban areas of the country, one each in Birmingham, Alabama and Richmond, Virginia and two in the Miami, Florida area. These facilities provide general and specialty medical and surgical healthcare services, emphasizing orthopaedics, sports medicine and rehabilitation. WELLHEALTH acquired the medical centers as an outgrowth of its ambulatory rehabilitative healthcare services. Often, patients require medical and surgical intervention prior to the initiation of their rehabilitative care. In each of the markets in which WELLHEALTH has acquired a medical center, WELLHEALTH had well-established relationships with the medical communities servicing each facility. As a result of these relationships, WELLHEALTH was able to respond to opportunities to enhance its capabilities to better serve the patients and physicians in those markets. Because WELLHEALTH's facilities enjoy a national and international reputation for orthopaedic surgery and sports medicine, WELLHEALTH believes the level of service and continuum of care offered by its medical centers enable them to compete successfully.

Initial Properties Associated with WELLHEALTH Medical Center--Birmingham

WELLHEALTH Medical Center--Birmingham is a 219-bed specialty medical center located in Jefferson County, Alabama that was acquired in October [Year] and expanded and renovated in [Year]. WELLHEALTH Medical Center concentrates on orthopaedics, sports medicine, and rehabilitation. The Medical Center's primary market is the Birmingham Metropolitan Statistical Area ("MSA"), which consists of five counties with an estimated population of 1,000,000. The Birmingham MSA is served by 18 acute-care hospitals with a total of 5,323 licensed beds. WELLHEALTH Medical Center--Birmingham draws patients locally and from across the nation due to its nationally recognized expertise in the fields of orthopaedics and sports medicine. The WELLHEALTH Medical Center--Birmingham campus consists of the hospital, ASMI, Birmingham Medical Building I and Birmingham Medical Building II.

ASMI. The American Sports Medicine Institute (ASMI), a research facility which was constructed in [Year], is a 27,800 net rentable square foot multi-story facility located on 1.02 acres. The facility is adjacent to the WELLHEALTH Medical Center--Birmingham. ASMI is 90% occupied by a not-for-profit corporation whose purpose is to conduct research and promote education in the field of orthopedics and sports medicine.

Birmingham Medical Building I. Birmingham Medical Building I, an ancillary hospital facility which was constructed in [Year], is a 42,500 net rentable square foot, multi-story commercial condominium situated on .92 acres. The building is occupied primarily by physicians and physician practice groups that practice at the Medical Center. The building is connected to the WELLHEALTH Medical Center--Birmingham and includes a six-story parking deck with spaces for approximately 180 cars located adjacent to the building. The leases of two of the current occupants of the building permit such occupants to purchase 6.46% of the condominium units.

Birmingham Medical Building II. Birmingham Medical Building II, an ancillary hospital facility constructed in [Year] as part of the renovation and expansion of WELLHEALTH Medical Center--Birmingham, is an 81,800 net rentable square foot, multi-story ancillary hospital facility located on 2.5 acres. The facility shares common areas with the WELLHEALTH Medical Center--Birmingham, and subject to approval by the appropriate governmental authority, the

portions occupied by each of Birmingham Medical Building II and the WELLHEALTH Medical Center--Birmingham will become separate condominiums. Tenants include Alabama Sports Medicine and other physician practice groups, as well as WELLHEALTH Rehabilitation Outpatient Center of Birmingham. All of the physicians located in the facility practice at the WELLHEALTH Medical Center--Birmingham.

WELLHEALTH Medical Center, Inc., a Subsidiary of WELLHEALTH, will be the sole Lessee of ASMI, Birmingham Medical Building I and Birmingham Medical Building II, which will continue to be operated as integral parts of WELLHEALTH Medical Center--Birmingham. WELLHEALTH Medical Center, Inc. will lease the three properties under a 15-year lease with three five-year renewal options. The Base Rent per square foot (which does not include an allocation of rent for 180 structured parking spaces) will be \$12.95, \$12.45 and \$13.20 for ASMI, Birmingham Medical Building I and Birmingham Medical Building II, respectively.

Initial Properties Associated with WELLHEALTH Medical Center--Richmond

WELLHEALTH Medical Center--Richmond is a 200-licensed bed specialty medical center located in Henrico County, Virginia that was acquired in [Year] and concentrates on orthopedics, sports medicine, and rehabilitation. The hospital's primary market is the 9-county Richmond-Petersburg MSA which has an estimated population of 825,000. There are 15 acute care hospitals serving the Richmond MSA with a total of 4,183 licensed beds. The WELLHEALTH Medical Center--Richmond campus consists of the hospital, Richmond Medical Building I and Richmond Medical Building II.

Richmond Medical Building I. Richmond Medical Building I, an ancillary hospital facility constructed in [Year], is a 23,200 net rentable square foot, multi-story facility located on 6.165 acres together with Richmond Medical Building II. This facility is adjacent to WELLHEALTH Medical Center--Richmond and is occupied by physician groups that practice at the Medical Center.

Richmond Medical Building II. Richmond Medical Building II, an ancillary hospital facility constructed in [Year] as part of the renovation and expansion of WELLHEALTH Medical Center--Richmond, is a 62,400 net rentable square foot, multi-story facility with 60 structured parking spaces located on the 6.165 acres together with Richmond Medical Building I. The facility is adjacent to the WELLHEALTH Medical Center--Richmond and is occupied by physician groups that practice at the Medical Center.

WELLHEALTH Virginia, Inc., a Subsidiary of WELLHEALTH, will be the sole Lessee of Richmond Medical Building I and Richmond Medical Building II, which will continue to be operated as integral parts of WELLHEALTH Medical Center--Richmond. WELLHEALTH of Virginia, Inc. will lease the two properties under a 15-year lease (with three five-year renewal options). The Base Rent per square foot (which does not include an allocation of rent for 60 structured parking spaces) will be \$10.18 and \$18.04 for Richmond Medical Building I and Richmond Medical Building II, respectively.

Initial Properties Associated with WELLHEALTH Larkin Hospital

WELLHEALTH Larkin Hospital located in South Miami, Dade County, Florida is a 112-licensed bed specialty medical center acquired in February [Year]. This facility specializes in orthopaedics, sports medicine and rehabilitation. The hospital's primary market is Dade County, Florida, which encompasses 26 municipalities with a population of approximately 2,000,000. There are 20 acute care hospitals serving the Dade County area with a total of approximately 6,100 licensed beds. The WELLHEALTH Larkin Hospital campus consists of the hospital, the One-7000 Building and Larkin Medical Building.

One-7000 Building. The One-7000 Building, an ancillary hospital facility that was constructed in [Year], with a total

renovation completed in [Year], is a 106,400 net rentable square foot, multi-story facility with 345 structured parking spaces on 1.12 acres adjacent to WELLHEALTH Larkin Hospital. The primary occupants are physician groups that practice at the adjacent WELLHEALTH Larkin Hospital and nearby WELLHEALTH Doctors' Hospital.

Larkin Medical Building. The Larkin Medical Building, an ancillary hospital facility that was constructed in [Year] and remodeled in [Year], is a 10,250 net rentable square foot, two-story facility on 1.072 acres. The facility is located adjacent to WELLHEALTH Larkin Hospital and currently houses the administrative and support staff offices of the hospital while the surplus land is used for parking by the hospital's employees.

Doctors' Hospital of South Miami, Ltd., a Subsidiary of WELLHEALTH, will be the sole Lessee of One-7000 Building and Larkin Medical Building, which will continue to be operated as integral parts of WELLHEALTH Larkin Hospital. Doctors' Hospital of South Miami, Ltd. will lease the two properties under a 15-year lease with three five-year renewal options. The Base Rent per square foot (which does not include an allocation of rent for 345 structured parking spaces) will be \$14.01 and \$24.68 for One-7000 Building and Larkin Medical Building, respectively.

OUTPATIENT REHABILITATION FACILITIES

WELLHEALTH operates the largest group of affiliated proprietary outpatient rehabilitation facilities in the United States. WELLHEALTH's outpatient rehabilitation centers offer a comprehensive range of rehabilitative healthcare services, including physical therapy and occupational therapy, that are tailored to the individual patient's needs, focusing predominantly on orthopaedic injuries, sports injuries, work injuries, hand and upper extremity injuries, back injuries, and various neurological/neuromuscular conditions. As of December 31, [Year], WELLHEALTH provided outpatient rehabilitative healthcare services through 93 outpatient centers and their 79 associated satellite clinics as well as through the 49 satellite outpatient clinics associated with its inpatient facilities. WELLHEALTH's outpatient rehabilitation services play a significant role in the continuum of care because they provide hospital-level services, in terms of intensity, quality and frequency, in a more cost efficient setting.

Coral Gables. Coral Gables, an outpatient rehabilitation facility constructed in 1960 and completely renovated in [Year], is a 14,538 net rentable square foot, two-story building located on 0.46 acres in Dade County, Florida. Outpatient rehabilitation services include therapy for orthopaedic injuries, neuromuscular disease, and programs for work hardening, neurorehabilitation, occupational therapy, respiratory therapy, and speech-language pathology. The facility's primary market is Dade County, Florida, which encompasses 26 municipalities, with a total population of approximately 2,000,000. The facility will be purchased from and leased to WELLHEALTH, which will in turn sublease the facility leased to WELLHEALTH Rehabilitation Center of Coral Gables Limited Partnership, a Subsidiary of WELLHEALTH. The Base Rent per square foot will be \$17.80.

Little Rock. Little Rock, an outpatient rehabilitation facility constructed in [Year], is an 11,963 net rentable square foot, one-story building located on 1.6 acres in Pulaski County, Arkansas. Outpatient rehabilitation services include therapy for orthopaedic injuries, strokes, head injuries, or neuromuscular disease, and programs for work hardening, neurorehabilitation, occupational therapy, respiratory therapy, and speech-language pathology. The facility's primary market is the Greater Little Rock MSA encompassing a four-county region with a population of approximately 500,000. The facility will be purchased from and leased to WELLHEALTH, which will in turn sublease to WELLHEALTH Rehabilitation Center of Little Rock, Ltd., a Subsidiary of WELLHEALTH. The Base Rent per square foot will be \$19.37.

Virginia Beach. Virginia Beach, an outpatient rehabilitation facility constructed in [Year], is a 10,000 net rentable square foot, one-story building situated on 1.10 acres in Lynnhaven Borough, Virginia. Outpatient rehabilitation services include therapy for orthopaedic injuries, strokes, head injuries, or neuromuscular disease and programs for work hardening, neurorehabilitation, occupational therapy, respiratory therapy and speech-language pathology. The

Virginia Beach facility's primary market is the Tidewater region of Virginia which includes three counties with a population of approximately 1,400,000. The Virginia Beach facility is located on real estate being ground leased from Holcar, Inc. ("Holcar"). The Company will acquire the seller's leasehold interest in the facility through an assumption of the existing ground lease between the seller and Holcar, including the option to purchase in favor of the seller. The Company will sublease the outpatient rehabilitation facility to WELLHEALTH, which will in turn sub-sublease to WELLHEALTH Rehabilitation Center of Virginia Beach Limited Partnership, a Subsidiary of WELLHEALTH. The Base Rent per square foot will be \$16.43, exclusive of the ground rent, which will be paid by the Lessee as sublessee under the ground lease.

Oregon Initial Properties

Oregon, headquartered in Nashville, Tennessee, is a healthcare services company that owns and operates acute care hospitals and related healthcare facilities. Oregon has entered into merger agreements with American Healthcare Management, Inc. and Summit Health Ltd. which are scheduled to close on or about April 19, [Year]. As a result of the mergers, Oregon, through its subsidiaries and affiliated partnerships, will own or operate 44 acute care hospitals with 7,712 licensed beds, including one managed for another, and two under leases, and two psychiatric hospitals with 138 licensed beds. Oregon's hospitals will be located in California, Florida, Georgia, Indiana, Louisiana, Mississippi, Missouri, Oregon, Nevada, Tennessee, Texas, West Virginia and Wyoming. Oregon also will own 43% of Horizon Mental Health Services, Inc., which operates one psychiatric hospital with 60 licensed beds and 53 specialty psychiatric and chemical dependency units with 1,101 licensed beds. Subsequent to the mergers, Oregon will own or control Health Choice Arizona, Inc., a Medicaid health maintenance organization, which has an enrollment of approximately 21,000 in the state of Arizona. Oregon will also provide healthcare services through its majority-owned subsidiary, Summit Care Corporation, which operates 20 skilled nursing centers with 2,534 licensed beds and four retirement centers with 468 beds.

Midway Medical Plaza will be purchased prior to the Effective Date by Midway Acquisition Company, Inc. ("MACI"), an Alabama corporation all of the stock of which is owned by M. Donal Rushmore, W. Gill McDaniel, and Dee Martin Michaels. MACI will be merged into the Company on or before the Effective Date of the Offering pursuant to the Merger Agreement. See "Management's Discussion and Analysis of Financial Condition and Results of Operations--Certain Transactions." The consideration for the Merger will be the cancellation or assumption by the Company of the indebtedness incurred by MACI in the acquisition of Midway Medical Plaza and the related parking facility. The Company will lease the Midway ancillary hospital facility and a 755-space parking deck to a Subsidiary of Oregon. The Lease will be guaranteed by Oregon, whose shares are listed on the New York Stock Exchange under the symbol ORND. As of August 31, [Year] and [Year], Oregon had assets of \$649,322,000 and \$830,564,000, stockholders' equity of \$61,172,000 and \$78,287,000, respectively, and for the years ended August 31, [Year] and [Year] had net revenues of \$501,770,000 and \$624,847,000, and net income of (\$91,759,000) and \$770,000, respectively.

Initial Properties Associated with Midway Hospital

Midway Hospital is licensed for 230 general acute care beds, including 206 medical/surgical beds and 24 ICU/CCU beds. Midway Hospital provides general acute care and includes a Spine Center, Industrial and Occupational Medicine Center and a center for treatment of AIDS patients. Midway Hospital is the third largest hospital in the west Los Angeles area. There are six hospitals with a combined 1,552 acute-care beds serving the west Los Angeles area. The Midway Hospital campus consists of the hospital and the Midway Medical Plaza.

Midway Medical Plaza. Midway Medical Plaza, an ancillary hospital facility which was constructed in [Year], is an 87,000 net rentable square foot, multi-story facility on 0.59 acres. The related parking structure was constructed in [

[Year] and contains 755 structured parking spaces on a 0.65 acre parcel of land adjacent to both Midway Hospital and the Midway Medical Plaza in Los Angeles County, California. Other than a pharmacy, the tenants of the Midway facility are all physicians or physician groups that practice on the medical staff of Midway Hospital.

A Subsidiary of Oregon will be the sole Lessee of the Midway facility which will continue to be operated as an integral part of Midway Hospital. The Midway facility will be leased under a 15-year lease with three five-year renewal options. The Base Rent per square foot (which does not include an allocation of rent for 755 structured parking spaces) will be \$24.62.

Total Health Initial Properties

Total Health, formed in [Year], and headquartered in Owings Mills, Maryland, is one of the nation's leading providers of long-term and sub-acute healthcare services. Total Health's strategy is to use geriatric care facilities as platforms to provide a wide variety of medical and rehabilitative services more typically delivered in the acute care hospital setting. Integrated Health's focus on providing sub-acute care is designed to address the fact that cost containment measures implemented by private insurers and limitations on government reimbursement of hospital costs have resulted in the discharge from hospitals of many patients who continue to require sub-acute care. These patients often cannot be effectively cared for in the home because of the complex monitoring and specialized medical treatment required. Because geriatric care facilities have lower capital and operating costs than acute care hospitals, Total Health is able to offer these complex medical services at a significantly lower cost than acute care hospitals.

On December 1, [Year], Total Health acquired substantially all of the United States operations of Central Park Lodges, Inc., consisting of 30 geriatric care facilities, nine retirement facilities and divisions which provide pharmacy, healthcare personnel, and support services through branch locations.

Total Health provides sub-acute care through medical specialty units ("MSUs"), which are typically 20 to 75 bed specialty units with physical identities, specialized medical technology and staff separate from the geriatric care facilities in which they are located. MSUs are designed to provide comprehensive medical services to patients who have been discharged from acute care hospitals but who still require sub-acute or complex medical treatment.

The levels and quality of care provided in Total Health's MSUs are similar to those provided in the hospital but at per diem treatment costs which Total Health believes are generally 30% to 60% below the cost of such care in acute care hospitals. Because of the high level of specialized care provided, Total Health's MSUs generate substantially higher net revenue and operating profit per patient day than traditional geriatric care services.

As of December 31, [Year], Total Health operated 97 geriatric care facilities (66 owned or leased and 31 managed) and 60 MSUs located in 33 of these facilities.

The Company will acquire and lease back one long-term care facility and one sub-acute care facility from Subsidiaries of Total Health. The Leases will be guaranteed by Total Health, whose shares are listed on the New York Stock Exchange under the symbol IHS. As of December 31, [Year] and [Year], Total Health had assets of \$311,973,000 and \$767,664,000 and stockholders' equity of \$145,596,000 and \$209,338,000, respectively, and for the years ended December 31, [Year] and [Year], had net revenues of \$195,262,000 and \$282,160,000 and net income of \$9,141,000 and \$15,471,000, respectively.

Gravois. Gravois, a sub-acute care facility constructed in 1966 with additions and renovations in [Year], [Year] and [Year], is a 167-licensed bed sub-acute care facility containing a 49,700 net rentable square foot, multi-story building located on 5.2 acres in St. Louis County, Missouri. Although the Gravois facility has historically been used as a skilled nursing facility, Total Health recently divided the market between skilled nursing care and sub-acute care, dedicating

the Gravois facility as the sub-acute care provider and the other Total Health facility, Total Health of St. Louis at Big Bend Woods, as the skilled nursing provider. This change will create more efficient operations at both facilities and should result in more sub-acute care patients for the Gravois facility. The total population within a ten mile radius of the facility is approximately 640,000 and the population 65 years and older within the ten mile radius is approximately 96,800.

Gravois Health Care, Inc., a Subsidiary of Total Health, will be the sole Lessee of the Gravois facility pursuant to a ten-year lease with three five-year renewal options. The Base Rent per square foot will be \$18.55.

Mountain View. Mountain View, a long-term care facility constructed in [Year] and renovated in [Year], is a 137-licensed bed long-term care facility containing 52,700 net rentable square feet in a multi-story building located on 8.2 acres in Unity Township, Pennsylvania, near Pittsburgh. Total Health will provide a full range of services at the Mountain View facility, including skilled nursing, complex care (post surgery, cancer, etc.), respiratory therapy and physical therapy. The total population within a ten mile radius is approximately 166,500 and the population 65 years and older within a ten mile radius is approximately 27,300. There are other skilled nursing care providers servicing the market; however, entry into the market is regulated through Pennsylvania's certificate of need ("CON") process.

Mountain View Nursing Center, Inc., a Subsidiary of Total Health, will be the sole Lessee of the Mountain View facility pursuant to a ten-year lease with three five-year renewal options. The Base Rent per square foot will be \$20.11.

QUORUM INITIAL PROPERTIES

Quorum, headquartered in Brentwood, Tennessee, owns, operates, manages and provides consultation services for acute care hospitals nationwide. Quorum is the nation's largest manager of acute care hospitals, having over 250 management contracts throughout the country. In December [Year], Quorum acquired Baptist Hospital in Gadsden, Alabama, renamed Gadsden Regional Medical Center, ("GRMC"), a 346 bed acute care hospital and in September [Year], Quorum acquired ten acute care hospitals from Charter Medical Corporation, including the Desert Springs Hospital, a 225 bed acute care hospital in Las Vegas, Nevada.

The Company will purchase and lease back four ancillary hospital facilities from two subsidiaries of Quorum. The Leases will be guaranteed by Quorum. Quorum is a privately held company that has filed reports with the SEC since [Year]. As of June 30, [Year] and [Year], Quorum had assets of \$220,603,000 and \$275,037,000 and stockholders' equity of \$43,990,000 and \$79,561,000, respectively, and for the years ended June 30, [Year] and [Year] had net revenues of \$173,219,000 and \$343,132,000, and net income of \$4,048,000 and \$14,299,000 (including a \$3,559,000 gain in [Year] realized from cumulative effect of a change in accounting principles and a non-recurring loss of \$1,591,000 in [Year] realized from early extinguishment of debt), respectively.

Initial Properties Associated with Gadsden Regional Medical Center

GRMC, located in Gadsden, Alabama, approximately 65 miles east of Birmingham, is the leading hospital in a six-county area in northeast Alabama. GRMC sits on a 23 acre campus which also contains a four story ancillary hospital facility ("Hamiter Building"), a new five story ancillary hospital facility ("Gadsden Medical Building II"), a cancer treatment center, a mental health treatment center, a day care center as well as a single story primary care clinic ("Goodyear Clinic").

GRMC is the dominant provider in the area of medical services such as general, neurological, and cardiovascular surgery, obstetrics, gynecology, pediatrics, orthopaedics and psychiatry. The medical staff is comprised of 155 physicians. A total of 30 specialties and sub-specialties are represented on the staff.

Goodyear Clinic. The Goodyear Clinic, an ancillary hospital facility constructed in [Year], is a 14,000 net rentable square foot, single-story building located on 1.19 acres. The facility is operated as a primary care clinic for the 2,500 employees of the Goodyear Tire & Rubber Company ("Goodyear") plant located less than a mile from the campus of GRMC. Three family practice physicians employed by Goodyear provide care to the Goodyear employees at the clinic.

Hamiter Building. The Hamiter Building, an ancillary hospital facility constructed in [Year], is a 38,200 net rentable square foot, four story building located on 1.3 acres. The facility is connected to GRMC via an enclosed skywalk. Tenants of the Hamiter Building facility are physician groups who practice on the medical staff of GRMC.

Gadsden Medical Building II. Gadsden Medical Building II, an ancillary hospital facility constructed in [Year], is a 50,600 net rentable square foot, multi-story building located on 0.65-acres and is connected to GRMC via enclosed skywalks and hallways. Tenants of the Gadsden Medical Building II facility are physician groups who practice on the medical staff of GRMC.

QHG of Gadsden, Inc., a Subsidiary of Quorum, will be the sole Lessee of Goodyear Clinic, Hamiter Building and Gadsden Medical Building II under a ten-year lease with three five-year renewal options. The Base Rent per square foot will be \$12.92 for each of the Goodyear Clinic, Hamiter Building and Gadsden Medical Building II, respectively.

Initial Properties Associated with the Desert Springs Hospital

The Desert Springs facility is located adjacent to the 225-licensed bed Desert Springs Hospital in the southern section of Las Vegas, approximately two miles from the "Las Vegas Strip." The Las Vegas MSA has an estimated population of 870,000. Desert Springs Hospital was established in [Year] and has grown to its current operating capacity through its diversified and specialized product lines and medical staff, including cardiac specialty services. There are eight acute care hospitals serving the Las Vegas MSA with a total of 2,018 licensed beds. The hospital sits on a 17.5-acre campus, which also contains the two-story ancillary hospital facility which will be purchased by the Company.

Desert Springs. Desert Springs, an ancillary hospital facility constructed in [Year], is a 26,700 net rentable square foot, multi-story building located on 3.34 acres in Clark County, Nevada. Current tenants of the facility include physicians who practice on the medical staff of Desert Springs Hospital.

NC-DSH, Inc., a Subsidiary of Quorum, will be the sole Lessee of Desert Springs under a ten-year lease with three five-year renewal options. The Base Rent per square foot is \$19.80.

Health Surgery Initial Properties

Health Surgery, headquartered in Atlanta, Georgia, and formed in [Year], is a leading operator of freestanding outpatient surgery centers. Health Surgery's surgery centers provide the facilities and medical support staff necessary for physicians to perform on an outpatient basis non-emergency surgical procedures. Health Surgery owns and operates a network of 30 freestanding surgery centers in 11 states with an aggregate of 123 operating and procedures rooms and is developing an additional eight surgery centers in three states. Based on industry sources, Health Surgery believes that it is the third-largest operator of freestanding outpatient surgery centers in the United States.

Health Surgery's strategy is to establish networks of high quality freestanding surgical centers in selected markets. Health Surgery has established regional networks in eight markets. This strategy is designed to enhance Health Surgery's ability to contract with managed care companies, enable Health Surgery to implement effective sale and marketing programs at lower marginal costs and provide physicians and patients with increased accessibility to its

surgery centers. Health Surgery pursues a marketing strategy of developing relationships with associations of prominent primary care and specialist physicians in its market areas and utilizing these relationships to establish affiliations with managed care companies. Health Surgery is also exploring joint ventures with hospitals.

The Company will acquire three ambulatory surgery centers from Surgical Health. Health Surgery will guarantee the Leases of the facilities leased to Subsidiaries of Health Surgery. On March 30, [Year], Health Surgery filed a registration statement with the SEC related to the issuance of \$75 million principal amount of senior subordinated notes that are expected to be listed on the New York Stock Exchange. As of December 31, [Year] and [Year], Health Surgery had assets of \$94,157,000 and \$162,896,000 and stockholders' equity of \$21,046,000 and \$36,140,000, respectively, and for the years ended December 31, [Year] and [Year], had net revenues of \$36,561,000 and \$80,883,000 and net income of \$187,000 and \$3,909,000, respectively.

South County Medical Center. The South County Medical Center facility is a multi-story, ambulatory surgery center, scheduled to be completed and occupied in May [Year]. The Company will acquire South County Medical Center upon the completion of its construction and issuance by the proper authority of a certificate of occupancy. As of April 15, [Year], leases had been signed for over 93% of the rentable space. The facility is situated on approximately 10 acres of land in St. Louis County, Missouri, will contain approximately 45,200 net rentable square feet, with Health Surgery's surgery center and related activities occupying approximately 25,000 square feet. Physicians practicing the following specialties are expected to use the four surgery suites at the facility: general surgery, gastroenterology, orthopaedic, urology, ENT and gynecology. A Subsidiary of WELLHEALTH will lease approximately 4,300 square feet to use as an outpatient rehabilitation facility. The remaining space will be leased to physicians.

Healthcare Real Estate Holdings II, Inc., a Subsidiary of Health Surgery, will be the sole Lessee of South County Medical Center under a 15-year lease with three five-year renewal options. The Base Rent per square foot is \$17.73.

Northlake. Northlake, an ambulatory surgery facility constructed in [Year], is an 8,749 square foot, single-story facility located on approximately 2.16 acres in Dekalb County, Georgia. Physicians practicing the following specialties are expected to use the four surgery suites located at the facility: general surgery, podiatry, ophthalmology, ENT, gynecology and oral surgery. One of Health Surgery's Subsidiaries will sublease the facility from the Company under a 13 year sublease with two five-year renewal options, which will be guaranteed by Health Surgery. The Northlake facility is located on real estate being ground leased from J. T. Honea, Sr. and J. T. Honea, Jr. The Company will assume the existing ground lease between the seller and the Honeas, including the right of first refusal in favor of the seller, and will sublease the real property to one of Health Surgery's Subsidiaries. The Base Rent will be \$12.86 per square foot, exclusive of ground rent, which will be paid by the sublessee.

The CON for the Northlake facility has been challenged by HCA Health Services of Georgia, Inc., d/b/a/ Northlake Regional Medical Center in two related Georgia state court proceedings on the basis that the Georgia State Health Planning Agency did not have authority by statute or regulation to permit the relocation of the facility without a new CON. Regulations have since been proposed that would permit such a relocation which contain a grandfather provision that would be applicable to the Northlake facility. If the proposed regulations are not finally adopted as published or are challenged and held invalid, or if Health Surgery does not prevail on the issue of whether the facility was properly grandfathered from the CON requirements, Health Surgery may be required to discontinue operation of the Northlake facility and apply for a new CON. In such event the Company can require Health Surgery to substitute one or more comparable properties for the Northlake facility.

North Shore. North Shore, an ambulatory surgery facility constructed in, completely remodeled in [Year] and acquired in [Year] by Surgical Health, is a 5,100 net rentable square foot, single-story facility located on approximately 2.2 acres in Cook County, Illinois. Physicians practicing the following specialties are expected to use the two surgery suites located at the facility: general surgery, gastroenterology, urology, gynecology and orthopaedics. One of Health Surgery's Subsidiaries will lease the facility from the Company, which Lease will be guaranteed by Health Surgery. The

Base Rent per square foot will be \$20.71.

ACQUISITION OF INITIAL PROPERTIES

The Company has signed letters of intent to acquire the 20 Initial Properties and expects to sign Purchase Agreements as soon as practical. The Purchase Agreements are expected to include customary representations and warranties from each current owner of the particular Initial Property relating to such matters as title, compliance with laws, condition of the properties and other similar items. Certain of the warranties may be qualified and may not afford the Company as much protection as unqualified warranties.

The Company intends to close the purchase of all of the Initial Properties into escrow on or before the Effective Date of the Offering and to release the Initial Properties from escrow immediately after the closing of the Offering, except for the South County Medical Center facility which will be acquired as soon as practical after the completion of its construction and the issuance by the proper authority of a certificate of occupancy. If the acquisition of any of the Initial Properties does not occur by the date specified in the applicable Purchase Agreement, the seller of such Initial Property will no longer be contractually bound to sell such property to the Company. The Company has no reason to believe that it will not be able to acquire the Initial Properties under the terms of the Purchase Agreements. The consummation of the closings of the Initial Properties held in escrow is contingent only upon the closing of the Offering no later than June 30, [Year]. The closing for the purchase of the South County Medical Center facility pursuant to the applicable Purchase Agreement is subject to satisfaction of conditions which are generally customary in similar real estate transactions. Because certain of the Initial Properties are subject to governmental regulation and indebtedness which require consent prior to a change of ownership, no assurance can be given that all of the Initial Properties will be available for purchase by the Company.

The purchase price for each of the Initial Properties has been determined by negotiation with the sellers after taking into consideration the rentals, operating history, age and condition of each of the Initial Properties, and other relevant factors, including appraisals. The applicable Disinterested Directors have approved the purchase price and other terms relating to the acquisition of each of the Initial Properties. In the opinion of management, each of the Initial Properties is well maintained, in good repair, and suitable for its intended use.

APPRAISALS

Current appraisals for each of the Initial Properties have been received by the Company. Each of the appraisals was prepared by appraisers unrelated to the Company and to WELLHEALTH and the other sellers of the Initial Properties. The appraisals indicated that the Initial Properties have an aggregate current fair market value of \$120,402,000. Each of the Initial Properties will be purchased at a purchase price not more than its appraised value.

The appraised values of the Initial Properties were generally developed based on considerations of the following valuation approaches: cost, market and income. The cost approach considers the land value of the sites and depreciated replacement cost of the improvements. The market approach analyzes sales of other going concern facilities in comparison to the Initial Properties. The income approach develops a going concern value of the Initial Properties by capitalizing their projected operating income. The appraisals of the Initial Properties valued the Initial Properties on a going-concern basis. The income approach normally provides the most reliable value estimate for multi-tenant professional office buildings. The value of the property is strongly related to the expected income stream of the property. Although the buyers of professional office buildings are usually owner/occupants, these buyers are generally aware of the property's cash flow potential and its value from an investor's perspective. For this reason, appraisers consider the income approach the best indicator of value for the subject. Appraisals based upon the liquidation approach may produce values lower than those produced by the income approach.

Operating data, financial data and legal descriptions provided to the appraisers were assumed by the appraiser to be accurate and correct, and no audit or verification was undertaken by the appraiser in connection with its report. The appraisers did not assume responsibility for matters of title.

Because the appraisals represent only an estimate of value, and are subject to numerous assumptions, the appraisals do not purport to represent precise measures of realizable value and should not be relied upon for purposes of determining such value at any particular time. The appraisals assume that the appraised facilities could be sold on an orderly basis under stable market conditions. The estimate of the aggregate value of the appraised facilities is the sum of the values determined for the individual facilities. No adjustment was made with respect to a bulk sale of a group of facilities.

LEASES

The following description of the Leases does not purport to be complete, but rather contains a general summary of certain provisions thereof. Reference is made to the Leases filed with the SEC as exhibits to the Registration Statement of which this Prospectus is a part, and the following summary is qualified in its entirety by such reference.

Each Lease relates to a healthcare facility, comprised generally of the land, buildings, other improvements and certain fixtures, for a use, in most cases, restricted to the intended healthcare related use and for such other uses as may be necessary in connection with or incidental to such use (the "Primary Intended Use"). Generally, personal property is not being purchased or leased, although the Company has been granted an option to purchase any personal property necessary or appropriate for the operation of the Initial Properties for an amount equal to the then-current book value (original cost less accumulated depreciation on the books of the Lessee). The Leases have initial terms ranging from 10 to 15 years with one or more renewal terms exercisable by the Lessee of at least 10 additional years. The Leases are subject to earlier termination upon the occurrence of certain contingencies. Base Rent varies by Lease, taking into consideration many factors, including the credit of the Lessee, operating performance of the facility, location, type and physical condition of the facility. All of the Leases provide for Additional Rent commencing after the first year based on either a set percentage increase or on 67% to 100% of the percentage increase in the applicable consumer price index, with annual increases generally limited to a maximum of 5%.

Each Lease is a Triple Net Lease and the Lessee is responsible thereunder, in addition to Base Rent and any Additional Rent, for all additional charges, including every fine, penalty, interest and cost which may be levied for nonpayment or late payment thereof, all taxes, assessments, levies, fees, water and sewer rents and charges, all governmental charges with respect to each of the Initial Properties, all utility and other charges, including insurance premiums, incurred in connection with the operation of the Initial Property and including ground rent in the case of the Virginia Beach and North Shore facilities.

Each Lessee is required, at its expense, to maintain its leased property in good order and repair. The Company is not required to repair, rebuild or maintain the Initial Properties. Under certain Leases, the Company must purchase from the Lessees certain structural capital improvements and replacements made by such Lessees.

Most Leases also contain provisions which generally permit the Lessees, under certain circumstances, to terminate the Leases and to repurchase the leased property for a price equal to the Minimum Repurchase Price (as defined in the Leases) or to substitute another property or properties for the applicable Initial Property. These circumstances include (i) the occurrence of certain damage to or destruction of one of the Initial Properties, (ii) condemnation, and (iii) mutual agreement of the parties. The Lessees also have a right of first refusal to purchase the leased property during the terms of the Leases and for a short period of time following the expiration of the terms of the Leases on the same terms and conditions as the Company may propose to sell one of the Initial Properties.

INSURANCE

The Company will require the Lessees to obtain title insurance with respect to each of the Initial Properties in amounts equal to their respective purchase prices, insuring that the Company holds title to each of the Initial Properties free and clear of all liens and encumbrances, except those approved by the Company. In the opinion of the management of the Company, the Initial Properties will be adequately covered by comprehensive liability, fire, flood (if available) and extended coverage with respect to the Initial Properties with policy specifications and insured limits customarily carried for similar properties. While the Company believes that its insurance coverage will be adequate, there are certain types of losses which may either be uninsurable or not economically insurable. Except with respect to the Midway facility, the Company generally does not require the Lessees to carry earthquake insurance with respect to its Initial Properties. This decision was based upon a number of factors, including the structural design of the buildings and the general lack of seismic activity in the areas where the Initial Properties are located. Should an uninsured loss occur the Company could lose its investment in, and anticipated profits and cash flow from, an Initial Property.

MEDICAID, MEDICARE, BLUE CROSS AND OTHER REVENUE

Payments for patient care earned by Lessees and Sublessees are received from the federal Medicare program, state Medicaid programs, private insurance carriers, employers and Blue Cross plans, health maintenance organizations, preferred provider arrangements and directly from patients. Medicare payments to acute care hospitals for inpatient services are made pursuant to the Prospective Payment System ("PPS") under which a hospital is paid a prospectively established rate based on diagnosis. In general, Medicare payments for psychiatric care and rehabilitative care are exempt from PPS and continue to be reimbursed on a cost basis system.

Under regulations effective November 1, [Year], the capital related costs of PPS hospitals are to be reimbursed by the Medicare program on a prospective basis, phased in over a ten-year transition period, eventually to be a set federal rate. The effects of the new payment methodology on actual levels of reimbursement cannot yet be predicted. Properties not subject to PPS will continue to be reimbursed by Medicare for capital costs on a percentage of cost basis. Payments from state Medicaid programs for acute care, rehabilitative and psychiatric care are based on reasonable costs or are at fixed rates. Medicare and Medicaid payments are generally below a facility's actual charge schedule and in some cases payments are limited, delayed or reduced because of federal and sometimes state budget deficits.

In recent years, fundamental changes in the Medicare program (including the implementation of a PPS for inpatient services at medical surgical hospitals) have resulted in reduced levels of payment for a substantial portion of healthcare services. Moreover, healthcare facilities have experienced increasing pressures from private payors attempting to control healthcare costs, that have reduced reimbursement to levels approaching that of government payors. Considerable uncertainties surround the future determination of payment levels under the Medicare program for inpatient hospital services as well as outpatient services.

Blue Cross payments in different states and areas are based on costs, negotiated rates or retail rates. Payments from health maintenance organizations and preferred provider organizations generally are negotiated, usually at a discount from published charge schedules, which may take the form of a flat payment per enrollee in the plan offered by such organizations.

FUTURE ACQUISITIONS OF HEALTHCARE FACILITIES

The Company's strategy is to become a leading provider of healthcare facility capital by investing in a high quality portfolio of properties managed by established operators including long-term care, hospital management, rehabilitation

and alternate-site care companies. The Company intends to diversify its portfolio by operator, geography, facility type and healthcare industry segment. Its investment criteria emphasize the credit quality of the guarantor, competitive position of the property, attractiveness of the industry segment, and fit with the Company's existing portfolio. The Company believes that there currently is significant demand for REIT financing capital in the healthcare industry. In addition, the Company believes the substantial healthcare industry experience and numerous relationships of its management and directors will help the Company identify, evaluate and complete additional investments. Management believes that opportunities for property acquisitions are currently particularly attractive because of the increasing demand for alternate site and outpatient healthcare services, anticipated capital requirements by the healthcare industry to fund these and other properties, and the reduced supply of available financing from traditional sources. Management also believes that there are opportunities to provide development funding to established healthcare industry operators on a selective basis.

The following are brief descriptions of the types of healthcare facilities in which the Company will seek additional investment:

Ancillary Hospital Facilities and Acute Care Hospitals

Ancillary hospital facilities are generally not subject to separate licensing requirements, although certain hospital ancillary services may be subject to licensing, CON and other regulatory requirements in addition to those applicable to acute care hospitals. The success of an ancillary hospital facility is dependent on its proximity to a hospital. The Company may purchase one or more hospital properties in the future. Acute care hospitals are subject to extensive federal, state and local legislation and regulation. Acute care hospitals undergo periodic inspections regarding standards of medical care, equipment and hygiene as a condition of licensure. Various licenses and permits also are required for narcotics, laboratories, pharmacies, radioactive materials and certain equipment. Accreditation by the Joint Commission on Accreditation of Healthcare Organizations is generally required for participation in government sponsored provider programs. Acute care hospitals are subject to and comply with various forms of utilization review. In addition, under PPS, each state must have a Professional Review Organization to carry out a federally mandated system of review of Medicare patient admissions, treatment and discharges in acute care hospitals. Medical and surgical services and practices are extensively supervised by committees of staff doctors at each acute care hospital, and are reviewed by each acute care hospital's local governing board and quality assurance personnel. New regulations governing the control of disposal of hazardous wastes may increase the costs of operating acute care facilities.

Physician Clinics

Physician clinics are subject to extensive federal, state, and local legislation and regulation. Every state imposes licensing requirements on individual physicians and on facilities and services operated by physicians. In addition, federal and state laws regulate health maintenance organizations and other managed care organizations with which the physician groups may have contracts. Many states require regulatory approval, including CONs, before establishing certain types of physician-directed clinics, offering certain services or making expenditures in excess of statutory thresholds for healthcare equipment, facilities, or programs. In connection with the expansion of existing operations and the entry into new markets, physician clinics and affiliated practice groups may become subject to compliance with additional regulation.

Ambulatory Surgery Centers

Ambulatory surgery centers are subject to extensive federal, state and local legislation and regulation. Ambulatory surgery centers undergo periodic inspections regarding standards of medical care, equipment and hygiene as a condition

of licensure. Many states require regulatory approval, including CONs, before establishing certain types of healthcare facilities, offering certain services or making expenditures in excess of statutory thresholds for healthcare equipment, facilities or programs. License and certification standards vary by jurisdiction and undergo periodic revision. In connection with the expansion of existing operations and the entry into new markets, ambulatory surgery centers may become subject to compliance with additional regulation.

Long-Term Care and Sub-Acute Care Facilities

Long-term care and sub-acute care facilities are licensed by state healthcare agencies, and are subject to extensive federal, state, and local regulatory and inspection requirements. License, CON and certification standards and requirements vary by jurisdiction and undergo periodic revision. These requirements relate to, among other things, the quality of the nursing care, the qualifications of administration personnel and nursing staff, the condition of the long-term care facility and the adequacy of its equipment, and continuing compliance with laws and regulations to the operation of the facilities.

GOVERNMENT REGULATION AND RECENT DEVELOPMENTS

The financial condition of Lessees or sublessees may be affected by changes in the reimbursement, licensing and certification policies of federal, state and local governments for healthcare related facilities. Certain of the Initial Properties may also be affected by changes in accreditation standards or procedures of accrediting agencies that are recognized by governments in the certification process. In addition, expansion (including the addition of new beds or services or acquisition of medical equipment) and occasionally the discontinuation of services of healthcare facilities is generally subjected to state regulatory approval through CON programs.

Rental arrangements are subject to federal and state laws and regulations governing illegal rebates and kickbacks where co-investors are physicians or others in a position to refer patients to the facilities. The effect of these laws and regulations is generally to prohibit, through the imposition of criminal and civil penalties (including program exclusion), payment arrangements that are construed to include compensation for patient referrals. Although there can be no assurance that government enforcement agencies' and courts' interpretations of these laws will be consistent with that of the Company, the Company does not believe it or any of the Lessees or sublessees of the Initial Properties has any Base Rent arrangements that do not comply in all material respects with these laws. Legislative and regulatory proposals may be enacted or adopted in the future that adversely affect physicians and other healthcare providers that invest in healthcare facilities, regardless of whether there is compensation for referrals, by limiting reimbursement by the Medicare and Medicaid programs of otherwise covered services, requiring disclosures of such interests, or imposing civil monetary and criminal penalties for violations of proscriptions against referrals to such facilities.

State CON statutes generally provide that, prior to the addition of new beds, the construction of new facilities or the introduction of new services, a state health planning designated agency ("SHPDA") must determine that a need exists for those beds, facilities or services. The CON process is intended to promote comprehensive healthcare planning, assist in providing high quality healthcare at the lowest possible cost and avoid unnecessary duplication by ensuring that only those healthcare facilities that are needed will be built.

Typically, the provider of services submits an application to the appropriate SHPDA with information concerning the area and population to be served, the anticipated demand for the facility or service to be provided, the amount of capital expenditure, the estimated annual operating costs, the relationship of the proposed facility or service to the overall state health plan and the cost per patient day for the type of care contemplated. Whether the CON is granted is based upon a finding of need by the SHPDA in accordance with criteria set forth in CON statutes and state and regional health facilities plans. If the proposed facility or service is found to be necessary and the applicant to be the appropriate

provider, the SHPDA will issue a CON containing a maximum amount of expenditure and a specific time period for the holder of the CON to implement the approved project.

Licensure and certification are separate, but related, regulatory activities. The former is usually a state or local requirement and the latter is a federal requirement. In almost all instances, licensure and certification will follow specific standards and requirements that are set forth in readily available public documents. Compliance with the requirements is monitored by annual on-site inspections by representatives of various government agencies. The Gravois facility and the Mountain View facility are currently required to be licensed.

Loss by a facility of its ability to participate in government sponsored programs because of licensing, certification or accreditation deficiencies or because of program exclusion resulting from violations of law would have adverse effects on its revenues.

In December [Year], the American Medical Association modified its ethical position on physician referrals to facilities in which they have an ownership interest. Generally, physicians are prohibited from making referrals to facilities in which they have an ownership interest unless they provide services at the facility (such as surgeons at surgery centers and physicians with staff privileges at hospitals). A narrow exception to this rule is permitted when a facility is clearly needed in a community and alternative financing is not available if certain strict conditions are satisfied. While it is generally believed that these regulations are not intended to affect physician ownership in large, publicly-traded companies such as the Company, physicians considering an investment to the Company should be aware of the existence of these ethical considerations and consider the potential applicability to the proposed investment.

In recent years, a number of proposals have been introduced in Congress that would reform various aspects of the healthcare system, including malpractice reform, universal access to healthcare, global budgeting of public and private healthcare spending, Medicare payment reform and establishment of national health or single payor insurance programs financed by the federal government. Legislation introduced in Congress known as "The Managed Competition Act of [Year]" would have, if enacted, (i) provided tax incentives to employers who provide basic healthcare benefits coverage for their employees, but would limit deductions for providing additional benefits; (ii) provided universal access to coverage through varying levels of direct government subsidies for individuals with incomes below 200% of the poverty level; (iii) incorporated insurance reform and malpractice reform to reduce costs; and (iv) encouraged through tax incentives the establishment of accountable health plans consisting of providers and insurance companies that compete on the basis of offering high quality, low cost healthcare.

In September [Year], President Clinton proposed plans for healthcare reform. Although elements of the Managed Competition Act, along with other health reform initiatives, are being considered, no assurance can be given as to what elements will be included in the President's comprehensive national healthcare reform package, whether such proposal will be enacted into law, or what effect such proposals would have on the operations of Initial Properties.

REGULATORY COMPLIANCE

The Company believes that healthcare regulations will continue to change and, therefore, regularly monitors developments in healthcare law. There can be no assurance that all facilities to be subject to Leases can remain in compliance with applicable law.

ENVIRONMENTAL MATTERS

Under various federal, state and local environmental laws, ordinances and regulations, an owner of real property may be liable for the costs of removal or remediation of certain hazardous or toxic substances at, under or disposed of in

connection with such property, as well as certain other potential costs relating to hazardous or toxic substances (including fines and injuries to persons and adjacent property). Most, if not all, of these laws, ordinances and regulations contain stringent enforcement provisions including, but not limited to, the authority to impose substantial administrative, civil and criminal fines and penalties upon violators. Such laws often impose liability without regard to whether the owner knew of, or was responsible for, the presence or disposal of such substances and may be imposed on the owner in connection with the activities of an operator of the property. The cost of any required remediation, removal, fines or personal or property damages and the owner's liability therefor could exceed the value of the property and/or the aggregate assets of the owner. In addition, the presence of such substances, or the failure to properly dispose of or remediate such substances, may adversely affect the owner's ability to sell or lease such property or to borrow using such property as collateral.

Operations at the Initial Properties have been and will continue to be subject to numerous federal, state, and local environmental laws, ordinances and regulations, including those relating to the generation, segregation, handling, packaging and disposal of medical wastes as well as facility siting, construction, occupational training and safety, disposal of non-medical wastes, underground storage tanks and ash emissions from incinerators. Operations of nuclear medicine departments at some of the Initial Properties also involve the use and handling, and subsequent disposal of, radioactive isotopes and similar materials, activities which are closely regulated by the Nuclear Regulatory Commission and state regulatory agencies. In addition, several of the Initial Properties were built prior to the time prohibitions on the use of asbestos in building construction were enacted and other such facilities may be acquired by the Company in the future. Seven of the Initial Properties contain non-friable asbestos-containing materials, and other facilities may contain friable and non-friable asbestos-containing materials. The presence of such materials could result in significant costs in the event that any friable asbestos-containing materials requiring immediate removal and/or encapsulation are located in or on any of such facilities or in the event of any future renovation activities.

The Company has had new environmental audits conducted on only some of the Initial Properties, while recent audits were relied upon with respect to the balance of the Initial Properties. All of the Purchase Agreements and leases pertaining to the Initial Properties contain indemnification provisions relating to environmental liabilities or conditions, although there can be no assurances that the seller will be able to fulfill its indemnification obligations. In addition, the scope of such indemnification obligations may be limited and there can be no assurances that such indemnification obligations will apply to all environmental costs or liabilities incurred by the Company. The Leases do not give the Company control over the operations of the Lessees, nor will the Company monitor the Lessees with respect to environmental matters.

Although the Company has not, in many cases, conducted or received an independent investigation or analysis of the environmental conditions or liabilities associated with the Initial Properties, the Company is not aware of any such condition or liability that management presently believes would have a material adverse effect on the Company's earnings, expenditures or continuing operations.

No assurance can be given that the provisions of either the Purchase Agreements or the Leases will fully protect the Company or that any prior owner, Lessee or future lessee of a Initial Property did not and will not create environmental conditions not known to the Company.

COMPANY OFFICES

The Company's headquarters are located in offices at Six Central Southern Bldg., Suite 101-A, Birmingham, Alabama 35243, which are leased by the Company from Birmingham Realty Company until May 31, [Year]. Annual rental is \$7,755.00. The office lease covers approximately 1,500 square feet at rent of \$5.17 per square foot.

LEGAL PROCEEDINGS

In June [Year], Mr. Gerald Chandler filed a lawsuit in the Circuit Court for Jefferson County, Alabama, against M. Donal Rushmore, Carleton Residence, Dee Martin Michaels, W. Gill McDaniel and a to be formed REIT, seeking damages arising out of the defendants' alleged breaches of alleged verbal agreements to employ Mr. Chandler. The Company is of the opinion that this lawsuit is without merit and will not have a material adverse effect on the Company and is defending the lawsuit vigorously.

The CON for the Northlake facility has been challenged by HCA Health Services of Georgia, Inc., d/b/a/ Northlake Regional Medical Center in two related Georgia state court proceedings on the basis that the Georgia State Health Planning Agency did not have authority by statute or regulation to permit the relocation of the facility without a new CON. Regulations have since been proposed that would permit such a relocation which contain a grandfather provision that would be applicable to the Northlake facility. If the proposed regulations are not finally adopted as published or are challenged and held invalid, or if Health Surgery does not prevail on the issue of whether the facility was properly grandfathered from the CON requirements, Health Surgery may be required to discontinue operation of the Northlake facility and apply for a new CON. In such event, the Company can require Health Surgery to substitute one or more comparable properties for the Northlake facility.

INVESTMENT AND OTHER POLICIES

The following is a summary of the Company's investment policy and policies with respect to certain other activities.

INVESTMENT POLICY

The Company's investment objectives are to (i) generate current income for stockholders, (ii) provide increased returns to stockholders through the acquisition and development of additional properties, which may require the use of additional debt or equity financing, (iii) provide the opportunity to realize capital growth resulting from appreciation, if any, in the residual values of any properties acquired and (iv) preserve and protect stockholders' capital. There can be no assurance that any of these objectives will be realized.

The Bylaws of the Company permit the Board of Directors with the consent of a majority of the Executive Committee, but without the approval of the stockholders, to alter the Company's investment policies if they determine in the future that such a change is in the best interests of the Company and its stockholders. The methods of implementing the Company's investment policies may vary as new investment and financing techniques are developed.

The Company intends to invest in real property, principally for the production of income, although the prospect for capital appreciation is a factor that will be considered in making such investments. The Company's present policy is not to have any single property or lease account for more than 20% of either its assets or annualized rental revenue. There are no limitations on the number or amount of mortgages that may be placed on any single property, but the Company's present policy prohibits aggregate debt (secured or unsecured) in excess of 50% of the Company's total capitalization. The Company intends to close all of the Initial Properties in escrow on or before the Effective Date of the Offering and to release the Initial Properties from escrow immediately after the closing of this Offering, except for the South County Medical Center facility which will be purchased after the completion of its construction and the issuance by the proper authority of a certificate of occupancy. Thereafter, the Company intends to seek growth through the acquisition of additional income-producing projects developed by third parties. The Company will concentrate on investments in healthcare-related facilities, including acute care hospitals, rehabilitation hospitals, physician clinics, ambulatory surgery centers, clinical laboratories, ancillary hospital facilities, long-term care facilities, and medical centers, but may also consider opportunities in other kinds of income-producing real property. Management has no present intention to

invest in properties unrelated to the healthcare industry.

The Company may acquire additional income-producing properties, expand and improve its properties or sell such properties when, in the opinion of the Company, circumstances warrant. The Company may also participate with other entities in property ownership, through joint ventures or other types of co-ownership, so long as the Company is the controlling party in any such venture. While the Company presently intends to acquire equity investments in real estate, it may, in its discretion, invest in mortgages and other types of interests in real estate. The Company may also invest in securities of concerns engaged in real estate activities or securities of other issuers, either for investment purposes or for the purpose of exercising control, subject to limitations on such investments necessary for REIT qualification. The Company has the authority to invest in securities of other issuers and interests in real estate, but has no present plans to do so. Except for the policy that no one property may account for more than 20% of the Company's assets or annualized rental revenue, there is no limit to the percentage of assets that may be invested in securities or interests in real estate.

The Company may enter into build-to-suit type agreements that by their terms require conversion to leases upon the completion of the development of the facility. During the term of the development of the facility, funds will be advanced pursuant to requests made by the developer in accordance with the terms and conditions of the applicable development agreement. Simultaneously with the commencement of the development of a facility, the Company will enter into a lease with the developer. The Base Rent under such a lease will be established at a specified rate or at a specified number of basis points over an agreed-upon United States treasury security's yield in effect at the time of certified substantial completion of the facility.

The Company's development program will generally include a variety of additional forms of security and collateral beyond that provided by the Leases, such as irrevocable letters of credit from financial institutions, payment and performance completion bonds or completion guarantees. In addition, prior to any advance of funds by the Company under a development agreement, the developer generally must provide: (i) satisfactory evidence in the form of an endorsement to the Company's title insurance policy that no intervening liens have been placed on the property since the date of the Company's previous advance; (ii) a certificate executed by the architect-of record that indicates that all construction work completed on the facility conforms with the requirements of the plans, specifications, and any change orders previously approved by the Company; (iii) a certificate executed by the general contractor or construction manager that all work requested for reimbursement has been completed; and (iv) satisfactory evidence that the funds remaining unadvanced are sufficient for the payment of all costs necessary for the completion of the facility in accordance with the terms and provisions of the agreement. As a further safeguard during the development period, the Company will generally retain a percentage of construction costs incurred until it has received satisfactory evidence that the facility has been substantially completed in accordance with the applicable plans, specifications, and approved change-orders, and the period during which liens may be perfected with respect to any work performed, or labor or materials supplied, in connection with the construction of the facility has expired. The Company anticipates that it will also monitor the progress of the development of each facility and the accuracy of the developer's requests for funds by having a third-party inspector perform monthly on-site inspections.

In evaluating potential investments, the Company will consider such factors as: (i) the geographic area, type of property and demographic profile; (ii) the location, construction quality, condition and design of the property; (iii) the current and anticipated cash available for distribution and its adequacy to meet operational needs and lease obligations and to provide a competitive market return on equity to the Company's investors; (iv) the potential for capital appreciation, if any; (v) the growth, tax and regulatory environment of the communities in which the properties are located; (vi) the occupancy and demand for similar health facilities in the same or nearby communities; (vii) an adequate mix of private and government sponsored patients; (viii) any potential alternative uses of the facilities; (ix) prospects for liquidity through financing or refinancing; (x) industry segment and operator diversification; and (xi) the suitability of the potential investments in light of maintaining REIT status.

In making future investments, the Company intends to focus on established, credit-worthy potential lessees which meet

the Company's standards for quality and experience of management. In order to determine creditworthiness of potential lessees, the Company will review historical and prospective financial information of the lessee, together with appropriate financial information of any guarantor. Factors considered in connection with such financial review with respect to the lessee and any guarantor will include the net worth, profitability and cash flow, debt position, and the ability of the lessee and any guarantor to provide additional credit enhancements.

The Company will actively seek to maintain diversification of its investments in terms of geographic location, lessee and facility types, although investments are not limited (as to percentage of assets or otherwise) to any geographic area or any specific type of property. A fundamental investment objective of the Company will be to obtain contractual Base Rent escalations under long-term, noncancellable, Triple Net Leases and to obtain credit enhancements based upon the credit of the Lessee or its parent.

Management of the Company will conduct market research and analysis for all potential investments. Management also will review the value of the property, the interest rates and debt service coverage requirements of any debt to be assumed and the anticipated sources of repayment for the investment. There are no limitations on the percentage of the Company's total assets that may be invested in any one property or joint venture or other investment. The Board of Directors may establish limitations as it deems appropriate from time to time without a vote of the stockholders of the Company. No limits have been set on the number of properties in which the Company will seek to invest, or on the concentration of investment in any one property or any one city or state.

The Company may determine to finance acquisitions through the exchange of properties or the issuance of shares of its capital stock to others, if such transactions otherwise satisfy the Company's investment criteria. The Company also has authority to repurchase or otherwise reacquire its Common Stock or any other securities and may determine to do so in the future.

To the extent that the Company's Board of Directors determines to obtain additional capital, the Company may raise such capital through additional equity offerings, debt financings or retention of cash available for distribution (subject to provisions of the Code concerning the taxability of undistributed income of REITs), or a combination of these methods. See "Management's Discussion and Analysis of Financial Condition and Results of Operations," "Liquidity and Capital Resources," *supra*, and "Other Policies," *infra*.

The Company expects to hold its properties as long-term investments and has no maximum period for retention of each investment. To the extent that the Company holds its properties for long periods, it may not have sufficient funds available to acquire additional properties unless such funds are available through the Bank Credit Facility or other borrowings, or are raised through additional equity or debt financing, including debt incurred by mortgaging existing properties.

The Company may invest its cash in certain short-term investment grade instruments. Such investments may be in interest-bearing bank accounts, certificates of deposit, money-market securities, United States government securities, mortgage-backed securities guaranteed by the Government National Mortgage Association, mortgages insured by the Federal Housing Administration or guaranteed by the Veterans Administration, mortgage loans, mortgage loan participation and certain other similar investments. The Company's ability to make certain of these investments may be limited by tax considerations.

The Company may sell a property if such property has significantly appreciated in value. The Company anticipates that the value of the properties that it intends to acquire will appreciate over the term of its ownership. Appreciation of the properties is dependent upon many factors, including: (i) growth of the healthcare industry in general, which in turn is dependent upon a rising demand for healthcare services, (ii) availability of financial resources to pay for increased healthcare services, and (iii) supply of healthcare facilities within the geographical area of the Company's properties which is available to satisfy the demand for such facilities. Supply and demand for healthcare facilities within the

geographical area of the Company's properties is dependent, among other considerations, upon (i) availability of capital for construction of new healthcare facilities; (ii) competing healthcare facilities; and (iii) population growth and the demographic composition thereof. The Company, in employing its investment criteria, has selected properties for acquisition with respect to which it believes there is reasonable likelihood for appreciation based upon the foregoing considerations.

In the event the Company sells or otherwise disposes of any of its properties, the Board of Directors will determine whether and to what extent the Company will acquire additional properties or distribute the proceeds to the stockholders.

OTHER POLICIES

The Company may incur indebtedness when, in the opinion of the Board of Directors, it is advisable to do so subject to the limitation described in "Investment Policy" and limitations imposed by financing as described under "Management's Discussion and Analysis of Financial Condition and Results of Operations --Liquidity and Capital Resources." The Company has obtained a written commitment from AmTrust for the \$30 million Bank Credit Facility, which will be used to purchase the Initial Properties, acquire additional properties and for general corporate purposes. The Company may from time to time negotiate lines of credit or arrange for other short-term borrowings from banks or otherwise. The Company may also arrange for long-term borrowings from public offerings, banks or other institutional investors. Such borrowings may be for general corporate purposes, to improve or expand existing properties, to acquire additional properties or to fund any shortfall of cash necessary to meet its cash distribution requirements that could arise if its taxable income exceeds its cash available for distribution.

In addition, the Company may incur mortgage indebtedness on real estate which it owns. Where terms are deemed favorable, the Company may invest in properties subject to existing mortgages, deeds of trust or similar liens on the properties. The Company also may obtain non-recourse or other mortgage financing for unleveraged properties in which it has invested or may refinance properties acquired on a leveraged basis. There is no limitation on the number or amount of mortgages which may be placed on any one property, although the Company's policy is not to incur indebtedness in excess of 50% of its total capitalization.

The Company has no present intention to issue senior securities; however, its Articles of Incorporation authorize the Board of Directors to classify or reclassify any unissued shares of stock, including the right to issue up to 10,000,000 shares of preferred stock in series, and the Company may in the future issue senior securities to raise equity or debt capital, to acquire real estate or other assets or in connection with a merger or other business acquisition or for any other corporate purposes. The Company may repurchase or otherwise reacquire its own shares, although it may not issue stock that is redeemable at the option of the holder.

The Company intends to hold the properties it acquires for long-term investment. The Company will seek to sell the properties it owns when management determines that the continued ownership no longer meets its then current criteria or where a higher yield would be achieved through another investment. Proceeds from the sale of properties may be used by the Company to acquire additional investments.

MANAGEMENT

DIRECTORS AND EXECUTIVE OFFICERS

The directors and executive officers of the Company are:

NAME	AGE	POSITION
W. Gill McDaniel (1)(3)	41	President, Chief Executive Officer and Director
Harlan C. Johnson	42	Senior Vice President and Head of Acquisitions
Ralph Cuzzins	37	Vice President, Chief Financial Officer, Secretary and Treasurer
M. Donal Rushmore (1)	41	Chairman of the Board
Dee Martin Michaels (1)(3)	33	Director
Robert M. Naismith (3)	49	Director
Donald W. Luccarelli (2)	49	Director
Erich Barnes (3)	39	Director
Lawrence W. Arbor III (2)	64	Director
Gordon Berry (1)	56	Director
Brian Edwards (2)	56	Director

(1) Member of Executive Committee

(2) Member of Audit Committee

(3) Member of Compensation Committee

Officers are appointed by and serve at the discretion of the Board of Directors. All current officers were appointed on March 31, [Year]. The officers will devote substantially their full business time to the business and affairs of the Company.

Mr. McDaniel was a senior officer of AmSouth Bank N.A., headquartered in Birmingham, Alabama, prior to becoming a co-founder, President and Chief Executive Officer of the Company. He was employed by AmSouth Bank from [Year] to [Year] and most recently was head of Corporate Banking for the Birmingham area. Mr. McDaniel's responsibilities at AmSouth also included oversight of the bank's entire healthcare lending portfolio and the Birmingham based real estate lending portfolio.

Mr. Johnson was a senior officer of SouthTrust Bank, N.A., headquartered in Birmingham, Alabama, prior to becoming employed by the Company. He was employed by SouthTrust Bank from [Year] to [Year] and was most recently head of the bank's healthcare lending area. Mr. Johnson serves on the advisory board of Carraway Medical Center, Inc.

Mr. Cuzzins, a CPA, was a senior manager with Andrew Arther in their Birmingham office prior to becoming employed by the Company. Mr. Cuzzins was employed by Andrew Arther from [Year] to [Year]. Prior to that time he was employed by Andrew Arther in their Tuscaloosa office.

Mr. Rushmore is Chairman, President and Chief Executive Officer of WELLHEALTH Rehabilitation Corporation and is a co-founder of the Company. Prior to founding WELLHEALTH in [Year], Mr. Rushmore served as a Vice President of Lifemark Corporation, a NYSE listed company. He also serves on the Board of Directors of Health Surgery Corporation, Total Health Services, Inc., Diagnostic Health Corporation, MedPartners, Inc., Caretenders Healthcorp, Omega Pharmaceuticals, Inc., and Scandipharm, Inc.

Mr. Michaels, is Senior Vice President and Treasurer of WELLHEALTH Rehabilitation Corporation and a co-founder of the Company. Prior to joining WELLHEALTH in [Year], he had been employed by AmSouth Bank N.A. since [Year]

J. At the time of his departure from AmSouth Bank, Mr. Michaels was Vice President and served in a corporate lending function. Mr. Michaels serves on the Board of Directors of Caretenders Healthcorp.

Mr. Naismith has served as Chairman and Chief Executive Officer of Integrated Health Services, Inc., since March [Year]. Prior to his founding Integrated Health, Mr. Naismith served as a co-founder and Vice President of Continental Care Centers, Inc., an operator of long-term healthcare facilities.

Mr. Luccarelli has been President and Chief Executive Officer of Surgical Health Corporation, a privately held company that operates outpatient surgery centers throughout the country, since its inception in July [Year]. Prior to co-founding Health Surgery Corporation, Mr. Luccarelli was Chief Executive Officer and a member of the Board of FLR Health Resources, a national healthcare consulting company. From [Year] through [Year], Mr. Luccarelli was associated with Surgical Care Affiliates, Inc., a publicly held company that operates surgery centers in partnership with physicians and hospitals.

Mr. Barnes is Chairman and Chief Executive Officer of U.S. Strategies Corp., a national public affairs and development company specializing in healthcare and urban affairs. Mr. Barnes founded North American Strategy, Inc., in [Year] and has served North American Strategy Inc. in his current capacity since that time.

Mr. Arbor is President and Chief Executive Officer of Circle "S" Industries, a holding company with headquarters in Selma, Alabama. Among the Circle "S" companies are Nelson/Brantley Glass Company, DISCO Aluminum Products, American Fine Wire, Clearview Properties, Aim Leasing Company. Mr. Arbor serves on the boards of directors of Omega Pharmaceuticals, Inc. and Med Partners, Inc.

Mr. Berry is President and Chief Executive Officer of The Robins & Morton Group, a Birmingham-based construction company that specializes in the construction of hospitals and related healthcare facilities throughout the southeast. Mr. Berry has served in his current capacity since [Year] and has been affiliated with The Robins & Morton Group his entire career.

Mr. Edwards is Chairman and Chief Executive Officer of USA Health Holding, Inc. USA Health Holding, Inc. is the parent of USA Health Network, the nation's largest preferred provider organization; USA Workers Insurance Network (WIN), the nation's largest workers compensation network; and USA Transnet, the nation's largest trauma and transplant network. Mr. Edwards founded USA Health Network in [Year].

A director holds office until the next annual meeting and until his successor is elected and qualified. A director may be removed from office with or without cause only at a meeting of the stockholders called for that purpose by the affirmative vote of the holders of not less than two-thirds of the shares then outstanding and entitled to vote on the election of directors.

The Company's Bylaws provide that a majority of the Company's directors not interested in a transaction, including a majority of the Disinterested Directors, is required to approve any transactions between the Company and any of its officers, directors, or their affiliates. The Company's Bylaws do not otherwise limit transactions between the Company and interested persons. No family relationship exists among the officers and directors.

EXECUTIVE COMPENSATION

The Company was organized on March 31, [Year], and has had no operations since that time.

The Company has agreed to reimburse the Partnership up to \$1,475,000 upon closing of the Offering for actual costs related to organizing the Company, negotiating the Initial Property acquisitions, performing due diligence investigations

related to the Initial Properties, performing corporate work in contemplation of the Offering, preparing the Registration Statement and providing interim financing for and closing the acquisition of the Initial Properties. These costs include certain costs related to performing property due diligence, certain property closing and financing costs, employee compensation, travel and overhead. These costs include salaries of executive officers from _____ [month] _____ [day], _____ [year], through, _____ [year], to W. Gill McDaniel (], Harlan C. Johnson (], and Ralph Cuzzins (]. All other amounts paid in connection with pre-formation activities were paid by the Partnership to unaffiliated third parties for services rendered on behalf of the Company.

The following table sets forth certain summary information concerning the annual base salaries to be paid to the Company's chief executive officer and the two other executive officers of the Company for [year]:

SUMMARY COMPENSATION TABLE

NAME	PRINCIPAL POSITION	ANNUAL COMPENSATION		LONG TERM COMPENSATION	
		YEAR	BASE SALARY (] (1)	BONUS	STOCK OP- TIONS (#) (3)
W. Gill McDaniel	President and Chief Executive Officer	[Year]	\$200,000	(2)	125,000
Harlan C. Johnson	Senior Vice President and Head of Acquisitions	[Year]	100,000	(2)	85,000.
Ralph Cuzzins	Vice President and Chief Financial Officer	[Year]	80,000	(2)	50,000

(1) Annualized for year ended December 31, [Year].

(2) Annual bonuses will be determined by the Compensation Committee of the Company's Board of Directors.

(3) Options to purchase a total of 260,000 shares of Common Stock will be granted to executive officers of the Company on the date of this Prospectus at the initial public offering price. See "Management--[Year] Stock Incentive Plan."

OPTIONS GRANTED IN FISCAL YEAR [Year] INDIVIDUAL GRANTS

NAME	OPTIONS GRANTED	PERCENT OF TOTAL OPTIONS GRANTED TO EM- PLOYEES IN FISCAL YEAR	EXERCISE OR BASE PRICE (\$/SH) (1)	EXPIRA- TION DATE	POTENTIAL REALIZABLE VALUE AT ASSUMED AN- NUAL RATES OF SHARE PRICE APPRECIATION FOR OPTION PERIOD	
					5% (]	10% (]
W. Gill McDaniel	125,000	48%	\$19.00		\$1,493,625	\$ 3,785,138

.....[

			<i>Date]</i>			
Harlan C.	85,000	33	19.00	1,015,665	2,573,894	
Johnson			<i>Date]</i>			
Ralph	50,000	19	19.00	597,450	1,514,055	
Cuzzins			<i>Date]</i>			

(1) Based on the mid-point of the filing range of the estimated initial public offering price of the Common Stock.

The Company intends to adopt and implement a bonus arrangement for its executive officers to be administered by the Compensation Committee.

COMPENSATION COMMITTEE AND INSIDER PARTICIPATION IN COMPENSATION DECISIONS

The members of the Compensation Committee of the Company's Board of Directors are M. Donal Rushmore, W. Gill McDaniel and Erich Barnes. There are no interlocks among the members of the Compensation Committee. Although W. Gill McDaniel serves on the Company's Compensation Committee, he does not participate in any decisions regarding his own compensation as an executive officer.

DEFERRED COMPENSATION PLAN

The Company intends to adopt a Deferred Compensation Plan (the "Plan"), pursuant to which eligible participants may elect to defer and invest a portion of their compensation. The Company intends to match a portion of the deferred amount. The amounts credited to a participant's account will be credited with the results of a selected investment option, which are expected to include funds primarily investing in debt issued by the United States Government, equity securities, or a combination of debt and equity securities. All amounts in an account of a participant will be fully vested at all times and may be withdrawn by a participant 30 days following such participant's termination of employment. The participant will be able to request that his benefits be paid as a single lump sum or over a period of between three and ten years as specified by the participant. The Plan will be administered by a committee consisting of three or more persons selected by the Compensation Committee of the Board of Directors. The Plan committee will have broad powers to interpret and administer the Plan, including designating participants and investment options.

[Year] STOCK INCENTIVE PLAN

The Board of Directors has adopted the [Year] Stock Incentive Plan (the "Stock Incentive Plan"). After the closing of the Offering, the Stock Incentive Plan will be administered by the Stock Option Committee appointed by the Board of Directors.

The Company may issue incentive awards for up to 418,600 of its outstanding shares of Common Stock under the Stock Incentive Plan. Under the Stock Incentive Plan, the Stock Option Committee appointed by the Board of Directors may grant to employees and members of the Board of Directors of the Company or its subsidiaries or affiliates stock awards or non-transferable options to purchase Shares of the Company's Common Stock for terms not longer than ten years, at prices to be determined by the Board of Directors or the Stock Option Committee, which may not be less than 95% of the fair market value of the Common Stock on the date of grant. Options granted under the Stock Incentive Plan may be subject to other conditions set by the Stock Option Committee, may be exercised by payment of cash, shares valued at

fair market value, or, at the option of the Stock Option Committee, by a note secured by shares. Unless terminated earlier, the Stock Incentive Plan will terminate on, [date].

Options to purchase a total of 260,000 shares of Common Stock will be granted to executive officers of the Company on the date of this Prospectus at the initial public offering price.

RETIREMENT PLANS

The Company intends to adopt a retirement plan for its executive officers pursuant to which an eligible executive may receive upon normal retirement (defined to be when the participant reaches age 65 and has completed five years of service with the Company) certain benefits based on average earnings and years of service. The plan will be unfunded and will be paid from earnings of the Company. All three of the Company's executive officers will be eligible participants.

COMPENSATION OF DIRECTORS

No officer who is a member of the Board receives compensation for serving on the Board. Each other member of the Board receives annual compensation of \$5,000 for serving on the Board, plus a fee of \$1,000 for each Board and committee meeting attended, except that only one fee will be paid in the event that more than one such meeting is held on a single day. All directors receive reimbursement of travel expenses incurred in attending Board and committee meetings.

INDEMNIFICATION OF DIRECTORS AND OFFICERS

The Company's Articles of Incorporation provide that a director or officer shall not be personally liable to the Company or its stockholders for money damages unless (i) it is proved that the person actually received an improper benefit or profit in money, property or services, for the amount of the benefit or profit in money, property, or services actually received, or (ii) a judgement or other final adjudication adverse to the person is entered in a proceeding based on a finding in the proceeding that the person's action, or failure to act, was the result of active and deliberate dishonesty and was material to the cause of action adjudicated in the proceeding. The Articles of Incorporation further provide that if the law of the State of Maryland is amended to authorize corporate action further limiting or eliminating the personal liability of directors or officers then the liability of directors and officers to the corporation or its stockholders shall be limited or eliminated to the fullest extent permitted. While liability for monetary damages may be eliminated under certain circumstances as a result of these provisions, equitable remedies such as injunctive relief or rescission remain available.

The Company's Articles of Incorporation provide that the Company shall indemnify directors, officers, employees and agents to the fullest extent permitted by the law of the State of Maryland. The Company's Bylaws require it to indemnify each director, officer, employee and agent of the Company and purchase and maintain liability insurance for those persons as, and to the extent permitted by Maryland law. Maryland law provides that any present or former director or officer who has been successful, on the merits or otherwise, in the defense of a proceeding to which he was made a party by reason of his services in that capacity may be indemnified against judgments, penalties, fines, settlements and reasonable expenses incurred by him in connection with the proceeding unless it is established that: (i) his act or omission was committed in bad faith or was the result of active or deliberate dishonesty; (ii) he actually received an improper personal benefit in money, property, or services; or (iii) in the case of a criminal proceeding, he had reasonable cause to believe that his act or omission was unlawful, but, if the proceeding is one by, or in the right of Company, indemnification is not permitted with respect to any proceeding in which the director has been adjudged to be

liable to the Company. The termination of any proceeding by conviction or upon a plea of nolo contendere or its equivalent creates a rebuttable presumption that the director failed to meet the requisite standard of conduct required for permitted indemnification. The termination of any proceedings by judgement, order or settlement, however, does not create a presumption that the director failed to meet the requisite standard of conduct for permitted indemnification. In addition, Maryland law provides that reasonable expenses incurred by a director or officer who is a party to a proceeding may be paid or reimbursed, in advance of final deposition of a proceeding, provided that the Company shall have received (i) a written affirmation by the director or officer of his good faith belief that he has met the standard of conduct necessary for indemnification by the Company as authorized by the Bylaws and (ii) a written undertaking by or on his behalf to repay the amount paid or reimbursed by the Company if it shall ultimately be determined that the standard of conduct was not met.

Indemnification under the provisions of the Maryland General Corporation Law ("MGCL") is not deemed exclusive of any other rights, by indemnification or otherwise, to which a director may be entitled under the Article of Incorporation, Bylaws, resolutions of stockholders or allegation, conduct or otherwise.

Indemnification of the Company's directors and officers is subject to certain limitations where claims of securities laws violations are involved. Insofar as indemnification for liabilities arising under the Securities Act of 1933, as amended (the "Securities Act"), may be permitted to directors and officers of the Company pursuant to the foregoing provisions or otherwise, the Company has been advised that, in the opinion of the SEC, such indemnification is against public policy as expressed in the Securities Act and is, therefore, unenforceable. In addition, indemnification may be limited by state securities laws.

INSURANCE

The Company expects to maintain appropriate liability insurance and casualty insurance on the Company's office premises and directors' and officers' liability insurance for the officers and directors of the Company.

CERTAIN TRANSACTIONS

Ten of the Initial Properties will be purchased by the Company from and leased to Subsidiaries of WELLHEALTH and the Leases for such Initial Properties will be guaranteed by WELLHEALTH. M. Donal Rushmore and Dee Martin Michaels, directors of the Company, are officers, directors and/or stockholders of WELLHEALTH.

Two of the Initial Properties will be purchased by the Company from and leased to Subsidiaries of Total Health and such Leases will be guaranteed by Total Health. Robert M. Naismith, a director of the Company, is Chairman, Chief Executive Officer and a stockholder of Total Health, and M. Donal Rushmore, Chairman of the Board of the Company, is a director of Integrated Health.

Three of the Initial Properties will be purchased by the Company from and leased to Subsidiaries of Health Surgery and such Leases will be guaranteed by Health Surgery. Donald W. Luccarelli, a director of the Company, is Chairman, President, Chief Executive Officer and a stockholder of Health Surgery, and M. Donal Rushmore, Chairman of the Board of the Company, is a director of Health Surgery.

The Midway facility will be acquired prior to the Effective Date of this Offering by MACI, an Alabama corporation all of the stock of which is owned by M. Donal Rushmore, W. Gill McDaniel and Dee Martin Michaels, which will be acquired by the Company pursuant to the terms of the Merger Agreement. The consideration to be paid for MACI is the assumption of the indebtedness incurred by MACI to purchase the Midway facility.

The Company has agreed to reimburse the actual costs incurred by the Partnership on behalf of the Company upon closing of the Offering. These costs relate to organizing the Company, negotiating the Initial Property acquisitions, performing due diligence related to the Initial Properties, performing corporate work in contemplation of the Offering, preparing the Registration Statement and providing interim financing for and closing the acquisition of the Initial Properties. These costs include certain costs related to performing property due diligence, certain property closing and financing costs, employee compensation, travel and overhead. The Company estimates that these reimbursements will be approximately \$1,475,000. These reimbursements will be paid from the proceeds of the Offering.

PRINCIPAL STOCKHOLDERS

The following table sets forth the anticipated ownership of shares of the Company's Common Stock by certain officers and directors of the Company upon the closing of this Offering:

PERCENT OF STOCK OWNED

NAME AND ADDRESS OF BENEFICIAL OWNER	SHARES BENEFICIALLY OWNED	PRIOR TO OFFERING	AFTER OFFERING
M. Donal Rushmore	82,656	45.92 %	1.38 %
WELLHEALTH	71,280	39.60	1.19
W. Gill McDaniel	18,000	10.00	.30
Dee Martin Michaels	8,064	4.48	.13
Total	180,000	100.00 %	3.00 %

DESCRIPTION OF SECURITIES

The summary of the terms of the Common Stock of the Company set forth below does not purport to be complete and is subject to and qualified in its entirety by reference to the Articles of Incorporation and Bylaws of the Company, copies of which are exhibits to the Registration Statement of which this Prospectus is a part. See "Additional Information."

GENERAL

The Articles of Incorporation of the Company provide that the Company may issue up to 60,000,000 shares of stock, consisting of 50,000,000 shares of Common Stock and 10,000,000 shares of preferred stock, par value \$.001 per share ("Preferred Stock"). As of March 31, [Year], 180,000 shares of Common Stock were issued and outstanding and held by four record holders and no shares of Preferred Stock were outstanding. Under Maryland law, stockholders generally are not liable for the corporation's debts or obligations.

COMMON STOCK

Holders of Common Stock will be entitled to receive such dividends as the Board of Directors may declare out of funds legally available for the payment of dividends. Upon issuance, the Common Stock will be fully paid and nonassessable and have no preferences or conversion, exchange, or preemptive rights. In the event of any liquidation, dissolution, or winding-up of the Company, the holders of Common Stock are entitled to share ratably in any of the Company's assets remaining after the satisfaction of all obligations and liabilities of the Company and after required distributions to holders of Preferred Stock, if any. The Common Stock is subject to restrictions on transfer under certain circumstances. See "Restrictions on Transfer."

Each share of Common Stock will be entitled to one vote on all matters voted upon by the holders of Common Stock. Holders of Shares will have no cumulative voting rights. The Company's Bylaws provide that the President or a majority of the Board may call a special meeting and the Secretary of the Company must call a special meeting of stockholders upon written request of stockholders entitled to cast at least 25% of all votes entitled to be cast at the meeting.

The transfer agent and registrar for the Company's Common Stock is AmSouth Bank N.A.

The Company intends to apply to list the Common Stock on the New York Stock Exchange. Prior to this Offering, there has been no market for the Common Stock.

PREFERRED STOCK

The Board of Directors is empowered by the Company's Articles of Incorporation to designate and issue from time to time one or more classes or series of Preferred Stock and to classify or reclassify any shares of unissued stock without stockholder approval. The Board of Directors may determine the relative rights, preferences and privileges of each class or series of Preferred Stock so issued. Because the Board of Directors has the power to establish the preferences and rights of each class or series of Preferred Stock, it may afford the holders in any series or class of Preferred Stock preferences, powers and rights, voting or otherwise, senior to the rights of holders of Common Stock. The issuance of Preferred Stock could have the effect of delaying or preventing a change in control of the Company. The Board of Directors has no present plans to issue any shares of Preferred Stock.

RESTRICTIONS ON TRANSFER

For the Company to qualify as a REIT under the Code in any taxable year after the first year of its election to be treated as a REIT, (i) not more than 50% in value of its outstanding Stock (as defined below) may be owned, directly or indirectly (after application of certain complex attribution rules), by five or fewer individuals at any time during the last half of its taxable year, and (ii) its Stock must be beneficially owned by 100 or more persons during at least 335 days of a taxable year of 12 months or during a proportionate part of a shorter taxable year.

In connection with the foregoing, if the Board of Directors shall, at any time and in good faith, believe that direct or indirect ownership (as determined under applicable federal tax attribution rules) of at least 9.8% or more in value of the outstanding Common Stock and/or Preferred Stock (collectively, the "Stock") has or may become concentrated in the hands of one beneficial owner, the Board of Directors has the power to refuse to transfer or issue Stock to a person whose acquisition of such Stock would cause a beneficial holder to hold in excess of 9.8% in value of the outstanding Stock. Further, any transfer of Stock that would create a beneficial owner of more than 9.8% of the outstanding Stock shall be deemed null and void, and the intended transferee shall be deemed never to have had an interest therein.

If at any time there is a transfer in violation of such restrictions, the Excess Shares shall be deemed to have been transferred to the Company, as trustee for the benefit of such persons to whom the Excess Shares are later transferred.

Subject to the Company's right to purchase the Excess Shares, the interest in the trust representing the Excess Shares shall be freely transferable by the intended transferee at a price that does not exceed the price paid by the intended transferee for the Excess Shares. Excess Shares shall have no voting rights, and shall not be considered for the purpose of any stockholder vote or determining a quorum, but shall continue to be reflected as issued and outstanding stock. No dividends shall be paid with respect to Excess Shares. The Company shall have the right to purchase Excess Shares for the lesser of the amount paid by the intended transferee for the Excess Shares or the market price. The market price for any Stock so purchased, shall be equal to the fair market value of such Shares reflected in (i) the closing sales price for the Stock, if then listed on only one national securities exchange, (ii) the average closing sales price of such Stock if then listed on more than one national securities exchange, or (iii) if the Stock are not then listed on a national securities exchange the latest bid quotation for the Stock if then traded over-the-counter, as of the day immediately preceding the date on which notices of such purchase are sent by the Company. If no such closing sales prices or quotations are available, the purchase price shall equal the net asset value of such Stock as determined by the Board of Directors in good faith.

The market price for any Stock so purchased, shall be equal to the fair market value of such Shares reflected in (i) the closing sales price for the Stock, if then listed on only one national securities exchange, or (ii) the average closing sales price of such Stock if then listed on more than one national securities exchange, or (iii) if the Stock is not then listed on a national securities exchange the latest bid quotation for the Stock if then traded over-the-counter, as of the day immediately preceding the date on which notices of such purchase are sent by the Company. If no such closing sales prices or quotations are available, the purchase price shall equal the net asset value of such Stock as determined by the Board of Directors in good faith.

DIVIDEND REINVESTMENT PLAN

The Company intends to adopt a Dividend Reinvestment Plan to provide registered owners of the Company's Common Stock with a simple and convenient method of investing dividends and other distributions paid in cash ("dividends") in additional Shares of the Company's Common Stock at a 5% discount from current market value and without payment of any brokerage commission or service charge. Since such additional shares of Common Stock will be purchased from the Company, the Company will receive additional funds which will be used for its general corporate purposes.

Participating stockholders ("Participants") may have cash dividends on all or a portion of their shares of Common Stock automatically reinvested in additional shares of the Company's Common Stock ("Plan Shares"). Participants' funds will be fully invested because the Dividend Reinvestment Plan permits fractions of shares to be credited to a Participant's account. Dividends on such fractions, as well as on whole shares, will be reinvested in additional shares, and such shares will be credited to a Participant's account. Participants will avoid the need for safe keeping of stock certificates for Plan Shares credited to their accounts under the Dividend Reinvestment Plan.

Regular statements reflecting all current activity, including purchases and latest balances and, if applicable, amounts withheld in conformity with any United States federal income tax requirements, will simplify Participants' recordkeeping.

Implementation of the Dividend Reinvestment Plan will commence upon compliance with applicable federal and state securities laws.

SHARES ELIGIBLE FOR FUTURE SALE

Prior to the Offering there has not been any public market for securities of the Company. No prediction can be made as to the effect, if any, that market sales of Common Stock or the availability of Common Stock for sale will have on the

market price prevailing from time to time. Nevertheless, sales of substantial amounts of Common Stock of the Company in the public market could adversely affect the prevailing market prices.

Upon completion of this Offering, a total of 5,980,000 shares of Common Stock will be outstanding, assuming no exercise of options under the Stock Incentive Plan to purchase shares of Common Stock. The 5,800,000 Shares sold in this Offering will be freely tradeable without restriction or further registration under the Securities Act, except (i) for shares purchased by "affiliates" of the Company as that term is defined in Rule 144 under the Securities Act and (ii) for shares governed by the Excess Share provisions. See "Restrictions on Transfer."

The remaining 180,000 shares are deemed "Restricted Shares" under Rule 144 in that they were originally issued and sold by the Company in private transactions in reliance upon exemptions from the registration requirements of the Securities Act. An aggregate of 180,000 shares held by existing stockholders are subject to "lock-up agreements" under which the holders of such shares have agreed not to sell or otherwise dispose of any of their shares without the prior written consent of the Representatives of the Underwriters for 180 days after the date of this Prospectus. After the expiration of these "lock-up agreements," certain of the shares subject to such agreements will be eligible for sale in the public market subject to volume limitations, holding period requirements and other requirements of Rule 144 promulgated by the SEC under the Securities Act.

In general, under Rule 144 as currently in effect, a person (or persons whose shares are aggregated), including an affiliate, who has beneficially owned Restricted Shares for at least two years from the later of the date such Restricted Shares were acquired from the Company and (if applicable) the date they were acquired from an affiliate, is entitled to sell within any three-month period a number of shares that does not exceed the greater of one percent of the then outstanding shares of the Common Stock (59,800 shares based on the number of shares to be outstanding after this Offering) or the average weekly trading volume in the public market during the four calendar weeks preceding such sale. Sales under Rule 144 are also subject to certain requirements as to the manner and notice of sale and the availability of public information concerning the Company. In addition, a person who is not deemed to have been an affiliate of the Company at any time during the three months preceding a sale, and who has beneficially owned the Shares proposed to be sold for at least three years, would be entitled to sell such shares under Rule 144(k) without regard to the requirements described above.

The Company has reserved 418,600 shares of Common Stock to be outstanding from time to time for issuance pursuant to grants under its Stock Incentive Plan. See "Management _____ [Year] Stock Incentive Plan." Options to purchase a total of 260,000 shares of Common Stock will be granted to executive officers of the Company on the date of this Prospectus at the initial public offering price.

CERTAIN PROVISIONS OF MARYLAND LAW AND OF THE COMPANY'S ARTICLES OF INCORPORATION AND BYLAWS

The following paragraphs summarize certain provisions of Maryland law and the Company's Articles of Incorporation and Bylaws. The summary does not purport to be complete and is subject to and qualified in its entirety by reference to Maryland law and the Company's Articles of Incorporation and Bylaws for complete information.

REMOVAL OF DIRECTORS

The Articles of Incorporation provide that a director may be removed with or without cause only by the affirmative vote of at least two-third of the votes entitled to be cast in the election of directors. This provision, when coupled with the provision in the Bylaws authorizing the Board of Directors to fill vacant directorships, may preclude stockholders from

removing incumbent directors except upon a substantial affirmative vote and filling the vacancies created by such removal with their own nominees.

BUSINESS COMBINATIONS

Under the MGCL, certain "business combinations" (including a merger, consolidation, share exchange, or, in certain circumstances, an asset transfer or issuance or reclassification of equity securities) between a Maryland corporation and any person who beneficially owns 10% or more of the voting power of the corporation's shares or an affiliate of the corporation who, at any time within the two-year period prior to the date in question, was the beneficial owner of 10% or more of the voting power of the then-outstanding voting stock of the corporation (an "Interested Stockholder") or an affiliate thereof, are prohibited for five years after the most recent date on which the Interested Stockholder became an Interested Stockholder. Thereafter, any such business combination must be recommended by the Board of Directors of such corporation and approved by the affirmative vote of at least (i) 80% of the vote entitled to be cast by holders of outstanding voting shares of the corporation and (ii) two-thirds of the votes entitled to be cast by holders of outstanding voting shares of the corporation other than shares held by the Interested Stockholder with whom the business combination is to be effected, unless, among other things, the corporation's stockholders receive a minimum price (as defined in the MGCL) for their shares and the consideration is received in cash or in the same form as previously paid by the Interested Stockholder for its shares. These provisions of Maryland law do not apply, however, to business combinations that are approved or exempted by the Board of Directors of the corporation prior to the time that the Interested Stockholder becomes an Interested Stockholder.

CONTROL SHARE ACQUISITIONS

The MGCL provides that "control shares" of a Maryland corporation acquired in a "control share acquisition" have no voting rights except to the extent approved by a vote of two-thirds of the votes entitled to be cast on the matter, excluding shares of stock owned by the acquiror or by officers or directors who are employees of the corporation. "Control Shares" are voting shares of stock which, if aggregated with all other shares of stock previously acquired by the acquiror, or in respect of which the acquiror is able to exercise or direct the exercise of voting power, would entitle the acquiror to exercise voting power in electing directors within one of the following ranges of voting power: (i) one-fifth or more but less than one-third; (ii) one-third or more but less than a majority; or (iii) a majority of all voting power. Control shares do not include shares the acquiring person is then entitled to vote as a result of having previously obtained stockholder approval. A "control share acquisition" means the acquisition of control shares, subject to certain exceptions.

A person who has made or proposes to make a control share acquisition, upon satisfaction of certain conditions (including an undertaking to pay expenses), may compel the Board of Directors to call a special meeting of stockholders to be held within 45 days of demand to consider the voting rights of the shares. If no request for a meeting is made, the corporation may itself present the question at any stockholders meeting.

If voting rights are not approved at the meeting or if the acquiring person does not deliver an acquiring person statement as required by the statute, then, subject to certain conditions and limitations, the corporation may redeem any or all of the control shares (except those for which voting rights have previously been approved) for fair value determined, without regard to the absence of voting rights for the control shares, as of the date of the last control share acquisition or of any meeting of stockholders at which the voting rights of such shares are considered and not approved. If voting rights for control shares are approved at a stockholder meeting and the acquiror becomes entitled to vote a majority of the shares entitled to vote, all other stockholders may exercise appraisal rights. The fair value of the shares as determined for purposes of such appraisal rights may not be less than the highest price per share paid by the acquiror in the control share acquisition.

The control share acquisition statute does not apply to shares acquired in a merger, consolidation or share exchange if the corporation is a party to the transaction, or to acquisitions approved or exempted by the articles of incorporation or bylaws of the corporation.

The business combination statute and the control share acquisition statute could have the effect of discouraging offers to acquire the Company and of increasing the difficulty of consummating any such offer.

AMENDMENT OF THE ARTICLES OF INCORPORATION

Certain provisions of the Company's Articles of Incorporation, including the provisions governing removal of directors, may be amended only by the affirmative vote of the holders of not less than 90% of all of the votes entitled to be cast on the matter.

DISSOLUTION OF THE COMPANY

The dissolution of the Company must be approved by the affirmative vote of the holders of not less than two-thirds of all of the votes entitled to be cast on the matter or the written consent of all holders of shares entitled to vote on the matter.

ADVANCE NOTICE OF DIRECTOR NOMINATIONS AND NEW BUSINESS

The Bylaws of the Company provide that (a) with respect to an annual meeting of stockholders, nominations of persons for election to the Board of Directors and the proposal of business to be considered by stockholders may be made only (i) pursuant to the Company's notice of the meeting, (ii) by the Board of Directors, or (iii) by a stockholder who is entitled to vote at the meeting and has complied with the advance notice procedures set forth in the Bylaws. The Bylaws further provide that with respect to special meetings of stockholders, only the business specified in the Company's notice of meeting may be brought before the meeting of stockholders, and nominations of persons for election of the Board of Directors may be made only (i) pursuant to the Company's notice of the meeting, (ii) by the Board of Directors, or (iii) provided that the Board of Directors has determined that directors shall be elected at such meeting, by a stockholder who is entitled to vote at the meeting and has complied with the advance notice provisions set forth in the Bylaws.

The provisions in the Bylaws for removal of directors, the business combination and control share acquisition provisions of the MGCL, and the advance notice provisions of the Bylaws could have the effect of discouraging a takeover or other transaction in which holders of some, or a majority, of the shares of Common Stock might receive a premium for their shares over the then prevailing market price or which such holders might believe to be otherwise in their best interests.

FEDERAL INCOME TAX CONSIDERATIONS

GENERAL

The following discussion summarizes the material federal income tax considerations to the Company and a prospective holder of Common Stock. Based upon representations of the Company with respect to certain facts set forth herein,

Etores & Premull, P.C., which has acted as tax counsel to the Company in connection with the formation of the Company and the Company's election to be taxed as a REIT commencing with its taxable year ending December 31, [Year], is of the opinion that the following discussion fairly summarizes the material federal income tax considerations to the Company and a holder of Common Shares. This discussion and such opinion are based on current law. The following discussion is not exhaustive of all possible tax considerations. This summary does not give a detailed discussion of any state, local or foreign tax considerations, nor does it discuss all of the aspects of federal income taxation that may be relevant to a prospective stockholder in light of his or her particular circumstances or, unless otherwise indicated, to certain types of stockholders (including insurance companies, tax-exempt entities, financial institutions or broker-dealers, foreign corporations and persons who are not citizens or residents of the United States) who are subject to special treatment under the federal income tax laws.

PROSPECTIVE PURCHASERS OF THE SHARES OF COMMON STOCK OFFERED HEREBY ARE URGED TO CONSULT WITH THEIR OWN TAX ADVISORS AS TO THE SPECIFIC FEDERAL, STATE, LOCAL, FOREIGN AND OTHER TAX CONSEQUENCES RELATING TO THE PURCHASE, OWNERSHIP AND DISPOSITION OF SUCH SHARES OF COMMON STOCK.

TAXATION OF THE COMPANY

The Company intends to elect and to qualify as a REIT for federal income tax purposes under Sections 856 through 860 of the Code (the "REIT Provisions of the Code"), commencing with its taxable year ending December 31, [Year]. The Company believes that, commencing with such taxable year, it will be organized and will operate in such a manner as to qualify for taxation as a REIT under the Code, and the Company intends to continue to operate in such a manner. No assurance can be given, however, that the Company will operate in a manner so as to qualify or remain qualified as an REIT. It should be noted that the Code, rules, regulations, and administrative and judicial interpretations are all subject to change (possibly on a retroactive basis).

In the opinion of Etores & Premull, P.C., upon consummation of the Offering, the Company will be organized in conformity with the requirements for qualification as a REIT and its proposed method of operation as described in this Prospectus will permit it to meet the requirements for qualification and taxation as a REIT under the Code. This opinion is based on various assumptions relating to the organization and operation of the Company and is conditioned upon certain representations made by the Company as to certain relevant factual matters, including matters related to the organization and expected manner of operation of the Company. Qualification of the Company as a REIT will depend upon its ability to meet, through actual annual operating results, the various qualification tests imposed under the Code, as discussed below. Sirote & Permutt, P.C. will not review compliance with these tests on a continuing basis. The Company will receive an opinion of Etores & Premull, P.C. that it has been organized in conformity with the requirements for REIT status under the Code and that its proposed ownership and method of operations, as described in this Prospectus, will enable it to meet the requirements for qualification and taxation as a REIT under the Code. Such opinion will be based upon a review of the Leases in place before the Offering, representations and opinions as to reasonable values, and other matters set forth in the opinion. Such opinion assumes, although no assurance can be given, that the actual results of the Company's operations for any one taxable year will satisfy such requirements. See "Failure to Qualify" below.

In brief, if certain detailed conditions imposed by the REIT Provisions of the Code are met, entities such as the Company that invest primarily in real estate and that otherwise would be treated for federal income tax purposes as corporations subject to regular corporate income tax are generally not taxed at the corporate level on their "REIT taxable income" that is distributed to stockholders. This treatment substantially eliminates the "double taxation" (at both the corporate and stockholder level) that generally results from the use of corporate investment vehicles.

If the Company were to fail to qualify as a REIT in any year, however, it would be subject to federal income tax at

regular corporate income tax rates as if it were a domestic corporation, and its stockholders would be taxed in the same manner as stockholders of regular corporations. In this event, the Company could be subject to potentially significant tax liabilities, and, therefore, the amount of cash available for distribution to its stockholders would be reduced.

General. If the Company qualifies for taxation as a REIT, it generally will not be subject to federal income tax on that portion of its ordinary income or capital gain that is currently distributed to stockholders. The Company will be subject to federal income tax, however, as follows: First, the Company will be taxed at regular corporate rates on any undistributed "REIT taxable income," including undistributed net capital gains. Second, under certain circumstances, the Company may be subject to the "alternative minimum tax" on its items of tax preference, if any. Third, if the Company has net income from the sale or other disposition of foreclosure property that is held primarily for sale to customers in the ordinary course of business or other nonqualifying income from foreclosure property, it will be subject to tax on such income at the highest corporate rate. Fourth, any net income that the Company has from prohibited transactions (which are, in general, certain sales or other dispositions of property other than foreclosure property held primarily for sale to customers in the ordinary course of business) will be subject to a 100% tax. Fifth, if the Company was to fail to satisfy either the 75% or 95% gross income tests (as discussed below), and nonetheless maintain its qualification as a REIT because certain other requirements have been met, it would be subject to a 100% tax on the net income attributable to the greater of the amount by which the Company fails the 75% or 95% gross income tests, multiplied by a fraction intended to reflect the Company's profitability. Sixth, if the Company fails to distribute during each year at least the sum of (i) 85% of its REIT ordinary income for such year, (ii) 95% of its REIT capital gain net income for such year, and (iii) any undistributed taxable income from preceding periods, then the Company would be subject to a 4% excise tax on the excess of such required distribution over the amounts actually distributed. Seventh, provided certain federal tax elections are made, if, during the 10-year period commencing on the day on which assets having a net unrealized built-in gain are acquired by the Company from a C corporation in a transaction in which the Company inherits the tax basis in such assets from the C corporation, the Company recognizes a gain from the disposition of all or a portion of such assets, then the Company will be subject to tax at the highest regular corporate rate on the excess, if any, of the fair market value over the adjusted basis of any such asset disposed of determined as of the beginning of the relevant 10 year period.

Requirements for Qualification as a REIT. To qualify as a REIT for a taxable year under the Code, the Company must elect or have in effect an election to be so treated and must meet other requirements, all of which are summarized below, including percentage tests relating to the sources of its gross income, the nature of the Company's assets, and the distribution of its income to stockholders. Such election, if properly made and assuming continuing compliance with the qualification tests described herein, will continue in effect for subsequent years.

The Code defines a REIT as a corporation, trust or association: (1) which is managed by one or more trustees or directors; (2) the beneficial ownership of which is evidenced by transferable shares or by transferable certificates of beneficial interest; (3) which would be taxable, but for the REIT Provisions of the Code, as an association taxable as a domestic corporation; (4) which is neither a financial institution nor an insurance company subject to certain provisions of the Code; (5) the beneficial ownership of which is held by 100 or more persons, determined without reference to any rules of attribution (the share ownership test); (6) which is not closely held as determined under the personal holding company stock ownership test of Section 542(a) (as applied with certain modifications); and (7) which meets certain other tests, described below, regarding the nature of its income and assets. The Code provides that conditions (1) through (4), inclusive, must be met during the entire taxable year and that condition (5) must be met during at least 335 days of a taxable year of 12 months, or during a proportionate part of a taxable year of less than 12 months. By reason of condition (6) above, the Company will fail to qualify as a REIT for a taxable year if at any time during the last half of such year more than 50% in value of its outstanding stock is owned directly or indirectly by five or fewer individuals (the five or fewer test). For purposes of the five or fewer test, any stock held by a qualified trust described in Section 401(a) of the Code will be treated as if the stock is held directly by the beneficiaries of the trust in proportion to their actual interest in the trust rather than as held by the trust. The five or fewer test and the share ownership test do not apply to the first taxable year for which an election is made to be treated as a REIT. Prior to the consummation of the

Offering, the Company will not satisfy the five or fewer or share ownership tests of conditions (5) and (6) above. The Company anticipates issuing sufficient Shares pursuant to the Offering to allow it to satisfy the share ownership test and the five or fewer test. In addition, the Company's Articles of Incorporation will provide restrictions regarding the transfer of Common Stock that are intended to assist the Company in continuing to satisfy the share ownership test and the five or fewer test described in (5) and (6) above. See "Description of Securities--Restrictions on Transfer."

In addition, a corporation may not elect to become a REIT unless its taxable year is the calendar year. The Company will have a calendar year taxable year.

If a REIT owns a qualified REIT subsidiary, the Code provides that the qualified REIT subsidiary is disregarded for federal income tax purposes, and all assets, liabilities, and items of income, deduction and credit of the qualified REIT subsidiary are treated as assets, liabilities and such items of the REIT itself. A qualified REIT subsidiary is a corporation all of the outstanding capital stock of which has been owned by the REIT from the commencement of such subsidiary corporation's existence.

Gross Income Tests. There are three separate percentage tests relating to the sources of the Company's gross income that must be satisfied annually.

1. The 75% Test. At least 75% of the Company's gross income from the taxable year must be "qualifying income." Qualifying income generally includes (i) rents from real property (except as modified below); (ii) interest on obligations collateralized by mortgages on, or interest in real property; (iii) gains from the sale or other disposition of interests in real property and real estate mortgages, other than gain from property held primarily for sale to customers in the ordinary course of the Company's trade or business ("dealer property"); (iv) dividends or other distributions on shares in other REITS, as well as gain from the sale of such shares; (v) abatements and refunds of real property taxes; (vi) income from the operation, and gain from the sale of property reduced to possession following a lessee's default under the terms of a lease or, of property acquired at or in lieu of a foreclosure of the mortgage collateralized by such property ("foreclosure property"); (vii) commitment fees received for agreeing to make loans collateralized by mortgages on real property or to purchase or lease real property; and (viii) certain qualified temporary investment income attributable to the investment of new capital received by the Company in exchange for its shares (including the Shares issued pursuant to the Offering) during the one-year period following the receipt of such new capital.

2. The 95% Test. In addition to deriving 75% of its gross income from the sources listed above, at least 95% of the Company's gross income for the taxable year must be derived from the above-described qualifying income, or from dividends, interest or gains from the sale or disposition of stock or other securities that are not dealer property. Dividends and interest on any obligations not collateralized by an interest in real property are included for purposes of the 95% test, but not for purposes of the 75% test. Similarly, any payments made to the Company by a financial institution pursuant to a rate protection agreement that hedges variable rate indebtedness incurred by the Company to acquire or carry real estate assets will be included as qualifying income for purposes of the 95% gross income test, but not for purposes of the 75% test.

For purposes of determining whether the Company complies with the 75% and 95% income tests, gross income does not include income from prohibited transactions. A "prohibited transaction" is a sale of dealer property, excluding sales of foreclosure property and certain sales of dealer property exempted from the prohibited transaction tax by virtue of a limited safe harbor rule.

In order to qualify as rents from real property, the amount of rent received generally must not be determined on the income or profits of any person, but may be based on a fixed percentage or percentages of receipts or sales. The Code also provides that rents will not qualify as rents from real property, in satisfying the gross income tests, if the REIT owns 10% or more of the tenant, whether directly or pursuant to certain attribution rules. The Company intends to lease property only under circumstances such that substantially all rents from such property would qualify as rents from real

property. Although it is possible that a tenant could sublease space to a sublessee in which the REIT is deemed to own directly or indirectly 10% or more of the tenant, the Company believes that as a result of the provisions in the Articles of Incorporation limiting ownership to 9.8% such occurrence would be unlikely. Application of the 10% ownership rule is, however, dependent upon complex attribution rules provided in the Code and circumstances beyond the control of the Company. Ownership, directly or by attribution, by an unaffiliated third party of more than 10% of the Company's Common Stock and more than 10% of the stock of any lessee or sublessee would result in a violation of the rule.

In order to qualify as interest on obligations secured by mortgages on real property, the amount of interest received generally must not be determined on the income or profits of any person, but may be based on a fixed percentage or percentages of receipts or sales.

In addition, the Company must not manage its properties or furnish or render services to the tenants of its properties, except through an independent contractor from whom the Company derives no income. There is an exception to this rule permitting a REIT to perform directly certain customary tenant services which are "reasonable and customary" in the geographic area in which the services are performed. The Company anticipates that any services provided for tenants will meet this requirement.

If rent attributable to personal property leased in connection with a lease of real property is greater than 15% of the total rent received under the lease, then the portion of rent attributable to such personal property will not qualify as rents from real property. Generally, this 15% test is applied separately to each lease. The portion of rental income treated as attributable to personal property is determined according to the ratio of the tax basis of the personal property to the total tax basis of the property which is rented. The determination of what fixtures and other property constitute personal property for federal tax purposes is difficult and imprecise. The Company does not believe that it will have 15% in value of any of its real properties classified as personalty. If however, rent payments do not qualify, for reasons discussed above, as rents from real property for purposes of Section 856 of the Code, it will be more difficult for the Company to meet the 95% or 75% gross income tests.

The Company may temporarily invest its working capital in short-term investments, including shares in other REITs or interests in REMICs. Although the Company will use its best efforts to ensure that its income generated by these investments will be of a type which satisfies the 75% and 95% gross income tests, there can be no assurance in this regard (see the discussion above of the new capital rule under the 75% gross income test). Moreover, the Company may realize short-term capital gain upon sale or exchange of such investments, and such short-term capital gain would be subject to the limitations imposed by the 30% gross income test. The Company generally expects to meet the 75% and 95% gross income tests through the rental of the property it acquires.

If the Company fails to satisfy one or both of the 75% or 95% gross income tests for any taxable year, it may nevertheless qualify as a REIT for such year if it is entitled to relief under certain provisions of the Code. It is not possible, however, to know whether the Company would be entitled to the benefit of these relief provisions as the application of the relief provisions is dependent on future facts and circumstances. If these relief provisions apply, a special tax generally equal to 100% is imposed upon the net income attributable to the greater of the amount by which the Company failed the 75% or 95% gross income tests, multiplied by a fraction intended to reflect the Company's profitability.

3. The 30% test. Not more than 30% of the Company's gross income for each taxable year may be derived from the sale or other disposition of (i) stock or securities held for less than one year, (ii) dealer property that is not foreclosure property, and (iii) real property held for fewer than four years (apart from involuntary conversions and sales of foreclosure property).

Asset Tests. At the close of each quarter of the Company's taxable year, it must also satisfy three tests relating to the nature of its assets. First, at least 75% of the value of the Company's total assets must consist of real estate assets

(including interests in real property and interests in mortgages on real property as well as its allocable share of real estate assets held by joint ventures or partnerships in which the Company participates, if any), cash, cash items and government securities. Second, not more than 25% of the Company's total assets may be represented by securities other than those includible in the 75% asset class. Finally, of the investments included in the 25% asset class, the value of any one issuer's securities owned by the Company may not exceed 5% of the value of the Company's total assets, and the Company may not own more than 10% of any one issuer's outstanding voting securities. The Company may own 100% of another corporation, however, if it is a qualified REIT subsidiary. Under that circumstance, the qualified REIT subsidiary is ignored and the assets, income, gain, loss and other attributes are treated as being owned or generated directly by the Company for federal income tax purposes. The Company has one or more wholly-owned REIT subsidiaries.

If the Company meets the Asset Tests described above at the close of any quarter, it will not lose its REIT status merely because of a change in the value of its assets in a subsequent quarter unless, subject to a 30 day grace period ending after the close of such subsequent quarter, such change exists immediately after the acquisition of any security or other property and is wholly or partly the result of such an acquisition during such quarter. The Company intends to maintain adequate records of the value of its assets to maintain compliance with the Asset Tests.

Annual Distribution Requirements. The Company, in order to qualify as a REIT, is required to distribute dividends (other than capital gain dividends) to its stockholders in an amount equal to or greater than the excess of (A) the sum of (i) 95% of the Company's real estate investment trust taxable income (computed without regard to the dividends paid deduction and the Company's net capital gain) and (ii) 95% of the net income, if any, (after tax) from foreclosure property, over (B) the sum of certain non-cash income (from certain imputed rental income and income from transactions inadvertently failing to qualify as like-kind exchanges). To the extent that the Company does not distribute all of its net long-term capital gain and all of its real estate investment trust taxable income, it will be subject to tax thereon. In addition, the Company will be subject to a 4% excise tax to the extent it fails within a calendar year to make required distributions to its stockholders of 85% of its ordinary income and 95% of its capital gain net income plus the excess, if any, of the grossed up required distribution for the preceding calendar year over the amount treated as distributed for such preceding calendar year. For this purpose, "grossed up required distribution" for any calendar year is the sum of the taxable income of the Company for the taxable year (without regard to the deduction for dividends paid) and all amounts from earlier years that are not treated as having been distributed under the provision. Dividends declared in the last quarter of the year (October, November or December) and paid during the following [month], will be treated as having been paid and received on December 31.

It is possible that the Company, from time to time, may not have sufficient cash or other liquid assets to meet the 95% distribution requirements due to timing differences between actual receipt of income and actual payment of deductible expenses or dividends on the one hand and the inclusion of such income and deduction of such expenses or dividends in arriving at real estate investment trust taxable income of the Company on the other hand. The problem of inadequate cash to make required distributions could also occur as a result of the repayment in cash of principal amounts due on the Company's outstanding debt, particularly in the case of balloon repayments or as a result of capital losses on short-term investments of working capital. Therefore, the Company might find it necessary to arrange for short-term, or possibly long-term, borrowing or new equity financing. If the Company were unable to arrange such borrowing or financing as might be necessary to provide funds for required distributions, its REIT status could be jeopardized.

Under certain circumstances, the Company may be able to rectify a failure to meet the annual REIT distribution requirements for a taxable year by paying deficiency dividends to stockholders within a specified period.

Share Ownership Test. As described above, the Company's Common Stock must be held by a minimum of 100 persons for at least approximately 92% of the days in each taxable year subsequent to [Year]. In addition, at all times during the second half of each taxable year subsequent to [Year], no more than 50% in value of the shares of beneficial interest of the Company may be owned, directly or indirectly, and by applying certain constructive ownership rules, by five or

fewer individuals. In order to ensure compliance with this test, the Company has placed certain restrictions on the transfer of the Common Stock to prevent further concentration of share ownership. Moreover, to evidence compliance with these requirements, the Company must maintain records which disclose the actual ownership of its outstanding Common Stock. In fulfilling its obligations to maintain records, the Company must and will demand written statements each year from the record holders of designated percentages of its Common Stock disclosing the actual owners of such Common Stock. A list of those persons failing or refusing to comply with such demand must be maintained as a part of the Company's records. A stockholder failing or refusing to comply with the Company's written demand must submit with his tax returns a similar statement disclosing the actual ownership of Common Stock and certain other information. In addition, the Company's declaration of trust provides restrictions regarding the transfer of its shares that are intended to assist the Company in continuing to satisfy the share ownership requirements.

Other REIT Issues. With respect to property acquired from and leased back to the same or an affiliated party of a lessee, the IRS could assert that the Company realized prepaid rental income in the year of purchase to the extent that the value of the leased property exceeds the purchase price paid by the Company for that property. In litigated cases involving sale-leasebacks which have considered this issue, courts have concluded that buyers have realized prepaid rent where both parties acknowledged that the purported purchase price for the property was substantially less than fair market value and the purported rents were substantially less than the fair market rentals. Because of the lack of clear precedent and the inherently factual nature of the inquiry, complete assurance cannot be given that the IRS could not successfully assert the existence of prepaid rental income. The value of and fair market rent for properties involved in sale-leasebacks are inherently factual matters and always subject to challenge.

Subject to a safe harbor exception for annual sales of up to seven properties (or properties with a basis of up to 10% of the REIT's assets) that have been held for four years, gain from the sale of a property held for sale to customers in the ordinary course of business is subject to a 100% tax. The simultaneous exercise of rights of first refusal granted to certain Lessees or other events could result in sales of properties by the Company that exceed this safe harbor. However, the Company believes that in such event, it will not have held such properties for sale to customers in the ordinary course of business.

Depreciation of Initial Properties. For tax purposes, the Company's real property generally is expected to be depreciated over 40 years and personal property over seven years utilizing the straight-line method of depreciation.

Failure to Qualify. If the Company fails to qualify for taxation as a REIT in any taxable year and the relief provisions do not apply, the Company will be subject to tax (including any applicable alternative minimum tax) on its taxable income at regular corporate rates. Distributions to stockholders in any year in which the Company fails to qualify will not be deductible by the Company, nor will they be required to be made. In such event, to the extent of current or accumulated earnings and profits, all distributions to stockholders will be taxable as ordinary income, and, subject to certain limitations in the Code, corporate distributees may be eligible for the dividends received deduction. Failure to qualify and to maintain qualification as a REIT would force the Company to significantly reduce its distributions and possibly incur substantial indebtedness or liquidate substantial investments in order to pay the resulting corporate taxes. In addition, the Company, once having obtained REIT status and having lost such status, would not be eligible to elect REIT status for the four subsequent taxable years, unless its failure to maintain its qualification was due to reasonable cause and not willful neglect, and certain other requirements were satisfied. In order to elect again to be taxed as a REIT, the Company would be required to distribute all of its earnings and profits accumulated in any non-REIT taxable year.

TAXATION OF DOMESTIC STOCKHOLDERS

Taxation of Taxable Domestic Stockholders. As long as the Company qualifies as a REIT, distributions other than capital gain dividends (including reinvestments pursuant to the Company's dividend reinvestment plan, if any) made to

the Company's taxable domestic stockholders out of current or accumulated earnings and profits will be taken into account by them as ordinary income, and corporate stockholders will not be eligible for the dividends received deduction. Distributions that are designated as capital gain dividends will be taxed as long-term capital gains to the extent they do not exceed the Company's actual net capital gain for the taxable year, although corporate stockholders may be required to treat up to 20% of any such capital gain dividend as ordinary income. Distributions in excess of current or accumulated earnings and profits will not be taxable to a stockholder to the extent that they do not exceed the adjusted basis of a stockholder's shares of Common Stock, but will reduce the basis of such stockholder's shares of Common Stock. To the extent that such distributions exceed the adjusted basis of a stockholder's shares of Common Stock, they will be included in income as long-term capital gain (or short-term capital gain if the shares of Common Stock have been held for not more than one year) assuming the shares of Common Stock are a capital asset in the hands of the stockholder. Stockholders may not include, in their respective income tax returns, any net operating losses or capital losses of the Company.

Dividends declared by the Company in the last quarter of the calendar year (October through December) to stockholders of record on a date in such quarter, shall be treated as both paid by the Company and received by such stockholders on December 31 of such year, provided that the Company actually pays such dividends during January of the following calendar year.

In general, any gain or loss recognized by a stockholder on the sale or other taxable disposition of shares of Common Stock will be treated as capital gain or loss, provided the shares are a capital asset in the hands of the seller. In general, any loss upon a sale or exchange of shares of Common Stock by a stockholder who has held such shares for not more than six months (after applying certain rules), will be treated as a long-term capital loss to the extent of distributions from the Company required to be treated by such stockholder as long-term gain.

Tax preference and other items which are treated differently for regular and alternative minimum tax purposes are to be allocated between a REIT and its stockholders under regulations which are to be prescribed. It is likely that these regulations would require tax preference items to be allocated to the Company's stockholders with respect to any accelerated depreciation claimed by the Company.

Backup Withholding. Under certain circumstances, taxable domestic stockholders may be subject to backup withholding at the rate of 31% imposed for payments of interest, dividends and payments of gross proceeds by brokers. This withholding applies only if a stockholder, among other things, (i) fails to furnish the Company with his taxpayer identification number certified under penalties of perjury, (ii) furnishes the Company an incorrect taxpayer identification number, (iii) fails properly to report interest or dividends from any source or (iv) under certain circumstances fails to provide the Company or his securities broker with a certified statement, under penalties of perjury, that he or she is not subject to backup withholding. Stockholders should consult their tax advisors as to their qualification for exemption from withholding and the procedure for obtaining such an exemption. Finally, United States persons are required to certify their United States status in order to receive dividends without the withholding imposed by the Foreign Investment in Real Property Tax Act of [Year] ("FIRPTA").

The Company will report to its stockholders and the IRS the amount of dividends paid or deemed paid during each calendar year, and the amount of tax withheld, if any.

Taxation of Tax-Exempt Stockholders. As a general rule, amounts distributed by a REIT to a tax-exempt entity do not constitute unrelated business taxable income ("UBTI") and thus distributions by the Company to a stockholder that is a tax-exempt entity should not constitute UBTI, provided that the tax-exempt entity has not financed the acquisition of Common Stock with "acquisition indebtedness" within the meaning of the Code and the shares of Common Stock are not otherwise used in an unrelated trade or business of the tax-exempt entity. If a REIT constitutes a "pension-held REIT" in a taxable year, distributions by such REIT to a tax-exempt employee's pension trust that owns more than 10% of the REIT may be treated as UBTI in an amount equal to the percentage of gross income of the REIT that is derived

from an "unrelated trade or business" (determined as if the REIT were a pension trust and subject to certain de minimus rules) divided by the gross income of the REIT for the year in which the dividends are paid. This rule only applies, however, if (i) the percentage of the gross income derived from the REIT for the year in which the dividends are paid is at least five percent, (ii) the REIT qualifies as a REIT only because the pension trust is not treated as a single individual for purposes of the "five-or-fewer" rule (see "Taxation of the Company--Requirements for Qualification as a REIT") and (iii) (A) one pension trust owns more than 25% of the value of the REIT, or, (B) a group of pension trusts individually holding more than 10 percent of the value of the REIT collectively own more than 50 percent of the value of the REIT. The Company does not expect that it will constitute a "pension-held REIT" in part because the ownership limits in the Company's Articles of Incorporation (assuming no waiver of such limits by the Board of Directors) would prevent such a pension trust from acquiring Common Stock in excess of the Ownership Limit.

TAXATION OF FOREIGN STOCKHOLDERS

The following is a discussion of certain anticipated U.S. federal income and estate tax consequences of the ownership and disposition of Common Stock applicable to Non-U.S. Holders of such shares. A "Non-U.S. Holder" is any person other than (i) a citizen or resident of the United States, (ii) a corporation or partnership created or organized in the United States or under the laws of the United States or of any state thereof, or (iii) an estate or trust whose income is includible in gross income for U.S. federal income tax purposes regardless of its source. The discussion is based on current law and is for general information only. The discussion addresses only certain and not all aspects of U.S. federal income and estate taxation.

Distributions from the Company

Ordinary Dividends. The portion of dividends received by Non-U.S. Holders payable out of the Company's earnings and profits which are not attributable to capital gains of the Company and which are not effectively connected with a U.S. trade or business of the Non-U.S. Holder will be subject to U.S. withholding tax at the rate of 30% (unless reduced by treaty). In general, Non-U.S. Holders will not be considered engaged in a U.S. trade or business solely as a result of their ownership of Common Stock. In cases where the dividend income from a Non-U.S. Holder's investment in Common Shares is (or is treated as) effectively connected with the Non-U.S. Holder's conduct of a U.S. trade or business, the Non-U.S. Holder generally will be subject to U.S. tax at graduated rates, in the same manner as U.S. stockholders are taxed with respect to such dividends (and may also be subject to the 30% branch profits tax in the case of a Non-U.S. Holder that is a foreign corporation).

To determine the applicability of a tax treaty providing for a lower rate of withholding, dividends paid to an address in a foreign country are presumed under current Treasury Regulations to be paid to a resident of that country. Treasury regulations proposed in [Year] which have not been finally adopted, however, would require Non-U.S. Holders to file certain forms to obtain the benefit of any applicable tax treaty providing for a lower rate of withholding tax on dividends. Such forms would contain the holder's name and address and other pertinent information, to be certified by such holder under penalties of perjury, and an official statement by the competent authority (as defined in the applicable treaty) in the foreign country attesting to the holder's status a resident thereof.

Non-Dividend Distributions. Distributions by the Company which do not represent dividends paid out of the current and accumulated earnings and profits of the Company will not be subject to a Non-U.S. Holder withholding tax. If it cannot be determined at the time a distribution is made whether or not such distribution will be in excess of current and accumulated earnings and profits, the distribution will be subject to withholding at the rate applicable to dividends. The Non-U.S. Holder may seek a refund of such amounts from the IRS, however, if it is subsequently determined that such distribution was, in fact, in excess of current and accumulated earnings and profits of the Company.

Capital Gain Dividends. Under FIRPTA, a distribution made by the Company to a Non-U.S. Holder, to the extent attributable to gains from dispositions of United States Real Property Interests ("USRPIs") such as the Initial Properties beneficially owned by the Company ("USRPI Capital Gains"), will be considered effectively connected with a U.S. trade or business of the Non-U.S. Holder and subject to U.S. income tax at the rate applicable to U.S. individuals or corporations, without regard to whether such distribution is designated as a capital gain dividend. In addition, the Company will be required to withhold tax equal to 35% of the amount of dividends to the extent such dividends constitute USRPI Capital Gains. Distributions subject to FIRPTA may also be subject to a 30% branch profits tax in the hands of a foreign corporate stockholder that is not entitled to treaty exemption.

Dispositions of Common Stock

Unless the Common Shares constitute a USRPI, a sale of Common Stock by a Non-U.S. Holder generally will not be subject to U.S. taxation under FIRPTA. The Common Stock will not constitute a USRPI if the Company is a "domestically controlled REIT." A domestically controlled REIT is a REIT in which, at all times during a specified testing period, less than 50% in value of its shares is held directly or indirectly by Non-U.S. Holders. It is currently anticipated that the Company will be a domestically controlled REIT, and therefore, that the sale of Common Shares will not be subject to taxation under FIRPTA. Because the Common Stock will be publicly traded, however, no assurance can be given the Company will continue to be a domestically controlled REIT.

If the Company does not constitute a domestically controlled REIT, a Non-U.S. Holder's sale of Common Stock generally will still not be subject to tax under FIRPTA as a sale of a USRPI provided that (i) the Company's Common Stock are "regularly traded" (as defined by applicable Treasury Regulations) on an established securities market (e.g., the NYSE, on which the Common Stock will be listed) and (ii) the selling Non-U.S. Holder held 5% or less of the Company's outstanding Common Stock at all times during a specified testing period.

If gain on the sale of Common Stock were subject to taxation under FIRPTA, the Non-U.S. Holder would be subject to the same treatment as a U.S. stockholder with respect to such gain (subject to applicable alternative minimum tax and a special alternative minimum tax in the case of nonresident alien individuals) and the purchaser of Common Stock could be required to withhold 10% of the purchase price and remit such amount to the IRS.

Capital gains not subject to FIRPTA will nonetheless be taxable in the United States to a Non-U.S. Holder in two cases: (i) if the Non-U.S. Holder's investment in Common Stock is effectively connected with a U.S. trade or business conducted by such Non-U.S. Holder, the Non-U.S. Holder will be subject to the same treatment as a U.S. stockholder with respect to such gain, or (ii) if the Non-U.S. Holder is a nonresident alien individual who was present in the United States for 183 days or more during the taxable year and has a "tax home" in the United States, the nonresident alien individual will be subject to a 30% tax on the individual's capital gain.

Estate Tax

Common Stock owned or treated as owned by an individual who is not a citizen or resident (as specially defined for U.S. federal estate tax purposes) of the United States at the time of death will be includible in the individual's gross estate for U.S. federal estate tax purposes, unless an applicable estate tax treaty provides otherwise. Such individual's estate may be subject to U.S. federal estate tax on the property includible in the estate for U.S. federal estate tax purposes.

Information Reporting and Backup Withholding

The Company must report annually to the IRS and to each Non-U.S. Holder the amount of dividends (including any capital gain dividends) paid to, and the tax withheld with respect to, each Non-U.S. Holder. These reporting requirements apply regardless of whether withholding was reduced or eliminated by an applicable tax treaty. Copies of these returns may also be made available under the provisions of a specific treaty or agreement with the tax authorities in the country in which the Non-U.S. Holder resides.

U.S. backup withholding (which generally is imposed at the rate of 31% on certain payments to persons that fail to furnish the information required under the U.S. information reporting requirements) and information reporting will generally not apply to dividends (including any capital gain dividends) paid on Common Stock to a Non-U.S. Holder at an address outside the United States.

The payment of the proceeds from the disposition of Common Stock to or through a U.S. office of a broker will be subject to information reporting and backup withholding unless the owner, under penalties of perjury, certifies, among other things, its status as a Non-U.S. Holder, or otherwise establishes an exemption. The payment of the proceeds from the disposition of Common Stock to or through a non-U.S. office of a non-U.S. broker generally will not be subject to backup withholding and information reporting except as noted below. In the case of a payment of proceeds from the disposition of Common Stock to or through a non-U.S. office of a broker which is (i) a U.S. person, (ii) a "controlled foreign corporation" for U.S. federal income tax purposes, or (iii) a foreign person 50% or more of whose gross income for certain periods is derived from a U.S. trade or business unless the broker has documented that such holder is a Non-U.S. Holder and certain other conditions are met.

Backup withholding with respect to foreign stockholders is not an additional tax. Rather, the amount of any backup withholding with respect to a payment to a Non-U.S. Holder will be allowed as a credit against any United States federal income tax liability of such Non-U.S. Holder. If withholding results in an overpayment of taxes, a refund may be obtained provided that the required information is furnished to the IRS.

OTHER TAX CONSEQUENCES

The Company and its stockholders may be subject to state or local taxation in various state or local jurisdictions, including those in which it or they transact business or reside. The state and local tax treatment of the Company and its stockholders may not conform to the federal income tax consequences discussed above. Consequently, prospective stockholders should consult their own tax advisors regarding the effect of state and local tax laws on an investment in the Common Stock of the Company.

The Company will report to its stockholders and the IRS the amount of dividends paid or deemed paid during each calendar year, and the amount of tax withheld, if any.

There may be other federal, state, local or foreign income, or estate and gift tax considerations applicable to the circumstances of a particular investor. Stockholders should consult their own tax advisors with respect to such matters.

DIVIDEND REINVESTMENT PLAN

Stockholders participating in any dividend reinvestment plan adopted by the Company will be deemed to have received the gross amount of any cash distributions which would have been paid by the Company to such stockholders had they not elected to participate. These deemed distributions will be treated as actual distributions from the Company to the participating stockholders and will retain the character and tax effects applicable to distributions from the Company generally. See "Taxation of Taxable Domestic Stockholders" and "Taxation of Foreign Stockholders." Participants in the dividend reinvestment plan are subject to Federal income tax on the amount of the deemed distributions to the extent

that such distributions represent dividends or gains, even though they receive no cash. Shares of Common Stock received under the plan will have a holding period beginning with the day after purchase, and a tax basis equal to their cost (which is the gross amount of the deemed distribution).

ERISA CONSIDERATIONS

The following is a summary of material considerations arising under the Employee Retirement Income Security Act of 1974, as amended ("ERISA"), and the prohibited transaction provisions of Section 4975 of the Code that may be relevant to prospective investors. This discussion does not purport to deal with all aspects of ERISA or the Code that may be relevant to particular investors in light of their particular circumstances.

A PROSPECTIVE INVESTOR THAT IS AN EMPLOYEE BENEFIT PLAN SUBJECT TO ERISA, A TAX-QUALIFIED RETIREMENT PLAN, AN IRA, OR A GOVERNMENTAL, CHURCH, OR OTHER PLAN THAT IS EXEMPT FROM ERISA IS ADVISED TO CONSULT ITS OWN LEGAL ADVISOR REGARDING THE SPECIFIC CONSIDERATIONS ARISING UNDER APPLICABLE PROVISIONS OF ERISA, THE CODE, AND STATE LAW WITH RESPECT TO THE PURCHASE, OWNERSHIP, OR SALE OF THE COMMON STOCK BY SUCH PLAN OR IRA.

A fiduciary of a pension, profit-sharing, or other employee benefit plan (an "Employee Plan") subject to ERISA should consider fiduciary standards under ERISA in the context of the Employee Plan's particular circumstances before authorizing an investment of all or any portion of such Employee Plan's assets in the Shares. Among other factors, such fiduciary should consider (i) whether the investment satisfies the prudence requirements of *Section 404(a)(1)(B) of ERISA*, (ii) whether the investment satisfies the diversification requirements of *Section 404(a)(1)(C) of ERISA* and (iii) whether the investment is in accordance with the documents and instruments governing the plan as required by *Section 404(a)(1)(D) of ERISA*. In addition, persons who control the investments of individual retirement accounts ("IRAs") should consider that IRAs may only make investments that are authorized by the appropriate governing documents and under applicable state law.

In addition to the imposition of general fiduciary standards of investment prudence and diversification, ERISA, and the corresponding provisions of the Code, prohibit a wide range of transactions involving the assets of an Employee Plan or IRA and persons who have certain specified relationships to the Employee Plan or IRA ("parties in interest" within the meaning of ERISA or "disqualified persons" within the meaning of the Code). Such transactions are treated as "prohibited transactions" under *Section 406 of ERISA* and *Section 408(e)(2) of the Code* and excise taxes are imposed upon such persons by *Section 4975 of the Code*. Thus, a fiduciary of an Employee Plan or a person making the investment decision for an IRA should consider whether the acquisition or the continued holding of the Shares might constitute or give rise to a direct or indirect non-exempt prohibited transaction.

The Department of Labor (the "DOL") has issued final regulations (the "DOL Regulations") as to what constitutes assets of an employee benefit plan under ERISA. Under the DOL Regulations, if an Employee Plan or IRA acquires an equity interest in an entity, which interest is neither a publicly offered security nor a security issued by an investment company registered under the Investment Company Act of 1940, as amended, the Employee Plan's or IRA's assets would include, for purposes of the fiduciary responsibility provisions of ERISA, both the equity interest and an undivided interest in each of the entity's underlying assets unless certain specified exceptions apply. The DOL Regulations define a publicly-offered security as a security that is "widely held," "freely transferable" and either (i) part of a class of securities registered under *Section 12(b) or 12(g) of the Securities Exchange Act of 1934*, as amended (the "1934 Act"), or (ii) sold pursuant to an effective registration statement under the Securities Act, if the class of securities of which such security is a part is registered under the 1934 Act within 120 days after the end of the fiscal year of the issuer during which the offering occurs. The Shares will be sold pursuant to an effective registration statement under the Securities Act and will be registered under the 1934 Act.

The DOL Regulations provide that a security is widely held only if it is part of a class of securities that is owned by 100 or more investors independent of the Company and of one another. A security will not fail to be widely held because the number of independent investors falls below 100 subsequent to the Offering as a result of events beyond the Company's control. The Company expects the Common Stock to be "widely held" upon completion of the Offering.

The DOL Regulations provide that whether a security is "freely transferable" is a factual question to be determined on the basis of all relevant facts and circumstances. The DOL Regulations further provide that when a security is part of the Offering in which the minimum investment is \$10,000 or less, as is the case with this offering, certain restrictions ordinarily will not, alone or in combination, affect the finding that such securities are freely transferable. Employee Plan and IRA fiduciaries should be aware that the Company's Articles of Incorporation contain certain restrictions on any transfer of Shares that would create a beneficial owner of more than 9.8% in value of the Company's outstanding Common Stock. See "Description of Securities--Restrictions on Transfer." While the Company believes that such a restriction is generally permitted under the DOL Regulations and is not likely to result in the failure of the Common Stock to be freely transferable, the DOL Regulations only establish a presumption in favor of the finding of free transferability, and, therefore, no assurance can be given that the DOL and the Treasury Department will not reach a contrary conclusion.

Assuming that the Common Stock will be widely held, the Company believes that the Common Stock will be publicly offered securities for purposes of the DOL Regulations and that the assets of the Company will not be deemed to be plan assets of any Employee Plan or IRA that invests in the Common Stock.

Employee Plans and IRAs and their fiduciaries are strongly urged to consult with their advisors before acquiring Common Stock of the Company.

UNDERWRITING

Subject to the terms and conditions of the Underwriting Agreement, the Underwriters named below have severally agreed to purchase from the Company, and the Company has agreed to sell to them, the following respective numbers of Shares at the initial public offering price less the underwriting discounts set forth on the cover of this Prospectus.

NUMBER OF

UNDERWRITER SHARES

Alabama Securities Corp. _____

Total _____

5,800,000

The Underwriting Agreement provides that the obligations of the several Underwriters to pay for and accept delivery of the Shares offered hereby are subject to approval of certain legal matters by their counsel and to certain other conditions. The Underwriters are obligated to take and pay for all the Shares offered hereby (other than those covered by the over-allotment option described below) if any of such Shares are taken.

The Company has been advised by Alabama Securities Corp. (the "Representative") that the Underwriters propose to offer the Shares to the public at the initial public offering price set forth on the cover of this Prospectus and to certain dealers at such price, less a concession not in excess of \$ per share. The Underwriters may allow, and such dealers may re-allow, a concession not in excess of \$ per share to certain other dealers. After the initial public offering, the public offering price and other selling terms may be changed by the Representative.

The Company has granted to the Underwriters an option, exercisable not later than 30 calendar days from the date of this Prospectus, to purchase up to 870,000 additional shares at the same price per share as the Company receives for the shares that the Underwriters have agreed to purchase. To the extent that the Underwriters exercise such option to purchase up to a total of 870,000 shares, each of the Underwriters will have a firm commitment to purchase approximately the same percentage thereof that the number of shares to be purchased by it shown in the above table bears to the total number of shares shown in the above table, and the Company will be obligated, pursuant to the option, to sell such shares to the Underwriters. The Underwriters may exercise such option only to cover over-allotments made in connection with the sale of the shares offered hereby. If purchased, the Underwriters will sell such additional 870,000 shares on the same terms as those on which the shares are being offered.

The Company will pay an advisory fee equal to 0.67% of the gross proceeds of the Offering (including any exercise of the Underwriters' over-allotment option) to Alabama Securities Corp. for advisory services in connection with the evaluation, analysis and structuring of the Company's formation and the Offering.

The Underwriting Agreement contains covenants of indemnity among the Underwriters and the Company against certain civil liabilities, including liabilities under the Securities Act.

The Company has agreed, and shall cause each officer, director and existing stockholder of the Company to agree that, without the prior written consent of the Representative, such person will not register, offer, sell, contract to sell, grant any option to purchase or otherwise dispose of any Shares of Common Stock or any securities convertible into or exercisable or exchangeable for Common Stock, or warrants to purchase Common Stock, for a period of 180 days, subject to certain exceptions set forth in the Underwriting Agreement.

The Representative has engaged and may in the future engage in investment banking services for certain affiliates of the Company.

Prior to this Offering there has been no established public market for the Common Stock. Consequently, the offering price has been determined by negotiation between the Company and the Representative. Among the factors considered in such negotiations were the number of shares to be offered, the projected revenues to the Company under the Leases and the expected cash available to the Company for distribution to its stockholders, the current yields and prices of publicly traded securities believed to be somewhat comparable to the Company, prevailing market conditions and other factors deemed relevant.

The Representative has informed the Company that the Underwriters do not intend to confirm sales to any account over which they exercise discretionary authority.

LEGAL MATTERS

The validity of the Shares offered hereby will be passed upon for the Company by Etores & Premull, P.C. of Birmingham, Alabama. Etores & Premull, P.C. has represented WELLHEALTH on matters unrelated to the Offering. Both the Company and WELLHEALTH have consented to this arrangement. Dowe & Flower Co., L.P.A., New York, N.Y., will pass upon certain legal matters relating to the Offering for the Underwriters.

EXPERTS

The balance sheet of American Capital Trust, Inc. at March 31, [Year], included herein and elsewhere in the registration statement has been included herein and in the registration statement in reliance upon the report of Andrew Arther, independent certified public accountants, appearing elsewhere herein, and upon the authority of said firm as experts in accounting and auditing.

The consolidated financial statements of WELLHEALTH Rehabilitation Corporation and Subsidiaries appearing in this Prospectus and Registration Statement have been audited by Whinney & Whinney, independent auditors, to the extent indicated in their reports thereon also appearing elsewhere herein and in the Registration Statement. Such consolidated financial statements have been included herein in reliance on their reports given on the authority of such firm as experts in accounting and auditing.

AVAILABLE INFORMATION

The Company has filed with the SEC a Registration Statement under the Securities Act with respect to the Shares offered by this Prospectus, which includes this Prospectus plus additional information. The Company will also file reports, proxy statements and other information with the SEC under the Securities Exchange Act of 1934. Such reports, proxy statements and other information can be inspected and copied at the public reference facilities maintained by the SEC at Room 1024, 450 Fifth Street, N.W., Washington, D.C. 20549, and at the SEC's Regional Offices located in Room 1204, Everett McKinley Dirksen Building, 219 South Dearborn Street, Chicago, Illinois 60605, and 14th Floor, 75 Park Place, New York, New York 10007. Copies of these materials can be obtained from the Public Reference Section of the SEC, Washington, D.C. 20549, at prescribed rates.

The Company will also furnish to its stockholders annual reports containing audited financial statements and quarterly reports for the first three quarters of each fiscal year containing unaudited financial information.

GLOSSARY

The following are definitions of certain terms used in this Prospectus. Unless the context otherwise requires, the following terms shall have the meanings set forth below for the purposes of this Prospectus:

"Additional Rent" means increases to the Base Rent commencing after the first year based on either a set percentage increase or on 67% to 100% of the percentage increase in the applicable consumer price index, with annual increases generally limited to a maximum of 5%.

"AHF" means ancillary hospital facility.

"AmSouth" means AmSouth Bank N.A.

"Articles of Incorporation" means the Articles of Incorporation of the Company.

"ASF" means ambulatory surgery facility.

"ASMI" means American Sports Medicine Institute.

"Bank Credit Facility" means the \$30 million line of credit from AmTrust to be used to fund a portion of the purchase price for the Initial Properties, to fund the acquisition of additional properties and for general corporate purposes.

"Base Rent" means the minimum annual rental payment payable by each Lessee as set forth in its respective Lease.

"Bylaws" means the Bylaws of the Company.

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

"Common Stock" means the common stock, par value \$.001 per share, of the Company.

"Company" means American Capital Trust, Inc., a Maryland corporation, and one or more of its subsidiaries or, as the context may require, American Capital Trust, Inc. only.

"CON" means certificate of need.

"CPI" means the Consumer Price Index.

"Disinterested Director" means any member of the Company's Board of Directors who is not affiliated with any seller of properties to the Company. For this purpose, an "affiliate" of the Company shall mean a person who is an officer, director or employee of a seller or who beneficially owns 5% or more of any class of equity securities of a seller or of any entity that controls, is controlled by or is under common control with a seller, or a member of whose immediate family has one of the foregoing relationships with a seller.

"Dividend Reinvestment Plan" means the Company's plan pursuant to which holders of its Common Stock may elect to reinvest dividends automatically in additional shares of Common Stock.

"Effective Date" means the date that the SEC executes an order declaring the Registration Statement effective under the Securities Act.

"Excess Shares" means those shares owned beneficially (under the applicable rules and regulations of the Commission) by any stockholder of the Company in excess of 9.8% in value of the Company's outstanding stock.

"Guarantor" means each of WELLHEALTH, Total Health, Quorum, Health Surgery and Oregon.

"WELLHEALTH" means WELLHEALTH Rehabilitation Corporation.

"WELLHEALTH Initial Properties" means each property identified in this Prospectus owned by WELLHEALTH or one or more of its Subsidiaries with respect to which the Company expects to enter into a definitive Purchase Agreement.

"Initial Properties" means the 20 properties identified in this Prospectus with respect to which the Company expects to enter into a definitive Purchase Agreement or the Merger Agreement as soon as practical.

"Total Health" means Total Health Systems, Inc.

"IRS" means the United States Internal Revenue Service.

"Lease" means the agreement to be entered into by each Lessee to lease one or more Initial Properties, or a portion thereof, from the Company.

"Lessee" means an entity leasing one or more Initial Properties from the Company.

"LTCF" means long-term care facility.

"MACI" means Midway Acquisition Company, Inc.

"Merger Agreement" means the Agreement and Plan of Merger between MACI and the Company, dated April, [Year].

"AmTrust" means AmTrust of Alabama, N.A.

"Offering" means the transaction by which the Shares of the Company are offered and sold pursuant to this Prospectus.

"ORF" means outpatient rehabilitation facility.

"Oregon" means Oregon HealthCorp.

"Partnership" means American Capital Partners, an Alabama general partnership.

"PPS" means the Medicare prospective payment system.

"Prospectus" means the prospectus that will be issued in connection with the Offering.

"Purchase Agreement" means each agreement, including the Merger Agreement, relating to the acquisition by the Company of one or more of the Initial Properties.

"Quorum" means Proxy Health Group, Inc.

"Registration Statement" means the Company's Form S-11 Registration Statement under the Securities Act of 1933.

"REIT" means a real estate investment trust as defined pursuant to Sections 856 through 860 of the Code.

"Representative" means Alabama Securities Corp. as representative of the Underwriters.

"RF" means research facility.

"SACF" means sub-acute care facility.

"SEC" means the Securities and Exchange Commission.

"Securities Act" means the Securities Act of 1933, as amended.

"Shares" means the shares of Common Stock being offered by this Prospectus.

"SHPDA" means a state health planning and development agency.

"Stock Incentive Plan" means the Company's [Year] Stock Incentive Plan.

"Subsidiary" means a wholly-owned corporate subsidiary of the Guarantors and a limited partnership, the general partner of which is one of the Guarantors or one of its wholly-owned corporate subsidiaries.

"Health Surgery" means Health Surgery Corporation.

"Treasury Regulations" means the income tax regulations promulgated under the Code.

"Triple Net Lease" means a lease pursuant to which the lessee pays all operating expenses, taxes, assessments, ground rents, water, sewer or other rents and charges, excises, tax levies, fees and all other governmental charges, utility charges and insurance premiums.

"UBTI" means unrelated business taxable income as defined in Section 512(a) of the Code.

"Underwriters" means the underwriters named in this Prospectus.

"Underwriting Agreement" means the Underwriting Agreement between the Company and the Underwriters.

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Notes to Unaudited Pro Forma Financial Statements

WELLHEALTH REHABILITATION CORPORATION AND SUBSIDIARIES

Report of Independent Auditors _____

Consolidated Balance Sheets as of December 31, [Year] and [Year] _____

Consolidated Statements of Income for the Years Ended December 31, [Year], [Year] and [Year]

Consolidated Statements of Stockholders' Equity for the Years Ended December 31, [Year], [Year] and [Year]

Consolidated Statements of Cash Flows for the Years Ended December 31, [Year], [Year] and [Year]

Notes to Consolidated Financial Statements

INDEPENDENT AUDITORS' REPORT

The Board of Directors and Stockholders

American Capital Trust, Inc.:

We have audited the accompanying balance sheet of American Capital Trust, Inc. as of March 31, [Year]. This balance sheet is the responsibility of the Company's management. Our responsibility is to express an opinion on this balance sheet based on our audit.

We conducted our audit in accordance with generally accepted auditing standards. Those standards require that we plan and perform the audit to obtain reasonable assurance about whether the balance sheet is free of material misstatement. An audit includes examining, on a test basis, evidence supporting the amounts and disclosures in the balance sheet. An audit also includes assessing the accounting principles used and significant estimates made by management, as well as evaluating the overall balance sheet presentation. We believe that our audit of the balance sheet provides a reasonable basis for our opinion.

In our opinion, the balance sheet referred to above presents fairly, in all material respects, the financial position of American Capital Trust, Inc. at March 31, [Year], in conformity with generally accepted accounting principles.

Andrew Arther

Birmingham, Alabama
April 6, [Year]

AMERICAN CAPITAL TRUST, INC.

BALANCE SHEET
MARCH 31, [Year]

ASSETS

Cash _____	\$ 180

STOCKHOLDERS' EQUITY

Preferred stock, \$.001 par value; 10,000,000 shares authorized; none issued or outstanding _____	\$ --

Common stock, \$.001 par value; 50,000,000 shares authorized; 180,000 issued and outstanding _____	180

Total stockholders' equity	\$180

AMERICAN CAPITAL TRUST, INC.

NOTES TO BALANCE SHEET
MARCH 31, [Year]

(1) ORGANIZATION

American Capital Trust, Inc. (the Company) was incorporated in the State of Maryland on March 31, [Year] and issued a total of 180,000 shares of common stock to the Company's chairman, its president, one of its directors, and WELLHEALTH Rehabilitation Corporation (WELLHEALTH) for total consideration of \$180. The chairman of the Company and one of its directors are executive officers of WELLHEALTH. The Company is in the process of an initial public offering pursuant to which it plans to issue approximately 5,800,000 additional shares of common stock (the Offering). The 180,000 shares issued upon incorporation (the Founders Shares) will constitute approximately 3 percent of the outstanding shares immediately after consummation of the Offering.

The Company has had no operations. Upon consummation of the Offering, the Company intends to begin operations by purchasing a diversified portfolio of healthcare properties and leasing the properties back to the healthcare operators.

(2) FEDERAL INCOME TAXES

At the earliest possible date, the Company intends to qualify as a real estate investment trust under the Internal Revenue Code and, accordingly, will not be subject to federal income taxes on amounts distributed to stockholders provided it distributes at least 95 percent of its real estate investment trust taxable income and meets certain other conditions. The Company may, however, be subject to state or local taxation in various state or local jurisdictions.

(3) PLANNED TRANSACTIONS

The Company plans to use the Offering proceeds and borrowings under a bank credit facility to purchase 20 healthcare properties for \$115,100,000. Ten of the properties will be acquired from WELLHEALTH for \$50,920,000 and five of the properties will be acquired for \$27,280,000 from two companies whose chairmen are directors of the Company.

The Company has agreed to reimburse actual costs incurred on its behalf by American Capital Partners and its affiliates upon consummation of the Offering. The actual costs incurred relate to organizing the Company, negotiating property acquisitions, performing due diligence related to the properties, performing corporate work in contemplation of the Offering, preparing the registration statement and providing interim financing for the acquisition of the properties. This amount is estimated to be approximately \$1,475,000 and will only be payable upon the closing of the Offering and will be paid from the proceeds of the Offering. The Company's chairman, its president and one of its directors are the partners in American Capital Partners.

(4) STOCKHOLDERS' EQUITY

For each of the first six quarters in which dividends are paid by the Company, the founders have consented to contribute to the Company the after-tax portion of any dividends distributed to them for such quarter if (i) the annualized dividends paid in such quarter do not exceed \$1.70 per Share (\$0.425 per Share per quarter) or (ii) the aggregate dividends paid in such quarter on the outstanding Shares exceed 95% of the cash available for distribution for the relevant quarterly period.

The Company intends to adopt a dividend reinvestment plan.

(5) EMPLOYEE BENEFITS

The Company's board of directors intends to adopt a deferred compensation plan, a retirement plan for executive officers and has adopted a stock incentive plan. The Company has reserved 418,600 shares of common stock for issuance under the stock incentive plan. As of the effective date of the Offering, the Company intends to grant options to purchase 260,000 shares of common stock.

AMERICAN CAPITAL TRUST, INC.

UNAUDITED PRO FORMA FINANCIAL STATEMENTS

The following pro forma financial statements are based on the balance sheet of the Company included elsewhere in the Prospectus, adjusted to give effect to the Offering and the application of the proceeds therefrom.

The pro forma balance sheet as of _____ [month] _____ [day], _____ [year], gives effect to the Offering and the acquisition of the Initial Properties, as if they had occurred, and the respective Leases as if they had been in effect, on _____ [month] _____ [day], _____ [year]. The pro forma statements of income for the year ended December 31, [year], and for the three months ended _____ [month] _____ [day], _____ [year], give effect to the Offering and the acquisition of the Initial Properties as if they had occurred, and the respective Leases as if they had been in effect, on _____ [month] _____ [day], _____ [year]. The pro forma adjustments are based upon available information and certain assumptions that management believes are reasonable. The pro forma financial statements do not purport to represent what the Company's financial position or results of operations and cash available for distribution would actually have been if the transactions had occurred on _____ [month] _____ [day], _____ [year] or _____ [month] _____ [day], _____ [year] or to project the Company's financial position or results of operations for any future period. Differences would result from, among other things, delays in the acquisition of the Initial Properties and changes in interest rates.

The pro forma financial statements should be read in conjunction with the balance sheet of the Company and related notes thereto, and other financial information pertaining to the Company, including "Capitalization" and "Management's Discussion and Analysis of Financial Condition and Results of Operations," included elsewhere in this Prospectus.

AMERICAN CAPITAL TRUST, INC.

PRO FORMA BALANCE SHEET MARCH 31, [Year]

	HISTORICAL	ADJUSTMENTS RELATED TO THE OFFERING AND ACQUISITION OF THE INITIAL PROPERTIES	AS ADJUSTED FOR THE OFFERING AND THE ACQUISITION OF THE INITIAL PROPERTIES
	ASSETS		
Cash and Cash equivalents	\$180	102,515,400 (1) (115,100,000) (2) (1,475,000) (3)	\$ 50,000

		14,184,820 (4)	
		(75,000) (5)	
Real credit facility com- mitment	--	115,100,000 (2)	116,150,000
fee _____		375,000 (3)	
Organization costs		675,000 (3)	
Total assets			75,000
	--	75,000 (5)	
	--	25,000 (3)	25,000
		_____	_____
	\$180	\$116,299,820	\$ 116,300,000
LIABILITIES			
Bank Credit facility	\$	\$ 14,184,820 (4)	\$ 14,184,820
Preferred stock, \$.001 par value, 10,000,000 shares authorized none outstand- ing	--	--	--
Common stock, \$.001 par value, 50,000,000 shares authorized; 180,000 issued and outstanding; 5,960,000 issued and outstanding, as adjusted	180	5,800(1)	5,980
Additional paid- in-capit- al _____		102,509,200(1)	102,109,200
		(400,000)(3)	
	_____	_____	_____
Total stockholders' equity	180	102,115,000	102,115,180

	_____	_____	_____
Total liabilities and stockholders' equity	\$180	\$116,299,820	\$116,300,000

AMERICAN CAPITAL TRUST, INC.

**PRO FORMA STATEMENT OF INCOME
FOR THE YEAR ENDED DECEMBER 31, [Year]**

	HISTORICAL	ADJUSTMENTS RELATED TO THE OFFERING AND ACQUISITION OF THE INITIAL PROPERTIES	AS ADJUSTED FOR THE OFFERING AND THE ACQUISITION OF THE INITIAL PROPERTIES
Revenues:			
Rental income	--	\$ 12,728,964 (6)	\$ 13,872,706

_____		1,143,742 (7)	
Cost and expense:			
Interest	--	936,993 (9)	936,993
_____			2,621,250

Depreciation and amortization	--	2,621,250 (8)	
Operating and administrative expenses	--	1,200,000 (9)	1,200,000

Total expenses	--	4,758,243	4,758,243

Net income	--	\$ 9,114,463	\$9,114,463
_____		_____	

Net income per share	--		\$ 1.52
_____		_____	

Shares outstanding		_____	5,980,000

CRESENT CAPITAL TRUST, INC.

**PRO FORMA STATEMENT OF INCOME
FOR THE YEAR ENDED MARCH 31, [Year]**

HISTORICAL	ADJUSTMENTS RELATED TO	AS ADJUSTED

		THE OFFERING AND ACQUISITION OF THE INITIAL PROPERTIES	FOR THE OFFERING AND THE ACQUISITION OF THE INITIAL PROPERTIES
Revenues:			
Rental income	--	\$ 3,182,241 (6)	\$ 3,468,176
		285,935 (7)	
Cost and expense:			
Interest	--	234,248 (0)	234,248
			655,313
Depreciation and amortization	--	655,313 (8)	
Operating and administrative expenses	--	300,000 (9)	300,000
Total expenses	--	1,189,561	1,189,561
Net income	--	\$ 2,278,615	\$2,278,615
Net income per share	--		\$ 0.38
Shares outstanding	\$ 180,000		5,980,000

See notes to pro forma financial statements

AMERICAN CAPITAL TRUST, INC.

NOTES TO UNAUDITED PRO FORMA FINANCIAL STATEMENTS

(1) Issuance of 5,800,000 Shares of Common Stock for \$110,200,000 at \$19.00 per share, less underwriting discount of \$7,685,000.

(2) Cost of the Initial Properties of \$115,100,000.

(3) Payment to American Capital Partners for reimbursement of actual costs incurred related to providing interim financing (\$375,000), negotiating Initial Property acquisitions (\$675,000), organizing the Company (\$25,000), and preparing the Offering (\$400,000).

(4) Borrowings of \$14,184,820 under the Bank Credit Facility to maintain cash and cash equivalents of \$50,000.

(5) Payment of Bank Credit Facility commitment fee of \$75,000.

(6) Rental income from the Initial Properties for the year ended December 31, [Year] is assumed to be \$12,728,964 (\$3,182,241 for the three months ended March 31, [Year]), which represents Base Rent (assuming no Additional Rent) from the Initial Properties under the terms of the Leases. Each Lease is a Triple Net Lease and the Lessee is responsible thereunder, in addition to the rent, for all operating expenses, taxes, assessments, ground rents, water, sewer or the rents and charges, excises, tax levies, fee and all other governmental charges, utility charges and insurance premiums.

(7) Certain of the leases provide for scheduled annual rent increases. Generally accepted accounting principles require that these rent increases be recognized on a straight-line basis over the term of the lease. The additional rental income recognized in this manner is assumed to be \$1,143,742 for the year ended December 31, [Year] (\$285,935 for the three months ended March 31, [Year]).

(8) Depreciation of buildings and land improvements is calculated using the straight-line method and useful remaining lives of approximately 40 years and 20 years, respectively. Amortization of organization costs is calculated using the straight-line method over a five-year period. The Bank Credit Facility commitment fee is amortized using the straight-line method over the 24-month life of the related facility.

THREE MONTHS ENDED MARCH 31, [Year]	YEAR ENDED DECEMBER 31, [Year]	
Depreciation:		
Buildings _____	\$619,687	\$2,478,750
Land Improvements _____	25,000	100,000
	664,687	2,578,750
Amortization:		
Organization costs _____	1,250	5,000
Financing commitment fee _____	9,375	37,500

	10,625	42,500
Total depreciation and amortization	\$655,312	\$2,621,250

(9) Operating and administrative expenses of \$1,200,000 for the year ended December 31, [Year] (\$300,000 for the three months ended March 31, [Year]) consist of compensation and related benefits, professional fees, travel, rent, interest expense calculated at a rate of 6.1875% of the outstanding balance of the Bank Credit Facility plus 0.375% of the unused portion of the Bank Credit Facility and other costs.

AMERICAN CAPITAL TRUST, INC.

NOTES TO UNAUDITED PRO FORMA FINANCIAL STATEMENTS--(CONTINUED) OTHER DATA--CASH AVAILABLE FOR DISTRIBUTION

Cash available for distribution is net income plus depreciation, amortization and other non-cash items less accrued rent. Distributions in excess of net income generally constitute a return of capital. Management considers cash available for distribution to be an informative measure of the performance of an equity REIT and consistent with measures used by analyst to evaluate equity REITs. Cash available for distribution does not represent cash generated from operating activities in accordance with generally accepted accounting principles, is not necessarily indicative of cash available to fund cash needs and should not be considered as an alternative to net income as an indicator of the Company's operating performance or as an alternative to cash flow as a measure of liquidity.

AS ADJUSTED FOR THE OFFERING AND ACQUISITION OF THE INITIAL PROPERTIES

	THREE MONTHS ENDED MARCH 31, [Year]	YEAR ENDED DECEMBER 31, [Year]
Pro forma cash available for distribution		
Net income _____	\$ 2,278,616	\$ 9,114,463
Accrued rent income (non-cash income) (See Note 7) _____	(285,935)	(1,143,742)
Depreciation, amortization and other non-cash expenses _____	675,313	2,701,250

Cash available for distribution	\$	2,667,994	\$	10,671,971
Cash available for distribution per share	\$	0.45	\$	1.78
Shares outstanding		5,980,000		5,980,000

REPORT OF Whinney & Whinney,
INDEPENDENT AUDITORS

The Board of Directors
WELLHEALTH Rehabilitation Corporation

We have audited the accompanying consolidated balance sheets of WELLHEALTH Rehabilitation Corporation and Subsidiaries as of December 31, [Year] and [Year], and the related consolidated statements of income, stockholders' equity and cash flows for each of the three years in the period ended December 31, [Year]. These financial statements are the responsibility of the Company's management. Our responsibility is to express an opinion on these financial statements based on our audits.

We conducted our audits in accordance with generally accepted auditing standards. Those standards require that we plan and perform the audit to obtain reasonable assurance about whether the financial statements are free of material misstatement. An audit includes examining, on a test basis, evidence supporting the amounts and disclosures in the financial statements. An audit also includes assessing the accounting principles used and significant estimates made by management, as well as evaluating the overall financial statement presentation. We believe that our audits provide a reasonable basis for our opinion.

In our opinion, the financial statements referred to above present fairly, in all material respects, the consolidated financial position of WELLHEALTH Rehabilitation Corporation and Subsidiaries at December 31, [Year] and [Year], and the consolidated results of their operations and their cash flows for each of the three years in the period ended December 31, [Year], in conformity with generally accepted accounting principles.

Whinney & Whinney

Birmingham, Alabama
February 28, [Year]

WELLHEALTH REHABILITATION CORPORATION
AND SUBSIDIARIES

CONSOLIDATED BALANCE SHEETS

DECEMBER 31,

[Year] [Year]

(IN THOUSANDS)

ASSETS

Current assets:

Cash and cash equivalents (Note 2)	\$ 70,874	\$ 53,470
Other Marketable securities (Note 2)	15,074	8,968
Accounts receivable, net of allowances for doubtful accounts and contractual adjustments of \$42,820,000 in [Year] and \$104,323,000 in [Year]	94,381	143,807
Inventories	10,800	20,783
Prepaid expenses and other current assets	21,444	34,682
Total current assets	212,541	261,710

Other assets:

Loans to officers	1,111	1,488
Other (Note 3)	11,092	21,244
Initial Property, plant and equipment, net (Note 4)	12,203	22,732
Intangible assets, net (Note 5)	335,058	708,205
Total assets	81,997	175,421
Total assets	\$641,700	\$1,168,068

CONSOLIDATED BALANCE SHEETS

LIABILITIES AND STOCKHOLDERS' EQUITY

Current liabilities:

Accounts payable	\$ 19,972	\$ 41,200
Salaries and wages payable	8,084	21,442
Accrued interest payable and other liabilities	11,452	22,606
Current portion of long-term debt (Note 6)	2,907	4,859

Total current liabilities	42,415	90,107
Long-term debt (Note 6)	299,508	779,690
Deferred income taxes	12,050	5,098
Other long-term liabilities	49	--
Minority interests-limited partnership	(2,335)	(1,799)
Commitments and contingent liabilities (Note 11)		
Stockholders' equity:		
Preferred Stock, \$.10 par value--1,500,000 shares authorized; issued and outstanding-- none	--	--
Common Stock, \$.01 par value--50,000,000 shares authorized; issued and outstanding - -28,283,000 in [Year] and 29,026,000 in [Year]	288	290
Additional paid-in capital	241,093	243,229
Retained earnings	68,393	70,648
Treasury stock, at cost (20,000 shares)	--	(263)
	309,774	313,904
Receivable from Employee Stock Ownership Plan (Note 12)	(19,642)	(18,932)
Total stockholders' equity	290,132	294,972
Total liabilities and stockholders' equity	\$641,799	\$1,168,068

WELLHEALTH REHABILITATION CORPORATION
AND SUBSIDIARIES
CONSOLIDATED STATEMENTS OF INCOME

	YEAR ENDED DECEMBER 31,		
	[Year]	[Year]	[Year]
	(IN THOUSANDS, EXCEPT FOR PER SHARE AMOUNTS)		
Revenues	\$225,485	\$406,968	\$482,304
Operating expenses:			
Operating units	157,654	303,604	348,912
Corporate general and administrative	7,947	10,245	14,020
Provision for doubtful accounts	5,298	11,000	12,680
Depreciation and amortization	14,718	25,485	36,494
Interest expense	9,912	10,836	12,683
Interest income	(5,483)	(4,340)	(3,173)
NME Selected Hospitals Acquisition related ex- pense (Note 9)	--	--	49,742
Terminated merger expense (Note 14)	--	3,665	--
	190,046	360,495	471,358
Income before income taxes and minority in- terests	35,439	46,473	10,946
Provision for income taxes	11,500	15,333	4,069
	23,939	31,140	6,877
Minority interests	1,568	1,402	190
Net income	\$ 22,371	29,738	\$ 6,687
Weighted average common and common equival- ent shares outstanding	25,905	29,887	29,858
Net income per common and common equivalent shares outstanding	\$.86	\$ 1.00	\$.22
Net income per common share--assuming full di- lution	\$.83	\$ N/A	\$ N/A

See accompanying notes.

WELLHEALTH REHABILITATION CORPORATION AND SUBSIDIARIES
CONSOLIDATED STATEMENTS OF STOCKHOLDERS' EQUITY

	COM- MON SHARES	COM- MON STOCK	ADDI- TIONAL PAID-IN CAPIT- AL	RE- TAINED EARN- INGS	TREAS- URY STOCK	RE- CEIV- ABLE FROM ESOP	TOTAL STOCK- HOLD- ERS' EQUITY
BALANCE AT DECEMBER 31, [Year]	12,713	\$127.1	\$100,442.7	\$27,331.2	\$ --	\$ --	\$127,901.0
Proceeds from issuance of common shares at \$32.00 per share	2,3002	3.0	69,581.3	--	--	--	69,604.3
Conversion of subordinated debentures	3,081	30.8	50,159.2	--	--	--	50,190.0
Issuance of shares in connection with stock split	9,348	93.5	(93.5)	--	--	--	--
Proceeds from exercise of options	602	6.0	5,761.8	--	--	--	5,767.8
Income tax benefits related to incentive Stock Options... ..	--	--	4,373.1	--	--	--	4,373.1
Common shares exchanged in the exercise of options	--	--	(11.9)	--	--	--	(11.9)
Loan to Employee Stock Ownership Plan	--	--	--	--	--	(10,000.0)	(10,000.0)
Purchase of limited partnership units	--	--	--	(854.2)	--	--	(854.2)
Net income	--	--	--	22,371.0	--	--	22,371.0
BALANCE AT DECEMBER 31, [Year]	28,044	280.4	230,212.7	48,848.0	--	(10,000.0)	269,341.1
Proceeds from exercise of op-	762	7.6	6,648.6	--	--	--	6,656.2

tions

Income tax benefits related to Incentive Stock Options... ..	--	--	3,827.7	--	--	--	3,827.7
Common shares exchanged in the exercise of options	(4)	--	(95.6)	--	--	--	(95.6)
Loan to Employee Stock Ownership Plan	--	--	--	--	--	(10,000.0)	(10,000.0)
Reduction in Receivable from Employee Stock Ownership	--	--	--	--	--	358.0	358.0
Purchase of limited partnership units	21	.2	499.8	(10,193.4)	--	--	(9,693.4)
Net income	--	--	--	29,738.0	--	--	29,738.0

WELLHEALTH REHABILITATION CORPORATION AND SUBSIDIARIES
CONSOLIDATED STATEMENTS OF STOCKHOLDERS' EQUITY

	COM- MON SHARES	COM- MON STOCK	ADDI- TIONAL PAID-IN CAPIT- AL	RE- TAINED EARN- INGS	TREAS- URY STOCK	RE- CEIV- ABLE FROM ESOP	TOTAL STOCK- HOLD- ERS' EQUITY
BALANCE AT DECEMBER 31, [Year]	28,823	288.2	241,093.2	68,392.6	--	(19,642.0)	290,132.0
Proceeds from exercise of options	203	\$ 2.0	\$ 1,709.6	\$ --	\$ --	\$ --	\$ 1,711.6
Income tax benefits related to Incentive Stock Options	--	--	425.7	--	--	--	425.7
Reduction in Receivable from Employee Stock Ownership	--	--	--	--	--	710.1	710.1
Plan.	--	--	--	--	--	710.1	710.1
Purchase of limited partner-	--	--	--	(4,431.7)	--	--	(4,431.7)

ship units

Purchase of treasury stock	(20)	--	--	--	(263.0)	--	(263.0)
Net income	--	--	--	6,687.1	--	--	6,687.1
BALANCE AT DECEMBER 31, [Year]	29,006	\$290.2	\$243,228	\$70,648.5	[263.0]	[18,931.9]	\$294,971.8

See accompanying notes

WELLHEALTH REHABILITATION CORPORATION
AND SUBSIDIARIES
CONSOLIDATED STATEMENTS OF CASH FLOWS

YEAR ENDED
DECEMBER 31,

	[Year]	[Year]	[Year]
(IN THOUSANDS)			
OPERATING ACTIVITIES Net income	\$ 22,371	\$ 29,738	\$ 6,687
Adjustments to reconcile net income to net cash provided by operating activities:			
Depreciation and amortization	14,718	25,485	36,494
Provision for doubtful accounts	5,298	11,000	12,680
NME Selected Hospitals Acquisition related expense	--	--	49,742
Income applicable to minority interests of limited partnerships	1,568	1,402	190
Provision (benefit) for deferred income taxes	3,168	4,695	(6,611)
Provision for deferred revenue from contractual agencies	(109)	(279)	(49)
Changes in operating assets and liabilities, net of effects of acquisitions:			
Accounts receivable	(15,216)	(31,007)	(19,545)
Inventories, prepaid expenses and other current assets	(7,860)	(11,749)	(14,317)
Accounts payable and accrued expenses	6,144	5,784	(12,928)

Net cash provided by operating activities	30,082	35,069	52,343
INVESTING ACTIVITIES			
Purchases of property, plant and equipment	(71,974)	(86,240)	(110,800)
Additions to intangible assets, net of effects and acquisition	(8,270)	(24,976)	(38,190)
Assets obtained through acquisitions, net of liabilities assumed	(41,693)	(41,343)	(385,077)
Changes in other assets	(648)	1,834	(4,868)
Proceeds received on sale of other marketable securities	11,286	14,041	12,106
Investments in other marketable securities	(26,339)	(4,945)	(6,000)
Net cash used in investing activities	(137,638)	(141,629)	(532,829)
FINANCING ACTIVITIES			
Proceeds from borrowings	102,158	169,800	482,710
Principal payments on long-term debt and leases	(35,524)	(58,890)	(17,687)
Proceeds from exercise of options	5,756	6,561	1,711
Proceeds from issuance of common stock	69,604	--	--
Purchase of treasury stock	--	--	(263)
Loans to Employee Stock Ownership Plan	(10,000)	(10,000)	--
Reduction in Receivable from Employee Stock Ownership Plan	--	358	710
Proceeds from investment by minority interests.	547	971	614
Purchase of limited partnership interests	(993)	(11,495)	(3,784)
Payment of cash distributions to limited partners	(3,146)	(2,833)	(897)
Net cash provided by financing activities	128,402	94,472	463,114
Increase (decrease) in cash and cash equivalents	20,846	(12,088)	(17,372)
Cash and cash equivalents at beginning of year	62,084	82,930	70,842
Cash and cash equivalents at end of year	\$82,930	\$ 70,842	\$ 53,470

SUPPLEMENTAL DISCLOSURES OF CASH FLOW INFORMATION

Cash paid during the year for:

Interest _____	\$12,205	\$12,469	\$ 11,049
Income taxes _____	6,701	9,201	15,608

NON-CASH FINANCING ACTIVITIES:

The holders of the Company's \$52,000,000 in aggregate principal amount of 73/4 % Convertible Subordinated Debentures Due 2014 surrendered the Debentures for conversion into 3,081,446 shares (on a pre-split basis) of the Company's common stock on various dates during [Year]

During [Year] the Company had a three-for-two stock split on its common stock, which was effected in the form of a fifty percent stock dividend.

The Company received a tax benefit from the disqualifying disposition of incentive stock options of \$4,373,000, \$3,828,000 and \$426,000 for the years ended December 31, [Year], [Year], and [Year], respectively.

See accompanying notes.

WELLHEALTH REHABILITATION CORPORATION AND SUBSIDIARIES NOTES TO CONSOLIDATED FINANCIAL STATEMENTS

[Month] [Day], [Year]

1. SIGNIFICANT ACCOUNTING POLICIES

The significant accounting policies followed by WELLHEALTH Rehabilitation Corporation and its subsidiaries (the Company) are presented as an integral part of the consolidated financial statements.

PRINCIPLES OF CONSOLIDATION

The consolidated financial statements include the accounts of WELLHEALTH Rehabilitation Corporation (WELLHEALTH) and its wholly-owned subsidiaries, as well as its limited partnerships (see Note 8). All significant intercompany accounts and transactions have been eliminated in consolidation.

WELLHEALTH Rehabilitation Corporation is engaged in the business of providing comprehensive rehabilitative and clinical healthcare services on an inpatient and outpatient basis.

MARKETABLE SECURITIES

Marketable securities are stated at cost, which approximates market, adjusted for amortization of premium and accretion of discount. The adjusted cost of the specific security sold method is used to compute gain or loss on the sale of

securities.

ACCOUNTS RECEIVABLE AND THIRD-PARTY REIMBURSEMENT ACTIVITIES

Receivables from patients, insurance companies and third-party contractual insured accounts (Medicare and Medicaid) are based on payment agreements which generally result in the Company collecting an amount different from the established rates. Final determination of the settlement is subject to review by appropriate authorities. Adequate allowances are provided for doubtful accounts and contractual adjustments. Uncollectible accounts are written off against the allowance for doubtful accounts after adequate collection efforts are made. Net accounts receivable include only those amounts estimated by management to be collectible.

The concentration of net accounts receivable from third-party contractual payors and others, as a percentage of total net accounts receivable, was as follows:

	[Month] [Day], [Year] [Year]	
Medicare _____	34%	31%
Medicaid _____	2%	4%
Other _____	64%	65%
	100%	100%

INVENTORIES

Inventories are stated at the lower of cost or market using the specific identification method.

PROPERTY, PLANT AND EQUIPMENT

Property, plant and equipment are recorded at cost. Upon sale or retirement of property, plant or equipment, the cost and related accumulated depreciation are eliminated from the respective account and the resulting gain or loss is included in the results of operations.

Interest cost incurred during the construction of a facility is capitalized. The Company incurred interest of \$11,880,000, \$12,815,000 and \$15,067,000 of which \$1,968,000, \$1,979,000 and \$2,384,000 was capitalized during [Year], [Year] and [Year], respectively.

Depreciation and amortization is computed using the straight-line method over the estimated useful lives of the assets or the term of the lease, as appropriate. The estimated useful life of buildings is 30-40 years and the general range of useful lives for leasehold improvements, furniture, fixtures and equipment is 10-15 years.

INTANGIBLE ASSETS

Cost in excess of net asset value of purchased facilities is amortized over 20 to 40 years using the straight-line method. Organization and start-up costs incurred prior to opening a new facility and partnership formation costs are deferred and

amortized on a straight-line basis over a period of 36 months. Organization, partnership formation and start-up costs for a project that is subsequently abandoned are charged to operations in that period. Debt issue costs are amortized over the term of the debt. Noncompete agreements are amortized using the straight-line method over the term of the agreements.

MINORITY INTERESTS

The equity of minority investors in limited partnerships of the Company is reported on the balance sheet as minority interests. Minority interests reported in the income statement reflect the respective shares of income or loss of the limited partnerships attributable to the minority investors, the effect of which is removed from the results of operations of the Company.

REVENUES

Revenues include net patient service revenues and other operating revenues. Net patient service revenues are reported at the estimated net realizable amounts from patients, third-party payors and others for services rendered, including estimated retroactive adjustments under reimbursement agreements with third-party payors.

INCOME PER COMMON AND COMMON EQUIVALENT SHARE

Income per common and common equivalent share is computed based on the weighted average number of common shares and common equivalent shares outstanding during the periods. Common equivalent shares include dilutive employees' stock options, less the number of treasury shares assumed to be purchased from the proceeds using the average market price of the Company's common stock. Fully diluted earnings per share (based on 27,855,000 shares in [Year]) assumes conversion of the 73/4 % Convertible Subordinated Debentures Due [Year] issued in [Month] [Year]. The debentures were converted to common stock in [Year].

RECLASSIFICATIONS

Certain amounts in the [Year] and [Year] Consolidated Financial Statements have been reclassified to conform with the [Year] presentation. Such reclassifications had no material effect on the previously reported financial position, net income or cash flows of the Company.

2. CASH, CASH EQUIVALENTS AND OTHER MARKETABLE SECURITIES (INCLUDING FUNDS SUBJECT TO WITHDRAWAL RESTRICTIONS)

Cash, cash equivalents and other marketable securities consisted of the following:

	DECEMBER 31,	
	[Year]	[Year]
(IN THOUSANDS)		
Cash _____	\$ 6,041	\$ 32,221
Municipal put bonds	49,330	9,800

Tax advantaged auction preferred stocks	--	4,000
Municipal put bond mutual funds	8,000	2,000
Money market funds	7,447	5,449
Bankers acceptances	24	--
Total cash and cash equivalents	70,842	53,470
Certificates of deposit	1,279	1,108
Municipal put bonds	13,795	1,860
Municipal put bond mutual funds	--	5,000
Collateralized mortgage obligations	--	1,000
Total other marketable securities	15,074	8,968
Total cash, cash equivalents and other marketable securities (approximate market value)	\$85,916	\$62,438

3. OTHER ASSETS

Other assets consisted of the following:

DECEMBER 31,

[Year]

[Year]

(IN THOUSANDS)

Notes and accounts receivable	\$ 2,187	\$ 2,968

Investment in Caretenders Health Corp.	7,380	7,382
Investments in other unconsolidated subsidiaries	--	3,991
Investment in land held for expansion	--	3,023
Other _____	1,525	2,880
	\$11,092	\$21,244

The Company has a 24% ownership interest in Caretenders Health Corp. (Caretenders). Accordingly, the Company's investment is being accounted for using the equity method of investments in common stock. The investment was initially valued at \$7,250,000. The Company's equity in earnings of Caretenders for the years ended December 31, [Year] and [Year] was not material to the Company's results of operations. At December 31, [Year], the Company guaranteed \$6,000,000 on a line of credit for Caretenders. The line of credit bears interest at the banks' prime rate plus 1/2 % and is secured by Caretender's receivables and inventory pursuant to an asset based lending formula. In return for the guarantee, Caretenders granted the Company warrants to purchase 500,000 shares of Caretenders common stock at a price of \$2.50 per share that expire on December 31, [Year].

4. PROPERTY, PLANT AND EQUIPMENT

Property, plant and equipment consisted of the following:

	DECEMBER 31,	
	[Year]	[Year]
	(IN THOUSANDS)	
Land _____	37,334	\$ 60,048
Buildings _____	170,216	441,885
Leasehold improvements	11,729	16,454
Furniture, fixtures and equipment	120,097	215,590
Construction in progress	33,399	29,274
	\$372,775	\$763,251
Less accumulated depreciation and amortization	37,717	55,046
	\$335,058	\$708,205

5. INTANGIBLE ASSETS

Intangible assets consisted of the following:

	DECEMBER 31,	
	[Year]	[Year]
(IN THOUSANDS)		
Organization, partnership formation and start-up costs _____	\$ 35,408	\$ 40,939
Debt issue costs _____	1,308	1,527
Noncompete agreements _____	19,983	24,862
Cost in excess of net asset value of purchased facilities _____	46,632	136,196
	_____	_____
	103,331	204,524
Less accumulated amortization _____	21,334	29,103
	_____	_____
	\$ 81,997	\$ 175,421

6. LONG-TERM DEBT

Long-term debt consisted of the following:

	DECEMBER 31,	
	[Year]	[Year]
(IN THOUSANDS)		
Notes and bonds payable Advances under a \$390,000,000 credit agreement with a bank _____	\$288,000	\$370,000
Due to National Medical Enterprises, Inc. _____	--	361,164
Notes payable to banks and various other notes payable _____	4,415	4,201
Noncompete agreements payable with payments _____	10,000	12,050

due at varying intervals through December [Year]

Hospital revenue bonds payable	--	24,862
Other _____	--	12,272
	<u> </u>	<u> </u>
	\$302,415	784,549
Less amounts due within one year	2,907	4,859
	<u> </u>	<u> </u>
	\$299,508	\$770,690

During [Year], the Company entered into a Credit Agreement with AmTrust of North Carolina, N.A. and participating banks (the [Year] Credit Agreement) which consists of a \$390,000,000 revolving facility and term loan. The [Year] Credit Agreement replaced a previous credit agreement with AmSouth Bank N.A. Interest is paid quarterly based on LIBOR rates plus a pre-determined margin, a base rate, or competitively bid rates from the participating banks. The Company is required to pay a fee of 0.25% on the unused portion of the [Year] revolving credit facility. The principal amount is payable on November 20, [Year]. The maturity date is extendible for two one year periods upon the mutual agreement of the Company and the lenders. The Company has provided a negative pledge of all its assets and has granted a first priority security interest in and lien on all shares of stock of its subsidiaries and rights and interests in its partnerships.

Effective December 31, [Year], the Company completed an acquisition of selected rehabilitation facilities from National Medical Enterprises, Inc. (NME) (see Note 9). The acquisition was financed by the Company through a \$410,000,000 Acquisition and Revolving Credit Facility (the NME Acquisition Credit Facility) with AmTrust of North Carolina, N.A., and six participating banks. Interest is paid quarterly based on LIBOR or a base rate plus a predetermined margin. This credit facility has an initial term ending June 30, [Year], but may be extended to June 30, [Year]. The Company has provided a negative pledge on all assets acquired in the NME Selected Hospitals Acquisition and granted the banks a first priority security interest in all shares of stock of its subsidiaries and rights and interests in its controlled partnerships relating to facilities acquired in the NME Selected Hospitals Acquisition.

The amount shown as Due to National Medical Enterprises, Inc. at December 31, [Year] was subsequently financed through the NME Acquisition Credit Facility.

On February 1, [Year], the Company filed a Registration Statement on Form S-3 with the Securities and Exchange Commission to issue \$250,000,000 (\$287,500,000 if the underwriter's over-allotment option is exercised in full) in Senior Subordinated Notes Due [Year] and \$100,000,000 (\$115,000,000 if the underwriters' over-allotment option is exercised in full) Convertible Subordinated Debentures Due [Year]. The Company intends to use proceeds from these debt offerings to repay indebtedness outstanding under its existing bank credit facilities. Accordingly, all amounts outstanding under the Company's existing bank credit facilities are shown as non-current in the accompanying financial statements at December 31, [Year].

Principal maturities of notes and bonds payable are as follows:

YEAR ENDING DECEMBER 31,	(IN THOUSANDS)	
[Year] _____		\$ 4,859

[Year] _____	375,630
[Year] _____	5,544
[Year] _____	4,602
[Year] _____	3,462
After [Year] _____	390,452
	\$784,549

7. STOCK OPTIONS

The Company has various stockholder-approved stock option plans which provide for the grant of options to Directors, officers and other key employees to purchase common stock at 100% of the fair market value as of the date of grant. During [Year], the Company's Board of Directors adopted the [Year] Stock Option Plan, which is subject to approval by the stockholders at their next meeting. The Board of Directors administers the stock option plans. Options may be granted as incentive stock options or as non-qualified stock options. Incentive stock options vest 25% annually, commencing upon completion of one year of employment subsequent to the date of grant. Non-qualified stock options generally are not subject to any vesting provisions. The options expire at dates ranging from five to ten years from the date of grant.

The following table summarizes activity in the stock option plans:

	YEAR ENDED DECEMBER 31,		
	[Year]	[Year]	[Year]
Options outstanding January 1	2,580,113	3,368,571	5,339,742
Granted _____	1,725,750	2,762,000	1,770,000
Exercised _____	898,854	765,328	180,455
Cancelled _____	38,438	25,501	53,501
Options outstanding at December 31 _____	3,368,571	5,339,742	6,875,786
Option price range for options granted during the period _____	\$18.33--\$27.41	\$15.25--\$19.88	\$13.50--\$16.88
Option price range for options exercised during the period _____	\$2.67--\$21.41	\$5.67--\$21.41	\$5.91--\$19.17
Options exercisable at December 31 _____	1,901,565	4,155,817	5,332,940
Options available for grant at December 31 _____	1,473,075	546,050	324,550

8. LIMITED PARTNERSHIPS

WELLHEALTH operates a number of rehabilitation centers as limited partnerships. WELLHEALTH serves as the general partner and operates the partnerships as comprehensive outpatient rehabilitation facilities or inpatient rehabilitation facilities. These limited partnerships are included in the consolidated financial statements (as more fully described in Note 1 under "Minority Interests"). The limited partners share in the profit or loss of the partnerships based on their respective ownership percentage (ranging from 1% to 50% at December 31, ____[Year]) during their ownership period.

Beginning in ____[Year], due to federal and state regulatory requirements, the Company began the process of buying back the partnership interests of its physician limited partners. The buyback prices for the interests were in general based on a pre-determined multiple of projected cash flows of the partnerships. The excess of the buyback price over the book value of the limited partners' capital amounts was charged to the Company's retained earnings.

9. ACQUISITIONS

Effective December 31, ____[Year], the Company completed an acquisition from National Medical Enterprises, Inc. (NME) of 28 inpatient rehabilitation facilities and 45 outpatient rehabilitation centers, which constituted substantially all of NME's rehabilitation services division (the NME Selected Hospitals Acquisition). The purchase price was approximately \$296,661,000 cash, plus net working capital of \$64,503,000, subject to certain adjustments as of June 30, ____[Year], the assumption of approximately \$16,313,000 of current liabilities and the assumption of approximately \$17,111,000 in long-term debt (see Note 6).

Also, at various dates during ____[Year], the Company acquired outpatient operations in nineteen cities located throughout the United States. The Company also acquired eight satellite locations. The combined purchase price of these acquired outpatient operations and satellites was approximately \$23,943,000.

In connection with these transactions, the Company entered into non-compete agreements totaling \$4,730,000.

The fair value of the total net assets acquired in ____[Year] was approximately \$301,382,000. The total cost for ____[Year] acquisitions exceeded the fair value of the net assets acquired by approximately \$83,725,000. This excess is being amortized over a forty-year period on a straight-line basis. The allocation of the purchase price of the NME Selected Hospitals Acquisition is tentative pending completion of appraisals on the facilities and equipment acquired. The allocation may change with the completion of these appraisals.

All of the acquisitions described above were accounted for as purchases and, accordingly, the results of operations of the acquired businesses are included in the accompanying consolidated financial statements from their respective dates of acquisition.

The following table summarizes the unaudited consolidated pro forma results of operations, assuming the NME Selected Hospitals Acquisition described above had occurred at the beginning of each of the following periods. This pro forma summary does not necessarily reflect the results of operations as they would have been had the Company and the acquired entities constituted a single entity during such periods.

	DECEMBER 31,	
	[Year]	[Year]
(In thousands, except for per share amounts)		
Revenues _____	\$922,136	\$937,173

Net income _____	45,869	14,566
Net income per common and common equivalent share _____	1.53	.49

As a result of the NME Selected Hospitals Acquisition, the Company has recognized an expense of approximately \$49,742,000 during the year ended December 31, ____[Year]. By recognizing this expense, the Company has provided for the write-down of certain assets to realizable value as the result of anticipated facility reorganizations and consolidations, related costs of certain employee separations, and the write-off of certain capitalized development project costs.

10. INCOME TAXES

WELLHEALTH and its subsidiaries file a consolidated federal income tax return. The limited partnerships file separate income tax returns. WELLHEALTH's allocable portion of each partnership's income (loss) is included in the taxable income of the Company. The remaining income (loss) of each partnership is allocated to the limited partners.

Effective ____[month] ____[day], ____[year], the Company changed its method of accounting for income taxes to the liability method required by Financial Accounting Standards Board (FASB) Statement No. 109, "Accounting for Income Taxes." The cumulative effect of adopting Statement 109 was not material. Previously, the Company had used the liability method as prescribed by FASB Statement No. 96.

Deferred income taxes reflect the net effects of temporary differences between the carrying amounts of assets and liabilities for financial reporting purposes and the amounts used for income tax purposes. Significant components of the Company's deferred tax liabilities and assets as of December 31, ____[Year] are as follows:

	YEAR ENDED DECEMBER 31,		
	CURRENT	NONCUR- RENT	TOTAL
(IN THOUSANDS)			
Deferred tax liabilities:			
Depreciation and amortization	\$--	\$24,497	\$24,497
Other _____	340	--	340
Total deferred tax liabilities	340	24,497	24,837
Deferred tax assets:			
NME Selected Hospitals Acquisition re- lated expense _____	--	19,399	19,399

Total deferred tax assets	--	19,399	19,399
Net deferred tax liabilities	\$340	\$5,098	\$5,438

The current portion of the Company's deferred tax liability is included with accrued interest payable and other current liabilities on the accompanying balance sheet.

The provision for income taxes was as follows:

	YEAR ENDED DECEMBER 31,		
	[Year]	[Year]	[Year]
	(IN THOUSANDS)		
Currently payable:			
Federal _____	\$ 7,639	\$ 9,497	\$ 9,695
State _____	693	1,141	985
	8,332	10,638	10,680
Deferred expense (benefit):			
Federal	2,616	4,175	(5,933)
State _____	552	520	(678)
	3,168	4,695	(6,611)
Total provision	\$11,500	\$15,333	\$ 4,069

The components of the provision for deferred income taxes for the years ended December 31, ____ [Year] and ____ [Year] are as follows:

	DECEMBER 31,	
	[Year]	[Year]
	IN THOUSANDS	

Depreciation and amortization _____	\$1,579	\$5,483
Bad debts _____	1,264	(953)
Installment sale _____	240	--
Other _____	85	165
	\$3,168	\$4,695

The difference between the provision for income taxes and the amount computed by applying the statutory federal income tax rate to income before taxes was as follows:

	YEAR ENDED DECEMBER 31,		
	[Year]	[Year]	[Year]
	(IN THOUSANDS)		
Federal taxes at statutory rates	\$11,516	\$15,324	\$3,765
Add (deduct):			
State income taxes, net of federal tax bene- fit _____	457	753	650
Tax-exempt interest income	(1,267)	(1,012)	(382)
Other _____	794	268	36
	\$11,500	\$15,333	\$4,069

11. COMMITMENTS AND CONTINGENCIES

At December 31, ____[Year], anticipated capital expenditures for the next twelve months approximate \$100,000,000. This amount includes expenditures for the construction and equipping of additions to existing facilities, the construction of three inpatient rehabilitation facilities for which regulatory approval has been obtained and the acquisition or development of comprehensive outpatient rehabilitation facilities.

Beginning December 1, ____[Year], the Company became self-insured for professional liability and comprehensive general liability. The Company purchased coverage for all claims incurred prior to December 1, ____[Year]. In addition, the Company purchased underlying insurance which would cover all claims once established limits have been exceeded. It is the opinion of management that at December 31, ____[Year] the Company has adequate reserves to cover losses on asserted and unasserted claims.

Operating leases

Operating leases generally consist of short-term lease agreements for buildings where facilities are located. These leases generally have 5-year terms, with one or more renewal options, with terms to be negotiated at the time of renewal. Total rental expense for all operating leases was \$8,801,000, \$13,099,000 and \$18,177,000 for the years ended December 31, ____[Year], ____[Year] and ____[Year], respectively.

The following is a schedule of future minimum lease payments under all operating leases having initial or remaining non-cancelable lease terms in excess of one year:

YEAR ENDING DECEMBER 31, (IN THOUSANDS)

[Year] _____	\$ 35,922
[Year] _____	33,207
[Year] _____	30,530
[Year] _____	28,295
[Year] _____	26,151
[Year] _____	92,234
Total minimum payments required	\$246,939

12. EMPLOYEE BENEFIT PLANS

The Company has a 401(k) savings plan which matches 15% (10% in ____[Year]) of the first 4% of earnings that an employee contributes. All contributions are in the form of cash. All employees who have completed one year of service with a minimum of 1,000 hours worked are eligible to participate in the plan. Company contributions are gradually vested over a seven-year service period. Contributions to the plan by the Company were approximately \$196,000, \$396,000, and \$430,000 in ____[Year], ____[Year] and ____[Year], respectively.

In ____[Year], the Company established an Employee Stock Ownership Plan (ESOP) for the purpose of providing substantially all employees of the Company the opportunity to save for their retirement and acquire a proprietary interest in the Company. The ESOP currently owns approximately 830,000 shares of the Company's Common Stock, which were purchased with funds borrowed from the Company, \$10,000,000 in ____[Year] (the ____[Year] ESOP Loan) and \$10,000,000 in ____[Year] (the ____[Year] ESOP Loan). At December 31, ____[Year], the combined ESOP Loans had a balance of \$18,932,000. The ____[Year] ESOP Loan, which bears an interest rate of 10%, is payable in annual installments covering interest and principal over a ten-year period beginning in ____[Year]. The ____[Year] ESOP Loan, which bears an interest rate of 8.5%, is payable in annual installments covering interest and principal over a ten-year period beginning in ____[Year]. Company contributions to the ESOP began in ____[Year] and shall at least equal the amount required to make all ESOP Loan amortization payments for each plan year. The Company recognizes compensation expense based on the shares allocated method. The total compensation expense related to the ESOP recognized by the Company was \$367,000, \$1,701,000 and \$3,198,000 in ____[Year], ____[Year] and ____[Year], respectively. Interest incurred on the ESOP Loans was approximately \$367,000, \$964,000 and \$1,743,000, in ____[Year], ____[Year] and ____[Year], respectively.

13. CAPITAL STOCK

On October 17, ____ [Year], the Company's Board of Directors authorized a three-for-two stock split to be effected in the form of a 50 percent stock dividend. The stock dividend was distributed on December 31, ____ [Year] to holders of record on December 13, ____ [Year]. An amount equal to the par value of the shares issued has been transferred from additional paid-in capital to the common stock account. All weighted average share and per share amounts have been restated to give effect to the stock split.

14. TERMINATED MERGER

On January 2, ____ [Year], the Company and Continental Medical System, Inc. (CMS) jointly announced an agreement to combine their business operations as provided in an Agreement and Plan of Reorganization (the Plan). On May 6, ____ [Year], the Company and CMS jointly announced the termination of the Plan. Accordingly, all costs and expenses incurred in connection with the Plan were charged to operations in ____ [Year] and reported as terminated merger expense in the accompanying statements of income.

NO DEALER, SALESMAN OR ANY OTHER PERSON HAS BEEN AUTHORIZED TO GIVE ANY INFORMATION OR TO MAKE ANY REPRESENTATIONS OTHER THAN THOSE CONTAINED IN THIS PROSPECTUS IN CONNECTION WITH THE OFFER MADE BY THIS PROSPECTUS AND, IF GIVEN OR MADE, SUCH INFORMATION OR REPRESENTATIONS MUST NOT BE RELIED UPON AS HAVING BEEN AUTHORIZED BY THE COMPANY OR ANY OF THE UNDERWRITERS. THIS PROSPECTUS DOES NOT CONSTITUTE AN OFFER TO SELL OR THE SOLICITATION OF ANY OFFER TO BUY ANY SECURITY OTHER THAN THE SHARES OF COMMON STOCK OFFERED BY THIS PROSPECTUS, NOR DOES IT CONSTITUTE AN OFFER TO SELL OR A SOLICITATION OF ANY OFFER TO BUY THE SHARES OF COMMON STOCK BY ANYONE IN ANY JURISDICTION IN WHICH SUCH OFFER OR SOLICITATION IS NOT AUTHORIZED, OR IN WHICH THE PERSON MAKING SUCH OFFER OR SOLICITATION IS NOT QUALIFIED TO DO SO, OR TO ANY PERSON TO WHOM IT IS UNLAWFUL TO MAKE SUCH OFFER OR SOLICITATION. NEITHER THE DELIVERY OF THIS PROSPECTUS NOR ANY SALE MADE HEREUNDER SHALL, UNDER ANY CIRCUMSTANCES, CREATE ANY IMPLICATION THAT INFORMATION CONTAINED HEREIN IS CORRECT AS OF ANY TIME SUBSEQUENT TO THE DATE HEREOF.

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Business _____

Investment and Other Policies _____

Management _____

Principal Stockholders _____

Description of Securities _____

Certain Provisions of Maryland Law and of The Company's Articles of Incorporation and Bylaws _____

Federal Income Tax Considerations _____

ERISA Considerations _____

Underwriting _____

Legal Matters _____

Experts _____

Available Information _____

Glossary _____

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UNTIL _____, ____[Year] ALL DEALERS EFFECTING TRANSACTIONS IN THE REGISTERED SECURITIES, WHETHER OR NOT PARTICIPATING IN THIS DISTRIBUTION, MAY BE REQUIRED TO DELIVER A PROSPECTUS. THIS IS IN ADDITION TO THE OBLIGATION OF DEALERS TO DELIVER A PROSPECTUS WHEN ACTING AS UNDERWRITERS AND WITH RESPECT TO THEIR UNSOLD ALLOTMENTS OR SUBSCRIPTIONS.

5,800,000 SHARES

AMERICAN CAPITAL TRUST, INC.

COMMON STOCK

PROSPECTUS

MAY, [Year]

ALABAMA SECURITIES CORP.

(c) Part II information

PART II
INFORMATION NOT REQUIRED IN PROSPECTUS

ITEM 30. QUANTITATIVE AND QUALITATIVE DISCLOSURES ABOUT MARKET RISK

The Company may be exposed to interest rate changes primarily as a result of long-term debt bearing interest at variable rates that the Company will likely incur to acquire properties and make loans and other permitted investments. The Company's interest rate risk management objectives will be to limit the impact of interest rate changes on earnings and cash flows and to lower overall borrowing costs. To achieve these objectives, the Company expects to borrow primarily at fixed rates or variable rates with the lowest margins available and, in some cases, with the ability to convert variable rates to fixed rates. With regard to variable rate financing, the Company will assess interest rate cash flow risk by continually identifying and monitoring changes in interest rate exposures that may adversely impact expected future cash flows and by evaluating hedging opportunities.

ITEM 31. OTHER EXPENSES OF ISSUANCE AND DISTRIBUTION

Set forth below is an estimate of the fees and expenses to be incurred in connection with the issuance and distribution of the shares of Common Stock offered hereby.

Securities and Exchange Commission Registration Fee _____	\$46,000
NASD Filing Fee _____	13,840
New York Stock Exchange Original Listing Fee _____	*
Blue Sky Fees and Expenses _____	*
Legal Fees and Expenses _____	*
Accounting Fees _____	*
Printing and Engraving Costs _____	*
Transfer Agent's Fee _____	*
Miscellaneous Expenses _____	*

Total

\$ *

* To be supplied by amendment

ITEM 32. SALES TO SPECIAL PARTIES

The Company sold an aggregate of 180,000 shares of Common Stock to M. Donal Rushmore (82,656 shares), WELLHEALTH Rehabilitation Corporation (71,280 shares), W. Gill McDaniel (18,000 shares) and Dee Martin Michaels (8,064 shares), its Founding Stockholders, for \$.001 per share (an aggregate of \$180) on March 31, ____[Year].

ITEM 33. RECENT SALES OF UNREGISTERED SECURITIES

The Company sold an aggregate of 180,000 shares of Common Stock to the four Founding Stockholders for an aggregate of \$180 on March 31, ____[Year] pursuant to the exemption from registration contained in Section 4(2) of the Securities Act of 1933, as amended.

ITEM 34. INDEMNIFICATION OF DIRECTORS AND OFFICERS

The Articles of Incorporation of the Company provides for indemnification of directors to the full extent permitted by the laws of the State of Maryland.

Section 2-418 of the MGCL generally permits indemnification of any director made a party to any proceedings by reason of service as a director unless it is established that (i) the act or omission of such person was material to the matter giving rise to the proceeding and was committed in bad faith or was the result of active and deliberate dishonesty; or (ii) such person actually received an improper personal benefit in money, property or services; or (iii) in the case of any criminal proceeding, such person had reasonable cause to believe that the act or omission was unlawful. The indemnity may include judgments, penalties, fines, settlements and reasonable expenses actually incurred by the director in connection with the proceeding; but, if the proceeding is one by, or in the right of the corporation, indemnification is not permitted with respect to any proceeding in which the director has been adjudged to be liable to the corporation. The termination of any proceeding by conviction or upon a plan of nolo contendere or its equivalent creates a rebuttable presumption that the director did not meet the requisite standard of conduct required for permitted indemnification. The termination of any proceeding by judgment, order or settlement, however, does not create a presumption that the director failed to meet the requisite standard of conduct for permitted indemnification.

Indemnification under the provisions of the MGCL is not deemed exclusive of any other rights, by indemnification or otherwise, to which a director may be entitled under the Articles of Incorporation, Bylaws, resolution of stockholders or directors, contract or otherwise.

The Company's Articles of Incorporation and Bylaws provide that the Company shall indemnify and advance expenses to its currently acting and its former directors to the fullest extent permitted by the MGCL, and that the Company may indemnify and advance expenses to its officers to the same extent as its directors and to such further extent as is consistent with law. The MGCL provides that a corporation may indemnify any director made a party to any proceeding

by reason of service in that capacity unless it is established that: (1) the act or omission of the director was material to the matter giving rise to the proceeding and (a) was committed in bad faith or (b) was the result of active and deliberate dishonesty, or (2) the director actually received an improper personal benefit in money, property or services, or (a) in the case of any criminal proceeding the director had reasonable cause to believe that the act or omission was unlawful. The statute permits Maryland corporations to indemnify its officers, employees or agents to the same extent as its directors and to such further extent as is consistent with law. The Company's Articles of Incorporation authorize the Company to indemnify persons serving as its officers to the same extent that the Company is obligated to indemnify its Directors. The Company's Bylaws, adopted by the Board of Directors provide that officers of the Company shall be entitled to such indemnification except to the extent that the Board of Directors may otherwise prospectively determine in any situation.

The Registrant intends to obtain officers and directors liability insurance.

ITEM 35. TREATMENT OF PROCEEDS FROM STOCK BEING REGISTERED

Not applicable.

ITEM 36. FINANCIAL STATEMENTS AND EXHIBITS

(a) Financial Statements Included in the Prospectus:

1. Audited Balance Sheet of American Capital Trust, Inc. as of March 31, ____ [Year].
2. Unaudited Pro Forma Financial Statements of American Capital Trust, Inc. as of December 31, ____ [Year].
3. Audited Consolidated Financial Statements of WELLHEALTH Rehabilitation Corporation and Subsidiaries.

(b) Exhibits:

EXHIBIT NUMBER

- * 1 Form of Underwriting Agreement.
- 3.1 Articles of Incorporation of the Registrant.
- 3.2 Bylaws of the Registrant.
- * 4 Form of stock certificate.
- * 5 Opinion of Etores & Premull, P.C. regarding legality.
- * 8 Opinion of Etores & Premull, P.C. regarding tax consequences.
- * 10.1 Agreement of Sale and Purchase with respect to American Sports Medicine Institute, Birmingham Medical Building I and Birmingham Medical Building II.
- * 10.2 Agreement of Sale and Purchase with respect to One-7000 Building.
- * 10.3 Agreement of Sale and Purchase with respect to Coral Gables MRI.
- * 10.4 Agreement of Sale and Purchase with respect to Little Rock.
- * 10.5 Agreement of Sale and Purchase with respect to Larkin Medical Building.

- * 10.6 Agreement of Sale and Purchase with respect to Richmond Medical Building I and Richmond Medical Building II.
- * 10.7 Agreement of Sale and Purchase with respect to Virginia Beach.
- * 10.8 Agreement of Sale and Purchase with respect to Midway Medical Plaza.
- * 10.9 Agreement of Sale and Purchase with respect to Mountain View.
- * 10.10 Agreement of Sale and Purchase with respect to Gravois.
- * 10.11 Agreement of Sale and Purchase with respect to Goodyear, Hamiter Building and Medical Building II.
- * 10.12 Agreement of Sale and Purchase with respect to Desert Springs.
- * 10.13 Agreement of Sale and Purchase with respect to South Lake Medical Center.
- * 10.14 Agreement of Sale and Purchase with respect to Northlake.
- * 10.15 Agreement of Sale and Purchase with respect to North Shore.
- 10.16 [Year] Stock Incentive Plan of American Capital Trust, Inc.
- 10.17 Lease Agreement between the Registrant and Birmingham Realty Company, dated May 25, [Year].
- * 21 Subsidiaries.
- 23.1 Consent of Etores & Premull, P.C. (included in Exhibits 5 and 8).
- 23.2 Consent of Andrew Arther.
- 23.3 Consent of Whinney & Whinney.
- 24 Powers of Attorney (included in Pages II-6 and II-7).

* To be filed by amendment.

ITEM 37. UNDERTAKINGS

The Company undertakes to provide to the Underwriters at the Closing specified in the Underwriting Agreement certificates in such denominations and registered in such names as required by the Underwriters to permit prompt delivery to each purchaser.

Insofar as indemnification for liabilities arising under the Securities Act may be permitted to directors, officers and controlling persons of the registrant, the registrant has been advised that in the opinion of the Commission such indemnification is against public policy as expressed in the Securities Act and is, therefore, unenforceable. In the event that a claim for indemnification against such liabilities (other than the payment by the registrant of expenses incurred or paid by a director, officer or controlling person of the registrant in the successful defense of any action, suit or proceeding) is asserted by such director, officer or controlling person in connection with the securities being registered, the registrant will, unless in the opinion of its counsel the matter has been settled by controlling precedent, submit to a court of appropriate jurisdiction the question of whether such indemnification by it is against public policy as expressed in the Securities Act and will be governed by the final adjudication of such issue.

The Company further undertakes that:

(1) For purposes of determining any liability under the Securities Act, the information omitted from the form of prospectus filed as part of this registration statement in reliance upon Rule 430A and contained in a form of prospectus filed by the registrant pursuant to Rule 424(b)(1) or (4) or 497(h) under the Securities Act shall be deemed to be part of this registration statement as of the time it was declared effective.

(2) For the purpose of determining any liability under the Securities Act, which post-effective amendment that contains a form of prospectus shall be deemed to be a new registration statement relating to the securities offered therein, and the offering of such securities at that time shall be deemed to be the initial bona fide offering thereof.

SIGNATURES

Pursuant to the requirements of the Securities Act of 1933, the Registrant certifies that it has reasonable grounds to believe that it meets all of the requirements for filing on Form S-11 and has duly caused this Registration Statement to be signed on its behalf by the undersigned, thereunto duly authorized in the City of Birmingham, State of Alabama, on the 15th day of April, ____[Year].

AMERICAN CAPITAL

TRUST, INC.

By /s/ W. Gill McDaniel

W. Gill McDaniel
President and Chief Executive
Officer

Pursuant to the requirements of the Securities Act of 1933, the Co-Registrant certifies that it has reasonable grounds to believe that it meets all of the requirements for filing on Form S-11 and has duly caused this Registration Statement to be signed on its behalf by the undersigned, thereunto duly authorized in the City of Birmingham, State of Alabama, on the 15th day of April, ____[Year].

WELLHEALTH REHABILITATION CORPORATION

By /s/ M. DONAL RUSHMORE

M. Donal Rushmore
President and Chief Executive
Officer

POWER OF ATTORNEY

KNOW ALL MEN BY THESE PRESENTS, that each person whose signature appears below constitutes and appoints

W. Gill McDaniel and Ralph Cuzzins, and each or either of them, his or her true and lawful attorney-in-fact and agent, with full power of substitution and resubstitution, for him or her and in his or her name, place and stead, in any and all capacities, to sign any and all amendments (including post-effective amendments) to this Registration Statement, and to file the same, with all exhibits thereto and other documents in connection therewith, with the Securities and Exchange Commission, granting unto said attorneys-in-fact and agents, and each of them, full power and authority to do and perform each and every act and thing requisite and necessary to be done in and about the premises, as fully and to all intents and purposes as he or she might or could do in person, hereby ratifying and confirming all that said attorneys-in-fact and agents or either of them, or their or his substitutes or substitute, may lawfully do or cause to be done by virtue hereof.

Pursuant to the requirements of the Securities Act of 1933, this Registration Statement has been signed by the following persons in the capacities and on the dates indicated.

SIGNATURE	TITLE	DATE
/s/ M. DONAL RUSH-MORE M. Donal Rushmore	Chairman of the Board	April 15, [Year]
/s/ W. GILL MCDANIEL W. Gill McDaniel	President, Chief Executive Officer and Director (Principal Executive Officer)	April 15, [Year]
/s/ RALPH CUZZINS Ralph Cuzzins	Vice-President--Finance Chief Financial Officer, and Secretary (Principal Financial and Accounting Officer)	April 15, [Year]
/s/ DEE MARTIN MICHAELS Dee Martin Michaels	Director	April 15, [Year]
/s/ ROBERT M. NAISMITH Robert M Naismith	Director	April 15, [Year]
/s/ DONALD W. LUCCARELLI Donald W. Luccarelli	Director	April 15, [Year]
/s/ ERICH BARNES Erich Barnes	Director	April 15, [Year]
/s/ LAWRENCE W. ARBOR III Lawrence W. Arbor III	Director	April 15, [Year]

/s/ GORDON BARRY Gordon Barry	Director	April 15, [Year]

/s/ GEORGE BOGLE George Bogle	Director	April 15, [Year]

POWER OF ATTORNEY

KNOW ALL MEN BY THESE PRESENTS, that each person whose signature appears below constitutes and appoints W. Gill McDaniel and Ralph Cuzzins, and each or either of them, his or her true and lawful attorney-in-fact and agent, with full power of substitution and resubstitution, for him or her and in his or her name, place and stead, in any and all capacities, to sign any and all amendments (including post-effective amendments) to this Registration Statement, and to file the same, with all exhibits thereto and other documents in connection therewith, with the Securities and Exchange Commission, granting unto said attorneys-in-fact and agents, and each of them, full power and authority to do and perform each and every act and thing requisite and necessary to be done in and about the premises, as fully and to all intents and purposes as he or she might or could do in person, hereby ratifying and confirming all that said attorneys-in-fact and agents or either of them, or their or his substitutes or substitute, may lawfully do or cause to be done by virtue hereof.

Pursuant to the requirements of the Securities Act of 1933, this Registration Statement has been signed by the following persons in the capacities and on the dates indicated.

SIGNATURE	TITLE	DATE
/s/ M. DONAL RUSHMORE M. Donal Rushmore	Chairman of the Board, President And Chief Executive Officer and Director (Principal Executive Of- ficer)	April 15, [Year]
/s/ NORA EBAMJAR Nora Ebamjar	Executive Vice President and Chief Financial Officer and Director (Principal Financial Officer)	April 15, [Year]
/s/ OWEN BENNETT TEAS Owen Bennett Teas	Group Vice President--Finance and Controller (Principal Accounting Officer)	April 15, [Year]
/s/ TANNER ANTONIO Tanner Antonio	Director	April 15, [Year]
/s/ CARLETON RESIDENCE Carleton Residence	Director	April 15, [Year]

28-22A Current Legal Forms for Real Estate FORM 22A.01

/s/ PAUL J. BENBOW Paul J. Benbow	Director	April 15, [Year]
/s/ WATSON KELLUM, D.D.S. Watson Kellum	Director	April 15, [Year]
/s/ H. STANTON GEORGE H. Stanton George	Director	April 15, [Year]
/s/ SAGE ADVICE Sage Advice	Director	April 15, [Year]
/s/ NEWTON W. MICHELS, SR. Newton W. Michels, Sr.	Director	April 15, [Year]
/s/ DAVID R. HUNTLIN David R. Huntlin	Director	April 15, [Year]

POWER OF ATTORNEY

KNOW ALL MEN BY THESE PRESENTS, that each person whose signature appears below constitutes and appoints M. Donal Rushmore and W. Gill McDaniel, and each or either of them, his or her true and lawful attorney-in-fact and agent, with full power of substitution and resubstitution, for him or her and in his or her name, place and stead, in any and all capacities, to sign any and all amendments (including post-effective amendments) to this Registration Statement, and to file the same, with all exhibits thereto and other documents in connection therewith, with the Securities and Exchange Commission, granting unto said attorneys-in-fact and agents, and each of them, full power and authority to do and perform each and every act and thing requisite and necessary to be done in and about the premises, as fully and to all intents and purposes as he or she might or could do in person, hereby ratifying and confirming all that said attorneys-in-fact and agents or either of them, or their or his substitutes or substitute, may lawfully do or cause to be done by virtue hereof.

Pursuant to the requirements of the Securities Act of 1933, this Registration Statement has been signed by the following persons in the capacities and on the dates indicated.

EXHIBIT INDEX

EXHIBIT NUMBER	DESCRIPTION	SUBSEQUEN- TIALY NUMBERED PAGE
+ 1	Form of Underwriting Agreement.	
+ 3.1	Articles of Incorporation of the Registrant.	
+ 3.2	Bylaws of the Registrant.	
+ 3.3	Articles of Amendment to Charter of the Registrant	

- 3.4 Articles of Amendment to Charter of the Registrant.
- + 4 Form of stock certificate.
- 5.1 Opinion of Etores & Premill, P.C. regarding legality.
- 8 Opinion of Etores & Premill, P.C. regarding tax consequences.
- + 10.1 Agreement of Sale and Purchase by and between WELL-HEALTH Medical Center, Inc. and American Capital of Alabama, Inc., dated May 23, [Year], with respect to American Sports Medicine Institute, Birmingham Medical Building I and Birmingham Medical Building II.
- + 10.2 Agreement of Sale and Purchase by or between WELL-HEALTH Rehabilitation Corporation and American Capital Trust, Inc., dated May 23, [Year], with respect to One-7000 Building.
- + 10.3 Agreement of Sale and Purchase by and between Doctors' Hospital of South Miami, Ltd. and American Capital Trust, Inc., dated May 23, [Year], with respect to Larkin Medical Building.
- + 10.4 Agreement of Sale and Purchase by and between WELL-HEALTH of Virginia, Inc. and American Capital Trust, Inc., dated May 23, [Year], with respect to Richmond Medical Building I and Richmond Medical Building II.
- + 10.5 Agreement of Sale and Purchase by and between WELL-HEALTH Rehabilitation Corporation and American Capital Trust, Inc., dated May 23, [Year], with respect to Little Rock.
- + 10.6 Agreement of Sale and Purchase by and between WELL-HEALTH Rehabilitation Corporation and American Capital Trust, Inc., dated May 23, [Year], with respect to Coral Gables MRI.
- + 10.7 Agreement of Sale and Purchase by and between WELL-HEALTH Rehabilitation Center of Virginia Beach Limited Partnership and American Capital Trust, Inc., dated May 23, [Year], with respect to Virginia Beach.
- + 10.8 Agreement of Sale and Purchase by and between OrNda Healthcorp and Midway Acquisition Company, Inc., dated April 19, [Year], with respect to Midway Medical Plaza.
- + 10.9 Agreement of Sale and Purchase by and between Mountain View Nursing Center, Inc. and American Capital of Pennsylvania, Inc., dated April 25, [Year], with respect to Mountain View.
- + 10.10 Agreement of Sale and Purchase by and between Gravois Healthcare, Inc. and American Capital Trust, Inc., dated April 25, [Year], with respect to Gravois.
- + 10.11 Agreement of Sale and Purchase by and between QHG of Gadsden, Inc. and American Capital of Alabama, Inc., dated

- May 25, [Year], with respect to Goodyear, Hamiter Building and Medical Building II.
- + 10.12 Agreement of Sale and Purchase by and between NC-DSH, Inc. and American Capital Trust, Inc., dated May 25, [Year], with respect to Desert Springs.
- + 10.13 Agreement of Sale and Purchase by and between Tesson Ferry Medical Equities, L.P. and American Capital Trust, Inc., dated May 27, [Year], with respect to South Lake Medical Center.
- + 10.14 Agreement of Sale and Purchase by and between Northlake Center for Outpatient Surgery, L.P. and American Capital Trust, Inc., dated May 27, [Year], with respect to Northlake.
- + 10.15 Agreement of Sale and Purchase by and between Surgical Health Corporation and American Capital Trust, Inc., dated May 27, [Year], with respect to North Shore.
- + 10.16 [Year] Stock Incentive Plan of American Capital Trust, Inc.
- + 10.17 Lease Agreement between the Company and Birmingham Realty Company, dated May 25, [Year].
- 10.18 Plan and Agreement of Merger between the Company and Midway Acquisition Company, Inc., dated May 27, [Year].
- 10.19 Appraisal of American Sports Medicine Institute Building, Birmingham, Alabama, dated January 18, [Year].
- 10.20 Appraisal of WELLHEALTH Professional Building, Birmingham, Alabama, dated January 17, [Year].
- 10.21 Appraisal of WELLHEALTH Professional #2, Birmingham, Alabama, dated March 2, [Year].
- 10.22 Appraisal of Larkin 7000 Building, South Miami, Florida, dated February 11, [Year].
- 10.23 Appraisal of Larkin Annex Building and Excess Land, South Miami, Florida, dated February 11, [Year], as modified by a Supplemental Report, dated May 26, [Year].
- 10.24 Appraisal of WELLHEALTH Professional Building I, Richmond, Virginia, dated January 18, [Year].
- 10.25 Appraisal of WELLHEALTH Professional Building II, Richmond, Virginia, dated January 20, [Year].
- 10.26 Appraisal of WELLHEALTH Rehabilitation Center of Little Rock, Little Rock, Arkansas, dated February 7, [Year].
- 10.27 Appraisal of WELLHEALTH Sports Medicine and Rehabilitation Center, Coral Gables, Florida, dated February 7, [Year].
- 10.28 Appraisal of WELLHEALTH Rehabilitation Center of Virginia Beach, Virginia Beach, Virginia, dated February 7, [Year].
- 10.29 Appraisal of Midway Medical Plaza and Adjacent Parking Structure, Los Angeles, California, dated April 8, [Year].

- 10.30 Appraisal of Mountain View Nursing Center, Greensburg, Pennsylvania, dated March 30, [Year]
- 10.31 Appraisal of Integrated Health Services of St. Louis at Gravois, St. Louis, Missouri, dated March 30, [Year].
- 10.32 Appraisal of The Goodyear Clinic, The Hamiter Building, and Baptist Medical Building II, Gadsden, Alabama, dated February 25, [Year].
- 10.33 Appraisal of Desert Springs Medical Plaza, Las Vegas, Nevada, dated February 21, [Year].
- 10.34 Appraisal of St. Louis Comprehensive and Ambulatory Care Facility (South County Medical Center), St. Louis, Missouri, dated May 25, [Year].
- 10.35 Appraisal of Northlake Tucker Ambulatory Surgery Center, Tucker, Georgia, dated April 14, [Year].
- 10.36 Appraisal of North Shore Surgical Center, Evanston, Illinois, dated April 28, [Year].
- 10.37 Dividend Agreement.
- 21 Subsidiaries.
- 23.1 Consent of Etores & Premill, P.C.
(included in Exhibits 5.1 and 8).
- 23.2 Consent of Andrew Arther.
- 23.3 Consent of Whinney & Whinney.
- 23.4 Consent of Andrew Arther.
- + 23.5 Consent of Valuation Counselors Group, Inc.
- + 24 Powers of Attorney.
- + Previously filed.



18 of 132 DOCUMENTS

Current Legal Forms for Real Estate

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Current Legal Forms for Real Estate
Chapter 22A REAL ESTATE SECURITIES
Part IV. FORMS
A. REIT FORM S-11 REGISTERED OFFERING

28-22A Current Legal Forms for Real Estate FORM 22A.02

AUTHOR: by Robert M. Nelson

FORM 22A.02

Real estate investment trust offering--acquisition of diversified portfolio of income-producing health-care related real properties and leaseback to healthcare operators--firm commitment underwriting--Maryland issuer--Exhibits to S-11--exhibit index--underwriting agreement--real estate purchase agreement--appraisal

COMMENT

This Form contains certain filed exhibits to the REIT offering set forth in the S-11 at Form 22A.01. Note that all the documents included here are just some of the relevant documents which may be required to be filed as exhibits to Part II, which follows the prospectus and financial statements of Part I, as shown in Form 22A.01. The instructions to Item 35 of SEC Form S-11 require, in addition to a listing of the financial statements which are filed as a part of the registration statement, the registrant to furnish the exhibits required by Item 601 of SEC Regulation S-K, 17 C.F.R. § 229.601. Item 601 sets forth in tabular form the documents which are required to be filed in connection with certain registration forms under the Securities Act of 1933 (including a Form S-11 registration) and certain periodic reports under the Securities Exchange Act of 1934. That item also requires that the registration statement also include an exhibit index, an example of which appears below.

This Form contains an underwriting agreement, a real estate purchase agreement and an appraisal, all of which were filed in connection with the Form S-11 REIT registration statement which appears in Form 22A.01. The underwriting agreement sets forth the terms under which the underwriter will purchase from the issuer and then resell the issuer shares being registered in a public offering. In a real estate offering such as this REIT offering, the issuer often may be using a significant portion of the offering proceeds to purchase and/or develop real estate which it intends to own and operate. In this offering, the issuer was purchasing several different existing real estate

properties from the current affiliated owners and then proposed to lease back those properties to the owners to operate. Obviously, in this type of transaction, the purchase agreements setting forth the terms of purchase, including price and payment terms, and the appraisals which opine as to the value of the properties being purchased are very significant documents and would be a relevant exhibit to the offering.

FORM

(a) Exhibit Index

EXHIBIT INDEX		
EXHIBIT NUMBER	DESCRIPTION	SUBSEQUEN- TIALY NUMBERED PAGE
* 1	Form of Underwriting Agreement.	_____
		—
3.1	Articles of Incorporation of the Registrant.	_____
		—
3.2	Bylaws of the Registrant.	_____
		—
* 4	Form of stock certificate.	_____
		—
* 5	Opinion of Etores & Premull, P.C. regarding legality.	_____
		—
* 8	Opinion of Etores & Premull, P.C. regarding tax consequences.	_____
		—
* 10.1	Agreement of Sale and Purchase with respect to American Sports Medicine Institute, Birmingham Medical Building I and Birmingham Medical Building II.	_____
		—
* 10.2	Agreement of Sale and Purchase with respect to One-7000 Building.	_____
		—
* 10.3	Agreement of Sale and Purchase with respect to Coral Gables MRI.	_____
		—
* 10.4	Agreement of Sale and Purchase with respect to Little Rock.	_____
		—
* 10.5	Agreement of Sale and Purchase with respect to Larkin Medical Building.	_____
		—
* 10.6	Agreement of Sale and Purchase with respect to Richmond Medical Building I and Richmond Medical Building II.	_____
		—
* 10.7	Agreement of Sale and Purchase with respect to Virginia Beach.	_____
		—
* 10.8	Agreement of Sale and Purchase with respect to Midway Medical Plaza.	_____
		—
* 10.9	Agreement of Sale and Purchase with respect to Mountain	_____

	View.	—
* 10.10	Agreement of Sale and Purchase with respect to Gravois.	_____
		—
* 10.11	Agreement of Sale and Purchase with respect to Goodyear, Hamiter Building and Medical Building II.	_____
		—
* 10.12	Agreement of Sale and Purchase with respect to Desert Springs.	_____
		—
* 10.13	Agreement of Sale and Purchase with respect to South Lake Medical Center.	_____
		—
* 10.14	Agreement of Sale and Purchase with respect to Northlake.	_____
		—
* 10.15	Agreement of Sale and Purchase with respect to North Shore.	_____
		—
10.16	[Year] Stock Incentive Plan of American Capital Trust, Inc.	_____
		—
10.17	Lease Agreement between the Registrant and Birmingham Realty Company, dated May 25, [Year].	_____
		—
* 21	Subsidiaries.	_____
		—
23.1	Consent of Etores & Premull, P.C. (included in Exhibits 5 and 8).	_____
		—
23.2	Consent of Andrew Arther.	_____
		—
23.3	Consent of Whinney & Whinney.	_____
		—
24	Powers of Attorney (included in Pages II-6 and II-7).	_____
		—

* To be filed by amendment.

(b) Underwriting agreement

EXHIBIT NO. 1

5,800,000 SHARES

AMERICAN CAPITAL TRUST, INC.
COMMON STOCK
UNDERWRITING AGREEMENT
_____, [Year]

ALABAMA SECURITIES CORP.
B.B. BEARSFORD COMPANY
c/o ALABAMA SECURITIES CORP.
833 Sandwich Street
New York, New York 10013

Dear Sirs:

American Capital Trust, Inc., a Maryland corporation (the "Company") intending to qualify for federal income tax purposes as a real estate investment trust ("REIT") pursuant to *Sections 856 through 860 of the Internal Revenue Code of 1986*, as amended (the "Code"), proposes to issue and sell, upon the terms and conditions set forth in Section 2 hereof, an aggregate of 5,800,000 shares (the "Firm Shares") of its common stock, \$.001 par value per share (the "Common Stock"), to the several underwriters named in Schedule I hereto (the "Underwriters"). The Company also proposes to issue and sell to the Underwriters, upon the terms and conditions set forth in Section 2 hereof, up to an additional 870,000 shares (the "Additional Shares") of Common Stock solely to cover over-allotments, if any. The Firm Shares and the Additional Shares are hereinafter collectively referred to as the "Shares."

The Company and WELLHEALTH Rehabilitation Corporation ("WELLHEALTH" and, together with the Company, the "Co-registrants"), a Delaware corporation and the co-registrant with the Company with respect to the offering of the Shares pursuant to the registration statement (as such term is defined in Section 1 of this Agreement), wish to confirm as follows their respective agreements with you (the "Representatives") and the other Underwriters on whose behalf you are acting, in connection with the several purchases of the Shares by the Underwriters.

1. Registration Statement and Prospectus. The Co-registrants have prepared and filed with the Securities and Exchange Commission (the "Commission") in accordance with the provisions of the Securities Act of 1933, as amended, and the rules and regulations of the Commission thereunder (collectively, the "Act"), a registration statement on Form S-11 under the Act (the "Registration Statement"), including a prospectus subject to completion relating to the Shares. The term "Registration Statement" as used in this Agreement means such registration statement (including all financial schedules and exhibits), as amended at the time it becomes effective, or, if such registration statement became effective prior to the execution of this Agreement, as supplemented or amended prior to the execution of this Agreement. If it is contemplated, at the time this Agreement is executed, that a post-effective amendment to the registration statement will be filed and must be declared effective before the offering of the Shares may commence, the term "Registration Statement" as used in this Agreement means the registration statement as amended by said post-effective amendment. The term "Prospectus" as used in this Agreement means the prospectus in the form included in the Registration Statement, or, if the prospectus included in the Registration Statement omits information in reliance on Rule 430A under the Act and such information is included in a prospectus filed with the Commission pursuant to Rule 424(b) under the Act, the term "Prospectus" as used in this Agreement means the prospectus in the form included in the Registration Statement as supplemented by the addition of the Rule 430A information contained in the prospectus filed with the Commission pursuant to Rule 424(b). The term "Pricing Prospectus" as used in this Agreement means the prospectus subject to completion in the form included in the registration statement at the time of the initial filing of the registration statement with the Commission, and as such prospectus shall have been amended from time to time prior to the date of the Prospectus.

2. Agreements to Sell and Purchase. The Company hereby agrees, subject to all the terms and conditions set forth herein, to issue and sell to each Underwriter and, upon the basis of the representations, warranties and agreements of each of the Company and WELLHEALTH herein contained and subject to all the terms and conditions set forth herein, each Underwriter agrees, severally and not jointly, to purchase from the Company, at a purchase price of \$ per Share (the "purchase price per share"), the number of Firm Shares set forth opposite the name of such Underwriter in Schedule I hereto (or such number of Firm Shares increased as set forth in Section 10 hereof).

The Company also agrees, subject to all the terms and conditions set forth herein, to sell to the Underwriters, and, upon the basis of the representations, warranties and agreements of the Company herein contained and subject to all the terms and conditions set forth herein, that the Underwriters shall have the right to purchase from the Company, at the purchase price per share, pursuant to an option (the "over-allotment option") which may be exercised at any time prior to 9:00 P.M., New York City time, on the 30th day after the date of the Prospectus (or, if such 30th day shall be a Saturday or Sunday or a holiday, on the next business day thereafter when the New York Stock Exchange is open for trading), up to an aggregate of 870,000 Additional Shares from the Company. Upon any exercise of the over-allotment option, each Underwriter, severally and not jointly, agrees to purchase from the Company the number of Additional Shares (subject to such adjustments as you may determine in order to avoid fractional shares) which bears the same proportion to the number of Additional Shares to be purchased by the Underwriters as the number of Firm Shares set forth opposite the name of such Underwriter in Schedule I hereto (or such number of Firm Shares increased as set forth in Section 10 hereof) bears to the aggregate number of Firm Shares.

3. Terms of Public Offering. The Company has been advised by you that the Underwriters propose to make a public offering of their respective portions of the Shares as soon after the Registration Statement and this Agreement have become effective as in their judgment is advisable and initially to offer the Shares upon the terms set forth in the Prospectus.

4. Delivery of the Shares and Payment Therefor. Delivery to the Underwriters of and payment for the Firm Shares shall be made at the office of Dowe & Flower Co., L.P.A., 191 Ninth Avenue, New York, New York 10022, at 10:00 A.M., New York City time, on, ____ [Year] (the "Closing Date"). The place of closing for the Firm Shares and the Closing Date may be varied by agreement between you and the Company.

Delivery to the Underwriters of and payment for any Additional Shares to be purchased by the Underwriters shall be made at the aforementioned office of Dowe & Flower Co., L.P.A. at such time on such date (the "Option Closing Date"), which may be the same as the Closing Date but shall in no event be earlier than the Closing Date nor earlier than three nor later than ten business days after the giving of the notice hereinafter referred to, as shall be specified in a written notice from you to the Company of your determination to purchase a number, specified in such notice, of Additional Shares. The place of closing for any Additional Shares and the Option Closing Date for such Additional Shares may be varied by agreement among you and the Company.

Certificates for the Firm Shares and for any Additional Shares to be purchased hereunder shall be registered in such names and in such denominations as you shall request prior to 1:00 P.M., New York City time, on the third business day preceding the Closing Date or any Option Closing Date, as the case may be. Such certificates shall be made available to you in New York City for inspection and packaging not later than 9:30 A.M., New York City time, on the business day next preceding the Closing Date or the Option Closing Date, as the case may be. The certificates evidencing the Firm Shares and any Additional Shares to be purchased hereunder shall be delivered to you on the Closing Date or the Option Closing Date, as the case may be, against payment of the purchase price therefor by certified or official bank check or checks payable in New York Clearing House (next day) funds to the order of the Company.

5. Agreements of the Co-registrants. The Co-registrants agree, severally and not jointly (each with respect to itself only), with the several Underwriters as follows:

(a) If, at the time this Agreement is executed and delivered, it is necessary for the Registration Statement or a post-effective amendment thereto to be declared effective before the offering of the Shares may commence, the Co-registrants will use their best efforts to cause the Registration Statement or such post-effective amendment to become effective as soon as possible and will advise you promptly and, if requested by you, will confirm such advice in writing, when the Registration Statement or such post-effective amendment has become effective.

(b) The Co-registrants will advise you promptly and, if requested by you, will confirm such advice in writing: (i) of any

request by the Commission for amendment of or a supplement to the Registration Statement, any Prepricing Prospectus or the Prospectus or for additional information; (ii) of the issuance by the Commission of any stop order suspending the effectiveness of the Registration Statement or of the suspension of qualification of the Shares for offering or sale in any jurisdiction or the initiation of any proceeding for such purpose; and (iii) within the period of time referred to in paragraph (f) below, of any change in the Company's or WELLHEALTH'S condition (financial or other), business, prospects, properties, net worth or results of operations, or of the happening of any event which makes any statement of a material fact made in the Registration Statement or the Prospectus (as then amended or supplemented) untrue or which requires the making of any additions to or changes in the Registration Statement or the Prospectus (as then amended or supplemented) in order to state a material fact required by the Act or the regulations thereunder to be stated therein or necessary in order to make the statements therein not misleading, or of the necessity to amend or supplement the Prospectus (as then amended or supplemented) to comply with the Act or any other law. If at any time the Commission shall issue any stop order suspending the effectiveness of the Registration Statement, the Co-registrants will use their best efforts to obtain the withdrawal of such order at the earliest possible time.

(c) The Co-registrants will furnish to you, without charge, three signed copies of the registration statement as originally filed with the Commission and of each amendment thereto, including financial statements and all exhibits to the registration statement, and will also furnish to each of you and your counsel without charge such number of conformed copies of the registration statement as originally filed and of each amendment thereto, as you may request.

(d) The Co-registrants will not (i) file any amendment to the Registration Statement or make any amendment or supplement to the Prospectus of which you shall not previously have been advised or to which you shall object after being so advised or (ii) so long as, in the opinion of counsel for the Underwriters, a Prospectus is required to be delivered in connection with sales by any Underwriter or dealer, file any information, documents or reports pursuant to the Securities Exchange Act of 1934, as amended (the "Exchange Act"), without delivering a copy of such information, documents or reports to you, as Representatives of the Underwriters, prior to or concurrently with the filing.

(e) Prior to the execution and delivery of this Agreement, the Company has delivered or will deliver to you, without charge, in such quantities as you have requested or may hereafter request, copies of each form of the Prepricing Prospectus. The Co-registrants consent to the use, in accordance with the provisions of the Act and with the securities or Blue Sky laws of the jurisdictions in which the Shares are offered by the several Underwriters and by dealers, prior to the date of the Prospectus, of each Prepricing Prospectus so furnished by the Company.

(f) As soon after the execution and delivery of this Agreement as possible and thereafter from time to time for such period as, in the opinion of counsel for the Underwriters, a prospectus is required by the Act to be delivered in connection with sales by any Underwriter or dealer, the Company will expeditiously deliver to each Underwriter and each dealer, without charge, as many copies of the Prospectus (and of any amendment or supplement thereto) as you may request. The Co-registrants consent to the use of the Prospectus (and of any amendment or supplement thereto) in accordance with the provisions of the Act and with the securities or Blue Sky laws of the jurisdictions in which the Shares are offered by the several Underwriters and by all dealers to whom Shares may be sold, both in connection with the offering and sale of the Shares and for such period of time thereafter as the Prospectus is required by the Act to be delivered in connection with sales by any Underwriter or dealer. If during such period of time any event shall occur that in the judgment of the Co-registrants or in the opinion of counsel for the Underwriters is required to be set forth in the Prospectus (as then amended or supplemented) or should be set forth therein in order to make the statements therein, in the light of the circumstances under which they were made, not misleading, or if it is necessary to supplement or amend the Prospectus in order to comply with the Act or any other law, the Co-registrants will forthwith prepare and, subject to the provisions of paragraph (d) above, file with the Commission an appropriate supplement or amendment thereto, and will expeditiously furnish to the Underwriters and dealers a reasonable number of copies thereof. In the event that the Company or WELLHEALTH and you agree that the Prospectus should be amended or supplemented, the Company and/or WELLHEALTH, as appropriate, if requested by you, will promptly issue a press release announcing or disclosing the matters to be covered by the proposed amendment or supplement.

(g) The Co-registrants will cooperate with you and with counsel for the Underwriters in connection with the registration or qualification of the Shares for offering and sale by the several Underwriters and by dealers under the securities or Blue Sky laws of such jurisdictions as you may designate and will file such consents to service of process or other documents as are necessary or appropriate in order to effect such registration or qualification; provided that in no event shall either of the Co-registrants be obligated to qualify to do business in any jurisdiction where it is not now so qualified or to take any action which would subject it to service of process in suits, other than those arising out of the offering or sale of the Shares, in any jurisdiction where it is not now so subject.

(h) The Company will make generally available to its security holders pursuant to Section 11(a) of the Act an earning statement, which need not be certified by independent certified public accountants unless required by the Act or the regulations promulgated thereunder, covering a twelve-month period commencing after the effective date of the Registration Statement, as soon as practicable after the end of such period, which earning statement shall satisfy the provisions of Section 11(a) of the Act.

(i) During the period of three years hereafter the Company shall furnish to you as soon as available, a copy of each report of the Company mailed to stockholders or filed with the Commission, and from time to time such other information concerning the Company as you may request.

(j) If this Agreement shall terminate or shall be terminated after execution pursuant to any provisions hereof (otherwise than pursuant to the second paragraph of Section 10 hereof or by notice given by you terminating this Agreement pursuant to Section 10 or Section 11 hereof), or if this Agreement shall be terminated by the Underwriters because of any failure or refusal on the part of the Company or WELLHEALTH to comply with the terms or fulfill any of the conditions of this Agreement, the Co-registrants agree to reimburse the Representatives for all out-of-pocket expenses (including fees and expenses of counsel for the Underwriters) incurred by you in connection herewith.

(k) The Company will apply the net proceeds from the sale of the Shares to be sold by it hereunder substantially in accordance with the description set forth in the Prospectus.

(l) If Rule 430A of the Act is employed, the Company will timely file the Prospectus pursuant to Rule 424(b) under the Act and will advise you of the time and manner of such filing.

(m) Except as provided in this Agreement, the Company will not offer, sell, contract to sell or otherwise dispose of any Common Stock or any securities convertible into or exercisable or exchangeable for Common Stock or grant any options or warrants to purchase Common Stock (except that the Company may grant options to purchase Common Stock under the Company's stock option plans) for a period of 180 days after the date of the Prospectus, without the prior written consent of Alabama Securities Corp. (on behalf of the several Underwriters).

(n) Except as stated in this Agreement and in the Prepricing Prospectus and Prospectus, the Company has not taken, nor will it take, directly or indirectly, any action designed to or that might reasonably be expected to cause or result in stabilization or manipulation of the price of the Common Stock to facilitate the sale or resale of the Shares.

(o) The Company will use its best efforts to have the Shares listed, subject to notice of issuance, on the New York Stock Exchange on or before the effective date of the Registration Statement.

(p) The Company has obtained or will obtain for the benefit of the Underwriters (and addressed to them) the written agreement of each of the executive officers, directors and stockholders of the Company not, without the prior written consent of Alabama Securities Corp. (on behalf of the Underwriters), to offer, sell, contract to sell, grant any option to purchase or otherwise dispose of any Common Stock or any securities convertible into or exercisable or exchangeable for Common Stock or warrants to purchase Common Stock for a period of 180 days after the date of the Prospectus.

(q) The Company will furnish the Representatives with copies of all reports on Form SR required by Rule 463 under the Act.

(r) The Company will use its best efforts to meet the requirements to qualify, commencing with the fiscal year ending December 31, [Year], as a REIT under the Code.

6. Representations and Warranties of the Co-registrants. The Company and WELLHEALTH represent and warrant (in the case of the Company, with respect to paragraphs (g)-(i), (k)-(m), (q) and (z) below, only to the extent such representations and warranties relate to the Company and excluding paragraph (f), and in the case of WELLHEALTH, with respect to paragraphs (g)-(i), (k)-(m), (q), and (z) below, only to the extent such representations and warranties relate to WELLHEALTH and excluding paragraphs (c)-(e), (n)-(p), (r)-(y), (aa) and (bb), severally and not jointly, to each Underwriter that:

(a) Each Prepricing Prospectus included as part of the registration statement as originally filed or as part of any amendment or supplement thereto, or filed pursuant to Rule 424 under the Act, complied when so filed in all material respects with the provisions of the Act. The Commission has not issued any order preventing or suspending the use of any Prepricing Prospectus.

(b) The registration statement in the form in which it became or becomes effective and also in such form as it may be when any post-effective amendment thereto shall become effective and the prospectus and any supplement or amendment thereto when filed with the Commission under Rule 424(b) under the Act, complied or will comply in all material respects with the provisions of the Act and did not or will not at any such times contain an untrue statement of a material fact or omit to state a material fact required to be stated therein or necessary to make the statements therein not misleading, except that this representation and warranty does not apply to statements in or omissions from the Registration Statement or the Prospectus made in reliance upon and in conformity with information relating to any Underwriter furnished to the Company in writing by or on behalf of any Underwriter through you expressly for use therein.

(c) All the outstanding shares of Common Stock of the Company have been duly authorized and validly issued, are fully paid and nonassessable, and are free of any preemptive or similar rights; and except as described in the Prospectus, there are no duly authorized and outstanding options, warrants or other rights calling for the issuance of, or any duly authorized commitment, plan or arrangement to issue, any Common Stock of the Company or any right or security convertible into or exchangeable or exercisable for any Common Stock of the Company or for any such right or securities. The Shares to be issued and sold by the Company have been duly authorized and, when issued and delivered to the Underwriters against payment therefor in accordance with the terms hereof, will be validly issued, fully paid and nonassessable, and free of any preemptive or similar rights, and the capital stock of the Company conforms to the description thereof in the Registration Statement and the Prospectus.

(d) The Company is a corporation duly organized and validly existing in good standing under the laws of the State of Maryland. The Company has full power and authority to own, lease and operate its properties and to conduct its business as described in the Registration Statement and the Prospectus, and is duly registered and qualified to conduct its business and is in good standing in each jurisdiction or place where the nature of its properties or the conduct of its business requires such registration or qualification, except where the failure to so register or qualify does not have a material adverse effect on the condition (financial or other), business, prospects, properties, net worth or results of operations of the Company and the Subsidiaries (as hereinafter defined) taken as a whole (a "Material Adverse Effect").

(e) All the Company's subsidiaries (collectively, the "Subsidiaries") are listed in an exhibit to the Registration Statement. Each Subsidiary is a corporation duly organized, validly existing and in good standing in the jurisdiction of its incorporation, with full corporate power and authority to own, lease and operate its properties and to conduct its

business as described in the Registration Statement and the Prospectus, and is duly registered and qualified to conduct its business and is in good standing in each jurisdiction or place where the nature of its properties or the conduct of its business requires such registration or qualification, except where the failure so to register or qualify does not have a Material Adverse Effect; all the outstanding shares of capital stock of each of the Subsidiaries have been duly authorized and validly issued, are fully paid and nonassessable, and are owned by the Company directly, or indirectly through one of the other Subsidiaries, free and clear of any lien, adverse claim, security interest, equity or other encumbrance.

(f) WELLHEALTH is a corporation duly organized and validly existing in good standing under the laws of the state of Delaware with full corporate power and authority to own, lease and operate its properties and to conduct its business as described in the Registration Statement and the Prospectus, and is duly registered and qualified to conduct its business and is in good standing in each jurisdiction or place where the nature of its properties or the conduct of its business requires such registration or qualification, except where the failure so to register or qualify does not have a material adverse effect on the condition (financial or other), business, prospects, properties, net worth or results of operations of WELLHEALTH and its subsidiaries taken as a whole (a "WELLHEALTH Material Adverse Effect").

(g) There are no legal or governmental proceedings pending or, to the knowledge of the Company or WELLHEALTH, threatened against the Company, any of the Subsidiaries or WELLHEALTH, or to which the Company, any of the Subsidiaries or WELLHEALTH, or to which any of their respective properties are subject, that are required to be described in the Registration Statement or the Prospectus but are not described as required, and there are no agreements, indentures, leases or other instruments that are required to be described in the Registration Statement or the Prospectus or to be filed as an exhibit to the Registration Statement that are not described or filed as required by the Act.

(h) None of the Company, any of the Subsidiaries or WELLHEALTH is (i) in violation of its certificate or articles of incorporation or by-laws, or other organizational documents, or (ii) in violation of any law, ordinance, administrative or governmental rule or regulation applicable to the Company, any of the Subsidiaries or WELLHEALTH or of any decree of any court or governmental agency or body having jurisdiction over the Company, any of the Subsidiaries or WELLHEALTH, or (iii) in default in the performance of any obligation, agreement or condition contained in any bond, debenture, note or other evidence of indebtedness or in any material agreement, indenture, lease or other instrument to which the Company, any of the Subsidiaries or WELLHEALTH is a party or by which any of them or any of their respective properties may be bound.

(i) None of the issuance and sale of the Shares, the execution, delivery or performance of this Agreement by the Company and WELLHEALTH or the agreements pursuant to which the Company will acquire the Initial Properties (as defined in the Registration Statement) and which have been filed as exhibits to the Registration Statement (the "Purchase Agreements") by the Company, or the consummation by the Company of the transactions contemplated hereby and by the Purchase Agreements (i) requires any consent, approval, authorization or other order of or registration or filing with, any court, regulatory body, administrative agency or other governmental body, agency or official (except such as may be required for the registration of the Shares under the Act and the Exchange Act and compliance with securities or Blue Sky laws of various jurisdictions, all of which have been or will be effected in accordance with this Agreement); (ii) conflicts or will conflict with or constitutes or will constitute a breach of, or a default under, the certificate or the articles of incorporation or by-laws, or other organizational documents, of the Company, any of the Subsidiaries or WELLHEALTH; or (iii) conflicts or will conflict with or constitutes or will constitute a breach of, or a default under, any agreement, indenture, lease or other instrument to which the Company, any of the Subsidiaries or WELLHEALTH is a party or by which they or any of their respective properties may be bound, or violates or will violate any statute, law, regulation or filing or judgment, injunction, order or decree applicable to the Company, any of the Subsidiaries or WELLHEALTH or any of their respective properties, or will result in the creation or imposition of any lien, charge or encumbrance upon any property or assets of the Company, any of the Subsidiaries or WELLHEALTH pursuant to the terms of any agreement or instrument to which any of them is a party or by which any of them may be bound or to which any of their respective properties or assets is subject.

(j) Each of the accountants who have certified or shall certify the financial statements filed or to be filed as part of the Registration Statement or the Prospectus (or any amendment or supplement thereto) are independent public accountants as required by the Act.

(k) The balance sheet of the Company as of March 31, [Year] presents fairly the financial position of the Company and its properties on the basis stated in the Registration Statement at such date; such statement has been prepared in accordance with generally accepted accounting principles except as disclosed therein; and the other financial and statistical data included in the Registration Statement and the Prospectus (and any amendment and supplement thereto) are accurately presented and prepared on a basis consistent with such financial statement and the books and records of the Company and its properties. The unaudited pro forma selected financial statements included in the Registration Statement comply in all material respects with the applicable accounting requirements of Rule 11-02 of Regulation S-X and the pro forma adjustments have been properly applied to the historical amounts in the compilation of that data. The financial statements, together with related schedules and notes, included in the Registration Statement and the Prospectus (and any amendment or supplement thereto), present fairly the consolidated financial position, results of operations and changes in financial position of WELLHEALTH on the basis stated in the Registration Statement at the respective dates or for the respective periods to which they apply; such statements and related schedules and notes have been prepared in accordance with generally accepted accounting principles consistently applied throughout the periods involved, except as disclosed therein; and the other financial and statistical information and data included in the Registration Statement and the Prospectus (and any amendment or supplement thereto) are accurately presented and prepared on a basis consistent with such financial statements and the books and records of WELLHEALTH and its properties.

(l) The execution and delivery of, and the performance by the Company and WELLHEALTH of their respective obligations under, this Agreement have been duly and validly authorized by the Company and WELLHEALTH and this Agreement has been duly executed and delivered by the Company and WELLHEALTH and constitutes the valid and legally binding agreement of each of the Company and WELLHEALTH, enforceable against each of the Company and WELLHEALTH in accordance with its terms, except as rights to indemnity and contribution hereunder may be limited by federal or state securities laws.

(m) Except as disclosed in or contemplated by the Registration Statement and the Prospectus (or any amendment or supplement thereto), subsequent to the respective dates as of which such information is given in the Registration Statement and the Prospectus (or any amendment or supplement thereto), none of the Company, any of the Subsidiaries or WELLHEALTH has incurred any liability or obligation, direct or contingent, or entered into any transaction, not in the ordinary course of business, that is material to the Company and the Subsidiaries taken as a whole, and there has not been any change in the capital stock, or material increase in the short-term debt or long-term debt, of the Company, or any change or development involving a material adverse change, in the condition (financial or other), business, prospects, properties, net worth or results of operations of the Company and the Subsidiaries taken as a whole.

(n) Upon consummation of the offering of the Shares and application of the net proceeds therefrom towards consummation of the transactions contemplated by the Purchase Agreements, the Company and the Subsidiaries will each carry, or will be covered by, insurance in such amounts and covering such risks as will be adequate for the conduct of its business and the value of its properties and as is customary for companies engaged in similar businesses in similar industries.

(o) Upon consummation of the offering of the Shares and application of the net proceeds therefrom towards consummation of the transactions contemplated by the Purchase Agreements, the Company and the Subsidiaries will have title insurance on all real properties described in the Prospectus as to be owned by them in an amount at least equal to the greater of (a) the aggregate Purchase Prices (as defined) for acquisition of such property as set forth in the Purchase Agreements relating to such property and (b) the cost of construction of the improvements located on such

properties.

(p) The Purchase Agreements have been duly authorized, executed and delivered by the Company, and, to the best knowledge of the Company, the other parties thereto. Such Purchase Agreements and all deeds, assignments of leases and other documents delivered or to be delivered in connection therewith are legally sufficient to effect the sale to the Company of all right, title and interest in and to the Initial Properties upon payment of the consideration therefor. Upon the sale of the Firm Shares on the Closing Date and application of the net proceeds therefrom, together with amounts to be drawn under the Company's credit facility, the Company will have good and marketable title in fee simple absolute to each of the items of real property except for three such items which are subject to ground leases and good title to each of the items of personal property which are included in the Initial Properties or are referred to in the Registration Statement and the Prospectus or are reflected in the financial statements referred to in Section 6(k) hereof as being owned by the Company, and valid and enforceable leasehold interests in each of the items of real and personal property which are included in the Properties or are referred to in the Registration Statement and the Prospectus as being leased by the Company, in each case free and clear of all liens, claims, security interests, and other encumbrances, except such as (i) are described in the Registration Statement and the Prospectus or (ii) would not have a material adverse effect on the expected business operations of the Company following consummation of the acquisition of the Initial Properties.

(q) The Co-registrants have not distributed and, prior to the later to occur of (i) the Closing Date and (ii) completion of the distribution of the Shares, will not distribute any offering material in connection with the offering and sale of the Shares other than the Registration Statement, the Prepricing Prospectus, the Prospectus or other materials, if any, permitted by the Act.

(r) The Company and each of the Subsidiaries have such permits, licenses, franchises and authorizations of governmental or regulatory authorities ("permits") as are necessary to own its respective properties and to conduct its business in the manner described in the Prospectus, subject to such qualifications as may be set forth in the Prospectus; the Company and each of the Subsidiaries have fulfilled and performed all its material obligations with respect to such permits and no event has occurred which allows, or after notice or lapse of time would allow, revocation or termination thereof or results in any other material impairment of the rights of the holder of any such permit, subject in each case to such qualification as may be set forth in the Prospectus; and, except as described in the Prospectus, none of such permits contains any restriction that is materially burdensome to the Company or any of the Subsidiaries.

(s) The Company maintains a system of internal accounting controls sufficient to provide reasonable assurances that (i) transactions are executed in accordance with management's general or specific authorization; (ii) transactions are recorded as necessary to permit preparation of financial statements in conformity with generally accepted accounting principles and to maintain accountability for assets; (iii) access to assets is permitted only in accordance with management's general or specific authorization; and (iv) the recorded accountability for assets is compared with existing assets at reasonable intervals and appropriate action is taken with respect to any differences.

(t) Neither the Company nor any employee or agent of the Company has made any payment of funds or received or retained any funds in violation of any law, rule or regulation, which payment, receipt or retention of funds is of a character required to be disclosed in the Prospectus.

(u) The Company and each of the Subsidiaries has filed all tax returns required to be filed, which returns are complete and correct, and neither the Company nor any of the Subsidiaries is in default in the payment of any taxes which were payable pursuant to said returns or any assessments with respect thereto.

(v) No holder of any security of the Company has any right to require registration of any Common Stock or any other security of the Company because of the filing of the Registration Statement or consummation of the transactions contemplated by this Agreement.

(w) Subject to the assumptions, conditions and exceptions set forth in Exhibit 8 to the Registration Statement, the Company is organized so that it will meet the requirements for qualification as a REIT under Sections 856 through 860 of the Code and the rules and regulations thereunder and the Company's proposed method of operation as described in the Registration Statement will enable it to meet the requirements for taxation as a REIT under the Code as currently in effect commencing with the year ending December 31, [Year].

(x) The Company is not now, and, after sale of the Shares to be sold by the Company hereunder and application of the net proceeds from such sale as described in the Prospectus under the caption "Use of Proceeds," will not be, an "investment company" within the meaning of the Investment Company Act of 1940, as amended.

(y) The Company and the Subsidiaries own or possess all patents, trademarks, trademark registration, service marks, service mark registrations, trade names, copyrights, licenses, inventions, trade secrets and rights described in the Prospectus as being owned by them or necessary for the conduct of their business, and neither the Company nor any Subsidiary is aware of any claim to the contrary or any challenge by any other person to the rights of the Company and the Subsidiaries with respect to the foregoing.

(z) There are no agreements or understandings between the Company and/or WELLHEALTH and any person that would give rise to a valid claim against the Company, WELLHEALTH or any Underwriter for a brokerage commission, finders fee or other like payment with respect to the consummation of the transactions contemplated by this Agreement.

(i) The Company has complied with all provisions of Florida Statutes, Section 157.075, relating to issuers doing business with Cuba.

(ii) To the best of the Company's knowledge, except as described in the Registration Statement and Prospectus, the Company and the Subsidiaries (i) are in compliance with any and all applicable foreign, federal, state and local laws and regulations relating to the protection of human health and safety, the environment, hazardous or toxic substances or wastes, pollutants or contaminants ("Environmental Laws"), (ii) have received all permits, licenses or other approvals under applicable Environmental Laws required in connection with their businesses, properties or assets as conducted or contemplated to be conducted as described in the Registration Statement, and (iii) are in compliance with all terms and conditions of any such permit, license or approval, except where such noncompliance with Environmental Laws, failure to receive required permits, licenses or other approvals or failure to comply with the terms and conditions of such permits, licenses or approvals would not, singly or in the aggregate, have a Material Adverse Effect on the Company and the Subsidiaries taken as a whole.

7. Indemnification and Contribution.

(a) The Company and WELLHEALTH, jointly and severally, agree to indemnify and hold harmless each Underwriter and each person, if any, who controls any Underwriter within the meaning of Section 15 of the Act or Section 20 of the Exchange Act from and against any and all losses, claims, damages, liabilities and expenses (including reasonable costs of investigation) arising out of or based upon any untrue statement or alleged untrue statement of a material fact contained in any Prepricing Prospectus or in the Registration Statement or the Prospectus or in any amendment or supplement thereto, or arising out of or based upon any omission or alleged omission to state therein a material fact required to be stated therein or necessary to make the statements therein not misleading, except insofar as such losses, claims, damages, liabilities or expenses arise out of or are based upon any untrue statement or omission or alleged untrue statement or omission which has been made therein or omitted therefrom in reliance upon and in conformity with the information relating to such Underwriter furnished in writing to the Company by or on behalf of any Underwriter through you expressly for use in connection therewith; provided, however, that the indemnification contained in this paragraph (a) with respect to any Prepricing Prospectus shall not inure to the benefit of any Underwriter (or to the benefit of any person controlling such Underwriter) on account of any such loss, claim, damage, liability or expense arising from the sale of the Shares by such Underwriter to any person if a copy of the Prospectus shall not have been

delivered or sent to such person within the time required by the Act and the regulations thereunder, and the untrue statement or alleged untrue statement or omission or alleged omission of a material fact contained in such Prepricing Prospectus was corrected in the Prospectus, provided that the Company has delivered the Prospectus to the Underwriters in requisite quantity on a timely basis to permit such delivery or sending. The foregoing indemnity agreement shall be in addition to any liability which the Company may otherwise have.

(b) If any action, suit or proceeding shall be brought against any Underwriter or any person controlling any Underwriter in respect of which indemnity may be sought against the Company or WELLHEALTH, such Underwriter or such controlling person shall promptly notify the Co-registrants, and the Co-registrants shall assume the defense thereof, including the employment of counsel and payment of all fees and expenses. Such Underwriter or any such controlling person shall have the right to employ separate counsel in any such action, suit or proceeding and to participate in the defense thereof, but the fees and expenses of such counsel shall be at the expense of such Underwriter or such controlling person unless (i) the Co-registrants have agreed in writing to pay such fees and expenses, (ii) the Co-registrants have failed to assume the defense and employ counsel, or (iii) the named parties to any such action, suit or proceeding (including any impleaded parties) include both such Underwriter or such controlling person and the Company or WELLHEALTH and such Underwriter or such controlling person shall have been advised by its counsel that representation of such indemnified party and the Company or WELLHEALTH by the same counsel would be inappropriate under applicable standards of professional conduct (whether or not such representation by the same counsel has been proposed) due to actual or potential differing interests between them (in which case the Co-registrants shall not have the right to assume the defense of such action, suit or proceeding on behalf of such Underwriter or such controlling person). It is understood, however, that the Co-registrants shall, in connection with any one such action, suit or proceeding or separate but substantially similar or related actions, suits or proceedings in the same jurisdiction arising out of the same general allegations or circumstances, be liable for the reasonable fees and expenses of only one separate firm of attorneys (in addition to any local counsel) at any time for the Underwriters and controlling persons not having actual or potential differing interests with you or among themselves, which firm shall be designated in writing by Alabama Securities Corp., and that all such fees and expenses shall be reimbursed as they are incurred. Neither of the Co-registrants shall be liable for any settlement of any such action, suit or proceeding effected without its written consent, but if settled with such written consent, or if there be a final judgment for the plaintiff in any such action, suit or proceeding, the Co-registrants agree to indemnify and hold harmless any Underwriter, to the extent provided in the preceding paragraph, and any such controlling person from and against any loss, claim, damage, liability or expense by reason of such settlement or judgment.

(c) Each Underwriter agrees, severally and not jointly, to indemnify and hold harmless each of the Co-registrants, their respective directors, their respective officers who sign the Registration Statement, and any person who controls either Co-registrant within the meaning of Section 15 of the Act or Section 20 of the Exchange Act, to the same extent as the foregoing indemnity from the Co-registrants to each Underwriter, but only with respect to information relating to such Underwriter furnished in writing by or on behalf of such Underwriter through you expressly for use in the Registration Statement, the Prospectus or any Prepricing Prospectus, or any amendment or supplement thereto. If any action, suit or proceeding shall be brought against either of the Co-registrants, any of their respective directors, any such officer, or any such controlling person based on the Registration Statement, the Prospectus or any Prepricing Prospectus, or any amendment or supplement thereto, and in respect of which indemnity may be sought against any Underwriter pursuant to this paragraph (c), such Underwriter shall have the rights and duties given to the Co-registrants by paragraph (b) above (except that if the Co-registrants shall have assumed the defense thereof such Underwriter shall not be required to do so, but may employ separate counsel therein and participate in the defense thereof, but the fees and expenses of such counsel shall be at such Underwriter's expense), and the Co-registrants, their respective directors, any such officer, and any such controlling person shall have the rights and duties given to the Underwriters by paragraph (b) above. The foregoing indemnity agreement shall be in addition to any liability which any Underwriter may otherwise have.

(d) If the indemnification provided for in this Section 7 is unavailable to an indemnified party under paragraphs (a) or (c) hereof in respect of any losses, claims, damages, liabilities or expenses referred to therein, then an indemnifying

party, in lieu of indemnifying such indemnified party, shall contribute to the amount paid or payable by such indemnified party as a result of such losses, claims, damages, liabilities or expenses (i) in such proportion as is appropriate to reflect the relative benefits received by the Co-registrants on the one hand and the Underwriters on the other hand from the offering of the Shares, or (ii) if the allocation provided by clause (i) above is not permitted by applicable law, in such proportion as is appropriate to reflect not only the relative benefits referred to in clause (i) above but also the relative fault of the Co-registrants on the one hand and the Underwriters on the other in connection with the statements or omissions that resulted in such losses, claims, damages, liabilities or expenses, as well as any other relevant equitable considerations. The relative benefits received by the Co-registrants on the one hand and the Underwriters on the other shall be deemed to be in the same proportion as the total net proceeds from the offering (before deducting expenses) received by the Company bear to the total underwriting discounts and commissions received by the Underwriters, in each case as set forth in the table on the cover page of the Prospectus. The relative fault of the Co-registrants on the one hand and the Underwriters on the other hand shall be determined by reference to, among other things, whether the untrue or alleged untrue statement of a material fact or the omission or alleged omission to state a material fact relates to information supplied by either of the Co-registrants on the one hand or by the Underwriters on the other hand and the parties' relative intent, knowledge, access to information and opportunity to correct or prevent such statement or omission.

(e) The Co-registrants and the Underwriters agree that it would not be just and equitable if contribution pursuant to this Section 7 were determined by a pro rata allocation (even if the Underwriters were treated as one entity for such purpose) or by any other method of allocation that does not take account of the equitable considerations referred to in paragraph (d) above. The amount paid or payable by an indemnified party as a result of the losses, claims, damages, liabilities and expenses referred to in paragraph (d) above shall be deemed to include, subject to the limitations set forth above, any legal or other expenses reasonably incurred by such indemnified party in connection with investigating any claim or defending any such action, suit or proceeding. Notwithstanding the provisions of this Section 7, no Underwriter shall be required to contribute any amount in excess of the amount by which the total price of the Shares underwritten by it and distributed to the public exceeds the amount of any damages which such Underwriter has otherwise been required to pay by reason of such untrue or alleged untrue statement or omission or alleged omission. No person guilty of fraudulent misrepresentation (within the meaning of Section 11(f) of the Act) shall be entitled to contribution from any person who was not guilty of such fraudulent misrepresentation. The Underwriters' obligations to contribute pursuant to this Section 7 are several in proportion to the respective numbers of Firm Shares set forth opposite their names in Schedule I hereto (or such numbers of Firm Shares increased as set forth in Section 10 hereof) and not joint.

(f) No indemnifying party shall, without the prior written consent of the indemnified party, effect any settlement of any pending or threatened action, suit or proceeding in respect of which any indemnified party is or could have been a party and indemnity could have been sought hereunder by such indemnified party, unless such settlement includes an unconditional release of such indemnified party from all liability on claims that are the subject matter of such action, suit or proceeding.

(g) Any losses, claims, damages, liabilities or expenses for which an indemnified party is entitled to indemnification or contribution under this Section 7 shall be paid by the indemnifying party to the indemnified party as such losses, claims, damages, liabilities or expenses are incurred. The indemnity and contribution agreements contained in this Section 7 and the representations and warranties of the Company and WELLHEALTH set forth in this Agreement shall remain operative and in full force and effect, regardless of (i) any investigation made by or on behalf of any Underwriter or any person controlling any Underwriter, the Company, its directors or officers, WELLHEALTH, its directors or officers or any person controlling the Company or WELLHEALTH, (ii) acceptance of any Shares and payment therefor hereunder, and (iii) any termination of this Agreement. A successor to any Underwriter or any person controlling any Underwriter, or to the Company, its directors or officers, WELLHEALTH, its directors or officers or any person controlling the Company or WELLHEALTH shall be entitled to the benefits of the indemnity, contribution and reimbursement agreement contained in this Section 7.

8. Conditions of Underwriter's Obligations. The several obligations of the Underwriters to purchase the Firm Shares hereunder are subject to the following conditions:

(a) If, at the time this Agreement is executed and delivered, it is necessary for the Registration Statement or a post-effective amendment thereto to be declared effective before the offering of the Shares may commence, the Registration Statement or such post-effective amendment shall have become effective not later than 5:30 P.M., New York City time, on the date hereof, or at such later date and time as shall be consented to in writing by you, and all filings, if any, required by Rules 424 and 430A under the Act shall have been timely made; no stop order suspending the effectiveness of the Registration Statement shall have been issued and no proceeding for that purpose shall have been instituted or, to the knowledge of the Company, WELLHEALTH or any Underwriter, threatened by the Commission; and any request of the Commission for additional information (to be included in the registration statement or the Prospectus or otherwise) shall have been complied with to your satisfaction.

(b) Subsequent to the effective date of this Agreement, there shall not have occurred (i) any change, or any development involving a prospective change, in or affecting the condition (financial or other), business, prospects, properties, net worth, or results of operations of the Company, WELLHEALTH or their respective subsidiaries not contemplated by the Prospectus, which in your opinion, as Representatives of the Underwriters, would materially adversely affect the market for the Shares, or (ii) any event or development relating to or involving the Company or WELLHEALTH, or any officer or director of the Company or WELLHEALTH, which makes any statement made in the Prospectus untrue or which, in the opinion of the Company and its counsel, WELLHEALTH and its counsel or the Underwriters and their counsel, requires the making of any addition to or change in the Prospectus in order to state a material fact required by the Act or any other law to be stated therein or necessary in order to make the statements therein not misleading, if amending or supplementing the Prospectus to reflect such event or development would, in your opinion, as Representatives of the several Underwriters, materially adversely affect the market for the Shares.

(c) You shall have received on the Closing Date, an opinion of Sirote & Permutt, P.C., counsel for the Company and WELLHEALTH, dated the Closing Date and addressed to you, as Representatives of the Underwriters, to the effect that:

(i) The Company is a corporation duly organized and validly existing in good standing under the laws of the State of Maryland with full corporate power and authority to own, lease and operate its properties and to conduct its business as described in the Registration Statement and the Prospectus (and any amendment or supplement thereto), and is duly registered and qualified to conduct its business and is in good standing in each jurisdiction or place where the nature of its properties or the conduct of its business requires such registration or qualification, except where the failure so to register or qualify does not have a Material Adverse Effect;

(ii) To the best knowledge of such counsel, after reasonable inquiry, the Company has no subsidiary other than the Subsidiaries. Each of the Subsidiaries is a corporation duly organized and validly existing in good standing under the laws of the jurisdiction of its organization, with full corporate power and authority to own, lease, and operate its properties and to conduct its business as described in the Registration Statement and the Prospectus (and any amendment or supplement thereto); and all the outstanding shares of capital stock of each of the Subsidiaries have been duly authorized and validly issued, are fully paid and nonassessable, and are owned by the Company directly, or indirectly through one of the other Subsidiaries, free and clear of any perfected security interest, or, to the best knowledge of such counsel after reasonable inquiry, any other security interest, lien, adverse claim, equity or other encumbrance;

(iii) WELLHEALTH is a Delaware corporation duly organized and validly existing in good standing under the laws of the State of Delaware, with full corporate power and authority to own, lease, and operate its properties and to conduct its business as described in the Registration Statement and the Prospectus (and any amendment or supplement thereto), and is duly registered and qualified to conduct its business and is in good standing in each jurisdiction or place where

the nature of its properties or the conduct of its business requires such registration or qualification, except where the failure so to register or qualify does not have WELLHEALTH Material Adverse Effect;

(iv) The authorized and outstanding capital stock of the Company is as set forth under the caption "Capitalization" in the Prospectus; and the authorized capital stock of the Company conforms in all material respects as to legal matters to the description thereof contained in the Prospectus under the caption "Description of Securities;"

(v) All the shares of capital stock of the Company outstanding prior to the issuance of the Firm Shares have been duly authorized and validly issued, and are fully paid and nonassessable; and except as described in the Prospectus, there are no duly authorized and outstanding options, warrants or other rights calling for the issuance of, or to such counsel's best knowledge after reasonable inquiry, any duly authorized commitment, plan or arrangement to issue, any Common Stock of the Company or any right or security convertible into or exchangeable or exercisable for any Common Stock of the Company or for any such right or security;

(vi) The Shares have been duly authorized and, when issued and delivered to the Underwriters against payment therefor in accordance with the terms hereof, will be validly issued, fully paid and nonassessable, and free of any preemptive, or to such counsel's best knowledge, after reasonable inquiry, similar rights that entitle or will entitle any person to acquire any Shares upon the issuance thereof by the Company;

(vii) The form of certificates for the Shares conforms to the requirements of the Maryland General Corporation Law;

(viii) The Registration Statement and all post-effective amendments, if any, have become effective under the Act and, to the best knowledge of such counsel after reasonable inquiry, no stop order suspending the effectiveness of the Registration Statement has been issued and no proceedings for that purpose are pending before or contemplated by the Commission; and any required filing of the Prospectus pursuant to Rule 424(b) has been made in accordance with Rule 424(b);

(ix) Each of the Company and WELLHEALTH has all requisite corporate power and authority to enter into this Agreement and to issue, sell and deliver the Shares to the Underwriters as provided herein, and this Agreement has been duly authorized, validly executed and delivered by each of the Company and WELLHEALTH and is a valid, legal and binding agreement of each of the Company and WELLHEALTH enforceable against the Company and WELLHEALTH in accordance with its terms, except as enforcement of rights to indemnity and contribution hereunder may be limited by federal or state securities laws or principles of public policy and subject to the qualification of the enforceability of the obligations of the parties hereto may be limited by bankruptcy, insolvency, reorganization, moratorium and other laws relating to or affecting creditors' rights generally and by general equitable principles;

(x) None of the Company, any of the Subsidiaries or WELLHEALTH is (i) in violation of its respective certificate or articles of incorporation or by-laws, or other organizational documents; (ii) to such counsel's best knowledge after reasonable inquiry, (A) in default in the performance of any material obligation, agreement or condition contained in any bond, debenture, note or other evidence of indebtedness or in any material agreement, indenture, lease, or other instrument known to such counsel to which such person is a party or by which any of them or their respective properties may be bound, except as may be disclosed in the Prospectus, or (B) in violation of any law, ordinance, administrative or governmental rule or regulation applicable to the Company, any of the Subsidiaries or WELLHEALTH Subsidiaries or of any decree of any court or governmental agency or body having jurisdiction over the Company, any of the Subsidiaries or WELLHEALTH which violation would have a Material Adverse Effect;

(xi) None of the offer, sale or delivery of the Shares, the execution, delivery or performance of this Agreement, compliance by the Company and WELLHEALTH with the provisions hereof, the execution, delivery and performance of the Purchase Agreements by the Company, compliance by the Company with the provisions thereof, or consummation by the Company of the transactions contemplated hereby and by the Purchase Agreements (i) conflicts

with or will conflict with or constitutes or will constitute a breach of, or a default under, (x) the certificate or articles of incorporation or by-laws, or other organizational documents, of the Company, any of the Subsidiaries, WELLHEALTH or (y) any agreement, indenture, lease or other instrument known to such counsel to which the Company, any of the Subsidiaries or WELLHEALTH is a party or by which any of them or any of their respective properties may be bound or (ii) to such counsel's best knowledge, after reasonable inquiry, violates any statute, law, regulation or filing or judgment, injunction, order or decree applicable to the Company, any of the Subsidiaries or WELLHEALTH, or any of their respective properties, or results in the creation or imposition of any lien, charge or encumbrance (except as described in the Prospectus) upon any property or assets of the Company, any of the Subsidiaries or WELLHEALTH pursuant to the terms of any agreement or instrument to which any of them is a party or by which any of them may be bound or to which any of them or their respective properties or assets is subject; or (iii) requires any consent, approval, authorization or other order of, or registration or filing with, any court, regulatory body, administrative agency or other governmental body, agency, or official (except as have been obtained under the Act and the Exchange Act or such as may be required under state securities or Blue Sky laws governing the purchase and distribution of the Shares);

(xii) The Registration Statement and the Prospectus and any supplements or amendments thereto (except for the financial statements and the notes thereto and the schedules and other financial and statistical data included therein, as to which such counsel need not express any opinion) comply as to form in all material respects with the requirements of the Act;

(xiii) To such counsel's best knowledge, after reasonable inquiry, (A) other than as described or contemplated in the Prospectus (or any supplement thereto), there are no legal or governmental proceedings pending or threatened against the Company, any of the Subsidiaries or WELLHEALTH, or to which the Company, any of the Subsidiaries or WELLHEALTH, or any of their respective properties is subject, which are required to be described in the Registration Statement or Prospectus (or any amendment or supplement thereto) and (B) there are no agreements, indentures, leases or other instruments, that are required to be described in the Registration Statement or the Prospectus (or any amendment or supplement thereto) or to be filed as an exhibit to the Registration Statement that are not described or filed as required;

(xiv) The statements in the Registration Statement and Prospectus under the captions "Risk Factors," "Management's Discussion and Analysis of Financial Condition and Results of Operations," "Business," "Investment and Other Policies," "Management," "Description of Securities" and "Certain Provisions of Maryland Law and of the Company's Articles of Incorporation and Bylaws," insofar as they are descriptions of agreements or other legal documents, or refer to statements of law or legal documents are accurate and present fairly the information required to be shown; and

(xv) Each of the Purchase Agreements has been duly authorized, executed and delivered by the Company and constitutes a valid and binding agreement of the Company, enforceable against such party in accordance with its terms, except as enforcement of rights to indemnity and contribution by any party thereunder may be limited by federal or state securities laws or principles of public policy and subject to the qualification of the enforceability of the obligations of the parties thereto may be limited by bankruptcy, insolvency, reorganization, moratorium and other laws relating to or affecting creditors' rights generally and by general equitable principles. The Purchase Agreements and all deeds, assignments of leases and other documents to be delivered in connection therewith are legally sufficient to effect the sale to the Company of all right, title and interest in and into the properties upon payment of the consideration therefor.

The requirements of this section shall be satisfied with respect to subparagraphs (x), (xi) and (xiii) by receipt of the opinion of David D. Arthur, in-house general counsel to WELLHEALTH.

In addition, such counsel shall also state that, although counsel has not undertaken, except as otherwise indicated in their opinion, to determine independently, and does not assume any responsibility for, the accuracy or completeness of the statements in the Registration Statement, such counsel has participated in the preparation of the Registration Statement and the Prospectus, including review and discussion of the contents thereof, and nothing has come to the

attention of such counsel that has caused it to believe that the Registration Statement, at the time the Registration Statement became effective, or the Prospectus, as of its date and as of the Closing Date or the Option Closing Date, as the case may be, contained an untrue statement of a material fact or omitted to state a material fact required to be stated therein or necessary to make the statements therein not misleading or that any amendment or supplement to the Prospectus, as of its respective date and as of the Closing Date or the Option Closing Date, as the case may be, contained any untrue statement of a material fact or omitted to state a material fact necessary in order to make the statements therein, in the light of the circumstances under which they were made, not misleading (it being understood that such counsel need express no opinion with respect to the financial statements and the notes thereto and the schedules and other financial and statistical data included in the Registration Statement or the Prospectus).

Such counsel shall also (i) reaffirm as of the Closing Date their opinions filed as Exhibits 5 and 8 to the Registration Statement and (ii) state that such counsel has been advised by the New York Stock Exchange that the Shares have been duly authorized for listing, subject to official notice of issuance, on the New York Stock Exchange.

In rendering their opinions as aforesaid, counsel may rely upon an opinion or opinions, each dated the Closing Date, of other counsel retained by them or the Company as to laws of any jurisdiction other than the United States or the State of Alabama, provided that (1) each such local counsel is acceptable to the Underwriters, (2) such reliance is expressly authorized by each opinion so relied upon and a copy of each such opinion is delivered to the Underwriters and is, in form and substance satisfactory to them and their counsel, and (3) counsel shall state in their opinion that they believe that they and the Underwriters are justified in relying thereon.

(d) You shall have received on the Closing Date an opinion of Dowe & Flower Co., L.P.A., counsel for the Underwriters, dated the Closing Date, with respect to the matters referred to in clauses (vi), (viii), (ix) (solely with respect to the Company) and (xii) of the foregoing paragraph (c), and such other related matters as you may request.

(e) You shall have received letters addressed to you and dated the date hereof and the Closing Date from Andrew Arther and Whinney & Whinney, each being independent certified public accountants, substantially in the forms heretofore approved by you.

(f)(i) No stop order suspending the effectiveness of the Registration Statement shall have been issued and no proceedings for that purpose shall have been taken or, to the knowledge of the Company or WELLHEALTH, shall be contemplated by the Commission at or prior to the Closing Date; (ii) there shall not have been any change in the capital stock of the Company nor any material increase in the short-term or long-term debt of the Company (other than in the ordinary course of business) from that set forth or contemplated in the Registration Statement or the Prospectus (or any amendment or Supplement thereto); (iii) there shall not have been, since the respective dates as of which information is given in the Registration Statement and the Prospectus (or any amendment or supplement thereto), except as may otherwise be stated in the Registration Statement and Prospectus (or any amendment or supplement thereto), any material adverse change in the condition (financial or other), business, prospects, properties, net worth or results of operations of the Company and the Subsidiaries taken as a whole; (iv) the Company shall not have any liabilities or obligations, direct or contingent (whether or not in the ordinary course of business), that are material to the Company and the Subsidiaries taken as a whole, other than those reflected in the Registration Statement or the Prospectus (or any amendment or supplement thereto); and (v) all the representations and warranties of the Company and WELLHEALTH contained in this Agreement shall be true and correct on and as of the date hereof and on and as of the Closing Date as if made on and as of the Closing Date, and you shall have received a certificate, dated the Closing Date and signed by the respective chief executive officers and chief financial officers of the Company and WELLHEALTH (or such other officers as are acceptable to you), to the effect set forth in this Section 8(f) and in Section 8(g) hereof.

(g) The Company or WELLHEALTH shall not have failed at or prior to the Closing Date to have performed or complied with any of its agreements herein contained and required to be performed or complied with by it hereunder at or prior to the Closing Date.

(h) Prior to commencement of the offering of the Shares, the Shares shall have been listed, or approved for listing upon official notice of issuance, on the New York Stock Exchange.

(i) Each of the Company and WELLHEALTH shall have furnished or caused to be furnished to you such further certificates and documents as you shall have reasonably requested.

All such opinions, certificates, letters and other documents will be in compliance with the provisions hereof only if they are satisfactory in form and substance to you and your counsel.

Any certificate or document signed by any officer of the Company or WELLHEALTH and delivered to you, as Representatives of the Underwriters, or to counsel for the Underwriters, shall be deemed a representation and warranty by the Company or WELLHEALTH to each Underwriter as to the statements made therein.

The several obligations of the Underwriters to purchase Additional Shares hereunder are subject to the satisfaction on and as of any Option Closing Date of the conditions set forth in this Section 8, except that, if any Option Closing Date is other than the Closing Date, the certificates, opinions and letters referred to in paragraphs (c) through (f) shall be dated the Option Closing Date in question and the opinions called for by paragraphs (c) and (d) shall be revised to reflect the sale of Additional Shares.

9. Expenses. The Company agrees to pay the following costs and expenses and all other costs and expenses incident to the performance by it of its obligations hereunder: (i) the preparation, printing or reproduction, and filing with the Commission of the Registration Statement (including financial statements and exhibits thereto), each Prepricing Prospectus, the Prospectus, and each amendment or supplement to any of them; (ii) the printing (or reproduction) and delivery (including postage, air freight charges and charges for counting and packaging) of such copies of the Registration Statement, each Prepricing Prospectus, the Prospectus, and all amendments or supplements to any of them, as may be reasonably requested for use in connection with the offering and sale of the Shares; (iii) the preparation, printing, authentication, issuance and delivery of certificates for the Shares, including any stamp taxes in connection with the original issuance and sale of the Shares; (iv) the printing (or reproduction) and delivery of this Agreement, the preliminary and supplemental Blue Sky Memoranda and all other agreements or documents printed (or reproduced) and delivered in connection with the offering of the Shares; (v) the registration of the Shares under the Exchange Act and the listing of the Shares on the New York Stock Exchange; (vi) the registration or qualification of the Shares for offer and sale under the securities or Blue Sky laws of the several states as provided in Section 5(g) hereof (including the reasonable fees, expenses and disbursements of counsel for the Underwriters relating to the preparation, printing or reproduction, and delivery of the preliminary and supplemental Blue Sky Memoranda and such registration and qualification); (vii) the filing fees and the fees and expenses of counsel for the Underwriters in connection with any filings required to be made with the National Association of Securities Dealers, Inc.; (viii) the transportation and other expenses incurred by or on behalf of officers and employees of the Company and WELLHEALTH in connection with the presentations to potential purchasers of the Shares; and (ix) the fees and expenses of the Company's accountants and the fees and expenses of counsel (including local and special counsel) for the Company.

10. Effective Date of Agreement. This Agreement shall become effective: (i) upon the execution and delivery hereof by the parties hereto; or (ii) if, at the time this Agreement is executed and delivered, it is necessary for the Registration Statement or a post-effective amendment thereto to be declared effective before the offering of the Shares may commence, when notification of the effectiveness of the Registration Statement or such post-effective amendment has been released by the Commission. Until such time as this Agreement shall have become effective, it may be terminated by the Company, by notifying you, or by you, by notifying the Company.

If any one or more of the Underwriters shall fail or refuse to purchase Shares which it or they are obligated to purchase hereunder on the Closing Date, and the aggregate number of Shares which such defaulting Underwriter or Underwriters

are obligated but fail or refuse to purchase is not more than one-tenth of the aggregate number of Shares which the Underwriters are obligated to purchase on the Closing Date, each non-defaulting Underwriter shall be obligated, severally, in the proportion which the number of Firm Shares set forth opposite its name in Schedule I hereto bears to the aggregate number of Firm Shares set forth opposite the names of all non-defaulting Underwriters or in such other proportion as you may specify in accordance with Section 20 of the Master Agreement Among Underwriters of Alabama Securities Corp., to purchase the Shares which such defaulting Underwriter or Underwriters are obligated, but fail or refuse, to purchase. If any one or more of the Underwriters shall fail or refuse to purchase Shares which it or they are obligated to purchase on the Closing Date and the aggregate number of Shares with respect to which such default occurs is more than one-tenth of the aggregate number of Shares which the Underwriters are obligated to purchase on the Closing Date and the aggregate number of Shares with respect to which such default occurs is more than one-tenth of the aggregate number of Shares which the Underwriters are obligated to purchase on the Closing Date and arrangements satisfactory to you and the Company for the purchase of such Shares by one or more non-defaulting Underwriters or other party or parties approved by you and the Company are not made within thirty-six (36) hours after such default, this Agreement will terminate without liability on the part of any non-defaulting Underwriters or the Company. In any such case which does not result in termination of this Agreement, either you or the Company shall have the right to postpone the Closing Date, but in no event for longer than seven days, in order that the required changes, if any, in the Registration Statement and the Prospectus or any other documents or arrangements may be effected. Any action taken under this paragraph shall not relieve any defaulting Underwriter from liability in respect of any such default of any such Underwriter under this Agreement. The term "Underwriter" as used in this Agreement, includes, for all purposes of this Agreement, any party not listed in Schedule I hereto who, with your approval and the approval of the Company, purchases Shares which a defaulting Underwriter is obligated, but fails or refuses, to purchase.

Any notice under this Section 10 may be given by telegram, telecopy or telephone but shall be subsequently confirmed by letter.

11. Termination of Agreement. This Agreement shall be subject to termination in your absolute discretion, without liability on the part of any Underwriter to the Company, by notice to the Company, if prior to the Closing Date or any Option Closing Date (if different from the Closing Date and then only as to the Additional Shares), as the case may be, (i) trading in securities generally on the New York Stock Exchange, American Stock Exchange or The Nasdaq Stock Market or of the Common Stock on the New York Stock Exchange, shall have been suspended or materially limited, (ii) a general moratorium on commercial banking activities in New York or Alabama shall have been declared by either federal or state authorities, or (iii) there shall have occurred any outbreak or escalation of hostilities or other international or domestic calamity, crisis or change in political, financial or economic conditions, the effect of which on the financial markets of the United States is such as to make it, in your judgment, impracticable or inadvisable to commence or continue the offering of the Shares at the offering price to the public set forth on the cover page of the Prospectus or to enforce contracts for the resale of the Shares by the Underwriters. Notice of such termination may be given to the Company by telegraph, telecopy or telephone and shall be subsequently confirmed by letter.

12. Information Furnished by the Underwriters. The statements set forth in the last paragraph on the cover page, the stabilization legend on the inside cover page, and the first, third, eighth and tenth paragraphs under the caption "Underwriting" in any Prepricing Prospectus and in the Prospectus, constitute the only information furnished by or on behalf of the Underwriters through you as such information is referred to in Sections 6(b) and 7 hereof.

13. Miscellaneous. Except as otherwise provided in Sections 5, 10 and 11 hereof, notice given pursuant to any provision of this Agreement shall be in writing and shall be delivered (i) if to the Company, to American Capital Trust, Inc., Six Central Southern Bldg., Suite 101-A, Birmingham, Alabama 35243, Attention: Mr. W. Gill McDaniel, President and Chief Executive Officer, (ii) if to WELLHEALTH, to WELLHEALTH Rehabilitation Corporation, One Central Southern Bldg., Birmingham, Alabama 35243, Attention: W. Donal Rushmore, Chairman of the Board, President and Chief Executive Officer, or (iii) if to any of the Underwriters, care of Alabama Securities Corp., 4139 American Blvd.,

New York, New York 10105, Attention: Manager, Corporate Finance Division.

This Agreement has been and is made solely for the benefit of the Underwriters, the Company and WELLHEALTH, their respective directors and officers, and the other controlling persons referred to in Section 7 hereof and their respective successors and assigns, to the extent provided herein, and no other person shall acquire or have any right under or by virtue of this Agreement. Neither the term "successor" nor the term "successors and assigns" as used in this Agreement shall include a purchaser from any Underwriter of any of the Shares in his status as such purchaser.

14. Applicable Law; Counterparts. This Agreement shall be governed by and construed in accordance with the laws of the State of New York applicable to contracts made and to be performed within the State of New York.

This Agreement may be signed in various counterparts which together constitute one and the same instrument. If signed in counterparts, this Agreement shall not become effective unless at least one counterpart hereof shall have been executed and delivered on behalf of each party hereto.

Please confirm that the foregoing correctly sets forth the agreement between the Company, WELLHEALTH and the several Underwriters.

Very truly yours,

AMERICAN CAPITAL TRUST, INC.

By Name: Title:

WELLHEALTH REHABILITATION CORPORATION

By Name: Title:

Confirmed as of the date first above mentioned ALABAMA SECURITIES CORP. B.B. BEARSFORD COMPANY for themselves and as representatives of the several underwriters listed in Schedule I hereto.

By: ALABAMA SECURITIES CORP.

Managing Director

SCHEDULE I

Number of Firm Shares:

Alabama Securities Corp. _____

B.B. Bearsford Company _____

TOTAL

5,800,000

(c) Real estate purchase agreement

EXHIBIT 10.1

AGREEMENT OF SALE AND PURCHASE

BY AND BETWEEN

WELLHEALTH Medical Center, Inc.,

an Alabama corporation

("SELLER")

AND

AMERICAN CAPITAL OF ALABAMA, INC.,

an Alabama corporation

("PURCHASER")

May 23, [Year]

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AGREEMENT OF SALE AND PURCHASE

THIS AGREEMENT OF SALE AND PURCHASE (the "Agreement") is made and entered into by and between WELLHEALTH MEDICAL CENTER, INC., an Alabama corporation (hereinafter referred to as "Seller"), and AMERICAN CAPITAL OF ALABAMA, INC., an Alabama corporation (hereinafter referred to as "Purchaser"). Seller and Purchaser are sometimes collectively referred to herein as the "Parties" and each of the Parties is sometimes singularly referred to herein as a "Party."

WHEREAS, Seller is the owner of the Property (as hereinafter defined), consisting of certain real property and improvements thereon located in Jefferson County, Alabama, consisting of three medical office buildings containing 27,800, 42,463 and 81,800 square feet, respectively, more or less, as more particularly described on Exhibit A attached hereto and made a part hereof for all purposes by this reference; and

WHEREAS, Seller desires to sell and Purchaser desires to purchase the Property, and simultaneously therewith, to enter into a lease transaction pursuant to which Purchaser shall lease to Seller, and Seller shall lease from Purchaser, the Property.

NOW, THEREFORE, in consideration of the sum of \$10.00, the mutual covenants and agreements contained herein and other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the Parties agree as follows:

ARTICLE I DEFINITIONS

As used herein (including any Exhibits attached hereto), the following terms shall have the meanings indicated:

"Bill of Sale" means a bill or bills of sale in the form attached as Exhibit B hereto, and sufficient to transfer to Purchaser all of the items set forth therein.

"Business Agreement" means any management agreement, service contract, easement, covenant, restriction or other agreement relating to the operation or maintenance of the Property.

"Business Day(s)" means calendar days other than Saturdays, Sundays and legal holidays.

"Certificate of Non-Foreign Status" means a certificate dated as of the Closing Date, addressed to Purchaser and duly executed by Seller, in the form of Exhibit C attached hereto.

"Claim" means any obligation, liability, lien, encumbrance, loss, damage, cost, expense or claim, including, without limitation, any claim for damage to property or injury to or death of any person or persons.

"Closing" means the consummation of the sale and purchase provided for herein, to be held at the offices of Sirote & Permutt, P.C., 2222 Arlington Avenue South, Birmingham, Alabama or such other place as the Parties may mutually agree.

"Closing Certificate" means a certificate in the form of Exhibit D wherein Seller shall represent that the representations and warranties of Seller contained in this Agreement are true and correct as of the Closing Date as if made on and as of the Closing Date, except with respect to those matters that may be disclosed in writing to and accepted by Purchaser prior to the Closing Date.

"Closing Date" means the closing date in the Escrow Agreement but no later than June 30, ____ [Year] or such earlier or later date as shall be hereafter agreed upon by the Parties.

"Credit Enhancements" means all security deposits, security interests, letters of credit, pledges, prepaid rent or other sums, deposits or interests, if any, held by Seller with respect to the Property, the Tenant Leases or the Tenants.

"Deed" means a special (limited) warranty deed substantially in the form of Exhibit E attached hereto (as the same may be modified to comply with local law and custom), executed by Seller, as grantor, in favor of Purchaser, as grantee, conveying the Land and Improvements to Purchaser, subject only to the Permitted Exceptions.

"Disclosure Schedule" has the meaning set forth in Section 6.1(u).

"Due Diligence Materials" means the information to be provided by Seller to Purchaser pursuant to the provisions of Section 4.1 hereof.

"Effective Date" means the later of the two dates on which this Agreement is signed and all changes initialed by Seller and Purchaser, as indicated by their signatures below; provided that in the event only one Party dates its signature, then the date of its signature shall be the Effective Date.

"Engineering Documents" means all site plans, surveys, soil and substrata studies, architectural drawings, plans and specifications, engineering plans and studies, floor plans, landscape plans, and other plans and studies that relate to the Land, the Improvements or the Fixtures and are in Seller's possession or control.

"Escrow Agreement" has the meaning set forth in Section 8.1 hereof.

"Exception Documents" means true, correct and legible copies of each document listed as an exception to title on the Title Commitment.

"Fixtures" means all permanently affixed equipment, machinery, fixtures, and other items of real and/or personal property, including all components thereof, now and hereafter located in, on or used in connection with, and permanently affixed to or incorporated into the Improvements, including, without limitation, all furnaces, boilers, heaters, electrical equipment, heating, plumbing, lighting, ventilating, refrigerating, incineration, air and water pollution control, waste disposal, air-cooling and air-conditioning systems and apparatus, sprinkler systems and fire and theft protection equipment, built-in vacuum, cable transmission, oxygen and similar systems, all of which, to the greatest extent permitted by law, are hereby deemed by the Parties hereto to constitute real estate, together with all replacements,

modifications, alterations and additions thereto, but specifically excluding any Tenant's trade fixtures or other fixtures or equipment that a Tenant is permitted to remove pursuant to the applicable Tenant Lease.

"Guaranty" means a guaranty of performance of the Lease substantially in the form attached hereto as Exhibit F to be executed by WELLHEALTH.

"Hazardous Materials" means any substance, including without limitation, asbestos or any substance containing asbestos and deemed hazardous under any Hazardous Materials Law, the group of organic compounds known as polychlorinated biphenyls, flammable explosives, radioactive materials, medical waste, chemicals, pollutants, effluents, contaminants, emissions or related materials and items included in the definition of hazardous or toxic wastes, materials or substances under any Hazardous Materials Law.

"Hazardous Materials Law" means any law, regulation or ordinance relating to environmental conditions, medical waste and industrial hygiene, including, without limitation, the Resource Conservation and Recovery Act of 1976 ("RCRA"), the Comprehensive Environmental Response, Compensation and Liability Act of 1990 ("CERCLA"), as amended by the Superfund Amendments and Reauthorization Act of 1986 ("SARA"), the Hazardous Materials Transportation Act, the Federal Water Pollution Control Act, the Clean Air Act, the Clean Water Act, the Toxic Substances Control Act, the Safe Drinking Water Act, and all similar federal, state and local environmental statutes, ordinances and the regulations, orders, or decrees now or hereafter promulgated thereunder.

"Independent Consideration" means the sum of \$100.00.

"Improvements" means all buildings, structures, Fixtures and other improvements of every kind now or on the Closing Date located on the Land, including, without limitation, all alleyways, connecting tunnels, crosswalks, sidewalks, landscaping, parking lots and structures, roads, drainage and all above ground and underground utility structures, equipment systems that constitute Fixtures and other so-called "infrastructure" improvements.

"Intangible Property" means all intangible property or any interest therein now or on the Closing Date owned or held by Seller in connection with the Land, the Improvements or the Fixtures, or any business or businesses now or hereafter conducted by Seller or any Tenant thereon or with the use thereof, including all leases, contract rights, agreements, trade names, water rights and reservations, zoning rights, business licenses and warranties (including those relating to construction or fabrication) related to the Land, the Improvements or the Fixtures, or any part thereof, provided "Intangible Property" shall not include the general corporate trademarks, service marks, logos or insignia or books and records of Seller or the Tenant Leases, the Business Agreements or the Credit Enhancements.

"IPO" has the meaning set forth in Section 7.1(k) hereof.

"Land" means the real property more particularly described on Exhibit A attached hereto and made a part hereof, together with all covenants, licenses, privileges and benefits thereto belonging, and any easements, rights-of-way, rights of ingress or egress or other interests of Seller in, on, or to any land, highway, street, road or avenue, open or proposed, in, on, across, in front of, abutting or adjoining such real property including, without limitation, any strips and gores adjacent to or lying between such real property and any adjacent real property.

"Laws" means all federal, state and local laws, moratoria, initiatives, referenda, ordinances, rules, regulations, standards, orders and other governmental requirements, including, without limitation, those relating to the environment, health and safety, disabled or handicapped persons.

"Lease" means a lease agreement in the form set forth on Exhibit G attached hereto and made a part hereof, which shall be executed and delivered by Seller and Purchaser at the Closing, and pursuant to the terms of which Purchaser shall lease the Property to Seller following the Closing.

"Lease Assignment" means an Assignment of Rents and Leases substantially in the form of Exhibit H attached hereto, to be executed by Seller to Purchaser at Closing, pursuant to the terms of which (i) Seller shall absolutely and unconditionally assign to Purchaser all of its right, title and interest in and to the Tenant Leases, and (ii) Seller shall assign to Purchaser the Credit Enhancements, if any, as security for the obligations of Seller under the Lease, and any other obligation of Seller to Purchaser.

"Party" or "Parties" have the meanings set forth in the preamble to this Agreement.

"Permits" means all permits, licenses, approvals, entitlements, notifications, determinations and other governmental and quasi-governmental authorizations including, without limitation, certificates of occupancy, required in connection with the ownership, planning, development, construction, use, operation or maintenance of the Property. As used herein, "quasi-governmental" shall include the providers of all utilities services to the Property.

"Permitted Exceptions" means those title exceptions or defects which are approved in writing by Purchaser pursuant to Article V of this Agreement.

"Property" means, collectively, the Land and all rights, titles, and appurtenant interests, the Credit Enhancements, the Improvements, the Fixtures, the Intangible Property, the Warranties, the Business Agreements, the Engineering Documents and the Tenant Leases. As used in the foregoing, "appurtenant interests" shall mean those interests which pass by operation of law with the conveyance of the fee simple estate in the Land and Improvements.

"Purchase Price" means an amount equal to \$17,500,000.00.

"Real Property" means the Land, the Improvements and the Fixtures.

"Review Period" has the meaning set forth in Section 5.2.

"Search Reports" means the initial reports of searches made of the Uniform Commercial Code Records of the County in which the Property is located, and of the office of the Secretary of State of the State in which the Property is located, which searches shall reflect that none of the Property is encumbered by liens. The Search Reports shall be updated, at Seller's expense, at or within one week prior to Closing.

"Seller's Personal Property" means all machinery, equipment, furniture, furnishings, beds, computers, signage, trade fixtures or other personal property and consumable inventory and supplies used or useful in the business of the Seller operated on the Property, except for the Property, all as more fully set forth on Exhibit I attached hereto.

"Survey" means a current "as-built" ALTA survey, certified to ALTA requirements, prepared by an engineer or surveyor licensed in the State in which the Land is located acceptable to Purchaser, which shall: (a) include a legal description of the Land by metes and bounds (which shall include a reference to the recorded plat, if any), and a computation of the area comprising the Land in both acre, gross square feet and net square feet (to the nearest one-hundredth of said respective measurement); (b) accurately (upon Seller's belief, without inquiry) show the location on the Land of all improvements, building and set-back lines, fences, evidence of abandoned fences, ponds, creeks, streams, rivers, officially designated 100-year flood plains and flood prone areas, canals, ditches, easements, roads, rights-of-way and encroachments; (c) be certified to the Purchaser, the Title Company, and any third-party lender designated by Purchaser; (d) legibly identify any and all recorded matters shown on the Title Commitment or on said survey by appropriate volume and page recording references and the survey shall show the location of all adjoining streets; and (e) be satisfactory to the Title Company so as to permit it to amend the standard exception for area and boundaries in the Title Policy.

"Tenant" means the lessees or tenants under the Tenant Leases, if any.

"Tenant Leases" means all leases, subleases and other rental agreements, if any, (written or verbal, now or hereafter in effect) that grant a possessory interest in and to any space in the Improvements or that otherwise have rights with regard to the use of the Land or Improvements, and all Credit Enhancements, if any, held in connection therewith.

"Title Commitment" means a current commitment issued by the Title Company to the Purchaser pursuant to the terms of which the Title Company shall commit to issue the Title Policy to Purchaser in accordance with the provisions of this Agreement, and reflecting all matters which would be listed as exceptions to coverage on the Title Policy.

"Title Company" means American Title Insurance Company, whose address is 5056 Fiesta Road, N.E., Suite 480, Atlanta, Georgia 30328-4011, Attention: Mr. Robert Heater.

"Title Policy" means an ALTA Extended Coverage Owner's Policy of Title Insurance (1990 Form B-- ____[Year] revision), together with such endorsements thereto as are reasonably and customarily required by institutional purchasers of real property similar to the Property, with liability in the amount of the Purchase Price, dated as of the Closing Date, issued by the Title Company, insuring title to the fee interest in the Real Property in Purchaser, subject only to the Permitted Exceptions and to the standard printed exceptions included in the ALTA standard form owner's extended coverage policy of title insurance, with the following modifications: (a) the exception for areas and boundaries shall be deleted; (b) the exception for ad valorem taxes shall reflect only taxes for the current and subsequent years; (c) any exception as to parties in possession shall be limited to rights of tenants in possession, as tenants only, pursuant to the Lease and the Tenant Leases; (d) there shall be no general exception for visible and apparent easements or roads and highways or similar items (with any exception for visible and apparent easements or roads and highways or similar items to be specifically referenced to and shown on the Survey and also identified by applicable recording information); and (e) all other exceptions shall be modified or endorsed in a manner reasonably acceptable to Purchaser.

"Warranties" means all warranties, representations and guaranties with respect to the Property, whether express or implied, which Seller now holds or under which Seller is the beneficiary, including, without limitation, all of the representations, warranties and guaranties given and/or assigned to Seller under the Tenant Leases.

"WELLHEALTH" means WELLHEALTH Rehabilitation Corporation, a Delaware corporation, which is the corporate parent company of Seller.

ARTICLE II

AGREEMENTS TO SELL, PURCHASE AND LEASE

2.1 AGREEMENT TO SELL AND PURCHASE. On the Closing Date, Seller shall sell, convey, assign, transfer and deliver to Purchaser and Purchaser shall purchase, acquire and accept from Seller, the Property, for the Purchase Price and subject to the terms and conditions of this Agreement. To the extent permitted or required by law, Seller shall assign to Purchaser all of Seller's right, title and interest in and to the Permits.

2.2 AGREEMENT TO LEASE. On the Closing Date, and subject to performance by the Parties of the terms and provisions of this Agreement, Purchaser shall lease to Seller and Seller shall lease from Purchaser, the Property at the rental and upon the terms and conditions set forth in the Lease.

ARTICLE III

PURCHASE PRICE

3.1 PAYMENT OF PURCHASE PRICE. The Purchase Price shall be paid by Purchaser delivering to the Title Company at the Closing a wire transfer or other immediately available funds payable to the order of the Title Company in the amount of the Purchase Price, subject to adjustment as provided in Article IX hereof.

3.2 INDEPENDENT CONSIDERATION. Within three Business Days following the Effective Date, Purchaser shall deliver to the Title Company, in funds immediately forfeitable to Seller, the Independent Consideration, as independent consideration for any option granted to Purchaser by Seller herein, and based upon such consideration and the mutual covenants of Seller and Purchaser contained herein, Seller hereby agrees that any such option granted Purchaser is irrevocable and Seller shall not terminate said option without the prior written consent of Purchaser, except as may be expressly provided for herein.

ARTICLE IV ITEMS TO BE FURNISHED TO PURCHASER BY SELLER

4.1 DUE DILIGENCE MATERIALS. Within 15 days after the Effective Date, Seller shall deliver to Purchaser or make available to Purchaser at the Property for its review the following items:

- (a) True, correct, complete and legible copies of all Tenant Leases, Business Agreements, Warranties, Permits, and Engineering Documents;
- (b) A true, correct, complete and legible rent roll of all existing Tenant Leases, if any, setting forth with respect to each of the Tenant Leases: (i) the premises covered; (ii) the date of such Tenant Lease and all amendments and modifications thereto; (iii) the name of the Tenant, licensee or occupant; (iv) the term, including specification of the commencement date and the termination date; (v) the rents; (vi) the nature and amount of the security deposits thereunder; if any (vii) options to renew or extend contained in any of the Tenant Leases; (viii) the status of Tenant improvements to be performed by Seller; and
- (c) An inventory of the Seller's Personal Property;
- (d) True, correct, complete and legible copies of the following items:
 - (i) tax statements or assessments for all real estate and personal property taxes assessed against the Property for the current and the prior two calendar years;
 - (ii) all existing fire and extended coverage insurance policies and any other insurance policies pertaining to the Property;
 - (iii) all instruments evidencing, governing or securing the payment of any loans secured by the Property or related thereto;
 - (iv) unaudited balance sheets and income statements of the Seller for [Year], [Year] and [Year], certified as correct to the best knowledge of an officer or managing general partner of Seller, as the case may be;
 - (v) all environmental studies or impact reports relating to the Property in possession or control of Seller, if any, and any approvals, conditions, orders or declarations issued by any governmental authority relating thereto (such studies and reports shall include, but not be limited to, reports indicating whether the Property is or has been contaminated by Hazardous Materials); and

(vi) all litigation files, if any, with respect to any pending litigation and claim files for any claims made or threatened, the outcome of which might have a material adverse effect on the Property or the use and operation of the Property.

4.2 DUE DILIGENCE REVIEW. During the Review Period Purchaser shall be entitled to review the Due Diligence Materials delivered or made available by Seller to Purchaser pursuant to the provisions of Section 4.1, above. If Purchaser shall, for any reason in Purchaser's sole discretion, disapprove or be dissatisfied with any aspect of such information, or the Property, then Purchaser shall be entitled to terminate this Agreement by giving written notice thereof to Seller on or before the expiration of the Review Period, whereupon this Agreement shall automatically be rendered null and void, all moneys which have been delivered by Purchaser to Seller or the Title Company (other than the Independent Consideration) shall be immediately returned to Purchaser and thereafter neither Party shall have any further obligations or liabilities to the other hereunder. Alternatively, Purchaser may give written notice setting forth any defect, deficiency or encumbrance and specify a time within which Seller may remedy or cure such matter (before or after the expiration of the Review Period). If any defect, deficiency or encumbrance, so noticed, is not satisfied or resolved to the satisfaction of Purchaser, in Purchaser's sole discretion, within the time period specified in such written notice, this Agreement shall automatically terminate as provided in this section. If no such notice is timely given, then Purchaser shall be deemed to have waived its right to so terminate. Also, Purchaser shall treat the Due Diligence Materials as confidential and shall use them solely for the purpose of evaluating the Property. If this Agreement is terminated, Purchaser shall promptly redeliver to Seller all Due Diligence Materials and shall not retain any copies, extracts or other reproductions in whole or in part of the Due Diligence Materials.

ARTICLE V TITLE AND SURVEY

5.1 TITLE COMMITMENT, EXCEPTION DOCUMENTS AND SURVEY. Within 15 days after the Effective Date, Seller shall deliver or cause to be delivered to Purchaser, the Title Commitment, Exception Documents, Survey, and Search Reports.

5.2 REVIEW PERIOD. Purchaser shall have the right to review the Title Commitment, Exception Documents, Search Reports and Survey for a period of 30 days from the date of Purchaser's receipt of the last of such items (the "Review Period"). In the event any matters appear therein that are unacceptable to Purchaser, Purchaser shall, within the Review Period notify Seller in writing of such fact. Upon the expiration of said Review Period, Purchaser shall be deemed to have accepted all exceptions to title referenced in the Title Commitment and all matters shown on the Survey except for matters which are the subject of a notification made under the preceding sentence, and such accepted exceptions shall be included in the term "Permitted Exceptions" as used herein; provided that in no event shall any of the items listed on Schedule B-1 or C of the Title Commitment constitute Permitted Exceptions for purposes hereof. In the event that Purchaser objects to any such matters within the Review Period, Seller shall have 30 days from receipt of such notice within which to eliminate or modify any such unacceptable exceptions or items. In the event that Seller is unable or unwilling to eliminate or modify such unacceptable items to the satisfaction of Purchaser on or before the expiration of said 30-day period, Purchaser may either (a) waive such objections and accept title to the Property subject to such unacceptable items (which items shall then be deemed to constitute part of the "Permitted Exceptions"), or (b) terminate this Agreement by written notice to Seller, whereupon this Agreement shall automatically be rendered null and void, all moneys which have been delivered by Purchaser to Seller or the Title Company (other than the Independent Consideration) shall be immediately returned to Purchaser, and thereafter neither Party shall have any further obligations or liabilities to the other hereunder.

5.3 ADDITIONAL EXCEPTIONS. In the event that at any time the Title Commitment, Exception Documents, Survey or Search Reports are modified (other than the deletion or elimination of any item as to which Purchaser has made an objection), Purchaser shall have the right to review and approve or disapprove any such modification and to terminate this Agreement in the event that Seller is unable or unwilling to eliminate any such matters to the satisfaction of

Purchaser in accordance with the provisions of Section 5.2 above, except that Purchaser's Review Period as to such additional items shall be for a period expiring on the date that is the earlier to occur of (a) 15 days following the date of Purchaser's receipt of such modification, and (b) the Closing Date, and all other time periods referred to in Section 5.2 shall expire on the date that is the earlier of (i) the final day of the specified time period as set forth therein, and (ii) the Closing Date.

ARTICLE VI
REPRESENTATIONS, WARRANTIES, COVENANTS
AND AGREEMENTS

6.1 REPRESENTATIONS AND WARRANTIES OF SELLER. To induce Purchaser to enter into this Agreement and to purchase the Property, Seller represents and warrants to Purchaser, to the best of its knowledge, as follows:

(a) Pursuant to Section 5.2 hereof, Seller has and at the Closing Seller will have, and will convey, transfer and assign to Purchaser, good, marketable, fee simple and insurable title to the Land, free and clear of any deeds of mortgages, liens, encumbrances, leases, tenancies, licenses, chattel mortgages, conditional sales agreements, security interests, covenants, conditions, restrictions, judgments, rights-of-way, easements, encroachments and any other matters affecting title or use of the Property.

(b) Seller has duly and validly authorized and executed this Agreement, and has right, title, power and authority to enter into this Agreement and, at Closing, to consummate the actions provided for herein, and the joinder of no person or entity will be necessary to convey the Property fully and completely to Purchaser at Closing and to lease the Property from Purchaser following Closing. The execution by Seller of this Agreement and the consummation by Seller of the transactions contemplated hereby do not, and at the Closing will not, result in a breach of any of the terms or provisions of, or constitute a default or a condition which upon notice or lapse of time or both would ripen into a default under any indenture, agreement, instrument or obligation to which Seller is a party or by which the Property or any portion thereof is bound; and does not and at the Closing will not, constitute a violation of any order, rule or regulation applicable to Seller or any portion of the Property of any court or of any federal or state or municipal regulatory body or administrative agency or other governmental body having jurisdiction over Seller or any portion of the Property.

(c) Without the benefit of any independent investigation or estoppel certificates from any of the Tenants, there are no adverse or other parties in possession of the Property or of any part thereof except the property manager, Seller and Tenants, if any, under valid and effective Tenant Leases delivered to Purchaser pursuant to this Agreement. No party has been granted any license, lease or other right relating to the use or possession of the Property, except Tenants under Tenant Leases which have been delivered to Purchaser pursuant to this Agreement.

(d) Each Tenant Lease, if any, furnished to Purchaser pursuant to this Agreement is in full force and effect and has not been materially amended, modified or supplemented in any way that has not been disclosed to Purchaser in writing. The Tenant Leases, if any, furnished to Purchaser pursuant to this Agreement constitute all material written and oral agreements of any kind for the leasing, rental or occupancy of any portion of the Property. No material default or breach on the part of the Seller as landlord or Tenant exists under any of the Tenant Leases. All material Tenant improvements, repairs and other work and obligations, if any, then required to be performed by the landlord under each of the Tenant Leases will be fully performed and paid for in full on or prior to the Closing. Seller has not, except as disclosed to Purchaser in writing, accepted the payment of rent or other sums due under any of the Tenant Leases for more than one month in advance.

(e) None of the Tenant Leases and none of the rents or other charges payable thereunder, if any, have been assigned, pledged or encumbered by Seller.

(f) No brokerage or leasing commissions or other compensation will be due or payable to any person, firm, corporation or other entity with respect to, or on account of, any Tenant Lease or any extensions or renewals thereof, if any, excepting those agreements entered into or accepted in writing by Purchaser.

(g) No notice has been received by Seller and Seller is not aware of any person having received notice from any insurance company that has issued a policy with respect to any portion of the Property or from any board of fire underwriters (or other body exercising similar functions), claiming any defects or deficiencies or requiring the performance of any repairs, replacements, alterations or other work. No notice has been received by Seller from any issuing insurance company that any of such policies will not be renewed, or will be renewed only at a higher premium rate than is presently payable therefor, except as disclosed to and accepted by Purchaser in writing.

(h) No pending condemnation, eminent domain, assessment or similar proceeding or charge affecting the Property or any portion thereof exists. Seller has not received any notice of a proposed increase in the assessed valuation of the Property.

(i) All of the Improvements (including all utilities) have been substantially completed and installed and are being used in substantial accordance with all applicable Laws, including the plans and specifications approved by the governmental authorities having jurisdiction to the extent applicable. Permanent certificates of occupancy, all licenses, permits, authorizations and approvals required by all governmental authorities having jurisdiction, and the requisite certificates of the local board of fire underwriters (or other body, exercising similar functions) have been issued for the Improvements, all of the same will be in full force and effect. The Improvements, as designed and constructed, comply materially with all statutes, restrictions, regulations and ordinances applicable thereto.

(j) The existing water, sewer, gas and electricity lines, storm sewer and other utility systems on the Land are adequate to serve the utility needs of the Property. All utilities required for the operation of the Improvements will enter the Land through adjoining public streets or through adjoining private land in accordance with valid public or private easements that will inure to the benefit of Purchaser. All approvals, licenses and permits required for said utilities have been obtained and are in force and effect. All of said utilities are installed and operating, all installation and connection charges have been paid in full, and the right to the return of any deposit or contribution in connection therewith shall inure to Purchaser.

(k) There are no material structural defects in any of the buildings or other Improvements constituting the Property. The Improvements, all heating, electrical, plumbing and drainage at, or servicing, the Property and all facilities and equipment relating thereto are in reasonably good condition and working order and adequate in quantity and quality for the normal operation of the Property. No part of the Property has been destroyed or damaged by fire or other casualty. There are no unsatisfied requests for repairs, restorations or alterations with regard to the Property from any Tenant, lender, insurance provider or governmental authority.

(l) No work has been performed or is in progress at the Property, and no materials will have been delivered to the Property that might reasonably be expected to provide the basis for a mechanic's, materialmen's or other lien against the Property or any portion thereof.

(m) There will exist no material service contracts, management or other agreements applicable to the Property other than the Business Agreements furnished to Purchaser pursuant to Section 4.1. There are no material agreements or understandings (whether oral or written) with respect to the Property or any portion thereof, to which Seller is a party, other than those delivered to Purchaser pursuant to Section 4.1.

(n) No default or breach exists under any of the Business Agreements, or any of the covenants, conditions, restrictions, rights-of-way or easements affecting the Property or any portion thereof.

(o) There are no actions, suits or proceedings pending or threatened against or affecting the Property or any portion thereof, any of the Tenant Leases or relating to or arising out of the ownership, or by any federal, state, county or municipal department, commission, board, bureau or agency or other governmental instrumentality, other than those disclosed to Purchaser pursuant to Section 4.1. All judicial proceedings concerning the Property will be finally dismissed and terminated prior to Closing.

(p) The Property has free and unimpeded access to presently existing public highways and/or roads (either directly or by way of perpetual easements), and all approvals necessary therefor have been obtained and in full force and effect. No fact or condition exists which would result in the termination of the current access from the Property to any presently existing public highways and/or roads adjoining or situated on the Property.

(q) There are no attachments, executions, assignments for the benefit of creditors, or voluntary or involuntary proceedings in bankruptcy or under any other debtor relief laws contemplated by or pending or, threatened against Seller or the Property.

(r) Other than with respect to activities in connection with or conditions arising strictly from customary and ordinary use or maintenance of the Property by Seller and Tenants in full compliance with any or all Hazardous Materials Law, Seller is unaware of (i) any Hazardous Materials installed, used, generated, manufactured, treated, handled, refined, produced, processed, stored or disposed of, or otherwise on or under the Property; (ii) any activity being undertaken on the Property which could cause (a) the Property to become a hazardous waste treatment, storage or disposal facility within the meaning of any Hazardous Materials Law, (b) a release or threatened release of Hazardous Materials from the Property within the meaning of any Hazardous Materials Law or (c) the discharge of Hazardous Materials into any watercourse, body of surface or subsurface water or wetland, or the discharge into the atmosphere of any Hazardous Materials which would require a permit under any Hazardous Materials Law; (iii) any activity undertaken with respect to the Property which would cause a violation or support a claim under any Hazardous Materials Law; (iv) any investigation, administrative order, litigation or settlement with respect to any Hazardous Materials, being threatened or in existence with respect to the Property; (v) any notice being served on Seller from any entity, governmental body or individual claiming any violation of any Hazardous Materials Law, or requiring compliance with any Hazardous Materials Law, or demanding payment or contribution for the environmental damage or injury to natural resources. Seller has not obtained and is not required to obtain, and Seller has no knowledge of any reason Purchaser will be required to obtain, any permits, licenses, or similar authorizations to occupy, operate or use the Improvements or any part of the Property by reason of any Hazardous Materials Law.

(s) The Purchase Price is being allocated to the Real Property and the portion of the Property which is considered to be personal property as set forth on Exhibit J attached hereto.

(t) No certificate of need or approval or consent from any governmental authority is necessary or appropriate for Seller's use of the property.

(u) All documents and information delivered by Seller to Purchaser pursuant to the provisions of this Agreement are materially true, correct and complete as of the date hereof and will be correct and complete as of the Closing Date, except as set forth in this Agreement and in the disclosure schedule accompanying this Agreement and initialled by the Parties (the "Disclosure Schedule"). The Disclosure Schedule will be arranged in paragraphs corresponding to the lettered paragraphs in this Section 6.1 and Section 6.3. From time to time after the execution of this Agreement until the Closing, Seller shall deliver to Purchaser one or more supplemental schedules setting forth all changes in the schedules, and in previously delivered supplemental schedules, if any, and in any of the representations and warranties made herein whether or not previously modified by a schedule, arising out of matters discovered or occurring prior to the Closing. Purchaser and its counsel shall have 30 days to object in writing to any material information in any supplemental schedule; failure by Purchaser to notify Seller within such 30-day period of any objection to information provided in the supplemental schedule prior to the Closing shall be deemed to be approval thereof.

6.2 INDEMNITY OF SELLER. Subject to the provisions provided hereafter limiting the liability of Seller, Seller hereby agrees to indemnify and defend, at its sole cost and expense, and hold Purchaser, its successors and assigns, harmless from and against and to reimburse Purchaser with respect to any and all claims, demands, actions, causes of action, losses, damages, liabilities, costs and expenses (including, without limitation, reasonable attorneys' fees and court costs) of any and every kind or character, known or unknown, fixed or contingent, asserted against or incurred by Purchaser at any time and from time to time by reason of or arising out of (a) the breach of any representation or warranty of Seller set forth in this Agreement, (b) the failure of Seller, in whole or in part, to perform any obligation required to be performed by Seller pursuant to Section 6.1 or (c) except for the matters disclosed herein or in the Disclosure Schedule the ownership, construction, occupancy, operation, use and maintenance of the Property prior to the Closing Date. This obligation of indemnity shall remain in effect only for the term of the Lease, but notwithstanding such limitation, otherwise it shall be without limitation with respect to the violation on or before the Closing Date of any Hazardous Material Law in effect on or before the Closing Date and any and all matters arising out of any act, omission, event or circumstance existing or occurring on or prior to the Closing Date (including, without limitation, the presence on the Property or release from the Property of Hazardous Materials disposed of or otherwise released prior to the Closing Date) which results in a violation of a Hazardous Materials Law, regardless of whether the act, omission, event or circumstance constituted a violation of any Hazardous Materials Law at the time of its existence or occurrence. The provisions of this Section 6.2 shall survive the Closing of the transaction contemplated by this Agreement and shall continue thereafter in full force and effect for the benefit of Purchaser, its successors and assigns. However, notwithstanding any provision of this Agreement to the contrary, Purchaser may exercise any right or remedy Purchaser may have at law or in equity should Seller fail to meet, comply with or perform its indemnity obligations required by this Section 6.2.

6.3 COVENANTS OF SELLER. Seller covenants and agrees with Purchaser, from the Effective Date until the Closing or earlier termination of this Agreement:

(a) Seller shall not collect rents in advance for more than one month.

(b) Upon reasonable notice as to time by Purchaser to Seller or any Tenant affected thereby, subject to the provisions of any of the Tenant Leases, Purchaser shall be entitled to make all inspections or investigations desired by Purchaser with respect to the Property or any portion thereof, and, subject to the Tenant Leases and any security requirements, shall have complete physical access to the Property and each of the leased premises located thereon, which access shall not unreasonably interfere with Tenants in possession. Seller and any Tenant affected thereby shall have the right to have one or more representatives present at any such inspection or investigation. Purchaser agrees to (i) repair any damages to the Property resulting from its inspection, (ii) prevent any liens from being filed against the Property resulting from such inspections, and (iii) indemnify Seller from any and all Claims by Purchaser arising out of such inspections.

(c) Seller shall cause to be maintained in full force fire and extended coverage insurance upon the Property and public liability insurance with respect to damage or injury to persons or property occurring on or relating to operation of the Property in substantially the amounts as are maintained by Seller on the date of this Agreement.

(d) Seller shall pay when due all bills and expenses of the Property. Seller shall not voluntarily enter into or assume any new contracts or obligations with regard to the Property which are in addition to or different from those furnished and disclosed to Purchaser and reviewed and approved pursuant to Section 4.1 other than any which may be terminated upon not more than 30 days prior notice or any providing for a term of 12 months or less and an annual payment of not more than \$10,000.00.

(e) Seller shall not create or voluntarily permit to be created any liens, easements or other encumbrances affecting any portion of the Property or the uses thereof without the prior written consent of Purchaser.

(f) Seller will pay, as and when due, all interest and principal and all other charges payable under any indebtedness secured by the Property of Seller from the date hereof until Closing and will not knowingly suffer or permit any material default or amend or modify the documents evidencing or securing any such indebtedness of Seller to institutional lenders without the prior consent of Purchaser.

(g) Seller will: (i) give to Purchaser, its attorneys, accountants and other representatives, during normal business hours and as often as may be requested, full access to the Property and to all books, records and files (but excluding information which may be protected by the attorney-client privilege) relating to the Property; provided that Purchaser will not interfere with the business operations of any of the Tenants or subject Seller to unreasonable expense not expressly contemplated by this Agreement; (ii) furnish to Purchaser all information concerning the Property which the Purchaser, its attorneys, accountants or other representatives will reasonably request; and (iii) furnish to Purchaser, to the extent readily available to Seller, all information necessary for an audit to be conducted with respect to the operations of the Property for the 36-month period preceding the Closing, including, without limitation, the general ledger, check register, cash receipts and disbursement journals, bank statements, rent rolls, Tenant Leases, invoices relating to direct operating expenses, ad valorem tax statements, payroll records, schedule of accounts payable, schedule of accounts receivable; and (iv) cooperate with Purchaser in the conducting of such audit to the extent that it does not materially interfere with Seller's business or require any substantial out-of-pocket expense and will deliver to the accountants conducting such audit such information known to Seller as may be reasonably required addressing, among other things, any irregularities or undisclosed claims or liabilities that could have a material effect on the results of the audit. Any information furnished to Purchaser hereunder shall be subject to the confidentiality provisions contained in Section 4.2.

(h) Seller shall not remove any of the Seller's Personal Property from the Land or Improvements which is necessary for the operation of the Property as it is currently being used without replacing same with substantially similar items of equal or greater value.

6.4 REPRESENTATIONS, WARRANTIES AND COVENANTS OF PURCHASER. Purchaser represents and warrants to Seller that:

(a) Purchaser has duly and validly authorized and executed this Agreement, and has full right, power and authority to enter into this Agreement and to consummate the actions provided for herein, and the joinder of no person or entity will be necessary to purchase the Property from Seller at Closing, and to lease the Property to Seller following Closing.

(b) The execution by Purchaser of this Agreement and the consummation by Purchaser of the transactions contemplated herein do not, and at the Closing will not, result in any breach of any of the terms or provisions of or constitute a default or a condition which upon notice or lapse of time or both would ripen into a default under any indenture, agreement, instrument or obligation to which Purchaser is a party; and does not constitute a violation of any order, rule or regulation applicable to Purchaser or any portion of the Property of any court or of any federal or state or municipal regulatory body or administrative agency or other governmental body having jurisdiction over Purchaser.

(c) Purchaser shall have made its own investigation regarding anticipated future Property performance, revenues, profits and expenses and shall not rely on any performance, revenue, profit or expense projections, forecasts or predictions relating to the Property provided by or on behalf of Seller; provided that the foregoing provision shall in no way lessen or diminish the obligation of Seller to furnish true and correct copies of the Due Diligence Materials to Purchaser as provided under Article IV hereof.

(d) Purchaser shall indemnify and hold Seller harmless from and against any claims for any brokerage fee or commission, finder's fee or financial advisory fee arising from or related to the transactions contemplated by this Agreement and which is asserted by any person or entity claiming to have acted as agent or a representative of Purchaser.

(e) All documents and information delivered by Purchaser to Seller pursuant to the provisions of this Agreement are true, correct and complete as of the date hereof and will be correct and complete as of the Closing Date, except as set forth in this Agreement and in the Disclosure Schedule. From time to time after the execution of this Agreement until the Closing, Purchaser shall deliver to Seller one or more supplemental schedules setting forth all changes in the schedules, and in previously delivered supplemental schedules, if any, and in any of the representations and warranties made herein whether or not previously modified by a schedule, arising out of matters discovered or occurring prior to the Closing. Seller and its counsel shall have 30 days to object in writing to any material information in any supplemental schedule; failure by Seller to notify Purchaser within such 30-day period of any objection to information provided in the supplemental schedule prior to the Closing shall be deemed to be approval thereof.

ARTICLE VII CONDITIONS TO THE PURCHASER'S AND SELLER'S OBLIGATIONS

7.1 CONDITIONS TO THE PURCHASER'S OBLIGATIONS. The obligations of Purchaser to purchase the Property from Seller and to consummate the transactions contemplated by this Agreement are subject to the satisfaction, as of the Closing, of each of the following conditions:

- (a) All of the representations and warranties of Seller set forth in this Agreement shall be true as of the Closing in all material respects except for changes expressly permitted or contemplated by the terms of this Agreement.
- (b) Seller shall have delivered, performed, observed and complied in all material respects with, all of the items, instruments, documents, covenants, agreements and conditions required by this Agreement to be delivered, performed, observed and complied with by Seller prior to, or as of, the Closing.
- (c) Neither Seller nor any Tenant shall be in receivership or dissolution proceedings or have made any assignment for the benefit of creditors, or admitted in writing its inability to pay its debts as they mature, or have been adjudicated as bankrupt, or have filed a petition in voluntary bankruptcy, a petition or answer seeking reorganization or an arrangement with creditors under the federal bankruptcy law or any other similar law or statute of the United States or any state and no such petition shall have been filed against it.
- (d) No material or substantial change shall have occurred with respect to the condition, financial or otherwise, of the Property or the Seller.
- (e) Neither the Property nor any part thereof or interest therein shall have been taken by execution or other process of law in any action prior to Closing.
- (f) Seller shall have obtained and delivered to Purchaser a current report, dated no more than ten days prior to this Agreement, from a licensed pest control company reasonably acceptable to Purchaser, and which must show the Property to be free of all termite, or other destructive insect and pest infestation, dry rot, fungus or other destructive agency infestation.
- (g) Purchaser shall be reasonably satisfied with its inspection of the Property with respect to the physical condition thereof by agents or contractors selected by Purchaser.
- (h) Purchaser shall have received, in form acceptable to Purchaser, evidence of compliance by the Property with all Permits required as of the Effective Date hereof and such other Permits as may be necessary or appropriate for the operation of the Property for the current and intended use and for the transactions contemplated by this Agreement and

the Lease.

(i) All necessary approvals, consents, estoppel certificates and the like of third parties to the validity and effectiveness of the transactions contemplated hereby shall have been obtained.

(j) Purchaser shall be reasonably satisfied that the Property is sufficient and adequate for Seller to carry on the business now being conducted thereon and that the Property is in good condition and repair as reasonably required for the proper operation and use thereof in compliance with applicable Laws and the requirements of applicable accreditation and licensing authorities.

(k) Purchaser (or Purchaser's corporate parent company) shall have been successful in causing the formation of a real estate investment trust whose interests have been sold to the public and in connection therewith has raised capital in an amount not less than \$100,000,000.00 (the "IPO").

(l) Purchaser shall be satisfied with all matters regarding title and survey pursuant to Article V hereof.

(m) The Purchaser shall have obtained an environmental site assessment report covering the Property in form and content acceptable to Purchaser.

(n) No portion of the Property shall have been destroyed by fire or casualty.

(o) No condemnation, eminent domain or similar proceedings shall have been commenced or threatened with respect to any portion of the Property.

(p) Purchaser shall have received an appraisal satisfactory to Purchaser in all respects, including without limitation, a fair market value substantially equivalent to the Purchase Price.

(q) Seller shall have provided such representations, warranties and consents as may be reasonably required by the United States Securities and Exchange Commission in connection with the IPO, including but not limited to inclusion of financial statements, financial information and other required information concerning Seller, or any affiliate in any United States Securities and Exchange Commission filings.

7.2 FAILURE OF CONDITIONS TO PURCHASER'S OBLIGATIONS. In the event any one or more of the conditions to Purchaser's obligations are not satisfied in whole or in part as of the Closing, Purchaser, at Purchaser's option, shall be entitled to: (a) terminate this Agreement by giving written notice thereto to Seller, whereupon all moneys which have been delivered by Purchaser to Seller or the Title Company (other than the Independent Consideration) shall be immediately refunded to Purchaser and neither Purchaser nor Seller shall have any further obligations or liabilities hereunder; (b) waive such failure of condition and proceed to Closing hereunder; or (c) pursue such other remedies as may be available to Purchaser.

7.3 CONDITIONS TO SELLER'S OBLIGATIONS. The obligations of Seller to sell the Property to Purchaser and to consummate the transactions contemplated by this Agreement are subject to the satisfaction, as of the Closing Date, of each of the following conditions:

(a) The representations and warranties of Purchaser contained herein shall be in all material respects true and accurate as of the Closing Date.

(b) Purchaser shall have delivered, performed, observed and complied in all material respects with all of the items, instruments, documents, covenants, agreements and conditions required by this Agreement to be delivered, performed, observed and complied with by Purchaser as of the Closing Date.

(c) No statute, rule, regulation, order, decree or injunction shall have been enacted, entered, promulgated or enforced by any court of competent jurisdiction or United States governmental authority which prohibits the consummation of the transactions contemplated by this Agreement.

(d) All action required to be taken by the Purchaser to authorize the execution, delivery, and performance of this Agreement and the other agreements or documents related hereto, and the consummation of the transactions contemplated hereby, shall have been duly and validly taken.

(e) Seller shall have received duly executed copies of all required Permits and/or necessary consents and approvals in form and substance satisfactory to Seller of third parties to the validity and effectiveness of the transactions contemplated by this Agreement.

7.4 FAILURE OF CONDITIONS TO SELLER'S OBLIGATIONS. In the event any one or more of the conditions to Seller's obligations are not satisfied in whole or in part as of the Closing, Seller, at Seller's option, shall be entitled to:

(a) terminate this Agreement by giving written notice thereto to Purchaser, whereupon all moneys which have been delivered by Purchaser to Seller or the Title Company (other than the Independent Consideration) shall be immediately refunded to Purchaser and neither Purchaser nor Seller shall have any further obligations or liabilities hereunder; or (b) waive such failure of conditions and proceed to Closing hereunder.

ARTICLE VIII

PROVISIONS WITH RESPECT TO THE CLOSING

8.1 SELLER'S CLOSING OBLIGATIONS. Seller and Purchaser shall enter into a mutually acceptable escrow agreement (the "Escrow Agreement") with the Title Company prior to the Closing. The Escrow Agreement will require the Title Company to close the transaction contemplated hereby in escrow pending closing of and funding under the IPO; provided that the Closing shall occur no later than June 30, ____ [Year]. Upon execution of the Escrow Agreement, Seller shall furnish and deliver to the Title Company for delivery to Purchaser, pursuant to instructions to be set forth in the Escrow Agreement, the following:

(a) The Deed, Title Commitment obligating the Title Company to issue the Title Policy subject only to the Permitted Exceptions, Bill of Sale, Certificate of Non-Foreign Status, Closing Certificate, the Guaranty, the Lease Assignment and the Lease, each duly executed and acknowledged by Seller, or WELLHEALTH, as the case may be.

(b) An affidavit, agreement and indemnity executed by Seller and dated as of the Closing Date, stating that there are no unpaid debts for any work that has been done or materials furnished to the Property prior to and as of Closing and stating that Seller shall indemnify, save and protect Purchaser and its assigns harmless from and against any and all Claims, including courts costs and reasonable attorneys' fees related thereto, arising out of, in connection with, or resulting from the same, up to and including the Closing Date, in form and substance mutually acceptable to Seller and Purchaser.

(c) Certificates of casualty and fire insurance for the Property as required pursuant to the Lease showing Purchaser as additional insured and loss payee thereunder, with appropriate provisions for prior notice to Purchaser in the event of cancellation or termination of such policies.

(d) Updated Search Reports, dated not more than ten days prior to Closing, evidencing no UCC-1 Financing Statements or other filings in the name of Seller with respect to the Property.

(e) Such affidavits, certificates or letters of indemnity as the Title Company shall reasonably require in order to omit

from its insurance policy all exceptions for unfilled mechanic's, materialman's or similar liens.

(f) Any and all transfer declarations or disclosure documents, duly executed by the appropriate parties, required in connection with the Deed by any state, county or municipal agency having jurisdiction over the Property or the transactions contemplated hereby.

(g) Such instruments or documents as are necessary, or reasonably required by Purchaser or the Title Company, to evidence the status and capacity of Seller or WELLHEALTH and the authority of the person or persons who are executing the various documents on behalf of Seller or WELLHEALTH in connection with the purchase and sale transaction contemplated hereby.

(h) Such other documents as are reasonably required by the Title Company to carry out the provisions of the Escrow Agreement.

8.2 PURCHASER'S CLOSING OBLIGATIONS. Upon the execution of the Escrow Agreement, Purchaser shall deliver to the Title Company for delivery to Seller, pursuant to the terms of the Escrow Agreement, the following:

(a) The Lease, duly executed and acknowledged by Purchaser.

(b) Such instruments as are necessary, or reasonably required by Seller or the Title Company to evidence the authority of Purchaser to consummate the transactions contemplated hereby and to execute and deliver the closing documents on the Purchaser's part to be delivered.

(c) Such other documents as are reasonably required by the Title Company to carry out the provisions of the Escrow Agreement.

8.3 TITLE COMPANY'S CLOSING OBLIGATIONS. Upon the closing of the IPO and disbursement of funds thereunder, the Title Company shall deliver to Seller the Purchase Price together with the items and documents specified in Section 8.2 and to Purchaser the items and documents specified in Section 8.1. In the event the IPO does not close prior to June 30, ____ [Year], the Title Company will return the items specified in Section 8.1 to Seller and the items specified in Section 8.2 to Purchaser, unless otherwise agreed to by the parties in writing.

ARTICLE IX EXPENSES OF CLOSING

9.1 ADJUSTMENTS. There shall be no adjustment of taxes, assessments, water or sewer charges, gas, electric, telephone or other utilities, operating expenses, employment charges, premiums on insurance policies, rents or other normally proratable items, it being agreed and understood by the Parties that the Seller shall be obligated to pay such items under the terms of the Lease.

9.2 CLOSING COSTS. Purchaser shall pay its own attorneys' fees. Seller shall pay all other costs of closing, including without limitation all title examination fees and premiums for the Title Policy, the Search Reports, the Survey, any environmental reports, any appraisals, any and all state, municipal or other documentary or transfer taxes payable in connection with the delivery of any instrument or document provided in or contemplated by this Agreement or any agreement or commitment described or referred to herein, and the charges for or in connection with the recording and/or filing of any instrument or document provided herein or contemplated by this Agreement or any agreement or document described or referred to herein.

ARTICLE X

DEFAULT AND REMEDIES

10.1 SELLER'S DEFAULT; PURCHASER'S REMEDIES.

(a) Seller's Default. Seller shall be deemed to be in default hereunder upon the occurrence of any one or more of the following events: (i) any of Seller's warranties or representations set forth herein shall be untrue in any material aspect when made or at Closing; or (ii) Seller shall fail in any material respect to meet, comply with, or perform any covenant, agreement or obligation on its part required within the time limits and in the manner required in this Agreement.

(b) Purchaser's Remedies. In the event Seller shall be deemed to be in default hereunder Purchaser may, as its sole remedies: (i) terminate this Agreement by written notice delivered to Seller on or before the Closing; or (ii) in the event that Seller shall willfully refuse to close the sale and only in such event, enforce specific performance of this Agreement against Seller including Purchaser's reasonable costs and attorneys fees in connection therewith. It is understood and agreed that termination or specific performance as provided in (i) and (ii) above constitute Purchaser's sole remedy against Seller, and that Purchaser shall not be entitled to seek monetary damages from Seller or assert any other remedy against Seller.

10.2 PURCHASER'S DEFAULT; SELLER'S REMEDIES.

(a) Purchaser's Default. Purchaser shall be deemed to be in default hereunder upon the occurrence of any one or more of the following events: (i) any of Purchaser's warranties or representations set forth herein shall be untrue in any material respect when made or at Closing; or (ii) Purchaser shall fail in any material respect to meet, comply with, or perform any covenant, agreement or obligation on its part within the time limits and in the manner required in this Agreement.

(b) Seller's Remedy. In the event Purchaser shall be deemed to be in default hereunder, Seller, as Seller's sole and exclusive remedy for such default, shall be entitled to terminate this Agreement and all rights of Purchaser hereunder and to receive the Independent Consideration, it being agreed between Purchaser and Seller that such sum shall be liquidated damages for a default of Purchaser hereunder because of the difficulty, inconvenience, and uncertainty of ascertaining actual damages for such default. If Seller shall be entitled to the Independent Consideration in accordance with this Section 10.2, Purchaser agrees to deliver, on written request of Seller, such instructions as may be reasonably necessary to cause the Title Company to deliver the Independent Consideration to Seller. In such event, Purchaser will pay the costs of the Survey, Title Commitment, Search Reports, appraisals and any environmental survey, report or study.

ARTICLE XI MISCELLANEOUS

11.1 SURVIVAL. All of the representations, warranties, covenants, agreements and indemnities (but not matters or items identified as conditions for parties' obligation to close) of Seller and Purchaser contained in this Agreement, to the extent not performed at the Closing, shall survive the Closing only to the extent provided herein and shall not be deemed to merge upon the acceptance of the Deed by Purchaser.

11.2 NOTICES. All notices, requests and other communications under this Agreement shall be in writing and shall be delivered in person or sent by reputable overnight delivery service, addressed as follows:

If to Purchaser:

American Capital of Alabama, Inc.

Six Central Southern Bldg.
Suite 101A Birmingham Alabama 35243

Attention: W. Gill McDaniel, President

With a copy to:

Mr. Gorman P. Thomas

Etores & Premill, P.C.
9999 UAB Heights Circle Birmingham Alabama 35205

If intended for Seller:

WELLHEALTH Medical Center, Inc.

c/o WELLHEALTH Rehabilitation Corporation
One Central Southern Bldg.
Suite 1120R Birmingham Alabama 35243

Attention: Michael D. Rushmore, Group Vice President,

Physical Resources

With a copy to:

Mr. Drew Demolay Barrymore

Vice President and Counsel
WELLHEALTH Rehabilitation Corporation
One Central Southern Bldg.
Suite 1120R Birmingham Alabama 35243

or at such other address, and to the attention of such other person, as the parties shall give notice as herein provided. All such notices, requests and other communications shall be deemed to have been sufficiently given for all purposes hereof upon delivery in person or one day after deposit with an overnight delivery service.

11.3 ENTIRE AGREEMENT; MODIFICATIONS. This Agreement embodies and constitutes the entire understanding

between the parties with respect to the transactions contemplated herein, and all prior or contemporaneous agreements, understandings, representations and statements (oral or written) are merged into this Agreement. Neither this Agreement nor any provision hereof may be waived, modified, amended, discharged or terminated except by an instrument in writing signed by the Party against whom the enforcement of such waiver, modification, amendment, discharge or termination is sought, and then only to the extent set forth in such instrument.

11.4 APPLICABLE LAW. This Agreement and the transactions contemplated hereby shall be governed by and construed in accordance with the laws of the state in which the Property is located.

11.5 CAPTIONS. The captions in this Agreement are inserted for convenience of reference only and in no way define, describe, or limit the scope or intent of this Agreement or any of the provisions hereof.

11.6 BINDING EFFECT. This Agreement shall be binding upon and shall inure to the benefit of the parties hereto and their respective heirs, executors, administrators, legal and personal representatives, successors, and assigns.

11.7 EXTENSION OF DATES. Notwithstanding anything to the contrary contained in this Agreement, if Seller shall fail to deliver any document or item required pursuant to any of the terms and provisions of Article IV and/or Article V within the applicable time period required, Purchaser, at its option, shall have the right to extend the date of expiration of the Review Period, and correspondingly the date of Closing, by the number of days elapsing from the date such items were required to be delivered and the date such items were actually delivered to Purchaser; provided that Purchaser shall give Seller notice of its intent to extend such dates. Nothing herein shall diminish Seller's obligation to timely furnish such items.

11.8 TIME IS OF THE ESSENCE. With respect to all provisions of this Agreement, time is of the essence. However, if the first date of any period which is set out in any provision of this Agreement falls on a day which is not a Business Day, then, in such event, the time of such period shall be extended to the next day which is a Business Day.

11.9 WAIVER OF CONDITIONS. Any Party may at any time or times, at its election, waive any of the conditions to its obligations hereunder, but any such waiver shall be effective only if contained in a writing signed by such Party. No waiver by a Party of any breach of this Agreement or of any warranty or representation hereunder by the other Party shall be deemed to be a waiver of any other breach by such other Party (whether preceding or succeeding and whether or not of the same or similar nature), and no acceptance of payment or performance by a Party after any breach by the other Party shall be deemed to be a waiver of any breach of this Agreement or of any representation or warranty hereunder by such other Party, whether or not the first Party knows of such breach at the time it accepts such payment or performance. No failure or delay by a Party to exercise any right it may have by reason of the default of the other Party shall operate as a waiver of default or modification of this Agreement or shall prevent the exercise of any right by the first Party while the other Party continues to be so in default.

11.10 OFFER AND ACCEPTANCE. This Agreement shall automatically terminate at 5:00 p.m. on May 30, ____ [Year], unless, prior to such time, Purchaser has returned to Seller, and Seller shall have returned to Purchaser, two fully-executed copies of this Agreement.

11.11 BROKERS. Seller hereby represents to Purchaser that Seller has not discussed this Agreement or the subject matter thereof with any real estate broker or salesman so as to create any legal rights in any such broker or salesman to claim a real estate commission or similar fee with respect to the purchase or sale of the Property. Seller agrees to defend, indemnify and hold Purchaser harmless from any and all claims for any real estate commissions, leasing fees or similar fees arising out of or in any way relating to a breach of the foregoing representation.

11.12 RISK OF LOSS. Until the Closing Date, the risk of loss of any portion of the Property shall be solely that of Seller. Risk of loss shall be that of Purchaser from and after the Closing Date, at which time Seller shall deliver to

Purchaser possession of the Property.

11.13 NO ASSUMPTION OF LIABILITIES. Purchaser shall not assume any of the existing liabilities, indebtedness, commitments or obligations of any nature whatsoever (whether fixed or contingent) of Seller in respect of the Property or otherwise, except those expressly assumed herein.

11.14 COUNTERPARTS. This Agreement may be executed in one or more counterparts, each of which shall be deemed an original, but all of which together shall constitute one and the same instrument.

EXECUTED to be effective as of the Effective Date.

PURCHASER

AMERICAN CAPITAL OF

ALABAMA, INC.,

an Alabama corporation

/s/ W. Gill McDaniels

W. Gill McDaniels

President

Date May 23, [Year]

Purchaser's Tax Identification

Number: 37-4561239

SELLER:

WELLHEALTH MEDICAL

CENTER, INC.,

an Alabama corporation

/s/ Thornton D. Anthony

Thornton D. Anthony

Vice President

Date May 23, [Year]

Seller's Tax Identification

Number: 37-7896541

(d) Real estate appraisal

EXHIBIT 10.19

AN APPRAISAL OF

U.S. SPORTS MED COMPLEX BIRMINGHAM ALABAMA

[logo] VALUATION SPECIALISTS COMPANY**9120 Interstate Seventy-One**

Atlanta, Georgia 30339

(Fax) 466-9550

(555) 559-8800

January 18, [Year]

WellHealth Rehabilitation Corporation

One Central Southern Bldg.

Birmingham, Alabama 35243

Attention: Mr. Dee Michaels, Treasurer

Gentlemen:

In accordance with your request, we are pleased to submit this appraisal report covering the market value of the professional office building identified as follows:

U.S. SPORTS MED COMPLEX

3939 4TH STREET SOUTH BIRMINGHAM ALABAMA

The purpose of this valuation is to estimate the market value of the subject property's leased fee estate as of September 29, ____[Year], subject to a master lease from WellHealth Rehabilitation Corporation. The report is to be used for asset valuation purposes. WellHealth Rehabilitation Corporation is selling nine professional office buildings for the purpose of establishing a real estate investment trust (REIT). This valuation assumes that the prospective REIT is the

owner of the property, with WellHealth Rehabilitation Corporation guaranteeing annual net rental income of \$12.00 per rentable square foot.

This appraisal investigation includes visits to the facility, discussions with the current owners and management of the property, a review of available financial data, discussions with local brokers and government offices, and research and analysis of the market.

"Market value" is defined as:

"The most probable price which a property should bring in a competitive and open market under all conditions requisite to a fair sale, the buyer and seller each acting prudently and knowledgeably, and assuming the price is not affected by undue stimulus. Implicit in this definition is the consummation of a sale as of a specified date and the passing of title from seller to buyer under conditions whereby:

- Buyer and seller are typically motivated;
- Both parties are well informed or well advised, and acting in what they consider their own best interests;
- A reasonable time is allowed for exposure in the open market;
- Payment is made in terms of cash in U.S. dollars or in terms of financial arrangements comparable thereto; and
- The price represents the normal consideration for the property sold unaffected by special or creative financing or sales concessions granted by anyone associated with the sale."

[The Appraisal of Real Estate, page 21, 10th Edition, published by The Appraisal Institute].

The subject property is a three-story professional office building containing 30,144 gross square feet and 27,800 leasable square feet. The building is a Class B facility, with a steel frame and poured-in-place concrete structure and dryvit and brick veneer exterior walls. It was constructed in ____[Year]. The building is currently occupied by the U.S. Sports Med Complex, which is owned by and associated with the WellHealth Medical Center.

In arriving at the opinion expressed in this report, it is assumed that the title to the property is free and clear and held under responsible ownership. The information furnished us by others is believed to be reliable, but no responsibility for its accuracy is assumed. The value reported herein is based upon the integrity of the information provided.

Based upon the procedures, assumptions and conditions outlined in this report, we estimate the market value of the leased fee interest in the U.S. Sports Med Complex Building, as of September 29, ____[Year], to be:

\$3,500,000

We have no responsibility to update our report for events and circumstances occurring after the date of this report. Neither the whole, nor any part of this appraisal or any reference thereto may be included in any document, statement, appraisal or circular without Valuation Specialists Company's prior written approval of the form and context in which it appears.

This appraisal report consists of the following:

- This letter outlining the services performed;
- Certifications of the appraisers;
- A Statement of Facts and Limiting Conditions;
- A Summary of Salient Facts and Conclusions;
- A Narrative Section detailing the appraisal of the property; and
- An Exhibit Section containing supplementary data.

A copy of this report and the working papers from which it was prepared will be kept in our files for eight years.

Respectfully submitted,

VALUATION SPECIALISTS

COMPANY

/s/ Simon M. Patrick

Simon M. Patrick

Managing Director

PJS:mhb
094-1519.8

APPRAISER CERTIFICATION

We, the undersigned, do hereby certify that to the best of our knowledge and belief:

The statements of fact contained in this report are true and correct.

The reported analyses, opinions, and conclusions are limited only by the reported assumptions and limiting conditions and are our personal, unbiased professional analyses, opinions, and conclusions.

We have no present or prospective interest in the property that is the subject of this report, and have no personal interest or bias with respect to the parties involved.

Our compensation is not contingent on an action or event resulting from the analyses, opinions, or conclusions in or the use of this report.

Our analyses, opinions, and conclusions were developed, and this report has been prepared in conformity with the requirements of the Code of Professional Ethics, the Appraisal Institute, American Society of Appraisers, and the

Uniform Standards of Professional Appraisal Practice.

The use of this report is subject to the requirements of the Appraisal Institute and American Society of Appraisers relating to review by its duly authorized representatives.

Marion O. Setab has made a personal inspection of the property that is the subject of this report. Simon M. Patrick has not made a personal inspection of the property.

The following have provided significant professional assistance to the person signing this report: Marion O. Setab

/s/ Simon M. Patrick

/s/ Marion O. Setab

Simon M. Patrick
Managing Director

Marion O. Setab
Appraiser

STATEMENT OF FACTS AND LIMITING CONDITIONS

Valuation Specialists Company strives to clearly and accurately disclose the assumptions and limiting conditions that directly affect an appraisal analysis, opinion, or conclusion. To assist the reader in interpreting this report, such assumptions are set forth as follows:

Appraisals are performed, and written reports are prepared by, or under the supervision of, members of the Appraisal Institute in accordance with the Institute's Standard of Professional Practice and Code of Professional Ethics.

Appraisal assignments are accepted with the understanding that there is no obligation to furnish services after completion of the original assignment. If the need for subsequent services related to an appraisal assignment (e.g., testimony, updates, conferences, reprint or copy services) is contemplated, special arrangements acceptable to Valuation Specialists Company must be made in advance. Valuation Specialists Company reserves the right to make adjustments to the analysis, opinions and conclusions set forth in the report as we may deem necessary by consideration of additional or more reliable data that may become available.

No opinion is rendered as to legal fee or property title, which are assumed to be good and marketable. Prevailing leases, liens and other encumbrances, including internal and external environmental conditions and structural defects, if any, have been disregarded, unless otherwise specifically stated in the report. Sketches, maps, photographs, or other graphic aids included in appraisal reports are intended to assist the reader in ready identification and visualization of the property and are not intended for technical purposes.

It is assumed that: no opinion is intended in matters that require legal, engineering, or other professional advice which has been or will be obtained from professional sources; the appraisal report will not be used for guidance in legal or professional matters exclusive of the appraisal and valuation discipline; there are no concealed or dubious conditions of the subsoil or subsurface waters including water table and floodplain, unless otherwise noted; there are no regulations of any government entity to control or restrict the use of the property unless specifically referred to in the report; and the property will not operate in violation of any applicable government regulations, codes, ordinances or statutes.

In the absence of competent technical advice to the contrary, it is assumed that the property being appraised is not adversely affected by concealed or unapparent hazards, such as, but not limited to, asbestos, hazardous or contaminated substances, toxic waste or radioactivity. The appraiser is not qualified to detect such substances.

No engineering survey has been made by the appraiser. Except as specifically stated, data relative to size and area were

taken from sources considered reliable, and no encroachment of real property improvements is considered to exist.

Information furnished by others is presumed to be reliable, and where so specified in the report, has been verified; however, no responsibility, whether legal or otherwise, is assumed for its accuracy, and cannot be guaranteed as being certain. All facts and data set forth in the report are true and accurate to the best of Valuation Specialists Company's knowledge and belief. No single item of information was completely relied upon to the exclusion of other information.

It should be specifically noted by any prospective mortgagee that the appraisal assumes that the property will be competently managed, leased, and maintained by financially sound owners over the expected period of ownership. This appraisal engagement does not entail an evaluation of management's or owner's effectiveness, nor are we responsible for future marketing efforts and other management or ownership actions upon which actual results will depend.

No effort has been made to determine the impact of possible energy shortages or the effect on this project of future federal, state or local legislation, including any environmental or ecological matters or interpretations thereof.

The date of the appraisal to which the value estimate conclusions apply is set forth in the letter of transmittal and within the body of the report. The value is based on the purchasing power of the United States dollar as of that date.

Neither the report nor any portions thereof, especially any conclusions as to value, the identity of the appraiser, or Valuation Specialists Company, shall be disseminated to the public through public relations media, news media, sales media or any other public means of communications without the prior written consent and approval of Valuation Specialists Company

Unless otherwise noted, Valuation Specialists Company assumes that there will be no changes in tax regulations.

No significant change is assumed in the supply and demand patterns indicated in the report. The appraisal assumes market conditions observed as of the current date of our market research stated in the letter of transmittal. These market conditions are believed to be correct; however, the appraisers assume no liability should market conditions materially change because of unusual or unforeseen circumstances.

The report and the final estimate of value and the prospective financial analyses included therein are intended solely for the information of the person or persons to whom they are addressed, solely for the purposes stated and should not be relied upon for any other purpose. Any allocation of total price between land and the improvements as shown is invalidated if used separately or in conjunction with any other report.

A copy of this report and the working papers from which it was prepared will be kept in our files for eight years.

SUMMARY OF SALIENT FACTS AND CONCLUSIONS

GENERAL DATA

Effective Date of Value:	September 29, [Year]
Last Date of Inspection:	September 29, [Year]
Property Identification:	U.S. Sports Med Complex (ASMI) Building
Property Location:	1313 13th Street South Birmingham, Alabama
Interest Appraised:	Leased Fee Estate
Gross Building Area:	30,144 square feet

Net Rentable Area:	27,800 square feet
Subject Land Size:	44,616 square feet, or 1.0242 acres
Improvements Description:	Three-story, steel frame and concrete office building constructed in [Year].
Occupancy Percentage:	Floors 1 and 2 are occupied by U.S. Sports Med Complex

CONCLUSIONS

Cost Approach:	\$3,975,000
Direct Sales Comparison Approach:	\$3,475,000
Income Approach:	\$3,520,000
Final Value Estimate:	\$3,500,000

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INTRODUCTION

PROPERTY IDENTIFICATION

The subject of this appraisal is U.S. Sports Med Complex Building located at 1313 13th Street South in Birmingham, Alabama. The subject is a three-story building that is situated just east of the new WellHealth Hospital. The property is identified by Jefferson County as tax parcel number 29-0-1-3-008-11.001. The property has a parking lot on its south end, with parking spaces for 26 vehicles.

PURPOSE AND EFFECTIVE DATE OF THE APPRAISAL

The purpose of this appraisal is to estimate the market value of the real property identified above. The effective date of valuation is September 29, ____[Year], the date of our last inspection.

FUNCTION OF THE APPRAISAL

The report is to be used for internal financial valuation purposes. The owners are considering the sale of nine professional office buildings for the purpose of establishing a real estate investment trust (REIT). The subject property would be included in that sale.

SCOPE OF THE APPRAISAL

This appraisal engagement includes all three of the standard valuation approaches and is in conformity with the requirements of the Code of Professional Ethics and Standards of Professional Practice of the Appraisal Institute and Society of Real Estate Appraisers. The scope of our assignment included collecting, verifying and analyzing market and property data applicable to the three approaches and consistent with the property's highest and best use. The results of the three approaches are then reconciled into a final value conclusion considering the relevancy and quality of data presented in each of the approaches.

PROPERTY RIGHTS APPRAISED

The property right appraised herein is the Leased Fee Estate.

"Leased Fee Estate" is:

ownership held by the landlord with the right of use and occupancy conveyed by lease to others; the rights of lessor (the leased fee owner) and leased fee are specified by contract terms contained within the lease."

[The Appraisal of Real Estate, p. 123, 10th Ed., published by The Appraisal Institute].

DEFINITION OF VALUE

For the purpose of this valuation, "market value" is defined as follows:

"The most probable price which a property should bring in a competitive and open market under all conditions requisite to a fair sale, the buyer and seller each acting prudently and knowledgeably, and assuming the price is not affected by undue stimulus. Implicit in this definition is the consummation of a sale as of a specified date and the passing of title from seller to buyer under conditions whereby:

- Buyer and seller are typically motivated;
- Both parties are well informed or well advised, and acting in what they consider their own best interests;
- A reasonable time is allowed for exposure in the open market;
- Payment is made in terms of cash in U.S. dollars or in terms of financial arrangements comparable thereto; and
- The price represents the normal consideration for the property sold unaffected by special or creative financing or sales concessions granted by anyone associated with the sale."

[The Appraisal of Real Estate, p. 21, 10th Ed., published by The Appraisal Institute].

HISTORY OF THE PROPERTY

WellHealth Medical Center, Inc., acquired the assets of the South Highlands Hospital in November ____[Year] [Deed Book 3726/Page 014]. A new main hospital building and the Alabama Rehabilitation Center were constructed in ____[Year]. From ____[Year] through ____[Year], WellHealth Medical Center acquired 15 parcels containing 1.7525 acres east of the existing hospital, and assembled and rezoned 1.0242 acres for the construction of the U.S. Sports Med Complex (ASMI). The ASMI facility was constructed in late ____[Year] and early ____[Year]. The top floor of the facility is vacant, and the tenant finish work has not yet been completed on this space.

The subject professional building has reportedly not been marketed for sale and is not currently under an agreement of sale. No other deed transfers were noted in the last three years. A title search is recommended for official determination.

HISTORY AND NATURE OF THE BUSINESS ENVIRONMENT

United States Economic Performance and Outlook

The value of the business enterprise value is influenced by potential returns available from alternative investments. These return expectations are affected by economic conditions as they impact the ability of a business enterprise to generate a return on its invested capital. Perhaps the most important economic indicator affecting potential investor returns is the aggregate demand for goods and services. Aggregate demand is measured by a country's Gross Domestic Product (GDP), which is the sum of all domestic expenditures for consumption, government services, and net exports.

As of the valuation date, the United States economy is currently mired in a period of slow economic growth. Gross Domestic Product (GDP) increased at a 2.1 percent annual rate during ____[Year] after declining (1.2%) during ____[Year]. The GDP was 0.7 percent and 1.6 percent, respectively, for the first and second quarters of ____[Year], or an annualized rate of 1.1 percent.

The components of GDP indicate that the economic recovery is affecting many sectors of the economy. Personal consumption expenditures, which account for approximately two-thirds of GDP, rose only 1.3 percent during the first half of ____[Year]. Non-residential

Fixed Investment advanced 2.2 percent and Residential Fixed Investment grew 1.7 percent. Federal Government Purchases declined (0.6%) over the same period. Federal Government Purchases account for 7.2 percent of the total GDP, and this decline is limited to the rate of overall GDP growth.

The value of the business enterprise value is also affected by the current and expected levels of inflation and interest rates. Inflation creates uncertainty in the mind of investors as they attempt to estimate future investment returns. This uncertainty is incorporated into both the required return on equity and debt capital.

The economic downturn has resulted in sharply lower inflation. The Consumer Price Index (CPI) ended ____[Year] with a 3.0 percent increase compared to a 4.2 percent increase during ____[Year]. The CPI for ____[Year] is currently estimated at 3.3 percent. The GDP Deflator, a much broader price level index, ended ____[Year] with a 2.6 percent annual increase compared to a 4.0 percent increase during ____[Year]. The GDP Deflator is currently estimated at 2.5 percent for ____[Year].

The Federal Reserve Bank has adopted a relatively easier monetary policy as a result of the recession. Interest rates, as represented by long-term Treasury bond yields, declined approximately ten basis points compared to rates existing a year earlier. Long-term corporate bond rates have also decreased and the Federal Reserve's discount rate reductions

have prompted commercial banks to lower their prime lending rate to 6.0 percent. Selected monetary statistics are presented in the following table.

INTEREST RATES AND SELECTED STATISTICS

	JUNE 30, [Year]	JANUARY 2, [Year]
Federal Fund Rate	3.0%	3.9%
90-Day Treasury Bill Rate	3.1%	3.9%
30-Year Treasury Bond	6.9%	7.5%
Aaa Bond Yield	7.4%	8.2%
Prime Rate	6.0%	6.5%

Economic Outlook

According to Value Line's Quarterly Economic Review, dated June 30, ____ [Year], the economic recovery is now two years old, but shows much slower growth than normal for a mature recovery. Among factors cited by Value Line for contributing to the slow growth are "high debt, stagnant personal income, low consumer confidence and a troubling unemployment rate." Value Line's Quarterly Economic Review identified the following estimates for selected economic statistics from ____ [Year] to ____ [Year].

	[Year]	[Year]	[Year]
Real GDP	2.7%	3.2%	3.3%
Personal Consumption Expenditures	2.8%	2.7%	2.5%
Federal Government Purchases	(5.2%)	(3.0%)	(4.0%)
30-Year Treasury Bond Yields	7.1%	7.2%	7.2%
Price Rate	6.0%	6.3%	6.7%
Consumer Price Index	3.5%	3.5%	3.6%

MARKET DATA--METROPOLITAN BIRMINGHAM

Birmingham is recognized as a leading financial, transportation, communication, manufacturing, healthcare and distribution center for the southeast United States. The region's central location within the state of Alabama has been a major factor in its economic success.

The Birmingham Metropolitan Statistical Area (MSA) consists of five counties with an estimated ____ [Year] population of 917,100. This ranks the metropolitan area as the 46th largest in the county. The larger 16-county primary market area contains a population of 1,341,500. A map of the Birmingham MSA is shown in the Exhibit Section of this report.

Trends in population, housing, employment and income are contributing social and economic forces that impact property values. Each of these elements is discussed separately.

POPULATION

Historical data and growth projections reflect the economic climate of an area and have both a direct and indirect impact on property values. Table 1 shows the county population totals by decade. Table 1 also shows the annual percentage increases in population for the individual counties in the Birmingham MSA.

The fastest annual population growth in the Birmingham MSA occurred in the decade of the ____ [Year]. The rate of growth in the ____ [Year], however, was only 1.13 percent per year, compared to 2.0 percent to 3.0 percent per year for many other large Southeast US metropolitan cities during the decade. The City of Birmingham, in Jefferson County, and Walker County experienced population declines during the most recent decade.

TABLE 1 POPULATION BY COUNTY

COUNTY	[Year] CENSUS	[Year] CENSUS	[Year] CENSUS
Blount	27,956	28,555	28,945
Jefferson	26,853	36,459	39,248
City of Birmingham*	644,991	671,392	651,525
Saint Claire	300,991	286,799	265,968
Shelby	27,956	41,205	50,009
Walker	56,382	68,660	67,670
TOTAL MSA	794,083	884,014	907,810

* City of Birmingham included in Jefferson County totals.

AVERAGE PERCENTAGE INCREASE

COUNTY	[Year]s	[Year]s	[Year]s
Blount	3.58%	0.79%	0.37%
Jefferson	0.41%	-0.30%	0.25%
Saint Claire	4.74%	2.14%	1.25%
Shelby	7.43%	4.99%	3.25%
Walker	2.21%	-0.14%	0.25%
TOTAL MSA	1.13%	0.27%	0.5%

Jefferson County, excluding the City of Birmingham, grew 1.18 percent per year in population during the ____ [Year], but experienced little growth during the ____ [Year]. The estimated population growth rate so far in the ____ [Year] is still slow, but faster than experienced in the ____ [Year].

HOUSING

The growth in housing in the Birmingham MSA was also slow but stable during the ____ [Year]. As was the case in other cities during the decade, much of the new housing occurred due to a decline in the average household size. In the Birmingham MSA, there were 3.01 persons per household in ____ [Year], compared to 2.41 persons per household in

_____[Year].

So far in the _____[Year], single-family housing sales have been brisk, with record sales in _____[Year] and thus far in _____[Year]. The area ranks 48th in new homes built in _____[Year], with 3,510 new homes the first half of _____[Year]. New apartment construction totaled over 6,000 units from _____[Year] through _____[Year], or an average of 1,545 per year. New multifamily units only totaled 40 in _____[Year] and 140 for the first six months of _____[Year]. Most of the new apartment construction has been concentrated south of the City of Birmingham along the U.S. Highway 280 and U.S. Highway 31 corridors. Looking forward, the average household size is not expected to continue to decline indefinitely. The growth in housing, therefore, should equal the population growth plus the replacement of obsolete housing.

EMPLOYMENT

In the _____[Year], the average annual growth in employment in the MSA was 3,520, compared to 8,290 per year during the _____[Year]. So far, in the _____[Year], the region is averaging 3,233 new jobs each year. The unemployment rate at the end of _____[Year] was 6.1 percent, compared to 7.3 percent and 7.4 percent for the state of Alabama and the U.S., respectively.

Table 2 shows the diversity in employment in the Birmingham MSA.

TABLE 2 EMPLOYMENT BY SECTOR

SECTOR	PERCENTAGE OF TOTAL LABOR DOLLARS	PERCENTAGE OF TOTAL ESTABLISHMENTS
Health Services	11.7%	6.5%
Other Services	14.0%	26.5%
Manufacturing	15.7%	5.7%
Construction	12.0%	8.8%
Transp., Comm. & Utilities	13.8%	3.6%
Wholesale Trade	10.2%	9.5%
Retail Trade	9.8%	25.2%
Finance, Insurance, & Real Estate	9.1%	9.2%
Mining & Agricultural	3.5%	1.4%
Miscellaneous	0.2%	3.6%
REGION	100.0%	100.0%

Source: Birmingham Chamber of Commerce

In _____[Year], manufacturing accounted for 28.3 percent of the employment in the MSA. By _____[Year], manufacturing only accounted for 13.1 percent of the area's employment. The manufacturing jobs have been replaced with service jobs. The service sector accounts for 25.4 percent of all jobs in _____[Year], versus 14.3 percent in _____[Year].

As of April _____[Year], the largest employers in the Birmingham MSA are as follows:

University of Alabama	15,696
U.S. Government	9,501
South Central Bell	7,450
State of Alabama	6,304
Birmingham City Schools	4,733
Alabama Power Company	4,611

INCOME

Jefferson County and the Birmingham MSA are very representative of the average per capita income and average household income in the United States. Table 3 below shows the area's income averages compared to the entire U.S.

TABLE 3

COUNTY	AVERAGE PER CAPITA	PERCENT OF U.S. AVERAGE	AVERAGE HOUSEHOLD INCOME	PERCENT OF U.S. AVER- AGE
Blount	\$13,135	70%	\$27,219	77%
Jefferson	18,624	100%	34,235	97%
Saint Claire	13,056	70%	26,750	76%
Shelby	15,935	85%	44,813	115%
Walker	14,556	78%	26,585	75%
MSA	17,479	94%	34,315	100%

Jefferson County has approximately the same per capita income and household income as the national average.

In summary, metropolitan Birmingham has experienced a slow but stable growth rate in recent years. Its economic base is diverse. National trends of a lower manufacturing work force and lower household size have also been the experience in Birmingham.

DESCRIPTIVE DATA

NEIGHBORHOOD ANALYSIS

The subject neighborhood is identified as the "Southside" area of Birmingham. This area is just south of the Central Business District (CBD) of Birmingham and east of the Red Mountain Expressway. This neighborhood is bounded on the north by the University of Alabama at Birmingham (UAB), on the east by the Red Mountain Expressway (U.S. Highway 31), on the south by Red Mountain with the famous Vulcan Statue, and on the west by Interstate 65. A map of the neighborhood is located in the Exhibit Section.

The Southside includes many of the city's old restored homes. The Highland/Five-Points area has undergone considerable renovation, and is becoming a restaurant and entertainment center. The subject medical office building,

which is part of the WellHealth Medical Center, is located one-quarter-mile west of the Highland/Five-Points area, and just north of Red Mountain. The upscale residential communities of Homewood and Mountain Brook are located just south and east of the Southside. The property is situated at 1313 13th Street South. The block bounded by 13th Place South, 12th Avenue South and 13th Street South contains the subject building. East and south of the property are primarily older residential areas. The WellHealth Medical Center and the WellHealth Professional Condominium Building are situated to the west of the property. Some homes have been converted to commercial uses around the hospital. A few neighboring parcels have been redeveloped with small apartment buildings, including the site just south of the property.

North of the WellHealth Medical Center is UAB, which is reportedly now the second largest university in Alabama. The university has been growing rapidly and has absorbed most of the land uses in a six by fifteen block area. The UAB Medical Center is considered by some to be in the same class as the Mayo Clinic in some medical research fields.

In summary, the neighborhood is an older residential area that is undergoing renovation and restoration. Development in the area is being driven primarily by hospital growth which includes the subject WellHealth Medical Center, the UAB Medical Center and St. Vincent Medical Center. Although medical service is the focus of new development, new retail, restaurant and residential development is also active in the area.

ZONING

The subject property is zoned "COI, Conditional Office and Institutional District," by the City of Birmingham. According to the City zoning requirements, the office and institutional district provides "for the orderly arrangement of institutional, clerical and administrative space". Permitted uses include public, semi-private or private office; public or semi-private, religious, educational or charitable institutions; and, other similar uses consistent with this zoning code's purpose and surrounding uses. This zoning shall not include properties with industrial characteristics, communal living facilities or correctional institutions.

The subject's "conditional" zoning provided for the specific medical services property that was constructed on the site. The owners of the building were reportedly granted setback and parking variances prior to the construction of the building. Since the site plan was approved prior to construction, and the occupancy permit received after construction, it is assumed that the property conforms to all the required conditions of zoning. The zoning variance may have provided for an easement with the hospital for additional parking spaces on the north side of the property. A letter of zoning compliance from the City of Birmingham is recommended for an official determination regarding any zoning conformity issues.

REAL ESTATE TAXES AND ASSESSMENTS

The subject property is situated in the City of Birmingham, and subject to the taxing authority of the City and Jefferson County. Commercial properties in the City and County are assessed at 20 percent of tax-appraised value for tax purposes. The subject's tax-appraised values and assessed values are summarized as follows:

	TAX APPRAISAL MARKET VALUE	ASSESSMENT VALUES
Land	192,000	\$ 38,400
Improvements	\$2,147,980	429,597
Total	\$2,339,980	\$467,996

The ____[Year] millage rate is \$69.50 per \$1,000 of assessed value. The ____[Year] taxes are calculated as follows:

$$\$467,996/\$1,000 \times \$69.50 = \$32,526$$

SITE ANALYSIS

The subject site is rectangularly-shaped with frontage of 240 feet on the east side of 13th Street South and 240 feet along the west side of 13th Place South. The subject site is 185.9 feet deep between the two streets. It contains 44,616 square feet, or 1.0242 acres. A survey showing the site containing 48,001 square feet is included in the Exhibit Section. The subject site is this survey site excluding 3,385 square feet that is now a hospital parking lot on the north side of the building. This survey is the subject property, excluding 3,385 square feet that is now a hospital parking lot on the north side of the building.

A legal description of the 48,001 square foot site was provided to the appraisers and is included in the Exhibit Section. A current survey and legal description of the subject 44,616 square feet was not available to the appraisers at the time of this report. We reserve the right to modify our report if the actual acreage is found to vary significantly from the 44,616 square feet.

The topography of the site slopes slightly downward from the parking lot on its south end to its north end adjoining the hospital parking lot. The front and main entrance to the building is on the first or ground floor. Entrance to the building from the south end parking lot is on the second floor of the building. The subject building is located on a hill and does not contain any flood plain.

Utilities serving the site include water, sewer, telephone, gas and electricity. Police services and fire protection are located in the neighborhood.

Other site improvements consists of general landscaping, asphalt paving, concrete paving and curbing, some shrubs and general signage. The parking lot to the north of the building contains 26 parking spaces, including two handicap spaces. We are not aware of any detrimental easements or encroachments encumbering the site. Further, we assume that the subject site is not encumbered with detrimental easements or encroachments. A copy of a Jefferson County tax plat map is included in the Exhibit Section.

To our knowledge, no environmental study has been conducted on the subject site. As appraisers, we are not qualified to detect hazardous materials. Consequently, our report assumes that there are no environmentally hazardous materials in the site or building that would adversely affect the subject property's value.

BUILDING AND SITE IMPROVEMENTS

The ASMI Building was constructed in ____[Year]. It contains 30,144 gross square feet and 27,800 leasable square feet on three floors. The rentable area excludes the mechanical rooms and vertical penetrations (stairwells, elevator shafts). The building area by floor is shown on floor plans included in the Exhibit Section of this report.

The building is a three-story, reinforced concrete and steel structure building, with a dryvit and brick veneer exterior. The entire building is sprinklered. The building has a metal deck roof structure, with a waterproof membrane roof and large-stone gravel covering. Ceiling heights are approximately nine and one-half feet on the first floor and nine feet on the second and third floors. Ceiling finishes consists of acoustical ceiling tiles and recessed fluorescent lighting and cone directional lights. The interior walls are wall paper on gypsum board over metal studs.

Air conditioning is supplied via Trane packaged units on each floor. A gas-fired Teledyne boiler provides heated air to the building. A natural gas emergency generator is located in the back of the building. The second floor of the building contains a computer room with raised floors.

The interior floors are mostly carpeted, with some vinyl and ceramic tile in the lab and bathroom areas. Windows and doors are metal framed, and interior doors are solid-core wood. The first floor contains the lobby, office and patient rooms, a laboratory area and a two-story gymnasium or rehab area. The second floor contains a library, a conference room, offices, a staff lounge and a television studio.

A detail description of the building and site improvements are included in the Exhibit Section of this report.

CONDITION OF IMPROVEMENTS AND OBSOLESCENCE

The building is new and in good condition. There is no deferred maintenance, functional or economic obsolescence. The top floor of the building contains 3,091 gross square feet and 2,607 net leasable square feet. The tenant finish work has not yet been completed on this space, and the floor is currently vacant. Since the master lease provides for WellHealth guaranteeing income on this space, this report assumes that WellHealth will complete the tenant finish work prior to prospective sale to the REIT.

HIGHEST AND BEST USE

The Appraisal Institute defines "highest and best use" as follows:

"The reasonably probable and legal use of vacant land or an improved property, which is physically possible, appropriately supported, financially feasible, and that results in the highest value"

[The Appraisal of Real Estate, Page 45, 10th Edition published by The Appraisal Institute].

The four categories of highest and best use analysis are:

1. Physically Possible--Uses which are physically possible for the site and improvements being analyzed.
2. Legally Permissible--Uses permitted by zoning and deed restrictions applicable to the site and improvements being analyzed.
3. Financially Feasible--This step identifies if the physically possible and legally permitted alternatives produce a net income equal to or greater than the amount needed to satisfy operating expenses.
4. Maximally Productive--This step clarifies which of the financially feasible alternatives provides the highest value consistent with the rate of return warranted by the market for a particular use.

There are two types of highest and best use: THE HIGHEST AND BEST USE OF LAND AS VACANT and THE HIGHEST AND BEST USE OF A PROPERTY AS IMPROVED. Both types are discussed as follows using the four categories of highest and best use.

As Vacant

The purpose of this analysis, given the site is vacant or can easily be made vacant, is to determine if something should be constructed on the site, and, if so, what should be constructed on the site.

PHYSICALLY POSSIBLE

The size and shape of the subject site is adequate for the development of a number of alternative uses including small residential, commercial, office/institutional, industrial and special-purpose properties. The site possesses good access and visibility. The size of the parcel would preclude any large developments.

LEGALLY PERMISSIBLE

As stated earlier in the Zoning section of this report, the property is currently zoned "COI, Conditional Office and Institutional." Permitted uses in this general zoning category vary widely. Potential legal uses would include some retail and restaurants, office/institutional, hotels, hospitals and other medically-oriented uses. The subject's conditional zoning provided for the construction of the subject medical facility, with variances for setbacks and parking received prior to construction.

Surrounding uses include the hospital, other professional office uses, some apartments and some old single-family residential properties. These use patterns would likely preclude industrial, retail or future single-family development on the site.

FINANCIALLY FEASIBLE

Having established that the site is physically suited for and legally restricted to office/institutional development, the next consideration is economic feasibility. Financially feasible uses for the site, if vacant, are those uses that would generate an economic return to the land. New hospital related development on the west side of the building indicates that new development is financially feasible. WellHealth Medical Center, UAB Medical Center and St. Vincent Medical Center have all recently built new medical office facilities.

MAXIMALLY PRODUCTIVE

The maximally productive use is a financially feasible use that would produce the greatest land value. Office/institutional use is physically possible and legally permissible, and new development is financially feasible. Based on this analysis, the current highest and best use of the land, if vacant, would be for office/institutional development based on the growth needs of the hospital.

As Improved

The subject site is currently improved with a 27,800 rentable square foot professional building and associated site improvements. The purpose of this discussion is to determine whether to leave the improvements as they are, to modify the improvements or to remove the improvements.

PHYSICALLY POSSIBLE

It would obviously be physically possible to leave the improvements as they are, to demolish the existing improvements and replace them with new improvements, or to modify existing improvements. The improvements were recently constructed and are considered functional.

LEGALLY PERMISSIBLE

The building, as improved, is assumed to be a legal conforming use, since the property was recently constructed and received an occupancy permit. Under the current zoning, the property could remain as it is, be torn down or renovated.

FINANCIALLY FEASIBLE

The highest and best use of the land, if vacant, was to develop with an office/ institutional use based on the adjacent hospital's growth needs. Of the physically possible and legally permissible changes that could be made to the existing facility, demolishing the building would significantly reduce the current asset value, and would not be financially feasible. The only financially feasible use of the existing improvements is its current use as medical office space.

MAXIMALLY PRODUCTIVE

The maximally productive use for the existing property is the financially feasible use that produces the greatest property value. The existing use was the only financially feasible use. The highest and best use, as improved, is the property's current use.

VALUATION SECTION

VALUATION METHODOLOGY

There are three principal methods to estimate the market value of the assets of the subject property. These are summarized as follows:

COST APPROACH: This method is based on the principle of substitution, whereby no investor would prudently pay more for a property than it costs to buy land and build a comparable new building. The market value is estimated by calculating the replacement costs of a new building and subtracting all forms of depreciation and obsolescence present in the existing facility. This provides a depreciated value of the subject improvements if replaced new. The estimate of the current value of the subject land is then added to provide a market value of the property.

DIRECT SALES COMPARISON APPROACH: The principle of substitution also says that market value can be estimated as the cost of acquiring an equally desirable substitute property, assuming no costly delay in making the substitution. This method analyses the sales of other comparable improved properties. Since two properties are rarely identical, the necessary adjustments for differences in quality, location, size, services and market appeal are a function of appraisal experience and judgment.

INCOME APPROACH: This method is based on the principle of anticipation, which recognizes that underlying value of the subject property can be estimated by its cash flow or stream of earnings. This approach simulates the future

earnings for the property, and converts those earnings into a present market value estimate.

Consideration has been given to each of the three methods to arrive at a final opinion of value. The application of each approach to value is further discussed in the appropriate sections which follow.

COST APPROACH

In the Cost Approach, the subject property is valued based upon the market value of the land, as if vacant, to which is added the depreciated replacement cost of the improvements. The replacement cost new of the improvements is adjusted for accrued depreciation resulting from physical deterioration, functional obsolescence, and external (or economic) obsolescence.

The sum of the market value of the land and the depreciated replacement cost of the improvements and equipment is the estimated market value via the Cost Approach.

- Land Valuation
- Land valuation, assuming the site is vacant, is based upon the following steps:
 - A comparison with recent sales and/or asking prices for similar land.
 - Interviews with reliable real estate brokers and other informed sources who are familiar with local real estate activity.
 - Our experience in estimating land values.

The following sales are located within the general market area of the subject property and are considered to be representative of market activity and conditions as of the valuation date. Unless otherwise indicated, the sales involved arms-length transactions that conveyed a fee simple interest, and only real property was included in the transactions.

Land Comparable Number 1

Parcel Number:	29,-01-3-008-7
Location:	East side of 13[th] Street South across from the new Alabama Sports Medicine and Orthopedic Center and the new WellHealth Hospital.
Size:	7,000 square feet
Sale Date:	April 29, [Year]
Deed Book/Page:	4544/195
Grantor:	Randall J. Westbrook
Grantee:	WellHealth Medical Center, Inc.
Sale Price:	\$135,000
Price Per Square Foot:	\$19.29
Terms of Sale:	All Cash
Shape:	Rectangular
Zoning:	Office/Institutional
Utilities:	All utilities are available.

Comments: This parcel was part of 15 parcels assembled from [Year]-[Year] for the construction of the Sports Medicine Institute and additional parking. The average price for the 15 parcels was \$18.16 per square foot. The Grantor in this transaction is an employee of the Grantee that acquired the property on July 10, [Year], from Dwain Pitts, et al. for the same price [Deed Book 4313/Page 978].

Land Comparable Number 2

Parcel Number: 29-01-3-010-4
Location: West side of 12[th] Street South adjacent to an existing parking lot across from the old entrance to the WellHealth Medical Center.
Size: 8.160 square feet
Sale Date: April 29, [Year]
Deed Book/Page: 4544/197
Grantor: Vicki E. Owens
Grantee: WellHealth Medical Center, Inc.
Sale Price: \$66,000
Price Per Square Foot: \$8.09
Terms of Sale: All Cash
Shape: Rectangular
Utilities: All utilities are available.
Comments: This parcel was purchased for future parking needs by the hospital. The hospital purchased the property based solely on land value and considered the forty year old house on the site to be only a temporary use until additional parking is needed. The Grantor in this transaction is an employee of the Grantee that acquired the property on October 30, [Year] FROM Robert Vests for the same price [Deed Book 4410/Page 819].

Land Comparable Number 3

Parcel Number: 29-01-3-005-3
Location: Northeast corner of 12[th] Street South and 11[th] Avenue South, one block north of the WellHealth Medical Center.
Size: 45,600 square feet
Sale Date: November 13, [Year]
Deed Book/Page: 3972/250
Grantor: Eleventh Avenue United Methodist Church
Grantee: WellHealth Medical Center, Inc.

Sale Price: \$1,500,000
Price Per Square Foot: \$32.89
Terms of Sale: All Cash
Shape: Rectangular
Zoning: Office/Institutional
Utilities: All utilities are available.
Comments: This parcel was a church before being sold to Well-Health. Part of the improvements have been removed and the site is used as overflow parking by the hospital. The remainder of the building is scheduled to be removed in the near future.

Land Comparable Number 4

Location: Northeaster corner of 17[th] Street and 11[th] Avenue approximately one-quarter mile south of the University of Alabama Medical Center and one-half mile northeast of the subject.
Size: 16,000 square feet
Sale Date: January 2, [Year]
Deed Book/Page: 3951/388
Grantor: Jo Anne Jackson
Grantee: Board of Trustees of University of Alabama
Sale Price: \$240,000
Price Per Square Foot: \$15.00
Terms of Sale: All Cash
Shape: Rectangular
Zoning: Office/Institutional
Utilities: All utilities are available.
Comments: This parcel contains an old doctor's building that is boarded up and no longer used. The building does not contribute any value.

Land Comparable Number 5--Current Listing

Location: Northwest corner of 19[th] Street and 5[th] Avenue South, just north of the University of Alabama Medical Center (UAB).
Size: 56,000 square feet
Owner: Mr. Hill
Asking Price: \$3,080,000
Price Per Square Foot: \$55.00
Shape: Rectangular
Zoning: M-1 Light Industrial, but permitted for the construction of an 11-story, 220,000 square foot office build-

ing.

Utilities: All utilities are available.

Comments: This vacant parcel is across from UAB and a high rise apartment building that is currently under construction. The owner has been offered approximately \$35 per foot.

A summary of the land sales and listing is shown as follows:

SUMMARY OF LAND COMPARABLES

LAND COMP	LOCATION	SALE DATE	SIZE (SF)	PRICE PER SF
1	13[th] Street South	04/93	7,000	\$19.29
2	12[th] Street South	04/93	8,160	8.09
3	12[th] Street South	11/90	45,600	32.89
4	17[th] Street	01/90	16,000	15.00
5	19[th] Street	Listing	56,000	55.00
SUBJECT	13[TH] AVENUE SOUTH		44,616	

Discussion of Land Comparables

LAND COMPARABLE 1 was one parcel of 15 that were assembled by the hospital around what is now the U.S. Sports Med Complex. Downward adjustments are indicated because of the more level topography of this comparable parcel and because of its smaller size. The adjustments are shown on a Land Sale Adjustment Grid at the end of this discussion. The adjusted price per square foot of this comparable is \$16.40 per square foot.

LAND COMPARABLE 2 was a parcel containing an old house. The site was purchased by the hospital for future parking needs of the hospital. The improvements were not considered to have any significant value. A large upward adjustment is indicated because of the inferior location of this parcel compared to the subject that is adjacent to the hospital. Downward adjustments are indicated because of the comparable's level topography and its smaller size. The adjusted price per square foot of this comparable is \$9.30.

LAND COMPARABLE 3 was a 45,600 square foot parcel north of the hospital that contained a Methodist Church. The church has relocated and the land is being used for hospital overflow parking. The remaining building is reportedly scheduled to be removed in the near future. Downward adjustments are indicated because of the declining economy since this purchase and because of the level topography of this site. The adjusted price for this comparable is \$28.12 per square foot.

LAND COMPARABLE 4 is a parcel that UAB purchased for future parking or development. It is located one-quarter-mile south of the UAB campus. An upward adjustment is indicated due to the inferior location of this comparable. A downward adjustment is indicated for size. The adjusted price per square foot of this comparable is \$14.85.

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LAND COMPARABLE 5 is the current listing of a site just north of UAB Medical Center. This site is zoned for high rise development. A significant downward adjustment is indicated because this is a listing rather than an actual sale. Downward adjustments are also indicated for location, topography and due to the superior zoning density of this site. The adjusted price per square foot of this comparable is \$32.73 per square foot. The adjusted land prices range from \$9.30 per square foot to \$32.73 per square foot, with the prices of the most comparable sites being in the middle of this range. Based on our analysis of the subject versus these comparables, it is our opinion that a land price of \$18.25 per square is representative of the subject site. The average price per square foot for the land assembled around what is now the U.S. Sports Med Complex was \$18.16 per square foot. The subject land value is estimated as follows:

$$\begin{array}{rclclcl}
 \$44,616 \text{ SF} & & \times & & \$18.25/\text{SF} & & = & & \$814,242 \\
 & & & & \text{Rounded to:} & & & & \$815,000
 \end{array}$$

LAND SALE ADJUSTMENT GRID U.S. Sports Med Complex Birmingham, Alabama

Element	Subject	Land Comp #1	Land Comp #2	Land Comp #3	Land Comp #4	Land Comp #5
Sale Price/SF		\$19.29	\$8.09	\$15.00	\$55.00	\$55.00
Property Rights Adjust- ment	Fee Simple	Same	Same	Same	Same	Same
Adjusted Price/SF		\$19.29	\$8.09	\$32.89	\$15.00	\$55.00
Financing Adjustment		Cash	Cash	Cash	Cash	Cash
Adjusted Price/SF		\$19.29	\$8.09	\$32.89	\$15.00	\$55.00
Condition of Sale Adjustment		None	None	None	None	None
Adjusted Price/SF		\$19.29	\$8.09	\$32.89	\$15.00	\$55.00
Market/Time Adjustment	Effective Sep-93	0%	0%	-10%	-10%	0%
Adjusted Price/SF		\$19.29	\$8.09	\$29.60	\$13.50	\$46.75
Other Adjustments:						
Location Adjustment		0%	30%	0%	20%	-15%
Topography Adjustment		-5%	-5%	-5%	0%	-5%
Size Adjustment	44.616	-10%	-10%	0%	-10%	0%
Zoning Adjustment		0%	0%	0%	0%	-10%
Net Other Adjustments		-15%	15%	-5%	10%	-30%
FINAL ADJUSTED PRICE PER SF		\$16.40	\$9.30	\$28.12	\$14.85	\$32.73

Building and Site Improvements

The building and site improvements have been valued on the basis of replacement cost less accumulated depreciation. The cost new was estimated via the segregated cost method, with cost factors obtained from Marshall Valuation Services, Inc., a national cost manual. The unit cost includes both direct and indirect costs, with adjustments made for special building features, construction quality, time and location. The composite unit cost has then been applied to the gross square footage of the building to derive the replacement cost new. The total project replacement costs for the subject building are estimated to be \$3,176,887 using Marshall Valuation Services. A schedule at the end of this section shows the estimated replacement cost by category for the subject building plus estimates of all forms of depreciation.

The total accumulated depreciation of a structure represents the loss in value due to physical deterioration, functional obsolescence, or external (or economic) obsolescence. Economic life of a structure or improvement is the period over which they contribute to the value of the property. These terms are defined as follows:

Physical Deterioration: The loss in value due to deterioration or ordinary wear and tear, i.e., natural forces taking their toll of the improvements. This begins at the time the building is completed and continues throughout its physical life.

Functional Obsolescence: The loss in value due to poor plan, functional inadequacy, or super-adequacy due to size, style, design, or other items. This form of depreciation occurs in both curable or incurable forms.

External (or Economic) Obsolescence: The loss in value caused by forces outside the property itself. It can take many forms such as excessive noise levels, traffic congestion, abnormally high crime rates, or any other factors which affect a property's ability to produce an economic income, thereby causing a decline in desirability. Other forms of economic obsolescence may include governmental restrictions, excessive taxes, or economic trends.

Economic Life: The economic life of a good quality medical office buildings is typically 40 to 50 years. For the subject Class B building, we have assumed an economic life of 45 years.

Remaining Economic Life: Remaining economic life can be defined as the number of years remaining in the economic life of the structure or structural components as of the date of the appraisal.

Marshall Valuation Services, Inc., and the actual experience of other buildings in the market, were used to estimate the overall economic life of the improvements. The assignment of economic lives assumed that, except for the building shell and foundation, building components would be replaced periodically over the life of the building.

Physical Depreciation

The amount of physical depreciation and obsolescence in the subject building is judged normal for a building of this age. Observation of the subject property indicated that the structure and related component parts have been adequately maintained through a continuous maintenance service program.

The subject property was constructed in early ____ [Year], and it is in excellent to good condition. After taking into consideration all significant physical factors affecting the subject property, it is judged that the subject has an effective age equal to its actual age of one and one-half years. The remaining useful life is estimated to be 43.5 years. This translates into a physical depreciation estimate of 3.3 percent (1.5 years divided by 45 years). The amount of depreciation attributable to the property has been estimated on a straight-line basis, which is founded on the assumption that depreciation of a property occurs equally throughout its economic life.

The elements which make up site improvements have shorter economic lives than the building. We have estimated the aggregate useful lives of these items to be 15 years with an effective age of one and one-half years and a remaining useful life of 13.5 years. Therefore, the depreciation rate attributable to the site improvements on a straight-line basis is estimated to be approximately 10.0 percent. Entrepreneurial profit and miscellaneous replacement costs are depreciated at a blended depreciate rate.

We also requested the actual construction costs for the property, since it was completed in early ____[Year]. The total costs of the improvements was reported by WellHealth to be \$2,973,780, including architectural and engineering expenses but excluding any profit. The detailed cost information was not audited by the appraisers, but is assumed to be correct. The total replacements costs via the Marshall Valuation Service, excluding the entrepreneurial profit, was approximately \$200,000 higher than the WellHealth costs.

The actual development costs of \$2,973,780 for the subject property is considered more reliable than the Marshall numbers because of the special-purpose nature of the subject building. We, however, believe that an entrepreneurial profit of 10.0 percent is normal and customary in the market to encourage new development. Including the entrepreneurial profit of 10.0 percent, or \$297,378, the total building replacement costs are \$3,271,158.

Total depreciation is estimated at \$109,509, based on 3.3 percent depreciation of building replacement costs and 10.0 percent depreciation of site improvements. The total depreciated value of the subject replacement costs is \$3,271,158 less \$109,509, or \$3,161,649. The \$815,000 land value is added to the depreciated replacement costs, for a final Cost Approach value of \$3,976,649.

Cost Approach Conclusion

Based on the investigation as previously defined, the market value of the subject property by the Cost Approach, as of September 29, ____[Year], is rounded to:

\$3,975,000

SUMMARY OF REPLACEMENT COSTS NEW 1313 13th STREET SOUTH

MARSHALL SERVICE

Site Preparation	\$ 36,440
Foundation	\$ 66,618
Frame	\$ 282,449
Exterior Walls	\$ 201,710
Floors	\$ 166,297
Roof	\$ 104,300
Roof Cover	\$ 36,654
Part. & Bit. in	\$ 609,512
Ceilings	\$ 170,916
Floor Coverings	\$ 98,420
Plumbing	\$ 189,605

HVAC			\$ 378,910
Electrical			\$ 203,773
Other Features		Owner's Costs	\$ 538,433
Total Building Replacement Costs			
		\$ 2,973,780	\$ 3,176,887
Site Improvement Replacement Costs			\$ 92,850
Total Replacement Cost			
		\$ 2,973,780	\$ 3,176,887
Architect's Fees Plans and Specs (Of Building Costs)	4.00%		
			123,361
Architect's Fees, Supervision (Of Building Costs)	1.50%		\$ 46,261
Entrepreneurial Overhead, Profit and other Miscellaneous Fees (Of Total Replacement Costs)	10.00%	\$ 297,378	\$ 317,689
Total Other Costs			
			\$ 487,311
Total Project Replacement Cost		\$ 3,271,158	\$ 3,664,198
Accrued Depreciation:			
Building Replacement Costs	3.3%	\$ 99,027	
	Straight Line 1.5/45[th]		
Site Improvement Costs	10.0% 1.5 Years/15 Years	\$ 0	
Other Costs 3.5% Blended Rate		\$ 10,482	
Total Physical Depreciation		\$ 109,509	
Less Total Depreciation (All Forms)		(\$ 109,509)	
Depreciated Value of Replacement Costs (Based on Actual Costs)		\$ 3,161,649	
Plus Land Value		\$ 815,000	
DEPRECIATED COST		\$ 3,975,000	

APPROACH VALUE

ROUNDED \$ 3,975,000

DIRECT SALES COMPARISON APPROACH

The Direct Sales Comparison Approach is based upon the principle of substitution; that is, when a property is replaceable in the market, its value tends to be set at the cost of acquiring an equally desirable substitute property, assuming there is no costly delay in making the substitution. Since two properties are rarely identical, the necessary adjustments for differences in quality, location, size, services and market appeal are a function of appraisal experience and judgment.

The Direct Sales Comparison Approach gives consideration to actual sales of other similar properties with adjustments as previously stated. The sales prices are analyzed in common denominators and applied to the subject property in respective categories to be indicative of market value.

The unit of comparison used in this analysis is the price per square foot, which is the gross purchase price of the building divided by the net leasable area in the building. The following sales are considered to be representative of market activity and conditions as of the valuation date. Unless otherwise indicated, the sales involved arm's length transactions that conveyed a fee simple interest, and only real property was included in the transactions. Also, all purchase prices quoted in this report represent all cash sales unless seller financing is noted and the sale prices adjusted for cash equivalency.

In our analysis, we obtained details on four professional office building sales which have occurred over the past two years. The terms of the sale and significant data was verified to the extent possible by county deed records and with parties to the transaction. Information on these sales is shown on the following pages:

IMPROVED SALE NUMBER 1

GENERAL SALE DATA

Location:	1770 Industrial Court, Homewood, Jefferson County, Alabama Date of Sale: March 9, [Year]
Deed Book/Page:	4223/115
Grantor:	Brookwood Medical & Dental Group
Grantee:	Proxy Land Development Corporation
Sale Price:	\$850,000
Terms of Sale:	All Cash

PROPERTY DATA

Land Size:	92,200 square feet
Building Size:	7,808 square feet--gross 6,928 square feet--leasable
Year Built:	[Year]
Occupancy at Sale:	100%

STABILIZED OPERATING DATA

	Dollars	Per SF
Estimated Gross Income:	\$.....10 0,456 50	\$.....14.
Vacancy Allowance @ 5%:	\$.....5,0 23 3	\$.....0.7
Effective Gross Income:	\$.....95, 433 77	\$.....13.
Estimated Expenses @ \$4.00:	\$.....27, 712 0	\$.....4.0
Net Operating Income:	\$.....67, 721 7	\$.....9.7

MARKET VALUE INDICATORS

Sale Price Per Square Foot:	\$.....12 2.69
Stabilized Overall Rate:	8.0%
EGIM:	8.91

COMMENTS

The Grantor was an affiliate of WellHealth Medical Center. The hospital paid more than market value for the building, so the Grantee/physician would move his surgical practice to the WellHealth Medical Center. The location and building quality for this comparable are very inferior to the subject property.

IMPROVED SALE NUMBER 2

GENERAL SALE DATA

Location:	West side of 20th Street South at the address 908 20th Street South in Birmingham, Alabama
Date of Sale:	December 20, [Year]
Deed Book/Page:	4166/170
Grantor:	The Byrd Company, Inc.
Grantee:	Board of Trustees of the University of Alabama
Sale Price:	\$3,750,000
Terms of Sale:	All Cash

PROPERTY DATA

Land Size:	82,460 square feet

Building Size: 52,440 square feet--gross
44,574 square feet--leasable

Year Built: 1964

STABILIZED OPERATING DATA

	Dollars	Per SF
Estimated Gross Income:	\$.....62	\$.....14.
	4,036 00	
Vacancy Allowance @ 10%:	\$.....62,	\$.....1.4
	404 0	
Effective Gross Income:	\$.....56	\$.....12.
	1,632 60	
Estimated Expenses @ \$6.00/SF:	\$.....22	\$.....5.0
	2,870 0	
Net Operating Income:	\$.....33	\$.....7.6
	8,762 0	

MARKET VALUE INDICATORS

Sale Price Per Square Foot: \$.....84.
13

Stabilized Overall Rate: 9.0%

EGIM: 6.68

COMMENTS

This three-story building was purchased by the UAB Medical Center. A Medical Genetics Center now occupies the facility. The current land value near the UAB campus is estimated at 40% to 45% of the total purchase price.

IMPROVED SALE NUMBER 3

GENERAL SALE DATA

Location: 1260 Upper Hembree Road in Roswell, Fulton
County, Georgia

Date of Sale: November 20, [Year]

Deed Book/Page: 14752/1-8

Grantor: Upper Hembree Associates II, Ltd.

Grantee: Medical Plaza, Inc.

Sale Price: \$4,525,000

Terms of Sale: All Cash

PROPERTY DATA

Land Size: 1.65 acres (approximate)

Building Size: 32,500 square feet
 Year Built: [Year]
 Occupancy at Sale: 100%

STABILIZED OPERATING DATA

	Dollars	Per SF
Estimated Gross Income:	\$.....67 1,125 65	\$.....20.
Vacancy Allowance @ 5%:	\$.....33, 556 3	\$.....1.0
Effective Gross Income:	\$.....63 7,569 62	\$.....19.
Estimated Expenses @ \$6.00/SF:	\$.....17 8,750 0	\$.....5.5
Net Operating Income:	\$.....45 8,819 12	\$.....14.

MARKET VALUE INDICATORS

Sale Price Per Square Foot: \$.....13
9.23

Stabilized Overall Rate: 10.1%

EGIM: 7.10

COMMENTS

This property included three buildings containing 12,400 SF, 12,000 SF and 8,100 SF. The first two buildings were leased to North Fulton Hospital for seven years. The first 12,400 SF was leased for \$16.00/SF net, and the other 12,000 SF was leased for \$16.25/SF net. The tenants were responsible for all costs but structural maintenance and management.

* The rents were adjusted upward \$4.50/SF for gross comparison.

IMPROVED SALE NUMBER 4

GENERAL SALE DATA

Location: 38A Lenox Pointe, Atlanta, Fulton County,
Georgia

Date of Sale: August 26, [Year]

Deed Book/Page: 15703/336

Grantor: Cates Construction Company

Grantee: Dr. Laura J. Mills

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Sale Price: \$184,000
 Terms of Sale: Third-party financing had no impact on the purchase price
 PROPERTY DATA
 Building Size: 1,200 square feet
 Year Built: [Year]
 Occupancy at Sale: Vacant/New

STABILIZED OPERATING DATA

	Dollars	Per SF
Estimated Gross Income:	\$.....21,600 00	\$.....18.
Vacancy Allowance:	\$.....1,080 0	\$.....0.9
Effective Gross Income:	\$.....20,520 10	\$.....17.
Estimated Expenses @ \$14.50/SF:	\$.....5,400 0	\$.....4.5
Net Operating Income:	\$.....15,120 60	\$.....12.

MARKET VALUE INDICATORS

Sale Price Per Square Foot: \$.....153.23
 Stabilized Overall Rate: 8.2%
 EGIM: 8.97

COMMENTS

This is a two-story office building that was constructed specifically for a dental practice. The construction is wood frame with brick veneer siding. It is situated among the Lenox Pointe Office buildings at the intersection of Lenox Road and Buford Highway.

These four sales are summarized as follows:

		SUMMARY OF IMPROVED SALES		
SAL E NO	ADDRESS	RENTABLE (SQUARE FEET)	SALE PRICE	PRICE PER SQUARE FOOT
1	Independence Court Birmingham, Alabama	6.928	\$ 850,000	\$ 122.69

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2	20[th] Street South Birmingham, Alabama	44,574	\$	3,750,000	\$	84.13
3	1260 Upper Hembree	32,500	\$	4,525,000	\$	139.23
4	38A Lenox Pointe Atlanta, Georgia	1,200	\$	184,000	\$	153.33

The unadjusted prices of these comparables range from \$84.13 per square foot to \$153.33 per square foot. Each of the comparables will be discussed and adjusted for comparisons with the subject property. An Improved Sales Adjustment Matrix is shown at the end of this section.

SALE 1 is a Class C professional office building that is located near the Brookwood Medical Center. An affiliate of WellHealth Medical Center purchased this building to entice its physician/owner to move his practice to their facility. This transaction was reportedly at a market value price. However, a downward adjustment is still indicated because the building was not marketed as a vacant building due to this relationship. A downward adjustment to the price per square foot is indicated because of the smaller size of this comparable. The building is located at the end of a steep winding road, and has poor visibility. An upward adjustment is indicated due to this inferior location compared to the subject. Upward adjustments to this comparable are also indicated because of the subject's superior construction quality and because the building is new. The adjusted price per square foot of this comparable is \$130.36.

SALE 2 is the sale of a building purchased by UAB to use as a Medical Genetics Center. Upward adjustments are indicated because of the subject's superior location, and because of the older age of this comparable. An upward adjustment to the price per square foot of this comparable is also indicated because it is larger than the subject building. The adjusted price for this comparable is \$121.99 per square foot.

SALE 3 was the sale of a three-building professional office facility that is located approximately one-quarter-mile from the North Fulton Medical Center in Roswell, Georgia. A downward adjustment is indicated because 80 percent of this facility was net leased to the hospital. An upward adjustment is indicated because of the subject's slightly superior location. The adjusted price per square foot of this comparable is \$125.31.

SALE 4 was the August ____ [Year] sale of a small dental office building in Atlanta, Georgia. A large downward adjustment to the price per foot of this comparable is indicated because of the comparable's small size. Upward adjustments are indicated for location and for quality of improvements. The adjusted price for this comparable is \$145.66 per square foot.

The adjusted prices per square foot range from \$121.99 to \$145.66, with most of the adjusted sales prices in the lower end of this range. An adjusted price of \$125.00 per square foot is representative of the subject property. Based on this analysis, the market value of the subject property by the Direct Sales Comparison Approach, as of September 29, ____ [Year], the effective date of this report, is calculated as follows:

$$27,800 \text{ SF} \times \$125.00/\text{SF} = \$3,475,000$$

IMPROVED SALE ADJUSTMENT GRID

U.S. Sports Med Complex Birmingham Alabama

Element	Subject	Improved Sales #1	Improved Sale #2	Improved Sale #3	Improved Sale #4

Sale Price/SF		\$122.69	\$84.13	\$139.23	\$153.33
Property Rights Adjustment	Fee Simple	Same	Same	Same	Same
Adjusted Price/SF		\$122.69	\$84.13	\$139.23	\$153.33
Financing Adjustment	Cash	Cash	Cash	Cash	Cash
Adjusted Price/SF		\$122.69	\$84.13	\$139.23	\$153.33
Condition of Sale Adjustment		Relationship 15.0%	None	None	None
Adjusted Price/SF		\$104.29	\$84.13	\$139.23	\$153.33
Market/Time/Adjustment	Effective Sep - 93	0%	0%	-10%	-10%
Adjusted Price/SF		\$104.29	\$84.13	\$139.23	\$153.33
Other Adjustments:					
Location Adjustment		20%	20%	5%	10%
Age/Condition		10%	15%	0%	0%
Size Adjustment		-15%	10%	0%	-25%
Quality Adjustment		10%	0%	0%	10%
				Leasing	
Other Adjustment		0%	0%	-15%	0%
Net Other Adjustments		25%	45%	-10%	-5%
FINAL ADJUSTED PRICE PER SF		\$130.36	\$121.99	\$125.31	\$145.66

INCOME APPROACH

The Income Approach is based on the principle of anticipation, and has as its premise that value is represented by the present worth of expected future benefits. The price that an investor will pay for an income property usually depends on the anticipated income stream. The Income Approach represents an attempt to simulate the future cash flows for the property, and to quantify the future benefits in present dollars.

The subject property is one of nine professional office buildings that WellHealth is selling for the purpose of establishing a real estate investment trust (REIT). WellHealth Rehabilitation Corporation, the seller, will provide a net rental guarantee, in the form of a master lease. The REIT, as the new property owner, will receive the net rental master lease rate per square foot of rentable office area, regardless of the rental rates charged or received from the actual physician/tenants.

This master lease is a credit enhancement vehicle that will enable the REIT issuer to sell the REIT shares. It will also allow WellHealth leasing flexibility for the office space. WellHealth can lease office space to various physicians at different rates and terms, or they can use the office space for hospital purposes.

The appraisers received a draft of the form of master lease agreement, but the actual master lease agreement for each property are not yet available. For the purpose of our Income Approach, the gross income will be the master lease rate for each property times the rentable building area. We reserve the right to modify the Income Approach valuation if the actual master lease for each property differs significantly from the draft lease presented to us.

As discussed earlier, this report assumes that the tenant finish work on the top floor of this building will be completed prior to the prospective sale to the REIT.

The master lease rate for the subject property will be \$12.00 per square foot of net rentable area. The gross income for the subject property is calculated as follows:

$$27,800 \text{ SF} \times \$12.00/\text{SF} = \$333,600$$

The subject appraisal assumes 100 percent of the income is guaranteed through the master lease agreement. Since the leased fee interest is being appraised, there is no deduction for vacancy or credit loss.

Since the master lease provides for an income level to the REIT net of all operating expenses, the only out-of-pocket expenses to the REIT will be accounting, legal and internal administration or management expenses. These management expenses are estimated at 5.0 percent of effective gross income, or \$16,680, based on the management experience of other properties. The net operating income for the property is \$333,600 less \$16,680, or \$316,920.

The estimated direct capitalization rates, or overall rates (OARs), for the four improved sale comparables presented in the Direct Sales Comparison Approach Section of this report are summarized as follows:

Sale No.	Property Location	Sale Date	OAR (%)
1	Independence Court Birmingham, Alabama	March [Year]	8.0%
2	20th Street South Birmingham, Alabama	December [Year]	9.0%
3	Upper Hembree Roswell, Georgia	November [Year]	10.1%
4	Lenox Pointe Atlanta, Georgia	August [Year]	8.2%

The direct capitalization, or overall rates, for these comparables ranged from 8.0 percent to 10.1 percent.

Since the market net income per square foot for the subject property is estimated to be the master lease rate of \$12.00, a

capitalization rate in the middle of this range, or 9.0 percent, is considered appropriate for the property.

It is, therefore, our opinion that the market value of the subject property by the Income Approach is calculated and rounded as follows:

Net Operating Income/OAR = Estimated Value

$\$316,920 / .090 = \$3,521,333$

Rounded to: \$3,520,000

CORRELATION AND CONCLUSION

We have considered three approaches to value in order to estimate the value of the 1313 13th Street South Office Building. The three approaches are summarized as follows:

Cost Approach _____	\$3,975,000
Direct Sales Comparison Approach _____	\$3,475,000
Income Approach _____	\$3,520,000

The Cost Approach involved a detailed analysis of the individual components of the property. These costs were estimated using reliable sources, including an estimator service and the actual costs provided by the building owners. The Cost Approach is usually considered a good indicator of value for a new special purpose property such as the subject. Some actual costs, however, may not translate into a higher value in the eyes of some prospective investors or property buyers. Overall, this approach is considered a good indicator of value.

The Direct Sales Comparison Approach is based on the price that investors and owner-occupants have recently paid for comparable professional office buildings. The quality and quantity of data available in this approach was considered good, but two of the four sales were not properties located in the Birmingham market. The appraisers only consider this approach to be a fair indicator of value for the subject property.

The Income Approach normally provides the most reliable value estimate for multi-tenant professional office buildings. The subject property is a special purpose facility that would likely be occupied by one or a very few number of tenants. For this reason, the Income Approach is only considered a fair indicator of value for the subject.

Based on this analysis, it is our opinion that the market value of the 1313 13th Street South Office Building, as of September 29, ____ [Year], and based on the assumptions and limiting conditions in this report, is:

\$3,500,000



19 of 132 DOCUMENTS

Current Legal Forms for Real Estate

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Current Legal Forms for Real Estate
Chapter 22A REAL ESTATE SECURITIES
Part IV. FORMS
A. REIT FORM S-11 REGISTERED OFFERING

28-22A Current Legal Forms for Real Estate FORM 22A.03

AUTHOR: by Robert M. Nelson

FORM 22A.03

Real estate investment trust offering--amendment to Form S-11 registration statement

COMMENT

Generally, one or more amendments will be filed with respect to an S-11 registration statement. The amendment may be necessary for a variety of reasons. Often, the SEC will review the registration statement and communicate its comments to the registrant; those comments may require or strongly suggest changes to the material in the prospectus filed in Part I of the registration statement. A second reason that amendments are often filed is to provide more recent financial information regarding the registrant and/or its affiliates. *Third, amendments* are often used to file one or more documents as exhibits and/or to provide information which was not available at the time of the original filing.

Form 22A.03 contains a *second amendment* which was filed in connection with the REIT S-11 registration statement which is the subject of Form 22A.01. This Amendment included a completely revised prospectus in Part I (which is not set forth in this Form) and also provided new or revised information for Part II and additional exhibits. In particular, the second amendment completed the information as to expenses of issuance and distribution in Item 30; the original registration statement indicated (as was the case with several other items and/or exhibits) that the information would be provided by amendment. This amendment also furnished additional financial statements, some of which were included in the prospectus and others of which were not. Finally, additional documents were filed as exhibits with Amendment No. 2.

FORM

(a) Amendment to Form S-11

AS FILED WITH THE SECURITIES AND EXCHANGE
COMMISSION ON JUNE 21, [Year]

REGISTRATION STATEMENT NO. 33-00000

SECURITIES AND EXCHANGE COMMISSION
WASHINGTON, D.C. 20549

AMENDMENT NO. 2

TO
FORM S-11
REGISTRATION STATEMENT UNDER THE SECURITIES
ACT OF 1933

AMERICAN CAPITAL TRUST, INC.
(Exact name of Registrant as specified in its charter)

SIX CENTRAL SOUTHERN BLDG., SUITE 101-A,
BIRMINGHAM, ALABAMA 35243,(555) 111-6666

(Address, including zip code, and telephone number, including area code, of Registrant's principal executive offices)

MARYLAND
(State of Incorporation)

W. GILL MCDANIEL PRESIDENT
AND
CHIEF

11-2233444
(IRS Employer
Identification Number)

EXECUTIVE OFFICER AMERIC-
AN CAPITAL TRUST, INC.
SIX CENTRAL SOUTHERN
BLDG., SUITE 101-A BIRMING-
HAM, ALABAMA 35243
(555) 111-666

(Name, address, including zip code, and telephone number, including area code, of agent for service)

WELLHEALTH REHABILITATION CORPORATION (Exact name of Co-Registrant as specified in its charter)

ONE CENTRAL SOUTHERN BLDG., BIRMINGHAM, ALABAMA 35243 (555) 111-5555

(Address, including zip code, and telephone number, including area code, of Co-Registrant's principal executive offices)

DELAWARE
(State of Incorporation)

M. DONAL RUSHMOER CHAIR-
MAN OF THE BOARD, (IRS Em-
ployer Identification Number)
PRESIDENT AND CHIEF EXEC-
UTIVE OFFICER WELLHEALTH
REHABILITATION CORPORA-
TION ONE CENTRAL SOUTH-
ERN BLDG. BIRMINGHAM,
ALABAMA 35243
(555) 111-5555

63-0860407
(IRS Employer
Identification Number)

(Name, address, including zip code, and telephone number,
including area code, of agent for service)

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FAX: (555) 333-8888

ROBERT M. DOWE, ESQ.
DOWE & FLOWER CO., L.P.A.
191 NORTH AVENUE
NEW YORK, NY 10022
TEL: 555-537-1000
FAX: 555-537-9000

THE REGISTRANT HEREBY AMENDS THIS REGISTRATION STATEMENT ON SUCH DATE OR DATES AS MAY BE NECESSARY TO DELAY ITS EFFECTIVE DATE UNTIL THE REGISTRANT SHALL FILE A FURTHER AMENDMENT WHICH SPECIFICALLY STATES THAT THIS REGISTRATION STATEMENT SHALL THEREAFTER BECOME EFFECTIVE IN ACCORDANCE WITH SECTION 8(A) OF THE SECURITIES ACT OF 1933 OR UNTIL THE REGISTRATION STATEMENT SHALL BECOME EFFECTIVE ON SUCH DATE AS THE COMMISSION, ACTING PURSUANT TO SAID SECTION 8(A), MAY DETERMINE.

AMERICAN CAPITAL CORPORATION

CROSS REFERENCE SHEETSHOWING LOCATION IN PROSPECTUS OF
INFORMATION REQUIRED BY FORM S-11

	REGISTRATION STATEMENT ITEMS	LOCATION IN PROSPECTUS
1.	Forepart of the Registration Statement and Outside Front Cover Page of Prospectus	Outside Front Cover Page
2.	Inside Front and Outside Back Cover Pages of Prospectus	Inside Front and Outside Back Cover
3.	Summary Information, Risk Factors and Ratio of Earnings to Fixed Charges	Prospectus Summary; Risk Factors
4.	Determination of Offering Price	Outside Front Cover Page; Underwriting
5.	Dilution	Dilution
6.	Selling Security Holders	*
7.	Plan of Distribution	Outside Front Cover Page; Underwriting
8.	Use of Proceeds	Use of Proceeds
9.	Selected Financial Data	Selected Historical, Pro Forma and Estim- ated Financial Information
10.	Management's Discussion and Analysis of Financial Condition and Results of Opera- tions	Management's Discussion and Analysis of Financial Condition and Results of Opera- tions
11.	General Information as to Registrant	Prospectus Summary; Risk Factors; Man- agement Principal Stockholders; Descrip- tion of Securities
12.	Policy with Respect to Certain Activities	Investment and Other Policies; Business; Management; Description of Securities; Additional Information
13.	Investment Policies of Registrant	Business; Investment and Other Policies
14.	Description of Real Estate	Business
15.	Operating Data	Business

16.	Tax Treatment of Registrant and Its Security Holders _____	Federal Income Tax Consideration
17.	Market Price of and Dividends on the Registrant's Common Equity and Related Stockholder Matters _____	Distribution to Stockholders; Description of Securities
18.	Description of Registrant's Securities _____	Distribution to Stockholders; Description of Securities
19.	Legal Proceedings _____	Business
20.	Security Ownership of Certain Beneficial Owners and Management _____	Management; Principal Stockholders
21.	Directors and Executive Officers _____	Management
22.	Executive Compensation _____	Management
23.	Certain Relationships and Related Transactions and Director Independence _____	Risk Factors; Management
24.	Selection, Management and Custody of Registrant's Investments _____	Business; Investment and Other Policies
25.	Policies with Respect to Certain Transactions _____	Investments and Other Policies
26.	Limitations of Liability _____	Management
27.	Financial Statements and Information _____	Financial Statements
28.	Interests of Named Experts and Counsel _____	*
29.	Disclosure of Commission Position on Indemnification for Securities Act Liabilities _____	*

 * Omitted as inapplicable.

PART II

INFORMATION NOT REQUIRED IN PROSPECTUS

ITEM 30. QUANTITATIVE AND QUALITATIVE DISCLOSURES ABOUT MARKET RISK

The Company may be exposed to interest rate changes primarily as a result of long-term debt bearing interest at variable rates that the Company will likely incur to acquire properties and make loans and other permitted investments. The Company's interest rate risk management objectives will be to limit the impact of interest rate changes on earnings and cash flows and to lower overall borrowing costs. To achieve these objectives, the Company expects to borrow primarily at fixed rates or variable rates with the lowest margins available and, in some cases, with the ability to convert variable rates to fixed rates. With regard to variable rate financing, the Company will assess interest rate cash flow risk by continually identifying and monitoring changes in interest rate exposures that may adversely impact expected future cash flows and by evaluating hedging opportunities.

ITEM 31. OTHER EXPENSES OF ISSUANCE AND DISTRIBUTION

Set forth below is an estimate of the fees and expenses to be incurred in connection with the issuance and distribution of the shares of Common Stock offered hereby.

Securities and Exchange Commission Registration Fee	\$ 46,000

NASD Filing Fee _____	13,840
New York Stock Exchange Original Listing Fee _____	88,100
Blue Sky Fees and Expenses _____	30,000
Legal Fees and Expenses _____	125,000
Accounting Fees _____	40,000
Printing and Engraving Costs _____	250,000
Transfer Agent's Fee _____	1,000
Miscellaneous Expenses _____	6,060
Total _____	\$600,000

ITEM 32. SALES TO SPECIAL PARTIES

The Company sold an aggregate of 180,000 shares of Common Stock to M. Donal Rushmore (82,656 shares), WELLHEALTH Rehabilitation Corporation (71,280 shares), W. Gill McDaniel (18,000 shares) and Dee Martin Michaels (8,064 shares), its Founding Stockholders, for \$.001 per share (an aggregate of \$180) on March 31, [Year].

ITEM 33. RECENT SALES OF UNREGISTERED SECURITIES

The Company sold an aggregate of 180,000 shares of Common Stock to the four Founding Stockholders for an aggregate of \$180 on March 31, [Year], pursuant to the exemption from registration contained in Section 4(2) of the Securities Act of 1933, as amended.

ITEM 34. INDEMNIFICATION OF DIRECTORS AND OFFICERS

The MGCL permits a Maryland corporation to include in its charter a provision limiting the liability of its directors and officers to the corporation and its stockholders for money damages except for liability resulting from (i) actual receipt of an improper benefit or profit in money, property or services or (ii) active and deliberate dishonesty established by a final judgment as being material to the cause of action. The Charter of the Company contains such a provision which limits such liability to the maximum extent permitted by the MGCL.

The Charter of the Company authorizes it to obligate itself to indemnify and to pay or reimburse reasonable expenses in advance of final disposition of a proceeding to directors, officers, employees and agents of the Company to the fullest extent permitted by Maryland law. The Bylaws of the Company obligate it to indemnify and to pay or reimburse reasonable expenses in advance of final disposition of a proceeding to (a) any present or former director or officer who is made a party to the proceeding by reason of his service in that capacity or (b) any individual who, while a director of the Company and at the request of the Company, serves or has served another corporation, partnership, joint venture, trust, employee benefit plan or any other enterprise as a director, officer, partner or trustee of such corporation, partnership, joint venture, trust, employee benefit plan, or other enterprise and who is made a party to the proceeding by reason of his service in that capacity. The Bylaws also permit the Company to indemnify and advance expenses to any person who served a predecessor of the Company in any of the capacities described above and to any employee or agent of the Company or a predecessor of the Company.

The MGCL requires a corporation (unless its charter provides otherwise, which the Company's Charter does not) to indemnify a director or officer who has been successful, on the merits or otherwise, in the defense of any proceeding to which he is made a party by reason of his service in that capacity. The MGCL permits a corporation to indemnify its present and former directors and officers, among others, against judgments, penalties, fines, settlements and reasonable expenses actually incurred by them in connection with any proceeding to which they may be made a party by reason of their service in those or other capacities unless it is established that (a) the act or omission of the director or officer was material to the matter giving rise to the proceeding and (i) was committed in bad faith or (ii) was the result of active and deliberate dishonesty, (b) the director or officer actually received an improper personal benefit in money, property or services or (c) in the case of any criminal proceeding, the director or officer had reasonable cause to believe that the act or omission was unlawful. However, a Maryland corporation may not indemnify for an adverse judgment in a suit by or in the right of the corporation. In addition, the MGCL requires the Company, as a condition to advancing expenses, to obtain (a) a written affirmation by the director or officer of his good faith belief that he has met the standard of conduct necessary for indemnification by the Company as authorized by the Bylaws and (b) a written statement by or on his behalf to repay the amount paid or reimbursed by the Company if it shall ultimately be determined that the standard of conduct was not met.

Indemnification under the provisions of the MGCL is not deemed exclusive of any other rights, by indemnification or otherwise, to which a director may be entitled under the Charter, Bylaws, resolution of stockholders or directors, contract or otherwise.

ITEM 35. TREATMENT OF PROCEEDS FROM STOCK BEING REGISTERED

Not applicable.

ITEM 36. FINANCIAL STATEMENTS AND EXHIBITS

(a) Financial Statements and Schedules:

1. Audited Balance Sheet of American Capital Corporation as of March 31, ____ [Year] (included in the Prospectus).

2. Unaudited Pro Forma Balance Sheet of American Capital Corporation as of December 31, ____[Year] (included in the Prospectus).

3. Audited Consolidated Financial Statements of WELLHEALTH Rehabilitation Corporation and Subsidiaries (included in the Prospectus).

4. Unaudited Consolidated Financial Statements of WELLHEALTH Rehabilitation Corporation and Subsidiaries (included in the Prospectus).

5. Financial Statement Schedules of WELLHEALTH Rehabilitation Corporation and Subsidiaries (not included in the Prospectus).

(b) Exhibits:

EXHIBIT NUMBER

+ 1	Form of Underwriting Agreement.
+ 3.1	Articles of Incorporation of the Registrant.
+ 3.2	Bylaws of the Registrant.
+ 3.3	Articles of Amendment to Charter of the Registrant.
3.4	Articles of Amendment to Charter of the Registrant.
+ 4	Form of stock certificate.
5.1	Opinion of Etores & Premill, P.C. regarding legality.
8	Opinion of Etores & Premill, P.C. regarding tax consequences.
+ 10.1	Agreement of Sale and Purchase by and between WELL-HEALTH Medical Center, Inc. and American Capital of Alabama, Inc., dated May 23, [Year], with respect to American Sports Medicine Institute, Birmingham Medical Building I and Birmingham Medical Building II.
+ 10.2	Agreement of Sale and Purchase by or between WELL-HEALTH Rehabilitation Corporation and American Capital Trust, Inc., dated May 23, [Year], with respect to One-7000 Building.
+ 10.3	Agreement of Sale and Purchase by and between Doctors' Hospital of South Miami, Ltd. and American Capital Trust, Inc., dated May 23, [Year], with respect to Larkin Medical Building.
+ 10.4	Agreement of Sale and Purchase by and between WELL-HEALTH of Virginia, Inc. and American Capital Trust, Inc., dated May 23, [Year], with respect to Richmond Medical Building I and Richmond Medical Building II.
+ 10.5	Agreement of Sale and Purchase by and between WELL-HEALTH Rehabilitation Corporation and American Capital Trust, Inc., dated May 23, [Year], with respect to Little Rock.
+ 10.6	Agreement of Sale and Purchase by and between WELL-

- HEALTH Rehabilitation Corporation and American Capital Trust, Inc., dated May 23, [Year], with respect to Coral Gables MRI.
- + 10.7 Agreement of Sale and Purchase by and between WELL-HEALTH Rehabilitation Center of Virginia Beach Limited Partnership and American Capital Trust, Inc., dated May 23, [Year], with respect to Virginia Beach.
- + 10.8 Agreement of Sale and Purchase by and between OrNda Healthcorp and Midway Acquisition Company, Inc., dated April 19, [Year], with respect to Midway Medical Plaza.
- + 10.9 Agreement of Sale and Purchase by and between Mountain View Nursing Center, Inc. and American Capital of Pennsylvania, Inc., dated April 25, [Year], with respect to Mountain View.
- + 10.10 Agreement of Sale and Purchase by and between Gravois Healthcare, Inc. and American Capital Trust, Inc., dated April 25, [Year], with respect to Gravois.
- + 10.11 Agreement of Sale and Purchase by and between QHG of Gadsden, Inc. and American Capital of Alabama, Inc., dated May 25, [Year], with respect to Goodyear, Hamiter Building and Medical Building II.
- + 10.12 Agreement of Sale and Purchase by and between NC-DSH, Inc. and American Capital Trust, Inc., dated May 25, [Year], with respect to Desert Springs.
- + 10.13 Agreement of Sale and Purchase by and between Tesson Ferry Medical Equities, L.P. and American Capital Trust, Inc., dated May 27, [Year], with respect to South Lake Medical Center.
- + 10.14 Agreement of Sale and Purchase by and between Northlake Center for Outpatient Surgery, L.P. and American Capital Trust, Inc., dated May 27, [Year], with respect to Northlake.
- + 10.15 Agreement of Sale and Purchase by and between Surgical Health Corporation and American Capital Trust, Inc., dated May 27, [Year], with respect to North Shore.
- + 10.16 [Year] Stock Incentive Plan of American Capital Trust, Inc.
- + 10.17 Lease Agreement between the Company and Birmingham Realty Company, dated May 25, [Year].
- 10.18 Plan and Agreement of Merger between the Company and Midway Acquisition Company, Inc., dated May 27, [Year].
- 10.19 Appraisal of American Sports Medicine Institute Building, Birmingham, Alabama, dated January 18, [Year].
- 10.20 Appraisal of WELLHEALTH Professional Building, Birmingham, Alabama, dated January 17, [Year].
- 10.21 Appraisal of WELLHEALTH Professional #2, Birmingham, Alabama, dated March 2, [Year].

- 10.22 Appraisal of Larkin 7000 Building, South Miami, Florida, dated February 11, [Year].
- 10.23 Appraisal of Larkin Annex Building and Excess Land, South Miami, Florida, dated February 11, [Year], as modified by a Supplemental Report, dated May 26, [Year].
- 10.24 Appraisal of WELLHEALTH Professional Building I, Richmond, Virginia, dated January 18, [Year].
- 10.25 Appraisal of WELLHEALTH Professional Building II, Richmond, Virginia, dated January 20, [Year].
- 10.26 Appraisal of WELLHEALTH Rehabilitation Center of Little Rock, Little Rock, Arkansas, dated February 7, [Year].
- 10.27 Appraisal of WELLHEALTH Sports Medicine and Rehabilitation Center, Coral Gables, Florida, dated February 7, [Year].
- 10.28 Appraisal of WELLHEALTH Rehabilitation Center of Virginia Beach, Virginia Beach, Virginia, dated February 7, [Year].
- 10.29 Appraisal of Midway Medical Plaza and Adjacent Parking Structure, Los Angeles, California, dated April 8, [Year].
- 10.30 Appraisal of Mountain View Nursing Center, Greensburg, Pennsylvania, dated March 30, [Year].
- 10.31 Appraisal of Integrated Health Services of St. Louis at Gravois, St. Louis, Missouri, dated March 30, [Year].
- 10.32 Appraisal of The Goodyear Clinic, The Hamiter Building, and Baptist Medical Building II, Gadsden, Alabama, dated February 25, [Year].
- 10.33 Appraisal of Desert Springs Medical Plaza, Las Vegas, Nevada, dated February 21, [Year].
- 10.34 Appraisal of St. Louis Comprehensive and Ambulatory Care Facility (South County Medical Center), St. Louis, Missouri, dated May 25, [Year].
- 10.35 Appraisal of Northlake Tucker Ambulatory Surgery Center, Tucker, Georgia, dated April 14, [Year].
- 10.36 Appraisal of North Shore Surgical Center, Evanston, Illinois, dated April 28, [Year].
- 10.37 Dividend Agreement.
- 21 Subsidiaries.
- 23.1 Consent of Etores & Premill, P.C. (included in Exhibits 5.1 and 8).
- 23.2 Consent of Andrew Arther.
- 23.3 Consent of Whinney & Whinney.
- 23.4 Consent of Andrew Arther.
- + 23.5 Consent of Valuation Counselors Group, Inc.
- + 24 Powers of Attorney.

+ Previously filed.

ITEM 37. UNDERTAKINGS

The Company undertakes to provide to the Underwriters at the Closing specified in the Underwriting Agreement certificates in such denominations and registered in such names as required by the Underwriters to permit prompt delivery to each purchaser.

Insofar as indemnification for liabilities arising under the Securities Act may be permitted to directors, officers and controlling persons of the registrant, the registrant has been advised that in the opinion of the Commission such indemnification is against public policy as expressed in the Securities Act and is, therefore, unenforceable. In the event that a claim for indemnification against such liabilities (other than the payment by the registrant of expenses incurred or paid by a director, officer or controlling person of the registrant in the successful defense of any action, suit or proceeding) is asserted by such director, officer or controlling person in connection with the securities being registered, the registrant will, unless in the opinion of its counsel the matter has been settled by controlling precedent, submit to a court of appropriate jurisdiction the question of whether such indemnification by it is against public policy as expressed in the Securities Act and will be governed by the final adjudication of such issue.

The Company further undertakes that:

- (1) For purposes of determining any liability under the Securities Act, the information omitted from the form of prospectus filed as part of this registration statement in reliance upon Rule 430A and contained in a form of prospectus filed by the registrant pursuant to Rule 424(b)(1) or (4) or 497(h) under the Securities Act shall be deemed to be part of this registration statement as of the time it was declared effective.
- (2) For the purpose of determining any liability under the Securities Act, which post-effective amendment that contains a form of prospectus shall be deemed to be a new registration statement relating to the securities offered therein, and the offering of such securities at that time shall be deemed to be the initial bona fide offering thereof.

SIGNATURES

Pursuant to the requirements of the Securities Act of 1933, the Registrant certifies that it has reasonable grounds to believe that it meets all of the requirements for filing on Form S-11 and has duly caused this Registration Statement to be signed on its behalf by the undersigned, thereunto duly authorized in the City of Birmingham, State of Alabama, on the 15th day of April, [Year].

AMERICAN CAPITAL TRUST, INC.

By /s/ W. Gill McDaniel

W. Gill McDaniel

President and Chief Executive Officer

Pursuant to the requirements of the Securities Act of 1933, the Co-Registrant certifies that it has reasonable grounds to believe that it meets all of the requirements for filing on Form S-11 and has duly caused this Registration Statement to be signed on its behalf by the undersigned, thereunto duly authorized in the City of Birmingham, State of Alabama, on the 15th day of April, [Year].

WELLHEALTH REHABILITATION

CORPORATION

By /s/ M. DONAL RUSHMORE

M. Donal Rushmore

President and Chief Executive Officer

POWER OF ATTORNEY

KNOW ALL MEN BY THESE PRESENTS, that each person whose signature appears below constitutes and appoints W. Gill McDaniel and Ralph Cuzzins, and each or either of them, his or her true and lawful attorney-in-fact and agent, with full power of substitution and resubstitution, for him or her and in his or her name, place and stead, in any and all capacities, to sign any and all amendments (including post-effective amendments) to this Registration Statement, and to file the same, with all exhibits thereto and other documents in connection therewith, with the Securities and Exchange Commission, granting unto said attorneys-in-fact and agents, and each of them, full power and authority to do and perform each and every act and thing requisite and necessary to be done in and about the premises, as fully and to all intents and purposes as he or she might or could do in person, hereby ratifying and confirming all that said attorneys-in-fact and agents or either of them, or their or his substitutes or substitute, may lawfully do or cause to be done by virtue hereof.

Pursuant to the requirements of the Securities Act of 1933, this Registration Statement has been signed by the following persons in the capacities and on the dates indicated.

SIGNATURE	TITLE	DATE
/s/ M. DONAL RUSH- MORE M. Donal Rushmore	Chairman of the Board	June 21, [Year]
/s/ W. GILL MCDANIEL W. Gill McDaniel	President, Chief Executive Officer and Director (Principal Executive Officer)	June 21, [Year]
/s/ RALPH CUZZINS Ralph Cuzzins	Vice-President--Finance Chief Fin- ancial Officer, and Secretary (Principal Financial and Account- ing Officer)	June 21, [Year]
/s/ DEE MARTIN MICHAELS	Director	June 21, [Year]

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Dee Martin Michaels

/s/ ROBERT M. NAISMITH Robert M Naismith	Director	June 21, [Year]

/s/ DONALD W. LUCCARELLI Donald W. Luccarelli	Director	June 21, [Year]

/s/ ERICH BARNES Erich Barnes	Director	June 21, [Year]

/s/ LAWRENCE W. ARBOR III Lawrence W. Arbor III	Director	June 21, [Year]

/s/ GORDON BARRY Gordon Barry	Director	June 12, [Year]

/s/ GEORGE BOGLE George Bogle	Director	June 21, [Year]

POWER OF ATTORNEY

KNOW ALL MEN BY THESE PRESENTS, that each person whose signature appears below constitutes and appoints M. Donal Rushmore and W. Gill McDaniel, and each or either of them, his or her true and lawful attorney-in-fact and agent, with full power of substitution and resubstitution, for him or her and in his or her name, place and stead, in any and all capacities, to sign any and all amendments (including post-effective amendments) to this Registration Statement, and to file the same, with all exhibits thereto and other documents in connection therewith, with the Securities and Exchange Commission, granting unto said attorneys-in-fact and agents, and each of them, full power and authority to do and perform each and every act and thing requisite and necessary to be done in and about the premises, as fully and to all intents and purposes as he or she might or could do in person, hereby ratifying and confirming all that said attorneys-in-fact and agents or either of them, or their or his substitutes or substitute, may lawfully do or cause to be done by virtue hereof.

Pursuant to the requirements of the Securities Act of 1933, this Registration Statement has been signed by the following persons in the capacities and on the dates indicated.

SIGNATURE	TITLE	DATE
/s/ M. DONAL RUSHMORE M. Donal Rushmore	Chairman of the Board, President And Chief Executive Officer and Director (Principal Executive Of- ficer)	June 21, [Year]

/s/ NORA EBAMJAR Nora Ebamjar	Executive Vice President and Chief Financial Officer and Director (Principal Financial Officer)	June 21, [Year]
/s/ OWEN BENNETT TEAS Owen Bennett Teas	Group Vice President--Finance and Controller (Principal Accounting Officer)	June 21, [Year]
/s/ TANNER ANTONIO Tanner Antonio	Director	June 21, [Year]
/s/ CARLETON RESIDENCE Carleton Residence	Director	June 21, [Year]
/s/ PAUL J. BENBOW Paul J. Benbow	Director	June 21, [Year]
/s/ WATSON KELLUM, D.D.S. Watson Kellum	Director	June 21, [Year]
/s/ H. STANTON GEORGE H. Stanton George	Director	June 21, [Year]
/s/ SAGE ADVICE Sage Advice	Director	June 21, [Year]
/s/ NEWTON W. MICHELS, SR. Newton W. Michels, Sr.	Director	June 21, [Year]
/s/ DAVID R. HUNTLIN David R. Huntlin	Director	June 21, [Year]

EXHIBIT INDEX

EXHIBIT NUMBER	DESCRIPTION	SUBSEQUEN- TIALY NUMBERED PAGE

28-22A Current Legal Forms for Real Estate FORM 22A.03

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28-22A Current Legal Forms for Real Estate FORM 22A.03

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- 10.23 Appraisal of Larkin Annex Building and Excess Land, South Miami, Florida, dated February 11, [Year], as modified by a Supplemental Report, dated May 26, [Year].
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- 23.3 Consent of Whinney & Whinney.
- 23.4 Consent of Andrew Arther.
- + 23.5 Consent of Valuation Counselors Group, Inc.
- + 24 Powers of Attorney.
- + Previously filed.



20 of 132 DOCUMENTS

Current Legal Forms for Real Estate

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Current Legal Forms for Real Estate
Chapter 22A REAL ESTATE SECURITIES
Part IV. FORMS
A. REIT FORM S-11 REGISTERED OFFERING

28-22A Current Legal Forms for Real Estate FORM 22A.04

AUTHOR: by Robert M. Nelson

FORM 22A.04 Real estate investment trust offering--amendment to Form S-11 registration statement--exhibits--tax counsel opinion letter--factual representations by issuer

COMMENT

As an important assurance and inducement to prospective investors, a REIT offering will commonly include an opinion letter to the issuer from its tax counsel which opines that the entity will qualify as a REIT for tax purposes and that the various tax consequences resulting to the investor will be as described in the prospectus. In order to enable tax counsel to give the requested opinions, many of which depend upon factual matters, the issuer provides to its tax counsel a letter making all relevant factual representations and agreeing that tax counsel is entitled to rely upon such representations in rendering its tax opinions.

Examples

of both tax counsel's opinion letter and the issuer's factual representation letter follow in this Form 22A.04. Both of these documents relate to the Form S-11 REIT registration appearing in Form 22A.01 above and were filed by way of an amendment of the type set forth above as Form 22A.03.

FORM

(a) Tax counsel opinion letter

EXHIBIT 8

ETORES

--&--

PREMILL

A PROFESSIONAL CORPORATION

9999 UAB Heights Circle
Reply To: Post Office Box 3480
Birmingham, Alabama 35255-5727
Telephone (555) 333-2450
Facsimile (555) 444-4900
Writer's direct dial number: (555) 310-8510

June 21, [Year]

American Capital Corporation
Six Central Southern Bldg.
Birmingham, Alabama 35243

Alabama Securities Corporation
Representative of the Several Underwriters
883 Sandwich Street
New York, New York 10013

Ladies and Gentlemen:

We have acted as tax counsel to American Capital Corporation (the "Company") in connection with the transaction (the "Transaction") described in the Prospectus that constitutes Part I of the Registration Statement filed by the Company with the Securities and Exchange Commission under the Securities Act of 1933 on April 15, ____[Year], as amended through the date hereof (the "Prospectus"). In connection with the Transaction, we have been asked to provide opinions on certain federal income tax matters described in the Prospectus. Capitalized terms used in this letter and not otherwise defined herein have the meaning set forth in the Prospectus.

The opinions set forth in this letter are based on relevant provisions of the Internal Revenue Code of 1986, as amended (the "Code"), of Treasury Regulations thereunder (including Proposed and Temporary Regulations), and interpretations of the foregoing as expressed in court decisions, administrative determinations, and legislative history as of the date hereof. These provisions and interpretations are subject to changes that might result in modification of our opinion.

In rendering the following opinions, we have examined such statutes, regulations, records, certificates and other documents as we have considered necessary or appropriate as a basis for such opinions, including the following: (1) the Prospectus and the Registration Statement (including the Exhibits thereto); (2) the Charter and Bylaws of the Company as in effect on the date hereof; (3) the Articles of Incorporation and Bylaws of Crescent Capital of Alabama, Inc., a wholly-owned subsidiary of the Company ("CCA"), as in effect on the date hereof; and (4) the Articles of Incorporation

and Bylaws of Crescent Capital of Pennsylvania, Inc. (formerly "American Capital of Pennsylvania, Inc."), a wholly-owned subsidiary of the Company ("CCP"), as in effect on the date hereof. In such examination, we have assumed that documents that have been reviewed in proposed form will be executed in substantially the form of the proposed agreements we have reviewed. We have also assumed the genuineness of all signatures, the proper execution of all documents, the authenticity of all documents submitted to us as originals, the conformity to originals of documents submitted to us as copies, and the authenticity of the originals of any copies.

This opinion is based in part on our opinion to be delivered at the closing of the Transaction addressed to the Underwriters that (i) the Company is a validly organized and duly incorporated corporation under the laws of the State of Maryland; (ii) CCA is a validly organized and duly incorporated corporation under the laws of the State of Alabama; and (iii) CCP is a validly organized and duly incorporated corporation under the laws of the State of Pennsylvania.

This opinion is also based on the representations of the Company contained in a letter to us dated June 21, ____[Year], and attached hereto.

We are not aware of any facts or circumstances contrary to or inconsistent with the foregoing representations and assumptions. To the extent that the representations of the Company are with respect to matters set forth in the Code or the applicable Treasury Regulations, we have reviewed with the individuals making such representations the relevant provisions of the Code, applicable Treasury Regulations and published administrative interpretations thereof. Based on the foregoing, we are of the opinion that:

(1) Commencing with the Company's taxable year ending December 31, [Year], and assuming consummation of the Transaction as contemplated in the Prospectus and assuming a timely election of REIT status, the Company will be organized in conformity with the requirements for qualification as a REIT under the Code, and the Company's proposed method of operation will enable it to meet the requirements for qualification and taxation as a REIT.

(2) The discussion in the Prospectus under the heading "Federal Income Tax Considerations" fairly summarizes the federal income tax considerations that are likely to be material to a holder of Common Stock.

For a discussion relating the law to the facts and the legal analysis underlying the opinions set forth in this letter, we incorporate by reference the discussion of federal income tax issues, which we prepared, in the section of the Prospectus under the heading "Federal Income Tax Considerations."

We hereby consent to the filing of this opinion as an exhibit to the Registration Statement and to the use of the name of our firm therein and under the caption "Federal Income Tax Considerations" in the Prospectus filed as a part of the Registration Statement.

Very truly yours,

Etores & Premill, P.C.

By /s/ Jonathan Rowe

Jonathan Rowe

(b) Issuer factual representation letter

AMERICAN CAPITAL CORPORATION

Six Central Southern Bldg.
Suite 101-A Birmingham Alabama 35243

June 21, [Year]

Etores & Premill, P.C.
9999 UAB Heights Circle
Birmingham, Alabama 35205

Ladies and Gentlemen:

American Capital Corporation (formerly "American Capital Trust, Inc."), a Maryland corporation (the "Company"), and the Underwriters have requested your opinion with respect to certain federal income tax issues relating to the transaction (the "Transaction") described in the Prospectus that constitutes Part I of the Registration Statement filed by the Company with the Securities and Exchange Commission under the Securities Act of 1933 on April 15, ____[Year], as amended through the date hereof (the "Prospectus"). Capitalized terms used herein and not otherwise defined have the meanings set forth in the Prospectus.

In connection with your opinion, the Company makes the following representations to you:

- (1) The Company will operate in accordance with Maryland law, its Charter and its Bylaws.
- (2) The Company will make the election specified in Section 856(c) of the Code to be a real estate investment trust ("REIT") under the Code with respect to its taxable year ending December 31, [Year].
- (3) The Company will be managed by one or more of its directors, and beneficial ownership in the Company will be evidenced by transferable shares.
- (4) The Company expects that, and the Company will take all measures within its control to ensure that, at no time during the last half of any taxable year after the first taxable year for which the election has been made to be a REIT will more than 50% in value of the Company's outstanding stock be owned, directly or indirectly, by or for five or fewer individuals as determined by applying Section 856(a) of the Code.
- (5) The Company expects that, and the Company will take all measures within its control to ensure that, at all times after the first taxable year for which the election has been made to be a REIT, the beneficial ownership of the Company will be held by 100 or more persons.
- (6) The projections and analyses prepared by the Company and presented to you with respect to the Company's qualification under the income and asset tests set forth in Section 856 of the Code represent the Company's best estimate of the gross income to be derived by the Company and the assets to be held by the Company.
- (7) The Company expects that, and the Company will take all measures within its control to ensure that, at least 95% of the gross income derived by the Company in any taxable year will consist of (i) amounts derived by the Company from rental of the Initial Properties or properties acquired in the future, including rents attributable to personal property as

described in representation (11) below and including charges for services customarily furnished or rendered in connection with the rental of real property, whether or not such charges are separately stated, but excluding for such purposes rents received from related parties as defined in Section 856(d)(2)(B) of the Code; (ii) interest on obligations secured by mortgages on real property or on interests in real property; (iii) amounts received with respect to the rental of certain parking facilities; (iv) any gain realized upon sale of all or a portion of the Initial Properties or properties acquired in the future; (v) interest attributable to amounts held by the Company in bank accounts or reserves; (vi) amounts described in Section 856(c)(2)(D) through (H) of the Code.

(8) The Company expects that, and the Company will take all measures within its control to ensure that at least 75% of the gross income derived by the Company in any taxable year will consist of (i) amounts derived by the Company from rental of the Initial Properties or properties acquired in the future, including rents attributable to personal property as described in representation (11) below and including charges for services customarily furnished or rendered in connection with the rental of real property, whether or not such charges are separately stated, but excluding for such purposes rents received from related parties as defined in Section 856(d)(2)(B) of the Code; (ii) interest on obligations secured by mortgages on real property or on interests in real property; (iii) amounts received with respect to the rental of certain parking facilities; (iv) any gain realized upon sale of all or a portion of the Initial Properties or properties acquired in the future; (v) amounts described in Section 856(c)(2)(D) through (H) of the Code.

(9) The Company expects that, and the Company will take all measures within its control to ensure that, in any taxable year less than 30% of the gross income of the Company in any taxable year will be derived from (i) the sale or other disposition of stock or securities held for less than one year; (ii) property in a transaction which is a prohibited transaction, as defined in the Code; and (iii) real property (including interests in real property and interests in mortgages on real property) held for less than four years other than property compulsorily or involuntarily converted within the meaning of Section 1033 of the Code and property which is foreclosure property within the definition of Section 856(e) of the Code.

(10) The Company will not enter into any agreement or arrangement in connection with the rental of the Initial Properties under which amounts payable to the Company will depend in whole or in part on the income or profits derived from any tenant (or sub-tenant) of such Initial Properties (except that such amounts may be based on a fixed percentage or percentages of receipts or sales).

(11) The Company expects that, and the Company will take all measures within its control to ensure that, (i) less than 15% of the rent received by the Company for the Initial Properties will be attributable to personal property; (ii) all personal property contained in the Initial Properties will be leased under or in connection with a lease of the real property contained in the Initial Properties; and (iii) no personal property owned by the Company at any time will have significant value in excess of its adjusted basis for federal income tax purposes.

(12) The Company expects that, and the Company will take all measures within its control to ensure that, no more than a de minimis amount of rent received by the Company for the Initial Properties will be received or accrued directly or indirectly from any person in which the Company owns (i) in the case of a corporation, 10% or more of the total combined voting power of all classes of stock entitled to vote, or 10% or more of the total number shares of all classes of stock; or (ii) in the case of an entity other than a corporation, an interest of 10% or more in the assets or net profits of such entity. For purposes of this representation, ownership will be determined by taking into account the attribution rules of Section 318 (as modified by Section 856(d)(5)) of the Code.

(13) Except as otherwise provided in representation (14), the Company will not enter into any agreement or arrangement pursuant to which (i) an entity that fails to qualify as an "independent contractor" within the meaning of Section 856(d)(3) of the Code will furnish any services to tenants of the Initial Properties; or (ii) the Company derives any income from an entity providing services to Initial Property tenants that qualifies as an "independent contractor."

(14) The Company will not enter into or maintain any agreement or arrangement with an entity to provide parking services in the Initial Properties unless either (i) such entity constitutes an "independent contractor" under Section 856(d)(3) of the Code; or (ii) such agreement or arrangement, if not with such an independent contractor, will not cause the Company to fail to meet the income tests in Section 856(c) of the Code.

(15) Entities that will provide parking services with respect to the Initial Properties that are independent contractors under Section 856(d)(3) of the Code will be adequately compensated for the provision of such services.

(16) The Company expects that, and the Company will take all measures within its control to ensure that, at least 75% of the total value of the assets of the Company will at all times consist of real estate assets within the meaning of Section 856(c)(5) of the Code, cash and cash items (including receivables) and government securities, and not more than 25% of the value of its assets will be represented by securities (other than Government securities).

(17) The Company will not own on the date of the consummation of the Transaction and will thereafter take all measures within its control not to own securities in any one issuer, having an aggregate value in excess of 5% of the value of the total assets of the Company as determined in accordance with *Treas. Reg. Section 1.856-2(d)(2)*.

(18) The Company does not and will not own any securities in any other issuer representing in excess of 10% of the outstanding voting securities of such issuer.

(19) The Company will at all times hold the Initial Properties (and all other assets of the Company) for investment purposes and not as (i) stock in trade or other property of a kind which would properly be includable in inventory if on hand at the close of the taxable year, or (ii) property held primarily for sale to customers in the ordinary course of the trade or business of the Company.

(20) The Company expects to, and the Company will take all measures within its control to make timely distributions sufficient to satisfy the annual distribution requirements of Section 857 of the Code.

(21) Representations herein as to the Initial Properties will also be true with respect to properties acquired by the Company after the date hereof.

Sincerely yours,

AMERICAN CAPITAL CORPORATION

/s/ Thomas B. Griffin

Thomas B. Griffin

Vice President and Chief

Financial Officer



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Current Legal Forms for Real Estate

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Current Legal Forms for Real Estate
Chapter 22A REAL ESTATE SECURITIES
Part IV. FORMS
B. REAL ESTATE SCOR REGISTERED OFFERING

28-22A Current Legal Forms for Real Estate FORM 22A.05

AUTHOR: by Robert M. Nelson

FORM 22A.05

NASAA Small Company Offering Registration (SCOR)--Overview: Introduction, Requirements, and Instructions--NASAA Statement of Policy Regarding Small Company Offering Registrations

COMMENT

The documents appearing below are official documents of the North American Securities Administrators Association (NASAA) which is the body that adopted and promulgated the Small Company Offering Registration. The first part of the document is NASAA's overview of the background, provisions, explanation and instructions regarding the SCOR document. The second part of the document is the official NASAA Statement of Policy which adopted and promulgated SCOR. Since its inception, SCOR has been adopted in the great majority, but not all, of the state jurisdictions. Many states have not adopted SCOR verbatim; thus, it is always prudent to check the state specific SCOR language in a given jurisdiction.

FORM

**NASAA Overview of
Small Company Offering Registrations (SCOR)**

NASAA revised the Form U-7, Disclosure Document on September 28, 1999. The revised Form U-7 has not been adopted by the Securities and Exchange Commission for use as the disclosure document in connection with Regulation A. If you intend to qualify your offering of securities under SEC Regulation A using Model A as the disclosure document, you may be required to use Form U-7, Small Corporate Offering Registration, adopted April 29, 1989.

Introduction, Requirements, and Instructions

Introduction.

Welcome to SCOR. In this document, you will find information on the requirements your company must meet in order to use the Form U-7, called the "SCOR Form," to offer and sell securities. You will find specific instructions on how to complete the Form in the SCOR Manual. It may be helpful to review the entire SCOR Form before responding to any of the items. This will help you determine the appropriate place for the Company's disclosure.

The SCOR Form is not available for use in connection with every type of securities offering. The Form was designed for use by companies seeking to raise capital through a public offering of securities exempt from registration with the U.S. Securities and Exchange Commission (SEC) under SEC Regulation A, Rule 504 of SEC Regulation D ("Rule 504"), or Section 3(a)(11) of the Securities Act of 1933. Your completed SCOR Form will become the main disclosure document for offerings being registered in all states accepting SCOR. A Company offering its securities under SEC Regulation A should check with the SEC to determine whether the SCOR Form may be used as the disclosure document.

The SCOR Form does not have Items that cover all types of industries and businesses. If the Items in the SCOR Form do not cover all the important areas of disclosure about your Company or its business, you may find it necessary to add material disclosure to Item 117, Other Material Factors.

Throughout this document and the SCOR Manual we refer to the Form U-7 as the "SCOR Form" or the "Disclosure Document."

These materials are intended to help small companies understand state securities laws and their filing requirements. You should be aware that the Company must also comply with federal securities laws. Information on complying with these laws is available from the SEC at the following website address: www.sec.gov.

Requirements.

Many jurisdictions require companies that want to use the SCOR Form to sell their securities to comply with the Statement of Policy of the North American Securities Administrators Association (NASAA) regarding Small Company Offering Registrations. Information about NASAA and help for small businesses may be found at the following website address: www.nasaa.org. The provisions of the NASAA Statement of Policy are summarized below:

The Company must:

- be a corporation or centrally managed limited liability company organized under the laws of the United States or Canada;
- not be subject to the reporting requirements of the Securities Exchange Act of 1934;
- not be an investment company under the Investment Company Act of 1940;
- not be engaged in petroleum exploration and production, mining, or other extractive industries; and

- not be a development stage company with no specific business plan or purpose other than merger.

Additionally, the Company may not use the SCOR Form to offer and sell its securities if the Company or any of its officers, directors, principal stockholders or promoters are disqualified because of prior violations of the securities laws. The Company also may not use salespersons who are disqualified because of prior violations of the securities laws.

The Company must set an offering price for common stock or common ownership interests that is equal to or greater than US \$1.00 per share or unit of interest. The Company must agree with the appropriate securities regulatory agencies that it will not split its common stock, or declare a stock dividend, for two years after effectiveness of the registration if to do so has the effect of lowering the price below US \$1.00.

If the Company pays a commission, fee or other remuneration to any person for soliciting any prospective purchaser in connection with the offering, that person must be registered or licensed if required under securities law.

The Company's financial statements must be prepared in accordance with either U.S. or Canadian generally accepted accounting principles. Interim financial statements may be unaudited. All other financial statements must be audited by independent certified public accountants. If certain conditions set out in the Statement of Policy are met, the Company's financial statements, instead of being audited, may be reviewed by an independent certified public accountant in accordance with the Accounting and Review Service Standards promulgated by the American Institute of Certified Public Accountants or the Canadian equivalent.

Although summarized above, you should read the Statement of Policy in its entirety.

State securities laws.

State securities laws are designed to provide investors with information needed to make an informed investment decision. Additionally, they are designed to protect investors from being victimized by dishonest promoters of fraudulent business schemes posing as legitimate business enterprises.

In order to comply with state securities laws, you must disclose in the SCOR Form all material information about the Company that a typical investor would want to know before making an investment in the Company. Many state securities laws also require Company promoters to share the potential risks and rewards of holding stock in the Company fairly with public investors. If you file an application to register the company's securities in those states, examiners will review the Company's offering for compliance with substantive standards.

The Company will receive comments from examiners in states in which the SCOR Form is filed. Comments may be limited to requests for disclosure of additional information or may require that certain terms of the offering be modified to comply with a state's substantive standards. Failure to resolve outstanding comments can lead to denial of an application for registration.

If the Company intends to offer its securities in two or more states within a geographic region, you should contact those states to determine if the Company can request regional review. By requesting regional review, the Company will, in most cases, confer with a lead jurisdiction that will coordinate the review and comments of all states within the region in which the Company intends to offer its securities. To link to the various regional review programs, go to the NASAA website at: www.nasaa.org and click on "Corporate Finance".

Prior to completing the SCOR Form, you may wish to contact your local securities regulator to review applicable standards. It may be possible to arrange a pre-filing conference.

General instructions.

You should use "Plain English" in writing the Company's Disclosure Document. If any answer requiring significant information is materially inaccurate, incomplete or misleading, the Company, its management and principal stockholders may be liable to investors. If the Company is using a salesperson to help sell its securities, the salesperson should ask questions to determine that the Disclosure Document is accurate and not misleading, or the salesperson may also be liable.

The SCOR Form when properly filled in, signed and submitted, together with the exhibits scheduled below and a Form U- 1, Uniform Application to Register Securities, constitutes an application to register securities in the states where filed. If the Company is relying on Rule 504, a copy of the Form D that you have filed with the SEC becomes part of the Company's application and you must also file it with the securities regulators. The Company must submit a signed original of the SCOR Form, together with an executed Form U-1 and any other required documents. Certain items on the Form U-1 may not be applicable depending on which federal exemption the Company relies.

You must file a separate Form U-1 in each state in which you want to sell securities indicating the amount of securities being registered in that state. You also must enclose a check for the amount of the filing fee. Each state must separately declare the registration effective by an order to that effect unless that state has some other procedure.

You must reproduce each Item in the SCOR Form exactly as it appears, although the Items or the Company's responses may appear in boldface type in order to distinguish between them. The Items and the Company's responses must appear in the same type size. You should not use script or italic type.

The Company must file an opinion that the securities being offered have been duly authorized and when issued will be legally and validly issued, fully paid and non-assessable and binding on the Company in accordance with their terms. The opinion must be from an attorney licensed to practice in a state or territory of the U.S. or in a province or territory of Canada.

Once the Company's SCOR Form is filled out, filed and declared effective, it becomes the Company's disclosure document. The Company may reproduce the SCOR Form for dissemination to potential investors or may place it on the Internet. You should make sure that the copies that are reproduced are readable and the same as the accepted SCOR form. You should also make sure that no one changes the Form that is given to investors or that is posted on the Internet because the Company may be held responsible for any inaccurate information. Do not include a cover of any type in the document you distribute.

If the Company intends to offer securities, including a public solicitation, before the offering is registered, it must ensure that it has complied with one of the available federal exemptions as well as with applicable state law.

If the Company is relying on an exemption from registration under Rule 504, the Company may not be able to conduct a public solicitation of its securities until the registration has been declared effective in at least one state. If the Company is making an intrastate offering of securities under Section 3(a)(11) of the Securities Act of 1933 or making an offering under SEC Regulation A, the Company may be able to make offers, but not sales, in certain jurisdictions prior to registration. In all three cases, you should contact the appropriate securities regulator to determine whether that jurisdiction's laws allow you to make an offer or public solicitation before the registration is declared effective.

Examples of activities that the Company may not be able to engage in until the offering is registered include giving the SCOR Form to potential investors, placing it on the Internet, taking orders, giving a potential investor a subscription agreement and taking money in exchange for securities. If the Company offers securities before allowed by the applicable securities laws, securities regulatory agencies may take action to delay or stop the offering, or to order the

Company or its management to return money to investors. An action taken by a regulator in one jurisdiction may prevent the offering from going forward in another jurisdiction. When the registration has been declared effective in a state, offers and sales may be made in that state even though registration in other states has not been declared effective.

You must deliver the Disclosure Document to each investor before a sale is made. The securities regulator will issue an order indicating the length of time the registration will be effective. The length of time a registration will remain effective in a particular jurisdiction is usually limited to a one year period, unless renewed.

If a material event concerning the Company or the offering occurs after the registration has been declared effective, and while the offering is still in progress, the Company will need to change its Disclosure Document so that it is accurate and complete. The Company must file its amended Disclosure Document with the appropriate securities regulators. The Company may not use the amended Disclosure Document until the securities regulators have cleared it. If any of the changes would be material to the making of an investment decision by an investor, and if the minimum proceeds have not been raised, the Company must deliver the amended Disclosure Document to persons that have previously subscribed. They must be given the opportunity to rescind or reconfirm their investment.

The Company must file all supplemental selling literature or advertisements announcing the offering with the securities regulator of each state prior to publication or circulation within that state.

You must include financial information about the Company. To do that, you must attach the Company's financial statements to the Disclosure Document. Refer to Item 118 of the SCOR Manual for details about the required financial statements. You also are encouraged to contact the securities regulatory agencies to discuss financial statement requirements, as certain jurisdictions may have financial statement requirements that differ from those disclosed in the SCOR Manual.

You should file the following exhibits with each application to register securities:

- Sales Agreement between the Company and a broker dealer or selling agent.
- Articles of Incorporation or Organizational Documents and all amendments to those documents
- By-Laws, as amended to date
- Any indenture, form of note or other contractual provision containing terms of notes or other debt, or of options, warrants or rights to be offered
- Specimen of security to be offered (including any legend restricting resale)
- Consent to service of process (Form U-2) accompanied by appropriate corporate resolution (Form U-2A), if required
- All advertising or other materials directed to or to be furnished investors in the offering
- Form of impound agreement for impound of proceeds
- Consent to inclusion in Disclosure Document of Accountant's report
- Consent to inclusion in Disclosure Document of Tax Advisor's opinion or description of tax consequences

- Consent to inclusion in Disclosure Document of any evaluation of litigation or administrative action by counsel
- Form of any Subscription Agreement for the purchase of securities in this offering
- Opinion of Counsel
- Computations of responses to Items 10, 34, 37, 40 and 65 (check your work against the Company's financial statements)

**Statement of Policy Regarding
Small Company Offering Registrations (SCOR)**

ADOPTED APRIL 28, 1996

I. Introduction

The following guidelines of the North American Securities Administrators Association, Inc. ("NASAA") provide for the uniform treatment of registrations of small company offerings which are exempt from federal registration under Rule 504 of Regulation D, Regulation A, or Rule 147 of the Securities Act of 1933, and are consistent with public investor protection and in the public interest. The Securities administrator ("administrator") may waive any standard set forth in this Policy Statement and may also impose substantive standards not contained in this Policy Statement.

II. Application

The requirements contained in this Policy Statement shall apply to registrations that utilize Registration Form U-7 and are exempt from federal registration under (1) Rule 504 of Regulation D, (2) Regulation A, or (3) Rule 147 of the Securities Act of 1933.

III. Requirements

Registrations covered in this Policy Statement shall meet the following requirements:

A. The issuer shall:

1. be a corporation or centrally managed limited liability company organized under the law of the United States or Canada, or any state, province, or territory or possession thereof, or the District of Columbia, and have its principal place of business in one of the foregoing;
2. not be subject to the reporting requirements of Section 13 or 15(d) of the Securities Exchange Act of 1934;
3. not be an investment company registered or required to be registered under the Investment Company Act of 1940;
4. not be engaged in or propose to be engaged in petroleum exploration and production, mining, or other extractive industries;

5. not be a development stage company that either has no specific business plan or purpose or has indicated that its business plan is to engage in merger or acquisition with an unidentified company or companies or other entity or person; and

6. not be disqualified under Section IV of this Policy Statement.

B. The offering price for common stock or common ownership interests (hereinafter, collectively referred to as common stock), the exercise price for options, warrants, or rights to common stock, or the conversion price for securities convertible into common stock, must be greater or equal to US \$1.00 per share or unit of interest. The issuer must agree with the Administrator that it will not split its common stock, or declare a stock dividend for two years after the effective date of the registration if such action has the effect of lowering the price below US \$1.00.

C. Commissions, fees, or other remuneration for soliciting any prospective purchaser in connection with the offering in the state are only paid to persons who, if required to be registered or licensed, the issuer believes, and has reason to believe, are appropriately registered or licensed in the state.

D. Financial statements shall be prepared in accordance with either US or Canadian generally accepted accounting principles. If appropriate, a reconciliation note should be provided. If the Company has not conducted significant operations, statements of receipts and disbursements shall be included in lieu of statements of income. Interim financial statements may be unaudited. All other financial statements shall be audited by independent certified public accountants, provided, however, that if each of the following four conditions are met, such financial statements in lieu of being audited may be reviewed by independent certified public accountants in accordance with the Accounting and Review Service Standards promulgated by the American Institute of Certified Public Accountants or the Canadian equivalent;

1. the Company shall not have previously sold securities through an offering involving the general solicitation of prospective investors by means of advertising, mass mailing, public meetings, "cold call" telephone solicitation, or any other method directed toward the public;

2. the Company has not been previously required under federal, state, provincial or territorial securities laws to provide audited financial statements in connection with any sale of its securities;

3. the aggregate amount of all previous sales of securities by the Company (exclusive of debt financing with banks and similar commercial lenders) shall not exceed US \$1,000,000; and

4. the amount of the present offering does not exceed US \$1,000,000.

E. The offering shall be made in compliance with Rule 504 of Regulation D, Regulation A, or Rule 147 of the Securities Act of 1933.

F. The issuer shall comply with the General Instructions to SCOR in Part I of the NASAA SCOR Issuer's Manual.

IV. Disqualifications

A. Unless the Administrator determines that it is not necessary under the circumstances that the disqualification under this section be applied, application for registrations referred to in Section II shall be denied if the issuer, any of its officers, directors, ten percent or greater stockholders, promoters, or selling agents or, any officer, director or partner of any selling agent:

1. has filed an application for registration which is subject to a currently effective stop order entered pursuant to any state or provincial securities laws within five years prior to the filing of the registration statement;
2. has been convicted, within five years prior to the filing of the current application for registration, of any felony involving fraud or deceit, including, but not limited to, forgery, embezzlement, obtaining money under false pretenses, larceny, or conspiracy to defraud;
3. is currently subject to any state or provincial administrative enforcement order or judgment entered by that state's or province's securities administrator within five years prior to the filing of the current application for registration;
4. is subject to any state or provincial administrative enforcement order or judgment in which fraud or deceit, including, but not limited to, making untrue statements of material facts and omitting to state material facts, was found, and the order or judgment was entered within five years prior to the filing of the current application for registration;
5. is subject to any state or provincial administrative enforcement order or judgment which prohibits, denies, or revokes the use of any exemption from registration in connection with the offer, purchase, or sale of securities;
6. is currently subject to any order, judgment, or decree of any court of competent jurisdiction that temporarily, preliminarily, or permanently restrains or enjoins such party from engaging in or continuing any conduct or practice in connection with the purchase or sale of any security, or involving the making of any false filing with the state, entered within five years prior to the filing of the registration statement; or
7. has violated the law of a foreign jurisdiction governing or regulating any aspect of the business of securities or banking or, within the past five years, has been the subject of an action of a securities regulator of a foreign jurisdiction denying, revoking, or suspending the right to engage in the business of securities as a broker-dealer, agent, or investment adviser or is the subject of an action of any securities exchange or self-regulatory organization operating under the authority of the securities regulator of a foreign jurisdiction suspending or expelling such person from membership in such exchange or self-regulatory organization.

B. The prohibitions of Subsections IV.A.1. through 3., and 5. shall not apply if the person subject to the disqualification is duly registered or licensed to conduct securities related business in the state or province in which the administrative order or judgment was entered against such person, or if the broker-dealer employing such person is registered or licensed in the state and the Form B-D filed in the state discloses the order, conviction, judgment, or decree relating to such person.

C. No person disqualified shall act in any capacity other than the capacity for which the person is registered or licensed.

D. Disqualification is automatically waived if the jurisdiction which created the basis for disqualification determines upon a showing of good cause that it is not necessary under the circumstances that registration be denied.



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Current Legal Forms for Real Estate

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Current Legal Forms for Real Estate
Chapter 22A REAL ESTATE SECURITIES
Part IV. FORMS
B. REAL ESTATE SCOR REGISTERED OFFERING

28-22A Current Legal Forms for Real Estate FORM 22A.06

AUTHOR: by Robert M. Nelson

FORM 22A.06 NASAA Small Company Offering Registration (SCOR) Manual--Form U-7 Disclosure Document

COMMENT

The Small Company Offering Registration (SCOR) Manual appearing below has been promulgated by the North American Securities Administrators Association (NASAA) to assist persons responsible for preparing the Form U-7 Disclosure Document which is the main part of a SCOR registration. Many states have adopted (and in many instances modified) the SCOR form of Registration proposed by NASAA. The SCOR filing will normally accompany an offering which is relying on a SEC Rule 504 or Regulation A exemption. The filing may be made in a number of state jurisdictions which may have somewhat different provisions in each state's statutory and regulatory material. Since each state's regulatory provisions may vary from the NASAA Form U-7 and the Manual's instructions, it is prudent to review each state's SCOR requirements. As the Manual suggests, each state's securities regulator may be contacted with questions about the state's SCOR statute, regulations, and Form U-7.

FORM

NASAA SMALL COMPANY OFFERING REGISTRATION (SCOR) MANUAL

This Manual has been prepared to help you complete the Form U-7 Disclosure Document. It contains instructions for completing the Items in the Form. If you need further information, contact your State or Provincial securities regulator or the North American Securities Administrators Association.

Cover Page-Page 1

DISCLOSURE DOCUMENT

____%

If maximum sold: \$

Investment in a small business is often risky. You should not invest any funds in this offering unless you can afford to lose your entire investment. See Item 1 for a discussion of the risk factors that management believes present the most substantial risks to you.

The date of this Disclosure Document is _____.

The first two pages of your Disclosure Document are the COVER PAGE and the EXECUTIVE SUMMARY. These pages summarize and highlight some of the essential information of the offering.

Make sure the Cover Page contains the specified information. Do not add any additional information to the Cover Page.

If you have a problem fitting the required information on this page, contact your securities regulator.

The first two items on the Cover Page are the address of the Company's principal office and the Company's telephone number. You may add other ways to contact the Company, such as a facsimile number, an e-mail address, and a web site address.

The next two items on the first Cover Page are:

Person(s) to contact at Company with respect to offering:

Telephone Number (if different from above):

If the Company's officers, directors, or employees will offer and sell its securities, respond to these items with their name(s) and telephone number(s). You may include other ways to reach these people, such as a facsimile number or an e-mail address. Check with the securities regulatory agencies in the jurisdictions where the Company will offer its securities to determine whether these people will need to be licensed or registered.

Delete these two items if the Company will offer its securities through sales persons or finders who are not officers, directors, or employees.

Alternatively, the Company may have someone at the Company available to answer questions about the Company, or the offering, even though it has contracted with other sales persons to offer the securities. In that case, respond to these items with the names, telephone numbers, etc. of those officers, directors, or employees.

The next item on the Cover Page is:

Type of securities offered:

You must describe the security in detail. If the Company, for example, is offering Preferred Stock with non-cumulative dividends, your response should clearly disclose that fact.

Cover Page-Page 2

Executive Summary

The Company

Describe the business of the Company.

Describe how the Company plans to carry out its activities.

This Company:

- ☐ Has never conducted operations.
- ☐ Is in the development stage.
- ☐ Is currently conducting operations.
- ☐ Has shown a profit in the last fiscal year.
- ☐ Other (Specify):

(Check at least one, as appropriate)

Jurisdiction and date of formation:

Fiscal year end:

(month) (day)

How the Company Will Use Your Money

Describe how the company intends to use the proceeds of this offering.

For more information about how the Company will use your money, see Item 30.

The Principal Officers of the Company

The principal officers of the Company and their titles are:

Chief Executive Officer:

Chief Operating Officer:

Chief Financial Officer:

For more information about these officers, see Item 77.

The Offering

Name of Sales Person(s):

Address:

Telephone Number:

Is there an impound of proceeds until the minimum is obtained?

☐ Yes ☐ No

(See Items 73-76)

Is this offering limited to members of a special group, such as employees of the Company or individuals? ☐ Yes ☐ No.....(See Item 72)

Is transfer of the securities restricted? ☐ Yes ☐ No.....(See Item 53)

This offering is available for sale in the following states:

You should consider the terms and risks of this offering before you invest. No government regulator is recommending these securities. No government regulator has verified that this document is accurate or determined that it is adequate. It is a crime for anyone to tell you differently.

Make sure the Executive Summary contains the specified information. Do not add any additional information to the Executive Summary.

If you have a problem fitting the required information on this page, contact your securities regulator.

The first section of the Executive Summary contains information about the Company. Be especially brief in your answer to the first two items. Try to limit each response to four sentences or less.

The first item is:

Describe the business of the company.

Briefly describe what business the Company does or plans to do. Include a description of the Company's products, goods or services. Indicate which are currently produced or provided and which are planned for the future.

The second item is:

Describe how the company plans to carry out its activities.

Briefly describe how the Company will produce or provide its products or services and how and when it intends to carry out these activities.

The third item is:

This Company:

- ☐ Has never conducted operations.
- ☐ Is in the development stage.
- ☐ Is currently conducting operations.
- ☐ Has shown a profit in the last fiscal year.
- ☐ Other (Specify):
(Check at least one, as appropriate)

Be sure to correctly characterize the Company's stage of development. You may need to check more than one box.

Generally, a company is in the development stage if substantially all of its efforts are devoted to establishing its business. A development stage company generally has commenced principal operations, but has not yet produced significant revenues. Development stage activities include: establishing a business plan; raising capital; engaging in research and development; establishing supply sources; acquiring property, plant, and equipment; recruiting and training personnel; developing markets; and starting up production.

After you have completed the entire Disclosure Document, review the Cover Page and Executive Summary for accuracy.

The Company has included in this Disclosure Document all of its representations about this offering. If anyone gives you more or different information, you should ignore it. You should rely only on the information in this Disclosure Document.

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A TABLE OF CONTENTS is a required feature of the Disclosure Document.

After you have completed the entire Disclosure Document, review the page numbers in the Table of Contents against the actual content of the rest of the Disclosure Document as printed. Be particularly careful to check the page numbers in the Table of Contents of the document you file with securities regulatory agencies.

When the Company makes its offering document available in other types of media, such as when the Company e-mails it as an electronic document or places it on its web site, the page numbers will change. Add a note to each page of the Table of Contents stating that the page numbers correspond to the printed version of the Disclosure Document.

RISK FACTORS

1. List in the order of importance the factors that the Company considers to be the most significant risks to an investor.

PURPOSE. The purpose of risk factors is twofold.

- To warn investors of the risks involved in purchasing the security; and
- To protect the Company from later claims that investors were not told all of the material risks.

AVOID GENERALIZED STATEMENTS. You should avoid generalized statements and include risk factors that are specific to the Company and the offering. No specific number of risk factors is required to be identified. Do not respond to Item 1 with a statement that there are no risks to purchasing securities in the offering. Every offering of securities involves risks. Additionally, do not qualify statements of risk in any manner that is intended to minimize the importance of the risks.

RISK FACTORS COMMON TO SMALL COMPANIES. There are several risks that are common to most small companies, especially those in the development stage. These risks include:

- cash flow and liquidity problems;
- inadequate capitalization;
- inexperience of management;
- absence of operating history;
- absence of a market for the company's products or services; and
- absence of a market for its stock or other securities.

OTHER RISK FACTORS. Other risk factors commonly appearing in connection with a securities offering address absence of profitable operations in recent periods, an erratic financial history, the overall financial position of the Company, the nature of the business in which the Company is engaged or proposes to engage, conflicts of interest between the Company and Management, arbitrary establishment of offering price, and reliance on the efforts of a single individual for success in operating the business. This listing is not intended to be inclusive as risks vary according to the nature of the Company's business and the type of security offered.

SPECIAL RISK FACTORS RELATED TO SALES OF PREFERRED STOCK OR DEBT. When a Company sells preferred stock or a debt security, generally the purchaser expects to receive a preference on payments of dividends or interest. Consequently, additional risk factors are required addressing the ability of the Company to pay the preference or repay the debt and the possibility that the preference may not be paid or the debt repaid at all. These risks may be the most important risks disclosed in connection with the offering and you should place them in an appropriate position.

PLACEMENT OF RISK FACTORS. Each risk factor should be stated in a separate concise paragraph. The title of the paragraph should state in specific language the risk discussed in the risk factor. The risk factors should appear in order of importance with the most important risk factors appearing first. If the Company has no operating history or a limited operating history, generally, risks addressing the Company's financial condition should appear first. This is especially true in a debt or preferred stock offering.

You should include cross-references at the end of each risk factor to the place in the Disclosure Document where the risk is discussed in detail. You may find it helpful to write your risk factors and determine their priority after you have completed all the other Items in the Disclosure Document.

Examples of risk factors can be found in Appendix A.

BUSINESS AND PROPERTIES

GENERAL DESCRIPTION OF THE BUSINESS

2. Describe the business of the Company, including its products or services.

DESCRIPTION OF THE BUSINESS. Describe the Company's business, focusing on the products or services the Company will be selling. Be brief, but include enough information that a person who knows nothing about the Company's business can understand what the Company does or will do. If the nature of the Company's business is technical, you should consider whether to include definitions or an explanation of terms in your response to this Item.

Cover the Company's main product or service and explain the context in which the Company provides the product or service. Answers that discuss how the Company intends to produce the products belong in Item 3; answers about the Company's competitive strategy belong in Items 13 and 14 and answers that discuss the Company's marketing strategy belong in Item 15.

In describing the business you should answer these questions:

- Who does the Company sell its products or services to?
- Why are customers using the Company's products or services?
- Is the Company's business retail or wholesale?
- Are products made to customer specifications or mass-produced?

PRESENT v. FUTURE OPERATIONS. Your response to this Item must be broken down into its parts:

- What products or services the Company produces or offers now; and
- What products or services the Company proposes to produce or offer in the future.

Generally, you should limit your answers to activities the Company presently engages in and activities in which it intends to engage in the next 12 months. If the Company plans to engage in activities using money from sources other than the proceeds from this offering of securities, your answer should disclose this fact. You should consider discussing these activities in a separate paragraph.

MULTIPLE PRODUCTS OR BUSINESSES. If you disclose that the Company will undertake to manufacture a number of products or provide more than one service, the disclosure must be directed to the Company's first (or most important) product or service. You should emphasize the product or service covered by the proceeds from the offering. Generally, the time frame for the development of a small company should correspond to the use of its available resources and the use of the offering proceeds.

3. Describe how the Company produces or provides these products or services and how and when the Company intends to carry out its activities.

MANUFACTURING COMPANIES. Your answer should address manufacturing, assembly, and marketing. It is important to disclose what the Company does itself and what it relies on others to do. For example, the Company might manufacture the final product; it might manufacture components and sell them to others who will produce the final product; or it might assemble a product from components it purchases. You should disclose who markets and distributes the Company's product and what resources (plant, inventory, employees, capital) the Company will need to start or continue manufacturing, assembling, marketing and/or distributing the product.

If the Company plans to offer a new product, disclose the present stage of development, including whether or not the Company has a working prototype. Indicate if the Company will use a material amount of its resources to complete development of the product, and estimate the amount of resources the Company will need to complete development of the product.

If the Company already is producing a product, emphasize how the production of the product will change when the Company has access to the offering proceeds. Discuss what will happen if the Company raises the maximum offering proceeds and what will happen if the Company raises the minimum offering proceeds. The disclosure should be consistent with Item 30, Use of Proceeds.

You should avoid using technical terms to describe the production process, but if you must use them, they should be defined.

SERVICE COMPANIES. If the Company provides a service or intends to provide a service in the future, you should discuss promotion activities, including advertising, public relations, publicity and networking. With respect to an existing service, you should disclose how the service would change when the Company has access to the offering proceeds. Discuss what will happen if the Company raises the maximum proceeds and what will happen if the Company raises the minimum proceeds. The disclosure should be consistent with Item 30, Use of Proceeds.

FOREIGN OPERATIONS. If the Company has a plant, an office or other operations in a foreign country, or is dependent upon foreign suppliers or companies, summarize matters particular to its international operations.

SUPPLIERS

4. Does the Company have any major supply contracts? ☐ Yes ☐ No

If yes, describe.

Describe the material terms of major or sole source contracts. Material terms include such Items as a requirement to purchase a minimum amount of raw materials or supplies, a requirement to purchase at a specified price, or other performance requirements.

5. (a) Is the Company dependent upon a limited number of suppliers?

☐ Yes ☐ No If yes, describe.

5. (b) Does the Company expect to continue to be dependent upon a limited number of suppliers? ☐ Yes

☐ No If yes, describe.

Items 5 (a) and (b) are included for the purpose of disclosing the impact on the Company's business should it lose its ability to obtain essential raw materials or other supplies or services. Disclose whether the Company depends on or expects to depend on one or a limited number of suppliers for essential raw materials or other supplies. Discuss the impact on the Company if its supplier(s) drastically raises prices, or interrupts or discontinues supplies. You should answer the following questions:

- Are there other sources of supply?
- How long will it take to replace the supplies?
- At what cost?

You should disclose the consequences of the impact in this Item and you should further consider if a special risk factor should be included in Item 1, Risk Factors.

CUSTOMER SALES AND ORDERS

6. Does the Company have any major sales contracts? ☐ Yes ☐ No

If yes, describe.

Describe the material terms of major existing sales contracts, including the quantity or quality of the goods and services,

or performance dates. If a major contract is oral or informal, you should disclose that fact and the difficulty of enforcing the contract.

If the status of any major contract is uncertain or subject to cancellation, include disclosure in Item 1, Risk Factors.

7. State the total amount of the Company's sales of products or services for the most recent 12 month financial reporting period.

If the Company has not had sales, state so here, and state that you will not be responding to Items 8 through 11.

8. State the dollar amount of a typical sale.

You should be careful to point out if the figure disclosed represents an average rather than actual order size.

9. Are the Company's sales seasonal or cyclical? ☐ Yes ☐ No If yes, explain.

If the Company has sales, disclose what percentage of the Company's annual sales revenues are received in each financial quarter. If the pattern of sales shows significant variation among the quarters, disclose the reasons for the variation.

10. State the amount of foreign sales as a percent of total sales for last fiscal year:
_____%.

Explain the nature of these sales, including any anticipated changes.

If the Company sells its product or service in a foreign country, summarize matters particular to that country that may have a negative impact on the ability of the Company to conduct business in the country. Such matters may include: devaluation of currency, political instability, or international trade agreements. Describe the impact on the Company. If the impact on the Company's operations is or might be substantial, disclose that in Item 1, Risk Factors.

11. Name any customers that account for, or based upon existing orders will account for, a major portion (20% or more) of the Company's sales.

Disclose any special legal or business relationship the Company has with the customer. Also disclose whether the loss of the customer would have a material adverse effect on the Company. You should consider whether the impact of the loss warrants a special disclosure under Item 1, Risk Factors.

In applying the 20% test, a group of affiliated customers should be regarded as a single customer.

12. State the dollar amount of firm orders.

A firm order is an order that has been confirmed and is not subject to cancellation in the usual course of business. If the Company does not have firm orders, state that you have not completed this Item because the Company has no firm orders.

COMPETITION

13. (a) Describe the market area in which the business competes or will compete.

Generally, limit the discussion of competition to the Company's geographic area. For example, if the Company is building budget motels in a particular city it should discuss competition in the surrounding metropolitan area and not address competition across the state or the United States. If, however, the Company truly competes with businesses outside its geographic area, you should discuss those businesses. An example of a company whose market is outside its geographic area is a company that does business mainly over the Internet.

You should not include information from segments of the market in which the Company does not or will not operate. For example, if the Company is in the business of operating a budget motel, it should not include information relating to resort hotels.

You should not use industry information to project how much the Company could sell if it achieves a certain market share. If you disclose facts and figures, you may be required to file information to document their source.

13. (b) Name the Company's principal competitors and indicate their relative size and financial and market strengths.

Identification of the Company's principal competitors requires a two-step analysis. First, identify the Company's customers and potential customers. Then determine whether other companies exist that are likely to fulfill the needs of the Company's customers and potential customers. You should not forget that another company might use a different method or product to satisfy customers' needs. These companies are competitors and should be included in the response to this Item. An example of two companies that provide the same service in different ways is the company that produces the yellow pages of the phone book and the company that operates an 800 number providing telephone listings.

14. (a) Does the Company compete, or expect to compete, by price?

☐ Yes ☐ No If yes, describe its competitive strategy.

If the Company's strategy is to compete on price, you should describe the strategy. If the Company has new technology that will allow it to compete on price, you should generally describe how it will be done.

If competition is by price, disclose the price or price range of the product or service. The price or price range of the product or service may be broken down in a number of ways:

- the cost of the product or services;
- the market price of the product or service; or
- the negotiated price of the product or service.

Disclose if the product is at a stage of development in which it is too early for you to determine its price. If the product has not been produced yet, discuss how you have made the determination that the Company can compete on price? You will need to explain how the Company will go about pricing the product.

14. (b) Does the Company compete, or expect to compete, by service?

☐ Yes ☐ No If yes, describe its competitive strategy.

14. (c) Does the Company compete, or expect to compete, on some other basis?

☐ Yes ☐ No If yes, state the basis and describe the Company's competitive strategy.

If your response to both Items 14(a) and 14(b) is "no", then you must explain on what other basis the Company expects to compete. Other common bases of competition include a unique product or service, a narrow market, or a product or service warranty.

MARKETING

15. (a) Describe how the Company plans to market its products or services during the next 12 months, including who will perform these marketing activities.

MARKETING STRATEGY v. TACTICS. You should describe how the Company intends to make its products or services known to potential customers. Typically you should disclose whether the Company will make direct sales at retail or wholesale, or sell through distributors or franchises. You need not include every tactic the Company intends to use in its marketing campaign. For example, if the Company will market its product through advertising inserted in telephone bills, it is not necessary to disclose the details of how many households will receive the advertising in each mailing. However, if the advertising is targeted to a certain demographic group, this should be disclosed. In general, it is the fact that the Company targets a particular group for advertising that is relevant, not the details of the targeting method.

MARKETING STUDIES. You should not refer to marketing studies unless you show that there is a basis to believe the marketing study is reasonable and accurate. You should not disclose marketing studies that contain unfounded projections; if a reference is made to a marketing study, you should set out the key assumptions, methods and findings. If the Company has not conducted any formal or scientific marketing studies, this fact should be disclosed.

If the Company has no marketing study or marketing plan, you should disclose this in Item 1, Risk Factors.

15. (b) State how the Company will fund these marketing activities?

If marketing activities are to be paid for with offering proceeds, set out the expenditure in Item 28, Milestones and in Item 30, Use of Proceeds. If the offering involves a minimum and maximum amount, describe the marketing activities to be undertaken at both the minimum and the maximum offering amounts.

EMPLOYEES

16. (a) State the number of the Company's present employees by type of employee (i.e., clerical, operations, administrative, etc.).

16. (b) State the number of employees the Company anticipates it will have within the next 12 months by type of employee (i.e., clerical, operations, administrative, etc.).

DEFINITION OF EMPLOYEE. If a person is within the normal work group for the Company's type of business, you should treat that person as an employee for disclosure purposes regardless of what the Company calls the person (e.g., employee, independent contractor, consultant).

You should disclose the number of the Company's existing employees and the number of employees the Company anticipates it will hire during the next 12-month period. The number of employees the Company will hire will be dependent upon the amount of money the Company anticipates it will have available to fund these positions.

Distinguish between employees to be added during the next 12-month period based upon the success of the offering and the number of employees that might be added regardless of whether the offering is successful. Distinguish between part time and full time employees. In an offering with a minimum and maximum offering amount, set out the number and type of employees (e.g., clerical, operations, and administrative) to be added if the Company raises the minimum offering amount as well as if the Company raises the maximum offering amount.

17. Describe the Company's labor relations.

Discuss whether the Company has experienced any problems in finding and retaining suitable employees and whether the Company anticipates any similar problems in the future.

If any of the Company's employees are subject to collective bargaining agreements, you should disclose the nature of the agreements. Include the dates the collective bargaining agreements expire.

If the Company's employees are on strike, or have been on strike in the past 3 years, or are threatening to strike, describe the dispute.

18. Indicate any benefits or incentive arrangements the Company provides or will provide to its employees.

You should first cover those benefits that the Company is presently giving its employees and then, those that it expects to give its employees in the future. If the Company intends to offer benefits, disclose whether the board of directors or stockholders must approve them.

Benefits or incentive arrangements can vary widely. Employee fringe benefits usually cover medical insurance, dental insurance, life insurance, vacation leave, sick leave and pension. Incentive arrangements include stock options, stock appreciation rights, low cost loans, bonuses, deferred compensation, profit sharing plans, employment agreements, commissions and royalties on product sales. Incentive arrangements in small businesses more often benefit officers, directors and key employees.

Emphasize benefits to all employees or rank and file employees. Benefits that are available to Officers, Directors and key persons only, should be disclosed in Item 83, Compensation.

You should discuss stock purchase agreements, stock options, rights or warrants that benefit current stockholders or employees in Item 101, Options and Warrants.

PROPERTIES

19. (a) Describe generally the principal properties that the Company owns or leases.

GENERAL. Item 19 (a) relates both to tangible property such as real estate, plant and equipment, and to intangible property such as patents, licenses, copyrights, trademarks, service marks, trade names, trade secrets, and other intellectual property that the Company owns prior to the offering and will use in the business. Generally, you should describe the important types of property the Company owns or leases.

Focus on the principal properties owned or leased. You should include only the amount of detail necessary to inform investors as to the suitability, adequacy, productive capacity and extent of utilization of the properties and facilities owned or leased by the Company. Descriptions of real estate such as office or warehouse space should be on a square-footage basis. You should disclose the location and character of the property, if this is important to the offering.

If any of the Company's properties are not owned outright, you should disclose the extent of the encumbrances or installment payments. If the terms of purchase constitute long term debt, you should disclose this fact.

You may need to disclose separately the Company's property that is subject to depreciation or obsolescence. If, for example, computer systems constitute an essential part of the business plan, you should discuss obsolescence, replacement and the method of financing replacements. If the Company does not have a plan for replacing plant and equipment, you should disclose this fact.

LEASES. If the Company leases property, you should include a summary of the terms under the leases, including the amount of payments, expiration dates and the terms of any renewal options. If the Company has decided to lease instead of own its property, you should disclose the reasons for the decision. A short term or annual lease raises the questions: What if the Company cannot renew the lease? What will the Company do next? What can the Company afford to do

next?

INTELLECTUAL PROPERTY. Indicate the extent to which the Company's operations depend upon or are expected to depend upon patents, copyrights, trade secrets, know-how, or other proprietary information. Discuss how the Company will use intellectual property, such as a patent, copyright or trade secret to become profitable. Describe the steps the Company has undertaken to secure and protect this intellectual property, including any use of confidentiality agreements, covenants not-to-compete, and efforts taken to protect rights under state, federal and foreign laws. The Company may find it costly to perfect and protect these rights. If such rights have not been secured, you should disclose the cost and time period it will take to secure them. Foreign rights, patents, trade secrets, trademarks and copyrights can exist, but such protection does not always exist to the same extent as in the United States. You should disclose any limitations on foreign rights, patents, trade secrets, trademarks and copyrights. If important, you should discuss each right separately.

Additionally, you should disclose the value the Company has placed on these intangibles and explain how the Company determined that value.

NEGATIVE DISCLOSURE. If the Company has chosen not to protect intellectual property, you should disclose this fact and explain why the Company has chosen not to try to protect its property.

DESCRIPTION OF TYPES OF INTELLECTUAL PROPERTY

Patent. A patent is a right granted by the government to make, use or sell an invention for a period of years.

Copyright. A copyright is a right granted by the government to an "author" of a work in a tangible medium for the exclusive publication, production, sale and distribution of the work. A "work" includes writings, literature, art, drama, motion pictures, and other electronically produced materials.

Trade Secret. A trade secret consists of any formula, pattern, device or calculation of information used in business to obtain a competitive advantage. The owner must take precautions to keep the process or device secret. Examples of possible trade secrets include, but are not limited to, blue prints, production formulas, manufacturing processes, customer lists, price and cost information and computer programs. Precautions might include confidentiality agreements and restrictions on access to the information.

Know-how. Know-how usually means being able to perform successfully, known processes that go to the heart of the production of the product or the operation of the enterprise. For instance, a process may be known by only one employee. An example is winemaking.

Trademark. A trademark is a word, logo, symbol, design or shape used on or in connection with the sale or distribution of a company's product.

Service Mark. A service mark is a word, logo, symbol, design or shape used to identify or in connection with the rendering of a service.

Trade Name. The name of a company that is used in commerce.

LICENSE AGREEMENTS. A license is a grant of rights from the owner of a patent, trademark, trade secret or copyright to another person. Summarize the principal terms and expiration dates of any significant license agreements, including the amount the Company expects to spend during the year. Disclose the relationships with the other party under the license agreement. A license agreement may be exclusive or shared. The Company must be certain before it uses the term "exclusive" license agreement. License agreements often do not assign all of the rights and interests

involved.

RISK FACTORS. Many possible risk factors arise out of the treatment, valuation and protection of intangible rights. For example, essential computer software or customer lists may become obsolete within a short period of time. Loss of a key employee may be critical to the Company. Patent or trademark infringement actions either by or against the Company may be very expensive and beyond the means of the Company. You may need to include a general or specific risk factor with regard to the inability of the Company to protect its intellectual property even though the Company has made required filings under law or taken other precautions. If the Company decides not to protect important intellectual property, disclose this fact in Item 1, Risk Factors.

CONFLICTS OF INTEREST. In the event the Company has purchased or leased properties from its officers, directors, stockholders or other key persons, disclose the relationship and, if relevant, the conflict of interest. You also should disclose whether the transactions were on terms at least as favorable to the Company as those generally available from unaffiliated third parties.

19. (b) Indicate what properties the Company intends to acquire or lease.

Generally, you should limit your answer to properties the Company intends to acquire in the next 12 months. In addition to describing a proposed acquisition, you should describe why it is being considered and how it will be accomplished. If property is to be acquired with offering proceeds, set out the acquisition in Item 28, Milestones and Item 30, Use of Proceeds. If the offering involves a minimum and maximum amount, describe properties to be acquired at both the minimum and the maximum offering amounts.

Include the cost of such acquisitions and the sources of financing the Company expects to use in obtaining these properties; whether by purchase, lease or otherwise. Address whether the Company will have the cash, credit worthiness, or capital stock available to purchase or lease the property. Disclose sources of financing available to the Company other than the offering proceeds or bank financing.

If you disclose acquisitions of property, you should distinguish between mere intentions, oral agreements, and written obligations.

If the Company has not yet identified properties to be acquired, you should disclose the criteria or standards the Company will use to select and acquire the properties.

If no properties are going to be acquired, you should disclose that the Company does not plan to acquire any properties in the immediate future.

In the event the Company is purchasing or leasing, or intends to purchase or lease, properties from officers, directors, stockholders or other key persons, you should disclose the relationship and, if relevant, the conflict of interest. Disclose whether the Company has established a policy with respect to affiliated transactions.

RESEARCH AND DEVELOPMENT

20. Indicate the amounts that the Company spent for research and development during its last fiscal year.

Research is the planned effort of a company to discover new information to help create a new product, service, process or technique or vastly improve a current one. Research does not include market research and market testing as this activity relates to the selling and marketing operations of the company. Development takes the findings generated by research and formulates a plan to create the desired item or improve the existing one.

Research and development implies a future benefit. You should disclose how the knowledge gained through research

and development will be valuable to the Company and how the Company is likely to be able to derive a commercial benefit from that knowledge. The Company might exploit the knowledge by producing the product or offering the service or by licensing or selling the technology to others.

In discussing historical research and development expenditures, you must identify any expenditures that relate to products or processes that the Company no longer expects to pursue. Additionally, you should distinguish between cumulative research and development and research and development for the last fiscal year.

If the Company has engaged in research and development and had revenues in the last fiscal year, disclose the percentage of the Company's fiscal year revenues these amounts represent.

21. (a) Will the Company expend funds on research and development during the current fiscal year? ☐ Yes ☐ No

21. (b) If yes, how much does the Company plan to spend on research and development during the current fiscal year?

21. (c) How does the Company intend to fund these research and development costs?

Disclose all sources of funding. If the Company intends to apply proceeds from the offering to research and development costs, set out the use in Item 28, Milestones and Item 30, Use of Proceeds. If the offering involves a minimum and maximum amount, include the amount of proceeds to be applied to research and development at both the minimum and the maximum offering amounts.

GOVERNMENTAL REGULATION

22. (a) Is the Company's business subject to material regulation by any governmental agency? ☐ Yes ☐ No

22. (b) Are the Company's products or services subject to material regulation by any governmental agency? ☐ Yes ☐ No

22. (c) Are the Company's properties subject to material regulation by any governmental agency? ☐ Yes ☐ No

22. (d) Explain in detail any "yes" answers to Items 22(a), 22(b), or 22(c), including the nature and extent of the regulation and its effect or potential effect upon the Company.

Concentrate on regulations that extend to the core of the Company's business. Avoid disclosing regulations that are not material or important to the Company's business. The key question is: Does the regulation have a substantial impact on the Company at this phase of the Company's business? If the answer is yes, you should disclose it.

Regulations can be imposed on a company by federal, state, provincial or local government agencies. In completing your response to this Item, you should first identify the type of regulation and then, if it is material, disclose the impact of the regulation. In determining the impact or the potential impact of regulation upon the Company, consider whether a capital expenditure may be necessary, earnings may be curtailed, the competitive position of the Company may be changed, or the continuation of the business may be imperiled.

Discuss regulatory related expenditures that the Company anticipates will be significant. If proceeds of the offering are to be used to pay for them, disclose the expenditure in Item 30, Use of Proceeds.

If the Company is highly dependent upon compliance with a certain governmental regulation in order to do business, disclose this fact in Item 1, Risk Factors.

If compliance with a certain government regulation is a key to the Company's near term profitability, you should include compliance with that regulation as a step in Item 28, Milestones.

The Company must look at indirect and direct impact of a regulation upon the Company's business, products or properties. An example of an indirect regulatory impact would be a decline in the business of a company that makes wood pellets for wood pellet stoves due to the fact that its customers become subject to strict environmental regulation for emissions.

23. (a) Is the Company required to have a license or permit to conduct business?
☐ Yes ☐ No

23. (b) If yes, does the Company have the required license or permit?
☐ Yes ☐ No

23. (c) If the answer to Item 23(b) is "yes," describe the effect on the Company and its business if it were to lose the license or permit.

23. (d) If the Company has not yet acquired a required license or permit, describe the steps the Company needs to take to obtain the license or permit. Estimate the time it will take to complete each step.

To respond to this Item ask yourself the following questions:

- What licenses, permits or other authority does the Company already have?
- What licenses, permits or other authority must the Company have in order to conduct business?
- How long will it take the Company to obtain the license or permit?
- What if the Company does not obtain the license or permit?
- What if the Company loses its license or permit?

If the Company is highly dependent upon obtaining a license or permit in order to do business, this fact should be disclosed as a risk factor.

If obtaining a license or permit is a key to achieving profitability in the near term, disclose that fact as a step in Item 28, Milestones.

COMPANY HISTORY AND ORGANIZATION

24. Summarize the material events in the development of the Company.

Why was the Company started? What was the initial strategy of the Company? If the strategy of the Company changed from its initial concept, explain.

If the Company history includes a merger, acquisition, spin-off, recapitalization, or other similar corporate or company transaction, disclose that event.

25. Describe any recent stock split, stock dividend, recapitalization, merger, acquisition, spin-off, or reorganization.

When you respond to this Item, you should cover the past five (5) years, or the period the Company has been in existence, if less than five (5) years. If the Company recently has undergone a stock split, stock dividend or recapitalization in anticipation of this offering, describe the transaction (and adjust historical per share figures elsewhere in this Disclosure Document accordingly). You should disclose major transactional and financial milestones and include significant stock sales. State the purpose for each transaction. If the Company has been in business for some time, the materiality of the disclosure should be treated on a sliding scale. Earlier events should be disclosed only if they are important and continue to be relevant.

26. Discuss any pending or anticipated stock split, stock dividend, recapitalization, merger, acquisition, spin-off, or reorganization.

You should disclose any type of pending or anticipated corporate or company reorganization.

27. State the names of any parent, subsidiary, or affiliate of the Company. For each, indicate its business purpose, its method of operation, its ownership, and whether it is included in the Financial Statements attached to this Disclosure Document.

CORPORATE STRUCTURE. You should answer this question so that the corporate or organizational structure is clear to the investor. A chart showing the relationship between affiliates may be a valuable supplement to narrative disclosure.

PARENT. Generally, a parent of the Company is a company that controls the Company, directly, or indirectly through one or more intermediaries.

SUBSIDIARY. Generally, a subsidiary of the Company is a company that the Company controls, directly, or indirectly through one or more intermediaries.

AFFILIATE. Generally, an affiliate of the Company is a company that directly or indirectly through one or more intermediaries controls the Company, or is controlled by the Company, or is under common control with the Company.

A person is said to control a company when that person has the power to direct or influence the direction of the management of the company through the ownership of voting securities, by contract or otherwise.

METHOD OF OPERATION. To understand the risks of the investment, the investor should know how the Company actually will be operated in relation to its parent, subsidiaries or affiliates. Consider the following questions in preparing your response:

- In which company are the proceeds of the offering to be used?
- In which company are the significant assets to be held or deployed?
- Which company will have significant revenues and earnings ?

- How will earnings of a parent, subsidiary, or affiliate be distributed to or benefit the Company?
- If a parent owns less than 100% of the Company, who owns the rest?

FINANCIAL STATEMENTS. If the Company has a parent, subsidiary or affiliate, you should consider the effect of accounting standards. Generally, a company that controls 50% or more of the stock of another company must have consolidated financial statements. If an affiliate is not included in the financial statements attached to the Disclosure Document, or is included, and the financial statements are not consolidated, you should include an explanation.

MILESTONES

28. Describe in chronological order the steps management intends to take to achieve, maintain, or improve profitability during the 12 months following receipt of the offering proceeds.

If management does not expect the Company to achieve profitability during that time period, describe the business objectives for that period and the steps management intends to take to achieve those objectives.

Indicate the probable timing of each step.

PURPOSE OF MILESTONES. The Milestone Section lists step- by-step future events that management believes must occur in order for the Company to become profitable or to meet its business objectives, and describes the activity management will undertake to complete each step. Your response to Items 28 and 29 should provide sufficient information so that an investor is able to assess the likelihood that the Company's resources will prove adequate to accomplish its goals.

MAJOR STEPS. List the major steps in your business plan. A company that is opening a new business needs to describe the specific steps to open the business. For example, you might list steps such as obtaining a state license; entering into construction contracts; purchasing specific equipment; and hiring a specific number of personnel. This example is particularly useful for development stage companies. It outlines the important steps the Company must take to reach its goal of opening the business.

The following are examples of typical milestones for small business offerings:

- acquiring a specific piece of equipment,
- registering a trademark,
- granting a license,
- acquiring a specific contract for goods or services,
- achieving a specific level of net sales,

- reaching a specific number of new markets,
- generating a specific level of manufacturing output,
- reaching a specific level of inventory purchases, or
- implementing the next stage of a business plan (e.g., hiring a marketing staff and creating a new marketing department or creating a new production line).

METHOD OF ACHIEVING THE STEPS. You should describe what the Company must do to complete each step. For example, if you have listed "obtain a patent on its product" as a Milestone, the expected manner of occurrence might be to hire an attorney to file an application with the US Patent and Trademark Office. If you have listed "purchase machinery" as a Milestone, the expected manner of occurrence might be to contact a dealer in that type of machinery and to enter into a contract for its purchase.

ORDER OF THE STEPS. List the steps of the Company's business plan in chronological order. To determine the sequence of disclosure here, ask the following questions:

- What are the most important things the Company must do?
- What things must the Company do first?
- What things are dependent upon others?

To the extent possible you should determine the "critical path" of the steps. What is the last point in time when a step can take place or a condition can be fulfilled before the entire plan is off schedule? What steps are dependent upon others? For instance, should leasing the premises come before or after hiring staff and purchasing equipment? Finally, you should not include past events in the Milestone Section.

The sequence of the steps also must be consistent with the Use of Proceeds Section, Item 30. The Use of Proceeds Section sets out the categories and amounts of funds for use by the Company. The Milestone Section shows the sequence in which the Company will use those funds.

TIMING OF THE STEPS. You should disclose when each step will occur. While a date may be given, it is preferable to state a range or number of months in which the Company expects to accomplish the business objective. In addition, you should indicate when the steps begin, such as upon completion of the minimum offering. The period of disclosure should not exceed 12 months.

COST OF COMPLETION OF THE STEPS. You should indicate the monetary cost to achieve each step. You may express this amount as a range. If the Company does not have access to funds from sources other than the proceeds of the offering, your response should track the Use of Proceeds table. If the Company will exhaust the offering proceeds prior to completing a step, you should indicate whether the Company has access to other sources of funds, identify the sources and disclose whether they are contingent or firm.

Be Specific. You should be detailed in describing what the Company needs to do to meet its business objectives. You should state a specific numerical amount or range when you describe certain steps. Examples of specific disclosure include:

"Reach sales of \$100,000," for a manufacturing and merchandising company;

"Acquire 40 large account customers," for a service provider; and
"Sign up 10,000 new subscriptions," for a magazine publisher.

OPERATING COMPANIES. If the Company has already been operating for some time, the Company's disclosure should accurately reflect:

- the current stage of the Company's business plan, and
- how the achievement of a particular business plan objective will have a positive effect on the Company's operations or profits.

TABULAR FORMAT. Describe in tabular form:

- what the steps are;
- what the Company must do to achieve each step;
- the order in which the Company will perform each step;
- the time it will take to complete each step; and
- how much money the Company will spend to complete each step.

EXAMPLE MILESTONE TABLE

Milestone or Step	Expected Manner of Occurrence or Method of Achievement	Date, or Number of Months after Receipt of Offering Proceeds When Step Should be Accomplished	Cost of Completion
Formation and Setup of Company	Find and Lease Location for Company, Purchase Equipment, Hire Employees	2 months	\$150,000
Start Operations	Purchase Materials, Start Assembling Widgets	2-4 months	\$250,000
Start Marketing Phase	Develop Sales Materials, Start Mailings and Product Presentations	2-4 months	\$200,000
Reach Sales of 3,000 Widgets	Finish and Ship Widgets	6-9 months	\$150,000

29. (a) State the anticipated consequences to the Company if any step is not completed as scheduled.

State the consequences to the Company if there are delays in achieving any of the steps listed in Item 28. You should emphasize the effect on the Company's available funds. In addition, state whether the steps in the Milestone Section are based on receipt of the minimum or maximum offering proceeds. If the steps are based on receipt of the maximum offering proceeds, you should also disclose the effect on the Company of raising only the minimum offering amount.

29. (b) Describe how the Company will deal with these consequences.

After the Company states the probable consequences of delay, identify how the Company will deal with the delays. If the Company has a liquidity problem, disclose how the Company will cut down on expenses. If the lack of funding will impact the Company's business plan, provide detailed disclosure. For example, if the Company is unable to turn a profit in the first year of operation, disclose that the "Company would have insufficient funds to open the second store discussed in the Disclosure Document."

NOTE:

After reviewing management's discussion of the steps it intends to take, potential investors should consider whether achievement of each step within the estimated time frame is realistic. Potential investors should also assess the consequences to the issuer of any delays in taking these steps and whether the Company will need additional financing to accomplish them.

USE OF PROCEEDS

30. Show how the Company intends to use the proceeds of this offering:

	If Minimum Sold		If Maximum Sold	
	Amount	%	Amount	%
Total Proceeds	\$	100%	\$	100%
Less: Offering Expenses				
Commissions and Finders Fees				
Legal & Accounting				
Copying & Advertising				
Other (Specify):				
Net Proceeds from Offering	\$	%	\$	%
Use of Net Proceeds				
	\$	%	\$	%
	\$	%	\$	%
	\$	%	\$	%
	\$	%	\$	%
	\$	%	\$	%

Total Use of Net Proceeds	\$	100% \$	100%

Use of Proceeds Section. This Item requires you to disclose in a table how the Company will use the proceeds from the offering. You start with the total amount of the offering and show how much it is reduced by the offering expenses. Next show how the Company expects to spend the Net Proceeds.

Offering Expenses. Calculate and disclose the direct costs associated with the offering. These costs usually include: commissions, legal and accounting, printing and copying, and advertising. Also disclose any miscellaneous fees and costs connected with the offering, such as filing, consulting, impound and escrow accounts, travel, postage, and sales meeting expenses.

Carefully check the figures in this part of the Table to avoid mistakes. Make sure that the percentages listed for the offering expenses are based on a percentage of the Total Proceeds of the offering, not the Net Proceeds.

Total Net Proceeds. In the second part of the Table, disclose in order of priority the use of the Net Proceeds. Check the figures and percentages. Make sure the percentages are based on the Net Proceeds of the offering.

Specific Line Items for the use of Net Proceeds. Disclose the principal purposes for the use of the net proceeds and the amount to be used for each purpose. Consider using the following categories: leases, rent, utilities, payroll (by position or type), purchase or lease of specific items of equipment or inventory, payment of notes, accounts payable, etc., marketing or advertising costs, taxes, consulting fees, permits, professional fees, insurance and supplies. The categories you use will depend on the Company's plans. Replace general labels, such as marketing or research and development, with specific items, such as purchases or salaries.

Related Party Transactions. Disclose all payments that the Company will make to any officer, director, principal stockholder, or key person. Include payments to acquire assets from or to reimburse an officer, director, stockholder, or key person for services already rendered, assets previously transferred, or moneys loaned or advanced. Make sure that your answer is consistent with the information in Items 108 and 109. If the Company has contractual agreements with its officers or employees to pay salaries, show those payments in this Item, unless the Company is profitable and has on-going operations.

Allocation of the Net Proceeds to Unspecified Purposes. This Disclosure Document is intended as a vehicle to raise capital for particular business purposes. The net proceeds should be allocated to specific business purposes following the Company's business plan. In the event that the Company is in the development stage and has no specific business plan or purpose, the Company may be disqualified from using this Disclosure Document under the NASAA Statement of Policy Regarding Small Company Offering Registrations (SCOR)(April 28, 1996). The Company may also be disqualified from using this Disclosure Document if it allocates a substantial amount of the offering proceeds to working capital or reserves.

Allocation of the Net Proceeds to Acquisition of Other Businesses. If the Company is raising capital for a merger or acquisition, you need to make specific disclosures about the planned acquisition. Simply reserving a substantial amount of the proceeds for "acquisition of other businesses" is not sufficiently specific and may cause the Company to be disqualified from using this Disclosure Document.

If the Company has identified the business it intends to acquire, identify the business and the status of any negotiations. Describe the business in detail and attach a copy of its financial statements to the Disclosure Document. Disclose whether the enterprise has business operations similar to the Company's core business and describe the business plan for expanding the business. You may need to discuss the acquisition in other sections of the Disclosure Document.

If the Company plans to use the offering proceeds to acquire another business but has not yet identified a specific enterprise, disclose the type of business the Company is seeking. Disclose whether the Company plans to acquire an enterprise with business operations similar to the Company's core business and describe the business plan for expanding the business. You may need to discuss the planned acquisition in other sections of the Disclosure Document.

Setting the Minimum Offering Amount. State law often authorizes the state securities administrator to require the Company to set a minimum offering amount and to place all offering proceeds into an impound account at a bank until a minimum offering amount is raised. This ensures that the Company does not spend the offering proceeds until a sufficient amount is raised to carry out the Company's business objective. Most small businesses are asked to set a minimum offering amount. If the minimum offering amount is not reached, the offering will be cancelled.

How you set the minimum offering amount is important. If the Company needs the proceeds to purchase a specific piece of property, or to complete a project, you must set the minimum offering amount at (or above) the cost of the property or project plus the costs of the offering. In some cases the minimum amount will be 100% of the offering proceeds.

In other circumstances the amount of the required minimum may be difficult to determine. In these instances, assess the Company's cash needs under a variety of assumptions and provide for a minimum based on its cash needs for the next twelve months under the least favorable assumptions. In some cases the 12 month period may be too long or too short. You will need to make adjustments for the time it takes to conduct the offering. For many small companies the minimum offering amount is simply: How much money will the company need to stay in business over the next 12 months?

To set the minimum, carefully review each item in the Use of Proceeds Section and the Milestone Section and decide which expenditures and purchases the Company must make to get the business plan off the ground, or to keep it from totally failing. With the help of the Milestone Section, recheck the "critical path" to determine the minimum amount of proceeds necessary.

Right to Change the use of Proceeds . If the Company intends to change the use of proceeds after the offering has started, you must reserve the right to do so. You should discuss the alternatives under which the Company may alter the use of proceeds.

After the offering has started, a material change in the Use of Proceeds Section may require the Company to offer a refund of money to investors who purchased before the change. As a matter of course, material changes during the ongoing offering require the Company to change the Disclosure Document on file with the securities regulators.

31. (a) Is there a minimum amount of proceeds that must be raised before the Company uses any of the proceeds of this offering? ☐ Yes ☐ No

31. (b) If yes, describe how the Company will use the minimum Net Proceeds of this offering.

Do not respond to this Item if you answered "no" to Item 31(a).

Give a detailed breakdown of each item listed in the "Use of Net Proceeds" part of the minimum offering column in the table in question 30. Describe each planned use in sequence and in order of priority.

Be specific. For example, identify a building or piece of property to be purchased or leased by its size, location, and the general terms of the purchase agreement or lease. Identify each specific piece of equipment the Company plans to purchase or lease and the general terms of the purchase or lease agreement. If the Company is hiring new personnel, identify each position by title, salary, and expected hiring date.

If the Company plans to use any material part of the proceeds to discharge indebtedness, describe the terms of that indebtedness, including the interest rates. If the Company incurred the indebtedness within the current or previous fiscal year, describe how it used the proceeds of the indebtedness.

Make sure that your answer to this Item is consistent with the information in Items 28 and 30.

31. (c) If the answer to Item 31(a) is "yes," describe how the Company will use the Net Proceeds of this offering that exceed the amount of the minimum offering proceeds.

Do not respond to this Item if you answered "no" to Item 31(a).

Give a detailed breakdown of how the Company plans to spend the offering proceeds that exceed the minimum offering amount. Describe each planned use in sequence and in order of priority. Be specific and make sure that your answer to this Item is consistent with the information in Items 28 and 30. See the discussion of Item 31(b) for more specific instructions.

31. (d) If the answer to Item 31(a) is "no," describe how the Company will use the Net Proceeds of this offering.

Do not respond to this Item if you answered "yes" to Item 31(a).

Give a detailed breakdown of each item listed in the Net Proceeds part of the Maximum offering column in the table in question 30. Describe each planned use in sequence and in order of priority. What expenses will the Company pay first, after the offering expenses? Be specific and make sure that your answer to this Item is consistent with the information in Items 28 and 30. See the discussion of Item 31(b) for more specific instructions.

When there is no minimum offering amount set, you may need to include a special risk factor in Item 1 with respect to the use of the proceeds and the ability of the Company to meet its business objectives. For instance, if only a small amount is raised, all or substantially all of the offering proceeds may be applied to cover the offering expenses and the Company will not otherwise benefit from the offering.

32. (a) Will the Company use other funds, together with the offering proceeds, to fund any project or activity identified in Item 31?

☐ Yes ☐ No

32. (b) If yes, state the amounts and sources of the other funds.

32. (c) Indicate whether the availability of the funds is firm or contingent. If contingent, explain.

Firm or Contingent Funding. In this Item disclose whether the source of the other funds is firm or contingent. You should disclose material conditions or contingencies even if the agreements are called firm commitments. For example, the bank may have promised its loan only if the Company completes the securities offering or hires a specific manager. In the case of a bank line of credit, you must disclose that it is due on demand or short notice and may not be available when the Company needs it. Likewise leases may be terminated, sales of assets may fall through, and private investment loans may never be made.

What will the Company do or what will happen if the Company does not receive the other funds? You should disclose whether or not the Company has a back up plan.

If the funds are critical to the business objectives disclosed or the continued operation of the business, include the contingent nature of the financing as a risk factor.

NOTE:

See the answer to Item 70 for information about proceeds used to compensate sales agents. See the answer to Items 108 and 109 for information about proceeds used to purchase assets from officers, directors, key persons, or principal stockholders or their associates or to reimburse them for services previously provided or moneys borrowed.

SELECTED FINANCIAL INFORMATION

NOTE:

The Company has adjusted all numbers in this section to reflect any stock splits or recapitalizations.

GENERAL

33. What were net, after-tax earnings for the last fiscal year? (If losses, show in parenthesis.)

Total \$

Per share \$

Earnings Per Share. You should first disclose the total earnings (or losses) of the Company and then disclose the earnings (or losses) on a per share basis.

Sample Calculation: **Earnings per Share** = Net after Tax Earnings / Outstanding
 Shares= \$183,246/863,020 = \$0.22/Share

In disclosing the per share data, you must include all outstanding shares. In determining what shares to include, you should include the shares outstanding prior to the offering and should not include shares being offered in this offering. For the purposes of this Item you are required to treat all outstanding options, warrants and rights as exercised. You use the exercise price in the option or warrant agreement to determine the number of shares to be issued. If the Company has issued a significant number of shares during the year, you should check with your accountant to determine whether a weighted average per share would be more appropriate. If so, you should disclose that the number reflects the weighted average per share.

Fiscal Year. You should disclose the after-tax earnings for the last fiscal year. The net after-tax earnings for the last fiscal year should be available from the Company's income statement. Even though the Company may not have operated for a full fiscal year, you must still disclose, its earnings or losses. The disclosure for this Item should reflect the fact that the Company has not been in existence for a full fiscal year, either by setting forth the dates in a parenthetical or by narrative. A typical disclosure might read: "The Company commenced operations in June 1999. The losses as of October 31, 1999 totaled \$195,000."

Interim Activity. If operations have substantially changed since the end of the last fiscal year, you also should show those interim earnings or losses.

Changes in Form of Entity. If the Company recently has reorganized or changed the form of its business entity, such as from a sole proprietorship or partnership, you should show the changes from the old entity to the new one.

Lack of Operations. If the Company is a start-up or development stage company that has had no operations, state: "The Company has not yet operated."

Accounting Review. Net after tax earnings must be based on generally accepted accounting principles.

34. If the Company had profits, show offering price as a multiple of earnings.

$$\frac{\text{Offering Price Per Share}}{\text{Net After-Tax Earnings Per Share for Last Fiscal Year}} = \frac{\text{price/earnings}}{\text{multiple}}$$

Offering Price/Earnings Multiple. The price/earnings multiple simply reflects the ratio of the offering price of the common stock (or other equity security) to the Company's historical earnings. To respond to this Item use the earnings per share calculation in Item 33 and take into consideration some of the other points discussed under Item 33. The price/earnings multiple must be based on financial statements prepared according to generally accepted accounting principles for the Company's last fiscal year. If you disclosed interim earnings in Item 33, you should complete the price/earnings multiple for the interim period.

Sample Calculation: **Price/Earnings Multiple** = Offering Price per share/Net After Tax Earnings per Share
\$5.00/\$0.22 = 22.7x

If the Company has no earnings, you cannot calculate the price/earnings multiple. In this event, you should disclose that the Company was not profitable.

CAPITALIZATION

35. Indicate the capitalization of the Company as of the most recent balance sheet date, and as adjusted to reflect the sale of the minimum and maximum amount of securities in this offering and the use of the net proceeds from this offering.

	Amount Outstanding		
	As of: // [date]	As Adjusted Minimum	Maximum
Debt:			
Short-term debt (average interest rate _____ %)	\$	\$	\$
Long-term debt (average interest rate _____ %)	\$	\$	\$
Total debt	\$	\$	\$
Stockholders equity (deficit):			
Preferred stock - par or stated value (by class of preferred - in order of preferences)	\$	\$	\$

	\$	\$	\$
	\$	\$	\$
Common stock - par or stated value	\$	\$	\$
Additional paid in capital	\$	\$	\$
Retained earnings (deficit)	\$	\$	\$
Total stockholders equity (deficit)			
	\$	\$	\$
Total Capitalization	\$	\$	\$

Number of preferred shares

authorized to be outstanding:

Class of Preferred	Number of Shares Authorized	Par Value Per Share
		\$
		\$
		\$

Number of common shares author- shares.
ized:

Par or stated value per share, if any: \$

Number of common shares reserved to meet conversion requirements or
for the issuance upon

exercise of options, warrants or shares.
rights:

Capitalization Table. In the format provided, you must set forth the short and long term debts owed by the Company, equity of the stockholders, paid in capital for common and preferred shares, earnings retained or earnings deficits, and the number of preferred and common shares authorized. You may want to ask your accountant to help you with this Item.

Comparison to Financial Statements. The figures in the Capitalization Table must be consistent with those in the Company's most recent Financial Statements. If the Company has mandatory redeemable preferred stock, include the amount of the redemption in "long term debt" instead of under the preferred stock heading and so indicate by footnote

to that category in the Capitalization Table.

Analysis of Financial Statements. In addition to comparing the figures in the Capitalization Table to the Financial Statements, you should check whether the Company's balance sheet accurately reflects the Company's capitalization in accordance with generally accepted accounting principles. You or your accountant should consider whether debt is correctly classified as short-term or long-term, whether leases should be capitalized, and whether a corporate combination should be treated as a pooling of interest or as a purchase. See the Financial Statements in Item 118.

Review of Authorized Capital. To answer the portion of this Item concerning the number of shares authorized, you should refer to the articles of incorporation or organization of the Company, and any amendments to the articles. Make sure your answer to this Item is consistent with the current articles.

DILUTION

36. (a) The price of the securities in this offering has been arbitrarily determined.
☐ Yes ☐ No

Risk Based on Arbitrary Pricing. If you have not done financial or market analysis to arrive at the price, you should answer yes, that the selection of the offering price was arbitrary. Even if you have considered certain financial indications of value, such as net tangible book value per share or earnings per share, you still may want to disclose that pricing is arbitrary.

If your answer is yes, disclose in Item 1, Risk Factors, that the Company arbitrarily decided the offering price. The following are two examples of such risk factor disclosures:

Arbitrary Offering Price. The offering price of \$5.00 per share was determined by the Company and the selling agent. The price bears no relationship to established value criteria such as net tangible assets, or a multiple of earnings per share and accordingly should not be considered an indication of the actual value of the Company.

Arbitrary Offering Price. The price for the shares of stock of this offering has been established in an arbitrary manner and is not related to net tangible assets per share or any price previously paid for the Company's stock by others. The price is 10 times that paid by the founders of the Company. The offering price may not be justified by the ultimate results of operations of the Company.

36. (b) If no, explain the basis on which the price of the securities was determined.

Disclose the various factors you considered in arriving at the offering price. Typical factors include: the established public trading market that dictates the price; the net tangible book value per share or the earnings per share (if the Company has any earnings); the stock prices of other similar companies; or the amount of money required by the Company to fund the product or project.

37. (a) The net tangible book value per share before offering is: \$

Net Tangible Book Value Per Share. The net tangible book value of a company is the accounting value of all assets on the balance sheet of the Company after subtracting all liabilities and all intangible assets. Intangible assets that appear on the balance sheet usually include such items as patents, copyrights, franchises, trademarks, operating rights and goodwill. Various costs incurred in the formation of the Company are also treated as intangible assets.

GAAP. You must base net tangible book value on the Company's most recent balance sheet prepared according to generally accepted accounting principles consistently applied. Calculating the net tangible book value depends upon the integrity of the balance sheet. If the assets or liabilities are improperly characterized, the net tangible book value may be materially inaccurate.

Computing Net Tangible Book Value Per Share. To compute the net tangible book value per share of common stock, you divide the total number of common shares outstanding immediately prior to the offering, by the net tangible book value related to common stockholders. The net tangible book value shall be computed based on the latest balance sheet.

You should take into consideration any shares issued between the date of the last balance sheet and the time of the offering when determining the number of outstanding shares.

Sample Calculation: **Net Tangible Book Value per Share =**

Net Tangible Assets: \$ 827,115

Less Total Liabilities: \$ 684,260

Net Tangible Book Value: \$ 142,855

Shares Outstanding (Before Offering): 524,920

\$142,855/524,920 = \$ 0.27/share

Preferred Stock. If the Company has issued preferred stock, you must determine the amount of the total net tangible assets (capital) attributable to preferred stockholders. Subtract the net tangible assets attributable to preferred stockholders from the total net tangible assets. The remainder is the net tangible assets available to common stockholders.

37. (b) For the minimum offering:

The net tangible book value per share after the minimum offering will be: \$

The amount of increase in net tangible book value per share as a result of receipt of cash from purchasers in this offering will be: \$

The dilution per share to purchasers will be: \$

37. (c) For the maximum offering:

The net tangible book value per share after the maximum offering will be: \$

The amount of increase in net tangible book value per share as a result of receipt of cash from purchasers in this offering will be: \$

The dilution per share to purchasers will be: \$

38. For each share purchased in this offering a purchaser will pay \$ _____ but will receive a share representing only \$ _____ in net tangible book value, if the minimum offering is achieved, or \$ _____, if the maximum offering is achieved.

The difference between the amount a purchaser pays for a share and the amount of net tangible book value that share represents is the dilution to the purchaser.

39. In a table, compare the existing stockholders' percentage ownership in the Company and the consideration paid for that ownership with that of purchasers in this offering.

	Shares Purchased		Total Consideration		Average Price
	Num-ber	Percent	Amount	Percent	Per Share
Existing holders:					
New Purchasers:					
Minimum of-fering					
Maximum of-fering					

In this Table you compare the effective cash cost of the shares held by existing stockholders to the contribution of the purchasers in this offering. The calculation of the average price per share should be on a fully diluted basis.

40. Using the offering price of these securities, what value is the Company's management attributing to the entire Company before the offering?

\$ _____

Evaluation of the Company. Multiply the total number of shares outstanding before the offering by the offering price. For the purpose of this calculation assume that all rights to convert into the shares of the Company have been exercised.

NOTE:

You should consider carefully whether the Company actually has this value at the present time. Some issues you should think about include: (1) the risks to which the Company is subject before it achieves success (see Item 1, Risk Factors); (2) the exercise prices of outstanding options (see Item 101); and (3) the prices that the Company's officers, directors, and principal stockholders paid for their shares (see Items 104 and 105).

MANAGEMENT'S DISCUSSION AND ANALYSIS OF CERTAIN RELEVANT FACTORS

41. Is the Company having or does the Company anticipate having within the next 12 months any cash flow or liquidity problems? ☐ Yes ☐ No If yes, explain.

Cash Flow Problems. If the Company is having current cash flow problems, you need to explain what is causing those problems and what the Company intends to do about them. If the Company anticipates having any cash flow problems in the next twelve months, you should explain the anticipated problems and what the Company intends to do about them.

In completing this Item, you should focus on the possibility that everything will not go according to plan. You also should consider whether the minimum offering amount is adequate to give the Company a reasonable chance of surviving a cash flow problem within the next twelve months.

Predicting Future Cash Flow. To predict whether the Company will have future cash flow problems, you need to do a cash flow analysis. You should start by considering the Company's stage of development and the extent to which it intends to change its operations in the near term. How fast will it burn up the money from the offering together with any funds available to it from other sources? When will the Company begin production of its product? When will it begin to sell its product or its services to the public? What level of sales must it achieve to reach its break even point?

You should be prepared to discuss your fixed costs. Rent is often a fixed cost as is depreciation of equipment. Variable costs are much more difficult to estimate for a Company that has not begun production. You should estimate your variable costs.

Until the Company can pay its expenses from its own operations, it will need some other source of funds to pay those expenses. Salaries are one of the main expenses the Company will have to pay. The discussion of the Company's work force in answer to Items 16, 17 and 18 should provide indications as to its cash needs. Items 83 and 84, dealing with compensation to officers, directors, and key persons, also are relevant. If officers and directors will be drawing salaries from the proceeds of the offering, how long will they be allowed to do so at their proposed rates of pay?

You should discount the possibility of substantial contributions from operations to the Company unless the results of the Company's prior operations demonstrate its earning power. Even if the Company is currently profitable in limited operations, you should consider the effect of any proposed expansion of the scope of those operations, including the addition of new product lines and new processes on the Company's cash flow. Coordinate the prediction of future cash flow with Items 28 and 29, Milestones.

42. (a) Is the Company in default of the terms of any note, loan, lease, or other indebtedness or financing arrangement requiring the Company to make payments?

☐ Yes ☐ No

42. (b) If yes, explain, identifying the creditor stating the amount in default or the term that the Company has not complied with, and describing any consequences to the Company resulting from the default.

43. Are a significant amount of the Company's trade payables more than 90 days old?

☐ Yes ☐ No

44. Is the Company subject to any unsatisfied judgments, liens, or settlement obligations? ☐ Yes ☐ No
If yes, state the amounts.

45. Describe the Company's plans to resolve the problems identified in Items 41-44.

Plans to Resolve Existing Overdue Obligations. If the Company has existing overdue obligations to persons other than insiders that it will not pay before the completion of the offering, you may want to include in the amount of the offering the sum necessary to pay these obligations. In this case you would also disclose the payment of the obligations in the use of proceeds for the offering. As to the obligations to insiders, you would disclose any plan to defer payment on these obligations.

46. (a) Do the Company's financial statements show losses from operations?

☐ Yes ☐ No

46. (b) If yes, explain the causes underlying these losses and what steps the Company has taken or is taking to address these causes.

Causes of Losses from Operations. If the Company has shown losses from operations, you need to explain the causes of the losses and how the Company has or expects to address these causes. Why does the Company believe that its losses will not continue? Is the Company going to change its competitive strategy? Is the Company going to introduce a new product? Is it going to change its manufacturing or service delivery process? Is it going to trim its general and administrative expenses? Is it going to launch a new marketing program to attempt to achieve a sales level that will allow it to break even? It may be useful to review your answers to the Business and Properties Section, especially Items 13, 14, and 15.

This Item is not applicable if the Company's Financial Statements do not show losses from operations. You should, however, be sure that you are properly applying the definition of "losses from operations." Generally, the definition means the loss before interest expense, interest income, or gains, and losses on sales of assets, and other extraordinary items.

If one or more of the Company's promoters has operated a predecessor or similar business that failed or was abandoned, address how the Company intends to avoid a similar fate. The probability of continuing losses requires a special risk factor disclosure in Item 1.

47. (a) Describe any trends in the Company's historical operating results.

47. (b) Indicate any changes now occurring in the underlying economics of the Company's business which, in the opinion of Management, will have a significant impact upon the Company's results of operations within the next 12 months.

47. (c) Describe the probable impact on the Company.

47. (d) Describe how will the Company will deal with this impact.

Trends. This Item focuses on how the Company's business plan addresses the effects of external forces (primarily trends in the Company's industry) on the Company's operating results. Generally you will be looking for matters that either would have an impact on future operations and have not had an impact in the past or that have had an impact in the past and are not expected to have an impact in the future. This Item is especially important for companies in industries experiencing rapid change, whether that change is technological, regulatory, or market related.

If the Company has financial statements available for more than one fiscal period, you can compare the operating results to look for trends. You also may use general economic trends to answer this Item. For example, if the Company offers luxury goods, it may have difficulty surviving an economic downturn. How does the Company intend to address this type of problem?

Raising Additional Funds. If the Company cannot satisfy its cash needs for the next twelve months, you must disclose the consequences of not having sufficient cash. Include a special risk factor in Item 1, the Risk Factor Section. If the Company's answer involves raising further funds, you must disclose in detail the source or sources of these funds. If the Company will borrow money from a financial institution or other lender, disclose the details of the lender's commitment. If the Company does not have such a commitment, you must disclose that there is no assurance that the Company will be able to obtain a loan.

If the Company intends to use internally generated funds to provide additional necessary funds during the next twelve months, the Company's current operating results must support this claim.

If the Company plans to raise funds through the sale of additional shares or upon the exercise of outstanding warrants, you must state that there is no assurance that the Company will be able to successfully conduct such an offering or that the warrants will be exercised.

If the Company contemplates raising additional funds through the sale of assets, you must state that there is no assurance that the Company will be able to sell its assets at prices sufficient to raise the needed funds.

48. (a) Will the proceeds from this offering and any available funds identified in Item 32, satisfy the Company's cash requirements for the 12 month period after it receives the offering proceeds? ☐ Yes ☐ No

48. (b) If no, explain how the Company plans to satisfy its cash requirements. State whether it will be necessary to raise additional funds. State the source of the additional funds, if known.

Internally Generated Funds. Another source of financing may be internally generated funds (i.e., the (future) cash flow of the business.) If the Company has been operating at a steady profit for many years, it may be realistic to rely on internally generated funds combined with the offering proceeds to accomplish a further business objective. You may include future profits in your response to this Item only if the Company has a reasonable basis to support the disclosure and you discuss the assumptions and limitations on which the disclosure is based.

Other Sources of Funds. Describe material sources of other funds that will be employed in conjunction with the offering funds. The Company may combine investor funds with other funding sources. Some of the typical outside sources of financing: bank loans and lines of credit; asset sales; lease financing; and consignment inventories.

In some cases the true capital needs of the Company are much larger than the maximum offering amount. This frequently occurs when the Company is relying on Securities and Exchange Commission Rule 504 of Regulation D that limits the Company's securities offering to one million dollars. To make up for the short fall the Company may attempt to raise additional amounts through other methods of financing, such as bank loans or private financing. When the other financing the Company intends to rely on is concurrent with the securities offering, you should enlarge, Item 30, the Use of Proceeds Section, to include these funds as part of the Total Use of Net Proceeds. This will correctly reflect both the need for and the use of those funds. This will require adjusting Item 30.

Materiality. Disclose "material" amounts of funds from other sources. Generally, you should consider any source of financing that is 10% or more of the net offering proceeds to be material. Financing sources of less than this may also be material if they are critical to the Company's operation or business objective. For example, if bank financing is necessary to make a purchase in conjunction with funds from the use of proceeds, the amount (regardless of the percentage of the net offering proceeds) would be material, and you would need to disclose the financing in this Item. Also if the amount of outside financing is an item disclosed in the Company's Milestone Section, you should treat it as material. In disclosing the sources of financing, such as bank loans or lines of credit, disclose not only the amounts, but also the terms and conditions and timing of the receipt of the funds by the Company.

DESCRIPTION OF SECURITIES OFFERED

GENERAL

49. The securities being offered are:

- ☐ Common Stock
- ☐ Preferred or Preference Stock
- ☐ Notes, Debentures, or Bonds
- ☐ Limited Liability Company Membership Interests
- ☐ Units of two or more types of securities, composed of:
- ☐ Other (specify):

If the company is offering more than one type of security or the security has unusual features that make it hard to classify, you cannot simply use the name the company has chosen for the security but must look behind that name to see how the security will function. An example is if the shares offered are called preferred stock, but the shares are actually inferior to the company's common stock in dividend or liquidation preferences. Disclose the specific preferences that the security has (and doesn't have).

Preferred Stock . Normally, call stock "preferred stock" only if it has an unqualified preference over all outstanding classes of stock of the company as to both liquidation and dividends. Disclose if the dividends on preferred stock are cumulative. (See discussion of Item 54, Cumulative Dividends.) If the stock offered has certain preferences over some but not all outstanding classes of stock as to liquidation or dividends, you may refer to it as preference stock. In this case you must prominently disclose the exact nature of the preference and any limitations on the preference granted.

Debt Securities . For debt offerings, you should check the box "Notes, Debentures or Bonds" regardless of what the Company calls the debt instrument. In responding to Item 56, Interest Rate and Item 57, Maturity Date, discuss all the special characteristics of the debt being offered. You should be very careful when disclosing that a debt security is insured or guaranteed to ensure that those claims are accurate.

LLC Membership Interest. If the Company is a Limited Liability Company, check this box. Summarize the material provisions of a Limited Liability Company' governing agreements under Item 11, Other Material Factors.

Units of More than One Type of Security. If the Company is offering securities consisting of two or more types of securities, include an explanation of whether, and if so, when and under what conditions, the parts of the unit can be transferred independently of each other.

Other Types of Securities . If the Company is offering a security other than a stock, a debt instrument or a membership interest (such as an interest in a cooperative), disclose the special features of the security being offered.

50. These securities have:

Yes No

- ☐ ☐ Cumulative voting rights
- ☐ ☐ Other special voting rights
- ☐ ☐ Preemptive rights to purchase any new issue of shares
- ☐ ☐ Preference as to dividends or interest
- ☐ ☐ Preference upon liquidation
- ☐ ☐ Anti-dilution rights
- ☐ ☐ Other special rights or preferences (specify):

Explain any yes answers.

To help you respond to this Item, you or your attorney should review the statute under which the Company was organized as well as the Company's corporate or governance documents. Incorporation statutes typically set default provisions for voting rights and preemptive rights. If the Company has not specified particular rights for the securities being issued, the rights will generally be those specified by statute. Disclose the rights of holders of preferred stock, notes or other securities being offered. You may do this by summarizing the charter, bylaw or other provision that gives rise to those rights.

Lack of Rights. You also should state if the securities offered lack any rights typically granted to securities of the type offered. For example, if the securities offered are called "common shares" but lack equal voting rights, you should provide information about the shares that have the voting preference.

Anti-Dilution. Anti-dilution rights generally provide that the conversion price of a security that is convertible into common shares will be adjusted if the Company issues additional common shares at a price that is less than the conversion price. If the securities carry anti-dilution rights, describe the anti-dilution formula applied and why the rights might be beneficial to the investor. If the securities carry a combination of different anti-dilution provisions, describe that combination and the relative benefits to the investor.

51. Are there any restrictions on dividends or other distributions? ☐ Yes ☐ No

If yes, describe.

Describe any restrictions to be imposed at the termination of the offering as well as those in place at the time the offering begins. For example, the Company may intend to use all or part of the offering proceeds to acquire a business and the seller of the business may be taking a loan back. If the loan agreement includes any restrictions on dividends, disclose those restrictions in responding to this Item even though the restrictions will not be in force until after the offering.

52. Are the securities convertible? ☐ Yes ☐ No

If yes, state conversion price or formula.

Date when conversion becomes effective:

_____/_____/_____

Date when conversion expires:

_____/_____/_____

This Item applies to any security convertible into another security at the option of the investor. A typical example is a note or preferred stock that is convertible into the Company's common stock. Describe securities convertible at the option of the Company in your response to Item 55, Preferred Stock) or Item 60, Debt Securities.

If the Company is issuing warrants that are part of a unit, disclose those warrants as convertible securities even if the warrants are or will be traded separately from the other securities to be issued.

The "date when conversion becomes effective" is the first date when the purchaser may convert the securities into other securities. Similarly, the "date when conversion expires" means the last date on which the purchaser may convert the securities into other securities. If the purchaser becomes entitled to convert the securities or loses the right to convert the securities because an event has occurred, describe that event.

53. Describe any resale restrictions on the securities and when the restrictions will terminate.

Securities regulatory agencies or the Company itself may impose resale restrictions for a variety of reasons. Resale restrictions affect an investor's ability to resell the security and, therefore, the value of the security. Be thorough and accurate when you describe the restrictions so that the investor is aware of any resale limitations before purchasing the security.

Legend Conditions. Legends are statements printed on the certificate representing the security that describe resale and other restrictions. Legend conditions inform securities purchasers of these restrictions. Many jurisdictions have specific requirements concerning where and how the legend conditions are to be placed on the certificate. You should be familiar with these requirements before placing the legend on the securities.

Offering to Limited Group. The Company may want to restrict ownership of the securities. For example, it may want to limit ownership to employees, independent contractors, or franchisees of the Company, property owners in a certain area, members of a social organization, etc. If the group that can buy the securities is restricted, disclose this as a resale restriction because it will affect whether an investor will be able to find a member of that group when the investor wants to sell the securities.

Restrictions Imposed by Securities Regulation . If a securities regulatory agency imposes any restrictions on the sale or resale of these securities, disclose those restrictions.

Restrictions for Intrastate Offerings. If you only want to sell the securities within one state and intend to rely on an exemption from registration with the Securities and Exchange Commission as an intrastate offering, you must disclose the restrictions imposed on the securities by federal securities legislation.

Restrictions Imposed by Other Authorities. Laws the Company must comply with may restrict the resale of the securities. For example, you may need to restrict transfer to meet Internal Revenue Code requirements (such as for an S corporation or a limited liability company), or to satisfy regulatory bodies governing the Company's industry. A licensing authority, for example, may restrict the resale of the securities so that the authority can check the background of new stockholders to determine whether they have any criminal history.

Required Resale to Company . If the Company requires that shares be sold back to it, disclose the resale price or formula with a description of how any formula operates. If the stockholder is guaranteed a return, answer the following questions: Will the Company set aside a reserve for this purpose? What is the basis for predicting that it will have the cash to make the payment? Is this basis reasonable?

Requirement that Company Consent to Resale . If stockholders wishing to transfer their shares must obtain the consent of the Company to the transfer, specify the conditions under which the Company will consent to a transfer.

PREFERRED STOCK

If the securities being offered are Preference or Preferred stock:

If the Company is not offering preferred or preference stock, state that you will not be responding to Items 54 and 55. Otherwise, respond to these Items.

54. Are unpaid dividends cumulative? ☐ Yes ☐ No

Dividends are cumulative if, when dividends are not paid when due, these unpaid dividends accumulate and must be paid before any dividends may be paid on the Company's common shares. If the dividends are not cumulative, disclose this in Item 1, Risk Factors, and on the Cover Page.

55. (a) Are the securities callable? ☐ Yes ☐ No If yes, describe.

55. (b) Are the securities redeemable? ☐ Yes ☐ No

If yes, describe, including redemption prices.

A security is callable if the Company has the option to repurchase it. You should explain the terms and conditions under

which the Company may call the securities. A security is redeemable if the Company is required to repurchase it. You should explain the terms and conditions under which an investor may redeem the securities, including the redemption price.

If the Company is required to repurchase preferred stock (rather than having an option to do that), you should treat the preferred stock as if it were debt and should answer Item 65, Ratio of Earnings to Fixed Charges.

DEBT SECURITIES

If securities being offered are notes or other types of debt securities:

If the Company is not offering notes or other types of debt securities, state that you will not be responding to Items 56 to 64. Otherwise, respond to these Items.

56. What is the interest rate on the debt securities? _____%

If the interest rate is variable or there are multiple interest rates, describe.

If the Company is offering securities with a variable interest rate, and the rate is based on the rate of a financial institution, clearly identify the institution and the name of the rate. If the rate is to be adjusted at intervals, explain when and how the Company will adjust the rate. Even after disclosing that the rate is based on a specific institution or index, you should choose a method of adjustment in the event that the rate base is discontinued. Describe when interest will be paid to investors (for example, monthly, quarterly, annually, or on the maturity of the debt security.)

57. What is the maturity date?

_____/_____/_____

If the securities will have serial maturity dates, describe.

Debt instruments have serial maturity dates if a predetermined amount of the principal becomes due and payable at specified intervals or if individual instruments have different due dates or redemption dates. Explain the due dates for the instruments and the method by which the Company expects to pay the instrument when due. A prospective investor should know the date his or her instrument will fall due or be considered for redemption.

58. Is there a sinking fund? ☐ Yes ☐ No If yes, describe.

Sinking funds are established so that the Company can make periodic payments for the purpose of accumulating funds to retire a debt issue. The Company uses the funds (as specified in the indenture or contract establishing the fund) for periodic partial redemption of debt, for periodic retirement of serial bonds, or for the repayment of the debt at maturity. Describe the payment schedule, how the fund may be used, and whether the Company or an independent trustee will administer the fund.

If the required payments to the fund are not of a sufficient size and regularity for the Company to pay the debt as agreed, you should disclose this. Even if the required payments would be adequate, disclose whether the Company's financial position will permit it to make these payments.

59. Is there a trust indenture? ☐ Yes ☐ No

If yes, state the name, address, and telephone number of Trustee.

A trust indenture establishes a trust relationship in which a trustee is appointed to represent the interests of the debt holders. You should determine if securities regulators will require that the Company enter into a trust indenture.

Disclose the material terms of any trust indenture and discuss what protections the trust will provide to investors. The Federal Trust Indenture Act of 1939 requires trust indentures to meet certain standards.

If there will be no trust indenture in connection with the issuance of debt, you should disclose in Item 1, Risk Factors,

the lack of a trust indenture and the lack of an independent trustee representing the interests of the debt holders.

60. (a) Are the securities callable? ☐ Yes ☐ No If yes, describe.

60. (b) Are the securities redeemable? ☐ Yes ☐ No

If yes, describe, including redemption prices.

A security is callable if the Company has the option to repurchase it. You should explain the terms and conditions under which the Company may call the securities. A security is redeemable if the Company is required to repurchase it. You should explain the terms and conditions under which an investor may redeem the securities, including the redemption price.

61. Are the securities secured by real or personal property? ☐ Yes ☐ No

If yes, describe.

If the securities are secured by property, describe fully both the property and the security arrangement, including the value of the property. Disclose if the property will be purchased with the proceeds of the offering, and whether the purchase was made from Officers, Directors, or affiliates of the Company.

You should emphasize the degree to which any secured interest in property protects the debt holders. Disclose if there are any other creditors with secured interests in the property superior to or equal to the interest of the debt holders? If so, disclose details of the prior claim. You should disclose any arrangement that allows the Company to further encumber the property and to what degree. Disclose if the secured interest of the debt holders in the property has been perfected (through filing of a financing statement or otherwise under the Uniform Commercial Code) or if it will be perfected prior to the release of the offering proceeds from escrow. If not, disclose that, both in the answer to this Item and in Item 1, Risk Factors.

62. (a) Are the securities subordinate in right of payment of principal or interest?

☐ Yes ☐ No If yes, explain the terms of the subordination.

Securities are subordinated if the right of the holders to receive payment is subordinated to prior payment of other indebtedness of the Company. Disclose fully the terms of any subordination agreement or subordination clause in an indenture or agreement. You may need to disclose in Item 1, Risk Factors, that the debt offered is subordinated.

In addition, discuss the protections, if any, given to the purchasers in the present offering if the Company incurs future debt. Protections might include limitations on additional borrowing or a pledge that if the Company incurs any secured debt it will provide equivalent security to the holders of the debt offered under this Disclosure Document. If the Company will not provide investors with significant protection against subsequently incurred debt, you may need to disclose that in Item 1, Risk Factors.

62. (b) How much currently outstanding indebtedness of the Company is senior to the securities in right of payment of interest or principal? \$

Check the figures here against the Company's most recent Financial Statements and the notes to those statements.

63. How much currently outstanding indebtedness ranks equally in right of payment with the securities?
\$

Check the figures here against the Company's most recent Financial Statements and the notes to those statements.

64. How much currently outstanding indebtedness is junior (subordinated) to the securities? \$

Check the figures here against the Company's most recent Financial Statements and the notes to those statements.

RATIO OF EARNINGS TO FIXED CHARGES

65. (a) If the Company had earnings during its last fiscal year, show the ratio of earnings to fixed charges on an actual and pro forma basis for that fiscal year.

		Actual		Pro Forma	
		Last Fiscal	Interim	Minimum	Maximum
		Year	Period		
"Earnings"	=				
"Fixed Charges"					

65. (b) If no earnings,
show "Fixed Charges" only

If the Company is not offering debt securities or preferred stock that the Company is required to repurchase, state that you will not be completing this Item.

"Fixed Charges" means interest (including capitalized interest), amortization of debt discount, premium and expense, preferred stock dividend requirements of majority owned subsidiary, and the portion of rental expense that can be demonstrated to be representative of the interest factor in the particular case. The pro forma ratio of earnings to fixed charges should include incremental interest expense as a result of the offering of the securities.

"Earnings" means pretax income from continuing operations plus fixed charges and capitalized interest.

If the Company cannot show a ratio of earnings to fixed charges, on a pro forma basis, of at least 1:1, the Company may not have sufficient earnings to fulfill its obligations to debt holders. Unless the Company has other means to repay investors, you must disclose the Company's limited ability to repay its obligations in Item 1, Risk Factors.

You may find the following sample calculation of earnings/fixed charges ratio helpful to you in completing this calculation.

Assume that earnings for the last fiscal year were \$300,000

Assume that fixed charges were \$50,000

Assume that the Company is issuing debt that will require it to pay \$100,000 per year if the minimum amount of the offering is sold and \$200,000 per year if the maximum amount of the offering is sold.

Assume that there are no other changes to fixed charges and that earnings do not change as a result of the offering.

Sample Table. The actual numbers for the Company will be different.

		Actual		Pro Forma	
		Last Fiscal	Interim	Minimum	Maximum
		Year	Period		
"Earnings"	=	300,000	150,000	300,000	300,000
		50,000	25,000	150,000	250,000
"Fixed Charges"					
Ratio		6:1	6:1	2:1	1.2:1

NOTE:

See the Financial Statements and especially the Statement of Cash Flow. Exercise care in interpreting the significance of the ratio of earnings to fixed charges as a measure of the "coverage" of debt service. The existence of earnings does not necessarily mean that the Company will have cash available at any given time to pay its obligations. See Items 41-48. Prospective purchasers should not rely on this ratio as a guarantee that they will receive the stated return or the repayment of their principal.

HOW THESE SECURITIES WILL BE OFFERED AND SOLD**Company Salespersons**

66. Provide the following information for each officer, director, or Company employee who intends to offer or sell the securities:

Use the format in 66(a) to identify the officers, directors, and/or Company employees that will be offering or selling the securities. Repeat the format as often as necessary, using (a), (b), (c), etc. to label each person.

66. (a) Name:

Title:

Address:

Telephone Number:

67. Describe any compensation that the Company will pay each person in addition to his or her customary salary and compensation.

Include cash, securities, contracts, bonuses, rewards or other consideration as part of the compensation.

Contact the securities regulators for information concerning licensing requirements and other related matters.

OTHER SALES PERSONS AND FINDERS

68. Provide the following information for each salesperson who is not an officer, director, or employee of the Company:

Use the format in 68(a) to identify the persons that will be offering or selling the securities who are not officers, directors, and/or employees of the Company. Repeat the format as often as necessary, using (a), (b), (c), etc. to label each person.

66. (a) Name:

Company:

Address:

Telephone Number:

Salesperson and Broker-Dealer Disciplinary History. Check the disciplinary history of each person the Company intends to use as a salesperson or broker-dealer. You may determine whether a sales person or broker-dealer has

disciplinary history by contacting the appropriate securities regulatory agency.

Broker-Dealer Licensing. If the salesperson the Company is planning to use to sell the offering is not affiliated with a licensed broker-dealer, the securities regulator may require the sales person to be registered as a broker-dealer. If the salesperson is a member of the National Association of Securities Dealers, Inc. (NASD), file the Disclosure Document with NASD Regulation. NASD Regulation will review compensation to be paid to the salesperson to determine whether it complies with NASD rules. The jurisdictions in which you want to sell your offering cannot register the offering until NASD Regulation has completed its review. NASD Regulation will need time to complete its review, so you should file the Disclosure Document with NASD Regulation at the same time you file it with the jurisdictions in which you want to sell the offering.

69. Provide the following information for each person who is a finder:

Use the format in 69(a) to identify the finders that will be assisting in the offer or sale the securities. Repeat the format as often as necessary, using (a), (b), (c), etc. to label each person.

69. (a) Name:

Company:

Address:

Telephone Number:

"Finders" are persons who are compensated for acting as intermediaries in obtaining salespersons or otherwise making introductions to help the offering succeed. Certain securities regulators may require finders to be registered as securities salespersons.

70. Describe all compensation that the Company will pay to each person identified in Items 68 and 69.

Disclose compensation as well as contractual and indemnification arrangements. Include cash, securities, contracts, bonuses, rewards or other consideration as part of the compensation, in addition to the cash commission that you disclosed as a percent of the offering price on the cover page of this Disclosure Document. Indicate whether the Company will indemnify the sales persons or finders against liabilities under the securities laws and summarize the terms of any agreement to provide that indemnity.

Disclose all contracts between sales persons and the Company whether in the form of underwriting agreements with broker-dealers, employment contracts, or contracts with independent contractors. Where the Company is compensating them with additional securities, disclose.

71. Describe any material relationships between any of these sales persons or finders and the Company or its management.

Discuss any material relationships between sales persons or finders and the Company or its management so that an investor could understand possible conflicts of interest. You will even need to disclose relationships without formal written agreements if they are material. Because the idea of "materiality" is sometimes subjective, you should consider most relationships that the Company has with its sales persons material and disclose them.

The sales person may be related to an officer, director or controlling stockholder of the Company by blood or marriage. If so, you should disclose the identity of the related person and nature of the relationship.

PURCHASER LIMITATIONS

72. (a) Is the offering limited to certain purchasers? ☐ Yes ☐ No

72. (b) Is the offering subject to any other purchaser limitations? ☐ Yes ☐ No

72. (c) If the answer to either 72(a) or 72(b) is yes, describe the limitation.

Typical limitations are based on sales only to employees, independent contractors, or franchisees of the Company; property owners in a certain area; residents of a single state; members of a social organization; or investors meeting specified financial suitability standards or number.

Describe what steps the Company will take to ensure that the purchasers will meet the offering limitations.

IMPOUND OF OFFERING PROCEEDS

73. (a) Will the Company impound the proceeds of the offering until it raises the minimum offering proceeds? ☐ Yes ☐ No

73. (b) If yes, what is the minimum amount of proceeds that the Company must raise and place in an impound account before the Company can receive and use the proceeds?

\$

73. (c) If the answer to Item 73(a) is "yes," state the date on which the offering will end if the Company has not raised the minimum offering proceeds. _____
date

An impound account is an account at a financial institution where proceeds of the offering will be held, generally until the minimum amount of proceeds is raised.

The primary purpose of placing funds raised in a securities offering into an impound account is to protect investors in the event that the Company's offering objectives are not met. If the proposed business of the Company requires a minimum amount of proceeds to commence or proceed with the business in the manner proposed, most states require that an impound account be established with a bank or other similar depository institution acting as independent impound agent. Refer to the discussion under Item 30, in the Use Of Proceeds section, on setting the minimum amount. The Company and its sales persons will deposit all proceeds received from investors into the impound account until the minimum amount of proceeds has been raised. Before spending significant time and expense, you should determine whether the securities regulators will accept the intended impound holder and the proposed terms and conditions of the impound agreement.

If a securities regulator requires that an impound agent be used to hold the offering proceeds, the agent generally must obtain the permission of the securities regulator before it can release the funds. Generally, these agreements provide for release of the funds when the minimum amount has been raised.

RELEASE OF IMPOUND CONTINGENT ON ANOTHER EVENT. In some circumstances, the Company may want to have the release of impound contingent on occurrence of some other event in addition to raising the minimum offering amount. Often, the other event will be the receipt of funds from another source. The Company might need both the minimum offering amount and the funds from the outside source to complete its objectives. You might want to keep the funds in an impound account until a government agency provides the Company with an approval or the Company acquires a license necessary for the Company to begin operations or to engage in a particular activity.

RELEASE OF PROCEEDS. If the Company does not raise the minimum proceeds during the offering period, investors that purchased securities will be entitled to a return of their investment. State the date on which the proceeds will be returned to investors if the Company has not raised the minimum offering amount.

74. (a) Does the Company reserve the right to extend the impound period?

☐ Yes ☐ No

74. (b) If yes, describe the circumstances under which the Company might extend the impound period.

Summarize any provisions in the impound agreement that allow the Company to extend the offering period. If no provision exists in the agreement that allows the Company to extend the period, you will need to apply to the securities regulators to request an extension. In that event, the Company will need to offer to rescind any sales made during the initial offering period.

75. State the name, address, and telephone number of the bank or other similar depository institution acting as impound agent.

76. If the offering proceeds are returned to investors at the end of the impound period, will the Company pay any interest earned during the impound period to investors?

☐ Yes ☐ No

MANAGEMENT

OFFICERS AND KEY PERSONS OF THE COMPANY

77. Provide the following information for each Officer and key person. The term "key person" means a person, other than the chief executive officer, chief operating officer, and chief financial officer, who makes a significant contribution to the business of the Company. Identify who performs the functions of Chief Executive Officer, Chief Operating Officer, and Chief Financial Officer.

Use the format in Item 77(a) to provide background information on the Company's chief executive officer, chief operating officer, chief financial officer, and other key employees. Repeat the format as often as necessary, using (a), (b), (c), etc. to label each person. Identify positions by title.

77. (a) Name: _____ Age: _____

Title: _____

Office Street Address: _____

Telephone Number: _____

Names of employers, titles, and dates of positions held during past five years, with an indication of job responsibilities.

Education (degrees, schools, and dates): _____

Also a Director of the Company ☐ Yes ☐ No

Indicate amount of time to be spent on Company matters if less than full time: _____

Officers and Key Persons of the Company. Identify all executive officers and the positions they hold in the Company. Also identify key persons who are not executive officers and their significance to the Company. Describe the responsibilities of all officers and key persons in enough detail to show whether their experience and abilities are relevant to their designated management positions.

Executive Officers and Key Persons Defined. When completing this Item, use the following definitions:

The "chief executive officer" has the overall authority to run the Company. In the small business context, the chief executive officer usually is the Company's president or general manager and is often the owner or principal stockholder.

The "chief operating officer," generally is entrusted with supervising the day-to-day business of a Company. Depending on the Company's size and structure, the chief executive officer may also be the chief operating officer.

The "chief financial officer" is usually the Company's "treasurer," the person who has custody of the Company's funds and financial records.

The term "key person" means a person, other than your chief executive officer, chief operating officer, and chief financial officer, who makes a significant contribution to the business of the Company. Examples of key persons are vice presidents, production managers, sales managers, and research scientists. A key person may be an employee, independent contractor, or consultant.

Employment History. For each executive officer and key person, describe all employment for the past five years, including each position held and the type of business involved. Include a complete five-year history of all prior occupations. Do not omit past ventures, successful or not. Securities laws require full disclosure of all material information. In addition, potential investors will notice gaps in employment history and may assume that the Company intentionally omitted information.

Note: When you respond to this Item, review Items 87 and 88. If Item 87 or 88 contains a detailed discussion of someone's employment history from the last five years, you do not need to provide a lot of information in this Item. Name the employer and the position held and refer the reader to Item 87 or 88, as appropriate, for more information.

Education. Briefly describe the education of executive officers and key persons. Do not include information about honorary degrees or training certificates unless it is relevant to the Company's business. Similarly, do not disclose outside affiliations with fraternal, charitable, or community organizations unless they are relevant to the Company's business.

Directors. Indicate which officers also serve as directors of the Company. State whether they have been elected for a specific term and whether they are serving under any special circumstances or arrangements.

Part-Time Officers and Key Persons. Indicate whether the Company's executive officers and key persons work less than full time. Disclose the approximate amount of time each part-time officer and key person devotes to Company matters. In addition, if an officer spends less than full time on Company matters, disclose why. Does the Company lack resources to pay his or her salary? Is the officer involved in other enterprises that demand his or her time? Is the officer engaged in another activity that is a conflict of interest?

If the reason that an executive officer or key person is part-time could have a negative impact on Company operations, disclose that information in detail in this section and summarize it in Item 1, Risk Factors.

DIRECTORS OF THE COMPANY

78. (a) Number of Directors:

78. (b) Are Directors elected annually? ☐ Yes ☐ No If no, explain.

If directors are not elected annually, disclose how and when they are elected.

78. (c) Are Directors elected under a voting trust or other arrangement?

☐ Yes ☐ No If yes, explain.

If there is a voting trust, stockholder agreement, or other agreement relating to the election of directors, describe all material provisions of the agreement.

Include in the description:

- the class of the securities held;
- the amount of securities held;
- the duration of the agreement;
- the names and addresses of the voting trustees; and
- the voting rights and other powers of the voting trustees.

If a voting trust, or similar arrangement, controls 10% or more of the Company's shares, disclose its impact on the ability of new investors to elect directors and exercise control over the Company. Also, you may need to summarize this information in Item 1, Risk Factors.

79. Provide the following information for each Director not described in Item 77:

Use the format in Item 79(a) to provide background information on each such Director. Repeat the format as often as necessary, using (a), (b), (c), etc. to label each person.

79. (a) Name:

Age:

Office Street Address:

Telephone Number:

Names of employers, titles, and dates of positions held during past five years, with an indication of job responsibilities.

Education (degrees, schools, and dates):

Identify all directors not described in Item 77, their term of office, and the period of time that they have already served. Describe their business experience for the past five years and identify other directorships they hold, naming each company and any affiliation with the Company. If a director holds a special title or serves in a special capacity, such as a member of a committee of the board of directors to review employee compensation or internal controls of the Company, briefly describe his or her responsibilities. Describe the background and responsibilities in enough detail to allow potential investors to determine whether their experience and abilities are relevant to their directorship.

CONSULTANTS

80. (a) Are all key persons employees of the Company? ☐ Yes ☐ No

80. (b) If no, state the details of each contract or engagement.

This Item requires you to disclose the terms of contracts or agreements for the services of key persons who are not employees of the Company. Disclose why these persons are not employees and describe the terms of the consulting

agreement. Explain whether the terms of the consulting agreement reflect standard industry practice and whether the agreement favors one party over the other. Does the agreement permit a consultant to also work for a competitor of the Company or to go into the business of the Company on his or her own? Also disclose any past relationships between the consultant and any officers, directors, or key employees of the Company.

If any aspect of the arrangement with a consultant may negatively impact the Company, provide appropriate risk disclosure and add to Item 1, Risk Factors.

ARRANGEMENTS WITH OFFICERS, DIRECTORS, AND KEY PERSONS

81. Describe any arrangements to ensure that Officers, Directors, and key persons will remain with the Company and not compete with the Company if they leave.

Disclose the Company's arrangements to ensure the continued availability of officers, directors, and key persons through long-term contracts, non-compete agreements, or other arrangements. Also disclose the lack of such an arrangement with an officer, director, or key person.

Required Disclosures. Describe the terms and conditions of any of the following contracts, plans, or arrangements:

- Any employment contract between the Company and an officer, director, or key person;
- Any compensatory arrangement activated by the resignation, retirement, or other termination of an officer, director, or key person; and
- Any compensatory arrangement activated by a change in the person's responsibilities after a change in control of the Company.

Disclose the amount involved, including all periodic payments or installments.

Disclosure of Agreements Not to Compete. Disclose the terms of any agreements of the Company's officers, directors, and key persons not to compete with the Company if they leave the Company. Describe the steps the Company might take to enforce each agreement.

82. (a) Describe the impact on the Company if it loses the services of any Officer, Director, or key person due to death or disability.

The loss of an officer, director, or key person represents a significant risk to the on-going operations of the Company. This is particularly true if a few people manage the Company. Discuss the potential impact of such a loss on the business of the Company and the risk this poses to investors. Also disclose any relevant factors, such as age or health of an officer, director, or key person, which may increase the risk that his or her services will become unavailable. Consider whether to include additional disclosure in Item 1, Risk Factors.

82. (b) Has the Company purchased key person life insurance on any Officer, Director, or key person? [] Yes [] No

82. (c) Has the Company made any arrangements to replace any Officer, Director, or key person it loses due to death or disability? [] Yes [] No

82. (d) If the answer to either Item 82(b) or 82(c) is "yes," describe.

Disclose whether the Company has established any procedures to deal with the loss of its officers, directors, and key persons. These procedures might include searching for a replacement for the key person or winding up the Company.

Insurance of Personnel. Disclose whether the Company has purchased "key person" life insurance on any of its personnel, payable to the Company upon the death of the person. Describe the terms and coverage of each insurance policy, including:

- the name of the person insured,
- the amount of the policy,
- to whom the proceeds are payable, and
- any arrangements that require the proceeds to be used to redeem securities or pay benefits to the estate of the insured person or to a surviving spouse.

Disclose how the Company intends to use the proceeds payable to it.

If the Company has not purchased "key person" life insurance, or if the Company will not benefit from the insurance, include the appropriate disclosures in Item 1, Risk Factors.

COMPENSATION

83. List all compensation that the Company paid to its Officers, Directors, and key persons for the last fiscal year:

	Cash	Other
Chief Executive Officer	\$	\$
Chief Operating Officer		
Chief Financial Officer		
Key Persons:		
Total:	\$	\$
	_____	_____
	—	—
Officers as a group		
(number of persons _____)	\$	\$
Directors as a group		
(number of persons _____)	\$	\$
Key Persons as a group		
(number of persons _____)	\$	\$

Disclose the salaries and other benefits, such as life insurance, paid to the Company's officers, directors, and key persons during the last fiscal year. Disclose the total compensation paid to the chief executive officer, chief operating

officer, chief financial officer, and each key person. Also disclose the total compensation paid to any other officer, director, or employee whose total compensation was more than that paid to a manager or key person.

List each person by title.

Compensation. Include anything provided by the Company that directly or indirectly benefits an officer, director, or employee. Compensation includes both cash and non-cash items.

"Cash" includes:

- salary,
- bonus,
- consulting fees,
- non-accountable expense accounts, and
- other similar items.

"Other" includes:

- the value of any options granted or securities given,
- any annuity, pension, or retirement benefits,
- bonus or profit-sharing plans, and
- personal benefits, including club memberships, company cars, insurance benefits not generally available to employees, etc.

Itemize these benefits in a footnote to the column.

If you paid compensation in some form other than cash, and it is impractical to determine the cash value, state the nature and amount of the compensation in a note to the table. An example of non-cash compensation that may be difficult to value is the use of a company car.

Compensation Under an Ongoing Plan. Briefly describe all proposed future compensation the Company will pay pursuant to ongoing plans or arrangements with the individuals and groups specified. Include in the description:

- a summary of how each plan operates,
- any performance formula or measure or other criteria used to determine payment amounts,
- the time periods used to determine the measurements of benefits,
- payment schedules, and
- any recent material amendments to the plan.

Include disclosure about life, health, or hospitalization insurance or medical reimbursement plans that discriminate in scope, terms, or operation in favor of officers or directors. Include the cost of key person life insurance if the proceeds are not payable to the Company.

Do not furnish Information about group life, health, or hospitalization insurance or medical reimbursement plans generally available to all salaried employees. Disclose this information in Item 18.

State the number of persons in each group and their total compensation.

84. (a) Has compensation been unpaid in prior years? ☐ Yes ☐ No

84. (b) Does the Company owe any Officer, Director, or employee any compensation for prior years? ☐ Yes ☐ No

84. (c) Explain any "yes" answer to Item 84(a) or 84(b).

Do not respond to this Item if you answered "no" to Items 84(a) and 84(b)

85. Is compensation expected to change within the next year? ☐ Yes ☐ No

If yes, explain.

86. (a) Does the Company have any employment agreements with Officers, Directors, or key persons? ☐ Yes ☐ No If yes, describe.

86. (b) Does the Company plan to enter into any employment agreements with Officers, Directors, or key persons? ☐ Yes ☐ No If yes, describe.

Describe the provisions of each agreement. Include:

- the title and name of the officer, director, or employee;
- the date of the agreement and its beginning and end dates;
- the compensation and/or benefits the Company agreed to provide; and
- terms for terminating the agreement.

If the Company has contractual agreements with its officers or employees to pay salaries, disclose how the Company plans to make these payments, including using the proceeds from the offering. Make sure your response to this Item agrees with Item 30, Use of Proceeds.

PRIOR EXPERIENCE

87. Has any Officer or Director worked for or managed a company (including a separate subsidiary or division of a larger enterprise) in the same type of business as the Company?

☐ Yes ☐ No If yes, explain in detail, including relevant dates.

You must disclose information about all past business ventures in the same business, particularly if they were

unsuccessful.

Disclose in detail each officer's and each director's prior experience with the same type of business as the Company. For each business or venture, disclose:

- the officer or director;
- the company,
- the position held,
- his or her areas of responsibility,
- any significant contributions to the company,
- whether the company is still operating,
- if the company is no longer operating, why not,
- why the prior experience is relevant and how it will enhance the management of the Company, and
- any on-going relationship with the business or venture partners.

Include in Item 77 or 79, as appropriate, any business venture disclosed in this Item.

If the officers and directors lack experience with the same type of business, briefly state that and identify the potential risk this may pose to investors. Consider whether you should add a similar statement to Item 1, Risk Factors.

88. (a) If the Company has never conducted operations or is otherwise in the development stage, has any Officer or Director managed another company in the start-up or development stage? ☐ Yes ☐ No

88. (b) If yes, explain in detail, including relevant dates.

Answer this Item only if the Company is in the start-up or development stage.

Disclose all information about past start-up or development stage business ventures, even if they were unsuccessful. If a prior start-up venture failed, explain why and whether the Company has formulated a plan to avoid a similar failure.

Disclose each officer's and each director's prior experience dealing with the problems and risks associated with a start-up venture. For each business or venture, disclose:

- the officer or director;
- the company,
- the position held,
- his or her areas of responsibility,
- any significant contributions to the company,

- a general description of the type of business engaged in,
- whether the company is still operating, and
- if the company is not still operating, why not.

You may also describe problems common to development-stage companies that were encountered in the venture, how those problems were handled, and how the experience gained is relevant to the Company.

If the Company is in the start-up or development stage and its officers and directors lack relevant experience with start-up ventures, provide a brief statement to that effect and identify the potential risk this may pose to investors. Add a similar statement to Item 1, Risk Factors.

CERTAIN LEGAL PROCEEDINGS

In responding to Items 89-95, see the discussion under Item 77 for definitions of some of the terms used in these Items.

Insolvency

89. Has a petition for bankruptcy, receivership, or a similar insolvency proceeding been filed by or against any Officer, Director, or key person within the past five years, or any longer period if material? [] Yes [] No

90. Was any Officer, Director, or key person an executive officer, a director, or in a similar management position for any business entity that was the subject of a petition for bankruptcy, receivership, or similar insolvency proceeding within the past five years, or any longer period if material? [] Yes [] No

A "similar insolvency proceeding" includes the court appointment of a custodian, trustee, fiscal agent, or similar officer for the business or property of any of the Company's officers, directors, or key persons or of a business entity related to any of them.

91. Explain in detail any "yes" answers to Item 89 or 90.

Do not respond to this Item if you answered "no" to Items 89 and 90.

Personal Insolvency Proceedings. Disclose all relevant issues about each personal bankruptcy or insolvency proceeding. Include:

- the name of the officer, director, or key person,
- the date of the initial proceeding,
- the name of the court that heard the proceeding,
- the docket number of the case,
- the current status of the case, and
- the current financial condition of the officer, director, or key person (i.e. is he or she insolvent?).

Also disclose whether any officer, director, or key person has substantial outstanding debts (including debts that were accelerated due to default).

Insolvency Proceedings for Other Ventures. Disclose all relevant issues about each proceeding. Include:

- the name of the officer or director;
- the company,
- the position held,
- his or her areas of responsibility,
- the date of the initial proceeding,
- the name of the court that heard the proceeding,
- the docket number of the case,
- the current status of the case, and
- any similarity between the business venture and the Company.

If any of the Company's officers or directors owned or managed a business in the same industry as the Company and that business has been the subject of a bankruptcy or insolvency proceeding, explain the prior business failure in Item 87. Also explain how the Company intends to avoid a similar failure. Make these disclosures whether or not the entity involved in the bankruptcy or insolvency is technically a predecessor of the present Company. Review your answers to Items 24-27 to determine whether you have adequately disclosed the relationship between the failed entity and the Company.

Give an evaluation by management or legal counsel, to the extent feasible, of the merits of any current proceedings and the potential impact on the Company's business, financial condition, or operations. Identify any potential risk to investors or the Company's operations that may result from the bankruptcy or insolvency of the officers, directors, or key employees. Consider whether to add a similar statement to Item 1, Risk Factors.

Criminal Proceedings

92. (a) Has any Officer, Director, or key person been convicted in a criminal proceeding, excluding traffic violations or other minor offenses?

[] Yes [] No

92. (b) Is any Officer, Director, or key person named as the subject of a pending criminal proceeding, excluding traffic violations or other minor offenses? [] Yes [] No

92. (c) Explain in detail any "yes" answer to Item 92(a) or 92(b).

Do not respond to this Item if you answered "no" to Items 92(a), and 92(b).

Disclose all relevant issues about each criminal proceeding. Include:

- the name of the officer, director, or key person,
- the crime or alleged crime,
- the prosecuting agency,
- the date of the initial proceeding,
- the name of the court,
- the docket number of the case,
- the current status of the case, and
- the penalty imposed or sought.

Give an evaluation by management or legal counsel, to the extent feasible, of the merits of any pending criminal proceedings and the potential impact on the Company's business, financial condition, or operations.

Identify any potential risk to investors or the Company's operations that may result from these proceedings. Consider whether to add a similar statement to Item 1, Risk Factors.

Civil Proceedings

93. (a) Has any Officer, Director, or key person been the subject of a court order, judgment, or decree in the last five years related to his or her involvement in any type of business, securities, or banking activity?

☐ Yes ☐ No

93. (b) Is any Officer, Director, or key person the subject of a pending civil action related to his or her involvement in any type of business, securities, or banking activity?

☐ Yes ☐ No

93. (c) Has any civil action been threatened against any Officer, Director, or key person related to his or her involvement in any type of business, securities, or banking activity?

☐ Yes ☐ No

93. (d) Explain in detail any "yes" answer to Item 93(a), 93(b), or 93(c).

Do not respond to this Item if you answered "no" to Items 93(a), 93(b), and 93(c).

Disclose all relevant issues about each civil action. Include:

- the name of the officer, director, or key person,
- the person bringing the action,
- a summary of the allegations,

- the date of the initial proceeding,
- the name of the court,
- the docket number of the case,
- the current status of the case, and
- the relief granted or sought.

Give an evaluation by management or legal counsel, to the extent feasible, of the merits of any pending civil litigation and the potential impact on the Company's business, financial condition, or operations of any pending or threatened civil actions.

Identify any potential risk to investors or the Company's operations that may result from these proceedings. Consider whether you should add a similar statement to Item, 1 Risk Factors.

Administrative Proceedings

94. (a) Has any government agency, administrative agency, or administrative court imposed an administrative finding, order, decree, or sanction against any Officer, Director, or key person in the last five years as a result of his or her involvement in any type of business, securities, or banking activity?
☐ Yes ☐ No

94. (b) Is any Officer, Director, or key person the subject of a pending administrative proceeding related to his or her involvement in any type of business, securities, or banking activity? ☐ Yes ☐ No

94. (c) Has any administrative proceeding been threatened against any Officer, Director, or key person related to his or her involvement in any type of business, securities, or banking activity? ☐ Yes ☐ No

94. (d) Explain in detail any "yes" answer to Item 94(a), 94(b), or 94(c).

Do not respond to this Item if you answered "no" to Items 94(a), 94(b), and 94(c).

Disclose all relevant issues about each administrative action. Include:

- the name of the officer, director, or key person,
- the agency bringing the action,
- a summary of the allegations,
- the date of the initial proceeding,
- the name of any hearing officer or administrative court,
- the docket number of the case,
- the current status of the case, and

- the relief imposed or sought.

Give an evaluation by management or legal counsel, to the extent feasible, of the merits of any pending administrative proceedings and the potential impact on the Company's business, financial condition, or operations of any pending or threatened administrative actions.

Identify any potential risk to investors or the Company's operations that may result from these proceedings. Consider whether you should add a similar statement to Item 1, Risk Factors.

Self-Regulatory Proceedings

95. (a) Has a self-regulatory agency imposed a sanction against any Officer, Director, or key person in the last five years as a result of his or her involvement in any type of business, securities, or banking activity? ☐ Yes ☐ No

95. (b) Is any Officer, Director, or key person the subject of a pending self-regulatory organization proceeding related to his or her involvement in any type of business, securities, or banking activity? ☐ Yes ☐ No

95. (c) Has any self-regulatory organization proceeding been threatened against any Officer, Director, or key person related to his or her involvement in any type of business, securities, or banking activity? ☐ Yes ☐ No

95. (d) Explain in detail any "yes" answer to Item 95(a), 95(b), or 95(c).

Do not respond to this Item if you answered "no" to Items 95(a), 95(b), and 95(c).

Disclose all relevant issues about each self-regulatory action. Include:

- the name of the officer, director, or key person,
- the self-regulatory agency bringing the action,
- a summary of the allegations,
- the date of the initial proceeding,
- the name of any hearing officer or administrative court,
- the docket number of the case,
- the current status of the case, and
- the relief imposed or sought.

Give an evaluation by management or legal counsel, to the extent feasible, of the merits of any pending self-regulatory proceedings and the potential impact on the Company's business, financial condition, or operations of any pending or threatened self-regulatory actions.

Identify any potential risk to investors or the Company's operations that may result from these proceedings. Consider

whether you should add a similar statement to Item 1, Risk Factors.

NOTE:

After reviewing the background of the Company's Officers, Directors and key persons, potential investors should consider whether or not these persons have adequate background and experience to develop and operate this Company and to make it successful. In this regard, the experience and ability of management are often considered the most significant factors in the success of a business.

OUTSTANDING SECURITIES

GENERAL

96. Describe all outstanding securities.

You should describe briefly each outstanding class of equity security, including any preferred stock. If the Company has issued any debt securities, also provide a brief description of each class issued. If the only classes of securities currently outstanding are already described in your answer to Items 49-64, simply provide a cross reference to those answers.

97. Describe any resale restrictions on currently outstanding securities and when those restrictions will terminate, if this can be determined.

Resale Restrictions on Outstanding Shares . Disclose all resale restrictions on currently outstanding shares and the anticipated termination of these restrictions. Disclose any effect the potential sale of formerly restricted securities will have on the price of the securities purchased by investors in this offering.

Resale Restrictions for Shares Sold Under Exemptions. If the shares outstanding were not sold in a registered offering, they may have been sold pursuant to a federal or state exemption from registration that required the shares to be restricted. Outstanding shares of the Company that are restricted may be subject to the requirements of Securities and Exchange Commission Rule 144. Outstanding shares may also be restricted if they were sold solely within one state under Securities and Exchange Commission Rule 147. You should disclose the amount of shares held and the expected periods of time persons subject to these rules are required to hold their shares.

Restrictions Under Promotional Stock Escrow. You also must disclose all restrictions on transfer of promoters' shares. A promoter is defined as a person who is a founder of the Company or owner of 10% or more of the stock of the Company. The stock held by a promoter is called promotional stock, which securities regulators may require to be placed in an escrow with a financial institution, and a restriction called a legend may also be required on the stock certificates. If a promotional escrow or legend is required, disclose the terms of the promotional stock escrow and legend and identify the amount of shares affected and the amount held by each affected stockholder.

98. Describe any anti-dilution rights on outstanding securities.

Anti-Dilution Rights. Disclose any rights or provisions that protect existing stockholders from dilution of their interest in the securities of the Company. Give the details of any anti-dilution formulas, including such provisions regarding preferred shares, convertible debt or in other agreements dealing with securities of the Company. Disclose the effect of the exercise of these rights on the ownership interest of investors in this offering.

DIVIDENDS, DISTRIBUTIONS, AND REDEMPTIONS

99. (a) Has the Company paid any dividends on its stock, made any distributions of its stock, or redeemed any securities within the last five years? [] Yes [] No
If yes, describe each transaction.

99. (b) Does the Company have any plans or commitments to pay dividends on its stock, make distributions of its stock, or redeem its outstanding securities in the future?

☐ Yes ☐ No If yes, explain.

You should describe the dividend policy of the Company, and emphasize that the past payment of dividends or distributions of its stock should not be viewed either as an indication of the success of the Company or that the Company will pay dividends or make any distributions in the future.

You should disclose if the dividends have been paid from the Company's capital or from gains from nonrecurring sales of assets, rather than from earnings from operations.

OPTIONS AND WARRANTS

100. (a) State the number of shares subject to issuance under outstanding stock purchase agreements, stock options, warrants or rights. _____ shares

100. (b) The shares identified in Item 100(a) are _____ % of the total shares to be outstanding after the minimum offering.

100. (c) The shares identified in Item 100(a) are _____ % of the total shares to be outstanding after the maximum offering.

101. In a table, describe these stock purchase agreements, stock options, warrants, and rights. State the basic terms of these securities, including the expiration dates, the exercise prices, who holds them, whether they are qualified or non qualified for tax purposes, and whether they have been approved by stockholders.

You should review the tax laws to determine the tax considerations of these of securities.

102. State the number of shares reserved for issuance under existing stock purchase or option plans but not yet subject to outstanding purchase agreements, options, or warrants. _____ shares

103. Does the Company have any plans or commitments to issue or offer options in the future?

☐ Yes ☐ No If yes, explain.

SALES OF SECURITIES

104. (a) Has the Company sold or issued securities during the last 12 months?

☐ Yes ☐ No

104. (b) If yes, using a tabular format, provide the following information for each transaction: the date of the transaction; the amount and type of securities sold or issued; the number of purchasers to whom the securities were sold or issued; any relationship of the purchasers to the Company at the time of sale or issuance; the price at which the securities were sold or issued; and a concise description of any non-cash consideration.

Issuance or Sale. Disclose the issuance of all "securities", not just common stock. This may require changing the headings on the tabular disclosure. If the number of persons to whom securities were issued was less than 10, their

names should be listed. You must also disclose the price, if any, at which the securities were issued and the date of sale.

TABULAR DISCLOSURE. Tabular disclosure is recommended with a narrative explanation preceding or following the table. The following is an example of tabular disclosure:

Date	Number of Shares	Stockholders	Relationship	Price	Consideration
6/5/___	1,500	Blair	Employee	\$ 1.00	Services
12/1/___	69,500*	Walter	Director	\$.18	Services
3/1/___	40,000**	Michaels	Employee	\$ 1.08	Cash
3/1/___	32,250	Brady	Advisor	\$.20	Services
8/1/___	14,297***	Debenture Con- version		\$ 1.00	Accrued Interest

*\$H*6*

*Options-Mr.
Walter re-
ceived no
cash com-
pensation
during his
first two
years.*

** *Mr. Michaels purchased 20,000 shares on 3/1/--. Mr. Michaels has the option to purchase an additional 20,000 shares up to 12/31/--.*

*** *The issuance of 14,297 shares pursuant to the conversion of outstanding debentures (as disclosed in Note 9, p. 12 of the Audited Financial Statements).*

Options on Shares. If options, warrants or other rights have been issued in the last year, the number of shares that could be issued upon exercise must be disclosed, together with a footnote that describes the material terms of any options, warrants or rights, including the exercise price.

Stock Splits. Stock splits do not change a stockholder's percentage of ownership in the Company. The number of shares and prices disclosed should be restated to reflect any stock splits. Items 25-26 should discuss the stock split.

Note:

If the Company has not issued or sold any securities in the last 12-month period, you should make that disclosure.

PRINCIPAL STOCKHOLDERS

105. In the following table, provide the name and office street address of each person who beneficially owns at least 10% of the common or preferred stock of the Company.

..	Average		No. of Shares			
..	Price		No. of		Held After	
..	Per		Shares		% of	
..	Class of		Share		% of	
..			Now Held		All Securities	
			Total		Total	

Shares

Sold

106. Number of shares beneficially owned by all Officers and Directors as a group:

106. (a) Before offering: _____ shares (_____ % of total outstanding)

106. (b) After offering: Assuming minimum securities sold: _____ shares (_____ % of total outstanding)

106. (c) After offering: Assuming maximum securities sold: _____ shares (_____ % of total outstanding)

Principal Stockholders. You should disclose the ownership interest of principal stockholders, officers and directors of the Company. List the principal stockholders (any stockholder whose ownership interest represents 10% or more of the total stock outstanding) in order of their percentage of interest. Shares held by family members, through corporations or partnerships, or through any other arrangement or agreement that would allow a stockholder, officer, or director to direct or control the voting of the shares are considered to be "beneficially owned" by the person who controls them. Those shares should be included when calculating the percentage of ownership interest.

The remainder of the required information should be calculated as follows:

"Average Price per Share": means the average price paid for securities currently owned by each principal stockholder, or in the case of options, warrants or convertible securities, their exercise price. Additional disclosure should be provided in a footnote to the table if the securities were obtained in a non-cash transaction. Describe the type of non-cash consideration given in exchange for receiving shares, and how the value of the consideration was determined.

"Number of Shares Now Held" means the number of shares of common stock (or options, warrants, or convertible securities, if more than one class of securities is owned) beneficially owned prior to the offering.

"% of Total" means the percentage of that class of securities outstanding prior to the offering or, as used in the last column, the percentage of the total of that class of securities outstanding after giving effect to the sale of all securities being offered in this offering. The total amount of securities outstanding is calculated assuming all options have been exercised and all convertible securities have been converted.

Note:

This Item asks the Company to disclose the number of shares beneficially owned by all officers and directors as a group. The required information (including the figures representing the total shares outstanding) should be calculated assuming the exercise of all options and the conversion of all convertible securities. Tabular disclosure is recommended with a narrative explanation preceding or following the table. The following is an example of tabular disclosure:

Sample Calculation: Beneficial Ownership of Officers and Directors (assumes 647,020 shares outstanding prior to the offering; minimum offering of 40,000 shares; and maximum offering of 216,000 shares).

Name	Shares	Options	Total
CEO	244,312	45,000	289,312
CFO	214,582	12,000	226,582
Director	1,000	19,000	20,000

Total	459,894	76,000	535,894
% Ownership Pre-Offering	535,894/647,020	=	82.8%
% Ownership Post-Offering Minimum	535,894/687,020	=	78.0%
% Ownership Post-Offering Maximum	535,894/863,020	=	62.1%

NOTE:

These calculations assume that all outstanding options have been exercised and all convertible securities have been converted.

MANAGEMENT RELATIONSHIPS AND TRANSACTIONS**FAMILY RELATIONSHIPS**

107. Is there a family relationship between any Officer, Director, key person, or principal stockholder? ☐ Yes ☐ No If yes, describe.

Family Relationships. Describe the nature of any family relationship between any director, executive officer, key person, 10% stockholder, or any person nominated or chosen by the Company to become one of the foregoing.

The term "family relationship" means any relationship by blood, marriage, or adoption, but not extending beyond a first cousin.

MANAGEMENT TRANSACTIONS

108. (a) Will the Company use any offering proceeds to acquire assets from any Officer, Director, key person, or principal stockholder?
☐ Yes ☐ No

108. (b) Will the Company use any offering proceeds to acquire assets from an associate of any Officer, Director, key person, or principal stockholder?
☐ Yes ☐ No

108. (c) If the answer to Item 108(a) or (b) is "yes," provide detailed information about each transaction. Include the name of the person, the cost to the Company, the method used to determine the cost, and any profit to the seller.

The Company must disclose acquisitions to be made with offering proceeds.

Acquisition of Assets. You should respond fully to this Item. Even if a particular acquisition of assets is already discussed in Item 30, Use of Proceeds, you should emphasize the particular acquisition of assets, in this Item. The acquisition of assets usually will be purchases by the Company. However, a long term lease might also be considered to be an acquisition of assets. If so, you should describe it as if it were a purchase. The Company must set out the cost and

material terms of the acquisition transaction.

Principal Stockholders. As set forth in Item 105 a person is a "principal stockholder" if the person beneficially owns, directly or indirectly, 10% or more of the common or preferred stock (or equity interests) presently outstanding. If the shares are held by family members, through corporations or partnerships or otherwise in a manner that would allow a person to direct or control the voting of shares, the Company must include these shares as beneficially owned.

Associate. An associate includes a person who is an officer, director, a partner, or is a direct or indirect beneficial owner of 5% or more of any class of equity security of an affiliate; a trust or estate in which an affiliate has a substantial beneficial interest or for which an affiliate serves as a trustee or in a similar capacity; or an affiliate's spouse and an affiliate's relative by blood or marriage.

Valuation. If the Company is purchasing an asset from an associate, you should disclose the name of the person, the cost to the Company, and the method of determining the cost. One method of determining cost is the fair market value as established by a market for the particular asset. The cost to the seller might form the basis for the cost to the Company. Generally you should disclose the lower of the seller's cost or market value. You also might disclose the asset's chain-of-title back to an independent third party so as to demonstrate a starting point for fair market value or original cost.

If the Company has obtained or will obtain an appraisal of the value of the asset to be acquired, disclose the value. If the Company has not obtained an appraisal, disclose that fact.

Disclosure of Profit. The Item requires the Company to disclose any profit to an officer, director, employee, principal stockholder, or an associate. Based upon their relationship with the Company, these persons should be required to disclose their profit. The seller acquired the property for a certain amount and sold it for a certain amount so that the profit may be estimated in that manner. The seller of the asset must report profits earned for income tax purposes, usually calculated as the sale price minus the cost basis in the asset. If the seller cannot determine what his or her basis is, the Company should assume that the seller's tax basis is zero and insist that the entire amount received be disclosed as profit.

Risk Factors. At a minimum, the Company must disclose that any transaction with an officer or director or other affiliated person was not engaged in as an arms-length transaction. Additionally, if the method of determining the value is not based on the lower of fair market value or the cost to the seller a special disclosure covering this must be made. If the Company has not obtained an appraisal of the particular asset being acquired, an appropriate risk factor also might be needed.

109. (a) Will the Company use any offering proceeds to reimburse any Officer, Director, key person, or principal stockholder for services already rendered, assets previously transferred, or moneys loaned or advanced, or otherwise? ☐ Yes ☐ No

109. (b) If yes, provide detailed information about each transaction. Include the name of the person, the cost to the Company, the method used to determine the cost, and any profit to the person.

Reimbursement. You should disclose if any amount of the proceeds is to be used to reimburse an officer, director, employee or stockholder for past services, assets transferred, moneys loaned and any other such transactions. Reimbursement covers actual out of pocket payments. A typical example of reimbursement arises upon the formation of the Company. A person may advance funds for legal services for the formation of the Company and may also advance funds for the initial accounting in preparation for the securities offering.

You should discuss the particular transaction and the benefit to the Company; evaluate the services rendered or assets

transferred to the Company; and finally, the value to be reimbursed. Additionally, disclose whether the person is making any profit on the particular transaction. Generally, a person may not seek reimbursement for activities that have not benefited the Company, such as for his or her own purchase of Company stock.

110. (a) Has the Company made loans to any Officer, Director, key person, or principal stockholder within the last two years? ☐ Yes ☐ No

110. (b) Does the Company plan to make loans to its Officers, Directors, key persons, or principal stockholders in the future?

☐ Yes ☐ No

If yes, describe any policies the Company has adopted to deal with the conflicts of interest in these transactions:

DISCLOSURE OF LOANS. You should disclose in the Disclosure Document if the Company is permitted to make loans to its officers, directors, key persons or principal stockholders in the future, excluding advances made in the normal course of business for travel, business expense and similar ordinary operating expenditures. Disclosure should include whether loans must be approved by a resolution of the Board of Directors and what role, if any, independent directors play in the approval process. Disclose any steps to be taken by the Company to determine if the loans should be made, including purpose for the loans, repayment schedules, maturity lengths, interest rates, credit reports, and promissory notes.

111. (a) Has the Company done business with any Officer, Director, key person, or principal stockholder within the last two years? ☐ Yes ☐ No

111. (b) Is the Company currently doing business with any Officer, Director, key person, or principal stockholder? ☐ Yes ☐ No

111. (c) Does the Company plan to do business with its Officers, Directors, key persons, or principal stockholders in the future? ☐ Yes ☐ No

If yes, describe any policies the Company has adopted to deal with the conflicts of interest in these transactions:

DISCLOSURE. You should disclose if the Company is permitted to do business with its officers, directors, key persons or principal stockholders in the future. Disclosure should include whether business arrangements will be on terms comparable to those available from unaffiliated third parties. Disclose any approval process required by the Board of Directors and what role, if any, Directors not having an interest in the business arrangements play in the approval process.

112. Explain any "yes" answers to Items 110(a), 111(a), or 111(b). State the principal terms of any significant loans, agreements, leases, financing, or other arrangements.

Transactions with Management . Describe any material transactions involving the purchase or sale of assets by the Company (or any of its subsidiaries) other than in the ordinary course of business. You should state the cost of those assets to the purchaser and, if acquired by the seller within the previous two years of the transaction, the cost to the seller. Describe the methods used in determining the Company's purchase or sale price and the name(s) of the person(s) making that determination.

Materiality of an Interest. To determine if a transaction needs to be disclosed, consider the relationship between the parties and the amount of the transaction as well as its importance to the Company and prospective stockholders.

113. (a) Has any Officer, Director, key person, or principal stockholder guaranteed or co-signed the Company's bank debt or other obligations? [] Yes [] No

113. (b) If yes, explain the terms of each transaction and describe the Company's plans for repayment.

LITIGATION

114. Describe any recent or pending litigation or administrative action which has had or may have a material effect upon the Company's business, financial condition, or operations. State the names of the principal parties, the nature and current status of the matters, and the amounts involved.

115. Describe any threatened litigation or administrative action that may have a material effect upon the Company's business, financial condition, or operations. State the names of the principal parties, and the nature and current status of the matters.

Introduction . In response to Items 114 and 115 the Company or its counsel should evaluate the merits of each pending litigation proceeding, including the potential impact on the Company's business, and financial condition.

Scope of Litigation Disclosure. You should disclose any litigation that is likely to have a material effect on the Company. Disclosure includes information not only about present pending litigation, but also includes past concluded litigation, and future unasserted claims of which the Company is aware. Disclosure is not limited to actions in which the Company is a party, but also includes separate litigation filed against the Company's directors, officers or key persons if the litigation is likely to have a material effect on the Company. The Company also should disclose any material litigation involving any subsidiary or affiliate. The Company also should include in its litigation disclosure, any outstanding judgments or liens that are a result of litigation.

MATERIALITY. If the litigation is material in its effect on the Company, you must disclose that. The Company should use its own judgment to determine if disclosure is needed. If there is any doubt about what is material, the Company should seek the assistance of an attorney or an accountant. A business may routinely generate a certain type of claim, for example, a negligence claim. The claim may not be material unless it exceeds the average for that type of claim. Claims for damages below 10% of the net assets of the Company are not usually material. A proceeding for bankruptcy, receivership or a similar proceeding is always material. Regulatory problems involving securities law violations should always be disclosed. Finally, disclose any material legal proceeding in which certain corporate insiders or affiliates of the Company are in a position that is contrary to that of the Company.

In determining the disclosure necessary in the Company's financial statements, answer the question: Should pending or threatened litigation be disclosed as a contingent liability? You should consider the following factors: the period in which the underlying cause of action occurred; if the litigation is pending, the probability of an unfavorable outcome, or if the litigation is threatened, the probability that a suit may be filed and the possibility of an unfavorable outcome; and, the ability to reasonably estimate the amount or range of potential losses.

Counsel for the Company should be asked to assess the likelihood that the company may lose. Based on the ability to reasonably estimate the amount of any contingent liability, an assessment may be required as to the material impact the resulting liability would have on the financial condition of the Company. Ordinarily, contingent liabilities associated with securities law violations must be disclosed.

CONTENT OF DISCLOSURE. To fully respond to this Item, you should include the name of the court where the proceeding is pending, a description of the facts underlying the claim and the relief sought.

TAX ASPECTS

116. Describe any material tax consequences to investors in this offering.

Tax Impact on Investors. You should discuss the federal income tax treatment of the Company and its impact on investors. If the Company is set up as an "S Corporation," a limited liability company, or other entity in which income is usually "passed through," you should discuss the impact on investors. Investors need to know how they will be taxed. Discuss other relevant tax treatment that may have an impact on investors.

Potential Loss of S Corporation Status. The primary risk involved in S corporation status is the Company's potential loss of that status. Disqualifying factors should be discussed in light of the individual circumstances of the issuer.

Feasibility Of S Corporation Status for Companies Registering an Offering. Because an S Corporation may have only 75 stockholders and one class of stock, an exemption from any state registration process should be actively pursued prior to considering registration. A Company claiming S corporation status that files an application should retain a qualified tax advisor to evaluate the tax aspects and risks and obtain a written analysis or opinion. If such analysis and opinion is not obtained from an independent tax advisor, the Company should disclose this fact.

Limited Liability Companies . Since this type of entity may provide the tax advantages of a limited partnership and the liability protection of a corporation and may issue multiple classes of stock, you should discuss any tax impact on the company and its members.

REIT' S and Cooperatives. Certain types of businesses organized under state law as corporations may qualify for special tax treatment. Two possible examples are the real estate investment trust and the cooperative. If a corporation qualifies as a REIT or a co-op for tax purposes, there may be a substantial individual tax impact on the members, which you should disclose to potential investors.

Net Operating Losses. Some companies may have accumulated a substantial net operating loss that may be carried forward into subsequent tax years to shelter income. If the Company intends to emphasize this disclosure in the offering, specific and accurate disclosure, should be included.

OTHER MATERIAL FACTORS

117. Describe any other material factors, either adverse or favorable, that will or could affect the Company or its business or which are necessary to make any other information in this Disclosure Document not misleading or incomplete.

Catch All. The Items in this Disclosure Document do not cover all industries and types of businesses. You may find it necessary to add material disclosure under this Item that is not covered elsewhere. You should understand that an investor may not be able to make an informed investment decision unless full and complete information about the Company is given when completing the Disclosure Document.

ADDITIONAL INFORMATION

118. (a) Describe the types of information that the Company will provide to security holders in the future.

118. (b) Describe the schedule for providing this information.

Your Disclosure Document should disclose what financial information about the company's progress will be provided

after the offering of securities has been completed. You also should disclose when that information will be provided. Generally, stockholders will receive an annual report within 120 days after the end of your fiscal year. The report should contain financial statements prepared in accordance with generally accepted accounting principles and reviewed by independent certified public accountants in accordance with the accounting and review service standards promulgated by the American Institute of Certified Public Accountants. See Appendix B.

118. (c) Attach the Company's financial statements to the Disclosure Document.

General Instructions for Financial Statements. There should be total consistency between the information in the narrative responses to Disclosure Document Items and the information appearing in the Financial Statements, including the accompanying Notes. You should contact your securities regulator to discuss financial statement requirements, as certain states have financial statement requirements that differ from those discussed in this manual.

Financial Statements. Attach to the Disclosure Document for the Company and its consolidated subsidiaries, a balance sheet as of the end of the most recent fiscal year. If the Company has been in existence for less than one fiscal year, attach a balance sheet as of the date within 135 days of the date of filing the registration application. If the first effective date of state registration, as set forth on the Cover Page of the Disclosure Document, is within 45 days after the Company's fiscal year end and financial statements for the most recent fiscal year are not available, the balance sheet may be as of the end of the preceding fiscal year. An additional balance sheet, at least as current as the end of the Company's most recent third fiscal quarter, should be included. Also attach, for the Company and its consolidated subsidiaries, and for its predecessors, statements of income and cash flows and statements of changes in stockholders' equity for the most recent fiscal year or such shorter period as the Company (including predecessors) has been in existence. In addition, for any interim period at least as current as the end of the Company's most recent third fiscal quarter, attach statements of income and cash flows. Financial statements shall be prepared in accordance with generally accepted accounting principles. If the Company has not conducted significant operations, statements of receipts and disbursements shall be included in place of statements of income. Interim financial statements may be unaudited. All other financial statements shall be audited by independent certified public accountants; provided, however, that if each of the following four conditions are met, such financial statements in place of being audited may be reviewed by independent certified public accountants in accordance with the Accounting and Review Service Standards promulgated by the American Institute of Certified Public Accountants: (a) the Company shall not have previously sold securities in an offering involving the general solicitation of prospective investors using advertising, mass mailings, public meetings, "cold call" telephone solicitation or any other method directed toward the public, (b) the Company has not been previously required under federal or state securities laws to provide audited financial statements in connection with any sale of its securities, (c) the aggregate amount of all previous sales of securities by the Company (exclusive of any debt financing with banks and similar commercial lenders) shall not exceed \$1,000,000, and (d) the amount of the present offering does not exceed \$1,000,000.

If since the beginning of its last fiscal year the Company has acquired another business, you should provide a pro forma combined balance sheet as of the end of the fiscal year, and a pro forma combined statement of income as if the acquisition had occurred at the beginning of the Company's last fiscal year, and any of the following exists: (a) the investments in and advances to the acquired business by the Company and its subsidiaries (other than the acquired business) exceed 20% of the Company's assets on its consolidated balance sheet at the end of the Company's last fiscal year, (b) the Company's and its subsidiaries (other than the acquired business') proportionate share of the total assets (after intercompany eliminations) of the acquired business exceeds 20% of the assets on the consolidated balance sheet, or (c) the Company's and its subsidiaries (other than the acquired business') equity in income from continuing operations before income taxes, extraordinary items and cumulative effect of a change in accounting principle, of the acquired business exceeds 20% of such income of the Company and its consolidated subsidiaries for the Company's last fiscal year.

The financial statements should reflect all stock splits (including reverse stock splits), stock dividends and recapitalizations even if they have occurred since the date of the financial statements.

Any responses to Items in the Disclosure Document discussing income or revenues should identify the accounting period(s) involved and those figures should agree with the figures on the Income Statement for the same period(s). Any discussion of outstanding shares, warrants, and options (both in number and price) in your Disclosure Document should take into account stock splits and stock dividends. Often the stock dividends and splits are reflected only in the Financial Statements (or in a subsequent event Note to the latest Financial Statement).

The above discussion of financial statements may appear to permit the Company to include only the Balance Sheet and Income Statement in an annual report. In order for the financial statements to be in accordance with generally accepted accounting principles, the Company must also present the Statement of Cash Flows and the Statement of Retained Earnings.

SIGNATURES:

The Company's Chief Executive Officer, Chief Financial Officer, and its Directors must sign this Disclosure Document. When they sign this Disclosure Document, they represent that they have diligently attempted to confirm the accuracy and completeness of the information in the Document.

When the Chief Financial Officer signs this Disclosure Document, he or she represents that the financial statements in the Document have been prepared in accordance with generally accepted accounting principles which have been consistently applied, except where explained in the notes to the financial statements and represents that the financial statements fairly state the Company's financial position and results of operations, or receipts and disbursements, as of the dates and period(s) indicated. He or she also represents that year-end figures include all adjustments necessary for a fair presentation under the circumstances.

Chief Executive Officer:

Directors:

Title

Chief Financial Officer:

Title:

Appendix A

SAMPLE RISK FACTORS

These examples are intended to aid the Company in developing risk factor disclosure for the Company's own offering. These examples should not be copied word for word nor will they apply to every offering. An offering may require risk factor disclosure for which an example is not included in this list. Each risk factor should summarize the potential impact of the risk on the investor and not simply state a fact.

For a company with a limited operating history:

We have a limited operating history.

We were incorporated on xx/xx/xx and have been operating only since xx/xx/xx. Because we have been operating for only a short period of time, we have not produced a profit. There is no assurance that we will ever produce a profit. As a new enterprise, we are likely to be subject to risks our management has not anticipated. We have limited resources and will not be able to continue operating without the proceeds from this offering. It is possible that the proceeds from this offering and our other resources may not be sufficient for us to continue to finance our operations.

For a company that has a history of losses with no expectation for immediate profits:**We have incurred losses since inception and may incur future losses.**

We have not yet generated a profit from operations. As of the date of our most recent financial statements, we had an accumulated deficit of \$ _____. We expect to continue to experience losses from operations and we cannot predict when or if we will become profitable. If we achieve profitability, we may not be able to sustain it.

For a company competing in a highly technical area where products rapidly become obsolete:

The (insert description) business is highly technical and our failure to introduce new products to the market may harm our business.

We operate in a highly technical industry, which is characterized by frequent introductions of new products and services into the market. Our success will depend, in part, on our ability to improve our present products, to develop new products and to provide necessary services and support. The proceeds of this offering may not provide us with sufficient funds to finance our research and development needs.

For a company that competes against larger and better financed companies in a competitive business:**We may not have sufficient financial resources to successfully compete in the (insert description) business.**

A large number of enterprises provide products or services similar to ours. We will be competing with established businesses that have a operating history, and greater financial resources, management experience and market share than we have. There can be no assurance that we will be able to compete or capture adequate market share. We will not be profitable if we cannot compete successfully with other businesses.

For a company that depends on the services of a limited number of key persons:

We depend on the services of key employees, whose knowledge of (insert description) would be difficult to replace.

Our success depends substantially on the services of (insert names and title of key persons). Our business may be

harmful if we lose the services of these people and we are not able to attract and retain qualified replacements.

For a company with inexperienced management:

Our officers and directors have no experience managing a company in the (insert description) business.

None of our officers and directors has managed a company in the (insert description) business nor has experience in managing a development stage enterprise. Our ability to operate successfully may depend on our ability to attract and retain qualified technical personnel, who may be in great demand.

For a company whose management has been involved in other business ventures that have not been successful:

Our officers and directors have been involved in other business ventures that have not been successful.

Prior to organizing the Company, (insert name of appropriate officers and directors) operated a business similar to ours in which shareholders lost part or all of their investment. (Insert name of appropriate officers and directors) operated a company in the (insert description) business, which while not similar to our business, also resulted in losses to investors. Our ability to operate successfully may be determined by the ability of our officers and directors to succeed where they have failed before.

For a company whose business is highly regulated:

Our failure to comply with government rules and regulations may harm our business.

Our business must comply with local, state and federal rules and regulations. (BRIEFLY identify type of regulations, e.g., taxation, environmental, licenses.) We believe that we comply with the rules and regulations with which we are required to comply. If we fail to comply with a rule or regulation we may be subject to fines, or other penalties, or our permit or license may be lost or suspended. We may have to stop operating and our investors may lose their entire investment.

For a company whose officers, directors or key persons own a substantial number of promotional shares and options:

Our officers, directors and key persons will continue to have substantial control over the Company after the offering.

Officers, directors and key persons own (insert number) shares of common stock, which will represent (insert number) % of outstanding common stock. Consequently, they will be able to elect all of the directors and control the direction of the Company. They paid an average price of \$_____ per share as compared with the public offering price of \$_____ per share. In addition, they own (insert number) options or warrants which are exercisable to purchase additional shares of common stock at an average price of \$_____ during the next (insert number) years. See Item 105, Principal Stockholders.

For a Company that has significant dilution between the offering price and book value:

The price of a share in this offering is significantly higher than the book value of the stock.

If we sell only the minimum number of shares in this offering, the book value per share will be \$ _____. This is (insert number) % of the offering price. As a result, investors participating in this offering will incur immediate and substantial dilution. To the extent outstanding options or warrants to purchase our shares are exercised, new investors will incur further dilution. Book value is determined by subtracting liabilities from tangible assets and dividing the answer by the number of outstanding shares.

For shares that have no existing market:

Because there is no market for our common stock, you may not be able to sell your shares.

You may never be able to sell your shares and recover any part of your investment, unless we are able to complete a subsequent public offering or we are able to sell the Company for cash or merge with a public company.

For an arbitrary offering price:

The offering price of our shares is arbitrary.

The offering price of \$ _____ per share bears no relationship to established value criteria such as net tangible assets, or a multiple of earnings per share and accordingly should not be considered an indication of the actual value of the Company.

For a debt offering where no sinking fund will be established:

We have not established a sinking fund for the purpose of accumulating funds for retiring the (insert name of debt instrument).

A sinking fund provides for periodic accumulation of funds over the life of the obligation with an independent trustee for the purpose of retiring the (insert name of debt instrument) at maturity. We will not maintain a sinking fund for the retirement of the (insert name of debt instrument) offered here and may not have the ability to retire the obligations when they mature.

For a debt offering where there will be no independent trustee:

We have not retained an independent trustee to act on investors' behalf in the event of default of our obligation to repay the (insert name of debt instrument).

We have not retained an independent trustee to act on investors' behalf in the event of default. Therefore, there is no independent third-party to protect investors' interests in the event the Company fails to meet any of the agreements contained in the trust indenture.

For an offering to be sold by company employees:

We have not retained an independent party to sell the offering and the failure of our officers to sell the offering may result in a shortage of operating funds.

Officers of the Company are offering our shares on a "best-efforts" basis. We have not contracted with an underwriter, placement agent, or other person to purchase or sell all, or a portion of our shares and there is no assurance that we can sell all or any of the shares. Further, if we had hired an underwriter, placement agent, or other independent person to sell the offering, that person would have conducted an independent due diligence examination into our business.

Appendix B

Accounting Terminology

The following is a description of some of the more important terms and concepts used in accounting:

Financial Statements

General Purpose Financial Statements

The term "financial statements" refers to a presentation of financial data, including accompanying notes, derived from accounting records and intended to communicate an entity's economic resources or obligations at a point in time or the changes therein for a period of time in conformity with a comprehensive basis of accounting. Financial statements are the means by which the information accumulated and processed in financial accounting is periodically communicated to those who use it. Although financial statements come in a wide variety of forms, which serve various purposes, there are four basic general purpose statements. These are:

Balance Sheet

Statement of Income or Statement of Operations

Statement of Retained Earnings or Statement of Changes in Stockholders' Equity

Statement of Cash Flows

A **Balance Sheet** is a statement which presents (as of a moment in time, unlike the other three statements which cover a time period) the assets, liabilities, and net worth of an entity. Sometimes this statement is titled **Statement of Assets and Liabilities**, **Statement of Financial Position**, or a similar title.

The **Statement of Income** or **Statement of Operations** presents for a period of time, an entity's revenues, costs, expenses, and net income or loss for the period involved. Other titles which are used include **Profit and Loss Statement**. An analogous statement for a cash basis entity could be a **Statement of Receipts and Disbursements**.

A **Statement of Changes in Stockholders' Equity** presents the changes that occurred during a given period affecting the corporation's capital accounts including retained earnings. If the only changes resulted from earnings, losses, or dividends, a company may simply present a **Statement of Retained Earnings**, or may combine the **Statement of Changes in Retained Earnings** with the **Statement of Income**. For partnerships, the analogous statement would be a **Statement of Changes in Partners' Capital**; for not-for-profit organizations, the corresponding statement would be a **Statement of Changes in Fund Balances**.

The **Statement of Cash Flows** is a statement that presents cash inflows and outflows from operating, financing, and investing activities for a given period.

Prospective Financial Statement.

Prospective financial information refers to any financial information about the future. The information may be presented as complete financial information or limited to one or more elements, items, or accounts. A prospective financial statement may be either a **Financial Forecast** or a **Financial Projection**.

A **Financial Forecast** is a prospective financial statement that presents, to the best of the responsible party's knowledge and belief, an entity's expected financial position, results of operations, and changes in financial position. In contrast, a **Financial Projection** is a prospective financial statement that presents, given one or more hypothetical assumptions, an entity's expected financial position, results of operations, and changes in financial position.

Classification of Financial Statements

Introduction

Financial statements may be classified by the kind of third party involvement. In this context there are two classes of financial statements: **Audited** and **Unaudited**. Audited financial statements include only those statements which have been audited by independent certified public accountants (CPAs) and in some states, independent public accountants (PAs). **Unaudited** financial statements include those reviewed or compiled by CPAs or PAs, but also include financial statements prepared by management without any service performed by an independent CPA or PA.

Audited Statements

The term audit, audited, or auditing refers to an examination of the books and records of an entity by an independent CPA or independent PA intended to serve as a basis for the expression of opinion on the fairness with which the entity's financial statements present financial position, results of operations, and cash flows in conformity with generally accepted accounting principles (GAAP). The auditor's report is the medium through which the accountant expresses an opinion or, if circumstances dictate, disclaims an opinion. Also, if circumstances require it, the auditor's report may contain an explanatory paragraph describing an uncertainty about the entity's ability to continue as a going concern for a reasonable period of time.

The terms "certified" or "examined" are sometimes used synonymously with the term "audited."

Sometimes, an independent accountant may audit financial statements that are not prepared in accordance with GAAP, but rather are prepared on another comprehensive basis of accounting (OCBOA). Such statements include cash basis,

tax basis, regulatory basis, and other non-GAAP basis. Such statements are generally titled differently from the equivalent GAAP statements. For example, a cash basis financial statement reflecting financial position might be titled **Statement of Assets and Liabilities Arising from Cash Transactions** instead of **Balance Sheet**.

Unaudited Statements

The term "unaudited" refers to all statements which have not been audited. Four classes of unaudited statements are discussed in this Appendix. These are:

Management prepared statements without any third party involvement.

Compilations pursuant to AICPA's Statement on Standards for Accounting and Review Service (SSARS).

Reviews pursuant to SSARS of a nonpublic entity (although under certain circumstances a review of a public entity may be made under SSARS).

Reviews of interim financial statements of public entities pursuant to SAS.

The following is a brief description of the four classes of unaudited statements:

Statements Prepared by Management Only

These are statements in which no third party accounting service by an independent CPA or PA is involved. Such statements may have been prepared by an in-house accountant or other qualified individual or may have been prepared by someone with a very limited accounting background.

Statements prepared by management would not necessarily be in accordance with GAAP. Often such statements are prepared on an OCBOA basis.

Compilations

A compilation is a service by a CPA or a PA which involves reading compiled statements and considering whether they appear to be appropriate in form and free from obvious material errors.

Compiled financial statements are accompanied by a report which states that:

A compilation has been performed.

A compilation is limited to presenting in the form of financial statements information that is the representation of management.

The statements have not been audited or reviewed and no opinion or any other form of assurance is expressed on them.

A compiled financial statement would not necessarily be in accordance with GAAP.

Reviews Pursuant to SSARS

A review under SSARS is a service performed by a CPA or PA which includes making inquiries of the entity's personnel and applying analytical procedures, and reading statements to consider, on the basis of information known, whether the statements appear to conform with generally accepted accounting principles.

Financial statements reviewed under SSARS are accompanied by a report that states:

A review was performed in accordance with SSARS issued by the AICPA.

All information included in the statements is the representation of management.

A review consists principally of inquiries of company personnel and analytical procedures applied to financial data.

A review is substantially less in scope than an audit, and that no opinion is expressed.

The CPA is not aware of any material modifications that should be made to the statements for them to be in conformity with GAAP.

Unaudited Financial Statements of a Public Entity

If a Public Entity is involved, neither a compilation nor a review under SSARS may generally be used. However, certain unaudited statements may be presented. For example, if in a public offering the issuer presented audited statements for three years [year], [year], and [year] and an unaudited stub period for the three months ended March 31, [year], the latter statement could not be compiled or reviewed under SSARS. The stub period statement could be indicated as being unaudited. The CPA or PA involved may have certain responsibilities with respect to the unaudited stub statements including performing inquiries and other varied procedures as deemed appropriate.

Unaudited stub period financial statements of a Public Entity may be accompanied by a report that states:

The statements were not audited.

No opinion is expressed on them.

(Under certain circumstances, a SSARS review may be performed for a Public Entity that is not required to have audited financial statements. When a Public Entity decides not to have its financial statements audited and is not required to do so, it may have its interim and annual financial statements reviewed under the provisions of SSARS.)

Generally Accepted Accounting Principles (GAAP)

GAAP is a technical accounting term that encompasses the conventions, rules, and procedures necessary to define accepted accounting principles at a particular time.

The word "principle" has several definitions one of which is "a general law or rule adopted or professed as a guide to action; a settled ground or basis of conduct or practice..." It is this definition which most accountants mean by the word principle when using the expression accounting principle. A generally accepted accounting principle is one which has substantial authoritative support.

Although there may be agreement on the existence of a body of generally accepted accounting principles, the

determination of whether a particular accounting principle has substantial authoritative support may be difficult because no single reference source exists for all such principles. There is, however, a hierarchy of the various sources of GAAP, a summary of which is as follows:

1. Statements and interpretations of the Financial Accounting Standards Board (FASB), Opinions of the Accounting Principles Board (APB) of the American Institute of Certified Public Accountants (AICPA), and AICPA Research Bulletins.
2. FASB Technical Bulletins, AICPA Industry Audit and Accounting Guides, and the AICPA Statements of Position (SOPs).
3. Consensus positions of the FASB Emerging Issues Task Force (EITF), and AICPA Practice Bulletins.
4. AICPA accounting interpretations, "Qs and As" published by the FASB staff, as well as industry practices widely recognized and prevalent.
5. Other Accounting Literature.

Accrual basis and cash basis financial statements are examples of GAAP and non-GAAP financial statements, respectively. Accrual accounting attempts to record the financial effects on an entity of transactions in the period in which such transactions occur rather than in the period in which cash is received or paid by the entity. Accrual basis accounting recognizes that the acquisition of resources needed to provide services and the rendering of service by the organization during a period often do not coincide with the cash receipts and payments of the period. Typical accruals for small business include depreciation, accounts receivable, accounts payable, and taxes payable.

Another example of a non-GAAP financial statement is one that omits some of the required disclosure or where the disclosure is inadequate. For example, the Statement of Cash Flows is required by GAAP. If such a statement were omitted the auditor would have to qualify his or her report which would take the form of a separate paragraph in the report drawing the reader's attention to the omission and indicating that the Statement of Cash Flows is required by GAAP. The opinion paragraph of the auditor's report would be qualified by a phrase to the effect that "except that the omission of a statement of cash flows results in an incomplete presentation..." followed by the opinion. An accountant's review report would contain an analogous qualification.

Generally Accepted Auditing Standards (GAAS) and Statements on Standards for Accounting and Review Services(SSARS)

When a CPA issues a report on the audit of the financial statements of any entity he or she states that the examination was made in accordance with GAAS. The auditing standards referred to are those which have been promulgated by the auditing standards board of the AICPA in a series of releases titled Statements on Auditing Standards (SAS).

An accountant may issue a compilation or review of the financial statements of an entity in accordance with SSARS. A compilation or a review is a service which is substantially less in scope than an audit and generally may be used only with respect to nonpublic companies. However, there is an exception. When a public entity does not have its annual statements audited, the AICPA permits an accountant to review the entity's annual or interim statements in accordance with SSARS.

Interim financial statements of public or nonpublic companies may be reviewed by a CPA under standards established by the AICPA through SAS. Interim and annual financial statements of nonpublic companies as well as interim and annual financial statements of public companies which are not required to have their annual statements audited may be

reviewed under the lower standards of SSARS.

Responsibility for Financial Statements

The financial statements are always management's responsibility. With respect to audited financial statements, the auditor's responsibility is to express an opinion on the financial statements.

The opinion expressed relates to whether the financial statements present fairly the financial position of the entity and the results of its operations and cash flows in conformity with GAAP.

Unaudited financial statements are also management's responsibility. When an accountant is associated (i.e., consented to the use of his or her name in a report, document, or written communications containing the statements) with the unaudited financial statements, he or she is required to disclose the degree of responsibility, if any, being taken.

Predecessor

The term "Predecessor" means an entity the major portion of the business and assets of which another entity acquired in a single succession, or in a series of related successions in each of which the acquiring entity (the "Successor") acquired the major portion of the business and assets of the acquired entity.

The acquisition of assets by the Successor organization is generally recorded as a Purchase. In some situations, if certain criteria are met, two or more businesses may be combined through a Pooling of Interest in which the ownership interests of the two or more businesses are continued (usually involving an exchange of common stock for common stock) with a new entity being formed, and in such a combination each of the original businesses are considered to be a Predecessor.

When a business combination is effected by the Purchase of assets by the Successor, the assets acquired are recorded at their fair value; where the business combination meets the criteria for a Pooling of Interest, the assets and liabilities are carried forward at the valuations reflected in the books of the Predecessor companies.

Where the Predecessor is a related party and the transaction does not meet the criteria for a Pooling of Interest, and thus the acquisition of the business and assets acquired are effected by means of a Purchase, the analyst should request documentation with respect to how the fair values of the assets acquired were reached.



23 of 132 DOCUMENTS

Current Legal Forms for Real Estate

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Current Legal Forms for Real Estate
Chapter 22A REAL ESTATE SECURITIES
Part IV. FORMS
B. REAL ESTATE SCOR REGISTERED OFFERING

28-22A Current Legal Forms for Real Estate FORM 22A.07

AUTHOR: by Robert M. Nelson

FORM 22A.07 Small Company Offering Registration (SCOR) Manual--Form U-7--Disclosure Document--State of Minnesota--Limited Liability Company--Acquisition of Land and Construction and Operation of Motel Property

COMMENT

The Form U-7 appearing below relates to a Registration filed in the State of Minnesota which is one of many states that have adopted (and in many instances modified) the SCOR form of Registration proposed by NASAA. The SCOR filing will normally accompany an offering which is relying on a SEC Rule 504 or Regulation A exemption. A SCOR filing is meant to effect compliance with the applicable state securities laws; although many state jurisdictions accept SCOR filings, not all do so it is advisable to check the law of each state in which the offering will be made to determine if each state accepts SCOR. The filing may be made in a number of jurisdictions and a co-ordinated regional review of the filing may be available, depending upon the states in which the SCOR filing will be made. For example, Minnesota participates in the CR-SCOR-Midwest region (comprised of Illinois, Indiana, Iowa, Kansas, Michigan, Minnesota, Missouri, Nebraska, North Dakota, South Dakota, and Wisconsin). The other co-ordinated review regions are: (1) the CR-SCOR-Mid-Atlantic region (comprised of Delaware, Maryland, New Jersey, Pennsylvania, Virginia and West Virginia), (2) the CR-SCOR-New England region (comprised of Connecticut, Maine, Massachusetts, New Hampshire, Rhode Island, and Vermont), (3) the CR-SCOR-Southwest (comprised of Arkansas, Oklahoma, and Texas), and (4) the CR-SCOR-West region (comprised of Alaska, Arizona, Colorado, Idaho, Montana, Nevada, New Mexico, Oregon, Utah, Washington and Wyoming). If a co-ordinated review is available, the states' review of the offering materials filed in the states in the region is lead by one state's securities agency.

The Form U-7 is presented in a question and answer format and may be circulated among the potential purchasers of an offering as the offering's disclosure document.

FORM**FORM U-7****DISCLOSURE DOCUMENT**

*A manual has been prepared to help you complete this Disclosure Document. The manual contains instructions for completing each Item. If you do not have a SCOR Manual, contact your State or Provincial securities regulator or the North American Securities Administrators Association.
(www.nasaa.org)*

THIS BOX IS NOT PART OF THE SCOR FORM AND SHOULD BE REMOVED BEFORE THE COMPLETED FORM IS GIVEN TO PROSPECTIVE INVESTORS

Place Company Logo (if any) here or to left or right of Company Name

PENGUIN LODGING, LLC

(Exact name of Company as set forth in Articles of Incorporation or Organizational Documents)

Street address of principal office:

700 Wick Avenue
Youngstown, MN 56087

Company Telephone Number: (507) 555-1234

Person(s) to contact at Company with respect to offering: Thomas M. Carey

Telephone Number (if different from above):

Type of securities offered: Membership Interests in a Limited Liability Company

Price per security: \$ 500 per Membership Unit

Sales commission, if any: 0%

Minimum number of securities offered: 900 (in addition to 520 original membership units):

Maximum number of securities offered: 1,450 (in addition to 520 original membership units):

Total proceeds: If minimum sold: \$450,000 (in addition to \$260,000 original investments)

If maximum sold: \$725,000 (in addition to \$260,000 original investments)

Investment in a small business is often risky. You should not invest any funds in this offering unless you can afford to lose your entire investment. See Item 1 for a discussion of the risk factors that management believes present the most substantial risks to you.

The date of this Disclosure Document is _____ [month] _____ [day],
_____ [year].

Executive Summary

The Company

Describe the business of the Company.

The Company has been formed for the purpose of constructing and operating a 58-room franchise motel facility in Youngstown, Minnesota.

Describe how the Company plans to carry out its activities.

The Company intends to build a 58-unit Penguin Motel or other franchise-type motel facility and to employ a professional management company to supervise and direct operations. Construction is anticipated to start in the spring of _____ [year] and be completed and the facility operating by _____ [month],
_____ [year].

This Company:

- ☒ Has never conducted operations.
- ☒ Is in the development stage.
- ☐ Is currently conducting operations.
- ☐ Has shown a profit in the last fiscal year.
- ☐ Other (Specify):
(Check at least one, as appropriate)

Jurisdiction and date of formation: MN _____ [month] _____ [year]

Fiscal year end: December 31

(month) (day)

How the Company Will Use Your Money

Describe how the Company intends to use the proceeds of this offering.

Proceeds of the offering will be used to pay the construction costs of the motel facility.

For more information about how the Company will use your money, see Item 30.

The Principal Officers of the Company

The Principal Officers of the Company and their titles are:

Chief Executive Officer:	Stephen R. Nelson
Chief Operating Officer:	Douglas M. Nelson
Chief Financial Officer:	Suzanne C. Blessinger
Secretary:	Carole M. Lumm

For more information about these Officers, see Item 77.

The Offering

Name of Sales Person(s): Officers and Directors of the issuer:

Name: Stephen R. Nelson, Chief Executive Officer and Director

Address: 17500 Greenwood Ave., Kamms, MN 56087

Telephone Number: (507) 555-1111 (work) (507) 555-1212 (home)

Name: Douglas M. Nelson, Chief Operating Officer and Director

Address: 1980 Lawyer's Club Circle, Ann Arbor, MN 56087

Telephone Number: (507) 555-2222 (work) (507) 555-2313 (home)

Name: Suzanne C. Blessinger, Chief Financial Officer and Director

Address: 41970 Abbe Marle W., Battleground, MN 56087

Telephone Number: (507) 555-3333 (work) (507) 555-3434 (home)

Name: Carole M. Lumm, Secretary

Address: 29059 Caroline Way, Medina, MN 56087

Telephone Number: (507) 555-4444 (work) (507) 555-4545 (home)

Name: Katherine S. Blessinger, Vice President

Address: 81998 David Drive, Battleground, MN 56087

Telephone Number: (507) 555-5555 (work) (507) 555-5656 (home)

Name: John D. Blessinger, Treasurer

Address: 21501 Spencer Lane, Battleground, MN 56087

Telephone Number: (507) 555-6666 (work) (507) 555-6767 (home)

Name: Connor R. Nelson, Vice President

Address: 922 Natalie Way, Kamms, MN 56087

Telephone Number: (507) 555-7777 (work) (507) 555-7878 (home)

Is there an impound of proceeds until the minimum is obtained? ☒ Yes ☐ No
(See Items 73-76)

Is this offering limited to certain purchasers? ☒ Yes ☐ No (See Item 72)

Is transfer of the securities restricted? ☒ Yes ☐ No (See Item 53)

This offering is available for sale in the following states: Minnesota

You should consider the terms and risks of this offering before you invest. No government regulator is recommending these securities. No government regulator has verified that this document is accurate or determined that it is adequate. It is a crime for anyone to tell you differently.

The Company has included in this Disclosure Document all of its representations about this offering. If anyone gives you more or different information, you should ignore it. You should rely only on the information in this Disclosure Document.

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List of Exhibits

RISK FACTORS

1. List in the order of importance the factors that the Company considers to be the most significant risks to an investor.

The most significant risk is that the motel operation may not generate a profit, which ultimately could result in a sale of the facility for less than the amount invested.

BUSINESS AND PROPERTIES

GENERAL DESCRIPTION OF THE BUSINESS

2. Describe the business of the Company, including its products or services.

Operation of an upper-economy fifty-eight (58) room motel facility pursuant to a national franchise agreement.

3. Describe how the Company produces or provides these products or services and how and when the Company intends to carry out its activities.

The company will construct the motel in _____ [year], after which it will be managed by a professional management company and operated pursuant to a franchise license agreement.

SUPPLIERS

4. Does the Company have any major supply contracts? [] Yes [X] No
If yes, describe.

5. (a) Is the Company dependent upon a limited number of suppliers?

☐ Yes ☒ No If yes, describe.

5. (b) Does the Company expect to be dependent upon a limited number of suppliers?

☒ Yes ☐ No If yes, describe.

It is expected that certain inventory items will be required to be purchased from the franchisor. In addition, the facility will rely on the national advertising and reservation system of the franchisor for a percentage of its occupancy.

CUSTOMER SALES AND ORDERS

6. Does the Company have any major sales contracts? ☐ Yes ☒ No

If yes, describe.

7. State the total amount of the Company's sales of products or services for the most recent 12 month financial reporting period.

None.

8. State the dollar amount of a typical sale.

Not yet determined; however, the marketing study the Company had prepared suggests an average room rate of \$55 to \$65 per night for a single room.

9. Are the Company's sales seasonal or cyclical? ☒ Yes ☐ No

If yes, explain.

The Company's marketing study suggests that June, July and August will be the strongest months for occupancy. The months of November through March are projected to be the weakest.

10. State the amount of foreign sales as a percent of total sales for last fiscal year. 0 %.

Explain the nature of these sales, including any anticipated changes.

11. Name any customers that account for, or based upon existing orders will account for, a major portion (20% or more) of the Company's sales.

None.

12. State the dollar amount of firm orders.

None.

COMPETITION

13. (a) Describe the market area in which the business competes or will compete.

The market area will be about twenty-five (25) miles from Youngstown to the south, east and north. Hubbard and Sharon to the east will cut this geographic penetration area to about ten (10) miles. Feeder markets for the subject

market would be generated by the smaller communities in the area. Most of the lodging demand would come from a regional market consisting of Minnesota, Iowa and South Dakota. The closest competing motel will be nineteen (19) miles away. Business-related travel to this area is expected to generate forty percent (40%) of the demand and the social/leisure is expected to be slightly higher than forty-five percent (45%).

13. (b) Name the Company's principal competitors and indicate their relative size and financial and market strengths.

Currently, there is no operating motel in Youngstown. There is a similar motel operation in Poland, Minnesota, about eleven (11) miles to the southwest. In the broader market area, Hubbard, which is about twenty (20) miles northeast of Youngstown, has four (4) motels. Warren is the closest major market located forty-two (42) miles northwest of Youngstown. Warren has three (3) branded motels.

14. (a) Does the Company compete, or expect to compete, by price?

☐ Yes ☒ No If yes, describe its competitive strategy.

14. (b) Does the Company compete, or expect to compete, by service?

☐ Yes ☒ No If yes, describe its competitive strategy.

14. (c) Does the Company compete, or expect to compete, on some other basis?

☒ Yes ☐ No

If yes, state the basis and describe the Company's competitive strategy.

There is currently an unaccommodated lodging demand in Youngstown, where there currently is no motel. Thus, the location for the planned motel is the primary competitive strategy.

MARKETING

15. (a) Describe how the Company plans to market its products or services during the next 12 months, including who will perform these marketing activities. Franchise marketing, including radio and newspaper giving regional coverage. Franchisors offer referral and reservation services through their network.

15. (b) State how the Company will fund these marketing activities.

Approximately three percent (3%) of receipts will be dedicated to advertising.

EMPLOYEES

16. (a) State the number of the Company's present employees by type of employee (i.e., clerical, operations, administrative, etc.).

Currently, the Company has no employees.

16. (b) State the number of employees the Company anticipates it will have within the next 12 months by type of employee (i.e., clerical, operations, administrative, etc.).

Administration - 1

Clerical - 1

Custodial - 1

17. Describe the Company's labor relations.

The Company has no employees; however, the employees eventually hired will be from the immediate area, will not be represented by a union and relations are expected to be excellent.

18. Indicate any benefits or incentive arrangements the Company provides or will provide to its employees.

The Company currently has no plan to provided benefits or incentive arrangements to its employees.

PROPERTIES

19. (a) Describe generally the principal properties that the Company owns or leases.

None.

19. (b) Indicate what properties the Company intends to acquire or lease.

The Company will acquire the site currently occupied by the now closed Hubbs Motel in addition to the two (2) lots immediately behind the Hubbs site for a total of 1.9 acres.

RESEARCH AND DEVELOPMENT

20. Indicate the amounts that the Company spent for research and development during its last fiscal year.

None. Marketing study done by ADE at no cost to the Company.

21. (a) Will the Company expend funds on research and development during the current fiscal year? [] Yes [X] No

21 (b) If yes, how much does the Company plan to spend on research and development during the current fiscal year?

The total cost of construction of the facility during 2004 and 2005 is estimated to be \$1,500,000.

21. (c) How does the Company intend to fund these research and development costs?

Bank Loan--	\$500,000	Seed Capital--	\$225,000
FIT Loan--	\$250,000	Equity from this offering--	\$525,000

GOVERNMENTAL REGULATION

22. (a) Is the Company's business subject to material regulation by any governmental agency? [] Yes [X] No

22. (b) Are the Company's products or services subject to material regulation by any governmental agency? [] Yes [X] No

22. (c) Are the Company's properties subject to material regulation by any governmental agency? ☐ Yes ☒ No

22. (d) Explain in detail any "yes" answer to Item 22(a), 22(b), or 22(c), including the nature and extent of the regulation and its effect or potential effect upon the Company.

23. (a) Is the Company required to have a license or permit to conduct business?

☐ Yes ☒ No

23. (b) If yes, does the Company have the required license or permit?

☐ Yes ☐ No

23. (c) If the answer to Item 23(b) is "yes," describe the effect on the Company and its business if it were to lose the license or permit. N/A

23. (d) If the Company has not yet acquired a required license or permit, describe the steps the Company needs to take to obtain the license or permit. Estimate the time it will take to complete each step. N/A

COMPANY HISTORY AND ORGANIZATION

24. Summarize the material events in the development of the Company.

Beginning in _____ [year], the Area Development Enterprise agency sought to address the lack of quality motel rooms in the Youngstown metropolitan community. Subsequent research, including discussions with franchisors, developers, consultants and motel owners along with a comprehensive marketing study culminated with the recent closing of the only and totally inadequate old motel in town. As a result, a local group of investors in cooperation with ADE have arranged to purchase the site of the old motel and the adjoining land to address the significant need for lodging in the area.

25. Describe any recent stock split, stock dividend, recapitalization, merger, acquisition, spinoff, or reorganization. N/A

26. Discuss any pending or anticipated stock split, stock dividend, recapitalization, merger, acquisition, spin-off, or reorganization. N/A

27. State the names of any parent, subsidiary, or affiliate of the Company. For each, indicate its business purpose, its method of operation, its ownership, and whether it is included in the Financial Statements attached to this Disclosure Document.

Statements attached to this Disclosure Document.

MILESTONES

28. Describe in chronological order the steps management intends to take to achieve, maintain, or improve profitability during the 12 months following receipt of the offering proceeds.

Complete construction of the facility and open it with appropriate promotions and incentives.

If management does not expect the Company to achieve profitability during that time period, describe the business

objectives for that period and the steps management intends to take to achieve those objectives.

The Company expects to operate at about a break-even level the first twelve (12) months. Any cash shortfall will be covered by short term loans or line of credit.

Indicate the probable timing of each step and the approximate cost to complete it.

Completion of construction and opening of the facility are expected to occur in _____ [year].

29. (a) State the anticipated consequences to the Company if any step is not completed as scheduled.

Operating losses will be incurred, which may require infusion of additional capital or securing of loans.

29. (b) Describe how the Company will deal with these consequences.

The Company believes that necessary short term debt will be available, if needed. Sale of assets, payment of debts, and liquidation of the Company would be the ultimate result of a significant failure to accomplish the projected results.

NOTE:

After reviewing management's discussion of the steps it intends to take, potential investors should consider whether achievement of each step within the estimated time frame is realistic. Potential investors should also assess the consequences to the Company of any delays in taking these steps and whether the Company will need additional financing to accomplish them.

USE OF PROCEEDS

30. Show how the Company intends to use the proceeds of this offering:

	If Minimum Sold		If Maximum Sold	
	Amount	%	Amount	%
Total Proceeds	\$ 450,000	100%	\$ 725,000	100%
Less: Offering Expenses				
Commissions and Finders Fees				
Legal & Accounting	20,000	4.45	20,000	2.76
Copying & Advertising				
Other (Specify):				
Net Proceeds from Offering	\$ 430,000	95.55%	\$ 705,000	97.24%
Use of Net Proceeds				

28-22A Current Legal Forms for Real Estate FORM 22A.07

Construction of motel	\$ 430,000	100%	\$ 630,000	89.36%
Reserve	\$ -0-	%	\$ 75,000	10.64%
	\$	%	\$	%
	\$	%	\$	%
	\$	%	\$	%
Total Use of Net Proceeds	\$ 430,000	100%	\$ 705,000	100%

31. (a) Is there a minimum amount of proceeds that must be raised before the Company uses any of the proceeds of this offering? [X] Yes [] No

31. (b) If yes, describe how the Company will use the minimum Net Proceeds of this offering.

The minimum, along with other funding, will be used for construction of the motel facility.

31. (c) If the answer to Item 31(a) is "yes," describe how the Company will use the Net Proceeds of this offering that exceed the amount of the minimum offering proceeds.

Construction costs of optional amenities and reserve for operating cash flow.

31. (d) If the answer to Item 31(a) is "no," describe how the Company will use the Net Proceeds of this offering.

N/A

32. (a) Will the Company use other funds, together with the offering proceeds, to fund any project or activity identified in Item 31? [X] Yes [] No

32. (b) If yes, state the amounts and sources of the other funds.

Initial Capital--	\$260,000
Bank Loan--	\$500,000
FIT Loan--	\$250,000

32. (c) Indicate whether the availability of the funds is firm or contingent. If contingent, explain.

A letter of intent has been obtained for the bank financing. The FIT loan has received preliminary City Council approval. The initial capital has been contributed by the initial investors.

NOTE:

See the answer to Item 70 for information about proceeds used to compensate sales agents. See the answer to Items 108 and 109 for information about proceeds used to purchase assets from Officers,

	Amount Outstanding		
	As of:	As Adjusted	
	(date)	Minimum	Maximum
Debt:			
Short-term debt (average interest rate _____ %)	\$	\$	\$
Long-term debt (average interest rate 6 %)	\$	\$ 750,000	\$ 750,000

Total debt	\$		\$	750,000	\$	750,000
Stockholders equity (deficit):						
Preferred stock - par or stated value (by class of preferred--in order of preferences)						
_____	\$		\$		\$	
_____	\$		\$		\$	
_____	\$		\$		\$	
Common stock - par or stated value	\$	260,000	\$	710,000	\$	985,000
Additional paid in capital	\$		\$		\$	
Retained earnings (deficit)	\$		\$		\$	
Total stockholders equity (deficit)	\$		\$		\$	
Total Capitalization	\$	260,000	\$	1,460,000	\$	1,735,000
Assets/Investment	\$		\$		\$	
Cash	\$	260,000	\$	--	\$	75,000
Land	\$	--	\$	100,000	\$	100,000
Building and Franchise	\$	--	\$	1,340,000	\$	1,540,000
Organizational Costs	\$	--	\$	20,000	\$	20,000
Total	\$	260,000	\$	1,460,000	\$	1,735,000

Number of preferred shares authorized to be outstanding:

Class of Preferred	Number of Shares Authorized	Par Value Per Share
_____	_____	_____
		\$
None		\$
		\$

Number of common shares authorized: 1970 membership units.

Par or stated value per share, if any: \$500

Number of common shares reserved to meet conversion requirements or for issuance upon the exercise of options,

warrants or rights:

None

DILUTION

36. (a) The price of the securities in this offering has been arbitrarily determined.
☒ Yes ☐ No

36. (b) If no, explain the basis on which the price of the securities was determined.

The amount of equity necessary to complete the facility. Offering price is the same price per membership unit of original investors.

37. (a) The net tangible book value per share before offering is: \$500

37. (b) For the minimum offering:

The net tangible book value per share after the minimum offering will be:	\$500

The amount of increase in net tangible book value per share as a result of receipt of cash from purchasers in this offering will be:	\$0

The dilution per share to purchasers will be:	\$0

37. (c) For the maximum offering:

The net tangible book value per share after the maximum offering will be:	\$500

The amount of increase in net tangible book value per share as a result of receipt of cash from purchasers in this offering will be:	\$0

The dilution per share to purchasers will be:	\$0

38. For each share purchased in this offering a purchaser will pay \$500 and will receive a share representing \$500 in net tangible book value, if the minimum offering is achieved, or \$500, if the maximum offering is achieved.

The difference between the amount a purchaser pays for a share and the amount of net tangible book value that share represents is the dilution to the purchaser.

39. In a table, compare the existing stockholders' percentage ownership in the Company and the consideration paid for that ownership with that of purchasers in this offering.

	Shares Purchased		Total Consideration		Average Price
	Number	Percent	Amount	Percent	Per Share
Existing holders:	500	36.6/26.3	\$260,000	36.6/26.3	\$500
New Purchasers:					

Minimum of- fering	900	63.4	\$450,000	63.4	\$500
Maximum offer- ing	1,450	73.6	\$725,000	73.6	\$500

40. Using the offering price of these securities, what value is the Company's management attributing to the entire Company before the offering?

\$ 260,000

NOTE:

You should consider carefully whether the Company has this value at the present time. Some issues you should think about include: (1) the risks to which the Company is subject before it achieves success (see Item 1, Risk Factors); (2) the exercise prices of outstanding options (see Item 101); and (3) the prices that the Company's Officers, Directors, and principal stockholders paid for their shares (see Items 104 and 105).

**MANAGEMENT'S DISCUSSION AND ANALYSIS OF CERTAIN
RELEVANT FACTORS**

41. Is the Company having or does the Company anticipate having within the next 12 months any cash flow or liquidity problems? ☒ Yes ☐ No If yes, explain.

Normal cash flow problems typical of starting a new motel operation.

42. (a) Is the Company in default of the terms of any note, loan, lease, or other indebtedness or financing arrangement requiring the Company to make payments? ☐ Yes ☒ No

42. (b) If yes, explain. Identify the creditor, state the amount in default or the term that the Company has not complied with, and describe any consequences to the Company resulting from each default. N/A

43. Are a significant amount of the Company's trade payables more than 90 days old?
☐ Yes ☒ No

44. Is the Company subject to any unsatisfied judgments, liens, or settlement obligations?
☐ Yes ☒ No If yes, state the amounts.

45. Describe how the Company will resolve the problems identified in Items 41-44.

Cash flow will improve as the motel operation becomes established. Short term debt or a line of credit will be available to address any cash flow issues.

46. (a) Do the Company's financial statements show losses from operations?
☐ Yes ☒ No

46. (b) If yes, explain the causes underlying these losses and what steps the Company has taken or is taking to address these causes.

N/A

47. (a) Describe any trends in the Company's historical operating results.

N/A

47. (b) Indicate any changes now occurring in the underlying economics of the Company's business which, in the opinion of Management, will have a significant impact upon the Company's results of operations within the next 12 months.

None

47. (c) Describe the probable impact on the Company.

N/A

47. (d) Describe how the Company will deal with this impact.

N/A

48. (a) Will the proceeds from this offering and any available funds identified in Item 32 satisfy the Company's cash requirements for the 12 month period after it receives the offering proceeds?

☒ Yes ☐ No

48. (b) If no, explain how the Company will satisfy its cash requirements. State whether it will be necessary to raise additional funds. State the source of the additional funds, if known.

N/A

DESCRIPTION OF SECURITIES OFFERED

GENERAL

49. The securities being offered are:

- ☐ Common Stock
- ☐ Preferred or Preference Stock
- ☐ Notes, Debentures, or Bonds
- ☒ Limited Liability Company Membership Interests
- ☐ Units of two or more types of securities, composed of:
- ☐ Other (specify):

50. These securities have:

Yes No

- ☐ ☐ Cumulative voting rights
- ☒ ☐ Other special voting rights
- ☐ ☐ Preemptive rights to purchase any new issue of shares
- ☐ ☐ Preference as to dividends or interest
- ☐ ☐ Preference upon liquidation
- ☐ ☐ Anti-dilution rights
- ☐ ☐ Other special rights or preferences (specify):

Explain any yes answer.

The Company intends to provide that one director may be elected for each block of seventy (70) membership units. Thus, those individuals who invested \$35,000 each in seed capital will each be eligible to serve as a director or designate someone for a seat. New investors in this offering who invest \$35,000 will have the same right. New investors in this offering who invest less than \$35,000 may combine with other similar investors to create a block of seventy (70) membership units and elect a director on the same terms.

51. Are there any restrictions on dividends or other distributions? ☐ Yes ☒ No

If yes, describe.

52. Are the securities convertible? ☐ Yes ☒ No

If yes, state conversion price or formula.

Date when conversion becomes effective: _____/_____/_____

Date when conversion expires: _____/_____/_____

53. Describe any resale restrictions on the securities and when the restrictions will terminate.

A first option to other members and the Company to repurchase membership units offered for sale is contained in the Company's Operating Agreement.

PREFERRED STOCK

If the securities being offered are Preference or Preferred stock: N/A

54. Are unpaid dividends cumulative? ☐ Yes ☐ No

55. (a) Are the securities callable? ☐ Yes ☐ No If yes, describe.

55. (b) Are the securities redeemable? ☐ Yes ☐ No

If yes, describe, including redemption prices.

DEBT SECURITIES

If the securities being offered are notes or other types of debt securities: N/A

56. What is the interest rate on the debt securities? _____%

If the interest rate is variable or there are multiple interest rates, describe.

57. What is the maturity date? _____/_____/_____

If the securities will have serial maturity dates, describe.

58. Is there a sinking fund? ☐ Yes ☐ No If yes, describe.

59. Is there a trust indenture? ☐ Yes ☐ No

If yes, state the name, address, and telephone number of Trustee.

60. (a) Are the securities callable? ☐ Yes ☐ No If yes, describe.

60. (b) Are the securities redeemable? ☐ Yes ☐ No

If yes, describe, including redemption prices.

61. Are the securities secured by real or personal property? ☐ Yes ☐ No

If yes, describe.

62. (a) Are the securities subordinate in right of payment of principal or interest?

☐ Yes ☐ No If yes, explain the terms of the subordination.

62. (b) How much currently outstanding indebtedness of the Company is senior to the securities in right of payment of interest or principal? \$

63. How much currently outstanding indebtedness ranks equally with the securities in right of payment? \$

64. How much currently outstanding indebtedness is junior (subordinated) to the securities? \$

RATIO OF EARNINGS TO FIXED CHARGES

65. (a) If the Company had earnings during its last fiscal year, show the ratio of earnings to fixed charges on an actual and pro forma basis for that fiscal year. N/A

	Actual		Pro Forma
	Last Fiscal Year	Interim Period	
			Minimum Maximum
"Earnings" =	_____	_____	_____
"Fixed Charges"	_____	_____	_____

65. (b) If no earnings, show "Fixed Charges" only

NOTE:

See the Financial Statements and especially the Statement of Cash Flows. Exercise care in interpreting the significance of the ratio of earnings to fixed charges as a measure of the "coverage" of debt service. The existence of earnings does not necessarily mean that the Company will have cash available at any given time to pay its obligations. See Items 41-48. Prospective purchasers should not rely on this ratio as a guarantee that they will receive the stated return or the repayment of their principal.

HOW THESE SECURITIES WILL BE OFFERED AND SOLD

COMPANY SALESPERSONS

66. Provide the following information for each Officer, Director, or Company employee who intends to offer or sell the securities:

66. (a) Name: See Executive Summary--Officers of the Company

Title:

Address:

Telephone Number:

67. Describe any compensation that the Company will pay each person in addition to his or her customary salary and compensation.

None

OTHER SALES PERSONS AND FINDERS

68. Provide the following information for each salesperson who is not an Officer, Director, or employee of the Company: None

68. (a) Name:

Company:

Address:

Telephone Number:

69. Provide the following information for each person who is a finder: None

69. (a) Name:

Company:

Address:

Telephone Number:

70. Describe all compensation that the Company will pay to each person identified in Items 68 and 69. N/A

71. Describe any material relationships between these sales persons or finders and the Company or its management.
N/A

PURCHASER LIMITATIONS

72. (a) Is the offering limited to certain purchasers? ☒ Yes ☐ No

72. (b) Is the offering subject to any other purchaser limitations? ☐ Yes ☒ No

72. (c) If the answer to either 72(a) or 72(b) is yes, describe the limitation.

The offering will be limited to purchasers who are Minnesota residents.

IMPOUND OF OFFERING PROCEEDS

73. (a) Will the Company impound the proceeds of the offering until it raises the minimum offering proceeds? ☒ Yes ☐ No

73. (b) If yes, what is the minimum amount of proceeds that the Company must raise and place in an impound account before the Company can receive and use the proceeds?

\$450,000

73. (c) If the answer to Item 73(a) is "yes," state the date on which the offering will end if the Company has not raised the minimum offering proceeds.

date

74. (a) Does the Company reserve the right to extend the impound period?

☒ Yes ☐ No

74. (b) If yes, describe the circumstances under which the Company might extend the impound period.

Three month extension of eighty percent (80%) of the minimum has been raised by original termination date of [month]/[day]/[year].

75. State the name, address, and telephone number of the bank or other similar depository institution acting as impound agent.

Gopher Savings
10 Buckeye Way
Youngstown, MN 56087

76. If the offering proceeds are returned to investors at the end of the impound period, will the Company pay any interest earned during the impound period to investors?

☐ Yes ☒ No

MANAGEMENT

OFFICERS AND KEY PERSONS OF THE COMPANY

77. Provide the following information for each Officer and key person. The term "key person" means a person, other than the chief executive officer, chief operating officer, and chief financial officer, who makes a significant contribution to the business of the Company. Identify who performs the functions of Chief Executive Officer, Chief Operating Officer, and Chief Financial Officer.

77. (a) Name: Stephen R. Nelson Age: 36

Title: Chief Executive Officer

Office Street Address: 700 Wick Ave.
Youngstown, MN 56087

Telephone Number: (507) 555-8888

Names of employers, titles, and dates of positions held during past five years, with an indication of job responsibilities.

Vice President of International Sales for Sherman Thomas Paints, Youngstown, MN for fifteen (15) years

Education (degrees, schools, and dates):

High School diploma, River Rock HS, River Rock, MN, 1986
B.A., Bowling Green State University, Bowling Green, OH, 1990

Also a Director of the Company ☒ Yes ☐ No

Indicate amount of time to be spent on Company matters if less than full time:

Name: Douglas M. Nelson Age: 24

Title: Chief Operating Officer

Office Street Address: 700 Wick Ave.
Youngstown, MN 56087

Telephone Number: (507) 555-8888

Names of employers, titles, and dates of positions held during past five years, with an indication of job responsibilities.

No previous employment--full-time student

Education (degrees, schools, and dates):

High School diploma, Village Bay HS, Village Bay, MN, 1997

B.A., Baldwin-Wallace College, Berea, OH, 2001

J.D., University of Michigan, Ann Arbor, MI, 2004

Also a Director of the Company ☒ Yes ☐ No

Indicate amount of time to be spent on Company matters if less than full time:

Name: Suzanne C. Blessinger Age: 34

Title: Chief Financial Officer

Office Street Address: 700 Wick Ave.
Youngstown, MN 56087

Telephone Number: (507) 555-8888

Names of employers, titles, and dates of positions held during past five years, with an indication of job responsibilities.

Vice President of Engineering for Proctor, Gamble and Loos, Youngstown, MN for nine (9) years

Education (degrees, schools, and dates):

High School diploma, River Rock HS, River Rock, MN, 1988

B.S. in Agr. Eng., Purdue University, West Lafayette, IN, 1992

Also a Director of the Company ☒ Yes ☐ No

Indicate amount of time to be spent on Company matters if less than full time:

DIRECTORS OF THE COMPANY

78. (a) Number of Directors: Three currently. The Company will add one (1) director for each \$35,000 invested. Minimum would increase the number of directors to twenty (20); maximum would increase number of directors to twenty-eight (28).

78. (b) Are Directors elected annually? ☒ Yes ☐ No If no, explain.

78. (c) Are Directors elected under a voting trust or other arrangement?
☒ Yes ☐ No If yes, explain.

Holders of seventy (70) membership units (\$35,000 investment) will be entitled to name a director.

79. Provide the following information for each Director not described in Item 77: N/A

79. (a) Name: Age:

Office Street Address:

Telephone Number:

Names of employers, titles, and dates of positions held during past five years, with an indication of job responsibilities.

Education (degrees, schools, and dates):

CONSULTANTS

80. (a) Are all key persons employees of the Company? ☒ Yes ☐ No

80. (b) If no, state the details of each contract or engagement.

ARRANGEMENTS WITH OFFICERS, DIRECTORS, AND KEY PERSONS

81. Describe any arrangements to ensure that Officers, Directors, and key persons will remain with the Company and not compete with the Company if they leave.

None

82. (a) Describe the impact on the Company if it loses the services of any Officer, Director, or key person due to death or disability.

None

82. (b) Has the Company purchased key person life insurance on any Officer, Director, or key person? ☐ Yes ☒ No

N/A

COMPENSATION

	Cash	Other	
Chief Executive Officer	\$	-0-	\$ -0-
Chief Operating Officer		-0-	-0-
Chief Financial Officer		-0-	-0-
Key Persons:		-0-	-0-
Total:	\$	-0-	\$ -0-
		_____	_____
		_____	_____
		_____	_____
		_____	_____
		_____	_____
		_____	_____
		_____	_____
		-	-
		_____	_____
		_____	_____
		_____	_____
		_____	_____
		_____	_____
		_____	_____
		_____	_____
		-	-
Officers as a group (number of persons _____)	\$	-0-	\$ -0-
Directors as a group (number of persons _____)	\$	-0-	\$ -0-
Key Persons as a group (number of persons _____)	\$	-0-	\$ -0-

84. (c) Explain any "yes" answer to Item 84(a) or 84(b). N/A

85. Is compensation expected to change within the next year? ☐ Yes ☒ No If yes, explain.

86. (a) Does the Company have any employment agreements with Officers, Directors, or key persons? ☐ Yes ☒ No If yes, describe.

86. (b) Does the Company plan to enter into any employment agreements with Officers, Directors, or key persons? ☐ Yes ☒ No If yes, describe.

PRIOR EXPERIENCE

87. Has any Officer or Director worked for or managed a company (including a separate subsidiary or division of a larger enterprise) in the same type of business as the Company?

☐ Yes ☒ No If yes, explain in detail, including relevant dates.

88. (a) If the Company has never conducted operations or is otherwise in the development stage, has any Officer or Director managed another company in the start-up or development stage?

☐ Yes ☒ No

88. (b) If yes, explain in detail, including relevant dates. N/A

CERTAIN LEGAL PROCEEDINGS

Insolvency

89. Has a petition for bankruptcy, receivership, or a similar insolvency proceeding been filed by or against any Officer, Director, or key person within the past five years, or any longer period if material? ☐ Yes ☒ No

90. Was any Officer, Director, or key person an executive officer, a director, or in a similar management position for any business entity that was the subject of a petition for bankruptcy, receivership, or similar insolvency proceeding within the past five years, or any longer period if material? ☐ Yes ☒ No

91. Explain in detail any "yes" answer to Item 89 or 90. N/A

Criminal Proceedings

92. (a) Has any Officer, Director, or key person been convicted in a criminal proceeding, excluding traffic violations or other minor offenses? ☐ Yes ☒ No

92. (b) Is any Officer, Director, or key person named as the subject of a pending criminal proceeding, excluding traffic violations or other minor offenses? ☐ Yes ☒ No

92. (c) Explain in detail any "yes" answer to Item 92(a) or 92(b). N/A

Civil Proceedings

93. (a) Has any Officer, Director, or key person been the subject of a court order, judgment or decree in the last five years related to his or her involvement in any type of business, securities, or banking activity? ☐ Yes ☒ No

93. (b) Is any Officer, Director, or key person the subject of a pending civil or action related to his or her involvement in any type of business, securities, or banking activity?
☐ Yes ☒ No

93. (c) Has any civil action been threatened against any Officer, Director, or key person related to his or her involvement in any type of business, securities, or banking activity?
☐ Yes ☒ No

93. (d) Explain in detail any "yes" answer to Item 93(a), 93(b), or 93(c). N/A

Administrative Proceedings

94. (a) Has any government agency, administrative agency, or administrative court imposed an administrative finding, order, decree, or sanction against any Officer, Director, or key person in the last five years as a result of his or her involvement in any type of business, securities, or banking activity? ☐ Yes ☒ No

94. (b) Is any Officer, Director, or key person the subject of a pending administrative proceeding related to his or her involvement in any type of business, securities, or banking activity? ☐ Yes ☒ No

94. (c) Has any administrative proceeding been threatened against any Officer, Director, or key person related to his or her involvement in any type of business, securities, or banking activity? ☐ Yes ☒ No

94. (d) Explain in detail any "yes" answer to Item 94(a), 94(b), or 94(c). N/A

Self-Regulatory Proceedings

95. (a) Has a self-regulatory agency imposed a sanction against any Officer, Director, or key person in the last five years as a result of his or her involvement in any type of business, securities, or banking activity? ☐ Yes ☒ No

95. (b) Is any Officer, Director, or key person the subject of a pending self-regulatory organization proceeding related to his or her involvement in any type of business, securities, or banking activity? ☐ Yes ☒ No

95. (c) Has any self-regulatory organization proceeding been threatened against any Officer, Director, or key person related to his or her involvement in any type of business, securities, or banking activity? ☐ Yes ☒ No

95. (d) Explain in detail any "yes" answer to Item 95(a), 95(b), or 95(c). N/A

NOTE:

After reviewing the background of the Company's Officers, Directors and key persons, potential investors should consider whether or not these persons have adequate background and experience to develop and operate this Company and to make it successful. In this regard, the experience and ability of management are often considered the most significant factors in the success of a business.

OUTSTANDING SECURITIES**GENERAL**

96. Describe all outstanding securities.

520 membership units held by original investors.

97. Describe any resale restrictions on outstanding securities and when those restrictions will terminate, if this can be determined.

Subject to first option to other members and Company.

98. Describe any anti-dilution rights of outstanding securities.

None.

DIVIDENDS, DISTRIBUTIONS, AND REDEMPTIONS

99. (a) Has the Company paid any dividends on its stock, made any distributions of its stock, or redeemed any securities within the last five years? ☐ Yes ☒ No

If yes, describe each transaction.

99. (b) Does the Company have any plans or commitments to pay dividends on its stock, make distributions of its stock, or redeem its outstanding securities in the future?

☒ Yes ☐ No If yes, explain.

Dividends will be paid only if there is an adequate operating profit and members approve.

OPTIONS AND WARRANTS

100. (a) State the number of shares subject to issuance under outstanding stock purchase agreements, stock options, warrants or rights. -0- shares

100. (b) The shares identified in Item 100(a) are 0 % of the total shares to be outstanding after the minimum offering.

100. (c) The shares identified in Item 100(a) are 0 % of the total shares to be outstanding after the maximum offering.

101. In a table, describe these stock purchase agreements, stock options, warrants, and rights. State the basic terms of these securities, including the expiration dates, the exercise prices, who holds them, whether they are qualified or non qualified for tax purposes, and whether they have been approved by stockholders.

N/A

102. State the number of shares reserved for issuance under existing stock purchase or option plans but not yet subject

to outstanding purchase agreements, options, or warrants.

-0- shares

103. Does the Company have any plans or commitments to issue or offer options in the future?

☐ Yes ☒ No If yes, explain.

SALES OF SECURITIES

104. (a) Has the Company sold or issued securities during the last 12 months?

☒ Yes ☐ No

Original issue of 520 membership units to Company organizers (seven (7) persons).

104. (b) If yes, in a table, provide the following information for each transaction: the date of the transaction; the amount and type of securities sold or issued; the number of purchasers to whom the securities were sold or issued; any relationship of the purchasers to the Company at the time of sale or issuance; the price at which the securities were sold or issued; and a concise description of any non-cash consideration.

See attached.

PRINCIPAL STOCKHOLDERS

105. In the following table, provide the name and office street address of each person who beneficially owns at least 10% of the common or preferred stock of the Company.

Name	Class Of Shares	Average Price Per Share	No. of Shares Now Held	% of Total	No. of Shares Held After Offering if All Securities Sold	% of Total
Stephen R. Nelson	Membership Units	\$500	75	.13	75	.035
Douglas M. Nelson	Membership Units	\$500	75	.13	75	.035
Suzanne C. Blessinger	Membership Units	\$500	75	.13	75	.035
Carole M. Lumm	Membership Units	\$500	70	.13	70	.035
Kathryn S. Blessinger	Membership Units	\$500	75	.13	75	.035
John D. Blessinger	Membership Units	\$500	75	.13	75	.035
Connor R. Nelson	Membership Units	\$500	75	.13	75	.035

106. Number of shares beneficially owned by all Officers and Directors as a group:

106. (a) Before offering: 520 shares (100 % of total outstanding)

106. (b) After offering: Assuming minimum securities sold: 900 shares
(36.6% of total outstanding)

106. (c) After offering: Assuming maximum securities sold: 1,450 shares
(26.3 % of total outstanding)

NOTE:

These calculations assume that all outstanding options have been exercised and all convertible securities have been converted.

MANAGEMENT RELATIONSHIPS AND TRANSACTIONS

FAMILY RELATIONSHIPS

107. Is there a family relationship between any Officer, Director, key person, or principal stockholder? ☒ Yes ☐ No If yes, describe.

Stephen R. Nelson, Douglas M. Nelson, and Suzanne C. Blessinger are siblings, Carole M. Lumm is their mother, Kathryn S. Blessinger and John D. Blessinger are Suzanne C. Blessinger's children, and Connor R. Nelson is Stephen R. Nelson's son.

MANAGEMENT TRANSACTIONS

108. (a) Will the Company use any offering proceeds to acquire assets from any Officer, Director, key person, or principal stockholder? ☐ Yes ☒ No

108. (b) Will the Company use any offering proceeds to acquire assets from an associate of any Officer, Director, key person, or principal stockholder? ☐ Yes ☒ No

108. (c) If the answer to Item 108(a) or (b) is "yes," provide detailed information about each transaction. Include the name of the person, the cost to the Company, the method used to determine the cost, and any profit to the seller. N/A

109. (a) Will the Company use any offering proceeds to reimburse any Officer, Director, key person, or principal stockholder for services already rendered, assets previously transferred, or moneys loaned or advanced, or otherwise? ☐ Yes ☒ No

109. (b) If yes, provide detailed information about each transaction. Include the name of the person, the cost to the Company, the method used to determine the cost, and any profit to the person. N/A

110. (a) Has the Company made loans to any Officer, Director, key person, or principal stockholder within the last two years? ☐ Yes ☒ No

110. (b) Does the Company plan to make loans to its Officers, Directors, key persons, or principal stockholders in the

future? ☐ Yes ☒ No

If yes, describe any policies the Company has adopted to deal with the conflicts of interest in these transactions:

111. (a) Has the Company done business with any Officer, Director, key person, or principal stockholder within the last two years? ☐ Yes ☒ No

111. (b) Is the Company currently doing business with any Officer, Director, key person, or principal stockholder? ☐ Yes ☒ No

111. (c) Does the Company plan to do business with its Officers, Directors, key persons, or principal stockholders in the future? ☐ Yes ☒ No

If yes, describe any policies the Company has adopted to deal with the conflicts of interest in these transactions:

A majority of disinterested directors must approve the terms and/or contract with the interested director(s)

112. Explain any "yes" answers to Items 110(a), 111(a), or 111(b). State the principal terms of any significant loans, agreements, leases, financing, or other arrangements. N/A

113. (a) Has any Officer, Director, key person, or principal stockholder guaranteed or cosigned the Company's bank debt or other obligations? ☐ Yes ☒ No

113. (b) If yes, explain the terms of each transaction and describe the Company's plans for repayment. N/A

LITIGATION

114. Describe any recent or pending litigation or administrative action which has had or may have a material effect upon the Company's business, financial condition, or operations. State the names of the principal parties, the nature and current status of the matters, and the amounts involved.

None

115. Describe any threatened litigation or administrative action that may have a material effect upon the Company's business, financial condition, or operations. State the names of the principal parties, and the nature and current status of the matters.

None

TAX ASPECTS

116. Describe any material tax consequences to investors in this offering.

Pass through of profits and losses of the LLC to its members.

OTHER MATERIAL FACTORS

117. Describe any other material factors, either adverse or favorable, that will or could affect the Company or its business or which are necessary to make any other information in this Disclosure Document not misleading or incomplete.

None

ADDITIONAL INFORMATION

118. (a) Describe the types of information that the Company will provide to security holders in the future.

Regular unaudited financial statements of the Company.

118. (b) Describe the schedule for providing this information. Quarterly and annually.

118. (c) Attach the Company's financial statements to the Disclosure Document.

None as yet prepared.

SIGNATURES:

The Company's Chief Executive Officer, Chief Financial Officer, and its Directors must sign this Disclosure Document. When they sign this Disclosure Document, they represent that they have diligently attempted to confirm the accuracy and completeness of the information in the Document.

When the Chief Financial Officer signs this Disclosure Document, he or she represents that the financial statements in the Document have been prepared in accordance with generally accepted accounting principles which have been consistently applied, except where explained in the notes to the financial statements. He or she represents that the financial statements fairly state the Company's financial position and results of operations, or receipts and disbursements, as of the dates and periods indicated. He or she also represents that year-end figures include all adjustments necessary for a fair presentation under the circumstances.

Chief Executive Officer:

/s/ Stephen R. Nelson.....

Title: President.....

/s/ Douglas M. Nelson.....

Title: Chief Financial Officer

/s/ Suzanne C. Blessinger.....

Title: CFO.....

Directors:

/s/ Stephen R. Nelson.....

.....

/s/ Douglas M. Nelson.....

.....

/s/ Suzanne C. Blessinger.....

.....

.....

LIST OF EXHIBITS

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Current Legal Forms for Real Estate

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Current Legal Forms for Real Estate
Chapter 22A REAL ESTATE SECURITIES
Part IV. FORMS
C. REAL ESTATE EXEMPTION OFFERINGS

28-22A Current Legal Forms for Real Estate FORM 22A.08

AUTHOR: by Robert M. Nelson

FORM 22A.08

SEC Rule 505 Offering Exemption--Limited Partnership--Private Placement Memorandum

COMMENT

The documents appearing below relate to an interstate offering of units in a limited partnership which is meant to rely upon the SEC Rule 505 exemption for offerings up to \$5,000,000 made to no more than thirty-five (35) nonaccredited investors (plus any number of "accredited investors" as that term is defined in Rule 501(a)). The units being offered will be subject to the limitation of offering restrictions set forth in Rule 502(c) and the units will be "restricted" securities subject to the limitations on resale as described in Rule 502(d). It is anticipated that this offering will also qualify for small offering exemptions in the states in which the units are offered for sale. The Private Placement Memorandum is fairly lengthy and complex due to the tax aspects of the offering (including both tax credit provisions and limited partnership taxation matters). The Memorandum is intended to comply with the informational requirements of Rule 502(b). The Memorandum includes a copy of the partnership's Amended and Restated Limited Partnership Agreement and a package of investor documents, including a Promissory Note to be tendered for part of the purchase price.

FORM

PRIVATE PLACEMENT MEMORANDUM

NO. _____

VMB RESIDENCE TAX CREDIT FUND VI, L.P.,
 SERIES 11 and SERIES 12
 Units of Limited Partnership Interest

VMB Housing Tax Credit Fund VI, L.P., Series 11 and Series 12 will invest in other entities owning low income apartment complexes. Federal tax law provides tax credits to investors in low income apartment complexes. Investors in Units can use these tax credits to reduce their own federal income tax liabilities. Approximately 75% of the Series' capital will be invested in low income apartment complexes. Approximately 15% will be used to pay fees to or expenses.

A purchase of Units involves risks. See "Risk Factors" on page _____. Risks include:

- ☐ There can be no assurance as to the amount of tax credits because compliance with the tax credit rules is complicated.
- ☐ An individual's ability to use tax credits is limited. See "Who Should Invest; Limitations on Use of Credits and Losses."
- ☐ An investor's ability to sell Units is limited. See "Transferability of Units."
- ☐ A market for Units probably will not develop.
- ☐ If mortgage payments for an apartment complex are not made, the lender could foreclose on the apartment complex.

	Per Unit	Total Minimum	Total Maximum	
Public Price	\$ 1,000	\$ 1,400,000	\$ 5,000,000	The Units are offered in two Series of 2,500 Units each by VMB Capital Corporation.
Selling Commissions and Dealer Man- ager Fee	\$ 90	\$ 126,000	\$ 500,000	The broker-dealers are not required to sell any specific number of Units, but will use their best efforts to sell the Units.
Proceeds to Series	\$ 910	\$ 1,274,000	\$ 4,500,000	

No Units in a Series will be sold unless a minimum of \$1,400,000 in cash is received within one year from the start of

the Series' offering. Each Series will deposit its subscriptions in an escrow account with AmeriBank.

Neither the Securities and Exchange Commission nor any state securities commission has approved or disapproved of these securities or passed upon the accuracy or adequacy of this Memorandum. Any representation to the contrary is a criminal offense. The use of forecasts in this offering is prohibited. Any representations to the contrary and any predictions, written or oral, as to the amount or certainty of any present or future cash benefit or tax consequence which may flow from an investment in this program is not permitted.

The date of this Memorandum is _____ [month] _____ [day],
_____ [year].

THESE SECURITIES BEING OFFERED HEREBY HAVE NOT BEEN REGISTERED UNDER THE FEDERAL SECURITIES ACT OF 1933, AS AMENDED, OR ANY STATE SECURITIES LAWS, AND MAY NOT BE RESOLD UNLESS REGISTERED UNDER APPLICABLE FEDERAL AND STATE SECURITIES LAWS OR, UNLESS AN EXEMPTION FROM REGISTRATION UNDER THE APPLICABLE FEDERAL AND STATE SECURITIES LAWS IS AVAILABLE.

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Sales of apartment complexes after 15 years are subject to limitations which may impact a local limited partnership's ability to sell its apartment complex

Investors can only use low income housing tax credits in limited amounts

Historic tax credits may be unavailable or may be recaptured

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If a Series has few investments, each investment will have a great impact on the Series' results of operations

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The Series will not control the local limited partnerships and must rely on the local general partners

Projects subsidized by other government programs are subject to additional rules which may make it difficult to operate and sell apartment complexes

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The Sponsor - VMB & Associates, Inc.

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VMB Capital Corporation

VMB Management, Inc.

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SUMMARY OF THE OFFERING

This summary outlines the main points of the offering. This summary does not replace a full and careful reading of this Memorandum. This summary is qualified by the remainder of this Memorandum. All prospective investors are urged to read this Memorandum in its entirety.

The Series	VMB Housing Tax Credit Fund VI, L.P., Series 11 and Series 12 are Kansas limited partnerships. Series 11 and Series 12 have been organized as limited partnerships because that structure permits the pass through of tax benefits to investors. The principal place of business of Series 11 and Series 12 is that of management: 3480 Brown Valley Trail, Suite 120, Topeka, KS 66699. The telephone number is 785-555-6666.
Management	The Fund Manager is VMB National Partners, LLC, a Kansas limited liability company. VMB & Associates, Inc., a Kansas corporation, is the sole member of the Fund Manager and the Sponsor of this offering. Management personnel of VMB & Associates, Inc. will be responsible for the management of each Series. Affiliates of VMB & Associates, Inc. will also provide services to the Series.
Investment and Objectives Policies	Each Series' principal investment objective is to generate tax credits for its investors over a period of 10 to 12 years. To do this each Series will acquire interests in residential properties which qualify for low income housing tax credits under Section 42 of the Internal Revenue Code of 1986, as amended. Some residential properties may qualify for historic tax credits under Section 47 of the Internal Revenue Code, or other tax credits yet to be enacted. The Series will not directly purchase apartment complexes. Rather, each Series will invest in other limited partnerships or limited liability companies owning apartment complexes. These other entities in which the Series will invest are referred to herein as local limited partnerships. The developers of the apartment complexes will not be affiliates of the VMB entities. The developer or an affiliated company will be the sponsor and the general partner of the local limited partnership. The general partners of the local limited partnerships are referred to herein as the local general partners. In addition to a Series, other persons may be limited partners of the local limited partnerships. These other persons may include affiliates of the

VMC entities:

- ☐ Investing on the same terms as the Series,
- ☐ Investing in state tax credits of the local limited partnerships, or
- ☐ Serving as the special limited partner.

None of the local limited partnerships have been selected yet.

This two-tier limited partnership form for investing in low income housing is common practice. The two-tier form:

- ☐ Gives a Series the same tax benefits which would be available if the Series invested directly in the housing, and
- ☐ Insulates the investors by providing a Series with limited liability for each of its investments.

Each Series will try to invest in a geographically-diversified portfolio of apartment complexes. There are no parameters concerning the types of communities in which the apartment complexes will be located. The apartment complexes can be located in rural areas, suburban communities or in urban areas. The properties will be rented either to senior citizens only, or to a mix of senior citizens, families and others.

The low income housing tax credit rules impose penalties if apartment complexes are sold before the sixteenth year. The rules of other government subsidy programs also can limit the sale of apartment complexes. And it can be hard to sell apartment complexes rented to low income tenants unless the federal government provides tax incentives to new owners. Under current law, tax credits are awarded to investors who purchase a qualifying apartment complex more than 10 years after it was last placed in service if the new owners substantially rehabilitate the apartment complex. Nonetheless, it is hard to tell when or whether a Series will be able to sell an apartment complex.

Each Series will try to liquidate its investments after 15 years, but whether it can and for how much is impossible to predict.

The Low Income Housing Tax Credit

Section 42 of the Internal Revenue Code awards valuable low income housing tax credits to investors in low income housing. These tax credits are designed to attract private capital to build and preserve low income housing. They are an integral element of the nation's low income housing program.

The federal government has provided tax benefits to investors in low income housing for more than three decades. Tax credits are the latest component of that policy. Internal Revenue Code Section 42 gives taxpayers an alternative to paying federal income taxes. Taxpayers can invest in a Series and receive tax credits which will directly reduce their federal income taxes each year for 10 to 12 years.

Internal Revenue Code Section 42 and the rules the IRS has adopted to administer these tax credits are extremely complicated. VMC's personnel are experienced in working with these laws and rules, and will do their best to

follow them. However, no one is guaranteeing that a Series will comply with all of the laws and rules.

Other rules govern the investors' ability to claim tax credits on their individual tax returns. For example, natural persons generally can only use tax credits to shelter:

- ☐ Income from other limited partnerships and other similar sources, and
- ☐ Up to \$25,000 of other income.

The low income housing tax credit rules include a complicated concept called recapture. Congress created this concept to ensure that apartment complexes are rented as low income housing for at least a 15-year period, even though the tax credits are claimed over a 10-year period. These are referred to herein as the 15-year compliance period and the 10-year credit period. Recapture means that a taxpayer must include in taxable income a portion of tax credits previously claimed if there is non-compliance with the tax credit rules during the 15-year compliance period. Recapture applies to the accelerated portion of the low income housing tax credits, as follows:

Year of Event Giving Rise to Recapture	Portion Recaptured
1-11	5/15
12	4/15
13	3/15
14	2/15
15	1/15

Interest is also imposed on the amount recaptured. The dollar amount recaptured will be additional taxes owed in the year of recapture.

Risk Factors

An investment in the Series involves risks, including the following:

- ☐ Risks Related to Low Income Housing Tax Credits:
 - ☐ The low income housing tax credit rules are extremely complicated. Noncompliance with these rules results in the loss of future tax credits and the fractional recapture of tax credits already taken.
 - ☐ In most cases the annual amount of tax credits that an individual can use is limited to the tax liability due on the person's last \$25,000 of taxable income.
 - ☐ The local limited partnerships may be unable to sell the apartment complexes at a profit. Accordingly, a Series may be unable to distribute any cash to its investors. Tax credits may be the only benefit from an investment in a Series.
- ☐ Investment Risks:

- ☐ If a Series does not raise much capital it will invest in a limited number of local limited partnerships. Such limited diversity means that the results of operation of each single apartment complex will have a greater impact on the Series. With limited diversity, poor performance of one apartment complex could impair a Series' ability to satisfy its investment objectives.
- ☐ Each apartment complex will be subject to mortgage indebtedness. If a local limited partnership failed to pay its mortgage it could lose its apartment complex in foreclosure. Foreclosure would result in:
 - ☐ a loss of future tax credits, if the foreclosure occurred during the first 10 years,
 - ☐ a fractional recapture of prior tax credits, if the foreclosure occurred during the first 15 years, and
 - ☐ a loss of the Series' investment in the apartment complex.
- ☐ A Series will be a limited partner or non-managing member of each local limited partnership. Accordingly, each Series will have very limited rights with respect to management of the local limited partnerships. Each Series will rely totally on the local general partners.
- ☐ Other Tax Risks:
 - ☐ The IRS may audit a Series or a local limited partnership and challenge the tax treatment of tax items. The amount of tax credits and tax losses allocable to the investors could be reduced if the IRS were successful in such a challenge.
- ☐ Series-Related Risks:
 - ☐ No trading market for the Units will develop. Investors may be unable to sell their Units except at a discount and should consider their Units to be a long-term investment.

Who Should Invest;
Limitations on Use of
Credits and Losses

Natural persons should invest in a Series only if they have federal income tax liabilities against which the tax credits can be applied. In most cases, the annual amount of tax credits that a natural person can use is limited to the tax liability due on the person's last \$25,000 of taxable income. For example, a person in the 35% federal tax bracket could use up to a maximum annual amount of \$8,750 in tax credits because $\$25,000 \times 35\% = \$8,750$. Generally, a natural person can claim a Series' tax losses only in very limited circumstances.

Closely-held and personal service corporations are subject to other limits on the use of tax credits and tax losses.

For all investors:

- ☐ Tax credits cannot be used to reduce the federal alternative minimum tax.
- ☐ Tax credits are subject to the general limitations on the use of all business tax credits.

Estimated Use of Proceeds	An IRA, Keogh or other retirement plan cannot buy Units. Each Series will invest approximately 75% of its capital in local limited partnerships, will hold 3% in working capital reserves, and will use the balance to pay fees and expenses to the VMB entities and others. Working capital reserves are amounts set aside for contingencies and to pay administrative expenses.														
Management Compensation	Each Series will pay the VMB entities compensation for management services. The following are the most significant items: <table border="0"> <tr> <td data-bbox="446 567 730 598">Dealer manager fee</td><td data-bbox="860 567 1263 598">Up to 2% of the capital raised</td></tr> <tr> <td data-bbox="446 609 730 640">Nonaccountable underwriting</td><td data-bbox="860 609 1263 682">Up to 1% of the capital raised expense allowance</td></tr> <tr> <td data-bbox="446 693 730 724">Acquisition and investment</td><td data-bbox="860 693 1263 766">Up to 7% of the capital raised management fee</td></tr> <tr> <td data-bbox="446 777 836 871">Nonaccountable reimbursement- organization and offering expenses other than selling expenses</td><td data-bbox="860 777 1263 976">3% of the capital raised in exchange for an agreement to pay all of the expenses in connection with the formation of each Series and the sale of the Units, other than selling expenses</td></tr> <tr> <td data-bbox="446 987 836 1050">Nonaccountable reimbursement- acquisition expenses</td><td data-bbox="860 987 1263 1144">2% of the capital raised in exchange for an agreement to pay all of the expenses related to the selection and acquisition of local limited partnerships</td></tr> <tr> <td data-bbox="446 1155 730 1186">Asset management fee</td><td data-bbox="860 1155 1263 1291">0.5% of the sum of a Series' cash investments in local limited partnerships plus the mortgage debts of the local limited partnerships</td></tr> <tr> <td data-bbox="446 1302 730 1333">Subordinated disposition fee</td><td data-bbox="860 1302 1263 1365">Up to 1% of the sales price of the apartment complexes</td></tr> </table> There are a number of other items of compensation and reimbursement which the VMB entities may receive.	Dealer manager fee	Up to 2% of the capital raised	Nonaccountable underwriting	Up to 1% of the capital raised expense allowance	Acquisition and investment	Up to 7% of the capital raised management fee	Nonaccountable reimbursement- organization and offering expenses other than selling expenses	3% of the capital raised in exchange for an agreement to pay all of the expenses in connection with the formation of each Series and the sale of the Units, other than selling expenses	Nonaccountable reimbursement- acquisition expenses	2% of the capital raised in exchange for an agreement to pay all of the expenses related to the selection and acquisition of local limited partnerships	Asset management fee	0.5% of the sum of a Series' cash investments in local limited partnerships plus the mortgage debts of the local limited partnerships	Subordinated disposition fee	Up to 1% of the sales price of the apartment complexes
Dealer manager fee	Up to 2% of the capital raised														
Nonaccountable underwriting	Up to 1% of the capital raised expense allowance														
Acquisition and investment	Up to 7% of the capital raised management fee														
Nonaccountable reimbursement- organization and offering expenses other than selling expenses	3% of the capital raised in exchange for an agreement to pay all of the expenses in connection with the formation of each Series and the sale of the Units, other than selling expenses														
Nonaccountable reimbursement- acquisition expenses	2% of the capital raised in exchange for an agreement to pay all of the expenses related to the selection and acquisition of local limited partnerships														
Asset management fee	0.5% of the sum of a Series' cash investments in local limited partnerships plus the mortgage debts of the local limited partnerships														
Subordinated disposition fee	Up to 1% of the sales price of the apartment complexes														
Conflicts of Interest	The VMB entities have conflicts of interest in their organization and management of the Series, including the following: ☐ The compensation to the VMB entities is not the result of arm's-length negotiations. The manner in which the Series' investments are purchased, managed and sold will determine the amount of some compensation. As a result, a Series: ☐ Might make investments which are less desirable to the investors but more desirable to the VMB entities, or ☐ Might retain an investment at a time when a sale of the investment could generate distributions to the investors. ☐ The VMB entities must allocate their time between the activities of														

each Series and their other activities. Although not anticipated, the VMB entities might be unable to fully discharge their duties to each Series.

- ☐ The VMB entities have some interests that are inconsistent with those of the investors. For example, the VMB entities can engage in activities without providing the benefits of such activities to the Series. As a result, an affiliate might purchase an investment which is suitable for purchase by a Series.

Fiduciary Responsibility

The Fund Manager is a fiduciary to each Series. This means that the Fund Manager owes the investors the utmost good faith and loyalty. However, each Series will hold the VMB entities harmless from liability to the Series for their actions and will compensate the VMB entities for damages suffered from their actions, provided the actions:

- ☐ Did not constitute negligence or misconduct, and
- ☐ Were the result of a course of conduct which the Fund Manager determined was in the best interests of the Series.

As a result an investor's ability to pursue an action against the VMB entities is diminished.

Local Limited Partnership Investment Protection Policies

The most uncertain stages of an investment in a local limited partnership occur during construction and rent-up of the local limited partnership's apartment complex. Each Series will try to protect its investments in local limited partnerships during these stages in the following ways:

- ☐ Staged Pay-In. Each Series will stage its capital payments to each local limited partnership. Capital payments will be due when conditions or benchmarks regarding construction or rental of apartment units are satisfied.
- ☐ Construction Guarantees. The local general partner or other guarantor will agree to provide all funds needed through completion of development and construction, after applying mortgage loan proceeds and the Series' capital contribution. This policy is intended to cause completion of an apartment complex at no extra cost to the Series where construction costs exceed the budgeted amount.
- ☐ Operating Deficit Guarantees. Each local general partner will agree to fund any operating deficits for a specified period following completion of construction or rehabilitation.
- ☐ Repurchase Guarantees. Each local general partner will be obligated to repurchase the Series' local limited partnership interest if the local limited partnership fails to: (i) receive an allocation of tax credits in the year in which the apartment complex is placed in service; (ii) cause the apartment complex to be placed in service in a timely manner; or (iii) remain eligible for tax credits during the period when the Series is required to make its capital contributions.
- ☐ Tax Credit Guarantees. During the 15-year compliance period, each local general partner will agree to fund any loss of tax credits and costs associated therewith which result from recapture. Each local general partner also will guarantee the annual tax credit amount and

will fund any shortfall during the first five years of the compliance period.

- ☐ Tax Credit Adjusters. In the event the tax credits actually allocated to a Series are less than the agreed to amount, the local limited partnership will reduce the Series' capital contribution.
- ☐ Voting Rights. The Series will have the right to approve or disapprove the sale or refinancing of the apartment complexes.

The Fund Manager will agree to eliminate these provisions only in unusual circumstances.

There can be no absolute guarantee that these policies will protect a Series' investment in a local limited partnership.

Prior Performance Summary Through *[month] [day], [year]*, the VMB entities have raised and invested equity as follows:

- ☐ More than 3,600 investors, including more than 1,000 investors in tax credit offerings,
- ☐ 240 properties, including nearly 110 properties in tax credit offerings,
- ☐ More than 6,000 apartment units located in 14 states, and the District of Columbia, including more than 5,000 apartment units located in 7 states and the District of Columbia in tax credit offerings,
- ☐ Nearly \$0.6 billion in aggregate acquisition costs, including approximately \$0.5 billion in aggregate acquisition costs in tax credit offerings.

Of the 17 tax credit partnerships organized by the VMB entities through *[month] [day], [year]*, 15 have a total of 70 apartment complexes which have completed the 10-year credit period, and six have a total of 11 apartment complexes which have completed the 15-year compliance period.

Federal Income Tax Considerations

The section of this Memorandum entitled "Federal Income Tax Considerations" includes a discussion of numerous federal income tax issues pertinent to the Series. That section also contains a description of the federal income tax legal opinions that the Series will receive from tax counsel.

Profits and Losses, Tax Credits and Cash Distributions

Generally, 99.9% of the tax credits, profits and losses of a Series are allocated to its investors and 0.1% to the Fund Manager. It is unlikely that a Series will distribute cash from operations. The section of this Memorandum entitled "Profits and Losses, Tax Credits and Cash Distributions" includes a discussion of how each Series will distribute net proceeds from the liquidation of its investments.

Summary of Certain Provisions of the Partnership Agreement

The Amended and Restated Agreement of Limited Partnership included as Exhibit B is the governing document for each Series. A Series' partnership agreement governs the relationship between the investors and the Fund Manager. It is a complex legal document. Portions of the partnership agreement are summarized throughout this Memorandum.

Investors should be aware of the following terms of each Series' partnership agreement:

- ☐ Investors owning more than 50% of the Units in a Series can take the following actions with respect to the Series:

- ☐ amend the Series' partnership agreement,
 - ☐ remove the Fund Manager and elect its replacement, and
 - ☐ approve the dissolution of the Series.
 - ☐ Each Series is organized as a separate Kansas limited partnership.
 - ☐ No investor will have any control over the business of his Series or any right to act in the Series name.
 - ☐ The books and records of each Series are kept at 3158 Redhill Avenue, Suite 120, Topeka, Kansas. An investor may examine his Series' books and records at any and all reasonable times.
- Transfer of Units Under the terms of the Series' partnership agreement, investors may transfer their Units, except where the transfer would result in adverse tax consequences. Investors may not transfer Units to a foreign person or a tax-exempt entity. The Units will not be listed on a securities exchange, and no market will exist for the Units. It is unlikely that an investor will be able to sell his Units except at a discount. A Series can require that a transfer fee be paid in an amount up to \$100.
- Terms of the Offering and Plan of Distribution The Units are offered in two Series on an all-or-none minimum, best-efforts maximum basis, which means that:
- ☐ No one is guaranteeing that any specified amount of capital will be raised,
 - ☐ No Units in a Series will be sold unless at least \$1,400,000 in cash is raised, and
 - ☐ As much as \$2,500,000 in Units may be sold by each Series.
- The Fund Manager will decide in its discretion when to terminate the Series 11 offering and commence the Series 12 offering.

PRIVACY NOTICE

SEC Regulation S-P requires that financial institutions such as the Series provide their consumer customers with written notice of their policies and procedures for disclosure of their customers' nonpublic personal information.

Investors should be aware of the following policies relating to disclosure of their nonpublic personal information:

1. The Series collect nonpublic personal information about investors from the following sources:

- ☐ Information received from an investor on applications or other forms;
- ☐ Information about your transactions with the Series, the Series' affiliates, or others.

2. The Series do not disclose any nonpublic personal information about their customers or former customers to anyone, except as permitted by law.

3. The Series restrict access to nonpublic personal information about investors to those employees who need to know that information to provide products or services to investors.
4. The Series maintain physical, electronic, and procedural safeguards that comply with federal standards to guard investors' nonpublic personal information.

If an investor has any questions about these policies or the use, maintenance and disclosure of the investor's nonpublic personal information, please contact Investor Services at 800-555 -6666, x111.

RISK FACTORS

The purchase of Units involves a number of significant risk factors. The material risk factors that prospective purchasers should consider are:

Risks arising from the Internal Revenue Code rules governing tax credits.

Each prospective investor is urged to carefully read and understand this section and the section entitled "The Low Income Housing Tax Credit" to determine whether an investment in a Series is suitable for the prospective investor.

Low income housing tax credits might not be available. Each Series will acquire an interest in apartment complexes to be rented to low income tenants.

Each Series expects to claim low income housing tax credits for each apartment complex. However, if an apartment complex does not satisfy the requirements of *Internal Revenue Code Section 42*, then the apartment complex will not be eligible for low income housing tax credits.

An apartment complex cannot comply with *Internal Revenue Code Section 42* until it is placed in service. In many instances, a Series will acquire an apartment complex which is still under construction. If so, the Series would be relying only upon guarantees and representations of the local general partners that the apartment complex will satisfy the *Internal Revenue Code Section 42* requirements. If it ultimately did not, the Series would not receive low income housing tax credits from the investment.

Low income housing tax credits might be less than anticipated. The local general partners will calculate the amount of the low income housing tax credits. No opinion of counsel will cover the calculation of the amount of low income housing tax credits. The IRS could challenge the amount of the low income housing tax credits claimed for any apartment complex under any of a number of provisions set forth in *Internal Revenue Code Section 42*. A successful challenge by the IRS would decrease the amount of the low income housing tax credits from the amount paid for by the Series.

Unless a bond is posted, low income housing tax credits may be recaptured if apartment complexes are not owned for 15 years. Apartment complexes must comply with *Internal Revenue Code Section 42* for a 15-year compliance period. Low income housing tax credits will be recaptured with interest to the extent that an apartment complex is not rented as low income housing or in some other way does not satisfy the requirements of *Internal Revenue Code Section 42* during the 15-year compliance period. For example, unless a bond is posted recapture with interest would occur if:

- ☐ a local limited partnership disposed of its interest in an apartment complex during the 15-year compliance period, or

- ☐ a Series disposed of its interest in a local limited partnership during the 15-year compliance period.

For these purposes, disposition includes transfer by way of foreclosure.

There can be no assurance that recapture will not occur.

Sales of apartment complexes after 15 years are subject to limitations which may impact a local limited partnership's ability to sell its apartment complex. Each local limited partnership will execute an extended low income housing commitment with the state in which the apartment complex is located. The extended low income housing commitment will state the number of years that the local limited partnership and any subsequent owners must rent the apartment complex as low income housing. Under federal law, the commitment must be for at least 30 years. The commitment actually agreed to may be significantly longer than 30 years. In prioritizing applicants for low income housing tax credits, most states give additional points for commitment periods in excess of 30 years. On any sale of the apartment complex during the commitment period, the purchaser would have to agree to continue to rent the apartment complex as low income housing for the duration of the commitment period. This requirement reduces the potential market, and possibly the sales price, for the apartment complexes. The sale of an apartment complex may be subject to other restrictions. For example, federal lenders or subsidizers may have the right to approve or disapprove a purchase of an apartment complex. Accordingly, there can be no assurance that a local limited partnership will be able to sell its apartment complex. Even if it does so, there can be no assurance that any significant amount of cash will be distributed to the investors. As a result, a material portion of the low income housing tax credits may represent a return of the money originally invested in the Series.

Investors can only use low income housing tax credits in limited amounts. The ability of an individual or other non-corporate investor to claim low income housing tax credits on his individual tax return is limited. For example, an individual investor can use low income housing tax credits to reduce his tax liability on:

- ☐ an unlimited amount of passive income, which is income from entities such as the Series, and
- ☐ \$25,000 in income from other sources.

However, the use of low income housing tax credits by an individual against these types of income is subject to ordering rules, which may further limit the use of low income housing tax credits. Some corporate investors are subject to similar and other limitations. They include corporations which provide personal services, and corporations which are owned by five or fewer shareholders.

Any portion of a low income housing tax credit which is allowed to an investor under such rules is then aggregated with all of the investor's other business credits. The aggregate is then subject to the general limitation on all business credits. That limitation provides that an investor can use business credits to offset the investor's annual tax liability equal to \$25,000 plus 75% of the investor's tax liability in excess of \$25,000. However, business credits may not be used to offset any alternative minimum tax. All of these concepts are extremely complicated. Investors are urged to read "The Low Income Housing Tax Credit" and "Federal Income Tax Considerations--Limitations on Losses and Credits from Passive Activities," "General Business Tax Credit Limitations" and "Other Important Tax Considerations--Alternative Minimum Tax," for examples.

Historic tax credits may be unavailable or may be recaptured. It is possible that a Series will invest in a local limited partnership intending to obtain historic tax credits. There can be no assurance that an apartment complex will meet the requirements for the historic tax credit set forth in *Internal Revenue Code Section 47*. In order for an apartment complex

to be eligible for historic tax credits, it must:

- ☐ meet the statutory requirements of *Internal Revenue Code Section 47*, and
- ☐ be certified by the Department of the Interior.

Even if it does meet the requirements, the IRS may challenge the calculation of the historic tax credit. The local general partners will calculate the amount of the historic tax credit. That calculation will not be the subject of an opinion of counsel.

An investor must recapture historic tax credits if:

- ☐ the local limited partnership sells the apartment complex during the first five years of operation,
- ☐ the Series sells the interest in the local limited partnership during the first five years of operation, or
- ☐ the investor sells his Units during the first five years of operation.

Other tax credits may be unavailable or may be recaptured. Proposals have been offered from time to time to provide tax credits for single-family home ownership. Other proposals may be forthcoming. If any are enacted into law, a Series may invest in local limited partnerships intending to obtain such tax credits. There can be no assurance that an apartment complex will generate any such tax credits, or that such credits would not be recaptured.

Risks related to investment in local limited partnerships and apartment complexes:

If a Series has few investments, each investment will have a great impact on the Series' results of operations. Geographic and other diversification of a Series' investments will depend upon the amount of capital raised by the Series.

The less capital received by the Series, the fewer number of investments purchased by the Series. The risks of limited diversification will exist if any Series:

- ☐ invests in a few local limited partnerships owning large apartment complexes rather than a greater number of local limited partnerships owning smaller apartment complexes,
- ☐ invests in local limited partnerships which have the same or affiliated local general partners, or
- ☐ invests in local limited partnerships which own apartment complexes located in the same area. If a Series' investments are not diversified then any single apartment complex experiencing poor operating performance, impairment of value or recapture of low income housing tax credits would have a significant impact upon the Series as a whole.

The failure to pay mortgage debt could result in a forced sale of an apartment complex. Each local limited partnership will leverage a Series' investment therein by incurring mortgage debt. If a local limited partnership's revenues are less than its debt payments and taxes and other operating costs, the local limited partnership would have to use working capital reserves, seek additional funds, or suffer a forced sale of its apartment complex, which could include a

foreclosure. The same results could occur if government subsidies ceased. If the apartment complex is highly-leveraged, a relatively slight decrease in the rental revenues could adversely affect the local limited partnership's ability to pay its debt service requirements. Mortgage debt may:

- ☐ have either fixed or variable interest rates, or
- ☐ be repayable in a self-amortizing series of equal installments or with a large balloon final payment.

Variable rate loans create the risk that debt service could rise during periods of high interest rates. Balloon payments maturing prior to the end of the anticipated holding period for the apartment complex create the risk of a forced sale if the debt cannot be refinanced. There can be no assurance that additional funds will be available to any local limited partnership if needed on acceptable terms or at all.

The Series will not control the local limited partnerships and must rely on the local general partners. The local general partners will make all management decisions for the local limited partnerships and the apartment complexes. Each Series will have very limited rights with respect to management of the local limited partnerships. Neither Series will be able to exercise any control with respect to its business decisions and operations. Consequently, the success of each Series will depend on the abilities of the local general partners. Investors may not have the opportunity to judge the local general partners for themselves.

Projects subsidized by other government programs are subject to additional rules which may make it difficult to operate and sell apartment complexes. It is anticipated that most of the apartment complexes will receive government financing or operating subsidies in addition to the tax credits. The following are risks associated with some such subsidy programs:

- ☐ Obtaining tenants for the apartment complexes. Government regulations limit the types of people who can rent subsidized housing. These regulations may make it more difficult to rent the residential units in the apartment complexes.
- ☐ Obtaining rent increases. In many cases rents can only be increased with the prior approval of the subsidizing agency.
- ☐ Limitations on cash distributions. The amount of cash that may be distributed to owners of subsidized apartment complexes is less than the amount that could be earned by the owners of non-subsidized apartment complexes.
- ☐ Limitations on sale or refinancing of the apartment complexes. A local limited partnership may be unable to sell its apartment complex or to refinance its mortgage loan without the prior approval of the subsidizer.

The subsidizer may withhold such approval in the discretion of the subsidizer. Approval may be subject to conditions. In addition, any prepayment of a mortgage may result in the assessment of a prepayment penalty.

- ☐ Limitations on transfers of interests in local limited partnerships. A Series may be unable to sell its interest in a local limited partnership without the prior approval of the subsidizer. The subsidizer may withhold such approval in the discretion of the subsidizer. Approval may be subject to conditions.

- ☐ Limitations on removal and admission of local general partners. A Series may be unable to remove a local general partner from a local limited partnership except for cause, such as the violation of the rules of the subsidizer. Regulations may prohibit the removal of a local general partner or permit removal only with the prior approval of the subsidizer. Regulations may also require approval of the admission of a successor local general partner even upon the death or other disability of a local general partner.
- ☐ Limitations on subsidy payments. Subsidy payments may be fixed in amount and subject to annual legislative appropriations. The rental revenues of an apartment complex, when combined with the maximum committed subsidy, may be insufficient to meet obligations. Congress or the state legislature, as the case may be, may fail to appropriate or increase the necessary subsidy. In those events, the mortgage lender could foreclose on the property unless a workout arrangement could be negotiated.
- ☐ Possible changes in applicable regulations. Legislation may be enacted which adversely revises provisions of outstanding mortgage loans. Such legislation has been enacted in the past.

Keen competition may increase the price of investments. Each Series will compete for investments with other entities. Such other entities include limited partnerships, limited liability companies and other entities engaged in real estate investment activities, and may include the other Series and other affiliates of the VMB entities.

The availability of such investments is limited in that there is a maximum amount of low income housing tax credits that may be allocated each year under *Internal Revenue Code Section 42*. Other factors may also limit availability of investments. Consequently, competition for desirable investments may be particularly keen. The purchase prices paid for such investments could increase as a result. In this connection, a state's allocation plan for low income housing tax credits must:

- ☐ give preference to applicants serving the lowest income tenants,
- ☐ give preference to applicants serving qualified tenants for the longest periods, and
- ☐ allocate no more tax credits to an applicant than is necessary for its project's financial feasibility and viability. The state may reduce the amount of the low income housing tax credits below the amounts for which the applicant would otherwise be eligible, if the state believes that the full amounts are not necessary in light of other sources of assistance that are available to the applicant.

In the recent past, heightened demand for apartment complexes has increased the purchase prices thereof. Further increases would reduce the return to investors and hamper a Series' ability to satisfy its principal investment objective.

Uninsured casualties could result in losses and recapture. There are casualties which are either uninsurable or not economically insurable. These include earthquakes, floods, wars and losses relating to hazardous materials or environmental matters. If an apartment complex experienced an uninsured casualty, a Series could lose both its invested capital and anticipated profits in such property. Even if the casualty were an insured loss, the local limited partnership might be unable to rebuild the destroyed property. A portion of prior tax credits could be recaptured and future tax credits could be lost if the apartment complex were not restored within a reasonable period of time. And liability judgments against the local limited partnership could exceed available insurance proceeds or otherwise materially and adversely affect the local limited partnership. The cost of liability and casualty insurance has increased in recent years. Casualty insurance has become more difficult to obtain and may require large deductible amounts.

Apartment complexes without financing or operating subsidies may be unable to pay operating expenses. If a local limited partnership were unable to pay operating expenses, one result could be a forced sale of the property. If a forced sale occurs during the first 15 years of an apartment complex, a partial recapture of tax credits could occur. In this regard, some of the local limited partnerships may own apartment complexes which have no subsidies other than low income housing credits. Those apartment complexes will not have the benefit of below-market-interest-rate financing or operating subsidies which often are important to the feasibility of low income housing. Those apartment complexes will have to rely solely on rents to pay expenses. However, in order for any apartment complex to be eligible for low income housing tax credits, it must restrict the rent which may be charged to tenants. Over time, the expenses of an apartment complex will increase. If a local limited partnership cannot increase its rents, it may be unable to pay increased operating expenses. Investors may be unable to evaluate their Series' investments. Except as otherwise set forth in a supplement to this Memorandum, the Series have not identified any of the apartment complexes in which they will invest. Accordingly, investors may not have the opportunity to evaluate for themselves the Series' investments. An investor who acquires his Units later in the offering period may have more information available concerning specific apartment complexes than the earlier purchaser.

There can be no assurance that any apartment complexes in which a Series invests will actually meet the investment objectives of the Series.

A Series' local limited partnership investment protection policies will be worthless if the net worth of the local general partners is not sufficient to satisfy their obligations. There is a risk that the local general partners will be unable to perform their financial obligations to the Series. The Fund Manager has not established a minimum net worth requirement for the local general partners. Rather, each local general partner must demonstrate a net worth which the Fund Manager believes is appropriate under the circumstances. The assets of the local general partners are likely to consist primarily of real estate holdings and similar assets. The fair market value of these types of assets is difficult to estimate. These types of assets cannot be readily liquidated to satisfy the financial guarantees and commitments which the local general partners will make to a Series. Moreover, other creditors may have claims on these assets. No escrow accounts or other security arrangements will be established to ensure performance of a local general partner's obligations. The cost to enforce a local general partner's obligations may be high. If a local general partner does not satisfy its obligations the Series may have no remedy, or the remedy may be limited to removing the local general partner as general partner of the local limited partnership.

Fluctuating economic conditions can reduce the value of real estate. Any investment in real estate is subject to risks from fluctuating economic conditions. These conditions can adversely affect an investor's ability to realize a profit or even to recover his invested capital. Among these conditions are:

- ☐ the general and local job market,
- ☐ the availability and cost of mortgage financing,
- ☐ monetary inflation,
- ☐ tax, environmental, land use and zoning policies,
- ☐ the supply of and demand for similar properties,
- ☐ neighborhood conditions, and

☐ the availability and cost of utilities and water.

Properties under development may not be completed. A Series may invest in apartment complexes which are under development. In general, investment in an uncompleted apartment complex involves more risk than the purchase of a completed property. The local general partners' ability to complete development and construction and rent the property may be affected by conditions beyond their control. If a property is not constructed as anticipated, the permanent loan commitment might be of no effect. The lender could refuse to advance the permanent loan, and the local limited partnership might be unable to repay the construction loan. Furthermore, a decision to invest in an uncompleted apartment complex is made based on projections of rental income and expenses. Whether the property will operate at such projected income and expense levels cannot be known.

Investments made before the sale of Units may be subject to loss. A Series may invest in apartment complexes at a time before the commencement or completion of its offering of Units. Such investments would be made in anticipation of the receipt of offering proceeds. The Series may borrow funds from the VMB entities for such purposes. The Series ultimately may be unable to pay its obligations with respect to such investments. If a Series didn't pay its obligations to a local limited partnership, the local limited partnership could reduce or terminate the Series' interest without returning the amounts paid by the Series. The local limited partnership could sue the Series to require performance of such obligations. If tax credits had already been claimed by the Series, the credits could be recaptured under *Internal Revenue Code Section 42*.

If a loan made to a local limited partnership is not repaid the amount of capital available for investment would be reduced. A Series may make a loan to a local limited partnership before the Series' acquisition of an interest therein. If the Series didn't invest in the local limited partnership, the local limited partnership might not repay the loan. If the local limited partnership didn't repay the loan, the amount of capital available for investment in local limited partnerships would be reduced.

Lack of control or risk of impasse in joint investments. A Series may invest in local limited partnerships jointly with the other Series or other limited partnerships, including partnerships formed by the VMB entities. There is a risk that a Series may not acquire a controlling interest in a joint investment. There is also a risk of impasse on decisions if the Series and its joint venture partner acquire equal interests in the joint venture.

Tax risks other than those relating to tax credits.

In addition to the risks pertaining specifically to tax credits, there are other federal income tax risks associated with an investment in Units. Neither Series will request rulings on any income tax matters from the IRS. Rather, they will rely on opinions of their independent legal counsel to the Series and the VMB entities, and opinions of counsel to the local limited partnerships. Unlike a ruling from the IRS, an opinion of counsel has no binding effect or official status of any kind. No assurance can be given that the IRS will not contest any conclusions reached in an opinion.

These additional federal income tax risks associated with the ownership of Units and the operations of the Series and the local limited partnerships include, but are not limited to, the following:

No opinion of counsel as to certain matters. No legal opinion will be obtained regarding matters:

☐ the determination of which depends on future factual circumstances,

☐ which are peculiar to individual investors, or

- ☐ which are not customarily the subject of an opinion.

The more significant of these matters include:

- ☐ allocating purchase price among components of a property, particularly as between buildings and fixtures, the cost of which is depreciable, and the underlying land, the cost of which is not depreciable,
- ☐ characterizing expenses and payments made to or by a Series or a local limited partnership,
- ☐ identifying the portion of the costs of any apartment complex which qualify for historic and other tax credits,
- ☐ applying to any specific investor the limitation on the use of tax credits and tax losses. Investors must determine for themselves the extent to which they can use tax credits and tax losses, and
- ☐ the application of the alternative minimum tax to any specific investor, or the calculation of the alternative minimum tax by any investor. The alternative minimum tax could reduce the tax benefits from an investment in a Series.

There can be no assurance, therefore, that the IRS will not challenge some of the tax positions adopted by a Series. The courts could sustain an IRS challenge. An IRS challenge, if successful, could have a detrimental effect on a Series' ability to realize its investment objectives.

Passive activity rules will limit deduction of Series' losses and impose tax on interest income. The Internal Revenue Code imposes limits on the ability of most investors to claim losses from investments in real estate. An individual may claim these so-called passive losses only as an offset to income from investments in real estate or rental activities. An individual may not claim passive losses as an offset against other types of income, such as salaries, wages, dividends and interest. These passive activity rules will restrict the ability of most investors to use losses from a Series as an offset of non-passive income.

A Series may earn interest income on its reserves and loans. The passive activity rules generally will categorize interest as portfolio income, and not passive income. Passive losses cannot be used as an offset to portfolio income. Consequently, an investor in a Series could pay tax liability on portfolio income from the Series.

At risk rules might limit deduction of Series' losses. If a significant portion of the financing used to purchase apartment complexes does not consist of qualified nonrecourse financing, the at risk rules will limit an investor's ability to claim Series losses to the amount the investor invests in the Series. The at risk rules of the Internal Revenue Code generally limit an investor's ability to deduct Series losses to the sum of:

- ☐ the amount of cash the investor invests in the Series, and
- ☐ the investor's share of Series qualified nonrecourse financing.

Qualified nonrecourse financing is non-convertible, nonrecourse debt which is borrowed from:

- ☐ a government, or
- ☐ with exceptions, any person actively and regularly engaged in the business of lending money.

Tax liability on sale of apartment complex or local limited partnership interest may exceed the cash available from the sale. When a local limited partnership sells an apartment complex it will recognize gain. Such gain is equal to the difference between:

- ☐ the sales proceeds plus the amount of indebtedness secured by the apartment complex, and
- ☐ the adjusted basis for the apartment complex. The adjusted basis for an apartment complex is its original cost, plus capital expenditures, minus depreciation.

Similarly, when a Series sells an interest in a local limited partnership the Series will recognize gain. Such gain is equal to the difference between:

- ☐ the sales proceeds plus the Series' share of the amount of indebtedness secured by the apartment complex, and
- ☐ the adjusted basis for the interest. The adjusted basis for an interest in a local limited partnership is the amount paid for the interest, plus income allocations and cash distributions, less loss allocations.

Accordingly, gain will be increased by the depreciation deductions taken during the holding period for the apartment complex. In some cases, an investor could have a tax liability from a sale greater than the cash distributed to the investor from the sale.

Alternative minimum tax liability could reduce an investor's tax benefits. If an investor pays alternative minimum tax, the investor could suffer a reduction in benefits from an investment in a Series. The application of the alternative minimum tax is personal to each investor. Accordingly, each investor is urged to consult his own tax adviser regarding how the alternative minimum tax will impact his investment in Units. Tax credits may not be utilized to reduce alternative minimum tax liability.

IRS could audit the returns of the Series, the local limited partnerships or the investors. The IRS can audit a Series or a local limited partnership at the entity level with regard to issues affecting the entity. The IRS does not have to audit each investor in order to challenge a position taken by a Series or a local limited partnership. Similarly, only one judicial proceeding can be filed to contest an IRS determination. A contest by the Series of any IRS determination might result in high legal fees.

An audit of a Series or a local limited partnership also could result in an audit of an investor. An audit of an investor's tax returns could result in adjustments both to items that are related to the investor's Series and to unrelated items. The investor could then be required to file amended tax returns and pay additional tax plus interest and penalties.

Each Series must register under the tax shelter registration provisions. Under those provisions, the IRS assigns a registration number to each Series. The investors must enter that number on their tax returns. An investor could be subject to a penalty if the investor does not enter the registration number on the investor's tax return. It is uncertain whether registration as a tax shelter materially increases the risk of IRS audit. Registration does not imply that the IRS has reviewed, examined or approved the investment or the claimed benefits of the investment.

A successful IRS challenge to tax allocations of the Series and the local limited partnerships would reduce the tax benefits of an investment in the Series. Under the Internal Revenue Code, a partnership's allocation of income, gains, deductions, losses and tax credits must have substantial economic effect. Substantial economic effect is a highly-technical concept. The fundamental principle is two-fold. If a partner will benefit economically from an item of partnership income or gain, that item must be allocated to him so that he bears the correlative tax burden. Conversely, if a partner will suffer economically from an item of partnership deduction or loss, that item must be allocated to him so that he bears the correlative tax benefit. If a partnership's allocations do not have substantial economic effect, then the partnership's tax items are allocated in accordance with each partner's interest in the partnership. The IRS might challenge the allocations made by a Series:

- ☐ between its investors and the Fund Manager,
- ☐ among its investors, or
- ☐ between the Series and a local general partner.

If any allocations were successfully challenged, a greater share of the income or gain or a lesser share of the losses or tax credits might be allocated to the investors. This would increase the tax liability or reduce the tax benefits to the investors.

Tax liabilities could arise in later years of the Series. After a period of years following commencement of operations by a local limited partnership, the local limited partnership may generate profits rather than losses. An investor would have tax liability on his share of such profits unless he could offset the income with:

- ☐ unused passive losses from his Series or other investments, or
- ☐ current passive losses from other investments.

In such circumstances, the investor would not receive a cash distribution from his Series with which to pay any tax liability.

IRS challenge to tax treatment of expenditures could reduce losses. The IRS may contend that fees and payments of a Series or a local limited partnership:

- ☐ should be deductible over a longer period of time or in a later year,
- ☐ are excessive and may not be capitalized or deducted in full,
- ☐ should be capitalized and not deducted, or
- ☐ may not be included as part of the basis for computing tax credits.

Any such contention by the IRS could adversely impact, among other things:

- ☐ the eligible basis of an apartment complex used to compute low income housing tax credits,
- ☐ the adjusted basis of an apartment complex used to compute depreciation,
- ☐ the correct deduction of fees,
- ☐ the amortization of organization and offering expenses and start-up expenditures.

If the IRS were successful in any such contention, the anticipated tax credits and losses of the Series would be reduced, perhaps substantially.

Changes in tax law might reduce the value of tax credits. Although all low income housing tax credits are allocated to an apartment complex at commencement of the 10-year credit period, there can be no assurance that future legislation may not adversely affect an investment in a Series. For example, legislation could reduce or eliminate the value of tax credits. In this regard, before 1986, the principal tax benefit of an investment in low income housing was tax losses. These tax losses generally were used to reduce an investor's income from all sources on a dollar-for-dollar basis. Investments in low income housing were made in reliance on the availability of such tax benefits. However, tax legislation enacted in 1986 severely curtailed deduction of such losses. It is unlikely that the pre-enactment limited partnerships will provide their investors with all of the tax benefits expected at the commencement of those partnerships.

New administrative or judicial interpretations of the law might reduce the value of tax credits. Many of the provisions of the Internal Revenue Code related to low income housing and real estate investments have not been interpreted by the IRS in regulations, rulings or public announcements, or by the courts. In the future, these provisions may be interpreted or clarified by the IRS or the courts in a manner adverse to the Series or the local limited partnerships. The IRS constantly reviews the federal tax rules, and can revise its interpretations of established concepts. Any such revisions could reduce or eliminate tax benefits associated with an investment in a Series.

State income tax laws may adversely affect the investors. An investor may be required to file income tax returns and be subject to tax and withholding in each state or local taxing jurisdiction in which:

- ☐ an apartment complex is located,
- ☐ the investor's Series or a local limited partnership engages in business activities, or
- ☐ the investor is a resident.

Corporate investors may be required to pay state franchise taxes.

The tax treatment of particular items under state or local income tax laws may vary materially from the federal income tax treatment of such items. Nonetheless, many of the federal income tax risks associated with an investment in a Series may also apply under state or local income tax law. A Series may be required to withhold state taxes from distributions or income allocations to investors in some instances. In deciding whether to invest in a Series, prospective investors should consider the additional cost of preparing state and local tax returns, as well as the additional state and local taxes which may be payable. This Memorandum makes no attempt to summarize the state and local tax consequences to an investor in any state or locality. Accordingly, prospective investors are urged to consult their tax advisers in this regard.

Risks related to the Series and the Series' partnership agreement.

A Series may be unable to timely provide financial reports to the investors which would adversely affect the investors' ability to monitor Series' operations. The failure of the local general partners to timely provide financial information to the Series would result in the investors' inability to timely receive reports. Each local general partner is required to retain independent public accountants and to report financial information to the Series in a timely manner.

Lack of liquidity of investment. It is unlikely that a public market will develop for the purchase and sale of Units. Accordingly, investors may not be able to sell their Units promptly or at a reasonable price. Units should be considered as a long-term investment because the Series are unlikely to sell any local limited partnership interests for at least 15 years.

The investors will not control their Series and must rely totally on the Fund Manager. The Fund Manager will make all management decisions for each Series. Management decisions include:

- ☐ selecting apartment complexes,
- ☐ selecting the date on which a Series will terminate its offering, and
- ☐ exercising powers granted to a Series by a local limited partnership.

Investors have no right or power to take part in their Series' management. Accordingly, a person should not purchase Units if he is unwilling to entrust all aspects of management to the Fund Manager.

Individual investors will have no recourse if they disagree with actions authorized by a vote of the majority. The partnership agreement of each Series grants to investors owning more than 50% of the Units in the Series the right to:

- ☐ remove the Fund Manager and elect a replacement fund manager,
- ☐ amend the Series' agreement of limited partnership, and
- ☐ terminate the Series.

Accordingly, a majority-in-interest of the investors in a Series could cause any such events to occur, even if investors owning 49% of the Units in the Series opposed such action.

Limitations on liability of the VMB entities to the Series. The investors' ability to sue the VMB entities is subject to limitations. The partnership agreement of each Series limits the liability of the VMB entities to the investors. The VMB entities will not be liable to the investors for acts and omissions:

- ☐ performed or omitted in good faith, and
- ☐ performed or omitted in a manner which the Fund Manager reasonably believed to be within the scope of its authority and in the best interest of the investors,

provided

☐ such conduct did not constitute negligence or misconduct.

Therefore, investors may be less able to sue the VMB entities than would be the case if such provisions were not included in the Series' partnership agreement.

Payment of fees to the VMB entities will reduce cash available for investment in local limited partnerships. The VMB entities will perform many services for the Series. They will be paid fees for these services, which will reduce the amount of the Series' cash available for investment in local limited partnerships. The nonaccountable acquisition expense reimbursement payable to VMB & Associates, Inc. will exceed the amount of expenses historically incurred by the VMB-partnerships and may exceed the actual amount of expenses incurred by the Series. Accordingly, an investor investing directly in a low income housing apartment complex would have a greater amount available for investment than an investor investing in low income housing through a Series.

Investors in one Series may be subject to different risks and receive different yields than investors in another Series. Each Series has been formed as a separate partnership under Kansas law. Each Series will invest in its own local limited partnerships. Therefore, investors in one Series may receive different yields than investors in the other Series. Investors in one Series may be subject to different risks regarding that Series' investments than investors in the other Series.

Obligations of investors paying for Units with promissory notes is unconditional. Each investor who subscribes for 20 or more Units may elect to pay one-half of the purchase price of his Units upon subscription and the balance in accordance with a promissory note. If an electing investor fails to pay the deferred installment when due, he will face serious consequences. These consequences include the foreclosure and sale of his Units, and the recapture of tax credits previously claimed by the investor. The Series may impose late charges. The investor may also be liable for attorneys' fees and other costs of collection incurred by the Series.

A Series may be at risk if its investors fail to pay their promissory notes. The Series may be unable to meet its obligations to local limited partnerships, and could suffer a dilution or termination of its interest in a local limited partnership. That could cause:

- ☐ recapture and loss of tax credits, and
- ☐ legal actions by the local general partners to require performance and to recover damages and costs.

Therefore, defaulting investors could adversely affect non-defaulting investors.

Lack of operating history. Neither Series has an operating history. No assurance can be given that operations will be successful or that a Series will meet its stated investment objectives.

WHO SHOULD INVEST; LIMITATIONS ON USE OF CREDITS AND LOSSES

All Investors.

An investor should invest in a Series only if he:

- ☐ reasonably expects to have federal tax liabilities which can be offset by tax credits during the next 10 to 12 years, and
- ☐ has adequate financial means to bear the risks associated with the Units. See "Risk Factors."

An investment in Units is not suitable for tax-exempt entities, including pension or profit-sharing plans, Keogh plans and Individual Retirement Accounts. Accordingly, such entities cannot invest in a Series.

There are many different financial investments available to investors. These include mutual funds, stocks, bonds, annuities, insurance and real estate, among others. An investor's decision as to the appropriate investment depends in part on the investor's goals and the aspects of each of the available investments. Tax reduction is an element of the investment decision. Many people and corporations have used low income housing tax credits as a long-term tax reduction tool.

The alternative minimum tax may limit the benefit of tax credits to an investor. The alternative minimum tax is a complex concept which is discussed under "Federal Income Tax Considerations--Other Important Tax Considerations--Alternative Minimum Tax." The Internal Revenue Code imposes an alternative minimum tax if a taxpayer's alternative minimum tax liability exceeds his regular tax liability. Tax credits cannot be used to reduce alternative minimum tax liability. Even where a taxpayer does not have alternative minimum tax liability, the taxpayer cannot use tax credits to reduce his regular tax liability to an amount less than his alternative minimum tax liability. Accordingly, investors are urged to consult their tax advisers to determine whether the alternative minimum tax limits their ability to benefit from tax credits.

The broker-dealers selling the Units have agreed to ask prospective investors whether an investment in Units is suitable for them. The broker-dealers have agreed to maintain records of their suitability determinations. Each broker-dealer has agreed to make every reasonable effort to determine that an investment in Units is suitable and appropriate for a potential investor, based on information provided by the potential investor as to his financial situation and investment objectives. In making this determination, a broker-dealer will have reasonable grounds to believe that the prospective investor:

- ☐ meets the minimum income and net worth standards set forth below,
- ☐ is or will be in a financial position appropriate to enable him to realize to a significant extent the benefits described in this Memorandum, including the federal income tax benefits,
- ☐ has an overall financial position sufficient to bear the risks of the investment, and
- ☐ understands the federal income tax benefits and risks.

Individual Investors.

Low income housing tax credits and, possibly, historic tax credits and other tax credits are the principal benefits from an investment in Units. The extent to which a prospective investor can use these tax benefits will help determine whether or not he is a suitable investor.

With respect to natural persons, federal tax law imposes limitations on the utilization of credits from passive activities and general business credits. Each of those categories includes low income housing tax credits, historic tax credits and other tax credits which a Series may generate. A Series will generate tax credits over a period of 10 to 12 years. Accordingly, an investment in a Series is not suitable for a prospective investor unless for the next 12 years he will be able to utilize his share of tax credits under:

- ☐ the passive activity rules discussed below,
- ☐ the general business credit rules discussed below, and
- ☐ the alternative minimum tax rules referred to above.

The Internal Revenue Code sorts income into several categories. Income can be:

- ☐ active, such as salaries and wages,
- ☐ portfolio, such as interest and dividends,
- ☐ passive, such as income from limited partnerships, or
- ☐ the result of material participation in real estate activities, such as the income of a landlord who invests significant amounts of time in managing his property.

Prospective non-corporate investors can use an unlimited amount of tax credits against income taxes due on passive income. They can also use tax credits against income taxes due on a maximum of \$25,000 of active or portfolio income each year if they do not materially participate in rental real estate activities. This is known as the \$25,000 deduction equivalent rule. However, a natural person can use historic tax credits in this manner only to the extent his adjusted gross income does not exceed \$200,000. A natural person's ability to use historic tax credits is phased out if his gross income is between \$200,000 and \$250,000, and eliminated if his gross income exceeds \$250,000. It is expected that the use of other tax credits will be similarly limited.

In general, a natural person can use losses from a Series only to the extent he has passive income.

Investors should read the entire discussion under "Federal Income Tax Considerations--Limitations on Losses and Credits from Passive Activities" and "General Business Tax Credit Limitations." That section includes more information regarding the principal limitations on the use of tax credits and losses from an investment in Units.

Corporate and Other Entity Investors.

Trusts and Estates. A trust other than a grantor trust is a taxable entity and should consider an investment in a Series only if it will have passive income against which the Series' tax credits and losses can be used. There is no \$25,000 deduction equivalent for non-grantor trusts.

A grantor trust is not a taxable entity. The grantor of a grantor trust includes the tax items of the trust in his tax return.

Therefore, a grantor trust should consider an investment only if the grantor meets the criteria applicable to it.

Generally, an estate has no \$25,000 deduction equivalent. A limited exception permits estates to use the \$25,000 deduction equivalent in a tax year ending less than two years after the decedent's death.

Corporations. The passive activity rules do not apply to regular corporations. A regular corporation should consider an investment in a Series only if it will have during the next 12 years sufficient income from all sources to use the Series' tax credits and losses. Regular corporations are corporations which:

- ☐ have not elected to be subject to Subchapter S under the Internal Revenue Code,
- ☐ are not closely-held, and
- ☐ are not personal service corporations.

A corporation is closely-held for these purposes if more than 50% of the corporation is owned, directly or indirectly, by five or fewer shareholders at any time during the last half of its relevant tax year. A corporation is a personal service corporation if it performs services in the fields of health, law, engineering, architecture, accounting, actuarial science, performing arts or consulting.

Special rules apply to all types of corporations other than regular corporations. A corporation other than a regular corporation should consider an investment in a Series only as follows:

- ☐ A personal service corporation must have during the next 12 years sufficient passive income to use the Series' tax credits and losses.
- ☐ A corporation which has elected to be subject to Subchapter S of the Internal Revenue Code must have shareholders who meet the criteria applicable to such shareholders. Thus, if all the shareholders are individuals, the shareholders must meet the criteria described above for individuals.
- ☐ A closely-held corporation which is not a personal service corporation and which has not elected to be subject to Subchapter S of the Internal Revenue Code must have during the next 12 years sufficient passive income and active income to use the Series' tax credits and losses.

Partnerships. A partnership should consider an investment only if each of its partners meets the investment criteria applicable to the partner. Thus, if all the partners are individuals, the partners must meet the criteria described above for individuals.

See "Federal Income Tax Considerations--Limitations on Losses and Credits from Passive Activities."

Entity Financial Reports. An entity investor should also consider the effect of an investment in a Series on the entity's financial reports.

The actual effect on an entity investor's net income for financial reporting purposes will depend upon the results of Series' operations and the method of accounting adopted by the investor to record its investment in the Series. The Emerging Issues Task Force of the Financial Accounting Standards Board has been examining the methods of accounting used by entities investing in low income housing through limited partnerships. In general, as of the date

hereof, the Emerging Issues Task Force has determined that the permissible methods used to account for such investments are the modified cost method, the equity method, the effective yield method and the full consolidation method.

Under the modified cost method, an entity investor initially capitalizes the cost of its investment in the limited partnership, and then amortizes the difference between the carrying cost and the aggregate estimated residual value of the limited partnership's property portfolio over the tax credit period of such portfolio. The estimated residual value of a property is its estimated residual value at the end of the last period in which tax credits are allocated to the investor and will not reflect anticipated inflation.

Under the equity method, an entity investor initially capitalizes the cost of its investment in the limited partnership, and then reduces or increases the carrying value by the investor's allocable share of losses or income, respectively, from the limited partnership. The carrying value may not be reduced below zero.

Under the effective yield method, an entity investor initially capitalizes the cost of its investment in the limited partnership, and then amortizes the cost to provide a constant effective yield over the period that the tax credits are allocated to the investor. The effective yield is the internal rate of return on the investment, based on the cost of the investment and the tax credits allocated to the investor. Any expected residual value of the investment is excluded from the effective yield calculation.

Under the full consolidation method, the low income housing properties themselves, and the results of operations therefrom are included in the entity investor's financial statements.

Regardless of the method selected, the Emerging Issues Task Force has not changed the requirement that an investment be reviewed periodically to determine impairment of value.

With the exception of the effective yield method, the method of accounting to be used by an entity investor in a low income housing program generally is not elective but rather is determined by the level of the entity's investment in the limited partnership and/or the ability of the investor to control the limited partnership. The effective yield method may be elected if:

- ☐ the tax credits allocable to the investor are guaranteed by a creditworthy entity,
- ☐ the investor's yield based solely on the cash flows from the guaranteed tax credits is positive, and
- ☐ the investor is a limited partner for legal and tax purposes and the investor's liability is limited to its capital investment.

If the investor is unable to or does not elect to use the effective yield method, the appropriate method will be:

- ☐ the modified cost method, if the investor's interest in the limited partnership is so minor as to give the investor virtually no influence over partnership operating and financial policies;
- ☐ the equity method, if the investor owns less than 50% of the limited partnership and has no significant control over partnership policies; or
- ☐ the full consolidation method, if the investor owns 50% or more of the limited partnership unless

the investor has no significant control over partnership policies, in which event the equity method is to be used.

To date, the Emerging Issues Task Force has provided no bright-line ownership test for use in determining when an investor's interest is so minor as to give the investor "virtually no influence over partnership operating and financial policies." The staff of the SEC, however, understands that accounting practice generally has viewed investments of more than 3% to 5% to be more than minor.

It is anticipated that entity investors in a Series will use either the modified cost method or the equity method. As indicated above, under the equity method an investor will actually report its share of Series' losses or income. In this regard, for financial reporting purposes each Series is expected to use the equity method, which will result in recognition by the Series of its share of losses or income from the limited partnerships in which it invests.

Minimum State Suitability Requirements.

The Series have established the subjective standards described above. These subjective standards apply to all investors. Each state has established objective standards for individuals which also must be satisfied. These standards are set forth below. An individual must satisfy the standard for his state of residency before he can consider an investment in Units. In the case of sales to fiduciary accounts, these minimum suitability standards must be met by the beneficiary, the fiduciary account, or by the donor or grantor who directly or indirectly supplies the funds to purchase the Units if the donor or grantor is one of the fiduciaries.

The Units may be offered and sold only in those jurisdictions in which they have been registered or qualified for sale, or are exempt from the registration or qualification requirement.

Set forth below are the minimum suitability standards for residents of each state in which the Series have applied to have the Units registered or qualified for sale or in which the sale of Units is exempt from registration. For these purposes, net worth is exclusive of home, furnishings and automobiles.

Arkansas	annual gross income of at least \$45,000 and a net worth of at least \$45,000 or a net worth of at least \$150,000
Colorado	annual gross income of at least \$35,000 and a net worth of at least \$35,000 or a net worth of at least \$75,000
Iowa	annual gross income of at least \$60,000 and a net worth of at least \$60,000 or a net worth of at least \$225,000
Kansas	annual gross income of at least \$45,000 and a net worth of at least \$45,000 or a net worth of at least \$150,000
Missouri	annual gross income of at least \$45,000 and a net worth of at least \$45,000 or a net worth of at least \$150,000; no investor may invest more than 10% of his net worth in a Series
Nebraska	annual gross income of at least \$45,000 and a net worth of at least \$45,000 or a net worth of at least \$150,000 for cash purchasers; annual gross income of at least \$60,000 and a net worth of at least \$60,000 or a net worth of at least \$225,000 for purchasers using promissory notes; no investor may invest more than 10% of his net worth in a Series
New Mexico	annual gross income of at least \$45,000 and a net worth of at least \$45,000 or a net worth of at least \$150,000; those electing the deferred payment plan described on page 195 must have annual gross income of at least

	\$60,000 and a net worth of at least \$60,000 or a net worth of at least \$225,000
Oklahoma	annual gross income of at least \$45,000 and a net worth of at least \$45,000 or a net worth of at least \$150,000

ESTIMATED USE OF PROCEEDS

The following table sets forth the estimated use of the proceeds from the sale of the Units. As indicated herein, approximately 75% of the total proceeds will be invested in local limited partnerships. The amounts in the table represent the Fund Manager's present estimates and the actual amounts may be different. At a minimum, each Series must invest in local limited partnerships and in reserves the greater of:

- ☐ 80% of the gross offering proceeds reduced by 0.1625% for each 1% of the Series' share of the mortgage financing encumbering the apartment complexes, or
- ☐ 70% of the gross offering proceeds.

Assuming that a Series share of the financing encumbering apartment complexes is 40%, the calculation is: $40 \times 0.1625\% = 6.5\%$; $80\% - 6.5\% = 73.5\%$. If the Series' share of financing is 61.75%, the calculation is: $61.75 \times 0.1625\% = 10\%$; $80\% - 10\% = 70\%$. In performing this calculation, there is a limit on the amount which may be invested in reserves. No more than 5% of gross offering proceeds may be considered as reserves at the Series level, and no more than 5% of gross offering proceeds may be considered as reserves at the local limited partnership level.

The following table excludes one Unit purchased by the initial limited partner in connection with the organization of the Series. It also excludes interest due under the investors' promissory notes. The amount of that interest to be received cannot be estimated. It will depend on the amounts and dates of payment of the investor promissory notes. Any such interest will constitute cash flow under the Series' partnership agreement. As such it may be used to pay administrative costs, or to increase reserves.

Some investors may purchase Units with a reduced selling commission. The following table assumes that the maximum selling commissions will be paid on all purchases of Units.

	Minimum Proceeds	Percent of Gross Proceeds	Maximum Proceeds	Percent of Gross Pro- ceeds
Gross Offering Proceeds	\$ 1,400,000	100.00%	\$ 5,000,000	100.00%
Less Public Offering Expenses:				
Selling Commissions	98,000	7.00%	350,000	7.00%
Dealer Manager Fee	28,000	2.00%	100,000	2.00%
Nonaccountable Underwriting Expense Allowance	14,000	1.00%	50,000	1.00%
Other Organizational and Of-	42,000	3.00%	150,000	3.00%

Offering Expenses

Total Public Offering Expenses		182,000	13.00%	650,000	13.00%
Amount Available for Investment	\$	1,218,000	87.00%	\$ 4,350,000	87.00%
Acquisition Expenses	\$	28,000	2.00%	\$ 100,000	2.00%
Acquisition and Investment Management Fees		98,000	7.00%	350,000	7.00%
Working Capital Reserves		42,000	3.00%	150,000	3.00%
Proceeds Invested	\$	1,050,000	75.00%	\$ 3,750,000	75.00%

Proceeds invested as set forth in the table above represent amounts to be paid:

- ☐ to acquire interests in local limited partnerships, and
- ☐ possibly, to repay loans incurred to acquire such interests and to pay interest and carrying costs on the loans.

Proceeds invested in local limited partnerships will be used by the local limited partnerships to pay or reimburse costs, to fund reserves, and to pay fees to the local general partners. These costs will consist of:

- ☐ acquisition costs,
- ☐ construction costs,
- ☐ construction interest and taxes,
- ☐ financing fees, and
- ☐ developmental and organizational expenses.

The exact manner in which a local limited partnership will use the proceeds will be negotiated in each case. It is anticipated that the local general partners will be paid approximately 10% to 30% of the cost of the apartment complex as a development fee and other compensation. In some cases it may be as much as 40%. In the discretion of the Fund Manager, this amount will be paid:

- ☐ over a period of two to three years, coinciding with the payments of the Series' capital contributions, or

☐ pursuant to an interest-bearing note generally payable no later than the eleventh year of the note.

Additional compensation will be payable to the local general partners from local limited partnership cash flow for their services in managing and selling apartment complexes. See "Investment Objectives and Policies--The Local General Partners--Compensation of Local General Partners."

MANAGEMENT COMPENSATION

The following table summarizes the types and estimated amounts of compensation to be paid to the VMB entities. Such compensation was not determined by arm's-length negotiations. Investment and management decisions which such persons make for the Series will affect the amount of the compensation actually to be received. See "Conflicts of Interest." Other than as set forth herein, no compensation is to be paid to the VMB entities. Such compensation cannot be increased by reclassifying into different categories fees or reimbursements which are in excess of the limitations set forth herein.

Type, Payee and Recipient	Determination of Amount	Minimum Amount	Maximum Amount
Organizational and Offering Stage			
Selling commissions payable by Series to VMB Capital Corporation	Up to 7% of the capital contributions, all or a portion of which will be re-allowed to participating broker-dealers	Up to \$98,000	Up to \$350,000
Dealer manager fees payable by Series to VMB Capital Corporation	Up to 2% of the capital contributions	Up to \$28,000	Up to \$100,000
Nonaccountable underwriting expense allowance payable by Series to VMB Capital Corporation	Up to 1% of the capital contributions	Up to \$14,000	Up to \$50,000
Nonaccountable organizational & offering expense reimbursement payable by Series to VMB & Associates, Inc.	3% of the capital contributions, in exchange for which VMB & Associates, Inc. will pay all organizational and offering expenses, with the exception of the 7% selling commissions, the 2% dealer manager fee, the 1% nonaccountable underwriting expense allowance and this 3% nonaccountable expense reimbursement. Organizational and offering expenses include all expenses incurred in connection with the formation of a Series, the registration and qualification of its Units under federal and state securities laws and its offering, and all advertising expenses.	\$42,000	\$150,000

Acquisition Stage (1)

Nonaccountable acquisition expense reimbursement payable by Series to VMB & Associates, Inc.	2% of the capital contributions, in exchange for which VMB & Associates, Inc. will pay all acquisition expenses. Acquisition expenses include legal fees and expenses, travel and communications expenses, costs of appraisals, non-refundable option payments on property not acquired, accounting fees and expenses, title insurance and miscellaneous expenses related to the selection and acquisition of local limited partnerships and apartment complexes.	\$28,000	\$100,000
Acquisition and investment management fees payable by Series to VMB & Associates, Inc.	Up to 7% of the capital contributions	Up to \$98,000	Up to \$350,000
Interest payable by Series to a VMB entity	A VMB entity may make short-term to a loans to a Series. Interest cannot exceed by 2% the prime rate of US bank charged by it on short-term unsecured loans to its most creditworthy customers.	Actual amounts are not determinable at this time.	

Operating Stage

Asset management fees payable by Series to VMB & Associates, Inc.	An annual fee in an amount not to exceed 0.5% of invested assets in local limited partnerships which are subsidized under one or more federal, state or local government programs. Invested assets means the sum of a Series' investment in local limited partnerships and the Series' allocable share of the amount of the mortgage loans on, and other debts related to, the apartment complexes.	Actual amounts are not determinable at this time.	
Property management fees payable by a local limited partnership to VMB Management, Inc. if VMB Management, Inc. acts as the management and leasing agent for the local limited partnership	The greater of 5% of gross property revenues or the competitive rate for comparable services, plus a fee for the one-time initial rent-up or leasing-up of a newly-constructed or totally-rehabilitated apartment complex. For HUD-subsidized properties, the competitive rate will be equal to the rate approved by HUD. For all other properties, the competitive rate will be determined by USDA - Rural Development guidelines. In no event may the fee for a property exceed 7% of gross property revenues.	Actual amounts are not determinable at this time.	
Reimbursement payable by Series of operating cash expenses ad-	The actual amount of any of a Series' operating cash expenses advanced. Operating cash expenses include expenses for management, on-site property personnel, utilities, repair and	Actual amounts are not determinable at this time. VMB & Associates, Inc. estimates that the total amount of reimbursable	

vanced by VMB & Associates, Inc.	maintenance, insurance, investor communications, legal, accounting, statistical and book-keeping services, use of computing or accounting equipment, travel and telephone expenses, salaries and direct expenses of Series employees while engaged in Series business, and any other operational and administrative	operating cash expenses during each Series' first full year of operations after termination of the offering, assuming receipt of the maximum offering proceeds, may be approximately \$20,000 to \$30,000

Reimbursement payable by Series of operating cash expenses advanced by VMB & Associates, Inc. (continued)	expenses necessary for the prudent operation of the Series. Operating cash expenses include the actual cost of goods, materials and administrative services used for or by the Series, whether incurred by VMB & Associates, Inc. or a non-affiliated person. As used in the preceding sentence:

- ☐ actual cost of goods and materials means the actual cost of goods and materials used for or by the Series and obtained from entities not affiliated with VMB & Associates, Inc., and
- ☐ actual cost of administrative services means the pro rata cost of personnel, but in no event to exceed a competitive amount.

In no event will reimbursements be permitted for:

- ☐ services for which VMB & Associates, Inc. is entitled to compensation by way of a separate fee,
- ☐ rent, depreciation or other such administrative items, or
- ☐ salaries, fringe benefits or travel expenses of a controlling person of VMB & Associates, Inc.

Share of Series' cash available for distribution to VMB National Partners, LLC	0.1% of cash available for distribution. Cash available for distribution means, with respect to any period, cash flow less any amounts added to reserves. Cash flow means:	Actual amounts are not determinable at this time.

- ☐ the Series' cash distributions from the local limited partnerships other than cash derived from the sale, financing or refinancing of apartment complexes, plus
- ☐ all cash funds generated by the Series, after deducting cash funds used to pay expenses, debt service and capital expenditures

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Share of local limited partnership's allocations and operating cash from operating cash flow(2) distributions to VMB Housing, L.P. as special limited partner of local limited partnerships	Up to 0.1% of all allocations by local limited partnerships of profits, losses and tax credits and up to 0.1% of distributions	Actual amounts are not determinable at this time.
Share of local limited partnership's allocations and operating cash distributions if VMB & Associates, Inc. or an affiliate becomes the local general partner	As determined by the provisions of the partnership agreement of the local limited partnership in effect prior to the time such person becomes the local general partner.(2)	Actual amounts are not determinable at this time.
Liquidation Stage		
Share of Series' sale or refinancing proceeds to VMB National Partners, LLC	After: ☐ a Series' investors have received sale or refinancing proceeds equal to the amounts of their capital contributions and their preferred return, and ☐ VMB National Partners, LLC has received sale or refinancing proceeds equal to the amount of its capital contributions and any subordinated disposition fee, the Series will distribute any additional sale or refinancing proceeds 90% to its investors and 10% to VMB National Partners, LLC.	Actual amounts are not determinable at this time.
Share of Series' sale or refinancing proceeds to VMB National Partners, LLC	Sale or refinancing proceeds are the Series' cash distributions from a local limited partnership's sale, financing or refinancing of an apartment complex, less any reserves funded with such proceeds. The investors' preferred return is an annual, cumulative, but not compounded, return to the Series' investors on their capital contributions equal to 10% through December 31, 2013,	

	and 6% for the balance of the Series' term.(2)	
Subordinated disposition fee payable by Series to VMB & Associates, Inc.	Subject to payment of preferred distributions to the investors, a fee equal to 1% of the sales price of the apartment complexes	Actual amounts are not determinable at this time.
Share of local limited partnership's distributions from a sale or refinancing transaction if VMB & Associates, Inc. or an affiliate becomes the local general partner	As determined by the provisions of the partnership agreement of the local limited partnership in effect prior to the time such person becomes the local general partner.(2)	Actual amounts are not determinable at this time.
Interest in Series		
Share of Series' profits, losses and tax credits to VMB National Partners, LLC	Generally, 0.1% of profits, losses and tax credits, except that in the case of profits from a sale or refinancing, the percentage may be increased to as much as 10%. See "Profits and Losses, Tax Credits and Cash Distributions."	Actual amounts are not determinable at this time.

- (1) It is possible that a local limited partnership may generate federal tax credits and state tax credits. If so, the VMB entities may organize another entity to invest in the state tax credits. See "Investment Objectives and Policies - Terms of the Local Limited Partnership Agreements -Interests in Profits, Losses and Distributions." The VMB entities would receive compensation from the other entity in connection with such activities.
- (2) Despite the information in the tables, the interest of the VMB entities in cash to be distributed by the Series from cash available for distribution and sale or refinancing proceeds, and from similar sources in the case of the local limited partnerships, will not exceed, in the case of cash available for distribution, 10% of total cash available for distribution and, in the case of sale or refinancing proceeds, 15% of sale or refinancing proceeds remaining after required payments to the investors. For a discussion of the required payments to investors, see "Profits and Losses, Tax Credits and Cash Distributions."

CONFLICTS OF INTEREST

The interests of the VMB entities may conflict with the interests of the investors. These conflicts include:

Receipt of Fees and Other Compensation by the VMB Entities.

The Fund Manager will decide:

- ☐ which investments will be made by the Series,
- ☐ in what manner the acquisitions will occur,
- ☐ how the investments will be managed, and
- ☐ when the investments will be sold.

As a result of these transactions, the VMB entities will receive fees, compensation and other income. See "Management Compensation." Such compensation arrangements were not negotiated at arm's length and may create conflicts between the interests of the VMB entities and those of the investors.

For example, the consent of a Series may be necessary in connection with the sale of an apartment complex by a local limited partnership. The Fund Manager may face a conflict in these circumstances because the VMB entities' share of fees and cash distributions from the transaction may be more or less than their expected share of fees if the apartment complex were not sold. And in its negotiations with local general partners over the terms of the Series' investments, the Fund Manager may request that VMB Management, Inc. serve as the property manager for the apartment complex. As property manager, VMB Management, Inc. would earn property management fees from the local limited partnerships. The result of these conflicts could be that a Series may make investments which are less desirable, or on terms which are less favorable, to the Series than might otherwise be the case.

Other Business Activities of the VMB Entities.

The VMB entities have formed and are serving as general partners of other public and private real estate limited partnerships. They also are providing administrative and consulting services for other real estate limited partnerships of which they were not the original managing general partners. See "Management" and "Prior Performance Summary." In addition, the VMB entities may become general partners of other public or private real estate limited partnerships and may become involved in other business activities unrelated to the business of the Series.

Under the Series' partnership agreement, the Fund Manager is required to devote to Series' affairs only such time as is necessary for the proper performance of its duties to the Series. The officers, directors and employees of VMB & Associates, Inc. will perform the duties of the Fund Manager. None of them will devote their full time to the performance of such duties. Therefore, conflicts may arise in the allocation of the time of such people among the activities of each Series and the other activities of the VMB entities. The Fund Manager believes that VMB & Associates, Inc. has sufficient personnel to fully discharge the Fund Manager's duties to the Series.

Competition with the VMB Entities with Respect to the Purchase or Ownership of Properties.

Some of the VMB entities are also general partners of other real estate limited partnerships and limited liability companies and will form and manage additional real estate entities. The other existing partnerships have, and it is expected that any entities to be organized in the future will have, the same or similar investment objectives as the Series.

VMB & Associates, Inc. might be presented with an investment opportunity which is appropriate for a Series and one or more other entities managed by the VMB entities, including the other Series. VMB & Associates, Inc. will decide which entity will make the investment. That decision will be based upon such factors as:

- ☐ the effect of the acquisition on the diversification of each entity's portfolio,
- ☐ the estimated income tax effects of the purchase on each entity,
- ☐ the amount of funds of each entity available for investment, and
- ☐ the length of time funds have been available for investment.

If a particular investment is determined to be suitable for more than one entity, the entity having uninvested funds for the longest period of time will have priority over the other entities. However, if an investment generates federal and state low income housing tax credits, then an entity formed to provide federal and state tax credits to its investors will have priority over each Series and other entities which are not formed to provide such state tax credits.

The VMB entities, and the local general partners and their affiliates may own or acquire interests in properties near or adjacent to the apartment complexes in which a Series may invest. It is possible that the value of such persons' properties may be enhanced by their proximity to the Series' apartment complexes. It is also possible that such properties may be in competition with the Series' apartment complexes for prospective tenants or purchasers. As a result, the interests of the VMB entities, the local general partners and their affiliates may conflict with those of a Series.

Other Transactions with Developers, Local General Partners, Lenders and Joint Venturers.

Certain persons controlling or having business dealings with some of the local limited partnerships, such as general partners, developers and lenders, will be persons with whom the VMB entities do business. The VMB entities may receive compensation, profits or other benefits in connection with such other transactions. As a result, conflicts may arise between their interests and the interests of the Series. For example, the Fund Manager generally is entitled to remove a local general partner without the consent of the investors. If a VMB entity has other business dealings with the local general partner, the Fund Manager might be reluctant to remove the local general partner under circumstances which otherwise would warrant removal.

Representation in Tax Audit Proceedings.

The Fund Manager has been designated the tax matters partner of each Series. As such, it is authorized and directed to represent each Series and its investors at the expense of the Series in connection with all examinations of the Series' affairs by tax authorities, including any resulting administrative or judicial proceedings. Such proceedings may involve or affect the other Series and other partnerships and limited liability companies managed by the VMB entities. In such situations, the positions taken by the VMB entities with respect to the Series may have differing effects on the Series and the other entities.

Distribution of Units.

The Series have not engaged an independent managing underwriter for the distribution of the Units. VMB Capital Corporation, as the dealer manager for the offering of Units, may sell Units and will perform wholesaling services for the Series. VMB Capital Corporation has not retained counsel separate from the Series' counsel but has conducted such due diligence review as it deems necessary under the circumstances. However, investors will not have the benefit of an

independent investigation of the Series performed by an independent, unaffiliated underwriter.

Joint Investments.

A Series may invest in local limited partnerships jointly with the other Series, other limited partnerships formed by the VMB entities or other limited partnerships if the conditions set forth under "Investment Objectives and Policies--Joint Investments" are met. There is always a risk that joint venture partners will reach an impasse respecting the activities of the joint venture. For example, it may be in the best interest of a Series to sell a jointly-held local limited partnership interest at a time when it is in the best interest of its co-venturer to retain such investment. In such event, the Series may be unable to sell the local limited partnership interest.

Resolution of Conflicts of Interest.

Except as set forth above, the Series have not developed any formal process for resolving conflicts of interest. However, the Fund Manager is subject to a fiduciary duty to exercise good faith and integrity in handling the affairs of each Series, and that duty will govern its actions in all such matters. See "Fiduciary Responsibility." Furthermore, the manner in which the Series can make investments and the manner in which the Series can operate are subject to restrictions contained in the Series' partnership agreement. See "Investment Objectives and Policies." Nonetheless, the conflicts described in this section could result in materially adverse effects on the investors, particularly where the Fund Manager has a fiduciary duty to more than one entity. In such cases, the Fund Manager will resolve the conflicts by exercising its best business judgment.

Lack of Separate Representation.

The Series, the VMB entities, and the investors are not represented by separate counsel. See "Legal Matters." All of the attorneys, accountants and other experts performing services for the Series also perform services for the VMB entities. Following the termination of the offering, if any controversy arises in which the interests of a Series appear to be in conflict with those of:

- ☐ the other Series,
- ☐ the VMB entities, or
- ☐ a local limited partnership,

other counsel would be retained for one or more of the parties.

Organizational Diagram

The following diagram illustrates the relationships among the Series, the VMB entities, and certain other parties:

[Click here to view image.](#)

As of November 30, ____[Year], the VMB entities are serving as general partners of more than 80 real estate limited

partnerships, including 67 tax credit partnerships. See "Prior Performance Summary."

No VMB entity can be the local general partner of a local limited partnership at the time of the Series' acquisition of an interest therein. A VMB entity can become a local general partner after acquisition of the local limited partnership interest only:

- ☐ upon request by a lender that such action be taken,
- ☐ in the event of the bankruptcy, death, dissolution, withdrawal, removal or adjudication of incompetence of a local general partner,
- ☐ in the event of a material default by a local general partner in the performance of its duties, or
- ☐ in the event of a material default by the local limited partnership under its mortgage loan.

FIDUCIARY RESPONSIBILITY

The Fund Manager is accountable to each Series as a fiduciary. The Series have been advised by counsel that the laws of the State of Kansas govern the fiduciary obligations of the Fund Manager to each Series and its investors. Under such laws, a general partner owes its partners the utmost good faith and loyalty. The Series' partnership agreement does not modify these fiduciary obligations provided under Kansas law. Rather, the Series' partnership agreement expressly provides that the Fund Manager:

- ☐ has fiduciary responsibility for the safekeeping and use of all funds and assets of each Series, whether or not in its immediate possession or control,
- ☐ may not employ or permit another to employ such funds or assets in any manner except for the exclusive benefit of the Series,
- ☐ may not contract away its fiduciary duty, and
- ☐ may engage in other business activities independent of the Series provided that the right to engage in such activities does not relieve it of its general fiduciary obligation to the Series.

Subject to the rules of Kansas law, a limited partner may institute legal action on behalf of a partnership to recover damages from third parties or to recover damages for a breach by a general partner of its fiduciary duty. This is known as a partnership derivative action. In addition, a limited partner may institute a legal action on behalf of himself and all other similarly situated limited partners to recover damages for a breach by a general partner of its fiduciary duties, subject to Kansas rules. This is known as a partnership class action. In any such action, the Fund Manager could assert defenses based on the exculpation provision in the Series' partnership agreement, described in the following paragraph. If the Fund Manager satisfied the standards for exculpation, it would be deemed not to have breached its fiduciary obligation. This area of the law is changing and developing and investors who have questions concerning the fiduciary duties of the Fund Manager are urged to consult with their counsel.

The exculpation provision of the Series' partnership agreement holds the Fund Manager and its affiliates harmless from

liability for losses suffered by the Series due to acts or omissions that any of them performs or fails to perform:

- ☐ in good faith, and
- ☐ in a manner which the Fund Manager reasonably believes to be within the scope of authority granted to it and in the best interest of the Series, provided
- ☐ the acts or omissions did not constitute negligence or misconduct.

The Series' partnership agreement also indemnifies the Fund Manager and its affiliates against losses and liabilities sustained by them when acting on behalf of the Series or performing services for the Series, provided such conduct:

- ☐ did not constitute negligence or misconduct, and
- ☐ was the result of a course of conduct which the Fund Manager, in good faith, determined was in the best interests of the Series.

Indemnification means the Series will pay any losses or liabilities suffered by the Fund Manager or its affiliates.

As a result of these exculpation and indemnification provisions, an investor may have a more limited right of action against the Fund Manager and its affiliates than he would otherwise have had in the absence of such provisions. In the opinion of the Securities and Exchange Commission, indemnification for liabilities arising under the Securities Act of 1933 is against public policy and therefore unenforceable.

INVESTMENT OBJECTIVES AND POLICIES

Principal Investment Objectives.

Each Series' principal investment objective is to provide tax benefits in the form of:

- (a) A predictable stream of tax credits which investors may use to offset their federal income tax liabilities.
- (b) Tax losses which:
 - ☐ some corporations may use to offset any type of income, and
 - ☐ other corporations and individuals may use to offset passive income. See "Federal Income Tax Considerations--Limitations on Losses and Credits from Passive Activities."

In addition, each Series will seek to preserve and protect its invested capital and to return such capital through cash distributions resulting from sale or refinancing transactions. See "Sale or Other Disposition of Investments" below in this section.

The Series will not seek to provide cash distributions from operations.

There can be no assurance that these investment objectives will be achieved. In addition, the degree to which each Series achieves its objectives may vary.

This Memorandum will be supplemented to identify a specific investment when the Fund Manager believes a reasonable probability exists that the investment will be acquired. Any such supplement will set forth available data with respect to the investment, including the proposed terms of purchase, a description of the apartment complex and local general partners, and other information considered appropriate for an understanding of the transaction. The consummation of any pending acquisition will be subject to further negotiation with the local general partners and execution of a final agreement. Such final agreement may differ in material respects from prior understandings or agreements between the local general partners and the Series. And the acquisition or retention of each investment will be subject to the terms and conditions of closing. Accordingly, there can be no assurance that any potential investment initially disclosed in a supplement to this Memorandum will ultimately be acquired, or that the terms of any acquisition will not differ substantially from those which were initially disclosed.

Low income housing tax credits are available for an apartment complex over a 10-year period commencing with the date that the property is placed in service and otherwise meets the requirements for the credit. It is expected that investors will be allocated low income housing tax credits beginning in the year they are admitted to the Series or the next year. It is also expected that the amount of low income housing tax credits available to investors will be higher in later years because of the time that is necessary:

- ☐ to identify the local limited partnerships in which a Series will invest, and
- ☐ for such local limited partnerships to complete construction of their respective apartment complexes.

Any reduction in low income housing tax credits in the first and second years of a Series should result in additional low income housing tax credits in the eleventh and twelfth years of a Series. A Series will be able to identify the annual amount of its tax credits and the month it will commence generating its stream of tax credits when its investments are identified and commence operations. Historically, investors in partnerships sponsored by the VMB entities generally have been allocated some tax credits in the year of investment and the next year, and the full amount of annual tax credits in the second full year following investment.

The Fund Manager believes that each Series will be able to acquire a sufficient number of investments at a purchase price which will enable the Series to provide the amounts of tax credits anticipated at commencement of the Series' offering. This belief is based upon the general knowledge that the management personnel of the VMB entities have with respect to the current and past purchase prices for tax credit properties. In negotiating the purchase price to be paid by a Series for its interest in a local limited partnership, VMB & Associates, Inc. will determine the portion of the Series capital that can be paid for such interest which will enable the investors to receive the anticipated amount of tax credits. VMB & Associates, Inc. will take into consideration the possibility that a local limited partnership will not provide all of the tax credits that are expected. To the extent a Series does not make distributions in respect of a Unit equal to the \$1,000 purchase price of the Unit, the tax credits generated by the Series would in effect represent a return of and not a return on the investor's investment in the Series.

Among other things, the Fund Manager's estimate of the amount of tax credits that will be provided by each Series is based upon the assumption that demand for tax credit properties does not increase the price for such properties. In the past, heightened demand for interests in local limited partnerships increased the purchase price for such interests. Further increases could impair the ability of a Series to provide investors with the anticipated amount of tax credits.

The Fund Manager's estimate of the amount of the tax credits that will be provided by each Series is based upon additional assumptions, including, that:

- ☐ no tax laws or regulations or court interpretations thereof will be enacted or adopted or issued which would adversely affect the Series,
- ☐ the apartment complexes will qualify for the anticipated tax credits at the appropriate times,
- ☐ that portion of the costs of the low income residential units in each apartment complex expected to qualify for the low income housing tax credits in fact will qualify for the low income housing tax credits,
- ☐ the low income residential units in each apartment complex will be rented to eligible tenants,
- ☐ the qualified basis of each apartment complex used to calculate the low income housing tax credits will not decrease during the 15-year compliance period,
- ☐ each local limited partnership will continually meet the rental and occupancy tests for the low income residential units during the 15-year compliance period,
- ☐ development fees to the local general partners or their affiliates will be included in the qualified basis of each apartment complex used to calculate the low income housing tax credits, and
- ☐ in the case of an existing apartment complex, the acquisition thereof will constitute a purchase for purposes of *Internal Revenue Code Section 42*.

See "The Low Income Housing Tax Credit."

Events occurring after the acquisition of interests in local limited partnerships could materially affect a Series' ability to provide all of the anticipated tax credits. For example, the amount of tax credits for a property depends, in part, on the costs to construct the property. If the costs to construct are less than anticipated, the amount of the tax credits will be less than anticipated. Also, the amount of tax credits is based in part on current interest rates. If there is a change in interest rates from the time a Series' agrees to acquire a property and the time the property is placed in service, the tax credits will be less or more than anticipated. The amount of tax credits could also be materially and adversely affected by the failure of any other of the assumptions listed above. However, as discussed below in this section under "Terms of the Local Limited Partnership Agreements," the partnership agreements of the local limited partnerships will include adjuster and other provisions intended to reduce these adverse consequences to a Series.

The foregoing investment objectives are set forth in the partnership agreement of each Series and can only be changed by an amendment to the partnership agreement.

Investment Policies.

Investment Criteria. In selecting apartment complexes, the Fund Manager will evaluate, among other factors:

- ☐ the amount of low income housing tax credits which are anticipated,
- ☐ the amount of cash flow from operations, if any, which is anticipated,
- ☐ the location of the apartment complex,
- ☐ general rental market conditions in the area of the apartment complex, including vacancy rates and information as to the numbers of eligible tenants in the area,
- ☐ the expenses, rental rates and costs of construction of the apartment complex and comparable apartment complexes,
- ☐ the data supplied to the agency providing government financing subsidies or other lender,
- ☐ the financial strength of the local general partners,
- ☐ the prior performance of the local general partners,
- ☐ the experience and prior performance of the property manager,
- ☐ the types of guarantees which can be obtained from the local general partners and other sellers and developers, and
- ☐ the prior experience and reputation of the builder and architect of the apartment complex.

The criteria for selecting a particular investment for a Series will include the following:

- ☐ The apartment complex must be completed, under development or in the process of being rehabilitated. For these purposes, development activities include:
 - ☐ engaging contractors,
 - ☐ engaging architects and other artisans,
 - ☐ applying for loan commitments,
 - ☐ applying for tax credit reservation, and
 - ☐ applying for building permits.
- ☐ In the case of a newly constructed or rehabilitated apartment complex, no substantial part of the

Series' investment can be made before receipt of a commitment for the construction loan and no more than 75% of the Series' investment can be made before receipt of a commitment for the permanent loan.

☐ The local general partners must represent that a specified percentage of the residential units comprising the apartment complex will be set aside for low income tenants. In compliance with the rules under *Internal Revenue Code Section 42*, the local general partners must represent that either 20% or more of the residential units will be set aside for occupants with incomes of 50% or less of area median income, or 40% or more of the residential units will be set aside for occupants with incomes of 60% or less or area median income.

☐ The local limited partnership must agree to provide the Series with a specific amount of tax credits.

☐ In no case shall the Series invest in any local limited partnership if, at the date of initial investment, a VMB entity is a local general partner or an affiliate of a local general partner, or otherwise has an interest therein, except that:

☐ another entity may invest in state tax credits, as discussed below under "Terms of the Local Limited Partnership Agreements--Interests in Profits, Losses and Distributions,"

☐ a Series may invest as a co-venturer, as discussed below under "Joint Investments,"

☐ a Series may purchase the interest of the Series' joint venture partner in a local limited partnership interest,

☐ a Series may purchase an interest in a local limited partnership from a VMB entity if such person purchased the interest in its name in order to facilitate the acquisition by the Series, and

☐ VMB Housing, L.P. may be a special limited partner in the local limited partnership as described below in this section under "Terms of the Local Limited Partnership Agreements--Role of Special Limited Partner."

This limitation does not prevent a Series from investing in a local limited partnership which is an affiliate of another local limited partnership in which a Series or another VMB-partnership has invested. Also, this does not prevent a VMB entity from becoming a local general partner of a local limited partnership after a Series has acquired an investment therein. However, a VMB entity would become a local general partner only under the circumstances described under "Conflicts of Interest--Organizational Diagram."

☐ A real estate developer with at least two years' experience must agree to supervise management of the apartment complex or to serve as the local general partner for a period of time acceptable to the Fund Manager.

The Fund Manager will seek to ascertain the status of certain matters with respect to a local limited partnership as a condition to a Series becoming a limited partner or member of the local limited partnership. These matters are expected to include:

- ☐ assurance that the local limited partnership has title to its apartment complex,
- ☐ assurance that the local limited partnership is duly formed as a limited partnership or limited liability company under the laws of its state of origin, and
- ☐ receipt of an opinion of counsel for the local limited partnership as to the limited liability of the Series as a limited partner or member thereof.

Such counsel's opinion will also include, or permit the Series counsel to render, an opinion that:

- ☐ the local limited partnership is a partnership for federal income tax purposes,
- ☐ the allocation provisions of the partnership agreement of the local limited partnership will not be significantly modified by the IRS, and
- ☐ based on the assumption that the local limited partnership will operate as represented by the local general partners, that the apartment complex will qualify for the anticipated tax credits.

A Series will not acquire an interest in a local limited partnership unless the Series has received, with respect to the apartment complex of such local limited partnership, either:

- ☐ an appraisal prepared by a competent, independent appraiser, or
- ☐ a form of a state or other governmental agency setting forth estimates with respect to construction and mortgage financing costs and initial rental income and operating expenses. These forms may include:
 - ☐ Forms 1924-13 (estimate and certificate of actual cost) and 1930-7 (statement of budget, income and expense) or comparable forms of the U.S. Department of Agriculture, Rural Development,
 - ☐ Form 2264 (project cost and budget analysis) or comparable form of the U.S. Department of Housing and Urban Development,
 - ☐ a comparable form of any successor of the U.S. Department of Agriculture, Rural Development or the U.S. Department of Housing and Urban Development, or
 - ☐ a form of any applicable tax credit allocation agency.

In any case, the appraisal or form will be maintained in the Series' records for at least five years, and will be available for inspection and duplication by any investor.

Each Series intends to invest only in local limited partnerships which will arrange for comprehensive insurance coverage for their apartment complexes, including liability, fire and extended coverage, of the type which is customarily

obtained for similar properties. See, however, "Risk Factors--Risks related to investments in local limited partnerships and apartment complexes."

Eligibility for Low Income Housing Tax Credits. Each Series will invest in local limited partnerships which own and operate apartment complexes to be eligible for tax credits. With respect to apartment complexes which will generate low income housing tax credits, at a minimum, at least:

- ☐ 40% of the residential units in each apartment complex, and
- ☐ 70% of the total number of residential units in all of the apartment complexes,

will be expected to be set aside for low income tenants.

Historic Tax Credits. Some of the local limited partnerships in which a Series invests may own apartment complexes which qualify for historic tax credits in addition to, or instead of, low income housing tax credits. Historic tax credits are available for rehabilitation expenditures incurred in improving certified historic structures. The historic tax credit is generally equal to 20% of the qualified rehabilitation expenditures. Unlike low income housing tax credits, the full amount of the historic tax credit is claimed in the year in which the rehabilitated structure is placed in service. The historic tax credit is more fully discussed in "Federal Income Tax Considerations--Historic Tax Credit" and "Historic Tax Credit Recapture."

Other Tax Credits. Proposals have been offered from time to time by members of Congress to provide tax credits for single-family home ownership. Other proposals may be forthcoming from the Administration or Congress. If any tax credits relating to housing are enacted into law, the Fund Manager will evaluate them. If the Fund Manager determines that it is appropriate for a Series to do so, a Series may invest in local limited partnerships intending to obtain such tax credits.

Types of Properties. Each Series might invest in two basic types of apartment complexes. The first type consists of newly-constructed or substantially rehabilitated apartment complexes financed either:

- ☐ with the proceeds of tax-exempt bonds or state and local bonds which are not tax-exempt,
- ☐ under the Home Investment Partnership program,
- ☐ by the U.S. Department of Agriculture, Rural Development, or
- ☐ with other below-market-interest-rate indebtedness.

These properties may also receive rental assistance.

The second type consists of newly-constructed or substantially rehabilitated apartment complexes without federal or state government subsidies, but which otherwise qualify for tax credits, including single-room occupancy complexes.

Location of Properties. The apartment complexes may be located in any of the United States, or the territories or possessions of the United States. Apartment complexes assisted by the U.S. Department of Agriculture, Rural Development will be located in towns with a population of less than 50,000. Other apartment complexes may be located in urban, suburban or rural areas. Each Series will seek as much diversity as is reasonably possible in the locations of

the apartment complexes. However, a Series' ability to provide such diversification will be substantially influenced by the amount of the proceeds it receives from its offering and the purchase prices of its investments. See "Number of Investments" below in this section and "Risk Factors--Risks related to investments in local limited partnerships and apartment complexes." The Series do not intend to invest in any distressed low income areas with a high risk of property deterioration and neighborhood instability. A Series may invest in renewal areas where the Fund Manager believes there is a strong probability of economic success.

Number of Investments. The number of apartment complexes in which a Series invests will depend on the amount of the proceeds from its offering and the purchase prices of its investments. If a Series receives only the minimum proceeds of \$1,400,000, it is expected that the Series would invest in only a few apartment complexes. If a Series receives the maximum proceeds of \$2,500,000, the number of the Series' apartment complexes would be substantially greater. A Series has no policy or limitation as to the amount or percentage of its proceeds which may be invested in any one local limited partnership or group of local limited partnerships or local limited partnerships with which any person or group of persons is affiliated.

Timing of Investments. Subject to the limitations discussed below, a Series may make or commit to make investments in apartment complexes at any time, including a time before the completion of its offering. There are risks involved in making or committing to make investments before the receipt of offering proceeds. See "Risk Factors--Risks related to investments in local limited partnerships and apartment complexes." The Fund Manager will attempt to mitigate the risks by limiting such investments and commitments and by attempting to negotiate protective provisions in the related agreements or commitments. Such provisions may include extensions of the due dates for payment, releases from commitments if proceeds are not available, or reduction of an interest in a local limited partnership.

Any portion of a Series' capital contributions which has not been invested or committed to investment in local limited partnerships or reserves within the later of:

- ☐ 24 months from the date of commencement of the Series' offering, or
- ☐ 12 months after termination of the offering,

will be returned by the Series to its investors. No interest will be payable to the investors if uninvested funds are returned to them. The VMB entities will not receive any fees from capital returned to investors. For these purposes, capital will be deemed committed to an investment no later than the date a Series executes a written agreement in principle, commitment letter, letter of intent or understanding, option agreement or other similar understanding or contract with respect to such investment. Once capital is treated as committed under that policy it need not later be returned to the investors even if the identified investment is not consummated. Rather, such capital could be used for another investment.

Until required by a Series for use in connection with its business and operations as described in this Memorandum, all funds received by a Series from its offering will be held by the Series in:

- ☐ United States government securities,
- ☐ securities issued or fully guaranteed by United States government agencies,
- ☐ certificates of deposit and time or demand deposits in, or repurchase agreements constituting obligations of, commercial banks with deposits insured by the Federal Deposit Insurance Corporation, or

- ☐ other short-term, highly-liquid investments.

The rate of return on such types of investments has been relatively low in recent years and may be significantly less than that obtainable from investments in apartment complexes.

Payment for Investments. A Series will normally make its capital contributions to a local limited partnership in stages over a period of from one to two years, with each contribution due when conditions regarding construction or operation of the apartment complex have been fulfilled. In this way the Series will risk as little capital as is possible during the most uncertain stages of an apartment complex. For example, and solely for illustrative purposes, the Series' contribution could be made over a one- to two-year period subject to satisfaction of some or all of the following requirements:

- ☐ reservation of low income housing credits and receipt of IRS Form 8609 (Low Income Credit Allocation Certification),
- ☐ admission of the Series as a limited partner or member in the local limited partnership,
- ☐ receipt of a commitment for or closing of the construction loan,
- ☐ substantial completion of the apartment complex,
- ☐ receipt of a commitment for or closing of the permanent loan, or
- ☐ occupancy by qualified tenants.

In connection with the acquisition of an interest in a local limited partnership owning a completed project, a Series may make its capital contribution in stages, as described above, or in full at the time of acquisition.

In general, each of the Series' payments to a local limited partnership will be made only after receipt of representations and warranties of the local general partners to the effect that there is no material default by the local limited partnership under any mortgage loan or under any other material agreements. See "Terms of the Local Limited Partnership Agreements" below in this section.

Once an investment has been selected, the asset management personnel of VMB & Associates, Inc. will monitor the apartment complex monthly to determine compliance with construction and rent-up schedules. After stabilized occupancy has been achieved, quarterly reviews and regular on-site visits will be conducted to monitor building maintenance, occupancy and other operations and maintenance of reserves.

In determining whether or not to acquire an interest in a local limited partnership, a Series may make a loan to the local limited partnership before acquiring the interest. Any such loan must be for a term of one year or less and must, unless earlier repaid, be repaid from the Series' initial capital contribution to the local limited partnership. The amount of any such loan may not exceed 50% of the total capital contribution to be made to the local limited partnership. If a Series does not make an investment in the local limited partnership and the local limited partnership does not repay the loan, the amount of capital the Series has available for investment in other local limited partnerships would be reduced. See "Risk Factors--Investment Risks--Risks related to investments in local limited partnerships and apartment complexes."

The Local General Partners.

The local general partners will operate and control the business of the local limited partnerships. The role of a Series in a local limited partnership will be limited to that of a limited partner or non-managing member. Hence, the experience and the financial condition of the local general partners will be crucial to the success of any apartment complex.

Financial Condition and Experience of Local General Partners. Before any investment in a local limited partnership, the acquisitions personnel of VMB & Associates, Inc. will obtain financial statements from the local general partners. The financial statements may be unaudited. VMB & Associates, Inc. will also obtain information and representations with respect to the prior real estate and tax credit experience of the local general partners. Except in the case of non-profit organizations, the local general partners or the person guaranteeing the obligations of any local general partner will be required to demonstrate an aggregate net worth:

- ☐ which is in an amount deemed appropriate by the Fund Manager, and
- ☐ which is sufficiently liquid or otherwise readily available to be able to protect the local limited partnership in view of:
 - ☐ the size and scope of the apartment complex,
 - ☐ the obligations of the local general partners and their affiliates to the local limited partnership,
 - ☐ any security or other assurances or measures taken to perform such obligations, and
 - ☐ the material contingent liabilities of the local general partners.

Despite the preceding, there cannot be any assurance that full and accurate disclosure will be made by local general partners of their financial condition, or that their financial condition will not change during the term of the Series' investment in the local limited partnership.

Except in the case of non-profit organizations, the local general partners generally will be individuals or closely-held entities which depend, for their successful management and operation, on one or a very limited number of principal owners. In a typical apartment complex the principal owners will, directly or through entities controlled by them, provide rent-up, property management and other services related to ownership of the apartment complex, and may also construct the apartment complex.

Compensation of Local General Partners. As discussed under "Estimated Use of Proceeds," the local general partners will receive compensation payable from the Series' capital contributions to the local limited partnerships. Each local general partner also will receive fees from cash flow of the local limited partnership in consideration of:

- ☐ management of the local limited partnership and the apartment complex, and
- ☐ the sale of the apartment complex.

Fees payable from local limited partnership cash flow are not set forth under "Management Compensation" or "Estimated Use of Proceeds" but are set forth under "Terms of the Local Limited Partnership Agreement--Interests in Profits, Losses and Distributions" below.

Withdrawal of Local General Partners. A local general partner will not be permitted to withdraw from the local limited partnership without the consent of the Series, unless a designated successor acceptable to the Series is admitted in its place.

Terms of the Local Limited Partnership Agreements.

Through the partnership agreement of each local limited partnership, a Series will impose significant responsibilities on the local general partners. The precise terms of such responsibilities, and the limitations thereon, will be subject to negotiation. However, the Fund Manager anticipates that the terms of the partnership agreement of each local limited partnership may include the provisions described below. Except for the provisions concerning the allocations of tax items and distributions, each of the following provisions is designed to protect the Series' investments.

Construction Completion Guarantees. In the case of an apartment complex under development, the local general partners or other guarantor of the local limited partnership will agree to provide all funds needed through the completion of the construction or rehabilitation of the apartment complex and the closing of its long-term mortgage financing, after applying mortgage loan proceeds and the Series' capital contribution. Funds so provided may or may not be reimbursable by the local limited partnership. In the event of the failure of the local general partners to perform those obligations, they will be in default pursuant to the terms of the local limited partnership agreement, and may be removed from the local limited partnership by the Series.

Tax Credit Guarantees. Each local general partner will agree to take no action which would cause a termination or discontinuance of the qualification of an apartment complex as a qualified low-income housing project under *Internal Revenue Code Section 42(g)(1)*. Each local general partner will agree to take no action which would cause the recapture of any tax credit under the Code without the consent of the Series. If the local general partner does so, or in the event there is a reduction in the qualified basis of an apartment complex following an audit by the IRS resulting in recapture, the local general partner generally will be obligated to pay to the Series an amount equal to any tax deficiency plus interest or penalties, or to furnish such other safeguards as are appropriate to protect the Series and the investors against the consequences of recapture. The local general partner will guarantee the annual tax credit amount and will fund any such reduction during the first five years of the 15-year initial compliance period.

Operating Deficit Guarantees. The local general partners or another guarantor will agree to provide funds to the local limited partnership to defray any operating deficits for a specified period of time following the completion of the development and construction or rehabilitation of the apartment complex. The local general partners may or may not be entitled to reimbursement of such funds by the local limited partnership. A Series may invest in local limited partnerships for which such operating guarantees are not required if the Fund Manager determines that there are adequate alternative forms of assurance protecting the Series' investment.

Repurchase Guarantees. The local general partner will be responsible for the overall operations and tax credit compliance of the apartment complex. The local general partner will agree to repurchase the Series' interest in the local limited partnership if the apartment complex does not receive an allocation of tax credits in the year in which it is placed in service, or the apartment complex is not placed in service in a timely manner, or the apartment complex does not remain eligible for tax credits during the period in which the Series is required to make its capital contributions.

Tax Credit Adjusters. It is possible that the amount of tax credits actually allocated to a Series by a local limited

partnership could be less than the amount expected when the investment in the local limited partnership was made. The difference between the amount expected and the amount allocated is a shortfall. To reduce the adverse consequences which a Series would experience in the event of a shortfall, the local limited partnership agreement will include adjuster provisions. Adjuster provisions are designed to provide the Series with a substantially similar aggregate return on investment as would have been received had the tax credits been as originally anticipated. Such provisions may adjust one or more of the required capital contribution by the Series, the local general partners' share of the cash available for distribution, or the Series' share of sale proceeds.

Rights of Limited Partner. As a limited partner or non-managing member of a local limited partnership, a Series will have no right to manage its operations. However, the Series will have voting rights, including the rights:

- ☐ to replace the local general partner on the basis of the performance and discharge of the local general partner's obligations,
- ☐ to approve or disapprove a sale or refinancing of the apartment complex,
- ☐ to approve or disapprove the dissolution of the local limited partnership, and
- ☐ to approve or disapprove amendments to the partnership agreement of the local limited partnership.

However, in the case of an apartment complex which has government-subsidized financing or rental assistance, the ability of the Series to take such actions may be subject to the prior approval of the government agency providing the assistance. See "Other Government Assistance Programs" and "Risk Factors--Risks related to investments in local limited partnerships and apartment complexes."

The partnership agreement of each local limited partnership will provide the Series with other rights, including rights relating to the calling of meetings, reports and access to records comparable to those granted to the investors by each Series. Generally, the Fund Manager will exercise each of the foregoing voting and other rights on behalf of the Series, and investors will not have any right to participate therein. See "Conflicts of Interest" above and "Role of Special Limited Partner" below. However, if a VMB entity serves as a local general partner of a local limited partnership, then the Series' voting and other rights will be exercisable by the Series' investors.

Role of Special Limited Partner. VMB Housing, L.P. is a Kansas limited partnership. The general partner of VMB Housing, L.P. is VMB & Associates, Inc. VMB Housing, L.P. was formed in ____ [Year] to act as a special limited partner in all limited partnerships invested in by VMB-partnerships. It is anticipated that VMB Housing, L.P. will be a special limited partner in each of the local limited partnerships and will be granted most of the following rights:

- ☐ to assume the duties and receive the benefits of the local general partner upon the removal or withdrawal of the local general partner,
- ☐ to approve the selection of, and/or dismiss, any manager of the apartment complex,
- ☐ to approve the selection of, and/or dismiss, the accountants for the local limited partnership,
- ☐ to direct the decisions of the tax matters partner of the local limited partnership, including the right to bring and defend administrative and judicial actions and make tax elections,

- ☐ to compel the local general partner to locate a buyer for the apartment complex or the Series' interest in the local limited partnership, and
- ☐ to approve or disapprove transactions outside of the ordinary course of business proposed by the local limited partnership.

In the case of an apartment complex which has government-subsidized financing or rental assistance, the ability of the special limited partner to take such actions may be subject to the prior approval of the government agency providing such assistance. See "Other Government Assistance Programs" and "Risk Factors--Risks related to investments in local limited partnerships and apartment complexes."

An explanation of the laws concerning limited liability is helpful to understand why VMB Housing, L.P. serves in this capacity. A limited partner is referred to as such because his liability for his partnership's obligations is limited. A limited partner's exposure is limited to the amount of his capital contribution. In order to preserve his status as a limited partner, a person named as a limited partner must not participate in the control of the business of the partnership. The meaning of control for these purposes may vary from jurisdiction to jurisdiction. It is possible that the powers listed above could be found to constitute control of a local limited partnership. If so, and if they were performed by a Series, the Series would have general liability for the obligations of the local limited partnership. Accordingly, in order to avoid to the extent possible exposure for general liability, VMB Housing, L.P. will possess and exercise such powers on behalf of the Series. VMB Housing, L.P. will receive no compensation for acting in this fashion, and will receive an immaterial interest in the tax items of the local limited partnerships. See "Management Compensation."

Interests in Profits, Losses and Distributions. In almost all instances each Series will acquire at least a 90% interest in the profits, losses and federal tax credits of each local limited partnership. Only in rare cases would a Series acquire a lesser interest in the profits, losses and federal tax credits of a local limited partnership. See, for example, "Joint Investments" below in this section. Except for an immaterial interest in each local limited partnership not to exceed 0.1% which will go to VMB Housing, L.P., the balance of 10% or less will go to the local general partners and their affiliates. The exact amount to be allocated to each party will be negotiated in each instance.

It is possible that a local limited partnership may generate state low income housing tax credits as well as federal low income housing tax credits. If so, the state tax credits may be allocated entirely to the local general partners or to a special or other limited partner which may or may not be an affiliate of the local general partners or the VMB entities. A nominal interest in federal income tax items and credits might also be allocated with the state tax credits. If the special or other limited partner were an affiliate of the VMB entities, the VMB entities would receive compensation from the affiliate for arranging the transaction.

The local general partners will receive reimbursements of expenses from cash flow from operations and distributions of a portion of such cash flow as management fees and/or partnership participations. The Series will receive from 10% to 50% of the sale or refinancing proceeds. The sharing arrangements for all cash distributions will depend upon:

- ☐ the competition for interests in apartment complexes,
- ☐ the proportion of residential units in the apartment complex eligible for low income housing tax credits,
- ☐ the amount invested in the apartment complex by the Series relative to the other sources of

financing,

- ☐ the percentage interest in the profits and losses of the local limited partnership acquired by the Series relative to the interests held by other parties, and
- ☐ the amounts of cash flow and appreciation anticipated.

Joint Investments.

A Series may invest in a local limited partnership jointly with the other Series or limited partnerships, including VMB-partnerships, provided that:

- ☐ the partnerships have similar investment objectives,
- ☐ there are no duplicate property management or other fees,
- ☐ the compensation to the sponsors of each partnership is substantially similar,
- ☐ the investment of each partnership is on substantially the same terms and conditions,
- ☐ each partnership will have a right of first refusal if another partnership wishes to sell its interest in the local limited partnership. There is a risk that a partnership may not have sufficient resources to make such a purchase.

See "Risk Factors--Risks related to investments in local limited partnerships and apartment complexes" and "Conflicts of Interest." A Series cannot engage in activities through a joint venture that it could not undertake alone.

The Fund Manager currently does not anticipate that the Series will invest jointly in local limited partnership interests. However, a Series may do so at any time.

Use of Leverage.

The Series may borrow funds to make initial investments in local limited partnerships before the sale of Units. Otherwise, the Series do not anticipate borrowing funds, although they have full authority to borrow money as deemed necessary or appropriate to achieving the Series' investment objectives.

VMB & Associates, Inc. or its affiliates may advance funds from time to time to a Series so that the Series may make initial investments, loans and/or deposits in local limited partnerships before the sale of the Series' Units. Such advances, together with interest thereon, will be repaid from the proceeds of the offering. See "Estimated Use of Proceeds." Loans provided by VMB & Associates, Inc. or an affiliate must:

- ☐ be on a short-term basis,
- ☐ not be subject to any prepayment charge or penalty, and

- ☐ not bear any interest, charges or fees in excess of the amounts which would be charged by unrelated lending institutions on comparable loans for the same purpose in the same locality.

In no event may interest be more than the prime rate of AmeriBank plus 2% per annum. The prime rate is the prime or reference rate charged by AmeriBank to its most creditworthy customers.

The ability of a Series to generate tax credits in the amounts anticipated will depend in part on the use of leverage by the local limited partnerships.

Accordingly, the Fund Manager expects that the local limited partnerships will use debt to finance approximately 30% to 80% of the acquisition and development costs of their apartment complexes. Financing may include loans made, guaranteed or subsidized by agencies of federal, state or local governments, including:

- ☐ state or local government bond financing,
- ☐ mortgages which are not amortized over their terms but which require large payments on maturity,
- ☐ loans providing for variable interest rates after 15 years,
- ☐ loans with renegotiable interest rates, and
- ☐ loans from non-profit organizations.

See "Other Government Assistance Programs" and "Risk Factors--Risks related to investments in local limited partnerships and apartment complexes." The Series will not impose any limitation on the indebtedness which may be incurred by any local limited partnership. However, following the termination of its offering, a Series' share of indebtedness may not exceed:

- ☐ with respect to non-subsidized apartment complexes, the sum of 85% of the aggregate purchase price of all apartment complexes which have not been refinanced, and 85% of the aggregate fair market value of all apartment complexes which have been refinanced, and
- ☐ with respect to subsidized apartment complexes, the sum of 100% of the aggregate purchase price of all apartment complexes which have not been refinanced, and 100% of the aggregate fair market value of all apartment complexes which have been refinanced.

Sale or Other Disposition of Investments.

In general, the sale of an apartment complex or the sale of a Series' interest in a local limited partnership will be subject to restrictions. These restrictions will require that the investments be held for substantial periods. A Series will hold its investments for the 15-year compliance period in order to avoid recapture of tax credits. See "The Low Income Housing Tax Credit." Subject to the restrictions discussed below, after the 15-year compliance period a Series will attempt to sell its investments with the objective of returning to its investors, at a minimum, their invested capital. However, the Fund Manager may cause a Series to sell or refinance any investments at an earlier or later time if it decides that it is in the

best interests of the Series to do so under all of the then applicable circumstances.

The low income residential units in an apartment complex generally must be rented as low income housing for at least 30 years and, possibly, of up to 55 years or longer. As a result, any sale of an apartment complex during that period must be to a purchaser who agrees to maintain the apartment complex as low income housing for the duration of such period.

Additional restrictions on sale will be imposed on apartment complexes receiving government financing or operating subsidies. For example, current regulations of the United States Department of Agriculture, Rural Development permit the sale of a property which is financed by Rural Development only with the approval of Rural Development. Mortgage loans funded by Rural Development cannot be prepaid at any time during their terms. Similarly, current regulations of the U.S. Department of Housing and Urban Development require that HUD must approve the sale of more than 50% of the interests in any limited partnership or limited liability company which owns a property receiving some form of HUD subsidies.

However, consistent with the foregoing and other applicable regulatory restrictions, the Fund Manager believes that the local limited partnerships should be able to sell the apartment complexes after a 15-to 20-year holding period to:

- ☐ an entity similar to the Series or the local limited partnership which would agree to continue to operate the apartment complex as low income housing for the balance of the required period. Such a sale would be likely only if at the time of sale the Internal Revenue Code offered benefits to the owners of existing low income housing; or
- ☐ other types of purchasers which may have incentives to acquire and operate the low income housing, such as an organization formed on behalf of the tenants or a state agency or non-profit organization.

Reserves.

Each Series initially will set aside at least 3% of the offering proceeds as reserves for contingencies and to pay expenses. The Fund Manager will increase or decrease the reserve balance from time to time as it deems appropriate. The reserves may be used to cure any problems of the apartment complexes, although most apartment complexes will have their own reserves. A Series may also use its reserves to pay its expenses, including the annual asset management fee, to the extent cash flow is insufficient for such purposes.

Other Policies.

Until required by a Series for use in connection with its business and operations as described in this Memorandum, all funds received by a Series from its offering will be held in:

- ☐ United States government securities,
- ☐ securities issued or fully guaranteed by United States government agencies,
- ☐ certificates of deposit and time or demand deposits in, or repurchase agreements constituting

obligations of, commercial banks with deposits insured by the Federal Deposit Insurance Corporation, or

☐ other short-term, highly-liquid investments, excluding common stock.

No Series will lend funds, except that a Series may:

☐ make loans to, or post letters of credit for, a local limited partnership, and

☐ may make temporary investments of the type described in the preceding paragraph.

No Series will:

☐ underwrite securities of other issuers,

☐ offer securities in exchange for property,

☐ except in connection with the investments of funds in local limited partnerships, invest in securities of other issuers, other than in temporary investments as described above,

☐ utilize cash from operations to acquire interests in local limited partnerships, or

☐ reinvest proceeds from a sale or refinancing transaction unless the Series distributes to each investor an amount equal to the federal, state and local income tax liability of the investor arising from the sale or refinancing transaction. In computing tax liability for these purposes the Series will assume that each investor is in a combined federal, state and local marginal income tax bracket of 30%. In no event will sale or refinancing proceeds be reinvested following the second anniversary of the termination of the Series' offering.

After the conclusion of its offering a Series may repurchase Units upon the written request of an investor. No Series is obligated to repurchase any Units at any time, and there is no assurance that a Series will in fact ever repurchase any Units. No Units will be repurchased from the VMB entities.

Neither Series is a real estate investment trust and, therefore, neither is subject to the restrictions imposed on such entities by the Internal Revenue Code. Each Series will use its best efforts to conduct its operations so as not to be required to register as an investment company under the Investment Company Act of 1940.

Neither Series will engage in any transaction which would result in the receipt by a VMB entity of any undisclosed rebate or give-up. Neither Series will engage in any reciprocal business arrangement which would result in the circumvention of the restrictions contained in its partnership agreement.

THE LOW INCOME HOUSING TAX CREDIT

Summary.

Section 42 of the Internal Revenue Code provides low income housing tax credits to investors in low income housing. Following is a summary of the material concepts included in *Internal Revenue Code Section 42* and its interrelation with other Internal Revenue Code provisions. Each of these other provisions is discussed in greater detail in the subsections below and under "Federal Income Tax Considerations."

Low income housing tax credits are indirect federal subsidies of low income housing. They are being used by individuals, small businesses and large corporations. Low income housing tax credits offset tax liability dollar-for-dollar regardless of a taxpayer's tax bracket because they are tax credits and not tax deductions. Therefore, tax credits are more valuable than tax deductions or tax deferrals. Taxes are one of the largest expenses faced by taxpayers and one of the greatest barriers to retaining earned income. According to a report issued by the Tax Foundation, in ____ [Year] the average American had to work two hours and twenty-four minutes of each eight-hour workday to pay all taxes. Federal taxes used one hour and thirty-seven minutes of earnings, and state and local taxes used forty-seven minutes of earnings. The report states that American workers utilized a greater portion of the workday to pay taxes than to pay for food, clothing, and housing and household operations. An investment in low income housing tax credits reduces federal tax liability and thereby can increase after-tax spendable income.

As stated above, low income housing tax credits are tax credits rather than the more familiar tax deductions. Tax credits offset tax liability dollar-for-dollar. For example, a married couple filing jointly with taxable income of \$100,000 in ____ [Year] would be subject to federal income tax liability in the amount of approximately \$18,600. The last \$25,000 of their income would be taxed at a 25% marginal rate. See "Federal Income Tax Considerations--Other Important Tax Considerations--Tax Rates" and "Changes in Tax Law."

GRAPHIC DELETED

If the couple had \$6,250 in low income housing tax credits, their federal tax liability of \$18,600 would be reduced by \$6,250 to \$12,350. As discussed under "Federal Income Tax Considerations--Limitations on Losses and Credits from Passive Activities--Exception for Tax Credits," the maximum permissible amount of low income housing tax credits to the couple under the so-called \$25,000 deduction equivalent at a marginal tax rate of 25% is \$6,250.

GRAPHIC DELETED

These pie charts are intended to display that low income housing tax credits reduce income taxes dollar-for-dollar. They are not, nor should they be interpreted as, predictions of low income housing tax credits to be allocated to an investor. The absolute and/or relative percentage reduction in federal income taxes to be realized by any investor will depend on his actual tax liabilities and his actual low income housing tax credits.

According to the ____ [Year] Housing Credit Conference & Marketplace Reference Manual, National Council of State Housing Agencies, low income housing tax credits accounted for the construction of approximately 59,400 housing units in ____ [Year]. Nonetheless, the affordable housing problem has worsened over the last 25 years. According to the ____ [Year] issue of *The State of the Nation's Housing*, published by the Joint Center for Housing Studies of Harvard University, "A staggering three in ten US households have housing affordability problems. Fully 14.3 million are severely cost-burdened (spend more than 50 percent of their incomes on housing) and another 17.3 million are moderately cost-burdened (spend 30-50 percent of their incomes on housing). Some 9.3 million households live in over-crowded units or housing classified as physically inadequate. And a disheartening 3.7 million households face more than one of these problem...The simple fact is the cost of supplying even the most modest housing far exceeds the amount many lower-income households can pay. Based on HUD's fair market rent measure, households with one

full-time minimum wage earner cannot afford to rent even a one-bedroom apartment anywhere in the country."

Low income housing tax credits are designed to subsidize either 70% or 30% of the costs of the low income residential units in an apartment complex. Accordingly, the amount of low income housing tax credits is based on the cost of a property, rather than the operations of the property, and are pre-determined when the property is placed in service. The subsidy is realized by claiming low income housing tax credits every year for 10 years. This results in a steady and predictable stream of tax credits. Unlike other investments, once determined, the amount of tax credits does not fluctuate.

In exchange for the right to claim low income housing tax credits, the owner of the apartment complex must:

- ☐ itself rent the low income residential units to low income individuals at reduced rental rates for at least 15 years, and
- ☐ grant the state in which the property is located the power to require that the property be rented as low income housing for a total period of 30 or more years.

Failure to comply with the first requirement results in ineligibility for the low income housing tax credits not yet claimed and the recapture of a portion of credits previously claimed.

Low income housing tax credits are allocated by the state in which the housing is located. *Internal Revenue Code Section 42* authorizes a fixed amount of low income housing tax credits which any state may allocate in any year.

Most taxpayers are not able to claim low income housing tax credits in unlimited amounts. Rather, the ability to use tax credits is limited by the provisions of the Internal Revenue Code known as the passive activity rules, the at risk rules, the overall limitation on general business tax credits, and the alternative minimum tax rules. Each of these rules is discussed in greater detail under "Federal Income Tax Considerations."

The low income housing tax credit program is extremely technical in nature. The U.S. Department of the Treasury has issued Regulations with regard to a portion of the program's rules, but not with regard to other important portions, and there can be no assurance that the provisions of *Section 42 of the Internal Revenue Code* will be interpreted in a manner consistent with the description set forth below. Furthermore, the discussion that follows is general in nature. Because the Series have not yet identified any of the local limited partnerships in which they will invest, it is impossible to predict how specific provisions of the low income housing tax credit program will apply to the apartment complexes.

Qualified Properties.

Qualified Low Income Projects. Low income housing tax credits are available only for qualified low income housing projects. Qualified low income housing projects are residential rental properties in which:

- ☐ 20% or more of the residential rental units are occupied by individuals with incomes of 50% or less of area median income, as adjusted for family size, or
- ☐ 40% or more of the residential rental units are occupied by individuals with incomes of 60% or less of area median income, as adjusted for family size.

This minimum set-aside requirement must be met in order for any portion of an apartment complex to be eligible for

low income housing tax credits. Additional residential rental units in an apartment complex beyond the minimum set-aside also can qualify for low income housing tax credits.

Minimum Set-Aside Income Computation				
Applicable Minimum Set-Aside Percentage (50% or 60%)	X	Area Median Gross Income (Based on Actual Number of Persons)	=	Allowable Household Income

Additionally, the gross rent charged to low income tenants cannot exceed 30% of the applicable minimum set-aside income. The applicable minimum set-aside income is 50% or 60% of area median income. This rent restriction test uses a statutory assumption that, in the case of a unit which does not have a separate bedroom, the unit is occupied by one individual, and, in all other cases, that the unit is occupied by one and one-half individuals per separate bedroom. Gross rent for this purpose includes the cost of any utilities, other than telephone, and any mandatory costs for services such as meals and social services. Federal, state and local rental assistance payments are not included in gross rent. Thus an owner may receive a rental subsidy payment in addition to the amount paid by the tenant.

Rent Restriction Computation

1.	Number of bedrooms	X	1.5	=	Imputed Household*
2.	Area Median Gross Income (Based on Imputed Household)	X	Applicable Minimum Set-Aside Percentage (50% or 60%)	=	Imputed Income
3.	Imputed Income	X	.30	=	Maximum Gross Rent

* Imputed household =1 if studio apartment.

Units which satisfy both the minimum set-aside test and the rent restriction test are low income residential units. To qualify for low income housing tax credits low income residential units cannot be used on a transient basis.

Under *Internal Revenue Code Section 42(g)(3)* an apartment complex must meet the minimum set-aside requirements as well as the rent restriction test not later than the close of the first year of the 15-year compliance period for the property. The owner may elect which of the 20-50 minimum set-aside test or the 40-60 minimum set-aside test it proposes to meet but, once made, the election is irrevocable. In order to avoid tax credit recapture, the apartment complex must remain in compliance with the rules governing the low income housing tax credit program for the 15-year compliance period.

Eligible Basis. The qualified basis of an apartment complex with respect to which low income housing tax credits are computed is generally:

- ☐ the applicable fraction of
- ☐ the eligible basis in a building attributable to the low income residential units.

In general, the eligible basis of a building is its adjusted basis for federal income tax purposes. Eligible basis is determined as of the close of the first year of the 15-year compliance period. For a newly constructed building, eligible basis is the cost of construction, including all direct costs and related soft costs, such as construction period interest, developer's and architects' fees, other compensation, insurance and general and administrative expenses related to construction. However, the IRS has issued Technical Advice Memorandums indicating that some items, under certain circumstances, may not be includable in eligible basis. These items included construction loan costs, one-time local impact fees, and land preparation costs. For a substantially rehabilitated building, eligible basis is comprised of the rehabilitation costs aggregated over a 24-month period. Acquisition costs may only be included in eligible basis to the extent they satisfy the principles for inclusion discussed below in this section under "Maximum Amount of Credit." Land costs may not be included in eligible basis. Because only the adjusted basis of a building may be included in eligible basis, an owner must take into account the adjustments to basis described in *Section 1016 of the Internal Revenue Code*, except for depreciation. For example, a reduction in basis equal to any historic tax credit allowed with respect to a property would be taken into account. Similar treatment may be afforded other types of tax credits. No opinion of counsel will be rendered with respect to the calculation of an apartment complex's adjusted basis.

It is likely that the IRS will give careful attention to the calculation of eligible basis if the IRS audits the owner of a low income housing property. In particular, in addition to the items listed above, the IRS may review the inclusion of developer's fees in eligible basis. The IRS has taken the position that developer's fees were paid for more than developer's services. Depending on the circumstances, the IRS has asserted that the fee also covered land acquisition activities, syndication activities and organization activities. Fees for those types of activities are not properly included in eligible basis. The IRS could also take adverse positions concerning developer's fees paid with a promissory note. The IRS could contend that fees paid with a promissory note:

- ☐ cannot be included in eligible basis at all, as discussed under "Federal Income Tax Considerations--Basis of Local Limited Partnerships in Their Apartment Complexes,"
- ☐ must be allocated to the general partners of the owner and not the limited partners, as discussed under "Profits and Losses, Tax Credits and Cash Distributions--Allocations of Profits and Losses--Special Allocations," or
- ☐ do not satisfy the at risk rules, as discussed under "Utilization of the Low Income Housing Tax Credit--Low Income Housing Tax Credit At Risk Rules."

The eligible basis of any building is reduced by the portion of the adjusted basis of the building which is attributable to residential rental units in the building which:

- ☐ are not low income residential units, and
- ☐ which are above the average quality standard of the low income residential units.

However, at the election of the taxpayer, the cost of a residential unit that would otherwise be excluded from eligible basis under this rule may be included in eligible basis if:

- ☐ the excess of the cost of such unit over the average cost of the low income residential units does not exceed 15% of the average cost of the low income residential units, and
- ☐ the excess cost is excluded from eligible basis.

For all types of buildings, eligible basis includes not only the adjusted basis of the residential rental units but also the adjusted basis of property used in common areas and amenities used by the tenants. Amenities include major appliances. Subject to limitations, the eligible basis of a building located in a qualified census tract may also include the adjusted basis of depreciable property used in providing a community service facility. A community service facility is one designed to service primarily individuals whose income is 60% or less of area median income. The costs of amenities in the non-low income residential units may only be included if the amenities are comparable to the costs of amenities in the low income residential units. Also, the allocable costs of tenant facilities such as swimming pools or other recreational facilities and parking areas may be included provided there is not a separate fee for use of these facilities and they are available on a comparable basis to all tenants.

Residential rental property may qualify for low income housing tax credits even though a portion of the building is available for commercial use. However, no portion of the cost of such nonresidential property may be included in eligible basis.

Eligible basis may not include the amount of any federal grant, whether or not such grant is includable in gross income. A federal grant for such purpose includes any grant to the extent it is federally funded. A federal grant does not include a federal loan or rental subsidy.

The eligible basis of a building located in an area designated by the U.S. Department of Housing and Urban Development as a qualified census tract or as difficult to develop will be deemed to be 130% of the eligible basis determined under the principles outlined above. A qualified census tract means a census tract or an enumeration district designated by HUD either:

- ☐ in which 50% or more of the households have an income which is less than 60% of the area median gross income, or
- ☐ which has a poverty rate of at least 25%.

An area is treated as difficult to develop if it has high construction, land and utility costs relative to area median gross income.

Determination of Eligible Basis

Eligible Basis Can Include:

Construction and rehabilitation costs
Acquisition costs
Site improvements

Eligible Basis Excludes:

Depreciation
Land
Historic and other tax credits claimed

28-22A Current Legal Forms for Real Estate FORM 22A.08

Developer's and architects' fees	Federal grants
Comparable non-low income units	Non-comparable non-low income units
Common facilities available to all if no separate fee	Commercial portion of mixed-use properties
Personal property	

Qualified Basis. The qualified basis if an apartment complex with respect to which low income housing tax credits are computed is generally the applicable fraction of the eligible basis in the building attributable to the low income residential units.

The applicable fraction is the lesser of:

- ☐ the proportion of occupied low income residential units to all residential rental units, whether or not occupied, or
- ☐ the proportion of floor space in the occupied low income residential units to the total floor space of all residential rental units, whether or not occupied.
-

Qualified Basis Computation

Eligible Basis	X	Unit Applicable Fraction or Floor Space Applicable Fraction	=	Qualified Basis

Maximum Amount of Credit.

Under *Internal Revenue Code Section 42*, an owner of low income housing receives tax credits for a 10-year credit period. The ceiling on tax credits limits the present value of the 10-year stream of credits to 70% or 30% of the qualified basis of the housing. The present value percentage is determined primarily by long-term interest rates at the outset of the 10-year credit period, and does not fluctuate with stock or bond prices. There are two basic credit categories:

1. Properties which are not federally subsidized and which are newly constructed or substantially rehabilitated receive a maximum credit which will yield a present value of 70% of the qualified basis of the property. Congress determined that for 1987 a 9% annual credit would have a present value of 70%; thus 9% was the applicable percentage for 1987. For years after 1987, each month the Treasury Department redetermines the appropriate yearly applicable percentage that will yield a 70% present value over 10 years utilizing a prescribed discounting methodology. For properties placed

in service in July ____ [Year], the yearly applicable percentage is 7.78%.

2. Properties which are federally subsidized and which are newly constructed or substantially rehabilitated receive a maximum credit which will yield a present value of 30% of the qualified basis of the property. Congress determined that for 1987 a 4% annual credit would have a present value of 30%; thus 4% was the applicable percentage for 1987. For years after 1987, the Treasury Department makes monthly redeterminations in a manner corresponding to that described for the 70% present value credit. For properties placed in service in July ____ [Year], the yearly applicable percentage is 3.33%.

For purposes of the low income housing tax credit program, federal subsidies include only tax-exempt financing and below-market-interest-rate federal loans. See the material below under the caption "Other Government Assistance Programs" for a discussion of whether the loan programs which may be used by local limited partnerships are considered federal subsidies for these purposes. An owner has the option of excluding federally subsidized loans from qualified basis and then using the 70% present value credit against the remaining qualified basis.

Calculation of Low Income Housing Tax Credit

Qualified Basis	X	Applicable Percentage	=	Low Income Housing Tax Credit

Substantial rehabilitation is defined as capital expenditures other than acquisition costs incurred in connection with the rehabilitation of a property aggregated over a 24-month period in an amount equal to at least the greater of 10% of adjusted basis or \$3,000 per low income residential unit.

The acquisition costs of existing buildings will only be eligible for a credit if the buildings are subject to substantial rehabilitation. If the substantial rehabilitation test is satisfied the acquisition costs are eligible for the 30% present value credit. However, acquisition costs are not available for the 30% present value credit if the property was last transferred, or if it underwent rehabilitation work, during the prior 10 years, although the Secretary of the Treasury may waive this rule in defined instances.

The applicable percentage for a property is determined in the earlier of:

- ☐ the month in which the property is placed in service, or
- ☐ at the election of the owner, the month in which the owner and the state housing credit agency enter into an agreement to allocate low income housing tax credits to the property.

Credits Subject to State Allocation.

The Internal Revenue Code limits the amounts of low income housing tax credits which can be allocated in any year. Low income housing tax credits are allocated by the states. In most cases, a state directly allocates low income housing tax credits to properties. For ____ [Year], the maximum allocation is the greater of \$1.75 per resident or \$2,000,000.

The volume cap will be increased in ____ [Year] and each year thereafter by a cost of living adjustment.

If a state fails to allocate its maximum tax credits in a year, the Internal Revenue Code permits a one-year carry forward of the unused amount by that state. If the unused amount is not used by the state during the carryforward period, it is reallocated to other states through a national pool.

In other cases, a state indirectly allocates tax credits by authorizing the issuance of tax-exempt bonds, the proceeds of which are used to finance the construction of low income housing. The ability of a state to issue tax-exempt bonds is subject to a ceiling included in the Internal Revenue Code.

Once tax credits are allocated to an apartment complex, the development does not have to reapply for tax credits in later years. Accordingly, all low income housing tax credits to be claimed by investors over the 10-year credit period are allocated at the outset of the 10-year period.

Generally, a building must be placed in service during the year for which the low income housing tax credits are allocated by the housing credit agency. There are exceptions to this general rule, the most important of which is the 10% carryover rule. Under this exception, a building can be placed in service not later than the close of the second calendar year following the calendar year in which the allocation is made. This exception is available if the taxpayer's basis in the building as of a designated date is more than 10% of the taxpayer's reasonably expected basis in such building as of the close of such second calendar year. The designated date is the later of:

- ☐ the date which is six months after the date the allocation is made, or
- ☐ the close of the calendar year.

For this purpose only, basis includes the cost of land.

Low income housing tax credits may not be allocated to any property unless the owner and the state execute an extended low income housing commitment for the apartment complex. In general, the extended low income housing commitment will require that the building be rented as low income housing for the period agreed to by the owner and the state. The period cannot be less than 30 years, and might be substantially longer. The extended low income housing commitment does not prevent the sale of the building to a new owner. It only requires that the new owner continue to rent the building as low income housing.

The extended low income housing commitment must be:

- ☐ binding on all successors of the owner,
- ☐ grant all individuals meeting the income limitation applicable to the building the right to enforce its terms in state court,
- ☐ be recorded as a restrictive covenant,
- ☐ prohibit any increase in the gross rent for a low income residential unit not otherwise permitted by *Internal Revenue Code Section 42*,
- ☐ prohibit the refusal to lease to a holder of a Section 8 voucher or certificate of eligibility because of

the status of the prospective tenant as such a holder, and

- ☐ prohibit the disposition to any person of any portion of the low income residential units unless all of the low income residential units are disposed of to such person.

After a period of 14 years, the owner may make a request that the state find someone to buy the building. The state will have one year to locate a buyer at a price no less than:

- ☐ with respect to the portion of the building which does not constitute low income residential units, the fair market value thereof, and
- ☐ with respect to the low income residential units, the applicable fraction of
- ☐ the outstanding indebtedness secured by the building, plus
 - ☐ the adjusted investor equity in the building, minus
 - ☐ cash distributions made or available from the building.

For these purposes, adjusted investor equity is the aggregate amount of cash invested in the building increased by a cost of living adjustment.

Price for Low Income Residential Units

Step 1	Debt	+	Adjusted Investor Equity	-	Distributions
Step 2	Unit Applicable Fraction or Floor Space Applicable Fraction	X	Result of Step 1		

If no buyer is located, the building may be converted to market-rate use. Low income tenants may not be evicted for a three-year period.

Despite the preceding, the one-year notice provision outlined above will not apply to the extent more stringent requirements are imposed under the extended low income housing commitment or state law.

Internal Revenue Code Section 42(m) imposes requirements on the state agencies which allocate low income housing tax credits. In general, an allocating agency must develop and follow a qualified allocation plan which ranks the developments applying for tax credits. The selection criteria must address:

- ☐ location factors, e.g., broad geographic distribution, designated target areas such as inner cities, Community Development Block Grant neighborhoods, distressed communities, pockets of poverty and

rural areas,

- ☐ housing needs characteristics, e.g., low vacancy rate, income mix of tenants within the development and meeting state, regional or local housing needs and priorities,
- ☐ development characteristics, e.g., whether the development increases the stock of low-income housing, whether substantial rehabilitation expenditures are needed by the development, energy conservation, quality of units and type of financing, including whether the project includes the use of existing housing as part of a community revitalization plan,
- ☐ sponsor characteristics, e.g., nonprofit sponsorship and minority participation in development and management,
- ☐ tenant populations with special housing needs, e.g., elderly, handicapped, disabled, homeless, large families and the displaced,
- ☐ public housing waiting lists,
- ☐ tenant populations of individuals with children, and
- ☐ developments intended for eventual tenant ownership.

The agency also must:

- ☐ notify the chief executive officer of the local jurisdiction within which the development is located of such development and provide the officer a reasonable opportunity to comment on the development,
- ☐ require a comprehensive market study of the housing needs of low income people in the area to be serviced by the development to be conducted before the credit allocation is made and at the developer's expense by a disinterested party who is approved by such agency, and
- ☐ make available to the public a written explanation for any credit allocation which is not made in accordance with established priorities and criteria.

Once the agency has selected its developments, it must allocate tax credits by giving preference to developments serving the lowest income tenants, developments obligated to serve tenants for the longest periods, and projects which are located in qualified census tracts and the development of which contributes to a concerted community development plan. Further, an allocating agency must use good faith efforts to allocate no more tax credits to a development than are necessary for the development's financial feasibility and viability as low income housing through the 10-year credit period. In making this determination the agency must consider:

- ☐ the sources and uses of funds,
- ☐ the available federal, state and local subsidies committed to the development,

- ☐ the total financing planned for the development,
- ☐ the proceeds or receipts expected to be generated by reason of tax benefits,
- ☐ the percentage of the tax credits to be used for project costs other than the cost of intermediaries,
and
- ☐ the reasonableness of the developmental and operational costs.

The allocating state agency may reduce the tax credits for which the development would otherwise be eligible if the agency believes that the full amounts are not necessary in light of other sources of assistance that are available to the development.

At least 10% of a state's annual tax credits must be allocated to properties in which a qualified nonprofit organization:

- ☐ has an ownership interest, and
- ☐ materially participates in the development and operation.

Each state is required to monitor all developments for non-compliance with the provisions of the Internal Revenue Code. Each state must report non-compliance to the IRS.

Utilization of the Low Income Housing Tax Credit.

Reduction for Partial Year of Operations. Low income housing tax credits are claimed over a 10-year credit period. In the first year, the allowable credit amount is based on the number of months the low income residential units were occupied by low income individuals. This determination uses an averaging convention. For example, if half of the low income residential units were first occupied in October and the remaining half were first occupied in December, a calendar year taxpayer would adjust the amount of his tax credits to reflect that the units were occupied on average only 2 months, or 1/6 of the year. To the extent that there is a reduction of tax credits in the first year, there is an addition to tax credits in the eleventh year.

Low Income Housing Tax Credit At Risk Rules. In order to fully utilize low income housing tax credits, a taxpayer who is:

- ☐ an individual,
- ☐ an S corporation, or
- ☐ a closely-held corporation,

must be at risk with respect to the investment in the low income housing. For these purposes an S corporation is a corporation which elects to be subject to Subchapter S under the Internal Revenue Code. A closely-held corporation is one in which five or fewer shareholders directly or indirectly own more

than 50% of the stock at any time during the last half of its relevant fiscal year. Generally, the qualified basis to any such taxpayer for the low income housing is reduced for at risk purposes by the amount of any non-qualified nonrecourse financing. Qualified commercial financing is not considered non-qualified nonrecourse financing. Therefore, a taxpayer will be considered to be at risk for purposes of low income housing tax credits with respect to qualified commercial financing. Qualified commercial financing is financing with respect to any property if the taxpayer acquires the property from an unrelated person, and the financing is borrowed from:

- ☐ any federal, state or local government,
- ☐ a person who is actively and regularly engaged in the business of lending money and who is not:
 - ☐ a person from whom the taxpayer acquired the property, or
 - ☐ a person who receives a fee with respect to the taxpayer's investment in the property, or
- ☐ a nonprofit organization which:
 - ☐ is not affiliated with or controlled by a for-profit organization,
 - ☐ has the purpose of fostering low-income housing, and
 - ☐ does not receive a fee with respect to the taxpayer's investment in the property,if the financing from the nonprofit organization is:
 - ☐ not in excess of 60% of the eligible basis of the apartment complex,
 - ☐ secured by the building, and
 - ☐ fully repaid on or before the earliest of:
 - ☐ the maturity date,
 - ☐ the date the building is sold or the loan is refinanced, or
 - ☐ 90 days after the close of the 15-year compliance period. If the nonprofit organization or an affiliate did not sell the property to the taxpayer, this is extended to 90 days after the earlier of:
 - ☐ the date the apartment complex ceases to be a qualified low income project, or
 - ☐ the date which is 15 years after the close of the 15-year compliance period.

The Fund Manager does not anticipate that the amount of low income housing tax credits allowable to investors will be limited under the at risk rules because each Series intends to invest in local limited partnerships that obtain qualified commercial financing as described above. However, counsel has rendered no opinion on this issue because it depends upon the specific nature of each apartment complex and its financing.

Other Limitations. Most investors are limited in their use of tax credits. Generally, individuals who have no passive income can only use tax credits to shelter up to the equivalent of \$25,000 of active or portfolio income. The allowance of tax credits is subject to other limitations. For a more complete discussion of these limitations see "Federal Income Tax Considerations--Limitations on Losses and Credits from Passive Activities," "General Business Tax Credit Limitations" and "Other Important Tax Considerations--Alternative Minimum Tax."

Recapture of Low Income Housing Tax Credits.

During each year of the 15-year compliance period the owner must certify to the Secretary of the Treasury that its apartment complex has complied throughout the year with the requirements for the tax credits. The owner must also report:

- ☐ the qualified basis of the development, and
- ☐ the maximum applicable percentage and qualified basis taken into account by the state allocating agency.

A Series will lose unclaimed tax credits and the investors will be required to recapture with interest a portion of any tax credits previously taken if, during the 15-year compliance period, any of the following events occur:

- ☐ an apartment complex is sold,
- ☐ an interest in a local limited partnership is sold,
- ☐ the qualified basis of the apartment complex is reduced. Events causing a reduction in qualified basis can include casualty losses and the failure to meet the minimum set-aside test or the rent restriction test.

The Internal Revenue Code provides rules for avoiding recapture penalties. For example, no recapture applies if the failure to satisfy the minimum set-aside requirement is:

- ☐ a de minimis error, and
- ☐ the failure is waived by the Secretary of the Treasury.

No recapture occurs if the reduction in qualified basis is corrected within a reasonable period, although the term reasonable is not defined in the Internal Revenue Code. A tenant's income may rise by as much as 140% over the qualifying income for that unit and the unit may still be considered a low income residential unit if it continues to be rent-restricted. Even if the tenant's income increases by more than that 140% amount, no recapture results unless any

vacant unit of comparable or smaller size in the development is rented to a non-qualifying tenant.

A local limited partnership or a Series can avoid recapture upon change of ownership by posting a bond with the Secretary of the Treasury, but only if it can be expected that the development will be operated as a qualified low income project for the remainder of the 15-year compliance period. As an alternative to posting a bond, a local limited partnership or a Series may establish a Treasury Direct Account. To do so, the local limited partnership or a Series would pledge Treasury securities to the IRS as security for the continued use of the development as a qualified low income project.

There is no recapture of low income housing tax credits if a casualty loss causes a reduction in qualified basis and the loss is restored by reconstruction or replacement within a reasonable period of time.

The amount of recapture is the accelerated portion of the low income housing tax credits on the project for all prior years. In addition, interest will be charged on the recapture amount. Interest is calculated from the due date for the return for the year the recapture amount was originally claimed.

The accelerated portion of low income housing tax credits in any year is the amount of the credit determined for the year less the amount which would have been determined for the year if all credits had been allowable ratably over the 15-year compliance period rather than the 10-year credit period.

Year of Event Giving Rise to Recapture	Portion Recaptured
1-11	5/15
12	4/15
13	3/15
14	2/15
15	1/15
After 15	0

State Low Income Housing Tax Credits.

A few states offer tax credits for low income housing located within the respective state. However, the Fund Manager does not expect that a significant number, if any, of the Series' investments will qualify for a state tax credit. For those that do, the state tax credits may be allocated to a partner or member of the local limited partnership other than the Series. See "Investment Objectives and Policies - Terms of the Local Limited Partnership Agreements - Interests in Profits, Losses and Distributions."

OTHER GOVERNMENT ASSISTANCE PROGRAMS

The discussion which follows describes federal and state government financing subsidy programs and operating subsidy

programs used in the past by VMB-partnerships. Some of a Series' apartment complexes may use these programs. The discussion is not all-inclusive. There can be no assurance that the terms of the programs discussed below will remain the same. The Fund Manager cannot predict which of these programs will be used by the local limited partnerships, or the percentage of apartment complexes which will receive any government financing subsidies or operating subsidies, until its investments have been selected.

Low income housing tax credits can be available for projects that receive financing subsidies or operating subsidies, as well as those that do not receive such subsidies. If a financing subsidy constitutes a federal subsidy under *Internal Revenue Code Section 42*, only the 30% present value tax credit can be available.

State and Local Bond Programs.

A number of states and some local jurisdictions have established housing finance agencies to assist in the development and financing of low and moderate income housing. Housing finance agencies are empowered to issue their own obligations which may be exempt from federal income tax. If so, the housing finance agencies sell the obligations in the tax-exempt municipal bond market at interest costs below conventional money market rates. The housing finance agencies then use the proceeds of the sale of their obligations to make or purchase mortgage loans for low and moderate income apartment complexes.

Generally, in cases where the mortgage loans of housing finance agencies are also insured by HUD, the HUD underwriting and regulatory standards and procedures are employed without any substantial additional requirements.

When a housing finance agency provides direct construction and permanent mortgage loans for multi-family housing without HUD mortgage insurance, the housing finance agency itself generally determines the economic feasibility of, market need for, demand for, and architectural construction characteristics of, the apartment complex. In such cases, the housing finance agency generally also monitors the progress of construction, marketing, rent-up and management of the completed apartment complex.

Although the criteria and requirements of housing finance agencies for non-HUD-insured direct mortgage loans vary, generally such loans are available in an amount of up to 90% of a housing finance agency's estimate of the total development cost of the apartment complex for terms of up to 40 years.

Generally, the owner must accept a limit on the amount of operating income which may be distributed annually. The direct loan programs of housing finance agencies frequently include requirements as to operating assurances, escrow, working capital and other deposits.

In order to maintain the tax-exempt nature of obligations issued by housing finance agencies:

- ☐ 20% of the units in an apartment complex must be rented to households at 50% of the area median income as adjusted for family size, or
- ☐ 40% of the units in an apartment complex must be rented to households at 60% of the area median income as adjusted for family size, and
- ☐ tenants may not pay more than 30% of their adjusted incomes for rent.

Typically, a mortgage loan financed with the proceeds of tax-exempt bonds may not be prepaid during the qualified

project period. Thereafter, it may be prepaid only upon payment of amounts necessary to redeem the housing finance agency's obligations, including the payment of premiums for early redemption. A housing finance agency's direct mortgage loan programs also impose limitations on the sale, refinancing or change in use of the apartment complex. They may also require that a restrictive covenant be placed on record prohibiting the use of the apartment complex for anything other than rental housing. Further, they may require approval of the sale of an interest in a partnership or limited liability company owner.

Apartment complexes financed by tax-exempt bonds issued by housing finance agencies may be eligible for low income housing tax credits. Apartment complexes financed by housing finance agencies typically are not allocated low income housing tax credits from a state's general pool. Rather, the Internal Revenue Code imposes a ceiling on the amount of tax-exempt bond authority available to a state or local agency. Apartment complexes financed by housing finance agencies are considered to be federally subsidized for purposes of low income housing tax credits, and thus eligible only for the 30% present value credit.

Home Investment Partnership Program

The Home Investment Partnership program was authorized under Title II of the Cranston-Gonzalez National Affordable Housing Act, enacted into law in 1990. The Home program is a federal housing program intended to support a wide variety of state and local low income housing programs.

Home program funds are allocated by HUD on a formula basis to participating state and local governments. Home program funds can be used to expand the supply of low income housing and to increase the number of households served by assisted housing programs. Funds can be used for acquisition, construction, moderate or substantial rehabilitation activities or for tenant-based rental assistance programs.

State and local jurisdictions are statutorily required to meet matching requirements in order to qualify for Home program funding. This match requirement is currently 25%.

Participating jurisdictions are allowed to use funds for equity investments, interest-bearing or non-interest-bearing loans, advances, interest subsidies, or other forms of assistance that HUD finds to be consistent with the purpose of the program.

Apartment complexes which are assisted with Home program funds must be occupied by low income families. For this purpose, low income families are those whose incomes do not exceed 80% of area median income, adjusted for family size. At least 20% of the dwelling units must be occupied by very low income families who pay rent equal to no more than:

- ☐ 30% of their adjusted income, or
- ☐ the amount permitted under the low income housing tax credit program.

Very low income families are those whose incomes do not exceed 50% of the area median income, adjusted for family size. The other 80% of the dwelling units must be rented at amounts which do not exceed the lesser of:

- ☐ the existing fair market rent under the HUD Section 8 program, or
- ☐ 30% of the adjusted income of a family whose income is 65% of the area median income, adjusted

for family size.

Accordingly, the rents allowed for the other 80% of the dwelling units may exceed the amounts permitted under the low income housing tax credit program.

If an apartment complex receives a Home program loan having a below-market-interest-rate, the apartment complex generally would be eligible only for the 30% present value low income housing tax credit because the apartment complex would be considered to be federally subsidized.

HUD Grant Programs to Local Governments.

The Community Development Block Grant program is authorized under Title I of the Housing and Community Development Act of 1974, as amended. Seventy percent of the program's allocation provides annual entitlement grants on a formula basis to metropolitan cities and urban counties. The remaining 30% is distributed to small cities either by states electing their own programs or by HUD on a competitive basis.

Grant recipients must give maximum feasible priority to CDBG activities which either benefit low-and moderate-income persons, aid in the elimination of slums and blight or address urgent needs of the community. Grant recipients may use CDBG funds for a wide range of activities. While rehabilitation, which may be accomplished through grants, loans or guarantees to developers, is a specifically-enumerated eligible activity, assistance to developers for new housing construction is generally only eligible when undertaken with the participation of neighborhood-based non-profit organizations, small business investment companies or local development corporations. Construction-related activities, such as land assembly, clearance and demolition, can be assisted without the participation of such entities.

The terms and conditions of the grant or loan of CDBG funds from a grant recipient to a developer will be negotiated between the grant recipient and the developer. Assisted activities are generally subject to several federal program requirements, including non-discrimination, environmental review and, in certain circumstances, payment of Davis-Bacon prevailing wage rates.

CDBG funds can be utilized with respect to an apartment complex eligible for low income housing tax credits. However, the amount of the grant must be deducted from the eligible basis of the apartment complex. After the deduction is made, the remaining qualified basis of the apartment complex would be eligible for the 70% present value credit if there were no other federal subsidies within the meaning of Section 42 of the Code.

HUD Section 8 Rental Assistance Programs.

HUD administers the Existing Housing Program under Section 8 of the National Housing Act. Under the Existing Housing Program low income tenants are given housing vouchers through a local housing authority. Tenants can use these vouchers to pay a significant portion of the rents for housing available in the private market, but only in projects approved by HUD on the basis of housing quality and suitability standards.

The definition of federally subsidized for purposes of the low income housing tax credits excludes all of the Section 8 programs except for the Moderate Rehabilitation Section 8 program, other than funds disbursed under the Stewart B. McKinney Homeless Assistance Act of 1988, so that units receiving such assistance may be eligible for the 70% present value credit.

RD Financing and Rural Rental Assistance Programs.

Section 515 of the Housing Act of 1949 authorizes the United States Department of Agriculture, Rural Development to provide direct below-market-interest-rate mortgage loans for rural rental housing. RD was formerly known as the Farmers Home Administration of the USDA. Such loans are in amounts of up to 95% of costs and for terms of up to 50 years. In addition, RD may provide an owner with mortgage interest subsidies, which effectively lower the interest rate of the loan to 1% per annum after the completion of the apartment complex. The owner must pass the benefits of the reduced interest rate on to tenants in the form of lower rents. A Section 515-financed apartment complex may be eligible for low income housing tax credits. However, if the financing is a below-market-interest-rate loan, the apartment complex would be considered federally subsidized and thus eligible only for the 30% present value credit.

RD regulations govern the operation of Section 515-financed apartment complexes. Failure of an owner to operate its apartment complex in compliance with RD regulations could result in termination of RD assistance.

RD regulations limit owners' cash distributions to a maximum cumulative return of 8% per annum on their equity investments. RD also requires monthly payments to a reserve account until 10% of the total construction cost of the apartment complex has been set aside. Among other things, RD must approve the management agent, the management agreement, any rent increases, a transfer or encumbrance of the apartment complex, the admission or removal of a general partner to a partnership owner or a manager to a limited liability company owner, and the reduction of a general partner's interest in a partnership owner. Prepayment of an RD mortgage loan is prohibited.

In its application to RD for interest credit subsidies, the owner of an apartment complex must submit budgets for market rents and budgets for basic rents. Market rents are rents required to operate on a limited profit basis with mortgage payments based on the interest rate provided in the RD mortgage loan. Budget rents are rents required to operate on a limited profit basis assuming a mortgage bearing interest at 1% per annum. The owner will have the option of charging basic rent or rent equal to 30% of a tenant's monthly adjusted income less a utility allowance. In neither case would the tenant be charged more than the market rent or less than the basic rent. Utilities are not included in either the basic rent or market rent. The owner will receive interest subsidies so that the amount which it must pay for debt service is the same as if the interest rate on its RD mortgage loan were 1% per annum, rather than the actual interest rate on the RD mortgage loan, plus the amount of overage for the month. Overage is the amount by which 30% of one-twelfth of a tenant's adjusted gross annual income exceeds the basic rent for his unit.

RD also provides rent subsidies, known as Rental Assistance Payments. In order to obtain Rental Assistance Payments for a newly constructed or substantially rehabilitated apartment complex, the owner must execute a rental assistance agreement with RD for a term of up to 20 years. However, some contracts may have only a five-year term. Upon expiration of the term of the agreement, a new agreement may be executed for a period of up to five years. Additional units in the apartment complex may later be eligible if funds are available.

MANAGEMENT

The Fund Manager--VMB National Partners, LLC.

VMB National Partners, LLC is the Fund Manager. The Fund Manager is a recently-formed Kansas limited liability company. Its sole member is VMB & Associates, Inc. As of July 17, ____ [Year], the Fund Manager had the net worth reflected in its audited balance sheet. See "Financial Statements."

The Fund Manager will be responsible for all aspects of the operations of the Series. The Fund Manager will provide executive supervisory and administrative services for the operations of the Series. The Fund Manager's services will include exercising all of the rights of the Series under the partnership agreements of the local limited partnerships.

Investors will have no right to participate in the management of their Series.

The Sponsor--VMB & Associates, Inc.

As the Fund Manager has no employees, the duties of the Fund Manager described above will be performed by employees of VMB & Associates, Inc. The Sponsor will have responsibility for evaluating, selecting, and negotiating investments for the Series. The Acquisitions Committee of the Sponsor will approve any investment before it is consummated. Project managers employed by VMB & Associates, Inc. make presentations to the Acquisitions Committee. The project manager engages in a due diligence review of his project prior to making his presentation, and will only make a presentation once the project manager is satisfied that the review has been completed in accordance with established guidelines. The Acquisitions Committee must approve an acquisition by unanimous vote. The members of the Acquisitions Committee are identified below.

Through the VMB-partnerships, VMB & Associates Inc. has acquired and oversees more than 725 low income housing properties. Accordingly, VMB & Associates, Inc. has significant experience in acquiring and managing investments in such rental housing.

Property management will be provided at the expense of each local limited partnership by agents, which may include VMB Management, Inc., an affiliate of VMB & Associates, Inc. See "Management Compensation."

VMB & Associates, Inc. and its affiliates are serving as the general partners of the sponsored VMB-partnerships described below under "Prior Performance Summary" and may serve as general partners for other real estate limited partnerships in the future. It is anticipated that the officers of VMB & Associates, Inc. will initially devote approximately 5% to 50% of their time to the Series. These individuals will spend significantly less time devoted to the Series after the investment of the Series capital in local limited partnerships. See "Conflicts of Interest."

VMB & Associates, Inc. is a Kansas corporation which was organized in 1971. Its officers and significant employees are:

Robert M. Nelson, Sr.	Chairman
Robert M. Nelson, Jr.	President, Chief Executive Officer and Secretary
Douglas M. Nelson, Esq.	Executive Vice President
Francine Cristino	Senior Vice President--Institutional Investments
Cheryl B. Belgrave	Senior Vice President--Originations
Rosemary H. Sferra, CPA	Vice President--Chief Financial Officer
John D. Blessinger	Vice President--Acquisitions
Joe Roudabush	Vice President--Portfolio Management

In addition to Robert M. Nelson, Sr., the directors of VMB & Associates, Inc., are Robert M. Nelson, Jr., Samuel M.

Davis, and Rae L. Knooper. The principal shareholder of VMB & Associates, Inc. is Robert M. Nelson, Sr.

Robert M. Nelson, Sr., age 62, is the founder and Chairman of the Board of Directors of VMB & Associates, Inc., a Director of VMB Capital Corporation, and a general partner in some of the partnerships previously sponsored by VMB & Associates, Inc. Mr. Nelson has been actively involved in the affordable housing industry since ____ [Year]. Previously, during ____ [Year] and ____ [Year], he was founder and a principal of Normative Equity Development Corporation, a predecessor of VMB & Associates, Inc., and of Normative Equity Corporation, a real estate investment firm. For 12 years before that, Mr. Nelson was employed by Stonehenge International Corporation, last serving as its manager of housing and urban developments where he had responsibility for factory-built housing evaluation and project management in urban planning and development. He has testified before committees of the U.S. Senate and the U.S. House of Representatives. He is the husband of Francine Cristino and the father of Robert M. Nelson, Jr. Mr. Nelson graduated from Berea College in ____ [Year] with a Bachelor of Arts degree.

Robert M. Nelson, Jr., age 40, is President, Chief Executive Officer, Secretary, a Director and a member of the Acquisition Committee of VMB & Associates, Inc. He is President of, and a registered principal with, VMB Capital Corporation, and is a Director of VMB Management, Inc. He has been involved in real estate investment and acquisition activities since ____ [Year] when he joined VMB & Associates, Inc. Previously, he served as a Government Affairs Assistant with Kiawa North America in Washington, D.C. He is the son of Robert M. Nelson, Sr. and the brother of Francine Cristino. Mr. Nelson graduated from The American University in ____ [Year] with a Bachelor of Arts degree.

Douglas M. Nelson, age 38, is Executive Vice President, a Director, Director of Asset Management, and a member of the Acquisition Committee of VMB & Associates, Inc., and a Director and Secretary of VMB Management, Inc. Mr. Nelson has been active in the real estate industry since ____ [Year]. Before joining VMB & Associates, Inc. in ____ [Year], he was engaged as an attorney in the private practice of law with a specialty in real estate and taxation. Mr. Nelson is a Director and President of the Kansas Council of Affordable Housing, and a member of the State Bar of Kansas. Mr. Nelson graduated from the University of Kansas at Kansas City in ____ [Year] with a Bachelor of Arts degree, from the New England School of Law in ____ [Year] with a Juris Doctor degree cum laude and from the University of San Diego in ____ [Year] with a Master of Law degree in Taxation.

Francine Cristino, age 36, is Senior Vice President--Institutional Investments of VMB & Associates, Inc. Ms. Cristino has been involved in real estate investment activities since ____ [Year]. Before joining VMB & Associates, Inc., in ____ [Year], she served as Executive Vice President with MRI, Inc., a real estate development and management firm. Ms. Cristino is a member of the National Association of Affordable Housing Lenders and the Financial Planning Association. She is the daughter of Robert M. Nelson, Sr. and the sister of Robert M. Nelson, Jr. She graduated from Michigan State University in ____ [Year] with a Bachelor of Science degree in Business Administration.

Cheryl B. Belgrave, age 39, is Senior Vice President--Originations of VMB & Associates, Inc. Her experience with real estate investments and finance has continued since ____ [Year], and she has been employed by VMB & Associates, Inc. since ____ [Year]. Previously, from ____ [Year] to ____ [Year], Ms. Belgrave served as a consultant for a national tax credit sponsor where she was responsible for on-site feasibility studies and due diligence analyses of tax credit properties. Ms. Belgrave graduated from Southern Lutheran University in ____ [Year] with a Bachelor of Business Administration degree.

Rosemary H. Sferra, age 48, is Vice President - Chief Financial Officer and a member of the Acquisition Committee of VMB & Associates, Inc. and President, Treasurer and a Director of VMB Management, Inc. She has been involved in real estate acquisition and investment activities since ____ [Year]. Before joining VMB & Associates, Inc., in ____ [Year], Ms. Sferra was employed by Trusted Realtor Advisors, a real estate acquisition and management company, last serving as Vice President--Operations. Ms. Sferra graduated from Youngstown State University in ____ [Year] with a Bachelor of Arts degree cum laude in Business Administration with a concentration in Accounting

and is a Certified Public Accountant and a member of the American Institute of Certified Public Accountants.

John D. Blessinger, age 27, is Vice President -Acquisitions and a member of the Acquisition Committee of VMB & Associates, Inc. Mr. Blessinger has been involved in real estate acquisition, valuation and investment activities since ____[Year] and has been associated with VMB & Associates, Inc. since ____[Year]. Prior to joining VMB & Associates, Inc., he was involved in the valuation and classification of major assets, restructuring of debt and analysis of real estate taxes with C.F. Manson & Company, parent of House Savings of America. Mr. Blessinger graduated from Purdue University, in ____[Year] with a Bachelor of Science degree in Business Administration--Finance. Joe Roudabush, age 25, is Vice President--Portfolio Management of VMB & Associates, Inc. He is responsible for overseeing portfolio management and investor reporting for all VMB funds, and for monitoring investment returns for all VMB institutional funds. Mr. Roudabush has been involved in real estate asset management and finance activities for 2 years. Mr. Roudabush is licensed as a Kansas real estate broker. He graduated from Notre Dame University in ____[Year] with a Bachelor of Science degree in finance and a minor in real estate.

Rae L. Knooper, age 66, is a Director of VMB & Associates, Inc. Mrs. Knooper was the sole proprietor of Agate 108, a manufacturer and retailer of home accessory products, from 1975 until its sale in ____[Year]. Ms. Knooper graduated from the University of Southern Kansas in ____[Year] with a Bachelor of Science degree.

Statement of Purpose. Since its organization in ____[Year], VMB & Associates, Inc. has specialized in providing quality investment opportunities exclusively in the field of affordable housing. VMB & Associates, Inc. has a time-honored tradition of prudent investing and is one of the nation's oldest sponsors of tax credit investments. Its officers believe that VMB & Associates, Inc. has developed an insight into the affordable housing business based upon the fundamental principles of diversification and market need that few other companies can match. Using a disciplined selection process it evaluates all investment properties for value and location, placing particular emphasis on long-term economic stability and rental demand.

Change in Management.

The management and control of the Fund Manager, of VMB & Associates, Inc. and of the other VMB entities may be changed at any time in accordance with their respective organizational documents, without the consent or approval of the investors. In addition, the partnership agreements of the Series provide for the admission of one or more additional or successor fund managers to a Series as set forth below.

First, with the consent of any other fund managers of the Series and a majority-in-interest of the investors, the Fund Manager may designate one or more persons to be successor or additional fund managers to the Series. In addition, the Fund Manager may, without the consent of any other fund manager or the investors:

- ☐ substitute in its stead as fund manager any entity which has, by merger, consolidation or otherwise, acquired substantially all of its assets, stock or other evidence of equity interest and continued its business, or
- ☐ cause to be admitted to the Series an additional fund manager if it deems such admission to be necessary or desirable for classification of the Series as a partnership for federal income tax purposes.

Finally, a majority-in-interest of the investors may at any time remove the Fund Manager and elect a successor fund manager. If at any time a Series does not have a fund manager which is an affiliate of VMB & Associates, Inc., the Series cannot include the initials "VMB" in its name.

VMB Capital Corporation.

VMB Capital Corporation, a Kansas corporation which is wholly-owned by VMB & Associates, Inc., was organized in ____[Year] principally to facilitate the distribution of securities of partnerships sponsored by VMB & Associates, Inc. VMB Capital Corporation is a member firm with the NASD, and is registered as a broker-dealer with the Securities and Exchange Commission, the Kansas Department of Corporations and regulatory agencies of other states.

VMB Management, Inc.

VMB Management, Inc., a Kansas corporation which is wholly-owned by VMB & Associates, Inc., was organized in ____[Year] to manage properties, principally those owned by local limited partnerships invested in by VMB partnerships.

PRIOR PERFORMANCE SUMMARY

All VMB-Partnerships.

From its formation through November 30, ____[Year], VMB & Associates, Inc. and its affiliates had raised equity from more than 6,000 investors to acquire interests in a total of 240 properties located in 14 states and the District of Columbia, and representing nearly more than \$60,000,000 in aggregate acquisition costs. Estimates of acquisition costs are equal to equity contributions and debt financing.

Since 1982, VMB & Associates, Inc. has sponsored 38 limited partnerships, in which capacity it has been responsible for the offerings, the identification and acquisition of local limited partnership interests, the management of the limited partnerships' assets, and investor and regulatory reporting and relations. A VMB entity serves as general partner of each of these sponsored limited partnerships.

Prior to 1982, VMB & Associates, Inc. assisted developers of low income housing to structure investments which could be sold in private placements. In connection with these 27 structured partnerships, VMB & Associates, Inc. provided structuring and consulting services to developers concerning the organization of the limited partnerships which were to own the low income housing developments, arranged for preparation of partnership agreements and other requisite documents for the projects, including legal opinions as to federal income tax and organizational matters, and arranged for the placement of securities, typically in accordance with Regulation D under the Securities Act of 1933. The developers relied on independent broker-dealers to place such securities.

VMB & Associates, Inc. was not an initial managing general partner of any of the structured partnerships. In the years immediately following the sale of the structured partnerships' interests, VMB & Associates, Inc. monitored the structured partnerships' activities and results of operations. Since then, VMB & Associates, Inc. has provided administrative services to some of the structured partnerships such as the preparation of partnership income tax information. Except for some of the structured partnerships as to which a VMB entity has become the substituted managing general partner, VMB & Associates, Inc. has no role in the ongoing management of the structured partnerships. Accordingly, the structured partnerships in which VMB & Associates, Inc. has no management role are distinguished from the partnerships as to which a VMB entity serves as managing general partner. Unlike the structured partnerships, generally these sponsored partnerships are similar to the Series in that VMB & Associates, Inc. is or was solely responsible for the conduct of the offering, the identification and acquisition of local limited partnership interests, and the management of the sponsored partnerships.

GRAPHIC OF U.S. MAP NOT SHOWN

Of the 240 properties, 10 of the 213 properties owned by the sponsored partnerships had been sold or refinanced as of November 30, ____[Year] and nine of the 27 properties owned by the structured partnerships had been sold as of November 30, ____[Year]. Four of the properties sold by sponsored partnerships were tax credit properties.

One of the 38 sponsored partnerships and nine of the 27 structured partnerships had completed operations as of November 30, ____[Year]. None of these partnerships were tax credit partnerships.

Exhibit A to this Memorandum includes Tables I, II and III which contain additional information as of November 30, ____[Year] with regard to some of the more recent public sponsored partnerships. Table V included in Exhibit A contains information with respect to recent sales of properties by sponsored public partnerships as of November 30, ____[Year]. Table IV has been omitted as none of the sponsored public partnerships had sold properties or terminated operations as of November 30, ____[Year].

Reference also is made to Table VI included in the Registration Statement which describes in greater detail the properties in which some of the more recent sponsored partnerships have invested. The Fund Manager will send to any prospective investor upon request and without a charge a copy of Table VI.

Of the 38 sponsored partnerships, 7 public and 20 non-public partnerships entailed low income housing tax credit offerings. As of November 30, ____[Year], the 17 tax credit partnerships had raised an aggregate of approximately \$775,820,000 from more than 14,800 investors, and had invested in a total of 139 apartment complexes at an aggregate acquisition cost of approximately \$1,467,587,000 in the jurisdictions set forth below. Five of the 17 tax credit partnerships have held one or more of their apartment complexes for the full 10-year credit period. None of the 57 structured partnerships entailed low income housing tax credit offerings.

	Number of Properties				
	All Struc- tured And Sponsored Programs	Tax Credit Programs		All Struc- tured and Sponsored Programs	Tax Credit Pro- grams
Alabama	24	24	Nebraska	8	8
Arizona	13	10	Nevada	12	12
Arkansas	26	26	New Jersey	9	9
Kansas	149	108	New Mexico	18	16
Colorado	1	0	New York	22	22
District of Columbia	1	1	North Carolina	41	39
Florida	14	8	Ohio	10	4
Georgia	7	6	Oklahoma	21	18
Idaho	2	2	Oregon	5	5
Illinois	30	29	Pennsylvania	5	5

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Indiana	9	9	South Carolina	21	15
Iowa	15	15	South Dakota	5	2
Kansas	7	5	Tennessee	29	28
Kentucky	5	4	Texas	106	96
Louisiana	19	16	US Virgin Isl	1	0
Maryland	3	3	Utah	1	0
Michigan	7	6	Virginia	10	9
Minnesota	13	13	Washington	3	2
Mississippi	14	14	West Virginia	4	0
Missouri	25	22	Wisconsin	21	21
Montana	3	3	Wyoming	1	1

Of the 67 tax credit sponsored partnerships, 14 public and 28 private partnerships conducted all or a portion of their offerings during the period between January 1, ____[Year] and November 30, ____[Year]. See "Public Partnerships Sponsored Between January 1, ____[Year] and November 30, ____[Year]" and "Private Partnerships Sponsored Between January 1, ____[Year] and November 30, ____[Year]" below. These 42 sponsored partnerships were organized to invest in other limited partnerships owning apartment complexes benefiting from low income housing tax credits and, in most instances, one or more other forms of government assistance. Other forms of government assistance include mortgage loan subsidies, which may be availed of by the Series. See "Other Government Assistance Programs."

Public Partnerships Sponsored Between January 1, [Year] and November 30, [Year].

The 14 public partnerships sponsored between January 1, ____[Year] and September 30, ____[Year] are:

- ☐ VMB Kansas Housing Tax Credits II, L.P. ("CHTCII"),
- ☐ VMB Housing Tax Credit Fund III, L.P. ("HTCFIII"),
- ☐ VMB Kansas Housing Tax Credits III, L.P. ("CHTCIII"),
- ☐ VMB Housing Tax Credit Fund IV, L.P., Series 1 ("HTCFIV Series 1"),
- ☐ VMB Housing Tax Credit Fund IV, L.P., Series 2 ("HTCFIV Series 2"),
- ☐ VMB Kansas Housing Tax Credits IV, L.P., Series 4 ("CHTCIV Series 4"),
- ☐ VMB Kansas Housing Tax Credits IV, L.P., Series 5 ("CHTCIV Series 5"),
- ☐ VMB Housing Tax Credit Fund V, L.P., Series 3 ("HTCFV Series 3"),

- ☐ VMB Housing Tax Credit Fund V, L.P., Series 4 ("HTCFV Series 4"),
- ☐ VMB Housing Tax Credit Fund VI, L.P., Series 5 ("HTCFVI Series 5"),
- ☐ VMB Housing Tax Credit Fund VI, L.P., Series 6 ("HTCFVI Series 6"),
- ☐ VMB Housing Tax Credit Fund VI, L.P., Series 7 ("HTCFVI Series 7"),
- ☐ VMB Housing Tax Credit Fund VI, L.P., Series 8 ("HTCFVI Series 8"), and
- ☐ VMB Housing Tax Credit Fund VI, L.P., Series 9 ("HTCFVI Series 9").

With the exception of HTCFVI Series 9, each of the 14 public partnerships had completed its offering as of November 30, ____[Year].

VMB & Associates, Inc. will send to any prospective investor upon request and without charge copies of the most recent report on Form 10-K filed by any of the public partnerships with the SEC which have done so, and will send upon request, for a reasonable fee, the exhibits to such Form 10-K.

Through November 30, ____[Year], the 14 public sponsored partnerships had raised an aggregate of approximately \$215,177,000 in capital contributions from an aggregate of approximately 11,800 investors and invested in a total of 235 apartment properties located in the following jurisdictions:

Alabama	13	Kentucky	2	North Carolina	17
Arizona	2	Louisiana	1	Ohio	4
Arkansas	13	Maryland	2	Oklahoma	5
Kansas	38	Michigan	3	Oregon	1
Florida	2	Minnesota	3	South Carolina	3
Georgia	2	Mississippi	10	South Dakota	4
Idaho	1	Missouri	12	Tennessee	6
Illinois	19	Nebraska	7	Texas	32
Indiana	2	New Mexico	7	Virginia	5
Iowa	9	New York	3	Wisconsin	3
Kansas	4				

The aggregate mortgage debt encumbering the properties was approximately \$277,499,000 and the aggregate acquisition cost of the properties was approximately \$438,678,000. At the times of the 14 public sponsored partnership's investments therein 105 of the properties were existing apartment complexes and 183 were under development or construction by the local partnerships which own them.

All of the 14 public sponsored partnerships have as their principal investment objective providing federal low income housing tax credits to their investors. Four of them have the additional objective of providing Kansas low income housing tax credits.

Tax credit information with regard to the 14 public partnerships sponsored since January 1, ____[*Year*] and the three other public sponsored partnerships organized to provide low income housing tax credits is set forth in the tables which follow:

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Current Legal Forms for Real Estate

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Current Legal Forms for Real Estate
Chapter 22A REAL ESTATE SECURITIES
Part IV. FORMS
C. REAL ESTATE EXEMPTION OFFERINGS

28-22A Current Legal Forms for Real Estate FORM 22A.09

AUTHOR: by Robert M. Nelson

FORM 22A.09

SEC Rule 504 Offering Exemption--Limited Liability Company--Operating Agreement--Securities Exemption Legend and Resale Restrictions

COMMENT

The document appearing below is an Operating Agreement for an Ohio LLC which was formed to establish a relatively small family real estate investment vehicle. The promoters relied on SEC Rule 504 for a federal exemption from registration and also relied on state exemptions for small or limited offerings which required no filings with any state securities agency, *i.e.*, the exemptions were "self-effectuating." This Operating Agreement contains provisions which relate to both the federal and state exemptions relied upon. SEC Rule 504(b)(1) excepts an offering from having to meet the limitations on the manner of the offering (*i.e.*, no use of general solicitation and advertising) set forth in Rule 502(c) and also from the limitations on resale (*i.e.*, that the securities are "restricted" and may not be freely resold without registration or the availability of an exemption) as set forth in Rule 502(d) but only in certain circumstances. Those Rule 504(b)(1) exceptions only apply if:

(1) the offering is made exclusively in one or more states that require registration, a public filing and delivery of a disclosure document to prospective purchasers prior to sale, or

(2) the offering is made in one or more states without such requirements but the securities are registered in at least one state requiring a public filing and a delivery of a pre-sale disclosure document and that document is delivered to all purchasers including those in the states not having such a requirement, or

(3) the offering is made exclusively according to state law registration exemptions which permit general solicitation and advertising so long as sales are made only to "accredited investors" as defined in SEC Rule 501(a).

None of those excepting circumstances are present with respect to this offering and, as a result, the Rule 502(c) and (d) limitations apply. In order to meet those limitations, no general solicitation or advertising may be used with respect to this offering. In addition, the Operating Agreement sets forth a legend stating that the LLC membership units have not been registered and the Agreement also provides in Paragraph 9. F. that no transfer of the units may be made without compliance with applicable federal and state securities law.

FORM

OPERATING AGREEMENT OF CRISTINO FAMILY REAL ESTATE INVESTMENTS LLC

(An Ohio Limited Liability Company)

THE MEMBERSHIP UNITS EVIDENCED BY THIS AGREEMENT HAVE NOT BEEN REGISTERED UNDER THE SECURITIES ACT OF 1933, AS AMENDED, OR ANY STATE SECURITIES LAWS, AND MAY NOT BE RESOLD UNLESS REGISTERED UNDER FEDERAL AND STATE SECURITIES LAWS OR, UNLESS AN EXEMPTION FROM REGISTRATION UNDER THE FEDERAL AND STATE SECURITIES LAWS IS AVAILABLE FOR ANY SUCH RESALE.

THIS OPERATING AGREEMENT is entered into as of the _____ [day] day of _____ [month], _____ [year], by and among ALEX CRISTINO, FRANCINE CRISTINO, JULIA CRISTINO, ALICIA CRISTINO, and EVELINA CRISTINO (said individuals being hereinafter referred to collectively as the "Members" and individually as "Member"), and CRISTINO FAMILY REAL ESTATE INVESTMENTS LLC, an Ohio limited liability company (the "Company").

WHEREAS, the Members own all of the membership units in the Company and desire the Company to be operated upon the terms and conditions set forth in this Agreement;

NOW, THEREFORE, in consideration of the mutual covenants set forth herein, the following is hereby adopted as the Operating Agreement of the Company:

1. Formation and Name of Limited Liability Company. The Members have formed the Company pursuant to the provisions of Sections 1705.01 to 1705.61, both inclusive, of the Ohio Revised Code (the "LLC Act") under the name "Cristino Family Real Estate Investments LLC." All rights, liabilities and obligations of the Members, both as among themselves and as to persons not parties to this Agreement, shall be as provided in the LLC Act, except as otherwise provided herein.

2. Principal Office. The principal office of the Company shall be 1717 East Sferra Circle, Cleveland, Ohio 44114, or at such other place in the State of Ohio as may be designated by the Voting Members (as hereinafter defined) by written notice to all of the Members.

3. Purposes of the Company. The purposes of the Company shall be to engage in any lawful acts or activities for which limited liability companies may be formed under the LLC Act.

4. Duration of the Company. The Company shall commence on the date on which its Articles of Organization are filed with the Ohio Secretary of State's Office, and shall continue until terminated and dissolved in accordance with the terms of this Agreement.

5. Classes of Interests; Capitalization; Capital Accounts.

A. Capitalization. The Company has been capitalized by the Member contributing the money indicated opposite such Member's name on Exhibit A attached hereto, with the Member holding the number of units ("Membership Unit") as set forth on such Exhibit. The Company and the Members may, from time to time, after the execution of this Agreement designate any additional capital amounts of the Members on such Exhibit A. Each such designation of a capital amount shall be dated as of the date it is added to such Exhibit A and shall be signed by the President and Secretary-Treasurer of the Company. Each Membership Unit represents an equal capital interest in the Company.

B. Capital Accounts. An individual capital account shall be established and maintained for each Member and has been or shall be credited with the amount of each Member's capital contribution to the Company. Each Member's capital account shall be determined and maintained throughout the term of the Company in accordance with the requirements of *Section 704(b) of the Internal Revenue Code of 1986* (the "Code") or its counterpart in any subsequently enacted Internal Revenue Code, the applicable Treasury Regulations (the "Regulations") thereunder and the provisions of Exhibit B attached hereto and incorporated herein.

6. Division of Profits, Losses, and Cash Flow.

A. Profits and Losses. The Company's "net profits" and "net losses," computed in accordance with the provisions of Exhibit C attached hereto and incorporated herein, shall be, subject to the provisions of such Exhibit, allocated among, or borne by, the Members in proportion to their respective number of Membership Units.

B. Cash Flow. The cash flow of the Company shall be the net profits and losses of the Company, computed as provided in Exhibit C attached hereto, plus depreciation and other noncash charges deducted in determining such profits and losses, minus principal payments on all mortgages, and any other cash expenditures which have not been deducted in determining the net profits and losses of the Company, and minus the amount reasonably determined by the Members to be necessary to maintain for the Company sufficient working capital and a reasonable reserve for repairs and/or replacements. The cash flow of the Company shall be determined separately for each fiscal year and not cumulatively.

C. Distribution or Retention of Cash Flow. Cash flow, as so determined, shall be distributed to the Members in proportion to their respective Membership Units at such time or times as may be determined by vote of the Members owning, in the aggregate, a majority of the Membership Units.

7. Control and Operation of the Company.

A. Powers of Members; Compensation. The Members shall have the control and management of the day-to-day operation of the Company's business. The Members shall not be entitled to compensation for managing the Company's business, but shall be reimbursed by the Company for all reasonable expenses incurred by them in their performance of acts on behalf of the Company.

B. Majority Approval Required. In exercising authority under this Agreement or over the day-to-day operation of the Company's business, all actions taken on behalf of the Company by a Member shall require the prior approval of Members owning, in the aggregate, a majority of the Membership Units.

C. Taxable Year; Accounting Method. The taxable year of the Company shall be a calendar year, and the first taxable year shall end on December 31st of the year in which the Company is formed. The books and records of the Company shall be maintained on the cash method of accounting.

D. Liability of Members. The Members shall not have any liability to the Company or to any other Member for any mistakes or errors in judgment, or for any act or omission believed in good faith to be within the scope of a Member's authority conferred by this Agreement. A Member shall be liable only for acts and/or omissions involving intentional wrongdoing. Actions or omissions taken in reliance upon the advice of legal counsel that they are within the scope of a Member's authority hereunder shall be conclusive evidence of good faith; provided, however, a Member shall not be required to procure such advice to be entitled to the benefit of this subparagraph.

E. Return of Capital Contribution. No Member shall have the right to demand or receive the return of such Member's capital contribution except as otherwise expressly provided herein.

8. Officers.

A. Officers Generally. The officers of this Company shall be a President, a Vice President and a Secretary-Treasurer. Any two offices may be held by one person. The officers shall be chosen by the Members by a majority vote and shall hold office for one (1) year or until their successors are elected and qualified, whichever shall later occur. Any officer may be removed at any time by a vote of a majority of the Members.

B. Officers. The names and offices are as follows:

ALEX CRISTINO	--	President
FRANCINE CRISTINO	--	Vice President
JULIA CRISTINO	--	Secretary-Treasurer

C. Execution and Signing of Documents. Deeds and other formal instruments to be executed on behalf of the Company shall be signed by the President and, if necessary, attested by the Secretary-Treasurer. Checks on the Company's bank accounts and all ordinary business contracts may be signed by the officer or officers, or other agents, as the President may from time to time authorize or designate. In any case where the signatures of two officers are required for any document or other instrument to be executed on behalf of the Company, such signatures must be those of two different persons.

9. Assignment, Transfer or Sale of Membership Interests.

A. Substitute Member. A Membership Unit may be assigned, transferred or sold only as provided in this Paragraph 9. With respect to any such permitted assignment, transfer or sale, the assignee, transferee or purchaser of one or more Membership Units shall be treated and considered as a "Member" hereunder for all purposes provided such transferee has complied with subparagraph 9.E. below.

B. Restrictions on Transfer. No Member shall pledge, cause a lien to be placed against, or encumber such Member's Membership Units, or transfer, sell, alienate, assign, or otherwise dispose of any of such Member's Membership Units, whether voluntarily, involuntarily, by operation of law, at judicial sale, or otherwise, except in accordance with the terms of this Agreement.

C. Voluntary Lifetime Transfers.

(1) Without the consent of any other Member, a Member may transfer all, or a portion of, such Member's Membership Units to, or in trust for the benefit of, such Member's spouse or any of such Member's descendants or, if a Member is a trust, to or in trust for the beneficiaries of the trust or the spouse or descendants of the beneficiaries ("Permitted Transferees").

(2) If a Member receives a bona fide offer from anyone other than a Permitted Transferee to purchase all, or a portion of, the Membership Units owned by such Member, such Member (the "Transferring Member") shall give written notice to the other Member or Members (the "Nontransferring Member(s)"), which notice shall set forth the identity of the prospective transferee (the "Offeror"), the number of Membership Units proposed to be sold (the "Offered Units"), and the price and other terms of the offer received by the Transferring Member. Upon receipt of such notice, the Nontransferring Member(s) shall have the right and option to purchase, or to cause the Company to purchase, the Offered Units at the price which was offered to the Transferring Member by the Offeror. To exercise such right, the Nontransferring Member(s) shall give written notice to the Transferring Member of such Member(s) intention to exercise such right, which notice shall be given within sixty (60) days after the receipt by the Nontransferring Member(s) of notice from the Transferring Member. Such notice shall set forth the number of Membership Units to be purchased by the Nontransferring Member(s) and/or the Company, it being understood that the Company and the Nontransferring Member(s) shall purchase, in the aggregate, all of the Offered Units. The number of Offered Units, if any, to be purchased by the Company shall be determined in the sole discretion of the Nontransferring Member(s) owning, in the aggregate, a majority of the Membership Units (exclusive of the Offered Units). Each Nontransferring Member shall purchase a number of the Offered Units which are not being purchased by the Company as determined by agreement of all of the Nontransferring Members or, if the Nontransferring Members are unable to so agree, in proportion to the number of Membership Units owned by each nontransferring Member (exclusive of the Offered Units). In the event the right to purchase the Offered Units pursuant to this subparagraph 9.C.(2) is exercised, the Transferring Member and the Nontransferring Member(s) (and/or the Company, as the case may be) shall complete the purchase and sale of the Offered Units in accordance with the terms of the offer (including the payment terms set forth therein) received by the Transferring Member; provided, however, in the event the Offeror's offer provides for the transfer, in whole or in part, of property or other non-cash consideration to the Transferring Member in exchange for the Offered Units, the Members agree to negotiate in good faith with one another to arrive at a value of such property, which value shall be paid in cash by the Nontransferring Member(s) and/or the Company, as the case may be, at the closing of the purchase and sale transaction. If the right to purchase the Offered Units pursuant to this subparagraph 9.C.(2) is not exercised, the Transferring Member may sell the Offered Units to the Offeror at a price, and on terms, no more favorable to the Offeror than those set forth in the notice given to the Nontransferring Member(s); provided, however, that if said sale shall not be concluded within thirty (30) days following the expiration of the 60-day option period, then the terms and conditions of this subparagraph shall again apply in the case of any proposed sale by the Transferring Member.

D. Involuntary Lifetime Transfers. A Member shall immediately notify the other Member(s), in writing, upon becoming aware of facts which would reasonably lead such Member to believe that a court ordered transfer or sale of all or a portion of such Member's Membership Units is foreseeable or likely, including, but not limited to, a court ordered transfer incident to any divorce or marital property settlement or pursuant to applicable community property, quasi-community property or similar state law. Such notice shall set forth the facts relating to the anticipated court order and the type and number of Membership Units expected to be subject thereto. In the event of such notice, the provisions of Paragraph 9.C.(2) shall apply with the following modifications: (a) the Nontransferring Member(s) shall have the right and option to purchase, or cause the Company to purchase, the Membership Units anticipated to be subject to the court ordered transfer at a price equal to the lesser of the fair market value of such Membership Units as determined by the certified public accountant then servicing the account of the Company or the value, if any, attributed to such Membership Units in connection with the involuntary transfer; and (b) the Nontransferring Member(s) may exercise such right with respect to less than all of the Membership Units anticipated to be subject to the court order.

E. Continuation of Restrictions. This Agreement, and the terms, conditions and restrictions set forth herein, shall

continue to apply to any Membership Units transferred by a Member in accordance with this Paragraph 9. As a condition to any transfer of Membership Units hereunder, a transferee shall agree in writing to be bound by all of the terms, conditions and restrictions of this Agreement, which writing may take the form of a certificate of acceptance and adoption of this Agreement. Failure to execute such a writing shall not relieve a transferee of any restrictions or obligations hereunder.

F. Securities Laws. Notwithstanding the preceding provisions of this Paragraph 9, no proposed or intended assignment, transfer or sale of Membership Units shall be effective, unless and until it appears, to the satisfaction of counsel for the Company, that such assignment, transfer or sale will not be in violation of, or otherwise render the Company and/or any Member liable under, the Securities Act of 1933, as amended, and the rules and regulations promulgated thereunder, or under the applicable state securities laws of any state or states.

G. Terminating Transfers. Notwithstanding the preceding provisions of this Paragraph 9, no sale or exchange of an interest may be made if the Membership Units sought to be sold or exchanged, when added to the total of all Membership Units sold or exchanged within the period of twelve (12) months prior thereto, would result in the termination of the Company under Section 708 of the Code, or any successor section thereto.

10. Effect of Death, Bankruptcy or Incompetency of a Member. A Member shall not be permitted to withdraw or resign from the Company. The death, adjudication of bankruptcy, whether voluntary or involuntary, or adjudication of incompetency of a Member who is an individual, or the bankruptcy or dissolution of a Member that is a corporation, partnership or trust, during the term of this Agreement, shall not effect the Company or its business. The executor, administrator, trustee or other legal representative of the deceased, bankrupt, incompetent or dissolved Member shall succeed to the rights of such Member, subject to the provisions of this Agreement.

11. Termination of the Company. The Company shall be terminated and dissolved upon the written consent of all of the Members.

12. Dissolution and Liquidation of the Company.

A. Winding Up. Upon the termination of the Company pursuant to Paragraph 11, *above*, a full and general accounting shall be taken of the Company's business, and the affairs of the Company shall be wound up. Any profits earned or losses incurred since the last previous accounting shall be allocated among, or borne by, the Members in accordance with the provisions of subparagraph 6.A., *above*. The Members shall wind up and liquidate the Company by selling the Company's assets, or by distributing such assets in kind, subject to the Company's liabilities, or by a combination thereof, as determined by the Members. The proceeds of such liquidation shall be applied and distributed in the following order of priority, by the end of the taxable year during which the liquidation occurs (or, if later, within ninety (90) days after the date of the liquidation):

(i) to the payment of any debts and liabilities of the Company;

(ii) to the setting up of any reserve which the Members shall reasonably deem necessary to provide for any contingent or unforeseen liabilities or obligations of the Company, with any excess in such reserve remaining after such liabilities are satisfied to be distributed as soon as practicable in the manner hereinafter set forth; and

(iii) thereafter, the balance of the proceeds, if any, shall be distributed in accordance with the positive capital account balances of the Members, as determined after taking into account all capital account adjustments for the Company taxable year during which such liquidation occurs. For purposes of this subparagraph, a liquidation of the Company shall mean a liquidation as defined in Section 1.704-1(b)(2)(ii)(g) of the Regulations.

B. Statement. The Members shall be furnished with a statement prepared by the Company's accountants, which shall set

forth the assets and liabilities of the Company as of the date of complete liquidation.

C. Return of Capital Contributions. Notwithstanding anything in this Agreement to the contrary, no Member shall be personally liable for the return of the capital contributions of the Members, or any portion thereof, it being expressly understood that any such return of the capital contributions of the Members shall be made solely from Company assets.

13. Tax Matters Member. The Members shall select a Member to serve as the Tax Matters Member of the Company, as provided in Regulations issued pursuant to Section 6231 of the Code. Such selection shall be made by the Members owning, in the aggregate, a majority of the Membership Units. The initial Tax Matters Member shall be Alex Cristino, who shall serve until a successor is selected. Each Member, by the execution of this Agreement (or acceptance of Membership Units in the case of a Member who is a transferee or successor transferee to a Member who has executed this Agreement), consents to such designation of the Tax Matters Member and agrees to execute, certify, acknowledge, deliver, swear to, file and record at the appropriate public offices such documents as may be necessary or appropriate to evidence such consent. The Company shall indemnify and reimburse the Tax Matters Member for all expenses, including legal and accounting fees, claims, liabilities, losses and damages incurred in connection with any administrative or judicial proceeding with respect to the tax liability of the Members. The payment of all such expenses shall be made before any distributions to Members are made by the Company. The taking of any action and the incurring of any expense by the Tax Matters Member in connection with any such proceeding, except to the extent required by law, is a matter in the sole discretion of the Tax Matters Member.

14. Amendments. This Agreement may be amended only with the written approval of Members owning, in the aggregate, two thirds (2/3) or more of the outstanding Membership Units.

15. Notices. All notices, consents or other instruments hereunder shall be in writing and mailed by United States mail, postage prepaid, and shall be directed to the parties hereto at the last addresses of the parties furnished by them in writing to the Company, and to the Company at its principal office. The Company and/or any Member shall have the right to designate a new address for receipt of notices by notice addressed to the other Member(s) and the Company and mailed as aforesaid. Such notices shall be made a permanent part of the Company records.

16. Obligations and Rights of Transferees. Any person who acquires in any manner whatsoever any interest in the Company, irrespective of whether such person has accepted and assumed in writing the terms and provisions of this Agreement, shall be deemed by the acceptance of the benefit of the acquisition thereof to have agreed to be subject to, and to be bound by, all the obligations of this Agreement with the same force and effect as any predecessor in interest of such person.

17. Benefit and Binding Effect. This Agreement shall inure to the benefit of, and be binding upon, the parties hereto and their respective next of kin, heirs, legatees, devisees, administrators, executors, legal representatives, nominees, successors and permitted assigns.

18. Governing Law. This Agreement and the rights of all parties hereunder shall be governed by, and construed in accordance with, the laws of the State of Ohio.

IN WITNESS WHEREOF, each party has executed this Operating Agreement as of the day first written above.

MEMBERS:

Alex Cristino

Francine Cristino

Julia Cristino

Alicia Cristino

Evelina Cristino

COMPANY:

CRISTINO FAMILY REAL ESTATE INVESTMENTS LLC

By: _____

Alex Cristino, President

EXHIBIT A

CAPITAL CONTRIBUTIONS

Member	Initial Contribution	Units
Alex Cristino	\$25,000	25
Francine Cristino	\$25,000	25
Julia Cristino	\$25,000	25
Alicia Cristino	\$25,000	25
Evelina Cristino	\$25,000	25

EXHIBIT B

Capital Account Accounting Principles

Section 1. For purposes of computing the amount of any item of income, gain, deduction or loss to be reflected in the Members' capital accounts, the determination, recognition and classification of any such item shall be the same as its determination, recognition and classification for federal income tax purposes; provided, however, that:

(a) Any deductions for depreciation, cost recovery or amortization (other than depletion under Section 611 of the Code) attributable to a Contributed Property (as defined below) shall be determined as if the adjusted basis of such property on

the date it was acquired by the Company was equal to the Agreed Value (as defined below) of such property. Upon an adjustment to the Carrying Value (as defined below) of any Company property subject to depletion under Section 611 of the Code, any further deductions for such depreciation, cost recovery or amortization attributable to such property shall be determined as if the adjusted basis of such property were equal to the Carrying Value of such property immediately following such adjustment.

(b) Any income, gain or loss attributable to the taxable disposition of any property (including any property subject to depletion under Section 611 of the Code) shall be determined by the Company as if the adjusted basis of such property as of such date of disposition were equal in amount to the Company's Carrying Value with respect to such property as of such date.

(c) The computation of all items of income, gain, loss and deduction shall be made by the Company and, as to those items described in Section 705(a)(1)(B) or Section 705(a)(2)(B) of the Code, without regard to the fact that such items are not includable in gross income or are neither currently deductible nor capitalizable for federal income tax purposes.

Section 2. A transferee of an Interest in the Company will succeed to the capital account relating to the Interest transferred; provided, however, that if the transfer causes a termination of the Company under Section 708(b)(1)(B) of the Code, the Company's properties shall be deemed to have been distributed in liquidation of the Company to the Members (including the transferee of the Interest) and recontributed by such Members and transferees in reconstitution of the Company. The capital accounts of such reconstituted partnership shall be maintained in accordance with the principles set forth herein.

Section 3. Upon an issuance of additional interests in the Company for cash or Contributed Property, the capital accounts of all Members (and the Carrying Values of all Company properties) shall, immediately prior to such issuance, be adjusted (consistent with the provisions hereof) upward or downward to reflect any unrealized gain or unrealized loss attributable to each Company property (as if such unrealized gain or unrealized loss had been recognized upon an actual sale of such property at the fair market value thereof, immediately prior to such issuance, and had been allocated to the Members, at such time, pursuant to subparagraph 6.A. of the Operating Agreement). In determining such unrealized gain or unrealized loss attributable to the properties, the fair market value of Company properties shall be determined by the Members using such reasonable methods of valuation as they may adopt.

Section 4. Immediately prior to the distribution of any Company property in liquidation of the Company pursuant to Paragraph 11 of the Operating Agreement, the capital accounts of all Members (and the Carrying Values of all Company properties) shall, immediately prior to any such distribution, be adjusted (consistent with the provisions hereof and of Section 704 of the Code) upward or downward to reflect any unrealized gain or unrealized loss attributable to each Company property (as if such unrealized gain or unrealized loss had been recognized upon an actual sale of each such property, immediately prior to such distribution, and had been allocated to the Members, at such time, pursuant to subparagraph 6.A. of the Operating Agreement). In determining such unrealized gain or unrealized loss attributable to the properties, the fair market value of Company properties shall be determined by the Members using such reasonable methods of valuation as they may adopt.

Section 5. For the purposes of this Exhibit B, the following terms shall have the meanings indicated unless the context clearly indicates otherwise:

" Agreed Value" means the fair market value of a Contributed Property as agreed to by the contributing Member and the Company, using such reasonable method of valuation as they may adopt.

" Carrying Value" means: (a) with respect to Contributed Property, the Agreed Value of such property, reduced (but not below zero) by all amortization, depreciation and cost recovery deductions charged to the Members' capital accounts with respect to such property, as well as any other charges for sales, retirements and other dispositions of assets

included in a Contributed Property, as of the time of determination; and (b) with respect to any other property, the adjusted basis of such property for federal income tax purposes as of the time of determination. The Carrying Value of any property shall be adjusted in accordance with the principles set forth herein.

" Contributed Property" means each Member's interest in property or other consideration (excluding services and cash) contributed to the Company by such Member.

For purposes of this Exhibit, all other capitalized terms will have the same meaning herein as is ascribed to them in the Operating Agreement.

EXHIBIT C

Allocations of Profits and Losses

Section 1. The terms "net profits" and "net losses," as used herein, shall mean the net amount of the Company's profits and losses, as determined for federal income tax purposes, and shall also include each Member's share of income described in Section 705(a)(1)(B) of the Code, any expenditures described in Section 702(a)(2)(B) of the Code, any expenditures described in Section 709(a) of the Code which are not deducted or amortized in accordance with Section 709(b) of the Code and losses not deductible pursuant to Section 267(a) or 707(b) of the Code.

Section 2. Notwithstanding any provision of this Agreement to the contrary, to the extent required by law, income, gain, loss and deduction attributable to property contributed to the Company by a Member shall be allocated among the Members so as to take into account any variation between the tax basis of the property and the fair market value thereof at the time of contribution, in accordance with the requirements of Section 704(c) of the Code.

Section 3. Company income, gain, loss and deduction shall be allocated to the Members in accordance with the portion of the year during which the Members have held their respective Membership Units. All items of income and loss shall be considered to have been earned ratably over the fiscal year of the Company, except that gains and losses arising from the disposition of assets shall be taken into account as of the date thereof.

Section 4. Notwithstanding any provision of the foregoing Operating Agreement to the contrary, at all times during the existence of the Company, the interest of each Member in each material item of Company income, gain, loss, deduction or credit will be equal to at least one percent (1%) of each such item.

Section 5. Notwithstanding any provision of the foregoing Operating Agreement to the contrary, in the event the Company is entitled to a deduction for imputed interest under any provision of the Code on any loan or advance from a Member, such deduction shall be allocated solely to such Member.

Section 6. Notwithstanding any provision of the foregoing Operating Agreement to the contrary, losses allocated pursuant to subparagraph 6.A. of the Operating Agreement shall not exceed the maximum amount of losses that can be so allocated without causing the Member receiving such allocation to have an Adjusted Deficit Capital Account Balance (as defined below) at the end of any fiscal year of the Company.

Section 7. Notwithstanding any provision of the foregoing Operating Agreement to the contrary, if there is a net decrease in Company Minimum Gain during any Company fiscal year, Members who would otherwise have an Adjusted Deficit Capital Account Balance at the end of such year shall be specially allocated items of Company income and gain for such year (and, if necessary, subsequent years) in an amount and manner sufficient to eliminate such Adjusted Deficit Capital Account Balance as quickly as possible. The items to be so allocated shall be determined in

accordance with Section 1.704-2 of the Regulations. This Section 7 is intended to comply with the minimum gain chargeback requirement in such section of the Regulations and shall be interpreted consistently therewith. "Company Minimum Gain" shall be computed in the manner described in Section 1.704-2(d)(1) of the Regulations. "Adjusted Deficit Capital Account Balance" shall mean the deficit capital account balance of a Member, if any, as of the end of the relevant fiscal year of the Company, after giving effect to the following: (A) credit to such capital account any amounts the Member is obligated to restore pursuant to the penultimate sentence of Section 1.704-2 of the Regulations; and (B) debit to such capital account the items described in Sections 1.704-1(b)(2)(ii)(d)(4), (5) and (6) of the Regulations.

Section 8. Notwithstanding any provision of the foregoing Operating Agreement to the contrary, to the extent the payment of any expenditure by the Company is treated as a distribution to a Member for federal income tax purposes, there will be a gross income allocation to such Member in the amount of such distribution.

Section 9. Notwithstanding any provision of the foregoing Operating Agreement to the contrary, if items of income or gain to be allocated include income or gain treated as ordinary income for federal income tax purposes because it is attributable to the recapture of depreciation under Section 1245 or 1250 of the Code, such income or gain, to the extent treated as ordinary income, shall be allocated to and reported by the Members in proportion to their then respective cumulative allocations of depreciation.

Section 10. Notwithstanding any provision of the foregoing Operating Agreement to the contrary, except as provided in Section 7 of this Exhibit C above, in the event any Member unexpectedly receives any adjustments, allocations, or distributions described in Sections 1.704-1(b)(2)(ii)(d)(4), (5) or (6) of the Regulations, items of Company income and gain shall be specially allocated to such Member in an amount and manner sufficient to eliminate the Adjusted Deficit Capital Account Balance in the Member's capital account created by such adjustments, allocations, or distributions as quickly as possible. Any special allocations of items of income or gain pursuant to this Section 10 shall be taken into account in computing subsequent allocations of other net profits, net losses and items thereof pursuant to the foregoing Operating Agreement (including the exhibits attached thereto), so that the net amount of any items so specially allocated pursuant to this Section 10 and the other net profits, net losses and all other items allocated to the Member pursuant to the Operating Agreement, to the extent possible, be equal to the net amount that would have been allocated to the Member had such unexpected adjustments, allocations or distributions not occurred.

Section 11. Except as provided in Section 7, *above*, in the event a Member has an Adjusted Deficit Capital Account Balance at the end of any Company fiscal year which is in excess of the sum of (i) the amount the Member is obligated to restore pursuant to any provision of this Agreement, and (ii) the amount the Member is deemed to be obligated to restore pursuant to the penultimate sentence of Section 1.704-2 of the Regulations, such Member shall be specially allocated items of Company income and gain in the amount of such excess as quickly as possible.



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Chapter 22A REAL ESTATE SECURITIES
Part IV. FORMS
C. REAL ESTATE EXEMPTION OFFERINGS

28-22A Current Legal Forms for Real Estate FORM 22A.10

AUTHOR: by Robert M. Nelson

FORM 22A.10 SEC Rule 504 Offering Exemption--Limited Liability Company--SEC Form D--Notice of Sale of Securities Pursuant to Regulation D, Section 4(6), and/or Uniform Limited Offering Exemption

COMMENT

The SEC Form D appearing below relates to a relatively small family interstate offering intended to be made to family members in two different states. Since the offering will not be made only in one state, the federal intrastate offering exemption provided by SEC Rule 147 is not available. The offering is small enough (not in excess of \$1,000,000) and otherwise meets the requirements of SEC Rule 504 which is one of the federal registration exemptions available under Regulation D. This particular offering was to be sold to less than ten (10) individuals in the same family who resided in two different states. In that instance, both of the states involved had available a small or limited offering type of exemption (to be made to a specified small number of purchasers in the state) which was available for the contemplated offering. In addition, these state exemptions were "self-effectuating" in that no filing of any kind was required to be made in either state in order to obtain the exemption.

FORM

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Part IV. FORMS
C. REAL ESTATE EXEMPTION OFFERINGS

28-22A Current Legal Forms for Real Estate FORM 22A.11

AUTHOR: by Robert M. Nelson

**FORM 22A.11 SEC Rule 504 Offering Exemption Limited Liability Company Subscription Agreement
Purchaser Representations Securities Exemption Legend and Resale Restrictions**

COMMENT

The document appearing below is a subscription agreement for units in an Ohio LLC which was formed to establish a relatively small family real estate investment vehicle. The promoters relied on SEC Rule 504 for a federal exemption from registration and also relied on state exemptions for small or limited offerings which required no filings with any state securities agency, *i.e.*, the exemptions were "self-effectuating." This subscription agreement contains representations from the subscriber which relate to both the federal and state exemptions relied upon. The document references the federal SEC Rule 504 exemption and also the Ohio exemption available under *Section 1707.03(O) of the Ohio Revised Code* for small corporate-type equity offerings.

FORM

SUBSCRIPTION AGREEMENT

THIS SUBSCRIPTION AGREEMENT is entered into between CRISTINO FAMILY REAL ESTATE INVESTMENTS LLC, an Ohio limited liability company (the "Company") and FRANCINE CRISTINO ("Subscriber") this _____ [day] of _____ [month] _____ [year].

WHEREAS, the Company is offering for sale to the Subscriber twenty-five (25) units of the Company's membership

interests (the "Securities"); and

WHEREAS, the Company is offering to sell the Securities to the Subscriber, and the Subscriber wishes to purchase all of the Securities from the Company; and

WHEREAS, the Company is offering and selling the Securities to the Subscriber pursuant to certain registration exemptions contained in federal and Ohio securities laws;

NOW, THEREFORE, in consideration of the mutual promises contained below and the payment of the purchase price by the Subscriber to the Company for the Securities, the Company and the Subscriber agree as follows:

1. Disclosure by Company. The Company hereby discloses the information set forth in this Paragraph 1 to the Subscriber in connection with the offer and sale of the Securities by the Company:

(A) The Securities have not been registered under the Federal Securities Act of 1933, as amended (the "Federal Act"), and are being offered and sold by the Company pursuant to a registration exemption contained in Section 3(b) of the Federal Act and/or Securities and Exchange Commission Regulation D and Rule 504, promulgated thereunder.

(B) The Securities have the status of securities acquired in a transaction under Section 3(b) of the Federal Act and cannot be resold without registration under the Federal Act or an exemption therefrom.

(C) A legend has been, or will be, placed on each certificate or other document evidencing any of the Securities in substantially the following form:

THESE SECURITIES EVIDENCED HEREBY HAVE NOT BEEN REGISTERED UNDER THE FEDERAL SECURITIES ACT OF 1933, AS AMENDED, OR ANY STATE SECURITIES LAWS, AND MAY NOT BE RESOLD UNLESS REGISTERED UNDER FEDERAL AND STATE SECURITIES LAWS OR, UNLESS AN EXEMPTION FROM REGISTRATION UNDER THE FEDERAL AND STATE SECURITIES LAWS IS AVAILABLE.

THE SECURITIES REPRESENTED BY THIS CERTIFICATE ARE SUBJECT TO THE TERMS AND CONDITIONS OF AN OPERATING AGREEMENT DATED _____ [month] _____ [day], _____ [year], ("THE AGREEMENT"), WHICH AGREEMENT RESTRICTS THE FREE TRANSFERABILITY OF SUCH UNITS. ANY PURCHASER OR TRANSFEREE OF THESE SECURITIES IS BOUND BY THE AGREEMENT AND SHALL BE CONSIDERED A PARTY TO THE AGREEMENT. THE COMPANY WILL MAIL TO THE HOLDER OF THIS CERTIFICATE, WITHOUT CHARGE, A COPY OF THE AGREEMENT WITHIN FIVE (5) DAYS AFTER RECEIVING A WRITTEN REQUEST THEREFOR.

(D) The Securities have not been registered under the Ohio Securities Act, as set forth in Chapter 1707 of the Ohio Revised Code (the "Ohio Act"), and are being offered and sold by the Company pursuant to the registration exemption contained in Section 1707.03(O) of the Ohio Act.

(E) The Company reasonably believes that the Subscriber is purchasing for investment, has no information to the contrary, and through Paragraph 2. below is hereby obtaining a signed statement to that effect from the Subscriber prior to the purchase of any of the Securities by the Subscriber.

2. Representations and Warranties of the Subscriber. In connection with the Subscriber's purchase pursuant to this Agreement, the Subscriber represents and warrants, which representations and warranties shall survive the consummation of the Subscriber's purchase pursuant to this Agreement, as follows:

(A) The Subscriber's principal residence or principal office, as the case may be, is located within the State of Ohio.

(B) The Subscriber represents that the Subscriber is an accredited investor as that term is defined in SEC Rule 501.

(C) The Subscriber is aware that no market may exist for the resale of any of the Securities purchased under this Agreement.

(D) The Subscriber is purchasing for investment and not for the distribution of any of the Securities purchased under this Agreement.

(E) The Subscriber is aware of any and all restrictions imposed by the Company on the further distribution of the Securities, including, but not limited to, any restrictive legends appearing on the certificate(s) and/or other document(s) evidencing any of the Securities, required holding periods, stop transfer orders, or buy-back rights of the Company or security holders thereof.

(F) The Subscriber is aware of the limitations on the disposition of the Securities, including, the limitations under federal and state securities laws.

3. Subscription for Securities. The Company hereby offers and agrees to sell to the Subscriber, and the Subscriber hereby accepts such offer and subscribes for the Securities, in exchange for twenty-five (25) Membership Units of the Company, an Ohio limited liability company. The Subscriber agrees to pay the sum of Twenty-five Thousand Dollars (\$25,000) for the units being purchased and agrees to pay the purchase price contemporaneously with the execution of this Agreement by the Company and the Subscriber. The Company, through its Authorized Representative, hereby acknowledges receipt of the foregoing subscription.

IN WITNESS WHEREOF, the Company and the Subscriber have signed this Subscription Agreement on the day and year first above written.

Company:

CRISTINO FAMILY REAL ESTATE
INVESTMENTS LLC

By: _____ Alex Cristino

SUBSCRIBER:

_____ Francine Cristino



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Current Legal Forms for Real Estate
Chapter 23 REAL ESTATE LEASES

31-23 Current Legal Forms for Real Estate 23.syn

AUTHOR: by Thomas G. Belden

§ 23.syn Synopsis to Chapter 23: REAL ESTATE LEASES

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[3] Taxation of Rental Income

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§ 23.05 Advance Rentals, Bonuses and Security Deposits

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§ 23.10 Lessor's Costs in Managing and Maintaining Rental Property

§ 23.11 Cost of Cancelling, Extending or Renewing Lease

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§ 23.12 Lease Agreements Between Related Parties

§ 23.13 Renting Out Dwelling Units Used for Personal Purposes

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by

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FOOTNOTES:

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Chapter 23 REAL ESTATE LEASES
Part I. The Tax Background

31-23 Current Legal Forms for Real Estate § 23.01

AUTHOR: by Thomas G. Belden

§ 23.01 Summary of this Chapter

§ 23.02 Rental Payments--In General. Lessee may deduct rental payments only for leased property used in lessee's trade or business or for production of income. For cash basis lessor, rental income is taxable when received; for accrual basis lessor, such income is taxable when he has right to receive it.

§ 23.03 Lessee's Payment of Lessor's Expenses. Lessee's payment of lessor's expenses pursuant to lease agreement are deductible by lessee as rent and are taxable to lessor as rental income.

§ 23.04 Assignment of Rent. Assigning right to rental income does not shift lessor's tax liability to assignee. Split of authority exists on issue of whether lessor's assignment of his leasehold interest shifts tax liability to assignee.

§ 23.05 Advance Rentals, Bonuses and Security Deposits. Advance rentals and bonuses are taxable income for year of receipt, regardless of lessor's accounting method. Lessee must deduct advance rentals and bonuses proportionately over life of lease. Security deposit is income to lessor only if lessee fails to perform lease obligations. Otherwise, lessor must return deposit at end of lease term.

§ 23.06 Lease Acquisition Costs. Lessee's expenditures to purchase leasehold and other initial acquisition costs are not deductible when paid or incurred. They represent part of lessee's cost of lease which must be amortized over lease term. Many of lessor's expenses in procuring tenant must also be amortized ratably over term of lease.

§ 23.07 Cost of Improvements to the Property. Cost of lessee's construction of buildings or other permanent improvements on leased property is not currently deductible, but must be amortized or depreciated over time. Lessor does not realize income on account of such improvements unless made in lieu of rent. Cost of lessor's constructions of buildings or permanent improvements in connection with execution of lease not currently deductible but must be recovered over estimated useful life of improvement.

§ 23.08 Demolition of Structures. Where lessor or lessee demolishes structure, neither may claim deduction for

demolition expense or for loss arising from demolition. Such expense and loss are chargeable to capital account of land where structure formerly stood.

§ 23.09 Lessee's Costs of Repairs, Replacements and Restoration. Lessee's expenses in maintaining and repairing leased premises are currently deductible. Where lease requires lessee to maintain premises at established level by making replacements, cost of replacements is currently deductible, even if replacement has useful life exceeding one year. Similarly, lessee's payment of money to lessor to restore premises at end of lease term to their original state is currently deductible.

§ 23.10 Lessor's Costs in Managing and Maintaining Rental Property. Taxpayer engaged in business of dealing in real property (i.e., selling, trading and renting real property) may deduct all ordinary and necessary expenses paid or incurred in carrying on such business. Similarly, taxpayer who owns and invests in rental property, but is not real estate dealer, may deduct ordinary and necessary expenses arising from managing and maintaining such property and collecting rents.

§ 23.11 Cost of Cancelling, Extending or Renewing Lease. Lessee's payment to cancel lease is deductible as current business expense. Lessee's payment to extend or renew lease is acquisition cost that must be amortized over life of extended or renewed lease. Payments received by lessor to cancel or modify lease are taxable in year of receipt. Lessor's payment made to lessee to obtain cancellation of tenant's lease must generally be amortized over remaining life of cancelled lease.

§ 23.12 Lease Agreements Between Related Parties. Where lessor and lessee are "related parties"--e.g., family members, corporation and its shareholder--question exists as to whether parties dealt with each other at arm's length, resulting in rental approximately equal to what stranger would have been required to pay.

§ 23.13 Renting Out Dwelling Units Used for Personal Purposes. If taxpayer rents out dwelling unit that he also uses for any personal purpose, rental expenses must be pro-rated between periods of rental and personal use. If dwelling is also taxpayer's "residence," rental expense deductions may not exceed gross rental income. But if dwelling is rented for less than 15 days, neither rental income nor expense is recognized for federal income tax purposes.

§ 23.14 Lease or Sale of Property? No deduction is allowed for "rental payments" that are actually payments toward purchase price of property. Determination of whether transaction is sale or lease is question of fact to be ascertained from intent of parties. Generally, where lessee has option to purchase property at price reduced by rent previously paid, rent paid before exercise of option is ordinary income to lessor and deductible expense to lessee; amounts paid thereafter are selling price of property.

§ 23.15 Sale-Leaseback Transactions. Sale-leaseback transactions offer tax and other financial advantages to seller, as lessee, and purchaser, as lessor. However, if transaction has no legitimate business purpose and is considered to be primarily for tax avoidance, it may be recharacterized for tax purposes as mortgage loan or similar arrangement, resulting in corresponding changes to anticipated tax benefits. Each case is decided on its own facts.



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Chapter 23 REAL ESTATE LEASES
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31-23 Current Legal Forms for Real Estate § 23.02

AUTHOR: by Thomas G. Belden

§ 23.02 Rental Payments--In General

[1] "Rent" Defined

Rent is the payment required of a lessee for the right to use or occupy the lessor's property.ⁿ¹ Although most commonly in the form of periodic (*e.g.*, monthly, annual), fixed payments of money, rent may take a variety of other forms as well.

For example, where a lessee owned stock in the lessor-corporation and transferred the stock to the lessor in exchange for a lease renewal, the Tax Court held that the fair market value of the stock was rental income.ⁿ²

Rent may also take the form of services performed by the lessee for the lessor,ⁿ³ payment of a percentage of the lessee's profits from the trade or business that he conducts on the leased premises,ⁿ⁴ his assumption of the lessor's expenses or other financial obligations,ⁿ⁵ or the erection of buildings or other permanent improvements by the lessee on the leased premises.ⁿ⁶

Rent has even been found in the reduction of the sale price of real estate in exchange for the seller's right to temporarily occupy the property following the sale at little or no charge.

Example:

The taxpayer sold warehouse property that had been offered for sale at approximately \$1 million, receiving \$750,000 in cash, plus the contractual right to retain occupancy of a portion of the premises "without further payment" for two and a half years. The Tax Court held that the transaction constituted a sale and leaseback of property. In exchange for the property, the taxpayer-lessee received the \$750,000 payment and "a 21/2-year leasehold interest..." The fair market value of that leasehold was \$253,090.75. This sum, in turn, was deductible as rent by the taxpayer-lessee during the life of the lease.ⁿ⁷

[2] Deductibility of Rental Payments

A lessee may deduct as a trade or business expense rental payments made for the use or possession of real property to

which he has not taken or is not taking title, or in which he has no equity. However, the property must be used for the purposes of the lessee's trade or business.ⁿ¹

No deduction is allowed if rental payments are made for the purpose of maintaining a household. Such payments are considered to be "personal, living or family expenses," and the Code and Regulations expressly preclude a deduction for them.ⁿ² A taxpayer who rents property for residential purposes, but incidentally conducts business there (his place or business being elsewhere), may not deduct any part of the rent. If, however, he uses part of the house as his place of business, the portion of the rent that is attributable to the place of business may be deductible as a business expense.ⁿ³

In the case of an individual taxpayer, rent paid or incurred during the tax year is deductible if:

- (1) it is paid or incurred for the production or collection of income, or for the management, conservation, or maintenance of property held for the production of income; and
- (2) the rent is an ordinary and necessary expense.

In such case, the rent is deductible by the individual as a nontrade or nonbusiness expense.ⁿ⁴

The lessee's method of accounting determines when he may claim a deduction for a rental payment. A cash basis lessee, for example, deducts rental payments for the tax year in which they are paid.ⁿ⁵ By contrast, an accrual basis lessee takes the deduction for the tax year in which all events have occurred that determine the fact of the liability, and the amount of the liability can be determined with reasonable accuracy.ⁿ⁶

[3] Taxation of Rental Income

A taxpayer's gross income includes all income from whatever source derived, including rent.ⁿ¹

The time for reporting rental income is dependent upon the lessor's method of accounting.ⁿ² If the lessor is a cash basis taxpayer, he must report such income at the time of receipt.ⁿ³ When this method is used, the "constructive receipt" doctrine applies. Under this doctrine, even though income has not yet entered into the lessor's physical possession, he nonetheless has constructively received it in the tax year in which:

- (1) it is credited to his account;
- (2) set apart for him; or
- (3) otherwise made available to him so that he may draw upon it at any time.

Rental income is not constructively received if the lessor's control of it is subjected to substantial limitations or restrictions.ⁿ⁴

If, on the other hand, the taxpayer utilizes the accrual method of accounting, he must include rental income "when all of the events have occurred which fix the right to receive such income and the amount thereof can be determined with reasonable accuracy."ⁿ⁵ When rent is based on a percentage of the lessee's sales, the rent accrues as income for the period during which the sales are made, even though the rent is not due until the following year.ⁿ⁶

There are a number of frequently recurring business transactions for which the courts have identified the proper party responsible for reporting rental income. For example, if leased property is sold to a third party subject to an outstanding lease, the rent income after transfer is taxable to the purchaser; however, if the seller retains the right to the rents, as well as the benefits and obligations of ownership for the balance of the term of the lease, the rent is taxable to the

seller.ⁿ⁷

If property is acquired in a foreclosure sale, subsequent rental income is taxable to the purchaser. If, however, a court later determines that the mortgagor has a right to redemption, and that the mortgagee-purchaser was merely holding the property for the mortgagor's benefit, rent received by the mortgagee belongs to the mortgagor and is taxable to him. In such a case, the mortgagor's income is realized when he applies the rent due to him toward redemption of the property.ⁿ⁸

[4] Special Accrual Rules for Certain Leases

Congress enacted special accrual rules that are applicable to the reporting of rental income and deductions arising from leases known as "Section 467 rental agreements."ⁿ¹ The purpose of these rules is to prevent the mismatching of income and deductions.ⁿ² A section 467 rental agreement is any rental agreement for the use of tangible property under which the total rental payments, plus the total fair market value of any other consideration received for use of the property, exceed \$250,000; and either

(1) there are increases in the amount to be paid as rent under the agreement; or

(2) at least one amount allocable to use of the property during a calendar year is to be paid after the calendar year following the calendar year in which the use occurs.ⁿ³

Sale of real property disguised as lease will result in disallowance of "rent" deduction. If a so-called "lease agreement" is actually a sale of real estate in disguise, a deduction for "rental" payments claimed by the lessee will be disallowed.

Example: An oil company sold 320 parcels of land for use as service station sites to a tax-exempt trust and simultaneously leased them back. Under the terms of the lease agreement, the company bore the burdens, risks and responsibilities and received important benefits traditionally reserved to the owner of property. The leases also bore similarities to debt financing agreements. The court held that the so-called rental arrangement was actually a financing agreement in disguise and disallowed the company's deductions for "rental" payments. ⁿ⁴

Legal Topics:

For related research and practice materials, see the following legal topics:

Real Property LawLandlord & TenantLease AgreementsCommercial LeasesSale-Leaseback TransactionsTax LawFederal Income Tax ComputationDeductions for Business ExpensesBusiness, Entertainment & Trade Expenses (IRC secs. 162, 274)Tax LawFederal Income Tax ComputationSales & ExchangesGeneral OverviewTax LawFederal Income Tax ComputationTax AccountingAccrual Method (IRC secs. 446, 447, 451, 461, 467)General OverviewTax LawFederal Income Tax ComputationTax AccountingAccrual Method (IRC secs. 446, 447, 451, 461, 467)Constructive ReceiptTax LawFederal Income Tax ComputationTax AccountingCash Basis Method (IRC secs. 446, 448, 451, 461)General Overview

FOOTNOTES:

(n1)Footnote 1. *IRC § 162(a)(3); see Rev. Rul. 69-132, 1969-1 CB 141 .*

(n2)Footnote 2. *C. G. Meaker Co. v. Commissioner, 16 T.C. 1348 (1951) .*

(n3)Footnote 3. *McBride v. Commissioner (A), 50 T.C. 1, 8 (1968) (physician's services as rent); Barranti v. Commissioner, 76 T.C.M. (CCH) 957 (1998) (repairs and maintenance as rent).*

(n4)Footnote 4. *E.g., Baton Coal Co. v. Commissioner*, 51 F.2d 469 (3d Cir. 1931), *aff'd* 19 B.T.A. 169 (1930).

(n5)Footnote 5. See § 23.03, *infra*, for a discussion of the tax treatment of a lessee's payment of a lessor's expenses.

(n6)Footnote 6. *Treas. Reg. § 1.109-1(a)*; see § 23.07[1], *infra*.

(n7)Footnote 7. *Steinway & Sons v. Comm'r*, 46 TC 375 (1966) ; *Alstores Realty Corp. v. Comm'r*, 46 TC 363 (1966) ; *New Orleans La. Saints v. Comm'r*, 73 TCM 2883 (1997) .

(n8)Footnote 1. *IRC § 162(a)(3)*.

(n9)Footnote 2. *IRC § 262(a)*; *Treas. Reg. § 1.262-1(b)(3)*.

(n10)Footnote 3. *Treas. Reg. § 1.262-1(b)(3)*; but see *IRC § 280(a)*.

(n11)Footnote 4. *IRC § 212*; *Treas. Reg. § 1.212-1(a), (g)*.

(n12)Footnote 5. See *Treas. Reg. § 1.461-1(a)(1)*.

(n13)Footnote 6. See *IRC § 461(h)(4)*; *Treas. Reg. § 1.461-1(a)(2)*.

(n14)Footnote 1. *IRC § 61(a)*. The Revenue Reconciliation Act of 1993 amended the restrictions on passive activity losses and credits regarding how lease-up services are treated under the "developer rule." Under the developer rule, net rental activity income incidental to a development activity is recharacterized as nonpassive income when the property is rented for less than 12 months between the time of development and the date of disposition. The regulations define how long the development phase is deemed to continue, when value-enhancing services are performed, and which taxpayers are subject to the developer rule. *Treas. Reg. § 1.469-2(f)(5)(ii)-(iv)* and *Temp. Treas. Reg. § 1.469-2T(f)(5)(ii)-(iv)*, amended by *TD 8495 (Nov. 3, 1993)* .

(n15)Footnote 2. See *IRC § 451(a)*; *Rev. Rul. 70-146, 1970-1 CB 18* .

(n16)Footnote 3. See *IRC § 451(a)*; *Butler v. Commissioner*, 19 B.T.A. 718, 728 (1930) ; *Rev. Rul. 70-146, 1970-1 CB 18* .

(n17)Footnote 4. See *Treas. Reg. § 1.451-2(a)*.

(n18)Footnote 5. See *Treas. Reg. § 1.451-1(a)*.

(n19)Footnote 6. *Heer-Andres Inv. Co. v. Comm'r*, 17 TC 786 (1951) .

(n20)Footnote 7. *Ashlock v. Commissioner*, 18 T.C. 405 (1952) .

(n21)Footnote 8. *Murray v. Commissioner*, 21 T.C. 1049 (1954) .

(n22)Footnote 1. *IRC § 467*.

(n23)Footnote 2. S. Rep. No. 98-169, 98th Cong., 2d Sess. 260-261 (1984).

(n24)Footnote 3. *IRC § 467(d)*.

(n25)Footnote 4. *Sun Oil Co. v. Commissioner*, 562 F.2d 258 (3d Cir. 1977) . For a detailed discussion of the tax consequences of sale and leaseback transactions, see § 23.15, *infra*.



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Current Legal Forms for Real Estate
Chapter 23 REAL ESTATE LEASES
Part I. The Tax Background

31-23 Current Legal Forms for Real Estate § 23.03

AUTHOR: by Thomas G. Belden

§ 23.03 Lessee's Payment of Lessor's Expenses

[1] Lessee's Payments Made Under a Lease for Lessor's Benefit

Generally, if a lessee pays any of his lessor's expenses pursuant to the lease, such payments are additional rental income to the lessor.ⁿ¹ These include, among others, property taxes, insurance premiums, mortgage interest and principal, maintenance costs, utilities and even the lessor's income taxes. Such payments are deductible as rental payments if the lessee uses the property in a trade or business or holds it for the production of income.ⁿ²

[a] Property Taxes

The amount of taxes paid by a tenant for the landlord's benefit are deducted by the tenant as *rent payments*, and not as taxes. The lessor, in turn, must report such payments as income. However, the lessor is also entitled to claim a deduction in the same amount,ⁿ³ since real property taxes are expressly deductibleⁿ⁴ and taxes are generally deductible "only by the person upon whom they are imposed."ⁿ⁵

Example:

A Hawaii statute provided that, when land is leased for a term of 15 years or more, the lessee is deemed to be the owner of the property for the purposes of paying the real property taxes. In determining whether a lessee was entitled to claim a deduction for taxes paid, the Service noted that, in general, taxes are deductible only by the person upon whom they are imposed. Ordinarily, that person is the lessor; however, the state statute imposed liability on the lessee instead. Consequently, the lessee was entitled to claim the deduction for taxes.ⁿ⁶

For a lessee who utilizes the accrual method of accounting, the deduction is taken when the lessee becomes liable for the taxes under the terms of the lease, rather than when the owner becomes liable. This date may prove different from the assessment date of the taxes.ⁿ⁷

[b] Insurance Premiums, Custodial Costs, Utilities and Interest on Indebtedness

Along with payment of property taxes owed by the landlord, other expenses that the tenant assumes pursuant to the lease are deductible by the tenant and considered income to the landlord. The Service has ruled that the lessee may deduct all expenses which, under the terms of the lease, he is required to pay to, or for, the lessor.ⁿ⁸ Some of these include:

- (1) insurance premiums (*e.g.*, fire, theft, liability, etc.);
- (2) custodial costs;
- (3) utilities;
- (4) interest on indebtedness (*i.e.*, mortgage interest);ⁿ⁹ and
- (5) payments to the lessor's creditors.ⁿ¹⁰

[c] Lessor's Income Taxes

Lessor's income taxes that are paid by the lessee pursuant to the lease are income to the lessor and deductible as rent to the lessee.

Example:

Railroad A leased all of its property to Railroad B. Under the lease, Railroad B agreed to pay, among other expenses, "all taxes of every description, federal, state, and municipal, upon the lessor's property, business, indebtedness, income,..." The Supreme Court held that these tax payments were taxable income to the lessor and deductible expenses to the lessee.ⁿ¹¹

[2] Lessee's Payment of Lessor's Mortgage: a Capital Expenditure

If a lease requires that the tenant pay all or part of the principal and interest on the landlord's mortgage, such payments are capital expenditures which must be amortized by the lessee.ⁿ¹ Conversely, the tenant's payments of principal and interest are income to the landlord in the year in which they were paid, regardless of whether the landlord was personally obligated on the mortgage debt.ⁿ²

Planning Note

The "pyramided" taxes problem. A prospective lessee should be advised against agreeing to a lease provision that would require him to pay the lessor's personal income taxes as part of the rent. Such an arrangement would result in the "pyramided" taxes problem. Pyramided taxes, also known as "taxes on taxes," result from a lessee's obligation to bear the full burden of *any* income taxes imposed upon the lessor.

For instance, if the lessor's tax liability in a given year is \$50,000, and the lessee pays the amount, the lessor has realized \$50,000 of income. Pursuant to the lease, the lessee must now pay taxes on the lessor's \$50,000. In other words, the lessee must pay taxes on the \$50,000 in taxes that he already paid for the lessor. For example, where a corporation pays the federal and state income taxes owed by an officer as part of his salary, such payments are taxable income to the officer.ⁿ³

Legal Topics:

For related research and practice materials, see the following legal topics:

Tax Law Federal Income Tax Computation Deductions for Business Expenses General Overview Tax Law Federal Income

Tax Computation Deductions for Business Expenses Business, Entertainment & Trade Expenses (IRC secs. 162, 274) Tax Law Federal Income Tax Computation Deductions for Business Expenses Taxes Paid (IRC sec. 164) Tax Law Federal Income Tax Computation Gross Income (IRC sec. 61)

FOOTNOTES:

(n1)Footnote 1. *Treas. Reg. § 1.61-8(c)*.

(n2)Footnote 2. *See IRC §§ 162(a)(3), 212; Rev. Rul. 55-540, 1955-2 CB 39, 43 .*

(n3)Footnote 3. *Treas. Reg. § 1.162-11(a)*.

(n4)Footnote 4. *IRC § 164(a)(1)*.

(n5)Footnote 5. *Treas. Reg. § 1.164-1(a)*.

(n6)Footnote 6. *Rev. Rul. 64-327, 1964-2 CB 56 .*

(n7)Footnote 7. *See Consolidated-Hammer Dry Plate & Film Co. v. Comm'r, 49 TC 153, 171 (1967) , aff'd, 409 F.2d 1077 (7th Cir. 1969) .*

(n8)Footnote 8. *Rev. Rul. 55-540, 1955-2 CB 39, 43 .*

(n9)Footnote 9. *United States v. Boston & Maine RR Co., 279 U.S. 732, 733 (1929) ; Cf. Appeal of Auerbach, 2 B.T.A. 67 (1925) .*

(n10)Footnote 10. *Brockman Bldg. Corp., Inc. v. Comm'r, 21 TC 175 (1953) , aff'd, 231 F.2d 145 (9th Cir. 1955)*

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(n11)Footnote 11. *United States v. Boston & Maine RR Co., N. 9, supra .*

(n12)Footnote 1. *Southwestern Hotel Co. v. U.S., 115 F.2d 686, 688 (5th Cir. 1940) , cert. denied, 312 U.S. 703 (1941) .*

(n13)Footnote 2. *Amey v. Commissioner, 22 T.C. 756 (1954) ; Wentz v. Gentsch, 40-2 USTC P 9666 (N.D. Ohio 1940).*

(n14)Footnote 3. *Old Colony Trust Co. v. Comm'r, 279 U.S. 716 (1929) .*



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Current Legal Forms for Real Estate
Chapter 23 REAL ESTATE LEASES
Part I. The Tax Background

31-23 Current Legal Forms for Real Estate § 23.04

AUTHOR: by Thomas G. Belden

§ 23.04 Assignment of Rent

A lessor's assignment of his right to receive rental income does not shift his tax liability to the assignee. Rather, the lessor remains responsible for reporting the income.ⁿ¹ In one case, for example, the court held that rental payments made by a sublessee to a third party were taxable to the sublessor, even though the sublessor had lost control over the disposition of the rents pursuant to a court-approved settlement.ⁿ²

Tax liability shifts to the transferee only if a lessor makes a valid transfer of the rent-producing property itself.

Example:

A property owner executed an instrument which purported to quitclaim her entire interest in the property to one of her sons. The instrument reserved to the owner the right to personally occupy the premises during her lifetime. After her death, the property would be distributed between both of her sons. The instrument failed to incorporate two of the formal elements of a quitclaim deed. Moreover, the instrument attempted to make a testamentary disposition of property without following the statutory prerequisites for the execution of a will. Accordingly, the instrument was held to be an invalid transfer of property, and the owner remained liable for taxes on the rental income generated by the property.ⁿ³

The courts and the Service frequently have addressed the issue of whether the assignment of the leasehold interest itself successfully shifts tax liability from the assignor to the assignee, or whether such a transaction is merely a sham. There is a split of authority on the question. In a decision by the United States Court of Appeals for the Third Circuit, a property owner assigned his "rights as landlord" to his wife for the period of a one-year lease. The court held that under local (New Jersey) law, the landlord had not simply assigned rents; instead, he had transferred his "interest as landlord." Accordingly, his transferee-wife was responsible for income taxes imposed on the rents received.ⁿ⁴

The Third Circuit decision is at odds with decisions by the United States Court of Appeals for the Fourth Circuit and the Service.ⁿ⁵ In the Fourth Circuit case, where an owner of leased property assigned to his wife all the rights of a landlord, the court held that the owner had merely conveyed the right to receive rental income, which remained taxable to him.

The court emphasized in its opinion that the owner continued to pay expenses for maintenance and improvement of the property after executing the assignments, and that the owner did not transfer his reversions to his wife.ⁿ⁶

Similarly, in a decision of the United States Court of Appeals for the Seventh Circuit, a property owner assigned his rights under a lease to a trust established for the benefit of his children. The assignment remained in effect only for the ten-year duration of the trust. The court held that the owner had merely assigned future income from the property, and that the rent paid under the lease remained taxable to him. The court noted that the owner retained both a reversionary interest in the lease and the entire reversionary interest in the land itself.ⁿ⁷

Finally, upon the sale of rental property, the parties to the transaction often agree that all or part of the sale price will consist of a percentage of the future rents paid by third party-lessees. In such case, the *buyer*, rather than the seller, must report that percentage of the rents as income. To the seller, these payments are proceeds from the sale, rather than taxable rental income.

Example:

Two taxpayers entered into a contract to purchase certain rental property. Under the terms of the agreement, rent was paid directly by the tenant to the seller of the property for a fixed number of years. The payments were used to discharge the taxpayers' obligations under the contract of sale. The Court held that the payments were taxable income to the taxpayers.ⁿ⁸

Planning Note

The feasibility of shifting tax liability by assigning a lease. The practical lesson taught by *Lum v. Comm'r* is that, while the assignment of rental income does not shift tax liability, it may be possible under state law to avoid this rule by assigning the entire leasehold interest to a third party. As noted above, in *Lum* New Jersey real property law allowed the transfer of an owner's "interest as landlord," and the Third Circuit viewed the transaction as much more than a mere assignment of income. Thus, counsel should carefully research local property law to determine the feasibility of following the *Lum* approach in an appropriate case.

If it is feasible to transfer the entire leasehold, the transfer should include not only the "rights" of a landlord, but also the common burdens of ownership. The Service is more likely to challenge the transaction if, after the assignment, the assignor-lessor has continuing responsibilities under the lease. Such burdens should be assumed by the assignee. Assignments to related persons are particularly vulnerable to attack.

Legal Topics:

For related research and practice materials, see the following legal topics:

Real Property LawLandlord & TenantLease AgreementsAssignmentsReal Property LawLandlord & TenantLease AgreementsLease ProvisionsTax LawFederal Income Tax ComputationGross Income (IRC sec. 61)

FOOTNOTES:

(n1)Footnote 1. *Bing v. Bowers*, 22 F.2d 450 (S.D.N.Y. 1927) ; *Seaman v. Commissioner*, T.C. Memo 1955-292 .

(n2)Footnote 2. *Drake University v. Commissioner*, 44 T.C. 70 (1965) .

(n3)Footnote 3. *Bonkowski v. Commissioner*, 458 F.2d 709 (7th Cir. 1972) .

(n4)Footnote 4. *Lum v. Commissioner*, 147 F.2d 356 (3d Cir. 1945) .

(n5)Footnote 5. *United States v. Shafro*, 246 F.2d 338 (4th Cir. 1957) ; *Rev. Rul. 58-337*, 1958-2 CB 13 .

(n6)Footnote 6. *United States v. Shafto*, N. 5, *supra* .

(n7)Footnote 7. *Iber v. U.S.*, 409 F.2d 1273 (7th Cir. 1969) ; *see also Galt v. Commissioner*, 216 F.2d 41 (7th Cir. 1954), *aff'g* 19 T.C. 892 (1953).

(n8)Footnote 8. *Clementson v. Commissioner*, T.C. Memo 1968-118 .



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Current Legal Forms for Real Estate
Chapter 23 REAL ESTATE LEASES
Part I. The Tax Background

31-23 Current Legal Forms for Real Estate § 23.05

AUTHOR: by Thomas G. Belden

§ 23.05 Advance Rentals, Bonuses and Security Deposits

[1] Nature of Payments

Advance rentals are payments made in anticipation of fixed, future rental obligations.ⁿ¹ By contrast, a "bonus" is an extra premium or profit given the lessor and arising out of the leasing of the property.ⁿ² A security deposit is a sum of money that the lessee pays upon execution of the lease in order to secure performance of his obligations under the lease. The lessor, in turn, is required to repay the deposit at the lease's end, assuming the lessee has performed his duties.ⁿ³

Generally, where a lessor is bound under the terms of the lease to account to the lessee for the deposit and to return the amount upon the expiration of the lease if the lessee performs his obligations, the amount is considered a security deposit and not an advance rental.ⁿ⁴ If, on the other hand, the lessor has a free and unfettered right to spend the sum as he chooses, it is an advance rental.ⁿ⁵

Where the lessor has a free and unrestricted right to use the sum, and the sum *both* secures the lessee's performance of his obligations under the lease and is to be applied against rent in later years, the payment is treated as an advance rental.ⁿ⁶ If, however, the lessor is required to place the sum in an escrow account or trust (thereby preventing him from using the sum for his own purposes), it is considered a security deposit, even though it is to be applied against future rent obligations.ⁿ⁷

A payment is not automatically treated as a security deposit simply because it is referred to as a "deposit" in the lease and is refundable.

Example:

A taxpayer in the business of renting farm land received deposits from lessees which were to be applied toward the rent of the next crop year. These payments were refundable if the leases were not subsequently signed. The court held that, although refundable, the sums were advance rentals since they were applicable toward rent of the next year.ⁿ⁸

The following are some of the factors which support a conclusion that a payment is a security deposit:

- (1) the lessee is credited with interest on the amount;
- (2) the lease provides for the return of the amount in the event Clinton Hotel Realty Corp. v. Comm'r, 128 F.2d 968 (5th Cir. 1942) of the property's destruction;ⁿ⁹ or
- (3) the lease requires the lessor to deposit the amount in a trust or escrow account.ⁿ¹⁰

[2] Advance Rentals and Bonuses

[a] When Lessor Must Report Advance Rentals and Bonuses as Income

The lessor must include advance rentals in income for the year in which they are received, regardless of the period covered or the method of accounting that the lessor uses.ⁿ¹ Similarly, a bonus paid to a cash basis lessor is taxable in the year of receipt and not in the year of the lease's execution.ⁿ² However, one federal appeals court held that an accrual basis lessor must report a bonus as income at the time the lease is executed.ⁿ³ The argument that advance rentals and bonuses should not be reported as income until later in the lease term when such payments are applicable has been rejected.ⁿ⁴

The payment of funds that may later be applied toward the cost of exercising a purchase option is an advance rental that is taxable upon receipt.ⁿ⁵

The Service has ruled that advance rent payments are taxable when they are paid to an escrowee at the lessor's direction, although they may be refunded to the lessee.ⁿ⁶

Like an advance rental payment, a bonus in the form of real estate is income to the lessor in the year of receipt. The amount of income is measured by the property's fair market value.ⁿ⁷ Similarly, a sublessor must report as income in the year of receipt a bonus paid by a sublessee for the former's granting of the sublease.ⁿ⁸

[b] When Lessee May Deduct Advance Rentals and Bonuses

Unlike the rule applied to the lessor, the lessee must deduct advance rental paymentsⁿ⁹ and bonusesⁿ¹⁰ proportionately over the life of the lease. This rule also applies to rental payments made in the initial portion of the term which exceed payments in later years. In such cases, the excess amount paid during the initial years must be deducted over the entire lease term.ⁿ¹¹

Similarly, where a 99-year lease was executed for a building with a useful life of less than 34 years, and the lessee was required to make mortgage payments during the initial seven years of the lease, those mortgage payments were advance rentals and were deductible over the life of the lease.ⁿ¹²

However, in the case of deferred possession of leased property, rental payments made before the lessee's occupancy need not be deducted over the term of the lease, as long as the rental payments remain constant throughout the term.ⁿ¹³

[3] Security Deposits

[a] Lessor's Treatment of Security Deposit

A security deposit constitutes income to the lessor only if the lessee fails to perform his obligations under the lease. In such case, the lessor's obligation to repay the security is terminated, and he must report the amount of the security deposit as income.ⁿ¹ As previously noted, if the lessor has a free and unfettered right to use the funds on deposit, then

they constitute an advance rental payment, rather than a security deposit.ⁿ²

The amount of income that must be reported upon the forfeiture of a security deposit can be a troublesome issue. One court held that when a forfeiture occurs prior to the expiration of the lease term, the lessor must report only the current value of the amount of the security which would have been refundable at the end of the lease term.ⁿ³ This holding was extended to a case in which the lessee relinquished his right to the security deposit under an agreement to accelerate termination of the lease. The court held that the lessor was only required to pay taxes on the current, discounted value of the amount which would have been refundable at the end of the lease.ⁿ⁴

It should be noted that the Service has refused to follow the holdings in the two cases discussed above. It is the position of the Service that when a lessee releases a lessor from the latter's obligation to repay a security deposit as consideration for cancellation of a lease, the *entire* amount realized by the lessor from the release is includable in income in the year of release.ⁿ⁵

[b] Lessee's Treatment of Security Deposit

Where a security deposit both secures the lessee's performance of his obligations and is to be applied against rent due at the end of the lease, the lessee deducts the deposit at the end of the lease term when it is actually applied against rent. The lessee need not amortize the amount of the deposit over the life of the lease.ⁿ⁶

If the lessee forfeits the security deposit by failing to perform his obligations under the lease, he is entitled to a loss deduction.ⁿ⁷

Planning Note

Avoiding the requirement of deducting advance rental payments over the lease term. As previously noted, a lessee must deduct advance rental payments proportionately over the life of the lease, rather than claim them as a deduction in the year of payment. However, the United States Court of Appeals for the Ninth Circuit created an exception to this rule in *Zaninovich v. Comm'r* In that case, lessees who had entered into a 20-year lease made an advance rental payment in December 1973, covering the first year of the lease: December 1973--November 1974.

The court held that the entire payment was deductible for 1973. Invoking the "one-year rule," the court explained that an expenditure is treated as a capital expenditure if it creates an asset, or secures a like advantage to the taxpayer, having a useful life of more than one year. Instantly, the rental expenditure did not have a useful life of more than a year because the payment covered one month in 1973 and 11 months in 1974. Hence, the payment did not have to be deducted over the life of the lease.ⁿ⁸

Legal Topics:

For related research and practice materials, see the following legal topics:

Real Property LawLandlord & TenantLandlord's Remedies & RightsSecurity DepositsReal Property LawLandlord & TenantLease AgreementsLease ProvisionsTax LawFederal Income Tax ComputationDeductions for Business ExpensesBusiness, Entertainment & Trade Expenses (IRC secs. 162, 274)Tax LawFederal Income Tax ComputationGross Income (IRC sec. 61)Tax LawFederal Taxpayer GroupsIndividualsBusiness Deductions (IRC secs. 62, 63, 162)Rentals & Other Payments

FOOTNOTES:

(n1)Footnote 1. See *Gilken Corp. v. Commissioner*, 10 T.C. 445, 451 (1948) ; cf. *Comm'r v. Indianapolis Power and Light Co.*, 493 U.S. 203, 213 (1990) .

(n2)Footnote 2. *O'Day Inv. Co. v. Commissioner*, 13 B.T.A. 1230, 1233 (1928) ; *Roby Realty Co. v. Commissioner*, 19 B.T.A. 696, 698 (1930) .

(n3)Footnote 3. *Mantell v. Comm'r*, 17 TC 1143, 1148 (1952) .

(n4)Footnote 4. *Est. of Barker v. Comm'r*, 13 B.T.A. 562, 567 (1928) .

(n5)Footnote 5. *United States v. Williams*, 395 F.2d 508, 510 (5th Cir. 1968) ; *Mantell v. Comm'r*, N. 3, *supra*.

(n6)Footnote 6. *Astor Holding Co. v. Commissioner*, 135 F.2d 47, 135 F.2d 47 (5th Cir. 1943) ; *August v. Commissioner*, 17 T.C. 1165 (1952) .

(n7)Footnote 7. *Commissioner v. Riss*, 374 F.2d 161 (8th Cir. 1967) ; *Gilken Corp. v. Commissioner*, 176 F.2d 141 (6th Cir. 1949) .

(n8)Footnote 8. *South Dade Farms, Inc. v. Comm'r*, 138 F.2d 818 (5th Cir. 1943) .

(n9)Footnote 9. *Clinton Hotel Realty Corp. v. Commissioner*, 128 F.2d 968 (5th Cir. 1942), *rev'g* 44 B.T.A. 1215 (1941).

(n10)Footnote 10. *Commissioner v. Riss*, N. 7, *supra*; *Est. of Barker v. Comm'r*, N. 4, *supra*

(n11)Footnote 1. *Treas. Reg. § 1.61-8(b)*.

(n12)Footnote 2. *Roby Realty Co. v. Commissioner*, 19 B.T.A. 696 (1930) , *appeal dismissed*, 62 F.2d 1079 (8th Cir. 1933) .

(n13)Footnote 3. *Commissioner v. Lyon*, 97 F.2d 70 (9th Cir. 1938) .

(n14)Footnote 4. *Gates v. Helvering*, 69 F.2d 277 (8th Cir. 1934) .

(n15)Footnote 5. *Gilken Corp. v. Commissioner*, 176 F.2d 141 (6th Cir. 1949) .

(n16)Footnote 6. *Rev. Rul. 65-141*, 1965-1 CB 210 ; *but see Rev. Proc. 2004-34* (regarding deferral of income for accrual basis taxpayers).

(n17)Footnote 7. *Pembroke v. Commissioner*, 23 B.T.A. 1176 (1931) , *aff'd*, 70 F.2d 850 (D.C. Cir. 1934) .

(n18)Footnote 8. *A. P. Schiro, Inc. v. Commissioner*, 20 B.T.A. 1026 (1930) .

(n19)Footnote 9. *Rev. Rul. 55-540*, 1955-2 CB 39, 43 ; *cf. Rev. Proc. 2001-28* .

(n20)Footnote 10. *Treas. Reg. § 1.162-11(a)*; *Baton Coal Co. v. Commissioner*, 51 F.2d 469 (3d Cir. 1931) ; *Galatoire Bros. v. Lines*, 23 F.2d 676 (5th Cir. 1928) ; *Cooper v. O'Malley*, 221 F.2d 279 (8th Cir. 1955) ; *Howe v. Comm'r*, TCM 2000-291.

(n21)Footnote 11. *Main & McKinney Bldg. Co. v. Comm'r*, 113 F.2d 81 (5th Cir. 1940) .

(n22)Footnote 12. *Southwestern Hotel Co. v. U.S.*, 115 F.2d 686 (5th Cir. 1940) ; *see Rev. Rul. 62-20*, 1962-1 C.B. 21 (television film rental).

(n23)Footnote 13. *Thomas v. Commissioner*, 31 T.C. 1009 (1959) .

(n24)Footnote 1. *Warren Service Corp. v. Commissioner*, 110 F.2d 723 (2d Cir. 1940) ; *Est. of Barker v. Comm'r*,

13 B.T.A. 562 (1928) ; *Mantell v. Comm'r*, 17 TC 1143 (1952) .

(n25)Footnote 2. *Hirsh Improvement Co. v. Comm'r*, 143 F.2d 912 (2d Cir. 1944) ; *Detroit Consol. Theatres, Inc. v. Comm'r*, 133 F.2d 200 (6th Cir. 1942) ; *Mantell v. Comm'r*, N. 1, *supra* .

(n26)Footnote 3. *Warren Service Corp. v. Commissioner*, 110 F.2d 723 (2d Cir. 1940) .

(n27)Footnote 4. *Bradford Hotel Operating Co. v. Comm'r*, 244 F.2d 876 (1st Cir. 1957) .

(n28)Footnote 5. *Rev. Rul. 68-19, 1968-1 CB 42* .

(n29)Footnote 6. *Cunningham v. Commissioner*, 39 T.C. 186 (1962) ; *Smith v. Commissioner*, 51 T.C. 429 (1968)

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(n30)Footnote 7. *Cf. Commissioner v. Paulson*, 123 F.2d 255 (8th Cir. 1941) .

(n31)Footnote 8. 616 F.2d 429 (9th Cir. 1980) .



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Chapter 23 REAL ESTATE LEASES
Part I. The Tax Background

31-23 Current Legal Forms for Real Estate § 23.06

AUTHOR: by Thomas G. Belden

§ 23.06 Lease Acquisition Costs

[1] Lessee's Costs in Acquiring Lease Must be Amortized

[a] Amortizable Costs

A lessee's expenditures to purchase a leasehold for business purposes and other costs in procuring a lease are not deductible when paid or incurred. Rather, such payments represent a part of the lessee's cost of the lease and must be amortized over its term.ⁿ¹

Among the amortizable expenses are real estate brokerage commissions paid by the lessee² and attorneys' fees for services in obtaining leases.ⁿ³ Outstanding taxes due on the leased property and assumed by the lessee are likewise amortizable.ⁿ⁴

Example:

A taxpayer leased premises for 99 years. As part of the consideration for the lease, the lessee agreed to pay all taxes, water rents and other charges which were then assessed against the premises. The delinquent taxes were not deductible for the year when the liability was assumed or paid, but were prorable over the life of the lease as a cost of capital assets.ⁿ⁵

Lease acquisition costs include a mortgage obligation on leased property which a lessee assumes as a term of his lease.ⁿ⁶ Where a lessee pays an amount to acquire the right to lease additional space under an existing lease, the amount is amortizable over the remaining term of the lease.ⁿ⁷

Fees paid for a study of the advisability of purchasing a leasehold must be amortized over the lease term. These might include payments to geologists to investigate the oil-drilling potential of a tract of land,ⁿ⁸ or to surveyors, engineers, architects, etc. A fee paid to obtain a guarantee that a lease renewal will be granted must also be amortized.ⁿ⁹

If a taxpayer acquires all of the assets of a business solely to obtain the business's lease, the entire expenditure is

considered leasehold acquisition cost.ⁿ¹⁰ Similarly, a lessee's payment to secure immediate possession of a 99-year lease from a sublessee is an amortizable capital expense,ⁿ¹¹ as are litigation costs incurred by a lessee in defending his title to the premises.ⁿ¹²

[b] Amortization Period

In determining the amount of the deduction allowable to a lessee during the tax year for amortization of lease acquisition costs, the term of the lease includes all renewal options, and any other period for which the parties reasonably expect the lease to be renewed, but only if less than 75 percent of the acquisition cost is attributable to the portion of the term of the lease remaining on the date of acquisition.ⁿ¹³ In computing the "term of the lease remaining," the taxpayer should not take into account any period for which the lease may subsequently be renewed, extended or continued under an option exercisable by the lessee.ⁿ¹⁴

Example 1:

On January 1, 1989, a lessee paid \$10,000 to acquire a 20-year lease. The lease contained two options, enabling the lessee to renew the lease for two five-year periods. Of the total \$10,000 cost to acquire the lease, \$7,000 was paid for the original 20-year lease term, and the balance of \$3,000 was paid for the renewal options. Since the \$7,000 cost of acquiring the initial lease is less than 75 percent of the \$10,000 cost of the lease, the term of the lease is treated as including the original lease period and the two renewal periods (i.e., a total of 30 years).ⁿ¹⁵

Example 2:

Assume the same facts as in the above example, except that the portion of the total cost (\$10,000) paid for the 20-year original lease period is \$8,000. Since the \$8,000 cost of acquiring the original lease is not less than 75 percent of the \$10,000 cost of the lease, the entire \$10,000 can be amortized over the 20-year term of the original lease, unless it was reasonably certain that the lease would be renewed.ⁿ¹⁶

[2] Lessor's Costs in Granting Lease Must be Amortized

Like acquisition costs incurred by a lessee, many of the lessor's expenses in procuring a tenant must be amortized ratably over the life of the lease. Some of these expenses include real estate brokerage commissions,ⁿ¹ attorneys' fees,ⁿ² an engineer's survey fees,ⁿ³ title chargesⁿ⁴ court costs,ⁿ⁵ and documentary stamps.ⁿ⁶ Real estate brokerage commissions paid by a lessee-sublessor to procure a sublessee are amortizable over the life of the sublease.ⁿ⁷

The accounting method used by the lessor is irrelevant. Whether the taxpayer is on the accrual basisⁿ⁸ or cash basis,ⁿ⁹ he must amortize the expenses discussed above ratably over the life of the lease.

Planning Note

Lessee's expenses incurred in failed attempt to acquire business lease are currently deductible. As previously noted, a lessee's expenditures in purchasing a leasehold and other costs in procuring a lease are not currently deductible, but must be amortized over the lease term. However, if a taxpayer incurs expenses in an *unsuccessful* effort to acquire a lease for business purposes, such expenses are currently deductible. Thus, where a taxpayer incurred legal fees and travel and entertainment expenses in an unsuccessful attempt to obtain leases of tracts of land from the Canadian government, the Tax Court held that such costs were ordinary and necessary business expenses and currently deductible.ⁿ¹⁰

Legal Topics:

For related research and practice materials, see the following legal topics:

Real Property LawLandlord & TenantLease AgreementsCommercial LeasesGeneral OverviewReal Property

LawLandlord & TenantLease AgreementsCommercial LeasesFinancing, Mortgaging & Security LeasesTax LawFederal Income Tax ComputationDeductions for Amortization, Depletion & DepreciationAmortization, Cost Recovery & Depreciation (IRC secs. 167-169, 171, 178, 194-195, 197, 216, 248, 280F)General OverviewTax LawFederal Income Tax ComputationDeductions for Amortization, Depletion & DepreciationAmortization, Cost Recovery & Depreciation (IRC secs. 167-169, 171, 178, 194-195, 197, 216, 248, 280F)Property Used in Business & TradeTax LawFederal Income Tax ComputationDeductions for Business ExpensesBusiness, Entertainment & Trade Expenses (IRC secs. 162, 274)

FOOTNOTES:

(n1)Footnote 1. *Treas. Reg. § 1.162-11(a)*; *Zenith Sportswear Co. v. Comm'r*, 28 TC 455 (1957) .

(n2)Footnote 2. *Appeal of D. N. & E. Walter & Co., Inc. v. Comm'r*, 4 B.T.A. 142, 146 (1926) .

(n3)Footnote 3. *Appeal of Columbia Theatre Co.*, 3 BTA 622 (1926) ; *Young v. Commissioner*, 20 B.T.A. 692 (1930) ; *M. & F. Holding Corp. v. Commissioner*, 26 B.T.A. 504 (1932) .

(n4)Footnote 4. *Midtown Tower, Inc. v. Comm'r*, 40 BTA 116 (1939) .

(n5)Footnote 5. *Fackler v. Commissioner*, 39 B.T.A. 395 (1939) .

(n6)Footnote 6. *Southwestern Hotel Corp. v. U.S.*, 115 F.2d 686 (5th Cir. 1940) , *cert. denied*, 312 U.S. 703 (1941) .

(n7)Footnote 7. *Giumarra Bros. Fruit Co. v. Comm'r*, 55 TC 460 (1970) .

(n8)Footnote 8. *Nusbaum v. Commissioner*, 10 B.T.A. 664 (1928) .

(n9)Footnote 9. *King Amusement Co. v. Comm'r*, 15 BTA 566 (1929) .

(n10)Footnote 10. *Rev. Rul. 68-260*, 1968-1 CB 86 .

(n11)Footnote 11. *Home Trust Co. v. Commissioner*, 65 F.2d 532 (8th Cir. 1933) .

(n12)Footnote 12. *Bush Terminal Bldgs. Co. v. Comm'r*, 204 F.2d 575 (2d Cir.) , *cert. denied*, 346 U.S. 856 (1953) .

(n13)Footnote 13. *IRC § 178(a)*.

(n14)Footnote 14. *IRC § 178(b)*.

(n15)Footnote 15. *Treas. Reg. § 1.178-1(b)(6)*, Ex. 4.

(n16)Footnote 16. *Treas. Reg. § 1.178-1(b)(6)*, Ex. 5.

(n17)Footnote 1. *Pembroke v. Commissioner*, 23 B.T.A. 1176 (1931) , *aff'd*, 70 F.2d 850 (D.C. Cir. 1934) ; *Rev. Rul. 70-408*, 1970-2 CB 68 ; *Rev. Rul. 81-161*, 1981-1 C.B. 313.

(n18)Footnote 2. *Young v. Commissioner*, 59 F.2d 691 (9th Cir. 1932), *aff'g* 20 B.T.A. 692 (1930); *Babbage v. Commissioner*, 27 B.T.A. 57 (1932) ; *Galt v. Commissioner*, 19 T.C. 892 (1953) , *rev'd on other issue*, 216 F.2d 41 (7th Cir. 1954) .

(n19)Footnote 3. *Bourg v. Commissioner*, T.C. Memo 1961-95, 14 Oil & Gas Rep. 665.

(n20)Footnote 4. *Young v. Commissioner*, N. 2, *supra* .

(n21)Footnote 5. *Babbage v. Commissioner*, N. 2, *supra* .

(n22)Footnote 6. *Cowden v. Commissioner*, 32 T.C. 853, 10 Oil & Gas Rep. 865 (1959) , *rev'd on other issue*, 289 F.2d 20, 14 Oil & Gas Rep. 309 (5th Cir. 1961) .

(n23)Footnote 7. *Bonwit Teller & Co. v. Comm'r*, 53 F.2d 381 (2d Cir. 1931) , *cert. denied*, 284 U.S. 690 (1932) .

(n24)Footnote 8. *Gould-Mersereau Co. v. Commissioner*, 21 B.T.A. 1316 (1931).

(n25)Footnote 9. *Tonningsen v. Commissioner*, 61 F.2d 199 (9th Cir. 1932) ; *Roby Realty Co. v. Commissioner*, 19 B.T.A. 696 (1930) , *appeal dismissed*, 62 F.2d 1079 (8th Cir. 1933) ; *Central Bank Block Ass'n v. Commissioner*, 19 B.T.A. 1183 (1930) , *aff'd*, 57 F.2d 5 (5th Cir. 1932) .

(n26)Footnote 10. *Davidson v. Commissioner*, 27 B.T.A. 158 (1932) .



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Current Legal Forms for Real Estate
Chapter 23 REAL ESTATE LEASES
Part I. The Tax Background

31-23 Current Legal Forms for Real Estate § 23.07

AUTHOR: by Thomas G. Belden

§ 23.07 Cost of Improvements to the Property

[1] Costs to Lessee

[a] Erecting Buildings and Making Other Improvements Are Capital Investments

A taxpayer who simply leases property upon which a building or other improvement already exists is not entitled to claim a deduction for depreciation of that asset since he has made no capital investment.ⁿ¹ Rather, the taxpayer is restricted to claiming deductions for amortization of his lease acquisition costs.ⁿ²

A lessee's cost of erecting buildings or making other permanent improvements on the lessor's property is a capital investment, and is not currently deductible as a business expense. Instead, such costs must be amortized or depreciated.ⁿ³ A capital investment has been defined as an improvement having a useful life of more than one year.ⁿ⁴

At the outset, a determination must be made as to when the asset was placed in service, since different rules apply depending upon the date.

Prior to 1981: If the useful life of the asset in the lessee's hands is equal to or shorter than the unexpired lease term, then the lessee may deduct the cost of the asset as depreciation over its useful life. If, on the other hand, the estimated useful life in the lessee's hands is longer than the unexpired lease term, then the lessee may deduct the cost as amortization over the unexpired term. (Amortization requires the lessee to claim an annual deduction in an amount equal to the cost of the asset, divided by the number of years remaining in the lease term.)ⁿ⁵

1981-1986: If the asset was placed in service during 1981-1986, and is subject to the Accelerated Cost Recovery System (ACRS) of *IRC Section 168*, the lessee recovers the cost over the ACRS recovery period applicable to the asset if that period is shorter than the lease term. If, on the other hand, the lease term is shorter than the recovery period, the cost is amortized under the rules for amortizing lease acquisition costs (*IRC Section 178*).ⁿ⁶

If a lessee places an asset in service *prior to 1987*, special rules exist pertaining to (1) lease renewals; and (2) leases

between related parties.

(1) In determining the lessee's deduction for depreciation or amortization during any tax year, the lease term is treated as including all periods for which the lease may be renewed or extended at the lessee's option, but only if the portion of the lease term (excluding all renewal/extension periods) remaining upon completion of the asset is less than 60 percent of the asset's estimated useful life.

This rule does not apply, however, if the lessee establishes that, as of the end of the tax year, it is more probable that the lease will not be renewed or extended than that it will be renewed or extended. In such a case, the cost of the asset is amortized over the remaining lease term.ⁿ⁷

(2) If the lessor and lessee are "related persons" at any time during the tax year, the asset's cost may *not* be depreciated or amortized over a period that is shorter than the asset's remaining useful life. Accordingly, even if the lease term is actually shorter than the asset's remaining useful life, the lessee may *not* use the lease term as the recovery period; he must instead use the remaining useful life.

A lessor and lessee are "related persons" if:

(1) they are members of an affiliated group of corporations which is eligible to file a consolidated return; or

(2) their relationship is among those listed in *IRC Section 267(b)*, regarding the disallowance of loss deductions on transactions between such related taxpayers as, *e.g.*, members of a family; a trust's grantor and fiduciary, etc.ⁿ⁸

After 1986: If the asset was placed in service after 1986 and it is eligible for depreciation under the Accelerated Cost Recovery System, the depreciation deduction is taken under the ACRS rules, regardless of the lease term.ⁿ⁹

[b] Income Realized by Lessor if Lessee Makes Improvements

Unless the lessee's improvements are made in lieu of rent, the lessor does not realize income when the improvements are madeⁿ¹⁰ or when he acquires them upon the termination of the lease.ⁿ¹¹ The enhancement in the value of the property during the term of the lease is neither income nor the payment of rent.

If a lessee makes improvements on real estate which constitute, in whole or in part, a substitute for rent, the improvements are rental income to the lessor. Whether a lessee's improvements result in rental income to the lessor in a particular case depends upon the intention of the parties, which may be indicated either by the terms of the lease or by the surrounding circumstances.ⁿ¹²

Often, a lessee agrees to erect a building on the lessor's unimproved property and, upon completion of the structure, pay rent to the lessor for use of the building during the remainder of the lease term. In such case, the rent is taxable to the lessor.

In addition, a lessor is taxed on any income which he realizes upon termination of the lease if such income is *not* attributable to the value of the improvements made by the lessee--*e.g.*, a security deposit forfeited by the lessee.ⁿ¹³

Example:

In 1945, the A Corporation leased for a period of 50 years unimproved real property to B Corporation under a lease requiring B Corporation to erect an office building on the premises costing \$500,000, in addition to paying A Corporation rent of \$10,000 per year beginning at the completion of the

improvements. The sum of \$100,000 was placed in escrow for the payment of the rent. The building was completed on January 1, 1950. The lease required all of the lessee's improvements to become the absolute property of A Corporation on the termination of the lease by forfeiture or otherwise, and the lessor would become entitled on such termination to any remaining sum in the escrow fund. B Corporation forfeited its lease on January 1, 1955, when the improvements had a value of \$100,000. The \$100,000 is excluded from gross income. The amount of \$50,000 representing the remainder in the escrow fund is forfeited to A Corporation and is included in its gross income.ⁿ¹⁴

As previously noted, the value of buildings erected or other improvements made by a lessee on the lessor's property is excluded from the latter's income, unless such asset serves as a substitute for rent. Similarly, neither the lessor's basis nor his adjusted basis in the property may be increased or decreased due to the asset.ⁿ¹⁵

[c] Availability of Depreciation to Lessor for Improvements Made by Lessee

The lessor is not entitled to a depreciation deduction for a building constructed by the lessee, even though the lessor is required to join in a mortgage which the lessee executes in order to obtain funds for construction.ⁿ¹⁶ However, if the lessor actually contributes toward the cost of the building, and the contribution is made on such terms and conditions as to give the lessor an investment interest in the building, he is entitled to a depreciation deduction.ⁿ¹⁷

[2] Costs to Lessor

[a] Lessor's Improvements to Leased Property Are Not Currently Deductible Expenses

A lessor's capital expenditures, made for the construction of buildings or other improvements in connection with the execution of a lease, do not represent current deductions. Rather, the cost must be recovered over the estimated useful life of the improvement, instead of over the lease term.ⁿ¹ Thus, where a lessor constructed a new building for its incoming tenant, it was held that the lessor had to depreciate the cost over the life of the building.ⁿ² Similarly, where a lessor altered its building by installing tile and plaster partitions for a new tenant, the life of the improvement was controlling.ⁿ³

In the case of ACRS property, the cost of improvements must be recovered over the applicable "recovery period," rather than the lease term.ⁿ⁴

[b] Lessor's Recovery of the Cost of Improvements

[i] Depreciation and ACRS Deductions--In General

In the case of buildings and other real property improvements placed in service before 1981, a lessor is allowed as a depreciation deduction a reasonable allowance for exhaustion, wear and tear, including a reasonable allowance for obsolescence. The property must be held for the production of income or used in a trade or business.ⁿ⁵ Land is not subject to an allowance for depreciation because it is not subject to exhaustion or wear or tear.ⁿ⁶

In essence, depreciation of property placed in service before 1981 is calculated by assigning the property an expected useful life, and then deducting the property's cost, less its salvage value, over that life through the use of one of several accounting methods.ⁿ⁷ Frequent conflicts between taxpayers and the Service over the expected useful life of property were a catalyst for the creation of the Accelerated Cost Recovery System.

Under the ACRS, the cost of "recovery property" placed in service after 1980 is deducted over a pre-established time period (known as a "recovery period"), rather than the taxpayer's estimated useful life for that property.ⁿ⁸ The property is placed into one of several general categories or classifications, based upon its useful life under the guideline class to which it is assigned by the Service.ⁿ⁹ Deductions allowed for the property are taken in accordance with statutorily

prescribed methods.ⁿ¹⁰ At the completion of the specified period--e.g., 27.5 years for residential rental property, using a straight line method--the deductions will total the original basis of the property.ⁿ¹¹ Salvage value is not considered.ⁿ¹²

[ii] ACRS Rules for Real Property Placed in Service After 1986

The cost recovery allowance for real property is determined by using the applicable depreciation method, recovery period and convention.ⁿ¹³ Most depreciable real property falls within the categories of (1) residential rental property or (2) nonresidential real property. The applicable depreciation method for both categories is the straight line method.ⁿ¹⁴ The recovery periods for residential rental property and nonresidential real property are 27.5 years and 39 years, respectively.ⁿ¹⁵

In the case of both residential rental property and nonresidential real property, the applicable convention is the mid-month convention. Thus, real property placed in service or disposed of by a taxpayer during any month is treated as having been placed in service or disposed of in the middle of that month.ⁿ¹⁶

Under an alternative depreciation system, a taxpayer may elect, on a building-by-building basis, a longer, 40-year recovery period for residential rental property or nonresidential real property. This alternative system utilizes the straight line method without regard to salvage value.ⁿ¹⁷

A building or structure is residential rental property for the tax year if 80 percent or more of the gross rental income from it for the tax year is rental income from dwelling units. If any part of such building or structure is occupied by the taxpayer, gross rental income includes the rental value of the portion so occupied. A dwelling unit is a house or apartment used to provide living accommodations in a building or structure, but does not include a unit in a hotel, motel, inn or other establishment if more than half of its units are used on a transient basis.ⁿ¹⁸

Nonresidential real property is *IRC Section 1250* property (i.e., depreciable real property) that is neither residential rental property nor property with a class life of less than 27.5 years.ⁿ¹⁹

The cost recovery for any addition to or improvement of property is computed in the same manner in which the deduction for the underlying property would be computed if such underlying property were placed in service at the same time as the addition or improvement. The applicable recovery period for the addition or improvement begins on the *later* of (1) the date on which the addition or improvement is placed in service; or (2) the date on which the underlying property is placed in service.ⁿ²⁰

Example:

An extra story is added in 1989 to a leased office building which was initially placed in service in 1987. The building is classified as nonresidential real property. The cost of the addition is recovered over 31.5 years, using the straight-line method. This is the same recovery period and method that would apply to the building if it had been placed in service in 1989.

Note that the recovery period for the new story commences to run on the date (in 1989) when the story was placed in service, rather than on the earlier date (in 1987) when the office building itself was placed in service.

[iii] ACRS Rules for Real Property Placed in Service from 1981-1986

Different ACRS rules are in effect for recovery property placed in service from 1981-1986. Generally speaking, under these rules, the capital cost of the property is recovered by either an accelerated or straight line method over predetermined periods generally unrelated to, but shorter than, the property's useful life.ⁿ²¹ "Recovery property" is defined here as tangible property which is subject to the depreciation allowance and is used in a trade or business, or is

held for the production of income.ⁿ²²

Several classes of recovery property are distinguished by the number of years over which cost recovery deductions may be taken with respect to the property in each class.ⁿ²³ At the completion of the period, the deductions should equal the original basis of the property. Salvage value is not considered in determining the allowable deductions.ⁿ²⁴

Most real property falls within a class which describes its recovery period. Initially, this was "15-year real property," later extended to "18-year real property," and then finally extended to "19-year real property." In addition, other classes for which real property could qualify included "10-year property" and "low-income housing."ⁿ²⁵

Alternatively, a taxpayer could have elected to recover the cost of recovery property over a period longer than that described above, using a straight line method. Thus, for 15-, 18-, or 19-year real property, the electable periods were 15, 18, 19 (respectively), 35 or 45 years.ⁿ²⁶

The accelerated cost recovery allowance for 15-, 18- or 19-year real property is based on the 15-, 18- or 19-year recovery period, using a method similar to the 175 percent declining balance, and switching to a straight line method in later years to maximize the allowable deduction.ⁿ²⁷

The recovery method for a building is also used for any of the building's components which is *IRC Section 1250* property. The recovery period for such component begins on the *later* of the dates on which the component, or the building, is placed in service.ⁿ²⁸ However, a "substantial improvement" to a building is eligible for a cost recovery method other than the one used for the building itself. In other words, the improvement is treated as a separate building.ⁿ²⁹ The improvement is substantial only if: (1) it was made more than three years after the building was placed in service; and (2) it added to the capital account of the building within a 24-month period an amount equal to, or in excess of, 25 percent of the building's adjusted basis as of the first day of the 24-month period.ⁿ³⁰

Planning Note

Availability of depreciation deduction to assignee of leasehold where lessee-assignor has made improvements to property. Where a lessee erects at his own cost a building on the leased premises, and then assigns his entire interest in the improved realty to a third party for a stipulated sum and for the assignee's agreement to pay all future rents owed to the lessor, the assignee's investment in such interest represents a "capital investment in the building of the same nature as that of the original lessee..." Hence, the sum paid for the assignment is treated as having been paid for the improvements, and the assignee is entitled to recover his investment through depreciation deductions.

It should be noted, however, that where the rental value of the leased land has risen since the execution of the lease, part of the sum paid by the assignee constitutes consideration for the increased rental value and is treated as a leasehold acquisition cost. As such, this part of the sum must be amortized over the remaining period of the lease. The rest of the sum paid by the assignee is deductible as depreciation.ⁿ³¹

Legal Topics:

For related research and practice materials, see the following legal topics:

Real Property LawLandlord & TenantGeneral OverviewTax LawFederal Income Tax ComputationDeductions for Amortization, Depletion & DepreciationAmortization, Cost Recovery & Depreciation (IRC secs. 167-169, 171, 178, 194-195, 197, 216, 248, 280F)General OverviewTax LawFederal Income Tax ComputationDeductions for Amortization, Depletion & DepreciationAmortization, Cost Recovery & Depreciation (IRC secs. 167-169, 171, 178, 194-195, 197, 216, 248, 280F)Accelerated Cost Recovery SystemTax LawFederal Income Tax ComputationDeductions

for Amortization, Depletion & DepreciationAmortization, Cost Recovery & Depreciation (IRC secs. 167-169, 171, 178, 194-195, 197, 216, 248, 280F)Basis for DepreciationTax LawFederal Income Tax ComputationDeductions for Amortization, Depletion & DepreciationAmortization, Cost Recovery & Depreciation (IRC secs. 167-169, 171, 178, 194-195, 197, 216, 248, 280F)Property Held for Income ProductionTax LawFederal Income Tax ComputationDeductions for Amortization, Depletion & DepreciationAmortization, Cost Recovery & Depreciation (IRC secs. 167-169, 171, 178, 194-195, 197, 216, 248, 280F)Property Used in Business & TradeTax LawFederal Income Tax ComputationDeductions for Business ExpensesCapital Expenditures (IRC secs. 263-263A)

FOOTNOTES:

(n1)Footnote 1. *Weiss v. Wiener*, 279 U.S. 333 (1929) .

(n2)Footnote 2. *See* §§ 23.05, 23.06, *supra* .

(n3)Footnote 3. *Treas. Reg. § 1.162-11(b)(1), 1.167(a)-4.*

(n4)Footnote 4. *Nelson v. Commissioner*, 184 F.2d 649, 652 (8th Cir. 1950) .

(n5)Footnote 5. *Treas. Reg. § 1.162-11(b)(1), 1.167(a)-4; see Rev. Rul. 60-180, 1960-1 CB 114 .*

(n6)Footnote 6. Staff of the Joint Committee on Taxation, *General Explanation of the Economic Recovery Tax Act of 1981*, 97th Cong., 1st Sess. 77 (Dec. 29, 1981).

The Accelerated Cost Recovery System is discussed in detail in § 23.07[2], *infra*.

(n7)Footnote 7. *IRC § 178(a)*, prior to amendment by the Tax Reform Act of 1986 (TRA 1986), Pub. L. No. 99-514, 99th Cong., 2d Sess. § 201(d)(2)(A) (Oct. 22, 1986); *Treas. Reg. § 1.178-1(b)*.

(n8)Footnote 8. *IRC § 178(b)*, prior to amendment by TRA 1986 § 201(d)(2)(A).

(n9)Footnote 9. *IRC § 168(i)(8)*.

(n10)Footnote 10. *M. E. Blatt Co. v. U.S.*, 305 U.S. 267 (1938) .

(n11)Footnote 11. *IRC § 109*.

(n12)Footnote 12. *Treas. Reg. § 1.61-8(c)*; *Cunningham v. Commissioner*, 28 T.C. 670 (1957) , *aff'd*, 258 F.2d 231 (9th Cir. 1958) ; *McGrath v. Comm'r*, T.C. Memo 2002-231, 84 T.C.M. (CCH) 238.

(n13)Footnote 13. *See Treas. Reg. § 1.109-1(a)*.

(n14)Footnote 14. *Treas. Reg. § 1.109-1(b)*.

(n15)Footnote 15. *IRC § 1019*.

(n16)Footnote 16. *Reisinger v. Commissioner*, 144 F.2d 475 (2d Cir. 1944) .

(n17)Footnote 17. *Commissioner v. Revere Land Co.*, 169 F.2d 469, 476 (3d Cir. 1948), *rev'g* 7 T.C. 1061 (1946).

(n18)Footnote 1. *Treas. Reg. § 1.167(a)-4*.

(n19)Footnote 2. *Triangle Realty Co. v. Comm'r*, 12 BTA 867 (1928) .

(n20)Footnote 3. *Borland v. Commissioner*, 27 B.T.A. 538 (1933) .

(n21)Footnote 4. *See* § 23.07[2][b], *infra*.

(n22)Footnote 5. *See* IRC § 167(a).

(n23)Footnote 6. *Treas. Reg.* § 1.167(a)-2.

(n24)Footnote 7. *IRC* § 167; *Treas. Reg.* § 1.167(a)-1.

(n25)Footnote 8. *IRC* § 168(a), (c).

(n26)Footnote 9. *IRC* § 168(e).

(n27)Footnote 10. *IRC* § 168(b).

(n28)Footnote 11. *IRC* § 168(b)(3), (c).

(n29)Footnote 12. *IRC* § 168(b)(4).

(n30)Footnote 13. *IRC* § 168(a) through (d).

(n31)Footnote 14. *IRC* § 168(b)(3)(A), (B).

(n32)Footnote 15. *IRC* § 168(c)(1), as amended by the Revenue Reconciliation Act of 1993, Pub. L. No. 103-66, 103rd Cong., 1st Sess. § 13151(a) (Aug. 10, 1993). It should be noted that the recovery period for nonresidential real property is 39 years for property placed in service by a taxpayer on or after May 13, 1993. Prior to the 1993 Act, the recovery period was 31.5 years.

(n33)Footnote 16. *IRC* § 168(d)(2), (4)(B).

(n34)Footnote 17. *IRC* § 168(g)(2), (7).

(n35)Footnote 18. *IRC* § 168(e)(2)(A).

(n36)Footnote 19. *IRC* § 168(e)(2)(B).

(n37)Footnote 20. *IRC* § 168(i)(6).

(n38)Footnote 21. *IRC* § 168, prior to amendment by the Tax Reform Act of 1986 (TRA 1986), Pub. L. No. 99-514, 99th Cong., 2d Sess. § 201(a) (Oct. 22, 1986).

(n39)Footnote 22. *IRC* § 168(c)(1), (e), prior to amendment by TRA 1986 § 201(a).

(n40)Footnote 23. *IRC* § 168(c)(2), prior to amendment by TRA 1986 § 201(a).

(n41)Footnote 24. *IRC* § 168(f)(9), prior to amendment by TRA 1986 § 201(a).

(n42)Footnote 25. *IRC* § 168(c)(2)(C) through (F), prior to amendment by TRA 1986 § 201(a).

(n43)Footnote 26. *IRC* § 168(b)(3)(A), prior to amendment by TRA 1986 § 201(a).

(n44)Footnote 27. *IRC* § 168(b)(2)(A), prior to amendment by TRA 1986 § 201(a).

(n45)Footnote 28. *IRC* § 168(f)(1)(A), prior to amendment by TRA 1986 § 201(a).

(n46)Footnote 29. *IRC* § 168(f)(1)(C)(i), prior to amendment by TRA 1986 § 201(a).

(n47)Footnote 30. *IRC § 168(f)(1)(C)(ii) through (iii)*, prior to amendment by TRA 1986 § 201(a).

(n48)Footnote 31. *Rev. Rul. 61-217, 1961-2 CB 49* .



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Current Legal Forms for Real Estate
Chapter 23 REAL ESTATE LEASES
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31-23 Current Legal Forms for Real Estate § 23.08

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§ 23.08 Demolition of Structures

When a structure is demolished, neither the owner nor lessee of such structure is allowed a deduction for (1) any amount expended for the demolition; or (2) any loss sustained because of the demolition.ⁿ¹ Rather, these amounts are chargeable to the capital account with respect to the land on which the demolished structure was located.ⁿ²

If a lessor or lessee of real property demolishes buildings situated thereon pursuant to a lease or an agreement which resulted in a lease, the adjusted basis of the demolished buildings--increased by the net cost of demolition, or decreased by the net proceeds from demolition--is considered to be part of the cost of the lease and is amortized over the lease term.ⁿ³

Planning Note

Demolition of certified historic structure. For demolitions beginning after 1983, costs and losses incurred in the demolition of "certified historic structures" must be added to the basis of the land on which the demolished structures were located, rather than claimed as a current deduction. (Previously, such costs were currently deductible, unless the structure and the property on which it was located were purchased with the intent to demolish the building.) A certified historic structure is a building that is certified by the Secretary of the Interior as having historic significance and that meets certain other requirements.ⁿ⁴

Legal Topics:

For related research and practice materials, see the following legal topics:

Tax LawFederal Income Tax ComputationDeductions for Amortization, Depletion & DepreciationGeneral OverviewTax LawFederal Income Tax ComputationDeductions for Amortization, Depletion & DepreciationAmortization, Cost Recovery & Depreciation (IRC secs. 167-169, 171, 178, 194-195, 197, 216, 248, 280F)General OverviewTax LawFederal Income Tax ComputationDeductions for Amortization, Depletion & DepreciationAmortization, Cost Recovery & Depreciation (IRC secs. 167-169, 171, 178, 194-195, 197, 216, 248, 280F)Property Used in Business & TradeTax LawFederal Income Tax ComputationDeductions for Business

ExpensesBusiness, Entertainment & Trade Expenses (IRC secs. 162, 274)Tax LawFederal Income Tax
 ComputationDeductions for Business ExpensesCapital Expenditures (IRC secs. 263-263A)

FOOTNOTES:

(n1)Footnote 1. *IRC § 280B(a)(1)*.

(n2)Footnote 2. *IRC § 280B(a)(2)*. The Service has provided a safe harbor for structural modifications to a building, the expenses for which will not be treated as amounts expended on, and losses incurred on account of, modifications pursuant to a demolition under *IRC § 280B* and chargeable to a capital account. The costs and losses may, however, be subject to other treatment under *IRC §§ 162, 168, 263, and 263A*. *Rev. Proc. 95-27, 1995-1 CB 704*.

(n3)Footnote 3. *Treas. Reg. § 1.165-3(b)(2)*.

(n4)Footnote 4. H.R. Conf. Rep. No. 98-861, 98th Cong., 2d Sess. 1273-1274 (1984).



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Current Legal Forms for Real Estate
Chapter 23 REAL ESTATE LEASES
Part I. The Tax Background

31-23 Current Legal Forms for Real Estate § 23.09

AUTHOR: by Thomas G. Belden

§ 23.09 Lessee's Costs of Repairs, Replacements and Restoration

[1] Maintenance and Repairs

Expenses that the lessee incurs in maintaining and repairing leased premises, either voluntarily or pursuant to his lease, are currently deductible business expenses.ⁿ¹

The issue frequently arises as to whether a particular expenditure by a lessee is a currently deductible expense or an improvement which must be capitalized.ⁿ² The Regulations provide that the cost of incidental repairs which neither materially add to the value of the property nor appreciably prolong its life, but keep it in ordinarily efficient operating condition, may be currently deducted.ⁿ³ Illustratively, such incidental repairs might include caulking a window or door, repairing a leaking faucet, patching small holes and cracks in walls, etc.

As a general rule, if the lessee's expenditure results in the creation of an asset having a useful life which extends beyond one year, such expenditure is not currently deductible.ⁿ⁴ It should be noted, however, that one federal appeals court has held that "in deciding whether particular costs are capital or current... the length of the ensuing benefit is but one factor under consideration."ⁿ⁵ Similarly, the United States Court of Appeals for the Tenth Circuit has stated that the so-called "one-year rule" is intended to serve as a "mere guidepost," and not as an absolute rule requiring the automatic capitalization of every expenditure providing a benefit enduring for more than one year.ⁿ⁶ Thus, the expense incurred in repairing a broken windowpane, a damaged lock or door, or even a periodic repainting of an entire building, may well be treated as a deductible repair expenditure, even though the benefits endure quite beyond one year.ⁿ⁷

[2] Replacements and Restoration

Where the lease requires the lessee to maintain the premises at an established standard by making replacements, the cost of such replacements is a currently deductible business expense for the lessee, even if a replacement has a useful life of more than one year. However, the replacement must not provide the lessee with an economic benefit beyond that of the premises which he leased.ⁿ¹

For example, in *Journal-Tribune Publishing Company v. Commissioner*, the lessee-newspaper company was required under its lease to maintain the property at an established level. The court held that the lessee could currently deduct as a business expense the cost of a printing press which it had bought to replace the lessor's worn out press, even though the new press had a useful life of more than a year.ⁿ²

Where the lessee's expenditures for the replacement of furnishings and equipment having a useful life of more than a year are *not* required under the lease, such expenditures are capital in nature and are not currently deductible.ⁿ³

A lessee's payment to the lessor in satisfaction of the latter's obligation to restore the leased premises to their original state is a currently deductible expense. The payment may either be made at the end of the lease term or earlier.ⁿ⁴ However, a lessee may not claim a deduction based upon the estimated cost of making required restorations at a *future time* when the lease expires.ⁿ⁵

With regard to the lessor, where the lessee is merely obligated "to keep the property in good repair..." the lessor is nonetheless entitled to deductions for depreciation of his buildings and equipment, including obsolescence.ⁿ⁶ By contrast, no depreciation deductions are allowed to a lessor where his lessee is required to actually replace the property at the expiration of the lease term with other property of "equal value." The deductions are prohibited here because the lessor does not have a wasting asset.ⁿ⁷

Legal Topics:

For related research and practice materials, see the following legal topics:

Tax Law Federal Income Tax Computation Deductions for Amortization, Depletion & Depreciation Amortization, Cost Recovery & Depreciation (IRC secs. 167-169, 171, 178, 194-195, 197, 216, 248, 280F) General Overview Tax Law Federal Income Tax Computation Deductions for Business Expenses Business, Entertainment & Trade Expenses (IRC secs. 162, 274) Tax Law Federal Income Tax Computation Tax Accounting General Overview

FOOTNOTES:

(n1)Footnote 1. *Rose v. Haverty Furniture Co.*, 15 F.2d 345 (5th Cir. 1926) .

(n2)Footnote 2. For a discussion of the cost recovery rules pertaining to improvements made by a lessee on leased premises, see § 23.07[1], *supra*.

(n3)Footnote 3. *Treas. Reg. § 1.162-4*.

(n4)Footnote 4. *Treas. Reg. § 1.461-1(a)(1)*.

(n5)Footnote 5. *NCNB Corp. v. U.S.*, 684 F.2d 285, 289 (4th Cir. 1982) .

(n6)Footnote 6. *United States v. Wehrli*, 400 F.2d 686, 689 (10th Cir. 1968) .

(n7)Footnote 7. *United States v. Wehrli*, 400 F.2d 686, 689 (10th Cir. 1968) .

(n8)Footnote 1. *Journal-Tribune Pub. Co. v. Commissioner*, 348 F.2d 266 (8th Cir. 1965), *rev'g* 38 T.C. 733 (1962); *Atlantic Coast Line RR Co. v. Comm'r*, 31 BTA 730 (1934) , *aff'd*, 81 F.2d 309 (4th Cir. 1936) .

(n9)Footnote 2. N. 1, *supra*.

(n10)Footnote 3. *Hotel Kingkade v. Comm'r*, 180 F.2d 310, 312-313 (10th Cir. 1950) .

(n11)Footnote 4. *Frank & Seder Co. v. Commissioner*, 44 F.2d 147 (3d Cir. 1930) .

(n12)Footnote 5. *Harris-Emery Co. v. Comm'r*, 10 BTA 297, 300 (1928) .

(n13)Footnote 6. *Alaska Realty Co. v. Comm'r*, 141 F.2d 675 (6th Cir. 1944) .

(n14)Footnote 7. *Comm'r v. Terre Haute Elec. Co.*, 67 F.2d 697, 698 (7th Cir. 1934) ; *Kem v. Commissioner*, 432 F.2d 961 (9th Cir. 1970) .



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Current Legal Forms for Real Estate
Chapter 23 REAL ESTATE LEASES
Part I. The Tax Background

31-23 Current Legal Forms for Real Estate § 23.10

AUTHOR: by Thomas G. Belden

§ 23.10 Lessor's Costs in Managing and Maintaining Rental Property

A taxpayer engaged in the business of dealing in real estate is entitled to a deduction for all ordinary and necessary expenses paid or incurred during the tax year in carrying on the business.ⁿ¹ Deductible expenses include those expenditures connected with and pertaining to buying, selling and trading in real estate, renting real estate and collecting rentals from it, and managing and maintaining such property.ⁿ²

Similarly, a taxpayer who owns and invests in rental property, but is not a real estate dealer, is likewise entitled to a deduction for all ordinary and necessary expenses paid or incurred in managing and maintaining the property and collecting rents.ⁿ³ The following are some of the major expenses deductible by lessors:

- (1) maintenance and repairs;ⁿ⁴
- (2) custodial services;ⁿ⁵
- (3) insurance premiums against fire, storm, theft, accident or similar losses;ⁿ⁶
- (4) state and local real property taxes;ⁿ⁷
- (5) mortgage interest;ⁿ⁸
- (6) water rent;ⁿ⁹
- (7) maintaining an office for the management of rental property;ⁿ¹⁰
- (8) legal fees paid to bring suit against a real estate agent to obtain an accounting;ⁿ¹¹
- (9) commissions paid for collecting rent and managing rental property;ⁿ¹² and

(10) legal fees paid in the collection of rent.ⁿ¹³

A taxpayer who uses real property solely as his residence may not deduct the cost of repairs, utilities, water, depreciation and insurance.ⁿ¹⁴ Such expenses are also nondeductible where the property is used by the taxpayer's relatives without the payment of rent.ⁿ¹⁵ It should be noted, however, that state and local real property taxes are deductible regardless of whether the property is used in a trade or business or for the production of income.ⁿ¹⁶ Residential mortgage interest is likewise deductible, subject to limitations on the amount of the underlying mortgage indebtedness and other restrictions.ⁿ¹⁷

The owner of real property who formerly used it as his residence may convert it to rental use and thereafter deduct ordinary and necessary expenses paid or incurred in connection with the management, conservation or maintenance of the property.ⁿ¹⁸ Generally, to claim the deductions, the owner must (1) cease using the property as his residence; and (2) *either* attempt to rent the propertyⁿ¹⁹ or list it for rent or sale with a broker.ⁿ²⁰ The expenses remain deductible even where the owner is never able to rent or sell the property.ⁿ²¹

Where the owner ceases using the property as his residence and lists it for sale (but not for rent), he is not automatically permitted to deduct depreciation, repairs, maintenance and utilities. Rather, the owner must hold the property until such time as its value exceeds *both* (1) his investment in the property (i.e., his cost or basis); and (2) the property's value at the time that he ceased using it as his residence. The Tax Court has stated that the placing of the property on the market for immediate sale, at or shortly after the time of its abandonment as a residence, will ordinarily be strong evidence that a taxpayer is not holding the property for post-conversion appreciation in value.ⁿ²²

Where the owner of real property converts his residence into rental property, the basis for depreciation is the lower of (1) the property's fair market value on the date of conversion; or (2) the adjusted basis of the property at that time.ⁿ²³

Planning Note

Taxpayer who abandons residence may not deduct rent paid for alternate abode. Rent paid for temporary living quarters is not deductible, even though the taxpayer incurs this expense in order to lease his own residence at a high rental. The rent paid for the temporary quarters is not an expense incurred in the production of income; rather, it is a nondeductible family living expense.
ⁿ²⁴

Holding cooperative apartment for sale or rent. The owner of a cooperative apartment who vacates the premises and lists it with a broker for sale or rental may deduct maintenance payments which he makes on the cooperative prior to its sale or rental. Such payments are treated as an ordinary and necessary expense incurred in the production of income. ⁿ²⁵

Legal Topics:

For related research and practice materials, see the following legal topics:

Tax Law Federal Income Tax Computation Deductions for Business Expenses Business, Entertainment & Trade Expenses (IRC secs. 162, 274) Tax Law Federal Income Tax Computation Deductions for Business Expenses Expenses for Production of Income (IRC sec. 212) Tax Law Federal Income Tax Computation Deductions for Business Expenses Interest (IRC sec. 163) Tax Law Federal Income Tax Computation Deductions for Business Expenses Taxes Paid (IRC sec. 164) Tax Law Federal Taxpayer Groups Individuals Business Deductions (IRC secs. 62, 63, 162) Rentals & Other Payments

FOOTNOTES:

(n1)Footnote 1. *IRC § 162; Brodbeck v. Commissioner, 8 B.T.A. 969 (1927)* .

(n2)Footnote 2. *Lloyd v. Commissioner*, 32 B.T.A. 887, 891 (1935) .

(n3)Footnote 3. *Leidesdorf v. Commissioner*, 26 B.T.A. 881 (1932) ; *Kirkland v. Commissioner*, 1 T.C.M. (CCH) 109, 113 (1942) .

(n4)Footnote 4. *E.g., Chesapeake Corp. of Virginia v. Commissioner*, 17 T.C. 668 (1951) (painting rental house, wallpapering rooms, repairing bath tiles, scraping and painting floors).

(n5)Footnote 5. *Lobsenz v. Commissioner*, 17 B.T.A. 81 (1929) .

(n6)Footnote 6. *Treas. Reg. §§ 1.162-1(a); 1.212-1(b)*.

(n7)Footnote 7. *IRC § 164(a)(1)*.

(n8)Footnote 8. *Treas. Reg. § 1.163-1(b)*.

(n9)Footnote 9. *Lobsenz v. Comm'r*, N. 5, *supra* .

(n10)Footnote 10. *Kirkland v. Commissioner*, N. 3, *supra* .

(n11)Footnote 11. *Croker v. Commissioner*, 27 B.T.A. 588 (1933) .

(n12)Footnote 12. *See Treas. Reg. § 1.162-1(a)*.

(n13)Footnote 13. *Friend v. Commissioner*, 40 B.T.A. 768 (1939) , *aff'd*, 119 F.2d 959 (7th Cir. 1941) .

(n14)Footnote 14. *Treas. Reg. § 1.262-1(b)(3)*; *Appeal of Page*, 1 B.T.A. 400 (1925) ; *Drexler v. Commissioner*, 25 B.T.A. 79 (1932) .

(n15)Footnote 15. *Drexler v. Commissioner*, N. 14, *supra* .

(n16)Footnote 16. N. 7, *supra*.

(n17)Footnote 17. *IRC § 163(h)(2), (3)*.

(n18)Footnote 18. *Treas. Reg. § 1.212-1(b), (h)*.

(n19)Footnote 19. *Horrmann v. Commissioner*, 17 T.C. 903, 907-908 (1951) .

(n20)Footnote 20. *Robinson v. Commissioner*, 2 T.C. 305, 307 (1943) .

(n21)Footnote 21. *Robinson v. Commissioner* at 309.

(n22)Footnote 22. *Newcombe v. Commissioner*, 54 T.C. 1298, 1302-1303 (1970) .

(n23)Footnote 23. *Treas. Reg. § 1.167(g)-1*.

(n24)Footnote 24. *Amerise v. Commissioner*, 1 T.C. 1108 (1949) .

(n25)Footnote 25. *Briley v. United States*, 189 F. Supp. 510 (N.D. Ohio 1960) , *rev'd on other issue*, 298 F.2d 161 (6th Cir. 1962) .



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Current Legal Forms for Real Estate
Chapter 23 REAL ESTATE LEASES
Part I. The Tax Background

31-23 Current Legal Forms for Real Estate § 23.11

AUTHOR: by Thomas G. Belden

§ 23.11 Cost of Cancelling, Extending or Renewing Lease

[1] Costs to Lessee

A lessee who pays for the cancellation of his lease may deduct the payment as a current business expense.ⁿ¹ The deduction is taken for the year in which the amount is actually paid or accrued, depending upon the lessee's method of accounting.ⁿ²

However, if the lessee purchases the leased property, no part of the purchase price is looked upon as a deductible cancellation fee, even if part of the price is directly attributable to the lessee's relief from the lease. Rather, the purchase price is an amortizable capital expenditure.ⁿ³

If a lease cancellation occurs, the lessee may deduct any unamortized cost of the lease in the year of cancellation.ⁿ⁴ However, if a lease is cancelled and the lessee executes a new lease of the same premises, any unrecovered cost of the old lease is added to the cost of acquiring the new one. The total is then deducted over the life of the new lease.ⁿ⁵

Where a lessee pays for an extension or renewal of the lease, the payment is, in effect, a lease acquisition cost. The payment, therefore, is not currently deductible; instead, it is amortized over the life of the extended or renewed lease.ⁿ⁶ Similarly, where a lessee obtains a lease modification through the payment of additional "rent" during any part of the lease term, the payments are capital expenditures amortizable over the full term of the lease.ⁿ⁷

As far as the lessor is concerned, payments received to cancel a lease are taxable as ordinary income in the year of receipt.ⁿ⁸ The cancellation payment is *not* a return of capital to the lessor.ⁿ⁹

While the cancellation payment is itself ordinary income to the lessor, any expenses that the lessor incurs on cancellation (*e.g.*, attorneys' fees, court costs, etc.) may be deducted from the amount received.ⁿ¹⁰

Like cancellation payments, amounts that a lessor receives as consideration for the modification of a lease are a

substitute for rental income and includable in gross income.

Example:

A lessor leased a tract of land for a period of 99 years. Shortly thereafter, the lessees assigned their interest in the lease to a third party. The lessor consented to the assignment and received \$7,500 from the lessees as consideration for the modification of the lease. The lessor reported \$7,500 on his tax return as a long-term capital gain. The Tax Court held that the payment of \$7,500 was a substitute for some of the income which the taxpayer might otherwise have received in rent. Hence, it represented ordinary income and not capital gain.ⁿ¹¹

[2] Costs to Lessor

A payment made by a lessor to obtain the cancellation of his tenant's lease constitutes the cost of a property right and is not a currently deductible expense. Generally speaking, the payment must be amortized over the remaining life of the cancelled lease.ⁿ¹

However, if the purpose of cancelling the lease is to enable the lessor to lease the property to a new tenant, the cancellation cost must be amortized over the period of the new lease.ⁿ² In addition, if the lessor seeks a cancellation in order to erect a new building for another tenant, the cancellation payment is part of the cost of the new building and is amortized over the useful life of the structure.ⁿ³ And if the cancellation payment is made in order to sell the property, the amount is added to the lessor's cost of the property.ⁿ⁴

The cancellation payment received by a lessee is taxable in the year of receipt, whether he is on the cash or accrual basis.ⁿ⁵ Amounts received by a lessee for the cancellation of a lease are considered amounts received in exchange for the lease, and thus are subject to capital gain treatment if the lease is a capital asset. This rule applies to leases of both real and personal property.ⁿ⁶ It also applies to a payment made in good faith for a partial cancellation of a lease if the cancellation relates to a severable economic unit, such as a portion of the premises covered by the lease or a reduction in the unexpired term of the lease.ⁿ⁷

Planning Note

Lease cancellation fee paid by lessor to demolish building and erect addition to plant. Where a lessor pays a lease cancellation fee in order to demolish an existing building on the land and erect an addition to his plant, the payment is a capital expenditure. It can neither be deducted as a business expense nor amortized over the remaining life of the lease. However, the Tax Court has expressly left open the question of whether the payment may be allocated to the land or to the plant addition.ⁿ⁸

Legal Topics:

For related research and practice materials, see the following legal topics:

Real Property LawLandlord & TenantGeneral OverviewTax LawFederal Income Tax ComputationDeductions for Business ExpensesBusiness, Entertainment & Trade Expenses (IRC secs. 162, 274)Tax LawFederal Income Tax ComputationDeductions for Business ExpensesCapital Expenditures (IRC secs. 263-263A)Tax LawFederal Income Tax ComputationSales & ExchangesIntangible Property (IRC secs. 1234-1235, 1241, 1253)Distributor Agreements & Lease CancellationsTax LawFederal Income Tax ComputationTax AccountingGeneral OverviewTax LawFederal Income Tax ComputationUnearned IncomeRental Income

FOOTNOTES:

(n1)Footnote 1. *Denholm & McKay Co. v. Comm'r*, 2 BTA 444 (1925) ; *Cassatt v. Commissioner*, 47 B.T.A. 400 (1942) , *aff'd*, 137 F.2d 745 (3d Cir. 1943) ; *Rev. Rul.* 69-511, 1969-2 C.B. 24 .

(n2)Footnote 2. *Rev. Rul. 69-511, 1969-2 C.B. 24 .*

(n3)Footnote 3. *Millinery Center Bldg. Corp. v. Commissioner, 350 U.S. 456, 76 S. Ct. 493, 100 L. Ed. 545, 1956-1 C.B. 609 (1956), aff'g 221 F.2d 322 (10th Cir. 1955), rev'g 21 T.C. 817 (1954).*

(n4)Footnote 4. *Oliver Mining Co. v. Comm'r, 13 T.C. 416 (1949) .*

(n5)Footnote 5. *Pig & Whistle Co. v. Commissioner, 9 B.T.A. 668 (1927) ; Phil Gluckstern's, Inc. v. Comm'r, TC Memo 1956-9 .*

(n6)Footnote 6. *See Treas. Reg. § 1.162-11(a).*

(n7)Footnote 7. *Rev. Rul. 73-176, 1973-1 CB 146 .*

(n8)Footnote 8. *Treas. Reg. § 1.61-8(b); G & C Frost Co. v. Commissioner, 44 B.T.A. 94 (1941) .*

(n9)Footnote 9. *Thorpe v. Commissioner, 42 B.T.A. 654 (1940) .*

(n10)Footnote 10. *G & C Frost Co. v. Commissioner, 44 B.T.A. 94 (1941) .*

(n11)Footnote 11. *Oliver v. Commissioner, T.C. Memo 1965-83 , aff'd, 364 F.2d 575 (8th Cir. 1966) ; see also Jennings & Co. v. Commissioner, 59 F.2d 32 (9th Cir. 1932) .*

(n12)Footnote 1. *Miller v. Commissioner, 10 B.T.A. 383 (1928) ; Borland v. Commissioner, 27 B.T.A. 538 (1933) ; Peerless Weighing & Vending Mach. Corp. v. Comm'r, 52 TC 850 (1969) .*

(n13)Footnote 2. *Wells Fargo Bank & Union Trust Co. v. Comm'r, 163 F.2d 521 (9th Cir. 1947) ; Montgomery Co. v. Commissioner, 54 T.C. 986 (1970) ; Latter v. Commissioner, T.C. Memo 1961-67 ; but see Trustee Corp. v. Commissioner, 42 T.C. 482 (1964) .*

(n14)Footnote 3. *Keiler v. U.S., 285 F. Supp. 520 (W.D. Ky. 1966) , aff'd, 395 F.2d 991 (6th Cir. 1968) ; Business Real Est. Trust of Boston v. Comm'r, 25 B.T.A. 191 (1932) .*

(n15)Footnote 4. *Shirley Hill Coal Co. v. Comm'r, 6 BTA 935 (1927) .*

(n16)Footnote 5. *Farrelly-Walsh, Inc. v. Comm'r, 13 BTA 923 (1928) .*

(n17)Footnote 6. *Treas. Reg. § 1.1241-1(a).*

(n18)Footnote 7. *Treas. Reg. § 1.1241-1(b).*

(n19)Footnote 8. *American Spring & Wire Specialty Co. v. Comm'r, TC Memo 1961-26 .*



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Current Legal Forms for Real Estate
Chapter 23 REAL ESTATE LEASES
Part I. The Tax Background

31-23 Current Legal Forms for Real Estate § 23.12

AUTHOR: by Thomas G. Belden

§ 23.12 Lease Agreements Between Related Parties

As previously noted, rentals or other payments made for the purpose of carrying on a trade or business are deductible. The Code does not limit deductions for rental payments to a "reasonable allowance." Nonetheless, the Service and the courts may examine the facts relating to such payments for the purpose of determining their true character, and may disallow deductions claimed as rent in certain circumstances, if the payments are excessive or unreasonable.ⁿ¹

The initial inquiry focuses on whether a lease has been entered into between related parties. The mere existence of a close relationship between lessor and lessee--e.g., one family member paying rent to another--will not automatically preclude a rent deduction.ⁿ² However, where such a relationship does exist, the next question is whether the rent is in excess of what the lessee would have paid had he dealt at arm's length with a stranger.ⁿ³ The objective is to prevent the shifting of income and expenses, purely for tax purposes, to a party who is not entitled to them.

Example:

A taxpayer rented, from his wife, property used in the manufacturing business which he operated as a sole proprietor and for which he paid a fixed rental of \$200 per month. During the fifth year of the lease, the taxpayer decided on his own to enter into an agreement with his wife in order to pay an increased rental of 45 percent of his net profits. Accordingly, during the fifth year and for five months of the following year, he paid sums that were ten to 30 times larger than the earlier, fixed rental. The Tax Court held that for the fifth year and the additional five months, the taxpayer was entitled to a *total* rent deduction of \$3,400 (\$200 x 17 months). All sums in excess of that amount were not "required" rental payments.ⁿ⁴

As the example illustrates, not only are fixed, periodic payments subject to scrutiny when their amount appears unreasonable; payments based on a percentage of profits or gross receipts may also be examined.ⁿ⁵ In *Brown Printing Company v. Commissioner*, the lessor and lessee entered into a percentage arrangement which resulted in extremely high rent during the first two years of a ten-year lease. Nonetheless, the rent deduction was not disallowed because the lease provisions were fair at the time the lease was executed.ⁿ⁶

Deductions for rental payments are *not* completely disallowed when found to be excessive or unreasonable. Rather, the Service will adjust the deduction downward so that it reflects a reasonable rental payment.ⁿ⁷ The deduction will not be disturbed as long as the rent paid is "reasonable and fair... such that unrelated parties dealing at arm's-length would have entered into a similar rental agreement."ⁿ⁸

In determining whether rental payments are "reasonable and fair," the Service and the courts carefully examine the facts and circumstances surrounding the rental to glean the intentions of the parties in agreeing upon the lease and fixing the rent.ⁿ⁹ In addition, the rental cost of comparable property in the general vicinity of the leased premises is given serious consideration. To establish such cost, testimony may be introduced from experts in the real estate business who are familiar with the area surrounding the leased premises.ⁿ¹⁰ Where evidence of the rental cost of comparable property is unavailable, a taxpayer may demonstrate that the rent under his lease is reasonable and fair by comparing it against the costs of ownership, and adding a fair profit percentage.ⁿ¹¹

As in the case of lease agreements between family members, a lease executed by a corporation and its shareholder is subject to close scrutiny. For example, if shareholders lease real estate to their corporation, rental payments may actually be dividends in disguise (known as "constructive dividends"). By cloaking the dividends as rental payments, the corporation obtains a tax deduction; dividend payments, on the other hand, are not deductible. Accordingly, where all or part of the rent paid is actually a constructive dividend, the corporate-lessee's rent deduction is disallowed in an equal amount, and the disallowed payments are treated as nondeductible dividend distributions.

Example 1:

The majority stockholder of a corporation, along with his wife, owned all of the stock of the company, except for certain qualifying shares. He also owned real estate which he purchased for \$50,700 and immediately rented to the corporation for \$18,000 per year. The Service disallowed a deduction for a portion of the payments made by the corporation and designated as rent. The Tax Court stated that it is entitled to inquire as to what part, if any, of a disallowed amount is a dividend disbursement. It held that \$9,600 of the "rent" was a distribution of dividends to the principal shareholder and his wife.ⁿ¹²

Example 2:

An individual purchased all of the stock of a corporation for \$150,000. He also bought land and buildings from the company for \$18,000 and contemporaneously leased the property back to the company for a 12-year term and at a monthly rental cost of \$1,350 (total annual payments: \$16,200). The Tax Court held that to the extent that the company's rental deductions exceeded \$3,000 in each of the years in issue, they were not allowable.ⁿ¹³

Planning Note

Compile proof that rental payments are reasonable at time lease is executed. When a lessor and lessee are related, the lessee should compile evidence at the very inception of the lease to prove that the rental payments are fair and reasonable. Practically speaking, there are two ways to establish the reasonableness of rental payments. The first way is through the use of an expert who can provide information about the average rental price of comparable property in the general vicinity of the leased premises. (Acquiring a written appraisal of rental value from a real estate agent at the time when the lease is executed is a prudent measure.) The second way is through the use of materials, published by the government or private sector, on the cost of leasing real property in various areas of the country.

Repayment of excessive rent by shareholder to corporation. Where rental payments under a lease between a lessor-shareholder and a lessee-corporation are arguably excessive, the lease should contain a clause requiring the shareholder to repay the corporation any rent for which a deduction

is subsequently disallowed. Such a clause will entitle the shareholder to claim a deduction on his own income tax return in the amount of the repayment. This deduction will offset the income which the shareholder reported earlier on his tax return when he received the excessive rent. n14

Rent disallowed as excessive may be treated as compensation paid by the lessee-corporation to the lessor-shareholder. Where a lessor-shareholder provides services to his lessee-corporation, a rental payment which is disallowed as excessive may be recharacterized as compensation paid to the shareholder for services rendered. Assuming the compensation is reasonable, the corporation will be able to retain its deduction of the payment. n15

Legal Topics:

For related research and practice materials, see the following legal topics:

Business & Corporate LawCorporationsFinanceDividends & Reacquisition of SharesGeneral OverviewBusiness & Corporate LawCorporationsFinanceDividends & Reacquisition of SharesConstructive DividendsReal Property LawLandlord & TenantGeneral OverviewTax LawFederal Income Tax ComputationDeductions for Nonbusiness ExpensesRelated Taxpayers (IRC sec. 267)

FOOTNOTES:

(n1)Footnote 1. *Imerman v. Commissioner*, 7 T.C. 1030, 1037 (1946) ; *West Virginia Tractor & Equip Co. v. Comm'r*, 12 TCM 1476, 1481 (1953) .

(n2)Footnote 2. *Murtha v. Commissioner*, 11 T.C.M. (CCH) 435, 436 (1952) .

(n3)Footnote 3. *Standwick's, Inc. v. Commissioner*, 15 T.C. 556, 560-561 (1950) ; *Place v. Commissioner*, 17 T.C. 199, 203 (1951) , *aff'd*, 199 F.2d 373 (6th Cir. 1952) .

(n4)Footnote 4. *Place v. Commissioner*, N. 3, *supra* .

(n5)Footnote 5. *E.g.*, *Brown Printing Co. v. Comm'r*, 255 F.2d 436 (4th Cir. 1958) ; *Davis v. Commissioner*, 26 T.C. 49 (1956) .

(n6)Footnote 6. N. 5, *supra*.

(n7)Footnote 7. *Potter Elec. Signal & Mfg. Co. v. Comm'r*, TC Memo 1960-30 , *aff'd*, 286 F.2d 200 (8th Cir. 1961) .

(n8)Footnote 8. *Davis & Sons, Inc. v. Comm'r*, T.C. Memo 1981-178 .

(n9)Footnote 9. *Davis v. Commissioner*, 26 T.C. 49, 56 (1956) ; *International Color Gravure, Inc. v. Comm'r*, TC Memo 1961-15 .

(n10)Footnote 10. *American Metal Products Corp. v. Comm'r*, 34 TC 89, 105-106 (1960) .

(n11)Footnote 11. *International Color Gravure, Inc. v. Comm'r*, N. 9, *supra*.

(n12)Footnote 12. *Limericks, Inc. v. Commissioner*, 7 T.C. 1129 (1946) .

(n13)Footnote 13. *Jefferson Block & Supply Co. v. Commissioner*, 59 T.C. 625 (1973) , *aff'd*, 492 F.2d 1243 (6th Cir. 1974) .

(n14)Footnote 14. *See United States v. Simon*, 281 F.2d 520, 526 (6th Cir. 1960), *rev'g* 172 F. Supp. 953 (ED Mich. 1959).

(n15)Footnote 15. *James Phelen & Co., Inc. v. Comm'r*, *TC Memo 1960-286* .



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Current Legal Forms for Real Estate
Chapter 23 REAL ESTATE LEASES
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31-23 Current Legal Forms for Real Estate § 23.13

AUTHOR: by Thomas G. Belden

§ 23.13 Renting Out Dwelling Units Used for Personal Purposes

If a taxpayer is engaged in the trade or business of renting dwelling units to others, all ordinary and necessary expenses that are paid or incurred in conducting such business are deductible. All of such expenses for managing, conserving, or maintaining property held for the production of income are also deductible.ⁿ¹ On the other hand, no deduction is generally allowed for personal, living, or family expenses, unless the Code expressly permits the same.ⁿ² Generally speaking, residential mortgage interest, property taxes, and casualty losses are expenses that are expressly deductible, even if personal in nature.ⁿ³ But no deduction is allowed for such items as depreciation, maintenance, insurance and utilities to the extent these items are attributable to personal use.ⁿ⁴

If business expenses attributable to a residence are deductible because it is rented to others, an opportunity exists to convert nondeductible personal expenses into deductible business expenses. This section is concerned with the limitations that are imposed on the deductibility of business expenses that are incurred when a taxpayer rents a dwelling unit to others, if the taxpayer also devotes such property to any personal purpose.

[1] Dwelling Units Subject to Rules

Dwelling units that are subject to the deduction limitation rules include houses, apartments, condominiums, mobile homes, boats or similar property. Hotels, motels, inns and similar establishments are not covered.ⁿ¹

[2] When Neither Rental Income Nor Deductions Are Recognized

If a taxpayer uses a dwelling unit as his residence and the property is rented for less than 15 days during the taxable year, neither income nor expenses attributable to the rental of the property are recognized for federal income tax purposes for that year.ⁿ¹ Accordingly, one need not proceed further in the matter under such circumstances. However, the deduction limitation rules do not apply to those deductions that are allowed regardless of whether they are incurred in connection with the taxpayer's trade or business.ⁿ² Thus, residential mortgage interest, property taxes and casualty losses incurred with respect to the property are still deductible.ⁿ³

[3] Allocation of Rental Expenses--Limitation on Deductions

Deductions are limited for expenses attributable to renting out a dwelling unit if the taxpayer also uses such property for any personal purpose. The extent to which such expenses are deductible depends upon the extent to which the taxpayer also uses the property for personal purposes.

[a] Allocation Between Periods of Rental and Personal Use

If a taxpayer rents out a dwelling unit that he also uses for any personal purpose during the taxable year, such as a vacation home, an allocation of expenses must be made between rental and personal use. The purpose of this allocation is to determine the amount of expenses that are deductible because they are attributable to the rental activity (e.g., maintenance, utilities and depreciation). The allocation is made on the basis of the ratio that the number of days the property is actually rented during the taxable year, at a fair rental, bears to the total number of days during the year that it is used for all purposes. This allocation is required regardless of whether the property is used as the taxpayer's residence.ⁿ¹ However, there is no limitation on deductions for those expenses that are deductible regardless of whether the property is actually rented, such as mortgage interest and property taxes.ⁿ²

[b] Limitation on Deductions Attributable to Rental of Residence

As noted above, if a taxpayer rents out a dwelling unit that he also uses for any personal purpose, expenses attributable to the rental are deductible only to the extent they are allocable to the rental period. However, if the taxpayer rents out property that he also uses as his residence, a further limitation is placed on the deductibility of such expenses. Under such circumstances, the deduction may not exceed the gross income derived from the property's rental, less the amount of otherwise allowable deductions that are incurred with respect to the property regardless of the purpose for which it is used. This includes mortgage interest, taxes, and any casualty losses. Rental expenses in excess of such limitation may be carried over to the next taxable year.ⁿ³ As previously noted, if the taxpayer rents out his residence for less than 15 days during the year, neither income nor expenses attributable to such rental are recognized for federal income tax purposes.

[4] When Property Is Used for Personal Purposes or as Residence**[a] When Property Is Deemed Used for Personal Purposes**

As a basic starting point, a taxpayer is deemed to use property for personal purposes on any day if, for any part of that day, it is used:

- (1) for personal purposes by the taxpayer or any other person who has an interest in the property, or any of their respective family members;
- (2) by anyone under an arrangement that lets the taxpayer use another dwelling unit, regardless of whether rental is charged for such other property; or
- (3) by anyone, except for a rental which is fair under all of the facts and circumstances.ⁿ¹

For the purpose of the above rules, "family members" consist only of brothers and sisters (whole or half blood), a spouse, ancestors and lineal descendants.ⁿ² The above rules are subject to certain exceptions in their application, however. A taxpayer is not deemed to use property for personal purposes if he rents it at a fair rental to any person for use as such person's principal residence. Also, the above rules do not apply if the taxpayer rents the dwelling unit under a "shared equity financing agreement" to someone who has an interest in the property.ⁿ³

A shared equity financing agreement is between two or more persons, each of whom has an undivided ownership

interest in the property. Under the agreement, one of the co-owners must be entitled to occupy the property for use as a principal residence provided that he pays a fair rental to one or more of the other co-owners. Whether the rental is fair is determined at the time the agreement is entered into and by taking into account the occupant's co-ownership interest.ⁿ⁴

It is clear from the above rules that a taxpayer could be deemed to use a dwelling unit for personal purposes although he never physically occupies the property.

[b] When Property Is Deemed Used as Residence

For purposes of the deduction limitation rules, whether a dwelling unit is considered a taxpayer's residence depends upon the extent to which he uses the property for personal purposes. A dwelling unit is deemed to be a taxpayer's residence for any taxable year if he uses the property for personal purposes during that year for more than the greater of 14 days, or for more than 10 percent of the number of days that the property is rented at a fair rental. However, the property is not considered to be rented at a fair rental for any day for which it is used for personal purposes.ⁿ⁵

Just as in the case where a taxpayer may be deemed to use a dwelling unit for personal purposes, although he may have never physically occupied the same, the property may also be deemed to be the taxpayer's residence without his ever having occupied it, because the determination is made based upon the extent to which it is used for the taxpayer's personal purposes.

[5] Order in Which Deductions Are Made

If a taxpayer rents out a dwelling unit which he also uses for personal purposes, expenditures to obtain tenants for the property, such as realtor's fees and advertising expenses, are deducted from gross rental receipts in order to arrive at gross rental income. Thereafter, rental expenses are deducted in the following order of categories:

- (1) deductions allowable without regard to the rental use of the property, such as mortgage interest and real estate taxes, but only to the extent of gross rental income from the property;
- (2) deductions allowable by reason of the rental use of the property (other than those that would result in an adjustment to the property's basis, such as depreciation), but only to the extent of gross income remaining after the deductions in (1), above; and
- (3) deductions allowable by reason of the rental use of the property that would result in an adjustment to the property's basis, e.g., depreciation, but only to the extent of gross income remaining after the deductions in (1) and (2), above.ⁿ¹

The manner in which all of the above rules are applied may be illustrated by the following example:ⁿ²

Example:

Bob owns a lakeside home which he rents at a fair rental of \$25 a day for 90 days during the taxable year. He rents the property to a friend at a discount rental of \$15 a day for 10 days, and also uses it for personal purposes on 20 other days during that year. Thus, the home is used for some purpose on 120 days during the taxable year, and the rental allocation fraction may not exceed 90/120. Bob incurred advertising and realtor's fees of \$200, mortgage interest of \$1,000, real estate taxes of \$800, insurance of \$400, utilities of \$600 and depreciation of \$1,500. The allocations and deductions are as follows:

Gross receipts from Rental:

90 days at \$20 per day	\$2,250
.....	
10 days at \$15 per day	150

.....		
Total	\$2,400	
Computation of gross rental income:		
Gross receipts from rental	\$2,400	
.....		
Less: Advertising and realtor's fee	200	
Gross Rental Income	\$2,200	
Mortgage interest (3/4 x \$1,000)n*	\$750	
Real Estate Taxes (3/4 x \$800)[*]	600	
Amount allowable	\$1,350	
Limit on further deductions		\$850
Allocation of insurance and utilities:		
Insurance (3/4 x \$400)	\$300	
.....		
Utilities (3/4 x \$600)	450	
.....		
Amount Allowable	\$750	
Limit on further deductions		\$100
Allocation of depreciation:		
Depreciation (3/4 x \$1,500).....	\$1,125	
Amount Allowablen**	\$100	

[6] Rental Deductions Where Leased Property Is Not Taxpayer's Residence

If a taxpayer does not use the dwelling unit as a residence, and the rental use is not an activity from which the taxpayer expects to make a profit, the rental expense deduction is limited to rental income and is deductible in the same order described above, just as in the case where the property is used as a residence. If the rental activity results in a profit for three or more years in a period of five consecutive years, it is presumed to be for profit. If the facts reflect that rental of the property is an activity from which the taxpayer expects to make a profit, deductible rental expenses are not limited to rental income derived from the property.ⁿ¹

Legal Topics:

For related research and practice materials, see the following legal topics:

Tax LawFederal Income Tax ComputationDeductions for Amortization, Depletion & DepreciationGeneral OverviewTax LawFederal Income Tax ComputationDeductions for Amortization, Depletion & DepreciationAmortization, Cost Recovery & Depreciation (IRC secs. 167-169, 171, 178, 194-195, 197, 216, 248, 280F)General OverviewTax LawFederal Income Tax ComputationDeductions for Business ExpensesGeneral OverviewTax LawFederal Income Tax ComputationDeductions for Business ExpensesExpenses for Production of Income (IRC sec. 212)Tax LawFederal Income Tax ComputationDeductions for Business ExpensesResidential Property Used for Business (IRC sec. 280A)Tax LawFederal Taxpayer GroupsIndividualsProduction of Income Expenses (IRC sec. 212)

FOOTNOTES:

(n1)Footnote 1. *IRC §§ 162, 212(2).*

(n2)Footnote 2. *IRC § 262(a).*

(n3)Footnote 3. *See IRC §§ 163-165.*

(n4)Footnote 4. *Treas. Reg. § 1.262-1(b)(3); Appeal of Page, 1 B.T.A. 400 (1925) ; Drexler v. Commissioner, 25 B.T.A. 79 (1932) .*

(n5)Footnote 1. *IRC § 280A(f)(1).*

(n6)Footnote 1. *IRC § 280A(g).*

(n7)Footnote 2. *IRC § 280A(b).*

(n8)Footnote 3. *See IRC §§ 163-165.*

(n9)Footnote 1. *IRC § 280A(e)(1).*

(n10)Footnote 2. *IRC § 280A(e)(2).*

(n11)Footnote 3. *IRC § 280A(c)(5).*

(n12)Footnote 1. *IRC § 280A(d)(2).*

(n13)Footnote 2. *IRC §§ 267(c)(4); 280A(d)(2)(A).*

(n14)Footnote 3. *IRC § 280A(d)(3)(A), (B).*

(n15)Footnote 4. *IRC § 280A(d)(3)(B)(ii), (C), (D).* Special allocation rules apply to partnerships, S corporations, estates, and trusts, when they have an interest in a dwelling unit. These entities are deemed to have made personal use of dwelling units when a beneficial owner or beneficiary of the entity would be treated as having made personal use of them. If more than one partner, shareholder, or beneficiary uses a unit on the same day, only one day of personal use is recognized. *Prop. Treas. Reg. § 1.280A-1(e)(5).*

(n16)Footnote 5. *IRC § 280A(d)(1).* A day is the 24-hour period for which a day's rental might generally be paid. Thus, the use of a vacation home from Friday afternoon through Sunday afternoon is considered to be use for only two days. *Prop. Treas. Reg. § 1.280A-1(f).*

(n17)Footnote 1. *Prop. Treas. Reg. § 1.280A-3(d).*

(n18)Footnote 2. *See Prop. Treas. Reg. § 1.280A-3(d)(4), Ex.*

(n19)Footnote *. If Bob itemizes deductions, he may claim the other \$250 in mortgage interest and \$200 in real estate taxes as itemized deductions.

(n20)Footnote **. Since there is insufficient rental income to fully deduct allowable depreciations, the excess may be carried over for deduction in the next taxable year to the extent there is sufficient rental income to offset the same.

(n21)Footnote 1. *See IRC §§ 162, 183.*



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Current Legal Forms for Real Estate

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Current Legal Forms for Real Estate
Chapter 23 REAL ESTATE LEASES
Part I. The Tax Background

31-23 Current Legal Forms for Real Estate § 23.14

AUTHOR: by Thomas G. Belden

§ 23.14 Lease or Sale of Property?

[1] Distinction Between Sale and Lease

A lessee is allowed a deduction for rental payments made for the use or possession, in a trade or business, of property to which he "has not taken or is not taking title or in which he has no equity."ⁿ¹ Thus, if so-called "rental payments" are, in reality, periodic payments toward the purchase price of the leased property, no deduction is allowed.ⁿ² The rationale is that under a conditional sales contract, the lessee-purchaser is gradually taking title to the property; with each payment, his equity interest in the property increases.ⁿ³

For income tax purposes, a "sale" is generally defined as a transfer of property for money or a promise to pay money.ⁿ⁴ The determination of whether a transaction is a sale or a lease is a question of fact to be ascertained from the intent of the parties. That intent finds its primary expression in the written agreement, which must be read in light of the attending facts and circumstances existing at the time the agreement was executed.ⁿ⁵

The following are some of the factors considered by the courts and the Service in determining whether the parties intended the agreement to be a sale or a lease:

- (1) whether legal title passes;ⁿ⁶
- (2) how the parties treat the transaction;ⁿ⁷
- (3) whether an equity was acquired in the property;ⁿ⁸
- (4) whether the contract creates a present obligation of the seller to execute and deliver a deed, and a present obligation of the purchaser to make payments;ⁿ⁹
- (5) whether the right of possession is vested in the purchaser;ⁿ¹⁰

- (6) which party pays the property taxes;n11
- (7) which party bears the risk of loss or damage to the property;n12
- (8) which party receives the profit from the operation and sale of the property;n13
- (9) whether the agreed "rental" payments materially exceed the current fair rental value (a possible indication that the payments include an element other than compensation for use of the property);n14
- (10) whether some portion of the periodic payments is specifically designated as interest or is otherwise readily recognizable as the equivalent of interest;n15
- (11) whether portions of the periodic payments are made specifically applicable to an equity to be acquired by the lessee;n16
- (12) whether the lessee will acquire title upon the payment of a stated amount of "rentals" which he is required to make under the contract;n17 and
- (13) whether the total amount which the lessee is required to pay for a relatively short period of use constitutes an inordinately large proportion of the total sum required to be paid to secure the transfer of title.n18

Example 1:

A husband and wife entered into agreements in the form of a lease and an option to purchase a parcel of land to be used in their farming and ranching business. Under the agreement, they were to pay \$10,000 for the first year and \$12,000 for the second as "rent," and another \$2,000 for the option to purchase the property thereafter for \$24,000. A fair and reasonable rental for the property would have ranged from \$3,000 to \$4,000 per year. Two years before the agreements were executed, the lessor had purchased the land for \$40,000. The Service disallowed the deduction of the so-called rental payment on the ground that it did not qualify as a rental expense. The Tax Court upheld the disallowance, noting that the payments were excessive in relation to the current fair rental value of the property, and that the taxpayers intended to and did acquire an equity in the property.n19

Example 2:

A taxpayer entered into a 10-year "lease" agreement under which it promised to pay rent of \$160 per month (total: \$19,200) for certain real property. The agreement also provided that upon payment of the full \$19,500, the lessors would automatically convey the property to the taxpayer. The Court held that amounts paid as "rent" by the taxpayer were not deductible; rather, they were installment payments of the purchase price of \$19,500.n20

Example 3:

A textile producer acquired new mill machinery under agreements referred to as leases. Under the agreements, it was required to make fixed monthly payments called rentals, to the manufacturers for about five years. The textile producer could then acquire title to the machinery by payment of a relatively small additional amount. As set forth in the correspondence, the amounts payable in monthly installments were computed to include five or six percent interest on the "principal," and interest tables were attached to the manufacturers' letters. The Tax Court held that the monthly amounts paid were not deductible as rentals because the textile producer thereby acquired an equity interest in the machinery.n21

[2] The Lease-Option

A "lease-option," known also as a "purchase option," is a lease under which the lessee has the right to purchase the leased property at some future time. The lease-option is a common business arrangement which is difficult to classify as either a sale or a rental agreement. Often the rental payments are applicable against the selling price, if and when the option is exercised. The basic question, therefore, is whether a sale is to be recognized *before* the formal exercise of the option. Depending upon the factual circumstances, the pre-exercise payments may be either sale proceeds or deductible rental payments.

Where a lease agreement provides the lessee with an option to purchase the property in the future, the issue of whether the agreement is a true lease or a conditional sales transaction depends upon the intent of the parties.ⁿ¹ That intent is ascertained from the provisions of the agreement, read in light of the facts and circumstances existing at the time the agreement was executed.ⁿ²

As a general rule, where the lessee has the option to purchase the leased property at a price reduced by rent previously paid, the rent due before exercise of the option is ordinary income to the lessor and a deductible expense to the lessee.ⁿ³ The amount due after exercise of the option is the selling price of the property. The lessor may *not* defer the reporting of rental income until he ascertains that the option will not be exercised.ⁿ⁴

A number of exceptions to this general rule exist. First, where the option price is relatively small when compared to the total "rental" payments that are required to be made, or where the option price is far less than the anticipated value of the property when the option is exercised, the "rent" is probably part of the selling price.ⁿ⁵

Second, a sale will be recognized where the total rentals, plus any option price, approximates the price for which the property could have been purchased at the time the agreement was executed, plus interest and carrying charges.ⁿ⁶

Third, a sale may be presumed where the rent is payable over a short part of the property's expected useful life, and the lessee may continue to use the property for approximately the remaining useful life through nominal payments, even though the agreement does not expressly pass title.ⁿ⁷

Planning Note

Other tax consequences to parties where lease agreement is found to be sale. Where a so-called "lease" agreement is found to be a sale, the "lessee-buyer" may not deduct his periodic payments as rental expenses, but he may take a depreciation deduction.ⁿ⁸ In addition, the interest component of the periodic payments is deductible.ⁿ⁹

As for the "lessor-seller," he is not required to report the periodic payments which he receives as rental income. Rather, they are considered payments on the sale price of the property to the extent that they do not represent interest or other charges.ⁿ¹⁰ Thus, the lessor-seller must report the interest component as income.ⁿ¹¹ In addition, he must report any gain realized on the sale.ⁿ¹²

Legal Topics:

For related research and practice materials, see the following legal topics:

Real Property LawLandlord & TenantLease AgreementsGeneral OverviewReal Property LawPurchase & SaleContracts of SaleGeneral OverviewReal Property LawPurchase & SaleContracts of SaleFormalitiesTax LawFederal Income Tax ComputationDeductions for Business ExpensesBusiness, Entertainment & Trade Expenses (IRC secs. 162, 274)Tax LawFederal Income Tax ComputationGross Income (IRC sec. 61)

FOOTNOTES:

(n1)Footnote 1. *IRC § 162(a)(3)*.

(n2)Footnote 2. *Helser Mach and Marine Works, Inc. v. Comm'r*, 39 BTA 644 (1939) ; *Rev. Rul. 55-540, 1955-2 CB 39, 41* .

(n3)Footnote 3. *Irby v. Commissioner*, 30 T.C. 1166 (1958) .

(n4)Footnote 4. *Commissioner v. Brown*, 380 U.S. 563, 570-571, 85 S. Ct. 1162, 14 L. Ed. 2d 75 (1965) .

(n5)Footnote 5. *Haggard v. Commissioner*, 24 T.C. 1124, 1129 (1955) , *aff'd*, 241 F.2d 288 (9th Cir. 1956) ; *Calbom v. Commissioner*, T.C. Memo 1981-95 .

(n6)Footnote 6. *Commissioner v. Segall*, 114 F.2d 706, 709 (6th Cir. 1940) , *cert. denied*, 313 U.S. 562 (1941) ; *Oesterreich v. Comm'r*, 226 F.2d 798, 802 (9th Cir. 1955) .

(n7)Footnote 7. *Oesterreich v. Comm'r*, 226 F.2d at 803 .

(n8)Footnote 8. *Haggard v. Commissioner*, 241 F.2d 288, 289 (9th Cir. 1956); see *Mathews v. Commissioner*, 61 T.C. 12, 21-23 (1973) , *rev'd*, 520 F.2d 323 (5th Cir. 1975) , *cert. denied*, 424 U.S. 967, 96 S. Ct. 1463, 47 L. Ed. 2d 734 (1976) .

(n9)Footnote 9. *Wiseman v. Scruggs*, 281 F.2d 900, 902 (10th Cir. 1960) .

(n10)Footnote 10. *Wiseman v. Scruggs*, 281 F.2d 900, 902 (10th Cir. 1960) .

(n11)Footnote 11. *Harmston v. Commissioner*, 61 T.C. 216, 229 (1973) , *aff'd*, 528 F.2d 55 (9th Cir. 1976) .

(n12)Footnote 12. *Harmston v. Commissioner*, 61 T.C. 216, 229 (1973) , *aff'd*, 528 F.2d 55 (9th Cir. 1976) .

(n13)Footnote 13. *Harmston v. Commissioner*, 61 T.C. 216, 229 (1973) , *aff'd*, 528 F.2d 55 (9th Cir. 1976) .

(n14)Footnote 14. *Bowen v. Commissioner*, 12 T.C. 446 (1949) ; *Rev. Rul. 55-540, 1955-2 CB 39, 42* .

(n15)Footnote 15. *Judson Mills v. Comm'r*, 11 T.C. 25 (1948) ; *Rev. Rul. 55-540, 1955-2 CB 39, 42* .

(n16)Footnote 16. *Bowen v. Comm'r*, N. 14, *supra* ; *Rev. Rul. 55-540, 1955-2 CB 39, 41* .

(n17)Footnote 17. See *Hervey v. Rhode Island Locomotive Works*, 93 U.S. 664 (1876) ; *Taft v. Commissioner*, 27 B.T.A. 808 (1933) .

(n18)Footnote 18. *Bowen v. Comm'r*, N. 14, *supra* .

(n19)Footnote 19. *Haggard v. Commissioner*, 24 T.C. 1124 (1955) , *aff'd*, 241 F.2d 288 (9th Cir. 1956) .

(n20)Footnote 20. *Helser Mach and Marine Works, Inc. v. Comm'r*, 39 BTA 644 (1939) .

(n21)Footnote 21. *Judson Mills v. Comm'r*, 11 T.C. 25 (1948) .

(n22)Footnote 1. *Benton v. Commissioner*, 197 F.2d 745 (5th Cir. 1952) ; *Breece Veneer & Panel Co. v. Comm'r*, 232 F.2d 319 (7th Cir. 1956) .

(n23)Footnote 2. *Rev. Rul. 55-540, 1955-2 CB 39* .

(n24)Footnote 3. *Est. of Eaton*, 10 T.C. 869 (1948) ; see *Est. of Stundon v. Comm'r*, TC Memo 1970-20 .

(n25)Footnote 4. *Kitchin v. Commissioner*, 353 F.2d 13 (4th Cir. 1965) .

(n26)Footnote 5. *Burroughs Adding Mach Corp. v. Bogdon*, 9 F.2d 54 (8th Cir. 1925) ; *Holeproof Hosiery Co. v. Comm'r*, 11 BTA 547 (1928) ; *East Coast Equip. Co. v. Comm'r*, 21 TC 112 (1953) , *aff'd*, 222 F.2d 676 (3d Cir. 1955) .

(n27)Footnote 6. *Rev. Rul. 55-540*, 1955-2 CB 39, 42 ; *Rev. Rul. 57-371*, 1957-2 C.B. 214.

(n28)Footnote 7. *Rev. Rul. 55-541*, 1955-2 CB 19 ; *Rev. Rul. 60-122*, 1960-1 C.B. 56 .

(n29)Footnote 8. *Irby v. Commissioner*, 30 T.C. 1166 (1958) .

(n30)Footnote 9. *Judson Mills v. Comm'r*, 11 T.C. 25 (1948) .

(n31)Footnote 10. *Rev. Ruls. 55-540*, 1955-2 CB 39, 43 ; *Rev. Rul. 72-408*, 1972-2 C.B. 86.

(n32)Footnote 11. *IRC § 61(a)(4)*.

(n33)Footnote 12. *Rev. Rul. 72-408*, 1972-2 CB 86 .



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Current Legal Forms for Real Estate
Chapter 23 REAL ESTATE LEASES
Part I. The Tax Background

31-23 Current Legal Forms for Real Estate § 23.15

AUTHOR: by Thomas G. Belden

§ 23.15 Sale-Leaseback Transactions

[1] In General

In a sale-leaseback transaction, the initial property owner sells it and then immediately leases it back from the new owner (the "purchaser-lessor"). Ideally, the rent payments are sufficient to pay all liabilities and costs that the new owner incurs in acquiring and owning the property. All such costs, previously paid by the initial owner, are then paid to the new owner in the form of rent. Usually, the lease is made for a long-term, often with renewal options.

A sale-leaseback has important tax and financial advantages for both the seller-lessee and the purchaser-lessor. These advantages may be lost, however, if the Service successfully challenges the substance of the transaction. A principal legal issue in a sale and leaseback transaction, in tax and other areas of law, is whether the transaction, in substance, is a true sale and leaseback or simply a loan or other long-term financing arrangement. Moreover, the advantages of a sale-leaseback to the purchaser-lessor may be disadvantageous to the seller-lessee; conversely, advantageous consequences for the seller-lessee may result in detrimental consequences for the purchaser-lessor.

[2] Financial Advantages and Disadvantages

[a] To Seller-Lessee

From a financing perspective, a sale-leaseback permits the initial owner to obtain funds equal to the market value of the property, in contrast to an alternative mortgage loan which is usually limited to a lower percentage (usually 80 percent or less) of the value. The financing technique is especially valuable in a tight-money market, where funds are not readily available or are subject to high borrowing rates. Also, funds obtained through a sale-leaseback do not carry the restrictions on company activities often imposed by capital financing loan documents.

The seller, as a tenant, may deduct his rental payments, which are often greater than the deductions for depreciation and mortgage interest available to him as an owner. If a substantial portion of the value of property is allocable to the land (which is not depreciable) or to substantially depreciated assets, the deductions as a lessee are even more likely to be

greater than those as an owner. However, loss of the depreciation deduction may, in some circumstances, outweigh any advantage from the deductible leaseback rent payments. In such cases, the sale and leaseback arrangement may not be advantageous for the initial owner.

Sale and leaseback arrangements sometimes include option clauses that give the seller-lessee the right to renew the lease or even to buy back the property. These options to renew or purchase should be carefully considered and structured, because they may subject the transaction to challenge by the Service on the ground that the parties are actually financing by mortgage loan rather than completing a bona fide sale.

[b] To Purchaser-Lessor

A major advantage to the purchaser-lessor of a sale-leaseback arrangement is that it may enable him to obtain a long-term tenant who has a special interest in remaining on the property and in making substantial improvements on it.ⁿ¹ The lease often provides for a net rental, which obligates the tenant to pay all carrying charges, such as taxes, insurance, and the like; the purpose is to give the new owner sufficient rental payments to pay the mortgage servicing charges (interest plus amortization) and a fair return on his investment. The entire rental, of course, is deductible by the tenant. The owner, on the other hand, has interest and cost recovery or depreciation deductions to set off against his rental income.

Also, under ideal circumstances, the new owner is able to acquire the property without having to make an equity investment. Moreover, the new owner's equity interest in the property increases as principal payments are made under the mortgage (which are funded by the rental payments).

[3] Tax Consequences

[a] Taxation of Seller-Lessee

In a sale-leaseback, the seller-lessee exchanges deductions of mortgage interest and depreciation for the deduction of rent. In addition, other expenses paid in the case of a net leaseback, such as insurance, taxes, maintenance, and repairs are deductible by the seller as additional rent payments.ⁿ¹ Even if the rent deduction does not exceed the former interest and depreciation deductions, other tax and financial considerations may still make the sale and leaseback desirable. Of course, a careful examination of all these factors is necessary.

The seller-lessee can determine the time of sale, thus timing the realization of gain or loss (the difference between the property's adjusted basis and the amount received).ⁿ² Gain may be realized on an appreciated asset in a year when net operating loss carryover would expire otherwise unused. The gain would thus be sheltered, while the net operating loss carryover would not be lost.

Any gain realized upon the sale is normally long-term in nature if the property has been held for the requisite holding period or if it qualifies as *IRC Section 1231* trade or business property.ⁿ³ If, however, the property is subject to depreciation recapture, all or a portion of the gain, *i.e.*, the recaptured amount, is taxed as ordinary income.ⁿ⁴ In that event, the ordinary income treatment may offset any advantages from the sale and leaseback arrangement. It should also be remembered that ordinary income treatment may result, to the extent of the gain, if the sale-leaseback is between related parties.ⁿ⁵ Moreover, if such a transaction between related parties results in a loss, the loss may be disallowed.ⁿ⁶

[b] Taxation of Purchaser-Lessor

The purchaser-lessor in a sale-leaseback reports rent as ordinary income.ⁿ⁷ This amount is offset to a certain extent by the cost recovery or depreciation deduction, which is available to the purchaser for business or income producing property acquired after 1980 (cost recovery) or before 1981 (depreciation).ⁿ⁸ If accelerated depreciation is available in the early years, the purchaser-lessor may not only receive the rent tax-free, but may also shelter some other income as

well. Interest on the purchaser's purchase money mortgage is also a deductible offset against rental income.ⁿ⁹ It should be noted, however, that limitations are imposed on investment indebtedness interest.ⁿ¹⁰

[4] Service Challenges; Tax Classification Factors

The tax and financial advantages of a sale and leaseback may be lost in the event of a successful Service challenge of the substance of the transaction. This risk is greatly increased if there is an obvious tax avoidance scheme without a legitimate business purpose. Even in the absence of tax avoidance, the Service has successfully used other avenues of attack to invalidate what the parties intended as a sale and leaseback arrangement. The principal challenges, and the tax factors which the Service and courts have applied in sale-leaseback litigation, are discussed below.

[a] Financing Devices

Although the payments in a sale-leaseback arrangement are in the form of rent rather than principal and interest, a true sale-leaseback transaction contains various characteristics which show that it is not a long-term loan or other financing device in substance. For example, if the purported purchaser-lessor assumes the risk of loss of the property's value, has entered into the transaction for business or income producing purposes, and possesses other meaningful benefits and burdens of ownership, it is more likely that the transaction is in fact a true sale and leaseback, and not a financing device.ⁿ¹

Whether a transaction is a bona fide sale-leaseback or a financing arrangement in the form of a sale-leaseback depends upon the facts of each case. Some of the principal factors examined in deciding the issue include the economic substance of the transaction, business realities, and other tax-independent considerations not used solely for tax avoidance.ⁿ² The same and related factors are used to determine whether the sale-leaseback of equipment and other personal property is a true lease or merely a financing arrangement.ⁿ³

The landmark case dealing with sale-leaseback of real property is *Frank Lyon Company v. United States*,ⁿ⁴ in which the Supreme Court held that where there is a genuine multi-party transaction with economic substance which is compelled or encouraged by business or regulatory realities, is imbued with tax-independent considerations, and is not shaped solely by tax-avoidance features that have meaningless labels attached, the Service should honor the allocation of rights and duties effectuated by the parties. The purchaser-lessor in *Lyon* financed the purchase by paying cash and borrowing funds for which there was substantial personal liability. The Court held that the transaction was a bona fide sale-leaseback. Among the many factors the Court cited in support for its holding was the fact that there was a business purpose for the sale-leaseback. This was evidenced by the fact that state and federal regulations prohibited the lessee-bank from borrowing a sufficient amount to finance construction. In addition, investment diversification was the lessor's principal motive. The Court also noted that the depreciation deductions would have been equally available to the lessee-bank had it retained title. The lessee's option to purchase, though fixed, was for a reasonable amount, and the lessor bore the risk that the lessee would not exercise that option if the price was more than the fair market value of the property. The facts indicated that the lessor would realize an overall profit from the transaction independent of tax benefits if the lessee-bank exercised its option to purchase the leased property.ⁿ⁵

In a subsequent case, decided in the Tax Court, the fact that the lessor could not reasonably expect to show a profit from the transaction, without taking into consideration the tax benefits of depreciation, etc., was a significant factor in denying lease treatment to the transaction. Following the guidelines set forth in *Lyon*, above, the Court found that a financing corporation was organized for the purpose of buying land from a department store chain, constructing a building, and then leasing it back to the chain under a net lease. The lessee was treated as the owner, not the lessor. The Court reached this conclusion because the lessee's status vis-a-vis the property underwent no appreciable change when the sale and leaseback arrangement was made, the lessor made no investment in the project, financing had been obtained using the store's credit with rental payments being made by the lessee directly to the lender under the nonrecourse mortgage, and the corporation's ownership interest was marketed to individuals as a tax shelter. The Court

found further that there was no economic foundation for their investment other than as a tax loss.ⁿ⁶

In another case, sale and leaseback status was denied because the transaction lacked economic substance. The interest and principal payments on a purchase money mortgage equaled the monthly rental payments, and the buyer-lessor granted to a related party of the seller-lessee an option to buy back the property at the end of the term for the same price it had sold for at the beginning of the term.ⁿ⁷

The above cases and rulings indicate that the Service is especially likely to recharacterize a transaction as a mortgage loan when the transaction looks like an alternative to conventional mortgage financing and the seller retains substantial control over the property. A purchase option in the leaseback for nominal consideration or for a price against which the rent is credited may cause the transaction to fail as a sale-leaseback. If the Service prevails, the seller would not be entitled to deduct the entire rental payments, but only that portion which would have been interest on the intended mortgage. The seller, not the buyer, would be entitled to the depreciation deduction. The income to the buyer would not include all the rent payments, but rather only that portion deemed to be interest on the hypothetical mortgage.ⁿ⁸

[b] Like-Kind Exchanges

No gain or loss is recognized under *IRC Section 1031* where there is an exchange of "like-kind" property held for productive use in a trade or business or for investment.ⁿ⁹ The regulations provide that an ownership in fee and a 30-year lease are properties of "like-kind."ⁿ¹⁰ This provision has caused apparently conflicting decisions as to whether a sale with a leaseback for a period of 30 years or more will result in the recognition of loss to the seller, or rather will be treated as a nontaxable like-kind exchange in which no loss can be recognized. An examination of the cases indicates that the courts look primarily at two related factors when the Service seeks to deny loss to the seller by claiming that the transaction is a like-kind exchange: (1) whether fair market value was paid for the property in cash, without including the leaseback as part of the consideration; and (2) whether fair rental value was paid on the leaseback. If the sale was consummated for a fair market price and the rentals are at fair market value, the sale-leaseback will probably be upheld and the seller-lessee will be able to recognize its loss.ⁿ¹¹

Where the leaseback is for less than 30 years and the selling price represents fair market value, loss (or gain) on the sale is recognized by the Service. In such case, the transaction will not be treated as a like-kind exchange, even if the loss contains options permitting extensions beyond 30 years.ⁿ¹²

Planning Note

Structure sale-leaseback transaction to satisfy *Lyon* factors. In order to lessen the chances that the Service will challenge a sale-leaseback as a financing arrangement rather than a true sale-leaseback, the parties should make every effort to structure the transaction so that it satisfies all, or at least most, of the factors listed by the Supreme Court in *Lyon*. If that is done, the Service will probably not try to recharacterize the transaction as a loan or financing device, and the parties will receive the intended tax consequences.

Legal Topics:

For related research and practice materials, see the following legal topics:

Real Property Law
Financing
Mortgages & Other Security Instruments
Nonconventional Mortgages
Real Property Law
Landlord & Tenant
Lease Agreements
Commercial Leases
Financing, Mortgaging & Security Leases
Real Property Law
Landlord & Tenant
Lease Agreements
Commercial Leases
Sale-Leaseback Transactions
Tax Law
Federal Income Tax
Computation
Deductions for Amortization, Depletion & Depreciation
Amortization, Cost Recovery & Depreciation (IRC secs. 167-169, 171, 178, 194-195, 197, 216, 248, 280F)
General Overview
Tax Law
Federal Income Tax
Computation
Deductions for Amortization, Depletion & Depreciation
Amortization, Cost Recovery & Depreciation (IRC secs. 167-169, 171, 178, 194-195, 197, 216, 248, 280F)
Property Used in Business & Trade
Tax Law
Federal Income Tax

ComputationDeductions for Business ExpensesBusiness, Entertainment & Trade Expenses (IRC secs. 162, 274)Tax LawFederal Income Tax ComputationDeductions for LossesNet Operating Loss (IRC secs. 172, 382)General OverviewTax LawFederal Income Tax ComputationOrdinary Income (IRC sec. 64)Tax LawFederal Income Tax ComputationSales & ExchangesBusiness Property (IRC secs. 1031, 1221, 1231)General OverviewTax LawFederal Income Tax ComputationSales & ExchangesBusiness Property (IRC secs. 1031, 1221, 1231)Property Held for Productive Use & InvestmentTax LawFederal Income Tax ComputationSales & ExchangesLike-Kind Exchanges (IRC sec. 1031)Nonrecognition of Gains & LossesTax LawFederal Income Tax ComputationSales & ExchangesRecapture of Depreciation (IRC secs. 1245, 1250)Tax LawFederal Income Tax ComputationSales & ExchangesRelated Party Transactions (IRC sec. 1239)General OverviewTax LawFederal Income Tax ComputationSales & ExchangesRelated Party Transactions (IRC sec. 1239)Ordinary Income Rule

FOOTNOTES:

(n1)Footnote 1. For a discussion of depreciation and cost recovery of lessee improvements on the lessor's property, see § 23.07[1], *supra*.

(n2)Footnote 1. *IRC § 162(a)(3)*. See § 23.03, *supra*, for a discussion of rent in the form of the lessee's assumption of the lessor's expenses.

(n3)Footnote 2. *IRC § 1001(a)*.

(n4)Footnote 3. As to the types of property and transactions that qualify for long-term capital gain or loss treatment, see *Current Legal Forms with Tax Analysis*, Vol. 25, Ch. 21, Sales and Exchanges, The Tax Background, § 21.05.

(n5)Footnote 4. *IRC § 1250*.

(n6)Footnote 5. *IRC §§ 1239* (ordinary income recognized on gains from sale of depreciable property between certain related taxpayers) and *707(b)(2)* (ordinary income recognized on gains from certain sales or exchanges of property with respect to controlled partnerships).

(n7)Footnote 6. *IRC §§ 267* (disallowing losses resulting from certain transactions between related taxpayers) and *707(b)(1)* (disallowing losses from certain transactions with respect to controlled partnerships).

(n8)Footnote 7. *IRC § 61(a)(5)*.

(n9)Footnote 8. *IRC §§ 167-168*.

(n10)Footnote 9. *IRC § 163(a)*.

(n11)Footnote 10. *IRC § 163(d)*.

(n12)Footnote 1. *Frank Lyon Co. v. U.S.*, 435 U.S. 561, 98 S. Ct. 1291, 55 L. Ed. 2d 550 (1978), *rev'g* 536 F.2d 746 (8th Cir. 1976); *see also* *Hilton v. Commissioner*, 74 T.C. 305 (1980), *aff'd per curiam*, 671 F.2d 316 (9th Cir. 1982).

(n13)Footnote 2. *Frank Lyon Co. v. U.S.*, N. 1, *supra*; *Hilton v. Commissioner*, 74 TC at 346; *see also* *Rev. Rul. 83-47, 1983-1 CB 63*.

(n14)Footnote 3. *See, e.g.*, *Rev. Rul. 60-122, 1960-1 C.B. 56*; *Rev. Rul. 72-408, 1972-2 C.B. 86*; *see also* *Rev. Proc. 75-21, 1975-1 CB 715*; *Rev. Proc. 75-28, 1975-1 C.B. 752*; *Rev. Proc. 76-30, 1976-2 C.B. 647*, *Rev. Proc. 2001-28, 2001-1 C.B. 1156, 2001-19 I.R.B. 1156*.

(n15)Footnote 4. 435 U.S. 561, 98 S. Ct. 1291, 55 L. Ed. 2d 550 (1978), *rev'g* 536 F.2d 746 (8th Cir. 1976).

(n16)Footnote 5. 435 U.S. 561, 98 S. Ct. 1291, 55 L. Ed. 2d 550 (1978), *rev'g*, 536 F.2d 746 (8th Cir. 1976).

(n17)Footnote 6. *Hilton v. Commissioner*, 74 T.C. 305 (1980) , *aff'd per curiam*, 671 F.2d 316 (9th Cir. 1982) .

(n18)Footnote 7. *Sowerby v. Commissioner*, T.C. Memo 1984-21 .

(n19)Footnote 8. For the tax consequences of a sale and leaseback transaction both as to the seller-lessee and the purchaser-lessor, see § 23.15[3], *supra*.

(n20)Footnote 9. Tax-free exchanges under *IRC § 1031* are discussed in *Current Legal Forms with Tax Analysis*, Vol. 25, Ch. 21, "Sales and Exchanges," The Tax Background, § 21.12, *supra*.

(n21)Footnote 10. *Treas. Reg. § 1.1031(a)-1(c)*.

(n22)Footnote 11. *Century Electric Co. v. Commissioner*, 192 F.2d 155 (8th Cir. 1951), *aff'g* 15 T.C. 581 (1950); *Jordan Marsh Co. v. Comm'r*, 269 F.2d 453 (2d Cir. 1959) ; *Rev. Rul. 60-43*, 1960-1 CB 687 .

(n23)Footnote 12. *Treas. Reg. § 1.1031(a)-1(c)*.



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Current Legal Forms for Real Estate
Chapter 23 REAL ESTATE LEASES
Part I. The Tax Background

31-23 Current Legal Forms for Real Estate §§ 23.16 through 23.26

AUTHOR: by Thomas G. Belden

[Reserved]

§§ 23.16[Reserved]



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Current Legal Forms for Real Estate
Chapter 23 REAL ESTATE LEASES
Part II. The Practice Background

31-23 Current Legal Forms for Real Estate § 23.27

AUTHOR: by Thomas G. Belden

§ 23.27 Introduction; Scope of Coverage

This practice background discusses the practical aspects of negotiating and drafting a lease agreement for commercial real estate. It includes strategies and techniques for negotiation for use by both the landlord and the tenant. There is a practical discussion of drafting leases, from identification of the parties through defaults and termination. This section includes a description of potential problems which the practitioner may encounter, as well as suggestions for avoiding and resolving such problems when they arise. The material should be useful for a variety of commercial leases, including office space, retail space, industrial sites, telecommunications sites, and recreational areas.

Legal Topics:

For related research and practice materials, see the following legal topics:

Real Property LawLandlord & TenantLandlord's Remedies & RightsPower to Reenter & TerminateReal Property LawLandlord & TenantLease AgreementsGeneral OverviewReal Property LawLandlord & TenantLease AgreementsBreachGeneral OverviewReal Property LawLandlord & TenantLease AgreementsCommercial LeasesGeneral OverviewReal Property LawLandlord & TenantLease AgreementsPerformanceGeneral Overview



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Current Legal Forms for Real Estate
Chapter 23 REAL ESTATE LEASES
Part II. The Practice Background

31-23 Current Legal Forms for Real Estate § 23.28

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§ 23.28 Preliminary Considerations and Negotiations

The preliminary negotiations for commercial leases frequently are performed by agents for the landlord and prospective tenant, rather than attorneys. These preliminary negotiations generally include the size of the space, the location of the space, and the basic rental amount; however, there is a great deal more to the lease than these basics. The practitioner should be involved in identifying additional items for negotiation and directing that negotiation either personally or through the agent. Many of the items which are commonly negotiated are set forth in the following sections in the discussions on drafting the contract.

Both the practitioner and the client should be fully aware of where the fiduciary obligation of the broker lies. Although the tenant may ostensibly have a broker "working" for him, if that broker's fee is paid by the landlord, the broker's obligation is to the landlord. The tenant may engage the broker and compensate him or her directly to change that fiduciary obligation.

[1] Finding the Right Space

In selecting space, location is the most important factor. The prospective tenant may need to consider whether the space is near mass transportation, for the convenience of its employees, customers and suppliers. In other situations, the tenant should consider the space's proximity to highways, or the adequacy of access roads and parking. Sometimes the condition of the neighborhood is important to the prospective tenant, or the adequacy of the water supply or other utilities. Because of the importance of telecommunications facilities for the efficient operation of the businesses of most tenants, the ability of the building to accommodate the telecommunication needs of the tenant is important. The tenant must make sure that the space is adequate in size for the conduct of its business, and may need to consider the possibility of future expansion.

Given equally desirable locations, the next consideration is monthly rent. Rent, of course, is negotiable, and many factors enter into the determination of the final dollar figure. The prospective tenant must compare the offered rent at multiple locations carefully, making sure to factor in such variables as how the space is measured, if the rent is based on

a per square foot basis, which expenses will be paid directly by the tenant and which will be included in the rent, and what inducements, if any, the landlord is willing to offer to the prospective tenant to rent the space.

[2] Financial Reliability

Both the landlord and the tenant need to be concerned about each other's financial ability. The tenant wants to ensure that the landlord will be able to maintain services, the quality of tenants, and the appearance of the premises during a period of less than full occupancy. The landlord's failure to do so will affect the tenant's business adversely. In retail facilities, customers will stop shopping at dirty or unkempt malls. Professionals will receive comments from patients or clients regarding the condition of the building.

The landlord will want assurances that the tenant can afford to pay for the space and successfully operate its business. A landlord has a very significant investment in the space each time a tenant turns over. There is no rent during vacancy, there will be legal fees during an eviction, and there are advertising and broker's costs. In addition, there is the cost of refurbishing the space for a new tenant. Landlords are also concerned that a facility will get a reputation for housing failing businesses. Such a reputation may become a self-fulfilling prophecy. If the financial reliability of the tenant is questionable, there may be other ways to satisfy the concerns of the landlord such as by security deposits, personal guaranties, letters of credit or other forms of security discussed below.

[a] Bankruptcy

The filing of a petition in bankruptcy by either party can have serious consequences to the other. Under the Bankruptcy Code,ⁿ¹ the debtor's trustee can assume or reject executory contracts and unexpired leases. If the landlord is a debtor, the landlord's trustee may reject an unexpired lease, although the tenant may choose to remain in possession for the remainder of the lease term.ⁿ² If the tenant is a debtor, the tenant's trustee can reject an overmarket lease, and the landlord will have to choose between vacant space and a lower rent. It is often the case that the rent is somewhat over market because of concessions granted in the early years or months of the lease. In any case, in a bankruptcy, the non-filing party, especially the landlord, often loses a great deal of the consideration for which it bargained initially. A financial review can help a party to avoid a lease situation where a bankruptcy is a possibility.

[b] Financial References

Both parties should request three to five financial references. At least one reference should be a bank with whom the party has its business accounts. Another reference should be a vendor who provides supplies to the party's business on a regular basis. The third should be the tenant's existing landlord or an existing tenant of the landlord, respectively. Each party should be directed to contact the references in writing and to give each reference permission to release information.

All financial references should be questioned regarding the apparent ability of the party to pay in a timely fashion. The reference should be asked whether the party routinely pays bills and loans on time, what is the longest period for which the party was overdue, and the reason given for being overdue.

The landlord's reference from another tenant should be questioned regarding the landlord's provision of repairs and services. Were they provided in a timely manner with satisfactory quality labor and materials?

The tenant's reference from another landlord should be questioned regarding timely payment of rent and the condition of the premises. Did the tenant maintain the premises in an appropriate manner? Were tenant-required repairs made in a timely fashion?

It should be remembered that most people provide references that they believe will give favorable reports. If any of the

inquiries produce information which leaves doubts about the financial security or ability of either party, further investigation is warranted. It is common for a landlord to require a tenant to provide a complete financial statement prior to execution of a lease. The landlord may request copies of prior years' tax returns. The landlord also may require the right to request additional financial statements in the future. This will afford a measure of continuing protection to the landlord, especially when considering lease renewal.

It would be very unusual for a landlord to be willing to provide a financial statement to a tenant. Often, the landlord owns more than one project. Older projects may be leveraged to acquire and develop new projects, so the financial statement of a particular project may not accurately reflect that project's income and expenses. Landlords are reluctant to share their profit information with a prospective tenant, for obvious reasons. Instead of a landlord's financial statement, a tenant is more likely to obtain provisions in the lease allowing the tenant to perform certain tasks normally required of the landlord if the landlord fails to perform after notice and passage of a specified period. The tenant would have the right to offset its reasonable costs against the rent. This would afford continuing protection to the tenant.

[3] Tenant Inducements

Depending upon the real estate market at a given place and time, the landlord may be willing to offer inducements to prospective tenants. Such possible inducements include rent abatements, construction allowances, lease takeovers, restrictive covenants and equity participation. The type and amount of inducements which the landlord will be willing to offer to any particular tenant will depend not only on the real estate market, but also on the tenant's size and importance to the landlord.

[a] Negotiating Tenant Inducements Generally

[i] Tenant's Perspective

Many factors may make a particular tenant desirable to a particular landlord. For example, if the tenant will be creating new jobs in the space, the tenant may be able to show the landlord that job development tax credits or low-cost loans may be available to the landlord because the tenant would be creating new jobs in the space. Similarly, a tenant may be able to use renovated space in a way which would qualify the landlord for historic tax credits.

In short, in negotiating tenant inducements, a tenant must demonstrate to the landlord that the tenant's value is such that the landlord will quickly recover the cost of whatever special considerations the landlord is asked to grant to the tenant. The tenant should take great care in preparing its presentation to the landlord and should include calculations of the benefits to the landlord. The tenant also can show the landlord incentives which are being offered to him at different sites.

[ii] Landlord's Perspective

In preparing to lease commercial space, the landlord should become fully familiar with the market, including the availability of other space and its location, the amounts of rent being charged, and the incentives being offered to tenants by other landlords. The landlord should know the relative benefits of its site in comparison to others, such as ease of access to highways, parking facilities, storage facilities, and amenities for employees and customers. If the prospective tenant is an anchor tenant, the landlord must ascertain the likelihood of obtaining another key tenant in the near future and the financial consequences of not having a key tenant. Once this information is assembled, the landlord and the tenant can negotiate for special considerations realistically.

[b] Anchor Tenants

In commercial buildings, there is often a key tenant for whom the space was built or who occupies the largest space. In retail space, such a tenant is often referred to as the "anchor" tenant. Hopefully, the anchor tenant will draw retail

customers to the location who, once there, will shop in other stores as well. Such an anchor tenant may be a large grocery store, drug store, or department store.

Due to the size and ability of the anchor to draw customers, the key tenant is frequently given special considerations which are not offered to other, smaller tenants. These may include a reduction or elimination of common area charges, or a period with no monthly rent or reduced monthly rent. Such financial concessions are often used to induce a tenant to relocate by compensating for the expense and inconvenience of moving. The key tenant may be given additional construction upgrades which are not offered to other tenants.

In seeking these considerations, the key tenant must be prepared to demonstrate its importance to the landlord. This may be done with traffic studies showing the number of shoppers who visit the tenant's current site or other sites. Where the tenant is not engaged in a retail business, it may be able to convince the landlord that other, similar services will be drawn to the building due to the tenant's presence. For example, a large law office or accounting firm may be able to draw some of its own clients as tenants. A potential industrial park tenant that produces certain raw materials may be able to draw other tenants to the industrial park that use those materials to manufacture various finished products.

[c] Non-anchor Tenants

The landlord is less likely to offer non-anchor tenants special considerations which will result in direct payments by the landlord. Instead, the landlord may offer favorable terms for renewal of the lease, or a month or two of occupancy without the payment of rent.

Sometimes, a landlord may offer to assist with construction expenses, if the tenant uses the landlord's company to perform the work. Before accepting such an offer, the tenant should obtain detailed estimates from other construction contractors to be certain that this is truly a bargain.

Like the anchor tenant, the non-anchor tenant must show its importance to the landlord in order to encourage the landlord to give special incentives. This may be done by showing how the tenant's business complements existing tenants. The tenant may also exert some pressure by showing what incentives are available at other comparable locations.

The tenant must be aware that, unless there is an overabundance of the type of space the tenant is seeking, the landlord may not be willing to negotiate much. The landlord may be concerned that once he or she gives such an incentive to one tenant, all future tenants will seek a similar concession. If there is an abundance of space, the landlord may be more willing to give considerations to get a tenant in place.

[d] Rent Abatement

Rent abatement is a common form of tenant inducement. The landlord will permit the tenant to occupy the premises at a lower rental, or rent free, for a period of time at the beginning of the lease term. Not only does this help to compensate the tenant for the expense of moving, but it can be extremely useful to a tenant who needs time to get a new business operating at its full potential.

Rent abatement provisions can vary. Some such provisions abate only base rent, but others also abate expenses passed on from the landlord to the tenant, such as taxes and utilities; however, most landlords are unwilling to abate their fixed out-of-pocket expenses. The landlord may seek a rent abatement clause that provides that if the tenant defaults under the lease, the tenant will be obligated to reimburse the landlord for the amount of the abatement. The type of rent to be covered by the abatement and the effect of a tenant default are subject to negotiation.

[e] Construction Allowance

Another concession commonly used to induce a tenant to lease space is a construction allowance, sometimes also called a "build-out allowance," a "tenant finish allowance," a "tenant improvement allowance," or a "work letter amount." Such an allowance consists of a credit or a monetary allowance from the landlord to be used in physically preparing the space for the tenant's occupancy.

Before drafting a construction allowance provision, the parties should consider and negotiate the specifics of the allowance carefully. An allowance that sounds substantial actually may be worth very little to the tenant if the allowance will be applied to construction or upgrades in the landlord's building generally rather than to preparing the tenant's space for its specific use. The parties also must agree on requirements for competitive bidding, the use of allowance amounts in excess of the actual amount used for construction, and the tenant's responsibility for removing improvements.

If substantial construction will be necessary, the tenant should employ an architect, engineer or other appropriate design professional early in the negotiation process to determine what work must be done, and whether the necessary work is feasible in this particular space. The design professional also should determine whether the tenant will be required to spend its allowance to remove building standard items and whether the work can be done in compliance with the landlord's construction guidelines.

[f] Lease Takeover

On occasion, a landlord with a very strong desire to induce a potential tenant to move to the landlord's building may agree to take over the tenant's obligations under its current lease. The landlord can offer to pay the current landlord a lump sum to obtain the tenant's release from its current lease, to assume the current lease, or to reimburse the tenant the amount of rent due under the current lease. The parties not only must negotiate which takeover payment method they will use, but also must negotiate when the agreement becomes effective, what the parties rights and obligations are with respect to the old lease, and what effect the tenant's default under the new lease will have on the takeover arrangement.

[g] Equity Participation

Another type of tenant inducement is to give the tenant an equity participation. Under an equity participation agreement, the desirable tenant receives an interest in the landlord's facility based on the future appreciation of the property. In essence, the tenant invests in the landlord's facility instead of immediately obtaining cash incentives such as rent abatement or a construction allowance. Therefore, a tenant who needs cash for improvements or other expenses will not want an equity participation arrangement. The tenant should also consider how the arrangement will affect its tax situation.

A prospective tenant who has been offered equity participation in the landlord's facility must analyze the facility as an investment. Such an analysis should include the projected appreciation in the real estate market, an economic assessment of the landlord's facility, and an evaluation of the facility's potential for appreciation. The tenant also must ascertain whether and how the tenant's profit interest is subordinated to the interests of lenders or others, the tenant's rights and remedies as a limited partner, and the effect of a default by the tenant.

[h] Restrictive Covenant

Another common concession that can be given to induce an anchor tenant to lease space in the landlord's shopping center is a restrictive covenant in the lease, protecting the image of the shopping center and preventing competition. Such covenants may bar the landlord from leasing to competitors of the tenant, give the tenant the right to approve other tenants, and/or allow the tenant to control the quality of goods sold by other tenants.

Legal Topics:

For related research and practice materials, see the following legal topics:

Bankruptcy LawCase AdministrationAdministrative PowersExecutory Contracts & Unexpired LeasesPowersReal
Property LawBankruptcyLeasesReal Property LawLandlord & TenantLandlord's Remedies & RightsGeneral
OverviewReal Property LawLandlord & TenantLandlord's Remedies & RightsRent RecoveryReal Property
LawLandlord & TenantLease AgreementsGeneral OverviewReal Property LawLandlord & TenantLease
AgreementsCommercial LeasesGeneral OverviewReal Property LawLandlord & TenantLease AgreementsCommercial
LeasesLong Term Commercial LeasesReal Property LawLandlord & TenantLease AgreementsCommercial
LeasesShopping Center LeasesReal Property LawLandlord & TenantTenant's Remedies & RightsRemediesRent
Abatement

FOOTNOTES:

(n1)Footnote 1. *11 U.S.C. § 365.*

(n2)Footnote 2. *11 U.S.C. § 365(h).*



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Current Legal Forms for Real Estate
Chapter 23 REAL ESTATE LEASES
Part II. The Practice Background

31-23 Current Legal Forms for Real Estate § 23.29

AUTHOR: by Thomas G. Belden

§ 23.29 Drafting the Commercial Lease

The commercial lease should be drafted with a great deal of care. The tenant will be required to operate its business for a considerable period of time under the lease's strictures. The goal should be a clear and concise document, which the parties need to later review only upon the occurrence of unusual events. The document should be functional.

[1] Identification of Parties

The lease must identify the parties by role, *i.e.*, landlord and tenant, as well as by name and business address. Business addresses are important for the delivery of notices, pursuant to other provisions of the lease.

[2] Capacity of the Parties

The lease must identify the capacity in which each signatory executes the lease, that is, as an individual, corporation, partnership, limited liability company, fiduciary, or agent. The capacity of the person executing the lease is important. There are different requirements various entities must fulfill in order to bind a party to the terms of the lease.

[a] Individuals

The attorney should be sure that all individual parties are over the age of majority. Infancy is not a bar to the leasing of real property, but in most states, laws protect minors by allowing them to disaffirm the lease while they are still minors or within a reasonable period after reaching the age of majority. Thus, unless special care is taken under applicable state law, leases signed by those under the age of majority may be voidable. The attorney should also determine that none of the individual parties is incapacitated by a mental disease or defect, which also could render the lease voidable.

[b] Corporations

Corporations are legal persons. A corporation may act only by direction of its board of directors, which evidences its acts by a resolution. Unless the certificate of incorporation or bylaws provides otherwise, a vote of the majority of the

board of directors is required to adopt a resolution.

If one of the parties is a corporation, the attorney should obtain a copy of the board of directors' resolution authorizing the lease and a certificate of the secretary of the corporation acknowledging that the resolution was properly adopted, is in full force and effect, and has not been modified or rescinded. The resolution should set forth the basic terms of the lease and identify one or more individuals who are authorized to execute the lease on behalf of the corporation. The resolution also should specify the parameters within which the authorized individuals are entitled to negotiate other or additional terms.

[c] Partnerships

If one of the parties is a partnership, the attorney should obtain proof of the authority of the individual partner to act on behalf of the partnership. Where possible, the preferred practice is to obtain the signatures of all members of the partnership on the lease. If the partnership has too many members or if they are geographically diverse, this may not be possible. One alternative is to obtain a letter of authority from each partner authorizing one or more named individuals to execute the lease on behalf of the partnership, and specifying basic terms of the lease such as rent and term.

If it is not possible to obtain letters of authorization from all of the partners, the attorney must review the partnership agreement and any amendments to determine the scope of authority of the person offering to execute the lease on behalf of the partnership. The attorney should also obtain an affidavit from the person offering to execute the lease acknowledging that the partnership agreement is in full force and effect and has not been modified, and that the person is authorized to execute the lease on behalf of the partnership. Alternatively, the attorney can request an opinion of counsel for the partnership opining that the individual offering to execute the lease has authority to do so and that the individual's act is a valid and enforceable act of the partnership.

[d] Limited Liability Companies

If one of the parties is a limited liability company, because most limited liability companies are structured as and operate similar to partnerships, the attorney should obtain proof of the authority of the individual member to act on behalf of the limited liability company. If there is more than one member, then a letter of authority or resolution should be obtained from all of the members of the limited liability company evidencing the authority of the member signing on behalf of the limited liability company. If that is not possible, the attorney should review the operating agreement for the limited liability company, and any amendments to it, to determine the scope of authority of the member offering to execute the lease on behalf of the limited liability company. The attorney should also obtain an affidavit from the member offering to execute the lease, acknowledging that the limited liability company is in full force and effect and has not been modified, and that the member is authorized to execute the lease on behalf of the limited liability company. Similar to a partnership, alternatively the attorney can request an opinion of counsel for the limited liability company opining that the individual offering to execute the lease has authority to do so and that the individual's act is a valid and enforceable act of the limited liability company.

[e] Fiduciary

If one of the parties is a fiduciary (typically the landlord), the attorney for the other party must obtain proof both of the appointment and of the scope of the fiduciary's authority. Sufficient proof of appointment generally will be a certificate of letters testamentary for an executor, certificate of letters of administration for an administrator, or order of guardianship or conservatorship, or other similar court order. The attorney also should obtain an affidavit acknowledging that the order of appointment has not been rescinded.

The attorney must examine the order or decree appointing the fiduciary and must determine the scope of the fiduciary's authority. In addition, the attorney should examine any will, trust or other document which is related to the appointment.

Finally, the attorney should review the relevant local laws for general powers of fiduciaries.

[f] Power of Attorney

If one of the parties is represented by an attorney-in-fact, the attorney must obtain proof of the validity of the appointment and scope of authority. A certified copy of the power of attorney document, together with an affidavit executed by the attorney-in-fact denying actual knowledge of the termination of his or her power by death, disability, incapacity or revocation by the principal, is sufficient in most states.

Some states have adopted the Uniform Durable Powers of Attorney Act, which contains rules for the effective use of durable powers. Other states, although they have not enacted the Uniform Act, have similar statutes. Some statutes provide forms for power of attorney documents. The attorney should consult the relevant statutes to determine the scope of authority granted in a particular document and whether that power is durable.

Although most states do not require that powers of attorney be acknowledged or recorded, they generally can and should be recorded.

[3] Identification of the Leased Property

The lease should identify the property to be leased in detail. The type of description will depend, in part, on the type of space leased. In all leases, the description should specify the state, county, and municipality. The street address should also be included, if there is one. If the leased premises include an entire building and the surrounding land, the approximate lot size should be included, and a metes-and-bounds description may be advisable. If the leased premises are only part of a building or complex of buildings, the unit number should be included. Where the premises are part of a strip mall or shopping center, it is common practice to include a floor plan as an exhibit to the lease, with the leased unit marked on the floor plan. To avoid disputes, it is important to note in the lease that the floor plan shows the approximate size and location of the leased premises, since the space as built out may differ somewhat from the original floor plans.

If the rent is to be based on the size of the leased premises, it is important to include the exact square footage in the lease. The square footage should be verified by physical measurement, since the "as built" dimensions are often quite different from the floor plan.

In structures where some tenants have entire floors while others have only parts of floors, it is important to set forth whether corridors, elevator shafts, staircases, and restrooms are included in the leased space or in the common areas. Frequently, in such cases, there are two types of common areas, those common to all, and those common to a particular floor. Thus, if a tenant leases part of a floor, the tenant will pay rent for its square footage plus its ratable share of the common space on the floor.

There are no standard definitions for calculating a rentable area. The Building Owners and Managers Association ("BOMA") promulgates a standard method for measuring floor areas in offices, but landlords are free to adapt it to their own needs and do so. In 1996, the BOMA standard was revised to provide a more complete and equitable method of floor measurement. A copy of the new standard is available at BOMA's website at www.BOMA.org.

The lease should identify all structures which are included for the tenant's use. This may include garage space, specified parking spaces, and storage space. These should be identified by an easily recognized system. For example, parking or storage spaces may have company names or number affixed to them. If use of such spaces is exclusive, the tenant should request that the lease provide that the landlord will guaranty such exclusivity by appropriate notification sanctions and lease provisions to other tenants.

[a] Appurtenances

The lease should specify all appurtenances which are included in the lease, at no additional expense. This might include common areas such as parking, restrooms, and kitchen facilities. If there are limitations on the use of such appurtenances, such as the number of vehicles permitted, such limitations should be specified. If there are access easements that are appurtenant to the property, such as roadways or driveways, these should be identified and the lease should specify the right of the tenant to use such easements.

The lease also should specify any appurtenances which are excluded from the lease. For example, in cities where parking is costly, the lease of a structure may not include the lease of parking spaces or garages on the lot. The landlord may lease these separately. Similarly, the lease of a structure on a parcel of land may not include the right to use the grounds or streams located on the same parcel.

[b] Personalty

If personal property is included in the lease, such property should be specifically described. Personal property included in the lease may consist of such items as shelving in storage areas, appliances in kitchen facilities and similar items. Alternatively, personal property included in the lease may be itemized in an accompanying schedule.

The lease should set forth whether personal property is leased "as is," in "working order," in "good working order," or in some other condition. Generally, in a commercial lease, personal property is leased "as is." Typically, such personalty consists of items left from a prior occupant, and the landlord leaves these items as a convenience to the new tenant but takes no responsibility for their condition. The lease will usually specify that the tenant is responsible for repair and replacement of personalty during the term of the lease. The lease should specify the condition in which such personalty or the replacement thereof shall be returned at the end of the lease. If the lease promised "working order" or "good working order" at the commencement of the lease term, it will generally seek the same, with reasonable wear and tear excepted, at the end. If the lease made no promises as to condition of personalty, typically the tenant may return it in the same condition, "as is."

[c] Fixtures

The lease should specify the fixtures which are included in the lease. This would include such items as the heating, ventilating and air-conditioning systems (HVAC), lighting fixtures and built-in cabinets or bookcases, if any.

The lease should indicate whether the fixtures are leased "as is," in "working order," or in "good working order." The lease should also specify which party is responsible for repair of such fixtures during the lease term. Typically, where the lease provides that fixtures are "as is," the tenant will be responsible for repairs. Where the fixtures are in "working order" or "good working order," either party may be designated by the lease for repair responsibility. The designation of a party responsible for repair may also depend on whether the fixture serves more than one tenant. If so, the landlord most likely will be responsible. If not, the tenant is more likely to be designated. It should be noted that where items are leased "as is," it is advisable to inspect the systems before executing the lease. The condition of costly items will impact the amount of rent which the tenant is willing to pay.

The lease should specify the condition in which fixtures are to be left at the end of the lease term. Most often this depends on who had responsibility to repair during the lease term. If the tenant had such responsibility, usually the tenant must leave fixtures in as good condition as at the commencement of the lease, reasonable wear and tear excepted.

[d] Items Supplied by Landlord at Added Cost

In some instances, the landlord may be willing, at an extra cost, to install additional personalty or fixtures which are not

in or on the premises. Similarly, the landlord may be willing to supply certain appurtenances such as parking or storage at an additional cost. Some of these items may be on a periodic or as needed basis, such as use of conference rooms or additional parking. Any items to be supplied by the landlord at an added cost should be identified in the lease. The lease should include the cost per unit for such items, the procedure to obtain them, and the conditions for their use. It is important to indicate whether such items are always available or whether they are subject to use by other tenants. It is also important to be careful not to make such provisions cumbersome or onerous. This can be a source of a great deal of conflict between the landlord and the tenant and among other tenants.

[4] Tenant Improvements

It is very rare for one tenant to be able to use the space vacated by another tenant without alterations. At a minimum, fresh paint must be applied; however, in most commercial space, walls must be moved, electrical facilities enhanced, and HVAC systems and plumbing updated. Although most commercial space is constructed to facilitate such alterations, it is still time consuming and costly.

Minimally, landlords will pay for "building standard" items, such as interior doors and carpeting. Landlords also often offer a construction allowance to tenants for the costs of tenants' initial improvements in excess of the building standard as an incentive to execute the lease. The construction allowance is typically calculated as a particular number of dollars per square foot of rentable area. Generally, the landlord "pays" this allowance by reducing the rent for an appropriate number of months.

Alternatively, the landlord may offer to perform specific tasks such as the construction of a particular number of linear feet of walls, including sheetrocking, taping, priming, and painting. If the landlord owns a number of properties, the landlord may have a permanent construction crew. By offering to perform specific tasks, it is likely that the tenant will hire the landlord's crew to perform all of the construction work.

There are several considerations for the tenant in deciding whether to have work done by the landlord's crew. First, is the pricing for the entire job competitive? The tenant will need to obtain several estimates to determine this.

Second, is the landlord's crew sufficiently talented and experienced to perform the required tasks? The tenant should inspect work performed by the landlord's crew for other tenants with uses similar to the tenant's uses. The tenant should keep in mind that the quality of construction work which is acceptable in industrial space may not be acceptable in a professional office.

Finally, the tenant should investigate the type of warranty which is available from the landlord's crew. If there is a problem with the HVAC or plumbing installed during the construction, there is a greater chance of quick response from the landlord than from an outside contractor. The landlord will be motivated to act not only to maintain the reputation of the crew but also to maintain the condition of the building.

The lease provision dealing with tenant improvements will be very long if it describes the construction work in detail. More commonly, the tenant improvement section of the lease is very short and refers to and incorporates the more detailed construction specifics contained in an attached work letter. The work letter must describe in detail the construction work to be done, who will pay for it, the materials to be used, and the procedure and time requirements for preparing plans and completing the work.

[5] Lease Price

[a] Base Rent

The lease must specify the rent to be paid, typically as a total amount for the lease term or as an annual amount. Most

often the lease provides that this rent amount must be paid in monthly or quarterly installments. The frequency of installments should be specified, together with the due date and the place of payment of each installment. This rent is often referred to as the base or fixed rent.

Often leases contain a grace period. That is, the rent is due on a particular date, such as the first of each month, but is not considered to be late until a later date, such as the tenth of the month. Where a grace period is included, there is usually a late fee charged for any payment received by the landlord after the expiration of the grace period. Such a late charge is designed to cover the costs incurred by the landlord as a result of the failure to pay the rent on time. Such costs include loss of interest on the funds, administrative costs required to send notices of default and bookkeeping charges.

[b] Additional Rent and Charges

Most commercial leases also have additional rent or charges, designed to compensate the landlord for the inevitable variations in maintenance costs, insurance, real estate taxes, assessments and other running expenses. Such an arrangement is commonly known as a "net lease." Under a net lease, or a provision for the payment of "net rent," the tenant is obligated to pay a fixed sum, or base rent, and, in addition, to bear the cost of most or all operating expenses. This device shifts to the tenant the impact of periodic changes in such costs. The lease should specify precisely the tenant's obligations regarding each specific operating expense.

[i] Water and Sewer Charges and Utilities

If the tenant has separate meters or possession of an entire building, the lease generally requires the tenant to pay water and sewer charges. If there are no separate meters, the lease usually provides that the tenant must pay water and sewer charges in proportion to the tenant's occupancy of the building. Before accepting such a lease condition, the tenant should make certain that there are no tenants in the building who use disproportionate amounts of water. The tenant may wish to request a clause in the lease which obligates the landlord to separately meter such a tenant. Typical tenants who are heavy users of water include restaurants, laboratories, dental offices, exercise studios, and beauty salons.

Utilities such as electricity, natural gas, and telephone generally are separately metered, and each tenant pays its own expenses. In some older buildings or single tenant buildings, the entire building is heated by fuel oil. The cost of the fuel oil is charged pro rata by square footage in multi-unit buildings. In single unit buildings, the tenant pays directly.

[ii] Garbage Disposal

Some commercial leases require tenants to dispose of their own garbage. Others provide refuse service as part of common charges. If tenants must provide their own disposal, a prospective tenant should inquire about the ability to store refuse before pick up. The landlord may provide exterior space for dumpsters. If not, the tenant must store refuse within the tenant's own space or make arrangements for daily removal.

[iii] Property Taxes

The tenant should usually expect to pay its ratable share of real property taxes, because the landlord will not be willing to assume the risk of periodic tax increases while the rent to the tenant remains constant. Some leases provide for payment only of increases in taxes; others provide for payment of all taxes. In multi-user buildings taxed as a single unit, taxes are allocated among the tenants, usually on the basis of relative rent payments or floor space occupancy.

Where the tenant is responsible for taxes, the tenant may wish to obtain the right to contest the assessment of the building and to delay payment of the tax pending the outcome of the protest. Some form of additional security is often provided to protect the landlord while payment is being withheld, or more often the tenant will be required to pay the tax and receive a refund of a portion of it if the contest is successful. Although such a proceeding challenging a tax assessment may be costly to the tenant, where the landlord has a fully leased facility in which tenants pay all taxes, the

landlord has no incentive to bring such a proceeding. Some leases may require the landlord to bring a proceeding to challenge a tax assessment at the request of a certain number of tenants, but the landlord usually has the ability to charge back its expenses, including legal fees, as common area charges.

[iv] Janitorial Services

The cost of janitorial services is often included in the base rent. If not, the tenant is typically required to obtain its own janitorial services. Similarly, window washing is often included in base rent. If it is not, in a multi-unit building, the tenant is usually responsible for the interior and the landlord is responsible for the exterior. In a single unit building, there is no customary provision for window washing, and such a provision is subject to negotiation. Many commercial leases make the tenant responsible for the cost of replacing broken windows, and the tenant is frequently required to carry plate glass replacement insurance.

[v] Common Area Charges

In nearly every multi-use facility, the tenants must pay for common area charges. These charges are generally assessed pro rata based on the number of square feet rented by a tenant in relationship to the total of rentable space in the building. Common area charges include the cost of landscaping, mowing, snow removal, parking area maintenance, cleaning of common areas, repairs to common areas, heating, air conditioning and lighting of common areas, pest control, insurance, and the cost of a management fee paid to the entity managing the building and common areas. The term common area charges or "operating expenses" is a term that requires careful definition through a negotiated agreement. Skilled tenants or their counsel will negotiate specific expenses that are to be excluded from the term. Normally, a capital expenditure is not an operating expense. However, through the definition of what is included in "operating expenses," the landlord's capital expenditures are frequently included. Most tenants will resist this and usually the compromise is to include only those capital expenditures that result in better efficiency (result in lower operating costs) and capital expenditures required by new laws or regulations. Tenants will want to define carefully what is a new law or regulation.

Landlords also adjust operating expenses among the tenants when there are vacancies through a lease clause commonly called the "gross-up" clause. The gross-up clause provides the means by which the landlord is able to pass on to tenants the share of operating expenses that would have been paid by whatever tenant would have occupied a vacant space if there are vacancies in the building. Only expenses that vary with occupancy are "grossed-up." These are called variable expenses and they include such costs as utilities, cleaning, repairs and maintenance. Usually gross-up clauses permit the landlord to gross-up variable expenses to what the landlord reasonably calculates they would have been had the building been either 90% or 95% occupied. However, from the point of view of a tenant that is paying operating expenses on the basis of increased from a base year, there should also be a gross-up clause that grosses-up the operating expenses of the base year to what those expenses would be had the building been either 90% or 95% occupied in the base year.

Often times, in shopping center leases, the landlord enters into leases with major or anchor tenants that have the leverage to insist that they will pay no share of operating expenses or a reduced share of operating expenses. In that case, the landlord will want to define the tenants' share of the expenses as rentable area divided by the total rentable area of the shopping center, minus the rentable area of anchor tenants. This seems inherently unfair to the non-anchored tenants, but those non-anchored tenants usually are willing to agree to this because they realize that without the anchor tenants, there could be no shopping center.

[vi] Retail Facilities

Additional charges which may be assessed to a tenant in a retail facility include advertising and mandatory merchants' associations. The landlord often reserves the right to prepare and disseminate advertising for the entire facility in newspapers, on television, on radio, and billboards. Since traffic generated by such advertising is presumed to benefit

the tenant, the lease usually requires the tenant to pay for its share; however, the tenant should be very cautious about such provisions. The tenant should insist that its obligation to pay for its share of advertising be limited to a particular number of times per year and to a specified total dollar amount. Often the landlord will delegate the obligation to produce advertising to the merchants' association. The tenant is generally well advised to participate in the merchants' association, which, among other things, often has the authority to demand assessments of the tenant for special promotions at different holidays.

[vii] Expenses Arising from Default or Litigation

Leases commonly provide that the tenant must reimburse the landlord for expenses incurred in protecting the landlord's rights under the lease. Such expenses include expenses incurred in the collection of rent following the tenant's nonpayment and expenses incurred in curing the tenant's defaults, including defaults in the obligation to make repairs or to pay insurance premiums. The tenant may desire a lease provision requiring the landlord to give the tenant notice of such a default and an opportunity to cure it before the tenant becomes bound to reimburse the landlord. Most leases do not require the tenant to pay for expenses incurred by the landlord because of defaults by other tenants.

The lease can also provide that the tenant will pay any legal expenses incurred by the landlord in maintaining legal proceedings for the prosecution or defense of legal actions related to the lease. Some leases provide that if the dispute is between the landlord and the tenant, the landlord only can recover its legal expenses if the final decision is in the landlord's favor. Other leases require the tenant to pay the landlord's legal expenses regardless of the final outcome of the litigation. Many leases also require a defaulting tenant to pay the landlord's expenses in recovering possession from the tenant.

[c] Percentage Rent

Certain leases structure the rent on a percentage of income, receipts or gross sales basis. Such a provision allows the landlord and the tenant to share the risks and benefits of fluctuations in property value or business income.

A percentage rent provision typically involves the payment of a fixed minimum rent and additional rent based upon a percentage of receipts or income from use of the premises in excess of a specified amount. The fixed rental amount generally is lower than the market rate for similar space.

The starting point in formulating the percentage rental provision may be "gross income," "adjusted gross receipts," "net income," or "gross sales." The appropriate basis for such a provision depends upon the nature of the tenant's business. For example, in the case of certain large scale merchandising and service enterprises, the complexities in accounting make it desirable to base the percentage rent on gross receipts.

The percentage rent provision must specify the amounts which the parties intend to include in or exclude from the amount of "gross income," "adjusted gross receipts," "net income," or "gross sales," as the case may be. The parties must consider whether such amounts should include receipts of the tenant's licensees or concessionaires, receipts of other tenant offices or stores resulting from sales at the leased premises, sales to the tenant's employees, returned items, donated items, interest and credit charges, uncollected credit sales, telephone or catalog sales, and off-premises deliveries. Such items as sales tax receipts, vending machine proceeds, and customer charges for delivery or alterations at cost are generally excluded. In view of the development of e-commerce involving sales over the internet, the parties must consider whether sales over the internet should be included. The problem with such sales is that they are not site specific. Therefore, it would be difficult to include them unless the actual goods shipped were from the site of the leased premises.

Note that where "net income" is used as the basis for the percentage rent provision, certain specified expenses can be deducted from gross receipts which cannot be deducted where "gross sales" is used as the basis for the provision. The

parties should take particular care in drafting such a provision to avoid defining "net income" as profits. If the parties are sharing profits, they risk being classified as partners.

The collection of percentage rent depends to a large extent upon the records maintained and supplied by the tenant. The lease should specify when and how the tenant must provide the landlord a report. The frequency of reports and the detail of information required will depend upon the circumstances of the transaction. The landlord should reserve the right to review the tenant's books and records to verify the accuracy of the percentage payments.

Typically, such leases also contain a provision allowing the landlord to have the books and records audited by an independent public accounting firm. If the amounts of receipts, income or sales reported by the tenant differ from those determined by the audit by a specified percentage, the tenant must pay the costs of the audit. The tenant should protect itself from the disruption of frequent audits by a provision that allows audits no more than once per year.

[6] Security Deposit and Other Forms of Security

The lease must require the tenant to pay a security deposit. The amount is usually at least equivalent to one month's base rent, but is negotiable based on the tenant's financial statement and references. The lease should specify the exact dollar amount of the security deposit and when the deposit is due. Typically, the security deposit is due either upon execution of the lease or upon acceptance of occupancy.

The lease should set forth the uses which the parties may make of the security deposit. Typically, the landlord will demand assurances that the tenant will not encumber the deposit by further pledging it to another party without the landlord's consent. The lease may also contain provisions barring the tenant from using the deposit in lieu of the final month's rent. In such a case, the lease will provide that the landlord may use the deposit toward the cost of repairing any damage to the premises caused by the tenant. Sometimes the lease will give the landlord the right to apply the deposit toward the cost of cleaning the premises if the tenant did not leave the premises "broom clean." In addition, the lease often provides that the landlord may use the security deposit during the term of the lease to satisfy obligations which the tenant fails to perform, such as the tenant's obligation to pay special assessments or additional fees. The effect of a lease clause providing that the security deposit is to constitute liquidated damages in the event of the tenant's default is dependent upon local law, which may find such provisions to be unenforceable penalties rather than a good faith attempt to anticipate and measure reasonable damages.

The lease should specify the procedure the parties must use to release the security deposit at the end of the lease. Typically, the lease requires the tenant to notify the landlord when the premises are vacant. The landlord and the tenant will then schedule an inspection. If the premises are in satisfactory condition, the security deposit will be returned. Most leases specify the number of days within which the deposit will be returned. That period usually ranges between ten and thirty days. It would be rare for a landlord to deliver a check to a tenant at the inspection or for a tenant to agree to wait more than thirty days.

Leases vary widely on the procedures to be followed if the landlord finds that the premises are not in the expected condition at the end of the lease term. The tenant may request an opportunity to correct the problem within a specified number of days and then to have the landlord reinspect the premises. Alternatively, the landlord and the tenant may agree upon a sum to be deducted from the security deposit to cover the cost of correcting the condition; however, if the parties cannot agree upon such a sum, most leases allow the landlord to summarily use the security deposit. The tenant may wish to negotiate a provision which allows a neutral party, designated in advance, to arbitrate the dispute. The cost of arbitration generally is borne by the losing party. If the arbitrator apportions the deposit, the responsibility for the cost of arbitration can be determined by the arbitrator. Inclusion of such a provision will encourage both parties to be reasonable.

The lease should also state whether interest is to be paid on the security deposit. If so, the lease should specify the

interest rate and whether it is compounded. If the interest rate is adjustable, the lease must specify how the rate will be calculated, how the adjustment will be made, and on what basis the adjustment will be made. The lease must also specify which party will be responsible for the income taxes on the interest which may be earned by the security deposit.

Other forms of security that the landlord might consider in lieu of or in addition to a cash security deposit are personal guaranties from another individual or parent or affiliated entity, letters of credit issued by a bank which can be called upon in the event of a default or breach of the lease, or pledges of assets owned by the tenant. Such a pledge might be in the form of marketable, liquid assets of the tenant, or of equipment used by the tenant at the leased premises.

[7] Lease Term; Rule Against Perpetuities

The lease must describe the term of the lease in dates certain wherever possible. This certainty avoids any disagreement over the period of occupancy and the obligation to pay rent.

However, where the leased premises are currently occupied, under construction, or require governmental approvals prior to occupancy, it may not be possible to set a date certain for commencement of the lease. In those cases, the date is typically established as a particular number of days after the occurrence of a triggering event. In cases where the occurrence of the triggering event is within the knowledge of one party, there should be a provision requiring the knowledgeable party to give notice of the occurrence of the event. The term then commences a specified number of days after notice is given. In some jurisdictions, where there is a question as to whether such a provision violates the applicable rule against perpetuities, the term can be made to commence on the earlier of either a specified date of the occurrence of the triggering event.

In general, the rule against perpetuities states that no interest is good unless it must vest, if at all, not later than twenty-one (21) years after some life in being at the time of the creation of the interest. Most states follow the common law or some variation of it. A good draftsman of a lease should make sure that the term of the lease is definite enough so that it cannot be interpreted as being perpetual, although most states hold that a tenant's estate for years is a present interest to which the rule against perpetuities does not apply. The same would be true for a covenant in a lease to renew the lease perpetually. Although that may be the case, a good draftsman should not take the risk that the provision in the lease violates the rule against perpetuities.

The termination date is equally important. Like the commencement date, it is preferable to have a date certain. Some leases provide that the term is for a specified number of months or years. Under such a lease, if the commencement was on an unusual date, then the termination also will be. Other leases provide a specified termination date which cannot be extended, even if the lease commences later than originally anticipated. In either situation, the tenant should review the rent structure to be certain that the rental increases follow any changes in the lease term. Thus, if the lease commences later than originally anticipated, the tenant must determine whether increases in rent become correspondingly later in time, or whether the tenant begins to pay the higher rent before the end of the actual year of occupancy. If the tenant is required to pay the increases in rent sooner, the tenant may experience some financial difficulties, since it may have anticipated twelve months at the initial rate rental during which time it could recover its relocation expenses. Instead, the increases may come after only a few months. The parties should take this into consideration when negotiating the lease. The landlord will not be benefitted by a financially distressed tenant.

[a] Delivery of Possession

There are many situations where it is possible that there will be delays in, or even a complete failure to accomplish, delivery of possession of the premises to the tenant. This is especially likely if the leased premises are currently occupied by a tenant who may holdover, or if the premises are under construction. The parties may wish to include a clause in the lease dealing with the consequences of the landlord's failure to deliver possession to the tenant upon the

commencement of the lease term. Without such a provision, the tenant may have no recourse against the landlord in the event of a holdover by a prior tenant, and the landlord may be unprotected from liability for damages, deferral of the lease term or cancellation of the lease resulting from the landlord's failure to deliver possession.

The lease can permit an abatement in rent for the period during which the tenant is unable to take possession, with the provision that the lease term will not be extended, and the tenant may not cancel the lease or recover damages. The tenant may prefer a clause that gives the tenant the right to cancel the lease and to recover any rent and security payments if possession is not delivered by a stated date.

[8] Renewal or Extension Rights

If the tenant's business may be affected by location, the tenant should consider negotiating a renewal or extension provision in the lease. Without such a provision, the landlord is under no obligation to continue to lease the space to the tenant upon the termination of the lease, putting the tenant in an extremely vulnerable position in attempting to negotiate a new lease. The landlord, knowing of the tenant's need, may exact a considerably higher rent than the market rent.

The language that should be used in a renewal or extension provision may depend upon the interpretation given to the words "renew" and "extend" under local law. In some states, the extension of a lease is regarded as a continuation of the original lease as if the original lease covered the entire term as extended. On the other hand, such states treat a renewal as involving a new lease for the additional period. In such states, therefore, an extension option may be exercised simply by notice to the landlord, whereas a renewal option requires the execution of a new lease. Other states do not make this distinction, and automatically apply the original lease provisions to the renewal period. Another approach, based on the intention of the parties, is to presume that the parties intend to extend the lease rather than renew it.

A renewal or extension provision should set the conditions, if any, which must be met by the tenant in order to qualify for the right to renew or extend. Generally, such a provision requires that the tenant not be in default under the terms of the lease at the time the tenant gives notice of its intention to renew or extend, and at the time the renewal or extension period commences.

The lease generally requires that the tenant give notice of its intention to renew or extend a particular period of time before the end of the term. Such a provision allows the landlord to begin showing the space to prospective tenants so the landlord may reduce the period of time during which the space will be vacant. Landlords generally seek a notice of renewal or extension period of six months or more. Tenants generally seek a shorter period so as to keep their options open as long as possible. Customarily, the longer the initial lease period is, the longer the period of time before the end of the lease term by which the tenant will be required to give notice of its intention to renew or extend. As an alternative to placing the burden on the tenant to remember to give notice of its intention to renew or extend, the lease can provide for an automatic renewal or extension unless the tenant gives notice of its intention not to renew or extend. A provision also can require the landlord to give the tenant notice that the time has come for the tenant to exercise its option to renew or extend.

The renewal or extension option is only useful as a protection to the tenant where it contains a provision either specifying or limiting the amount of future rent. Without such a provision, the tenant has a rather hollow right. Although the renewal or extension provision may specify the exact amount of the future rent, this is risky for both parties, especially for a long term lease. Unforeseen changes in the economy in general or in the real estate market in particular may result in a windfall to the landlord or to the tenant.

A more market sensitive approach may be to tie the changes in rent to the changes in the Consumer Price Index (CPI) or another index which may be more appropriate to the tenant's business or to the rental rates in the geographic area in which the space is located, but for the tenant's protection having some outside limit or "cap" on the amount of the

increase. Where the lease is a long term lease, it is appropriate to use the first year of the lease as the base year. The changes in the index over the lease years are factored in giving the rate for the first year of the renewal or extension term. Where the original term increases were based on negotiation instead of the CPI, it is possible that a decrease in rent may be the result for the renewal or extension period. Frequently, leases provide that there will be no decrease in rent where the CPI or similar index is used.

The lease should specify any additional terms which will be effective for the renewal or extension period or any provisions which will not be included for the renewal or extension period. Often leases will incorporate all terms except the right to renew (or extend) for the renewal (or extension) period. Care should be taken to draft a provision that cannot be construed to continue the right to renew or extend in perpetuity. Additional terms effective only for the renewal or extension period may include the right to increase or decrease the rented space and the right to obtain renovations or modernization of space.

[9] Option to Purchase

The option to purchase generally is not available in a multi-unit building, such as a shopping center or an office complex. A tenant who negotiates an option to purchase can expect to pay additional consideration for that right. Typically, that consideration will be a separately stated dollar amount as opposed to an increased monthly rent.

The option should set a price at which the tenant may purchase the premises. If the price is "fair market value," a mechanism for determining the value should be included. The parties can specify an agreed upon appraiser who will determine fair market value. This method may be difficult. Frequently, the parties will not be able to agree on an appraiser. If the landlord has many properties which the appraiser is called upon to appraise, there may be an unconscious bias toward the landlord. Additionally, the appraiser may not be available at the time the need for the appraisal arises.

The parties may each select an appraiser to perform a determination of value, and the two appraisals can be averaged. This method is quite expensive because both appraisers are performing the same service. In addition, there may be a skewed result if either appraiser is quite high or quite low in their appraisal.

A third method is to provide that each party selects an appraiser, and then the two appraisers jointly select a third appraiser who performs the appraisal. This method has the advantage of keeping the cost at a reasonable level, and also removes the possibility of bias, since neither party will have control over whom the other selects and whom the appraisers ultimately select.

The option should specify the period of time during which it is exercisable. This period may extend for the entire duration of the lease or for some shorter period. Frequently, where such a shorter period is used, the period will be toward the end of the lease term; however, a wise landlord will reserve the last three to six months of the lease to locate a new tenant. Thus, the landlord will want the option period to expire before the end of the lease.

An option should set forth the manner in which the tenant may exercise it. Usually, the tenant must give written notice to the landlord that the tenant is exercising the option. A contract for the sale of the premises is then executed. It is helpful if the terms of the contract of sale are agreed upon when the parties execute the lease containing the option. Often the contract of sale is annexed as an exhibit to the lease. The contract of sale must contain provisions regarding the status of the title, mortgage contingency, if any, and the time frame for closing. There is usually no need for inspections, as the tenant has been occupying the premises and should be aware of the conditions. A mortgage contingency often is not required because the tenant already has investigated its ability to obtain a mortgage before exercising the option.

If the time frame of the option is quite short, it may be necessary to have contingencies in the contract of sale. These

would include contingencies for mortgage approval, title and any physical inspections which the tenant did not obtain prior to exercising the option. Such inspections may include radon gas, urea formaldehyde insulation, asbestos, lead wood boring insects, environmental concerns, structural soundness, and any site specific concerns. These provisions should all be negotiated and agreed upon by the time the lease containing the option is executed. Otherwise, the parties may not have an enforceable option agreement, but may only have an agreement to agree. For a more detailed discussion of real estate sales contracts and contract forms, see Vol. 25, Chapter 21, Sales and Exchanges, *supra*. For a more detailed discussion of environmental contingencies and specific forms relating to them, see Vol. 33, Chapter 25, Environmental Considerations in Real Estate Transactions, *infra*.

It is important to record a document so as to put the public on notice of the option to purchase rights that were granted to the tenant. This is usually done by including reference to the option in the short form lease which is used to record the rights of the tenant to lease the property. If there is a mortgage, the lender will most likely ask that the option be subordinated to the rights of the lender under the mortgage unless the holder of the option can convince the lender otherwise.

[10] Rights of First Refusal or First Offer to Purchase Leased Premises

The tenant who has a right of first refusal essentially has a latent option to purchase real property that is activated when a third party offers or agrees to purchase the property. The tenant's right to purchase the property for the price and on the terms offered by the third party is superior to the third party's offer or agreement. A right of first refusal is similar to an option in that it grants the tenant the right to purchase the leased premises under certain conditions. It is in these conditions that the two concepts differ most significantly.

An option to purchase gives the tenant the right, within a limited period of time, to decide to purchase the premises. The right of first refusal gives the tenant the right to purchase, if, and only if, the landlord first decides to sell and receives an offer. If the landlord does not decide to entertain offers during the term of the lease, or during the period of the tenant's right as contained in the lease, the tenant has no right to acquire the premises.

Because the right of first refusal is so limited, there is usually no separately stated consideration for the right. The right of first refusal is rarely included in leases for multi-unit facilities, such as shopping centers and office complexes.

The right of first refusal may be drafted in many different ways. Most often, the tenant is offered the right to purchase on the same terms and conditions contained in a purchase offer which is acceptable to the landlord. If the tenant fails to accept the offer, the tenant's right of first refusal is forever extinguished. This method presents several problems for the tenant. First, although the price may be in the range which is acceptable to the tenant, the other terms of the offer may not be acceptable. For example, the mortgage contingency may not include an amount high enough to provide for the tenant's needs. Similarly, the agreement may not provide for contingencies for inspections desired by the tenant. Second, this method would allow an unscrupulous landlord to obtain a collusive offer in order to terminate the right. Such an offer would include an extremely high purchase price or other terms so onerous that no sensible tenant would ever agree to match the offer.

The tenant may attempt to protect itself by a provision which revives the right of first refusal if the transfer of title does not occur. This term should not be objectionable to an honest landlord. In exchange for this term, the tenant could agree to a short period of time in which to match the offer, such as five to ten days.

It is more difficult to fairly protect the tenant from other terms of the offer which may be objectionable. Some minor variations may not be particularly objectionable to the landlord; however, at some point, variations may make the offer of the tenant not nearly as acceptable as the offer of the outside party.

The right of first refusal must contain a requirement that the landlord notify the tenant if an acceptable offer is received.

The right of first refusal must contain a period of time during which the tenant may match the offer. This period should be reasonably short because the outside purchaser may not be willing to wait very long to learn whether he or she will be the purchaser. The landlord must be sure to advise potential purchasers of the right of first refusal, and all purchase offers must be contingent on the tenant's failure to exercise the right of first refusal within the specified time period. Note that an outstanding right of first refusal can make it difficult for the landlord to market and sell the property, since brokers and prospective purchasers know that the tenant may intervene in the transaction and purchase the property.

The right of first refusal must contain a method by which the tenant signifies its willingness to purchase the premises on the same terms and conditions contained in the offer of the outside purchaser. The tenant, after accepting the offer, must proceed to satisfy all contingencies including title, and thereafter, the tenant must be prepared to close. Failure by the tenant to close upon satisfaction of all contingencies, will make the tenant liable for breach of contract.

Another possible contract provision, similar to a right of first refusal, is a right of first offer. The landlord who gives a tenant a right of first offer is obligated to offer to sell the subject property to the tenant before offering to sell the property to any third parties. The tenant's right to purchase is activated when the landlord offers the property to the tenant at a price and upon terms chosen by the landlord, rather than when the landlord receives an offer from a third party. The tenant may accept the landlord's terms for the sale, or, if not, the landlord may offer the property to third parties at the same price and upon the same terms. An outstanding right of first offer generally does not impair the landlord's ability to market and sell the property, since the tenant must elect whether or not to purchase the property upon the terms offered before any real estate brokers and prospective purchasers become involved.

For the same reasons stated above, the tenant should have the right of first refusal or right of first offer included in the short form lease which is recorded. In that way, the right granted to the tenant becomes constructively known to anyone dealing with the property.

[11] Future Expansion or Contraction of Space

Provisions can be contained in a lease allowing the tenant to increase or decrease space during the lease term. The tenant, anticipating future growth, may desire an option to lease adjoining or nearby space during the term. Often in such situations, the lease will give the tenant the right of first refusal or a right of first offer for the desired space as it becomes available. Such a provision will give the tenant a right to lease the desired space that is superior to the right of any third party. This right is similar to the rights of first refusal and first offer discussed above in relation to the purchase of leased property by the tenant. As in a sale situation, the tenant has no obligation to lease the additional space if and when it becomes available. Another method for giving the tenant the ability to expand its space in the future is to restrict surrounding tenants to short-term leases of adjoining space, and/or make the lease rights of such neighboring tenants subject to the landlord's right to relocate them if the principal tenant seeks to expand.

If the tenant plans to eliminate or move certain operations in the future, the lease can grant the tenant the right to abandon part of the premises while the tenant continues to occupy the remainder. A provision permitting the tenant to decrease space may specify the space to be abandoned, and the time period within which the option to abandon must be exercised or else forfeited. The lease also should include a formula or other method for rent adjustment.

[12] Right to Assign or Sublease

Most leases include provisions controlling the tenant's right to assign the lease and to sublet the leased property. At a minimum, such provisions delineate the procedures to be followed by the tenant and certain basic protections for the landlord. On the other hand, such provisions can severely limit assignment and subletting rights in the tenant.

The most liberal assignment and subletting provisions merely require that the tenant give the landlord adequate notice of the assignment or sublet arrangement. If the landlord desires to retain more control over assignment and subletting of

the premises, the lease should require the landlord's written consent as a prerequisite to any assignment or sublease.

From the landlord's point of view, this clause should make clear that in the event of an assignment the tenant is not released from its obligations under the lease (unless the landlord agrees at the time to grant such a release). From the tenant's point of view, the tenant should try to negotiate a clause whereby if the new assignee has a net worth equal to or greater than the tenant, that a release would be granted. In addition, the tenant frequently will ask for the right to assign or sublet without the consent of the landlord, to an entity affiliated with the tenant, or a successor to the tenant by merger or other reorganization, or by acquisition of substantially all of the tenant's assets. The landlord will usually agree to such a clause provided that the landlord is given adequate notice of the name, address, and identification of such assignee.

[13] Repairs and Maintenance

The lease must allocate responsibility for repair and maintenance between the landlord and the tenant. There must be clear guidelines defining the immediate obligations of the parties, since the curing of a defective physical condition often cannot await a protracted dispute as to responsibility. General statements, such as a provision requiring the tenant to keep the premises in "good repair," may or may not be construed to include structural repairs or the replacement of worn out items.

Absent a lease provision to the contrary, a landlord generally has no duty to repair or maintain leased premises, except with respect to concealed defects existing at the beginning of the term. As a practical matter, the parties rarely desire to make the tenant responsible for all maintenance and repair. The landlord is likely to want some amount of control over its building, while at the same time the tenant probably wants to handle the day-to-day responsibility for maintaining its space as it desires.

In a typical commercial lease, the tenant is responsible for "nonstructural" repairs, while the landlord is responsible for "structural" repairs. The term "structural" usually refers to the following systems: heating, ventilating, air conditioning (HVAC), roofing, load-bearing members, plumbing, foundation, and exterior walls. The definition of "structural" may be varied by agreement. For example in some multi-unit facilities, such as strip shopping malls, the HVAC system is installed by the tenant, and the tenant bears the responsibility for the system. This also may be true of plumbing.

The reason for the repair dichotomy is that landlords have a strong interest in the structural items because they are of particular importance to the integrity and value of the building. The nonstructural items are far less costly to repair. By making nonstructural items the tenant's responsibility, the landlord is also encouraging the tenant to take good care of those items on a day-to-day basis.

Most leases contain a provision requiring the tenant to notify the landlord promptly when a structural repair will be required. In addition, the landlord must reserve rights of access to repair structural items and to perform emergency repairs on nonstructural items where the items in need of repair could cause additional damage. Such an emergency repair of a nonstructural item may be charged to the tenant under the terms of many leases.

In addition to being responsible for structural repairs, some landlords prefer to be responsible for ordinary repairs to the premises. Clearly, the landlord will factor such responsibility into the rental structure of the lease, or will require the tenant to reimburse the landlord for the cost of performing such repairs.

The landlord may wish to perform nonstructural repairs for many reasons. First, the landlord may be concerned that the tenant will not perform the repairs promptly. Items which are highly visible to visitors to the premises will detract from the value of the building and its desirability to future tenants. Second, the landlord may be concerned about the quality of workmanship. In a first class building, poor quality workmanship will have the same effect as failure to repair. Third, the landlord may be concerned that the tenant or its agents may not have the knowledge or skill needed to perform a

repair to a complicated system properly. In addition, the landlord may be concerned about the effect that the repair work will have on other tenants. Noise, dust and carelessly placed supplies and equipment will not be popular with other tenants who are trying to carry on their businesses. If the landlord can control the repairs, the landlord can also maintain the quality and atmosphere of its buildings.

[14] Other Obligations of Tenant

The lease should contain a description of the additional obligations assumed by the tenant. These include obligations concerning the condition of the premises, insurance, use of the property and other obligations which are specific to the particular parties or premises.

[a] Condition of the Premises

The reasonable tenant will have examined the premises on a few occasions prior to the negotiation and execution of the lease. The tenant will know what is needed to put the premises into the condition which the tenant will need for use. From that framework, the parties can negotiate the terms of the lease. Although certain provisions may be described as "typical," the provisions are always subject to negotiation. One caveat should be noted. Landlords who own and lease considerable amounts of commercial space may be less likely to negotiate provisions unless they have a large amount of vacant space.

The tenant will be asked to maintain the premises in good condition. This will require the tenant to clean and paint as is necessary, and to prevent employees and invitees from damaging the premises. The provision of cleaning and janitorial service is generally subject to negotiation. In office complexes with many tenants, cleaning is often included in the lease price. In single use retail and industrial spaces, cleaning is more often not included in the lease price. Unless the tenant has someone on staff to handle these responsibilities, the tenant should carefully investigate the cost of cleaning services before accepting this term.

Lawn care and snow removal are generally included in the lease price of multi-unit buildings. In shopping centers, these are a component of the common area charges. In single user buildings, this is subject to negotiation. Both the landlord and the tenant will have concerns about these items. The landlord will want to be sure that the persons performing the job are competent so that expensive landscaping is not ruined. The tenant will want the grounds maintained for both aesthetic and safety reasons. The parties should carefully investigate the costs. Where the landlord has an outdoor maintenance staff, this may be cost effective and will satisfy both aesthetic and safety concerns.

[b] Alterations

Alterations are changes in the layout of the building which are required to make the space useful to the tenant. Alterations include initial tenant improvements at the beginning of the lease. In addition, they include any physical changes required during the term of the lease to accommodate growth or other business changes.

After the initial tenant improvements, alterations, if the lease permits them, are typically performed at the tenant's expense, since they are generated by the tenant's needs. However, the lease should provide that alterations may be made only with the landlord's prior written approval, to prevent the tenant from making alterations in such a way that the landlord will have difficulty renting the space in the future or the premises will be permanently damaged. Part of the approval process may be a condition that the tenant restore the premises to its prior configuration at the lease end. The tenant will ask for the right to make nonstructural alterations without the prior consent of the landlord.

If alterations are permitted by the lease, the lease should include a provision controlling the possibility that the property could become encumbered by liens for materials and services furnished to the tenant. Several different methods are available to protect the landlord from such encumbrances, including the following requirements: (a) the landlord's

approval of all work in excess of a specified amount; (b) a bond for the completion of the work free of encumbrances; (c) waivers of liens of materialmen, architects, contractors and others; (d) the deposit of security by the tenant; and (e) the landlord's right to discharge liens which are on record for more than a specified period and to add the cost of such discharge to the rent. The lease also should require the tenant to obtain all necessary permits from governmental authorities before construction begins, and to perform all work in compliance with all applicable laws, building and zoning codes.

[c] Decorations

The term "decorations" usually refers to amenities or fixtures added by the tenant for its own pleasure. These may include wallpaper, window treatments, crown moldings, closets, and built-in bookshelves. Many leases provide that such amenities become part of the demised premises and must be left behind at the conclusion of the term. In addition, many leases give the landlord the option of requiring the tenant to remove decorations. Typically, the landlord will want the tenant to remove decorations that may be dangerous or decorations that one would not expect future tenants to use or which would be costly to remove.

Some leases contain an exception for trade fixtures. That is, where the decoration is an item used by the tenant in its trade or business, the item may be removed without compensating the landlord.

The removal of or failure to remove a decoration may result in the cost thereof being charged to the tenant. Similarly, if the removal of an item causes damage, the tenant is responsible for the cost of the repair.

[15] Insurance

Both the landlord and the tenant should be insured for both liability and casualty losses. Each may be liable for an injury to person or property which occurs on or about the premises, since each has an interest in the premises.

The policy limits for liability insurance, in large part, depend on the location of the property. In metropolitan areas it is common to require liability policy limits in multiple millions. In less populated areas, required liability insurance limits of more than a million dollars are less common.

Property damage or casualty limit requirements will vary depending upon the type of tenancy, type of building, and the potential for injury. These limits are subject to negotiation; however, both parties must be sure that sufficient insurance is obtained. Failure to do so can result in a tremendous financial disaster for all involved.

Most leases require that the tenant provide proof of the required insurance coverage before taking possession of the premises. Such proof can be a duplicate original insurance policy or a certificate of insurance. The certificate will show the policy limits, premises insured, the named insured and the loss payee, if any.

The liability insurance obtained by the tenant must cover any injury which occurs on or about the premises or arises out of the tenant's use of the premises. In a multi-unit facility, the landlord must carry liability insurance for injuries occurring in the common areas. In shopping centers and facilities with similar rent structures, this cost is charged back to the tenants as part of the common area charges.

The casualty insurance obtained by the tenant must protect against damage to the space and to the tenant's personalty. The landlord may require the tenant in a single use structure to insure the entire structure. In a multi-unit facility, the landlord may charge the casualty insurance on the structure back to the tenant as part of common area charges, or by a separate charge.

Most leases contain a provision requiring the tenant to obtain a provision in its policy of insurance notifying the

landlord of a cancellation of the insurance a particular number of days before the effective date of cancellation, usually between ten and thirty days. The purpose of such a provision is to allow the landlord the opportunity to obtain other coverage while taking the necessary legal steps to enforce the tenant's obligation to maintain coverage.

Landlords frequently require that tenants name them as "additional insureds." The effect of this requirement is to create an obligation on the part of the tenant's insurance company to the landlord.

Landlords also frequently require a hold harmless provision. This requires the tenant to indemnify the landlord for any claim (including defense costs) which arises out of the tenant's use of the premises, or resulting from any default or breach of the lease by the tenant. The tenant's counsel should review any hold harmless provision carefully to be sure that the tenant's insurance will cover the liability being assumed. In addition, the tenant's counsel should be certain that the tenant is not assuming liability for any injury caused by the landlord.

The parties also may desire to include a provision in the lease denying subrogation rights in order to prevent insurance companies, as primary obligors, from shifting the burden of casualty loss to a negligent or indemnifying landlord or tenant. One method of precluding the shifting of risk from the insurance company is to include both the landlord and the tenant in the same insurance policy, since the insurer has no right of subrogation against its own insured. Another method is for each party to release the other from liability, thereby foreclosing the insurer's subrogation rights. The operation of such a release clause may be conditioned upon the issuance by the insurer of a waiver of subrogation rights. The most comprehensive type of clause denying subrogation rights provides for a mutual release of all liabilities to the extent of insurance coverage, conditioned upon an appropriate arrangement with the insurance company, and including an undertaking by the parties to make such an arrangement wherever possible.

[16] Limitations on Use of the Leased Premises

The parties may negotiate a number of limitations on the use of the leased premises. Such use limitations can protect the landlord and the value of the premises, they can protect the tenant and its business, or they can protect other tenants and their businesses.

[a] Commercial Use

Most leases contain a provision describing the tenant's intended use of the premises. Where a specific business use is contemplated, the lease usually permits activities which are allied to the main enterprise. The specification of a particular use in the lease does not constitute a representation on the landlord's part that the use is permitted under applicable laws and regulations. If a permit, license or other government approval is necessary, the tenant should make sure that its lease obligations are contingent upon obtaining the necessary governmental permission.

Many leases also contain provisions prohibiting uses which are hazardous or which could increase the insurance rates, impair the landlord's title, or adversely affect the value of the property. Additionally, it is common to prohibit uses which violate the certificate of occupancy, breach governmental laws or regulations, constitute a nuisance, or are disreputable, bawdy, or illegal. In some jurisdictions, unless the landlord intends to limit the tenant's use of the premises to a specific purpose, it may be sufficient to allow the tenant to use the premises for "any lawful purpose" if local laws and regulations impose adequate limitations on the tenant's activities.

The landlord will want to be certain that any new tenant's use of the premises is in harmony with other uses in the facility. The landlord does not wish to have a tenant whose legitimate use of the space is so noxious as to drive out other valuable tenants. For example, the landlord may not wish to have a food vendor or hair salon in the same building with professional offices, because the odors produced may not be conducive to the existing tenancies. Similarly, an off-track betting parlor may not be appropriate in a building which also houses a day care center.

[i] Noncompetition Provisions and Radius Restrictions

A tenant has no right to prevent the landlord or other tenants from engaging in competing businesses unless the lease specifically provides for such a right. Such a provision is sometimes called a "noncompetition" or "exclusive use" provision. An exclusive use provision restricts the landlord from allowing a use by another tenant in the landlord's facility similar to the use specified in the lease. For example, a lease of a toy store in a shopping center may contain a restriction against leasing to another toy store within the center.

There are three basic types of exclusive use provisions. The first method is to restrict the landlord from entering into a lease with another tenant for a specified use. The second method is to include in the lease a covenant by the landlord not to permit the particular use in a store or other space in the landlord's facility. In the third method, the landlord grants the tenant the exclusive right to the particular use in the landlord's facility. The choice of exclusive use provision appropriate in a particular lease depends upon the facts and circumstances of the transaction, as well as local law.

In addition, the landlord may have obligations to existing tenants not to accept tenants who will compete directly for business. Often the landlord will ask a potential retail tenant to provide a list of its product lines or suppliers before executing the lease. The landlord may require that certain product lines not be carried, and a list of those prohibited product lines may be annexed to the lease.

Other variations on noncompetition clauses are the "approval clause" and the "no discounter clause." These provisions are most often found in the leases of anchor tenants in shopping centers. The approval clause grants the tenant the right to approve other tenants in the landlord's facility. The no discounter clause allows the tenant to control the quality of the goods sold by other tenants. Both types of lease provisions are designed to protect the image and financial security of the shopping center.

Some leases also have prohibitions on tenants operating a similar business within a particular distance of the landlord's facility. Such a provision is commonly known as a "radius restriction." The landlord does not want the tenant competing with itself for business, particularly where the landlord receives a percentage of income as part of the rent. Radius restrictions are often used in conjunction with percentage rent arrangements, especially in shopping center leases. Instead of an outright ban against the tenant's operation of a similar store within a given distance from the landlord's facility, the lease can accomplish a similar purpose by including the income or sales of any store operated by the tenant within a specified radius in the computation of the tenant's income or sales for the determination of percentage rent. A radius restriction also can be used to prevent the landlord from leasing other premises within a certain area to a competitor of the tenant.

The parties must draft a noncompetition provision or radius restriction carefully to avoid having the clause invalidated as a violation of antitrust laws or an unlawful restraint of trade. Such provisions must have a bona fide business purpose. The scope and effect of the restriction may not be unreasonably broad. Therefore, the lease provision must be reasonable in terms of the length of time that it is effective, the geographical distance covered by the provision, and the particular purpose of the clause. The practitioner should consult applicable federal and local law, as various jurisdictions treat such provisions differently. Ultimately, the validity of a particular restriction depends upon the facts and circumstances of the transaction.

[b] Limitations on the Use of Substances on the Premises

Either the landlord or the tenant may desire a provision in the lease limiting the use of certain substances on the premises. With more attention being focused on the dangers of particular substances which are commonly used, this part of the lease may be subject to a great deal of negotiation.

The parties may be concerned about the use of pesticides and insecticides in the structures and on the grounds.

Wherever garbage is stored and disposed of, there is potential for vermin. Pesticides seem to be the only effective treatment; however, these can have a harmful effect on humans in the building as well.

Similarly, cleaning agents can have noxious odors and harmful effects even when properly used. When not properly used, they can be deadly. For example, the mixing of toilet bowl cleaner and chlorine bleach can create deadly gas.

Certain businesses may use or create hazardous substances as part of their ordinary business activities. The parties should discuss and agree upon procedures for storage and disposal of such substances. Under federal law,ⁿ¹ both the user and owner of real property can be liable for the clean up of toxic and other hazardous substances which are released onto the property.

Where the tenant is using hazardous substances, the landlord may require that the tenant keep a record of all substances which have been used, produced or disposed of on or from the premises. The landlord should reserve the right to review the records and audit for compliance.

The landlord may require a hold harmless provision to protect the landlord from claims by other tenants or injury to persons and property arising out of the use of hazardous substances. The landlord should be certain that the tenant has the financial ability to protect the landlord. Moreover, the landlord may want additional security in the form of a letter of credit or indemnity bond.

[c] Use of Natural Resources

If premises contain natural resources, the parties must negotiate the extent to which the tenant, its invitees and employees may use the natural resources. This issue has a variety of aspects.

[i] Exterior Open Space

Where the premises have exterior green space, the tenant may wish to establish recreational areas for its employees, such as a picnic area or trails for exercise. This may increase the value of the landlord's property on re-rental, but it may cause wildlife to relocate, which may decrease its ultimate value. The landlord may wish to designate particular areas for use or set other protective limitations on recreational use.

[ii] Water Sources

If the premises contain water sources, an industrial tenant may wish to utilize the water sources in lieu of municipal water. This could save the tenant a considerable amount of money over the course of the lease. It also has the potential to do a great deal of harm to the premises, which may reduce its value and for which the landlord could be liable under various federal and state laws. If the tenant is to be allowed to use such water sources, there must be very strict guidelines included in the lease. These guidelines should specify the volume of water to be drawn per day, the site from which it may be drawn, the method to be used to measure the volume, and the records which will be kept. The landlord should have access to those records and the right to audit them. The lease should also specify how the water is to be released after use, including the location of release, volume per day, purity, temperature, and record keeping requirements. Again, the landlord should have the right to audit records. In case the tenant violates any provisions relating to the use of water, the landlord should retain the right to terminate the tenant's use of the water summarily.

The lease should provide that the tenant must hold the landlord harmless for any loss which occurs as a result of the tenant's violation of the lease provisions or any law relating to water use and discharge. The landlord should review the tenant's finances to be sure that the tenant has the capacity to indemnify.

[iii] Energy Sources

If the premises contain energy sources, such as natural gas, the tenant may request the right to utilize such energy sources. The tenant will be able to realize a considerable savings over commercial sources; however, such energy sources are nonrenewable. Therefore, the tenant should pay the landlord additional consideration for the use of the resources.

The landlord may wish to limit the volume of use. Provision for measurement and record keeping should be included. The equipment needed to exploit the energy sources may be extensive and unsightly, so the landlord may wish to designate sites for construction and location of such equipment. The landlord also may wish to require natural screening of the site with trees and shrubbery to protect the aesthetic value of the property.

The lease should require removal of the equipment, at the landlord's option, upon the termination of the lease. In addition, restoration of the site to its former condition should be required to maintain property values.

If the development of the energy source is hazardous, additional insurance requirements should be set forth in the lease. In addition, the landlord should require a hold harmless agreement to indemnify the landlord from any loss (including defense costs) for injury to person or property which arises out of or in the course of the exploration, development or use of the energy source by the tenant. The landlord should review the tenant's finances to be sure that the tenant can indemnify if a loss occurs which is not covered by insurance.

[iv] Harvesting Resources

Some tenants are engaged in businesses that use other resources, such as shale or timber, which may be found on the landlord's premises. Shale is a non-renewable resource. Timber, is renewable, although many years are required to return a forest to its former condition. The tenant will be using these resources strictly to enhance its profit, so the landlord should receive a part of this profit. Generally, the landlord's share of profits is in the form of royalties based on the volume which the tenant harvests.

The lease should provide a method for determining volume and a requirement for record keeping. The landlord should reserve the right to inspect and audit the records, and may wish to include a penalty provision in the event that the records are inaccurate or deceptive. The landlord should require the royalties be paid within a particular period after the resource is harvested, and interest should be paid after that period expires.

The lease should also provide for appropriate reclamation of the land at the conclusion of the harvesting activities. The landlord may wish to require the tenant to purchase a bond to cover the cost of reclamation. Alternatively, the landlord can require that a certain amount of money per ton or thousand board feet be placed in an escrow account to help defray the cost of reclamation. In addition, where appropriate, natural screening of the area should be required.

Most harvesting activities are more hazardous than the ordinary tenancy, so the landlord should require additional insurance. Additionally, the landlord should negotiate a hold harmless provision, requiring the tenant to indemnify the landlord for any loss (including defense costs) for injury to person or property which arises out of or in the course of the harvesting and reclamation activities. The landlord should review the tenant's finances to be sure that the tenant has the ability to indemnify in the event that there is insufficient insurance coverage.

The lease should require the tenant to obtain all necessary governmental approvals for the activities. A copy of any permits should be provided to the landlord, and the tenant should be required to notify the landlord immediately if any permit is revoked or not renewed. Such revocation or non-renewal is an indication that the tenant may not have abided by all governmental requirements. The landlord should thoroughly investigate such a situation, and should have the ability to terminate the lease if the investigation shows that the tenant has not complied with all laws. Alternatively, the landlord can extend to the tenant a period of time within which to correct the deficiencies. If the tenant fails to correct, then the landlord can terminate the lease. If the tenant does correct the deficiencies, the landlord is in a better position

since the landlord has a rent paying tenant instead of a vacancy with deficiencies which the landlord must correct. Whether to terminate the lease or allow the tenant time to correct the deficiencies depends on the nature of the deficiencies and the character of the tenant. If the deficiencies are items which may worsen instead of improving over time, such as pollution, the landlord may be better off terminating the tenancy before the tenant has an opportunity to release further pollutants. If, however, the deficiencies are in the nature of the operations, such as OSHA² violations, rather than in the condition of the premises, the landlord can be comfortable in extending time in which to correct the deficiencies. In either event, the landlord should monitor the situation closely to protect itself from liability or irreversible injury to the premises.

[v] Recreational Use of Vacant Land

Owners of tracts of real property which are idle may be asked to lease the property for recreational use. Often the proposed tenant will be a hunting, biking or ski club. The club offers to pay rent for exclusive use of the premises by its members. The rent will help offset the landlord's cost of taxes and insurance, and in some cases, may exceed those expenses.

The landlord will want to be sure that the attributes of the land are not damaged by the tenant's use. To prevent such damage, the landlord can place limits on the use, such as prohibiting the use of timber for firewood, requiring sanitation facilities at various locations, or requiring that all refuse be carried off the premises for disposal. The landlord may wish to place a limit on the number of persons using the premises per day or per season, or to expressly prohibit certain activities such as hunting or snowmobiling. The landlord should reserve the right to terminate the lease if the land is suffering deterioration from the tenant's use.

If the landlord permits the tenant to construct warming huts, shelters or lodges, the lease should require the landlord's approval of all plans and locations. The lease also should provide for maintenance of the structures and casualty insurance, and should specify whether the structures can or must be removed at the end of the term.

Many leases of recreational land provide that the tenant must provide for security for the premises. In addition, the landlord will require a hold harmless provision and personal injury liability insurance to protect the landlord from any claim by a person who may be injured while using the premises.

[17] Termination of the Lease

[a] Condition of the Premises

The parties must set forth the condition in which the premises are to be returned to the landlord at the termination of the tenancy. This agreed upon condition should apply whether the termination is voluntary, at the end of the term of the lease, or involuntary by eviction.

An appropriate lease provision regarding the condition of the premises upon the termination of the lease will depend, in part, on whether the tenant is responsible for repairs. If the tenant is responsible, the lease may provide that the tenant will leave the premises in as good condition as it was in at the beginning of the lease, reasonable wear and tear excepted. In such a case, the tenant need not repaint, but all walls should be intact, all doors and windows should function, ceiling tiles should be in place, and floor coverings should be in place.

If the tenant is not responsible for repairs during the term of the lease, the lease will generally specify that the premises are to be returned "broom clean." The term "broom clean" means exactly that, that the tenant has removed its property and swept the premises. The tenant need not clean the windows and carpets professionally. In most cases, the landlord will have a substantial amount of work to do to ready the premises for a new tenant, including moving walls, installing new floor coverings and freshly painting the premises. Cleaning beyond broom clean would be a waste.

There may be certain instances where the landlord wants the premises professionally cleaned. This typically is the case in a single user structure, where walls cannot be moved, such as a building of historic significance. In that case, the lease should carefully specify the exact measures which the tenant is to take before surrendering possession. If the tenant fails to take such measures, the landlord may offset its expenses in fulfilling the tenant's obligations against the security deposit.

[b] Removal of Personalty

The removal of personalty is always a difficult issue. Where the personalty becomes built into the space, its removal may cause damage to the premises and may also be costly. However, the personalty may not enhance the space for use by a different tenant. In fact, it may inhibit future tenants from renting the space.

To avoid problems, the landlord should reserve the right to review and approve all alterations in advance of installation. With each alteration, the parties should agree on how it is to be installed, whether it will be removed at the end of the lease and who will be responsible for repair of any damage caused by removal. If the tenant fails to remove any item which was designated for removal, the landlord may offset the cost of removal, disposal and repair against the tenant's security deposit.

An alternative approach is to allow the tenant to make the alterations during the lease. Upon termination of the lease, the landlord is given a particular number of days in which to determine which, if any, items the landlord wishes to have removed. The tenant has a specified number of days thereafter to remove the items. If the tenant fails to remove the items, the landlord can remove them and offset the cost against the security deposit.

The latter scheme has the advantage of more flexibility for the landlord. By the end of the lease the landlord may have a new tenant. If the new tenant wants the fixtures, the parties are saved the trouble and expense of removal; however, if items which at the beginning of the lease seemed to be enhancements are now, at the end of the lease, in poor condition, the landlord can require their removal. Although this may be an awkward system for the old tenant, who must focus attention on the old site while trying to get settled in a new location, this system does have an advantage, since the old tenant will not be required to remove items that the new tenant wants anyway.

[c] Trade Fixtures

Trade fixtures are those items installed by the tenant for specific use in the tenant's business. Trade fixtures may include such things as walk-in freezers for a restaurant, the bar in a tavern, or hydraulic chairs in a dental office. Since the tenant cannot operate its business without these items, the tenant should always reserve the right to remove them.

Similarly, since another tenant is unlikely to need these items, the landlord should require their removal and the repair of any damage caused by such removal. If the tenant fails to remove and repair, the landlord may offset its expenses in doing so against the security deposit.

[d] Return of Keys

The return of keys is particularly important in a multi-unit building with common areas. A former tenant's failure to return keys may require the landlord to change locks and provide new keys to all tenants. This can be a very costly process. In buildings which use security codes rather than keys, this is not quite as expensive an issue.

Technically, a tenant does not surrender possession until it has delivered the keys to the landlord. The landlord is entitled to rent until the keys are delivered or until the landlord changes the lock or security keys.

The landlord should reserve the right to charge its costs in changing the locks and supplying new keys against the security deposit.

[e] Prompt Vacation of the Premises

Vacating the premises is never an easy chore for the tenant, who often has a great deal of inventory, equipment, files and other items to move. In addition, the tenant has to cope with the interruption of its business. Many people find moving distasteful and put it off as long as possible. If the landlord is receiving rent and has no other tenant waiting, this may not pose a problem; however, if the landlord has a new tenant waiting for the space, delays in the existing tenant's vacation of the premises can cause the landlord to lose the new tenant.

At the commencement of the lease, no one can be sure what the situation will be at the end of the lease. Therefore, to encourage the timely departure of the tenant, many leases provide a penalty for holding over. The penalty is often an increase in the rent of a hundred percent or more. Such a penalty, in addition to encouraging the departure of the existing tenant, can provide the landlord with the ability to offer the new tenant a decrease in rent for a period to make up for the inconvenience of being unable to take occupancy on time. Most leases relieve the landlord of any liability to the new tenant for failure to deliver the premises in a timely manner; however, a financial incentive is a practical way to smooth a rough start to the new tenancy.

[18] Quiet Enjoyment

Quiet enjoyment is an ancient concept that, in essence, provides that the landlord will ensure that the tenant's use and occupation of the leased premises will not be interrupted so long as the tenant fulfills its obligations. This is similar to the rights of quiet enjoyment contained in a warranty deed, except that the deed refers to the extended rights of a fee owner, while the lease encompasses the lesser rights of use and occupation of a tenant. A general covenant of quiet enjoyment rarely gives the tenant any rights in addition to those which are implied in every lease by law.

The covenant of quiet enjoyment in a lease sometimes is used to limit the scope of the covenants implied by law. For example, the lease may provide that the right to quiet enjoyment is predicated upon the tenant's performance of all of the terms of the lease. The covenant also may be limited by making the tenant's rights subordinate to existing mortgages, ground leases, and other superior liens.

[19] Contingencies

After the tenant locates an acceptable space and negotiates the basics of rental amount, term and tenant improvements, there still may be a number of issues which concern the tenant. These issues cannot be readily resolved by a bare inspection by the tenant, but instead, inspection and testing by a professional or knowledgeable individual is required. If the issues are of such importance that the tenant will relinquish otherwise desirable space if the issues cannot be satisfactorily resolved, then such issues may be handled by means of contingencies to the lease.

Lease contingencies provide that if a certain item of concern is found on the premises or an issue cannot be resolved favorably within a specified period, the tenant may terminate the lease without further obligation. The tenant must watch the time frames carefully. The landlord is under no obligation to extend the contingencies. If the tenant fails to terminate the lease within the specified period, the tenant becomes obligated to fulfill the terms of the lease regardless of the resolution of the issue.

Often, where the issue is the condition of the structure, the tenant will want the space even in the face of a negative inspection report. The landlord and the tenant often can negotiate an addendum or amendment to the lease which allows the tenant to correct the problem with an agreed upon abatement or reduction in the rent. Alternatively, the landlord can agree to remedy the problem with no change in rent. If the landlord is not agreeable to either alternative, the tenant must

either accept the space subject to the problem or terminate the lease and seek new space.

Contingencies often concern healthy or environmental issues regarding the leased space, such as radon, asbestos, lead or urea formaldehyde insulation. Contingencies may concern the capacity of the facilities appurtenant to the space, such as a well or septic system, or the ability to use the space under various governmental restrictions. All of these issues impact on the tenant's use of the premises and none can be resolved without further investigation. For a more detailed discussion of environmental contingencies and specific forms relating to them, see Vol. 33, Chapter 25, Environmental Considerations in Real Estate Transactions, *infra*.

[a] Septic System

In many areas not served by a municipal sewerage system, commercial structures are served by septic systems. Depending on the nature of the use, some septic systems are as complicated as small municipal sewerage systems. Where the tenant's proposed use contemplates the use and discharge of significant amounts of water, it will be necessary to determine the capacity of the septic system. This can be done by an engineer, who will review the design of the system, the soils and the proposed output to determine the capacity.

If the system cannot handle the expected output, the tenant has several options. The tenant can terminate the lease, negotiate with the landlord for an expansion of the system by landlord, or offer to pay to expand the system with a reduction in the annual rent to help offset the cost of the system. The tenant also can investigate the cost of attachment to the municipal system.

If attachment to the municipal system is a possibility, the tenant must determine whether the amount of water the tenant intends to discharge is acceptable to the municipality. Certain large users may require permits to discharge. In addition, the tenant must determine the cost to attach. Since such attachment is a permanent improvement, the tenant should negotiate with the landlord as to who will pay the cost of attachment. Where the septic system is functioning adequately otherwise, the landlord may be reluctant to pay a large portion of the cost; however, where the landlord has no other prospective tenants, the landlord may be willing to pay a larger portion of the attachment cost.

Even a tenant who does not contemplate extraordinary output must still be concerned that the septic system is in good working order so that the tenant's business operations will not be interrupted. This can be determined by means of a dye test. A dye is introduced into a toilet on the premises, flushed into the system, and observed to be sure that it flows properly. If the system is not functioning properly, the cause must be determined. There may be a blockage or there may be a need for additional drain field.

If the system is not functioning, the tenant may terminate the lease or ask the landlord to make the necessary repairs. The landlord should be willing to make the repairs, since the value of the building will be enhanced thereby. In addition, if the building is a multi-user facility, it is likely that existing tenants' leases will require such repairs. Normally, the repair of a septic system, as part of the plumbing system, is considered a structural repair to be performed by the landlord.

[b] Well Water

In areas not served by municipal water systems, commercial buildings may be served by a well. Three issues always arise in connection with well water: purity, quantity, and quality.

[i] Water Purity

Well water should be free of harmful bacteria.ⁿ¹ Well water purity can be tested by a laboratory analysis of water drawn from a tap on the premises. The laboratory will test for the presence of bacteria, particularly Coliform and E.Coli.

Both bacteria can cause illness in humans. If the analysis shows the presence of bacteria, the well may be treated with chlorine or other disinfectant and retested. If the well remains contaminated, the source of the contamination must be located and abated. Frequently, the source is a septic system which is too close to the well.

If testing determines that there are problems with the purity of well water, the tenant may terminate the lease or ask the landlord to make the necessary repairs. Generally, because a well is part of the plumbing system, the work necessary to protect the purity of the well is considered a structural repair. In a multi-user building, the landlord probably is obligated under existing leases to perform such work.

[ii] Water Quantity

The next issue is the quantity of well water available. Where the sole use of water in a commercial building is for sinks and toilets, the sufficiency of the quantity of water available may be determined by a simple test similar to that required in a home. Where additional water is needed for production, showers or washing machines, the amount needed may be difficult to predict. The flow quantity may be determined by a simple test that consists of measuring the number of gallons produced per minute as water flows from a faucet.

If the flow is not sufficient, several techniques may be used to enhance the amount of water available for use. First, a holding tank may be attached to the well. This may be filled so that at peak use, water may be drawn from the holding tank in addition to the well. The tank is slowly refilled from the well during nonpeak times. This is not an extremely costly method.

If a holding tank will not solve the problem, sometimes the well can be deepened. This solution has potential problems. It may not produce the desired increased flow. In addition, the process of deepening may tap into veins of water or minerals which may affect the quality of the well water.

Another solution is to establish a new well. This is a fairly costly technique depending on the geology of the area, and a second well does not always have the desired results. It may not produce any additional water, and the quality of the water may not be acceptable.

Hydrofracturing may be tried. Hydrofracturing is a process designed to break up veins or pockets of water and make them more available to access by the well. The process includes pumping gas into the ground as well as blasting. This technique has inherent dangers associated with blasting, can be quite costly, and is not guaranteed to produce the desired results. If the landlord decides to try hydrofracturing, a thorough investigation of the qualifications of the hydrofracturer should be undertaken.

The lease contingency should provide that the tenant may terminate the lease if the water quantity is insufficient. Alternatively, the tenant may ask the landlord to undertake one or more of the above-described techniques to enhance flow. With the possible exception of the holding tank, the nature of the techniques to increase water flow are such that the landlord would not want the tenant to undertake them on the landlord's property. Furthermore, if the landlord has other tenants in the property, the landlord may be obligated under those leases to remediate well water quantity problems as structural repairs.

[iii] Water Quality

The final water issue is quality. Water which is clear of bacteria nevertheless may contain substances which make it unpalatable. Some of these substances are not considered harmful, but they may be noxious or unpleasant, such as sulphur or iron, which have a characteristic unpleasant smell. Others may be quite harmful, such as lead or methane gas.

Laboratory tests are available to determine the content of the water. Where a particular substance exceeds acceptable

levels (either by industry standards or personal preference), a water conditioning system can be installed. Such a system can be installed for the entire building or at a particular site on a system to improve drinking water. Alternatively, a bottled water service may be used.

The tenant is likely to find that the landlord will not be willing to bear the cost of the installation and maintenance of a water conditioning system unless the substances affecting the water quality are dangerous, such as methane gas. Matters of personal preference will not be costs of the landlord.

[c] Asbestos²

Asbestos is a naturally occurring crystalline substance. In the past, it was used in construction for its insulating and flame retardant properties. In older structures, it can be found as insulation on pipes and boilers, as well as in floor and ceiling tiles.

Asbestos is now considered to be a carcinogen.³ It is associated with lung cancer and other lung disorders, such as asbestosis. If the tiny asbestos fibers are released into the air, they are inhaled, and they may cause health problems over time. Asbestos has been classified as a "hazardous air pollutant" under the Clean Air Act.⁴

Asbestos is friable and should be treated. Since the mid-1980s, there has been a movement to remove or encapsulate asbestos in all structures. Encapsulation involves applying layers of encapsulating material to the surface of the asbestos to seal the fibers inside.

Work with asbestos is dangerous and costly. Asbestos workers must be certified to handle asbestos and must wear protective gear. Work areas must be sealed with outerspace-like airlock doorways, and negative air pressure must be maintained to prevent contamination of other areas. Air quality monitoring must take place to be sure that the fibers have been successfully removed.

Removal projects of particular size require notice to the Federal Environmental Protection Agency, as well as the appropriate state agencies. Projects must be performed by licensed asbestos handlers.

The presence of asbestos can be determined by microscopic examination of the suspected material. A certified asbestos handler can report whether the condition of the asbestos requires its removal. If an inspection of the premises reveals the existence of asbestos, the tenant may terminate the lease. Alternatively, the tenant may negotiate with the landlord regarding the removal or encapsulation of the asbestos. Both parties should be concerned about the presence of asbestos. Either party may be subject to claims by the tenant's employees and invitees for injury caused by exposure to friable asbestos. If the parties contemplate major renovations to the premises prior to occupancy by the tenant, the removal costs could be included as part of the tenant improvements. The exact allocation of the cost should be agreed upon by the parties.

Where very minor amounts of tenant improvements are contemplated, the negotiations become more difficult because the cost of asbestos removal may dramatically increase the costs of such improvements. The landlord will be in a difficult position. Once the landlord is aware of the existence of asbestos, the landlord may be obligated ethically to reveal that fact to other prospective tenants. Removal of the asbestos may increase the value of the building. Consequently, the landlord may be willing to agree to a reduction of rent to help offset the tenant's cost of asbestos removal where the tenant agrees to do so as part of the initial tenant improvements. If the tenant asks the landlord to remove the asbestos, the landlord will not grant an adjustment in rental. The landlord probably will need to absorb the entire cost of asbestos removal, unless the space is uniquely suited to the tenant's needs and no similar space is readily available to the tenant. In such a situation, the tenant may be willing to assist in the removal of asbestos to ensure the availability of the space.

[d] Urea Formaldehyde Insulation⁵

During the energy crisis of the 1970s and 1980s, many owners of existing buildings sought inexpensive ways to insulate those buildings. One method of insulation was to drill holes in the exterior siding of structures and blow foam into the space between the exterior siding and the interior walls. The foam would harden into insulation. The holes in the siding were capped.

Some of the foam contained urea formaldehyde. As the foam lies in between the walls, vapors from the formaldehyde may be released. Ill effects have been reported by the occupants of such structures. Some residential mortgage lenders require certification that real property which serves as the collateral for the loan does not contain urea formaldehyde insulation.

The existence of urea formaldehyde insulation can be determined by records, if any, maintained by landlord or by a laboratory test of a sample of the insulation. If the insulation is determined to contain urea formaldehyde, the usual method of removal is to remove the exterior siding, remove the hardened foam, reinsulate, and replace the siding. This is fairly labor intensive, and therefore, fairly costly.

If urea formaldehyde insulation is found, the tenant may terminate the lease or attempt to negotiate with the landlord regarding removal. Due to the cost involved, the landlord is not likely to agree to pay for the removal unless there is a demonstrable health hazard for which the landlord may be liable. This is quite difficult to show. Furthermore, for the same reason, the landlord is unlikely to agree to reduce the rent and allow the tenant to effect the removal. In addition, the landlord is unlikely to trust the appearance of the exterior of the building to the tenant. A careless job could significantly reduce the value of the building. The tenant may wish to consider a different site.

[e] Lead⁶

Lead is often found in structures built before 1978 in the paint and/or in water pipes. Lead is very dangerous, especially to young children and pregnant women. It can cause death, damage to the brain and nervous system, behavior and learning problems, reproductive problems, high blood pressure, slowed growth, hearing problems, and many other health problems in children and adults. Lead is introduced into the body in a variety of ways. It leaches into the drinking water from pipes. It may be breathed into the body as dust from old paint, and small children often eat paint chips. Lead is extremely difficult to remove from the body.⁷

Federal law requires that individuals receive certain information about lead before renting, buying or renovating pre-1978 housing.⁸ In nonresidential situations, the tenant may still require various lead inspections and testing, the extent and nature of which will depend to some extent upon the nature of the tenant's use of the premises, including whether children will be present on the site.

The presence of lead pipes can usually be determined by visual inspection. The dangers of lead water pipes can only be eliminated by removal and replacement of the pipes. The cost of this will depend on the number of pipes and the ease of access to them.

Lead paint problems can be determined by visual inspection of paint condition and location, surface dust tests, spectrography or chemical tests of samples. Lead paint can be handled in three ways: removal of the surface containing the paint, encapsulation (*i.e.*, by sheetrocking over the surface), or by sanding the surface. Removal is the most permanent and most expensive method, and it causes the least amount of lead dust. Encapsulation may not be permanent and is moderately expensive. As the seams age, lead dust may escape. Encapsulation may not be performed by painting alone. Sanding is not recommended, as it produces high quantities of lead dust; however, sanding is a lower cost alternative and deemed permanent.

In drafting lease contingencies, the attorney should draft separate contingencies for lead pipes and lead paint respectively. If the tenant's use will expose employees or customers to the water coming through the lead pipes, the pipe contingency should allow the tenant to terminate the lease if any lead water pipes exist. Alternatively, the tenant may negotiate with the landlord regarding the removal of lead pipes.

A lead paint contingency should be included in the lease of any structure or part of a structure built before 1978, especially if the structure is a residence and the anticipated tenant has small children. A commercial property lease should contain a contingency that at least provides for testing for lead dust, which is harmful to people of any age.

The lead paint contingency should specify the method of testing and analysis to be used and should require that multiple samples be taken in each room, as well as soil samples from outdoors. The contingency should provide for repair of the sampled areas. It also should specify the qualifications and credentials of the party performing the sampling and analysis. It is important to be sure that the inspector is qualified and has received training in sampling and spectrography techniques.

The tenant may choose to terminate the lease if any lead paint or dust is found, or if the soil around the premises is found to be contaminated with lead. Given the cost of treating a lead paint problem, this may be the best choice if the tenant expects children to be present on the premises. Alternatively, the tenant may negotiate with the landlord regarding the treatment of a lead paint problem; however, in a commercial property lease situation, the landlord is not likely to agree to pay for such treatment unless there is a demonstrable health hazard for which the landlord may be liable. This will depend upon where the lead is found and how the property will be used. The willingness of the landlord to treat a lead paint problem will also depend upon how the particular problem should be treated and how expensive that treatment will be. If the parties contemplate major renovations to the premises prior to occupancy by the tenant, the lead paint treatment costs could be included as part of the renovation and construction, which frequently includes surface and sheetrock work anyway.

[f] Radonⁿ⁹

Radon is a colorless, odorless gas which occurs naturally. It is radioactive, and has been linked to a high incidence of lung cancer if found indoors in high concentrations. Radon enters structures in three ways. It may be contained in the building materials, it may seep into basements from underground pockets, or it may be contained in water that enters the structure. Radon is only dangerous in enclosed areas.ⁿ¹⁰

The presence of radon may be discovered through the use of a radon test kit. Several types are available, some of which are more accurate than others. Depending on the size of the space to be tested, more than one radon test kit may be needed. Alternatively, a radon testing company can be hired to test. The radon testing companies are usually more accurate than the test kits, so if a borderline result is achieved using a test kit, the landlord and tenant may wish to retest with a more sophisticated test. Most tests require the maintenance of closed door conditions. That is, the windows in the structure must remain closed and the number of times the doors are opened should be limited. This may be quite difficult in commercial space with multiple tenants.

The test kits are analyzed by a laboratory. The results are usually expressed in terms of pico curies of radon per liter of air. The United States Environmental Protection Agency has established a level of four pico curies per liter as the level above which remediation is suggested.

Various methods of remediation are available, depending on the source of the radon, radon level, and type of construction. Some involve ventilation of the basement area to remove radon. More complicated methods involve sealing the area to prevent entry of the radon or suctioning air from under the basement. Some methods are very inexpensive, while others are quite costly and may create other problems, such as increased heating costs. Radon remediation is a subject of great controversy, because the exposure takes a long time to cause an ill effect.

The landlord's attitude will have a strong effect on whether the landlord is willing to undertake remediation. The higher the level of radon, the more important remediation becomes. Since remediation affects the building as a whole and may require structural alterations, any remediation should be undertaken by the landlord. If the landlord is unwilling to effect remediation and the level of radon is high, the tenant should seek other space.

It may be helpful for the clients and attorneys to become familiar with current literature on radon. The United States Environmental Protection Agency publishes several pamphlets on radon.ⁿ¹¹ They may be useful in making an informed determination as to what radon level is high enough to require a prudent tenant to seek remediation or cancellation of the lease.

[g] Exterior Environmental Hazards

The events of the Love Canalⁿ¹² area near Buffalo, New York, alerted the entire nation to the problems of hazardous wastes and the fact that they may be found in many locations. Hazardous wastes are associated with a variety of health problems. The tenant may want to be aware of any potential hazardous waste problems on or near the premises to be leased.

The tenant can obtain a phase one environmental site assessment from a qualified company. Most of such companies take a multiple discipline approach to the environmental site assessment. The purpose of the assessment is to determine whether there is any evidence that the site in question or a nearby site suffers an adverse environmental impact due to releases of hazardous substances in, on or around the subject premises.

The assessment reviews the history of uses on the site by examining records in the office of the county clerk, local health department, municipality and police department. In addition, atlases, zoning maps and aerial photographs are obtained and studied. The Federal Environmental Protection Agency Superfund list and the State of New York mini-superfund lists will be searched to determine whether this site or a nearby site is listed. If any of the uses of the site may have involved the use of hazardous substances, further investigation is done, including interviews with former workers and a review of company records, if possible.

If this further investigation reveals a likelihood of use of hazardous substances, a recommendation will be made to take soil and water samples for laboratory testing. This is a phase two environmental site assessment. If the results of this test show no hazardous substances, the assessment is complete. However, the assessment report will be subject to caveats because of the leaching nature of some hazardous substances. That is, some substances may migrate through ground water. A site which is clean now may later be contaminated from a nearby site.

If the assessment shows evidence of pollution, the tenant should consider another site. CERCLAⁿ¹³ provides for strict liability for "owners and operators" of polluted sites for the cost of clean up of hazardous materials. The tenant should not risk becoming involved in future litigation in which it may be required to prove that it was not an owner or operator within the meaning of the law.ⁿ¹⁴ Furthermore, the tenant may not wish to subject itself, its employees, customers, or clients to the potential health risks associated with a polluted site.

If the landlord effects remediation of the site, the tenant may again consider the site; however, considering the cost and time involved, it is likely that the tenant will have found a suitable site long before the subject site is ready for use.

For a more detailed discussion of environmental assessments and specific forms relating to them, see Vol. 33, Chapter 25, Environmental Considerations in Real Estate Transactions, *infra*.

[h] Governmental Approvals

There are a variety of governmental approvals which may be required before the tenant takes occupancy of and uses the subject premises. These may be in the nature of zoning or planning approvals. They may be operational approvals such as emissions permits or waste disposal approval. If the tenant cannot obtain the needed permit, it cannot operate its business on the site. The lease, however favorable, is useless.

Governmental approvals can take a considerable period of time to obtain. The tenant and its counsel should be certain that the contingency contains enough time to obtain the approvals required. Otherwise, the tenant may find itself in the difficult situation of not having the required approvals when the contingency is about to expire and the landlord will not extend it. The tenant will then be forced to choose between losing a favorable lease or possibly being burdened with a useless lease.

There are three common types of lease provisions the parties can use to handle the need for governmental approval. The lease can be made contingent upon the tenant obtaining the required approval. Alternatively, the lease can obligate the landlord to obtain the approval and can provide that the tenant has no obligation under the lease if the landlord does not do so. Finally, the lease can place the entire burden on the tenant by requiring it to file for the approval, and also requiring it to pay rent for the term of the lease whether it obtains the approval or not.

[i] Zoning and Planning

Many local governments have enacted zoning and planning laws to establish and regulate the types of activities which are permissible in various areas. The laws vary widely from municipality to municipality in their requirements. Some laws are quite strict and require a site review for each new tenant, regardless of whether the use is the same as a prior tenant. Some require a building permit for the installation of a display cabinet.

It is extremely important to determine whether zoning or planning approval will be needed for a new tenant and the extent of such approval. The landlord, as part of the contingency, should be required to actively support the tenant's application for approval.

The tenant should make its application for zoning or planning approval immediately. If any negative response is expected from neighboring sites, the tenant should attempt to learn the basis of the objections. The tenant and the landlord may wish to offer appeasements to such objectors in advance. This may include limits on hours of operations, screening of parking, loading and refuse storage areas, and similar concessions designed to make the tenant a more palatable neighbor. Where such problems are handled before the public hearing, there is a much greater chance of obtaining the needed approval.

If the tenant is unable to obtain the zoning or planning approval, the tenant may consider resubmitting its application with a revised plan based on the objections of the zoning or planning officials. Usually, this will require an extension of the contingency. If the tenant is a desirable tenant, the landlord will usually grant an extension. Otherwise, the landlord must begin the search and approval process over again.

If the tenant is unable to obtain the approvals, the tenant must terminate the lease and locate another site.

[i] Business Operations Permits

Local law may require the tenant to obtain business operation permits. The need for such permits depends on the type of business in which the tenant is engaged. For example, if the tenant has a smoke stack, the tenant may be required to obtain a permit from the Environmental Protection Agency. Similarly, if the tenant's operations require the discharge of large amounts of water into a waterway or a sewerage system, it may need a discharge permit. If the tenant was previously operating at another site, it may need to meet higher standards at a new site, as it may lose the benefit of a grandfathering provision.

The tenant's proposed business operations should be thoroughly reviewed so that all necessary permits will be included in the contingency and obtained.

[ii] Waste Disposal

Under the Resource Conservation Recovery Act (RCRA),ⁿ¹⁵ solid waste disposal is no longer something to be taken for granted. Many municipalities will no longer collect refuse from commercial sources, so commercial tenants must locate private haulers who will collect the refuse. The cost of such haulers can be quite significant, especially for certain types of waste, such as medical wastes.

The tenant may wish to make the lease contingent upon the tenant's ability to obtain a refuse removal contract for a stated number of years, at a stated price or within a range of prices, which cannot be terminated without cause and which contains limits on increases in prices during the period. If the tenant cannot obtain such a contract, it may terminate the lease. To protect itself, the landlord may wish to reserve the right to obtain such a contract for the tenant. If the landlord does obtain such a contract, the contingency will be deemed satisfied.

[iii] Signs

Some municipalities are extremely sensitive about signs. Many limit the size and number of signs which a tenant may display on the exterior of a building. Signs not only advertise and identify a business location, but, for the operation of certain types of businesses, may be required by local laws. Without the sign, the business cannot legally operate.

Similarly, some municipalities limit the locations of signs. Certain property may be so physically situated that a sign in a legal place is not visible.

If the tenant includes a contingency for sign approval, the tenant should include the number of signs, minimum acceptable size, and location. If the tenant is unable to obtain all of its sign requirements, the tenant can terminate the lease. As with other municipal approvals, the contingency should require the landlord to actively support the tenant's application. Where the tenant is able to negotiate signage which is less than the tenant requested, but acceptable to it, the tenant may waive the benefits of the contingency.

[20] Compliance with Governmental Regulations

The lease should allocate responsibility between the landlord and the tenant for any changes or alterations necessary to conform to governmental laws and regulations. Sometimes this responsibility is contained in the clauses regarding repairs or permitted uses, and sometimes it is contained in a separate clause.

A lease clause regarding compliance with governmental regulations should specify the parties' respective obligations to make structural changes and to comply with future enactments not within the original contemplation of the parties. The tenant may desire that the lease grant it the right to contest the validity or applicability of a governmental regulation. Such a provision should specify whether and under what circumstances the tenant may delay compliance with the regulation, and whether the tenant is required to post security for the landlord's protection.

[a] Americans with Disabilities Act

The Americans with Disabilities Act (ADA)ⁿ¹ prohibits discrimination on the basis of disability by public accommodations. Among other things, the law requires places of public accommodation and commercial facilities to be designed, constructed and altered in compliance with accessibility standards contained in federal regulations.ⁿ² Depending upon the circumstances of the lease, the landlord and the tenant of premises which meet the statutory definition of a "public accommodation" and/or a "commercial facility" will desire to provide in the lease for compliance

with ADA requirements. Such a provision may ensure one party that the other party has complied with applicable governmental regulations, or it may allocate between the parties the responsibility for compliance.

[21] Defaults

[a] Default by the Tenant

Under most leases, the tenant's failure to fulfill any obligation set forth in the lease constitutes a default. The lease will expire or the landlord will be entitled to terminate the lease upon the occurrence of a default. The most common default is the failure to pay rent in a timely manner.

Default provisions usually enumerate the events of default, describe the procedures by which the lease may expire or be terminated upon such default, and establish the measure of damages recoverable by the landlord. Lease provisions regarding default must take into consideration the law of the locality involved. Jurisdictional variations pose distinctive drafting alternatives and problems.

Many leases contain provisions which allow the tenant to cure a default. The landlord is required to give the tenant written notice of the nature of the default, and the tenant is given a specified period in which to cure that default. The cure period may be quite short when the default is the failure to pay rent or involves some activity which is dangerous to person or property. The period generally is longer for less serious defaults. If the default is not timely cured, the landlord may begin to follow the procedures required under the lease to terminate the lease and regain possession of the premises. In addition, or in the alternative, the landlord may seek damages if the default involves harm to the property.

[i] Rent and Damages After Default

The default provisions of a lease should preserve the tenant's liability for rent payments beyond the date of the premature termination of the lease resulting from the default. Otherwise, the tenant's obligation to pay rent would end with the early termination of the lease.

There are two standard types of provisions which can be used to govern the tenant's liability for rent payments after a termination following a default. Commonly, the tenant is required to make payments over what would have been the remaining term of the lease, when such payments would have become due, in the amount of the rent which would have been due less any rent realized upon the reletting of the premises. Expenses for restoration of the property, acquisition of new tenants, and other consequences of the lease termination are taken into account.

Alternatively, the lease can accelerate the time when damages are payable so that the landlord can recover damages without waiting. Such a lease clause generally provides that the landlord is entitled to damages calculated as of the early termination date which become payable immediately thereafter. Such damages usually consist of the present value of the remaining rental payments which would have been payable absent the default, less the present rental value of the property, plus the costs of re-rental. If the premises have been relet, the amount of the new rental generally is prima facie evidence of present rental value.

[ii] Summary Eviction

Summary eviction is a legal proceeding which generally is authorized by statute as well as by the lease. Summary eviction procedures are governed by statute, and vary from jurisdiction to jurisdiction. All summary eviction procedures are designed to restore the landlord to possession of the leased premises promptly following a breach by the tenant, while at the same time giving the tenant an opportunity to assert defenses before being evicted.

Although summary eviction procedures vary widely, every summary eviction statute provides specific procedures which the landlord must follow exactly to evict the tenant. Usually, the landlord must demand possession before

commencing a proceeding in court. Sometimes the statute only permits summary eviction for a default in the payment of rent. In some states, a proceeding to evict the tenant summarily can be combined with a claim for rent.

Evicting a tenant can be a costly undertaking. There is the cost of legal fees for drawing the papers and appearing in court. There can be officers' fees for service of legal papers and maintaining the peace. There are the moving company fees and storage fees. In addition, there is lost rent and perhaps damage to the premises. This is the reason that security deposits are substantial and why most leases provide that the landlord is entitled to its legal fees on an eviction.

Although the judgment in some states may grant the landlord the rent, legal fees (if applicable), and filing fees, may not be collectible. If the tenant cannot pay its rent, the tenant is unlikely to have assets from which these expenses can be collected.

[iii] Reletting the Premises

In many jurisdictions, leases providing for the survival of the tenant's liability upon a reletting of the premises by the landlord are strictly construed against the landlord. In order to prevent the reletting from terminating the defaulting tenant's obligations, most leases expressly provide that the landlord can relet the premises. The lease should specify all rights reserved to the landlord, including the rights to determine whether or not to relet, to grant concessions, and to rent for a shorter or longer period than the original term.

The lease should provide that all expenses of the reletting, including tenant improvements, advertising, brokerage fees and other similar items, are chargeable to the tenant. In addition, most leases provide that the landlord may relet at a lower rent and charge the difference to the tenant, together with the rent for the months when the property was vacant. Again, if the tenant could not pay its rent, the chances of collecting these sums are very small.

In some jurisdictions by law, and often by lease provision, the landlord is under a duty to mitigate its damages. Therefore, the landlord must make good faith efforts to rent the property. If the landlord does not do this, it may not claim its lost rent from the tenant.

[iv] Self-help

Some jurisdictions permit the landlord to use self-help to regain possession of commercial premises. This remedy must be specifically authorized in the lease, in a provision setting forth the specific defaults on the part of the tenant that will trigger the landlord's right to use the remedy. The lease provision also must set forth the period within which the tenant can cure the breach, and the requirements the landlord must follow to give the tenant notice of the breach. If the landlord becomes entitled to use self-help, the landlord may enter the leased premises, remove the tenant's personalty and trade fixtures, and take possession of the premises.

The practitioner should consult the law of the applicable jurisdiction before drafting a self-help remedy provision. Many states do not permit self-help repossession by the landlord, and some states impose punitive damages or criminal liability on a landlord who attempts to use self-help to repossess the premises.

[b] Default by the Landlord

Just as the lease must delineate the landlord's rights upon the tenant's default in its obligations under the lease, so should the lease provide for the possibility that the landlord might default in its obligations. Such a default by the landlord can adversely affect the tenant's interest in the leased property. For example, if the landlord defaults in paying real estate taxes or in meeting obligations under a mortgage, the entire tenancy may be at risk.

To protect the tenant's leasehold and right to possession of the premises, the tenant may desire a provision in the lease

granting it the right to cure defaults by the landlord. Such a provision usually allows the tenant to pay overdue amounts, make repairs, or otherwise cure the landlord's default, and to apply such expenditures against future rentals. The tenant also may be given the right to maintain a separate action against the landlord for reimbursement. Additionally, the lease may give the tenant an option to terminate the lease if the landlord is guilty of recurring defaults.

[22] Damage by Fire or Other Casualty

Damage to leased premises by fire, storm or other such event is a rare occurrence, fortunately. However, all leases should make a provision for such an event.

[a] Responsibility for Repair and Abatement of Rent

In negotiating such provisions, the parties should bear in mind the types of damage which may occur, structural and nonstructural, and the extent of the damage, extensive or minor. In addition, the parties should consider the type of use which the tenant makes of the premises. It may take far less damage to render space unsuitable for a professional office than for a warehouse.

Typically, the party who is responsible for the ordinary repair of an item is responsible for carrying the insurance on that item and effecting the repair of the item following damage by fire or other casualty. Thus, if the landlord is responsible for structural repairs, the landlord would rebuild the structure while the tenant would repair the nonstructural items. Care should be taken in defining each category of items.

Typically, if the premises are rendered unfit for use, the rent abates until repairs are made. The lease should attempt to describe what conditions will make the premises unfit for use. Clearly, this is a difficult task since no one can readily predict the exact type of damage which a casualty will cause. It may be better to attempt to define unfit in terms of activities which cannot be carried on in the premises after a casualty occurs.

Obviously, there is a great deal of opportunity for reasonable minds to differ on both the issue of whether a particular item is the landlord's or the tenant's responsibility, and the issue of whether the premises are usable. It is important to include a method for dispute resolution which is easy to use, inexpensive and provides a rapid result. The parties may consider the use of an independent adjuster as an arbitrator. The procedures should be informal and binding without further appeal, unless fraud is involved.

[b] Notice

The lease should provide that the tenant is required to give notice to the landlord of the occurrence of any casualty, regardless of size. The landlord wants the right to inspect the damage. In addition, the landlord's agents may need to inspect the damage for the purpose of preparing and filing any insurance claims.

[c] Termination of the Lease

Most leases contain a provision which allows the landlord to terminate the lease if the landlord determines not to reconstruct the premises following a casualty loss. For the tenant's protection, such provisions usually require the landlord to give notice of its decision within a particular period. The tenant should try to keep this period as short as possible as the tenant will be unable to make definite plans for the future until this issue is resolved.

The tenant should try to negotiate a similar right to terminate the lease after a casualty. This is especially so if the damage is severe. The tenant will have little control over the length of time required for repairs. It may take many, many months to complete adjustment and repairs. If the tenant is a retail business, there may be no customers left if the tenant is out of business for several months. If the tenant is a professional office, moving to temporary quarters and back is extremely unappealing. The loss of productivity and the cost can be prohibitive.

[23] Eminent Domain

A large variety of governmental and public service corporations have the ability to condemn property under eminent domain laws for public purposes. Typically, small strips of land are taken to widen roadways, to install water and sewer mains and to place telephone, electric, gas and cable television facilities. Occasionally, an entire parcel is taken for a special purpose.

[a] Ownership of Compensation

The entity which takes property by eminent domain must pay fair value to the owner. Most leases provide that any compensation for taking of the fee belongs solely to the landlord; however, this does not prohibit the tenant from seeking an award for loss of the value of the lease from the condemning entity. Sometimes the lease itself provides that any condemnation award will be shared by both the landlord and the tenant. The lease can also provide that the tenant is entitled to recover the unamortized cost of its improvements.

In the absence of any provision, the tenant is entitled to share in the condemnation award to the extent that the award is attributable to the present value of the leasehold estate; that is, the rental value of the premises less the rent reserved for the unexpired term. The tenant also is entitled to compensation for the loss of its fixtures. The balance of any award is then payable to the landlord.

[b] Termination of Lease or Abatement of Rent

Where the land taken is small and does not affect the tenant's use or enjoyment of the premises, there is typically no right to terminate the lease or right to an abatement of rent. However, the lease must make provision to govern the possible situation that a taking does affect the tenant. Such provisions generally are similar to those that govern a casualty loss.

Much depends on the amount lost and the tenant's need for the space which was lost. A tenant operating a warehouse may be willing to do with less space provided that the tenant has a proportionate decrease in rent; however, a professional office may not be able to function where it loses offices of its professional staff.

Clearly, the effect of an unknown taking is difficult to predict when negotiating a lease. The tenant should insist on the right to terminate the lease or receive a reduction of rent if a portion of its space is taken, including parking. Many leases, however, leave termination of the lease or reduction of the rent to the discretion of the landlord.

A variety of criteria can be used in the lease to determine when a partial taking will result in termination of the lease. One possibility is a test based on the percentage of space expropriated. Some leases allow reductions or termination only if all or a "substantial" portion is taken. "Substantial" is a term over which reasonable minds can differ. Where such a provision is used, a dispute resolution mechanism should be included similar to that used in a casualty loss situation. Instead of an adjuster, however, an appraiser or real estate broker, agreed upon in advance, may act as the arbitrator. It should be remembered that the purpose is to achieve a fast and fair result, not necessarily the same result which one would reach in a court of law. The parties cannot wait the years it would take for a court to reach a decision.

[c] Restoration Expenses

The lease should also provide for the possibility that there will be expenses necessary to restore the premises to its previous use following a condemnation of a part of the premises, and that these expenses may exceed the amount of the condemnation award. Frequently, the lease authorizes the tenant to restore the premises and obligates the landlord to apply all or a portion of the condemnation award to defray the tenant's cost. Some leases provide that the landlord is not required to make such reimbursement until the landlord has received an architect's or an engineer's statement as to

necessary expenditures.

[24] Other Provisions of the Lease

[a] Ability to Show Space

Most leases provide that the landlord may show the tenant's space during the last six months of the lease to prospective tenants and purchasers. The tenant may wish to limit this right to times when the tenant or its agent is present. This is especially true where the tenant has expensive or delicate equipment or confidential documents to protect.

The landlord also may request the ability to show the tenant's space throughout the lease to prospective tenants. This often occurs where the tenant has done a particularly nice job of design and construction on unusual space. The landlord wants to show the space to demonstrate the uses which can be made of the space. The tenant should be certain to keep limits on the showings so that they will not disrupt its business. In addition, the tenant may wish to have someone representing it at showings to protect against loss or damage of personalty or invasion of confidential documents.

[b] Hours of Operation

Some leases provide required hours of operation, especially leases for retail facilities. The tenant should be certain that the hours are reasonable and compatible with its business. The tenant should also be sure that the hours are not subject to change without its approval.

Where the rental amount includes percentage rent based upon the tenant's income, the hours and days during which the tenant is open for business will affect its income, and consequently the landlord's income as well. To ensure the maximum rent, the landlord may desire a provision requiring the tenant to stay open on specified days and during specified hours. Additionally, the lease can provide that the tenant's failure to conduct the business continuously will constitute a breach on the part of the tenant. Alternatively, the lease may provide that if the continuous operation of the tenant's business has been interrupted for a cause within the tenant's control, the amount of income, receipts or sales used to measure the percentage rent will be determined by reference to the corresponding period for the previous year or some other relevant standard.

Sometimes leases for office complexes limit access to the building during certain hours as a security precaution. The tenant should be certain that these hours are compatible with its business. In addition, the tenant should request a procedure for after hours access where needed. Frequently this is achieved by giving special identification passes for those who will use the premises after hours.

Where the landlord provides janitorial services, the tenant may request that these services be provided after the close of normal or agreed upon business hours. It can be very disruptive to the operation of the tenant's business to have the janitorial staff vacuuming while business is proceeding.

[c] Signs

As discussed above, many municipalities have sign permit requirements. Many leases contain sign provisions as well. Such provisions may direct the placement, size, quality and style of the sign. Other provisions may prohibit particular types of signs, such as temporary, paper "sale" signs. The purpose of such provisions is to maintain uniformity and quality. The landlord will be particularly interested in the tenant's signs where the amount of the landlord's rent is based on a percentage of the tenant's sales or income, since signs will have a direct effect on the amount of business done by the tenant. Leases almost always require the tenant to pay for and maintain signs in good condition.

[d] Real Estate Broker Commissions

A real estate broker or salesperson may be entitled to a commission if a lease results from the broker's efforts. Most often, the landlord engages the broker and is responsible for the commission, but occasionally a tenant will engage a broker to locate suitable space and the tenant is responsible for the commission.

The law defining when a broker's commission is earned varies from state to state. Sometimes the commission claim is based on informal negotiations or dealings. To protect itself from unexpected brokerage claims, the landlord may seek a representation in the lease by the tenant that no broker was involved in the transaction, and indemnification in the event that a claim for commissions is made. This is frequently based on the economic reality that the amount of rent may reflect whether or not the landlord is to pay a real estate commission.

[e] Miscellaneous Clauses

The miscellaneous clauses are often referred to as "boilerplate" clauses. Although the terms may be fairly standard, they are very important. Care should be taken to include them in the agreement.

[i] Non-waiver

This clause provides that the failure of either party to demand performance of some obligation by the other party does not waive the right to require performance at a later date. This becomes important where the landlord has looked the other way at a particular practice of the tenant, such as paying the rent a few days late or not maintaining particular hours of operation. If this becomes a problem because the situation is getting worse or because other tenants, based on this tenant's behavior, begin to do the same, the landlord does not lose its ability to enforce its rights. The landlord may demand late charges or it may give notice of default and demand that the tenant cure. The clause also protects the tenant if the landlord has been lax in performing an obligation.

[ii] Notice

Most leases provide for a number of situations where notice must be given by one party to another. In some jurisdictions, the law provides for procedures, including personal delivery, to fulfill notice requirements, unless a more convenient method is permitted under the lease. Many leases require that notice be in writing and be served by either registered or certified mail. Some leases provide for alternative methods of giving notice, such as personal service or ordinary mail. The lease should also set forth the time when service is deemed to have been made.

The notice clause should specify the person and the address to which the notice is sent, together with a procedure for change. Provided that the party follows the procedures set forth therein, that party has fulfilled its obligations to give notice. No party is responsible for a new address unless the procedures are followed. This protects against a claim that a party had or should have had knowledge of a new address.

[iii] Illegality

This clause provides that if any portion of the lease is found to be illegal, that portion will be deemed excised and the balance of the lease will remain in full force and effect. This protects the tenant from an unscrupulous landlord who might purposefully insert an illegal clause in order to be able to cancel the lease at a later date to force the tenant into a higher rent or to take a better offer.

This clause also prevents the parties from having to renegotiate the entire lease if a portion is eliminated. The parties may not be in the same bargaining positions as they were at the beginning of the lease, and there may be an unfair result if the lease is subject to complete renegotiation.

[iv] Entire Agreement

This clause acknowledges that the contract contains the entire terms of the agreement between the parties. There are no oral understandings, representations, warranties, promises or agreements which have not been included in the lease.

The entire agreement clause protects both parties from any claim based on an alleged oral statement. Clearly, the terms of an oral agreement may be difficult to prove or disprove. This clause eliminates that need. If a provision is important, reduce it to writing and include it in the lease. If it is not so included, it is not enforceable.

[v] Governing Law

Traditionally, the law of the situs applies to real estate transactions, including commercial leases. Since a lease is a contract as well as a conveyance of real property, it is possible that contractual provisions may be governed by some other law than the law of the situs.

The parties may include a provision in the lease designating which state's law will apply to the lease. The landlord and the tenant may be residents of a state other than the designated state. If the designated state is the state where the property is located, such a lease provision usually will be honored. If the designated state is not the state where the property is located, the provision may not be given effect with respect to the resolution of property rights; however, if the chosen jurisdiction has some relationship to the transaction, the designated state's law will govern contractual rights.

[vi] Subordination to Any Mortgages

A lease constitutes an encumbrance on property. Where it is executed prior in time to a mortgage, the lease is not subject to the terms of the mortgage. That is, in the event of a foreclosure, the mortgagee could not terminate the rights of the tenant, so the sale of the premises would be subject to the lease.

Most lenders will not lend money to a landlord unless the mortgage securing the loan is the first encumbrance on the premises. Therefore, landlords will require a clause by which the tenant acknowledges that its lease is subordinate and subject to any mortgage now or later encumbering the subject property. In addition, the clause will generally provide that the tenant will execute any documents reasonably required by the lender or its counsel as further proof of the subordinated status of the lease. The tenant should make their agreement to this clause contingent on the tenant being able to receive a nondisturbance agreement from the lender which in essence will state that the lender will honor the rights of the tenant under the lease in the event of a foreclosure, provided the tenant is not in default under the terms of the lease at the time of such foreclosure. With respect to mortgages already in effect at the time the lease is executed, the tenant should attempt to negotiate a provision in the lease that makes the lease contingent on the landlord obtaining such a nondisturbance agreement from its existing lender for the protection of the tenant in the event of a foreclosure.

[vii] Dispute Resolution Mechanism

In previous sections concerning casualty losses and eminent domain, a short form dispute resolution mechanism was suggested to expedite matters. In those sections, the concern was for speed and practicality of result, rather than reaching the legally correct result. For other disputes, reaching the legally correct result is important.

The court system is extremely crowded. It often takes several years to reach a conclusion. This may be longer than the term of the lease. An alternative dispute resolution mechanism may produce the desired results within a reasonable period of time. Alternatives may include arbitration before a specified panel or through a specified organization, arbitration before a court appointed arbitrator, or mediation through a specified organization. The agreement should provide that the result achieved is final, binding and not subject to appeal. In addition, the agreement should provide that the prevailing party may enter a judgment based on the decision received. Failure to do this may allow the matter to be relitigated through the court system. The purpose of the dispute resolution mechanism will have been defeated and will have actually cost more time and money because of having had two proceedings.

If the parties decide to use an arbitration clause, the parties must decide what disputes will be subject to arbitration because it may not be appropriate for all disputes under the lease to be subject to arbitration. The landlord, for example, will not want the arbitration clause to cover the basic obligation of the tenant to pay rent to the landlord. Most frequently, the clause would be used in the lease context to resolve a dispute for such things as responsibility for repairs required to be made. A good arbitration clause will spell out the types of disputes to be covered by arbitration, will state which body will handle the arbitration such as the American Arbitration Association, may state whether a panel of one or three arbitrators is to be selected, and will include the place where the arbitration will occur. If the lease includes a choice of law clause that state's laws would govern the arbitration proceeding. If the drafter uses the American Arbitration Association, it should keep in mind that the American Arbitration Association has specialized rules for arbitration and those rules should be specified. In the lease context, those rules would be the commercial arbitration rules of the American Arbitration Association. Finally, to be fully effective, the clause should state that a judgment on the award rendered by the arbitrator or arbitrators may be entered in any court having jurisdiction thereof, and thereby be enforceable through the courts.

Legal Topics:

For related research and practice materials, see the following legal topics:

Real Property LawLandlord & TenantLandlord's Remedies & RightsRent RecoveryReal Property LawLandlord & TenantLandlord's Remedies & RightsSecurity DepositsReal Property LawLandlord & TenantLease AgreementsAssignmentsReal Property LawLandlord & TenantLease AgreementsCommercial LeasesGeneral OverviewReal Property LawLandlord & TenantLease AgreementsCommercial LeasesShopping Center LeasesReal Property LawLandlord & TenantLease AgreementsLease ProvisionsReal Property LawLandlord & TenantLease AgreementsSubleasesReal Property LawLandlord & TenantTenant's Remedies & RightsPossession of PremisesReal Property LawLandlord & TenantTenanciesGeneral OverviewReal Property LawPurchase & SaleGeneral OverviewReal Property LawPurchase & SaleOption ContractsRights of First RefusalReal Property LawPurchase & SaleOption ContractsRights of PreemptionReal Property LawZoning & Land UseBuilding & Housing Codes

FOOTNOTES:

(n1)Footnote 1. *See* 42 U.S.C. §§ 6901, *et seq.* (Resource Conservation Recovery Act) and 42 U.S.C. §§ 9601, *et seq.* (Comprehensive Environmental Response, Compensation and Liability Act).

(n2)Footnote 2. 29 U.S.C. §§ 651 *et seq.*

(n3)Footnote 1. *See* Vol. 33, Chapter 25, Environmental Considerations in Real Estate Transactions, § 25.18[3][b][iv], *infra*.

(n4)Footnote 2. *See* Vol. 33, Chapter 25, Environmental Considerations in Real Estate Transactions, § 25.18[3][a][ii], *infra*.

(n5)Footnote 3. *See* N.Y. Labor Law § 900 for factual findings of the New York State Legislature relating to the dangers of asbestos.

(n6)Footnote 4. 42 U.S.C. § 7412. *See also* 40 C.F.R. Part 61.

(n7)Footnote 5. *See* Vol. 33, Chapter 25, Environmental Considerations in Real Estate Transactions, § 25.18[3][a][iii], *infra*.

(n8)Footnote 6. *See* Vol. 33, Chapter 25, Environmental Considerations in Real Estate Transactions, § 25.18[3][a][vi], *infra*.

(n9)Footnote 7. For general information on lead-based paint disclosure, copies of federal rules and regulations, and

background materials, contact the national Lead Information Clearinghouse (NLIC), at (800) 424-LEAD or FAX: (202) 659-1192.

(n10)Footnote 8. See the Residential Lead-Based Paint Hazard Reduction Act of 1992, at 42 U.S.C. §§ 4851-4856. For detailed rules and regulations regarding lead-based paint disclosure, see 40 C.F.R. Part 745 and 24 C.F.R. Part 35, Subpart A.

(n11)Footnote 9. See Vol. 33, Chapter 25, Environmental Considerations in Real Estate Transactions, § 25.18[3][a][i], *infra*.

(n12)Footnote 10. See N.Y. State Joint Legislative Commission on Toxic Substances and Hazardous Wastes, *Radon: Risk, Reality and Reason* (1990).

(n13)Footnote 11. See United States E.P.A., *A Citizen's Guide to Radon: What Is It and What to Do About It* (1986); United States E.P.A., *Radon Reduction Methods* (1987); United States E.P.A., *Radon Reduction Methods: A Homeowner's Guide* (1989).

(n14)Footnote 12. *United States v. Hooker Chemicals & Plastics Corp.*, 680 F. Supp. 546 (W.D.N.Y. 1988) .

(n15)Footnote 13. Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C. §§ 9601, *et seq.*

(n16)Footnote 14. 42 U.S.C. § 9607(a).

(n17)Footnote 15. See Resource Conservation Recovery Act, 42 U.S.C. §§ 6901, *et seq.* (RCRA).

(n18)Footnote 1. 42 U.S.C. § 12181.

(n19)Footnote 2. 28 C.F.R. Part 36.



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Current Legal Forms for Real Estate
Chapter 23 REAL ESTATE LEASES
Part II. The Practice Background

31-23 Current Legal Forms for Real Estate § 23.30

AUTHOR: by Thomas G. Belden

§ 23.30 Execution

The lease must be executed by both the landlord and the tenant. Where either party signs other than in his or her individual capacity, that capacity must be noted.

A corporate party may execute through an officer duly authorized by its board of directors. A partnership may execute through a partner duly authorized by the partners.

The lease also should be dated. Any changes on the face of the lease should be initialed by all parties and dated to indicate the parties' knowledge of that change.

Most states do not require a lease to be witnessed. Acknowledgment of the execution of the lease may be required. Where a lease has been acknowledged, it does not need authentication when entered into evidence in a trial. The form of the acknowledgment should be the same as the form used to entitle a deed to be recorded.

Legal Topics:

For related research and practice materials, see the following legal topics:

Contracts Law Formation Execution Contracts Law Types of Contracts Lease Agreements General Overview Real Property Law Landlord & Tenant General Overview Real Property Law Landlord & Tenant Lease Agreements General Overview



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Chapter 23 REAL ESTATE LEASES
Part II. The Practice Background

31-23 Current Legal Forms for Real Estate § 23.31

AUTHOR: by Thomas G. Belden

§ 23.31 Recording

A lease may be recorded so as to serve as notice of its existence; however, commercial leases are often too lengthy to be recorded. In lieu of recording the entire lease, a memorandum of lease may be recorded. The memorandum should contain a recital of the basic terms of the lease, including a description of the property subject to the lease, the term of the lease, the monthly or annual rental, any renewal rights, and any terms of particular importance such as options to purchase or a right of first refusal to purchase the leased property.

Legal Topics:

For related research and practice materials, see the following legal topics:

Real Property LawLandlord & TenantLease AgreementsGeneral OverviewReal Property LawLandlord & TenantLease AgreementsCommercial LeasesGeneral OverviewReal Property LawPriorities & RecordingGeneral Overview



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Chapter 23 REAL ESTATE LEASES
Part II. The Practice Background

31-23 Current Legal Forms for Real Estate § 23.32

AUTHOR: by Thomas G. Belden

§ 23.32 Rules and Regulations

Rules and regulations usually are written in a separate document which is included by reference in the lease. These rules and regulations are more detailed and more specific than the general use restrictions often included in the lease. These detailed rules and regulations may be attached to the lease and initialed or signed by the tenant.

By keeping the rules and regulations separate from the lease, the landlord possesses the flexibility to amend the rules and regulations as circumstances change. For example, if local regulations are enacted restricting utility use or other services, the rules and regulations can be amended accordingly. The lease generally provides that the rules and regulations can be amended unilaterally by the landlord, and that any amendments will be delivered to the tenant or posted in a designated location. It would be far more difficult for the landlord to amend the lease in such a situation.

The exact nature of lease provisions relating to rules and regulations depends upon the objectives of the parties. If the landlord seeks flexibility, the lease can simply provide that the tenant's use of the premises is subject to the landlord's rules and regulations as they exist at the time the lease is executed and as subsequently amended.

Legal Topics:

For related research and practice materials, see the following legal topics:

Contracts LawTypes of ContractsLease AgreementsGeneral OverviewReal Property LawLandlord & TenantLease AgreementsGeneral Overview



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Current Legal Forms for Real Estate
Chapter 23 REAL ESTATE LEASES
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31-23 Current Legal Forms for Real Estate §§ 23.33 through 23.43

AUTHOR: by Thomas G. Belden

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Chapter 23 REAL ESTATE LEASES
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31-23 Current Legal Forms for Real Estate § 23.44

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§ 23.44 Research Checklist

A. Negotiating and drafting leases

1. Negotiation generally..... ☐

-- Collins, Thomas & Cargile, *What About the Little Guys? The Top Issues for a Smaller Tenant to Negotiate in its Lease*, 18 Prob. & Prop. 10 (November-December 2004)..... ☐

-- Carbone, *Negotiating a Letter of Intent for an Anchor Store Lease*, 11 Prac. Real Est. Law. 85 (1995)..... ☐

-- Coats, *Negotiating a Commercial Lease Termination Agreement*, 9 Prac. Real Est. Law. 13 (1993)..... ☐

-- Di Scullo, *Negotiating Lease Clauses to Address the Possibility of Terrorism*, 16 Prob. & Prop. (September-October 2002)..... ☐

-- Ferguson, *Negotiating a First-rate Lease*, 21 GP Solo 22 (April-May 2004)..... ☐

-- Goldman, *The Top 100 Changes a Tenant Would like to See in a Landlord's Standard Lease*, 16 Prac. Real Est. Law. 19 (2000)..... ☐

-- Hollyfield, *Negotiating Net Leases*, 10 Prac. Real Est. Law. 61 (1994).....

☐

-- Schwartz & Serebro, *Allocation of Environmental Risk as Between Landlords and Tenants: The New York View*, 19 Pace Envtl. L. Rev. 49 (Winter, 2001)

☐

-- Street and Zaleha, *Environmental Risks: Negotiating and Drafting Lease Agreements*, 27 Idaho L. Rev. 37 (1990) ☐

-- Weisman, *Negotiating Commercial Leases*, 65 Fla. Bar L. 40 (1991).....

☐

2. Tenant inducements..... ☐

-- Coombes, *Tax Treatment of Lease Incentives*, 65 Law Inst. J. 395 (1991).....

☐

-- de Clef Pineiro, *Negotiating Build-Out Allowances*, Real Est. Rev. 67 (Winter 1994)..... ☐

-- Frydland, *Should Your Client Take an Equity Incentive?* Prac. Real Est. Law. 53 (1993)..... ☐

-- Frydland, *Deferred Payment Leases Can Be More Tax Beneficial Than Rent Holidays*, 73 J. Tax'n 356 (1990) ☐

-- Frydland and Shapack, *Maximizing Benefits of Commercial Real Estate Lease Inducements*, 76 J. Tax'n 372 (1992) ☐

-- Goldman, *The Top 100 Changes a Tenant Would Like to See in a Landlord's Standard Lease*, 16 Prac. Real Est. Law. 19 (2000)..... ☐

-- Jacobson, *Establishing, Maintaining, and Improving Tenant-oriented Leasing Standards*, 19 Prac. Real Est. Law. 37 (January 2003)..... ☐

-- Natis and Tipton, *Obtaining Security for Landlord Concession Packages and Obligations*, Real Est. Fin. 3 (Winter 1992)..... ☐

-- Suwalsky, *Structuring Lease Inducements in a Soft Market*, 7 BNA Real Estate Tax Memo 247 (1991)..... ☐

3. Drafting leases generally..... ☐

-- Bell, *Checklist for Reviewing or Drafting Commercial Leases*, 5 Utah B.J. 7 (1992)

..... ☐

-- Compton & Stein, *Landlord's Checklist of Silent Lease Issues*, 18 Prac. Real Est. Law 23 (2002)..... ☐

-- Compton & Stein, *Tenant's Checklist of Silent Lease Issues*, 19 Prac. Real Est. Law 25 (2003)..... ☐

-- Drahozal, *"Unfair" Arbitration Clauses*, U. Ill. L. Rev. 695 (2001)..... ☐

-- Goldman, *How to Draft a Fair Office Relocation Clause*, 6 Prac. Real Est. Law. 49 (1990)..... ☐

-- Goldman, *Uniform Commercial Landlord and Tenant Act - A Proposal to Reform "Law Out of Context,"* 19 T.M. Cooley L. Rev. 175 (2002) ☐

-- Goldstein, *Plain Language Ten Years After: Some Reflections on Its Basic Assumptions*, 61 N.Y. St. B.J. (1989)..... ☐

-- Herman, *Drafting Compliance With Laws Clauses in Leases*, 12 Prac. Real Est. Law. 27 (1996)..... ☐

-- Homburger & Grant, *A Real Estate Focus: A Changing World: A Commercial Landlord's Duty to Prevent Terrorist Attacks in Post-September 11[th] America*, 36 J. Marshall L. Rev. 669 (Spring 2003) ☐

-- Horn, *Drafting for Partner Liability in Law Firm Leases*, 10 Prac. Real Est. Law. 43 (1994)..... ☐

-- Liegel, *Negotiating and Drafting Lease Provisions to Protect the Tenant Against Environmental Liability*, 7 Prac. Real Est. Law. 63 (1991)..... ☐

-- Manley, *Beware the Standard Lease*, 18 Prac. Real Est. Law. 33 (September 2002)..... ☐

-- Piccola, *Executing Real Estate Contracts by Fax*, 9 Prob. & Prop. 15 (1995)..... ☐

-- Rubenstein & Leno, *Avoiding Expensive Drafting Mistakes in Commercial Leasing*, 229 N.Y.L.J. 4 (2003))..... ☐

4. Rent and other clauses..... ☐

-- Athanas & Semenek, *Pro-Ration of Rent Dead in Third and Sixth Circuits -- Landlords Won the Battle, But Will They Lose the War?*, 19 Bank. Dev. J. 123 (2002) ☐

-- De Ganon, *Playing the Leasing Numbers Game: A Tenant's Analysis of Rent, Escalation, and Operating Expense Provisions*, 21 Real Est. L.J. 239 (1993)..... ☐

-- Drahozal, *"Unfair" Arbitration Clauses*, U. Ill. L. Rev. 695 (2001)..... ☐

-- Goldman, *Are You Sure You Know What the Lease Rate Is?* 7 Prac. Real Est. Law. 53 (1991)..... ☐

-- Greenwald, *Alligators in Your Lease*, 16 Prac. Real Est. Law. 9 (July 2000)..... ☐

-- Hagan, *How to Draft CPI Escalators In Leases*, 11 Prac. Real Est. Law. 27 (1995)..... ☐

-- Hollyfield, *Negotiating Net Leases*, 10 Prac. Real Est. Law. 61 (1994)..... ☐

-- Kaplan and Gage, *Counseling the Client on Commercial Lease Escalation Clauses*, 8 Prac. Real Est. Law. 41 (1992)..... ☐

-- Kolback, *Assignment of Rents Clauses F.S. § 697.07 Presents Unanswered Questions*, 65 Fla. B.J. 31 (1991) ☐

-- Lubin, *Lease Guaranties: a Practical Approach*, 17 Prac. Real Est. Law. 27 (May 2001)..... ☐

-- Miner, *Counseling the Client on Percentage Rent Clauses*, 10 Prac. Real Est. Law. 11 (1994)..... ☐

-- Murray, *Percentage Rent Provisions in Shopping Center Leases: a Changing World?*, 35 Real Prop. Prob. & Tr. J. 731 (Winter 2001) ☐

-- Nadel, *Determining a Tenant's Actual Rental Obligations Under Its Lease*, 18 Real Est. L.J. 296 (1990)..... ☐

-- Roe, *Rents and Their Corporate Consequences*, 53 Stan. L. Rev. 1463 (July 2001) ☐

-- Ware, *Mandatory Arbitration: Arbitration Clauses, Jury-Waiver Clauses, and Other Contractual Waivers of Constitutional Rights*, 67 Law & Contemp. Prob. 167 (Winter/Spring 2004) ☐

5. Repair and maintenance..... ☐

-- Grant, *First Class Conditions: Responsibilities, Rights and Remedies Respecting the Condition of Commercial Leasehold Premises*, 29 Real Prop., Prob. & Tr. J. 735 (1995)..... ☐

-- Goldman, *Tenant Triage: Operating on a Landlord's Operating Expense Clause*, 16 Prac. Real Est. Law. 19 (March 2000)..... ☐

-- Hennigh, *Sample Tenant Exclusions from Operating Expense "Pass-throughs" in Gross Leases*, 20 Prac. Real Est. Law. 31 (March 2004)..... ☐

-- Israel, *What You Should Know About Common Area Maintenance Cost Audits*, 8 Prac. Real Est. Law. 23 (1992)..... ☐

6. Improvements and construction..... ☐

-- Greenwald, *Work Letters in Commercial Leases*, 12 Prac. Real Est. Law. 61 (1996)..... ☐

-- Hennigh, *Sample Tenant Exclusions from Operating Expense "Pass-throughs" in Gross Leases*, 20 Prac. Real Est. Law. 31 (March 2004)..... ☐

-- Kwasnick, *Construction Issues in Leases: the Tenant's Perspective*, 20 Prac. Real Est. Law. 51 (March 2004)..... ☐

-- Majeve and Grant, *Work Letters in Commercial Leases*, 12 Prac. Real Est. Law. 27 (1996)..... ☐

7. Taxes and insurance..... ☐

-- Halper, *Real Estate Tax Clauses in Shopping Center Leases*, 7 Prac. Real Est. Law. 49

(1991)..... ☐

-- Iwamoto, *Using Insurance in Commercial Leases*, 10 Prac. Real Est. Law. 81

(1994)..... ☐

-- Roche, *Lease Cancellation Payments are Capital Gain? Yes!*, 102 J. Tax. 364

(2005)..... ☐

-- Speyer, *Property Insurance Aspects of Real Estate Practice*, 24 N.Y. Real Prop. L.J. 75

(1996)..... ☐

-- Teare, *Don't Buy...Rent!: Maryland Law Provides Limitless Insurance for Tenants Against Criminal Activity After Hemmings v. Pelham Wood*, 34 U. Balt. L. Rev. 131 (Fall, 2004) ☐

-- Temkin, *The Value in Protecting the Tenant's Interest: Leasehold Title Insurance*, 16 Prob. & Prop. 35 (May-June 2002)..... ☐

8. Restrictive covenants and radius clauses..... ☐

-- Chupack, *Applying Antitrust Law to Shopping Centers*, 9 Prac. Real Est. Law. 61 (1993)..... ☐

-- DiSciullo, *Geographic and Product Markets for Radius Clauses Under the Rule of Reason*, 19 Real Est. L.J. 121 (1990)..... ☐

-- Holloway, *Real Property: Commercial lease giving a business lessee non-exclusive use rights to an area beyond the leasehold premises can create liability under the new Tennessee business liability standard*, 4 Tenn. J. Bus. L. Trans. 79 (Fall 2002)..... ☐

9. Assignment and subletting..... ☐

-- Frome, *Drafting Landlord Consent to Assignment and Subletting Clauses*, 18 Prac. Real Est. Law. 7 (May 2002)..... ☐

-- Kaiser, *Giving Up on Voluntary Surrender: The Rights of a Sublessee When the Tenant and Landlord Cancel the Main Lease*, 24 Cardozo L. Rev. 2149 (May 2003) ☐

-- Kirkman, *Landlord-Tenant: Sublet or Assignment of Tenancy Without Landlord Consent. Slavin v. Rent Control Board of Brookline*, 406 Mass. 458, 76 Mass. L. Rev. 97

☐

-- Mashian, *Strategies for Assignment and Subletting in Commercial Leasing*, 22 L.A. Law. 14 (2000)..... ☐

-- Sachs, *Lease Assignment Issues in Retail Business Acquisitions*, 49 Prac. Law. 57 (October 2003) ☐

-- Stipanov, *Assignment and Subletting of Commercial Leases Under the New Statutory Scheme*, 8 Cal. Real Prop. J. 18 (1990)..... ☐

-- Sutin, *Assignment of Leases and Rents in Mortgage Financing*, 6 Prac. Real Est. Law. 23 (1990)..... ☐

-- Talley & Ominsky, *Assignments of Retail Leases in Bankruptcy: What's Left of the Lease?*, 19 Prob. & Prop. 18 (January-February 2005)..... ☐

-- Wachs, *Withholding Consent to Alienate: If Your Landlord Is in a Bad Mood, Can He Prevent You From Alienating Your Lease?*, 43 Duke L.J. 671 (1993) ☐

10. Options, renewal, expansion..... ☐

-- Chupak, *Lease Renewals: What Your Mother Never Told You*, 11 Prac. Real Est. Law. 41 (1995)..... ☐

-- Leon, *Making Fair Market Lease Renewals Fair*, 15 Prob. & Prop. 23 (March-April 2001)..... ☐

-- Shulman and Chudnoff, *Options to Renew, Expand and Contract*, 7 Prac. Real Est. Law. 69 (1991)..... ☐

B. Real property and contract issues

1. Leasehold interests..... ☐

-- Bogart, *The Right Way to Reach Transactional Lawyers: Commercial Leasing and the forgotten "Dirt Lawyer,"* Univ. Pitt. Law. Rev. 335 (2000)..... ☐

-- Hendrix, *Myths of Property Rights*, 12 Ariz. J. Int'l & Comp. L. 183 (1995)..... ☐

-- Kelley, *Any Reports of the Death of the Property Law Paradigm for Leases Have Been*

Greatly Exaggerated, 41 Wayne L. Rev. 1563 (1995) ☐

2. Implied covenants and warranties..... ☐

-- Brown, *A Landlord's Duty to Mitigate in Arkansas: What It Was, What It Is, and What It Should Be*, 55 Ark. L. Rev. 123 (2002) ☐

-- Compton & Stein, *Landlord's Checklist of Silent Lease Issues*, 18 Prac. Real Est. Law. 23 (2002)..... ☐

-- Compton & Stein, *Tenant's Checklist of Silent Lease Issues*, 19 Prac. Real Est. Law. 25 (March 2003)..... ☐

-- DeAngelo, *Commercial Leasing: Implied Covenants of Operation in Shopping Center Leases*, 95 Dick. L. Rev. 383 (1991) ☐

-- Mastroianni, *Caveat Lessor: Courts' Unwillingness to Find Implied Covenants of Continuous Use in Commercial Real Estate Leases*, 24 Real Est. L.J. 236 (1996)..... ☐

-- Murray, *The Evolution of Implied Warranties of Fitness in Commercial Real Estate Leases*, 28 U. Rich. L. Rev. 145 (1994) ☐

-- Walker, *Real Estate: Diminution in Fair Market Value of a Shopping Center is the Correct Measure of Damages when an Anchor Tenant Breaches an Implied Covenant of Continuous Occupancy*, 3 Tenn. J. Bus. L. Trans. 36 (Fall 2001)..... ☐

-- Comment, *Commercial Leasing: Implied Covenants of Operation in Shopping Center Leases*, 95 Dick. L. Rev. 383 (1991) ☐

3. Termination, default and remedies..... ☐

-- Britton, *Consignments, Landlord's Lien, Purchase Money Security Interest and Rights of Transferees of Collateral*, 25 Okla. City U.L. Rev. 213 (Spring / Summer, 2000) ☐

-- Brown, *A Landlord's Duty to Mitigate in Arkansas: What It Was, What It Is, and What It Should Be*, 55 Ark. L. Rev. 123 (2002) ☐

-- Coats, *Negotiating a Commercial Lease Termination Agreement*, 9 Prac. Real Est. Law. 13 (1993)..... ☐

-- Daniels & Osterm, *A Primer on Remedies for Landlord Defaults*, 20 Prac. Real Est. Law. 47 (May 2004)..... ☐

-- Dixon, *The Landlord's Duty to Mitigate*, 8 Prac. Real Est. Law. 15 (1992).....
☐

-- Finkelstein and Ferrara, *The "Rent Demand" Discord: A Call for Uniformity*, 65 N.Y. St. B.J. 24 (1993) ☐

-- Gerchick, *No Easy Way Out: Making the Summary Eviction Process a Fairer and More Efficient Alternative to Landlord Self-Help*, 41 UCLA L. Rev. 759 (1994)
..... ☐

-- Greenwald, *Lease Termination Agreements*, 14 Prob. & Prop. 40 (September-October 2000)..... ☐

-- Grokenberger, *Can the Pay Rent or Quit Notice Be Used to Terminate Illegal Tenancies?*, 18 W. St. U. L. Rev. 599 (1991) ☐

-- Hatch, *On Assuming or Rejecting Leases Under the New Law*, 24-3 ABIJ 6, April 2005
..... ☐

-- Heeren, *Unfair Evictions: Where Fair Housing and Landlord-Tenant Law Intersect*, 37 Clearhse. Rev. 418 (November-December 2003)..... ☐

-- Hoeniz and Hunter, *Dispute Resolution in Construction and Real Estate*, 23 Real Est. Rev. 79 (1993)..... ☐

-- Kaiser, *Giving Up on Voluntary Surrender: The Rights of a Sublessee When the Tenant and Landlord Cancel the Main Lease*, 24 Cardozo L. Rev. 2149 (May 2003)
☐

-- Klingler, *Representing Clients in Real Estate Mediations*, 14 Cal. Real Prop. J. 16 (1996)..... ☐

-- Koplow, *Surveying the Surrender Obligation in Commercial Leases*, 12 Prac. Real Est. Law. 77 (1996)..... ☐

-- Leyhane, *Why Tenants Can Seldom Be Sued for Causing a Fire*, 79 Ill. B.J. 284 (1991) ☐

-- Lubin, *Lease Guaranties: a Practical Approach*, 17 Prac. Real Est. Law. 27 (May

☐

-- Norton, *Commercial Tenant Defaults: Fact Issues to Anticipate*, 27 Ga. St. B.J. 181 (1991) ☐

-- Skinner, *Gambling With Remedies: Rent Acceleration and Mitigation of Damages in Alabama*, 45 Ala. L. Rev. 275 (1993) ☐

-- Thornton, *Enforceability of Leasehold Covenants: More Questions Than Answers*, 11 Legal Stud. 47 (1991)..... ☐

-- Walker, *Real Estate: Diminution in Fair Market Value of a Shopping Center is the Correct Measure of Damages when an Anchor Tenant Breaches an Implied Covenant of Continuous Occupancy*, 3 Tenn. J. Bus. L. Trans. 36 (Fall 2001)..... ☐

-- Walters, *Tenant Default Cures in Leasehold Mortgages*, 12 Prac. Real Est. Law. 71 (1996)..... ☐

-- Weidle, *The Inadequate Protection Afforded an Absent Tenant's Property During an Eviction*, 10 B.U. Pub. Int. L.J. 320, (Spring 2001) ☐

-- White & Medford, *Securing Payment of Rent: Are Letters of Credit Still a Viable Mechanism?*, 23-6 ABIJ 30 (July/August 2004))..... ☐

-- Wilkinson, *Loss of Quiet Enjoyment*, 140 New L.J. 1158 (1990) ☐

-- Comment, *Extending the Contractual Duty to Mitigate Damages to Landlords When a Tenant Abandons the Lease*, 42 Baylor L. Rev. 553 (1990) ☐

-- Comment, *The Holdover Tenant in Texas*, 44 Baylor L. Rev. 153 (1992) ☐

C. Specific uses of premises

1. Residential leases..... ☐

-- Elliott & Locke, *Caveat Broker: What Can Real Estate Licensees Do About Their Potentially Expanding Liability for Failure to Disclose Radon Risks in Home Purchase and Sale Transactions?*, 25 Colum. J. Evnt'l L. 71 (2000)..... ☐

-- Fejfar, *Permissive Waste and the Warranty of Habitability in Residential Tenancies*, 31 Cumb. L. Rev. 1 (2000/2001) ☐

-- Geurtz, Mintz & Gavin, *Ethical Behavior in the Residential Landlord-Tenant Relationship: The Dilemma of the Tenant*, 33 Real Est. Law J. 27 (Summer 2004)..... ☐

-- Geurtz, *The Historical Development of the Lease in Residential Real Estate*, 32 Real Est. Law J. 356 (Spring 2004)..... ☐

-- Hess, *Federal Preemption of Rent Regulation Under FIRREA*, 20 Fordham Urb. L.J. 939 (1993) ☐

-- Neisser, *The Tenant as Consumer: Applying Strict Liability Principles to Landlords*, 64 St John's L. Rev. 527 (1990) ☐

-- Radford, *Regulatory Takings Law in the 1990's: The Death of Rent Control?*, 21 Sw. U. L. Rev. 1019 (1992) ☐

-- Sangster, *Limits on the Application of the Strict Liability Doctrine in California Residential Defect Cases*, 8 Cal. Real Prop. J. 16 (1990)..... ☐

-- Segal, *Tax Considerations in Related-Party Rentals of a Residence*, 29 Real Est. Law J. 120 (Fall 2000)..... ☐

2. Commercial leases..... ☐

-- Battershall, *Commercial Leases and Section 365 of the Bankruptcy Code*, 64 Am. Bankr. L.J. 329 (1990) ☐

-- Bell, *Checklist for Reviewing or Drafting Commercial Leases*, 5 Utah B.J. 7 (1992) ☐

-- Bogart, *The Right Way to Reach Transactional Lawyers: Commercial Leasing and the forgotten "Dirt Lawyer,"* Univ. Pitt. Law. Rev. 335 (2000)..... ☐

-- Brock & Phillips, *The Commercial Lease: Property or Contract?*, 38 Alberta L. Rev. 989 (2001)..... ☐

-- Cameron, *Dealing with Brokers and Managers for the Commercial Lessor*, 12 Prac. Real Est. Law. 25 (1996)..... ☐

-- Coats, *Negotiating a Commercial Lease Termination Agreement*, 9 Prac. Real Est. Law. 13 (1993)..... ☐

-- Darrow, Schachat & Umberger, *Leasing to Dot-coms (and Other High-tech Start-ups): What the Parties to the Lease Should Know*, 17 TM Real Est. J. 184 (July 2001)..... ☐

-- Di Sciullo, *Negotiating Lease Clauses to Address the Possibility of Terrorism*, 16 Prob. & Prop. 32 (September-October 2002)..... ☐

-- Di Sciullo, *A Guide to Subrogation in Commercial Leases*, 20 Real Est. L.J. 299 (1992)..... ☐

-- Duncan, *The Regulation of Commercial Tenancies: Heading for the Sunset?* 2 Bond L. Rev. 28 (1990)..... ☐

-- Ellman and Africk, *Planning Your Next Office Lease: A Memo to Your Client*, 6 Prac. Real Est. Law. 75 (1990)..... ☐

-- Frydland and Shapack, *Maximizing Benefits of Commercial Real Estate Lease Inducements*, 76 J. Tax'n 372 (1992) ☐

-- Gisleson, *Competitive Bidding of Municipal Contracts in Pennsylvania and the Litigation it Generates: Who is the Lowest Responsible Bidder?*, 41 Duq. L. Rev. 513 (Spring 2003) ☐

-- Grant, *First Class Conditions: Responsibilities, Rights and Remedies Respecting the Condition of Commercial Leasehold Premises*, 29 Real Prop., Prob. & Tr. J. 735 (1995)..... ☐

-- Greenberg and Goldberger, *Commercial Lease-Listing Contracts: Dangers for the Unwary*, 66 Wis. Law. 12 (1993)..... ☐

-- Greenhalgh & Zucker, *Tenants' Free Expression Rights on California Real Properties*, 24 Real Est. Law J. 210 (Winter 2001)..... ☐

-- Greenwald, *Alligators in Your Lease*, 16 Prac. Real Est. Law. 9 (July 2000)..... ☐

-- Greenwald, *Work Letters in Commercial Leases*, 12 Prac. Real Est. Law. 61 (1996)..... ☐

-- Hagan, *Using Waivers and Indemnities in Commercial Leases*, 9 Prac. Real Est. Law. 81 (1994)..... ☐

- Hammond, *A Real Estate Focus: The (Pre) (As) Sumed "Consent" of Commercial Binding Arbitration Contracts: An Empirical Study of Attitudes and Expectations of Transactional Lawyers*, 36 J. Marshall L. Rev. 589 (Spring 2003) ☐
- Hennigh, *Sample Tenant Exclusions from Operating Expense "Pass-throughs" in Gross Leases*, 20 Prac. Real Est. Law. 31 (March 2004)..... ☐
- Hesse, *A Return to Confusion and Uncertainty as to the Effective Date of Rejection of Commercial Leases in Bankruptcy: A Critical Analysis of Revco [In re Revco D.S., Inc., 109 B.R. 264 (1989)] and Joseph C. Spiess Company [In re Joseph C. Spiess Co., 145 B.R. 597 (1992)]*, 9 Bankr. Dev. J. 521 (1993) ☐
- Homburger & Grant, *A Real Estate Focus: A Changing World: A Commercial Landlord's Duty to Prevent Terrorist Attacks in Post-September 11[th] America*, 36 J. Marshall L. Rev. 669 (Spring 2003) ☐
- Iwamoto, *Using Insurance in Commercial Leases*, 10 Prac. Real Est. Law. 81 (1994)..... ☐
- Jacobson, *Establishing, Maintaining, and Improving Tenant-oriented Leasing Standards*, 19 Prac. Real Est. Law. 37 (January 2003)..... ☐
- Jones, *Commercial Leases Under the Americans with Disabilities Act*, 22 Real Est. Law. 11 (1994)..... ☐
- Lilly, *Subrogation of Mortgages in California: A Comparison with the Restatement and Proposals for Change*, 48 UCLA L. Rev. 1633 (August, 2001) ☐
- Kaplan and Gage, *Counseling the Client on Commercial Lease Escalation Clauses*, 8 Prac. Real Est. Law. 41 (1992)..... ☐
- Kleinman, *Relocate and Renegotiate Your Office Space*, 28 Trial 68 (1992)..... ☐
- Koplow, *Surveying the Surrender Obligation in Commercial Leases*, 12 Prac. Real Est. Law. 77 (1996)..... ☐
- Legg, *A Commercial Lease Summary Form*, 8 Prac. Real Est. Law. 61 (1992)..... ☐
- Liu, *Counseling the Landlord on Tenant Estoppels and SNDAs*, 16 Prac. Real Est. Law. 15 (July 2000)..... ☐

-- Lombardi, *The Arbitration Provisions of the Retail Tenancies Act 1986*, 64 Law Inst. J. 496 (1990)..... ☐

-- Majev and Grant, *Work Letters in Commercial Leases*, 12 Prac. Real Est. Law. 27 (1996)..... ☐

-- Manley, *Beware the Standard Lease*, 18 Prac. Real Est. Law. 23 (September 2002)..... ☐

-- Mastroianni, *Caveat Lessor: Courts' Unwillingness to Find Implied Covenants of Continuous Use in Commercial Real Estate Leases*, 24 Real Est. L.J. 236 (1996)..... ☐

-- Maul, *Commercial Lease Drafting Tips in Light of California's Unlawful Detainer Statute*, 14 Cal. Real Prop. J. 12 (1996)..... ☐

-- Nielsen & Clark, *Miscellaneous Lease Provisions-- What You Don't Know Can Hurt You*, 21 Cal. Real Prop. J. 3 (Fall 2003)..... ☐

-- Norton, *Commercial Tenant Defaults: Fact Issues to Anticipate*, 27 Ga. St. B.J. 181 (1991) ☐

-- Plummer, *Personal Injury and the Louisiana Law of Lease*, 64 La. L. Rev. 177 (2003) ☐

-- Powell, *Unconscionability in the Lease of Commercial Real Estate*, 35 Real Prop. Prob & Tr. J. 197 (Spring 2000) ☐

-- Redfern, *The Retail Tenancies Act An Update*, 64 Law Inst. J. 943 (1990)..... ☐

-- Rosen, *When Office Building Landlords Lease to Retail Tenants*, 20 Prac. Real Est. Law. 7 (September 2004)..... ☐

-- Rubenstein & Leno, *Avoiding Expensive Drafting Mistakes in Commercial Leasing*, 229 N.Y. Law J. 4 (2003)..... ☐

-- Ruschman, *Protect Tenants Through Use of the Landlord's Estoppel Letter and Form*, 53 Tex. B.J. 1166 (1990) ☐

-- Ruzzo, *Coping with Environmental Liabilities in Commercial Lease Transactions*, 20 Real Est. L.J. 211 (1992)..... ☐

-- Shaffer, *Using Tenant Estoppel Letters to Cut to the Chase*, 15 Prob. & Prop. 38 (November-December 2001)..... ☐

-- Shenkman, *Contracting for Pitfalls or Success? Signing a Commercial Lease Need Not Be a Game of Chance, But It Can Bring Good Fortune*, 135 N.J. Law. 34 (1990)..... ☐

-- Smith, Garbarino and Marlini, *Analyzing the Leasing Criteria of Retail Tenants*, J. Prop. Mgmt. 40 (Nov./Dec. 1992)..... ☐

-- Stern, *Sample Hazardous Substance Provisions for Commercial Leases*, 38 Prac. Law. 55 (1992) ☐

-- Stipanov, *Assignment and Subletting of Commercial Leases Under the New Statutory Scheme*, 8 Cal. Real Prop. J. 18 (1990)..... ☐

-- Ware, *Mandatory Arbitration: Arbitration Clauses, Jury-Waiver Clauses, and Other Contractual Waivers of Constitutional Rights*, 67 Law & Contemp. Prob. 167 (Winter/Spring 2004) ☐

-- Weiser, *The Real Estate Covenant as Commons: Incomplete Contract Remedies Over Time*, 13 S. Cal. Interdis. L.J. 269 (Spring, 2004) ☐

-- Whelan, *The "Public Access" Provisions of Title III of the Americans with Disabilities Act: A Guide for Commercial Landlords and Tenants*, 34 Santa Clara L. Rev. 215 (1993)..... ☐

3. Shopping center leases..... ☐

-- Carbone, *Negotiating a Letter of Intent for an Anchor Store Lease*, 11 Prac. Real Est. Law. 85 (1995)..... ☐

-- DeAngelo, *Commercial Leasing: Implied Covenants of Operation in Shopping Center Leases*, 95 Dick. L. Rev. 383 (1991) ☐

-- Garfinkel, *May All or Portions of a Recorded Shopping Center Reciprocal Arrangement Be Rejected as an Executory Agreement Under Section 365 of the Bankruptcy Code*, 28 Real Prop. Prob. & Tr. J. 83 (1993)..... ☐

-- Gretchko, *Last in Line: Debtor Beware! Fourth Circuit Enforces Restrictive Use Clause to Block Debtor/Tenant's Assignment of Shopping Center Lease*, 23- 7 ABIJ 18 (September 2004) ☐

-- Halper, *Real Estate Tax Clauses in Shopping Center Leases*, 7 Prac. Real Est. Law. 49 (1991)..... ☐

-- Israel, *What You Should Know About Common Area Maintenance Cost Audits*, 8 Prac. Real Est. Law. 23 (1992)..... ☐

-- Liu, *Counseling the Landlord on Tenant Estoppels and SNDAs*, 16 Prac. Real Est. Law. 15 (July 2000)..... ☐

-- Miner, *Counseling the Client on Percentage Rent Clauses*, 10 Prac. Real Est. Law. 11 (1994)..... ☐

-- Murray, *Percentage Rent Provisions in Shopping Center Leases: a Changing World?*, 35 Real Prop. Prob. & Tr. J. 731 (Winter, 2001) ☐

-- Nekritz and Volk, *Counseling the Shopping Center Landlord on Handling a Fire*, 11 Prac. Real Est. Law. 23 (1995)..... ☐

-- Randolph, *Does a Shopping Center Landlord Have an Implied Operating Duty?*, 17 Prob. & Prop 26 (March-April 2003)..... ☐

-- Rick, *All About Parking: Behind the Wheel with the Tenant*, 14 Prob. & Prop. (Sept. - Oct. 2000)..... ☐

-- Rudman, *Drafting the Lease for the Anchor Tenant*, 10 Prac. Real Est. Law. 51 (1994)..... ☐

-- Schmitt, *The Bankruptcy Code Requirement of Compliance with Lease Obligations Does "All" Mean Everything?*, 10 N. Ill. U.L. Rev. 225 (1990)..... ☐

-- Smith & Ellis, *Solvent Shopping Center Tenants*, 24-1 ABIJ (February 2005)..... ☐

-- Walker, *Real Estate: Diminution in Fair Market Value of a Shopping Center is the Correct Measure of Damages when an Anchor Tenant Breaches an Implied Covenant of Continuous Occupancy*, 3 Tenn. J. Bus. L. Trans. 36 (Fall 2001)..... ☐

-- Comment, *Commercial Leasing: Implied Covenants of Operation in Shopping Center Leases*, 95 Dick. L. Rev. 383 (1991) ☐

4. Ground leases..... ☐

-- Steuben, *The Income Tax Treatment of Interests Acquired from a Ground Lessor*, 23 Fla. St. U. L. Rev. 863 (1996) ☐

D. Taxation

-- Auster, *Writing Off Website Expenses for Real Estate Professionals*, 29 Real Est. Law. J. 177 (Winter 2001)..... ☐

-- Bates and Cooper, *Structuring Tax Benefits in Leveraged Leasing*, 74 J. Tax'n 38 (1991)..... ☐

-- Coombes, *Tax Treatment of Lease Incentives*, 65 Law Inst. J. 395 (1991)..... ☐

-- Copple, *S Corporations and Rental Real Estate*, Real Est. Tax. 14 (Fall 2002)..... ☐

-- Frydland and Shapack, *Maximizing Benefits of Commercial Real Estate Lease Inducements*, 76 J. Tax'n 372 (1992) ☐

-- Greiner, *Real Estate Professionals Tax Relief Act of 1993*, 23 Colo. Law. 1317 (1994) ☐

-- Kaster, *Leasehold Improvements Held Eligible for Ten-Year Depreciation*, 84 J. Tax'n 119 (1996) ☐

-- Kaster, *Real Estate Transactions by Tax-exempt Entities: Treatment of Rents Under UBIT*, 16 TM Real Est. J. (April 2000)..... ☐

-- Lipman and Williamson, *Will the Final Regulations Under IRC § 469(c)(7) Renew Taxpayer Interest in Real Estate?*, 25 Real Est. L.J. 137 (1996)..... ☐

-- Lipton, *IRS Issues Final Regulations on Passive Loss Relief for Real Estate Professionals*, 74 Taxes 91 (1996)..... ☐

-- Lofton, Judice and Cook, *Generating Significant Tax Savings for Complying with Title III of the Americans with Disabilities Act*, 22 Real Est. L.J. 94 (1993)..... ☐

-- Lynch & Beausejour, *Lease In/Lease Out Transactions are the Subject of Another IRS Ruling*, Real Est. Law J. 9 (Summer 2003)..... ☐

-- Richmond, *Taxes and the Elderly: An Introduction*, 19 Nova L. Rev. 587 (1995)

..... ☐

-- Roche, *Lease Cancellation Payments are Capital Gain? Yes!*, 102 J. Tax. 364 (2005)..... ☐

-- Schachat, *Final Regulations Under Section 469 (c)(7): How Do You Spell Passive-Loss Relief?*, 24 J. Real Est. Tax. 3 (1996)..... ☐

-- Schmelzer, *Tax-deferred Transfers of Lessee Improvements*, 44 Res Gestae 34 (January 2001)..... ☐

-- Segal, *Tax Considerations in Related-Party Rentals at a Residence*, 28 Real Est. Law J. 120 (Fall 2000)..... ☐

-- Solodky, *Tenant Improvements Create Tax Quandries; Few Landlords or Tenants Fully Consider the Tax Consequences of Starting and Ending Leases*, Nat'l L.J., June 24, 1996, at p. B16, col. 2..... ☐

-- Stara and Schnee, *Maximizing Deductions When Acquiring Real Property Leases*, 27 Tax Adviser 166 (1996)..... ☐

-- Steuben, *The Income Tax Treatment of Interests Acquired from a Ground Lessor*, 23 Fla. St. U. L. Rev. 863 (1996). ☐

-- Williamson, *The "Net Election" to Treat Real Estate Investment as a Trade or Business*, Real Est. Tax 125 (Spring 2002)..... ☐

-- Yuhas & Fellows, *Sale-Leasebacks Revisited: The Old and the New of Federal Tax Law*, Real Est. Law J. 9 (Summer 2002)..... ☐

-- Zimmerman, *Deducting Prepaid Rent*, 28 J. Real Est. Tax. 388 (Summer 2001)..... ☐

E. Condemnation

-- McKirdy, *How to Value a Leasehold in an Eminent Domain Case*, 10 Prac. Real Est. Law. 11 (1994)..... ☐

-- Pang, *"Imminent Domain": Viewpoints on Leasehold Conversion of Hawaiian Lands: Leasehold Perspective*, 4 Asian-Pacific L & Pol'y J. 547 (2003)..... ☐

-- Searles, *The Role of Fixtures in Enhancing Values in Eminent Domain Proceedings*,

**F. Bankruptcy**

-- Andrew, *Leasehold Mortgages in Bankruptcy*, 9 Cal. Real Prop. J. 40 (1991)..... ☐

-- Battershall, *Commercial Leases and Section 365 of the Bankruptcy Code*, 64 Am. Bankr. L.J. 329 (1990) ☐

-- Cisar & Simoni, *Secured Letters of Credit and the § 502(b)(6) Cap on Lease Rejection Damages*, 24-1 ABIJ 10, February 2005..... ☐

-- Flick and Herman, *What Can a Mortgagee Do After the Bankruptcy Petition Is Filed?* 6 Prac. Real Est. Law. 43 (1990)..... ☐

-- Garfinkel, *May All or Portions of a Recorded Shopping Center Reciprocal Arrangement Be Rejected as an Executory Agreement Under Section 365 of the Bankruptcy Code*, 28 Real Prop. Prob. & Tr. J. 83 (1993) ☐

-- Gretchko, *Last in Line: Debtor Beware! Fourth Circuit Enforces Restrictive Use Clause to Block Debtor/Tenant's Assignment of Shopping Center Lease*, 23-7 ABIJ 18 (September 2004)..... ☐

-- Hatch, *On Assuming or Rejecting Leases Under the New Law*, 24-3 ABIJ 6, April 2005..... ☐

-- Lichtenstein, *A Landlord's Options if a Tenant Files Chapter 11*, 20 Real Est. Law J. 234 (1992)..... ☐

-- Lichtenstein, *Calculating a Landlord's Claim in Bankruptcy*, 32 Real Est. Law J. 131 (Fall 2003)..... ☐

-- Salerno, *Memo to Tenants: If You're Going to Trash Leased Estate Property, Be Sure to Reject the Lease*, 23-10 ABIJ 24 (December 2004)..... ☐

-- Sankaran, *Rejection Versus Termination: A Sublessee's Rights in a Lease Rejected in a Bankruptcy Proceeding Under 11 U.S.C. § 365(D)(4)*, 99 Mich. L. Rev. 853 (2001) ☐

-- Savage, *Reciprocal Easement Agreements: Assumption and Rejection in Bankruptcy*, 19 Real Est. L.J. 99 (1990)..... ☐

- Schmitt, *The Bankruptcy Code Requirement of Compliance with Lease Obligations Does "All" Mean Everything?*, 10 N. Ill. U.L. Rev. 225 (1990)..... ☐
- Schmitt, *Bankruptcy's Effect on Security Interests in Rents and Profits*, 58 UMKC L. Rev. 397 (1990) ☐
- St. James, *Landlord Beware: Will a Security Deposit Survive a Bankruptcy?*, 26 Cal. Bankr. J. 44 (Winter 2001)..... ☐
- Taubenfeld and Hale, *The Effect of a Lessee's Bankruptcy on a Real Property Lease*, 6 Prac. Real Est. Law. 13 (1990)..... ☐
- Truitt, *From the Conflicting Treatment of Nonmonetary Defaults in § 365(b), an Exception for Franchises Emerges*, 17 Bank. Dev. J. 257 (2000) ☐
- Winick, *Tenant Letters of Credit; Bankruptcy Issues for Landlords and Their Lenders*, 9 Am. Bankr. Inst. L. Rev. 733 (Winter 2001) ☐
- Zaretsky, *Real Estate Issues in the Code Amendments*, N.Y.L.J., Nov. 19, 1994, at p. 3, col. 1..... ☐
- Comment, *Assignment of Rents: The Creditor's Uncertain Path to Obtaining Rents Generated From the Debtor's Property in Bankruptcy*, 9 Bankr. Dev. J. 177 (1992) ☐

G. Governmental regulations

- Field, *The Americans with Disabilities Act "Readily Achievable" Requirement for Barrier Removal: A Proposal for the Allocation of Responsibility Between Landlord and Tenant*, 15 Cardozo L. Rev. 569 (1993)..... ☐
- Fleming, *Protecting the Innocent: The Future of Mentally Disabled Tenants in Federally Subsidized Housing After HUD v. Rucker*, 40 Harv. C.R.-C.L. L. Rev. 197 (Winter 2005) ☐
- Gisleson, *Competitive Bidding of Municipal Contracts in Pennsylvania and the Litigation it Generates: Who is the Lowest Responsible Bidder?*, 41 Duq. L. Rev. 513 (Spring 2003) ☐
- Haft, *The Americans with Disabilities Act-- Concerns for Lenders, Owners, and Tenants*, 7 Real Est. Fin. J. 48 (1992)..... ☐
- Hennigh, *Sample Tenant Exclusions from Operating Expense "Pass-throughs" in*

Gross Leases, 20 Prac. Real Est. Law. 31 (March 2004)..... ☐

-- Herman, *Drafting Compliance With Laws Clauses in Leases*, 12 Prac. Real Est. Law. 27 (1996)..... ☐

-- Isaacson and Hosford, *The ADA and Real Estate Transactions*, 6 Prob. & Prop. 57 (1992). ☐

-- Jones, *Commercial Leases Under the Americans with Disabilities Act*, 22 Real Est. Law. 11 (1994)..... ☐

-- Milani, "Oh, Say, Can I See--And Who Do I Sue If I Can't?:" *Wheelchair Users, Sightlines Over Standing Spectators, and Architect Liability Under the Americans With Disabilities Act*, 3 Fla. L. Rev. 523 (July 2000) ☐

-- Whelan, *The "Public Access" Provisions of Title III of the Americans with Disabilities Act: A Guide for Commercial Landlords and Tenants*, 34 Santa Clara L. Rev. 215 (1993)..... ☐

H. Environmental considerations¹

-- Allison, *Going Once, Going Twice, Sold: Implications for Leasing State Trust Lands to Environmental Organizations and Other High Bidders*, 25 Pub. Land & Resources L. Rev. 39 (2004) ☐

-- Anderson and Lewis, *Lead-Based Paint: Abate or Wait? Your Insurance Policy May Hold the Answer*, 182 N.J. Law. 10 (1997)..... ☐

-- Block and Hubbard, *Drafting Indoor Air Quality Clauses for Leases*, 12 Prac. Real Est. Law. 29 (1996)..... ☐

-- Cameron, Galante & Swink, *The Impact of Stigma on Environmental Liability Claims*, Real Est. Law J., p. 117 (Fall 2002)..... ☐

-- Jensen, *Lessor and Lessee Liability Under the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA); The Catch-22 of Lease Agreements*, 32 S. Tex. L. Rev. 447 (1991) ☐

-- Klayman, *Toxic Mold: A Growing Problem for the Real Estate Industry*, Real Est. Law J., p. 211 (Winter 2002)..... ☐

-- Liegel, *Negotiating and Drafting Lease Provisions to Protect the Tenant Against Environmental Liability*, 7 Prac. Real Est. Law. 63 (1991)..... ☐

-- Maltese and Jankowski, *An Overview of the New Federal Lead-Based Paint Disclosure Requirements*, 182 N.J. Law. 7 (1997)..... ☐

-- Murphy and Conant, *Contractual Allocation of Environmental Liabilities: Recent Developments and Practice Considerations*, 9 Env'tl Claims J. 91 (1997).....
☐

-- Ruzzo, *Coping with Environmental Liabilities in Commercial Lease Transactions*, 20 Real Est. L.J. 211 (1992)..... ☐

-- Schwartz & Serebro, *Allocation of Environmental Risk as Between Landlords and Tenants: The New York View*, 19 Pace Env'tl. L. Rev. 49 (Winter 2001)..... ☐

-- Stern, *Sample Hazardous Substance Provisions for Commercial Leases*, 38 Prac. Law. 55 (1992)..... ☐

-- Street and Zaleha, *Environmental Risks: Negotiating and Drafting Lease Agreements*, 27 Idaho L. Rev. 37 (1990)..... ☐

-- Trapp and Decker, *Landlord-Tenant Liability Under CERCLA: What's New?* 14 Cal. Real Prop. J. 25 (1996)..... ☐

-- Youngblood, *Environmental Traps for the Commercial Lessee*, 12 Prac. Real Est. Law. 65 (1996)..... ☐

-- Comment, *Who's Liable for Asbestos Removal Costs: Landlord or Tenant?*, 16 U. Dayton L. Rev. 695 (1991)..... ☐

I. Financing arrangements and security interests..... ☐

-- Andrew, *Leasehold Mortgages in Bankruptcy*, 9 Cal. Real Prop. J. 40 (1991)..... ☐

-- Cisar & Simoni, *Secured Letters of Credit and the § 502(b)(6) Cap on Lease Rejection Damages*, 24- 1 ABIJ 10, February 2005..... ☐

-- Fileti & Steen, *Synthetic Lease Financing for the Acquisition and Construction of Power Generation Facilities in a Changing U.S. Energy Environment*, 24 Fordham Int'l L.J. 1083 (2001) ☐

-- Flick and Herman, *What Can a Mortgagee Do After the Bankruptcy Petition Is Filed?*,



-- Forrester, *A Uniform and More Rational Approach to Rents as Security for the Mortgage Loan*, 46 Rutgers L. Rev. 349 (1993)..... ☐

-- Haroldson, *Perfecting a Security Interest in Future Rents from Mortgaged Property*, 40 Drake L. Rev. 287 (1991)..... ☐

-- Lilly, *Subrogation of Mortgages in California: A Comparison with the Restatement and Proposals for Change*, 48 UCLA L. Rev. 1633 (August, 2001) ☐

-- McNally, Klein & Adrams, *Advantages to Landlord and Landlord's Lender*, 16 Prob. & Prop. 28 (July-August 2002)..... ☐

-- O'Connor & Tydlaska, *What's a Financeable Lease?*, 16 Prac. Real Est. Law. 41 (September 2000)..... ☐

-- Richardson, *The Influence of Offshore Leasing Regimes on Commercial Oil Activity: An Empirical Analysis of Property Rights in the Gulf of Mexico and the North Sea*, 17 Geo. Int'l Envtl. L. Rev. 97 (2004) ☐

-- Rostocki, *Perfecting Security Interests in Rents: Article 9 Must Be Amended*, 24 UCC L.J. 151 (1991)..... ☐

-- Sutin, *Assignment of Leases and Rents in Mortgage Financing*, 6 Prac. Real Est. Law. 23 (1990)..... ☐

-- Turner, *Nebraska's Adoption of Statutory Provisions for the Creation, Perfection and Enforcement of a Security Interest in Real Estate Rents*, 27 Creighton L. Rev. 181 (1993)..... ☐

-- Walters, *Tenant Default Cures in Leasehold Mortgages*, 12 Prac. Real Est. Law. 71 (1996)..... ☐

-- Winick, *Tenant Letters of Credit; Bankruptcy Issues for Landlords and Their Lenders*, 9 Am. Bankr. Inst. L. Rev. 733 (Winter 2001) ☐

-- York, *The Ground Lease and the Leasehold Mortgage*, 99 Banking L.J. 8 (1982)..... ☐

J. Brokers

-- Auster, *Writing Off Website Expenses for Real Estate Professionals*, 29 Real Est. Law

J. 177 (Winter 2001)..... ☐

-- Black, *Client Liability to Real Estate Brokers: From Contract to Punitive Damages*, 25 Real Est. L.J. 78 (1996)..... ☐

-- Brown, Grohman and Valcarcel, *Real Estate Brokerage: Recent Changes in Relationships and a Proposed Cure*, 29 Creighton L. Rev. 25 (1995)..... ☐

-- Cameron, *Dealing With Brokers and Managers for the Commercial Lessor*, 12 Prac. Real Est. Law. 25 (1996)..... ☐

-- Cameron, *Buyer Brokering More Complicated Than It Sounds*, 12 Prac. Real Est. Law. 13 (1996)..... ☐

-- Dallon, *Theories of Real Estate Broker Liability and the Effect of the "As Is" Clause*, 54 Fla. L. Rev. 395 (July 2002) ☐

-- Elliott & Locke, *Caveat Broker: What Can Real Estate Licensees Do About Their Potentially Expanding Liability for Failure to Disclose Radon Risks in Home Purchase and Sale Transactions?*, 25 Colum. J. Evnt'l L. 71 (2000)..... ☐

-- Fain, *An Overview of Real Estate Agent or Broker Liability*, 23 Real Est. L.J. 257 (1995)..... ☐

-- Ferguson and Gray, *Environmental Liability of Brokers and Other Parties*, 19 Real Est. L.J. 218 (1991)..... ☐

-- Hagglund, Weimer, Berman and Weiss, *Caveat Misrepresenter: The Real Estate Agent's Liability to the Purchaser*, 5 Hofstra Prop. L.J. 381 (1993)..... ☐

-- Jaworski, *Overages: To Pay or Not to Pay, That Is the Question*, 113 Banking L.J. 909 (1996)..... ☐

-- Lucero, *The Nuts and Bolts of Commercial Lease Listing Agreements*, 14 Prob. & Prop. 6 (July-August 2000)..... ☐

-- Pancak, Miceli and Sirmans, *Real Estate Agency Reform: Meeting the Needs of Buyers, Sellers and Brokers*, 25 Real Est. L.J. 345 (1997)..... ☐

-- Pendergrass, *The Real Estate Consumer's Agency and Disclosure Act: The Case Against Dual Agency*, 48 Ala. L. Rev. 277 (1996)..... ☐

K. Texts1. General real property and lease issues..... ☐

-- Bellairs, Helsel and Caldwell; McAdams, consulting ed., Modern Real Estate Practice in Pennsylvania (Real Estate Educ. Co. 9th ed. 2002)..... ☐

-- C. Nance, Modern Real Estate Practice in Texas (Real Estate Educ. Co. 11[th] ed. 2002)..... ☐

-- Powell on Real Property (LexisNexis Matthew Bender 2005)..... ☐

-- P. Rohan, RET: Current Leasing Law and Techniques (LexisNexis Matthew Bender 2005)..... ☐

-- Witkin, ed., Environmental Aspects of Real Estate and Commercial Transactions (ABA 2004)..... ☐

-- Principles of Oregon Real Estate Law (Oregon State Bar Continuing Legal Educ. 2003)..... ☐

2. Commercial property..... ☐

-- M. Adams, *et al.*, Office Leasing; Drafting and Negotiating the Lease (California Continuing Educ. of the Bar 1996)..... ☐

-- Eisenberg, *et al.*, The Commercial Office Lease Handbook (ABA 2003)..... ☐

-- P. Randolph, Jr., ed., The Commercial Property Lease; Structuring Agreements, Assessing Expenses, and Preventing Liabilities for Landlords and Tenants (American Bar Ass'n Section of Real Property, Probate & Trust Law 1993)..... ☐

3. Taxation..... ☐

-- Glynn, *et al.*, Federal Taxes Affecting Real Estate (LexisNexis Matthew Bender 2005)..... ☐

-- Hoven, The Real Estate Investor's Tax Guide (Real Estate Educ. Co. 4[th] ed. 2005)..... ☐

4. Brokers..... ☐

-- P. Rohan, B. Goldstein & C. Bobis, RET: Real Estate Brokerage Law and Practice
 (LexisNexis Matthew Bender 2005)..... ☐

Legal Topics:

For related research and practice materials, see the following legal topics:

Real Property LawLandlord & TenantGeneral OverviewReal Property LawLandlord & TenantLease
 AgreementsGeneral OverviewReal Property LawLandlord & TenantLease AgreementsCommercial LeasesGeneral
 OverviewReal Property LawLandlord & TenantLease AgreementsCommercial LeasesFinancing, Mortgaging &
 Security LeasesReal Property LawLandlord & TenantLease AgreementsCommercial LeasesShopping Center Leases

FOOTNOTES:

(n1)Footnote 1. For further material, see Vol. 33, Chapter 25, Environmental Considerations in Real Estate
 Transactions, *infra*.



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Current Legal Forms for Real Estate
Chapter 23 REAL ESTATE LEASES
Part III. Drafting Guidelines

31-23 Current Legal Forms for Real Estate § 23.45

AUTHOR: by Thomas G. Belden

§ 23.45 Overview of Drafting Guidelines

The drafting of a commercial lease is usually undertaken by the landlord's attorney because frequently the client will ask his or her attorney to prepare a form lease which can be used for the particular building for more than one transaction with respect to that building, either because it is a multi-tenant building or because sooner or later the term of the lease will expire and a new lease will have to be negotiated for the next tenant. Notwithstanding the fact that there may be a form lease drafted by the landlord's attorney, the tenant and the tenant's attorney will want to negotiate the various provisions in the lease which will, of course, be drafted in the favor of the landlord if it is a form lease prepared by the landlord and the landlord's attorney. Even if the tenant does not have any changes it desires to be made to the lease, which would be highly unusual, the form lease will still have to be tailored to the particular transaction.

Usually the terms of the transaction are obtained from a letter of intent from the tenant or the tenant's broker, submitted to the landlord and the landlord's broker for consideration. Once the letter of intent has been negotiated and is accepted by the landlord, it will be given to the landlord's attorney so that the attorney can incorporate the terms of the letter of intent into the form lease. One exception where the tenant may have its own form lease is where the tenant is a national chain or is large enough to be considered an anchor tenant in the multi-tenant property. Under those circumstances, the tenant usually has the bargaining power to dictate that its form of lease be used, at least at the start of the negotiations.

Form leases done for landlords will vary depending on the type of building that is being leased. For example, if the building is a single use building as opposed to a multi-tenant building or multi-tenant shopping center, the landlord's attorney will not have to worry about passing on various costs such as common area operating expenses to the tenants, and will not have to worry about how those costs are to be allocated among the tenants. If there is just a single user utilizing the entire building, then there is a much greater likelihood that the lease will be a net-net-net lease in which the primary expenses of repairs, insurance and real estate taxes are passed on in their entirety to the single tenant user. In addition, because there is only one tenant using the entire building and the area outside the building, the costs of maintaining the common areas and other areas outside of the building are paid for 100% by the single tenant user.

In contrast, in a multi-tenant building the various expenses are passed on to the multiple tenants using the building by a

formula that usually relates to the fraction of the space in the building that the tenant is leasing. For example, if the tenant is leasing only 10% of the space then only 10% of the costs will be passed on to that particular tenant. Because there are multiple tenants, no one tenant can be responsible for maintaining the common areas. Under the circumstances, usually the landlord will take care of the common areas and pass those charges on among various tenants by a formula that relates to the amount of space the particular tenant leases in the building to the total rental square feet in the building.

The tenant's counsel should review the draft prepared by the landlord's counsel. The primary concern of the tenant's counsel, apart from verifying the economic terms of the lease to make sure that those economic terms are accurate and consistent with the letter of intent, is to make sure the various clauses in the lease are fair to the tenant and not totally one sided in favor of the landlord.

A sample of a commercial lease for a multi-tenant building follows. Comments are set forth opposite noteworthy provisions in the indenture of lease.

Legal Topics:

For related research and practice materials, see the following legal topics:

Real Property LawLandlord & TenantLease AgreementsGeneral OverviewReal Property LawLandlord & TenantLease AgreementsCommercial LeasesGeneral OverviewReal Property LawLandlord & TenantLease AgreementsCommercial LeasesShopping Center LeasesReal Property LawLandlord & TenantLease AgreementsLease Provisions



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Current Legal Forms for Real Estate
Chapter 23 REAL ESTATE LEASES
Part III. Drafting Guidelines

31-23 Current Legal Forms for Real Estate § 23.46

AUTHOR: by Thomas G. Belden

§ 23.46 Analysis of a Basic Commercial Lease for a Multi-Tenant Building

Analysis of a Basic Commercial Lease for a Multi-Tenant Building

CONTRACT

INDENTURE OF LEASE

THIS INDENTURE OF LEASE is made and entered into at _____, _____, this _____ day of _____, _____ [date], by and between _____, hereinafter called "Lessor," and _____, hereinafter called "Lessee."

WITNESSETH:

1. Demised Premises.

A. For the rents and upon the terms and conditions hereinafter set forth, Lessor hereby leases to Lessee certain premises, containing approximately _____ square feet of floor space in the building located on the parcel of land described on Exhibit A, attached hereto and made a part hereof, being outlined in red on the floor plan marked Exhibit B, attached hereto and made a part hereof, hereinafter called the "Demised Premises." (n1) COMMENT

B. Lessee has examined the Demised Premises and the same are known to the Lessee to be in good condition and repair, and Lessee hereby accepts them in their present condition *[save and except for the leasehold improvements to be done by Lessor for Lessee pursuant to subparagraph 9. B., below.] (n2) COMMENT

C. Lessor reserves the right to place, maintain, repair and replace utility lines, pipes, tunneling and the like, in, under, over and through the Demised Premises as may be reasonably necessary or advisable for the servicing, renovation,

improvement or repair of the building in which the Demised Premises are located. Lessor shall have the right to the use of the roof and exterior walls of the Demised Premises for such purpose. Lessee agrees that none of the aforesaid work shall permit Lessee to receive an abatement of rent or to make a claim for any damages or losses to Lessee or Lessee's business resulting directly or indirectly therefrom. (n3) COMMENT

2. Term. Lessee shall hold the Demised Premises for the term of _____ (_____) year[s], commencing on the _____ day of _____ [date], and expiring on the _____ day of _____ [date], unless the term hereby demised shall be sooner terminated *[or extended] as hereinafter provided. **[If the leasehold improvements referred to in subparagraph 9.B., below, have not been substantially completed by the aforesaid commencement date, the commencement date and payment of rent hereunder shall be delayed until said improvements are substantially completed or until Lessee begins doing business at the Demised Premises, whichever is earlier. In the event of such delay, Lessor and Lessee agree upon the commencement of the term to exchange a side letter agreement setting forth the actual commencement and termination dates of this lease. If Lessee begins to do business at the Demised Premises, or the date the leasehold improvements are completed, is other than on the first day of the month, then the commencement date of the lease term shall be the first day of the month next following, and the expiration date shall be _____ (_____) year[s] after such date. However, during the partial month preceding the commencement date of the lease term, all provisions of this lease shall be in full force and effect and the rent for such partial month shall be prorated based on the applicable number of days in the partial month in question to the total number of days in the month, multiplied times the monthly rate of rent payable during the first full month of the lease.] (n4) COMMENT

3. Base Rental. In consideration of said demise, Lessee covenants and agrees to pay to Lessor, without deduction or setoff of any kind, as base rental for the use of the Demised Premises for the term hereof, the sum of _____ Dollars (\$ _____), in equal monthly installments of _____ Dollars (\$ _____) each, hereinafter sometimes called the "base rental," payable in current legal tender of the United States of America, as the same is then by law constituted. All such sums are due and payable in advance, on the first day of each and every calendar month during said term, at _____, _____, _____, or at such other place as Lessor may in writing designate. All rent and other charges not paid by Lessee within five (5) days of its due date shall bear interest at the rate of interest equal to two points in excess of the base lending rate of _____ Bank, or its successor, then in effect at the time, until paid. (n5) COMMENT

4. Additional Payments.

A. *[Additional Rent. (1)] For purposes of this [sub]paragraph 4. _____ [A.], the "base year" shall be the calendar year _____ [date], and each calendar year thereafter during the term of this lease shall be deemed to be the "comparison year." The annual base rental shall be adjusted for each comparison year or part thereof comprised in the term hereof by an amount equal to the Lessee's proportion, as hereinafter defined, of any increases for the comparison year over the base year in the amount of:

(i) real estate taxes and assessments, general and special, levied upon the parcel of land described on Exhibit A and the building in which the Demised Premises are located and other improvements thereon, including any tax or other imposition charged by any governmental authority (other than income or franchise tax) against said land, building and improvements, the tenancy created hereby, or the rental provided herein, in substitution for or in addition to said real estate taxes and assessments, in whole or in part;

(ii) the insurance premium paid by Lessor to carry a fire and extended coverage and additional perils policy of insurance upon the building in which the Demised Premises are located and other improvements in or upon the land described on Exhibit A; and

(iii) operating expenses, as hereinafter defined, incurred with respect to the land described on Exhibit A and building and other improvements thereon. (n6) COMMENT

The term "operating expenses" shall mean all costs and expenses of every kind and nature paid or incurred by Lessor with respect to the operation and maintenance of the land described on Exhibit A, and building and other improvements thereon, including, without limitation, common areas and common facilities as defined in Paragraph 22, below. Such costs and expenses shall include, without limitation, costs of: sanitary, water and storm sewer charges, maintaining and repairing the exterior of the building, removing snow and ice, cleaning, gardening and landscaping, lighting, insuring (including, without limitation, public liability, property damage, automobile, rental, sign and other insurance (excluding fire and extended coverage and additional perils) in limits selected by Lessor), repairing and replacing the parking lot and driveways, line painting, and providing police, security and fire protection services, fire hydrant charges, sweeping, garbage removal and other sanitary control services, renting and/or depreciation or expensing of machinery, equipment and tools used in such maintenance, utility charges not paid by Lessee pursuant to Paragraph 7, below, the cost of personnel to implement such services and similar services and functions, plus 15 percent of all such costs and expenses to cover Lessor's administrative and overhead expenses in connection therewith. (n7) COMMENT

In the event the term of this lease shall terminate other than on the last day of a calendar year, the rental adjustments provided herein shall be prorated for the applicable portion of the part year in question. (n8) COMMENT

*B. or (2) For the purposes of this [sub]paragraph 4. _____[A.], the "Lessee's proportion" shall be _____percent (_____%); provided, however, in the event that the square footage occupied by Lessee in the building in which the Demised Premises are located, shall be increased or decreased, the "Lessee's proportion" shall be a fraction having as its numerator the total number of square footage occupied by Lessee in the building and having as its denominator the total number of square footage of rentable floor space in said building. (n9) COMMENT

**C. or (3) With respect to the payment by Lessee of Lessee's proportionate share of real estate taxes and assessments or other impositions and the fire insurance premium as required by subparagraphs 4. A. [(1)](i) and (ii), above, Lessor shall notify Lessee in writing of the amount of said real estate taxes and assessments and insurance premium, submit proof of payment of said amounts, and notify Lessee of Lessee's proportion of any increase over the base year amounts thereof. In the event that such amounts result in any increase over the base year amounts, Lessee shall pay Lessee's proportion thereof to Lessor within ten (10) days of receipt of said notice. (n10) COMMENT

With respect to subparagraph 4. A. [(1)](iii), within sixty (60) days after the close of the base year, as defined in subparagraph 4. A. [(1)], the Lessor shall notify Lessee in writing of the operating expenses as defined hereinabove, together with a statement by Lessor certifying the accuracy thereof. Within sixty (60) days after the close of each comparison year thereafter, Lessor shall notify Lessee in writing of said operating expenses, together with a statement certifying the accuracy thereof, and notify Lessee of Lessee's proportion of any increase over the base year thereof. During the next fifteen (15) days following receipt of such notice, Lessee shall be entitled to reasonably examine Lessor's books and records regarding such operating expenses. In the event that such notice reflects an increase in said operating expenses during the comparison year over the base year amount, within thirty (30) days following receipt of said notice, Lessee shall pay to Lessor Lessee's proportion thereof. (n11) COMMENT

*D. or (4) Within thirty (30) days following receipt by Lessee of written notice by Lessor as provided in the foregoing subparagraph 4. C. [A.(3)], Lessee shall be entitled to notify Lessor in writing of any claim by Lessee with respect to the accuracy of the determination of the amount paid by Lessee to Lessor pursuant to the provisions of subparagraph 4. C. [A.(3)]. Notwithstanding any such claim by Lessee or any contest initiated by Lessee as permitted by the provisions of subparagraph 4. E. [A.(5)], below, a payment from Lessee to Lessor as provided in subparagraph 4. C. [A.(3)] shall be paid in accordance with the provisions of subparagraph 4. C. [A.(3)]. In the event that any such claim of Lessee shall not be resolved by the parties within thirty (30) days of said written notice of said claim, said claim shall be settled and

determined by arbitration in accordance with the commercial rules of the American Arbitration Association, or its legal successors, then in effect; and the decision of said arbitration, including the decision with respect to the allocation of costs of said arbitration as between the Lessor and Lessee, shall be binding upon Lessor and Lessee. Within ten (10) days following receipt of notification of the decision of said arbitration or the final determination of any contest initiated in accordance with the provisions of subparagraph 4. E. [A.(5)], Lessor shall pay to the Lessee any amount due the Lessee by reason of said decision of the arbitration or conclusion of said contest. (n12) COMMENT

*E. or (5) Lessee, upon prior written consent from Lessor, shall be entitled to contest, in good faith, in the name of Lessor or Lessee, by appropriate proceedings diligently conducted, the validity or applicability, as the case may be, of any: (a) law or requirement or any proposed law or requirement of any governmental authority;

(b) tax, assessment or other governmental charges; or

(c) requirement of insurance carrier,

which during the term of this lease shall be levied, assessed, imposed, demanded or threatened to be levied, assessed, imposed or demanded by any governmental authority or insurance carrier, or alleged by any person to have been imposed, or with respect to or in connection with, the possession, occupation, alteration, maintenance, repair or use of the Demised Premises or any part thereof to the extent that the same shall affect Lessee's occupancy of the Demised Premises or the amount of additional rental hereunder. Lessor shall be obliged reasonably to cooperate with Lessee in any such contest which Lessee shall elect to undertake, and to that end shall make available to Lessee all books and records of the Lessor and all employees and agents of Lessor with personal knowledge of facts relating to any such contest. Lessee agrees to indemnify and save harmless the Lessor from any and all loss, cost, damage, expense, penalty or any liability whatsoever resulting from or in any manner arising out of the delay or failure to pay when due, discharge or comply with any such law, tax, assessment or other governmental charge, or requirement of any insurance carrier as aforesaid which Lessee shall so contest. Any such contest which the Lessee shall elect to undertake shall be at the Lessee's expense. Any refund or the applicable portion thereof resulting from such contest shall be the property of Lessee to the extent that it is based upon a payment made by Lessee. (n13) COMMENT

*[F. or B.? Security Deposit. Concurrently with the execution of this lease, Lessee shall deposit with Lessor the sum of _____ Dollars (\$ _____) as security for the punctual performance by Lessee of each and every obligation of Lessee under this lease. In the event of any default by Lessee not corrected within the permitted grace period granted herein, in addition to and without prejudice to any other rights or remedies available to Lessor set forth in this lease or otherwise, Lessor may apply or retain all or any part of such security to cure the default or to reimburse Lessor for any sum which Lessor may spend by reason of the default. In the case of every such application or retention, Lessee shall, on demand, pay to Lessor the sum applied or retained which shall be added to the security deposit so that the same shall be restored to its original amount. If at the end of the lease term, Lessee shall not be in default under this lease, but not otherwise, the security deposit, or any balance thereof, shall be returned to Lessee, without interest. It is expressly understood and agreed that the within security deposit is not an advance payment of or on account of the rent herein reserved or any part or installment thereof or a measure of Lessor's damages.] (n14) COMMENT

*[F. or G. OR B. or C.? Option to Renew. The Lessee shall have the option to extend the term of this lease for _____ additional term[s] of _____ (_____) year[s], provided that Lessee is not in default of any and all of the terms, covenants and conditions of this lease either on the date that notice of extension is given or on the commencement date of the extended term. Such option to extend shall be exercised by the Lessee by giving written notice to the Lessor not less than six (6) months prior to the expiration date of the original **[(or renewal)] term of the lease then in effect. The extension of this lease shall be upon the same terms, covenants and conditions as are contained in the lease except that the monthly base rental shall be [_____]

***increased to account for changes in the cost of living. Such changes in the cost of living shall be measured by use of the Consumer Price Index (All Items Figures for All Urban Consumers for the City of _____, base year 1982 - 1984 = 100) published by the Bureau of Labor Statistics, Department of Labor, popularly referred to as the "Cost of Living Index," or its successor then in effect. If the base year selected by the U.S. Department of Labor is changed, then the resultant Cost of Living Index shall be readjusted to reflect the base initially established under this lease. If there is no such Index still published at the time of renewal, Lessor shall designate a new Index to be used as near as possible to the Cost of Living Index. The Cost of Living Index as of the first day of the original term of the lease herein shall be ascertained and compared with the same as of the first day of the renewal term next to commence. In the event the Cost of Living Index is increased between the aforementioned dates, then the monthly base rental shall be increased in the same proportion as the aforesaid increase in the Cost of Living Index to obtain the monthly base rental to be paid during the renewal term next to commence. In no event shall the monthly base rental then being paid be decreased.](n15) COMMENT

Each year during the term after the first comparison year, in order to provide for current payments on account of any increases in real estate taxes and assessments and/or operating expenses over the base year applicable to such expenses, Lessee agrees that all monthly installments of rent coming due thereafter shall be adjusted by Lessor to the extent necessary to pay an estimated adjusted base rental for the succeeding comparison year. The estimated adjusted base rental shall be paid in monthly installments equivalent to one-twelfth (1/12) of the amount of the adjustment for the prior comparison year; provided, however, that the first monthly payment made after the estimated adjusted base rental for the succeeding comparison year is computed shall include the monthly adjustment for the months which have elapsed in the comparison year then in effect prior to the said first monthly payment. If, as finally determined, Lessee's share shall be greater than or less than the aggregate of all installments so paid on account to the Lessor for a comparison year, then Lessee shall pay to Lessor the amount of such underpayment, or the Lessor shall credit Lessee for the amount of such overpayment against the next installments of base rental due hereunder, or if none, shall promptly refund the overpayment to Lessee. (n16) COMMENT

5. Use. The Demised Premises shall be used solely for _____ and for no other purpose. If Lessee uses the Demised Premises for any purpose, authorized herein or otherwise, which causes the accessibility or other requirements of the Americans with Disabilities Act of 1990 ("ADA"), or the rules and regulations thereunder, to be applicable to the Demised Premises or building in which the Demised Premises are located, Lessee agrees at Lessee's expense to pay for any modification to the Demised Premises or building imposed by the ADA, or the rules and regulations thereunder. The statement in this lease of the nature of Lessee's business does not constitute a representation by Lessor that such business is lawful or otherwise permitted by law at the Demised Premises. Lessee shall not use or occupy, or permit the use or occupancy of, the Demised Premises, or any part thereof, in any unlawful manner or for any illegal purpose or in such a manner as to constitute a nuisance or violate the terms and conditions of any certificate of occupancy or equivalent use permit applicable to the Demised Premises, or for any purpose or in a manner likely to cause structural injury, and shall not use or occupy or permit the use or occupancy of the Demised Premises for other than purposes of the nature and to the extent permitted by the laws, rules, regulations, and ordinances of the applicable governmental authorities and their agencies, including without limitation, environmental laws and regulations. (n17) COMMENT

6. Compliance with Laws. Lessee shall, at Lessee's own expense but subject to Lessee's right to contest the validity thereof, promptly comply with the requirements of every applicable statute, law and ordinance, including all applicable environmental laws, federal, state and local, and with every applicable lawful regulation and order, including without limitation the ADA, with respect to the condition and maintenance of the Demised Premises to the extent that Lessee is obligated to repair and maintain the same, and with respect to Lessee's use or occupation of the Demised Premises. Lessee shall likewise comply with any applicable regulation or order of the applicable Board of Fire Insurance Underwriters, or other body having similar functions, or of any liability or fire insurance company by which the Demised Premises may be insured, with respect to Lessee's use and occupancy of the Demised Premises. Lessee shall not knowingly permit any article to be brought upon, or any act to be done upon or about the Demised Premises that

shall cause the cancellation of any policy of insurance thereon or cause an increase in the rate of premium of any such insurance. (n18) COMMENT

7. Utilities. The Lessee shall pay for all heat, electric current, water, gas and other utilities furnished to or used by Lessee in or upon the Demised Premises, together with all taxes, levies or other charges on such utilities and governmental charges based on utility consumption. Such payment shall be made directly to the department furnishing the same unless such utilities are submetered or are not separately metered or assessed. If such utilities are not separately metered or assessed, (or are only partly separately metered or assessed) and are used in common with the other tenants in the Building, Lessee will pay to Lessor an apportionment of such charges for utilities used in common based on the proportion of square feet in the Demised Premises served by such utility to the total square feet in the building served by such utility. If such utilities are submetered by a re-registering meter or otherwise, Lessee shall pay Lessor for such utilities at the same rates that Lessee would be charged by the utility company if billed directly by the utility company. Lessee shall pay said bills received from Lessor within ten (10) days of receipt thereof. Notwithstanding the above, Lessor will pay the utility company for water used solely for sanitary purposes and sewer charges applicable thereto, subject to the terms of subparagraph 4. A.(1)(iii), above. (n19) COMMENT

Lessor shall not be liable to anyone for cessation of any services, including but not limited to public utility services, heating and air conditioning, due to inability to obtain fuel, electricity, service or supplies from the sources from which they are usually obtained, due to failures in the equipment used to provide such services, governmental rationing of such utilities, or for any other reason beyond the control of the Lessor. Any such interruption of any of the above services shall never be deemed an eviction or disturbance of the Lessee's use of the Demised Premises or any part thereof, or render the Lessor liable to the Lessee for damages, or relieve the Lessee from performance of the Lessee's obligations under this lease. (n20) COMMENT

8. Repairs.

A. Repairs by Lessee and Surrender. Throughout the term of this lease, Lessee will keep and maintain the interior of the Demised Premises and any fixtures, facilities or equipment therein in a good state of repair, including, without limitation, all servicing, repairs and replacements required to the wiring, plumbing, sewage system, and heating and air cooling installations, ordinary wear and tear, damage by fire, casualty, invasion, acts of war, insurrection and the like, the elements and Acts of God, excepted. Lessee shall also keep, maintain and repair all exterior doors and window frames. Lessee will be liable for replacement of all broken glass of the same size and quality as that broken and will keep the entire Demised Premises in a clean, safe and healthy condition according to the applicable governmental ordinances and the direction of the proper public officers. Lessee shall, at its expense, remove the snow and ice from the sidewalks adjoining the Demised Premises. Lessee further agrees to deliver up and surrender to Lessor possession of the Demised Premises upon the expiration or other termination of this lease in as good condition as when taken, ordinary wear and tear and damage from the above-specified causes excepted. (n21) COMMENT

B. Lessor's Repairs. Subject to the provisions of Paragraph 16, Lessor shall maintain and make all necessary structural repairs and replacements, and except as otherwise provided herein will maintain and make all necessary repairs to the exterior of the building in which the Demised Premises are located subject to the provisions of subparagraph 4 A(1)(iii), above, provided that Lessee shall have notified Lessor in writing that any such repairs to said building are required; and provided further that any such repairs, if occasioned by the fault or negligence of Lessee, Lessee's agents or employees, shall be made by Lessor at Lessee's expense, except to the extent that the damage necessitating such repairs shall be covered by the fire and extended coverage insurance policy carried by Lessor and the waiver of subrogation provided in Paragraph 14 is applicable. Subject to the provisions of Paragraph 16, Lessor shall repair any damage to the interior of said building caused by a casualty covered by Lessor's fire and extended coverage insurance policy and Lessee shall have no liability with respect thereto provided that the waiver of subrogation provided in Paragraph 14 is applicable. All work set forth in this paragraph, and all other work to be performed by the Lessor under the terms of this lease, shall be done during ordinary working hours. If any such work is, at the request of Lessee, to be done at hours other than

ordinary working hours, Lessee shall pay any extra cost occurring because of such request. (n22) COMMENT

9. _____ [A.] Alterations. Lessee shall make no alterations in, or additions or improvements to, said Demised Premises (structural or otherwise) without the written consent of Lessor first had and obtained, which consent will not be unreasonably withheld. Notwithstanding the aforesaid Lessee shall not be permitted to make any alterations or improvements to the Demised Premises or building in which the Demised Premises are located which would cause to be applicable to the Demised Premises or building the accessibility or other requirements of the ADA, or the rules and regulations promulgated thereunder from time to time. In the event any permitted alterations, additions or improvements in or to said Demised Premises are made by Lessee, the Lessee covenants and agrees that Lessee will make all such alterations, additions or improvements in or to said Demised Premises at Lessee's own expense. If Lessee, its agents and employees, makes any alterations or improvements (whether or not authorized by Lessor), which cause the accessibility or other requirements of the ADA to be applicable to the Demised Premises or building in which the Demised Premises are located, Lessee agrees at Lessee's expense to pay for any modifications to the Demised Premises or building imposed by the ADA, or the rules and regulations issued thereunder. Any such permitted alterations, additions or improvements which are begun by Lessee shall be completed by Lessee. Lessee shall, in making any such alterations, additions or improvements, and/or in using and/or occupying the Demised Premises, comply with all applicable laws and ordinances pertaining to such work and/or such use or occupancy. Any additions, alterations or improvements made by Lessee shall become and remain a part of the Demised Premises, and be and remain the property of Lessor upon the termination of this lease or Lessee's occupancy of the Demised Premises. Notwithstanding the above, the Lessor may, by giving written notice to the Lessee, require Lessee to restore the Demised Premises to the same condition they were in at the commencement of this lease. Lessee shall indemnify and save harmless Lessor from and against all expenses, liens, claims or damages to either property or person which may or might arise by reason of such repairs, alterations, improvements or additions. In any event, Lessee shall have the right to remove all Lessee's trade fixtures, furnishings and other personal property in the Demised Premises which have been placed there by Lessee even though the same be attached to said Demised Premises, provided that the removal of such annexation shall be effected before the expiration of said term, and all damage caused to said Demised Premises by such removal shall be repaired by Lessee on or before the expiration of said term. (n23) COMMENT

*[B. Lessor has agreed to install, or cause to be installed, at Lessor's expense, certain leasehold improvements on the Demised Premises requested by Lessee, pursuant to plans and specifications identified on Exhibit B, attached hereto and made a part hereof, agreed to and initialed by Lessor and Lessee. Lessor agrees to install the same in a good and workmanlike manner, and to diligently pursue the completion of same so that the same are substantially completed prior to the commencement date of the lease, delays due to reasons beyond the control of Lessor excepted.] (n24) COMMENT

10. Eminent Domain.

A. If the whole of the Demised Premises or common areas, or such part thereof as shall substantially interfere with the Lessee's use and occupancy thereof, shall be taken for any public or quasi-public purpose by any lawful power or authority by exercise of the right of appropriation, condemnation or eminent domain or sold to prevent such taking, the Lessee or the Lessor may at Lessor's or Lessee's option terminate this lease effective as of the date possession is taken by said authority by written notice to the other within thirty (30) days after the date possession is taken by said authority. If neither party so elects to terminate, this lease shall continue in full force and effect except that the rent shall be equitably reduced and Lessor, at Lessor's expense, shall promptly proceed to restore the Demised Premises to a condition as nearly equivalent as feasible to their condition prior to said taking. (n25) COMMENT

B. If the amount of property or the type of estate taken shall not substantially interfere with the conduct of Lessee's business, this lease shall not terminate and Lessor shall be entitled to the entire amount of the award as the owner of all interests in the real estate without deduction for any estate or interest of Lessee in said real estate. Lessor, at Lessor's expense, shall promptly proceed to restore the Demised Premises to substantially their same condition prior to such

partial taking, and a proportionate allowance shall be made to Lessee for the rent corresponding to the time during which, and to the part of the Demised Premises of which, Lessee shall be so deprived on account of such taking and restoration. (n26) COMMENT

Notwithstanding the above, if said taking shall occur during the last _____ year[s] of the term of the lease, either Lessor or Lessee may elect to terminate this lease by written notice to the other within thirty (30) days from the date possession is taken by said authority, effective as of the date possession is taken. If neither party so elects, this lease shall continue in full force and effect except that the rent shall be equitably reduced and Lessor, at Lessor's expense, shall promptly proceed to restore the Demised Premises to a condition as nearly equivalent as possible to their condition prior to said taking. (n27) COMMENT

C. If this lease is terminated pursuant to this paragraph, Lessee shall not because of such taking assert any claim against the Lessor or the taking authority for any compensation because of such taking, and Lessor shall be entitled to receive the entire amount of any award as the owner of all interests in the real estate without deduction for any estate or interest of Lessee. Lessee shall, however, have the right to pursue, at Lessee's expense by separate claim against the taking authority, any rights Lessee might have as Lessee for Lessee's cost of moving or relocating any trade fixtures, equipment, or other personal property that Lessee placed upon the Demised Premises, or for the recovery of any other provable damages to Lessee's business, provided that such claim shall not result in a reduction of Lessor's award. (n28) COMMENT

*[D. For the purposes of subparagraph 10. B., above, the phrase "term of the lease" shall mean the next renewal term of this lease if Lessee, at any time prior to the expiration of fifteen (15) days after the date possession is taken by the authority, shall have exercised Lessee's _____[next] option to extend the term pursuant to the provisions of Paragraph 4, above.] (n29) COMMENT

11. Rights of Lessor Upon Default.

A. This lease is made upon the condition that Lessee shall punctually perform all of its covenants and agreements as herein set forth and if: (n30) COMMENT

(1) Lessee defaults in payment of rent, or additional rent, or any additional charge or amount of money to be paid by Lessee as provided in this lease, and such default shall continue uncorrected for a period of ten (10) days after written notice to the Lessee thereof; or

(2) Lessee defaults in the prompt and full performance and observance of any of the terms and conditions of this lease to be performed or observed by Lessee and not relating to the payment of money, and any such default shall continue uncorrected for a period of thirty (30) days after written notice to the Lessee thereof, or if any such last mentioned default cannot reasonably be corrected within such 30-day period, then if Lessee shall not within such period have commenced in good faith to correct such default; or

(3) Lessee abandons the Demised Premises; or (n31) COMMENT

(4) any execution, attachment or other order of court shall be issued upon or against the interest of Lessee in this lease and shall continue for a period of thirty (30) days after notice,

then in any such event, in addition to any and all rights and remedies allowed by law and equity, Lessor may, with or without further notice, forthwith terminate this lease and Lessee's right to possession of the Demised Premises, or Lessor may, without terminating this lease, terminate Lessee's right to possession of the Demised Premises. (n32) COMMENT

B. Upon the termination of this lease, or upon the termination of Lessee's right to possession without termination of this lease:

(1) Lessee shall surrender possession and vacate the Demised Premises immediately, and Lessor may enter into and repossess said Demised Premises, with or without process of law, and remove all persons and property therefrom in the same manner and with the same right as if this lease had not been made, and for the purpose of such entry and repossession Lessee waives any notice provided by law or otherwise to be given in connection therewith; and

(2) Lessor may remove from the Demised Premises any and all property found therein, and such repossession shall not release Lessee from Lessee's obligation to pay the rents herein provided.

C. In the event of termination of this lease as provided in this Paragraph 11, Lessor, in addition to any and all rights and remedies allowed by law and equity, shall upon such termination be entitled to recover damages in the amount equal to the then present value of the rent reserved in this lease for the entire residue of the stated term hereof less the then present worth of the fair rental value of the Demised Premises for the residue of the term hereof as then in effect, plus the costs incurred, including reasonable legal expenses, to terminate this lease and Lessee's possession of the Demised Premises. (n33) COMMENT

D. In the event of any repossession by Lessor without terminating this lease, Lessor shall use reasonable efforts to relet and keep rented the Demised Premises or any part thereof, as agent of Lessee, to any person, firm or corporation, and on such terms as Lessor may determine, provided that Lessor shall use reasonable efforts to mitigate damages to Lessee arising from Lessee's continuing liability under this lease. Lessor may make repairs, alterations, replacements, and/or decorations in or to the Demised Premises to the extent reasonably necessary and advisable for the purpose of reletting the Demised Premises, and in the making of such repairs, alterations, additions, replacements and/or decorations shall not operate or be construed to release Lessee from liability hereunder; and Lessee shall upon demand pay the cost thereof, together with Lessor's expense of reletting (including reasonable legal expenses and brokerage commissions). If the rents collected by Lessor upon any such reletting are not sufficient to pay monthly the full amount of the rent reserved herein, together with the cost of such repairs, alterations, additions, replacements, decorations and expenses, Lessee shall pay to Lessor the amount of each monthly deficiency upon demand, and if the rent so collected from any such reletting is more than sufficient to pay the full amount of the rent reserved herein, together with such costs and expenses of Lessor, Lessor shall, at least every twelve (12) months after such eviction, account for any surplus to Lessee. (n34) COMMENT

E. Any and all property which may be removed from the Demised Premises by Lessor may be handled, removed, stored or otherwise disposed of by Lessor at the risk and expense of Lessee, and Lessor shall in no event be responsible for the preservation or the safekeeping thereof. Lessee shall pay to Lessor, upon demand, any and all expenses incurred in such removal and all storage charges against such property, so long as the same shall be in Lessor's possession or under Lessor's control. If any property shall remain in the Demised Premises or in the possession of Lessor, and shall not be retaken by Lessee within a period of ten (10) days from and after the time when the Demised Premises are either abandoned by Lessee or repossessed by Lessor under the terms of this lease, said property shall conclusively be deemed to have been forever abandoned by Lessee. (n35) COMMENT

12. Bankruptcy: Assumption; Assignment; Adequate Protection.

A. Chapter 7. If a petition is filed by or against Lessee under Chapter 7 of the Bankruptcy Code and the Trustee in Bankruptcy ("Trustee") elects to assume this lease for the purpose of assigning it or otherwise, the assumption or assignment, or both, may be made only if all of the terms and conditions of subparagraph 12.C., below, are satisfied. If the Trustee fails to assume this lease within sixty (60) days after the Trustee's appointment, or within such additional time period as the Bankruptcy Court may allow, this lease shall be deemed to have been rejected. Assumption of this lease must satisfy all of the conditions of subparagraph 12.C., below, which Lessor and Lessee acknowledge to be

commercially reasonable. In the event this lease is rejected, Lessor shall then immediately be entitled to possession of the Demised Premises without further obligation to Lessee or the Trustee and this lease shall be canceled. Lessor's right to be compensated for damages in the bankruptcy proceeding, however, shall survive. (n36) COMMENT

B. Chapter 11. If a petition for reorganization under Chapter 11 of the Bankruptcy Code is filed by or against Lessee, or a proceeding that is filed by or against Lessee under any other chapter of the Bankruptcy Code is converted to a Chapter 11 proceeding and Lessee as debtor in possession fails to assume this lease within sixty (60) days from the date of filing of the petition or the conversion, or within such additional time period as the Bankruptcy Court may allow, debtor in possession will be deemed to have rejected this lease.

C. Assumption of Lease. Assumption of this lease must satisfy, in Lessor's business judgment, all of the following conditions which Lessor and Lessee acknowledge to be commercially reasonable:

(1) The Trustee or the debtor-in-possession has cured or has provided to Lessor adequate assurance, as defined hereinbelow that:

(a) The Trustee will cure all monetary defaults under this lease within ten (10) days from the date of the assumption; and

(b) The Trustee will cure all non-monetary defaults under this lease within thirty (30) days from the date of the assumption.

(2) The Trustee or the debtor-in-possession has compensated Lessor, or has provided to Lessor adequate assurance as defined hereinbelow, that within ten (10) days from the date of the assumption Lessor will be compensated for any pecuniary loss it incurred arising from the default of Lessee, Trustee, or the debtor-in-possession.

(3) The Trustee or the debtor-in-possession has provided Lessor with adequate assurance of future performance, as defined hereinbelow, of each of Lessee's obligations under the lease; provided, however, that:

(a) The Trustee or debtor-in-possession will also deposit with Lessor, as security for the timely payment of rent, an amount equal to three months base rental and other monetary charges accruing under this lease.

(b) If required by the terms of this lease, the Trustee or the debtor-in-possession will also pay in advance, on each day the base rental is payable, one-twelfth (1/12) of Lessee's annual obligation for operating expenses and real estate taxes and assessments.

(4) Lessor has determined that the assumption of this lease will not:

(a) Breach any provision in any other lease, mortgage, financing agreement, or other agreement by which Lessor is bound relating to the Building; or

(b) Disrupt, in Lessor's judgment, the lessee mix of the Building or any other attempt by Lessor to provide a specific variety of tenants in the Building that, in Lessor's judgment, would be most beneficial to all of the tenants of the Building and would enhance the image, reputation and profitability of the Building.

(5) For purposes of this subparagraph 12.C., "adequate assurance" means that:

(a) The Trustee or the debtor-in-possession has, and will continue to have, sufficient assets to assure Lessor that Trustee or the debtor-in-possession will have sufficient funds to fulfill Lessee's obligations under the lease and to keep the Demised Premises properly staffed with sufficient employees to conduct a fully operational, actively promoted business

on the Demised Premises; and

(b) An order will have been entered segregating sufficient cash payable to Lessor and/or a valid and perfected first lien and security interest will have been granted on the property of the estate that is acceptable for value and kind to Lessor, to secure to Lessor the obligation of the Trustee or debtor-in- possession to cure the monetary or non-monetary defaults under this lease within the time period set forth above.

(c) If the Trustee or the debtor-in-possession has assumed the lease under the terms of subparagraphs 12.A. or 12.B., above, and elects to assign Lessee's interest under this lease or the estate created by that interest to another person, that interest or estate may be assigned only if Lessor acknowledges in writing that the intended assignee has provided adequate assurance of future performance, as defined hereinbelow, of all of the terms, covenants and conditions of this lease to be performed by Lessee.

(d) For the purposes of this Paragraph 12.C., "adequate assurance of future performance" means that Lessor has ascertained that each of the following conditions has been satisfied:

(i) The assignee has submitted a current financial statement, audited by a certified public accountant, that shows a net worth and working capital in amounts determined by Lessor to be sufficient or to assure future performance by the assignee of Lessee's obligations under this lease;

(ii) If requested by Lessor, the assignee will obtain guarantees in form and substance satisfactory to Lessor, from one or more persons who satisfy Lessor's standards of creditworthiness;

(iii) Lessor has obtained all consents or waivers from any third party required under any lease, mortgage, financing agreement, or other agreement by which Lessor is bound to permit the assignment;

(iv) When, pursuant to the Bankruptcy Code, the Trustee or the debtor-in-possession is obligated to pay reasonable use and occupancy charges for the use of all or a portion of the Demised Premises, the charge will be no less than base rental and additional rent and other monetary obligations of the Lessee included in this lease.

13. A. Lessor's Right to Perform Lessee's Covenants. In addition to, but without limitation or qualification of, any other right or remedy of the Lessor herein provided, if the Lessee shall default in the performance of any covenant, condition or stipulation contained in this lease except defaults pertaining to the payment of rent or additional rent, the Lessor may, after thirty (30) days' written notice to the Lessee, or if such default cannot reasonably be corrected within such 30-day period, then if Lessee shall not within such period have commenced in good faith to correct such default, or with or without notice if, in the Lessor's reasonable opinion, an emergency exists, perform the same for the account and at the expense of the Lessee, and the amount of any payments made or other expenses incurred by the Lessor for such purpose shall be forthwith repaid by the Lessee with interest thereon at the rate of 8 percent per annum. Should the Lessee, pursuant to this subparagraph 13. A. or any other provision of this lease, become obligated to reimburse or otherwise pay Lessor any one or more sums of money in addition to the fixed rent, the amount thereof shall be deemed additional rent and may, at the option of Lessor, be added to any subsequent installment of the basic rent due and payable under the lease, in which event the Lessor shall have the remedies for default in the payment thereof provided in Paragraph 11 hereof. The provisions of this subparagraph 13. A. shall survive the termination of this lease. Nothing in this subparagraph 13. A. shall in any manner increase Lessor's liability to Lessee or to any others. The rights granted to Lessor under this subparagraph 13. A. shall be permissive only and shall not be construed as requiring Lessor to perform any such condition or covenant or to correct any such default. (n37) COMMENT

B. Lessor's Access to Demised Premises. Lessor reserves the right to enter the Demised Premises during the normal business hours of Lessee only, or at any time in case of an emergency, for the purpose of examining, repairing and protecting the Demised Premises, or for the purpose of showing the premises to a prospective purchaser or mortgagee,

and also during the last six (6) months of the term of this lease for the purpose of exhibiting the Demised Premises to prospective tenants and putting up the usual notice "to rent" or "for sale," which notice shall not be removed or hidden by Lessee. The rights granted to Lessor pursuant to this subparagraph 13. B. shall not require Lessor to make any repairs to the Demised Premises other than those herein specifically agreed to be made by Lessor nor otherwise extend any of Lessor's other obligations. (n38) COMMENT

14. Insurance. Lessor covenants and agrees that at all times after the commencement of the term hereof, Lessor shall obtain and keep in force adequate insurance for fire and lightning, with extended coverage and vandalism and malicious mischief endorsement on the building of the Demised Premises. Lessee shall obtain and keep in force, during the term of this lease, insurance to cover the physical loss of Lessee's personal property in said premises in amounts sufficient to cover Lessee's interest. Lessee hereby expressly waives any right of recovery against the Lessor for any and all liability and expense for loss, damage or destruction of the Lessee's property resulting from perils ordinarily covered by standard fire insurance policies with extended coverage and vandalism and malicious mischief endorsements, notwithstanding that the damage may be due to the negligent acts or omissions of Lessor, Lessor's agents or employees. Lessor hereby expressly waives any right of recovery against the Lessee for loss, damage or destruction of Lessor's property resulting from perils ordinarily covered by standard fire insurance policies with extended coverage and vandalism and malicious mischief endorsements, notwithstanding that the damage may be due to the negligent acts or omissions of Lessee, Lessee's agents or employees. Each of Lessor and Lessee shall place Lessor's and Lessee's respective insurance with companies that will agree to acknowledge, by endorsement to the policies of the insured if necessary, that the insurance will not be invalidated should the insured waive in writing prior to a loss any or all right of recovery against any party for loss occurring to the property described therein.

Lessee agrees to carry public liability and property damage insurance with respect to the Demised Premises in insurance companies licensed to do business in the State of Ohio and having limits of not less than Five Hundred Thousand Dollars (\$500,000) for injury to one person in any one accident, and not less than One Million Dollars (\$1,000,000) for injury to all persons in any one accident, and not less than Three Hundred Thousand Dollars (\$300,000) for damages caused to all properties in any one accident. Lessee will furnish to Lessor a certificate evidencing such insurance. The insurance policies shall designate specifically that Lessor is named as an additional insured thereunder. (n39) COMMENT

Lessor and Lessee hereby waive all rights of recovery and causes of action against the other, the other's agents and employees, and all persons claiming through or under the other, relating to loss of business, business interruption or loss of rentals resulting from any damage or destruction to the Demised Premises or any of Lessee's property contained therein, notwithstanding that any such damage or destruction may be due to the negligence of Lessor or Lessee, their respective agents or employees, as the case may be. (n40) COMMENT

15. Indemnity.

A. Lessee agrees that no representations or warranties, either express or implied, have been made with reference to the condition of the Demised Premises or their fitness for the use of any purpose whatsoever, and that Lessor shall not be liable for any use to which the Demised Premises are put or any damage either to person or property because of any injury, loss of life, loss or damage to or total destruction of merchandise or property resulting from such use. Lessee agrees that Lessee will at all times save and keep Lessor and the Demised Premises free and harmless from and against any and all liens placed or permitted to be placed thereon by Lessee, or by any other person claiming by, through, from or under Lessee, and from and against any and all loss, cost, damage, suits, fines, penalties, liability or expense, including attorney's fees, occasioned (i) by the act or neglect of Lessee, or any of Lessee's agents or employees, or those claiming or holding under Lessee, (ii) by the breach, violation or nonperformance of any covenant, condition or agreement in this lease by Lessee or any of Lessee's agents or employees or those claiming or holding under Lessee, or (iii) arising out of an accident causing death or injury to any person whomsoever, or damage to any property whatsoever resulting from any use of the Demised Premises by Lessee or any person holding under Lessee or Lessee's employees,

licensees or invitees. (n41) COMMENT

16. Destruction of Demised Premises.

A. Except as provided in subparagraph 16. B., below, if the Demised Premises, or any part thereof, shall be destroyed or damaged at any time during the term of the lease then in effect, and such destruction or damage may reasonably be repaired within one hundred twenty (120) days from the happening of such destruction or damage, Lessee shall not be entitled to surrender possession of the Demised Premises, or any part thereof, nor shall Lessee's liability to pay rent under this lease cease; but in case of any such destruction or damage, Lessor shall at Lessor's expense repair the same with all reasonable speed and shall complete such repairs within one hundred twenty (120) days from the happening of such destruction or damage, subject to delays beyond Lessor's reasonable control. In the event that any destruction or damage cannot reasonably be repaired within one hundred twenty (120) days from the happening of such destruction or damage, either Lessor or Lessee shall have the right to terminate this lease by giving written notice to the other within thirty (30) days from the happening of such destruction or damage, in the absence of which notice Lessor shall at Lessor's expense repair the same with all reasonable speed. (n42) COMMENT

B. If the Demised Premises, or any part thereof, shall be destroyed or damaged by fire or other casualty at any time during the last _____ year[s] of the term of the lease and the same can be reasonably repaired or restored within sixty (60) days following such occurrence, this lease shall not terminate; but in case of any such damage or destruction, Lessor shall at Lessor's expense repair the same with all reasonable speed and shall complete such repair within sixty (60) days from the happening of such damage or destruction, subject to delays beyond Lessor's reasonable control. In the event that any such damage or destruction cannot reasonably be repaired within sixty (60) days following such occurrence, the Lessee or the Lessor may elect to terminate this lease by written notice to the other within thirty (30) days following such damage or destruction, in the absence of which notice Lessor shall at Lessor's expense repair the same with all reasonable speed.

C. If any damage or destruction to the Demised Premises or the repair or rebuilding thereof shall render the Demised Premises untenantable in whole or in part, Lessee shall be allowed a proportionate reduction or abatement of the rent and additional rent payable hereunder corresponding to the time and space of which Lessee shall be deprived (giving due consideration to the reasonable use of the remaining portion of the Demised Premises) from the date of the occurrence of such damage or destruction until the date Lessor completes the repair or restoration thereof. (n43) COMMENT

This clause makes it clear that the Lessee will not have to pay its base rent during the time the Lessee cannot use all or part of the Demised Premises, but only to the extent of the portion of the Demised Premises that cannot be used.

*[D. For the purposes of subparagraph 16. B., above, the phrase "term of the lease" shall mean the next renewal term of this lease if Lessee, at any time prior to the expiration of fifteen (15) days after the occurrence of said destruction or damage, shall have exercised Lessee's ** _____ [next] option to extend the term pursuant to the provisions of Paragraph 4., above.] (n44) COMMENT

17. Loss or Damage to Lessee's Property. All trade fixtures, equipment, inventory and all other personal property belonging to Lessee, Lessee's agents, or Lessee's guests, located in or about the Demised Premises shall be at the sole risk of Lessee, and Lessor shall not be liable for the theft or misappropriation, nor for any damage or injury thereto, nor for any damage or injury to Lessee, or any of Lessee's officers, agents, employees, licensees or guests, or to other persons or to any property caused by fire, explosion, wind, water, rain, snow, frost, steam, gas, electricity, any Acts of God, heat or cold, dampness, falling plaster and/or ceilings, sewers or sewage odors, noise, leaks from any part of said building or by the bursting or leaking of pipes, plumbing, electrical wiring and equipment and fixtures of all kinds, or by any act or neglect of any other tenant or of any person; provided, however, subject to the provisions of Paragraph 14., Lessor shall not be relieved of liability for the negligence, intentional wrongful acts or omissions of Lessor, Lessor's

agents and employees. (n45) COMMENT

18. Assignment and Subletting. Lessee shall not be permitted to mortgage, pledge or encumber this lease. Lessee may sublet all or any part of the Demised Premises and may assign this lease or any interest Lessee may have hereunder, whether voluntarily or involuntarily, by operation of law or otherwise, provided that: (n46) COMMENT

(1) the signed written consent of the Lessor to any such subletting or assignment shall first be obtained (which consent Lessor will not unreasonably withhold or delay); and

(2) in the event of any such permitted assignment or subletting, Lessee shall remain liable as Lessee for the performance of all of the conditions and covenants on the part of Lessee to be performed under this lease, unless Lessor shall otherwise expressly consent in writing.

The right on the part of Lessee to assign this lease under any of the foregoing provisions of this Paragraph 18 shall be upon the express condition that such assignment shall be in writing, executed by Lessee and the assignee, that in such writing the assignee shall, in consideration of such assignment, agree to assume, perform and be bound by all of the terms, obligations and conditions on the part of Lessee to be performed under this lease, and that a duplicate executed counterpart of such instrument of assignment and assumption shall be delivered to Lessor within ten (10) days after the execution thereof. [For purposes of this lease, the sale or transfer of a majority of the common stock of Lessee, or of a majority of the beneficial or equitable interests of the owners of a noncorporate Lessee, shall be considered an assignment of the lease subject to the provisions of this paragraph.]

19. Liability.

*[A. Limitation of Lessor's Liability. The term "Lessor," as used in this lease so far as covenants or obligations on the part of Lessor are concerned, shall be limited to mean and include only the owner or owners at the time in question of the fee of the Demised Premises. In the event of any transfer or transfers of title to such fee, the Lessor herein named (and in case of any subsequent transfers or conveyances, the then grantor) shall be freed and relieved from and after the date of such transfer and conveyance of all liability with respect to performance of any covenants or obligations on the part of Lessor contained in this lease thereafter to be performed. Without further agreement, the transferee of such title shall be deemed to have assumed and agreed to observe and perform any and all obligations of the Lessor hereunder during the transferee's ownership of the Demised Premises. Lessor may transfer Lessor's interest in the Demised Premises without the consent of Lessee, and such transfer or subsequent transfer shall not be deemed a violation on Lessor's part of any of the terms and conditions of this lease.] (n47) COMMENT

**[B. No Personal Liability. Notwithstanding anything to the contrary contained in this lease, it is expressly understood and agreed, such understanding and agreement being a significant and material inducement to the execution of this lease by Lessor, that (i) there shall be absolutely no personal liability of whatever nature imposed upon Lessor or Lessor's heirs, personal representatives, successors and assigns, [or upon any partner of Lessor, general or limited] with respect to any terms, covenants or conditions of this lease; (ii) in the event that Lessor shall commit a default or breach of any of the terms, covenants or conditions hereof and Lessee shall obtain a judgment against Lessor for such default or breach, Lessee's sole exclusive remedy for the enforcement and collection of such judgment shall be the institution of foreclosure or other appropriate execution proceedings solely against the land on Exhibit A and improvements thereon and (iii) regardless of whether or not the proceedings described in "(ii)" immediately above shall result in a complete satisfaction of Lessee's judgment, in no event (whether by proceedings at law, in equity, administrative proceedings or otherwise) shall any deficiency or other personal judgment be rendered or enforced against Lessor or Lessor's heirs, personal representatives, successors or assigns, [or upon any partner of Lessor, general or limited.] (n48) COMMENT

20. Mortgage Subordination. The Lessee understands that Lessor may have or hereafter desire to place a mortgage upon all or part of the land described herein and the building constructed thereon. It is further understood that the

mortgagee of said mortgage may require that the within lease be subordinated to said mortgage, in which event Lessee agrees to execute any document required by such mortgagee to evidence such subordination; provided, however, that the mortgagee of any such mortgage shall covenant in writing that the Lessee's leasehold interest hereunder shall not be foreclosed in any action brought under such mortgage or in the event of a sale of the Demised Premises as a result of said action if at the time of bringing an action to foreclose or at the time of said sale the Lessee is not in default in the payment of rental or in the performance of any other obligation under this lease, with due allowance to be given for the payment of any past due rental or for the correction of any other default by Lessee within the period of time permitted after any notice is given or required to be given by the terms of this lease. It is further understood that the mortgagee of said mortgage may require that the Lessee agree to attorn to any purchaser of the property in the event that the same should be sold through foreclosure proceedings, and that the Lessee agrees to waive any and all rights to treat any such foreclosure proceedings as a breach of the lease by Lessor, in which event Lessee agrees to execute any document required by such mortgagee to evidence such agreements. (n49) COMMENT

21. Estoppel Certificate by Lessee. Lessee will execute, acknowledge and deliver to Lessor, promptly upon request, a certificate certifying that (a) this lease is unmodified and in full force and effect (or, if there have been modifications, that the lease is in full force and effect, as modified, and stating the modifications), (b) the dates, if any, to which basic rent, additional rent and other sums payable hereunder have been paid, and (c) no notice has been received by Lessee of any default which has not been cured, except as to defaults specified in said certificate, it being intended that any such certificate may be relied upon by any prospective purchaser or mortgagee of the property or any part thereof. (n50) COMMENT

22. Common Areas. "Common areas" and "common facilities," as used in the within lease, include, without limitation, all of the parking areas, approaches, entrances, driveways, sidewalks and service areas and landscaping located on the parcel of real estate described on Exhibit A, and all public or semi-public parts of the building in which the Demised Premises are located, including, without limitation, halls, exits, stairs, lavatories, doors or windows. Lessor shall operate, manage, equip, repair, replace and maintain the common areas and facilities for their intended purposes in such manner as Lessor shall, in Lessor's sole discretion, determine; provided, however, Lessor agrees to keep said common areas and facilities clean and to remove snow and ice from the parking areas and driveways as promptly as possible. Lessor reserves the right to change the location, size, elevation or nature of the common areas and common facilities. Lessor may, from time to time, make reasonable rules and regulations for the use of said common areas and common facilities which regulations shall be promulgated when established. (n51) COMMENT

The Lessee, Lessee's agents, employees and invitees, shall have the right to use said common areas and common facilities jointly with Lessor, Lessor's agents and employees, and other tenants (except such service areas as may be designated by Lessor for the exclusive use of a particular tenant or tenants) of the above-described building, their agents, employees and invitees. All of such use of any of the common areas and common facilities shall be such as will not unreasonably obstruct or interfere with the joint use thereof, and shall be in compliance with all applicable laws, rules and regulations. (n52) COMMENT

23. Signs. Lessee shall have the right to erect and maintain upon the Demised Premises, at Lessee's expense, all signs necessary or appropriate to the conduct of the business of Lessee which are not in violation of any governmental rule or regulation; provided, however, that Lessee shall not have the right to erect or maintain in or upon the Demised Premises any sign, the erection, maintenance or removal of which will operate to decrease the value of the Demised Premises, without the Lessor's prior consent in writing. Installation of any and all exterior signs on the Demised Premises, including the building and the roof, shall be subject to the prior written approval of Lessor as to design, size and location, it being understood that the Demised Premises are part of an integrated and uniform building, and that control of exterior signs by Lessor is essential in order to maintain uniformity and aesthetic value in said building. (n53) COMMENT

Lessee shall maintain said signs in good condition and repair at all times, and shall save Lessor harmless from injury to

person or property arising from the erection or maintenance of said signs. Any signs placed in or upon the Demised Premises, upon the written request of Lessor, shall be removed by Lessee at Lessee's expense upon the expiration or sooner termination of this lease, and all damage caused by the removal of such signs shall be fully repaired at the cost and expense of Lessee. (n54) COMMENT

24. Covenant Against Waste. Lessee agrees that Lessee will not commit waste in or upon the Demised Premises or any portion thereof. (n55) COMMENT

25. Quiet Enjoyment. The Lessor covenants that Lessor has lawful title to the above-described real property and the right to make this lease for the term aforesaid and, conditioned upon the prompt performance and observance by the Lessee, Lessee's agents and employees of all of the terms, covenants and conditions hereof required to be performed or observed by Lessee, Lessee's agents and employees, Lessee shall at all times during the term of this lease have the peaceable and quiet enjoyment of the Demised Premises. (n56) COMMENT

26. Withholding Premises. Should Lessee withhold from Lessor possession of the Demised Premises after the expiration or termination of this lease, whether by lapse of time or otherwise, such withholding shall constitute only a month-to-month tenancy. (n57) COMMENT

27. Effect of Demand. Any demand for rent upon the Lessee after the same shall have become due and payable, or for the performance or observance of any covenant or condition of this lease after the same is required to be performed or observed under the provisions hereof, shall have the same effect as though made at the time and place such rent became due or such obligation should have been performed or observed, any law to the contrary notwithstanding.

28. Effect of Waiver. No waiver of any condition or covenant of this lease or of the breach of any condition or covenant shall be taken to constitute a waiver of any subsequent breach of such condition or covenant, or to justify or authorize the nonobservance on any other occasion of the same or any other condition or covenant thereof. The acceptance of rent by the Lessor at any time when the Lessee is in default of any covenant or condition shall not be construed as a waiver of such default or of the Lessor's rights under Paragraph 11, above, on account of such default, nor shall the payment of rent by the Lessee at any time when Lessor is in default under any covenant or condition hereof be construed as a waiver of such default, nor shall any waiver or indulgence granted by the Lessor or Lessee be taken as an estoppel against the party granting the same. (n58) COMMENT

29. Notices. Whenever Lessor or Lessee shall make any demand or serve any notice which is required to be in writing under the terms of this lease upon the other, the same shall be in writing and shall be sufficiently given if sent, postage prepaid, by United States registered or certified mail, addressed to Lessee at _____, _____, _____, and addressed to Lessor at _____, _____, _____, or at such other address as Lessor or Lessee may theretofore by written notice to the other have designated for the service of such notice. (n59) COMMENT

30. Terminology; Captions. Where the context so requires or such interpretation is appropriate, any word used herein denoting gender shall include all genders, natural or artificial, and the singular and plural shall be interchangeable. The term "paragraph" shall refer to all paragraphs under the caption in question, where appropriate. The captions of the various provisions of this lease are for convenience only and in no way define, limit or describe the scope or intent of this lease or the provisions which they precede or in any other manner affect this lease.

31. Short-Form Lease. This lease shall not be recorded, but the parties agree to execute a skeleton lease incorporating the terms of this lease and including a legal description of the property upon which the Demised Premises is situated, at the request of Lessee or Lessor. The same shall be duly executed in form suitable for recording, and any costs incurred in connection therewith shall be at the expense of the party requesting same. (n60) COMMENT

32. Successors and Assigns. This lease and the covenants and conditions herein contained shall inure to the benefit of and be binding upon Lessor, Lessor's heirs, legal representatives, or successors and assigns, and shall be binding upon and inure to the benefit of Lessee, Lessee's heirs, legal representatives, or successors and those assignees of Lessee who become assignees in accordance with and as permitted by the terms of Paragraph 18., above.

33. Severability. In case any one or more of the provisions contained herein shall for any reason be held to be invalid, illegal or unenforceable in any respect, such invalidity, illegality or unenforceability shall not affect any other provision of this lease, but this lease shall be construed as if such invalid, illegal or unenforceable provisions had not been contained herein. (n61) COMMENT

34. Broker. Lessor warrants, which warranty shall survive the execution of this lease, that no brokerage fee or other compensation is due any real estate broker or other person or entity by reason of this transaction [except _____ who shall be paid by Lessor]. Lessee warrants, which warranty shall survive the execution of this lease, that no broker [except _____] induced Lessee to enter into this transaction. (n62) COMMENT

35. Environmental Compliance. Lessor represents and warrants to Lessee that the Building has been and/or shall be constructed in full compliance with all applicable federal, state and local environmental, health and safety laws, regulations and ordinances ("Environmental Requirements"), and that on the date of this Lease, to Lessor's best knowledge and belief, the site and the project are in full compliance with all Environmental Requirements. Lessor also represents and warrants to Lessee that the Premises, the Building, and the project shall be constructed to contain no fireproofing or other insulating materials which contain asbestos. Lessor hereby agrees to indemnify, defend and hold Lessee, and its officers, employees and agents harmless from any claim or liability relative to (1) injury, loss, accident or damage to any person or property, or (2) from any direct loss or damage, including, with respect to the items described in (1) or (2) any judgments, penalties, fines, costs, attorneys, consulting or expert fees, site investigation or clean up costs, to the extent arising from: (n63) COMMENT

(i) The clean-up of any hazardous materials and resulting liability therefrom in, on, under or about the Building which existed prior to the date of this Lease or are subsequently brought into the Building by Lessor or Lessor's employees, agents, contractors or licensees; and

(ii) The violation of any Environmental Requirements and the resulting liability therefore that may affect the Premises or the Building which existed prior to the date of this Lease, or is otherwise caused by the acts or omissions of Lessor or Lessor's employees, agents, contractors or licensees.

36. Compliance with Americans with Disabilities Act. Lessor represents, warrants and covenants that to the best of Lessor's knowledge, the Building complies, as of the commencement date, and during the term hereof, including any renewal term, in all respects with all applicable federal, state or local laws, codes, rules, ordinances, and regulations relating to the design, construction, renovation, occupancy, use and operation of the Building, including, without limitation, all such laws, ordinances, codes, rules and regulations regarding accessibility, use and occupancy of the Building by handicapped individuals. Lessor shall bear all costs of compliance with any such present or future laws, codes, ordinances, rules and regulations as applicable to the Building as a whole, and such costs shall not be included in the additional rent payable by Lessee under this Lease or otherwise imposed on Lessee after the commencement date. After the commencement date, if there are any changes in said laws as they may affect just Lessee's Premises, Lessee shall be responsible for causing the Premises to be in compliance with such laws. (n64) COMMENT

37. Entire Agreement. This lease contains the entire agreement between the parties hereto; and any agreement hereafter or heretofore made shall not operate to change, modify, terminate or discharge this lease, in whole or in part, unless such agreement is in writing and signed by each of the parties hereto.

The parties hereto have signed this Indenture of Lease as of the date first above written. (n65) COMMENT

By: _____

And: _____

LESSOR

By: _____

And: _____

LESSEE

(Acknowledgments)

[Attach Exhibit A]

(n66) COMMENT

Legal Topics:

For related research and practice materials, see the following legal topics:

Real Property Law Bankruptcy Leases Real Property Law Eminent Domain Proceedings Constitutional Limits & Rights Takings Real Property Law Fixtures & Improvements Tenant & Trade Fixtures Real Property Law Landlord & Tenant Landlord's Remedies & Rights Power to Reenter & Terminate Real Property Law Landlord & Tenant Landlord's Remedies & Rights Rent Recovery Real Property Law Landlord & Tenant Landlord's Remedies & Rights Security Deposits Real Property Law Landlord & Tenant Landlord's Remedies & Rights Termination Notice Real Property Law Landlord & Tenant Lease Agreements General Overview Real Property Law Landlord & Tenant Lease Agreements Commercial Leases General Overview Real Property Law Landlord & Tenant Lease Agreements Lease Provisions Real Property Law Landlord & Tenant Tenant's Remedies & Rights Possession of Premises Real Property Law Landlord & Tenant Tenant's Remedies & Rights Remedies General Overview

FOOTNOTES:

(n1) COMMENT (n1) This is a form of Lease for a multi-tenant building. It is a type of net-net-net Lease in that increases in certain costs over a base year are passed on pro rata among the tenants of the building.

The name of the Lessor needs to be properly identified as the titleholder of the property to be leased, so that a valid leasehold is conveyed. The Lessee must be properly identified because that is the person or entity that the Lessor will look to for the rent and other obligations imposed on the Lessee.

Because a lease is a conveyance of a leasehold estate, the estate must be properly and adequately described so that it can be leased. The Lessee will need to verify the square footage in the Demised Premises to make sure the base rent that is required to be paid is accurate because usually it will be based on the amount of rentable square feet in the Demised Premises.

(n2) COMMENT (n2) This clause spells out whether the Lessor has any obligations to prepare the space, or whether it is being taken "as is." If the latter, the Lessee needs to inspect the Demised Premises prior to signing the Lease.

(n3) COMMENT(n3) This clause is necessary especially if the building is older and the Lessor may need to make renovations to it. The Lessee may want to modify the clause to provide that any such work will not unreasonably interfere with Lessee's use of the space.

(n4) COMMENT(n4) The commencement of the Lease term and its expiration date need to be spelled out to define the duration of the initial lease term. The commencement date can be a certain date unless the space needs to be built out by the Lessor for the Lessee's use, in which case the commencement date needs to be tied to substantial completion of the work. The Lessee needs to be concerned about how substantial completion is verified (perhaps by the issuance of a Certificate of Occupancy) and by putting some kind of time limit for completion of the space. The Lessee should try to negotiate an outside date for completion, which if not met would allow Lessee to terminate the Lease.

(n5) COMMENT(n5) The base rent may be fixed for the initial term or could be adjusted periodically by means of a formula, by fixed increases, or by any number of other methods. Some Lessors will agree to start the rent at a lower rate to make it easier for the Lessee to pay, then step it up in later years. If the rent is not timely paid, the Lessor needs some kind of financial cost imposed on the Lessee to encourage timely payment, so this clause requires interest to be paid on the amount that is overdue. The other way to provide such an incentive is to charge a "late fee" equal to a percentage of the overdue amount, such as two percent (2%).

(n6) COMMENT(n6) In this Lease, the base rent is set at a certain rate by the Lessor knowing that the Lessor will receive a certain return on Lessor's investment given the costs of operating and owning the building. Those primary costs are for real estate taxes, the cost to insure the property, and the cost to operate the property. Those "costs" must be defined in the Lease. If those costs go up over a "base year" as defined in the Lease (usually the year the Lease is executed), then the Lessor has the right to charge the Lessee its pro rata share of the increases. These charges are sometimes referred to as escalation charges, because they are measured against a base year.

(n7) COMMENT(n7) The Lessee should try to narrowly define these costs, especially those for operating costs, so that the Lessor cannot pass on costs not typically considered "operating" costs, such as capital expenditures for major building components.

(n8) COMMENT(n8) The Lessor will typically add on a percentage to these costs to cover certain administrative and overhead costs incurred to keep track of such costs. If Lessor hires a management company for such purpose then the cost of the management fee will be included in lieu of the 15% administrative and overhead fee.

(n9) COMMENT(n9) This paragraph spells out the formula for computing the Lessee's pro rata share. The Lessee should verify the square footages used to compute the percentage.

(n10) COMMENT(n10) This paragraph spells out the mechanics for billing the Lessee for its share of the increase in real estate taxes and assessments, and insurance costs, and the time Lessee has to pay the increase in such costs.

(n11) COMMENT(n11) This clause spells out the mechanics for billing the increases in operating expenses, and the time for payment. It also allows the Lessee to examine Lessor's books and records to verify such costs.

(n12) COMMENT(n12) This clause provides a mechanism for the Lessee to contest the amount of the escalation charges billed to the Lessee. If the contest is not resolved, this clause requires for it to be determined by binding arbitration through the American Arbitration Association.

(n13) COMMENT(n13) Because Lessee is being charged these various expenses, this clause gives the Lessee the right to contest these various charges with the governmental authority or agency imposing the charges. The Lessor agrees to cooperate with the Lessee but the Lessee agrees to indemnify Lessor from any costs related to such contest. Any refund or portion thereof relating to a payment made by Lessee shall be paid to Lessee.

(n14) COMMENT(n14) The Lessor may or may not want a security deposit from the Lessee, depending upon the

credit of the Lessee. Usually the security deposit is one month or more of the base monthly rent depending on the credit of the Lessee and the amount of money Lessor is paying to prepare the space. Other forms of security might be personal guaranties or guaranties from a parent or affiliated company of the Lessee, or letters of credit backing payment of the base rent or several installments of the base rent.

(n15) COMMENT(n15) The Lessee will try to obtain options to renew because they are to the Lessee's advantage to have them. The Lessor may or may not agree to give the Lessee an option to renew. If the Lessor does, then the Lessor must decide at what adjustment in base rent. This clause provides for an adjustment based on changes in the cost of living measured by the Consumer Price Index. The Lessee may prefer a fixed increase because it will give the Lessee more certainty about its costs, or Lessee may want to negotiate a cap on the increase computed by use of the Consumer Price Index because of the uncertainty of that Index.

(n16) COMMENT(n16) This clause allows the Lessor to bill the Lessee on a monthly basis for an estimate of what the escalation charges will be. At the end of the calendar year, after the actual charges are known, there will be an adjustment made if the estimates are different than the actual charges.

(n17) COMMENT(n17) The precise use of the Demised Premises by the Lessee should be defined so that Lessor has some control over the use of the Lessor's property. In certain retail properties, it may be important to limit the use because the Lessor may have granted other tenants in the Building the right to a certain exclusive use that other lessees cannot do.

If the Lessee decides to make alterations to the Demised Premises and if the space is not compliant with the regulations issued under the Americans with Disabilities Act of 1990 ("ADA"), those alterations may trigger the requirement that the Demised Premises be made compliant. This clause requires the Lessee to be responsible for meeting such requirements, at Lessee's expense.

(n18) COMMENT(n18) This clause requires the Lessee to comply with all applicable laws that would affect the Lessee's use of the Demised Premises, including all environmental laws and the ADA as discussed above. The Lessee should ascertain whether the Building and the Demised Premises are compliant prior to signing the Lease, so the Lessee can either negotiate with the Lessor to require the Lessor to pay for the cost of such compliance, or know the amount of costs Lessee will be facing if it moves into the space.

(n19) COMMENT(n19) This clause requires the Lessee to pay for the utilities it uses. It is preferable to the Lessee that there be separate meters to measure such use so that the Lessee has no argument about whether the Lessee is paying for more than it is using. However, if separate meters are not possible, this clause covers that circumstance.

(n20) COMMENT(n20) This clause states that Lessor is not responsible for interruption of utilities, and such interruption will not allow Lessee to cease paying rent during the interruption. The Lessee may want to negotiate for some abatement of its base rent if Lessee cannot use the Demised Premises because of the interruption, at least if the interruption lasts longer than two or three days. The Lessor may agree to such a compromise if it carries rental interruption insurance to cover such abatement of rent.

(n21) COMMENT(n21) This clause is always one of contention between Lessor and Lessee. In this clause, the Lessee is responsible for all interior repairs and replacements. The next paragraph states that Lessor is responsible for the building exterior and structural repairs and replacements. Lessee may, by negotiation, try to limit its responsibility just to repairs in the interior of its space, but not replacements.

(n22) COMMENT(n22) Lessor's responsibility for repairs is conditioned upon (i) notice from Lessee that it is required, and (ii) the repair not being due to the fault or negligence of the Lessee, its agents and employees. However, if the latter, and if the repair is covered by the insurance carried by Lessor, then Lessor will be responsible for the repair by use of the insurance proceeds, without payment from Lessee, as long as the insurance company does not pay Lessor

and then by means of a subrogation claim go after the Lessee for reimbursement.

(n23) COMMENT(n23) This clause requires the Lessee to obtain Lessor's written consent to any alterations, structural or otherwise. The Lessee should try to limit the consent requirement to just structural alterations.

This requirement that Lessee may have to restore the Demised Premises to their prior condition is usually objectionable to most tenants. Lessee should try to have it eliminated based on the rationale that it improved the Demised Premises and such improvements may be usable again for future tenants at the Demised Premises.

(n24) COMMENT(n24) In many instances the Lessor will agree to improve or buildout the Demised Premises for Lessee's use in order to provide an incentive for Lessee to lease the Demised Premises. The Lessor may have, as part of its financing with its lender, a reserve of funds specified just for tenant improvements. The clause should describe what Lessor has agreed to construct.

(n25) COMMENT(n25) This clause states what happens in the event there is a taking by eminent domain of all or a substantial portion of the Demised Premises or the common areas. This clause is fair to the Lessee because if the Lessee cannot use the space the Lease is terminated, at Lessee's option. If the Lease does continue, the base rent is equitably reduced because of the taking.

(n26) COMMENT(n26) If the taking by eminent domain does not substantially interfere with Lessee's business, the Lease does not terminate but Lessee's base rent is reduced in proportion to the amount of space taken, until the remaining space is restored.

(n27) COMMENT(n27) The parties may want to make it easier to terminate if the taking occurs during the last year or two of the Lease.

(n28) COMMENT(n28) As is typical in most multi-tenant buildings, this clause makes it clear that the Lessee cannot make a claim against the taking authority for any portion of the value of the real estate, including a value attributable to the value of the leasehold. That right belongs to Lessor. Lessee may make a separate claim for other damages it may have incurred relating to its business and costs to relocate its fixtures. However, if the Lessee is making substantial improvements to the space the Lessee may negotiate a right to a portion of the award granted to Lessor to reimburse Lessee for all or part of its investment based on the argument that the value of the property has gone up because of the improvements made by Lessee. Very often that may not be true, but Lessor may agree to a compromise whereby an amortization schedule is set up for the tenant improvements possibly related to the term of the Lease, with the Lessee entitled to receive the unamortized cost of the improvements at the time the condemnation occurs if prior to the end of the term of the Lease.

(n29) COMMENT(n29) This clause may be used if the Lessee is granted an option or options to renew the Lease. It is tied back to the provisions of subparagraph 10.B.

(n30) COMMENT(n30) This clause spells out the events which are considered defaults on the part of the Lessee which would result in a termination of the Lease, or at least the termination of Lessee's right to possession. These are drastic remedies but reasonable because for most of the events of default, Lessee is given written notice and a grace period within which to cure the default.

(n31) COMMENT(n31) These last two events of default do not have a grace period within which to correct them because of the nature of those defaults.

(n32) COMMENT(n32) Lessor has two choices if there is a default, to terminate the Lease and possession, or to just terminate the possession of Lessee but not terminate the Lease. In this latter event, the rent shall continue to accrue unless and until the space can be re-rented.

(n33) COMMENT(n33) This clause gives the Lessor an alternative to sue for damages in one lump sum for the value of the Lease instead of keeping the Lease in effect and suing the Lessee as rents accrue. The value of the Lease, as determined by this clause, may have some value if rents have gone down since the Lease was executed.

(n34) COMMENT(n34) This clause spells out the obligation of the Lessor to re-rent the space if the Lease is not terminated. It also spells out what the Lessor may do, and charge the Lessee for, in order to re-rent the space.

(n35) COMMENT(n35) This clause allows Lessor to remove Lessee's personal property if not removed by Lessor.

(n36) COMMENT(n36) Most bankruptcy clauses in leases formerly stated that if Lessee should become bankrupt, that Lessor could terminate the Lease. Such clauses are not enforceable under federal bankruptcy laws which essentially state that the bankruptcy court will make the decision as to whether an executory lease will be kept in effect. This clause attempts to follow more closely the bankruptcy laws.

(n37) COMMENT(n37) This clause gives the Lessor a self-help tool to remedy a default of the Lessee, assuming the Lessor does not want to take the more drastic step of declaring the Lessee in default under Paragraph 11 of this Lease. The Lessee should consider attempting to negotiate a similar clause giving the Lessee the right to cure defaults on the part of the Lessor if the Lessor does not cure the default within a specified period of time, such as 30 days, after receipt of notice from the Lessee.

(n38) COMMENT(n38) This clause is to allow Lessor the right of access to the Demised Premises under certain conditions, subject to certain limitations.

(n39) COMMENT(n39) Under this Lease, Lessor is required to insure the building in which the Demised Premises are located, but Lessee must insure its personal property located at the Demised Premises. In addition, as stated below, Lessee must carry public liability insurance for the protection of both Lessee and Lessor. This clause also contains a mutual waiver of liability clause, the effect of which is to require each of Lessor and Lessee to look to their insurance company for recovery even if the damage to the property of Lessor or Lessee was due to the acts or neglect of the other. The insurance company is asked to agree to such waiver of liability by agreeing as part of the policy to waive its subrogation rights. Lessee is required to name Lessor as an additional insured party on its liability policy. In that way, the insurance company will also defend Lessor if the Lessor is sued on a liability claim by a third party.

(n40) COMMENT(n40) This clause also provides for a waiver of liability with respect to business interruption and rental interruption claims.

(n41) COMMENT(n41) This clause indemnifies the Lessor from certain matters listed in this clause relating to Lessee's acts, breaches or negligence. Lessee should try to negotiate a similar clause for Lessee's benefit, namely an indemnification from Lessor for the acts or omissions of Lessor, its agents and employees.

(n42) COMMENT(n42) This clause is similar to the eminent domain clause except that in this case the cause of the loss of use of the Demised Premises is damage by fire or casualty. If the damage can be repaired and restored within 120 days, the Lessee cannot terminate the Lease. The Lessee may want to negotiate to shorten that time period if the Lessee believes that it cannot be out of business for that long of a period. If the damage or destruction occurs during the last year or two of the Lease, the parties may believe that the period of time to determine whether to rebuild and keep the Lease in effect should be shortened to 60 days as in this clause.

(n43) COMMENT(n43) This clause is similar to the eminent domain clause except that in this case the cause of the loss of use of the Demised Premises is damage by fire or casualty. If the damage can be repaired and restored within 120 days, the Lessee cannot terminate the Lease. The Lessee may want to negotiate to shorten that time period if the Lessee believes that it cannot be out of business for that long of a period. If the damage or destruction occurs during the last year or two of the Lease, the parties may believe that the period of time to determine whether to rebuild and keep the Lease in effect should be shortened to 60 days as in this clause.

(n44) COMMENT(n44) This clause is useful if the Lessee has been granted options to renew the Lease. It ties back to subparagraph 16.B.

(n45) COMMENT(n45) This clause states that the Lessor is not responsible for damage to Lessee's property, unless due to Lessor's negligence, and then only if the damage is not covered by insurance for which a waiver of subrogation endorsement is in place. That endorsement states that the insurance company will not pay the insured party and then exercise its right to bring a claim for reimbursement against the other party to the Lease, by reason of its subrogation rights.

(n46) COMMENT(n46) This clause limiting the right to assign or sublet the Demised Premises allows the Lessor to control who uses the space in its building. The Lessee can ask to assign or sublease only with the prior consent of Lessor, not to be unreasonably withheld or delayed. Some leases may spell out more specifically the grounds or criteria which must be considered by the Lessor. There are many variations to this clause, but this one is fair to both parties. The Lessee may also negotiate the right to assign to certain pre-approved entities or persons, or to affiliated entities or successor entities, such as successors by merger, reorganization or acquisition of substantially all of the assets of Lessee.

(n47) COMMENT(n47) This clause is important to the Lessor because if there is a transfer of the property, provided the new owner assumes the obligations of the Lessor under the Lease, the Lessor is released from future obligations accruing after the transfer of title. Without this clause, the Lessor would remain liable.

(n48) COMMENT(n48) This clause should be used if the Lessor is an individual or general partnership subject to personal liability. It protects such a Lessor from personal liability the same as would be available to the shareholders of a corporation or the members of a limited liability company.

(n49) COMMENT(n49) This clause is important to the mortgage lender of the Lessor who wants to make sure its mortgage is superior to the rights of the Lessee under the Lease, in particular if the lender ever needs to foreclose its mortgage because of a default on its loan. The Lessee can agree to this clause but only if it is given a nondisturbance clause from the lender that protects the Lessee's rights under the Lease as long as the Lessee is not in default under the Lease. If there already is a mortgage in place, the Lessee should ask for a nondisturbance agreement from the lender as a contingency for proceeding with the Lease.

(n50) COMMENT(n50) Estoppel certificates are needed by the Lessor if the Lessor is financing or refinancing by means of a loan secured by a mortgage, or if the Lessor is selling the property to a new purchaser. In either event, the Lessor's mortgage lender or prospective purchaser will want to know the status of the leases affecting the property. The estoppel certificate is used to verify the status of the leases.

(n51) COMMENT(n51) This clause defines the common areas and spells out the Lessor's maintenance obligations related to those areas, for which Lessee will pay a pro rata share if those expenses increase over a base year.

(n52) COMMENT(n52) This paragraph states Lessee's right to use the common areas as a common right with the other tenants, but also reserves to Lessor the right to make changes to the common areas. The Lessee needs to make sure that common areas such as parking areas are adequate for Lessee's business needs. Lessee may desire to negotiate for exclusive use of certain common areas, such as parking spaces or docks.

(n53) COMMENT(n53) This clause is important to the Lessee because it identifies its business location. However, the Lessor needs to protect the aesthetics of its property, so the Lessor needs to control the signs at the property.

(n54) COMMENT(n54) The Lessee has maintenance obligations for its signs, and must remove them at the end of the Lease.

(n55) COMMENT(n55) This is a common clause in any lease, for Lessor's protection. Even if not set forth in the

Lease, it is a common law requirement under most state common law, imposed on the Lessee.

(n56) COMMENT(n56) This clause protects the Lessee from adverse title claims made against the Lessor which could interfere with the rights of Lessee under the Lease. The burden is upon Lessor to protect against such occurrences.

(n57) COMMENT(n57) This clause makes clear that a holdover does not imply any renewal of the Lease term, but merely a month-to-month tenancy which can be terminated at the end of a month. Some holdover clauses contain a provision for an increase in the base rent to discourage a holdover.

(n58) COMMENT(n58) This clause protects the Lessor from a claim by the Lessee that the Lessor has waived its rights if the Lessor previously failed to enforce a provision in the Lease.

(n59) COMMENT(n59) The parties may desire to explicitly authorize notices by facsimile, electronic transmission or by personal delivery through a recognized national courier.

(n60) COMMENT(n60) It is advisable for the Lessee to record its rights under the Lease to protect those rights from third parties dealing with the property, such as lenders and purchasers, because the recording provides constructive notice to them which applies whether or not they have actual notice. However, the Lessor (and the Lessee) will not want the economic terms of the Lease made known, just the property rights, so a short form lease should be required. The state statute will spell out the requirements that must be met to record the short form, and should be consulted.

(n61) COMMENT(n61) This clause could protect the Lease if one particular clause is ruled illegal or unenforceable.

(n62) COMMENT(n62) The parties may wish to add this clause as an indemnity from each party to the other if the representation is breached and some other party makes a claim for a commission.

(n63) COMMENT(n63) This clause and the next clause are important for the protection of the Lessee. The Lessee will not want to lease part of a property having environmental problems for several reasons, including the risk to its employees if the environmental condition imposes a health risk, the financial burden imposed on the Lessor to pay for a potential clean-up, and interference with the use of the property that could occur from the work required to remediate the property. These representations and requirement for an indemnification from the Lessor are one way for the Lessee to protect itself. The other way is for the Lessee to do its own due diligence regarding the property prior to signing the Lease, including obtaining of an environmental report done by professional environmental engineers.

(n64) COMMENT(n64) The Lessee should also be concerned about compliance of the Building with the ADA because this could be a significant cost if not in compliance. In this clause, the financial burden of compliance is imposed on the Lessor with respect to matters relating to laws in effect at the time the Lease commences. Thereafter, Lessee agrees to be responsible if the compliance requirement is due to a change in the law, and affects just the Lessee's Demised Premises as opposed to the Building as a whole.

(n65) COMMENT(n65) This clause is important to the Lessor in particular because it prevents the Lessee from raising issues not covered in the Lease. If there are other contemporaneous documents relating to the Lease, such as a Guaranty from an entity related to the Lessee, reference to that document should be made in this paragraph.

(n66) COMMENT(n66)



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Current Legal Forms for Real Estate
Chapter 23 REAL ESTATE LEASES
Part III. Drafting Guidelines

31-23 Current Legal Forms for Real Estate §§ 23.47 through 23.50

AUTHOR: by Thomas G. Belden

[Reserved]

§§ 23.47 [Reserved]



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Current Legal Forms for Real Estate
Chapter 23 REAL ESTATE LEASES
Part III. Drafting Guidelines

31-23 Current Legal Forms for Real Estate § 23.51

AUTHOR: by Thomas G. Belden

§ 23.51 Commercial Lease: Drafting Checklist

A. Parties ☐

1. Identity of landlord ☐

a. Name..... ☐

b. Address..... ☐

2. Character of landlord..... ☐

a. Individual..... ☐

(1) Over the age of majority..... ☐

(2) Not incapacitated by mental disease or defect..... ☐

b. Corporation..... ☐

(1) State of incorporation..... ☐

(2) Obtain proof of authority of person executing lease on behalf of

corporation..... ☐

(3) Obtain copy of resolution of corporation's board of directors authorizing lease..... ☐

(4) Obtain any required court or government agency approvals..... ☐

c. Partnership..... ☐

(1) State of formation..... ☐

(2) Obtain proof of authority of partnership representative to act on behalf of all partners..... ☐

(3) Obtain copy of partnership decision authorizing lease..... ☐

(4) Obtain any required court or government agency approvals..... ☐

d. Limited Liability Company..... ☐

(1) State of formation..... ☐

(2) Obtain proof of authority of member to act on behalf of all members.....
☐

(3) Obtain copy of Operating Agreement or member resolution authorizing lease..... ☐

(4) Obtain any required court or government agency approvals..... ☐

e. Fiduciary..... ☐

(1) Obtain proof of appointment..... ☐

(2) Examine order or decree appointing fiduciary and determine scope of authority..... ☐

(3) Examine document (will, trust, etc.) creating appointment..... ☐

(4) Determine whether court order required for lease..... ☐

f. Attorney-in-fact or agent..... ☐

(1) Obtain proof of appointment (certified copy of power of attorney document)..... ☐

(2) Determine whether appointment has been terminated by death, disability, incapacity or revocation (in most states, affidavit of attorney-in-fact denying actual knowledge of termination of power is sufficient)..... ☐

(3) Determine scope and duration of powers, making sure it includes power to lease real property..... ☐

3. Identity of tenant..... ☐

a. Name..... ☐

b. Address..... ☐

4. Character of tenant..... ☐

a. Individual..... ☐

(1) Over the age of majority..... ☐

(2) Not incapacitated by mental disease or defect..... ☐

b. Corporation..... ☐

(1) State of incorporation..... ☐

(2) Obtain proof of authority of person executing lease on behalf of corporation..... ☐

(3) Obtain copy of resolution of corporation's board of directors authorizing lease..... ☐

(4) Obtain any required court or government agency approvals..... ☐

c. Partnership..... ☐

(1) State of formation..... ☐

(2) Obtain proof of authority of partnership representative to act on behalf of all partners..... ☐

(3) Obtain copy of partnership decision authorizing purchase..... ☐

(4) Obtain any required court or government agency approvals..... ☐

d. Limited Liability Company..... ☐

(1) State of formation..... ☐

(2) Obtain proof of authority of member to act on behalf of all members.....
☐

(3) Obtain copy of Operating Agreement or member resolution authorizing lease..... ☐

(4) Obtain any required court or government agency approvals..... ☐

e. Fiduciary..... ☐

(1) Obtain proof of appointment..... ☐

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(3) Examine document (will, trust, etc.) creating appointment..... ☐

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(1) Obtain proof of appointment (certified copy of power of attorney document)..... ☐

(2) Determine whether appointment has been terminated by death, disability, incapacity or revocation (in most states, affidavit of attorney-in-fact denying actual knowledge of termination of power is sufficient)..... ☐

(3) Determine scope and duration of powers, making sure it includes power to lease real property..... ☐

B. Financial reliability of parties..... ☐

1. Obtain references..... ☐

a. Bank with which party has business account..... ☐

b. Regular supplier..... ☐

c. Current landlord or tenant..... ☐

2. Obtain permission to contact references and get credit report on tenant..... ☐

3. Information to be supplied by tenant..... ☐

a. Complete financial statement..... ☐

b. Copies of prior years' tax returns..... ☐

4. Consideration of need for security deposit, letter of credit or personal guaranty of lease obligations by tenant..... ☐

C. Premises..... ☐

1. Identify lease premises in detail..... ☐

a. Specify location by state, county and municipality..... ☐

b. Set forth street address, if one exists..... ☐

c. State lot or unit size (if rent is based on size of space, include exact square footage)..... ☐

d. Specify room, suite or unit number where property is in multi-unit facility (*e.g.*, office building, warehouse complex, shopping center)..... ☐

☐

2. Buildings, structures and other permanent improvements located on premises (*e.g.*, garages, pools, etc.)..... ☐

a. Set forth buildings, structures and permanent improvements included in lease..... ☐

b. Set forth buildings, structures and permanent improvements excluded from lease..... ☐

3. Appurtenances (*e.g.*, common areas, parking lots, garages, easements for ingress and egress, storage space, rest room, meeting rooms, rooftop antenna space, etc.)..... ☐

a. Set forth appurtenances included in lease..... ☐

b. Set forth appurtenances excluded from lease..... ☐

c. Identify appurtenances available to tenant at additional costs..... ☐

(1) Set forth cost of item..... ☐

(2) Set forth procedure to obtain items..... ☐

(3) Set forth conditions for use..... ☐

4. Fixtures and equipment (*e.g.*, HVAC system, lighting fixtures, built-in cabinets, infrastructure for telecommunications services such as bandwidth availability, riser capacity, etc.)..... ☐

a. Set forth fixtures and equipment included in lease..... ☐

b. Set forth fixtures and equipment excluded from lease..... ☐

5. Personal property (*e.g.*, office equipment, furniture, etc.)..... ☐

a. Set forth personal property included in lease..... ☐

b. Set forth personal property excluded from lease..... ☐

c. Identify personal property available to tenant at additional costs..... ☐

- (1) Set forth cost per unit..... ☐
- (2) Set forth procedure to obtain items..... ☐
- (3) Set forth present condition of items..... ☐
- (4) Set forth maintenance, repair and replacement responsibilities..... ☐
- (5) Specify condition in which items are to be returned at end of lease term.....
☐

6. Condition of premises, fixtures and personal property included in lease..... ☐

- a. Specify condition premises, fixtures and personalty will be leased in (*e.g.*, "as is," or "good working order" or "working order")..... ☐
- b. Set forth maintenance, repair and replacement responsibilities..... ☐
- c. Specify condition in which items are to be returned at end of lease term..... ☐

7. Option to expand or contract space..... ☐

- a. Option to lease adjoining or nearby space..... ☐
 - (1) Right of first refusal to lease available space..... ☐
 - (2) Right of first offer to lease available space..... ☐
 - (3) Terms under which expansion space can be leased..... ☐
- b. Restriction surrounding tenants to short-term leases..... ☐
- c. Lease rights of surrounding tenants subject to landlord's right to relocate them..... ☐
- d. Tenant right to abandon part of premises to decrease space..... ☐
 - (1) Specify space to be abandoned..... ☐
 - (2) Time period within which option to abandon must be exercised..... ☐

(3) Formula for rent adjustment..... ☐

D. Tenant improvements or alterations in premises..... ☐

1. Identify initial improvements, alterations or construction necessary to make the leased premises suitable for use by tenant..... ☐

2. Provide for further alterations or improvements desired by tenant during term of lease..... ☐

3. Specify who will pay for such improvements (landlord, tenant, or both) and set forth any limits or caps on amount to be paid..... ☐

a. Construction allowance from landlord..... ☐

b. Requirements for competitive bidding..... ☐

4. Plans, blueprints and specifications..... ☐

a. Specify who will prepare or have plans prepared..... ☐

b. Specify if landlord or tenant must approve plans and what grounds are for disapproval..... ☐

c. Contractor..... ☐

(1) Name contractor who will do work..... ☐

(2) If contractor not named in lease, set forth who will choose contractor and any guidelines for or conditions on choice..... ☐

d. Specify who must obtain necessary governmental permits and approvals..... ☐

e. Specify date when improvements must be completed..... ☐

f. State if tenant must remove improvements at end of lease term and restore premises to their original state..... ☐

5. Protecting landlord from liens for materials and services..... ☐

- a. Tenant covenant not to encumber landlord's title..... ☐
- b. Require landlord's approval of all work in excess of specified amount..... ☐
- c. Require bond for completion of work free of encumbrances..... ☐
- d. Require waivers of liens of materialmen, architects, contractors, etc..... ☐
- e. Require tenant security deposit..... ☐
- f. Landlord right to discharge liens on record for longer than specified period and to add cost of discharge to rent..... ☐

E. Lease price..... ☐

1. Base rent..... ☐

a. Annual rental amount or total amount for lease term..... ☐

b. Periodic payments to be made throughout year (*e.g.*, monthly installments)..... ☐

(1) Amount..... ☐

(2) Frequency of installments..... ☐

(3) When due..... ☐

(4) Grace period for late payment of rent, if any..... ☐

(5) Late fee, if any..... ☐

2. Additional price for fixtures, appurtenances or personal property..... ☐

3. Percentage rent..... ☐

a. Basis for calculation..... ☐

(1) Gross income..... ☐

(2) Adjusted gross receipts..... ☐

(3) Net income..... ☐

(4) Gross sales..... ☐

b. Set forth rate percentage of basis to be paid..... ☐

c. Specify amounts included in or excluded from basis..... ☐

(1) Receipts of tenant's licensees or concessionaires..... ☐

(2) Receipts of other offices or stores owned by tenant resulting from sales at leased premises..... ☐

(3) Sales to tenant's employees..... ☐

(4) Returned items..... ☐

(5) Donated items..... ☐

(6) Interest and credit charges..... ☐

(7) Uncollected credit sales..... ☐

(8) Telephone or catalog sales..... ☐

(9) Off-premises deliveries..... ☐

(10) Sales tax receipts..... ☐

(11) Vending machine proceeds..... ☐

(12) Customer charges for delivery or alterations at cost..... ☐

(13) Internet Sales..... ☐

(14) Other..... ☐

d. Set forth any guaranteed minimum rental..... ☐

e. Reporting by tenant to landlord..... ☐

(1) When reports made..... ☐

(2) How reports made..... ☐

(3) Information required..... ☐

(4) Landlord right to review tenant's books and records..... ☐

(5) Audit by independent public accounting firm..... ☐

4. Security deposit..... ☐

a. Amount..... ☐

b. Date(s) when due..... ☐

c. Form of payment..... ☐

d. Set forth how deposit may or may not be used..... ☐

(1) Encumbrance by tenant..... ☐

(2) Final month's rent..... ☐

(3) Repair of damages..... ☐

(4) Cleaning costs..... ☐

(5) Rent or charges unpaid by tenant..... ☐

(6) Liquidated damages..... ☐

e. Terms for refund..... ☐

f. State whether interest will be paid, the rate, if compounded or adjustable, and who will pay income taxes on such interest..... ☐

5. Additional rent or charges..... ☐

a. Common area charges for cost of maintaining and repairing common areas..... ☐

b. Maintenance costs..... ☐

c. Water and sewer charges..... ☐

d. Utilities..... ☐

e. Garbage disposal..... ☐

f. Janitorial services..... ☐

g. Insurance..... ☐

h. Real estate taxes..... ☐

i. Assessments..... ☐

j. Other operating expenses..... ☐

k. Retail facilities and shopping malls..... ☐

(1) Advertising charges..... ☐

(2) Merchants' association dues..... ☐

l. Expenses arising from default or litigation..... ☐

6. Rent abatement to induce tenant to enter into lease..... ☐

7. Payment of moving costs or lease termination costs of tenant to induce tenant to enter into lease..... ☐

F. Utilities..... ☐

1. Types of utilities..... ☐

a. Water..... ☐

b. Sewers..... ☐

c. Gas..... ☐

d. Electricity..... ☐

e. Fuel oil..... ☐

f. Heat..... ☐

g. Air conditioning..... ☐

h. Telephone..... ☐

i. Internet Access..... ☐

2. Charges..... ☐

a. Specify who will pay utility charges..... ☐

b. Specify how charges will be determined..... ☐

(1) Separate meters..... ☐

(2) Proportional charges to tenants in multi-unit building with single meter.....

☐

G. Real property taxes and special assessments..... ☐

1. Tenant payment of ratable share of taxes..... ☐

2. Tax increases over a base year..... ☐

3. Responsibility for special assessments..... ☐

a. Assessments existing before lease for completed improvements..... ☐

b. Assessments made during lease term..... ☐

4. Right to protest assessment and delay tax payment while protest pending..... ☐

5. Tenants' right to require landlord to protest assessment..... ☐

H. Lease term..... ☐

1. Commencement date..... ☐

a. Date certain..... ☐

b. Period of time after triggering event..... ☐

2. Consequence of failure to deliver possession on commencement date..... ☐

a. Rent abatement..... ☐

b. Right to cancel..... ☐

3. Termination date..... ☐

4. Renewal or extension..... ☐

a. Set forth tenant's right to renew or extend, if any..... ☐

b. Set forth any conditions to be met prior to renewal or extension (*e.g.*, tenant may not be in default)..... ☐

c. When and how tenant must give notice to landlord that tenant is exercising the right to renew or extend..... ☐

d. Changes in lease terms for renewal or extension period..... ☐

(1) Amount of rent..... ☐

(a) Specify exact amount..... ☐

(b) Amount based on Consumer Price Index or other index (specify if cap on the

increase, if any)..... ☐

(2) Length of renewal or extension term..... ☐

(3) Provisions for additional renewals or extensions, if any..... ☐

(4) Provisions for improvements, increase or decrease in space..... ☐

(5) Other changes in terms of lease..... ☐

I. Option to purchase, rights of first offer or refusal..... ☐

1. Purchase option..... ☐

a. Purchase price..... ☐

(1) Specify exact amount..... ☐

(2) Fair market value, with provision for appraisal..... ☐

b. Period of time when option exercisable..... ☐

c. When and how tenant must give notice to landlord that tenant is exercising right to purchase..... ☐

d. Terms of contract of sale..... ☐

e. Closing date for sale..... ☐

f. Termination of option by landlord..... ☐

2. Right of first refusal or right of first offer to purchase leased premises..... ☐

a. Conditions for triggering activation of right..... ☐

(1) Right of first refusal third party's bona fide offer to purchase premises.....
☐

(2) Right of first offer landlord's decision to offer premises for sale to third parties..... ☐

- b. Notice to tenant of triggering event..... ☐
- c. Period of time to exercise right..... ☐
- d. How right to be exercised..... ☐
- e. Determination of price..... ☐
- f. Termination of right..... ☐
- g. Contingencies acceptable to tenant in contract of sale..... ☐
- h. Closing date..... ☐

J. Right to assign or sublet..... ☐

- 1. Procedure to be followed by tenant..... ☐
 - a. Notice to landlord..... ☐
 - b. Landlord's written consent..... ☐
- 2. Limitations on right to assign or sublet..... ☐
- 3. Rights to assign or sublease without landlord consent to affiliated entity..... ☐
- 4. Rights to assign without landlord consent to entity acquiring substantially all assets of tenant, or entering into merger or other reorganization with tenant..... ☐

K. Limitations on use of property..... ☐

- 1. Commercial purposes only..... ☐
 - a. Specify tenant's business..... ☐
 - b. Specify permitted activities allied to main enterprise..... ☐
- 2. Noncompetition (exclusive use) provisions..... ☐

a. Landlord restricted from entering into lease with another tenant for specified use..... ☐

b. Landlord covenants not to permit particular use in another space in landlord's facility..... ☐

c. Tenant granted exclusive right to specified use in landlord's facility..... ☐

d. Tenant granted right to approve other tenants or control quality of goods sold by other tenants..... ☐

3. Radius restrictions..... ☐

a. Tenant prohibited from operating similar business within specified distance from premises..... ☐

b. Income or sales from business operated by tenant within specified distance from premises to be included in determination of percentage rent..... ☐

4. Use of natural resources..... ☐

a. Exterior open space..... ☐

b. Recreational use of vacant land..... ☐

c. Water sources other than municipal water..... ☐

(1) Site from which water to be drawn..... ☐

(a) Well..... ☐

(b) Lake or pond..... ☐

(c) River, stream or brook..... ☐

(d) Marsh..... ☐

(e) Other..... ☐

(2) Volume of water to be drawn per day..... ☐

(3) Release of water after use..... ☐

(4) Record keeping..... ☐

(5) Tenant to obtain governmental approvals..... ☐

d. Energy sources (*e.g.*, natural gas, coal, oil, etc.) other than commercial sources..... ☐

(1) Additional consideration for use of nonrenewable resources..... ☐

(2) Site from which resources to be taken..... ☐

(3) Limitations on volume of use..... ☐

(4) Location, storage and removal of equipment..... ☐

(5) Record keeping..... ☐

(6) Tenant to obtain governmental approvals..... ☐

e. Harvesting resources (*e.g.*, shale, timber, iron, silver, fish, game, etc.)..... ☐

(1) Royalties to landlord..... ☐

(2) Site from which resources to be taken..... ☐

(3) Method for measuring volume harvested..... ☐

(4) Location, storage and removal of equipment..... ☐

(5) Reclamation of land..... ☐

(6) Record keeping..... ☐

(7) Tenant to obtain governmental approvals..... ☐

5. Other limitations on uses..... ☐

- a. Hazardous uses..... ☐
- (1) Pesticides and insecticides..... ☐
- (2) Cleaning agents..... ☐
- (3) Storage, use, production or disposal of hazardous substances..... ☐
- (a) Tenant required to keep records..... ☐
- (b) Landlord right to review records and audit for compliance..... ☐
- b. Uses that increase insurance rates..... ☐
- c. Uses that impair landlord's title..... ☐
- d. Uses that adversely affect property value..... ☐
- e. Uses that may disturb other tenants..... ☐
- f. Uses that violated certificate of occupancy..... ☐
- g. Illegal uses..... ☐
- h. Nuisances..... ☐
- L. Maintenance and repair obligations..... ☐
1. Maintenance..... ☐
- a. Set forth who has duty to maintain premises..... ☐
- (1) Cleaning and janitorial services..... ☐
- (2) Painting..... ☐
- (3) Window washing..... ☐
- (4) Trash removal..... ☐

☐

(6) Snow removal..... ☐

b. Tenant duty to maintain premises in good repair..... ☐

c. Landlord duty to maintain common areas..... ☐

2. Repairs..... ☐

a. Set forth who has duty to perform repairs, if any..... ☐

(1) Minor nonstructural repairs..... ☐

(2) Minor structural repairs..... ☐

(3) Major nonstructural repairs..... ☐

(4) Major structural repairs..... ☐

b. Landlord duty to repair common areas..... ☐

c. Notice requirement..... ☐

(1) Notice to other party that repairs necessary..... ☐

(2) Notice that repairs being undertaken..... ☐

d. Right of access to make repairs, emergencies..... ☐

M. Insurance..... ☐

1. Types..... ☐

a. Fire..... ☐

b. Boiler..... ☐

c. Other casualty..... ☐

d. Liability..... ☐

e. Plate glass replacement..... ☐

2. Set forth who has responsibility for obtaining insurance and who is insured party..... ☐

a. Landlord..... ☐

b. Tenant..... ☐

c. Both..... ☐

3. Amount of coverage required..... ☐

4. Set forth who is designated payee of policy..... ☐

5. State rights of mortgagee, if any..... ☐

6. State whether landlord has right to approve tenant's insurance company or policy..... ☐

7. Waiver of subrogation rights..... ☐

8. Require notice prior to cancellation of policy..... ☐

9. Require proof of coverage..... ☐

N. Damage by fire or other casualty..... ☐

1. Premises unfit for use..... ☐

a. Procedure for determining unfitness..... ☐

b. Abatement of rent until repairs made..... ☐

2. Specify who is responsible for repairs or rebuilding..... ☐

a. State when work must begin and end..... ☐

b. Describe type, size cost of repairs or rebuilding required..... ☐

3. Termination of lease..... ☐

a. State whether landlord or tenant (or both) are entitled to terminate lease (and under what conditions)..... ☐

b. Notice of intention to terminate ☐

4. Tenant required to notify landlord of occurrence of casualty..... ☐

5. Landlord right to inspect damage..... ☐

6. Set forth disposition of insurance proceeds in event of damage or destruction (make sure loan documents allow for use of insurance proceeds)..... ☐

7. Dispute resolution mechanism..... ☐

a. Independent adjuster as arbitrator..... ☐

b. Binding determination..... ☐

O. Eminent domain..... ☐

1. Specify who is entitled to proceeds of award and if both landlord and tenant specify how allocated..... ☐

2. Restoration of portion of premises not taken..... ☐

a. Use of condemnation award for restoration..... ☐

b. Expenses exceeding award..... ☐

3. Set forth procedure for determining whether taking terminates lease..... ☐

a. Entire or partial taking..... ☐

b. Effect of taking on leased premises..... ☐

4. Rent abatement for partial taking..... ☐

P. Contingencies..... ☐

1. General provisions applicable to all contingencies..... ☐

a. Specify who must obtain satisfaction of contingency and what that party must do..... ☐

b. Set time limit for resolving contingency..... ☐

c. Set standard for determining whether contingency is satisfied..... ☐

d. Specify whether landlord, tenant or both have right to waive satisfaction of contingency..... ☐

e. Specify who will pay cost of testing..... ☐

2. Governmental approvals..... ☐

a. Certificate of occupancy..... ☐

b. Certificate of compliance with local ordinances, such as building, housing, safety, environmental, or fire ordinances..... ☐

c. Zoning..... ☐

d. Emission of substances into air or water..... ☐

e. Waste disposal..... ☐

f. Business operating permits..... ☐

g. Sign approval..... ☐

3. Testing of well water quality..... ☐

4. Testing of well water quantity..... ☐

5. Septic or other on-site sewage disposal system..... ☐

a. Condition (*e.g.*, "good working order")..... ☐

b. Capacity..... ☐

c. Availability of sewer connections..... ☐

6. Radon gas inspection..... ☐

7. Asbestos inspection..... ☐

8. Urea formaldehyde insulation..... ☐

9. Inspection for lead pipes..... ☐

10. Inspection for lead paint and dust..... ☐

11. Environmental site assessment..... ☐

Q. Termination of lease..... ☐

1. Condition of premises

a. Tenant not responsible for repairs during lease term to return premises in "broom clean" condition..... ☐

b. Tenant responsible for repairs during lease term to return premises in as good condition as at beginning of lease, reasonable wear and tear excepted..... ☐

c. Tenant to have premises professionally cleaned..... ☐

d. Personal property..... ☐

(1) Tenant to remove all..... ☐

(2) Landlord to inspect premises upon termination and determine what property tenant must remove..... ☐

e. Trade fixtures..... ☐

(1) Tenant right to remove..... ☐

(2) Tenant to repair damage caused by removal..... ☐

2. Tenant to vacate on or before termination date..... ☐

a. Penalty for holding over..... ☐

b. Return of keys..... ☐

R. Defaults and remedies..... ☐

1. Default by tenant..... ☐

a. Nature of default..... ☐

(1) Failure to pay rent..... ☐

(2) Enumerate events of default in other terms of lease..... ☐

b. State whether landlord required to give notice of default to tenant..... ☐

(1) Describe contents of notice..... ☐

(2) Specify how, where and to whom notice to be delivered..... ☐

(3) Proof of service of notice..... ☐

c. Opportunity to cure default, setting forth amount of time given to cure specified defaults.....
☐

d. Landlord right to make advances on tenant's default in payment of taxes, insurance, etc.....
☐

e. Effect of default..... ☐

(1) Automatic expiration of lease..... ☐

(2) Landlord right to terminate lease..... ☐

f. State whether acceptance of rent or waiver of any breach waives such breach or any succeeding

breaches..... ☐

g. Right to evict..... ☐

(1) Summary eviction..... ☐

(2) Self-help..... ☐

h. Measure of damages payable to landlord..... ☐

i. Tenant's liability for rent payments preserved beyond premature termination date following default..... ☐

(1) Tenant payments required over remaining lease term..... ☐

(2) Acceleration of rent..... ☐

j. State whether landlord has a lien for rent..... ☐

(1) Security deposit..... ☐

(2) Tenant's personal property..... ☐

k. Reimbursement of expenses arising from default or litigation..... ☐

(1) Collection of rent..... ☐

(2) Expenses to cure other defaults..... ☐

(3) Legal expenses..... ☐

(4) Expenses to recover possession..... ☐

l. Reletting of premises following surrender or eviction..... ☐

m. State whether landlord's remedies are cumulative..... ☐

2. Default by landlord..... ☐

a. Tenant right to cure landlord's defaults..... ☐

b. Tenant option to terminate..... ☐

c. Ouster of tenant by superior title..... ☐

d. Damages..... ☐

(1) Reimbursement of amounts spent to cure default..... ☐

(2) Application of expenditures against future rentals..... ☐

(3) Maintenance of separate action for reimbursements..... ☐

(4) Liability limited to abatement of rent..... ☐

S. Other provisions..... ☐

1. Set forth required days and hours of business operation by tenant..... ☐

2. Signs and advertising..... ☐

a. Location of sign..... ☐

b. Size limitations..... ☐

c. Style and content limitations..... ☐

d. Permits required..... ☐

e. Responsibility for installation, maintenance and repair of signs..... ☐

3. Compliance with governmental regulations..... ☐

a. Set forth who is responsible for changes or alterations necessary to conform to governmental laws and regulations regarding premises and business conducted there..... ☐

b. Set forth who is responsible for compliance with Americans with Disabilities

Act..... ☐

4. Tenant guaranteed possession of lease property throughout lease term absent default.....
☐

5. Landlord's right to show space to prospective tenants..... ☐

6. Broker..... ☐

a. Name brokers involved in lease transaction and specify who will pay
commissions..... ☐

b. Indemnification against brokerage claims..... ☐

7. Estoppel certificate executed by tenant upon request..... ☐

8. Landlord released from future lease obligations upon transfer of property being leased.....
☐

T. Miscellaneous clauses..... ☐

1. Non-waiver provision..... ☐

2. Select state law which will apply to transaction..... ☐

3. Illegal portions of lease deemed excised..... ☐

4. Merger clause providing that lease contains entire agreement between parties..... ☐

5. Binding effect of lease on parties and their successors and assigns..... ☐

6. All amendments to lease to be in writing..... ☐

7. Provision for the giving of notice between the parties..... ☐

8. Subordination to any mortgages and nondisturbance agreement for the tenant..... ☐

9. Dispute resolution mechanism..... ☐

10. Right to record the lease -- memorandum of lease..... ☐

U. Execution of the lease..... ☐

1. Signed by parties or their representatives..... ☐

2. Dated..... ☐

3. Witnesses if desired or required..... ☐

4. Acknowledgment if desired or required..... ☐

5. Multiple originals..... ☐

6. Execution in counterparts..... ☐

V. Attachments..... ☐

1. Floor plan..... ☐

2. Work letter..... ☐

3. Rules and regulations..... ☐

4. Legal description of land..... ☐

5. Guaranty of lease -- form..... ☐

6. Memorandum of lease -- form..... ☐

Legal Topics:

For related research and practice materials, see the following legal topics:

Real Property Law
 Fixtures & Improvements
 Tenant & Trade Fixtures
 Real Property Law
 Landlord & Tenant
 General Overview
 Real Property Law
 Landlord & Tenant
 Landlord's Remedies & Rights
 General Overview
 Real Property Law
 Landlord & Tenant
 Landlord's Remedies & Rights
 Eviction Actions
 Self-Help Remedies
 Real Property Law
 Landlord & Tenant
 Landlord's Remedies & Rights
 Power to Reenter & Terminate
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 Security Deposits
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 General Overview
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 Landlord & Tenant
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 Lease Provisions
 Real Property Law
 Landlord & Tenant
 Tenant's Remedies & Rights
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 Landlord & Tenant
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 Remedies
 Rent Abatement
 Real Property Law
 Ownership & Transfer
 Business & Corporate Entities



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Current Legal Forms for Real Estate

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Current Legal Forms for Real Estate

Chapter 23 REAL ESTATE LEASES

Part IV. Forms

A. COMPLETE LEASES AND RELATED AGREEMENTS

31-23 Current Legal Forms for Real Estate FORM 23.01

AUTHOR: by Thomas G. Belden

FORM 23.01 Option for ground lease

COMMENT

An option to lease a parcel of land often represents the first step in the development of a commercial project. Generally, it is during the option period that the developer will prepare feasibility studies, environmental reports, surveys and preliminary plans and specifications, and obtain preliminary cost estimates, commitments for financing, and indications of interest from major tenants.

Lease annexed to option:

This form follows the better practice of having the complete lease agreed upon in advance and annexed to the option as an exhibit. Occasionally, counsel may find an option to lease which contains specific provisions as to the rental and the term of lease and, ostensibly, the other provisions are covered by a clause to the effect that "the lease will also provide for such other terms and conditions as are generally contained in leases of the same nature." However, the developer soon finds that he is unable to obtain anything more than preliminary indications of interest from lenders and prospective tenants, due to the absence of a definitive lease. It is at this point, when considerable time and money may already have been expended, that the developer may discover there can be an honest difference of opinion as to what the "other provisions" of the lease should be and he may find that he must renegotiate what he had assumed to be agreed upon.

FORM

For and in consideration of \$500, receipt of which is hereby acknowledged, and other valuable consideration, Stone Centers, Inc. (the "Optionors"), grants to Castle Co., a Florida corporation, its successors or assigns (the "Optionee"),

An Option to lease the following described property, together with all the buildings and improvements thereon and all rights and appurtenances thereunto appertaining, more particularly described as follows:

[Insert legal description from title policy]

On the following terms and conditions:

1. *Lease appended; conflicting provisions.* The parties shall use the Lease form, marked Exhibit A attached to and made a part of this Option, as the Lease to be executed at closing. However, the terms and conditions provided below shall be incorporated in the Lease. If there is any conflict between the provisions of the Lease form and those of this Option, the latter provisions shall prevail.

2. *Notice; exercise; termination.* The Optionee must give written notice to the Optionors of its election to lease the premises described below not later than 6 p.m., [date]. If the Optionee fails to give such notice, this Option shall terminate.

3. *Suitability studies.* The Optionors will permit the Optionee, at any time after this option agreement is executed and either before or after its exercise, to make engineering studies, including soil tests and borings and estimated cost of grading, and environmental studies including a Phase I environmental report, on the premises to determine the suitability of the premises for the Optionee's proposed use.

4. *Zoning contingency.* If the premises are not zoned so as to permit their proposed use by the Optionee for the construction and operation of an office building, the Optionors shall, at their expense, secure the necessary zoning as soon as possible. If proceedings to obtain a change in zoning have been commenced but not completed by the date specified as the last date for exercising this Option, the time for giving notice of election to lease hereunder shall be extended to a date two weeks after the Optionee has received notice from the Optionors that they have obtained the proper zoning variance or exception, but in no event shall the option expire later than [date]. If the zoning change is finally denied, this Option shall terminate and the Optionors shall return to the Optionee all monies paid to them.

5. *Delivery of possession.* Possession will be given upon delivery and execution of the Lease, and Optionors will cause any tenants in possession to vacate the premises prior to such time.

6. *Taxes.* Real estate taxes, whether or not then due or payable, shall be prorated to the date of closing. The Optionors will pay all assessments or installments thereof which become due prior to the execution and delivery of the Lease.

7. *Water; sewers.* This option is conditioned upon the Optionee being able to obtain an 8' Water Service to the Property to sustain a Sprinkler System and Permits to hook up to the Public Sewer System.

8. *Title policy; closing.* The Optionee shall have 30 days after the giving of notice of its election to lease the subject premises in which to secure a leasehold policy of title insurance. At such time the parties will proceed with the closing and the payment of the first rental.

9. *Notices.* Notice given hereunder must be in writing, and may be served personally, by mail or by a nationally recognized overnight courier. The time of service shall be the date of actual delivery to the address personally or the time of deposit in the mail, postage prepaid, directed to the last known address of the party to be served. Notice shall be directed to the Optionors at the office of _____ and to the Optionee at _____ or such other address as they may hereafter designate.

10. *Binding effect.* The provisions of this Option shall be binding upon and inure to the benefit of both parties and their respective heirs, assigns, executors, administrators, and successors.

11. *Non-waiver.* No delay or failure by either party to exercise any right under this Option, and no partial or single exercise of that right, shall constitute a waiver of that or any other right, unless otherwise expressly provided herein.

12. *Headings.* Headings in this Option are for convenience only and shall not be used to interpret or construe its provisions.

13. *Governing law.* This Option shall be construed in accordance with and governed by the laws of the State of Florida.

14. *Counterparts.* This Option may be executed in two or more counterparts, each of which shall be deemed an original but all of which together shall constitute one and the same instrument.

15. *Time of essence.* Time is expressly declared to be of the essence of this Option.

16. *Entire agreement.* This Option supersedes all agreements previously made between the parties relating to its subject matter. There are no other understandings or agreements between them.

In witness whereof the parties have signed this Option on this [date].

Optionors

Optionee

Witnesses:

[Acknowledgment]

[Exhibit A: Lease Form]



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Current Legal Forms for Real Estate
Chapter 23 REAL ESTATE LEASES

Part IV. Forms

A. COMPLETE LEASES AND RELATED AGREEMENTS

31-23 Current Legal Forms for Real Estate FORM 23.02

AUTHOR: by Thomas G. Belden

FORM 23.02 Commercial lease--tenant oriented clauses--retail use

COMMENT

The form of lease illustrated here is a commercial lease for retail use by the tenant. It contains many clauses which benefit or protect the tenant's interests. Several of these clauses may be useful in other types of forms of leases on behalf of the tenant. For example, the tenant, who is required to pay real estate taxes (§§ 3.2, 29.1(1)), is permitted to contest the amount of tax (§ 6.1), and is expressly entitled to any refund (§ 6.2). The tenant is permitted to provide the required insurance coverage under blanket policies, which may also cover other tenant locations (§ 9.2). In addition, the landlord agrees to mitigate damages in the event of an eviction of the tenant. This may obligate the landlord to relet the premises, and thereby possibly reduce the tenant's liability for a deficiency in rent. The tenant's obligation for a rent deficiency is limited to basic rent, and specifically excludes the percentage rent under this lease (§ 24.2). Because of the widespread use of selling over the internet, the percentage rental clause must cover whether sales over the internet are included in the definition of gross sales from the leased premises. Because internet sales typically do not involve any contact with the leased premises, and the goods purchased are not located at the premises, internet sales are not included as part of gross sales (§ 3.5).

Future changes by tenant:

This lease contains several clauses which allow the tenant to surrender the premises or to move to another location. These provisions are aimed at allowing flexibility in future business planning. For example, the lessee is expressly permitted to assign or sublet the premises to a business which will use the property for the same purpose as the tenant (§ 12.1). A strongly pro-tenant clause in this lease allows the tenant to terminate the lease if, after a specified period, the use is

uneconomical (§ 19.1). However, if the lease is terminated on this basis during the initial term, the tenant must offer to purchase the property from the landlord for a specified price (§ 12.2). During the initial term, however, the tenant is permitted to change locations, in effect, by exchanging property at another location with the landlord for the leased property (§ 20.1). These clauses give the tenant much future planning leeway. Future planning is anticipated by the required, but unspecified, operating hours, which cannot be less than those of similar businesses in the area, but may be as long as 24 hours per day (§ 11.2).

Purchase options:

This lease gives the tenant the opportunity to purchase the leased property from the landlord. The lease contains a purchase option (§ 17.1), and a right of first refusal (§ 18.1). On the last day of the initial term or any extended term, the lessee can purchase the property for its fair market value, if prior notice is given (§ 17.1). Fair market value, if disputed, is to be determined by appraisers (§ 29.1(i)). The right of first refusal permits the tenant the option to purchase on substantially the same terms as a bona fide offer (§ 18.1).

FORM

Table of Contents

Article	Heading
1.	Demised Property
2.	Term
3.	Rent, Percentage Rent
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5.	Covenant Against Liens
6.	Permitted Contests
7.	Maintenance, Alterations and Additions
8.	Indemnification
9.	Insurance
10.	Condemnation and Casualty
11.	Use, Operation of Business
12.	Assignment, Subletting
13.	Right to Cure Defaults
14.	Subordination and Nondisturbance
15.	Lessee's Trade Fixtures and Equipment
16.	Surrender
17.	Purchase Option
18.	Right of First Refusal
19.	Termination for Uneconomic Use
20.	Substitution of a New Lease

- 21. Procedure for Purchase
- 22. Short Form Lease
- 23. Certificates
- 24. Events of Default, Remedies
- 25. Notices
- 26. Amendments
- 27. Lessor's Negative Covenants
- 28. Miscellaneous
- 29. Definitions

This lease agreement is executed this _____ day of [date], by and between 1995 Main Street Corp. ("Lessor"), whose address is 1995 Main Street, Los Angeles, California 90000, and Greenwood Foods, Inc. ("Lessee"), whose address is 1000 State Street, San Francisco, California 90000.

Witnesseth:

Article 1 Demised Property

1.1 Lessor hereby leases to Lessee and Lessee hereby leases from Lessor the Property in San Francisco, California, more particularly described in the Exhibit "A" attached hereto and made a part hereof. The Property has been improved with a restaurant building, which is included in this Lease as part of the Property. Lessee has inspected the Property and by the execution of this Lease accepts it in its present condition.

Article 2 Term

2.1 The term of this Lease shall begin on the Commencement Date and, unless terminated or extended, shall end on the Termination Date (the "Basic Term"). Lessee may extend the term for up to two consecutive periods of five years each ("Extended Terms"). The term shall automatically be extended for each Extended Term unless Lessee shall notify Lessor of its intention to terminate this Lease at least three months prior to the expiration of the then existing term.

Article 3 Rent, Percentage Rent

3.1. *Rent.* Lessee shall pay the minimum rent and percentage rent to Lessor, during the term of this Lease, in the amounts and at the times prescribed below in lawful money of the United States of America, at Lessor's address for notice hereunder or otherwise as Lessor may designate.

3.2. *Impositions.* Lessee will also pay all Impositions and all charges for utility, communications, and other services rendered or used on or about the Property during the term, before any interest or penalty may be added; and will furnish to Lessor, upon request, satisfactory proof evidencing such payment. If Lessee may legally pay any Imposition or other charge in installments and elects to do so, it shall only be liable for those installments coming due within the term. Lessor shall be responsible for all installments becoming due after the expiration of this Lease.

3.3. *Basic rent.* Lessee covenants and agrees to pay Lessor, as rent for the Property during the Basic Term, the minimum rent of:

--Dollars per annum (herein the "Basic Rent"), in equal monthly payments, in arrears, on the fifteenth business day of

each month (herein the "Rent Payment Dates"), each in the sum of

--Dollars, commencing on the fifteenth day of the month next succeeding the Commencement Date. However, on the Commencement Date Lessee shall pay to Lessor a sum equal to one month's Basic Rent, to be applied against the final payment of Basic Rent due thereunder.

3.4. *Percentage rent.* In addition to the payment of the Basic Rent, Lessee shall pay to Lessor monthly in the manner, upon the conditions, and at the times hereinafter set forth, during the Basic Term of this Lease and each Extended Term additional rent. The additional rent shall equal 5 percent of the annual "gross sales," as hereinafter defined, from all business conducted on the Property by or under Lessee during the term of this Lease, less (a) the monthly installment of the Basic Rent, (b) the aggregate amount of all general real estate taxes and special assessments on the Property paid by Lessee and (c) the aggregate amount of all premiums paid by Lessee in connection with insurance maintained pursuant to Article 9. Amounts deducted from the sum representing 5% of gross sales pursuant to (b) and (c) above may be deducted either in the Lease Year in which such amounts are paid by Lessee or in which they accrue according to Lessee's election.

3.5. *Gross sales.* The term "gross sales" as used herein shall (subject to the exceptions and authorized deductions hereinafter set forth) mean the gross amount received for everything sold upon or from the Property, either for cash or credit, with the full amount of credit sales being reported as gross sales in the month in which said credit sales are made. The term "gross sales" as used herein shall not include the following: (i) commissions or location rentals received from vending machines or coin operated devices, provided they only constitute an incidental portion of Lessee's business; (ii) the amount of sales or excise taxes collected from customers; (iii) receipts from the sales of meals to the restaurant's employees on the Property, in the course of their employment, provided such sales are registered and recorded separately from other sales; (iv) any service charge made, collected and turned over to employees in lieu of tips or gratuities from patrons; (v) the proceeds of the sale of any franchise or joint venture interest in the restaurant on the Property, and all fees, charges or rentals charged to or received from any such franchisee or joint venturer; (vi) the proceeds of the sale of any of Lessee's trade fixtures or restaurant equipment used on the Property; (vii) the value of any promotional meals; (viii) service charges or commissions paid to any issuer of credit cards accepted by Lessee in lieu of cash; (ix) sales and/or exchanges made to or with other restaurants owned or controlled by Guarantor; and (x) sales made over the internet, unless the goods purchased are purchased directly from the Property.

3.6. *Statement.* On each Rent Payment Date, Lessee shall pay to Lessor any additional rent due hereunder, and shall concurrently therewith submit to lessor a statement of Lessee's gross sales during the preceding month. The statement shall be certified to be correct by a representative of Lessee or Guarantor.

3.7. *Annual adjustment.* Within 30 days after the close of each Lease Year, Lessee shall pay to Lessor any additional rent due hereunder, and shall concurrently submit to Lessor a statement of Lessee's gross sales during the preceding Lease Year. The statement shall be certified to be correct by a Representative of Lessee or Guarantor. If the aggregate percentage rent paid to Lessor exceeds the amount actually payable by Lessee, the excess amount shall be credited against rent thereafter becoming due.

3.8. *Audit.* Lessor may, by giving written demand within 60 days after the end of each Lease Year, and at Lessor's sole expense, have Lessee's records of gross sales for the period inspected at the Lessee's offices by an impartial, reputable licensed accountant of Lessor's choice. If such audit discloses an error of 5% or more in Lessee's monthly statements of gross sales, as adjusted, Lessee shall bear the costs of inspection. Lessor's failure to make written demand shall constitute a waiver of its rights for that Lease Year. Lessor shall be deemed to have accepted each annual statement as correct unless, within 30 days of receipt thereof, it notifies Lessee of any objection.

3.9. *Business records.* Lessee shall, at all times during the terms, keep in a manner consistent with good accounting practice accurate and complete records of all business transactions made in, on, or from the Property.

3.10. *Confidence.* Lessor shall hold in confidence all sales figures and other financial data or information relating to Lessee's operations obtained from Lessee or upon inspection and audit of Lessee's books and records.

3.11. *No representations.* Lessee makes no representation or warranty to Lessor as to the gross sales to be made from the Property.

Article 4 Compliance with Requirements Including Environmental

4.1. Lessee will promptly procure, maintain and comply with all permits, licenses and other authorizations required for the use of the Property as a restaurant and for the lawful operation, maintenance, and repair of the Property or any part thereof. Lessee will not do any act or thing which constitutes a public or private nuisance. Lessor will join, if necessary, in the application for any permit or authorization with respect to any Legal Requirements. In connection with its use of the Property, Lessee shall comply with all applicable governmental laws, rules and regulations, federal, state and local, including those relating to environmental matters.

Article 5 Covenant against Liens

5.1. *Liens of Lessee.* If because of any act or omission of Lessee, any mechanic's lien or other lien, charge, or order for the payment of money is filed against any portion of the Property, Lessee shall, at its expense, cause the lien or liens to be discharged of record or bonded within 90 days after it receives written notice from Lessor of their filing, unless Lessee contests their validity in accordance with Section 6.1.

5.2. *Removal of liens.* If Lessee fails to cause the liens to be discharged of record or bonded within the required 90-day period (unless it contests their validity as provided above) or to satisfy them within 60 days after any final (nonappealable) judgment in favor of the lien holders, Lessor may cause the liens to be discharged. All payments by Lessor to have liens discharged shall constitute additional Basic Rent payable to it by Lessee.

5.3. *Liens of Lessor.* If, because of any act or omission of Lessor, any lien, charge, or order for the payment of money is filed against the Property, Lessor shall, at its expense, cause the lien or liens to be discharged of record or bonded within 90 days after it receives written notice from Lessee of their filing. In that event, Lessor shall indemnify and save harmless Lessee against and from all costs, liabilities, suits, penalties, claims, and demands. If Lessor fails to cause the liens to be discharged or bonded within the required 90-day period, or if before that period expires Lessee's quiet enjoyment of the Property is affected or threatened as a result thereof, Lessee may cause the liens to be discharged. All payments by Lessee may be deducted from subsequent installments of rent payable under this Lease.

Article 6 Permitted Contests

6.1. *Contest proceedings.* Lessee may contest by appropriate proceedings, the amount, validity, or application of any Imposition, Legal Requirement, or any lien arising therefrom, provided that: (a) such proceedings suspend the collection thereof; (b) no part of the Property or of any rent would be subject to loss, sale, or forfeiture before determination of any contest; (c) Lessor would not be subject to any criminal liability for failure to pay; (d) such proceedings do not affect the payment of rent hereunder or prevent Lessee from using the Property for its intended purposes; and (f) Lessee notifies Lessor of any such proceedings at which the amount in contest exceeds \$25,000 within 20 days after the commencement thereof, and describes such proceedings in reasonable detail. Lessee will conduct all such contests in good faith and with due diligence and will, promptly after the determination of such contest, pay and discharge all amounts determined to be payable therein.

6.2. *Refunds.* All refunds or rebates of Impositions paid by Lessee shall belong to Lessee. All refunds received by Lessor shall be deemed trust funds and as such shall be received by it in trust and paid to Lessee forthwith. Lessor shall,

at Lessee's request, sign all receipts which may be necessary to secure the payment of any refund or rebate, and shall pay over to Lessee all refunds or rebates received by it.

Article 7 Maintenance, Alterations, and Additions

7.1. *Maintenance.* Lessee shall keep the Property in good order and condition (except for ordinary wear and tear or damage caused by casualty or a Taking) and shall make all repairs and take all other action necessary or appropriate to keep and maintain the Property in good order and condition. Lessor will not be liable for any labor, services, or materials furnished or to be furnished to Lessee, or to anyone holding the Property or any part thereof through or under Lessee. No mechanics' or other liens for any such labor or materials shall attach to or affect the interest of Lessor in and to the Property.

7.2. *Alterations and additions.* If there is no continuing Event of Default, Lessee may make additions or improvements to or alterations of the Property. All maintenance and repair, and each such addition, improvement, or alteration (i) must not, individually or in the aggregate, substantially lessen the Fair Market Value of the Property or materially affect the Property's usefulness in Lessee's business, (ii) shall be completed expeditiously in a good and workmanlike manner, and in compliance with all Legal Requirements (including without limitation, the Americans with Disabilities Act of 1990 ("ADA") and all regulations issued thereunder) and all Insurance Requirements, and (iii) shall become part of the Property and subject to this Lease.

7.3. *Replacements.* Lessee may install or place or reinstall or replace upon and, if there is no continuing Event of Default, remove from the Property any trade fixtures, signs, machinery, and equipment. Such trade fixtures, signs, machinery, and equipment shall not become the property of Lessor. However, replacements of Lessor's trade fixtures, machinery, and equipment shall be its property.

Article 8 Indemnification

8.1. Lessee hereby indemnifies, and shall protect and hold Lessor harmless from and against all liabilities, losses, claims, demands, costs, expenses, and judgments of any nature arising, or alleged to arise, from or in connection with the following: (a) any injury to, or the death of, any person or loss or damage to property on or about the Property or any adjoining property arising from or connected with the Lessee's use of the Property during the term; (b) performance of any labor or services or the furnishing of any materials or other property in respect of the Property or any part thereof by or at the Lessee's request of Lessee; (c) any contest permitted by Article 6. Lessee will resist and defend any action, suit or proceeding brought against Lessor by reason of any such occurrence by counsel designated by Lessee.

Article 9 Insurance

9.1. *Insurance coverage.* Lessee will maintain with insurers authorized to do business in the state in which the Property is located and which are well rated by any recognized national rating organization:

(a) fire insurance and insurance with respect to risks from time to time included under the standard extended coverage endorsement, including vandalism and malicious mischief, in amounts sufficient to prevent Lessor and Lessee from becoming co-insurers of any loss, but in any event not less than the then Full Insurable Value of the Property as determined from time to time (but not less often than once every three years) by the insurer or insurers;

(b) comprehensive general public liability insurance against claims for bodily injury, death, or property damage arising out of the use or occupancy of the Property by Lessee, in a combined single limit amount of not less than \$300,000.

9.2. *Policy terms and conditions.* All insurance policies that Lessee must maintain under this Article shall name it and Lessor as the insured parties, as their respective interests may appear. The policies may be carried under blanket policies

maintained by Lessee if they comply with the provisions of this subsection. The fire policies may provide for the same deductible amounts, not to exceed \$25,000, that Lessee customarily provides for in its insurance for similar properties owned or leased by it. The policies shall provide for a reserved amount with respect to the Property so as to assure that the amount of insurance required by section 9.1(a) will be available notwithstanding any losses with respect to other property covered by such blanket policies. All policies of insurance that Lessee must maintain under Section 9.1(a) shall: (i) bear a standard first mortgagee endorsement in favor of any holder or holders of a first mortgage lien or security interest in the Property with loss payable to the holder or holders for application as provided in Article 10; (ii) provide for the benefit of the holder or holders, that ten days' prior written notice of cancellation, termination, modification, or lapse of coverage shall be given; and (iii) not contain a provision relieving the insurer thereunder of liability for any loss by reason of the existence of other insurance policies covering the Property against the perils involved, regardless of collectibility.

9.3. *Insurance certificate.* Lessee shall deliver to Lessor, promptly after this Lease commences, insurers' certificates evidencing all insurance that Lessee must maintain under this Lease, and, within 30 days before any such insurance expires, other certificates evidencing its renewal.

9.4. *Waiver of claim.* If and so long as the insurance that Lessee must maintain under Section 9.1 is in full force and effect, Lessor waives, releases, and discharges Lessee from all claims or demands that Lessor may have or subsequently acquire arising out of damage or destruction of the Property occasioned by fire or extended coverage risks, whether the claim or demand arises because of the negligence of Lessee, its agents, or otherwise. Lessor shall look to the insurance coverage only in the event of such loss.

Article 10 Condemnation and Casualty

10.1. *Condemnation or insurance awards.* Lessee hereby assigns to Lessor any award or payment on account of any damage, destruction, or Taking which is payable in connection with the Property. However, Lessee shall be entitled to that portion of the net award representing payment for its leasehold interest, trade fixtures, moving expenses, business interruption, or loss of profits. All amounts paid pursuant to an agreement with a condemning authority in connection with any Taking shall be deemed to constitute an award on account of such Taking. Lessee agrees that this Lease shall control the rights of both parties in any such award, and any contrary provision of any present or future law is hereby waived.

10.2. *Notice.* If there is any damage to or destruction of the Property or if any proceedings or negotiations are instituted which do or may result in a Taking, each party will promptly give notice thereof to the other, describing its nature and extent.

10.3. *Lessee restoration.* Subject to subsection 10.5, if the cost of Restoration is less than \$25,000, Lessee will promptly commence and complete Restoration of the Property and Lessor shall cause the Net Award to be made available to Lessee for such purpose.

10.4. *Substantial restoration.* Subject to subsection 10.5, if the cost of Restoration exceeds \$25,000 and can be completed within 180 days after the occurrence, Lessor will promptly commence and complete Restoration of the Property in accordance with plans and specifications to be prepared by Lessee within 20 days after the occurrence reflecting the requisite nature and scope of the Restoration improvements. Lessee shall prepare such final plans and specifications and submit copies of them to Lessor within 20 days from the date it receives notice under subsection 10.2. The final plans and specifications shall be deemed approved by Lessor unless it notifies Lessee, within five days after receipt, of any reasonable objections to them, and specifies the nature of the objections. Lessor shall not unreasonably withhold approval of the final plans and specifications. If within ten days after Lessee receives Lessor's objections the parties are unable to agree upon the final plans and specifications, either party may terminate the Lease by giving ten days' prior written notice to the other.

10.4.1. *Ownership of plans.* Lessor acknowledges that the said plans and specifications are the sole property of Lessee and Guarantor, that the architectural design of Lessee's restaurant building is unique and that such plans and specifications will be furnished to Lessor in confidence. Lessor agrees not to knowingly permit or suffer any person to utilize same for any purpose other than the Restoration improvements.

10.4.2. *Contractor bids, contracts.* Within ten days after Lessor has approved or is deemed to have approved the final plans and specifications, Lessee, on Lessor's behalf, shall solicit and obtain a bid from a reputable and responsible contractor for the construction and completion of the Restoration improvements. A qualified, reputable, and bondable contractor designated by Lessor shall be allowed to submit a bid to Lessee, provided that Lessor submits the name of the contractor to Lessee within 30 days after the notice of occurrence, as foresaid. Within five days after receipt of bid(s), Lessee, on Lessor's behalf, shall designate the contractor who has submitted the acceptable bid to construct the Restoration improvements and shall forward to Lessor the general construction contract to be executed by Lessor on Lessee's approved contract form. Lessor agrees that no contractor shall be deemed any agent of Lessee and that Lessee assumes no obligations with respect to the manner or quality of construction or any other matter relating to the construction, and that Lessee shall have the right to insist upon compliance by Lessor with all terms and provisions hereof.

10.4.3. *Construction extras.* Lessee may require the Lessor to amend the construction contract to include Extras, provided however, that their aggregate cost shall not exceed the Net Award.

10.4.4. *Completion date.* Lessor shall diligently proceed with the construction of the Restoration improvements and shall complete them within 180 days after the occurrence, but this date shall be extended for all delays in construction resulting from causes beyond Lessor's reasonable control. However, if for any reason, including causes beyond Lessor's reasonable control, construction is not completed within one year from the date of occurrence, Lessee may terminate this Lease. Lessee's right to terminate is in addition to any other remedies provided herein or by law.

10.4.5. *Work standards and completion.* Lessor shall cause the general contractor to construct the Restoration improvements in a good workmanlike manner and in compliance with plans and specifications and all Legal Requirements. Lessor shall furnish to Lessee satisfactory evidence of completion in the form of (1) a certificate of occupancy (where appropriate) issued by the appropriate governmental authority, if available, and (2) Lessor's certificate of completion.

10.4.6. *Lessee inspection and work.* During the course of construction, Lessee or its representatives may enter upon the Property at all reasonable times for the purpose of inspecting the construction to determine that the work is being completed in accordance with the plans and specifications. When construction is substantially completed, Lessee may enter the Property for the purpose of installing improvements, fixtures, and other equipment, upon the condition that Lessee does not unreasonably interfere with completion of construction of the Restoration improvements.

10.4.7. *Clean-up.* Lessor shall deliver the Property to Lessee on the completion of Restoration in broom clean condition, free and clear of all debris, rubbish, and discarded building materials.

10.4.8. *Construction bonds.* Before commencement of construction of Restoration improvements, Lessor shall cause its contractor to procure performance and payment bonds issued by a duly qualified corporate surety in the full amount of the construction contract, naming Lessor as the Obligee. The bonds shall be: (a) conditioned upon the full and complete and faithful performance of the terms and conditions and of the work to be performed under the contract, and (b) further conditioned upon payment in full of the claims of all persons performing labor upon, or furnishing materials to be used in, or furnishing appliances, equipment or power contributing to such work. The bonds shall meet the statutory requirements of the governing jurisdiction of the work site, be recordable in form, and be in the form and written by the companies that Lessee reasonably approves. If any contractor defaults under a construction contract and Lessor receives

sums under the bonds, Lessor shall hold the sums in trust to be applied to the cost of completion of Restoration improvements.

10.5. *Termination events.* This Lease shall terminate as of the date of the occurrence or Taking if any of the following termination events occur: (a) Restoration cannot be completed within 180 days after the occurrence; (b) the damage, destruction, or Taking occurs during the last five years of the Basic Term or during any Extended term; or (c) within 30 days after a Taking, Lessee determines in good faith and notifies Lessor that, as a result thereof, the Property no longer is suitable for use as a restaurant. In that event, the Basic Rent, Percentage Rent, and other payments to be made by Lessee shall be apportioned as of the date of the occurrence or Taking.

10.6. *Lessor's failure to restore.* If Lessor does not commence Restoration within 30 days after the occurrence, or does not prosecute the Restoration with due diligence, Lessee, upon ten days notice to Lessor, may either (i) commence and complete Restoration at Lessor's expense, in which event Lessor shall make the Net Award available to Lessee for such purpose, or (ii) terminate this Lease. If the Award is not adequate to complete Restoration, Lessor shall promptly pay the deficiency to Lessee.

10.7. *Rent abatement.* Upon damage or destruction to the Property or upon its Taking which does not result in termination under subsection 10.5, the Basic Rent, Percentage Rent, and all other payments to be made by Lessee hereunder shall abate as of the date of the occurrence. In the case of partial damage, destruction or Taking which does not cause Lessee to discontinue use of the Property as a restaurant, the above payments shall be equitably apportioned.

10.8. *Restoration trust funds.* If damage or destruction to the Property or the Taking thereof does not result in termination under subsection 10.5, the Net Award shall be paid to the Depository to be held in trust for Restoration.

10.9. *Arbitration.* If Lessor and Lessee are unable to agree upon the period required to complete Restoration or upon its cost, such matters shall be determined as follows: Each party shall appoint an arbiter. If the two arbiters cannot agree upon the disputed matter, it shall be determined by a third arbiter selected by them. If the two arbiters cannot agree upon a third arbiter, he shall be appointed by a federal district court judge, acting in a nonjudicial capacity, for the district in which the Property is located.

10.10. *Application of award.* If there is no continuing Event of Default and unless this Lease has been terminated under Section 10.5, the Net Award shall be applied as follows: (a) any Net Award received by Lessor as compensation for a Taking of temporary use or occupancy during the term of this Lease shall be paid over immediately to Lessee; (b) any portion of the Net Award allocable to a period after the expiration or earlier termination of this Lease shall become the property of Lessor and shall be paid to it; and (c) any portion of the Net Award which is received for damage to or destruction of the Property shall be paid to the Depository and applied as provided in subsections 10.3, 10.4, or 10.6.

Article 11 Use, Operation of Business

11.1. *Use.* Lessee shall use the Property only for the operation of a restaurant and for no other purpose without Lessor's prior written consent. However, at Lessor's option, Lessee may use the property for any legally permissible use which proves to be economically feasible, to be determined by Lessee within its good faith discretion.

11.2. *Operation.* During the term, Lessee shall operate a restaurant upon the Property not less than the hours similar businesses are open for business in the immediate area of the Property and may operate on a 24 hour per day, seven day per week basis if permitted by Legal Requirements. However, temporary discontinuance of business due to strikes, lockouts, fire, casualty, remodeling, Legal Requirements, or other causes beyond Lessee's control shall not be deemed a breach of this section 11.2.

Article 12 Assignment, Subletting

12.1. *Assignment and sublease.* Lessee may not mortgage, pledge, or otherwise encumber its interest in this Lease or in any sublease of the Property. Lessee may assign this Lease or sublet the Property to any person whose business is to operate a restaurant, provided that the sublease or assignment is expressly subject to the provisions of this Lease, and that the sublease or assignment does not affect or reduce Lessee's obligations hereunder, which shall continue in full effect as the obligations of a principal and not as a guarantor or surety, to the same extent as though no assignment or sublease had been made.

12.2. *Performance.* Any act required to be performed by Lessee under this Lease may be performed by its sublessees or assignees. Their performance shall be deemed to be that of Lessee and shall be acceptable as its act by Lessor.

Article 13 Right to Cure Defaults

13.1. *Lessor defaults.* If Lessor fails to pay any liens or encumbrances affecting the Property and to which this Lease may be subordinate when any of them become due or otherwise fails to perform any of its covenants or agreements under this Lease, and the failure or default continues for 30 days after Lessee gives notice to Lessor (notwithstanding any delay or forbearance in giving notice), Lessee may pay the lien or encumbrance and cure the default. Lessee may further make all necessary payments in connection therewith, including, but not limited to, the payment of reasonable attorney's fees, costs, and charges of or in connection with any pending legal action. Lessor shall immediately pay Lessee all amounts paid by Lessee, including interest thereon at the maximum legal rate, or, if no such rate is established, at 15 percent per annum. All sums charged to Lessor by Lessee hereunder shall be Lessor's indebtedness to Lessee, payable on demand. If all Lessor's indebtedness is not fully paid within 30 days after demand, Lessee may (i) deduct such amount from rent subsequently becoming due hereunder, (ii) terminate this Lease by giving 30 days notice to Lessor (unless Lessor cures the default), or (iii) extend this Lease on the same covenants and conditions as herein provided until the indebtedness is fully paid by application to rents.

13.2. *Lessee defaults.* If Lessee fails to make or perform any required payment or act, Lessor may do so for Lessee's account. Lessee shall pay to Lessor on demand all amounts so paid by Lessor and all incidental costs and expenses (including attorney's fees and expenses) incurred in connection with the payment or performance, including interest thereon at the maximum legal rate, or, if no such rate is established, at 15 percent per annum from the date the payment is made or the costs and expenses are incurred.

Article 14 Subordination and Nondisturbance

14.1. This Lease and all rights of Lessee hereunder are and shall be subject and subordinate to the lien of any and all mortgages, or consolidated mortgage or mortgages, which may now or hereafter affect the Property, or any part thereof, and to all renewals, modifications, consolidations, replacements, and extensions thereof, subject to the following conditions. Any mortgage placed upon the Property shall provide that so long as there is not outstanding a continuing Event of Default by Lessee in any term, condition, covenant, or agreement of this Lease, (i) the leasehold estate of Lessee created hereby and Lessee's peaceful and quiet possession of the Property shall be undisturbed by any foreclosure of the mortgage, (ii) the Net Award will be made available for Restoration, and (iii) the lien will be released if Lessee purchases the Property pursuant to Article 17 and pays the purchase price to the mortgagee to the extent that a balance is due on the mortgage.

Article 15 Lessee's Trade Fixtures and Equipment

15.1. All trade fixtures, signs, equipment, furniture, or other personal property of whatever kind and nature kept or installed on the Property by Lessee shall not become the property of Lessor or a part of the realty no matter how affixed to the Property and may be removed by Lessee at any time and from time to time during the entire term of this Lease. Upon request of Lessee or its assignees or any subtenant, Lessor shall execute and deliver any real estate consent or

waiver forms submitted by any vendors, lessors, chattel mortgagees, or holders or owners of any trade fixtures, signs, equipment, furniture, or other personal property of any kind and description kept or installed on the Property setting forth that Lessor waives, in favor of the vendor, lessor, chattel mortgagee, or any holder or owner, any Superior lien, claim, interest or other right therein. Lessor shall further acknowledge that property covered by the consent or waiver forms is personal property and is not to become a part of the realty no matter how affixed thereto, and that such property may be removed from the Property by the vendor, lessor, chattel mortgagee, owner, or holder at any time upon default in the terms of such chattel mortgage or other similar documents, free and clear of any claim or lien of Lessor.

Article 16 Surrender

16.1. Upon the expiration or earlier termination of this Lease, Lessee shall surrender the Property to Lessor in good order and condition, except for ordinary wear and tear, existing Legal Requirements, and the results of any damage, destruction, or Taking. Lessee shall remove from the Property on or prior to the expiration or earlier termination all of its property situated thereon and shall repair any damage caused by the removal. Property not so removed shall become the property of Lessor.

Article 17 Purchase Option

17.1. Lessee may purchase the Property on the last day of the Basic Term or of any Extended Term at a price equal to the Fair Market Value of the Property as of the date of purchase. Lessee shall give notice of the exercise of the option within 180 days prior to the expiration of the effective term. On the date of such purchase, Lessor shall convey marketable title to the Property to Lessee against payment of the purchase price therefor in accordance with Article 21.

Article 18 Right of First Refusal

18.1. If at any time during any term of this Lease, Lessor receives and is willing to accept a bona fide offer from a third party to purchase the Property, other than an offer to purchase it at any sale incidental to the exercise of a remedy provided for in a mortgage or other security instrument creating a lien on the Property, or if Lessor offers to sell the Property to a third party, Lessor shall, if there is no continuing Event of Default, promptly transmit to Lessee its offer to sell the Property to Lessee upon terms and conditions substantially similar to those offered by or to the third party, together with a true copy of such original offer. If Lessee does not accept such offer within 30 days after it is made, Lessor may, within 180 days after the 30-day period expires, sell the interest to a third party upon terms and conditions substantially similar to those offered to Lessee. If Lessee accepts such offer by notice to Lessor within the time permitted, the offer and acceptance shall constitute a contract for the sale by Lessor and the purchase by Lessee of the Property at a closing to be held within 30 days following the receipt by Lessor of Lessee's notice of acceptance. On the date of such purchase, Lessor shall convey marketable title to the Property to Lessee against payment of the purchase price therefor in accordance with Article 21.

Article 19 Termination for Uneconomic Use

19.1. *Termination option.* If, at any time two years or more after this lease commences, the Leased Property is no longer economic or suitable for Lessee's continued use and occupancy, Lessee may give notice to Lessor of its intention to terminate the lease. The notice shall specify that it is being given under this Article 19, and shall contain the following: (a) the termination date, which shall be the Payment Date as set forth below first occurring at least 180 days after notice is given; (b) Lessee's certification that its board of directors has made a determination that the Leased Property is no longer economic or suitable for Lessee's continued use and occupancy and that Lessee has discontinued or will discontinue its use on or before the termination date, and, after that date, Lessee will discontinue the use of the Leased Property in its ordinary course of business for a period of at least three years; and (c) if the termination date occurs during the Basic Term, Lessee's irrevocable offer to purchase the Leased Property on that date at a purchase price previously determined in accordance with Section 19.2. If Lessor rejects the offer by giving notice to Lessee not later than 30 days before the termination date, or if that date occurs during an Extended Term, this lease shall terminate on

the termination date. Unless Lessor has rejected the offer provided in the preceding sentence, Lessor shall be conclusively presumed to have accepted it and, on the termination date Lessor shall transfer, and Lessee shall purchase, the Leased Property in accordance with Article 21.

19.2. *Purchase prices.* The payment dates and purchase prices, referred to above, are as follows:

Payment Date	Purchase Price
[date]	\$1,130,000
[date]	\$1,143,000
[date]	\$1,157,300
[date]	\$1,173,000
[date]	\$1,190,000

Article 20 Substitution of a New Lease

20.1. If, at any time during the Basic Term, the Leased Property is no longer economic or suitable for Lessee's continued use and occupancy, Lessee may give notice to Lessor of its intention to terminate the lease. The notice shall specify that it is being given under this Article 20, and shall contain the following: (a) the termination date, which shall be the Payment Date first occurring at least 180 days after notice is given; (b) Lessee's certification that its board of directors has made a determination that the Leased Property is no longer economic or suitable for Lessee's continued use and occupancy and that Lessee will discontinue its use on or before the termination date for a period of at least three years; and (c) a description, in reasonable detail, of the new property that Lessee intends to convey or assign to Lessor as the purchase price for the Leased Property payable under this Article 20. The new property shall consist of a fee interest in improved real property. However, if the Leased Property is subject to a Ground Lease, the new property may consist of a fee interest in improved real property or, with Lessor's consent, a leasehold interest created by a ground lease and its assignment. The term of the ground lease, including renewals, shall expire not earlier than 15 years after the expiration date of the lease referred to in the following sentence as that lease may be extended under its terms, and the ground lease shall otherwise be satisfactory to Lessor. Upon the date specified for termination of this Lease, Lessee shall convey or assign to Lessor a parcel of property which shall be unencumbered by any lien or charge and suitable for use in Lessee's business as a restaurant. Lessee shall then enter into a lease of the property with Lessor, provided the following conditions are met: (A) the Fair Market Value of the property is not less than the greater of (i) the Fair Market Value of the Leased Property, as determined by a member of the American Institute of Real Estate Appraisers, not more than 60 days before the termination date, or (ii) the purchase price of the Leased Property at the purchase date which would be payable upon a purchase under Article 19; (B) the new lease (i) provides for payments of basic rent on each Payment Date that are not less than the Basic Rent payable under this Lease, (ii) provides for a term ending on a date not earlier than the Termination Date, (iii) provides for purchase prices for the property that are not less than the respective purchase prices that would be payable upon a purchase of the Leased Property by Lessee under this Lease, (iv) has substantially the same other terms and provisions as this Lease, and (v) is guaranteed by the Guarantor on the same terms and conditions as set forth in the Guaranty; and (C) all of the documents and proceedings relating to the conveyance or assignment and new lease and its substitution, including the terms and provisions of the new lease, are reasonably satisfactory in form and substance to Lessor. Lessee shall pay all costs, charges, and expenses incident to the conveyance or assignment of the property and the lease thereof and any mortgage thereof by Lessor and any assignment of the lease thereof, including attorney's fees and expenses, recording fees, the costs of appraisals, title insurance premiums covering title insurance for Lessor and for the mortgagee under such mortgage, and all applicable taxes which may be incurred or imposed by reason of such transactions. On the termination date, Lessor shall transfer to Lessee, and Lessee shall purchase from Lessor, the Leased Property in accordance with Article 21.

Article 21 Procedure for Purchase

21.1. *Marketable title, liens.* Upon the purchase by Lessee of the Property under this Lease, Lessor shall transfer marketable title to Lessee. Title shall, however, be subject to all liens, encumbrances, charges, exceptions, and restrictions affecting the Property as of the Commencement Date (excluding any monetary liens or encumbrances) and those attaching thereto on or after such date (a) which shall be or have been expressly consented to in writing by Lessee, or (b) for the discharge of which Lessee is responsible under this Lease, and subject to all Legal Requirements, but free of all liens which secure amounts or obligations which Lessee is not obligated to pay or discharge under this Lease.

21.2. *Settlement.* Upon the date fixed for any such purchase, Lessee shall pay to Lessor at its address for notices hereunder or otherwise as the Lessor may designate, the purchase price specified herein, by certified or official bank check payable to the order of Lessor or its designee, and Lessor shall deliver to Lessee an appropriate instrument or instruments of transfer of the interest in the Property. Upon completion of the purchase, this Lease and all obligations hereunder shall terminate, except for actual or contingent obligations and liabilities which arose on or prior to the purchase date.

Article 22 Short Form Lease

22.1. *Recordable form.* The parties will, simultaneously with the execution of this Lease, execute counterparts of an instrument, in recordable form, which, when completed to include a metes and bounds description of the Property and the Commencement Date and Termination Date of this Lease, will constitute a short form of lease. Lessor authorizes and appoints Lessee as its attorney-in-fact to complete the document when the omitted data is available and thereupon to record it.

22.2. *Nondisclosure of rent.* Lessor shall not record this Lease or any short form lease or other document which sets forth the rent to be paid by Lessee. Any such recording or attempted recording by Lessor shall constitute a breach of this Lease.

Article 23 Certificates

23.1. Either party shall, without charge, at any time within ten days after the other's written request, from time to time, certify by written instrument duly executed and acknowledged to any actual or proposed mortgagee or purchaser, or any other Person specified in the request, as to the following: (a) whether this Lease has been supplemented or amended, and if so, the substance and manner of such supplement or amendment; (b) the validity and force and effect of this Lease, in accordance with its tenor as then constituted; (c) the existence of any default thereunder; (d) the existence of any offsets, counterclaims, or defenses thereto by the other party; (e) the commencement and expiration dates of the term of this Lease; and (f) all other matters that may reasonably be so requested. Any such certificate may be relied upon by the party requesting it and any other Person to whom it may be exhibited or delivered. The contents of the certificate shall be binding on the party executing it.

Article 24 Events of Default, Remedies

24.1. *Default.* Any of the following occurrences, conditions, or acts shall constitute an "Event of Default" under this Lease:

(a) if Lessee:

(i) defaults in making payment when due of any Basic Rent or Percentage Rent, and the default continues for 30 days after Lessor gives written notice to Lessee specifying the default and demanding that it be cured, or

(ii) defaults in the observance or performance of any other provision of this Lease, and the default continues for 60 days after Lessor gives written notice to Lessee specifying the default and demanding that it be cured. However, if the default

cannot be cured by the payment of money and cannot with due diligence be wholly cured within the 60-day period, Lessee may have any longer period that is necessary to cure the default, so long as Lessee proceeds promptly to cure it within that period, prosecutes the cure to completion with due diligence, and advises Lessor from time to time, upon Lessor's request, of the actions that Lessee is taking and the progress being made;

(b) if the Property is abandoned by Lessee for a period of 45 consecutive days;

(c) if Lessee or the Guarantor files a petition in bankruptcy, for reorganization or for an arrangement under the Bankruptcy law or any similar federal or state law, is adjudicated a bankrupt or becomes insolvent, is unable to meet Lessee's obligations as they become due, or takes any corporate action in furtherance of any of the foregoing;

(d) if a petition or answer is filed proposing the adjudication of Lessee or the Guarantor, if any, as a bankrupt or the reorganization of Lessee or the Guarantor under the Bankruptcy law or any similar federal or state law, and (i) Lessee or the Guarantor consents to the filing thereof, or (ii) the petition or answer is not discharged or denied within 60 days after its filing;

(e) if a receiver, trustee, or liquidator (or other similar official) of Lessee or the Guarantor, of all or substantially all of their respective businesses or assets, or of the estate or interest of Lessee in the Property is appointed and is not discharged within 60 days thereafter or if Lessee or the Guarantor consents to or acquiesces in the appointment; or

(f) if Lessee's estate or interest in the Property is levied upon or attached in any proceeding and the process is not vacated or discharged within 60 days after the levy or attachment, unless the levy or attachment is being contested under Article 6.

(g) Notwithstanding the provisions of subparagraphs (c), (d), and (e) above, if at any time during the term of this lease, proceedings in bankruptcy, insolvency, or similar proceedings are instituted by or against Lessee, whether or not they result in an adjudication against Lessee, or if a receiver of Lessee's business or assets is appointed, the proceedings or adjudications shall not affect the validity of this lease so long as rent and additional rent reserved under it continues to be paid to Lessor and Lessee performs all its other terms, covenants, and conditions under this lease. In that event, this lease shall continue to remain in full force and in accordance with its terms.

24.2 Remedies. If there is any default under the above Section 24.1, the following shall occur: (a) the rent shall immediately become due and be paid up to the time of reentry, expiration, and/or dispossession; (b) Lessor may relet the Property or any part or parts of it, either in Lessor's name or otherwise, for a term or terms which may, at Lessor's option, be less than or exceed the then remaining term of this lease; and (c) Lessee shall also pay to Lessor, as liquidated damages for Lessee's failure to observe and perform its covenants under this lease, any deficiency between the Basic Rent hereby reserved and/or agreed to be paid and the net amount, if any, of the rents collected on account of the Property's lease or leases for each month of the period which would otherwise have constituted the balance of the term of this Lease. However, any such deficiency shall be paid as the Basic Rent becomes due and payable in monthly installments. In computing the liquidated damages, there shall be added to the deficiency all reasonable expenses that Lessor may incur in connection with reletting, such as brokerage and preparation for reletting. Lessee shall pay any such liquidated damages in monthly installments on the Rent Payment Dates specified in the lease. Any suit brought to collect the deficiency for any month shall not prejudice in any way Lessor's rights to collect the deficiency for any subsequent month by a similar proceeding. Lessor may make all alterations, repairs, replacements, and decorations in the Property that it, in its sole judgment, considers advisable and necessary for the purpose of reletting the premises. Such action by Lessor shall not operate or be construed to release Lessee from its liability under this lease. Lessor shall use its best effort to mitigate all damages and to relet the Property if there is any Event of Default by Lessee.

25.1. All notices, demands, requests, consents, approvals, offers, statements, and other instruments or communications required or permitted to be given hereunder shall be in writing and be deemed to have been given when delivered, or when mailed by first class registered or certified mail, postage prepaid, addressed, (a) if to Lessee, at its address set forth above, Attention: Corporate Counsel, with a copy addressed to Guarantor, Attention: Corporate Counsel, at the address specified in the guarantee instrument, or at any other address that Lessee or the Guarantor may furnish in writing to Lessor, or (b) if to Lessor, at the address set forth above.

Article 26 Amendments

26.1. This Lease may not be amended, modified, or terminated, nor may any obligation under it be waived orally. No amendment, modification, termination, or waiver shall be effective for any purpose unless it is in writing and signed by the party against whom enforcement thereof is sought.

Article 27 Lessor's Negative Covenants

27.1. *Restaurant leases.* During the term, Lessor shall not, without Lessee's prior written consent, directly or indirectly engage in, or acquire any financial or beneficial interest in, or grant a lease to any Person to operate a restaurant business for the sale or furnishing of food, excluding only ethnic type establishments.

27.2. *Application of restriction.* The provisions of subsection 27.1 shall apply to all officers, directors, subsidiaries, and affiliates of Lessor, shall be covenants running with any land owned by Lessor, and shall be binding upon its successors and assigns.

Article 28 Miscellaneous

28.1. *Severability.* If any provision of this Lease or any application thereof shall be invalid or unenforceable, the remainder of this Lease and any other application of such provision shall not be affected thereby.

28.2. *Binding effect.* The provisions of this Lease shall be binding upon and inure to the benefit of both parties and their respective successors and assigns.

28.3. *Quiet Enjoyment.* Upon due performance by Lessee of its covenants and agreements under this Lease, Lessor covenants that Lessee shall and may at all times peaceably and quietly have, hold, and enjoy the Property during the Lease term. If this covenant of quiet enjoyment is breached and Lessee is made a party to any legal proceedings affecting its right of possession, Lessor shall reimburse Lessee for all reasonable attorneys' fees or other expenses incurred by it in defending its right to this Lease. Lessee may apply all such expenses to rent due or to become due.

28.4. *Headings.* The table of contents, Article, and Section headings are for convenience and reference only and shall not be used to limit or otherwise affect the meaning of any provision of this Lease.

28.5 *Counterparts.* This Lease will be simultaneously executed in two or more counterparts, each of which shall be deemed a fully enforceable original but all of which together shall constitute one and the same instrument.

28.6 *Governing law.* This Lease shall be construed in accordance with and governed by the laws of the State of California.

28.7. *Relationship of parties.* Lessor and Lessee shall not be considered or deemed to be joint venturers or partners and neither shall have the power to bind or obligate the other except as set forth herein.

28.8. *Default of Lessor's Trustee.* If Lessee is unable to use the Property for the use intended because Lessor is involved

in a bankruptcy or insolvency proceeding and Lessor's Trustee fails to perform any of Lessor's obligations under this Lease, Lessee may terminate the Lease.

28.9. *Construction.* All terms used in this Lease, regardless of the number or gender in which they are used, shall be deemed and construed to include any other number, singular or plural, and by other gender, masculine, feminine, or neuter, as the context or sense of this Lease or any section, subsection, or clause herein may require as if such terms had been fully and properly written in such number or gender.

28.10. *Investment tax credit.* It is the parties intent that Lessee shall at all times be considered the owner and original user of all fixtures, trade fixtures, equipment, and other property upon or used in connection with the Property and that Lessee shall be entitled to and may claim an investment tax credit in accordance with *Sections 38 and 46 through 48 of the Internal Revenue Code of 1954* or corresponding provisions of subsequent law. Lessor shall at no time take any action or file any document which is inconsistent with the foregoing intent and Lessor shall take such action and execute all documents that may be lawful, reasonable, and necessary to facilitate accomplishment of this intent.

28.11. *Modification.* No changes, additions, or interlineations made to this Lease shall be binding unless initialed by both parties.

28.12. *Non-waiver.* No delay or failure by either party to exercise any right under this Lease, and no partial or single exercise of that right, shall constitute a waiver of that or any other right, unless otherwise expressly provided herein.

28.13. *Time of essence.* Time is expressly declared to be of the essence of this Lease.

28.14. *Entire Agreement.* This Lease supersedes all agreements previously made between the parties relating to its subject matter. There are no other understandings or agreements between them.

Article 29 Definitions

29.1. As used in this Lease, the following terms have the following respective meanings:

(a) *Basic rent:* defined in Article 3.

(b) *Basic rent payment date:* the fifteenth day of each consecutive month during the term.

(c) *Basic term:* defined in Article 2.

(d) *Commencement date:* the date on which the Lessee takes possession of the premises.

If the Commencement Date falls on other than the first day of a month, Lessee shall pay a prorated rent for the partial month and the Commencement Date for the Basic Term of the Lease shall be adjusted to be the first day of the following month.

(e) *Date of this Lease:* the date of acknowledgment of the signatures of the Lessee's officers executing this Lease.

(f) *Default:* an event or condition the occurrence of which would, with the lapse of time or the giving of notice or both, become an Event of Default.

(g) *Depository:* any bank, savings institution, trust company, or national banking associations located in the jurisdiction in which the Property is located.

(h) *Event of default*: defined in Article 24.

(i) *Fair market value*: The Fair Market Value of the Property shall be the amount a willing buyer would pay to a willing seller (neither party being forced to buy or sell) if such property were being used for its highest and best use. If Lessor and Lessee are unable to agree on the Fair Market Value of the Property, it shall be determined by two appraisers, one appointed by Lessor and the other by Lessee. If the two appraisers are unable to agree upon a Fair Market Value, it shall be determined by a third appraiser to be selected by them. If the two appraisers are unable to agree on a third appraiser, the appraiser shall be appointed by a federal district court, acting in a nonjudicial capacity, for the district in which the Property is located.

(j) *Full insurable value*: actual replacement costs, including the costs of debris removal, less physical depreciation, but not including the costs of soil tests, trenches, foundations, and other improvements below ground which are not ordinarily insurable.

(k) *Guarantor*: Greenwood, Inc., a California corporation, together with any successor thereto by way of merger, consolidation, or acquisition of all or substantially all its assets.

(l) *Impositions*: all taxes, assessments (including all assessments for public improvements or benefits), water, sewer, or other rents, rates and charges, excises, levies, license fees, permit fees, inspection fees, and other authorization fees and charges, in each case whether general or special (including all interest and penalties thereon), which at any time during or in respect of the term hereof may be assessed, levied, confirmed, or imposed on or in respect of or be a lien upon the Property or any part thereof.

(m) *Insurance requirements*: all terms of any insurance policy required to be maintained by Lessee under section 9.1 hereof, and all requirements of the National Board of Fire Underwriters (or any other body exercising similar function) applicable to or affecting all or any part of the Property.

(n) *Lease year*: the period between the Commencement Date for the Basic Term and the first anniversary of the Commencement Date and each successive annual period thereafter during the term.

(o) *Legal requirements*: all statutes, codes, ordinances, rules, regulations, orders, judgments, or decrees of governments, authorities, agencies, officials, and officers, which now or at any time hereafter may be applicable to the Property of any part of it.

(p) *Lessee*: the party defined as such in the first paragraph of this Lease together with any successor thereto by way of merger, consolidation, or acquisition of all or substantially all of its assets.

(q) *Lessor*: the party defined as such in the first paragraph of this Lease, together with any successor or successors to its rights and obligations as Lessor hereunder, including at any time after the date hereof, the then owner of Lessor's interest in the Property.

(r) *Net award*: any insurance proceeds or condemnation award payable in connection with any damage, destruction, or Taking, less the costs, fees, and expenses incurred in the collection thereof.

(s) *Person*: any individual, partnership, corporation, trust, unincorporated association, or joint venture, a government or any department or agency thereof, or any other entity.

(t) *Property*: the parcel of land described in Exhibit "A," together with all improvements at any time existing thereon, all fixtures at any time affixed thereto and all easements, rights, and appurtenances at any time relating thereto but not including trade fixtures, machinery, and equipment which remains the property of Lessee under section 7.3.

(u) *Restoration*: the restoration, replacement, or rebuilding of the Property or any portion thereof as nearly as practicable to its value, condition, and character immediately prior to damage, destruction, or Taking.

(v) *Subsidiary*: any corporation which is at least 50% owned or controlled by Guarantor.

(w) *Taking*: a taking of all or any part of the Property, or any interest therein or right accruing thereto, as a result of or in lieu of or in anticipation of the exercise of the right of condemnation or eminent domain pursuant to any law, general or special, or by reason of the temporary requisition of the use or occupancy of the Property or any part thereof, by any governmental authority, civil or military.

(x) *Termination date*: the fifth anniversary after the Commencement Date.

In witness whereof the parties have executed this Lease as of the date first above written.

Witnesses:

Lessor:

1995 Main Street Corp.

by _____

Lessee:

Greenwood Foods, Inc.

by _____

Guaranty

Greenwood, Inc. hereby unconditionally guarantees the performance by Lessee of its obligations under this Lease for a period of five years from the Commencement Date of this Lease.

Greenwood, Inc.

by _____

[Acknowledgments]

[Attach Exhibit A]



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Current Legal Forms for Real Estate

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Current Legal Forms for Real Estate
Chapter 23 REAL ESTATE LEASES
Part IV. Forms

A. COMPLETE LEASES AND RELATED AGREEMENTS

31-23 Current Legal Forms for Real Estate FORM 23.03

AUTHOR: by Thomas G. Belden

FORM 23.03 Commercial lease--recreational or leisure facilities--leasehold mortgage provisions

COMMENT

This lease of recreational or leisure time facilities contains clauses which could be used in other commercial leases. In addition to the leasehold mortgage and real estate tax provisions, discussed below, this lease covers many areas of common concern to the landlord and tenant of other types of commercial space. For example, the lease requires the landlord to obtain a variance for the use, as well as construction permits (§ 2.1). The landlord is to construct the facilities to be leased (§ 2.2). The rent payable on renewal is a specified amount for the first three renewal terms, but is based on an indexed formula for the second three renewal terms (§§ 3.2, 3.3). The tenant is given a right of first refusal (§ 1.6). The elevator in the building is to allow access to the tenant's facilities by disabled persons (§ 1.2).

Real estate tax abatement program:

This lease anticipates a special tax abatement program benefitting the building in which the leased premises are located. Under the municipal tax abatement program, real estate taxes are not due on the residential portion of the building for a specified number of years. Taxes are due, however, on the commercial parts of the building. The tenant agrees to pay two-thirds of any increase in the real estate taxes resulting from the commercial parts of the building, and 7% when the tax abatement program expires (§ 3.4(a), (b)). Apparently, this allocation is based on the tenant's floor area or some other allocation formula previously agreed to by the parties.

Tenant's leasehold mortgage provisions:

Article 8 of this lease covers the tenant's right to mortgage the tenant's interest in the lease, and the rights of the prospective holder of the leasehold mortgage. These provisions are drafted to encourage a lender to take a mortgage or lien in the tenant's lease. If possible, the prospective leasehold mortgagee, or its attorney, should be consulted as to their particular requirements. If this is not feasible, the parties might include a provision in the lease to the effect that the lease will be amended to comply with the requirements of a leasehold mortgagee. This lease requires the landlord to give notice of the tenant's default to the leasehold mortgage holder as well as to the tenant, and permits the leasehold mortgage lender to cure the default (§ 8.3(a), (b)). The landlord agrees not to terminate the lease without giving the leasehold mortgagee the opportunity to foreclose on the tenant's interest in the lease (§ 8.3(d)). If the lease is terminated, the landlord is to offer a new lease to the leasehold mortgagee (§ 8.3(e)). The Article of the lease contains other provisions dealing with the interests of the leasehold mortgagee.

FORMS

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Agreement of Lease, made [date], between Cornerstone, Inc. ("Landlord"), a New York corporation having its office at 145 East 44 Street, New York, New York 10017, and Leisure Time, Inc. ("Tenant"), a New York corporation having its office at 250 Park Avenue, New York, New York 10017,

Witnesseth:

Article 1 Premises and Term

§ 1.1. *Demised premises.* Landlord leases to Tenant and Tenant takes from Landlord the following:

(a) the space shown and described in the Plans and Drawings annexed hereto as Exhibit A, in the building being erected at and to be known by the street address 1199 Second Avenue, in the Borough of Manhattan, County, City, and State of New York; and

(b) all the equipment, fixtures, furnishings, design, decor, decorations, installations, appurtenances, and personal property to be placed, installed, and erected in said space by Landlord in accordance with said Plans and Drawings annexed hereto as Exhibit A and the Specifications also part of Exhibit A; and

(c) a storage room in the basement or cellar of said building for the exclusive use of Tenant; all of the foregoing being the "demised premises," except that the stained glass mural to be installed in the lobby is and shall remain the sole property of the artist who shall be entitled to remove the same. Tenant shall repair any damage caused by such removal.

§ 1.2. *Commencement and term.* The term of this lease shall commence on the first day of the calendar month after the issuance of a temporary or permanent Certificate of Occupancy for the demised premises providing for the use thereof, without time limitation or other than minor condition, as a recreational and entertainment facility having a capacity of 500 persons (sometimes hereinafter the "Facility") and permitting the use of the building elevator to bring disabled persons to the Facility. However, if the Facility cannot be opened for business and is not ready for Tenant's use because the equipment, fixtures, furnishings, installations, appurtenances, and personal property for the Facility or the design, decoration, and decor work set forth in the Plans, Drawings, and Specifications in Exhibit A (marked for identification with this lease) are not completed, installed, and operational on or before said first day, the term shall commence on the first day of the calendar month after the Facility is opened for business. The later of such first days is hereinafter called the "Commencement Date." The term of this lease shall end 15 years after the Commencement Date.

§ 1.3. *Fixed commencement date.* Upon the issuance of the Certificate of Occupancy referred to in § 1.2, Landlord and Tenant shall execute and deliver an instrument fixing the Commencement Date and the last day of the 15-year term. If the Certificate of Occupancy referred to in § 1.2 is not issued on or before [date], Tenant may cancel this agreement of lease, and upon such cancellation Landlord shall refund to Tenant any rent paid by Tenant.

§ 1.4. *Renewal option.* Tenant may renew this lease for six successive renewal terms of five years each. Each of the renewal terms shall be upon the same terms, covenants, and conditions hereof, except (a) there shall be no further renewal right after the expiration of the sixth and last renewal term, and (b) the annual rental shall be as provided in Article 3. Tenant may, at any time or times, exercise the renewal options in any single instance with respect to one or more of the renewal terms, in consecutive order. Each exercise by Tenant of any renewal option or options shall be evidenced and effected by Tenant giving to Landlord, not less than 90 days prior to the expiration of the then current term, written notice of Tenant's election to renew this lease for the renewal term or terms specified in the notice.

§ 1.5. *Term defined.* The terms "term" or "term of this lease" shall mean the term set forth in § 1.2 and any renewal thereof pursuant to § 1.4.

§ 1.6. *Right of first refusal.* If at any time during the term of this lease Landlord shall receive a bona fide offer to purchase or lease the entire land and building of which the demised premises forms a part, it shall furnish to Tenant a true and correct copy of the proposed lease or purchase agreement which the offeror is ready, willing, and able to sign and notify Tenant that Landlord is ready, willing, and able to sign it. Tenant may, by giving notice to Landlord within 30 days after Tenant's receipt of the proposed lease or purchase agreement, lease or purchase the land and building, upon the terms, covenants, and conditions set forth therein. If Tenant does not so elect within the 30-day period, Landlord may enter into the proposed lease or purchase agreement with the offeror. If the proposed agreement with the

offeror is not consummated, Tenant's right to first refusal shall remain in effect. Neither the making of the proposed agreement by Landlord nor anything provided in this § 1.6 shall be construed or deemed to terminate or extinguish any renewal option of Tenant provided for in § 1.4 or the exercise thereof.

Article 2 Construction of the Facility

§ 2.1. *Variance, permits.* Promptly, after the execution and delivery of this lease, Landlord shall, at its sole expense, take all steps, including application for a variance permitting the Facility in the building, necessary to obtain the permits required for the construction of the Facility.

§ 2.2. *Construction by landlord.* Promptly, after obtaining the necessary permits, Landlord shall, at its sole expense, commence, and diligently proceed with, the construction of the Facility and the furnishing, placing, erection, and installation of the equipment, fixtures, furnishings, design, decorations, installations, and personal property therefor, and complete the same, all in accordance with the Plans, Drawings, and Specifications annexed as Exhibit A. Landlord shall prepare, at its sole expense, all further plans, drawings, and specifications (which shall require Tenant's approval) that may be reasonably necessary. Landlord shall complete all of the foregoing and deliver possession of the demised premises to Tenant on or before [date]. Tenant may inspect the work at reasonable times during the construction period.

§ 2.3. *Construction standards.* All work provided and called for by the above Plans, Drawings, and Specifications shall be done in a good and workmanlike manner and in compliance with all applicable laws, ordinances, regulations, orders, and requirements of governmental authority and the Board of Fire Underwriters and the reasonable requirements of the building's insurers.

Article 3 Rent

§ 3.1. *Annual rent.* Tenant shall pay to Landlord, without deduction or set-off except as otherwise provided in this lease, at Landlord's address first above set forth or at such other place as Landlord may designate in writing, an annual rental of \$50,000 in equal monthly installments, in advance, on the first day of each calendar month during the original fifteen year term.

§ 3.2. *Fixed renewal rent.* Tenant's annual rental during the first three renewal terms provided for in § 1.4 shall be as follows: \$55,000 during the first renewal term; \$60,500 during the second renewal term; and \$66,550 during the third renewal term, all in the same manner as provided in § 3.1.

§ 3.3. *Indexed renewal rent.*

(a) *Index.* As used in this § 3.3 "Index" shall mean the "Consumer Price Index for Urban Wage Earners and Clerical Workers" "(1986=100)" specified for "All Items," relating to New York and issued by the Bureau of Labor Statistics of the United States Department of Labor. If the Index is subsequently converted to a different standard reference base or otherwise revised, the determination of the Percentage Increase (as used below) shall be made by using the conversion factor, formula, or table for converting the Index as published by the Bureau of Labor Statistics, or, in its absence, by using the conversion factor, formula, or table as published by any nationally recognized publisher of similar statistical information. If the Index ceases to be published, then, for the purposes of this § 3.3, there shall be substituted for it any other index that the Landlord and Tenant shall agree upon. If the parties are unable to agree within 90 days after the Index ceases to be published, the matter shall be determined by arbitration in New York City in accordance with the rules of the American Arbitration Association.

(b) *Renewal terms.* The annual rental to be paid by Tenant to Landlord, all in the same manner as provided in § 3.1, during the last three renewal terms provided for in § 1.4 shall be as follows: (i) during the fourth renewal term, the greater of \$73,205 or \$66,550 plus a Percentage Increase, if any, equal to a fraction of \$66,550, the numerator of which

shall be the Index on the last day of the third renewal term less the Index on the first day of the third renewal term, and the denominator of which shall be the Index on the first day of the third renewal term; (ii) during the fifth renewal term, the greater of the annual rental payable during the fourth renewal term plus 10% thereof, or the annual rental payable during the fourth renewal term plus a Percentage Increase, if any, equal to a fraction of the annual rental payable during the fourth renewal term, the numerator of which shall be the Index on the last day of the fourth renewal term less the Index on the first day of the fourth renewal term, and the denominator of which shall be the Index on the first day of the fourth renewal term; and (iii) during the sixth renewal term, the greater of the annual rental payable during the fifth renewal term plus 10% thereof, or the annual rental payable during the fifth renewal term plus a Percentage Increase, if any, equal to a fraction of the annual rental payable during the fifth renewal term, the numerator of which shall be the Index on the last day of the fifth renewal term less the Index on the first day of the fifth renewal term, and the denominator of which shall be the Index on the first day of the fifth renewal term.

§ 3.4. *Tax escalation.*

(a) *Commercial real estate tax increases.* In each and every real estate fiscal tax year during the term of this lease, Tenant shall pay to Landlord, as additional rent, 662/3 % of any increase in each such real estate fiscal tax year in the amount of real estate taxes separately assessed, levied and billed to Landlord on the commercial portion (that is, the facility and the store to be included in the building) of the property of which the demised premises form a part, over and above the real estate taxes separately assessed and billed thereon for the first real estate fiscal tax year following the Commencement Date for which said commercial portion is fully assessed as completed for real estate tax purposes. The term "real estate taxes" as used in this § 3.4 shall be deemed to include all items included in the Municipal real estate tax bill, and the term "real estate fiscal tax year" shall be deemed to mean the fiscal tax year of the Municipality.

(b) *Land and building tax increases.* If real estate taxes are assessed and levied on the whole land and building of which the demised premises form a part, without exemption or abatement, Tenant shall pay to Landlord, as additional rent in lieu of the additional rent provided for in paragraph (a) of this § 3.4, 7% of any increase in each real estate fiscal tax year in the amount of real estate taxes on said land and building, over and above the real estate taxes thereon for the first real estate fiscal tax year that real estate taxes are assessed and levied on the whole of said land and building including the commercial portion.

(c) *Pro rata taxes.* If this lease expires or otherwise terminates on a date different than the last day of the real estate fiscal tax year, the additional rent under this § 3.4 shall be prorated on a daily basis.

(d) *Quarterly payments.* Such additional rent shall be paid in four equal quarterly installments commencing within ten days after written demand therefor by Landlord. Each such demand shall be accompanied by a copy of the applicable tax bills. These bills shall be sufficient evidence of the amount of the taxes and for determination of the amount to be paid by Tenant.

Article 4 Use and Signs

§ 4.1. *Use.* Tenant shall use and occupy the demised premises for the following purposes only: (a) as a recreational and entertainment facility; (b) for the incidental retail sale of food, cigarettes, cigars, tobacco, candy, confectionery, ice cream, telephone and weighing services, beverages, refreshments, all for on-premises consumption and use, and all other items which now are and hereafter may be customarily and generally sold and used in facilities of similar types from time to time; and (c) for the incidental retail sale of records, tapes, books, magazines, toys, and novelties in connection with any particular presentation or entertainment. Landlord warrants and represents that the demised premises may lawfully be used for said purposes during the term of this lease. Tenant shall, in its use of the demised premises, comply with all applicable laws, rules and regulations, federal, state and local, including all environmental laws, rules and regulations.

§ 4.2. *Signs.* Tenant may place on and in the demised premises and the building of which they form a part all signs that Tenant deems necessary and proper in the conduct of its business, subject to the following conditions: (a) Tenant must obtain, at its sole expense, all permits and licenses required for the erection and maintenance of the signs; and (b) the erection and maintenance of the signs must be permitted by law. Tenant shall indemnify and hold harmless Landlord against and from any and all losses, damages, claims, suits, or actions for any injury or damage to person or property caused by the erection and maintenance of the signs, and insurance coverage therefor shall be included in the public liability policy which Tenant is required to furnish under this lease.

Article 5 Care and Repair of Demised Premises

§ 5.1. *Maintenance.* Tenant shall commit no waste and shall take good care of the demised premises and make all repairs necessitated by Tenant's misuse of the demised premises. Tenant shall maintain and keep in repair the plumbing equipment, fixtures, and appurtenances located within the demised premises and, after the first year of the Term, the air conditioning system, equipment, fixtures, and appurtenances (but not the heating element) serving the demised premises. Landlord shall maintain and keep in repair (and shall put into repair where necessary) the walls, structure, foundation, and roof of the building of which the demised premises form a part and the sidewalks in front thereof; and, except as aforesaid, the plumbing, electrical and heating, ventilation and air conditioning systems and the equipment, fixtures, and appurtenances to said systems, and other installations serving more than one tenant of the building; and shall make all other repairs except those required to be made by Tenant.

§ 5.2. *Water seepage.* Landlord has informed Tenant that there is an underground flow or source of water under a portion of the building, which may seep into that portion of the demised premises located in the building's basement. Landlord shall use its best efforts to prevent such seepage, but if seepage occurs, Landlord shall not be liable for any damage (except to the extent occasioned by the negligence of Landlord or its employees, servants, or agents) to property of Tenant or of Tenant's employees, customers, agents, or invitees.

§ 5.3. *Tenant property.* All improvements made by Tenant to the demised premises which are so attached that they cannot be removed without material injury to the demised premises shall become the property of Landlord upon installation. Not later than the last day of the term Tenant may, nevertheless, remove all its personal property. The demised premises shall be surrendered to Landlord at the end of the term in as good condition as they were at the beginning of the term, except for reasonable wear, and damage by fire, the elements, casualty, or other cause not due to the misuse or neglect by Tenant or Tenant's agents, servants, customers, visitors, or licensees.

Article 6 Alterations

§ 6.1. Tenant may, at its expense, without Landlord's consent, redecorate the demised premises, and make all non-structural alterations, changes, installations, additions, or improvements (collectively "changes") in, on, to, or about the parts of the premises that it deems expedient or necessary for its purposes and those of its subtenants, licensees, and concessionaires. Tenant may, for such purposes, make all reasonably necessary structural changes in, on, to, or about the demised premises if it first obtains Landlord's written consent, which Landlord shall not unreasonably withhold or delay. No such changes shall adversely affect the safety of the structure or diminish its value. All work shall be done in a good and workman-like manner, and in accordance with all applicable laws, including without limitation, the accessibility or other requirements of the Americans with Disabilities Act of 1990, or the rules and regulations promulgated thereunder. Landlord shall, upon Tenant's request, execute and deliver all instruments embodying Landlord's approval required by any public or quasi-public authority for the purpose of obtaining any license or permit for the making of these changes. Tenant shall pay for all necessary licenses and permits.

Article 7 Assignment and Subletting

§ 7.1. *Concessions.* Tenant may, without Landlord's consent, grant concessions or licenses for the sale of any or all of

the merchandise, products, and items referred to in § 4.1 within the demised premises.

§ 7.2. *Related corporations.* Tenant may, without Landlord's consent, assign this lease or sublet the demised premises or any part thereof to the parent or any subsidiary of Tenant or to any entity resulting from Tenant's consolidation or merger.

§ 7.3. *Assignment, sublease.* Tenant may, without Landlord's consent, assign this lease or sublet the demised premises or any part thereof for the uses herein specified if the assignee or sublessee of the entire demised premises deposits as security with Landlord a sum of money equal to two months rent.

§ 7.4. *Assumption of lease.* If this lease is assigned or if the demised premises or any part thereof is sublet, the assignment or subletting shall be upon and subject to all of the terms, covenants, and conditions contained in this lease, and Tenant shall continue to remain liable thereunder. Upon any subsequent assignment, each subsequent assignee shall continue to be and remain liable hereunder. Within 30 days after the execution and delivery of any such assignment, Tenant shall furnish to Landlord a duplicate original of the assignment which shall contain an assumption by the assignee of all of Tenant's obligations under this lease.

Article 8 Mortgages of Tenant's Interest

§ 8.1. *Subordinated leasehold mortgage.* Tenant, and its successors and assigns, may, without restriction, mortgage and pledge this lease, subject, however, to the limitations of this Article. Any such mortgage or pledge shall be subject and subordinate to Landlord's rights hereunder.

§ 8.2. *Notice to landlord.* No holder of a mortgage on this lease shall have the rights or benefits mentioned in this Article, nor shall the provisions of this Article be binding upon Landlord, unless and until the name and address of the mortgagee has been delivered to Landlord, notwithstanding any other form of actual or constructive notice.

§ 8.3. If Tenant or its successors or assigns mortgage this lease in compliance with the provisions of this Article, then so long as any such mortgage remains unsatisfied of record, the following provisions shall apply:

(a) *Notice of tenant's default.* Landlord, upon serving upon Tenant any notice of default pursuant to the provision of Article 14 hereof, or any other notice under the provisions of or with respect to this lease, shall also serve a copy of the notice upon the holder of such mortgage, at the address provided for in paragraph (g) of this § 8.3. No notice by Landlord to Tenant hereunder shall be deemed to have been duly given unless and until a copy thereof has been so served.

(b) *Cure by mortgagee.* Any holder of such mortgage, if Tenant is in default hereunder, may, within the period and otherwise as herein provided, remedy the default or cause it to be remedied. Landlord shall accept such performance by or at the instance of the holder as if it had been made by Tenant.

(c) *Commencement of cure.* For the purposes of this Article, no event of default shall be deemed to exist under Article 14 hereof in respect of the performance of work required to be performed, of acts to be done, or of conditions to be remedied, if good faith steps have been commenced within the time permitted to rectify the default and prosecuted to completion with diligence and continuity as provided in Article 14.

(d) *Forbearance of landlord.* Anything herein contained to the contrary notwithstanding, upon the occurrence of an event of default other than in the payment of money, Landlord shall take no action to effect a termination of this lease without first giving to the holder of such mortgage written notice thereof and a reasonable time thereafter within which either (i) to obtain possession of the mortgaged property (including possession by a receiver) or (ii) to institute, prosecute, and complete foreclosure proceedings or otherwise acquire Tenant's interest under this lease with diligence.

The holder, upon obtaining possession or acquiring Tenant's interest under this lease, shall promptly cure all defaults that are then reasonably susceptible of being cured by it, subject to the following conditions and exceptions: (i) the holder shall not be obligated to continue possession or foreclosure proceedings after the defaults have been cured; (ii) nothing contained herein shall preclude Landlord, subject to the provisions of this Article, from exercising any right or remedy under this lease with respect to any other default by Tenant during the pendency of the foreclosure proceedings; and (iii) the holder shall agree with Landlord in writing to comply during the period of forbearance with all terms, conditions, and covenants of the lease that are reasonably susceptible of being complied with by the holder. Any default by Tenant that is not reasonably susceptible of being cured by the holder shall be deemed to have been waived by Landlord upon completion of the foreclosure proceedings or upon acquisition of Tenant's interest in this lease. However, any event of default that is reasonably susceptible of being cured after completion and acquisition shall then be cured with reasonable diligence. The holder, or his designee, or other purchaser in foreclosure proceedings may become the legal owner and holder of this lease through such foreclosure proceedings or by assignment of this lease in lieu of foreclosure.

(e) *Termination; new lease.* If this lease terminates before its term expires, except by eminent domain (as provided in Article 12), Landlord shall serve upon the holder of the mortgage written notice of that fact, together with a statement of all sums which would at that time be due under this lease but for the termination, and of all other defaults under this lease then known to Landlord. The holder may then obtain a new lease in accordance with and upon the following terms and conditions: (i) Upon the written request of the mortgage holder, within 30 days after service of notice that the lease has been terminated, Landlord shall enter into a new lease of the demised premises with the holder, or his designee, as follows; (ii) The new lease shall (A) be entered into at the reasonable cost of the new tenant, (B) be effective as of the date of termination of this lease, (C) be for the remainder of the term of this lease, and (D) be at the rent and upon all the agreements, terms, covenants, and conditions hereof, including all applicable rights of renewal. The new lease shall require the tenant to perform all of Tenant's unfulfilled obligations under this lease that are reasonably susceptible of being performed by the Tenant. Upon execution of the new lease, the new tenant shall pay all sums that would then be due under this lease but for the termination, as well as all expenses, including reasonable counsel fees, court costs, and disbursements incurred by Landlord in connection with the defaults and termination, the recovery of possession of the premises, and the preparation, execution, and delivery of the new lease. Upon execution of the new lease, Landlord shall allow to the new tenant, and the new tenant shall be entitled to, an adjustment equal to the net income derived by Landlord from the demised premises during the period from the date of termination of this lease to the date of execution of the new lease.

(f) *Renewal option, new lease.* If by reason of its failure either to exercise any renewal option under § 1.4 hereof, or for any other reason whatsoever, Tenant does not become entitled to renew this lease for any renewal term provided for in § 1.4, Landlord shall serve upon the holder of the mortgage written notice of that fact. The holder may then, by serving written request upon Landlord, obtain from it a new lease of the demised premises for the renewal term in accordance with and upon the following terms and conditions: The written request shall be served upon Landlord not later than 60 days after service of the above notice by Landlord on the holder. Within 30 days after service of the written request, Landlord and the holder of the mortgage (or his designee) shall enter into a new lease of the demised premises, as follows: The new lease shall (A) be entered into at the new tenant's reasonable expense, (B) be effective as at the date of termination or expiration of the then current term of the lease, (C) be for the renewal term succeeding the then current term of this lease, and (D) be at the rent and upon all the agreements, terms, covenants, and conditions hereof, including all applicable rights of renewals. The new lease shall require the tenant to perform all of Tenant's unfulfilled obligations under this lease that are reasonably susceptible of being performed by the tenant. Upon execution of the new lease, the new tenant shall pay all sums remaining unpaid under the expiring lease, plus the reasonable expenses incurred by Landlord in connection with the preparation, execution, and delivery of the new lease.

(g) *Notices.* Any notice or other communication which Landlord shall desire or is required to give to or serve upon the holder of a mortgage on this lease shall be in writing and served by registered or certified mail, addressed to the holder at his address as set forth in the mortgage, or in the last assignment of it delivered to Landlord under § 8.2, or at any

other address that the holder designates by written notice given to Landlord by registered or certified mail. Any notice or other communication which the holder of a mortgage on this lease shall desire or is required to give to or serve upon Landlord shall be deemed to have been duly given or served if sent in duplicate by registered or certified mail addressed to Landlord at its addresses as set forth in Article 15 of this lease or at any other address that the Landlord designates by written notice given to the holder by registered or certified mail.

(h) *Assignment of subleases.* Effective upon the commencement of the term of any new lease executed under paragraph (e) or paragraph (f) of this § 8.3, any subleases shall be assigned and transferred without recourse by Landlord to the tenant under the new lease. All moneys on deposit with Landlord which Tenant would have been entitled to use but for the termination or expiration of this lease may be used by the tenant under the new lease for the purposes of and in accordance with its provisions.

(i) *Priority for new lease.* Anything herein contained to the contrary notwithstanding, the provisions of this Article 8 shall enure only to the benefit of the holders of leasehold mortgages which shall be, respectively, a first, second, and third lien. If the holders of more than one such leasehold mortgage shall make written requests upon Landlord for a new lease in accordance with the provisions of paragraph (e) or paragraph (f) of this Section, the new lease shall be entered into pursuant to the request of the holder whose leasehold mortgage shall be prior in lien thereto. Thereupon the written requests for a new lease of each holder of a leasehold mortgage junior in lien shall be and be deemed to be void and of no force or effect.

(j) *Possession.* Nothing herein contained shall be deemed to obligate Landlord to deliver possession of the demised premises to the tenant under any new lease entered into under paragraph (e) or paragraph (f) of this § 8.3.

(k) *Prior consent.* No agreement between Landlord and Tenant modifying, cancelling, or surrendering this lease shall be effective without the leasehold mortgagee's prior written consent.

(l) *Nonmerger.* No union of the interests of Landlord and Tenant herein shall result in a merger of this lease in the fee interest.

§ 8.4. *Lease assignment by mortgagee.* If any leasehold mortgagee acquires title to Tenant's interest in this lease, by foreclosure of a mortgage thereon, by assignment in lieu of foreclosure, by assignment from a designee or wholly owned subsidiary corporation of the mortgagee, or under a new lease pursuant to this Article 8, the mortgagee may assign the lease. Upon assignment, the mortgagee shall be released from all liability for the performance or observance of the covenants and conditions in the lease contained on tenant's part to be performed and observed from and after the date of assignment, provided that the mortgagee's assignee has assumed the lease in accordance with, and otherwise complied with, § 7.4 of this lease.

Article 9 Services

§ 9.1. *Landlord services.* Landlord shall, at its expense, furnish the following services to the demised premises:

(a) *Heat.* Heat when and as required by law, during the hours when the demised premises are open for business.

(b) *Water.* Hot and cold water for lavatory and drinking purposes. However, Landlord may, at its expense, install and maintain a water meter to register such consumption, and Tenant shall pay, as additional rent, when and as bills are rendered by the supplier, for water consumed and for sewer rent based upon such consumption of water.

(c) *Air conditioning.* Air conditioning during the hours when the demised premises are open for business to maintain Tenant's temperature requirements for the uses referred to in Article 4.

§ 9.2. *Electricity.*

(a) *Adequate supply.* Landlord warrants and represents that the electrical system and equipment, appliances, and fixtures to be installed in the building and in the demised premises will at all times be adequate for the furnishing by Landlord and the public utility company of electric current to the demised premises sufficient for Tenant's requirements for lighting and for the operation of the demised premises for Tenant's uses and purposes. Landlord shall furnish and supply the electric current and services, which Tenant shall pay for as provided below.

(b) *Metered electric bills.* The quantity of electric current consumed by Tenant shall be measured by a meter or meters furnished and installed by Landlord, at Landlord's expense. The meter or meters shall be read monthly by Landlord and Tenant jointly or by an agent designated by both of them. Bills therefor shall be rendered by Landlord, and the amounts thereof, as computed from such meter at the same rates paid by Landlord to the public utility, shall be deemed to be and shall be paid by Tenant as additional rent, within 20 days after the bills are rendered. If any municipal, state, or federal agency imposes a tax upon Landlord with respect to the purchase, sale, or resale of electric energy supplied by it to Tenant, Tenant's pro rata share of the tax shall, when permitted by law, be passed on to and included in its bill, and be paid by Tenant to Landlord.

(c) *Discontinuance.* If Landlord is required by law to discontinue the furnishing of electric energy and service to Tenant, it shall give Tenant 60 days prior notice of discontinuance. Landlord shall also permit Tenant to receive electric energy and service direct from the public utility, permit Landlord's wires and conduits to be used for that purpose, and make all necessary alterations and additions thereto. Discontinuance of services and Landlord's compliance with the above terms shall not be deemed to be a lessening or diminution of services within the meaning of any existing or future law, rule, or regulation.

§ 9.3 *Miscellaneous.*

(a) *Compactor.* Tenant may use the building compactor, without charge, to dispose of its rubbish and garbage so long as the Municipality does not prohibit such use. If such use is prohibited, Tenant shall properly dispose of its rubbish and garbage at its expense.

(b) *Security system.* Landlord may install and keep in the facility the television receivers that are part of the building security closed circuit television system. Tenant shall not be responsible for the repair, maintenance, or replacement of the equipment or for its operation or use. Landlord shall pay the cost of arranging for any of Tenant's employees to watch the receivers for it.

(c) *Exhaust fan.* Landlord may install and keep in the facility the building exhaust fan control panel. Tenant shall not be responsible for the operation, repair, maintenance, or replacement of the panel.

Article 10 Indemnity-Liability Insurance

§ 10.1. *Indemnity.* After the Commencement Date, Tenant shall indemnify and hold harmless Landlord against and from any and all liabilities, fines, suits, claims, demands, and actions, and costs and reasonable expenses of any kind or nature or by anyone whomsoever, due to or arising out of (a) any default in observing, violation, or nonperformance of any term, covenant, or condition of this lease on the part of Tenant to be observed and performed, (b) any damage to person or property occasioned by Tenant's use and occupancy of the demised premises or to any use or occupancy which Tenant may permit or suffer to be made of the demised premises, or (c) any injury to person or persons, including death resulting at any time therefrom, occurring in or about the demised premises. Tenant's liability under this § 10.1 shall be reduced by the net proceeds actually collected on any insurance effected by Tenant on the risks in question for Landlord's benefit.

§ 10.2. *Liability insurance.* During the term of this lease, Tenant, at its sole expense and for the mutual benefit of Landlord and Tenant, shall carry and maintain comprehensive public liability insurance, including property damage, insuring Landlord and Tenant against liability for injury to persons or property occurring in or about the demised premises or arising out of its ownership, maintenance, use or occupancy. The insurance shall have a limit of not less than \$300,000 for any one accident or occurrence, and so-called "umbrella" or "excess" coverage therefor to the limit of not less than \$2,000,000. On the Commencement Date, Tenant shall furnish to Landlord copies or certificates of the policies together with proof of payment of the premium therefor, and shall, upon the expiration of the term of any such policy, similarly furnish to Landlord a copy or certificate of each such renewal policy together with proof of payment of the premium therefor. The policy and each renewal thereof shall provide that it may not be cancelled by the insurer without ten days' prior written notice to Landlord and to Tenant.

§ 10.3. *Waiver of subrogation.* Notwithstanding any provision of this lease to the contrary, in the event of loss or damage to the building, the demised premises and/or any contents, each party shall look first to any insurance in its favor before making any claim against the other party. To the extent possible, without additional cost, each party shall obtain, for each policy of such insurance, provisions permitting waiver of any claim against the other party for loss or damage within the scope of the insurance, and each party, to such extent permitted, for itself and its insurers, waives all such insured claims against the other party.

Article 11 Damage by Fire or Other Casualty

§ 11.1. *Substantial casualty.* If the demised premises are materially damaged or rendered materially untenable by fire or other casualty (whether occurring in the demised premises alone or in the building of which they form a part), or are so damaged or so rendered untenable by fire or other casualty (whether occurring in the demised premises alone or in the building of which they form a part) that their repair, restoration, or rebuilding would require more than 60 days for completion, Tenant may, by giving written notice to Landlord within 15 days after the fire or other casualty occurs, terminate this lease upon a date specified in the notice. This date shall not be less than five nor more than ten days after the notice is given. In such event, the term of this lease shall expire in the same manner as if the date specified in the notice were the date herein originally specified for the expiration of the term. If Tenant does not give the required notice, Landlord shall immediately proceed to repair, restore, and rebuild the demised premises and building to their former condition at Landlord's sole expense, and complete the same with reasonable promptness. The rent and additional rent shall abate from the date of the fire or other casualty until the repairs, restoration, and rebuilding are completed. If this lease is terminated pursuant to notice as provided above, Tenant shall pay no rent or additional rent for any period after the date of the fire or other casualty. The rent or additional rent shall be apportioned as of that date, and Tenant shall be repaid all rent or additional rent paid for any subsequent period.

§ 11.2. *Casualty insurance.* Landlord shall insure the building of which the demised premises form a part against damage and destruction by fire, including extended coverage, and other perils a lending institution holding a mortgage on the property would require, to the full replacement cost of the building and shall maintain such insurance during the term of this lease. Tenant shall not be liable to Landlord for any loss or damage to the building or the demised premises by fire or any other cause, and in the event of any such loss or damage, Landlord will look solely to the insurer or any third party against which it may have a claim. Landlord shall cause such insurance to be written so as to provide that insurers waive all right of recovery by way of subrogation against Tenant.

§ 11.3. *Contents insurance.* During the term of this lease, Tenant shall, at its expense and for the benefit of Landlord and any mortgagee of the property, insure the property described in § 1.1(b) against damage and destruction by fire, including extended coverage and other perils a lending institution holding a mortgage on the property would require, to the full replacement cost or other maximum insurable value thereof. On the Commencement Date, Tenant shall furnish to Landlord the insurance policy together with proof of payment of the premium therefor, and shall upon the expiration of the term of any such policy similarly furnish to Landlord each renewal policy together with proof of payment of the premium therefor. The policy and each renewal thereof shall provide that it may not be cancelled by the insurer without

ten days' prior written notice to Landlord and any named insured.

Article 12 Eminent Domain

§ 12.1. *Material condemnation.* If the demised premises or any part thereof or any estate therein, or any other part of the building of which the demised premises form a part materially affecting Tenant's use of the demised premises, are taken by virtue of eminent domain, this lease shall terminate on the date title vests pursuant to the taking. In such case the rent and additional rent shall be apportioned as of that date and Tenant shall be repaid all rent and additional rent paid for any subsequent period.

§ 12.2. *Landlord's award, tenant's share.* Tenant shall not be entitled to any part of the award. However, Landlord shall pay to Lessee from the award when received any amount by which it is increased by reason of the following: the taking of fixtures and equipment which Tenant is entitled to remove; alterations and improvements paid for by Tenant; or the cost to Tenant of moving from the demised premises and relocating.

§ 12.3. *Tenant's award.* Nothing in this Article 12 to the contrary shall be construed or deemed to affect Tenant's right, or to deprive Tenant or its right to make and prosecute a claim against the condemning authority for, and to recover damages to or for, the taking of Tenant's fixtures and equipment, as well as alterations, decorations, installations, additions, and improvements in and to the demised premises made at its sole expense, and for moving and relocation expenses, resulting from the taking.

Article 13 Subordination

§ 13.1. *Subordination, nondisturbance agreement.* This lease shall be subject and subordinate to mortgages which now affect the real property of which the demised premises form a part and to all renewals, modifications, consolidations, and replacements of the presently existing mortgages. Landlord shall use its best efforts to obtain and cause to be delivered to Tenant, within a reasonable time after the Commencement Date, an agreement from the holder of each such mortgage, which Tenant shall promptly execute if so requested, providing, in effect, that so long as no event of default on Tenant's part, as set forth in this lease, has occurred and is continuing, it shall not be joined as a party defendant in any foreclosure action or proceeding which may be taken or instituted by the then holder of the mortgage by reason of any default under the mortgage, and that Tenant shall not be evicted from the demised premises or its leasehold estate hereunder be terminated or disturbed by reason of any default under the mortgage.

§ 13.2. *Future mortgages.* This lease shall also be subject and subordinate to any first mortgage held by a lending institution, which may hereafter affect the real property and to all renewals, modifications, consolidations, and replacements thereof provided the holder of the first mortgage executes and delivers to Tenant an agreement similar in effect to that referred to in § 13.1.

§ 13.3. *Subordination agreement.* Although no instrument or act by Tenant shall be necessary to effect the above subordination, Tenant will, nevertheless, execute and deliver all further instruments that the mortgage holders may desire to confirm subordination of this lease on the above terms. Tenant hereby irrevocably appoints Landlord attorney in fact to execute and deliver all such instruments for Tenant if it fails or refuses within a reasonable time after request to do so.

Article 14 Default--Remedies

§ 14.1. *Default, notice, termination.* If Tenant defaults in the payment of rent or additional rent or in the performance of any term, covenant, or condition of this lease, Landlord may give Tenant written notice of default. If Tenant does not cure any rent or additional rent default within 15 days, or other default within 30 days (or, if the default is of such nature that it cannot be completely cured within 30 days, if Tenant does not commence the curing within 30 days and

thereafter proceed with reasonable diligence and in good faith to cure the default), after notice of default is given, Landlord may terminate this lease by giving seven days' written notice to Tenant. This lease then shall terminate on the date specified in the notice, and Tenant shall quit and surrender the demised premises to Landlord. However, Tenant shall remain liable as provided below. If this lease is so terminated by Landlord, it may at any time thereafter resume possession of the demised premises by any lawful means and remove Tenant and other occupants and their effects.

§ 14.2. *Repossession, reletting.* Whenever Landlord has recovered possession of the demised premises by reason of Tenant's default Landlord may occupy the demised premises or cause them to be redecorated, altered, divided, consolidated with other adjoining premises, or otherwise changed or prepared for reletting. Landlord may also relet the demised premises or any part thereof as Tenant's agent or otherwise for a term or terms to expire prior to, at the same time as, or subsequent to, the original expiration date of this lease, and receive the rent therefor. Landlord shall apply such rent as follows: first to the payment of any expenses it has incurred in connection with the recovery of possession, redecorating, altering, dividing, consolidating with other adjoining premises, or otherwise changing or preparing for reletting, and the reletting, including brokerage and reasonable legal fees; and then to the payment of damages equal to the rent hereunder and the expense of performance of the other covenants of Tenant as provided herein. Tenant shall, whether or not Landlord has relet, pay to Landlord damages equal to the rent and other sums that Tenant has agreed herein to pay, less any net proceeds of the reletting, as ascertained from time to time. Tenant shall pay these damages on the several rent days specified above. In reletting the demised premises as provided above, Landlord may grant rent concessions, for which Tenant shall not be credited. No such reletting shall constitute a surrender and acceptance or be deemed evidence thereof. If Landlord elects, pursuant hereto, actually to occupy and use the demised premises or any part thereof during any part of the balance of the term as originally fixed or since extended, there shall be allowed against Tenant's obligation for rent or damages as herein defined, during the period of Landlord's occupancy, the reasonable value of the occupancy, not to exceed in any event the rent herein reserved. The occupancy shall not be construed as a release of Tenant's liability hereunder.

§ 14.3. *Waiver of right of redemption.* Tenant waives all right of redemption to which it or any person claiming under it may be entitled by any existing or future law.

§ 14.4. *Cumulative remedies.* Landlord's remedies hereunder are in addition to any remedy allowed by law.

§ 14.5. *Landlord's cure of tenant's default.* If Tenant breaches any term, covenant, or condition of this lease, Landlord may, by giving reasonable notice to Tenant (except that no notice need be given in case of emergency), cure the breach at Tenant's expense. All reasonable expenses, including legal fees, incurred by Landlord in curing Tenant's breach shall be deemed additional rent payable on demand.

Article 15 Notices

§ 15.1. Any notice, demand, request, or other communication given hereunder or made by either party to the other shall be in writing and mailed by registered or certified mail in a postpaid envelope addressed as follows:

(a) if to Tenant, at its address set forth above, with a copy at the demised premises,

(b) if to Landlord, at its address set forth above,

or at any other address that Tenant or Landlord, respectively, may designate by written notice under this § 15.1.

Article 16 Broker

§ 16.1. The parties agree that this lease was brought about by Collins & Associates, Inc., 439 East 49th Street, New York, New York, as broker. Landlord shall pay the broker its commission under separate agreement. Tenant represents

that Tenant dealt with no other broker in connection with this lease.

Article 17 Quiet Enjoyment

§ 17.1. *Quiet enjoyment.* Landlord covenants that if and so long as Tenant pays the rent and additional rent and performs the terms, covenants, and conditions applicable to it, Tenant shall peaceably and quietly have, hold, and enjoy the demised premises for the term of this lease, subject to its provisions.

§ 17.2. *Title warranty.* Landlord warrants and represents that it has good and marketable title to the real property of which the demised premises form a part, free and clear of all liens and encumbrances except mortgages.

Article 18 Miscellaneous Provisions

§ 18.1. *Non-waiver.* The failure of either party to insist on strict performance of any term, covenant, or condition hereof, or to exercise any option herein contained (other than the options provided for in § 1.4), shall not be construed as a waiver of such term, covenant, condition, or option in any other instance.

§ 18.2. *Written modification.* This lease cannot be changed or terminated orally, but only by an instrument signed by both parties.

§ 18.3. *Mechanic's liens.* Tenant shall within 30 days after notice from Landlord discharge any mechanic's lien for materials or labor claimed to have been furnished to the demised premises on Tenant's behalf, except liens that may be filed in connection with Landlord's construction of the facility provided for in § 2.2.

§ 18.4. *Access to premises.* Landlord may enter the demised premises at any reasonable time on reasonable notice to Tenant for the purpose of inspection and to show the premises to prospective mortgagees or purchasers.

§ 18.5. *Interruption of services.* Interruption or curtailment of any service maintained in the building of which the demised premises form a part, or furnished to the demised premises, if caused by strikes, mechanical difficulties, or any causes beyond Landlord's control whether similar or dissimilar to those enumerated, shall not entitle Tenant to any claim against Landlord or to any abatement in rent, nor shall the same constitute constructive or partial eviction, unless Landlord fails to take all reasonable measures under the circumstances to restore the service without undue delay. If the demised premises are rendered wholly or partially unfit for the uses specified in this lease, for a period of more than three days, by the making of repairs, replacements or additions, other than those made with Tenant's consent or caused by misuse or neglect by Tenant or its agents, servants, customers, visitors or licensees, there shall be a proportionate abatement of rent during the period of such unfitness.

§ 18.6. *No representations.* Neither party has made any representations or promises, except as contained in this lease.

§ 18.7. *Tenant estoppel certificates.* Tenant shall from time to time, upon not less than ten days prior written request by Landlord, execute, acknowledge, and deliver to Landlord a written statement certifying that this lease is unmodified and in full force and effect (or that it is in full force and effect as modified, listing the instruments of modification), the dates to which the rent and other charges have been paid, and whether or not to the best of Tenant's knowledge Landlord is in default hereunder (and if so, specifying the nature of each default).

§ 18.8. *Landlord estoppel certificates.* Landlord shall from time to time, upon not less than ten days prior written request by Tenant, execute, acknowledge, and deliver to Tenant a written statement certifying as to the matters set forth in § 18.7, except that it shall certify whether or not to the best of Landlord's knowledge Tenant is in default hereunder, and if so, specifying the nature of each default.

§ 18.9. *Memorandum of lease.* At the request of either party, the other party will execute, acknowledge and deliver to the requesting party a short form or memorandum of this lease in form for recording.

§ 18.10. *Headings.* Headings in this lease are for convenience and reference only and shall not be used to interpret or construe its provisions.

§ 18.11. *Binding effect.* The provisions of this lease shall be binding upon and inure to the benefit of Landlord and Tenant and their respective successors, legal representatives, and assigns. The term "Landlord," as used in this lease, shall mean only the owner, the mortgagee in possession, or the ground lessee for the time being of the real property of which the demised premises form a part. Thus, if there is any sale or sales or ground lease of the real property, or if the mortgagee takes possession thereof, Landlord shall be entirely freed and relieved of all its covenants and obligations under this lease accruing thereafter. In addition, the purchaser, the ground lessee, or the mortgagee in possession shall be deemed to assume and agree to carry out all of Landlord's covenants and obligations hereunder.

§ 18.12. *Governing law.* This lease shall be construed in accordance with and governed by the laws of the State of New York.

§ 18.13. *Counterparts.* This lease may be executed in two or more counterparts, each of which shall be deemed an original but all of which together shall constitute one and the same instrument.

§ 18.14. *Time of essence.* Time is expressly declared to be the essence of this lease.

§ 18.15. *Entire agreement.* This lease supersedes all agreements previously made between the parties relating to its subject matter. There are no other understandings or agreements between them.

In witness whereof Landlord and Tenant have duly executed this lease the day and year first above written.

Cornerstone, Inc.

Landlord

by _____

President

Leisure Time, Inc.,

Tenant

by _____

President



60 of 132 DOCUMENTS

Current Legal Forms for Real Estate

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Current Legal Forms for Real Estate
Chapter 23 REAL ESTATE LEASES
Part IV. Forms

A. COMPLETE LEASES AND RELATED AGREEMENTS

31-23 Current Legal Forms for Real Estate FORM 23.04

AUTHOR: by Thomas G. Belden

FORM 23.04 Ground lease--shopping center

COMMENT

This form of ground lease contains several features which are favorable to the lessee that are not always found in long-term leases. The lease contemplates that the lessee will build a shopping center or other commercial buildings upon the leased premises, and that in addition to a fixed minimum rent which the lessee is to pay to the lessor (yearly, and in advance) the lessee will also pay percentage rent which is based upon percentage rent that the lessee will receive from its subtenants. It should be noted, however, that the lessee is not required to construct any improvements, as discussed below.

Construction of improvements:

Although the lease contemplates that a shopping center is to be built, Article XIII of the lease specifically provides that the lessee is under no obligation to do so. The lessee is not permitted to construct any improvements on the premises unless they are in the nature of a commercial building or shopping center. However, should the lessee elect to do so, he may continue the lease in effect merely by paying the minimum rent and the lessor would never receive the anticipated percentage rent. As a practical matter, it is doubtful that the lessee would continue to pay rent indefinitely for bare land which produces no income and, upon failure to pay rent, the lessor could terminate the lease. In this respect, it should be noted that the fixed minimum rent increases by more than 100% within a period of five years (see Article III). It is more common, however, to provide that the lessor may terminate the lease in the event that the lessee fails to commence and complete construction of the improvements by specified dates.

Mortgage financing:

Another feature contained in this lease, which should be useful to the lessee, is the requirement that the lessor mortgage his fee ownership in the land in order to help the lessee obtain temporary and permanent financing to construct the desired improvements (see Article XIV).

Nonrecourse mortgage as to lessor:

If the lessor is willing to go along with the basic concept of mortgaging his fee ownership, he will generally insist on additional provisions (similar to those contained in Article XIV below) which are designed to protect him from personal liability for the mortgage debt and offer some assurance that, although it is possible for him to lose his land in a mortgage foreclosure action, it is not probable. Nevertheless, the lessor must be made aware of the fact that if the lessor is unwilling or unable to cure a possible default of the developer (which may involve the payment of substantial sums) the lessor runs the risk of losing his land in a mortgage foreclosure action.

If the lessor is a "sophisticated" landowner who is unwilling to mortgage his fee ownership, he will generally permit the lessee to mortgage his leasehold interest in the land on terms and conditions that an institutional lender would require in order to make the leasehold mortgage acceptable security for temporary and permanent construction financing.

Table of contents:

Long-term leases are inherently lengthy documents due to the fact that they provide, as a matter of contract, for the rights and obligations of the lessor and the lessee with respect to a wide variety of matters, under varying circumstances, over a long period of time. Accordingly, a table of contents frequently precedes the agreement in order to give interested parties quick access to various contractual matters that are generally covered by all leases. These tables of contents are reproduced for two basic reasons. First, they serve as a basic checklist for broad problems that are normally covered in most leases. They also enable counsel to compare the manner in which the same problem receives comparable or different treatment in other leases provided in this section.

FORM

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THIS LEASE made and entered into at Bel Air, Harford County, State of Maryland, on *[date]*, by and between James Hackney Enterprises (the "Lessor") and Hebditch Holders, Inc., a Maryland corporation (the "Lessee");

The Lessor and the Lessee, for and in consideration of the keeping by the parties of their respective obligations hereinafter contained agree as follows:

Article I Demised Premises

1. *Lessor's demise.* Upon the terms and conditions hereinafter set forth, and in consideration of the payment of the rents and the prompt performance by the Lessee of the covenants and agreements, to be kept and performed by the Lessee, the Lessor does lease, let, and demise to the Lessee and the Lessee hereby leases from the Lessor, the following described premises, situate, lying, and being in Harford County, State of Maryland:

[Insert legal description or refer to attached exhibit]

2. *Conditions.* The demise is likewise made subject to the following:

- (a) All conditions, restrictions, and limitations now appearing of record;
- (b) Zoning ordinances of any municipality, the County of Harford, State of Maryland, and any other competent governmental body now existing or which may hereafter exist during the life of this Lease;
- (c) Any questions of survey, the Lessee having satisfied itself as to the boundary lines and contents of the above described premises as well as with the sufficiency of the Lessor's present title; and
- (d) The Lessee's proper performance of all the terms and conditions contained in this Lease.

Article II Term

To have and to hold the demised premises for a term commencing [date] and ending [date], inclusive, unless terminated sooner as provided below.

Article III Rent

1. *Annual rentals.* The Lessee shall pay the Lessor the following rent:

1st year	\$11,000
2nd year	17,500
3rd year	20,000
4th year	22,500
5th year	25,000
6-50th year	25,000

All rent payments shall be paid annually and in advance.

2. *Cost of fill; offset.* The Lessee shall pay the first \$35,000 of the cost of filling the subject property to the specifications of its subtenants, state and local building codes, and all other applicable authorities. The cost of fill shall be determined by three qualified bidders, approved by the Lessor and Lessee. If the cost exceeds \$35,000, all excess amounts shall be deducted from the minimum rent payment at the rate of 10% per annum between the sixth and fifteenth years of this Lease.

3. *Supplementary rent.* (a) The Lessee shall pay Supplementary Rent to the Lessor. Supplementary Rent shall be 10% of the net amount of "Percentage Rent" (as hereinafter defined) paid to the Lessee during the preceding calendar year by all subtenants of portions of the demised premises used for retail or other shopping center purposes, plus 5% of "Gross Rents" (as hereinafter defined) received by the Lessee during the preceding calendar year from subtenants of portions of the shopping center used for other purposes. If the premises leased to a subtenant are used principally or primarily for retail or other shopping center purposes, and the applicable lease provides for the payment of Percentage Rent, for the purpose of computing Supplementary Rent it shall be deemed that all thereof are used for retail or shopping center purposes. The operation of the following businesses shall be deemed to be shopping center uses (without limitation thereto): bank, finance company office, insurance company office, barber shop and beauty parlor, launderette, supermarket, dry cleaning store, variety store, department store, restaurant, discount store, or real estate office. Supplementary Rent shall be paid on July 1 of each year during the term.

(b) After the receipt of such statements of Gross Sales (as defined in the applicable sublease) and payments of Percentage Rent and Gross Rent from subtenants, the Lessee shall compile a schedule thereof and furnish a copy to Lessor on or before July 1 of each year.

(c) In lieu of Article III, Section 3(a), above, the Lessor may compute Percentage Rent as follows:

The sixth year that the Shopping Center is in operation will be considered the Base Year. Rental Incomes attributed to stores that were in operation during that year may increase, the amount of such increase to be deemed Percentage Rent, whether by having the stores in operation pay additional rent or procuring new tenants to replace such stores. The Lessor will receive 10% of these increases. On any new building the Base Year will be the first year's rental.

4. *Due date.* All rental payments shall be made on the anniversary of the payment of the first rental.

5. *Place of payment.* Rent shall be payable at such place as the Lessor may specify, in writing, from time to time.

6. *Net lease*. All rent shall be absolutely net to Lessor, so that this Lease shall, except as hereinafter provided to the contrary, yield net to Lessor the rent, to be paid in each year during the term of this Lease. Accordingly, the Lessee shall pay all costs, expenses, and obligations of every kind or nature, relating to the demised premises, or any improvements thereon, which may arise or become due during the term of this Lease, and shall indemnify and hold harmless the Lessor from and against the same. Nothing in this Lease shall be deemed to require the Lessee to pay or discharge any liens or mortgages of any character which may later be placed upon the demised premises by the Lessor's affirmative acts. However, the Lessee shall pay and discharge temporary and permanent mortgages referred to in Article XIV hereof.

Article IV Definitions

As used in this Lease, the following terms have the following definitions:

1. "Percentage Rent" shall mean rent payable by a subtenant of a part of the demised premises to the Lessee, computed in the following or similar manner:

(a) As the extent to which a specified percentage of certain sales (subject to exclusions and deductions) exceeds a fixed minimum rent and possibly other charges payable under the applicable sublease; or

(b) As a percentage of the extent to which certain sales (subject to exclusions and deductions) made in such premises exceeds a specified minimum sales figure; or the difference between such percentage and other charges payable by the subtenant.

If any subtenants are permitted to deduct sums or are entitled to refunds from the percentage rents, the amounts shall be deductible from the Percentage Rent referred to herein.

2. "Gross Rent" shall mean all rent payable to Lessee by subtenants minus Subtractions, as follows:

(a) The utility charges segregated in any sublease from the rent payable thereunder and paid to Lessee as a reimbursement for the supplying of utilities to such subtenant; and

(b) Such subtenant's pro rata share of the cost to Lessee of maintaining, repairing and operating common areas of the demised premises.

3. "Pro Rata Share" shall mean the proportion that the floor area of the premises leased to a subtenant bears to the square foot area of all of the space of the buildings (excluding any covered mall or any buildings used as common facilities) situated in the demised premises. For purposes of this formula, the floor area shall be computed on the basis of exterior dimensions.

Article V Payment of Taxes

1. *Lessee's obligations*. The Lessee shall pay, before any fine, penalty, interest, or cost may be added, become due, or be imposed for nonpayment thereof, the following: all taxes, assessments, water and sewer rents, rates and charges, transit taxes, charges for public utilities, excises, levies, licenses and permit fees and other governmental charges, general and special, ordinary and extraordinary, unforeseen and foreseen, of any kind and nature, which at any time during the term of this Lease may be assessed, levied, confirmed, imposed upon, or grow or become due and payable out of or in respect of, or become a lien on, the demised premises, or any improvements thereon, or any part thereof or any appurtenance thereto, or otherwise arising out of the rent and income received by the Lessee from subtenants, any use or occupation of the demised premises, and such franchises as may be appurtenant to the use of the demised premises, or any

document (to which the Lessee is a party) creating or transferring an interest or estate in the demised premises.

2. *Obligations altered.* Nothing herein shall require the Lessee to pay municipal, state, or federal income taxes assessed against the Lessor, the Lessor's municipal, state, or federal capital levy, estate, succession, inheritance, or transfer taxes, or corporate franchise taxes imposed upon any corporate owner of the fee of the demised premises. However, if at any time during the term of this Lease the methods of taxation prevailing at the commencement of its term are altered so as to cause the whole or any part of the taxes, assessments, levies, impositions, or charges now levied, assessed and imposed, wholly or partially as a capital levy, or otherwise, on the rents received therefrom, or of any tax, corporation franchise tax, assessments, levy (including, but not limited to any municipal, state, or federal levy), imposition or charge, or any part thereof, are measured by or based in whole or in part upon the demised premises and are imposed upon the Lessor, then all such taxes, assessments, levies, impositions, or charges, or the part thereof so measured or based, shall be paid and discharged by the Lessee.

3. *Mode of payment.* The Lessee shall pay the taxes and other charges enumerated in this Article and deliver to the Lessor official receipts evidencing payment, at least 30 days before the tax itself would become delinquent in accordance with the then applicable law governing such payments. If, however, the Lessee desires to contest the validity of any tax or tax claim, it may do so without being in default hereunder, provided it gives the Lessor written notice of its intention to contest the tax or claim, and also furnishes the Lessor with a bond with a surety made by a surety company qualified to do business in the State of Maryland, or pays cash to a recognized Escrow Agent in Hartford County equal to 150 percent of the amount of the tax item or items it intends to contest, conditioned to pay the tax or tax items when their validity has been determined. The Lessee shall give the Lessor the notice and bond (or cash equivalent) not later than 60 days before the tax item or items it proposes to contest would otherwise become delinquent.

4. *Lessee's default.* If the Lessee fails, refuses, or neglects to make any payment required in this Article, the Lessor may do so. In that event, the Lessee shall, upon the Lessor's demand, repay to it the amounts so paid, including reasonable attorneys' fees and all other expenses reasonably incurred because of or in connection with the payments, together with interest thereon at the rate of 10 percent per annum. The Lessor may collect or enforce any payment in the same manner as though it were an installment of rent specifically required by the terms of the Lease to be paid by the Lessee, on the day when the Lessor demands repayment of or reimbursement therefor. However, the Lessor's election to pay the taxes shall not waive the Lessee's default.

5. *Proration.* Notwithstanding the above, the taxes for the first and last years of this Lease shall be prorated proportionately between Lessor and Lessee.

Article VI Mechanics' Liens

1. *No lien.* The Lessee shall not subject the Lessor's interest in the premises to any mechanics' or materialmen's liens or other lien of any kind, except to the extent that the creation of such lien or liens is specifically authorized by a provision in this Lease.

2. *Release of lien.* The Lessee shall not allow a lien or claim of any kind (except for the mortgage referred to in Article XIV) to be filed or claimed against the Lessor's interest in the demised premises during the continuance of this Lease. If such lien is claimed or filed, the Lessee shall cause the premises to be released from the claim within 30 days after the Lessor is given written notice that a claim has been filed, or within 30 days after the Lessor is given written notice of the claim and transmits written notice of its receipt to the Lessee, whichever 30-day period expires earlier. The Lessee will cause such release either by paying to the court the amount necessary to relieve and release the premises from the claim, or in any other manner which, as a matter of law, will result, within the 30-day period, in releasing the Lessor and its title from the claim.

Article VII Governing Law, Cumulative Remedies

1. *Governing law.* All of the rights and remedies of the parties shall be governed by the provisions of this instrument and by the laws of the State of Maryland.

2. *Cumulative remedies.* During the continuance of the Lease, the Lessor shall have all rights and remedies which this Lease and the laws of the State of Maryland assure to it. All rights and remedies accruing to the Lessor shall be cumulative; that is, the Lessor may pursue all rights that the law and this Lease afford to it, in whatever order the Lessor desires and the law permits without being compelled to resort to any one remedy in advance of any other.

Article VIII Indemnification of Lessor

1. *Indemnification by Lessee.* During the entire term of the Lease, the Lessee will indemnify and hold harmless the Lessor against any and all claims, debts, demands, or obligations which may be made against the Lessor or against its title in the premises, arising out of, or in connection with, any alleged act or omission of the Lessee or any person claiming under, by, or through the Lessee. If it becomes necessary for the Lessor to defend any action seeking to impose any such liability, the Lessee will pay the Lessor all costs of court and attorneys' fees incurred by the Lessor in effecting such defense in addition to all other sums that the Lessor may be called upon to pay by reason of the entry of a judgment against it in the litigation in which such claim is asserted.

2. *Insurance.* As soon as the Lessee commences construction on the demised premises or any part of it, or from and after any earlier date when the Lessee makes actual use of and occupies the demised premises or any part of it, the Lessee shall cause to be written a policy or policies of insurance in the form generally known as public liability policies. In addition, if any boilers or elevators are included in improvements located on the demised premises, the Lessee shall cause to be written boiler insurance and elevator insurance policies. The policies shall insure the Lessee against all claims and demands made by any person or persons for injuries received in connection with the operation and maintenance of the premises, improvements, and buildings located on the demised premises and for any other risk insured against by such policies. Each class of policies shall be written within limits of not less than \$500,000 for damages incurred or claimed by any one person for bodily injury, or otherwise, plus \$100,000 for damages to property, and for not less than \$1,000,000 for damages incurred or claimed by more than one person for bodily injury, or otherwise, plus \$100,000 for damages to property. All such policies shall name the Lessee and the Lessor, as their respective interests may appear, as the insured persons. Lessee shall promptly deliver the original or a duplicate original of each policy or policies to the Lessor as soon as they are written, together with adequate evidence of the fact that the premiums are paid.

Article IX Insurance

1. *Lessee's obligation.* From and after the time the Lease commences, the Lessee will keep insured any and all buildings and improvements upon the premises against all loss or damage by fire and windstorm, together with "extended coverage." The amount of insurance shall at all times be sufficient to prevent any party in interest from being or becoming a co-insurer on any part of the risk, and shall not be less than 80 percent of the full insurable value. All of the insurance policies shall include the Lessor as one of the insured parties and shall fully protect both the Lessor and the Lessee, as their respective interests may appear. All insurance received by the Lessor and the Lessee for the destruction of buildings or improvements by fire, windstorm, or other casualty shall be deposited in a joint account in a bank designated by the Lessee in the County in which the demised premises are located. These funds shall be made available to the Lessee for the construction or repair, as the case may be, of any building or buildings damaged or destroyed by fire, windstorm, or other casualty for which insurance is payable. The Lessor and the Lessee shall periodically pay out these funds from the joint account on the estimate of any reliable and authorized architect licensed in the State of Maryland, who must certify that the amount of the estimate is reasonable and is being applied to the payment of the reconstruction or repair. However, the Lessee shall provide the total amount of money necessary for the reconstruction or repair of any destroyed or damaged building or buildings and shall assure the application of the money for such

purpose. The Lessee shall rebuild and repair any buildings and improvements, or any part thereof, that are destroyed or damaged by fire, windstorm, or other casualty. The rebuilt or repaired building or improvement, or the replaced or repaired personal property on the demised premises, shall be of the same or higher value as prior to the damage or destruction, and shall be rebuilt and ready for occupancy within 15 months from the time of the loss or destruction. The 15-month period for reconstruction shall be extended by delays caused without the Lessee's fault or neglect by Act of God, strikes, lockouts, or other conditions (other than matters of finance) beyond the Lessee's control.

2. *Delivery of policies.* The Lessee shall deliver to the Lessor the originals of all such policies along with the receipted bills evidencing payment of the premiums for them. However, nothing contained herein shall prohibit the Lessee from financing the premiums when the terms of the policies are for three years or more. In that event, the receipts shall evidence that the installment premium payment or payments are paid at or before their respective maturities. If, however, there is a mortgage on the premises created pursuant to the provisions contained in Article XIV of this Lease ("Mortgage Financing"), and if the terms of that mortgage require the Lessee to cause the originals of the policies to be delivered to the mortgagee, the Lessee shall deliver to the Lessor duplicate certificates of the policies. The Lessee shall deliver to the Lessor the policies (or duplicate certificates thereof) at least 10 days before their effective date.

3. *Proceeds payable to mortgagee.* Any mortgagee holding a mortgage created under the provisions of Article XIV may, in accordance with its terms, require that the insurance proceeds be paid to it. However, even if the mortgagee so elects, the Lessee shall still be required to create the complete fund in the manner set forth in this Article to assure and complete the payment for the reconstruction and repair work.

4. *Damages; insurance proceeds; joint bank account.* If the Lessee is not in default, it shall be paid any excess money received from insurance remaining in the joint bank account after the building or buildings are reconstructed or repaired. If, after damage or destruction caused by fire, windstorm, or other cause, the Lessee does not commence reconstruction or repair within 6 months from the date of payment of the loss and prosecute the reconstruction or repair so that it will be completed within 15 months after the damage or destruction occurs, it shall pay to the Lessor the amount collected, or the balance thereof remaining in the joint account. If the Lessee fails promptly, within the time specified, to complete the reconstruction and repair work, the Lessor may terminate this Lease and retain the amount as liquidated and agreed upon damages. The 15-month period for reconstruction shall be extended by delays caused without the Lessee's fault or neglect by Act of God, strikes, lockouts, or other conditions (other than matters of finance) beyond the Lessee's control.

5. *Direct repayment.* Notwithstanding the above, if the insurance proceeds are \$25,000 or less, no joint bank account shall be created but the proceeds shall be paid directly to the Lessee, who shall use the funds to make the necessary replacements or repairs.

Article X Insurance Premiums

The Lessee shall pay premiums for all of the insurance policies it is required to carry under the terms of this Lease, and shall deliver to the Lessor evidence of such payment before the payment of any premiums become in default. The Lessee shall also cause renewals of expiring policies to be written and the policies or copies thereof, as required by the Lease, to be delivered to the Lessor at least 10 days before the policies' expiration dates.

Article XI Assignment

1. *Written assignment; filing.* This Lease is freely assignable, but no assignment or transfer shall be valid unless the assignee expressly assumes and agrees to perform every covenant of this Lease which, by its terms, the Lessee agrees to keep and perform. The assignee's assumption shall be evidenced by a recordable instrument, either by joinder in the assignment itself or by separate instrument. The assignment shall not be deemed valid unless it and the assumption agreement are promptly filed for record in the appropriate office, and an executed original thereof delivered to the

Lessor.

2. *Estoppel certificates.* Both the Lessor and Lessee shall, within 20 days after written notice that the status of the Lease is required, give a written statement showing that the Lease is in good standing, and, if it is not, the particulars thereof. Failure within the 20-day period to give a written reply shall constitute a representation, which any person may rely upon as being true and correct, that the Lease is in good standing. Notice and the subsequent reply shall be deemed given, and time shall begin to run, when they are deposited in the United States Registered or Certified Mails, with sufficient prepaid postage to deliver them to their addressed destinations. The notice and reply shall be addressed to the parties at the required places and in the required manner for giving notice. The notice shall contain the exact language set forth in this Section 2.

3. *Lessee's primary liability.* If the Lessee's interest in and to this Lease Agreement is assigned, its liability for the performance of every term, condition, covenant, or agreement contained herein shall remain in full force and effect.

Article XII Condemnation

1. *Eminent domain; cancellation.* If, at any time during the continuance of this Lease, all or any portion of the demised real estate or the improvement of any building located thereon is taken, appropriated or condemned by reason of eminent domain, the Lessor and Lessee shall divide the proceeds and awards in the condemnation proceedings, abate the rent, and make other adjustments in a just and equitable manner under the circumstances. If the parties cannot agree on a just and equitable division, annual abatement of rent, or other adjustments within 30 days after the award has been made, the disputed matters shall, by appropriate proceedings, be submitted to a court having jurisdiction of the subject matter for its decision and determination. If legal title to the entire premises is wholly taken by condemnation, the Lease shall be cancelled.

2. *Apportionment.* Although title to the building and improvements placed by the Lessee upon the demised premises will pass to the Lessor, for purpose of condemnation, the fact that the Lessee placed the buildings on the demised premises shall be taken into account. The deprivation of the Lessee's use of the buildings and improvements shall, together with the remaining term of the lease, be an item of damage in determining the Lessee's portion of the condemnation award. It is the general intent of this Section that, upon condemnation, the parties shall share in their awards to the extent that their respective interests are depreciated, damaged, or destroyed by the exercise of the right of eminent domain. If the condemnation is total, the condemnation award shall be allocated so that the then value of the property, as if it were unimproved property, is allocated to the Lessor, and the then value of the building or buildings thereon is allocated between the Lessor and Lessee after giving due consideration to the number of years remaining in the term of this lease and the condition of the buildings at the time of condemnation.

Article XIII Construction

1. *Building not mandatory.* This Lease is executed with the understanding and agreement that the Lessee is not obligated to construct buildings or improvements on the demised premises that will be commercial buildings or a shopping center. If Lessee does elect to construct a building, all construction shall be done in a good and workmanlike manner, and in accordance with all applicable building and zoning codes and laws, including without limitation, the accessibility and other requirements of the Americans with Disabilities Act of 1990, and its rules and regulations.

2. *Lessee to bear expenses.* The Lessee shall pay the entire cost of all buildings constructed by it on the demised premises.

3. *Financial commitment.* Before commencing the building or buildings, the Lessee shall arrange for sufficient financing to pay for the entire construction.

Article XIV Mortgage Financing

1. *Construction mortgages.* Upon the circumstances and subject to the terms contained in this Article, the Lessee may, in conjunction with the construction work on the property and permanent financing, require the Lessor to join with it in executing a mortgage or mortgages to provide temporary and permanent financing for a shopping center or commercial buildings to be erected on the demised premises.

2. *Institutional lender.* Any such mortgage will be in favor of an institutional lender as mortgagee. As used herein, "institutional lender" means any bank, trust company, savings and loan association, insurance company, pension fund or title insurance company, real estate investment trust (REIT), or similar organization, authorized to make mortgage loans in Harford County, Maryland.

3. *Nonrecourse.* Any such mortgage must contain a provision that the mortgagee recognizes that the Lessor's joinder in the mortgage is primarily for the purpose of creating a mortgage lien against the property encumbered by it and that no personal liability shall ever attach to or personal judgment be sought or obtained against the Lessor by reason of the Lessor's joinder in the mortgage. Similarly, if any mortgagee requires the Lessor's joinder in the note or notes secured by the respective mortgages referred to in this Lease, no personal liability shall attach to, and no personal judgment shall be sought or obtained against, the Lessor by reason of its joinder in the note or notes.

4. *Debt service.* The Lessee shall submit satisfactory evidence to the Lessor that the total base rental to be due each month from all major credit tenants in the shopping center under signed leases will not be less than 100% of the debt service on a permanent loan in an amount then committed to be advanced under such mortgage or deed of trust. As used herein, "Debt Service" means the monthly installment of principal and interest necessary to amortize the loan; and "Major Credit Tenant" means a tenant having a net worth of not less than \$10,000,000, established by generally accepted accounting practices as of the end of its last official year as shown by an audit by an independent certified public accountant. The net worth of all such tenants and all guarantors executing a single lease shall be combined for the purpose of determining whether the group collectively constitutes a "Major Credit Tenant." A prospective tenant who does not meet these requirements will still be deemed a Major Credit Tenant if it can obtain lease insurance or a guaranty by a surety company with assets of at least \$50 million.

5. *Expenses.* Before and during construction the Lessee shall draw Demised Premises Expenses from a Construction and Development Loan. As used in this lease the term "Demised Premises Expenses" means expenses incurred in connection with the demised premises or their development; the construction, reconstruction, and/or alteration of buildings, structures, and improvements thereto; allowances which may be paid to subtenants required by their respective subleases; development costs, including site preparation, site investigation, off-site improvements, temporary improvements, maintenance of off-site improvements, test borings, piling, filling, compacting, dredging, excavation, and demolition; bringing utilities to the demised premises; customary and reasonable related professional fees and disbursements, including those of attorneys, architects, brokers, surveyors, and engineers; contractors' overhead and profit; fees, charges, and expenses of the applicable Mortgagee; commitment fees and other charges with respect to all mortgage loans; interest charges with respect to construction loans; real estate taxes; and insurance premiums incurred before the consummation of the loan secured by the first Permanent Mortgage executed by the Lessor. This loan may be obtained from a noninstitutional source as long as it complies with Paragraph 3, above.

6. *Conditions of construction loan.* The Construction Loan shall be subject to the following restrictions:

(a) *Amount.* The amount of the Construction Loan shall not exceed that on the Permanent Mortgage Commitment.

(b) *Bid amount.* If construction is to be started before a Permanent Mortgage Commitment is obtained, the Construction Loan can only be for the amount bid for the construction of the Proposed Shopping Center. If the successful bidder is an organization owned by the Lessee, this bid must be less than the amount of bids obtained from outside general

contractors presently working in Arundel and Harford Counties, Maryland.

(c) *Guarantee.* In addition to the requirements of subparagraph (b) above, during the period of construction there must be a Performance Guarantee to Lessee from Tydings Factors, a Maryland corporation, or a substitute corporation or individual having a net worth of at least \$2,200,000, or the total projected value of the Shopping Center, which shall be authenticated by a Certified Financial Statement 60 days prior to commencement of construction.

This Guarantee will be waived if a Permanent Mortgage Commitment is obtained and the successful bidder for the construction of the Shopping Center is bonded in full by a bonding company authorized to do business in the State of Maryland.

7. *Proceeds of loan application.* The Lessor hereby directs any lender to pay the proceeds of the loan directly to the Lessee. The Lessor shall execute all appropriate documents required by the lender for that purpose. If the lender refuses to pay the loan proceeds to any person other than the Lessor or to the Lessor and Lessee jointly, the Lessor shall pay over the proceeds to the Lessee immediately on receipt, and endorse and deliver to the Lessee any check made payable jointly to the Lessee and Lessor.

8. *Power of attorney.* The Lessor shall give the Lessee a General Power of Attorney so that the Lessee may sign on behalf of the Lessor all Mortgages, Consent Agreements, Subordination Agreements, and other necessary documents for the leasing or financing of the demised premises. Any mortgage must comply with the above provisions. The Lessor must approve all documents or instruments executed under the General Power of Attorney before their execution thereunder.

9. *Refinancing.* The Lessee may refinance the permanent mortgage periodically provided that the following conditions are met:

(a) The new permanent mortgage must provide for a sufficient principal amount to pay all the expenses of the refinancing and the unpaid principal balance of the then existing permanent mortgage;

(b) The holder or mortgagee of the new permanent mortgage must be an institutional lender as defined in Section 2, Article XIV of this Lease; and

(c) The new permanent mortgage shall provide for self-liquidation by its maturity date as a result of the application of the amortization payments provided for therein, shall not have a term longer than 25 years, and shall not bear interest at a rate in excess of the then prevailing rate of interest on similar institutional financing.

If the Shopping Center is refinanced, all excess funds received by the Lessee after paying off the original mortgage in full, and if there is new construction, all items covered in Sections 1 through 6 of Article XIV, shall be distributed equally between the Lessee and Lessor. If the new permanent mortgage complies with the above conditions, the Lessor and Lessee shall join in the execution, acknowledgment, and delivery of the new first mortgage for the purpose of subjecting their respective interests in the demised premises to the lien thereof, and the permanent mortgage shall cover and be a lien on the entire premises. Each shall also execute, acknowledge, and deliver all other agreements, certificates, and papers that are necessary or desirable in order to accomplish the replacement or refinancing of the existing permanent mortgage. However, the Lessor shall incur no personal liability for the payment of any portion of the principal amount secured by any permanent mortgage or the interest thereon, or the payment of any other sum that may be secured or required thereby, or for the performance of any term, agreement, covenant, condition, or provision thereof. Moreover, each mortgage shall provide that it be paid in full before the last five years of the term of this Lease.

(d) Any such mortgage given for refinancing shall comply with the provisions of Section 1, Article XIV of this Lease.

Article XV Default

1. *Effect of default by lessee.* If at any time the Lessee defaults in the payment of any rent on the day it is due and payable, or if the Lessee fails to perform any other covenant under this Lease, the Lessor may declare the lease term ended. In that event, the Lessor may re-enter upon any part of the premises and the building or buildings and improvements situated on it, either with or without process of law, the Lessee waiving any demand for possession of the premises and all buildings and improvements situated thereon. The Lessor shall also have all other remedies provided by law and this instrument. Immediately upon termination of the demised term, at the Lessor's election or in any other way, the Lessee shall peaceably surrender and deliver up the demised premises and all real and personal property to the Lessor, or its agent or attorney. If the Lessee, or its agent, attorney, or tenants, holds the premises, or any part thereof, one day after the date for their surrender, according to the terms of this Lease, the Lessee shall be deemed guilty of forcible detainer of the premises under the statutes and shall be subject to eviction or removal, forcibly or otherwise, with or without process of law.

2. *Landlord-tenant relationship only.* The relationship between the parties is that of Landlord and Tenant. The Lessee specifically acknowledges that all statutory proceedings regulating the relationship of Landlord and Tenant respecting collection of rent or possession of the premises, accrue to the Landlord.

3. *Lessor's remedies.* Nothing herein shall be construed as authorizing the Lessor to declare this Lease in default, however, unless the default is for the nonpayment of rent, security, insurance premiums, or taxes in violation of the terms of this Lease and the nonpayment continues for 30 days after the respective due dates for payment of these items. If the alleged default consists of any other violation, the Lessor may not declare this Lease in default until the violation continues for 30 days after the Lessor gives the Lessee written notice thereof. However, nothing contained herein shall be construed as precluding the Lessor from having any other remedy that may be necessary to preserve its right and its interest in the premises and this Lease, even before expiration of the grace or notice periods provided for in this Section, if under the then existing circumstances, the allowance of the grace or the giving of the notice would prejudice or endanger the Lessor's rights and estate in this Lease and the demised premises.

4. *Default period.* All default and grace periods shall be deemed to run concurrently and not consecutively.

5. *Legal costs; receiver.* Subject to the rights of the holder of any first mortgage to which this Lease has been subordinated, the Lessee pledges with, and assigns to, the Lessor all rents, issues, and profits that might otherwise accrue to the Lessee for the use, enjoyment, and operation of the demised premises. In connection with such pledging of the rents, the Lessee covenants and agrees with the Lessor that if the Lessor, upon the Lessee's default, elects to file suit in chancery to enforce the Lease and protect its rights, the Lessor may, as ancillary to such suit, apply to any court of competent jurisdiction for the appointment of a receiver of all and singular the demised premises, and the improvements and buildings located thereon. Thereupon, the parties expressly covenant and agree that the court shall immediately appoint a receiver with the usual powers and duties of receivers in like cases. The court shall make the appointment as a matter of strict right to the Lessor, without reference to the adequacy or inadequacy of the value of the property subject to the Lessor's lien, to the Lessee's solvency or insolvency, or to the commission of waste. Nothing contained in this Section shall be construed as empowering the Lessor to collect rents accruing from the premises, unless and until the Lessee is in default.

Article XVI Repair Obligations

During the continuance of this Lease the Lessee shall keep in good state of repair and in first class condition all buildings, furnishings, fixtures, and equipment which Lessee brings, constructs, or places upon the demised premises. The Lessee shall not suffer or permit any strip, waste, or neglect of any building or other property to be committed. The Lessee shall repair, replace, and renovate the property as often as necessary to keep the buildings and other property subject to this Lease in first class repair and condition.

Article XVII Demolition

1. *Conditions precedent to demolition by lessee.* Although it is the Lessee's duty under the terms hereof to keep and maintain all buildings and improvements on the demised premises in good repair, this shall not be construed as empowering the Lessee to demolish any buildings on the demised premises or any substantial part thereof or to cause any item of major repair and construction to be made unless and until the Lessee:

(a) Causes plans for the new buildings or the new construction to be prepared in full accordance with all applicable laws, building codes, and zoning ordinances, and delivers the plans to the Lessor for its approval (which the Lessor shall not unreasonably withhold) at least 30 days before the proposed work is actually commenced;

(b) Furnishes the Lessor with a performance and payment bond with corporate surety, guaranteeing the doing and completion of the work; or, in lieu of furnishing such bond; and

(c) Creates an escrow fund with any bank or trust company selected by the Lessee, into which it shall pay the full cost of the repair and replacement. The cost shall be evidenced by the bona fide bid of a responsible general contractor or the aggregate of the bona fide estimates of reliable subcontractors and materialmen. The Lessee shall submit all the evidence to the Lessor not later than 30 days before the work starts. The escrow fund shall be utilized to pay for the work as it progresses upon the requisition of the contractor and the certificate of an architect supervising the work, but disbursements from the escrow fund shall be made by written order of the Lessor and Lessee. If the Lessor elects to exercise joint control over the escrow fund, it shall promptly approve or cause to be approved progress payments so long as the balance remaining in the fund is sufficient to cause the work to be carried through to completion and paid for, and full and final waivers and releases are procured from all persons who furnish work, labor, services, or materials to the job.

2. *Replacement value.* The value of the reconstruction, repair, and replacement must not be less than the value of the building or buildings, or portion thereof, then being demolished, replaced, and repaired.

3. *Demolition defined.* For the purposes of this Article, no work shall be deemed a "demolition" or a major repair so as to bring it within the terms of this Section of the Lease unless it constitutes either the actual destruction of all or a substantial part of a building or a remodeling which, in substance, requires the tearing down of a substantial part of a building. The changing of openings or the removal and/or relocating of partition walls, or other work inside the building designed to accommodate itself to better occupancy, shall not be deemed major repair and construction within the meaning of this Article. The provisions of this Article shall not be applicable to the removal of any building or structure on the premises at the time of execution of this Lease.

Article XVIII Additional Covenants of Lessee

1. *Legal use.* The premises shall be used for legal purposes only, including without limitation, all environmental laws, rules and regulations, federal, state and local.

2. *Insurance claims.* No damage or destruction to any building or improvements by fire, windstorm, or any other casualty shall be deemed to entitle the Lessee to surrender possession of the premises, to terminate this Lease, to violate any of its provisions, or to cause any rebate or reduction in the rent when due or thereafter becoming due under its terms. If the Lease is cancelled because of the Lessee's default while any obligation from an insurance company to pay for all or any part of the damage remains outstanding, the claim against the insurance company shall, upon cancellation of the Lease, be deemed immediately to become the absolute and unconditional property of the Lessor.

3. *Termination.* Upon termination of this Lease, the Lessee shall peaceably and quietly deliver to the Lessor possession of the premises and all improvements, including all furnishings, fixtures, and equipment which the Lessee has brought,

placed, or constructed upon the premises, under the provisions of Article XIII of this Lease.

4. *Costs of suits.* If, at any time, the Lessor is required to enforce this Lease or to defend any action arising out of the facts connected with or caused by reason of the Lessee's ownership of this Lease or occupancy of the leased premises, the Lessee shall owe and pay to the Lessor all court costs and reasonable attorneys' fees incurred or expended by Lessor in conducting the defense or in enforcing the terms of this Lease. The Lessor may collect the amount of costs and fees as though it was rent then maturing and coming due.

Article XIX Quiet Enjoyment

So long as the Lessee keeps and performs all of its covenants and conditions under this Lease, it shall have quiet, undisturbed, and continued possession of the premises, free from all claims against the Lessor and all persons claiming under, by, or through the Lessor.

Article XX Right of Entry

The Lessor and its agents may enter upon the premises at all reasonable times to examine their condition and use, so long as that right is exercised in a manner that does not interfere with the Lessee in the conduct of its business on the premises. If the premises are damaged by fire, windstorm, or other casualty which causes them to be exposed to the elements, the Lessor may enter upon them to make emergency repairs. However, if it does so, the act or acts shall not be deemed to excuse the Lessee from its obligation to keep the premises in repair, and the Lessee shall, upon the Lessor's demand, immediately reimburse it for the cost of the emergency repairs.

Article XXI Separate Parcels

1. *Multiple leases.* (a) It is contemplated that, from time to time, Lessee may find it desirable to develop, transfer, use, sublet, and/or mortgage the demised premises in separate portions. If Lessee so requests in writing, the Lessor shall execute four Leases for portions of the demised premises containing all the provisions hereunder, with the following exceptions: the applicable rent for each lease shall be as set forth below; and each lease may contain additional provisions which provide, in effect, that the respective lessees and persons designated by them may use certain portions of the premises designated by the lessees in common with each other.

(b) The portions of the demised premises may be two areas ("Front Parcels"). Neither Parcel shall front more than 250 feet on State Route 192 nor exceed one acre and another parcel in the shopping center of one 21/2 acre ("Interior Parcel") and the balance of the demised premises ("Balance Parcel"). In that event, the annual basic rent shall be \$2,500 for each Front Parcel, \$1,000 for the Interior Parcel, and the balance of rent then due for the Balance Parcel. The Lease for the Balance Parcel shall provide that if a default occurs with respect to the Front Parcels or Interior Parcel, the lessee of the Balance Parcel shall be required to cure the default.

2. *Single lease.* If some or all of the lessees under the new leases ("Multiple Leases") give written notice to the Lessor that they desire the premises demised under their respective leases to be governed by a single lease, and the Lessor agrees that it will execute a single lease of the premises containing all the provisions of this Lease (except that the applicable "Basic Rent" shall be the sum of the applicable basic rents provided in each such lease), the applicable multiple leases shall be cancelled.

3. *Performance.* If a subtenant performs any of the Lessee's obligations under this Lease for the Lessee's account or on its behalf in accordance with the subtenant's authority to do so under its sublease, the Lessor shall accept the performance as if it were performed by the Lessee.

Article XXII Miscellaneous

1. *Force majeure.* If the Lessor or Lessee is delayed, hindered, or prevented from performing any act required hereunder by reason of strikes, lockouts, labor troubles, inability to procure materials, failure of power, restrictive government laws or regulations, riots, insurrection, the act, failure to act or default of the other party, war, or other reason beyond its control, then performance of the act shall be excused for the period of the delay. In that event, the period for the performance of the act shall be extended for a period equivalent to the period of the delay.

2. *Estoppel certificates.* Either party shall, without charge, at any time and from time to time hereafter, within ten days after the others' written request of the other, certify by instrument duly executed and acknowledged to any mortgagee or purchaser or proposed mortgagee or proposed purchaser, or any other person, firm, or corporation specified in the request as to:

(a) Whether this Lease has been supplemented or amended, and, if so, the substance and manner of the supplement or amendment;

(b) The validity and force and effect of this Lease, in accordance with its tenor as then constituted;

(c) The existence of any default thereunder;

(d) The existence of all offsets, counterclaims, or defenses thereto on the part of the other party;

(e) The commencement and expiration dates of the term of this Lease; and

(f) All other matters that may reasonably be so requested.

Any such certificate may be relied upon by the party who requested it and any other person, firm, or corporation to whom it may be exhibited or delivered, and the contents of the certificate shall be binding on the party executing it.

3. *Duplicates; recordation.* Either party shall, at any time, at the other's request, promptly execute duplicate originals of an instrument, in recordable form, which shall constitute a short form of lease. This will set forth a description of the demised premises, the term of this Lease, and any other portion thereof, except for the rental provisions, requested by either party.

4. *No recourse.* Notwithstanding anything to the contrary, the Lessor shall look solely to the interest of the Lessee hereunder for the satisfaction of any remedy it may have hereunder or in connection herewith and shall not look to any other assets of the Lessee or of any other person, firm or corporation. If the Lessee is a corporation, no personal liability shall attach to any of its present or future shareholders, officers, or directors, or its successors or assigns, for any obligation hereunder or in connection herewith. If the Lessee is a firm, partnership, joint venture, or association, it shall have no personal liability for any obligation hereunder or in connection herewith. If the Lessee assigns its Leasehold Interest to Lessor, it shall be completely relieved of all liability hereunder or in connection herewith, regardless whether accrued at the time of assignment and whether a cause of action exists at such time or arises thereafter.

5. *Consent not to be unreasonably withheld.* The Lessor shall not unreasonably withhold its consent, permission, or approval for any act which may be required or desired by the Lessee under the provisions of this Lease. Such consent, permission, or approval shall be deemed to have been granted if, within 45 days after the Lessor receives the request, it fails to notify the Lessee of its express disapproval and the reasons therefor.

6. *Right of first refusal to purchase.* The Lessor shall not sell or grant options with respect to, or otherwise dispose of, the demised premises unless it has first (i) received a bona fide arm's-length offer from an unaffiliated party for the sale or disposition, (ii) notified the Lessee in writing of the offeror's identity and address all of the provisions of the offer, and (iii) afforded the Lessee the prior option to purchase or otherwise acquire the demised premises on the same terms

and provisions as those contained in the offer.

7. *Option procedure.* The Lessee shall exercise its option by giving written notice to the Lessor within 30 days after it receives the Lessor's notice of the offer. The Lessor shall give such notice within 10 days after it receives the offer. If the Lessee fails to exercise its option and the Lessor does not subsequently sell or dispose of the demised premises under the provisions of the offer, the above prohibition against the Lessor's sale or other disposition shall continue in full force and effect. In that event, the Lessee's option to purchase shall apply to any subsequent offer on the same terms as set forth above.

8. *Notice of exercise of option.* The notice provided in Section 7 shall set forth the time and place of closing (which may not be more than 50 miles from the demised premises unless the Lessor so consents). The time of closing shall be designated in the notice of exercise but not later than 60 days after the notice is given.

9. *Closing.* At such closing conference; (i) the Lessee shall pay to Lessor (by good certified check or an official check of a bank or trust company) the applicable purchase price; (ii) the Lessor shall convey good and marketable title of the demised premises to the Lessee free and clear of all encumbrances and title defects other than those which arose at the Lessee's request or by virtue of the its tenancy; and (iii) the Lessor and Lessee shall execute all documents which may be necessary to effectuate the closing and the transfer of title contemplated hereunder.

10. *Related transactions; inapplicability.* The foregoing provisions of this Section shall not apply to the sale, transfer, or other disposition of the demised premises to (i) any parent, sibling, child, or grandchild of the Lessor, or (ii) a corporation or other entity owned or controlled by any or all of them.

11. *Income tax deductions and credits.* Only the Lessee may take deductions and credits on its tax returns for the buildings, structures, improvements, changes, alterations, repairs, additions, and installations, and for their depreciation or cost recovery.

12. *Covenants running with land; binding effect.* All covenants, conditions, and obligations contained herein or implied by law are covenants running with the land and shall attach and bind and inure to the benefit of the Lessor and Lessee and their respective heirs, legal representatives, successors, and assigns, except as otherwise provided herein.

13. *Non-waiver.* No waiver of a breach of any covenant in this Lease shall be construed to be a waiver of any succeeding breach of the same covenant. No delay or failure by either party to exercise any right under this Lease, and no partial or single exercise of that right, shall constitute a waiver of that or any other right, unless otherwise expressly provided herein.

14. *Arrears.* All arrearages in the payment of rent shall bear interest from the date when due and payable at the then prime rate of CitiBank, New York, New York per annum until paid.

15. *Written modifications.* No modification, release, discharge, or waiver of any provision hereof shall be of any force, effect, or value unless signed in writing by the Lessor, or its duly authorized agent or attorney.

16. *Entire agreement.* This instrument contains the entire agreement between parties as of this date. The execution hereof has not been induced by either party by representations, promises, or understandings not expressed herein. There are no collateral agreements, stipulations, promises, or undertakings whatsoever upon the respective parties in any way touching the subject matter of this instrument which are not expressly contained in it.

17. *Notices.* All notices between the parties in connection with this Lease shall be in accordance with its terms. Notice shall be given by registered or certified mail, deposited in the United States mails with postage prepaid. The notices shall be addressed as follows:

For the Lessor:

For the Lessee:

Either party may change the place for giving notice by written notice in the manner set forth in this Section.

18. *Joint liability.* If the parties upon either side (Lessor and Lessee) consist of more than one person, such persons shall be jointly and severally liable on the covenants of this Lease.

19. *Liability continued.* All references to the Lessor and Lessee mean the persons who, from time to time, occupy the positions, respectively, of Lessor and Lessee. However, this shall not be construed as relieving a person of any liability incurred by them by reason of or in connection with it having been Lessor or Lessee at one time.

20. *Broker.* The parties recognize Allman Brothers, Havre de Grace, Maryland, as the Broker in this transaction. The Lessor shall pay the Broker its commission as per the parties' separate agreement.

21. *Headings.* Headings in this Lease are for convenience and reference only and shall not be used to interpret or construe its provisions.

22. *Time of essence.* Time is expressly declared to be of the essence of this Lease.

In witness whereof the Lessor and the Lessee have hereunto set their hands and seals, the day and year above written.

Signed, sealed and delivered
 in the presence of:

 (as to Lessor)

Lessor

 (as to Lessee)

Lessee

Realty and Development
 Corporation

 President

 Secretary

[Acknowledgments]



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Current Legal Forms for Real Estate

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Current Legal Forms for Real Estate

Chapter 23 REAL ESTATE LEASES

Part IV. Forms

A. COMPLETE LEASES AND RELATED AGREEMENTS

31-23 Current Legal Forms for Real Estate FORM 23.05

AUTHOR: by Thomas G. Belden

FORM 23.05 Long-term sublease--shopping center

COMMENT

Although this instrument is characterized as a "lease" and the parties are referred to as "landlord" and "tenant," it is clear from all of the provisions of the instrument that the landlord's interest in the shopping center is a leasehold estate which the landlord acquired as lessee under a ground lease. Thus, the lease is a sublease in reality and the tenant is a sublessee. See article XVIII, section 18.4 below. The terms "lease," "landlord," and "tenant" are used in lieu of "sublease," "sublessor," and "sublessee" primarily for clarity of style. Article XVIII, section 18.9 permits the tenant to cure any default of landlord which would have the effect of terminating the tenant's interests under the lease and, accordingly, is of paramount importance in this agreement.

FORM

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THIS INDENTURE OF LEASE is made [date], between Pierce Real Estate Company, a New York partnership, having its office at 320 Park Avenue, Suite 2160, New York, New York 10017 ("Landlord") and Douglas Stores, Inc., a Delaware corporation, having a principal office at 540 Madison Avenue, Suite 1205, New York, New York 10017 ("Tenant").

Article I Demised Premises

Section 1.1. Landlord, in consideration of the rents to be paid and the covenants and agreements to be performed by Tenant, leases to Tenant, and Tenant does lease and take from Landlord, certain premises located in a Shopping Center at U.S. Highway No. 6 (Euclid Avenue, in the City of Des Moines, County of Polk and State of Iowa, containing approximately 145,875 square feet of land, together with a one-story building containing 145,875 square feet of gross floor area outlined in red on Exhibit "A" attached (the "Demised Premises"). The legal description of the Shopping Center of which the Demised Premises is a part is attached as Exhibit "B." During the term hereof Tenant in common with other tenants (and their respective employees, concessionaires, licensees, customers, and invitees) of the land outlined in blue on Exhibit "A" (the "Shopping Center") may use all parking and other common facilities and the like presently designated on Exhibit "A" and which may hereafter from time to time be delineated, segregated, allocated, and set aside for use as common facilities and built on the Shopping Center, subject to the provisions of this lease. The Landlord reserves the right to place and maintain and repair all utility lines, pipes, tunneling and the like, over, under or around the Demised Premises that may be reasonably necessary or advisable for the servicing of other portions of the Shopping Center at its sole expense.

Article II Term of Lease; Inspection

Section 2.1. *Term.* The term of this lease shall begin on [date] (the "Commencement Date") and shall end on [date], unless extended.

The "First Lease Year" of the term shall be from the Commencement Date to the 31st day of January immediately subsequent to the Commencement Date.

Each lease year thereafter shall run for a period of 12 consecutive calendar months from the expiration of the First

Lease Year or preceding lease year, as the case may be.

Section 2.2. *Recordable memorandum.* Promptly, after the execution hereof, Landlord and Tenant shall execute instruments in recordable form, setting forth a description of the Demised Premises, the term of this lease, any right of extension, and all other information, excepting the rent reserved hereunder, reasonably requested by either party. Either party may record the instrument, and shall pay the full recording fee.

Section 2.3. *Condition of premises.* Tenant acknowledges that it has inspected, and is fully satisfied with the physical condition of, the Demised Premises. Tenant shall accept the Demised Premises in its present "as is" condition. Neither Landlord nor any of its representatives has made any warranties or representations as to the physical condition of the Demised Premises upon which Tenant relies, except for the provisions of Section 5.2 (Article V) of this lease. The Demised Premises, however, shall be delivered to Tenant vacant and broom clean (except for trade fixtures and equipment which shall remain in the Demised Premises and be Tenant's property).

Article III Right to Extend

Section 3.1. Tenant may extend the original term, when it expires, for three successive periods of five years, five years, and ten years, respectively. The extensions shall be on the same terms, covenants, and conditions as are contained herein. Tenant shall exercise the right to extend by giving written notice to Landlord at least nine months before the expiration of the original term or any extension thereof, as the case may be. As soon as notice is given, and without any further instrument, lease, or agreement, this lease shall be so extended or further extended.

Article IV Rent

Tenant shall pay rent to Landlord, at any place or places Landlord directs from time to time by written notice to Tenant, at the following rates and times:

Section 4.1. *Minimum rent.* Minimum rent per year of \$226,060, payable in equal monthly installments of \$18,838.34 in advance on the first day of each calendar month during the term of this lease, and pro rata for the fraction of any month. Also, on the first rent day Tenant shall pay rent at the above rate for any portion of the preceding calendar month included in the term.

Section 4.2. *Percentage rent.* Percentage rental per year of 11/2 percent of all gross sales (as defined in Section 4.4 below) exceeding \$13,920,000 made by the Tenant in, on, or from the Demised Premises during the preceding lease year, less the sum of (i) all impositions paid under Section 18.17 (Article XVIII), and (ii) all insurance premiums paid by Tenant under the provisions of Article XIV. The above amount--additional rental less stated deductions--is the percentage rental payable under this lease.

Section 4.3. *Payment and statements.* The percentage rental shall be paid within 60 days after the end of each lease year. Each payment shall be accompanied by a written statement, certified by one of Tenant's financial officers or duly authorized representatives, setting forth the gross sales. Tenant shall also deliver to Landlord, within 15 days after the end of each three-month period during the term, a written statement, in duplicate and signed by a financial officer of Tenant, setting forth the gross sales for the preceding three-month period. Each lease year shall constitute a separate accounting period. The computation of percentage rental due for any one lease year shall be based on the gross sales for that year without reference to or adjustment for the gross receipts of any other lease year.

Section 4.4. *Gross sales defined.* For the purpose of determining the percentage rental, "gross sales" are defined as the total of all sales or business, including internet sales if the sale was of goods sold from the Demised Premises, conducted and the charges for all services rendered in, at, on and from the Demised Premises by Tenant or any subtenant, concessionaires or licensees at retail or wholesale, for cash or for credit, less the selling price of all goods

returned by any customer, if the selling price of the returned goods has been included, and less merchandise trade-ins, expressly excluding the following:

(a) Income from the sale of stamps, money orders, express checks, bank checks and check-cashing receipts (unless Tenant or any subtenant, concessionaire, or licensee operates such a business or concession, in which case the charges for such items shall be a part of gross sales), lockers and public toilets, operation of any sub-post office, telephone revenues, sales to Tenant's or subtenant's employees, income from weighing and automatic vending machines dispensing items such as chewing gum or cigarettes and similar items which are not handled by Tenant or any of Tenant's subtenants or concessionaires or licensees as part of Tenant's regular course of business, of the type presently used in any store operated by Tenant or any subtenant incidental to its business, from the sale of federal, state or municipal savings bonds and tax certificates, all sums received as charges for delivery to customers for products sold from the Demised Premises by Tenant or any subtenant, all sums received from the sale of tickets of admission to theatrical, circus, church, and sport events, and that portion of the sales price of merchandise which is paid for by the trading in of other merchandise of the customer (but the proceeds from the subsequent sale of such trade-in merchandise shall be includable in the gross sales hereunder).

(b) All sums representing the so-called sales tax, based upon present and future federal, state, and local laws, and collected by Tenant or any subtenant in the operation of its business on the Demised Premises, any tax, excise, or duty which is levied or assessed against Tenant or any subtenant by any federal, state, municipal or local authority based on sales of specific merchandise sold on, or the privilege or license to sell or distribute specific merchandise on the Demised Premises, all of which are paid to the taxing authority by the Tenant or any subtenant, concessionaire, or licensee, regardless of whether the amount is passed on to or collected by Tenant or any subtenant from any purchaser thereof.

(c) The transfer of merchandise by Tenant, or a subsidiary or subtenant, from the Demised Premises to another store or place of business owned or operated by any one of them shall not constitute a sale if made solely for the convenient operation of the business of Tenant or its subtenants, rather than for the purpose either of consummating a sale which has previously been made at, in, on, or from the Demised Premises or of depriving Landlord of the benefit of a sale which otherwise would have been made at, in, on, or from the Demised Premises.

(d) Provided that Tenant, at the Demised Premises or at any other location operated as a "Douglas Store," shall make use of gift certificates or like vouchers in a manner not calculated to reduce the gross sales of Tenant, its subtenants, concessionaires, and licensees, only the avails of the redemption thereof at the Demised Premises shall be included in gross sales.

(e) All proceeds from the sale of Tenant's used trade fixtures, machinery and equipment and proceeds from insurance covering any casualty to them.

Section 4.5. *Records.* Tenant shall keep at its executive offices in the City and State of New York, where now or hereafter located, a true and accurate account of all information necessary in order to determine gross sales.

Landlord or its agents may inspect Tenant's records of sales made in the Demised Premises at reasonable times, but not more than once in any lease year, at Tenant's executive office. However, the inspection must be made within one year after Tenant mails or delivers the statement of sales to Landlord, and it is limited to the period covered by the statement.

Any claim by Landlord for revision of a statement of sales or for percentage rent shall be deemed waived if the claim is not made to Tenant within 30 days after the one-year period expires. Landlord shall hold in confidence all sales figures and other information obtained from Tenant's records. Tenant makes no representation or warranty as to expected sales in the Demised Premises.

Article V Contractor's Warranties; Utilities

Section 5.1. *Warranty assignments.* Landlord shall, at Tenant's request, assign to Tenant all warranties in effect received from contractors, subcontractors, mechanics, materialmen and suppliers covering the Demised Premises.

Section 5.2. *Utilities.* Landlord represents that it has provided to the building constructed on the Demised Premises, all sewer facilities and utility facilities that are located up to and on the exterior of the buildings (including but not limited to water, electric current, and gas) as provided in plans of the Demised Premises, copies of which have been delivered to Tenant. Tenant shall, as herein elsewhere provided for, maintain all such facilities.

Article VI Parking Areas

Section 6.1. *Parking and other common areas.* The buildings, parking areas, all approaches, entrances, exits, sidewalks and roadways, loading areas, service roads and means of ingress and egress to and from the adjoining public roads shall be substantially as shown on Exhibit "A." Tenant, its customers, employees and all those having business with it, may use the parking areas and all approaches, entrances, exits, sidewalks, roadways, loading areas, service roads, and means of ingress and egress to and from the adjoining public roads, in common with others having business in the buildings or Shopping Center. There shall, at all times, be included in the foregoing parking facilities, parking areas designated for Tenant's employees and employees of other tenants and occupants of the Shopping Center. Landlord and Tenant shall use reasonable diligence to cause all such employees to park their motor vehicles within areas designated by Landlord from time to time subject, however, to Tenant's reasonable approval. Landlord covenants and agrees as follows:

(a) Loading areas are provided adjacent to Tenant's loading doors and shall be connected to a service roadway.

(b) All such common facilities and loading areas are of cement and concrete, or so called hot topping, and are provided with an adequate drainage system; and the parking areas are striped. All sidewalks in the Demised Premises are of cement and concrete construction. Landlord shall keep and maintain the foregoing in good repair and condition and reasonably free of snow, ice, refuse and other obstructions. All of the parking areas and the Demised Premises shall, at all times, have the right of ingress and egress to and from Euclid Avenue.

(c) All parking areas and common facilities shall be reasonably illuminated by Landlord during all of Tenant's business hours and for one-half (1/2) hour thereafter by floodlighting installations presently constructed, and maintained by Landlord in good repair and condition.

(d) No charge shall be made to customers and invitees for the parking of vehicles in the Shopping Center.

Section 6.2. *Common area expenses.* (a) In addition to all payments required herein to be paid by Tenant, and as part of the total rent to be paid, Tenant shall pay to Landlord its pro rata share (as defined below) of the cost for services to be rendered by it as provided for in Section 6.1(b) and (c) above, as well as its share of the cost of sewage and disposal during the term hereof and premiums on public liability insurance maintained by Landlord. Tenant's pro rata share shall be equal to a fraction, the numerator of which is the gross square feet ground floor area of the Demised Premises and the denominator of which is the gross square feet ground area of all buildings then occupied within the Shopping Center. Landlord shall submit quarterly statements showing the total expense and its apportionment. Tenant shall pay the amount shown on the statement within 30 days after its receipt. Tenant or its agents may inspect, annually, Landlord's records of the expense at Landlord's executive office, provided that inspection is made within six months after Landlord submits the annual statement to Tenant and is limited to the period covered by the statement. Cost of maintenance, as referred to in this and the preceding Section, shall not be deemed to include taxes or assessments, if Tenant otherwise pays them under the provision of Section 18.17. An annual adjustment between Landlord and Tenant shall be made at the same time Landlord provides the required annual statements. Landlord shall operate the parking and common areas, and facilities, in a reasonably economical manner.

(b) If Landlord fails to commence clearing of snow from the parking area within 12 hours after the snow ends, Tenant may do so at Landlord's expense. In that event, Tenant may bill Landlord for the entire cost of snow removal, less Tenant's proportionate share determined in the manner provided above.

(c) Tenant's payments hereunder shall be paid as rent, together with the monthly rental then falling due for the first calendar month following ten days after Tenant's receipt of a statement of such charge.

(d) Subject to Tenant's payment of the pro rata cost under the provisions of Section 6.2, paragraph (a), Landlord shall maintain throughout the term of this lease public liability and property damage insurance under which the insurer shall indemnify Tenant from and against all costs and liability arising out of or based upon all claims, accidents, and injuries occurring on, within, or about the parking areas and common facilities. Each policy shall be in a company that is reasonably approved by Tenant and that is then authorized to issue it by the state in which the Demised Premises are located. The policy shall be noncancellable as to Tenant and its designees unless ten days' written notice of cancellation is given to them. A duplicate original or certificate of the policy shall be delivered to Tenant. The insurance shall have minimum limits of liability of \$500,000 for injury (or death) to any one person, \$1,000,000 for injury (or death) to more than one person, and \$100,000 for damage to property.

Section 6.3. *Injunction.* In addition to its usual remedies at law or equity, Tenant may enforce the provisions of this Article by injunction.

Section 6.4. *Parking regulations.* Tenant's use of the parking area and common areas shall be subject to all reasonable nondiscriminatory rules and regulations imposed by Landlord. Tenant shall abide by these rules and regulations and use its best efforts to cause its subtenants, licensees, concessionaires, officers, agents, and employees to do likewise.

Article VII Use

Section 7.1. *Use.* Tenant may use the Demised Premises for all lawful purposes.

Section 7.2. *Injunction.* In addition to all other remedies at law or equity, Landlord and Tenant may enforce the provisions of this Article by injunction.

Section 7.3. *Mortgagee protection.* Notwithstanding any contrary provision of this lease or Articles VI and VII hereof, so long as the holder, or its successors or assigns, of any mortgage or deed of trust has an interest in the Demised Premises, either as holder of the note secured by a deed of trust or mortgage, or as owner of the legal title in the mortgaged premises, by purchase at a sale foreclosing the deed of trust or mortgage, or by acceptance of a deed or an assignment of lease in lieu of foreclosure, no default in any of Landlord's obligations set forth in Article VI shall create the right in Tenant to: terminate this lease; any reduction in the rent payable hereunder, or to offset against the rent by reason of any damages resulting from the default; any cause of action for damages against the holder of any mortgage or deed of trust.

Article VIII Repairs and Alterations

Section 8.1. *Landlord structural repairs.* Landlord shall repair and maintain in good order and condition, the structural portions of the Demised Premises only, including the outside and inside of exterior walls (but not interior decoration, painting, or other interior repairs), foundations, structural portions of the canopy and structural members, the roof, gutters, and down spouts. Not included is any other portion of the demised Premises, except as specifically set forth above. Moreover, Tenant shall make, at its own expense, all repairs otherwise required to be made by Landlord if they are necessitated by a default or negligence of Tenant, or its subtenants, concessionaires, licensees, servants, or employees.

Section 8.2. *Tenant interior maintenance.* Except as provided in Section 8.1, Tenant shall, during the term hereof and all extensions, keep and maintain in good order, condition and repair, the interior and each part of the Demised Premises. Included, without limitation, are: all utilities, hookups and connections serving the Demised Premises (except as otherwise provided herein). Also included are the exterior and interior portions of all doors, windows, plate glass, showcases, and other things in and about the Demised Premises, including, without limitation, all wiring, plumbing, sewage, heating and air conditioning systems, pipes, conduits, and all other utility and sprinkler fixtures and equipment within (and without the Demised Premises to the extent that they serve the Premises), fixtures and interior walls, floors, ceilings, signs and all interior and exterior building appliances, appurtenances, and similar equipment. The Tenant further shall keep the interior of the Demised Premises at all times in good order, condition, and repair as aforesaid, reasonable wear and tear, fire, and other casualty excepted.

Section 8.3. *Landlord interior repairs; mortgagee protection.* Landlord shall make all interior repairs to the building on the Demised Premises throughout the term of the lease when required because of the settling of the building of which the Demised Premises are a part, or the act, default, or negligence of Landlord, its employees, agents, licensees, or contractors. However, Tenant shall notify Landlord that such repairs are required within five days after Tenant has knowledge of that fact, and Landlord shall diligently proceed to make the repairs within a reasonable time. If the repair work is caused because of defective or faulty installation or construction by any contractor, subcontractor, or materialman other than Landlord, Tenant shall cooperate (at no cost to it) with Landlord in any action or proceeding which Landlord takes against such other party. Notwithstanding the above, this Section shall not be applicable to or enforceable against the Mortgagee. Further, if Tenant has any right to offset against rent payable under the lease by reason of this Section, it may not offset against any monthly installment of rent then due and payable more than the amount that would cause the rent to be reduced below the amount required to pay the monthly installment of principal and interest next due and payable on the note secured by the Mortgage, and to pay the monthly installment of ground rent next due and payable under the Ground Lease.

8.4. *Repair of violations.* If any federal, state, county, or municipal government, or its department or division, at any time condemns all or a part of the Demised Premises as unsafe or as not in conformity with the laws and regulations relating to its use, occupation, and construction (except as to requirements necessitated by a nonretail use of all or part of the Premises), or orders or requires any building, alteration, or repair thereof or installations therein, (except as to any requirement necessitated by a nonretail use of all or part of the Demised Premises), Landlord shall, at its expense, rebuild or make all necessary alterations, installations, and repairs. If the effect of such laws, orders, or requirements, or the work done by Landlord in connection with them, is to deprive Tenant of the use of the Demised Premises, rent shall abate during that period. If Tenant is deprived of part of the Demised Premises, rent shall abate proportionately. All rebuilding, alteration, installing, and repairing shall be done in accordance with the appropriate governmental requirements, subject to Tenant's approval, which it shall not unreasonably withhold. However, if the condemnation order or requirement is the result of some unusual use, including, but not limited to, any affirmative act by Tenant which results in the condemnation order or requirement, or from Tenant's nonretail use of the Demised Premises, Tenant shall comply with that order or requirement at its expense and no abatement of rent shall be granted.

Section 8.5. *Tenant alterations.* Tenant may, at its expense, redecorate the interior of the Demised Premises and make all nonstructural alterations and changes in the interior parts that it deems expedient or necessary for its purposes. However, the alterations and changes shall not injure the safety of the structure of the Demised Premises or diminish its value, and shall be done in a good and workmanlike manner. Tenant may make interior structural alterations and additions to the Demised Premises if they do not injure the safety of the structure or diminish its value and if Tenant first obtains Landlord's written consent, which it shall not unreasonably withhold. Landlord shall, at Tenant's request, execute and deliver all instruments embodying Landlord's approval required by a public or quasi-public authority in order to obtain a license or permit for the making of the alterations, changes, and additions in, to, or upon the Demised Premises. Tenant shall pay for the license or permit, and also shall be responsible for all repairs and damages resulting from the alterations, changes, and installations, including compliance with the provisions of Section 8.3. In making any

such alterations hereunder, if the accessibility or other requirements of the Americans with Disabilities Act of 1990 ("ADA") are applicable, Tenant shall fully comply with the same.

Article IX Tenant's Covenants

Tenant covenants and agrees as follows:

Section 9.1. *Rent payments.* To pay when due rent and percentage rent, and all other required charges, at the times and in the manner provided in this lease.

Section 9.2. *Licenses; surrender.* To procure all licenses and permits required for any use by it of the Demised Premises. Also, upon the expiration or termination of this lease, to remove its goods and effects and those of all persons claiming under it, and to yield up peaceably to Landlord the Demised Premises in good order, repair, and condition in all respects, excepting only damage by fire, taking, casualty, structural defects required to be made by Landlord, and reasonable wear and tear.

Section 9.3. *Mechanic's liens.* That it shall not do or allow anything to be done by which the land and the building of which the Demised Premises are a part, are encumbered by any notice of intention to file, mechanic's lien, or otherwise, and shall, whenever any such notice or lien is filed purporting to be for labor or materials furnished or to be furnished to Tenant or any of its subtenants, licensees, or concessionaires, discharge same of record within ten days after the date of filing, by bonding or otherwise. Landlord shall not be liable for any labor or materials furnished or to be furnished to Tenant, its subtenants, licensees, or concessionaires and no mechanic's or other liens for any such labor or materials shall attach to or affect Landlord's reversionary or other estate or interest in and to the land and building of which the Demised Premises are a part. Tenant shall pay promptly when due the entire cost of any work to the Demised Premises which shall at all times be free of liens for labor and materials; to procure all necessary permits before undertaking such work; to do all of such work in a good and workmanlike manner, employing materials of good quality and complying with all governmental requirements; and to save Landlord harmless and indemnify it against all injury, loss, claims, costs, liabilities, suits, penalties, demands, or damage, including reasonable counsel fees, to any person or property occasioned by or growing out of such work.

Section 9.4. *Landlord's access.* To permit Landlord and its agents to examine the Demised Premises at reasonable times and to show the Demised Premises to prospective purchasers and tenants, but only during the last six months of this lease term and only if Landlord does not thereby interfere with the conduct of Tenant's business; to permit Landlord to enter the Demised Premises to make all repairs, improvements, alterations, and additions thereto that are required to comply with the requirements of a public authority having jurisdiction of the Demised Premises or are required by Landlord under this lease, but only if such entry does not unreasonably interfere with the conduct of Tenant's business.

Section 9.5. *Compliance with law and insurance requirements.* To the extent required solely as a result of the use by Tenant or its subtenants, licensees, or concessionaires of the Demised Premises, Tenant shall promptly comply with all laws, ordinances, and lawful orders and regulations affecting the Demised Premises (other than condemnation and repairs required to be made by Landlord) and their cleanliness, safety, occupation, and use, including without limitation all environmental laws, rules and regulations, federal, state and local. Tenant shall also promptly comply with and execute all rules, orders and regulations of the Board of Fire Underwriters, Rating Bureaus, and Fire Insurance Companies, organizations and associations for the prevention of fires, at its expense. Tenant shall not permit or commit any waste.

Section 9.6. *Deliveries; parking.* In addition to the above, Tenant shall, at all times during the term of this lease: (a) cause all goods and merchandise to be delivered and removed, and all removal to be made only by way of the rear of the Demised Premises; and (b) furnish to Landlord, at its written request, the license numbers of the vehicles of Tenant and of its employees, officers and agents, subtenants, concessionaires, and licenses, if such approval is required of other

Tenants.

Article X Indemnity and Public Liability

Section 10.1. *Indemnification.* Tenant shall indemnify and save harmless Landlord from and against all liability, damage, penalties, judgments, or claims of whatever nature arising from injury to person or property sustained by anyone in or about the Demised Premises (except for the common areas, as defined in Section 10.3), except for Landlord's willful acts. Tenant shall, at its expense, defend all suits or actions which may be brought against Landlord or in which Landlord may be impleaded with others upon any such above-mentioned matter, claim, or claims. This Section 10.1 shall not apply if the liability arises from Landlord's willful failure to perform any of its covenants under this lease, but nothing herein contained shall be deemed to limit Tenant's obligation to maintain liability insurance for the benefit of Landlord and its designees as provided in Section 10.2. This indemnity and hold harmless agreement shall include indemnity against all costs, expenses and liabilities incurred in or in connection with any such claim or proceeding brought thereon and the defense thereof.

Section 10.2. *Liability insurance.* Tenant shall maintain in full force during the term hereof a policy of public liability and property damage insurance, under which the insurer agrees to indemnify and hold Landlord and its designees harmless from and against all cost, expense, and liability arising out of or based upon all claims, accidents, injuries, and damages referred to in Section 10.1. Each policy may be in blanket form covering other locations of Tenant as well as the Demised Premises, and shall be in any company that is reasonably approved by Landlord and authorized by the state in which the Demised Premises are located. Each policy shall be noncancellable with respect to Landlord and its designees unless Tenant gives each 30 days' prior written notice before (i) policy expiration and (ii) commencement of this lease term. The insurance shall have minimum limits of liability of \$500,000 for injury (or death) to any one person, \$1,000,000 for injury (or death) to more than one person in any one accident or other occurrence, and \$100,000 for the damage of property.

Section 10.3. *Common area release.* Except as otherwise provided in this lease (including Article VI), all permitted use and occupancy by Tenant of the Demised Premises and use of all other portions of the common areas of the Shopping Center (defined herein to mean all parking areas, roadways, malls, means of ingress and egress, and landscaped areas within the Shopping Center) shall be at its own risk. Tenant shall release Landlord, and its agents, servants, contractors, and employees, from all claims and demands resulting from any accident, damage, or injury occurring therein, unless due to their wilful acts or Landlord's wilful failure to perform any covenant under this lease. Landlord shall not be liable for any loss of or damage to Tenant's fixtures or other personal property, unless caused by the wilful acts of Landlord, or its agents, servants, or employees.

Article XI Assignment

Section 11.1. *Assignment; subletting.* Tenant may, without limitation, transfer and assign this lease or sublet all or any portion of the Demised Premises for the uses set forth in this lease, provided that an otherwise permitted use by Tenant's assignees or sublessees does not conflict with any exclusive privilege that Landlord may have granted heretofore in an existing lease of stores situated in other parts of the Shopping Center of which the Demised Premises are a part. If Tenant assigns or sublets as provided above, it shall remain fully liable for the payment of rent and the fulfillment of all terms, covenants, and conditions under this lease. Landlord shall provide Tenant, within ten days after it receives written request, with a certificate setting forth all exclusive privileges then in force and effect with other tenants of the Shopping Center. Tenant shall furnish to Landlord, at least ten days before the effective date, a duly executed copy of the assignment in recordable form, together with an assumption agreement by the assignee under which the assignee assumes all of Tenant's terms, covenants, and conditions under this lease.

Section 11.2. *Discontinued use.* Tenant shall give Landlord at least 90 days' written notice before any of the following acts of intended vacating, assigning or subletting, nonretail use, or subdividing, occur: Tenant intends to vacate the

Demised Premises with the intention of discontinuing its business therein; Tenant intends before or after the vacating to assign this lease or sublet the Demised Premises to someone other than a successor, subsidiary, affiliate, parent, merged, consolidated, controlled, or controlling corporation; Tenant intends before or after the vacating, or its assignee intends after the assignment, to use the Demised Premises for a nonretail use; or Tenant intends before or after the vacating, or its assignee intends before or after the assignment, to subdivide the Demised Premises into smaller stores to be sublet by Tenant or its assignee or subtenant. In any such event, Tenant shall specify in the notice the date of the proposed vacating, assigning or subletting, nonretail use, or subdividing. Moreover, it is expressly understood that:

(a) If Tenant gives notice of intention to vacate under the above provisions, without assigning the lease or subletting the Demised Premises, Landlord may, by giving notice to Tenant within 90 days after receipt of notice, cancel and terminate the lease, effective as of the date set forth in the notice for vacating the Demised Premises. Tenant shall have, in any event, at least 30 days after notice from Landlord within which to vacate the Demised Premises.

(b) If Tenant gives notice of intention to assign or sublet to someone other than a successor, subsidiary, affiliate, parent, merged, consolidated, or controlling corporation, or to use or assign the Demised Premises for nonretail use, in either case as provided above, Landlord may, by giving notice to Tenant within 90 days after it receives Tenant's notice, cancel and terminate the lease, effective as of the later of the assigning or subletting or the nonretail use, or the last day of the 90-day notice period provided in this paragraph (b).

(c) If Tenant gives notice of intention to subdivide the Demised Premises, Landlord may, by giving notice to Tenant within 90 days after it receives Tenant's notice, cancel and terminate this lease, effective as of the date specified in the notice by Tenant for the subdivision.

(d) Upon Landlord's termination of this lease as provided in paragraphs (a) through (c) of this Section, all further obligations of the parties hereto shall abate. In that event, Tenant shall be refunded all sums prepaid by it as rent under the lease or otherwise, and neither party shall have any further obligation to the other.

Article XII Fixtures

Section 12.1. The following shall remain the property of Tenant: all counters, shelving, refrigerating, and other equipment, and other trade and light fixtures, installed by or at Tenant's expense or owned by it; and all other erections, additions, and improvements made to, in, or on the Demised Premises by and at Tenant's expense and susceptible of being removed without substantial injury to the Premises. Tenant may remove all or any part of the above property at any time during the term of this lease. Tenant shall promptly cause, at its expense, the prompt repair in a good and workman-like manner of any injury to the Demised Premises caused by such removal.

Article XIII Signs

Section 13.1. *Exterior signs.* Tenant may, at its expense and in conformity with and subject to all applicable laws and ordinances, erect and thereafter replace the following:

(a) All signs on the Demised Premises not extending above the parapet, and, if permitted by governing authorities, all signs on the roof and the marquee. Tenant's installation of a roof sign shall be made in a manner that does not affect the rights of Landlord or its assignees, under any roofing bond then in force, and that does not overload the roof or any other structural portion of the Demised Premises. Tenant shall repair all damages caused by the installation or removal;

(b) A sign of reasonable size designating its parcel pickup station;

(c) Illuminated signs at or near the entrances to the parking areas stating "in" and "out"; and

(d) Tenant's usual pylon sign at the perimeter of the Shopping Center.

Section 13.2. *Interior signs.* Tenant may also erect, maintain, place, and install its usual and customary signs and fixtures in the interior of the Demised Premises, including, without limitation, flat paper signs.

Article XIV Casualty Insurance

Section 14.1. *Insurance requirements.* Tenant, at its expense, shall keep, or cause to be kept, all the Demised Premises, the appurtenances thereto, and equipment and facilities in and upon and used in connection therewith (other than any furniture, fixtures, machinery and trade fixtures, and equipment and merchandise owned by Tenant or its subtenants, concessionaires, and licensees) insured for the benefit of Landlord, the Ground Owner, and the holder of any mortgage covering all or part of the Demised Premises (the "Mortgage"), as their respective interests may appear during the term of this lease. The insurance shall be against loss or damage by fire and by other reasons covered by endorsements commonly known as "extended coverage" to the full extent of the replacement value (exclusive of the cost of excavations, foundations, and footings below the lowest basement floor). However, in no event shall the amount of insurance be less than that reasonably required by the holder of any mortgage. The full replacement value shall be determined by Tenant at its expense (but not more frequently than once in any 24-month calendar period) at Landlord's request, given to Tenant, by the Engineering Department of the insurance company issuing the insurance, or determined by application of appropriate cost indices reasonably acceptable to Landlord, its Mortgagee, and Tenant. No omission by Landlord to request any such determination shall relieve Tenant of its obligations under this Article. Tenant's obligations to furnish the insurance referred to in this Article shall be deemed complied with if it is furnished by any subtenant, licensee, or concessionaire for Landlord's account and benefit and the insurance otherwise complies with all the applicable requirements of this lease.

Notwithstanding the above, Tenant shall only carry builder's risk insurance, with extended coverage endorsement, on the building, insuring any construction, repairs, maintenance, or alterations performed by Tenant under the terms of this lease. The policy shall name not only Landlord, the Ground Owner, and the holder of any mortgage, but also the contractor and builder of the building. Whenever any portion of the building being reconstructed, repaired, or maintained is completed, Tenant shall substitute permanent insurance as required hereunder for builder's risk insurance on that portion. As used in this lease the term "Mortgage" includes a Mortgage and a Deed of Trust or similar security instrument, the Ground Lease, and a sale leaseback lease; and the term "holder" includes the holders of any of these instruments.

Section 14.2. *Adverse additional insurance.* Tenant shall not carry any additional insurance which shall have the effect of reducing the insurance coverage for the benefit of Landlord or the holder of any Mortgage under the provisions of this Article, or of causing Landlord to become a co-insurer under policies required to be carried by Tenant under this Article.

Section 14.3. *Premium payments, original policies.* All insurance provided for in this Article shall be effected under valid and enforceable policies (which may cover the Demised Premises and other locations) in form reasonably satisfactory to Landlord. The insurance shall be issued by insurers of recognized responsibility, which are licensed to do business under the laws of the United States and the state in which the Demised Premises are located.

Upon the execution of this lease, and thereafter not less than 15 days before the expiration dates of the expiring policies previously furnished under this Article, Tenant shall deliver to Landlord originals of the policies, bearing notations evidencing the payment of premiums or accompanied by other evidence satisfactory to Landlord of such payment. Alternatively, at Landlord's request, the original policy shall be delivered to the holder of any Mortgage on the Demised Premises or any part thereof. If the original policies are delivered to other than Landlord as provided above, duplicate originals of the policies, or certificates or memoranda of them, shall simultaneously be delivered to Landlord. Tenant may provide any required insurance by blanket insurance covering the Demised Premises and other locations if the

following conditions are met: Tenant furnishes Landlord or its designees a certificate of the insurance (in lieu of the original policy); the blanket insurance complies with all other requirements of this lease with respect to the insurance involved and also is reasonably acceptable to all Mortgagees; and the insurance certificate separately states the amount of coverage and other coverage applicable to the Demised Premises.

Section 14.4. *Named insureds.* All policies of insurance provided for in this Article shall name Landlord, the Ground Owner, the holder of any Mortgage on the Demised Premises or any part thereof, and, in the event of a sale and leaseback of Tenant's leasehold estate, the lessor under the sale-leaseback lease, as the insureds. At Landlord's request the policies shall be payable to the holder of any Mortgage, or jointly to Landlord and the Mortgage holder and/or the lessor under any sale-leaseback lease.

Section 14.5. *Collection notice.* Each policy or certificate therefor issued by the insurer shall contain its agreement not to cancel the policy unless it gives at least 30 days' prior written notice to Landlord and to the holder of any Mortgage or lessor in any sale-leaseback transaction to whom a loss thereunder may be payable.

Section 14.6. *Waiver of subrogation.* Landlord and Tenant hereby release each other from any and all liability or responsibility (to either or anyone claiming through or under them by way of subrogation or otherwise) for any loss or damage to property caused by fire or any of the extended coverage or supplementary contract casualties even if caused by the fault or negligence of Landlord or Tenant, or anyone for whom either may have been responsible. Landlord's and Tenant's policies shall include appropriate clauses, to the extent they are not prohibited, waiving all rights of subrogation against the respective parties with respect to losses payable under the policies, and/or agreeing that the policies shall not be invalidated if the insured waives in writing prior to a loss all rights of recovery against either party for losses covered by the policies. The policies shall include such clauses so long as they are obtainable without extra cost, or if either party pays for the extra cost. Either party shall advise the other as to the amount of extra cost, and the other party may pay it. Tenant shall, at its expense, cooperate fully with Landlord in obtaining recovery and shall execute all consents and other instruments and take all other actions necessary or desirable to effectuate them and to cause the proceeds to be paid as provided above. Landlord and Tenant shall not carry any insurance concurrent in coverage and contributing in the event of loss with any insurance required to be furnished by either party hereunder if the separate insurance has the effect of reducing the protection or payment to be made under either's insurance. Nothing contained in this lease shall prohibit Tenant's use of reasonable insurance deductibles consistent with sound insurance practices and subject to the approval of the holder of any Mortgage.

Article XV Fire or Other Casualty

Section 15.1. *Rent adjustment.* This lease is made on condition that if all or any part of the Demised Premises are destroyed or damaged by fire or other casualty while this lease is in effect, the minimum rent reserved in Article IV, Section 4.1, and any additional rent and other charges, or a just and proportionate part thereof, according to the nature and extent to which the Demised Premises are rendered unfit for use and occupancy, shall be suspended and abate. Suspension and abatement shall continue until the buildings on the Demised Premises are put, by Landlord and at its expense, in the same condition they were immediately before the destruction or damage. However, Landlord's work shall be limited to the available insurance proceeds.

Section 15.2. *Restoration; termination option.* Subject to the provisions of Article XIV and the availability to Landlord of the insurance proceeds from the policies enumerated therein, Landlord shall proceed, immediately after such destruction and damage, to repair and restore the Demised Premises to their prior condition. If the insurance proceeds are not sufficient to fully repair or restore the Demised Premises, Tenant shall provide the necessary funds to make up the difference. However, if the restoration or repairs are not completed within eight months after the damage or destruction (subject to extension of not more than four months under Section 18.15 of Article XVIII), Tenant may, by mailing written notice to Landlord within 60 days of the expiration of the eight-month period (subject to the above extension), terminate this lease on the 14th day following the mailing of the notice. Moreover, either Landlord or

Tenant may terminate this lease, except as provided in Section 15.3, below, if the Demised Premises are damaged or destroyed by fire or other casualty and the destruction or damage occurs:

- (a) During the third year next preceding the expiration or any extension of the original term, and amounts to 35 percent or more of the insurable value of the Demised Premises (exclusive of the land and foundations);
- (b) During the second year next preceding the expiration or any extension of the original term, and amounts to 25 percent or more of the insurable value of the Demised Premises (exclusive of the land and foundations); or
- (c) During the last year of the original term, or any extension of it, and amounts to 15 percent or more of the insurable value of the Demised Premises (exclusive of the land and foundations). In any such event, Landlord or Tenant shall send written notice to the other party of its election to terminate within 30 days after the destruction or damage.

Upon termination by either party, as provided above, this lease shall terminate and all unearned rent and other charges paid in advance shall be refunded to Tenant. If the destruction or damage to the Demised Premises is such that neither Landlord nor Tenant has the right to terminate the lease under this Section, or if either party has that right but fails to exercise it, Landlord shall immediately repair and restore the Demised Premises as provided above, except that it shall have an additional 30 days in which to complete its work.

Section 15.3. *Restoration upon extension of lease.* If, at the time of the destruction or damage, Tenant has the right to extend or further extend the term of this lease, as provided in Article III, it may exercise that right within 20 days after it receives Landlord's notice of termination. In that case, the notice shall be void and of no effect, and Landlord shall repair and restore the Demised Premises as provided above.

Article XVI Eminent Domain

Section 16.1. *Complete condemnation.* If, during the term of this lease, the Demised Premises are completely taken by a public or private authority under its power of eminent domain, this lease shall terminate as of the date of taking. In that event, Tenant may continue to occupy the Demised Premises, subject to the terms of this lease, for all or any part of the period between the date of taking and the date when the condemning authority takes possession, and all unearned rent and other charges paid in advance shall be refunded to Tenant. If required, Tenant shall procure from the applicable governmental authority, at Tenant's expense, all necessary consents and authorizations to continue to occupy the Demised Premises from and after the date of taking.

Section 16.2. *Partial condemnation.* If, during the term of this lease, the Demised Premises are partly taken, as described below, by a public or private authority under its power of eminent domain, Tenant may terminate this lease. A partial condemnation, for this purpose, shall include a taking that results in one of the following:

- (a) The reduction of the ground floor area of the building on the Demised Premises by more than 15 percent; or
- (b) The reduction of the parking area shown within the area outlined in green on Exhibit "A" by 15 percent or more.

In either event, Tenant may terminate this lease by giving Landlord notice of its election to do so within 20 days of the date notice is given to Tenant of the taking (or purchase). In that event the term of this lease shall terminate as of the last day of the calendar month in which Tenant gives notice of its election to terminate, and all unearned rent and other charges paid in advance shall be refunded to it. Notwithstanding (b), above, any termination rights granted herein to Tenant shall be null and void if Landlord supplies additional parking (including parking area made available by cross-easements) on contiguous property or constructs parking area contiguous to existing parking area, which together with the remaining parking area after the taking, is equal to at least 85 percent of all such parking areas before the taking.

Section 16.3. *Rent adjustment.* If Tenant does not exercise its right to terminate, or if Landlord constructs additional parking, this lease shall continue in full force and effect. In that event, Landlord shall, at its expense, immediately restore any remaining portion of the Demised Premises including all improvements previously made, the parking areas, and the Demised Premises, to substantially their same condition before the taking. (The scope of Landlord's work, however, shall be limited to its original work in constructing the Demised Premises, and its cost shall be limited to the net available proceeds available to it.) Moreover, a just proportion of the minimum rent reserved in Section 4.1 of Article IV, and all other charges payable by Tenant under this lease, according to the nature and extent of the injury to the Demised Premises and Tenant's business, shall be suspended or abated until the remaining portion of the Demised Premises and the parking areas are restored as provided above. Thereafter, a just proportion of minimum rent and all such other charges, according to the nature and extent of the taking and resulting injury to the Demised Premises and Tenant's business shall be permanently abated for the balance of the term of this lease. In computing the amount of proportionate rent reduction as herein provided, due consideration shall be given to the value of the portion of the floor area so taken in condemnation with relation to the remaining floor area insofar as its use for Tenant's business is concerned, and to the effect of such taking on Tenant's business, and the amount of parking area and the value of what remains insofar as its use for Tenant's business is concerned.

16.4. *Minimum rent; mortgage payments.* Rent reduction shall not exceed the amount of any reduction in the constant monthly payments then payable under any Mortgage resulting from the holder's recasting of the payments upon the application of all or any portion of the proceeds of the taking to the entire or partial prepayment of the Mortgage. Notwithstanding the above (but only during the initial term or any extensions of this lease which are within the original term of the Mortgage), if any Mortgage holder refuses to recast the then payable constant monthly Mortgage payments to the extent of any application by it of the proceeds of any taking to repayment of the Mortgage principal due, then, in that event only, when the proceeds are applied to fully prepay the Mortgage before its normal payment date, Tenant shall, during the remaining period of this lease (including any extensions of it during the period before the Mortgage should have been fully paid according to its terms), be entitled to a monthly reduction in the basic monthly rent due hereunder. The monthly reduction shall equal the lesser of:

- (a) The constant monthly payments of principal and interest which would otherwise have been normally payable to the holder for the remaining period of the Mortgage; or
- (b) The reduction in annual minimum rental provided for in Section 16.3, subject to this Section, together with interest thereon from the date of the physical reduction of the Demised Premises at the then per annum prime rate of CitiBank, State and City of New York.

Section 16.5. *Condemnation award.* All damages awarded for a taking under the power of eminent domain as provided in this Article XVI, whether for the whole or a part of the Demised Premises, and whether as compensation for diminution in value to the leasehold or to the fee of the Demised Premises, shall belong to and be the property of Landlord. Tenant may file a claim and prove, collect, and retain all damages awarded for its fixtures and all leasehold improvements made by Tenant at its expense, to the extent that the improvements are not replacements or substitutions of prior improvements made by Landlord at its expense. Tenant shall be entitled to all awards recoverable from the condemning authority for damage to its business conducted in the Demised Premises, and to all damages suffered by it as a result of the partial or complete cancellation of this lease, and moving expenses, which are compensable by the condemning authority. Neither award shall reduce or affect the award payable to Landlord or the Lessor under the Ground Lease. However, the damage or claims by Tenant shall not include a claim by it for the value of the unexpired term of this lease.

Article XVII Defaults

Section 17.1. *Default and termination.* This lease shall wholly terminate if any one or more of the following defaults or

events occur:

(a) If Tenant defaults in the payment of all or part of the rent reserved herein or any item of additional rent mentioned herein, or in making any other payment provided herein, and the default continues for more than 15 days after Landlord gives Tenant written notice specifying the default;

(b) If Tenant defaults in the observance of any other term, covenant, or condition of this lease and the default continues for more than 30 days after Landlord gives written notice specifying the default; if this lease passes to or devolves upon a person other than Tenant (other than by merger or consolidation, except as provided herein); or if the entire Demised Premises are occupied by a person other than Tenant, or its successors, assigns, licensees, or sublessees (except as provided herein); or

(c) If Tenant makes any assignment for the benefit of creditors, files a voluntary petition in bankruptcy, is adjudicated a bankrupt by any court, or voluntarily or involuntarily takes the benefit of any insolvency act or is dissolved under it; or if a receiver or Trustee of Tenant and/or its property is appointed in any non-bankruptcy proceeding and the appointment, petition for an arrangement, or reorganization, if made in proceedings instituted by Tenant, is not vacated within 30 days after it is made, or if made in proceedings instituted by any other person, is not vacated within 120 days after it is made (if during the respective 30-day and 120-day periods Tenant continues to perform all its covenants under this lease, including the payment of rent).

Upon the happening of any one or more of the above defaults or events, this lease and the term hereof shall, upon a date specified by Landlord to Tenant in a notice by registered or certified mail, wholly cease and terminate with the same force and effect as if the date so specified were the date set forth above as the date of the expiration of the original term of this lease. At that or any later time, Landlord may re-enter the Demised Premises by force or otherwise, and have the same possession as of its former estate, and may recover possession thereof in the manner prescribed by the statute governing summary proceedings, or similar statutes (but Tenant shall remain liable to Landlord as provided below). Landlord may recover such possession without having to make any demand for the rent, any re-entry for condition broken, or any notice to quit possession or other notice prescribed by statute, and Tenant expressly waives all rights to any such demand, re-entry, or notice to quit possession or other statutory notices or prerequisites.

17.2. *Cure of default.* Tenant's failure to observe any term, covenant, or condition of the lease other than the payment of rent shall not be deemed a default within the meaning of Section 17.1 of Article XVII, so long as Tenant, after receiving any notice as specified herein, proceeds to cure the default as soon as reasonably possible and continues to take all steps necessary to complete the curing of such default within a reasonable period of time under all prevailing circumstances. No default shall be deemed to continue if and so long as Tenant proceeds to cure it in good faith or is delayed in or prevented from curing it by facts or circumstances beyond Tenant's control.

Section 17.3. *Reletting, deficiency.* In case of such re-entry, termination of lease, and/or dispossession by summary proceedings or otherwise:

(a) The rent shall become due thereupon and be paid up to the time of re-entry, dispossession, and/or termination of lease, together with all reasonable expenses Landlord may incur for legal expenses, attorneys' fees, brokerage, and putting the Demised Premises in such condition as the Tenant under the provisions hereof is required to maintain, or for preparing the same for re-rental;

(b) Landlord may re-let all or any part of the Demised Premises, either in its name or otherwise, for a term or terms which may at its option be less than or exceed the period which would otherwise have constituted the balance of the term of this lease and may grant concession or free rent if reasonably required; and

(c) Tenant or its legal representatives shall also pay Landlord as liquidated damages for Tenant's failure to perform, any

deficiency between the rent hereby reserved and/or covenanted to be paid and the net amount, if any, of the rents collected on account of the lease or leases of the Demised Premises for each month of the period which would otherwise have constituted the balance of this lease term. In computing the liquidated damages there shall be added to the deficiency all expenses incurred by Landlord in connection with re-letting, such as legal expenses, attorneys' fees, and brokerage, in preparing the Demised Premises for re-letting, and for keeping them in the same condition as is required of Tenant. Tenant shall pay all liquidated damages in monthly installments on the rent day specified in this lease. Any suit brought to collect a deficiency for any month shall not prejudice in any way Landlord's rights to collect the deficiency for any subsequent month by a similar proceeding. Landlord may make all alterations, repairs, replacements, and decorations in the Demised Premises that it reasonably considers advisable and necessary for the purpose of re-letting them, and the making of any alteration or decoration shall not operate or be construed to release Tenant from its above liability. Landlord shall not be liable in any way for failure to re-let the Demised Premises, or, if they are re-let, for failure to collect the rent under the re-letting, subject to the provisions of Section 18.19 of Article XVIII.

Section 17.4. *Cumulative remedies; waiver of redemption.* Mention in this lease of any particular remedy shall not preclude Landlord from any other remedy, in law or in equity. Tenant hereby expressly waives all rights of redemption granted by or under any present or future law if it is lawfully evicted or dispossessed for any cause provided herein or if Landlord lawfully obtains possession of the Demised Premises as provided herein, by reason of Tenant's violation of any covenant or condition of this lease.

Section 17.5. *Insolvency.* If this lease is terminated under Section 17.1(c), Landlord may immediately (notwithstanding any other provision of this lease) recover from Tenant, as liquidated damages, in lieu of the liquidated damages provided for in Section 17.3, and in addition to any unpaid rent and additional rent accrued to the date of termination, the difference, for the unexpired portion of the lease term, between the rent and additional rent reserved hereunder and the then fair and reasonable rental value of the Demised Premises, both discounted at the rate of 8 percent per annum to present worth. However, nothing contained herein shall limit or prejudice Landlord's right to prove for and obtain as liquidated damages by reason of the termination the maximum amount then allowed by any applicable statute or rule of law, regardless of whether that amount is greater, equal to, or less than the difference referred to above. The rental realized by any re-letting, if it is accomplished within a reasonable time after termination of this lease, shall be deemed prima facie to be the rental value of the Demised Premises.

Article XVIII Miscellaneous Provisions

Section 18.1. *Subordination.* Tenant shall, upon Landlord's written request, subordinate this lease to the lien of any present or future first Mortgage (as defined above) upon the Demised Premises regardless of when the lien is executed or the first Mortgage is recorded, if the Mortgage holder enters into a written agreement with Tenant to the effect that:

- (a) If the holder takes foreclosure or other action under the Mortgage, this lease and Tenant's rights under it shall not be disturbed, but they shall continue in full force and effect so long as this lease is not terminated by Landlord by reason of Tenant's default;
- (b) The holder shall permit insurance proceeds to be used for any restoration and repair required by the provisions of Article XV; and
- (c) The holder shall agree that if it or any successor or assign is in possession of the Demised Premises, so long as Tenant observes and performs all of its obligations under this lease, the mortgagee will perform all of Landlord's obligations under this lease.

Section 18.2. *Cure of default; reimbursement.* If Landlord or Tenant defaults in the performance or observance of any agreement, condition, or other provision in this lease, and does not cure the default within the notice period provided for under the applicable lease provisions, or if no notice is provided for within 30 days after the other party gives notice

specifying the default (or does not within that period commence to cure the default and thereafter prosecute its curing, to completion with due diligence), either party may, without waiving any claim for breach of agreement, at any time thereafter cure the default for the account of the defaulting party. In that case, the defaulting party shall reimburse the other for any amount paid and any expense or contractual liability so incurred. Tenant may deduct any such amount due it from the next rental payments accruing if it simultaneously notifies the holder of any Mortgage of which it had written notification that a default existed, and Landlord may add any such amount due it to the next rental payment accruing. However, Landlord or Tenant may cure any default before the expiration of the waiting period, but after notice to the other party, if necessary to protect the real estate or their respective interests therein or to prevent injury or damage to persons or property.

Section 18.3. *Quiet enjoyment.* If Tenant pays the rent and observes and performs all of its terms, covenants, and conditions under this lease, Tenant may peaceably and quietly have, hold, occupy, and enjoy the Demised Premises, including the common facilities, without hindrance or molestation. This covenant and all other covenants of Landlord under this lease shall be binding upon Landlord and its successors or assigns only with respect to breaches occurring during its and their respective ownership of Landlord's interest hereunder, and only if the successor or assign assumes Landlord's obligations under this lease when it acquires Landlord's interest. The aggregate personal liability of Landlord, and its successors and assigns, under this Section and all other provisions of this lease shall be limited to its equity in the premises of which the Demised Premises form a part. This limitation shall run in favor of the members of Landlord as individuals or either of them, who succeed to the interests of Landlord after its liquidation and dissolution and to their heirs, representatives, successors, and assigns.

Section 18.4. *Landlord's title.* Landlord is not the owner of the fee interest in the Demised Premises. Rather, it has acquired a leasehold interest in a larger premises of which the Demised Premises forms a part by virtue of a certain Indenture of Lease dated [date], between Stanley Baker and Harriet Baker, his wife, as Landlord, and the Landlord under this lease, as tenant under the Indenture of Lease. A short form of the Ground Lease was recorded in the Office of the Recorder of Polk County, Iowa, on [date], in Book 2395, Page 953, as Instrument No. 22883. Accordingly, this lease is a sublease and the demise under it is a portion of Landlord's leasehold interest under the Ground Lease. Tenant accepts such demise with reference to all of the terms, covenants, and conditions of the Ground Lease and to all of its extensions, renewals, and amendments. Further, Tenant has examined the Ground Lease and is fully familiar with all its provisions. Also, Tenant is entering into the lease with full knowledge of the state and condition of the lessor's fee interest under the Ground Lease as disclosed in a title report received by Tenant. Both parties have entered into this lease in reliance upon the acknowledgments, agreements, representations, and indemnities contained in it. Landlord has full right and authority to enter into the Ground Lease for the full term thereof, and also to perform its obligations under this lease for the full term and all extensions provided herein. The Ground Lease is in full force and effect and in good standing, and Landlord has a good leasehold estate in the Demised Premises by virtue of the Ground Lease (subject, however, to all exceptions and other title defects set forth in the Ground Lease and title report delivered to Tenant) for the term and all extensions set forth therein. This lease shall be a first lien on the Demised Premises, subject only to any mortgage to which this lease may be subordinated (as provided above) and the Ground Lease. Subject to such state of the title, Landlord may execute this lease for the term, in the manner, and upon the conditions and provisions contained herein. There is no legal impediment to prevent the Demised Premises from being used as a department store building. The Demised Premises is zoned for retail purposes by valid and binding decision of appropriate authorities, or is available for that use, together with the parking of motor vehicles associated therewith.

Section 18.5. *Lease termination.* Upon the expiration or termination of this lease, Tenant shall remove all of its property. If it fails to do so, Landlord may cause the removal at Tenant's expense, and Tenant shall pay all reasonably necessary expenses incurred by the removal. If, as the sole result of the removal, any portion of the Demised Premises or of the building of which it is a part is damaged, Tenant shall pay to Landlord the reasonable cost of repairs unless due to negligence of Landlord, or its agents, servants, employees, or contractors. Tenant's obligation to observe or perform this covenant shall survive the expiration or other termination of this lease term. If Tenant continues in occupancy of the Demised Premises after the term expires, the occupancy shall not be deemed to extend or renew this lease term. Rather,

Tenant shall be deemed to be occupying the Demised Premises as a tenant from month to month, subject to all the covenants, provisions, and conditions of this lease applicable to a month-to-month tenancy, at the rental in effect during the last lease year of the term, prorated and payable for the period of the occupancy.

Section 18.6. *Non-waiver.* Failure of one party to complain of any act or omission by the other, no matter how long the act or omission continues, shall not be deemed a waiver by the party of any right under this lease. No express or implied waiver by either party, at any time, of a breach of any provision of this lease shall be deemed a waiver of a breach of any other provision or a consent to a subsequent breach of the same or other provision. If an action by either party requires consent or approval on any one occasion, this shall not be deemed a consent to or approval of the action on any subsequent occasion or of any other action on the same or a subsequent occasion. All rights and remedies which either party may have under this lease or by operation of law, at law or in equity, upon a breach, shall be distinct, separate, and cumulative, and shall not be deemed inconsistent with each other. No one remedy, regardless of whether it is exercised by a party, shall be deemed to exclude any other. Any two or more of the rights and remedies may be exercised simultaneously.

Section 18.7. *Disputes.* If, at any time, a dispute arises as to the amount of money either party must pay to the other under this lease, the party against whom the obligation is asserted (the "paying party") may make payment "under protest." In that case, the payment shall not be regarded as voluntary, and the paying party may institute suit for its recovery. If it is later adjudged that the paying party had no obligation to make the payment or any part thereof, such party may recover the payment or portion. If, at any time, a dispute arises between the parties as to the work to be performed by either under this lease, the party against whom the claim is asserted (the "performing party") may perform the work and pay the cost "under protest." In that case, the performance of the work shall not be regarded as voluntary, and the performing party may institute suit for recovery of the cost. If it is later adjudged that the performing party had no obligation to perform the work or any part thereof, the party may recover the entire or partial cost. In any case, Tenant may withhold or deduct its payment from any rent reserved herein.

Section 18.8. *Emergency repairs.* Notwithstanding any contrary provision herein, if the lease requires Landlord to make repairs promptly, Tenant may proceed immediately to have the repairs made and pay their cost. In that case, Landlord shall, on Tenant's demand, reimburse it for the cost. If no payment is made to Tenant within 30 days after it gives written notice to Landlord and a copy thereof is simultaneously given to the holder of any first Mortgage (provided that the holder gives Tenant written notice of its interest as holder and the address for sending a copy of the notice), Tenant may deduct its cost from present or future rent. If Tenant does not make the repairs, it shall promptly notify Landlord of the need for repairs. Notwithstanding the above, Tenant shall use its best efforts to notify Landlord of the need for emergency repairs, by telephone, telegraph, or any other available means. In any event, Tenant shall notify Landlord, as soon as possible after the repairs are made, of the fact that they were made, as well as of their nature, their cost, and the reason for making them.

Section 18.9. *Landlord's defaults.* If Landlord fails, refuses, or neglects to pay any rent, taxes, assessments, or other charges that are not Tenant's obligation under this lease, or any Mortgage, lien, or encumbrance the judicial sale of which might affect Tenant's interest hereunder, or to pay the interest due or payable on the Mortgage, lien, or encumbrance, and if Landlord fails to pay or arrange for deferment of the rent and charges within ten days after Tenant gives written notice to it of nonpayment, Tenant may pay the above items or perform the above conditions in accordance with the provisions of Section 18.2. In that case, Tenant may charge the payments to Landlord and withhold them from any rent reserved herein, and Landlord shall pay to Tenant the amount by which Tenant's payments exceed the reserved rent.

Notwithstanding any contrary provision in this Section or elsewhere in this lease, Landlord's failure at any time to make a payment of a Mortgage or the note secured by it shall not be a default under this lease. Tenant shall have no rights with reference to the failure except the specific right set forth in this Section to pay the Mortgage or note and to withhold and deduct the payment from any rent reserved herein.

Section 18.10. *Notices.* All notices and other communications authorized or required under this lease shall be in writing and given by mailing them by certified or registered mail, postage prepaid. The notice or other communication shall be deemed to be given when received by the party to whom it is addressed. If intended for Landlord, it shall be mailed to 320 Park Avenue, Suite 2160, New York, New York 10017, or at any other address Landlord designates by notice to Tenant; and if intended for Tenant, it shall be mailed to 540 Madison Avenue, Suite 1205, New York, New York 10017, or any other address Tenant designates by notice to Landlord. Any notice of default shall specify the nature of the default.

Section 18.11. *Partial validity.* If any term or provision of this lease or its application to any person or circumstance is, to any extent, invalid or unenforceable, the remainder of the lease or of the application to other persons or circumstances shall not be affected thereby, and each term and provision shall be valid and enforced to the fullest extent permitted by law.

Section 18.12. *Headings; definitions.* The headings in this lease are for convenience and reference only. They are not a part of this lease and do not in any way limit or amplify its terms and provisions.

The term "building," whenever used in this lease, is intended to include any building or structure that is now or that may later be erected on the Demised Premises or on the premises of which the Demised Premises are a part.

The term "Landlord," subject to the provisions of Section 18.3, and the pronouns referred thereto, shall mean, when the context so admits or requires, the persons, firm, or corporation named herein as Landlord, and the holder of the Mortgage then in possession of the land and building demised herein. If there is more than one landlord, Landlord's covenants shall be the joint and several obligations of each. If Landlord is a partnership, its covenants shall be the joint and several obligations of each partner and the obligations of the firm. Any pronoun shall be read in the singular or plural number and in the gender required by the context. If there is an underlying lease of the entire Shopping Center (or an underlying lease or leases of part or parts of the Shopping Center to or from the fee owner of the balance thereof), the lessee under that lease, if it is liable for the performance of Landlord's obligations under this lease, shall be deemed the "Landlord," and not the owner or owners in fee of the Shopping Center or portions thereof covered by the underlying lease or leases.

Section 18.13. *Entire agreement.* This instrument contains the entire and only agreement between the parties respecting its subject matter. No oral statements or representations, or prior written matter not contained herein, shall have any force or effect. This instrument shall not be modified in any way except by the parties' written agreement.

Section 18.14. *Short form of lease.* The parties shall, concurrently with the execution of this lease, execute a short form lease for recording. This lease and the short form shall be construed together as one instrument.

Section 18.15. *Force majeure.* Neither party shall be liable for failure to furnish a service or perform a repair that is required of it during the term of this lease when it is so prevented by any cause beyond its reasonable control, such as strike, lockout, breakdown, accident, or order of or regulation by any governmental authority. Moreover, neither party shall be liable because of the following: its inability, due to failure of supply or, despite the exercise of reasonable diligence, for any other cause, to obtain the necessary supplies, parts, or employees for furnishing the services; war or other emergency; or for any other cause due to any act or neglect of the other party or of its servants, agents, employees, assignees, sublessees, or successors in interest. The time for performing the services or repairs shall be extended for a period equal to the delay from such cause.

Section 18.16. *Waiver of trial by jury.* Landlord and Tenant shall waive trial by jury in any action, proceeding, or counterclaim brought by one against the other, or any matters arising out of or in any way connected with this lease, the relationship of Landlord and Tenant, Tenant's use or occupancy of the Demised Premises, or any claim of injury or

damage.

Section 18.17. *Taxes and utility expenses.* (a) (1) Tenant shall, during the term of this lease, pay and discharge punctually, as additional rent, as and when it becomes due and payable, prior to the imposition of any penalty, its pro rata share (as defined in Section 6.2(a)) of the following items: all taxes, including special, area, and general assessments, water rents, and rates and charges of every kind and nature, whether ordinary or extraordinary ("Taxes"); all installments that are charged, levied, laid, assessed, imposed, and become due and payable; liens upon, for, or with respect to the Shopping Center or any part of it, or buildings, appurtenances, and equipment thereon or therein, or part thereof, together with interest thereon, under or by virtue of all present or future federal, state, and local laws, ordinances, requirements, orders, directives, rules, and regulations (all of which shall also be included in the term "taxes," as defined above); and all water rents, rates and charges, sewer rents, and charges for water, steam, gas, hot water, electricity, light and power, and other services furnished to the Demised Premises or the occupants during this lease term ("Utility Expenses").

(2) To the extent permitted by law, Tenant may pay any assessment for improvements assessed during the term of this lease in annual installments, and it shall pay and discharge the installments punctually as they become due and payable during the term.

(3) Tenant shall be deemed to have complied with the above provisions if it pays the Taxes either within any period allowed by law or by the imposing governmental authority for making payment without penalty or interest or before the Taxes become a lien on the Demised Premises, and it produces satisfactory evidence of the payment to Landlord upon Landlord's written request.

(4) Taxes due and payable in the year in which this lease commences or terminates shall be apportioned at the date they are determined, regardless of whether the Taxes have become liens upon the Demised Premises.

(b) (1) Tenant may contest or review all Taxes by legal proceedings or in any other manner it deems suitable. If Tenant institutes proceedings, it shall conduct them promptly at its expense, and, if necessary, in the name of and with the cooperation of Landlord, and Landlord shall execute all necessary documents to accomplish the above. Notwithstanding the above, Tenant shall promptly pay all required Taxes, but it may do so under protest.

(2) The legal proceedings referred to in the preceding paragraph (1) shall include appropriate certiorari proceedings, appeals from orders therein, and appeals from all judgments, decrees, or orders.

(c) All refunds or rebates on account of the Taxes paid by Tenant under the provisions of this lease shall belong to it. All refunds received by Landlord shall be deemed trust funds and as such shall be received by it in trust and immediately paid to Tenant. Landlord shall, at Tenant's request, sign all necessary receipts to secure the payment of any refund or rebate, and pay over to Tenant any refund or rebate it receives. Landlord shall, at Tenant's request at any one or more time but at Tenant's expense, make application, individually (if legally required), or join in Tenant's application (if legally required), for separate tax assessments for all portions of the Demised Premises that Tenant at any one or more time designates. However, the above shall not relieve Tenant of its obligations to pay the required Taxes and assessments.

(d) Nothing contained in this lease shall require or be construed to require Tenant to pay any inheritance, estate, succession, transfer, gift, franchise, income, or profit tax that is or may be imposed upon Landlord or its successors or assigns.

Section 18.18. *Estoppel certificate.* Each party shall, at any one or more times, upon not less than ten days' prior request by the other, execute, acknowledge, and deliver to it a written statement certifying the following: that this lease and/or the Ground Lease is unmodified and in full force and effect (or if there have been modifications, stating them and that

the lease or Ground Lease as modified is in full force and effect); and that, if the lease or Ground Lease is in fact unmodified, there are no known defaults under either, or, if there are defaults, specifying them and all offsets, counterclaims, and defenses being claimed and the dates to which the rent and other charges have been paid. It is intended that any such statement delivered under this Article may be relied upon by all prospective purchasers of Landlord's interest in the Demised Premises or of a Mortgage, and by all other properly interested parties. However, the execution, acknowledgment, and delivery of the statement shall not affect any claim or right of action of the party executing, acknowledging, or delivering it as against the other party or any other person, firm, or corporation, and the statement may contain a reservation that the claim or right of action is not waived or released thereby.

Section 18.19. *Mitigation of damages.* Notwithstanding any contrary term or provision above, Landlord and Tenant shall each have the obligation to mitigate, in every reasonable manner, all damages that may or shall be caused or suffered by virtue of the other's defaults under or violation of any term or provision of this lease.

Section 18.20. *Governing law.* This lease shall be construed in accordance with and governed by the laws of the State of Iowa.

Section 18.21. *Binding effect.* Except as otherwise provided above, the provisions of this lease shall be binding upon and inure to the benefit of both parties and their respective heirs, executors, administrators, successors, and assigns.

Section 18.22. *Counterparts.* This lease may be executed in two or more counterparts, each of which shall be deemed an original but all of which together shall constitute one and the same instrument.

IN WITNESS WHEREOF the parties have set their hands and seal as of the day and year first written above.

Pierce Real Estate Company

by _____

General Partner

Douglas Stores, Inc.

by _____

Vice President

[Acknowledgments]

[Attach Exhibit A]



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Current Legal Forms for Real Estate

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Current Legal Forms for Real Estate

Chapter 23 REAL ESTATE LEASES

Part IV. Forms

A. COMPLETE LEASES AND RELATED AGREEMENTS

31-23 Current Legal Forms for Real Estate FORM 23.06

AUTHOR: by Thomas G. Belden

FORM 23.06 Shopping center lease

COMMENT

A shopping center lease provides not only (1) for the lease of store space by a tenant from a landlord, but also (2) for the use of common facilities with other tenants and customers, as well as (3) for the rules regulating the relationship among the tenants and the landlord for the success of their cooperative merchandising venture. Another significant factor affecting the shopping center lease is the prospective assignment of the lease as additional collateral security for the landlord's mortgage lender. The realities of the bargaining powers of the tenants vis-a-vis the landlord will also affect the shopping center lease. A large desirable department store, which would draw a large number of customers will be better able to obtain concessions from the shopping center owner than will a smaller "satellite" or "line" tenant.

Minimum and percentage rent:

Shopping center leases, as many store leases, generally require the tenant to pay not only a monthly installment of rent, in a minimum amount, but in addition, a percentage rental. The percentage rental is generally based on gross sales from the tenant's premises, and may be adjusted by subtracting the minimum rental, returned merchandise, credits, or similar items. Clear delineation of what amounts received by the tenant are included in "gross sales" is advisable. For example, gross sales may not include:

-- delivery and installation charges

- mail order or catalogue purchases
- finance charges on credit sales
- sales, use or excise taxes
- receipts from vending machine, snack bar, or amusement devices installed for the tenant's employees sole use
- internet sales, unless somehow specifically traceable to the premises

Common areas:

Common areas in a shopping center generally include the malls, promenades, parking facilities, loading docks and area, landscaping and similar areas. A tenant should receive a right to the use of and access to common areas as an appurtenance to the lease.

Regulation of the use of the common elements is usually a right reserved by the landlord. This provides for uniformity for all tenants. Such regulations would include matters such as prohibition against "sidewalk" sales by tenants and restrictions of parking by tenant employees to areas further away from the shopping center.

Although maintenance of the common areas is most often the landlord's responsibility, the common area maintenance costs are generally shared proportionately among tenants and the owner. Maintenance may include the landlord's overhead and management expenses, as well as depreciation of maintenance equipment and overall insurance premiums.

Merchants' association:

A merchants association is a useful organization for considering planning, promotional, and operating functions within the shopping center. Tenant voting rights and the method of membership fee assessment are points to consider here.

Use restrictions and exclusives:

Use restrictions in a shopping center lease requires extreme care. Not only does a landlord seek a good tenant mix by carefully defining each tenant's use, but he must also avoid breach of "exclusives" or clauses barring competing product lines contained in other tenant leases. This can be a problem area. Rather than entering into a lease prohibiting another tenant from selling, for example, men's hats, a landlord may avoid future problems by agreeing not to lease to a tenant whose main business is selling men's hats, or even men's clothing.

Restrictions against competition:

In addition to tenant leases containing "exclusives" (whereby the landlord agrees not to lease to a tenant selling the same product as, or engaged in a business similar to, the subject tenant), a lease may also restrict a tenant from opening a store within a specified radius of the shopping center. If a tenant, prior to entering the shopping center lease, already maintains a store within the proposed radius, he should seek a specific exception. Such restrictions are aimed at preventing the diversion of business from the shopping center and diminishing the amount of the landlord's percentage

rent.

Any restriction which involves restraints on trade should not be so strict as to be in violation of the federal or local anti-trust laws. A review of the current state of the anti-trust law should be made to avoid violation and insure enforceability.

Store hours:

A landlord, as well as most tenants, seeks to keep the shopping center in continuous operation, six to seven days a week including evenings. Many leases may therefore contain a clause requiring the tenant to be open at specified times or at such times as may be set by the merchants' association.

Signs:

In the interest of overall appearance of the shopping center, a landlord will generally retain control over the design and appearance of individual tenant signs. Usually a tenant and landlord should agree on both interior and exterior sign design and appearance before signing the lease.

Mortgage lender protection:

If a tenant enters and records its lease prior to the recording of the landlord's mortgage, the lease will not be subject, generally, to termination by foreclosure. A lender, on the other hand, may be restricted by government regulation to first lien priority on its loans. A tenant does not usually want to lose its lease because of a foreclosure against a landlord. A resolution of this conflict is found in this lease. In exchange for subordination of its lease to the mortgage, the tenant should receive a side agreement from the mortgage lender to honor the lease (despite the landlord's default in the mortgage) so long as the tenant is not in default under the lease, i.e., a nondisturbance agreement.

Mortgage lenders who maintain a substantial interest in upholding the value of the shopping center as a whole by assuring a steady flow of rental income, disfavor, generally, certain types of clauses. Included would be a clause giving the tenant the right to repair defects which the landlord failed to repair, and deduct the cost of such repairs from rent and a clause giving the tenant the right to terminate for breach of its "exclusive" right to sell a particular item or line.

FORM

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THIS LEASE is entered into on *[date]*, by and between the Landlord and the Tenant named below.

Article I Definitions and Contract Basic Provisions

1.1. *Definitions.*

- (a) "Landlord:" Center Associates, a Texas Limited Partnership.
- (b) Landlord's address: 1020 Marshall Tower, Dallas, Texas
- (c) "Tenant:" Big Star Clothes, Inc., a Texas corporation.
- (d) Tenant's address: 224 King's Court, Center, Dallas, Texas.
- (e) Tenant's trade name: Big Star Clothes Store.
- (f) "Agent:" Marshall Real Estate Company, 1020 Marshall Tower, Dallas, Texas.
- (g) "Cooperating Agent:" Lone Star Country Real Estate, Inc.

(h) "Demised Premises:" King's Court Shopping Center (the "Shopping Center") in the City of Dallas, Dallas County, Texas. The store is approximately 9,198 square feet in area (outlined in red on Exhibit A attached hereto and made a part hereof) measured to the exterior of outside walls and to the center of interior walls, and the premises are known as 224 King's Court Center.

(i) Lease term: Commencing on [date], except as may be modified by exhibits which will be attached to this lease if a building is to be constructed for Tenant (the "Commencement Date"), and continuing for ten years. However, if the Commencement Date is not the first day of a calendar month, the 10-year lease term shall be extended by adding the remainder of the calendar month following the Commencement Date.

(j) Minimum guaranteed rental: Minimum guaranteed rental shall be \$1,336.29 per month during the first five years of the term hereof. Minimum guaranteed rental during the second five years of the term shall be \$1,336.29 per month adjusted by the percentage increase in the Consumer Price Index for the last full month of the first five years of the term as compared to the last full month prior to the Commencement Date. The term "Consumer Price Index" shall, for the purpose of this lease, be the "Consumer Price Index for all Urban Consumers" specified for "All Items," (United States City Average, 1967 + 100) and issued by the Bureau of Labor Statistics of the United States Department of Labor. If the price index is in the future compiled upon a different basis, a proper adjustment shall be made therein, for the purposes of this paragraph, to reflect the change in the cost of living that has occurred since the date of this lease. If, at the time of the computation, the United States Department of Labor no longer compiles and publishes a price index, the index for "All Items" compiled and published by any other branch or department of the federal government shall be used for the purpose of this paragraph. If there is no such index, the basis for the adjustments shall be the statistics reflecting cost of living increases as compiled by any institution, organization, or individual generally recognized as an authority by financial and insurance institutions. The minimum guaranteed rental during the second five years of the lease term shall not be less than that during the first five years.

(k) Percentage rental rate: 21/2 percent of all gross sales over \$400,000 per year.

(l) Common area maintenance charge: A minimum of \$268.28 per month, payable in advance.

(m) Prepaid rental: \$_____ as rent for the _____ month(s) of the lease term.

(n) Security deposit: \$_____

(o) Permitted use: Operation of a men's, women's, boys' and girls' department or specialty store.

1.2. *Interpretation.* Each of the above definitions and basic provisions shall be construed in conjunction with and limited to the references thereto in the other provisions of this lease.

Article II Granting Clause

2.1. In consideration of Tenant's obligation to pay rent and of the other terms, covenants, and conditions hereof, Landlord leases to Tenant, and Tenant takes from Landlord, the Demised Premises as described in Section 1.1(h), TO HAVE AND TO HOLD the premises for the lease term specified in Section 1.1(i), all upon the terms and conditions set forth in this lease. If Tenant performs all of its covenants and agreements herein, it shall, subject to the terms of this lease, at all times during the continuance thereof, have peaceful and quiet possession of the Demised Premises. [NOTE: If this lease provides for construction prior to occupancy, refer to the appropriate exhibits attached hereto. In such case Article II shall be deemed modified to the extent inconsistent with such exhibits.]

Article III Construction and Acceptance of Premises

3.1. *Occupancy deemed compliance.* By occupying the Demised Premises, Tenant shall be deemed to have accepted them and to have acknowledged that they comply fully with Landlord's covenants and obligations hereunder.

3.2. *Holdover of prior tenant.* If this lease is executed before the Demised Premises become vacant, or if any present tenant or occupant of the premises holds over, the Landlord cannot acquire possession of the Demised Premises before the Commencement Date (as defined in Section 1.1(i)), it shall not be deemed to be in default under the lease, and Tenant shall accept possession of the Demised Premises whenever Landlord is able to tender them. Landlord waives the payment of rent covering any period before possession is tendered to Tenant.

3.3. *Recordable lease memorandum.* Landlord and Tenant, at either's request, shall execute and deliver a short form lease in recordable form containing the basic provision of this agreement, acknowledging that Tenant has accepted possession and reciting the exact Commencement Date and termination date of this lease.

Article IV Rent

4.1. *Payment of rent.* Rental shall accrue hereunder from the Commencement Date, and shall be payable to Landlord in care of Agent at the address specified in Section 1.1(f).

4.2. *Minimum rent.* Tenant shall pay to Landlord minimum guaranteed rental in monthly installments in the amounts specified in Section 1.1(j). The first monthly installment shall be due and payable on or before the Commencement Date, and subsequent installments shall be due and payable on or before the first day of each succeeding calendar month during the demised term. However, if the Commencement Date is not the first day of a calendar month, Tenant shall, on or before that date, pay as minimum guaranteed rental for the balance of that month a percentage of the rent specified for the first full calendar month. This percentage shall be determined by a fraction, the numerator of which is the number of days from the Commencement Date to the end of the calendar month within which that date falls, and the denominator of which is the total number of days in the month.

4.3. *Percentage rent.* (a) In addition to the minimum guaranteed rental, Tenant shall pay to Landlord, for each year during the term of this lease, percentage rental determined by (i) multiplying the total gross sales made in or from the Demised Premises during the particular calendar year by the percentage rental rate stated in Section 1.1(k), and (ii) subtracting from the resulting product the minimum guaranteed rental paid by Tenant to Landlord for the calendar year. The percentage rental shall be paid in monthly installments as follows: On or before the 10th day of each calendar month during the term of this lease, Tenant shall pay to Landlord, after deducting therefrom the minimum guaranteed rental paid for the preceding calendar month, an amount equal to the product of the specified percentage rental rate multiplied by the total gross sales made in or from the Demised Premises during that month. If the total monthly payments of percentage rental for any calendar year do not equal the annual percentage rental computed on the amount of gross sales for the calendar year in accordance with the specified rate, Tenant shall pay the deficiency to Landlord, or Landlord shall refund the overpayment to Tenant, as the case may be, within 60 days after the end of the calendar year. The rent to be paid by Tenant and retained by Landlord for any calendar year shall not be less than the annual minimum guaranteed rental specified above.

(b) If the designation of a percentage rental rate in Section 1.1(k) includes a breakpoint of gross sales (e.g., "5 percent of gross sales over \$100,000"), then: (a) subsection (ii) in the first sentence of this Section 4.3 shall be deemed to have been deleted and all other formula references in this Article IV adjusted accordingly, (b) the breakpoint shall be divided by 12 for purposes of computing monthly percentage rental installments in the second sentence of Section 4.3, and (c) during all periods when minimum guaranteed rentals are reduced (e.g., under Section 15.4 or Section 16.2) the breakpoint shall be reduced proportionately.

4.4. *Partial calendar years.* If this lease commences on a date other than the first day of a calendar year or terminates on a date other than the last day of a calendar year, percentage rental for the fractional part of the calendar year following

the Commencement Date or preceding the termination date, as the case may be, shall be paid at the specified rate for all sales made during the fractional part that, after deducting from the percentage rental all payments of minimum guaranteed rental for the fractional period. The percentage rental shall be paid in monthly installments as provided above with respect to full calendar years.

4.5. *Gross sales.* The term "gross sales" as used herein shall be construed to include the entire amount of the sales price whether for cash or otherwise, of all sales of merchandise (including gift and merchandise certificates), services and other receipts whatsoever of all business conducted in or from the Demised Premises, including internet, mail or telephone orders received or filled at the Demised Premises, deposits not refunded to purchasers, orders taken (even if they are filled elsewhere), sales to employees, sales through vending machines or other devices, and sales by any sublease, concessionaire or licensee or otherwise in the premises. Each sale upon installment or credit shall be treated as a sale for the full price in the month during which the sale was made, regardless of when the Tenant receives payment from its customer. No deduction shall be allowed for uncollected or uncollectible credit accounts. Gross sales shall not, however, include the following: amounts collected and paid out for any sales or excise tax imposed by a duly constituted governmental authority; the exchange of merchandise between Tenant's stores if made solely for the convenient operation of its business, and not for the purpose of consummating a previous sale, or of depriving Landlord of the benefit of a sale which would otherwise be made, in or from the Demised Premises; returns to shippers or manufacturers; cash or credit refunds on sales if all or part of the merchandise is later returned by the purchaser and accepted by Tenant; and sales of Tenant's fixtures.

4.6. *Late payment penalty.* The minimum guaranteed rental shall be payable on or before the first day of the month (in accordance with Section 4.2). Percentage rental shall be payable on or before the 10th day of each calendar month, without any offset or deduction. If either rental is not received within 10 days after its due date for any reason, the amount due shall bear interest at the maximum contractual rate that could legally be charged if a loan of the rental were made to Tenant in the state where the Demised Premises are located (but not to exceed 11/2 percent per month). This interest shall accrue continuously on any unpaid balance due to Landlord by Tenant during the period commencing with the above due date and terminating with the date on which Tenant makes full payment of all amounts owing to Landlord at the time of payment. Any such increase shall be payable as additional rent hereunder, shall not be considered as a deduction from percentage rental, and shall be payable immediately on demand.

4.7. *Partial acceleration.* If Tenant fails in two consecutive months to make rental payments within ten days after due, Landlord, in order to reduce its administrative costs, may require, by giving written notice to Tenant, that minimum guaranteed rentals be paid in advance quarterly instead of monthly, that all future rental payments be made on or before the due date by cash, cashier's check, or money order, and that delivery of Tenant's personal or corporate check no longer constitutes a payment of rental under this lease. (The above rights are in addition to Landlord's right under Section 4.6 to receive accrued interest, as well as its other rights and remedies accruing under other terms, provisions, and covenants (including Articles XIX and XX) of this lease). Any subsequent acceptance by Landlord of a monthly rental payment or a personal or corporate check shall not be construed as a waiver of its rights.

Article V Sales Reports and Records

5.1. *Certified sales statements.* On or before the tenth day of each calendar month during the term of this lease, Tenant shall prepare and deliver to Landlord at the place where rental is then payable a certified statement of gross sales made during the preceding calendar month. In addition, within 60 days after the expiration of each calendar year, and within 60 days after the termination of this lease if it does not terminate at the end of a calendar year, Tenant shall prepare and deliver to Landlord at the place rental is then payable a statement of gross sales during the preceding calendar (or partial calendar) year, certified to be correct by an independent certified public accountant. Tenant shall furnish similar statements for its licensees, concessionaires, and subtenants. All statements shall be in the form required by Landlord.

5.2. *Books and records.* Tenant shall keep in the Demised Premises or at some other location in the city where they are

located a permanent, accurate set of books and records of all sales of merchandise and revenue derived from business conducted in the Demised Premises, and all supporting records such as tax reports and banking records. All books and records shall be retained and preserved for at least 24 months after the end of the calendar year to which they relate and be subject to inspection and audit by Landlord and its agents at all reasonable times.

5.3. *Audit; adjustments.* If Landlord is not satisfied with the statements of gross sales submitted by Tenant, Landlord may have its auditors make a special audit of all books and records wherever located pertaining to sales made in or from the Demised Premises. If the statements are found to be incorrect by more than 2 percent over the figures submitted by Tenant, it shall pay promptly to Landlord any deficiency, or Landlord shall promptly refund to it any overpayment, as the case may be, established by the audit. In either case, however, Tenant shall pay for the audit.

Article VI Common Areas

6.1. *Common area; parking.* The term "Common area" is defined for all purposes of this lease as that part of the Shopping Center, including applicable facilities, that are intended for the common use of all tenants. For purposes of this definition, facilities include the parking area, private streets and alleys, landscaping, curbs, loading area, sidewalks, malls and promenades (enclosed or otherwise), lighting facilities, drinking fountains, meeting rooms, public toilets, and the like. Not included, however, are space in existing or future buildings designed for commercial rental purposes and streets and alleys maintained by a public authority. Landlord may from time to time change the dimensions and locations of the Common Area, as well as the dimensions, identity, and type of all buildings in the Shopping Center. Tenant, and its employees and customers, when duly authorized under the provisions of this lease, its subtenants, licensees, and concessionaires, shall have the nonexclusive right to use the Common Area as constituted from time to time. The use shall be in common with Landlord, other tenants to the Shopping Center, and other persons permitted by Landlord to use the Shopping Center. The use shall be subject to all reasonable rules and regulations prescribed by Landlord, including the designation of specific areas within the Shopping Center or in reasonable proximity to it for parking automobiles owned by Tenant and its employees, subtenants, licensees, and concessionaires. In this regard, Tenant shall furnish to Landlord, at its request, a complete list of the license numbers of all automobiles operated by Tenant and its employees, subtenants, licensees, and concessionaires. If automobiles or other vehicles owned or operated by Tenant or the above persons are at any time parked in a part of the Shopping Center that is not specifically designated for employee parking, Tenant shall pay to Landlord, as additional rent, an amount equal to the daily or hourly charge established by Landlord for each automobile or other vehicle so parked. Tenant shall not solicit business within the Common Area or take any action that would interfere with the rights of other persons to use it. Landlord may temporarily close any part of the Common Area for any period necessary to make repairs or alterations or to prevent the public from obtaining prescriptive rights.

6.2. *Substitute parking.* Landlord may from time to time substitute for any parking areas other areas, whether elevated, surface, or underground, reasonably accessible to tenants of the Shopping Center.

6.3. *Management and maintenance.* Landlord shall be responsible for the operation, management, and maintenance of the Common area. The manner of and expenditures for maintenance shall be in Landlord's sole discretion.

6.4. *Common area charges.* In addition to rentals and other charges prescribed in this lease, Tenant shall pay to Landlord Tenant's proportionate share of the cost incurred by Landlord of operating and maintaining the Common Area, including costs for lighting, painting, cleaning, policing, inspecting, repairing, and replacing, and for heating and cooling any enclosed mall or promenade in the Shopping Center, as well as a reasonable allowance for Landlord's overhead costs, for depreciation of maintenance equipment, and the cost of hazard insurance. However, such costs shall not include general real estate taxes, assessments, and depreciation of Landlord's original investment. Tenant's proportionate share of the cost of operating and maintaining the Common Area shall be computed on the ratio that the total ground floor area of the Demised Premises bears to the total ground floor area of all buildings within the Shopping Area. However, Tenant's share shall not be less than the amount specified in Section 1.1(l), above. Tenant shall make

the payments to Landlord on demand, at monthly or longer intervals. Landlord may require Tenant to pay in advance monthly or other periodic charges based upon the estimated annual cost of operating and maintaining the Common Area. However, such charges shall be subject to adjustment after the end of the year on the basis of the actual cost for that year.

Article VII Use and Care of Premises

7.1. *Use; name; continuous operation.* The Demised Premises may be used only for the purpose or purposes specified in Section 1.1(o) unless Landlord gives prior written consent. In transacting business in the Demised Premises Tenant shall use only the trade name specified in Section 1.1(e) unless Landlord gives prior written consent. Tenant shall not at any time leave the Demised Premises vacant, but shall in good faith continuously throughout the term of this lease conduct and carry on the type of business for which the Demised Premises are leased. Tenant shall operate its business in an efficient, high class, and reputable manner so as to produce maximum sales from the premises. Tenant shall also, except during reasonable periods for repairing, cleaning, and decorating, keep the premises open to the public for business and have adequate personnel in attendance on all days and during all hours (including evenings) established by Landlord as store hours for the Shopping Center, and during all other hours the Center is open to the public for business, except when Tenant is prohibited from being open for business by applicable law, ordinance, or governmental regulation.

7.2. *Compliance with insurance requirements.* Tenant shall not, without Landlord's prior written consent, keep anything within the premises or use the premises for any purpose which increases the insurance premium cost or invalidates any insurance policy carried on the Demised Premises or other parts of the Shopping Center. All property kept, stored or maintained within the premises by Tenant shall be at its sole risk.

7.3. *Discount sales; nuisance.* Tenant shall not do any of the following acts: conduct within the Demised Premises any fire, auction, bankruptcy, "going-out-of-business," "lost-our-lease," or similar sales or operate within the Demised Premises a "wholesale" or "factory outlet" store, a cooperative store, a "second hand" store, a "surplus" store or a store commonly referred to as a "discount house"; advertise that it sells its products or services at "discount," "cut price," or "cut-rate" prices; permit any objectionable or unpleasant odors to emanate from the premises; place or permit any radio, television, loudspeaker or amplifier on the roof or outside the Demised Premises or where it can be seen or heard from outside the building; place any antenna, awning or other projection on the exterior of the Demised Premises; take any other action that would constitute a nuisance or would disturb or endanger other tenants of the Shopping Center or unreasonably interfere with their use of their respective premises; or do anything that would tend to injure the reputation of the Shopping Center.

7.4. *Rubbish.* Tenants shall take good care of the Demised Premises and keep them free from waste at all times. Tenants shall keep the Demised Premises and sidewalks, serviceways and loading areas adjacent to the premises neat, clean and free from dirt or rubbish at all times, and shall store all trash and garbage within the premises, arranging for the regular pick up of such trash and garbage at Tenant's expense. Receiving and delivery of goods and merchandise and removal of garbage and trash shall be made only in the manner and areas prescribed by Landlord. Tenant shall not operate an incinerator or burn trash or garbage within the Shopping Center area.

7.5. *Display windows.* Tenant shall maintain all display windows in a neat, attractive condition, and shall keep all display windows, exterior electric signs and exterior lighting under any canopy in front of the Demised Premises lighted from dusk until 11:00 p.m. every day, including Sundays and holidays.

7.6. *Address in advertising.* Tenant shall include the address and identity of its business activities in the Demised Premises in all advertisements made by Tenant in which the address and identity of any similar local business activity of Tenant is mentioned.

7.7. *Licenses.* Tenant shall procure at its expense all permits and licenses required for the transaction of business in the Demised Premises and otherwise comply with all applicable laws, ordinances, and governmental regulations.

Article VIII Maintenance and Repair of Premises

8.1. *Landlord obligations.* Landlord shall keep the foundation, the exterior walls (except plate glass windows, doors, door closure devices and other exterior openings; window and door frames, molding, locks, and hardware; special store fronts; lighting, heating, air-conditioning, plumbing and other electrical, mechanical and electromotive installation, equipment and fixtures, signs, placards, decorations or advertising media of any type; and interior painting or other treatment of exterior walls) and roof of the Demised Premises in good repair. Landlord, however, shall not be required to make any repairs caused by the act or negligence of Tenant or of its agents, employees, subtenants, licensees, or concessionaires, subject, however, to the provisions of Articles XV and XVI of this lease. Tenant shall give Landlord immediate written notice of all repairs that Landlord is required to make on or in the Demised Premises, but it shall have a reasonable time after receipt of the notice to make the necessary repairs.

8.2. *Tenant obligations.* Tenant shall keep the Demised Premises in good, clean, and habitable condition and at its expense free of insects, rodents, vermin, and other pests. Tenant shall also make all needed repairs and replacements (including replacement of cracked or broken glass), except for those required of Landlord under Section 8.1 and Articles XV and XVI. Without limiting the foregoing, Tenant shall repair and replace all lighting, heating, air-conditioning, plumbing, and other electrical, mechanical, and electromotive installation, equipment, and fixtures, make all utility repairs in ducts, conduits, pipes, and wiring, and clear up any sewer stoppage located in, under, and above the Demised Premises. If Tenant does not make a required repair within 10 days after it receives Landlord's written notice, Landlord may make the repair without liability to Tenant for resulting loss or damage to Tenant's stock or business. In that case, Tenant shall pay to Landlord upon demand, as additional rent under this lease, the cost of repairs plus the maximum contractual interest (not to exceed 11/2 percent per month) that Landlord could charge to Tenant for a comparable loan in the state where the Demised Premises are located. Such interest shall accrue continuously from the date of payment by Landlord until repayment by Tenant. Upon expiration of the lease, Tenant shall surrender the Demised Premises in good condition, excepting reasonable wear and tear and losses required to be restored by Landlord under Section 8.1 and Articles XV and XVI.

Article IX Alterations

9.1. *Tenant installations.* Tenant shall not make any alterations, additions or improvements, to the Demised Premises without Landlord's prior written consent, except for the installation of unattached, movable trade fixtures, which may be installed without drilling, cutting or otherwise defacing the premises. All alterations, additions, improvements and fixtures (other than Tenant's unattached, readily movable furniture and office equipment) made or installed by either party upon the Demised Premises shall remain upon and be surrendered with the premises and become Landlord's property upon the termination of this lease. However, if Landlord requests removal of the above installations, Tenant shall at its expense do so and restore the premises to their original condition.

9.2. *Construction work.* All construction work done by Tenant within the Demised Premises shall be performed in a good and workmanlike manner, in compliance with all governmental requirements, including without limitation, the American with Disabilities Act of 1990 ("ADA") and the accessibility guidelines issued thereunder, and in a manner that causes a minimum of interference with other construction in progress and with the transaction of business in the Shopping Center. Tenant shall indemnify Landlord and hold it harmless from and against all loss, liability, or damage resulting from Tenant's work, and shall, if requested by Landlord, furnish satisfactory bond or other security against such loss, liability, or damage.

Article X Landlord's Right of Access, Use of Roof

10.1. *Access.* Landlord may enter upon the Demised Premises at any time for the purposes of inspection, repairs, alterations, or additions to adjacent premises, or to show the Demised Premises to prospective purchasers, lessees, or lenders.

10.2. *"For Sale" or "For Lease" signs.* Landlord may place and maintain "For Rent" or "For Lease" signs on the Demised Premises during the last 90 days of the lease term. The signs shall not affect Tenant's obligations under Section 7.3, Article XI, or any other provision of this lease.

10.3. *Roof.* Landlord shall have exclusive use of the roof above the Demised Premises.

Article XI Signs, Store Fronts

11.1. Tenant shall not, without Landlord's prior written consent, (a) make any changes to the store front, (b) install any exterior lighting decorations, paintings, awnings, canopies, or the like, or (c) erect or install any signs, window or door lettering, placards, decorations or advertising media of a type which can be viewed from the exterior of the Demised Premises, excepting only dignified displays of customary type for its display windows. All signs, lettering, placards, decorations and advertising media shall conform in all respects to the sign criteria established by Landlord for the Shopping Center, from time to time, and be subject to its prior written approval as to construction, method of attachment, size, shape, height, lighting, color and general appearance. All signs shall be kept in good condition and in proper operating order at all times.

Article XII Utilities

12.1. *Utility conduits.* Landlord shall cause to be provided and maintained all necessary mains, conduits, and other facilities for the supply of water, gas, electricity, telephone service, and sewerage service to the Demised Premises.

12.2. *Tenant expense.* Tenant shall promptly pay all charges for electricity, water, gas, telephone service, sewerage service, and other utilities furnished to the Demised Premises. Landlord may furnish one or more utility services to Tenant. In such event, Tenant shall purchase the use of all such services and pay on demand as additional rent the rates established for them by Landlord. The rates shall not exceed those that local public utility companies would charge for directly furnishing the same services. Landlord may at any time discontinue a service without obligation to Tenant other than to connect the Demised Premises to the public utility furnishing such service.

12.3. *Interrupted service.* Landlord shall not be liable for any interruption in utility services not furnished by it, or for interruptions in utility services furnished by it that are due to fire, accident, strike, Acts of God, or other causes beyond its control or are necessary to make alterations, repairs, or improvements.

Article XIII Indemnity and Public Liability Insurance

13.1. *Release and indemnity.* Landlord shall not be liable to Tenant, its employees, agents, or visitors, or any other person for injury to person or damage to property on or about the Demised Premises or the Common Area, if: caused by the negligence or misconduct of Tenant, its employees, subtenants, licensees, or concessionaires, or any other person entering the Shopping Center under Tenant's express or implied invitation; arising out of Tenant's use of the premises and the conduct of its business therein; or arising out of a breach or default by Tenant in performing its obligations under this lease. Tenant shall indemnify Landlord and hold it harmless from and against all losses, expenses, or claims arising out of such damage or injury.

13.2. *Public liability insurance.* Tenant shall procure and maintain throughout the term of this lease a policy or policies of insurance, at its expense, insuring both Landlord and Tenant against all claims, demands, or actions arising out of or in connection with Tenant's use or occupancy of the Demised Premises or by the condition of the Demised Premises.

Each policy shall have a limit of at least \$200,000 for injuries to or death of any one person, \$500,000 for any one accident or disaster, and \$100,000 for damage or destruction to property, and shall be written by an insurance company satisfactory to Landlord. Tenant shall obtain a written obligation from each insurance company that it will notify Landlord at least 10 days before the insurance is cancelled. The policies or duly executed certificates of insurance shall be promptly delivered to Landlord, and all required renewals thereof shall be delivered to Landlord at least 30 days before the respective policy terms expire. If Tenant fails to comply with the above requirements, Landlord may obtain the insurance. In that case, Tenant shall pay to Landlord on demand, as additional rent under this lease, the premium cost of the insurance plus interest at the maximum contractual rate (not to exceed 11/2 percent per month) from the date of payment by Landlord until repayment by Tenant.

Article XIV Nonliability for Certain Damages

14.1. Neither Landlord nor its agents or employees shall be liable to Tenant for any injury to person or damage to property caused by the Demised Premises or other portions of the Shopping Center becoming out of repair, by defect or failure of any structural element of the Demised Premises or of any equipment, pipes, or wiring, by broken glass, by the backing up of drains, or by gas, water, steam, electricity, or oil leaking, escaping, or flowing into the Demised Premises, except when due to Landlord's wilful failure to make required repairs within a reasonable time after it receives written notice that repairs are needed. Landlord also shall not be liable to Tenant for any loss or damage occasioned by or through the acts or omissions of other tenants of the Shopping Center or of other persons, other than Landlord's duly authorized employees and agents.

Article XV Damages by Casualty

15.1. *Notice.* Tenant shall give immediate written notice to Landlord of any damage caused to the Demised Premises by fire or other casualty.

15.2. *Repair or termination.* If the Demised Premises are damaged or destroyed by fire or other casualty insurable under standard fire and extended coverage insurance and Landlord does not elect to terminate this lease (as provided below), it shall proceed with reasonable diligence and at its expense to repair or rebuild the Demised Premises. Landlord may either terminate this lease or proceed to repair or rebuild the Demised Premises if: (a) the building in which the Demised Premises are located is destroyed or substantially damaged by a casualty not covered by Landlord's insurance; (b) the building is destroyed or made untenable to the extent of over 50 percent of the first floor area by a casualty covered by Landlord's insurance; or (c) the holder of a mortgage, deed of trust, or other lien on the Demised Premises at the time of the casualty elects, under such particular lien, that all or part of Landlord's insurance proceeds be used in satisfaction of all or part of the indebtedness secured by the lien. Landlord shall give written notice to Tenant of the election within 60 days after the casualty occurs. If Landlord elects to rebuild or repair it shall proceed to do so with reasonable diligence and at its expense.

15.3. *Restoration work.* Landlord's above obligation to rebuild or repair shall be limited to restoring (a) the Demised Premises to substantially the same condition as before the casualty, exclusive of any alterations, additions, improvements, fixtures, and equipment installed by Tenant; or (b) Landlord's work (if any) to substantially the same condition as before the casualty, as the case may be. Promptly after Landlord completes the work, Tenant shall proceed with reasonable diligence and at its expense to restore, repair, and replace all alterations, additions, improvements, fixtures, signs, and equipment installed by or belonging to Tenant.

15.4. *Store operation; rent abatement.* During any period of reconstruction or repair, Tenant shall continue to operate its business within the Demised Premises to the extent practicable. During the period from occurrence of the casualty until Landlord's completion of the repairs, the minimum guaranteed rental shall be reduced by an amount that is fair and reasonable under the circumstances. However, there shall be no abatement of the percentage rental or other charges provided for in this lease.

Article XVI Eminent Domain

16.1. *Substantial taking.* This lease shall terminate if more than 30 percent of the floor area of the Demised Premises is taken for any public or quasi-public use under a governmental law, ordinance, or regulation, or by right of eminent domain or by private purchase in lieu thereof. In any such case, the rent shall be abated during the unexpired portion of the lease, effective on the date the condemning authority takes physical possession.

16.2. *Partial taking.* This lease shall not terminate if less than 30 percent of the floor area of the Demised Premises is taken as provided in Section 16.1. However, the minimum guaranteed rental (but not percentage rental) payable during the unexpired portion of this lease shall be reduced in proportion to the area taken, effective on the date the condemning authority takes physical possession. Following the partial taking, Landlord shall make all necessary repairs or alterations to the remaining premises or within the scope of its work, as the case may be, to make the remaining portions of the Demised Premises an architectural whole.

16.3. *Common area.* If any part of the Common Area is taken as provided above, this lease shall not terminate and the rent payable hereunder shall not be reduced. However, either Landlord or Tenant may terminate this lease if the area of the Common Area following the taking plus any additional parking area provided by Landlord in reasonable proximity to the Shopping Center is less than 70 percent of the area of the Common Area immediately before the taking. Either party may evidence its election to terminate this lease by delivering written notice of termination to the other within 30 days after the condemning authority takes physical possession.

16.4. *Condemnation proceeds.* All compensation awarded for any taking (or the proceeds of private sale in lieu thereof) of the Demised Premises or Common Area shall be the property of Landlord, and Tenant hereby assigns its interest in any such award to Landlord. However, Landlord shall have no interest in any separate award made to Tenant for its moving and relocation expenses or for the loss of its fixtures and other tangible personal property.

Article XVII Assignment and Subletting

17.1. *Consent required; non-waiver.* Tenant shall not assign or in any other manner transfer this lease or any estate or interest therein, sublet all or part of the Demised Premises, or grant a license, concession, or other right of occupancy of any portion of the Demised Premises without Landlord's prior written consent. Landlord's consent to one or more assignments or sublettings shall not operate as a waiver of its rights as to any subsequent assignment or subletting.

17.2. *Corporate stock transfers.* If Tenant is a corporation and at any time during the primary term (or any renewal or extension) of this lease the majority owner or owners of either the outstanding voting shares or all outstanding shares of Tenant's capital stock at the time of execution of this lease cease to own a majority of the shares (except as the result of transfers by devise or descent), the loss of majority status shall be deemed an assignment of this lease by Tenant and therefore subject in all respects to the provisions of Section 17.1. The previous sentence shall not apply, however, if at the time of execution of this lease the outstanding voting shares of Tenant's capital stock are listed on a recognized security exchange or over the counter market.

17.3. *No release; excess rent.* Notwithstanding any assignment or subletting, Tenant and any guarantor of its obligations under this lease shall remain fully responsible and liable for the payment of rent and compliance with all of its obligations hereunder (even if future assignments and sublettings occur after the assignment or subletting by Tenant, and regardless of whether Tenant's approval has been approved for them). Moreover, Tenant shall be bound and obligated to pay Landlord the following excess amounts: if the rental due and payable by a sublessee for both the sublease rental and any bonus or other consideration for or incident to it exceeds the rental payable under this lease; or, if respect to an assignment, license, or other transfer by Tenant permitted by Landlord, the consideration payable to Tenant by the assignee, licensee, or other transferee exceeds the rental payable under this lease. Tenant shall pay Landlord the excess rental and other excess consideration within 10 days after its receipt from the sublessee, assignee,

licensee, or other transferee. If there is any assignment or subletting, Tenant shall receive all rentals paid to it by the assignee or sublessee in trust for Landlord, and shall forward the amounts immediately to Landlord without offset or reduction of any kind. Landlord may require Tenant to pay such rentals directly to it as specified in Section 4.1, in which case they shall be applied as a credit and offset to Tenant's rental obligations.

17.4. *Leasehold mortgages.* Tenant shall not mortgage, pledge, or otherwise encumber its interest in this lease or in the Demised Premises.

17.5. *Landlord assignment.* If Landlord assigns and transfers its interest in this lease and in the building containing the Demised Premises to a person expressly assuming its obligations under the lease, Landlord shall thereby be released from all further obligations hereunder, and Tenant shall look solely to Landlord's successor in interest for performance of the obligations. Landlord may assign and transfer to the successor in interest any security given by Tenant to secure performance of its obligations under this lease, and Landlord shall thereby be discharged of all further related obligations.

Article XVIII Taxes and Insurance

18.1. *Personal property taxes.* Tenant shall be liable for all taxes levied against personal property and trade fixtures placed by it in the Demised Premises. If the taxes are levied against Landlord or its property and it elects to pay them, or if the assessed value of Landlord's property is increased by inclusion of personal property and trade fixtures placed by Tenant in the Demised Premises and Landlord elects to pay the taxes based on the increase, Tenant shall pay to Landlord upon demand that part of the taxes for which Tenant is primarily liable under this lease.

18.2. *Real estate and general tax increases.* Except as provided in Sections 18.1 and 18.3, Landlord shall pay or cause to be paid all general real estate taxes, general and special assessments, parking surcharges, and other governmental charges (collectively "the general taxes") levied against the Shopping Center for each real estate tax year. However, if during any real estate tax year of the primary term (or its renewal or extension) of this lease the general taxes levied against the Shopping Center (or against the Demised Premises, if separately assessed) for that year exceed the general real estate taxes levied against the Shopping Center (or the Demised Premises) for the base real estate tax year, Tenant shall pay to Landlord upon demand, and in addition to the rentals and other charges prescribed in this lease, the entire increase attributable to the Demised Premises. The term "base real estate tax year" means the real estate tax year during which the Demised Premises were originally occupied by Tenant under this lease or any other property. However, if this lease requires Tenant to construct a new building, and Landlord's work on the building is completed more than 60 days after the initial date of a real estate tax year, "base real estate tax year" means the real estate tax year immediately following the one in which Landlord completes its work. The term "increase attributable to the Demised Premises" is defined in Section 18.5, except that if the Demised Premises are separately assessed in either the base real estate tax year or the subsequent year in question, or both, the computations in Section 18.5 shall be modified accordingly. Tenant's payment for the real estate tax year in which this lease terminates shall bear the same ratio to payment which would be required to be made for the full tax year as the number of days of the tax year which elapsed prior to termination of this lease bears to a full tax year.

18.3. *Rent or other taxes.* If, at any time during the primary term of this lease or any renewal or extension thereof, a tax or excise on rents or other tax however described (except any franchise, estate, inheritance, capital stock, income or excess profits tax imposed upon Landlord) is levied or assessed against Landlord by any lawful taxing authority on account of Landlord's interest in this lease or the rents or other charges reserved hereunder, as a substitute in whole or in part, or in addition to the general taxes described in Section 18.2, Tenant shall pay to Landlord upon demand, and in addition to the rentals and other charges prescribed in this lease, the amount of the tax or excise. If the tax or excise is levied or assessed directly against Tenant, it shall be responsible for and pay the tax or excise whenever and in the manner required by the taxing authority.

18.4. *Increases in insurance premiums.* If at any time during the primary term of this lease or its renewal or extension the premiums for liability insurance, fire and extended coverage insurance, or both, carried by Landlord covering the Shopping Center (the "insurance premiums") exceed the insurance premiums for the base insurance term, Tenant shall pay to Landlord upon demand, and in addition to the rentals and other charges prescribed in this lease, the entire increase attributable to the Demised Premises. The term "base insurance term" means the period commencing with the date the Demised Premises were originally occupied by Tenant under this lease or any prior lease (or, if later the date on which Landlord commenced to carry insurance on the Shopping Center) and ending on the date at which the amount of insurance premiums is increased from the amount at the commencement of the term. The term "increase attributable to the Demised Premises" is defined in Section 18.5 below. Tenant's payment for the insurance term in which this lease terminates shall bear the same ratio to the payment that would be required for the full insurance term as the number of days of the term that elapsed prior to termination of this lease bears to the full term.

18.5. *Formula for increase.* The amount of any increase of general taxes or insurance premiums attributable to the Demised Premises shall be computed in accordance with the following formula:

$$*I = (A \times B + C \times D) \times F$$

"I" equals the dollar amount of any increase which is attributable to the Demised Premises; "A" equals the amount of general taxes or insurance premiums accruing during the period in question (prorated, if necessary, to provide a period of like duration to the base real estate tax year or base insurance term, as the case may be; "B" equals the total leasable ground floor area of all buildings in the Shopping Center at the commencement of the period in question; "C" equals the amount of general real estate taxes or insurance premiums which accrued during the base real estate tax year or base insurance term; "D" equals the total leasable ground floor area of all buildings in the Shopping Center either at the beginning of the base real estate tax year or base insurance term, or, if later, when Tenant originally occupied the Demised Premises; and "F" equals the total square feet included in the Demised Premises.

18.6. *Prepayment.* If at any time during the primary term of this lease or its renewal or existence Landlord has reason to believe that at some time within the immediately succeeding taxable month period, Tenant will owe Landlord a payment pursuant to one or more of the preceding sections of this Article XVIII, Landlord may direct that Tenant prepay monthly a pro rata portion of the prospective future payment (i.e., the prospective future payment divided by the number of months before the prospective future payment will be due). Any prepayment directed by Landlord shall be due and payable monthly on the same day that minimum guaranteed rental is due.

Article XIX Default by Tenant and Remedies

19.1. *Default and remedies.* The following events shall be deemed to be events of default by Tenant under this lease:

- (1) Tenant fails to pay any installment of rent or other obligation hereunder involving the payment of money and the failure continues for ten days after the date due.
- (2) Tenant fails to comply with any term, provision or covenant of this lease, other than as described in subsection (1), above, and does not cure the failure within 15 days after written notice thereof to Tenant.
- (3) Tenant or any guarantor of its obligations under this lease becomes insolvent, makes a transfer in fraud of creditors, or makes an assignment for the benefit of creditors.
- (4) Tenant or any guarantor of its obligations under this lease files a petition under any section or chapter of the National Bankruptcy Act, as amended, or under any similar federal or state law or statute, or Tenant or any guarantor of its obligations under this lease is adjudged bankrupt or insolvent in proceedings filed against Tenant or any guarantor of

its obligations under this lease.

(5) A receiver or Trustee is appointed for the Demised Premises or for all or substantially all of the assets of Tenant or of any guarantor of its obligations under this lease.

(6) Tenant deserts or vacates, or commences to desert or vacate, all or a substantial portion of the Demised Premises, or removes or attempts to remove, without Landlord's prior written consent, all or a substantial portion of Tenant's goods, wares, equipment, fixtures, furniture, or other personal property.

(7) Tenant does or permits to be done anything that creates a lien upon the premises.

If any of the above events of default occur, Landlord may pursue either of the following alternative remedies:

A. Without any notice or demand, Landlord may take any action or actions permissible at law to insure performance by Tenant of its covenants and obligations under this lease. If Tenant deserts or vacates the Demised Premises, Landlord may enter upon and take possession in order to protect them from deterioration and continue to demand from Tenant the monthly rentals and other charges provided in this lease, without any obligation to relet. Moreover, if Landlord elects to relet the Demised Premises, that action shall not be deemed an acceptance of Tenant's surrender of them unless Landlord expressly notifies Tenant otherwise in writing pursuant to subsection B below. Landlord shall otherwise be reletting as Tenant's agent. Tenant shall pay Landlord on demand any deficiency between the monthly rentals and other charges provided in this lease that are actually collected by Landlord. If there is any default described in subsection (2) of this Section, Landlord may enter upon the Demised Premises, by force if necessary, without being liable for prosecution or any claim for damages, and do whatever Tenant is obligated to do under this lease. Tenant shall reimburse Landlord on demand for all expenses incurred by it in effecting compliance with Tenant's obligations hereunder, and Landlord shall not be liable for resulting damages to Tenant.

B. Landlord may terminate this lease by giving written notice to Tenant. In such event, Tenant shall immediately surrender the Demised Premises to Landlord. If Tenant fails to do so, Landlord may, without prejudice to any other remedy it may have for possession or arrearages in rent (including any accrued interest under Section 4.6), enter upon and take possession of the Demised Premises and expel or remove, by force if necessary, Tenant and any other person who is occupying all or a portion of the premises without being liable for prosecution or any claim for damages. Tenant hereby waives any statutory requirement of prior written notice for filing eviction or damage suits for nonpayment of rent. In addition, Tenant shall pay to Landlord on demand all loss and damage suffered by it by reason of any termination effected under this subsection B. The loss or damage shall be determined by either of the following alternative measures of damages:

(i) Until Landlord is able, through reasonable efforts the nature of which shall be at its sole discretion, to relet the Demised Premises, Tenant shall pay to it, on or before the first day of each calendar month, the monthly rentals and other charges specified in this lease. After Landlord relets the Demised Premises, Tenant shall pay to it, on the 20th day of each calendar month, the difference between the monthly rentals and other charges for the preceding calendar month and the amount actually collected by Landlord for that month. If Landlord is required to bring suit in order to collect a deficiency, it may allow the deficiency to accumulate and bring an action on several or all of the accrued deficiencies at one time. Such suit shall not prejudice in any way Landlord's right to bring a similar action for subsequent deficiencies. If the amount collected by Landlord from subsequent tenants for a calendar month exceeds the monthly rentals and other charges, the excess shall be credited to Tenant in reduction of its liability for any calendar month for which the amount collected is less than the monthly rentals and other charges. However, Tenant's right to the excess is limited to the above described credit.

(ii) Landlord may demand a final settlement at any time. Upon such demand, Tenant shall pay the difference between the monthly rentals and other charges provided in this lease for the remainder of the term and the reasonable rental

value of the Demised Premises for that period. The difference shall be discounted to present value at the rate of interest agreed on by the parties, or, if there is no such agreement, at the rate allowed by law in the state designated by Section 28.9 (or, if there is no such law, at the rate of 12 percent per annum).

Landlord's election to exercise the remedy prescribed above in subsection A shall in no way prejudice its right at any later time to cancel the election in favor of the remedy provided in subsection B, if at the time of cancellation Tenant is still in default. Similarly, Landlord's election to compute damages in the manner prescribed above by subsection B(i) shall in no way prejudice its right at any later time to demand a final settlement in accordance with subsection B(ii). Pursuit of any of the above remedies shall not preclude pursuit of any other remedy provided elsewhere in this lease or by law. Landlord's forbearance to enforce any remedy provided herein upon an event of default shall not be deemed to constitute a waiver of the default.

19.2. *Other charges.* In determining "the monthly rentals and other charges provided in this lease," as that term is used in subsections A and B of Section 19.1, the minimum guaranteed rental (as specified in Section 1.1(j)) shall include the following: charges for maintenance of the Common Area (as specified in Section 6.4); charges for taxes and insurance (as specified in Article XVIII); and 1/2 percent of all percentage rentals required to be paid by Tenant (under Sections 4.3 and 4.4) because of gross sales during the two full calendar years immediately preceding the date Landlord initiated action under subsections A and B (or, if two full calendar years have not then elapsed, the minimum guaranteed rental shall include the corresponding fraction of all percentage rentals required to be paid because of gross sales during the period from the Commencement Date of this lease to the date on which Landlord initiated the action).

19.3. *Landlord expenses.* In addition to the payments required by subsections A and B of Section 19.1, Tenant shall compensate Landlord for the following: all expenses incurred by Landlord in repossession (including any increase in insurance premiums caused by the vacancy of the Demised Premises), and in reletting (including repairs, remodeling, replacements, advertisements, and brokerage fees); all concessions granted to a new tenant upon reletting (including renewal options); all leases incurred by Landlord as a direct or indirect result of Tenant's default (including any adverse reaction by Landlord's mortgagee or by other tenants or potential tenants of the Shopping Center); and a reasonable allowance for Landlord's administrative efforts, salaries, and overhead attributable directly or indirectly to Tenant's default and Landlord's pursuing the rights and remedies provided under this lease and applicable law.

19.4. *Injunction; cumulative remedies.* Landlord may restrain or enjoin any breach or threatened breach of Tenant's covenants, duties, and obligations under this lease without having to prove the inadequacy of any legal remedy or irreparable harm. Landlord's remedies under this lease shall be deemed cumulative and not exclusive.

19.5. *Attorney's fees.* If Landlord is required, on account of a breach or default by Tenant in any obligation under this lease, to hire an attorney to present, enforce, or defend Landlord's rights or remedies under the lease, Tenant shall pay all reasonable attorney's fees incurred by Landlord in that connection.

19.6. *Security deposit.* Landlord hereby acknowledges receipt from Tenant of the sum stated in Section 1.1(m) (prepaid rental), to be applied to the first accruing installments of rent. Landlord further acknowledges receipt from Tenant of the sum stated in Section 1.1(n) (security deposit), to be held without interest as security for Tenant's performance of its covenants and obligations under this lease. The security deposit may be comingled with Landlord's other funds; it is not an advance payment of rental or a measure of Landlord's damages in case of Tenant's default. Whenever an event of default by Tenant occurs, Landlord may, without prejudice to any other remedy provided in this lease or by law, use the fund to the extent necessary to make good all arrears of rentals and other damage, injury, expense, or liability caused to it by the event of default. Tenant shall pay to Landlord on demand the amount so applied in order to restore the security deposit to its original amount. If Tenant is not then in default, Landlord shall return to Tenant the remaining balance of the deposit upon termination of this lease (subject to the provisions of Section 17.5).

20.1. In addition to the statutory Landlord's lien, Landlord shall have at all times a valid security interest to secure payment of all rentals and other sums of money becoming due from Tenant under this lease, as well as all damages or loss which Landlord may suffer by reason of Tenant's breach of any covenant, agreement, or condition. Landlord's security interest shall be upon all of Tenant's goods, wares, equipment, fixtures, furniture, improvements, and other personal property presently or subsequently situated on the Demised Premises. Tenant shall not remove the property without Landlord's consent until it pays and discharges all arrearages in rent and other sums of money then due or to become due to Landlord and fully complies with and performs all of its covenants, agreements, and conditions. Whenever an event of default by Tenant occurs, Landlord may, in addition to any other remedy provided herein, enter upon the Demised Premises and take possession of all of Tenant's goods, wares, equipment, fixtures, furniture, improvements, and other personal property situated on the premises, without liability for trespass or conversion. Landlord may sell the property at public or private sale, regardless of whether it has the property there, after it gives Tenant reasonable notice of the time and place of sale. Landlord or its assigns may, unless otherwise prohibited by law, purchase any property at the sale. Unless otherwise provided by law, and without intending to exclude any other manner of giving Tenant reasonable notice, the requirement of reasonable notice shall be met if notice is given in the manner prescribed in this lease at least seven days before the time of sale. Any sale made under this paragraph shall be deemed to be a public sale conducted in a commercially reasonable manner if held in the above-described premises or where the property is located after the time, place, and method of sale and a general description of the types of property to be sold are advertised in a daily newspaper published in the county in which the property is located, for five consecutive days before the date of sale. The proceeds of the sale, less all expenses connected with the taking of possession, holding, and selling of the property (including reasonable attorney's fees and legal expenses), shall be applied as a credit against the indebtedness secured by the security interest granted in this paragraph. Any surplus shall be paid to Tenant or as otherwise required by law, and Tenant shall immediately pay all deficiencies. At Landlord's request, Tenant shall execute and deliver to it a financing statement in form sufficient to perfect Landlord's security interest in the above property and sales proceeds under the applicable provisions of the Uniform Commercial Code (or corresponding state statute) in the state in which the property is located, as well as under any other state law that Landlord considers to be applicable.

Article XXI Holding Over

21.1. If Tenant remains in possession of the Demised Premises after this lease expires and without executing a new lease, it shall be deemed to be occupying them as a tenant from month to month at a rental equal to 150 percent of the rental (including percentage rental) provided herein. Tenant shall also be subject to all the conditions, provisions, and obligations of this lease to the extent they are applicable to a month to month tenancy.

Article XXII Subordination

22.1. *Subordination.* Tenant accepts this lease subject and subordinate to any existing or subsequent mortgage, deed of trust, or other lien, or its renewal or extension, upon the Demised Premises or the Shopping Center as a whole. The mortgagee may at any time subordinate the mortgage, deed of trust, or other lien to this lease. However, notwithstanding that this lease may be (or made to be) superior to the mortgage, deed of trust, or other lien, the provisions of that lien relative to the mortgagee's rights with respect to proceeds arising from an eminent domain taking (including a voluntary conveyance by Landlord) or insurance payable by reason of damage to or destruction of the Demised Premises shall be prior and superior to contrary provisions in this instrument regarding the payment or usage thereof. Landlord shall have full and irrevocable power and authority to subordinate this lease to any future mortgage, deed of trust, or other lien placed upon the Demised Premises or the Shopping Center as a whole, and Tenant shall upon demand execute all further instruments requested by Landlord subordinating this lease. However, Landlord shall, upon Tenant's written request and notice to it, use good faith efforts to obtain the mortgagee's written agreement that Tenant's rights shall remain in full force and effect during the term of this lease so long as Tenant continues to recognize and perform all of its covenants and conditions.

22.2. *Tenant remedies.* Whenever the holder of an indebtedness secured by an outstanding mortgage, deed of trust, or other lien covering Landlord's interest in the Demised Premises gives Tenant written notice of its interest in this lease, Tenant may not exercise any remedies for Landlord's default until the holder receives written notice of the default and a reasonable time for curing the default has elapsed.

Article XXIII Merchants Association

23.1. If Landlord organizes a merchants association composed of tenants in the Shopping Center, Tenant shall join and maintain membership in the association, pay all dues and assessments fixed and determined by it, and comply with all its other bylaws, rules, and regulations.

Article XXIV Radius Restriction

24.1. Tenant acknowledges that its monetary contribution to Landlord (in the form of rentals) and its general contribution to commerce within the Shopping Center (also important in Landlord's determination to execute this Lease with Tenant) will be substantially reduced if, during the term of this lease, either Tenant or any other person, firm, or corporation directly or indirectly controlling, controlled by, or under common control with it directly or indirectly operates, manages, conducts, or has any interest in any establishment within commercial proximity of the Shopping Center. Accordingly, during the term of this lease, neither Tenant nor any of the above persons (and also, if Tenant is a corporation, any officer or director or shareholder owning more than 10 percent of its outstanding stock, or any parent, subsidiary, related, or affiliated corporation) shall directly or indirectly operate, manage, conduct, or have any interest in any commercial establishment within three miles of the Shopping Center. However, any commercial establishment existing at the date of this lease may continue to be operated, managed, conducted, and owned in the same manner as at that date, if there is no change in its size or trade name.

Article XXV Notices

25.1. *Written notice.* Any notice required or permitted under this lease shall be in writing. The notice, or any other required or permitted document, shall be deemed to be delivered when actually received by the designated addressee, or, if earlier (and regardless of whether actually received), when deposited in the United States Mail, postage prepaid, Certified Mail, Return Receipt Requested. The notice or document shall be addressed to the parties at their respective addresses set forth in Section 1.1 (or, if Landlord so elects, to Tenant at the Demised Premises), or at any other address previously specified by them by written notice.

25.2. *Agent for notice purposes.* Whenever the term "Landlord" or "Tenant" is used in this instrument to include more than one person, firm, or corporation, all such parties shall arrange for the joint execution of the notice and specify an individual and address for the receipt of notices and payments to Landlord or Tenant, as the case may be. All parties included within the terms "Landlord" and "Tenant," respectively, shall be bound by notices and payments given in accordance with the provisions of this Article to the same effect as if each had received the notice or payment.

Article XXVI Commissions

26.1. Landlord shall pay its Agent, Marshall Development Associates ("Agent"), a commission for negotiating this lease. Agent's right to receive the commission (and rentals as provided in Section 4.1 for deduction of applicable commissions before forwarding to Landlord) shall irrevocably vest upon the execution of this lease, notwithstanding any subsequent default by Landlord or Tenant or any amendment, modification, or termination of this lease. Landlord also shall pay Agent additional commissions on all renewals, extensions, holdovers, new leases, or rental agreements (as long as Tenant continues to occupy all or a portion of the Demised Premises), as well as expansions or substitutions of lease space within the Shopping Center, made by Landlord with Tenant or its subtenants or assignees. Landlord shall pay all of the commissions to Agent at its principal office in Dallas, Texas. The commissions shall be six percent of

guaranteed minimum and percentage rental, as well as other fees and charges due over the term of this lease. In addition, if Tenant or any assignee or subtenant purchases the Demised Premises (separately or together with all or a portion of the Shopping Center) under a contract entered into at any time before the tenth year of this lease, Landlord shall pay to Agent an additional sales commission of six percent of the gross sales price for the property purchased. Agent shall be granted a lien against Landlord's entire interest in the Shopping Center property to secure payment of the commissions (including not only the original commission payable hereunder, but also all additional commissions that may later become payable by reason of renewals, new leases, rental agreements, sales, or otherwise). Agent's lien shall be subordinate to Tenant's rights under this lease (except for Agent's rights as provided in the preceding sentence), but shall be prior and superior, except as provided in the following sentence, to subsequent liens created against the Shopping Center. Agent's lien shall be subordinate and inferior to all liens in favor of banks, insurance companies, building and loan associations, and similar regulated financial institutions ("institutions") securing indebtedness incurred for the purpose of acquiring the Shopping Center or constructing, repairing, rebuilding, or remodeling buildings and other improvements on it, if the institutions recognize Agent's rights under this lease and acknowledge that the rights will be preserved in any foreclosure or similar proceeding. The above provisions shall be binding upon Landlord and its heirs, personal representatives, assigns, and successors in interest, and inure to the benefit of Agent and its successors in interest. If Landlord makes an assignment of this lease or there is a sale of all or a portion of the Demised Premises, Landlord and the assignee or purchaser, and their respective assigns and successors, shall be jointly and severally liable for all commissions due or to become due under this lease. However, if Landlord causes the assignee or purchaser to assume and agree to perform, in writing delivered to Agent before the transfer, Landlord's covenants, duties, and obligations under this section, Landlord shall be released whenever the assignee or purchaser commences performance under the assumption. If Agent employs an attorney to present, enforce, or defend its rights hereunder, the party against whom the rights are presented, enforced, or defended shall pay all reasonable attorney's fees incurred by Agent in that connection.

Article XXVII Government Regulations

27.1. *Government regulations.* Landlord and Tenant acknowledge that there are in effect federal, state, county, and municipal laws, orders, rules, directives, and regulations (collectively the "Regulations") and that additional Regulations may hereafter be enacted or go into effect, relating to or affecting the Demised Premises or the Shopping Center, and concerning the impact on the environment of construction, land use, maintenance and operation of structures, and conduct of business. Subject to the express rights granted to Tenant under the terms of this lease, Tenant will not cause, or permit to be caused, any act or practice, by negligence, omission, or otherwise, that would adversely affect the environment, or do anything or permit anything to be done that would violate any of the laws, regulations, or guidelines. Moreover, Tenant shall have no claim against Landlord by reason of any changes Landlord may make in the Shopping Center or the Demised Premises or any charges imposed upon customers or other invitees under the Regulations.

27.2. *Rent freeze.* If the payment to, or collection by, Landlord of any rental or other charge (collectively "Lease Payments") payable by Tenant under the provisions of this lease exceeds the amount (the "Maximum Charge") permitted by any federal, state, county or municipal law, order, rule, directive, or regulation (collectively the "Regulations"), then while the Regulations are in force and effect (the "Freeze Period"), Tenant shall not be required to pay, and Landlord shall not be permitted to collect, any sum in excess of the Maximum Charge." Upon the earlier of (i) the expiration of the Freeze Period, or (ii) the issuance of a final order or judgment of a court of competent jurisdiction declaring the Regulations to be invalid or not applicable to the provisions of this lease, Tenant, to the extent not then proscribed by law and commencing with the first day of the next month, shall pay to Landlord as additional rental, in equal monthly installments during the balance of the lease term, an amount equal to the cumulative difference between the Maximum Charges and the Lease Payments during the Freeze Period. If any provision of this lease, or its application, is to any extent declared to be invalid and unenforceable, that shall not be deemed to affect any other provision of this section or lease; the remaining provisions shall be deemed valid and enforceable to the fullest extent permitted by law.

Article XXVIII Miscellaneous

28.1. *Relationship of parties.* Nothing contained in this lease shall be deemed or construed by the parties, or by a third party, to create the relationship of principal and agent, of partnership, or of joint venture between them. No provision contained herein, including the method of computation of rent, and no acts of the parties shall be deemed to create any relationship between them other than the relationship of landlord and tenant.

28.2. *Separate rent obligation.* Tenant shall not for any reason withhold or reduce its required payments of rentals and other charges. Landlord's obligations under this lease are independent of Tenant's obligations, except as expressly provided otherwise. In this regard, if Landlord commences proceedings against Tenant for nonpayment of rentals or any other sum due and payable under this lease, Tenant shall not interpose any counterclaim or other claim against Landlord. If Tenant does so, Landlord may, in addition to its other lawful remedies, move to have the counterclaim or other claim severed out of the proceedings. The proceedings may then proceed to final judgment separately and apart from, and without consolidation with or reference to, the status of the counterclaim or other claim.

28.3. *No recourse.* Landlord's liability to Tenant for any default under this lease shall be limited to the sale proceeds on execution of Landlord's interest in the Demised Premises. Landlord shall not be personally liable for any deficiency, except that it shall, subject to the provisions of Section 17.5, remain personally liable to account to Tenant for any security deposited hereunder. This clause shall not be deemed to limit or deny any remedy, which does not involve Landlord's personal liability, that Tenant may have in case of Landlord's default.

28.4. *Consent discretionary.* Except as otherwise provided in this lease, whenever prior consent or permission of Landlord or Tenant ("first party") is required before the other party ("second party") is authorized to take a particular type of action, the decision to do so shall be within the sole discretion of the first party. This decision shall not constitute a breach under the lease, or a defense by the second party to its performance of any covenant, duty, or obligation hereunder that the first party delayed or withheld the granting of consent or permission, whether or not the decision to do so was, in the second party's opinion, prudent, reasonable, or based on good cause.

28.5. *Non-waiver.* A waiver by either party of one or more covenants, terms, or conditions of this lease shall not be construed as a waiver of a subsequent breach of the same covenant, term, or condition. The first party's consent to or approval of any act by the second party shall not be deemed to waive or render unnecessary consent to or approval of any subsequent similar act.

28.6. *Delays beyond Landlord's control.* Whenever a provision of this lease prescribes a time period for Landlord to take action, it shall not be liable or responsible for, and there shall be excluded from the computation of that period, all delays due to strikes, riots, Acts of God, shortages of labor or materials, war, governmental laws, regulations, restrictions, or other causes that are beyond Landlord's reasonable control.

28.7. *Estoppel certificate.* Tenant shall, at Landlord's request, execute and deliver to it a statement in recordable form certifying that the lease is unmodified and in full force and effect (or if there have been modifications, that they are in full force and effect).

28.8. *Sublease obligations.* If this lease is in fact a sublease, Tenant accepts it subject to all of the terms and conditions of the underlying lease under which Landlord holds the Shopping Center as lessee. Tenant shall do no act or thing that would constitute a violation by Landlord of its obligation under the underlying lease. However, Tenant's agreement in this regard is premised on Landlord's assurances that the terms of this lease do not violate the underlying lease.

28.9. *Governing law; partial validity; venue.* The interpretation, validity, performance, and enforcement of this lease shall be governed by the laws of the State of Texas. If any provision is held to be invalid or unenforceable, the validity and enforceability of the remaining provisions shall not be affected thereby. Venue for any action under this lease shall

be in the county in which rentals are due under Sections 4.1 and 4.4.

28.10. *Headings.* Headings in this lease are for convenience and reference only and shall not be used to limit, amplify, or otherwise construe its provisions.

28.11. *Number; gender.* Whenever used in this lease, the singular number shall include the plural, and words of any gender shall include each other gender.

28.12. *Binding effect.* The terms, provisions, and covenants of this lease shall be binding upon and inure to the benefit of both parties and their respective heirs, successors in interest, and legal representatives, except as otherwise expressly provided herein.

28.13. *Modification; entire agreement.* This lease contains the entire agreement between the parties. No other agreements shall be effective to change, modify, or terminate this lease, in whole or in part, unless in writing and duly signed by both parties. Each party acknowledges that it is not relying on any representation or promise of the other, or of the Agent or Cooperating Agent, except as expressly set forth herein.

28.14. *Counterparts.* This lease may be executed in two or more counterparts, each of which shall be deemed an original but all of which together shall constitute one and the same instrument.

28.15. *Contents.* This lease consists of 28 Articles and _____ attached pages, including Exhibit A through _____ (any space left blank will be deemed to have been completed with the word "none"). Except for Article VI, if any provision of an exhibit or other attached page is inconsistent with a provision in the body of the lease, the provision in the exhibit shall be deemed to control.

Executed as of [date].

Landlord:

Center Associates, a Texas
Limited Partnership

_____ by _____
Attest or Witness Title: General Partner

Tenant:

_____ Big Star Clothes, Inc.
Attest or Witness by _____
Title: President

Agent:

Marshall Real Estate
by _____
Lone Star Country Real
Estate, Inc.
by _____

[Acknowledgments]



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Current Legal Forms for Real Estate

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Current Legal Forms for Real Estate
Chapter 23 REAL ESTATE LEASES
Part IV. Forms

A. COMPLETE LEASES AND RELATED AGREEMENTS

31-23 Current Legal Forms for Real Estate FORM 23.07

AUTHOR: by Thomas G. Belden

FORM 23.07 Restaurant lease in shopping center--tenant franchisee--tenant's right to use premises conditioned on obtaining liquor permit--percentage rent

COMMENT

This lease of space in a shopping center for use as a restaurant contains many clauses which can be used in commercial and shopping center leases generally. For example, as in most shopping center leases, this lease provides for the use of common facilities with other tenants, standard rules and regulations for all of the shopping center tenants, and a merchants' association. The lease also contains provisions dealing with store hours, advertising and signs. In addition, because the tenant is a franchisee restaurant, the lease provides for a liquor permit and franchisor rights.

Liquor permit:

This lease conditions the tenant's right to use the premises as a restaurant upon the tenant obtaining and maintaining required liquor permits. Such a clause protects the landlord from the possibility that the tenant will attempt to operate a restaurant that does not serve liquor if the tenant cannot obtain a liquor license. The landlord needs such protection because the tenant will be paying percentage rent based upon gross sales, and such gross sales amounts will be substantially lower if the tenant is not selling liquor.

A tenant might desire a clause conditioning the effectiveness of the entire lease on the tenant's ability to obtain a liquor license. Such a clause will give the tenant an option to cancel the lease if a liquor license is not obtained.

Franchisor's rights:

The tenant in this lease intends to operate its restaurant business under a franchise agreement with the franchisor. The lease provides that the franchisor has the right to cure any default on the part of the tenant. Furthermore, the landlord agrees to permit the franchisor to take possession of the lease premises if the tenant defaults under the franchise agreement, if the franchisor assumes the tenant's interest under the lease in writing, cures any defaults on the part of the tenant, and indemnifies the landlord from liability, loss or damage. If the franchisor assumes the tenant's interest in the lease, then the franchisor may sublet the premises to another franchisee without the landlord's consent. By granting such rights to the franchisor, the landlord protects itself from the possibility that the tenant's business will suffer if it loses its franchise, and at the same time the franchisor is assured that it can maintain its franchise even if its franchisee defaults.

Percentage rent:

This lease requires the tenant to pay percentage rent as well as a minimum base rent. The percentage rent here is based on the tenant's gross sales. Percentage rent arrangements also can be based on income or receipts; however, in a service business such as a restaurant, accounting complexities make it desirable to base the percentage rent on gross receipts. Percentage rent arrangements allow the landlord and the tenant to share the risks and benefits of fluctuations in property value or business income. This lease does not require the tenant to pay percentage rent in the first year of the lease.

The lease defines "gross sales" in detail, specifying the amounts which the parties intend to include in or exclude from "gross sales" for the purpose of determining the percentage rent. Among other things, this lease includes in "gross sales" the actual sales price of goods, the actual charges for services, and receipts of subtenants, licensees or concessionaires. Also included are all sales and services arising out of the use of the leased premises, no matter how or where made or delivered, including sales and services made by mail, telephone, telegraph, the internet, or mechanical vending devices.

Radius restrictions:

In order to prevent the tenant from diverting sales from this location to another, and thereby lowering percentage rent payments, this lease contains a radius restriction. The radius restriction prohibits the tenant, or any parent, subsidiary, affiliate, franchisee, officer, director or shareholder of the tenant, from owning, operating or having a financial interest in a similar business within a specified distance of the landlord's shopping center. The restriction further bars the tenant from permitting a similar business within the specified distance to be operated under a name similar to the tenant's trade name without the landlord's approval. The lease provides that, if the tenant violates the radius restriction, in addition to the landlord's other remedies for default, the landlord may include the gross sales from such other business in the determination of percentage rent.

Records and audits:

The collection of percentage rent depends to a large extent upon the records maintained and supplied by the tenant. This lease requires the tenant to deliver to the landlord a monthly accounting of gross sales and an annual gross sales statement accompanied by the certificate of a certified public accountant. Furthermore, the tenant must keep financial information needed to determine gross sales for a period of at least four years. Such records include tax returns, cash register tapes, and various transaction reports.

The landlord has the right to examine and audit the tenant's books and records. If an audit discloses that the tenant has underpaid the percentage rent by two percent or more, the tenant must pay the cost of the audit, as well as interest on the additional rent due from the time it should have been paid. If the underpayment exceeds three percent, the landlord may terminate the lease.

FORM

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THIS LEASE ("Lease") is made on [date], by and between _____ Associates, a State of _____ general partnership ("Landlord"), and _____ Corp., a corporation incorporated under the laws of the State of _____ ("Tenant").

In consideration of the mutual covenants and agreements herein contained, and intending to be legally bound, the parties hereby covenant and agree as follows:

Article I Demise

1.01 *Leased Premises.* Landlord hereby leases to Tenant and Tenant hereby takes from Landlord, the Leased Premises for the Term (as defined in Section 1.04) and at the Rent (as defined in Section 2.01) and upon the provisions and conditions hereinafter set forth. "Leased Premises" and/or "Premises" mean that portion of the Landlord's Building (as defined in Section 1.03) outlined in red on Exhibit A, and described as follows: *(insert description of leased premises)*. The Leased Premises shall not include the roof over the Premises or the land lying under the Leased Premises.

1.02 *Common Areas.* Tenant shall have the right to use, in common with other tenants of the Shopping Center, the Common Areas and Facilities; subject, however, to the terms and conditions of this Lease, to the right of Landlord to alter such areas from time to time and to establish from time to time uniform rules and regulations for the use thereof.

1.03 *"Shopping Center" and "Landlord's Building" Defined.* "Shopping Center" means that certain parcel of land, situated in the City of _____, City of _____, State of _____, and more particularly described in Exhibit B attached hereto (as the same may be altered or reduced from time to time) and any other parcel(s) of land at any time designated by Landlord to be added thereto (but only so long as such designation remains unrevoked), which are or are to be used for Shopping Center related purposes, including but not limited to, expansion area, employee parking, or the furnishing to the Shopping Center of any utility or other service, for any office and/or professional building or for any other improvement appropriate or related to the operation or functioning of the Shopping Center, together with all buildings on and improvements to any such parcel(s) of land. Landlord shall have the right to exclude in its discretion, any of the foregoing parcels, whether or not such parcels shall be used for Shopping Center or related purposes. "Landlord's Building" means the structure or structures and other improvements now or hereafter constructed on the parcel of land described in the attached Exhibit B, as the same may be altered, reduced or expanded from time to time.

1.04 *Term and Commencement Date.* The Term shall commence on the Commencement Date and, unless sooner terminated or extended in accordance with the terms of this Lease, shall expire on the last day of the last month of the fifth (5th) Lease Year. As used in this Lease, "Term" shall include any extensions of the period specified in this Article.

The "Commencement Date" means the earlier of one hundred twenty (120) days from the date that possession of the Lease Premises is delivered to Tenant or the date Tenant opens for business in the Leased Premises. Landlord and Tenant shall, upon demand of the other, execute a declaration expressing the Commencement Date. The term "Lease Year" shall mean a period of twelve (12) consecutive full calendar months. The first Lease Year shall begin on the Commencement Date, if the Commencement Date occurs on the first day of a calendar month, otherwise, the first Lease Year shall begin on the first day of the first full calendar month after the Commencement Date. Each succeeding Lease Year shall begin on the anniversary of the first lease Year. The first Lease Year shall include the period of time, if any, between the Commencement Date and the first day of the first Lease Year.

1.05 *Option to Renew.* Tenant may, at its option, renew this Lease for three (3) renewal terms of five (5) years each. The term of each renewal period shall commence immediately upon the conclusion of the original term of this lease or the preceding renewal period, as the case may be. This option(s) to renew may be exercised only by written notice in the manner provided in Section 22.05 hereof no later than one (1) year prior to the expiration date of the original term of this Lease or the preceding renewal period, as the case may be. This shall be the exclusive and only method of exercising this renewal option(s) and any other method shall not constitute an exercise thereof. The renewal term(s), granted pursuant to this option(s) to renew, shall be on the same terms and conditions as are to be in effect during the original terms of this Lease except that: (i) Tenant shall have no further option to renew this Lease beyond the expiration of the third renewal period created by this Section; (ii) the Minimum Rent for the first renewal period shall be \$_____ per Lease Year and annual Percentage Base shall be \$_____; (iii) the Minimum Rent for the second renewal period shall be \$_____ per Lease Year and annual Percentage Base shall be \$_____; and (iv) the Minimum Rent for the third renewal period shall be

\$_____ per Lease Year and annual Percentage Base shall be \$_____.

If Tenant exercises its second option to renew in accordance with the terms and conditions of this Section 1.05 and if Tenant is not in default under this Lease, Landlord shall expend the sum of \$_____ toward the cost of refurbishing the Premises.

If: (i) Tenant shall fail to exercise this renewal option(s) during the period(s) in which it is available and in the manner required hereby, or (ii) this Lease is no longer in full force and effect for any reason, or (iii) Tenant is in default under this lease, at the time of such exercise, this renewal option(s) shall terminate, be void and of no further force or effect.

Unless otherwise herein expressly provided, any reference in this Lease to the "term of this Lease" shall mean the original term hereof and such renewal period(s), if validly exercised by Tenant pursuant to its option(s) to renew set forth in this Section, except to the extent that the original term or any renewal period may be sooner terminated or canceled under any provisions of this Lease.

1.06 Failure of Tenant to Open. In the event that the Landlord notifies the Tenant that the Leased Premises are available for occupancy and the Tenant fails to take possession and to open the Leased premises for business fully fixtured, stocked and staffed within one hundred twenty (120) days thereafter, then the Landlord shall have, in addition to any and all remedies herein provided, the right at its option to collect not only the Minimum Rent, but also Additional Rent at the rate of \$_____ per day for each and every day that the Tenant shall fail to commence to do business as herein provided. Such Additional Rent shall be deemed to be in lieu of any Annual Percentage Rent that might have been earned during such period of the Tenant's failure to open.

1.07 Cancellation Option. The obligations of both Tenant and Landlord under this Lease are expressly conditioned upon Tenant determining within thirty (30) days after the date of this Lease that the utilities servicing the premises are sufficient for Tenant's Permitted Use. If Tenant determines within such thirty (30) day period that the utilities servicing the Premises are insufficient for Tenant's Permitted use, then Tenant may cancel this Lease, in which event, both parties shall be released of any further liability under this Lease. Failure of Tenant to exercise this option to terminate within that thirty (30) day period shall constitute Tenant's waiver of its right to do so.

Article II Rent

2.01 Rent Payable. Tenant shall pay to Landlord as rent (sometimes collectively referred to as "Rent") for the Leased Premises, the following:

A. "Advance Rent," as defined in Section 2.08, means the sum of \$_____;

B. "Minimum Rent," as defined in Section 2.02, means \$_____ per Lease Year;

C. "Annual Percentage Rent" means the applicable percent (the "Annual Percentage"), as set forth in Section 2.03, of all Gross Sales (as defined in Section 2.04) in excess of the applicable Percentage Base as set forth in Section 2.03;

D. Tenant's proportionate share of Operating Costs as defined in Section 6.04 and as the same may be from time to time adjusted. The first month's charge shall be due and payable in advance on the Commencement Date and monthly on the first day of each month thereafter;

E. Tenant's proportionate share of Taxes, as defined in Section 3.01, and Insurance Premiums, as defined in Section 9.02, as the same may be from time to time adjusted, the first installment of which shall be due and payable in advance on the Commencement Date and monthly on the first day of each month thereafter;

F. "Security Deposit" means \$_____ to be paid pursuant to Section 2.09 hereof;

G. Merchants' Association Dues in the amount of \$_____ per month due and payable on the first day of each and every month of the Term; and

H. In addition to Minimum Rent and Annual Percentage Rent, all additional sums, charges or amounts of whatever nature to be paid by Tenant to Landlord in accordance with the provisions of this Lease, shall be considered "Additional Rent" whether or not such sums, charges or amounts are referred to as such.

2.02 *Minimum Rent.* Tenant hereby covenants and agrees to pay to Landlord, at its office or at such other place as Landlord may from time to time designate, as "Minimum Rent" for the Leased premises during the original Term of this Lease, without deduction or setoff, the sum of \$_____ per Lease Year, in equal monthly installments of \$_____ each, in advance on the first day of each and every calendar month during the Term. Minimum Rent and any other charges required to be paid by Tenant

If the Commencement Date of this Lease is on or before ninety (90) days after the date Landlord delivers possession of the Premises to tenant, then, in that event, no Minimum Rent shall be payable by Tenant for thirty (30) days after the Commencement Date, but Tenant is obligated to pay all other charges under the Lease.

2.03 *Annual Percentage Rent.* Tenant shall pay, as Annual Percentage Rent, for each of Lease Years two (2) through five (5), an amount equal to the product of (i) _____ percent (_____%) (the "Annual Percent") multiplied by (ii) the amount, if any by which Gross Sales (as defined in Section 2.04) for such Lease Year exceeds \$_____ ("Percentage Base"), or as it may be from time to time adjusted in accordance herewith. Annual Percentage Rent shall be due and payable on the tenth (10th) day of the month immediately following the month in which Gross Sales for the Lease Year exceeds the Percentage Base. Thereafter, Annual Percentage Rent shall be due and payable monthly on or before the tenth (10th) day of each month on all additional Gross Sales during the remainder of the Lease Year. Within ninety (90) days after the end of each Lease Year, the Annual Percentage Rent paid or payable for such Lease Year shall be adjusted between Landlord and Tenant so as to reflect the actual Annual Percentage Rent due for such Lease Year, and Tenant shall promptly pay Landlord or Landlord shall promptly credit to Tenant's account as the case may be, the amount necessary to effect such adjustment. If the Minimum Rent is prorated, reduced or abated for any reason, then the Percentage Base shall be proportionately prorated, reduced or abated for the same period. Tenant shall not be obligated to pay Annual Percentage Rent for the first Lease Year of the original Term of this Lease.

2.04 *"Gross Sales" Defined.*

(a) "Gross Sales" means the actual sales price of all goods, wares and merchandise sold, leased, licensed or delivered, and the actual charges for all services performed by Tenant or by any person, firm or corporation on its behalf, or by any subtenant, licensee, or concessionaire in, at, from, or arising out of the use of the Leased Premises, whether for wholesale or retail, and whether for cash or credit, including the value of all consideration other than money received, without reserve or deduction for inability or failure to collect. Gross Sales shall include, without limitation, sales and services: (i) where the orders therefor originate in, at, from, or arising out of the use of the Leased Premises, whether delivery or performance is made from the Lease Premises or from some other place; (ii) made or performed by internet, mail, telephone or telegraph orders; (iii) made or performed by means of mechanical or other vending devices in the Leased Premises; and (iv) which Tenant or any subtenant, licensee, concessionaire or other person in the normal and customary course of its business would credit or attribute to its operations at the Leased premises or any part thereof. Any deposit not refunded shall be included in Gross Sales. Each installment or credit sale shall be treated as a sale for the full price in the month during which such sale is made, regardless of the time, if ever, that Tenant receives payment therefor. No franchise or capital stock tax and no income or similar tax based on income or profits shall be deducted from Gross Sales. Nothing contained herein shall imply any consent by Landlord to any sublease, license or concession

in violation of any other term of this Lease.

(b) The following shall not be included in Gross Sales: (i) any exchange of merchandise between stores of Tenant where such exchange is made solely for the convenient operation of Tenant's business and not for the purpose of consummating a sale made in, at or from the leased premises, or for the purpose of depriving Landlord of the benefit of a sale which would otherwise be made in or at the Lease Premises; (ii) returns to shippers or manufacturers; (iii) cash or credit refunds to customers on transactions (not to exceed the actual selling price of the item returned) previously included in Gross Sales; (iv) sales of trade fixtures, machinery and equipment after use thereof in the conduct of Tenant's business; (v) amounts collected and paid by Tenant to any governmental authority for any sales or excise tax; (vi) amounts collected from vending machines and pool tables; and (vii) bad debts not exceeding _____ percent (_____%) of Gross Sales written off by Tenant for income tax purposes may be deducted from Gross Sales in the Lease Year in which they are written off, however, if any account receivable previously written off as a bad debt is later collected, that amount shall be included in the amount of Gross Sales in the Lease Year in which collected.

(c) Radius Clause: During the Term of this Lease, neither Tenant, nor any parent, subsidiary, affiliate, franchisee, officer, director or shareholder of Tenant, will within a radius of _____ miles of the perimeter of the Shopping Center, either directly or indirectly, own, operate or be financially interested in, with or without others, a business like or similar to the business permitted to be conducted pursuant to this Lease, nor will Tenant permit any like or similar business within such radius to be operated under a name which shall be the same or similar to the Tenant trade name without prior written approval of Landlord. Without limiting Landlord's remedies, if this Section is not complied with, in addition to any other rights or remedies available to Landlord, Landlord shall have the right to include the gross sales of such other business in the Gross Sales from the Leased Premises for the purpose of computing Annual Percentage rent due under this Lease. The provisions of this Section shall survive the termination of this lease or the re-entry into the Leased Premises by Landlord resulting from a breach of this Lease by Tenant.

2.05 *Statements of Gross Sales.* Tenant shall deliver to Landlord: (a) within fifteen (15) days after the end of each calendar month of the Term a written report signed by Tenant's accountant or by an authorized executive officer or authorized agent of Tenant and certified by such person to be complete and accurate, setting forth the Gross Sales made in the preceding calendar month; and (b) within sixty (60) days after the end of each Lease Year and within sixty (60) days after the expiration or earlier termination of this Lease, a statement of Gross Sales for the preceding Lease Year or other period preceding the termination of this Lease. The annual statement shall be accompanied by the signed certificate of Tenant's certified public accountant stating specifically that: (i) he or she has examined the report of Gross Sales for the preceding Lease Year; (ii) such examination included such tests of Tenant's books and records as such certified public accountant considered necessary or appropriate under the circumstances; (iii) such report presents fairly the Gross Sales of the preceding Lease Year; and (iv) such Gross Sales conform with and are computed in compliance with the definition of Gross Sales contained in Section 2.04 hereof. If Tenant shall fail to deliver the monthly report or the annual statement and certificate to Landlord within the time required, then, in addition to any other rights of Landlord, Landlord shall have the right thereafter to employ, at Tenant's expense, an independent certified public accountant to examine such books and records as may be necessary to determine the amount of Tenant's Gross Sales for such month or Lease Year, as the case may be. Both the monthly report and the annual statement shall be in the form and style and contain such detail as Landlord shall reasonably require.

2.06 *Tenant's Records.* For the purpose of permitting verification by Landlord of any amounts due as Annual Percentage Rent, Tenant will keep and preserve for at least four (4) years, and during the Term shall keep at the Tenant Notice Address, original or duplicate books and records which shall disclose all information required to determine Gross Sales, including: (i) federal, state and local gross income, sales and occupation tax returns; (ii) daily, dated cash register tapes, including tapes from temporary registers; (iii) settlement report sheets of transactions with subtenants, concessionaires and licensees; (iv) daily and/or weekly transaction reports; and (v) such other records, if any, which would normally be examined by an independent accountant pursuant to generally accepted auditing standards in performing an audit of

Tenant's sales. At any time or from time to time after at least ten (10) business days' advance notice to Tenant, Landlord and any mortgagee and/or their respective agents and accountants, shall have the right to make any examination or audit of Tenant's books and records which Landlord or such mortgagee may desire to verify or ascertain Gross Sales. If such audit shall disclose a liability in any Lease Year for Annual Percentage Rent in excess of the Annual Percentage Rent therefore paid by Tenant for such period, then Tenant shall promptly pay such excess. Should any such liability for Annual Percentage Rent equal or exceed two percent (2%) of the Annual Percentage Rent previously paid for such Lease Year, Tenant shall, in addition promptly pay the cost of the audit and interest at the Default Rate on all additional Annual Percentage Rent then payable, from the date such additional Annual Percentage Rent should have been paid. Should any such liability for Annual Percentage Rent equal or exceed three percent (3%) of the Annual Percentage Rent previously paid for such Lease Year, Landlord may, in addition to any right or remedy available to Landlord, terminate this Lease by notifying Tenant in writing within ninety (90) days after Landlord discovers such liability, and the Term of this Lease shall expire on the last day of the second full calendar month after the date of such notice.

2.07 Payment of Rent. Tenant shall pay all Rent when due and payable, without any setoff, deduction or prior demand therefor whatsoever. Any Rent which is not paid when due shall bear interest from the original due date at the Default Rate, which is hereby defined as being fifteen percent (15%) per annum or the maximum rate of interest for which Tenant may lawfully contract in the State of _____, whichever is less. Any Additional Rent which shall become due shall be payable, unless otherwise provided herein, on the first day of each month during the Term. Rent and statements required of Tenant shall be paid and delivered to Landlord at _____ Street, City of _____, State of _____. Any payment by Tenant or acceptance by Landlord of a lesser amount than shall be due from Tenant to Landlord shall be treated as payment on account. The acceptance by Landlord of a check for a lesser amount with an endorsement or statement thereon, or upon any letter accompanying such check, that such lesser amount is payment in full, shall be given no effect, and Landlord may accept such check without prejudice to any other rights or remedies which Landlord may have against Tenant.

2.08 Advance Rent. Concurrently with the execution of this Lease, Tenant shall deposit with the Landlord the Advance Rent as described in Section 2.01 hereof. The Advance Rent shall be applied by Landlord against the first installment of Rent due hereunder. No interest shall be payable to Tenant on account of the Advance Rent.

2.09 Security Deposit. Concurrently with the execution of this Lease, Tenant shall deposit the Security Deposit with Landlord and thereafter, during the continuance of this Lease, shall maintain the Security Deposit with Landlord. The Security Deposit shall be security for the full, prompt and faithful performance by Tenant of all of its obligations hereunder. Landlord shall have the right, but not the obligation, to apply the Security Deposit of any part thereof toward the cost and expense (including Landlord's attorneys' and other professional fees, if any) of curing any default on the part of Tenant; in which event, Tenant shall restore the Security Deposit to its original amount within ten (10) days after receipt of Landlord's written request to do so. Upon expiration of this Lease and vacation of the Premises in the manner required by this Lease, the Security Deposit, or the portion thereof remaining unapplied after the curing of every default by Tenant, shall be returned to Tenant. No interest shall be payable to Tenant on account of the Security Deposit.

Article III Taxes

3.01 Tenant to Pay Proportionate Share of Taxes. Tenant shall pay for each calendar year (or portion thereof) during the Term, as Additional Rent, a proportionate share of all real estate taxes, ad valorem taxes and assessments, general and special assessments, or any other tax imposed upon or levied against real estate and/or improvements or upon owners of real estate and/or improvements as such, rather than levied upon persons generally, payable with respect to or allocable to the Shopping Center and/or Landlord's Building, together with the reasonable cost (including fees of attorneys, consultants, accountants and appraisers) of any negotiation, contest or appeal pursued by Landlord in an effort to reduce or lower the amount of any increase in any such tax, assessment or charge, the same being collectively referred to herein as "Taxes." Tenant's proportionate share of Taxes for any calendar year shall be computed by multiplying the amount of Taxes for such year by a fraction, the numerator of which shall be Tenant's Floor Area and

the denominator of which shall be the Floor Area of Landlord's Building. For the calendar year in which the Term commences or terminates, Tenant's liability for its proportionate share of any Taxes for such year shall be subject to a pro rata adjustment based upon the number of days of such calendar year falling within the Term.

3.02 *Payment of Proportionate Share of Taxes.* Tenant's proportionate share of Taxes shall be paid by Tenant in equal monthly installments in such amounts as are estimated and billed for each year by Landlord in its sole discretion at the commencement of the Term or as a result of revised assessments during the Term and at the beginning of each successive year during the Term, each such installment being due and payable on the first day of each calendar month. The first monthly payment shall include a prorated portion of Tenant's proportionate share of Taxes for the period from the Commencement Date to the first day of the first full calendar month of the Term. Within a reasonable time after Landlord's receipt of tax bills for a particular year, Landlord will notify Tenant of the amount of Taxes for the year in question and the amount of Tenant's proportionate share thereof. The proportionate share paid or payable for each year shall be adjusted between Landlord and Tenant, and Tenant shall pay Landlord or Landlord shall credit to Tenant's account (or, if such adjustment is at the end of the Term, pay Tenant), as the case may be, within ten (10) days of the aforesaid notice, the amount necessary to effect such adjustment. The failure of Landlord timely to provide the aforesaid notice shall not relieve Tenant of its obligations to pay its proportionate share of Taxes generally or for the specific year in which any such failure occurs.

3.03 *Taxes on Rent.* In addition to Tenant's proportionate share of Taxes, Tenant shall pay to the appropriate agency any and all sales, income and excise taxes (not including, however, Landlord's income taxes) levied, imposed or assessed by the State of _____ or any political subdivision thereof or other taxing authority upon any Rent payable hereunder.

3.04 *Tenant's Municipal, County, State or Federal Taxes.* Tenant shall be responsible for and shall pay, before delinquency, all municipal, county, state or federal taxes assessed against: (i) the income or gross receipts of Tenant; and/or (ii) any leasehold interest or any fixtures, furnishings, equipment, stock-in-trade or other personal property of any kind owned, installed or used in or on the Premises.

3.05 *"Floor Area" Defined.* "Floor Area," with respect to Landlord's Building, means the average number of square feet of leasable area in Landlord's Building(s) from time to time designated by Landlord for the exclusive use and occupancy of rent-paying tenants. Any change in the Floor Area of Landlord's Building(s) shall be deemed in effect on the first day of the month following such change. For purposes of calculating Additional Rent, the Floor Area of the Leased Premises ("Tenant's Floor Area") shall be the area specified in Article I.

Article IV Improvements

4.01 *Improvements.*

(a) Landlord has no obligation to alter, remodel or improve the Premises in any way. Tenant agrees to accept the Premises in an "as is" condition.

(b) Tenant shall submit to Landlord, on or before thirty (30) days after the date of this Lease, drawings for the renovation of the Premises.

(c) Within ten (10) days after the receipt of the Tenant's drawings, Landlord, by notice in writing addressed to Tenant, shall indicate Landlord's approval of them or clearly specify any objections to them, the objections in all events to be reasonable. Tenant will, within ten (10) days after receipt of a notice of disapproval, as aforesaid, appropriately amend and modify the drawings so as to reflect all changes, modifications and corrections that Landlord reasonably requests. The revisions and resubmissions shall continue until Landlord approves in writing the drawings. The work to be performed by Tenant as described in the drawings therefore, approved by Landlord as provided above, are herein

referred to as "Tenant's Work."

(d) The drawings for Tenant's Work shall be prepared by licensed architects in the employ of Tenant. Tenant shall bear all costs of preparing the drawings. Landlord's approval of the drawings shall not constitute an opinion or agreement that they are in compliance with law (it being agreed that such compliance is solely Tenant's responsibility) nor shall such approval impose any present or future liability on Landlord or waive any of Landlord's rights under this Lease. Tenant shall provide Landlord with two (2) sets of the drawings.

(e) Tenant shall, to the reasonable satisfaction of Landlord, commence, construct, perform and complete all Tenant's Work in a good and workmanlike manner, in complete accordance with the drawings approved by Landlord.

(f) At all times prior to the Commencement Date, all the provisions, covenants and conditions of the Lease shall be applicable to the Premises other than those requiring payment of rent relating solely to the Premises.

(g) Prior to the commencement of construction of Tenant's Work, Tenant shall obtain, at its sole cost and expense, all permits and licenses and other consents and approvals of all governmental authorities as may be required in connection with Tenant's Work and shall deliver copies thereof to Landlord. Tenant shall, at its sole cost and expense, furnish to Landlord all certificates and approvals with respect to work done by Tenant or on Tenant's behalf that may be required from any governmental authority for the issuance of a certificate of occupancy for the Premises and shall obtain such certificate and furnish Landlord with a copy of such certificate prior to the Commencement Date.

(h) Tenant's Work and all of Tenant's trade fixtures and equipment shall be performed, constructed and installed in accordance and in full compliance with all applicable governmental requirements, including without limitation the accessibility and other requirements of the Americans with Disabilities Act of 1990 ("ADA"), and all applicable laws, statutes, codes, ordinances and governmental rules, regulations and orders, as well as reasonable rules and regulations established by Landlord. Tenant's Work shall be performed without interference and disruption to Landlord or other tenants.

(i) Any contractor used by Tenant to perform Tenant's Work pursuant to this Section, must first be approved in writing by Landlord, which approval shall not be unreasonably withheld. Such approval shall be in Landlord's sole discretion based on the proposed contractor's financial condition, reputation and workmanship, but no such approval shall relieve Tenant of any of its other obligations hereunder or impose any liability upon Landlord. Tenant hereby acknowledges and agrees that Tenant must use _____ Roofing Company for any roof cuts in connection with the installation of the heating, ventilating and air conditioning system on the roof of the Premises. In connection with the performance of Tenant's Work or the use and occupancy of the Premises, Tenant shall not permit anything to occur which directly or indirectly interferes in any way with the use and occupancy of any tenant or the normal operations of the Shopping Center.

(j) Landlord shall provide to Tenant an allowance in the sum of \$_____ which shall be used by Tenant toward the cost of construction of Tenant's Work ("Tenant's Allowance"). The Tenant's Allowance may only be used for leasehold improvements that become part of the Leased Premises; it being specifically understood and agreed that no portion of the Tenant's Allowance may be used for removable trade fixtures, equipment, furniture or other personal property. All improvements constructed with Tenant's Allowance dollars shall become part of the Leased Premises and title thereto shall vest in Landlord upon installation free and clear of all liens and encumbrances. All costs of Tenant's Work that exceed Tenant's Allowance shall be paid by Tenant. Tenant hereby expressly grants Landlord an offset and deduction against Tenant's Allowance for all delinquent costs, payments and expenses Tenant is obligated to pay Landlord pursuant to the Lease or otherwise due and owing to Landlord.

Tenant's Allowance shall be due and payable if and when: (i) Tenant shall have completed the installation of the heating, ventilating and air conditioning system in accordance with the approved drawings and other provisions of this

Lease; (ii) Tenant shall have furnished evidence satisfactory to Landlord that all work for the heating, ventilating and air conditioning system contracted for by Tenant in and about the Premises has been paid for, including without limitation, mechanic's lien affidavits and lien waivers in accordance with the mechanic's lien laws of the State of _____; (iii) Tenant shall have executed such certificates as shall be reasonably required by Landlord or any mortgagee of Landlord; (iv) Tenant shall have furnished Landlord with a written certificate of the actual cost of the heating, ventilating and air conditioning system with cost must be at least \$ _____; then, when and if each condition contained in the foregoing items (i) through (iv) inclusive hereof shall have been complied with in full, Landlord shall pay to Tenant the Tenant Allowance.

4.01 Alterations. Tenant covenants and agrees that it will not make or permit any structural or nonstructural alterations of the Leased premises except by and with the prior written consent of the plans and specification therefor by Landlord. All alterations and other improvements made by Tenant shall be made in a good and workmanlike manner in accordance with all applicable laws, including without limitation, the ADA and all rules and regulations issued thereunder, shall become the immediate property of Landlord and shall remain for the benefit of Landlord unless otherwise provided in the written consent mentioned above. Tenant shall obtain and furnish Landlord with all permits, licenses and other consents and approvals of all governmental authorities as may be required prior to the commencement of such work. Tenant further agrees in the event of making such alterations as herein provided, fully and promptly to pay for same and to indemnify and save Landlord and the Shopping Center harmless from and against any loss, cost, expense or lien in connection therewith. In the event any such alterations are removed by Tenant (without hereby implying Landlord's consent to such removal), Tenant shall, at its sole cost and expense, repair any damage to the Leased Premises occasioned by such removal.

4.03 Changes and Additions to Buildings. The Landlord hereby reserves the right at any time and from time to time to make additions or alterations to any buildings in the Shopping Center. The Landlord also reserves the right to construct other buildings or improvements in the Shopping Center from time to time and to make alterations thereof or additions thereto and to build additional stories on any building or buildings or to build adjoining same or to construct double-deck or elevated parking facilities.

4.04 Remodeling of Buildings. In the event Landlord determines, in its sole judgment, to remodel, reface or alter the exterior front portion of the Leased Premises and the exterior front portions of the other storerooms in Landlord's Building, Tenant shall pay to Landlord, as Additional Rent, its proportionate share (based on the ratio which the front footage of the Leased Premises bears to the front footage of all storerooms in Landlord's Building) of the cost of such remodeling, refacing or alteration. In addition to the foregoing payment, Tenant agrees that notwithstanding anything to the contrary in Article VII hereof, in the event of any such remodeling, refacing or alteration, Tenant shall, upon the demand of Landlord, remove its existing sign(s) from the exterior of the Leased Premises and Tenant may replace such sign(s) with a uniform sign to be designated by Landlord or Landlord's architect so as to blend harmoniously with the signs of all other lessees in the building.

4.05 Mechanic's Liens. The interest of Landlord in the Shopping Center and the Premises shall not be subject to liens for improvements made by Tenant.

Notwithstanding anything to the contrary contained in the statutes of the State of _____ or in this Lease, Tenant shall not be deemed to be a partner, joint venturer or agent of Landlord; and in no event shall any lien resulting from Tenant's improvements to the Premises encumber Landlord's underlying fee simple estate. Tenant agrees that it shall not enter into any contract for improvements to the Premises unless the following language is included in such contract:

"Notwithstanding anything herein contained to the contrary, the contractor acknowledges that _____ Corp. holds only a leasehold interest in the property which is the subject of this contract. _____ Corp. is not the agent of the owner of the property, and no lien resulting from work performed under this contract shall attach

to the interest of such owner."

Tenant shall not permit any work to be commenced until such time as Tenant has provided Landlord with a fully executed copy of the construction contract evidencing incorporation of the aforesaid language. In addition, prior to the commencement of the work, Tenant shall post the following notice in a conspicuous place on the Premises, and shall assure that such notice is maintained throughout the entire course of construction:

"NOTICE TO CONTRACTORS, SUBCONTRACTORS, MATERIALMEN AND LABORERS

Notice

is hereby given that work on _____ Corp., located at _____ Avenue, City of _____, State of _____, is being performed for _____ Corp. _____ Corp. is not the agent of the owner of this property, and any lien rights shall be limited to the leasehold estate of _____ Corp. and shall in no event attach to the interest of the owner."

If, for whatever reason, any mechanic's or other lien shall be filed against the Premises, or the Shopping Center, purporting to be for labor or material furnished or to be furnished at the request of Tenant, then Tenant shall, at its expense, cause such lien to be discharged of record by payment, bond or otherwise as allowed by law, within ten (10) days after the filing thereof. If Tenant shall fail to cause such lien to be discharged of record within such ten (10) day period, Landlord, in addition to any other rights and remedies, may, but shall not be obligated to, cause such lien to be discharged by payment, bond or otherwise, without investigation as to the validity thereof or as to any offsets or defenses thereto, and Tenant shall, upon demand, promptly within ten (10) days, reimburse Landlord for all amounts paid and costs incurred, including attorneys' fees and interest thereon at the maximum legal rate from the respective dates of Landlord's payments therefor, in having such lien discharged of record, and, further, Tenant also shall otherwise indemnify, protect, defend and save Landlord harmless from any claim or damage resulting therefrom.

Article V Conduct of Business by Tenant

5.01 Use of premises. Tenant shall use the Leased Premises solely to operate a _____ restaurant franchise serving liquor, beer, wine and food (the "Permitted Use") and for no other purpose whatsoever. Tenant's right to use the Premises for the Permitted Use is expressly conditioned upon Tenant obtaining all required liquor permits from the Department of Liquor Control of the State of _____ and maintaining such liquor permits in full force and effect throughout the Term of this Lease in full compliance with all laws, rules and regulations in connection therewith. From and after the Commencement Date, Tenant shall occupy the Leased Premises and shall conduct continuously in the Leased premises the business above stated. Tenant will not use or permit, or suffer the use of, the Leased Premises for any other business or purpose or any purpose contrary to law or the rules and regulations of any public authority or in any manner deemed extra hazardous on account of fire or otherwise nor in any manner so as to increase the cost of fire and extended coverage insurance of the Leased Premises.

5.02 Operation of Business. Tenant shall operate continuously one hundred percent (100%) of the Leased Premises for the Permitted Use during the entire Term under the trade name "_____", with due diligence and efficiency so as to produce the maximum amount of Gross Sales which may be produced by such manner of operation. Tenant shall carry at all times in the Leased Premises a stock of merchandise of such size, character and quality as shall be reasonably designed to produce the maximum amount of Gross Sales. Tenant agrees to keep the Premises open for business from at least 12:00 p.m. to 12:00 a.m., seven days per week; provided, however, (i) Tenant may open for business with the public as early as 11:00 a.m. and may remain open past 2:30 a.m. (however, Tenant shall not serve liquor, beer or wine past 2:30 a.m.); (ii) Tenant shall provide a doorman between the hours of 11:00 p.m. through the time of closing; (iii) the above hours are not in conflict with any law, ordinance or union contract provisions; (iv)

Tenant shall be relieved of such obligation to operate during such hours to the extent it may be necessary that the Premises be closed on account of the order of any duly constituted authority, or for the purpose of making repairs or improvements, or during the period of any strikes, lockouts, emergencies or other causes beyond Tenant's control, so long as Tenant shall make all reasonable efforts to shorten such periods; and (v) Tenant is permitted to close on the following holidays: New Year's Day, Easter Sunday, Fourth of July, Thanksgiving and Christmas Day. Tenant shall keep the display windows and signs, if any, in the Leased Premises well lighted during the hours from sundown to 11:00 p.m., unless prevented by causes beyond the control of Tenant.

5.03 *Storage, Office Space.* Tenant shall warehouse, store and/or stock in the Leased Premises only such goods, wares and merchandise as Tenant intends to offer for sale at retail at, in, from or upon the Leased Premises. This shall not preclude occasional emergency transfers of merchandise to the other stores of Tenant, if any, not located in the Shopping Center. Tenant shall use for office, clerical or other non-selling purposes only such space in the Leased Premises as is from time to time reasonably required for Tenant's business in the Leased Premises.

5.04 *Deliveries.* All deliveries to the Leased Premises shall be made through the rear entrance to the Leased Premises.

Article VI Parking and Common Areas and Facilities

6.01 *Common Areas and Facilities.* "Common Areas and Facilities" means the portions of the Shopping Center, whether owned or ground leased by Landlord or made available for use by other owners or ground lessors of parcels within the Shopping Center, which have, at the time in question, been designated and improved for common use by or for the benefit of more than one retail occupant of the Shopping Center; including, without limitation (if and to the extent facilities therefor are provided by the Landlord at the time in question), the land and facilities utilized as: parking lots; access and perimeter roads; landscaped areas; exterior walks, arcades, stairways and ramps; underground storm and sanitary sewers, utility lines and the like installed at the cost of Landlord; but excluding all portions of the Shopping Center which are (i) used or intended for use by one occupant only; or (ii) designated by Landlord for the exclusive use of office tenants, including without limitation all interior corridors and public lavatories. Any portion of the Shopping Center so included within Common Areas and Facilities shall be excluded therefrom when designated by Landlord for a non-common use, and any portion thereof not theretofore included within Common Areas and Facilities shall be included when so designated and improved for common use.

6.02 *Control of Common Areas and Facilities by Landlord.* All Common Areas and Facilities shall at all times be subject to the exclusive control and management of the Landlord, and the Landlord shall have the right from time to time to establish, modify and enforce reasonable rules and regulations with respect to all facilities and areas mentioned in this Article. The Landlord shall have the right to construct, maintain and operate lighting facilities on all such areas and improvements; to police the same; from time to time to change the size area, level, location and arrangement of parking areas and other facilities referred to above; to restrict parking by tenants, their officers, agents and employees to employee parking areas; to enforce parking charges (by operation of meters or otherwise); to close all or any portion of such areas or facilities to such extent as may, in the opinion of Landlord's counsel, be legally sufficient to prevent a dedication thereof or the accrual of any rights to any person or the public therein; to close temporarily all or any portion of the parking areas or facilities; to discourage non-customer parking; and to do and perform such other acts in and to such areas and improvements as, in the use of good business judgment, the Landlord shall determine to be advisable with a view to the improvement of the convenience and use thereof by Tenant, other tenants and their officers, agents, employees and customers. The Landlord will operate and maintain the Common Areas and Facilities in such manner as the Landlord, in its sole discretion, shall determine from time to time. Without limiting the scope of such discretion, the Landlord shall have the full right and authority to employ all personnel and to make all rules and regulations pertaining to and necessary for the operation and maintenance of the Common Areas and Facilities.

6.03 *License.* All Common Areas and Facilities, which the Tenant may be permitted to use and occupy, are to be used and occupied under a revocable license, and if the amount of such areas be diminished, the Landlord shall not be subject

to any liability nor shall the Tenant be entitled to any compensation or diminution or abatement of Rent, nor shall such diminution of such areas be deemed constructive or actual eviction.

6.04 Tenant to Share Expense of Common Areas and Facilities.

(a) Tenant shall pay during the Term as Additional Rent its proportionate share of Landlord's Operating Costs. Tenant's proportionate share of Landlord's Operating Costs shall be computed by multiplying the operating costs for the period then being billed by a fraction, the numerator of which is the Floor Area of the Leased Premises and the denominator of which is the Floor Area of Landlord's Building(s). Such proportionate share shall be paid by Tenant in equal monthly installments in such amounts as are estimated and billed by Landlord at the commencement of the Term and at the beginning of each successive calendar year, each such installment being due on the first day of each calendar month. The first monthly payment shall include a prorated portion of Landlord's Operating Costs for the period from the Commencement Date to the first day of the first full calendar month of the Term. For the calendar year in which the Term commences or terminates, Tenant's liability for its proportionate share of Landlord's Operating Costs shall be subject to a pro rata adjustment based upon the number of days of such calendar year falling within the Term. Within a reasonable time after the end of each calendar year, Landlord shall deliver to Tenant a statement of Landlord's Operating Costs for such calendar year, and the monthly installments paid or payable shall be adjusted between Landlord and Tenant, and Tenant shall pay Landlord or Landlord shall credit to Tenant's account (or, if such adjustment is at the end of the Term, pay Tenant), as the case may be, within fifteen (15) days of receipt of such statement, such amounts as may be necessary to effect such adjustment for such calendar year. Upon reasonable notice, Landlord shall make available for Tenant's inspection at Landlord's office, during normal business hours, Landlord's records relating to Landlord's Operating Costs for the preceding calendar year. Failure of Landlord to provide the statement called for hereunder within the time prescribed shall not relieve Tenant of its obligations hereunder.

(b) Tenant's proportionate share of any increase in Operating Costs for Lease Years two (2) through five (5) shall not exceed one hundred four percent (104%) of Tenant's proportionate share of those expenses for the preceding Lease Year (the "Cap"), unless Tenant's proportionate share percentage increase of those expenses for any preceding Lease Year was less than the Cap, in which event the difference between the Cap and the lesser percentage increase shall be carried forward and added to the Cap for the current Lease Year and future Lease Years until completely consumed.

6.05 "Landlord's Operating Costs" Defined. "Landlord's Operating Costs" means the costs and expenses of every kind and nature paid or incurred in operating, maintaining and preserving Landlord's Building, and the Common Areas and Facilities, including, without limitation, all costs and expenses of: (i) installation, maintenance, repair, replacement, improvement, operation, lighting, signing, cleaning, painting, striping, policing and security (including cost of uniforms, equipment and employment taxes); (ii) alarm systems; (iii) insurance, including liability insurance for personal injury, death and property damage, insurance against fire, extended coverage, theft or other casualties, worker's compensation insurance covering personnel, fidelity bonds for personnel, insurance against liability for defamation and claims of false arrest, and plate glass insurance for glass exclusively serving the Common Areas and Facilities; (iv) maintenance of sprinkler systems serving the Leased Premises, and the Common Areas or Facilities; (v) removal of snow, ice, trash and debris; (vi) regulation of traffic; (vii) inspection and depreciation of machinery and equipment used in the operation and maintenance of the Shopping Center, together with personal property taxes, rent and other charges incurred in connection with such equipment; (viii) fire protection and fire hydrant charges; (ix) paving, curbs, walkways, landscaping, guardrails, bumpers, fences, screens, flagpoles, bicycle racks, traffic signals, markers and signs, drainage, pipes, ducts, conduits and similar items, and lighting facilities; (x) planting, replanting and replacing flowers, shrubbery and planters; (xi) rental of music program services and loudspeaker systems, including furnishing electricity therefor; (xii) providing energy to heat, ventilate and air-condition the Common Areas and Facilities; (xiii) maintenance, repair, installation, replacement and amortization of the equipment and systems which provide heating, ventilation and air conditioning; (xiv) reasonable capital cost reserves for Landlord's Building's heating, ventilating, air conditioning and parking lots; (xv) water; (xvi) sewage charges; (xvii) services, if any, furnished by Landlord for nonexclusive use of all tenants; (xviii) parcel pick-up and delivery services; (xix) floors, floor coverings, ceilings, walls, roof and roof

flashings, canopies, sky lights, signs, planters, benches, fountains, elevators, escalators and stairs, fire exits, doors and hardware, windows, glass and glazing of the Common Areas and Facilities; (xx) all license and permit fees, and all parking surcharges that may result from any environmental or other laws, rules, regulations guidelines or orders; (xxi) obtaining and operating public transportation or shuttle bus systems used in connection with bringing customers to Landlord's Building or if required by any environmental or other laws, rules, regulations, guidelines or orders; (xxii) rent or other costs or charges payable by Landlord with respect to any rights, privileges and easements now or hereafter benefitting the Shopping Center; (xxiii) personnel, including, without limitation, security and maintenance people of Landlord's Building, the Building Manager and Assistant Building Manager, secretaries and Building management bookkeepers (including, without limitation, payroll, taxes and employee benefits of such personnel); and (xxiv) an allowance for administrative costs equal to fifteen percent (15%) of the total of the foregoing costs and expenses. Such costs and expenses shall not include depreciation (other than depreciation as above specified). The costs and expenses referred to above are for definition only and are not to be construed so as to impose any obligation or obligations on Landlord or to indicate that any particular service or item is required to be furnished by Landlord.

Article VII Signs, Awnings and Canopies

7.01 Signs, Awnings and Canopies. Tenant shall at its sole cost erect and maintain a sign, advertising Tenant's business, on the exterior front of the Leased Premises and on the pylon sign for the Shopping Center in the space presently displaying "Space for Lease." If required by Landlord, Tenant shall pay for and install an additional sign advertising Tenant's business in the covered walkway adjoining Landlord's Building, if any. Tenant's sign(s) shall conform to Landlord's standard sign criteria. Tenant shall not install any sign(s) facing on the parking areas or elsewhere on the Lease Premises or in the Shopping Center, or place on the roof or any exterior wall (including both the interior and exterior surfaces of windows and doors) of the Leased Premises any sign, symbol, advertisement, neon or other light, shade, or any other object or thing visible to public view outside of the Leased Premises, without first obtaining Landlord's approval as to whether the same shall be so installed or placed and, if so, as to the location, number, type and appearance of each thereof.

Article VIII Condition and Maintenance of Leased Premises

8.01 Condition of Leased Premises. Tenant acknowledges that neither Landlord nor its agents have made any representations as to the condition or repair of the Leased Premises except those specified in this Lease.

8.02 Maintenance by Tenant. The Tenant shall, at all times, keep the Leased Premises (including maintenance of exterior entrances, all glass, show window moldings and frames, delivery doors and loading docks) and all partitions, doors, fixtures, equipment and appurtenances thereof (including lighting, heating and plumbing fixtures and equipment, sewer systems and any air-conditioning system exclusively serving the Leased Premises whether located inside or outside the Leased Premises) in good order, condition and repair (including reasonable periodic painting as determined by the Landlord), damage by unavoidable casualty excepted, except for structural portions of the Leased Premises, which shall be maintained by the Landlord. The Tenant further agrees to keep the inside and outside of all glass in doors and windows of the Leased Premises cleaned; to replace promptly at its own expense with glass of a like kind and quality any plate glass or window glass of the Leased Premises which may become cracked or broken; not to place or maintain any merchandise or other articles on the foot walk adjacent thereto or elsewhere on the exterior thereof; to maintain the Leased Premises in a clean, orderly and sanitary condition and free of insects, rodents, vermin and other pests; not to permit accumulations of garbage, trash, rubbish, litter and other refuse in the Leased Premises and the immediately adjacent portion of the Shopping Center, to remove the same at its own expense, and to keep such refuse in proper containers (or in trash room maintained by Tenant) on the exterior of the Leased Premises until called for it to be removed; if Landlord provides a common area for a trash dumpster or compactor, then Tenant shall remove to and place its trash in the trash removal containers furnished by Landlord, and Tenant shall prior to doing so break down all boxes and other shipping containers; to keep all mechanical apparatus free of vibration and noise which may be transmitted beyond the confines of the Leased Premises; not to cause or permit objectionable odors to emanate or be dispelled from

the Leased Premises; to comply with all laws and ordinances and all valid rules and regulations of any federal, state, municipal or public authority having jurisdiction with respect to the Leased Premises, and to conduct its business in the Leased Premises in all respects in a dignified manner in accordance with high standards of store operation. In the event the Landlord is required to make repairs: (i) to structural portions of the Leased Premises by reason of Tenant's negligent acts or omissions to act, or (ii) to the Common Areas and Facilities of the Shopping Center by reason of the acts of Tenant, its employees or agents, the Landlord may add the cost of such repairs to the Rent.

8.03 *Snow and Ice*. Tenant shall provide for the removal of all snow and ice from the Leased Premises, the sidewalk in front of the Leased Premises if any, and the customer exits and delivery entrances at the rear of the Leased Premises, if any. Landlord shall provide for the removal of snow and ice from the parking areas and driveways of the Shopping Center.

8.04 *Landlord's Maintenance and Repairs*. Subject to the provisions of Articles XV and XVI hereof, and except for repairs, maintenance or replacements made necessary by the acts of Tenant, its employees, agents, customers or persons making deliveries to the Leased Premises (which repairs, maintenance or replacements shall be the responsibility of Tenant), Landlord covenants and agrees:

(a) to maintain in good order, condition replacement and repair the foundation, roof and exterior walls of the Leased Premises; and

(b) to maintain in good order, condition, replacement and repair, the conduits providing utility services for gas, electricity, sewer and water up to the Leased Premises.

8.05 *Surrender of Premises*. At the expiration of the tenancy hereby created, the Tenant shall surrender the Leased Premises in the same condition as the Leased Premises were upon delivery of possession thereto under this Lease and as thereafter improved, reasonable wear and tear excepted, and damage by unavoidable casualty excepted, and shall surrender all keys for the Leased Premises to the Landlord at the place then fixed for the payment of Rent and shall inform the Landlord of all combinations on locks and vaults, if any, in the Leased Premises. The Tenant shall, if requested by the Landlord, remove all of its trade fixtures and other improvements before surrendering the Leased Premises as aforesaid, shall repair any damage to the Leased Premises caused thereby, and shall restore the Leased Premises to their original condition. The Tenant's obligation to observe or perform this covenant shall survive the expiration or earlier termination of the Term of this Lease.

Article IX Insurance and Indemnity

9.01 *Liability Insurance*. The Tenant shall, during the entire Term hereof, keep in full force and effect a policy of public liability and property damage insurance with respect to the Leased Premises, and the business operated by Tenant and any subtenants, concessionaires and licensees of the Tenant in the Leased Premises in which the limits of public liability shall be not less than \$_____ per person and \$_____ per accident and in which the property damage liability shall not be less than \$_____. The policies shall name the Landlord, any person, firms or corporations designated by the Landlord, and the Tenant as insured, and shall contain a clause that the insurer will not cancel or change the insurance without first giving the Landlord thirty (30) days prior written notice. The policies shall be written to provide that such coverage shall be primary and that any insurance maintained by Landlord shall be excess insurance only. All such insurance shall provide for severability of interests; shall provide that an act or omission of one of the named insureds shall not reduce or avoid coverage to the other named insureds; and shall afford coverage for all claims based on acts, omissions, injury and damage, which claims occurred or arose (or the onset of which occurred or arose) in whole or in part during the policy period. Any deductible amounts under any insurance policies required hereunder shall be subject to Landlord's prior written approval. Such insurance shall be in an insurance company approved by the Landlord and a copy of the policy or a certificate of insurance shall be delivered to the Landlord prior to the Commencement Date.

9.02 *Landlord's Insurance.* (a) Tenant will pay Landlord, as Additional Rent, a proportionate share of the cost of all insurance as Landlord may from time to time maintain with respect to the Shopping Center (including, but without limitation, comprehensive general liability insurance, fire, extended coverage, vandalism and malicious mischief and all-risk insurance and boiler and sprinkler insurance). Such insurance may include Landlord's interest in the improvements and betterments installed in the Premises by Tenant (except inventory, trade fixtures, wall and floor coverings, furniture and other personal property of Tenant removable by Tenant under the provisions of this Lease), whether the same have been paid for entirely or partially by Tenant.

(b) Tenant's proportionate share of the cost of the insurance described in subparagraph (a) shall be computed by multiplying Landlord's total expense (excluding the amount thereof attributable to insuring the Common Areas and Facilities and which are included in Landlord's Operating Costs) ("Insurance Premiums") for the billing period in question by a fraction, the numerator of which is Tenant's Floor Area and the denominator of which is the Floor Area of Landlord's Building. Such proportionate share shall be paid by Tenant in twelve (12) consecutive equal monthly installments in such amounts as are estimated and billed by Landlord at the commencement of the Term and at the beginning of each successive billing period, each installment being due on the first day of each calendar month. The first monthly payment shall include a prorated portion of Insurance Premiums for the period from the Commencement Date to the first day of the first full calendar month of the Term of this Lease. Within a reasonable time after the end of each calendar year, Landlord shall deliver to Tenant a statement of Insurance Premiums for the previous year, and the monthly installments paid or payable shall be adjusted between Landlord and Tenant, and Tenant shall pay Landlord or Landlord shall credit Tenant's account (or, if such adjustment is at the end of the Term, pay Tenant), as the case may be, within fifteen (15) days of receipt of such statement, such amounts as may be necessary to effect such adjustment for such year.

(c) Tenant shall have no rights in any policy or policies maintained by Landlord and shall not, by reason of the reimbursement required by this Section, be entitled to be a named insured thereunder.

(d) Tenant shall furnish Landlord, within thirty (30) days after the Commencement Date, a written statement, certified by Tenant or an executive officer of Tenant, of the actual cost incurred by Tenant in making all improvements and betterments to the Leased Premises, in order to assist Landlord in providing adequate insurance coverage.

9.03 *Mutual Waiver of Subrogation.* Landlord and Tenant hereby release each other to the extent of their respective insurance coverage, from any and all liability to the other or anyone claiming through or under it by way of subrogation or otherwise, for any loss or damage to property covered by the fire or extended coverage insurance policies carried by Landlord and Tenant, respectively, even if such damage shall have been caused by the fault or negligence of the other party, or anyone claiming through or under it, provided however, that this release shall be applicable and in force and effect only with respect to loss or damage occurring during such time as such policies shall contain a clause or endorsement to the effect that any such release shall not adversely affect nor impair such policies or prejudice the right to recover thereunder. Each party agrees that its policies of insurance will include such a clause or endorsement so long as the same shall be obtainable.

9.04 *Indemnification of Landlord.* The Tenant will indemnify the Landlord and save it harmless from and against any and all claims, actions, damages, liability, suits and expense in connection with the loss of life, personal injury and damage to property arising from or out of any occurrence in, upon, or at the Leased Premises, or the occupancy or use by the Tenant of the Leased Premises or any part thereof, or the conduct by Tenant of its business therein, thereon and therefrom, or occasioned wholly or in part by any act or omission of the Tenant, its agents, contractors, employees, servants, lessees or concessionaires or the sale of merchandise by Tenant in, on or from the Leased Premises. In case the Landlord shall be made a party to any litigation commenced by or against the Tenant, then the Tenant shall protect and hold the Landlord harmless and shall pay all costs, expenses and reasonable attorneys' fees incurred or paid by Landlord in connection with such litigation. The Tenant shall also pay all costs, expenses and reasonable attorneys' fees that may

be incurred or paid by the Landlord in the enforcing of the covenants and agreements of this Lease.

9.05 Increases in Fire Insurance Premiums Attributable to Tenant. Tenant shall not keep, use, sell or offer for sale in or upon the Premises any article which may be prohibited by the standard form of fire insurance policy. Tenant agrees to pay one hundred percent (100%) of any increase in premiums for fire and extended coverage insurance that may be charged during the Term on the amount of such insurance which may be carried by Landlord on Landlord's Building, resulting from the type of merchandise sold by Tenant in the Premises, whether or not Landlord has consented to the same. In determining whether increased premiums are the result of Tenant's use of the Premises, a schedule, issued by the organization making the insurance rate on the Premises, showing the various components of such rate, shall be conclusive evidence of the several items and charges which make up the fire insurance rate on the premises.

In the event Tenant's occupancy causes any increase of premium for the fire, and/or casualty rates on Landlord's Building, Tenant shall pay the additional premium on the fire and/or casualty insurance policies by reason thereof. The Tenant also shall pay, in such event, any additional premium on the rent insurance policy that may be carried by the Landlord for its protection against rent loss through fire. Bills for such additional premiums shall be rendered by Landlord to Tenant at such times as Landlord may elect, and shall be due from, and payable by, Tenant when rendered, and the amount thereof shall be deemed to be, and be paid as, Additional Rent.

Article X Utilities

10.01 Utility Charges. The Tenant shall be solely responsible for and promptly pay all charges for heat, water, sewer, gas, oil, electricity and any other utility used or consumed in the Leased Premises. Should the Landlord elect to supply any utility used or consumed in the Leased Premises, the Tenant agrees to purchase and pay the same as Additional Rent at the applicable rates filed by the Landlord with the proper regulatory authority, if any, or absent such filing, at a rate equal to Tenant's proportionate share of such utility service determined by taking the ratio that the total number of square feet of the Leased Premises bears to the total number of square feet of that rented portion of the Shopping Center buildings included under the common meter for such service. In no event shall the Landlord be liable for an interruption of or failure in the supply of, or for the quantity or quality of, any of such utilities to the Leased Premises and no such interruption or failure shall ever be deemed to be an actual or constructive eviction.

Article XI Subordination, Estoppel Certificate

11.01 Mortgage Subordination. Tenant agrees that, within ten (10) days after written request of Landlord, it will subordinate this lease to the lien of any present or future mortgage to a bank, savings and loan association, insurance company, real estate investment trust or similar institution, irrespective of the time of execution or time of recording of any such mortgage. Tenant agrees that if the mortgagee or any person claiming under the mortgage shall succeed to the interest of Landlord in this Lease, it will recognize such mortgagee or person as its landlord under the terms of this Lease. Tenant hereby irrevocably appoints Landlord its attorney-in-fact to execute and deliver any necessary or appropriate instrument or instruments of subordination, for and in the name of Tenant. It is expressly acknowledged that the foregoing power of attorney is coupled with an interest. The word "mortgage" as used herein includes mortgages, deeds of trust or other similar instruments and modifications, consolidations, extensions, renewals, replacements and substitutes thereof.

11.02 Estoppel Certificates. At any time and from time to time Landlord and Tenant each agree, within ten (10) days after request in writing from the other, to execute, acknowledge and deliver to the other or to any person designated by the other a statement in writing certifying that the Lease is unmodified and in full force and effect (or if there have been modifications, that the same is in full force and effect as modified and stating the modifications), that the other party is not in default in the performance of its covenants hereunder (or if there are such defaults, specifying the same), and the dates to which the rent and other charges have been paid.

Article XII Assignments and Subletting

12.01 *Landlord's Consent Required.* Tenant will not mortgage, pledge, encumber, assign or in any manner transfer this lease, in whole or in part, nor sublet all or any part of the Leased Premises, nor license concessions or lease departments therein, without, in each instance, first obtaining the written consent of Landlord. The within prohibition against transfer without the Landlord's prior written consent includes any subletting or assignment which would otherwise occur by operation of law, merger, consolidation, reorganization, transfer or other change of Tenant's corporate or proprietary structure, or an assignment, subletting to or by a receiver or trustee in any federal or state bankruptcy, insolvency, or other proceedings. The consent by Landlord to any assignment, subletting or other transfer shall not constitute a waiver of the requirement for such consent to any subsequent assignment, subletting or other transfer. Any assignment, subletting or other transfer, even with the consent of Landlord, shall not relieve Tenant from primary liability for the payment of Rent or from the primary obligation to keep and be bound by the terms, conditions and covenants of this Lease. If, at any time, Tenant shall request Landlord's consent to assign or otherwise transfer this Lease or to sublet all or any portion of the Leased premises, then Landlord shall have the right, by notifying Tenant in writing within thirty (30) days after receipt of such request, to terminate this Lease as of the date specified in such notice from Landlord to Tenant, which effective date shall be not more than ninety (90) nor less than thirty (30) days from the date of such notice. In the event of such termination, all Rent (other than any Rent or Additional Rent due Landlord resulting from Tenant's failure to perform any of its obligations under this Lease) shall be adjusted as of the date of such termination. Landlord's failure or refusal to so terminate this Lease shall not constitute a consent to the proposed assignment, subletting or other transfer. In the event Tenant shall assign or sublet the Leased Premises or request the consent of Landlord for any act that Tenant proposes to do, then Tenant shall pay Landlord's reasonable attorneys' fees incurred in connection therewith. Should Tenant assign, sublet or otherwise dispose of the Leased Premises, whether with or without Landlord's consent, any and all sums payable by virtue of such assignment, sublease or other demise shall be due and payable solely to Landlord. Tenant does hereby appoint Landlord as its attorney-in-fact to bill and collect any and all such sums for the use and benefit of Landlord without liability whatsoever to Tenant.

12.02 *Corporate, Partnership or Limited Liability Company Ownership.* If Tenant is a corporation, then any change in ownership or power to vote of a majority of its outstanding voting stock shall constitute an assignment for the purpose of this Lease and shall require Landlord's prior written consent. If Tenant is a partnership, general or limited, or is a limited liability company, and if at any time during the term hereof or any extension or renewal thereof, the person or persons who at the time of the execution of this Lease owns or own the general partner's interest in a general or limited partnership, or owns a majority of the voting interest in the limited liability company, ceases to own such interest, such cessation of ownership shall constitute an assignment of this Lease for all purposes of this Article.

12.03 *Acceptance of Rent from Transferee.* The acceptance by Landlord of the payment of Rent following any assignment, subletting or other transfer restricted or prohibited by this Article shall not be deemed to be a consent by Landlord to any such assignment or other transfer nor shall the same be deemed to be a waiver of any right or remedy of Landlord hereunder.

Article XIII Waste, Governmental Regulations

13.01 *Waste or Nuisance.* The Tenant shall not commit or suffer to be committed any waste upon the Leased Premises or any nuisance or other act or thing which may disturb the quiet enjoyment of any other tenant in Landlord's Building or in the Shopping Center.

13.02 *Governmental Regulations.* The Tenant shall, at Tenant's sole cost and expense, comply with all of the requirements of all county, municipal, state, federal and other applicable governmental authorities, now in force, or which may hereafter be in force, pertaining to the Leased Premises, including without limitation, the requirements of all applicable environmental authorities, and shall faithfully observe in the use of the Leased Premises and the Shopping Center all municipal and county ordinances and state and federal statutes now in force or which may hereinafter be in

force.

Article XIV Advertising, Merchants' Association

14.01 *Solicitation of Business.* The Tenant and Tenant's employees and agents shall not solicit business or place any signs or advertising devices in the Common Areas and Facilities, nor shall the Tenant distribute any handbills or other advertising matter to automobiles parked in the parking areas or in other Common Areas and Facilities without permission from the Landlord.

14.02 *Merchants' Association.* Tenant shall join and be a member of the Shopping Center's Merchants' Association and shall pay dues and abide by all reasonable regulations adopted by such Association, its successors and assigns.

14.03 *Advertised Name.* Tenant agrees not to change its trade name or the advertised name of the business operated in the Leased Premises without Landlord's prior written consent.

14.04 *Promotional Activities.* Tenant shall not use any portion of the Common Areas and Facilities of the Shopping Center for promotional or advertising activities without the prior written approval of the Landlord.

14.05 *Special Sales, Conduct of Business.* No auction, fire removal, closing, going-out-of-business or bankruptcy sales may be conducted in or from the Leased Premises without the prior written consent of Landlord. Tenant will not use the sidewalk or mall area adjacent to the Leased Premises for sale or display of merchandise or wares, nor will it use any loudspeaker, phonograph, radio or television for advertising in the Shopping Center in such manner that it may be heard or seen outside the Leased Premises without first securing Landlord's written consent.

Article XV Damage or Destruction

15.01 *Damage to Leased Premises Repairable Quickly.* If the Leased Premises shall be damaged or destroyed by any cause so as to be unfit for occupancy and such damage or destruction could reasonably be repaired or rebuilt within one hundred eighty (180) days from the happening of such damage or destruction, then Tenant shall not be entitled to surrender possession of the Leased Premises nor shall Tenant's liability to pay Rent under this Lease cease, but in the case of any such damage or destruction Landlord shall repair or rebuild the same with all reasonable speed, and substantially complete such repairs or rebuilding within one hundred eighty (180) days from the happening of such damage or destruction, subject to delays beyond its control. If Tenant shall be deprived of the occupancy of any portion of the Leased Premises because of any such damage or destruction, but can nevertheless reasonably continue to engage in its business, a proportionate allowance shall be made to Tenant from the Minimum Rent and Additional Rent corresponding to the time during which and to the portion of the Leased Premises of which Tenant shall be deprived on account of such damage or destruction and the making of such repairs. No Minimum Rent or Additional Rent shall be payable during such period as Tenant shall be deprived of the occupancy of all portions of the Leased Premises because of such damage or destruction or the effecting of such rebuilding.

15.02 *Non Repairable Quickly.* If such damage or destruction cannot reasonably be repaired or rebuilt within one hundred eighty (180) days from the happening thereof, Landlord shall notify Tenant within sixty (60) days after the happening of such damage or destruction whether or not Landlord will repair or rebuild. If Landlord elects not to repair or rebuild, this Lease shall be terminated, in which event the parties shall be relieved from their respective obligations which would otherwise thereafter accrue. If Landlord shall elect to repair or rebuild, Landlord shall specify the time within which such repairs or rebuilding will be completed, and Tenant shall have the option within thirty (30) days after receipt of such notice, to elect either to terminate this Lease or to extend the term of the Lease by a period of time equivalent to the time from the happening of such damage or destruction until the Leased Premises are restored to their former condition. In the event Tenant elects to extend the Term of the Lease, or shall fail to terminate this Lease within the time specified, Landlord shall repair or rebuild the Leased Premises to their former condition within the time

specified in the notice (excluding Tenant's personal property or leasehold improvements, changes or betterments to the Leased Premises made by or for Tenant) subject to delays beyond its control, and Tenant shall be entitled to an abatement of Minimum Rent and Additional Rent in the manner hereinbefore set forth and this Lease shall continue in full force and effect.

15.03 Damage to Shopping Center or Building. If more than forty percent (40%) of the rentable square footage of the Shopping Center or of Landlord's Building is destroyed or damaged by any cause (whether or not the Leased Premises are destroyed or damaged), Landlord shall have the option, upon giving notice to Tenant within sixty (60) days after the happening of such damage or destruction to cancel this Lease as of a date sixty (60) days after the giving of such notice.

15.04 Uninsured Damage; Loss Near End of Term. Notwithstanding the foregoing, in the event that damage or destruction of the Leased Premises shall not result from any of the causes covered by Landlord's policies of fire and extended coverage insurance as now or hereafter constituted, or if Landlord's mortgagee does not make the applicable insurance proceeds available to Landlord, or if such damage or destruction shall occur during the last two (2) years of the original term or any extended term of this Lease, Landlord shall have the election of repairing or rebuilding, in which event Tenant shall remain liable under the Lease, or of terminating this Lease, in which event the parties shall be relieved from their respective obligations which would otherwise thereafter accrue. Landlord shall give Tenant notice within thirty (30) days after such damage or destruction of its election.

Article XVI Eminent Domain

16.01 Taking. If, as a result of the taking by way of appropriation or right of eminent domain (a "Taking") of any part of the Leased Premises, Tenant's use of the Leased premises for the conduct of its business therein is materially adversely impaired, either party may terminate this Lease, in which event the parties shall be relieved of all obligations hereunder thereafter accruing. Tenant's use of the Leased Premises for the conduct of its business shall not be deemed to be "materially adversely impaired" if less than twenty-five percent (25%) of the Leased Premises is taken.

16.02 Award. All compensation awarded for any Taking, whether for the whole or a portion of the Leased Premises or the Shopping Center, shall be the sole property of Landlord, whether such compensation shall be awarded for diminution in the value of, or loss of, the leasehold or for diminution in the value of, or loss of, the fee in the premises, or otherwise, and Tenant hereby assigns to Landlord all of Tenant's right, title and interest in any and to any and all such compensation.

16.03 Non-Termination. If there is a Taking of the Leased Premises and the Lease does not terminate, the Minimum Rent and Additional Rent will be reduced by that proportion which the number of square feet of the Leased Premises of which Tenant is thereby deprived bears to the total square feet encompassed within the entire Leased Premises immediately prior to such Taking.

Article XVII Default

17.01 Events of Default and Remedies. In the event that any installment of Minimum Rent or Additional Rent shall be and remain unpaid for a period of ten (10) days; or in the event Tenant shall at any time be in default in the observance or performance of any of the other covenants, obligations, terms, or conditions assumed by or imposed upon Tenant hereunder and such default continues for a period of fifteen (15) days after written notice to Tenant of such default; or if any waste be committed or unnecessary damage done upon or to the Leased Premises; or if Tenant shall fail to remain open for business for five (5) consecutive business days; or if any audit of Tenant's books and records shall disclose a liability for Annual Percentage Rent to the extent of three percent (3%) or more in excess of the rentals theretofore computed and paid by Tenant for any period (whether or not Tenant thereafter reimburses Landlord for such deficiency); or if a temporary or permanent receiver or trustee of Tenant's property or the property of any guarantor of this Lease ("Guarantor") be appointed by any court; or if Tenant or any Guarantor shall make any assignment for the

benefit of creditors; or if any execution or attachment shall be issued against Tenant or any Guarantor or Tenant's leasehold interest hereunder and shall not be discharged within forty-five (45) days; or if Tenant shall commence proceedings in a court of bankruptcy or insolvency; or if Tenant or any Guarantor shall be declared or adjudicated bankrupt or insolvent according to law; or if any proceedings are commenced against Tenant or Guarantor in a court of bankruptcy or insolvency, which shall not be discharged within forty-five (45) days; then, and in any one or more of such events, Landlord shall be entitled, at its election, to exercise concurrently or successively, any one or more or all of the following rights and remedies:

(a) Without waiving such default, Landlord may pay any sum required to be paid by Tenant to third parties other than Landlord and which Tenant has failed to pay, and may perform any obligation required to be performed by Tenant for the account of Tenant, and any amount so paid by Landlord shall bear interest thereon at the Default Rate. Any amount or amounts paid by Landlord for the account of Tenant for the performance of any obligations required to be performed by Tenant shall be treated as Additional Rent due hereunder and Landlord may exercise concurrently or successively any one or more of the rights and remedies contained in this Lease for the enforcement of the payment of Rent;

(b) Landlord may enjoin any breach or threatened breach by Tenant of the covenants hereof;

(c) Landlord may bring suit for the collection of the Rent or other amounts for which Tenant may be in default, or for the performance of any other covenant devolving upon Tenant for performance, or damages therefor, all without entering into possession or terminating this Lease;

(d) Landlord may re-enter the Leased Premises by summary proceedings or otherwise, and take possession thereof, without terminating this Lease, and thereupon, to expel all persons and remove all property therefrom, either peaceably or by force, without becoming liable to prosecution therefor, and relet the Leased Premises making reasonable efforts therefor, for such periods and upon such terms according to Landlord's sole discretion, and receive the rent therefrom. Such rent shall be applied first to the payment of the reasonable expenses of such re-entry and the cost of such reletting, including but not limited to the expense of such decorations, alterations and remodeling as shall be incident to such reletting, and then to the payment of the Rent and other sums accruing hereunder, the balance, if any, to be retained by Landlord as a security deposit against Tenant's defaults during the remainder of the Term of this Lease. Tenant, whether or not the Leased Premises are relet, shall remain liable for any deficiency, which deficiency shall be paid by Tenant to Landlord, periodically, upon the successive days upon which the Rent hereunder is payable.

It is agreed that the commencement and prosecution of any action by Landlord in forcible entry and detainer, ejectment or otherwise, or the appointment of a receiver, or any execution of any decree obtained in any action to recover possession of the Leased Premises, or any re-entry, shall not be construed as an election to terminate this Lease unless Landlord shall, in writing, expressly exercise its election to declare the term hereunder ended and to terminate this Lease, and such re-entry or entry by Landlord, whether taken under summary proceedings, or otherwise, shall not be deemed to have absolved or discharged Tenant from any of its obligations and liabilities for the remainder of the term of this Lease.

(e) Landlord may terminate this Lease, re-enter the Leased Premises and take possession thereof, wholly discharged from this Lease. In the event Landlord shall elect to terminate this Lease, as aforesaid, all rights and obligations of Tenant shall cease, except that Landlord shall have and retain full right to sue for and collect all Rent and other amounts for the payment of which Tenant shall then be in default and all damages to Landlord by reason of such breach, and Tenant shall surrender and deliver up the Leased Premises to Landlord, together with all improvements and additions thereto, and upon any default by Tenant in so doing, Landlord shall have the right to recover possession by summary proceedings or otherwise, and to obtain a receiver and other ancillary relief in such action, and again to have and enjoy the Leased premises, fully and completely, as if this Lease had never been made. Tenant hereby expressly waives any and all rights of redemption granted by or under any present or future laws in the event of Tenant being evicted or dispossessed for any cause, or in the event Landlord obtains possession of the Leased Premises by reason of the breach

or violation by Tenant of any of the covenants and conditions in this Lease contained or otherwise. No such expiration or termination of this Lease, or summary proceedings, abandonment or vacancy, shall relieve Tenant of its liability and obligation under this Lease, whether or not the Leased Premises shall be relet. In any such event, Tenant shall pay Landlord the Rent and all other charges required to be paid by Tenant up to the time of such event. Thereafter:

(1) Tenant, until the end of the term of this Lease, or what would have been such term in the absence of any such event, shall be liable to Landlord as damages for Tenant's default, the equivalent of the amount of the Rent, and the other charges which would be payable under this Lease by Tenant if this Lease were still in effect, less the net proceeds of any reletting, effected pursuant to the provisions of this Section, after deducting all Landlord's expenses in connection with such reletting, including, without limitation, all repossession costs, brokerage and management commissions, operating expenses, legal expenses, reasonably attorneys' fees, alterations, costs and expenses of preparation for such reletting.

(2) Tenant shall pay such current damages (herein called "deficiency") to Landlord monthly on the days on which the Rent would have been payable under this Lease if this Lease were still in effect, and Landlord shall be entitled to recover from Tenant each monthly deficiency as the same shall arise.

(3) At any time after the expiration or termination of this Lease or abandonment or vacating of the Leased Premises by Tenant, in lieu of collecting any further monthly deficiencies as aforesaid, Landlord shall be entitled to recover from Tenant, and Tenant shall pay to Landlord, on demand, as damages, (minus any such monthly deficiencies previously recovered from Tenant) an amount equal to the difference between the Rent, and other charges reserved in this Lease from the date of such breach to the date of the expiration of the original term demised and the then fair and reasonable rental value of the Leased Premises for the same period. Such damages shall become due and payable to Landlord immediately upon such breach of this Lease and without regard to whether this lease be terminated or not, and if this lease be terminated, without regard to the manner in which it is terminated. In the computation of such damages, the difference between any installment of rent thereafter becoming due and the fair and reasonable rental value of the premises for the period for which such installment was payable shall be discounted to the date of such breach at the rate of not more than seven percent (7%) per annum.

(f) If Tenant shall at any time during the term hereof be adjudged bankrupt, then this Lease, at the option of Landlord, shall terminate. Landlord, in the event it exercises such option to terminate, shall be entitled to receive, as liquidated damages, the difference between the Rent provided for hereunder and the then rental value of the Leased Premises, which liquidated damages shall, however, in no event be less than any sums or allowances to which Landlord may be entitled at that time under any then existing statutes of the State of _____ or of the United States of America.

(g) All rights and remedies granted Landlord herein and any other rights or remedies which Landlord may have at law or in equity are cumulative and not exclusive, and the fact that Landlord may have exercised any remedy without terminating this Lease shall not impair Landlord's rights thereafter to terminate or to exercise any other remedy herein granted or to which it may be otherwise entitled.

(h) For purposes of this Article, the Annual Percentage Rent for any period when Tenant is out of possession following any event to which the provisions of this Article are applicable shall be deemed, for each Lease year during such period, to be at the rate equal to the greatest amount of Gross Sales for any one Lease year prior to such time multiplied by the Annual Percent that would be applicable under this Lease if Tenant was still in possession. If this Article becomes applicable prior to the expiration of the first Lease Year, then Tenant's average Gross Sales for the months prior to the invocation of this Article shall be annualized for the purpose of determining "the greatest amount of Gross Sales for any one Lease Year."

17.02 *Laches*. No waiver of any covenant or condition or the breach of any covenant or condition of this Lease shall be

taken to constitute a waiver of any subsequent breach of such covenant or condition, nor to justify or authorize the non-observance on any other occasion of the same, or any other covenant or condition hereof, nor shall the acceptance of Rent by Landlord at any time when Tenant is in default under any covenant or condition hereof be construed as a waiver of such default, nor shall any waiver or indulgence granted by Landlord to Tenant be taken as an estoppel against Landlord. It is expressly understood that if, at any time, Tenant shall be in default in any of the covenants or conditions hereunder, an acceptance by Landlord of Rent during the continuance of such default, or of the failure on the part of Landlord promptly to avail itself of such other rights or remedies as Landlord may have, shall not be construed as a waiver of such default; but Landlord may at any time thereafter, if such default continues, take action is deems necessary on account of such default, in the manner provided in this Article XVII. Every demand for rent due wherever and whenever made, or demand for the performance or observance of any of the other obligations devolving upon Tenant hereunder, shall have the same effect as if made at the time it falls due and at the place of payment; and after the service of any notice of commencement of any suit or final judgment therein, Landlord may receive and collect any rent due, and such collection or receipt shall not operate as a waiver of nor affect such notice, suit or judgment.

17.03 Self-help. If Tenant shall default in the performance or observance of any agreement or condition in this Lease contained on its part to be performed or observed and shall not cure such default within fifteen (15) days after notice from Landlord specifying the default, or if such default shall reasonably take more than fifteen (15) days to cure, shall not have commenced the same within the fifteen (15) days and diligently prosecuted the same to completion, Landlord may, at its option, in addition to any other remedy specified herein, without waiving any claim for damages for breach of agreement, at any time thereafter cure such default for the account of Tenant and any amount paid or any contractual liability incurred by Landlord in so doing shall be deemed paid or incurred for the account of Tenant and Tenant agrees to reimburse promptly Landlord therefor and save Landlord harmless therefrom; provided that Landlord may, however, cure any such default as aforesaid prior to the expiration of such waiting period, if the curing of such default prior to the expiration of such waiting period is reasonably necessary to protect the Leased premises or the Shopping Center or to prevent injury or damage to persons or property. If Tenant shall fail promptly to reimburse Landlord for any amount paid for the account of Tenant hereunder, such failure shall constitute an additional default by Tenant under this Lease and such amount shall be added to and become due as a part of the next payment of Rent due hereunder.

17.04 Bankruptcy. If Landlord shall not be permitted to terminate this Lease as provided above because of the provisions of Title 11 of the United States Code relating to Bankruptcy, as amended ("Bankruptcy Code"), then Tenant as a debtor-in-possession or any trustee for Tenant agrees promptly, within no more than fifteen (15) days upon request by Landlord to the Bankruptcy court, to assume or reject this lease and Tenant on behalf of itself, and any trustee agrees not to seek or request any extension or adjournment of any application to assume or reject this Lease by Landlord with such Court. In such event, Tenant or any trustee for Tenant may only assume this Lease if (A) it cures or provides adequate assurance that the trustees will promptly cure any default hereunder, (B) compensates or provides adequate assurance that Tenant will promptly compensate Landlord for any actual pecuniary loss to Landlord resulting from Tenant's defaults, and (C) provides adequate assurance of performance during the fully stated term hereof of all of the terms, covenants, and provisions of this Lease to be performed by Tenant. In no event after the assumption of this Lease shall any then-existing default remain uncured for a period in excess of the earlier of ten (10) days or the time period set forth therein. Adequate assurance of performance of this lease, as set forth above, shall include, without limitation, adequate assurance (1) of the source of rent reserved hereunder, (2) that any Annual Percentage Rent due hereunder will not decline from the levels anticipated, and (3) the assumption of this lease will not breach any provision hereunder. In the event of a filing of a petition under the Bankruptcy Code, Landlord shall have no obligation to provide Tenant with any services or utilities as herein required, unless Tenant shall have paid and be current in all payments of Landlord's Operating Costs, utilities or other charges therefor.

17.05 Franchisor Rights. Tenant operates its business at the Premises under a franchise from _____ Franchise Corp., whose address for notice purposes is _____ Road, City of _____, State of _____, (the "Franchisor"). Landlord shall forward to Franchisor, at Franchisor's notice address referred to above, any default notice that Landlord serves on Tenant. Franchisor is afforded the right to cure any default

on the part of Tenant under this Lease within the same period of time that Tenant has in which to cure that default. Moreover, if under the terms of the franchise agreement between Tenant and Franchisor with respect to the Premises, Franchisor is entitled to take possession of the Premises because of any default by Tenant under that franchise agreement, then Landlord shall recognize Franchisor's right to take possession of the Premises, but only if before this Lease is terminated pursuant to Article XVII of this Lease all of the following conditions are satisfied:

- (a) Franchisor assumes Tenant's interest under this Lease pursuant to a document in form and substance satisfactory to Landlord, and Franchisor unconditionally delivers that document to Landlord;
- (b) Franchisor cures all defaults on the part of Tenant under this lease; and
- (c) Franchisor unconditionally agrees to protect, indemnify, defend and hold harmless Landlord from and against all liability, loss, cost or damage, including reasonable fees of attorneys, arising out of or in connection with its franchise agreement, with Tenant, its taking possession of the Premises, and any dispute relating to the Premises or this Lease.

If Franchisor assumes the Tenant's interest under this Lease and satisfies each of the conditions described in subparagraphs (a), (b) and (c) above, then so long as Franchisor is not in default under this Lease, Franchisor may later elect to sublet the entire Premises without Landlord's consent to another of its franchisees who agrees to operate the Premises as a _____ franchise subject to all of the terms and conditions of this Lease.

Article XVIII Access by Landlord

18.01 *Right of Entry; For Lease Signs.* The Landlord or the Landlord's agents shall have the right to enter the Leased Premises upon reasonable notice (except in the case of an emergency where no prior notice will be required), to examine the same, and to show them to prospective purchasers or lessees of the Leased Premises or the Shopping Center, to make such repairs, alterations, improvements or additions as the Landlord may deem necessary or desirable, and the Landlord shall be allowed to take all material into and upon such Leased Premises that may be required therefor without the same constituting an eviction of the Tenant in whole or in part and the Rent reserved shall be in no wise abated while such repairs, alterations, improvements or additions are being made, by reason of loss or interruption of business of the Tenant or otherwise. During the six (6) months prior to the expiration of the Term of this Lease or any renewal term, or at any time during which Tenant has ceased to conduct its business with the public, the Landlord may place upon the Leased Premises the usual notices "For Rent" or "For Sale," which Tenant shall permit to remain thereon without molestation. If the Tenant shall not be personally present to open and permit an entry into the Premises, at any time, when for any reason an entry therein shall be necessary or permissible, the Landlord or the Landlord's agents may enter the same peaceably or by force, without rendering the Landlord or such agents liable therefor, and without in any manner affecting the obligations and covenants of this lease. Nothing herein contained, however, shall be deemed to impose upon the Landlord any responsibility or liability whatsoever, for the care, maintenance or repair of the Leased Premises, Landlord's Building or any part thereof, except as otherwise herein specifically provided.

18.02 *Excavation.* If an excavation shall be made upon land adjacent to the Leased Premises, or shall be authorized to be made, the Tenant shall afford to the person causing or authorized to cause such excavation, license to enter upon the Leased Premises for the purpose of doing such work as the Landlord shall deem necessary to preserve the wall or walls of Landlord's Building from injury or damage and to support the same by proper foundations, without any claim for damages or indemnification against the Landlord or diminution or abatement of Rent.

Article XIX Tenant's Property

19.01 *Loss and Damage.* The Landlord shall not be responsible for any damage to the property of the Tenant or of others located on the Leased Premises, nor for the loss of or damage to any property of the Tenant or of others by theft or otherwise. The Landlord shall not be liable for any injury or damage to persons or property resulting from fire,

explosion, falling plaster, steam, gas, electricity, water, rain or snow, or leaks from any part of the Leased Premises, or from the pipes, appliances or plumbing works, or from the roof, street or sub-surface, or from any other place, or by any other cause whatsoever of any nature. The Landlord shall not be liable for any such damage caused by other tenants or persons who are occupants of adjacent property, or of the Shopping Center, or the public, or caused by operations in construction of any private, public or quasi-public work. The Landlord shall not be liable for any latent defects in the Leased Premises or in Landlord's Building. All property of the Tenant kept or stored on the Leased Premises shall be so kept or stored at the risk of the Tenant only, and the Tenant shall hold the Landlord harmless from any claims arising out of damage to the same.

19.02 *Notice by Tenant.* The Tenant shall give immediate notice to the Landlord in case of fire or accidents in the Leased Premises or in the Landlord's Building and of defects therein or in any fixtures or equipment.

Article XX Holding Over, Successors

20.01 *Holding Over.* Should Tenant, with Landlord's written consent, hold over at the end of the Term of this Lease, Tenant shall become a Tenant at will and any such holding over shall not constitute an extension of this Lease. During such holding over, Tenant shall pay Rent and other charges at the highest monthly rate provided for herein. If Tenant holds over at the end of the Term without Landlord's written consent, Tenant shall pay Landlord as liquidated damages, a sum equal to twice the Rent to be paid by Tenant to Landlord for all the time Tenant shall so retain possession of the Premises; provided that the exercise of the Landlord's rights under this clause shall not be interpreted as a grant of permission to Tenant to continue in possession.

20.02 *Successors.* All rights, duties and liabilities herein given to, or imposed upon, the respective parties hereto, shall extend to and bind the several respective heirs, executors, administrators, successors, and assigns of the said parties; and if there shall be more than one tenant, they shall all be bound jointly and severally by the terms, covenants and agreements herein. No rights, however, shall inure to the benefit of any assignee of the Tenant unless the assignment to such assignee has been approved by the Landlord in writing as provided in Section 12.01 hereof.

Article XXI Quiet Enjoyment

21.01 *Landlord's Covenant.* Landlord covenants and agrees that if Tenant shall perform all of the covenants and agreements herein stipulated to be performed on Tenant's part, Tenant shall at all times during the Term hereof have the peaceable and quiet enjoyment and possession of the Leased Premises and the appurtenances thereto without any manner of hindrance from Landlord or any persons lawfully claiming through Landlord, and it is understood and agreed that this covenant and all other covenants of Landlord contained in this Lease shall be binding solely upon Landlord and not any partner thereof and its successors in interest only with respect to breach occurring during its and their respective ownership of the Landlord's interest hereunder.

21.02 *Landlord's Liability.* Notwithstanding anything to the contrary in this Lease, it is specifically agreed that the monetary liability of any Landlord hereunder in the event of a breach by the Landlord of any of the terms, covenants and conditions of this Lease to be performed by Landlord or in the event of any other claim by Tenant against Landlord, whether under this Lease, imposed by statute, or existing at common law, in respect of any matter related to, arising out of or occurring in connection with this Lease, the Leased Premises, the Shopping Center or their relationship to each other as landlord and tenant, shall be limited to and enforceable solely against the Landlord's interest in the Shopping Center and that no personal or other money judgment shall be sought or obtained against Landlord or any partners or shareholders thereof.

Article XXII Miscellaneous

22.01 *Entire Agreement.* This Lease and the Exhibits attached hereto and forming a part hereof, set forth all the

covenants, promises, agreements, conditions and understandings between the Landlord and Tenant, concerning the Leased Premises and there are no covenants, promises, agreements, conditions or understandings, either oral or written, between them other than are herein set forth. Except as herein otherwise provided, no subsequent alteration, amendment, change or addition to this Lease shall be binding upon the Landlord or Tenant unless reduced to writing and signed by them.

22.02 No Partnership. The Landlord does not, by virtue of this Lease, in any way or for any purpose, become a partner of the Tenant in the conduct of its business, or otherwise, or joint venturer or a member of a joint enterprise with the Tenant. The provisions of this Lease relating to the Annual Percentage Rent payable hereunder are included solely for the purpose of providing a method whereby rent is to be measured and ascertained.

22.03 Cost and Expense. Whenever this Lease provides for the doing of any act by any party, such act shall be done by such party at its sole cost and expense unless a contrary intent is expressed.

22.04 Force Majeure. In the event that Landlord shall be delayed or hindered in or prevented from the performance of any act required hereunder by reason of strikes, lock-outs, labor troubles, inability to procure materials, failure of power, restrictive governmental laws or regulations, riots, insurrection, war or other reason of a like nature not the fault of the Landlord in performing work or doing acts required under the terms of this lease, then performance of such act shall be excused for the period of delay and the period for the performance of any such act shall be extended for a period equivalent to the period of such delay.

22.05 Notices. Any notice, demand, request or other instrument which may be or are required to be given under this Lease shall be in writing and delivered in person or sent by United States certified mail, return receipt requested, postage prepaid, and shall be addressed to the Landlord at _____ Street, City of _____, State of _____, or at such other address as the Landlord may designate by written notice, and if to Tenant prior to the Commencement Date of the Lease at _____ Road, City of _____, State of _____, and after the Commencement Date of this Lease at _____ Avenue, City of _____, State of _____, or at such other address as the tenant shall designate by written notice (the "Tenant Notice Address"). Notices shall be effective upon delivery unless delivery is refused or cannot be made in which event notice shall be effective upon mailing.

22.06 Captions and Section Numbers. The captions, section numbers, article numbers, and table of contents appearing in this lease are inserted only as a matter of convenience and in no way define, limit construe, or describe the scope or intent of such sections or articles or this lease nor in any way affect this Lease.

22.07 Tenant Defined, Use of Pronoun. The word "Tenant" shall be deemed and taken to mean each and every person or party mentioned as a Tenant hereunder, be the same one or more, and if there be more than one Tenant, any notice required or permitted by the terms of this Lease may be given by or to any one thereof, and shall have the same force and effect as if given by or to all thereof. The use of the neuter, singular pronoun to refer to the Landlord or to the Tenant shall be deemed a proper reference even though the Landlord or the Tenant may be an individual, a partnership, a corporation, or a group of two or more individuals or corporations. The necessary grammatical changes required to make the provisions of this Lease apply to the plural sense where there is more than one Landlord or Tenant and to either corporations, associations, partnerships, or individuals, males or females, shall, in all instances, be assumed as though in each case fully expressed.

22.08 Broker's Commission. Each of the parties represents and warrants that there are no claims for brokerage commissions or finder's fees in connection with this Lease, except a commission payable to _____, which fee shall be paid by the Landlord pursuant to a separate agreement between Landlord and _____; and each of the parties agrees to indemnify the other against and hold it harmless from all liabilities arising from any breach of its respective warranty (including, without limitation, the cost of counsel fees in

connection therewith).

22.09 *Partial Invalidity.* If any term, covenant or condition of this Lease or the application thereof to any person or circumstance shall, to any extent, be invalid or unenforceable, the remainder of this Lease, or the application of such term, covenant or condition to persons or circumstances other than those to which it is held invalid or unenforceable, shall not be affected thereby, and each term, covenant and condition of this Lease shall be valid, and be enforced, to the fullest extent permitted by law.

22.10 *No Option.* The submission of this Lease for examination does not constitute a reservation of or option for the Leased Premises and this Lease becomes effective as a Lease only upon the execution and delivery thereof by both the Landlord and the Tenant.

22.11 *Recording.* The Tenant shall not record this Lease without the written consent of the Landlord. However, upon the request of either party hereto, the other party shall join in the execution of a memorandum or so-called "short form" of this Lease to the purpose of recordation. Such memorandum or short form of this Lease shall describe the parties, the Leased Premises and the Term of this Lease and shall incorporate this Lease by reference. The party requesting such short form lease shall pay all recording fees.

22.12 *Joint and Several Liability.* If Tenant is a partnership or other business organization the members of which are subject to personal liability, the liability for each such member shall be deemed to be joint and several. If Tenant is individual persons, then the individual persons comprising Tenant shall be liable for all obligations of Tenant under this Lease.

22.13 *Confidentiality.* Tenant shall keep the contents of this Lease confidential and shall not disclose the contents of this Lease in any manner whatsoever, except that (i) Tenant may make any disclosure of information contained in this Lease to which Landlord gives its prior written consent, and (ii) any information contained in this Lease may be disclosed to Tenant's Representatives who need to know that information for the purpose of assisting Tenant in connection with its business at the Premises and who agree in writing to keep that information confidential. Tenant shall be responsible for any breach of the provisions of this Section by any of its Representatives. The term "Representatives" as used in this Section of the Lease means Tenant's directors, officers, partners, employees, attorneys, accountants and bankers.

If Tenant or its Representatives receive a request to disclose all or any part of the contents of this Lease under the terms of a subpoena or other order issued by a court of competent jurisdiction or by a government agency, Tenant shall: (i) promptly notify Landlord of the existence, terms and circumstances surrounding such request; (ii) consult with Landlord on the advisability of taking steps to resist or narrow that request; (iii) if disclosure of any portion of this Lease is required, furnish only such portion of this Lease as Tenant is advised by counsel is legally required to be disclosed; and (iv) cooperate with Landlord in its efforts to obtain and order or other reliable assurance that confidential treatment will be accorded to that portion of the Lease that is required to be disclosed.

Tenant agrees to protect, indemnify, defend and hold harmless Landlord from any damages or other adverse consequences that Landlord may incur or suffer as a result of a breach of the covenants contained in this Section of the Lease. In addition, Tenant understands, acknowledges and agrees that any breach of the provisions of this Section on the part of Tenant or its Representatives shall constitute a default under this Lease. The provisions of this Section shall survive the expiration or earlier termination of the Term of this Lease.

22.14 *Exhibits.* The exhibits enumerated in this Section and attached hereto are incorporated herein by reference and made a part hereof.

Exhibit A. Drawing depicting location and configuration of the Leased Premises

Exhibit B. Legal description of the Shopping Center

IN WITNESS WHEREOF, the parties hereto have executed this Lease Agreement as of the day and year first above written.

LANDLORD:

_____ Associates, a state of _____ general partnership

By: _____

, Partner

TENANT:

_____ Corp., a State of _____ corporation

By: _____

, President

By: _____

, Vice President

[Acknowledgments]

[Attach Exhibit A]

[Attach Exhibit B]



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Current Legal Forms for Real Estate

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Current Legal Forms for Real Estate
Chapter 23 REAL ESTATE LEASES

Part IV. Forms

A. COMPLETE LEASES AND RELATED AGREEMENTS

31-23 Current Legal Forms for Real Estate FORM 23.08

AUTHOR: by Thomas G. Belden

FORM 23.08 Medical office space lease--tenant obligated to dispose of infectious medical waste

COMMENT

Medical office space:

This lease of space in an office building for use as a medical office contains many clauses which can be used in office leases generally. The lease also contains a provision dealing with the disposal of infectious medical waste by the tenant. The tenant physician is responsible for segregating, packaging, treating, transporting and disposing of all infectious waste generated by the tenant. The lease requires that such waste be identified, segregated, measured, stored and disposed of by the tenant in compliance with applicable laws, and in a manner that complies with all federal state and local laws or regulations applicable to infectious waste. Infectious waste may not be stored in common areas. This lease also contains a death or disability clause for the protection of the tenant.

FORM

LEASE AGREEMENT

THIS INDENTURE OF LEASE is made and entered into at the City of _____, State of _____, this _____ day of [date], by and between _____ Realty Associates, a limited partnership in business in the State of _____ (hereinafter called "Landlord"), with

its mailing address at _____ Avenue, City of _____, State of _____, and _____ (hereinafter called "Tenant"), with its mailing address at _____ Street, City of _____, State of _____.

WITNESSETH:

1. *Demise.* Landlord leases to Tenant and Tenant leases from Landlord the premises identified as Suite No. _____, consisting of approximately _____ square feet (hereinafter called the "Premises") in the building known as _____ Medical Office Building (hereinafter called the "Building"), located at _____ Street, City of _____, State of _____, for a term of _____ years commencing on [date], and ending on [date], unless sooner terminated as hereinafter provided. Landlord excepts and reserves hallways, stairways, shaftways, and other common areas and facilities, and the rights to maintain, use, repair and replace pipes, ducts, wires, meters and any other equipment, machinery, apparatus and fixtures serving other parts of the Building, including such of them as may occur above the finished ceiling of the Premises.

2. *Use of premises.* The Premises shall be used solely for medical offices, all in accordance with this Lease. Tenant shall not use or occupy, or permit the use or occupancy of, the Demised Premises, or any part thereof, in any unlawful manner or for any illegal purpose or in such manner as to constitute a nuisance or violate the terms and conditions of any certificate of occupancy applicable to the Premises, or for any purpose or in a manner liable to cause structural injury, and shall not use or occupy, or permit the use or occupancy of the Premises, for other than purposes of the nature and to the extent permitted by the laws, rules, regulations, and ordinances of the applicable governmental authorities, including without limitation all environmental laws, rules and regulations, federal, state and local. Tenant shall not affix or permit to be affixed any advertising signs or notices upon the outside of the Building in which the Premises is located, or on the inside of such Building, except for signs to be located beside the door to the suite leased by the Tenant and on the Directory Board in the Building, such signs to be bought and installed by the Landlord. Landlord shall have the right to remove all other signs without notice to the Tenant, and at Tenant's expense.

3. *Annual base rent.* In consideration thereof, Tenant covenants to pay Landlord without demand an Annual Base Rent for the Premises at the rate of \$ _____ per year in equal monthly installments of \$ _____ in advance on the first day of each and every calendar month throughout the term of this Lease at Landlord's offices or such other places as Landlord may from time to time designate.

4. *Definitions.* As used in this Lease, the following terms shall have the following respective meanings:

(a) "Annual Base Rent:" The annual rent to be paid by Tenant to Landlord pursuant to the provisions of Paragraph 3.

(b) "Base Year:" The full calendar year, commencing [date] and ending [date].

(c) "Comparison Term:" The first full calendar year, or fraction thereof, of the Tenant's tenancy, and each subsequent full calendar year, or fraction thereof, at the termination of the Lease, during which this Lease shall continue in effect.

(d) "Tenant's Share:" Tenant's premises contains _____ square feet of space which is agreed upon as being _____ % of the total net rentable area of the Building.

(e) "Operating Expenses:" All expenses, costs and disbursements (but not replacements of capital investment items or specific costs billed to specific tenants) of every kind and nature relating to or incurred or paid in connection with the ownership, operation and management of the Building during the year, whether the Base Year or a Comparison Term, including but not limited to, the following:

(i) Wages and salaries of all persons directly engaged in the operation, maintenance or access control for the Building, including taxes, insurance and benefits relating thereto.

(ii) All supplies, tools, equipment and materials used in the operation and maintenance of the Building.

(iii) Cost of all utilities for the Building, including but not limited to the cost of gas, water and power for heating, lighting, air conditioning and ventilating (excluding those costs billed to specific tenants).

(iv) Costs of all maintenance and service agreements for the Building and the equipment therein, including but not limited to security service, window cleaning, elevator maintenance, HVAC maintenance and janitorial service.

(v) Costs of repairs and general maintenance (excluding repairs and general maintenance paid by proceeds of insurance or by Tenant or other third parties, and alterations attributable solely to tenants of the Building other than Tenant).

(vi) Amortization of the cost of installation of capital investment items which are installed for the purpose of reducing operating expenses or which may be required by governmental authority. All such costs which relate to the installation of capital investment items required by governmental authority shall be amortized over the reasonable life of the capital investment item, with the reasonable life and amortization schedule being determined in accordance with generally accepted accounting principles and in no event to extend beyond the reasonable life of the Building.

(vii) The cost of all insurance relating to the Building, including, but not limited to, the cost of casualty, rental abatement and liability insurance applicable to the Building and Landlord's personal property used in connection therewith.

(f) "Taxes:" The taxes and assessments, special or otherwise and sewer charges, if any, including expenses incurred in connection with disputing or contesting the amount thereof levied, or assessed for the year in question, whether the Base Year or Comparison Term, or a partial year, upon or with respect to the Building and the Land upon which it is located, by federal, state, or local government. Should any governmental authority having jurisdiction impose a tax and/or assessment (other than an income or franchise tax) upon or against the rentals payable hereunder or on the privilege of renting, leasing, or letting real property, either by way of substitution for the taxes and assessment levied or assessed against such land and such buildings, or in addition thereto, such tax and/or assessments shall be deemed to constitute a tax and/or assessment against such land and improvements for the purposes of this paragraph 4(f).

5. *Rent adjustment.* The Annual Base Rent shall be adjusted for each Comparison Term by Tenant's share of the increase in the amount of Operating Expenses for the Comparison Term over those for the Base Year. The Annual Base Rent shall also be adjusted for each Comparison Term by Tenant's share of the increase in the amount of taxes for the Comparison Term over those for the Base Year. In no event shall the adjusted annual rent be less than the amount stipulated in Paragraph 3. The adjustment to the Annual Base Rent for each Comparison Term shall be paid by Tenant to Landlord in one lump sum within ten (10) days of the presentation to Tenant of statement reflecting such adjustment. The adjustment shall be made and billed annually or, at the option of the Landlord, semiannually.

Landlord shall keep and make available to Tenant for a period of sixty (60) days after statements for Rent Adjustment payments are rendered to Tenant, records in reasonable detail of Taxes and Operating Expenses for the period covered by such Rent Adjustment statement or statements, and shall permit Tenant and the representatives of Tenant to examine such statements at any reasonable time during business hours. If Tenant disputes any item included by Landlord in determining Taxes or Operating Expenses for the Base Year or any Comparison Term, and such dispute is not amicably settled between Landlord and Tenant within thirty (30) days after any statement for adjusted Annual Rent has been rendered or after the date for settling the Adjusted Rent payable for any Comparison Term, either Landlord or Tenant may, during the twenty (20) days next following the expiration of the thirty (30) day period, notify the other of its election to arbitrate the dispute and may then refer such disputed item or items to a reputable firm of certified public

accountants selected by Landlord for decision, and the decision of such firm shall be conclusive and binding upon Landlord and Tenant. The expense involved in such determination shall be borne by the party against whom a decision is rendered by the accountants; provided that, if more than one item is disputed and the decision is against each party in respect to any item or number of items so disputed, then the expenses shall be apportioned according to the dollar amount of the items decided against each party. Pending a decision, Tenant shall pay on the basis of Adjusted Annual Rent subject to a proper adjustment upon rendition of the decision. If Tenant does not dispute any item or items of any such statement within thirty (30) days after such statement has been rendered, Tenant shall be deemed to have approved such statement.

6. *Payment of rental.* Tenant shall pay all Rental when due and payable, without any setoff, deduction or prior demand therefor whatsoever. Any Rental, or other sum due Landlord under the terms of this Lease, not paid when due shall bear interest from the original due date at the rate of not less than _____% per annum until paid.

7. *Security deposit.* Concurrently with the execution of this Lease, Tenant shall deposit with Landlord the sum of \$_____ as security for the punctual performance by Tenant of each and every obligation of Tenant under this Lease. In the event of any default by Tenant, in addition to and without prejudice to any other rights and remedies available to Landlord, Landlord may apply or retain all or any part of such security to cure the default or to reimburse Landlord for any sum which Landlord may spend by reason of the default. In the case of every such application or retention, Tenant shall, on demand, pay to Landlord the sum applied or retained which shall be added to the security deposit so that the same shall be restored to its original amount. If, at the end of the lease term, Tenant is not in default under this Lease, but not otherwise, the security deposit, or any balance thereof, shall be returned to Tenant, without interest. It is expressly understood and agreed that the within security deposit is not an advance payment of or on account of the rent herein reserved or any part or installment thereof or a measure of Landlord's damages.

8. *Building services.* Provided that Tenant is not in default under any of the covenants and agreements of this Lease, Landlord shall furnish Tenant the following services:

(a) individually controlled heat and air conditioning necessary to maintain the Premises at comfortable temperatures on such working days and hours as are reasonably consistent with Tenant's intended use and occupancy;

(b) janitorial and cleaning services, including such services to the common washrooms and common areas (such janitorial and cleaning services shall be furnished not more than five (5) days per week);

(c) window washing service on the exterior of windows as reasonably required but not in excess of once per year;

(d) parking spaces for the use, in common, with the other tenants of the Building, and their employees and invitees. The use of such parking spaces shall be gratuitous and Tenant agrees not to unreasonably interfere with the use thereof;

(e) snow removal service for the aforementioned parking lot area and for all approaches thereto;

(f) during business hours, reasonable illumination for all parking areas and footways appurtenant to the Building in which the Demised Premises is situated;

(g) a directory in the lobby of the Building which will list Tenant in the same, and a sign at the door to the Demised Premises, which will identify the suite number and the identity of the Tenant (the signs shall be of uniform appearance and design throughout the Building, as determined by Landlord);

(h) all keys needed by Tenant for entry to the Demised Premises. Tenant will not permit any duplicate keys to be made, and will not permit additional locks to be put on the Demised Premises, without the consent of the Landlord. All such

keys should remain the property of the Landlord, and, upon termination of this Lease, Tenant will surrender to Landlord all of the aforementioned keys;

(i) property management and maintenance service for the building;

(j) Landlord shall provide gas and water consumed by Tenant. Electricity for illumination, office and medical equipment, together with all light bulbs and ballasts requested by the Tenant, shall be Tenant's responsibility.

Landlord, while not warranting that any of the Building services stipulated in this Paragraph 8 shall be free from interruptions or suspensions caused by repairs, renewals, improvements, alterations, strikes, lockouts, accidents, inability of Landlord to procure such service, or to obtain fuel or supplies or for other cause or causes beyond Landlord's reasonable control, shall nevertheless diligently attempt to make such repairs or renewals to Building distribution lines and facilities as may be required to restore any such service so interrupted or suspended. An interruption or suspension of, or fluctuation in, any Building service (resulting from any such cause or causes) shall never be deemed a constructive eviction or evictions or disturbance of Tenant's use and possession of the Premises or any part thereof, nor render Landlord liable to Tenant for damages to person(s) or property, nor relieve Tenant from performance of Tenant's covenants and agreements hereunder.

9. Rights reserved by landlord. In addition to all remedies which are allowed to the Landlord by law and equity and without limitation on any of them, Landlord reserves the following rights:

(a) to designate all sources furnishing sign painting, lettering, coffee service, vending machines of all types, towel or toilet supplies, or other similar services required in the Premises;

(b) to enter during the last ninety (90) days of the term for the purpose of altering, remodeling, repairing, renovating, or otherwise preparing the Premises for retenanting, using reasonable means not to disturb Tenant's use of the Premises;

(c) to enter the Premises at all reasonable times (i) for the making of such inspections, repairs, alterations, improvements or additions of or to the Premises or the Building as Landlord, in its sole discretion, may deem necessary or desirable; (ii) to exhibit the Premises to others during the last six (6) months of the term hereunder; and (iii) for any purpose whatsoever, related to the safety, protection, preservation or improvement of the Premises or of the Building or of Landlord's interest;

(d) At any time or times, Landlord, either voluntarily or pursuant to governmental requirements, may at Landlord's expense, make repairs, alterations or improvements in or to the Building or any part thereof, and during such times may temporarily close entrances, doors, corridors, elevators or other public facilities;

(e) to charge Tenant any expense (including overtime, or premium costs incurred by Landlord) resulting from repairs, alterations, decorating or other work performed in the Premises or the Building at Tenant's request made at other than business hours;

(f) from and after the commencement date of this Lease and throughout the term of this Lease and any extension thereof, to require the Tenant to protect, indemnify and save harmless the Landlord from and against any and all liability to third parties incurred by any act or neglect of Tenant, or any of its agents, servants or employees, in, on or about the Demised Premises; and Tenant at all times shall, at its own cost, protect the Landlord with public liability insurance and property damage insurance in a responsible insurance company or companies authorized to do business in the State of _____ in the amount no less than \$_____ for injury to one person and no less than \$_____ for injury to two or more persons and \$_____ for damages to property, provided that Tenant shall carry such greater limits of coverage as Landlord may reasonably request from time to time. Landlord shall be named as an additional insured under such policy for the Premises. The Tenant shall within

ten (10) days of the commencement date of this Lease, or as soon thereafter as made available by the insurance company, deposit with the Landlord a copy of all such policies or certificates showing such insurance to be then in force.

(g) require Tenant, at its own expense but subject to its right to contest the validity thereof, promptly to comply with the requirements of every applicable statute, law, ordinance, fire regulation, and with every applicable lawful regulation and order with respect to the condition and maintenance of the Demised premises to the extent that Tenant is obligated to repair and maintain the same and with respect to Tenant's use or occupation of the Demised Premises.

The rights granted to Landlord pursuant to this paragraph shall not require Landlord to make any repairs to the Demised Premises other than those herein specifically agreed to be made by Landlord nor otherwise extend any of Landlord's other obligations. Landlord may exercise all or any of the forgoing rights hereby reserved without being deemed guilty of an eviction or a constructive eviction or disturbance of Tenant's use and possession, without being liable in any manner to Tenant, and without elimination or abatement of rent, or payment of other compensation, and such acts shall in no way affect the Lease.

10. *Casualty insurance.* Landlord shall maintain standard fire and extended coverage insurance on the Building (excluding leasehold improvements) and on all Building standard leasehold improvements. Such insurance shall be maintained with an insurance company authorized to do business in the State of _____, in amounts desired by Landlord and at the expense of Landlord (but with the same to be included in the operating expenses of the Building as described herein) and payments for losses thereunder shall be made solely to Landlord. Tenant shall maintain at its expense standard fire and extended coverage insurance on all of its personal property, including removable trade fixtures, located in the leased premises and on its non-Building standard leasehold improvements and all other additions and improvements (including fixtures) made by Tenant and not required to be insured by Landlord above. If the annual premiums to be paid by Landlord shall exceed the standard rates because of Tenant's operations within or contents of the leased premises, Tenant shall promptly pay the excess amount of the premium upon request by Landlord (and, if necessary, Landlord may allocate the insurance costs of the Building to give effect to this sentence).

Anything in this Lease to the contrary notwithstanding, Landlord and Tenant each hereby waives any and all rights of recovery, claim, action or cause of action, against the other, its agents, servants, partners, shareholder, officers, or employees, for any loss or damage that may occur to the leased premises or the Building, or any improvements thereto, or any personal property of such party therein, by reason of fire, the elements, or any other cause which could be insured against under the terms of the standard fire and extended coverage insurance policies referred to herein regardless of cause or origin, including negligence of the other party hereto, its agents, officers, partners, shareholders, servants, or employees, and covenants that no insurer shall hold any right of subrogation against such other party. Tenant shall not knowingly permit any article to be brought upon, or any act to be done upon or about, the Demised Premises that shall cause the cancellation of any policy of insurance thereon or cause an increase in the rate of premium of any such insurance.

11. *Possession.* Landlord, at its own expense, shall construct that portion of the Premises pursuant to Landlord's "Work Letter" signed on behalf of Landlord and Tenant, and such changes thereto as shall be necessary and appropriate. All other construction or installations necessary to complete the Premises, and not shown as Landlord's work on the Work Letter shall be the sole obligation of Tenant and shall be performed at Tenant's expense. All plans and specifications for Tenant's work shall be approved by Landlord prior to Tenant's construction. Installation of any equipment (having substantial weight) shall be approved by Landlord, before mounting on walls, ceiling or floor.

Tenant shall indemnify and hold harmless Landlord from and against all costs (including attorneys fees and costs of suit), losses, liabilities, or causes of action arising out of or relating to any alterations, additions or improvements made by Tenant to the leased premises, including but not limited to any mechanics' or materialmen's liens asserted in connection therewith.

Should any mechanic's or other liens be filed against any portion of the Building by reason of Tenant's acts or omissions or because of a claim against Tenant, Tenant shall cause the same to be canceled or discharged of record by bond or otherwise within ten (10) days after notice by Landlord. If Tenant fails to cancel or discharge the lien or liens within such ten-day period, Landlord may, at its sole option, cancel or discharge the same and upon Landlord's demand, Tenant shall promptly reimburse Landlord for all costs incurred in canceling or discharging such liens.

The taking of possession of the Premises by the Tenant shall be conclusive evidence of Tenant's acceptance thereof and approval of all construction.

Nothing contained in this Lease shall be deemed or construed in any way as constituting the consent or request of Landlord, express or implied, by inference or otherwise, to any contractor, subcontractor, laborer, or materialman for the performance of any labor or the furnishing of any materials for any specific improvement, alteration to or repair of the Demised Premises or any part hereof, and the personal property hereby leased, nor as giving Tenant any right, power or authority to contract for or permit the rendering of any services or furnishing of any materials that would give rise to the filing of any lien against the Premises or the Building, or against any personal property leased.

Landlord shall complete the Premises with reasonable diligence subject to delays caused by reason of fire, tornado, or other casualty, adverse or unfavorable weather conditions or other Acts of God, or any strike, lockout, insurrection, war embargo, any governmental requirement now existing or later imposed or by reason of any cause beyond Landlord's reasonable control.

In the event Landlord is unable to deliver possession of the Premises to Tenant on any specified date or the date of the commencement of the term as a result of any delay in commencing construction or completing construction of the Premises or for a total failure to complete the Premises, or because of the holding over of any Tenant or Tenants, or for any other cause as hereinbefore stated, the rent reserved shall not commence until the date that possession of the Premises is available to Tenant. Tenant agrees to accept such allowances and abatement of rent as liquidated damage, in full satisfaction for the failure of Landlord so to deliver possession on the date of commencement, and to the exclusion of all claims and rights which Tenant otherwise may have by reason of delivery of possession not being made on such date or any time thereafter and no failure to so deliver possession shall in any event extend, or be deemed to extend, the term of this Lease.

12. Loss or damage to property. All personal property belonging to Tenant or to any other person located in or about the Premises or the Building shall be there at the sole risk of Tenant or such other person, and neither Landlord nor Landlord's agents or employees shall be liable for the theft or misappropriation thereof, nor for any damage or injury thereto, nor for death or injury of Tenant or any other persons or damage to property caused by but not limited to the following: water, snow, frost, steam, heat, cold, dampness, falling plaster, explosions, sewers or sewerage, gas, odors, noise, the bursting or leaking of pipes, plumbing, electrical wiring and equipment and fixtures of all kinds or by any act or neglect of other tenants or occupants of the Building, or of any other person, or caused in any other manner whatsoever. Tenant shall protect, indemnify and save harmless, Landlord, from all losses, costs, including attorney fees, or damages sustained by reason of any act or other occurrence or failure to act causing death or injury to any person or damage to property whosoever or whatsoever due directly or indirectly to the use or occupancy of the Premises or any part thereof by Tenant, or due directly or indirectly to any breach or default on the part of Tenant in the performance of any covenant or agreement, on the part of Tenant to be performed.

Tenant covenants, upon notice from Landlord, to resist or defend, at Tenant's expense, such action or proceeding by counsel reasonably satisfactory to Landlord.

Landlord shall not be liable to anyone for cessation of any of the services that Landlord is required to provide under this Lease, including but not limited to public utility services and air conditioning, due to inability to obtain fuel, electricity,

service or supplies from the sources from which they are usually obtained, due to failures in the equipment used to provide such services, or for any other reason beyond the control of the Landlord. Any such interruption of any of the above services shall never be deemed an eviction or disturbance of the Tenant's use of the Demised Premises or any part thereof, or render the Landlord liable to the Tenant for damages, or relieve the Tenant from performance of the Tenant's obligations under this Lease. Landlord, however, shall promptly take the necessary steps to terminate such interruptions as expeditiously as possible under the circumstances.

13. *Holding over.* Should Tenant withhold possession of the Premises after the termination of this Lease, whether by expiration of the terms of the demise or otherwise, the damages for which Tenant shall be liable to the Landlord for such detention, shall be and hereby are liquidated at a sum equal to double the rental stipulated herein for a period equal to the period of such detention, together with any Adjusted Rent due for such detention period. Should Tenant occupy the Premises after the termination of this Lease for any cause whatsoever, Tenant shall be considered a tenant at will and by sufferance of Landlord and no such occupancy shall operate as a renewal of the Lease or any part thereof.

14. *Renewal term.* Tenant may, at its option, renew the term of this Lease for one (1) renewal term of five (5) years. The term of the renewal period shall commence immediately upon the conclusion of the original term of this Lease. The option to renew may be exercised only by written notice in the manner provided in Section 21 hereof no later than one (1) year prior to the expiration date of the original term of this Lease. This shall be the exclusive and only method of exercising the renewal option and any other method shall not constitute an exercise thereof. The renewal term, granted pursuant to such option to renew, shall be on the same terms and conditions as are to be in effect during the original term of this Lease, except that the Base Rent shall be in an amount to be agreed upon by Landlord and Tenant, and Tenant shall have no further option to renew this Lease beyond the expiration of the renewal period created by this Section. If an agreement on the amount of the Base Rent to be paid during the renewal period has not been reached and evidenced by an appropriate amendment to this Lease within six (6) months prior to the expiration of the original term of this Lease, then notwithstanding anything to the contrary contained herein, the foregoing option to renew shall lapse and be void and this Lease shall expire no later than the expiration date of the original term hereof.

If (i) Tenant fails to exercise the renewal option during the period in which it is available and in the manner required hereby, or (ii) if this Lease is no longer in full force and effect for any reason, or (iii) if Tenant is in default under this Lease, at the time of such exercise, or (iv) if Tenant and Landlord are unable to agree upon the amount of the Base Rent for such renewal period no later than six (6) months prior to the expiration of the original term of this Lease and evidence such agreement as hereinbefore provided, the renewal option shall terminate, be void and of no further force or effect.

Unless otherwise herein expressly provided, any reference in this Lease to the "term of this Lease" shall mean the original term hereof and the renewal period, if exercised by Tenant pursuant to its option to renew set forth in this Section, except to the extent that the original term or renewal period may be sooner terminated or canceled under any provisions of this Lease.

15. *Assignment or sublease by tenant.* Tenant shall not mortgage, pledge, encumber, assign or in any manner transfer this Lease, in whole or in part, nor sublet all or any part of the Premises without, in each instance, first obtaining the written consent of Landlord. The within prohibition against transfer without the Landlord's prior written consent includes any subletting or assignment which would otherwise occur by operation of law, merger, consolidation, reorganization, transfer or other change of Tenant's corporate or proprietary structure, or an assignment, subletting to or by a receiver or trustee in any federal or state bankruptcy, insolvency, or other proceedings. Any attempted assignment or sublease by Tenant in violation of the terms and covenants of this Section shall be void. The consent by Landlord to any assignment, subletting or other transfer above described shall not constitute a waiver of the requirement for such consent to any subsequent assignment, subletting or other transfer. It shall be a condition to any consent by Landlord that Tenant shall reimburse Landlord for any and all cost and expense, including, but not limited to, reasonable attorneys' fees for the review and preparation of documents, which may be incurred by Landlord in connection with any

of the foregoing, which sum shall be deemed additional rental due and payable in accordance with the terms of this Lease. Any assignment, subletting or other transfer, even with the consent of Landlord, shall not relieve Tenant from primary liability for the payment of Rental or from the primary obligation to keep and be bound by the terms, conditions and covenants of this Lease. Should Tenant assign, sublet or otherwise dispose of the Premises, whether with or without Landlord's consent, any and all sums payable by virtue of such assignment, sublease or other demise shall be due and payable solely to Landlord. Tenant hereby appoints Landlord as its attorney-in-fact to bill and collect any and all such sums for the use and benefit of Landlord without liability or accountability whatsoever to Tenant.

16. *Alterations personal property.* Tenant shall make no alterations in, or additions or improvement to, the Demised Premises without the written consent of Landlord first had and obtained, which consent will not be unreasonably withheld. In making any alterations, Tenant shall comply with the accessibility guidelines of the Americans with Disabilities Act of 1990, and the rules and regulations issues thereunder. Any addition, alterations or improvements made by Tenant shall become and remain a part of the Premises, and be and remain the property of Landlord upon the termination of this Lease or Tenant's occupancy of the Premises; notwithstanding the above, the Landlord may, by giving written notice to the Tenant, require Tenant to restore the Premises to the same condition they were in at the commencement of this Lease. Tenant shall indemnify and save harmless Landlord from and against all expenses, liens, claims or damages to either property or person which may or might arise by reason of such repairs, alterations, improvements or additions.

17. *Use and repair of premises by tenant.* Throughout the term of this Lease, Tenant will keep and maintain the interior of the Premises in a good state of repair, ordinary wear and tear and damage by the elements or by Acts of God only excepted. Landlord shall make the required repairs and maintenance for which the Tenant is responsible with material of the same quality as that originally used, and Tenant agrees to reimburse the Landlord for the expense incurred by the Landlord in connection therewith. Tenant will be liable for replacement of all broken glass of the same size and quality as that broken through the negligence of Tenant, its agents, guests or invitees, and will keep the entire Premises in a clean, safe and healthy condition according to the city ordinances and the direction of the proper public officers. Tenant further agrees to deliver up and surrender to Landlord possession of the Premises upon the expiration of this Lease in as good condition as when taken, ordinary wear and tear and damage from the above specified causes excepted.

18. *Untenantability.* In the event the Premises, or any part thereof, shall be destroyed or damaged, and such destruction or damage may be reasonably repaired within one hundred twenty (120) days from the happening of such destruction or damage, Tenant shall not be entitled to surrender possession of the Premises, or any part thereof, nor shall Tenant's liability to pay rent under this Lease cease; but in case of any such destruction or damage, Landlord shall repair the same with all reasonable speed and shall complete such repairs within one hundred twenty (120) days from the happening of such destruction or damage, subject to delays beyond Landlord's reasonable control. If Tenant shall thereby be deprived of the occupancy of any part of the Premises, a proportionate allowance shall be made to Tenant from the rent, corresponding to the time during which and to the part of the Premises of which Tenant shall be so deprived on account of such destruction or injury of or the making of such repairs. In the event that any destruction or damage cannot reasonably be repaired within one hundred twenty (120) days from the happening of such destruction or damage, either Landlord or Tenant shall have the right to terminate this Lease by giving written notice within thirty (30) days from the happening of such destruction or damage.

19. *Lien for rent.* In consideration of the mutual benefits arising under this Lease, Tenant hereby grants to Landlord a lien and security interest on all property of Tenant now or hereafter placed in or upon the leased Premises, and such property shall be and remain subject to such lien and security interest of Landlord for payment of all rent and other sums agreed to be paid by Tenant herein. The provisions of this Section relating to such lien and security interest shall constitute a security agreement under the Uniform Commercial Code (UCC) so that Landlord shall have and may enforce a security interest on all property of Tenant now or hereafter placed in or on the leased Premises, including but not limited to all fixtures, machinery, equipment, furnishings and other articles of personal property now or hereafter placed in or upon the leased Premises by Tenant. Tenant agrees to execute as debtor such financing statement or

statements as Landlord may now or hereafter reasonably request in order that such security interest or interests may be protected pursuant to the UCC. Landlord may, at its election, at any time, file a copy of this lease as a financing statement. Landlord, as secured party, shall be entitled to all of the rights and remedies afforded a secured party under the UCC in addition to and cumulative of the Landlord's liens and rights provided by law or by the other terms and provisions of this Lease. Notwithstanding the foregoing, Landlord hereby agrees to subordinate its liens herein retained to any lien securing bona fide financing of Tenant's movable personal property placed in the leased Premises or the construction of Tenant's initial non-Building standard leasehold improvements to the leased Premises.

20. *Infectious waste.* Notwithstanding anything to the contrary contained in the Lease, Tenant, rather than Landlord, shall be responsible and shall pay for all costs of segregating, packaging, treating, transporting and disposing of all Infectious Waste generated by Tenant at or from the Building. All Infectious Waste shall be identified, segregated, measured, stored and disposed of by Tenant in a manner that complies with all federal state and local laws or regulations applicable to Infectious Waste. None of the common areas may be used by Tenant for the storage or disposal of Infectious Waste.

As used herein, the term "Infectious Waste" means any infectious waste as defined in the infectious waste regulations of the State of _____, including without limitation Section _____ of the _____ Code of the State of _____, as amended from time to time. Tenant hereby agrees that it shall be fully liable for all costs and expenses related to the use, storage and disposal of Infectious Waste generated from the Premises by Tenant.

21. *Remedies of landlord.* All rights and remedies of Landlord herein set forth are in addition to any and all rights and remedies allowed by law and equity.

(a) This Lease is made upon the condition that Tenant shall punctually perform all of its covenants and agreements as herein set forth and if:

(i) Tenant defaults in payment of rent, or additional rent, or any additional charge or amount of money, to be paid by Tenant as provided in this Lease, and such default shall continue uncorrected for a period of ten (10) days after written notice to the Tenant thereof; or

(ii) Tenant defaults in the prompt and full performance and observance of any of the terms and conditions of this Lease to be performed or observed by Tenant or the Code of Regulations and not relating to the payment of money, and any such default shall continue uncorrected for a period of thirty (30) days after written notice to the Tenant thereof, or if any such last mentioned default cannot be reasonably corrected within such thirty (30) day period, then if Tenant shall not within such period have commenced in good faith to correct such default; or

(iii) Tenant abandons the Premises; or

(iv) Any execution, attachment or other order of court shall be issued upon or against the interest of Tenant in this Lease and shall continue for a period of thirty (30) days after notice, then in any such event, in addition to any and all rights and remedies allowed by law and equity, Landlord may, with or without further notice, forthwith, terminate this Lease and Tenant's right to possession of the Premises, or Landlord may, without terminating this Lease, terminate Tenant's right to possession of the Premises; or

(v) If any voluntary or involuntary petition or similar pleading under any act of Congress relating to bankruptcy shall be filed by or against Tenant, or if any voluntary or involuntary proceedings in any court or tribunal shall be instituted by or against Tenant to declare Tenant insolvent or unable to pay Tenant's debts, then in any such event Landlord may if Landlord so elects, with or without notice of such election and with or without entry or other action by Landlord, forthwith terminate this Lease and Tenant's right to possession of the Premises, and notwithstanding any other provision

hereof, Landlord shall forthwith upon such termination be entitled to recover damages in an amount equal to the then present value of the rent reserved in this Lease for the entire residue of the stated term hereof.

In addition to, but without limitation or qualification of, any other right or remedy of the Landlord, herein provided, if the Tenant defaults in the performance of any covenant, condition or stipulation contained in this Lease, the Landlord may, after thirty (30) days written notice to the Tenant, or without notice if in the Landlord's reasonable opinion an emergency exists, perform the same for the account and at the expense of the Tenant, and the amount of any payments made or other expenses incurred by the Landlord for such purpose shall be forthwith repaid by the Tenant with interest thereon at the highest per annum rate allowed by law. Should the Tenant, pursuant to this paragraph, or any other provision of this Lease, become obligated to reimburse or otherwise pay Landlord any one or more sums of money in addition to the fixed rent, the amount thereof shall be deemed additional rent and may, at the option of Landlord, be added to any subsequent installment of the fixed rent due and payable under the Lease, in which event the Landlord shall have the remedies for default in termination of this Lease. The provisions of this paragraph shall survive the termination of this Lease. Nothing in the paragraph shall in any manner increase Landlord's liability to Tenant or to any others. The rights granted to Landlord under this paragraph shall be permissive only and shall not be construed as requiring Landlord to perform any such condition of covenant or to correct any such default.

(b) Upon the termination of this Lease, or upon the termination of Tenant's right to possession without termination of this Lease:

(i) Tenant shall surrender possession and vacate the Premises immediately, and Landlord may enter into and repossess the Premises without or with process of law, and remove all persons and property therefrom in the same manner and with the same right as if this Lease had not been made, and for the purpose of such entry and repossession Tenant waives any notice provided by law or otherwise to be given in connection therewith; and

(ii) Landlord may remove from the Premises any and all property found therein and such repossession shall not release Tenant from Tenant's obligation to pay the rents herein provided.

(c) In the event of termination of this Lease as provided in this paragraph, Landlord, in addition to any and all rights and remedies allowed by law and equity, upon termination, shall be entitled to recover damages in the amount equal to the then present value of the rent reserved in this Lease for the entire residue of the stated term hereof.

(d) Any and all property which may be removed from the Premises by Landlord may be handled, removed, stored or otherwise disposed of by Landlord at the risk and expense of Tenant, and Landlord shall in no event be responsible for the preservation or the safekeeping thereof. Tenant shall pay to Landlord, upon demand, any and all expenses incurred in such removal and all storage charges against such property, so long as the same shall be in Landlord's possession or under Landlord's control. If any property shall remain in the Premises or in the possession of Landlord, and shall not be retaken by Tenant within a period of ten (10) days from and after the time when the Premises are either abandoned by Tenant or repossessed by Landlord under the terms of this Lease, such property shall be deemed conclusively to have been forever abandoned by Tenant.

The parties hereto shall and they hereby do waive trial by jury in any action, proceeding or counterclaim brought by either of the parties hereto against the other on any matters whatsoever arising out of or in any way connected with this Lease, the relationship of Landlord and Tenant, Tenant's use or occupancy of the Premises, and/or any claim of injury or damage. In the event Landlord commences any proceedings for nonpayment of Rental or for recovering of possession of the Premises, Tenant will not interpose any counterclaim of whatever nature or description in any such proceeding. This shall not, however, be construed as a waiver of the Tenant's right to assert such claims in any separate action or actions brought by Tenant.

22. *Subordination.* The Tenant understands that Landlord may have or hereafter desire to place a mortgage upon the

land described herein and the Building constructed thereon. It is further understood that the mortgagee may require that the within Lease be subordinated to such mortgage, in which event, Tenant agrees to execute any document required by such mortgagee to evidence such subordination; provided however, that the mortgagee of any such mortgage shall covenant that the Tenant's leasehold interest hereunder shall not be foreclosed in any action brought under such mortgage if at the time of bringing of any action to foreclose, the Tenant is not in default in the payment of Rental or in the performance of any other obligation under this Lease, with due allowance to be given for the payment of any past due Rental or for the correction of any other default by Tenant within the period of any notice given or required to be given by the terms hereof. It is further understood that the mortgagee of such mortgage may instead require that the Tenant agree to attorn to any purchaser of the property in the event that the same should be sold through foreclosure proceedings, and that the Tenant agrees to waive any and all rights to treat any such foreclosure proceedings as a breach of the Lease by Landlord, in which event Tenant agrees to execute any document required by such mortgagee to evidence such agreements.

23. *Notices.* Whenever Landlord shall make any demand or serve any notice which is required to be in writing under the terms of this Lease upon Tenant, the same shall be in writing and shall be sufficiently given if sent, postage prepaid, by United States registered or certified mail, addressed to Tenant at the address as set forth herein, or at such other address as Tenant may theretofore by written notice to Landlord have designated for the service of such notice. Notice shall be sufficiently given or served by Tenant upon Landlord if sent, postage prepaid, by United States registered or certified mail, addressed to Landlord at _____ Avenue, City of _____, State of _____, or at such other address as Landlord may theretofore by written notice to Tenant have designated for the service of such notice.

24. *Common areas.* Tenant and Tenant's agents, employees, licensees, and invitees shall have the right to use, in common with Landlord and Landlord's tenants and the agents, employees, licensees, and invitees of each, of the public sidewalks, entrances, lobbies, vestibules, stairways, corridors, passenger and freight elevators, public toilets and other public areas of the Building, subject, however, to applicable Building rules, regulations and security measures. Tenant and Tenant's agents, employees, licensees and invitees shall not obstruct or litter, or use for storage (temporary or otherwise) or for the display of merchandise or services or for any purpose other than the intended and normal purpose, any of the public sidewalks, entrances, lobbies, vestibules, stairways, corridors, passenger and freight elevators, public toilets and other public areas of the Building, and no floor mats or runners shall be placed by Tenant in any Building corridor, lobby or vestibule.

25. *Eminent domain.* Tenant agrees with Landlord that if the whole or any part of the Premises is appropriated, condemned, taken or otherwise acquired by any public or quasi-public authority under the power of eminent domain, condemnation or other proceedings, this Lease and the estate hereby created shall terminate and wholly expire on the date title shall vest in the acquiring authority, and all rent shall be prorated and adjusted as of that date. In no event whatsoever shall Tenant have any claim against Landlord by reason of any appropriation, condemnation or taking of the whole or any part of the Premises or of the Building, nor shall Tenant have any claim to the amount, or any portion thereof, that may be awarded as damages or paid as a result of such appropriation and taking. Tenant hereby assigns to Landlord all of Tenant's right, title and interest in and to any and all amounts awarded or paid by reason of such appropriation, condemnation and taking; provided however, that none of the foregoing is meant to deprive the Tenant from claiming moving expenses, displacement expenses or the like solely from the acquiring authority.

26. *No waiver.* Any demand for rent upon the Tenant after the same shall have become due and payable, or for the performance or observation of any covenant or condition of this Lease after the same is required to be performed or observed under the provisions hereof, shall have the same effect as though made at the time and place such rent became due or such obligation should have been performed or observed, any law to the contrary notwithstanding.

(a) The receipt of money by Landlord from Tenant with knowledge of the breach of any covenants of this Lease, or after the termination hereof, or after the service of any notice or after the commencement of such suit, or after final

judgment for possession of the Premises shall not be deemed a waiver of such breach, nor shall it reinstate, continue, or extend the term of this Lease or affect any such notice, demand or suit.

(b) No delay on the part of Landlord in exercising any right, power or privilege hereunder shall operate as a waiver thereof, nor shall any single or partial exercise of any right, power or privilege preclude any other, or further, exercise thereof or the exercise of any other right, power or privilege.

(c) No act done or thing said by Landlord or Landlord's agents or employees shall constitute a cancellation, termination or modification of this Lease, or a waiver of any covenant, agreement or condition hereof, nor relieve Tenant from Tenant's obligation to pay the rents reserved or other charges to be paid hereunder, or the acts required to be done herein. Any waiver or release by Landlord and any cancellation, termination or modification of this Lease must be in writing signed by Landlord.

27. Limitation of landlord's personal liability. Tenant specifically agrees to look solely to Landlord's interest in the Building and the Land for the recovery of any judgment against Landlord, it being agreed that Landlord (and its partners and shareholders) shall never be personally liable for any such judgment. The provision contained in the foregoing sentence is not intended to, and shall not, limit any right that Tenant might otherwise have to obtain injunctive relief against Landlord or Landlord's successors in interest or any suit or action in connection with enforcement or collection of amounts which may become owing or payable under or on account of insurance maintained by Landlord.

28. Rules and regulations. Tenant and Tenant's agents, employees and invitees shall faithfully observe and strictly comply with the Rules and Regulations appearing at the end of the Lease and made a part hereof, and with such further reasonable Rules and Regulations as Landlord may, after notice to Tenant, from time to time adopt. Nothing contained in this Lease shall be construed to impose upon Landlord any duty or obligation to enforce the Rules and Regulations in any other Lease as against any other Tenant, and Landlord shall not be liable to Tenant for violation of the same by any other Tenant or the agents, employees, licensees or invitees of such other Tenant.

29. Death or disability. The heirs, executors, administrators or personal representatives of a deceased tenant or a tenant who is disabled by illness or injury to the extent that the Tenant cannot reasonably conduct his business as defined in Paragraph 2 of this Lease for a period of one hundred eighty (180) consecutive days, shall have the right for a period of one hundred eighty (180) days following his death, or the termination of the one hundred eighty (180) day period in the event of disability, to assign the Tenant's rights in this Lease in connection with a bona fide sale of the Tenant's business to another tenant who will occupy the Premises for the business purpose as stated herein and for no other purpose; provided, however, that such assignment shall be valid only if written consent thereto shall first be obtained from Landlord and any cotenant of Tenant, which consent Landlord and the cotenant, if any, agree not to unreasonably withhold, and provided further, that the assignee of Tenant's rights shall, in writing satisfactory to the Landlord, assume and agree to pay and perform all of the rent, terms and provisions of this Lease. During the one hundred eighty (180) day period, the Tenant or the estate of the Tenant shall continue to be obligated for and to pay the Rental due hereunder from Tenant.

If no such bona fide sale of Tenant's business and assignment of Tenant's interests in this Lease takes place during the one hundred eighty (180) day period described, then all rights and obligations of Tenant and his estate in and to this Lease shall terminate on the one hundred eightieth (180th) day following his death or the termination of the one hundred eighty (180) day period in the event of disability.

30. Entire agreement. This Lease contains the entire agreement between the parties hereto and shall not be modified in any manner except by an instrument in writing executed by the parties or their respective successors in interest. If more than one person or entity or a combination thereof comprise "Tenant," their liability hereunder shall be joint and several. Landlord has made no representations or warranties with respect to the Premises, except as herein expressly set forth.

31. *Paragraph headings.* The paragraph headings appearing in this Lease are inserted only as a matter of convenience and for reference purposes, and in no way define, limit or describe the scope and intent of this Lease, or any paragraph hereof, nor in any way affect it.

IN WITNESS WHEREOF, Tenant and Landlord have executed triplicate counterparts of this LEASE AGREEMENT as of the day, month and year first above shown.

Signed in the presence of:

LANDLORD:

State of _____

general partnership

By: _____
_____, Partner

(Witnesses as to Landlord)

TENANT:

(Witnesses as to Tenant)



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Current Legal Forms for Real Estate

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Current Legal Forms for Real Estate

Chapter 23 REAL ESTATE LEASES

Part IV. Forms

A. COMPLETE LEASES AND RELATED AGREEMENTS

31-23 Current Legal Forms for Real Estate FORM 23.09

AUTHOR: by Thomas G. Belden

FORM 23.09 Office space lease--building under construction--procedure for tenant work

COMMENT

Although this lease contains special provisions which are specifically applicable to the lease of office space in a building that is under construction, leases generally provide that occupancy of the premises is not to commence until a future date, for a variety of reasons. Thus, the premises may be occupied by an existing tenant who is not required to move until a future date, or the premises may have to be redesigned in order to meet the specific requirements of the new tenant, etc. Accordingly, the comprehensive nature of this lease renders it suitable as a basic model for an office lease which must provide for these common occurrences.

FORM

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XXXV	Memorandum of Lease

THIS INDENTURE OF LEASE is made this _____ day of _____, [date] between Melville Building Company, a New York limited partnership, having its office at 20 Victor Place, New York, New York 10004 ("Landlord"), and Page & Company, Inc., a Delaware corporation duly qualified to do business in the State of New York, and having its principal office at One Trafalgar Plaza, New York, New York 10005 ("Tenant").

Article I Premises; Term

Section 1.01. Landlord leases to Tenant and Tenant hires from Landlord the following space in the building to be constructed substantially in accordance with plans, as modified to this date, on file in Landlord's office and available for

inspection by Tenant, in the Borough of Manhattan, City, County and State of New York, known as Melville Plaza (the "Building"):

The 19th, 20th, 21st, and 22nd Floors,

As set forth in the floor plan annexed hereto as "Exhibit A" (the "Demised Premises").

The Demised Premises are leased together with the appurtenances, including the right to use in common with others the lobby, public entrances, public stairways, public elevators (except elevators specifically assigned for the exclusive use of other tenants of the Building), and other public portions of the Building.

To Have and to Hold the Demised Premises unto Tenant for the term of 16 years. If the Commencement Date (defined in Section 2.01) is not the first day of a month, the term shall include the number of days from the Commencement Date to the last day of the month. The term shall commence on the Commencement Date and end, unless terminated sooner, on the last day of the month which includes the 16th anniversary of the Commencement Date. This Lease shall yield and pay the rents and additional rents set forth below, all on the covenants, conditions, and agreements stated therein. Promptly after the Commencement Date, Landlord and Tenant shall execute an agreement in recordable form (the "Commencement Date Agreement"), stating among other things the commencement and termination dates of this Lease.

Article II Commencement of Term

Section 2.01. *Commencement date.* The term of this Lease and the payment of rent hereunder shall commence on the date the Demised Premises are substantially completed ("Commencement Date"). The Demised Premises or any Occupancy Unit (as defined below) shall be deemed substantially completed when the following are done: Landlord procures either a temporary or permanent Certificate of Occupancy permitting occupancy of the Demised Premises or Occupancy Unit for the purposes provided herein; Landlord substantially performs the work and additional work required of it in Exhibit "B;" Landlord puts in operating condition for Tenant's permitted use under Article IV the Building's service facilities and systems serving the Demised Premises or the Occupancy Unit, including the elevators, air-conditioning, heating, lighting, water supply, and sewage systems; the exterior of the Building is substantially completed and enclosed; the lobby of the Building is substantially completed and reasonably free of debris and construction materials so as to be reasonably usable for egress and ingress; reasonable access is available to the Demised Premises or Occupancy Unit; and Landlord cleans the Demised Premises or Occupancy Unit and otherwise renders them in new and reasonably unblemished condition, excluding anything caused by Tenant, or its agents, servants, contractors, or employees. This work shall include but not be limited to the following:

- (i) Tile floors wet mopped, waxed, and buffed;
 - (ii) Walls and partitions cleaned and all damaged places filled and touched up;
 - (iii) All glass cleaned both sides;
 - (iv) Toilet fixtures cleaned and polished;
 - (v) Trash, dirt, and leftover materials removed from the Demised Premises, excluding anything caused by Tenant.
- "Operating condition," as applicable to air-conditioning and heating, shall include balancing, but Landlord shall only be required, at such time, to balance the system necessary for the then season.

Section 2.02. *Notice of completion.* Landlord shall give Tenant at least 30 days' prior written notice of the anticipated date of substantial completion of the work to be performed in the Demised Premises in Landlord. Tenant may enter the

premises as provided in Exhibit "B," but nothing contained herein shall impose any liability upon Landlord for the care, maintenance, or preservation of Tenant's property. Landlord shall notify Tenant promptly if the substantial completion date is delayed after Landlord gives notice. In that case Landlord shall give Tenant at least five days' prior written notice of the anticipated postponed date of substantial completion. Further postponements shall also require at least five days' prior written notice.

Section 2.03. *Staggered completion.* (a) The parties recognize that the work to be performed by Landlord will be completed in stages. Accordingly, it is the parties' intention that Tenant will take occupancy of various portions of the Demised Premises at different times before the Commencement Date. Tenant shall, on or before [date], give notice to Landlord:

(1) Advising it which floor or floors (but not exceeding three full floors in any Occupancy Unit) of the Demised Premises Tenant desires to occupy at or about the same time as the Commencement Date (collectively, an "Occupancy Unit"), and which full floor or floors Tenant does not desire to occupy before that date; and

(2) Setting forth a practicable sequence for the completion of Landlord's work with respect to the various Occupancy Units. The sequence shall be subject to Landlord's approval, which it shall not unreasonably withhold. Nothing in this subsection shall be deemed to obligate Landlord to complete its work with respect to any one or more Occupancy Units by any fixed date before the Commencement Date.

(b) Tenant may use and occupy each Occupancy Unit on a date (the "Earlier Completion Date") fixed by Landlord in a notice to Tenant. This date shall be at least 30 days after the date of Landlord's notice. Landlord's notice shall state that:

(1) The New York City Department of Buildings has or will have issued a temporary or permanent Certificate (or Certificates) covering the Occupancy Unit; and

(2) Landlord has, or before the Earlier Completion Date fixed in the notice will have, substantially completed Landlord's work with respect to the Occupancy Unit.

Any such use or occupancy shall be deemed to be under all the terms, covenants, and conditions of this Lease, except as provided below in this subsection. Tenant shall pay rent for each Occupancy Unit for the period starting with the Earlier Completion Date for that Unit (or from any earlier date on which Tenant uses or occupies the Occupancy Unit to conduct its business) and ending with the date immediately preceding the Commencement Date. Rent for that period shall be equitably apportioned on the basis of the rentable area of the Occupancy Unit and the rent for the Demised Premises as set forth in Article III, Section 3.01. Rent for each Occupancy Unit shall be payable at the end of each month following the Unit's respective Completion Date (or any earlier date on which Tenant uses or occupies the Occupancy Unit to conduct its business) until the Commencement Date.

Section 2.04. *Possession; substantial completion.* If Tenant takes possession of any Occupancy Unit or of the entire Demised Premises, either fact shall be conclusive evidence, as against Tenant, that, at the time of taking, Landlord substantially completed its work on the Occupancy Unit or the Demised Premises, as the case may be, as required in Exhibit "B." Within 10 business after the Commencement Date, a representative of both parties shall survey the Demised Premises for the purpose of determining which items of Landlord's work remain to be completed, which they shall reduce to an itemized agreed "punch" list. Landlord shall complete these items within a reasonable time thereafter.

Section 2.05. *Site representatives.* Landlord and Tenant will each give full cooperation in having available at the job all persons who are necessary to settle problems arising out of job conditions.

Section 2.06. *Contractor's office, plans.* Landlord or its general contractors shall maintain an office in or near the Building. They shall at all times during the construction of the Building and the finishing of the Demised Premises have

available in the office for Tenant's use a complete set of plans, drawings (including shop drawings), specifications pertaining to the work, and construction schedules. Moreover, they shall furnish to Tenant at its request copies of the plans, drawings, specifications, and construction schedules for the Demised Premises.

Section 2.07. *Tenant-caused delay.* If the occurrence of any condition specified in Section 2.01 is delayed due to any act or omission of Tenant, or of its agents, employees, or contractors, the Demised Premises shall be deemed ready for occupancy on the day they would have been ready but for the delay. For this purpose, a delay shall include:

(a) Delay in submission of Tenant's plans or specifications or giving authorizations or approvals required for the preparations for or execution of Landlord's work;

(b) Delay due to:

(1) Changes made by or on behalf of Tenant in its plans or in Landlord's work;

(2) Postponement by Landlord of any work, either at Tenant's request or because Tenant must perform work on a particular item or items before Landlord does so (and Landlord agrees to give Tenant notice of the delay and all additional costs resulting from it before commencing or postponing the work);

(3) Any other interference by Tenant or its agents, servants, or employees, with Landlord's work in the Demised Premises or the building.

Section 2.08. *Delay expenses.* If Landlord sustains additional costs or damages as a result of any delay by Tenant under this Article, Tenant shall pay to Landlord (in addition to the rent payable as a result of the acceleration of the Commencement Date, as provided above) all reasonable costs and damages sustained by Landlord as a result of the delay.

Section 2.09. *Completion deadline.* If neither the Commencement Date nor any Earlier Completion Date occurs by [date], or an extended date as provided in this Section, Tenant may cancel and terminate this Lease and the Demised Term. It shall do so by giving notice of cancellation and termination within 30 days after [date], or the extended date. Upon giving of notice, this Lease and the Demised Term shall expire and come to an end, and both parties shall be released and discharged of and from all further liability under the Lease. However, Tenant shall remain liable for the cost of any work performed by Landlord at Tenant's request. Time is expressly declared to be of the essence with respect to any such notice of cancellation and termination. Tenant may not give any notice after expiration of the above 30-day period, and any such notice shall have no force or effect. If Tenant fails to give the required timely notice, or if it uses or occupies any part of the Demised Premises to conduct its business, the Demised Term shall commence in accordance with the provisions of Section 2.01, and Tenant shall have no further right under this Section to cancel and terminate this Lease. Landlord may extend the [date] date, set forth in this Section, by a period equal to the total of:

(a) The number of days which have elapsed between the date on which Tenant is required to submit a plan to Landlord under the provisions of Exhibit "B," and the date on which Tenant submits the plan; plus

(b) The number of days of delay (or delays) in substantial completion of Landlord's work due to Tenant's delay (or delays) in submitting any other plans or specifications, in supplying information, in approving plans, specifications, or estimates, or in giving authorizations; by reason of any additional Work, as defined in Exhibit "B," designated by Tenant, or any changes by Tenant in designations previously made by it, under Exhibit "B;" or by reason of any other similar act or omission of Tenant.

Article III Rent

Section 3.01. *Rent payments.* During the term of this Lease, Tenant shall pay to Landlord a fixed annual minimum rent of \$900,000. Rent shall be payable in equal monthly installments, in advance on the first day of each month during this Lease term, at Landlord's office or any other place designated by it, without any set-off or deduction. Tenant shall pay the rent and all other payments deemed under this Lease to be additional rent by check drawn on any bank which is a member of the New York Clearing House. The check shall be payable in lawful money of the United States which, at the time of payment, is legal tender for the payment of public and private debts (Landlord to accept the check subject to collection). If the Commencement Date is not the first day of a calendar month, Tenant shall pay to Landlord, on the Commencement Date, a fraction of the equal monthly installment, the numerator of which is the number of days from the Commencement Date to the end of the calendar month in which that date occurs, and the denominator of which is the total number of days in the calendar month. This payment shall represent the pro rata rent from the Commencement Date to the end of the calendar month.

Section 3.02. *Additional rent.* All costs, charges, and expenses that Tenant assumes, agrees to, or is obligated to Landlord under this Lease and the annexed schedules, shall be deemed additional rent. In the event of nonpayment, Landlord shall have the same rights and remedies with respect to the additional rent as is provided for herein in case of nonpayment of rent. Tenant shall pay Landlord the rent, additional rent, and adjustments of rent provided for in this Lease, when due and without notice or demand, at the time and in the manner specified herein.

Article IV Use

Section 4.01. *Office use; density.* Tenant shall use and occupy the Demised Premises for the general office activities (excluding, however, a cafeteria, computer operations, general records storage, or operations of similar scope) of its executive, administrative, and sales personnel, or those of its assignees or subtenants, permitted under Article XI. The Demised Premises shall not be used for any other purpose. The number of persons per floor shall not exceed one person for each 100 square feet.

Section 4.02. *Adverse use.* Tenant shall not suffer or permit the Demised Premises or any part of them to be used in any manner, anything to be done in them, or anything to be brought into or kept in them, that would in any way:

- (i) violate any public law or requirement;
- (ii) cause structural injury to the Building or any part of it;
- (iii) interfere with the normal operations of the Building's heating, air-conditioning, ventilating, plumbing, or other mechanical or electrical systems, or of its elevators;
- (iv) constitute a public or private nuisance; or
- (v) alter the appearance of the Building's exterior or of any portion of its interior other than the Demised Premises.

Section 4.03. *Prohibited uses.* The use of the Demised Premises for the purposes specified in Section 4.01 shall not in any event be deemed to include, and Tenant shall not use, or permit the use of, the Demised Premises or any part thereof for:

- (a) Sale at retail of any products or materials (except for sale of beverages or food to Tenant's employees, only, through vending machines);
- (b) The conduct of a public auction of any kind;
- (c) The conduct of a commercial bank, trust company, savings bank, safe deposit, savings and loan association or bank,

or any branches of any of the foregoing or a loan company business (except for the conduct of a credit union or benefit plan for Tenant's employees and except as incident to Tenant's business);

(d) The issuance and sale of traveler's checks, foreign drafts, letters of credit, foreign exchange or domestic money orders (except as incidental to Tenant's business);

(e) The receipt of money for transmission (except as incidental to Tenant's business).

Section 4.04. *Continued occupancy.* (a) Tenant acknowledges that the continued occupancy of the Demised Premises by Tenant or its assignees or subtenants permitted under Article XI, and the regular conduct of business therein by Tenant or its assignees or subtenants are of the utmost importance to the Landlord in the renewal of other leases of portions of the Building, in the renting of vacant space in the Building, in the providing of electricity, air-conditioning, steam, and other services to the Building's tenants, and in the maintenance of the character and quality of the Building's tenants. Tenant, therefore, except as otherwise provided in this Section or in Articles VI, X, XI, XIV, and XV, or when prevented by strikes or other labor troubles or generally applicable laws or public regulations, shall occupy the entire Demised Premises and conduct its business therein in the regular and usual manner, throughout the term of this Lease. Tenant acknowledges that Landlord is executing this Lease in reliance upon these covenants, and that they are a material element of consideration in inducing Landlord to execute it. If, at any time during this Lease term Tenant vacates the entire Demised Premises, except in the case of constructive eviction or as otherwise permitted by law, or fails to so conduct its business therein, without Landlord's prior written consent, except as permitted by Articles VI, X, XI, XIV, and XV, or when prevented by strikes or other labor troubles or generally applicable laws or public regulations, all rent and additional rent reserved in this Lease from the date of the breach to its expiration date shall become immediately due and payable to Landlord.

(b) The parties recognize and agree that the damage to Landlord resulting from any breach of the covenants in paragraph (a) of this Section will be extremely substantial, and will be impossible of accurate measurement. The parties therefore agree as follows:

(1) If there is a breach or threatened breach of the above covenants, Landlord shall, in addition to all of its other rights and remedies at law, in equity, or otherwise, have the right of injunction to preserve Tenant's occupancy and use. The words "become vacant or deserted," as used elsewhere in this Lease, shall include Tenant's failure to occupy or use as required by this Section. Cessation of the use or occupancy other than as provided in paragraph (a) of this Section for a period not exceeding 60 days shall not be deemed a breach by Tenant.

(2) If this Lease is terminated because Tenant breaches either covenant in paragraph (a) of this Section, Landlord may, notwithstanding any contrary provision in this Lease, re-enter the Demised Premises to alter, reconstruct, and rent all or any part of them, at any rental agreed to by Landlord, for any portion of or beyond the original Lease term. Any income received by Landlord on such re-rental shall be its property, as compensation for the expenses incurred in preparing and re-renting all or any part of the Demised Premises. This income, together with the above rents and additional rents, shall constitute liquidated damages for Tenant's breach. Tenant shall not receive any portion of the proceeds from the re-letting except for any payment made by or due from it to Landlord under paragraph (a) of this Section.

(c) If any provision of this Section or its application to any person or circumstance is, to any extent, invalid or unenforceable, the remainder of this Section, or the application of the provision to other persons or circumstances, shall not be affected thereby. Each provision of this Section and this Lease shall be valid and enforced to the fullest extent permitted by law.

Article V Construction of Building

Section 5.01. *Building.* Landlord shall, subject to delays by causes beyond its reasonable control, proceed to build the

Building as a modern, fully air-conditioned office building on the land herein described in Exhibit "C" (the "Land").

Section 5.02. *Landlord work.* Landlord, prior to the Commencement Date, shall install and furnish in the Demised Premises all of the work, additional work, and installations substantially in accordance with Exhibit "B" annexed hereto.

Article VI Repairs; Alterations; Fixtures

Section 6.01. *Landlord maintenance.* If Landlord knows that structural repairs are needed, it shall, at its expense, make them and maintain the exterior and public areas of the Demised Premises and the public areas of the Building in good order and repair. Landlord shall also maintain in good condition and make (a) all repairs to the structure in the Demised Premises, (b) all repairs to all electric wiring, risers, plumbing, heating and air-conditioning facilities serving the Demised Premises (other than any of the above installed by Tenant), and (c) all other repairs necessary to correct any latent defects for one year after the Commencement Date in the Demised Premises (other than defects connected with, or related to, any alterations made or performed by or on behalf of Tenant by persons other than Landlord or its contractors). However, Landlord shall not be required to make any repairs referred to in subdivisions (a) or (b) if Tenant is obligated to make them under Section 6.02. Tenant shall promptly notify Landlord of the necessity of any repairs of which Tenant has knowledge and for which Landlord may be responsible under this Section.

Section 6.02. *Tenant maintenance.* Tenant shall take good care of the Demised Premises, and the fixtures, equipment and appurtenances therein, except those repairs required to be made by Landlord under Section 6.01. Tenant shall, at its own expense, make all repairs to the Demised Premises when needed to preserve them in good working order and condition. All damage or injury to the Demised Premises and its fixtures, glass, appurtenances, and equipment or to the Building or its fixtures, glass, appurtenances, and equipment caused by Tenant moving property in or out of the Building or by installation or removal of furniture, fixtures, or other property, or resulting from fire, explosion, short circuits, flow or leakage of water, steam, illuminating gas, sewer gas, sewerage, or by frost or by bursting or by leaking of pipes or plumbing or from any other cause of any other kind or nature whatsoever, due to carelessness, omission, neglect, improper conduct, or other cause of Tenant, its servants, employees, agents, visitors, or licensees, shall be repaired, restored, or replaced promptly by Tenant to the reasonable satisfaction of Landlord at Tenant's expense except to the extent that the cost and expense is covered by insurance proceeds recovered by Landlord. All repairs and restorations or replacements required in connection therewith shall be of quality and class at least equal to the original work or installations and done in a good and workmanlike manner.

Section 6.03. *Obstructions.* Tenant shall not store or place any materials of whatsoever kind or nature or any obstructions in the lobby, passageways, stairs, on the sidewalks or plaza abutting the Building or in any of its public portions.

Section 6.04. *Additional alterations.* Except as provided for in Exhibit B, Tenant shall make no alterations, decorations, installations, additions, or improvements in or to the Demised Premises, including but not limited to water coolers, air-conditioning or cooling system, unit or part thereof or other apparatus of other or like nature without Landlord's prior written consent and then only by contractors or mechanics approved in writing by Landlord. However, Landlord shall at all times authorize at least three contractors or mechanics in each trade to perform such alterations, decorations, installations, additions, or improvements in and about the Demised Premises. Landlord shall not unreasonably withhold its consent to any nonstructural alterations, decorations, installations, additions, or improvements proposed by Tenant to adapt the Demised Premises for Tenant's business purposes. Landlord hereby consents to all nonstructural alterations, decorations, installations, additions, or improvements proposed by Tenant to adapt the Demised Premises for Tenant's business purposes if they not interfere with furnishing services to other Tenants and if the aggregate estimated cost, in Landlord's reasonable judgment, of all proposed alterations, decorations, installations, additions, or improvements in any successive 12-month period does not exceed \$50,000. However, if the alterations, decorations, installations, or improvements interfere with or affect Landlord's ability to provide the services in the Demised Premises prescribed in Article XXI, Landlord shall be relieved from such obligation to the extent of such interference. All work, alterations,

decorations, installations, additions, or improvements shall be done at Tenant's expense and at such times and in such manner as Landlord may from time to time designate and in full compliance with all applicable laws, rules, regulations, and requirements of all governmental bureaus and bodies having jurisdiction thereover, including without limitation, the accessibility requirements of the Americans with Disabilities Act of 1990 ("ADA") and the regulations issued thereunder. All alterations, decorations, installations, additions, or improvements (other than communications equipment, quotation devices, or equipment leased by Tenant) shall, at Landlord's election (which it shall make by notice as provided in Article XXX not less than 30 days before this Lease expires or is renewed or extended, or, if it is terminated before then, not later than 60 days after termination), become Landlord's property and shall remain upon and be surrendered with the Demised Premises as a part of them at the end of the term or renewal term, or the term's prior expiration, as the case may be. If Landlord elects otherwise, all alterations, decorations, installations, additions or improvements made by Tenant upon the Demised Premises as the Landlord may select (as well as any communications equipment, quotation devices, or equipment leased by Tenant) shall be removed by Tenant and it shall restore the premises to their original condition (except with respect to those items which Landlord has elected to remain) at Tenant's expense at or prior to the expiration of the term. As a condition precedent to Landlord's consent to the making by Tenant of alterations, decorations, installations, additions, or improvements to the Demised Premises in addition to other requirements as provided in this Lease or elsewhere, Tenant shall obtain and deliver to Landlord written and conditional waivers of mechanics' liens upon the property of which the Demised Premises are a part for all work, labor and services to be performed and materials to be furnished in connection with such work in the form approved by Landlord's attorneys, signed by all contractors, subcontractors, material-men, laborers, and workmen to become involved in such work. Notwithstanding the above, if any mechanic's lien is filed against the Demised Premises or the Building for work claimed to have been done for, or materials claimed to have been furnished to Tenant, it shall be discharged by Tenant within ten days thereafter, at Tenant's expense, by filing the bond required by law or payment or otherwise. Landlord shall not be liable for any failure or any Building facilities or services including but not limited to the air-conditioning and ventilating equipment in the Demised Premises installed by Landlord caused by alterations, installations, and/or additions by Tenant, and Tenant shall correct any faulty installation. Upon Tenant's failure to correct same, Landlord may make the correction and charge Tenant for its cost. The sum due Landlord shall be deemed additional rent and shall be paid by Tenant promptly upon being billed therefor. Tenant shall keep full and accurate records of the cost of all alterations, installations, and improvements in and to the Demised Premises made by it and shall, if requested by Landlord, make them available to Landlord for use in connection with any proceeding to review the Assessed Valuation of the Building or to acquire the Land and Building for public or quasi public use. If any of Tenant's property remains in the Demised Premises after expiration of the term (or the earlier termination of this Lease) and Tenant's removal, the property may be deemed by Landlord to have been abandoned. In that case, Landlord may either retain the property or dispose of it at Tenant's expense and without accountability in whatever manner Landlord may see fit. If Landlord causes the property to be removed, any damage caused by the removal and any other damage to the Demised Premises caused by Tenant's removal may be repaired at Tenant's expense and Tenant shall pay to Landlord upon demand all such expenses. The above provisions shall survive the expiration or termination of this Lease.

Section 6.05. *Permits; insurance.* With the exception of Tenant's work performed under Exhibit "B," prior to commencing any work under the provisions of Section 6.04, Tenant shall furnish to Landlord:

- (a) Copies of all governmental permits and authorizations which may be required in connection with the work.
- (b) A certificate evidencing that Tenant (or its contractors) has (have) procured workmen's compensation insurance covering all persons employed in connection with the work who might assert claims for death or bodily injury against any Over-Landlord, Tenant, or the Building.
- (c) All additional personal injury and property damage insurance (over and above the insurance required to be carried by Tenant under Section 9.03) that Landlord may require because of the nature of the work to be done by Tenant.

Article VII Floor Load; Noise

Section 7.01. Tenant shall not place a load upon any floor of the Demised Premises which exceeds the load per square foot which the floor is then designed to carry and which is then allowed by law. All business machines and equipment and all other mechanical equipment installed and used by Tenant in the Demised Premises shall be properly shielded and be so placed, equipped, installed, and maintained by Tenant at its expense in settings of cork, rubber, or spring-type vibration-eliminators or in such other manner as Landlord may reasonably direct so as to be sufficient to eliminate the transmission of noise, vibration or electrical, or other interference from the Demised Premises to any other area of the Building. Landlord shall include a sentence of equivalent purport to the preceding sentence in other leases of space for adjacent floors in the Building, and shall exercise reasonable efforts to require compliance therewith with respect to such transmissions affecting the Demised Premises.

Tenant shall not move any safe, heavy equipment or bulky matter in or out of the Building without Landlord's written consent, which it shall not unreasonably withhold or delay. If the movement of such items requires special handling, Tenant shall employ only persons holding a Master Rigger's License to do the work and all such work shall be done in full compliance with the Administrative Code of the City of New York and other municipal requirements. All such movements shall be made during hours which will least interfere with the normal operations of the Building, and all damage caused by such movement shall be promptly repaired by Tenant at its expense.

Article VIII Laws, Ordinances, Requirements of Public Authorities

Section 8.01. *Tenant compliance.* Tenant shall, at its expense, comply with all federal, state, county, and municipal laws, orders, ordinances and regulations including without limitation, those relating to environmental matters, and those relating to the accessibility requirements of the ADA, and with any lawful direction of any public officer or officers which shall, with respect to the occupancy, use or manner of use of the Demised Premises or to any abatement of nuisance caused by Tenant, impose any violation, order, or duty upon Landlord or Tenant arising from Tenant's occupancy, use, or manner of use of the Demised Premises or any installations made therein by or at Tenant's request or required by reason of a breach of any of Tenant's covenants or agreements hereunder.

Section 8.02. *Notice of violations.* Tenant shall promptly notify Landlord if it receives notice of any violation of law, ordinance, rule, order, or regulation applicable to the Demised Premises. Landlord shall promptly notify Tenant if it receives notice of any violation of any such law, order, ordinance, or regulation applicable to the Demised Premises or services, access or other appurtenances to the Demised Premises, especially, but not limited to, any creating an obligation of Tenant under Section 8.01.

Section 8.03. *Landlord compliance.* Except as provided above, Landlord shall, at its expense, comply with or cause to be complied with, all federal, state, county, and municipal laws, orders, ordinances, and regulations and any direction made pursuant to law of any public officer or officers which shall, with respect to the public portions of the Building, or which affect Tenant's access to the Demised Premises, impose any violation, order or duty upon Landlord or Tenant and with respect to which Tenant is not obligated by Section 8.01 to comply. Landlord may at its expense contest the validity of any such law, ordinance, rule, order, or regulation.

Section 8.04. *Window cleaning.* Tenant shall not clean, nor require, permit, suffer or allow any window in the Demised Premises to be cleaned, from the outside in violation of Section 202 of the Labor Law or of the rules of the Board of Standards and Appeals or of any other board or body having or asserting jurisdiction.

Section 8.05. *Rent control laws.* Landlord may cancel this Lease and its term, by giving Tenant 30 days' notice, if at any time hereafter a law or ordinance which is of a nature commonly referred to as "rent control laws" is enacted. For this purpose, a rent control law is any law or ordinance which limits, reduces, or suspends in whole or in part or otherwise

affects the rents or revenues from the Demised Premises or the Building or which makes it illegal to pay or prohibit or restrict the payment to, or receipt by, Landlord of the minimum fixed rent, additional rent, or adjustment of rent or any part or portion of any thereof or as a result of which the Landlord may not, or may not be entitled to receive when due, the full and entire fixed minimum rent, additional rent, and adjustments of rent, or which permits Tenant to seek the return of all or any part of the rent, additional rent, or adjustments of rent. If Landlord elects to terminate and serves upon Tenant a 30-day notice of cancellation of this Lease, upon the expiration of the 30-day period this Lease and its term shall end and expire as fully and completely as if the date of expiration of the 30-day period were the day herein definitely fixed for the end and expiration of this Lease and its term and Tenant shall then quit and surrender the Demised Premises to Landlord.

Article IX Insurance

Section 9.01. *Compliance with insurance regulations.* Tenant shall not do or permit to be done any act or thing in or upon the Demised Premises which will invalidate or be in conflict with the Certificate of Occupancy or the terms of the New York State standard form of fire, boiler, sprinkler, water damage, or other insurance policies covering the Building and/or the fixtures, equipment, and property therein. Tenant shall, at its expense, comply with all rules, orders, regulations, or requirements of the New York Board of Fire Underwriters or any other similar body having jurisdiction, that relate to its use or occupancy of the Demised Premises, and shall not knowingly do or permit anything to be done in or upon the Demised Premises or bring or keep anything therein or use them in a manner which increases the rate of insurance upon the Building or on any property or equipment located therein over the rate in effect at the commencement of the term of this Lease.

Section 9.02. *Tenant caused increases.* If, because of anything done, caused, or permitted to be done, permitted, or omitted by Tenant, the rate of liability, fire, boiler, sprinkler, water damage or other insurance (with all extended coverage) on the Building or on the property and equipment of Landlord or any other tenant or subtenant in the Building is higher than it otherwise would be, Tenant shall reimburse Landlord and the other tenants and subtenants in the Building for the additional insurance premiums thereafter paid by any of them. Tenant shall make the reimbursement on the first day of the month following the payment by Landlord or the other tenants or subtenants. In any action or proceeding in which Landlord and Tenant are parties, a schedule or "make up" of any insurance rate for the Building or Demised Premises issued by the New York Fire Insurance Exchange, or other body establishing fire insurance rates for the Building, shall be conclusive evidence of the facts therein stated and of the several items and charges in the insurance rates then applicable to the Building or Demised Premises.

Section 9.03. *Liability insurance.* Tenant, at its expense, shall maintain insurance protecting and indemnifying Landlord, Tenant and any Overlandlord against all claims for injury or damage to persons or property or for the loss of life or of property occurring upon, in or about the Demised Premises, the public portions of the Building used by Tenant, its employees, agents, contractors, customers, and invitees. The insurance shall afford minimum protection during the term of this Lease, of not less than \$1,000,000 for bodily injury or death to any one person and not less than \$3,000,000 for any one occurrence or accident, and not less than \$100,000 for property damage.

All such insurance shall be effected under valid and enforceable policies (which may cover the Demised Premises and other locations), shall be issued by insurers of recognized responsibility acceptable by Landlord, and shall contain a provision under which the insurer agrees not to cancel the insurance without 20 days' prior written notice to Landlord.

On or before the Commencement Date, Tenant shall furnish Landlord with a certificate evidencing the aforesaid insurance coverage. Renewal certificates shall be furnished to Landlord at least 30 days prior to the expiration date of each policy for which a certificate was furnished.

Section 9.04. *Waiver of subrogation.* Landlord's insurance policies shall insure the Building and its property therein against loss, damage, or destruction by fire or other casualty and the rental value thereof. Tenant's policies shall insure

its property in the Demised Premises against loss, damage, or destruction by fire or other casualty. Both parties shall use their best efforts to include in their respective insurance policies: (a) a waiver of the insurer's right of subrogation against the other party; (b) an express agreement that the policy will not be invalidated if the assured waives the right of recovery against any party responsible for a casualty covered by the policy before the casualty; or (c) any other form of permission for the other party's release. If the waiver or permission is not, or ceases to be, obtainable, with or without additional charge, the insured party shall, upon learning that, promptly so notify the other party. In that case, if the other party so elects and pays the insurer's additional charge therefor, the waiver or permission shall be included in the policy. Each party hereby releases the other party with respect to any claim (including a claim for negligence) which it might otherwise have against the other party for loss, damages, or destruction with respect to its property by fire or other casualty (including rental value or business interest, as the case may be) occurring during the term of this Lease and with respect and to the extent to which it is not prohibited under a policy or policies containing a waiver of subrogation or permission to release liability or naming the other party as an additional assured, as provided above. If such waiver is not obtainable for any reason there shall be no release of the other party. The waiver of subrogation or permission for release referred to herein shall extend to the agents of each party and its and their employees and shall be coextensive therewith, and, in the case of Tenant, shall also extend to all other persons and entities occupying or using the Demised Premises in accordance with the terms of this Lease, but only if and to the extent that such waiver or permission can be obtained without additional charge (unless such party pays the charge). If Tenant does not carry insurance, Landlord shall be released co-extensively and to the same extent as though Tenant's property were insured for fire insurance with extended coverage.

Article X Damage by Fire or Other Cause

Section 10.01. *Damage.* If the Demised Premises are partially damaged by fire or other cause without the fault or neglect of Tenant, or of its servants, employees, agents, visitors, or licensees, the damage shall be repaired by and at Landlord's expense and the fixed minimum rent until the repairs are made shall be apportioned according to the part of the Demised Premises which is usable by Tenant. But if such partial damage is due to the fault or neglect of Tenant, or of its servants, employees, agents, visitors, or licensees, without prejudice to any other rights and remedies of Landlord and, except as provided in Section 9.04, without prejudice to the rights of subrogation of Landlord's insurer, the damage shall be repaired by Landlord but there shall be no apportionment or abatement of rent. No penalty shall accrue for any delay which may arise by reason of adjustment of insurance by Landlord and for any delay on account of "labor troubles," or any other similar or dissimilar cause, beyond Landlord's control. Tenant shall give immediate notice to Landlord in case of fire in the Demised Premises. If the Demised Premises are totally or substantially damaged or are rendered wholly or substantially untenable by fire or other cause, and Landlord decides not to restore or rebuild them, or if the Building is substantially damaged and Landlord decides to demolish, rebuild, or remodel it (regardless of whether the Demised Premises have been damaged), Landlord may, within 90 days after the fire or other cause, give Tenant written notice (as provided in Article XXX) of its decision. Thereupon, the term of this Lease shall expire by lapse of time on the third day after notice is given, and Tenant shall vacate the Demised Premises and surrender them to Landlord. If Tenant is not in default under this Lease, upon its termination under the conditions provided for in the immediately preceding sentence, Tenant's liability for rent shall cease as of the day following the casualty. Tenant hereby expressly waives the provisions of Section 227 of the Real Property Law or any like law which may hereafter be enacted and agrees that the foregoing provisions of this Article shall govern and control in lieu thereof, this Article being an express agreement.

Section 10.02. *Limitation.* No damages, compensation, or claims shall be payable by Landlord for inconvenience, loss of business or annoyance arising from any repair or restoration of any portion of the Demised Premises or of the Building, except for rent abatement as provided in Section 10.01.

Article XI Assignment, Subletting, Mortgaging

Section 11.01. *Conditions, requirements.* Tenant shall not, by operation of law or otherwise, assign, mortgage, or

encumber this Lease, or sublet or permit the Demised Premises or any part thereof to be used by others, without Landlord's prior written consent. Landlord's consent to any assignment or subletting shall not in any manner be construed to relieve Tenant from obtaining Landlord's express written consent to any other or further assignment or subletting. Tenant may permit portions of the Demised Premises to be used by, or sublet portions of the Demised Premises without profit to any wholly owned subsidiaries or affiliates of Tenant (i.e., corporations at least 50% of whose stock is owned by Tenant), if, and so long as, Tenant's ownership of them continue to be not less than 20% of their stock. Tenant shall give prompt notice to Landlord of any such use or subletting by or to the subsidiaries or affiliates. Tenant may, without Landlord's consent, assign its interest in this Lease to any corporation which succeeds to the assets, business, and goodwill of Tenant (either by merger or consolidation) or of any wholly owned subsidiary or affiliate (i.e., corporations of which Tenant owns at least 50 percent of the stock), if, and for so long as, the subsidiaries or affiliates continue to be owned by Tenant. However, the assignment shall not be valid unless, within 10 days after its execution, Tenant delivers to Landlord (i) a duplicate original instrument of assignment, in form and substance satisfactory to Landlord, duly executed by Tenant, and (ii) an instrument, in form and substance satisfactory to Landlord, duly executed by the assignee, in which such assignee shall assume observance and performances of, and agree to be personally bound by, all of the terms, covenants, and conditions of this Lease on Tenant's part to be observed and performed. Tenant shall, in no event, be released from liability under this Lease.

With the express exceptions set forth in the preceding paragraph, if Tenant desires to assign or sublet all or any portion of the Demised Premises, it shall use Landlord as its exclusive rental agent for such purpose and notify Landlord of its desire to assign this Lease or sublet the premises. Before obtaining a proposed assignee or sublessee, upon terms satisfactory to Tenant, Tenant shall submit to Landlord in writing the terms and conditions of the proposed assignment or subletting and any other information reasonably requested by Landlord.

Landlord shall have the following options, to be exercised within 90 business days from submission of Tenant's request:

(a) If the proposed assignment or subletting is for all or substantially all of the Demised Premises, Landlord may, within the above 90-day period, cancel and terminate this Lease as of the date proposed by Tenant for the assignment or subletting.

(b) If the proposed sublease is for less than all or substantially all of the Demised Premises or for less than the balance of the term granted hereunder, Landlord may, within the above 90-day period, cancel and terminate this Lease only as to the portion of the premises and of the term of the proposed sublease that takes effect as of the effective date thereof. If Landlord exercises its option under this paragraph (b), the rent and all other charges payable hereunder shall be equitably apportioned.

If Landlord does not exercise either option within the time set forth above, Tenant may list the proposed space with any other brokers. Landlord shall not unreasonably withhold consent to any proposed assignment or subletting if it is upon the same or better terms than those submitted to Landlord. Landlord shall give Tenant notice as to giving or withholding such consent within 30 days after Tenant furnishes Landlord, in writing, in addition to the information set forth above, (1) the name of the proposed assignee or sublessee and (2) the nature and character of the business of the proposed assignee or sublessee. However, if Landlord does not exercise either of the above options and Tenant assigns this Lease or sublets all or any portion of the Demised Premises, other than a sublease in lieu of temporary condemnation as provided in Article XIV, Section 14.03, Tenant shall pay to Landlord, as additional rent, any difference between the fixed minimum rent plus additional rent allocable to that part of the Demised Premises affected by such assignment or sublease under the provisions of this Lease, and the fixed minimum rent and additional rent payable by the assignee or sublessee to Tenant, less a single brokerage commission payable by Tenant with respect to such assignment or sublease. The additional payments shall be made monthly within five days after their receipt by Tenant.

Section 11.02. *Rent collection.* If this Lease is assigned, or all or a part of the Demised Premises is sublet or occupied by any person or persons other than Tenant, Landlord may, after default by Tenant, collect rent from the assignee,

subtenant or occupant and apply the net amount collected to the rent herein reserved. However, no such assignment, subletting, occupancy or collection of rent shall be deemed a waiver of the covenants in this Article, nor shall it be deemed acceptable of the assignee subtenant or occupant as a tenant, or a release of Tenant from the full performance by Tenant of all the terms, conditions and covenants of this Lease.

Section 11.03. *Lease obligations.* Each permitted assignee or transferee shall assume and be deemed to have assumed this Lease and shall be and remain liable jointly and severally with Tenant for the payment of the rent, additional rent, and adjustments of rent, and for the due performance of all of Tenant's terms, covenants, conditions, and agreements for the term of this Lease. No assignment shall be binding on Landlord unless the assignee or Tenant delivers to Landlord a duplicate original of the instrument of assignment which contains a covenant of assumption by the assignee of all of the above obligations and obtains from Landlord the above written consent prior thereto.

Article XII No Liability on Landlord's Part

Section 12.01. Landlord and its agents shall not be liable for any damage to property of Tenant or of others entrusted to employees of the Building, or for the loss of or damage to any property of Tenant by theft or otherwise. Landlord and its agents shall not be liable for any injury or damage to persons or property resulting from fire, explosion, falling plaster, steam, gas, electricity, water, rain or snow, or leaks from any part of the Building, from the pipes, appliances or plumbing works, from the roof, street or sub-surface, or from any other place or by dampness or by any other cause of whatsoever nature, unless caused by or due to the negligence of Landlord, its agents, servants, or employees. Moreover, Landlord and its agents shall not be liable for any such damage caused by other tenants or persons in the Building or caused by operations in construction of any private, public, or quasi-public work. Landlord shall not be liable for damages for injury to the person or property of Tenant or others, except to the extent of its obligation, if any, under Section 6.01 for any latent defect in the Demised Premises or in the Building. If, at any time, any windows of the Demised Premises are temporarily closed, darkened, or bricked up for any reason including, but not limited to, Landlord's own acts, Landlord shall not be liable for any resulting damage to Tenant, and Tenant shall not be entitled to any compensation therefor or abatement of rent; moreover, such actions shall not release Tenant from its obligations hereunder or constitute an eviction. (Reference above to Landlord shall for all purposes be deemed to include any Overlandlord.) Tenant shall reimburse and compensate Landlord as additional rent within five days after rendition of a statement for all expenditures made by or damages or fines sustained or incurred by Landlord due to nonperformance or noncompliance with or breach or failure to observe any term, covenant, or condition of this Lease upon Tenant's part to be kept, observed, performed, or complied with. Tenant shall give immediate notice to Landlord in case of accidents in the Demised Premises or in the Building or of defects therein or in any fixtures or equipment. Landlord shall give immediate notice to Tenant of its knowledge of accidents in the Demised Premises or accidents affecting services, access or other appurtenances to the Demised Premises, or (to the extent caused or claimed to arise from or be related to, Tenant's use or occupancy under this Lease) in the Building or of defects therein or in any fixtures or equipment.

Article XIII Name of Building

Section 13.01. The Building will be known as "Melville Plaza," but Landlord may from time to time change the name or designation, without Tenant's consent. So long as Tenant occupies the Demised Premises, Landlord shall not designate, as the name by which the Building is commonly known, the name of any firm whose principal line of business is the same as or related to Tenant's business, except as provided above.

Article XIV Condemnation

Section 14.01. *Condemnation.* If all or a material part of the Building is condemned or taken in any manner for any public or quasi-public use, this Lease shall cease and terminate as of the date of vesting of title. If only a part of the Demised Premises is so condemned or taken, then, effective thereafter as of the date Tenant vacates and removes from the part of the Demised Premises so taken, the fixed minimum rent and the Tenant's Proportionate Share shall be

proportionately reduced, and this Lease shall continue as to the remaining part. If only a nonmaterial part of the Building is so condemned or taken, then (a) if substantial structural alteration or reconstruction of the Building is, in Landlord's opinion, necessary or appropriate as a result of the condemnation or taking (regardless of whether the Demised Premises are affected), Landlord may terminate this Lease as of the date of vesting of title by giving Tenant, within 60 days after it receives notice thereof, written notification of termination, or (b) if Landlord does not elect to terminate this Lease, this Lease shall be and remain unaffected by such condemnation or taking, except that the rent shall be abated to the extent, if any, hereinbefore provided. If only a part of the Demised Premises is so condemned or taken and this Lease and the term and estate hereby granted are not terminated as provided above, Landlord shall, at its expense, restore with reasonable diligence the remaining structural portions of the Demised Premises as nearly as practicable to their same condition as prior to the condemnation or taking. In the event of termination in any of the cases provided above this Lease and the term and estate hereby granted shall expire as of the date of the termination with the same effect as if that were the date hereinbefore set for the expiration of the term of this Lease, and the rent hereunder shall be apportioned as of that date.

Section 14.02. *Condemnation award.* If there is any condemnation or taking, as provided above, of all or part of the Building (regardless of whether the Demised Premises are affected), Landlord shall receive the entire award in the condemnation proceeding, including any award made for the value of the estate vested by this Lease in Tenant. Tenant hereby expressly assigns to Landlord all of its right, title and interest now or hereafter arising in or to any such award or any part thereof, and Tenant shall not be entitled to receive any part of the award. Notwithstanding the above, Tenant shall be entitled to any award for loss or taking of its fixtures, or its relocation expenses.

Section 14.03. *Temporary condemnation.* (a) If the whole or any part of the Demised Premises is acquired or condemned for any temporary public or quasi-public use or purpose, for any period ending prior to the end of the term, then, except as otherwise provided in this Section, this Lease and the Demised Term shall continue in force and effect and Tenant shall continue to pay in full the rent, additional rent, and other charges herein reserved without deduction or abatement. Tenant shall be entitled, subject to the provisions of this Section, to all awards or payments made for such temporary use, except that they shall be paid to and held by Landlord as a fund which Landlord shall apply, from time to time, to the extent that such fund avails, to the payment of rent, additional rent and other charges due to Landlord from Tenant under the terms of this Lease provided Tenant is not otherwise in default hereunder beyond any applicable grace period for the curing of such default (if such use is for only a part of the Demised Premises, the awards or payments shall only be applied in payment of the rent, additional rent, and other charges allocable to such part of the Demised Premises). If required by Landlord, Tenant shall restore the Demised Premises to its condition prior to the temporary taking.

(b) If all of the Demised Premises are acquired or condemned for any temporary public or quasi-public use or purpose for a period extending beyond the end of the term, this Lease and the Demised Term shall end as of the Date of such taking with the same effect as if that Date were the end of the term.

(c) If any part, rather than all, of the Demised Premises is acquired or condemned for any temporary public or quasi-public use or purpose for a period extending beyond the end of the term, that part of the Demised Premises (the "Eliminated Condemnation Space") shall be eliminated from the Demises Premises from and after the date (the "Elimination Condemnation Date") immediately prior to the commencement of such temporary use, and

(1) From and after that date, the Eliminated Condemnation Space shall be eliminated from the Demised Premises for all purposes;

(2) Tenant shall surrender the Eliminated Condemnation Space on or before the Elimination Condemnation Date in the same manner as if that date were the end of the term but Tenant shall not be required to remove its property or restore the Demised Premises as required by Section 6.04;

(3) From and after the Elimination Condemnation Date,

(A) The rent, and any electric charge, escalation, or additional rent computed on a Floor area basis shall be equitably reduced on the basis of the area of the Eliminated Condemnation Space, and any pre-paid portion of rent or additional rent for any period after that Date allocable to the Space shall be refunded by Landlord to Tenant; and

(B) The Demised Premises Area shall be reduced in the proportion which the area of the Eliminated Condemnation Space bears to the total area of the Demised Premises immediately before the Elimination Condemnation Date.

Article XV Entry, Right to Change Public Portions of the Building

Section 15.01. *Access.* Landlord may erect, use, and maintain pipes and conduits in and through the Demised Premises, which shall be, to the extent possible, concealed. Landlord and its agents and designees may enter the Demised Premises for the purpose of making any repairs or alterations that it desires, is required, or has the right, to make under this Lease. Subject to the above, Landlord may enter the Demised Premises for the purpose of inspecting them or exhibiting them to prospective purchasers or lessees of the Building, to prospective mortgagees, or to the mortgagees' prospective assignees. Except in cases of emergency, Tenant may require Landlord or its representative, agent, or employee to be accompanied, while in the Demised Premises, by Tenant's representative, agent, or employee if Tenant furnishes such person promptly after Landlord gives notice to Tenant that it is exercising its right of entry. Landlord may take all material into and upon the Demised Premises that is required for the above repairs or alterations, and such act shall not constitute an eviction or partial eviction of Tenant. Moreover, the rent reserved shall not abate, except as otherwise provided in this Lease, while the repairs or alterations are being made. However, the repairs shall be made as expeditiously as reasonably possible, and be conducted in such a manner, and on such notice, as to minimize as far as reasonably possible any unreasonable interference with Tenant's use and occupancy of the Demised Premises for the purposes specified in Article IV, Section 4.01.

Section 15.02. *Changes to public areas.* Landlord may, at any time, without thereby creating any actual or constructive eviction or incurring any liability to Tenant therefor, and without abatement in rent, change the arrangement or location of entrances, passageways, doors, doorways, corridors, stairs, toilets, and other like portions of the Building, as well as the designated express or local stops of elevators servicing the Demised Premises. However, such changes shall be designed to avoid any material obstruction or reduction in Tenant's access to the Demised Premises, and other appurtenances. Landlord may, if necessary to comply with laws, rules, or requirements of any governmental bureau or agency, move any wall or partition in or dividing the Demised Premises.

Article XVI Bankruptcy

16.01. *Prior to term.* This Lease shall *ipso facto* be cancelled and terminated if at any time before the date fixed above as the Commencement Date a petition in bankruptcy or insolvency, for reorganization, or for the appointment of a receiver or trustee of all or a portion of Tenant's property is filed by or against it in any court under any federal or state statute, and within 90 days thereafter Tenant fails to secure a discharge thereof, or if Tenant makes an assignment for the benefit of creditors, or petitions for or enters into an arrangement. In any such event, neither Tenant nor any person claiming through or under it or by virtue of any statute or court order shall be entitled to possession of the Demised Premises and Landlord, in addition to the other rights and remedies given by Section 16.03 and by virtue of any other provision contained in this Lease or any statute or rule of law, may retain as liquidated damages any rent, security, deposit or moneys received by it from Tenant or others in Tenant's behalf upon the execution thereof.

16.02. *During term.* Landlord may cancel and terminate this Lease if at the date fixed as the Commencement Date or any time during the term hereby demised a petition in bankruptcy or insolvency, for reorganization, or for the appointment of a receiver or trustee of all or a portion of Tenant's property is filed by or against Tenant in any court

under any federal or state statute, and within 90 days thereafter Tenant fails to secure a discharge thereof, or if Tenant makes an assignment for the benefit of creditors or petitions for or enters into an arrangement. Landlord shall exercise its right to cancel and terminate within a reasonable time after it receives notice that any of the above events have occurred. If Landlord exercises such right, neither Tenant nor any person claiming through or under it by virtue of any statute or court order shall be entitled to possession or to remain in possession of the Demised Premises but shall forthwith quit and surrender the premises, and Landlord, in addition to the other rights and remedies it has by virtue of any other provision contained in this Lease or any statute or rule of law, may retain as liquidated damages any rent, security, deposit or monies received by it from Tenant or others in Tenant's behalf.

16.03. *Landlord's damages.* In the event of the termination of this Lease under Sections 16.01 and 16.02, Landlord may immediately, notwithstanding any contrary provision of this Lease, recover from Tenant as and for liquidated damages the difference between the rent reserved hereunder for the unexpired portion of the term demised and the then fair and reasonable rental value of the Demised Premises for the same period. In computing such damages the differences between any installment of rent becoming due hereunder after the date of termination and the fair and reasonable rental value of the Demised Premises for the period for which such installment was payable shall be discounted to the date of termination at the rate of 10% per annum. If all or any part of the premises are re-let by Landlord for the unexpired term of this Lease or any part thereof, before proof of such liquidated damages is presented to any court, commission or tribunal, the amount of rent reserved upon such reletting shall be deemed prima facie to be the fair and reasonable rental value for the part or the whole of the premises so re-let during the term of the re-letting. Nothing contained herein shall limit or prejudice Landlord's right to prove for and obtain as liquidated damages by reason of such termination, an amount equal to the maximum allowed by any statute or rule of law in effect at the time, and governing the proceedings in which, such damages are to be proved, regardless of whether that amount is greater than, equal to, or less than the amount of the difference referred to above.

Article XVII Defaults, Remedies and Waiver of Redemption

Section 17.01. *Default and remedies.* (a) If Tenant (1) defaults in fulfilling any covenant of this Lease, requiring the payment of fixed minimum rent or additional rent, (2) defaults in complying with any other term, condition, or provision of this Lease, or (3) except as provided in Articles VI, X, XI, XIV, or XV, or where prevented by strikes or other labor troubles, or generally applicable laws or public regulations, ceases to conduct its business in the Demised Premises or leaves them completely vacant, then, in the case of the nonpayment of fixed minimum rent or additional rent which continues for ten days after Landlord serves a written notice upon Tenant specifying such default, or if Tenant defaults in any one or more of the events referred to in (2) or (3) above, then upon Landlord serving a written 15-days' notice upon Tenant specifying the nature of the default and upon the expiration of said 15 days, if Tenant has failed to comply with or remedy such default, or if the default or omission complained of is of such a nature that it cannot be completely cured or remedied within the 15-day period, and if Tenant has not diligently commenced curing the default within such 15-day period, and does not thereafter with reasonable diligence and in good faith proceed to remedy or cure default, then Landlord may serve a written 15-days' notice of cancellation of this Lease upon Tenant, and upon the expiration of the 15 days, this Lease and the term hereunder shall end and expire as fully and completely as if the date of expiration of the 15-day period were the day herein definitely fixed for the end and expiration of this Lease and the term thereof. Tenant shall then quit and surrender the Demised Premises to Landlord but Tenant shall remain liable as provided below.

(b) If the 15-day notice of cancellation provided for in subparagraph (a), above, is not given, and the term expires as provided above; or (1) if Tenant defaults after ten-days' notice in the payment of the fixed minimum rent reserved herein or any item of additional rent herein mentioned or any part of either or in making any other payment herein provided; or (2) if any execution or attachment is issued against Tenant or any of its property whereupon the Demised Premises are taken or occupied by someone other than Tenant, Landlord may, without notice, re-enter the Demised Premises by force or otherwise and dispossess Tenant, its legal representative, or other occupant by summary proceedings or otherwise, remove their effects, and hold the premises as if this Lease had not been made. However,

Tenant shall remain liable hereunder as hereinafter provided, and it hereby waives the service of notice of intention to re-enter or to institute legal proceedings to that end.

Section 17.02. *Rent deficiency.* In case of any such default, re-entry, expiration and/or dispossession by summary proceedings or otherwise, (a) the fixed minimum rent and additional rent shall become due thereupon and be paid up to the time of re-entry, dispossession and/or expiration, together with all expenses incurred by Landlord for legal expenses, attorneys' fees, brokerage, and/or putting the Demised Premises in good order, or for preparing them for re-rental; (b) Landlord may re-let all or part of the premises, either in its name or otherwise, for a term or terms, which may be less than or exceed the period which would otherwise have constituted the balance of the term of this Lease, and may grant concessions or free rent; and/or (c) Tenant or its legal representatives shall also pay Landlord as liquidated damages for Tenant's failure to observe and perform its covenants contained herein, any deficiency between the rents and additional rents hereby reserved and/or covenanted to be paid and the net amount, if any, of the rents collected or to be collected on account of the lease or leases of the Demised Premises for each month of the period which would otherwise have constituted the balance of this Lease term. Landlord's failure or refusal to re-let all or part of the premises shall not release or affect Tenant's liability for damages. In computing such damages there shall be added to the deficiency all expenses incurred by Landlord in connection with re-letting, such as legal expenses, attorneys' fees, brokerage, and for keeping the Demised Premises in good order or for preparing them for re-letting. Any such damages shall be paid in monthly installments by Tenant on the rent days specified in this Lease. Any suit brought to collect the deficiency for any month or months shall not prejudice in any way Landlord's rights to collect the deficiency for any subsequent month or months by a similar proceeding. Landlord may make all alterations, repairs, replacements and/or decorations in the Demised Premises that it considers advisable and necessary for the purpose of re-letting them. The making of such alterations and/or decorations shall not operate or be construed to release Tenant from its above liability. Landlord shall in no event be liable in any way for failure to re-let the Demised Premises, or if the Demised Premises are re-let, for failure to collect the rent thereof under such reletting. Any such action may be for the full amounts of all rents and damages suffered or to be suffered by Landlord. If Tenant breaches or threatens to breach any covenant or provision of this Lease, Landlord shall have the right of injunction and the right to invoke any remedy allowed at law or in equity as if re-entry, summary proceedings and other remedies were not provided for herein. Mention in this Lease of any particular remedy shall not preclude Landlord from any other remedy, in law or in equity. Landlord's above remedies and rights are cumulative. Tenant hereby expressly waives all rights of redemption granted by or under any present or future laws if it is evicted or dispossessed for any cause, or if Landlord obtains possession of the Demised Premises, by reason of Tenant's violation of any covenant or condition of this Lease, or otherwise.

Article XVIII Landlord's Right to Perform Tenant's Obligations

Section 18.01. *Tenant obligations.* If Tenant defaults in the observance or performance of any term or covenant under this Lease, Landlord may, without thereby waiving the default, remedy the default for Tenant's account and at Tenant's expense. If in connection therewith Landlord makes any expenditures or incurs any obligations for the payment of money or in instituting, prosecuting, or defending any action or proceedings commenced before or during the term of this Lease or after the expiration or termination of the term, including but not limited to legal expenses and attorneys' fees, Tenant shall pay to Landlord on demand the sums paid or obligations incurred, together with legal interest and costs. If not paid, Landlord, in addition to any other remedy, may deem the due payments to be additional rent.

Section 18.02. *Additional rent.* All amounts over the fixed minimum rent payable by Tenant to Landlord under the terms of this Lease shall be deemed additional rent hereunder. Tenant shall pay these amounts in the same manner as an installment of the fixed minimum rent within a reasonable time after they become payable unless provision is made in this Lease for their payment on a specific date or within a specified time and, in default of payment may, if the Landlord desires, be added to the next or any other installment of fixed minimum rent subsequently becoming due. Landlord shall have all the rights and remedies in the event of their nonpayment as it would have had in the event of the nonpayment of any installment of fixed minimum rent. Tenant's obligation to pay any additional rent which has theretofore become due and payable shall survive the expiration or earlier termination of this Lease.

Article XIX Covenant of Quiet Enjoyment

Section 19.01. Landlord warrants and represents that it has full authority to execute this Lease for the above term. Landlord covenants that upon Tenant's paying the rent and additional rent and performing its covenants, Tenant may peaceably and quietly have, hold, and enjoy the Demised Premises, subject, nevertheless, to the terms and conditions of this Lease. This covenant shall bind Landlord only so long as it is the owner of the premises.

Article XX Excavation

Section 20.01. If any excavation or construction is made or authorized for building or other purposes upon land adjacent to the Building, Tenant shall, if necessary, afford to the person or persons causing or authorizing the work a license to enter upon the Demised Premises for the purpose of doing all work that is reasonably necessary to protect or preserve the Building or its walls from injury or damage and to support them by proper foundations, pinning and/or underpinning, or otherwise.

Article XXI Services and Equipment

Section 21.01. *Landlord services.* So long as Tenant is not in default under any provision of this Lease, Landlord, at its expense, shall:

(a) Provide elevator service in accordance with Building Plans from 8:00 a.m. to 6:00 p.m., Mondays through Fridays, holidays excepted, and at least one elevator serving the Demised Premises on Saturdays, Sundays, and holidays and after regular hours on other days. Landlord intends to install operatorless elevators in the Building. Landlord may designate local and express stops for elevators and change the designation of express and local stops from time to time, as provided in Article XV, Section 15.02.

(b) Landlord, at its expense, shall supply heat during the heating seasons, air-conditioning during the cooling seasons, and ventilation from the system installed by it from 8 a.m. to 6 p.m. on Mondays through Fridays, holidays excepted, which the parties agree are the hours of normal occupancy. Landlord shall have no responsibility or liability for the ventilating conditions and/or temperature of the Demised Premises during the hours or days it is not required to furnish heat, ventilation, or air-conditioning under this paragraph. Landlord has informed Tenant that the windows of the Demised Premises and the Building may be sealed, and that the Demised Premises may become uninhabitable and the air therein may become unbreathable during the hours or days when Landlord is not required to furnish heat, ventilation, or air-conditioning except as provided in this Section 21.01(e). Any use or occupancy of the Demised Premises authorized by Tenant, other than by Landlord's employees, agents, or contractors, acting under this Lease, during the hours or days Landlord is not so required to furnish heat, ventilation, or air-conditioning to the Demised Premises shall be at Tenant's sole risk, responsibility and hazard. Such condition of the Demised Premises shall not constitute nor be deemed to be a breach or a violation of this Lease or of any provision thereof, nor shall it be deemed any eviction, nor shall Tenant claim or be entitled to claim any abatement of rent nor make any claim for any damages or compensation by reason of such condition.

The heating seasons shall be the periods between September 15th and the following May 15th and the cooling seasons shall be the periods between May 15th and the following September 15th. Tenant shall in any event cause and keep entirely unobstructed all of the vents, intakes, outlets, and grilles, at all times and shall comply with and observe all regulations and requirements prescribed by Landlord for the proper functioning of the heating, ventilating, and air-conditioning system.

(c) Provide Building standard cleaning services in the Demised Premises and public portions of the Building except on Saturdays, Sundays, and holidays, similar to first-class office buildings in the area.

(d) Furnish hot and cold water for lavatory and drinking and office cleaning purposes. If Tenant requires, uses, or consumes water for any other purposes, Landlord may install a meter or meters or other means to measure Tenant's water consumption. Tenant shall reimburse Landlord for the cost of all meters and their installation, and pay for the maintenance of the meter equipment and/or pay Landlord's cost of other means of measuring the water consumption by Tenant. Tenant shall reimburse Landlord for the cost of all water consumed as measured by the meter or meters or as otherwise measured, including sewer rents, and all other charges imposed by any authority, on, or measured by, the use of water.

(e) Landlord also shall furnish air-conditioning (heating, ventilating, and cooling) beyond the above stated hours if it is given notice of the need for such service before noon on a business day when required for use in the evening, and by noon of the preceding business day when such service is to be provided for Saturday, Sunday, or holiday use. Tenant shall pay Landlord's charge, as agreed upon from time to time, for supplying additional services under this Section 21.01.

Section 21.02. *Holidays*. Holidays shall be deemed to mean all those dates designated as holidays by the Board of Governors of the New York Stock Exchange, in addition to dates designated as holidays by the City of New York, State of New York and/or the United States, other than Columbus Day and Lincoln's Birthday, unless the Board of Governors designates them as holidays.

Section 21.03. *Interruptions*. Landlord may interrupt, curtail, or suspend its services under this Article when such action is necessary because of accident, emergency, or mechanical breakdown, or is required by any federal, state, county, or municipal law, order, or regulation, or for any other cause beyond Landlord's reasonable control. Landlord shall use reasonable diligence to complete all required repairs or other necessary work as quickly as reasonably possible so that Tenant's inconvenience resulting therefrom may be for as short a period as circumstances will reasonably permit. Tenant shall not claim any diminution or abatement of rent or other compensation as a result of such interruptions, curtailment, or suspension, nor shall this Lease or any of Tenant's obligations be affected or reduced by reason of them.

Section 21.04. *Reimbursement*. Tenant shall reimburse Landlord for its cost of removing from the Demised Premises and the Building any of Tenant's refuse and rubbish in excess of normal office waste and Tenant shall pay all bills therefor when rendered.

Section 21.05. *Lobby directory*. Tenant shall be entitled to its proportionate share of listing spaces on a directory to be maintained by Landlord in the lobby of the Building for the listing of the names of Tenant, its officers and employees and of all other permitted occupants of the Demised Premises, their officers and employees. Tenant shall pay all charges for such listings.

Article XXII Adjustment of Rent

Section 22.01. *Wage adjustments*. In addition to the fixed minimum rent reserved above, Tenant shall pay to Landlord, as additional rental, sums computed in accordance with the following provisions:

(a) "Wage Rate" shall mean one-half of the combined total of the minimum regular hourly wage rate plus all other sums required to be paid to or for the benefit of (1) porters, and (2) female cleaners engaged in the general maintenance and operation of office buildings of the type and in the vicinity of the Building under a collective bargaining agreement between Realty Labor Relations, Inc. (or any of its successors) and Local 45 of the Employees International Union (or any of its successors). The Wage Rate shall include but not be limited to sums paid for pensions, welfare funds, vacations, bonuses, social security, unemployment, disability benefits, health, life, accident, and other type of insurance. If any such agreement is not entered into or the parties or their successors cease to bargain collectively, the Wage Rate shall be one-half the combined total of the minimum regular hourly wage rate and above other sums payable to or for the benefit of porters and female cleaners engaged in the maintenance and operation of the Building and payable by

either Landlord or the contractor furnishing such services. However, the Wage Rate shall not exceed the hourly minimum rate of wages and other sums for porters and female cleaners engaged in the general maintenance and operation of buildings of the same type as the Building.

(b) "Base Wage Rate" shall mean the Wage Rate in effect on *[date]*.

(c) For purposes of this article, the number of square feet of rentable area contained in the Demised Premises is hereby fixed at 89,428 square feet.

If the Wage Rate is changed at any time during the term of this Lease and is greater than the Base Wage Rate, Tenant shall pay to Landlord as additional rent an annual sum equal to 1.50 times the product obtained by multiplying (i) the number of cents (including any fraction of a cent), by which the Wage Rate exceeds the Base Wage Rate by (ii) the number of square feet of rentable area in the Demised Premises. Such amounts shall be payable in equal monthly installments commencing with the first monthly installment of fixed rent falling due hereunder after the effective date of such change in the Wage Rate and continuing thereafter until a new adjustment in the additional rent is established and become effective in accordance with the provisions of this paragraph, except that notwithstanding any change in the Wage Rate downwards the fixed minimum annual rental shall not be reduced. If any change in the Wage Rate is made retroactive, Tenant shall pay Landlord the amount of the retroactive adjustment within ten days after being billed for it.

Section 22.02. *Tax adjustments.* Tenant further shall pay to Landlord, as additional rent, sums computed as follows:

(a) "Taxes" shall mean all real estate taxes, assessments, governmental levies, county taxes or any other governmental charge, whether general or special, ordinary or extraordinary, foreseen or unforeseen, or of any kind or nature, which are or may be assessed or imposed upon the Land, any leasehold of air rights or Landlord's share thereof, the Building and the sidewalks, plazas or streets in front of or adjacent thereto, including any tax, excise or fee measured by or payable with respect to any rent, and levied against Landlord and/or the Land and/or Building, under the laws of the United States, the State of New York or any political subdivision thereof or by the City of New York, as a substitute or addition in whole or in part for taxes presently or hereafter imposed on the Land and Building or resulting from or due to any change in the method of taxation, provided that the substitute tax on rent is considered as if the rent were Landlord's only income, but excluding any income, franchise, corporate, estate, inheritance, succession, capital stock, or transfer tax levied on Landlord. The term "Land," when used in this Lease, shall, unless the context otherwise indicates, include air rights, by lease or deed over adjoining property.

(b) "Tax Year" shall mean every 12-month consecutive period commencing each July 1 during the term of this Lease.

(c) "First Tax Year" shall mean that period of 12 months commencing July 1 for which the Building is first assessed for tax purposes, as a completed building.

(d) "Tenant's Proportionate Share" shall be deemed to be 13.625%.

(e) "Basic Tax" shall mean the agreed amount of \$762,500.

If the taxes for any Tax Year including the First Tax Year are greater than the Basic Tax, Tenant shall pay to Landlord as additional rent an amount equal to Tenant's Proportionate Share of the increase over the Basic Tax. If the Commencement Date of this Lease occurs during any Tax Year, or if the term of this Lease expires or is terminated during any Tax Year, the amount shall be prorated.

After the applicable governmental authority issues tax bills for real estate taxes assessed, levied and/or imposed upon the Land and Building, Landlord shall submit to Tenant a copy of the bill or bills. Thereafter, on or about each respective anniversary date, Landlord shall submit a copy of the tax bill or bills for the Taxes assessed, levied or

imposed upon the Land and Building for Tax Year, together with a statement which indicates any amount required to be paid by Tenant as additional rent as under this Section.

Within 30 days after the issuance of the statement, Tenant shall pay any additional rent set forth on the statement.

If Landlord receives a reduction of taxes for any Tax Year for which Tenant has paid any additional rent under this Section, the proceeds of such reduction less legal fees and other expenses incurred in collecting them, shall be applied and allocated to the period for which the reduction was obtained and proper adjustment shall be made between Landlord and Tenant.

All payments or refunds due hereunder for any period of less than a full Tax Year at the commencement or end of the term of this Lease, or because of any change in the area of the Demised Premises, shall be equitably pro-rated to reflect such event.

Section 22.03. *Rent tax.* Tenant shall pay to Landlord all present and future occupancy and rent taxes payable by Landlord. The tax shall be paid to Landlord as additional rent upon demand.

Article XXIII Electric Inclusion

Section 23.01. *Electric service.* Landlord shall furnish the electric energy required by Tenant in the Demised Premises on a rent inclusion basis. That is, there shall be no charge to Tenant for the electric energy by way of measuring it on any meter or otherwise, but it shall be included in Landlord's services which are covered by the fixed minimum rent. The amount included in the fixed minimum rent was based upon the normal use of electrical energy between the hours of 8:00 a.m. to 6:00 p.m. on Mondays through Fridays, except holidays, for lighting and for the operation of the machinery, appliances and equipment normally used in Tenant's business. Landlord shall not be liable in any way to Tenant for any failure or defect in the supply or character of electric energy furnished to the Demised Premises by reason of any requirement, act or omission of the public utility serving the Building with electricity or for any other reason not attributable to Landlord. Tenant shall furnish and install all lighting tubes, lamps, bulbs, and ballasts required in the Demised Premises, at its expense, or shall pay Landlord's reasonable charges therefor on demand.

Section 23.02. *Tenant electric use.* Subject to the provisions of Section 23.05, Tenant's use of electric energy in the Demised Premises shall not at any time exceed the capacity of any of the electrical conductors, machinery, and equipment in or otherwise serving the Demised Premises. In order to insure that such capacity is not exceeded and to avert possible adverse effect upon the Building electric service, Tenant shall not, without Landlord's prior written consent in each instance, connect any additional fixtures, machinery, appliances, or equipment to the Building electric distribution system or make any alteration or addition to Tenant's machinery, appliances, or equipment (other than an insubstantial number of electric typewriters, small computers, calculators, electric office equipment, or equipment of equivalent nature and immaterial consumption of electric energy), or the electric system of the Demised Premises existing on the Commencement Date. If Landlord grants consent, it shall provide all additional risers or other equipment required therefor and Tenant shall pay the cost thereof upon Landlord's demand. As a condition to granting consent, Landlord may require Tenant to agree to an increase in the fixed minimum rent by an amount that will reflect the values to Tenant of the additional service to be furnished by Landlord, that is, the potential additional electrical energy to be made available to Tenant based upon the estimated additional capacity of the additional risers or other equipment. If Landlord and Tenant cannot agree thereon, the amount shall be determined by an independent electrical engineer, based on standard practices, to be selected by Landlord and paid by Tenant. When the amount of the increase is so determined, the parties shall execute a supplementary agreement to reflect the increase in the amount of fixed minimum rent stated in this Lease and in the amount set forth in Section 23.04, effective from the date the additional service is made available to Tenant; but the increase shall be effective from such date even if the supplementary agreement is not executed.

Section 23.03. *Utility rate adjustment.* A utility rate adjustment shall be made (as provided below) if any one or more of the following events occur: the public utility rate schedule for the supply of electric current to the Building is increased or decreased during the term of this Lease; there is a change in taxes; additional taxes are imposed upon the sale or furnishing of the electric current; there is a change in the space constituting the Demised Premises; if Tenant's failure to maintain its machinery and equipment in good order and repair causes greater consumption of electrical current; if Tenant uses electricity on days or hours other than those specified in the third sentence of Section 23.01; or if Tenant adds any machinery, appliances or equipment. In any such event, the fixed minimum rent herein reserved shall be equitably adjusted to reflect the resulting increase in use, and the amount set forth in Section 23.04 shall also be adjusted accordingly. If Landlord and Tenant cannot agree thereon, the amounts of the adjustments shall be determined, based on standard practices, by an independent electrical engineer, to be selected by Landlord and paid by Tenant. When the amounts are so determined, the parties shall execute a supplementary agreement to reflect such adjustments in the amount of the fixed minimum rent stated in this Lease and in the amount set forth in Section 23.04. The adjustments shall be effective from the date of the increase or decrease of such usage as determined by the electrical engineer, or, if applicable, from the effective date of such increase or decrease in the public utility rate schedule. However, the adjustments shall be effective from such date regardless of whether a supplementary agreement is executed.

Section 23.04. *Discontinued service.* If required by law or public regulation or the tariff of the applicable public utility, or if Landlord wishes to discontinue service to the balance of the Building, Landlord may discontinue furnishing electric energy to Tenant in the Demised Premises at any time by giving it not less than 90 days' notice. If Landlord exercises such right to termination, this Lease shall continue in full force and effect and shall be unaffected thereby. However, from and after the effective date of termination, Landlord shall not be obligated to furnish electric energy to Tenant and the fixed minimum rent payable under this Lease shall be reduced by \$44,714 per annum, plus or minus the amount of any change under Sections 23.02 and 23.03. If Landlord so discontinues furnishing electric energy to Tenant, Tenant shall arrange to obtain electric energy directly from the public utility company furnishing electric service to the Building. Such electric energy may be furnished to Tenant by means of the then existing building system feeders, risers, and wiring to the extent that they are available, suitable and safe for such purposes. Tenant shall install and maintain, at its expense, all meters and additional panel boards, feeders, risers, wiring, and other conductors and equipment which may be required to obtain electric energy directly from the public utility company.

Section 23.05. *Electric load limitation.* At no time will the average connected electrical load in each floor of the Demised Premises exceed 5 watts per square foot. Subject only to any limiting requirement, act or omission of the public utility serving the Building with electricity referred to in Section 23.01, as well as the provisions of Section 23.04, Landlord shall furnish sufficient electric energy to each floor of the Demised Premises to supply an average connected electrical load of 5 watts per square foot.

Section 23.06. *Electric tax.* If any tax is imposed upon Landlord with respect to electrical energy furnished as a service to Tenant by any federal, state, or municipal authority, Tenant shall, if permitted by law or applicable regulations, reimburse its pro rata share of the taxes to Landlord.

Section 23.07. *Electrical survey.* Although the charge for the service of redistributing and furnishing electrical energy is included in the fixed minimum rent on a so-called "rent inclusion" basis, Landlord shall, at tenant's expense, select an independent electrical engineer or electrical consulting firm doing solely such work to make a determination within one year next following the commencement of Tenant's normal business activities in all of the Demised Premises, of the charge for the electrical service supplied by the Landlord and used by Tenant annually in the Demised Premises. If Tenant disputes the determination of such engineer or consultant, Tenant may have a survey made by an independent electrical engineer or electrical consulting firm doing solely such work. If the two consultants so chosen do not agree upon the rent inclusion charges, they shall pick a third similar consultant, and the opinion of two of them shall be binding upon the parties. If it is finally determined that the charge exceeds or is less than \$44,714, the parties shall enter into a written supplementary agreement, in form satisfactory to Landlord, modifying this Lease by adjusting the fixed minimum rent by an amount equal to the difference. In that event, the \$44,714 figure set forth in Section 23.04 shall be

changed in a like amount.

Article XXIV Broker

Section 24.01. The sole broker who negotiated and brought about this transaction was Stanley & Drake, Inc. Landlord shall pay it a broker's commission as per separate agreement.

Article XXV Subordination

Section 25.01. *Subordination.* This Lease is and shall be subject and subordinate to any ground or underlying lease and any lease of air rights which may now or hereafter affect the Building, the Land, or both, and to any amendment, modification, renewal, or extension of the ground or underlying lease or lease of air rights. This Lease is also subject and subordinate to all mortgages which may now or hereafter affect any lease of air rights or ground or underlying lease or the Land and/or Building and to all renewals, modifications, amendments, consolidations, replacements, or extensions thereof. The Landlord or Lessor under any ground or underlying lease is referred to in this Lease as "Overlandlord." This clause shall be self-operative and no further instrument of subordination shall be required by any Overlandlord or Mortgagee. In confirmation of such subordination, Tenant without cost or charge to Landlord, shall execute promptly any certificate or instrument of subordination requested by Landlord. If Tenant fails upon reasonable request to execute the certificate or instrument, Tenant hereby constitutes and appoints Landlord its attorney-in-fact to execute all such certificates or instruments for and on behalf of Tenant.

Section 25.02. *Notice of mortgagees.* If there is any act or omission by Landlord which would or may give Tenant the right to terminate this Lease or to claim a partial or total eviction, Tenant will not exercise the right until:

- (a) It has given written notice of any such act or omission to the holder of any leasehold mortgage or of any fee mortgage and to the Landlord or Landlords of any ground or underlying lease or leases whose names and addresses previously have been furnished to Tenant by giving such notice, addressed to the holders and the Landlord or Landlords at the last addresses so furnished; and
- (b) A reasonable period of time for remedying such act or omission has elapsed following the giving of notice, during which any of the parties to whom notice was given has not commenced with reasonable diligence to remedy, or cause to be remedied, the act or omission.

Section 25.03. *Mortgage modification.* If, in connection with obtaining temporary or permanent financing for the Land and/or Building or of any ground or underlying lease, any lender requests reasonable modifications of this Lease as a condition to such financing, Tenant shall not unreasonably withhold, delay, or defer the execution of an agreement of modification of this Lease if such modifications do not increase Tenant's financial obligations hereunder or materially adversely affect the leasehold interest hereby created or Tenant's reasonable use and enjoyment of the premises. If Tenant refuses to execute and deliver any such modification agreement within ten days after its request by Landlord, Landlord may cancel and terminate this Lease. Upon such cancellation and termination neither party shall have any further right or obligation to the other arising out of the execution and delivery of this Lease.

Section 25.04. *Nondisturbance of Tenant.* Notwithstanding the provisions of Section 25.01, the subordination of this Lease to any later executed superior lease or superior mortgage or to any later renewal, modification, replacement, or any extension of superior lease or superior mortgage, or to any existing or future consolidation or spreader of any superior mortgage, is subject to the express conditions that, so long as this Lease is in full force and effect and Tenant is not in default of the terms and provisions of this Lease beyond any applicable grace periods:

- (a) Tenant shall not be joined as a party defendant (1) in any action or proceeding which may be instituted or taken by the lessor of the superior lease for the purpose of terminating it by reason of any default thereunder, or (2) in any

foreclosure action or proceeding which may be instituted or taken by the holder of the superior mortgage; and

(b) Tenant shall not be evicted from the Demised Premises, Tenant's leasehold estate under this Lease shall not be terminated or disturbed, nor shall any of Tenant's rights under this Lease be affected in any way, by reason of any default under the superior leasehold or superior mortgage.

Section 25.05. *Attornment.* If the lessor of a superior lease or the holder of a superior mortgage succeeds to Landlord's rights under this Lease, whether through possession or foreclosure action or delivery of a new lease or deed, then at the request of the successor party ("successor landlord") and upon such successor landlord's written agreement to accept Tenant's attornment, Tenant shall attorn to and recognize the successor landlord as Tenant's landlord under this Lease, and shall promptly execute and deliver any instrument requested by the successor landlord to evidence such attornment. If Tenant refuses or fails promptly upon reasonable request to execute such instrument, Tenant hereby irrevocably appoints Landlord or the successor landlord its attorney-in-fact to execute and deliver the instrument on its behalf. Upon such attornment this Lease shall continue in full force and effect as if it were a direct lease between the successor landlord and Tenant upon all of the terms, conditions, and covenants set forth in it and shall be applicable after such attornment. However, the successor landlord shall not:

(a) Have any liability for refusal or failure to perform or complete Landlord's work or otherwise to prepare the Demised Premises for occupancy in accordance with the provisions of Exhibit "B" of this Lease;

(b) Be obligated under Article X to repair, restore, replace, or rebuild the Building or the Demised Premises, in case of total or substantially total damage or destruction, beyond any repair, restoration, or rebuilding that can reasonably be accomplished with the net proceeds of insurance actually received by, or made available to, the successor landlord;

(c) Be liable for any of Landlord's previous acts or omissions under this Lease;

(d) Be subject to any offset, not expressly provided for in this Lease, which has previously accrued to Tenant against Landlord;

(e) Be bound by any previous modification of this Lease, except as expressly provided for in it, or in Article XIV, Section 14.03, by any previous prepayment of more than one month's rent, unless the modification or prepayment has been expressly approved in writing by the lessor of the superior lease or the holder of the superior mortgage through or by reason of which the successor landlord has succeeded to Landlord's rights under this Lease.

Article XXVI Legal Proceedings

Section 26.01. *Waiver of jury trial.* Landlord and Tenant hereby waive, to the extent not prohibited by law, the right to a jury trial in any action, summary proceeding, or legal proceeding between or among the parties or their successors arising out of this Lease, Tenant's occupancy of the Demised Premises, or Tenant's right to occupy the Demised Premises.

Section 26.02. *Tenant counterclaims.* Tenant hereby waives the right to interpose a counterclaim in any summary proceeding instituted by Landlord against Tenant or in any action instituted by Landlord for unpaid rent or additional rent under this Lease.

Section 26.03. *Tenant's equitable remedies.* If Tenant claims or asserts that Landlord has violated or failed to perform a covenant not to unreasonably withhold or delay Landlord's consent or approval, or whenever Landlord's reasonableness in exercising its judgment is in issue, Tenant's sole remedy shall be an action for specific performance, declaratory judgment, or injunction. Tenant shall not be entitled to any money damages for a breach of such covenant or to claim or assert any claims in any money damages in any action or by way of set off, defense, or counterclaim. Tenant hereby

specifically waives the right to any money damages or other remedies.

Article XXVII Surrender of Premises

Section 27.01. Upon the expiration or other termination of the term of this Lease, Tenant shall quit and surrender the Demised Premises in good order and condition, ordinary wear and tear and damage by fire or other casualty, or the elements excepted, and shall remove all its property therefrom, except as otherwise provided in this Lease. Tenant's obligation to observe or perform this covenant shall survive the expiration or other termination of this Lease term.

Article XXVIII Rules and Regulations

Section 28.01. *Rules and regulations.* Tenant, its servants, employees, agents, visitors, and licensees shall observe faithfully and comply strictly with the rules and regulations set forth in Exhibit "D" attached hereto and made a part hereof. Landlord may from time to time during the term of this Lease make reasonable changes in and additions to the rules thus set forth if such changes and additions are applicable to all other office tenants in the Building.

Section 28.02. *Enforcement.* Landlord's failure to enforce any existing or future rules and regulations, either against Tenant or any other tenant in the Building, shall not constitute a breach hereunder or waiver of any such rules and regulations. However, any rule or regulation not generally enforced against other Tenants in the Building will not be discriminatorily enforced against Tenant.

Article XXIX Successors and Assigns

Section 29.01. *Binding effect.* The covenants, conditions, and agreements contained in this Lease shall bind and inure to the benefit of the parties and their respective heirs, legal representatives, successors and, except as otherwise provided herein, assigns.

Section 29.02. *Landlord defined.* The term "Landlord" whenever used in this Lease shall be limited to mean only the owner or owners at the time in question of the Building or the tenant under a ground or underlying lease affecting the Land and/or the Building, to whom this Lease may be assigned, or an overlandlord who enters into possession, or a mortgagee in possession, so that in the event of any sale, assignment or transfer of the Landlord and/or Building, or of the ground or underlying lease, such owner, tenant under the ground or underlying lease or overlandlord or mortgagee in possession shall thereupon be released and discharged from all of Landlord's covenants, conditions and agreements thereafter accruing. However, such covenants, conditions and agreements shall be binding upon each new owner, tenant under the ground or underlying lease, overlandlord or mortgagee in possession for the time being of the Building, until sold, assigned, or transferred.

Article XXX Notices

Section 30.01. Any notice, request, demand, or communication permitted or required to be given by this Lease, or by any law or governmental regulation, by one party to the other, shall be in writing. Unless otherwise required by law or regulation, the notice, request, or demand shall be given, and shall be deemed to have been served and given, by Landlord and received by Tenant when Landlord deposits it by certified or registered mail, return receipt requested, enclosed in a securely closed postpaid wrapper, in a United States Government general or branch post office, addressed to Tenant (1) at the Demised Premises, or (2) until Tenant shall have moved its offices to the Demised Premises, addressed to Tenant at its address as stated on the first page of this Lease. Such notice, request, or demand shall be given, and shall be deemed to have been served and given by Tenant and received by Landlord, when Tenant deposits it, by certified or registered mail, return receipt requested, enclosed in a securely closed postpaid wrapper in such post office addressed to Landlord at its address stated on the first page of this Lease. Either party may, by notice sent in the above manner, designate a different address or addresses for notices, requests, demands, or communications to it.

Article XXXI No Waiver; Entire Agreement

Section 31.01. *Non-waiver.* The failure of either party to seek redress for violation of, or to insist upon the strict performance of, any covenant or condition of this Lease, or of Landlord to enforce any Rule or Regulation set forth or hereafter adopted by it, shall not prevent a subsequent act, which would have originally constituted a violation, from having all the force and effect of an original violation. The receipt by Landlord of rent or payment of rent by Tenant with knowledge of the breach of any covenant of this Lease shall not be deemed a waiver of the breach. No provision of this Lease shall be deemed to have been waived by either party, unless it is in writing signed by such party. No payment by Tenant or receipt by Landlord of a lesser amount than the monthly rent herein stipulated shall be deemed to be other than on account of the earliest stipulated rent, nor shall any endorsement or statement on any check or any letter accompanying any check or payment as rent be deemed an accord and satisfaction. Landlord may accept the check or payment without prejudice to its right to recover the balance of the rent or pursue any other remedy provided in this Lease.

Section 31.02. *Entire agreement.* This Lease together with the annexed Exhibits contains the entire agreement between the parties. Any executory agreement hereafter made between them shall be ineffective to change, modify, waive, release, discharge, terminate, or effect an abandonment of this Lease, in whole or in part, unless the executory agreement is in writing and signed by the party against whom enforcement of the change, modification, waiver, release, discharge, termination, or effecting of the abandonment is sought.

Section 31.03. *Severability.* If any term or provision of this Lease is to any extent invalid or unenforceable, the remainder of this Lease shall not be affected thereby and the remaining terms and provisions shall be valid and enforceable to the fullest extent either hereunder or as permitted by law.

Article XXXII Index and Captions; Estoppel Certificate

Section 32.01. *Headings.* The index preceding this Lease and the headings of Articles in this Lease are inserted only as a matter of convenience and for reference. They in no way define, limit, or describe the scope of this Lease or of the intent of any provision thereof.

Section 32.02. *Estoppel certificates.* Each party shall, at any one or more times, upon not less than 10 days' prior notice by the other party, execute, acknowledge, and deliver to it a written statement. The statement shall certify that this Lease is unmodified and in full force and effect (or, if there have been modifications, that the same is in full force and effect as modified and stating the modifications), state the dates to which the fixed minimum rent, additional rent, and other charges have been paid, and state whether to the best knowledge of the signer of the certificate, there exists any default in the performance of any covenant, agreement, term, provision, or condition contained in this Lease, and, if so, specify each such default. The parties intend that any such statement may be relied upon by the other party, by any mortgagee or prospective mortgagee of any mortgage affecting the Building or the Building and the Land or Tenant's interest in this Lease, by any Landlord under a ground or underlying lease affecting the Land or Building, and by any subtenant or assignee of Tenant's interest in this Lease.

Article XXXIII Inability to Perform

Section 33.01. *Landlord performance.* This Lease and Tenant's obligation to pay rent or additional rent hereunder and perform and comply with all of its other covenants and agreements hereunder shall in no way be affected, impaired, or excused because of Landlord's delay or failure to perform or comply with any of its covenants or provisions hereunder; or because Landlord is unable to fulfill any of its obligations under this Lease or to supply or is delayed in supplying any service expressly or impliedly to be supplied or is unable to make; or is delayed in making any repair, additions, alterations or decorations; or is unable to supply or is delayed in supplying any equipment or fixtures if Landlord is prevented or delayed from so doing by reason of strike or labor troubles or any other cause including, but not limited to,

governmental preemption in connection with a National Emergency or by reason of any rule, order or regulation of any governmental department, agency, or subdivision thereof or the conditions of supply and demand which have been or are affected by war or other emergency. The time given to Landlord to comply with any obligation under this Lease shall be extended for a period equal to any period of delay resulting from any of the above causes.

Section 33.02. *Tenant performance.* This Lease and Landlord's obligation to perform and comply with its covenants and agreements hereunder shall in no way be affected, impaired, or excused because of Tenant's delay or failure to perform or comply with any of its covenants or provisions hereunder; nor because Tenant is unable to fulfill any of its obligations under this Lease or to supply or is delayed in supplying any service expressly or impliedly to be supplied; or is unable to make, or is delayed in making any repair, additions, alterations, or decorations; or is unable to supply or is delayed in supplying any equipment or fixtures, if Tenant is prevented or delayed from so doing by reason of strike or labor troubles or any other cause including, but not limited to, governmental preemption in connection with a National Emergency or by reason of any rule, order or regulation of any governmental department or subdivision or the conditions of supply and demand which have been or are affected by war or other emergency. The time given to Tenant to comply with any obligation under this Lease shall be extended for a period equal to any period of delay resulting from any of the above causes.

Article XXXIV No Representations by Landlord

Section 34.01. Neither Landlord nor its agents have made any representations or promises with respect to the Building, the Land, or the Demised Premises except as expressly set forth herein. No rights, easements, or licenses are acquired by Tenant by implication or otherwise except as expressly set forth in the provisions of this Lease. The taking possession of the Demised Premises by Tenant shall be conclusive evidence as against it, that Tenant accepts the premises and the Building and that they were in good and satisfactory condition when possession was so taken.

Article XXXV Memorandum of Lease

Section 35.01. This Lease shall not be recorded. The parties shall, if Tenant requires, execute and deliver a memorandum of this Lease in proper form for the purpose of recording. However, the memorandum shall not in any circumstances be deemed to modify or change any provision of this Lease. The Lease provisions shall in all instances prevail.

In witness whereof Landlord and Tenant have respectively signed and sealed this Lease as of the day and year first above written.

Melville Building Company

(a New York Limited Partnership)

by _____

General Partner

Landlord

Page & Company Inc.

by _____

Senior Vice President

Tenant
(Corporate Seal)

[Acknowledgments]

Exhibit "A"
(Floor Plan)

Exhibit "B"

Procedure for Tenant Work

1. *Tenant's work*

Tenant, at its expense, shall prepare a set of plans, which shall contain complete information and dimensions necessary for the construction and finishing of the premises. Tenant shall submit the plans to Landlord on or before the following dates:

(a) Partition layouts for A/C design: *[date]*.

(b) Final detail drawings: *[date]*.

In accordance with these plans, Landlord, at its expense, except as otherwise expressly specified in this Exhibit B and in the foregoing Lease, shall make and complete in and to the premises the following work and installations, all of which shall be of material, manufacture, design, capacity, finish, and color of the building-standard adopted by Landlord for the Building:

I. Partitions:

A. Furnish and install 21/2 "metal stud drywall partitions with one layer of 5/6 "sheetrock each side, spackled, taped and painted. One side of partitions shall extend to slab above hung ceiling.

B. At all points that any partition intersects the perimeter air conditioning enclosures, furnish and install sound baffles within these enclosures.

II. Doors, Bucks & Hardware:

A. Furnish and install ceiling high hollow metal doors in hollow metal bucks. Doors shall be a 3/4 "thick. All doors shall be installed in bucks in locations as specified on Tenant's plans.

B. Closets. Each closet, 5'-0' (nominal) in length, ceiling high, and flush bi-fold doors; two wood hat shelves (paint grade) and one metal chrome coat rod. One closet for up to each 3,000 square feet of net rentable area.

C. Furnish and install 11/2 pairs of ball bearing butts, a heavy duty latch set, and door stop on each door as designated on the Tenant's plans. All hardware shall be Schlage D-Line or equal in satin chrome finish. Locksets and door closers

shall be furnished and installed on the basis of a maximum of two doors per floor. All locksets shall be masterkeyed to building system.

III. Ceilings:

Furnish and install a building standard mechanically suspended acoustic ceiling, concealed spline, mineral fissured.

IV. Floor Covering:

A. Furnish and install building standard 1/8' vinyl asbestos tile in all noncarpeted areas including 4' rubber or vinyl base (cove or straight edge) in accordance with Tenant's plans. Colors to be selected by Tenant from Landlord's building standards. (The expression "noncarpeted areas" shall not be deemed to include those areas in which rugs and/or carpets are used or initially planned to be used by the Tenant.)

V. Venetian Blinds:

Furnish and install building standard venetian blinds on all windows of office floors in color and type as selected by Landlord. (No substitutions)

VI. Lighting:

A. Furnish and install one fluorescent lighting fixture per every 90 square feet of rentable area in the demised premises. These fixtures shall be 2' x 4' recessed, designed to contain four 40-watt fluorescent lamps with rapid start ballasts and Arcylic plastic lens (without lamps).

B. Furnish and install all miscellaneous fixtures, either fluorescent or incandescent, for such areas as mechanical spaces, toilets, stairwells, exits, etc., in quantities to conform with the Building Code.

C. Furnish and install all quiet type single pole switches and associated wiring facilities required to service the aforementioned lighting fixtures, as required by municipal authorities, but in no event less than one per room.

VII. Electrical:

A. Furnish and install a cellular floor with active cells approximately 6'0' on center and a header duct system for power receptacles and telephone wiring system. Furnish and install, in locations designated on Tenant's plans, standard electrical duplex receptacles with the required associated wiring facilities in the quantity of one outlet per 100 square feet of rentable area in the demised area of which 25% can be floor outlets.

All floor outlets must be located directly above active floor cells.

B. Landlord shall provide adequate electrical power feeders to each floor not to exceed 6-watts per square foot rentable area for Tenant power and lighting requirements, exclusive of air conditioning and elevator power requirements.

C. Furnish and install one telephone outlet per 150 square feet of rentable area in the demised area of which 25% may be floor outlets. All floor outlets must be located directly above active floor cells.

VIII. Heating, Ventilating & Air Conditioning:

Year round air conditioning system except as otherwise provided in this lease, combining the use of periphery units and interior duct air distribution system. The periphery air conditioning system shall service that portion of the demised

premises being approximately 15 ft. distant from the glass line of the Building. For periphery rooms, Landlord will furnish one thermostat for every two peripheral column bays. Interior duct distribution, including building standard ducts, grilles, etc., to accommodate Tenant's layout. The air conditioning system will maintain interior conditions of 78 [degrees] dry bulb and 50% relative humidity when outside conditions are 95 [degrees] dry bulb and 75 [degrees] wet bulb, and will provide fresh air in a quantity not less than 0.30 cu. ft. per minute per square foot of floor area provided that in any given room or area of the demised premises--the occupancy does not exceed one person for each 100 square feet of the Demised Premises and total connected electric load does not exceed 5 watts per sq. ft. of all purposes, including lighting and power. Duct distribution to accommodate Tenant's layout shall be designed only by Engineer in Landlord's employ.

IX. Plumbing:

Furnish and install rough plumbing for a reasonable amount of Tenant's electric water coolers but not to exceed an average of two per floor and said rough plumbing shall be located at a wet column. Connections and water coolers shall be at Tenant's expense.

X. Painting & Wall Coverings:

A. Paint all walls, vertical furring, nonacoustically treated ceilings, metal or wood doors and door bucks, convactor enclosures and all other masonry or metal surfaces. This painting shall consist of one prime coat and two coats of paint, flat or semi-gloss, stippled finish. Colors for this initial painting of all surfaces shall be selected by Tenant from 12 building standard colors, with no more than one color in any one room or open area.

B. Complete one coat repainting after the fifth and tenth years of the term of the Lease. Only those areas which were originally painted by Landlord at its expense are to be repainted, as called for above.

XI. Miscellaneous:

A. All work performed by the Landlord shall be performed in good and workmanlike manner and the quality of materials, equipment and fixtures shall be of good quality throughout the Building.

2. Substitutions and Credits

Tenant may select different new materials (except venetian blinds) in place of Building standard materials which would otherwise be initially furnished and installed by Landlord under the provisions of this Exhibit. If Tenant makes any such selection, or if different new materials are required because of any situation created by Tenant (by reason of subleasing or any other similar or dissimilar cause) wherein the Building Code prohibits the use of Landlord's Building standard materials, and if the Work Cost of the different new materials exceed Landlord's cost of its Building standard material thereby replaced, Tenant shall pay to Landlord, as provided below, the difference between the Work Cost and Landlord's Cost. Tenant may also indicate on its plans additional Building standard work and materials to be furnished and installed at its expense, and Tenant shall pay to Landlord, as provided below, the Work Cost of the additional work and materials. No different new materials shall be furnished and installed in replacement for any of Landlord's Building standard materials nor shall any additional work or additional materials be furnished and installed until Landlord has received Tenant's agreement to pay the difference between the Cost of the different new materials and Landlord's Cost of the replaced Landlord's Building standard materials, of the Cost of the additional work or additional materials, as the case may be. If within ten days after Landlord's notice to Tenant of such Costs Tenant fails to deliver to Landlord its agreement to pay them, Landlord may proceed with the installation of the Building standard materials which would otherwise have been initially furnished and installed by it under the provisions hereof. All amounts payable by Tenant to Landlord under this exhibit shall be paid as additional rent promptly after Landlord submits bills for them to Tenant. Landlord may submit bills while the work is being performed or while the materials for it are furnished and installed.

Tenant shall be allowed credit equal to Landlord's unit costs for the omission of Landlord's Building standard materials, but only within each trade.

The term "Work Cost," as used in this Exhibit, shall mean the actual cost (including the cost of applicable insurance premiums and the cost of additional engineering, if any, required by reason of the next preceding paragraph) to Landlord's contractor of furnishing and installing the different new materials or the additional work or additional materials including 21% of the actual costs for the contractor's overhead and profit. The term "Landlord's Cost," as used in this Exhibit, shall mean the estimated or actual cost to Landlord of furnishing and installing its Building standard materials thereby replaced.

3. Tenant's Installations

(a) Tenant may employ directly any finishing trades, such as carpeting, curtains, and interior furnishings. Landlord shall provide access to the Demised Premises for such trades and also for the purpose of permitting Tenant to install its furniture, furnishings, business machines, and other like movable property when, in Landlord's opinion, the basic work in the Building and Demised Premises has been completed to the point that the installations or the work of such trades can be made and installed without delaying or interfering with the performance of the work of Landlord's contractors or subcontractors in the Demised Premises or elsewhere in the Building.

(b) All employees of the above finishing trades and those who are employed in Tenant's Installations shall be of union affiliation acceptable to Landlord's contractors and subcontractors. Tenant shall cooperate fully in the maintenance of harmony between all trades. If at any time any entry in the Building causes disharmony, or in Landlord's opinion, interferes with or tends to delay completion of the work of Landlord's contractors or subcontractors in the Demised Premises or elsewhere in the Building, Landlord may immediately withdraw this license by giving Tenant oral or written notice. As soon as such notice is given all employees engaged in the finishing trades or installations shall immediately withdraw from the Building and thereafter have no further right of access in or to the Building.

(c) All work and installations to be done in the Demised Premises by Tenant shall be performed whenever, in the judgment of Landlord and its contractor, the work will not interfere with the performance of other work of Landlord's contractors or subcontractors in the Demised Premises or elsewhere in the Building. Tenant shall pay Landlord for all loss of rent under the Lease caused by delays in the substantial completion of any part of the Demised Premises or the Building resulting from any interference with or delay of other work of Landlord's contractors or subcontractors in the Demised Premises or the Building.

(d) Any installation or work by Tenant shall be at its sole risk and any loss or damage to any work or installations by or for Tenant shall be borne solely by it. Neither Landlord nor its contractors shall be responsible for the care or safety of Tenant's work or installations. Tenant shall promptly repair any damage resulting from its acts or those of its contractors, subcontractors, agents, or employees in the Demised Premises in advance of or subsequent to the Commencement Date.

(e) Any entry upon the Demised Premises or in the Building by Tenant or its agents, employees, contractors, and workmen shall be deemed to be under all of the terms, covenants and provisions of the Lease, except as to the covenant to pay rent.

(f) Tenant shall enter into a written contract or contracts with Landlord's contractor covering the installation of Tenant's Work if the contractor agrees to perform the work and installations at a cost to Tenant not exceeding the contractor's cost plus 21% for its overhead and profits.

4. Miscellaneous

(a) Tenant, at its expense, shall file all required Tenant plans with the Department of Buildings and obtain approvals of other applicable governmental authorities.

(b) The Building, and all facilities and equipment installed by Landlord as part of Landlord's Work, whether in the Demised Premises or elsewhere in the Building, shall be constructed, installed, and operated in such a manner that noise and vibration levels in the Demised Premises resulting from operation of the facilities and equipment shall not exceed the noise and vibration levels in buildings of similar nature, where good construction and operating practices prevail. Landlord shall not be liable for noise or vibrations, however caused, emanating from sources outside the Building.

(c) Landlord at its expense, shall cause the Demised Premises, including the exterior and interior of the peripheral windows, to be cleaned on completion of construction immediately prior to Tenant's occupancy.

(d) All plans, drawings, and specifications for the Demised Premises and required to be submitted by Tenant to Landlord, shall comply and conform with the Building plans filed with the Department of Buildings of the City of New York, and with all the rules, regulations, and other requirements of any governmental department having jurisdiction over the construction of the Building or the Demised Premises. In completing the Building and the Demised Premises, Landlord may make all changes required by any governmental department and all changes and variations in construction due to or in order to meet job conditions affecting their construction. The changes or variations shall not be deemed to be a violation of Tenant's plans or any provision of this Exhibit, and shall be accepted by Tenant.

(e) Notwithstanding any contrary provision herein, if Tenant fails to comply with the Submission Dates as set forth in this Exhibit, Landlord may proceed with all its work in accordance with plans and drawings last submitted by either party to the other and with the standard of the Building. The completion shall be deemed to be substantial completion of the Premises in accordance with the provisions of the Lease.

If, within 30 days after the Submission Dates, Tenant submits no plans, Landlord may complete the Demised Premises only in accordance with the minimum legal requirements necessary for occupancy as "open space." Completion in such manner shall be deemed full compliance with this Exhibit and Landlord shall be released of all further obligations under it.

(f) If substantial completion of the Demised Premises or substantial performance of Landlord's work under this Schedule or further agreements between the parties pertaining to the work is delayed by Tenant's failure to comply with its obligations under this Schedule or by Tenant's changes, the term of this Lease and the payment of rent under it shall commence on the date such term and payment would have commenced had Tenant not so delayed completion of the work. In addition, Tenant shall pay the costs and damages sustained by Landlord by reason of the changes or delay in submitting the layouts.

(g) All of Tenant's plans and drawings shall be subject to Landlord's approval, which it shall not unreasonably withhold. Except as otherwise permitted or required herein, each party shall give the other its required approval or disapproval within 10 days after written request therefor. Submissions of shop drawings, plans, layouts, etc., and requests for authorization to proceed with work at Tenant's expense that are not disapproved or corrected within ten days shall be deemed approved.

(h) The initial air conditioning duct distribution for the premises other than for special areas will be designed at Landlord's expense. If any engineering services are required for any other purposes or as a result of changes in any of Tenant's layout or its requirements for occupancy, Tenant shall reimburse Landlord for their cost. The engineering services shall be performed by Landlord's engineer only.

Exhibit "C"
(Description of Land)

Exhibit "D"
Rules and Regulations

1. The rights of tenants in the entrances, corridors, elevators, and escalators of the Building are limited to ingress to and egress from the tenants' premises for the tenants and their employees, licensees, and invitees. No tenant shall use, or permit the use of, the entrances, corridors, escalators, or elevators for any other purpose. No tenant shall invite to its premises, or permit the visit of, persons in such numbers or under such conditions as to interfere with the use and enjoyment of any plaza, entrance, corridor, escalator, elevator or other facility of the Building by other tenants. Tenant shall not use or permit its employees to use the elevators before 10:00 a.m. in a "Down" direction for purposes of taking a coffee break or similar activities. Fire exits and stairways are for emergency use only, and shall not be used for any other purposes by the tenants, their employees, licensees or invitees. No tenant shall encumber or obstruct, or permit the encumbrance or obstruction of any sidewalk, plaza, entrance, corridor, escalator, elevator, fire exit, or stairway of the Building. Landlord reserves the right to control and operate the public portions of the Building and the public facilities, as well as facilities, furnished for the common use of the tenants, in any manner it deems best for the benefit of the tenants generally.
2. The cost of repairing any damage to the public portions of the Building or the public facilities or to any facilities used in common with other tenants, caused by a tenant or its employees, licensees, or invitees, shall be paid by the tenant.
3. Landlord may refuse admission to the Building outside of ordinary business hours to any person not known to the watchman in charge or not having a pass issued by the Landlord or not properly identified, and may require all persons admitted to or leaving the Building outside of ordinary business hours to register. Tenant's employees, agents, and visitors shall be permitted to enter and leave the building whenever appropriate arrangements have been previously made between the Landlord and the Tenant with respect thereto. Each tenant shall be responsible for all persons for whom permission is requested and shall be liable to the Landlord for all acts of such persons. Any person whose presence in the Building at any time shall, in Landlord's judgment, be prejudicial to the safety, character, reputation, and interests of the Building or its tenants may be denied access to the Building or may be ejected from it. For the safety of the tenants and protection of property in the Building, Landlord may prevent all access to the Building, by closing the doors or otherwise, during any invasion, riot, public excitement, or other commotion. Landlord may require any person leaving the Building with any package or other object to exhibit a pass from the tenant from whose premises the package or object is being removed, but the establishment and enforcement of such requirement shall not impose any responsibility on Landlord for the protection of the tenant against the removal of such property. Landlord shall, in no way, be liable to any tenant for damages or loss arising from the admission, exclusion, or ejection of any person to or from the tenant's premises or the Building under this rule.
4. No tenant shall obtain or accept for use in its premises ice, drinking water, food, vending machines, beverage, towel, barbering, boot blacking, floor polishing, lighting maintenance, cleaning, or other similar services from any persons not authorized by the Landlord in writing to furnish such services, if Landlord authorizes a person or persons to provide services desired by Tenant, and the charges for services are not excessive. The services shall be furnished only at the hours, in the places within the tenant's premises, and under the regulations fixed by Landlord.
5. No tenant shall install any awnings or other projections over or around the windows. Only window blinds supplied or permitted by Landlord shall be used in a tenant's premises.
6. No hand trucks, except those equipped with rubber tires and side guards, shall be used by Tenant, jobbers, or others in delivering or receiving merchandise in any space or the public halls of the Building.
7. All entrance doors in each tenant's premises shall be left locked when the premises are not in use. Entrance doors

shall not be left open at any time. All windows in each tenant's premises shall be kept closed at all times and all blinds therein above the ground floor shall be lowered when and as reasonably required because of the position of the sun, during the operation of the Building air conditioning system to cool or ventilate the tenants' premises.

8. No noise, including the playing of any musical instruments, radio, or television, which, in Landlord's judgment, might disturb other tenants in the Building shall be made or permitted by any tenant. No cooking shall be done in the tenant's premises, except as expressly approved by Landlord. Nothing shall be done or permitted in any tenant's premises, and nothing shall be brought into or kept in any tenant's premises, which would impair or interfere with any of the Building services, the proper and economic hearing, cleaning or other servicing of the Building or the premises, or the use or enjoyment by any other tenant of any other premises. No tenant shall install any ventilating air conditioning, electrical, or other equipment of any kind which might cause any such impairment or interference.

9. Tenant shall not permit any cooking or food odors emanating within the Demised Premises to seep into other portions of the Building.

10. No acids, vapors, or other materials shall be discharged or permitted to be discharged into the waste lines, vents, or flues of the Building which may damage them. The water and wash closets and other plumbing fixtures in or serving any tenant's premises shall not be used for any purpose other than that for which they were designed or constructed, and no sanitary napkins, paper towels, sweepings, rubbish, rags, acids, or other foreign substances shall be deposited therein. Each tenant shall be responsible for all damages resulting from any misuse of the fixtures by it or by its servants, employees, agents, visitors, or licensees.

11. No signs, advertisement, notice, or other lettering shall be exhibited, inscribed, painted, or affixed by any tenant on any part of the outside or inside the premises or the Building without Landlord's prior written consent. If any tenant violates the preceding rule, Landlord may remove the sign or other lettering without any liability and charge the tenant for the resulting expense. Interior signs and lettering on doors and elevators shall be inscribed, painted, or affixed for each tenant by Landlord at the Tenant's expense, and shall be of a size, color and style acceptable to Landlord. Landlord may prohibit any advertising by any tenant which impairs the reputation of the building or its desirability as a building for offices, and upon written notice from Landlord, Tenant shall refrain from or discontinue such advertising.

12. No additional locks or bolts of any kind shall be placed upon any door or window in any tenant's premises and no lock on any door therein shall be changed or altered in any respect. Duplicate keys for a tenant's premises and toilet rooms shall be procured only from Landlord, which may make a reasonable charge therefor. Upon the termination of a tenant's lease, all keys of the tenant's premises and toilet rooms shall be delivered to Landlord.

13. No tenant shall mark, paint, drill into, or in any way deface any part of the Building or the premises demised to him. No boring, cutting or stringing of wires shall be permitted, except with Landlord's prior written consent and as directed by Landlord. No tenant shall install any resilient tile or similar floor covering in the demised premises except in a matter approved by Landlord.

14. No tenant shall use or occupy, or permit any portion of the demised premises to be used or occupied, as an office for a public stenographer or typist, as a barber or manicure shop, or as an employment bureau. No tenant or occupant shall engage or pay any employees in the Building, except those actually working for such tenant or occupant in the Building, nor advertise for laborers giving an address at the Building.

15. No premises shall be used, or permitted to be used, at any time, as a store for the sale or display of goods, wares, or merchandise of any kind, as a restaurant, shop, booth, bootblack, or other stand, for the conduct of any business or occupation which predominantly involves direct patronage of the general public in the premises demised to such tenant, or for manufacturing or other similar purposes. However, nothing in the preceding sentence shall prohibit the conduct of the business and services of securities and commodities brokerage and investment banking.

16. The requirements of tenants will be attended to only upon application at the building office. Landlord's employees shall not perform any work or do anything outside of the regular duties, unless under special instructions from Landlord's office.

17. If Landlord is required to discontinue providing electric current to the premises demised to Tenant, each tenant shall, at its expense, provide artificial light in its demised premises for Landlord's agents, contractors, and employees while performing janitorial or other cleaning services and making repairs or alterations in such premises.

18. The tenant's employees shall not loiter around the hallways, stairways, elevators, front, roof, or any other part of the building used in common by the occupants thereof.

19. If the premises demised to any tenant become infested with vermin, such tenant, at its expense, shall cause its premises to be exterminated, from time to time, to Landlord's satisfaction, and shall employ only those exterminators approved by Landlord.

20. Tenant shall, at its expense, care for and clean all cuspidors or similar containers or receptacles used in any tenant's premises.



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Current Legal Forms for Real Estate

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Current Legal Forms for Real Estate
Chapter 23 REAL ESTATE LEASES

Part IV. Forms

A. COMPLETE LEASES AND RELATED AGREEMENTS

31-23 Current Legal Forms for Real Estate FORM 23.10

AUTHOR: by Thomas G. Belden

FORM 23.10 Amendment to office space lease providing for expansion of space--rent increase for added space--option for additional expansion space--right of first offer--renewal option

COMMENT

Lease amendments:

As with any contract, a lease may be amended in accordance with applicable requirements of law and the original requirement. Most leases provide that they can be amended, but only in a writing signed by both parties. Such a writing, the lease amendment, changes and becomes a part of the original lease. This lease amendment form specifically refers to, changes and deletes the various affected sections of the original lease.

Lease amendments are commonly needed to adjust the agreement of the parties to account for unanticipated changes in the premises or the business needs of one or both of the parties. This form amends a number of sections of the original lease in response to the unanticipated growth of the tenant. Among other things, the amendment provides for three separate office space expansions (including changes in rent to account for the additional space), an option to expand more in the future, a right of first refusal for certain nearby office space, and a renewal option.

Option to expand space:

If a tenant anticipates future growth, the tenant may want the option to expand the area of its premises in the landlord's facility. Expansion options may be achieved by giving the tenant the

right of first refusal or the right of first offer for the desired space as it becomes available. Such a provision will give the tenant a right to lease the desired space that is superior to the right of any third party. Under such an arrangement, the tenant has no obligation to lease the additional space if and when it becomes available. Alternatively, surrounding tenants may be restricted to short-term leases of adjoining space, which are expressly subject to the right of the landlord to relocate them if the principal tenant seeks to expand.

Right of first offer:

This form accommodates the tenant's concerns about future expansion by granting the tenant a right of first offer. The landlord who gives a tenant a right of first offer is obligated to offer to lease the desired premises to the tenant before offering to lease the premises to any third parties. The tenant's right to lease is activated when the landlord offers the property to the tenant at a rental price and upon terms chosen by the landlord. The tenant may accept the landlord's terms for the lease, or, if not, the landlord may offer the premises to third parties at the same rental price and upon the same terms.

FORM

AMENDMENT TO LEASE

THIS AMENDMENT TO LEASE ("Amendment") is made on this _____ day of [date] by and between _____ Associates, a limited partnership in the State of _____ (Landlord), and _____ Corp., a corporation incorporated under the laws of the State of _____ (Tenant).

RECITALS:

A. Landlord and Tenant entered into a certain Lease dated [date], as amended by an Amendment to Lease dated [date] (collectively the "Lease"), for the lease of certain premises now containing approximately _____ useable square feet (the "Existing Premises"), as more particularly described in the Lease, which space is known as Suite _____ and is located on the eighth floor of the building known as The _____ Building, in the City of _____, State of _____.

B. Tenant desires to lease additional space on the eighth floor of The _____ Building, shown within the area outlined in red on Exhibit B, attached hereto and by this reference made a part hereof, containing approximately _____ useable square feet (the "First Expansion Space").

C. Tenant desires to lease additional space on the seventh floor of The _____ Building, shown within the area outlined in red on Exhibit C, attached hereto and by this reference made a part hereof, containing approximately _____ useable square feet (the "Second Expansion Space").

D. Tenant desires to lease additional space on the ninth floor of The _____ Building, shown within the area outlined in red on Exhibit D, attached hereto and by this reference made a part hereof, containing approximately _____ useable square feet (the "Third Expansion Space").

E. Landlord and Tenant desire to amend the Lease in order to provide for the terms of leasing the First Expansion Space, the Second Expansion Space and the Third Expansion Space and to memorialize other changes they have agreed

to concerning the Lease by entering into this Third Amendment.

NOW, THEREFORE, in consideration of the premises, the terms, covenants and conditions set forth below and other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, Landlord and Tenant agree as follows:

1. *Certain Definitions.* Unless specifically defined herein or the context clearly requires a different meaning, the words and phrases used herein that are defined in the Lease and not otherwise defined in this Amendment shall have the meanings ascribed to them in the Lease. The term "First Effective Date" as used herein means the date that Landlord substantially completes and delivers the First Expansion Space to Tenant. The term "Second Effective Date" as used herein means the date that Landlord substantially completes and delivers the Second Expansion Space to Tenant. The term "Third Effective Date" as used herein means the date that Landlord substantially completes and delivers the Third Expansion Space to Tenant.

2. *Term.* The term of the Lease is hereby extended for a period of approximately seven (7) years beginning on the First Effective Date and ending seven (7) years after the last day of the month in which the First Effective Date occurs (the "Extended Term").

3. *First expansion space.* Effective as of the First Effective Date, Landlord leases to Tenant and Tenant hereby leases from Landlord the First Expansion Space. As of the First Effective Date, the Premises and all references thereto throughout the Lease shall include the First Expansion Space and the total square footage of the Premises shall contain _____ useable square feet and _____ rentable square feet.

As of the First Effective Date, the second sentence of Section _____ of the Lease is hereby deleted in its entirety and the following is substituted in lieu thereof:

"Tenant acknowledges, understands and agrees that the rentable square footage of the Premises (_____ square feet) rather than the usable square footage of the Premises (_____ square feet) is the basis for calculating rental increases for Real Estate Taxes and Building Operating Costs."

4. *Second expansion space.* Effective as of the Second Effective Date, Landlord leases to Tenant and Tenant hereby leases from Landlord the Second Expansion Space. As of the Second Effective Date, the Premises and all references thereto throughout the Lease shall include the Second Expansion Space and the total square footage of the Premises shall contain _____ useable square feet and _____ rentable square feet.

As of the Second Effective Date, the second sentence of Section _____ of the Lease is hereby deleted in its entirety and the following is substituted in lieu thereof:

"Tenant acknowledges, understands and agrees that the rentable square footage of the Premises (_____ square feet) rather than the usable square footage of the Premises (_____ square feet) is the basis for calculating rental increases for Real Estate Taxes and Building Operating Costs."

5. *Third expansion space.* Effective as of the Third Effective Date, Landlord leases to Tenant and Tenant hereby leases from Landlord the Third Expansion Space. As of the Third Effective Date, the Premises and all references thereto throughout the Lease shall include the Third Expansion Space and the total square footage of the Premises shall contain _____ useable square feet and _____ rentable square feet.

As of the Third Effective Date, the second sentence of Section _____ of the Lease is hereby deleted in its entirety and the following is substituted in lieu thereof:

"Tenant acknowledges, understands and agrees that the rentable square footage of the Premises (_____ square feet) rather than the usable square footage of the Premises (_____ square feet) is the basis for calculating rental increases for Real Estate Taxes and Building Operating Costs."

6. *New Exhibit A.* The Lease Data Sheet attached to the Lease as Exhibit A is deleted in its entirety and Exhibit A attached hereto is substituted as the new Lease Data Sheet.

7. *Rent.* During the Extended Term, Tenant covenants and agrees to pay to Landlord, at such place as Landlord may designate, without deduction or setoff, except as otherwise expressly provided in the Lease, rent for the Premises as follows:

(a) During the period beginning on the First Effective Date and ending on the date preceding the Second Effective Date, the sum of \$_____ per annum, in equal monthly installments of \$_____ each, in advance on the first day of each and every calendar month during said period;

(b) During the period beginning on the Second Effective Date and ending on the date preceding the Third Effective Date, the sum of \$_____ per annum, in equal monthly installments of \$_____ each, in advance on the first day of each and every calendar month during said period;

(c) During the period beginning on the Third Effective Date and ending [date], the sum of \$_____ per annum, in equal monthly installments of \$_____ each, in advance on the first day of each and every calendar month during said period;

(d) During the period beginning [date] and ending [date], the sum of \$_____ per annum, in equal monthly installments of \$_____ each, in advance on the first day of each and every calendar month during said period; and

(e) During the period beginning [date] and ending on the expiration date of the Extended Term, the sum of \$_____ per annum, in equal monthly installments of \$_____ each, in advance on the first day of each and every calendar month during said period.

8. *Rent abatement.* Effective as of the First Effective Date, Section _____ of the Lease, captioned "Rent Abatement," is hereby deleted in its entirety and the following is substituted in lieu thereof:

"Notwithstanding anything to the contrary contained in Section _____ of the Lease or the Lease Data Sheet, Tenant shall be entitled to a rent abatement at the rates and at the time set forth in the following schedule (collectively the "Rental Abatement"):

TIME PERIOD	RATE PER MONTH
Beginning on the Second Effective Date and ending _____ months thereafter.	\$_____ per month.
Beginning on the Third Effective Date and ending _____ months thereafter.	\$_____ per month.

The Rental Abatement provided for in this Section is applicable only during the Extended Term and is totally inoperable and without effect during any renewal period of the Lease.

9. Increases for taxes and building costs.

(a) Effective as of the First Effective Date, Second Effective Date and Third Effective Date, Tenant's pro rata share of Building Operating Costs and Real Estate Taxes shall be respectively increased as shown in Sections _____, _____, _____, and _____ of the Lease Data Sheet attached as Exhibit A.

(b) Notwithstanding anything to the contrary contained in Section _____ of the Lease, Tenant's pro rata share of any increase for any comparison year in Building Operating Costs shall not exceed _____ percent of Tenant's pro rata share of those expenses for the preceding comparison year, or a _____ percent increase on a cumulative basis for the Extended Term.

10. *Improvements.* Landlord, at Landlord's expense, agrees to make the improvements to the First Expansion Space and the Existing Premises in accordance with the work letter and floor plan attached hereto as Exhibit E. Notwithstanding the foregoing, Tenant shall pay the sum of \$ _____ toward the cost of the improvements for the First Expansion Space, which sum shall be paid by Tenant to Landlord on or before the First Effective Date. Landlord, at Landlord's expense, agrees to make the improvements to the Second Expansion Space in accordance with the work letter attached hereto as Exhibit F. Landlord, at Landlord's expense, agrees to remodel the Third Expansion Space in the same manner and style and on the same terms as provided for in the Existing Premises.

11. *Storage area.* Landlord shall relocate Tenant's storage area to another location of comparable size in The _____ Building.

12. Additional expansion space options.

(a) The first paragraph of Section _____ of the Lease is hereby deleted in its entirety and the following is substituted in lieu thereof:

Tenant shall have options to lease the respective additional amounts of rentable square feet shown at Sections _____ and _____ on the Lease Data Sheet located on the tenth floor of the Building by giving written notice to Landlord on or before the respective dates shown at Sections _____ and _____ on the Lease Data Sheet. Such options are given upon the following terms and conditions:

(b) The term "Expansion Space Effective Date" as used in Section _____ of the Lease shall mean the dates appearing in Section _____ and Section _____ of the Lease Data Sheet, whichever may be applicable at the time in question.

(c) The following is added to the end of Section _____ of the Lease as Subsection _____:

If the spaces identified in Sections _____ and _____ of the Lease Data Sheet become available prior to the respective times specified, then Landlord will notify Tenant of such availability and Tenant may elect to lease such space(s) on the same terms as provided above. Tenant must exercise such election within fifteen (15) business days after receipt of Landlord's notice. If Tenant fails to exercise such option(s), Landlord may lease that space to another tenant; however, Tenant shall again have the right to elect to lease such space(s) at the times originally stated.

(d) Section _____ of the Lease is deleted in its entirety and the following is substituted in lieu thereof:

The annual rent for the additional space shall be at the same rate per rentable square foot, including all applicable escalations, then being paid by Tenant for the Existing Premises as of the Expansion Space Effective Date, but subject to the rental increases for the Existing Premises in effect from time to time as provided in Sections 7 and 17 of this Amendment.

(e) Notwithstanding anything to the contrary contained in this Amendment, the Lease Data Sheet or the Lease, Tenant's Second Expansion Option more fully described in Section _____ of the Lease Data Sheet, shall be null and void unless Tenant simultaneously exercises its renewal option in accordance with the provisions of Section 17 of this Amendment.

13. Right of first offer.

(a) During the Extended Term, Tenant shall have the right of first offer (the "Right of First Offer"), to lease space located on the tenth and eleventh floors of The _____ Building (the "Offer Space"), subject to Sections 13(b) through 13(f) of this Amendment, inclusive.

(b) At the time Tenant exercises a Right of First Offer:

(i) The Lease must be in full force and effect;

(ii) Tenant shall not be in Default; and

(iii) The commencement date of the lease for any Available First Offer Space must be at least three (3) years prior to the expiration date of the Extended Term unless Tenant simultaneously exercises its option to renew in accordance with the provisions of Section 17 of this Amendment.

(c) (i) Subject to the other terms of this Section 13, after any part of the Offer Space has or will "become available" (defined below), Landlord shall not, during the Extended Term, offer on the market or lease to another tenant that space within the Offer Space that has or will become available without first offering Tenant the right to lease that space.

(ii) Space shall be deemed to become available when the lease for the current occupant of the space expires or is otherwise terminated.

(iii) Notwithstanding Section 13(c)(ii) of this Amendment, Offer Space shall not be deemed to become available if the space is:

(1) Assigned or subleased by the current tenant of the space;

(2) Released by the current tenant of the space by renewal, extension, or renegotiation;

(3) Subject to a specific expansion right of another tenant in the Building existing as of the date of this Amendment unless and until such tenant(s) has (have) failed to timely exercise its (their) option(s) or right(s); or

(4) Not leased to a tenant as of the date of this Lease (until that space is leased, and then subsequently "becomes available").

(iv) Consistent with Section 13(c)(i) of this Amendment, Landlord shall not offer any such Offer Space on the open market unless and until Landlord has first notified Tenant in writing (the "First Offer Leasing Notice") that Landlord intends to offer the designated Offer Space to third parties, and until a period of fifteen (15) days has elapsed from the

date that Landlord has delivered to Tenant the First Offer Leasing Notice without Tenant having notified Landlord in writing of Tenant's desire to lease all of the Available First Offer Space (defined below). The First Offer Leasing Notice shall:

- (1) Advise Tenant that Landlord intends to offer on the market the Available First Offer Space;
 - (2) Describe the amount and location of the First Offer Space that has or will become available (the "Available First Offer Space") and attach a floor plan showing the Available First Offer Space crosshatched; and
 - (3) Set forth the date on which the Available First Offer Space will be available for leasing by Tenant (which shall not be more than twelve (12) months and not less than three (3) months after the date of the First Offer Leasing Notice).
- (v) Subject to Section 13(b) of this Amendment, if Tenant delivers to Landlord written notice of Tenant's desire to lease all of the Available First Offer Space within the fifteen-day period, the Available First Offer Space shall be leased by Tenant on the terms and conditions set forth in this Section 13.
- (vi) If Tenant declines or fails to effectively exercise the Right of First Offer as provided herein or fails to meet the conditions set forth in Section 13(b) of this Amendment, Landlord shall thereafter be free to offer the particular Available First Offer Space previously identified in a First Offer Leasing Notice on the open market and to lease some or all of that Available First Offer Space previously offered to Tenant at any time without regard to the restrictions in this Section 13 and on whatever terms Landlord may decide in its sole discretion.
- (vii) If Landlord rejects Tenant's acceptance of any Offer Space because Tenant fails to meet the conditions in Section 13(b) or (c) of this Amendment, Landlord must provide to Tenant a written notice within ten (10) days after receiving Tenant's acceptance, which Landlord notice shall specify in detail how Tenant failed to meet the cited conditions.
- (d) If Tenant leases Available First Offer Space under this Section 13, all of the terms and conditions of the Lease shall apply to the Available First Offer Space except that:
- (i) The commencement date of the Lease for each particular Available First Offer Space shall be seven (7) days after the Available First Offer Space is delivered to Tenant broom clean, free of tenants or other occupants, and otherwise in the condition required by Section 13(d)(ii), and the termination date shall be the same as for the Existing Premises, including any extension or renewal terms (exercised or to be exercised).
 - (ii) Landlord shall build-out the Available First Offer Space in the same manner and style as for the Existing Premises or if the Available First Offer Space is already built out, then Landlord shall adapt the Available First Offer Space to conform with the style and layout of the Existing Premises.
 - (iii) The annual rent for the Available First Offer Space shall be at the same rate per rentable square foot, including all escalations, then being paid by Tenant for the Existing Premises as of the commencement of the lease for the Available First Offer Space, but subject to rental increases for the Existing Premises in effect from time-to-time as provided in Sections 7 and 17 of this Amendment.
 - (iv) As of the commencement date for the Available First Offer Space, Tenant's pro rata share shall be increased to an amount computed by dividing the total of the rentable square footage of the Existing Premises plus all Available First Offer Space leased by Tenant plus all other space becoming part of the Existing Premises after the date of this Amendment (the numerator) by the rentable square footage of The _____ Building (the denominator), and expressing the fraction as a percentage.
 - (v) Any Available First Offer Space taken by Tenant shall be deemed part of the Premises as of the commencement of

the lease term for such Available First Offer Space taken by Tenant.

(e) Landlord shall use commercially reasonable efforts to remove any holdover tenants or other occupants from the Available First Offer Space Tenant leases under this Section 13. Although Landlord shall not be liable for any damages for any holdover Tenant or other occupant (unless Landlord is not using commercially reasonable efforts to remove the holdover tenant or other occupant), all of Tenant's obligations regarding the Available First Offer Space shall be abated until the holdover tenant or other occupant is removed, and the commencement date for the Available First Offer Space shall be delayed until the holdover tenant or other occupant is removed.

(f) The parties shall, within thirty (30) days after each time Tenant adds any Available First Offer Space, confirm in writing:

(i) The Commencement date for the Available First Offer Space;

(ii) The Available First Offer Space that was leased showing that space cross-hatched;

(iii) The additional rent to be paid for the Available First Offer Space;

(iv) The increased pro rata share allocated to the Available First Offer Space; and

(v) Any other terms related to the Available First Offer Space or this lease that either party reasonably requests to be confirmed.

14. *Rental escalations -- operating expenses.* Tenant shall have the right to audit Building Operating Costs payable as provided in Section _____ of the Lease upon thirty (30) days prior written notice to Landlord. Tenant's right to dispute any item pursuant to Section _____ of the Lease is subject to the condition that Tenant shall have paid to Landlord all amounts due from Tenant to Landlord on or before the time required therefor under the provisions of the Lease. In no event shall Tenant be entitled to withhold, deduct, or offset any monetary obligation of Tenant to Landlord under the Lease (including, without limitation, Tenant's obligation to make all rental payments and all payments for its pro rata share of real estate taxes and Building Operating Costs) pending the resolution of any disputed item. Tenant acknowledges that Landlord maintains its records for this property at its offices at _____ Street, City of _____, State of _____, and Tenant therefore agrees that any review of records under this Subsection shall occur at that location.

Tenant acknowledges and agrees that any records reviewed under Section _____ of the Lease constitute confidential information of Landlord, which shall not be disclosed to anyone other than the accountants performing the review, the principals of Tenant who receive the results of the review and Tenant's attorneys. Any dispute arising from any audit as provided in this Section 14 shall be subject to arbitration as provided in Section _____ of the Lease.

15. *Right to relocate.* Landlord reserves the right at any time to relocate Tenant from the Second Expansion Space to other space within the Building. Landlord shall give Tenant at least sixty (60) days' prior written notice of its intention to relocate Tenant from the Second Expansion Space to other space within the Building. Landlord shall make reasonable efforts to assure that the relocated premises are comparable in size and tenant finish with the Second Expansion Space; however, the relocated premises shall contain at least _____ percent of the number of useable square feet that are contained in the Second Expansion Space. The rent for the relocated premises will be calculated at the rate per rentable square foot of floor area as the rate from time to time in effect for the Second Expansion Space, but will not exceed the rent for the Second Expansion Space regardless of whether the relocated premises are larger than the Second Expansion Space. Landlord agrees to pay the reasonable costs of moving Tenant from the Second Expansion Space to the relocated premises and the cost of replacing Tenant's then existing stock of

stationary and business cards bearing the Second Expansion Space suite number.

16. *Minimum space guaranty.*

(a) During calendar year [date], Landlord shall afford Tenant the opportunity to lease at least _____ square feet of additional space in the Building for a term commencing on or about [date] and ending on the same termination date as for the Existing Premises including any extension or renewal term (exercised or to be exercised). Any additional space offered to Tenant during calendar year [date] as provided in Section _____ of the Lease and Section 13 of this Amendment shall be credited against that _____ square feet. Any additional space offered to Tenant other than pursuant to the provisions of Section _____ of the Lease or Section 13 of this Amendment shall be offered by Landlord to Tenant on the same terms and conditions as provided in Sections 13(b), (c)(iv)-(vii), (d), (e) and (f) of this Amendment. The additional space contemplated by this paragraph need not be a single block of space, but rather may comprise multiple areas of The _____ Building that together aggregate approximately _____ square feet.

(b) If Tenant exercises its renewal option in accordance with the provisions of Section 17 of this Amendment, then during calendar year [date], Landlord shall afford Tenant the opportunity to lease at least _____ square feet of additional space in The _____ Building for a term commencing on or about [date] and ending on the expiration date of the renewal option described in Section 17 of this Amendment. Any additional space offered to Tenant during calendar year [date], as provided in Section _____ of the Lease and Section 13 of this Amendment, shall be credited against the _____ square feet. Any additional space offered to Tenant, other than pursuant to the provisions of Section _____ of the Lease or Section 13 of this Amendment, shall be offered by Landlord to Tenant on the same terms and conditions as provided in Section 13(b), (c)(iv)-(vii), (d), (e) and (f) of this Amendment. The additional space contemplated by this paragraph need not be a single block of space, but rather may comprise multiple areas of The _____ Building that together aggregate approximately _____ square feet.

17. *Renewal option.* Section _____ of the Lease is deleted in its entirety and the following is substituted in lieu thereof:

(a) The Tenant shall, if it is not in default, have the option to extend this Lease for one (1) period (renewal period) as shown at Item _____ on the Lease Data Sheet for the number of years shown at Item _____ on the Lease Data Sheet by giving written notice of such renewal to Landlord no later than the date shown at Item _____ on the Lease Data Sheet.

(b) If such option to extend is exercised, all provisions and covenants of this Lease shall be in full force and effect during such extended term, except that the annual rental during the renewal period shall be the higher of (i) the annual rental payable by Tenant during the last year of the Extended Term of this Lease, or (ii) the product of the annual rental payable by Tenant during the last year of the Extended Term of this Lease multiplied by a fraction, the numerator of which shall be the Department of Labor, Bureau of Labor Statistics Consumer Price Index for "All Urban Consumers" (CPI-U, 1982-84 Base = 100, the "Index") as of the first day of the renewal period and the denominator of which shall be the Index as of the Effective Date (i.e., [date]).

References to the Consumer Price Index applicable to any date means the Consumer Price Index published most recently prior to that date. If the Department of Labor, Bureau of Labor Statistics, ceases to publish the Index, the index that would most nearly accomplish the purpose and use thereof by the parties hereto with respect to the adjustment in rent herein contemplated shall be used in lieu of the Index. As soon as Landlord obtains the necessary data, it shall determine the annual rent payable during the renewal period and notify the Tenant of the adjustment in writing. Pending that determination, Tenant shall continue to pay the same monthly rent it was paying during the last year of the Extended Term. Should the monthly rent for the period following that adjustment date exceed the monthly rent

previously paid by Tenant for such period, Tenant shall forthwith pay the difference to Landlord.

(c) If (i) Tenant shall fall to exercise the renewal option during the period in which it is available and in the manner required hereby, or (ii) this Lease is no longer in full force and effect for any reason, or (iii) Tenant is in default under this Lease, at the time of such exercise, said renewal option shall terminate, be void and of no further force or effect.

(d) Unless otherwise herein expressly provided, any reference in this Lease to the "term of this Lease" shall mean the original term hereof, the Extended Term and the renewal period, if exercised by Tenant pursuant to its option to renew set forth in this Section, except to the extent that the original term, the Extended Term or renewal period may be sooner terminated or canceled under any provisions of this Lease.

(e) The base year for rental escalation during the renewal period shall be the escalation base year as set out at Item _____ on the Lease Data Sheet."

18. *Reaffirmation and conflicts.* All of the terms, covenants and conditions of the Lease shall continue in full force and effect, and the same are hereby reaffirmed, remade and rewritten, except to the extent that any such terms, covenants or conditions have been nullified hereby or conflict or are inconsistent with the terms of this Amendment, in which event the terms of this Amendment shall, in all respects, govern and prevail. Tenant acknowledges that to the best of its knowledge, it has no claims, defenses, or offsets regarding the performance of any of its obligations under the Lease, nor any claims against Landlord or its agents.

19. *Binding effect.* This Amendment shall be binding upon and shall inure to the benefit of the parties hereto and their respective successors and assigns. No reference in the preceding sentence to assigns shall be deemed to authorize any assignment or other transfer, in whole or in part, of the interest of Tenant in violation of any of the provisions of the Lease.

IN WITNESS WHEREOF, Landlord and Tenant have executed this Amendment as of the date first above written.

SIGNED IN THE PRESENCE
OF:

(Witnesses as to Landlord)

LANDLORD:

By: _____

TENANT:

By: _____

(Witnesses as to Tenant)

[Acknowledgments]

[Attach Exhibit A]

[Attach Exhibit B]

[Attach Exhibit C]

[Attach Exhibit D]

[Attach Exhibit E]

[Attach Exhibit F]



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Chapter 23 REAL ESTATE LEASES

Part IV. Forms

A. COMPLETE LEASES AND RELATED AGREEMENTS

31-23 Current Legal Forms for Real Estate FORM 23.11

AUTHOR: by Thomas G. Belden

FORM 23.11 Amendment to lease providing for extension of lease term--increase in base rent and security deposit--improvements in premises

COMMENT

This form is an amendment to a lease for the primary purpose of extending the lease term. The desire for such an amendment may arise where the tenant realizes that it wishes to secure its right to occupy the leased premises beyond the expiration date of the original lease and any renewal options. Such security may be very important to a tenant whose business is affected by location, and the tenant may be willing to accept a rent increase in exchange for the security. The amendment also increases the base rent and the security deposit, and provides for improvements in the premises.

Renewal or extension:

Whether a particular agreement is a renewal or an extension of a lease depends upon the interpretation given to those words under local law. In some states, the extension of a lease is regarded as a continuation of the original lease as if the original lease covered the entire term as extended. On the other hand, such states treat a renewal as involving a new lease for the additional period. Some states make no distinction between the two. Since this agreement expressly continues the original lease, it is a lease extension.

FORM

AMENDMENT TO LEASE

THIS FIRST AMENDMENT TO LEASE is made and entered into as of [date], between _____ Corp., a corporation incorporated under the law of the State of _____ ("Landlord") and _____ ("Tenant").

RECITALS:

A. Landlord and Tenant entered into a certain lease dated [date] (the "Lease"), for the lease of certain premises containing approximately _____ square feet of floor area (the "Premises") located at The _____ Towers (the "Building"), _____ Street, Suite _____, City of _____, State of _____.

B. Landlord and Tenant desire to extend the term of the Lease and otherwise amend the Lease in accordance with the following terms and conditions.

NOW, THEREFORE, in consideration of the premises, Landlord and Tenant hereby agree as follows:

1. Unless specifically defined herein or the context clearly requires a different meaning, the capitalized words and phrases used herein shall have the meanings ascribed to them in the Lease.
2. The term of the Lease is hereby extended for a period of five (5) years beginning on [date] and ending on [date].
3. Tenant hereby covenants and agrees to pay to Landlord, without deduction or setoff and without demand, at its office or at such other place as Landlord may from time to time designate, as Annual Base Rent for the Premises during the extended term of the Lease, the sum of \$_____ per annum, in equal monthly installments of \$_____ each, in advance on the first day of each and every calendar month during the extended term.
4. Concurrently with the execution of this Amendment to Lease, Tenant shall deposit with Landlord as additional security deposit the sum of \$_____, so that the total security deposit under the Lease shall be \$_____.
5. Landlord, at Landlord's expense, agrees to make the improvements to the Premises described in the workletter attached hereto as Exhibit A and by this reference made a part hereof.
6. If Landlord agrees to perform, at Tenant's request, any further additions or nonstandard work over and above that specified in Exhibit A hereof, such work shall be performed by Tenant, at Tenant's expense, as a Tenant's extra. Before commencing such work, Landlord will submit to Tenant written estimates of the cost thereof. Tenant shall pay Landlord, promptly upon being billed therefor, the cost of all such agreed work, plus ten percent (10%) for Landlord's overhead and five percent (5%) for Landlord's profit. If Tenant defaults in the payment thereof, Landlord shall (in addition to all other remedies) have the same rights as in case of default in rent.
7. All of the terms, covenants and conditions of the Lease as amended to date shall continue in full force and effect, and the same are hereby reaffirmed, remade and rewritten, except to the extent that any such terms, covenants or conditions have been nullified hereby or conflict or are inconsistent with the terms of this Amendment to Lease, in which event the terms of this Amendment to Lease shall, in all respects, govern and prevail.
8. This Amendment to Lease shall be binding upon and shall inure to the benefit of the parties hereto and their respective successors and assigns. No reference in the preceding sentence to assigns shall be deemed to authorize any assignment or other transfer, in whole or in part, of the interest of Tenant in violation of any of the provisions of the

Lease.

IN WITNESS WHEREOF, Landlord and Tenant have executed this Amendment to Lease as of the date first written.

SIGNED IN THE PRESENCE
OF:

LANDLORD

By: _____

(Witnesses as to Landlord)

TENANT:

By: _____

(Witnesses as to Tenant)

[Acknowledgments]

[Attach Exhibit A]



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Current Legal Forms for Real Estate
Chapter 23 REAL ESTATE LEASES
Part IV. Forms

A. COMPLETE LEASES AND RELATED AGREEMENTS

31-23 Current Legal Forms for Real Estate FORM 23.12

AUTHOR: by Thomas G. Belden

FORM 23.12 Industrial park lease--landlord's agent as lessor--absolute subordination of lease

COMMENT

This lease of space in an industrial park contains clauses and provisions which would be useful in other types of leases. Many of the rights and remedies of the landlord or the managing agent specified in this lease could be used in an office lease, a retail lease, or other type of lease agreement.

Landlord rights in tenant property:

If the tenant defaults in the payment of rent or other amounts, the landlord may seek recovery by distraint, a levy, or some other method of attachment against the tenant's property used in the leased premises. This may include the tenant's equipment, inventory, or other personal property. This lease expressly provides that the goods on the leased property, including goods leased rather than owned by the tenant, are not exempt from levy (paragraphs 5, 9(a)). While these provisions may benefit the landlord, they may hamper the tenant's ability to obtain financing using the equipment, inventory, or other assets as collateral. The landlord's potential claim may also interfere with the tenant's ability to lease equipment. If the provision is included in the lease, the landlord could resolve the situation by providing separate releases in the event of inventory financing, or equipment financing or leasing.

As an additional protection to the landlord, this lease provides that any attempt by the tenant to remove goods or property from the leased property, other than in the ordinary course of business, is deemed fraudulent, and the landlord would be entitled to distraint, i.e., take possession of the tenant's property (paragraph 9(b)). The lease also provides that any additions, alterations, or

improvements to the premises by the tenant are the property of the landlord, but if the landlord elects, they must be removed at the tenant's expense upon termination of the lease (paragraph 21).

Managing agent commissions and provisions:

A number of provisions in this lease protect the interest of the managing agent of the property. The leasing brokerage fee is determined as a percentage of the "rental." The rental includes, however, not only money paid as rent, but other tenant payments as well. The broker is entitled, under this lease, to a leasing commission against any tenant payments for real estate and other taxes, insurance premiums, the value of tenant renovations or alterations in lieu of rent, and the amount of any rent allowance (paragraph 30). The lease provides that the leasing brokerage fee payment can be spread over the term of the lease if the agent is to collect the rent for the landlord (paragraph 31). The payment of the deferred commission is accelerated, and thereby payable in full, upon the happening of certain events. These include foreclosure, possession by an encumbrancer, bankruptcy, or assignment for the benefit of creditors by the lessor, or the lessor's use of another agent to lease or sell the property (paragraph 32). The agent is given a security interest in the lease, and a lien against the premises, to secure payment of the commission (paragraph 33). The lease also provides that the agent is the exclusive real estate agent for any further lease or sales transactions between the landlord and tenant occurring during the term of the lease (paragraph 34). These provisions are aimed at encouraging the landlord and tenant to act in good faith with respect to the agent and the payment of the agent's commission.

Subordination of lease to landlord's mortgage:

One of the provisions contained in this lease is lessee's agreement that his leasehold interest is subordinate to the lien of all mortgages which encumber the demised premises at any time (paragraph 25). In the ordinary course of events, leasehold interests are subject to prior mortgages, but the express subordination by subsequent lessees of their leasehold interests may be required as further protection. Mortgage liens, however, may be subordinate to rights under previously recorded leases unless the lessee expressly agrees to the contrary. The subordination clause contained in this lease does not permit the lessee to cure any default by the lessor-mortgagor nor does it contain any provision for nondisturbance. Accordingly, the lessee must face the possibility that his leasehold estate may be terminated in the event of a mortgage foreclosure action.

FORM

Paragraph	Title
1	Demised premises; rent
2	Taxes
3	Use of premises
4	Insurance
5	Remedies
6	Waivers
7	Ejectment
8	Confession of judgment
9	Removal of goods

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10	Acceleration of rent
11	Assignment and subletting
12	Rent or sale signs
13	Vacating of premises
14	Alterations, improvements, services
15	Risk of loss
16	Care of premises
17	Right of entry
18	Failure of lessee to perform
19	Liability of agent
20	Damage by fire
21	Surrender of premises
22	No waiver
23	Zoning; permits
24	Condemnation
25	Subordination
26	Judgment rights
27	Pavements, sidewalks, etc.
28	Public areas
29	Termination; automatic extensions
30	Commissions
31	Termination of agency
32	Acceleration of brokerage fee
33	Agent's lien
34	Exclusive agency
35	Condition of premises
36	Owner's approval
37	Miscellaneous

THIS AGREEMENT is made this _____ day of _____ [date], between Barnes Corporation, a Pennsylvania corporation, Agent for Hines-Cohen Corporation, of Pennsylvania (the "Lessor"), and Martin Meat Corporation, a Pennsylvania corporation, or its corporate nominee, which is to be formed (the "Lessee").

1. *Demised premises; rent.* The Lessor demises and lets to the Lessee all that certain premises consisting of Sections 8 through 11, inclusive, of Industrial Fabricators Buildings, 66 Ceasar Road, New Hope Industrial Park, New Hope, Pennsylvania, as shown on the plan attached as Exhibit A, for the term of ten years, commencing [date]. The minimum annual rent shall be \$54,400, payable in advance, in monthly payments of \$4,533.33, on the first day of each month during the term, or its renewal. The Lessee shall make each monthly payment without demand at the office of Barnes Corporation, Philadelphia, Pennsylvania, or at any other place the Lessor requires in writing. Rent shall begin on April 1, [year], and the first payment shall be made when this lease is executed.

2. *Taxes.* The Lessee further shall pay as additional rent upon demand, on June 1st of each year, 4/11 of all taxes annually assessed or imposed upon the premises of which the demised premises are a part during the term of this lease. This additional rent shall be apportioned for the first and last calendar years of the Lessee's occupancy.

3. *Use of premises.* The demised premises shall be used and occupied only as and for offices and the manufacturing, storage, and distribution of food products, and for no other purpose without the Lessor's prior written consent. If, in the Lessor's opinion, the premises of any part thereof are not being used in the usual and legitimate manner in the conduct of such business, the Lessor may give the Lessee written notice requiring the Lessee to terminate the improper use within two days thereafter. A failure to comply with such request shall constitute a breach of this lease, which will entitle the Lessor to immediate possession of the premises hereby leased (in addition to all other remedies given to the Lessor for the breach of any condition or covenant of this lease).

4. *Insurance.* The Lessee will not do or suffer to be done, any act, matter, or thing objectionable to the fire insurance companies whereby the fire insurance or any other insurance now in force or hereafter to be placed on all or part of the demised premises, or on the building of which the demised premises are a part, becomes void or suspended, or is rated as a more hazardous risk than at the date of the execution of this lease. The Lessee shall not employ any person or persons objectionable to the fire insurance companies, or carry or have any benzine or explosive matter of any kind in and about the demised premises. In case of a breach of this covenant (in addition to all other remedies given to the Lessor for the breach of any condition or covenant of this lease) the Lessee shall pay to the Lessor as additional rent, upon demand, all increase or increases of premiums on insurance carried by the Lessor on all or part of the demised premises, or on the building of which the demised premises are a part, caused in any way by the Lessee's occupancy.

5. *Remedies.* If the rent or any charges included as rent remain unpaid on any day on which the payments are due, the Lessor, or any person acting under it, may enter the premises, and without any demand, proceed by distress and sale of the goods therefound to levy the rent and all other charges herein payable as rent. All costs and officers' commissions, watchman's wages, and further including the 5% chargeable as tax to the Lessor, shall be paid by the Lessee. In that case, all costs, officers' commissions and other charges shall immediately attach and become part of the Lessor's claim for rent. Any tender of rent without such costs, made after the issue of a warrant of distress, shall not be sufficient to satisfy the Lessor's claim. The Lessee waives the benefit of all present and future laws regarding any limitation in which distress is to be made after removal of goods, and further relieves the Lessor of the obligation of proving or identifying such goods. The Lessee shall lease no goods of any kind for use on the demised premises, with the understanding that such goods shall be exempt from levy for rent, and other charges herein reserved as rent.

6. *Waivers.* The Lessee waives all right under the Act of Assembly of [date], and all present and future supplements or amendments of that Act, and authorizes the sale of any goods distrained for rent at any time after five days from such distraint without any inventory or appraisalment thereof. The Lessee waives the benefit of all present and future exemption laws, releasing goods on the premises or elsewhere, or any property in any way belonging to the Lessee, from levy and sale upon distress for rent or other charges reserved as rent, or upon an execution or any judgment obtained in an action brought for nonpayment of rent, or in all suits, actions, or proceedings, amicably or otherwise, for the collection of rent or other charges reserved as rent due and in arrears for any expenses incurred in removing ashes, rubbish, or refuse matter from the premises, and for damage for the nonfulfillment of any covenant contained herein. The Lessee also waives the right of inquisition on any real estate that may be levied upon to collect any amount due under the terms and conditions of this lease, and does voluntarily condemn the same and authorizes the Prothonotary to enter a writ of execution or other process on such Lessee's voluntary condemnation. The Lessee further agrees that the real estate may be sold on a writ of execution or other process.

7. *Ejectment.* If the Lessee fails or omits to pay the rent or other charges reserved as rent, whenever and wherever they are made payable, or in any other respect violates any term, condition, or covenant contained herein, the Lessor may deem this lease and its term to be terminated. In that event, the lease shall become absolutely void without any right by

the Lessee to save the forfeiture by payment of rent due, or by other performance of the terms, conditions, or covenants so violated. Moreover, when the lease is so terminated, either during its original term or any extension of it, and also as soon as the initial term or extension thereof has expired, any attorney, as attorney for the Lessee, may sign an agreement for entering in any competent court an amicable action and judgment in ejectment, without any stay of execution or appeal against the Lessee and all persons claiming under the Lessee for the recovery by the Lessor of possession of the premises, without such attorney being liable, for which this shall be a sufficient warrant, whereupon a writ of possession may issue forthwith without any prior writ or proceeding. If a true copy of this lease is filed in such action, the original need not be filed as a warrant of attorney, notwithstanding any contrary rule of court. If for any reason after commencement of such action the lease is terminated and possession of the premises remains in or is restored to the Lessee, the Lessor may in any subsequent default bring one or more further amicable actions to recover possession of the premises for such default. No such determination of this lease nor taking or recovering possession of the premises shall deprive the Lessor of any remedies or action against the Lessee for rent or for damages for the breach of any covenant herein contained, nor shall the bringing of any such action for rent, or of breach of covenant, nor the resort to any other remedy be construed as a waiver of the right to insist upon the forfeiture and to obtain possession in the manner herein provided.

8. *Confession of judgment.* The Lessee empowers any Prothonotary or Clerk of the Court, or attorney of any court, to appear for the Lessee in all actions to be brought for any arrears of rent or rent herein treated as if in arrears, or other charges reserved as rent which may at any time fall due, or for any expense incurred by the Lessor in removing ashes, rubbish, or refuse matter from the premises, and to sign for the Lessee an agreement for entering in any competent court an amicable action or actions for the recovery of such arrears of rent or rent herein treated as if in arrear, or other charge or expense. Further, in such suits or in such amicable action or actions any attorney is authorized to confess judgment against the Lessee for all arrears of rent or rent herein treated as if in arrear, or other charges or expense as aforesaid, which may at any time fall due or become due under this lease, and for interests and costs, and so on from time to time as often as any of the rent or other charges or expenses, as aforesaid, shall fall due or be in arrears, or treated as if in arrear under the terms hereof. The power and powers herein granted may be exercised as well after the expiration of the original term and/or after the expiration of any extension or renewal of the original term as during the original term and/or during any extension or renewal of the term.

9. *Removal of goods.* (a) All goods, property, and chattels to be used or kept by Lessee or to be attached upon the premises, shall be owned or leased by Lessee. However, no such leased goods or chattels shall be leased with the understanding that they shall be exempt from levy for rent and other charges reserved as rent. This condition by the Lessor shall be deemed to be a part of the consideration for entering into this lease, and a breach of this condition shall give the Lessor the rights and privileges to which it may be entitled by the terms of this lease or by law for conditions broken.

(b) If the Lessee at any time during the continuance of this lease removes or attempts to remove its goods or property out of or from the premises, except in the ordinary course of business, without first having paid and satisfied the Lessor in full for all rent which may become due during the entire term of this lease, such removal or attempted removal shall be considered as fraudulent, and thereupon the Lessor may consider the whole rent of this lease or any part of it to be due and payable and in arrear. Moreover, the Lessor may proceed by landlord's warrant or other process to distrain, or collect or sue for the whole or such part of the rent in the same manner as if by the conditions of this lease the whole or such part of the rent were due and payable in advance, and were in arrear, and may also, at any time during the term of this lease or any extension or renewal thereof, enter judgment by confession for such amount in the manner herein elsewhere provided for entering of judgment by confession.

10. *Acceleration of rent.* If the Lessee becomes insolvent, bankrupt, or makes an assignment for the benefit of creditors, or is levied upon or sold out by Sheriff's, Marshal's, or Constable's sale, or if a receiver is appointed, the Lessor may declare the rent for the balance of the term or any part thereof to be due and payable as if by the terms of the lease it were payable in advance. If the rent or any other sum payable hereunder is at any time unpaid when due, the Lessor may

then declare the rent for the balance of the term or any part thereof to be immediately due and payable as if by the terms of the lease it were payable in advance, and the Lessor may immediately proceed to distrain, collect, or bring action for the whole rent or any part thereof, as if it were in arrear, or may enter judgment therefor, in an amicable action as hereinabove provided in the case of rent in arrear. Any attorney is authorized to confess judgment against the Lessee in such suit or amicable action for the whole rent or any part thereof.

11. *Assignment and subletting.* Lessee shall not transfer, mortgage, or pledge this lease, or sublease the subject premises or any portion thereof, without the Lessor's prior written consent. The Lessor may deem any levy or sale or execution or other legal process against the Lessee, or any assignment or sale in bankruptcy or assignment of a receiver or insolvency of the Lessee, to be an assignment within the meaning of this Section.

12. *Rent or sale signs.* The Lessor may place and continually keep in a conspicuous place on the demised premises for the information of the public the usual and customary "For Sale" or "For Rent" signs with the name and address of the Lessor, and its agents or either of them, at any time within three months before the expiration of the term, or before any sooner determination, or any time after notice from either party of an intention to terminate this lease. Prospective purchasers or tenants authorized by the Lessor may inspect the premises at reasonable hours at any time.

13. *Vacating of premises.* If any of the following events occur, the Lessor may, without notice or demand, enter the premises, breaking open locked doors if necessary to effect entrance: the Lessee removes from the premises or ceases to use and occupy them as provided herein; the premises are vacated or deserted during the term of this lease or any renewal or extension; the Lessor desires to distrain; or the Lessee fails to pay rent or any other sum on the due date hereunder. In any such event, the Lessor shall not be liable to action for prosecution or damages for such entry or the manner thereof, for the purpose of distraining or levying and for other purposes. The Lessor may also relet such premises as agent for the Lessee for any unexpired portion of the term and receive rent therefor, holding the Lessee liable for any deficiency.

14. *Alterations, improvements, services.* None of the following acts or omissions by the Lessor shall in any way affect the payment of the rent at the time specified in this lease: if the Lessor at any time enters into a contract for any alterations, additions, or improvements; if the Lessor fails to make such alterations, additions, or improvements; or if the Lessor or its agents or contractors makes the alterations, additions, or improvements. The Lessor may discontinue all facilities and services rendered by it or its agents or contractors that are not expressly covenanted for herein; such facilities and services shall constitute no part of the consideration for this lease.

15. *Risk of loss.* The Lessor shall not be held responsible for, and is relieved from all liability by reason of, any injury or damage to any person, persons, or property in the demised premises, whether belonging to the Lessee or any other person, caused by any fire or by any breakage or leakage in any part or portion of the demised premises, or in any part or portion of the building of which the demised premises are a part, unless such breakage, leakage, injury, or damage is caused by or results from the negligence of the Lessor or its agents. The Lessee, in consideration of the rent, accepts and assumes such responsibility and liability.

(a) The Lessor shall not be held responsible for, and is relieved from all liability by reason of, any damage to any person, persons, or property in the demised premises, whether belonging to the Lessee or to any other person, from water, rain, or snow that may leak into, issue, or flow from any part of the premises or of the building of which the demised premises are a part, from the pipes or plumbing work of the same, or from any place or quarter, unless such damage, leak, or flow is caused by or results from the negligence of the Lessor or its agents or any person or persons. The Lessee, in consideration of the rent herein specified, accepts and assumes such responsibility and liability.

(b) The Lessee releases the Lessor from all liability, and assumes all liability, for damages which may arise from any kind of injury to person, persons, or property on account of the use, misuse, or abuse of all elevators, hatches, or openings of any kind that may exist or hereafter be erected or constructed on the premises or from any kind of injury

that may arise from any other cause on the premises, unless such damage, injury, use, misuse, or abuse is caused by or results from the negligence of the Lessor or its agents.

16. *Care of premises.* The Lessor has let the demised premises in their present order, arrangement, and condition. The Lessee shall, at its expense, keep all waste and drain pipes open, repair all damage to plumbing, and keep every part and portion of the interior of the demised premises, and all glass windows and plate glass, in good order and repair. Further, if so requested by the Lessor, the Lessee shall, at its expense, comply with all requirements under notice from the Lessor's insurance carriers and all of the constituted public authorities, including the Fire Department, Bureau of Elevator Inspection, Bureau of Boiler Inspection, Board of Health, and Board of Fire Underwriters.

17. *Right of entry.* The Lessee shall permit the Lessor, the Lessor's authorized representatives, and the holder of any mortgage or any prospective mortgagor, to enter the demised premises at all reasonable times for the purpose of (a) inspecting them, and (b) making all necessary repairs, alterations, additions, or improvements including, but not limited to, repairs that may be necessary by reason of the Lessee's failure to make the same. Nothing herein shall imply any duty by the Lessor to do any such work, and the Lessor's performance of such work shall not constitute a waiver of the Lessee's failure to have performed any work which the Lessee is required to perform under the terms of this lease.

18. *Failure of lessee to perform.* (a) If the Lessee at any time fails to make any payment or perform any act required of it under this lease, the Lessor may do so, without notice to or demand upon the Lessee, and without waiving or releasing the Lessee from any obligation hereunder. All sums so paid by the Lessor and all necessary incidental costs and expenses in connection with the performance of any such act by the Lessor, together with interest thereon at two points above the prime rate of Philadelphia National Bank per annum from the date such expenditure is made, shall immediately become due and be payable by the Lessee on demand. All sums which may become payable to the Lessor by the Lessee under this paragraph (a) shall be deemed additional rent, and in the event of nonpayment the Lessor shall have (in addition to its other rights and remedies) the same rights and remedies as in the case of the Lessee's default in the payment of minimum rent.

(b) All of the above remedies given to the Lessor and all rights and remedies given to it by law and equity shall be cumulative and concurrent. No determination of this lease or the taking or recovering of the premises shall deprive the Lessor of any remedy or action against the Lessee for rent due at the time or which, under the terms hereof, would in the future become due as if there had been no determination, or for any sums due at the time or which, under the terms hereof, would in the future become due as if there had been no determination. Moreover, neither the bringing of any action for rent or breach of covenant, or the resort to any other remedy herein provided for the recovery of rent shall be construed as a waiver of the right to obtain possession of the premises.

19. *Liability of agent.* Barnes Corporation is acting as Agent only, and shall not in any event be held liable to the owner or the Lessee for the fulfillment or nonfulfillment of any term or condition of this lease, or for any action or proceeding that may be taken by the owner against the Lessee, or by the Lessee against the owner.

20. *Damage by fire.* If the demised premises are totally destroyed or so damaged by fire or other casualty not occurring through fault or negligence of the Lessee, or those employed by or acting for it, that they cannot be repaired and restored, on the basis of normal working days and hours, within 90 days, this lease shall terminate, and the rent shall abate for the balance of the term.

If the damage above is only partial and the premises can be restored, on the basis of normal working days and hours, to the present condition within 90 days, the Lessor shall restore them as speedily as circumstances reasonably permit, including the time necessary and required by the insurance companies to inspect the premises and to make an adjustment with the Lessor. The Lessor may enter upon the premises for the purpose of doing the restoration work. However, if such damage occurs during the final 12 months of the then current term, the Lessor may terminate this lease by giving written notice to the Lessee within 30 days after the damage occurs. If the Lessor exercises such option the

rent shall abate for the balance of the term. The Lessor also may enter upon the demised premises whenever necessary to repair damage caused by fire or other casualty to the building of which the demised premises are a part, even though the effect of such entry is to render the demised premises or a part thereof untenable. In either event, the rent shall be apportioned and suspended while the Lessor is in possession, taking into account the proportion in area of the demised premises rendered untenable and the duration of the Lessor's possession. If a dispute arises as to the amount of rent due under this clause, the Lessee shall pay the full amount claimed by the Lessor. The Lessee may, however, proceed by law to recover any excess payment.

21. *Surrender of premises.* The Lessee shall, during the term of this lease and all continuations, keep, and at the expiration, peaceably surrender possession of the premises in as good order and condition as they now are, reasonable wear and tear excepted, and free from all ashes, dirt, and refuse matter, and shall at the expiration or any continuance of such term deliver the keys at the Lessor's office. The Lessee shall not make any alterations, additions, or improvements without the Lessor's prior written consent. All alterations, additions, or improvements, including partitions, and all fixtures attached to the building upon the premises by the Lessee, after such consent is given shall be the Lessor's property. The Lessor may either allow such property to remain upon and be surrendered with the premises as a part thereof, without molestation or injury, at termination of this lease, or remove the property at the Lessee's expense.

22. *Non-waiver.* The Lessor's failure to insist in any one or more instances upon the performance of any covenant or condition of this lease, or to exercise any right or privilege contained in it, shall not be construed as a subsequent waiver or relinquishment of such covenant, condition, right, or privilege, all of which shall continue and remain in full force and effect. The Lessor's receipt of any rent from the Lessee or its assignees or subtenants, regardless of whether the rent was originally reserved or may become payable under any covenant (or portion thereof) contained herein, shall not operate as a waiver of the Lessor's right to enforce the payment of the additional rent or of any of the other obligations of this lease by appropriate remedies and shall not waive or avoid the Lessor's right, at any time thereafter, to elect to terminate this lease on account of such assignment, subletting, transferring of this lease, or any other breach of any covenant, term, or condition herein.

23. *Zoning; permits.* Anything herein elsewhere contained to the contrary, this lease and all the terms, covenants, and conditions hereof are in all respects subject and subordinate to all zoning restrictions affecting the demised premises, and the building in which they are located, and the Lessee shall be bound by such restrictions. The Lessor further does not warrant that any licenses or permits which may be required for the business to be conducted by the Lessee on the demised premises will be granted, or, if granted, will be continued in effect or renewed. Any failure to obtain the licenses, permits, or any revocation thereof or failure to renew them, shall not release the Lessee from the terms of this lease.

24. *Condemnation.* If all or a part of the demised premises are taken or condemned for a public or quasi-public use, this lease shall, as to the part so taken, terminate when title vests in the condemnor, or, if the Lessor so elects, when the condemnor assumes physical possession of such premises. Rent reserved shall abate proportionately to the square footage of leased space taken or condemned as to the part so taken or shall cease if the entire demised premises are so taken. In that event, the Lessee shall waive all claims as against the Lessor and make no claim against it by reason of the complete or partial taking. Moreover, the Lessee shall not be entitled to any notice of the partial or complete termination of this lease by reason of the above. If the Lessor's lease of the premises of which the demised premises form a part is terminated (whether by the Lessor's landlord or otherwise) either because of the unsafe condition of any building on the premises or because the whole or a portion of any building or premises under lease to the Lessor is condemned, this lease shall terminate upon the same date as does the Lessor's lease, regardless of whether any portion of the demised premises is declared unsafe or is condemned. In the event of complete or partial termination, the Lessee shall make no claim against the Lessor and shall waive all claims for damages, and such termination shall take effect without any notice to the Lessee.

25. *Subordination.* This lease shall be subject and subordinate at all times to the lien of all present and future mortgages,

rents, and encumbrances placed on the land and buildings demised or of which the demised premises form a part. No further instrument or act by the Lessee shall be necessary to effectuate such subordination. However, the Lessee shall execute and deliver, upon demand of any such mortgagee, proposed mortgagee, or other person, all further instruments evidencing subordination of this lease to the lien of such mortgage, ground rent, or other encumbrance. The Lessee irrevocably appoints the Lessor its attorney-in-fact to execute and deliver all such instruments for and in the Lessee's name.

26. *Judgment rights.* The right to enter judgment against the Lessee shall be exercised on behalf of any assignee of the Lessor in his, her, or their own name. This right shall be exercisable as often as there is default by the Lessee, and shall not be exhausted by one or more uses thereof.

27. *Pavements, sidewalks, etc.* The Lessee shall be responsible for the condition of the pavement, curb, cellar doors, awnings, and other erections on the pavement during the term of this lease, and shall keep the pavement free of snow and ice. The Lessee shall be solely liable for any accidents alleged to be due to their defective condition. This Section is applicable only if an entire building is leased to a single Lessee, or if a first floor is leased to the Lessee.

The Lessee of the first floor shall, at its expense, keep the pavement in the front of the premises in good order and repair and free from snow and ice. The Lessor shall, at its expense, keep the exterior and roof of the building of which the demised premises are a part in good order and repair. The Lessee acknowledges that the same now are in good order and repair. The Lessor shall not be liable or responsible for any injury or damage occasioned by bad order or lack of repair until it receives written notice thereof either from the Lessee or another tenant of the building and has had a reasonable time to remedy such order or make the repair.

28. *Public areas.* If the demised premises constitute one or more floors, or portions thereof, of the building, and, at the time of the execution of this lease there are upon such floor or floors, or portions thereof, hallways, passageways, stairways, elevators, or other means of access to and from the upper and lower portions of the building, the space occupied by such hallways, passageways, stairways, elevators, and other means of access, although within the demised premises as above described, shall be taken to be excepted therefrom and reserved to the Lessor or to the other tenants or occupants of the building, and they shall not be considered a portion of the demised premises.

29. *Termination; automatic extensions.* Either party may terminate this lease at the end of the term by giving the other at least six months' prior written notice. If such notice is not given, this lease shall continue upon the same terms and conditions for a further period of one year, from year to year, unless terminated by either party, by giving the other at least six months' written notice for removal prior to expiration of the then current term. However, if this lease is continued for under the above terms, any allowance given the Lessee on the rent during the original term shall not extend beyond that term. Moreover, if before the expiration of any extended term the Lessor gives written notice to change the terms and conditions of this lease, and the Lessee does not within 30 days thereafter notify the Lessor of its intention to vacate the demised premises at the end of the then current term, the Lessee shall be considered as Lessee under the terms and conditions mentioned in the notice for a further term as provided above, or for such further term as stated in the notice. If the Lessee gives notice of intention to vacate the premises at the end of any term and fails or refuses to vacate them on the date designated in such notice, the Lessor either (a) may disregard the notice and deem it to have no effect, in which case all the terms and conditions of this lease shall continue thereafter with full force as if such notice had not been given, or (b) may at any time within 30 days after such term give the Lessee 10 days' written notice of its intention to terminate the lease, whereupon the Lessee shall vacate the premises at the end of the 10-day period specified in such notice. During any renewal of the original term of this lease, the Lessor may exercise the same powers granted to it during the original term, and the Lessee shall perform the same obligations imposed upon it during the original term.

30. *Commissions.* In consideration of services rendered in procuring the tenancy created in this lease, Barnes Corporation, the Agent, has earned, and the Lessor shall pay to it, in cash, when this lease is executed, a service charge

equal to one-half of the stipulated maximum monthly rental payable hereunder, or \$100, whichever is less, plus a leasing brokerage fee equal to 6% of the first year's rental, plus 5% of the second year's rental, if any, plus 4% of the rental for the balance of the term, if any. For any period less than a year, the leasing brokerage fee due shall be computed on the basis of a full year's rental. Commissions shall be based upon all amounts required to be paid by the Lessee according to the lease, including but not limited to (a) taxes, (b) insurance, (c) water and sewer rents, (d) amortization of capital sums, (e) amounts expended by the Lessee in lieu of rent to alter, remodel, repair, renovate, build, or rebuild, and (f) amounts of any allowances to the tenant as free rent therefor. The commissions thereon shall be payable when the payments or expenditures are made and when the waivers or offsets of rent shall become effective.

31. *Termination of agency.* Notwithstanding any contrary provision in Section 30, the Agent may permit payment of the leasing brokerage fee to be spread over the term of the lease. In such event, the Lessor authorizes the Agent to collect the rent due or to become due hereunder during the continuance of the term of this lease, and of any renewal or renewals thereof. The Agent shall remit monthly the rent collected by it, deducting and retaining from such collection a sum to cover both leasing brokerage fees and collection commission equal to 6% of the rent collected each month during the term of the lease and during any renewals or continuances thereof. However, the Lessor may terminate the agency of the Agent at any time by giving it 30 days' written notice and retake possession of this lease, except that such termination, or termination of the agency for any other reason, shall not become effective until the Lessor pays to the Agent, or the Agents authorized to retain and deduct from any funds of the Lessor in its hands, the following items in payment of deferred leasing brokerage (which shall be in addition to the sums due or to become due as provided in Sections 33 and 34):

(a) 6% of the rental accruing up to one year after such termination, plus

(b) 5% of the rental up to the second year thereafter, if any, plus

(c) 4% of the rental for the balance of the term, if any.

(d) For any period less than a year, the deferred leasing brokerage shall be equal to three-fifths of the maximum rental for any one month.

All provisions of this Section shall bind the Lessor's assigns, heirs, executors, and successors in interest.

32. *Acceleration of brokerage fee.* If the Agent is collecting the rent it may collect the deferred leasing brokerage fee if any of the following events occur:

(a) An encumbrancer takes possession of, or foreclosure is commenced, on any encumbrance on the demised premises;

(b) Any execution is issued against, a petition in bankruptcy is filed against, a receiver is appointed for, or an assignment for the benefit of creditors is made by the lessor;

(c) The Lessor sells or leases or permits any other person to rent or offer for rent the property or any portion of it of which the demised premises are a part, or instructs the Agent to remove its signs from the same;

(d) The Lessor in any way alters this lease by agreement with the Lessee without the Agent's approval;

(e) This lease is a sublease and the Lessor or its receiver or Trustee in equity or bankruptcy cancels or disaffirms the paramount lease without the Agent's approval; or

(f) Without fault of the Agent this lease is terminated for any reason.

33. *Agent's lien.* If the Agent is collecting rent for the Lessor, the Agent shall retain this lease in its possession during the term, or during any renewal or renewals thereof, under lien for the Agent's services. The Agent has a security interest in this lease to the extent of any deferred leasing brokerage due it, and the Lessor is entitled to receive only the net amount due hereunder after deduction of the brokerage Commission. No grantee, assignee, receiver, trustee, encumbrancer, or other person or officer shall adopt or receive the benefits of this lease without paying such brokerage fee or making provisions therefor.

The Agent shall have a lien against the premises for such brokerage and for the repayment of any sums advanced in connection with the demised premises, including insurance premiums, and for all other sums due in accordance herewith, on this lease and on any funds of the Lessor in Agent's hands, whether arising from this lease or from any other transaction. The Lessor assigns, transfers, and sets over to the Agent the rentals herein reserved up to the amount of the commission. A renewal shall be deemed to occur if the relationship of Landlord and Tenant continues after the expiration of the original or any renewal term, under this or any other agreement, between the Lessor and any successor or assign of the Lessor and Lessee or any person, company, or corporation having any interest, relationship, or connection in or with the Lessee or this lease. If the Lessee or any person, company, or corporation, having any interest, relationship, or connection in or with the Lessee or this lease, becomes the purchaser of the demised premises, or any other building or land owned by the Lessor, at any time while this lease or any renewal thereof is in force or any of the above parties are in possession of the demised premises or of all or any portion of the property of which the demised premises form a part, the Lessor shall, at the time of such sale, pay the Agent a sales commission at the customary rate charged for the service.

34. *Exclusive agency.* The Agent has the exclusive right, while this lease is in effect, to lease or sell to the Lessee any additional building space or land owned by the Lessor. If at any time while the Lessee is in possession of all or part of the demised premises, whether during the original term or any renewal thereof or under any new lease or agreement, the Lessee leases or purchases additional building space or land owned by the Lessor, regardless of whether contiguous to the space or areas described in this lease or under an amendment to this lease, a separate lease, or agreement of sale, and regardless of who sells or leases it, whether by the Lessor directly or by another agent, the Lessor shall pay to the Agent for such additional building space or land leased or sold to the Lessee, in addition to the leasing brokerage payable to the Agent hereunder, a brokerage commission in accordance with the provisions of Sections 30 through 34. The additional commission shall be paid as if the additional space or areas formed a part of the premises leased to the Lessee under this lease.

35. *Condition of premises.* The Lessee or its duly authorized agent has inspected the premises. The premises are leased as a result of such inspection and not in reliance upon any representations made by the Lessor, or its leasing or other agent, except as expressly stated in this lease. Neither the Lessor nor any of its agents shall be responsible or liable for any agreement, condition, or stipulation not set forth herein, including, without limitation, anything relating to or affecting the physical condition of such premises.

36. *Owner's approval.* This lease shall become null and void and all money paid on account thereof shall be refunded by the Lessor unless approved by it within seven days from the date hereof. The use and deposit of any checks or other payments by the Agent shall not constitute approval.

37. *Miscellaneous.*

(a) All headings preceding the text of the several Sections and subsections hereof are inserted solely for convenience or reference and shall not constitute a part of this lease or affect its meaning, construction, or effect.

(b) This lease represents the entire agreement between the parties; there are no collateral oral agreements or understandings between them. All additions, variations, or modifications to this lease shall be void and of no effect unless in writing signed by the parties.

(c) This lease and any attached riders set forth all the promises, agreements, conditions, and understandings between the Lessor and Lessee with respect to the demised premises. There are no other oral or written promises, agreements, conditions, or understandings between them. Except as otherwise provided herein, no subsequent alteration, amendment, change, or addition to this lease shall be binding upon the parties unless in writing and signed by them.

(d) The provisions of this lease shall be binding upon and inure to the benefit of both parties and their respective legal representatives, successors, and assigns.

(e) No delay or failure by either party to exercise any right under this lease, and no partial or single exercise thereof, shall constitute a waiver of that or any other right, unless otherwise expressly provided herein.

(f) This lease may be executed in two or more counterparts, each of which shall be deemed an original but all of which together shall constitute one and the same instrument.

(g) Unless otherwise authorized herein, all notices or other documents under this lease shall be in writing and delivered personally or mailed by certified mail, postage prepaid, addressed to the parties at their last known addresses.

In witness whereof the parties have hereunto set their hand and seals the day and year aforesaid.

Sealed and delivered
in the presence of:

Barnes Corporation, Agent

by _____

Stanford White, President (Seal)

Martin Meat Corporation (to be formed)

by _____ (Seal)

Attest: _____ (Seal)

This lease having been examined by the undersigned Lessor (Principal of Barnes Corporation, Agent) is approved with all the agreements contained herein.

Hines-Cohen Corporation

by _____

Jerome Hines, President



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Current Legal Forms for Real Estate

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Current Legal Forms for Real Estate
Chapter 23 REAL ESTATE LEASES
Part IV. Forms

A. COMPLETE LEASES AND RELATED AGREEMENTS

31-23 Current Legal Forms for Real Estate FORM 23.13

AUTHOR: by Thomas G. Belden

FORM 23.13 Sublease--simultaneous termination with underlying lease

COMMENT

There is a distinction between a true sublease and an assignment of a lease. An assignment is deemed to be a complete transfer of all of one's interest in a lease in some jurisdictions.

Sublease vs. assignment:

An assignment transfers the entire unexpired term in the whole or some part of the leased and/or demised premises, leaving no reversionary interest in the transferor. It is a transfer of the prime lessee's whole interest in the lease in the whole or some part of the demised premises.

A transfer of a portion of the lessee's interest, however, is a sublease. A transfer creating new conditions with a right of reentry or new causes of forfeiture is also a sublease, since the transferee in such case holds by different tenure than his transferor. A transferor who reserves the right of reentry for breach of conditions has a contingent reversionary interest which prevents his transfer from operating as an assignment of the whole of the unexpired term; instead, a sublease is created. If a subtenant makes rental payments directly to the owner rather than to his transferor, that does not affect the status of the transfer, even though such payment is by mutual agreement.

Whether a given transaction constitutes an assignment or a sublease will depend upon its legal effect rather than on what the parties denominate it or what sort of instrument they may employ to give it effect.

Remedies of lessor against lessee's assignees:

Whatever remedies the lessor of any real property has against his immediate lessee for the breach of any agreement in the lease, or for recovery of the possession, he also has against the assignees of the lessee for any cause of action accruing while they are the assignees, except where the assignment is made as security for a loan, and is not accompanied by possession of the premises.

In some jurisdictions an occupant of real property holding possession by bare assignment of the lessee assumes, vis-a-vis the lessor, only such obligations as arise out of privity of estate, as distinguished from those arising on privity of contract and therefore is bound to perform only those covenants running with the land.

Effect of lease provisions on sublease:

Leases frequently contain a prohibition against the lessee's assigning or subletting the leased premises without the prior consent of the lessor. Generally, these provisions prohibit only voluntary and not involuntary assignments. Thus, transfer by execution sale and assignment by lessee's estate may be permissible. If the lessor desires to avoid an involuntary transfer of the leasehold interest of the tenant, it should be expressly provided in the lease.

A clause prohibiting the assignment of a lease does not necessarily foreclose every voluntary transfer of the lessee's rights. If a transfer results merely from a change in the legal form of a business and does not affect the interests of the party protected by the nonassignment provisions of the lease, there may be no breach of that provision. Accordingly, a lessee might be permitted to transfer the lease to a corporation formed and wholly owned by the lessee.

The incorporation of the lessee does not of itself operate as an assignment of the lease to the corporation. For example, the incorporation of an existing partnership does not operate to transfer to the corporation the title to the real or personal property of the partnership or association in the absence of a statutory provision to such effect. But there generally must be a conveyance, contract of sale, or assignment. (The corporation may, however, acquire an equitable title without a conveyance.)

Transfer by lessee in violation of lease prohibition:

Since a violation of the covenant or condition against assignment or subletting may result in forfeiture, the condition generally is strictly construed against the lessor. In such a case, assignment without consent may not of itself terminate the lease or render the assignment void. However, the making of the assignment may give the lessor certain rights to be exercised in the manner provided by law, i.e., the assignment is not void, but only voidable. The leasehold passes to the assignee, subject only to forfeiture by the lessor and the right to declare a forfeiture may be waived.

If the lessor desires to rely on the restriction against assignment, he may give notice of his election to declare a forfeiture of the lease and sue for breach of the lease. He may also pursue his remedy in unlawful detainer in some jurisdictions if possession is thereafter withheld following proper notice. However, the lessor does not have the option of merely giving notice of the invalidity of the assignment without declaring a forfeiture. The restriction as to the condition of assignment is generally considered to be a personal covenant for the benefit of the lessor and until the lessor elects to take advantage of the breach, the assignment remains a valid and binding conveyance of the leasehold interest as to all other parties.

Rent payments:

Absent a provision in the lease expressly providing to the contrary, if the lessor accepts payments of rent from the assignee, even under a stipulation reserving the right to declare a forfeiture, the lessor's right is deemed waived. But, since a waiver is the relinquishment of a known right, there must be actual knowledge of the existence of the fact on which such right can be predicated. There is no waiver on the part of the lessor due to an acceptance of rent without actual knowledge of the assignment or sublease. Such knowledge must be actual, not constructive. However, there is a presumption of an assignment which follows occupancy of the leased premises by one other than the lessee, especially when the occupancy pays the rent and cost of maintenance.

FORM

THIS SUBLEASE is dated [date], between Albany Metal Works, a New York Corporation, with its principal place of business at Houghton Park, Albany, New York 14830 (the "Lessor"), and Retailers Alliance Limited--U.S.A. ("RAL, U.S.A."), a Delaware Corporation, with a place of business at 57 East Road, Chicago, Illinois 60631 (the "Lessee").

The Lessor lets to the Lessee and Lessee hires from the Lessor the following described premises: Approximately 990 sq. ft. of office space located in the Fifth Floor, known as Suite No. 525, of the office building designated as Building 100 in the complex of buildings known as PHASE III, O'Hare Plaza, located at 57 East Road, Chicago, Illinois to be used only for a district sales office for the term commencing [date] and expiring [date] at the monthly rent provided in Section 20.

The Lessee agrees to each of the following:

1. *Payment of rent.* Pay the rent set forth herein to Albany Metal Works.

2. *Repairs.* At its expense, keep the premises in good repair, ordinary wear and tear, repairs to the roof, exterior of the building, and structural repairs excepted, unless such repairs are made necessary by the Lessee's act or negligence. At the expiration of the term, the Lessee shall remove its goods and effects and peaceably yield up the premises to the Lessor in as good condition as when delivered to the Lessee, ordinary wear and tear, damage by fire, the elements, act of the public enemy, or casualty excepted. All notices to quit or vacate are expressly waived, any law, usage or custom to the contrary notwithstanding.

3. *Compliance with regulations.* Comply promptly with all laws, ordinances, requirements, and regulations of the federal, state, county, municipal and other authorities, the fire insurance underwriters, and insurance organizations or associations. However, the Lessee shall not be required to make alterations to the exterior of the building, or alterations of a structural nature.

4. *Viewing premises.* Use the premises exclusively for the purpose set forth herein and during the last three months of this lease, or any extension thereof, and permit the Lessor to display the usual "To Let" signs and show the premises to prospective tenants. At any time during the term the Lessor, its landlord, or either's agents, may enter the premises for the purpose of examining their condition or making repairs in any part of the building. However, the Lessor does not assume any liability for the care or supervision of the premises or appurtenances.

5. *Assignment.* The Lessee shall not make or permit to be made any alterations or additions to the premises, assign, mortgage, or pledge this lease, or sublet the whole or any part of the premises without the Lessor's written consent. Such consent shall apply solely to the particular transaction consented to and shall not constitute the Lessor's waiver of the

provisions of this lease.

6. *Insurance.* The Lessee shall not leave the premises unoccupied during the term, or by any act of commission or omission cause an increase in the rate of insurance or the cancellation of any insurance policy. If any increase in the rate of insurance is caused by the Lessee's occupancy, the Lessee shall pay on demand the amount of the increase, and in default of such payment, the amount may be added to the next installment of rent as additional rent. The Lessee shall furnish the Lessor with public liability insurance policies issued by companies and in amounts satisfactory to the Lessor.

7. *Signs.* The Lessee shall not install awnings, advertisements, or signs on any part of the premises without the Lessor's written consent and shall keep the sidewalks free from ice, snow, and all obstructions.

8. *Utilities.* The Lessee shall make its own arrangements for the supply of gas, electricity, water, fuel, and the like, and pay for all such services.

9. *Indemnification.* The Lessor shall not be responsible for any defect or change of condition in the premises, or for any damage thereto, or to any person, or to goods or things contained therein due to any cause except the Lessor's act or negligence. The Lessee shall indemnify the Lessor from all claims, demands, and actions arising in connection with the Lessee's use of the property, or the use by any person occupying the premises during the term hereof, or by reason of any breach or nonperformance of any covenant herein, or the Lessee's violation of any law or regulation.

10. *Fire damage.* If the premises are so damaged by fire, other casualty, or act of the public enemy so as to be substantially destroyed, this lease shall terminate and any unearned rent paid in advance by the Lessee shall be apportioned and refunded to it. However, if the premises are not substantially destroyed, the Lessor will endeavor to have the Lessee restore them, and a just proportion of the rent shall abate according to the extent to which the premises have been rendered untenable until they have been restored. The Lessee shall give the Lessor immediate notice of any damage to the premises.

11. *Default and remedies.* If the Lessee fails to perform or observe any of its covenants under this lease within 10 days after the Lessor gives it notice of default, the Lessor may immediately: (a) terminate or cancel this lease by notifying the Lessee as provided above, and upon such termination or cancellation the Lessee shall be liable to the Lessor for all damages sustained by it by reason of the Lessee's breach of covenant and of the termination or cancellation; or (b) re-enter the premises without notice and upon reentry let all or any part thereof as agent for the Lessee. If the premises are let in accordance with the provisions of (b), the Lessor may receive the rent, applying it first to the payment of any expense the Lessor incurs in entering and letting the premises, and then to the payment of the rent and the fulfillment of the Lessee's covenants hereunder. If the Lessee defaults, it shall pay and be liable for the several installments of rent that would under this lease become due had no default occurred, regardless of whether the demised premises are re-let or remain vacant, and whether the vacancy is in whole or in part or for a period less than the whole or remainder of the term. The Lessee shall be credited at the end of each month with any net amounts actually received by the Lessor during that month for the use or occupancy of all or part of the demised premises provided that the Lessor has been fully reimbursed for all sums and liabilities it has paid or incurred for any of the above purposes (which the Lessee also shall pay and be liable for). Such payments shall be made either directly by the Lessee or out of moneys actually received for renting the demised premises after the Lessor has received undisputed possession. The Lessor's maintenance of any action or proceeding to recover possession of the premises or any installment or installments of rent or other moneys that may be due or become due from the Lessee shall not preclude the Lessor from also instituting and maintaining subsequent actions or proceedings to recover possession of the premises or of any subsequent payment or payments of rent or other moneys that may be due or become due from the Lessee. A waiver by the Lessor of the Lessee's breach of any one or more covenants or conditions contained herein shall not bar any of the Lessor's rights or remedies for a subsequent breach of the same covenant or condition.

12. *Additional rent.* If the Lessor makes any expenditure for which the Lessee is responsible, or if the Lessee fails to

make any required payment under this lease, the Lessor may add such amount to any current or future installment of rent.

13. *Condemnation.* If all or any part of the premises are taken or condemned for a temporary or permanent public or quasi-public use, the Lessor may terminate this lease. In that case, it shall return to the Lessee all unearned rent paid in advance.

14. *Demolition.* If any competent governmental authority decides that the building or buildings should be demolished and removed, the Lessee shall immediately vacate the premises, this lease shall terminate, and all unearned rent paid in advance by the Lessee shall be apportioned and refunded to it.

15. *Notices.* All notices or other documents under this lease shall be in writing and delivered personally to the party to be notified or sent by telegram or by registered or certified mail addressed to such party at its last known address.

16. *Termination.* The Lessor may terminate this lease if any one or more of the following events occur: proceedings in bankruptcy, or under any other act for the relief of debtors, are instituted by or against the Lessee; the Lessee compounds its debts, or assigns over its estate or effects for payment thereof; any execution issues against the Lessee or any of its effects; a receiver or trustee is appointed for the Lessee's property; or this lease by operation of law devolves upon or passes to any person or persons other than the Lessee personally. In any such event, the Lessor may immediately terminate this lease by notifying the Lessee as provided in Paragraph 15. Upon such termination all present and future sums due from the Lessee shall immediately become due and payable.

17. *Sublease.* This is a sublease. The Lessor's interest in the premises is as Lessee under an underlying sublease made by General Products Corporation dated [date], a copy of which, initialed for identification, is attached hereto. Except as provided in paragraph 20, this sublease is expressly made subject to all the terms and conditions of the underlying lease. The Lessee shall use the premises in accordance with the terms of the underlying lease and not do or omit to do anything which will breach any of its terms. If the underlying lease is terminated, this sublease shall terminate simultaneously and any unearned rent paid in advance shall be refunded to the Lessee, if such termination is not the result of a breach by the Lessee of the within sublease. The Lessee shall assume the obligation for performance of all of the Lessor's obligations under the underlying lease, except the obligation to pay rent to Lessor's landlord.

18. *Quiet possession.* The Lessor covenants that the Lessee, upon paying the rent reserved herein and performing all its covenants and agreements contained herein, may quietly enjoy the premises, except as otherwise provided herein. However, this covenant shall be subject to the terms of the underlying lease and of any mortgages which may now or later affect the premises.

19. *Waiver.* Both parties waives their respective rights against the other for damages caused by fire or other perils covered by insurance when the damages are sustained in connection with the occupancy of the leased premises.

20. *Rent payments.* Commencing [date] through [date], the monthly rental shall be \$763.13. No term of the underlying lease referred to in Section 17 shall be effective under any circumstances to increase or escalate this monthly rental during the term of this sublease. Rental shall be payable in advance on the first business day of each month during the term of the sublease.

21. *Binding effect.* The provisions of this instrument shall be binding upon and inure to the benefit of both parties and their respective legal representatives, successors, and assigns.

22. *Non-waiver.* No delay or failure by either party to exercise any right under this instrument, and no partial or single exercise of that right, shall constitute a waiver of that or any other right, unless otherwise expressly provided herein.

23. *Headings.* Headings in this Sublease are for reference and convenience only and shall not be used to interpret or construe its provisions.

24. *Counterparts.* This Sublease may be executed in two or more counterparts, each of which shall be deemed an original but all of which together shall constitute one and the same instrument.

25. *Entire agreement.* This instrument supersedes all agreements previously made between the parties relating to its subject matter. There are no other understandings or agreements between them, except as otherwise provided herein.

In witness whereof the Lessor has signed and sealed this instrument, [date] and the Lessee has signed and sealed this instrument, [date].

Attest:	Albany Metal Works
_____	_____
Assistant Secretary	Senior Vice President--Staff
Attest:	Retailers Alliance Limited--U.S.A.
_____	_____
Secretary	Chairman of the Board

Consent of Lessor in Primary Lease

The undersigned, as Managing Agent for National Bank and Trust Company of Chicago, consents to the within Sublease whereby Albany Metal Works has subleased premises located at 57 East Road, Chicago, Illinois to RAL, U.S.A.

Dated	Chambers & Company, Managing
_____	Agent for National Bank and Trust
	Company of Chicago as Trustee

The undersigned, General Products Corporation, hereby consents to the within Sublease whereby Albany Metal Works has subleased premises located at 57 East Road, Chicago, Illinois, to RAL, U.S.A.

Dated:	General Products Corporation
	by _____
	by _____



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Current Legal Forms for Real Estate
Chapter 23 REAL ESTATE LEASES
Part IV. Forms

A. COMPLETE LEASES AND RELATED AGREEMENTS

31-23 Current Legal Forms for Real Estate FORM 23.14

AUTHOR: by Thomas G. Belden

FORM 23.14 Assignment and assumption of lease--landlord consent--assignor remains liable for assignee's performance

COMMENT

Assignment and assumption agreement:

The agreement set forth in this form is a three-way agreement between an assignor, an assignee, and the landlord. Such an agreement is a convenient method to delineate the rights and obligations of all three parties interested in the transaction in one document. Each party then has full knowledge of the agreement between the other two parties. In this single agreement, the assignor assigns the lease to the assignee, the assignee assumes the assignor's obligations under the lease, and the landlord consents to the assignment. Alternatively, the assignment can be accomplished in one agreement between the assignor and the assignee, and the landlord's consent can be accomplished in a separate document.

Assignor's continued liability:

Where the original lease provides that it cannot be assigned without the landlord's consent, the landlord may refuse to consent to an assignment unless certain conditions are met. A common condition to the landlord's consent is that the assignor remain liable for the assignee-tenant's performance under the lease. In essence, the landlord requires the assignor to guarantee the assignee's performance. As with a lease guaranty, this protects the landlord from the consequences of a default by an assignee-tenant whose financial situation is uncertain.

FORM**ASSIGNMENT AND ASSUMPTION OF LEASE**

THIS ASSIGNMENT AND ASSUMPTION OF LEASE ("Assignment") is made as of the _____ day of [date], by and among: (1) _____, Assignor, having a notice address of _____ Street, City of _____, State of _____; (2) _____ Corp., Assignee, a corporation incorporated under the laws of the State of _____, having a notice address of _____ Avenue, City of _____, State of _____; and (3) _____ Associates, Landlord, a limited partnership in the State of _____, having a notice address of _____ Road, City of _____, State of _____.

WITNESSETH:

WHEREAS, Assignor (as "Tenant"), and Landlord made and entered into a certain Lease Agreement dated [date], as amended by a First Amendment to Lease dated [date] (collectively the "Lease"), demising certain leased premises located at _____ Road, City of _____, State of _____, containing approximately _____ square feet of floor area, all as in the Lease more particularly described (the "Premises");

WHEREAS, Assignor desires to assign the Lease to Assignee;

WHEREAS, the Lease provides, among other things, that the Lease shall not be assigned without the Landlord's consent in writing;

NOW, THEREFORE, in consideration of the mutual covenants and agreements herein set forth, and of other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the parties covenant and agree as follows:

1. Effective as of [date], Assignor assigns to Assignee all its right, title and interest in and to the Lease.
2. Assignor covenants, warrants and represents that: (a) the Lease is in full force and effect; (b) Assignor has performed all of its obligations up to the effective date of this Assignment; (c) Assignor has full right and power to execute this Assignment; and (d) the Lease has not been modified, supplemented or amended.
3. Assignor hereby surrenders and assigns to Assignee, and Assignee hereby accepts the surrender and assignment from Assignor of, all of Assignor's right, title and interest in, to and under the Lease, a copy of which is attached as Exhibit A and incorporated herein by reference.
4. Assignee hereby assumes and agrees to be bound by and pay and perform all of the obligations, terms, covenants and conditions which, pursuant to the Lease, are to be observed, kept and/or performed by the Assignor, effective as of [date].
5. Assignor agrees to remain liable for the performance of all terms, covenants and conditions of the Lease to be performed by Assignee and by Assignee's successors and assigns thereunder.
6. Landlord consents to the aforesaid Assignment of the Lease by Assignor to Assignee upon the express conditions

that: (a) the Assignor remains liable for the full and due performance by the Assignee, and by Assignee's successors and assigns, of all terms, obligations, covenants and agreements under the Lease; and (b) no further assignment of the Lease shall hereafter be made without the prior written consent of the Landlord.

7. Nothing in this Assignment shall be deemed to authorize any assignment or other transfer in whole or in part of the interest of Assignee in violation of any provisions of the Lease.

8. This Assignment shall be binding upon and shall inure to the benefit of the parties hereto and their successors and permitted assigns.

IN WITNESS WHEREOF, the parties have executed this Assignment and Assumption of Lease as of the date first written.

SIGNED IN THE PRESENCE
OF:

(Witnesses as to Assignor)

ASSIGNEE:

(Witnesses as to Assignee)

LANDLORD:

(Witnesses as to Landlord)

ASSIGNOR:

By: _____

By: _____

By: _____

[Acknowledgments]

[Attach Exhibit A]



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Chapter 23 REAL ESTATE LEASES

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A. COMPLETE LEASES AND RELATED AGREEMENTS

31-23 Current Legal Forms for Real Estate FORM 23.15

AUTHOR: by Thomas G. Belden

FORM 23.15 Lessor's consent to sublease--nondisturbance agreement to protect subleasehold interest

COMMENT

Most primary leases require the consent of the Lessor prior to a sublease of a portion of the space leased by the sublessor under the terms of the primary lease. This form can be used to document that consent. However, the mere consent of the lessor to the sublease does not fully protect the sublessee from a possible loss of its subleasehold interest because if the primary lease is terminated, the sublease itself terminates by operation of law.

In this form, the lessor is asked to accept the sublessee as its tenant for a period equal to the unelapsed portion of the term of the sublease, in the event the primary lease is terminated because of a default by the sublessor or in the event the sublessor voluntarily surrenders and cancels the primary lease. This lease provides that as long as the sublessee is not in default under the terms of its sublease at the time of such termination or cancellation of the primary lease, the lessor will accept the sublessee as its tenant, and in return the sublessee will agree to recognize the lessor as its lessor for the balance of the term of the lease. The form goes on to further clarify that in the event the termination is due to fire or other casualty or taking by eminent domain, causes beyond the control of the parties, the primary lease will terminate under those circumstances.

FORM

Consent of Lessor

For One Dollar (\$1.00) and other valuable consideration the receipt and sufficiency of which is hereby acknowledged, _____ ("Lessor"), as Sublessor's landlord under the primary lease dated [date], for the premises known as _____, hereby consents to the Sublease Agreement ("Sublease") to which this Consent is attached between _____ ("Sublessor") and _____ ("Sublessee"), provided however that this Consent shall not be deemed to be a release of Sublessor from all or any part of Sublessor's obligations under the primary lease with Lessor, nor shall it be deemed to be a waiver in the future of the requirement that Sublessor obtain the prior written consent of Lessor to any assignment or sublease as provided in Sublessor's primary lease with Lessor.

In the event of (i) the termination of the primary lease caused by the default thereunder by Sublessor, or (ii) the voluntary surrender and cancellation of the primary lease by Lessor and Sublessor, Lessor agrees to accept Sublessee as its tenant for a period equal to the full and unelapsed portion of the terms of the Sublease to Sublessee, and upon the same covenants and conditions as are contained in the Sublease, provided Sublessee is not in default of the terms of the Sublease at the time of such termination or cancellation of the primary lease. In consideration thereof, Sublessee shall make full and complete attornment to Lessor for the balance of the term of the Sublease to establish direct privity of estate and contract between Lessor and Sublessee and with the same force and effect as though the Sublease was originally made directly from the Lessor to the Sublessee. Thereafter, provided the primary lease to Sublessor has been terminated or cancelled, Sublessee shall make all rental payments directly to Lessor. It is understood by the parties hereto that this paragraph shall not apply to termination of the primary lease by reason of fire or other casualty or eminent domain pursuant to the terms of the primary lease.

Lessor further agrees to and does hereby waive any right of recovery against Sublessee for loss, damage or destruction of the Demised Premises or building in which the Demised Premises is located resulting from perils ordinarily covered by standard fire insurance policies with extended coverage and vandalism and malicious mischief endorsements, notwithstanding that the damage may be due to the negligent acts or omission of Sublessee, Sublessee's agents or employees. Lessor agrees to acknowledge that the insurance will not be invalidated should the insured waive in writing prior to a loss any or all right of recovery against any party for loss occurring to Lessor's property.

Executed at _____, _____, this _____ day of _____, [date].

LESSOR:

by _____

SUBLESSOR:

by _____

SUBLESSEE:

by _____

[Acknowledgments]



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Chapter 23 REAL ESTATE LEASES

Part IV. Forms

A. COMPLETE LEASES AND RELATED AGREEMENTS

31-23 Current Legal Forms for Real Estate FORM 23.16

AUTHOR: by Thomas G. Belden

FORM 23.16 Third party lease guaranty agreement

COMMENT

Lease guaranties:

A lease guaranty agreement is an agreement by a third-party to be liable for rent payments and the performance of the tenant's obligations under a lease agreement. The landlord may require such a guaranty before signing a lease with a tenant whose financial situation is uncertain. Such assurances might be necessary if the tenant is starting a new business, engages in a highly speculative business, has insufficient capital to provide a security deposit, or has a poor credit record. The guaranty protects the landlord from the consequences of a tenant default, and enables such a tenant to enter into a lease. Additionally, the guarantor may benefit from the tenant's ability to lease the premises if the guarantor is a partner in a tenant partnership, an officer or director of a tenant corporation, a member in a limited liability company, a franchisor of a tenant franchisee, or otherwise related to the tenant's business.

Conditional or absolute guaranty:

This form is an example of an absolute guaranty. Under the agreement, upon the tenant's default, the landlord may proceed directly against the guarantor without being obligated to proceed against the tenant first. In a conditional guaranty, the landlord is required to exhaust its remedies against the tenant before the landlord can proceed against the guarantor. Sometimes, the agreement provides that the guaranty is subject to certain conditions other than the tenant's

default, and those conditions must be met before the landlord may proceed against the guarantor.

The guaranty also contains a confession of judgment clause (Paragraph 10.) which would allow the landlord to obtain a default judgment against the guarantor if there is a lease default. Such a clause may or may not be statutorily permitted depending on the applicable state law.

Scope and duration of guaranty:

A guaranty agreement may limit the scope of the guaranty, usually to a specified dollar amount. The agreement also may limit the duration of the guaranty to a specified period of time. For example, the guaranty may terminate after the first several years of the lease provided the tenant has consistently paid its rent and there are no defaults under the terms of the lease. The agreement set forth in this form is not limited as to its scope or duration.

FORM

GUARANTY AGREEMENT

This Guaranty is made as of this _____ day of _____, [date] by _____ ("Guarantor"), to _____ Associates, a State of _____ limited partnership ("Landlord").

WITNESSETH:

Guarantor has requested Landlord to enter into a certain Lease Agreement dated [date], (hereinafter, together with any modifications, amendments, extensions, riders, and renewals, referred to as the "Lease") with _____, Inc., a corporation incorporated under the laws of the State of _____, as the Tenant ("Tenant"), covering the space as set forth in Section _____ of the Lease, and defined as the "premises" in the Lease.

To induce Landlord to enter into the Lease, the Guarantor hereby agrees to guarantee, as hereinafter provided, the performance by Tenant of all of the terms, covenants, conditions, obligations, and agreements (collectively the "Covenants") contained in the Lease on the part of Tenant to be performed thereunder.

NOW THEREFORE, in consideration of the making of the Lease and other good and valuable consideration, including the undertakings herein contained, the Guarantor hereby agrees as follows, intending to be legally bound hereby:

1. *Definitions.* Unless specifically defined in this Guaranty Agreement or the context clearly requires a different meaning, the capitalized words and phrases used in this Guaranty Agreement have the same meanings ascribed to them in the Lease.

2. *Guaranty of Lease.* Guarantor unconditionally and absolutely, jointly and severally, guarantees to Landlord the prompt payment, when due, of the rents and any and all other charges payable under the Lease and the full and faithful performance and observance of any and all Covenants contained in the Lease, including, without limitation, the rules and regulations as therein provided, on the part of Tenant to be performed and observed. Guarantor unconditionally and absolutely covenants to Landlord that, if Tenant shall default at any time in the Covenants to pay rent or any other charge stipulated in the Lease or in the performance of any of the other Covenants contained in the Lease on Tenant's part to be performed, Guarantor will well and truly perform such Covenants, and pay the rent or other charges or arrears

thereof that may remain due thereon to Landlord, and also all damages stipulated in the Lease. Guarantor shall pay to Landlord, on demand, all expenses (including reasonable expenses for attorneys' fees and reasonable charges of every kind) incidental to, or relating to, the enforcement of this Guaranty Agreement. If the Lease is renewed or its term extended, for any period beyond the original expiration date specified in the Lease, either pursuant to any option to renew granted under the Lease or otherwise at any time, or if the Tenant holds over beyond the term of the Lease, or if the Lease is modified in any way, the obligations hereunder of Guarantor shall extend and apply with respect to the full performance and observance of all of the covenants, terms, and conditions of the Lease, as existing, extended, renewed or modified and of any such amendment thereof.

3. *No Discharge of Guaranty.* The liability of any Guarantor hereunder shall not be impaired, released, terminated or discharged, in whole or in part, by any of the following, notwithstanding that the same are made with or without notice to the Guarantor:

- (a) any amendment or modification of the provisions of the Lease; or
- (b) any extensions of time for performance, whether in whole or in part, of the covenants of Tenant under the Lease given prior to or after default thereunder; or
- (c) any other Guaranty now or hereafter executed by any Guarantor or any other person; or
- (d) any waiver of, assertion or enforcement of, or failure or refusal to assert or enforce, in whole or in part, any covenants, claims, causes of action, or remedies that Landlord may, at any time, have under the Lease or with respect to any guaranty or any security that Landlord may hold, at any time, for or under the Lease or with respect to Tenant; or
- (e) any act, thing, omission or delay to do any act or thing that may, in any manner, or to any extent, vary the risk of Guarantor or that would otherwise operate as a discharge of any Guarantor as a matter of law; or
- (f) the failure to give any Guarantor any notice whatsoever; or
- (g) the release of any security, Guaranty, or any rights, power, or privileges Landlord may now or hereafter have against any persons, entity, or collateral; or
- (h) any transfer by Tenant or any assignment of Tenant's interest under the Lease, whether or not with Landlord's consent; or
- (i) the invalidity of the Lease for any reason whatsoever.

In the event that any agreement or stipulation between Landlord and Tenant shall extend the time of performance or modify any covenants of the Lease on the part of Tenant to be performed, Guarantor shall continue to be liable upon this Guaranty.

4. *Demand Not Required.* To charge any Guarantor under this Guaranty, no demand shall be required nor shall there be required any notice of any default in any of the covenants of the Lease on the part of Tenant to be performed or of the same as affected by any agreement or stipulation extending the time of performance or modifying the covenants of the Lease. Guarantor hereby expressly waives any such demand or notice. Landlord shall have the unlimited right to enforce this Guaranty without pursuing any rights or remedies of Landlord against Tenant, or any other party, of any security Landlord may hold, it being intended that immediately upon any breach or default by Tenant in the performance or observance of any covenant of the Lease, Landlord may enforce its rights directly against any Guarantor under this Guaranty. Landlord may commence any action or proceeding based upon this Guaranty directly against Guarantor for the full performance of the Lease without making Tenant, any other guarantors, or any other person a

party defendant in such action or proceeding. Any one or more successive or concurrent actions may be brought on this Guaranty against any Guarantor either by the same action, if any, brought against Tenant and/or any other party or in separate actions, as often as Landlord, in its sole discretion, may deem advisable.

5. *Waivers.* The Guarantor hereby expressly waives and releases the following: (i) notice of the acceptance of this Guaranty and notice of any change in Tenant's financial condition; (ii) the right to interpose all substantive and procedural defenses of the law of guaranty, indemnification, and suretyship, except the defenses of prior payment or prior performance by Tenant (of the obligations which Guarantor is called upon to pay or perform under this Guaranty) or that there is no obligation on the part of Tenant with respect to the matter or matters claimed to be in default; (iii) all rights and remedies afforded by applicable law to Guarantor or sureties, including, without limitation, any extensions of time conferred by any law now or hereafter in effect; (iv) the right to interpose any defense (except as allowed under (ii) above), set-off, or counterclaim of any nature or description in any action or proceeding; (v) any right or claim of rights to cause a marshaling of Tenant's assets or to cause Landlord to proceed against Tenant or any collateral held by Tenant at any time or in any particular order; (vi) any right against Tenant for reimbursement or contribution because of any payment made by Guarantor under this Guaranty Agreement; and (vii) any defense based upon the invalidity of the Lease.

6. *No Impairment of Obligation.* Neither Guarantor's obligations to make payment in accordance with the term of this Guaranty nor any remedy for the enforcement thereof, shall be impaired, modified, changed, stayed, released, or limited in any manner whatsoever by impairment, modification, change, release, limitation or stay of the liability of Tenant or its estate in bankruptcy or any remedy for the enforcement thereof, resulting from the operation of any present or future provision of the Bankruptcy Act of the United States or other statutes, or from the decision of any court interpreting any of the same, and each Guarantor shall be obligated under this Guaranty as if no such impairment, stay, modification, change, release, or limitation had occurred.

7. *Subrogation Rights.* Whenever at any time or from time to time Guarantor makes any payment to Landlord or performs or fulfills any covenant, Guarantor will notify Landlord in writing that such payment or performance, as the case may be, is for such purpose. No such payment or performance by Guarantor pursuant to any provision hereof shall entitle Guarantor, by subrogation or otherwise, to the rights of Landlord to any payment by Tenant or out of the property of Tenant, except after payment of all sums or fulfillment of all covenants, terms, conditions, provisions or agreements to be paid or performed by Tenant.

8. *Estoppel Certificate.* Guarantor will, at any time and from time to time, within ten (10) business days following written request by Landlord, execute, acknowledge and deliver to Landlord a statement certifying that this Guaranty is unmodified and in full force and effect (or if there have been modifications, that the same is in full force and effect as modified and stating such modifications). Such certificate may be relied on by anyone holding or proposing to acquire any interest in the premises from or through Landlord or by any mortgagee or prospective mortgagee of the premises or of any interest therein.

9. *Binding Effect.* All of Landlord's rights and remedies under this Guaranty are intended to be distinct, separate and cumulative and no right or remedy mentioned herein is intended to be an exclusion of or a waiver of any of the others. This Guaranty shall be binding upon Guarantor and Guarantor's heirs, personal representatives and assigns.

10. *Confessions of Judgment.* Guarantor authorizes any attorney at law at any time or times to appear in any state or federal court of record in the United States of America after the amount guaranteed hereunder or any part thereof shall have become due and payable (whether the payment becomes due by lapse of time or by acceleration of maturity or otherwise), and in each case to waive the issuance and service of process, to admit the maturity of the debt in question and the nonpayment thereof when due, to present evidence of the debt in question or any part thereof to the court and to certify the amount of the debt then owing thereon, to confess judgment against Guarantor and each of them in favor of the Landlord for the amount of the debt then appearing due, together with interest and costs of suit, and thereupon to

release all errors and waive all rights of appeal and stay of execution. The foregoing warrant of attorney shall survive any judgment, and should any judgment be vacated for any reason, the Landlord may nevertheless utilize the foregoing warrant of attorney in thereafter obtaining additional judgment or judgments against Guarantor.

IN WITNESS WHEREOF, this Guaranty is executed this _____ day of _____ [date].

WARNING -- BY SIGNING THIS PAPER YOU GIVE UP YOUR RIGHT TO NOTICE AND COURT TRIAL. IF YOU DO NOT PAY ON TIME, A COURT JUDGMENT MAY BE TAKEN AGAINST YOU WITHOUT YOUR PRIOR KNOWLEDGE AND THE POWERS OF A COURT CAN BE USED TO COLLECT FROM YOU REGARDLESS OF ANY CLAIMS YOU MAY HAVE AGAINST THE CREDITOR WHETHER FOR RETURNED GOODS, FAULTY GOODS, FAILURE ON THE CREDITOR'S PART TO COMPLY WITH THE AGREEMENT, OR ANY OTHER CAUSE.

IN THE PRESENCE OF:

GUARANTOR:

Residence Address

[Acknowledgments]



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Chapter 23 REAL ESTATE LEASES

Part IV. Forms

A. COMPLETE LEASES AND RELATED AGREEMENTS

31-23 Current Legal Forms for Real Estate FORM 23.17

AUTHOR: by Thomas G. Belden

FORM 23.17 Cell Tower Lease with Option

COMMENT

This is a form of lease used for a free standing cell tower to be constructed on a parcel of land located in a portion of a state university campus athletic field. It is set up as a 12-month option to lease so that during the 12-month option, the carrier can verify the suitability of the property for the cell tower, and to allow it to see if all permits and licenses can be obtained to construct the cell tower and operate it.

Telecommunications providers want to offer television, telephone and high speed internet services in offices and homes. In general, real estate developers need to consider a lot of issues in connection with these installations, including safety, aesthetics, consumer choice, carrier reliability and general engineering concepts.

There has been a proliferation of wireless telecommunications sites appearing on water tanks, roof tops, ridges and fields. If cell tower equipment is to be located in a field, it will usually be mounted on a tower, as in this lease. Unlike more traditional utilities which utilize eminent domain to acquire property to install its equipment, wireless telecommunications infrastructure has occurred in the free market through negotiated use and access agreements. These are usually in the form of leases, easements, or licenses between a landowner and the telecommunications company. In this form, the land on which the ground equipment and cell tower are to be located is leased from the landowner.

Most carriers have their own forms of lease written to the advantage of the carrier. If you represent the owner, you must check the form lease of the carrier to make sure that the cell tower

will not interfere with other telecommunication facilities of the owner, or the operations of the owner, that the agreement covers the hazardous materials obligations of the carrier, that the lease does not restrict the owners from locating other carriers on the owner's property, that adequate rent is paid throughout the term of the lease, that there is a requirement to restore the property upon termination, including removal of all or portions of the concrete foundations supporting the tower. In addition, the usual protective provisions for the landlord such as indemnities, insurance coverage requirements and subordination clauses should be included. A security deposit should be considered to back up the lease obligations of the tenant, especially if there are extensive obligations imposed on the carrier to remove its installations, including foundations and to restore the site upon the expiration or termination of the lease.

FORM

SITE LEASE WITH OPTION

THIS SITE LEASE WITH OPTION (this "Lease") is by and between _____ ("Landlord") and _____ ("Tenant").

1. Option to Lease.

(a) In consideration of the payment of one thousand and no/100 dollars (\$1,000.00) (the "Option Fee") by Tenant to Landlord, Landlord hereby grants to Tenant an option to lease a portion of the real property described in the attached Exhibit A (the "Property"), on the terms and conditions set forth herein (the "Option"). The portion of the Property to be leased shall be referred to as the "Premises" as more fully described in Section 1(c), below. The Option shall be for an initial term of twelve (12) months, commencing on the Effective Date (as defined below) (the "Option Period").

(b) During the Option Period and during the term of this Lease, Landlord agrees to cooperate with Tenant in obtaining, at Tenant's expense, all licenses and permits or authorizations required for Tenant's use of the Premises (as defined below) from all applicable government and/or regulatory entities (including, without limitation, zoning and land use authorities, and the Federal Communication Commission ("FCC") ("Governmental Approvals"), including all land use and zoning permit applications, and Landlord agrees to cooperate with and to allow Tenant, at no cost to Landlord, to obtain a title report, zoning approvals and variances and land-use permits. Landlord expressly grants to Tenant a right of access to the Property to perform any surveys, soil tests, and other engineering procedures or environmental investigations ("Tests") on the Property deemed necessary to determine that Tenant's use of the Property will be compatible with Tenant's engineering specifications, system design, operations and Government Approvals. Tenant may not change the zoning classification of the Property without first obtaining the Landlord's written consent. During the Option Period, Landlord agrees that it will not interfere with Tenant's efforts to secure other licenses and permits or authorizations that relate to other property. During the Option Period, Tenant may exercise the Option by so notifying Landlord in writing, at Landlord's address in accordance with Section 12 hereof. During the Option Period, Tenant agrees to and does hereby indemnify, defend and hold harmless Landlord from any claims, actions, liabilities or expenses arising from the exercising of any of the rights set forth herein relating to the Tests or other work to be done by Tenant, its agents and employees. In addition, Tenant shall repair and restore the Property to the condition it was in prior to any such Tests or other procedures. Prior to any entry on to the Property, Tenant shall provide to Landlord proof of the insurance required by the terms of Section 11(a), below.

(c) If Tenant exercises the Option, then, subject to the following terms and conditions, Landlord hereby leases to Tenant that portion of the Property sufficient for placement of the Antenna Facilities (as defined below), together with all necessary space and easements for access and utilities, as described and depicted in the attached Exhibit B (collectively

referred to hereinafter as the "Premises"). The Premises, located at _____, comprises approximately _____ square feet.

2. Term. The initial term of this Lease shall be five (5) years commencing on the date of exercise of the Option (the "Commencement Date"), and terminating at midnight on the day preceding the fifth anniversary of the date of exercise of the Option ("Initial Term").

3. A. Permitted Use. The Premises may be used by Tenant only for the transmission and reception of radio communication signals and for the construction, installation, operation, maintenance, repair, removal or replacement of related facilities, including, tower and base, antennas, microwave dishes, equipment shelters and/or cabinets and related activities, as approved by Landlord.

3. B. Compliance with Laws. Tenant shall fully comply with all applicable laws, statutes, ordinances, rules and regulations pertaining to Tenant's operation at the Property, the improvements constructed, used or maintained by Tenant at the Property, or Tenant's use and occupancy of the Property including without limitation those of the Federal Aviation Administration and the Federal Communications Commission.

4. Rent. Tenant shall pay Landlord, as rent, two thousand and no/100 dollars (\$2,000.00) per month ("Rent"). Rent shall be payable within twenty (20) days following the Commencement Date prorated for the remainder of the month in which the Commencement Date falls, and thereafter Rent will be payable monthly in advance by the fifth day of each month to Landlord at the address specified in Section 12 below. If this Lease is terminated at a time other than on the last day of a month, Rent shall be prorated as of the date of termination, subject to the provisions of Section 8 hereof. All rent shall be paid to Landlord at _____, or to such other address as Tenant is notified in writing. All rent not received by the tenth (10[th]) day of the month shall be subject to a late penalty of two percent (2%) of the amount past due, and shall be payable upon demand. If a payment is mailed it shall not be subject to a late penalty if postmarked prior to the 5[th] day of the month.

5. Renewal. Provided Tenant is not in default under the terms of this Lease, Tenant shall have the right to extend this Lease for four (4) successive five-year terms (each a "Renewal Term") on the same terms and conditions as set forth herein, except that Rent shall be increased by fifteen percent (15%) of the Rent paid over the preceding term. Provided Tenant is not in default under the terms of this Lease, this Lease shall automatically renew for each successive Renewal Term unless Tenant notifies Landlord, in writing, of Tenant's intention not to renew this Lease, at least ninety (90) days prior to the expiration of the Initial Term or either of the Renewal Terms. If Tenant shall remain in possession of the Premises at the expiration of this Lease or any Renewal Term without a written agreement, such tenancy shall be deemed a month-to-month tenancy under the same terms and conditions of this Lease.

6. Interference. Tenant shall not use the Premises in any way which interferes with the use of the Property by Landlord or reception or transmissions of Landlord, or lessees or licensees of Landlord with rights in the Property prior in time to Tenant's use. Similarly, Landlord shall not use, nor shall Landlord permit its lessees, licensees, employees, invitees or agents to use, any portion of the Property in any way which interferes with the operations of Tenant; provided, however, that nothing herein shall be construed to mean that Landlord cannot continue to use its Property in the same manner in which it has been using such Property. Such interference shall be deemed a material breach by the interfering party, who shall, upon written notice from the other, be responsible for terminating said interference. In the event any such interference does not cease within thirty (30) days after written notification or in the case of objectionable interference to the reception or transmissions of Landlord, within twenty-four (24) hours after notification of such interference, the interfering party shall be required to (1) cease operation until interference can be corrected to the satisfaction of the injured party (except for test transmissions of minimal duration made in coordination with all parties involved; or (2) be terminated upon receiving written notice from the other party. All parties acknowledge that continuing interference may cause irreparable injury and, therefore, the injured party shall have the right, in addition to any other rights that it may have at law or in equity, to bring a court action to enjoin such interference or to terminate this Lease immediately upon

written notice, subject to the provisions of Section 8 hereof if applicable.

7. Improvements; Utilities; Access.

(a) Tenant shall have the right, at its expense, to erect and maintain on the Premises improvements, personal property and facilities necessary to operate its communications system, including, without limitation, radio transmitting and receiving antennas, microwave dishes, tower and base, equipment shelters and/or cabinets and related cables and utility lines and a location based system, as such location based system may be required by any county, state or federal agency/department, and including, without limitation, additional antenna(s), coaxial cable, base units and other associated equipment (collectively, the "Antenna Facilities"). All such improvements are to be made on the basis of drawings approved by the Landlord and referenced in "Exhibit B" hereto. At all times, Exhibit B will reflect a true and accurate description of the site. Prior to construction of Antenna Facilities, Tenant shall provide construction plans for review by Landlord, who shall review and approve or reject said construction plans within fifteen (15) business days of Landlord's receipt of plans. Tenant shall have the right to alter, replace, expand, enhance and upgrade the Antenna Facilities at any time during the term of this Lease upon Landlord's written approval, which will not be unreasonably withheld, conditioned or delayed. Tenant shall cause all construction to occur lien-free and in compliance with all applicable laws and ordinances. The Antenna Facilities shall remain the exclusive property of Tenant and shall not be considered fixtures. Tenant shall remove the Antenna Facilities, including concrete footings to three (3) feet below grade, upon the expiration or termination of this Lease at Tenant's own cost.

Upon the termination of the Lease, and in addition to removing the tower and applicable portion of the foundation of Tenant's pole and tower, Tenant agrees to promptly reinstall the pole and lights of Landlord which were removed in connection with the installation of the Antenna Facilities by Tenant. Tenant agrees to do such work in accordance with all applicable laws and to the reasonable satisfaction of Landlord. To ensure that the Premises and Property are properly surrendered upon the termination of this Lease, upon the execution of Tenant's option to lease the Premises, Tenant agrees to deposit with Landlord a security deposit in the amount of three (3) months' rent as security for the performance of such obligations and any other obligations under this Lease. In the event the Premises and the Property are properly surrendered to the reasonable satisfaction of Landlord, such security deposit shall be promptly released to Tenant.

(b) Tenant shall, at Tenant's expense, keep and maintain the Antenna Facilities now or hereafter located on the Property in commercially reasonable condition and repair during the term of this Lease and in compliance with all applicable laws, normal wear and tear and casualty excepted. Upon termination or expiration of this Lease, the Premises shall be returned to Landlord in good, usable condition and as required by Section 7(a), above, normal wear and tear and casualty excepted.

(c) Subject to Landlord's prior written notice and prior approval of Tenant's plans which shall be approved or rejected within fifteen (15) business days of receipt of the plans, Tenant shall have the right to install utilities, at Tenant's expense, and to improve the present utilities on the Property. (including, but not limited to, the installation of emergency power generators. Landlord agrees to use reasonable efforts in assisting Tenant to acquire necessary utility service. Tenant shall install separate meters for utilities used on the Property by Tenant.

(d) As partial consideration for Rent paid under this Lease, Landlord hereby grants Tenant a License in, under and across the Property for ingress, egress, utilities and access (including access for the purposes described in Section 1) to the Premises adequate to install and maintain utilities, including but not limited to, the installation of power and telephone service cable, and to service the Premises and the Antenna Facilities at all times during the Initial Term of this Lease and any Renewal Term (collectively, the "License"). The License provided hereunder shall have the same term as this Lease.

(e) Subject to the limits hereafter set forth, Tenant shall have 24-hours-a-day, 7-days-a-week right to access to the

Premises at all times during the Initial Term of this Lease and any Renewal Term, provided Tenant gives Landlord forty-eight (48) hours notice prior to entry on the Premises in non-emergency situations except for routine maintenance. Upon the occurrence of an emergency, Tenant shall give Landlord notice of entry as soon as practicable and reasonable under the circumstances. Tenant acknowledges that the Premises being leased is located on the Property which has limited access because it is in an athletic field that is fenced in. Therefore, any access to the Premises, whether under emergency circumstances or otherwise, shall be in accordance with the rules and regulations and policies of the Landlord regarding access to such Property. Initially, such regulation shall require access by obtaining the access key for the policeman on duty at the Landlord's police station, after proper identification is given to the policeman, after which the key must be promptly returned to the police station.

(f) Where applicable, Tenant shall maintain and repair all access roadways from the nearest public roadway to the Premises in a manner sufficient to allow vehicular and pedestrian access at all times, at its sole expense, except for any damage to such roadways caused by Landlord.

8. Termination. Except as otherwise provided herein, this Lease may be terminated as follows:

(a) upon thirty (30) days' written notice by Landlord if Tenant fails to cure a default for payment of amounts due under this Lease within such thirty (30) day period;

(b) immediately upon written notice by Tenant if Tenant notifies Landlord of any unacceptable results of any Tests prior to Tenant's installation of the Antenna Facilities on the Premises, or if Tenant does not obtain, maintain, or otherwise forfeits or cancels any license (including, without limitation, an FCC license), permit or any Governmental Approval necessary to the installation and/or operation of the Antenna Facilities or Tenant's business;

(c) upon thirty (30) days' written notice by Tenant if Tenant determines that the Property, or the Antenna Facilities are inappropriate or unnecessary for Tenant's operations for economic or technological reasons, provided Tenant pays Landlord three (3) months' rent at the time such notice is given, and pays all rent through the date of termination;

(d) immediately upon written notice by Tenant if the Premises or the Antenna Facilities are destroyed or damaged so as in Tenant's reasonable judgment to substantially and adversely affect the effective use of the Antenna Facilities. In such event, all rights and obligations of the parties shall cease as of the date of the damage or destruction;

(e) at the time title to the Property transfers to a condemning authority, pursuant to a taking of all or a portion of the Property sufficient in Tenant's determination to render the Premises unsuitable for Tenant's use. Landlord and Tenant shall each be entitled to pursue their own separate awards with respect to such taking but Landlord shall have the right to the entire amount of the award attributable to the real property. Sale of all or part of the Property to a purchaser with the power of eminent domain in the face of the exercise of the power shall be treated as a taking by condemnation;

(f) immediately upon written notice by either party as set forth in Section 6 hereof; or

(g) Upon one (1) years' notice from Landlord to Tenant, in the event of redevelopment of all or a portion of the Property by Landlord; provided, however, that if a termination of the Lease due to redevelopment occurs sooner than the tenth (10th) year of the Lease term, then Landlord agrees to reimburse Tenant for a portion of its expenditures with respect to the Antenna Facilities, provided such expenditures can be substantiated to Landlord. Such reimbursement shall be in proportion to the amount of time remaining during the aforesaid 10-year period. For example, if the term of the Lease has been in effect for eight (8) years at the time of the termination, and there are two (2) years remaining of that 10-year period, then two-tenths (2/10ths) of the amount of such expenditures shall be reimbursed to Tenant.

9. Default and Right to Cure. Notwithstanding anything contained herein to the contrary and without waiving any other rights granted to it at law or in equity, each party shall have the right, but not the obligation, to terminate this Lease on

written notice pursuant to Section 12 hereof, to take effect immediately, if the other party fails to perform any covenant or commits a breach of this Lease and fails to diligently pursue a cure thereof to its completion after thirty (30) days' written notice specifying such failure of performance or default.

10. Taxes. (Section must be reviewed in light of Landlord's status as instrumentality of the State of Ohio) Landlord shall pay when due all real property taxes for the Property, including the Premises. Notwithstanding the foregoing, Tenant shall pay any personal property tax, real property tax or any other tax or fee which is directly attributable to the presence or installation of Tenant's Antenna Facilities, only for so long as this Lease has not expired of its own terms or is not terminated by either party. If Landlord receives notice of any personal property or real property tax assessment against Landlord, which may affect Tenant and is directly attributable to Tenant's installation, Landlord shall provide timely notice of the assessment to Tenant sufficient to allow Tenant to consent to or challenge such assessment, whether in a Court, administrative proceeding, or other venue. Further, Landlord shall provide to Tenant any and all documentation associated with the assessment and shall execute any and all documents reasonably necessary to effectuate the intent of this Section 10.

11. Insurance and Subrogation and Indemnification.

(a) Tenant will maintain Commercial General Liability Insurance in amounts of One Million and no/100 Dollars (\$1,000,000.00) per occurrence and Two Million and no/100 Dollars (\$2,000,000.00) aggregate which shall remain in full force and effect immediately upon the execution hereof and throughout the entire term of this Lease and until all equipment and structures of Tenant have been removed. Tenant may satisfy this requirement by obtaining the appropriate endorsement to any master policy of liability insurance Tenant may maintain. Landlord will be named as an additional insured on such policy. Proof of such insurance shall be provided to Landlord upon the execution hereof and upon request thereafter.

(b) Tenant releases Landlord, and its successors or assigns, from liability and waives all rights of recovery against Landlord for any loss or damage whether covered by its first party property insurance or not. Tenant's insurance policy shall contain a waiver of subrogation in Landlord's favor.

(c) Tenant agrees to and does hereby indemnify, defend and hold harmless Landlord from and against any and all claims, damages, costs and expenses, including reasonable attorney fees, to the extent caused by or arising out of the negligent acts or omissions or willful misconduct in the operations or activities on the Property by the Tenant or the employees, agents, contractors, licensees, tenants and/or subtenants of Tenant, or a breach of any obligation of Tenant under this Lease. The Tenant's obligations under this section are contingent upon its receiving written notice of any event giving rise to an obligation to Landlord within a reasonable period of time from the time Landlord learns of such matters.

(d) Landlord, to the fullest extent permitted by State of Ohio Law and decisions thereunder, shall be responsible for any and all personal injury and property damage (excluding attorney's fees) which is attributable to the negligent actions or omissions of Landlord, or its trustees, officers or employees while acting within the scope of their employment in relation to this Lease as set forth in *Ohio Revised Code Section 2743.02*. Landlord and Tenant hereby agree that nothing in this provision shall be construed or interpreted as a waiver of the sovereign immunity of Landlord or the State of Ohio beyond the waiver provided in *Ohio Revised Code Section 2743.02*.

(e) Notwithstanding anything to the contrary in this Lease, the parties hereby confirm that the provisions of this Section 11 shall survive the expiration or termination of this Lease.

(f) Tenant shall not be responsible to Landlord, or any third-party, for any claims, costs or damages (including fines and penalties) attributable to any pre-existing violations of applicable codes, statutes or other regulations governing the Property.

(g) Tenant agrees that the Antenna Facilities and all other fixtures and equipment and personal property belonging to Tenant and located in or about the Premises shall be at the sole risk of Tenant, and Landlord shall not be liable for the theft or misappropriation thereof, nor for any damage or injury thereto, nor for any damage or injury to Tenant, its agents, employees and licensees or invitees, or to any other persons or to any property caused by fire, explosion, wind, water, rain, snow, frost, steam, gas, electricity, any Acts of God, heat or cold, or by any act or neglect of any other tenant or any person, it being the obligation of Tenant to insure its personal property and Antenna Facilities.

12. Notices. All notices, requests, demands and other communications shall be in writing and are effective three (3) days after deposit in the U.S. mail, certified and postage paid, or upon receipt if personally delivered or sent by next-business-day delivery via a nationally recognized overnight courier to the addresses set forth below. Landlord or Tenant may from time to time designate any other address for this purpose by providing written notice to the other party.

If to Tenant, to:

With a copy to:

_____	_____
—	_____
_____	_____
—	_____
_____	_____
—	

—	

If to Landlord, to:

With a copy to:

_____	_____
—	_____
_____	_____
—	_____

—	

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—	

13. Quiet Enjoyment, Title and Authority. Landlord covenants and warrants to Tenant that (i) Landlord has full right, power and authority to execute this Lease; (ii) it has good and unencumbered title to the Property free and clear of any liens or mortgages, except those disclosed to Tenant and which will not interfere with Tenant's rights to or use of the Premises; and (iii) execution and performance of this Lease will not violate any laws, ordinances, covenants, or the provisions of any mortgage, lease, or other agreement binding on Landlord; provided, however, that nothing herein shall be deemed to be a representation that the Property and Premises are suitable for Tenant's purposes or that the Property is properly zoned to allow such use, the same being the obligation of the Tenant to determine. Landlord covenants that at all times during the term of this Lease, Tenant's quiet enjoyment of the Premises or any part thereof shall not be disturbed as long as Tenant is not in default beyond any applicable grace or cure period.

14. Environmental Laws. Landlord represents that it has no knowledge of any substance, chemical or waste (collectively, "Hazardous Substance") on the Property that is identified as hazardous, toxic or dangerous in any applicable federal, state or local law or regulation. Landlord and Tenant shall not introduce or use any Hazardous Substance on the Property in violation of any applicable law. Landlord shall be responsible for, and shall promptly

conduct any investigation and remediation as required by any applicable environmental laws, all spills or other releases of any Hazardous Substance not caused solely by Tenant, that have occurred or which may occur on the Property. Tenant shall not cause or permit any Hazardous Substance to be brought upon, stored, used, generated, released into the environment, or disposed of on, under, from or about the Property (which includes but is not limited to subsurface soil and ground water) by Tenant, its agents, employees, contractors or representatives. Tenant shall be responsible for, and shall promptly conduct any investigation and remediation as required by any applicable environmental laws, all spills or other releases of any Hazardous Substance not caused solely by Landlord, that have occurred or may occur on or above the Property. Tenant agrees to defend, indemnify and hold harmless Landlord from and against any and all administrative and judicial actions and rulings, claims, causes of action, demands and liability (collectively, "Claims") including, but not limited to, damages, costs, expenses, assessments, penalties, fines, losses, judgments and reasonable attorney fees that the Landlord may suffer or incur due to the existence or discovery of any Hazardous Substances on the Property or the migration of any Hazardous Substance to other properties or the release of any Hazardous Substance into the environment (collectively, "Actions"), that relate to or arise from the Tenant's activities on the Property. Landlord, to the extent permitted by State of Ohio law and decisions thereunder, shall be responsible for Claims and Actions (excluding attorney's fees) arising under this Lease attributable to the negligent actions or omissions of Landlord, its trustees, officers or employees while acting within the scope of their employment, as set forth in *Ohio Revised Code Section 2743.02*. Landlord and Tenant hereby agree that nothing in this provision shall be construed or interpreted as a waiver of the sovereign immunity of Landlord or the State of Ohio beyond the waiver provided in *Ohio Revised Code Section 2743.02*. The liabilities in this section specifically include, without limitation, costs incurred in connection with any investigation of site conditions or any cleanup, remedial, removal or restoration work required by any governmental authority. This Section 14 shall survive the termination or expiration of this Lease.

15. Assignment and Subleasing. Tenant shall have the right to assign or otherwise transfer this Lease and the License (as defined above) to any person or business entity which is FCC-licensed to operate a wireless communications business, is a parent, subsidiary or affiliate of Tenant, is merged or consolidated with Tenant, or purchases more than fifty percent (50%) of either an ownership interest in Tenant or the assets of Tenant in the "Metropolitan Trading Area" or "Basic Trading Area" (as those terms are defined by the FCC) in which the Property is located provided that the assignee has a net credit worth either greater than or equal to Tenant. Tenant shall obtain such documents as shall be needed to substantiate to Landlord the net credit worth of the proposed assignee and shall provide the same to Landlord. In addition, Tenant shall provide the full name and address of the proposed assignee, and the legal identification of the proposed assignee. Provided each of the aforesaid are provided to Landlord and are satisfactory to Landlord, upon such assignment Tenant shall be relieved of all future liabilities and obligations under the Lease accruing on and after the effective date of such assignment, and Landlord shall look solely to the assignee for performance under this Lease with respect to all such future obligations and liabilities.

Tenant may otherwise assign this Lease upon written approval of Landlord, which approval shall not be unreasonably delayed, withheld, conditioned or denied. In the event of such assignment, Tenant shall not be released from any liabilities or obligations under the Lease without the express prior written consent of Landlord.

Tenant may sublease space on the tower to other properly licensed telecommunications providers for collocation, provided that such sublessee first obtains and executes an acceptable separate ground lease with Landlord for its ground equipment. If such separate ground lease is not agreed to and executed by both parties, the sublease shall not be effective.

Additionally, Tenant may, upon notice to Landlord, mortgage or grant a security interest in this Lease and the Antenna Facilities, and may assign this Lease and the Antenna Facilities to any mortgagees or holders of security interests, including their successors or assigns (collectively "Mortgagees"), provided such Mortgagees agree to be bound by the terms and provisions of this Lease. In such event, Landlord shall execute such consent to financing as may reasonably be required by Mortgagees.

16. Successors and Assigns. This Lease and the Easements granted herein shall run with the land, and shall be binding upon and inure to the benefit of the parties, their respective successors, personal representatives and assigns.

17. Waiver of Landlord's Lien. As long as Tenant is not in default hereunder, Landlord hereby waives any and all lien rights it may have, statutory or otherwise, concerning the Antenna Facilities or any portion thereof, which shall be deemed personal property for the purpose of this Lease, whether or not the same is deemed real or personal property under applicable laws, and Landlord gives Tenant and Secured Parties the right to remove all or any portion of the same from time to time, whether before or after a default under this Lease, in Tenant's and/or Secured Party's sole discretion and without Landlord's consent.

18. Miscellaneous.

(a) This Lease constitutes the entire agreement and understanding of the parties, and supersedes all offers, negotiations and other agreements with respect to the subject matter and property covered by this Lease. Any amendments to this Lease must be in writing and executed by both parties.

(b) Landlord agrees to cooperate with Tenant in executing any documents necessary to protect Tenant's rights in or use of the Premises. A Memorandum of Lease in substantially the form attached hereto as Exhibit C may be recorded in place of this Lease by Tenant. In the event of a conflict between this Lease and the Memorandum of Lease, the provisions of this Lease shall govern.

(c) In the event the Property is encumbered by a mortgage or deed of trust, Landlord agrees, upon request of Tenant, to obtain and furnish to Tenant a non-disturbance and attornment agreement for each such mortgage or deed of trust, in a form reasonably acceptable to Tenant.

(d) Tenant may obtain title insurance on its interest in the Premises. Landlord agrees to execute such documents as the title company may require in connection therewith.

(e) This Lease shall be construed in accordance with the laws of the State of Ohio, without regard to the conflicts of law principles of such state.

(f) If any term of this Lease is found to be void or invalid, the remaining terms of this Lease shall continue in full force and effect. Any questions of particular interpretation shall not be interpreted against the drafter, but rather in accordance with the fair meaning thereof. No provision of this Lease will be deemed waived by either party unless expressly waived in writing by the waiving party. No waiver shall be implied by delay or any other act or omission of either party. No waiver by either party of any provision of this Lease shall be deemed a waiver of such provision with respect to any subsequent matter relating to such provision.

(g) The persons who have executed this Lease represent and warrant that they are duly authorized to execute this Lease in their individual or representative capacities as indicated.

(h) This Lease may be executed in any number of counterparts, each of which shall be deemed an original, but all of which together shall constitute a single instrument.

(i) All Exhibits referred to herein are incorporated herein for all purposes. The parties understand and acknowledge that Exhibits A and B may be attached to this Lease and the Memorandum of Lease, in preliminary form. Accordingly, the parties agree that upon the preparation of final, more complete exhibits, Exhibits A, and/or B, as the case may be, may be replaced by Tenant with such final, more complete exhibit(s).

(j) If Tenant is represented by any broker or any other leasing agent, Tenant is responsible for all commission fees or

other payment to such agent, and agrees to indemnify and hold Landlord harmless from all claims by such broker or anyone claiming through such broker.

The effective date of this Lease is the date of execution by the last party to sign (the "Effective Date").

LANDLORD:

By: _____

Printed Name: _____

Its: _____

Date: _____

TENANT:

By: _____

Printed Name: _____

Its: _____

Date: _____

Approved as to form

[Acknowledgments]

EXHIBIT A
Legal Description

The Property is legally described as follows:

<<Insert Legal Description of Property>>

EXHIBIT B
The location of the Premises within the Property (together with access and utilities)
is more particularly described and depicted as follows:

<<Insert Survey & Site Plan of the Premises>>

EXHIBIT C
Memorandum
of
Lease

Memorandum of Lease

Assessor's Parcel Number: <<Assessor's Tax Parcel Number>>

Between _____ ("Landlord") and _____ ("Tenant")

A Site Lease with Option (the "Lease") by and _____, ("Landlord") and _____ ("Tenant") was made regarding a portion of the following property:

See Attached Exhibit "A" incorporated herein for all purposes

The Option is for a term of twelve (12) months after [date], the Effective Date of the Lease (as defined under the Lease).

The Lease is for a term of five (5) years and will commence on the date as set forth in the Lease namely [date], (the "Commencement Date"). Subject to the terms and conditions set forth in the Lease, Tenant shall have the right to extend this Lease for four (4) additional and successive five-year terms.

The parties hereto have respectively executed this memorandum effective as of the date of the last party to sign.

LANDLORD:

By: _____

Printed Name: _____

Its: _____

Date: _____

TENANT:

By: _____

Printed Name: _____

Its: _____

Date: _____

[Acknowledgments]

Memorandum of Lease EXHIBIT A
Legal Description



74 of 132 DOCUMENTS

Current Legal Forms for Real Estate

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Current Legal Forms for Real Estate

Chapter 23 REAL ESTATE LEASES

Part IV. Forms

A. COMPLETE LEASES AND RELATED AGREEMENTS

31-23 Current Legal Forms for Real Estate FORM 23.18

AUTHOR: by Thomas G. Belden

FORM 23.18 Traffic Camera Lease on Rooftop

COMMENT

This form of lease is for the leasing of space on the rooftop of a high rise building for the installation and use of a traffic camera, used for traffic reports made by a radio station. This form was prepared by the radio broadcast station but has been modified by the Lessor to protect the Lessor's interest. The essential factual information for the lease is set forth on the exhibits to the lease. Because of the large number of leases entered into by the Lessee for traffic cameras or other broadcasting facilities, it is easier to put the information which varied from lease to lease on an exhibit to the lease. The name, address, term of the lease and rent are set forth on Exhibit A to the lease, the description of the equipment is set forth on Exhibit B to the lease, and the legal description of the land on which the building is located is described on Exhibit C to the lease.

Section 5 of the lease makes clear that the equipment must be used in accordance with the standards imposed by the Federal Communications Commission ("FCC") and any other applicable governmental agencies. The Lessor has also made clear in Section 5.1 that the use of the rooftop is not exclusive to the Lessee because it is a large rooftop and the Lessor has the potential of leasing additional space to other companies in the telecommunications business. Section 5.2 makes clear that the Lessee cannot interfere in any way with the operation of any other existing roof top tenants in the building.

Please see the comment to Form 23.10 relating to the leasing of land for a cell tower for a discussion of other concerns a lessor should have when dealing with large national companies who provide telecommunications services, all of whom have their own form lease for such facilities. Of primary concern to the lessor in these types of leases is that the lessee carry adequate liability

insurance for lessor's protection, has agreed to indemnify the lessor from any acts or omissions of the lessee in connection with the use of the rooftop and the lessee's equipment, and agrees to remove the equipment upon the termination of the lease and repair any damage to the rooftop as a result thereof.

FORM

LEASE AGREEMENT

THIS LEASE AGREEMENT (the "Lease") made as of this _____ day of _____, [date], between _____ ("LESSEE"), and _____ ("LESSOR").

RECITALS:

A. Lessor is the owner of a structure (building known as _____ (the "Building") and rooftop) (the "Structure") located on real property owned by Lessor described in Exhibit C (the "Property"), attached hereto;

B. Lessor desires to lease to Lessee and Lessee desires to lease from Lessor certain space on the Structure as more particularly described in Exhibit B of this Lease, all under the following terms and conditions.

NOW, THEREFORE, in consideration of the foregoing, and other good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, the parties agree as follows:

1. Premises. Lessor hereby leases to Lessee:

1.1 Camera Space. Space on the Structure as described in Exhibit B (the "Camera Space").

1.2 Shelter Space. Space on the Property for the construction of Lessee's transmitter facilities, equipment cabinets, and other associated equipment as described in Exhibit B.

1.3 Access. A nonexclusive right to have transmission lines run from the Shelter Space to the Camera Space for the sole purpose of enabling Lessee to service the Camera mounted in the Camera Space.

1.4 Utilities. The right, in common with others, to maintain such power, telephone and utility lines within the Property as may be necessary for the operation of Lessee's Equipment.

All of the foregoing shall be collectively referred to herein as the (Premises.)

2. Lessee's Equipment. The term "Lessee's Equipment" shall mean Lessee's one (1) unmanned traffic camera and other associated equipment more particularly described in Exhibit B of this Lease, and any replacement or additions permitted by this Lease.

3. Term. The Initial Term of this Lease shall commence on the "Commencement Date" described in Exhibit A, and shall end and terminate, subject to any early termination as specifically provided in this Lease, at midnight, on the final day

of the Initial Term. So long as Lessee is not in material default under the terms of this Lease, Lessee shall have an option to extend the term of this Lease for the number of Extended Terms described in Exhibit A, following the Initial Term "the (Extended Term(s))". Each Extended Term option shall be exercised only by written notice from Lessee to Lessor, given no less than six (6) months prior to the expiration of the Initial Term. Lessee shall hold the Premises during the Extended Terms upon the same terms, covenants and conditions herein contained, except that the Rent (as defined in Section 4) shall be adjusted in accordance with Section 4. Collectively, the Initial Term and Extended Terms are sometimes referred to hereinafter as the "Term."

4. Rent. During the Term, Lessee shall pay as rent for the use of the Premises the Basic Rent, as defined in Section 4.1, and the Additional Rent, as defined in Section 4.2. The term "Rent" as used in this Lease shall mean, collectively, Basic Rent and Additional Rent.

4.1 Basic Rent. Lessee shall pay Lessor the basic rent set forth on Exhibit A as fixed minimum rent (herein called (Basic Rent)) for the first year of the Term; payable in equal monthly installments in advance on or before the first business day of each calendar month during the Term. The term "Lease Year" as used in this Lease shall mean each consecutive twelve (12) month period, the first of which shall commence on the first day of the month during which the Commencement Date occurs and the last of which shall end at the termination of the Lease.

4.2 Additional Rent. Lessee shall pay as additional rent (herein sometimes called "Additional Rent"), all sums of money or charges of whatsoever nature (except Basic Rent) required to be paid by Lessee to Lessor pursuant to this Lease, whether or not the same is designated specifically as Additional Rent.

4.3 Payment of Rent.

(a) Lessee covenants to pay all Rent when due and payable without any prior demand therefor whatsoever.

(b) Any Additional Rent provided for in this Lease shall become payable, unless otherwise provided herein, within ten (10) days after the date Lessor renders a statement therefor.

(c) Rent shall be paid to Lessor at the address for notices as provided in Section 29, or at such other place as Lessor may, from time to time, designate in a notice to Lessee.

(d) Any payment by Lessee or acceptance by Lessor of a lesser amount than shall be due from Lessee to Lessor shall be treated as a payment on account. No acceptance of any payment by Lessor from Lessee after termination of this Lease, or after the service of any notice or commencement of any suit shall renew, reinstate, continue or extend the Term or affect any such notice, demand or suit, unless otherwise agreed by Lessor in writing.

(e) Any Rent or other charge not paid when due shall bear interest at the rate of one and one-half percent (1 1/2 %) per month from and after Ten (10) days after its due date until paid, which interest shall be paid by Lessee as Additional Rent.

(f) All Rent shall be paid in lawful money of the United States of America.

5. Uses of Premises. The Premises is to be used solely for the installation, removal, operation, repair, and maintenance of the Lessee's Equipment as identified in Section 2, above. Operation of Lessee's Equipment shall be conducted in accordance with the standards imposed by the FCC and any other governmental body or agency as shall have jurisdiction over the installation, repair, alteration, operation, or replacement of Lessee's Equipment or with any activities of Lessee on the Premises.

5.1 Lessor shall have the right to lease space on the Structure to any other person or persons desiring to engage in any

form of broadcasting and/or electromagnetic communication.

5.2 Interference. Lessor shall use all commercially reasonable efforts to ensure that other tenants on the Structure do not cause interference to the operation of Lessee's Equipment, to the extent the equipment of such other tenants was installed subsequent to the installation of Lessee's Equipment ("Objectionable Interference"). Should Objectionable Interference be experienced by Lessee, Lessee shall provide notice in writing of such Objectionable Interference to Lessor, and Lessor shall cooperate with Lessee in identifying the source of the Objectionable Interference and in causing the responsible party to take such reasonable steps necessary to eliminate the Objectionable Interference. In the event such party causing the Objectionable Interference fails to correct such problem and Lessee's broadcast continues to be materially affected within thirty (30) days of Lessee notifying Lessor of such problem, Lessee shall have the right to terminate this Lease by written notice to Lessor at any time thereafter (unless such Objectionable Interference is eliminated within the aforesaid 30-day period), at which point Lessor shall refund to Lessee any payments made by Lessee which apply to the period after said termination date.

Lessee agrees that it shall not interfere in any way with the operations of the existing rooftop tenants or other tenants in the Building. In the event such interference does occur, Lessee shall promptly take all necessary actions needed to avoid such interference. If such interference cannot be avoided, Lessee shall cease its operations and this Lease shall be terminated.

5.3 Lessee shall comply with all laws and regulations of the federal, state, county and municipal authorities applicable to the Premises, the housing and operation of Lessee's Equipment therein, and the exercise of the rights conferred hereunder, including, but not limited to, the land use requirement of the county in which the Structure is located and the Occupational Safety and Health Administration ("OSHA").

5.4 Lessee shall conduct its business in such a manner as regards noise, other nuisances or otherwise, as will not unreasonably and unnecessarily interfere with, annoy or disturb the Lessor in the conduct of the main purpose of the Shelter Space, other lessees of the Structure, or area landowners and their tenants, provided however, that nothing said herein is intended to preclude Lessee's quiet enjoyment of the Premises afforded herein. The sidewalks, entrances, and parking areas of the Shelter Space shall not be obstructed or encumbered by Lessee or used for any other purpose other than normal ingress or egress to and from the Premises, except as may be necessary to permit Lessee to exercise its rights hereunder.

5.5 Lessee's Risks. All Lessee's Equipment and personal property of every kind or description which may at any time be in the Premises shall be at Lessee's sole risk, or at the risk of those claiming under Lessee, and Lessor shall not be liable for damage to or theft of or misappropriation of such property, any injury or damage to persons or property resulting from or related to Lessee's Equipment or personal property or any latent defect in any improvements located upon the Property; *provided, however*, the foregoing limitation on Lessor's liability shall not apply to Lessor's acts of gross negligence and/or willful misconduct.

6. Lessee's Rights to Access. Lessor hereby grants to Lessee a nonexclusive right to access the Property for the employees, agents or representatives designated by Lessee to the extent reasonably necessary to enable Lessee to install, operate, maintain and monitor Lessee's Equipment, as follows:

6.1 Lessee shall have access to the ground or building portions of the Premises, including Lessee's equipment shelter, if any, twenty-four hours a day, seven days a week. However, Lessee shall not enter Lessor's Shelter Space without first providing Lessor prior notice, and if outside Lessor's customary Building hours of 9:00 a.m. to 5:00 p.m., then such prior notice shall be given at least twenty-four (24) hours in advance. Lessee acknowledges that Lessor may require that Lessor's representative be present in the event of access of the Structure by Lessee. Lessee acknowledges that Lessor's control of access to the Property is essential to the safe operations of all parties utilizing the Structure.

6.2 Lessee's Contractors.

(a) All contractors and subcontractors (sometimes collectively referred to herein as "Contractor") of Lessee who shall perform any service for Lessee on the Premises shall hold licenses and/or governmental authorizations appropriate to and necessary for the work being performed. In addition, all such contractors and subcontractors shall carry insurance of the type and in the amount provided in Section 10, issued by companies licensed in the states where the services are to be performed. In addition, prior to commencement of any work by Lessee and upon Lessor's request, Contractor shall provide Lessor with certificates or other proof of insurance which shall name Lessor as an "additional insured" on all such policies identified below and such other documentation as Lessor may reasonably request showing Contractor's compliance with this Section 6.2.

(b) Without limitation as to any other indemnification requirements contained in this Lease, Lessee further agrees to indemnify and hold harmless Lessor for any claims related to the operation of Lessee's business at the Structure (whether by Lessee or Lessee's employees, agents, contractors and/or subcontractors), including any claims related to health, safety, RF energy exposure or equipment damage (including damage to Lessor's equipment or other third party equipment) resulting from such operation.

6.3 In order to maintain the integrity of the operations of Lessor, Lessee and other Structure tenants, Lessee shall comply with any applicable instructions regarding any site security system. All gates and doors shall remain closed and locked (if applicable) at all times unless entering or exiting the premises. When leaving any building, Lessee shall ensure that all doors are locked and the security system (if any) is armed.

6.4 If Lessee leases space inside Lessor's Shelter Space, Lessor shall provide to Lessee a key by which Lessee may unlock the Shelter Space for maintenance purposes. If this key is lost, Lessee shall be responsible for the expense of retooling the locks and providing new keys for all authorized persons.

7. Utilities. Lessor shall provide Lessee electric power and with connectivity to Lessor's electrical service at the Premises as part of this Lease. Installation costs directly associated with Lessor's providing electrical service to Lessee shall be initiated, contracted for, obtained and paid for by Lessee. Lessee agrees to cooperate with Lessor's reasonable requests regarding the manner and timing of the installation of Lessee's utilities. No other utilities (water, sewer or gas) will be available at the Premises during the Term. If in Landlord's sole judgment, the electric charges for the Premises are substantially higher than normal due to Tenant's usage, then Tenant agrees that it will, upon written notice from Landlord, install a sub-meter at Tenant's expense and thereafter pay all electrical charges for the Premises based on such meter readings.

In no event shall Lessor be liable for the quality, quantity, failure or interruption of electrical service to the Premises or damages resulting directly or indirectly therefrom by reason of or resulting from any accident, or the need or priority of repairs or improvements, or by reason of orders of any military, civil or governmental authority, or strikes, riots, insurrections or invasions, or any other reason beyond the control of Lessor.

8. Taxes. Lessor will pay all real property taxes assessed against the Property. Lessee will pay when due any taxes levied against the Lessee's Equipment and any other personal property of Lessee located on the Premises or any increase in real property taxes as a result of Lessee's Equipment being located on the Property or Premises. Where possible, Lessee shall cause the Lessee's Equipment or other personal property to be assessed and billed separately from the Property.

9. Indemnification. EACH PARTY HERETO, AS "INDEMNITOR," HEREBY AGREES TO REIMBURSE, INDEMNIFY, AND HOLD HARMLESS THE OTHER PARTY HERETO, ITS PARENT, SUBSIDIARY AND AFFILIATED ENTITIES, AND THEIR RESPECTIVE OFFICERS, DIRECTORS, SHAREHOLDERS, EMPLOYEES, REPRESENTATIVES AND AGENTS (COLLECTIVELY, "INDEMNITEES"), FROM AND

AGAINST ANY AND ALL CLAIMS, DAMAGES, LOSSES, LIABILITIES, COSTS AND EXPENSES (INCLUDING, WITHOUT LIMITATION, REASONABLE ATTORNEYS' FEES) ARISING OUT OF ANY MATERIAL BREACH OF ANY REPRESENTATION, WARRANTY OR AGREEMENT IN THIS AGREEMENT BY INDEMNITOR. THE PROVISIONS OF THIS SECTION SHALL SURVIVE THE TERMINATION OR EXPIRATION OF THIS AGREEMENT. EACH PARTY HERETO AS "INDEMNITOR" FURTHER AGREES TO INDEMNIFY AND HOLD HARMLESS THE INDEMNITEES FROM ALL CLAIMS FOR LOSS OR DAMAGE ON ACCOUNT OF INJURY OR DEATH TO ANY PERSON OR PERSONS OR DAMAGE TO OR DESTRUCTION OF PROPERTY OF ANY PERSON OR PERSONS OCCURRING ON THE PROPERTY, TO THE EXTENT CAUSED BY (A) THE INDEMNITOR'S EQUIPMENT, OR (B) ANY ACT OR OMISSION OF THE INDEMNITOR OR ITS AGENTS, EMPLOYEES, SERVANTS OR CONTRACTORS IN CONNECTION WITH THEIR USE OF THE STRUCTURE & PREMISES UNDER THIS AGREEMENT.

10. Liability Insurance. Lessee shall obtain, and at all times thereafter shall maintain, at a minimum, the policies of insurance set forth below and otherwise acceptable to Lessor, issued by companies licensed in the states where the Structure is located. In addition, prior to commencement and upon Lessor's request at any time, Lessee shall provide Lessor with certificates or other reasonable proof of insurance which shall name Lessor, its Affiliates "defined below), and all partners, officers, directors, employees, agents and representatives of Lessor and its Affiliates, as "additional insureds" on all such policies identified below and such other documentation as Lessor may reasonably request showing Lessee's compliance with this Section 10. For the purpose of this Agreement, "Affiliate(s)" of Lessor means any other entity that directly or indirectly controls, is controlled by, or is under direct or indirect common control with, Lessor. Lessee acknowledges and agrees that Lessee's property placed on the Structure shall be placed at Lessee's sole risk and expense, and Lessee shall be solely responsible for any insurance coverage related to such property.

10.1 Commercial General Liability Insurance. Lessee shall obtain, and at all times thereafter shall maintain Commercial General Liability Insurance for bodily injury and property damage, which includes products/completed operations and all standard broad form comprehensive general liability extensions without limitations. Contractual liability, if not written on a blanket basis, must be endorsed to cover the indemnities specified herein. This policy shall be written on an "occurrence" basis. It shall provide for bodily injury and property damage coverage with limits no less than \$2,000,000 aggregate per location and no less than \$1,000,000 per occurrence.

10.2 Workers' Compensation and Employer's Liability Insurance. Lessee shall carry Workers' Compensation and Employer's Liability Insurance affording coverage under the workers' compensation laws of the state in which the Structure is located, with Employer's Liability Insurance having minimum limits of \$1,000,000.00 for injury by accident and \$1,000,000.00 for injury by disease. Such coverage shall provide a standard waiver of subrogation endorsement in favor of Lessor, and its Affiliates.

10.3 Insurance Requirements. All of Lessee's insurance required hereunder shall be with insurance carriers licensed to do business in the state where the Structure is located, and rated no lower than A-X in the most current edition of A.M. Best's Property-Casualty Key Rating Guide. Lessee shall deliver to Lessor certificates evidencing the insurance required to be maintained by Lessee hereunder prior to Lessee's installation of the Lessee's Equipment and annually thereafter. Without limitation upon the other terms and provisions of this Section 10, each insurance policy maintained by Lessee with respect to the Premises shall be endorsed to provide (i) that in the event of cancellation, non-renewal or material modification, Lessor shall receive 30-days advance written notice thereof and (ii) that Lessor shall receive renewal Certificates of Insurance in advance of each renewal.

11. Maintenance of Premises. Lessor shall maintain the Premises (but not Lessee's Equipment housed thereon), and in compliance with all governmental regulations, and shall promptly repair any material damage to the Premises; all necessary maintenance and repairs; provided, however, that when such maintenance and repair is made necessary by or because of the fault or negligence of Lessee (reasonable wear and tear excepted), Lessee shall reimburse Lessor for the cost thereof. In the performance of its obligation to maintain and repair the Structure, and to allow other lessees to

install, remove, relocate, maintain and repair their equipment, it may be necessary from time to time for the Lessor to require Lessee to temporarily cease operations and transmission activities, to turn off electrical power, and/or to make other adjustments to its equipment and operations. Lessor shall use commercially reasonable efforts to schedule such work so as to cause minimum disruption to Lessee's operations. Lessee agrees to cooperate with Lessor and to comply with and honor Lessor's requests for temporary cessation of operations and transmission activities, to turn off electrical power, and/or to make adjustments to its equipment or operation, as necessary, to allow orderly performance and carrying out of such work.

11.1 Lessor shall maintain all required records and shall file any required notification concerning any failure of, repairs to, and correction of the Structure in compliance with the rules and regulations of all applicable governmental authorities.

11.2 Lessee, at its own expense, shall carry out maintenance of Lessee's Equipment, including, but not limited to, the electrical and mechanical maintenance of Lessee's equipment. Maintenance shall be conducted by Lessee in accordance with standards of good engineering practice to assure that at all times, Lessee's Equipment conforms with the requirements of all government bodies or agencies with jurisdiction over Lessee.

12. Lessee Construction. Lessee shall have the right at its cost and expense, to install, renovate, alter, and remove the Lessee Equipment, detailed in Exhibit B, located in or on the Premises as its operation may require; provided however, that:

(1) such installation is in compliance with standards of good engineering practice and, if necessary, have been approved and are in compliance with standards imposed by any governmental body or agency as referred to in Section 5 hereof;

(2) Lessee submits plans and specifications to Lessor and Lessor, whose approval shall not be unreasonably withheld prior to the installation of Lessee's Equipment;

Notwithstanding the above, the final mounting and installation of Lessee's equipment shall be subject to the prior approval of Lessor, or Lessor's representative.

Construction of Lessee's Equipment on the Structure shall not commence without consent from the Lessor. Lessee shall give Lessor no less than five (5) business day's advance notice of commencement of initial construction, and no less than ten (10) business day's advance notice of commencement of any alterations to Lessee's Equipment within the Premises or on the Structure, and twenty (20) business day's advance notice of commencement of any structural modifications to the Structure.

Such installation work may require the cessation of operation of other tenants on the Structure, however, and there can be no assurance that each will agree to the precise schedule requested by Lessee. Lessor shall use reasonable efforts to coordinate this work with the other tenants to permit construction at the time(s) and date(s) requested.

Lessee shall give Lessor no less than five (5) business days advance notice of any maintenance of Lessee's Equipment on the Structure. Such maintenance or installation work may require the cessation of operation of other tenants on the Structure. However, there can be no assurance that each will agree to the precise schedule requested by Lessee. Lessor shall use reasonable efforts to schedule this work with the other tenants at the time requested.

LESSEE SHALL DELIVER, PURSUANT TO THE TIMELINES DESCRIBED IN THIS SECTION 12, TO LESSOR PRIOR TO COMMENCEMENT OF CONSTRUCTION ALL COPIES OF ANY CONSTRUCTION DRAWINGS, PERMITS, INSURANCE CERTIFICATES, AND OTHER RELATED DUE DILIGENCE PURSUANT TO THIS LEASE.

12.1 Alterations by Lessee. Lessee shall be permitted to make replacements or repairs to Lessee's Equipment without completing the steps described at (2) above in Section 12, to the extent such changes utilize physically identical equipment as that being replaced and/or repaired.

12.2 Liens. Lessee has no authority or power to cause or permit any lien or encumbrance of any kind whatsoever, whether created by act of Lessee, operation of law or otherwise, to attach to or be placed upon Lessor's title or interest in the Property, Structure, or Premises, any and all liens and encumbrances created by Lessee shall attach to Lessee's interest only. Lessee covenants and agrees not to suffer or permit any lien of mechanics, suppliers, materialmen or others to be placed against the Structure, Premises, or Property, and Lessee covenants and agrees within thirty (30) days after written notice by any entity of the filing of such lien to cause it to be release and removed of record. If Lessee shall fail to cause such lien or encumbrance to be discharged, then, in addition to any other right or remedy Lessor may, but shall not be obligated to, discharge the same either by procuring the discharge of such lien by deposit or by bonding proceedings, and in any such event Lessor shall be entitled, if Lessor so elects, to compel the prosecution of an action of the foreclosure of such lien by the lienor and to pay the amount of the judgment in favor of the lienor with interest, costs and allowances. Any amount so paid by Lessor, and all costs and expenses, including attorneys' fees, incurred by Lessor in connection therewith, shall constitute Additional Rent.

12.3 Title. Lessor's title to the Property (if owned by Lessor), and Structure, is and always shall be paramount to the interest of Lessee and nothing herein contained shall empower Lessee to do any act or to omit any act which would encumber Lessor's title.

13. Structure Damage. In the event that the Structure is fully or partially destroyed or damaged by fire, lightning, windstorm, explosion, collapse, vandalism, civil disturbance, aircraft or other vehicle damage or other casualty so as to be unfit for Lessee's occupancy and intended use hereunder and the Structure cannot be restored or rebuilt by Lessor within ninety (90) days, then either Lessee or Lessor may elect to terminate this Lease by written notice to the other party. If the Structure is in need of such repair or is so damaged by fire, lightning, windstorm, explosion, vandalism, aircraft or other vehicle damage, collapse or other casualty that reconstruction or repair cannot reasonably be undertaken without dismantling Lessee's Equipment, then Lessor may remove Lessee's Equipment and interrupt Lessee's operations, thereafter replacing the Lessee's Equipment as soon as reasonably possible. Lessee shall be entitled to a pro rata refund of its prepaid Monthly Rent for such time as it is unable to conduct its normal operations as a result of such total or partial destruction or damage or need of repair. Under no circumstances shall Lessor be liable for any financial loss due to business interruption caused by the aforementioned circumstances.

14. Hazardous Materials. Lessee shall not cause or permit any hazardous substances to be brought upon, stored, used, generated, released into the environment or disposed of on, under, from or about the Structure by Lessee, its agents, employees, contractors or representatives. Lessee agrees to at all times comply with all environmental laws, rules and regulations, federal, state and local. Lessee agrees to defend, indemnify and hold harmless Lessor from and against any and all administrative and judicial actions and rulings, claims, causes of action, demands of liability (collectively "Claims") including, but not limited to, damages, costs, expenses, assessments, penalties, fines, losses, judgments and reasonable attorney fees that the Lessor may suffer or incur due to the existence or discovery of any hazardous substances or the release of any hazardous substances into the environment (collectively "Actions") that arise from Lessee's activities at or about the Structure.

15. Limitation of Liability. Lessor, its agents or employees, shall not be liable for (and to the extent permitted by law, Lessee hereby releases Lessor and its agents and employees from) any loss of or damage to property of Lessee or of Lessee's agent, contractors, employees, invitees, or licensees, nor for any injury or damage to persons or property resulting from any cause of whatsoever nature unless caused by the acts or omissions of Lessor or its agents, employees or contractors. Without limiting the foregoing, neither Lessor, nor its agents or employees, shall be liable for any such damage caused by other tenants of Lessor or persons in, upon or about the Building, Structure, Premises, or Property, or caused by bursting, stoppages, or leaking, of water, gas, sewage or steam pipes, transmissions, electrical systems,

flooding or damage caused by sprinkling devices, air conditioning apparatus, water, snow, ice, frost, steam, excessive heat or cold, broken glass, odor, noise, or collisions, unless any such loss or damage is proximately caused by the willful or negligent acts of Lessor, its agents, employees or contractors. All property belonging to Lessee or any occupant of the Property that is in the Building, Structure, Premises or Property, shall be there at the risk of Lessee or other occupant only; and Lessor shall not be liable for loss or damage thereto or theft or misappropriation thereof except as provided herein above. Any liability of the Lessor to Lessee under this Lease shall be recoverable only from the interest of Lessor in the Structure and Property, and neither Lessor nor any of its owners, officers, directors, employees or affiliates shall have any personal liability therefor.

16. Service Interruption. Lessor shall incur no liability to Lessee for failure to furnish space, as provided herein, or the rendition of any services, if prevented by war, fires, strikes, or other labor troubles, accidents Acts of God, or other causes beyond its control, including but not limited to, temporary or intermittent service interruptions resulting from maintenance and repair work to the facilities of Lessor or other tenants on the Structure, or alterations to the Structure required by any tenants on the Structure, or alterations to the Structure required by any governmental authority.

17. Eminent Domain. If the land which Lessor's Structure, foundation, guy wire anchors or building is located, or the Property are acquired or condemned under the power of eminent domain whether by public authority, public utility, or otherwise, then this Lease shall terminate as of the date title shall have vested in public authority. Lessor shall be entitled to the entire amount of any condemnation award, except the Lessee shall be entitled to make claim for and retain a condemnation award based on and attributed to the expense of removing its fixtures.

18. Assignment. Lessee shall not sublet, assign, mortgage, or encumber this Lease without the express written consent of Lessor which shall not be unreasonably withheld provided however, that Lessee may, without Lessor's consent, transfer or assign this Agreement in conjunction with the sale of Lessee's business or the sale or transfer by Lessee of all or substantially all of its assets but in such event Lessee shall notify Lessor of the name and address of such purchaser-assignee. Lessee shall include a provision in its sales contract that buyer shall acknowledge acceptance of this Lease Agreement and that Buyer's use of the Lease Premises is subject to the terms and conditions of this Agreement prior to close of sale.

19. Termination. In the event Lessee shall: (i) default in the payment of Rent or any other sum payable by Lessee hereunder, and such default shall continue for a period of ten (10) business days after receipt of written notice by Lessor; or (ii) default in the performance of any other covenants or agreements of this Lease and such default shall continue for twenty (20) days after Lessee's receipt of written notice thereof; or (iii) become bankrupt or insolvent or should any debtor proceeding be initiated by or against Lessee, then Lessor may pursue the following rights and remedies:

- (a) Terminate this Lease and retake possession of the Premises;
- (b) Enter the Premises and relet the same without termination of the Lease, in which event Lessee covenants and agrees to pay any deficiency after Lessee is credited with the Rent thereby obtained less all repairs and expenses (including the expenses of obtaining possession);
- (c) Cure any such default and invoice Lessee for the costs and expenses of the same, which invoice shall be payable within twenty (20) days of its receipt by Lessee; and
- (d) Exercise any other remedy available at law or in equity.

If Lessee remains in default beyond any applicable cure period, whether or not Lessor shall have terminated this Agreement, Lessor may demand immediate removal by Lessee of Lessee's Equipment (except for Permanent Improvements) from the Property, and if Lessee fails to do so within sixty (60) days of Lessor's demand, Lessor may

remove and store the Lessee's Equipment at Lessee's sole cost.

In the event Lessor shall be in default in the performance of any material representation, warranty or agreement contained in this Lease and such default shall continue for twenty (20) days after Lessor's receipt of written notice thereof, Lessee may terminate this Lease and may exercise any other remedy available at law or in equity

20. Removal of Lessee's Equipment. Lessee shall, at the termination of this Lease, surrender possession of the Premises to Lessor in as good a condition as prior to the commencement of this Lease, reasonable wear and tear excepted. At the termination of this Lease, whether it expires by its own terms or is canceled for any reason, Lessor agrees to give Lessee access to remove Lessee's Equipment for a period of no more than thirty (30) days after such termination. Lessee agrees at the termination of this Lease to remove Lessee's Equipment and to pay all cost in connection with such removal, and to repair and restore any damage resulting from such removal.

21. Subordination.

21.1 Lessee acknowledges that Lessor may have or hereafter may desire to place a mortgage upon all or part of the Property. It is further understood that the mortgagee of said mortgage may require that the within Lease be subordinated to said mortgage, in which event Lessee agrees to execute, at no cost to Lessee, any document reasonably required by such mortgagee to evidence such subordination; provided, however, that the mortgagee of any such mortgage shall covenant in writing that the Lessee's leasehold interest hereunder shall not be foreclosed and any action brought under such mortgage or in the event of a sale of the Property as a result of said action if, at the time of bringing an action to foreclose or at the time of said sale, Lessee is not in default in the payment of rent or the performance of any other obligations under this Lease, with due allowance given for the payment of any past due rental or for the correction of any other default by Lessee within the period of time permitted after any notice is given or required to be given by the terms of this Lease. It is further understood that the mortgagee of said mortgage may require that the Lessee agree to attorn to any purchaser of the Property in the event that the same shall be sold through foreclosure proceedings, and that Lessee agrees to waive any and all rights to treat any such foreclosure proceedings as a breach of the Lease by Lessor, in which event Lessee agrees to execute, at no cost to Lessee, any document reasonably required by such mortgagee to evidence such agreements.

22. Remedies Cumulative. The remedies provided herein shall be cumulative and shall not preclude the assertion by any party hereto of any other rights or the seeking of and other remedies against the other party hereto.

23. No Waiver. Should Lessor permit a continuing default of Lessee in Lessee's performance of the terms of this Lease, the obligations of Lessee hereunder shall continue and such permissive default shall not be construed as a renewal of the term hereof nor as a waiver of any of the rights of Lessor or obligations of Lessee hereunder.

24. Relationship of Parties. Nothing herein contained shall be deemed or construed as creating the relationship of principal and agent or of partnership or of joint venture between the parties hereto, it being understood and agreed that neither the provision contained herein, nor any acts of the parties, shall be deemed to create any relationship between the parties hereto other than the relationship of landlord and tenant, nor cause Lessor to be responsible in any way for the acts, debts or obligations of Lessee.

25. Broker. Lessee warrants that it has dealt with no broker, commission agent, finder or other person or entity with respect to this Lease and Lessor warrants that it has dealt with no broker, commission agent, finder or other person or entity with respect to this Lease, except for Colliers International, who Lessor shall be solely responsible for paying pursuant to a separate letter agreement. Each party shall indemnify and hold harmless the other party from any and all claims, actions, damages, costs, expenses, and liability whatsoever, including reasonable attorney's fees, that may arise from any claims for commission or finder's fees in connection with this Lease, the Property, or Premises.

26. Applicable Law. This Lease shall be construed and governed in accordance with the internal laws of the State in which the Property is located and without regard to the conflict of laws provisions thereof.

27. Entire Agreement. This Lease and any other documents referred to herein or delivered pursuant hereto, which form a part hereof, contains the entire understanding of the parties with respect to its subject matter. There are no restrictions, agreements, promises, warranties, covenants or undertaking other than expressly set forth herein. This Lease supersedes all prior agreements and understandings between the parties. No modification of this Lease shall be effective unless contained in writing signed by the authorized representative of both parties.

28. Headings. The section and paragraph headings contained in this Lease are for reference purpose only and shall not affect in any way the meaning or interpretation of this Lease.

29. Notice. Except as otherwise expressly provided herein, all notices, requests, claims, demands and other communications hereunder shall be in writing and shall be deemed to have been duly delivered if mailed (certified mail, postage prepaid, return receipt requested), sent by fax, or sent by overnight delivery service as described in Exhibit A, or to such address or fax number as any party may have furnished to the other in writing in accordance herewith, except that notices of change in address shall only be effective upon receipt.

30. Counterparts: Faxed Signature Pages. This Lease may be executed in one or more counterparts, each of which shall be deemed an original, but all of which together shall constitute one and the same instrument. Any faxed signature page hereof shall be considered an original signature page and be effective for all purposes to evidence such party's execution hereof.

31. Severability. It is the intention of the parties hereto that if any provision of this Lease is capable of two constructions, one of which would render the provision valid, then the provision shall have the meaning which renders it valid. If any term or provision, or any portion thereof, of this Lease, or the application thereof to any person or circumstances shall, to any extent, be invalid or unenforceable, the remainder of this Lease, or the application of such term or provision to persons or circumstances other than those as to which it is held invalid or unenforceable, shall not be affected thereby, and each other term and provision of this Lease shall be valid and be enforced to the fullest extent permitted by law.

32. Lessee Entity. Lessee hereby covenants and warrants that: the Lessee is a duly constituted organization (corporation, limited partnership, limited liability company, partnership non-profit corporation, etc.) qualified to do business in the state in which the Property is located; all Lessee's corporate franchise or other entity-related taxes have been paid to date; all future forms, reports, fees and other documents necessary for Lessee to comply with applicable laws will be filed by Lessee when due; and such person is duly authorized by the governing body of such corporation to execute and deliver this Lease on behalf of the corporation.

33. Successor and Assigns. This Lease shall inure to the benefit of and be binding upon Lessor, its successors and assigns, and shall be binding upon Lessee, its successors and assigns, and shall inure to the benefit of Lessee and only such assigns of Lessee as are permitted herein. Except as expressly provided otherwise, nothing contained in this Lease shall be construed so as to confer upon any persons rights of a third party beneficiary.

34. Representations and Warranties. Lessor and Lessee each represent and warrant to the other that it is legally qualified, empowered and able to enter into this Lease, and that the execution, delivery and performance hereof shall not constitute a breach or violation of any agreement, contract or other obligation or any kind to which the party is subject or by which it is bound.

35. Survival. All indemnifications herein shall survive termination of this agreement and be binding on Lessee, any successors, heirs, and assigns.

36. Estoppel Certificate. Lessee will, at no cost to Lessee, execute, acknowledge and deliver to Lessor, promptly upon request, a certificate certifying that (a) this Lease is unmodified and in full force and effect (or, if there have been modifications, that the Lease is in full force and effect, as modified, and stating the modifications), (b) the dates, if any, to which the base rent, additional rent and other sums payable hereunder have been paid, and (c) no notice has been received by Lessee of any default which has not been cured, except as to defaults specified in said certificate, it being intended that any such certified may be relied upon by any prospective purchaser or mortgagee of the Property or any part thereof.

37. Waiver of Subrogation. Any other provision of this Lease notwithstanding, Lessor and Lessee hereby release each other and each other's employees and agents from any and all liability (to the other or anyone claiming through or under them by way of subrogation or otherwise) for any loss or damage which is coverable by a customary policy of insurance required to be carried by that party hereunder.

This Lease has been duly executed and delivered by the Lessor and the Lessee on the date first above written.

LESSOR:

By: _____

Its: _____

LESSEE:

By: _____

Its: _____

[Acknowledgments]

Schedule of Exhibits:

Exhibit A Terms & Notices

Exhibit B Lessee Equipment Schedule & Drawings (if any)

Exhibit C Legal Description of Property

**EXHIBIT A
TERMS & NOTICES**

LESSOR: _____

LESSEE: _____

Lessee Site #

Property Location: _____

Commencement Date: The Earlier of _____,
20 _____ or Com-
 mencement of Construction by Lessee

Initial Term: 3 Three Years
 Number of Extended Terms: 1 One Term
 Duration of Each Extended Term: 3 Three Years
 Basic Rent: _____ \$ _____ per month
 _____ Dollars _____
 Option Rent _____ \$ _____ per month
 _____ Dollars _____

Name and Address for Notices:**LESSOR: (Notice & Remit To:)**

Atten- tion: _____
Telephone: _____

**LESSEE: (Notice)
NAME:**

AD-

DRESS: _____

CITY, STATE, ZIP:

Attention:

Telephone:

**LESSEE: (Billing)
NAME:**

ADDRESS:

CITY, STATE, ZIP:

Atten-**tion:** _____

**EXHIBIT B
 LESSEE EQUIPMENT SCHEDULE**

CAMERA SPACE AND EQUIPMENT**DESCRIPTION****Camera Type**

Quantity

Weight

Dimensions

Mount Location

Antenna Equipment

Lease Area Dimensions

W x D x H

Power Requirements

Lessor Building

YES or NO

Telco Requirements

Lessee Shelter or Outdoor

YES or NO

Access to Lessor Generator

YES

Other: Mounting details to be provided prior to installation. Exposed equipment painted to match exterior color along the roof line.

EXHIBIT C

LEGAL DESCRIPTION OF PROPERTY



75 of 132 DOCUMENTS

Current Legal Forms for Real Estate

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Current Legal Forms for Real Estate
Chapter 23 REAL ESTATE LEASES
Part IV. Forms

A. COMPLETE LEASES AND RELATED AGREEMENTS

31-23 Current Legal Forms for Real Estate FORM 23.19

AUTHOR: by Thomas G. Belden

FORM 23.19 Building Lease to School Board for High School Students

COMMENT

This lease is a lease of a building located on a state university campus to the local Board of Education in the City where the university is located. The purpose of the lease is for use by certain gifted high school students in the City who are using the building because it has labs set up for special instructional courses in the health care field. It is a triple net lease, meaning that all the expenses are required to be paid by the Lessee.

The building to be leased is an older building not in compliance with the accessibility guidelines of the Americans with Disabilities Act of 1990, or the Individuals with Disabilities Education Act of 1997 ("IDEA"). Therefore, there are clauses in the lease in Paragraph 5 that require Lessee to comply with those requirements.

In addition, the university leasing the building was concerned about providing security for the high school students so the university added a provision in the lease that places the burden of security on the Lessee, and provides that it is the Lessee's responsibility to cause the permanent removal of any students who cause trouble at the building or anywhere on the campus of the university.

FORM

INDENTURE OF LEASE

THIS INDENTURE OF LEASE is made and entered into at _____, _____, this _____ day of _____ [date], by and between _____ UNIVERSITY, an instrumentality of the State of _____ (hereinafter called "Lessor"), and _____ BOARD OF EDUCATION, a political subdivision of the State of _____, (hereinafter called "Lessee").

WITNESSETH:

1. Demised Premises. For the rents and upon the terms and conditions hereinafter set forth, Lessor hereby leases to Lessee the building located at _____, _____, which building is commonly known as the _____ building, and the land on which it is situated described on Exhibit A, attached hereto and made a part hereof, all of which shall hereinafter be referred to as the "Demised Premises."

2. Term. Lessee shall hold the Demised Premises for the term of two (2) years, commencing on the first (1st) day of [month, year], and terminating on the last day of [month, year], unless the term hereby demised shall be sooner terminated or extended as hereinafter provided.

3. Rent. In consideration of said demise, Lessee covenants and agrees to pay to Lessor, without deduction or setoff of any kind, as rent for the use of the Demised Premises for the term hereof, the sum of _____ Dollars (\$ _____), in equal monthly installments of _____ Dollars (\$ _____) each, payable in current legal tender of the United States of America, as the same is then by law constituted. All such sums are due and payable in advance, on the first day of each and every calendar month during said term, at _____, or at such other place as Lessor may in writing designate.

4. A. Option to Renew. The Lessee shall have the option to extend the term of this lease for one additional term of one (1) year, provided that Lessee is not in default of any and all of the terms, covenants and conditions of this lease either on the date that notice of extension is given or on the commencement date of the extended term. Such option to extend shall be exercised by the Lessee by giving written notice to the Lessor not less than six (6) months prior to the expiration date of the term of the lease. The extension of this lease shall be upon the same terms, covenants and conditions as are contained in the lease ascertained and compared with the same as of the first day of the renewal term next to commence.

B. Possession. Lessee acknowledges that Lessee has been given an opportunity to examine the Demised Premises, and Lessee accepts the Demised Premises in its "AS IS," "WHERE IS," condition with all faults, and Lessor is not making any representations or warranties (either express or implied) regarding the condition or use of the Demised Premises, all of which, including the implied warranty of fitness for a particular purpose, is hereby disclaimed. Lessee's taking possession of the Demised Premises shall be conclusive evidence of Lessee's acceptance thereof. The parties acknowledge and agree that Lessee will be making extensive repairs and renovations to the Demised Premises to bring the Demised Premises into compliance with all applicable city building code provisions.

5. Use. The Demised Premises shall be used solely as an educational facility for approximately four hundred (400) to five hundred (500) _____ High School students participating in health care instructional and educational programs offered by Lessee and its affiliate, the _____ ("Hospital"), and for no other purpose. The parties hereby acknowledge and agree that said instructional and educational programs shall be provided by Lessee and/or the Hospital at the Demised Premises between the hours of 7:30 a.m. and 2:15 p.m., Monday through Friday, unless otherwise agreed by the parties hereto. If Lessee uses the Demised Premises for any purpose, authorized herein or otherwise, which causes the accessibility or other requirements of the Americans with Disabilities Act of 1990 ("ADA"), Individuals with Disabilities Education Act, amended in 1997 ("IDEA"), or the rules and regulations

thereunder, to be applicable to the Demised Premises or building in which the Demised Premises are located, Lessee agrees at Lessee's expense to pay for any modification to the Demised Premises or building imposed by the ADA, IDEA, or the rules and regulations thereunder. The statement in this lease of the nature of Lessee's business does not constitute a representation by Lessor that such business is lawful or otherwise permitted by law at the Demised Premises. Lessee shall not use or occupy, or permit the use or occupancy of, the Demised Premises, or any part thereof, in any unlawful manner or for any illegal purpose or in such a manner as to constitute a nuisance or violate the terms and conditions of any certificate of occupancy or equivalent use permit applicable to the Demised Premises, or for any purpose or in a manner liable to cause structural injury, and shall not use or occupy or permit the use or occupancy of the Demised Premises for other than purposes of the nature and to the extent permitted by the laws, rules, regulations, and ordinances of the applicable governmental authorities and their agencies.

6. Security; Removal of Student. Lessee shall be solely responsible for providing security and security personnel for the Demised Premises. Lessee acknowledges and agrees that Lessor may require Lessee to cause the permanent removal from the Demised Premises, subject to the due process rights afforded students under federal and state law, of any _____ High School student who (i) participates in the vandalization or destruction of any part of the Demised Premises or any other _____ University property; (ii) engages in any illegal activity in, on, or about the Demised Premises or any other _____ University property; or (iii) is placed under arrest or is otherwise taken into custody in connection with any activities on, in, or about the Demised Premises or any other _____ University property.

7. Compliance with Laws. The Lessee shall throughout the term of this lease, at the Lessee's sole cost and expense, but subject to Lessee's right to contest the validity thereof, promptly comply with all laws and ordinances and the orders, rules, regulations or requirements, including without limitation the ADA and IDEA, of all applicable governmental authorities and their agencies, and appropriate departments, commissions, boards and officers thereof, and the orders, rules and regulations of the applicable Board of Fire Underwriters, or any other body now or hereafter constituted exercising similar functions, foreseen or unforeseen, ordinary as well as extraordinary, and whether or not the same require structural repairs or alterations, which may be applicable to the Demised Premises, and the fixtures thereof, if any, or the use or manner of use of the Demised Premises, except as provided elsewhere in this lease. The Lessee shall likewise observe and comply with the requirements of all policies of public liability, fire and all other policies of insurance at any time in force with respect to the buildings and improvements on the Demised Premises and the equipment thereof.

8. Net Lease Provisions.

A. This lease shall be deemed and construed to be a "net lease" and, except as expressly otherwise provided in this lease, the Lessor shall receive all rental and all payments hereunder to be made by Lessee free from any charges, taxes, assessments, impositions, expenses or deductions of any and every kind and nature whatsoever.

B. The parties acknowledge that the Demised Premises are exempt from any and all state and local real property taxes and assessments as a result of the use thereof exclusively for tax exempt purposes. In the event that the Demised Premises shall at any time during the term of this lease become subject to any state or local real property tax and/or assessment as a result of this lease, Lessee shall be solely responsible for the payment thereof, and all such taxes and assessments shall be paid by Lessee as and when they come due during the term of this lease.

9. Utilities. The Lessee shall, during the continuance of this lease, pay for all heat, electric current, steam, water, sewer, trash removal, gas, telephone and other utilities furnished to or used by Lessee in or upon the Demised Premises, together with all taxes, levies, or other charges on such utilities and governmental charges based on utility consumption. Such payment shall be made directly to the utility company or department furnishing the same provided, however, that if such utilities are submetered or separately metered, Lessee shall instead pay Lessor for such utilities at the same rates that Lessee would be charged by the utility company if billed directly by the utility company, such payment to be made

by Lessee to Lessor within ten (10) days of receipt by Lessee from Lessor of the bill thereof. Lessee agrees to indemnify Lessor and save Lessor harmless against any liability or damages on all such accounts. The Lessee shall also at Lessee's sole cost and expense procure any and all necessary permits, licenses or other authorizations required for the lawful and proper installation and maintenance upon the Demised Premises of wires, pipes, conduits, tubes and other equipment and appliances for use in supplying any such service to and upon the Demised Premises.

Lessor shall not be liable to anyone for cessation of any services, including but not limited to public utility services, heating and air conditioning, due to inability to obtain fuel, electricity, service or supplies from the sources from which they are usually obtained, due to failures in the equipment used to provide such services, or for any other reason beyond the control of the Lessor. Any such interruption of any of the above services shall never be deemed an eviction or disturbance of the Lessee's use of the Demised Premises or any part thereof, or render the Lessor liable to the Lessee for damages, or relieve the Lessee from performance of the Lessee's obligations under this lease.

10. Insurance. Lessee shall, at Lessee's cost and expense, secure and keep in effect during the term of this lease or any extension thereof insurance policies in the amounts and covering the following risks:

A. With respect to the building and improvements at any time forming a part of the Demised Premises (and all the contents, fixtures, furnishings and equipment therein), a broad form insurance policy against loss or damage by fire, vandalism, malicious mischief, and such other risks as are from time to time included in a standard form of fire and extended coverage and additional perils policy of insurance available in the State of Ohio. Said building and improvements shall be insured for the benefit of Lessor in an amount not less than the full replacement cost thereof as determined from time to time by the insurance company. These insurance provisions shall in no way limit or modify any of the obligations of the Lessee under any provisions of this lease to restore the Demised Premises.

B. For the protection of Lessor, a self-insurance fund for claims for bodily injury, death, and property damage occurring upon, in or under the Demised Premises, to the extent of not less than One Million Dollars (\$1,000,000), and comprehensive general public liability insurance policies for said claims in excess of One Million Dollars (\$1,000,000) up to and including Five Million Dollars (\$5,000,000), which policies shall designate Lessor as a named additional insured thereof.

All insurance carried by Lessee as required by this paragraph shall be carried in favor of Lessor and/or Lessee as may be appropriate, as their respective interests may appear, and shall, whenever appropriate and if requested by Lessor, include the interest of the holders of any mortgages on the Demised Premises. All policies of insurance shall, to the extent obtainable, provide that any loss shall be payable notwithstanding any act or omission of the Lessee which might otherwise result in a forfeiture or reduction of said insurance.

Lessee shall procure policies for all excess insurance required by this paragraph for periods of not less than one (1) year and shall deliver to Lessor certificates of insurance certifying that such insurance is in full force and effect, and shall procure renewals thereof from time to time at least twenty (20) days before the expiration thereof. In default of such delivery or renewal, Lessor may procure any such insurance and Lessee shall, on demand, reimburse Lessor for the cost thereof with interest thereon until paid in full at the rate per annum equal to one percent (1%) in excess of the prime rate of _____ Bank then in effect. All such insurance shall be taken in such companies as shall be reasonably acceptable to the Lessor and to the holders of any mortgages on the Demised Premises. The policies of insurance shall provide that they may not be canceled except upon at least thirty (30) days' prior written notice to Lessor and the holder of any mortgage, and shall further provide, if so requested by the Lessor, that the proceeds be payable to the holder of any mortgage on the Demised Premises as the interest of such mortgagee may appear pursuant to a standard mortgage clause; provided, however, that any payment of such proceeds to any such mortgage holder shall not prejudice any right of Lessee hereunder to the use or benefit of any insurance proceeds. The Lessee may provide any insurance required by this lease in the form of a blanket package-type policy, provided such policy complies in all respects with the provisions of this paragraph.

Lessor and Lessee agree that if the building and improvements at any time forming a part of the Demised Premises or the personal property of Lessee located on the Demised Premises shall be damaged or destroyed by an insured peril, and whether or not such damage or destruction was caused by the negligence of or any act or omission of the other party, the other's agents or employees, neither party shall have any liability to the other on account of such damage or destruction, or the cause thereof, except as hereinafter stated, and each party shall, with due diligence, require all policies of risk insurance with respect to the Demised Premises carried by such party during the term of this lease to be endorsed with a provision by which the insurer designated therein shall waive its right of subrogation against the other party.

Furthermore, each of Lessor and Lessee agrees to, and does hereby waive all rights of recovery and causes of action against the other, the other's agents and employees, and all persons claiming through or under the other, relating to the loss of business, business interruption or loss of rentals resulting from any damage or destruction to the Demised Premises or any of Lessee's property contained therein, notwithstanding that any such damage or destruction may be due to the negligence or any act or omission of Lessor or Lessee, their respective agents or employees, as the case may be.

11. Repairs and Surrender; Mechanic's Liens.

A. Subject to the provisions of Paragraph 13., throughout the term of this lease, Lessee shall maintain the building (including its principal components) and other improvements at any time forming a part of the Demised Premises (including without limitation of the generality of the foregoing the foundations, vaults, water, sewer and gas connections, pipes and mains, plumbing, heating and ventilation, and electrical systems, but excluding parking lots, driveways, grounds and landscaping, fences, sidewalks, and other outside areas) in as good and tenantable repair as at the commencement of the term of this lease, reasonable wear and tear excepted, and shall promptly and in a good and workmanlike manner make all necessary repairs, ordinary as well as extraordinary, structural and otherwise, to the Demised Premises, and shall comply with all governmental regulations, laws or ordinances with respect to such repairs, maintenance or alterations of the Demised Premises.

When used in this Paragraph 11., the term "repairs" shall include replacements or renewals when necessary, and all such repairs made by Lessee shall be equal in quality and class to the original work. Lessee agrees to deliver up and surrender to Lessor possession of the Demised Premises upon the expiration of this lease, in good and tenantable repair, reasonable wear and tear and damage by insured peril for which Lessee has not been paid and for which damage the insurance proceeds have been assigned to Lessor by Lessee excepted.

B. Except as otherwise provided herein, Lessor shall be responsible for the maintenance and repair of all parking lots, driveways, grounds and landscaping, fences, sidewalks, and other outside areas forming any part of, or appurtenant to, the Demised Premises.

C. The Lessee shall not suffer or permit any mechanic's or other liens to be filed against the Demised Premises or any part thereof by reason of work, labor, services or materials supplied or claimed to have been supplied to the Lessee or anyone holding the Demised Premises or any part thereof through or under the Lessee. If any such mechanic's lien or other liens shall at any time be filed against the Demised Premises, the Lessee shall cause the same to be discharged of record within thirty (30) days after the date of filing the same. If the Lessee shall fail to discharge such mechanic's lien within such period, then in addition to any other right or remedy of the Lessor, the Lessor may, but shall not be obligated to, discharge the same either by paying the amount claimed to be due or by procuring the discharge of such lien by deposit in court or by giving security or in such other manner as is, or may be, prescribed by law. Any amount paid by the Lessor for any of the aforesaid purposes, and all reasonable legal and other expenses of the Lessor, including reasonable counsel fees, in or about procuring the discharge of such lien, with all necessary disbursements in connection therewith, with interest thereon until paid in full at the rate per annum equal to one percent (1%) in excess of the prime rate of National City Bank then in effect, shall be repaid by the Lessee to the Lessor on demand, and if unpaid

may be treated as additional rent. Nothing contained herein shall imply any consent or agreement on the part of the Lessor to subject the Lessor's estate to liability under any mechanic's lien law.

12. Alterations. Lessee shall make no alterations in, or additions or improvements to, said Demised Premises (structural or otherwise) without the written consent of Lessor first had and obtained, which consent shall not be unreasonably withheld. Notwithstanding the aforesaid, Lessee shall not be permitted to make any alterations or improvements to the Demised Premises or building in which the Demised Premises are located which would cause to be applicable to the Demised Premises or building the accessibility or other requirements of the ADA and/or IDEA, or the rules and regulations promulgated thereunder from time to time. If any permitted alterations, additions or improvements in or to said Demised Premises are made by Lessee, the Lessee covenants and agrees that Lessee will make all such alterations, additions or improvements in or to said Demised Premises at Lessee's own expense. If Lessee, its agents and employees, makes any alterations or improvements (whether or not authorized by Lessor), which cause the accessibility or other requirements of the ADA and/or IDEA to be applicable to the Demised Premises or building in which the Demised Premises are located, Lessee agrees at Lessee's expense to pay for any modifications to the Demised Premises or building imposed by the ADA and/or IDEA, or the rules and regulations issued thereunder. Any such permitted alterations, additions or improvements which are begun by Lessee shall be completed by Lessee. No alterations, additions or improvements shall be made which will weaken the structural strength of any building at any time forming a part of the Demised Premises. Lessee shall, in making any such alterations, additions or improvements, and/or in using and/or occupying the Demised Premises, comply with all applicable laws and ordinances pertaining to such work and/or such use or occupancy. Any additions, alterations or improvements made by Lessee shall become and remain a part of the Demised Premises, and be and remain the property of Lessor upon the termination of this lease or Lessee's occupancy of the Demised Premises. In any event, Lessee shall have the right to remove all Lessee's trade fixtures, furnishings and other personal property in the Demised Premises which have been placed there by Lessee, even though the same be attached to said Demised Premises, upon the condition that the removal of any such annexation shall be effected before the expiration of the term of this lease, and that all damage caused to said Demised Premises by such removal shall be repaired by Lessee on or before the expiration of said term. Lessee shall indemnify and save harmless Lessor from and against all expenses, liens, claims or damages to either property or person which may or might arise by reason of such repairs, alterations, improvements, additions or removals.

13. Destruction of Demised Premises.

A. Except as provided in subparagraph 13.B., below, if the Demised Premises, or any part thereof, shall be destroyed or damaged during the term of the lease, and the same can reasonably be repaired or restored within ninety (90) days following such occurrence, Lessee shall not be entitled to surrender possession of the Demised Premises, or any part thereof, nor shall Lessee's liability to pay rent under this lease cease; but in case of any such damage or destruction, this lease shall continue in full force and effect and the proceeds of all insurance covering such damage or destruction shall be made available to the Lessor. Lessor shall make use of such insurance proceeds to rebuild and reconstruct such damaged portion of the Demised Premises. If the proceeds of any insurance covering such damage or destruction exceed the cost of repair or reconstruction, such excess shall belong absolutely to the Lessor. In the event of any such damage or destruction and the same cannot reasonably be repaired within ninety (90) days following such occurrence, either Lessor or Lessee may elect to terminate this lease by written notice to the other within thirty (30) days following such damage or destruction. In the event either does so elect to terminate this lease, all proceeds of the insurance covering such damage or destruction shall belong absolutely to the Lessor. In the event that neither Lessor nor Lessee elects to terminate this lease, the Lessee's obligation and the use of the proceeds shall be the same as described above under circumstances where the damage and destruction can be repaired within ninety (90) days.

B. If any damage or destruction to the Demised Premises or the repair or rebuilding thereof shall render the Demised Premises untenantable in whole or in part, Lessee shall be allowed a proportionate reduction or abatement of the rental hereunder corresponding to the time and space of which Lessee shall be deprived (giving due consideration to the reasonable use of the remaining portion of the Demised Premises) from the date of the occurrence of such damage or

destruction until the date Lessor completes the repair or restoration thereof.

14. Eminent Domain.

A. If all of the Demised Premises or such portion thereof as shall substantially interfere with the Lessee's use and occupancy thereof, shall be condemned or taken by any governmental authority, or sold to any such governmental authority to prevent such taking, then this lease shall wholly terminate effective as of the date possession is taken by said authority, and the rent, taxes, insurance and other items payable under this lease shall be equitably apportioned and paid to the time of such termination. Thereupon, all parties shall be relieved of any further obligations accruing under this lease.

B. If the amount of property or type of estate taken shall not substantially interfere with the conduct of Lessee's business, this lease shall continue in full force and effect, except that the rental shall be equitably reduced, and Lessor, by use of the award received as a result of said taking and/or condemnation, shall promptly commence and diligently complete the repair and restoration of the remainder of the Demised Premises, subject to delays beyond its reasonable control, to a condition as nearly equivalent as feasible to the condition of the Demised Premises existing prior to such taking.

C. Whether such taking shall be partial or the entire Demised Premises, and whether this lease shall by reason thereof be terminated or not, Lessee shall not, because of such taking, assert any claim against the taking authority or against Lessor for any compensation because of such taking, except that Lessee shall be entitled to make a separate claim for any rights Lessee may have for Lessee's cost of moving or relocating any trade fixtures, equipment or other personal property that Lessee placed upon the Demised Premises, or for the recovery of any other provable damages to Lessee's business. For this purpose, Lessee reserves the right to participate at Lessee's expense in any condemnation proceeding. In no event, however, shall the Lessee's rights, as stated above, reduce the Lessor's award from the condemning authority as the owner of all interests in the real estate.

15. Rights of Lessor Upon Default.

A. This lease is made upon the condition that Lessee shall punctually perform all of its covenants and agreements as herein set forth and if,

(i) Lessee defaults in payment of rent, or any additional charge or amount of money to be paid by Lessee as provided in this lease, and such default shall continue uncorrected for a period of ten (10) days after written notice to the Lessee thereof; or

(ii) Lessee defaults in the prompt and full performance and observance of any of the terms and conditions of this lease to be performed or observed by Lessee and not relating to the payment of money, and any such default shall continue uncorrected for a period of thirty (30) days after written notice to the Lessee thereof, or if any such last-mentioned default cannot reasonably be corrected within such 30-day period, then if Lessee shall not within such period have commenced in good faith to correct such default; or

(iii) Lessee abandons the Demised Premises; or

(iv) any execution, attachment or other order of court shall be issued upon or against the interest of Lessee in this lease and shall continue for a period of thirty (30) days after notice,

then in any such event, in addition to any and all rights and remedies allowed by law and equity, Lessor may, with or without further notice, forthwith terminate this lease and Lessee's right to possession of the Demised Premises, or Lessor may, without terminating this lease, terminate Lessee's right to possession of the Demised Premises.

B. Upon the termination of this lease, or upon the termination of Lessee's right to possession without termination of this lease:

(i) Lessee shall surrender possession and vacate the Demised Premises immediately, and Lessor may enter into and repossess said Demised Premises, with or without process of law, and remove all persons and property therefrom; and

(ii) Lessor may remove from the Demised Premises any and all property found therein, and such repossession shall not release Lessee from Lessee's obligation to pay the rents herein provided.

C. In the event of termination of this lease as provided in this Paragraph 15., Lessor, in addition to any and all rights and remedies allowed by law and equity, shall upon such termination be entitled to recover damages in the amount equal to the then present value of the rent reserved in this lease for the entire residue of the stated term hereof less the then present worth of the fair rental value of the Demised Premises for the residue of the term hereof as then in effect, plus the costs incurred, including reasonable legal expenses, to terminate this lease and Lessee's possession of the Demised Premises.

D. Any and all property which may be removed from the Demised Premises by Lessor may be handled, removed, stored or otherwise disposed of by Lessor at the risk and expense of Lessee, and Lessor shall in no event be responsible for the preservation or the safekeeping thereof. Lessee shall pay to Lessor, upon demand, any and all expenses incurred in such removal and all storage charges against such property, so long as the same shall be in Lessor's possession or under Lessor's control. If any property shall remain in the Demised Premises or in the possession of Lessor, and shall not be retaken by Lessee within a period of twenty (20) days from and after the time when the Demised Premises are either abandoned by Lessee or repossessed by Lessor under the terms of this lease, said property shall conclusively be deemed to have been forever abandoned by Lessee.

16. Lessor's Right to Perform Lessee's Covenants. In addition to, but without limitation or qualification of, any other right or remedy of the Lessor herein provided, if the Lessee shall default in the performance of any covenant, condition or stipulation contained in this lease except defaults pertaining to the payment of rent or additional rent, the Lessor may, after thirty (30) days' written notice to the Lessee, or if such default cannot reasonably be corrected within such 30-day period, then if Lessee shall not within such period have commenced in good faith to correct such default, or with or without notice if, in the Lessor's reasonable opinion, an emergency exists, perform the same for the account and at the expense of the Lessee, and the amount of any payments made or other expenses incurred by the Lessor for such purpose shall be forthwith repaid by the Lessee with interest thereon until paid in full at the rate per annum equal to one percent (1%) in excess of the prime rate then in effect as published by National City Bank. Should the Lessee, pursuant to this subparagraph 16.A. or any other provision of this lease, become obligated to reimburse or otherwise pay Lessor any one or more sums of money in addition to the fixed rent, the amount thereof shall be deemed additional rent and may, at the option of Lessor, be added to any subsequent installment of the basic rent due and payable under the lease, in which event the Lessor shall have the remedies for default in the payment thereof provided in Paragraph 15., hereof. The provisions of this subparagraph 16.A. shall survive the termination of this lease. Nothing in this subparagraph 16.A. shall in any manner increase Lessor's liability to Lessee or to any others. The rights granted to Lessor under this subparagraph 16.A., shall be permissive only and shall not be construed as requiring Lessor to perform any such condition or covenant or to correct any such default.

17. Indemnity. Lessee agrees that no representations or warranties, either express or implied, have been made with reference to the condition of the Demised Premises or their fitness for the use of any purpose whatsoever. Lessee assumes the sole responsibility for the condition, operation, maintenance and management of the Demised Premises, and Lessee shall indemnify, defend and save harmless Lessor from any and all liabilities, damages, penalties, costs, expenses, claims, suits or actions due to or arising out of (i) any breach, violation or nonperformance of any covenant, condition or agreement in this lease contained on the part of Lessee to be fulfilled, kept, observed and performed; (ii)

any damage to property or any injury to persons (including death) resulting at any time therefrom in, on, under or about any Cleveland State University property or facility, including but not limited to, the Demised Premises or the adjacent streets, sidewalks and other adjoining or adjacent areas, which damage shall arise out of or result from Lessee's use or occupancy of the Demised Premises or from any activity in which Lessee, its employees, agents, invitees and visitors may be engaged, which activity is related to or arises out of Lessee's use or occupancy of the Demised Premises, but excluding any such damage or injury resulting from Lessor's breach of this lease; and (iii) any and all liens placed or permitted to be placed thereon by Lessee, or any other person claiming by, through, from or under Lessee.

18. Loss or Damage to Lessee's Property. All trade fixtures, equipment, inventory and all other personal property belonging to Lessee, Lessee's agents, or Lessee's guests, located in or about the Demised Premises shall be at the sole risk of Lessee, and Lessor shall not be liable for the theft or misappropriation, nor for any damage or injury thereto, nor for any damage or injury to Lessee, or any of Lessee's officers, agents, employees, licensees or guests, or to other persons or to any property caused by fire, explosion, wind, water, rain, snow, frost, steam, gas, electricity, any Acts of God, heat or cold, dampness, falling plaster and/or ceilings, sewers or sewage odors, noise, leaks from any part of said building, or by the bursting or leaking of pipes, plumbing, electrical wiring and equipment and fixtures of all kinds, or by any act or neglect of any other tenant or of any person; provided, however, subject to the provisions of Paragraph 10., Lessor shall not be relieved of liability for the negligence, intentional wrongful acts or omissions of Lessor, Lessor's agents and employees.

19. Assignment and Subletting. Lessee may sublet all or any part of the Demised Premises and may assign this lease or any interest Lessee may have hereunder, provided that:

(i) the signed written consent of the Lessor to any such subletting or assignment shall first be obtained, which may be granted in Lessor's sole discretion; and

(ii) in the event of any such permitted assignment or subletting, Lessee shall remain liable as Lessee for the performance of all of the conditions and covenants on the part of Lessee to be performed under this lease, unless Lessor shall otherwise expressly consent in writing.

The right on the part of Lessee to assign this lease under any of the foregoing provisions of this Paragraph 18. shall be upon the express condition that such assignment shall be in writing, executed by Lessee and the assignee, that in such writing the assignee shall, in consideration of such assignment, agree to assume, perform and be bound by all of the terms, obligations and conditions on the part of Lessee to be performed under this lease, and that a duplicate executed counterpart of such instrument of assignment and assumption shall be delivered to Lessor within ten (10) days after the execution thereof.

20. Limitation of Lessor's Liability. The term "Lessor," as used in this lease so far as covenants or obligations on the part of Lessor are concerned, shall be limited to mean and include only the owner or owners at the time in question of the fee of the Demised Premises. In the event of any transfer or transfers of title to such fee, the Lessor herein named (and in case of any subsequent transfers or conveyances, the then grantor) shall be freed and relieved from and after the date of such transfer and conveyance of all liability with respect to performance of any covenants or obligations on the part of Lessor contained in this lease thereafter to be performed. Without further agreement, the transferee of such title shall be deemed to have assumed and agreed to observe and perform any and all obligations of the Lessor hereunder during the transferee's ownership of the Demised Premises. Lessor may transfer Lessor's interest in the Demised Premises without the consent of Lessee, and such transfer or subsequent transfer shall not be deemed a violation on Lessor's part of any of the terms and conditions of this lease.

21. Mortgage Subordination. The Lessee understands that Lessor may have or hereafter desire to place a mortgage upon all or part of the land described herein and the building constructed thereon. It is further understood that the mortgagee of said mortgage may require that the within lease be subordinated to said mortgage, in which event Lessee agrees to

execute any document required by such mortgagee to evidence such subordination; provided, however, that the mortgagee of any such mortgage shall covenant in writing that the Lessee's leasehold interest hereunder shall not be foreclosed in any action brought under such mortgage or in the event of a sale of the Demised Premises as a result of said action if at the time of bringing an action to foreclose or at the time of said sale the Lessee is not in default in the payment of rental or in the performance of any other obligation under this lease, with due allowance to be given for the payment of any past due rental, or for the correction of any other default by Lessee within the period of time permitted after any notice is given or required to be given by the terms of this lease. It is further understood that the mortgagee of said mortgage may require that the Lessee agree to attorn to any purchaser of the property in the event that the same should be sold through foreclosure proceedings, and that the Lessee agrees to waive any and all rights to treat any such foreclosure proceedings as a breach of the lease by Lessor, in which event Lessee agrees to execute any document required by such mortgagee to evidence such agreements.

22. Estoppel Certificate by Lessee. Lessee will execute, acknowledge and deliver to Lessor, promptly upon request, a certificate certifying that (a) this lease is unmodified and in full force and effect (or, if there have been modifications, that the lease is in full force and effect, as modified, and stating the modifications), (b) the dates, if any, to which basic rent, additional rent and other sums payable hereunder have been paid, and (c) no notice has been received by Lessee of any default which has not been cured, except as to defaults specified in said certificate, it being intended that any such certificate may be relied upon by any prospective purchaser or mortgagee of the property or any part thereof.

23. Signs. Lessee may, subject to the prior written approval of Lessor, which approval shall not be unreasonably withheld, erect and maintain upon the Demised Premises, at Lessee's expense, all signs necessary or appropriate to the conduct of the business of Lessee which are not in violation of any governmental rule or regulation and will not invalidate any insurance policy of Lessor.

Lessee shall maintain said signs in good condition and repair at all times, and shall save Lessor harmless from injury to person or property arising from the erection or maintenance of said signs. Any signs placed in or upon the Demised Premises, upon the written request of Lessor, shall be removed by Lessee at Lessee's expense upon the expiration or sooner termination of this lease, and all damage caused by the removal of such signs shall be fully repaired at the cost and expense of Lessee.

24. Quiet Enjoyment. The Lessor covenants that Lessor has lawful title to the above-described real property and the right to make this lease for the term aforesaid and, conditioned upon the prompt performance and observance by the Lessee, Lessee's agents and employees of all of the terms, covenants and conditions hereof required to be performed or observed by Lessee, Lessee's agents and employees, Lessee shall at all times during the term of this lease have the peaceable and quiet enjoyment of the Demised Premises, subject to zoning ordinances, and all restrictions, reservations, conditions, covenants and easements of record or which are known by Lessee and any condition which would be disclosed by an accurate survey.

25. Withholding Premises. Should Lessee withhold from Lessor possession of the Demised Premises after the expiration or termination of this lease, whether by lapse of time or otherwise, such withholding shall constitute only a month-to-month tenancy.

26. Effect of Demand. Any demand for rent upon the Lessee after the same shall have become due and payable, or for the performance or observance of any covenant or condition of this lease after the same is required to be performed or observed under the provisions hereof, shall have the same effect as though made at the time and place such rent became due or such obligation should have been performed or observed, any law to the contrary notwithstanding.

27. Effect of Waiver. No waiver of any condition or covenant of this lease or of the breach of any condition or covenant shall be taken to constitute a waiver of any subsequent breach of such condition or covenant, or to justify or authorize the nonobservance on any other occasion of the same or any other condition or covenant thereof. The acceptance of rent

by the Lessor at any time when the Lessee is in default of any covenant or condition shall not be construed as a waiver of such default or of the Lessor's rights under Paragraph 15., above on account of such default, nor shall the payment of rent by the Lessee at any time when Lessor is in default under any covenant or condition hereof be construed as a waiver of such default, nor shall any waiver or indulgence granted by the Lessor or Lessee be taken as an estoppel against the party granting the same.

28. Notices. Whenever Lessor or Lessee shall make any demand or serve any notice which is required to be in writing under the terms of this lease upon the other, the same shall be in writing and shall be sufficiently given if sent, postage prepaid, by United States registered or certified mail, addressed to Lessee at _____ Board of Education, Attention: Chief Legal Counsel, and addressed to Lessor at _____ University, _____, Attention: Chief Legal Counsel, or at such other address as Lessor or Lessee may theretofore by written notice to the other have designated for the service of such notice.

29. Terminology; Captions. Where the context so requires or such interpretation is appropriate, any word used herein denoting gender shall include all genders, natural or artificial, and the singular and plural shall be interchangeable. The term "paragraph" shall refer to all paragraphs under the caption in question, where appropriate. The captions of the various provisions of this lease are for convenience only and in no way define, limit or describe the scope or intent of this lease or the provisions which they precede or in any other manner affect this lease.

30. Short-Form Lease. This lease shall not be recorded, but the parties agree to execute a skeleton lease incorporating the terms of this lease and including a legal description of the property upon which the Demised Premises is situated, at the request of Lessee or Lessor. The same shall be duly executed in form suitable for recording, and any costs incurred in connection therewith shall be at the expense of the party requesting same.

31. Successors and Assigns. This lease and the covenants and conditions herein contained shall inure to the benefit of and be binding upon Lessor and Lessor's successors and assigns, and shall be binding upon and inure to the benefit of Lessee, Lessee's successors, and those assignees of Lessee who become assignees in accordance with and as permitted by the terms of Paragraph 19., above.

32. Severability. In case any one or more of the provisions contained herein shall for any reason be held to be invalid, illegal or unenforceable in any respect, such invalidity, illegality or unenforceability shall not affect any other provision of this lease, but this lease shall be construed as if such invalid, illegal or unenforceable provisions had not been contained herein.

33. Broker. Lessor warrants, which warranty shall survive the execution of this lease, that no brokerage fee or other compensation is due any real estate broker or other person or entity by reason of this transaction. Lessee warrants, which warranty shall survive the execution of this lease, that no broker induced Lessee to enter into this transaction.

34. Remedies Not Exclusive. All rights and remedies of the Lessor and Lessee herein set forth shall not be exclusive, but shall be in addition to any and all rights and remedies allowed by law and equity.

35. Entire Agreement. This lease contains the entire agreement between the parties hereto; and any agreement hereafter or heretofore made shall not operate to change, modify, terminate or discharge this lease, in whole or in part, unless such agreement is in writing and signed by each of the parties hereto.

The parties hereto have signed this Indenture of Lease as of the date first above written.

_____ UNIVERSITY

By: _____

LESSOR

_____ BOARD OF EDUCATION

By: _____

LESSEE

[Acknowledgments]

[Attach Exhibit A]



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Current Legal Forms for Real Estate

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Current Legal Forms for Real Estate

Chapter 23 REAL ESTATE LEASES

Part IV. Forms

A. COMPLETE LEASES AND RELATED AGREEMENTS

31-23 Current Legal Forms for Real Estate FORM 23.20

AUTHOR: by Thomas G. Belden

FORM 23.20 Hunting and fishing lease

COMMENT

This form is a lease agreement between a lumber company and a hunting and fishing organization. The lumber company is fully entitled to continue its business activities on the property, while the organization is allowed to construct lodges and use the property for hunting, fishing and other outdoor activities. In exchange for this, the organization pays rent, which covers the property taxes and liability insurance on the property. In addition, the organization acts as caretaker of the property, providing security services while also making certain that the land remains clean, safe and unspoiled.

The agreement allocates liability and risk of loss between the parties. The agreement also mandates the use of good conservation techniques by all parties in order to preserve the usefulness and pristine condition of the land. These techniques include, among others, clean-up and sanitation requirements, an annual report by the tenant of the fish and game harvested on the premises during the past year, etc.

FORM

THIS AGREEMENT is made this _____ day of _____ [date], between _____ [insert lessor's name], a corporation having its principal place of business at _____, hereafter referred to as the "Lessor," and _____ [insert lessee's name], hereafter referred to as the "Lessee," having an office located at _____.

W I T N E S S E T H:

In consideration of the mutual promises contained herein, it is agreed as follows:

1. *Lessor agrees to lease property to lessee.* The Lessor, subject to the rights reserved in Paragraph 11 hereof, hereby leases to the Lessee ALL THAT TRACT OR PARCEL OF LAND described in Exhibit A, annexed hereto and made a part hereof, hereinafter called the "Premises." This Lease shall be for a term of approximately _____ (_____) [*insert number*] years, commencing on the _____ day of _____ [date], and expiring on the _____ day of _____ [date], unless sooner terminated under the terms and conditions of this Lease. This Lease shall expire, regardless of any extensions given thereto, on _____ [date].

2. *Lessee to pay annual rental fee.* The Lessee agrees to pay an annual rental fee to the Lessor, as set forth in Paragraph 3, below.

3. *Such annual rental fee shall include:*

(a) All taxes (general and special) assessed during the term of this Lease against the Premises, including, but not limited to, county and municipal property tax, school tax, water and sewer tax, special district assessments, if any, together with any additional taxes which may be assessed as a result of the construction of any buildings or other improvements on the Premises, or as a result of the use and existence of any buildings or other improvements thereon by the Lessee. The Lessee shall pay such taxes to Lessor during the time within which such tax may be paid without penalty. Lessor shall provide proof of payment within _____ (_____) [*insert number*] days thereafter;

(b) A sum equal to twenty-five percent (25%) of the taxes specified in Paragraph 3(a). This sum shall be paid at the same time that the taxes are to be paid. In the event that the taxes are paid at more than one time each year, said sum may be paid in full on December 31st of each lease year, at the option of the Lessee; and

(c) A sum equal to \$1.50 per acre times the total acreage of the Premises described in Exhibit A, annexed hereto. The Lessee shall make these payments on the anniversary of this Lease. If the final year of this Lease is not a full calendar year, the sum due shall be prorated.

4. *Insurance.* During the term of this Lease, the Lessee shall maintain, in full force and effect, the insurance listed below. Lessee shall provide Lessor with a certificate of insurance evidencing such coverage, together with proof of payment of the premiums, on the anniversary of this Lease in each year.

(a) Public Liability Insurance, including Contractual Liability Insurance to cover the indemnity agreement set forth in Paragraph 5, in at least the following amounts:

Bodily Injury Liability: \$250,000 per injured person,
 including Contractual Liability
 \$500,000 per occurrence

Property Damage Liability: \$250,000 per occurrence, including
 Contractual Liability
 of \$500,000 in the aggregate

The Public Liability Policy shall be obtained from a company with a rating of "AA" or better. The policy shall name the Lessor as an additional insured.

(b) Fire and Casualty insurance on any buildings on the Premises, equal to at least eighty percent (80%) of the replacement cost of said buildings. The policy shall be obtained from a company with a rating of "AA" or better. The policy shall name the Lessor as an additional insured.

5. *Indemnification and hold harmless.* The Lessee hereby shall indemnify, defend and hold harmless the Lessor from and against all claims for damages to person or property arising out of, incidental to, or in any way connected with, the use of the Premises by the Lessee or its members, their guests, agents or invitees.

6. *Lessee's rights.* The Lessee is hereby granted, subject to the rights of the Lessor: the exclusive privilege to occupy the Premises during the period (hereafter the "Privilege Period") beginning with the opening of the rifle season for deer and extending through December 31st of each year; exclusive use and occupancy of the buildings year round; the non-exclusive right to cut and use firewood for heating purposes, but only in any of the buildings located on the Premises. (However, said firewood is to be taken only from trees which are not useful as lumber or pulpwood. It is to be removed only from dead or fallen trees, or cut from trees definitely marked by the Lessor for that purpose with tops lopped according to the laws of the State of _____).

7. *Use of timber by lessee prohibited.* No merchantable timber shall be used by the Lessee for the construction or repair of camps, buildings, or for any other purpose without the prior written approval of the Lessor, who will mark the timber which may be so used.

8. *Fishing and trapping.* With the exception of the "Privilege Period" as described above, fishing and trapping by the public shall be permitted on the premises described in Schedule A, annexed hereto. Hunting by the public shall be permitted only for any established season which is not within the "Privilege Period."

9. *Lessee to provide services of caretaker.* The Lessee covenants to have either a caretaker or a watchman (either of whom may be a member of the Lessee organization who lives in the immediate area) patrol the Premises during the Privilege Period and at any other time requested by the Lessor. It is anticipated that the additional times shall be only when the conditions are such as to create fire hazards. The Lessee, its members and guests at all times will use reasonable caution in order to prevent forest fires on the Premises described in Schedule A, annexed hereto.

10. *Lessee to report to lessor about violations of the use of leased premises.* The Lessee shall report promptly to the Lessor any violations of the use of the Premises under this Agreement, including, but not limited to, the cutting or removal of logs, timber, stovewood, gravel, or other natural resources. Lessee shall report to the Lessor immediately any unusual circumstances which involve or affect the Premises described in Schedule A, annexed hereto.

11. *Lessor's rights.* The Lessor hereby reserves the right to remove timber and/or trees from the Premises at any time during the term of this Lease. The Lessor shall notify the Lessee _____ (_____) [insert number, e.g., two (2)] days prior to the time at which the Lessor intends to cut or remove timber or trees from the Premises. Lessor shall specify the general geographic area in which it intends to cut. Lessee shall notify its members to vacate and avoid this area during the period of cutting. The Lessee shall advise all of its members and guests of the nature and location of all timberstand improvement work carried on by the Lessor. Lessee shall caution them of the possible hazards resulting from the use of herbicides, and from dead, dying and falling timber.

12. *Buildings or other improvements erected by lessee.* The Lessee may not erect any buildings or other improvements on the Premises without the prior written permission of the Lessor. The title to any such building or other improvements shall vest in the Lessor immediately upon erection. Lessee shall maintain all improvements in good repair, reasonable wear and tear excepted, at all times during the term of this Lease and at Lessee's sole cost and expense.

The Lessee shall maintain all furnishings and equipment provided by the Lessor in good repair and return same to Lessor at the end of the term.

13. *Lessee must comply with all laws.* The Lessee shall fully cooperate with the Lessor and the duly authorized federal, state or local authorities in complying with and enforcing all laws and regulations now in effect or hereafter enacted or promulgated pertaining to the protection of fish, birds, and game; the use of the Premises for hunting, trapping, and fishing purposes; and the use of the property by the public in accordance with the conservation easement hereinbefore or hereinafter granted by the Lessor to the People of the State of _____. The Lessee shall comply with the terms of said Conservation Easement. The Lessee shall indemnify and hold harmless the Lessor for any violation by it or its members of said laws or regulations or conservation easement. The Lessee shall restrict its usage of the Premises, described in Schedule A and annexed hereto, to its members and guests only. Lessee shall not permit any commercial use of the premises.

14. *Lessee to maintain leased premises.* The Lessee shall not dam any streams. Lessee shall not allow or suffer trash, glass, cans, refuse or garbage of any nature to accumulate on the Premises. Lessee shall cause the same to be hauled away at its own expense. Lessee shall not allow any garbage or refuse to be burned on the Premises. Lessee shall not allow any human waste to be discharged into any stream on the Premises. The Lessee shall not create or suffer any health hazard on the Premises. The Lessee shall be bound by and comply with all federal, state, and municipal sanitation, health, environmental and other laws, orders and regulations which may pertain to the use or possession of the Premises.

15. *No assignment of lease or subletting the premises.* This Lease shall not be assigned, and no part of the premises shall be subleased by the Lessee. Lessee shall not use or permit the Premises to be used by anyone, for any purpose other than the above specified, without the prior written consent of the Lessor. If this Lease is assigned or the premises subleased, or the premises are used or permitted to be used without such written consent, the Lessor may terminate this Agreement, re-enter and re-let the Premises. The Lessor may also obtain an injunction to prevent the use of the leased Premises by the Lessee for any purposes other than hunting, trapping and fishing. The Lessor shall not be precluded from any legal remedy which it would otherwise enjoy by reason of the specification herein of any particular remedy.

16. *Lease is subordinate to any mortgage outstanding on property.* This Lease, and any amendments or extensions thereof, is and shall be subordinate to any mortgage now, or hereafter to become, a lien on said premises. Lessee agrees to execute any documents required by any mortgage to effect a subordination.

17. *Termination of lease by lessor.* In the event the Lessor determines to sell any part of the Premises or to devote or use the Premises for purposes which Lessor, in its sole discretion, determines to be inconsistent with the use of the Premises by the Lessee under the terms of this Lease, Lessor may terminate this Lease, at its option. Lessor shall give Lessee at least _____ (_____) [insert number, e.g., thirty (30)] days' written notice prior to the effective date of termination of the Lease. Notwithstanding the foregoing, if notice is given in the months of October or November, Lessee may retain the possession and use of the Premises until the end of that deer-hunting season. In the event of termination under this Paragraph, all rental fees shall be prorated and paid or refunded, as the case may be, on the effective date of termination.

18. *Condemnation of property by government.* In the event of a condemnation by any governmental or quasi-governmental authority, all compensation and damages awarded for such condemnation shall be the sole and exclusive property of the Lessor.

19. *Lessee to supply list of names and addresses of its officers, directors and caretakers.* The Lessee, upon execution of this Lease, shall deliver to the Lessor a list of the names and residence addresses of its officers, directors and caretakers. This list shall be updated on the anniversary date of this Lease in each year.

20. *Lessee to submit reports to lessor on fish and game harvested.* The Lessee shall provide Lessor with accurate reports of all fish and game taken during each year of this Lease. This report shall be provided to the Lessor on the anniversary

date of this Lease in each year.

21. *Boundary lines of premises.* The Lessee shall post the boundary lines of the Premises with signs approved by the Lessor and compatible with the applicable provisions of the laws and regulations of the State of _____ for such posting. Lessee shall use only aluminum nails for posting purposes. Lessee shall not use nails made of other metals in any of the standing timber.

22. *Lessor to be furnished with keys or combinations to all locks on buildings and gates.* The Lessor will be furnished with keys or combinations to all locks on buildings and gates maintained by the Lessee. The location and design of all gates and fences shall be approved, in writing, by the Lessor. Lessee shall maintain all gates and fences which it has installed in good repair and in good working order. If Lessee fails to do so, Lessor may make such repairs and charge the cost thereof to Lessee as additional rent. Lessor shall give Lessee written notice to repair at least _____ (_____) [insert number] days prior to Lessor commencing such repairs.

23. *Giving of notice.* Any notice required to be given to Lessor shall be in writing and sent certified mail, return receipt requested, to _____ [insert person's name], located at _____. Any notice required to be given to Lessee shall be in writing and sent certified mail, return receipt requested, to _____ [insert person's name], located at _____. Notice shall be deemed given when received.

24. *Agreement contains entire understanding of parties.* This Agreement contains the entire understanding of the parties; there have been no representations made which are not contained herein.

25. *Modification of agreement.* This Agreement may only be modified by a written amendment signed by both parties. An oral modification shall not be binding on either party.

26. *Interpretation of agreement.* This Agreement shall be construed in accordance with the laws of the State of _____.

27. Any failure by either party to enforce any right arising hereunder shall not be deemed a waiver of such right.

The parties hereto have set their hands and seals the day and year first above written.

LESSOR

By: _____

LESSEE

By: _____

[Acknowledgments]

[Attach Exhibit A]

[Attach Schedule A]



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Current Legal Forms for Real Estate
Chapter 23 REAL ESTATE LEASES
Part IV. Forms

A. COMPLETE LEASES AND RELATED AGREEMENTS

31-23 Current Legal Forms for Real Estate FORM 23.21

AUTHOR: by Thomas G. Belden

FORM 23.21 Model recreation lease--tenant permitted to harvest wildlife on leased premises--tenant has obligation to properly dispose of garbage and human waste--tenant promises not to use, store or dispose of hazardous substances on leased premises

COMMENT

Like the preceding lease, this lease is another form by which the tenant--a recreational organization with many members--acquires the right to use the landlord's undeveloped property for recreational purposes. The landlord retains the right to use its property for lumbering, forest management operations, mining and mineral prospecting. As in the preceding lease, the rental fee equals the annual real estate taxes assessed against the land.

The lease contains a variety of provisions pertaining to wildlife found on the property. All of these provisions are designed to protect the landlord from potential civil or criminal liability, or from damage to its property. For example, there are provisions prohibiting trapping of different types of wildlife appearing on government lists of endangered species. There is another provision requiring the tenant to notify the landlord of the discovery of beaver dams. (Beaver dams result in the destruction of valuable standing timber and may render an area unsuitable for recreational use.)

Yet another provision requires that members of the tenant-organization be trained in proper food and refuse storage techniques in order to avoid attracting bears to campsites. This provision is particularly important to the safety of users of the leased property. In the past, bears became accustomed to eating at open-air garbage dumps around the nation; but as communities began closing such dumps, the food supply diminished, and bears became frequent raiders at campsites, seeking food. Thus, campers must know how to properly store food and organic refuse in order to avoid dangerous incidents which may result in injury or death to campers.

This lease provides the tenant with the exclusive right to hunt, trap and fish on the leased premises. In addition, it requires proper disposal of garbage and human waste by the tenant so that the property will not become polluted. The lease also contains prohibitions on the use, storage or disposal of hazardous substances.

FORM

RECREATION LEASE

THIS LEASE is made this _____ day of _____ [date], between
 _____ [insert name of lessor-corporation], a _____ [insert name of state where
 lessor-corporation is incorporated] corporation, having an office at _____ ("Lessor"), and
 _____ [insert name of lessee-corporation], a _____ [insert name of state where
 lessee-corporation is incorporated] corporation, having an office at _____ ("Lessee").

WITNESSETH:

WHEREAS, Lessor is a corporation which manufactures wood products and maintains a large inventory of land on which timber may not be harvested for many years; and

WHEREAS, Lessee is a membership corporation comprised of many individuals and organizations, which are devoted to teaching young people the pleasures of outdoor recreation, including, but not limited to, camping, hiking, bicycling, hunting, fishing and survival techniques; and

WHEREAS, Lessor supports the mission of Lessee; and

WHEREAS, Lessor is not currently harvesting timber from the land described in Exhibit A, annexed hereto;

NOW, in consideration of the mutual covenants contained herein, it is agreed as follows:

1. *Lessor agrees to lease property to lessee.* The Lessor hereby leases to the Lessee ALL THAT TRACT OR PARCEL OF LAND described in Exhibit A, attached hereto and made a part hereof (hereinafter called the "Premises"). This Lease shall be for a term of _____ (_____) [insert number] years, commencing on the _____ day of _____ [date], and expiring at midnight on the _____ day of _____ [date], unless sooner terminated under the terms and conditions of this Lease.

The Lessor and Lessee further agree as follows:

2. *Rental fee.* The Lessee agrees to pay to the Lessor as annual rental all taxes (general and special) assessed during the term of this Lease against the Premises, including any additional taxes assessed as a result of the construction of any buildings or other improvements thereon by the Lessee, pursuant to the provisions of Paragraph 10 hereof, or as a result of an increase in the tax rate. The Lessee shall pay such taxes within _____ (_____) [insert number] days after the receipt by it of bills for said taxes.

3. *Insurance.* During the term of this Lease, the Lessee shall maintain, in full force and effect, the following insurance:

(a) Public Liability Insurance, in at least the following amounts:

Bodily Injury Liability:	\$ 250,000 per injured person;
Property Damage Liability:	\$ 250,000 per occurrence and \$ 500,000 in the aggregate.

The Public Liability Policy shall be written by a company acceptable to the Lessor. Said policy shall name the Lessor, the Lessee and Lessee's members as insureds. A certified copy of the policy and evidence of premium payment shall be delivered to the Lessor for approval before the Lessee enters upon the premises;

(b) Fire insurance on any buildings (not including lean-tos or outhouses) that may be erected on the Premises, covering at least eighty percent (80%) of the replacement cost of said buildings, written by a company acceptable to the Lessor and naming the Lessor, the Lessee and Lessee's members as insureds. A certified copy of the policy and evidence of premium payment shall both be delivered to the Lessor for its approval before the Lessee enters upon the premises.

4. *Indemnification and hold harmless.* The Lessee hereby shall indemnify, defend and hold the Lessor harmless from and against all claims for damages for bodily injury, including death at any time resulting therefrom, and for damage to property, including loss of use thereof, arising out of, incidental to, or in any way connected with, the use of the Premises by the Lessee.

5. *Lessee's right to post the premises and use firewood.* The Lessee is hereby granted, subject to the rights of the Lessor, the exclusive privilege to post the Premises and to protect the same as a private park, and to take and use firewood only for fuel for any of the buildings now located or to be erected on the Premises. (However, said firewood is to be taken from timber not useful for lumber or pulpwood, and is to be cut only from trees definitely marked by the Lessor for that purpose, with all tops lopped off and all cutting practices to be performed according to the conservation laws of the State of _____.)

6. *Lessee has exclusive right to hunt, trap and fish.* The Lessee is hereby granted, subject to the rights of the Lessor, the exclusive hunting, trapping and fishing privileges on the Premises, with the understanding that the trapping of the following endangered species is hereby totally prohibited:

(1)

(2)

(3)

7. *Lessee to provide caretaker.* The Lessee covenants to have either a caretaker or a watchman (either of whom may be a member of the Lessee-organization who lives in the immediate area) patrol the premises at all times during which the conditions are such as to create a significant danger of forest fires. The Lessee, its members and guests at all times will use reasonable caution in order to prevent forest fires on the Premises.

8. *Lessee's duty to issue reports to lessor:*

(a) The Lessee shall report promptly to the Lessor any trespass on the Premises, including, but not limited to, the unlawful cutting or removal of logs, timber, stovewood, gravel, shale, or other natural resources.

(b) Lessee shall report to Lessor any damage or probability of damage that might result from the construction of any dams by beavers or other animals, and shall report immediately to the Lessor any unusual circumstances involving or affecting the Premises.

(c) Lessee shall instruct its members and guests in the proper handling and storage of food and garbage so as to avoid unnecessary entanglements with bears. Lessee shall report all damage to person and property caused by bears to the forest ranger immediately. Lessee shall provide bear-proof lockers for food at all established campsites.

9. *Lessor to notify lessee if former intends to remove timber.* The Lessor shall notify the Lessee if, at any time, the Lessor intends to cut or remove timber or trees from the Premises, and the Lessor hereby reserves the right to remove timber and/or trees from the Premises at any time.

10. *Construction by lessee.* Lessee may construct sleeping lodges, lean-tos, outhouses, latrines and other recreational buildings or structures or improvements. Such improvements shall have natural wood exteriors which are stained in shades of brown or green only in order to blend with the natural setting. The Lessee will not erect any buildings or other improvements on the Premises without first notifying the Lessor and receiving the Lessor's written permission. The title to any such buildings or other improvements shall vest in the Lessor immediately upon erection. No house trailer or permanent trailer shall be placed upon the premises by Lessee. Lessor shall have no responsibility or liability whatsoever to Lessee or any other party to maintain, repair, care for, protect or rebuild any building or other improvement erected on the subject premises by Lessee, and Lessee shall be fully responsible for said maintenance, repair, care, and protection of the buildings so erected. In the event that Lessee is in full compliance with the terms of this Lease, and at Lessor's sole discretion, Lessee may be allowed to remove, at the end of the Lease term, any such building Lessee has been allowed to construct on the Premises. Such right of removal shall be upon the condition that Lessee shall, at its own cost, clean up and remove any and all debris or rubble, etc., from the Premises; shall fill in with clean gravel any foundation or other opening in the ground; and shall restore the land to its natural condition as nearly as possible. Lessee may be required by Lessor to post cash or other security for the faithful performance of said obligations.

11. *Lessee must comply with all laws.* The Lessee, at its own cost, shall fully cooperate with the Lessor and the duly-authorized federal, state or local authorities in complying with and enforcing all laws and regulations now in effect or hereafter enacted or promulgated pertaining to: (1) the protection of fish, birds and game; and (2) the use of the Premises for camping, hiking, hunting, trapping and fishing. The Lessee shall indemnify and hold the Lessor harmless for any violation by Lessee or its members of said laws or regulations. The Lessee shall restrict the usage of the premises to its members and non-commercial guests only. Lessee covenants not to conduct any business or commercial enterprise whatsoever on the Premises, including, but not limited to, the sale or rental of any equipment, vehicles or any other item.

12. *Further obligations of lessee:*

(a) The Lessee shall maintain in good condition any existing roads, buildings or other improvements on the Premises, or any buildings or other improvements hereinafter erected on the Premises. Upon the expiration or termination of this Lease, Lessee shall surrender not only said buildings and improvements, but the entire Premises in as good condition as now exists, reasonable wear and tear excepted. The Lessee shall dam no stream unless the Lessor consents thereto in writing.

(b) The Lessee shall allow no litter, trash, glass, cans, refuse or garbage to accumulate on the Premises, and the same shall be hauled away by the Lessee, at its expense, as often as is necessary, but no less often than once each week during periods when the Premises are in use. Prior to hauling, organic refuse shall be stored in bear-proof containers. No rubbish or garbage shall be burned, nor any human waste discharged, into any stream on the Premises. The Lessee shall be bound by, and comply with, the requirements of the public health laws of the State of _____, and

all other laws, orders and regulations, whether federal, state or local, pertaining to the use or possession of the Premises. Lessor reserves the right to enter upon the leased Premises at any time to clear, repair or take steps to protect its roads, property or other improvements located thereon, all for Lessor's sole benefit.

(c) No pesticides, fertilizers or substances deemed hazardous under any federal, state or local law, regulation or policy shall be used, stored, manufactured or disposed of on the premises.

Violation by Lessee of any of these provisions shall be grounds for immediate termination of this Lease, notwithstanding any other provisions contained herein. It is the intention of Lessor to maintain the premises in as natural a condition as possible. Use of hazardous substances is not compatible with this intention.

13. Assignment of lease or subleasing of premises prohibited:

(a) Neither this Lease, nor the term hereby leased, nor the Premises, nor any part thereof, shall be assigned, let or under-let by the Lessee, or used or permitted to be used by the Lessee for any purpose other than the above specified, without the written consent of the Lessor. If so assigned, let or under-let, used or permitted to be used without such written consent of Lessor, then Lessor may re-enter and re-let the Premises. In addition, this Lease, by such unauthorized act of Lessee, shall become void, if the Lessor shall so determine and elect. Without objections by Lessee, the Lessor, at its option, may also apply for and obtain an injunction to prevent the use of the leased Premises by Lessee for any purposes other than camping, hiking, bicycling, hunting, trapping and fishing, and the Lessor shall not be precluded from any legal remedy which it would otherwise have by reason of the specification herein of any particular remedy for any specified breach of the terms and conditions of this Lease. In case of the assignment of this Lease, or any part of the term hereby leased, or any subletting or under-letting, the Lessor shall have a lien upon, and shall be hereby empowered to collect, any rent accruing from the subtenant or assignee, and shall apply the net amount collected to the rent due and owing from Lessee.

(b) Lessee shall limit the use of the premises at any time to no more than _____
(_____) [*insert number*] people.

14. Lease is subordinate to any mortgage on leased premises. In the event that the premises are mortgaged by the Lessor, this Lease, and any amendments or extensions thereof, shall automatically be subordinate to any such mortgage. Lessee shall have no right to mortgage the leased premises or pledge this lease as collateral for any purpose whatsoever.

15. Termination of lease. This Lease may be terminated, in whole or in part, by the Lessor, at its option and for any reason whatsoever, on _____ (_____) [*insert number, e.g., ten (10)*] days' prior written notice to the Lessee, as long as there are no buildings on the premises which the Lessee has erected. In the event that the Lessee has erected buildings on the premises, subject to the provisions set forth in Paragraph 10 of this Lease, such notice must be supplied to the Lessee _____ (_____) [*insert number, e.g., sixty (60)*] days prior to termination. However, any such notice given in the months of October or November shall permit the Lessee to retain the possession and use of the Premises until the end of the deer hunting season in that particularly calendar year. In the event of termination under this Paragraph, the Lessor shall return to the Lessee the unearned portion of the rental money already paid by the Lessee if there has been a complete termination, and a portion thereof, reflecting the proportionate land area or part of the Premises to which the termination applied, in the event of a partial termination.

16. Eminent domain. If, under the power of eminent domain, there should be a taking or condemnation of the whole or any portion of the Premises, all compensation and damages awarded for any such taking or condemnation shall be the property of the Lessor, and the Lessee hereby assigns to Lessor all of the Lessee's right, title and interest in and to any and all such compensation and damages. The Lessee shall execute such instruments of assignment as may be required by the Lessor in connection with such taking or condemnation, and Lessee agrees to prosecute, at the Lessor's expense

and request, either singly or jointly, any proceedings to recover such compensation and damages.

17. *Lessee to supply lessor with names and addresses of lessee's members.* The Lessee, within _____ (_____) [insert number] days of the execution of this Lease, shall deliver to the Lessor a list of the names and addresses of the Lessee's individual members and corporate members, and the names and residence addresses of its officers, officials and caretakers. The Lessee shall, at least annually and at the time the rental is paid, deliver to the Lessor a list of any changes in its membership.

18. *Lessee to supply lessor with a count of deer killed.* The Lessee shall keep an accurate record of the total number of deer taken during each hunting season on the Premises and shall make a report of the same at the conclusion of each hunting season to the Lessor.

19. *Lessee to post boundary lines.* The Lessee shall post the boundary lines of the Premises with signs approved by the Lessor, and such signs shall be compatible with the applicable provisions of the laws and regulations of the State of _____ for such posting. However, the Lessee shall not paint or otherwise mark the boundary lines of the Premises, except at the request of, and under the direction and supervision of, the Lessor.

20. *Lessor reserves right to conduct its business on leased premises.* This Lease of the Premises shall in no way or manner interfere with the Lessor's right to conduct business on said premises for any lawful purpose whatsoever, including, but not limited to, lumbering and forest management operations, mining or mineral prospecting, or other such operations. The Lessor shall give the Lessee notice of the commencement of any such operations, and the Lessee shall thereby be prohibited from entering upon any portion of the Premises on which such operations are being conducted for the duration of the conduct of such operations.

21. *Other rights and privileges of lessor, its guests and invitees.* The Lessor and any guests or invitees thereof and any other persons designated by the Lessor shall have the same privileges and rights to the Premises as are granted herein to the Lessee and its members, subject, however, to all the rules, regulations and by-laws established by the Lessee and applicable to its members, but without any requirement for the payment of fees, dues or assessments by Lessor, its guests or invitees.

22. *Lessee to advise its members and guests of business activities of Lessor.* The Lessee shall advise all its members and guests of the business activities of Lessor, including, but not limited to, timber work carried on by the Lessor, and shall caution them of possible hazards resulting from the use of herbicides, and from dead, dying and falling timber.

In addition, the Lessee shall not use nails or any other metal in or around any of the standing timber, except that Lessee may use aluminum nails for the purpose of posting property.

23. *Notice to the parties.* Any notice to be given to Lessor shall be given to _____ [insert name of person] at the following address: _____. Any notice to be given to Lessee shall be given to _____ [insert name of person] at the following address: _____.

The parties hereto have caused this Lease to be signed by their proper officers or duly-authorized representatives on the day and year first above written.

LESSOR

By: _____

LESSEE

By:_____

[Acknowledgments]

[Attach Exhibit A]



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Current Legal Forms for Real Estate

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Current Legal Forms for Real Estate

Chapter 23 REAL ESTATE LEASES

Part IV. Forms

A. COMPLETE LEASES AND RELATED AGREEMENTS

31-23 Current Legal Forms for Real Estate FORM 23.22

AUTHOR: by Thomas G. Belden

FORM 23.22 Office retail space lease on a net-net-net basis to the lessee

COMMENT

This form is a form of lease that could be used for office space or retail space in a multi-tenant building which is set up as a net-net-net lease in that the tenant is required to pay its pro rata share of real estate taxes and assessments, insurance, common area expenses and certain building repairs. In this form, those costs are passed on to the tenants on a dollar for dollar basis, in contrast to just passing the costs on to the extent they exceed what the costs were during a defined base year. The latter is referred to as an escalation clause. The base rent will vary depending on whether the costs are passed on dollar for dollar, or just increases in expenses are passed on to the tenants. In this form, the pro rata share is done in the customary manner by dividing the space in the leased premises by the total rental square feet in the building. Under such a formula, the landlord will be able to recover dollar for dollar each of those expenses being passed along to the tenants as long as the landlord is able to lease up all of the space. Otherwise, 100% of those costs will not be recouped by the landlord.

The one area that the tenant must be concerned about as far as paying its pro rata share is concerned is the area of building repairs and maintenance. This form lease excludes from building repairs and maintenance any structural repairs and replacements because if major structural repairs and replacements are required they will benefit the landlord for a lot longer period of time than the term of the lease. Therefore, the tenant will argue that the tenant should not have to pay any portion of such capital-like expenditures. The compromise is often passing on only a portion of those capital expenditures each year during the term of the lease as they would be allowed to be written off for tax purposes over the applicable recovery period for the particular expenditure. For a discussion of the period over which leasehold improvements can be written off, see The Tax

Background § 23.07. For example, if the capital expenditure had a fifteen year life, only one-fifteenth of the expenditure would be passed on to the tenants pro rata each year during the term of the particular lease of the tenant.

This particular form also provides in Paragraph 25 that the landlord has the right to build an additional building on the parcel of land on which the existing building is situated. In such event, the formula for computing the pro rata share of expenses passed on to tenants would have to be recalculated as stated in that Paragraph 25.

FORM

INDENTURE OF LEASE

THIS INDENTURE OF LEASE is made and entered into at _____, _____ this _____ day of _____ [date], by and between _____, hereinafter called "Lessor," and _____, a[n] _____, hereinafter called "Lessee."

WITNESSETH:

1. Demised Premises.

A. For the rents and upon the terms and conditions hereinafter set forth, Lessor hereby leases to Lessee certain premises, containing approximately _____ (_____) square feet of floor space in the building known as _____, located on the parcel of land described on Exhibit A, attached hereto and made a part hereof, being outlined or crosshatched on the floor plan marked Exhibit B, attached hereto and made a part hereof, hereinafter called the (Demised Premises.(

B. Lessee has examined the Demised Premises and the same are known to the Lessee to be in good condition and repair, and Lessee hereby accepts them in their present condition.

C. Lessor reserves the right to place, maintain, repair and replace utility lines, pipes, tunneling and the like, in, under, over and through the Demised Premises and building in which the Demised Premises are located as may be reasonably necessary or desirable for the servicing, repair, renovation or improvement of the Demised Premises or the building in which the Demised Premises are located. Lessor shall have the right to enter the Demised Premises at all reasonable times and to the use of the roof and exterior walls of the Demised Premises and building for such purpose. Lessor agrees that none of the aforesaid work shall permit Lessee to receive an abatement of rent or to make a claim for any damages or losses to Lessee or Lessee's business resulting directly or indirectly therefrom.

2. A. Term. Lessee shall hold the Demised Premises for the term of _____ (_____) years, commencing on the commencement date hereafter defined. However, if the commencement date is other than on the first day of a month, the term shall be extended by the number of days remaining in said month.

B. Commencement Date of Term. The commencement date of the term shall be [date], or upon the earlier taking of possession of the Demised Premises by Lessee. However, if the Demised Premises have not been substantially completed by Lessor in accordance with the provisions of subparagraph 13.B. below prior to the date specified in this subparagraph 2.B., the commencement date of the term shall be the date when the Demised Premises shall have been certified by Lessor's project architect as substantially completed in accordance with the provisions of this Lease and

possession surrendered to Lessee, or upon earlier taking of possession of the Demised Premises by the Lessee; provided, however, that if any delay in completion is caused by the acts or omissions of Lessee, Lessee's agents and employees, then the commencement date of the term shall be the date certified by Lessor's project architect on which the Demised Premises would have been substantially completed but for the delay caused by Lessee. In the event of any such delay, Lessor and Lessee agree to exchange a side letter agreement setting forth the actual commencement and termination dates of this Lease. Said letter shall be prepared by Lessor and forwarded to Lessee for execution. Failure by Lessee to respond within ten (10) days of receipt of such letter shall be deemed an acceptance of the dates therein. Even if Lessee does not agree with such dates, Lessee shall pay rent and perform all other obligations pursuant to the terms of this Lease according to the dates in such letter, subject to refund or credit when the matter is resolved.

3. A. Rent. In consideration of said demise, Lessee covenants and agrees to pay to Lessor, without deduction or setoff of any kind, as rent for the use of the Demised Premises for the term hereof, the sum of _____ Dollars (\$ _____), in equal monthly installments of _____ Dollars (\$ _____) each, payable in current legal tender of the United States of America, as the same is then by law constituted. All such sums are due and payable in advance, on the first day of each and every calendar month during said term, _____, or at such other place as Lessor may in writing designate. In the event any payment of rent is not received by Lessor within ten (10) days of its due date, Lessor shall have the right at Lessor's option to charge Lessee a late fee of two percent (2%) of the amount of the overdue payment. If the late fee is charged, it shall be payable upon demand.

B. Expenses of Enforcement. Lessee shall pay, upon demand, all of Lessor's reasonable costs, charges and expenses, including without limitation, attorneys' fees and out-of-pocket expenses of counsel, agents and others retained by Lessor, incurred in enforcing Lessee's obligations hereunder or incurred by Lessor in any litigation, negotiation or transaction in which Lessee causes Lessor to become involved or concerned.

4. A. Services. Lessor shall provide, at Lessor's expense, sewer and water (for sanitary purposes only). Lessor shall also provide, subject to the terms of Subparagraph 8., below, electricity for heat and for air conditioning services to the Demised Premises and building to the extent required to maintain temperatures compatible with normal standards of comfort, during business hours. The term "business hours" shall mean Monday through Friday inclusive, from 8:00 a.m. to 6:00 p.m., and on Saturday from 8:00 a.m. to 12:00 p.m., but excluding all legal holidays. Installation of special equipment shall be subject to Lessor's prior approval and to special charges and regulations. Any new or additional electrical facilities required to service Lessee's equipment, and all changes in existing electrical or communication facilities servicing the Demised Premises required by Lessee shall be subject to Lessor's prior written approval, and if permitted, shall be at Lessee's expense. All expenses of maintenance and cleaning and lighting equipment located in the Demised Premises, including tubes, fixtures, light bulbs and component parts, shall be paid by Lessee. Should Lessee require any additional work or services, including services furnished outside the stipulated hours, Lessor may, in terms to be agreed upon, upon reasonable advance notice by Lessee, furnish Lessee's additional services and Lessee agrees to pay Lessor such charges as may be agreed upon, but in no event less than Lessor's actual cost plus fifteen percent (15%) for overhead, for the additional services provided.

It is understood that Lessor does not warrant that any of the services referred to above, or any other services which Lessor may supply, will be free from interruption. Lessee acknowledges that any one or more such services may be suspended by reason of accident or of repairs, alterations, or improvements necessary to be made, or by strikes or lockouts, or by reason of operation of law, or causes beyond the reasonable control of Lessor. Any such interruption or discontinuance of services shall never be deemed an eviction or disturbance of Lessee's use and occupancy of the Demised Premises or any part thereof, or render Lessor liable to Lessee for damages, or relieve Lessee from performance of Lessee's obligations under this Lease. In the event of any such interruption, Lessor shall use commercially reasonable efforts to restore services as soon as reasonably possible.

B. Security Deposit. Concurrently with the execution of this lease, Lessee shall deposit with Lessor the sum of

_____ Dollars (\$_____) as security for the punctual performance by Lessee of each and every obligation of Lessee under this lease. In the event of any default by Lessee not corrected within the permitted grace period granted herein, in addition to and without prejudice to any other rights or remedies available to Lessor set forth in this lease or otherwise, Lessor may apply or retain all or any part of such security to cure the default or to reimburse Lessor for any sum which Lessor may spend by reason of the default. In the case of every such application or retention, Lessee shall, on demand, pay to Lessor the sum applied or retained, which shall be added to the security deposit so that the same shall be restored to its original amount. If at the end of the lease term Lessee shall not be in default under this lease, but not otherwise, the security deposit, or any balance thereof, shall be returned to Lessee, without interest. It is expressly understood and agreed that the within security deposit is not an advance payment of or on account of the rent herein reserved or any part or installment thereof or a measure of Lessor's damages.

C. Option to Renew. The Lessee shall have the option to extend the term of this lease for _____ (_____) additional term(s) of _____ (_____) year(s) each, provided that Lessee is not in default of any and all of the terms, covenants and conditions of this lease either on the date that notice of extension is given or on the commencement date of the extended term. Such option to extend shall be exercised by the Lessee by giving written notice to the Lessor not less than six (6) months prior to the expiration date of the original *[(or renewal)] term of the lease then in effect. The extension of this lease shall be upon the same terms, covenants and conditions as are contained in the lease except that the monthly rental shall be [_____ Dollars (\$_____)].

5. Use. The Demised Premises shall be used solely for _____, and for no other purpose. Lessee shall not use or occupy, or permit the use or occupancy of, the Demised Premises, or any part thereof, in any unlawful manner or for any illegal purpose, or in such a manner as to constitute a nuisance or violate the terms and conditions of any certificate of occupancy or equivalent use permit applicable to the Demised Premises, or for any purpose or in a manner liable to cause structural injury, and shall not use or occupy or permit the use or occupancy of the Demised Premises for other than purposes of the nature and to the extent permitted by the laws, rules, regulations, and ordinances of the applicable governmental authorities and their agencies.

6. Compliance with Laws. The Lessee shall throughout the term of this lease, at the Lessee's sole cost and expense, promptly comply with all laws and ordinances including without limitation, all environmental laws, rules and regulations, federal, state and local, and the orders, rules, regulations or requirements of all applicable governmental authorities and the orders, rules and regulations of the applicable Board of Fire Underwriters, or any other body now or hereafter constituted exercising similar functions, foreseen or unforeseen, ordinary as well as extraordinary, and whether or not the same require repairs or alterations, which may be applicable to the Demised Premises and the fixtures thereof, or the use or manner of use of the Demised Premises, except as provided elsewhere in this lease. The Lessee shall likewise observe and comply with the requirements of all policies of public liability, fire and all other policies of insurance at any time in force with respect to the Demised Premises. Lessor shall at its cost and expense comply with all laws and ordinances and the orders, rules, regulations or requirements of all applicable governmental authorities with respect to the building and improvements as a whole; provided, however, Lessee shall reimburse Lessor for its pro rata share as hereafter defined, of the costs incurred by Lessor to so comply.

7. Net Lease Provision. This lease shall be deemed and construed to be a "net lease" and, except as otherwise expressly provided in this lease, the Lessor shall receive all rental and all payments hereunder to be made by Lessee free from any charges, taxes, assessments, impositions, expenses or deductions of any and every kind and nature whatsoever (excluding any inheritance, estate, succession, transfer, gift, franchise, corporate, income or profit tax or capital levy) to the extent the aforesaid are required to be paid pro rata by tenants in the building in which the Demised Premises are located, including Lessee.

8. Utilities. The Lessee shall, during the continuance of this lease, pay for all heat, electric current, water, sewer, gas, telephone, internet services and other utilities used by Lessee in or upon the Demised Premises. Lessor shall at its

option install separate meters to measure Lessee's use of utilities but if said utilities are supplied to the building as a whole, or to a portion of the building including more than just the Demised Premises, Lessee shall pay an allocable share of the cost of such utilities based upon the square feet in the Demised Premises to the total rentable square feet in the building served by such utilities. Lessee shall pay to Lessor its pro rata share, as hereafter defined, of the water and sewer bills and of any other utilities supplied to the building as a whole (or supplied to a portion of the building) within ten (10) days from receipt of a bill therefor. Separately metered utilities shall be paid directly to the utility company supplying the same.

9. Taxes and Assessments; Pro rata Share. Lessor shall pay, but Lessee shall reimburse Lessor for its pro rata share, as hereafter defined, of all real estate taxes and assessments (both general and special), any tax (other than income or franchise tax) assessed by any governmental agency against the rental provided herein or other tax in substitution of said real estate taxes and assessments, all charges and other taxes, duties and charges, fees or payments imposed by any governmental, quasi-governmental or public authority, which shall be imposed, assessed, levied or become a charge or lien upon, or arise in connection with the use, occupancy or possession of, the Demised Premises or any part thereof or any appurtenances thereto for any portion of the term hereby granted; provided, however, that if any such real estate taxes and assessments or other such charges relate to a fiscal period of the taxing authority, a portion of which is included in the term of this lease and a portion of which is included in a period of time prior to or after the term of this lease, they shall be prorated based on the applicable portion of the fiscal period coinciding with the term of this lease and Lessee shall be required to reimburse Lessor for its pro rata share thereof. The Lessor shall in each instance submit to Lessee a bill evidencing the amount of said taxes and other charges and showing Lessee's pro rata share thereof, and Lessee shall be required to pay said bill within ten (10) days from receipt thereof. Said costs shall be billed to Lessee as often as Lessor is billed for said costs by the taxing authority.

For purposes of this paragraph and as used elsewhere in this lease, Lessee's pro rata share shall mean the percentage obtained by dividing the total rentable square feet of space leased by Lessee by the total rentable square feet of space in the building; provided, however, in the event the square footage occupied by Lessee in the building is increased or decreased, the Lessee's pro rata share shall be adjusted accordingly in accordance with the aforesaid formula.

10. Insurance. Lessor shall at Lessor's cost and expense (except to the extent reimbursed therefor for Lessee's pro rata share thereof, as hereafter provided) secure and keep in effect during the term insurance policies in the amounts and covering the following risks:

A. For the benefit of Lessor, with respect to the building and improvements in which the Demised Premises are located, insurance against loss or damage by fire and such other risks as are from time to time included in a standard form of all risk (special form) or a fire and extended coverage and additional perils policy of insurance available in the State of Ohio.

B. For the protection of Lessor and Lessee, comprehensive general public liability insurance against claims for bodily injury or death occurring upon, in, or under the common areas and common facilities, as hereafter defined, to the extent of not less than One Million Dollars (\$1,000,000) in respect to bodily injury or death to any one person, and to the extent of not less than Two Million Dollars (\$2,000,000) for bodily injuries or death to any number of persons arising out of one accident or disaster, and property damage with limits of not less than Three Hundred Thousand Dollars (\$300,000).

Lessee shall reimburse Lessor for its pro rata share of the premium cost to carry the aforesaid insurance described in subparagraphs A. and B., above, within ten (10) days from receipt of a bill from Lessor evidencing said costs and showing Lessee's pro rata share thereof. Lessor shall bill Lessee for such insurance costs as often as Lessor is billed therefor by Lessor's insurer.

C. Throughout the term of this lease, for the protection of Lessor, Lessee shall secure at Lessee's expense

comprehensive general public liability insurance against claims for bodily injury or death occurring upon, in, or under the Demised Premises to the extent of not less than One Million Dollars (\$1,000,000) in respect to bodily injury or death to any one person, and to the extent of not less than Two Million Dollars (\$2,000,000) for bodily injuries or death to any number of persons arising out of one accident or disaster, and property damage with limits of not less than Three Hundred Thousand Dollars (\$300,000). Lessor shall be named as an insured under said policy. Lessee shall provide Lessor with a certificate evidencing such insurance prior to commencement of the lease term and thereafter from time to time when requested by Lessor.

Lessor and Lessee agree that if the building and improvements at any time forming a part of the Demised Premises or the personal property of Lessee located in or about the Demised Premises shall be damaged or destroyed by an insured peril, and whether or not such damage or destruction was caused by the negligence of or any act or omission of the other party, the other's agents or employees, neither party shall have any liability to the other on account of such damage or destruction, or the cause thereof, except as hereinafter stated, and each party shall with due diligence require all policies of risk insurance carried by such party during the term of this lease to be endorsed with a provision by which the insurer designated therein shall waive its right of subrogation against the other party.

Furthermore, each of Lessor and Lessee agrees to, and does hereby waive all rights of recovery and causes of action against the other, the other's agents and employees, and all persons claiming through or under the other, relating to the loss of business, business interruption, or loss of rentals resulting from any damage or destruction to the Demised Premises, or building in which the Demised Premises are located, or any of Lessee's property contained therein, notwithstanding that any such damage or destruction may be due to the negligence or any act or omission of Lessor or Lessee, their respective agents or employees, as the case may be.

11. A. Repairs by Lessor. Subject to the provisions of this Paragraph 11., throughout the term of this lease, Lessor shall, at Lessor's expense (except to the extent reimbursed therefor by Lessee's pro rata share thereof as hereafter provided), maintain the building (including its principal components) and other improvements at any time located on the land described in Exhibit A (including, without limitation of the generality of the foregoing, the roof, foundation, vaults, fences, water, sewer and gas connections, pipes and mains, plumbing, heating and ventilation, and electrical systems, parking lots, driveways and other appurtenances) in as good and tenantable repair as at the commencement of the term of this lease, reasonable wear and tear excepted, provided Lessee notifies Lessor of the need for such repairs and further provided such repairs are not caused by the fault or negligence of Lessee, Lessee's agents and employees, except to the extent covered by Lessor's insurance. Said repairs shall include all necessary repairs, interior or exterior, ordinary as well as extraordinary, structural and otherwise, to the Demised Premises and building in which the same are located. When used in this Paragraph 11., the term "repairs" shall include replacements or renewals when necessary.

Lessor shall be responsible for the cost of operation and maintenance of the common areas and common facilities, as more fully described in Paragraph 25., below, including, without limitation, costs of equipping, removing snow and ice (except from sidewalks, which shall be done by Lessee at its expense), lighting, cleaning, landscaping, insuring, line painting, repairing and replacing, paying personnel to implement such services, plus fifteen percent (15%) of the foregoing costs for Lessor's administrative expenses in connection therewith.

Lessee shall reimburse Lessor for its pro rata share of all of the aforesaid costs (not covered by insurance and excluding structural repairs and replacements) set forth in this Paragraph 11.A., within ten (10) days from receipt of a bill therefor itemizing said costs and showing Lessee's pro rata share thereof. Said costs shall be billed by Lessor on an annual basis, or more frequently at Lessor's option.

B. Estimated Payments. In order to provide for current payments on account of the payments required for the operating and other expenses described in subparagraph 11.A., above, and to account for the payments required for real estate taxes and assessments and other charges pursuant to subparagraph 9.A., above, and the payments for insurance pursuant to Paragraph 10., above, Lessee agrees that Lessor may at its option at any time during this lease bill Lessee for the

estimated amount of such charges to be paid in monthly installments equivalent to 1/12 of the estimated amount of such charges for the year. If, as finally determined, Lessee's pro rata share of such expenses shall be greater than or less than the aggregate of all the monthly installments so paid on account to the Lessor, then Lessee shall promptly pay to Lessor the amount of such underpayment, or Lessor shall credit Lessee for the amount of such overpayment against the next installments of base rental due hereunder, or if such next installments are not sufficient in amount to cover the overpayment, shall promptly refund the overpayment to Lessee.

12. Repairs by Lessee and Surrender. Throughout the term of this lease, Lessee will keep and maintain the interior of the Demised Premises and any fixtures, facilities or equipment therein in a good state of repair, including, without limitation, all servicing and repairs required to the wiring, plumbing, sewage system, and heating and air cooling installations, ordinary wear and tear, damage by fire, casualty, invasion, acts of war, insurrection and the like, the elements and Acts of God excepted. Lessee shall also keep, maintain and repair all exterior door and window frames. Lessee will be liable for replacement of all broken glass of the same size and quality as that broken and will keep the entire Demised Premises in a clean, safe and healthy condition according to the applicable governmental ordinances and the direction of the proper public officers. Lessee shall, at Lessee's expense, remove the snow and ice from the sidewalks adjoining the Demised Premises. It shall be Lessee's obligation to obtain its own cleaning service, at its option. Lessee further agrees to deliver up and surrender to Lessor possession of the Demised Premises upon the expiration or other termination of this lease in as good condition as when taken, ordinary wear and tear and damage from the above-specified causes excepted.

13. A. Alterations. Lessee shall make no alterations in, or additions or improvements to, said Demised Premises without the written consent of Lessor first had and obtained, which consent shall not be unreasonably withheld. If any permitted alterations, additions or improvements in or to said Demised Premises are made by Lessee, the Lessee covenants and agrees that Lessee will make all such alterations, additions or improvements in or to said Demised Premises at Lessee's own expense. Any such permitted alterations, additions or improvements which are begun by Lessee shall be completed by Lessee. No alterations, additions or improvements shall be made which will weaken the structural strength of any building at any time forming a part of the Demised Premises. Lessee shall, in making any such alterations, additions or improvements, and/or in using and/or occupying the Demised Premises, comply with all applicable laws and ordinances pertaining to such work and/or such use or occupancy, including without limitation the Americans with Disabilities Act of 1990, and all rules and regulations issues thereunder. Any additions, alterations or improvements made by Lessee shall become and remain a part of the Demised Premises, and be and remain the property of Lessor upon the termination of this lease or Lessee's occupancy of the Demised Premises. Notwithstanding the above, Lessor may, by giving written notice to Lessee, require Lessee to restore the Demised Premises to the same condition they were in at the commencement of the lease term. In any event, Lessee shall have the right to remove all Lessee's trade fixtures, furnishings and other personal property in the Demised Premises which have been placed there by Lessee, even though the same be attached to said Demised Premises, upon the condition that the removal of any such annexation shall be effected before the expiration of the term of this lease, and that all damage caused to said Demised Premises by such removal shall be repaired by Lessee on or before the expiration of said term. Lessee shall indemnify and save harmless Lessor from and against all expenses, liens, claims or damages to either property or person which may or might arise by reason of such repairs, alterations, improvements, additions or removals.

B. Construction. Lessor shall, at its own expense, commence construction of the leasehold improvements for the Demised Premises and shall substantially complete the same with due diligence in accordance with the provisions of this Lease, subject to delays caused by the acts or omissions of Lessee, Lessee's agents and employees, governmental regulations, strikes, inability to obtain labor or materials, casualties, inclement weather and acts beyond the control of Lessor. Any delay in the substantial completion of Lessor's work attributable to acts or omissions of Lessee, Lessee's agents and employees, shall not delay the commencement date of the Lease and Lessee's obligation to pay rent. Lessor shall perform only the work which shall be set forth on mutually agreeable plans and specifications which must be completed by [date]. The plans and specifications will incorporate the building standard items and the Tenant Fit Plan set forth on Exhibit C, attached hereto and made a part hereof. Lessee shall perform all other work and make all other

installations necessary for the use of the Demised Premises by Lessee, at Lessee's expense, but only pursuant to plans and specifications approved by Lessor, and subject to all of the terms set forth in subparagraph 13.A., above.

Taking of possession by Lessee shall be conclusive evidence against Lessee that the Demised Premises are in good order and satisfactory condition, save and except for a punchlist which Lessee shall have the right to prepare and submit to Lessor. Lessor agrees to correct such punchlist items as soon as reasonably possible. No promise of Lessor to alter, remodel or improve the Demised Premises or the building, and no representation respecting the condition of the Demised Premises or the building have been made by Lessor to Lessee, unless the same is contained herein, or made a part hereof.

C. The Lessee shall not suffer or permit any mechanic's or other liens to be filed against the Demised Premises or any part thereof by reason of work, labor, services, or materials supplied or claimed to have been supplied to the Lessee or anyone holding the Demised Premises or any part thereof through or under the Lessee. If any such mechanic's lien or other liens shall at any time be filed against the Demised Premises, the Lessee shall cause the same to be discharged of record within thirty (30) days after the date of filing the same. If the Lessee shall fail to discharge such mechanic's lien within such period, then in addition to any other right or remedy of the Lessor, the Lessor may, but shall not be obligated to, discharge the same, either by paying the amount claimed to be due or by procuring the discharge of such lien by deposit in court, or by giving security or in such other manner as is, or may be, prescribed by law. Any amount paid by the Lessor for any of the aforesaid purposes, and all reasonable legal and other expenses of the Lessor, including reasonable counsel fees, in or about procuring the discharge of such lien, with all necessary disbursements in connection therewith, with interest thereon at the rate of seven percent (7%) per annum from the date of payment, shall be repaid by the Lessee to the Lessor on demand, and if unpaid may be treated as additional rent. Nothing contained herein shall imply any consent or agreement on the part of the Lessor to subject the Lessor's estate to liability under any mechanic's lien law.

14. Destruction of Demised Premises.

A. If the Demised Premises, or any part thereof, or building in which the same is located, shall be destroyed or damaged during the term of the lease, and the same can reasonably be repaired or restored within one hundred eighty (180) days following such occurrence, Lessee shall not be entitled to surrender possession of the Demised Premises, or any part thereof, nor shall Lessee's liability to pay rent under this lease cease; but in case of any such damage or destruction, this lease shall continue in full force and effect. Lessor shall be obligated to repair and reconstruct such damage as soon as reasonably possible, subject to delays beyond the control of Lessor. In the event of any such damage or destruction and the same cannot reasonably be repaired within one hundred eighty (180) days following such occurrence, Lessor or Lessee may elect to terminate this lease by written notice to the other within thirty (30) days following such damage or destruction. In the event neither Lessor nor Lessee so elects to terminate this lease, all proceeds of the insurance covering such damage or destruction shall belong absolutely to the Lessor. In the event that neither Lessor nor Lessee elects to terminate this lease, the Lessor's obligation shall be the same as described above under circumstances where the damage and destruction can be repaired within one hundred eighty (180) days.

B. If any damage or destruction to the Demised Premises or the repair or rebuilding thereof shall render the Demised Premises untenantable in whole or in part, Lessee shall be allowed a proportionate reduction or abatement of the rental and other charges hereunder corresponding to the time and space of which Lessee shall be deprived (giving due consideration to the reasonable use of the remaining portion of the Demised Premises) from the date of the occurrence of such damage or destruction until the date Lessee completes the repair or restoration thereof.

[C. For the purposes of subparagraph 14.B., above, the phrase "term of the lease" shall mean the next renewal term of this lease if Lessee, at any time prior to the expiration of fifteen (15) days after the occurrence of said destruction or damage, shall have exercised Lessee's option to extend the term pursuant to the provisions of Paragraph 4., above.]

15. Eminent Domain.

A. If all of the Demised Premises or building in which the Demised Premises are located, or the common areas or such portion thereof as shall substantially interfere with the Lessee's use and occupancy thereof, shall be condemned or taken by any governmental authority, or sold to any such governmental authority to prevent such taking, then this lease shall wholly terminate effective as of the date possession is taken by said authority and the rent, taxes, insurance and other items payable under this lease shall be equitably apportioned and paid to the time of such termination. Thereupon, all parties shall be relieved of any further obligations accruing under this lease.

B. If the amount of property or type of estate taken shall not substantially interfere with the conduct of Lessee's business, this lease shall continue in full force and effect, except that the rental shall be equitably reduced, and Lessor, at Lessor's expense, shall promptly commence and diligently complete the repair and restoration of the remainder of the Demised Premises, subject to delays beyond its reasonable control, to a condition as nearly equivalent as feasible to the condition of the Demised Premises existing prior to such taking.

C. Whether such taking shall be partial or the entire Demised Premises, and whether this lease shall by reason thereof be terminated or not, Lessee shall not, because of such taking, assert any claim against the taking authority or against Lessor for any compensation because of such taking, except that Lessee shall be entitled to make a separate claim for any rights Lessee may have for Lessee's cost of moving or relocating any trade fixtures, equipment or other personal property that Lessee placed upon the Demised Premises, or for the recovery of any other provable damages to Lessee's business. For this purpose, Lessee reserves the right to participate at Lessee's expense in any condemnation proceeding. In no event, however, shall the Lessee's rights, as stated above, reduce the Lessor's award from the condemning authority as the owner of all interests in the real estate.

[D. For the purposes of subparagraph 15.B., above, the phrase "term of the lease" shall mean the next renewal term of this lease if Lessee, at any time prior to the expiration of fifteen (15) days after the date possession is taken by the authority, shall have exercised Lessee's option to extend the term pursuant to the provisions of Paragraph 4., above.]

16. Rights of Lessor Upon Default.

A. This lease is made upon the condition that Lessee shall punctually perform all of its covenants and agreements as herein set forth and if,

(1) Lessee defaults in payment of rent, or any additional charge or amount of money to be paid by Lessee as provided in this lease, and such default shall continue uncorrected for a period of ten (10) days after written notice to the Lessee thereof; or

(2) Lessee defaults in the prompt and full performance and observance of any of the terms and conditions of this lease to be performed or observed by Lessee and not relating to the payment of money, and any such default shall continue uncorrected for a period of thirty (30) days after written notice to the Lessee thereof, or if any such last mentioned default cannot reasonably be corrected within such 30-day period, then if Lessee shall not within such period have commenced in good faith to correct such default; or

(3) Lessee abandons the Demised Premises; or

(4) Lessee becomes insolvent under state law, makes a general assignment for the benefit of creditors, a receiver or trustee is appointed to take possession of Lessee's assets and is not removed within thirty (30) days, or any execution, attachment or other order of court shall be issued upon or against the interest of Lessee in this lease and shall continue for a period of thirty (30) days after notice,

then in any such event, in addition to any and all rights and remedies allowed by law and equity, Lessor may, with or without further notice, forthwith terminate this lease and Lessee's right to possession of the Demised Premises, or Lessor may, without terminating this lease, terminate Lessee's right to possession of the Demised Premises.

B. Upon the termination of this lease, or upon the termination of Lessee's right to possession without termination of this lease:

(1) Lessee shall surrender possession and vacate the Demised Premises immediately, and Lessor may enter into and repossess said Demised Premises, with or without process of law, and remove all persons and property therefrom; and

(2) Lessor may remove from the Demised Premises any and all property found therein, and such repossession shall not release Lessee from Lessee's obligation to pay the rents herein provided.

C. In the event of termination of this lease as provided in this Paragraph 16., Lessor, in addition to any and all rights and remedies allowed by law and equity, shall upon such termination be entitled to recover damages in the amount equal to the then present value of the rent reserved in this lease for the entire residue of the stated term hereof less the then present worth of the fair rental value of the Demised Premises for the residue of the term hereof as then in effect, plus the costs incurred, including reasonable legal expenses, to terminate this lease and Lessee's possession of the Demised Premises.

D. In the event of any repossession by Lessor without terminating this lease, Lessor shall use Lessor's best efforts to relet and keep rented the Demised Premises or any part thereof, as agent of Lessee, to any person, firm or corporation, and on such terms as Lessor may determine, provided that Lessor shall use reasonable efforts to mitigate damages to Lessee arising from Lessee's continuing liability under this lease. Lessor may make repairs, alterations, replacements, and/or decorations in or to the Demised Premises to the extent reasonably necessary and advisable for the purpose of reletting the Demised Premises, and in the making of such repairs, alterations, additions, replacements and/or decorations shall not operate or be construed to release Lessee from liability hereunder; and Lessee shall upon demand pay the cost thereof, together with Lessor's expense of reletting (including reasonable legal expenses and brokerage commissions). If the rents collected by Lessor upon any such reletting are not sufficient to pay monthly the full amount of the rent reserved herein, together with the cost of such repairs, alterations, additions, replacements, decorations and expenses, Lessee shall pay to Lessor the amount of each monthly deficiency upon demand, and if the rent so collected from any such reletting is more than sufficient to pay the full amount of the rent reserved herein, together with such costs and expenses of Lessor, Lessor shall, at least every twelve (12) months after such eviction, account for any surplus to Lessee.

E. Any and all property which may be removed from the Demised Premises by Lessor may be handled, removed, stored, or otherwise disposed of by Lessor at the risk and expense of Lessee, and Lessor shall in no event be responsible for the preservation or the safekeeping thereof. Lessee shall pay to Lessor, upon demand, any and all expenses incurred in such removal and all storage charges against such property, so long as the same shall be in Lessor's possession or under Lessor's control. If any property shall remain in the Demised Premises or in the possession of Lessor, and shall not be retaken by Lessee within a period of twenty (20) days from and after the time when the Demised Premises are either abandoned by Lessee or repossessed by Lessor under the terms of this lease, said property shall conclusively be deemed to have been forever abandoned by Lessee.

17. Bankruptcy: Assumption; Assignment; Adequate Protection.

A. Chapter 7. If a petition is filed by or against Lessee under Chapter 7 of the Bankruptcy Code and the Trustee in Bankruptcy ("Trustee") elects to assume this lease for the purpose of assigning it or otherwise, the assumption or assignment, or both, may be made only if all of the terms and conditions of subparagraph 17.C., below, are satisfied. If the Trustee fails to assume this lease within sixty (60) days after the Trustee's appointment, or within such additional

time period as the Bankruptcy Court may allow, this lease shall be deemed to have been rejected. Assumption of this lease must satisfy all of the conditions of subparagraph 17.C., below, which Lessor and Lessee acknowledge to be commercially reasonable. In the event this lease is rejected, Lessor shall then immediately be entitled to possession of the Demised Premises without further obligation to Lessee or the Trustee and this lease shall be canceled. Lessor's right to be compensated for damages in the bankruptcy proceeding, however, shall survive.

B. Chapter 11. If a petition for reorganization under Chapter 11 of the Bankruptcy Code is filed by or against Lessee, or a proceeding that is filed by or against Lessee under any other chapter of the Bankruptcy Code is converted to a Chapter 11 proceeding and Lessee as debtor in possession fails to assume this lease within sixty (60) days from the date of filing of the petition or the conversion, or within such additional time period as the Bankruptcy Court may allow, debtor in possession will be deemed to have rejected this lease.

C. Assumption of Lease. Assumption of this lease must satisfy, in Lessor's business judgment, all of the following conditions which Lessor and Lessee acknowledge to be commercially reasonable:

(1) The Trustee or the debtor-in-possession has cured or has provided to Lessor adequate assurance, as defined hereinbelow that:

(a) The Trustee will cure all monetary defaults under this lease within ten (10) days from the date of the assumption; and

(b) The Trustee will cure all non-monetary defaults under this lease within thirty (30) days from the date of the assumption.

(2) The Trustee or the debtor-in-possession has compensated Lessor, or has provided to Lessor adequate assurance as defined hereinbelow, that within ten (10) days from the date of the assumption Lessor will be compensated for any pecuniary loss it incurred arising from the default of Lessee, Trustee, or the debtor-in-possession.

(3) The Trustee or the debtor-in-possession has provided Lessor with adequate assurance of future performance, as defined hereinbelow, of each of Lessee's obligations under the lease; provided, however, that:

(a) The Trustee or debtor-in-possession will also deposit with Lessor, as security for the timely payment of rent, an amount equal to three months base rental and other monetary charges accruing under this lease.

(b) If required by the terms of this lease, the Trustee or the debtor-in-possession will also pay in advance, on each day the base rental is payable one-twelfth (1/12) of Lessee's annual obligation for operating expenses and real estate taxes and assessments.

(4) Lessor has determined that the assumption of this lease will not:

(a) Breach any provision in any other lease, mortgage, financing agreement, or other agreement by which Lessor is bound relating to the Building; or

(b) Disrupt, in Lessor's judgment, the lessee mix of the Building or any other attempt by Lessor to provide a specific variety of tenants in the Building that, in Lessor's judgment, would be most beneficial to all of the tenants of the Building and would enhance the image, reputation and profitability of the Building.

(5) For purposes of this subparagraph 17.C., "adequate assurance" means that:

(a) The Trustee or the debtor-in-possession has, and will continue to have, sufficient assets to assure Lessor that Trustee

or the debtor-in-possession will have sufficient funds to fulfill Lessee's obligations under the lease and to keep the Demised Premises properly staffed with sufficient employees to conduct a fully operational, actively promoted business on the Demised Premises; and

(b) An order will have been entered segregating sufficient cash payable to Lessor and/or a valid and perfected first lien and security interest will have been granted on the property of the estate that is acceptable for value and kind to Lessor, to secure to Lessor the obligation of the Trustee or debtor-in- possession to cure the monetary or non-monetary defaults under this lease within the time period set forth above.

(c) If the Trustee or the debtor-in-possession has assumed the lease under the terms of subparagraphs 17.A. or 17.B., above, and elects to assign Lessee's interest under this lease or the estate created by that interest to another person, that interest or estate may be assigned only if Lessor acknowledges in writing that the intended assignee has provided adequate assurance of future performance, as defined hereinbelow, of all of the terms, covenants and conditions of this lease to be performed by Lessee.

(d) For the purposes of this Paragraph 17.C., "adequate assurance of future performance" means that Lessor has ascertained that each of the following conditions has been satisfied:

(i) The assignee has submitted a current financial statement, audited by a certified public accountant, that shows a net worth and working capital in amounts determined by Lessor to be sufficient or to assure future performance by the assignee of Lessee's obligations under this lease;

(ii) If requested by Lessor, the assignee will obtain guarantees in form and substance satisfactory to Lessor, from one or more persons who satisfy Lessor's standards of creditworthiness;

(iii) Lessor has obtained all consents or waivers from any third party required under any lease, mortgage, financing agreement, or other agreement by which Lessor is bound to permit the assignment;

(iv) When, pursuant to the Bankruptcy Code, the Trustee or the debtor-in-possession is obligated to pay reasonable use and occupancy charges for the use of all or a portion of the Demised Premises, the charge will be no less than base rental and additional rent and other monetary obligations of the Lessee included in this lease.

18. Lessor's Access to Demised Premises. Lessor reserves the right to enter the Demised Premises during the normal business hours of Lessee only, or at any time in case of an emergency, for the purpose of examining, repairing, renovating, improving and protecting the Demised Premises, or for the purpose of showing the Demised Premises to a prospective purchaser or mortgagee, and also during the last six (6) months of the term of this lease for the purpose of exhibiting the Demised Premises to prospective tenants and putting up the usual notice "to rent" or "for sale," which notice shall not be removed or hidden by Lessee.

19. Indemnity. Lessee agrees that no representations or warranties, either express or implied, have been made with reference to the condition of the Demised Premises or their fitness for the use of any purpose whatsoever. Lessee shall indemnify, defend and save harmless Lessor from any and all liabilities, damages, penalties, costs, expenses, claims, suits or actions due to or arising out of (i) any breach, violation or nonperformance of any covenant, condition or agreement in this lease contained on the part of Lessee to be fulfilled, kept, observed and performed; (ii) any damage to property or any injury to persons (including death) resulting at any time therefrom in, on, under or about the Demised Premises or the adjacent streets, sidewalks and other adjoining or adjacent areas caused by the negligence, willful acts or omissions of Lessee, or of the employees, agents, invitees, visitors, assignees and sublessees of Lessee, and the employees, agents, invitees and visitors of said assignees and sublessees; and (iii) any and all liens placed or permitted to be placed thereon by Lessee, or any other person claiming by, through, from or under Lessee.

20. Loss or Damage to Lessee's Property. All trade fixtures, equipment, inventory and all other personal property belonging to Lessee, Lessee's agents, or Lessee's guests, located in or about the Demised Premises shall be at the sole risk of Lessee, and Lessor shall not be liable for the theft or misappropriation, nor for any damage or injury thereto, nor for any damage or injury to Lessee, or any of Lessee's officers, agents, employees, licensees or guests, or to other persons or to any property caused by fire, explosion, wind, water, rain, snow, frost, steam, gas, electricity, any Acts of God, heat or cold, dampness, falling plaster and/or ceilings, sewers or sewage odors, noise, leaks from any part of said building or by the bursting or leaking of pipes, plumbing, electrical wiring and equipment and fixtures of all kinds, or by any act or neglect of any other tenant or of any person; provided, however, subject to the provisions of Paragraph 10., Lessor shall not be relieved of liability for the negligence, intentional wrongful acts or omissions of Lessor, Lessor's agents and employees.

21. Assignment and Subletting. Lessee shall not be permitted to mortgage, pledge or encumber this lease. Lessee may sublet all or any part of the Demised Premises and may assign this lease or any interest Lessee may have hereunder, whether voluntarily or involuntarily, by operation of law or otherwise, provided that:

(1) the signed written consent of the Lessor to any such subletting or assignment shall first be obtained (which consent shall not be unreasonably withheld); and

(2) in the event of any such permitted assignment or subletting, Lessee shall remain liable as Lessee for the performance of all of the conditions and covenants on the part of Lessee to be performed under this lease, unless Lessor shall otherwise expressly consent in writing.

Lessee shall supply to Lessor all financial and other information with respect to a prospective assignee or sublessee as required by Lessor. The parties hereby agree that it shall be reasonable under this lease or under any applicable law for Lessor to withhold consent to any proposed transfer to a sublessee or assignee where one (1) or more of the following applies (without limitation as to other reasonable grounds for withholding consent): (i) the proposed sublessee or assignee is of the character or reputation or engaged in a business which is not consistent with the quality or nature of the other tenants in the Building, or would be a significantly less prestigious occupant of the Building than Lessee, (ii) the sublessee or assignee intends to use the Demised Premises, or any portion thereof, for purposes which are not permitted under this lease, (iii) the sublessee or assignee is either a government (or agency or instrumentality thereof), (iv) the proposed sublessee or assignee or affiliate thereof is an occupant of the building, or has negotiated to lease space in the building from Lessor during the prior twelve (12) months, (v) the proposed sublessee or assignee does not have, in Lessor's sole good faith determination, satisfactory references or a reasonable financial condition in relation to the obligations to be assumed in connection with the sublease or assignment, (vi) the sublease or assignment involves a partial or collateral assignment, or a mortgage, pledge, hypothecation, or other encumbrance or lien on this lease, or is a transfer by operation of law, (vii) the proposed sublease or assignment would cause Lessor to be in violation of any laws or any other lease, mortgage or agreement to which Lessor is a party, would give another tenant in the building a right to cancel its lease, or would create adverse tax consequences for Lessor, or (viii) Lessee has committed a default under this lease and failed to cure the same within the applicable grace period. If Lessee disagrees with Lessor's decision to deny approval, Lessee agrees that its sole remedy shall be to seek injunctive relief.

Any attempt to assign this Lease or to sublet all or any portion of the Demised Premises, without Lessor's prior written consent, shall be void and, at Lessor's option, shall constitute an event of default under this lease. The right on the part of Lessee to assign this lease under any of the foregoing provisions of this Paragraph 21 shall be upon the express condition that such assignment shall be in writing, executed by Lessee and the assignee, that in such writing the assignee shall, in consideration of such assignment, agree to assume, perform and be bound by all of the terms, obligations and conditions on the part of Lessee to be performed under this lease, and that a duplicate executed counterpart of such instrument of assignment and assumption shall be delivered to Lessor within ten (10) days after the execution thereof. For purposes of this lease, the sale or transfer of the majority of the common stock of Lessee, or the majority of the beneficial or equitable interests of the owners of a non-corporate Lessee, shall be considered an

assignment of the lease subject to the provisions of this Paragraph 21 In the event Lessor consents to any such assignment or sublease to any assignee or sublessee that is not related to Lessee in the manner hereafter described in the next paragraph, all options granted to Lessee herein, if any, whether renewal, expansion or otherwise, shall not apply to such assignee or sublessee.

Notwithstanding the foregoing, if Lessee is a corporation, Lessee shall have the right to assign this lease or sublet a portion thereof without Lessor's consent to any subsidiary, parent or successor corporation of Lessee. A successor corporation shall mean any corporation or entity which shall acquire all or a substantial part of the assets in business of Lessee whether by merger, consolidation, dissolution, corporate reorganization or otherwise. However, in such event, Lessee shall remain liable under this lease and shall notify Lessor in writing of such event within thirty (30) days of its occurrence, and of the exact name and address of the new entity.

If Lessee requests that Lessor consent to a sublease of the Demised Premises or a portion thereof, or an assignment of the Demised Premises (other than in connection with the sale of Lessee's business) in lieu of granting such consent, Lessor shall have the right and option to exclude ("recapture") from this lease the space proposed to be subleased or assigned, effective as of the proposed commencement date of the sublease. If Lessor elects to recapture such space, Lessor shall give Lessee written notice thereof within thirty (30) days of receipt of Lessee's written request to sublease such space, in which event Lessee shall surrender such space as of the proposed commencement date. Effective as of the date of recapture of the space proposed to be subleased or assigned, the base rent and additional rent with respect to such recaptured space shall be prorated as of such date, and if the space to be recaptured is not the entire Demised Premises, the base rent and additional rent for the balance of the term shall be adjusted accordingly.

Lessee shall submit all requests for Lessor's consent to an assignment or sublease in writing to Lessor, accompanied by a non-refundable service fee of \$500 to cover Lessor's consideration of the request. Such written request shall include the name and address of the proposed sublessee, and the terms of the proposed sublease, including without limitation, the sublease term, rental rate and description of the space. In addition, Lessee shall be responsible for the reasonable legal fees incurred by Lessor in connection with (i) the review of any subleases and preparation or review of consents to subleases, and in connection with the review or preparation of any assignments of the Lease or consents to assignments; and (ii) the review or preparation of any construction contracts related to the buildout of space for the subtenant or assignee.

22. A. Limitation of Lessor's Liability. The term "Lessor," as used in this lease so far as covenants or obligations on the part of Lessor are concerned, shall be limited to mean and include only the owner or owners at the time in question of the fee of the Demised Premises. In the event of any transfer or transfers of title to such fee, the Lessor herein named (and in case of any subsequent transfers or conveyances, the then grantor) shall be freed and relieved from and after the date of such transfer and conveyance of all liability with respect to performance of any covenants or obligations on the part of Lessor contained in this lease thereafter to be performed. Without further agreement, the transferee of such title shall be deemed to have assumed and agreed to observe and perform any and all obligations of the Lessor hereunder during the transferee's ownership of the Demised Premises. Lessor may transfer Lessor's interest in the Demised Premises without the consent of Lessee, and such transfer or subsequent transfer shall not be deemed a violation on Lessor's part of any of the terms and conditions of this lease.

B. No Personal Liability. Notwithstanding anything to the contrary contained in this lease, it is expressly understood and agreed, such understanding and agreement being a significant and material inducement to the execution of this lease by Lessor, that (i) there shall be absolutely no personal liability of whatever nature imposed upon Lessor or Lessor's officers, agents, employees, personal representatives, successors and assigns, with respect to any terms, covenants or conditions of this lease, (ii) in the event that Lessor shall commit a default or breach of any of the terms, covenants or conditions hereof and Lessee shall obtain a judgment against Lessor for such default or breach, Lessee's sole exclusive remedy for the enforcement and collection of such judgment shall be the institution of foreclosure or other appropriate execution proceedings solely against the land on Exhibit A and improvements thereon, and (iii) regardless of whether or

not the proceedings described in "(ii)" immediately above shall result in a complete satisfaction of Lessee's judgment, in no event (whether by proceedings at law, in equity, administrative proceedings or otherwise) shall any deficiency or other personal judgment be rendered or enforced against Lessor or Lessor's officers, agents, employees, personal representatives, successors or assigns.

23. Mortgage Subordination. The Lessee understands that Lessor may have or hereafter desire to place a mortgage upon all or part of the land described herein and the building constructed thereon. It is further understood that the mortgagee of said mortgage may require that the within lease be subordinated to said mortgage, in which event Lessee agrees to execute any document required by such mortgagee to evidence such subordination; provided, however, that the mortgagee of any such mortgage shall covenant in writing that the Lessee's leasehold interest hereunder shall not be foreclosed in any action brought under such mortgage or in the event of a sale of the Demised Premises as a result of said action if at the time of bringing an action to foreclose or at the time of said sale the Lessee is not in default in the payment of rental or in the performance of any other obligation under this lease, with due allowance to be given for the payment of any past due rental or for the correction of any other default by Lessee within the period of time permitted after any notice is given or required to be given by the terms of this lease. It is further understood that the mortgagee of said mortgage may require that the Lessee agree to attorn to any purchaser of the property in the event that the same should be sold through foreclosure proceedings, and that the Lessee agrees to waive any and all rights to treat any such foreclosure proceedings as a breach of the lease by Lessor, in which event Lessee agrees to execute any document required by such mortgagee to evidence such agreements.

24. Estoppel Certificate by Lessee. Lessee will execute, acknowledge and deliver to Lessor, promptly upon request, a certificate certifying that (a) this lease is unmodified and in full force and effect (or, if there have been modifications, that the lease is in full force and effect, as modified, and stating the modifications), (b) the dates, if any, to which basic rent, additional rent and other sums payable hereunder have been paid, and (c) no notice has been received by Lessee of any default which has not been cured, except as to defaults specified in said certificate, it being intended that any such certificate may be relied upon by any prospective purchaser or mortgagee of the property or any part thereof.

25. Common Areas. "Common areas" and "common facilities," as used in the within lease, include, without limitation, all of the parking areas, approaches, entrances, driveways, sidewalks and service areas and landscaping located on the parcel of real estate described on Exhibit A, and all public or semi-public parts of the building in which the Demised Premises are located, including, without limitation, halls, exits, stairs, lavatories, doors or windows. Lessor shall operate, manage, equip, repair, replace and maintain the common areas and common facilities for their intended purposes in such manner as Lessor shall, in Lessor's sole discretion, determine; provided, however, Lessor agrees to keep said common areas and common facilities clean and to remove snow and ice from the parking areas and driveways as promptly as possible.

Lessor reserves the right to change the location, size, elevation or nature of the common areas and common facilities, including without limitation, the right to construct an additional building containing approximately 3,000 square feet on the parcel on which the building is situated. Such building, if constructed, shall be at Lessor's sole cost and expense. In the event such building is constructed, it is anticipated that the tenants of such building shall share in the use of the common areas. In such event, those expenses related solely to the use of the outside common areas by the tenants of both buildings shall be passed on pro rata to the tenants of both buildings, based on an allocation to the tenants taking into consideration the total rentable square feet in both buildings. The pro rata share of those common area expenses shall be equivalent to the percentage obtained by dividing the rentable square feet in the Demised Premises by the total rentable square feet in both buildings. Lessor may, from time to time, make reasonable rules and regulations for the use of said common areas and common facilities, which regulations shall be promulgated when established.

The Lessee, Lessee's agents, employees and invitees, shall have the right to use said common areas and common facilities jointly with Lessor, Lessor's agents and employees, and other tenants of the above-described building, their agents, employees and invitees. All of such use of any of the common areas and common facilities shall be such as will

not unreasonably obstruct or interfere with the joint use thereof, and shall be in compliance with all applicable laws, rules and regulations.

26. Signs. Lessee shall have the right to erect and maintain upon the Demised Premises, at Lessee's expense, all signs necessary or appropriate to the conduct of the business of Lessee which are not in violation of any governmental rule or regulation and will not invalidate any insurance policy of Lessor; provided, however, that Lessee shall not have the right to erect or maintain in or upon the Demised Premises any sign, the erection, maintenance or removal of which will operate to decrease the value of the Demised Premises or impair the structural integrity of the building, without the Lessor's prior consent in writing. Installation of any exterior signs, however, shall be subject to the prior written approval of Lessor as to design, size and location, it being understood that the Demised Premises are part of an integrated and uniform commercial building, and that control of exterior signs by Lessor is essential.

Lessee shall maintain said signs in good condition and repair at all times, and shall save Lessor harmless from injury to person or property arising from the erection or maintenance of said signs. Any signs placed in or upon the Demised Premises, upon the written request of Lessor, shall be removed by Lessee at Lessee's expense upon the expiration or sooner termination of this lease, and all damage caused by the removal of such signs shall be fully repaired at the cost and expense of Lessee.

27. Quiet Enjoyment. The Lessor covenants that Lessor has lawful title to the above-described real property and the right to make this lease for the term aforesaid and, conditioned upon the prompt performance and observance by the Lessee, Lessee's agents and employees, of all of the terms, covenants and conditions hereof required to be performed or observed by Lessee, Lessee's agents and employees, Lessee shall at all times during the term of this lease have the peaceable and quiet enjoyment of the Demised Premises.

28. Withholding Premises. Should Lessee withhold possession of the Demised Premises after the termination of this lease, whether by lapse of time or otherwise, Lessee shall be subject to all of the terms of this lease except the rent required to be paid shall be at a rate equal to two (2) times the base rental (plus additional rental payments) required to be paid immediately prior to such holdover. In addition, if Lessor shall suffer any damage or loss which may result from Lessor's inability to timely deliver the Demised Premises to a subsequent tenant, Lessee shall promptly pay the amount to Lessor. Should Lessee occupy the Demised Premises after the termination of this lease for any cause whatsoever, Lessee shall be considered a tenant-at-will and by sufferance of Lessor and no such occupancy shall operate as a renewal of the lease or any part thereof.

29. Effect of Demand. Any demand for rent upon the Lessee after the same shall have become due and payable, or for the performance or observance of any covenant or condition of this lease after the same is required to be performed or observed under the provisions hereof, shall have the same effect as though made at the time and place such rent became due or such obligation should have been performed or observed, any law to the contrary notwithstanding.

30. Effect of Waiver. No waiver of any condition or covenant of this lease or of the breach of any condition or covenant shall be taken to constitute a waiver of any subsequent breach of such condition or covenant, or to justify or authorize the nonobservance on any other occasion of the same or any other condition or covenant thereof. The acceptance of rent by the Lessor at any time when the Lessee is in default of any covenant or condition shall not be construed as a waiver of such default or of the Lessor's rights under Paragraph 16., above, on account of such default, nor shall the payment of rent by the Lessee at any time when Lessor is in default under any covenant or condition hereof be construed as a waiver of such default, nor shall any waiver or indulgence granted by the Lessor or Lessee be taken as an estoppel against the party granting the same.

31. Notices. Whenever Lessor or Lessee shall make any demand or serve any notice which is required to be in writing under the terms of this lease upon the other, the same shall be in writing and shall be sufficiently given if sent, postage prepaid, by United States registered or certified mail, or delivered by a nationally recognized overnight courier,

addressed to Lessee at _____, _____, and addressed to Lessor at _____, _____, or at such other address as Lessor or Lessee may theretofore by written notice to the other have designated for the service of such notice.

32. Terminology; Captions. Where the context so requires or such interpretation is appropriate, any word used herein denoting gender shall include all genders, natural or artificial, and the singular and plural shall be interchangeable. The term "paragraph" shall refer to all paragraphs under the caption in question, where appropriate. The captions of the various provisions of this lease are for convenience only and in no way define, limit or describe the scope or intent of this lease or the provisions which they precede or in any other manner affect this lease.

33. Short-Form Lease. This lease shall not be recorded, but the parties agree to execute a skeleton lease incorporating the terms of this lease and including a legal description of the property upon which the Demised Premises is situated, at the request of Lessee or Lessor. The same shall be duly executed in form suitable for recording, and any costs incurred in connection therewith shall be at the expense of the party requesting same.

34. Successors and Assigns. This lease and the covenants and conditions herein contained shall inure to the benefit of and be binding upon Lessor, Lessor's successors and assigns, and shall be binding upon and inure to the benefit of Lessee, Lessee's heirs, legal representatives, or successors and those assignees of Lessee who become assignees in accordance with and as permitted by the terms of Paragraph 21., above.

35. Severability. In case any one or more of the provisions contained herein shall for any reason be held to be invalid, illegal or unenforceable in any respect, such invalidity, illegality or unenforceability shall not affect any other provision of this lease, but this lease shall be construed as if such invalid, illegal or unenforceable provisions had not been contained herein.

36. Broker. Lessor warrants, which warranty shall survive the execution of this lease, that no brokerage fee or other compensation is due any real estate broker or other person or entity by reason of this transaction, except _____, who shall be paid by Lessor. Lessee warrants, which warranty shall survive the execution of this lease, that no broker induced Lessee to enter into this transaction, except _____. Lessor and Lessee each agree to indemnify, defend and hold harmless the other from any breach of said warranties.

37. Rules and Regulations. Lessor reserves the right from time to time to adopt such rules and regulations as Lessor may deem necessary for the preservation, safety, care, cleanliness or operation of the building, common areas and common facilities, provided such rules and regulations are promulgated by Lessor and are uniformly enforced among all of the tenants in the building.

38. Authority of Lessee. Lessee hereby agrees that prior to Lessee's execution and delivery of this Lease to Lessor and as a condition of Lessor's duties and obligations hereunder, Lessee will provide Lessor with such reasonable documentation as Lessor may require, including, without limitation, a resolution evidencing the Lessee's authority to execute and deliver this Lease.

39. Confidentiality. Lessee shall keep the content and all copies of this lease, related documents or amendments now or hereafter executed, and all proposals, materials, information and matters relating thereto strictly confidential, and shall not disclose, disseminate or distribute any of the same, or permit the same to occur, except to the extent reasonably required for proper business purposes by Lessee's employees, attorneys, insurers, auditors, lenders and permitted assignees or sublessees (and Lessee shall obligate any such parties to whom disclosure is permitted to honor the confidentiality provisions hereof), and except as may be required by law or court proceedings.

40. Remedies Not Exclusive. All rights and remedies of the Lessor and Lessee herein set forth shall not be exclusive, but shall be in addition to any and all rights and remedies allowed by law and equity.

41. Entire Agreement. This lease contains the entire agreement between the parties hereto; and any agreement hereafter or heretofore made shall not operate to change, modify, terminate or discharge this lease, in whole or in part, unless such agreement is in writing and signed by each of the parties hereto.

The parties hereto have signed this Indenture of Lease as of the date first above written.

LESSOR

By:_____

LESSEE

By:_____

[Acknowledgments]

[Attach Exhibit A]

[Attach Exhibit B]

[Attach Exhibit C]



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Current Legal Forms for Real Estate

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Current Legal Forms for Real Estate
Chapter 23 REAL ESTATE LEASES
Part IV. Forms

A. COMPLETE LEASES AND RELATED AGREEMENTS

31-23 Current Legal Forms for Real Estate FORM 23.23

AUTHOR: by Thomas G. Belden

FORM 23.23 Restaurant lease in office building--tenant to perform the buildout of leasehold improvements

COMMENT

This form was used for a restaurant lease on the ground floor of a high-rise office building. The tenant has agreed to pay, in addition to the base rent, its pro rata share of increases in real estate taxes and assessments and insurance to carry a fire and extended coverage or all risk policy of insurance upon the building in which the premises are located. In this particular lease, the tenant is only required to pay its pro rata share of such increases over a base year as defined in Paragraph 4. of the lease. In addition, in Paragraph 4.A.(2), the tenant is also required to pay its pro rata share of certain operating expenses with respect to the maintenance and repair of the common areas and facilities located outside of the building. Tenant's pro rata share of these operating expenses are passed on to the tenant on a dollar for dollar basis, not just the increases over a base year. Unlike other office space tenants in the building, the common area expenses for the maintenance and repair of the common areas inside the building are not required to be paid by this restaurant tenant because this restaurant tenant is not using those common areas. It has direct access to its space from the outside of the building, and has its own restroom facilities. The definition of "operating expenses" and how inclusive it is, is always a matter of negotiation between the landlord and the tenant. In this particular lease, the tenant was able to negotiate several exclusions from the definition of operating expenses, which exclusions are set forth on Exhibit B-1 attached to the lease.

In this transaction, the tenant has agreed to take the premises in their "as is" condition and to perform its own buildout of the space pursuant to the terms of Paragraph 9.B.(1) of the lease, but within the time period referred to in that paragraph. The tenant has also agreed to purchase the existing restaurant equipment left in the premises by the prior tenant. Finally, it should be noted

that the transaction is contingent upon the tenant obtaining all building permits and licenses referred to under Paragraph 9.B.(5) of the lease, and is contingent upon the ability to obtain a liquor license for use in connection with its restaurant operation as referred to in Paragraph 9.D. of the lease.

It should also be noted that in this lease, because of the size of the restaurant, parking is an important issue for the tenant and must be adequately spelled out in the lease. In Paragraph 22.B. of the lease, the tenant is granted the right to the use of the non-exclusive parking areas around the building, but in addition is granted the right to the exclusive use of certain parking spaces located on an adjoining piece of property over which the landlord has easement rights for parking purposes. Those all must be properly identified in the lease or on exhibits to the lease, and tenant's counsel should make sure that it reviews the documents which created the parking easement in the first instance.

FORM

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INDENTURE OF LEASE

THIS INDENTURE OF LEASE is made and entered into at _____, _____ [city, state] this _____ day of _____ [date], by and between _____, hereinafter called "Lessor," and _____ hereinafter called "Lessee."

WITNESSETH:

1. Demised Premises

A. For the rents and upon the terms and conditions hereinafter set forth, Lessor hereby leases to Lessee certain premises, containing approximately _____ square feet of floor space in the building located on the parcel of land described on Exhibit A, attached hereto and made a part hereof, being delineated in red on the floor plan marked Exhibit B, attached hereto and made a part hereof, hereinafter called the "Demised Premises."

B. Lessee has examined the Demised Premises and the same are known to the Lessee to be in good condition and repair, and Lessee hereby accepts them in their present "as is" condition.

C. Lessor reserves the right to place, maintain, repair and replace utility lines, pipes, tunneling and the like, in, under, over and through the Demised Premises as may be reasonably necessary or advisable for the servicing, renovation, improvement or repair of the building in which the Demised Premises are located. Lessor shall have the right to the use

of the roof and exterior walls of the Demised Premises for such purpose. Lessee agrees that none of the aforesaid work shall permit Lessee to receive an abatement of rent or to make a claim for any damages or losses to Lessee or Lessee's business resulting directly or indirectly therefrom, provided the aforesaid work does not unreasonably interfere with Lessee's use or occupation of the Demised Premises and the operation of Lessee's business therein.

2. Term. Lessee shall hold the Demised Premises for the term of _____ (_____) years, commencing upon (i) one hundred twenty (120) days after the execution of this lease, or (ii), the date Lessee begins doing business at the Demised Premises, whichever shall first occur (the "Commencement Date"). However, if Lessee's Work as described in Paragraph 9.B., below, is not substantially completed within such 120-day period despite Lessee's commercially reasonable efforts, and provided Lessee can substantiate such fact to Lessor's reasonable satisfaction, Lessee shall have up to an additional thirty (30) days before the lease commences, but in no event shall the Commencement Date be later than one hundred fifty (150) days from the date of execution of this lease or the date Lessee begins doing business at the Demised Premises, whichever is sooner. The term shall expire on the _____ (_____) year anniversary of the Commencement Date, unless the term hereby demised shall be sooner terminated. If the Commencement Date is other than on the first day of the month, then the Commencement Date of the lease term shall be the first day of the month next following, and the expiration date shall be _____ (_____) years after such date. However, during the partial month preceding the Commencement Date of the lease term, all provisions of this lease shall be in full force and effect and the rent for such partial month shall be prorated based on the applicable number of days in the partial month in question to the total number of days in the month, multiplied times the monthly rate of rent payable during the first full month of the lease.

3. Base Rental. In consideration of said demise, Lessee covenants and agrees to pay to Lessor, without deduction or setoff of any kind, as base rental for the use of the Demised Premises during the first _____ (_____) years of the term hereof, the sum of _____ Dollars (\$ _____) per annum, in equal monthly installments of _____ Dollars (\$ _____) each, and during the final _____ (_____) years of the term hereof, the sum of _____ Dollars (\$ _____) per annum, in equal monthly installments of _____ Dollars (\$ _____), payable in current legal tender of the United States of America, as the same is then by law constituted. All such sums (hereinafter sometimes called the "base rental") are due and payable in advance, on the first day of each and every calendar month during said term, at _____, _____, _____, _____, _____, or at such other place as Lessor may in writing designate. All rent and other charges not paid by Lessee within ten (10) days of its due date shall bear interest at the rate of interest equal to two points in excess of the base lending rate of _____ Bank, or its successor, then in effect at the time, until paid.

4. Additional Payments

A. Additional Rent.

(1) For purposes of this subparagraph 4.A., the "base year" shall be the calendar year [date], and each calendar year thereafter during the term of this lease shall be deemed to be the "comparison year." The annual base rental shall be adjusted for each comparison year or part thereof comprised in the term hereof by an amount equal to the Lessee's proportion, as hereinafter defined, of any increases for the comparison year over the base year in the amount of:

(i) real estate taxes and assessments, general and special, levied upon the parcel of land described on Exhibit A and the building in which the Demised Premises are located and other improvements thereon, including any tax or other imposition charged by any governmental authority (other than income or franchise tax) against said land, building and improvements, the tenancy created hereby, or the rental provided herein, in substitution for or in addition to said real estate taxes and assessments, in whole or in part; and

(ii) the insurance premium paid by Lessor to carry a fire and extended coverage and additional perils (or all risk [special form]) policy of insurance upon the building in which the Demised Premises are located and other improvements in or upon the land described on Exhibit A.

(2) In addition, Lessee shall pay to Lessor as additional rent for each calendar year or partial year during the term hereof an amount equal to "Lessee's proportion" of the Operating Expenses (as hereinafter defined) incurred by Lessor during any lease year (or during any calendar year of which the lease year of less than twelve (12) months shall be a part) during the term hereof. The term "operating expenses" shall mean all costs and expenses of every kind and nature paid or incurred by Lessor with respect to the operation and maintenance of common areas and common facilities located outside of the Building as defined in Paragraph 22., below. Such costs and expenses shall include, without limitation, costs of: sanitary, water and storm sewer charges, maintaining and repairing the exterior of the building, removing snow and ice, cleaning, gardening and landscaping, lighting, insuring (including, without limitation, public liability, property damage, automobile, rental, sign and other insurance (excluding fire and extended coverage and additional perils) in limits selected by Lessor), repairing and replacing the parking lot and driveways, line painting, and providing police, security and fire protection services, fire hydrant charges, sweeping, garbage removal and other sanitary control services, renting and/or depreciation or expensing of machinery, equipment and tools used in such maintenance, utility charges not paid by Lessee pursuant to Paragraph 7., below, and the cost of personnel to implement such services and similar services and functions. Notwithstanding the foregoing, the term Operating Expenses shall not include any items described in Exhibit B-1, attached hereto and incorporated herein.

In the event the term of this lease shall terminate other than on the last day of a calendar year, the rental adjustments provided herein shall be prorated for the applicable portion of the part year in question.

(3) For the purposes of this subparagraph 4.A., the "Lessee's proportion" shall be the percentage equivalent of the fraction having as its numerator _____ square feet and having as its denominator the total number of square feet of rental space in the building (_____ square feet), or _____ percent (_____%); provided, however, in the event that the square footage occupied by Lessee in the building in which the Demised Premises are located, shall be increased or decreased, the "Lessee's proportion" shall be a fraction having as its numerator the total number of square footage occupied by Lessee in the building and having as its denominator the total number of square footage of rentable floor space in said building.

(4) With respect to the payment by Lessee of Lessee's proportionate share of real estate taxes and assessments or other impositions and the fire insurance premium as required by subparagraphs 4. A.(1)(i) and (ii), above, Lessor shall notify Lessee in writing of the amount of said real estate taxes and assessments and insurance premium, submit proof of payment of said amounts, and notify Lessee of Lessee's proportion of any increase over the base year amounts thereof. In the event that such amounts result in any increase over the base year amounts, Lessee shall pay Lessee's proportion thereof to Lessor within thirty (30) days of receipt of said notice.

As soon as reasonably possible after the close of each comparison year, Lessor shall notify Lessee in writing of Lessee's proportion of operating expenses. During the next thirty (30) days following receipt of such notice, Lessee shall be entitled to reasonably examine Lessor's books and records regarding such operating expenses. Within thirty (30) days following receipt of said notice Lessee shall pay to Lessor Lessee's proportion thereof. Lessor shall have the right, for a period of twelve (12) months following any such written notice (or such longer period as may be reasonably required to accurately ascertain the facts relating to such notice), to send corrected statements of the notice to Lessee, and any rent adjustments required thereby shall be made within thirty (30) days after Lessor's delivery of the corrected statements.

(5) Each year during the term, in order to provide for current payments on account of any increases in real estate taxes and assessments or any increase in the insurance premium as described above, and each year (or partial year) during the term hereof in order to provide for current payments on account of the payment of Lessee's proportion of operating

expenses, Lessee agrees that all monthly installments of rent coming due thereafter shall be adjusted by Lessor to the extent necessary to pay an estimated adjusted base rental. The estimated adjusted base rental shall be paid in monthly installments equivalent to one-twelfth (1/12) of the amount of the adjustment; provided, however, that the first monthly payment made after the estimated adjusted base rental as computed shall include the monthly adjustment for the months which have elapsed in the year then in effect prior to the said first monthly payment. If, as finally determined, Lessee's proportion shall be greater than or less than the aggregate of all installments so paid on account to the Lessor for a year, then Lessee shall pay to Lessor the amount of such underpayment, or the Lessor shall credit Lessee for the amount of such overpayment against the next installments of base rental due hereunder, or if none, shall promptly refund the overpayment to Lessee.

(6) Within thirty (30) days following receipt by Lessee of written notice by Lessor as provided in the foregoing subparagraph 4. A.(4), Lessee shall be entitled to notify Lessor in writing of any claim by Lessee with respect to the accuracy of the determination of the amount paid by Lessee to Lessor pursuant to the provisions of subparagraph 4. A.(4). Notwithstanding any such claim made by Lessee, a payment from Lessee to Lessor as provided in subparagraph 4. A.(4) shall be paid in accordance with the provisions of subparagraph 4. A.(4). In the event that any such claim of Lessee shall not be resolved by the parties within thirty (30) days of said written notice of said claim, said claim shall be settled and determined by arbitration in accordance with the commercial rules of the American Arbitration Association, or its legal successors, then in effect; and the decision of said arbitration, including the decision with respect to the allocation of costs of said arbitration as between the Lessor and Lessee, shall be binding upon Lessor and Lessee. Within ten (10) days following receipt of notification of the decision of said arbitration, Lessor shall pay to the Lessee any amount due the Lessee by reason of said decision of the arbitration or conclusion of said contest.

B. Option to Renew. The Lessee shall have the option to extend the term of this lease for two (2) additional terms of five (5) years each, provided that Lessee is not in default of any and all of the terms, covenants and conditions of this lease either on the date that notice of extension is given or on the Commencement Date of the extended term. Such option to extend shall be exercised by the Lessee by giving written notice to the Lessor not less than six (6) months prior to the expiration date of the original term of the lease. The extension of this lease shall be upon the same terms, covenants and conditions as are contained in the lease except that the base rental for the first renewal term shall be _____ Dollars (\$ _____) per annum, payable in equal monthly installments of _____ Dollars (\$ _____) each, and the base rental for the second renewal term shall be _____ Dollars (\$ _____) per annum, payable in equal monthly installments of _____ Dollars (\$ _____) each.

C. Services. Lessor shall not be obligated to furnish any services within the Demised Premises. Lessee shall pay for its own rubbish removal. Lessor has installed a dumpster for rubbish removal in an area outside the Demised Premises for Lessee's use, provided, however, that Lessee shall in all events be responsible for contracting for and paying for removal of rubbish from the dumpster.

5. Use. The Demised Premises shall be used solely for the operation of a first class restaurant serving a variety of foods with the incidental privilege of the sale of alcoholic beverages and for no other purpose. Lessee shall, at all times, operate its restaurant as a full service first class restaurant in a first class building. Lessee agrees to keep open and operate its restaurant during the usual and customary hours for a first class restaurant, but in no event less than 11:00 a.m to 10:00 p.m. Monday through Thursday, 11:00 a.m. to 11:00 p.m. on Friday, and 12:00 p.m. to 11:00 p.m. on Saturday. Lessor agrees that Lessee may in the future open its restaurant on Sunday during its normal and customary hours for such day. The statement in this lease of the nature of Lessee's business does not constitute a representation by Lessor that such business is lawful or otherwise permitted by law at the Demised Premises. Lessee shall not use or occupy, or permit the use or occupancy of, the Demised Premises, or any part thereof, in any unlawful manner or for any illegal purpose or in such a manner as to constitute a nuisance or violate the terms and conditions of any certificate of occupancy or equivalent use permit applicable to the Demised Premises, or for any purpose or in a manner likely to cause structural injury, and shall not use or occupy or permit the use or occupancy of the Demised Premises for other

than purposes of the nature and to the extent permitted by the laws, rules, regulations, and ordinances of the applicable governmental authorities and their agencies, including without limitation, environmental laws and regulations.

6. Compliance with Laws. Lessee shall, at Lessee's own expense but subject to Lessee's right to contest the validity thereof, promptly comply with the requirements of every applicable statute, law and ordinance, including all environmental laws, rules, and regulations (whether federal, state, or local) and with every applicable lawful regulation and order, including without limitation the ADA, with respect to the condition and maintenance of the Demised Premises to the extent that Lessee is obligated to repair and maintain the same, and with respect to Lessee's use or occupation of the Demised Premises, including without limitation compliance with all laws, rules, and regulations relating to Lessee's use of its liquor license. Lessee shall likewise comply with any applicable regulation or order of the applicable Board of Fire Insurance Underwriters, or other body having similar functions, or of any liability or fire insurance company by which the Demised Premises may be insured, with respect to Lessee's use and occupancy of the Demised Premises. Lessee shall not knowingly permit any article to be brought upon, or any act to be done upon or about the Demised Premises that shall cause the cancellation of any policy of insurance thereon or cause an increase in the rate of premium of any such insurance.

Lessee shall not use or occupy, or permit the use or occupancy of, the Demised Premises, or any part thereof, in any manner as shall violate the terms and conditions of its liquor license. Lessee's customers and patrons shall not disrupt the business of the other tenants of the building or unreasonably interfere with any such tenant's use and occupancy thereof, and Lessee agrees that its customers or patrons shall not constitute a nuisance to the other tenants of the building or to the public. In no event shall Lessee use the Demised Premises or allow the Demised Premises to be used in any manner that will injure the reputation of the Demised Premises, the building, Lessor, or the other tenants of the building.

7. Utilities. The Lessee shall pay for all heat, electric current, water, gas and other utilities furnished to or used by Lessee in or upon the Demised Premises, together with all taxes, levies or other charges on such utilities and governmental charges based on utility consumption. Such payment shall be made directly to the department furnishing the same unless such utilities are submetered or are not separately metered or assessed. If such utilities are not separately metered or assessed, (or are only partly separately metered or assessed) and are used in common with the other tenants in the building, Lessee will pay to Lessor an apportionment of such charges for utilities used in common based on the proportion of square feet in the Demised Premises served by such utility to the total square feet in the building served by such utility. If such utilities are submetered by a re-registering meter or otherwise, Lessee shall pay Lessor for such utilities at the same rates that Lessee would be charged by the utility company if billed directly by the utility company. Lessee shall pay said bills received from Lessor within ten (10) days of receipt thereof.

Lessor shall not be liable to anyone for cessation of any services, including but not limited to public utility services, heating and air conditioning, due to inability to obtain fuel, electricity, service or supplies from the sources from which they are usually obtained, due to failures in the equipment used to provide such services, governmental rationing of such utilities, or for any other reason beyond the control of the Lessor. Any such interruption of any of the above services shall never be deemed an eviction or disturbance of the Lessee's use of the Demised Premises or any part thereof, or render the Lessor liable to the Lessee for damages, or relieve the Lessee from performance of the Lessee's obligations under this lease; provided, however, if the interruption is due to the negligence of Lessor, its agents, servants and employees and the interruption lasts for longer than forty-eight (48) consecutive hours, Lessee's base rent shall be abated after such 48-hour period in proportion to the amount of space Lessee is unable to use until the interruption ceases.

8. Repairs

A. Repairs by Lessee and Surrender. Throughout the term of this lease, Lessee will keep and maintain the interior of the Demised Premises and any fixtures, facilities or equipment therein in a good state of repair, including, without

limitation, all servicing, repairs and replacements required to the wiring, plumbing, and sewage system, and heating and air cooling installations inside the Demised Premises (but not on the rooftop), ordinary wear and tear, damage by fire, casualty, invasion, acts of war, insurrection and the like, the elements and Acts of God, excepted. Lessee shall also keep, maintain and repair all exterior doors and window frames. Lessee will be liable for replacement of all broken glass of the same size and quality as that broken and will keep the entire Demised Premises in a clean, safe and healthy condition according to the applicable governmental ordinances and the direction of the proper public officers. Lessee shall, at its expense, remove the snow and ice from the sidewalks and entrances adjoining the Demised Premises. Lessee further agrees to deliver up and surrender to Lessor possession of the Demised Premises upon the expiration or other termination of this lease in as good condition as when taken, ordinary wear and tear and damage from the above-specified causes excepted. Notwithstanding the foregoing, Lessee shall not be required to replace the rooftop HVAC system, the same being the responsibility of Lessor.

B. Lessor's Repairs. Subject to the provisions of Paragraph 16., Lessor shall maintain and make all necessary structural repairs and replacements and all repairs and replacements to the rooftop HVAC, and except as otherwise provided herein will maintain and make all necessary repairs to the exterior of the building in which the Demised Premises are located subject to the provisions of subparagraph 4. A.(2), above, provided that Lessee shall have notified Lessor in writing that any such repairs to said building are required; and provided further that any such repairs, if occasioned by the fault or negligence of Lessee, Lessee's agents or employees, shall be made by Lessor at Lessee's expense, except to the extent that the damage necessitating such repairs shall be covered by the fire and extended coverage insurance policy carried by Lessor and the waiver of subrogation provided in Paragraph 14. is applicable. Subject to the provisions of Paragraph 16., Lessor shall repair any damage to the interior of said building caused by a casualty covered by Lessor's fire and extended coverage insurance policy and Lessee shall have no liability with respect thereto provided that the waiver of subrogation provided in Paragraph 14. is applicable. All work set forth in this paragraph, and all other work to be performed by the Lessor under the terms of this lease, shall be done during ordinary working hours. If any such work is, at the request of Lessee, to be done at hours other than ordinary working hours, Lessee shall pay any extra cost occurring because of such request.

9. A. Alterations. Subject to subparagraph 9.B., below, Lessee shall make no alterations in, or additions or improvements to, said Demised Premises (structural or otherwise) without the written consent of Lessor first had and obtained, which consent will not be unreasonably withheld or delayed. In the event any permitted alterations, additions or improvements in or to said Demised Premises are made by Lessee, the Lessee covenants and agrees that Lessee will make all such alterations, additions or improvements in or to said Demised Premises at Lessee's own expense. Any such permitted alterations, additions or improvements which are begun by Lessee shall be completed by Lessee. Lessee shall, in making any such alterations, additions or improvements, and/or in using and/or occupying the Demised Premises, comply with all applicable laws and ordinances pertaining to such work and/or such use or occupancy, including without limitation the Americans with Disabilities Act. Any additions, alterations or improvements made by Lessee shall become and remain a part of the Demised Premises, and be and remain the property of Lessor upon the termination of this lease or Lessee's occupancy of the Demised Premises. Lessee shall indemnify and save harmless Lessor from and against all expenses, liens, claims or damages to either property or person which may or might arise by reason of such repairs, alterations, improvements or additions. In any event, Lessee shall have the right to remove all Lessee's trade fixtures, furnishings and other personal property in the Demised Premises which have been placed there by Lessee even though the same be attached to said Demised Premises, provided that the removal of such annexation shall be effected before the expiration of said term or within a reasonable period thereafter not to exceed ten (10) days, and all damage caused to said Demised Premises by such removal shall be repaired by Lessee on or before the expiration of said term.

B. Lessee's Construction and Installations

(1) Lessee's Construction. Lessee shall, at its own cost and expense: (i) perform all work and supply all installations required to prepare the Demised Premises for the operation of Lessee's business as a first class restaurant and (ii) subject

to the terms of subparagraph 9. B.(2), below, fully equip the Demised Premises with all trade fixtures, lighting fixtures, furniture, furnishings, fixtures, signs, and any special equipment and other items of construction and personal property necessary for the completion of the Demised Premises and the proper operation of Lessee's business. All such items not purchased by Lessee from Lessor shall be new or in good condition. All such work to be done by Lessee shall be referred to as "Lessee's Work." Lessee agrees as part of Lessee's Work to replace the outside awnings with new awnings, install two (2) new signs over its outside entrance doorway, and to install a monument sign outside the Demised Premises, all as more fully described in Paragraph 23. below. In addition, Lessee agrees as part of its work to make improvements to the interior and exterior of the Demised Premises as described on Exhibit C, attached hereto and made a part hereof. Lessee agrees that Lessee's Work shall be done in accordance with all applicable building codes and regulations. Lessee agrees to perform Lessee's Work diligently so as to substantially complete Lessee's Work as soon as reasonably possible and in no event later than one hundred twenty (120) days from the date of execution hereof. However, if Lessee is unable to substantially complete Lessee's Work within such 120-day period despite its commercially reasonable efforts to do so, and provided Lessee can substantiate such fact to Lessor's reasonable satisfaction, Lessee shall have an additional thirty (30) days within which to substantially complete Lessee's Work.

Lessee shall submit all plans and specifications for all of Lessee's Work to Lessor for Lessor's approval, which shall be granted or withheld in Lessor's sole discretion and shall be subject to approval by the City of Independence. All such plans shall be submitted to Lessor as soon as possible and no later than fifteen (15) days after execution of this lease. The approval by Lessor of such plans and specifications shall not constitute the assumption of any liability on the part of Lessor for their accuracy or their conformity with Building Code requirements, and Lessee shall be solely responsible for such plans. Lessee shall not commence any such work without first delivering to Lessor a policy or policies of public liability and property damage insurance of the type and with the limits set forth in Paragraph 14., hereof, naming Lessor as additional insured.

(2) Purchase of Equipment. Lessee agrees to purchase from Lessor all of the personal property identified on Exhibit D, attached hereto and made a part hereof, formerly belonging to the prior tenant thereof, in its as is condition with all faults, for an aggregate purchase price of _____ Dollars (\$_____) to be paid by Lessee in readily available funds upon its execution hereof. Upon receipt of payment, Lessor shall deliver a bill of sale to Lessee warranting title to the said equipment to be free and clear of all liens and encumbrances. All other equipment located in the Demised Premises shall be leased by Lessee from Lessor, without additional charge, during the term hereof. All such equipment shall be put into good working order by Lessee prior to the Commencement Date.

(3) License to Enter Demised Premises. Upon the execution hereof, Lessor agrees that Lessee, its agents and employees, shall have access to the Demised Premises for the performance of Lessee's work, at Lessee's sole risk and expense.

(4) Mechanic's Liens. Lessee shall not permit to be created or to remain undischarged any lien, encumbrance or charge (arising out of any work of any contractor, mechanic, laborer or materialman retained by Lessee or any mortgage, conditional sale, security agreement or chattel mortgage, or otherwise incurred by Lessee or those claiming under Lessee) which might be or become a lien or encumbrance or charge upon the Demised Premises or any part thereof or the income therefrom, and Lessee will not suffer any other matter or thing whereby the estate, rights and interest of Lessor in the Demised Premises or any part thereof might be impaired. If any lien or notice of lien on account of an alleged debt of Lessee or any notice of contract by a party engaged by Lessee or Lessee's contractor to work on the Demised Premises shall be filed against the Demised Premises or any part thereof, Lessee, within thirty (30) days after notice of the filing thereof, will cause the same to be discharged of record by payment, deposit, bond, order of a court of competent jurisdiction or otherwise. If Lessee shall fail to cause such lien or notice of lien to be discharged within thirty (30) days after written notice by Lessor, then, in addition to any other right or remedy, Lessor may, but shall not be obligated to, discharge the same either by paying the amounts claimed to be due or by procuring the discharge of such lien by deposit or by bonding proceedings, and in any such event Lessor shall be entitled, if Lessor so elects, to compel the prosecution of an action for the foreclosure of such lien by the lienor and to pay the amount of the judgment in favor of the lienor with interest, costs and allowances. Any amount so paid by Lessor and all costs and expenses including

attorneys fees incurred by Lessor in connection therewith, together with interest thereon at the base lending rate of _____ Bank, from time to time, plus 2%, not to exceed twelve percent (12%) per annum, from the respective dates of Lessor's making of the payment or incurring of the cost and expense shall constitute additional rent payable by Lessee under this lease and shall be paid by Lessee to Lessor on demand. Nothing herein contained shall obligate Lessee to pay or discharge any lien created by Lessor.

(5) License Permit. Lessee shall exercise its best efforts to obtain all permits and licenses for its work under this paragraph 9.B. In the event Lessee shall fail to obtain all such necessary permits and licenses within sixty (60) days after the date of execution of this lease (despite its best efforts), then either party may terminate this lease by delivering written notice thereof upon the other party no later than five (5) days after the expiration of said sixty (60) day period. If neither party exercises its right to terminate this lease within said five (5) day period, then this lease shall continue in full force and effect.

C. Outdoor Patio. During the term of this lease, Lessor may, in Lessor's sole discretion, subject to the approval of the City of Independence, grant Lessee the right to construct at Lessee's sole cost and expense an outdoor patio immediately adjacent to the Demised Premises for the exclusive use of Lessee and its patrons during the term hereof. If a patio is permitted by Lessor in Lessor's sole discretion, the square footage contained in the patio shall not be considered additional rentable square feet for which Lessee is charged. Any such construction shall be subject to the prior written approval of Lessor with respect to design, size, location, and otherwise, which approval may be granted or withheld in Lessor's sole discretion.

D. Liquor License Contingency. Lessee upon execution hereof shall exercise best efforts to obtain a liquor license for the operation of Lessee's restaurant in the Demised Premises within sixty (60) days from the date of execution of this lease. In the event Lessee shall fail to obtain such liquor license within sixty (60) days after the date of execution of this lease (despite its best efforts), then either party may terminate this lease by delivering written notice thereof upon the other party no later than five (5) days after the expiration of said sixty (60) day period. However, notwithstanding the aforesaid, if Lessee can substantiate to Lessor that it has used its best efforts and there is a realistic probability of obtaining the liquor license, Lessee shall have the right to an additional thirty (30) days to obtain the permit. If, at the end of that 30-day period, Lessee has not obtained the permit, then either party may terminate this lease by delivering written notice to the other party no later than five (5) days after the expiration of said 30-day period. If neither party exercises its right to terminate this lease within said five (5) day period, then this lease shall continue in full force and effect.

10. Eminent Domain.

A. If the whole of the Demised Premises or common areas, or such part thereof as shall substantially interfere with the Lessee's use and occupancy thereof, shall be taken for any public or quasi-public purpose by any lawful power or authority by exercise of the right of appropriation, condemnation or eminent domain or sold to prevent such taking, the Lessee or the Lessor may at Lessor's or Lessee's option terminate this lease effective as of the date possession is taken by said authority by written notice to the other within thirty (30) days after the date possession is taken by said authority. If neither party so elects to terminate, this lease shall continue in full force and effect except that the rent shall be equitably reduced and Lessor, at Lessor's expense, shall promptly proceed to restore the Demised Premises to a condition as nearly equivalent as feasible to their condition prior to said taking.

B. If the amount of property or the type of estate taken shall not substantially interfere with the conduct of Lessee's business, this lease shall not terminate and Lessor shall be entitled to the entire amount of the award as the owner of all interests in the real estate without deduction for any estate or interest of Lessee in said real estate. Lessor, at Lessor's expense, shall promptly proceed to restore the Demised Premises to substantially their same condition prior to such partial taking, and a proportionate allowance shall be made to Lessee for the rent corresponding to the time during which, and to the part of the Demised Premises of which, Lessee shall be so deprived on account of such taking and

restoration. Notwithstanding the above, if said taking shall occur during the last year of the term of the lease, either Lessor or Lessee may elect to terminate this lease by written notice to the other within thirty (30) days from the date possession is taken by said authority, effective as of the date possession is taken. If neither party so elects, this lease shall continue in full force and effect except that the rent shall be equitably reduced and Lessor, at Lessor's expense, shall promptly proceed to restore the Demised Premises to a condition as nearly equivalent as possible to their condition prior to said taking.

C. If this lease is terminated pursuant to this paragraph, Lessee shall not, because of such taking, assert any claim against the Lessor or the taking authority for any compensation because of such taking, and Lessor shall be entitled to receive the entire amount of any award as the owner of all interests in the real estate without deduction for any estate or interest of Lessee. Lessee shall, however, have the right to pursue, at Lessee's expense by separate claim against the taking authority, any rights Lessee might have as Lessee for Lessee's cost of moving or relocating any trade fixtures, equipment, or other personal property that Lessee placed upon the Demised Premises, or for the recovery of any other provable damages to Lessee's business, provided that such claim shall not result in a reduction of Lessor's award.

D. For the purposes of subparagraph 10.B., above, the phrase "term of the lease" shall mean the next renewal term of this lease if Lessee, at any time prior to the expiration of fifteen (15) days after the date possession is taken by the authority, shall have exercised Lessee's next option to extend the term pursuant to the provisions of Paragraph 4., above.

11. Rights of Lessor Upon Default

A. This lease is made upon the condition that Lessee shall punctually perform all of its covenants and agreements as herein set forth and if,

(1) Lessee defaults in payment of rent, or additional rent, or any additional charge or amount of money to be paid by Lessee as provided in this lease, and such default shall continue uncorrected for a period of ten (10) days after written notice to the Lessee thereof; or

(2) Lessee defaults in the prompt and full performance and observance of any of the terms and conditions of this lease to be performed or observed by Lessee and not relating to the payment of money, and any such default shall continue uncorrected for a period of thirty (30) days after written notice to the Lessee thereof, or if any such last mentioned default cannot reasonably be corrected within such 30-day period, then if Lessee shall not within such period have commenced in good faith to correct such default; or

(3) Lessee abandons the Demised Premises; or

(4) any execution, attachment or other order of court shall be issued upon or against the interest of Lessee in this lease and shall continue for a period of thirty (30) days after notice; or

(5) Lessee is cited more than once during any twelve (12) month period for the violation of any of the laws, rules, or regulations applicable to the liquor license permits being used by Lessee at the Demised Premises,

then in any such event, in addition to any and all rights and remedies allowed by law and equity, Lessor may, with or without further notice, forthwith terminate this lease and Lessee's right to possession of the Demised Premises, or Lessor may, without terminating this lease, terminate Lessee's right to possession of the Demised Premises.

B. Upon the termination of this lease, or upon the termination of Lessee's right to possession without termination of this lease:

(1) Lessee shall surrender possession and vacate the Demised Premises immediately, and Lessor may enter into and

repossess said Demised Premises, with process of law, and remove all persons and property therefrom in the same manner and with the same right as if this lease had not been made; and

(2) Lessor may remove from the Demised Premises any and all property found therein, and such repossession shall not release Lessee from Lessee's obligation to pay the rents herein provided.

C. In the event of termination of this lease as provided in this Paragraph 11., Lessor, in addition to any and all rights and remedies allowed by law and equity, shall upon such termination be entitled to recover damages in the amount equal to the then present value of the rent reserved in this lease for the entire residue of the stated term hereof less the then present worth of the fair rental value of the Demised Premises for the residue of the term hereof as then in effect, plus the costs incurred, including reasonable legal expenses, to terminate this lease and Lessee's possession of the Demised Premises.

D. In the event of any repossession by Lessor without terminating this lease, Lessor shall use reasonable efforts to relet and keep rented the Demised Premises or any part thereof, as agent of Lessee, to any person, firm or corporation, and on such terms as Lessor may determine, provided that Lessor shall use reasonable efforts to mitigate damages to Lessee arising from Lessee's continuing liability under this lease. Lessor may make repairs, alterations, replacements, and/or decorations in or to the Demised Premises to the extent reasonably necessary and advisable for the purpose of reletting the Demised Premises, and in the making of such repairs, alterations, additions, replacements and/or decorations shall not operate or be construed to release Lessee from liability hereunder; and Lessee shall upon demand pay the cost thereof, together with Lessor's expense of reletting (including reasonable legal expenses and brokerage commissions). If the rents collected by Lessor upon any such reletting are not sufficient to pay monthly the full amount of the rent reserved herein, together with the cost of such repairs, alterations, additions, replacements, decorations and expenses, Lessee shall pay to Lessor the amount of each monthly deficiency upon demand, and if the rent so collected from any such reletting is more than sufficient to pay the full amount of the rent reserved herein, together with such costs and expenses of Lessor, Lessor shall, at least every twelve (12) months after such eviction, account for any surplus to Lessee.

E. Any and all property which may be removed from the Demised Premises by Lessor may be handled, removed, stored or otherwise disposed of by Lessor at the risk and expense of Lessee, and Lessor shall in no event be responsible for the preservation or the safekeeping thereof. Lessee shall pay to Lessor, upon demand, any and all expenses incurred in such removal and all storage charges against such property, so long as the same shall be in Lessor's possession or under Lessor's control. If any property shall remain in the Demised Premises or in the possession of Lessor, and shall not be retaken by Lessee within a period of fifteen (15) days from and after the time when the Demised Premises are either abandoned by Lessee or repossessed by Lessor under the terms of this lease, said property shall conclusively be deemed to have been forever abandoned by Lessee.

12. Bankruptcy

A. Chapter 7. If a petition is filed by or against Lessee under Chapter 7 of the Bankruptcy Code and the Trustee in Bankruptcy ("Trustee") elects to assume this lease for the purpose of assigning it or otherwise, the assumption or assignment, or both, may be made only if all of the terms and conditions of subparagraph 12.C., below are satisfied. If the Trustee fails to assume this lease within sixty (60) days after the Trustee's appointment, or within such additional time period as the Bankruptcy Court may allow, this lease shall be deemed to have been rejected. Assumption of this lease must satisfy all of the conditions of subparagraph 12.C., below, which Lessor and Lessee acknowledge to be commercially reasonable. In the event this lease is rejected, Lessor shall then immediately be entitled to possession of the Demised Premises without further obligation to Lessee or the Trustee and this lease shall be canceled. Lessor's right to be compensated for damages in the bankruptcy proceeding, however, shall survive.

B. Chapter 11. If a petition for reorganization under Chapter 11 of the Bankruptcy Code is filed by or against Lessee, or

a proceeding that is filed by or against Lessee under any other chapter of the Bankruptcy Code is converted to a Chapter 11 proceeding and Lessee as debtor in possession fails to assume this lease within sixty (60) days from the date of filing of the petition or the conversion, or within such additional time period as the Bankruptcy Court may allow, debtor in possession will be deemed to have rejected this lease.

C. Assumption of Lease. Assumption of this lease must satisfy, in Lessor's business judgment, all of the following conditions which Lessor and Lessee acknowledge to be commercially reasonable:

(1) The Trustee or the debtor-in-possession has cured or has provided to Lessor adequate assurance, as defined hereinbelow that:

(a) The Trustee will cure all monetary defaults under this lease within ten (10) days from the date of the assumption; and

(b) The Trustee will cure all non-monetary defaults under this lease within thirty (30) days from the date of the assumption.

(2) The Trustee or the debtor-in-possession has compensated Lessor, or has provided to Lessor adequate assurance as defined hereinbelow, that within ten (10) days from the date of the assumption Lessor will be compensated for any pecuniary loss it incurred arising from the default of Lessee, Trustee, or the debtor-in-possession.

(3) The Trustee or the debtor-in-possession has provided Lessor with adequate assurance of future performance, as defined hereinbelow, of each of Lessee's obligations under the lease; provided, however, that:

(a) The Trustee or debtor-in-possession will also deposit with Lessor, as security for the timely payment of rent, an amount equal to three months base rental and other monetary charges accruing under this lease.

(b) If required by the terms of this lease, the Trustee or the debtor-in-possession will also pay in advance, on each day the base rental is payable one-twelfth (1/12) of Lessee's annual obligation for operating expenses and real estate taxes and assessments.

(4) Lessor has determined that the assumption of this lease will not:

(a) Breach any provision in any other lease, mortgage, financing agreement, or other agreement by which Lessor is bound relating to the building; or

(b) Disrupt, in Lessor's judgment, the lessee mix of the building or any other attempt by Lessor to provide a specific variety of tenants in the building that, in Lessor's judgment, would be most beneficial to all of the tenants of the building and would enhance the image, reputation and profitability of the building.

(5) For purposes of this subparagraph 12.C., "adequate assurance" means that:

(a) The Trustee or the debtor-in-possession has, and will continue to have, sufficient assets to assure Lessor that Trustee or the debtor-in-possession will have sufficient funds to fulfill Lessee's obligations under the lease and to keep the Demised Premises properly staffed with sufficient employees to conduct a fully operational, actively promoted business on the Demised Premises; and

(b) An order will have been entered segregating sufficient cash payable to Lessor and/or a valid and perfected first lien and security interest will have been granted on the property of the estate that is acceptable for value and kind to Lessor, to secure to Lessor the obligation of the Trustee or debtor-in- possession to cure the monetary or non-monetary defaults

under this lease within the time period set forth above.

(c) If the Trustee or the debtor-in-possession has assumed the lease under the terms of subparagraphs 12.A. or 12.B., above, and elects to assign Lessee's interest under this lease or the estate created by that interest to another person, that interest or estate may be assigned only if Lessor acknowledges in writing that the intended assignee has provided adequate assurance of future performance, as defined hereinbelow, of all of the terms, covenants and conditions of this lease to be performed by Lessee.

(d) For the purposes of this subparagraph 12.C., "adequate assurance of future performance" means that Lessor has ascertained that each of the following conditions has been satisfied:

(i) The assignee has submitted a current financial statement, audited by a certified public accountant, that shows a net worth and working capital in amounts determined by Lessor to be sufficient or to assure future performance by the assignee of Lessee's obligations under this lease;

(ii) If requested by Lessor, the assignee will obtain guarantees in form and substance satisfactory to Lessor, from one or more persons who satisfy Lessor's standards of creditworthiness;

(iii) Lessor has obtained all consents or waivers from any third party required under any lease, mortgage, financing agreement, or other agreement by which Lessor is bound to permit the assignment;

(iv) When, pursuant to the Bankruptcy Code, the Trustee or the debtor-in-possession is obligated to pay reasonable use and occupancy charges for the use of all or a portion of the Demised Premises, the charge will be no less than base rental and additional rent and other monetary obligations of the Lessee included in this lease.

13. A. Lessor's Right to Perform Lessee's Covenants. In addition to, but without limitation or qualification of, any other right or remedy of the Lessor herein provided, if the Lessee shall default in the performance of any covenant, condition or stipulation contained in this lease except defaults pertaining to the payment of rent or additional rent, the Lessor may, after thirty (30) days' written notice to the Lessee, or if such default cannot reasonably be corrected within such 30-day period, then if Lessee shall not within such period have commenced in good faith to correct such default, or with or without notice if, in the Lessor's reasonable opinion, an emergency exists, perform the same for the account and at the expense of the Lessee, and the amount of any payments made or other expenses incurred by the Lessor for such purpose shall be forthwith repaid by the Lessee with interest thereon at the rate of 12 percent per annum. Should the Lessee, pursuant to this subparagraph 13. A. or any other provision of this lease, become obligated to reimburse or otherwise pay Lessor any one or more sums of money in addition to the fixed rent, the amount thereof shall be deemed additional rent and may, at the option of Lessor, be added to any subsequent installment of the basic rent due and payable under the lease, in which event the Lessor shall have the remedies for default in the payment thereof provided in Paragraph 11. hereof. The provisions of this subparagraph 13. A. shall survive the termination of this lease. Nothing in this subparagraph 13. A. shall in any manner increase Lessor's liability to Lessee or to any others. The rights granted to Lessor under this subparagraph 13.A. shall be permissive only and shall not be construed as requiring Lessor to perform any such condition or covenant or to correct any such default.

B. Lessor's Access to Demised Premises. Lessor reserves the right to enter the Demised Premises during the normal business hours of Lessee only, or at any time in case of an emergency, for the purpose of examining, repairing and protecting the Demised Premises, or for the purpose of showing the premises to a prospective purchaser or mortgagee, and also during the last six (6) months of the term of this lease for the purpose of exhibiting the Demised Premises to prospective tenants and putting up the usual notice "to rent" or "for sale," which notice shall not be removed or hidden by Lessee. The rights granted to Lessor pursuant to this subparagraph 13. B. shall not require Lessor to make any repairs to the Demised Premises other than those herein specifically agreed to be made by Lessor nor otherwise extend any of Lessor's other obligations.

14. Insurance. Lessor covenants and agrees that at all times after the commencement of the term hereof, Lessor shall obtain and keep in force adequate insurance for fire and lightning, with extended coverage and vandalism and malicious mischief endorsement on the building of the Demised Premises. Lessee shall obtain and keep in force, during the term of this lease, insurance to cover the physical loss of Lessee's personal property in the Demised Premises in amounts sufficient to cover Lessee's interest. Lessee hereby expressly waives any right of recovery against the Lessor for any and all liability and expense for loss, damage or destruction of the Lessee's property resulting from perils ordinarily covered by standard fire insurance policies with extended coverage and vandalism and malicious mischief endorsements, notwithstanding that the damage may be due to the negligent acts or omissions of Lessor, Lessor's agents or employees. Lessor hereby expressly waives any right of recovery against the Lessee for loss, damage or destruction of Lessor's property resulting from perils ordinarily covered by standard fire insurance policies with extended coverage and vandalism and malicious mischief endorsements, notwithstanding that the damage may be due to the negligent acts or omissions of Lessee, Lessee's agents or employees. Each of Lessor and Lessee shall place Lessor's and Lessee's respective insurance with companies that will agree to acknowledge, by endorsement to the policies of the insured if necessary, that the insurance will not be invalidated should the insured waive in writing prior to a loss any or all right of recovery against any party for loss occurring to the property described therein.

Lessee agrees to carry public liability and property damage insurance with respect to the Demised Premises in insurance companies licensed to do business in the State of _____ and having limits of not less than One Million Dollars (\$1,000,000) for injury to one person in any one accident, and not less than Two Million Dollars (\$2,000,000) for injury to all persons in any one accident, and not less than Five Hundred Thousand Dollars (\$500,000) for damages caused to all properties in any one accident. Lessee will furnish to Lessor a certificate evidencing such insurance. The insurance policies shall designate specifically that Lessor is named as an additional insured thereunder.

Lessor and Lessee hereby waive all rights of recovery and causes of action against the other, the other's agents and employees, and all persons claiming through or under the other, relating to loss of business, business interruption or loss of rentals resulting from any damage or destruction to the Demised Premises or any of Lessee's property contained therein, notwithstanding that any such damage or destruction may be due to the negligence of Lessor or Lessee, their respective agents or employees, as the case may be.

15. Indemnity.

A. Lessee agrees that no representations or warranties, either express or implied, have been made with reference to the condition of the Demised Premises or their fitness for the use of any purpose whatsoever, and Lessor shall not be liable for any use to which the Demised Premises are put or any damage either to person or property because of any injury, loss of life, loss or damage to or total destruction of merchandise or property resulting from such use, except to the extent resulting from the negligence of Lessor, its agents, servants, or employees. Lessee agrees that Lessee will at all times save and keep Lessor and the Demised Premises free and harmless from and against any and all liens placed or permitted to be placed thereon by Lessee, or by any other person claiming by, through, from or under Lessee, and from and against any and all loss, cost, damage, suits, fines, penalties, liability or expense, including attorney's fees, occasioned (i) by the act or neglect of Lessee, or any of Lessee's agents or employees, or those claiming or holding under Lessee, (ii) by the breach, violation or nonperformance of any covenant, condition or agreement in this lease by Lessee or any of Lessee's agents or employees or those claiming or holding under Lessee, or (iii) arising out of an accident causing death or injury to any person whomsoever, or damage to any property whatsoever resulting from any use of the Demised Premises by Lessee or any person holding under Lessee or Lessee's employees, licensees or invitees.

16. Destruction of Demised Premises.

A. Except as provided in subparagraph 16.B., below, if the Demised Premises, or any part thereof, shall be destroyed or damaged at any time during the term of the lease then in effect, and such destruction or damage may reasonably be

repaired within one hundred twenty (120) days from the happening of such destruction or damage, Lessee shall not be entitled to surrender possession of the Demised Premises, or any part thereof, nor shall Lessee's liability to pay rent under this lease cease; but in case of any such destruction or damage, Lessor shall at Lessor's expense repair the same with all reasonable speed and shall complete such repairs within one hundred twenty (120) days from the happening of such destruction or damage, subject to delays beyond Lessor's reasonable control. In the event that any destruction or damage cannot reasonably be repaired within one hundred twenty (120) days from the happening of such destruction or damage, either Lessor or Lessee shall have the right to terminate this lease by giving written notice to the other within thirty (30) days from the happening of such destruction or damage, in the absence of which notice Lessor shall at Lessor's expense repair the same with all reasonable speed.

B. If the Demised Premises, or any part thereof, shall be destroyed or damaged by fire or other casualty at any time during the last year of the term of the lease and the same can be reasonably repaired or restored within sixty (60) days following such occurrence, this lease shall not terminate; but in case of any such damage or destruction, Lessor shall at Lessor's expense repair the same with all reasonable speed and shall complete such repair within sixty (60) days from the happening of such damage or destruction, subject to delays beyond Lessor's reasonable control. In the event that any such damage or destruction cannot reasonably be repaired within sixty (60) days following such occurrence, the Lessee or the Lessor may elect to terminate this lease by written notice to the other within thirty (30) days following such damage or destruction, in the absence of which notice Lessor shall at Lessor's expense repair the same with all reasonable speed.

C. If any damage or destruction to the Demised Premises or the repair or rebuilding thereof shall render the Demised Premises untenantable in whole or in part, Lessee shall be allowed a proportionate reduction or abatement of the rent and additional rent payable hereunder corresponding to the time and space of which Lessee shall be deprived (giving due consideration to the reasonable use of the remaining portion of the Demised Premises) from the date of the occurrence of such damage or destruction until the date Lessor completes the repair or restoration thereof.

D. For the purposes of subparagraph 16. B., above, the phrase "term of the lease" shall mean the next renewal term of this lease if Lessee, at any time prior to the expiration of fifteen (15) days after the occurrence of said destruction or damage, shall have exercised Lessee's next option to extend the term pursuant to the provisions of Paragraph 4., above.

17. Loss or Damage to Lessee's Property. All trade fixtures, equipment, inventory and all other personal property belonging to Lessee, Lessee's agents, or Lessee's guests, located in or about the Demised Premises shall be at the sole risk of Lessee, and Lessor shall not be liable for the theft or misappropriation, nor for any damage or injury thereto, nor for any damage or injury to Lessee, or any of Lessee's officers, agents, employees, licensees or guests, or to other persons or to any property caused by fire, explosion, wind, water, rain, snow, frost, steam, gas, electricity, any acts of God, heat or cold, dampness, falling plaster and/or ceilings, sewers or sewage odors, noise, leaks from any part of said building or by the bursting or leaking of pipes, plumbing, electrical wiring and equipment and fixtures of all kinds, or by any act or neglect of any other tenant or of any person; provided, however, subject to the provisions of Paragraph 14., Lessor shall not be relieved of liability for the negligence, intentional wrongful acts or omissions of Lessor, Lessor's agents and employees.

18. Assignment and Subletting. Lessee shall not be permitted to mortgage, pledge or encumber this lease. Lessee may sublet all or any part of the Demised Premises and may assign this lease or any interest Lessee may have hereunder, whether voluntarily or involuntarily, by operation of law or otherwise, provided that:

(1) the signed written consent of the Lessor to any such subletting or assignment shall first be obtained (which consent Lessor will not unreasonably withhold or delay); and

(2) in the event of any such permitted assignment or subletting, Lessee shall remain liable as Lessee for the performance of all of the conditions and covenants on the part of Lessee to be performed under this lease, unless Lessor shall

otherwise expressly consent in writing.

In determining whether to grant consent to the Lessee's sublet or assignment request, the Lessor may consider any reasonable factor. Lessor and Lessee agree that any one of the following factors, or any other reasonable factor, will be reasonable grounds for declining the Lessee's request: (a) the business reputation of the proposed subtenant/assignee is not in accordance with generally acceptable commercial standards; (b) the use of the Demised Premises by the proposed subtenant/assignee is not identical to the use permitted by this lease; and (c) managerial and operational skills of the proposed subtenant/assignee are not the same or better than those of the Lessee.

The right on the part of Lessee to assign this lease under any of the foregoing provisions of this Paragraph 18., shall be upon the express condition that such assignment shall be in writing, executed by Lessee and the assignee, that in such writing the assignee shall, in consideration of such assignment, agree to assume, perform and be bound by all of the terms, obligations and conditions on the part of Lessee to be performed under this lease, and that a duplicate executed counterpart of such instrument of assignment and assumption shall be delivered to Lessor within ten (10) days after the execution thereof. For purposes of this lease, the sale or transfer of a majority of the common stock of Lessee, or of a majority of the beneficial or equitable interests of the owners of a noncorporate Lessee, shall be considered an assignment of the lease subject to the provisions of this paragraph.

19. Limitation of Lessor's Liability. The term "Lessor," as used in this lease so far as covenants or obligations on the part of Lessor are concerned, shall be limited to mean and include only the owner or owners at the time in question of the fee of the Demised Premises. In the event of any transfer or transfers of title to such fee, the Lessor herein named (and in case of any subsequent transfers or conveyances, the then grantor) shall be freed and relieved from and after the date of such transfer and conveyance of all liability with respect to performance of any covenants or obligations on the part of Lessor contained in this lease thereafter to be performed. Without further agreement, the transferee of such title shall be deemed to have assumed and agreed to observe and perform any and all obligations of the Lessor hereunder during the transferee's ownership of the Demised Premises. Lessor may transfer Lessor's interest in the Demised Premises without the consent of Lessee, and such transfer or subsequent transfer shall not be deemed a violation on Lessor's part of any of the terms and conditions of this lease.

20. Mortgage Subordination. The Lessee understands that Lessor may have or hereafter desire to place a mortgage upon all or part of the land described herein and the building constructed thereon. It is further understood that the mortgagee of said mortgage may require that the within lease be subordinated to said mortgage, in which event Lessee agrees to promptly execute any document required by such mortgagee to evidence such subordination; provided, however, that the mortgagee of any such mortgage shall covenant in writing that the Lessee's leasehold interest hereunder shall not be foreclosed in any action brought under such mortgage or in the event of a sale of the Demised Premises as a result of said action if at the time of bringing an action to foreclose or at the time of said sale the Lessee is not in default in the payment of rental or in the performance of any other obligation under this lease, with due allowance to be given for the payment of any past due rental or for the correction of any other default by Lessee within the period of time permitted after any notice is given or required to be given by the terms of this lease. It is further understood that the mortgagee of said mortgage may require that the Lessee agree to attorn to any purchaser of the property in the event that the same should be sold through foreclosure proceedings, and that the Lessee agrees to waive any and all rights to treat any such foreclosure proceedings as a breach of the lease by Lessor, in which event Lessee agrees to execute any document required by such mortgagee to evidence such agreements.

21. Estoppel Certificate by Lessee. Lessee will execute, acknowledge and deliver to Lessor, promptly upon request, a certificate certifying that (a) this lease is unmodified and in full force and effect (or, if there have been modifications, that the lease is in full force and effect, as modified, and stating the modifications), (b) the dates, if any, to which basic rent, additional rent and other sums payable hereunder have been paid, and (c) no notice has been received by Lessee of any default which has not been cured, except as to defaults specified in said certificate, it being intended that any such certificate may be relied upon by any prospective purchaser or mortgagee of the property or any part thereof.

22. A. Common Areas. "Common areas" and "common facilities," as used in the within lease, include, without limitation, all of the parking areas, approaches, entrances, driveways, sidewalks and service areas and landscaping located on the parcel of real estate described on Exhibit A. Lessor shall operate, manage, equip, repair, replace and maintain the common areas and facilities for their intended purposes in such manner as Lessor shall, in Lessor's sole discretion, determine; provided, however, Lessor agrees to keep said common areas and facilities clean and to remove snow and ice from the parking areas and driveways as promptly as reasonably possible. Lessor reserves the right to change the location, size, elevation or nature of the common areas and common facilities.

The Lessee, Lessee's agents, employees and invitees, shall have the right to use said common areas and common facilities jointly with Lessor, Lessor's agents and employees, and other tenants (except such service areas as may be designated by Lessor for the exclusive use of a particular tenant or tenants) of the above-described building, their agents, employees and invitees. All of such use of any of the common areas and common facilities shall be such as will not unreasonably obstruct or interfere with the joint use thereof, and shall be in compliance with all applicable laws, rules and regulations.

B. Parking. During the term of the lease, Lessee shall have the right to the nonexclusive use of the common parking areas described in subparagraph 22.A., above, along with the right to the exclusive use of the parking area on the land immediately adjacent to the Demised Premises and land described on Exhibit A attached hereto, as described on Exhibit E and as further described on the site plan marked Exhibit E-1, attached hereto and made a part hereof. In addition, Lessee shall have during the term of the lease the exclusive use of up to four (4) parking spaces to be located in the common area located directly in front of the Demised Premises, for the purpose of providing parking to Lessee's carry-out customers (the "Carry-out Spaces"). The location of the Carry-out Spaces within said common parking area shall be designated by Lessor in its sole discretion. Lessee shall bear sole responsibility for enforcing its exclusive use of the Carry-out Spaces and all other exclusive use parking spaces.

C. Rules. Lessee agrees to comply with rules and regulations adopted now or in the future, and relating to the use of the building, the Demised Premises, and common areas and common facilities, as may be amended from time to time by Lessor at its discretion, provided such rules and regulations are uniformly promulgated to all the tenants and are made uniformly applicable to all of the tenants.

23. Signs. Lessee shall install at its sole expense new awnings, two (2) signs over the entrance doorway at least one (1) of which is a lit sign, and one (1) outside monument sign between the Demised Premises and _____ Road, but subject to the prior written approval of Lessor and the City of _____. Such awnings, two doorway signs and monument sign shall be installed in such locations as are approved by Lessor. The design and type of awnings and of the two doorway signs and the monument sign shall be subject to the prior written approval of Lessor, which Lessor may grant in its sole discretion, it being understood that the Demised Premises are part of an integrated and uniform building, and that control of exterior awnings and signs by Lessor is essential in order to maintain uniformity and aesthetic value in said building. Lessee agrees to submit to Lessor as soon as reasonably possible its outside elevation plans showing such proposed changes.

Lessee shall maintain said awnings and signs in good condition and repair at all times, and shall save Lessor harmless from injury to person or property arising from the erection or maintenance of said awnings and signs. Any sign placed in or upon the Demised Premises, upon the written request of Lessor, shall be removed by Lessee at Lessee's expense upon the expiration or sooner termination of this lease, and all damage caused by the removal of such sign shall be fully repaired at the cost and expense of Lessee.

24. Covenant Against Waste. Lessee agrees that Lessee will not commit waste in or upon the Demised Premises or any portion thereof.

25. Quiet Enjoyment. The Lessor covenants that Lessor has lawful title to the above-described real property and the right to make this lease for the term aforesaid and, conditioned upon the prompt performance and observance by the Lessee, Lessee's agents and employees of all of the terms, covenants and conditions hereof required to be performed or observed by Lessee, Lessee's agents and employees, Lessee shall at all times during the term of this lease have the peaceable and quiet enjoyment of the Demised Premises.

26. Withholding Premises. Should Lessee withhold from Lessor possession of the Demised Premises after the expiration or termination of this lease, whether by lapse of time or otherwise, such withholding shall constitute only a month-to-month tenancy, provided that the monthly rental for such month-to-month tenancy shall be one and one-half times the monthly rental in effect immediately prior to the commencement of such month-to-month tenancy.

27. Effect of Demand. Any demand for rent upon the Lessee after the same shall have become due and payable, or for the performance or observance of any covenant or condition of this lease after the same is required to be performed or observed under the provisions hereof, shall have the same effect as though made at the time and place such rent became due or such obligation should have been performed or observed, any law to the contrary notwithstanding.

28. Effect of Waiver. No waiver of any condition or covenant of this lease or of the breach of any condition or covenant shall be taken to constitute a waiver of any subsequent breach of such condition or covenant, or to justify or authorize the nonobservance on any other occasion of the same or any other condition or covenant thereof. The acceptance of rent by the Lessor at any time when the Lessee is in default of any covenant or condition shall not be construed as a waiver of such default or of the Lessor's rights under Paragraph 11., above, on account of such default, nor shall the payment of rent by the Lessee at any time when Lessor is in default under any covenant or condition hereof be construed as a waiver of such default, nor shall any waiver or indulgence granted by the Lessor or Lessee be taken as an estoppel against the party granting the same.

29. Notices. Whenever Lessor or Lessee shall make any demand or serve any notice which is required to be in writing under the terms of this lease upon the other, the same shall be in writing and shall be sufficiently given if sent, postage prepaid, by United States registered or certified mail, addressed to Lessee at _____, _____, _____ until such time as Lessee occupies the Demised Premises, at which time such notices shall be addressed to Lessee at the Demised Premises during the term of this lease, and addressed to Lessor at _____, _____, _____, or at such other address as Lessor or Lessee may theretofore by written notice to the other have designated for the service of such notice.

30. Terminology; Captions. Where the context so requires or such interpretation is appropriate, any word used herein denoting gender shall include all genders, natural or artificial, and the singular and plural shall be interchangeable. The term "paragraph" shall refer to all paragraphs under the caption in question, where appropriate. The captions of the various provisions of this lease are for convenience only and in no way define, limit or describe the scope or intent of this lease or the provisions which they precede or in any other manner affect this lease.

31. Short-Form Lease. This lease shall not be recorded, but the parties agree to execute a skeleton lease incorporating the terms of this lease and including a legal description of the property upon which the Demised Premises is situated, at the request of Lessee or Lessor. The same shall be duly executed in form suitable for recording, and any costs incurred in connection therewith shall be at the expense of the party requesting same.

32. Successors and Assigns. This lease and the covenants and conditions herein contained shall inure to the benefit of and be binding upon Lessor, Lessor's successors and assigns, and shall be binding upon and inure to the benefit of Lessee, Lessee's successors and those assignees of Lessee who become assignees in accordance with and as permitted by the terms of Paragraph 18., above.

33. Severability. In case any one or more of the provisions contained herein shall for any reason be held to be invalid, illegal or unenforceable in any respect, such invalidity, illegality or unenforceability shall not affect any other provision of this lease, but this lease shall be construed as if such invalid, illegal or unenforceable provisions had not been contained herein.

34. Broker. Lessor warrants, which warranty shall survive the execution of this lease, that no brokerage fee or other compensation is due any real estate broker or other person or entity by reason of this transaction, except _____, who shall be paid by Lessor. Lessee warrants, which warranty shall survive the execution of this lease, that no broker except _____ induced Lessee to enter into this transaction. The parties acknowledge and agree that _____ represent both Lessor and Lessee in this transaction, and Lessor and Lessee hereby consent to such dual agency representation.

35. Entire Agreement. This lease and the Guaranty of this lease contain the entire agreement between the parties hereto; and any agreement hereafter or heretofore made shall not operate to change, modify, terminate or discharge this lease, in whole or in part, unless such agreement is in writing and signed by each of the parties hereto.

The parties hereto have signed this Indenture of Lease as of the date first above written.

LESSOR:

By: _____

Title: _____

LESSEE:

By: _____

Title: _____

[Acknowledgments]

[Attach Exhibit A]

[Attach Exhibit B]

[Attach Exhibit D]

[Attach Exhibit E]

[Attach Exhibit E-1]

Exhibit B-1**EXCLUDED OPERATING EXPENSES**

1. Costs incurred in connection with the original construction of the building or in connection with any major change in the building.
2. Costs of alterations or improvements to the Demised Premises or the premises of other tenants.
3. Depreciation, interest, and principal payments on mortgages, and other debt costs, if any, encumbering the building.
4. Costs of correcting defects in or inadequacy of the initial design or construction of the building, excluding ordinary wear and tear.
5. Expenses directly resulting from the negligence of the Lessor, its agents, servants or employees.
6. Legal fees, space planners' fees, real estate brokers' leasing commissions, and advertising expenses incurred in connection with the original development or original leasing of the building or future leasing of the building, but excluding advertising fees for future leasing, which the parties agree shall be included in the definition of Operating Expenses.
7. Costs for which Lessor is reimbursed by insurance by its carrier or Lessee's carrier.
8. Any bad debt loss, rent loss, or reserves for bad debts or rent loss.
9. The expense of extraordinary services provided to other tenants in the building and not to Lessee.
10. Costs associated with the operation of the business of the partnership or entity which constitutes the Lessor as the same are distinguished from the costs of operation of the building (including partnership accounting and legal matters, except as the actions of Lessee may be in issue), costs of selling, syndicating, financing, mortgaging, or hypothecating any of Lessor's interest in the building, costs of any disputes between Lessor and its employees (if any) not engaged in building operation, disputes of Lessor with building management, or outside fees paid in connection with disputes with other tenants.
11. Fines, penalties, and interest not resulting from the fault or negligence of Lessee.
12. Amounts paid as ground rental by Lessor.
13. Earthquake insurance, except to the extent Lessor reasonably determines it is commercially reasonable to carry such insurance.
14. Capital expenditures required by Lessor's failure to comply with laws enacted on or before the date of the building's certificate of occupancy is validly issued.
15. Any recalculation of or additional expenses for cleaning, maintaining or operating the building actually incurred more than two (2) years prior to the year in which Lessor proposes that such costs be

included (excluding disputes or litigation with respect to such costs).

16. Costs incurred by Lessor with respect to goods and services (including utilities sold and supplied to tenants and occupants of the building) to the extent that Lessor is reimbursed for such costs.

17. Costs, including permit, license and inspection costs, incurred with respect to the installation of tenant improvements made for new tenants in the building or incurred in renovating or otherwise improving, decorating, painting, or redecorating vacant space for tenants or other occupants of the building.

18. Expenses in connection with services or other benefits which are not available (whether used or not) to Lessee or for which Lessee is already being charged directly.

19. Rentals and other related expenses incurred in leasing air conditioning systems, elevators or other equipment ordinarily considered to be of a capital nature, except equipment not affixed to the building which is used in providing janitorial or similar services.

20. Costs incurred by Lessor in connection with any major alterations in the building, such as roof replacement or lobby renovations, which are considered capital improvements and replacements under generally accepted accounting principles consistently applied.

21. All items and services to the extent that Lessee or any other tenant in the building reimburses Lessor, or which Lessor provides to one or more tenants (other than Lessee) without reimbursement.



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Current Legal Forms for Real Estate

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Current Legal Forms for Real Estate
Chapter 23 REAL ESTATE LEASES
Part IV. Forms

A. COMPLETE LEASES AND RELATED AGREEMENTS

31-23 Current Legal Forms for Real Estate FORM 23.24

AUTHOR: by Thomas G. Belden

FORM 23.24 Lease buyout agreement--tenant pays landlord to terminate office space lease early

COMMENT

This form documents an agreement between a landlord and tenant whereby the tenant desires to terminate its lease after an extensive buildout of the space by the landlord for the tenant's new office headquarters. The early termination was desired because of a sudden and unexpected buyout of the tenant by another company which did not desire to relocate to the location where the premises were located. Initially, because the tenant did not move into the builtout space, the tenant decided to keep the primary lease in place and to sublease its space to several subtenants needing smaller spaces than the tenant. After some subleases were successfully negotiated by tenant, the tenant decided it did not make economic sense for it to continue in the commercial leasing of the office space when that was not its primary business. Therefore, it negotiated an early termination of its primary lease by a payment to the landlord. As part of that agreement, the landlord agreed to negotiate new direct leases with the subtenants of tenant, on similar terms and conditions.

In order to minimize the impact of the receipt of the lump sum payment to be made by the tenant to the landlord, all of which would be taxable as ordinary income to the landlord in the year of receipt (see TB § 23.11[1]), in Paragraph 1., part of the payment is deflected to the construction company used by the landlord for construction costs required to be incurred to re-rent the space which otherwise would normally be paid by the new tenant. The costs include the hard and soft costs of construction. Some of the costs are also deflected from the landlord to the landlord's leasing broker, to cover some of the commission costs that will be required to be paid in connection with re-leasing the space to new tenants.

In Paragraph 2., part of the direct payment made by the tenant to the landlord is allocated to the

actual construction costs incurred by landlord to buildout the space for the tenant. From a tax point of view, these costs are required to be capitalized and can be written off over the recovery period of the particular asset. See TB § 23.07. Because the landlord has not yet had the chance to write off those costs and because the costs can now be deducted in full since the lease is being terminated, receipt of money as reimbursement for such costs is taxable income but can be offset by such costs. To the extent that the payments made to landlord referred to in Paragraph 2. exceed those actual costs incurred to do the buildout, they are taxed as ordinary income to the landlord.

The security deposit referred to in Paragraph 2. is to be kept by the landlord according to the agreement. Receipt of that security deposit is taxed as ordinary income to the landlord unless the landlord can substantiate that it is in payment of actual expenses incurred by the landlord because of the termination of the lease. See TB § 23.05.

In this form, the actual lease cancellation agreement is set forth on a separate document to be delivered by the landlord to the tenant in exchange for the payments from the tenant. It was kept on a separate document because it is to be recorded, and the parties do not want the amount of the payment and other terms to be disclosed.

FORM

LEASE BUYOUT AGREEMENT

This Lease Buyout Agreement is made this _____ day of _____, [date], by and between _____ (hereinafter called "Landlord"), and _____ (hereinafter called "Tenant").

WHEREAS, Landlord and Tenant entered into a certain lease dated [date] (hereinafter called the "Lease"); and

WHEREAS, the Lease relates to certain premises located in the building located at _____ (hereinafter referred to as the "Premises"); and

WHEREAS, Tenant decided not to take possession of the Premises and, since that decision was made, has subleased portions of the Premises to various subtenants and as required by the Lease has used ABC Construction Corp. ("ABC"), a company affiliated with Landlord, to plan for and carry out the buildout of the various subleased premises; and

WHEREAS, Tenant has decided that it no longer desires to sublease its space and desires to make a settlement with Landlord that would allow Tenant to surrender the Premises to Landlord subject to certain resolutions of the subleases, to cover certain costs owed to ABC with respect to such subleases and to obtain a release from future obligations under the terms of the Lease after a certain date; and

WHEREAS, Tenant and Landlord desire to set forth in writing the terms and conditions for such surrender of the Premises and termination of the Lease;

NOW, THEREFORE, Tenant and Landlord agree as follows:

1. Tenant acknowledges that there will be incurred certain expenses with respect to the efforts of Landlord to re-lease portions of the Premises. Those expenses relate to tenant improvements which are usually paid for by the tenant, and for commissions incurred in connection with having to lease the space again. In order to cover such expenses and restore

the Premises to a multi-tenant capacity, Tenant agrees to pay ABC the sum of _____ Dollars (\$_____) to cover such hard and soft costs for tenant improvements for the portion of the premises used or to be use by any tenants to whom Landlord leases space. In addition, because a portion of the Premises now leased to Tenant will be vacated in the event Tenant is released from the Lease, Tenant agrees to pay to Johnson Brokerage Company the sum of _____ Dollars (\$_____) in payment of the commissions due and payable with respect to the leasing of such space in the future.

2. Tenant hereby acknowledges that at the inception of its Lease, Landlord incurred costs of _____ Dollars (\$_____) in connection with the buildout of the Premises for Tenant's use. In order to repay Landlord for such costs and obtain a release, Tenant shall pay Landlord the sum of _____ Dollars (\$_____) in consideration for which Landlord shall deliver to Tenant the release and cancellation of the Lease in the form set forth on Exhibit A, attached hereto and made a part hereof. Such release shall be delivered to Tenant on the date set forth in Paragraph 5., below. All rights to the security deposit on the Lease shall be retained by Landlord. All other outstanding invoices owed by Tenant to Landlord or ABC shall be paid on or before the date set forth in Paragraph 5., below.

3. In consideration of the payment to Landlord by Tenant, Landlord agrees to offer a new lease to the existing subtenants on the same terms as space was subleased to the subtenants by Tenant (except for the location in the building which could be subject to change, the commencement dates, and the fact that the leases will be direct leases, not subleases), which new leases shall supersede the existing subleases to the subtenants.

4. In consideration of the release and cancellation of the Lease given to Tenant by Landlord, Tenant agrees to obtain terminations of its subleases with other subtenants.

In further consideration of the release of the Lease, Tenant agrees to and does hereby indemnify, defend and hold harmless Landlord from any and all claims made by subtenants of Tenant, or others holding under Tenant, from any agents, consultants or other persons or entities with whom Tenant dealt in connection with the Lease, the subleases or this transaction, and from any claims for brokerage commissions payable with respect to or by reason of such subleases of sub-subleases. This indemnity shall survive the closing of this transaction.

5. The payments required by the terms of Paragraphs 1. and 2. shall be due and payable as of the _____ day of _____ [date], on which date the lease cancellation and release set forth on Exhibit A shall be delivered to Tenant by Landlord. Under the terms of such release, Tenant shall continue to pay all rent and other payments owed to Landlord pursuant to the terms of the Lease through [date].

6. Upon the execution of this Agreement, Tenant agrees to allow Landlord to enter the Premises to make all necessary alterations of the Premises in order to carry out the terms of this Agreement.

7. The parties hereto agree that the terms and conditions of this Agreement are strictly confidential and that neither party shall disclose any of the terms and conditions of this Agreement to any third party, save and except for the attorneys, accountants and advisors to the parties hereto.

8. This Agreement shall be governed by the laws of the State of _____. This Agreement represents the entire agreement between the parties hereto and shall not be amended or modified in any manner whatsoever except in a writing signed by each of the parties hereto.

9. This Agreement shall be binding upon and inure to the benefit of the parties hereto and their respective successors and assigns.

The parties hereto have signed this Lease Buyout Agreement as of the date first set forth above.

LANDLORD:

By: _____

Title: _____

TENANT:

By: _____

Title: _____

Exhibit A

LEASE CANCELLATION AGREEMENT AND RELEASE

THIS LEASE CANCELLATION AGREEMENT AND RELEASE is made at _____ [city],
 _____ [state], this _____ day of _____, [date], by and between
 _____ (hereinafter called "Landlord"), and _____ (hereinafter called "Tenant").

WITNESSETH:

WHEREAS, by written leased dated [date] (hereinafter called the "Lease"), the Landlord demised to the Tenant certain premises in the building located at _____, _____ (hereinafter called the "Premises");
 and

WHEREAS, for good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, the parties have mutually agreed to execute this Agreement.

NOW, THEREFORE, in consideration of the aforesaid, the parties agree as follows:

1. The Tenant agrees to surrender and deliver up said Premises in compliance with the terms of the Lease to the Landlord on [date], and continue to pay all rent and other charges due under the lease through [date].
2. In consideration whereof, the Landlord agrees to accept said payments and surrender in full satisfaction and discharge of all obligations of the Tenant under said Lease, and provided such payments are made, releases Tenant from any claims under the Lease.
3. In consideration of this cancellation and release of Tenant, Tenant hereby releases Landlord from all obligations under the Lease and hereby waives any and all claims thereunder against Landlord.

IN WITNESS WHEREOF, the parties have executed this Lease Cancellation Agreement and Release as of the day and year first above written.

Signed in the presence of:

TENANT:

LANDLORD:

By: _____

Title: _____

By: _____

Title: _____

[Acknowledgments]



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Chapter 23 REAL ESTATE LEASES

Part IV. Forms

A. COMPLETE LEASES AND RELATED AGREEMENTS

31-23 Current Legal Forms for Real Estate FORM 23.24A

AUTHOR: by Thomas G. Belden

FORM 23.24A Garage Space Lease

COMMENT

This document is a form of lease that can be used for the leasing of a garage space in an indoor parking garage built primarily for the use by the occupants of an adjoining apartment building. This form anticipates that there are other spaces in the parking garage that may be used by the public, other than a garage dedicated just for use by residential apartment tenants.

An important part of this lease is the enforcement of the use of the space by the owner of the automobile identified in the lease, used by one of the residential apartment tenants. That emphasis and other provisions of the lease are imposed for the safety and security of the apartment tenants who use the garage. To provide flexibility on the part of the landlord to change the parking rates, the lease provides that the rates can be changed upon thirty (30) days' written notice to the tenant. In addition, if operating procedures need to be changed, the lease provides for that flexibility by the terms of Paragraph 18. which states that landlord can change the rules and regulations applicable to the use of the garage from time to time.

Finally, because of the landlord's concern about protecting the landlord from liability, the lease provides in Paragraph 2. that the tenant owning the car must carry at least the minimum insurance required by the state in which the garage is located, and the lease provides for an indemnity of the landlord in case of damage to persons or property resulting from the use of the space by the tenant.

FORM

GARAGE SPACE LEASE

Tenant: _____
 Suite #: _____
 Phone Numbers: Home: _____
 Cell: _____
 Work: _____

Tenant agrees to pay Landlord as rent for the garage space the monthly sum of _____ Dollars (\$_____) in advance on the first day of each month together with the monthly rental payment of Tenant's suite, at the same location as the rent for the suite is due. This lease shall commence on _____, 20____. If such commencement date is other than the first day of a calendar month, the rent for the first partial month shall be prorated based on the number of days remaining in such month to the total number of days in the month. Such prorated amount plus the next full month's rent shall be payable in advance upon the execution of this Agreement. The monthly rental rate quoted is guaranteed for thirty (30) days from the execution of this Agreement by both parties, after which time the rate is subject to change upon ten (10) days' notice to the Tenant based on market conditions. This Garage Lease shall run concurrently with the Tenant's Apartment Lease for the full term of the Apartment Lease, but may be terminated by either party upon thirty (30) days' written notice.

I/we agree to the following conditions:

1. Tenant agrees the Landlord is not responsible for any damages to vehicles or any other item in said space or in the vehicle, including but not limited to damage caused by other vehicles, water leaks, vandals or any other cause. Landlord shall not be responsible for theft of vehicles or any other property in said space. Tenant agrees that Landlord is not responsible for any damages to persons or property resulting from the use of the space or garage by Tenant, Tenant's agents, employees, or invitees. Tenant agrees to and does hereby indemnify, defend and hold harmless Landlord from any claims, actions, suits, damages or expenses resulting or occasioned by such use by Tenant, Tenant's agents, employees, or invitees.
2. The garage space is to be used for the described auto only and Tenant represents to Landlord that Tenant is the registered owner of the vehicle and that Tenant has insurance for the vehicle as mandated by state law. Upon request from time to time, Tenant shall provide proof of insurance. The garage space cannot be sublet or assigned without the prior written consent of the Landlord. In the event any other auto is parked in said space, Landlord shall have the right to (a) disable the vehicle until the vehicle owner pays a fee of \$50.00; and/or (b) have the vehicle towed, at the vehicle owner's sole cost and expense, to a storage lot. Thereafter, the vehicle owner shall be responsible for any and all charges for storage, damage, or casualty to the vehicle.
3. Should the Tenant park the Tenant's vehicle in any other location within the garage other than the Tenant's designated space, Landlord shall have the same rights stated above with respect to Tenant's use of the space for an unauthorized vehicle and in addition shall have the right to terminate this Lease immediately at Landlord's sole discretion.
4. Vehicle measurements cannot exceed the size designated by the Landlord. Vehicles larger than these measurements will not be permitted to use the garage.
5. It is expected that the garage will be open during normal business hours; however, operating hours are subject to change. Except on an emergency basis or as a result of factors beyond Landlord's control, Landlord shall post any

changes to the operating hours in the garage thirty (30) days prior to any change.

6. Vehicles must obey the speed limit of **5 MPH** at all times.

7. Vehicles must maintain their lane when driving throughout the garage in order to ensure proper clearances to other vehicles traversing the garage and **must give way to pedestrians at all times**.

8. Vehicles must be maintained in a way to prevent loud exhausts, squeaky brakes, tire squeals and any other type of loud or offensive noises.

9. All guests shall pay the advertised market rate.

10. There shall be no storage of any kind within the garage except for the vehicle itself.

11. Tenant may not allow anyone else the use of the Tenant's car for access to the garage or the Tenant's space in the garage. If key card access is provided, Tenant may not allow anyone else to use the Tenant's garage access card. In addition, Tenant may not use the Tenant's garage access card to allow more than the Tenant's vehicle to enter or exit the garage. Landlord reserves the right to verify the identification of Tenant and Tenant's vehicle at all times while in the garage. If Tenant refuses to verify identification, Landlord reserves the right to deny access to the garage and/or may terminate this Agreement and remove the vehicle from the garage.

12. Tenant must park in the designated area within the garage; tenants with reserved spaces must park only in their reserved space as designated at the bottom of this Lease. Tenants with general parking must park above the third floor in non-reserved spaces only. First floor, second floor and basement parking is prohibited to residents and guests. Anyone in non-compliance of this lease term will be fined \$100 per infraction and/or Landlord reserves the right to immediately terminate this Agreement.

13. Tenant shall not use the emergency egress doors located on floors 2 through 6 for ingress into the adjoining apartment building. All access to the apartment building shall be through the first floor entrance.

14. No washing of vehicles is permitted in the garage except in areas designated by the Landlord.

15. No repairing of vehicles is permitted in the garage. However, vehicles having dead batteries may be jumped, or vehicles having flat tires may be changed to allow the vehicles to be serviced. Any unauthorized, abandoned or permanently inoperable vehicles or vehicles not having current license plates will be towed from the garage at the Tenant's risk and expense. Tenant shall be liable for any damages caused by Tenant's vehicle or Tenant's guest's vehicles for oil, gas, antifreeze, leaks, etc.

16. If key card access is provided and the key card is lost or damaged, a new card will be issued for a replacement fee of \$50. The garage access card must be returned undamaged at the expiration of the lease or the garage security deposit will be disbursed along with any other security deposit being refunded to the Tenant.

17. Upon expiration of the Lease, Tenant agrees to immediately remove the Tenant's vehicle from the Landlord's garage. Should Tenant fail to remove the Tenant's vehicle from the garage, such vehicle shall be conclusively deemed to be abandoned and Landlord shall have the right to have the vehicle towed, at Tenant's sole cost and expense, to a storage lot. Thereafter, Landlord shall not be responsible to Tenant for any charges for storage, damage, or casualty to the vehicle. Landlord shall have no obligation to contact Tenant regarding removal of the Tenant's vehicle at the end of the lease term. This Lease shall automatically renew concurrently with the Apartment Lease, if Tenant elects to renew the Apartment Lease, unless Tenant notifies Landlord in writing at the same time it renews the Apartment Lease that Tenant does not wish to renew the garage space lease.

18. Landlord reserves the right from time to time to impose reasonable rules and regulations that Landlord believes are necessary for the safe operation of the garage and the safety and security of the property. Such rules and regulations shall be posted in the garage. Notice of any changes in rules and regulations or adoption of new rules shall be posted in the garage and shall be automatically and immediately incorporated herein without further notice.

19. If Tenant and/or Tenant's guests are found to be in violation of any of the terms above or any other rules and regulations reasonably imposed by Landlord, Landlord shall have the use of all remedies and rights available under law in addition to Landlord's right to terminate this Agreement. If Landlord terminates the Agreement pursuant to a violation of the rules and regulations imposed, Landlord may at Landlord's sole discretion bar the Tenant from access to the garage.

20. The laws of the State of _____ shall govern this Agreement.

Tenant has read the foregoing Lease and is familiar with and understands the contents herein.

Make of car: _____

Model/Year: _____

Color: _____

License Plate: _____

Garage Sticker #: _____

Garage Card #: _____

Garage Security Deposit: \$ _____

Lease Commencement Date: _____

Space # (if reserved): _____

Tenant: _____ Execution Date: _____

Landlord: _____ Execution Date: _____



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Current Legal Forms for Real Estate
Chapter 23 REAL ESTATE LEASES
Part IV. Forms

A. COMPLETE LEASES AND RELATED AGREEMENTS

31-23 Current Legal Forms for Real Estate FORM 23.24B

AUTHOR: by Thomas G. Belden

FORM 23.24B Net Lease of Multi-Tenant Warehouse--Office Space

COMMENT

This is a form of a net lease for an existing warehouse office space proposed to be renovated and leased to the tenant taking a substantial part of the space in the building. The lease is a net lease in that the tenant is required to pay its pro rata share of all real estate taxes, insurance, maintenance costs of the common areas, and repair and maintenance costs of the building, save and except for major structural repairs to the roof, building and foundation, vaults, water, sewer and gas connections, pipes and mains, plumbing, electrical systems and the heating/air conditioning system, parking lots, fences and driveways.

The building itself is located on a large parcel of land, all of which is not required to be used for the building to be leased. Therefore, in Paragraph 1.A. the Lessor has reserved the right from time to time to sell or transfer a portion of the land which is not required in connection with the use and operation of the building, and reserves the right to grant easements for ingress or egress or for utilities over the land not sold or transferred, for the benefit of the land sold or transferred.

Because this is an existing building which was previously used by other tenants who have since vacated the building, an extensive build out is required as described in Paragraphs 4.B. and 4.C. of the lease. Paragraph 4.B. refers to general building work required to be done by the Lessor in order to put the building back in rentable condition. In addition, the Lessor has agreed to buildout the office space for use by the Lessee, pursuant to the terms of Paragraph 4.B.2. of the lease. Lessee has agreed to do the remainder of the buildout as described in Paragraph 4.C. captioned "Lessee's Work," but Lessor has agreed to grant Lessee an allowance of \$300,000 to be applied towards the cost of that Lessee's Work. Paragraph 4.C. spells out the construction procedure which Lessee must meet in order to obtain the use

of that \$300,000 allowance.

In addition to the favorable buildout provisions which the Lessee was able to negotiate, because it was a favorable market for tenants at the time this lease was negotiated, this Lessee was able to negotiate three additional options to renew (*see* Paragraph 4.A.), a right of first offer to purchase the real estate (*see* Paragraph 4.D.), a right of first offer to lease additional space in the building (*see* Paragraph 4.E.), a right of first refusal to lease additional space in the building (*see* Paragraph 4.F.), an agreement on the part of the Lessor to pay a portion of the Lessee's rent for the building it was continuing to lease during the buildout (*see* Paragraph 4.G.), and an option to terminate the lease at the end of the sixth full year of the ten year term of the lease (*see* Paragraph 4.H.).

Another favorable provision the Lessee was able to negotiate is set forth in Paragraph 25.B. of the lease relating to parking provided for Lessee. In addition to the 260 parking spaces in the parking lot to be designated for use by Lessee, the Lessor has agreed to land bank certain of its additional land that it owns to accommodate the possible need for additional parking in the future for use by Lessee. The details of that land bank for parking are spelled out in Paragraph 25.B. of the lease.

FORM

INDENTURE OF LEASE

THIS INDENTURE OF LEASE is made and entered into at _____, _____, this _____ day of _____, 20____, by and between ROUDABUSH ASSOCIATES, LLC, a Delaware limited liability company, hereinafter called "Lessor," and WHELAN CORPORATION, an Ohio corporation, hereinafter called "Lessee."

WITNESSETH:

1. Demised Premises.

A. For the rents and upon the terms and conditions hereinafter set forth, Lessor hereby leases to Lessee certain premises containing approximately fifty thousand (50,000) square feet of floor space consisting of approximately ten thousand (10,000) square feet of office space and forty thousand (40,000) square feet of production space in the building known as 23000 Kirtland Parkway, Cleveland, Ohio, located on the parcel of land described on Exhibit A, attached hereto and made a part hereof, identified on the floor plan marked Exhibit B, attached hereto and made a part hereof, hereinafter called the "Demised Premises." Lessee shall have the right to increase or decrease the rentable square feet to be leased by no more than ten percent (10%), provided Lessee notifies Lessor in writing of its exact space layout plan showing the square footage by no later than _____. Upon receipt of the proposed space layout plan, Lessor shall have ten (10) days in which to confirm the exact square footage of the Demised Premises. In such event, if the layout is more or less than 50,000 square feet, this lease shall be amended to reflect such change, and the base rent and Lessee's prorata share of expenses shall be adjusted accordingly.

Subject to the terms of Paragraph 4.D. below and to Lessee's rights described in Paragraph 25.B. below relating to a one acre land bank for possible future parking, Lessor reserves the right from time to time at its option to sell or transfer portions of the land described on Exhibit A which are not required in connection with the use and operation of the building. Lessor further reserves the right to grant easements for ingress and egress or for utilities over the remaining land described on Exhibit A not sold or transferred, for the benefit of the land sold or transferred.

B. Lessee has examined the Demised Premises and the same appears to be in good condition and repair subject to Lessor performing the work described in Paragraph 4.B. below. Subject to the warranties of Lessor set forth in subparagraph 1.D. below, Lessee hereby accepts them in their present condition save and except for the improvements agreed to be performed by Lessor as more fully described in Paragraph 4.B. below.

C. Lessor reserves the right to place, maintain, repair and replace utility lines, pipes, tunneling and the like, in, under, over and through the Demised Premises and building in which the Demised Premises are located as may be reasonably necessary or desirable for the servicing, repair, renovation or improvement of the Demised Premises or the building in which the Demised Premises are located. Lessor shall have the right to enter the Demised Premises at all reasonable times and to the use of the roof and exterior walls of the Demised Premises and building for such purpose. Lessor agrees that none of the aforesaid work shall permit Lessee to receive an abatement of rent or to make a claim for any damages or losses to Lessee or Lessee's business resulting directly or indirectly therefrom, provided that any such work, once commenced, is diligently pursued to completion and that commercially reasonable efforts are used to minimize disruption to the Lessee's business during the performance of the work. If the work is not diligently pursued to completion, subject to delays beyond the control of Lessor, or the Lessor or its agents or contractors fail to use commercially reasonable efforts to minimize disruption to the Lessee's business, rent shall be abated or reduced in appropriate amounts.

D. Lessor warrants that by the date that Lessee is required to commence paying rent as set forth in Paragraph 2. below, the operating systems of the Building (mechanical, electrical, HVAC, plumbing and lighting) and the structural components of the building, including the roof, shall be in good working order. In addition, Lessor represents that to the best of its knowledge no violations of environmental laws exist as of the date of execution of this Lease with respect to the building and land described on Exhibit A.

2. Term. Lessee shall hold the Demised Premises for the term of ten (10) years, commencing on the 1st day of _____, _____, and terminating on the 31st day of _____, _____, unless the term hereby demised shall be sooner terminated or extended as hereinafter provided.

If the improvements being done by Lessee described in Paragraph 4.C. below are not substantially completed by _____, _____, regardless of the cause of the delay, the base rent and all obligations imposed upon Lessee hereunder shall commence as of _____, _____. However, if the delay is due solely to the failure of Lessor to act with reasonable diligence in the performance of its obligations that form part of Lessee's Work as hereafter defined (e.g. making of disbursements to Lessee), then the rent shall not commence until substantial completion actually occurs. In addition, if the delay is due to the failure of Lessor to cause substantial completion of Lessor's Work as described in Paragraph 4.B. below, other than due to the acts or omissions of Lessee, its agent, employees and contractors, then the rent shall not commence until substantial completion of Lessor's Work, or until Lessee begins doing business at the Demised Premises, whichever is sooner. If such date is other than on the first day of the month, then the commencement date of the lease term shall be the first day of the month next following such event, and the expiration date shall be ten (10) years after such date. However, during the partial month preceding the commencement date of the lease term, all provisions of this lease shall be in full force and effect and the rent for said partial month shall be prorated based on the applicable number of days remaining in the partial month in question to the total number of days in said month, multiplied by the monthly rate of rent payable during the first full month of the lease. In the event of such delay in the commencement date, Lessor and Lessee agree upon the commencement of the lease term to exchange a side letter agreement setting forth the actual commencement and expiration dates of this lease.

3. Rent. In consideration of said demise, Lessee covenants and agrees to pay to Lessor, without deduction or setoff of any kind, as rent for the use of the Demised Premises for the term hereof, rent at the following rates and amounts during the following years of the lease, payable in monthly installments as follows:

Year	Rate Per Square Foot	Annual Amount	Monthly Installment

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1	\$ _____	\$ _____	\$ _____
	—	—	
2	\$ _____	\$ _____	\$ _____
	—	—	
3	\$ _____	\$ _____	\$ _____
	—	—	
4	\$ _____	\$ _____	\$ _____
	—	—	
5	\$ _____	\$ _____	\$ _____
	—	—	
6	\$ _____	\$ _____	\$ _____
	—	—	
7	\$ _____	\$ _____	\$ _____
	—	—	
8	\$ _____	\$ _____	\$ _____
	—	—	
9	\$ _____	\$ _____	\$ _____
	—	—	
10	\$ _____	\$ _____	\$ _____
	—	—	

All such rent shall be payable in current legal tender of the United States of America, as the same is then by law constituted. All such sums are due and payable in advance, on the first day of each and every calendar month during said term at _____, _____, _____, or at such other place as Lessor may in writing designate. However, notwithstanding the above, the first month's rent shall be paid to Lessor upon the execution of this lease, such payment to be applied against the base rent for the first month as and when the rent accrues for such month. In the event any payment of rent is not received by Lessor within ten (10) days of its due date, Lessor shall have the right at Lessor's option to charge Lessee a late fee of five percent (5%) of the amount of the overdue payment, which option Lessor agrees not to exercise until Lessee is late more than once during the term hereof. If the late fee is charged, it shall be payable upon demand.

4. A. Option to Renew. Lessee shall have the option to extend the term of this lease for three (3) additional terms of three (3) years each, provided that Lessee is not in material default of any and all of the terms, covenants and conditions of this lease on the date that notice of extension is given and has not been in default (as hereafter defined) more than three (3) times during the lease term as it may have been extended. As used throughout this lease, the term "material default" shall only apply, if at all, to nonmonetary defaults. All monetary defaults shall be considered material whether or not so stated, and the term "default" without the qualifier shall mean any default, material or otherwise. Such option to extend shall be exercised by the Lessee by giving written notice to the Lessor not less than nine (9) months prior to the expiration date of the original or renewal term of the lease then in effect. The extension of this lease shall be upon the same terms, covenants and conditions as are contained in the lease, except that the base rent shall be ninety-five percent (95%) of the then prevailing fair market rent as determined by Lessor from available space being marketed in comparable buildings in the area of the Demised Premises, taking into account the terms and conditions under which the space is to be leased as set forth in this lease, but in no event shall the base rent be less than the base rent being paid hereunder during the last year of the term of the lease then in effect. Upon Lessee's request in writing to Lessor made within thirty (30) days prior to Lessee's exercise of said option, Lessor shall inform Lessee in writing of its determination of ninety-five percent (95%) of the then prevailing market rate of rent as described above. Such

determination shall be made reasonably and in good faith by Lessor. Notwithstanding anything to the contrary contained herein, Lessee's option herein shall be subject to a determination by Lessor, at Lessor's sole discretion to be exercised reasonably and in good faith, that Lessee's financial condition on a consolidated basis with its parent company, affiliates and subsidiaries at the time it makes such election is comparable or better than the financial condition of Lessee on a consolidated basis with its parent company, affiliates and subsidiaries, at the time Lessee executed this Lease. If at such time Lessee's parent company is no longer a publicly traded company, then Lessee shall provide Lessor with financial statements requested by Lessor to make such determination.

4. B. Lessor's Work.

1. General Building Work. Lessor shall, at Lessor's sole cost and expense and exclusive of any other allowances given by Lessor to Lessee hereunder, complete the work described on Exhibit C, attached hereto and made a part hereof. Lessor agrees to use commercially reasonable efforts to substantially complete such work on or before the date that Lessee is obligated to commence paying rent, except for the work to the parking lot areas described on Exhibit C, which work shall be done as stated on Exhibit C.

2. Office Space Buildout. Lessor, at Lessor's sole cost and expense, agrees to buildout the approximately _____ square feet of office space identified on Exhibit B, attached hereto and made a part hereof, in such a manner as to be adequate to turn-key such space for use by Lessee to a finish level comparable to the existing office space located in the Demised Premises. Such work shall include all finishes, demising walls, HVAC, electrical, plumbing (including a lunchroom and restrooms if required by code), and windows installed in the north wall. In connection with such work, Lessor shall work closely with Lessee's architect but Lessor reserves the right to hire its own contractor of its choice for this specific work. Lessor and Lessee agree to work in a productive and cohesive manner to control the costs of this work. Lessee agrees to cause its architect to develop floor plans and specifications descriptive of the work as soon as reasonably possible, so as to allow the office space work to commence and to be completed in a timely manner, which plans and specifications shall be subject to the approval of Lessor. In order to do so, Lessee shall (i) cause its architect to deliver to Lessor no later than _____, 20____, final working drawings completed and ready to be submitted to Lessor's contractor for bidding, and ready to be submitted to the City of Cleveland for permits, and (ii) cause its architect to submit such working drawings to the City of Cleveland in order to obtain construction permits by _____, 20____ so that Lessor can cause construction to start by no later than the next work day thereafter. Lessee, at its expense, shall supply Lessor and the City of Cleveland with the necessary number of sets of working drawings required for such purposes. Lessor agrees to reimburse Lessee for the cost of space planning services up to the sum of Fifteen Thousand and 00/100 Dollars (\$15,000.00). Lessor agrees to use commercially reasonable efforts to complete the office improvements and buildout by the scheduled commencement date of the term of the lease as set forth above, subject to delays beyond the reasonable control of Lessor. Commercially reasonable efforts shall not require the need to work overtime.

3. All work to be done or caused to be done by Lessor pursuant to this Paragraph 4.B. shall be done in a good and workmanlike manner and in conformity with all applicable building codes and regulations. Any defects in material or workmanship shall be corrected or caused to be corrected by Lessor at Lessor's expense.

4. C. Lessee's Work. Except for the Lessor's work as described above, Lessee agrees at its cost and expense, save and except for the allowance hereafter described, to perform all other portions of the buildout required in order for Lessee to use its Demised Premises for the purpose herein intended (the "Lessee's Work"). Lessee shall have the right to select and supervise its architect, engineers, construction managers and contractors as required to complete the Lessee's Work.

Lessee hereby represents and warrants to Lessor that it will cause such Lessee's Work to be performed on a competitive bid basis, and agrees that Lessor shall be entitled to review and approve all of the contractors selected by Lessee; provided, however, that Lessor's approval shall not be unreasonably withheld, conditioned or delayed.

In consideration of Lessee doing the Lessee's Work, subject to the conditions hereinafter enumerated, Lessor shall provide Lessee an allowance of Three Hundred Thousand Dollars (\$300,000) towards the cost of Lessee's Work. Such allowance shall be applied against the actual costs of Lessee's Work including but not limited to the actual hard costs of construction (including, without limitation, demolition and construction costs) and the soft costs incurred by Lessee in connection therewith, including, without limitation, all architectural, engineering and design fees, and permit fees incurred by Lessee.

Disbursements shall be made monthly from the allowance during the progress of construction in an amount equal to the paid invoices submitted to Lessor by Lessee and for which Lessee has not been previously reimbursed or sought reimbursements, save and except for a ten percent (10%) retainage from each disbursement to be held back by Lessor until substantial completion of all of the Lessee's Work. A request for payment shall be made on AIA Form G-702, Applications for Payment, for work done through the last day of the month. Lessor shall make disbursements from the allowances by the tenth (10th) day of the following month provided (i) Lessor has received acceptable invoices, statements, and any other documentation reasonably requested by Lessor (or Lessor's lender) substantiating the cost of the work claimed to be done (ii) the work done to date is in conformity with Lessee's final plans and specifications which shall be submitted to Lessor for approval, which approval shall not be unreasonably withheld or delayed, and (iii) Lessee has complied with all of the other terms and provisions set forth in this Paragraph 4.C. Lessor shall not be required to pay the 10% retainage until substantial completion of all of the Lessee's Work and unless and until Lessor is provided with all affidavits and lien waivers requested from Lessee's contractors and all subcontractors and suppliers thereunder.

Lessee agrees to keep the Demised Premises and building free from any liens arising out of nonpayment of any of the Lessee's Work. In the event any such lien is filed, Lessee covenants and agrees to take immediate action to cause such lien to be released or removed of record and to notify Lessor of such action. If Lessee does not diligently pursue the release or removal of the lien, or if the lien is not released and removed within thirty (30) days following the imposition of any such lien, Lessor shall have the right, upon ten (10) days prior written notice to Lessee, to cause the lien to be released and removed by such means as Lessor shall deem proper, including without limitation, payment of, bonding or defense of the claim giving rise to such lien. All sums to be paid by Lessor in connection therewith shall constitute rent under the lease, due upon demand, and shall bear interest at the rate of eight percent (8%) per annum until paid. Nonpayment of said sum shall constitute a default under the lease and entitle Lessor to any and all remedies specified under the lease for defaults of rent.

All work done or caused to be done by Lessee pursuant to this Paragraph 4.C. shall be done in a good and workmanlike manner and in conformity with all applicable governmental codes and regulations. Any defects in material or workmanship shall be corrected or caused to be corrected by Lessee at Lessee's expense. Lessee shall be responsible for all repairs and maintenance required of the Lessee's Work installed by Lessee pursuant to this Paragraph 4.C. Lessee agrees to use commercially reasonable efforts to cause Lessee's Work to be substantially completed on or before the scheduled commencement date of _____, _____, but agrees that in any event the rent shall commence as of said date, subject to the exception set forth in Paragraph 2. above.

4. D. Right of First Offer (Purchase). Provided Lessee is not in material default under the terms of this lease, Lessee shall have the continuing right during the term of the lease to purchase the building and the land on which it is located as described on Exhibit A, attached hereto, or to purchase any parcel of land within the boundaries of the parcel described on Exhibit A, if Lessor decides in its sole discretion to sell the land and building or such parcel of vacant land. From time to time during the term of the lease Lessor may deliver to Lessee a notice ("Lessor's Sale Notice") setting forth in reasonable detail a description of the property proposed to be sold.

Lessee shall have ten (10) business days following receipt of Lessor's Sale Notice in which to elect to purchase the property described in the Lessor's Sale Notice. If Lessee fails to timely respond to Lessor's Sale Notice, Lessee shall be deemed to have waived its right to respond to Lessor's Sale Notice and Lessor may proceed to sell such property to

other prospective purchasers. If Lessee exercises the right to purchase the property, Lessee shall notify Lessor and the purchase price for such property shall be the fair market value for such property as determined in the manner hereafter described. Within five (5) days following receipt by Lessor of Lessee's election to purchase such property, Lessor shall notify Lessee of the fair market value at which the property may be purchased as determined by Lessor from comparable buildings or parcels of land in the Cleveland, Ohio vicinity. If Lessee believes that the fair market value specified by Lessor exceeds the fair market value for the property as of the proposed sale date, then Lessee shall notify Lessor of its objection within five (5) days following receipt of Lessor's notice of the amount of the fair market value. If the parties are unable to agree upon the fair market value for the property within five (5) days after Lessor's receipt of Lessee's notice of Lessee's objection to the price, then Lessor shall be free to offer such price to prospective purchasers without any further restrictions imposed upon Lessor.

4. E. Right of First Offer (Lease). Provided Lessee is not in material default under the terms of this lease, and except as to the space proposed to be leased to Richmond Corporation ("Richmond") if such lease to Richmond is executed, Lessee shall have the continuing first right to lease Available (defined below) space in the building, in accordance with the terms and provisions of this Paragraph 4.E. From time to time during the term of the lease, Lessor may deliver to Lessee a notice ("Lessor's Availability Notice") setting forth in reasonable detail a description of space within the building which is available, or which Lessor expects to be or become available. At Lessee's request, Lessor shall arrange for Lessee to view any space described in Lessor's Availability Notice.

Lessee shall have ten (10) business days following receipt of Lessor's Availability Notice within which to elect to lease any of the space described in Lessor's Availability Notice. If Lessee fails to timely respond to Lessor's Availability Notice, Lessee shall be deemed to have waived its right to respond to Lessor's Availability Notice and Lessor may proceed to lease such space to other prospective tenants. If Lessee timely exercises the right to lease the additional space provided herein, the additional space in question shall be added to and become a part of the Demised Premises following the substantial completion of tenant improvements therein, if any, and the base rent payable for such additional space shall be the market rent for such space as determined in the manner hereafter described. Within five (5) days following receipt by Lessor of Lessee's election to lease any of the space described in Lessor's Availability Notice, Lessor shall notify Lessee of the market rent at which the space may be leased as determined by Lessor from available space being marketed in comparable buildings in the Cleveland, Ohio vicinity, taking into account the terms and conditions under which the space is to be leased as set forth in this lease. If Lessee believes that the market rent specified by Lessor exceeds the actual market rent for the proposed space as of the proposed commencement date for the leasing of such space, then Lessee shall notify Lessor within five (5) days following receipt of Lessor's notice of the amount of the market rent. If the parties are unable to agree upon the market rent for the space within five (5) days after Lessor's receipt of Lessee's notice of Lessee's objection, Lessor shall be free to offer such space to prospective tenants and to rent such space without any further restrictions imposed upon Lessor.

As used in this Paragraph 4.E. the term "Available" means that the space in question is or will be, or will become, ready to be offered in the market place to the public at large for rent, free and clear of all claims and rights of other parties. Such space shall be deemed not to be Available only if, as to such space, there is a lease, lease option or other right of extension, renewal, expansion, refusal, negotiation or similar or other right: (i) pursuant to any lease which was entered into on or before the date of this lease or entered into with Richmond; or (ii) pursuant to any extension or renewal of any of the foregoing, whether or not set forth in the original lease or written agreement, or (iii) pursuant to any lease which was entered into after the date of execution of this lease with respect to space for which Lessee failed to timely respond to Lessor's Availability Notice, or failed to reach an agreement with Lessor as to the market rent with respect to such space pursuant to the procedures set forth above, or any extension or renewal thereof whether or not set forth in the original lease.

The right to take additional space pursuant hereto shall only apply provided Lessor and Lessee agree to an extension of the term of this lease pursuant to Paragraph 4.A. above or otherwise, so that there will be at least five (5) years during which the expansion space shall be leased, or if there is not a full five years, if either (i) Lessee agrees to promptly

reimburse Lessor upon the termination of the lease for the unamortized cost of any leasehold improvements Lessor is required to pay for with respect to the additional space, assuming an interest rate of eight percent (8%) per annum on the cost paid for by Lessor for such leasehold improvements and for the unamortized cost of any commissions required to be paid with respect to such additional space, in each instance based upon a 60-month amortization period; or (ii) Lessee agrees to accept a lower leasehold improvement allowance reduced in proportion to the number of months less than a full 60 months that Lessee would occupy and pay rent for such additional space.

4. F. Right of First Refusal (Lease). Provided Lessee is not in material default under the terms of this lease and has not been in material default more than three (3) times during the term of this lease, during the initial term of this lease and excluding the space proposed to be leased to Richmond if such lease to Richmond is executed, Lessee shall have a right of first refusal ("Right of First Refusal") to lease any other vacant space in the building ("Additional Space") on the same terms and conditions that Lessor is prepared to accept from any third party. If Lessor receives a bona fide offer to lease the Additional Space from a third party which Lessor desires to accept, Lessor shall first notify Lessee of the same offer in writing to Lessee. Lessee shall have five (5) business days from receipt of such offer within which to accept or reject the offer in writing to Lessor. If Lessee rejects such offer in writing or fails to notify Lessor of its intention to do so within the aforesaid 5-day period, then Lessee shall be deemed to have waived its rights under this paragraph, and Lessor shall be free to lease the Additional Space to such third party on substantially the same terms and conditions offered to Lessee in the foregoing manner. If Lessor does not enter into a new lease with such third party within six (6) months from the date such offer is first made to Lessee, Lessee's Right of First Refusal shall apply again to such space and Lessor shall be required to submit any other offer for such space to Lessee in the same manner as set forth above.

If Lessee validly exercises its Right of First Refusal herein, the parties shall execute an amendment to this lease adding the Additional Space or shall enter into a new lease for the Additional Space, or shall enter into such other documentation as Lessor shall reasonably require, promptly after Lessor reasonably shall prepare the same, in order to confirm the leasing of such Additional Space to Lessee. However, a valid exercise of the Right of First Refusal contained herein shall not be fully effective unless and until such confirmatory documentation is executed.

The foregoing Right of First Refusal shall apply only with respect to the entire Additional Space, and may not be exercised with respect to only a portion thereof, unless only a portion thereof shall first become the subject of a legally sufficient offer acceptable to Lessor (in which case the foregoing Right of First Refusal shall apply to such portion as the same became subject to such offer).

4. G. Payments on Selden Road Lease. Lessee currently leases space at the property known as 9999 Selden Road, Cleveland, Ohio (the "Selden Road Building") pursuant to the terms of the lease for such space identified by reference on Exhibit D, attached hereto and made a part hereof. Lessor agrees to make the lease payments (including additional rent and other charges due under the lease) through the expiration date of the lease on _____, 20____, required to be made under that portion of the lease of the Selden Road Building which is not being leased on a month-to-month basis, on a short term basis, or under terms where the space is cancelable, subject to a maximum monthly payment of \$_____. Lessee shall continue to be responsible to pay for its own insurance, utilities and repairs with respect to such space to the extent required by the Selden Road Building lease. Lessee hereby represents and warrants that the expiration date of the lease for the Selden Road Building is _____, 20____. The aforesaid payments agreed to be made by Lessor shall not commence until the Lessee commences to pay the base rent hereunder. In addition, such monthly payments shall only be required to be made if and as long as Lessee is current in its rental obligations to Lessor under the terms of this lease. In the event such rental payments are not current, Lessor's requirement to pay rent for the Selden Road Building shall be suspended until such time as Lessee pays all past due rent due under this lease, and is current on all other rent and charges due under this lease.

Lessor shall have the right at any time after this lease is executed to hire a real estate brokerage firm in an effort to sublease the space being leased by Lessee at the Selden Road Building. In order to facilitate such subleasing, Lessee agrees to keep such space in a clean and sightly condition, and to cause its landlord to cause the outside areas to be

cleared from snow and ice as necessary to allow access to such space. In the event all or any portion of such space is subleased prior to the payment of the full amounts of the rent owed for such space, then any unspent money shall accrue to and belong to Lessor.

4. H. Option to Terminate. Lessee shall have a one time right to cancel the lease effective as of the end of the sixth full lease year during the initial term of the lease (the "termination date"), provided that Lessee notifies Lessor in writing of its intention to terminate at least nine (9) months prior to the termination date of the lease, and further provided that Lessee pays the payments hereafter described. In order for this termination to be effective, Lessee must reimburse Lessor for the unamortized cost as of the termination date of all leasehold improvements paid from the \$300,000 allowance granted to Lessee as set forth in Paragraph 4.C. above, assuming that the cost of such leasehold improvements are amortized over the 10-year term of the lease at an interest rate of seven percent (7%) per annum. In addition, Lessee must reimburse Lessor for the unamortized cost as of the termination date of all lease commissions paid by Lessor with respect to the initial term of the lease, assuming the straight-line amortization of such leasehold commissions at an interest rate of seven percent (7%) per annum. In addition to the aforesaid payments, Lessee must also pay in one lump sum to Lessor the equivalent of six (6) months of base rent based on the monthly rental required to be paid by Lessee under the terms of this lease during the sixth year of the lease term. All of the aforesaid payments must be paid to Lessor at the same time Lessee gives Lessor notice of its intention to terminate the lease. In the event all of such payments are not timely made to Lessor, this lease shall continue in full force and effect and there shall be no termination of this lease.

Lessee may exercise the rights in this Paragraph 4.H. notwithstanding that it is at the time of the notice or thereafter in default of this lease; provided, however, that, with respect to any monetary defaults hereunder occurring before or arising after the notice date, Lessor may notify Lessee in writing of the amounts that it in good faith contends are due. Within thirty (30) days after receipt of any such notice, Lessee must, at its election, either (i) pay to Lessor the amount alleged to be due, or (ii) place the amount alleged to be due into an escrow account with an escrow agent mutually selected by Lessor and Lessee. If Lessor and Lessee cannot agree, the escrow agent shall be designated by the Chief Administrative Judge of the Stark County Court of Common Pleas. If Lessee fails to pay such amount alleged to be due or to place it in escrow, this option to terminate early shall be void and of no further force and effect. If reasonably unable to resolve the dispute among themselves within ten (10) business days of the funds being placed in escrow, the parties shall reasonably promptly thereafter cause such dispute to be settled and determined by arbitration in accordance with the commercial rules of the American Arbitration Association, or its legal successor then in effect. The decision of said arbitration, including the decision with respect to the allocation of costs of said arbitration as between the Lessor and Lessee, shall be binding upon Lessor and Lessee. The escrow agent shall disburse the funds in accordance with the arbitration decision promptly upon being notified of the decision. The parties shall share equally in the costs of the escrow agent, if any.

5. Use. The Demised Premises shall be used solely for the operation of Lessee's business, and for no other purpose. This statement in this Lease of the nature of Lessee's business does not constitute a representation by Lessor that such business is lawful or otherwise permitted by law at the Demised Premises. Lessee shall not use or occupy, or permit the use or occupancy of, the Demised Premises, or any part thereof, in any unlawful manner or for any illegal purpose, or in such a manner as to constitute a nuisance or violate the terms and conditions of any certificate of occupancy or equivalent use permit applicable to the Demised Premises, or for any purpose or in a manner liable to cause structural injury, and shall not use or occupy or permit the use or occupancy of the Demised Premises for other than purposes of the nature and to the extent permitted by the laws, rules, regulations, and ordinances of the applicable governmental authorities and their agencies, including without limitation those relating to environmental matters.

6. Compliance With Laws. Subject to Lessor's express obligations hereunder, the Lessee shall throughout the term of this lease, at the Lessee's sole cost and expense, promptly comply with all laws and ordinances, including without limitation, the ADA and all environmental laws, rules and regulations, federal, state and local. Lessee shall likewise comply with the orders, rules, regulations or requirements of all applicable governmental authorities and the orders,

rules and regulations of the applicable Board of Fire Underwriters, or any other body now or hereafter constituted exercising similar functions, foreseen or unforeseen, ordinary as well as extraordinary, and whether or not the same require repairs or alterations, which may be applicable to the Demised Premises and the fixtures thereof, or the use or manner of use of the Demised Premises, except as provided elsewhere in this lease. The Lessee shall likewise observe and comply with the requirements of all policies of public liability, fire and all other policies of insurance at any time in force with respect to the Demised Premises. Lessor shall at its cost and expense comply with all laws and ordinances and the orders, rules, regulations or requirements of all applicable governmental authorities with respect to the building and improvements as a whole.

7. Net Lease. This lease shall be deemed and construed to be a "net lease" and, except as otherwise expressly provided in this paragraph or expressly provided in this lease, the Lessor shall receive all rental and all other payments hereunder by Lessee free from any charges, taxes, assessments, impositions, expenses or deductions of any and every kind and nature whatsoever to the extent the aforesaid are required to be paid by Lessee alone or pro rata by Lessee and other tenants in the building in which the Demised Premises are located, including Lessee. Nothing herein contained shall require or be construed to obligate Lessee to pay any franchise, corporation, capital stock, capital levies, transfer, estate or inheritance tax imposed upon Lessor; provided, however, that in any case in which a tax may be levied, assessed or imposed upon the income arising from the rent hereunder for the use and occupancy of the Demised Premises in lieu of or as a substitute for real estate taxes and assessments upon the Demised Premises and land on which it is situated, or if at any time during the term of this Lease the method of taxation prevailing at the commencement of the term hereof shall be altered so as to cause the whole or any part of the taxes, assessments, levies, impositions or charges now or hereafter levied, assessed or imposed on the real estate and the improvements thereon, to be levied, assessed or imposed wholly or partially as a capital levy or otherwise on the rents therefrom in lieu of or in addition to real estate taxes and assessments upon the Demised Premises, Lessee shall upon written request by Lessor reimburse its pro rata share of the same to Lessor.

8. Utilities. The Lessee shall, during the continuance of this lease, pay for all heat, electric current, water, gas, telephone and other utilities used by Lessee in or upon the Demised Premises. Lessor shall install separate meters to measure Lessee's use of gas and electricity. If other utilities such as water are not separately metered or assessed (or are only partially separately metered or assessed) and are used in common with other tenants in the building, Lessee will pay an apportionment of such charges for utilities used in common based on the proportion of square feet in the Demised Premises served by such utility to the total square feet in the building served by such utility. In the event that the water usage by Lessee or another tenant sharing such bill with Lessee becomes extraordinary, Lessor shall at its expense separately meter such water usage.

Separately metered utilities serving only the Demised Premises shall be paid by Lessee directly to the utility company supplying the same. Lessor shall, at its expense, supply separate gas and electric meters for the Demised Premises and the electrical service brought to the Demised Premises at Lessor's expense shall be adequate to provide power for the existing office space in the Demised Premises, new office space to be constructed by Lessor as described in Paragraph 4.B.2. above, and the production space in the Demised Premises, as determined by customary industry standards. Except with respect to Lessor's Work, Lessee shall, at Lessee's sole cost and expense, procure any and all necessary permits, licenses and other authorizations required for the lawful and proper installation and maintenance upon the Demised Premises of wires, pipes, conduits, tubes and other equipment and appliances for use in supplying any such service to and upon the Demised Premises from the Lessor supplied meters.

Lessor shall not be liable to anyone for cessation of any services, including but not limited to public utility services, heating and air conditioning, due to inability to obtain fuel, electricity, service or supplies from the sources from which they are usually obtained, due to failures in equipment used to provide such services, or for any reason beyond the control of Lessor. Any such interruption of any of the above services shall never be deemed an eviction or disturbance of Lessee's use of the Demised Premises or any part thereof, render Lessor liable to Lessee for damages, or relieve Lessee from the performance of Lessee's obligations under this Lease; provided, however, that if such interruption is

caused by the acts or omissions of Lessor, its agents and employees, and lasts for in excess of seven (7) consecutive days, then Lessee's base rent shall be abated in proportion to the amount of space which Lessee is unable to use to the total space leased by Lessee, until such interruption ceases. Lessor agrees to use commercially reasonable efforts to restore such services at the earliest possible date.

9. Taxes and Assessments.

A. Lessor shall pay, but Lessee shall reimburse Lessor for its pro rata share, as hereafter defined, of all real estate taxes and assessments (both general and special), levied upon the parcel of land described on Exhibit A, attached hereto, and the building in which the Demised Premises are located and any other improvements thereon, including any tax or other imposition charged by any governmental authority (other than franchise or income tax) against the land, building and improvements, the tenancy created hereby, or the rental provided herein, in substitution for or in addition to said real estate taxes and assessments, in whole or in part, and for water rents, sewer rentals, and all charges and other taxes, duties and charges, fees or payments imposed by any governmental, quasi-governmental or public authority, which shall be imposed, assessed, levied or become a charge or lien upon, or arise in connection with the use, occupancy or possession of, the Demised Premises or any part thereof or any appurtenances thereto, for any portion of the term hereby granted. However, if any such real estate taxes and assessments or other such charges relate to a fiscal period of the taxing authority, a portion of which is included in the term of this lease and a portion of which is included in a period of time prior to or after the term of this lease, they shall be prorated based on the applicable portion of the fiscal period coinciding with the term of this lease and Lessee shall be required to reimburse Lessor for its prorata share thereof. The Lessor shall in each instance submit to Lessee a bill evidencing the amount of said taxes and other charges and showing Lessee's pro rata share thereof, and Lessee shall be required to pay said bill within ten (10) days from receipt thereof. Said costs shall be billed to Lessee as often as Lessor is billed for said costs by the taxing authority.

Lessee shall have the right to contest such taxes and assessments at Lessee's expense, if Lessee first requests that Lessor contests such taxes and assessments and Lessor elects not to do so. In the event any refund of such taxes and assessments are obtained by Lessee, Lessee shall be allowed to keep the pro rata portion of the refund attributable to the Demised Premises if previously paid by Lessee, and the balance of such refund shall be remitted to Lessor.

B. Pro rata Share. For purposes of this Paragraph 9. and as used elsewhere in this lease, Lessee's pro rata share shall mean the percentage obtained by dividing the total square feet of space in the Demised Premises leased by Lessee by the total square feet of rentable space in the building; provided, however, in the event the square footage occupied by Lessee in the building is increased or decreased, the Lessee's pro rata share shall be adjusted accordingly in accordance with the aforesaid formula.

10. Insurance. Lessor shall at Lessor's cost and expense (except to the extent reimbursed therefor for Lessee's pro rata share thereof, as hereafter provided) secure and keep in effect during the term insurance policies in the amounts and covering the following risks:

A. For the benefit of Lessor, with respect to the building and improvements in which the Demised Premises are located, All Risk (Special Form) insurance for the full replacement cost of such building and improvements.

B. For the protection of Lessor and Lessee, comprehensive general public (Commercial General) liability insurance against claims for bodily injury or death occurring upon, in, or under the common areas, as hereafter defined, to the extent of not less than One Million Dollars (\$1,000,000) in respect to bodily injury or death to any one person, and to the extent of not less than Two Million Dollars (\$2,000,000) for bodily injuries or death to any number of persons arising out of one accident or disaster, and property damage with limits of not less than Five Hundred Thousand Dollars (\$500,000).

Lessee shall reimburse Lessor for its pro rata share of the premium cost to carry the aforesaid insurance described in

subparagraphs A. and B. above within ten (10) days from receipt of a bill from Lessor evidencing said costs and showing Lessee's pro rata share thereof. Lessor shall bill Lessee for such insurance costs as often as Lessor is billed therefor by Lessor's insurer.

C. Throughout the term of this lease, for the protection of Lessor, Lessee shall secure at Lessee's expense comprehensive general (Commercial General) public liability insurance against claims for bodily injury or death occurring upon, in, or under the Demised Premises to the extent of not less than One Million Dollars (\$1,000,000) in respect to bodily injury or death to any one person, and to the extent of not less than Two Million Dollars (\$2,000,000) for bodily injuries or death to any number of persons arising out of one accident or disaster, and property damage with limits of not less than Five Hundred Thousand Dollars (\$500,000). Lessor shall be named as an additional insured under said policy. Lessee shall provide Lessor with a certificate evidencing such insurance prior to commencement of the lease term and thereafter from time to time when requested by Lessor.

Lessor and Lessee agree that if the building and improvements at any time forming a part of the Demised Premises or the personal property of Lessee located on the Demised Premises shall be damaged or destroyed by an insured peril, and whether or not such damage or destruction was caused by the negligence of or any act or omission of the other party, the other's agents or employees, neither party shall have any liability to the other on account of such damage or destruction, or the cause thereof, and each party shall with due diligence require all policies of risk insurance carried by such party during the term of this lease to be endorsed with a provision by which the insurer designated therein shall waive its right of subrogation against the other party.

Furthermore, each of Lessor and Lessee agrees to, and does hereby waive all rights of recovery and causes of action against the other, the other's agents and employees, and all persons claiming through or under the other, relating to the loss of business, business interruption, or loss of rentals resulting from any damage or destruction to the Demised Premises, or building in which the Demised Premises are located, or any of Lessee's property contained therein, notwithstanding that any such damage or destruction may be due to the negligence or any act or omission of Lessor or Lessee, their respective agents or employees, as the case may be.

11. A. Repairs by Lessor; Common Area Operating Expenses. Subject to the provisions of Paragraph 14., throughout the term of this lease, Lessor shall, at Lessor's expense (except to the extent reimbursed therefor by Lessee's pro rata share thereof as hereafter provided), maintain the building (including its principal components) and other improvements at any time located on the land described on Exhibit A (including, without limitation of the generality of the foregoing, the roof, foundation, vaults, fences, water, sewer and gas connections, pipes and mains, plumbing, heating and ventilation, and electrical systems, parking lots, driveways and other appurtenances) in as good and tenantable repair as at the commencement of the term of this lease, reasonable wear and tear excepted, provided Lessee notifies Lessor of the need for such repairs and further provided such repairs are not caused by the fault or negligence of Lessee, Lessee's agents and employees, except to the extent covered by Lessor's insurance. Said repairs shall include all necessary repairs, interior or exterior, ordinary as well as extraordinary, structural and otherwise, to the Demised Premises and building in which the same are located. Lessor shall, at Lessor's expense (except to the extent reimbursed therefor by Lessee's pro rata share thereof) make all necessary repairs, replacements or alterations to comply with all laws and ordinances, and the orders, rules, regulations or requirements of all applicable governmental authorities with respect to the building and improvements as a whole. When used in this Paragraph 11., the term "repairs" shall include replacements or renewals when necessary.

Subject to Lessee's obligation to reimburse Lessor for a pro rata portion thereof, Lessor shall be responsible for the cost of operation and maintenance of the common areas, as more fully described in Paragraph 25. below, including, without limitation, costs of equipping, removing snow and ice, lighting, cleaning, landscaping, line painting, securing, repairing and replacing, paying personnel to implement such services, plus fifteen percent (15%) of the foregoing costs for Lessor's administrative expenses in connection therewith.

Lessee shall reimburse Lessor for its pro rata share of all of the aforesaid costs (not covered by insurance) set forth in this Paragraph 11., save and except for major structural repairs to the roof, building and foundation, vaults, water, sewer and gas connections, pipes and mains, plumbing, electrical systems and heating/air conditioning system, parking lots, fences, and driveways, within ten (10) days from receipt of a bill therefor itemizing said costs and showing Lessee's pro rata share thereof. Said costs shall be billed by Lessor on an annual basis, or more frequently at Lessor's option.

11. B. Estimated Payments. In order to provide for current payments on account of the payments required for the operating and other expenses described in subparagraph 11.A., above, and to account for the payments required for real estate taxes and assessments and other charges pursuant to subparagraph 9.A., above, and the payments for insurance pursuant to Paragraph 10., above, Lessee agrees that Lessor may at its option at any time during this lease bill Lessee for the estimated amount of such charges to be paid in monthly installments equivalent to 1/12th of the estimated amount of such charges for the year. If, as finally determined, Lessee's pro rata share of such expenses shall be greater than or less than the aggregate of all the monthly installments so paid on account to the Lessor, then Lessee shall promptly pay to Lessor the amount of such underpayment, or Lessor shall credit Lessee for the amount of such overpayment against the next installments of base rental due hereunder, or if such next installments are not sufficient in amount to cover the overpayment, shall promptly refund the overpayment to Lessee.

11. C. Right to Review Records. Lessor shall keep and make available to Lessee for a period not less than twelve (12) months after statements for the operating and other expenses and for real estate taxes and assessments and insurance are rendered to Lessee, as well as for any other fees, charges, or costs assessed by Lessor to Lessee under or in connection with this Lease, records in reasonable detail of such costs and expenses for the period covered by such statement. During such period of time, Lessee and the representatives of Lessee, shall be permitted to examine and audit such records at any reasonable time during Lessor's usual business hours; provided that, upon Lessee's request, Lessor shall mail copies of all such records to Lessee. Lessee shall promptly reimburse Lessor for the copying and shipping costs related thereto. Within one hundred twenty (120) days following receipt by Lessee of such statements from Lessor, Lessee shall be entitled to notify Lessor in writing of any claim by Lessee with respect to the accuracy of the determination of the amount paid by Lessee to Lessor pursuant to the provisions of subparagraphs 9.A. and 11.A. and Paragraph 10., above. Notwithstanding any such claim by Lessee, all such payments due hereunder shall continue to be made by Lessee to Lessor in accordance with the terms of this Lease. In the event that any such claim of Lessee shall not be resolved by the parties within thirty (30) days of written notice of said claim, said claim shall be settled and determined by arbitration in accordance with the commercial rules of the American Arbitration Association, or its legal successor then in effect. The decision of said arbitration, including the decision with respect to the allocation of costs of said arbitration as between the Lessor and Lessee, shall be binding upon Lessor and Lessee within ten (10) days following receipt of notification of the decision of said arbitration. Lessor or Lessee, as the case may be, shall pay any amount due the other by reason of said decision of the arbitration.

12. Repairs by Lessee and Surrender. Throughout the term of this lease, Lessee will keep and maintain the interior of the Demised Premises and any fixtures, facilities or equipment therein in a good state of repair, including, without limitation, all servicing and repairs required to the wiring, plumbing, sewage system, and heating and air cooling installations, ordinary wear and tear, damage by fire, casualty, invasion, acts of war, insurrection and the like, the elements and Acts of God excepted. Lessee, at its expense, shall keep in effect at all times during the term hereof and any renewals a preventive maintenance contract with respect to the heating and air cooling installations serving the Demised Premises, and provide evidence thereof to Lessor. If, with Lessor's approval, any air conditioning units are installed by Lessee, Lessee shall be responsible at its expense for keeping such units in good condition and repair. Lessee shall also keep, maintain and repair all exterior doors and window frames. Lessee will be liable for replacement of all broken glass of the same size and quality as that broken and will keep the entire Demised Premises in a clean, safe and healthy condition according to the applicable governmental ordinances and the direction of the proper public officers. Lessee shall at its expense be responsible for all cleaning, maintenance and waste disposal with respect to its Demised Premises. Lessee further agrees to deliver up and surrender to Lessor possession of the Demised Premises upon the expiration or other termination of this lease in as good condition as when taken, ordinary wear and tear and

damage from the above-specified causes excepted.

13. Alterations.

A. From and after the commencement date of the lease, Lessee shall make no alterations in, or additions or improvements to, the Demised Premises without the written consent of Lessor first had and obtained, provided, however, if such alterations are for an amount less than \$5,000, such alterations shall not require the prior written consent of Lessor. If Lessor consents to any alterations, improvements or additions (collectively, "Alterations"), Lessor may impose such reasonable conditions with respect thereto as Lessor deems appropriate, including, without limitation, requiring Lessee to furnish Lessor with insurance against liabilities which may arise out of such work, furnish plans and specifications and permits necessary for such work, and comply at Lessee's expense with the ADA and the rules and regulations issued thereunder, resulting from such alterations and additions, but in any event excluding the ability to require that Lessee subsequently remove the Alterations, subject however to Paragraph 13.C., below. The work necessary to make any alterations, improvements or additions to the Demised Premises, whether prior to or subsequent to the commencement date shall be done at Lessee's expense by contractors hired by Lessor except to the extent Lessor gives its prior written consent to Lessee's hiring of Lessee's own contractors, which consent shall be solely within Lessor's discretion. If Lessor shall so desire, Lessee shall submit to the reasonable supervision of Lessor or Lessor's agent of Lessee's work at Lessee's expense. Lessee shall also pay Lessor for all other costs and expenses arising directly in connection with such work, including without limitation, additional janitorial, security and utility expenses. Lessee shall promptly pay to Lessor, or the Lessee's contractors, as the case may be, when due, the cost of all such work, supervision, and other charges. Upon completion of such work, or from time to time as Lessor may reasonably require, Lessee shall deliver to Lessor, if payment is made directly to contractors, evidence of payment, contractors' affidavits and full and final waivers of all liens for the labor, services, or materials all in form satisfactory to Lessor. Lessee shall indemnify, defend and hold Lessor harmless from all costs, damages, liens and expenses related to such work. All work done by Lessee, or its contractors, pursuant to this lease shall be done in a first-class workmanlike manner using only good grades of materials, and shall comply with all insurance requirements and all applicable laws and ordinances and rules and regulations of governmental departments or agencies. All such work shall be performed so as not to unreasonably interfere with or materially impair the use and enjoyment of the Building by the Lessor and other tenants as determined by Lessor. Lessor may require all or a portion of such work to be performed outside of business hours. Subject to Lessor's option contained in Paragraph 13.C. below, all additions, alterations, fixtures and improvements (temporary or permanent) in and upon the Demised Premises, whether installed by Lessee or Lessor, shall become Lessor's property, and shall remain upon and be surrendered with the Demised Premises without disturbance or injury upon the termination of this lease by lapse of time or otherwise, all without payment or credit to Lessee. In the event any permitted alterations, additions or improvements in or to said Demised Premises are made by Lessee, the Lessee covenants and agrees that Lessee will make all such alterations, additions or improvements in or to said Demised Premises at Lessee's own expense, including without limitation the cost of all permits and licenses therefor. Any such permitted alterations, additions or improvements which are begun by Lessee shall be completed by Lessee. Lessee shall have the right to remove all Lessee's trade fixtures, furnishings and other personal property in the Demised Premises which have been placed there by Lessee even though the same be attached to said Demised Premises, provided that the removal of such annexation shall be effected before the expiration of said term, all damage caused to said Demised Premises by such removal shall be repaired by Lessee on or before the expiration of said term, including the closing of all floor, ceiling and roof openings resulting from such removal, and all debris shall be removed from the Demised Premises.

B. The Lessee shall not suffer or permit any mechanic's or other liens to be filed against the Demised Premises or any part thereof by reason of work, labor, services, or materials supplied or claimed to have been supplied to the Lessee or anyone holding the Demised Premises or any part thereof through or under the Lessee. If any such mechanic's lien or other liens shall at any time be filed against the Demised Premises, the Lessee shall cause the same to be discharged of record within thirty (30) days after the date of filing the same. If the Lessee shall fail to discharge such mechanic's lien within such period, then in addition to any other right or remedy of the Lessor, the Lessor may, but shall not be

obligated to, discharge the same, either by paying the amount claimed to be due or by procuring the discharge of such lien by deposit in court, or by giving security or in such other manner as is, or may be, prescribed by law. Any amount paid by the Lessor for any of the aforesaid purposes, and all reasonable legal and other expenses of the Lessor, including reasonable counsel fees, in or about procuring the discharge of such lien, with all necessary disbursements in connection therewith, with interest thereon at the rate per annum equal to two percent (2%) in excess of the prime rate of National City Bank, or its corporate successor then in effect, from the date of payment until repaid. Said amount shall be repaid by the Lessee to the Lessor on demand, and if unpaid may be treated as additional rent. Nothing contained herein shall imply any consent or agreement on the part of the Lessor to subject the Lessor's estate to liability under any mechanic's lien law.

C. 1. Lessor shall not have the right to cause alterations or additions described in Paragraphs 4.B. or 4.C. above to be removed, or to have removed any work hereafter performed by Lessor or its contractors or agents. Notwithstanding the foregoing, if Lessee exercised its early termination right under Paragraph 4.H. above, Lessee shall, unless notified to the contrary by the Lessor within thirty (30) days after receipt of Lessee's notice under Paragraph 4.H., remove all wiring, cabling, and telecommunications lines installed by Lessee as part of the work described in Paragraph 4.C., either before the termination of the lease or within a reasonable time thereafter (provided that work in furtherance of this obligation conducted after the termination of the lease shall not cause Lessee to be deemed to be withholding the Demised Premises as provided in Paragraph 28., nor shall it entitle Lessor to the remedies specified in Paragraph 28. or elsewhere in this lease in connection with holdover tenancies). Lessee shall not hereunder be obligated to remove wiring, cabling, or telecommunications facilities (i) that the Lessor or its contractors installed, whether as part of Lessor's Work or otherwise, (ii) that were already in the Demised Premises before Lessee commenced the Lessee's Work, or (iii) if the lease terminates or expires other than in connection with the exercise of Lessee's rights under Paragraph 4.H.. For greater clarity, a default under this subsection C.2. new following shall not limit Lessee's ability to exercise its early termination right under Paragraph 4.H.

2. Additionally, and notwithstanding Lessor's consent to any Alteration to the Demised Premises made after the commencement date of this lease, Lessor shall retain the option, by notifying Lessee at or before the time that approval is issued, of requiring Lessee, at Lessee's sole cost and expense, to remove at the termination or expiration of this lease any and all of said Alterations made after the commencement date of the Lease, including without limitation, wiring, cabling and other telecommunications facilities, and to repair substantially all the damage caused directly by such removal. Should Lessor not notify Lessee at or before the time it issues its approval of an Alteration of the removal requirement, Lessee shall not thereafter be required to remove the Alteration. For greater clarity, this subsection C.2. shall not apply to the work described in Paragraphs 4.B. and 4.C. above.

14. Destruction of Demised Premises.

A. Except as provided in Paragraph 14.B. below, if the Demised Premises, or any part thereof, or building in which the same is located, shall be destroyed or damaged during the first eight (8) years of the term of the lease, and the same can reasonably be repaired or restored within one hundred eighty (180) days following such occurrence, Lessee shall not be entitled to surrender possession of the Demised Premises, or any part thereof, nor shall Lessee's liability to pay rent under this lease cease; but in case of any such damage or destruction, this lease shall continue in full force and effect. Lessor shall be obligated to repair and reconstruct such damage as soon as reasonably possible, subject to delays beyond the control of Lessor. In the event of any such damage or destruction and the same cannot reasonably be repaired within one hundred eighty (180) days following such occurrence, Lessor or Lessee may elect to terminate this lease by written notice to the other within thirty (30) days following such damage or destruction. In the event neither Lessor nor Lessee so elects to terminate this lease, all proceeds of the insurance covering such damage or destruction shall belong absolutely to the Lessor. In the event that neither Lessor nor Lessee elects to terminate this lease, the Lessor's obligation shall be the same as described above under circumstances where the damage and destruction can be repaired within one hundred eighty (180) days.

B. If the Demised Premises, or any part thereof, or building in which the same is located, shall be destroyed or damaged by fire or other casualty at any time during the last two (2) years of the term of the lease, and the same can be reasonably repaired or restored within sixty (60) days following such occurrence, this lease shall not terminate and Lessor shall be obligated to rebuild and repair such damage as soon as reasonably possible, subject to delays beyond the control of Lessor. In the event of any such damage or destruction and the same cannot reasonably be repaired within sixty (60) days following such occurrence, Lessor or Lessee may elect to terminate this lease by written notice to the other within thirty (30) days following such damage or destruction. In the event that neither Lessor nor Lessee elects to terminate this lease, the Lessor's obligation shall be the same as described above under circumstances where the damage and destruction can be repaired within sixty (60) days.

C. If any damage or destruction to the Demised Premises or the repair or rebuilding thereof shall render the Demised Premises untenantable in whole or in part, Lessee shall be allowed a proportionate reduction or abatement of the rental and other charges hereunder corresponding to the time and space of which Lessee shall be deprived (giving due consideration to the reasonable use of the remaining portion of the Demised Premises) from the date of the occurrence of such damage or destruction until the date Lessee completes the repair or restoration thereof.

D. For the purposes of Paragraph 14.B., above, the phrase "term of the lease" shall include the renewal term of this lease if Lessee, at any time prior to the expiration of fifteen (15) days after the occurrence of said destruction or damage, shall have exercised Lessee's option to extend the term pursuant to the provisions of Paragraph 4.A., above.

15. Eminent Domain.

A. If all of the Demised Premises or building in which the Demised Premises are located, or the common areas or such portion thereof as shall substantially interfere with the Lessee's use and occupancy thereof, shall be condemned or taken by any governmental authority, or sold to any such governmental authority to prevent such taking, then this lease shall wholly terminate effective as of the date possession is taken by said authority and the rent, taxes, insurance and other items payable under this lease shall be equitably apportioned and paid to the time of such termination. Thereupon, all parties shall be relieved of any further obligations accruing under this lease.

B. If the amount of property or type of estate taken shall not substantially interfere with the conduct of Lessee's business, this lease shall continue in full force and effect, except that the rental shall be equitably reduced, and Lessor, at Lessor's expense, shall promptly commence and diligently complete the repair and restoration of the remainder of the Demised Premises, subject to delays beyond its reasonable control, to a condition as nearly equivalent as feasible to the condition of the Demised Premises existing prior to such taking. Notwithstanding the aforesaid, if said taking shall occur during the last two (2) years of the term of the lease, either Lessor or Lessee may elect to terminate this lease by written notice to the other within thirty (30) days after the date possession is taken by said authority, effective as of the date possession is taken. If neither so elects, this lease shall continue in full force and effect, except that the rental shall be equitably reduced and Lessor, at Lessor's expense, shall promptly commence and diligently complete the repair and restoration of the remainder of the Demised Premises, subject to delays beyond Lessor's reasonable control, to a condition as nearly equivalent as feasible to the condition of the Demised Premises existing prior to such taking.

C. Whether such taking shall be partial or the entire Demised Premises, and whether this lease shall by reason thereof be terminated or not, Lessee shall not, because of such taking, assert any claim against the taking authority or against Lessor for any compensation because of such taking, except that Lessee shall be entitled to make a separate claim for any rights Lessee may have for Lessee's cost of moving or relocating any trade fixtures, equipment or other personal property that Lessee placed upon the Demised Premises, or for the recovery of any other provable damages to Lessee's business. For this purpose, Lessee reserves the right to participate at Lessee's expense in any condemnation proceeding. In no event, however, shall the Lessee's rights, as stated above, reduce the Lessor's award from the condemning authority as the owner of all interests in the real estate.

D. For purposes of Paragraph 15.B., above, the phrase "term of the lease" shall include the renewal term of this lease if Lessee, at any time prior to the expiration of fifteen (15) days after the date possession is taken by the authority, shall have exercised Lessee's option to extend the term pursuant to the provisions of Paragraph 4.A. above.

16. Rights of Lessor Upon Default.

A. This lease is made upon the condition that Lessee shall punctually perform all of its covenants and agreements as herein set forth and if,

(1) Lessee defaults in payment of rent, or any additional charge or amount of money to be paid by Lessee as provided in this lease, and such default shall continue uncorrected for a period of ten (10) days after written notice to the Lessee thereof; or

(2) Lessee defaults in the prompt and full performance and observance of any of the terms and conditions of this lease to be performed or observed by Lessee and not relating to the payment of money, and any such default shall continue uncorrected for a period of thirty (30) days after written notice to the Lessee thereof, or if any such last mentioned default cannot reasonably be corrected within such 30-day period, then if Lessee shall not within such period have commenced in good faith to correct such default; or

(3) Lessee abandons the Demised Premises or vacates the Demised Premises for longer than fourteen (14) consecutive days; or

(4) any execution, attachment or other order of court shall be issued upon or against the interest of Lessee in this lease and shall continue for a period of thirty (30) days after notice,

then in any such event, in addition to any and all rights and remedies allowed by law and equity, Lessor may, with or without further notice, forthwith terminate this lease and Lessee's right to possession of the Demised Premises, or Lessor may, without terminating this lease, terminate Lessee's right to possession of the Demised Premises.

B. Upon the termination of this lease, or upon the termination of Lessee's right to possession without termination of this lease:

(1) Lessee shall surrender possession and vacate the Demised Premises immediately, and Lessor may enter into and repossess said Demised Premises, with or without process of law, and remove all persons and property therefrom; and

(2) Lessor may remove from the Demised Premises any and all property found therein, and such repossession shall not release Lessee from Lessee's obligation to pay the rents herein provided.

C. In the event of termination of this lease as provided in this Paragraph 16., Lessor, in addition to any and all rights and remedies allowed by law and equity, shall upon such termination be entitled to recover damages in the amount equal to the then present value of the rent reserved in this lease for the entire residue of the stated term hereof less the then present worth of the fair rental value of the Demised Premises for the residue of the term hereof as then in effect, plus the costs incurred, including reasonable legal expenses, to terminate this lease and Lessee's possession of the Demised Premises.

D. In the event of any repossession by Lessor without terminating this lease, Lessor shall use Lessor's best efforts to relet and keep rented the Demised Premises or any part thereof, as agent of Lessee, to any person, firm or corporation, and on such terms as Lessor may determine, provided that Lessor shall use reasonable efforts to mitigate damages to Lessee arising from Lessee's continuing liability under this lease. Lessor may make repairs, alterations, replacements, and/or decorations in or to the Demised Premises to the extent reasonably necessary and advisable for the purpose of

reletting the Demised Premises, and in the making of such repairs, alterations, additions, replacements and/or decorations shall not operate or be construed to release Lessee from liability hereunder; and Lessee shall upon demand pay the cost thereof, together with Lessor's expense of reletting (including reasonable legal expenses and brokerage commissions). If the rents collected by Lessor upon any such reletting are not sufficient to pay monthly the full amount of the rent reserved herein, together with the cost of such repairs, alterations, additions, replacements, decorations and expenses, Lessee shall pay to Lessor the amount of each monthly deficiency upon demand, and if the rent so collected from any such reletting is more than sufficient to pay the full amount of the rent reserved herein, together with such costs and expenses of Lessor, Lessor shall, at least every twelve (12) months after such eviction, account for any surplus to Lessee.

E. Any and all property which may be removed from the Demised Premises by Lessor may be handled, removed, stored, or otherwise disposed of by Lessor at the risk and expense of Lessee, and Lessor shall in no event be responsible for the preservation or the safekeeping thereof. If any property shall remain in the Demised Premises or in the possession of Lessor, and shall not be retaken by Lessee within a period of twenty (20) days from and after the time when the Demised Premises are either abandoned by Lessee or repossessed by Lessor under the terms of this lease, said property shall conclusively be deemed to have been forever abandoned by Lessee.

17. Bankruptcy: Assumption; Assignment; Adequate Protection.

A. Chapter 7. If a petition is filed by or against Lessee under Chapter 7 of the Bankruptcy Code and the Trustee in Bankruptcy ("Trustee") elects to assume this lease for the purpose of assigning it or otherwise, the assumption or assignment, or both, may be made only if all of the terms and conditions of subparagraph 17.C., below, are satisfied. If the Trustee fails to assume this lease within sixty (60) days after the Trustee's appointment, or within such additional time period as the Bankruptcy Court may allow, this lease shall be deemed to have been rejected. Assumption of this lease must satisfy all of the conditions of subparagraph 17.C. below, which Lessor and Lessee acknowledge to be commercially reasonable. In the event this lease is rejected, Lessor shall then immediately be entitled to possession of the Demised Premises without further obligation to Lessee or the Trustee and this lease shall be canceled. Lessor's right to be compensated for damages in the bankruptcy proceeding, however, shall survive.

B. Chapter 11. If a petition for reorganization under Chapter 11 of the Bankruptcy Code is filed by or against Lessee, or a proceeding that is filed by or against Lessee under any other chapter of the Bankruptcy Code is converted to a Chapter 11 proceeding and Lessee as debtor in possession fails to assume this lease within sixty (60) days from the date of filing of the petition or the conversion, or within such additional time period as the Bankruptcy Court may allow, debtor in possession will be deemed to have rejected this lease.

C. Assumption of Lease. Assumption of this lease must satisfy, in Lessor's business judgment, all of the following conditions which Lessor and Lessee acknowledge to be commercially reasonable:

(1) The Trustee or the debtor-in-possession has cured or has provided to Lessor adequate assurance, as defined hereinbelow that:

(a) The Trustee will cure all monetary defaults under this lease within ten (10) days from the date of the assumption; and

(b) The Trustee will cure all non-monetary defaults under this lease within thirty (30) days from the date of the assumption.

(2) The Trustee or the debtor-in-possession has compensated Lessor, or has provided to Lessor adequate assurance as defined hereinbelow, that within ten (10) days from the date of the assumption Lessor will be compensated for any pecuniary loss it incurred arising from the default of Lessee, Trustee, or the debtor-in-possession.

(3) The Trustee or the debtor-in-possession has provided Lessor with adequate assurance of future performance, as defined hereinbelow, of each of Lessee's obligations under the lease; provided, however, that:

(a) The Trustee or debtor-in-possession will also deposit with Lessor, as security for the timely payment of rent, an amount equal to three months base rental and other monetary charges accruing under this lease.

(b) If required by the terms of this lease, the Trustee or the debtor-in-possession will also pay in advance, on each day the base rental is payable one-twelfth (1/12) of Lessee's annual obligation for operating expenses and real estate taxes and assessments.

(4) Lessor has determined that the assumption of this lease will not:

(a) Breach any provision in any other lease, mortgage, financing agreement, or other agreement by which Lessor is bound relating to the Building; or

(b) Disrupt, in Lessor's judgment, the lessee mix of the Building or any other attempt by Lessor to provide a specific variety of tenants in the Building that, in Lessor's judgment, would be most beneficial to all of the tenants of the Building and would enhance the image, reputation and profitability of the Building.

(5) For purposes of this subparagraph 17.C., "adequate assurance" means that:

(a) The Trustee or the debtor-in-possession has, and will continue to have, sufficient assets to assure Lessor that Trustee or the debtor-in-possession will have sufficient funds to fulfill Lessee's obligations under the lease and to keep the Demised Premises properly staffed with sufficient employees to conduct a fully operational, actively promoted business on the Demised Premises; and

(b) An order will have been entered segregating sufficient cash payable to Lessor and/or a valid and perfected first lien and security interest will have been granted on the property of the estate that is acceptable for value and kind to Lessor, to secure to Lessor the obligation of the Trustee or debtor-in-possession to cure the monetary or non-monetary defaults under this lease within the time period set forth above.

(c) If the Trustee or the debtor-in-possession has assumed the lease under the terms of subparagraphs 17.A. or 17.B. above, and elects to assign Lessee's interest under this lease or the estate created by that interest to another person, that interest or estate may be assigned only if Lessor acknowledges in writing that the intended assignee has provided adequate assurance of future performance, as defined hereinbelow, of all of the terms, covenants and conditions of this lease to be performed by Lessee.

(d) For the purposes of this subparagraph 17.C., "adequate assurance of future performance" means that Lessor has ascertained that each of the following conditions has been satisfied:

(i) The assignee has submitted a current financial statement, audited by a certified public accountant, that shows a net worth and working capital in amounts determined by Lessor to be sufficient or to assure future performance by the assignee of Lessee's obligations under this lease;

(ii) If requested by Lessor, the assignee will obtain guarantees in form and substance satisfactory to Lessor, from one or more persons who satisfy Lessor's standards of creditworthiness;

(iii) Lessor has obtained all consents or waivers from any third party required under any lease, mortgage, financing agreement, or other agreement by which Lessor is bound to permit the assignment;

(iv) When, pursuant to the Bankruptcy Code, the Trustee or the debtor-in-possession is obligated to pay reasonable use and occupancy charges for the use of all or a portion of the Demised Premises, the charge will be no less than base rental and additional rent and other monetary obligations of the Lessee included in this lease.

18. A. Lessor's Right to Perform Lessee's Covenants. In addition to, but without limitation or qualification of, any other right or remedy of the Lessor herein provided, if the Lessee shall default in the performance of any covenant, condition or stipulation contained in this lease except defaults pertaining to the payment of rent or other payments owed to Lessor, the Lessor may, after thirty (30) days' written notice to the Lessee, or if such default cannot reasonably be corrected within such 30-day period, then if Lessee shall not within such period have commenced in good faith to correct such default, or with or without notice if, in the Lessor's reasonable opinion, an emergency exists or the default occurs upon the termination of this lease or termination of Lessee's occupancy, perform the same for the account and at the expense of the Lessee, and the amount of any payments made or other expenses incurred by the Lessor for such purpose shall be forthwith repaid by the Lessee with interest thereon at eight percent (8%). Should the Lessee, pursuant to this subparagraph 18.A. or any other provision of this lease, become obligated to reimburse or otherwise pay Lessor any one or more sums of money in addition to the fixed rent, the amount thereof shall be deemed additional rent and may, at the option of Lessor, be added to any subsequent installment of the fixed rent due and payable under the lease, in which event the Lessor shall have the remedies for default in the payment thereof provided in Paragraph 16. above. The provisions of this subparagraph 18.A. shall survive the termination of this lease. Nothing in this subparagraph 18.A. shall in any manner increase Lessor's liability to Lessee or to any others. The rights granted to Lessor under this subparagraph 18.A. shall be permissive only and shall not be construed as requiring Lessor to perform any such condition or covenant or to correct any such default.

B. Lessor's Access to Demised Premises. Lessor reserves the right to enter the Demised Premises during the normal business hours of Lessee only, or at any time in case of an emergency, for the purpose of examining, repairing, renovating, improving and protecting the Demised Premises as and to the extent required by this Lease, or, upon reasonable advance notice to Lessee, for the purpose of showing the Demised Premises to a prospective purchaser or mortgagee, and also during the last nine (9) months of the term of this lease for the purpose of exhibiting the Demised Premises to prospective tenants and putting up the usual notice "to rent" or "for sale," which notice shall not be removed or hidden by Lessee.

19. Indemnity. Lessee agrees that no representations or warranties, either express or implied, have been made with reference to the condition of the Demised Premises or their fitness for the use of any purpose whatsoever except as stated in Paragraph 1.D., above. Lessee shall indemnify, defend and save harmless Lessor from any and all liabilities, damages, penalties, costs, expenses, claims, suits or actions due to or arising out of (i) any breach, violation or nonperformance of any covenant, condition or agreement in this lease contained on the part of Lessee to be fulfilled, kept, observed and performed; (ii) any damage to property or any injury to persons (including death) resulting at any time therefrom in, on, under or about the Demised Premises or the adjacent streets, sidewalks and other adjoining or adjacent areas caused by the negligence, willful acts or omissions of Lessee, or of the employees, agents, invitees, visitors, assignees and sublessees of Lessee, and the employees, agents, invitees and visitors of said assignees and sublessees (except to the extent caused by the negligence, willful acts, or omissions of Lessor, or its employees, agent, invitees, visitors, assignees, contractors, or by the negligence, willful acts, or omission of any other lessee of the building or its employees, agents, invitees, visitors, assignees, or contractors); and (iii) any and all liens placed or permitted to be placed thereon by Lessee, or any other person claiming by, through, from or under Lessee.

Lessor shall indemnify, defend, and save harmless Lessee from any and all liabilities, damages, penalties, costs, expenses, claims, suits, or actions due or arising out of (i) any breach, violation, or nonperformance of any covenant, condition or agreement in this Lease contained on the part of Lessor to be fulfilled, kept, observed and performed; (ii) Lessor's violation of applicable laws, regulations, or judicial orders; or (iii) any damage to property or any injury to persons (including death) resulting at any time therefrom in, or, under or about the Demised Premises or the adjacent

streets, sidewalks and other adjoining or adjacent areas caused by the negligence, willful acts, or omissions of Lessor, or of the employees, agents, invitees, visitors, assignees and contractors of Lessor, and the employees, agents, invitees and visitors thereof (except to the extent caused by the negligence, willful acts, or omissions of Lessee, or its employees, agents, invitees, visitors, assignees, contractors, or by the negligence, willful acts, or omissions of any other lessee of the building or its employees, agents, invitees, visitors, assignees, or contractors).

20. Loss or Damage to Lessee's Property. All trade fixtures, equipment, inventory and all other personal property belonging to Lessee, Lessee's agents, or Lessee's guests, located in or about the Demised Premises shall be at the sole risk of Lessee, and Lessor shall not be liable for the theft or misappropriation, nor for any damage or injury thereto, nor for any damage or injury to Lessee, or any of Lessee's officers, agents, employees, licensees or guests, or to other persons or to any property caused by fire, explosion, wind, water, rain, snow, frost, steam, gas, electricity, any Acts of God, heat or cold, dampness, falling plaster and/or ceilings, sewers or sewage odors, noise, leaks from any part of said building or by the bursting or leaking of pipes, plumbing, electrical wiring and equipment and fixtures of all kinds, or by any act or neglect of any other tenant or of any person; provided, however, subject to the provisions of Paragraph 10., Lessor shall not be relieved of liability for the negligence, intentional wrongful acts or omissions of Lessor, Lessor's agents and employees.

21. Assignment and Subletting. Lessee may sublet all or any part of the Demised Premises and may assign this lease or any interest Lessee may have hereunder, provided that:

(1) the signed written consent of the Lessor to any such subletting or assignment shall first be obtained (which consent Lessor will not unreasonably withhold); and

(2) in the event of any such permitted assignment or subletting, Lessee shall remain liable as Lessee for the performance of all of the conditions and covenants on the part of Lessee to be performed under this lease, unless Lessor shall otherwise expressly consent in writing.

The right on the part of Lessee to assign this lease under any of the foregoing provisions of this Paragraph 21. shall be upon the express condition that such assignment shall be in writing, executed by Lessee and the assignee, that in such writing the assignee shall, in consideration of such assignment, agree to assume, perform and be bound by all of the terms, obligations and conditions on the part of Lessee to be performed under this lease, and that a duplicate executed counterpart of such instrument of assignment and assumption shall be delivered to Lessor within ten (10) days after the execution thereof. For purposes of this Paragraph 21., the sale or transfer of the majority of the common stock of Lessee if not a publicly held corporation, or the majority of the beneficial or equitable interests of the owners of a non-corporate tenant which is not publicly held, shall be considered an assignment of the lease subject to the provisions of this Paragraph 21.

Notwithstanding the foregoing, if Lessee is a corporation Lessee shall have the right to assign this lease or sublet a portion thereof without Lessor's consent, to any subsidiary, parent or successor corporation of Lessee, or to any corporation or subsidiary thereof sharing a common parent with Lessee. A successor corporation shall mean any corporation or entity which shall acquire all or substantially all of the assets and business of Lessee, whether by merger, consolidation, dissolution, corporate reorganization or otherwise. However, in such event, Lessee shall remain liable under this lease and shall notify Lessor in writing of such event within thirty (30) days of its occurrence, and of the exact name and address of the new entity.

If Lessee requests that Lessor consent to a sublease of the Demised Premises or a portion thereof, or an assignment of the Demised Premises (other than in connection with the sale of Lessee's business), in lieu of granting such consent Lessor shall have the right and option to exclude ("recapture") from this lease the space proposed to be subleased or assigned, effective as of the proposed commencement date of the sublease or assignment. At the time of Lessee's request, which shall be by written notice to Lessor, Lessee shall give Lessor written notice of the economic terms of the

sublease or assignment, as the case may be. If Lessor elects to recapture such space, Lessor shall give Lessee written notice thereof within thirty (30) days of receipt of Lessee's written request to sublease or assign such space, in which event Lessee shall surrender such space as of the proposed commencement date. Effective as of the date of recapture of the space proposed to be subleased or assigned, the base rent and other charges hereunder with respect to such recaptured space shall be prorated as of such date, and if the space to be recaptured is not the entire Demised Premises, the base rent and additional rent for the balance of the term shall be adjusted accordingly. In lieu of the recapture of such space, in the event Lessee requests that Lessor consent to a sublease of the Demised Premises or an assignment of the Demised Premises (other than in connection with the sale of Lessee's business), and in the case of a sublease if the terms of the proposed sublease are for a base rent in excess of the base rent per square foot required to be paid in this lease, then Lessor shall have the right to be paid by Lessee fifty percent (50%) of the base rent payable to Lessee under the terms of the sublease to the extent it is in excess of the base rent then being paid by Lessee hereunder, and to the extent in excess of the reasonable out-of-pocket expenses incurred by lessee to sublet the space. Such payment shall be made as and when it is paid to Lessee by its subtenant, within ten (10) days of its receipt by Lessee. In the case of an assignment of the Demised Premises, if as part of such assignment the assignee has agreed to pay Lessee a sum of money (whether in a lump sum or installments) for the value of the leasehold interest, Lessor shall have the right to receive fifty percent (50%) of such payments as and when they are made, and such payments shall be paid by Lessee to Lessor within ten (10) days from receipt of such payments by Lessee.

22. Limitation of Lessor's Liability. The term "Lessor," as used in this lease so far as covenants or obligations on the part of Lessor are concerned, shall be limited to mean and include only the owner or owners at the time in question of the fee of the Demised Premises. In the event of any transfer or transfers of title to such fee, upon written notice to Lessee, the Lessor herein named (and in case of any subsequent transfers or conveyances, the then grantor) shall be freed and relieved from and after the date of such transfer and conveyance of all liability with respect to performance of any covenants or obligations on the part of Lessor contained in this lease thereafter to be performed. Without further agreement, the transferee of such title shall be deemed to have assumed and agreed to observe and perform any and all obligations of the Lessor hereunder during the transferee's ownership of the Demised Premises, including, without limitation, any then-outstanding liabilities or obligations that arose before the transfer was effective. Lessor may transfer Lessor's interest in the Demised Premises without the consent of Lessee, and such transfer or subsequent transfer shall not be deemed a violation on Lessor's part of any of the terms and conditions of this lease.

23. Mortgage Subordination. The Lessee understands that Lessor may have or hereafter desire to place a mortgage upon all or part of the land described herein and the building constructed thereon. It is further understood that the mortgagee of said mortgage may require that the within lease be subordinated to said mortgage, in which event Lessee agrees to execute any document required by such mortgagee to evidence such subordination; provided, however, that the mortgagee of any such mortgage shall covenant in writing that the Lessee's leasehold interest hereunder shall not be foreclosed in any action brought under such mortgage or in the event of a sale of the Demised Premises as a result of said action if at the time of bringing an action to foreclose or at the time of said sale the Lessee is not in default in the payment of rental or in the performance of any other material obligation under this lease, with due allowance to be given for the payment of any past due rental or for the correction of any other material default by Lessee within the period of time permitted after any notice is given or required to be given by the terms of this lease. It is further understood that the mortgagee of said mortgage may require that the Lessee agree to attorn to any purchaser of the property in the event that the same should be sold through foreclosure proceedings, and that the Lessee agrees to waive any and all rights to treat any such foreclosure proceedings as a breach of the lease by Lessor, in which event Lessee agrees to execute any document required by such mortgagee to evidence such agreements.

Within sixty (60) days from the date of execution of this lease, Lessor agrees to obtain and deliver to Lessee a subordination and nondisturbance agreement from Lessee's mortgagee for the benefit of Lessee, on such terms as are commercially reasonable to Lessee and Lessor's mortgagee.

24. Estoppel Certificate by Lessee. Lessee will execute, acknowledge and deliver to Lessor, promptly upon request, a

certificate certifying that (a) this lease is unmodified and in full force and effect (or, if there have been modifications, that the lease is in full force and effect, as modified, and stating the modifications), (b) the dates, if any, to which basic rent, additional rent and other sums payable hereunder have been paid, and (c) no notice has been received by Lessee of any default which has not been cured, except as to defaults specified in said certificate, it being intended that any such certificate may be relied upon by any prospective purchaser or mortgagee of the property or any part thereof.

25. A. Common Areas. "Common areas," as used in the within lease, include, without limitation, all of the parking areas, approaches, entrances, driveways, sidewalks and service areas and landscaping located on the parcel of real estate described on Exhibit A. Lessor shall operate, manage, equip, repair, replace and maintain the common areas for their intended purposes in such manner as Lessor shall, in Lessor's sole discretion, determine; provided, however, Lessor agrees to keep said common areas clean and to remove snow and ice from the parking areas and driveways as promptly as reasonably possible. Lessor reserves the right to change the location, size, elevation or nature of the common areas. Lessor may, from time to time, make reasonable rules and regulations for the use of said common areas, which regulations shall be promulgated when established.

The Lessee, Lessee's agents, employees and invitees, shall have the right to use said common areas jointly with Lessor, Lessor's agents and employees, and other tenants (except such service areas as may be designated by Lessor for the exclusive use of a particular tenant or tenants) of the above-described building, their agents, employees and invitees. All of such use of any of the common areas shall be such as will not unreasonably obstruct or interfere with the joint use thereof, and shall be in compliance with all applicable laws, rules and regulations.

25. B. Parking. Notwithstanding the terms of Paragraph 25.A., above, Lessor shall allocate to Lessee two hundred sixty (260) parking spaces in the current parking lot. Such parking spaces shall be designated by paint markings for use by Lessee. It is understood, however, that this is a one-time designation, and Lessor shall have no responsibility to enforce the use of such parking spaces solely by Lessee, its employees, customers and invitees, except that Lessor shall, once per year, notify the other tenants of the Building and Lessee that certain spaces are designated and marked for the exclusive use of certain tenants.

In addition to the aforesaid allocation of parking spaces, Lessor agrees to land bank approximately one (1) usable acre of ground (at a location near Lessee's eastern parking area) to accommodate approximately one hundred twenty (120) parking spaces. Such one acre of land shall be designated by Lessor in its sole discretion, taking into account the most efficient use of such spaces by Lessee, but also taking into account the ultimate development or disposition opportunities for such adjacent land by Lessor. During the initial two years of the lease term, there shall be no charge for the land banking of the one acre of land. However, whether or not Lessee uses the land banked area, during years 3-5 of the lease there shall be a charge of Ten Thousand Dollars (\$10,000) per year, and during years 6-10 of the lease there shall be a charge of Fifteen Thousand Dollars (\$15,000) per year, each payable in twelve (12) equal monthly installments, in advance, on the first day of each month during the lease year. In the event renewal options are properly exercised, the land bank charge shall be increased by increases in the cost of living occurring during the five years prior to the start of the first 3-year renewal term, and during the three years prior to the start of the next two 3-year renewal terms. Such increases in the cost of living shall be measured by the use of the Consumer Price Index (All Items Figures for All Urban Consumers for the City of Cleveland, Ohio, base year 1982 - 1984 = 100) published by the Bureau of Labor Statistics, Department of Labor, popularly referred to as the "Cost of Living Index," or its successor then in effect. If the base year selected by the U.S. Department of Labor is changed, then the resultant Cost of Living Index shall be readjusted to reflect the base initially established under this lease. If there is no such Index still published at the time of renewal, Lessor shall designate a new Index to be used as near as possible to the Cost of Living Index. With respect to the first 3-year renewal term, the Cost of Living Index as of the first day of the sixth year of the lease herein shall be ascertained and compared with the same as of the first day of the first 3-year renewal term next to commence. In the event the Cost of Living Index is increased between the aforementioned dates, then the monthly charge shall be increased in the same proportion as the aforesaid increase in the Cost of Living Index to obtain the monthly charge to be paid during the first 3-year renewal term. As to the second and third 3-year renewal terms, the Index shall be measured

during the 3-year period preceding the renewal term next to commence. In no event shall the monthly charge then being paid be decreased. In the event Lessee desires to use the parking spaces in the land banked area, Lessee agrees to reimburse Lessor for all reasonable costs for creating and maintaining such parking spaces in the land banked area, including, without limitation, costs of restriping parking lots, converting truck docks, paving grassed areas, and engineering costs. Lessee shall have the right to notify Lessor that Lessee no longer needs the land banked area at any time during the term of this lease, in which event all future monthly payments thereafter payable for such land banked area shall terminate.

26. Signs. Lessee shall have the right to erect and maintain a sign upon the front entry way to the Demised Premises, and to share use of the monument sign with other tenants now or later occupying space in the building, all at Lessee's expense. Lessor agrees that Lessee shall have the right to the top position on the monument sign. All such signs shall be necessary or appropriate to the conduct of the business of Lessee and not in violation of any governmental rule or regulation and will not invalidate any insurance policy of Lessor; provided, however, that Lessee shall not have the right to erect or maintain in or upon the entry to the Demised Premises any sign, the erection, maintenance or removal of which will operate to decrease the value of the Demised Premises or impair the structural integrity of the building, without the Lessor's prior consent in writing. Installation of any exterior signs, however, shall be subject to the prior written approval of Lessor as to design, size and location, it being understood that the Demised Premises are part of an integrated and uniform warehouse-office building, and that control of exterior signs by Lessor is essential.

Lessee shall maintain said signs in good condition and repair at all times, and shall save Lessor harmless from injury to person or property arising from the erection or maintenance of said signs. Any signs placed in or upon the Demised Premises, upon the written request of Lessor, shall be removed by Lessee at Lessee's expense upon the expiration or sooner termination of this lease, and all damage caused by the removal of such signs shall be fully and promptly repaired at the cost and expense of Lessee.

27. Quiet Enjoyment. The Lessor covenants that Lessor has lawful title to the above-described real property and the right to make this lease for the term aforesaid and, conditioned upon the prompt performance and observance by the Lessee, Lessee's agents and employees, of all of the terms, covenants and conditions hereof required to be performed or observed by Lessee, Lessee's agents and employees, Lessee shall at all times during the term of this lease have the peaceable and quiet enjoyment of the Demised Premises.

28. Withholding Premises. Should Lessee withhold possession of the Demised Premises after the termination of this lease, whether by lapse of time or otherwise, Lessee shall be subject to all of the terms of this lease except the rent required to be paid shall be at a rate equal to one and three-fourths (1 3/4) times the base rental set forth in Paragraph 3. above required to be paid by Lessee during the last twelve (12) months of the lease term. In addition, if Lessor shall suffer any damage or loss which may result from Lessor's inability to timely deliver the Demised Premises to a subsequent tenant, Lessee shall promptly pay the amount to Lessor. Should Lessee occupy the Demised Premises after the termination of this lease for any cause whatsoever, Lessee shall be considered a tenant-at-will and by sufferance of Lessor and no such occupancy shall operate as a renewal of the lease or any part thereof.

29. Effect of Demand. Any demand for rent upon the Lessee after the same shall have become due and payable, or for the performance or observance of any covenant or condition of this lease after the same is required to be performed or observed under the provisions hereof, shall have the same effect as though made at the time and place such rent became due or such obligation should have been performed or observed, any law to the contrary notwithstanding.

30. Effect of Waiver. No waiver of any condition or covenant of this lease or of the breach of any condition or covenant shall be taken to constitute a waiver of any subsequent breach of such condition or covenant, or to justify or authorize the nonobservance on any other occasion of the same or any other condition or covenant thereof. The acceptance of rent by the Lessor at any time when the Lessee is in default of any covenant or condition shall not be construed as a waiver of such default or of the Lessor's rights under Paragraph 16. above on account of such default, nor shall the payment of

rent by the Lessee at any time when Lessor is in default under any covenant or condition hereof be construed as a waiver of such default, nor shall any waiver or indulgence granted by the Lessor or Lessee be taken as an estoppel against the party granting the same.

31. Notices. Whenever Lessor or Lessee shall make any demand or serve any notice which is required to be in writing under the terms of this lease upon the other, the same shall be in writing and shall be sufficiently given if sent, postage prepaid, by United States registered or certified mail, or personally delivered by a nationally recognized overnight courier, addressed to Lessee at 9999 Selden Road, Cleveland, Ohio 44139, until such time as Lessee takes occupancy, after which all notices shall be sent to Lessee at its address in the building, and addressed to Lessor at 9999 Smith Parkway, Wilmington, Delaware 08439, or at such other address as Lessor or Lessee may theretofore by written notice to the other have designated for the service of such notice.

32. Terminology; Captions. Where the context so requires or such interpretation is appropriate, any word used herein denoting gender shall include all genders, natural or artificial, and the singular and plural shall be interchangeable. The term "paragraph" shall refer to all paragraphs under the caption in question, where appropriate. The captions of the various provisions of this lease are for convenience only and in no way define, limit or describe the scope or intent of this lease or the provisions which they precede or in any other manner affect this lease.

33. Short-Form Lease. This lease shall not be recorded, but the parties agree to execute a skeleton lease incorporating the terms of this lease and including a legal description of the property upon which the Demised Premises is situated, at the request of Lessee or Lessor. The same shall be duly executed in form suitable for recording, and any costs incurred in connection therewith shall be at the expense of the party requesting same.

34. Successors and Assigns. This lease and the covenants and conditions herein contained shall inure to the benefit of and be binding upon Lessor, Lessor's successors and assigns, and shall be binding upon and inure to the benefit of Lessee, Lessee's heirs, legal representatives, or successors and those assignees of Lessee who become assignees in accordance with and as permitted by the terms of Paragraph 21. above.

35. Severability. In case any one or more of the provisions contained herein shall for any reason be held to be invalid, illegal or unenforceable in any respect, such invalidity, illegality or unenforceability shall not affect any other provision of this lease, but this lease shall be construed as if such invalid, illegal or unenforceable provisions had not been contained herein.

36. Remedies Not Exclusive. All rights and remedies of the Lessor and Lessee herein set forth shall not be exclusive, but shall be in addition to any and all rights and remedies allowed by law and equity.

37. Waiver of Jury Trial. The parties hereto shall and do hereby waive a trial by jury in any action or proceeding on any matters whatsoever arising out of or connected with this Lease, the relationship of Lessor and Lessee, Lessee's use or occupancy of the Demised Premises, or any claim of injury or damages.

38. Authority of Lessee. Lessee hereby agrees that prior to Lessee's execution and delivery of this lease to Lessor and as a condition of Lessor's duties and obligations hereunder, Lessee will provide Lessor with such reasonable documentation as Lessor may require, including, without limitation, a resolution evidencing the Lessee's authority to execute and deliver this Lease.

39. Broker. Lessor warrants, which warranty shall survive the execution of this lease, that no brokerage fee or other compensation is due any real estate broker or other person or entity by reason of this transaction except _____ and _____, jointly, who shall be paid by Lessor, and _____ who shall be paid by _____ and _____, jointly. Lessee warrants, which warranty shall survive the execution of this lease, that no broker induced Lessee to enter into this transaction except

_____, _____ and _____. Lessor and Lessee each agree to indemnify, defend and hold harmless the other from any breach of said warranties.

40. Entire Agreement. This lease contains the entire agreement between the parties hereto; and any agreement hereafter or heretofore made shall not operate to change, modify, terminate or discharge this lease, in whole or in part, unless such agreement is in writing and signed by each of the parties hereto.

The parties hereto have signed this Indenture of Lease as of the date first above written.

ROUDABUSH ASSOCIATES, LLC

By: _____
Managing Member

WHELAN CORPORATION

By: _____

And: _____

Acknowledgments

EXHIBITS

EXHIBIT A -- Legal Description of Land

EXHIBIT B -- Floor Plan of Demised Premises (office space and production)

EXHIBIT C -- Description of General Building Work by Lessor

EXHIBIT D -- Identification of Tenant's Existing Lease at Selden Road Building



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Current Legal Forms for Real Estate

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Current Legal Forms for Real Estate
Chapter 23 REAL ESTATE LEASES
Part IV. Forms
B. LEASE CLAUSES

31-23 Current Legal Forms for Real Estate FORM 23.25

AUTHOR: by Thomas G. Belden

FORM 23.25 Description of leased property

COMMENT

This section sets forth the basic provisions in lease agreements. Each "Form" in this section deals with a different type of provision, and includes various clauses illustrating techniques employed in drafting that type of provision.

Selected clauses:

In order to deal with a manageable group of clauses, it has been necessary to select only the principal items covered in leases. In practice, many lease provisions deal with matters which are unique to the particular relationship between the parties. These are not sufficiently recurrent to warrant their inclusion in a selective group of clauses. There are also, in general use, various minor provisions which give the draftsman no trouble, and as to which there could be no useful commentary. These too have been omitted from this chapter.

Lease of property interest:

A lease has a dual purpose: to convey an interest in real property and to establish the terms of a continuing relationship between the landlord and the tenant. Thus, the draftsman must formulate both an adequate definition of the property interest conveyed and the essentials of a durable contractual agreement. The first step in defining this interest is to describe the leased property. This is the purpose of the clauses in this group. Other provisions may qualify the scope of the leasehold interest, such as those dealing with the title and the condition of the property, the availability of vault space, and the limitations or privileges of easements.

Property description:

The particularity with which the property interest must be described depends in part upon the nature of the leased premises, the duration of the lease, and the commitments undertaken by the parties. In the case of short-term residential leases, identification of the leased premises is made by a simple reference to a street address, or to an address and apartment number. Commercial leases generally require more detailed descriptions. A metes-and-bounds description may be advisable. The size of the building or the total number of square feet is often specified. If the lease covers part of a floor, a blueprint or sketch of the precise area may have to be attached. If personal property is included, it should be itemized in an accompanying schedule which also describes its condition.

Additional lease rights:

In most situations a tenant leases more than just floor space. The property rights which are usually implied include the right of access to the leased property, or the right to display the tenant's name on a building directory or shopping center sign. Some of these related rights may be of significant importance to a particular tenant or landlord. An express provision in the lease is advisable in these situations. For example, a shopping center tenant may seek an express clause granting the tenant, its employees and customers, access to the common areas, such as parking, walkways and other facilities. An office tenant may seek the express right to list not only the tenant's corporate name on the building directory, but also the names of corporate officers, significant employees, as well as affiliated companies or subtenants.

FORMS*(1) Entire building--detailed description attached*

The Landlord leases to the Tenant the property located at 250 Circle Drive, City of Centreville, State of New York (the "leased property"), more particularly described in Schedule A attached hereto and made a part hereof.

(2) Entire motel building--personalty included

The Landlord leases to the Tenant all the property known as the West Side Motel, on Uptown Avenue, Hollywood, California, together with the furniture, furnishings, fixtures, and equipment used in the operation of such motel and listed in Schedule A attached hereto and made a part hereof (collectively the "leased property").

(3) Office space--diagram attached

The Landlord leases to the Tenant, and the Tenant takes and hires from the Landlord, the office space constituting a portion of the ground floor and a portion of the second floor, as outlined in red on Exhibits A and B attached hereto and made a part hereof, of the Perry Building, located on the northwest corner of 8th Avenue and 47th Street, New York, New York (the "leased property").

(4) Land and building to be erected

The Landlord hereby leases to the Tenant, subject to the conditions hereinafter contained, that certain parcel of real property, together with the buildings and improvements to be erected thereon, situated in the City and County of New York, State of New York, described as follows:

(Insert description)

(5) Store in shopping center to be erected--common parking facilities

The Landlord, for and in consideration of the rents, covenants, and agreements hereinafter specified to be paid, kept, and performed by the Tenant, leases the premises consisting of a store 40 feet by 80 feet (the "leased property") to be built by the Landlord in the shopping center area located at the west side of North Road, in the town of Greenville, New York. The store is to be located approximately as outlined in red on the plot plan dated January 4, _____[date], annexed and marked Exhibit A. This lease includes the Tenant's right to use, in common with other tenants of the shopping center, the parking facilities in the area outlined in blue on Exhibit A for the parking of automobiles of the Tenant's employees, customers, invitees, or licensees.

(6) Shopping center lease--common areas--landlord's obligation to maintain--common area charges

(a) *Common areas.* Landlord grants to Tenant, in common with other tenants, and their agents, employees, customers, and persons doing work for or business with tenants in the shopping center, the right to use the "common areas" consisting of the parking areas, roadways, pathways, sidewalks, entrances, and exits designated by Landlord for common use in the shopping center, subject to the terms and conditions of this lease.

(b) *Maintenance of common areas.* The Landlord or its managing agent shall be required: (i) to maintain and keep in good repair (including the making of any necessary replacements) all portions of the common areas, including, but not limited to, paving, roads, hydrants and sprinkler equipment (including standby charges), driveways, sidewalks, secondary fire pump facility, curbs, culverts and drainage facilities, surfacing, landscaping, barriers, retaining walls, fences, gates, grading, directional and shopping center signs, marking of the parking area, sewer and water supply lines and facilities, and other outside service and utility lines and facilities, including electric lines, pipes, and installation of every kind serving the buildings in the shopping center (including those in premises not leased to Tenant); (ii) to keep the common areas reasonably free from accumulated snow, ice, and refuse, and open for use and fully lighted during all business hours; (iii) to keep the curb cuts of the shopping center, and to keep the sidewalks and curbs, if any, adjacent to and immediately in front of the shopping center, in good condition and repair, and reasonably free from accumulated snow, ice, and refuse, and to comply with all applicable governmental requirements; (iv) to establish reasonable reserves for the replacement of the paving; and (v) to include the common areas and the above curb cuts, sidewalks and curbs, covered by public liability insurance, protecting the Landlord and Tenant against all claims for personal injury and property damage occurring thereon with limits of at least \$500,000 for bodily injury to one person, \$1,000,000 for injury to all persons in any one occurrence, and \$100,000 for property damage. The insurance policy shall be written by companies licensed to write insurance in the jurisdiction where the shopping center is located. Such insurance may be carried under a blanket policy covering the Landlord's other locations, and shall include Tenant and may include as insured other tenants of the buildings in the shopping center. Landlord shall provide Tenant with a certificate of such insurance.

(c) *Control of common areas.* Landlord shall have exclusive control over and management of the common areas, and may establish, modify, change, and enforce reasonable rules and regulations with respect thereto. Tenant shall abide by and conform with such rules and regulations. Customers shall have the right to use the parking facilities only while they are shopping in the shopping center. Tenant and its employees may park their trucks, delivery vehicles, and automobiles only in parking areas designated by Landlord for that purpose. Landlord may close any part of the common areas for whatever time as may, in the opinion of Landlord's counsel, be necessary to prevent a dedication thereof or the accrual of any rights in any person, or to clean and repair such area. Landlord may close any part of the parking area for whatever time it deems necessary in order to discourage noncustomer parking and to do other things that it deems reasonable and necessary for the benefit of the shopping center.

(d) *Common area charges.* Tenant shall pay Landlord, as an additional charge for the use and maintenance of the common areas, its proportionate share, which is 6.71 percent, of Landlord's total actual costs of maintaining, operating, and insuring such areas. Tenant shall make such payments within 10 days after Landlord submits statements indicating the amounts due.

(7) General access to leased property

The Tenant may, at any time during the term of this lease or any renewal, determine and change the hours during which it keeps the leased property open for business. The Tenant's employees, agents, customers' clients, and business invitees shall at all times during which the Tenant is open for business have the free and uninterrupted right of access to the leased property by means of all doorways, passageways, corridors, stairways, elevators, and entrances to the building which afford access to the leased property.

(8) Continued occupancy of existing space during construction of new space--proportionate rent abatement for surrendered space

The parties acknowledge that Tenant, on the Commencement Date of this Lease will continue to use and occupy portions of the Building other than the Demised Premises ("Tenant's Existing Space"). Landlord has agreed to permit Tenant to remain in Tenant's Existing Space until Tenant's Initial Construction in the Demised Premises has been completed. Such use and occupancy of Tenant's Existing Space shall be pursuant to all of the terms, covenants, and conditions of this lease, except for those which are inapplicable to Tenant's Existing Space and except for the following:

(a) *Rent.* The fixed rental during the first three months following the Commencement Date shall be at the annual rate of \$2,020,847.50 including electricity. Such rental shall be payable in equal monthly installments of \$168,403.95, without any set-off or deduction, in advance on the first day of each month during the term. The first installment shall be payable on the Commencement Date. Rent payments shall continue throughout the term (subject, however, to adjustment as provided below) until Tenant has quit and surrendered to Landlord all of Tenant's Existing Space. If the Commencement Date is not the first day of a calendar month, the fixed rent for such month shall be prorated, and the balance of the first month's rent theretofore paid shall be credited to the next monthly installment.

(b) *Pro rata abatement.* Commencing with the fourth month of the term, the fixed rental for Tenant's Existing Space shall continue at the annual rental rate provided in (a) above, except that rental shall be abated at the rate of \$8.75 per square foot of usable area to be effective as Tenant surrenders a portion or portions of Tenant's Existing Space to Landlord. Adjustments of rental shall be made on a weekly basis, the first adjustment to be made on the Rent Commencement Date.

(c) *Good faith.* Tenant shall use due diligence and best efforts to complete Tenant's Initial Construction as soon as possible following the Commencement Date. Tenant further shall promptly quit and surrender those portions of Tenant's

Existing Space as its work in such portions is completed.

(9) Roof space--advertising purposes

The Landlord leases to the Tenant the entire roof of the building located at 7 Elwood Road, Troy, New York. The Tenant shall have the exclusive right to erect, place, and maintain an advertising sign structure on such roof and to post, paint, illuminate, and maintain advertisements on such structure.

(10) Vacant land--right to erect sign

The Landlord leases to the Tenant a strip of ground on front of lots situated in Madison, Wisconsin, described as follows:

(Insert description)

The Tenant shall have the exclusive right to place, erect, and maintain thereon billboard structures. The Tenant may use whatever space in the rear of such strip is necessary for placing supports or braces for such structures, and may maintain advertisements on them, for the demised term.

[Attach Schedule A]

[Attach Exhibit A]

[Attach Exhibit B]



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31-23 Current Legal Forms for Real Estate FORM 23.26

AUTHOR: by Thomas G. Belden

FORM 23.26 Rights and options to expand or contract tenant space

COMMENT

Expansion and contraction of tenant space:

Business planning flexibility can be achieved by allowing a tenant to increase or decrease space during the term of the lease. A tenant, anticipating future growth, may seek an option to lease adjoining or nearby space during the term. On the other hand, if a tenant plans to eliminate or move certain operations in the future, the lease might allow the tenant the right to abandon part of the leased property, while continuing to occupy the remainder. The inclusion of such clauses, and the mechanics of achieving the desired flexibility, depend on the particular circumstances of the transaction.

Expansion of space:

Expansion options may be achieved by giving the tenant the right of first refusal or the right of first offer for the desired space as it becomes available. Such a provision will give the tenant a right to lease the desired space that is superior to the right of any third party. Under such an arrangement, the tenant has no obligation to lease the additional space if and when it becomes available. Alternatively, surrounding tenants may be restricted to short-term leases of adjoining space, which are expressly subject to the right of the landlord to relocate them if the principal tenant seeks to expand.

Right of first refusal:

The tenant who has a right of first refusal essentially has a latent option to rent certain premises that is activated when a third party offers or agrees to rent the premises. The tenant's right to lease the property for the rental price and on the terms offered by the third party is superior to the third party's offer or agreement. The right of first refusal gives the tenant the right to lease, if, and only if, the landlord first decides to lease and receives an offer. If the landlord does not decide to entertain offers during the term of the tenant's lease, or during the period of the tenant's right as contained in the lease, the tenant has no right to lease the additional premises.

Right of first offer:

Another possible method for granting a tenant an expansion right is the right of first offer. The landlord who gives a tenant a right of first offer is obligated to offer to lease the desired premises to the tenant before offering to lease the premises to any third parties. The tenant's right to lease is activated when the landlord offers the property to the tenant at a rental price and upon terms chosen by the landlord, rather than when the landlord receives an offer from a third party. The tenant may accept the landlord's terms for the lease, or, if not, the landlord may offer the premises to third parties at the same rental price and upon the same terms.

Contraction of space:

If the tenant plans to eliminate or move certain operations in the future, the lease can grant the tenant the right to abandon part of the premises while the tenant continues to occupy the remainder. A provision permitting the tenant to decrease space may specify the space to be abandoned, and the time period within which the option to abandon must be exercised or else forfeited. The lease also should include a formula or other method for rent adjustment.

FORMS*(1) Future surrender of part of leased premises at tenant's option*

Tenant's obligation to occupy and pay fixed and additional rental for the 13th floor portion of the Demised Premises shall be in effect for the first 30 months of the demised term only. If Tenant does not intend to use and occupy such portion of the Demised Premises beyond the 30th month, it shall so notify Landlord not less than six months before the 30th month ends. In that case, Tenant shall quit and surrender the 13th floor to Landlord on or before the end of the 30th month in accordance with the terms of this Lease (but subject to any existing subleases). Upon such surrender the parties shall promptly enter into an appropriate amendment of lease to restate the Demised Premises, the fixed rent, Tenant's proportionate share of Adjustments of Rent, and all other mutually agreed upon matters.

(2) Option to lease additional space

The Tenant shall have an option to lease approximately 3,200 square feet of additional rentable space by giving written notice to the Landlord on or before July 1, _____[date]. Landlord shall designate such additional

space, and will use reasonable efforts to provide it on the tenth floor adjacent to the property originally leased hereunder. This option is given upon the following terms and conditions:

(a) This lease shall be in force on January 1, _____[*date*], on which date Tenant shall have fully performed all the terms of this lease.

(b) The term for the additional space shall commence on January 1, _____[*date*], or on such date thereafter as Landlord is able to deliver possession thereof to Tenant, but in any event not later than January 1, _____[*date*]. The term for the additional space shall terminate on the termination date of this lease.

(c) The annual rent for the additional space shall be \$12 per square foot.

(d) If the Tenant exercises this option to lease, the parties shall enter into a written agreement modifying this lease. Such modification shall reflect and be governed by the terms of this lease, with appropriate adjustments for the additional rentable area.

(e) The Landlord shall use reasonable diligence to make such additional space available to the Tenant as soon after January 1, _____[*date*], as it can. The Landlord shall not be liable for the failure to give possession of the additional space on the commencement date set forth above if such failure is caused by the holding over or retention of possession of any tenant or occupant. Moreover, such failure shall not impair the validity of this lease or extend its term. The rent for such additional space shall be abated until possession is delivered to the Tenant.

(3) Future expansion of leased space at tenant's option--restrictions on lease of adjoining space by others

(a) *Option to lease additional space.* Tenant shall have the option to lease, for the first ten lease years, the contiguous approximately 25,000 square feet of gross floor area (as such configuration is set forth in Exhibit B annexed or as it is agreed upon by the parties when the option is exercised or as soon thereafter as practicable) at the per square foot rent then prevailing under this Lease.

With respect to such additional space: (i) the term of any lease that Landlord enters into with any other party shall not exceed five years; (ii) any such lease shall contain a clause permitting Landlord to relocate that tenant to other space; and (iii) within thirty days after the other tenant executes the lease, Landlord shall provide Tenant with a memorandum thereof, not in recordable form, setting forth, at a minimum, the terms and conditions for that space.

If Tenant has exercised its rights to lease additional space, it shall pay all costs and expenses of the other tenant's relocation.

(b) *Rental of excess space.* Tenant may lease space in excess of the 25,000 square feet provided in subparagraph (a), as such space becomes available for leasing, at the then prevailing market rental. Landlord shall not be required to notify Tenant of any prospective lease unless Tenant has given Landlord prior written notice of Tenant's desire to lease additional space.

(c) *Notice; terms of lease.* Exercise of the option set forth in paragraph (a) shall be by written notice, certified mail, return receipt requested, not less than seven months before the date on which Tenant intends to take possession of the option space. Such contiguous space shall, after the date of possession, be included within the demised premises and be leased under the same terms and conditions as contained herein.

(4) Right of first refusal of tenant to lease available space

Tenant shall have the right of first refusal with respect to leasing, on an entire floor basis, the 12th, 13th, 14th, and 15th floors in the Building as such space becomes available for leasing by the Landlord, provided that (1) this Lease is then in full force and effect, and (2) at least five years of its term then remain (or, if less than five years remain, Tenant has given notice of its option to accept an extension of this Lease). The exercise of Tenant's right of first refusal shall be further subject to the following conditions:

(a) As soon as Landlord receives an acceptable bona fide offer from a third party for the leasing of all or any part of such space (on an entire floor basis), Landlord shall notify Tenant of the terms and conditions of such offer and furnish it with a true copy thereof. Tenant shall then have 30 days to notify Landlord that it agrees to lease the same space on the same terms and conditions as are contained in such offer.

(b) Landlord may accept the third party's offer if Tenant declines to meet the offer or fails to reply to Landlord's notice thereof within the 30-day period specified in (a), above.

(c) If Tenant agrees by reply notice to meet such offer, it shall promptly enter into a modification of this Lease with Landlord to incorporate the subject space into this Lease, but otherwise upon the terms and conditions set forth in such offer.

(5) Right of first refusal of tenant to lease contiguous additional space--adjustment of rent if space added to leased premises

Tenant shall have a right of first refusal to lease any additional space which becomes available during the term of the Lease, provided that such additional space is contiguous to the Premises and shall consist of no less than _____ square feet ("Additional Space"). If Landlord has Additional Space available and receives a bona fide offer to lease the Additional Space from a third party which Landlord is willing to accept, Landlord shall send written notice to Tenant, which notice shall set forth the terms of the third party offer. Within _____ days after receipt of Landlord's notice, Tenant shall reply by written notice either accepting the Additional Space on the same terms and conditions of the third party offer, or rejecting the same. Failure to respond within the _____-day period shall constitute a rejection of the Additional Space. If Tenant accepts the Additional Space, the Additional Space shall be added to the Premises by amendment to this Lease, which shall include an adjustment of Tenant's pro rata share and such other changes as may be appropriate.

(6) Right of first offer of tenant to lease available space

During the first two Lease Years, Landlord agrees that prior to entering into a lease with another tenant for space contiguous to the Leased Premises outlined in green on Exhibit A, Landlord shall so notify Tenant, in writing, which notice shall be accompanied by a term sheet for such space (the "Termsheet"), setting forth the terms and conditions under which Landlord is willing to lease such space to Tenant. Tenant shall then have a period of seven (7) business days after receipt of such notice and Termsheet (the "Acceptance Period") within which to notify Landlord, in writing, that it elects to lease such space on the terms and conditions set forth in such Termsheet. If Tenant makes such election within the Acceptance Period, an appropriate amendment to this Lease shall be entered into by Landlord and Tenant to add the adjacent space to the Leased Premises on the terms set forth in the Termsheet submitted by Landlord. If Tenant does not make the aforesaid election within the Acceptance Period, or if Landlord and Tenant do not enter into an amendment to this Lease incorporating such space on the terms set forth in the Termsheet within thirty (30) days after receipt by Landlord of Tenant's written election to lease such space, Tenant shall be deemed to have waived its rights with respect to the space set forth in Landlord's notice and Landlord shall be free to lease such space to another tenant free of any claim of Tenant.

(7) Right of first offer--provisions for conditions, notice requirements, rent, build-out, removal of holdover tenants

(1) During the term of this lease, as extended in accordance with the terms of the lease, Tenant shall have the right of first offer (the "Right of First Offer"), to lease space located on the second and third floors of the landlord's building (the "Offer Space").

(2) At the time Tenant exercises a Right of First Offer: (a) the Lease must be in full force and effect; (b) Tenant shall not be in Default; and (c) the commencement date of the lease for any Available First Offer Space must be at least _____ years prior to the expiration date of this lease, unless Tenant simultaneously exercises its option to renew in accordance with the provisions of this lease.

(3) (a) After any part of the Offer Space has or will "become available," as defined below, Landlord shall not, during the term of this lease, offer on the market or lease to another tenant that space within the Offer Space that has or will become available without first offering Tenant the right to lease that space.

(b) Space shall be deemed to become available when the lease for the current occupant of the space expires or is otherwise terminated.

(c) Offer Space shall not be deemed to become available if the space is: (i) assigned or subleased by the current tenant of the space; (ii) released by the current tenant of the space by renewal, extension, or renegotiation; (iii) subject to a specific expansion right of another tenant in the landlord's building existing as of the date of this lease unless and until such other tenant has failed to timely exercise its option or right; or (iv) not leased to a tenant as of the date of this Lease (until that space is leased, and then subsequently "becomes available").

(d) Landlord shall not offer any such Offer Space on the open market unless and until Landlord has first notified Tenant in writing (the "First Offer Leasing Notice") that Landlord intends to offer the designated Offer Space to third parties, and until a period of fifteen (15) days has elapsed from the date that Landlord has delivered to Tenant the First Offer Leasing Notice without Tenant having notified Landlord in writing of Tenant's desire to lease all of the Available First Offer Space (defined below). The First Offer Leasing Notice shall: (i) advise Tenant that Landlord intends to offer on the market the Available First Offer Space; (ii) describe the amount and location of the First Offer Space that has or will become available (the "Available First Offer Space") and attach a floor plan showing the Available First Offer Space crosshatched; and (iii) set forth the date on which the Available First Offer Space will be available for leasing by Tenant (which shall not be more than twelve (12) months and not less than three (3) months after the date of the First Offer Leasing Notice).

(e) Subject to the conditions set forth in subsection (2) above, if Tenant delivers to Landlord written notice of Tenant's desire to lease all of the Available First Offer Space within the fifteen-day period, the Available First Offer Space shall be leased by Tenant on the terms and conditions set forth in this Section.

(f) If Tenant declines or fails to effectively exercise the Right of First Offer as provided herein or fails to meet the conditions set forth in subsection (2), above, Landlord shall thereafter be free to offer the particular Available First Offer Space previously identified in a First Offer Leasing Notice on the open market and to lease some or all of that Available First Offer Space previously offered to Tenant at any time without regard to the restrictions in this Section and on whatever terms Landlord may decide in its sole discretion.

(g) If Landlord rejects Tenant's acceptance of any Offer Space because Tenant fails to meet the conditions in subsections (2) and (3), above, Landlord must provide to Tenant a written notice within ten (10) days after receiving Tenant's acceptance, which Landlord notice shall specify in detail how Tenant failed to meet the cited conditions.

(4) If Tenant leases Available First Offer Space under this Section, all of the terms and conditions of the Lease shall apply to the Available First Offer Space except that:

(a) The commencement date of the Lease for each particular Available First Offer Space shall be seven (7) days after the Available First Offer Space is delivered to Tenant broom clean, free of tenants or other occupants, and otherwise in the condition required by this subsection (4), and the termination date shall be the same as for the Existing Premises, including any extension or renewal terms (exercised or to be exercised).

(b) Landlord shall build-out the Available First Offer Space in the same manner and style as for the Existing Premises or if the Available First Offer Space is already built out, then Landlord shall adapt the Available First Offer Space to conform with the style and layout of the Existing Premises.

(c) The annual rent for the Available First Offer Space shall be at the same rate per rentable square foot, including all escalations, then being paid by Tenant for the Existing Premises as of the commencement of the lease for the Available First Offer Space, but subject to rental increases for the Existing Premises in effect from time-to-time as provided in Section _____ of this lease.

(d) As of the commencement date for the Available First Offer Space, Tenant's pro rata share shall be increased to an amount computed by dividing the total of the rentable square footage of the Existing Premises plus all Available First Offer Space leased by Tenant plus all other space becoming part of the Existing Premises after the date of this lease (the numerator) by the rentable square footage of Landlord's building (the denominator), and expressing the fraction as a percentage.

(e) Any Available First Offer Space taken by Tenant shall be deemed part of the Premises as of the commencement of the lease term for such Available First Offer Space taken by Tenant.

(5) Landlord shall use commercially reasonable efforts to remove any holdover tenants or other occupants from the Available First Offer Space Tenant leases under this Section. Although Landlord shall not be liable for any damages for any holdover Tenant or other occupant (unless Landlord is not using commercially reasonable efforts to remove the holdover tenant or other occupant), all of Tenant's obligations regarding the Available First Offer Space shall be abated until the holdover tenant or other occupant is removed, and the commencement date for the Available First Offer Space shall be delayed until the holdover tenant or other occupant is removed.

(6) The parties shall, within thirty (30) days after each time Tenant adds any Available First Offer Space, confirm in writing:

(a) The Commencement date for the Available First Offer Space;

(b) The Available First Offer Space that was leased showing that space cross-hatched;

(c) The additional rent to be paid for the Available First Offer Space;

(d) The increased pro rata share allocated to the Available First Offer Space; and

(e) Any other terms related to the Available First Offer Space or this lease that either party reasonably requests to be confirmed.

[Attach Exhibit A]

[Attach Exhibit B]



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31-23 Current Legal Forms for Real Estate FORM 23.27

AUTHOR: by Thomas G. Belden

FORM 23.27 Condition, inspection, and acceptance of property

COMMENT

The tenant's acceptance of the title to and the condition of the leased property, or the landlord's warranty as to these facts, may be dealt with in a general list of conditions to which the lease is subject or in separate provisions dealing explicitly with particular matters. The standard clause for the benefit of the landlord provides that he makes no warranty as to the title to or the condition of the property, and that the tenant has examined and accepts the title and condition as existing at the time of the lease. Sometimes, a provision is added specifying that there is no right to any abatement in rent if there should be a defect in title or condition. To insure that a tenant's rights against a contractor for defective construction are not waived by acceptance of the condition of the property, the tenant may expressly preserve such rights.

Tax aspects:

For tax purposes, any costs incurred by the tenant to defend his right to possession constitute capital expenditures generally amortizable over the term of the lease. The expense of a repair or a replacement is deductible in the year paid or accrued unless it constitutes a capital improvement, in which case the deduction must be spread over the recovery period applicable to the improved property. For a more detailed discussion of the tax treatment of the lessee's costs of improvements and repairs to the leased premises, see the Tax Background §§ 23.07[1] and 23.09, at the beginning of this chapter.

Title or use warranties:

Also illustrated in this group are clauses in which the landlord covenants that his title to the property is good and that the use contemplated by the tenant is permissible. The tenant's protection must be expressed precisely, since the general rule is that in the absence of such a provision the landlord makes no warranties as to title or permissible use. Many lease agreements take care of the problems relating to the title and to the condition of the property by "subject to" clauses. Such a clause, in which there is a summary listing of all items related to these matters, may be sufficient in most cases.

Residential implied warranty of habitability:

A number of jurisdictions have adopted the principal of implied warranty of habitability in residential lease transactions. This implied warranty acknowledges that a residential tenant leases an apartment primarily to live in it, and imposes an obligation on the landlord to provide habitable space. If the apartment is not habitable, the landlord has breached the warranty of habitability. Residential premises may be rendered unlivable by a lack of vital facilities necessary for living. The warranty has not been extended to commercial nonresidential leases generally. Local law should be examined to determine if an express provision in a residential lease may modify the effect of the warranty of habitability and available tenant remedies. There are significant variations of the warranty and related remedies among jurisdictions which have adopted the same.

FORMS

(1) Tenant's acceptance of property

At the commencement of the term, the Tenant shall accept the building, improvements, and any equipment on or in the leased premises, in their existing condition. No representation, statement, or warranty, express or implied, has been made by or on behalf of the Landlord as to such condition, or as to the use that may be made of such property. In no event shall the Landlord be liable for any defect in such property or for any limitation on its use.

(2) Tenant's acceptance of property--another form

Neither the Landlord nor its agents have made any representations with respect to the building, the land upon which it is erected, or the leased property except as expressly set forth herein and no rights, easements, or licenses are acquired by the Tenant by implication or otherwise except as expressly set forth in this lease. The taking of possession of the leased property by the Tenant shall be conclusive evidence that the Tenant accepts the same "as is" and that the leased property and the building of which the same form a part were in good condition at the time possession was taken.

(3) Tenant's acceptance of property and title--no abatement in rent

The Tenant has examined the leased property, the title thereto, the sidewalks and structures adjoining the same, any subsurface conditions, and the present uses and nonuses thereof. The Tenant accepts the same in the condition in which they now are, without representation or warranty, express or implied, in fact or by law, by the Landlord, and without recourse to the Landlord as to title, the nature, condition, or usability of the leased property, or the uses to which the

leased property may be put. The Landlord shall not be responsible for any latent defect or change of condition in the building, improvements, and personalty, or of title, and the rent hereunder shall not be withheld or diminished on account of any defect in such title or property, any change in the condition thereof, any damage occurring thereto, or the existence with respect thereto of any violations of the laws or regulations of any governmental authority.

(4) Tenant's acceptance of property--reservation of rights against contractor

Tenant acknowledges that the Landlord, or its agent, has made no representations or promises in regard to the premises for the term herein demised. Tenant's taking possession of the Demised Premises shall be conclusive evidence as against it that Tenant accepts the premises "as-is" and that such premises were in good and satisfactory condition when such possession was taken. Landlord shall not be required to make any repairs, alterations, improvements, or additions to such premises for Tenant's initial occupancy. Tenant does not waive any rights it may have against the general contractor or any subcontractor under guarantees with respect to any defects that may now exist or hereafter occur due to defective materials or workmanship in the original construction of the leased property.

(5) Landlord's representation of good title

The Landlord represents that it owns the leased property in fee simple and that the property is free from encumbrances except as referred to elsewhere in this lease. The Landlord further represents that it has the right to make this lease and covenants that it will execute or procure any further necessary assurances of title that may be reasonably required for the Tenant's protection.

(6) Landlord's agreement to maintain property up to time of possession by tenant

The Landlord shall maintain the leased property in its present state of repair, reasonable wear and tear excepted, up to the time that the Tenant is to take possession under the terms of this lease. The Landlord shall turn over the leased property to the Tenant in such condition that it can be immediately used and occupied by the Tenant for the purposes for which such property is to be used.

(7) General list of conditions--"subject to" clause

This lease is made by the Landlord and accepted by the Tenant subject to the following:

- (a) Rights of tenants, licensees, concessionaires, or occupants in possession.
- (b) Any state of facts that an accurate survey or inspection would show.
- (c) Any presently existing defect of title, easement, covenant, encumbrance, restriction, mortgage or deed of trust, agreement, and lien affecting the leased property.
- (d) All existing or future zoning regulations affecting the leased property.
- (e) Restrictive covenants and party wall agreements of record.
- (f) Encroachment of the leased property on any street or on adjacent property.

(g) Projection of any portion of the leased property or equipment in or under any abutting street and the right of any governmental authority to require the removal thereof.

(h) All ordinances, statutes, and regulations, and any presently existing violations thereof, whether or not of record.

(i) The existing condition and state of repair of the leased property.

(8) Lease of property subject to existing leases

This lease is given and accepted subject to the leases, rights, and privileges of tenants in possession, more particularly set forth in Schedule A attached hereto and incorporated by reference herein. The existence of such leases, rights, and privileges shall not be deemed a violation of the Landlord's covenant of quiet enjoyment or any other covenant in this lease. The Tenant hereby assumes all liability by reason of such leases and the rights of such tenants, and subject to the right of the Landlord to receive the rent, reserved hereunder, the Tenant is hereby entitled from the date hereof to all rents, additional rents, and other amounts due from such tenants, except that the Landlord shall retain any security deposits listed in Schedule A. Any security deposits which by reason of such leases with such tenants (the "subtenants") are required to be returned to such subtenants shall be paid to them by the Tenant. The Tenant shall receive a credit against current rent equal to the security deposits so returned, plus any interest, not in excess of 4 percent per annum, on such security deposits which the Tenant may have paid to such subtenants in accordance with the terms of such leases. If the Tenant is entitled under law to receive any such security deposits as a result of a default by any subtenant, the Tenant shall receive a credit against current rent equal to such security deposits. The Tenant shall collect and pay over to the Landlord as additional rent all sums due under tax escalator clauses in existing leases with subtenants and in all future leases made by the Tenant with subtenants containing tax escalator clauses. The Tenant may enforce all rights, remedies, and privileges of the Landlord under the terms of the leases listed in Schedule A, except as herein otherwise provided, until the expiration of such leases or the sooner termination of this lease.

(9) "As is" broom clean condition--landlord's right to change shopping center common areas

Tenant has examined the demised premises and accepts them in an "as is" condition without any further responsibility of the Landlord for any construction, repairs, alterations, or additions thereto, except that Landlord shall deliver the premises to Tenant in broom clean condition. Landlord may from time to time make changes, additions, and eliminations in and to the buildings and common areas in the shopping center. However, the size and location of the demised premises shall not be changed without Tenant's prior written consent.



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31-23 Current Legal Forms for Real Estate FORM 23.28

AUTHOR: by Thomas G. Belden

FORM 23.28 Term of lease

COMMENT

The drafting of a provision describing the term of a lease is a relatively simple matter if its commencement and termination dates are known. The problems are somewhat more difficult when the commencement date is contingent upon the completion of an improvement, the installation of special facilities, the issuance of a certificate of occupancy or other governmental approval, or the placement of adequate financing.

Commencement date for new construction:

If the beginning of the lease term depends upon the completion of construction, the lease must contain a method for establishing the commencement date. The simplest method is for the term to commence only after the issuance of a certificate of occupancy or a certificate of completion by the architect, or after a similar prescribed event signifying the completion of the construction. There is a question in some jurisdictions as to whether such a provision violates the applicable rule against perpetuities because of the possibility that the prescribed event might not occur within the period of the rule. In order to avoid such vulnerability, the term may be made to commence on the earlier of either a specified date or the occurrence of the prescribed event. Alternatively, the lease may provide for its cancellation if the prescribed event does not occur prior to a specified date. Regardless of the method for fixing the commencement date, the tenant in most cases will want the privilege of access to the premises during the construction period in order to install his own equipment. In addition, he may want to impose some pressure on the landlord to complete the construction within the anticipated period by requiring the payment of damage for any inordinate delay.

Tax amortization of expenses:

For tax purposes, the lease term is significant because it is the measuring period for the deduction of various expenses. For example, the cost of a leasehold, including the brokerage commissions and similar initial expenses incurred by a tenant in procuring the lease, is not deductible in the year of payment, but is deductible proportionately each year over the term of the lease. This rule applies also to advance rentals, even to the extent of requiring a tenant under a long-term lease to spread the deductions for annual payments during the early portion of the lease where they exceeded payments during the later portion of the lease. Deductions for payments by a tenant to renew a lease must be similarly spread. In contrast, the landlord must report all advance rentals as income in the year in which they were received. For the tax treatment of lessor and lessee expenses, see the Tax Background (TB) §§ 23.03, 23.09, and 23.10, at the beginning of this chapter. For the tax consequences of advance rentals, see the TB § 23.05.

Recovery of leasehold improvement costs:

The cost of any building erected, or improvement made, on leased property, is recovered over the cost recovery period applicable to the building or the property improved. Costs are recovered using the straight line method over 27.5 years for residential rental property or 39 years for nonresidential real property. For property or improvements placed in service after 1986, the lease term is not taken into account. For property placed in service prior to 1987, the lease term was taken into account in determining the deduction for the amortization, cost recovery or depreciation of the cost of improvements. For leasehold improvements placed in service during 1981 to 1986, the recovery period (rather than its useful life) was used to determine whether the cost of the improvement was recovered over the shorter of the lease term or the recovery period. See the TB § 23.07.

Amortization over lease term:

Where the deduction is measured by the term of the lease (for example, leasehold acquisition costs), the deduction is characterized as amortization rather than depreciation. The significance of this distinction is that the accelerated rates (declining balance, sum-of-the-years digits, etc.) were applicable to deductions for cost recovery or depreciation but not to deductions for amortization. There are special rules for measuring the term of the lease where the tenant has renewal or extension options. See the TB § 23.06.

Effect of cancellation of lease:

If the lease is cancelled before the end of its term the undepreciated or unamortized portion of the cost of the lessee's improvements is deductible in the year of cancellation. This applies also to other deductions deductible over the lease term.

Cancellation payments:

The term of the lease is also a significant factor for a landlord who makes a payment to cancel a tenant's lease. Where there is a cancellation by the landlord for the purpose of acquiring the right to possession for the remaining term of the lease, the deduction is spread over that period. When the lease is cancelled to enable the landlord to rent the space to a new tenant, the cancellation cost is amortizable over the term of the new lease. Bypassing the allocation problem, the Tax Court has

held that the amount paid by a lessor to indemnify and reimburse a lessee for the expense of moving to another location so that the lessor could relet to a new tenant paying a higher rental is amortizable over the basic period of the new lease containing a renewal option. But where the landlord's intent is to erect a new building or to sell the property, the cancellation payment will be added to the cost of the building or the property. For the tax consequences of cancellation of a lease and of cancellation payments, see the TB § 23.11.

Term for holdover tenant:

The length of the lease may also be important where a tenant remains in possession after the expiration of the original term. Local law may operate harshly upon such a tenant, binding him to a new term. There is considerable variation from state to state as to the length of the new term to which the tenant is committed where the lease makes no provisions for holdover. In some jurisdictions the result depends upon the manner in which the rent is reserved. Thus, if the rent is reserved on a yearly basis but payable monthly, the holdover tenancy is for a year, or from year to year. If the rent is reserved monthly, then the new tenancy is on a monthly basis, or from month to month. In other jurisdictions, the new term is measured by the length of the original term. In some jurisdictions the tenant is liable for increased rent during the holdover period. Generally, the retention of possession by a subtenant will cause the primary tenant to be liable as a holdover.

FORMS

(1) Specific term

The term of this lease shall be 20 years, commencing on _____[date], and ending on _____[date], inclusively, unless terminated sooner as provided below.

(2) Commencement of term on earlier of opening for business, completion of alterations, or specified date--term of specific years

The term of this lease shall commence on the earlier of (i) the date Tenant opens for business in the demised premises, (ii) 60 days after Tenant has completed its work of alterations, or (iii) _____[date]. The term of this lease shall expire on the last day of the month following 21 years after commencement (unless the term commences on the first day of a month, in which case it shall expire 21 years later). Within a reasonable time after commencement of the term the parties shall execute an agreement setting forth the dates upon which the lease commenced and shall expire.

(3) Term to begin after construction by landlord--tenant's option to cancel

(a) *Term.* The initial term of this lease shall be 12 years, beginning on the commencement date (defined in paragraph (b) of this article) and ending at 12 o'clock noon on a date 12 years thereafter, unless sooner terminated by the Landlord as herein provided.

(b) *Commencement date.* The commencement date shall be the earlier of: (1) the 45th day immediately after the later of

the following two dates: (i) the date on which the architect supervising construction certifies in writing to the parties that the motel and all of its facilities are substantially complete and ready for use (except for the personal property required to be installed or supplied by the Tenant), or (ii) the date the appropriate governmental authority issues a temporary certificate of occupancy for the entire motel; or (2) the date on which the Tenant commences business at the motel. After the commencement date has been determined, and upon the demand of either party, the parties shall execute a declaration in recordable form expressing the specific commencement and termination dates of the initial term.

(c) *Tenant fixtures.* The Tenant may, prior to the commencement date, enter upon the leased property at reasonable times for the purpose of installing the furniture, furnishings, fixtures, and equipment which it is required to install under the terms of this lease.

(d) *Completion date.* If the commencement date does not occur on or before _____[date], the Tenant may cancel this lease by giving five days' prior written notice to the Landlord. In the event of such cancellation, the Landlord shall (1) return to the Tenant the security deposit and all other sums which the Tenant may have paid to the Landlord; (2) purchase from the Tenant, at a price equal to the Tenant's cost, all furniture, furnishings, fixtures, and equipment which the Tenant has purchased for installation in the leased property; and (3) assume the performance of all unpaid contracts and obligations for furnishings, fixtures, and equipment incurred by the Tenant in connection with its obligations under this lease. If the lease is terminated under this paragraph the Landlord shall not be obligated to make any payments to the Tenant other than those specified in this paragraph.

(4) *Term to begin after construction by landlord--specific deadline*

The term of this lease shall be 25 years, beginning on (a) _____[date], or (b) the date on which the Landlord tenders possession of the leased property to the Tenant, if that date is later than _____[date] (whichever date is applicable being the effective date of this lease), and ending 25 years after the effective date of this lease. Tender of possession of the leased property by the Landlord to the Tenant shall be evidenced by written notice given by the Landlord to the Tenant, accompanied by a copy of any necessary certificate of occupancy, stating that the building to be constructed on the leased property has been substantially completed and is ready for occupancy by the Tenant. If the effective date of this lease is not the first day of a calendar month, the term of this lease shall be deemed extended by the number of days between the effective date and the first day of the first calendar month following the effective date, so that the term of this lease shall expire 25 years after such first day of the first calendar month following the effective date. In such case, the Tenant shall pay pro rata rent, in advance, for the period from the effective date of this lease to the first day of the following calendar month. On and after the first day of such following calendar month, the Tenant shall pay the rent provided in this lease. Notwithstanding the above, the effective date of this lease shall be no later than _____[date]. If the lease does not become effective on or before that date in accordance with the terms of this paragraph, this lease shall be deemed to be cancelled and all deposits and payments made by the Tenant to the Landlord shall be returned to the Tenant.

(5) *Construction of building by landlord--lease to commence when ready for occupancy--meaning of "ready for occupancy"*

(a) Notwithstanding any other provision in this lease, the term shall not commence until the leased property is ready for occupancy by the Tenant.

(b) The leased property shall be conclusively considered as ready for occupancy when all of the following events occur:

(1) A temporary or final certificate of occupancy is issued by the appropriate authorities.

(2) All installations, decorations, and other work required to be done by the Landlord under this lease are substantially completed. Minor mechanical adjustments shall be made by the Landlord as promptly as possible.

(3) Elevator, plumbing, heating, air conditioning, gas, and electrical facilities are substantially completed to the extent that the appropriate services to be rendered through such facilities can be supplied.

(4) The entrance and lobby of the building are substantially completed and the means of ingress and egress in no manner interfered with by any scaffolding, building material, or other articles.

(5) The Landlord gives notice to the Tenant that items (1) through (4) have been complied with and a period of ten days elapses from the date of such notice.

(6) Term to begin on day following expiration of present tenant's lease or day possession surrendered, whichever is earlier

(a) *Term.* This lease shall be for a term beginning on the commencement date as defined in subparagraph (b) and ending on _____[date], unless sooner terminated as herein provided.

(b) *Commencement date.* It is contemplated that the present tenant will vacate the leased property and surrender possession thereof to the Landlord on or before _____[date]. The term of this lease shall commence on the date (the "Commencement Date"), which shall be the earlier of (1) _____[date], or (2) the day immediately following the date on which the present tenant surrenders possession of the leased property to the Landlord.

(c) *Waiver.* Subparagraph (b) constitutes an express provision as to the Commencement Date and the time when the Landlord will deliver possession of the leased property to the Tenant. The Tenant hereby waives any right to rescind this lease which it might have under any implied condition that the lessor will deliver possession at the beginning of the lease term, as provided under Section 223-a of the Real Property Law of the State of New York.

(d) *Completion date.* If the Commencement Date does not occur on or before _____[date], the Tenant may terminate this lease by giving written notice to the Landlord. In the event of such termination, neither party shall be under any further obligation to the other hereunder, except that the Landlord shall promptly return to the Tenant the security deposit, the first monthly installment of rent, and all other sums which the Tenant has paid to the Landlord.

(7) Lease contingent upon governmental approval

This lease shall not become binding upon the Tenant unless the Comptroller of the Currency authorizes the Tenant to open and maintain a branch office for banking business at the location of the leased property. The Tenant shall promptly make an application to the Comptroller for approval and shall exercise due diligence to obtain it. Tenant shall notify Landlord if it obtains approval, or if the Comptroller fails or refuses to give approval on or before _____[date]. If approval is not granted by such date, either party may cancel this agreement by giving the other party written notice of cancellation by registered mail. In that case this agreement and all rights and obligations hereunder shall cease.

(8) Holdover by tenant--provision for month-to-month tenancy

If the Tenant remains in possession of the leased property after the expiration of either the original term of this lease or of any extended term, except pursuant to an exercise of an option to extend, such possession shall be as a month-to-month tenant. During such month-to-month tenancy, rent shall be payable at the same rate as that in effect during the last month of the preceding term, and the provisions of this lease shall be applicable.

(9) Holdover by tenant--not renewal or extension--month-to-month tenancy--landlord's right to terminate

If the Tenant holds over and remains in possession of the leased property after the expiration of this lease without the Landlord's consent, such holdover shall not be deemed or construed to be a renewal or extension of this lease but shall only operate to create a month-to-month tenancy, which may be terminated by the Landlord at the end of any month by giving 30 days' prior written notice to the Tenant.

(10) Option of landlord to deem holdover renewal of lease or to remove tenant

If Tenant holds over for more than one day after this lease term expires without Landlord's consent, Landlord may either deem such holdover a renewal of this lease for an additional term of one year under the same terms, covenants, and conditions thereof, or take all required steps to remove Tenant from the leased property.

(11) Holdover by subtenant--release of tenant

If any of Tenant's subtenants fails to surrender possession of all or any part of the leased property when the original term or any extended term of this lease terminates, such failure shall not constitute a "holding over" by Tenant so as to impose any liability on it. However, if such subtenant does not relinquish possession of the leased property within 30 days after Landlord gives Tenant written notice requesting the subtenant's removal, Tenant shall reimburse Landlord for its reasonable costs incurred, including attorneys' fees, for removing the subtenant.



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Current Legal Forms for Real Estate
Chapter 23 REAL ESTATE LEASES
Part IV. Forms
B. LEASE CLAUSES

31-23 Current Legal Forms for Real Estate FORM 23.29

AUTHOR: by Thomas G. Belden

FORM 23.29 Options to extend or renew lease

Options to extend or renew a lease can affect the amortization period for leasehold acquisition costs. However, costs for a building erected, or improvements made, on leased property are recovered over the recovery period applicable to the building or the improved property, regardless of the lease term.

Lease acquisition cost amortization period:

Generally, lease acquisition costs are amortized over the lease term. However, the term of the lease is treated as including all renewal options, and any other period that the parties reasonably expect the lease to be renewed, if less than 75 percent of the cost is attributable to the period of the term of the lease remaining on the date of its acquisition. In determining the term of the lease remaining on the acquisition date, the period for which the lease may subsequently be renewed, extended, or continued under an option exercisable by the lessee is not taken into account. For a more detailed discussion of the tax treatment of lease acquisition costs, see the Tax Background (TB) § 23.06 at the beginning of this chapter.

Tax treatment of renewal payments:

Any payment made to extend or renew a lease is reportable as income by the landlord in the year of receipt. The lessee's deduction, however, must be amortized over the term of the extended new lease. See the TB § 23.11.

Renewal or extension:

The language required in drafting an option to prolong the term of a lease may depend on the particular interpretation given to the words "renew" and "extend" under local law. In some states, the extension of a lease is regarded as a continuation of the original lease as if the original lease covered the entire term as extended, whereas renewal is treated as involving a new lease for the additional period. In such states, therefore, an extension option may be exercised simply by notice to the landlord, whereas a renewal option requires the execution of a new lease. Other jurisdictions do not make this distinction and treat the original lease provisions as automatically applicable to the renewal period. A third approach is based upon the intention of the parties, with a presumption that an extension rather than a renewal is normally contemplated. In the clauses in this group, except where an option to renew is specifically intended, the term "extend" is used so that in all jurisdictions the exercise of the option would not require the execution of a new lease.

The renewal option may range from a simple expression of the tenant's right to a complex contractual pattern. The option may be unconditional, may be made subject to nondefault by the tenant during the original lease term, or may be exercisable in the event of an excusable default. The option may precipitate specific changes in the lease, including an increase in rent. This increase may be fixed in advance or may be made to depend on economic factors at the time of the renewal. If the option is to extend a sublease, the sublessor's renewal of the basic lease must be taken into account. A useful refinement in such a case is an option on the part of sublessee to acquire the sublessor's interest in the basic lease if the sublessor does not wish to extend it. Provisions for automatic renewal in the absence of notice are valid in most jurisdictions, but in some states a reminder must be given by a residential landlord of the impending extension.

of option to renew:

Frequently, the renewal provision requires that the tenant give the landlord written notice of the exercise of the option to renew or extend the lease. Usually, the notice must be given within a certain number of days or months before the expiration of the current term. The use of certified or registered mail is required in many cases to evidence the fact that the option has been exercised. Since the burden of sending the notice is placed on the tenant, the tenant risks clerical or administrative error in the failure to give timely notice. One method of dealing with this risk is to provide that the renewal is automatic unless the tenant sends notice of its intention not to renew. Whether such a clause is desirable, of course, depends upon the circumstances of the particular case. Another alternative would require that the landlord first notify the tenant just before or during the time period that the tenant is to give notice of the exercise to renew. This condition lessens the tenant's risk of a costly clerical error. The clause would be particularly useful in the case of a particularly long initial term.

Drafting considerations:

The extension or renewal term should not be drafted in such a manner that the renewal right could be construed as perpetual. This could occur, for example, if the clause included the right to renew or extend under all the terms and conditions of the lease. Such a clause presumably could include also the right to renew, in perpetuity. This risk can be decreased by specifying that the right to renew applies only once, or some other specified time. In addition, or alternatively, the renewal could be made subject to the terms of the initial lease, excepting the clause permitting renewal. Similarly, it may be useful to expressly state the effect of renewal on other provisions of the lease of particular importance to the parties. For example, the tenant's option to purchase the leased property may or may not be extended upon renewal of the lease. A tenant might desire an express provision permitting the tenant's assignee to exercise the renewal or extension option,

and/or relieving the tenant from liability upon the assignee's renewal or extension. A tenant may also seek a provision that the option to renew is exercisable even if the tenant is in default, provided that the tenant is making a diligent effort to cure the default.

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(1) Option for one extension--no lease changes

The Tenant may extend this lease, upon the same terms, for an additional period of ten years. Tenant shall exercise this option in writing not later than 60 days before the original term expires.

(2) Option for several extensions

(a) Tenant may extend the term of this lease for four successive periods of 21 years each (the "extended terms"), as follows:

First extended term--[date] to [date]

Second extended term--[date] to [date]

Third extended term--[date] to [date]

Fourth extended term--[date] to [date]

Tenant shall exercise the option to extend by giving written notice to Landlord not more than 24 months nor less than 12 months before expiration of the then existing term.

(b) Each extended term shall be upon the same terms, covenants, and conditions, with the same annual rent payable, as provided in this lease for the initial term. Payment of all additional rent and other charges required to be made by the Tenant under this lease for the initial term shall continue to be made during each of the extended terms. The Tenant may not extend this lease beyond the fourth extended term. Any termination of this lease during the initial or any extended term shall terminate all rights of any further extension hereunder.

(3) Option for several extensions--change in rent--amount of rent specified

The Tenant may extend the term of this lease for three separate and successive periods (extended terms) of 21 years each by giving written notice of each renewal at least 24 months before the then current lease term expires. The last extended term shall end on _____[date]. During each extended term, the basic rent shall be \$100,000 per annum.

(4) Option to extend lease--ceiling on rent increase

The Tenant may extend this lease for a further term of ten years from _____[date], upon the same terms and conditions herein set forth, except that the rental shall be the lesser of the following:

(a) A rental of \$100,000 per annum, plus the Tenant's pro rata share of any increase in real estate taxes and any increase in the actual cost of operating the property, including wages, supplies, fuel, water rent, and other normal expenses of operation over the amount of such taxes and expenses during the calendar year _____[date].

(b) An annual rental of \$120,000.

The Tenant shall notify the Landlord in writing prior to _____[date], as to whether it intends to exercise this option.

(5) Option to extend lease--conditioned on tenant's performance--advance notice by landlord

(a) Tenant may extend this lease upon the expiration of its initial term, provided that this lease is then in full force and effect and Tenant has fully performed all of its terms and conditions. The first extended term shall be upon the same terms and conditions as under the initial term, including the provision for rent, and shall be for 20 years, commencing on _____[date], and ending on _____[date]. Upon expiration of the first extended term, Tenant may extend this lease for a second extended term of 20 years if this lease as extended remains in full force and effect and Tenant has fully performed all of its terms and conditions. The second extended term shall be upon the same terms and conditions, including the provision for rent, and shall be for 20 years, commencing on _____[date], and ending on _____[date]. Tenant shall exercise the option for each extended term by giving written notice thereof to Landlord not less than 12 months nor more than 24 months before expiration of the then current term.

(b) If, 30 days prior to the time that Tenant's right to give notice of exercise of option shall expire, Tenant shall not have previously given Landlord written notice of exercise of option for an extended term, Landlord shall give Tenant written notice that Tenant's option rights are about to expire. Notwithstanding any contrary provision herein, the time within which Tenant may then serve its notice of exercise of option for an extended term shall continue for 15 days after receiving Landlord's advisory notice.

(6) Option to extend lease--default pending at time of exercise

(a) *Extension options.* Upon expiration of the initial term, provided that, with respect to such term or any extended term, Tenant is not then in default hereunder, or has cured any default for which it may have been given notice, Tenant may extend the term of this lease for four periods consisting of three successive periods of 21 years each, and a final period of 15 years (the "extended terms"). However, if there is a default, Tenant may nevertheless exercise the option and be entitled to any such extended term if the default cannot with due diligence be cured before the last date on which the Tenant is entitled to exercise the option, and Tenant has proceeded promptly and with due diligence to cure such default after service of notice of default.

(b) *Number of extended terms.* Each extended term shall be upon the same conditions as provided in this lease, except that the Tenant may not extend the term of this lease for any period beyond the expiration of the fourth extended term.

(c) *Notice.* The Tenant shall exercise the option for an extended term by notifying the Landlord in writing at least six months before the then current term expires. Upon such exercise this lease shall be deemed to be extended without the execution of any further lease or other instrument.

(7) Option to extend sublease

The Subtenant, if the then effective term of the Main Lease exceeds any term of this sublease when and if extended, may extend the term of this sublease for three separate and successive extended terms as follows:

First extended term--[*date*] to [*date*]

Second extended term--[*date*] to [*date*]

Third extended term--[*date*] to [*date*]

However, the Subtenant's right to so extend the sublease term shall be subject to the following conditions:

- (a) The Subtenant is not in default on the date that the notice of extension is given or on the date of the commencement of the extended term.
- (b) The extended term is upon the same conditions applicable during the original term, except that the basic rent during the extended term shall be \$100,000 per annum.
- (c) There is no further privilege of extension after the third extended term expires.

The Subtenant shall extend the sublease term by giving written notice to the Sublessor of its intention to do so at any time during the then current term, but not later than 30 days before such term expires.

(8) Option to extend sublease--conditional right in subtenant to take over basic ground lease

(a) *Extension option.* The Subtenant may extend this lease for a term of 23 years commencing on _____ [*date*], and ending on _____ [*date*], by giving the Sublessor written notice of election to extend not later than 18 months before the expiration date of the initial term, upon the following terms and conditions:

- (1) Subtenant, is not in default under any term of this lease, either at the time such notice to extend is given or when the extended term commences.
- (2) During the extended term all the terms of this lease shall apply, except that the net rent payable during such extended term shall be \$15,000 per annum.
- (3) Such extension by the Subtenant, although irrevocable by it, does not take effect unless the Sublessor (as Tenant under the Ground Lease) has exercised the option to extend the term of the Ground Lease from [*date*], to [*date*].

(b) *Extension of ground lease.* If the Subtenant has exercised its option to extend the term of this lease, the Sublessor shall advise the Subtenant in writing whether it intends to exercise its option to extend the term of the Ground Lease from _____ [*date*], to _____ [*date*]. The notice shall be given to the Subtenant not later than 16 months before the expiration date of the initial term of this lease.

(i) If the notice states that the Sublessor elects not to extend the Ground Lease, the Subtenant shall have 30 days from the receipt of the notice to exercise an option, by written notice to the Sublessor, to acquire by assignment all of the Sublessor's right, title, and interest in and to this lease and as Tenant under the Ground Lease.

(ii) If the Sublessor fails to give the Subtenant the notice provided for in this subparagraph (b), the Subtenant may, by giving written notice to the Sublessor within one month after the last date for giving such notice, require the assignment to it of the Sublessor's entire right, title, and interest in and to this lease and as Tenant under the Ground Lease. The assignment, in the case of either (i) or (ii), shall be without recourse, except that the Sublessor shall warrant that it is not

in default as Tenant under the Ground Lease. The notice of the Subtenant's election shall specify the date (which shall be no more than 15 days or less than 12 days in advance) and the time of day during business hours when and the place in New York City where the closing of the assignment shall take place. At the closing, the Sublessor and the Subtenant shall execute and deliver to each other instruments by which the Sublessor shall assign to the Subtenant its interest as Tenant under the Ground Lease and by which the Subtenant shall assume the obligations of the Tenant thereunder, all in compliance with the provisions of the Ground Lease. Thereupon the Sublessor shall have no further rights under this lease or under the Ground Lease.

(c) *Power of attorney.* If the Sublessor fails or refuses to execute and deliver the required instruments under subparagraph (b), the Subtenant is hereby irrevocably designated as attorney-in-fact for the Sublessor to execute and deliver such instruments on its behalf.

(9) Automatic extension of lease--tenant's right to terminate--advisory notice from landlord

The term of this lease shall be automatically extended for a period of 20 years, upon the same terms and conditions, including the same basic rent, overage rent, and additional rent, as herein provided, unless the Tenant gives to the Landlord, between 18 months and 24 months before the initial term of this lease expires, written notice that the lease shall not be so extended. However, at least 15 days before the expiration of the period within which the Tenant is required to give such notice, the Landlord shall notify the Tenant in writing of the final date for giving such notice. Notwithstanding the above, the Tenant shall have 30 days after it receives the Landlord's notice to give the Landlord written notice that the lease is not to be extended.

(10) Option to renew lease--renewal rent based on land value subject to minimum

(a) *Renewal option.* The Tenant may renew this lease for a period of 21 years, to commence upon the expiration of the original term, provided that the Tenant is not in default hereunder on the expiration date of the original term. The Tenant shall exercise the renewal option by giving the Landlord written notice of its election to do so at least one year, but not more than two years, before the original term expires.

(b) *Renewal rent.* The net annual rent during the renewal term shall be the greater of (1) the rate per annum payable at the end of the original term, or (2) a sum equal to 5% of the appraised value of the land covered by this lease, considered as unimproved and exclusive of any buildings or improvements thereon, as of the date for the expiration of the original term. If the parties are unable to agree upon the value of the land for the purpose of fixing the net annual rent for the renewal term, they shall promptly resolve the dispute by arbitration. The renewal lease shall contain the same conditions as those contained in this lease, except as to the net annual rent and except also that the covenants contained herein with respect to the demolition of the buildings now on the leased property and the erection of the new building shall not apply to the renewal lease. The renewal lease shall not require the deposit of further security.

(11) Tenant's release option

Effective as of the last day of the 25th lease year (the "Effective Date"), the Tenant may be released and relieved from all liabilities thereafter accruing under this lease, provided that Tenant gives Landlord not less than 18 nor more than 24 months' prior written notice to such effect and that, when such notice is given and as of the Effective Date, Tenant is not in default under any provision hereof.

(12) Option for two extensions--renewal rent at fair rental value--prior rent continued during determination of renewal rent

(a) *Initial extension option.* Upon expiration of the initial term of this lease for the Demised Premises, provided that the same is then in full force and effect and Tenant is not in default hereunder, Tenant may extend such term for a first renewal term of 10 years by giving Landlord written notice that it desires such extension. Such notice must be given not less than one year before the initial term expires. The renewal term shall be upon the same terms, provisions, covenants, and conditions as are contained in this Lease, except as to the duration of the term, the rental rate, and any other provision herein which by its terms is applicable only to the initial term.

(b) *Second extension option.* Tenant may extend the term of this Lease for a second renewal term of 10 years, commencing on the day following the expiration of the first renewal term, upon the following terms and conditions: (i) Tenant shall have exercised its option for the first renewal term under the provisions of subsection (a); (ii) this Lease is in full force and effect and Tenant is not in default hereunder; (iii) Tenant notifies Landlord in writing not less than one year before the first renewal term expires that it desires such extension; and (iv) such extension is upon the same terms, provisions, covenants, and conditions as are contained in this Lease, except as to the duration of the term, the rental rate, and any other provision herein which by its terms is applicable only to the initial or first renewal term.

(c) *Renewal rent determination.* The rents during the first and second renewal terms shall be equal to the fair rental value of the Demised Premises at the time of commencement of each renewal period, as determined by agreement between Landlord and Tenant or by arbitration in accordance with the provisions of this lease and this subsection. If Tenant exercises any option in subsection (a) or (b), it shall specify in each such notice its evaluation of the fair rental value of the Demised Premises ("Tenant's Rent") for the period covered by such exercise. Within three months thereafter, Landlord shall send to Tenant a notice stating either (i) Landlord's agreement with Tenant's Rent, in which event such amount shall be fixed as the rent payable by Tenant for the renewal period in issue, or (ii) Landlord's evaluation of such fair rental value ("Landlord's Rent"). If Landlord and Tenant are unable to agree upon such fair rental value within three months from the date of sending the notice described in (ii) above, the matter shall be determined by arbitration under this lease. The arbitrator's determination of the fair rental value of the Demised Premises for the renewal period in issue may not, in any event, be less than Tenant's Rent nor more than Landlord's Rent.

(d) *Continuation of prior rent.* If, for any reason, the first and second renewal terms commence before the fixed rent for such term is determined, Tenant, in the meantime, shall pay the monthly installments of fixed rent (the "Prior Rent") in effect under this lease on the last day of the term being renewed. If the fixed rent for such renewal term is determined to be greater than the Prior Rent, Tenant immediately following such determination shall pay to Landlord the difference between the Prior Rent actually paid and that which should have been paid on the basis of such determination if the fixed rent for such renewal term was determined to be less than the Prior Rent. Immediately following such determination, Landlord shall pay to Tenant the difference between the monthly installments of the Prior Rent actually paid and those which should have been paid on the basis of such determination. Tenant shall pay the fixed rent as so determined.

(e) *Condition of premises, failure to give notice.* Tenant shall accept the Demised Premises in the condition then existing as of the commencement of any of the renewal terms of this lease. Landlord shall not be responsible for performing any work or furnishing any materials to the Demised Premises, except that it shall continue to supply its services. If Tenant fails to give the required notice under subsection (a) or (b) above exercising its option to renew within the time and manner provided, such failure or omission shall be deemed, without further notice or agreement between the parties, to be an election by Tenant not to exercise such options.

(f) *Information request.* Upon Landlord's request during the last three years of the original or any renewal term, Tenant shall execute and deliver to Landlord an instrument in form satisfactory to it, which states either (i) that Tenant has not exercised either option contained in subsections (a) and (b), or (ii) that Tenant has exercised such option. In the event of (ii), such instrument shall set forth all of the modifications to this lease resulting therefrom, including, but not limited to,

the new fixed rent, as determined by agreement between the parties, or by arbitration, whichever is applicable. However, Tenant's failure to execute or deliver such instrument shall not vitiate any provision of this Article, and if Tenant's time to exercise an option has not yet expired, the giving of such notice under (i) shall not preclude such exercise thereafter.

(13) Option for several extensions--minimum rent and annual percentage base increases specified--landlord allowance for refurbishing on extension--conditioned on tenant's performance

(a) Tenant may, at its option, extend this lease for three (3) extended terms of five (5) years each. The term of each extension period shall commence immediately upon the conclusion of the original term of this lease or the preceding extension period, as the case may be. This option(s) to extend may be exercised only by written notice, in the manner provided in Section _____ of this lease, no later than one (1) year prior to the expiration date of the original term of this lease or the preceding extension period, as the case may be. This shall be the exclusive and only method of exercising this extension option(s) and any other method shall not constitute an exercise thereof. The extended term(s), granted pursuant to this option(s) to extend, shall be on the same terms and conditions as are to be in effect during the original terms of this lease except that: (i) Tenant shall have no further option to extend this lease beyond the expiration of the third extended period created by this Section; (ii) the minimum rent for the first extension period shall be \$ _____ per lease year and annual percentage base shall be \$ _____; (iii) the minimum rent for the second extension period shall be \$ _____ per lease year and annual percentage base shall be \$ _____; and (iv) the minimum rent for the third extension period shall be \$ _____ per lease year and annual percentage base shall be \$ _____.

(b) If Tenant exercises its second option to extend in accordance with the terms and conditions of this Section, and if Tenant is not in default under this lease, Landlord shall expend the sum of \$ _____ toward the cost of refurbishing the premises.

(c) If: (i) Tenant fails to exercise this option(s) to extend during the period(s) in which it is available and in the manner required hereby, or (ii) this lease is no longer in full force and effect for any reason, or (iii) Tenant is in default under this lease, at the time of such exercise, this option(s) to extend shall terminate, be void and of no further force or effect.

(d) Unless otherwise herein expressly provided, any reference in this lease to the "term of this lease" shall mean the original term hereof and any extended period(s), if validly exercised by Tenant pursuant to its option(s) to extend set forth in this Section, except to the extent that the original term or any extended period may be sooner terminated or canceled under any provisions of this lease.

(14) Option to renew--rent increase governed by prevailing rate--disputes decided by appraiser

Tenant may, at its option, renew this Lease for one (1) renewal term of _____ years. The term of the renewal period shall commence immediately upon the conclusion of the original term of this Lease. This option to renew may be exercised only by written notice in the manner provided in Section _____ of this Lease no later than six (6) months prior to the expiration date of the original term of this Lease. This shall be the exclusive and only method of exercising the renewal option and any other method shall not constitute an exercise thereof. The renewal term, granted pursuant to this option to renew, shall be on the same terms and conditions as are to be in effect during the original term of this Lease except that: (i) the Base Rent for the renewal term shall be the higher of (a) ninety percent (90%) of the "prevailing rate" (as defined below) per square foot of floor area, or (b) the rate per annum payable in the last Lease Year of the original term of this Lease; and (ii) Tenant shall have no further option to renew this Lease beyond the expiration of the renewal period created by this Section.

The term "prevailing rate," as used in this Section, means the fair market rental rate then being charged for like space similarly situated in office-warehouse buildings similar to and reasonably proximate to the Building in the same city and/or geographical area. In the event the parties cannot reach an agreement as to the prevailing rate, the same shall be determined by appraisal in accordance with the following provisions.

If, by the day that is one hundred fifty (150) days prior to the expiration of the original term of this Lease, the parties are unable to agree in writing on the prevailing rate, then the prevailing rate shall be established by appraisers chosen and who shall act in the following manner: Landlord and Tenant shall each nominate one appraiser deemed by them, respectively, to be fit, reputable and impartial, to appraise and determine the prevailing rate for the renewal term of this Lease. The nomination must be in writing and must be given by each party to the other within one hundred twenty (120) days prior to the expiration of the original term of the Lease. If only one party shall so nominate an appraiser, then that appraiser shall have the power to act alone, and that appraiser's decision as to the prevailing rate made in accordance with the provisions hereof shall be binding upon both parties as if in fact it were made by appraisers selected by both parties. If the two appraisers nominated and appointed as appraisers by the parties shall differ in judgment as to such prevailing rate, then they shall appoint a third appraiser who is a fit, reputable and impartial person. However, if they cannot agree upon such person, then the Administrative Judge of the _____ Court shall appoint a fit, reputable and impartial person to act as the third appraiser, but if such Administrative Judge fails or refuses to act, then such appointment shall be made by _____. If the two appraisers agree in writing upon such prevailing rate, then that determination shall be binding on the parties, but if they are unable to agree within thirty (30) days after the second of the two has been appointed, then the selection of the third appraiser shall be made, as above provided for, within ten (10) days thereafter, and the three appraisers then named shall act with promptness, and the decision of a majority of such appraisers shall be conclusive and binding upon the parties. Each party shall bear the expense of its own appraiser, but the fees of the third appraiser shall be shared equally.

No person shall be qualified for appointment as an appraiser hereunder unless he or she is a licensed real estate broker or agent with at least five (5) years of experience in leasing office-warehouse space. Any appraiser may be removed by the parties or other persons who appointed that appraiser, as the case may be, for failure to perform his or her duties expeditiously, and a successor appraiser shall be promptly appointed by such parties or person(s), as the case may be. If the prevailing rate has not been determined and evidenced by an appropriate amendment to this Lease prior to the expiration of the original term of this Lease, then Tenant shall pay as Base Rent the amount set forth in the following paragraph until such determination has been made, at which time Tenant shall pay the difference, if any.

If the prevailing rate has not been determined as of the first day of the renewal period, then pending determination of the prevailing rate, Tenant shall pay Landlord the sum of \$_____ per month as Base Rent for the Premises.

If: (i) Tenant fails to exercise the renewal option during the period in which it is available and in the manner required hereby, or (ii) this Lease is no longer in full force and effect for any reason, or (iii) Tenant is in default under this Lease, at the time of such exercise, the renewal option shall terminate, be void and of no further force or effect.

Unless otherwise herein expressly provided, any reference in this Lease to the "term of this Lease" shall mean the original term hereof and the renewal period, if validly exercised by Tenant pursuant to its option to renew set forth in this Section, except to the extent that the original term or renewal period may be sooner terminated or canceled under any provisions of this Lease.



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31-23 Current Legal Forms for Real Estate FORM 23.30

AUTHOR: by Thomas G. Belden

FORM 23.30 Delivery of possession

COMMENT

The interests of both landlord and tenant may be served by a clause dealing with the consequences of the failure to deliver possession to the tenant upon commencement of the lease term. In the absence of such a provision, the tenant's remedies may be inadequate. For example, in many jurisdictions the tenant has no recourse against the landlord in the event of a holdover by a prior tenant. On the other hand, the landlord may wish to protect himself where his failure to deliver possession might otherwise result in liability for damages, deferral of the lease term, or a right in the tenant to cancel the lease.

Effect of failure to deliver possession:

One approach is to permit an abatement in rent during the period when the tenant is unable to take possession, with the provision that such inability will not extend the lease term or give the tenant an action to cancel the lease or obtain damages. A clause for the benefit of the tenant would provide that the lease term is to begin when possession is delivered, and that the tenant may cancel the lease and recover any rent and security payments if possession is not delivered by a stated date.

Tax effect of rent repayment:

If a landlord is required to repay rent in a tax year other than the one in which it was reported as income, the amount repaid is deductible in the year of repayment. However, if the amount repaid exceeds \$3,000 the taxpayer may elect in the alternative to recompute the tax for the year in which the income was reported by excluding from the income of that year the amount repaid. For a

discussion of the tax consequences of rental payments generally, see the Tax Background § 23.02, at the beginning of this chapter.

FORMS

(1) Delay in delivering possession--abatement of rent

If, for any reason, the Landlord cannot deliver possession of the leased property to the Tenant when the lease term commences, this lease shall not be void or voidable, nor shall the Landlord be liable to the Tenant for any loss or damage resulting therefrom. However, there shall be an abatement of rent for the period between the commencement of the lease term and the time when the Landlord delivers possession.

(2) Delay in delivering possession--abatement of rent--no extension of lease

The Landlord shall not be liable for failure to give possession of the leased property to the Tenant upon the effective date of this lease if such failure is due to the fact that the leased property is not ready for occupancy, is being held over by a prior tenant or is otherwise in the wrongful possession of another person, or is not available for any other reason. In such event, the rent shall not commence until possession is given or is made available to the Tenant, but the term of this lease shall not be extended.

(3) Delay in delivering possession--landlord allowed time to evict--abatement of rent as full settlement of damages

If the Landlord is unable to give possession of the leased property to the Tenant upon the commencement date of this lease because of the present tenant's failure to vacate such property, the Landlord shall be allowed sufficient time to evict the holdover tenant by due process of law. The rent reserved under this lease will be abated while Tenant is not in possession of the leased property, and Tenant shall consider such rent abatement as full settlement of any damages caused by the delay in its possession of the leased property.

(4) Delay in delivering possession--landlord not liable for damages--lease remains effective--rent abatement--lease extended

If the Landlord is unable to deliver possession of the leased property upon the date the term of this lease is to commence, neither the Landlord nor its agents shall be liable for any damages caused to the Tenant by reason of the delay nor shall this lease become void or voidable. However, the Tenant shall not be liable for the payment of rent until the Landlord delivers possession of the leased premises to it and the term of this lease shall be extended by the length of time possession by the Tenant has been delayed.

(5) Delay in delivering possession--no abatement of rent

Tenant shall not be allowed any abatement or diminution of the rent to be paid hereunder, nor shall the validity of the lease be impaired, if Landlord is unable to give possession of the leased property on the term commencement date for

any reason, including the holding over or retention of possession of any tenant, or if repairs, improvements, or decorations are not completed with respect to the leased property or of the building of which such property forms a part.

(6) Delay in delivering possession--lease remains effective--rent not payable until ready for occupancy

This lease shall remain in full force and effect if the property is not ready for occupancy at commencement of the term because alterations or repairs are being made upon the property, or the building of which such property forms a part, or if the present occupant of the property fails to vacate and surrender possession. However, Tenant shall not be required to pay rent until the leased property is ready for occupancy and it has been notified thereof by letter addressed to its last known post office address.

(7) Delay in delivering possession--not default if cause beyond landlord's control--right of either party to cancel lease--delivery of key not deemed possession

(a) The Landlord shall not be deemed in default with respect to the performance of any term, covenant, or condition of this lease if such nonperformance is due to strike, lockout, civil commotion, war, war-like operation, invasion, rebellion, hostilities, military or usurped power, sabotage, inability to obtain any material or service through Act of God, or other cause beyond the Landlord's control, if such cause is not due to Landlord's act or neglect.

(b) If for any reason the Landlord fails to deliver possession of the demised premises to the Tenant on or before _____[date], either party may terminate and cancel this lease by giving written notice to that effect within 30 days after such date. This lease shall then terminate and be null and void, and neither party shall have any further rights against or obligations to the other.

(c) No giving of possession shall be deemed to occur when Landlord delivers the key for the leased property to Tenant. Giving of possession shall occur only when Landlord gives written notice to Tenant that Landlord has completed its required work, and has received from its architect or engineer a certificate that the work has been completed.

(8) Tenant's option to cancel for delay beyond stated date

If, for any reason, the Landlord cannot deliver possession of the leased property to the Tenant at the beginning of the lease term this lease shall not be void or voidable, but such term shall commence whenever the Landlord is able to deliver possession. However, if the Landlord cannot deliver possession of the leased property by _____[date], the Tenant may cancel this lease, in which event the first month's rent and the security deposit shall be returned to the Tenant and neither party shall have any further obligation to perform hereunder.

(9) Building under construction--tenant's option to cancel for delay--early possession

Landlord shall not be liable if it is unable to give Tenant possession of the leased property on the commencement date of this lease, if the property is located in a building that is under construction and has not been sufficiently completed to make the property ready for occupancy, if it has not procured a certificate of occupancy, or for any other reason. Under such circumstances, the payment of rent shall not commence until possession of the leased property is given to or the property is available for occupancy by the Tenant. No such failure to give possession on the commencement date of the lease term shall affect the validity of this lease or the obligations of the Tenant hereunder, or extend the term of this lease. However, if the leased property is not available for occupancy by _____[date], Tenant may cancel this lease by giving 15 days' written notice before Landlord tenders possession. If Tenant receives permission to

enter into possession of the leased property or to occupy other property before the date specified as the commencement of the lease term, such occupancy shall be subject to all the terms of this lease, except that the obligation to pay rent shall begin only upon the commencement of the lease term.

(10) Landlord to notify tenant of estimated date of possession--tenant's right of access

At least 90 days before the leased property is ready for delivery to the Tenant's exclusive possession, the Landlord shall give the Tenant written notice fixing the estimated date on which such possession will be delivered. From the date of such notice, the Tenant, its agents, and its employees shall have access to the leased property for the purpose of installing furniture, fixtures, equipment, and other items necessary for the commencement of the Tenant's operations provided that there shall be no interference with the completion of construction.



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31-23 Current Legal Forms for Real Estate FORM 23.31

AUTHOR: by Thomas G. Belden

FORM 23.31 Fixed rent and net lease provisions

COMMENT

Where possible, the lease should state the total amount of the rent which the tenant will be obligated to pay during the entire term. The time and the place of payment should also be specified. In many jurisdictions, in the absence of a specific provision, rent is payable on the premises and at the end of the term. As a matter of general custom, most leases provide that periodic rent is payable in advance and at the office of the landlord, with the right reserved in the landlord to designate a different place.

Fixed rent vs. net rent:

While the term "fixed rent" appears to contemplate an ascertainable income from the leasing of property, actually only the tenant's expense is fixed. The landlord's rate of return is subject to inevitable variations in maintenance costs, insurance, real estate taxes, assessments, and other running expenses. Where the landlord's intention is to derive a constant cash flow from the property, without fluctuation due to these changeable factors, the appropriate arrangement is a "net lease." Under a net lease, or a provision for the payment of "net rent," the tenant is obligated to pay a fixed sum and, in addition, to bear the cost of most or all operating expenses. This device shifts to the tenant the impact of periodic changes in such costs.

Net lease:

The terms "net lease," or "net-net lease," do not in themselves define the expenses to be paid by the tenant. While such terms may be useful to indicate generally the intention of the parties,

proper draftsmanship requires a more complete and precise specification of the tenant's obligations. Therefore, if it is intended that the tenant is to pay all operating costs the lease should state specifically that the landlord is to be free from all expenses, assessments, deductions, and impositions in connection with the property. Normally, the lease will also state that these additional items required to be paid by the tenant are to be considered as additional rent and that the landlord is to have the same rights upon the nonpayment of such items as he has for the nonpayment of rent. In addition, the lease should clearly define the tenant's obligations with respect to such major items as repairs, utilities, mortgage amortization, and taxes. The clauses in this group illustrate the general description of the rental obligation when a "net lease" is contemplated.

Rent deduction:

Periodic rent payments are deductible under the statutory section covering ordinary and necessary trade or business expenses. Rental payments for property not used in a trade or business but held for the production of income are also deductible. The issuance of a non-negotiable instrument is not "payment" of rent permitting a deduction. There is no statutory condition for the "reasonableness" of rent. An excessive amount, however, may be a factor in determining that the payments were not in fact rent. Rental payments made by a tenant for property used solely for residential purposes are not deductible. For a further discussion of the deductibility of rental payments, see the Tax Background (TB) § 23.02, at the beginning of this chapter. For tax treatment of rental payments for residential property, see TB § 23.13.

Tax leveling of uneven rent payments:

Lessors and lessees of tangible property are subject to timing requirements to avoid mismatching income and deductions. The restrictions apply if: (1) the rent totals more than \$250,000, and (2) any payment either varies in amount or is deferred more than one calendar year, e.g. stepped rents or deferred payments. In effect, the rent payments are "leveled" for tax purposes, whether the taxpayer uses the accrual or cash method of tax accounting. See TB § 23.02[4] .

Net lease deductions:

Where the tenant pays all taxes, charges, and other operating expenses under a net lease, such amounts are treated as additional rental income to the landlord, and are deductible by the tenant if the basic rent is deductible as an ordinary business expense or as an income-producing expense. The landlord may deduct the amount of any item paid by the tenant if it would constitute a deduction were it paid directly by the landlord. For a further discussion of the tax consequences of the lessee's payment of the lessor's expenses, see TB § 23.03.

Capital expenditures:

Certain payments made by the tenant on behalf of the landlord which constitute capital expenditures, though constituting rental income to the landlord, are not deductible as current expenses, but must be amortized by annual deductions over the life of the lease. An example is an assessment for local improvements paid by a tenant. Another type of payment which would be amortized rather than deducted as paid by the tenant is an amount paid to reduce the landlord's mortgage obligation. See TB § 23.03.

FORMS*(1) Fixed annual rent--equal monthly installments*

The Tenant shall pay to the Landlord the annual rent of \$4,800 in lawful money of the United States, in equal monthly installments of \$400 in advance, on the first day of each month throughout the term of this lease. Payment of rent of \$400 for the month of _____[month], is hereby acknowledged. The rent shall be payable at the office of the Landlord or at any other place it designates in writing.

(2) Fixed total rent--varying monthly installments

The Tenant shall pay to the Landlord during the original term of this lease total rental of \$250,000, in advance, without demand, on the first day of each month, as follows:

\$5,000 for the month of March in each year
\$3,000 for the month of April in each year
\$3,000 for the month of May in each year
\$4,100 for the month of June in each year
\$7,500 for the month of July in each year
\$7,500 for the month of August in each year
\$6,300 for the month of September in each year
\$5,000 for the month of October in each year
\$2,150 for the month of November in each year
\$2,150 for the month of December in each year
\$2,150 for the month of January in each year
\$2,150 for the month of February in each year

(3) Fixed rent--annual increases--acceleration upon default

The Tenant shall pay to the Landlord rent, in equal monthly payments, on the first day of every month during the term of this lease, as follows:

From _____[month] to _____[month], equal monthly payments of \$3,000 (total of \$72,000);

From _____[month] to _____[month], equal monthly payments of \$4,000 (total of \$96,000); and

From _____[month] to _____[month], equal monthly payments of \$5,000 (total of \$120,000).

The property is leased for a rental of \$288,000 for the term hereof, payable upon the execution of this lease. The provisions contained herein for the payment of such rent in installments are solely for Tenant's convenience. If Tenant defaults in such payment, the entire rent then remaining unpaid for the full lease term shall immediately become due

and payable without any notice or demand.

(4) Rent based on floor space--floor space defined

Beginning with the rent commencement date of this lease, the Tenant shall pay the Landlord a fixed annual rental equal to \$4.20 for each square foot of floor space. Floor space is to be measured from the extension of the exterior walls of the building. If the plans and specifications for the building call for basement space, such space shall be included in the floor space upon which the annual rent is computed. The fixed annual rent shall be paid to the Landlord in equal monthly installments in advance on the first day of each month during the term of this lease.

(5) Place and manner of payment

Tenant shall make all rental payments without notice or demand, at any place in the United States Landlord designates in writing. Landlord presently designates as such place The North Shore Bank, Palm Beach, Florida. All rent shall be payable in current United States legal tender, as it is then, by law, constituted. Checks must be drawn on a Florida bank and are subject to collection. The extension of time for the payment of any installment of rent, or the acceptance by the Landlord of any money other than of the kind specified herein, shall not be a waiver of the Landlord's rights to insist on having all other payments of rent made in the manner and at the time specified herein.

(6) Payment by tenant of lesser amount deemed payment on account--endorsement on check or statement not deemed accord and satisfaction

No payment by the Tenant or receipt by the Landlord of a lesser amount than the monthly rent stipulated in this lease shall be deemed other than a payment on account of the earliest rent due, nor shall any endorsement or statement on any check or on any letter accompanying any check or payment as rent be deemed an accord and satisfaction. The Landlord may accept such check or payment without prejudice to its right to recover the balance of the rent or to pursue any other remedy provided for in this lease.

(7) Net rent provision

The rent specified in this lease shall be net to Landlord in each year during the lease term. Accordingly, Tenant shall pay all expenses and obligations relating to the leased property (except as otherwise specifically provided herein) which may arise or become due during the lease term, and Tenant shall indemnify and hold Landlord harmless against such expenses and obligations.

The net rent shall be paid to the Landlord without notice or demand and without abatement, deduction, or setoff (except as otherwise specifically provided in this lease). The net rent shall be paid in equal monthly installments in advance on the first day of each calendar month during the lease term.

(8) Net rent provision--no obligation to pay mortgage interest, franchises, or taxes of landlord

The Landlord shall receive the rents, additional rents, and all sums payable by the Tenant under this lease free of all taxes, expenses, charges, damages, and deductions, and the Tenant shall pay all sums which except for this lease would have been chargeable against the leased property or payable by the Landlord. The Tenant shall, however, be under no obligation to pay interest on any mortgage on the fee of the leased property, any franchise or income tax payable by the

Landlord, or any gift, inheritance, transfer, estate, or succession tax which may be enacted during the lease term.

(9) Net rent for construction and occupancy periods--apportionment of expenses at beginning of lease

(a) The Tenant shall pay to the Landlord net rent in equal quarterly installments in advance as follows:

(1) \$27,500 net per annum for the Construction Period, which shall begin on the date hereof and end on the earlier of (i) three years thereafter, or (ii) the date a temporary or final Certificate of Occupancy is issued permitting the use of all or any part of the new building, the construction of which is required to replace the existing structure under the provisions of this lease; (2) \$110,000 net per annum for the Occupancy Period, which shall begin when the Construction Period expires and end 25 years thereafter.

(b) If the Occupancy Period commences on any day other than the first day of a calendar month, the Tenant shall pay to the Landlord on such commencement day the proportionate amount of rent due for the balance of such current month at the new rate then prevailing, and, on the first day of the next succeeding month, the next quarterly installment of rent at such new rate.

(c) The rent under all leases, tenancies, and occupancies shown on Schedule A attached to this lease and made a part hereof shall be apportioned between the parties as of the date of this lease, as well as premiums on existing transferable insurance policies, real estate taxes, assessments for local improvements, water charges, sewer rents if any (to the extent to which they are not payable by tenants), fuel, employees' compensation and related employees' benefits, and charges under service contracts. Such apportionment shall be computed with all reasonable diligence after the execution and delivery of this lease. Immediately after such apportionment is concluded, Tenant shall pay Landlord, or Landlord shall pay Tenant, as the case may be, whatever net balance is determined to be owing from it. If the parties are unable to agree upon the proper apportionment of any such item, they shall promptly resolve the dispute by arbitration in the manner provided for in this lease.

(10) All obligations of tenant considered additional rent

The following obligations of the Tenant shall be deemed to be additional rent hereunder: all taxes, charges, and expenses that Tenant is required to pay hereunder; all interest and penalties that may accrue on such items because of the Tenant's failure to pay the same; and all damages and expenses that Landlord may incur because of Tenant's default or failure to comply with the lease terms. In the event of Tenant's nonpayment of any of the foregoing, Landlord shall have the same rights and remedies as it has for nonpayment of the basic rent.

(11) Tenant to submit proof of payment of items of additional rent--tenant appointed attorney-in-fact for payment purposes

(a) *Taxes.* The Tenant shall promptly pay all real estate taxes, assessments, water and sewer charges, and other governmental levies against the leased property, and also any occupancy tax and "tax on rents" ("impositions"). The phrase "tax on rents" means any tax levied, assessed, or imposed in connection with the receipt of rent under this lease for the use and occupancy of the leased property, in lieu of all or part of any real estate or personal property tax upon the leased property. The Tenant may pay any imposition in installments, if payment may be so made without penalty. All impositions for the tax year in which this lease terminates shall be apportioned between the Tenant and the Landlord, except that Tenant shall pay in full, at least 60 days before the lease term expires, any imposition it has elected to pay in installments.

(b) *Advance monthly payments.* The Tenant shall pay as additional rent on the first day of each month, in advance, one-twelfth of any tax that may be imposed in connection with the rental and use of the personal property included in the leased property. The Landlord shall remit such payment to the proper governmental authority together with any required return. The Tenant shall also pay any gross receipts tax imposed on the Landlord in connection with the Landlord's receipt of rents for the rental and use of the personal property.

(c) *Operating expenses.* The Tenant shall pay all expenses in the operation of the leased property, except (1) any interest and amortization on mortgages encumbering the fee title at any time, (2) rentals payable by the Landlord as tenant under any superior lease, and (3) any estate, inheritance, income, or other personal taxes of the Landlord.

(d) *Receipts.* The Tenant shall furnish to the Landlord official receipts or other satisfactory proof of payment, within a reasonable time after the Landlord's demand.

(e) *Contested amounts, deposit.* The Tenant may contest the amount or validity of any imposition by appropriate proceedings. However, the Tenant shall promptly pay the contested imposition unless (1) the proceedings operate to prevent or stay its collection, and (2) the Tenant has deposited with the Landlord the contested and unpaid amount, together with a sum sufficient to cover all charges that may be assessed against the leased property in such proceedings. Upon the termination of such proceedings, the Tenant shall deliver to the Landlord proof of the amount of the imposition as finally determined, and thereupon the Landlord shall, out of the deposited sums, pay such imposition and refund the balance to the Tenant. If the deposited sums are insufficient to pay the full amount of the imposition and other charges, the Tenant shall immediately pay any deficiency. If, at any time during the proceedings, the Landlord deems the deposited amount insufficient, the Tenant shall, upon demand, deposit with the Landlord all additional sums it may reasonably request. The Landlord, at the Tenant's expense, shall join in any such proceedings if so required by law. Any sums deposited hereunder with the Landlord shall be held in a trust account.

(f) *Additional rent.* All sums (other than the basic rent) which may be due and payable or are to be deposited by the Landlord under this lease shall be payable on demand and shall be deemed to be additional rent hereunder.

(g) *Power of attorney.* Landlord appoints Tenant as Landlord's attorney-in-fact for the purpose of making all payments to be made by Tenant under any provision of this lease to persons other than Landlord. If such person refuses to accept payment directly from Tenant, Tenant shall so notify Landlord in writing and pay the sum directly to Landlord, who shall then pay it to such person.

(12) Shopping center--additional rent for advertising

The Tenant shall pay to the Landlord additional rent of \$2,000 per annum within 30 days after the Tenant takes possession of the leased property and each year thereafter on the same date. Upon receiving such additional rental, Landlord shall contribute \$2,000 to the fund. Landlord shall expend such additional rental and contribution each year solely for the purpose of advertising and promoting the shopping center, by any means it determines.

(13) Additional rent--tenant's share for maintenance of parking area--easement to tenant

Tenant shall pay Landlord, as its share of the maintenance of the parking area, additional rent of \$2,400 per year, in equal monthly installments in advance on the first day of each month, beginning on the date fixed for the commencement of this lease. Landlord may promulgate rules and regulations governing the use of the parking area by Tenant and its employees and customers. Tenant, at no additional charge, is hereby given an easement in common with the other stores to use the parking lot for itself and its employees, customers, and invitees, and shall have an easement over the walks for the ingress and egress of such persons to and from the leased property.



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31-23 Current Legal Forms for Real Estate FORM 23.32

AUTHOR: by Thomas G. Belden

FORM 23.32 Percentage rent

COMMENT

A fixed rental provision does not protect the landlord against inflation, or enable him to benefit from an appreciation in property income or rental value or from an increase in business potential which may occur during the term of a long lease. From the tenant's point of view, the burden of a fixed rent may become unsupportable during a period of depressed business conditions. A sharing of the risks of fluctuations in value or business income is commonly accomplished by a provision for a percentage rental.

Minimum rent:

Such a provision generally involves the payment of two separately computed rentals: a fixed minimum rental and a rental based upon a percentage of receipts or income from use of the property in excess of a specified amount. The fixed rental provides a return for the landlord which is often less than the return customarily derived from similar property. The clause will generally follow the language for fixed rent, but with an indication of the requirement for additional rent. The minimum rent provision, however, may be quite elaborate, as in the case where it is designed to permit the landlord to recover over the term of the lease the costs of improvements constructed for the tenant.

Income base for percentage rent:

The starting point in formulating the percentage rental provision may be "gross income," "adjusted gross receipts," "net income," or "gross sales." The basis to be selected will depend

primarily upon the nature of the tenant's operations. In the case of certain large scale merchandising and service enterprises, the complexities in accounting make it desirable to base the percentage rent on gross receipts. The simplest provision will require the payment of a percentage of gross receipts in excess of a specified amount.

Gross sales defined:

One of the significant parts of a percentage rent clause is the definition of the income base against which the percentage is taken. Frequently, gross sales or gross receipts are used as the base. Although the definition of "gross sales" may vary, an understanding of the basic parameters of the definition is useful for negotiation and drafting purposes. The starting point is an inclusion of all receipts from the leased premises, followed by a list of applicable exclusions or deductions. The broad inclusion would specify such items as all revenues of any kind and character from the leased premises, including all sales of merchandise, for cash or on credit, and income from services.

Where applicable, a well drafted lease would specify whether gross sales includes receipts of the tenant's licensees or concessionaires, uncollected credit sales, telephone or catalog sales, sales over the internet, and off-premises deliveries. Gross sales may also include receipts of other tenant stores or offices resulting from sales at the leased premises. Internet sales may be included if the goods sold are located or sold from the leased premises. Items which would be generally excluded in the definition are sales tax receipts, vending machine proceeds, and customer charges for mail, delivery, or alterations if at cost. Other excluded receipts may be sales to the tenant's employees at discount, interest and credit charges, and sales at the tenant's other locations, assuming these sales are not diverted to avoid the percentage rent. This approach to defining gross sales is used with retail tenants.

Net income defined:

If net income is used as the base for percentage rent, the definition will permit the deduction of certain specified expenses from gross receipts. This is a significant difference from the definition of gross sales, which does not allow for the deduction of expenses. Care should be exercised so that the definition of net income is not synonymous with profits or net profits. A sharing of profits must be avoided if the landlord and tenant do not want to be classified as partners. (The effect of sharing "gross receipts" or income on the landlord-tenant relationship is discussed below.) A net income base for percentage rent has been used by landlords of commercial office space who seek a percentage of sublease revenues from the prime tenant. Deductions from gross receipts would include expenses related to subleasing, such as rent paid by the prime tenant to the landlord, the prime tenant's expenses for management fees, commissions, insurance, wages, advertising, interest, and similar operating expenses. One of the difficulties inherent in basing the percentage rent upon net income stems primarily from the need to specify the allowable deductions from gross receipts or gross sales. Such a provision imposes substantial record-keeping burdens upon the tenant and makes proper supervision difficult for the landlord. Some of these problems may be solved by accepting the income tax figure as a starting point. If major income of the tenant derives from subletting, as in an office building, the landlord may require, for his own benefit and for the benefit of the mortgagee, information respecting such subleases and also the right to inspect the original instruments.

Sales records and statements:

Collection of the percentage rent depends to a large extent upon the records maintained and

supplied by the tenant. Usually, a percentage rent provision requires a tenant to keep certain records and receipts and to give a periodic statement to the landlord. The primary record in a retail operation is the cash register receipts tape. Other records may include credit sales and transactions which would not normally be recorded on the register. The tenant is usually required to provide the landlord with a statement of receipts or sales periodically. The frequency of the report and the detail of the information depends upon the circumstances of the transaction. An annual statement may be sufficient in many cases, while daily reports may be required in others.

Enforcement and verifications of percentage rent:

A basic ingredient of all these formulas is the obligation on the tenant to maintain adequate records and to supply periodic statements. In order to avoid the expense and delay, the lease may provide that the tenant's continued failure, after notice of delinquency, to produce the required statement will empower the landlord to terminate the lease. In addition, the landlord is often given the right to inspect the tenant's records within a prescribed time after each rental period, the tenant to bear the cost of such inspection if an understatement, in a minimum amount, of the basis for computations is discovered. Cross-checks of the tenant's figures is also a useful enforcement device. This can be achieved by requiring the tenant to make available to landlord specific records, such as tenant sales tax returns, and notification to the landlord of any sales tax audits or income tax audits. The figures from these items of information can then be compared to the information supplied by the tenant.

Continued operation by tenant:

The amount of percentage rent received by a landlord is directly affected by the income of the tenant. The hours of the day and the days of the week during which the tenant is open for business will affect income. The landlord, therefore has an economic interest in the continued operation of the tenant's business. To insure the maximum rent, the lease may provide that a failure to conduct the business continuously will constitute a breach on the part of the tenant. Alternatively, the lease may provide that if the continuous operation of the tenant's business has been interrupted for a cause within his control, the measuring receipts or sales shall be determined by reference to the corresponding period for the previous year or by some other relevant standard. A stronger provision would be to allow the lessor to "recapture" the leased premises if the additional rent anticipated by virtue of the percentage clause is not forthcoming within a stipulated period of time.

Avoiding partnership status:

The payment of a part of gross receipts by a tenant to a landlord will not, alone, lead to classification of the landlord-tenant relationship as a partnership. However, if the landlord shares in the tenant's profits, the possibility of partnership classification increases. Under the Uniform Partnership Act, a partnership is an association of two or more persons to carry on as co-owners a business for profit. UPA § 6. Receipt of profits from a business is prima facie evidence, although not conclusive, that the person receiving the profits is a partner. UPA § 7(4). However, sharing gross returns or receipts does not of itself establish a partnership. UPA § 7. The gross receipts are usually paid under a percentage rent provision without regard to the tenant's profits. The intention of the parties is also a significant factor in the classification of a relationship as a partnership. Many practitioners include an express disclaimer of any intention to create a partnership or joint venture between the landlord and tenant.

Tax aspects:

For tax purposes, the most troublesome question has been the timing of the income and deduction for percentage rent. A cash basis taxpayer obviously must report the income or take the deduction when the payment is made. In the case of an accrual basis taxpayer, rent based on sales accrues as income for the period during which the sales are made. For a more detailed discussion of the tax treatment of rental payments, see the Tax Background § 23.02, at the beginning of this chapter.

FORMS

(1) Basic rent--reference to additional percentage rent

The basic annual rent for the leased property is \$48,000, payable by the Tenant monthly in advance in equal installments of \$4,000 each on the first day of every month during the lease term. In addition to the basic rent, the Tenant shall pay in each year additional rent, based upon a percentage of its gross income from the leased property, as set forth below.

(2) Basic rent--lease of building constructed for tenant--cost recovery formula

(a) *Basic rate formula.* The Tenant shall pay an annual basic rental, in addition to all other required payments, and without any abatement or setoff, equal annually to 8 1/2 percent of the Rent Determination Base. The annual basic rental shall be paid in equal monthly installments in advance on the first day of each calendar month during the term of this lease, commencing on _____ [date], or on the first day of the first calendar month following the effective date of this lease if such date is not _____ [date].

(b) *Rent determination base.* The term "Rent Determination Base" as used in this lease shall be the total amount of the following items:

(1) *Land acquisition costs.* The purchase price to the Landlord of the land described herein, the cost of title insurance covering the land and the improvements to be constructed thereon, and all recording fees, revenue stamps, and other closing costs paid or incurred by the Landlord in connection with the acquisition of the land, the construction of the improvements, and the necessary financing transactions.

(2) *Property taxes.* All ad valorem taxes paid by the Landlord by reason of ownership of the land before the effective date of this lease.

(3) *Architect and engineering fees.* All fees and other remuneration paid to architects and engineers for the design, planning, supervision, and all other services rendered in connection with the construction of the buildings under the terms of an agreement attached hereto as Exhibit A.

(4) *Construction costs.* The contract sum provided for in a construction contract between the Landlord and ABC Builders, Inc., as such contract may be modified by the provisions of this lease. For the purposes of this paragraph, however, such contract sum shall be reduced by the greater of (i) \$500,000, or (ii) the amount paid by Tenant to Landlord for tenant improvements under this lease.

(5) *Interim financing.* Landlord shall pay interest of 7 percent per annum for the interim financing of all items set forth in subparagraphs (1) through (4) of this paragraph (b), regardless of when incurred or accrued, until the effective date of this lease. The Landlord shall attempt to keep the amount of this item as low as possible by drawing against interim financing commitments from time to time only such sums as are then necessary to meet obligations which are then due or for which sound business discretion would then provide.

(6) *Deposit credit.* The aggregate sum of all the items set forth above in subparagraphs (1) through (5) of this paragraph shall be reduced by the amount of the security deposit paid by the Tenant to the Landlord upon the execution of this lease.

(c) *Settlement of amount.* During the course of the construction of the buildings and the completion of the leased property, the Landlord shall maintain a complete and accurate accounting of all sums to be included in the Rent Determination Base. Upon the completion of the buildings, the Landlord shall submit to the Tenant a complete summary of the amount of the Rent Determination Base, and the Tenant shall have a reasonable time to check and verify all figures included in the Rent Determination Base. For this purpose, Tenant may examine Landlord's books and records. Within ten days after Tenant receives such summary from Landlord, it shall give Landlord written notice either that it agrees to the amount of the Rent Determination Base, or that it does not agree, pointing out any amounts which it questions as being accurate or includable in the Rent Determination Base. If Tenant questions the accuracy of any such figure or its inclusion in the Rent Determination Base, both parties shall attempt in good faith to resolve the dispute. If the parties are unable to do so within seven days after Tenant submits written notice specifying the nature of its questions concerning the amounts, the parties shall appoint a board of arbitration to resolve their differences and to determine the Rent Determination Base. Such board shall consist of one individual named by Tenant, a second named by Landlord, and a third selected by the two designees. In making the determination, the arbitrators may seek the assistance and advice of an independent certified public accounting firm, the charges of which shall be paid equally by Landlord and Tenant. The decision of the three arbitrators shall be final and binding upon both parties.

(3) Subleased rental property--additional rent based on gross income in excess of minimum

If the gross income collected by the Tenant from the operation of the leased property exceeds \$200,000 in any calendar year, it shall pay 5% of the excess to the Landlord as additional rent for such year. Upon demand, the Tenant shall furnish to the Landlord a list of the rents collected during each calendar year, including the names of all subtenants. Such lists shall be furnished within 30 days after demand and if uncertified may be audited by the Landlord's accountant.

(4) Subleased rental property--additional rent in gross receipts adjusted for improvements and taxes

(a) *Percentage rent.* If the adjusted gross receipts (as defined below) of the Tenant in the operation of the leased property exceed \$825,000 in any lease year (as defined below), the Tenant shall pay to the Landlord, as additional rent, 2% of such excess.

(b) *Lease year.* The term "lease year" means the period of 12 consecutive months commencing on November 1 of each year during the term hereof.

(c) *Adjusted gross receipts.* The term "adjusted gross receipts" means Tenant's gross receipts from the operation of the leased property for the particular lease year, less (1) the cost of capital improvements to the leased property (including alterations for subtenants renting space in such property) made by Tenant at its expense during the particular lease year, (2) the cost of such capital improvements made by Tenant in any previous lease year that was not deducted by it in the previous year, and (3) real estate taxes in excess of \$100,000 paid by Tenant during the particular lease year.

(d) *Annual statement.* The Tenant shall keep a full and accurate set of books adequately showing the amount of adjusted gross receipts received by it in each lease year. Within 60 days after the close of each lease year, the Tenant shall furnish to the Landlord a verified statement certified by a certified public accountant setting forth the Tenant's adjusted gross receipts during the preceding lease year and showing the amount of additional rent required to be paid by the Tenant for such year. Simultaneously with the delivery of such statement, the Tenant shall pay to the Landlord all such additional rent. The Landlord and its duly authorized representatives may inspect the Tenant's books, records, leases, and other supporting data at all times during the term of this lease during normal business hours.

(e) *Disputed amounts.* If the Landlord is not satisfied with such statement, it shall so notify Tenant in writing within 30 days after the statement is delivered to it. Otherwise, Landlord shall be deemed to accept and approve the statement. Any dispute as to the amount of adjusted gross receipts in any lease year shall be determined by arbitration in accordance with the provisions of this lease.

(f) *Separate determination.* The amount of additional rent shall be determined only with respect to the particular lease year and shall be independent of any other lease year. The fact that additional rent was not payable for any lease year shall not affect or diminish the amount of additional rent which may become due in any subsequent lease year, except as to the cost of capital improvements not previously deducted. Such improvements may be carried forward to, and deducted from, the adjusted gross income of any subsequent lease year in accordance with generally accepted accounting principles approved in advance by Landlord, but such approval shall not be unreasonably withheld.

(5) Subleased rental property--additional rent based on net income--deductible and nondeductible items listed

The Tenant shall pay, as additional rent for each calendar year during the term of this lease, commencing on _____[date], a sum equal to one-third of the annual net income in excess of the following annual amounts ("minimum net income") derived by Tenant from the operation of the leased property:

During the period ending [date]	\$1,000,000
During the period commencing [date], and ending [date]	1,500,000
Thereafter	1,800,000

The term "net income" for any calendar year means the net income derived by the Tenant from the leased property, determined in the following manner:

(a) *Gross income.* The gross income derived from the leased property shall be computed for each calendar year on an accrual basis, in accordance with generally accepted accounting principles consistently applied. Gross income shall include all income received from all sources as a result of the operation of the leased property, including all net refunds, rebates, and recoveries of items previously charged as an expense (after deducting therefrom necessary expenses incurred in recovering such items, except for refunds, rebates, or recoveries of items not previously charged or deductible as an expense). Gross income, however, shall not include the proceeds from any loan or financing, condemnation award paid to the Tenant under this lease, or proceeds from the sale of the leasehold estate created hereby. The proceeds of any insurance recovery arising from damage shall be included in gross income, but only as and when the repairs of such damage have been completed, and then only to the extent that such proceeds exceed the cost of such repairs.

(b) *Deductions.* All of the following items shall be deducted from the calendar year gross income described above in subparagraph (a): (1) net rent payable under this lease; (2) management fees of a managing agent, or, if the leased

property is operated directly by the Tenant, an amount equal to the cost of such operation, not to exceed customary rates for management then currently paid in the area in which the property is located; (3) leasing commissions, or, if no such commission is payable in connection with the making of any lease, an amount equal to the commission that would have been payable to a broker for procuring such lease, not to exceed customary rates then currently paid in the area; (4) cost of alterations for tenants; (5) cost of capital improvements (other than alterations for tenants); (6) wages and salaries paid to building employees engaged in the operation and maintenance of the leased property, including, but not limited to, any vacation pay, hospitalization, and contributions to welfare funds under customary agreements with such employees or their representatives or required by law or governmental regulations, provided that no deduction is allowed for salaries paid to any person as an officer or member of the Tenant; (7) premiums for insurance policies required to be carried under this lease, and for all other types of insurance, including compensation insurance, deemed proper by the Tenant and which may be reasonably approved by the Landlord, to cover any hazard against which the Tenant should be insured in connection with the kind of real estate referred to herein; (8) taxes paid by the Tenant under this lease; (9) uncollectible amounts due from tenants; (10) sales taxes and other taxes paid to governmental agencies for utilities and payrolls of building employees; (11) advertising expenses in connection with offering for rent specific space in the leased property; (12) reasonable fees for legal services incurred in connection with occupancy or collection of income and for accounting services in connection with the preparation of the annual reports hereinafter required to be submitted to the Landlord; (13) interest on loans incurred in connection with and used to pay for improvements made to the leased property, together with the reasonable expenses of procuring such loans; and (14) all other necessary expenses in connection with the operation of the leased property, properly chargeable against income, and not hereinafter expressly excluded. All amounts deducted under this subparagraph (b) shall be computed on an accrual basis, in accordance with generally accepted accounting principles consistently applied.

(c) *Nondeductible amounts.* The following items shall not be deducted from gross income (1) depreciation, depletion, obsolescence, or amortization of the cost of, or any value attributed to, the leasehold estate created hereby; (2) taxes not payable hereunder by the Tenant; (3) additional rent payable under this lease; and (4) cost of repairs or restoration to the extent of insurance recovery.

(d) *Pro rata deductions.* Anything to the contrary notwithstanding, the amount of the deductions in each calendar year enumerated as items (3), (4), (5), and (6) in subparagraph (b) shall be computed as follows:

"Leasing commissions"--prorated over the terms of the respective leases.

"Cost of alterations for tenants"--prorated over the terms of the respective leases.

"Cost of capital improvements"--prorated over the useful life of such improvements or a term of ten years, whichever is less.

"Insurance premiums"--prorated over the terms of the respective policies.

(e) *Cash payments.* If, during any calendar year, the Tenant makes cash payments for expenses incurred during such year on account of any item specified in (3), (4), or (5) of paragraph (b) and such payments exceed the total deductions permitted under paragraph (b), plus the proceeds of any financing arranged for or in connection with such expenses, any amount which (except for this subparagraph) would otherwise have been the additional rent calculated for such calendar year under this paragraph shall be reduced by the lesser of (i) the portion of such amount which equals one-third of the excess cash payments, or (ii) such amount itself. Any remaining amount shall be paid as additional rent for such calendar year under this paragraph. One-fifth of such reduction shall be additional rent for each of the five succeeding calendar years.

(f) *Annual report.* The Tenant shall submit to the Landlord on or before April 1 of each year, commencing _____[date], a certified report prepared by qualified independent public accountants showing the net

income, as defined herein, and the calculation, if any, specified in subparagraph (e), for the preceding calendar year. When such report is submitted, Tenant shall pay Landlord the additional rent shown to be due.

(g) *Books.* The Tenant shall maintain suitable books of account at its regular business office. Such books shall be available for inspection and audit by the Landlord or its agent at any reasonable time within six months after the expiration of each respective calendar year. Nothing in this paragraph or in any other portion of this lease shall be construed to imply that the relationship between the Landlord and the Tenant is other than that of landlord and tenant.

(h) *Separate determinations.* For purposes of calculating additional rent, each calendar year shall be regarded as independent of any other calendar year during the term of this lease, so that the amount by which the net income in any calendar year is less than the minimum net income for that year shall not be treated as a deduction or credit in computing net income or additional rent for any other calendar year.

(i) *Arbitration.* Any dispute in calculating additional rent shall be submitted to and determined by arbitration in New York City in accordance with the prevailing rules of the American Arbitration Association.

(6) Hotel operation--additional rent based on gross revenue from room sales

(a) *Annual statement.* The Tenant shall keep records on a calendar year basis, commencing _____ [date]. Within 60 days after the end of each calendar year, the Tenant shall deliver to the Landlord a statement of its profit or loss from the operation of the leased property for the preceding fiscal year. Each statement shall be prepared and certified by an independent certified public accountant in accordance with standard hotel accounting practice. If the Tenant subleases all or substantially all of the leased property, it shall submit to the Landlord a similar statement of profit and loss of the subtenant. The Tenant shall deliver to the Landlord with such statement, as overage rent, a sum equal to 20% of the amount by which "gross revenue from room sales" (as defined in paragraph (b) below) exceeds \$3,000 times the average number of rooms in existence during the fiscal year. The Landlord may, during normal business hours, by giving five days' written notice to the Tenant, inspect the Tenant's books and records for the purpose of verifying any statement within three years after it is submitted. The Landlord's receipt of overage rent shall not be deemed to create any partnership or joint venture between the Landlord and the Tenant.

(b) *Gross revenues.* The term "gross revenue from room sales" includes, but is not limited to, rentals, service charges, or other fees charged by the Tenant or by any other person operating the leased property under or through it, for accommodations, whether residential or commercial, transient or permanent, and rentals or other charges for concessions and the use of public rooms, whether for cash or credit, and whether paid or unpaid. If the Tenant, directly or indirectly, operates or controls any business or concession at the leased property, it shall pay a fair rental for the space occupied by the business or concession and such fair rental shall be considered as part of "gross revenue from room sales."

(7) Motel operation--additional rent based on gross revenue from room rentals in excess of given volume--penalty for understating volume

(a) *Average rent.* In addition to the minimum rental, the Tenant shall pay to the Landlord, as overage rent for the leased property, 35 percent of the amount by which the "gross revenue from room rentals" (as defined in paragraph (b) below) in each calendar year exceeds \$800,000. If the term of this lease commences other than on January 1, or terminates or expires other than on December 31, the \$800,000 figure shall be appropriately prorated for the purpose of computing overage rent for the first and last year of the lease term.

(b) *Gross revenues.* The term "gross revenue from room rentals" includes, all rentals, service charges, or other fees charged by the Tenant or any other person operating the leased property for the use and occupancy of the 200 dwelling rooms which are part of the leased property, whether such rooms are rented for residential or commercial purposes, on a transient or permanent basis, for cash or for credit, or paid or unpaid (all risks of credit shall be borne by the Tenant). The term "gross revenue from room rentals" shall not include any revenue received by the Tenant from the operation of the restaurant, coffee shop, bar and cocktail lounge, shops, cabana club, or any other facilities in or about the leased property, whether such facilities are operated directly by the Tenant or by others on a sublease or concession basis. The Landlord shall share solely in the revenue derived from the dwelling accommodations. Computation of gross revenue from room rentals shall be made separately for each calendar year. If, at any time, the Tenant adopts a program which offers rooms under the so-called "American Plan," that is, where a single charge is made for accommodations and meals, the parties shall agree upon an allocation of such charge as between room rental and food charges, and the amount of the room rental only shall be included in "gross revenue from room rentals." If the parties cannot agree upon such allocation, the question shall be arbitrated in accordance with the provisions of this lease.

(c) *Operating reports.* The Tenant shall keep its records on a calendar year basis. Within 60 days after the end of each calendar year, the Tenant shall cause to be delivered to the Landlord a certified operating report, prepared in accordance with generally accepted accounting principals for motel operations by a certified public accountant. The report shall set forth the gross revenue from room rentals and the net operating profit derived from the operation of the leased property for such calendar year (regardless of whether the Tenant is the operator). If the report discloses that overage rent is due for the preceding calendar year, the Tenant shall deliver its check in payment of the overage rent together with the report. In addition to the foregoing annual certified operating report, the Tenant shall cause to be delivered to the Landlord, in writing, on or about the tenth day of each month during the initial or any renewal term of this lease, a written statement of gross revenue from room rentals for the preceding month, certified to be accurate by the Tenant or its authorized representative.

(d) *Inspection of books.* Within three years after Tenant submits any statement to it, Landlord, upon five days' written notice given to Tenant, may inspect Tenant's books and records during normal business hours for the purpose of verifying such statement. Landlord's receipt of overage rent shall not be deemed to create a partnership or joint venture between the parties or to make Landlord liable for any debts incurred by Tenant in the conduct of its business. The relationship between the parties is, and at all times shall remain, that of landlord and tenant. Landlord's acceptance of overage rent shall not be deemed a waiver of its rights to claim additional or further overage rent after a review and inspection of Tenant's books and records.

(e) *Understatements; nonreporting.* If Landlord's inspection of Tenant's books and records discloses that Tenant's certified operating report understated "gross revenue from room rentals," resulting in an error of \$500 or more in overage rent, Tenant shall bear the reasonable cost of such inspection. If Tenant fails to have a certified operating report or statement of gross revenue delivered to Landlord at the times and in the manner provided herein, Landlord may terminate this lease by giving Tenant five days' written notice of default and of its intention to terminate. When such notice period expires, the term of this lease shall expire as fully and completely as if that were the date fixed herein for term expiration.

(8) Retail operation--additional rent based on gross sales--quarterly payments

(a) *Percentage rent.* In addition to the rent reserved herein, Tenant shall pay to Landlord, as an additional charge, 3 percent of the amount by which gross sales (as defined in paragraph (c) below) for each lease year exceed \$75,000 ("minimum gross sales"). The first lease year shall commence on the first day of the calendar month on or after which the term of this lease commences, and shall run for 12 full calendar months thereafter. Each succeeding 12-month period shall be deemed a lease year. If Tenant commences business on other than the first day of a month, the period between such first day and the commencement date shall be included as part of the first month of the first lease year.

For any other fractional part of a lease year, Tenant shall pay 3 percent of the amount by which the gross sales for such fractional part exceed a proportionate amount of minimum gross sales (based upon the fractional part of the lease year).

(b) *Payment of percentage rent.* Within 15 days after the end of each calendar month during the term hereof, Tenant shall deliver to Landlord a statement, signed and certified as correct either by Tenant or its principal executive (if Tenant is a corporation). The statement shall show the gross sales for the preceding calendar month or fraction of such month, whichever applies. Tenant shall make quarterly payments of percentage rent equal to the amount by which the gross sales for that quarter exceed 1/4 of the minimum gross sales of \$75,000, within 15 days after the expiration of each quarter of each lease year. Tenant, however, shall be liable for percentage rent only to the extent that the total gross sales for all quarters of that lease year exceed a proportion of minimum gross sales (of \$75,000) for such year. Within 30 days after the end of each lease year, or expiration or sooner termination of this lease, Tenant shall deliver to Landlord a cumulative statement, certified by a certified public accountant, showing the gross sales made in, at, or from the demised premises for the preceding lease year, or fraction thereof as the case may be, from the end of the preceding year to the expiration or sooner termination of this lease. Such gross sales shall be the total amount of sales and excise taxes paid or payable to the state or any county or municipal authority. If Tenant has not paid Landlord the full amount of percentage rent for the period of the cumulative statement, it shall simultaneously with the delivery of such statement pay the balance. If Tenant has paid more than the required percentage rent, Landlord shall promptly refund the excess.

(c) *Definition of gross sales.* The term "gross sales," as used herein, includes: the entire amount charged by Tenant and any sublessee, concessionaire, licensee, or other person or corporation, for all sales of merchandise made or services rendered in, at, or from the premises, sales wherever made of merchandise stored on the premises including without limitation those made over the internet, or sales from any business conducted from the premises, regardless of whether made on a cash basis or on credit, paid or unpaid, or collected or uncollected. Gross sales also shall include deposits not refunded to customers, as well as orders, including but not limited to telephone and mail orders received at or solicited from the premises, filled on the premises or elsewhere. Gross sales shall not include the following amounts: (1) any sales or excise tax that is added to the price of a sale or service and collectible from the customer, and in turn payable by Tenant to the governmental authority imposing such tax; (2) transfers of merchandise from the premises to Tenant's other stores if made for the convenient operation of its business and not to consummate or to deprive Landlord of a sale made in or from the premises; (3) returns to Tenant's suppliers; (4) credits and refunds for returned or exchanged merchandise, and allowances for loss of or damage to merchandise sold; and (5) sales of fixtures and equipment used by Tenant in the operation of its business on the premises. Tenant may deduct from gross sales all amounts listed in (1) through (5) that were previously included in such sales.

(d) *Records of gross sales.* All cash sales made upon the premises shall be immediately registered on a cash register equipped with tape. The Tenant shall install and keep on the premises complete and accurate books and records of all business conducted in or from the premises, and the Landlord may examine them during regular business hours. The Tenant shall keep and preserve for at least one year after the end of each lease year, all tapes, sales slips, books, records, and other evidence of the business conducted in the premises for that lease year. All tapes shall be dated and totaled and be available for inspection. If the Landlord's audit discloses that gross sales for any lease year or part thereof have been understated by more than 3%, the Tenant shall pay for the cost of the audit. Any audit, whether spot check or complete, shall be made during regular business hours. Tenant shall not permit anyone who fails to comply with the provisions of this Article to occupy any part of the premises. However, nothing contained herein shall be deemed a consent by Landlord to any assignment, subletting, or occupancy by any one except Tenant.

(e) *Operation of business.* At all times on and after the commencement date of this lease, the Tenant shall keep the entire premises open for business at least 52 hours per week and conduct its business in a high class and reputable manner, with an adequate staff and full stock of merchandise. The Tenant shall not at any time during the term of this lease be or become interested or engaged, directly or indirectly, in a similar business within a radius of two miles of the premises except with respect to leases in force or signed before the date hereof.

(9) Retail operation--additional rent based on percentage of sales in excess of minimum rent

(a) *Percentage rent.* In addition to the minimum annual rental, Tenant shall pay Landlord, as additional rental for each lease year, 2 percent of Tenant's gross sales in such year less Tenant's minimum annual rental. The term "lease year" means the first consecutive 12-month period beginning the first day of the first full month hereunder and each succeeding 12-month period.

(b) *Gross sales.* The term "gross sales" includes the gross amount of all sales made in, upon, or resulting from the conduct of any business upon the leased property, after deducting credits, allowances, and refunds from the return of merchandise by customers, refunds made in the normal course of business, and charges to customers for credit service, extension of credit, deferred payments, or layaways. Proceeds from vending machines shall not be included in gross sales, if the use of such machines does not exceed their incidental use characteristic of stores presently operated by the Tenant. No deduction from gross sales shall be made because the sale price of any article proves to be uncollectible. Gross sales shall not include any taxes paid by the Tenant or its customers.

(c) *Annual statement.* On or before 60 days after the close of each lease year, the Tenant shall deliver to the Landlord an annual statement showing gross sales during such year, which statement shall be verified by a duly qualified officer of the Tenant. Simultaneously with delivery of the statement, the Tenant shall pay to the Landlord the additional rental, if any, required by the provisions of this lease to be paid for any such year.

(d) *Audit.* The Landlord may each year examine and audit the Tenant's records, but only for the purpose of ascertaining the amount of gross sales. Such audit shall not be made more than once a year by a certified public accountant selected by the Landlord. If the Landlord wishes to audit the Tenant's records, it shall notify the Tenant and proceed with the audit within 90 days after receipt from the Tenant of the verified statement as provided in paragraph (c) above. Such statement shall be final and binding upon Landlord if it fails to exercise its right to audit within the required 90-day period. Any audit or examination by Landlord shall be at its expense. The Landlord shall keep in confidence all information furnished to it, either in the form of the statement of sales delivered by the Tenant, or any information which it might gain or gather from the examination or audit of the Tenant's books.

(10) Retail operation--graduated percentage rent based on gross sales--chain store tenant--cash register receipts

(a) *Percentage rent.* In addition to the minimum annual rental, Tenant shall pay Landlord, as additional rental for each lease year, the following amount: (1) 5 percent of the gross sales up to \$250,000, plus 4 percent of the gross sales over \$250,000 and up to \$500,000, plus 3 percent of the gross sales over \$500,000, less (2) the minimum rental for such lease year. Within 30 days after the expiration of each lease year, Tenant shall furnish to Landlord a statement, verified by a duly qualified officer of Tenant, setting forth the gross sales made on the leased property in such year, and simultaneously therewith pay Landlord the additional rental due for such year. The term "lease year" means the 12-month period beginning on _____ [date] of each year and ending on the following _____ [date]. The first lease year shall begin on _____ [date]. If a period at the end of this lease term is less than a full 12-month lease year, the shorter period shall be considered a separate lease year.

(b) *Gross sales.* The term "gross sales" means all receipts from the conduct of all business upon the leased property including, without being limited to, the gross sales of merchandise at or supplied from the leased property, whether sold for cash or on a charge or credit basis, all charges for the rendition of services on or supplied from the leased property, and all sales and business of any licensees or concessionaires operating upon the leased property. Amounts attributable to sales originally made upon the leased property and to services originally contracted for upon such property shall be included in gross sales even though payment of the bill for such sales or services is transferred to another location for collection, or deliveries pursuant to such sales or performance of such services are effected outside of the leased

property. Amounts attributable to merchandise delivered or services performed upon the leased property, though contracted for elsewhere, shall be included in gross sales.

(c) *Excluded receipts.* In computing gross sales, a deduction shall be taken for all federal, state, or local taxes payable by the seller on the sale of merchandise or services in or from the leased property, but not for any capital stock tax, privilege tax, franchise tax, or income or similar tax based solely upon income or profits. A deduction from gross sales also may be taken for receipts from the sale on the leased property of meals to the Tenant's employees in the course of their employment, any service charge collected by the Tenant and turned over to its employees in lieu of their receiving tips or gratuities from the Tenant's patrons, and the proceeds of the sale of any of the Tenant's fixtures or store equipment used upon the leased property.

(d) *Books and records.* The Tenant shall maintain with respect to the business transacted in or from the leased property the same books and records as are generally kept during the lease term at its other stores. Such books and records shall be maintained at the Tenant's main office and shall be preserved for the same length of time as is the general practice with respect to the other stores. The books and records in any event shall be maintained according to generally accepted accounting principles and shall contain sufficient information to permit a calculation of gross sales. Landlord may examine all books and records of Tenant that in any way pertain to business transacted in or from the leased property. Such examination shall be during regular business hours and at Tenant's main accounting office. Landlord may also examine at the leased property all of Tenant's sales reports and other records pertaining to gross sales.

(e) *Cash register records.* Tenant's store on the leased property shall use tape-recording cash registers or other sales-recording devices commonly used in lieu thereof, if such other devices make a permanent written record of each sale. Tenant shall record on such cash register or other recording device all amounts received from sales of merchandise and services. Landlord may, at all times during the store's business hours, take readings of such cash register or other recording device and observe the operation of the recording of sales thereon.

(f) *Landlord's examination costs.* If Landlord, upon examining Tenant's books and records, discovers an error in its favor which results in there being due to it additional percentage rental of over \$100, Tenant shall pay the reasonable cost of such examination.

(g) *Relationship of parties.* Nothing contained in this lease shall be construed to create a partnership or joint venture between the Landlord and the Tenant or between the Landlord and any other party, or cause the Landlord to be responsible in any way for the debts or obligations of the Tenant or any other party.

(11) Retail operation--additional rent based on gross sales less specified deductions--inspection of bank deposits, sales tax returns

(a) *Rent.* On or before the last day of February, May, August, and November respectively of each year, the Tenant shall deliver to the Landlord a statement certified as correct by a duly authorized officer or member of the Tenant, and prepared in accordance with generally accepted accounting principles for the retail merchandising industry under the supervision of a certified public accountant. Such statement shall show in reasonable detail the amount of the gross sales (as defined in paragraph (b)) during the three-month period ended on the last day of the month preceding the month in which the statement is due ("lease quarter"). Simultaneously with the submission of each statement, Tenant shall pay Landlord, as overage rent, the following sum: (1) 3 percent of gross sales for the lease quarter, less (2) the amount of allowables plus the basic rent for the lease quarter.

NOTE:

Select one of the alternative "(b)" clauses, *below*.

(b) *Gross sales.* The term "gross sales" means the entire price charged for merchandise or services sold at the leased property by Tenant or its concessionaires, undertenants, or licensees (collectively, "Occupants"). Gross sales shall include the following:

- (1) 3% of gross sales for the lease quarter, less the aggregate of
- (2) The amount of allowables for such lease quarter, and
- (3) The basic rent for such lease quarter.

(b) *Gross sales.* The term "gross sales" shall mean the entire price charged for merchandise or service sold at the leased property by the Tenant or any concessionaire, undertenant, or licensee of the Tenant (hereinafter called collectively "Occupants"), and shall include the following:

- (1) Sales made wholly or partially on credit.
- (2) Sales made over the internet or resulting from telephone or mail orders received at the leased property.
- (3) Net income derived from vending machines, public telephones, or other coin-operated equipment, in lieu of the price charged for merchandise or services dispensed thereby. However, if any such equipment is operated by the Tenant or Occupants or any affiliate or other party related to or controlled by the Tenant or Occupant, the price charged for the merchandise or services dispensed thereby shall be included in lieu of net income.

(c) *Accounting principles.* The following principles shall at all times be applied by the Tenant in computing overage rent:

- (1) Generally accepted retail accounting principles shall be consistently applied by the Tenant in determining when sales are made.
- (2) Orders received at the leased property shall be included in gross sales even if they are filled elsewhere.
- (3) All sales shall be computed without deductions for uncollected credit accounts. However, unpaid balances of credit sales that are charged off as bad debts may be deducted from gross sales at the time of such charge-off, except that any amount later collected on account thereof shall be included in gross sales.

(d) *Exclusions and deductions.* The following shall be deducted from gross sales:

- (1) Sums charged separately to and collected from customers, and required by law to be paid out for any sales or compensating use tax.
- (2) Proceeds from sales of merchandise to stores or warehouses controlled by or affiliated with the Tenant or any Occupant, if such sales are made solely for the convenient operation of the Tenant or Occupant and not for the purpose of diverting sales which would otherwise be made at the leased property.
- (3) Any cash or credit refund made upon a sale which was previously included in gross sales.
- (4) Interest or other carrying charges on credit or time sales.
- (5) Amounts charged customers for mailing, delivery, alterations, or other services, if such service is rendered to the customer without profit to the vendor.

(6) Amounts received from sales of distressed, damaged, or obsolescent merchandises sold in bulk to persons other than retail customers.

(7) Amounts received from sales to employees of the Tenant or any Occupant physically present at the leased property, if such sales are at prices less than those charged customers for the same merchandise or services.

(e) *Exterior maintenance and insurance.* The term "allowables" means the Tenant's expenditures only for insurance premiums and exterior maintenance. Allowables with respect to exterior maintenance shall be computed on a cash basis of accounting, and shall be recognized at the time and to the extent that actual payment is made by the Tenant. With respect to insurance premiums, allowables shall be computed on an accrual accounting basis. For the purpose of computing allowables, the following rules shall apply:

(1) Insurance premiums paid by the Tenant shall be limited to the premiums paid for insurance the Tenant is required to carry under the terms of this lease or any mortgage or easement agreement to which this lease may be subject, and any insurance carried against the risk of a condemnation of the leased property for a limited period of time.

(2) Exterior maintenance shall include only (i) repairs to the foundation, roof, exterior walls, and marquee, if any, and structural members (whether or not exterior), except for repairs to any glass, windows, and doors; (ii) repairs relating to the lighting towers, drainage facilities, paving, and striping of the parking area; and (iii) snow and ice removal at the parking area. Notwithstanding any contrary provision herein, exterior maintenance shall exclude all repairs during the first 18 months after construction of the leased property is completed, except for those required as a result of Landlord's negligence. Landlord hereby assigns to Tenant, but only for this lease term, all of Landlord's right, title, and interest in and to all guarantees and warranties obtained from contractors and materialmen. Tenant may enforce such guarantees and warranties in its name or that of the Landlord.

(3) Nothing herein shall be construed in any way to relieve Tenant of its full responsibility for all repairs and maintenance relating to the leased property or for providing all required insurance coverage, or to include under allowables any repairs made necessary because of the negligent acts of Tenant or any Occupant, or its respective agents.

(f) *Sales records; inspection.* For a period of two years following the end of each lease year, Tenant, as long as it or any affiliate is a tenant under this lease, shall keep at its principal office, or at a location known to and approved by Landlord, all daily sheets tabulating sales of merchandise and services, receipts, and records for all allowables, and receipts and records for all items excluded from gross sales under paragraph (d) to the extent that such exclusions are not recorded in the daily sheets. At all times, the Tenant shall cause accurate cash registers, of a type which record all sales separately, to be installed at the leased property and to be utilized to record all cash sales. Such records and books, together with all records of bank deposits and copies of sales and compensating use tax reports, shall, upon five days' written notice to the Tenant, be open to inspection and audit by the Landlord and its agents at all reasonable times during ordinary business hours. The Tenant shall immediately notify the Landlord of the result of any audit of any sales and compensating use tax reports by the taxing authority, and shall submit to the Landlord any written report covering such audit. If Tenant makes any valid assignment of this lease, Landlord may thereafter require the new tenant to install and maintain any other or different record or system that is reasonably required to assure Landlord that the proper amount of overage rent is paid, if such record or systems is of a type then in common use in retail store accounting.

(g) *Certified audit statements.* The Tenant shall submit to the Landlord, within 60 days following the end of each lease year, a statement showing the computation of the overage rent, prepared in accordance with generally accepted retail merchandising accounting practices under the supervision of a certified public accountant, certified as correct by such accountant and by a duly authorized officer of the Tenant. The certification by the certified public accountant may be based upon spot verifications in lieu of a complete audit. Such statement shall show in reasonable detail the amount of gross sales made by the Tenant and all Occupants, and the amount of the allowables during the preceding lease year.

Similar certified audit statements shall be submitted to the Landlord within 60 days following the expiration or termination of the term of this lease, covering the preceding or fractional lease year. None of the following acts or omissions by Landlord shall bar it from collecting, at any time within five years after such act or omission, the correct overage rent due for any period: the receipt of any statement; the acceptance of any payment of overage rent; or the failure to make an audit. If an audit of Tenant's records reveals a deficiency in any payment of overage rent, Tenant shall pay the deficiency. However, if the deficiency exceeds 5 percent of the correct overage rent for the lease year, Tenant shall also pay interest of 18 percent per annum on the deficiency, starting on the date the payment should have been made, plus Landlord's expense for the audit.

(h) *Relationship of parties.* Nothing contained in this lease shall be deemed or construed to create a partnership or joint venture between the Landlord and the Tenant or between the Landlord and any other party, or cause the Landlord to be responsible in any way for the debts or obligations of the Tenant or any other party. The only relationship hereunder is solely that of landlord and tenant.

(12) Tenant's obligation to conduct business during specified hours

The Tenant shall operate the leased property for the uses and purposes for which it is let continuously throughout the year, and shall conduct and operate its business therein during each business day from the hours of 9 a.m. to 6 p.m. The Tenant shall keep the leased property reasonably stocked with merchandise, and reasonably staffed to serve customers, comparable to stores doing a similar business in the vicinity of such property. The Tenant is not required to operate its business on Sundays or legal holidays, nor during any time while such operations must be suspended because of casualty loss to the building, strike, insurrection, or other cause beyond the Tenant's control.

(13) Experimental minimum--subject to upward adjustment after period of operation

(a) The Tenant shall pay the Landlord, as rental for the demised premises, the following:

(1) A minimum rental of \$24,000 per annum, payable in equal monthly installments in advance on the first day of each calendar month of the term without any set-off or deduction; plus

(2) The amount by which (i) Tenant's first \$300,000 of gross sales made in or from the demised premises during each lease year, plus 7 percent of such sales over \$300,000 and up to \$500,000, plus 6 percent of such sales over \$500,000, exceed (ii) the minimum rental for such year.

The minimum rental in (1) above shall be subject to the following adjustments:

(i) Within 45 days after the end of the first three annual periods in the term commencing with the date Tenant's demised premises are open for business (each such annual period is the "adjusting year"), during which the business has been operated without substantial interruption because of fire or other hazard, Tenant shall submit to Landlord a statement setting forth the amount of gross sales made in or upon the demised premises during each such adjusting year. This statement shall be duly certified in the same manner as provided herein with respect to the annual statement of gross sales.

(ii) Beginning with the day following the expiration of the third of such first three full adjusting years, and continuing for the remainder of the term, the minimum rental per annum shall be the greater of the following: (a) \$24,000; or (b) 80 percent of the average for such three adjusting years of the gross sales made in the demised premises during each such year, determined as follows: 8 percent of the first \$300,000 of such sales, plus 7 percent of such sales over \$300,000 and up to \$500,000, plus 6 percent of such sales over \$500,000.

(iii) Pending determination of the adjusted minimum rental under this paragraph, and subject to such adjustment, the minimum rental shall be \$24,000 per annum, as provided in paragraph (1).

(iv) If the change in the minimum rental under this paragraph occurs on other than the first day of the calendar month, the minimum rental for that month shall be equitably prorated between the old minimum rental, i.e., the rental from such first day through the day immediately preceding the change, and the new minimum rental, i.e., the rental for the balance of the month.

(14) Additional rent based on gross sales, with credit for net lease payments--self-implementing provision for gross sales determination when business operation interrupted

(a) *Rent.* The Tenant shall pay to the Landlord, without notice, demand, or set-off, an annual basic rent in equal monthly installments in advance on the first day of each calendar month wherever the Landlord designates in writing.

(b) *Basic rent.* For the purpose of this lease, the annual basic rent means the sum of the following:

(1) The yearly real property taxes, assessments, and governmental charges and levies, assessed or imposed upon the whole of the land and building wherein the demised premises are situate (separately payable, however, in the manner set forth below).

(2) One-tenth of Landlord's cost, not to exceed \$10,000, of making alterations to the demised premises ("cost of construction").

(3) The annual interest charges incurred by the Landlord as set forth in the original commitment relating to the loan of moneys to cover the cost of construction.

(4) The annual premium required to keep the building of which the demised premises are a part insured against loss or damage by fire with extended coverage (Landlord being responsible for obtaining such insurance).

(5) The amount of \$12,000.

(c) *Additional rent.* In addition to the annual basic rent, Tenant shall pay Landlord for each lease year annual "additional rent." Such additional rent shall be determined in the following manner:

(1) By first ascertaining the amount representing 4 percent of the Tenant's gross sales for the lease year in question.

(2) By then determining the annual basic rent for such year, less a deduction for any abnormal increase in fire insurance premiums attributable to Tenant's operations on the demised premises ("adjusted annual basic rent").

(3) By subtracting the adjusted annual basic rent determined in step (2) from the amount in step (1) ("additional rent").

(4) If all or part of Tenant's operations on the demised premises are interrupted for any reason within its control, gross sales for the interrupted lease year shall be calculated by using as a base gross sales for the corresponding period of the prior lease year, adjusted to reflect any annual increment, or, if no corresponding period is available, by using as a base the gross sales of the short period immediately preceding the interruption.

(d) *Gross sales.* Gross sales mean the total dollar value of all sales of merchandise and all revenues of every kind and character derived from, arising out of, or payable on account of the business and all business transactions conducted on

the demised premises by the Tenant or for its account, both for cash and on credit, including all orders for merchandise taken or sold at or from the demised premises, including orders taken over the internet.

(e) *Statements.* Lease year means a period of 12 calendar months, beginning on the first day of this lease term or on any anniversary date thereof. Tenant shall keep a full and accurate set of books adequately showing the amount of gross sales in each lease year and, within 30 days after the close of each quarter-year, shall furnish the Landlord a verified statement certified by a certified public accountant setting forth the Tenant's gross sales from business conducted on the demised premises during the preceding quarter-year. Within 30 days after the close of each lease year, the Tenant shall furnish the Landlord a verified statement certified by a certified public accountant setting forth the Tenant's gross sales from business conducted on the demised premises during the preceding lease year and showing the amount of additional rent required to be paid by the Tenant for such year. Concurrently with the delivery of such yearly statement, the Tenant shall pay any required additional rent. The Landlord and its duly authorized representatives may inspect the Tenant's books, records, and supporting data at all times during the lease year during normal business hours. The Tenant shall keep such books, records, and supporting data at a convenient place during the entire lease term.

(15) Additional rent in lieu of percentage rent if tenant fails to open for business

In the event that the Landlord notifies the Tenant that the Leased Premises are available for occupancy and the Tenant fails to take possession and to open the Leased premises for business fully fixtured, stocked and staffed within one hundred twenty (120) days thereafter, then the Landlord shall have, in addition to any and all remedies herein provided, the right at its option to collect not only the Minimum Rent, but also Additional Rent at the rate of \$_____ per day for each and every day that the Tenant shall fail to commence to do business as herein provided. Such Additional Rent shall be deemed to be in lieu of any Annual Percentage Rent that might have been earned during such period of the Tenant's failure to open.

(16) Disclaimer of partnership status

No term, provision, or condition of this lease shall be construed to create a partnership or joint venture between Landlord and Tenant, or in any manner to make Landlord liable for Tenant's debts, defaults, obligations, or losses.

[Attach Exhibit A]



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Current Legal Forms for Real Estate

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Current Legal Forms for Real Estate
Chapter 23 REAL ESTATE LEASES
Part IV. Forms
B. LEASE CLAUSES

31-23 Current Legal Forms for Real Estate FORM 23.33

AUTHOR: by Thomas G. Belden

FORM 23.33 Rent adjustment

COMMENT

A percentage rental arrangement is only one method of adjusting rent in order to reflect business and economic fluctuations. Another method is to express the economic variable in terms of the consumer price index. Or the rent adjustment can be made to depend on fairly narrow factors, such as the increase in labor costs incurred by the landlord in the operation of his building. In many leases increases in real estate taxes are passed on to the tenant in the form of rent adjustments. In long-term net leases, protection against an inflationary trend may be obtained by an overage rent clause. Generally, the gross amounts of the subrent collected at the commencement of the term of the net lease is the base rent upon which the overage rent is computed. All of these methods are designed to permit periodic rent increases during the term of any particular lease.

A technique which is not sensitive to periodic changes but which can reflect the sum total of all changes during an extended period is the appraisal procedure. The objective in this procedure is to insure the landlord a fair return by fixing the rent at a predetermined percentage of the value of his property as appraised at prescribed intervals. These are generally long-term intervals, partly because appraisal procedures are expensive, but primarily because the parties are usually concerned only with substantial changes in the values.

FORMS

(1) Consumer price index

(a) *Rent.* Tenant shall pay Landlord, at the address specified herein or furnished hereunder, a net annual rental ("net rent"), as follows:

(1) For the 20-year period from [date] through [date], \$100,000 per annum.

(2) For each lease year of any extended term hereunder, \$100,000 per annum, plus any additional amount that is sufficient to give Landlord for each year during such extended term a total net rent equal to the purchasing power of \$100,000 during [date].

(b) *Computation.* Within 30 days after its publication and issuance, Landlord shall deliver to the Tenant a true copy of the Consumer Price Index (the "Index"), for New York, New York, for all items of the Bureau of Labor Statistics of the United States Department of Labor for the month ending _____ [date], (the "base month"), for the month ending _____ [date], and for the corresponding month in each subsequent lease year. If the Index for the month of _____ [date], and for each corresponding month in each subsequent lease year shows a decrease in the purchasing power of \$100,000 as compared, in each such case, to the Index for the month ending _____ [date], the Landlord, as soon as possible after the delivery of each Index subsequent to the Index for the base month, shall furnish the Tenant with the computation of any additional amount, to be paid by the Tenant for the lease year in question. Such additional amount shall be divided and paid in 12 equal monthly installments during each such lease year. Pending the determination of any additional amount to be paid by it, Tenant shall continue to pay net rent of \$100,000 per annum. When the additional amount is determined, Tenant, on the first day of the month immediately after Landlord furnishes Tenant with such computation, shall pay Landlord all elapsed installments from the commencement of the lease year in question up to and including the first day of such month.

(c) *Substitution.* If, at the time required for the determination of the additional rent, the Index is no longer published or issued, or either the Landlord or the Tenant believes that the Index does not accurately reflect, in relationship to the base date, the purchasing power of \$100,000, the parties shall use any other index that is then generally recognized and accepted for similar determinations of purchasing power. If the parties are unable to agree on the selection of an index that would most accurately carry out their intent, or if there is a dispute regarding the computation of the additional rent provided herein, the issue shall be determined by arbitration as provided for in this lease.

(2) Rent adjustment during renewal term--consumer price index--another form

(a) *Renewal rent.* If the Tenant exercises its option to extend the term of this lease, its fixed rent during the extended term shall be \$50,000 per annum plus any increase as determined in accordance with the provisions of subdivision (b) below.

(b) *Rent adjustment.* (1) As promptly as practicable after the end of the initial ten-year term of this lease, the Landlord shall compute any increase in the cost of living for the preceding ten-year period based upon the "Revised Consumers Price Index--Cities (1967 = 100)" (the "Index"), published by the Bureau of Labor Statistics of the United States Department of Labor.

(2) The "base Index number" shall be the Index number indicated for the City of Philadelphia, entitled "all items," for the month of [date]. The "current Index number" shall be the corresponding Index number for the month of [date].

(3) The current Index number shall be divided by the base Index number, and the integer 1 shall be subtracted from such

quotient. Any resulting positive number shall be deemed to be the percentage of increase in the cost of living.

(4) The increase referred to in subdivision (a) above shall be determined by multiplying the percentage of increase by \$50,000.

(5) Landlord shall give Tenant notice of any such increase within a reasonable time after obtaining the necessary data for computing it. Landlord's computation shall be conclusive and binding, but shall not preclude any adjustment that may be required by a published amendment of the index figures upon which such computation was based unless Tenant notifies Landlord of any claimed error therein within 60 days after such notice is given. Any dispute between the parties as to any such computation shall be resolved by arbitration.

(c) *Rent payment.* The fixed rent, as determined above (i.e., \$50,000 plus the "increase" calculated in accordance with paragraphs (1) through (4) of subdivision (b)), shall be due and payable to Landlord in equal monthly installments, commencing with the first month of the extended term of this lease. Any retroactive payments then due shall be payable within five days after the above provided notice is given. If there is any subsequent redetermination of such amount, the parties shall promptly make the indicated adjustment.

(d) *Substituted index.* If publication of the Consumers Price Index is discontinued, the parties shall accept comparable statistics on the cost of living for the City of Philadelphia, as such statistics are computed and published by a federal agency or by a recognized financial periodical selected by the parties or by arbitration. If comparable statistics are used in place of the Consumers Price Index, or if the Index figure is published at non-monthly intervals, the method of computation shall include all revisions required to carry out the intent of this Article. If such adjustment is disputed by the parties, the matter shall be resolved by arbitration.

(3) Consumer price index--reduction in mortgage payments

(a) *Basic rent.* The Tenant shall pay the Landlord a rental (the "basic rent"), of \$48,000 per annum, in equal payments of \$4,000 on the first day of each month in advance.

(b) *Overage rent.* Commencing in _____[date], in each year in which the National Consumer Price Index, for the month of July, published by the United States Bureau of Labor Statistics, shows a rise of more than 10% in the cost of living index for New York City over the level of such cost of living index in _____[date], the Tenant shall pay the Landlord, as overage rent, such percentage of the basic rent as is proportional to the rise in such index from its level for _____[date], to its level for July of such later year. All overage rent shall be due and payable within 20 days after the Landlord notifies the Tenant of the level of the index and of the amount of overage rent payable. The receipt by the Landlord of overage rent shall not be deemed to create any partnership or joint venture between the parties.

(c) *Refinancing.* If Landlord refinances any mortgage on the leased property to which this lease is subordinate, or places a new mortgage thereon, and such action results in a reduction of the total annual requirements for mortgage interest and amortization, the basic rent shall be reduced by 40 percent of the difference between the total annual requirements for interest and amortization under the prior mortgages and the requirements under the refinanced or new mortgage. The reduced basic rent shall commence with the month following the month in which the refinancing is effected or the new mortgage is placed, and continue so long as this lease remains in force.

(d) *Mortgage liquidation.* Upon liquidation of the mortgages to which this lease may be subordinate, the annual basic rent shall be immediately reduced by \$8,000, which shall include the aggregate annual amount of all prior reductions in basic rent under paragraph (c). However, if such mortgages have been liquidated by Landlord's lump-sum payment, the annual basic rent shall not be so reduced at the time of liquidation. In that event, the annual basic rent in effect before

the liquidation shall continue until the liquidated mortgages would have been fully paid by the regular rule of amortization, at which time such rent shall be reduced by \$8,000.

(e) *Minimum rent.* Notwithstanding anything herein to the contrary, the annual basic rent shall not be less than \$40,000.

(4) Labor cost fluctuation

(a) *Rent adjustment.* If the Adjusted Labor Rate is greater or less than the Base Labor Rate, the annual fixed rent shall be increased or decreased, as the case may be, as of the date of such change in the Labor Rate. The amount of such adjustment shall be one and one-half cents times the number of square feet in the leased property for each 1%, or fraction thereof, by which the Adjusted Labor Rate exceeds, or is less than, the Base Labor Rate. The Landlord, promptly after the effective date of any such change, shall furnish the Tenant with a statement thereof, and all subsequent monthly installments of fixed rent shall reflect one-twelfth of the annual amount of such adjustment. If such statement is furnished to the Tenant after the effective date of the change, Tenant shall pay Landlord, or vice versa, as the case may be, an amount equal to the portion of such adjustment allocable to that part of the Lease Year that has elapsed prior to the first day of the calendar month immediately following the calendar month in which such statement was furnished.

(b) *Labor rate.* The term "Labor Rate" means one-half of the combined total of the regular hourly wage rate paid to porters and to cleaners in Class A Office Buildings (i.e., an office building that has a square-foot rentable area of over 280,000 square feet).

(c) *Base labor rate.* The term "Base Labor Rate" means the Labor Rate in effect after the most recent change in the Labor Rate for which an adjustment in rent is to be made.

(d) *Adjusted labor rate.* The term "Adjusted Labor Rate" means the Labor Rate in effect after the most recent change in the Labor Rate for which an adjustment in rent is to be made.

(5) Labor cost increase

If the cost of labor employed in the operation of the building of which the demised premises form a part increases during any year of this lease above the labor cost for the first lease year, Tenant's rental for each later year shall be increased by .005 percent of the labor cost increase. Tenant shall pay the amount of such increase as additional rent for that year, within five days after it receives a written statement thereof from Landlord.

(6) Labor cost increase--another form

(a) *Rent adjustment.* Commencing with the lease year beginning _____ [date], and for each later lease year in which Landlord's operating expenses exceed the base rate (as defined below), Tenant shall pay as additional rent, within 90 days after the end of such year, 2.5 percent of the excess.

(b) *Base rate.* The term "base rate" means the operating expenses incurred by the Landlord during the lease year ending _____ [date] (the "base period").

(c) *Operating expenses.* Operating expenses shall include the following:

(1) Wages, salaries, or other compensation for the following classes of employees or agents of the Landlord performing

services rendered solely in connection with the operation of the Building (but not including leasing commissions paid to its agents):

(A) Management fees of the Building's managing agent. If there is no managing agent, the owner-manager's management fees shall be deemed to equal the prevailing fees for managing a building similar to the one in which the demised premises are located in the Borough of Manhattan, City of New York, in the year [year].

(B) Elevator starters and assistant starters.

(C) Window cleaners, porters, janitors, cleaners, dusters, sidewalk shovelers, and miscellaneous handymen.

(D) Watchmen, caretakers, and persons engaged in patrolling and protecting the Building.

(E) Carpenters, engineers, mechanics, electricians, plumbers, and persons engaged in the operation of the Building's heating, air-conditioning, ventilating, plumbing, electrical, and elevator systems.

(2) The uniforms of employees specified in (B), (C), (D), and (E) of subdivision (1) and the cleaning and pressing thereof.

(3) Repairs to and physical maintenance of the Building and the cost of supplies and equipment used in connection therewith.

(4) Premiums and other charges incurred by the Landlord with respect to the following insurance on the Building:

(A) Fire and extended coverage insurance, including windstorm, hail, explosion, riot, rioting attending a strike, civil commotion, aircraft, vehicle, and smoke insurance.

(B) Public liability insurance.

(C) Elevator insurance.

(D) Workmen's compensation insurance for the employees specified in (A), (B), (C), (D), and (E) of subdivision (1), except employees of the managing agent if other than the owner-manager.

(E) Boiler, sprinkler leakage, water damage, and pilferage insurance on the Building equipment and materials.

(F) Health, accident, and group life insurance on employees enumerated in (A), (B), (C), (D), and (E) of subdivision (1), except employees of the managing agent, if carried during the base period.

(G) Insurance, except rent insurance and war damage insurance and rent or use and occupancy or rental value insurance, not carried during the base period but which the holder of any mortgage affecting the Building or the Building and the Land might in the future require to be carried under the terms of such mortgage, but only to the extent of the excess of its cost over the cost that would have been incurred for it if it had been carried during the base period.

(5) Costs incurred for fuel or other energy for heating the Building and operating the air-conditioning system, and for electricity, steam, or other power required in connection with the operation of the Building.

(6) Costs incurred in connection with inspection and servicing of elevator, electrical distribution, and air-conditioning, and cost of supplies and equipment used in connection therewith.

(7) Water charges and sewer rents.

(8) Payroll taxes, federal and state unemployment taxes, and social security taxes payable in connection with the employment of any of the employees specified in (A), (B), (C), (D), and (E) of subdivision (1), except employees of the managing agent if other than the owner-manager.

(9) Sales and excise taxes on goods and services provided by the Landlord to properly manage, operate, or maintain the Building and equipment.

(d) *Occupancy adjustment.* If, in the base period, the Building is not fully occupied during the entire year, the base rate shall be corrected to reflect operating expenses for a fully occupied Building, for the entire year, by projecting the actual operating expenses per square foot of occupied rentable area in the Building to cover periods when there is less than full occupancy.

(e) *Statements.* Within 60 days after the expiration of the period, the Landlord shall furnish the Tenant with a statement, certified by a certified public accountant, setting forth in reasonable detail the base rate for such period. Within 60 days after the expiration of each lease year thereafter, the Landlord will furnish the Tenant with a comparative statement, certified by a certified public accountant, of the operating expenses for such year, together with the Landlord's statement for any additional rent due under this Article. The Landlord shall make available to the Tenant for its examination and inspection all books and records that relate to or have any bearing upon the base rate for the base year and on operating expenses for any subsequent year, and make extracts of such books and records at the Tenant's expense. The payment of any additional rent under this Article without such examination and inspection shall not be deemed a waiver of any error revealed by a subsequent examination and inspection for the year for which payment has been made. If, in respect to any subsequent lease year for which additional rent may be currently payable, the books and records are not made promptly available upon demand by the Tenant, any additional rent for that year shall not be deemed due and payable earlier than 30 days after such demand is honored.

(7) Building constructed by landlord--cost exceeding specified amount

If the cost of construction exceeds \$3,000,000, the annual minimum rental provided for in this lease shall be increased by 5% of the cost in excess of \$3,000,000.

(8) Rent adjustment--area of leased property more or less than specified

Annual fixed rent set forth in this Lease is based on a rate of \$8.75 per square foot, and the Demised Premises contains 230,954 square feet of rentable area. If the Demised Premises is re-measured by either Landlord or Tenant following the execution of this Lease, but in no event later than 12 months following the Rent Commencement Date, using the most current Building Owners and Managers ("BOMA") standard and such re-measurement results in a rentable area of other than 230,954 square feet, the fixed rent payable under this Lease shall be adjusted to reflect the differential and the parties shall promptly enter into an appropriate amendment of lease to set forth the rental adjustment.

(9) Increases in taxes and operating expenses--annual tenant credit

I. Rent adjustment for taxes.

(a) *Definitions.* For purposes of this section I:

1. "Taxes" mean the real estate taxes and assessments and special assessments imposed upon the Building and/or the Land by any governmental bodies or authorities. If, at any time during the term of this Lease, the methods of taxation prevailing at the term commencement are altered so that in lieu of, or as an addition to or substitute for, all or any part of the taxes, assessments, levies, impositions or charges now levied, assessed or imposed on real estate and the improvements thereof, there are levied, assessed and imposed (i) a tax, assessment, levy or otherwise on the rents received therefrom, (ii) a license fee measured by the rent payable by Tenant to Landlord, or (iii) any other such additional or substitute tax, assessment, levy, imposition or charge, all such taxes, assessments, levies, impositions or charges or the part thereof so measured or based shall be deemed to be included within the term "Taxes."

2. "Base Tax" means Taxes for the fiscal period of [date] to [date].

3. "Tax Year" means the fiscal year for which Taxes are levied by the governmental authority.

4. "Tenant's Proportionate Share" shall be 43.5% subject, however, to adjustment under any applicable provisions of this lease.

(b) *Additional rent, taxes.*

1. If the Taxes for any Tax Year exceed the Base Tax, Tenant shall pay, as additional rent for such year, an amount equal to its Proportionate Share of the excess amount (the "Tax Payment"). The Tax Payment shall be prorated, if necessary, to correspond with that portion of a Tax Year occurring within this Lease term. Tenant shall make the Tax Payment at the same time as Landlord makes its payments to the taxing authority or mortgagee, as the case may be, and within ten days after Tenant receives the Landlord's demand therefor. Landlord's demand shall be accompanied by a copy of the tax bill and its computations of the Tax Payment.

2. If the Tax Base is reduced as a result of an appropriate proceeding, Landlord may adjust the amount of Tenant's Tax Payment for any Tax Year in which it is or was obligated to make such payment. Tenant shall pay such adjustment on the rental installment day immediately following receipt of a rent statement from Landlord setting forth the adjustment amount.

(c) *Tax refunds.* If Landlord receives a refund for any Tax Year in which Tenant has made a Tax Payment, it shall repay Tenant's Proportionate Share of such refund after deducting therefrom the expenses, to be allocated to all of the Tax Years involved, of obtaining such refund. If Landlord effects a reduction in the assessed valuation, thus reducing the Tax Payment that would otherwise be payable by Tenant, Tenant shall pay, upon Landlord's demand, Tenant's Proportionate Share of the expenses of obtaining such reduction of assessed value.

(d) *Partial tax years.* Landlord's statement shall adjust the additional rent due hereunder for any period at the expiration hereof that constitutes a partial Tax Year. Tenant's obligation for such additional rent for the partial tax year shall survive the expiration of this Lease term.

II. *Rent adjustment for operating expenses.*

(a) *Additional rent for operating expenses.* In any calendar year during the term of this Lease ("Comparison Year") in which the expenses for maintaining and operating the Building of which the Demised Premises are a part (as such expenses are defined below) are increased over the amount thereof for the calendar year _____ [date] ("Base Year"), Tenant shall pay, as additional rent, an amount equal to Tenant's proportionate Share (as defined above) of such increase in the expenses for maintaining and operating the Building. Such amount shall be payable in equal monthly installments during this Lease term.

(b) *Definition.* For the Base Year and for each Comparison Year, the term "expenses for maintaining and operating the Building" shall mean (i) those expenses incurred during such year for the operation and maintenance of the Building in accordance with accepted principles of sound management and accounting practice as applied to the operation and maintenance of first class buildings of the type involved, including, without limitation, (1) sewer rents or charges, electricity (for the common areas of the Building only) and premiums for insurance carried by Landlord plus (2) those additional expenses which Landlord would have so incurred during such year had the Building been 100% occupied. Such expenses shall not include (i) expenses for any capital improvements made to the Land or Building, including without limitation replacement costs of building fixtures, equipment, and facilities; (ii) expenses for painting, redecorating, or other work which Landlord performs for Tenant or for any other tenants in the Building (such expenses for maintaining and operating the Building shall, however, include the costs of other work in public areas which is standard for the Building and the proportionate cost of painting and redecorating in such public areas which is done at intervals); (iii) expenses for repairs or other work caused by fire, windstorm, or other casualty; (iv) expenses incurred in leasing or procuring new tenants (including lease commissions, advertising expenses, and expenses of renovating space for new tenants); (v) legal expenses in enforcing the terms of any lease; (vi) interest or amortization payments on any mortgage or mortgages and rental under any ground or underlying lease or leases; and (vii) all cleaning costs except with respect to the common areas on the ground floor.

(c) *Partial year adjustment.* In addition to the rental adjustments provided for hereunder, if the term of this Lease shall terminate on a date other than December 31st, then for the fractional portion of such calendar year at the end of this Lease, the rent for such period shall be adjusted at the same rate as the rent for the Comparison Year immediately preceding such calendar year. The adjustment for such period shall be made when Landlord shall render its statement for the last monthly installment of the fixed rent payable under this Lease, or if that is not reasonably feasible, as soon thereafter as is reasonably feasible. This obligation for the fractional portion of the Comparison Year in which this Lease terminates shall survive the termination of this lease.

(d) *Statement.* Landlord shall furnish Tenant with statements of Tenant's pro rata share of expenses for maintaining and operating the Building, which Tenant is required to pay as additional rent as provided above, as soon as reasonably feasible during the calendar year following the first Comparison Year and each Comparison Year thereafter, except as otherwise provided in subparagraph (c) for any fractional period at the end of this Lease. After Landlord renders such statement, however, it may send a corrected statement to Tenant. In that event, all time limits specified below shall date from when such corrected statement is rendered.

(e) *Payment of adjustment.* Tenant's payment of any increase in rent under the provisions of this Section II shall be made as follows: On the first day for the payment of rent under this Lease which is at least ten days after the delivery to Tenant of a statement for the Comparison Year: (1) Tenant shall pay to Landlord a sum equal to one-twelfth of Tenant's Proportionate Share of such increase multiplied by the number of months then elapsed commencing with January 1st of the preceding Comparison Year (except as otherwise modified by subparagraph (c) hereof, for fractional periods); and (2) thereafter, until the next Comparison Year statement is rendered, the monthly installments of rent payable under this Lease shall be increased by an amount equal to one-twelfth of Tenant's Proportionate Share of such increase. Any adjustment required under subparagraph (f) shall be made within 20 days after the decision requiring such adjustment has been rendered by the certified public accountants and a copy thereof delivered to each party.

(f) *Dispute settlement.* Any statement rendered by Landlord under this Article shall be final and binding upon the parties. However, Tenant, by giving written notice thereof to Landlord within 120 days after the delivery of such statement, may dispute any time involving the expenses for maintaining and operating the Building, or the additional expenses which would have been incurred had the Building been 100% occupied, upon which such statement is based. If Tenant gives such notice and the dispute is not settled within 60 days thereafter, Landlord's statement shall become final and binding on Tenant unless, within such 60 day-period, either party refers the disputed item or items to an independent firm of certified public accountants designated by Landlord and, if requested in writing by Tenant, to

another independent firm of certified public accountants selected by Tenant, for decision by arbitration to be held in New York City. If the two firms are unable to reach an agreement, they shall select a third firm of independent certified public accountants as an additional arbitrator. If they are unable to agree on a third arbitrator, the selection shall be made under the provisions of the governing New York arbitration law.

The decision of a majority of such firms shall be conclusive and binding upon Landlord and Tenant. The expenses involved in such determination shall be borne by the party against whom the decision is rendered by the accountants.

III. Tenant credit against rent adjustments.

Notwithstanding any contrary provision in Sections I and II of this Article, in each 12-month period throughout the original 15-year term of this lease, the first \$70,000 of additional rent payable under Sections I and II shall be forgiven by Landlord and in fact not be payable by Tenant. If, in any such 12-month period the Tenant is obligated to pay less than \$70,000 as additional rental under Sections I and II, it may deduct the difference between \$70,000 and the additional rent so payable from the next installment(s) of fixed rent payable under the lease. Such \$70,000 annual credit will be proportionately increased, if, as and when the Tenant elects to lease additional space in the Building, such increase to be effective on the date the Tenant takes possession of such additional space.

(10) Rent on renewal--appraisal and arbitration

(a) *Renewal rent.* If the Tenant exercises the option for a renewal term under the provisions of this lease, and the parties have not agreed in writing at least six months before the expiration of the initial term upon the amount of the fixed annual rent to be paid during the renewal term, the fixed annual rent shall be 6% of the value of the land on the date three months prior to the conclusion of the initial term. Such value shall be determined by arbitration as provided in subparagraph (b). The fixed annual rent shall not be less than \$50,000 during the renewal term.

(b) *Arbitration of value.* If the value of the land must be ascertained under subparagraph (a), each party shall appoint an arbitrator within 30 days after written notice of the dispute or after notice of the necessity for arbitration, and shall advise the other party of the choice. If either party fails to appoint an arbitrator within ten days after notification of the appointment by the other party, the person appointed as arbitrator may appoint an arbitrator to represent the party in default. The two arbitrators appointed in either manner shall then appraise the land. If they are unable to do so, they may select a third arbitrator, and an award by two of the three arbitrators shall be binding upon the parties. If the two arbitrators are unable to agree on a third arbitrator, he shall be appointed by the Presiding Justice of the Appellate Division of the Second Department. Each party shall pay one-half of the arbitrators' expenses and reasonable fees, and both shall be bound by the arbitrators' award. Each arbitrator shall be a real estate broker and have at least 15 years' experience in appraising real estate or acting as brokers of real estate in New York State.

(11) Adjustment of excessive rent disallowed by Internal Revenue Service--related parties

If the Internal Revenue Service disallows any rental paid hereunder by Tenant to Landlord as excessive and not a proper deduction for federal income tax purposes, by reason of the relationship of the parties, a reallocation of tax items, or otherwise, the Landlord shall refund to the Tenant the amount of rental disallowed upon proof that the Tenant has paid a tax deficiency in such amount.



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Current Legal Forms for Real Estate
Chapter 23 REAL ESTATE LEASES
Part IV. Forms
B. LEASE CLAUSES

31-23 Current Legal Forms for Real Estate FORM 23.34

AUTHOR: by Thomas G. Belden

FORM 23.34 Taxes paid by tenant

COMMENT

Many leases shift the burden of taxes to the tenant, even though they do not qualify as "net" leases. The primary reason for this is the refusal of a landlord to assume the risk of periodic tax increases while the rent to the tenant remains constant. Instead of passing on the entire obligation to the tenant, the agreement may require the tenant to pay only the excess over taxes levied during a specific base period. Where there are several tenants occupying one taxable unit, the burden is allocated among them usually on the basis of relative rent payments or floor space occupancy.

Tenant tax payments:

The usual tax clause encompasses the ad valorem property tax, and frequently, it also covers water and sewer charges as well as special assessments. Specifically excluded are income or franchise taxes of the landlord. Since the burden is shifted to the tenant many of these clauses permit the tenant to contest the tax assessment and to delay payment of the tax pending the outcome of the protest. Some form of additional security is often provided to protect the landlord while payment is being withheld. In some cases, even in the absence of a contest, the tenant is required to make advance periodic deposits to create a fund for the tax payment when it becomes due.

Tax escalation clause:

Generally, a tax escalation clause provides that a tenant is to pay all or a portion of the tax increases over the "base year." Usually, the base year is the fiscal tax year in which the lease

commences. If the property to be leased is under construction, the lease could provide that the base year is the tax year following the year of commencement of the lease. This avoids the problem of taxes assessed in the base year without taking into consideration the full value of the building. Usually, the building will not be assessed for taxes until construction is completed. The fact that different tax authorities, i.e., municipality, county, school district, etc., have different tax years should also be taken into consideration in defining the base tax year. In addition to the tenant's right to contest the assessed valuation or amount of tax, the provision should allow for downward adjustment or refund to the tenant if the tax contest is successful, after payment of expenses.

Tax aspects:

Taxes of the landlord paid by the tenant are taxable as rent to the landlord and are deductible by the tenant if the rental property is used by the tenant for business purposes or for the production of income. However, the landlord has an offsetting deduction for such amounts. By specific statutory provision, income taxes of the lessor paid by the lessee are income to the lessor. This includes any pyramided taxes which may result from a lessee's obligation to bear the full burden of any income taxes imposed upon the additional income realized from the payment of such taxes. Special assessments for improvements are capital expenditures which are amortizable by the tenant over the term of the lease. For a more detailed discussion concerning the tax consequences of the lessee's payments of the lessor's expenses, see the Tax Background § 23.03, at the beginning of this chapter.

FORMS

(1) Payment of taxes and assessments--proration in first and last years

The Tenant, in addition to the fixed rent, shall pay all taxes and assessments upon the leased property, and upon the buildings and improvements thereon, which are assessed during the lease term. All taxes assessed prior to but payable in whole or in installments after the effective date of the lease term, and all taxes assessed during the term but payable in whole or in installments after the lease term, shall be adjusted and prorated, so that the Landlord shall pay its prorated share for the periods preceding and following the lease term and the Tenant shall pay its prorated share for the lease term.

(2) Payment of all taxes except as specifically excluded--proof of payment by tenant

(a) *Additional rent.* The Tenant shall pay as additional rent, before any fine, penalty, interest, or cost is added for its nonpayment, all real estate taxes, assessments, water rates and water charges, and other governmental levies and charges, whether general or special, ordinary or extraordinary, or foreseen or unforeseen, which are assessed or imposed upon all or part of the leased property, or become payable during this lease term.

(b) *Excluded taxes.* Nothing in this lease shall require the Tenant to pay any franchise, corporate, estate, inheritance, succession, capital levy, or transfer tax of the Landlord, any income, profits, or revenue tax, or any other tax, assessment, charge, or levy upon the rent payable by Tenant hereunder. However, if at any time during the term hereof this state or one of its political subdivisions assesses a tax on rents against Landlord or the basic rent, as a whole or

partial substitution for taxes assessed by it on land or buildings, such tax shall be included within the amount which the Tenant is required to pay under this article.

(c) *Tax receipts.* The Tenant shall furnish to the Landlord for its inspection, within 30 days after the date any amount is payable by the Tenant, as provided in this article, official receipts of the appropriate taxing authority or other proof satisfactory to the Landlord evidencing payment.

(3) Payment of all increases in taxes above present specified amount--payment of special assessments--effect of increase in assessed valuation

The Tenant shall pay all increases in the taxes assessed and levied against the leased property above the present tax of \$40,000 per annum during the term of this lease, whether such increase results from a higher tax rate or an increase in the assessed valuation of the leased property, or both. The Tenant shall also pay any special assessment imposed upon the property for any purpose during such term.

(4) Payment of portion of increase in taxes--specific percentage

The Tenant shall pay as additional rent one-half of one percent of any increase in real estate taxes exceeding those payable for the fiscal year _____[date] which may be imposed upon the property of which the leased premises form a part, in each and every year during the period of this lease, commencing from the lease year _____[date]. Such amount shall be paid within five days after Landlord's demand and shall be collectible as rent. Tax bills shall be sufficient evidence of the amount of such taxes and shall be used for calculating the amounts to be paid by the Tenant.

(5) Payment of portion of increase in taxes--based upon percentage of total rental value

The Tenant shall pay the Landlord, as additional rent, the proportionate part of any increase in taxes assessed on the land and building of which the leased property is a part over the amount assessed for the first year after assessment is made of the land and the completed building. The portion of such increase payable by the Tenant shall be based on the ratio of the Tenant's annual rent to the total annual rent payable by all tenants, including the rental value of any vacant rentable space in the building, for the year prior to the year for which the assessment has been increased. The Tenant may during reasonable business hours examine the Landlord's books to verify the total annual rent payable by all tenants and the rental value of vacant rentable space in the building.

(6) Payment of percentage of increase in real estate taxes above specific amount--collectible as rent--tax bill as evidence

The Tenant shall pay as rent 10% of any increase in the amount of real estate taxes over \$50,000 which may be imposed upon the property of which the leased property is a part, in each year during the period of this lease. Such amount shall be paid within ten days after the Landlord's demand and shall be collectible as rent. A tax bill shall be sufficient evidence of the amount of taxes and for calculating the amount to be paid by the Tenant.

(7) Payment of portion of increase in taxes--based upon proportionate share of floor space

The Tenant shall pay annually that proportion of any increase in real estate taxes assessed against the land and building

of which the leased property is a part over the amount of such taxes assessed against the land and building for the calendar year ____[year] which the total number of square feet of floor space in the leased property bears to the total number of square feet of floor space in the entire building. For the final year of the lease term the Tenant shall pay only a pro rata share of such proportion of any increase in taxes. The Landlord shall furnish the Tenant with a properly authenticated statement of the real estate taxes assessed for the calendar year ____[year] and with a receipted bill for the real estate taxes for any subsequent year in which an increased amount has been assessed.

(8) Adjustment for increase or decrease in taxes

The Landlord shall pay all real estate taxes on the leased property. However, if there is any change in such taxes from those assessed in the year ____[year], the Tenant shall pay as additional rent all increases over the ____[year] assessment and be given credit against the basic rent for any decreases from the ____[year] assessment.

(9) Tenant's right to contest taxes and other charges--legal proceedings

The Tenant may contest and review by legal proceedings, instituted and conducted by it at its own expense, real estate taxes, assessments, water rates, sewer rents, or other charges imposed upon or against the demised premises or buildings thereon. If Tenant exercises such right of review, it shall continue to pay, as they become due and payable, all protested taxes, assessments, and other charges. The term "legal proceedings," as used herein, includes appropriate appeals of all judgments, decrees, orders, and certiorari proceedings and appeals of orders therein, including appeals to the court of last resort.

(10) Taxes paid as additional rent--allocation based on tenant's floor area--tenant's right to contest subject to prior consultation and consent of landlord

(a) *Taxes and assessments.* Tenant shall pay or cause to be paid as additional rent, in the same manner as the annual rent, before any fine, penalty, interest, or cost is added thereto for nonpayment, all taxes, assessments (including, but not limited to, assessments for public improvement), water and sewer rents, rates and charges for public utilities, excises, levies and other governmental charges, whether general or special, ordinary or extraordinary, foreseen or unforeseen, which at any time during the term hereof are assessed, levied, confirmed, or imposed upon, become due or payable out of or in respect of, or become a lien on, the demised premises or any part or appurtenance thereof, the rent or income received by Tenant from subtenants, or the right or privilege of leasing real estate or collecting rents therefrom.

(b) *Payment by tenant; computation.* Tenant shall make monthly payments to Landlord on account of the annual real estate taxes and assessments assessed against the demised premises for the then effective tax year, and Landlord shall pay such taxes and assessments. Tenant's share of real estate taxes shall be computed by multiplying the total tax assessment on the tax lots whereon the demised premises are located times a factor, the numerator of which, shall be the gross floor area occupied by Tenant when this computation is made, and the denominator of which is the gross floor area of the entire building or buildings on such lots. Landlord shall provide Tenant with copies of the tax assessment statements together with a statement showing the allocation of such taxes or assessments to the demised premises.

(c) *Contests.* Tenant may contest the amount or validity, in whole or in part, of any assessment or seek a reduction in the assessed valuation of the demised premises by appropriate proceedings diligently conducted in good faith, but only after payment of such amount and/or item in question unless such payment would operate as a bar to such contest or interfere materially with its prosecution.

Upon the final determination of any such proceeding, Tenant shall immediately pay all amounts, including interest, fees,

penalties, and other liabilities, awarded therein. Landlord shall not suffer or sustain any costs or expenses (including, but not limited to, attorneys' fees) or any liabilities in connection with such proceeding.

Tenant shall first consult with Landlord and obtain its consent before contesting any assessment or charge. If Tenant subsequently appeals the assessment, it shall regularly consult with Landlord during the appeal proceedings so that Landlord may protect its interest.

(11) Tax escalation in proportion to ground level floor area--additional shopping center buildings

(a) *Payment of tax increases.* If the real estate or ad valorem taxes payable on the land and buildings comprising the shopping center are increased for any tax year over the amount of such taxes payable for the tax year ____ [year] (such tax year is the "base year" and the taxes payable in that year are the "basic taxes"), Tenant shall pay Landlord as an additional charge, within 10 days before such taxes or any installment thereof are payable to the municipality or taxing authority, 6.71 percent (determined by dividing Tenant's ground level floor area by the floor area of all ground level rented and rentable space in the shopping center) of the tax increase. Such percentage shall be determined on the 30th day before such taxes or installments are payable to the municipality or taxing authority.

(b) *Added land and buildings.* If any land or buildings are added to the shopping center during or after the base year, the following taxes shall be added to the basic taxes: for the additional land, the real estate or ad valorem taxes payable with respect thereto for the tax year when such taxes are added; for the additional buildings, the real estate or ad valorem taxes payable with respect thereto for the tax year when they are first assessed as completed buildings. If such additional land or buildings are not separately assessed or their assessed valuations are not obtainable from the tax assessor, the taxes to be added to the basic taxes shall be computed on valuations as appraised by a reputable and competent appraiser designated by the Landlord, and multiplied by the tax rates for the applicable tax year. Tenant shall not be responsible for its proportion of taxes on such additional land unless that land is contiguous to and improved as part of the shopping center.

(c) *Definition of floor area.* The term "floor area," whenever used in this lease, means the number of square feet of floor space within the exterior faces of the exterior walls, without deduction for any space occupied by or used for columns, stairs, or other interior construction or equipment. The center of the wall shall be used when party walls and walls between spaces are occupied by two or more separate tenants.

(d) *Alternate taxes.* Tenant shall not be chargeable with, nor obligated to pay, any income tax, inheritance tax, gift tax, franchise tax, corporate tax, gross receipts tax, or tax on Landlord's business. Tenant shall be liable proportionately for the payment of only real estate taxes assessed against the real estate (including the buildings and improvements thereto). However, if at any time during the term hereof the present method of taxation or assessment is changed so that the real estate taxes previously levied, assessed, or imposed on real estate and the buildings and improvements thereon are, in lieu thereof, imposed, as a capital levy or otherwise upon the rents reserved herein or as a tax, corporation franchise tax, assessment, levy, or charge or any part thereof, measured by, or based upon, the demised premises or on the rents derived therefrom and imposed upon Landlord, Tenant shall pay all such taxes so measured or based to the extent that any such change in the method of taxation or assessment relieves Tenant from paying the real estate taxes as they were previously known. If there is any change in the method of taxation as set forth herein, the parties shall continue to bear their respective pre-change monetary obligations.

(12) Proportionate share of taxes paid by tenant--tenant payments based on leased area until tax assessment is complete

(a) *Real estate taxes.* Lessee shall pay its proportionate share of the real estate taxes during this Lease term, and for any

prior period during which it transacted business in the Demised Premises. For the purposes of this Article, the term "real estate taxes" includes all real estate taxes, assessments, water and sewer rents (except water meter charges and sewer rent based thereon) and all other kinds of governmental impositions and charges, whether ordinary or extraordinary, general or special, foreseen or unforeseen, and every installment thereof (including any interest on installment payments) which are, during the term hereof, levied, assessed, or imposed, become due and payable, or liens upon, or arise in connection with, the use, occupancy, or possession of, or become due and payable out of or for, the Shopping Center or any part thereof, and all costs incurred by Lessor in contesting or negotiating the same with governmental authority. Lessee's proportionate share shall be computed by multiplying the total amount of the real estate taxes each year by a fraction, the numerator of which is the Floor Area of the Demised Premises and the denominator of which is the total rentable building space in the Shopping Center as of the beginning of the calendar year in which such taxes are paid. Lessee hereby waives all statutory or other rights

Nothing contained herein shall be construed to include as a tax which shall be the basis of real estate taxes, any inheritance, estate, succession, transfer, gift, franchise, corporation, income or profit tax or capital levy that is or may be imposed upon Lessor. However, if at any later time the methods of taxation are altered so that in lieu of or as a substitute for the whole or any part of the taxes now levied, assessed, or imposed on real estate as such, there are levied, assessed, or imposed (i) a tax on the rents received from such real estate, (ii) a license fee measured by the rents receivable by Lessor from the Shopping Center or any portion thereof, (iii) a tax or license fee imposed upon Lessor which is otherwise measured by or based entirely or partly upon the Shopping Center or any portion thereof, or (iv) an income or franchise tax, the same shall be included in the computation of real estate taxes hereunder, computed as if the amount of such tax or fee were that due if the Shopping Center were the only property of Lessor subject thereto.

(b) *Amount of Lessee payment.* On the first day of each calendar month, Lessee shall pay Lessor, as its estimated payment of real estate taxes, four cents per month for each square foot of Floor area contained in the Demised Premises, until the Shopping Center is assessed as substantially complete. For each subsequent year, Lessee shall pay Lessor, on the first day of each calendar month, one-twelfth (1/12) of Lessee's tax liability for the preceding calendar year. Lessor shall notify Lessee of the actual amount due. If Lessee's payment exceeds the actual amount due, the difference shall be credited on the next payment due under this section. If Lessee's payment is less than the actual amount due, it shall pay the difference within 10 days after Lessor notifies it of the deficiency. If the term of this Lease does not begin or end on the first or last day of a calendar year, these charges shall be billed and adjusted on the basis of such fraction of a calendar year. If the taxing authorities include in such real estate taxes, Lessee's machinery, equipment, fixtures, inventory, or other personal property or assets, Lessee shall also pay the entire real estate taxes for such items.

(13) Percentage excess taxes paid by tenant--credit against percentage rent--tax reduction credit--base year adjustment

(a) *Tax increases.* For each lease year during this lease term in which the total annual real estate taxes imposed or assessed upon the land and building of which the demised premises form a part exceed, by reason of increased assessed valuation or increased rate of taxes, the real estate taxes imposed or assessed for the tax year ____[year], Tenant shall pay Landlord, as additional rent, within 90 days after the end of such lease year, 7.82 percent of the excess. Such percentage of the excess real estate taxes for less than a year shall be prorated and apportioned. The additional rental paid under this section shall be credited against the "percentage rental" in the lease year in which paid.

(b) *Credit for tax reduction; base year adjustment.* If any refund is obtained because the assessed valuation of the land and building is reduced by the Assessors, the Tax Commission, or the courts, appropriate credit shall be given against subsequent rent payments falling due. The original computations, as well as any payments of additional rent under this Article, shall be based upon the original assessed valuations. Adjustments shall be made at a later date when any tax refund is paid to Landlord by the taxing authorities. However, if any proceeding for review of the tax assessment for the tax year ____[year] is pending, the Tax Commission's final determination of the assessments shall be used in all

computations until a different assessment is determined by the court or otherwise. If a different assessment is so determined, Landlord shall promptly notify Tenant of that fact and Tenant shall, within 90 days after notification, pay any additional rent required by reason of such different assessment. In determining the assessment for the base year or any subsequent year, any settlement or stipulation made by the Landlord and the tax authorities shall be conclusive and binding upon the Tenant. A proportionate share of expenditures for legal fees and other similar or dissimilar expenses directly necessary to obtain the tax refunds, may be charged against the tax refund before the adjustments are made for the tax year.

(14) Shopping center lease--adjustment for increase in taxes--separate formulas for assessment against leased space, building or entire center--allocation of common area taxes

(a) *Tax increases.* If at any time during the term hereof, or its renewal, extension, or modification, the Real Estate Taxes (as defined in paragraph (b) below) are increased above Landlord's Basic Tax Liability (as defined in paragraph (c) below), Tenant shall pay such increase or its share thereof, as the case may be, as additional rental. Payment shall be made on the rent installment day immediately following receipt of Landlord's Statement.

(b) *Taxes defined.* The term "Real Estate Taxes" means special or other taxes and assessments, assessed upon or with respect to the ownership of, or all other taxable interests in, the following:

(1) all buildings, structures, and other improvements situated in the tax lot of which the leased property is a part;

(2) all land lying under any of the buildings, structures, and other improvements described in subparagraph (1), above; and

(3) all land and improvements constituting the Common Area, including, without limitation, all mall and mall areas and all improvements thereto, imposed by federal, state, and local governments or other competent governmental authorities. However, Real Estate Taxes shall not include income, intangible franchise, capital stock, estate, or inheritance taxes, or taxes based upon the receipt of rentals. The term "Common Area" means all portions of the Shopping Center, as now or hereafter constituted, except those portions which are covered by buildings which may be erected thereon, but including all mall and mall areas and all improvements thereto.

(c) *Basic tax defined.* The "Landlord's Basic Tax Liability" shall be equal to the lesser of the amount of the Real Estate Taxes as assessed or reduced by appropriate proceedings against the tax lot of which the leased property is a part for the first tax year immediately following the tax year in which possession of such property is delivered to the Tenant. Excluded, however, are Real Estate Taxes for special assessments for local improvements not located on property owned by the Landlord.

(d) *Tenant's share formulas.* The Tenant's share of any increase in Real Estate Taxes above Landlord's Basic Tax Liability shall be computed as follows:

(1) If the increase occurs with respect to leased property (but not the entire building) and the underlying land, which together constitute a separate tax lot, Tenant shall pay the entire increase.

(2) If the increase occurs with respect to the entire building in which the leased property is located and the underlying land, which together constitute a separate tax lot, Tenant shall pay a proportionate share of the increase. Tenant's share shall be determined by multiplying the increase by a fraction, the numerator of which is the number of square feet of floor space in the leased property and the denominator of which is the number of square feet of all floor space in the building in which the leased property is located (the "Fraction").

(3) If the building in which the leased property is located and the underlying land are not separately assessed but are part of a larger tax lot, Tenant shall pay a proportionate share of the increase on the larger lot. Tenant's share shall be determined by adding the results of multiplying the Fraction by (A) the Applicable Land Increase, and (B) the Applicable Building Increase. The "Applicable Land Increase" is that portion of the increased Real Estate Taxes on the land, exclusive of all buildings thereon (other than the Common Area), comprising the larger tax lot which the land area under the building in which the leased property is located bears to the total land area on which such increased taxes were assessed. The "Applicable Building Increase" is the portion of the increased Real Estate Taxes on all of the jointly taxed buildings, which is equitably allocable to the building in which the leased property is located on the basis of the respective values for tax purposes of all of the buildings taxed.

The parties shall resolve by arbitration any dispute as to the amount of tax so allocable to the building in which the leased property is situated. Persons who may be made parties to such arbitration include Landlord, any ground or underlying lessor, any separate fee owner, and the other lessees or occupants of all buildings included in the total tax and who are directly responsible for paying taxes with regard thereto, either by reason of ownership or because the lease provides for such payment in addition to fixed rent. Arbitration shall be by a board of three arbitrators, and shall take place in the county in which the leased property is located, in accordance with the governing rules and regulations of the American Arbitration Association. Judgment upon the award rendered may be entered in a federal court or any other court of competent jurisdiction. The arbitrators shall decide which party or parties shall bear the cost of arbitration and, if there is more than one, in what proportions.

(4) If such tax increases occur to the Common Area, regardless of whether part of Tenant's tax lot, Tenant's share of such increase, in addition to its obligations under paragraphs (1), (2), and (3) above, shall be determined by multiplying the increase of Real Estate Taxes on the Common Area by a fraction, the numerator of which is the total area of all floor space in the leased property and the denominator of which is the total area of all floor space of all buildings in the Shopping Center. Unless a separate tax assessment is obtained for the Common Area, the Real Estate Taxes on the Common Area shall mean and refer to that portion of all of the Real Estate Taxes on the land comprising the larger tax lot, including the Common Area, which the Common Area bears to the total land area taxed.

(e) *Landlord's tax statement.* The Landlord may at any time deliver to the Tenant a written statement (the "Landlord's Statement"), containing a computation of the increase above the Landlord's Basic Tax Liability and the amount of the Tenant's share thereof. The Landlord's failure to deliver a Landlord's Statement shall not prejudice or waive its right to deliver such statement for any subsequent tax year, nor from including in such statement as additional rental the Tenant's share of any increase for any year in which no Landlord's Statement was delivered to the Tenant, but for which the Tenant was otherwise obligated to pay such additional rental. If the Landlord's Basic Tax Liability is reduced as a result of any appropriate proceeding, the Landlord may adjust the amount of such additional rental due from the Tenant for any year in which the Tenant is or was obligated to pay such additional rental hereunder. Tenant shall pay the amount of such adjustment on the next rent installment day immediately following receipt of a written statement from Landlord setting forth the adjusted amount.

With respect to any period at the expiration of this lease term which constitutes a partial tax year, Landlord's Statement shall apportion the amount of the additional rental due hereunder. The Tenant's obligation with respect to such additional rental for all or part of the last year of this lease term shall survive the expiration of such term.

(15) Payment of taxes--right in tenant to contest--advance monthly deposits

(a) *Payment of impositions.* The Tenant shall promptly pay all real estate taxes, assessments, water and sewer charges, and other governmental levies against the leased property, whether ordinary or extraordinary, or foreseen or unforeseen, together with any interest or penalties thereon ("impositions"). The Tenant may pay any impositions in installments, if payment may be made without penalty, unless such installment payment would violate the terms of any mortgage or

deed of trust. All impositions for the tax year in which this lease begins or terminates shall be apportioned between the Tenant and the Landlord, except that on the final termination of this lease Tenant shall pay in full, at least 60 days before the lease term expires, any imposition which it has elected to pay in installments.

(b) *Tax contests.* Tenant may contest the amount or validity of any imposition by appropriate proceedings. However, Tenant shall promptly pay any contested imposition unless the proceeding prevents or stays its collection and Tenant deposits with Landlord the amount contested and unpaid, together with a sum to cover all charges that may be assessed against the leased property in such proceeding. Upon the termination of such proceeding, Tenant shall deliver to Landlord proof of the amount of such imposition as finally determined. Landlord shall then pay such imposition out of the sum so deposited with it by Tenant and refund any balance to Tenant. If sums deposited with Landlord are insufficient to pay the full amount of such imposition and other charges, Tenant shall immediately pay any deficiency. If during such proceeding Landlord deems the sums deposited with it insufficient, Tenant shall, upon demand, deposit with Landlord such additional sums that Landlord may reasonably request. Landlord, at Tenant's expense, shall join in any such proceeding required by law.

(c) *Tax escrow.* The Landlord may at any time require the Tenant to deposit funds for the payment of current impositions on the leased property in a bank or trust company selected by the Landlord. Such funds shall be held in the Tenant's name, with any interest payable to the Tenant, but the depository shall not pay such funds to anyone other than the appropriate taxing authority without the Landlord's written consent. The Tenant shall so deposit one-twelfth of the current annual impositions, or those of the preceding tax year if the current impositions have not then been fixed, on the first day of each month in advance. However, all additional funds required for any payment shall also be deposited on the first day of the final month during or at the end of which a payment is due and payable without interest or penalty. Notwithstanding the above, Tenant's first deposit shall be sufficient to create the same bank balance as if Landlord had required such deposit on the preceding January 1.

(16) Rent escalation for taxes--exclusion of income and franchise taxes--tenant's right to contest

(a) *Annual basic rent.* During the initial term hereof, Tenant shall pay Landlord an annual basic rental ("basic rent") of \$16,800.

(b) *Payment.* Tenant shall pay the annual basic rental at Landlord's address set forth above, or at any other address Landlord designates in writing. Payment shall be made in equal monthly installments in advance on the first day of each month during the term hereof, without notice or demand, and without abatement, deduction, set-off, or counterclaim of any amount, except as specifically provided below.

(c) *Additional rent; taxes.* Tenant shall pay as additional rent, before the addition of any fine, penalty, interest, or cost for nonpayment, all real estate taxes (other than special assessments), water rates and charges, and other governmental charges, whether general or special, ordinary or extraordinary, or foreseen or unforeseen (collectively, "impositions") that are assessed, levied, confirmed, imposed, or become a lien on the demised premises or become payable during the lease term, or that are now liens thereon. However, if by law any such imposition is payable, or may be payable by Tenant, in installments (regardless of whether interest accrues on the unpaid balance), Tenant may pay the imposition (and any accrued interest on the unpaid balance) in installments as they respectively become due and before any fine, penalty, interest, or cost is added for the nonpayment of any installment and interest. If any part of the imposition relating to a fiscal period of the taxing authority is included in a period before the commencement or after the termination of the lease term, such imposition shall be adjusted between the parties when the lease term commences or terminates, regardless of whether during this term it is assessed, levied, confirmed, imposed, becomes a lien on the demised premises, or becomes payable. Accordingly, Landlord shall pay a percentage of such imposition, the numerator of which is that part of the fiscal period included in the period before such commencement or after such termination, and the denominator of which is the fiscal period, and Tenant shall pay the remainder.

(d) *Excluded taxes.* Nothing in this lease shall require the Tenant to pay any franchise, corporate, estate, inheritance, succession, capital levy, income, profits, revenue or transfer tax of the Landlord, or any income, profits or revenue tax or any other tax, assessment, charge or levy upon the basic rent payable by the Tenant under this lease. No kind of tax, assessment, charge, or levy described above in this Section shall be included as an "imposition" under this Article. However, if at any time during the lease term this state or any of its political subdivisions levies or assesses a tax or excise on rents against Landlord or the basic rent, as a full or partial substitution for taxes or imposed by such taxing authority on land or buildings, or both, such tax or excise on rent shall be included as an "imposition." In such case, Tenant shall pay and discharge such tax or excise as an imposition in accordance with the provisions of this Article, but only to the extent that such substitution so far as ascertainable relieves the Tenant from the payment of impositions under it. Tenant's obligation to pay such tax or excise on rent shall be limited to the amount which, but for this lease, would have been payable by Landlord had the basic rent payable hereunder (and upon which such tax or excise was imposed) been Landlord's sole taxable income for the year in question.

(e) *Contests.* Tenant may contest the amount or validity of any imposition by appropriate legal proceedings. However, this shall not be deemed or construed in any way to relieve, modify, or extend Tenant's obligation to pay any imposition at the time and in the manner provided in this Article, unless such proceedings operate to prevent the collection of the contested imposition and the sale of all or part of the demised premises to satisfy the same. Upon termination of such legal proceedings, Tenant shall pay all impositions finally determined to be due, including those deferred during the course thereof, plus all related costs, fees, interest, penalties, and other liabilities.

(f) *Landlord participation.* Landlord shall not be required to participate or join in any such proceeding unless such action is necessary or advisable for its prosecution. However, Landlord shall not be subjected to any liability for the payment of any costs or expenses in connection with any such proceedings, and Tenant shall indemnify and save harmless Landlord from such costs or expenses. Tenant shall be entitled to and a refund of any such imposition and penalties or interest thereon which have been paid by either party and for which Landlord has been fully reimbursed, including interest thereon to the date of reimbursement.

(g) *Tax bill.* A certificate, advice, or bill made or issued by an appropriate official which indicates that an imposition was not paid shall be prima facie evidence that the imposition was then due and unpaid. For this purpose, an appropriate official is one designated by law to make or issue such certificate, advice, or bill, or to receive payment of such imposition.

(17) *Rent escalation based on tax increases--rider to lease--definitions and formula*

RENT ESCALATION RIDER

Section A. *Definitions.* As used in this escalation rider:

(1) "*Taxes*" mean the aggregate amount of real estate taxes and assessments (exclusive of penalties, interest and discount thereon or with respect to a refund thereof) imposed upon the land and Building (including, without limitation, (i) real estate taxes upon any "air rights" or payable by Landlord to a ground lessor with respect thereto, and (ii) all special assessments levied after the date of this lease for public benefits to land and/or Building (excluding an amount equal to the assessments payable in whole or in part during or for a Base Tax Year). Such assessments, if payable in installments, shall be deemed payable in the maximum number of permissible installments) in the manner in which such taxes and assessments are imposed as of the date hereof. However, if because of any change in the taxation of real estate, any other tax or assessment (including, without limitation, any occupancy, gross receipts, or rental tax) is

imposed upon Landlord or the owner of the land and/or Building, or upon or with respect to the land and/or Building or the occupancy, rents or income therefrom, in substitution for, or in addition to, any of the foregoing Taxes, such other tax or assessment shall be deemed part of the Taxes. With respect to any Comparison Year, all expenses, including legal fees, experts' and other witnesses' fees, incurred in contesting the validity or amount of any Taxes or in obtaining a refund of Taxes, shall be considered as part of the Taxes for such year.

(2) "*Base Annual Rental Rate*" means the rate of annual rent originally provided or formulated in this lease on the date of its execution, as such rate may be subsequently fixed, modified or supplemented in any way other than under the provisions of this escalation rider.

(3) "*Term of this lease*" or "*lease term*," for the purpose of this rider, means the period beginning with the date of Tenant's obligation to commence paying rent and ending with the date of the expiration or termination of this lease.

(4) "*Tax Year*" means the period July 1 to June 30 (or any other period hereafter duly adopted by the municipality as its fiscal year for real estate tax purposes).

(5) "*Comparison Year*" means: (a) with respect to Taxes, any Tax Year subsequent to the Base Tax Year and (b) with respect to Operating Expenses, any calendar year for any part or all of which there is an increase or decrease in Base Annual Rental Rate under Section B below.

(6) "*Base Tax Year*" means the Tax Year within which the date of this lease falls.

(7) "*Base Taxes*" mean the Taxes payable for the Base Tax Year.

(8) "*Tenant's Proportionate Percentage*" shall be 3.13% and shall represent the agreed percentage of any increase or decrease in Taxes or Operating Expenses allocable to Tenant under Section B below.

(9) (a) "*Operating Expenses*" mean those expenses (and any taxes thereon) paid or incurred by or on behalf of Landlord (whether directly or through independent contractors) in respect of the operation, maintenance and management of the land and/or Building and the sidewalks and areas adjacent thereto ("Operation of the Property") which, in accordance with the accounting practice used by Landlord, (and in accordance with sound management principles respecting the operation of noninstitutional first class office buildings in New York City) are properly chargeable to the Operation of the Property, together with and including (without limitation) the cost of electricity (including any taxes paid thereon) used in operating all Building equipment and servicing common areas of the Building. Such cost shall be determined (if such electricity is not separately metered) on the basis of an electrical survey of such equipment and common area facilities and the then prevailing rates, and financial expenses incurred in connection with the Operation of the Property such as insurance premiums and legal, auditing, and other professional fees and expenses, but specifically excluding (i) Taxes as defined in Section "A(1)", (ii) franchise or income taxes imposed on Landlord, (iii) ground rent and mortgage interest, (iv) leasing commissions, (v) the cost of electrical energy furnished directly to tenants of the building, (vi) cost of tenant installations and decorating incurred in connection with preparing space for a new tenant, and (vii) capital improvements. However, (x) if any capital improvement results in reducing any Operating Expenses (as, for example, a labor-saving improvement), then with respect to the calendar year in which the improvement is made and each subsequent calendar year during the term of the lease, the amount by which the Operating Expenses have been reduced shall be deemed deducted from the Base Operating Expenses, and (y) if Landlord is not furnishing any particular work or service (the cost of which if performed the Landlord would constitute an Operating Expense) to a Tenant who has undertaken to perform such work or service in lieu of the performance thereof by Landlord, Operating Expenses shall be deemed to be increased by an amount equal to the additional Operating Expenses which would reasonably have been incurred during such period by Landlord if it had at its own expense furnished such work or service to such Tenant.

(b) In determining the amount of Operating Expenses for the Base Expense Year and for any subsequent year, if less

than 95% of the building rentable area has been occupied by tenants at any time during the year, Operating Expenses shall be deemed for such year to be equal to the like expenses which would normally be expected to be incurred had such occupancy been 95% throughout such year. However, the Operating Expenses for any Comparison Year shall not be based on any percentage of occupancy less than the percentage of occupancy utilized for the Base Expense Year.

(c) If any capital improvement is made after the Base Expense Year in compliance with the requirement of any federal, state or local law, or governmental regulation, as for example, improvements respecting fire safety required by the municipality, the reasonable annual amortization, with interest, of the cost of such improvement shall be deemed an Operating Expense in each of the calendar years during which such amortization occurs unless there is an exemption or abatement of Taxes on account of the cost of such improvement as contemplated by the last sentence of paragraph (1) of Section B below.

(10) "*Base Expense Year*" means the calendar year ____[year].

(11) "*Base Operating Expenses*" means the Operating Expenses for the Base Expense Year.

Section B. *Increase or Decrease in Rent.*

(1) *Taxes.* If the Taxes payable for any Tax Year (any part or all of which falls within the lease term) after the Base Tax Year represent an increase above or decrease below the Base Taxes, the Base Annual Rental Rate for such Tax Year (i.e., a Comparison Year) and continuing thereafter until a new comparative statement is sent to Tenant, shall be increased or decreased, as the case may be, by the Tenant's Proportionate Percentage of the increase or decrease. The real estate taxes involved in this paragraph (1) shall be initially computed on the basis of the assessed valuations in effect at the time the comparative statement is sent (as such assessed valuations may have been settled or finally adjudicated prior to such time), regardless of any then pending application, proceeding or appeal respecting the reduction of any such assessed valuations, but shall be subject to subsequent adjustment as provided in paragraph (1) of Section D, below. If, in, or for any Comparison Year, there is an exemption or abatement of Taxes on account of changes or additions to the Building at the Landlord's expense and made pursuant to requirement of any law or governmental regulation, the Taxes for such year shall be calculated as though there were no such exemption or abatement.

(2) *Operating expenses.* If the Operating Expenses for any calendar year (any part or all of which falls within the lease term) after the Base Expense Year is greater or less than the Base Operating Expenses, the Base Annual Rental Rate payable under this lease for such calendar year (i.e., a Comparison Year), and continuing thereafter until a new comparative statement is sent to Tenant, shall be increased or decreased, as the case may be, by the Tenant's Proportionate Percentage of the increase or decrease.

Section C. *Payment or Credit.*

(1) *Statement.* At any time during or after any Comparison Year Landlord shall send Tenant a comparative statement(s) showing separately or together: (i) a comparison of the Taxes for the Comparison Year with the Base Taxes, (ii) a comparison of the Operating Expenses for the comparison year with the Base Operating Expenses, and (iii) the amount of the increase or decrease in the Base Annual Rental Rate resulting from each comparison.

(2) *Adjustment.* On the first day for the payment of a monthly rent installment following the furnishing to Tenant of such comparative statement, (i) Tenant, in case of an increase, shall pay to Landlord 1/12 of such increase in Base Annual Rental Rate, multiplied by the number of the preceding months (and any fraction thereof) for which the increase is applicable; and in case of a decrease, shall be entitled to a credit against the rent next becoming due, of 1/12 of such

decrease multiplied by the number of the preceding months (and any fraction thereof) for which the decrease is applicable; and (ii) thereafter, commencing with the then current monthly rent installment, and continuing monthly thereafter, until a different comparative statement is sent to Tenant, the monthly installments of rent shall be increased or decreased, as the case may be, by 1/12 of such increase or decrease. If the last mentioned increased or decreased monthly installments of rent continue beyond the end of the Comparison Year, any necessary adjustment will be made when the next succeeding comparative statement is sent to Tenant.

(3) *Tentative charge.* As used in this paragraph (3), "Tentative Monthly Expense Escalation Charge" means 1/12 of the Tenant's Proportionate Percentage multiplied by the difference between (i) the Base Operating Expenses and (ii) 110% of the Operating Expenses for the calendar year immediately preceding the Current Year, and "Current Year" shall mean the calendar year in which a demand is made upon Tenant for payment of a Tentative Monthly Expense Escalation Charge.

At any time in any calendar year (any part or all of which falls within the lease term) after the Base Expense Year, the Landlord, may demand and collect from Tenant, as additional rent, a sum equal to the Tentative Monthly Expense Escalation Charge multiplied by the number of months in said year preceding the demand, and thereafter, commencing with the month in which the demand is made and continuing thereafter for each month remaining in such year, the monthly rent shall be deemed increased by the Tentative Monthly Expense Escalation Charge. Landlord may include any amount due it under this paragraph (3) in any comparative statement sent to the Tenant under paragraph (1) of this Section C.

After the end of the Current Year and when Landlord sends a comparative statement to Tenant under paragraph (1) of this Section C respecting the comparison of the Operating Expenses for said Current Year (i.e., a Comparison Year), with the Base Operating Expenses, the amounts, if any, collected by Landlord from Tenant under this paragraph (3) on account of Tentative Monthly Expense Escalation Charge shall be adjusted. If the amount so collected is less than the amount actually due under such comparative statement for the Comparison Year, the Tenant shall pay the difference, as additional rent, to Landlord forthwith. If the amount so collected exceeds the amount actually due for the Comparison Year, the excess shall be credited against the next rental due from Tenant, or if no further rental is due, Landlord shall immediately pay the excess to Tenant.

Section D. *General.*

(1) *Assessed valuation.* (a) *Comparative year reduction.* If, after a comparative statement has been sent to Tenant, an assessed valuation which had been utilized in computing the Taxes for a Comparison Year is reduced (as a result of settlement, final determination of legal proceedings or otherwise), and as a result thereof a refund of Taxes is actually received by or on behalf of Landlord, then, promptly after receipt of such refund, Landlord shall send Tenant a statement adjusting the Taxes for such Comparison Year (taking into account the expenses mentioned in the last sentence of paragraph (1) of Section A above) and setting forth Tenant's Proportionate Percentage of such refund, and Tenant shall receive such Percentage by way of a credit against the rent next becoming due after such statement has been sent. However, Tenant's share of such refund shall be limited to any amount previously paid by it to Landlord as increased rent for such Comparison Year on the basis of the assessed valuation before its reduction.

(b) *Base year reduction.* If, after a comparative statement has been sent to Tenant, the assessed valuation utilized in computing the Base Taxes is reduced (as a result of settlement, final determination of legal proceedings or otherwise) then: (i) the Base Taxes shall be retroactively adjusted to reflect such reduction, (ii) the monthly installment of rent shall be increased accordingly and (iii) all retroactive additional rent resulting from such retroactive adjustment shall be forthwith payable when billed by Landlord. Landlord shall promptly send to Tenant a statement setting forth the basis for such retroactive adjustment and additional rent payments.

(2) *Objections.* Any comparative statement sent to Tenant shall be conclusively binding upon it unless, within 30 days thereafter, it sends a written notice to Landlord objecting to such statement and specifying what portions are claimed to be incorrect. If such notice is sent, Landlord's books and records shall not be available for inspection because of their confidential nature. However, either party may submit the issues for resolution to M. Smith & Co., certified public accountants, its successor firm, or any other reputable firm of certified public accountants selected by Landlord, and its decision shall be conclusively binding upon the parties. The unsuccessful party shall bear all the fees and expenses of such decision. If both parties are partially unsuccessful, the accountants shall apportion the fees and expenses between them based on the degree of success of each party.

(3) *Minimum rent.* Notwithstanding any contrary provision in Section B, the rental payable under this lease shall not be less than the Base Annual Rental Rate.

(4) *Lease expiration.* The expiration or termination of this lease during any Tax Year or any calendar year for any part or all of which the Base Annual Rental Rate is increased or decreased under this rider shall not affect the rights or obligations of the parties respecting such increase or decrease. Any comparative statement relating to such increase or decrease may, on a pro rata basis, be sent to Tenant subsequent to, and all such rights and obligations shall survive, any such expiration or termination. Any payments due under such comparative statement shall be payable within 20 days after it is sent to the Tenant.



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Current Legal Forms for Real Estate
Chapter 23 REAL ESTATE LEASES
Part IV. Forms
B. LEASE CLAUSES

31-23 Current Legal Forms for Real Estate FORM 23.35

AUTHOR: by Thomas G. Belden

FORM 23.35 Landlord's expenses paid by tenant as additional rent

COMMENT

Leases commonly provide that the tenant reimburse the landlord for expenses incurred in management, maintenance, or protecting the landlord's rights under the lease. These charges are frequently denominated "additional rent" in order to give the landlord a possessory as well as a contractual remedy. Provisions of this type are valid and enforceable, although the state law in the jurisdiction where the property is located will need to be ascertained to find out whether legal fees incurred by the landlord are collectible from the tenant.

Expenses, notice:

Expenses incurred in the collection of rent occasioned by the tenant's nonpayment are included in the covenants obligating the tenant to pay specific as well as unanticipated expenses. Expenses borne by the landlord in curing the tenant's defaults, as in the case of the tenant's failure to make required repairs or to pay insurance premiums, are common reimbursable items. A tenant may seek to be given notice, and afforded an opportunity to cure the default before becoming bound to reimburse the landlord. A notice requirement may be included in the covenant imposing the obligation. Giving notice can be made a condition precedent to the tenant's default.

Litigation expenses:

Some lease provisions obligate the tenant to pay the legal expenses incurred by the landlord in maintaining legal proceedings for the prosecution or defense of legal actions related to the lease. If the dispute is between the landlord and the tenant, the landlord is not able to recover such fees and

expenses unless the final decision is in his favor, under some leases. Many lease provisions, however, are not so conditioned. The terms of these lease agreements make it obligatory that the tenant pay such expenses regardless of the litigation's outcome. Payment of the landlord's expenses in recovering possession from a defaulting tenant by means of summary eviction or similar proceedings is also a common requirement.

Landlord's lien, distraint, security interest:

As additional security for the tenant's payment of expenses, some leases provide that the landlord will have a lien against the tenant's property. Depending on the circumstances, the relevant tenant's property may include subleases, building improvements constructed by the tenant, or the tenant's personal property. The creation and enforcement of the liens in these various property interests are governed by local laws dealing with real estate liens, landlord's distraint or liens, or the Uniform Commercial Code. Although Article 9 of the Uniform Commercial Code will not govern a lien or other interest against real estate, it will govern a security interest in personal property, unless there is a specific state law governing the lien. *U.C.C. § 9-104*. Many jurisdictions have specific statutes governing a landlord's interest in a tenant's personal property located in the leased premises upon a tenant's default. These laws could apply without a specific lease provision. If the lease is primarily for residential purposes, however, consumer protection laws could be involved, and should be examined before proceeding under the landlord's right of distraint.

Tax aspects:

Frequently, commercial insurance premiums, interest, and similar payments required under a commercial lease to be paid by the tenant to or for the benefit of the landlord are deductible as rent by the tenant. Such payments constitute taxable income to the landlord. Usually, these expenses are deductible, in turn by the landlord. Many practitioners expressly characterize such payments as "additional rent" in the lease instrument. For a more detailed discussion concerning the tax consequences of the lessee's payments of the lessor's expenses, see the Tax Background § 23.03, at the beginning of this chapter.

FORMS

(1) Reimbursement of default and eviction action expenses

The Tenant shall pay and indemnify the Landlord against all legal costs and charges, including counsel fees lawfully and reasonably incurred, in obtaining possession of the leased premises after any default of Tenant, including a default in surrendering possession upon the expiration or earlier termination of the lease term or enforcing any of Tenant's covenants under this lease.

(2) Reimbursement of expenses of curing tenant's default--no prior notice required

If the Tenant defaults in observing or performing any term or provision of this lease, Landlord may, without notice, perform the same for Tenant's account. If Landlord makes any expenditures or incurs any obligations for the payment of

money in this connection including, but not limited to, attorneys' fees, such sums, with interest and costs, shall be deemed to be additional rent and shall be paid by the Tenant to the Landlord within five days after an appropriate bill or statement is rendered to Tenant.

(3) Reimbursement of expenses of curing tenant's default--prior notice required

If Landlord, because of Tenant's failure after due notice to perform any covenant, term, or condition of this lease, is required to pay any money, incur any obligation for the payment of money, do any act that requires the payment of money, or expend any sums for any type of legal services, the payments or obligations, with interest, shall be added to the installment of rent next becoming due, and shall be collectible as additional rent, in the same manner and with the same remedies as if it had been ordinarily reserved.

(4) Cleaning contractor selected by landlord at tenant's expense--tenant's right to submit alternate cleaning contractor

During the initial term hereof and all extension periods, Tenant shall clean the entire Demised Premises at its expense, using a cleaning contractor selected by Landlord. However, if Tenant disputes the contractor's rates or quality of service, it may submit to Landlord its own cleaning contractor to compete for such cleaning. The parties shall use their combined best efforts to choose a mutually acceptable cleaning contractor. Only one cleaning contractor will be contracted to service the entire building.

(5) Heating, air cooling, and ventilation overtime--additional rent on per hour basis

If Tenant shall require the use of the heating, air cooling, and/or ventilating service furnished by Landlord to the leased premises for any period of time other than the hours provided for such services in this lease:

A. Tenant shall pay to Landlord, promptly upon demand, as additional rent, a special overtime service charge of \$180 per hour for air cooling, \$125 per hour for ventilating, and \$150 per hour for heating, subject to increase for increased costs, for such service. However, no charge shall be made for any electricity except as used in the heating, air cooling, and/or ventilating systems for Tenant's space.

B. Landlord shall furnish any such overtime service on the day requested by Tenant if such request is received by 2 p.m. of that day. However, the Landlord shall not be required to furnish such overtime services to Tenant for more than 20 hours in any one week.

C. If more than one tenant requests the same overtime service at the same time, the charge to Tenant shall be adjusted pro rata.

(6) Common areas of shopping mall--maintenance and regulation by landlord--common area charges--parking

(a) *Common areas use.* Lessee shall have nonexclusive use of the Common Areas during the term hereof. The Common Areas shall be subject to Lessor's exclusive control and management and to all of Lessor's rules and regulations. Lessor may make any changes, additions, deletions, alterations, and improvements in and to the Common Areas, so long as there is no unreasonable obstruction of Lessee's right of ingress to or egress from the Demised Premises.

(b) *Maintenance; payment.* Lessor shall maintain the Common Areas in good repair, reasonably clear of debris, and lighted and open until 10:00 p.m. of each business day, and shall keep all enclosed mall areas adequately lighted,

heated, and air conditioned until 10:00 p.m. of each business day.

For these services Lessee shall pay Lessor twenty-five cents ("Common Area Payment") each year for each square foot of Floor Area contained in the Demised Premises. The total annual amount shall be payable in equal installments on the first day of every calendar month, and a pro rata sum for any partial month when the term commences. At the end of the first Lease Year, and each Lease Year thereafter, the Common Area Payment shall be adjusted upwards or downwards in the manner set forth below, but never less than the above amount. The amount of the Common Area Payment for each Lease Year, commencing with the second Lease Year, shall be determined as follows: Using the Consumer Price Index for "All Urban Consumers" (CPI-U, 1982-84 Base = 100), published by the Bureau of Labor Statistics of The United States Department of Labor, applicable on the date of this Lease as the denominator and the index number for the first month of each Lease Year thereafter as the numerator, multiply the resulting fraction by the above stated Common Area Payment. If the Bureau of Labor Statistics changes the base period, the new index numbers shall be substituted for the old index numbers in making the above computation. If such Consumer Price Index is discontinued, comparable statistics on the purchasing power of the consumer dollar, as published at the time of discontinuation by a recognized financial periodical, shall be used for making such computation.

(c) *Indemnification.* Lessor shall protect, indemnify and save and keep harmless Lessee against and from all claims, loss, cost, damage, or expense arising out of or from any accident or other occurrence on the Common Areas, except for the willful acts or negligence of Lessee or its agents.

(d) *Insurance.* Lessor shall carry public liability insurance on the Common Areas providing coverage of not less than \$500,000 against liability for injury to or death of any person and \$1,000,000 for any one occurrence. Lessee shall pay Lessor 6 cents per year for each square foot of Floor Area contained in the Demised Premises, payable in equal installments on the first day of every calendar month, as Lessee's share of the cost of the premiums for such insurance, (hereinafter the "Insurance Payment"). At the end of the first Lease Year, and each Lease Year thereafter, the Insurance Payment shall be adjusted upward or downward, but never less than the above amount, in direct proportion to the increase or decrease in the cost of the premiums paid by Lessor for such insurance coverage.

(e) *Personnel and equipment.* Lessor shall provide personnel and equipment to police the malls and other Common Areas that it deems necessary to maintain order, security, traffic, and pedestrian control and protect the person and property of the general public and the tenants, their agents and employees while upon the Shopping Center premises. In consideration of Lessor providing such personnel and equipment, Lessee shall pay Lessor a proportion of the total cost thereof, based upon the ratio of the square feet of Floor Area in the Demised Premises to the total square feet of all building space leased in the Shopping Center as of the last day of the calendar year in which such cost was incurred. Total cost shall be deemed to include actual cost to Lessor plus 15% for administration.

As its estimated payment for security service, Lessee shall pay Lessor, in advance, on the first day of each calendar month, two cents per month for each square foot of Floor Area contained in the Demised Premises. For each subsequent year, Lessee shall pay Lessor monthly, in advance, one-twelfth of Lessee's actual security service payment for the preceding calendar year. Lessor shall notify Lessee in writing of the actual amount due for the preceding year. If such payment exceeds the actual amount due, Lessee shall be credited with the excess on its next payment. If the estimated payment is less than the actual amount due, Lessee shall pay the deficiency within ten days after it is so notified by Lessor. If the term hereof begins or ends on other than the first or last day of the calendar year, the charge for the deficiency shall be billed and adjusted on the basis of such fraction of a calendar year.

(f) *Snow removal costs.* Lessee shall pay Lessor annually its proportionate share of Lessor's snow removal costs. Lessee's proportionate share shall be based upon the ratio of the square feet of Floor Area in the Demised Premises to the total square feet of all building space leased in the Shopping Center as of May 31 of each year. Snow removal costs shall be deemed to include actual cost to Lessor plus 15% for administration. Within 60 days after May 31 of each year, Lessor shall notify Lessee of the actual amount due for the preceding 12 months ending May 31. Lessee shall pay the

amount due within 30 days after receipt of said notice from Lessor. If the term of this Lease shall begin or end other than on May 31, the charge shall be billed and adjusted on the basis of such fraction of a year.

(g) *Parking.* Lessee and its employees shall park only in the outer areas of the parking lot or other places provided and designated by Lessor for employee parking. Lessee shall deliver to Lessor, within 10 days after its request, a statement listing all automobiles owned by Lessee and its employees, including their description and state license numbers. Lessee shall subsequently advise Lessor of all changes, additions, or deletions in such list. If any listed automobile is parked in a non-designated area after Lessor notifies Lessee or its store manager that such automobile was previously parked in violation of this provision, Lessee shall pay Lessor \$10 for each day (or part thereof) for each such automobile improperly parked. Such payment shall be due within 10 days after Lessee receives notice from Lessor.

(7) Office building operation--additional rent keyed to real estate taxes and landlord's expenses of operation

(a) *Fixed and additional rent.* Tenant shall pay Landlord fixed annual rent of \$120,000, in lawful money of the United States, without notice or demand and without abatement, deduction, or set-off. Such payment shall be made in equal monthly installments, in advance, on the first day of each calendar month, at Landlord's office or any other place designated by it. Tenant shall pay the first month's rent on execution and delivery of this lease. If the obligation to pay rent commences on other than the first day of the month, the fixed rent for the unexpired portion of such month shall be prorated and paid on a per diem basis, and Landlord shall credit any difference toward the payment of the rent for the following calendar month. Tenant shall also pay Landlord "additional rent," as provided below.

(b) *Definitions.* For the purposes of this Article:

(1) "Lease year" means every period of 12 consecutive months commencing on the 1st day of May immediately following the commencement of this lease term.

(2) "Real property" means collectively the building and the land upon which it stands.

(3) "Taxes" mean all present or future real estate taxes levied, assessed, or imposed against the real property.

(4) "Tax base year" means the first full lease year in which the building has been fully assessed as a completed building.

(5) "Expenses" means all expenses paid by or incurred by the Landlord in the operation of the real property, including maintenance and repair costs, steam, electricity, water, water rates, frontage charges, sewer rents, fuel, air-conditioning, labor costs, window cleaning, lighting, and all other expenses of maintenance and repair of the real property.

(6) "Expense base year" means the average of the first two full lease years commencing with the first full lease year in which the permanent certificate of occupancy for the building is issued.

(c) *Taxes.* If the taxes for any lease year after the tax base year are greater than those for the tax base year, Tenant shall pay Landlord, as additional rent, 1.03 percent of the increased taxes for each such subsequent year. If the taxes for any subsequent lease year are less than those for the tax base year, Landlord shall pay the Tenant 1.03 percent of the reduced taxes for each such subsequent year.

Landlord shall not unreasonably refuse any timely request by tenants occupying 50 percent or more of the building's rentable area to contest, through available legal remedies, the validity or amount of the real property's assessed valuation or the taxes levied on it. If Landlord receives a tax refund for any subsequent tax year in which Tenant has paid it additional rent under this section, Landlord shall, after deducting all expenses incurred in obtaining such refund (including reasonable attorney's fees), reimburse Tenant 1.03 percent of the balance.

(d) *Expenses.* If the expenses for any lease year after the expense base year are greater than those for the expense base year, Tenant shall pay Landlord, as additional rent, 1.03 percent of the increased expenses for each such subsequent year. If the expenses for any subsequent lease year are less than those for the expense base year, Landlord shall pay Tenant 1.03 percent of the reduced expenses for each such subsequent year.

(e) *Escalation cap.* Notwithstanding any other provision, the total additional rent resulting from increases in taxes and expenses in any lease year under this section shall not exceed 10 percent of the fixed annual rent set forth, above.

(f) *Payment.* Tenant shall pay any additional rent due Landlord for taxes or expenses within 30 days after Landlord submits a statement reflecting how such amount was computed. Landlord shall pay any amount due Tenant for taxes or expenses by crediting it toward the payment of the next monthly installment of fixed rent becoming due or, in the case of the last lease year of the term, by refunding it to Tenant within 30 days after the end of such year. Landlord shall make available, for at least 60 days after such statement is submitted, reasonably detailed records supporting the items referred to therein, for examination at reasonable times by Tenant and its representatives.

(8) Rent escalation based on cost of living index--definitions and formula

(a) *Definitions.* As used in this section:

(i) *"Index"* means the Consumer Price Index for "All Urban Consumers" (CPI-U, 1982-84 Base = 100), issued by the Bureau of Labor Statistics of the United States Department of Labor. If the Index is subsequently converted to a different standard reference base or otherwise revised, the Percentage Increase (defined in subsection (iv), below) shall be determined by using any conversion factor, formula, or table for converting the Index published by the Bureau of Labor Statistics, or, if the Bureau does not publish it, by using any conversion factor, formula, or table published by a nationally recognized publisher of similar statistical information. If the Index ceases to be published, for the purposes hereof, any other index agreed upon by the parties shall be substituted therefor. If the parties are unable to agree on a substitute index within 90 days after publication of the Index ceases, the matter shall be determined by arbitration in New York City under the governing rules of the American Arbitration Association.

(ii) *"Base Index"* means the Index in effect in December of the calendar year in which the date of this lease falls.

(iii) *"Anniversary Month"* means December of the calendar year succeeding the calendar year in which the Tenant's obligation to pay rent commences under this lease and such successive December thereafter during the lease term.

(iv) *"Percentage Increase"* means the percentage equal to the fraction, the numerator of which is the Index in the Anniversary Month less the Base Index and the denominator of which is the Base Index.

(b) *Rent escalation.* If the Index in an Anniversary Month shall exceed the Base Index, then the Base Annual Rental Rate payable for the ensuing calendar year, and thereafter until a new index comparative statement is sent to Tenant, shall be increased by 25% of the Percentage Increase. At any time after January 1st of the ensuing calendar year, Landlord shall send Tenant an index comparative statement setting forth (a) the Index of the Anniversary Month preceding the date of the statement, (b) the Base Index, (c) the Percentage Increase, and (d) the increase in the Base Annual Rental Rate. On the first day of the calendar month ("current month") following the month in which the index comparative statement was sent, (i) Tenant shall pay to Landlord a sum equal to 1/12 of the increase in Base Annual Rental Rate multiplied by the number of calendar months of the lease term then elapsed since such January 1st, and (ii) thereafter, commencing with the current month and continuing monthly thereafter until a different index comparative statement is sent to Tenant, the monthly installments of rent shall be increased by 1/12 of said increase. If the last mentioned increased monthly installments of rent shall continue beyond the end of the calendar year for which such

payments were payable, any necessary adjustment will be made when the next index comparative statement is sent to Tenant.

(9) Security interest grant in tenant's inventory and equipment--to secure payment of rent and performance of other obligations

(a) *Security interest, collateral.* For valuable consideration and as security for the payment of rent and other charges becoming due hereunder, Lessee hereby grants Lessor a security interest in the following described collateral: (i) All inventory in the Demised Premises during the term of this Lease; (ii) All equipment and other personalty placed in the Demised Premises during the term of this Lease; and (iii) All proceeds of said inventory, equipment and personalty.

(b) *Default.* Lessee shall be deemed in default if any of the following events or conditions occur: (1) default in the payment of rent, additional rent, or performance of any obligation, covenant, or liability contained or referred to in this lease; (2) making of any levy, seizure, or attachment of the collateral; or (3) death, dissolution, termination of existence, insolvency, business failure, appointment of a receiver, assignment for the benefit of creditors by, or the commencement of a proceeding under any bankruptcy or insolvency law by or against, Lessee or any guarantor or surety for Lessee. Upon the happening of any such events or conditions, or at any time thereafter (if such default has not previously been cured), Lessor shall have all rights and remedies of a secured party under the laws of the state in which the Demised Premises are located. Such rights and remedies shall include, without limitation, the right to take possession of the collateral, and for that purpose, the Lessor may enter upon the Demised Premises and remove the collateral therefrom. Lessor shall give Lessee at least ten days' prior notice of any public sale thereof, or of the date after which any private sale or other intended disposition is to be made. Lessor may purchase the collateral at any such sale.

(c) *Termination.* The security agreement and the security interest and collateral created hereby shall be terminated when all of the rent and other charges becoming due during the term of this Lease or its extension have been paid in full.

(10) Reimbursement of litigation expenses--expenses deemed landlord's lien

If Landlord, without its fault, is made a party to any litigation commenced by or against the Tenant, the Tenant shall pay all costs, including reasonable attorney's fees, incurred by or against the Landlord in connection with such litigation. The Tenant shall also pay all costs and reasonable attorney's fees incurred by or against the Landlord in enforcing the covenant, term, or provision of this lease, or in terminating this lease by reason of the Tenant's default. All such costs and reasonable attorney's fees, all taxes and assessments, and all moneys to be paid by the Tenant under this lease, shall, if paid or incurred by the Landlord, be a landlord's lien upon any building and improvement and the Tenant's interest in any personal property placed upon the premises at any time during the term of this lease, upon the leasehold interest hereby created, and upon the rent of any building and improvement situated upon the premises at any time during the lease term. Tenant hereby grants Landlord a security interest in all such personal property for such purpose.

(11) Reimbursement of litigation expenses--tenant exculpated if joinder of landlord is due to landlord's acts.

If the Landlord is made a party to any litigation commenced against the Tenant, the Tenant shall pay all expenses, costs, and reasonable attorney's fees incurred by or imposed on the Landlord in connection with such litigation. Such expenses, costs, and attorney's fees shall be additional rent due on the last rent day after service of notice of such payment or payments, together with interest from the payment date. Such additional rent shall be collected as rent unless Landlord is made a party by reason of any independent liability of Landlord caused by its act or omission and not resulting from any act or omission by Tenant or from Landlord's execution of the lease.

(12) Reimbursement of litigation expenses recoverable in landlord-tenant proceedings only if landlord prevails

If Landlord, without its fault, is made a party to any litigation by or against the Tenant, the Tenant shall pay all costs of such litigation and reasonable attorney's fees incurred by or charged against the Landlord in enforcing the covenants, terms, and conditions of this lease or in terminating this lease by reason of the Tenant's default. In any litigation between the parties, the Tenant shall pay the Landlord's costs and attorney's fees only if the final judgment is in the Landlord's favor.



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Current Legal Forms for Real Estate
Chapter 23 REAL ESTATE LEASES
Part IV. Forms
B. LEASE CLAUSES

31-23 Current Legal Forms for Real Estate FORM 23.36

AUTHOR: by Thomas G. Belden

FORM 23.36 Security deposits, advance rentals, and bonuses

COMMENT

Payments to a landlord to secure a tenant's lease obligations have raised a variety of problems. A major area of controversy has involved the tax effect of such a payment. Essentially, the issue is whether or not the payment constitutes income to the landlord and a deduction to the tenant, even though all or a portion of the sum may subsequently be returned.

Tax treatment--deposit, advance rent:

The basic tax principles are easily stated. Where the payment is a security deposit, to be returned to the tenant under stipulated conditions, it is not income to the landlord nor a deduction to the tenant while it is being held subject to such conditions. If, on the other hand, the payment is in effect an advance rental or bonus, it must be reported as income by the landlord when it is received, regardless of the period covered or the method of accounting employed by the taxpayers. An advance rental or bonus payment generally must be amortized by the tenant over the period of the lease unless it is applicable against the last period of the lease, in which event it becomes deductible at that time. The key, however, is to distinguish between a security deposit and an advance rental or bonus.

The following are some facts which would support a conclusion that a payment is a security deposit: the obligation of the landlord to return the payment if the tenant performs the terms of the lease; the setting up at the request of the tenant of an escrow arrangement for the deposit; the crediting of interest to the tenant; and the right of the landlord to apply the payment during the lease term only upon a default by the tenant. On the other hand, where the deposit is to be applied

to the rent for the final period of the lease, the landlord has the unrestricted right to use the funds, and there is no provision for interest, the payment has been treated as an advance rental. For a further discussion of the tax effect of advance rentals and security deposits, see the Tax Background § 23.05, at the beginning of this chapter.

Residential deposit escrows:

In some jurisdictions, a security deposit for a residential lease is required by statute to be held as a trust fund by the landlord and remains the property of the tenant until the landlord is entitled under the terms of the lease to appropriate it or apply it against rent. In such states, the deposit would not become income to the landlord so long as it is held subject to such trust.

Security deposit dispositions:

A number of other considerations should be taken into account in drafting the security provisions. These include the disposition of the deposit in the event of the landlord's sale of the property, the assignability of the deposit by the tenant, and the effect of a clause providing for liquidated damages. Generally, the lease gives the landlord the right to transfer the security to a purchaser without any further obligation to the tenant. On the other hand, a tenant's assignment of the security deposit, outright, as collateral, or otherwise, normally requires the consent of the landlord. Some leases provide that the security deposit is to constitute liquidated damages in the event of the tenant's default. The effect of this clause depends upon the local rule. The facts will vary as to when the provision is so unreasonable as to constitute a penalty which is unenforceable, and when it is valid as an attempt in good faith to anticipate and measure reasonable damages.

The following clauses illustrate a variety of arrangements for security deposits, advance rentals, and bonuses. The simplest procedure is the deposit of cash to be returned to the tenant after the termination of the lease and the full performance of its terms by the tenant. Some leases require the repayment of the deposit by the landlord prior to the expiration of the lease term.

FORMS

(1) Security returnable at end of lease--landlord's right to transfer to purchaser

The Tenant has deposited with the Landlord \$5,000 as security for Tenant's full and faithful performance of all the terms of this lease. Landlord shall return such sum when this lease expires if Tenant has fully and faithfully carried out all of its terms. If there is a bona fide sale of the property of which the leased premises are a part, Landlord may transfer to the purchaser the security to be held under the terms of this lease, and the Landlord shall be released from all liability for the return of such security to the Tenant.

(2) Security deposit to be returned to tenant without interest--transfer to purchaser--deposit to remain unencumbered by tenant

Tenant shall deposit with Landlord security for Tenant's full and faithful performance of all the terms, covenants, and

conditions of this lease. Landlord shall return such sum, without interest, after the expiration hereof, if Tenant has fully and faithfully carried out all of such terms, covenants, and conditions. Landlord may apply any part of such deposit to cure any of Tenant's defaults. In such event, Tenant shall, upon demand, deposit with Landlord the amount so applied so that Landlord shall have the full deposit on hand at all times during the term hereof. If there is a sale or lease of the shopping center, subject to this lease, Landlord may transfer the security to the purchaser or lessee. In that event, Landlord shall thereby be released from all liability for the return of such security, and Tenant shall look solely to the new landlord for its return. The preceding shall apply to every transfer or assignment made of the security to a new landlord. Tenant shall not mortgage, assign, or encumber the security deposited under this lease without Landlord's written consent, and any attempt to do so shall be void.

(3) Security returnable at end of lease and after surrender of possession--specific uses to which security may be applied

The Tenant has deposited with the Landlord \$10,000 as security for the Tenant's performance of the terms of this lease. The Landlord may use, apply, or retain all or any part of the security to the extent required for the payment of any rent, additional rent, or other sum or debt as to which the Tenant is in default or for any sum expended or incurred by Landlord due to Tenant's default in any term of this lease, including, but not limited to, any damages or deficiency in the reletting of the leased property, whether such damages or deficiency accrued before or after summary proceedings or other reentry by the Landlord. If the Tenant complies with all of the terms of this lease, the security shall be returned to the Tenant after the date fixed as the end of the lease and after delivery of possession of the leased property to the Landlord. If a sale or lease of the premises of which the leased property forms a part, the Landlord may transfer the security to the purchaser or lessee and the Landlord shall thereupon be released from all liability for the return of such security. The Tenant shall look solely to the new landlord for the return of such security. The Tenant shall not assign or encumber the money deposited as security, and neither the Landlord nor its successors or assigns shall be bound by any such assignment or encumbrance.

(4) Cash security--transfer on sale by landlord--release of mortgagee--tenant prohibited from assigning or encumbering security

(a) *Security deposit.* The Tenant has deposited \$5,000 with the Landlord as security for the Tenant's full and faithful performance of every term, covenant, and condition of this lease. If the Tenant defaults in respect of any term, provision, covenant, or condition of this lease, including but not limited to payment of any rentals, the Landlord may use, apply, or retain all or any part of the security for the payment of any rentals in default or for any other sum which the Landlord may expend or be required to expend by reason of the Tenant's default, including any damages or deficiency in the reletting of the leased property, whether such damages or deficiency accrue before or after summary proceedings or other reentry by the Landlord. If the Tenant complies fully and faithfully with all the terms, provisions, covenants, and conditions of this lease, the security or any balance thereof shall be returned to the Tenant after the time fixed as the expiration of this lease. The Tenant shall not be entitled to any interest on the security. In the absence of evidence satisfactory to the Landlord of any assignment of the right to receive the security, or the remaining balance, the Landlord may return the security to the original Tenant, regardless of one or more assignments of the lease itself.

(b) *Assignment by Landlord.* If there is a bona fide sale, subject to this lease, the Landlord may transfer the security to the purchaser for the benefit of the Tenant. In such case, the Landlord shall be considered released by the Tenant from all liability for the return of the security, and the Tenant shall look to the new landlord solely for the return of the security. The preceding shall apply to every transfer or assignment made of the security to a new landlord.

(c) *Release of mortgagee.* No holder of a mortgage to which this lease is subordinate shall be responsible in connection with the security deposited hereunder, by way of credit or payment of any rentals or otherwise, unless such mortgagee

actually has received the security, but then only to the extent of receipt.

(d) *Restrictions.* Tenant shall not assign or encumber the security deposited under this lease without Landlord's prior written consent. The issuance of a warrant and the reentering of the leased property by Landlord for any default by Tenant before the term hereof expires shall not be deemed a termination of this lease so as to entitle Tenant to recover the security. Landlord shall retain the deposit until the end of the term.

(5) Cash security--landlord's right to intermingle funds--no interest to tenant--prohibition against assignment by tenant

(a) *Deposit.* Concurrently with the execution of this lease, the Tenant has deposited with the Landlord \$8,000 as security for Tenant's performance of all its obligations hereunder. Landlord shall return such sum to Tenant after the expiration hereof if Tenant has performed all of such obligations. Prior to the time that Tenant is entitled to the return of the security deposit, Landlord may intermingle such deposit with its own funds and use the deposit for whatever purposes it desires. Tenant shall not receive any interest on the security deposit.

(b) *Default.* If Tenant defaults in the performance of any of its obligations hereunder, including, but not limited to, the payment of rent and additional rent, the Landlord may use, apply, or retain all or any part of such security deposit for the payment of any unpaid rent and additional rent, or for any other amount which the Landlord may be required to spend by reason of the Tenant's default, including any damages or deficiency in the reletting of the leased property, regardless of whether the accrual of such damages or deficiency occurs before or after an eviction or a summary reentry or other reentry by the Landlord.

(c) *Assignment.* Tenant shall not assign or encumber the security deposit without Landlord's written consent, and any assignment or encumbrance without such consent shall not bind the Landlord. Regardless of any assignment of this lease by the Tenant, the Landlord may return the security deposit to the original Tenant, in the absence of evidence satisfactory to the Landlord of an assignment of the right to receive such security deposit or any part of the balance thereof.

(6) Surety bond as security--landlord's option to terminate upon tenant's failure to furnish

The Tenant shall execute and deliver to the Landlord a bond for \$10,000 with a surety company acceptable to Landlord as the surety thereon to insure the Landlord against loss resulting from the Tenant's failure to perform the terms, conditions, and covenants of this lease. Such bond shall be executed and delivered to the Landlord at the Tenant's expense within 15 days after the execution of this lease. If Tenant fails to furnish such bond, this lease shall terminate 30 days after Landlord gives Tenant written notice to that effect. Such notice shall be sent to Tenant by registered mail, at its above address. Such bond shall be for a term of not less than one year, and shall be renewed thereafter as required for the term of this lease under the same condition of termination as herein provided.

(7) Security deposits received under tenant's subleases--landlord indemnified against claims of subtenants

The Tenant shall indemnify the Landlord against any claim or lien against the Landlord or its successors or against the leased property for the return of any securities under any leases with subtenants for any of the rentable space in the leased property. Neither the Landlord nor its successors shall be liable for any such claim nor shall there be any lien by reason of any such sublease. If Tenant makes any assignment of this lease, Tenant may transfer all securities it then holds under any leases with subtenants, if the assignee agrees in writing to apply all such securities in accordance with the terms of the respective leases and to indemnify both Tenant and Landlord against any claim or lien against them or against the property for the return of any such securities. If the assignee so agrees, Tenant shall immediately be released

from all liability under this paragraph. These provisions shall apply to every subsequent transfer of such securities to a new assignee of this lease.

(8) Advance rental--applied to last three months' rent

Upon the execution of this lease, the Tenant shall pay the Landlord \$3,000 to be applied to the payment of the last three months' rent of this lease. The Landlord shall have the sole and unrestricted right to use such sum and the sum so paid shall constitute an advance rental.

(9) Advance rental--installment payments--applied as partial payment of last year's rent

Upon the execution of this lease, the Tenant shall pay the Landlord \$1,000, an additional \$1,000 within three months thereafter, and an additional \$1,000 within three months following the second payment. The total of \$3,000 shall constitute partial payment of the rental for the last year of this lease, and the balance of such rental for such period shall be paid in equal monthly payments on the first day of each month of the last year of this lease.

(10) Bonus payment--lump sum

To obtain this lease, the Tenant shall pay the Landlord a bonus of \$3,000 upon its execution.

(11) Bonus payment--installment payments

To obtain this lease, the Tenant shall pay the Landlord a bonus of \$3,000, payable in annual installments of \$1,000. The first payment shall be made upon the signing of this lease, and the remaining installments shall be paid on the second and third anniversary dates of this lease.

(12) Bonus by promissory note

Simultaneously with the execution of this lease, the Tenant will deliver to the Landlord its duly executed promissory note to pay the Landlord \$3,000 on or before _____[date], and \$3,000 on or before _____[date]. The consideration for the total of \$6,000 is the execution of this lease by the Landlord. Such amount shall be fully earned by the Landlord upon the execution of this lease. No part shall be applied to or be in satisfaction of any rental becoming due by the Tenant under the terms of this lease.



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Current Legal Forms for Real Estate
Chapter 23 REAL ESTATE LEASES
Part IV. Forms
B. LEASE CLAUSES

31-23 Current Legal Forms for Real Estate FORM 23.37

AUTHOR: by Thomas G. Belden

FORM 23.37 Restrictions on use

COMMENT

There is an infinite variety of clauses covering the uses to which leased property may be put by a tenant. The clauses in this group illustrate some of the more common limitations placed upon a tenant's activities.

General restrictions:

In some jurisdictions, it may be sufficient to allow a tenant the broadest leeway, such as the right to use the premises for "any lawful purpose," unless it is intended to limit his use to a specific purpose. Such a broad provision may be appropriate if zoning regulations, building codes, a certificate of occupancy, and general prohibitions against nuisances are considered to impose adequate limitations. Frequently, a number of restrictions are spelled out, particularly limitations which would not apply as a matter of local law. In this category are restrictions on activities jeopardizing insurance coverage, impairing the landlord's title, or endangering or adversely affecting the value of the property. In addition, violations of the certificate of occupancy, breaches of governmental laws and regulations, and the maintenance of nuisances are often specifically prohibited.

Limited restrictions:

Where a specific business use is contemplated, it is the practice to permit activities which are allied to the main enterprise. Where there is a common landlord for several adjoining tenants, a clause restricting competition is often essential for the protection of each tenant. The specification

of a particular use in a lease does not normally constitute a representation on the landlord's part that the use is permitted. A zoning variance, a license, or a governmental approval may be required for the contemplated use. The tenant may have to predicate his obligations under the lease upon his obtaining the necessary variance, license, or approval. If this appears certain, it may be sufficient merely to require the landlord's cooperation in obtaining it. The tenant's expenditures to obtain the zoning variance, license, or government approval are not deductible when paid but must be amortized as a capital expenditure over the term of the lease.

FORMS

(1) Use for any lawful purpose

The Tenant may use and occupy the leased property for any lawful purpose. The Tenant shall not use or knowingly permit any part of the leased property to be used for any unlawful purpose.

(2) Retail use limited to sale of specified type of items--sale of specified incidental items permitted

Tenant shall use the leased premises solely for the purpose of conducting the following business, and for no other purpose: the sale of medium to better Men's Boy's clothing, furnishings and accessories, including the sale of men's sundries and Men's and Boy's shoes as an incidental part thereof.

(3) Prohibition against close-out sales--conduct of retail business in high class manner

Tenant shall not, throughout the term of this lease, conduct any auction, bankruptcy, going-out-of-business, or close-out sales on or from the demised premises, and shall at all times conduct its business in a high class manner suitable for the building and the neighborhood in which it is located. Tenant shall keep the show window of the demised premises and its window displays at all times in a neat and attractive condition.

(4) Prohibition against unlawful, disreputable, or extra-hazardous use--enforcement against subtenants

The Tenant may use and occupy the leased property for any lawful purposes. Tenant shall not use or occupy or permit the leased property or any part thereof to be used or occupied for any unlawful business, use, or purpose, for any business, use, or purpose deemed disreputable or extra-hazardous, or for any purpose or in any manner which is in violation of any present or future governmental laws or regulations. The Tenant shall, promptly after the discovery of any such unlawful, disreputable, or extra-hazardous use, take all necessary legal and equitable steps, to compel the discontinuance of such use and to oust and remove any subtenants, occupants, or other persons guilty of such unlawful, disreputable, or extra-hazardous use. The Tenant shall indemnify the Landlord against all costs, expenses, liabilities, losses, damages, injunctions, suits, fines, penalties, claims, and demands, including reasonable counsel fees, arising out of any violation of or default in these covenants.

(5) Prohibition against uses affecting certificate of occupancy, insurance, structural changes

The Tenant shall not use or occupy or permit the leased property to be used or occupied, nor do or permit anything to be done in or on the leased property, in a manner which will in any way violate any certificate of occupancy affecting the leased property, or make void or voidable any insurance then in force with respect thereto, or which will make it impossible to obtain fire or other insurance required to be furnished by the Tenant hereunder, or which will cause or be likely to cause structural damage to the building or any part thereof, or which will constitute a public or private nuisance, and shall not use or occupy or permit the leased property to be used or occupied in any manner which will violate any present or future laws or regulations of any governmental authority.

(6) Prohibition against use resulting in insurance rate increase--landlord's remedy upon tenant's failure

The Tenant shall not use the leased property in a manner which shall increase the rate of fire insurance in the building in which such property is located over that in effect prior to this lease. If the Tenant's failure to comply with the provisions of this paragraph causes the fire insurance rate to be higher than it otherwise would be, the Tenant shall reimburse the Landlord, as additional monthly rent, for that part of all fire insurance premiums thereafter paid by the Landlord which have been charged because of Tenant's failure.

(7) Prohibition against use violating certificate of occupancy--tenant's obligation to discontinue use upon notice from authorities--landlord's rights upon tenant's failure

The Tenant shall not, at any time, use or occupy the leased property in violation of the certificate of occupancy. If any competent governmental authority at any time contends or declares by notice, violation, order, or otherwise that the leased property is used for a purpose which is a violation of the certificate of occupancy, the Tenant shall, upon five days' written notice from the Landlord, immediately discontinue such use of the leased property. Tenant's failure to do so after such notice shall be considered a default in the fulfillment of a covenant of this lease, whereupon Landlord may immediately terminate this lease and exercise all rights, privileges, and remedies given to it by law and under this lease. The statement in this lease of the nature of the business to be conducted by the Tenant in the leased property shall not be deemed or construed to constitute a representation or guaranty by the Landlord that such business may be conducted in the leased property or is lawful or permissible under the certificate of occupancy issued for the building of which such property forms a part, or is otherwise permitted by law.

(8) Prohibition against specified uses--no use impairing landlord's title or adversely affecting value or character of property

The Tenant shall not use or allow the leased property or any part thereof to be used or occupied for any unlawful purpose or in violation of any certificate of occupancy or certificate of compliance covering or affecting the use of the leased property. The Tenant shall not permit any act to be done or any condition to exist on the leased property or any article to be brought thereon which may be dangerous, unless safeguarded as required by law, which may in law constitute a public or private nuisance, or which may make void or voidable any insurance then in force with respect to the leased property. The Tenant shall not permit the leased property to be used by the public, as such, without restriction or in such manner as might reasonably tend to impair the Landlord's title to the leased property or might reasonably make possible a claim of adverse usage or adverse possession by the public, as such, or of implied dedication of the leased property. The Tenant shall not use or permit the use of the leased property for any purpose which in the Landlord's reasonable opinion would adversely affect the then value or character of the leased property. Any dispute between the Landlord and the Tenant arising under the provisions of this paragraph shall be submitted to arbitration as provided in this lease.

(9) Restrictions on floor load--heavy mechanical equipment

(a) The Tenant shall not place a load upon any floor of the leased property exceeding the floor load per square foot which such floor was designed to carry and which is allowed by law. The Landlord certifies that the street floor space of the leased property will carry 100 pounds live load per square foot of floor space, and that the second floor space of the leased property will carry 50 pounds live load and 20 pounds for partitions per square foot of floor space. If the Tenant desires a floor load in excess of that specified for any portions of the leased property the Landlord shall strengthen and reinforce the floor so as to give the Tenant the live load desired, if the Tenant submits to the Landlord the plans showing the locations of and the desired floor live load for the areas in question, and agrees to reimburse the Landlord on demand for the cost of such strengthening and reinforcement.

(b) The Landlord may prescribe the weight and position of all safes which must be placed so as to distribute the weight evenly.

(10) Restrictions on moving heavy equipment without landlord's consent--special handling by licensed persons--indemnification of landlord

(a) The Tenant shall not move any heavy equipment, heavy machinery, freight, bulky items, or fixtures into or out of the leased property without the Landlord's prior written consent.

(b) If any of the foregoing items require special handling, the Tenant shall employ only persons holding a Master Rigger's license to do the work, and all work shall comply with all federal, state, and local regulations.

(c) Notwithstanding Landlord's consent, Tenant shall indemnify and hold Landlord harmless from and against all damages to property and all damages or moneys paid by Landlord in settlement of all claims or judgments, including all related expenses and attorneys' fees and all costs incurred in repairing any damages to the leased property.

(11) No representation by landlord as to use--specific restrictions on use

(a) The Tenant shall not at any time use or occupy the leased property in violation of the certificate of occupancy issued for the building of which the leased property forms a part. The statement in this lease of the nature of the business to be conducted by the Tenant in the leased property does not constitute a representation or guaranty by the Landlord that such business may be conducted in the leased property, or is lawful or permissible under the certificate of occupancy issued for the building of which the leased property forms a part, or is otherwise permitted by law.

(b) The Tenant shall comply with all applicable federal, state, county, and municipal laws and regulations governing its business in the leased property.

(c) The Tenant shall conduct its business in a manner, regarding noise and other nuisances, that will not interfere with, annoy, or disturb any other tenant in the conduct of its business, or the Landlord in the management of the building.

(d) The Tenant shall not keep within the leased property any article of dangerous, inflammable, or explosive character which increases the danger of fire upon the leased property, or which would be deemed "hazardous" or "extra-hazardous" by any responsible insurance company.

(e) Tenant shall not obstruct or encumber the sidewalks, entrances, passages, courts, elevators, or halls or use them for any purpose other than access to the leased property.

(12) Use for apartment house--commercial or professional uses if permitted by law

The Tenant shall use the leased property for the purpose of operating and maintaining an apartment house, including any commercial or professional tenancies and any stores on the street-level grade, if permitted by law.

(13) Use for specific office purpose--limitation on number of employees--material consideration

The Tenant shall use the leased property solely for the purpose of conducting an insurance brokerage, and for no other purposes. The Tenant shall not, without the Landlord's written consent, permit the leased property to be occupied by any other person, firm, or corporation or by more than 25 employees exclusively employed in the Tenant's insurance brokerage business. This restriction on the type of use of the leased property and the number and type of occupants is a material consideration for the Landlord to enter into this lease.

(14) Use of apartment as residence

(a) *Residential use.* The Tenant shall use the leased property exclusively for a private residence.

(b) *Pets prohibited.* No domestic animals shall be kept in or about the leased property without the Landlord's written consent.

(c) *Appliances.* The Tenant shall not install or use a laundry or dish washing machine, air conditioning or ventilating equipment, or other mechanical equipment, or a television or radio antenna in or outside of the apartment without the Landlord's written consent.

(d) *Storage.* The laundry rooms and storerooms are provided and maintained gratuitously by the Landlord, and their use is not appurtenant to the leased property. Any use of the laundry rooms or storerooms by the Tenant shall be at its own risk. The Landlord shall not be or become liable for any loss or damage to persons or property by reason of such use.

(e) *Rules.* The Tenant shall conform to the rules and regulations attached hereto and hereafter adopted to protect the building and to further the general comfort and welfare of the occupants.

(15) Use for supermarket operation--"stay-open" and "radius" clauses

(a) *Retail use.* Subject to and in accordance with all rules, regulations, laws, ordinances, statutes, and requirements of all governmental authorities and the Fire Insurance Rating Organization and Board of Fire Insurance Underwriters, and all similar bodies having jurisdiction, the Tenant shall use the leased property solely for the retail sale of food for off-premises consumption, except that an area not to exceed 3,000 square feet of floor space, inclusive of aisle space, may be used for the sale of non-food items.

(b) *Operation, hours.* The Tenant shall conduct its business in the leased property under the name of Tasty Products, Inc., as a typical supermarket operation, and in any consistent manner therewith that will achieve the maximum volume in gross sales. The Tenant shall be open for business on all days and for all hours during which the majority of supermarkets in the community are open for business.

(c) *Radius restriction.* Neither the Tenant nor any person owning a greater than 20 percent interest in it shall own,

operate, manage, or have any interest in the profits of any similar store or business within a radius of five miles from the leased premises, unless such store or business is in operation on the date of this agreement.

(16) Use as store in shopping mall--hours of operation--continuous, active, and diligent operation of business--penalty for failure to remain open--merchants association

(a) *Use.* Lessee shall operate its business in the Demised Premises during the term of this Lease under the name "A Bedder World." The Demised Premises shall be occupied and used solely for the purpose of retail sales of primarily beds, water beds, and associated bedroom furniture and accessories, including, but not limited to, bedding, pillow furniture and pillow couches, but expressly excluding the sales of leather, rosewood, or butcher-block furniture, housewares and gourmet utensil items.

(b) *Use restrictions.* Lessee shall not abandon or leave vacant the Demised Premises, or permit, license, or allow them to be occupied by any other party. Lessee shall:

(i) Keep the Demised Premises continuously and uninterruptedly open for business at least from 10:00 a.m. to 9:30 p.m. each day of the week, unless prevented from doing so by strikes, fire, casualty, or other causes beyond Lessee's control.

(ii) Conduct no auction, fire or bankruptcy sales, or similar practice.

(iii) Display no merchandise outside the Demised Premises nor in any way obstruct the malls or sidewalks adjacent thereto. Lessee shall store all trash and refuse in appropriate containers within the Demised Premises and attend to the daily disposal thereof in the manner designated by Lessor. Lessee shall not burn any trash or rubbish anywhere within the confines of the shopping center complex, or operate a garbage grinder without Lessor's prior consent. If Lessor elects to provide refuse compactor service in the shopping center complex, Lessee shall use said service exclusively for disposal of all waste. If compactor service is not provided, Lessee shall use a refuse disposal service approved by Lessor.

(iv) Load or unload all merchandise, supplies, fixtures, equipment, and furniture and cause the collection of rubbish only through the rear service door or doors of the Demised Premises. No deliveries of any kind shall be made through the front entrance.

(v) Keep the Demised Premises in a careful, safe, clean, and proper manner; and not permit any rubbish or refuse of any nature emanating from the Demised Premises to accumulate in the mall areas or rear delivery area.

(vi) Prevent the Demised Premises from being used in any way which will injure the reputation of the same or of the Shopping Center of which it is a part, or from being used in any way which may be a nuisance, annoyance, inconvenience, or damage to the other tenants or occupants of the shopping center complex, including, without limiting the generality of the foregoing, noise by the playing of any musical instrument or radio or television or the use of a microphone, loud speaker, electrical equipment, or other equipment which may be heard outside of the Demised Premises.

(vii) Display or affix no sign, advertising, placard, name, trademark, insignia, decal, advertising matter, or any other item or items on any exterior door, wall, or window or within any display window space in the Demised Premises or within five feet of the front of the Demised Premises in the case of an open storefront, or within any entrance to the Demised Premises. Lessor may, without notice to Lessee and without any liability for damage to the Demised Premises reasonably caused thereby, remove all items displayed or affixed in violation of the above provisions.

(viii) Abide by all reasonable rules and regulations established by Lessor, from time to time, with respect to the

common areas, facilities, improvements, and sidewalks.

(c) *Active operation.* Upon commencement of the term hereof, Lessee shall proceed with due dispatch and diligence to open for business in the Demised Premises. Lessee shall thereafter continuously, actively, and diligently operate its business on the Demised Premises in a high grade and reputable manner, maintaining therein an adequate staff of employees and a full and complete stock of merchandise during business hours throughout this term, unless prevented from doing so by fire, strikes, or other contingencies beyond its control. If Lessee fails to open for business within 30 days after the term commences or thereafter fails to thereafter keep the Demised Premises open each business day during the hours specified herein, then Lessee shall pay as rent during each month the Demised Premises are not open or in which such hours are not maintained an amount equal to double the Minimum Rent provided for in Article III. Such amount represents the agreed liquidated damages to Lessor, since the exact amount of its damages cannot be ascertained with certainty. Lessor's right to receive such liquidated damages shall be in addition to all its other rights and remedies.

(d) *Compliance with law.* Lessee shall not use or occupy the Demised Premises or any part thereof, or permit all or part of such premises to be used or occupied, for any purpose contrary to law, the rules or regulations of any public authority, the requirements of any insurance underwriters or rating bureaus, or in any manner so as to increase the cost of insurance to Lessor over the normal cost of such insurance for the use above permitted for the type and location of the building of which the Demised Premises are a part. Lessee shall, on demand, reimburse Lessor for all extra premiums caused by Lessee's use of the Demised Premises, regardless of whether Lessor has consented to such use. Nothing contained herein shall permit a use other than the use provided above. Lessee shall promptly comply with all present and future laws, regulations, and rules of applicable county, state, federal, and other governmental authorities, and their respective bureaus and departments, as well as of the National Board of Fire Underwriters or any other body exercising similar function which may be applicable to the Demised Premises, including the making of any required structural changes thereto. If Lessee shall install any electrical equipment that overloads the lines in the Demised Premises, Lessee shall make whatever changes are necessary to comply with the requirements of the applicable insurance underwriters and governmental authorities.

(e) *Merchants association.* Lessee shall become a member of any Merchants Association formed by the tenants of the Shopping Center and approved by Lessor, abide by all rules and regulations established by the Merchants Association and maintain such membership. Lessee shall cooperate in any Merchants Association's Shopping Center wide sales and promotions and advertise annually in at least four Shopping Center wide Merchants Association newspaper sections or advertisements as from time to time determined by the Association's Board of Directors. The minimum size of such advertisements shall be either 1/8 page in a full-sized newspaper section, or 1/4 of a page of a tabloid size advertisement. In addition to the foregoing, Lessee shall pay as its share of the cost of the activities conducted by the Merchants Association the 25 cents per year for each square foot of Floor Area contained in the Demised Premises ("Merchants Association payment"), payable in advance in quarter annual installments, plus a nonrecurring fee of 25 cents per sq. ft. for each square foot of Floor Area contained in the Demised Premises as an initial membership fee in such Merchants Association. Commencing with the second Lease Year, and each Lease Year thereafter, the Merchants Association payment shall be adjusted upwards or downwards in the manner set forth below, but never less than the above amount. The amount of the Merchants Association payment for each Lease Year, commencing with the second Lease Year, shall be determined as follows: Using the Consumer Price Index for "All Urban Consumers" (CPI-U, 1982-84 Base = 100), published by the Bureau of Labor Statistics of the United States Department of Labor, applicable on the date of this Lease as the denominator and the index number for the first month of each Lease Year thereafter as the numerator, multiply the resulting fraction by the above stated Merchants Association payment. If the Bureau of Labor Statistics changes the base period, the new index numbers shall be substituted for the old index numbers in making the above computation. If the above Consumer Price Index is discontinued, comparable statistics on the purchasing power of the consumer dollar, as then published by a recognized financial periodical, shall be used in making such computation.

(17) Use as administrative offices--no injury to reputation of building--extra hazardous activity prohibited--general tenant covenants and covenants regarding environmental compliance

(a) *Tenant's use of leased premises.* Tenant shall use the Leased Premises for administrative offices for a _____ business only and for no other purpose whatsoever.

(b) *Nature of use.* Tenant shall use and occupy the Leased Premises in a careful, safe and proper manner and shall keep the Leased Premises in a clean and safe condition in accordance with local ordinances and the lawful directions of proper public officers. Tenant shall not use, occupy or permit the Leased Premises to be used or occupied, nor do or permit anything to be done in or on the Leased Premises, in whole or in part, in a manner which would in any way violate any certificate of occupancy affecting the Building.

(c) *Reputation of building.* Tenant shall not use or allow the Leased Premises to be used, for any purpose other than as specified herein, and shall not permit the Leased Premises to be used for any unlawful, disreputable or immoral purpose or in any way that will injure the reputation of the Building, nor permit the Leased Premises to be occupied in whole or in part by any other person, except as otherwise provided herein.

(d) *Extra hazardous activity.* Tenant agrees that it will not do or permit to be done, or keep or suffer to be kept, anything in, upon or about the Leased Premises which will contravene Landlord's policies insuring against loss or damage by fire or other hazards, or which will prevent Landlord from procuring such policies in companies acceptable to Landlord. Tenant shall not use or occupy or permit the Leased Premises to be occupied, nor do or permit anything to be done in or on the Leased Premises, in whole or in part which will cause or be apt to cause structural injury to the Leased Premises or the Building or any part of either, or as or will constitute a public or private nuisance. Tenant shall permit no waste, damage or injury to the Leased Premises.

(e) *Exterior.* Tenant will not mark, paint, decorate, drill or in any way deface the exterior of the Leased Premises or the Building without first obtaining Landlord's written approval. Tenant shall remove promptly upon order of Landlord any paint or decoration which has been applied to or installed upon the exterior of the Leased Premises by Tenant, its agents, employees or contractors without Landlord's prior written approval, or take such other action with reference thereto as Landlord may direct.

(f) *Rubbish and trash.* Tenant shall not permit the accumulation of rubbish, trash, garbage or other refuse in and around the Leased Premises or the Building, will remove same at Tenant's expense, and will keep such refuse in proper containers on the interior of the Leased Premises until called for to be removed. In the event Tenant fails to remove any accumulation of rubbish within three (3) days after notice to remove the same, Landlord shall have the right to remove the same, in which event the cost thereof shall be paid by Tenant as additional rent for the following month, except that Landlord shall at no time be obligated to remove the same but may cancel this Lease if continual violations occur.

(g) *General covenants of tenant.* Tenant will, at its sole cost: (i) comply with all laws or ordinances and all valid rules, regulations and requirements of all county, municipal, state, federal and other governmental authorities, now in force or which may hereafter be in force, pertaining to the Leased Premises; (ii) comply with all recommendations of any public or private agency having authority over insurance rates with respect to the use or occupancy of the Leased Premises by Tenant; (iii) install and maintain fire extinguishers; (iv) comply with all reasonable rules and regulations which Landlord may, from time to time, establish for the use and care of the Leased Premises, Building and Common Areas, and other facilities in the Development; (v) not park on, and require its employees to refrain from parking any vehicles on, Development Land except in such places as may be designated from time to time by Landlord for the use of Tenant and its employees; (vi) not load or unload or permit the loading or unloading of merchandise, supplies or other property from any doors except those doors designed for such purpose; and (vii) adequately heat the Leased Premises to prevent damage by freezing or otherwise.

(h) *Covenants regarding environmental compliance.*

(1) Tenant will not use, generate, manufacture, produce, store, release, discharge, or dispose of on, under or about the Leased Premises and the Development or transport to or from the Leased Premises and the Development any Hazardous Substance (as defined below), or allow any other person or entity to do so except in minor amounts under conditions permitted by applicable laws.

(2) Tenant shall keep and maintain the Leased Premises in compliance with, and shall not cause or permit the Leased Premises to be in violation of, any Environmental Law (as defined below).

(3) Tenant shall give prompt written notice to Landlord of:

(i) any proceeding or inquiry by any governmental authority with respect to the presence of any Hazardous Substance on the Leased Premises or the migration thereof from or to other property;

(ii) all claims made or threatened by any third party against Tenant or the Leased Premises relating to any loss or injury resulting from any Hazardous Substance; and

(iii) Tenant's discovery of any occurrence or condition on any real property adjoining or in the vicinity of the Leased Premises that could cause the Leased Premises or any part thereof to be subject to any restrictions on the ownership, occupancy, transferability or use of the Leased Premises under any Environmental Law.

(4) Tenant shall protect, indemnify and hold harmless Landlord, its directors, officers, employees, agents, successors and assigns from and against any and all loss, damage, cost, expense or liability (including attorney fees and costs) directly or indirectly arising out of or attributable to the use, generation, manufacture, production, storage, release, threatened release, discharge, disposal, or presence of a Hazardous Substance on, under or about the Leased Premises, including, without limitation: (i) all foreseeable consequential damages, and (ii) the costs of any required or necessary repair, cleanup or detoxification of the Leased Premises and the Development and the preparation and implementation of any closure, remedial or other required plans. The foregoing environmental indemnity shall survive the expiration or termination of this Lease and/or any transfer of all or any portion of the Leased Premises, or of any interest in this Lease, and shall be governed by the laws of the State of _____.

(5) Definitions:

"Environmental Law" means any federal, state or local law, statute, ordinance, or regulation pertaining to health, industrial hygiene, or the environmental conditions on, under or about the Leased Premises, including without limitation the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 ("CERCLA") as amended, 42 U.S.C. Sections 9601 *et seq.*, and the Resource Conservation and Recovery Act of 1976 ("RCRA"), 42 U.S.C. Sections 6901 *et seq.*

The term "Hazardous Substance" includes without limitation:

(i) Those substances included within the definitions of "hazardous substances," or "solid waste" in CERCLA, RCRA, and the Hazardous Materials Transportation Act, 49 U.S.C. Sections 1801 *et seq.*, and in the regulations promulgated pursuant to those laws;

(ii) Those substances listed in the United States Department of Transportation Table (49 CFR 172.101 and amendments thereto) or by the Environmental Protection Agency (or any successor agency) as hazardous substances (40 CFR Part 302 and amendments thereto);

(iii) Such other substances, materials and wastes which are or become regulated under applicable local, state or federal law, or the United States government, or which are classified as hazardous or toxic under federal, state, or local laws or regulations; and

(iv) Any material, waste or substance which is (a) asbestos, (b) polychlorinated biphenyls, (c) designated as a "hazardous substance" pursuant to Section 311 of the Clean Water Act, *33 U.S.C. Sections 1251 et seq. (33 U.S.C. Section 1321)* or listed pursuant to Section 307 of the Clean Water Act (*33 U.S.C. Section 1317*); (d) explosives, or (e) radioactive materials.



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Chapter 23 REAL ESTATE LEASES
Part IV. Forms
B. LEASE CLAUSES

31-23 Current Legal Forms for Real Estate FORM 23.38

AUTHOR: by Thomas G. Belden

FORM 23.38 Exclusive use provisions and radius restrictions

COMMENT

In the absence of specific protection in a lease, a tenant has no right to prevent competing uses by other tenants in the same building, tenants in the vicinity or by the landlord. For this reason, many leases provide that the landlord will not lease or permit the use of other parts of a building for activities which will offer business competition to the tenant. Such provisions are commonly referred to as "exclusive use" clauses.

In formulating an exclusive use clause the draftsman may consider:

- (1) Failure of the landlord to insert a restriction on use in a subsequent lease to another tenant;
- (2) The operation of a competing activity by the landlord;
- (3) Sale of the premises to a new owner who either competes or leases the premises to another for a competing use.

Radius restriction on the tenant:

A radius restriction clause prohibits the tenant from opening a similar store within a specified radius of the landlord's shopping center. Generally, a radius clause could give rise to the issue of whether it is an unreasonable restraint of trade. The resolution of this issue depends upon the facts and circumstances of each particular case. Attention should be given to the reasonableness of the time, distance, and purpose of the particular radius clause. This requires an examination of all

relevant facts in light of applicable law.

Radius restrictions do serve a legitimate business purpose. To obtain the substantial sums necessary to construct shopping centers, developers have used two useful devices: the radius clauses and percentage rent. Percentage rent, generally based on the gross sales volume in each store, was developed to deal with fluctuations in the economy and the particular business over the term of the lease. As a necessary corollary, the developer relies upon a radius clause so that the tenant will not open a site too close to the shopping center which would pull customers away from the shopping center and reduce the percentage rent. A radius clause which is reasonable in terms of time, distance, and purpose, and which is merely ancillary to a lawful lease, should generally be enforceable, although applicable law should be examined.

Radius restriction and gross sales for percentage rent:

Lease clauses which restrict tenants in shopping centers from operating competing stores within a certain radius of the center aim to protect the developer's percentage of rentals by insuring that tenants devote their best efforts to generating sales within the center. While a second store operated by the same tenant within the same trade area might be at a competitive disadvantage to the store within the center, it still may siphon off at least some customers from the center. This could result in decreased sales and decreased income. Instead of an outright ban against the tenant's operation of a similar store within a given distance from the center, a less restrictive provision could be employed for protecting the developer's rentals. This could be done by including the gross sales of any store within the radius in the gross sales of the leased store within the center for the purpose of computing the lessee's percentage rent.

Exclusive use provisions:

It is not uncommon for a shopping center lease to restrict the landlord from allowing a use in another store in the shopping center similar to the use specified in the lease. For example, a lease of a computer store may contain a restriction against leasing to another computer store, within the center or within a specified radius from the center. The restriction is frequently drafted in one of three ways. One method is to restrict the landlord from leasing, or entering into a lease for a store to be used for the particular use. An alternative is a covenant by the landlord not to permit the particular use in a store in the shopping center. A third alternative is the landlord's grant of the exclusive right to the particular use to the tenant. Which style of restriction is desirable in a particular lease depends on the facts and circumstance of a particular lease transaction as well as applicable law.

Antitrust aspects:

Ordinarily, a provision in a shopping center lease granting a tenant the exclusive right to carry on a certain line of business in the shopping center does not constitute an illegal restraint of trade as long as the scope and effect of the restriction is not unreasonably broad. Lease restrictions are often necessary in order for a shopping center to obtain a desirable tenant. Whether a particular restriction is unreasonably broad depends upon the facts and circumstances of the transaction, and local as well as federal law. There is no guarantee, however, that a particular restriction, although apparently reasonable, would not be challenged as a restraint on trade. The resolution of this issue in many cases is a question of fact rather than a question of law. The same clause may be valid or deemed a restraint of trade depending upon different facts and circumstances.

The Federal Trade Commission has issued various orders prohibiting the inclusion of certain anticompetitive restrictive clauses in shopping center leases which are an unreasonable restraint on trade. Accordingly, many prior practices have been abandoned in order to conform to the body of developing regulatory law in this area.

For example, the following anticompetitive clauses have been forbidden:

- (1) Giving a drugstore-chain landlord the right to be the only drugstore in a shopping center;
- (2) Giving the landlord the "right of first refusal" on placing another drugstore in a shopping center;
- (3) Restrictions imposed by a substantial chain tenant upon types of goods and services which may be offered for sale by satellite and other tenants already within a shopping center where the landlord-chain is a tenant.

In general, all lease agreements which prohibit or in any manner control the entrance of prospective tenants into shopping centers, or control or restrict the business operations of other tenants therein, could subject the landlord to FTC action.

Tax aspects:

In the event of a breach of an exclusive use clause, there may be a problem in measuring the tenant's loss. The tenant may have an action for loss of profits or for injury to goodwill. Or the damages may be the difference in rental value with and without the covenant. The method of taxing the amount received by the tenant depends upon the nature of the recovery. As a general rule, amounts recovered for damages to a taxpayer's capital or goodwill represent a return of capital. Such amounts are not taxable unless they exceed the taxpayer's basis of the asset to which they are attributable. On the other hand, damages for the destruction of business are taxable if they represent a recovery of lost profits rather than the loss of tangible or intangible assets. In some cases, however, a recovery may represent compensation for damage to goodwill even though the amount is measured by the loss of profits. Thus, damages have been first attributed to the loss of physical assets and to an investment in advertising before being attributed to the loss of income. Among the factors taken into account in classifying the recovery are the causes of action permitted under local law, the nature of the claim asserted by the tenant, and the measure of the recovery.

FORMS

(1) Landlord's agreement not to rent other space in shopping center for specified use

The Lessor shall not rent other space in the shopping center for use solely as a men's specialty shop specializing in clothes of the same quality as those of the Tenant at the time of execution of this lease.

(2) Retail use by tenant--restriction against landlord leasing to another to operate a similar store--store to remain open and stocked

The Tenant may use the demised premises only for a stationery, card, and gift shop. The Landlord shall not lease to any other Tenant whose use of space in the shopping center is to be for the principal purpose of the operation of a stationery, card, and gift shop. The demised premises shall be kept open and fully stocked for business during normal business hours.

(3) Landlord restricted from leasing space for use specified--conditioned on tenant performance of lease terms--major tenants excepted

Notwithstanding any contrary provision herein, so long as Tenant is not in default of any term, provision, covenant, or condition hereof, Landlord shall not lease or cause to be occupied any other space in the shopping center for the purposes of a medium to better priced men's and boy's clothing store. This clause shall not be applicable to:

The Major Department Store

The Chain Drugstore

The National Department Store

The Local Supermarket

or to any Tenant where the sale of Men's and Boy's clothing is incidental to its main line of business.

(4) Landlord's agreement not to permit similar use in premises or within a specified radius--permitted similar uses described

In order to induce the Tenant to enter into this lease, neither Landlord nor its successors and assigns, officers, directors, shareholders (holding more than 10 percent of its stock), parent, affiliated and subsidiary corporations, or affiliated parties shall use, suffer, permit, or consent to the use or occupancy of (a) any part of the Entire Premises or adjacent premises as a supermarket or for the sale of food or food products intended for off-premises consumption or (b) any other premises owned or controlled by Landlord or any of the above mentioned parties within a radius of two miles of the Entire Premises as a food supermarket.

Notwithstanding any contrary provision of this Section, Landlord may lease stores within the Entire Premises for the following uses upon the following terms and conditions:

(a) One bakery selling home-style baked goods, baked by its proprietor.

(b) Any premises leased to reputable chains operating variety stores or junior department stores may be operated by them without restriction if they do not operate such premises or permit the same to be operated as a supermarket.

(c) Premises occupied by Washington Stores Corporation, or any of its subsidiaries, successors or assigns (operated under the name of "Alberts") may be operated as a department store without restriction, except that not more than 1,000 square feet of its selling floor space may be devoted to sales of food products. For the purposes of this restriction, candy, confections, cookies, potato chips, pretzels, and other "snack" products shall not be considered food products.

(d) Any restaurant may sell food prepared on the premises ready for immediate consumption without further preparation either on or off the premises.

(5) Tenant's exclusive right to sell specified products--not applicable to other specified stores

The Tenant shall have the exclusive right to sell products normally sold by a bakery shop, except that such exclusive right will not apply to or prevent the sale of such products by chain tenants such as the super food markets, the Jr. Department store or the Variety store and the Drug store. The Landlord shall not rent any other space in the shopping center for the purpose of baking on the premises, with the exception of the Chains, but the Landlord shall not rent any space to a bakery chain.

(6) Restriction on tenant operating a similar business within specified radius--tenant includes related parties--inclusion of income from other stores within the radius in percentage rent gross income

During the term of this Lease and all renewals and extensions thereof, Tenant shall not, directly or indirectly, or through subsidiary or affiliated corporations, partnerships, or other commercial entities (and no officer or director, or shareholder owning more than 10 percent of the Tenant's stock, shall) engage in the same or any similar business as that conducted on the Demised Premises within a radius of four miles from the extreme limits of the Landlord's premises. This restriction shall not apply to any business of Tenant that (i) is open and doing business within the specified radius as of the date this Lease is executed, or (ii) that is opened for business to the public within such radius after execution thereof. The exception in (ii) shall apply only if the parties agree in writing to the following: to add the gross sales of such business to the gross sales from the Tenant's business in the Demised Premises for the purpose of computing percentage rental under this Lease; and not to include gross sales from any store opened more than four years from the date hereof within such four-mile radius, except that the required minimum annual rental shall be increased by 35 cents per square foot of the floor area in the demised premises (as specified in Article II above), starting on the date such store opens for business.

(7) Landlord's agreement not to rent space in medical office building to competing radiology service--exception for dentists and physicians with X-ray equipment for their own patients--provision void if tenant defaults, assigns, sublets, or changes use

During the term, Landlord shall not permit any portion of Landlord's building to be used by a Competing Business. "Competing Business" shall mean an office engaged primarily in providing radiology services to the public, excluding: (i) any business occupying space in the building directly or (as an assignee or sublessee) indirectly under a lease executed prior to the execution of this lease by Landlord and Tenant; (ii) Landlord and Tenant understand and agree that certain tenants of the building (i.e., dentists and doctors) and specifically The _____ Clinic, will have, as a service to their patients, X-ray equipment in their offices and that those services do not constitute a default under this lease. This paragraph shall be null and void if: (a) an event of default, as described in Paragraph _____ of this lease, shall have occurred; (b) Tenant shall have assigned its rights under this lease to sublet the premises; or (c) the premises shall cease to be used primarily for the use of providing radiology services to the public.

(8) Landlord prohibited from competing with tenant

The Landlord shall not, during the continuance of this lease, directly or indirectly engage in or compete with the Tenant's trade or business. However, the Landlord may manufacture, within the corporate limits of the municipality in which the demised premises are situated, goods handled by the Tenant, if such goods are conveyed and sold beyond such corporate limits.

(9) Tenant's rights upon landlord's breach of prohibitions against competing

If there is a breach of any provision of this paragraph, the Tenant shall have the following rights and remedies, none of which shall be exclusive of the others or any other remedy otherwise available to the Tenant:

(a) *Injunction.* The Tenant may institute proceedings to enjoin the violation, either in its name or that of the Landlord.

(b) *Termination.* If the conflicting use continues for a period of ten days after the Tenant gives written notice to Landlord, Tenant may, at any time thereafter, elect to terminate this lease. If Tenant so elects, this lease shall be terminated on the date fixed in the notice of such election, and Tenant shall be released and discharged from all further liabilities hereunder.

(c) *Rent.* So long as such condition exists, the Tenant's only obligation with respect to rental shall be the payment of percentage rentals only, with no guaranteed minimum annual rentals, on the basis of the percentages of gross sales. Such percentage rentals shall be payable only after each lease year of the term expires, and only while such condition continues.

(d) *Expenses.* The Tenant may hold the Landlord liable for all costs and expenses, including counsel fees, sustained or incurred in connection with any proceedings instituted by the Tenant. If the Landlord does not institute and proceed diligently with a suit to enjoin such conflicting use, the Tenant may hold it liable for any other damages sustained or to be sustained by reason of the violation of such covenant.



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Chapter 23 REAL ESTATE LEASES
Part IV. Forms
B. LEASE CLAUSES

31-23 Current Legal Forms for Real Estate FORM 23.39

AUTHOR: by Thomas G. Belden

FORM 23.39 Covenants of quiet enjoyment

COMMENT

A specific covenant of quiet enjoyment only rarely gives the tenant any rights in addition to those which are implied in every lease. A specific provision is not required to protect the tenant against evictions and other substantial interference by the landlord, or by anyone asserting a title superior to that of the landlord.

Many covenants of quiet enjoyment are designed to circumscribe the scope of the implied covenant. A common method of limiting the right to quiet enjoyment is to predicate this right upon the tenant's performance of all the terms of the lease. In the absence of such a condition, the tenant's implied rights do not depend upon his standing under the lease. The clauses in this group include this condition. In addition, these clauses illustrate further limitations on the covenant of quiet enjoyment by making the tenant's rights subordinate to existing mortgages, ground leases, and other superior liens.

FORMS

(1) Covenant of quiet enjoyment--subject to tenant's performance of lease

The Tenant, upon the payment of the rent and the performance of all the terms of this lease, shall at all times during the lease term and any extension or renewal term peaceably and quietly enjoy the leased property without any disturbance from the Landlord or any other person claiming through it.

(2) Covenant of quiet enjoyment--subject to tenant's performance of lease--subject to existing mortgage

The Tenant, upon paying the basic rent and all additional rent and other charges, and performing all the other terms of this lease, shall quietly have and enjoy the leased property during the lease term without hindrance or interference by anyone claiming by or through the Landlord, subject, however, to the reservations and conditions of this lease and the fee mortgage to which it is subordinate.

(3) Quiet enjoyment conditioned upon payment of minimum and percentage rent--exclusion of eminent domain

If the Lessee pays the Minimum and Percentage Rent and other charges provided herein and performs all of its covenants and agreements hereunder, Lessee shall, at all times during such term, have the peaceable and quiet enjoyment and possession of the Demised Premises without any manner of hindrance from Lessor or any persons lawfully claiming through it, except as to any portion of the Demised Premises that is taken under the power of eminent domain.

(4) Covenant of quiet enjoyment--landlord to pay ground lease mortgage--subject to ground lease, existing fee, mortgages, and restrictions

So long as the Tenant pays the rents reserved by this lease and performs and observes all of its covenants and provisions, the Tenant shall quietly enjoy the leased property. The Landlord shall comply with all the terms of and make all payments due on mortgages placed by the Landlord on the existing ground lease, and shall pay all real estate taxes on the leased property before they become delinquent. The Tenant's quiet enjoyment of the leased property shall be subject, however, to the terms of this lease, to dispossession by reason of superior title, the ground lease, or the existing mortgages on the fee, and to all easements, restrictions of record, and municipal ordinances. If the Tenant is dispossessed from the leased property by reason of the terms of this lease, the ground lease, or the existing mortgages on the fee, or by reason of such easements, restrictions, or ordinances, the payment of rent shall cease from and after the date of such dispossession. Landlord shall, immediately after such dispossession, return to Tenant any rent prepaid by it or any sum held by Landlord constituting Tenant's security deposit. However, Tenant shall not be entitled to receive from Landlord any damages suffered as a result of such dispossession.

(5) Covenant of quiet enjoyment--eviction by foreclosure or after conveyance of fee not breach

The Tenant, on paying the rent reserved, and performing all the covenants and conditions of this lease, shall, at all times during the demised term, peaceably and quietly have, hold, and enjoy the leased property. However, no eviction of the Tenant by reason of the foreclosure of any present or future mortgage now or hereafter on the leased property shall be construed as a breach of this covenant, nor shall any action by reason thereof be brought against the Landlord. Moreover, no eviction of the Tenant for any reason, after the Landlord has conveyed the fee of the leased property, shall be construed as a breach of this covenant, and no action therefor shall be brought against the Landlord.

(6) Covenant of quiet enjoyment by landlord and mortgagee

So long as the Tenant pays the rent reserved under this lease and fulfills its obligations thereunder, the Tenant shall peaceably hold and quietly enjoy the leased property without interruption by the Landlord or the mortgagee, or any other person, firm, or corporation claiming under either of them.

(7) Prior mortgage or lease to contain clauses protecting tenant--tenant not to be made party to eviction or foreclosure actions of prior interests--nondisturbance agreement required

(a) *Prior interests in premises.* Notwithstanding the subordination of this lease to any subsequent superior lease or superior mortgage or to any subsequent renewal, modification, replacement, or extension of any superior lease or superior mortgage, or to any consolidation or spreader of any prior or subsequent superior mortgage, this lease is subject to the express conditions that, and shall be effective only if, the holder of such superior mortgage or the lessor of such superior lease, by their respective terms, or by separate agreement, agrees in substance as long as this lease is in effect:

(i) The Tenant shall not be joined as a party defendant (1) in any action or proceeding instituted or taken by the lessor of such superior lease for the purpose of terminating such superior lease by reason of any default thereunder, or (2) in any foreclosure action or proceeding instituted or taken by the holder of such superior mortgage; and

(ii) The Tenant shall not be evicted from the Demised Premises, nor shall its leasehold estate under this Lease be terminated or disturbed, or any of its rights under this Lease be affected in any way, by reason of (1) any default under such superior lease or such superior mortgage, or (2) any disaffirmance or other termination of such superior lease. However, upon the request of the holder of a superior mortgage or the lessor of a superior lease, the Tenant shall attorn and execute a nondisturbance, recognition and attornment agreement in form prepared by such holder and reasonably satisfactory to the Tenant.

(b) *Nondisturbance agreement.* The Landlord represents that there is presently no existing superior lease. The Landlord shall deliver to the Tenant, on the Commencement Date of this Lease, a nondisturbance agreement from the then existing mortgagee, and concurrently with the execution of future superior mortgages, shall deliver a nondisturbance agreement from such mortgagees, in the form approved and prepared by such holder, and reasonably satisfactory to the Tenant.

(c) *Attornment to successor landlord.* If the lessor of a superior lease or the holder of a superior mortgage succeeds to the Landlord's rights under this Lease, whether through possession or foreclosure action or delivery of a new lease or deed (the "successor landlord"), and the successor landlord requests, and agrees in writing to accept, Tenant's attornment, Tenant shall attorn to and recognize the successor landlord as its landlord under this Lease, and shall promptly execute and deliver any instrument that the successor landlord reasonably requests to evidence such attornment. Upon such attornment, this Lease shall continue in full force and effect as, or as if it were, a direct lease between the successor landlord and Tenant upon all of the terms, conditions, and covenants set forth in this Lease and shall be applicable after such attornment. However, the successor landlord shall not:

(i) be liable for any previous act or omission of the Landlord under this Lease;

(ii) be subject to any offset, not expressly provided for in this Lease, which has previously accrued to the Tenant against the Landlord; or

(iii) be bound by any previous modification of this Lease, not expressly provided for therein, or by any previous prepayment of more than one month's fixed rent, unless such modification or prepayment has been expressly approved in writing by the lessor of the superior lease or the holder of the superior mortgage through or by reason of which the successor landlord has succeeded to the Landlord's rights under this Lease.

Notwithstanding any of the foregoing provisions of this Section, none of Tenant's claims against any prior Landlord shall be deemed waived, extinguished, or relinquished.

(d) *Approval of mortgagee.* No alteration or modification of any provision of this Lease, nor any cancellation or surrender of this Lease, shall be valid or binding against any superior mortgagee of the premises covered by this Lease unless it has been approved in writing by the holder of such superior mortgage, whose name and address has been furnished to the Tenant, in writing, by notice as provided above.



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Chapter 23 REAL ESTATE LEASES
Part IV. Forms
B. LEASE CLAUSES

31-23 Current Legal Forms for Real Estate FORM 23.40

AUTHOR: by Thomas G. Belden

FORM 23.40 Repair and maintenance

COMMENT

A provision dealing with repair and maintenance is normally included in a lease because the local rules of law do not generally reflect the customs in the trade. Moreover, this is an area in which there must be clear guidelines defining the immediate obligations of the parties, since the curing of a defective physical condition often cannot await a protracted dispute as to responsibility.

Tenant repairs:

If the burden is on the tenant, the extent of his responsibility should be spelled out with exactness. A general requirement to keep property in good repair may not include structural repair or the replacement of worn-out items unless such obligations are specified. On the other hand, if the tenant covenants to make all necessary repairs without exception, his obligation to make repairs may exist regardless of the reason for the repairs. Therefore, exceptions are often made for ordinary wear and tear and for repairs necessitated by casualties. A tenant's undertaking to effect all repairs does not normally require him to put the premises in a better condition than when received. Sometimes this obligation is imposed by a covenant to "put in repair." The repair and maintenance provision should also cover the responsibility with respect to exterior areas, and should assign the task of snow and rubbish removal. In some cases, the tenant's obligation to repair is expressed by obligating him to return the property in as good a condition as when received. This type of provision presents its own unique problems. From a tax perspective, the landlord may be denied a deduction for depreciation or cost recovery. For a detailed discussion of the tax treatment of the lessee's costs of repairs, see the Tax Background (TB) § 23.09, at the beginning of this chapter.

Landlord repairs:

A landlord generally has no duty to repair or maintain leased premises, except with respect to concealed defects existing at the beginning of the term. Therefore, a specific provision is usually required whenever such duties are to be shared by or assigned to the landlord. Among the obligations often assumed by the landlord are those relating to structural and exterior areas, and those occasioned by defective materials or workmanship in buildings erected by the landlord. It should be noted that a clause requiring one party to make specified repairs does not in itself obligate the other to make the remaining repairs, and a clause excusing one party from certain repairs does not automatically commit the other to making them. For a more detailed discussion of the tax treatment of the lessor's costs in managing and maintaining rental property, see TB § 23.10.

Tax deduction or amortization:

The tax treatment of expenditures for repairs can become a difficult problem. There is a fine dividing line between repair costs which are deductible and improvement costs which must be capitalized and then deducted over the recovery period of the improvement. The Regulations provide, "The cost of incidental repairs which neither materially add to the value of the property nor appreciably prolong its life, but keep it in an ordinarily efficient operating condition may be deducted as an expense." However, the rule is different for the cost of "repairs in the nature of replacements, to the extent that they arrest deterioration and appreciably prolong the life of the property." The rules apply to the landlord and the tenant equally. The tax treatment of the cost of improvements to rental property is covered in greater detail in TB § 23.07. The tax treatment of the lessee's and lessor's repairs are considered in TB §§ 23.09 and 23.10, respectively.

Tax treatment of specific items:

The tax litigation in this area has made it extremely difficult to state any meaningful generalizations. Deductions have been allowed for the costs of shoring a wall and repairing a foundation of a collapsing building, for painting and repapering rooms, and for cleaning and refilling loose mortar in brick walls of a building. On the other hand, on facts which are difficult to distinguish in principle, deductions have been denied for recovering and replacing a large portion of a roof, for replacing the electrical system in a building, for covering old shingles with new, and for replacing worn-out furnishings and equipment in a hotel. A deduction is not justified merely because the repair or replacement must be made in order to comply with local laws or regulations. The fact that repairs and replacements are required by the terms of a lease tends to justify the deduction. Thus, the deduction has been allowed for recurring purchases of assets of relatively short life and for the costs of replacing worn-out machinery and equipment all made pursuant to lease obligations. See TB §§ 23.09 and 23.10.

Business or investment purpose:

For both the landlord and the tenant, the deduction is based upon the general allowance of all ordinary and necessary expenses paid or incurred in carrying on a trade or business, or for the production or collection of income, or for the management, conservation, or maintenance of property held for the production of income. Thus, a tenant whose occupancy is purely for residential purposes may not take a deduction for the cost of repairing and maintaining the leased property. For the difference in tax treatment between rental of property used in a business or

investment and rental of dwellings used for personal purposes, see TB §§ 23.02 and 23.13.

FORMS

(1) Tenant's obligation to repair and replace--landlord's right on tenant's default

Tenant, at its expense, shall promptly make all necessary repairs and replacements to the leased property, whether interior or exterior, ordinary or extraordinary, or structural or nonstructural, as and when necessary. Such obligation shall extend to repairs and replacements to the pipes, heating and plumbing systems, window glass, fixtures, and all other appliances and their appurtenances, as well as to all equipment used in connection with the leased property, and the sidewalks, curbs, and vaults adjoining or appurtenant thereto. The quality and class of all repairs and replacements shall be at least equal to that of the original work. If Tenant defaults in making such repairs or replacements, Landlord may make them for Tenant's account, and all expenses thereof shall constitute and be collectible as additional rent.

(2) Tenant's obligation to maintain buildings--adjacent areas

The Tenant shall, at all time during the lease term, at its expense, put and maintain in thorough repair and in good and safe condition, all buildings and improvements on the leased property, and their equipment and appurtenances, both inside and outside, structural and nonstructural, extraordinary and ordinary, however the necessity or desirability for repairs may occur, and regardless of whether necessitated by wear, tear, obsolescence, or defects, latent or otherwise. The Tenant shall also, at its expense, put and maintain in thorough repair and in good and safe condition, and free from dirt, snow, ice, rubbish, and other obstructions or encumbrances, the sidewalks, areas, chutes, sidewalk hoists, railings, gutters, and curbs in front of and adjacent to the leased property.

(3) Tenant's obligation to maintain sprinkler system--to make changes required by authorities

The Tenant shall maintain in good and proper condition the sprinkler system now installed in the leased property. If such system or any of its appliances are damaged or injured or not in proper working condition by reason of any negligence or fault of the Tenant, its agents, servants, employees, or visitors or otherwise, the Tenant shall immediately make all needed repairs and restore the system to a good working condition. If the Board of Fire Underwriters, the Fire Insurance Exchange, or any state or municipal bureau, department, or official requires or recommends that any changes, modifications, alterations, or additional sprinkler heads or other equipment be made or supplied by reason of Tenant's business or the location of partitions, trade fixtures, or other contents of the leased property, or if such changes or additional equipment become necessary for any reason, Tenant shall promptly make or supply them at its expense.

(4) Tenant's obligation to maintain and repair--standard for repairs--arbitration of disputes

(a) Repairs. Throughout the term hereof, Tenant, at its expense, shall take good care of, and make all necessary repairs to, the leased property and the adjoining sidewalk, curbs, and vaults, regardless of whether interior or exterior, structural or nonstructural, ordinary or extraordinary, or foreseen or unforeseen. As used in this Article, "repairs" include all necessary replacements, renewals, alterations, additions, and betterments. All repairs made by the Tenant shall be at least equal in quality and class to the original work. The Tenant will do or cause others to do all necessary shoring of

foundations and walls of the building and every other act for the safety and preservation thereof which may be necessary by reason of any excavation or other building operation upon any adjoining property or street, alley, or passageway.

(b) *Standards.* Whether repairs to the leased property and adjoining areas are necessary and adequate under subparagraph (a) above shall be measured by the appropriate standard for improvements of similar construction and class. However, Tenant shall in any event make all necessary repairs in such a manner as to avoid any structural damage or injury to the building.

(c) *Maintenance.* The Tenant shall maintain all portions of the leased property and adjoining areas in a clean and orderly condition, free of dirt, rubbish, snow, ice, and unlawful obstructions.

(d) *Sole responsibility.* The Landlord shall not be required to furnish any services or facilities or to make any repair or alteration in or to the leased property or adjoining areas. The Tenant shall assume the full and sole responsibility for the condition, operation, repair, replacement, maintenance, and management of the leased property and adjoining areas.

(e) *Arbitration.* Any dispute between the parties as to the standard of care and maintenance of the leased property and adjoining areas shall be determined by arbitration. If, however, the requirement for making repairs or replacements is imposed by any governmental authority or the holder of any mortgage to which this lease is subordinate, such requirement shall be complied with by the Tenant and shall not be considered an arbitrable dispute. The Tenant, however, may dispute or contest the validity, application, or reasonableness of any such requirement and the Landlord shall give it reasonable cooperation in this connection.

(5) Tenant's obligation to maintain and repair--covenant against waste--reasonable wear and tear excepted

The Tenant shall not cause or permit any waste, damage, or injury to the leased property. The Tenant, at its expense, shall keep the leased property as now or hereafter constituted with all improvements made thereto and the adjoining sidewalks, curbs, walls, parking areas, landscaping, access roads, and vaults clean and in good condition (reasonable wear and tear excepted), and shall make all repairs, replacements, and renewals, whether ordinary or extraordinary, foreseen or unforeseen, including all structural repairs, necessary to maintain the leased property. All repairs, replacements, and renewals shall be at least equal in quality of materials and workmanship to that originally existing in the leased property. The Landlord shall in no event be required to make any repair, alteration, or improvement to the leased property. Any equipment and materials replaced by the Tenant shall belong to the Tenant, and all proceeds from their disposition may be retained by the Tenant. The Tenant shall indemnify the Landlord against all costs, expenses, liabilities, losses, damages, suits, fines, penalties, claims, and demands, including reasonable counsel fees, because of the Tenant's failure to comply with the above. The Tenant shall not call upon the Landlord for any disbursement or outlay in connection therewith, and expressly releases and discharges the Landlord of and from any liability therefor.

(6) Landlord maintenance of roof and structure--tenant maintenance of leased premises--indemnification of landlord and mall tenants for accidents

(a) *Lessor maintenance.* Lessor shall keep and maintain the roof and structural portions of the Demised Premises, except that Lessee shall promptly repair any damage caused thereto by its act or negligence or that of its employees, agents, invitees, subtenants, licensees, assignees, or contractors. Except as otherwise provided herein, the Lessor shall not be responsible to maintain or make any improvements or repairs of any kind, in or upon the Demised Premises.

(b) *Lessee maintenance.* Except as provided above, Lessor shall keep and maintain every part of the Demised Premises in good order, condition, and repair (including any necessary replacements). Such maintenance shall include, without

limitation, the exterior and interior portions of all doors, door checks, security gates, windows, glass, utility facilities, plumbing and sewage facilities within the Demised Premises or under the floor slab including free flow up to the main sewer line, fixtures, heating, air-conditioning including exterior mechanical equipment, exterior utility facilities and exterior electrical equipment serving the Demised Premises and interior walls, floors and ceilings, including compliance with applicable building codes relative to fire extinguishers. If Lessee refuses or neglects to commence or complete repairs promptly and adequately, Lessor may make or complete such repairs and require Lessee to reimburse it for the cost thereof.

(c) *Indemnification.* Lessee shall protect, indemnify, save and keep harmless Lessor and other tenants and occupants of the shopping center complex against and from all claims, loss, cost, damage, or expense arising out of or from any accident or other occurrence in, on or at the Demised Premises, from the utilities located thereunder causing injury to any person or property, the occupancy or use of the Demised Premises or any act or omission of Lessee, its employees, agents, invitees, subtenants, licensees, assignees, or contractors. Lessee shall hold Lessor harmless and indemnified against and from any penalty or damage or charges imposed for any violations of any law or ordinance, whether occasioned by the neglect of Lessee or those holding under Lessee. Lessee shall also indemnify, and hold harmless Lessor and other tenants and occupants of the shopping center complex against and from any and all claims and against and from any and all loss, cost, damage, liens, or expense arising out of any failure of Lessee to comply with and perform all the requirements and provisions of this Lease. Lessee shall procure and continue in force general liability insurance covering all claims for injuries to persons in or upon the Demised Premises, including all damage from signs, glass, awnings, fixtures, or other appurtenances now or hereafter erected on the Demised Premises, and insuring the indemnity agreement contained in this paragraph. Such insurance shall be for not less than \$500,000 for injury to one person in one accident, occurrence or casualty and not less than \$1,000,000 for injuries to more than one person in one accident, occurrence or casualty. Lessee shall also carry property damage insurance for not less than \$100,000 for damage to property arising out of any one occurrence. All insurance policies required hereunder shall name Lessor as an additional insured, and Lessee shall furnish Lessor evidence of such insurance coverage. Such insurance policies may not be modified or terminated without 30 days advance notice to Lessor.

(7) Shopping center lease--tenant to pay pro rata share to maintain common area

(a) *Maintenance expenses.* The Tenant shall pay the Landlord in the manner provided in subdivision (b) below the Tenant's pro rata share of the Actual Costs of Maintaining and Operating the Common Area during the leased term. The "Actual Costs of Maintaining and Operating the Common Area" mean the following: All amounts paid by the Landlord as actual net costs for maintaining and repairing the common areas (but only to the extent that the cost in question is not properly chargeable to "capital account" under generally accepted accounting principles) including, without limitation, any and all enclosed or unenclosed malls and mall areas and installations therein; cleaning; snow and ice removal; costs and expenses of planting, replanting, and replacing flowers and landscaping; water and sewerage charges; maintenance, repair, and replacement of utility systems; lighting, heating, and air conditioning of any enclosed mall; premiums for liability and workmen's compensation insurance; wages; salaries of any resident manager and his secretary, directly and actually performing services in connection with the common areas in an amount not to exceed \$45,000 per annum; unemployment taxes, social security taxes, personal property taxes, if any, sales and use taxes on material, equipment, supplies, and services purchased for maintenance of the common areas; real property taxes on any enclosed mall, including the land thereunder; fees for required licenses and permits, supplies and operation of loudspeakers and any other equipment supplying music to the common areas or any part thereof; operation of public restrooms; policing the common areas and affording protection thereof against fire; reasonable straight-line depreciation of movable equipment used in the operation, repair, and maintenance of the common areas; reasonable rental of movable equipment used in the maintenance of the common areas, but without duplication as to depreciation charges on such movable equipment, but as to rental of such equipment only if its rental will, in the Landlord's good faith judgment, be less expensive than depreciation on owned equipment; and other similar direct costs properly chargeable to such operation. However, Tenant's maintenance expenses shall not include any real property taxes (except such taxes on any enclosed mall),

assessments, capital costs, depreciation, interest, amortization, compensation of executives, overhead, and profit, all as determined in accordance with generally accepted accounting principles.

(b) *Pro rata share.* The Tenant's pro rata share of the costs and expenses shall be that portion of the whole which the floor space of the leased property bears to the total ground floor space from time to time occupied by the tenants in the Shopping Center. The annual charge to the Tenant shall be paid in monthly installments on the first day of each calendar month in advance in an amount estimated by the Landlord. Within 90 days after the end of each calendar year, the Landlord shall furnish the Tenant a statement in reasonable detail of the actual common area costs and expenses paid or incurred by the Landlord or its designees during such period, prepared in accordance with sound accounting practices by the Landlord's or the designee's accountant. Thereupon there shall be an adjustment between the Landlord and the Tenant, with payment to or repayment by the Landlord, as the case may require, so that the Landlord shall receive the entire amount of the Tenant's pro rata share of such costs and expenses for such period. In no event, however, shall the Tenant's pro rata share and payments exceed \$15,000 annually.

(c) *Arbitration.* Any disagreement between the Landlord and the Tenant with respect to the interpretation or application of this section shall be determined by arbitration under the governing rules of the American Arbitration Association.

(8) Landlord's obligation to maintain parking area--tenant's rights upon default

(a) *Parking area installation.* The Landlord shall, at its expense, grade, drain, and suitably hardsurface the parking area to conform with the Tenant's requirements at or prior to the commencement of this lease term.

(b) *Maintenance.* The Landlord shall, at all times during this lease term, at its own expense:

(1) Maintain sufficient floodlights and other means of illumination to illuminate the parking area during all twilight and evening hours that the Tenant's store is open for business and in operation;

(2) Maintain and keep the parking area in good condition with a hard-top surface pavement and properly striped, clean and remove debris, ice, and snow, and provide suitable and sufficient traffic direction personnel as required;

(3) Permit free parking on the parking area at all times by the Tenant, its customers, employees, and persons dealing with the Tenant; and

(4) Obtain and maintain public liability insurance covering the interests of the Landlord and the Tenant indemnifying the Tenant and holding it harmless from any liability for personal injury, death, or property damage arising on or about the operations on the parking area, within limits of \$100,000/\$300,000 for personal injury and death, and \$25,000 for property damage, and to furnish the Tenant on demand with certificates evidencing the existence of the required insurance.

(c) *Remedies.* If, at any time during the term of this lease, there is a default in or other noncompliance with any provision of this paragraph, the Tenant shall have the following rights and remedies, none of which shall be exclusive of the others or any remedy otherwise available to the Tenant:

(1) The Tenant may remedy or attempt to remedy any such default or other noncompliance and expend all necessary sums therefor at Landlord's expense. All sums so expended plus lawful interest thereon shall be payable to Tenant on demand and may be deducted by it from any rents or other sums due or to become due.

(2) So long as any such default or other noncompliance continues, all provisions in this lease with respect to the payment of any guaranteed minimum annual rental shall be eliminated, and the Tenant's only obligation with respect to

rental shall be the payment of the percentage rentals on gross sales as provided for in this lease, payable only after the expiration of each lease year of the term so long as such condition continues.

(3) So long as any such default or other noncompliance continues, the Tenant may, on written notice, terminate and cancel this lease, in which event it shall be relieved of any further liability hereunder.

(9) Landlord's right to maintain and repair--pipes, cables, conduits, etc.--interference with tenant's use to be avoided

The Tenant shall permit the Landlord or its designees to erect, use, maintain, and repair pipes, cables, conduits, plumbing, vents, and wires in, to, and through the leased property, as and to the extent that the Landlord may now or hereafter deem to be necessary or appropriate for the proper operation and maintenance of the building. All such work shall be done, so far as practicable, in such manner as to avoid interference with the Tenant's use of the leased property.

(10) Landlord's obligation to repair--interior decoration excepted

The Landlord shall bear the entire expense of all repairs, alterations, or improvements required on the leased property, except for interior redecoration which shall be performed by the Tenant at its expense. All such repairs, alterations, or improvements by the Landlord shall be accomplished promptly with first class materials, in a good and workmanlike manner, in compliance with all applicable laws of all governmental authorities and in accordance with the applicable orders, rules, and regulations of the Board of Fire Underwriters or any other body hereafter exercising similar functions, and in a style, character, and quality conforming to the existing construction. Delays shall be excused when due to force majeure, which, among other things, shall include strikes, lockouts, and other labor and industrial disputes restricting the Landlord's operations or the operations of any contractor or subcontractor.

(11) Painting and decorating by tenant on landlord's inspection--maximum of once every five years

Landlord may require the premises to be painted and decorated if, upon inspection, it judges that they are not being maintained in good condition or that they require painting and decorating. Tenant shall perform such painting and decorating within 30 days after it receives appropriate written notice from Landlord. If Tenant fails to do so, Landlord may either paint and decorate such areas and charge the cost thereof to Tenant as additional rent, or consider such failure as a default for which Landlord shall have the same remedies as in the case of any other default under the terms of this lease. Such painting and decorating shall not be required more than once in each five-year period.

(12) Heating plant--landlord's obligation to repair--tenant's remedy upon failure

The heating plant and equipment to be installed in the building in which the leased property is located will be, at the commencement of the term, in good working order capable of producing temperature of at least 70 _____ [degrees] Fahrenheit at 0 _____ [degrees] outside, and will be in compliance with all federal, state, and municipal orders, regulations, and requirements. Landlord shall at all times during the term of this lease, at its expense, keep such heating plant and equipment in good order and make all necessary repairs and replacements thereto. If the Landlord fails to make such repairs or replacements, the Tenant may do so, and the cost thereof shall be payable by the Landlord to the Tenant on demand with lawful interest thereon. The Tenant may deduct or retain the amount so paid out of any rents or other sums that may then be due or that may thereafter become due under this lease. In the event of emergency, the Tenant may make such repairs at the Landlord's expense, before giving any written notice to the Landlord, but the Tenant shall notify the Landlord in writing within three business days after the expiration of the emergency.

(13) Tenant to maintain exterior doors--landlord notice of required repairs

Tenant shall repair and replace whenever necessary, at its expense, all exterior doors leading to the demised premises, and fittings, including front door assemblies, jambs, transoms, checks, and hardware. If Landlord determines that such door or doors and appurtenances require repair or replacement, Tenant shall make the necessary repair or replacement within 30 days after it receives appropriate written notice from Landlord. If Tenant fails to make such repair or replacement within the 30-day period, Landlord may either do so and charge Tenant with the cost thereof as additional rent, or consider such failure to be a default for which it will have the same remedies as in the case of any other default hereunder.

(14) Neighboring excavation--tenant's obligation to protect property

If any excavation is made or contemplated for building or other purposes upon property adjacent to the leased property, the Tenant shall either (a) allow any person causing such excavation to enter upon the leased property and any building and improvement now or hereafter erected for the purpose of doing such work as such person considers to be necessary to preserve any wall or structure thereof from injury or damage and to support such walls or structures by proper foundations, or (b) at the Tenant's expense, cause to be done all work that is necessary to preserve any wall or structure of any building and improvement now or hereafter erected upon the leased property from injury or damage and to support such walls or structures by proper foundations. The Tenant shall not, by reason of any such excavation or work, have any claim against the Landlord for damages or indemnity or for suspension, diminution, abatement, or reduction of rent under this lease or any renewal or extension thereof.

(15) Neighboring excavation--landlord's obligation to protect property

If an excavation is made or contemplated for building or other purposes upon land (including land in the bed of a street) adjacent to the leased property, the Landlord may permit any person causing such excavation to enter upon the leased property for the purpose of doing such work as such person deems necessary to preserve the walls and structures of the leased building from injury or damage, and to support such walls and structures by proper foundations. The Landlord shall, at its expense, repair or cause to be repaired any damage caused to any part of the leased property because of any excavation, construction work, or other work of a similar nature which may be done on any adjacent land. The Tenant hereby assigns to the Landlord all rights to recover against the adjoining owners, or the parties causing such damages, the amounts expended or damages sustained by the Landlord from such excavation, construction work, or other similar work.



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Current Legal Forms for Real Estate
Chapter 23 REAL ESTATE LEASES
Part IV. Forms
B. LEASE CLAUSES

31-23 Current Legal Forms for Real Estate FORM 23.41

AUTHOR: by Thomas G. Belden

FORM 23.41 Compliance with laws and regulations

COMMENT

A general covenant to make necessary repairs does not normally require the tenant to make changes or alterations in order to conform to laws and regulations of governmental authorities, or to the requirements imposed by insurance policies. Therefore, the responsibility for such an obligation is customarily expressed either in the repair clause, or in a clause dealing with permitted uses, or in a special clause of the type illustrated in this group.

Structural changes required by law:

In many jurisdictions, the mere statement of a covenant to comply with the requirements of law does not obligate the tenant either to make structural changes or to comply with subsequent enactments not within the original contemplation of the parties. Where the leased premises constitute only part of a building it is especially likely to be presumed that structural changes by the tenant are not intended. Thus, several of the following clauses specify the tenant's obligation with respect to both present and future laws, and structural as well as nonstructural repairs or alterations.

Tenant's right to contest regulations:

One aspect of the tenant's duty to comply with regulatory requirements which is often extensively treated in the lease agreement is the tenant's right to contest the validity or applicability of a regulation or order. The conditions under which the tenant may delay compliance so as to prosecute his contest are generally that no lien will attach to the property and that no civil or

criminal liability will be imposed upon the landlord because of the delay. In addition, the tenant may be required to post security for the protection of the landlord.

Americans with Disabilities Act:

The Americans with Disabilities Act (ADA) prohibits discrimination on the basis of disability by public accommodations. Among other things, the law requires places of public accommodation and commercial facilities to be designed, constructed and altered in compliance with accessibility standards contained in federal regulations. Depending upon the circumstances of the lease, the landlord and the tenant of premises which meet the statutory definition of a "public accommodation" and/or a "commercial facility" will desire to provide in the lease for compliance with ADA requirements. Such a provision may ensure one party that the other party has complied with applicable governmental regulations, or it may allocate between the parties the responsibility for compliance.

Environmental laws:

Environmental laws cover a wide spectrum. They may include water and air pollution, dangerous chemicals and construction materials, refuse removal, and other similar laws. The responsibility for compliance with such laws should be delineated in the lease. The laws applicable in any given leasing situation will depend upon the location, nature and use of the premises. For a more detailed discussion of environmental laws and specific forms relating to them, see Vol. 33, Chapter 25, Environmental Considerations in Real Estate Transactions, *infra*.

Tax treatment of expenditures:

The primary difficulty in determining whether an expenditure is a deductible expense or a depreciable capital item is the same as that involved in expenses for repairs. The fact that the expenditure is initiated solely to satisfy governmental authorities is not a relevant factor in establishing its character. For a more detailed discussion of the tax treatment of the lessee's costs of maintenance and repairs, see the Tax Background § 23.09, at the beginning of this chapter.

FORMS

(1) Tenant's obligation to comply with applicable laws--tenant to obtain necessary license

Tenant, at its expense, shall promptly comply with all federal, state, and municipal laws, orders, and regulations, and with all lawful directives of public officers, which impose any duty upon it or Landlord with respect to the leased property. The Tenant, at its expense, shall obtain all required licenses or permits for the conduct of its business within the terms of this lease, or for the making of repairs, alterations, improvements, or additions, and the Landlord, when necessary, will join with the Tenant in applying for all such permits or licenses.

(2) Tenant's obligation to comply with applicable laws--compliance with requirements of insurance policies

Tenant, at its expense, shall promptly comply with all federal, state, and municipal laws and regulations, including those of appropriate departments, commissions, authorities, boards, and their officers, as well as all orders and regulations of the National Board of Fire Underwriters or any other present or future body exercising similar functions, which may be applicable to the leased property, the fixtures and equipment therein, and the adjoining sidewalks and curbs. Tenant shall comply with the requirements of all public liability, fire, and other types of insurance policies at any time in force with respect to the building and other improvements on the leased property.

(3) Tenant's obligation to comply with applicable laws--structural changes excepted--tenant's right to contest applicability

Tenant, at its expense, shall promptly comply with all present and future federal, state, county, municipal, and other governmental laws and regulations, as well as the orders and regulations of the National Board of Fire Underwriters or any other body exercising similar functions, which may be applicable to the leased property, except when a structural change is required. The Tenant may, after written notice to the Landlord, contest by appropriate legal proceedings, diligently conducted in good faith, the validity or application of any such law, regulation, or rule, and delay compliance therewith pending the prosecution of such proceedings, if such delay does not cause any civil or criminal liability to be incurred by Landlord or any lien or charge to be imposed upon or satisfied out of the leased property.

(4) Tenant's obligation to comply with applicable laws--right in tenant to contest applicability--security for liens or liability

The Tenant, at its expense, shall promptly comply with all present and future laws and regulations of all federal, state, and municipal governments, courts, departments, commissions, authorities, boards, and officers, and all orders and regulations of the National Board of Fire Underwriters or any other body exercising similar functions, whether foreseen or unforeseen, ordinary or extraordinary, which may be applicable to the leased property and adjoining sidewalks, curbs, and vaults or applicable to its owners, tenants, or occupants regardless of whether such laws or regulations require structural changes or improvements or interfere with the use and enjoyment of the leased property. The Tenant shall likewise comply with the requirements of all public liability, fire, and other insurance policies at any time in force with respect to the leased property. Tenant may, after written notice to Landlord, contest by appropriate legal proceedings diligently conducted in good faith, in the name of either or both, without expense to Landlord, the validity or application of any law or regulation of the nature herein referred to, subject to the following:

(a) Tenant may delay compliance until final determination of such proceeding if Tenant prosecutes it with due diligence, provided that the contested law or regulation expressly allows such delay without imposing any lien, charge, or liability against the leased property, or Tenant's leasehold interest therein, and without subjecting either party to any civil or criminal liability for failure to comply.

(b) If any lien, charge, or civil liability would be incurred by reason of any delay under subparagraph (a), Tenant may, with Landlord's written consent (which it shall not unreasonably withhold), contest and delay compliance with such law or regulation, as provided in subparagraph (a), if (i) such action does not subject Landlord to criminal liability, (ii) Tenant furnishes reasonably satisfactory security to Landlord against any resulting loss or injury, and (iii) Tenant prosecutes the contest with due diligence. Landlord shall execute and deliver all necessary and proper documents to permit Tenant to contest the validity or application of any such law or regulation. Landlord shall not be required, however, to execute and deliver any document which, in the judgment of Landlord's attorney, may prejudice its interest in the leased property.

(5) Tenant's obligation to comply with applicable laws--tenant's right to contest applicability and proceedings to widen street and to remove encroachments

(a) *Compliance with law.* Tenant, at its expense, shall promptly comply with all present and future federal, state, county, city, and other applicable governmental laws and regulations, as well as all orders and rules of the insurance underwriting board or insurance inspection bureau, or any other body exercising similar functions, having or claiming jurisdiction over the leased property, and of all insurance companies writing policies covering such property. Compliance, by Tenant, shall include any necessary structural alteration, change, addition, improvement, or repair, either inside or outside, extraordinary or ordinary (including the removal of any encroachment on the street or on adjoining property by any building on the leased property). Without limiting the generality of the foregoing, the Tenant shall procure every permit, license, certificate, or other authorization required in connection with the lawful and proper use of the leased property or with any present or future building or improvement erected thereon, and shall require every person cleaning any window on the leased property from the outside to use the equipment and safety devices then required by law. The Tenant, after notice to the Landlord, may, by appropriate proceedings conducted at the Tenant's expense, contest in good faith the validity or enforcement of any such law or regulation and may defer compliance therewith if such deferment does not constitute a crime by Landlord, Tenant diligently prosecutes such contest to a final determination, and Tenant furnishes Landlord with such security, by bond or otherwise, as Landlord may reasonably request in connection with such contest.

(b) *Street widening.* If, at any time, during the term of this lease, or any extension or renewal hereof, any proceeding is instituted or order made for the widening or other enlargement of any contiguous street, requiring removal of any projection or encroachment on, under, or about any such street, or any changes or alterations upon the leased property, or in the sidewalks, curbs, gutters, vaults, or appurtenances, Tenant, at its expense, shall promptly comply with such requirement. If Tenant fails to comply, Landlord may do so after giving Tenant ten days' written notice. In such case, Landlord shall add the amount expended, together with any interest, fines, penalties, architects' fees, counsel fees, or other expenses which it may thereby incur, as additional rent to the next installment of net rent due. Tenant may contest in good faith any such proceeding or order if (i) during the pendency of such contest, Tenant deposits with Landlord security in amount and form satisfactory to Landlord for the performance of the work required in case Tenant's contest is unsuccessful, and (ii) such contest is consented to in writing by the holder of any mortgage to which this lease is then subordinate. Tenant shall not permit Landlord to become liable for any criminal violation because of Tenant's failure to comply with any such order.

(6) Tenant to comply with law--flammable materials prohibited--compliance with insurance rules

Tenant shall comply with the requirements of all governmental laws, orders, ordinances, and regulations. Tenant shall not use the demised premises in any manner that would constitute a violation of their permitted use, bring or permit to be brought or kept in or on the demised premises any inflammable, combustible, or explosive fluids, materials, chemicals, or other substances, permit any cooking not expressly authorized hereunder, permit any unusual or objectionable odors to emanate from the demised premises, or do or permit any act upon the demised premises which may subject Landlord to any liability or responsibility for injury to persons or damage to property. Tenant shall comply with all rules, orders, and requirements of the local and National Board of Fire Underwriters, the Fire Insurance Rating Organization, and other similar bodies having jurisdiction. Tenant shall not do, permit, bring, or keep anything in the demised premises which shall increase the rate of fire insurance on the building of which such premises are a part or on the property kept therein over the insurance in effect at the term commencement. If Tenant engages in any of the above, it shall reimburse Landlord on demand, as an additional charge hereunder, for the increased insurance premiums thereafter payable and which are charged because of Tenant's violation, and shall indemnify and hold Landlord harmless from and against all other costs, liabilities, and expenses Landlord may thereby incur. In any action or proceeding in which Landlord and Tenant are parties, a schedule or makeup of rates for the building or the demised premises issued by the Fire Insurance Rating Organization or other body fixing the fire insurance rates, shall be conclusive of the facts therein stated and of the items and charges in the fire insurance rate then applicable to the said

premises.

(7) Environmental law compliance--violation by tenant deemed breach of lease--disclaimer by landlord

The parties acknowledge that certain federal, state, and local laws, regulations and guidelines are now in effect, and that additional laws, regulations and guidelines may hereafter be enacted, relating to or affecting the demised premises, the shopping center, and the larger parcel of land of which the demised premises and the shopping center are a part, concerning the impact on the environment of construction, land use, the maintenance and operation of structures and the conduct of business. Tenant will not cause, or permit to be caused, any act or practice, by negligence, omission, or otherwise, that would adversely affect the environment or do anything or permit anything to be done that would violate any of said laws, regulations, or guidelines. Any violation of this covenant shall be an event of default under this lease. Tenant shall have no claim against Landlord by reason of any changes Landlord may make in the shopping center or the premises in which the leased premises are located under such laws, regulations, and guidelines.

(8) Landlord's obligation to comply with applicable laws

The Landlord certifies that the leased property, fixtures, and appurtenances, excluding fixtures and appurtenances installed by the Tenant, conform to all applicable governmental laws, ordinances, regulations, and requirements, as well as the regulations and requirements of all boards of underwriters, rating bureaus, and similar organizations, and of any insurer of the leased property. Landlord, at its expense, shall comply with all such laws, ordinances, regulations, and requirements.

(9) Landlord's obligation to comply with applicable laws--exception as to tenant's defaults

The Landlord shall make all repairs, changes, alterations, and additions required by the laws, ordinances, orders, or regulations of any public authorities having jurisdiction over the leased property. However, the Tenant shall make all such repairs, changes, alterations, and additions required because of its use of the leased property (other than the proper and lawful conduct of the Tenant's business), or because of any unlawful action or negligence of the Tenant or any breach or default by it under this lease.

(10) Tenant's obligation to dispose of infectious waste in compliance with law--lease of medical office space

Notwithstanding anything to the contrary contained in the Lease, Tenant, rather than Landlord, shall be responsible and shall pay for all costs of segregating, packaging, treating, transporting and disposing of all Infectious Waste generated by Tenant at or from the Building. All Infectious Waste shall be identified, segregated, measured, stored and disposed of by Tenant in a manner that complies with all federal state and local laws or regulations applicable to Infectious Waste. None of the common areas may be used by Tenant for the storage or disposal of Infectious Waste.

As used herein, the term "Infectious Waste" means any infectious waste as defined in the infectious waste regulations of the State of _____, including without limitation Section _____ of the _____ Code of the State of _____, as amended from time to time. Tenant hereby agrees that it shall be fully liable for all costs and expenses related to the use, storage and disposal of Infectious Waste generated from the Premises by Tenant.

(11) Allocation of responsibilities for compliance with Americans with Disabilities Act

Landlord warrants and represents that to the best of its knowledge the common areas of the Development are in compliance with the requirements of Title III of the Americans with Disabilities Act of 1990, *42 U.S.C. §§ 12101 et seq.* ("ADA"). Landlord further represents and warrants that any alterations, modifications, upfit or construction performed by Landlord to the Leased Premises or the common areas located thereon shall be performed in compliance with the ADA.

Tenant represents and covenants that it shall conduct its occupancy and use of the Leased Premises in accordance with the ADA (including, but not limited to, modifying its policies, practices and procedures, and providing auxiliary aids and services to disabled persons).

If the Lease provides that the Tenant is to complete certain alterations and improvements to the Leased Premises in conjunction with the Tenant taking occupancy of the Leased Premises, Tenant agrees that such work shall comply with the ADA and, on request of the Landlord, Tenant shall provide Landlord with evidence reasonably satisfactory to Landlord that such work was performed in compliance with the ADA. Furthermore, Tenant covenants and agrees that any and all future alterations or improvements made by Tenant to the Leased Premises shall comply with the ADA.



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Chapter 23 REAL ESTATE LEASES
Part IV. Forms
B. LEASE CLAUSES

31-23 Current Legal Forms for Real Estate FORM 23.42

AUTHOR: by Thomas G. Belden

FORM 23.42 Surrender upon termination of lease

COMMENT

The tenant's obligation to return leased property is clear even in the absence of a provision requiring him to do so. However, the condition in which the property is to be returned and the rights with respect to fixtures installed by the tenant and improvements constructed by him should be defined.

Removal of tenant installations:

With respect to the tenant's installations, the problem is not only to define the property which the tenant may remove when the lease expires, but also to indicate the extent to which he is obligated to remove the property. One alternative is to permit the tenant to remove trade fixtures and movable assets, with the provision that any property remaining when the tenant vacates is owned by the landlord. Other alternatives may give the landlord the option to keep the property or have it removed at the tenant's expense. In many cases, the tenant is required to remove all such property. In some jurisdictions this may be the effect of a covenant by the tenant to return the premises in the same condition as when received, or to return the premises "broom-clean."

Tax aspects of surrender clause:

In describing the condition in which property is to be returned, one standard provision requires surrender of the property "in the same condition as at the commencement of the lease term, ordinary wear and tear excepted." This provision should not preclude a depreciation or cost recovery allowance to the landlord. But it was the position of the Service for a long time that

depreciation was allowed to neither the landlord nor the tenant if the tenant was required to return the property at the expiration of the lease in the same condition as at the beginning of the lease. The Service has modified its position and now concedes that some depreciation, such as for obsolescence, may be allowed even under such a provision. Depreciation is questionable, however, if the tenant's obligation is to return the property in its same condition as at the beginning of the lease, or the equivalent in its value at that time. A lessee is allowed a deduction for expenses incurred to restore the premises as required under the lease. A deduction is allowed also for a payment in lieu of restoration. The tax treatment of the lessee's costs of repairs, replacements, and restoration is discussed more fully in The Tax Background (TB) § 23.09, at the beginning of this chapter.

Depreciation affected by tenant obligations:

The landlord's depreciation or cost recovery allowance can be affected by the obligation of the tenant to restore the leased property. The denial of the allowance depends upon the degree of the tenant's restoration obligation. Although the tax result depends upon the facts and circumstances of each particular lease transaction, the general legal principles are fairly clear. Generally, if the terms of the lease require the tenant to return the leased property to the landlord upon expiration of the lease in the same condition as at the beginning of the term, or its equivalent in value, or otherwise fully protect the landlord from economic loss, no deduction for depreciation or cost recovery of the leased property is allowed. On the other hand, a landlord may be entitled to depreciation or cost recovery under the terms of a lease requiring the tenant only to make all necessary repairs and replacements and to maintain the property in good condition during the term of the lease, if it can be demonstrated that the landlord will suffer economic loss during the term of the lease. See TB § 23.09.

Surrender of premises:

A number of incidental problems arise with respect to the surrender provision. The measure of damages for the tenant's breach of the covenant to surrender in a prescribed condition may be either the landlord's cost of restoration or the diminution in value, depending upon the jurisdiction. If a particular measure of damages or the right to injunctive relief to compel surrender is contemplated by the parties it should be specifically provided for. Complications which may result from subleasing should be considered. A subtenant who retains possession may acquire certain rights as a holdover tenant unless his status is clarified by the agreement. If the tenant is to pay the cost of the subtenant's removal, this too should be specified in the lease.

FORMS

(1) Surrender in as good a condition as at beginning of lease term--reasonable wear excepted

At the expiration of the lease term, the Tenant shall surrender the leased property in as good condition as it was in at the beginning of the term, reasonable use and wear and damages by the elements excepted.

(2) Surrender in as good a condition as at beginning of lease term--lessee's improvements returned in their condition

when completed

The Tenant shall on the last day of the term, or upon the sooner termination of the term, peaceably and quietly surrender the leased property to the Landlord, broom-clean, including all buildings, alterations, rebuildings, replacements, changes, or additions placed by the Tenant thereon, in as good condition and repair as at the commencement of the term, and as any new buildings, structures, replacements, additions, or improvements constructed, erected, added, or placed thereon by the Tenant are when completed, natural wear and tear excepted.

(3) Surrender in same good order and condition--tenant's option to remove his property--landlord's right to unremoved property

The Tenant shall vacate the leased property in the good order and repair in which it now is, ordinary wear and tear and casualties by accidental fire not occurring through the Tenant's negligence alone excepted, and shall remove all its property therefrom so that the Landlord can repossess the leased property not later than noon on the day upon which this lease or any extension thereof ends, whether upon notice or by holdover or otherwise. The Landlord shall have the same rights to enforce this covenant by ejectment and for damages or otherwise as for the breach of any other condition or covenant of this lease. The Tenant may at any time prior to or upon the termination of this lease or any renewal or extension thereof remove from the leased property all materials, equipment, and property of every other sort or nature installed by the Tenant thereon, provided that such property is removed without substantial injury to the leased property. No injury shall be considered substantial if it is promptly corrected by restoration to the condition prior to the installation of such property, if so requested by the Landlord. Any such property not removed shall become the property of the Landlord.

(4) Surrender--removal of tenant's personal property--landlord's right to store and sell

At the expiration of the lease term, the Landlord may remove any personal property then upon the leased property, store the property at the Tenant's expense, and on three days' written notice to the Tenant sell such property at public or private sale, or, if it is unsalable, may dispose of it in any other manner, without liability. The Tenant shall be liable for all expenses of such property's storage, sale, or removal, and the Landlord may retain a 5% commission on the amount realized upon a sale.

(5) Surrender in broom clean and good condition, wear and tear excepted--removal of tenant improvements and restoration of premises--clause to survive lease

(a) *Surrender.* Lessee shall deliver and surrender to Lessor possession of the Demised Premises upon expiration of this Lease, or its earlier termination, broom clean and in as good condition and repair as they were at the commencement of this Lease term, or may have been put by Lessor during the continuance thereof, ordinary wear and tear and damage by fire or the elements beyond Lessee's control excepted.

(b) *Tenant improvements.* Lessee shall remove all of its property and all alterations, additions, and improvements that Lessor has elected not to retain, repair all damage to the Demised Premises caused by such removal, and restore the Demised Premises to their condition prior to the installation of the articles so removed. Any property that Lessor has elected not to retain and that is not so removed at the expiration of this term shall be deemed to have been abandoned by Lessee, and may be retained or disposed of by Lessor. Lessee's obligation to observe or perform this covenant shall survive the expiration or termination of this Lease.

(6) Surrender in good order and repair--property subleased by tenant--apportionment of income and expenses

Upon the termination of this lease, the Tenant shall surrender the leased property in good order and repair, except for reasonable wear and tear. Unless the Tenant is then in default in the performance of its obligations, the parties shall apportion all accrued and prepaid income and normal operating expenses as of the expiration of this lease. The Tenant shall deliver to the Landlord all leases, lease files, plans, records, registers, and other papers and documents required for the proper operation and management of the leased property. It is understood that the Landlord will suffer irreparable injury in the event of any violation of this provision, and that the Landlord shall be entitled to a mandatory injunction (including a temporary mandatory injunction, pendente lite) to enforce this provision.

(7) Surrender of building in good order and repair--free of subtenancies--improvements except movable trade fixtures to belong to landlord--abandoned fixtures and personal property to be retained by landlord or removed at tenant's expense

The Tenant shall, on the expiration or the sooner termination of the lease term, surrender to the Landlord the leased property, including all buildings, replacements, changes, additions, and improvements constructed or placed by the Tenant thereon, with all equipment in or appurtenant thereto, except all movable trade fixtures (not including equipment) installed by the Tenant, broom-clean, free of subtenancies, and in good condition and repair, reasonable wear and tear excepted. Any trade fixtures or personal property belonging to the Tenant or any subtenant, if not removed at such termination and if the Landlord so elects, shall be deemed abandoned and become the property of the Landlord without any payment or offset therefor. If the Landlord does not so elect, it may remove such fixtures or property from the leased property and store them at the Tenant's risk and expense. The Tenant shall repair and restore, and save the Landlord harmless from, all damage to the leased property caused by such removal by either party.

(8) Surrender--liquidated damages to landlord upon tenant's failure

At the termination of this lease, whenever occurring or howsoever caused, the Tenant shall immediately surrender and deliver possession of the leased premises to the Landlord. If the Tenant fails to deliver the premises, it shall pay Landlord, as liquidated rental, \$100 for each day it holds possession. Landlord, by accepting such liquidated rental, shall not be deemed to waive any other right or privilege under this lease, but rather such right shall be considered as in addition to and not in exclusion of such rights and privileges.

(9) Surrender of leased property broom-clean--tenant's right to movable property--damages for delay--retention of possession by subtenant not a holdover, but tenant liable for costs of subtenant's removal

(a) *Surrender of possession.* The Tenant shall, on or before the expiration of the lease term, surrender the leased property free of subtenancies and broom-clean, together with all alterations, additions, and improvements made upon the leased property, except movable furniture, movable personal property, or movable trade fixtures put in at the expense of the Tenant or any subtenant. Tenant shall remove the property on or before the expiration of the lease term, and any property not so removed shall be deemed abandoned by it.

(b) *Delay.* If the leased property is not surrendered at such time, the Tenant shall make good to the Landlord all damage which the Landlord suffers by reason thereof, and shall indemnify the Landlord against all claims made by any succeeding tenant against the Landlord founded upon its delay in delivering possession of the leased property to such tenant, to the extent that such delay is occasioned by the Tenant's failure to surrender the leased property.

(c) *Subtenants*. The Tenant shall not enter into any sublease for a period beyond the expiration date of the lease term. If any subtenant of the Tenant or any person holding by, through, or under it fails to surrender possession of the leased property at the expiration of the lease term, such failure and the continuance in possession of the leased property by such subtenant or other person shall not constitute a "holding over" by Tenant so as to impose any liability upon it. If Tenant fails to remove such subtenant or other person within ten days after Landlord's written demand, Landlord may do so. In such case, Tenant shall reimburse Landlord for all reasonable expenses, including counsel fees, incurred in effecting such removal.

(10) Acceptance of surrender in writing--acceptance of keys not acceptance of surrender--acceptance of partial rent not a settlement

No agreement to accept a surrender of the demised premises shall be valid unless in writing and signed by Landlord. The delivery of keys to any of Landlord's employees or agents shall not operate as a termination of the lease or a surrender of the premises. Tenant's payment or Landlord's receipt of an amount less than the rent stipulated herein shall not be deemed to be other than on account of the earliest stipulated rent. No endorsement or statement on any check and no letter accompanying any check or payment as rent shall be deemed an accord and satisfaction, and Landlord may accept such check or payment without prejudice to its right to recover the balance of such rent or pursue any other remedy provided in this lease.

(11) Landlord repairs of roof and structure--tenant repair of leased premises--surrender in good, broom clean condition, wear and tear excepted

Landlord shall make all necessary repairs to the roof and structural parts of the demised premises after notification thereof by Tenant, except for repairs caused by Tenant's negligence. During the lease term, Tenant, at its expense, shall keep and maintain the demised premises and all fixtures and equipment therein, including all plumbing, sprinkler, heating, air-conditioning, electrical, gas and like fixtures and equipment, the store-front and all show window glass, the ceilings, doors and door frames, windows and window frames, and inside walls of the demised premises, and all signs of the Tenant erected outside of the demised premises, in good repair, order, and condition. Tenant shall make all required repairs thereto, of the same quality, design, and class as the original work. However, Tenant shall not be required to make repairs to the structural parts of the building, i.e., the bearing walls, beams, roof, foundations and concrete slab, unless the condition necessitating such repairs was caused by the Tenant, its agents, servants or invitees. At the expiration of this lease, the Tenant shall surrender the demised premises in good condition and broom clean, reasonable wear and tear excepted.



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Current Legal Forms for Real Estate
Chapter 23 REAL ESTATE LEASES
Part IV. Forms
B. LEASE CLAUSES

31-23 Current Legal Forms for Real Estate FORM 23.43

AUTHOR: by Thomas G. Belden

FORM 23.43 Tenant's right to alter and improve

COMMENT

The primary tax questions raised by improvements made by a tenant are those relating to the recognition of income to the landlord, the cost recovery or depreciation of the tenant's costs, and the deductions upon termination of the lease.

Tax amortization of tenant improvements:

A tenant's cost of erecting buildings or making other permanent improvements is not currently deductible, but is treated as a capital expenditure. The cost of any building erected, or improvements made, on leased property is recovered over the recovery period applicable to the property. Costs are recovered under the straight line method over 27.5 years for residential rental property or 39 years for nonresidential real property. The costs are recovered over the applicable recovery period regardless of the term of the lease. For a further discussion of the tax treatment of the lessee's costs of improvements, see the Tax Background (TB) § 23.07[1], at the beginning of this chapter.

Tax effect on landlord:

So long as the tenant is in possession under his lease, no income is realized by the landlord from improvements made by the tenant. The enhancement in the value of the property during the term of the lease is not realized income. Improvements which the tenant is permitted to make in lieu of rent may constitute rental income to the landlord. Whether an improvement made by a lessee results in rental income to the lessor in a particular case depends upon the intention of the parties,

which may be indicated either by the terms of the lease or by the surrounding circumstances. Rent-free periods or rent abatements when coupled with an obligation on the tenant to make improvements indicate an intention that the improvements are in lieu of the payment of rent. For a more detailed discussion of the tax treatment of the lessor's costs of improvements, see TB § 23.07[2].

Surrender of tenant improvements:

The Code specifically excludes from the landlord's income the value of buildings and other improvements erected or made by a tenant when they are acquired by the landlord upon the termination of the lease. This rule is not applicable if the improvements are accepted in satisfaction of a rental obligation. See TB § 27.07[1].

Lease clause:

Since a tenant generally has no implied authority to make alterations, a permissive provision should be included in the lease whenever future physical changes are considered a possibility. The scope of authority should be defined so as to indicate whether structural alterations and the erection of new structures are permitted. Rights of ownership and the obligation to remove upon termination of the lease should also be specified. An important purpose of this type of provision is to protect the value and the character of the property. For this reason, the landlord often reserves the right to approve the plans and specifications of improvements proposed by the tenant.

Mechanics' liens:

The provision must also deal with the possibility that the property could become encumbered by liens for materials and services furnished to the tenant. A number of techniques are employed to protect the landlord in this respect: (1) approval by the landlord of all work in excess of a specified amount; (2) a bond for the completion of the job free of encumbrances; (3) waivers of liens of materialmen, architects, contractors, and others; (4) the deposit of security by the tenant; and (5) the right in the landlord to discharge liens which are on record for more than a specified period and to add the cost thereof to the rent. The tenant should also be obliged to obtain all necessary permits from governmental authorities before construction is begun.

FORMS

(1) Consent of landlord--improvements to become property of landlord

Tenant shall not make any alterations, additions, or improvements to, or install any fixtures on, the leased property without Landlord's prior written consent. If such consent is given, all alterations, additions, and improvements made, and fixtures installed, by Tenant shall become Landlord's property upon the expiration or sooner termination of this lease. Landlord may, however, require Tenant to remove such fixtures, at Tenant's cost, upon the termination hereof.

(2) Tenant alterations permitted only with landlord consent--alterations become property of landlord

The Tenant shall not make any additions, alterations or improvements in or to the demised premises without the Landlord's written consent. All additions, alterations and improvements made in or to the demised premises by either party shall become the property of Landlord and be surrendered with the premises at the termination of this lease. The Tenant may remove or replace its movable trade fixtures, if it repairs any damage caused by such removal. The Tenant's failure to remove its fixtures or any of its property at the termination of this lease term may be deemed abandonment of such property by the Landlord.

(3) Tenant alterations--landlord's prior consent--attached improvements become landlord property--tenant's obligation to remove improvements on notice of landlord

Lessee shall not make or permit to be made any alterations, improvements, or additions to the Demised Premises or any part thereof without Lessor's prior written consent, and only if they are made in accordance with all applicable laws. All such alterations, improvements, and additions shall immediately be deemed to have attached to the freehold and to have become Lessor's property, and shall remain for its benefit upon the expiration or sooner termination of this lease, in as good order and condition as they were when installed, reasonable wear and tear excepted. However, if before the expiration hereof, or within 15 days thereafter, Lessor directs Lessee to remove any of its additions, improvements, fixtures, or installations, Lessee shall promptly do so and repair any resulting damage. If Lessee fails to effect such removals or make such repairs, Lessor may do so at Lessee's expense. Lessee shall indemnify and hold harmless Lessor from all expense, liens, claims, and damages to persons or property arising out of, or resulting from, the undertaking or the making of any alterations, additions, or improvements hereunder.

(4) Tenant's right to alter and improve--consent of mortgagee where required

Unless prohibited by the terms of any mortgage or deed of trust, the Tenant may make whatever alterations, structural or otherwise, to the leased property it deems desirable in the conduct of its business, including an increase in the height of any building on the leased property, but not the demolition of any building or part thereof. All such alterations and new construction shall be performed in accordance with the provisions of this lease. Whenever any alteration requires the consent of the holder of any mortgage or deed of trust, the Tenant shall first procure such consent.

(5) Tenant's right to alter and improve--landlord to consent to demolition, material changes, and alterations exceeding specified cost

The Tenant may, at its expense, make what alterations, improvements, additions, and changes to the leased property it deems necessary or expedient in the operation of the leased property. Tenant shall not, however, without Landlord's written consent, tear down or materially demolish any improvement on the leased property, or make any material change or alteration thereto, if the improvement, when completed, would substantially diminish the value of the leased property. The Tenant shall not make any change in or alteration to the leased property which would violate the terms of any mortgage then a lien upon the leased property, or of any policy of insurance in force with respect to the leased property. If the estimated cost of any proposed alteration, improvement, addition, or change to the leased property exceeds \$10,000, Tenant shall first obtain Landlord's approval of the plans therefor, which Landlord shall not unreasonably withhold.

(6) Tenant's right to alter and improve--present structure not to be changed from self-contained operating unit--limitation on cost of unapproved improvement

The Tenant may make changes or alterations to the building located on the leased property, or construct improvements on such property, subject to the following conditions:

(a) *Structural limitations.* The Tenant shall not make any structural or other alteration that converts the building located on the leased property into a structure which is not a complete, self-contained operating unit. The Tenant shall make no structural change in, or addition to, the proposed new building if its total cost may be reasonably expected to exceed \$25,000, without first submitting to the Landlord plans and specifications thereof and obtaining the Landlord's written consent thereto, which it shall not unreasonably delay or withhold.

(b) *Insurance.* During the course of any construction, alteration, or addition to the leased property, the Tenant shall deliver to the Landlord, at the Tenant's expense, comprehensive general liability insurance of the character and in the limits reasonably required by the Landlord.

(c) *Ownership.* Any alteration, addition, and improvement placed upon the leased property by the Tenant, as well as fixtures and articles of personal property attached to or used in connection with the leased property, shall immediately become the property of the Landlord and be surrendered to it at the end or other termination of this lease. However, the movable furniture, movable personal property, and movable trade fixtures put in at the Tenant's expense and which, under the provisions of this lease, may be removed by the Tenant at or before the expiration or sooner termination of this lease, shall not be deemed to be the property of, or surrendered to, the Landlord.

(7) Tenant alterations at tenant's expense--prior approval of plans--compliance with law--indemnification

(a) *Alteration at tenant expense.* Subject to the Landlord's financial contribution to the cost of the Tenant's installations, Tenant shall accept the premises in their present condition "AS IS" without calling upon Landlord to make any expenditures or to perform any work for the preparation of the demised premises for its use. Tenant shall at its expense, make the necessary alterations and installations in the demised premises required for its business, using a contractor or contractors who have been approved in writing by Landlord, such approval not to be unreasonably withheld. Tenant shall comply at its expense with all present and future governmental requirements arising out of, in connection with, or necessitated by such alterations.

(b) *Approval of plans.* Before commencing such alterations, Tenant shall submit the plans and specifications therefor to Landlord or its agent, for Landlord's written approval, which Landlord shall not unreasonably withhold. All work to be done by Tenant shall be performed in strict accordance with the approved plans and specifications, unless otherwise approved in writing by Landlord.

(c) *Preconditions.* Before commencing any work or installing any equipment, Tenant shall:

(1) *Permits.* Obtain the necessary consents, authorizations, and licenses from federal, state, and/or municipal authorities having jurisdiction over the work to be done. No work shall be started or equipment installed until all such necessary consents, authorizations, and licenses shall have first been duly obtained by the Tenant, its contractor, or other persons doing the work or installing the equipment on the Tenant's behalf;

(2) *Subcontracts.* Enter into a contract with its contractor and/or other persons who will do the work and install the equipment referred to. Such contract will provide, among other things: that the work shall be done and equipment installed in a good workmanlike manner in accordance with the plans and specifications previously approved and consents, authorizations, and licenses previously obtained; that the contractor or other persons above referred to will look solely to Tenant for payment and will hold Landlord and the demised premises free from all liens and claims of all persons furnishing labor or furnishing materials therefor, or both; and that similar waivers of the right to file liens shall be obtained from all of such contractors or materialmen. A copy of the contract, together with a duly executed waiver of

the right to file liens executed by the contractor or other persons above referred to, shall be furnished to Landlord. The contract shall further provide that all labor employed in the alteration work will be labor recognized by the local Building Trade union or unions for such purposes and, in the Landlord's sole judgment, will cause no labor difficulty or other jurisdictional dispute with respect to any other workers or groups of workers then employed in or about the building of which the demised premises form a part;

(3) *Indemnification.* Tenant shall also indemnify and save harmless the Landlord against all bills for labor performed and equipment, fixtures, and material furnished to the above Tenant in connection with work and against all liens, bills, or claims therefor or against the demised premises and from and against all loss, damages, costs, expenses, suits, claims, and demands whatsoever;

(4) *Laws; insurance.* Tenant, at its expense, shall promptly comply with all applicable federal, state, city, and other governmental laws, ordinances, orders, and rules, and shall reimburse Landlord for all expenses incurred on account of Tenant's failure to comply. All such expenses incurred by Landlord shall be deemed additional rent under this lease, which shall be due and payable to Landlord on the first day of the month immediately following their payment by Landlord. All persons who do work or install equipment, whether Tenant, its contractors, or other persons, must be fully covered by workmen's compensation insurance, and the certificate therefor must be furnished to Landlord before any such work is commenced. Tenant shall indemnify and hold Landlord harmless from all claims for personal injury, death, or property damage occurring during the progress, or as a result, of any work done in or about the demised premises.

(d) *Records and disputes.* Tenant shall keep, maintain, and operate, full, true, and accurate books of account and full, true, and complete records with respect to such alterations. Landlord and its representatives shall have full access to such books and records at all times during regular business hours and may examine and audit them. Tenant shall furnish Landlord all statements, information, vouchers, invoices, and supporting data it reasonably requires with respect to such work. Any dispute between the parties as to the cost of such alterations shall be submitted for arbitration to the American Arbitration Association (or any successor organization) in accordance with the association's rules and regulations, and the parties shall be bound by its decision. The parties shall bear equally the expense of such arbitration, except that Tenant shall bear the entire expense if it is determined that Tenant's report of the cost of the alterations was substantially incorrect. As soon as Tenant completes the required alterations and submits satisfactory evidence of their cost, Landlord shall reimburse Tenant therefor up to a maximum of \$340,000.

(8) Tenant work in accordance with landlord approved plans--permits, insurance, indemnification--noninterference with adjacent office space

Tenant, at its expense, shall design and construct the Demised Premises for the proper conduct of its business in accordance with the following terms and conditions:

(a) *Plans.* Tenant's work shall be completed pursuant to working plans and specifications prepared by a duly registered architect employed by Tenant at its expense. Such plans shall be submitted to the Landlord for its reasonable approval. Thereafter, the work shall be commenced and completed with due diligence in substantial conformity with such approved plans and specifications. Any deficiency in design or construction shall be Tenant's sole responsibility, regardless of whether previously approved by Landlord.

The aforementioned plans and specifications and Tenant's work shall comply with all applicable governmental laws, rules, regulations, codes, and orders, and with the requirements of the National Board of Fire Underwriters and other competent agencies. Such compliance is intended to prevent any increase in the applicable fire insurance rates for the Building.

(b) *Representations; disclaimer.* No representations have been made by Landlord or its employees or agents with respect to the Building, the Demised Premises, applicable zoning and building regulations, or the location, availability, or adequacy of any utilities required in the work.

(c) *Permits.* Tenant, at its sole cost and expense, shall file all drawings and specifications, pay all fees, and obtain all permits and applications from the local Building Department, the Department of Labor, and other competent governmental authorities, and also obtain a Certificate of Completion (or equivalent) and all other approvals required to enable it to open for business. Tenant shall promptly furnish to the Landlord all certificates and approvals required by the governing authorities. Landlord shall sign all applications requiring the owner's signature.

(d) *Workmanship.* All materials shall be new, and both workmanship and materials shall be of first class quality; all architects, contractors, subcontractors, materialmen, and workmen shall be duly licensed (if required by local laws) and skilled in their profession and trades.

(e) *Mechanic's liens.* If any mechanic's or other labor or material lien is filed against the Building or any part thereof as a result of Tenant's work, Tenant shall cause such lien to be discharged by payment, bond, or otherwise, within 30 days after it has knowledge or receives notice from Landlord, the architect, the general contractor, or any other person, that the lien was filed. If Tenant fails to do so, Landlord may obtain such discharge. In such event, Tenant shall indemnify and hold Landlord harmless from and against all expenses in connection therewith. Tenant shall reimburse Landlord for such expenses, on demand, as additional rent.

(f) *Insurance; indemnification.* Prior to commencement of the work, the general contractor shall secure Builders Risk Insurance (Fire with Extended Coverage and Vandalism Endorsement) on a Completed Value Form with Landlord and Tenant as named assured, in an amount not less than 100% of the value of the work.

Tenant shall indemnify and hold harmless Landlord and any mortgagee(s) having an interest in the Demised Premises, from and against any and all suits, actions, damages, losses, claims or liabilities, expense, including reasonable counsel fees, resulting from or due to the work contemplated hereunder, whether same be as a result of the claims of other tenants in the Building or acts or omissions of Tenant, its agents, employees, the architect, the general contractor, or any subcontractor, supplier, or materialman. Tenant shall insure this obligation in its hereinafter required Comprehensive General Liability Policy. In addition, prior to the commencement of the work, Tenant shall procure and maintain at its own cost and expense: insurance against claims under Workmen's Compensation Acts with limits of \$100,000 for employer's Liability Insurance; Comprehensive General Liability Insurance covering the work (including Broad Form Contractual Liability Insurance and Products and Completed Operations Insurance) with a combined single limit of not less than \$1,000,000 bodily injury and/or property damage liability. Landlord and all mortgagees having an interest in the demised premises shall be named assured in such insurance policies, which shall be issued by companies approved by Landlord. Certificates evidencing the placement of all the above required insurance and evidencing endorsements providing for 15 days' prior written notice to Landlord of cancellation or changes in such insurance shall be delivered to Landlord before the work commences. If such certificates are not furnished, Landlord may secure them at Tenant's expense.

(g) *Maintenance.* Tenant shall not permit the accumulation of building supplies, equipment, waste material, or rubbish outside the Demised Premises, and during the construction and upon completion shall cause all rubbish, implements, material, and equipment to be removed from the premises. At no time, shall the sidewalks, adjacent office entrances, or public areas be blocked or interfered with, and Tenant shall maintain continuous protection of the property. If any damage is done to any other portions of the Building, Tenant, at its own cost and expense, shall repair and/or replace same, in a manner satisfactory to the Landlord, to the condition existing prior to the commencement of the work.

(h) *Labor.* Tenant shall require its general contractor and all subcontractors and materialmen to employ the services of labor that will work in harmony with each other, and any others working in the area. If labor disputes arise, from any

cause whatever, Tenant shall make every effort to end same.

(i) *Title to personalty.* Title to all improvements, as constructed and installed by Tenant, together with Tenant's trade fixtures and furniture shall remain in Tenant until the expiration or sooner termination of this lease. Upon such expiration or sooner termination of the lease term, title to its improvements, installations, trade fixtures and furniture which are not removed by Tenant shall immediately vest in Landlord, free of any and all liens or claims of Tenant or any other person. Notwithstanding the foregoing, if Tenant, or anyone claiming by, through or under Tenant, or anyone claiming by, through or under Tenant, shall have any claim or lien on said improvements by operation of law or otherwise, such claim or lien shall at all times be subject and subordinate to the lien of any mortgage or mortgages and any underlying lease which may now or hereafter affect the Building or any part thereof.

(j) *Inspections.* Landlord may place its supervisory personnel and representatives on the job during the course of construction, at Landlord's expense, for the purpose of making inspections and insuring that Tenant and Tenant's contractors, suppliers and materialmen comply with these conditions. Notwithstanding the foregoing enumeration of restrictions and conditions, Landlord may at any time during the course of the work to impose such other restrictions, rules and conditions as may be reasonably necessary to insure the proper completion of the work.

(k) *Consent.* Nothing herein contained shall imply any consent or agreement by the Landlord to subject Landlord's estate to liability under any mechanic's or other lien law.

(l) *Drawings.* Upon completion of the work, Tenant shall provide Landlord, at Tenant's sole cost and expense, one set of "as built" drawings.

(9) Tenant improvements-- landlord approval of drawings and contractor required-- tenant to obtain permits and licenses--landlord to provide tenant's allowance for construction

(a) *Condition of premises.* Landlord has no obligation to alter, remodel or improve the Premises in any way. Tenant agrees to accept the Premises in an "as is" condition.

(b) *Drawings.* Tenant shall submit to Landlord, on or before thirty (30) days after the date of this Lease, drawings for the build out of the Premises. Within ten (10) days after the receipt of the Tenant's drawings, Landlord, by notice in writing addressed to Tenant, shall indicate Landlord's approval of them or clearly specify any objections to them, the objections in all events to be reasonable. The work to be performed by Tenant as described in the drawings therefor, approved by Landlord as provided above, are herein referred to as "Tenant's Work."

The drawings for Tenant's Work shall be prepared by licensed architects in the employ of Tenant. Tenant shall bear all costs of preparing the drawings. Landlord's approval of the drawings shall not constitute an opinion or agreement that they are in compliance with law (it being agreed that such compliance is solely Tenant's responsibility), nor shall such approval impose any present or future liability on Landlord or waive any of Landlord's rights under the Lease. Tenant shall provide Landlord with two (2) sets of the drawings.

(c) *Workmanship.* Tenant shall, to the reasonable satisfaction of Landlord, commence, construct, perform and complete all Tenant's Work in a good and workmanlike manner, in complete accordance with the drawings approved by Landlord.

(d) *Lease applicability before commencement date.* At all times prior to the Commencement Date, all the provisions, covenants and conditions of the Lease shall be applicable to the Premises other than those requiring payment of rent relating solely to the Premises.

(e) *Permits.* Prior to commencement of construction of Tenant's Work, Tenant shall obtain, at its sole cost and expense, all permits and licenses and other consents and approvals of all governmental authorities as may be required in connection with Tenant's Work and shall deliver copies thereof to Landlord. Tenant shall, at its sole cost and expense, furnish to Landlord all certificates and approvals with respect to work done by Tenant or on Tenant's behalf that may be required from any governmental authority for the issuance of a certificate of occupancy for the Premises and shall obtain such certificate and furnish Landlord with a copy of such certificate prior to the Commencement Date.

(f) *Compliance with law.* Tenant's Work and all of Tenant's trade fixtures and equipment shall be performed, constructed and installed in accordance and in full compliance with all applicable governmental requirements, including without limitation all applicable laws, statutes, codes, ordinances and governmental rules, regulations and orders, as well as reasonable rules and regulations established by Landlord. Tenant's Work shall be performed without interference and disruption to Landlord or other tenants.

(g) *Approval of contractor.* Any contractor used by Tenant to perform Tenant's Work pursuant to this Section, must first be approved in writing by Landlord, which approval shall not be unreasonably withheld. Such approval shall be in Landlord's sole discretion based on the proposed contractor's financial condition, reputation and workmanship, but no such approval shall relieve Tenant of any of its other obligations hereunder or impose any liability upon Landlord. In connection with the performance of Tenant's Work or the use and occupancy of the Premises, Tenant shall not permit anything to occur which directly or indirectly interferes in any way with the use and occupancy of any tenant or the normal operations of the Shopping Center.

(h) *Tenant's allowance.* Landlord shall provide to Tenant an allowance in the sum of \$_____, which shall be used by Tenant toward the cost of construction of Tenant's Work ("Tenant's Allowance"). The Tenant Allowance may only be used for leasehold improvements that become part of the Leased Premises, it being specifically understood and agreed that no portion of the Tenant Allowance may be used for removable trade fixtures, equipment, furniture or other personal property. All improvements constructed with Tenant's Allowance dollars shall become part of the Leased Premises and title thereto shall vest in Landlord upon installation. All costs of Tenant's Work that exceed Tenant's Allowance shall be paid by Tenant. Tenant hereby expressly grants Landlord an offset and deduction against Tenant's Allowance for all delinquent costs, payments, and expenses Tenant is obligated to pay Landlord pursuant to the Lease or otherwise due and owing to Landlord.

Tenant's Allowance shall be due and payable when: (i) Tenant's Work has been performed in accordance with the provisions of this Section; (ii) Tenant has furnished evidence satisfactory to Landlord that all work contracted for by Tenant in and about the Premises has been paid for, including without limitation, mechanic's lien affidavits and lien waivers in accordance with the mechanic's lien laws of the State of _____; (iii) the Premises are open for business; (iv) Tenant has made the first payment of Minimum Rent required hereunder; (v) Tenant has executed such certificates as shall be reasonably required by Landlord or any mortgagee of Landlord; (vi) Tenant has furnished Landlord with a written certificate of the actual cost of Tenant's Work, together with evidence of such cost as Landlord shall require; and (vii) at or prior to Tenant's opening for business at the Premises, Tenant has, at its sole cost and expense, obtained and delivered to Landlord a final certificate of occupancy for the Premises. Then, when and if each condition contained in the foregoing items (i) through (vii), inclusive, hereof has been complied with in full, Landlord shall pay to Tenant the Tenant Allowance.

(10) Subtenant's right to alter and improve--general conditions

The Subtenant may from time to time to make, at its sole expense, additions, alterations, and changes (hereinafter sometimes collectively referred to as "alterations"), in or to the leased property, subject to the following conditions:

(a) *Notice.* No structural alterations shall be commenced unless the Tenant gives at least 20 days' prior written notice to

the Landlord.

(b) *Structural*. No alterations of any kind shall be made which would change the general design, character, or structure of the building, materially decrease its size, cubic content, or rentable area, or materially reduce or impair the value, rental, rental value, rentability, or usefulness of the leased property or any part thereof.

(c) *Permits*. No alterations shall be commenced until the Subtenant procures and pays for all necessary governmental permits and authorizations. The Landlord shall join whenever necessary, but without any liability or expense to it, in the applications for such permits or authorizations, and, if necessary, shall request the Main Landlord to join in such applications.

(d) *Architect*. All alterations involving an estimated total cost of more than \$25,000 shall be conducted under the supervision of an architect or engineer selected by the Subtenant and approved in writing by the Landlord. Such alterations shall be made in accordance with detailed plans and specifications and cost estimates prepared or approved in writing by such architect or engineer and approved in writing by the Landlord prior to their commencement.

(e) *Standards*. All alterations shall be made promptly and in a good workmanlike manner, and in compliance with all applicable governmental laws, ordinances, regulations, orders, permits, and authorizations, as well as with the orders, rules, and regulations of the applicable insurance underwriting board or insurance inspection bureau, or any other body exercising similar functions.

(f) *Insurance*. Before commencing alterations, the Subtenant shall, at its expense: provide workmen's compensation insurance covering all persons employed in connection with the work and with respect to whom death or bodily injury claims could be asserted against the Main Landlord, the Landlord, the Subtenant, or the leased property; provide, if the work involved calls for blasting, insurance against loss or damage resulting from blasting, explosion, and vibrations; and obtain all necessary endorsements on the insurance policies provided for elsewhere in this lease covering the additional risks during the course of such alterations.

(g) *Bond*. Before commencing any alteration, the estimated cost of which is \$25,000 or more, the Subtenant shall provide a surety company bond or bonds in a company or companies and in form satisfactory to the Landlord in an aggregate amount equal to the estimated cost of such alteration, guaranteeing the completion of such alteration in accordance with plans and specifications therefor approved by the Landlord and the payment of the cost of such alteration.

(11) Liens for improvements by tenant--indemnification of landlord

The Tenant shall indemnify the Landlord against any mechanic's lien or other lien arising out of the making of any alteration, repair, addition, or improvement by the Tenant.

(12) Liens for improvements by tenant--deposit of security or performance bond

The Tenant shall deposit with the Landlord whatever security or performance bond is reasonably requested by it, or the holder of the first mortgage on the leased property, in order to protect the leased property, the Landlord, and such mortgagee from and against liens of mechanics and materialmen performing work or services in or on the leased property or supplying materials in connection with any construction work to be performed in or on such property.

(13) Removal of liens by tenant--right to contest

The Tenant shall not permit any mechanic's, materialman's, or other lien to stand against it. Tenant, however, may contest the validity of any lien or claim if it first posts a bond to insure that, upon final determination of such claim, it shall immediately pay any judgment rendered against it with all proper costs and charges, and have such lien released without cost to the Landlord.

(14) Removal of liens by tenant--landlord's right on default

The Landlord shall not be liable for any labor or materials furnished or to be furnished to the Tenant, and no mechanic's or other lien for any such labor or materials shall attach to or affect the Landlord's interest in and to the leased property. If any mechanic's lien is filed against the leased property, based upon any act or interest of the Tenant or of anyone claiming through it, or if any security agreement is filed for or affecting any materials, machinery, or fixtures used in the construction, repair, or operation by the Tenant, the Tenant shall immediately take whatever action by bonding, deposit, or payment will remove the lien or security interest. If the Tenant does not remove the lien or security interest within 30 days after notice to it, the Landlord may pay the lien or security interest or discharge the same by deposit. The amount so paid or deposited, with interest, shall be deemed additional rent under this lease, and shall be immediately payable with interest at the prime rate of First National Bank from the date of such advance, and with the same remedies to the Landlord as in the case of default in the payment of rent.



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Current Legal Forms for Real Estate
Chapter 23 REAL ESTATE LEASES
Part IV. Forms
B. LEASE CLAUSES

31-23 Current Legal Forms for Real Estate FORM 23.44

AUTHOR: by Thomas G. Belden

FORM 23.44 Construction of new buildings

COMMENT

The following clauses illustrate a variety of arrangements which may be made for the construction of a new building under a lease. The landlord may be required to construct the new building for an entering tenant, the tenant may arrange for the new construction which is to be paid for by the landlord, or the tenant may be required to construct the new building at his own expense. Each arrangement involves special problems.

Construction by landlord:

Where the landlord is to construct the building for a new tenant the lease should include provisions for: (1) the tenant's approval of the original plans and the periodic progress of construction; (2) the commencement of the lease term and of rent payments; (3) early entry by the tenant to install improvements; (4) payment by the tenant for such items as fixtures, painting, and other special additions; and (5) the liability of the landlord for damages in the event of his default. In addition, there may be provisions for modifications in the plans during the course of construction, for mortgage financing, and for the assignment to the tenant of rights under guarantees by contractors.

Rent commencement:

Normally, the lease term and rent payments begin either after the landlord notifies the tenant that the building is ready for occupancy, or after delivery of a certificate of occupancy issued by the local authority. A deadline is usually imposed for the completion of construction, with extensions

allowed for delays beyond the control of the landlord.

Construction by tenant:

If the tenant is to control the construction of the new building, it is proper to impose on him many of the conditions which generally limit a tenant's right to make alterations or improvements on leased property. These include protections for the landlord against liens attaching to the premises, against violations of local law in the course of construction, and against undesirable construction by the tenant. To implement these protections, the landlord is given the right of approval over the plans and the right to check the progress of construction.

Payment of construction costs:

If the landlord is to pay for the cost of construction but the construction is to be under the tenant's control, the limitation on costs and the schedule of payments must be set forth. The tenant is likely to require some immediate funds to undertake construction, but payment of the major portion of the costs is frequently deferred until mortgage financing may be arranged. The more common transaction is one in which the tenant is obligated at his own cost to demolish existing structures and erect a new one. The basic problem of the landlord in this type of situation is to insure the completion of the project. This requires extensive supervision and control by the landlord over the details of construction, the time schedule, and the financial responsibility of the tenant.

Tax aspects of demolition:

Demolition of existing structures sometimes must be accomplished to prepare for new construction. An owner or lessee is not permitted to take a deduction for the cost of, or losses incurred in connection with, the demolition of any structure after 1983. Demolition expenses were not always deductible prior to enactment of this specific exclusion. Under prior law, if an owner-lessor or a lessee demolished a building pursuant to a lease or an agreement which resulted in a lease, no deduction was allowed to the lessor for the demolition of the old building. However, the adjusted basis of the demolished building, increased by the net cost of demolition or decreased by the net proceeds from demolition, was considered a part of the cost of the lease to be amortized over the remaining lease term. The measuring life was that of the new lease, not that of the new building which replaces the demolished one. For this purpose, the courts have not distinguished between cases in which the new lease is longer or shorter than the life of the new building. If the new lease was prematurely terminated, the then remaining cost of the demolished building would seem to be deductible at the time of termination. For a more detailed discussion concerning the tax treatment of demolition of structures, see the Tax Background (TB) § 23.08, at the beginning of this chapter.

Amortization of tenant removal costs:

In some cases, tenants must be removed in order to proceed with construction. Expenditures for such removals are not deductible when paid or incurred, but must be amortized. When the payment is made by the owner to remove a tenant in order to erect a new building to be leased to a new tenant, the amount is treated as part of the cost of the new building. The costs of cancelling a lease paid by an owner simply to enable the owner to lease the premises to a new tenant are deductible over the life of the new lease. For a further explanation of the tax aspects of cancelling, extending, or renewing a lease, see TB § 23.11.

FORMS

(1) Construction by landlord--simple form

The Landlord shall, at its expense, construct the building to contain the leased property in accordance with the outline specifications dated _____[*date*], which have been initialed by representatives of the parties simultaneously with the execution of this lease and are deemed a part hereof. The Landlord shall complete the construction by _____[*date*], but this date shall be extended for all delays in construction resulting from causes beyond the Landlord's control. Construction shall be deemed to have been completed when the Landlord sends Tenant written notice of completion, accompanied by a copy of a certificate of occupancy applicable to the leased property.

(2) Construction of building by landlord--tenant's right to terminate lease if not completed within specified time

If the building to be occupied by the Tenant is not completed within 12 months after the making of this lease, the Tenant, by giving written notice to the Landlord, may terminate this lease, together with its obligations and liability. In such case, the term of this lease shall thereupon cease, and the parties shall be under no further obligation or liability to each other.

(3) Construction of building by landlord--early entry by tenant--delivery of possession

(a) *Building construction.* The building to be constructed on the leased property by the Landlord shall be constructed in accordance with the preliminary specifications set forth in Exhibit A, attached, and the detailed plans and specifications to be approved by the parties in writing. The Landlord shall construct and erect the building in compliance with all applicable federal, state, and municipal laws and regulations. The Landlord shall furnish the Tenant satisfactory evidence of such compliance in the form of a certificate of occupancy issued by the appropriate municipal department or, if such certificates are not issued by the municipal authorities, by a certificate of compliance issued by the Landlord's architect.

(b) *Tenant access.* During the course of such construction the Tenant, its employees, agents, and contractors may enter upon the leased property at all reasonable times for the purpose of inspection and, as soon as possible after such construction is substantially completed, may enter upon the leased property for the purpose of installing improvements, fixtures, and other equipment. However, the Tenant, its employees, agents, and contractors will not unreasonably interfere with the Landlord's employees, agents, or contractors in the pursuit of the Landlord's construction.

(c) *Removal of materials.* The Landlord shall remove or cause its builder to remove all tools, scaffolding, unused and discarded building materials, waste, debris, and rubbish in, on, or about the leased property before the commencement date of this lease.

(d) *Time of completion.* Possession of the leased property, completed in accordance with the detailed plans and specifications, shall be delivered not later than [*date*], unless construction is delayed for causes beyond the Landlord's control. In that event the time fixed to complete and deliver such building shall be extended for a grace period equivalent to the time lost by reason of such delay, but not to exceed 60 days.

(e) *Rent commencement.* Notwithstanding any provision herein to the contrary, Tenant shall commence rental payments 30 days after delivery to it of possession of the leased property under a certificate of occupancy issued by the appropriate municipal authority or a certificate of completion issued by the Landlord's architect certifying that the building and surrounding area have been completed in accordance with the detailed plans and specifications, and with all applicable laws, ordinances, rules, and regulations.

(4) Construction of building by landlord--deadline for completion--tenant to pay for special improvements

(a) *Construction.* The Landlord shall, at its expense, erect a 12-story office building and a connecting seven-story parking garage in substantial compliance with the plans and specifications attached as Exhibit A. The Tenant shall specify the names or designations by which the office building and parking garage shall be commonly known during the term of this lease.

(b) *Completion.* The Landlord has entered into a contract dated [date], with Ace Builders, Inc., for the construction of the building and garage. The contract provides that all work in connection with the construction of the buildings shall be substantially completed on [date]. The Landlord shall use its best efforts to tender possession of the leased property to the Tenant on or before [date]. If the buildings are not substantially completed and the Landlord has not tendered possession of the leased property to the Tenant on or before [date], but the Landlord is attempting to complete the buildings, the Landlord shall pay the Tenant as liquidated damages a sum equal to \$1,000 multiplied by the number of days which transpire after [date], up to and including the day before the buildings are substantially completed and the Landlord tenders possession of the leased property to the Tenant. The Landlord shall not, however, be liable to the Tenant for failure to tender possession of the leased property on [date], if such failure is the result of unavoidable delays. The date upon which the Landlord is obliged to tender possession of the leased property to the Tenant shall be extended for the cumulative period of all unavoidable delays occurring between the date of this lease and [date]. The term "unavoidable delays" means delays resulting from, or arising out of, strikes, lockouts, Acts of God, inability to obtain labor or materials, governmental restrictions, enemy action, civil commotion, fire, unavoidable casualty, or similar causes beyond the control of the Landlord or the contractor under the construction contract.

(c) *Bond.* Ace Builders, Inc., as contractor under the construction contract, has given the Landlord a bond guaranteeing the performance by the contractor of all of its obligations under the contract. Landlord shall pay Tenant, as liquidated damages, all sums Landlord recovers under the bond if the contractor defaults in the performance of the contract, Landlord recovers sums under such bond, the buildings are not completed by [date], and Landlord is not then attempting to complete the buildings. In such event, this lease shall terminate and be of no further force or effect, and neither party shall have any further obligation or liability hereunder.

(d) *Tenant access.* During the period of construction, the Tenant and its duly authorized representatives shall have access at all reasonable times to the leased property for the purpose of inspecting it and determining that the work is completed in accordance with the plans and specifications. The Tenant may, during the course of construction, modify the plans and specifications by selecting non-specified materials and by change orders. Such modifications, however, except to the extent that they represent tenant improvements (as defined below), shall not result in additional costs of over \$50,000.

(e) *Tenant improvements.* The Tenant shall pay the Landlord a sum equal to the cost of the purchase, erection, and installation of tenant improvements in the buildings. "Tenant improvements" shall include, but not be limited to, all floor coverings, interior finishing and partitions, lighting fixtures and electrical work, kitchen and cafeteria equipment, special equipment, signs of every description, and all other items which would not normally or customarily be included in buildings of the type to be constructed without specific direction or request of the proposed tenant. The Landlord has furnished the Tenant a detailed statement of the tenant improvements which the Landlord proposes to purchase, erect,

and install in the buildings, showing that such improvements are estimated to cost \$520,000. The Tenant approves the proposed tenant improvements and shall pay the Landlord \$520,000 therefor, and the Landlord shall purchase, erect, and install such improvements in the buildings. During the course of the construction of the buildings, however, the Tenant may change or add to the proposed tenant improvements. The Tenant shall pay the Landlord all additional costs attributable to changes or additions to tenant improvements resulting from any action by the Tenant. The Tenant shall pay, from time to time, such portion of the total amount which it is obligated to pay the Landlord under this subparagraph upon certification by the architects that such sums are due and payable.

(5) Construction of building by landlord--part of building leased to tenant

(a) *Construction of building.* The Landlord shall within a reasonable time erect, or cause to be erected, on the property, a nine-story building in which the leased premises are to be located, substantially in accordance with plans and specifications now on file with the appropriate city authorities. The leased premises shall be laid out and completed in accordance with the plans and outline of specifications, which are attached as Exhibit A.

(b) *Completion.* Landlord shall give Tenant written notice at least 90 days before the building is completed. The lease term and rent shall commence on the date fixed in such notice if, in fact, the leased premises are ready for occupancy on that date. Immediately upon receipt of such notice, Tenant may commence installation of its equipment and make all other preparations it deems necessary to make the leased premises available for its use rental commencement date. If Tenant takes possession of the leased premises and conducts its business therein before the specified rental commencement date, Tenant shall pay the rent in full from the date such business operations are begun.

(c) *Possession.* Landlord shall not be liable if, for any reason beyond its control, it is unable to give Tenant possession of the leased premises. However, if the lease term does not commence before [date], the lease shall be deemed cancelled and neither party shall have any further rights against or obligations to the other.

(6) Construction of supermarket by landlord--time for completion--tenant's option to terminate lease for delays

(a) *Construction.* Landlord, at its expense, shall erect upon the leased property a building containing at least 50,000 square feet on the street level, with a basement of at least 20,000 square feet and a parking area of at least 30,000 square feet. The building and parking area shall be constructed in accordance with plans and specifications to be prepared by Landlord and approved in writing by Tenant. The building shall be substantially similar to the Tasterite Supermarket being operated by the Tenant at Scarsdale, New York, as to quality and the kind of material and workmanship. A general synopsis of the proposed plans and specifications is annexed and marked Exhibit A. The final plans and specifications will embody substantially the items set forth in the general synopsis.

(b) *Permits.* Immediately upon written approval by the parties of plans and specifications for the building and parking area, the Landlord shall apply to all applicable municipal, federal, and other governmental agencies for permission to erect a building and to make all the improvements required by this lease, and the Landlord shall proceed diligently with applications for such permits. The Tenant shall cooperate with the Landlord and furnish it with all necessary information and data in the Tenant's possession required in connection with such applications.

(c) *Completion.* The Landlord shall diligently proceed to complete construction of the building and the other improvements to be erected and performed by it. If the building is not commenced within 12 months of the date hereof or is not completed and ready for use and occupancy by the Tenant and possession thereof actually delivered to it within 12 months of the date of commencement, the Tenant may, at any time thereafter, so long as the construction of the building has not been commenced or the building and parking area have not been completed within the time above set forth above: (1) terminate this lease by giving the Landlord ten days' notice, and thereupon the Tenant shall be relieved

and released of all its obligations hereunder as if this lease had never been drawn; or (2) extend the Landlord's time for completion thereof and delivery of possession to the Tenant.

(7) Construction of motel by landlord--contractors' guarantees transferred to tenant--security deposit by tenant

(a) *Construction.* The Landlord shall, at its expense, except as hereinafter set forth, complete the construction of a 200-room motel, with swimming pool, restaurant, cocktail lounge, and other facilities, all in accordance with the plans and specifications prepared by Lavar Associates as architects, copies of which have been delivered to the Tenant and initialed by it. No changes shall be made in the plans and specifications, without the Tenant's prior written approval, that result in a reduction in the number of dwelling rooms or diminution of other facilities.

(b) *Certificate of occupancy.* The Landlord shall obtain at its expense and deliver to the Tenant, on or before the commencement date of this lease term, a certificate of occupancy for the leased property, and all other necessary governmental approvals and permits to evidence completion of the motel and its readiness for use and occupancy.

(c) *Contractor guarantees.* The Landlord represents that under its general contract with West Side Contracting Co., Inc., for the construction of the motel, the general contractor is obligated to deliver a guarantee for a period of one year from the date of completion against any defects of workmanship and materials, and that the plumbing, roofing, air conditioning, and electrical contractors are also required to deliver guarantees of the materials and workmanship provided by each of them. The Landlord assigns to the Tenant all its rights under the guarantees of the general contractor and the subcontractors so that the Tenant shall have the full benefit, right, and privilege of enforcing such guarantees if necessary. The Tenant may sue for and recover any damages and the cost of any restoration and repair caused by the breach of any such guarantees or warranties, in the name of the Landlord or the Tenant as required.

(d) *Furnishings and equipment contract.* The Landlord has entered into a letter agreement, dated [date], with Melvin Supply Company relating to the furnishing and equipping of the motel, a copy of which has been delivered to the Tenant. The Tenant hereby assumes all of the Landlord's obligations under such agreement, and shall reimburse the Landlord for all sums previously paid by it to such company under such agreement.

(e) *Painting subcontractor.* The Tenant shall contribute \$50,000 toward the cost of painting the motel, which is being performed by Baker Brothers, as subcontractor. Tenant shall pay such sum directly to the subcontractor on or before the commencement date of the lease term upon presentation of appropriate bills therefor, or, if Landlord has previously paid such sum to the contractor or subcontractor, Tenant shall reimburse Landlord for such payments.

(f) *Security deposit.* Simultaneously with the execution of this lease, the Tenant shall deposit with the Landlord \$100,000 in cash or by certified check, or by delivering to the Landlord negotiable federal, state, or municipal bonds having a market value of \$100,000 on the date of their deposit. Landlord shall retain such deposit as security for Tenant's faithful performance of its obligations hereunder. If such deposit is made in the form of negotiable bonds, all interest accruing thereon shall belong to Tenant, and any such interest collected by Landlord shall be paid over to Tenant when the security deposit is returned.

(g) *Refund of deposit.* The Tenant shall not be entitled to possession of the leased property until it has fully complied with its obligations under subparagraph (d), and has fully paid \$50,000 as required under subparagraph (e). Promptly, after the Tenant takes possession of the leased property and pays the minimum rent for the first month, Landlord shall refund to it the security deposit, together with any interest thereon which Landlord has collected.

(h) *Completion.* The buildings and other facilities on the leased property shall be deemed completed on the date that the supervising architects, Twining Associates, delivers a certificate of completion and a temporary official certificate of occupancy.

(8) Construction of building by landlord--landlord's obligation to comply with laws pertaining to employment and to employ union labor--tenant's damages upon breach

The Landlord shall comply with, and require all contractors to comply with, all federal, state, and local laws and regulations pertaining to employment, conditions, and hours of employment in connection with the construction of the building on the leased property, and employ union labor on such construction. If the Tenant is damaged as a result of the breach of this paragraph, the Landlord shall pay such damages to the Tenant if it furnishes the Landlord with proof thereof.

(9) Construction of building by tenant--approval of plans by landlord

(a) Construction documents. On or before [date], the Tenant shall submit to the Landlord for its approval, which shall not be unreasonably delayed or withheld, plans and specifications for the construction on the leased property of a one-story, steel beam structure having a ground floor area of not less than 60,000 square feet, suitable for use as a self-service department store. After such plans and specifications are approved and before construction is commenced, the Tenant shall also submit to the Landlord for its approval, which shall not be unreasonably delayed or withheld:

(1) A copy of any proposed written construction agreement with a general contractor (or, if no general contractor will be used, a copy of each proposed written agreement with the various subcontractors). Such agreement shall provide that payment of at least 10 percent of the total price thereunder shall not be due until at least 30 days after full completion of the work to be performed; and

(2) An estimated schedule of payments thereunder which shall provide for partial payments as the work progresses.

(b) Construction. On or before [date], the Tenant shall commence construction of the structure and of parking facilities on the leased property. The Tenant shall diligently pursue the work to completion, and the department store shall be fully ready to open for business not later than [date], except as such date may be extended by the number of working days lost by reason of strikes, fire, Acts of God, or other events beyond the Tenant's control.

(c) Plan variances. The Tenant shall not authorize any variance from the plans or specifications approved by the Landlord without its prior written approval if any single variance would increase or decrease the cost of construction by more than \$30,000, or if all variances authorized during the course of construction would increase or decrease the cost of construction by more than \$100,000.

(d) Completion documents. On the completion date, the Tenant shall deliver to the Landlord each of the following:

(1) A certificate of completion by the architect who supervised the construction, which shall state that all work has been completed in accordance with the approved plans and specifications.

(2) A certificate of occupancy, or any equivalent permit or certificate required by governmental authority before business can be commenced at the leased property.

(3) A survey of the leased property, showing the completed structure and parking field, and that there are no encroachments by either on any adjoining premises.

(e) Certificate of title. Within 30 days after the completion date, the Tenant shall deliver to the Landlord the certificate of the Southern Title Company of Richmond, Virginia, or its agency, currently dated, that the time for the filing of

mechanics', materialmen's, and similar liens has expired, or, if such is not the case, that a search of the record shows that no such liens then encumber the leased property. If the latter information is furnished by such title company, or its agency, within 90 days thereafter, the Tenant shall deliver a further certificate of such title company that no such liens then encumber the leased property.

(10) Construction of building by tenant--mortgage financing to be arranged by tenant

(a) *Construction plans.* Within one year after the execution of this lease, or within four months after the Landlord executes a mortgage for construction financing, whichever occurs first, the Tenant shall proceed with the demolition of the structures now on the leased property and the construction of a multi-family dwelling (the "Building"), under the construction agreement executed by the parties contemporaneously herewith, and the outlined architectural, engineering, and mechanical plans and specifications (the "Outlined Plans") attached as Exhibit A. Before construction of the Building commences, the Tenant shall submit to the Landlord the final architectural, engineering, and mechanical plans and specifications (the "Final Plans"), for the Landlord's approval. The Landlord shall not unreasonably withhold approval if the Final Plans substantially conform to the Outlined Plans. The Tenant, at its expense, shall diligently file the Final Plans with the proper municipal departments and obtain from such departments all required permits, certificates and documents. The Building shall become and be the Landlord's property.

(b) *Construction period.* The Tenant's failure to commence the demolition of the existing structures and the construction of the Building within the period specified in subparagraph (a), or to complete the Building within such reasonable period of time after commencement as would ordinarily be required by any reputable or prudent builder to erect, construct, and complete a similar building, shall be deemed a default by the Tenant under this lease, unless caused by unavoidable delay.

(c) *Final plans.* The Building shall be constructed substantially in accordance with the Final Plans as approved by the Landlord and filed with the applicable municipal authorities. There shall be no substantial changes in the Final Plans or the construction of the Building except for changes required by the municipal authorities, or with the express written consent of the fee mortgagee or mortgagees. No change shall be made which substantially alters the nature or character of the Building as provided for by the Final Plans.

(d) *Payments.* Tenant shall construct the Building at the guaranteed cost to Landlord of \$3.52 million, as more particularly provided in the construction agreement referred to in subparagraph (a). Landlord shall pay Tenant such sum as follows:

(1) \$320,000 on the execution hereof, receipt of which Tenant hereby acknowledges; and

(2) The balance of \$3.2 million from the proceeds of temporary and permanent mortgage financing which Tenant shall procure for Landlord in accordance with the provisions of subparagraph (e).

(e) *Mortgage financing.* The temporary and permanent mortgage financing to be procured by Tenant may consist of one or more mortgages, and shall provide for yearly interest and amortization payments of not more than \$300,000. Landlord shall cooperate with Tenant in obtaining the mortgage or mortgages. Landlord or its nominee shall execute any instrument, including, without limitation, certificates, notes, bonds, mortgages, or other evidences of indebtedness reasonably required in connection therewith. Each instrument shall expressly provide that the mortgagee or payee, as the case may be, will not look to any principal, disclosed or undisclosed, for the payment of any indebtedness, or that the instruments so executed by the Landlord shall expressly provide that the mortgagee or payee, as the case may be, will not look to any principal, disclosed or undisclosed, for the payment of any indebtedness, or that the instruments so executed by the Landlord shall expressly provide that the mortgagee or payee, as the case may be, shall look solely to the security of the real estate for the payment of the indebtedness and will not seek to collect the indebtedness from or

obtain a deficiency judgment against the maker or mortgagor. Any such mortgage to be obtained by the Tenant in accordance with the above provisions shall be for a term of not less than ten years from its commencement date. The Tenant shall pay all costs, fees, title insurance charges, recording fees, taxes, and legal fees incurred or payable in connection with such mortgage. This lease shall be subordinate only to the mortgage or mortgages so obtained by the Tenant for the Landlord.

(11) Construction of building by tenant--removal of present subtenants--demolition procedure--detailed building procedure

(a) *Removal of existing tenants.* Promptly, after the execution hereof, Tenant, at its expense, shall commence with the lawful removal of all tenants and other occupants of the leased property. Tenant shall conduct the removal with due diligence until it has secured entire possession of the leased property free and clear of all tenancies and other rights of possession. The Tenant shall proceed on the basis that it intends to demolish the existing buildings and to replace them with the type required below. For the purpose of carrying out this covenant, the Tenant shall not extend or renew any existing lease, license, or tenancy or right to possession or use of any part of the leased property, or enter into any new lease, license, or right to possession, and shall not permit any occupant of any part of the leased property to remain in possession beyond the time such occupant is now entitled by agreement or may be entitled by virtue of an emergency rent law. The making of any such lease or agreement or the permitting of any occupant to remain in possession beyond the time such occupant could be legally removed shall be deemed a default under this lease. The Landlord shall, after the execution and delivery of this lease and upon the Tenant's request, serve upon the tenants listed in Schedule "I" all notices of termination of lease which are required by their respective leases, in whatever form the Tenant approves.

(b) *Building plans.* The Tenant, at its expense, shall promptly cause building plans and specifications to be prepared for the replacement of the existing structures with a modern, first-class, fully air conditioned office building of a design suitable for the location, at least 30 stories in height, covering so much of the leased property as is allowed by applicable municipal building and zoning ordinances for a new building of such type on the site. The building shall stand entirely on the leased property, be a complete, self-sustaining operating unit containing adequate utilities and facilities, and be of a design, character, and appearance appropriate and in keeping with the neighborhood and the site on which it is constructed. Any garage and parking space shall be in the basement of the building. No gasoline, petroleum product, tire, or automobile accessory shall be stored or sold in any garage or parking space.

(c) *Preliminary plans.* The Tenant, at its expense, shall engage an architect to prepare preliminary plans and specifications and prepare and submit to the Landlord on or before six months after the date hereof preliminary plans and outline specifications in sufficient detail to show the design, character, and appearance of the building to be erected. If the Tenant fails to submit the preliminary plans and outline specifications within the time specified, the Landlord may terminate this lease by giving ten days' written notice.

(d) *Approval of preliminary plans.* The Landlord, immediately upon receiving the preliminary plans and outline specifications, may employ its own architect, engineer, or both, to examine them and report whether they are adequate and satisfactory. Within 30 days after submission, the Landlord shall inform the Tenant in writing of any objections to the preliminary plans and outline specifications. In such event, the Tenant shall have 20 days thereafter to propose in writing corrective amendments for the Landlord to accept or reject within the next 20 days. The Landlord's failure to inform the Tenant of its objections within the 30-day period shall constitute the Landlord's approval of the preliminary plans and outline specifications. The Landlord's approval of such preliminary plans and outline specifications shall not be deemed its approval of the final plans or the complete detailed specifications.

(e) *Permit application.* After the Landlord has notified the Tenant that it approves the preliminary plans and outline specifications, the Tenant shall promptly apply to the municipal Department of Buildings for a permit permitting the Tenant to construct the new building required under this article. The Tenant shall submit to the Landlord all plans and

detailed drawings required by the Department of Buildings in connection with the permit application and shall obtain the Landlord's prior written approval before submitting them to the Department. The Landlord's failure to inform the Tenant in writing of its objections within the ten days shall constitute the Landlord's approval of such plans and detailed drawings.

(f) *Final plans.* Thereafter, the Tenant, at its expense, shall also proceed promptly to prepare complete and final plans ("final plans"), and completed detailed specifications covering each building trade concerned in the construction of the proposed new building, and shall submit to the Landlord for its approval final plans as soon as practicable. The Landlord will not require final plans and complete detailed specifications to be completed before the date construction is commenced. If the Tenant fails to proceed promptly with the preparation of final plans and to submit final plans as required by this subparagraph, the Landlord may notify the Tenant in writing of the Landlord's claim to that effect and may designate in such notice a date for their submission, which shall be not less than 30 days thereafter. If Tenant shall fail to submit final plans to Landlord by the designated date, Landlord may terminate this lease by giving ten days' written notice. Any claim by Tenant that it acted promptly in preparing final plans shall be decided by arbitration, if Tenant gives written notice thereof to Landlord within ten days after Landlord gives the above 30 days' notice. If Tenant fails to give such timely notice, it shall be deemed to have waived any right to contest Landlord's claim by arbitration or otherwise.

(g) *Approval of final plans.* The Landlord, immediately upon receiving the final plans, shall require its architect or engineer, or both, to examine and report to the Landlord whether they are adequate and satisfactory. Within 30 days after the plans are submitted, Landlord shall inform Tenant in writing of any objections thereto. Tenant shall then have 20 days to propose in writing corrective amendments, which Landlord shall accept or reject within the next 20 days. Landlord shall be deemed to approve the final plans if it fails to inform Tenant of its objections within the preliminary 30-day period. Tenant's failure to submit corrective amendments to the final plans shall have the same effect as its failure to submit the original final plans. In such event, Landlord may terminate this lease by giving ten days' written notice, and may retain the security. Immediately after it obtains Landlord's approval, Tenant shall cause the final plans, or the appropriate part thereof, to be filed with the municipal Department of Buildings for its approval.

(h) *Detailed specifications.* After obtaining the Department of Building's approval for the work shown on the final plans, and before entering into any contract for such work, Tenant shall submit to Landlord for its approval complete detailed specifications covering each building trade involved in such contract. Landlord shall immediately require its architect and engineer to examine such specifications and report to it whether they are adequate. Within 30 days after Tenant submits any complete detailed specifications, Landlord shall inform it in writing of any objection thereto. Tenant shall have 20 days from such notice to propose in writing corrective amendments, which Landlord shall accept or reject within the next 20 days.

(i) *Approval unreasonably withheld.* The Landlord shall not unreasonably withhold its approval to any preliminary plans, outline specifications, plans and detailed drawings required by the Department of Buildings, final plans, or complete detailed specifications. Any claim by Tenant that Landlord unreasonably withheld approval of any such plans or specifications shall be decided by arbitration, if Tenant shall apply for arbitration within ten days after it receives Landlord's written notice of disapproval. Otherwise, Tenant shall be deemed to have waived its right to contest such claim by arbitration or otherwise. Landlord's refusal to approve the final plans and detailed specifications shall not be deemed unreasonable if they vary substantially from the approved preliminary plans and outline specifications.

(j) *Demolition and construction.* After the Department of Buildings issues a permit based upon approved plans and specifications, Tenant, at its expense, shall demolish the existing improvements on the leased property and, with diligence and continuity, construct the building in accordance with such plans and specifications. All demolition, excavation, and construction required hereunder shall be performed diligently, in conformity with all legal safety requirements, in a good and workmanlike manner, and in accordance with the standards required by the municipal Department of Buildings. No demolition, excavation, or construction shall be commenced, however, until Tenant shall

deliver to Landlord the following:

(1) *Completion bond.* A contractors' completion bond of a surety company or surety companies (or other assurances that are satisfactory to the Landlord) running to the Landlord as obligee, conditioned on completion of the building in accordance with approved plans and specifications and the provisions of this lease, free and clear of all mechanics' or other liens (except any leasehold mortgages permitted under this lease), and security agreements, and of the possibility of such liens and security agreements. If the approved plans or specifications are subsequently amplified or modified, the bond shall immediately be modified to include such change. The bond shall be in any form and written by any company which Landlord may approve, but such approval shall not be unreasonably withheld.

(2) *Liability insurance.* Comprehensive general liability insurance insuring the Landlord for at least \$2,500,000 for any one accident and \$500,000 for any injury to any one individual, and \$500,000 for damage to property, written to protect the Landlord in regard to its ownership of the leased property, the demolition of the existing buildings, and the construction of the improvements contemplated by this article.

(k) *Time limitation.* Notwithstanding any provision to the contrary herein contained, Tenant shall comply with all the provisions of this article and be prepared to commence demolition and construction, by no later than the second anniversary of the first day of the original lease term.

(l) *Demolition commencement.* If Tenant does not commence demolition by [date], Landlord may terminate this lease by giving ten days' written notice. In such event, this lease shall terminate at the end of the ten-day period and be of no further force and effect, and Landlord may retain, as liquidated damages, the security deposited hereunder. However, if Tenant commences demolition during such ten-day period, its failure to commence such demolition by the specified date shall not be deemed a default hereunder, and Landlord's notice of termination shall be of no force and effect. But if demolition is not thereafter continued with due diligence to completion, Landlord may terminate this lease by giving ten days' notice. At the end of such period, this lease shall terminate and Landlord may retain, as liquidated damages, the security deposited hereunder.

(m) *Delay.* Such demolition and construction shall proceed with diligence and continuity until completion, subject, however, to fire, strikes, embargoes, governmental restrictions, unavailability of construction materials, or other similar contingencies beyond the Tenant's control. No delay of any nature, however, regardless of whether occasioned by any change in the laws existing or regulations now in effect governing the removal of tenants, shall postpone the accrual of rent hereunder of \$110,000 per annum from and after the third anniversary of the first day of the original lease term.

(n) *Compliance with law.* The Tenant shall procure all the required permits for the construction of the building and shall, during construction, comply with all applicable legal requirements. The building shall, when completed, comply with all applicable state, municipal, and other governmental laws, ordinances, regulations, and orders, and with all requirements of the local Fire Insurance Rating Organization or similar body and of any liability for accidents in or connected with the leased property. Before the building is used for its designed purpose the Tenant shall obtain and deliver to the Landlord a certificate of occupancy, or a temporary certificate of occupancy if such is provided for by law. If a certificate of occupancy is issued for any part of the building to be erected, the part of the building so certified may be occupied. On Tenant's demand, Landlord shall promptly execute all documents that require its signature in order to obtain such certificate, but only if, in the opinion of its counsel, it incurs no expense or liability thereby.

(o) *Inspection.* During construction the Landlord and its architects or engineers, or both, may, from time to time, inspect the building and require that they be furnished with copies of all plans, shop drawings, and specifications relating to construction. If, during construction or at any time before a final certificate of occupancy is issued, Landlord or its architects or engineers determine that the building is not being constructed in accordance with the plans and specifications, prompt written notice shall be given to Tenant specifying in detail the particular deficiency, omission, or other act of nonconformance. Upon receiving such notice, Tenant shall take all necessary steps to make the proper

corrections.

(p) *Changes and additions.* If after construction is begun the Tenant desires substantial changes in the plans and specifications or substantial additions thereto, it shall serve upon the Landlord a statement thereof, together with appropriate plans and specifications showing in detail the nature of the proposed changes or additions. Any change or addition proposed by Tenant shall be deemed part of the plans and specifications approved by both parties unless, within 20 days after receipt thereof, Landlord notifies Tenant that it refuses to accept the proposed change or addition. Landlord, however, shall not unreasonably withhold its consent. Minor changes in work or materials that do not affect the general character of the alteration may be made in the plans and specifications at any time without Landlord's approval.

(q) *Architect fees.* Tenant shall bear the charges of any architect or engineer employed by Landlord to pass upon any plans and specifications and to supervise and approve any construction, or for any other services rendered by such architect or engineer as contemplated hereunder. The architect's or engineer's fees shall be comparable to those customarily paid for similar services. Any dispute concerning the reasonableness of such fees shall be settled by arbitration.

(r) *Leasehold mortgages.* Within 20 days after requested by any holder of a first mortgage on this lease, Landlord shall furnish it with a duly acknowledged statement as to whether Landlord accepts and approves the plans and specifications for the new building required by this article; whether such building has been completed in accordance with the plans and specifications; the amount of any rent and additional rent due; and whether the fire and other insurance required by this lease has been obtained. Any such statement shall be for the sole benefit of such leasehold-mortgagee requiring it and shall have no effect, as an estoppel or otherwise, with respect to any third party.

(12) Tenant's agreement to amend lease for construction financing--certain terms unamendable

The Landlord intends to procure from one or more financing institutions part or all of the funds to finance the construction of the improvements on the property of which the leased premises are a part. If any such financing institution requires any modification of the terms and provisions of this lease as a condition to such financing, the Landlord may cancel this lease if the Tenant refuses to approve and execute such modification within 30 days after the Landlord's request. Such request may not be made later than 60 days before delivery of possession. If such right is exercised, this lease shall thereafter be null and void and any money deposited shall be returned to the Tenant. Neither party shall have any liability to the other for damages or otherwise by reason of such cancellation. The Tenant, however, shall not be required to agree, and the Landlord shall not have any right of cancellation for the Tenant's refusal to agree, to any modification of the provisions of this lease relating to the amount of minimum and percentage rentals reserved, the purposes for which the leased premises may be used, the size or location of the leased premises, the duration or commencement date of the term, or the improvements to be made by the Landlord to the property of which the leased premises are a part.

(13) Tenant work upon building shell constructed by landlord--landlord approval of tenant plans and contractors

(a) *Lessor's work in the Demised Premises.* Lessor shall construct the Demised Premises substantially in accordance with its construction obligations set forth in Exhibit "A," Part I, "Lessor's Work Done at Lessor's Expense," annexed. Lessor shall commence and complete its construction in the Demised Premises as soon as may practically be done, but Lessor shall not be liable in any manner whatsoever for its failure to do so.

(b) *Lessee's Work.* (1) *Commencement of work.* Promptly, after Lessor notifies Lessee that the shell of the Demised Premises is ready for commencement of Lessee's work, Lessee shall commence and thereafter complete with due

diligence its construction work and installation of fixtures in accordance with its construction obligations set forth in Exhibit "A," Part II, "Lessee's Work Done at Lessee's Expense," annexed and in accordance with its Preliminary Plans and Specifications and its Working Plans and Specifications. If Lessee shall neglect, fail, or refuse to commence its work as aforesaid and thereafter neglects, fails or refuses to diligently proceed with and complete its work, Lessor, in addition to its other rights and remedies and after 30 days' written notice given to Lessee, may (a) complete Lessee's work at Lessee's expense and thereupon commence the Lease term, (b) commence such term and all of Lessee's payment obligations hereunder, notwithstanding the incompleteness of Lessee's work, or (c) declare this Lease cancelled and of no further force and effect.

(2) *Preliminary work.* Lessee may, with Lessor's consent, enter the Demised Premises for preliminary work before Lessor completes its work, provided that Lessee's work is done in a manner that does not interfere with either the completion of Lessor's work or any of its labor agreements.

(3) *Certificates; entry by tenant.* Lessee shall furnish Lessor with all certificates and approvals with respect to work done by Lessee or on its behalf that may be required by any governmental authority for the issuance of a certificate of occupancy. Lessor shall not be responsible for any loss or damage to any fixtures or equipment installed or left in the Demised Premises. Lessee's entry on and occupancy of such premises before the commencement of this Lease shall be governed by and subject to all of its provisions, covenants, and conditions, other than those requiring the payment of Minimum Rent and other charges except utility charges.

(4) *Preliminary plans.* Lessee shall furnish Preliminary Plans and Specifications incorporating its construction obligations under Exhibit "A" for Lessor's prior approval within 15 days after Lessor's architects provide Lessee with outline plans for the Demised Premises. Within 45 days after Lessor approves the Lessee's Preliminary Plans and Specifications, Lessee shall submit Working Plans and Specifications for Lessor's review and prior approval. The Lessor's approval of the Preliminary Plans and Specifications and the Working Plans and Specifications shall not constitute its assumption of any liability for their compliance or conformity with applicable building codes and the requirements of this Lease or for their accuracy, and Lessee shall be solely responsible for such plans and specifications.

(5) *Approval of contractors.* Any contractor used by the Lessee to perform its work under Exhibit "A," Part II, "Lessee's Work Done at Lessee's Expense," must first be approved in writing by Lessor. Such approval shall be in Lessor's sole discretion based on the proposed contractor's financial condition.

(6) *Lessee's allowance.* Lessor shall allow Lessee \$10,000 for the completion of Lessee's work in the Demised Premises. This allowance shall be paid after the Lessee's work is completed and approved by Lessor, the Demised Premises are opened for business, and Lessee delivers to Lessor (a) properly executed general contractor's affidavits stating that all laborers and materialmen have been paid in full, (b) final waivers of liens or lien releases from all general contractors and subcontractors who have performed work on or furnished materials to the Demised Premises, and (c) an occupancy certificate or an unqualified estoppel letter executed by Lessee.

[Attach Exhibit A]



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Current Legal Forms for Real Estate

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Current Legal Forms for Real Estate
Chapter 23 REAL ESTATE LEASES
Part IV. Forms
B. LEASE CLAUSES

31-23 Current Legal Forms for Real Estate FORM 23.45

AUTHOR: by Thomas G. Belden

FORM 23.45 Utilities and other services

COMMENT

The clauses in this group deal primarily with the responsibility for providing and paying for utilities. The specific arrangements often depend upon the character of the tenancy.

Tenant utility payments:

In the lease of an entire building to one tenant there is generally no obligation on the part of the landlord to furnish utilities or other services. In such a case, the lease will state that the landlord is not required to furnish utility services. Even where the landlord does provide these services the obligation to pay for them is passed on to the tenant directly or in the form of additional rent.

Tax treatment of tenant's payments:

For tax purposes, these situations are conceptually different, even though the ultimate result is the same. Where the tenant pays for a cost which is the legal obligation of the landlord, the payment is treated as an additional rental payment. The landlord must include the amount of the payment as ordinary income, but this is eliminated by an offsetting deduction since the payment would have been deductible if made by him directly. If, on the other hand, the tenant obtains and pays for the services on his own, the landlord does not become involved. One distinction between these two approaches is the inclusion of the utility payment amounts in the landlord's gross income. If the landlord is an individual who itemizes deductions, this could affect the deduction for medical expenses or casualty losses, each of which is subject to a limitation based on a percentage of adjusted gross income. Under both arrangements, the costs incurred by the tenant are deductible

by the tenant if the basic rental payments are deductible.

In some situations, costs for utilities and other services are shared by the tenants. A typical case is the shopping center. The landlord generally provides and maintains the conduits to bring utilities to the leased property. He also assumes the cost of lighting the common parking area. On the other hand, each tenant is required to furnish all interior facilities for utilities and to pay for the services furnished to him.

In leases of apartments, office space, or parts of a building used for other purposes, the landlord frequently provides certain services free of charge for the occupants of the entire building. A basic protection for the landlord in such a case is a clause providing that interruption of service for reasons beyond the control of the landlord will not result in any claim for damages or abatement of rent, if service is restored as soon as is reasonably possible. Another protection is a clause providing that if normal use of a particular utility is exceeded, the landlord may install a meter at the tenant's expense, after which the tenant will be charged for the cost of the utility incurred in connection with his own use. The tax treatment of the lessee's payments of the lessor's expenses is discussed more fully in the Tax Background § 23.03, at the beginning of this chapter.

FORMS

(1) Utilities not furnished by landlord

Landlord shall not be required to furnish to Tenant any facilities or services of any kind, including, but not limited to, water, steam, heat, gas, hot water, electricity, light, and power.

(2) Utilities paid by tenant to landlord--additional rent

Tenant shall pay for all electricity, gas, and water used in the property upon presentment of a bill therefor by Landlord. Such amount shall be deemed additional rent hereunder.

(3) Utility charges paid by tenant--indemnification of landlord

Tenant shall pay or cause to be paid all charges for air conditioning, heat, water, gas, electricity, light, telephone, or any other communication or utility service used in or rendered or supplied to the demised premises throughout the term of this lease, and shall indemnify Landlord and save it harmless against any liability or damages on such account.

(4) Electric supplied by utility company--landlord not responsible for failure of supply

Tenant understands that the Consolidated Edison Company of New York, its successors or assigns (the utility company), furnishes and shall furnish electric current for all purposes to the building and the demised premises. Landlord shall not be liable for any damages incurred on account of the utility company's failure at any time to supply such electric current due to strikes, lockouts, boycotts, labor disturbances accidents, or any other cause beyond

Landlord's control, or by virtue of any direction, order, or regulation of any Federal, State, City, County, or Municipal authority.

(5) Utilities paid by tenant--meters installed by landlord--deposits--disclaimer for service interruptions

Tenant shall pay for all water charges, sewer charges, or sewer tax if based on use or consumption of water, gas, electricity, fuel and like utilities used or consumed in or upon the leased premises, including the operation of the heating, air-conditioning and sprinkler systems for the leased premises. Landlord may interrupt the supply of water, gas, electric and also sewer service and all other similar utilities for the leased premises, when required by reason of accident or of repairs, alterations or improvements, until such repairs, alterations or improvements shall have been completed. Landlord shall arrange for the installation of all required utility meters for the leased premises. However, Tenant shall be responsible for the payment of any deposits or similar charges required to be paid in connection therewith and of any sewer or other utility assessment, charge or connection fee required to be paid as a result of a change in the nature of a utility service to the leased premises after the commencement date of this lease. Landlord shall not be liable in damages or otherwise for any failure to furnish or interruption of water, gas, electricity, or sewer services.

(6) Water supplied by landlord--tenant to pay proportionate cost--option to install submeter

Landlord shall furnish Tenant with water for drinking, lavatory and toilet purposes only, through the fixtures installed by Landlord. Tenant shall not waste or permit the waste of water, or use it for any nonstated purposes. Landlord will periodically bill Tenant for Tenant's Proportionate Share of all water bills received by Landlord for water metered to the Building. Tenant shall pay such bills promptly, but in no event later than the date for the next Monthly Installment. Tenant, at its expense, may install a submeter to meter water delivered to the Leased Premises. In such event, Tenant shall not be subject to the foregoing restrictions concerning water usage, but shall pay Landlord for water used according to meter readings (at the rate charged by the supplier of such water) in lieu of paying Tenant's Proportionate Share of bills for all water metered to the Building. All previous or subsequent leases executed with respect to premises in the Building shall contain identical restrictions governing the use, misuse, or wasting of water, except when Tenant installs a submeter at its expense, and such submetered water will be deducted before computing its Proportionate Share of any water bills.

(7) Electrical equipment installed by tenant--tenant's obligation to make changes to remedy overloading

If the Tenant installs any electrical equipment which overloads the lines in the leased property or the building in which such property is located, the Tenant shall, at its expense, promptly make whatever changes are necessary to remedy such condition and to comply with all requirements of Landlord, the Board of Fire Insurance Underwriters (or any similar body), and any applicable governmental authority. For the purposes of this paragraph, any finding or schedule of the applicable Fire Insurance Rating Organization shall be deemed to be conclusive.

(8) Elevator service--right to suspend service

The Landlord shall keep in operation in the building during ordinary business hours, except on Sundays and legal holidays, as many passenger elevators it deems necessary to maintain elevator service. In case of accidents, strikes, repairs, renewals, or improvements to the building or machinery therein, or for other cause deemed sufficient by the Landlord, or those acting for it, the operation of such elevators and other machinery may be changed or suspended. The Landlord will keep one elevator in such building available for service after ordinary business hours and on Sundays and legal holidays, subject to call by the Tenant.

(9) Heat, water, gas, electric and other utilities to be obtained by tenant--surcharge if supplied by landlord--landlord's right to suspend service

(a) *Utilities.* Lessee shall contract for, in its own name, and shall pay for all utility services rendered or furnished to the Leased Premises, including heat, water, gas, electricity, fire protection, sewer rental, sewage treatment facilities and the like, together with all taxes levied or other charges on such utilities. Lessee shall purchase from Lessor all utility services that Lessor supplies, or is required to pay for under a master meter, at charges not to exceed those for similar utility services supplied in the area by any public utility corporation or governmental agency, plus an additional 10 percent for Lessor's overhead costs. Any such charges for service supplied by Lessor shall be due and payable within ten days after billed to Lessee. Lessor shall not be liable for the quality, quantity, failure, or interruption of such service to the Leased Premises.

(b) *Suspension of utility service.* Lessor may, with notice to Lessee, or without notice in the case of an emergency, cut off and discontinue gas, water, electricity and all other utilities whenever such discontinuance is necessary to make repairs or alterations. No such action by Lessor shall be construed as an eviction or disturbance of possession or as its election to terminate this Lease, nor shall Lessor be in any way responsible or liable for such action.

(10) Water, gas, and electricity supplied by tenant--tenant's cost proportionate to tenant's ground floor space in shopping center--landlord may suspend utility service

(a) *Utilities.* The Landlord shall provide the necessary mains, ducts, and conduits in order to bring water, gas and electricity to the demised premises. Unless otherwise specifically provided herein, Tenant at its expense shall supply all means of distribution of all utilities within the demised premises, and shall bear the cost of water, gas, electricity, sewerage, and all other utilities.

(b) *Cost of utilities.* If Landlord initially pays for the cost of a utility furnished to the demised premises, Tenant shall reimburse it for such expenses. If the precise cost of the utility cannot be determined because there is no meter in the demised premises, Tenant shall pay the Landlord the proportionate share of the total cost of such utility furnished to tenants in the Shopping Center, in the ratio that the area of ground floor space in the demised premises bears to the total area of ground floor space in the Shopping Center. If the cost of electricity used in the demised premises is billed to Landlord's meter, Tenant shall reimburse it for such cost. The parties intend to agree hereafter as to the method for approximating the cost of electricity used in the demised premises.

(c) *Suspension of utility service.* The Landlord may interrupt or suspend the supply of any utility service to the demised premises in order to make necessary repairs or alterations to them or to any other building or other part of the Shopping Center. There shall be no abatement in rent because of any such interruption or suspension, if the Landlord makes such repair or alteration with reasonable diligence. No interruption or suspension of any utility for any cause beyond the Landlord's control shall constitute a constructive eviction or entitle the Tenant to any abatement in rent.

(11) Landlord's standard electric services supplied without additional charge--subject to rate adjustment--restrictions on use--landlord's right to discontinue

(a) *Landlord's standard electrical service.* As long as Tenant is not in default in the payment of any rent or the performance of any of its covenants under this lease, Landlord shall furnish to the demised premises, as one of the services supplied without additional charge to Tenant, Landlord's Standard Electrical Service for Tenant's requirements for lighting and electrical appliances and equipment within the demised premises without specific measurement or

charge, on any meter or otherwise, for Tenant's consumption of electricity therein. The furnishing of such Standard Electrical Service is included in the annual rental reserved under this lease, subject to future adjustment if there is an increase or decrease in the electric rate schedule. All installations of electrical fixtures, appliances and equipment within the demised premises shall be subject to Landlord's prior written approval. If, under paragraph (c) below, Landlord discontinues furnishing electric current to the demised premises: (i) Tenant shall contract for such electrical service directly with the public utility serving the area in which the building is located for all of Tenant's electric current requirements if, before such discontinuance, it is physically possible for Tenant to receive electric current in the demised premises from such public utility; and (ii) the annual rental reserved under this lease shall be reduced, as of the date Landlord discontinues furnishing electric current to Tenant, in an amount equal to the aggregate of Tenant's payments to such public utility for electric current consumed for the first twelve month period following the discontinuance of such service by substantially the same electric fixtures, equipment and appliances in use and installed on the date of the discontinuance. Such reduction shall be effected by Landlord's granting to Tenant, (1) commencing with and applied against the first rent becoming due hereunder after the rendition of the first monthly bill from such public utility, and (2) upon Tenant's furnishing to Landlord a photostatic copy of each receipted monthly bill from such public service, a credit against such rent equal to such monthly bill, and for each of the next succeeding eleven monthly payments of rent due hereunder a credit equal to the respective next succeeding eleven monthly bills received by Tenant from such public utility. Thereafter, at the expiration of such twelve month period, the monthly payments of annual rental hereunder shall be reduced by one-twelfth of the aggregate of such billing for such first twelve month period. The rendition of public utility bills and the allowance of credit to Tenant as provided above shall not preclude Landlord from claiming that such bills include charges for electrical consumption by increased electrical fixtures, equipment and appliances.

(b) *Electrical restrictions.* If Tenant does not pay the rent reserved hereunder within five days after the due date, Landlord may discontinue supplying electric service to the demised premises, without further notice. Such discontinuance shall not release Tenant from any liability hereunder or cause Landlord or its agent to incur liability for any resulting damage or loss to Tenant. Tenant shall purchase from Landlord or its agent all lamps, starters, ballasts, and bulbs used in the demised premises. Landlord shall in no way be liable to Tenant for any loss, damage, or expense sustained or incurred by Tenant if either the quantity or character of electric service is changed or is no longer available or suitable for Tenant's requirements. Landlord shall install, at Tenant's expense, any riser or risers that Tenant requests in writing to supply its electrical requirements, if Landlord believes, in its sole judgment, that such items are necessary, and will not cause permanent damage to the building or demised premises, cause or create a dangerous or hazardous condition, entail excessive or unreasonable alterations, repairs, or expense, or interfere with or disturb other tenants or occupants. In addition, Landlord shall, at Tenant's expense, install all proper and necessary equipment in connection with the installation of such riser or risers, subject to the above terms and conditions. Tenant's use of electric current shall not at any time exceed the capacity of the feeders to the building, the risers, or wiring installation. All of the above expenses shall be chargeable as additional rent, and shall be paid by Tenant to Landlord within five days after Landlord renders any bill or statement to Tenant therefor.

(c) *Discontinued electric service.* Landlord may discontinue the above service by giving Tenant 30 days' notice, without being liable to Tenant therefor and without in any way affecting this lease or Tenant's liability hereunder. Such discontinuance shall not be deemed to be a diminution of services within the meaning of any present or future law, rule, or regulation. If Landlord gives such notice of discontinuance, it shall permit Tenant to receive such service directly from the public utility and to use Landlord's wires and conduits, to the extent they are available, suitable, and safely capable, for that purpose. Tenant shall make no alteration or additions to the electrical equipment or appliances without Landlord's prior written consent. Only rigid conduit will be allowed. If any tax is imposed upon Landlord with respect to the purchase, sale, or resale of electrical energy supplied to Tenant by any municipal, state, or federal agency, Tenant's pro rata share of such taxes, if permitted by law, shall be passed on to and paid by Tenant to Landlord.

(12) *Standard electrical service supplied by landlord--rent adjustment for lower or higher use or rate changes--public utility fuel adjustment applicable--use appraisal*

(a) *Landlord's standard electrical service.* The rental reserved in the lease includes Landlord's Standard Electrical Service, consisting of the furnishing of 4 watts of electrical energy per square foot of rentable area, connected load, at 85 percent demand for 236 hours per month (i.e., .8024 kwhrs per square foot per month--"Kwhrs Factor").

(b) *Electrical utility charge in rent.* In computing the rental reserved in this Lease, \$1.60 per rentable square foot has been included in the rental to cover Landlord's Standard Electrical Service, based on electrical rates, fuel adjustment factor, and transfer adjustment factor in effect on the date hereof (as adjusted from time to time, the "Electrical Utility Charge").

(c) *Use adjustment.* If, (i) in Tenant's judgment, Tenant's lighting fixtures, appliances and equipment ("Tenant's Electrical Installations") use a lower connected load and/or lower demand factor, or (ii) in Landlord's judgment, Tenant's Electrical Installations use a higher connected load and/or higher demand factor than that provided in the Standard Electrical Service, Tenant or Landlord, as the case may be, may at any time hereafter request in writing a reduction or increase, as the case may be, in the Electrical Utility Charge (and consequently in the rental reserved in the Lease).

If Landlord and Tenant cannot reach agreement ("settlement") of such reduction or increase, an appraisal shall be made by an independent electrical engineer mutually acceptable to them. If the parties cannot agree promptly upon an acceptable independent electrical engineer, they shall promptly arbitrate the amount of such reduction or increase before the American Arbitration Association, and in accordance with the Association's rules. The parties shall share equally the costs of such appraisal or arbitration. However, if either party requests a reduction or increase within one year of the date hereof or after an earlier settlement, appraisal, or arbitration has been made or concluded, it shall bear the costs of the new appraisal or arbitration.

The settlement, appraisal, or arbitration shall be binding on both parties, and shall set forth (i) the connected load and demand factors of Tenant's electrical installations, and (ii) if the same is less or more than the Standard Electrical Service, the Electrical Utility Charge reduction or increase to be made by reason of applying Tenant's actual connected load and demand factor to the then current electrical rates for the Building.

Any change in Electrical Utility Charge (and consequently in the rental reserved in the Lease), as outlined above, shall become effective on the first day of the month following the month in which the request for a reduction or increase in rent reserved under the Lease, as the case may be, was made, and the Lease shall be deemed amended accordingly.

(d) *Utility charge adjustment.* A. If either:

(1) the electrical energy rates of the public utility supplying the Building for its current Service Classification (or any successor classification reflecting similar services) applicable to the Building is increased or decreased from and after the date hereof, over or below the rates in effect on the date hereof (upon which rates the rent is based as mentioned above),

or

(2) the fuel adjustment and/or the transfer adjustment factors applied by such public utility are increased or decreased from and after the date hereof over or below the base fuel adjustment factor of .4093 [cents] per kwhr and the base transfer adjustment factor of .1603 [cents] per kwhr in effect on the date hereof (upon which factors the rent is based as mentioned above),

then, in any one or more of such instances:

(i) with respect to any rate change under subparagraph (1) of this paragraph (d)A., the Electrical Utility Charge (and consequently the rent reserved under the Lease) shall be increased or decreased, as the case may be, by applying the new rates to the agreed connected load and demand factor used by Tenant at that time, which may be converted into a percentage of increase or decrease of the Electrical Utility Charge, and by applying such percentage of increase or decrease to the Electrical Utility Charge set forth in paragraph (b), less fuel adjustment, if any, under the next succeeding paragraph, and

(ii) with respect to any change under subparagraph (2) of this paragraph (d)A., the rent reserved in the Lease shall be increased or decreased by reason of any change in electricity costs for the Building resulting from such change in the fuel adjustment and/or transfer adjustment factors, as set forth either in the monthly bills of said public utility, or in a statement published by the utility company or such other verification of such change, by multiplying (x) the product of the rentable square-foot area of the demised premises and the Kwhrs Factor of Standard Electric Service set forth in paragraph (a) above (as adjusted by the results of any appraisal made under paragraph (c) hereof) by (y) the net increase or decrease over or under, as the case may be, the base fuel adjustment and/or transfer adjustment factors set forth in subparagraph (2) of this paragraph, annualized.

B. Such increases or decreases under paragraph A. of this paragraph (d) shall go into effect as of the date they become effective, and the Lease shall be deemed amended accordingly.

C. Upon the occurrence of any change under this paragraph (d) which incorporates any portion of the fuel adjustment factor in effect immediately prior to such change, the base fuel adjustment factor set forth in this paragraph (d) shall be changed to the fuel adjustment factor applied by such public utility after giving effect to such rate change for purposes of any increase or decrease in rent under this paragraph (d) which may thereafter be applicable.

(e) *Option areas.* The increases or decreases shall apply not only to the demised premises but also to any option area referred to in the Lease, so that, at any time such area becomes part of the demised premises, the increase or decrease in rent to be paid by Tenant at such time shall be increased or decreased to reflect all changes in the above rates and fuel adjustment and/or transfer adjustment factors from the date hereof to the time such area becomes part of the demised premises.

(f) *Electrical use appraisal.* Within 90 days after the Lease term commences, an independent electrical engineer selected by Landlord and reasonably acceptable to Tenant shall make an appraisal to determine the connected load and demand factor of Tenant's Electrical Installations and the Electrical Utility Charge applicable to such factor. The appraisal shall be made at Tenant's expense, and any increase or decrease in the Electrical Utility Charge from that set forth in subparagraph (b) of this agreement shall be effective retroactively to the commencement date of the Lease term.

(13) Air-conditioning, heat, elevator service provided by landlord--computer air-conditioning at tenant's expense--business hours

Landlord shall furnish the following services at its expense:

(a) *Air Cooling.* Air cooling through the air-conditioning equipment of the Building, between May 15 and October 15 on business days from 8:00 a.m. to 6:00 p.m., and on Saturdays from 8:00 a.m. to 1:00 p.m., to the extent required in Landlord's reasonable judgment to maintain interior temperatures compatible with normal standards of comfort.

Use of the Demised Premises, or any part thereof, in a manner exceeding the design conditions (including occupancy and connected electrical load) for air-conditioning service in the Demised Premises, or the use of computer or data processing machines, may require changes in the air-conditioning system servicing the Demised Premises. Such

changes shall be made by Tenant, at its expense, as Tenant's Alterations.

Tenant shall keep and cause to be kept closed all the windows in the Demised Premises whenever the air cooling system is in operation. Tenant at all times shall cooperate fully with Landlord and abide by all reasonable regulations and requirements which Landlord may prescribe for the proper functioning and protection of its air-conditioning system. Landlord shall have free access to all of its mechanical installations, including, but not limited to, air-conditioning, fan, ventilating, and machine rooms, and electrical closets. Tenant shall not construct partitions or other obstructions which may interfere with Landlord's free access thereto, or with the moving of Landlord's equipment to and from the enclosures containing such installations. Neither Tenant nor its agents, employees, or contractors shall at any time enter such or adjust, touch, or otherwise in any manner tamper with Landlord's mechanical installations.

(b) *Elevators and access.* Elevator service on business days with first floor supervisor, from 8:00 a.m. to 6:00 p.m., and on Saturdays from 8:00 a.m. to 1:00 p.m. At all other times Landlord shall have an elevator available in operating condition. Tenant shall have access to the Building and the Demised Premises 24 hours per day, 7 days per week throughout the term.

(c) *Heat.* Heat, when and as required by law, on business days from 8:00 a.m. to 6:00 p.m. If Tenant requires heat at any other time ("after hours") Landlord shall furnish such after-hours heat upon reasonable advance notice from Tenant, and Tenant shall pay on demand Landlord's reasonable cost therefor, which shall be determined by survey made by Landlord's Building engineer.

(d) *Janitor services.* Janitor services shall be performed such as are standard and customary for the entire Building. Landlord may charge Tenant for removal of wooden or metal packaging materials at Landlord's actual cost for such removal.

(e) *Suspension of services.* Landlord may suspend, delay, or stop any services to be furnished and provided by it under the provisions of this Article whenever necessary by reason of fire, storm, explosion, strike, lockout, labor dispute, casualty or accident, lack or failure of sources of supply of labor, fuel supply, Acts of God or the public enemy, riots, interferences by civil or military authorities in compliance with the laws of the United States of America or with any governmental laws, orders, rules and regulations, or by reason of any other cause beyond Landlord's control, or for emergency or for inspection, cleaning, repairs, replacements, alterations, or renewals that Landlord deems to be desirable or necessary.

(f) *Building condition.* Landlord shall keep and maintain the Building in good order and repair and condition as an office building. Landlord shall do all other repairs in the Demised Premises that are not Tenant's obligation under this lease.

(14) Electricity supplied by landlord--prior approval of increased use--rent adjustment--use survey

(a) *Electricity.* Landlord shall furnish Tenant's electric energy on a rent inclusion basis. Landlord shall not charge Tenant for electric energy by way of measuring it on any meter or otherwise, but it shall be included in Landlord's services which are covered by the annual rental. Landlord shall not be liable in any way to Tenant for any failure or defect in the supply or character of electric energy furnished to the Demised Premises by reason of any requirement, act or omission of the public utility servicing the Building with electricity or for any other reason not attributable to Landlord. Landlord shall furnish and install, at Tenant's expense, all replacement lighting tubes, lamps, bulbs, and ballasts required in the Demised Premises.

(b) *Excess energy demand.* Tenant's use of electric energy in the Demised Premises shall not at any time exceed the capacity of any electrical conductors and equipment in or otherwise servicing the Demised Premises. In order to insure

that such capacity is not exceeded and to avert possible adverse effect upon the Building's electric service, Tenant shall not, without Landlord's prior written consent in each instance (which shall not be unreasonably withheld), connect any additional fixtures, appliances or equipment to the Building's electric distribution system, other than the usual lamps, typewriters and small office machines, or make any alteration or addition to the electric system of the Premises existing on the Rent Commencement Date. If Landlord grants such consent, all additional risers or other equipment required therefor shall be provided by Landlord and their cost shall be paid by Tenant upon Landlord's demand. As a condition to granting such consent, Landlord may require Tenant to agree to an increase in the annual rental to an amount which will reflect the value to Tenant of the additional service to be furnished by Landlord, i.e., the potential additional electrical energy to be made available to Tenant based upon the estimated additional capacity of such additional risers or other equipment. If the parties cannot agree, such amount shall be determined by a reputable, independent electrical engineer, to be selected by Landlord (but subject to Tenant's reasonable approval), and paid equally by both parties. When the amount of such increase is so determined, the parties shall execute a supplementary agreement to reflect such increase in the amount of annual rental stated in this Lease, effective from the date such additional service is made available to Tenant. The increase shall be effective from such date even if the supplementary agreement is not executed.

(c) *Rent adjustment.* (1) *Electricity factor adjustments.* The sum of \$88,629.50 ("electricity factor") is included in the annual rental to cover the cost of electricity made available to Tenant in the Demised Premises. If the public utility rate schedule for the supply of electric current to the Building is increased or decreased (using the rate in effect on [date] as the base rate), or if there occurs any other cost adjustment resulting in an increase or decrease in Landlord's cost for furnishing the electrical energy to the Demised Premises, the annual rental shall be equitably adjusted to reflect the increase or decrease in the electricity factor, and Tenant shall pay Landlord the new annual rental resulting from such adjustment. If the parties cannot agree, the amounts of the adjustments shall be determined in the same manner as a dispute as to the value of additional electric service to the Tenant set forth in paragraph (b), above.

(2) *Use survey.* The parties recognize that at the time of the execution of this Lease, the electricity factor (\$88,629.50) is an arbitrary figure, not necessarily representing the true cost of electricity being supplied to the Premises. Promptly following the Rent Commencement Date a survey shall be made by an electrical engineer selected by Landlord (but subject to Tenant's reasonable approval). When the survey is completed and delivered to Tenant, the cost of electricity as set forth in the survey shall become binding upon Tenant, unless, within 120 days after the delivery of the survey, Tenant notifies Landlord, in writing, that it disputes the amount set forth therein. In such event, Tenant may have an independent survey made by an electrical engineer selected and paid for by it. Tenant shall submit its survey to Landlord and the parties shall have a period of 60 business days to resolve the dispute. If the dispute cannot be resolved within such period, it shall be settled by arbitration. Any adjustment in fixed rent shall be retroactive to the Rent Commencement Date and shall continue for the balance of the term and any renewal thereof, subject, however, to further adjustments as provided for in this Lease.

(3) *Future use surveys.* Throughout the demised term and any extension periods, either party may annually resurvey to determine if a further adjustment in the electricity factor is warranted. Such adjustment would be warranted (in addition to the factors set forth above) to reflect an increase or decrease in the use of more or less electrical service than could be purchased from the public utility company furnishing electric current to the Building under Landlord's Service Classification. When any survey is completed and delivered to the other party, the cost of electricity as set forth therein shall become binding upon the other party unless, within 120 days after delivery of the survey, the other party notifies the serving party in writing that it disputes the amount set forth therein. Settlement of the dispute shall be made in the same manner as provided in subsection (2), above.

(d) *Supply of electric energy.* (1) *Discontinuance by landlord.* Landlord may discontinue furnishing electric energy to Tenant in the Demised Premises at any time by giving it not less than 30 days' notice. If Landlord exercises such right of termination, this Lease shall continue in full force and effect and shall be unaffected thereby, except only that, from and after the effective date of such termination, Landlord shall not be obligated to furnish electric energy to Tenant and the annual rental payable under this Lease shall be reduced to \$732,155.00, subject, however, to any further

adjustment(s) that may be made under any other Articles of this Lease.

(2) *Electric furnished by tenant.* If Landlord discontinues furnishing electric energy to Tenant, Tenant shall arrange to obtain electric energy directly from the public utility company furnishing electric service to the Building. Such electric energy may be furnished to Tenant by means of the then existing building system feeders, risers and wiring to the extent that they are available, suitable, and safe for such purposes. All meters and additional panel boards, feeders, risers, wiring and other conductors and equipment which may be required to obtain electric energy directly from such public utility company shall be installed by Landlord at its expense. Landlord shall not discontinue furnishing of electric current to the premises until Tenant has completed its arrangements to obtain electric current directly from the public utility company furnishing electric current to the Building, so that there is no interruption in the continuity of electric service.

(15) *Tenant's option to cancel lease if utilities found to be insufficient*

The obligations of both Tenant and Landlord under this Lease are expressly conditioned upon Tenant determining within thirty (30) days after the date of this Lease that the utilities servicing the premises are sufficient for Tenant's Permitted Use. If Tenant determines within such thirty (30) day period that the utilities servicing the Premises are insufficient for Tenant's Permitted use, then Tenant may cancel this Lease, in which event, both parties shall be released of any further liability under this Lease. Failure of Tenant to exercise this option to terminate within that thirty (30) day period shall constitute Tenant's waiver of its right to do so.



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Current Legal Forms for Real Estate
Chapter 23 REAL ESTATE LEASES
Part IV. Forms
B. LEASE CLAUSES

31-23 Current Legal Forms for Real Estate FORM 23.46

AUTHOR: by Thomas G. Belden

FORM 23.46 Landlord's rights upon tenant's default

The purpose of the default clause is to specify both the defaults by the tenant and the remedies of the landlord in the event of a breach by the tenant. Generally, this provision enumerates the events of default, describes the procedures by which the lease may expire or be terminated upon such default, and establishes the measure of damages recoverable by the landlord. Proper treatment of these points requires careful consideration of local law, since jurisdictional variations pose distinctive drafting alternatives and problems.

Rent after default:

Several functions are served by the section of the default clause dealing with rent and damages. Normally, the early termination or expiration of a lease concludes all rental obligations of the tenant. Thus, one purpose of the damages clause is to preserve the tenant's liability beyond the premature termination date. This provision is also often designed to accelerate the time when damages are payable. In the absence of a specific provision the landlord might be required to wait until the lease would have otherwise expired, since only then could the effect of the early termination be ascertained precisely.

Deficiencies in rent and expenses:

A standard provision for damages requires the tenant to make payments over what would have been the remaining term of the lease, on the dates when rental payment would have been due. The amount to be paid on each due date in such case is generally the rental which would have been due under the terminated lease, less rentals realized under any new lease entered into by the landlord. Expenses for restoration of the property, acquisition of new tenants, and other consequences of the

lease termination are taken into account.

Present value of unpaid rent:

An alternative formula is often allowed to the landlord. Damages are calculated as of the early termination date and become payable immediately thereafter. They consist of the present value of the remaining rental payments which would have been due until the expiration of the full lease term, less the immediate rental value of the property, plus costs of rental. If the property has been relet the new rental is generally prima facie evidence of present rental value.

Tenant's liability on reletting:

In many jurisdictions, clauses providing for the survival of the tenant's liability upon a reletting by the landlord are strictly construed against the landlord. In order for the reletting not to terminate the tenant's obligations in these jurisdictions, the reletting must be specifically permitted by the lease. For this reason, the landlord is frequently permitted considerable freedom in the manner in which he may relet the premises. He often reserves the right to determine whether or not to relet, to grant concessions, and to rent for a shorter or longer period than the original term.

of default:

In defining the defaults upon which the landlord's rights to an early cancellation of the lease arise, the problem is not only to list the breaches which will cause a cancellation, but also to establish the length of time they may be allowed to persist. The diversity in the seriousness of different breaches is usually taken into account by allowing varying periods for correction following notice by the landlord. An ample period may be allowed to correct the breach of a relatively minor condition. On the other hand, a breach which is considered relatively serious, such as nonpayment of rent, usually must be corrected within a short period following the landlord's notice. Allowance may be made for delays which are beyond the tenant's control.

Bankruptcy of tenant:

The Bankruptcy Reform Act of 1978 nullifies, for all practical purposes, the effect of a default clause which purports to terminate a lease on the basis of insolvency, unsatisfactory financial condition, commencement of a proceeding under the Bankruptcy Act, or the appointment of or taking possession by a bankruptcy trustee or custodian. The law precludes termination or modification in such circumstances, despite express language in the lease to the contrary. Under prior law, a termination or modification based upon these specified events was generally enforceable. Some courts, however, would not permit terminations or modifications on equitable grounds.

Bankruptcy default clause:

Although the effectiveness of the clause, which provides that proceedings in bankruptcy, insolvency, or related events will be deemed a default, may be substantially diminished by the Bankruptcy Reform Act, the clause still frequently appears in leases. This continued inclusion may be motivated by a desire to test the effectiveness of the new law in court, by a hope that the federal law will change during the term of the lease, by the force of tradition, or for future negotiation advantage. Note that the provisions of the standard bankruptcy clause relating to state insolvency situations are still effective.

Other practical alternatives to sole reliance on the traditional default clause can be pursued. Some practitioners advise a landlord to make a careful review of a prospective tenant's financial condition. Additional precautions for a landlord include the holding of additional cash security or obtaining a guarantee from a responsible third party. Special provision can be made for periodic review of financial statements as an early warning sign. Such provisions are sometimes found in bank loan or security documents. The lease can provide that the landlord may terminate if the tenant does not maintain a specified minimum net worth, working capital or cash flow standards. Hopefully, these financial problems will become obvious soon enough that the landlord can terminate and regain possession of the premises before bankruptcy proceedings are commenced.

Insolvency, possession, and bankruptcy:

Defaults such as insolvency, the financial condition of the tenant falling below prescribed standards specified in the lease, or appointment of a receiver in state proceedings, will enable a landlord to take steps to obtain possession of the property. If the lease is thereby terminated and possession is recovered by the landlord prior to commencement of federal bankruptcy proceedings, the landlord will have escaped the automatic stay of proceedings effective under the bankruptcy law. If, however, the landlord is still in the process of obtaining possession or otherwise enforcing his right to terminate the lease at the time that bankruptcy court obtains jurisdiction, the automatic stay will become effective. The landlord may seek relief in bankruptcy court, requesting that the stay be lifted for "good cause." Good cause is not defined in the Act, but requires an examination of case law.

Shopping center leases in bankruptcy:

Shopping center leases are given special attention in the Bankruptcy Reform Act. A trustee in bankruptcy cannot assume a shopping center lease, otherwise in default (i.e., nonpayment of rent), unless he can provide "adequate assurance" of future performance (i.e., rent payments). For shopping center leases, the phrase "adequate assurance" is explained in some detail in the Bankruptcy Act: (1) specification of the source of rent, (2) that percentage rent will not substantially decline, (3) lease assignment or assumption will not breach lease or other valid shopping center restriction, and (4) there will be no disruption, by assignment or assumption of the lease, of tenant mix at the center.

Insolvency and liquidation:

State authorized insolvency and liquidation proceedings could still trigger a termination clause. This assumes that the bankruptcy provision is not preemptive. Problems and complications may arise, however, if state proceedings are abandoned in favor of the bankruptcy law's protection.

Additional landlord protection:

There are a number of additional protections which may be provided for the landlord. These include a waiver by the tenant of rights of redemption provided under local law, a security interest in the tenant's personal property to secure payment of amounts due under the lease and damages from any default, a pledge of profits or an assignment of subleases in the event of termination, and a consent by the tenant to injunctive relief for the landlord. The latter provision, of course, cannot in itself liberalize the principles employed by the courts to determine when equitable relief is available. With respect to perfecting a security interest on the tenant's personal property, it is

essential that local statutory filing requirements be strictly adhered to. In this connection, it should be noted that for the purpose of complying with the filing requirements, the Uniform Commercial Code distinguishes between fixtures and other kinds of personal property. Another common provision states that failure by the landlord to require strict performance of any condition is not a waiver of that condition. The waiver of the right to a trial by jury is included here because the relinquishment of this right is generally considered to be to the landlord's advantage.

Tax aspects:

The tax effects of the cancellation of a lease and the payment of damages generally are not complicated. The amount received as damages by the landlord is income to him in the year received, even though it may relate to future periods and even though the landlord is an accrual basis taxpayer. This amount is most often ordinary income, and not the proceeds of a sale or exchange of a capital asset. The tenant's payment upon cancellation is usually currently deductible. The tenant may also deduct in the year of cancellation the unamortized costs incurred in acquiring the lease and the undepreciated or unamortized costs of his improvements on the leased property. For a further discussion of the tax aspects of cancelling a lease, see the Tax Background § 23.11, at the beginning of this chapter.

FORMS

(1) Landlord's right to reenter upon tenant's default--damages based upon reletting

Landlord may declare this lease to be null and void and, without incurring liability therefor, reenter or repossess the leased property, by force, summary proceedings, surrender, or otherwise, and dispossess and remove Tenant or other occupants therefrom, together with their effects, if (a) the leased property shall become deserted or vacated, (b) proceedings are commenced by or against Tenant in any court under a bankruptcy act or for the appointment of a trustee or receiver of Tenant's property before or after the lease term commences, (c) Tenant defaults in paying all or part of the rent for more than five days after Landlord gives written notice thereof, or (d) Tenant defaults in performing any other covenant, agreement, condition, rule, or regulation now or subsequently contained herein for more than 20 days after Landlord gives written notice thereof. In any such event, Landlord may relet all or part of the leased property, as Tenant's agent, and Tenant shall pay Landlord the difference between the rent due for the remaining term at the time of reentry or repossession and any amount received or to be received under such reletting for the remaining term. Tenant hereby waives service of notice of intention to reenter or of instituting legal proceedings to that end, all right to trial by jury in any summary proceeding instituted by Landlord against Tenant with respect to the leased property, and all rights to redeem under Section 761 of the New York Real Property Actions and Proceedings Law.

(2) Landlord's right to cause expiration upon listed defaults--recovery of rent for balance of term less reasonable rental value

(a) *Default.* Landlord may give Tenant five days' notice of intention to terminate this lease in any of the following circumstances:

(1) *Breach.* If Tenant shall default in observing, performing, or keeping any term, provision, covenant or condition of

this lease on Tenant's part to be kept, observed, or performed (other than covenants for payment of basic rent and additional rent) and shall not cure such default within 15 days after Landlord gives Tenant written notice thereof, or, if such default cannot be cured completely within the 15-day period, if Tenant does not promptly commence within such period and thereafter proceed with due diligence to cure the same.

(2) *Insolvency.* If Tenant is unable to meet its obligations as they become due, is adjudicated a bankrupt, makes a general assignment for the benefit of creditors, or takes the benefit of any insolvency act, or a permanent receiver or trustee in bankruptcy is appointed for Tenant's property and such appointment is not vacated within 90 days. For these purposes, "Tenant" shall mean the tenant then in possession of the leased property.

(3) *Abandonment.* If the leased property becomes vacant or deserted for a period of 30 days.

(4) *Assignment.* If this lease is assigned or the leased property sublet other than in accordance with the lease terms and such default is not cured within 15 days after notice.

(5) *Rent.* If Tenant shall be in default of the prompt payment, when due, of any installment of basic rent or additional rent.

(b) *Termination.* If Landlord gives the five days' notice of termination provided in subparagraph (a), at the expiration of such period this lease shall terminate as completely as if that were the date fixed for the expiration hereof, and Tenant shall then surrender the leased property to Landlord. If this lease so terminates, Landlord may, without any formal demand or notice, reenter the leased property by an unlawful detainer action or by any other means, including force, and remove Tenant therefrom without being liable for any damages therefor. Upon the termination of this lease, Landlord may terminate any sublease then in effect, without the consent of the sublessee.

(c) *Continued liability.* Tenant shall remain liable for all its obligations under this lease, despite Landlord's reentry, and Landlord may rerent or use the leased property as Tenant's agent, if Landlord so elects. Tenant waives any legal requirement for notice of intention to reenter and any right of redemption.

(d) *Statutory notice.* Nothing in this article shall be deemed to require Landlord to give Tenant any notice, except as required by statute, before the commencement of an unlawful detainer action for nonpayment of any basic rent or additional rent. The five-day notice is intended only for the purpose of creating a conditional limitation hereunder pursuant to which this lease shall terminate.

(e) *Deficiency.* If the lease terminates as provided in this article, Landlord may at any time recover from Tenant the amount by which the rent and charges equivalent to rent reserved herein for the balance of the term exceed the reasonable rental value of the leased property for the same period.

(f) *Time of essence.* Time is of the essence of this lease with respect to Tenant's performance of its obligations hereunder.

(3) Default on failure to pay rent or ten days after notice of failure to perform other covenants--reentry without lease termination--application of rent on reletting--nonwaiver, cumulative remedies

(a) *Default; reentry.* In addition to all other rights and remedies it may have, Lessor may immediately terminate this Lease, or reenter and attempt to relet without terminating, and remove all persons and property from the Demised Premises, if Lessee (i) fails to pay any rental or other sums when due hereunder, (ii) fails to observe, perform, or keep any other term, provision, covenant or condition hereof required by Lessee to be observed, kept or performed, for more than ten days after Lessor gives Lessee written notice of such default, (iii) falsifies any reports required to be furnished

to Lessor hereunder, or (iv) allows this Lease to be taken under any writ of execution. In any such event, Lessor may remove such property and store it in a public warehouse, or elsewhere, for Lessee's account and at its expense, without service of notice or resort to legal process, and without being deemed guilty of trespass or becoming liable for any resulting loss or damage.

(b) *Application of rent; deficiency.* If Lessor (i) elects to reenter and attempts to relet, or (ii) takes possession pursuant to legal proceedings or any notice provided by law, it may, from time to time, make whatever alterations and repairs are required to relet all or part of the Demised Premises for any term or terms (which may extend beyond the term of this Lease), at any rental or rentals, and upon any other terms and conditions Lessor deems advisable. All rentals received by Lessor from each such reletting shall be applied, first, to the payment of any indebtedness other than rent due hereunder from Lessee to Lessor; second, to the payment of all costs and expenses of such reletting, including brokerage fees and attorney's fees; third, to the payment of rent due and unpaid hereunder; and balance shall be held by Lessor and applied to payment of future rent as it becomes due and payable hereunder. If the rentals received from such reletting during any month are less than those to be paid during that month by Lessee hereunder, Lessee shall pay such deficiency to Lessor. Such deficiency shall be calculated and paid monthly. No such reentry or taking possession of the Demised Premises by Lessor shall be construed as its election to terminate this Lease unless a notice of such intention is given to Lessee or the termination thereof is ordered by a court of competent jurisdiction. Notwithstanding any such reletting without termination, Lessor may at any time thereafter elect to terminate his Lease for such previous breach. In addition to all other rights and remedies which Lessor may have at law, in equity, or hereunder, if Lessor shall terminate this Lease for any breach, it may recover from Lessee: (i) all damages incurred by reason of such breach, including the cost of recovering the Demised Premises, (ii) reasonable attorney's fees, and (iii) the amount by which the rent and equivalent charges reserved herein for the remainder of the stated term exceeds the then reasonable rental value of the Demised Premises for such remaining period. All of the above amounts shall be immediately due and payable from Lessee to Lessor. In determining the rent which would be payable hereunder by Lessee after default, the annual rent for each year of the unexpired term shall be equal to the average annual Minimum and Percentage Rents paid by Lessee from the commencement of the term to the time of default, or during the preceding three full calendar years, whichever period is shorter.

(c) *Expense reimbursement.* Lessee shall pay upon demand all of Lessor's charges and expenses incurred in recovering all sums due hereunder, or arising out of the breach of any covenant hereunder or for any other relief against Lessee, including the fees of counsel, agents, and others retained by Lessor. The foregoing shall be in addition to all of Lessor's other rights and remedies at law, in equity, or hereunder. If Lessor prevails in any action brought against it by Lessee for relief hereunder, Lessee shall pay Lessor's reasonable attorney fees and all court costs.

(d) *Bankruptcy; insolvency.* Lessor may cancel and terminate this Lease if Lessee or any Surety of this Lease becomes bankrupt, or files or has filed against it in any court under any federal or state statute, any debtor proceedings, or a petition in bankruptcy or insolvency, for reorganization, or for the appointment of a receiver or trustee of all or part of Lessee's or such Surety's property; or if Lessee or any such Surety makes an assignment for the benefit of creditors, or petitions for or enters into an arrangement. Upon such cancellation and/or termination, no party claiming on behalf of Lessee or any such Surety of this Lease shall have any rights hereunder,

(e) *No waiver.* No waiver of any covenant or condition of this Lease or of the breach thereof shall be deemed to constitute a waiver of any subsequent breach of such covenant or condition, or to justify or authorize the nonobservance on any other occasion of the same or any other covenant or condition hereof. No waiver or indulgence granted by Lessor to Lessee shall be taken as an estoppel against Lessor. Lessor's acceptance of rent, or its failure to promptly avail itself of any or all of its rights or remedies at any time while Lessee is in default under any covenant or condition hereof, shall not be construed as a waiver of such default, or of Lessor's right to terminate this Lease on account thereof.

(f) *Cumulative remedies.* Lessor's rights and remedies hereunder shall be deemed to be cumulative and not exclusive of all other rights and remedies which it may have at law or in equity, and Lessor may exercise any such right or remedy at

any one or more times without impairing its standing to subsequently exercise any other right or remedy.

(4) Default--failure to pay rent--abandonment--failure to perform covenants--assignment for benefit of creditors, bankruptcy--inability to obtain insurance

The occurrence of any of the following shall constitute a default of this Lease:

1. *Rent default.* Any failure by Tenant to pay the rental or make any other required payment when such failure continues for five days after it receives Landlord's written notice.

2. *Abandonment.* Tenant's abandonment of the Leased Premises.

3. *Breach.* Tenant's failure to observe and perform any other provision of this Lease, when such failure continues for 15 days after it receives Landlord's written notice. However, if the default cannot reasonably be cured within such period, Tenant shall not be deemed to be in default if within this period it commences to cure and then diligently completes such curing.

4. *Insolvency.* Tenant's making of a general assignment for the benefit of creditors. The filing by or against Tenant of a petition to have it adjudged a bankrupt or of a petition for reorganization or arrangement under any bankruptcy law (unless, in the case of a petition filed against Tenant, it is dismissed within 60 days); the appointment of a trustee or receiver to take possession of substantially all of Tenant's assets or of its interest in this Lease, if possession is not restored to Tenant within 30 days; or the attachment, or other judicial seizure of substantially all of Tenant's assets or of its interest in this Lease if such seizure is not discharged within 30 days.

5. *Insurance.* Landlord's inability to obtain fire and extended coverage insurance equal to the full replacement cost of the Building (less foundations) from recognized insurers because of any use of the Leased Premises by Tenant. Landlord shall give Tenant notice of such inability, and Tenant shall have 30 days to obtain such insurance for Landlord or cease the offending use.

(5) Termination remedy on tenant's default--damages to include rent and expenses incurred in reletting--reentry and rent deficiency--default under another lease--late payment penalty

(a) *Default damages.* In the event of any default by Tenant, Landlord may immediately terminate this Lease by giving written notice. If Landlord exercises such right of termination, it shall recover from Tenant:

(1) The worth at the time of award of any unpaid rent which has been earned at the time of such termination;

(2) The worth at the time of award of the amount by which the unpaid rent for the balance of the term after the time of award exceeds the amount of such rental loss that Tenant proves could be reasonably avoided;

(3) Any other amount necessary to compensate Landlord for all the detriment proximately caused by Tenant's failure to perform its obligations under this Lease or which in the ordinary course would be likely to result from the cost of preparing the premises for reletting, brokerage fees, and reasonable attorney fees incurred in such reletting.

The term "rent" as used herein means rental and all other sums required to be paid by Tenant. All such sums, other than Basic Rental, shall be computed on the basis of the average monthly amount thereof accruing during the immediately preceding 24-month period prior to default. If it becomes necessary to compute such rental before such 24-month period occurs, the rental shall be computed on the basis of the average monthly amount accruing during the actual period

elapsed.

As used in paragraph (1), above, the "worth at the time of award" is computed by allowing interest at the rate of 10 percent per annum. As used in paragraph (2) above, the "worth at the time of award" is computed by discounting such amount at the discount rate of the Federal Reserve Bank of Chicago at the time of award plus 1 percent.

(b) *Right of reentry, rent deficiency.* In the event of any default by Tenant, Landlord may also reenter the Leased Premises and remove all persons and property from them. Such property may be removed and stored in a public warehouse or elsewhere at Tenant's cost and for its account.

In the event of abandonment of the Leased Premises or if Landlord elects to reenter as provided above, or takes possession of the Leased Premises under legal proceeding or under any notice provided by law, and if Landlord does not elect to terminate this Lease, Landlord may from time to time, without terminating this Lease, either recover all rental as it becomes due or relet the Leased Premises or any part thereof for such term or terms and at such rental or rentals and upon such other terms and conditions as Landlord deems advisable, with the right to make alterations and repairs to the Leased Premises.

If Landlord elects to relet, rentals received by it shall be applied: (1) to the payment of any indebtedness other than rent due from Tenant to Landlord; (2) to the payment of any cost of such reletting including reasonable attorneys' fees; (3) to the payment of the cost of any alterations and repairs to the Leased Premises; (4) to the payment of rent due and unpaid hereunder; and (5) any balance shall be held by Landlord and applied in payment of future rent as it becomes due and payable hereunder. Tenant shall be responsible for any deficiency created by such reletting during any month, such deficiency to be paid monthly. Tenant shall also pay Landlord, as soon as ascertained, all costs and expense incurred by Landlord in such reletting or in the making of such alterations and repairs not covered by rentals received from the reletting.

No reentry or taking possession of the Leased Premises by Landlord under this Section shall be construed as an election to terminate this Lease, or cause a forfeiture of rents or other charges to be paid during the balance of the term unless a written notice of such intention is given to Tenant or termination is decreed by a legal proceeding. Notwithstanding any reletting without termination by Landlord because of any default by Tenant, Landlord may at any time after such reletting elect to terminate this Lease for any such default.

(c) *Default under other lease.* If the term of any lease (other than this Lease) made by Tenant for any adjacent premises leased from Landlord is terminated or terminable after the making of this Lease, because of any default by Tenant under such other lease, Landlord may terminate this Lease by notice to Tenant.

(d) *Late payment penalty.* Tenant acknowledges that late payment to Landlord of rent and other sums due hereunder will cause Landlord to incur costs not contemplated by this Lease, the exact amount of which will be extremely difficult to ascertain. Such costs include, but are not limited to, processing and accounting charges, and late charges which may be imposed on Landlord by the terms of any mortgage or trust deed covering the Premises. Accordingly, if any installment of rent or any other sum due from Tenant is not received by Landlord or its designee within ten days after such amount is due, Tenant shall pay Landlord a late charge equal to 10 percent of such overdue amount. The parties agree that such late charge represents a fair and reasonable estimate of the costs Landlord will incur by reason of late payment by Tenant. Landlord's acceptance of such late charge shall in no event constitute a waiver of Tenant's default with respect to such overdue amount, or prevent Landlord from exercising any other right or remedy granted hereunder.

(e) *Subtenants.* As used in this Article, "Tenant" also means subtenant.

(6) *Default by failure to pay rent, breach of covenants, or transfer of lease--reentry upon failure of possession by tenant--rent deficiency as liquidated damages--injunction and nonexclusive remedies*

(a) *Defaults.* Landlord may terminate this lease, as provided below, if (1) Tenant defaults in paying any rent or additional charges and such default continues for five days after such payment is due, (2) Tenant defaults in performing any other covenant or agreement on its part to be performed hereunder, and such default is not cured within ten days after written notice thereof from Landlord, or the cure thereof is not commenced within such period and thereafter diligently prosecuted to completion, or (3) this lease is transferred to or devolves upon any person or corporation other than Tenant, except as specifically provided herein. In any such event, Landlord or its agent may give Tenant written notice specifying a day, not less than five days thereafter, on which this lease shall end, and on such day this lease shall expire as fully as if the specified day was the day fixed herein for expiration of the lease. Tenant shall then quit and surrender the demised premises to Landlord, but shall remain liable as provided below.

(b) *Abandonment.* Landlord may reenter the demised premises and remove Tenant or its legal representatives or other occupant, by summary proceedings or otherwise, if (1) Tenant abandons the demised premises, (2) the term of this lease expires, or (3) Tenant fails to take possession of the demised premises within ten days after the lease term commences. Tenant hereby waives service of notice of intention to reenter or to institute legal proceedings to that end.

(c) *Reentry.* In case of any reentry, expiration, or dispossession under subparagraph (b) above, the rent shall immediately become due and be paid up to that time, together with all expenses incurred by Landlord for brokerage and putting the demised premises in good order, or for preparing them for rental. Landlord may relet all or any part of the premises, in its name or otherwise, for a term or terms that are less or greater than the period that otherwise would have constituted the balance of the lease term, and may grant reasonable concessions, or free rent. In addition, Tenant or its legal representatives shall pay Landlord, as liquidated damages, for Tenant's failure to observe and perform its covenants hereunder, any deficiency between (1) all rent and additional charges hereby reserved or covenanted to be paid, with percentage rental computed for the balance of the term for the purpose of this Article at the average percentage rent for the two full lease years preceding the default or reentry, and (2) the net amount of any rents collected on account of the lease of the demised premises for each month of the period which would otherwise have constituted the balance of this lease term. In computing such liquidated damages, the deficiency shall include all expenses incurred by Landlord in connection with reletting, such as for brokerage, keeping the demised premises in good repair, and preparing them for reletting. Tenant shall pay all such liquidated damages in monthly installments on the rent days specified in this lease. If Landlord brings a suit to collect the deficiency for any month, the same shall not prejudice in any way its rights to collect the deficiency for any subsequent month by a similar proceeding. Landlord may make all necessary alterations, repairs, replacements, and decorations in the demised premises for the purpose of reletting without releasing Tenant from its liability hereunder. Landlord shall not be liable for failure to relet the demised premises. The words "reenter" and "reentry," as used in this lease, shall not be restricted to their technical legal meaning.

(d) *Injunctive relief.* If Tenant breaches or threatens a breach of any covenant or provision of this lease, Landlord shall have the right to an injunction and to invoke any remedy allowed at law or in equity, as if reentry, summary proceedings, and other remedies were not provided herein. Mention in this lease of any particular remedy shall not preclude Landlord from any other remedy at law or in equity. Tenant expressly waives all rights of redemption granted by or under any present or future laws if it is evicted or dispossessed, or if Landlord obtains possession of the demised premises by reason of Tenant's violation of any provision of this lease.

(e) *Cure defaults.* If Tenant defaults in the observance or performance of any provision, covenant, or condition required by it to be observed, kept or performed hereunder, Landlord may cure such default for Tenant's account and at Tenant's expense. If Landlord, at any time, is compelled or elects to pay any sum or to do any act that requires such payment because of Tenant's failure to comply with any provision hereof, or if Landlord incurs any expense in prosecuting or defending any action or proceeding because of such default, Landlord's payments, together with legal interest, costs, and damages, shall be due from and paid by Tenant to Landlord on demand as an additional charge hereunder.

(7) Cure of default by tenant after notice--ten-day notice of default in rent--30-day notice of other default--contest of landlord's allegation of default

The following shall govern notices to Tenant and opportunity to cure if it defaults under this Lease:

Landlord may serve a three-day notice of termination upon Tenant as permitted in this Lease:

(a) If Tenant defaults in the payment of any installment of fixed rent or of any additional rent or other charge payable by it to Landlord on any day that the same is due hereunder, and such default continues for ten days after Landlord gives Tenant written notice specifying such default; and

(b) If Tenant does or permits anything to be done, whether by action or inaction, contrary to any of its obligations hereunder (other than the payment of money, as specified above), and if such action or inaction continues and is not remedied within 30 days after Landlord notifies Tenant of such fact, or if there is a default which cannot, with due diligence, be cured within such 30-day period (and which will not subject Landlord to the risk of criminal liability, termination of any superior lease, or foreclosure of any superior mortgage) if Tenant does not commence the cure of such default within such 30-day period and thereafter diligently prosecute the same to completion.

(c) Tenant may contest an alleged default specified by Landlord in its notice if such protest is made in good faith and with due diligence, and the exercise of such right does not subject Landlord to the risk of criminal liability, termination of any superior lease, or foreclosure of any superior mortgage. Such protest shall suspend the time within which Tenant must perform.

(8) Landlord's right upon tenant's failure to take possession--additional per diem rent as damages in lieu of percentage rent

If Tenant receives notice that the leased property is ready for occupancy and fails to take possession and to open for business fully fixtured, stocked, and staffed within the time herein provided, Landlord may, in addition to all of its other remedies, collect additional rent of \$100 per day for each day that Tenant fails to commence business as herein provided. Such additional rental shall be deemed to be in lieu of any percentage rent earned during the period Tenant failed to open.

(9) Late charge for delay in payment of rent--monthly percentage reimbursement of expenses to collect late charge

Landlord may require Tenant to pay as an additional charge hereunder interest of 11/2 percent per month (based upon the rate of 18 percent per annum) on all payments of rent and additional charges which are made more than ten days after the due date. If Tenant fails or refuses to pay rent or any additional charge hereunder and Landlord institutes suit for its collection, Tenant shall reimburse Landlord for all reasonable expenses incurred by Landlord in connection therewith, including but not limited to attorneys' fees, not to exceed 15 percent of the total amount due from Tenant.

(10) Waiver of right of redemption

If Landlord obtains possession of the Leased Premises by reason of Tenant's violation of this Lease, Tenant expressly waives all rights of redemption granted by or under any present or future laws.

(11) Tenant's waiver of statutory redemption rights

Tenant, for itself, and on behalf of all persons, firms, corporations, and associations claiming through or under it, including creditors of all kinds, waives all of its rights and privileges under any present or future law to redeem the premises or to have a continuance of this lease for the demised term after it is dispossessed or ejected therefrom by process of law or under the terms of this lease or after the expiration or termination of this lease as herein provided or pursuant to law. Tenant also waives the provisions of any law relating to notice and/or delay in levy of execution in case of an eviction or dispossession of a tenant for nonpayment of rent, and of any other present or future similar law. Tenant shall not interpose any counterclaim in any summary proceeding commenced by Landlord for nonpayment of rent.

(12) Security interest and lien on tenant's improvements and personal property

Landlord shall have a security interest and first lien paramount to all others on every right and interest of Tenant in and to this lease, on any building or improvement on or hereafter placed on the leased property, and on all furnishings, equipment, fixtures, or other personal property of any kind belonging to Tenant, or the Tenant's equity therein, on the leased property. The security interest and lien are granted for the purposes of securing payment of rents, taxes, assessments, charges, liens, penalties, and damages, and of securing the performance of all of Tenant's obligations under this lease. The security interest and lien shall be in addition to all other rights granted to Landlord under present or future laws of this state.

(13) Landlord's right to receiver upon tenant's default

In addition to any other security for the performance of this lease, Tenant hereby assigns to Landlord all of the rents and profits which might otherwise accrue to Tenant from the use, enjoyment, and operation of the leased property. This assignment shall become effective, however, only after default by Tenant in the performance of its obligations under this lease. If Landlord, upon Tenant's default, elects to file a suit in equity to enforce lease and protect its right hereunder, Landlord may upon notice to Tenant, as ancillary to such suit, apply to any competent court for the appointment of a receiver of the leased property, the improvements and buildings located thereon, and the personal property located therein, and thereupon the court may appoint a receiver with the usual powers and duties of receivers in similar cases. Landlord shall have an absolute right to such appointment, without considering the adequacy of the value of Tenant's interest in the lease, Tenant's solvency or insolvency, the value of the property, the commission of waste thereon, or the deterioration thereof. Nothing herein shall prevent the enforcement of Landlord's lien for rent in any court or by any proceeding authorized by the laws of this state, or Landlord's institution of a separate proceeding in equity for the appointment of a receiver as an ancillary remedy to protect Landlord's rights and interest. All remedies and proceedings are considered cumulative and not exclusive.

(14) Injunctive relief for landlord or tenant

In addition to other remedies provided for in this lease, Landlord and Tenant shall be entitled to restraint by injunction of the violation, or attempted or threatened violation, of any condition or provision of this lease, or to a decree specifically compelling performance of any such condition or provision.

(15) Injunctive relief by landlord against tenant or others--cumulative remedy

Any violation, attempted violation, or threatened violation of any condition of this lease by Tenant, or anyone claiming under it, shall be remediable by injunction, which shall be a cumulative remedy in addition to every other remedy given

by this lease or by existing or future laws.

(16) No waiver of landlord's rights through failure to require strict performance

Landlord's failure to insist upon a strict performance of any term or condition of this lease shall not be deemed a waiver of any of its rights or remedies with respect thereto or with respect to any subsequent breach of such term or condition.

(17) No waiver of landlord's rights except by written instrument

No failure by Landlord to insist upon the strict performance of any term or condition of this lease or to exercise any right or remedy available on a breach thereof, and no acceptance of full or partial rent during the continuance of any such breach, shall constitute a waiver of any such breach, term, or condition. No term or condition of this lease required to be performed by Tenant, and no breach thereof, shall be waived, altered, or modified, except by a written instrument executed by Landlord. No waiver of any breach shall affect or alter any term or condition in this lease, and each such term or condition shall continue in full force and effect with respect to any other existing or subsequent breach thereof.

(18) Remedies cumulative--exercisable concurrently

All rights and remedies of Landlord are cumulative. The exercise of one or more rights or remedies shall not be taken to exclude or waive the right to exercise any other. All such rights and remedies may be exercised and enforced concurrently and whenever and as often as Landlord deems desirable.

(19) Remedies not exclusive--exercisable from time to time

No remedy conferred upon Landlord shall be considered exclusive of any other remedy, but shall be in addition to every other remedy available to Landlord under this Lease or as a matter of law. Every remedy herein conferred upon Landlord may be exercised from time to time and as often as the occasion may arise.



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Current Legal Forms for Real Estate
Chapter 23 REAL ESTATE LEASES
Part IV. Forms
B. LEASE CLAUSES

31-23 Current Legal Forms for Real Estate FORM 23.47

AUTHOR: by Thomas G. Belden

FORM 23.47 Landlord's right to perform tenant's obligations

COMMENT

In many cases, the right to terminate a lease upon the tenant's default will not by itself afford all the protection needed by the landlord. There are certain defaults which normally should not be permitted to continue even for the period of notice customarily provided in default clauses dealing with termination of a lease. For example, it is important that taxes be paid promptly, that insurance be kept in full force, and that violations of laws and administrative regulations be eliminated. Moreover, it is obviously not to the landlord's advantage to terminate a basically favorable lease upon defaults which can be expected to be cured by the tenant. For these reasons, the landlord is generally given the right to perform obligations of the tenant which are in default.

Additional rent for expenses:

The usual provision permits the landlord to perform obligations which remain in default for a specified period after notice to the tenant. Amounts expended by the landlord, together with interest and reasonable attorneys' fees, are required to be reimbursed by the tenant as additional rent. Thus, the landlord has the same rights to terminate the lease in the event of the nonpayment of this additional rent as he has for the nonpayment of the fixed rent.

Additional items:

A number of additional items may be added to this basic pattern. The landlord may be permitted to reenter the premises whenever necessary to cure defaults (see also clauses dealing with the landlord's right of reentry in the event the tenant fails to keep the premises in repair). There may

be variation in the notice period, depending upon the immediacy with which the obligation must be performed. The clause may specify that the landlord's performance of the tenant's obligations will not constitute a waiver of the default or preclude the landlord's right to terminate the lease and recover possession. In the case of a failure by the tenant to keep insurance in force, the landlord's damages should not be limited to the amount of the premiums which the tenant neglects to pay. The lease should permit the landlord to recover any loss which becomes uninsured because of the tenant's delinquency.

Tax aspects:

It should be noted that a payment by a landlord on behalf of a tenant does not justify a current deduction by the landlord or a reduction in rental income in any case where the landlord is entitled to reimbursement from the tenant and the right of reimbursement is not valueless. Consistently, the tenant's deduction is in the year of the landlord's payment, not when the tenant repays the amount. Any interest paid on the reimbursement would be taxable income to the landlord and deductible by the tenant. For a more detailed discussion concerning the tax aspects of rental payments, see the Tax Background (TB) § 23.02, at the beginning of this chapter. For the tax treatment of the lessee's payment of the lessor's expenses, see TB § 23.03.

FORMS

(1) Performance of tenant's obligations--general form

If Tenant is in default hereunder, Landlord may cure such default on Tenant's behalf. In such case, Tenant shall reimburse Landlord for all sums paid to effect such cure, together with interest of 6 percent per annum and reasonable attorneys' fees. In order to collect such reimbursement Landlord shall have all the remedies available under this lease for a default in the payment of rent.

(2) Reimbursement of landlord for expenses of performing tenant obligations--payable without demand or setoff

Lessee shall observe, perform and keep, at it's expense, all of the terms, provisions, covenants, and conditions required by it to be observed, kept and performed hereunder. If Lessor incurs any expense arising out of Lessee's failure, neglect, or refusal to perform its obligations hereunder, Lessee shall reimburse Lessor for such amount in the next installment of rent. All such payments by Lessee to Lessor shall be made without any prior demand and without any deduction, counterclaim, or setoff.

(3) Performance of tenant's obligations after notice--other remedies--landlord payments are additional rent

If, at any time, Tenant is in default in the payment of any imposition, insurance premium, or other amount required by it to be paid hereunder, or in the performance of any other act required hereunder, Landlord, in addition to invoking all other remedies for such default, may pay Tenant's obligations, or, after giving it ten days' prior written notice, perform Tenant's acts, in the manner and to the extent Landlord deems desirable, and may pay all incidental expenses. All such payments by Landlord shall constitute additional rent payable on demand. Failure to make such payments on demand

shall constitute a new default by Tenant and Landlord shall have the same rights and remedies as in the case of default by Tenant in the payment of any installment of rent.

(4) Performance of tenant's obligations after notice or without notice in emergency

If Tenant defaults in performing any of its obligations hereunder, Landlord may perform such obligation for Tenant's account and at Tenant's expense, after giving 30 days' notice to Tenant, or without notice if Landlord believes an emergency exists. Tenant shall reimburse Landlord for all expenses, including reasonable attorneys' fees, incurred by Landlord in instituting, prosecuting, or defending any action or proceeding resulting from Tenant's default. If Tenant is required hereunder to reimburse or otherwise pay Landlord any money in addition to the specified rent, such amount shall be deemed additional rent, which Landlord may add to any subsequent installment of specific rent due and payable hereunder. In such case, Landlord shall have the remedies for default in the payment of rent provided by this lease. The provisions of this paragraph shall survive the termination of this lease.

(5) Performance of tenant's obligations--damages not limited to unpaid insurance premiums

(a) *Insurance and other obligations.* If Tenant at any time fails to (i) pay any amount in accordance with the provisions hereof, (ii) obtain, maintain, or deliver any insurance policies provided for herein, or (iii) perform any of its other obligations hereunder, Landlord may do so after giving 15 days' notice to Tenant, or without notice in case of an emergency, and without waiving or releasing any other right or remedy Landlord may have against Tenant. Landlord may enter upon the leased property for such purposes and take all necessary action.

(b) *Additional rent.* All payments and expenses incurred by Landlord in performing Tenant's obligations under paragraph (a), together with interest thereon at the rate of 18 percent per annum from the respective dates of each such payment and expense, shall constitute additional rent hereunder, which Tenant shall pay Landlord on demand.

(c) *Damages.* Notwithstanding any provision to the contrary herein contained, damages claimed by Landlord for Tenant's failure to provide and keep insurance in force shall, in addition to the amount of insurance premiums not paid by Tenant, include any uninsured loss, together with losses, costs and expenses arising out of any suit incurred by reason of damage occurring to the leased property during any period Tenant has failed to provide and keep such insurance in force.

(6) Performance of tenant's obligations upon notice--special provision for taxes

(a) *Tenant obligations.* If Tenant defaults in performing any of its obligations hereunder, Landlord may, after giving 30 days' notice to Tenant specifying such default, or without notice in case of emergency, perform such obligation for Tenant's account and at Tenant's expense, including reasonable counsel fees. Any payment made or expense incurred by Landlord for such purpose, with interest thereon at the rate of 10 percent per annum, shall be deemed additional rent, which Tenant shall immediately pay to Landlord, or, if Landlord so elects, shall be added to any subsequent installment of rent due and payable hereunder. If no emergency exists, the provisions of this subparagraph shall be inapplicable if, within 30 days after Landlord gives such notice, Tenant either cures the default or commences and thereafter diligently proceeds to cure the same. Nothing contained herein shall be deemed to waive Landlord's right to hold Tenant liable for any money paid or indebtedness incurred by Landlord under the provisions of this subparagraph. Such provisions shall survive the termination of this lease.

(b) *Taxes.* Notwithstanding the provisions of subparagraph (a), if Tenant does not pay any real estate tax, assessment, sewer rent, water charge, or other tax set forth in this lease at least ten days before the last day on which they may be

paid without penalty or interest, Landlord may make such payment. Landlord's payment, with interest thereon, may be added as additional rent to the next installment of rent due and payable hereunder, and the amount of such tax or charge shall, for all purposes, be deemed to be rent payable on such rent day or on any other subsequent rent day selected by Landlord. Landlord's payment shall not be deemed to waive or release Tenant's default for nonpayment or Landlord's rights to terminate this lease and to recover possession.

(7) Tenant not to allow mechanic's liens--landlord's option to pay if tenant fails to discharge--reimbursement to landlord on demand

Lessee shall not permit to be created nor to remain undischarged any lien, encumbrance, or charge arising out of any work of any contractor, mechanic, laborer, or materialman which might be or become a lien or encumbrance or charge upon the Demised Premises or the Shopping Center of which the Demised Premises is a part, or the income therefrom. Lessee shall not suffer any other matter or thing whereby Lessor's estate, right and interest in the Demised Premises or in the Shopping Center may be impaired. If any lien or notice of lien on account of an alleged debt of Lessee or any notice of contract by a party engaged by Lessee or Lessee's contractor to work in the Demised Premises is filed against the Demised Premises or the Shopping Center, Lessee shall, within 20 days after notice of the filing of such lien or notice of lien, cause it to be discharged of record by payment, deposit, bond, order of a court of competent jurisdiction, or otherwise. If Lessee fails to cause such lien or notice of lien to be discharged within the period provided, Lessor, in addition to its other rights and remedies, may discharge the lien or notice of lien either by paying the amounts claimed to be due or by procuring the discharge of such lien by deposit or by bonding proceedings. In either case, Lessor may defend any prosecution of an action for foreclosure of such lien by the lienor, or compel the lienor to prosecute such action, and pay the resulting judgment in favor of the lienor, with interest, costs, and allowances. Lessee shall pay Lessor on demand all amounts paid by Lessor and all costs, including attorney's fees, incurred by it in connection with such action, together with maximum legal interest thereon from the respective dates that Lessor makes the payment or incurs the expense.



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31-23 Current Legal Forms for Real Estate FORM 23.48

AUTHOR: by Thomas G. Belden

FORM 23.48 Access and easements to the premises

COMMENT

Access to the premises and surrounding areas is important to both the landlord and the tenant. The principal concerns of the landlord usually relate to maintenance of the property and showing it to prospective lessees, purchasers, or mortgage lenders. A tenant's concern for access relates to the right to use some parts of the landlord's property not leased by the tenant for entering and leaving the leased part. This may involve the right to use elevators, access of customers in a shopping center to the tenant's store, or the use of common hallways, stairways, and the like.

Access by landlord:

There are several purposes for including a provision authorizing the landlord to enter the premises. In the absence of such a provision, the landlord's rights of access are narrowly limited, and he may be subject to an action for damages or rent abatement if the entry is not allowed by the lease. Therefore, the lease should specify the occasions on which the landlord has access to the premises. If the landlord has agreed to make repairs or alterations, or if there are common facilities which he is obligated to maintain, he should have the right to enter to inspect such facilities and to make such repairs. A similar right should exist if the landlord is to make any repairs which are the responsibility of the tenant but which the tenant has failed to make. The landlord also normally retains the right to exhibit the premises to prospective tenants and purchasers and to post "for rent" signs.

Limitations on landlord's access:

Reasonable limitations can be placed on the frequency and hours of the landlord's entry for these purposes. If an entry is sought because of the tenant's failure to make repairs, the tenant should be entitled to notice and to an opportunity to object or to comply before being charged with the work done by the landlord. The landlord's right to exhibit the premises to prospective tenants can be limited to a fixed period towards the end of the lease. On the other hand, the right to enter during an emergency should be unqualified. There is the possibility that some affirmative obligation may be inferred from the landlord's right of entry. To help preclude any such contention the provision may state that it does not impose upon the landlord any obligation other than those specifically assumed in the lease.

Utility easements and access:

In many cases, it is desirable for the landlord to reserve the right to grant easements for the installation of utilities. While the simple statement of the reserved right may be sufficient, local law may require a specific provision to the effect that no abatement in rent will result from the granting of such an easement. On the other hand, the tenant may want the assurance that any such easement will not unduly interfere with his planned use of the premises.

FORMS

(1) Landlord's right of entry--purposes specified

Landlord and its representatives may enter the leased property at any reasonable time in order to inspect the property, perform any work made necessary by reason of Tenant's default hereunder, exhibit the property for sale, lease, or mortgage financing, and to post notices of nonresponsibility under any mechanic's lien law.

(2) Landlord's access to leased premises--landlord alterations and repairs--interruption of business not an eviction

Lessee shall permit Lessor or its agents to inspect or examine the Demised Premises at any reasonable time, and shall permit Lessor to make all repairs, alterations, improvements, or additions in the Demised Premises or to the building of which they are a part, that Lessor deems desirable or necessary or that Lessee is required but fails to do. Such repairs, alterations, improvements, or additions shall not be construed as a full or partial eviction of Lessee, and the rent shall not abate in any manner while such work is being performed, whether by reason of resulting loss or interruption of Lessee's business or any other reason.

(3) Landlord's right to enter premises--inspection, exhibit to prospective purchasers, maintenance--"for sale" sign

Landlord may enter upon the demised premises at all reasonable hours for the following purposes: to inspect or protect the same; to effect compliance with all applicable governmental laws, orders, and regulations; to exhibit the demised premises to prospective purchasers, lenders, or tenants; to make or supervise repairs, additions, or alterations to the demised premises or the building of which they are a part, and to take thereon all required materials; to erect, use, and maintain pipes and conduits in and through the demised premises; and to alter, decorate, or otherwise prepare the demised premises for reoccupancy at any time after Tenant vacates then or removes substantially all of its property

therefrom. None of the foregoing shall constitute an actual or constructive eviction of Tenant or a deprivation of its rights, subject Landlord to any liability or impose upon it any obligation, responsibility or liability, for the care, supervision, or repair of the building of which the demised premises are a part, or any part thereof, other than as specifically provided herein, or entitle Tenant to any compensation or diminution or abatement of the reserved rent. Landlord shall not be responsible to Tenant for any loss or damage that may accrue to its merchandise or other property by reason of any work done by Landlord in or about the demised premises. During the last six months of this lease, Tenant shall permit Landlord to place upon the exterior of the demised premises and the show window the usual "For Rent" or "For Lease" sign.

(4) Landlord's access to make repairs or show premises--landlord's rights to control signs, keys, third-party access, heavy equipment, etc., in premises, building, and site

The Landlord reserves the following rights:

1. To take all measures, including inspections, repairs, alterations, additions, and improvements to the Leased Premises or the Building that are necessary or desirable for their operation, safety, protection, or preservation, if such work does not permanently reduce the area rented by Lessee;
2. To show the Leased Premises to prospective tenants or brokers during the last six months of this Lease term (and if vacated during such period, to prepare the Leased Premises for reoccupancy) and to prospective purchasers at all reasonable times, if prior notice is given to Tenant.

In addition to other rights set forth in this Lease, Landlord shall have the following rights, exercisable without notice or liability to Tenant, for damage or injury to property, person, or business (all claims for damage being hereby released) and without effecting an eviction or disturbance of Tenant's use or possession or giving rise to any claim for set-offs or abatement of rent:

- (a) To change the name or street address of the Site, or the site number of the Premises;
- (b) To install and maintain signs on the exterior and interior of the Site;
- (c) To designate all sources furnishing sign painting and lettering, ice, mineral or drinking water, beverages, foods, towels, vending machines, or toilet supplies used or consumed on the Premises and the Site;
- (d) To have pass keys to the Premises;
- (e) To grant to anyone the exclusive right to conduct any business or render any service in the Site, if such exclusive right does not operate to exclude Tenant from the use expressly permitted by this Lease;
- (f) To decorate, remodel, repair, alter, or otherwise prepare the Premises for reoccupancy during the last six months of the term hereof, if during or prior to such time Tenant vacates the Premises, or at any time after it abandons the Premises;
- (g) To enter the Premises to make inspections, repairs, alterations, or additions in or to the Premises or the Site or to exhibit the Premises to prospective tenants, purchasers, or others, at reasonable hours and at any time in the event of an emergency or to perform any acts related to the safety, protection, preservation, reletting, sale, or improvement of the Premises or the Site;
- (h) To have access to all mail chutes according to the rules of the United States Post Office;

- (i) To require all persons entering or leaving the Site during reasonable hours set by Landlord to identify themselves to a watchman by registration or otherwise and to establish their right to enter or leave, and to exclude or expel any peddler, solicitor, or beggar at any time from the Premises or the Site;
- (j) To close the Building at 10:00 p.m. or other reasonable time set by Landlord, subject, however, to Tenant's right to admittance under regulations prescribed from time to time by Landlord;
- (k) To approve the weight, size, and location of safes and other heavy equipment and articles in and about the Premises and the Site, and to require all such items to be moved in and out of the Site and the Premises only at the times and in the manner directed by Landlord, and only at Tenant's sole risk and responsibility;
- (l) To decorate, alter, repair, or improve the Premises, the Site, and appurtenances at any time. For that purpose, Landlord and its representatives may enter on and about the Leased Premises and the Building with whatever material Landlord deems necessary, erect scaffolding and all other necessary structures on or about the Premises and the Site, and close or temporarily suspend operations of entrances, doors, corridors, elevators, or other facilities. Tenant waives any claim for damages including the loss of business resulting therefrom, and agrees to pay Landlord for overtime and other expenses incurred for work done other than during ordinary business hours at Tenant's request. In exercising its rights under this subparagraph, Landlord shall not unreasonably interfere with the conduct of Tenant's business; and
- (m) To do or permit to be done any work in or about the Leased Premises or the Building or any adjacent or nearby building, land, street, or alley.

(5) Landlord's right of entry--broad purposes

Landlord or its agents may enter the leased property at all times in order to examine it, to show it to prospective purchasers or lessees, or to make any decorations, repairs, alterations, improvements, or additions that Landlord deems necessary or desirable. Landlord may take all necessary material into and upon the leased property, and such entry shall not constitute a full or partial eviction of Tenant. The rent reserved shall not abate while decorations, repairs, alterations, improvements, or additions are being made, whether by reason of loss or interruption of Tenant's business or otherwise.

During the six months preceding the expiration of the term of this lease or any renewal term, Landlord may place upon the leased property the usual notices "To Let" or "For Sale," which Tenant shall permit to remain without molestation. If Tenant removes all or substantially all of its property therefrom during the last month of the term, Landlord may immediately enter and alter, renovate, and redecorate the leased property, without elimination or abatement of rent and without liability to Tenant for any compensation, and such acts shall have no effect upon this lease.

If the Tenant is not personally present to open and permit an entry into the leased property whenever for any reason an entry therein is necessary or permissible, Landlord or its agents may enter the leased property by a master key, or forcibly enter the leased property, without rendering them liable therefor (if during such entry Landlord or its agents accord reasonable care to Tenant's property), and without in any manner affecting the obligations and covenants of this lease.

Landlord's right of reentry shall not be deemed to impose upon it any obligation, responsibility, or liability for the care, supervision, or repair of the leased property other than as herein provided. Landlord may, at any time, without effecting an actual or constructive eviction or incurring any liability to Tenant therefor, change the arrangement or location of entrances or passageways, doors and doorways, corridors, elevators, stairs, toilets, or other public parts of the building and change the name, number, or designation by which the building is commonly known.

(6) Right of entry to make necessary repairs--no liability for disturbance

Landlord or its agent may enter the leased property at all reasonable times during usual business hours for the purpose of inspecting the same, making all necessary repairs thereto, and performing any work therein made necessary by Tenant's default hereunder. Nothing herein shall imply any duty by Landlord to do any work which Tenant is required to perform under any provision of this lease, and Landlord's performance of such work shall not constitute a waiver of Tenant's default. Landlord may during the progress of any work on or in the leased property keep and store upon the leased property all necessary materials, tools, and equipment. Landlord shall not in any event be liable for inconvenience, annoyance, disturbance, loss of business, or other damage to Tenant or its subtenants by reason of making such repairs or performing such work on or in the leased property, or bringing materials, supplies, and equipment into or through the leased property during the course of such work, and Tenant's obligations under this lease shall not thereby be affected in any manner.

(7) Right of entry to make repairs for safety

Landlord and its representatives may enter any part of the leased property at all reasonable hours for the purpose of examining the same or making all necessary repairs or alterations for its safety and preservation. Except in emergencies, Landlord shall give Tenant ten days' notice before making any repair or alteration. Any dispute by Tenant as to the necessity for a particular repair or alteration shall be resolved by arbitration under the provisions of this lease. Landlord is under no obligation to make any repairs or alterations, all of which shall be made at Tenant's expense. Tenant shall repay Landlord's cost of such repairs or alterations, together with interest, as additional rent. The receipted bills of Landlord's mechanics or contractors, showing Landlord's payment for such repairs or alterations, shall be *prima facie* evidence that the charges are reasonable and that Landlord paid the same.

(8) Landlord's right to grant utility easements--no rent abatement

Landlord may grant easements in areas of the leased property for the installation of utilities, if the use of the easement areas for such purposes does not interfere substantially with the operation of Tenant's business. In the absence of such substantial interference, Tenant shall not be entitled to any compensation or abatement of rent.

(9) Access areas reserved for other tenants

If the leased property constitutes one or more floors, or portions thereof, of a building, and any floor or portion contains hallways, passageways, stairways, elevators, or other means of access to and from the upper and lower portions of the building ("access areas"), the space occupied by such access areas shall be reserved for the use of Landlord and all Tenants in the building and shall not be considered a portion of the leased property, even if it is within such property.

(10) Reservation of driveway easement

Landlord hereby reserves the right to use the driveway across the leased property as a means of ingress and egress to and from the street in front of the leased property, and to and from the premises in the rear of such property, by trucks and other vehicles, and by persons on foot. Landlord shall have the right for itself, its agents, servants, and employees, invitees, and licensees, to use such easement of right of way at any time and for any purpose.

(11) Access to service elevator by tenant--basement entrance for deliveries

Tenant shall have the use of the service elevator for access to the demised premises through the basement entrance for the removal of rubbish and deliveries at whatever times and subject to whatever regulations Landlord establishes for the use of the service elevator.

(12) Excavation of adjoining premises--tenant to permit entry to preserve building--not deemed an eviction

If an excavation or other construction is undertaken upon land adjacent to the demised premises, Tenant shall afford to the person performing such work permission to enter upon the premises for the purpose of doing any work such party deems necessary to preserve the wall, or the building of which the demised premises form a part, from injury or damage and to support it by proper foundations. Such permission and entry shall not constitute a whole or partial eviction of Tenant, or entitle it to claim any damages or indemnity against Landlord, or diminution or abatement of rent. The person performing such work shall use reasonable efforts to minimize interference with, or interruption of, Tenant's business operations, and shall repair any resulting damage caused to the demised premises.

(13) Shopping center landlord's right to refuse admission during nonbusiness hours--right to eject or close in event of commotion

Landlord reserves the following rights: to refuse admission to the shopping center and the demised premises, outside of ordinary business hours, to any person not known to any watchman in charge or properly identified; to eject any person from the shopping center whose conduct may tend to be harmful to the safety and interests of the tenants and the property therein; and to close any part of the shopping center during any riot or other commotion when person or property may be imperiled.



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31-23 Current Legal Forms for Real Estate FORM 23.49

AUTHOR: by Thomas G. Belden

FORM 23.49 Tenant's right to perform landlord's obligations

COMMENT

A tenant's interest in leased property can, at times, be adversely affected by his landlord's failure to meet certain obligations. Such a result is possible, for example, if the landlord defaults in paying real estate taxes or in meeting obligations under a mortgage. A tenant who has a substantial stake in continuous possession can seek the right to cure any defaults by the landlord which can jeopardize the tenant's possession.

Payments by the tenant for this purpose are generally treated like those made by the landlord to cure defaults by the tenant. Within a specified period prior to the deadline for payment, the tenant may be given the right to pay any overdue amounts. Such expenditures are then applied against future rentals. To take care of the case where the recovery by offsetting against future rent may extend over a long period, the tenant may be given the additional right to maintain a separate action for reimbursement. Also, the tenant may be given an option to terminate the lease if the landlord is guilty of recurring defaults. These rights may be extended to apply to the breach of other covenants by the landlord. For example, failure by the landlord to make repairs within a reasonable time may justify the performance of such work by the tenant. Sometimes this right is limited to emergency repairs, or to repairs which cost less than a specified amount.

The tenant's payment of the landlord's obligations is in the nature of an advance, and unless clearly uncollectible would produce no income tax deduction at the time the expenditure is made. Recovery by the tenant is generally assured by the operation of the provision allowing him to subtract from future rents amounts expended to cure the landlord's defaults. If the tenant is unable to recover the full amount of the outlay, a loss deduction would then become available. For

further discussion of the tax aspects of the lessee's payment of lessor's expenses, see the Tax Background § 23.03, at the beginning of this chapter.

FORMS

(1) Performance of landlord's obligation--general provision

If Landlord defaults in observing or performing any of its obligations hereunder, Tenant may remedy the default after giving 30 days' notice to Landlord, and in connection therewith may pay expenses and employ counsel, except that Tenant may remedy Landlord's default without notice in case of an emergency. Landlord shall reimburse Tenant on demand for all sums expended or obligations incurred by Tenant in connection with such default. If Landlord fails to do so, Tenant, in addition to its other rights and remedies, may deduct such amount from basic rent or additional rent thereafter becoming due to Landlord.

(2) Performance of landlord's obligation--option to cure default or terminate lease

If Landlord breaks any condition under this lease, Tenant may either cure such breach and deduct the cost thereof from rent subsequently becoming due hereunder, or terminate this lease by giving 30 days' notice to Landlord. If Tenant elects termination, this lease shall terminate on the date fixed in such notice unless Landlord has cured such default prior thereto.

(3) Performance of landlord's obligation--option to terminate lease upon recurring default

If Landlord, after being given written notice of the need thereof, fails or unreasonably delays in building, rebuilding, maintaining, or repairing the leased property as herein required, or in performing any other covenant hereunder, Tenant may perform Landlord's obligation and deduct the cost thereof, with interest, from future rents until such cost is fully recovered. For the purpose of this paragraph, failure for more than three business days to repair leaks in roofs or skylights shall be considered unreasonable. If Landlord's failure or delay to perform any obligation reoccurs and continues for a period of 30 days, Tenant may terminate this lease by giving written notice to Landlord.

(4) Mortgage payments by tenant--right to apply against future rentals or sue for recovery

If Landlord fails to pay any sum due upon any mortgage which encumbers the leased property, Tenant may do so and apply the money so advanced on account of the next maturing rent payments due to Landlord, or, may recover such advances, together with all attorneys' fees and costs incurred in connection with the recovery, in any court of competent jurisdiction.

(5) Mortgage and real estate tax payments by tenant

(a) Mortgage payments. If Landlord, at any time, fails to pay an installment of principal or interest or any other sum due under any present or future mortgage placed on the fee of the leased property to which this lease is subordinate, Tenant

may make such payment provided that it gives Landlord five days' notice prior to the expiration of any grace period after which Landlord's failure to make such payment would constitute a default under the mortgage. Tenant may deduct such payment and any additional expense incurred on account of Landlord's nonpayment, with interest thereon at the rate of 10 percent per annum from the date of payment, from subsequent installments of rent until Tenant has been fully reimbursed for such payment, expense, and interest. Tenant shall in no event be subrogated to any lien, interest, or right of the holder of any such mortgage unless Tenant pays such mortgage in full and receives an assignment thereof.

(b) *Taxes.* If Landlord, at any time, fails to apply any sums deposited hereunder by Tenant for real estate taxes to the payment of such taxes before the last day on which they may be paid without penalty, Tenant may pay such taxes directly and deduct such payment, together with interest thereon at the rate of 10 percent per annum from the date of payment, from subsequent installments of rent until Tenant has been fully reimbursed for such payment and interest.

(c) *Subsequent taxes.* Tenant, in addition to its right to pay real estate taxes as provided in subparagraph (b) above, may also pay the real estate taxes for the next two years directly to the collector of such taxes. In such event, Tenant shall not be required to make any deposit with Landlord for such item or items during the two-year period.

(6) Mortgagee's right to cure landlord's default

If Landlord is in default under this lease, Tenant shall give written notice thereof to the holder of record of the first mortgage covering the leased property. The mortgagee shall be permitted to correct or remedy the default within 30 days after it receives such notice from Tenant. If the mortgagee fails to do so, Tenant, after giving notice thereof to Landlord, may cure the default and deduct the cost thereof from the rent subsequently becoming due hereunder.

(7) Performance of landlord's obligations after notice--duplicate notice to holder of first mortgage--first mortgagee's option to correct or remedy

(a) *Notice of landlord's default.* Lessor shall in no event be charged with default in performing any of its obligations hereunder unless it has failed to perform them within 30 days after Lessee gives it notice properly specifying the details of its nonperformance, or within such additional time as may be reasonably required to correct the default.

(b) *Notice to first mortgagee.* If the holder of record of the first mortgage covering the Demised Premises (the "first mortgagee") gives prior written notice to Lessee that it is the holder thereof and includes in such notice the address at which notices are to be sent to it, Lessee shall give the first mortgagee notice simultaneously with any notice to Lessor to correct Lessor's default as provided above. The first mortgagee shall have 30 days after receipt of such notice to correct or remedy Lessor's default, during which time Lessee may not take any action hereunder to cure the same. Any notice of default to Lessor shall be null and void unless simultaneous notice is given to the first mortgagee.



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31-23 Current Legal Forms for Real Estate FORM 23.50

AUTHOR: by Thomas G. Belden

FORM 23.50 Fire or other casualty losses

COMMENT

There are basically two components of the cost of providing for the restoration of property in the event of a fire or other casualty: the cost of insurance premiums and the expenses of restoration in excess of the insurance proceeds. Thus, the burden of such costs may be allocated in any one of four different ways. Either the tenant or the landlord may pay both the insurance premiums and the restoration costs in excess of the insurance proceeds; the tenant may pay the premiums and the landlord the additional costs; or the landlord may pay premiums and the tenant the additional costs. The clauses in this group assign the burden for the costs of restoration in excess of the insurance proceeds and set forth the procedures for the restoration of the property or the termination of the lease in the event of fire or other casualty.

Termination on destruction of property:

Statutes in many jurisdictions provide that if leased premises are destroyed or rendered unfit for occupancy through no fault of the tenant and there is no written agreement to the contrary, the tenant may elect to surrender possession and be released from paying rent for the period subsequent to the surrender. The rule in jurisdictions where the common law has not been modified by statute is generally that the tenant is not liable for rent in the event of the total destruction of the leased property. Therefore, if it is intended that the lease is to continue and the rent is not to abate, a specific provision to this effect is required.

The lease may provide for its continuance in all events, or only if some prescribed portion of the property has not been destroyed. The standard for the extent of the destruction which will bring

about a termination of the lease may be mechanical, such as a fixed percentage of floor space, or may be a flexible test, depending upon whether repair is economically feasible. If the lease is to continue, it should assign the responsibility for the repair work. In some cases, an election is given to either or both parties to terminate the lease if the casualty occurs near the expiration of the term, in which case insurance proceeds become the property of the landlord.

Tenant restoration:

If the tenant is to arrange and pay for the restoration, a procedure should be established for the application of the insurance proceeds. One approach is to transfer the proceeds to the tenant, who is to hold them in trust or place them in escrow to insure their application toward restoration costs. Another arrangement is for the landlord to retain the funds until he has received from the tenant a certificate of an architect or engineer that funds have been expended or are due for restoration work. A combination of these plans may be employed.

Mortgagee's right to proceeds:

Frequently, the insurance proceeds are subject to the prior claim of a mortgagee. The tenant who has undertaken to pay restoration costs should make certain that funds will be available to him to replace the amount of any insurance proceeds which are retained by a mortgagee. This may be accomplished by a direct requirement that the landlord provide funds to the extent that insurance proceeds are retained by the mortgagee. Another procedure is to authorize or require the placing of a second mortgage on the property to provide funds equivalent to the amount withheld by the mortgagee. Of course, the agreement with the mortgagee may permit the use of all insurance proceeds for restoration purposes, under safeguards controlled by the mortgagee. The landlord should negotiate with its mortgagee prior to signing its loan documents for this right to the use of the insurance proceeds as long as the landlord is not in default and the insurance proceeds alone, or in combination with the landlord's own funds, are adequate to fully restore the property.

Landlord restoration:

If the landlord is to pay the restoration costs he may be given an election to repair or terminate the lease, or he may be obligated to repair unless the property is totally destroyed. If the lease is terminated, rent is apportioned as of the date of the damage or termination. If the premises are wholly or partly untenantable during the course of repair, provision must be made for the suspension, reduction, or continuance of the tenant's rent obligation.

Loss deduction:

A loss from fire, storm, or other casualty creates a deduction for the taxpayer who has purchased or constructed the damaged improvement. If business or income-producing property is completely destroyed, the deduction is for the full adjusted basis of the property, no matter what its value immediately before the casualty. In the case of a partial loss, the deduction is limited to the difference in value before and after the casualty, but cannot exceed the adjusted basis of the property. For example, if the loss in value is \$8,000 and the adjusted basis of the property is \$5,000, the allowable deduction is \$5,000. If the loss in value is \$4,000, that amount is the deductible loss. The amount of any insurance proceeds is subtracted from the adjusted basis in computing the limitation on the deduction. Thus, in the example given, if insurance proceeds of \$3,000 are recovered the deduction in both cases would be limited to \$2,000.

Loss measurement:

Loss in value is one of the limiting factors in measuring the amount of the deduction. While competent appraisal is the traditional method of proving loss in value, the taxpayer may rely upon the cost of repairs as the measure of the loss in value if he shows that (a) the repairs are necessary to restore the property to its condition immediately before the casualty, (b) the amount for such repairs is not excessive, (c) the repairs do not correct more than the damage suffered, and (d) the value of the property after the repairs does not, as a result of the repairs, exceed the value of the property immediately before the casualty. If a lessee has no interest in the leased property, a casualty can not create a deductible loss for him.

Capital asset limitation:

Insured casualty losses or gains from insurance proceeds and the cost of repairs are within the scope of a special statutory classification referred to as "section 1231" transactions. If the transactions result in a net gain, gains and losses from capital transactions are subject to the special limitations applicable to capital assets. If such transactions produce a net loss, the capital asset limitations do not apply. Uninsured casualty losses of long-term business property are deductible as ordinary losses, however, without regard to other transactions. Receipt of fire insurance proceeds by a lessor is a section 1231 transaction even though the tenant elects to terminate the lease instead of requiring the landlord to restore the property.

FORMS*(1) Full risk of loss upon tenant*

No destruction or damage to any building or improvement on the leased property by fire, windstorm, or any other casualty shall entitle Tenant to surrender possession of the leased property, terminate this lease, violate any of its provisions, or cause any rebate or abatement in rent then due or thereafter becoming due under the terms hereof.

(2) Tenant to repair--landlord to apply and turn over insurance proceeds

(a) *Damage and restoration.* If the leased property is damaged or destroyed by fire or other casualty, Tenant, at its expense, shall promptly restore the property as nearly as possible to its prior condition. All insurance proceeds received by Landlord under the provisions of this lease, less any cost of such recovery, shall be held in trust and applied by Landlord to the payment of such restoration as it progresses.

(b) *Termination.* If at any time within 18 months before the end of the initial or any renewal term, (i) Tenant has not served upon Landlord notice of renewal or extension, (ii) the leased property is completely destroyed or so damaged by fire or other casualty, regardless of whether covered by insurance, so as to render it unfit for its intended use, and (iii) repair or restoration is not economically feasible, either party may terminate this lease by giving at least ten days, but not more than 30 days, notice. Such notice must be given within 60 days after the date of such damage or destruction. If the lease is so terminated, all basic and additional rent shall be apportioned to the date of termination, and all insurance proceeds shall belong to Landlord. Any disagreement between the parties as to the economic feasibility of repairing or

restoring the leased property shall be arbitrated as provided below.

(c) *Deficiency.* If the lease is not so terminated and the proceeds of insurance are insufficient to pay the full cost of repair or restoration, Tenant shall pay the deficiency. If the insurance proceeds exceed such cost, the excess shall be paid to Tenant.

(d) *Mortgagee, trustee.* Any disbursement of insurance proceeds by a holder of a deed of trust shall be deemed to have been made by Landlord. If any holder of a mortgage or deed of trust refuses to disburse any portion of insurance proceeds to which Tenant is entitled, Landlord shall provide an equivalent sum from other sources.

(e) *Continuing obligations.* Except as provided in subparagraph (b) above, the fact that all or part of the leased property, or the furniture, furnishings, and fixtures therein, is destroyed or damaged shall not affect the provisions of this lease, notwithstanding any contrary law, rule, or regulation, and Tenant's obligations under this lease, including the payment of basic rent, percentage rent, additional rent, and other charges, shall continue without any abatement.

(3) Tenant to repair--insurance proceeds to be applied by landlord--landlord to retain excess proceeds

(a) *Damage and restoration.* If any building on the leased property, or the machinery, fixtures, and equipment, (except movable trade fixtures, furniture, and furnishings, used in its operation or maintenance), is damaged or destroyed by fire or otherwise, Tenant shall, at the time and upon the conditions set forth below, restore, repair, replace, rebuild, or alter the damaged or destroyed property as nearly as possible to its prior condition (the "work"). Such work shall be commenced as soon as practicable after Landlord or any mortgage holder (the "mortgagee") receives the insurance proceeds, and shall be performed with reasonable diligence.

(b) *Application of funds.* Landlord or the mortgagee shall apply all insurance money received on account of such damage or destruction, less the cost of recovery, to pay the cost of such work. Such cost shall include expenditures made for temporary repairs or for the protection of property pending the completion of the work. The insurance funds shall be paid out, as provided below, from time to time as the work progresses, upon Tenant's written request, which shall be accompanied by the following:

(1) A certificate of the architect or engineer in charge of the work (the certificate), dated not more than 30 days before such request, setting forth that the requested sum either has been paid by Tenant or is justly due to contractors, subcontractors, materialmen, engineers, architects, or other persons (whose names and addresses shall be stated) who have rendered services or furnished materials for certain work. The certificate shall give a brief description of such services and materials, list the several amounts so paid or due to each such person, state the fair value of the work at the date of the requisition, and state that no part of such expenditures has been or is being made the basis for any other request for payment. The certificate shall state also that except for the amounts listed therein, the architect or engineer, after due inquiry, knows of no outstanding indebtedness that is then due for labor, wages, materials, supplies, or services relating to such work and which, if unpaid, could become the basis of a vendor's, mechanic's, laborer's, materialman's, or similar lien upon such work or the leased property.

(2) An affidavit sworn to by Tenant that all materials and property constituting the work described in such architect's or engineer's certificate are free and clear of all security interests, liens, charges, or encumbrances, except encumbrances securing indebtedness due to persons specified in such certificate which are to be discharged upon payment of such indebtedness.

(c) *Disbursement.* Upon compliance with the provisions of subparagraph (b), above, Landlord or such mortgagee shall, out of such insurance money, on Tenant's request, pay to the persons named in such certificate the respective amounts stated to be due to them, or shall pay to Tenant the amount stated to have been paid by it. Such payments, however,

shall not exceed the fair value of the relevant work as stated in the certificate. If the insurance proceeds held by Landlord or the mortgagee exceeds the amount required to pay the cost of the work, such party may retain the excess.

(d) *No rent abatement.* Tenant's obligation to pay the basic rent and all other charges and to perform all other terms of this lease shall not be affected by any such damage to or destruction of any building on the leased property or of the machinery, fixtures, and equipment used in its operation and maintenance, and Tenant waives the provisions of any present or future statute or law to the contrary.

(e) *Tenant default.* Notwithstanding the above provisions of this paragraph, Landlord or such mortgagee shall not be required to pay out insurance moneys held by it when payment is requested, if Tenant is then in default in performing any of its obligations hereunder as to which notice of default has been given.

(4) Tenant to repair--insurance proceeds in escrow--tenant's right to mortgage fee if proceeds retained by existing mortgagee--right to cancel lease if damage occurs near expiration of term

(a) *Damage and repair.* If any building or improvement upon the leased property is totally or partially destroyed or damaged as a result of a casualty or hazard against which Tenant is required to carry insurance, and all or part of the insurance proceeds are due or required to be paid to Landlord or any mortgagee, Tenant shall immediately notify Landlord of such fact. Tenant may then, at its expense, either promptly repair, replace, or rebuild such building or other improvement at least to the extent of its prior value, or delay the commencement of the work until the proceeds of all insurance policies covering the casualty or hazard are made available to it for such purpose. Tenant shall continue the commenced work with reasonable diligence until its completion.

(b) *Specifications and approvals.* Tenant shall make the repair, replacement, or rebuilding in accordance with applicable plans and specifications. If the estimated cost of the work is more than \$50,000, the plans and specifications shall first be submitted to and approved in writing by Landlord, which approval shall not be unreasonably withheld or delayed. Before any work is commenced, the plans and specifications shall be filed with and approved by all applicable municipal or other governmental authorities, and, if so required by the terms of the mortgage, Tenant shall obtain and deliver to Landlord the written consent of any present mortgagee. Landlord shall join in any application to the mortgagee for such consent, and use all reasonable efforts to obtain it. Before commencing the work, Tenant shall procure at its expense, and deliver to Landlord, all policies of insurance usually required in connection with such work.

(c) *Insurance proceeds escrow.* For the purpose of paying the cost of repair, replacement, or rebuilding, Tenant shall keep the insurance proceeds in an escrow account and disburse the same during the course of the work. If the proceeds are insufficient to pay the cost of the work, Tenant shall pay the deficiency. If the proceeds exceed the cost of such work, Tenant may retain the excess.

(d) *Mortgages.* If the holder of any existing mortgage (the "mortgagee") elects to apply any insurance proceeds towards the reduction of the mortgage, Landlord shall make available to Tenant, for the sole purpose of the repair, replacement, or rebuilding for which Tenant is obligated, an amount equal to the total insurance proceeds retained by such mortgagee. If Landlord fails to do so within a reasonable time after final settlement of the loss with the insurers, Tenant may place a mortgage against the leased property in an amount not greater than that which Landlord is required to make available to Tenant, plus the expenses of placing such mortgage. However, if the total charges for interest and amortization upon such new mortgage and for the existing mortgages exceed the then current charges for interest and amortization, Tenant shall pay 50 percent of the excess to Landlord as additional rent, and Landlord shall pay the remaining 50 percent directly and execute all papers in connection therewith. Landlord, however, shall not incur any personal liability with respect to any such mortgage.

(e) *Termination by Landlord.* If the work of repairing, replacing, or rebuilding is not commenced and completed within

the period specified above, Landlord may terminate this lease by giving Tenant 30 days' written notice. If the work is not commenced and the other conditions satisfied before such 30-day period expires, this lease shall terminate, and the insurance proceeds received and receivable shall belong to and be retained by Landlord or any mortgagee to whom such proceeds are payable, as their interests may appear, without claim thereon by Tenant.

(f) *Termination by either party.* If, during the final three years of the last renewal period of this lease, the building and improvement on the leased property are damaged or destroyed as a result of a casualty or hazard against which Tenant is required to carry insurance and such damage or destruction exceeds 50 percent of their then insurable value, either party may cancel this lease by giving the other five days' written notice within 30 days after the date of damage or destruction. In such case, this lease shall terminate on the date specified in the notice. Tenant shall not be required to rebuild, and Landlord or any mortgagee to whom the insurance proceeds are payable may retain all such proceeds, whether received or receivable. All taxes, rents, and other charges shall be prorated and paid to the date specified in the notice of termination.

(g) *Continuation of lease.* Except as otherwise provided herein, this lease shall not terminate or be affected in any manner by reason of the damage or destruction, by fire or other casualty, in whole or in part, of the leased property or the building or improvement thereon, or by reason of the untenantability of the leased property, and Tenant shall pay the fixed rent reserved in this lease, as well as all other charges payable hereunder, in accordance with the terms of this lease, without abatement, diminution, or reduction of rent on account of any such damage or destruction.

(5) Landlord to repair--rent abatement during repair--termination of lease upon complete destruction

If the building in which the leased property is located is damaged by fire or other casualty, without Tenant's fault, and the damage is so extensive as to effectively constitute a total destruction of the property or building, this lease shall terminate and the rent shall be apportioned to the time of the damage. In all other cases of damage without Tenant's fault, Landlord shall repair the damage with reasonable dispatch, and if the damage has rendered the leased property wholly or partially untenantable, the rent shall be apportioned until the damage is repaired. In determining what constitutes reasonable dispatch, consideration shall be given to delays caused by strikes, adjustment of insurance, and other causes beyond the Landlord's control.

(6) Restoration by landlord of property destroyed by insured casualty--tenant to replace trade fixtures--proportionate rent abatement--landlord's option to terminate

If the demised premises or the building containing it is damaged or destroyed during the lease term by fire or other insurable casualty without Tenant's fault, Landlord shall repair or restore such property to substantially its prior condition, except as otherwise provided in this Article. However, Landlord's obligation shall not exceed the scope of the work required of it in the original construction of the building. Landlord shall not be required to, but Tenant shall with due dispatch, replace or restore all trade fixtures, signs or other installations previously installed by Tenant. Rent payable under this lease shall be abated proportionately according to the floor area of the demised premises which is usable by Tenant, but if such damage was caused by Tenant's fault, there shall be no abatement of rent. Such abatement shall continue for the period commencing with such damage or destruction and ending when Landlord completes its required repair work or reconstruction. If, however, the demised premises, the building containing it, or the other buildings in the shopping center are damaged or destroyed by any cause and Landlord decides to demolish or completely rebuild any of them, it may, within 60 days after such damage or destruction, give Tenant written notice of its decision. Thereupon, this lease shall be deemed to have terminated as of the date of the damage or destruction and Tenant shall immediately quit and surrender the demised premises to Landlord.

(7) Landlord to repair--rent abatement during repair for loss of business--no rent abatement if damage due to tenant's

negligence

If all or any part of the leased property is damaged or destroyed by fire or other casualty insured under the standard fire insurance policy with approved standard extended coverage endorsement applicable to the leased property, Landlord shall, except as otherwise provided herein, repair and rebuild such property with reasonable diligence. If such work requires Tenant to temporarily close its business to the public, the minimum rental shall be equitably adjusted for the duration of such repairs. Notwithstanding the above, if the leased property is damaged by fire or other insured casualty due to Tenant's fault or neglect, or the fault or neglect of its servants, employees, contractors, agents, visitors, or licensees, Landlord shall, without prejudice to Landlord's other rights and remedies, repair the damage, but there shall be no apportionment or abatement of any rent. Except to the extent provided for in this paragraph, neither the rent payable by Tenant nor any of its other obligations under any provision of this lease shall be affected by any damage to or destruction of the leased property by any cause and Tenant hereby expressly waives all additional rights it might otherwise have under any law or statute.

(8) Restoration of premises by landlord from insurance proceeds released by mortgagee--rent abatement--option to terminate upon substantial destruction

(a) *Restoration of damaged premises.* If the Leased Premises are damaged, destroyed, or rendered partially untenable for their then use by fire or other casualty insured by Landlord, it shall promptly repair (but only from insurance proceeds released by the holder of any mortgage lien upon the Building which contain the Leased Premises) the premises and restore them to substantially their prior condition. Landlord's obligation to repair shall not extend to any of Tenant's improvements or additions.

(b) *Rent abatement.* During the period from the date of such casualty until the Leased Premises are repaired and restored, Tenant's obligation to pay any basic rental due hereunder, shall abate, but only to the extent there is no rental insurance covering such obligation. However, Tenant shall be responsible for its share of any additional rental due hereunder. The abatement shall be in the proportion that the destroyed or untenable portion of the Leased Premises bears to the total leased premises.

(c) *Termination option.* Notwithstanding the above, if 50 percent or more of the Leased Premises or the building of which they are a part is destroyed or rendered untenable by fire or other casualty, Landlord may terminate this Lease effective as of the date of such casualty, by giving Tenant written notice of termination within 45 days after such casualty occurs.

(d) *Fire and other casualty.* Except as expressly provided herein, this Lease shall not terminate and there shall be no abatement of rent or other charges as a result of fire or other casualty.

(e) *Advance rent refund.* If Landlord elects to terminate as provided above, it shall promptly repay Tenant all advance rentals or other charges that have not been earned as of the date of such event.

(9) Destruction by casualty--landlord's option to re-do landlord's work, tenant to do tenant's work--proportionate percentage rent

(a) *Damage to premises; election to rebuild.* If the Demised Premises are damaged to the extent of 50 percent or more of their cost of replacement, or damaged by any uninsured casualty, Lessor may rebuild or terminate this Lease, by giving appropriate notice to Lessee not more than one year from the date of damage. If Lessor elects to rebuild, it shall, at its expense, proceed with so much of the restoration of the Demised Premises as was included in Lessor's work

provided for in the Article entitled "Lessor's Work in the Demised Premises." Lessee shall perform all repairs and restorations of the Demised Premises not included in Lessor's work in conformance with the Article entitled "Lessee's Work and Approval of Lessee's Plans and Specifications." The parties shall promptly commence and diligently proceed with their restoration obligations hereunder.

(b) *Election to terminate lease.* If, at any time, prior to the last five years during the term hereof the Demised Premises are damaged to the extent of less than 50 percent of their replacement cost by fire or other casualty covered by Lessor's fire and extended coverage insurance policy, the parties shall restore the Demised Premises in accordance with the original construction obligations contained therein. If such damage occurs during the last five years of this Lease, Lessor may rebuild or terminate the Lease, by giving appropriate notice to Lessee not more than one year from the date of damage.

(c) *Proportionate percentage rent.* If the Demised Premises are totally destroyed, Lessee's rent shall completely abate from the date of destruction and the Percentage Break Point shall be prorated to the date of such destruction. If Lessor elects to rebuild as provided above, Lessee's rent shall completely abate from the date of such destruction until 180 days after the date when Lessor notifies Lessee that the shell of the Demised Premises is ready for commencement of Lessee's work, or upon the day when Lessee opens for business, whichever event first occurs. The Percentage Break Point shall be proportionately reduced, based on the period Lessee is unable to open for business due to such destruction. If, however, a partial destruction or damage deprives Lessee of the occupancy and use of only a portion of the Demised Premises, Minimum Rent and the Percentage Break Point shall be equitably apportioned according to the area of the Demised Premises which is unusable by Lessee, until the Demised Premises are repaired or restored as provided herein.

(d) *Election to discontinue operations.* If any portion of the property of which the Demised Premises form a part is damaged or destroyed to the extent that Lessor elects to discontinue operations, Lessor may cancel this Lease by giving Lessee notice of such election, and this Lease shall terminate and become null and void 90 days thereafter.



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Current Legal Forms for Real Estate

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Current Legal Forms for Real Estate
Chapter 23 REAL ESTATE LEASES
Part IV. Forms
B. LEASE CLAUSES

31-23 Current Legal Forms for Real Estate FORM 23.51

AUTHOR: by Thomas G. Belden

FORM 23.51 Insurance

COMMENT

The purpose of the insurance provision is to specify the required coverage and fix the responsibility for the payment of the premiums. It may also describe the manner in which the proceeds are to be distributed, although this is often covered in the clause dealing with casualty losses. Of course, if there is no provision fixing the responsibility for insurance coverage, each party must determine for itself how to obtain protection against loss. Coverage generally includes fire and extended coverage insurance, boiler and machinery insurance, sprinkler system leakage insurance, and rental value or use and occupancy insurance. Although the tenant may pay the premiums, the insurance is written to protect the landlord, the tenant, and the mortgagee according to their respective interests. Minimum coverage may be stated either in an absolute amount or as a percentage of insurance value usually with an 80 percent minimum. Where the latter criterion is employed, provision may be made for an appraisal to determine insurable value. In any event, it is common to require coverage in an amount at least sufficient to prevent the landlord and the tenant from paying for the loss themselves.

Deductible expense:

The Regulations specifically allow a deduction as a business expense for insurance premiums against fire, storm, theft, accident, or other similar losses. Although no specific reference to insurance appears in the Regulations on nonbusiness expenses, the deduction would appear to be allowable for insurance carried in the management, conservation, or maintenance of property held for the production of income, even if the taxpayer's use of the property does not amount to a trade or business and does not currently produce income. A residential tenant could not deduct the cost

of insurance.

Time of deduction:

The treatment of prepaid insurance by a cash basis taxpayer is not certain. There is a division of authority as to whether the deduction is to be taken in the year of payment or is to be amortized over the period of coverage. The position of the Revenue Service is that a prepaid insurance premium by a cash basis taxpayer for a term in excess of one year cannot be deducted when paid but must be ratably deducted over the policy's life. As to an accrual basis taxpayer, the law appears to require a proration of the deduction. Some agreements provide for reimbursement by the tenant for the landlord's prepayments at the commencement of the lease term, and for reimbursement by the landlord for the tenant's prepayments at the termination of the term. Such reimbursements constitute prepayments, and the proper treatment by the party making the payments would be subject to the rules noted.

Tax treatment of insurance gains:

Gain realized from the receipt of insurance proceeds for losses with respect to property held for more than the required holding period is treated as long-term capital gain. Such gain, however, must be offset against any net loss realized during the taxable year on sales or exchanges of business real estate and depreciable business property held for more than the required holding period; the net gain from all such transactions is subject to the capital gain limitations and the net loss is treated as ordinary loss.

Rent insurance:

Insurance proceeds compensating for the loss of rent or for the loss of profits under use and occupancy insurance must be reported as ordinary income.

For a more detailed discussion of the tax treatment of insurance with respect to leased property, see The Tax Background §§ 23.03 and 23.10, at the beginning of this chapter.

FORMS

(1) Landlord to maintain fire insurance

Landlord shall keep the building in which the leased property is located insured against loss or damage by fire with extended coverage endorsement in an amount sufficient to prevent it from becoming a coinsurer under the terms of the applicable policies but, in any event, in an amount not less than 80 percent of the full insurable value as determined from time to time. The term "full insurable value" means actual replacement cost (exclusive of the cost of excavation, foundations, and footings below the basement floor) without deduction for physical depreciation. Such insurance shall be issued by financially responsible insurers duly authorized to do business in this state.

(2) Tenant's general undertaking for insurance--present coverage maintained

Throughout the term of this lease, Tenant shall pay all premiums for insurance coverage on the leased property, including fire and windstorm insurance, in whatever amounts and with such companies as Landlord now maintains or shall otherwise approve.

(3) Insurance to be obtained by tenant--public liability, property damage, and plate glass insurance--landlord coinsured--ten-day notice to landlord of cancellation

Tenant shall, at its expense, during the term hereof, maintain and deliver to Landlord public liability and property damage and plate glass insurance policies with respect to the demised premises. Such policies shall name both Landlord and Tenant as insureds, and have limits of at least \$500,000 for injury or death to any one person and \$1,000,000 for any one accident, and \$100,000 with respect to damage to property and with full coverage for plate glass. Such policies shall be in whatever form and with such insurance companies as are reasonably satisfactory to Landlord, and shall provide for at least ten days' prior notice to Landlord of cancellation. At least ten days before any such policy expires, Tenant shall supply Landlord with a substitute therefor, together with evidence that the premiums therefor were paid. If Tenant fails to do so, Landlord may procure such policies or pay such premiums. In such case, all amounts so paid by Landlord, with interest thereon at the rate of 6 percent per annum from the time of payment, shall be added to the next installment of monthly rent becoming due, and shall be collected as an additional charge.

(4) Contents, fire, and casualty insurance to be obtained by tenant--landlord coinsured--certificate of coverage and cancellation notice to landlord

Tenant shall throughout the term of this lease, for the benefit of both Landlord and Tenant as named insureds, maintain insurance against loss or damage by fire, and such other risks and hazards as are insurable under present and future standard forms of fire and extended coverage insurance policies, to Tenant's personal property, furniture, furnishings, and fixtures located in the demised premises, for their actual cash value less depreciation, with New York standard co-insurance clauses for not less than 80 percent of the actual cash value. Each such policy shall provide that not less than ten days before expiration, evidence of its renewal, or a new certificate, together with evidence of payment of premiums for the renewal period or insurance policy, as the case may be, shall be delivered to Landlord. Each policy shall provide that the insurance company will not cancel such policy or change its coverage without giving Landlord ten days' prior written notice. In the event of any fire or other casualty insured against by Tenant's policy, Landlord shall, at Tenant's request, assign to Tenant all of Landlord's right, title, and interest in and to the insurance proceeds. Tenant shall accept such proceeds as full payment for any loss or damage to its property, and shall not make any claim against Landlord for any other sum therefor, even if the loss or damage is due to the carelessness or negligence of Landlord or its servants, agents, or employees. If any insured casualty occurs, Tenant shall have full authority, and shall take all necessary measures, to negotiate, compromise, or adjust any loss under its policy.

(5) Landlord to maintain fire insurance--tenant's rights upon failure

(a) Insurance. Landlord shall at all times during the term of this lease, at its expense, insure and keep in effect on the building in which the leased property is located fire insurance with extended coverage, covering Landlord and Tenant, as their respective interests may appear. Such insurance shall be written by an insurance company or companies authorized to do business in the state in which the leased property is located, and be sufficient to fully pay all covered losses. The foregoing policies shall require the insurer to give Tenant ten days' prior written notice of any cancellation or reduction of insurance under each such policy, and to forward to Tenant copies of all endorsements issued after the date of such policy.

(b) *Tenant's rights.* If Landlord fails, refuses, or neglects to obtain or maintain such insurance, and to furnish Tenant with proof thereof upon demand, Tenant may procure such insurance and deduct the cost thereof from any rent or other sum payable under this lease, or Landlord shall pay such amount together with lawful interest thereon on demand.

(6) Landlord to carry fire and extended coverage insurance--tenant to carry contents insurance--mutual releases to extent of insurance coverage

(a) *Landlord insurance.* Lessor shall carry fire and extended coverage insurance, insuring the improvements constructed by Lessor, including the improvements upon the Demised Premises, for not less than the amount required by Lessor's mortgagee.

(b) *Tenant insurance.* Lessee shall carry insurance against fire and such other risks as are from time to time included in standard extended coverage insurance for the full insurable value of all improvements provided by Lessee as set forth in "Lessee's Work Done at Lessee's Expense." Lessee shall also carry such insurance for the full insurable value of its merchandise, trade fixtures, furnishings, wall covering, carpeting, drapes, equipment, and all other items of its personal property located on or within the Demised Premises. All required insurance policies under this paragraph shall name Lessor as an additional insured, and Lessee shall furnish Lessor evidence of such insurance coverage. Such insurance policies may not be modified or terminated without 30 days' advance notice to Lessor.

(c) *Release.* Each party hereto ("Releasing Party") hereby releases the other ("Released Party") from any liability which the Released Party would, but for this paragraph, have had to the Releasing Party arising out of or in connection with any accident or occurrence or casualty (1) which is or would be covered by a fire and extended coverage policy (with vandalism and malicious mischief endorsement attached) or by a sprinkler leakage or water damage policy in the state in which the Demised Premises is located, regardless of whether such coverage is being carried by the Releasing Party, and (2) to the extent of recovery under any other casualty or property damage insurance being carried by the Releasing Party at the time of such accident, occurrence or casualty, which may have resulted in whole or in part from any act or neglect of the Released Party, its officers, agents or employees; and insofar as Lessee is the Releasing Party, it will also release the department stores in the shopping center complex from any such liability as if the department stores were each a Released Party under this paragraph. However, the release set forth above shall become inoperative and null and void if the Releasing Party contracts for the insurance required to be carried under this Lease with an insurance company which (a) takes the position that the existence of such release vitiates or would adversely affect any policy so insuring the Releasing Party in a substantial manner and gives notice thereof to the Released Party, or (b) requires the payment of a higher premium by reason of the existence of such release, unless the Released Party within ten days after notice thereof from the Releasing Party pays such increase in premium. Notwithstanding any contrary provision herein, Lessor shall not be liable for any damage to person or property arising from the negligent act or omission of any other tenant or occupant of the shopping center complex; and Lessee expressly waives any claim for such damages.

(7) Tenant to obtain public liability, property damage, and workmen's compensation insurance--indemnification--certificate of policy to landlord--cancellation notice to landlord

At all times during the term of this lease, and during any use, occupancy, or possession of the demised premises before such term commences, Tenant shall, at its expense, provide public liability and property damage insurance in a company approved by Landlord. Such insurance shall provide for coverage of not less than \$200,000 for injury or death to any one person, and not less than \$500,000 for injury or death occurring to more than one person as a result of one accident, and not less than \$100,000 for property damage, and shall name Landlord as insured. Such insurance policy shall be in the form commonly known as "Comprehensive General Liability" or "Owner-Landlord and Tenant." Tenant further shall indemnify and hold Landlord harmless from all claims for personal injuries, death and property damage which occur as the result of the operation of Tenant's business in and about the demised Premises, or from any work

done in and about the demised premises by Tenant or any contractor selected by or for it.

Tenant further shall, at its expense, take out and maintain at all times all necessary workmen's compensation insurance covering all persons employed by Tenant in and about the demised premises.

Before the lease term commences or before Tenant's use, occupancy, or possession of the demised premises, whichever is sooner, Tenant shall obtain all such insurance from a company approved by Landlord and deliver to Landlord a certificate or certificates evidencing the issuance of such policies, together with evidence of the payment of premiums,.

Not less than ten days before the expiration of any such policy, Tenant shall deliver to Landlord evidence of the policy's renewal, or a new certificate, together with evidence that premiums were paid for the renewal period or new policy, as the case may be. All such insurance shall contain an agreement by the insurance company not to cancel the policy or policies, or to change the coverage, without giving ten days' prior written notice to Landlord.

Any contractor selected by or for Tenant to perform alteration or repair work shall carry public liability insurance in limits of not less than the amounts specified above. Such insurance shall be in addition to the insurance carried by Tenant. However, Tenant may obtain insurance coverage under a blanket insurance policy instead of a separate policy or policies if the certificate or certificates issued under the policy and the coverage afforded thereby conforms in all respects to the requirements of this section.

(8) Building, rent, and contents insurance obtained by tenant--landlord loss adjustment--primary, not excess, coverage--noncancellable for tenant omission--waiver of subrogation

(a) Building coverage. At all times subsequent to taking possession of the Leased Premises, Tenant shall, at its expense, provide the following insurance coverages:

(1) Comprehensive and general, public liability insurance against claims for personal injury, death or property damage occurring in connection with the use and occupancy of the Leased Premises or arising out of their improvement, repair, or alteration. The limits of such insurance shall not be less than one million dollars per occurrence.

(2) Property damage insurance of not less than \$100,000 for damage to property arising out of any one occurrence.

(3) Insurance on the Building in which the Leased Premises are located against loss or damage by fire and other risks embraced by the so-called "Broad Extended Coverage Endorsement" in amounts at all times sufficient to prevent Landlord or Tenant from becoming a coinsurer under the terms of the applicable policies but, in any event, in an amount not less than 100 percent of the then full insurable value of the Entire Premises. The term "Full Insurable Value" means actual replacement value (exclusive of costs of excavation, foundations and footings). If the Leased Premises are part of a larger Building, such coverage shall be procured by Landlord, and Tenant shall pay Landlord as additional rent its proportionate share of the premiums.

(4) Landlord's risk public liability insurance with single limits of \$1,000,000.

(5) Rental insurance against loss of rental under a rental value insurance policy covering risk of loss due to the occurrence of any of the hazards insured against under Tenant's Fire and Extended Insurance on the building, in an amount sufficient to prevent Landlord from becoming a coinsurer but in any event, in an amount sufficient to pay for one year the rent payable under this Lease. All proceeds received by Landlord under rent insurance policies will be credited as received against the rent due. If the Building is occupied by more than one Tenant, Landlord may secure such a rental value insurance policy on the building and bill Tenant for Tenant's Proportionate Share thereof.

(b) *Tenant coverages.* At all times after taking possession of the Leased Premises, Tenant shall, at its expense, provide the following insurance coverages:

(1) *Fire and extended coverage insurance (contents broad form)* on Tenant's personal property located in the Leased Premises in amounts reasonably deemed adequate by Tenant to fully insure such personal property.

(2) *Contractual liability.* Coverage to insure the performance by Tenant of the indemnity agreement as to liability for injury to or death of persons injured or damage to property as set forth in this Lease.

(3) *Named Insureds.* All insurance required hereunder shall name as insureds, Landlord, its employees and agents.

(4) *Increased Limits.* If during the term of the Lease, higher limits of insurance than those mentioned above are appropriate, customary, and generally required for like premises utilized for similar uses, Tenant shall, upon Landlord's request, procure such increased limits insurance.

(5) *Quality of Insurance.* Insurance required hereunder shall be in companies rated AAA or better in "Best's Insurance Guide," which shall be qualified to do business in the State in which the premises are located. Tenant shall deliver to Landlord copies of policies of such insurance or certificates evidencing its existence and amounts with loss payable clauses satisfactory to Landlord. No such policy shall be cancellable or subject to reduction of coverage or other modification except after ten days' prior written notice to Landlord. No financed premiums or policy with a deductible greater than \$5,000 shall be allowed without Landlord's prior consent.

(6) *Loss Adjustments.* All policies shall expressly provide that any loss thereunder shall be adjusted with Landlord. The policies shall contain a provision that Landlord and additional insureds, although named as insured, shall, nevertheless, be entitled to recover under such policies for any loss occasioned by them, their servants, agents, and employees other than by reason of the negligence of Landlord or additional insureds.

(7) *Primary Insurance.* All policies shall be written as primary, and not contributing with or in excess of the coverage carried by Landlord or additional insureds, their agents, servants, and employees.

(8) *Blanket Policies.* Tenant's obligations to carry the insurance herein provided may be brought within the coverage of a "blanket policy." However, Landlord and additional insureds shall be named as insureds thereunder as their interests may appear. Furthermore, coverage afforded shall not be reduced or diminished by reason of the use of such "blanket policy" and must be at least equal to the coverage which would be provided under a separate policy covering only the Leased Premises.

(9) *Noncancellable.* The policy shall provide that it shall not be invalidated as to Landlord or additional insureds by reason of any act or omission by Tenant or any misrepresentations in its application for insurance.

(10) *Increased Insurance Risk.* The parties acknowledge that Premises are a part of a larger space in the Building, and Tenant agrees that if fire and extended coverage insurance maintained by Landlord on the Building or any fire contents insurance maintained by Landlord on materials or goods stored by it in any portion of the Building are increased as a result of Tenant's occupancy, Tenant shall pay such increase upon demand.

(11) *Waiver of Subrogation.* Neither party shall be liable to the other for any business interruption or any loss or damage to property or injury to or death of persons occurring in the Building (including the Leased Premises), or in any manner growing out of or connected with Tenant's use and occupation of the Leased Premises, the Building or the condition thereof, whether caused by the negligence or other fault of Landlord or Tenant, or of their respective agents, employees, subtenants, licensees, or assignees. This release shall apply to the extent that such business interruption, loss, or damage to property or injury to or death of persons is covered by insurance, regardless of whether such insurance is payable to

or protects Landlord or Tenant, or both. Nothing herein shall be constructed to impose any other or greater liability upon either Landlord or Tenant than would have existed in the absence of this provision. This release shall be in effect only so long as the applicable insurance policies contain a clause to the effect that this release shall not affect the right of the insured to recover under such policies. Such clauses shall be obtained by the parties whenever possible. The release in favor of Landlord contained herein, is in addition to, and not in substitution for, or in diminution of the hold harmless and indemnification provisions hereof.

(9) Tenant's specific undertaking for insurance--another form

(a) *Insurance.* Tenant shall keep the leased property insured throughout the term of this lease against the following:

(1) *Fire and extended coverage.* Loss or damage by fire and such other risks as may be included in the broadest form of extended coverage insurance from time to time available in amounts sufficient to prevent Landlord or Tenant from becoming a coinsurer within the terms of the applicable policies, and in any event, in an amount not less than 80 percent of the then full insurable value.

(2) *Sprinkler system.* Loss or damage from leakage of present or future sprinkler systems installed in the building on the leased property in an amount not less than 10 percent of the then full insurable value.

(3) *Boiler.* Loss or damage by explosion of present or future steam boilers, pressure vessels, or similar apparatus, installed in the building on the leased property, in such limits with respect to any one accident as landlord may reasonably request from time to time.

(4) *Rental value.* Loss of rental, under a rental value insurance policy covering risk of loss due to the occurrence of any of the hazards described in the preceding subparagraphs of this paragraph (a), in an amount sufficient to prevent Landlord from becoming a coinsurer, but in any event, in an amount not less than 80 percent of the then full rental income fixed by this lease including all rental that Tenant agrees to pay hereunder.

(5) *Liability.* Claims for personal injury or property damage, under a policy of general public liability insurance, with such limits as Landlord reasonably requests from time to time, but not less than \$300,000/\$1,000,000 in respect of bodily injury, and \$100,000 for property damage.

(6) *Mortgage requirements.* Against such other hazards and in such amounts as the holder of any mortgage or deed of trust to which this lease is subordinate requires from time to time.

(b) *Full insurable value.* The term "full insurable value" means the actual replacement cost, less physical depreciation, excluding foundation and excavation costs. The full insurable value shall be determined whenever reasonably requested by Landlord, by a qualified appraiser selected and paid by Tenant and acceptable to Landlord. The appraiser's finding shall not be binding without Landlord's written approval, which it shall not unreasonably withhold.

(c) *Policies.* All insurance provided for in this lease shall be effected under policies issued by recognized insurers licensed to do business in this state. At least 15 days before the expiration date of any policy, Tenant shall deliver to Landlord the original renewal policy for such insurance. Within 15 days after the premium on any policy becomes due and payable, Landlord shall be furnished with satisfactory evidence of its payment.

(d) *Insureds.* The rental value insurance policy described above shall name only Landlord as the insured. However, Tenant may furnish a combined rental and use and occupancy policy, if Landlord is named as the insured and the first payee with respect to an amount equal to the basic rent and real estate taxes, and Tenant is named as the payee with respect to any remaining proceeds. All other policies of insurance shall name Landlord and Tenant as the insureds, as

their respective interests may appear. At Landlord's request, any insurance policy shall be made payable to the holders of any mortgage or deeds of trust to which this lease is at any time subordinate, as the interest of such holders may appear, pursuant to a standard clause for holders of mortgages or deeds of trust. To the extent obtainable, all policies shall contain an agreement by the insurers (1) that any loss shall be payable to Landlord or the holders of any such mortgage or deed of trust, notwithstanding any act or negligence of Tenant which might otherwise result in forfeiture of such insurance, (2) that such policies shall not be cancelled except upon ten days' prior written notice to Landlord and to the holders of any mortgage or deed of trust to whom loss may be payable, and (3) that the insurance coverage shall not be affected by the performance of any work in or about the leased property. Landlord shall not have any right of action against Tenant on account of any loss or damage from fire and extended coverage, if such loss is covered by insurance and this waiver by Landlord does not invalidate any insurance policy.

(e) *Premium apportionment.* Premiums on all insurance policies in force at the commencement, expiration, or earlier termination of this lease shall be apportioned between Landlord and Tenant as of the date of such commencement or termination.

(f) *Blanket policies.* If Tenant provides any insurance required by this lease in the form of a blanket policy, Tenant shall furnish satisfactory proof that such policy complies in all respects with the provisions of this lease, and that the coverage thereunder is at least equal to the coverage which would be provided under a separate policy covering only the leased property.

(10) Tenant to maintain plate glass insurance--insurance certificates to landlord--landlord's right upon failure

Tenant shall insure, and keep insured, at its expense, all plate and other glass in the leased property for and in the name of Landlord. Tenant shall deposit with Landlord certificates of such insurance at or before the commencement of the term and thereafter within ten days before the expiration of such policies. Such policies shall provide that they may not be cancelled without at least ten days' prior written notice to Landlord.

If Tenant fails to deliver certificates of such insurance to Landlord, Landlord may cause the insurance to be issued and may at any time render bills for the premiums to Tenant. Tenant shall pay such bills when rendered, and the amount thereof shall be deemed to be, and paid as, additional rent.

(11) Tenant's obligation to renew insurance--landlord to be furnished with binder and certificate--landlord to receive notice of change or cancellation

Tenant shall furnish a binder to Landlord renewing each policy that Tenant is required to carry under this lease at least 30 days before such policy expires. Each policy or binder shall provide for at least 15 days' notice to Landlord of any change or its cancellation. Tenant shall promptly deliver to Landlord a certificate from the insurance carrier evidencing the renewal of a policy and the payment of premium.

(12) Subtenant's specific undertaking for insurance

(a) *Insurance.* Subtenant shall during the term hereof, at its expense, provide and keep in force the following insurance coverage:

(1) *Fire and extended coverage.* Insurance on the building against loss or damage by fire and extended coverage, with no deductible provisions, in an amount at all times sufficient to prevent the Prime Landlord, the Sublessor, or the Subtenant from becoming a coinsurer under the terms of the applicable policies, but in any event in an amount not less

than 80 percent of the full insurable value thereof, unless the holder of a first fee mortgage or of a mortgage covering the leasehold estate of the ground lease requires coverage in a greater amount, in which event the insurance shall be for such greater amount, but not to exceed 100 percent of the full insurable value. The term "full insurable value" means actual replacement value of the building (exclusive of cost of excavation, foundations, and footings below the lowest basement floor) less physical depreciation. The Sublessor may request full insurable value to be determined from time to time, but not more than once during any 24 calendar months, by one of the insurers or by an appraiser, engineer, architect, or contractor who is mutually acceptable to the Sublessor and the Main Landlord. No omission by the Sublessor to request any such determination shall relieve the Subtenant of any obligation under this article.

(2) *Liability.* General public liability insurance protecting and indemnifying the Subtenant, the Sublessor, and the Prime Landlord against all claims for damages to person or property or for loss of life or of property occurring upon, in, or about the leased property, the streets, gutters, sidewalks, curbs, or vaults adjacent thereto, to such limits as the Sublessor or the Prime Landlord may reasonably, from time to time, require for injuries to any one person, for any one accident or disaster or incident of negligence, and for property damage. Limits of \$500,000 for injuries to any one person, \$2,000,000 for any one accident or disaster or incident of negligence, and \$100,000 for property damage are deemed reasonable as of the date hereof. In any event the amount of the foregoing limits of insurance shall be as determined under the ground lease.

(3) *Plate glass, boiler.* Plate glass insurance covering the glass in the leased property and boiler insurance if and when the leased property contains a boiler or boilers, all in the amounts required under the terms of the ground lease.

(4) *Rental value.* Rent, or use and occupancy, or rental value insurance in an amount sufficient to pay for one year the net rent and additional rent payable under this lease.

(5) *Miscellaneous.* Such other insurance against other insurable hazards in such amounts as are from time to time required by the Sublessor, the Prime Landlord, or any mortgagee of a mortgage covering the fee or ground lease, if such insurable hazards are commonly insured against with respect to similar premises, due regard being given to the height and type of construction, location, use, and occupancy.

(b) *Policies and carriers.* All insurance provided for in paragraph (a) hereof shall be effected under standard form policies issued by insurers of recognized responsibility, which are well rated by national rating organizations and which have been approved in writing by the Sublessor. All policies of insurance of the character described in subparagraphs (1), (3), (4) and (5) of paragraph (a) shall expressly provide that any loss thereunder shall be adjusted with the Sublessor and the Prime Landlord and the holders of all fee and ground lease mortgages. All such insurance shall be carried in the name of the Subtenant, the Sublessor, and the Prime Landlord.

(c) *Application of rental value proceeds.* The proceeds of the insurance provided for in subparagraph (4) of paragraph (a) hereof shall, in accordance with the terms of the ground lease, be paid to the Prime Landlord and be applied by the Prime Landlord first to the net rent and additional rent then due under the ground lease. After the Prime Landlord has paid the balance to the Sublessor, the Sublessor shall retain a sum equal to the difference between the last mentioned amount applied by the Prime Landlord and the amount of net rent and additional rent then due under this lease, and shall then pay over any remaining balance to the Subtenant. If, however, such proceeds include compensation for a period beyond the date of such payment, such compensation shall be divided into as many parts as the number of months contained in such period and the amount of such compensation shall be paid to the Sublessor, who shall hold such payment as a trust fund. The Sublessor shall, on the first day of each month following the date of such payment, pay to the Prime Landlord from each such part an amount equal to the net rent and additional rent payable by the Sublessor, as tenant under the ground lease, applicable to such month. The Sublessor shall then retain from the balance thereof a sum equal to the difference between the amount paid to the Prime Landlord for such month and the amount of the net rent and additional rent payable by the Subtenant under this sublease applicable to such month, and shall then pay over any balance then remaining from such monthly payment, to the Subtenant. If this sublease is cancelled or terminated as

provided herein, all proceeds of such insurance to which the Sublessor is entitled under the ground lease shall be paid to and become the property of the Sublessor.

(d) *Original policies and certificates.* Pursuant to the terms of the ground lease, the originals of the policies may be held by the Prime Landlord. In such event, duplicate originals of such policies, if obtainable, or, if not obtainable, certified copies of such policies if obtainable, or, if not obtainable, certificates therefor, shall be delivered to the Sublessor and to the holder of any fee and ground lease mortgage. The Subtenant shall pay all premiums for all policies required under paragraph (a), above. At least 30 days before each such policy expires, the Subtenant shall pay the premium for its renewal and furnish to the Sublessor for exhibition to the Prime Landlord the original policy with proper endorsement or receipt or other satisfactory information evidencing payment of such premium. The Subtenant shall not violate or permit to be violated any condition or provision of any policy furnished by it under paragraph (a), and shall so perform and satisfy the requirements of the companies writing such policies so that at all times companies of good standing satisfactory to the Sublessor and the Prime Landlord are willing to write such insurance.

(e) *Separate insurance.* The Subtenant shall not carry separate insurance concurrent in coverage with any insurance required to be furnished by it under this article, unless the Sublessor, the Prime Landlord, and all fee and ground lease mortgagees are included therein as insureds with loss payable as provided herein. The Subtenant shall promptly notify the Sublessor of the issuance of any such separate insurance and shall deliver any such policy or certified copy or certificate as provided in paragraph (d).

(f) *Prior notice.* Each policy required by this article, a duplicate original, a certified copy thereof, or a certificate therefor shall, to the extent obtainable, contain an agreement by the insurer not to cancel such policy without giving at least ten days' prior written notice to the Sublessor, the Prime Landlord, and the holders of all fee and ground lease mortgagees named in such policy. If such agreement cannot be obtained with respect to any policy, the Subtenant shall notify the Sublessor in writing and shall accept any insurer of recognized responsibility well rated by national rating organizations named by the Sublessor who will consent to include such agreement in a like policy, if the inclusion thereof does not require the Subtenant to pay any additional premium.



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Current Legal Forms for Real Estate
Chapter 23 REAL ESTATE LEASES
Part IV. Forms
B. LEASE CLAUSES

31-23 Current Legal Forms for Real Estate FORM 23.52

AUTHOR: by Thomas G. Belden

FORM 23.52 Denial of subrogation rights

COMMENT

The purpose of a clause which denies subrogation rights is to prevent insurance companies as primary obligors from shifting the burden of casualty losses to a negligent or indemnifying landlord or tenant. For example, if the premises are destroyed by a fire caused by the negligence of the tenant, the tenant is liable in tort to the landlord for the loss. If the landlord has received insurance proceeds to compensate for his loss, the insurer usually may recover from the negligent tenant by becoming subrogated to the rights of the landlord. Similarly, a tenant who has agreed to indemnify his landlord against all losses, damages, or liabilities arising out of the use of the premises may be liable to the landlord's insurer on his indemnity agreement although the tenant is without fault.

Insurance coverage:

One method of precluding the shifting of the risk from the insurance company is to include both the landlord and the tenant in the same policy. Subrogation is avoided because an insurer has no right of subrogation against its own insured. There are certain impracticalities to this approach. It is sometimes difficult to cover all tenants in one policy, or to include a provision that no act or omission of any tenant will invalidate the policy with respect to the landlord. However, in certain circumstances, a lease may follow this technique for avoiding subrogation.

Release from liability:

An alternative technique for preventing the insurance company from shifting the risk is to

foreclose its subrogation right. Since subrogation is a derivative right, the insurer can have no basis for subrogation if the landlord releases the tenant from liability. Thus, the basic arrangement is for the landlord to release the tenant (or for both parties to release each other) from liability to the extent that such liability is covered by insurance. One problem which must be taken into account is that such a clause may jeopardize the insured's rights under the policy. In most cases, it is necessary to obtain from the insurer a waiver of subrogation rights. The operation of the clause may be conditioned upon the issuance of such a waiver by the insurer.

Drafting alternatives:

The most comprehensive type of clause provides for a mutual release of all liabilities to the extent of insurance coverage, conditioned upon an appropriate arrangement with the insurance company, and an undertaking by the parties to make such an arrangement wherever possible. There are more limited and somewhat varied approaches. For example, the landlord's waiver may apply only to damages to the leased property, not to tort claims by third parties. Or the waiver may be applicable to hazards covered by insurance, not limited to the amount of the insurance. In such case, the parties assume the burden of the uninsured cost of any liability which they waive. The lease may require the landlord to obtain the appropriate clause in the insurance policy where it will not increase the premiums. If there is a premium increase, the tenant may be given the option to pay such increase and must exercise this option if the landlord's waiver is to become operative.

FORMS

(1) Landlord's release of tenant's liability for damage to property--to extent permitted by insurance

Landlord releases Tenant from any liability for any destruction to the leased property caused by any act or omission by Tenant, its agents, servants, or employees. This release shall be valid and binding only if it is recognized and accepted by the fire and hazard insurance companies under the policies required to be carried hereunder on the leased property.

(2) Landlord's release of tenant's liability for casualties covered by insurance--cost of provision to be borne by tenant

Landlord releases Tenant, to the extent of Landlord's insurance coverage, from any liability for loss or damage caused by fire or any of the extended coverage casualties included in Landlord's insurance policies, even if such fire or other casualty is brought about by the fault or negligence of Tenant, its agents, or employees. However, this release shall be in effect only with respect to loss or damage occurring during the time that Landlord's policies for fire and extended coverage insurance contain a clause to the effect that this release shall not affect its right to recover under such policies. Landlord's fire and extended coverage insurance policies will include such a clause only so long as it is includable without extra cost or, if extra cost is chargeable therefor, only so long as Tenant pays such cost. Landlord shall advise Tenant of any extra cost and Tenant may elect as to whether it chooses to pay the same.

(3) Landlord's casualty insurance to allow waiver of subrogation--effective only to extent of coverage--additional premium to be paid by tenant

Landlord's insurance policies for fire and extended coverage, which may contain a \$100,000 deductible provision covering the building of which the demised premises are a part, shall contain in substance the following endorsement, if it is then obtainable from any financially responsible insurance company:

"This insurance shall not be invalidated if, prior to a loss, the insured waives in writing any or all right of recovery against any party for loss occurring to the property described herein."

If Landlord obtains such endorsement, it shall not make any claim against, or seek to recover from Tenant, that portion of any loss or damage to the building which exceeds the deductible sum of \$100,000, caused by such fire or other perils so insured, regardless of whether the loss or damage is due to the carelessness or negligence of Tenant, its servants, agents and/or employees. Landlord shall notify Tenant if Landlord's insurance carrier, as a condition of making the above endorsement, requires the payment of a premium in addition to the normal and standard premiums for the coverage involved. If Tenant requires such endorsement in the policy, it shall pay the additional premium cost.

(4) Mutual release of liability for all hazards covered by insurance

Landlord and Tenant and all parties claiming under them hereby mutually release and discharge each other from all claims and liabilities arising from or caused by any hazard covered by insurance on the leased property, or covered by insurance in connection with property on or activities conducted on the leased property, regardless of the cause of the damage or loss.

(5) Mutual release from liability covered by insurance--limited to extent of insurance collected--conditioned on terms of insurance policy and cost

Each party releases the other party (which term as used in this Article includes the other party's employees, agents, officers and directors) from all liability, whether for negligence or otherwise, in connection with loss covered by any insurance policies which the releasor carries with respect to the leased premises or any interest or property therein or thereon (regardless of whether such insurance is required to be carried under this Lease), but only to the extent that such loss is collected under said insurance policies. Such release is also conditioned upon the inclusion in the policy or policies of a provision whereby any such release does not adversely affect such policies or prejudice any right of the releasor to recover thereunder. Each party's insurance policies shall include such a provision so long as it is obtainable without extra cost, or if extra cost is charged, so long as the party for whose benefit the clause or endorsement is obtained pays such cost. Each party shall advise the other of the amount of any extra cost charged, and the other party may elect as to whether it chooses to pay the same.

(6) Mutual release from liability for fire or other casualty--conditioned on nonimpairment of insurance or no increased cost

Landlord and Tenant release each other from any and all liability or responsibility (to the other or anyone claiming through or under them by way of subrogation or otherwise) under fire and extended coverage or supplementary contract casualties, if such fire or other casualty is caused by the fault or negligence of the other party, or anyone for whom it is responsible. However, this release shall be applicable and in full force and effect only for loss or damage occurring while the releasor's policies contain a clause or endorsement to the effect that such release will not adversely affect or impair the policies or prejudice the releasor's right to recover under them. The parties' respective policies shall include such a clause or endorsement if it is obtainable without extra cost, or if such cost is charged, if the party who would benefit by such clause shall pay such charge. If extra cost is charged, each party shall notify the other of the exact amount, and the other party shall be obligated to pay such amount unless, within ten days after such notice, it notifies

the original party in writing that it elects not to be so obligated. If such clause or endorsement is not available, or either party elects not to pay the extra cost for such coverage, the provisions of this paragraph shall not apply to the policy or policies in question.

(7) Tenant's release of landlord's liability for loss covered by insurance--conditioned on insurer's approval or landlord being named as insured at his expense

Tenant shall use its best efforts to include in its fire insurance policies for its contents, furniture, furnishings, fixtures, and other property removable by Tenant under the provisions of this lease appropriate clauses under which the insurance carriers either (i) waive all rights of subrogation against Landlord with respect to losses payable under such policies, or (ii) agree that such policies will not be invalidated if the insured waives in writing before a loss any right of recovery against any party for losses covered by such policies. If Tenant, at any time, is unable to obtain inclusion of either clause (i) or (ii), it shall have Landlord named in such policies as one of the assureds. If any additional premium is charged for such clauses or for naming Landlord as an assured, Tenant shall be released from its obligation unless Landlord agrees to pay the additional premium within 20 days after it receives written notice from Tenant that such premium is required. If Landlord is named as one of the assureds in accordance with the above provisions, it shall promptly endorse to the order of Tenant, without recourse, any check, draft, or order for the payment of money representing the proceeds of any such policy or any other payment under such policies, and Landlord irrevocably waives all rights in and to such proceeds and payments. If Tenant's right of full recovery under such policies is not thereby prejudiced or otherwise adversely affected, Tenant waives all other rights of recovery against Landlord, and its agents and employees, for loss or damage to Tenant's contents, furniture, furnishings, fixtures, and other property removable by Tenant under the provisions of this lease to the extent they are covered by Tenant's insurance, even if such loss or damage results from the negligence or fault of Landlord or its agents or employees. Tenant shall promptly advise Landlord as to the coverage or provisions of the clauses included in its insurance policies under this paragraph, as well as of any cancellation or change of the terms of any such policies that would affect such clauses.



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Current Legal Forms for Real Estate
Chapter 23 REAL ESTATE LEASES
Part IV. Forms
B. LEASE CLAUSES

31-23 Current Legal Forms for Real Estate FORM 23.53

AUTHOR: by Thomas G. Belden

FORM 23.53 Condemnation

COMMENT

There are special rules under the Revenue Code which are applicable to an involuntary conversion of property. For the purpose of these rules, the term "involuntary conversion" encompasses the condemnation of property by governmental authority, as well as the expropriation of property, the destruction of property by natural causes, and the loss of property through casualty or by theft. The statute applies not only to an actual condemnation of property, but to the "threat or imminence" of a condemnation. Where the taxpayer faces a real threat of condemnation which would damagingly disrupt his business, he may anticipate the event by a sale to another person. See 26 U.S.C. § 1033.

Long-term capital gain or loss:

One of these special rules applies to the gain or loss from the involuntary conversion of property (other than inventory) held for more than the capital asset holding period. Such gain or loss must be combined with gains or losses during the taxable year on sales or exchanges of business real estate and depreciable business property held for more than the minimum holding period. The net gain from all such transactions is treated as capital gain; the net loss from such transactions may be deducted as an ordinary loss. See 26 U.S.C. § 1231.

Short-term gain or loss:

Where the condemned property has been held for less than the minimum holding period, this special rule does not apply. In such event, the classification of the gain or loss depends upon

whether the property is business or nonbusiness property. In the case of a nonbusiness capital asset, any gain is taxable as short-term capital gain and any loss is subject to all the limitations upon short-term capital losses. Gain or loss realized with respect to business property is fully taxable or fully deductible.

Tax allocation of condemnation award:

To calculate the gain or loss from a condemnation, the award must be broken down so that only the amount specifically intended as compensation for the condemned property is taken into account. If only part of the taxpayer's property is condemned, the portion of the award intended as compensation for damages to the remaining property resulting from the severance must be subtracted from the gross award to determine the gain from the involuntary conversion. The amount awarded for severance damages is applied in reduction of the basis of the remaining property, and gain is recognized to the extent that such basis is exceeded.

Replacement of condemned property:

A second aspect of the special treatment for involuntary conversions comes into play where the converted property is replaced. The Revenue Code provides that no gain is recognized if property as a result of its requisition, condemnation or threat or imminence thereof is converted into "property similar or related in service or use." This provision applies to a direct exchange, or to the acceptance of property in satisfaction of a claim. Nonrecognition in such case is mandatory. In the more usual case where money is received in compensation for the converted property, the taxpayer has the option to defer the recognition of gain if he uses all of the money to purchase property similar or related in use. Such replacement must occur either after the date of disposition, or after the date of the threat or imminence of requisition or condemnation provided that the taxpayer retains ownership of the replacement property until the date of the disposition of the original property.

Replacement period:

The replacement must normally be made no later than two years after the close of the first taxable year in which any part of the gain was realized. The period for replacement is measured from the time of an initial payment resulting in gain even though a greater award in a subsequent year may increase the amount of gain. However, application may be made to the Revenue Service for permission to make the replacement at a later time. The application must be timely.

Partial recognition upon replacement:

If only part of the proceeds are used for replacement, gain is recognized to the extent of the proceeds not so used. Thus, if the condemnation award is \$20,000, the adjusted basis of the condemned property is \$10,000, and \$15,000 is used to purchase replacement property, \$5,000 of the \$10,000 realized gain is recognized. The basis of the replacement property is its cost decreased by the amount of gain not recognized. In the previous example, the basis of the replacement property would be \$10,000. The special nonrecognition provision does not apply to losses, which must be recognized at the time of disposition regardless of whether the property is replaced.

Qualified replacement property:

There is the question of when replacement property obtained by a lessor is "similar or related in

use" to the lessor's condemned property. The Revenue Service position is that even though replacement property is used by the tenants for different purposes than the condemned property, the nonrecognition provision is applicable if the lessor's management, services, and business risks are similar. Under this theory, deferral of gain has been permitted in the case of the replacement of an office building by a hotel or by an apartment house where the lessor's basic position, as indicated by management and services to tenants, remained the same.

Condemnation lease clause:

Among the principal matters to be dealt with in the lease clause covering the question of condemnation are the continuation or termination of the lease, the allocation of the award, and the responsibility for restoration. The usual approach in the case where the tenant has no major investment in the leased property is to terminate the lease in the event of total or substantial condemnation. There is considerable variety in the criteria for determining when a partial condemnation will result in the termination of the lease. One possibility is a test based on the percentage of space expropriated. Alternatively, the tenant may be permitted an election. In some cases, the standard is purposely vague, such as whether the property is capable of continued use for the purpose for which it was intended, and provision is made for arbitration if the parties cannot agree. If the lease is to continue, upon partial condemnation, provision should be made for an abatement of part of the rent.

Allocation of award:

The provision covering the allocation of the award may similarly vary. The award may be shared. Frequently, the entire award is assigned entirely to the landlord. Another approach is to permit the tenant to recover the unamortized cost of his improvements. In the absence of any provision, the tenant could be entitled to share in the award to the extent that it is attributable to the present value of the leasehold estate--the rental value of the premises less the rent reserved for the unexpired term. He may also be compensated for loss of his fixtures. The balance of the award is payable to the landlord.

Restoration expenses:

If the property is to be restored to its previous use, the principal point to be settled is the responsibility for the cost of restoration in excess of the award. Frequently, the tenant is authorized to make the restoration and the landlord is obligated to apply all or a portion of the award to defray the tenant's cost. Under some agreements, the landlord is not required to make such reimbursement until he has received an architect's or an engineer's statement as to necessary expenditures.

FORMS

(1) Termination of lease upon condemnation--rent apportionment--entire award to landlord

If all or any part of the leased property is taken by eminent domain, this lease shall expire on the date of such taking,

and the rent shall be apportioned as of that date. No part of any award shall belong to Tenant.

(2) Separate claim by tenant for tenant property and relocation expenses permitted--tenant claim not to reduce landlord's claim

Notwithstanding the provisions of this lease, Tenant may make a separate claim with the condemning authority for the value of its property and for moving and relocation expenses if such claim does not reduce or adversely affect the amount of Landlord's award.

(3) Termination of lease upon condemnation--specific payments to tenant based upon date

This lease shall be terminated if all or any part of the leased property, other than the vaults under the street on which the premises abut, is taken or condemned for public use. In such event, Tenant shall receive the following amounts as its share of the condemnation award when, as, and if it is paid:

\$100,000 if the final order of condemnation is entered before _____[date]; \$80,000 if entered between _____[date] and _____[date]; \$40,000 if entered between _____[date] and _____[date]; \$10,000 if entered at any time between _____[date] and _____[date]; and no award or share if the order is entered on or after _____[date]. Tenant waives any right to share in any award other than on the above terms.

(4) Termination of lease upon condemnation rendering property unsuitable for intended use--rent apportionment--landlord and tenant to recover respective damages

If any legally constituted authority condemns the entire leased property, or such part thereof which shall make the entire property unsuitable for the purposes leased, this lease shall cease when the public authority takes possession, and Landlord and Tenant shall account for rental as of that date. Such termination shall be without prejudice to the rights of either party to recover compensation from the condemning authority for any loss or damage caused by the condemnation. Neither party shall have any rights in or to any award made to the other by the condemning authority.

(5) Termination upon taking by eminent domain--partial taking rent adjustment--severance damages applied to repairs

If all or any portion of the Premises are taken under the power of eminent domain or sold under the threat of the exercise of such power ("condemnation"), this Lease shall terminate as to the part so taken as of the date the condemning authority takes title or possession, whichever occurs first. If more than 25 percent of the floor area of the Premises is taken by condemnation, Tenant may, within ten days after Landlord gives it written notice of such taking (or if there is no such notice, within ten days after the condemning authority takes possession), terminate this Lease as of the date the condemning authority takes such possession. If Tenant does not terminate this Lease as provided above, this Lease shall remain in full force and effect as to the portion of the remaining Premises, except that the rent shall be reduced in the proportion that the floor area taken bears to the total floor area of the building situated on the Premises. If this Lease is not so terminated, Landlord shall, to the extent of severance damages received by it in connection with such condemnation, repair any damage to the Premises caused by such condemnation except to the extent that Tenant has been reimbursed therefor by the condemning authority. Tenant shall pay any amount in excess of such severance damages required to complete such repair.

(6) Termination of lease upon condemnation or transfer in lieu of condemnation--award, leasehold, and reversion to

landlord--award for tenant improvements to tenant--option to terminate on partial condemnation

(a) *Eminent domain.* If all or any part of the Demised Premises is permanently taken, condemned, or transferred by agreement in lieu of condemnation for any public or quasi-public use or purpose by any competent authority, regardless of whether this Lease shall be terminated, the entire compensation award, both leasehold and reversion, shall belong to Lessor without deduction for any present or future estate of Lessee, and Lessee hereby assigns to Lessor all of its right, title, and interest to such award. Lessee shall execute all required documents to evidence such result. Lessee shall, however, be entitled to claim, prove, and receive in the condemnation proceedings any award allowed for fixtures and other equipment installed by it, but only if or to the extent such award is in addition to the award for the land and the building and other improvements (or portions thereof) containing the Demised Premises.

(b) *Complete condemnation.* If the entire Demised Premises are taken, condemned, or transferred as provided above, this Lease shall terminate and become null and void from the time possession is required for public use, and from that date the parties shall be released from any further obligation hereunder. However, if only a portion of the Demised Premises is so taken or condemned, Lessor may terminate this Lease or, at its expense, repair and restore the portion not affected by the taking, and thereafter Lessee's Minimum Rent shall be equitably and proportionately adjusted.

(c) *Partial condemnation.* If a portion of the shopping center complex is taken, condemned, or transferred as provided above and, as a result, Lessor elects to discontinue the operation of the Shopping Center, Lessor may cancel this Lease by giving Lessee notice of its election to do so. In such case, this Lease shall terminate 90 days after such notice, and the provisions governing the awards shall be determined by paragraph (a) of this article.

(7) Termination on complete taking--option to terminate on substantial taking--rent adjustment on partial taking--award for landlord except as to tenant fixtures

(a) *Complete condemnation.* If the entire demised premises are taken under the power of eminent domain, this lease shall be terminated as of the day possession is so taken.

(b) *Substantial condemnation.* Landlord or Tenant may terminate this lease if more than 25 percent of the floor area of the demised premises, or more than 50 percent either of the common parking area or of all of the ground level floor area of the buildings in the shopping center is taken under the power of eminent domain. Either party may terminate by giving written notice within 30 days after it surrenders possession to the public authority pursuant to such taking. If neither party elects to terminate this lease, Landlord shall restore and adapt the remaining demised premises, and the rent shall be reduced as described in subsection (c) below.

(c) *Partial condemnation.* This lease shall not terminate if 25 percent or less of the floor area of the demised premises, or 50 percent or less either of the common parking area or of all of the ground level floor area of the buildings in the shopping center is taken under the power of eminent domain. In such case, this lease shall continue in full force and effect, except that the rent shall be reduced in the same proportion that the floor area of the demised premises so taken bears to the total floor area leased to Tenant at the time of such taking, and Landlord shall, at its expense, make all necessary restorations to the building in which the demised premises are located so as to constitute the portion of the building not taken a complete architectural unit, but such work shall not exceed the scope of the work to be done by Landlord in originally constructing such building.

(d) *Award.* All damages awarded for any taking under the power of eminent domain, whether for the whole or a part of the demised premises, shall belong to and be the sole property of Landlord, whether such damages are awarded as compensation for diminution in value to the leasehold or to the fee of the premises. However, Landlord shall not be entitled to any award made to Tenant for loss of or damage to Tenant's trade fixtures.

(e) *Tenant payments.* If this lease is terminated as provided in this Article, Tenant shall pay all rent and additional charges and perform all other covenants up to the day that possession is so taken by public authority, and Landlord shall make a proportionate refund of any rent or additional charges paid by Tenant in advance.

(8) *Termination upon total condemnation or at option of each party upon substantial condemnation--landlord to restore if no termination--temporary taking by condemnation*

(a) *Eminent domain.* If the entire leased property is taken for any public or any quasi-public use under any statute or by right of eminent domain, or by private purchase in lieu thereof, this lease shall automatically terminate as of the date that title is taken. If any part of the leased property is so taken as to render the remainder unusable for the purposes for which the leased property was leased, either Landlord or Tenant may terminate this lease by giving 30 days' notice to the other within 90 days after the date of such taking. If this lease is terminated, the rental shall be equitably adjusted. Any dispute under this paragraph shall be submitted to the American Arbitration Association for its determination, which shall be binding upon both parties.

(b) *Restoration.* If any part of the leased property is so taken and this lease does not terminate or is not terminated under subparagraph (a) above, the minimum rental shall be equitably apportioned according to the space so taken. Landlord shall, at its expense, restore the remaining portion of the leased property to the extent necessary to render it reasonably suitable for the purposes for which it was leased, and shall make all repairs to the building in which the leased property is located to the extent necessary to constitute the building a complete architectural unit, if such work does not exceed the scope of the work required to be done by Landlord in originally constructing such building and the cost thereof does not exceed the proceeds of its condemnation award.

(c) *Compensation.* All compensation awarded or paid upon such a total or partial taking of the leased property shall belong to and be the property of Landlord without any participation by Tenant. However, nothing contained herein shall be construed to preclude Tenant from prosecuting any claim directly against the condemning authority in such condemnation proceedings for loss of business, or depreciation to, damage to, or cost of removal of, or for the value of stock, trade fixtures, furniture, and other personal property belonging to Tenant. Moreover, no such claim shall diminish or otherwise adversely affect Landlord's award or the award of any fee mortgagee.

(d) *Temporary taking.* Tenant shall give Landlord prompt written notice if at any time during the term of this lease or any renewal hereof, temporary use of the whole or any part of the leased property is taken for any public or quasi-public purpose by any lawful authority, whether by exercise of the right of condemnation or eminent domain, or by Tenant's agreement with such authority. In such event, the term hereof shall not be reduced or affected in any way, and Tenant shall continue to pay in full the net rent, additional rent, and all other required sums of money. Tenant shall be entitled to the entire award for such taking (whether paid by way of damages, rent, or otherwise). If, however, the period of occupation and use by the condemning authority extends beyond the expiration date of this lease and of any extension of hereof, the award made for such taking shall be apportioned between Landlord and Tenant as of the expiration date. Landlord may intervene and participate in any proceeding for such taking or condemnation. If such intervention is not permitted, however, Tenant shall, at its expense, consult with Landlord and its attorneys and experts, and make all reasonable efforts to cooperate with Landlord in prosecuting or defending such proceeding. When the use or occupation of the leased property terminates, Tenant shall, at its expense, repair and restore the buildings and improvements on the leased property, as nearly as is reasonably possible, to their condition at the time of such taking. Tenant, however, shall not be required to make such repairs and restoration if the term of this lease or of any renewal of it expires before, or within one year after, such temporary use terminates. In any such event, Landlord may recover all damages and awards resulting from the condemning authority's failure to repair and restore the building after the temporary taking ends. Any recovery or sum received by Tenant as an award or compensation for physical damage to the leased property caused by and during the temporary taking shall be deemed a trust fund for the purpose of repairing or restoring such damage.

(9) Termination of lease and allocation of award upon condemnation of 50 percent or more of rentable area--tenant to restore if no termination--tenant's right to participate in proceedings

(a) *Substantial condemnation.* If 50 percent or more of the net rentable area of the building on the leased property is acquired or condemned by eminent domain proceedings or sold under threat of such proceedings, all of the award or proceeds derived from such proceedings or sale shall be paid and distributed in the following order:

(1) *Mortgage.* First, the holder of any mortgage to which this lease is subordinate shall be paid the amount necessary to satisfy and discharge such mortgage.

(2) *Landlord.* Next, Landlord shall be paid \$350,000, or so much thereof as is available after the required payment is made under subdivision (1), above.

(3) *Tenant.* Next, Tenant shall be paid \$350,000, or so much thereof as is available after the required payments are made under subdivisions (1) and (2), above.

(4) *Balance.* Any balance remaining shall be divided equally between Landlord and Tenant.

If such condemnation, taking, or sale is for less than the entire leased property, the remainder shall be sold at public auction, or by private sale if agreed upon by Landlord, Tenant, and the holder of any unsatisfied mortgage on the property. The proceeds of such sale shall first be applied against any deficits in the amounts provided for in subdivisions (1), (2), and (3), above, and any balance shall be divided equally between Landlord and Tenant.

In the event of any such condemnation, taking, or sale, this lease shall terminate on the date Tenant surrenders possession. The net rent and prepaid charges due from Tenant shall be apportioned and paid to such date, and any advance payments shall be equitably refunded to Tenant.

(b) *Partial condemnation.* If less than 50 percent of the net rentable area of the building on the leased property is condemned, taken, or sold under the conditions described in subparagraph (a), Tenant shall proceed promptly and with due diligence to repair, restore, or replace such building and improvements. Tenant's work shall be done in accordance with plans and specifications approved by Landlord, which approval shall not be unreasonably withheld or delayed. There shall be made available to Tenant out of the award or proceeds from such condemnation, taking, or sale a sufficient sum to cover the cost of repair, restoration, or replacement. Any remaining balance shall be divided equally between Landlord and Tenant. This lease shall continue, but the net annual rent payable hereunder from and after the date Landlord receives its share of any such balance shall be reduced by an amount equal to 10 percent of such share.

(c) *Tenant notice and consent.* Tenant shall have the right to notice and to participate in all eminent domain proceedings, together with Landlord and any mortgagee. Landlord shall not settle any such eminent domain proceedings, or sell the leased property or any part thereof under threat of such proceedings, without Tenant's prior written consent.

(10) Termination of lease and allocation of award upon total condemnation--tenant to restore if no termination--procedure for restoration--provision for temporary taking

(a) *Eminent domain proceeding.* If, during the term of this lease, the entire leased property is taken as a result of the exercise of the power of eminent domain (the "proceeding"), this lease and all right, title, and interest of Tenant hereunder shall cease on the date of vesting of title pursuant to such proceeding, and Landlord shall be entitled to

receive the total award made in such proceeding and to dispose of it as provided in subparagraph (f), below.

(b) *Partial condemnation.* If, during the term of this lease, less than the entire leased property is taken in any such proceeding, this lease shall, upon vesting of title in the proceeding, terminate as to the part so taken, and Landlord shall be entitled to the total award made in any such proceeding. Tenant shall restore, repair, and replace that portion of the building on the leased property not so taken to a complete architectural unit for its use and occupancy as expressed in this lease. Tenant shall commence such restoration, repair, and replacement ("restoration"), as soon as practicable after the award made in any such proceeding is received by Landlord or the holder of any mortgage, and shall thereafter prosecute such work with due diligence.

(c) *Restoration expenses.* Landlord shall apply or cause to be applied toward the cost of such restoration the net amount of any award for damage to the building on the leased property which Landlord or the mortgagee in any such proceeding receives. The net award shall be paid to Tenant from time to time as the restoration progresses upon its written request, which shall be accompanied by the following:

(1) *Architect's certificate.* A certificate of the architect or engineer in charge of the restoration, dated not more than 30 days prior to such request, setting forth that the sum then requested to be withdrawn either has been paid by Tenant or is justly due to contractors, subcontractors, materialmen, engineers, architects, or other persons who have rendered services or furnished materials for such restoration. The certificate shall give a brief description of such services and materials, the several amounts so paid or due, and the persons to whom paid or due. The certificate shall state the fair value of such work at the date of the requisition, that no part of such expenditures, in any previous or then pending requisition, has been or is being made the basis for the withdrawal of any proceeds of any such award, and that, except for any amounts, stated in such certificate to be due for services or materials, there is no known outstanding indebtedness to such contractor, subcontractor, materialman, engineer, architect, or other person, after due inquiry, which is then due for labor, wages, materials, supplies, or services in connection with such restoration which, if unpaid, might become the basis of a vendor's, mechanic's, laborer's, materialman's, or other similar lien upon restoration, or upon the leased property.

(2) *Tenant affidavit.* An affidavit sworn to by the Tenant stating that all materials and all property constituting the work described in such certificate of the architect or engineer are free and clear of all mortgages, liens, charges, or encumbrances, except encumbrances, if any, securing indebtedness due to persons specified in such certificate, which encumbrances will be discharged upon payment of such indebtedness.

(d) *Disbursements.* Upon compliance with the provisions of subparagraph (c) and at Tenant's request, Landlord shall pay to Tenant or other persons named in such certificate, as the case may be, the respective amounts stated therein to be due. All payments shall be made out of the proceeds of such net award, provided that the payments do not exceed the fair value of the relevant work, as stated in such certificate. If the funds to be applied by Landlord or any mortgage holder shall exceed the cost of such restoration, Landlord or such mortgage holder, as the case may be, shall be entitled to retain the excess.

(e) *Rent abatement.* From and after the date of vesting of title in such proceeding, a just proportion of the basic rent, according to the extent and nature of such taking, shall abate for the remainder of the lease term.

(f) *Apportionment of award.* If the entire leased property shall be taken in any such proceeding, the total award made in such proceeding, less the expenses incurred by Landlord in connection with such proceeding, including reasonable counsel fees, shall be apportioned between Landlord and Tenant, as follows:

(1) *Landlord.* Landlord shall be entitled to retain out of the balance of such award the sum of \$500,000.

(2) *Tenant.* After the payment provided for in subdivision (1) Tenant shall receive \$250,000 out of any remaining

balance.

(3) *Balance.* After the payments provided in subdivisions (1) and (2), Landlord shall receive any remaining balance of such award.

(g) *Award for Tenant fixtures.* Notwithstanding any contrary provision in this article, in any taking of all or any part of the leased property, regardless of whether this lease is terminated, Tenant shall have the right to prove damages in the proceeding and shall receive any award made for damage to or condemnation of movable trade fixtures, furniture, and furnishings.

(h) *Temporary condemnation.* If all or any portion of the leased property is taken by the exercise of the right of eminent domain for governmental occupancy for a limited period, this lease shall not terminate, and Tenant shall continue to perform and observe all of its obligations hereunder as though such taking had not occurred, except to the extent Tenant is prevented from doing so by reason of such taking. Tenant shall receive the entire amount of any award made for such taking, whether paid by way of damages, rent, or otherwise. If, however, the period of governmental occupancy extends beyond the lease term, the award, to the extent it represents rent, shall be apportioned between Landlord and Tenant as of the date this lease ends. Upon the termination of such governmental occupancy, Tenant shall, at its expense, restore the building on the leased property as nearly as is reasonably possible to its condition before the taking. Tenant, however, shall not be required to perform such restoration work if the lease term terminates on or before the date the governmental occupancy ends.

(11) Termination upon condemnation of whole or substantially all of leased property--entire award to landlord--termination at option of tenant if condemnation of less than either whole or substantially all includes building--restoration by landlord limited by amount of award--apportionment of net rent--determination of substantially all

(a) *Condemnation.* If at any time during the term of this lease all or any part of the demised premises are taken for any public or quasi-public purpose by any lawful power or authority by the exercise of the right of condemnation or eminent domain, Landlord shall be entitled to and receive all awards made in any such proceeding. Tenant hereby assigns and transfers to Landlord all such awards made to Tenant.

Tenant shall not be entitled to any payment based upon the value of the unexpired term of this lease, consequential damage to the land not so taken, fixtures, or alterations to the premises or their use or otherwise.

(b) *Lease termination.* If such proceedings result in the taking of all or substantially all of the demised premises, this lease and the term hereof shall terminate and expire on the date of such taking, and the net rent, additional rent, and other sums or charges to be paid by Tenant shall be apportioned and paid to the date of such taking.

(c) *Partial condemnation.* If less than all or substantially all of the demised premises are taken in such proceedings, and the part so taken consists only of the parking area or any part thereof, this lease shall terminate only as to that portion. This lease shall continue for the balance of the term as to the remaining part of the demised premises, without any reduction, abatement, or effect upon the term or Tenant's obligation to pay in full the net rent, additional rent, and all other sums and charges which it is required to pay hereunder. If, however, the part so taken consists of all or part of the building on the demised premises, Tenant may terminate this lease as of the date of such taking by giving Landlord written notice within 30 days after Landlord mails a notice advising Tenant of such taking. In such event, the net rent, additional rent, and all other sums and charges Tenant is required to pay shall be apportioned and paid to the date of such termination.

If Tenant does not elect to terminate, this lease shall continue for the balance of the term as to the remaining part of the

demised premises, without any reduction, abatement, or other effect upon the lease term, or Tenant's obligation to pay in full the additional rent and all other sums and charges due from Tenant. However, Tenant's annual net rent after such taking for the remaining part of the demised premises shall be reduced pro rata in the proportion which the space in the building so taken bears to the entire space in the building originally demised.

If the parties do not agree upon the amount of such pro rata reduction within ten days after expiration of the 30-day period within which Tenant may elect to cancel, the amount shall be determined by arbitration as provided in this lease.

(d) *Restoration.* If less than all or substantially all of the building on the demised premises is taken in such proceedings, and Tenant does not elect to terminate this lease, Landlord shall, with reasonable dispatch, repair the remaining portion of the building so as to restore the same as a complete building. However, Landlord shall not be required to expend more than the net sum allowed it in the condemnation proceeding for damage to the building, after deducting all expenses incurred by it in such proceeding, and there shall be no abatement of rent during the restoration. If, however, the expense of such restoration would exceed the foregoing net sum, Landlord shall have 30 days after such partial taking within which to decide whether to make the restoration or terminate this lease. If within such period Landlord gives written notice of termination to Tenant, this lease and its term shall terminate on the last day of the calendar month following the month in which such notice is given, and the net rent, additional rent, and other sums or charges due from Tenant shall be apportioned and paid to the date of such termination. However, if Tenant agrees in writing, within 20 days after receiving Landlord's termination notice, to pay the amount by which the cost of restoration exceeds the net sum allowed Landlord in the condemnation proceeding, Landlord's right to terminate hereunder shall cease, and Landlord shall make the above required restoration.

(e) *Substantially all of premises.* For the purposes of this Article, substantially all of the demised premises shall be deemed to have been taken if the portion of the demised premises not so taken does not constitute, or cannot be repaired or reconstructed so as to constitute, a complete plot and structure usable by Tenant as an entity for the proper conduct of its business.

(f) *Arbitration.* Any dispute between Landlord and Tenant as to whether "substantially all" of the demised premises are taken shall be submitted to and determined by arbitration as provided in this lease.

(g) *Rent during arbitration.* The rent hereunder shall not abate during any arbitration proceeding or pending any arbitration award under this Article. However, an adjustment in the net rent, including a retroactive adjustment for any period during which Tenant has been deprived of the use of all or part of the building on the demised premises, shall be made as soon as the exact amount has been determined by the arbitration award.

(h) *Tenant fixtures.* Tenant shall be entitled to receive out of the award any sum specifically allowed to it for moving expenses and for its trade fixtures.

(12) Sublease provision--termination of sublease upon total condemnation--subtenant to restore if no termination--participation of subtenant in award

(a) *Definitions.* Whenever used in this article, the following words shall have the definition and meaning set forth below:

(1) *"Condemnation proceedings."* Any action or proceeding whereby the fee of all or any part of the leased property is, at any time during the lease term, taken for any public or quasi-public purposes by any lawful power or authority by the exercise of the power of eminent domain or right of condemnation.

(2) *"Taking or taken."* The event and date of vesting of title to all or any part of the leased property under condemnation

proceedings.

(3) *"Substantially all of the leased property."* A 50 percent or greater portion of the leased property.

(b) *Complete condemnation.* If the entire leased property is taken by condemnation, this lease shall terminate on the date of such taking, and the net rent and additional rent which Subtenant is required to pay hereunder shall be apportioned as of and paid to such date.

(c) *Substantial condemnation.* If substantially all of the leased property is taken by condemnation, Subtenant may terminate this lease by giving notice to Sublessor within 20 days after notice of such taking. In that event, this lease shall terminate on the date of such taking, and the net rent and additional rent which Subtenant is required to pay hereunder shall be apportioned as of and paid to such date. Sublessor shall promptly notify Subtenant of such taking after it receives notice or knowledge thereof. If Subtenant does not elect to terminate this lease, Sublessor may not terminate the Ground Lease pursuant to the terms thereof.

(d) *Rent adjustment.* If less than substantially all of the leased property is taken by condemnation proceedings, or if substantially all of the leased property is so taken and Subtenant does not elect to terminate this lease, this lease shall continue, but the net rent and additional rent shall be reduced from the date of such taking by an amount to be agreed upon by Sublessor and Subtenant. If, within 30 days after the date of such taking, Sublessor and Subtenant are unable to agree on the amount of the reduction, the matter shall be determined by arbitration under the provisions of this lease.

(e) *Allocation of award.* If there is any such taking, whether partial, whole, or substantially all, the entire award, with interest, shall be disposed of and apportioned in accordance with the provisions of the Ground Lease, subject to the following conditions:

(1) *Negotiation.* Sublessor shall advise and consult with Subtenant concerning Sublessor's negotiations with Prime Landlord, as contemplated under the Ground Lease, as to the disposition and apportionment of such award between Prime Landlord and Sublessor. Sublessor shall not make any agreement with Prime Landlord in respect of any such disposition and apportionment without Subtenant's consent, which it shall not unreasonably withhold.

(2) *Arbitration.* If Prime Landlord and Sublessor resort to arbitration under the Ground Lease as to the disposition and apportionment of such award between them, Subtenant may join in such arbitration, all in the same manner and subject to the same conditions as provided for arbitration under this lease.

(3) *Restoration.* If less than substantially all of the leased property is taken by condemnation proceedings, or if substantially all of the leased property is so taken and Subtenant does not elect to terminate this lease, Subtenant at its expense shall conduct any necessary demolition, and shall repair, alter, replace, and rebuild the part of the building not so taken to a complete architectural unit of substantially the same usefulness, design, and construction as existed immediately prior to such taking. However, with respect to the funds representing that portion of the condemnation award to which Sublessor may be entitled, under the provisions of the Ground Lease, for the purpose of restoring the remaining portion of the building to a complete architectural unit, Sublessor shall pay over such funds, or cause Prime Landlord to pay such funds, to Subtenant as they become due and payable under the Ground Lease.

(f) *Sublessee share of award.* If Sublessor, as tenant under the Ground Lease, becomes entitled to any portion of an award for such taking of the leased property, whether partial, whole, or substantially all, Subtenant shall be entitled to whatever part of Sublessor's share both parties agree upon. If Sublessor and Subtenant are unable to agree as to such apportionment, the matter shall be determined by arbitration under the provisions of this lease.

(13) *Termination upon condemnation of whole or substantially all of leased property which includes accessory parking--determination of substantially all--apportionment of proceeds of distribution between landlord and tenant*

(a) *Condemnation*. If, at any time during the initial term of this lease or any renewal thereof, title to all or substantially all of the demised premises is taken in condemnation proceedings or by any right of eminent domain, this lease shall terminate on the date of such taking and the rent and any additional rent shall be apportioned and paid to the date of such taking.

(b) *"Substantially all" defined*. "Substantially all of the demised premises" shall be deemed to have been taken if the portion remaining cannot reasonably be used, after restoration, to complete architectural units, for the conduct and operation of a bank and office building, including necessary accessory parking. There are now 300 on-site parking spaces accessory to the building. As a result of the taking, it is agreed that the portion remaining cannot reasonably be used for the conduct of a bank and office building if the on-site accessory parking spaces fall below 200 on-site parking spaces.

(c) *Apportionment of award*. If there is a total taking or a substantial partial taking as defined above, the rights and interests of Landlord and Tenant in and to the entire award including interest or the aggregate of any separate awards made by the court or otherwise, after payment of all reasonable fees and expenses incurred by both parties in connection with the establishing and collection of such awards, shall be apportioned as follows:

(1) *Land*. Landlord shall be entitled to receive and retain whatever portion of the award represents compensation for the value of the land including severance and consequential damages to the remainder.

(2) *Tenant fixtures*. Tenant shall receive no compensation for its leasehold value, if any, and shall be entitled solely to compensation for fixtures owned by it at title vesting. Tenant's fixtures shall not include electrical wiring, air conditioning ducts, heating units and conduits, floors and ceilings, all of which shall be included in Landlord's share of the award.

(3) *Improvements*. The portion of the award that represents the improvements shall be apportioned between Landlord and Tenant as follows:

(A) The first \$25,000 shall belong to Tenant.

(B) The Landlord shall then be entitled to receive and retain such portion of the award with interest thereon as the number of months elapsed since the commencement of the initial term bears to the number of months from such commencement to the then scheduled expiration date of the term, initial or renewal as the case may be, during which the taking occurs.

(C) The balance of this award shall then belong to Tenant.

(4) *Renewal option*. Any option to renew contained in this lease, shall, on the date of the taking, be deemed to have been exercised by Tenant so as to be computed as part of the initial term for the purposes of this condemnation clause.

(5) *Tenant participation*. Notwithstanding any language of limitation on Tenant's rights to any awards in condemnation as set forth in these condemnation clauses, it is specifically understood and agreed that Tenant has reserved the right to notice and to participate in the trial of the condemnation proceedings, any settlements thereof, and in any negotiations that lead to acquisition by purchase in lieu of condemnation. Landlord specifically covenants not to settle any such proceedings without Tenant's prior written consent.

(d) *Partial taking award*. If there is a taking of less than all or substantially all of the demised premises, the term of this lease shall not be reduced or affected in any way and Tenant shall restore the improvements constructed by it in

accordance with subsection (3) below. The award shall be apportioned as follows:

(1) *Land.* Landlord shall first be entitled to receive and retain such portion of the award or awards with the interest thereon as represents compensation for the value of the land or the part thereof so taken considered by Landlord as vacant and unimproved, or based on an economic value at the time of the taking, plus severance and consequential damages (but after giving effect to the completion of the restoration by Tenant) to the remainder considered as vacant and unimproved.

(2) *Repair allowance.* If the balance of such award or awards is \$75,000 or less, such balance shall be paid to Tenant and applied by it to the restoration and repair of the improvements constructed by it on the demised premises. If the balance is over \$75,000, the amount shall be paid to Landlord as Condemnation Trustee for application under the terms of subsection (5) below.

(3) *Restoration.* Tenant, at its expense, and regardless of whether the award payable under subsection (2), above, is sufficient for the purpose, shall proceed with reasonable diligence to construct, repair, alter, and restore the remaining part of the demised premises so that they will contain complete architectural units for use as a bank and office building and related parking facilities with that combination of rentable space and facilities for the on-site parking of automobiles which will result in the greatest number of square feet of rentable space permitted by the appropriate municipality or other governmental unit. Such construction repairs, alterations, or restoration, including temporary repairs, are referred to in this section as the Restoration.

(4) *Architect fees.* The cost of the Restoration shall include the reasonable fees of any architect employed by Landlord for the purpose of examining and passing upon the plans and specifications and supervising the Restoration.

(5) *Condemnation trustee.* If the award or awards are deposited with Landlord as Condemnation Trustee under the provisions of subsection (2) above, Landlord shall hold, apply, make available, and pay over the award to Tenant in the same manner as is provided with respect to insurance proceeds under the appropriate provisions of this lease. However, any balance of the award not used for the Restoration shall be divided between Landlord and Tenant as follows:

(A) Landlord shall be entitled to receive and retain such portion of the balance of the award or awards with interest thereon as the number of months elapsed since the commencement of the initial term bears to the number of months from such commencement to the then scheduled expiration date of the term, initial or renewal as the case may be, during which the taking occurs.

(B) The balance of any award or awards shall belong to the Tenant.

(6) *No rent abatement.* If there is any taking as described herein, no abatement of rent shall be allowed to Tenant.



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Current Legal Forms for Real Estate

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Current Legal Forms for Real Estate
Chapter 23 REAL ESTATE LEASES
Part IV. Forms
B. LEASE CLAUSES

31-23 Current Legal Forms for Real Estate FORM 23.54

AUTHOR: by Thomas G. Belden

FORM 23.54 Vault space and other encroachments

COMMENT

This group of clauses deals with the use of portions of the leased property which may be subject to termination by governmental authorities or by action of neighboring property owners. Many leases contain provisions relating specifically to vault space located beyond the building line and under sidewalk and street areas. The problems presented by this type of provision are similar to those raised by overhanging ledges, conduits, and other encroachments.

It is clear that the landlord cannot grant an absolute right to the possession of vault space beyond the property line. Consequently, provisions dealing with vault space normally state that such space is not included in the lease. Instead, the right to use such space is conveyed on the condition that there is to be no abatement in rent if such right is subsequently terminated, and on the further condition that any fees for continued use and any costs for removal shall be borne by the tenant. In some cases, the right to such use is conveyed in the form of a license, revocable by any appropriate authority. In dealing with encroachments in general, the usual provision exonerates the landlord from any liability and imposes no obligation on the tenant to remove them unless required by governmental authority or superior title.

FORMS

(1) Vault space and other encroachments--prohibition of use not to affect rent

This lease includes, as appurtenant to the leased property, any rights of Landlord, or which Landlord has authority to grant, in or to any vaults, steam lines, show-windows, porches, or other space in, under, or over any adjoining avenue, street, highway, or property. However, if, by law, or by or in consequence of the action of any authority or by title paramount, the possession or use of any such appurtenance to any building now or hereafter erected on the leased property outside the boundaries of the land owned by Landlord is discontinued, such discontinuance shall in no way affect Tenant's liability to pay the full rent and perform all the covenants contained in this lease.

(2) Vault and other space beyond building lines excluded from lease--tenant's revocable license to use--tenant's obligation to pay fees

Notwithstanding anything to the contrary contained in or indicated on any sketch, blueprint, plan, or elsewhere in this lease, no vaults, vault space, or space outside the property lines of the building shall be deemed leased hereunder. Landlord makes no representation as to the location of the property lines of the building. All vaults and vault space and all space not within the property lines of the building which Tenant may be permitted to use and occupy are to be used and occupied under a revocable license. If any such license is revoked, or if such space is diminished or taken by any governmental authority, Landlord shall not be subject to any liability therefor, and Tenant shall not be entitled to any compensation or diminution or abatement of rent, and such revocation, diminution, or taking shall not constitute a constructive or actual eviction. Tenant shall pay any municipal fee or charge for such vault.

(3) Vault and other adjoining space excluded from lease--tenant's obligation to pay rent, fines, and costs of removing violations

Landlord does not lease to Tenant any vaults or other space upon or under any street or sidewalk adjoining the leased property, but Tenant may occupy and use such vaults or other space during the term of this lease and any renewal or extension term, subject to all applicable governmental laws, rules, and regulations. No revocation by any governmental authority having jurisdiction of the maintenance and use of such vaults or other space upon or under any street or sidewalk adjoining the leased property shall in any way affect this lease, the amount of basic rent, or any other charge payable by Tenant hereunder. Tenant shall be liable for any rent or compensation charged or any fine or damages demanded by any governmental authority on account of the use of such vaults or other space. If any maintenance or use of such vaults or other space becomes prohibited, Tenant shall, at its expense, perform all work necessary to comply with the prohibiting order.

(4) General encroachments--landlord's exoneration--tenant's obligation to comply with orders to remove

(a) *"As is" condition.* Tenant represents that it has examined the leased property, including the title thereto, the possession and occupancy thereof, the adjoining sidewalks and structures, all surface and subsurface conditions thereof, and the present uses thereof, and that it accepts all thereof in the condition or state in which they now are, "as is," without any express or implied representation, covenant, or warranty, in fact or in law, and without recourse to Landlord as to the title thereto, possession or occupancy thereof, encumbrances thereon, appurtenances, nature, condition, or usability thereof, or uses to which the leased property may be put.

(b) *Encroachments on street.* Any existing encroachment on any avenue or street may continue. Tenant's failure to remove such encroachments shall not constitute a default by it under this lease, unless the state, the municipality, or any other competent body orders removal of such encroachment. In such case, Tenant, in a safe and workmanlike manner

and at its expense, shall comply promptly with such order, cause such encroachment to be removed promptly, and take all necessary steps to remove any violations noted in connection therewith and to protect adequately both parties from liability or injury to persons and property.

(c) *Encroachment on adjoining property.* Any existing encroachment on property adjoining the leased property may continue. Tenant's failure to remove such encroachment shall not constitute a default by it under this lease, unless a court or other competent body orders the removal of such encroachment. In such case, Tenant, in a safe and workmanlike manner and at its expense, shall comply promptly with such order, cause such encroachment to be removed promptly, and take all necessary steps to protect adequately both parties from liability for injury to persons and property. Any cause of action at law or in equity instituted against either party, or both, shall be defended by Tenant, at its expense, and by counsel reasonably satisfactory to Landlord. Tenant shall duly discharge any judgment for damages, whether in connection with such order, separately, or in lieu thereof, rendered against either party, or both.

(5) Vault removal not to affect lease--tenant to pay costs

If any vault or basement in front of or adjoining the leased premises, or any portico, stoop, window, or other projection or erection of any kind beyond the building lines, as authorized and fixed by law from time to time during the term, is ordered removed or is removed as the result or by virtue of any present or future federal, state, city, or other governmental laws, ordinances, requirements, orders, rules, or regulations, such removal, whether entire or partial, shall not constitute or be deemed to be a violation or breach of any of Landlord's covenants under this lease, a ground for any claim for damages against Landlord, or for any claim for the abatement, diminution, or reduction of rent or other charges. Tenant shall make such removal and incidental alteration and repair at its expense. Tenant shall indemnify and hold harmless Landlord against and from all costs, expenses, liabilities, losses, damages, suits, fines, penalties, claims, and demands, including reasonable counsel fees, arising out of failure to comply with such laws, ordinances, requirements, orders, directions, rules, or regulations directing such removal, alteration, or repair.



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Chapter 23 REAL ESTATE LEASES
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B. LEASE CLAUSES

31-23 Current Legal Forms for Real Estate FORM 23.55

AUTHOR: by Thomas G. Belden

FORM 23.55 Rights to assign and sublease

COMMENT

Most lease agreements control, in some way, the tenant's right to assign his lease or to sublet the leased property. Though the limitations may be minimal and, in effect, may permit assignment or subletting without the landlord's consent, normally provision is made at least for the procedures to be followed by the tenant and for certain basic protections for the landlord.

Alternative provisions:

The most liberal provision permitting assignment and sublease by the tenant requires no more than adequate notice to the landlord of the transaction negotiated by the tenant. The opposite provision is the provision requiring the landlord's approval as a prerequisite to any assignment or sublease. There are a number of intermediate variations. Consent may be required for all assignments except those to related organizations or to controlled business enterprises. A basic question is the extent of the obligation which is to continue with the assignor after the assignment.

Subtenant and prime lease:

Additional conditions and limitations may control subleases. An attornment provision is often included in a sublease, so that each subtenant will be required to accept the prime lessor as landlord under the sublease in the event of the sublessor's default under the prime lease. Even where this formality is not imposed, the prime landlord may retain the right to collect rents from subtenants in the event of the sublessor's default as lessee under the prime lease.

Tax aspects of assignment or sublease:

Both with respect to tax consequences and consequences under local law, one of the major issues in a tenant's disposition of his leasehold interest is whether it is to be classified as a complete assignment or as a sublease. This classification generally determines whether proceeds from the disposition are taxed as ordinary income or as capital gain. In the hands of the lessee, a leasehold is ordinarily a capital asset. Where the lessee makes an assignment of his entire interest, he is generally permitted to recover tax-free the unexhausted portion of the basis to him of the leasehold interest, and to treat the balance of the consideration as a capital gain. In contrast, where the transaction constitutes a sublease, the consideration is deemed to be rental income.

Classification as assignment or sublease:

While there are clear distinctions in the law between an assignment and a sublease, there are many borderline transactions in which the classification depends on the extent to which the tenant has retained rights or responsibilities. Among the facts which have caused a disposition to be treated as a sublease are the reservation in the lease of the right to exercise a purchase option, the lessee's continuing liability to the lessor, the lessee's right of reentry for breach, and an arrangement for monthly payments of the "selling price." If these facts are not present, and if the disposition is complete, there will be a capital transaction, even if the assignment is to a landlord who is to lease directly to a subtenant. The latter transaction should be distinguished from the cancellation of a lease by a landlord and tenant; in a cancellation the amount received by the landlord from the tenant must be reported as ordinary income.

Tax treatment of assignment gain, income:

Classification of the transaction as an assignment does not completely dispose of the question as to whether ordinary income or capital gain is to be reported. The nature of the leasehold interest as an asset of the tenant is also relevant. If the taxpayer is engaged in the business of selling leaseholds, he would be required to report gain from a leasehold assignment as ordinary income. In most cases, the leasehold is either a capital asset or, if the lessee is engaged in the business of subleasing, depreciable business property. In both these situations, gain realized upon an assignment would be subject to the capital gain limitations.

Assignment vs. sublease:

The real property law makes important distinctions between an assignment and a sublease. In the case of an assignment, the assignee acquires privity of estate with the lessor, and each may sue the other for breach of lease covenants running with the land. The original tenant terminates his privity of estate with the landlord, but he may continue to be liable for rent payments as a contractual obligation. If the assigning tenant is to be released from this obligation it should be clearly expressed by the landlord. The assignor's responsibilities for other covenants under the lease are normally extinguished by an assignment. In the case of a sublease, the original tenant retains both privity of contract and privity of estate with the lessor and hence remains liable for the observance of all the covenants in the lease.

Landlord's assignment of lease:

A landlord's disposition of leased property normally is accomplished by a sale or exchange of the entire parcel. It is possible, of course, for the landlord to assign the right to rents and retain title to

the property. Amounts received as consideration for such an assignment must be reported as ordinary income. The landlord's rights as lessor also may be conveyed in connection with the execution of an overriding or "sandwich" lease.

For a further discussion as to whether a transaction is a lease or a sale of property for tax purposes, see the Tax Background (TB) § 23.14, at the beginning of this chapter. For discussion of sale-leaseback transactions, see TB § 23.15.

FORMS

(1) Landlord's consent required to sublet--specified uses prohibited--liability of tenant continued

Tenant may sublet all or portions of the leased property for the remainder of the term with Landlord's approval, which it shall not unreasonably withhold, if the subtenant's business or occupation is not extra-hazardous, or illegal, but Tenant shall remain primarily liable for the payment of rent and the performance of its other obligations hereunder.

(2) Landlord's consent required to assign, sublet or mortgage--acceptance of rent from subtenant or assignee

Tenant shall not assign, mortgage, or encumber this lease, or permit all or any part of the leased property to be used by others, without Landlord's prior written consent. If, with such consent, Tenant makes such assignment or permits such use, Landlord may, after Tenant's default, collect rent from the assignee, subtenant, or occupant and apply the net amount collected to the rent herein reserved. No such assignment, subletting, occupancy, or collection shall be deemed a waiver of this covenant, or the acceptance of the assignee, subtenant, or occupant as tenant, or a release of the Tenant from its further performance of the covenants in this lease. Landlord's consent to an assignment or subletting shall not be construed to relieve Tenant from obtaining Landlord's written consent to any further assignment or subletting.

(3) Tenant's right to assign to a corporation in which tenant is a principal stockholder--release of initial tenant from liability

Notwithstanding any provision herein to the contrary, Tenant, if it is not then in default, may assign this lease to a corporation of which it is the principal stockholder. Tenant shall be released from all liability hereunder one year after it delivers a copy of such assignment to Landlord, together with an assumption agreement in form satisfactory to Landlord's counsel.

(4) Landlord's consent for tenant assignment or sublet--reimbursement of landlord's attorneys' fees--landlord's consent not unreasonably withheld

Tenant shall not transfer, assign, sublet, or pledge this Lease or its interest in the Leased Premises without Landlord's prior written consent. Tenant shall reimburse Landlord for its reasonable attorneys' fees incurred in processing or documenting the requested consent. Landlord shall not unreasonably withhold its consent to any such transaction, provided that Tenant shall remain liable during the term hereof and there shall be no uncured defaults when the consent is requested and granted.

(5) Landlord's authority to assign lease--tenant to hold assignee responsible for performance--not applicable to assignment as security

Landlord reserves the right to sell, assign, or transfer this Lease upon the condition that, in such event, this Lease shall remain in full force and effect, subject to the performance by Tenant of all its terms, covenants, and conditions, and upon the further condition that such assignee or transferee, except as assignee or transferee merely for security, agrees to perform all the terms, covenants and conditions under this Lease. Upon any such sale, assignment, or transfer, other than merely as security, Tenant agrees to look solely to the assignee or transferee with respect to all matters in connection with this Lease and Landlord shall be released from any further obligations hereunder. If Tenant makes any security deposit by virtue of this Lease or otherwise, Landlord may transfer the deposit to the assignee or transferee and thereupon Landlord shall be discharged from any further liability in reference thereto.

(6) Assignment, sublet or license, voluntary or by operation of law requires landlord's prior consent--sale of stock in corporate tenant deemed an assignment--consent not a release of tenant

Tenant shall not assign, mortgage or encumber this lease, or sublet, license, or permit all or any part of the demised premises to be used by others, whether voluntarily, by operation of law, or otherwise, without Landlord's prior written consent. If Tenant is a corporation, the sale or transfer of its stock representing control shall be deemed an assignment of this lease, unless the sale or transfer (a) is made to a publicly owned corporation, (b) involves the sale or issuance of securities registered under the Securities Act of 1933, as amended, (c) is made among Tenant's existing stockholders, or (d) results from the death of one of Tenant's stockholders. If this lease is assigned, or all or any part of the demised premises are sublet, or occupied by anyone other than Tenant, Landlord may collect rent from the assignee, sublessee, or occupant and apply the net amount collected to the rent due. However, no such collection of rent shall be deemed a waiver of Landlord's consent, Landlord's acceptance of the assignee, sublessee, or occupant as tenant, or a release of Tenant's performance of its obligations under this lease. Landlord shall not unreasonably withhold its consent to any assignment or subletting, but if such consent is granted in any instance, the same shall not relieve Tenant or any assignee or subtenant from obtaining Landlord's written consent to any further assignment or subletting.

(7) Prior consent required for sublet or assignment, voluntary, involuntary, or by operation of law--consent required for assignment by merger or liquidation of corporate tenant and assignment for benefit of creditors

(a) *Assignment or subletting.* Lessee shall not, whether voluntarily, involuntarily, or by operation of law, assign or encumber all or any part of this Lease, sublet all or any part of the Demised Premises, or permit any other person to occupy the same without Lessor's prior written consent. If Lessee requests permission either to assign this Lease or to sublet all or part of the Demised Premises, or if this Lease is deemed to be assigned under paragraph (b) of this Article, Lessor may either grant or withhold consent, but shall not be deemed to have made an election unless the same is in writing and signed on Lessor's behalf by a duly authorized person. Lessor's consent to any assignment or subletting shall not release Lessee from any of its obligations hereunder, including the payment of rent or other sums provided for herein. Lessor's acceptance of rent from any other person shall not be deemed a waiver of any provision hereof or a consent to the assignment or subletting of the Demised Premises.

(b) *Merger.* If Lessee is a corporation, any transfer of this Lease from Lessee by merger, consolidation or liquidation, or any change in ownership or power to vote of a majority of its outstanding voting stock from the owners of such stock or those controlling the power to vote such stock as of the date of this Lease shall constitute an assignment.

(c) *Assignment for benefit of creditors.* An assignment for the benefit of creditors or by operation of law shall not be

effective to transfer any rights to assignee without Lessor's prior consent.

(8) Landlord's consent required to assign--definition of unreasonable withholding of consent--tenant discharged upon assignee's assumption of liability

Tenant shall not assign this lease without Landlord's prior written consent, which it shall not unreasonably withhold. Landlord shall not withhold such consent if the proposed assignee's financial standing and responsibility at the time of such proposed assignment is sufficient to give Landlord reasonable assurance of the payment of all rents and other amounts required under this lease, and of compliance with all other terms, covenants, provisions, and conditions hereof. Upon such an assignment, Tenant shall thereafter be released from all liability arising or accruing hereunder, provided that such assignee shall execute, acknowledge, and deliver to Landlord an assumption agreement, in form and substance satisfactory to it, whereby such assignee agrees to observe, perform, and keep, all of the terms, provisions, covenants and conditions required to be observed, performed and kept as tenant hereunder.

(9) Tenant's limited right to assign and sublet without consent--no discharge of tenant

(a) *Acquisition or merger, store use.* Tenant may assign this lease without Landlord's consent to any corporation which is affiliated with Tenant, or to any corporation with or into which Tenant merges or consolidates (if the resulting corporation controls substantially all of Tenant's store operations), or which acquires substantially all of the assets of Tenant's store operations. Tenant may also assign this lease to any qualified department store operator. Tenant shall not assign this lease to any other person or business organization without Landlord's prior written consent, which it shall not unreasonably withhold. Landlord's consent shall not be required, however, if, during the three consecutive lease years immediately preceding the assignment, the volume of gross sales were such as to not entitle Landlord to receive any percentage rent hereunder. No assignment of this lease at any time shall release Tenant of its obligations hereunder. No extension of time or other indulgence granted by Landlord to any subsequent Tenant, regardless of whether notice is given to any predecessor, shall release Tenant from any of its obligations hereunder.

(b) *Assignment and assumption.* No assignment shall be valid or effective until there is delivered to Landlord a duplicate original of the assignment, in recordable form, containing the assignee's name and address, and the assignee's assumption of this lease and of all Tenant's obligations hereunder. Such assumption need relate only to obligations to be performed by Tenant from and after the date of such assignment.

(c) *Tenant ownership.* The transfer of a majority of the issued and outstanding capital stock of any corporate tenant or of a majority of the total interest in any partnership tenant, however accomplished, shall be deemed an assignment of this lease.

(d) *Sublease.* Tenant may sublet all or any part of the leased property, but Landlord's prior written consent shall be required for a sublease of any substantial portion of the property to any person other than a corporation to which an assignment may be made without such consent under subparagraphs (a) through (c), above. No such sublease shall be valid or effective until a duplicate original thereof is delivered to Landlord. No sublease shall affect or diminish Tenant's obligation to perform all of its obligations under this lease.

(10) Tenant's right to assign or sublet to similar business--approval required for other assignments or subleases--release of tenant

(a) *Assignment.* Tenant may assign this lease, without Landlord's consent, to any qualified motel operator, to any corporation, a majority of the officers and directors of which are qualified motel operators, or to any corporation in

which Tenant or its members or stockholders own a majority of the issued and outstanding capital stock. Tenant may assign this lease to any other person or corporation with Landlord's written consent, which it shall not unreasonably withhold. No assignment shall be valid, however, until there is delivered to Landlord a duplicate original of the instrument of assignment, in recordable form, containing the assignee's name and address, and the assignee's assumption of this lease and of all agreements to be performed by Tenant. Upon any valid assignment of this lease, as provided herein, Tenant shall be relieved of all obligations accruing from the effective date of the assignment, but all prior rental obligations shall remain unaffected. The transfer of a majority of the issued and outstanding capital stock of any corporate assignee of this lease, or of a majority of the interests in any partnership assignee of this lease, however accomplished, shall be deemed an assignment of this lease.

(b) *Sublease.* Tenant may sublet all or any part of the leased property, except that it shall obtain Landlord's prior written consent, which Landlord shall not unreasonably withhold, for a sublease of more than 50 percent of the property to other than a qualified motel operator. No such sublease shall be effective until a duplicate original of it is delivered to Landlord. No sublease shall diminish Tenant's obligation to perform all of its agreements hereunder, including the obligation to pay additional percentage rental based upon gross income from the subtenant's operations.

(c) *General prohibition.* Except as provided in subparagraphs (a) and (b) of this article, no assignment or sublease shall be valid without Landlord's written consent.

(11) Tenant's right to sublet--tenant's and landlord's right to assign--continued liability of assignor

Tenant may sublet all or any part of the leased property, except that no part shall be sublet for any unlawful, dangerous, noxious, or offensive purpose. No subletting by Tenant shall affect its obligation to perform all of its covenants under this lease. Landlord and Tenant each may assign or transfer its respective right, title, and interest in and to this lease without the other party's consent. No such assignment shall release the assigning party of any obligation or liability hereunder unless the other party specifically agrees in writing to such release.

(12) Tenant's right to sublet--prescribed procedure--requirement for attornment by subtenant

Tenant may sublet all or part of the leased property for any purposes not prohibited by this lease, upon the following conditions:

(a) *Subordination.* Each sublease shall provide that it is subject and subordinate to the rights of Landlord under this lease and to any renewal, amendment, or modification thereof, and to the rights of any mortgage to which this lease is subject or subordinate and to all renewals, modifications, consolidations, correlations, replacements, and extensions thereof. The provisions for such subordination shall be self-operative so that no further instrument of subordination need be required by any mortgagee.

(b) *Cancellation or surrender.* Without Landlord's written consent, Tenant shall not effect a cancellation or surrender of any sublease, except in accordance with its terms.

(c) *Default.* Without Landlord's written consent, Tenant shall not knowingly permit any default by it, as sublessor, to continue with respect to any sublease which would enable the subtenant to terminate its lease. If any subtenant at any time asserts to Tenant that it is so in default, Tenant shall promptly notify Landlord of such claim.

(d) *Advance rent.* Tenant shall not collect rent in advance for more than one month from any subtenant without Landlord's prior written consent. However, if not prohibited by the terms of any mortgage to which this lease is subject or subordinate, Tenant may accept payment of rent for up to the first six months of the term of a sublease if its terms

provide for tenant changes in the subleased space to be performed at Tenant's expense, and such rent payments do not exceed the amount actually required for such changes.

(e) *Attornment.* The Tenant will cause each sublease to contain a provision in substantially the following form: "If by reason of a default by Landlord as tenant under any underlying lease in performing any of its terms or provisions, or if for any other reason the underlying lease and Landlord's leasehold estate as tenant thereunder are terminated by summary proceedings or otherwise, or through foreclosure proceedings brought by the holder of any mortgage to which such underlying lease is subject or subordinate (the "holder"), Tenant will attorn to the lessor under such underlying lease (the "lessor") or to the purchaser in foreclosure proceedings (the "purchaser"), as the case may be, and will recognize the lessor or purchaser as Tenant's Landlord under this sublease, unless the lessor or holder in such proceedings elects in connection therewith to terminate this sublease and Tenant's right to possession of the leased property. Tenant shall execute and deliver, at any one or more times, upon the request of Landlord, the lessor, or the holder, any instrument that is necessary or appropriate to evidence such attornment. Tenant appoints Landlord its attorney-in-fact to execute and deliver all such instruments. Tenant waives any present or future right of election to terminate this sublease or to surrender possession of the leased property if the underlying lease is terminated or any such proceeding therefor is brought by the lessor or holder. This sublease shall not be affected in any way by any such proceeding or termination unless and until the lessor or holder, in connection with such proceeding, elects to terminate this sublease and to extinguish Tenant's leasehold estate hereunder."

(f) *Lease copy.* Tenant shall furnish Landlord with a true copy of each sublease and of each extension or modification of a sublease.

(13) Tenant's right to assign in whole only--no release--transfer of subtenants' security deposits

(a) *Assignment conditions.* Tenant shall have the absolute right to assign this lease in whole only and not in part, without Landlord's consent, subject to the following conditions:

- (1) At the time of making such assignment, Tenant is not in default of any of the provisions of this lease.
- (2) Landlord receives written notice of the assignment and its effective date within 10 days after its execution and delivery.
- (3) Such assignment is in writing, duly executed and acknowledged by Tenant in proper form for recording.
- (4) Such assignment includes the then unexpired balance of this lease term.
- (5) A duplicate original of such assignment is delivered to Landlord within 10 days after its execution and delivery.
- (6) Such assignment is duly recorded.
- (7) All subtenants' security deposits held by Tenant at the time of such assignment are then transferred to the assignee, who will be advised by Tenant, to the best of its knowledge, information, and belief, of all existing legal requirements with respect thereto. Tenant also shall supply to Landlord a statement of the amounts of the security deposits so turned over.
- (8) Such assignment expressly prohibits the assignee from removing any of Landlord's personalty from the leased premises without Landlord's express written consent.
- (9) No assignment of this lease releases or discharges, in whole or in part, Tenant's liability for the full performance of

its terms, covenants, and conditions hereunder.

(b) *Partial sublease.* Tenant may sublet a portion of the leased premises upon the terms and conditions set forth in subparagraph (a) above with regard to an assignment of this lease, except that such subletting shall not be for the entire unexpired balance of the lease term and the sublease shall not be recorded.

(c) *Rent.* If all or any part of the leased premises is sublet or occupied by anybody other than Tenant, Landlord may, after Tenant's default, collect rent from all subtenants or occupants, and apply the net amount collected to the rent reserved herein. However, no such collection shall be deemed a waiver of any agreement, term, covenant, or condition hereof or Landlord's acceptance of any subtenant or occupant as tenant. Tenant shall not collect more than one month's advance rent from any subtenant.

(14) Tenant's right to assign and sublet--release upon assignment

(a) *Assignment.* Tenant may assign this lease together with all of its rights hereunder without Landlord's consent, subject to the following conditions:

- (1) At the time of such assignment this lease is in full force and effect.
- (2) Landlord is given notice of such assignment and its effective date within 5 days after its execution and delivery.
- (3) Such assignment is in writing, duly executed and acknowledged in proper form for recording, and recorded within 10 days after execution and delivery.
- (4) Such assignment includes the unexpired balance of the lease term and all rights of renewal.
- (5) A duplicate original or certified copy of such assignment together with the recording date is served upon Landlord within 10 days after its return from the office of the recorder.
- (6) Every assignee assumes this lease by instrument, and a duplicate original of which is served upon Landlord within 10 days after the effective date of such assignment.

(b) *Release of tenant.* Immediately upon making an assignment of this lease, in compliance with the conditions in subparagraph (a), Tenant shall be released and relieved of all further liability thereunder. Each subsequent assignee, upon making a further assignment in compliance with the foregoing conditions, shall immediately be released and relieved of all further liability under this lease.

(c) *Subleases.* Tenant may sublet all or portions of the leased property at any time without Landlord's consent, except that Tenant shall not, without first obtaining such consent:

- (1) Sublet space exceeding 7,500 square feet of rentable area to any one subtenant.
- (2) Enter into any sublease of a portion of the leased property which has a term of more than 10 years, or has renewal or extension privileges in favor of the subtenant for a term expiring more than 10 years from the date of the inception of the original sublease term.
- (3) Cancel, surrender, or modify any sublease having an unexpired term of one year or more, or an annual rental in excess of \$10,000 per annum.

(4) Enter into an extension or new sublease relating to all or any portion of the leased property at a rental less than 80 percent of the rent previously payable for such space under the last sublease applicable thereto.

(d) *Subordination.* All subleases shall be subject and subordinate to this lease. No right, estate, or privilege of any subtenant shall exceed Tenant's rights, estate, and privileges hereunder. In the event of any termination of this lease, whether by expiration, forfeiture, cancellation, surrender, or otherwise, Landlord may terminate all leases and deem any dispossession of Tenant to constitute an automatic dispossession of all subtenants. Landlord shall not be bound by any agreement, term, covenant, or condition contained in any sublease, regardless of whether it has notice thereof. Landlord may require Tenant to include the above provisions as to subletting in each sublease made by Tenant which has a term of five years or more, or has renewal or extension privileges in favor of the subtenant for a term expiring five years or more from the date of the inception of the original sublease term.

(e) *Rent.* If any part of the leased property is sublet or occupied by anybody other than Tenant, Landlord may, after Tenant's default, collect rent from any subtenant or occupant, and apply the net amount collected to the rent reserved herein. However, such collection shall not be a waiver of any agreement, term, covenant, or condition of this lease, or Landlord's acceptance of any subtenant or occupant as tenant.

(15) Landlord's assignment of existing leases to new tenant

Landlord, without recourse, hereby assigns to Tenant for the term of this lease, and while Tenant is not in default hereunder, all its right, title, and interest in and to all existing leases and tenancies covering portions of the leased property, and the rents and profits due or to become due to Landlord under the provisions thereof. Tenant hereby assumes for the term of this lease the performance of all of Landlord's obligations under such leases and tenancies, and undertakes to indemnify Landlord against all obligations accruing thereunder from and after the date of this lease.

(16) Landlord's assignment of existing leases to new tenant--special provision for security deposits and tax escalator clauses

(a) *Assignments.* This lease is given and accepted by Lessee subject to the leases, rights, and privileges of tenants in possession, more particularly set forth in Schedule A attached, and the existence of such leases, rights, and privileges shall not be deemed a violation of Landlord's covenant of peaceful possession, or any other covenant in this lease. Lessee assumes all liability by reason of such leases and the rights and privileges of such tenants and, subject to the right of Landlord to receive all basic rent, percentage rent, and additional rent reserved to Landlord hereunder, Lessee from the date hereof is hereby entitled to all rents, additional rents, and other amounts due from such tenants, except that Landlord shall retain any security deposits listed in Schedule A subject to any obligation to pay interest thereon.

(b) *Security deposits.* If any lease requires the security deposit to be returned to the tenant, Lessee shall pay over the deposit to it. If the deposit or deposits have been previously paid over to Landlord, Lessee shall receive a credit against current rent equal to the amounts so returned. If Lessee is entitled by law to receive any security deposit as a result of a default by any tenant, and such deposit has previously been paid over to Landlord, Lessee shall receive a credit against current rent equal to such deposit.

(c) *Rent escalation.* Lessee shall be required to collect and pay over to Landlord as additional rent all sums due under the tax-escalator clauses of existing leases and of all future leases containing such tax-escalator clauses made by Lessee for any portion of the leased property. Lessee shall not be required to include any sums received by Landlord as security deposits or any additional rent due Landlord by virtue of an increase in tenant rental resulting from increased real estate taxes, as part of gross business in computing percentage rental; nor shall any such sums be considered as part of the payments by Lessee of guaranteed minimum rent or percentage rent due hereunder.

(d) *Term.* Lessee shall be allowed to enforce all rights, remedies, and privileges of Landlord under the terms of the leases listed in Schedule A, except as otherwise provided herein, until such leases expire or this lease terminates, whichever occurs first.

(17) Landlord's right to assign interest in rents

Landlord may assign from time to time the entire net rent payable hereunder to persons, firms, corporations, trusts, or other entities designated by it in written notice to Tenant. In such event, Tenant shall pay the net rent, subject to the terms hereof, to Landlord's designee at the address specified in Landlord's notice for the period covered by such assignment.

(18) Landlord's consent required to sublet--right of recapture

Tenant may sublet all or any part of the leased property with Landlord's prior written consent, which it shall not unreasonably withhold. However, if Tenant, upon not less than 60 days' prior written notice, advises Landlord of its intention to sublet for substantially the unexpired balance of the term (80 percent or more of the term's remaining period), Landlord may, by giving written notice to Tenant within 30 days after it receives Tenant's notice, recapture the space described therein. Landlord's recapture notice shall terminate this lease with respect to the space described in Tenant's notice as of the date stated in such notice. If Tenant's notice covers all of the leased property and Landlord gives the recapture notice with respect thereto, this lease term shall end on the date stated in Tenant's notice as if that date had originally been fixed for the term expiration. If this lease is terminated with respect to less than the entire leased property, the rent shall be proportionately adjusted on the basis of the number of square feet retained by Tenant.

(19) Recapture option for space proposed to be sublet--landlord notice to tenant of exercise of option--conditions to sublease--sublease profits to be paid to landlord

(a) *Sublease consent; recapture option.* Landlord covenants that it will not unreasonably withhold or delay its consent to any subletting of all or any part of the demised premises, subject to compliance with the provisions of paragraphs (b), (c), and (d) below. However, if Tenant, by written notice, advises Landlord of its intention, from on and after a stated date, which shall not be less than 60 days after the date of Tenant's notice, to sublet all or any part of the demised premises for substantially the unexpired balance of the term (75 percent or more of the term's remaining period), Landlord may recapture the space described in Tenant's notice by giving written notice to Tenant within 30 days after receipt of its notice. Landlord's recapture notice shall terminate this lease with respect to the described space as of the date stated in Tenant's notice. If Tenant's notice covers all of the demised premises and Landlord gives the recapture notice with respect thereto, this lease term shall end on the date stated in Tenant's notice as fully and completely as if that date had originally been fixed for the term expiration. If, however, this lease is cancelled with respect to less than the entire demised premises, the rental and the escalation percentage herein reserved shall be adjusted on the basis of the number of square feet retained by Tenant in proportion to the number of square feet in the demised premises, and this lease as so amended shall continue thereafter in full force and effect.

(b) *Prohibited uses.* No sublease shall be made with a Tenant who shall be, or who shall seek to use any portion of the demised premises for occupancy as, an employment agency, labor union office, physician's or dentist's office, dance or music studio, school (except for the training of Tenant's employees), beauty salon, or for any purpose otherwise prohibited by this lease.

(c) *Maximum number of tenants.* No sublease shall be made if it results in an occupancy of more than three tenants

(including Tenant) in the demised premises or if it is for a term of less than two years, unless the unexpired term of this lease is for less than two years. In such event, the subletting shall be for the unexpired term less one day).

(d) *Tenant, subtenant liability.* Any subletting hereunder shall not release or discharge Tenant of or from any past, present, or future liability, under this lease, and Tenant shall continue fully liable hereunder. The subtenants shall agree to comply with and be bound by all of the terms, covenants, and conditions of this lease to the extent of the space sublet, and Tenant shall deliver to Landlord, promptly after execution, an executed copy of each such sublease and an agreement of compliance by each such subtenant on Landlord's form.

(e) *Profits to landlord.* If there is any sublease of all or any part of the demised premises, Tenant shall pay Landlord (1) the amount by which any rent or other consideration paid to Tenant by any subtenant exceeds the pro rata portion of the rent for such space that Tenant is then paying to Landlord under the provisions of this lease, and (2) any other profit or gain realized by Tenant from such subletting. All sums payable hereunder by Tenant shall be paid to Landlord as additional rent immediately upon the receipt thereof by Tenant.

(20) Notice of sublease to include proposed sublease, proposed use, and subtenant financial information--landlord's right of first refusal to sublease--landlord's option for partial or complete termination--leaseback at rent in tenant's lease--sublease limitations and terms

(a) *Assignment; subletting; prior consent.* Tenant, for itself, its heirs, distributees, executors, administrators, legal representatives, successors and assigns, expressly covenants that it shall not assign, mortgage or encumber this lease, or underlet or permit all or any part of the Demised Premises to be used or occupied by others, without Landlord's prior written consent. If this lease is assigned or the Demised Premises are so underlet or occupied without Landlord's consent, Landlord may, after Tenant's default, collect rent from the assignee, undertenant, or occupant, and apply the net amount collected to the rent reserved herein. However, no assignment, underletting, occupancy or collection shall be deemed a waiver of the provisions hereof, the acceptance of the assignee, undertenant or occupant as tenant, or a release of Tenant from the performance of its obligations hereunder. Landlord's consent to an assignment or subletting shall not release Tenant from obtaining Landlord's express written consent to any other assignment or subletting. In no event shall any permitted sublessee assign or encumber its sublease, further sublet all or any portion of its sublet space, or otherwise permit all or part of such space to be used or occupied by others, without Landlord's prior written consent.

(b) *Notice of proposed sublease; right of first refusal.* Tenant shall notify Landlord if, at any time, during the term hereof it desires to assign the lease or sublet all or part of the Demised Premises. Tenant's notice shall be accompanied by the following: (1) a conformed or photostatic copy of the proposed assignment or sublease, the effective or commencement date of which is not less than 60 or more than 120 days after such notice is given; (2) a statement setting forth in reasonable detail the identity of the proposed assignee or subtenant, the nature of its business and its proposed use of the Demised Premises; and (3) current financial information with respect to the proposed assignee or subtenant, including, without limitation, its most recent financial report. Such notice shall be deemed an offer from Tenant to Landlord whereby Landlord may: (i) sublease such space (the "Leaseback Space") from Tenant upon the terms and conditions set forth below (if the proposed transaction is a sublease of all or part of the Demised Premises); (ii) terminate this lease (if the proposed transaction is an assignment or a sublease of all or substantially all of the Demised Premises); or (iii) terminate this lease with respect to the Leaseback Space (if the proposed transaction is a sublease of part of the Demised Premises for the entire balance of the demised term). Landlord may exercise any of these options by giving Tenant notice at any time within 30 days after Tenant gives such notice to Landlord. During this 30-day period Tenant shall not assign this lease or sublet such space to any person.

(c) *Exercise of termination option.* If Landlord exercises its option to terminate this lease when Tenant desires either to assign this lease or sublet all or substantially all of the Demised Premises, this lease shall end on the date such assignment or sublet was to be effective or commence, as the case may be, and the fixed rent and additional rent shall be

paid and apportioned to such date.

(d) *Partial termination option.* If Landlord exercises its option to terminate this lease when Tenant desires to sublet part of the Demised Premises for the entire balance of the demised term, (1) this lease shall end with respect to such part of the Demised Premises on the date the proposed sublease was to commence; and (2) from and after such date the fixed rent and additional rent shall be adjusted, based upon the proportion that the rentable area of the remaining Demised Premises bears to the total rentable area of the Demised Premises.

(e) *Landlord's sublet of leaseback area.* If Landlord exercises its option to sublet the Leaseback Area, such sublease to Landlord (as subtenant) shall be at the rental rate per rentable square foot of fixed rent and additional rent then payable under this lease, and shall be for the same term as that of the proposed subletting. Moreover, such sublease:

(1) shall be expressly subject to all of the covenants, agreements, terms, provisions and conditions of this lease except those that are irrelevant or inapplicable, and except as otherwise expressly set forth to the contrary in this Section;

(2) shall be upon the same terms and conditions as those contained in the proposed sublease, except those that are irrelevant or inapplicable, and except as otherwise expressly set forth to the contrary in this Section;

(3) shall give the sublessee the unqualified and unrestricted right, without Tenant's permission, to assign such sublease or any interest therein and/or to sublet the space covered by such sublease or any part or parts of such space and to make all changes, alterations, and improvements in the space covered by such sublease (but Tenant shall not be obligated to repair or restore such space), and if the proposed sublease will result in the subletting of all or substantially all of the Demised Premises grant Landlord the option to extend the term of such sublease for the balance of this lease term less than one day;

(4) shall provide that Landlord may permit any of its assignees or further subtenants to make alterations, decorations, and installations in any part of such space; and shall also provide in substance that the assignee or subtenant may remove all or part of such alterations, decorations, and installations before or upon the expiration or other termination of such sublease, if the assignee or subtenant, at its expense, repairs all resulting damage to the sublet space; and

(5) shall also provide that: (i) the parties to such sublease expressly negate any intention that any estate created under such sublease be merged with any other estate held by either of such parties; (ii) any assignment or subletting by Landlord (as the subtenant) may be for any purpose or purposes that Landlord, in its uncontrolled discretion, deems suitable or appropriate; (iii) Landlord, at its expense, may make all alterations that are required or deemed necessary by it to physically separate the subleased space from the balance of the Premises and to comply with all governmental laws and requirements relating to such separation; and (iv) that at the expiration of the term of such sublease, Tenant will accept the space covered by such sublease in its then existing condition, subject to the obligations of the sublessee to make all repairs thereto that are necessary to preserve the premises demised by such sublease in good order and condition, and, at Tenant's option, to restore them to their pre-sublease condition.

(f) *Indemnification and release of tenant for leaseback space.* (1) If Landlord exercises its option to sublet the Leaseback Space, it shall indemnify and save Tenant harmless from all obligations under this lease as to the Leaseback Area while it is so sublet to Landlord.

(2) Landlord's performance under a sublease of the Leaseback Area shall be deemed Tenant's performance of all similar obligations under this lease, and no default under the sublease shall give rise to a default under a similar obligation contained in this lease. Tenant shall not be liable for any default under this lease, or be deemed to be in default hereunder, if the default is caused by or arises from any act or omission of either the tenant under such sublease or any occupant holding under or pursuant thereto.

(3) Tenant shall have no obligation, at the expiration or earlier termination of this lease term, to remove any alteration, installation or improvement made in the Leaseback Area by Landlord.

(g) *Sublease by consent.* If Landlord does not exercise any of its options under paragraph (b) above and this lease is in full force and effect, Landlord shall not unreasonably withhold or delay its consent, which must be in writing, to the proposed assignment or sublease, if:

(1) In Landlord's reasonable judgment the proposed assignee or subtenant is engaged in a business, and all or a relevant part of the Demised Premises will be used in a manner, which (i) is in keeping with the then standards of the Building, (ii) is limited to the use expressly permitted under this lease, and (iii) will not violate any negative covenant as to use contained in any other lease of space in the Building;

(2) The proposed assignee or subtenant is a reputable person of good character; and

(3) The proposed assignee or sublessee is not a person with whom Landlord is then negotiating to lease space in the Building.

Except for any subletting by Tenant to Landlord under the provisions of this Article, each subletting hereunder shall be subject to all of the covenants, agreements, terms, provisions, and conditions contained in this lease. Notwithstanding any such subletting to Landlord or to any other subtenant or Landlord's acceptance of rent or additional rent from any subtenant, Tenant shall remain fully liable for the payment of all present and future rent and additional rent due under this lease and for the performance of all Tenant's covenants, agreements, terms, provisions, and conditions hereunder. Tenant shall remain fully liable for all acts and omissions of any licensee, subtenant, or anyone claiming under or through any subtenant which are in violation of any obligation hereunder, and any such violation shall be deemed a violation by Tenant. Tenant further agrees that, notwithstanding any such subletting, no other subletting of the Premises by Tenant or any person claiming through or under it (except as provided in paragraph (e)) shall be made except upon compliance with and subject to the provisions of this Article. If Landlord refuses to consent to any proposed assignment or sublease or exercises any of its options under paragraph (b), Tenant shall indemnify, defend, and hold harmless Landlord against and from all loss, liability, damages, and expenses (including reasonable counsel fees) resulting from any claims that may be made against Landlord by the proposed assignee or sublessee or by any brokers or other persons claiming a commission or similar compensation in connection with the proposed assignment or sublease.

(h) *Expiration of landlord's consent.* If (1) Landlord fails to exercise any of its options under paragraph (b) and consents to a proposed assignment or sublease, and (2) Tenant fails to execute and deliver such assignment or sublease within 90 days after such consent was given, Tenant shall again comply with all of the provisions and conditions of paragraph (b) before assigning this lease or subletting all or part of the Demised Premises.

(i) *Sublease limitations; nondisturbance preconditions.* With respect to each and every sublease or subletting authorized by Landlord under the provisions of this lease, it is further agreed:

(1) No subletting shall be for a term ending later than one day before the expiration date of this lease;

(2) No sublease shall be valid, and no subtenant shall take possession of the Premises or any part thereof, until an executed counterpart of such sublease has been delivered to Landlord;

(3) Each sublease shall provide that it is subject and subordinate to this lease and to the matters to which this lease is or shall be subordinate, and that in the event of termination, reentry or dispossession by Landlord under this lease Landlord may take over all of the right, title and interest of Tenant, as sublessor, under such sublease, and such subtenant shall, at Landlord's option, attorn to Landlord pursuant to the then executory provisions of such sublease, except that Landlord shall not (1) be liable for any previous act or omission of Tenant under such sublease, (2) be subject to any offset, not

expressly provided in such sublease, which theretofore accrued to such subtenant against Tenant, or (3) be bound by any previous modification of such sublease or by any previous prepayment of more than one month's rent;

(4) Notwithstanding the provisions of (3), above, if any sublease hereunder (i) is entered into after armslength bargaining between Tenant, as sublandlord, and subtenant, and the subtenant is unrelated to Tenant, (ii) is for a term of not less than five years, (iii) provides for rents that are less than the higher of (A) the rental that Tenant is then paying Landlord (including additional rent payable under this Lease), or (B) the fair market rents then prevailing for the Building, (iv) sublets to the subtenant not less than 5,000 square feet of rentable area, and (v) is with a subtenant who is a reputable person of good character (or whose principals are reputable persons of good character) with sufficient financial worth considering the responsibility involved, and Landlord has been furnished with reasonable proof thereof (each such sublease complying with the above requirements, which are collectively referred to as a "Nondisturbance Sublease"), Landlord covenants and agrees to promptly enter into a nondisturbance agreement with the subtenant thereunder in recordable form providing that this lease shall be terminated or expire and provided that the subtenant is not then in default under the Nondisturbance Sublease beyond any period permitted thereunder to cure the same, the Nondisturbance Sublease shall not terminate on account thereof and shall continue as a direct lease between Landlord and the subtenant on all of the terms, covenants and conditions of such sublease as if so entered into in the first instance.

(j) *Additional rent on assignment or sublease.* If Landlord consents to any assignment of this lease or to any sublease, Tenant shall in consideration therefor pay to Landlord, as additional rent:

(1) in the case of an assignment, an amount equal to all sums and other considerations paid to Tenant by the assignee for or by reason of such assignment (including, but not limited to, sums paid for the sale of Tenant's fixtures, leasehold improvements, equipment, furniture, furnishings or other personal property, less, in the case of a sale thereof, the then net unamortized or undepreciated cost thereof determined on the basis of Tenant's federal income tax returns, brokerage commissions, cost of alterations, and reasonable attorney's fees); and

(2) in the case of a sublease, any rents, additional charge or other consideration payable under the sublease to Tenant by the subtenant which is in excess of the fixed rent and additional rent accruing during the term of the sublease in respect of the subleased space (at the rate per square foot payable by Tenant hereunder) pursuant to the terms hereof (including, but not limited to, sums paid for the sale or rental of Tenant's fixtures, leasehold improvements, equipment, furniture or other personal property, less, in the case of the sale thereof, the then net unamortized or undepreciated cost thereof determined on the basis of Tenant's federal income tax returns and less brokerage commissions, cost of alterations, reasonable attorney's fees and cleaning expenses). The sums payable under this paragraph (2) shall be paid to Landlord as and when payable by the subtenant to Tenant.

(k) *Corporate subtenant or assignee.* If any assignee or subtenant of Tenant is a corporation (other than a publicly held corporation), the provisions of paragraph (a) shall apply to a transfer (by one or more transferors) of a majority of Tenant's stock as if such transfer were an assignment of this lease. Such provisions shall not apply to transactions with a corporation into or with which Tenant is merged or consolidated or to which substantially all of Tenant's assets are transferred or to any corporation which controls or is controlled by Tenant or is under common control with Tenant, if Tenant's successor has a net worth computed in accordance with generally accepted accounting principles at least equal to Tenant's net worth immediately before such merger, consolidation, or transfer.

(1) *Assumption by assignee; tenant's continued responsibility.* Any assignment or transfer, whether made with Landlord's consent under paragraph (a) or without its consent under paragraph (k), shall be made only if, and shall not be effective until, the assignee executes, acknowledges, and delivers to Landlord an agreement under which the assignee assumes Tenant's obligations under this lease and agrees that the provisions in paragraph (a) shall, notwithstanding such assignment or transfer, continue to be binding upon it as to all future assignments and transfers. The original named Tenant covenants that it shall remain fully liable for the payment of the fixed rent and additional rent and for all of Tenant's other obligations under this lease, notwithstanding any assignment or transfer or Landlord's acceptance of fixed

rent or additional rent from an assignee, transferee, or any other party.

(m) *No waiver.* The joint and several liability of Tenant and any immediate or remote successor in interest of Tenant and the due performance of Tenant's obligations under this lease shall not be discharged, released, or impaired in any respect by any agreement or stipulation made by Landlord extending the time of, or modifying any of the obligations of, this lease, or by any waiver or failure of Landlord to enforce any of the obligations of this lease.

(n) *Building directory.* The listing of any name other than that of Tenant, whether on the doors of the Premises or the Building directory, or otherwise, shall not operate to vest any right or interest in this lease or in the Premises, or be deemed to be Landlord's consent to any assignment or transfer of this lease or to any sublease of the Premises or to the use or occupancy thereof by others.

(21) Retail tenant's authority to enter into license agreements with concessionaires--maximum number, floor space, and advertising restrictions--landlord's approval of form of agreement

Landlord agrees that Tenant may enter into license agreements with not more than three concessionaires in the same or related business at any one time and in the aggregate relating to one-fourth or less of the floor space of the demised premises, provided that (1) the concession is conducted and any advertisement in connection therewith is made solely in Tenant's name, (2) Tenant's obligations under this lease are in no manner deemed reduced or impaired thereby, (3) Landlord gives its prior approval as to the form of the agreement, and (4) the agreement contains provisions satisfactory to Landlord to effect the intention of this paragraph.

(22) Landlord withholds written consent unreasonably--tenant to be released

Any tenant renting a residence in the subject dwelling having four or more residential units may sublease his premises, subject to Landlord's prior written consent, which it shall not unreasonably withhold. If Landlord unreasonably withholds such consent, it shall release the tenant from the lease upon the tenant's request.

The tenant shall inform Landlord of his intent to sublease by mailing a notice of such intent by registered or certified mail. Such request shall be accompanied by the written consent thereto of any co-tenant or guarantor of this lease and a statement of the name, business, and home address of the proposed sublessee. Within 10 days after such request is mailed, Landlord may ask the tenant for any additional information that will enable it to determine whether rejection of the request is unreasonable. Within 30 days after Tenant mails the request for consent or Landlord requests the additional information, whichever is later, Landlord shall either send a notice to tenant of its consent or its reasons for refusing consent. Landlord's failure to send the notice shall be deemed to be a consent for the proposed subletting. If Landlord consents, the premises may be sublet in accordance with the tenant's request, but the tenant shall remain liable for the performance of all of his obligations under the lease.

(23) Tenant's right to assign to specified person without landlord's consent upon tenant's retirement--release of initial tenant from liability

Notwithstanding anything to the contrary contained herein, if Tenant desires at any time to retire and sell her business to _____, Tenant may assign her interest under this lease to _____ without Landlord's prior written consent. If, at the time of such assignment, Tenant is not in default hereunder, Tenant shall be released from any further liability hereunder. The provisions of this paragraph are effective only if: (a) Tenant notifies Landlord in writing of the events of this paragraph at the time they occur; and (b) _____ confirms in writing his agreement to remain liable under this lease despite Tenant's release from liability.

[Attach Schedule A]



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Current Legal Forms for Real Estate

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Current Legal Forms for Real Estate
Chapter 23 REAL ESTATE LEASES
Part IV. Forms
B. LEASE CLAUSES

31-23 Current Legal Forms for Real Estate FORM 23.56

AUTHOR: by Thomas G. Belden

FORM 23.56 Protective provisions in subleasing

COMMENT

A subtenant's position is uniquely vulnerable. His continued possession depends not only upon the status of his own lease, but also upon the continuation of the relationship between his landlord and the lessor under the prime lease. There are several devices which may afford some protection against defaults resulting from acts or omissions of the sublessor. To some extent, the lessor under the prime lease may also require protection in the event of a sublease. He may, of course, rely on his right to withhold his consent to any sublease and the conditions he can impose as a prerequisite to any sublease. Or, he may rely on the continued responsibility of his own tenant. This, however, will not insure responsible performance by subtenants if the sublessor does in fact default.

Sublessee and prime landlord agreement:

The most comprehensive protection for both the subtenant and the prime lessor is likely to be accomplished by a direct agreement between them. Such an agreement may include the prime lessor's promise that if the subtenant is not in default, his possession will not be disturbed upon the sublessor's default. This type of protection may be afforded either by a nondisturbance agreement, or by an attornment agreement in which the prime lessor undertakes to become the landlord under the sublease and the subtenant undertakes to be bound directly to the prime lessor for the performance of all obligations under the sublease in the event of the sublessor's default.

Alternative provisions:

In some cases, the subtenant agrees in the sublease to attorn to the prime lessor. The subtenant

then lacks protection unless there is a separate undertaking by the prime lessor to accept subtenants in good standing. Such a nondisturbance clause may be contained in the prime lease. If the landlord under the prime lease has not executed an attornment or nondisturbance agreement, the subtenant may derive some degree of protection by defining his rights against the sublessor. This clearly leaves the subtenant's status more tenuous than it would be if there were an undertaking by the prime landlord. The subtenant's right of action against the sublessor for damages is not likely, as a practical matter, to have much effect if the sublessor has defaulted under the prime lease. In any event, such a right of action may be predicated on the promise of the sublessor to perform his obligation under the prime lease and to refrain from any cancellation or modification of the prime lease without the approval of the subtenant. Another provision which may prove useful to the subtenant is one which gives him the right to sue the prime lessor directly in the event that the prime lessor defaults in his obligations under the prime lease. Since there is neither privity of contract nor privity of estate between the prime lessor and the subtenant, the subtenant does not have the right of direct action in the absence of such a provision. A similar type of protection is provided by the sublessor's promise to perform all defaulted obligations of the prime lessor.

Subtenant's performance of prime lessee:

The principal danger posed to the sublessor by the sublease is that acts of the subtenant may endanger the sublessor's status under the prime lease. Some degree of protection may be obtained by incorporating the limitations in the prime lease as conditions of the sublease, or obtaining the subtenant's promise to comply with all the provisions of the prime lease.

FORMS

(1) Direct agreement between prime landlord and subtenant

(a) *Nondisturbance.* So long as the Subtenant is not in default in the payment of rent or additional rent or in the performance of any term, covenant, or condition of the sublease, the Prime Landlord will not join the Subtenant as a party defendant in any action or proceeding for the purpose of terminating the Subtenant's interest and estate under the sublease because of any default by the tenant under the main lease.

(b) *Attornment.* If the main lease is terminated by reason of possession proceedings or for any other reason and the Prime Landlord succeeds to the interest of the sublessor under the sublease, the Subtenant shall be bound to the Prime Landlord under all of the conditions of the sublease for the balance of the term thereof with the same force and effect as if the Prime Landlord were the landlord under the sublease, and the Subtenant hereby attorns to the Prime Landlord as its landlord. Such attornment shall be effective and self-operative without the execution of any further instruments by either party hereto immediately when the Prime Landlord succeeds to the interest of the landlord under the sublease. The Subtenant shall be under no obligation to pay rent to the Prime Landlord until the Subtenant receives written notice from the Prime Landlord that it has succeeded to the interest of the sublessor under the sublease. The respective rights and obligations of the Subtenant and the Prime Landlord upon such attornment shall for the balance of the term of the sublease and be the same as now set forth therein, it being the intention of the parties hereto for this purpose to incorporate the sublease in this agreement by reference with the same force and effect as if it were fully set forth herein.

(c) *Obligations.* If the prime lease is terminated by reason of possession proceedings or for any other reason and the Prime Landlord succeeds to the interest of the sublessor under the sublease, the Prime Landlord shall be bound to the Subtenant under all of the terms of the sublease, and the Subtenant shall, from and after such event, have the same remedies against the Prime Landlord for the breach of any agreement contained in the sublease that the Subtenant might have had under the sublease against the sublessor thereunder. However, the Prime Landlord shall not be liable for any act or omission of the sublessor, shall not be subject to any offsets or defenses which the Subtenant might have against the sublessor, and shall not be bound by any rent or additional rent which the Subtenant might have paid to the sublessor for more than the current month.

(2) Landlord's promise to lease to subtenants on sublessor's default

If by reason of any default by the Tenant, this lease, or any extension or renewal, is terminated at Landlord's election before the stated expiration, Landlord will enter into a new lease of the leased property, or a portion thereof, as the case may be, with subtenants in good standing under subleases conforming to the requirements of this lease, for the remainder of the term and subject to the same terms and conditions as contained in such subleases.

(3) Subtenant's attornment agreement--representation that prime lessor will accept subtenant

The Subtenant recognizes that the Sublessor's interest in the premises is that of lessee under a long-term ground lease. If the ground lease is cancelled or terminated before its expiration date and before the expiration date of this lease or any extension or renewal thereof, or if the ground lease is surrendered, whether voluntary, involuntary, or by operation of law, the Subtenant shall make full and complete attornment to the Prime Landlord for the balance of the lease term, including all extensions and renewals thereof, upon the same covenants and conditions as are contained herein, so as to establish direct privity of estate and contract between the Prime Landlord and the Subtenant and with the same force and effect as though this lease was originally made directly from the Prime Landlord to the Subtenant. The Subtenant shall make all rent payments thereafter directly to the Prime Landlord. The Sublessor represents that the Prime Landlord has covenanted that in the event of the cancellation, termination, expiration, or surrender of the ground lease, the Prime Landlord will accept the Subtenant, its successors and assigns, as its lessee for a period equal to the full unexpired portion of the lease term, including all extensions and renewals thereof, and upon the same covenants and conditions as are contained herein, and the Prime Landlord will thereafter become the landlord under this lease.

(4) Subtenant's promise to comply with ground lease

The Subtenant shall duly comply with all the provisions of the ground lease and all the terms of any mortgage to which this sublease is subordinate which are to be observed or performed during the term hereof, except the payment of rent under the ground lease and the payment of interest and principal under any such mortgage.

(5) Sublessor's promise to comply with prime lease--representations as to prime lease

The Sublessor warrants that the performance of the obligations, by the subtenant, under this sublease will satisfy all of the Sublessor's obligations under the prime lease with respect to the leased property. The Sublessor will perform all of its affirmative obligations under the prime lease throughout the term of this sublease. The Sublessor represents that the prime lease contains no terms or provisions which would permit the prime landlord to terminate the prime lease or abridge any rights of the Sublessor as tenant thereunder, except upon the same terms set forth in this sublease for the termination hereof or the abridgement of any right of the Subtenant hereunder.

(6) Sublessor's promise to comply with prime lease--right of subtenant to cure sublessor's default

The Sublessor shall duly observe and perform all obligations imposed upon the tenant under the prime lease to the extent that Subtenant's performance under this lease does not constitute tenant's performance under the prime lease. The Subtenant may, at any time, at the Sublessor's expense, take any action which the Sublessor is required but fails to timely take, if such action is or may be necessary to prevent a default under the terms of the prime lease.

(7) Sublessor to comply with ground lease and with leasehold mortgage--subtenant's right to cure defaults

(a) *Ground lease.* The Sublessor shall duly pay each installment of net rent under the terms of the ground lease and duly observe and perform every term and condition of the ground lease to the extent that such term and condition is not satisfied by Subtenant's performance under this lease. Sublessor will not do or permit any act, condition, or thing to occur which would or may constitute a default under the ground lease.

(b) *Leasehold mortgage.* The Sublessor shall duly pay each regular installment of interest and sinking fund payment under the terms of the leasehold mortgage and not do any act or permit any condition to occur which would constitute a default thereunder. Sublessor shall promptly notify Subtenant of any notice of default which Sublessor may receive from the holder of the leasehold mortgage and Subtenant shall have the right, but not the obligation, to cure any such default at Sublessor's cost and expense.

(c) *Subtenant performance.* The Subtenant may, at any one or more times, make any payment or take any action that is necessary to prevent a default under the terms of the ground lease or the leasehold mortgage. The amount of any such payment or the cost of any such action shall be treated as a sum of money advanced by the Subtenant to the Sublessor and shall be repayable by the Sublessor to the Subtenant on demand. If not so paid on demand, the Subtenant may deduct such amount from any future installment of net rent becoming due hereunder.

(8) Sublessor to renew prime lease if subtenant renews sublease

If the Sublessor receives notice from the Subtenant of its intention to extend or renew this lease, the Sublessor will, within five days after such receipt, give notice to the Prime Landlord of its election to exercise its current extension privilege under the prime lease and thereafter within 10 days shall notify the Subtenant in writing that the prime lease has been effectively renewed for the next succeeding extension period. If the Sublessor fails to give such notice of election to the Prime Landlord, the Subtenant shall be entitled to an assignment from the Sublessor of the prime lease, if such assignment complies with the conditions relating to assignments set forth in the prime lease.

(9) Subtenant's right to proceed against prime landlord

Except as otherwise provided herein, if the Sublessor has the right to enforce any rights against the Prime Landlord or any other party under the main lease because of the default by either, and within a reasonable period after the Subtenant's request the Sublessor fails to enforce such rights, the Subtenant may do so, either in its name or, if necessary, in the Sublessor's name. Such enforcement shall be at the Subtenant's expense, and it shall indemnify the Sublessor against all expenses, including, but not limited to, reasonable counsel fees, incurred by the Sublessor in connection with any such claim, action, or proceeding brought by the Subtenant. Any recovery obtained by the Subtenant shall belong to it, except that the Sublessor shall be compensated therefrom for all damages sustained by it as a result of such default or breach by the Prime Landlord or other party. Any dispute as to damages sustained by the Sublessor shall be determined by arbitration.

(10) No modification or surrender of prime lease without subtenant's consent

The Sublessor shall not modify or surrender the prime lease without the Subtenant's prior written consent, and any modification or surrender made without such consent shall be null and void and have no effect on the Subtenant's rights under this lease.

(11) Prime landlord to enter into nondisturbance agreement with future subtenant

Upon the written request of Tenant, Landlord shall enter into an appropriate agreement with the subtenant of any space in the leased property, who is occupying the same for professional, commercial, or business purposes ("nondisturbance agreement"). The nondisturbance agreement shall provide, in substance, that, so long as the subtenant complies with all of the terms of its sublease, the Landlord, in the exercise of any of its rights or remedies under this lease, shall not deprive the subtenant of possession, or the right of possession, of the leased property during the term of the sublease, or join the subtenant as a party in any action or proceeding to enforce or terminate this lease or obtain possession of the property leased in the sublease for any reason other than a breach by the subtenant of the terms of the sublease which would entitle the sublessor to dispossess subtenant thereunder, if the following conditions are met: (a) the subtenant meets reasonable requirements of financial responsibility; (b) its business is of a character consistent with those in the area of the leased property and with the nature of the building and is required by the terms of the sublease to pay a rental consistent with current rentals in the vicinity of the building for comparable space; (c) such nondisturbance agreement does not cover any period beyond the term of this lease; and (d) simultaneously with the execution of the nondisturbance agreement, the subtenant, at Landlord's request, agrees in writing that if this lease is terminated before the lease term expires the subtenant will be deemed attorned to Landlord, and will become Landlord's tenant under its sublease.

(12) Prime lease to prevail over sublease--tenant liable for breach of prime lease--consent of prime landlord required--prime landlord coinsured--nondisturbance of tenant by prime landlord

(a) *Prime lease terms.* This lease is a sublease, Landlord having previously entered into a Lease Agreement ("Prime Lease"), a copy of which is attached to this Lease. To the extent that there is any conflict between the provisions of this Lease and the Prime Lease, the Prime Lease shall control. Tenant acknowledges that any default by it under this Sublease Agreement may constitute a default by Landlord as Tenant under the Prime Lease, and that Tenant's liability to Landlord shall include, but not be limited to, any damages or liabilities incurred by Landlord to Prime Landlord under the Prime Lease arising out of Tenant's default. The consents that Landlord must give under this Sublease Agreement shall also include the consent of Prime Landlord under the Prime Lease. All insurance to be obtained by Tenant shall name as additional parties insured the Prime Landlord under the Prime Lease, the Landlord, and all other persons which Landlord, as Tenant would have to name under the Prime Lease.

(b) *Subordination.* This Lease and the rights of Tenant hereunder shall be, and are hereby made expressly subject and subordinate at all times to the Prime Lease and to all amendments, renewals and extensions thereof. If any default by Prime Landlord under the Prime Lease results in a default by Landlord under this Sublease Agreement, Tenant's right to recover against Landlord shall be limited to a pro rata share of any recovery made by Landlord against Prime Landlord based upon the balance of the Term remaining under the Prime Lease.

(c) *Landlord.* Any obligations under this Sublease Agreement to be performed by Landlord but performed by Prime Landlord shall be deemed to be the performance by Landlord.

(d) *Nondisturbance.* This Lease shall not be effective until the written consent of any Prime Landlord is obtained. Such consent shall contain a provision that so long as Tenant is not in default under the provisions of this Lease, (1) this Lease shall remain in full force and effect, and (2) the possession of the Premises by Tenant shall not be disturbed.

(13) Tenant's operating statement--inspection of subleases

Tenant, upon Landlord's written request, shall from time to time, but not more often than three times during any two-year period, furnish or cause to be furnished to Landlord within 15 days from the date of the request a written operating statement of the leased premises covering the lease year immediately preceding the year in which such statement is requested, together with a written statement setting forth the names of all subtenants of the leased premises, the terms of their respective tenancies, the spaces occupied, and the rentals and any security paid. The foregoing statements shall be certified and sworn to as true and correct by Tenant or its authorized representative. Upon Landlord's written request, Tenant shall from time to time make available for inspection by Landlord, or its designee, during reasonable business hours, the subleases covering the various portions of the leased premises. Such subleases shall be made available for inspection at the leased premises.



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Current Legal Forms for Real Estate
Chapter 23 REAL ESTATE LEASES
Part IV. Forms
B. LEASE CLAUSES

31-23 Current Legal Forms for Real Estate FORM 23.57

AUTHOR: by Thomas G. Belden

FORM 23.57 Mortgaging of leasehold

COMMENT

A leasehold, just as a fee interest, may provide adequate security for a loan. The right to grant a mortgage which encumbers a leasehold is a valuable privilege. This right is normally secured by a specific provision in the lease, which often prescribes various conditions intended for the protection and benefit of both parties.

Leasehold mortgage:

It is equally important, of course, to protect the position of the leasehold mortgagee. Since the security of the leasehold mortgagee depends upon the continuation of the lease in good standing, a mortgagee who has a leasehold as collateral requires protection that is somewhat similar (but, perhaps more comprehensive) to the protection that may be required by a subtenant. Due to the fact that the leasehold mortgagee's collateral could literally disappear upon the occurrence of any event that would permit the landlord to terminate the lease, a leasehold mortgagee will generally direct his primary attention to these contingencies.

Protection of leasehold mortgagee:

To forestall termination of the lease, the leasehold mortgagee may be given the right to receive notice of the tenant's defaults and the right to cure such defaults. If the lease is in fact terminated, the mortgagee may be given the option to obtain a new lease for the remainder of the period of the prior lease, upon curing all existing defaults. The latter privilege may be particularly significant where the default results from a failure to comply with covenants to repair or to adhere to laws or

regulations of governmental authorities. The leasehold mortgagee cannot generally perform such covenants unless he can first obtain possession of the premises. He can be protected with respect to this type of default only if given enough time to act. Where the landlord may be prejudiced by delay, as where a particular condition exposes him to civil or criminal liability, he may be reluctant to cooperate with the leasehold mortgagee by deferring termination of the lease until the mortgagee can obtain possession by foreclosure or otherwise. The option to obtain a new lease upon the correction of existing defaults within a reasonable period of time meets this difficulty.

Additional protection:

Another provision designed to protect a mortgage who has a leasehold as collateral permits him to exercise any extension or renewal option not exercised by the tenant. A further protective provision should define the mortgagee's right to share in the proceeds of insurance upon damage to the leased property.

FORMS

(1) Tenant's right to mortgage the leasehold--leasehold mortgagee's right to notice and right to cure defaults

(a) *Mortgage of lease.* Tenant is given and has the absolute right, without Landlord's consent, to mortgage its interest in this lease, except that no such mortgage shall extend to or affect the fee, the reversionary interest, or the estate of Landlord in and to any land or building and improvements now or hereafter erected on the leased property.

(b) *Nonbinding effect on Landlord.* No mortgage or assignment of this lease shall be binding upon Landlord in the enforcement of its rights under this lease, nor shall Landlord be deemed to have any notice thereof, unless a fully conformed copy of each instrument affecting such mortgage or assignment, in form proper for record, is delivered to the Landlord.

(c) *Notice of lease default.* If, before any default occurs in this lease, the holder of any such mortgage gives Landlord a written notice containing the holder's name and office address, Landlord shall give the holder a copy of each notice of default by Tenant at the same time that Landlord gives such notice to Tenant. Each copy of such notice shall be deemed duly given to the holder when mailed to the holder at its last post office address furnished to Landlord.

(d) *Cure of default.* Landlord shall accept performance by the holder of any such mortgage of any obligation of this lease that Tenant is required to perform, with the same force and effect as if performed by Tenant, provided that at the time of such performance Landlord is furnished with satisfactory evidence that the person, firm, or corporation tendering such performance or payment has the claimed interest in the leased property. The holder of such mortgage shall have 10 days after receipt of any such notice of default within which to cure any default in the payment of rent or additional rent under this lease, and a reasonable time within which to cure any other default.

(2) Tenant's right to mortgage the leasehold--notices to landlord--subordination provision

Tenant may mortgage this lease, except that there shall be no more than two mortgages at any time, one of which shall be a bona fide purchase money mortgage. The holder of any mortgage of this lease or of Tenant's interest hereunder,

and anyone claiming by, through, or under any such holder, shall not acquire any greater rights hereunder than Tenant has (except the right to cure or remedy Tenant's defaults), and shall not become entitled to a new lease if this lease is terminated or Tenant fails to exercise any outstanding option to extend it. No mortgage of this lease or of Tenant's interest hereunder by Tenant or its successors or assigns shall be valid unless:

- (a) This lease is in full force and effect when such mortgage is created.
- (b) The mortgage is subject to all the agreements, terms, covenants, and conditions of this lease.
- (c) The mortgage contains the following provisions:

This instrument is executed upon condition that (unless this condition is released or waived by Landlord under the lease or its successors in interest by an instrument) no purchaser or transferee of the lease at any foreclosure sale, or other transfer in lieu of foreclosure, shall, as a result of such sale or transfer, acquire any right, title, or interest in or to the leasehold estate in which a lien is hereby created, unless Landlord is given notice of such sale or transfer of the lease and the effective date thereof within five days after the effective date of such sale or transfer, the instrument used to effect such sale or transfer is promptly recorded, and a duplicate original or certified copy thereof together with the recording data shall be served upon Landlord within 10 days after the return thereof from the office of recording.

"This instrument and all rights hereunder are and shall be subject and subordinate to the lien of any mortgage to which the lease is or may be subordinate. The holder hereof shall upon demand, at any time, execute, acknowledge, and deliver to Landlord under the lease, without expense to Landlord, any instrument that may be necessary or proper to confirm the subordination of this instrument and all rights hereunder to the lien of any such mortgage and any renewal, modification, consolidation, replacement, or extension thereof and, if the holder hereof fails at any time to execute, acknowledge, and deliver any such subordination instrument, Landlord under the lease, in addition to all other remedies available to it in consequence thereof, may execute, acknowledge, and deliver the same as the attorney-in-fact of the holder hereof and in his name, place, and stead, and the holder hereof appoints Landlord under the lease such attorney-in-fact for that purpose.

- (d) Landlord shall receive written notice of its creation of such mortgage within five days after the execution and delivery, and such mortgage shall be recorded within 10 days after its execution and delivery.
- (e) A duplicate original or certified copy and the recording data of such mortgage shall be served upon the Landlord within 10 days after its return from the office of the recorder.

(3) Tenant's right to mortgage the leasehold--various protections for leasehold mortgagee--right to extend default period

Tenant and every successor tenant is given and has the right to mortgage or assign its interest in this lease without Landlord's prior consent, if no other mortgage in this lease is outstanding at the time such mortgage is granted. If Tenant or any successor or assign mortgages this leasehold, so long as such mortgage remains in effect the following provisions will apply:

- (a) *Lease surrender.* There shall be no cancellation, surrender, acceptance of surrender, or modification of this lease, without the lease hold mortgagee's prior written consent.
- (b) *Notice of default, cure.* Landlord shall, upon serving on Tenant any notice of default or any other notice under this lease, simultaneously serve a copy of such notice upon the leasehold mortgagee, and no notice of such default shall be deemed to have been duly given until a copy thereof has been so served. The mortgagee shall thereupon have the same

time within which to remedy or cause to be remedied the defaults complained of as is allowed to Tenant, and Landlord shall accept such performance by or at the instigation of the mortgagee as if such performance had been accomplished by Tenant.

(c) *Due diligence, cure.* For the purpose of this article, no default by Tenant in the performance of work to be performed, acts to be done, or conditions to be remedied, which cannot reasonably be completed within the grace period, shall be deemed to exist, if steps, in good faith, have been commenced promptly to rectify the same, and are prosecuted to completion with diligence and continuity.

(d) *Leasehold mortgagee compliance.* Notwithstanding any other provision herein, Landlord may not terminate this lease while such leasehold mortgage remains in effect, if, within 10 days after the date of service of a notice to terminate this lease for any reason, the leasehold mortgagee has paid Landlord all rent and additional rent and has complied, or taken reasonable steps to comply, with the requirements of this lease so as to cure the default or defaults claimed by Landlord. In such case, any notice of termination by Landlord shall be void.

(e) *Extension of time to cure.* If Landlord elects to terminate this lease by reason of any default of Tenant, the leasehold mortgagee shall not only have and be subrogated to all rights of Tenant with respect to curing such default, but shall also have the right to postpone and extend the specified date for the termination of this lease as fixed by Landlord in its notice of termination, for a period of not more than six months, if: (1) the mortgagee cures any existing default, and meanwhile pays the rent and additional rent and performs all of Tenant's other obligations under this lease; (2) no further defaults accrue hereunder during such extended period; or (3) if the nature of the default is such that the mortgagee is unable to take reasonable steps to cure the same, the mortgagee immediately proceeds to acquire Tenant's interest in this lease by foreclosure of its mortgage or otherwise.

(f) *Insurance.* The name of the leasehold mortgagee may be added to the "Loss Payable Endorsement" of any and all insurance policies required to be carried by Tenant hereunder. Subject to the provisions of any fee mortgage, Landlord will make available jointly to Tenant and to leasehold mortgagee, all insurance or condemnation proceeds to which Tenant may be entitled hereunder, for purposes of restoration of the leased property.

(g) *Estoppel certificate.* Landlord, within 10 days after a written request by Tenant or the leasehold mortgagee, shall furnish a written statement, duly acknowledged, that this lease is in full force and effect and that Tenant is not in default hereunder. If there is a default, the statement shall specify the nature thereof claimed by Landlord.

(h) *Extension of lease.* Landlord shall notify the leasehold mortgagee if Tenant fails to exercise any extension or renewal option hereunder. The leasehold mortgagee may exercise any such option on Tenant's behalf, within 10 days after receipt of such notice, provided that Tenant's indebtedness to the leasehold mortgage has not been fully paid.

(4) Tenant's right to mortgage the leasehold--various protections for leasehold mortgagee--right to new lease upon default resulting in termination

(a) *Mortgage of lease.* Tenant may mortgage its interests under this lease without Landlord's prior consent provided that Tenant is not then in default hereunder, and that any such mortgage shall contain the following provision:

This mortgage is executed and delivered upon the condition that no party shall acquire any interest in the lease in which a lien is hereby granted unless: (a) the instrument transferring the interest requires such party to perform and observe all of Tenant's obligations under such lease; (b) such party executes such instrument in the manner required to entitle a deed to recordation; and (c) an executed copy of such transfer and assumption is delivered to Landlord before the party takes possession of the leased property. If this mortgage is held by a lending institution (including an insurance company or pension fund) which acquires Tenant's interest in the lease as a result of mortgage foreclosure, any transfer

in lieu of foreclosure, or through settlement of or arising out of any pending or contemplated foreclosure action, such institution may transfer its interest in the lease to a nominee or a wholly owned subsidiary corporation without Landlord's prior consent, provided that the transferee complies with (a), (b), and (c), above. The lending institution shall thereafter be relieved of any liability under the lease.

(b) *Modification of lease.* Landlord shall not accept any surrender or enter into any modification of this lease without the leasehold mortgagee's prior written consent.

(c) *Cure of defaults.* Any leasehold mortgagee shall have and be subrogated to all of Tenant's rights with respect to Tenant's curing of any default hereunder. Such rights shall include, without limitation, the right to exercise any extension option within 30 days after Tenant's time to do so has expired, of which fact Landlord shall give the mortgagee prompt written notice, and if Tenant shall fail to timely appoint an arbitrator in any arbitration proceeding, the right to appoint such an arbitrator within 15 days after the deadline applicable to Tenant. Any arbitrator appointed by the mortgagee shall be recognized in all respects as if appointed by Tenant.

(d) *Termination; new lease.* If, by reason of any default of Tenant, this lease or any extension hereof is terminated by Landlord before the stated expiration therefor, Landlord shall enter into a new lease with the leasehold mortgagee for the remainder of the term, effective as of the date of such termination, at the rent and additional rent, and on the terms herein contained, subject to the following conditions:

(1) The leasehold mortgagee requests such new lease from Landlord in writing within 40 days after the termination date, such request to be accompanied by a payment to Landlord of all sums then due it under this lease.

(2) The mortgagee pays Landlord, upon execution and delivery of the new lease, all sums due thereunder in addition to those which would then be due but for such termination, plus all reasonable expenses, including legal fees, incurred by Landlord by reason of such default.

(3) The mortgagee, on or before the execution and delivery of the new lease, performs all conditions that Tenant failed to perform hereunder.

(4) Landlord, upon execution and delivery of the new lease, immediately assigns and transfers to the new tenant, without recourse to Landlord, all subleases which have previously been assigned and transferred to Landlord.

(e) *Mortgagee assignment of lease.* If a lending institution, or its nominee or wholly owned subsidiary corporation, holds a mortgage upon this lease and subsequently acquires a leasehold estate, derived either from such mortgage or from Landlord, and desires to assign this lease or any new lease obtained from Landlord to an assignee (other than to a nominee or wholly owned subsidiary corporation as set forth above) who will undertake to perform Tenant's obligations under such lease, Landlord shall not unreasonably withhold its consent to such assignment and assumption. The lending institution, nominee, or subsidiary shall thereafter be relieved of any further liability under such lease. Any claim that Landlord is unreasonably withholding its consent to a proposed assignment shall be resolved by arbitration, as provided in this lease.

(f) *Survivability.* The provisions of this article shall survive termination of this lease.

(5) *Landlord's obligation to lease to leasehold mortgagee upon termination of lease prior to normal expiration--prior assumption by mortgagee required*

(a) *Defaults; new lease.* If any event of default results in the termination of this lease, Landlord shall so notify any leasehold mortgagee who has notified Landlord of its name and address under the provisions of this lease. Landlord's

notice shall be addressed to the leasehold mortgagee at the address last furnished to Landlord, as provided above. Landlord shall, on written request of the leasehold mortgagee made at any time within 30 days after the mailing of such notice, execute and deliver a new lease of the leased premises to the leasehold mortgagee, or its designee or nominee, which shall be a corporation qualified to do business in this state. The term of the new lease shall be for the remainder of this lease term, at the net rent and additional rent, and upon all other covenants, conditions, and agreements contained herein, including the covenants with respect to renewals; provided that the leasehold mortgagee has paid Landlord all rent, additional rent, and other charges due under this lease up to and including the commencement date of the new lease, together with all expenses, including reasonable attorneys' fees, incident to its execution and delivery. But nothing contained herein shall impose any obligation on Landlord to deliver physical possession of the leased premises to the leasehold mortgagee.

(b) *Assumption.* No leasehold mortgagee shall be entitled to become the owner of this lease by foreclosure, or assignment in lieu thereof, unless the leasehold mortgagee, or its corporate designee or nominee, has first delivered to Landlord an assumption agreement, executed in recordable form, under which such mortgagee or its designee or nominee assumes the performance of all the terms, covenants, and conditions of this lease.



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Chapter 23 REAL ESTATE LEASES
Part IV. Forms
B. LEASE CLAUSES

31-23 Current Legal Forms for Real Estate FORM 23.58

AUTHOR: by Thomas G. Belden

FORM 23.58 Subordination of leases and mortgages

COMMENT

As a general rule, liens, leaseholds, and other interests affecting real property take effect and rank in priority according to their dates of recording. In many instances the parties will set aside this rule by agreeing to the priorities of various interests. The most common provision of this sort is a concession by a tenant that his leasehold interest is subordinate to existing or future mortgages on the fee.

Subordination to mortgagee:

Subordination clauses range from the complete subordination of a lease to all present and future liens to a narrow circumscription of the landlord's power to create interests superior to that of the tenant. One common restraint is a specification of the maximum amount of the mortgages which may take priority over the leasehold. Another type of limitation provides that the mortgage will be a prior lien only if annual amortization and interest costs do not exceed a specified percentage of the rentals. In this way, the tenant may have the assurance that the landlord will have sufficient cash flow to satisfy the terms of the mortgage debt. The permissible mortgagees are often limited to institutional lenders with prescribed minimum financial strength.

Mortgagee nondisturbance agreement:

If the leasehold is subordinate to a mortgage, the tenant's best protection against the destruction of his interest because of the landlord's default under the terms of the mortgage debt is the execution by the mortgagee of a nondisturbance agreement. By such an agreement the mortgagee

promises not to seek the termination of the tenant's interest during the balance of the lease term if the tenant is not in default. The agreement by the mortgagee may be made by joining in the lease or by executing a separate document. The execution of such an agreement may be made a condition to the subordination of the leasehold to any future mortgage. Even where the tenant does not have such absolute protection, he may at least obtain the landlord's promise to attempt to arrange for the mortgagee's execution of a nondisturbance agreement.

Tenant's right to cure default:

Another form of protection which is similar to that provided to subtenants and leasehold mortgagees is that which permits the tenant to cure the landlord's default in the payment of the mortgage debt. However, if the tenant is only one of several tenants in a building, it is not likely that the tenant will want to sustain such a burden. In this type of situation such a right, as a practical matter, affords limited protection. For the same reason, the right of a tenant to protect his lease by redeeming the property at a mortgage foreclosure sale is often of limited practical value.

Other subordination provisions:

There are situations in which a mortgagee is willing to subordinate his interest to a subsequent leasehold. This may occur where the potential new tenancy will enhance the value of the property. If a mortgage is to be subordinated to a subsequent leasehold, the lease agreement may specify that the lease is superior to all existing and future mortgages. Obviously, an effective subordination can only be made by the party whose interest is to be inferior, so that the lease provision by itself cannot bind the mortgagee. By itself, the promise in the lease only provides the basis for a contractual right of action by the tenant against the landlord.

FORMS

(1) Subordination to existing and future mortgages

This lease is subject and subordinate at all times to the lien of existing and future mortgages on the leased property. Although no instrument or act by Tenant shall be necessary to effectuate such subordination, Tenant shall, nevertheless, execute and deliver such further instruments subordinating this lease to the lien of all such mortgages desired by the mortgagee. Tenant hereby appoints Landlord its attorney-in-fact, irrevocably, to execute and deliver any such instrument for Tenant.

(2) Subordination to existing and future institutional mortgages

This lease is subject and subordinate to all mortgages and any renewal, modification, consolidation, replacement, and extension of any mortgage at any time affecting the leased property, if any mortgage hereafter placed upon the leased property represents security for a mortgage loan advanced by a savings bank, trust company, insurance company, college, university, pension fund, or any institution authorized to make first mortgage loans in the state in which the leased property is situated.

(3) Subordination to existing or future institutional first mortgage--notice of default to tenant

This lease and all rights of Tenant hereunder are and shall be subject and subordinate to any mortgage (including a consolidated mortgage) or deed of trust constituting a first lien on the leased property, or any part thereof, whether such mortgage or deed of trust has heretofore been, or may hereafter be, placed upon the leased property to secure an indebtedness to any savings bank, bank, trust company, or other institutional lender, private or public, and to any renewal, modification, consolidation, replacement, or extension of any such mortgage or deed of trust.

Landlord will cause any such mortgage or deed of trust to contain provisions requiring the holder of the indebtedness secured by such mortgage or deed of trust to mail to Tenant by registered mail a copy of each notice of breach of covenant, default, or foreclosure given by the holder or the trustee under such mortgage or deed of trust to Landlord. This subordination shall be self-operative and no further instrument of subordination shall be required. The Tenant shall, nevertheless, execute and deliver, from time to time, all instruments and certificates affirming and confirming such subordination that Landlord may reasonably request.

(4) Subordination to future first mortgage--limitation on annual burden of mortgage

This lease is subject and subordinate to the lien of the existing first mortgage held by Northfield Savings Bank, any renewal, extension, or modification thereof, and to any new institutional mortgage which may replace the existing mortgage or be consolidated or correlated with it, without limit as to principal amount, if the aggregate regular annual payments for principal and interest of any such mortgage, or its renewal, extension, modification, or replacement, shall not (except for the final payment thereof) exceed in any year 75 percent of the net rent payable under this lease during such year. In no event shall this lease be subject and subordinate to any first mortgage covering any property other than the leased property. The provisions of this paragraph shall be self-operative without the necessity of any other written consent, approval, or subordination by Tenant. However, upon Landlord's written request at any time, Tenant shall execute and deliver to Landlord, without expense to Landlord, any instrument required to effectuate any of the above. Tenant, in confirmation of the above, irrevocably appoints Landlord as its attorney-in-fact for any purpose required to effectuate and carry out the parties' intent as provided for in this paragraph, and Tenant ratifies all that Landlord may do as such attorney-in-fact.

(5) Subordination to existing and future mortgages--limitation on annual mortgage payments and length of mortgage--tenant's right to cure defaults

This lease is subordinate to all existing mortgages or deeds of trust and to all modifications, extensions, and consolidations thereof, and also to all replacements and other mortgages or deeds of trust held by any lending institutions which may hereafter encumber the leased property, if the aggregate annual payments for interest and principal of such mortgages or deeds of trust, exclusive of the year of maturity, does not exceed \$100,000; and also if any new mortgage or deed of trust placed after the date of this lease does not mature earlier than seven years from the date of execution of such new mortgage or deed of trust. Tenant shall execute any document to indicate such subordination which Landlord submits to it. If Tenant fails at any time to execute and deliver such document, Landlord, in addition to all other available remedies, may execute and deliver the same as Tenant's attorney-in-fact, and Tenant hereby constitutes Landlord, and its successors and assigns, such attorney-in-fact. Notwithstanding any contrary provision in this lease, Tenant shall duly comply with all the provisions of any mortgage or deed of trust to which this lease is subordinate, except the payment of interest and principal thereunder, and shall execute and deliver any document which may be necessary to permit due compliance with all such provisions by the party responsible thereunder for such compliance. If Landlord defaults in the payment of any installment of interest or principal payable

under any such mortgage or deed of trust, Tenant may pay such installment, and may deduct such payment, together with interest at 12 percent per annum and all costs incurred by Tenant, from the next installments of basic rent becoming due.

(6) Subordination to present and future ground leases and mortgages--subordinate to renewals, modifications, consolidations, replacements, and extensions--landlord attorney-in-fact for subordination documents

This lease is subject and subordinate to all ground or underlying leases and to all present or future mortgages or deeds of trust affecting such leases, and to all mortgages or deeds of trust which may now or hereafter affect the real property of which the demised premises form a part, whether such mortgages or deeds of trust cover only the real property or are a blanket mortgage or deed of trust covering other premises in addition to the real property, and to all renewals, modifications, consolidations, replacements or extensions thereof. This clause shall be self-operative and no further instrument of subordination shall be required by any mortgagee or trustee. Tenant shall execute promptly any instrument which Landlord may request in confirmation of such subordination, and hereby constitutes and appoints Landlord as its attorney-in-fact to execute any such instrument for and on behalf of Tenant.

(7) Subordination to ground lease and mortgage--landlord to use best effort to obtain non-disturbance agreement

This lease is subject and subordinate at all times to any ground or underlying lease, to the lien of any mortgage which may now or hereafter affect the leased property, and to all renewals, modifications, amendments, consolidations, replacements, and extensions thereof. Tenant shall execute and deliver any instrument which may be reasonably required by Landlord in confirmation of such subordination promptly upon Landlord's request. Landlord, however, shall exercise its best efforts to arrange with the holder of any such underlying lease or mortgage for an agreement that if, by dispossession, foreclosure, or otherwise such holder, or any successor in interest, comes into possession of the leased property, becomes the owner of the leased property, or takes over the rights of Landlord in the leased property, it will not disturb the possession, use, or enjoyment of the leased property by Tenant, its successors or assigns, or disaffirm this lease or Tenant's rights or estate hereunder, so long as all of Tenant's obligations are fully performed in accordance with the terms of this lease.

(8) Subordination to first and second mortgages--limitation on mortgage terms and conditions

(a) Subordination to first mortgage. This lease and all rights of Tenant hereunder are and shall be subject and subordinate to the lien only of any institutional nonparticipating first mortgage, as defined below, in a principal amount not exceeding \$200,000, affecting the land and building constituting the leased property, exclusive of the personalty, the land only, or the building only, and to any renewal, extension, consolidation, replacement, or modification of any such first mortgage, if the total required quarter-annual payments for interest and amortization under any such mortgage do not exceed \$30,000. This lease shall be subject and subordinate only to one first mortgage at any time. For this purpose, a consolidated first mortgage shall be deemed to be only one first mortgage if it is an institutional first mortgage, as defined below, and complies with the terms and provisions of this paragraph.

(b) Subordination instrument. Tenant shall upon demand execute, acknowledge, and deliver to Landlord, without expense to Landlord, any instrument that may be necessary to subordinate this lease and all rights hereunder, or to confirm such subordination, to the lien of any such first mortgage and to each such renewal, extension, consolidation, replacement and modification. If Tenant fails at any time to execute and deliver any such subordination instrument, Landlord, in addition to any other remedy available to it may execute and deliver such instrument as Tenant's attorney-in-fact, and Tenant appoints Landlord such attorney-in-fact for that purpose.

(c) *Subordination of leasehold mortgage.* Tenant shall also upon demand deliver or cause to be delivered to Landlord, without expense to Landlord, any instrument executed and acknowledged by the holder of any mortgage on this lease that may be necessary or proper to subordinate any such leasehold mortgage, or to confirm such subordination, to the lien of any mortgage to which this lease is or may be subordinate.

(d) *Institutional mortgage.* The term "institutional mortgage" shall be construed to mean any nonparticipating mortgage placed with or held by one or more savings banks, savings and loan associations, or insurance companies authorized to make first mortgage loans in this state. The term "institutional mortgage" shall also be construed to mean any mortgage placed with or held by one or more commercial banks, trust companies, colleges, universities, teachers' retirement funds, pension funds, or other similar institutions authorized to make first mortgage loans in this state, if at the time of such placing or acquisition of the mortgage or part thereof, the institution is limited by law or by its charter or bylaws, with respect to investment in mortgages or shares thereof, to the same extent that insurance companies authorized to do business in this state are then so limited.

(e) *Notice of mortgage.* Within 10 days after the execution and delivery of any fee mortgage, Landlord shall serve upon Tenant, by registered mail, notice of the execution and delivery of such mortgage together with a copy thereof and of the note, bonds, extension agreement, consolidation agreement, participation agreement, or other instrument secured thereby.

(f) *Mortgage maturity.* At least six months before the maturity date of any mortgage affecting the fee of the leased property to which this lease is subordinate, Landlord shall advise Tenant in writing of the provisions made or being made for the payment, extension, or refinancing of such mortgage.

(g) *Second mortgage.* If, upon the maturity of any mortgage to which this lease is subject and subordinate, Landlord is unable to procure an extension or renewal thereof or a new mortgage in lieu thereof of the extent of the balance remaining unpaid upon such maturity, and if Tenant, after not less than one month's notice of such inability is unable to procure such extension or new mortgage to the extent of such unpaid balance at maturity, this lease shall be subject and subordinate to any second mortgage made by Landlord, if, and solely upon condition that, the second mortgage is a nonparticipating mortgage and its full face amount does not exceed the difference between the principal amount of any new or extended first mortgage to which it is subordinate and the principal balance of the prior first mortgage remaining unpaid at such maturity.

(9) Subordination to present or future first mortgages--limitation on mortgage terms and conditions--tenant to share benefits of more favorable mortgage

(a) *Institutional first mortgage.* This lease and all rights of Tenant are subject and subordinate to the first mortgage now held by the Island Savings and Loan Association, to any renewal, extension, modification, or consolidation of such mortgage, to any new mortgage that hereafter may be made a lien against the leased property, and to any renewal, extension, modification, consolidation, or replacement thereof, if the new mortgage, or its renewal, extension, modification, consolidation, or replacement is an institutional first mortgage as hereinafter defined; and also if the annual total charge for both interest and amortization on the first mortgage to which this lease is subject and subordinate by the terms hereof at any time do not exceed the annual net rent payable by Tenant hereunder. For the purpose of this article, the term "institutional first mortgage" means a nonparticipating first mortgage for a period of not less than five years placed with or held by a bank, trust company, insurance company, college, university, religious, or charitable institution, pension fund, or teachers' retirement fund authorized to make first mortgage loans in this state.

(b) *Fee mortgages.* Nothing in this lease shall preclude Landlord from mortgaging its fee or reversionary interest or estate in the leased property, or renewing, extending, modifying, consolidating, or replacing any such mortgage, if any such mortgage, and any renewal, extension, modification, consolidation, or replacement thereof is at all times subject

and subordinate to this lease, unless such mortgage, or renewal, extension, modification, consolidation, or replacement satisfies the requirements set forth in paragraph (a) of this article. All subleases entered into by Tenant shall be subject and subordinate to all of the terms, conditions, and covenants of this lease.

(c) *Subordination instruments.* Tenant shall execute, whenever required by Landlord, a proper instrument of subordination in accordance with the provisions of this article, and Landlord, its successors and assigns, is hereby irrevocably appointed attorney-in-fact for and on behalf of Tenant to execute any instrument of sub-ordination in accordance with the provisions of this article.

(d) *Refinance; excess principal.* If, at any time, the fee mortgage presently a lien against the leased property to which this lease is subject and subordinate, or any mortgage in replacement, renewal, extension, modification, or consolidation thereof is refinanced and Landlord receives an amount from such refinancing in excess of the face value of the fee mortgage to which this lease is subject and subordinate, after payment of the mortgage expense (which shall include all prepayment penalties, brokerage commissions, title company charges, lender's attorneys' fees, recording fees, and taxes), Tenant shall be entitled to receive one-half of any such excess.

(e) *Refinance rent adjustment.* If, at any time, the fee mortgage presently a lien against the leased property, and to which this lease is subject and subordinate, or any mortgage in replacement, renewal, extension, modification, or consolidation thereof, is refinanced and the annual charges for interest and amortization thereon after the refinancing are less than \$91,000 per annum, the net annual rent payable by Tenant under this lease, from the date of such refinancing, shall be deemed reduced by one-half of the difference between such annual charges for interest and amortization and \$91,000. For the purpose of this paragraph any replacement, renewal, extension, modification, or consolidation of any mortgage shall constitute a "refinancing."

(f) *Mortgage obligations.* Tenant shall perform all duties and obligations which the mortgagor under any mortgage now or hereafter a lien upon the leased property and to which this lease is subject and subordinate is required to perform, except the payment of principal and interest on such mortgage. Tenant shall satisfy such duty or obligation on or before 10 days prior to the last day allowed to the mortgagor under the terms of any such mortgage to perform such duty or obligation without suffering the risk of foreclosure or the exercise of any other right or remedy by the mortgagee. Tenant shall not do or permit to be done any act which may be prohibited under the terms of any such present or future mortgage. If Tenant fails to perform the above duties and obligations within the prescribed time, Landlord may immediately do so and enter the leased property for that purpose, if necessary. Landlord's costs in performing Tenant's obligations shall immediately become due and payable as additional rent hereunder, together with interest at 12 percent per annum.

(g) *Building work.* If, under the terms of any mortgage now or hereafter a lien upon the leased property and to which this lease is subject and subordinate, any alteration, renovation, repair, or replacement ("work") is required with respect to the building upon the leased property, or any of its facilities, Landlord may do such work. For that purpose, Landlord may enter into the leased property after giving Tenant written notice of its intention to do such work. In such event, Landlord's expenses for the work, together with interest at 12 percent per annum until the expenses are paid, shall be immediately due and payable as additional rent hereunder.

(h) *Mortgage maturity.* Landlord shall, at least three months before the maturity of any mortgage to which this lease is subject and subordinate, advise Tenant of any action taken or contemplated in connection with any replacement, renewal, extension, modification, or consolidation of such mortgage. If Landlord fails to obtain and deliver to Tenant a copy of a firm commitment for such replacement, renewal, extension, modification, or consolidation in accordance with the terms of paragraph (a) of this article at a date no less than four months before the maturity of such mortgage, Tenant is hereby irrevocably appointed attorney-in-fact for and on behalf of Landlord to make application for the replacement, renewal, extension, modification, or consolidation of such mortgage on the terms set forth in paragraph (a). Landlord shall in such event cooperate in order for such replacement, renewal, extension, modification, or consolidation to be

accomplished, and sign all necessary applications and other papers required by the lending institution. If Tenant procures the replacement, renewal, extension, modification, or consolidation of such mortgage, all of the provisions of this article shall apply with the same force and effect as though obtained by Landlord.

(i) *Mortgage copy.* Landlord shall deliver to Tenant a copy of any mortgage, replacement, renewal, extension, modification, or consolidation agreement within ten days after its execution.

(10) Nondisturbance agreement between mortgagee and tenant

(a) *Nondisturbance.* So long as Tenant is not in default in the payment of rent or additional rent or in the performance of any term of the lease, Tenant's possession of the leased property and its rights and privileges under the lease or any renewal thereof shall not be diminished or interfered with by Mortgagee.

(b) *Attornment.* If the mortgage is foreclosed for any reason, and Mortgagee succeeds to Landlord's interest under the lease, Tenant shall be bound to the Mortgagee under all of the terms of the lease for the balance of the remaining term with the same force and effect as if Mortgagee were the landlord under the lease. Tenant hereby attorns to Mortgagee as its landlord, such attornment to be effective and self-operative, without the execution of any further instrument by either party, as soon as Mortgagee succeeds to the landlord's interest under the lease. Notwithstanding any contrary provision herein, Tenant shall not be required to pay rent to the Mortgagee until Tenant receives written notice from Mortgagee that it has succeeded to the landlord's interest under the lease. The respective rights and obligations of Tenant and Mortgagee upon such attornment shall, to the extent of the then remaining balance of the lease term, be the same as now set forth therein, it being the parties' intention for this purpose to incorporate the lease in this agreement by reference with the same force and effect as if set forth at length herein.

(c) *Landlord's obligations.* If the mortgage is foreclosed for any reason and Mortgagee succeeds to the landlord's interest under the lease, Mortgagee shall be bound to Tenant under all of the terms of the lease, and Tenant shall, from and after such event, have the same remedies against Mortgagee for the breach of an agreement contained in the lease that Tenant might have had under the lease against the prior landlord thereunder. In no event shall Mortgagee be liable for any act or omission of any prior landlord, be subject to any offsets or defenses which Tenant might have against any prior landlord, or be bound by any rent or additional rent which Tenant might have paid to any prior landlord for more than the current month.

(d) *Binding effect.* The rights and obligations hereunder of Tenant and Mortgagee shall bind and inure to the benefit of their respective successors and assigns.

(11) Priority of lease over mortgages

This lease and all rights of Tenant hereunder are and shall be prior, superior, and paramount to the lien of any mortgage which may now or hereafter affect Landlord's fee interest or reversionary interest in the leased property or any part thereof. Landlord represents that the lien of the existing mortgage on the fee has been duly and validly subordinated to this lease and to all rights of Tenant hereunder.

(12) Priority of lease over mortgages--consent of mortgagees required for changes in lease

This lease and any renewal or extension thereof shall not be subject or subordinate to any present or future mortgage placed upon the fee of the leased property. If at any time a mortgage affects the fee ownership of the leased property, or any part thereof, this lease shall not, without the written consent of each holder of any such mortgage, be cancelled,

surrendered, merged, or modified in any of the following respects:

- (a) Neither the original nor any renewal term shall be shortened.
- (b) Neither the rent nor additional rent shall be reduced.
- (c) No rent shall be paid in advance of the time herein provided.
- (d) No provision requiring payment of additional rent, such as payment of taxes or assessments, furnishing of insurance, or requiring upkeep of the premises, shall be modified.

Any breach of the foregoing prohibitions shall not be binding upon the holder of any such mortgage.

(13) Mortgaging of lessor's interest as security for new leasehold mortgage--construction of improvements

Landlord's interest in the demised premises shall not be mortgaged as security for any loan or loans which are intended to replace original leasehold mortgage financing other than interim construction financing, unless the new loan is procured for one or more of the following purposes: (1) to refinance or replace the original loan; (2) to provide funds for remodeling or new improvements; or (3) to construct improvements after the original improvements become obsolete or are demolished and new improvements erected, but in no event shall original improvements be demolished before _____[date].

(14) No recording of lease by tenant--parties to sign recordable short form lease

Tenant shall not record this Lease, and both Landlord and Tenant agree to execute, acknowledge, and deliver at any time after the date of this Lease, at the other's request, a "short form lease" suitable for recording.

(15) Recording of lease--prior consent of landlord required--tenant to sign memorandum of lease upon request

Tenant shall not place this lease on record without Landlord's consent. At Landlord's request, Tenant will execute a memorandum of lease for recording purposes containing references to the provisions of this lease that Landlord deems necessary.



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Current Legal Forms for Real Estate
Chapter 23 REAL ESTATE LEASES
Part IV. Forms
B. LEASE CLAUSES

31-23 Current Legal Forms for Real Estate FORM 23.59

AUTHOR: by Thomas G. Belden

FORM 23.59 Tenant's option to purchase landlord's interest

COMMENT

A tenant's option to purchase his landlord's interest may sometimes be difficult to classify for tax purposes. Depending upon various factors, such an arrangement may possess the fundamental characteristics of a sale rather than a lease. The tax consequences vary significantly, depending upon the resolution of this issue. If the lease arrangement is recognized, the payments made by the tenant until his exercise of the option are reportable by the landlord as rental income and are deductible by the tenant. If the transaction is treated as a sale, the seller reports as income only gains from the disposition, subject to the limitations applicable to capital assets if the property is used in a trade or business or held for the production of income. The purchaser's periodic payments are basically capital expenditures which are not currently deductible.

Sale classification:

The conceptual distinction between a sale and a lease is clear, and the extreme cases are easy to recognize. For example, if the interim "rent" is greatly in excess of the rental value of the property, and if exercise of the purchase option is practically certain because the option price is far less than the anticipated value of the property, the transaction is clearly a sale.

Lease vs. sale tests:

There have been confusing results in borderline situations. Apart from the fact that many factual patterns are inherently difficult to classify, the courts have been divided on the appropriate criteria to be applied. In some cases a so-called "objective economic" test has been decisive, while

in others the apparent intent of the parties at the time the transaction was initiated has been controlling. Under the objective economic test, a sale will be found if the total rentals plus any optional purchase price approximate the price for which the property could have been purchased, plus interest and carrying charges. If intent is the determining factor, the payments made prior to exercise of the option are treated as rent if the parties believed that such payments represented reasonable rent and the option price represented a fair measure of future value. As a prerequisite to such treatment, it must be found as a fact that the parties did not intend to enter into a security agreement in the nature of a conditional sales contract.

Tax treatment of sale:

If the transaction is treated as a sale, the seller's recognition of gain would be reported most likely under the installment method. In applicable cases, under the installment method there would be immediate recognition of any amounts recaptured as ordinary income due to accelerated cost recovery or accelerated depreciation. Ordinary income in an installment sale also applies under the proportionate disallowance rule and original issue discount rules. As to the purchaser, though the rent deduction is denied, he may deduct a reasonable allowance for depreciation. A deduction for the interest factor in the periodic payments of "purchase price" would also appear to be available. For a further discussion of the distinction for tax purposes between a lease and sale of property, see the Tax Background (TB) § 23.14, at the beginning of this chapter.

Leaseback and option as mortgage:

An option to purchase is sometimes granted to a lessee in connection with a sale and leaseback transaction. In this type of situation, there may be a question as to whether the arrangement is in fact a security transaction. If the leaseback and option have the effect of a mortgage, the "seller" will not realize gain or loss upon the passage of title and will be denied the rental deduction. Instead, he will be permitted a cost recovery or depreciation deduction upon his original cost of the property and the deduction for the interest factor in the periodic payments. The determining factors in classifying this type of transaction have been whether the repurchase price is a realistic reflection of prospective value and the likelihood, based upon the general circumstances and the apparent intent of the parties, that the property would be repurchased. For a more detailed discussion of sale-leaseback transactions, see TB § 23.15.

Drafting considerations:

A tenant's option to purchase may be provided for either in the lease agreement or in a separate agreement executed concurrently. If a separate instrument is employed, it should be drafted to include all the elements of a contract of sale, so that it is not necessary to formulate a new document upon exercise of the option. If the option is included in the lease, the execution of a subsequent instrument is normally contemplated, unless the option provisions are fairly comprehensive. In any event, the lease should cover such fundamentals as the purchase price, the time of exercise, the assignability of the option separately from the lease, the fulfillment of the lease terms as a condition precedent, and the method of exercising the option.

(1) Tenant's option to purchase--attached contract of sale

Tenant is hereby given the option to purchase the leased property owned by Landlord at the end of the lease period at a price of \$300,000. Tenant may exercise its option by giving written notice to Landlord not less than 120 days before the end of the lease period. If Tenant exercises the option, both parties shall, within 10 days after such exercise, execute and acknowledge in duplicate the contract of sale attached to this lease as Exhibit A.

(2) Tenant's option to purchase--right of first refusal

If Landlord, during the lease term, or any extension thereof, elects to sell all or any portion of the leased premises, whether separately or as a part of the larger parcel of which the leased premises are a part, Tenant shall have the right of first refusal to meet any bona fide offer of sale on the same terms and conditions of such offer. If Tenant fails to meet such bona fide offer within 30 days after notice thereof from Landlord, Landlord may sell the premises or portion thereof to such third person in accordance with the terms and conditions of his offer.

(3) Right of first refusal--tenant's option to meet any bona fide offer--offers of parties related to landlord excepted

If Landlord receives, from any third party, other than one controlled by Landlord's principal shareholder or members of its immediate family as majority shareholder or general partner, an acceptable bona fide offer to purchase the Demised Premises or the Entire Premises, it shall submit a written copy of such offer to Tenant giving Tenant 30 days within which to elect to meet such offer. If Tenant elects to meet such offer, it shall give Landlord written notice thereof and settlement shall be held within 90 days thereafter, whereupon Landlord shall convey to Tenant a good and marketable title to the premises free and clear of all liens, encumbrances, and restrictions.

(4) Tenant's option to purchase--general terms of sale

At any time after six months from the date hereof, but not later than _____[date], Tenant, upon giving not less than 60 days' notice in writing to Landlord, may purchase the leased property. The purchase price shall be \$500,000. If the option is exercised, Landlord and Tenant will, within the 60-day notice period, execute and deliver a formal contract of sale which shall provide that the sale shall be all cash above the existing mortgages and that 10 percent of such cash payment shall be paid upon the execution and delivery of the contract. The balance of the cash payment shall be made at the closing of title, which shall take place within 30 days from the date of the execution and delivery of the contract. The contract shall provide, among other things, that Tenant shall take title subject to liens and other encumbrances existing as of the date of this lease and to any mortgage hereafter placed against the leased property in accordance with the provisions of this lease. However, Tenant shall not be obligated to take title subject to any other lien or other encumbrance arising between the date hereof and the date of the delivery of the deed which results from Landlord's act, contract, or agreement. Adjustment and prorations for taxes, water rates, and insurance premiums are to be made as of the date of closing. The deed shall be the statutory short form for recording and shall be executed and acknowledged and have documentary stamps in the proper amount affixed thereto by Landlord at its expense, so as to convey to Tenant the fee simple title to the leased property, subject only to the conditions referred to above.

(5) Tenant's option to purchase--same terms as proposed sale--termination of lease if option not exercised

If Landlord has the opportunity to sell the leased property, it shall give Tenant 30 days' notice of such proposed sale and

the terms thereof. Tenant shall have the first option to purchase the leased property within the 30-day period at the same price and on the same terms of any such proposal.

If Tenant fails to exercise the option, the lease will terminate and Tenant will surrender and vacate the leased property within such period.

(6) Tenant's option to purchase--price to be agreed upon if no agreement price determined by appraisal

At any time within five years after the date hereof, Tenant may purchase the leased property for a consideration to be agreed upon with Landlord. If the parties fail to agree upon the purchase price, the amount shall be determined by appraisal, Landlord and Tenant each appointing one appraiser who shall in turn jointly choose another. The three named appraisers shall act with promptness, and the decision of any two as to the proper consideration for the purchase of such property shall be binding upon the parties.

(7) Tenant's option to purchase--periodic options--detailed terms of sale

(a) *Option to purchase.* Landlord grants to Tenant the option to purchase the leased property at the time, for the consideration, and upon the terms and conditions set forth below.

(b) *Option date, term.* Tenant may purchase the leased property only on an option date. For the purposes of this option, the term "option date" shall be a date one year after the effective date of the lease and the corresponding date in each year thereafter. If this option is not exercised and the sale and transfer of the property is not completed on or prior to the 15th option date (which shall be a date 15 years after the effective date of this lease), this option shall expire and thereafter be of no further force or effect.

(c) *Exercise of option.* Tenant's election to exercise this option must be evidenced by a written notice addressed to Landlord, sent by registered or certified mail to Landlord's office or to any other place designated by Landlord by written notice to Tenant. If Tenant elects to exercise the option on the first option date, such written notice must be given not less than four months nor more than five months before such date. If Tenant elects to exercise the option on the second option date or on any subsequent option date, such written notice must be given not less than 12 months before the option date on which the option is to be exercised.

(d) *Option price.* The price to be paid by Tenant to Landlord for the leased property if the option is exercised shall be as follows:

If the option is exercised on:	The option price shall be:
First Option Date	\$106,390
Second Option Date	103,180
Third Option Date	101,830
Fourth Option Date	98,640
Fifth Option Date	95,130
Sixth Option Date	91,300
Seventh Option Date	87,130
Eighth Option Date	82,830
Ninth Option Date	78,540

Tenth Option Date	74,320
Eleventh Option Date	69,150
Twelfth Option Date	64,990
Thirteenth Option Date	59,910
Fourteenth Option Date	57,130
Fifteenth Option Date	53,380

(e) *Expenses, mortgage.* The option price to be paid to Landlord, as provided above, shall be a net amount to Landlord, and all expenses in connection with the transfer of the leased property, including, but not limited to, title insurance, recording fees, documentary stamps, and all other closing costs, shall be paid by Tenant. The option price, reduced by the amount of any existing mortgage, shall be paid by Tenant in cash to Landlord concurrently with the conveyance of the leased property by Landlord to Tenant.

(f) *Transfer of title.* Except as provided below, Landlord shall convey the leased property to Tenant free and clear of any mortgage or other encumbrance. Any such transfer shall be effected by a full covenant and warranty deed containing special covenants of warranty by Landlord.

(g) *First mortgage.* Tenant's rights under this option are and shall be subject and subordinate to any mortgage (including a consolidated mortgage) or deed of trust constituting a first lien on the leased property, or any part thereof, whether such mortgage or deed of trust has heretofore been, or may hereafter be, placed upon the leased property to secure an indebtedness to any savings bank, bank, trust company, or other institutional lender, private or public, and to any renewal, modification, consolidation, replacement, or extension of any such mortgage or deed of trust. This subordination is limited and relates only to a first mortgage securing an indebtedness that will not on any option date exceed the price at which this option may then be exercised on that date, as herein provided. This subordination shall be self-operative and no further instrument of subordination shall be required. Tenant shall, nevertheless, execute and deliver, from time to time, any instrument and certificate affirming and confirming such subordination that Landlord may reasonably request. Landlord will cause any such mortgage or deed of trust to contain provisions requiring the holder of the indebtedness secured by mortgage or deed of trust to mail to Tenant by registered mail, addressed to Tenant at its office as set forth in this lease, a copy of each notice of breach of covenant, default, or foreclosure given by the holder or the trustee under such mortgage or deed of trust to Landlord. Notwithstanding the provisions of subparagraph (c), Tenant may, upon receiving notice of breach of covenant, default, or foreclosure under any such mortgage or deed of trust as herein provided, exercise this option at the following option price: the amount which would have been payable, as provided in subparagraph (d), at the next succeeding option date, plus 1/365ths of the difference between that amount and the amount which would have been payable, as provided in subparagraph (d), at the last preceding option date, multiplied by the number of days remaining between the settlement date and the next succeeding option date.

(h) *Performance of lease.* The right to exercise this option is conditioned upon the faithful performance by Tenant of all its covenants, conditions, and agreements under this lease, and the payment by Tenant of all basic rent, additional rent, and other special payments as provided in this lease to the date of the completion of the purchase of the property by Tenant.

(i) *Adjustments.* Adjustments and prorations of taxes, water rents, insurance premiums, and similar items shall be made as of the date of the closing of title, in accordance with the practice approved by the companies.

(j) *Security deposit.* If this option is exercised, Landlord shall at the closing of title transfer to the person so exercising this option the security deposit provided for in this lease, and Landlord shall, from and after such transfer, be released

from any further liability or obligation in respect of such security deposit, whether the option is exercised by Tenant or its assignee.

(k) *Priority.* This option shall be a covenant running with the land described above, and no conveyance, transfer, easement, or encumbrance of such land shall defeat or adversely affect this option.

(l) *Assignment, binding effect.* Tenant may assign this option, which shall inure to the benefit of Tenant's respective successors and assigns.

(8) Subtenant's option to purchase ground lease

(a) *Option to purchase.* Sublessor grants to Subtenant the option to purchase the ground lease on July 1, 2004, for the purchase price of \$1,000,000, all cash, free of all encumbrances except matters listed in the ground lease, and any encumbrances created or permitted to exist by Subtenant. Subtenant may exercise this option, without expense to Sublessor (other than fees of Sublessor's attorneys), by giving at least 120 days' prior notice to Sublessor. The closing of the purchase shall be held at the leased premises and at the time during business hours on July 1, 2004 (the closing date) specified by Subtenant in its notice. No apportionments or adjustments shall be made or required in connection with such purchase.

(b) *Transfer.* The assignment of the ground lease shall be in proper statutory form for recording and shall be duly executed and acknowledged by both parties so as to transfer the ground lease to Subtenant or its designee, free of all encumbrances except matters listed in the ground lease, and so as to impose on the assignee Tenant's obligations under the ground lease.

(c) *Closing representations.* Sublessor will deliver to the assignee on such closing, in addition to such assignment, an instrument reasonably satisfactory to the assignee in which Sublessor will represent that the ground lease is then in full force and effect as a valid and subsisting lease, and that Sublessor has had no notice of default from Landlord thereunder and is not aware of any existing default by it as tenant thereunder. If Sublessor has had notice or is aware of such default, the instrument shall contain a statement of the substance of such default and, if the default is not due to a default by Subtenant under this lease, an agreement by Sublessor to cure it.

(d) *Payment.* If Subtenant has given notice for the exercise of this option, such option shall nevertheless be of no further force and effect if, between the date of such notice and the closing date, Sublessor tenders payment of \$250,000 to Subtenant.

(e) *Assignment.* Subtenant may not assign its rights under this option separately from all of its other rights under this lease.

(f) *Termination.* If this lease expires or is terminated in any manner or for any reason (except as the result of Sublessor's failure to perform its covenants thereunder), all of Subtenant's rights under this option shall cease, and this option shall be void. This provision shall be applicable in all events, and despite a separate assignment by Subtenant of its rights under this option.

[Attach Exhibit A]



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31-23 Current Legal Forms for Real Estate FORM 23.60

AUTHOR: by Thomas G. Belden

FORM 23.60 Arbitration and appraisal

COMMENT

Arbitration and appraisal procedures are quite similar, even though they are intended to serve different purposes. Arbitration is essentially an adversary proceeding which arises only in the event of a controversy. Appraisal, on the other hand, establishes an amount of value or loss to preclude controversy.

Arbitration v. appraisal:

The distinction between arbitration and appraisal is functional. Arbitration must generally be conducted according to definite procedures. Arbitrators are usually required to meet at all hearings, and to take evidence only when the parties have had an opportunity to be present. On the other hand, appraisers may gather evidence independently and reach independent judgments, and need meet only to reconcile differences in their conclusions.

Basic provisions:

Lease provisions for both arbitration and appraisal generally cover the same basic points:

- (1) Issues to which the procedure is to be applied;
- (2) Procedure for selecting arbitrators or appraisers;
- (3) Time limitations for various stages of the procedure and for rendering the decision;

(4) Special qualifications of arbitrators or appraisers;

(5) Substitution of arbitrators or appraisers;

(6) Allocation of costs.

There may, of course, be considerable variations in specificity. A common short cut in providing for arbitration is to allow the entire procedure to be controlled by the rules of the American Arbitration Association.

Qualifications:

It is frequently stipulated that an appraiser must be a member of a specified organization, or be licensed by a governmental authority. An arbitration provision generally contemplates a wide range of possible issues, so that the background of the appointee cannot be so rigidly defined. Expertise can be assured by requiring that the arbitrator have a minimum number of years of experience with problems related to the issue in dispute. The procedure for the selection of arbitrators generally deals with the possible failure of the parties to agree upon a panel. In such a case, appointment may be made by a person holding a designated position or public office.

Effect of local law:

There is significant variation in the effect of arbitration or appraisal provisions under local law. In some states, provisions for arbitration are enforceable and represent covenants running with the land. Even if such a provision is not specifically enforceable, a party might be denied affirmative relief on an issue which he refuses to arbitrate as required by the lease. These and other local rules may have an important impact on the problems of drafting arbitration and appraisal provisions.

FORMS

(1) Arbitration of all controversies--application of state law

Any claim or controversy between Landlord and Tenant regarding their respective rights, duties, or obligations hereunder shall be settled by arbitration. Such arbitration shall be before one disinterested arbitrator, or if one cannot be agreed upon, before three disinterested arbitrators, one named by Landlord, one by Tenant, and one by the two thus chosen. The arbitrator or arbitrators shall determine the controversy in accordance with the laws of the state in which the property is located as applied to the facts found by him or them.

(2) Arbitration of all controversies--American Arbitration Association

Any disagreement between the parties with respect to the interpretation or application of this lease or the obligations of the parties hereunder shall be determined by arbitration. Such arbitration shall be conducted, upon request of either Landlord or Tenant, before three arbitrators (unless either party agrees to one arbitrator) designated by the American

Arbitration Association and in accordance with the rules of such Association. The arbitrators designated and acting under this lease shall make their award in strict conformity with such rules and shall have no power to depart from or change any of the provisions thereof. The parties shall bear equally the expense of arbitration proceedings conducted hereunder. All such proceedings shall be conducted in the county in which the leased property is located.

(3) Arbitration of issues specified in lease--arbitrators to include an attorney and an accountant

Any arbitration required hereunder shall be conducted in accordance with the then existing rules of the American Arbitration Association, and judgment upon the award rendered may be entered in any court of competent jurisdiction. Hearings shall be conducted at the Association's office in the City of New York. Notwithstanding such rules, any arbitration shall be before a panel of three arbitrators, one of whom shall be a practicing attorney-at-law and another a certified public accountant. Each party to the arbitration shall pay one-half of its cost.

(4) Arbitration of issues specified in lease--arbitrator may grant injunction

Either party may request arbitration of any matter in dispute whenever this lease expressly provides for arbitration as the appropriate remedy. All such controversies shall be settled by the American Arbitration Association under its governing rules or those of its successor. The arbitrator or arbitrators may grant injunctions or other relief in such controversies or claims. The decision of the arbitrator or arbitrators shall be final, conclusive, and binding upon the parties, and a judgment may be obtained thereon in any court of competent jurisdiction. Landlord and Tenant shall each pay one-half of the cost of such arbitration, and each shall separately pay for its own attorneys' fees and expenses.

(5) Arbitration of issues specified in lease--procedure for appointing arbitrators--special qualification of arbitrators

Any dispute between Landlord and Tenant as to an issue specifically mentioned elsewhere herein as a matter to be decided by arbitration shall be determined thereby as provided in this paragraph. Each party shall appoint a person as arbitrator, who shall have at least 10 years of experience with the subject matter of the dispute. Each party shall signify its appointment in writing to the other. If the two arbitrators fail to agree upon the matter so submitted, they shall appoint a third arbitrator who shall have the same experience. If they are unable to agree upon the third arbitrator, the same shall be appointed by the American Arbitration Association from its qualified panel of arbitrators. If either party fails to appoint an arbitrator within 20 days after the other party gives it written notice to make such appointment, the arbitrator appointed by the other party shall appoint a second arbitrator. If the two arbitrators fail to resolve the dispute within 10 days thereafter, they shall appoint a third arbitrator. The three arbitrators, after being duly sworn to perform their duties impartially and faithfully, shall proceed to determine the question submitted. The decision of the arbitrators shall be rendered within 30 days after their appointment, and shall be in writing and in duplicate, with one counterpart thereof delivered to each party. The arbitrators' award shall be binding, final, and conclusive on the parties. The parties shall bear equally the arbitrators' fees and the expenses incident to the proceedings. Each party shall pay the cost of its counsel and the fees of expert witnesses and other witnesses called by it.

(6) Permanent arbitration board--appointment of third arbitrator if board cannot agree

(a) *Arbitrators.* John Stephenson, as representative of Landlord, and David Warren, as representative of Tenant, shall constitute a permanent Arbitration Board to determine any disputes between the parties under this lease.

(b) *Substitutes.* Each party, upon written notice to the other, may substitute another person as its representative in the place and stead of the person nominated in subdivision (a), above.

(c) *Third arbitrator.* If the Arbitration Board fails to agree on the determination of any dispute submitted to it for arbitration, the two representatives shall name a third arbitrator and the matter in dispute shall be determined by a majority of the three arbitrators. If the two representatives fail or are unable to agree on the third arbitrator, he shall be appointed by the Supreme Court of the State of New York.

(7) Arbitration procedure under sublease--procedure for appointing arbitrators--disputes arising under ground lease

(a) *Arbitration.* Any arbitration required hereunder shall be conducted as provided in this article. The party desiring such arbitration (the first party) shall give written notice to that effect to the other party (the second party), specifying therein the name and address of the person designated to act as arbitrator on its behalf. Within 15 days after such notice is served, the second party shall give written notice to the first party, specifying the name and address of the person designated to act as arbitrator on its behalf. If the second party fails to notify the first party of the appointment of its arbitrator within the required 15-day period, the second arbitrator shall be appointed by the President of the Association of the Bar of the City of New York, or those designated below as his alternates. The two arbitrators so chosen shall meet within 10 days after the second arbitrator is appointed to appoint a competent and impartial third arbitrator. If they are unable to do so, the parties themselves shall appoint a third arbitrator within a further period of 15 days. If the parties are unable to do so, either party, on behalf of both, may request such appointment by the President of the Association of the Bar of the City of New York (or any successor organization), or in his absence or refusal, failure, or inability to act, by the President of the Chamber of Commerce of the State of New York (or any successor organization). If the President of the Chamber of Commerce is absent, or fails, refuses, or is unable to act, either party may apply to the Supreme Court in the County of New York for the appointment of a third arbitrator.

(b) *Decision; costs.* The arbitrators so chosen shall render their decision within 30 days after the third arbitrator is appointed. The decision of any two arbitrators shall in all cases be binding and conclusive upon the parties. Each party shall pay the fees and expenses of the original arbitrator appointed by it, and one-half of the fees and expenses of the third arbitrator.

(c) *Successor arbitrator.* If any arbitrator appointed under subparagraph (a) dies or becomes unwilling or unable to act as arbitrator, his successor shall be appointed within 15 days by the party who appointed him. If, however, the third arbitrator dies or is unwilling or unable to act (or if not appointed by the party entitled to do so), his successor shall be appointed as provided in subparagraph (a).

(d) *Ground lease disputes.* If any dispute arises under the ground lease between Prime Landlord and Sublessor involving issues also in dispute between or affecting Sublessor and Subtenant under this lease, Sublessor shall give Subtenant timely notice of any such dispute or the commencement of arbitration under the ground lease involving such issues. The Sublessor shall, at all times during the pendency of any such dispute or arbitration, consult with Subtenant with regard thereto and, insofar as may be permitted either under the provisions of the ground lease or by Prime Landlord, Sublessor shall afford Subtenant the opportunity to participate in all discussions between Prime Landlord and Sublessor concerning any such dispute or the opportunity to participate in any such arbitration. In any such arbitration under the ground lease, Sublessor and Subtenant shall designate one arbitrator to act on Sublessor's behalf in the arbitration. If Sublessor and Subtenant cannot agree on the selection of such arbitrator within five days after Prime Landlord serves written notice upon Sublessor designating Prime Landlord's arbitrator, either Sublessor or Subtenant may apply to the Supreme Court in the County of New York for such arbitrator's appointment, which shall be binding upon both of them.

(8) Appraisal procedure

If it becomes necessary to determine the appraised value of Landlord's interest in the leased property, such appraisal shall be conducted in accordance with the provisions of this paragraph. Tenant shall appoint as an appraiser a disinterested person with at least 10 years' professional experience as a licensed real estate appraiser. Within 10 days thereafter, Landlord shall give Tenant written notice of Landlord's designated appraiser having the same experience and qualifications. The two appraisers shall appoint a third disinterested appraiser with the same experience and qualifications, and all three appraisers shall as promptly as possible determine such value. If a second appraiser is not appointed, the first appraiser shall determine such value. If, within five days after the appointment of the second appraiser, the two appraisers appointed by the parties are unable to agree upon the appointment of a third appraiser, they shall so notify the parties in writing. If the parties fail to agree upon the selection of a third appraiser within five days after such notice, within five days thereafter either party, upon written notice to the other, may apply for such appointment to the Supreme Court of the State of New York or to any other court of competent jurisdiction exercising similar functions. Landlord and Tenant may each present evidence and argument to the appraisers. The determination of the majority of the appraisers, or of the sole appraiser, as the case may be, shall be conclusive upon the parties, and judgment upon such determination may be entered in any court of competent jurisdiction. The appraisers shall notify the parties in writing of their determination, and furnish to each party a signed copy thereof. If any appraiser fails, refuses, or is unable to act, a new appraiser shall be appointed in his place. Such appointment shall be made in the same manner as provided above for the appointment of an appraiser who fails, refuses, or is unable to act. The parties shall bear equally the expenses of each appraisal conducted under the provisions of this paragraph.



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31-23 Current Legal Forms for Real Estate FORM 23.61

AUTHOR: by Thomas G. Belden

FORM 23.61 Exculpatory clauses

COMMENT

This group of clauses illustrates a variety of devices employed to limit the landlord's liability to the tenant and to third persons. Such exoneration from liability is accomplished by an exculpatory clause, which may relate to personal injury and property damage, or to contractual liability, or to both.

Limited effect of exculpatory clauses:

Special consideration must be given to exculpatory clauses relating to personal injury and property damage. Exculpatory clauses exempting the landlord from liability to the tenant and to third parties for all acts and omissions including his own negligence will have only limited effect in many jurisdictions. In the first place, such provisions are generally ineffective against third parties. Even as to responsibilities which the tenant has undertaken, the landlord may still be held liable for his own negligence. On the other hand, the tenant's waiver of his right of recovery for the landlord's negligence is often given effect, though the statutory rules vary.

Specific risk assumption:

As a general rule, the more restricted the scope of the exculpatory clause, the more likely it will be enforced. Thus, the transfer of specific responsibilities from the landlord to the tenant, or the assumption of a particular risk by the tenant which otherwise would fall upon the landlord, is more readily sustainable than a blanket provision that the landlord will not be liable for any negligence.

Contractual liabilities:

Exculpatory clauses dealing with contractual liabilities are generally designed to enable the true party in interest under a lease, or its incorporators or organizers, to avoid personal or direct liability. A special provision may take cognizance of the use of a "dummy" to execute a lease. Such an arrangement is generally acceptable to a landlord only if he is satisfied that his property can be readily rerented if the tenant defaults.

FORMS*(1) Landlord's exoneration--exception for negligence*

Landlord shall not be liable for injury or damage to person or property occurring within the leased property, unless caused by or resulting from its negligence or that of its agents, servants, or employees in the operation or maintenance of the leased property or the building containing such property.

(2) Landlord's exoneration from specific events--exception for affirmative act of negligence

Unless caused by its affirmative act of negligence, Landlord shall not be liable for any failure of water supply, gas, or electric current; or for any injury or damage to person or property caused by gasoline, oil, steam, gas, or electricity, or hurricane, tornado, flood, wind, or similar storms or disturbances, or water, rain, or snow leaking or flowing from the street, sewer, gas mains, or any subsurface area or from any part of the building or buildings; or for any interference with light or air.

(3) Landlord's general exoneration from liability to tenant

Landlord shall not be liable for any personal injury or property damage to Tenant or to its officers, agents, and employees, or to any other occupant of any part of the leased property, regardless of how such injury or damage is caused, whether from action of the elements or acts of negligence of Landlord or occupants of adjacent properties.

(4) Landlord's liability to tenant limited to loss of rent reserved

Landlord shall not be liable, under any expressed or implied covenant of this lease, for any damages to Tenant, except for the loss of rent reserved by this lease, accruing after any act or breach of covenant for which damages may be recovered against Landlord. If Tenant is ousted from the possession of the leased property by reason of any defect in Landlord's title, Tenant shall not be required to pay any rent under this lease while it is so deprived of possession, and Landlord shall not incur any liability, except for the loss of rent during such period.

(5) Landlord's exoneration for latent defects

Landlord shall not be liable for any latent defect in the leased property or in the building of which it forms a part except for the first year after Tenant takes possession of the property.

(6) Landlord's exoneration for liability to tenant from specific events--exception for negligence and failure to repair

Landlord shall not be responsible or liable to Tenant for any injury or damage resulting from acts or omissions of persons occupying property adjoining such property or any part of the building of which the leased property is a part, or for any injury or damage resulting to Tenant or its property from bursting, stoppage, or leaking of water, gas, sewer or steam pipes, except when such loss or damage arises from the willful or negligent misconduct of Landlord, its agents, servants, or employees, or from Landlord's failure to make its required repairs hereunder.

(7) Tenant's personalty on premises at tenant's sole risk--landlord not liable for water or other damage

All of Lessee's personal property in the Demised Premises shall at all times be at its sole risk, or at the risk of those claiming under it. Lessor shall not be liable for any damage to such property or loss suffered by Lessee's business or occupation caused by water from any source, from the bursting, overflowing, or leaking of sewer or steam pipes or the heating or plumbing fixtures, from electric wires, from gas or odors, or from any other cause.

(8) Landlord and agent not liable for property entrusted to employees or theft--not liable for personal injury or property damage

Landlord and its agents shall not be liable for any loss or damage to property entrusted to their employees or agents, or for loss of property by theft. Landlord and its agents shall not be liable for any injury or damage to persons or property resulting from falling plaster, from steam, gas, water, or snow leaking from any part of the building or from the pipes or appliances therein, or from the street or sub-surface or from dampness, or from any other cause.

(9) Landlord's exoneration for damage to property entrusted to employees--theft--other causes--exception for negligence

Landlord shall not be liable for any damage to property entrusted to employees of the building in which the leased property is located or for the loss of or damage to any property of Tenant by theft or otherwise. Landlord shall not be liable for any injury or damage to person or property resulting from fire, explosion, falling plaster, steam, gas, electricity, water, rain or snow, or leaks from any part of such building or from the pipes, appliances, plumbing, or from the roof, street, or subsurface, or from any other place, or by dampness or by any other cause unless caused by or due to Landlord's negligence, nor shall Landlord be liable for any such damage caused by other tenants or persons in such building.

(10) Mortgage by landlord--use of "dummy"

Whenever provision is made for any present or future mortgage to be placed upon the leased property, or extended, modified, or substituted, Landlord shall not be obligated to assume personal liability on any bond, note, agreement, or obligation which constitutes the basis for such mortgage. In such event, the leased property may be conveyed temporarily to any corporation to assume such liability and to execute any such mortgage, and the leased property may be conveyed temporarily to any corporation to assume such liability and to execute any necessary instrument or, if the mortgagee or lender agree, such bond, note, agreement, or obligation may be executed without change in ownership of

the leased property, but without Landlord's personal liability.

(11) Tenant as agent--exoneration of principal

Notwithstanding the provisions of any statute, rule, or decision, no principal, disclosed or undisclosed, other than Tenant named herein, shall be liable for the performance of the terms of this lease.

(12) Corporate tenant--exoneration of stockholders and officers

If Tenant is or shall be a corporation, no recourse under any provision of this lease otherwise permitted by any statute or rule of law shall be had against any of the corporation's past, present, or future incorporators, subscribers, stockholders, officers, or directors, either directly or through the corporation.

(13) Noncorporate landlord or tenant--exoneration of individuals

If Landlord or Tenant, or any successor in interest of either, is an individual, no personal liability shall attach to such individual with respect to any obligation arising out of this lease, regardless of the manner in which such liability might otherwise arise, but for this express waiver thereof. If either party shall breach any provision hereof, the other party shall look solely to Landlord's equity in the property or to Tenant's interest in the leasehold estate, as the case may be, for the satisfaction of their respective rights.

(14) Nonrecourse as to landlord personally or partners--tenant to look solely to landlord's equity in property

Notwithstanding any provision herein to the contrary, neither Landlord nor its partners shall be personally liable for the breach of any provision of this lease. In the event of any such breach, Tenant shall look solely to Landlord's equity in the premises, if any, for the satisfaction of all of Tenant's rights and remedies. Such exculpation of personal liability is absolute and unconditional.

(15) Nonrecourse against unincorporated landlord--tenant to look solely to land and building for satisfaction

Notwithstanding any contrary provision herein, if Landlord or any successor in interest is an individual, joint venture, tenancy in common, copartnership, unincorporated association, or other unincorporated aggregate of individuals (all of which are referred to below, individually and collectively, as an "unincorporated landlord"), Tenant shall look solely to the unincorporated landlord's estate and property in the land and building of which the leased premises are a part, for the satisfaction of Tenant's remedies for the collection of a judgment (or judicial process) requiring the payment of money by Landlord in the event of its default or breach of any provision of this Lease. No other property or assets of such unincorporated landlord shall be subject to levy, execution, or other enforcement procedure for the satisfaction of Tenant's remedies.



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31-23 Current Legal Forms for Real Estate FORM 23.62

AUTHOR: by Thomas G. Belden

FORM 23.62 Indemnification of landlord

COMMENT

There are jurisdictions in which the landlord cannot exonerate himself from tort liability to persons other than the tenant by an exculpatory provision in the lease. Some protection for the landlord can be obtained with respect to these unavoidable liabilities by shifting the ultimate burden to the tenant. This may be accomplished by an indemnification provision. In its most extensive form, the indemnification provision covers all liabilities, claims, and expenses arising from occurrences on the leased property, from the use and management of the property, from defaults by the tenant under the lease, and from the negligence of the tenant. In many agreements the coverage is more selective.

Indemnification:

To some extent, an indemnification provision may be of limited usefulness. In various respects, it merely restates rules which would otherwise be applicable under local law or under other provisions of the lease. For example, if a loss is occasioned by a breach of a covenant to be performed by the tenant, the landlord normally has a right to recover from the tenant whether or not there is an express provision to that effect. Nevertheless, depending upon the local law, it may be desirable to include certain special provisions. If there is doubt as to whether a tenant's general covenant to indemnify the landlord applies to a joint obligation imposed on them both, the lease may provide that the tenant's indemnification obligation applies whether or not there is joint or concurrent liability. Another common provision precludes indemnification to the extent that the loss is covered by insurance. This prevents the landlord's insurer from shifting the loss to the tenant. Provision is also often made for the responsibility or the right to defend any action which

may result in liability to the landlord.

Tax aspects:

If a landlord becomes liable for an occurrence with respect to which the indemnification provision applies, he may have a deductible loss notwithstanding his right of recoupment from a tenant. A loss evidenced by a liability of an accrual basis taxpayer is deductible when the liability is ascertained and admitted. A cash basis taxpayer takes the deduction when he makes the payment. A subsequent recovery by the landlord of any amount previously deducted as a loss would, of course, be includible in gross income in the year of recovery. For a further discussion of the tax aspects of the lessee's payments of the lessor's expenses, see the Tax Background § 23.03, at the beginning of this chapter.

FORMS

(1) Indemnification of landlord against claims of personal injury or property damage

Tenant shall defend, indemnify, and hold Landlord harmless from and against any claim, loss, expense or damage to any person or property in or upon the demised premises or any area allocated to or used exclusively by Tenant or its agents, employees, or invitees, arising out of Tenant's use or occupancy of such premises, or any act or neglect of Tenant or its servants, employees or agents, or any change, alteration or improvement made by Tenant in the demised premises.

(2) Indemnification for liabilities resulting from tenant's default--treated as additional rent

If Landlord pays any amount for property damage or personal injury resulting from Tenant's failure to observe or perform any covenant under this lease, such amount, together with all costs, damages, and reasonable attorneys' fees, shall be considered additional rent, due in the month succeeding such payment and collectible at such time.

(3) Indemnification for liabilities resulting from tenant's default--treated as additional rent--another form

If Tenant defaults in observing or performing any of its covenants under this lease, Landlord may, without notice, perform such obligation for Tenant's account. If Landlord makes any expenditures or incurs any obligations for the payment of money in connection therewith including, but not limited to, legal fees in instituting, prosecuting, or defending any action or proceeding, such payments or obligations, plus interest and costs, shall be deemed to be additional rent hereunder, which Tenant shall pay Landlord within five days after Landlord submits a bill or statement therefor.

(4) Indemnification for specific liabilities--exception for loss due to landlord's default in making repairs

Tenant shall indemnify Landlord against any liability or loss arising out of injury to any person, or damage to any property belonging to Tenant or to any other person, occurring in or about the leased property, if such injury or damage

is caused by fire or other casualty not covered by Landlord's insurance, by leakage in any part of the leased property, or by water, rain, or snow leaking into or flowing from any part of the leased property, except injury or damage which results from Landlord's failure to make required repairs under this lease.

(5) Indemnification for general liabilities

Tenant shall indemnify Landlord against all liabilities, expenses, and losses incurred by Landlord as a result of: (a) Tenant's failure to perform any of its obligations hereunder; (b) any accident, injury, or damage happening in or about the leased property or appurtenances, or on or under the adjoining streets, sidewalks, curbs, or vaults, or resulting from the condition, maintenance, or operation of the leased property or of the adjoining streets, sidewalks, curbs, or vaults; (c) failure to comply with any governmental requirements; and (d) any mechanic's lien, or security agreement, filed against the leased property, any equipment therein, or any materials used in the construction or alteration of any building or improvement thereon.

(6) Indemnification for general liabilities--exception for landlord's affirmative negligence

Except for claims arising out of acts caused by the affirmative negligence of Landlord or its representatives, Tenant shall indemnify and defend Landlord and the leased property, at Tenant's expense, against all claims, expenses, and liabilities arising from (a) the management of or any occurrence on or about the leased property or any adjoining street, curb, sidewalk, or vault; (b) any default by Tenant hereunder; or (c) any act or negligence of Tenant or its agents, contractors, employees, or licensees.

(7) Indemnification against claims arising out of tenant's activities, breach or default in lease, negligence--extends to tenant's agents, employees, contractors and licensees--defense of legal action at tenant's expense

Tenant shall indemnify and hold Landlord harmless from and against all claims by or on behalf of any person, firm, or corporation, arising out of (1) any work or thing done in or about the Demised Premises by or on behalf of Tenant, (2) any breach or default by Tenant in performing any obligation hereunder, (3) any act or negligence of Tenant or its agents, contractors, servants, employees, and licensees, and (4) all costs, reasonable counsel fees, and liabilities incurred in or about any such claim, action, or proceeding brought thereon. Upon written notice from Landlord, Tenant shall resist or defend, at its expense, any action or proceeding brought against Landlord by reason of any such claim, by counsel reasonably satisfactory to Landlord.

(8) Indemnification for liabilities resulting from tenant's acts or omissions--attorneys' fees of landlord in third party actions

(a) *Indemnity.* Tenant shall hold Landlord harmless and indemnified at all times against any loss, damage, cost, expense or liability (including attorneys' fees) resulting to any person or property by reason of any use made of all or part of the Leased Premises, or of any act or thing done or omitted in, upon, or about such premises.

(b) *Attorneys' fees.* If any person institutes an action against Tenant in which Landlord is made a party defendant, Tenant shall indemnify and save Landlord harmless from all liabilities by reason thereof, including reasonable attorneys' fees and all costs incurred by Landlord in such action. If an action is brought to recover any rental under this Lease, for or on account of any breach of or to enforce or interpret any term, covenant or condition of this Lease, or for the recovery of possession of the Leased Premises, Landlord may recover from Tenant, as part of Landlord's costs, a reasonable attorneys' fee.

(9) Indemnification for general liabilities--tenant to defend actions

Tenant shall indemnify and hold harmless Landlord against all liabilities, damages, and other expenses, including reasonable architects' and attorneys' fees, which may be imposed upon, incurred by, or asserted against Landlord by reason of any of the following, which occur during the term of this lease:

- (a) Any use or condition of all or part of the leased property, or any street, alley, sidewalk, curb, vault, passageway, or space adjacent thereto.
- (b) Any negligence by Tenant or its agents, contractors, licensees, or invitees.
- (c) Any personal injury or property damage occurring on or about the leased property or any adjoining street, alley, sidewalk, curb, vault, passageway, or space.
- (d) Any failure by Tenant to perform or comply with any of its covenants hereunder.

If any action or proceeding is brought against Landlord by reason of any such occurrences, Tenant, upon Landlord's written notice, shall at its expense resist such action or proceeding by counsel reasonably approved in writing by Landlord.

(10) Indemnification for general liabilities--tenant subrogated to landlord's rights--landlord's obligation to notify tenant of claim--landlord's right to participate in defense

Tenant shall indemnify and hold harmless Landlord against all liability, penalties, damages, expenses, and judgments by reason of any injury or claim of injury to person or property, of any nature, arising out of the use, occupation, and control of the leased property, or the adjacent streets, alleys, and sidewalks, by Tenant at any time during the lease term, including those resulting from any work in connection with any alterations, changes, new construction, or demolition. Tenant is hereby subrogated to all of Landlord's rights against any other parties in connection therewith. Landlord shall promptly notify Tenant of any claim asserted against Landlord on account of any such injury or claimed injury to persons or property, and shall promptly deliver to Tenant the original or a true copy of any summons or other process, pleading, or notice issued in any suit or other proceeding to assert or enforce any such claim. Tenant may defend any such suit with its own attorneys, and Landlord may participate in such defense at its expense.



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31-23 Current Legal Forms for Real Estate FORM 23.63

AUTHOR: by Thomas G. Belden

FORM 23.63 Notices

There are many provisions in a lease which may require a notice or demand. The intention to terminate a lease, the exercise of an option to renew or extend, the development of defects requiring repair, or the existence of defaults are some of the situations in which a notice must be given or a demand made. In many jurisdictions, the law provides for procedures, including personal delivery, to fulfill notice or demand requirements, unless a more convenient method is permitted under the lease.

and receipt:

Many leases require that notices be in writing and be served by either registered or certified mail and sent to the party's address as set forth in the lease, or as subsequently specified. Some leases contain alternative provisions, expressly permitting personal service of the notice, service by a nationally recognized overnight courier, service by ordinary mail, or both. The time that service is deemed to be made can have significant effect, particularly if notice of default is used to determine the period within which to correct the default or terminate the lease. In many cases, the lease provides that notice is deemed given when mailed. This would require a longer period within which to correct defaults or otherwise take the action specified in the notice. Alternatively, the lease could provide that notice is deemed given a specific number of days after mailing, i.e., three days or five days.

FORMS

(1) Notices sent by mail, postage prepaid--addresses as specified at beginning of lease

Any notice, request, demand, approval, consent, or other communication which Lessor or Lessee is required or permitted to give to the other party shall be in writing and mailed to such party at the address specified at the beginning of this lease, to the Demised Premises if such communication is to Lessee, or to such other address that either party has designated by notice to the other. Such notice shall be deemed mailed when it is deposited in the United States mail, postage prepaid.

(2) Notice by registered or certified mail to specified addresses

All required notices and communications under this lease shall be sent by registered or certified mail as follows:

By Tenant to Landlord:

Real Estate Corporation

One Fifth Avenue New York New York 10012

Attention: Vice President, Commercial Leases

By Landlord to Tenant:

Retail Outlets, Incorporated

1983 Avenue of the Americas New York New York 10128

(3) Notice by personal delivery or certified mail--deemed received five days after mailing--landlord's address where rent is paid--tenant address is leased premises or as specified by tenant

Notices and demands under this Lease shall be given by personal delivery or sent by Certified Mail. If by Certified Mail, notice shall be deemed given on the 5th day after mailing. Notice to Landlord shall be given to the address at which the last rental payment was required. Notice to Tenant shall be addressed to it at the Leased Premises, or any other address last specified in writing by Tenant.

(4) Notice in writing in person or by registered mail

Any notice by either party to the other shall be in writing, and shall be deemed to be duly given only if delivered personally or mailed by registered mail in a postpaid envelope, addressed to Tenant at the building in which the leased property is located, and to Landlord at the address noted on this lease. If either party admits the receipt of notice, either in writing or under oath, evidence of service in accordance herewith shall not be necessary.

(5) Notice by registered mail--effective date

Any notice, demand, request, or other communication by either party to the other shall be in writing, and, any law or statute to the contrary notwithstanding, shall not be effective for any purpose unless it is served by registered mail, postage prepaid, return receipt requested, to the address listed in this lease or to any other address that either party from time to time designates by notice to the other by registered mail. Any such notice, demand, request, or other communication shall be deemed to have been given when it is duly deposited and registered in any United States Post Office or Branch Post Office.

(6) Notice by registered or certified mail, return receipt requested--date of deposit in mail is date of notice--bills and other communications delivered at premises or sent by ordinary mail

All notices between Landlord and Tenant shall be in writing and sent by certified or registered mail, return receipt requested, addressed to either party at its respective address, or to any other address that either party designates to the other by similar notice. Such notice shall be deemed to be given when deposited in the United States mail, postage prepaid. Any bill, statement, or communication by Landlord to Tenant, other than a notice provided for in this lease, shall be sufficiently given if delivered to Tenant personally, left at the demised premises with a person of suitable discretion, or sent by mail addressed to Tenant at the demised premises or Tenant's last known address. Such bill, statement, or communication shall be deemed to be rendered when so served or deposited in the mail.

(7) Notice by registered or certified mail--deemed given on day mailed in state--copies to attorneys for parties

Any required or desired notice, statement, demand, or other communication between the parties shall be in writing, regardless of whether so stated elsewhere in this Lease. Such notice or other communication shall be deemed to have been properly given, rendered, or made on the date mailed, if sent by registered or certified mail, return receipt requested, addressed to the other party at the address set forth above. If mailed outside of this state, however, such notice shall be deemed to have been given, rendered, or made on the expiration of the normal period of time for delivery of mail from the post office of origin to the post office of destination. Copies of Notices to Tenant shall be sent in like manner to Goldsmith, Greene & Albert, One Main Street, Westchester, New York, 10000, Attn: Carl D. Place, Esq. Copies of Notices to Landlord shall be sent in like manner to Cooke & McNeill, 9876 Broadway, New York, New York 10000, Attn: Arthur L. Frostmeyer, Esq. Either party may, by above notice, designate a different address or addresses to receive notices, statements, demands, or other communications.

(8) Notice by registered mail--requirement for notice to subtenant, assignee, and leasehold mortgagee

Any required or permitted notice under this lease shall be in writing and sent by registered mail, return receipt requested, addressed to Landlord, at 200 Fifth Avenue, New York, New York, and to Tenant at 250 Fifth Avenue, New York, New York, or to any other address either party designates in the manner set forth herein for the giving of notice. In addition, any notice required by Landlord to Tenant shall be effective hereunder only if given in writing to all subtenants of the leased property and all assignees and first mortgagees of this lease, but only if Landlord has previously received written notice, by registered mail, of such subtenant's, assignee's, or mortgagee's name and address.

(9) Notice by registered mail--tenant's interest held by more than one person

All notices, demands, and requests required under this lease shall be in writing. All notices, demands, and requests shall

be deemed to have been properly given if served personally, or if sent by United States registered mail, postage prepaid, addressed to Landlord at 499 West 34th Street, Borough of Manhattan, City of New York, addressed to Tenant at the leased property, and if intended for the holder of any leasehold mortgage, addressed to such holder at the address given by it. All notices, demands, and requests shall be deposited in a Post Office or Branch Post Office regularly maintained by the United States Government in the State of New York. Whenever Tenant's interest herein is vested in more than one person, firm, or corporation, jointly, in common, or in severalty, a notice, demand, or request by Landlord to any one such person, firm, or corporation shall be conclusively deemed to have been given to all such persons, firms, and corporations. Any notice, demand, or request by Tenant to Landlord shall be ineffective unless signed by all such persons, firms, and corporations, unless they have previously given notice to Landlord, signed by each of them, designating one or more of them to give the required notice, demand, or request.



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31-23 Current Legal Forms for Real Estate FORM 23.64

AUTHOR: by Thomas G. Belden

FORM 23.64 Mortgagee protection and estoppel certificates

COMMENT

The value of rental property is significantly affected by the cash flow generated by rent payments and the effectiveness of the leases. The landlord's mortgage lender will frequently look at the leases to determine the value of the property, and the amount which may be loaned, using the property and rent assignments as collateral. A prospective purchaser of the rental property will also examine the leases. In these situations, the landlord may find it necessary to deliver proof that the tenant or landlord is not in default. Or the tenant may be the one who wishes to dispose of his interest in accordance with the lease terms, and is required to furnish the prospective assignee with evidence that the lease continues in full force and effect. In the absence of a right under the agreement to require the other party to come forward with such proof, the individual seeking the certificate is relegated to the mercy of the other. Proper representation would call for inclusion in the lease of a clause obligating either or both of the parties to furnish an estoppel certificate, when so requested. Noncompliance, derived possibly from business differences, can be effectively handled by making the clause self-implementing, i.e., the failure to deliver a certificate, after due demand has been made therefor, is deemed to constitute an admission that the information sought is true.

FORMS

(1) Certification by tenant that lease is in effect without offset--delivery in recordable form upon request

Within ten days after Landlord's request, Tenant shall deliver in recordable form a certification to any proposed mortgagee, trustee, or purchaser, certifying that this lease is in full force and effect and that there are no defenses or offsets thereto, or stating those claimed by Tenant.

(2) Certificate of lease and rent status--joint obligation to furnish--simple form

Landlord and Tenant shall certify in writing the status of this lease and the rent payable hereunder, at any time, upon 10 days' written notice. Such certificate shall be in a form reasonably satisfactory to a prospective purchaser or mortgagee of the fee title, or assignee of the lease or of any superior lease.

(3) Certificate of lease and rent status--compliance with lease, no defaults, lease in effect

Tenant shall, from time to time, and upon Landlord's written request, furnish Landlord a written statement, signed by Tenant and addressed to the person designated in such request, on the status of any matter pertaining to the Lease, including that at the date of such statement whether: (i) the provisions and conditions of the Lease have been complied with; (ii) there are no defaults by Landlord; and (iii) the Lease is still in full force and effect. If Tenant is unable to make the above affirmative declarations, it shall describe in the statement the facts and matters that allegedly prevent it from doing so.

(4) Estoppel certificate to be executed by either party upon request--for benefit of mortgagee or purchaser--contents to specify unmodified lease, setoffs and advance rent payments, if any

Within 10 days after request by either party, the other party shall, without charge, deliver a duly executed and acknowledged instrument to any mortgagee, assignee of any mortgagee or purchaser, or any other person, firm, or corporation reasonably required by the requesting party, certifying:

(a) That this lease is unmodified and in full force and effect (or if there has been modification, that the lease is in full force and effect as modified and stating the modifications);

(b) Whether there then exist any setoffs, defenses, or counterclaims against the enforcement of any obligation which either party is required to perform or comply with hereunder, and, if so, specifying such setoff or defense;

(c) The date to which any rental or other charges hereunder have been paid in advance; and

(d) That prior to the date the required certificate was executed, to the best knowledge of the person executing the same, there has been no violation or breach that would constitute a default under this lease.

(5) Attornment of tenant to first mortgagee or purchaser at foreclosure

Upon written request of the holder of any note and first mortgage (or first trust deed) on the Leased Premises securing the note, Tenant shall agree in writing that (a) no action taken by the holder to enforce the mortgage (or trust deed) by reason of default thereunder shall terminate this Lease or invalidate or constitute a breach of any of its terms or conditions, (b) Tenant will attorn to the purchaser at any foreclosure sale or the grantee in any conveyance in lieu of

foreclosure as Landlord of the Premises, and (c) Tenant will, upon such purchaser's or grantee's written request, execute all necessary or appropriate instruments to evidence such attornment.

(6) Certificate of lease and rent status--separate agreements of landlord and tenant to furnish

(a) *Tenant statement.* Tenant shall, at any time, upon not less than 20 days' prior written notice by Landlord, execute, acknowledge, and deliver to Landlord a statement certifying that this lease is unmodified and in full force and effect (or if there have been modifications, that the lease is in full force and effect as modified and stating the modifications), and the dates to which the net rent and the additional rent have been paid, and stating whether Tenant is in default in performing any covenant contained in this lease, and, if in default, specifying each such default. It is intended that any such statement delivered under this paragraph may be relied upon by Landlord or any prospective purchaser of the fee or any mortgagee thereof or any assignee of any mortgagee upon the fee of the leased property.

(b) *Landlord statement.* Landlord shall at any time, upon not less than 20 days' prior written notice by Tenant, execute, acknowledge, and deliver to Tenant a statement certifying that this lease is unmodified and in full force and effect (or if there have been modifications, that the lease is in full force and effect as modified and stating the modifications), and the dates to which the net rent and the additional rent have been paid, and stating whether to Landlord's best knowledge Tenant is in default in performing any covenant contained in this lease and, if Tenant is in default, specifying each such default of which the signer may have knowledge. It is intended that any such statement delivered under this paragraph may be relied upon by any prospective assignee of Tenant's interest in this lease, but reliance on such certificate may not extend to any default of Tenant as to which Landlord has no prior actual knowledge.

(7) Certificate of lease and rent status--failure to furnish

(a) *Tenant statement.* Tenant shall, on demand and without charge, execute and acknowledge a duly executed recordable certificate certifying whether this lease is in full force and effect and whether Landlord is then in default under any of its terms, and deliver such certificate to Landlord or any mortgagee.

(b) *Landlord statement.* Within 20 days after receiving written request, Landlord will certify in writing to any holder of any mortgage upon this lease, whether as of the date of such certification Tenant has made all payments due to Landlord and whether Landlord knows of any default by Tenant in performing its covenants hereunder. Landlord's failure to execute and deliver such certificate within the specified time shall be constituted Landlord's certification to the effect that Tenant has made all payments due Landlord and that Tenant is not in default hereunder.

(8) Tenant estoppel certificate regarding construction, commencement of term--attornment to purchaser--subordination to ground lease or mortgage--power of attorney to landlord--recording of lease

(a) *Estoppel certificate.* Within ten days after Lessor's request, Lessee shall deliver to Lessor a written and acknowledged statement certifying that Lessor has completed construction of the Demised Premises, that Lessee has accepted possession thereof, that this Lease is unmodified and in full force and effect (or if there have been modifications, that the Lease is in full force and effect as modified and stating the modifications), and the dates to which any Minimum Rent and other charges have been paid in advance. It is intended that any prospective purchaser or mortgagee of the fee of the Demised Premises may rely upon any such statement delivered under this Article.

(b) *Attornment to purchaser.* If any proceedings are brought for the foreclosure of the Demised Premises or if the power of sale under any mortgage made by Lessor covering the premises is exercised, Lessee shall, upon Lessor's request, attorn to the purchaser upon such foreclosure or sale, and recognize the purchaser as Lessor under this Lease.

(c) *Subordination.* Upon Lessor's request, Lessee shall subordinate its rights hereunder to (1) any ground lease, (2) the lien of any mortgage, (3) the lien resulting from any present or future method of financing or refinancing in force against the land or buildings of which the Demised Premises are a part or against any building subsequently placed upon such land, and (4) all present or future advances upon the security thereof.

(d) *Power of attorney.* Upon request of any party in interest, Lessee shall promptly execute all instruments or certificates requested by Lessor to carry out the intent of above paragraphs (a), (b), and (c). Lessee hereby irrevocably appoints Lessor as its attorney-in-fact, with full power and authority to execute and deliver in Lessee's name all such instruments and certificates.

(e) *Recording.* This lease shall not be recorded without Lessor's prior written consent. Upon Lessor's request, Lessee shall execute a short form of this Lease, which may be recorded in Lessor's sole discretion.

(9) Corporate resolution to be provided by tenant--approval of lease by tenant's board of directors--landlord's option to terminate if not received

If Tenant is a corporation, it shall provide a resolution of its Board of Directors approving the execution of this lease within 30 days after such execution. If Tenant fails to do so, Landlord may terminate this lease by giving Tenant 10 days' prior notice.



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AUTHOR: by Thomas G. Belden

FORM 23.65 Options to terminate

COMMENT

The following clauses illustrate provisions permitting a termination of a lease in various special circumstances, and provisions insuring that the landlord's obligations under the lease will be extinguished upon his disposition of the fee. In the absence of a provision to the contrary, a lease terminates without any notice at the end of the specified period. Most leases, however, contain various provisions which may result in the precipitation of a termination. These provisions are usually predicated upon some default by the tenant or upon some major casualty. There are, however, additional situations which may justify an option in one of the parties to terminate. These include the execution of a new lease, the frustration of the tenant's right to his expected use of the premises, and the inadequacy of the premises resulting from a prospective expansion or a business merger. On the other hand, a landlord may want to reserve an option to cancel if he thinks such a cancellation is a prerequisite to any future sale. In addition, the landlord must recognize that in most jurisdictions his responsibilities under a lease made by him survive his conveyance of the fee because of the privity of contract with the tenant. Many leases, therefore, provide that the current responsibilities of the landlord extend only to the owner of the fee for the time being. As to the costs of cancelling a lease, see the Tax Background § 23.11, at the beginning of this chapter.

FORMS

(1) Termination of prior lease on execution of new lease

Upon the execution and delivery of this lease, the lease dated _____ [date], between the parties, affecting the property hereby leased, is cancelled and neither party shall have any further rights or obligations thereunder.

(2) Tenant's option to cancel if premises rendered untenable by casualty

If the demised premises are totally damaged or rendered wholly untenable by fire or other cause during the last two years of the term, Tenant may, within 20 days after such fire or other occurrence, cancel this lease by serving written notice upon Landlord to such effect. This lease shall terminate on the third day after such notice is given.

(3) Tenant's option to terminate if intended use is prohibited by restrictions

If, at any time, because of the application of any of the "subject clauses" contained in this lease against which Tenant has obtained title insurance from East County Title Company ("Title Company"), the leased property is not usable for the use specified in and intended by this issue, within the parties' contemplation, Tenant may terminate this lease by giving notice of termination to Landlord within 60 days after such use of the property ceases. Such notice shall state the date on which this lease will terminate, which shall be not less than five or more than 30 days after Landlord receives the notice. However, this lease shall not terminate until Tenant has effectively assigned to Landlord all of Tenant's right, title, and interest in and to all insurance proceeds which Tenant is entitled to receive from the Title Company. Tenant may not terminate this lease if it has done or failed to do anything which allows the Title Company to avoid liability for any title defect against which Tenant has obtained title insurance.

(4) Tenant's option on business merger

If Tenant's business is merged with that of an established business enterprise engaged in a substantial volume of the same general line of business, and Tenant reasonably believes that the leased property does not have sufficient space for the combined business, Tenant may terminate this lease on the last day on any month if it (a) gives Landlord at least six months' prior written notice of its intention to terminate, and (b) pays Landlord a sum equal to the annual fixed rent on the date this lease so terminates.

(5) Landlord's option on sale of leased property

If there is a bona fide sale of the property of which the leased property is a part, Landlord may terminate this lease by giving Tenant 90 days' notice.

(6) Landlord's option to terminate--payment of specific sum to tenant

Landlord may terminate this lease at any time after two years from its commencement by giving Tenant four months' notice of such fact by registered or certified mail, and by paying Tenant before such period expires the amount deposited as security plus \$10,000, less all sums then due hereunder to Landlord. In such event, this lease shall terminate on the date specified in such notice, as if that were the date originally fixed herein for the expiration of the term. Tenant shall thereupon surrender the premises, and Landlord may immediately recover the possession thereof in

the manner herein provided for termination because of nonpayment of rent. Tenant shall on demand execute and deliver to Landlord a written surrender in recordable form. If there is a dispute as to the amount due Landlord, as provided above, Landlord shall pay Tenant the undisputed part, and deposit the balance in escrow with any trust company or title company selected by Landlord, to be held pending determination of the parties' rights thereto; but this lease shall nevertheless terminate on the date originally specified in Landlord's notice. The parties shall equally bear the expenses of making the escrow deposit.

(7) Landlord's liability terminated by sale--purchaser deemed to assume landlord's responsibilities

The term "Landlord," as used in this lease, means only the owner for the time being of the leased property, so that if there is any sale of the leased property, the seller shall be and hereby is entirely relieved of all Landlord's obligations hereunder. Without further agreement between the parties or between either of the parties and any purchaser of the leased property, such purchaser shall be deemed to have assumed all Landlord's obligations under this lease.

(8) Landlord's liability terminated by sale--underlying leasehold

The term "Landlord," as used in this lease, means only the owner for the time being in fee of the leased property, the owner of the leasehold estate created by an underlying lease, or the mortgagee of the fee or of such underlying lease in possession for the time being of the leased property, so that if there is any sale of the leased property or of any transfer or assignment or other conveyance of such underlying lease and the leasehold estate thereby created, the seller, transferor, or assignor shall be entirely relieved of all Landlord's further obligations herein. It shall be deemed without further agreement between the parties of their successors in interest, or between the parties and any such purchaser, transferee, or assignee has agreed to carry out all Landlord's obligations hereunder.

(9) Tenant's option to cancel during term on payment of liquidated damages

Tenant may elect to terminate this lease as of _____ [date], as if such termination date were the expiration date above set forth, by (1) giving Landlord written notice to that effect on or before _____ [date], (2) paying to Landlord, together with such notice, the sum of \$10,000, representing agreed upon liquidated damages for the abridgment of the term of this lease, and (3) performing all of its obligations hereunder through such termination date including the surrender of the leased property on or before that date.

(10) Termination by either party if sales are less than specified amount

If Tenant's aggregate gross sales for any year during the term of this lease are less than \$350,000, either party may give termination notice to the other party not later than 60 days after the end of such year, and this lease will terminate at the end of the month in which the notice was given as though that were the date originally fixed for the termination of this lease. If the option to terminate is not exercised within the time specified, it shall be deemed no longer valid or exercisable for the particular year in question.

(11) Tenant's right to terminate lease after specified period upon notice and payment of agreed sum

Tenant shall have the right, by giving Landlord at least sixty (60) days advance written notice, to terminate this Lease after eighteen (18) months and shall include with its notice a certified or cashier's check payable to Landlord in the sum of \$ _____. Upon termination, the parties shall have no further liabilities under this Lease, except that

the rent and any other charges shall be adjusted as of the date of termination.

(12) Tenant's option to terminate--liquidated damages to be adjusted based on when option exercised

Tenant may elect to terminate this Lease after the expiration of the twenty-fourth (24th) month of the term of this Lease by (i) giving Landlord ninety (90) days prior written notice to that effect at any time after the expiration of the twenty-first (21st) month of this Lease; (ii) paying to Landlord, together with such notice, the sum of five thousand dollars (\$5,000.00), by certified check representing the agreed upon liquidated damages for abridgement of the term of this Lease; and (iii) performing all of its obligation hereunder through such termination date including the surrender of the Premises on or before that date. Notwithstanding the provisions contained in the preceding sentence, if Tenant elects to terminate this Lease any time after the twenty-fourth (24th) month of the term of this Lease, then the sum for liquidated damages stated in (ii) above shall be reduced by the sum of four hundred and sixteen dollars (\$416.00) per month. For purposes of illustration only, if Tenant elects to terminate this Lease by giving Landlord written notice prior to the expiration of the twenty-sixth (26th) month of the term of this Lease, the sum for liquidated damages would be four thousand one hundred and sixty-eight dollars (\$4,168.00).

(13) Tenant's option to terminate upon notice and payment of cancellation fee--termination right void if tenant in default

Subject to the conditions set forth below, Tenant may terminate the Lease by delivering to Landlord written notice of Tenant's election to do so on or before _____[date] ("Tenant's Termination Notice"), and simultaneously with delivering Tenant's Termination Notice, Tenant pays Landlord, by a certified or official bank check, a lease cancellation fee of \$ _____ ("Lease Cancellation Fee"), in which event the Lease shall terminate on _____[date]. Tenant's right to terminate the Lease pursuant to this Section shall be void and of no further force or effect if:

(i) Tenant is then in default under the Lease; or

(ii) Tenant fails to continue to pay rent and perform all its other obligations under the Lease during the period of time following Tenant's Termination Notice to Landlord; or

(iii) Tenant fails to deliver to Landlord the Lease Cancellation Fee with Tenant's Termination Notice; or

(iv) Tenant fails to exercise its option to terminate the Lease during the period in which it is available and in the manner required hereby.



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AUTHOR: by Thomas G. Belden

FORM 23.66 Delays in performance

COMMENT

Generally, a landlord will countenance no delay by the tenant in the payment of the monthly rent. Faced with a fixed schedule of mortgage payments or with other commitments and expenses, the landlord will not permit an interruption in the cash flow from the property. Sometimes this peril is avoided by a lease requirement that the rent be paid "without notice or demand." Such a provision may, however, be inadequate in a situation where the tenant withholds full payment of the rent under a claim that he is entitled to a set-off for the balance. The cautious draftsman should consider the advisability of incorporating a lease provision which expressly prohibits such action. The tenant is not left without a remedy, assuming he has a valid claim, for he can still hold the landlord accountable in a separate action.

Obligations other than rent:

The lease agreement often requires the tenant to undertake construction, alterations, or repairs, or to perform duties other than the payment of money. Performance of these obligations may sometimes be delayed by circumstances beyond the control of the tenant, the landlord, or the individuals who are supposed to render such services. Strikes, riots, national emergency, Acts of God, nonavailability of labor or material, acts of a public enemy, or war and national defense considerations are some of the contingencies that may delay performance of the tenant's obligations. In such circumstances, it is seldom helpful to the landlord to declare a default and a forfeit of the lease, and it is likewise unfair to the tenant. Accordingly, leases commonly provide that the tenant is excused from nonperformance during the time when such conditions obtain. Similar provisions may be included in the lease instrument in favor of the landlord.

Applicable clauses may require the consent of mortgagees, the posting of security by the lessee, directions for the application of insurance proceeds, or such other matters as are appropriate.

FORMS

(1) Payment of rent--no notice or demand

Tenant shall pay the rent herein reserved at the time and place herein specified, without notice or demand.

(2) Payment of rent--equal monthly installments--no notice or demand

Tenant shall pay Landlord, without notice or demand and without abatement, deduction, or set-off, in lawful money of the United States, fixed rent at the annual rate of \$48,140, in equal monthly installments in advance on the first day of each calendar month, at Landlord's office or at any other place Landlord designates in writing.

(3) Payment of rent--delay permitted upon notification of landlord default

Tenant's obligation to pay the full rent herein reserved shall not be affected by any future act or omission by Landlord with respect to the tenantability of the leased premises, or the building of which they are a part, unless Tenant gives Landlord or its agents at Landlord's principal place of business immediate written notice of such act or omission and a reasonable time to perform its legal duty with respect to the condition complained of.

(4) Payment of rent--no abatement, diminution, or reduction for interrupted use

Neither Tenant nor any person claiming under it shall claim or be allowed any abatement, diminution, or reduction of rent, charges, or other compensation, under any circumstances, whether for inconvenience, discomfort, interruption of business, or otherwise, arising from or because of (1) the making of alterations, changes, additions, improvements, or repairs to any existing or future building on the leased premises, (2) any present or future governmental law, ordinance, requirement, order, direction, rule, or regulation, (3) the restoration of the leased premises due to their destruction or damage by fire or other cause, or the taking or condemnation of only a portion of the premises, or (4) any other cause or reason.

(5) Force majeure--landlord excused for delay caused by fire and other causes beyond landlord's control

If Landlord's performance of any of its obligations hereunder is delayed due to fire, catastrophe, strikes or labor trouble, civil commotion, Acts of God, inability or difficulty in obtaining materials, or any other cause beyond its control, the period of delay shall be added to Landlord's time for performing such obligations, and Landlord shall have no liability because of such delay.

(6) Payment of rent and performance of covenants--no delay or abatement allowed by reason of landlord's default

Tenant's obligation to perform all of its obligations hereunder, including the payment of rent, shall not be affected, impaired, or excused if Landlord (1) is unable to supply or is delayed in supplying any service by Landlord to be supplied, (2) is delayed in making any repairs, additions, alterations, or decorations, or (3) is unable to supply or is delayed in supplying any equipment or fixtures, if such inability or delay is due to or arises out of governmental preemption with respect to a national emergency declared by the President of the United States; any governmental rule, order, or regulation; or the conditions of supply and demand which have been or are affected by war, civil unrest, or embargo.

(7) Performance of covenants other than rent payment--tenant's delay temporarily excused, subject to mortgagee approval

Tenant shall be exonerated from any default, other than money payments, if nonperformance is caused or due to strikes, nonavailability of labor or materials, war, national defense, civil unrest, Acts of God, or other causes beyond Tenant's control. Tenant, however, shall commence performance and proceed diligently therewith after removal of the causes if the mortgagee does not object to the exercise of Tenant's rights therein.

(8) Performance of covenants other than rent payment--tenant's delay temporarily excused--posting of security required

Whenever Tenant is required, by the terms hereof, or by law, to pay any sum of money (other than the net rent payable to Landlord), to perform and pay for any contract, work, labor, or service, to discharge any lien against the premises, or to perform and comply with any laws, rules, orders, ordinances, regulations, or zoning regulations, Tenant shall not be deemed to be in default hereunder, and Landlord shall not enforce or exercise any of its rights hereunder, if and so long as:

(a) Nonperformance or default hereunder is directly caused by strikes, lockouts, nonavailability of labor or materials, war, governmental restrictions, enemy action, civil commotions, Acts of God, or other similar causes beyond Tenant's control; and

(b) Tenant shall furnish Landlord whatever security, in cash or surety company bond, is reasonable for Landlord's protection under the circumstances. Tenant shall contest the matter involved with due diligence and in good faith in a proper forum or court with whatever person (other than Landlord) or governmental authority that requires the payment, asserts the lien, ordinance, rule, order, regulation, or contract, or requires the act, work, labor, or service.

If, at any time, however, all or part of the leased premises are in danger of being forfeited or lost, Tenant shall pay any required sum of money, and Tenant shall commence and continue such performance with diligence and continuity immediately after any of the above causes are removed.

(9) Performance of covenants--landlord's delay temporarily excused--option time extended accordingly

The provisions of this paragraph shall be applicable if there occurs, during the demised term: any strike, lockout, or labor dispute; inability to obtain labor or materials or reasonable substitutes therefor; or Act of God, governmental restriction, regulation, or control, enemy or hostile governmental action, civil commotion, insurrection, revolution, sabotage, or fire or other casualty, or other similar condition beyond Landlord's reasonable control. If Landlord, as the result of such event, fails punctually to perform any lease obligation, such obligation shall be punctually performed as

soon as practicable after such event abates. If Landlord is, as a result of such event, is unable to exercise any right or option within any time limit provided therefor in this lease, such time limit shall be deemed extended for a period equal to the duration of such event.

(10) Performance of covenants--landlord's delay temporarily excused--payment of rent to abate while tenant's business inoperable

This lease and Tenant's obligation to pay rent and perform all of the other covenants and conditions hereunder shall not be affected, impaired, or excused because Landlord is unable: (a) to fulfill any of its obligations under this lease; (b) to supply, or is delayed in supplying, any express or implied service; (c) to make, or is delayed in making, any repair, addition, alteration, or decoration; or (d) to supply, or is delayed in supplying, any equipment or fixtures, by reason of strikes, labor troubles, or any cause beyond Landlord's control, including, but not limited to, any governmental rule, order, or regulation, or by reason of the condition of supply and demand which has been or is affected by war, embargo, or other emergency. However if, as a result thereof, the demised premises are so untenable as materially to interfere with Tenant's conducting normal business operations, and such service is not restored or performed within a reasonable time after Tenant so notifies Landlord in writing, the rent shall abate for the balance of the term until the services are restored or work performed.

(11) Performance of covenants other than rent payment--delay of either party temporarily excused

If either party is required to do any act, other than make a payment of money, delays caused by or resulting from an Act of God, war, civil commotion, fire or other casualty, labor difficulties, general shortages of labor, materials, or equipment regulations, or other causes beyond such party's reasonable control shall not be counted in determining the time when the performance of such act must be completed, whether such time is designated by a fixed time, a fixed period of time, or "a reasonable time." If work is to be paid for out of insurance proceeds or condemnation awards, due allowance shall be made, both to the party required to perform such work and to the party required to make such payment, for delays in the collection of such proceeds and awards.

(12) Performance of covenants other than rent payment--written notice specifying grounds for default required--time of rent payment of the essence

Tenant shall be allowed a grace period of 24 hours within which to pay Landlord the rent and other sums due hereunder, time being of the essence with respect to such payment. Neither Landlord nor, except as otherwise herein provided, Tenant shall be deemed to have defaulted or breached any covenant or condition unless the party asserting such default or breach serves upon the other party written notice setting forth with particularity the nature of the alleged default or breach, and the charged party fails to cure such default or breach within 10 days after service. If, notwithstanding the timely cure of such default or breach, the asserting party incurs or pays any penalty because of the other party's failure or omission to perform or satisfy the covenant or condition, such other party shall pay such penalty.



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31-23 Current Legal Forms for Real Estate FORM 23.67

AUTHOR: by Thomas G. Belden

FORM 23.67 Sign and Advertising restrictions

COMMENT

The tenant's right to display signs outside a building or upon its roof or walls is often covered in a specific provision. Outside walls bounding the leased interior are normally included in the leased premises, and the lease of an entire building usually permits the use of the roof. Therefore, aside from uses constituting nuisances or violations of zoning regulations, the tenant generally has the right to maintain signs on the outside walls of his premises, unless limited by the terms of the lease.

Shopping center and retail signs:

A landlord has a significant interest in the signs exhibited by his tenants. The overall appearance of the property will affect its value, and appearance is affected by exterior signs. In some situations, a landlord may seek to achieve a uniform appearance of tenant signs. If the landlord receives rent based on a percentage of the tenant's sales or other business, his interest in the tenant's signs should be indicated in the lease. The type of sign used by the tenant could have an effect of increasing or decreasing the trade generated by the tenant. This will directly affect the sales upon which percentage rent is based.

Tradenames and use on signs:

In many situations, considerable value is attached to a tradename, particularly if it is familiar to the potential customers of a store or shopping center. The landlord may seek an express clause that a well known chain tenant will use its name in signs and advertising. On the other hand, a landlord who has spent considerable sums in advertising the name of his shopping center or building will

want to maintain exclusive property rights in that name, even though a tenant may be permitted to use it in its own advertising.

FORMS

(1) Unlimited right to maintain signs

Tenant may place and maintain in and about the leased property neat and appropriate signs advertising its business. Upon the termination of this lease Tenant shall remove all signs and repair any damage to the leased property caused by the erection, maintenance, or removal of the signs.

(2) Sign to comply with law--prior approval of landlord for change in sign--landlord cooperation to obtain permits

Tenant may install an illuminated or nonilluminated sign or signs on the exterior wall or roof of the Building, if such sign does not violate any governmental law, ordinance, or regulation. If the sign is different than Tenant's standard signs now used at other locations, it shall be subject to Landlord's approval. Landlord shall cooperate with Tenant to obtain any required permits.

(3) Tenant's obligation to maintain exterior and signs in good condition

Tenant shall maintain in good order and condition the exterior of the demised premises, including the store front, windows, doors, fittings, any signs, awnings and/or any other equipment, as well as the interior of the demised premises, in a manner satisfactory to Landlord.

(4) Landlord's prior approval of signs--merchandise not to be displayed in front exterior

Tenant shall not display, erect, or affix any lettering, signs, posters, streamers, placards, or any other like advertising media on the windows or exterior of the demised premises, or upon the building or buildings of which they form a part, without Landlord's prior written approval. Tenant shall also submit to Landlord complete sign drawings and specifications for prior approval. Tenant shall not display merchandise or place stock or supplies in the front exterior of any part of the demised premises or in the foyer entrance thereto.

(5) Signs to comply with law and rules of local business association

Tenant shall not attach or affix any sign or insignia to the exterior of the leased property in violation of any law, rule, or ordinance. Tenant shall fully comply with all the requirements, relating to signs or insignia or to advertising on any exterior wall of any building, of the Broad Street Association or any similar or successor organization operating within the area in which the leased property is located.

(6) Signs to comply with trade practice

Tenant may during the term of this lease or any renewal letter the windows of the leased property and display on the exterior suitable signs, illustrated and otherwise, advertising its name and business, if the lettering and signs are consistent with accepted banking and trust company practices.

(7) Prohibition of signs without landlord's consent

Landlord has not conveyed to Tenant any rights in or to the outer side of the outside walls of the building of which the leased property forms a part. Tenant shall not display or erect any lettering, sign, advertisement, awning, or other projection in or on the leased property or in or on the building of which it forms a part, or make any alteration, decoration, addition, or improvement in or to the leased property, or in or to the building of which it forms a part, without Landlord's prior written consent. If consent is granted, Tenant, at its expense, shall carry any workmen's compensation and general liability insurance required by Landlord.

(8) Prohibition of signs or obstructions on or outside building without landlord's consent

Tenant shall not erect, place, or allow to be placed any sign, advertising matter, stand, booth, or showcase in or upon the doorsteps, vestibules, outside walls, outside windows, or pavements of the building in which the leased property is located without Landlord's written consent.

(9) Prohibition of extra signs--consent of landlord not to be unreasonably withheld

Tenant shall not, without Landlord's written consent, place or erect any signs of any nature on any part of the leased property, or the sidewalk adjoining the leased property, or on any part of Landlord's property adjacent to the leased property. Landlord will not unreasonably withhold its consent to the placement of a flat sign of reasonable size bearing Tenant's trade name on or over the front of the store, but the location, colors, materials, and style of such sign shall be subject to Landlord's absolute right of approval.

(10) Landlord's reservation of right to use of roof to advertise from operation of lease

Landlord reserves the right to use the roof of the leased property for the purpose of advertising and the erection of any structure or structures, together with the installation and maintenance of any wiring or equipment necessary to utilize the roof for advertising purposes.

(11) Shopping center signs--landlord limitations to achieve uniformity of design and type

Landlord may limit the shape, kind and number of signs in the demised premises so as to insure uniformity of design and type of signs in the Shopping Center of which the demised premises is a part.

(12) Shopping mall interior sign--installed, maintained, removed by tenant

Tenant may erect illuminated signs on the interior mall front of the Demises Premises, and shall maintain such signs in good state of repair. Tenant shall indemnify and hold Landlord harmless from and against any liability loss, cost, damage, or expense arising out of the erection, maintenance, existence, or removal of such signs, and shall repair any

damage resulting from such installation, maintenance, or removal. All signs shall be in accordance with Landlord's Sign Specifications and approved in writing by Landlord. Upon vacating the Demised Premises, Tenant shall remove all signs and repair all damage caused by such removal.

(13) Tenant signs require landlord's prior approval--tenant to maintain approved exterior sign--temporary removal by landlord for building maintenance or alteration--prohibition against flashing or neon signs

Tenant shall not maintain or display any signs, lettering, or lights on the exterior of the demised premises or in the interior or any show window thereof, which is visible from the exterior unless approved by Landlord in writing. Tenant shall provide and maintain a proper sign or signs on the exterior of the demised premises and, if requested by Landlord, also an additional sign located over the sidewalk at or near the entrance to the demised premises. All such signs shall be of the size, color, design, illumination, and location designated and approved by Landlord in writing. No rights are granted to Tenant to use the outer walls or the roof of the demised premises without Landlord's written consent. Landlord may, at its expense, remove any or all signs, at any one or more times during the term of this lease, if necessary to paint or make other repairs, alterations, or improvements in or upon all or any part of the premises or the building in which they are located. Landlord shall, also at its expense, replace the signs when the work is completed. Tenant shall at no time utilize any flashing or neon signs or lights in the demised premises, and replace the bulbs of all permitted signs and lights as soon as they become defective or lose their intensity.

(14) No signs by tenant except as specified--sign company regularly used by landlord at tenant's expense

Tenant shall not place any painting or exterior sign, placard, or other advertising media, banners, pennants, aerals, antennas, projections, awnings, or devices of any kind on the site or on the exterior of the building, except a sign on the front door of the Leased Premises. The permitted sign shall consist of letters of no more than six inches in height, and its design and conformity shall be approved in writing by Landlord prior to installation. The sign shall be installed by Landlord's regular sign company, but at Tenant's expense.

(15) Tenant may install signs on or near building--landlord to cooperate in obtaining permits necessary to install signs--tenant may remove signs

Tenant may place and remove signs in and about the demised premises and all buildings thereon, and on or under adjacent canopies and marquees. Landlord, at no expense to it, shall cooperate with Tenant in securing all necessary building and other permits and authority for any work by Tenant on installations. If Tenant's building is part of a larger building, Landlord will permit Tenant to enter the balance of the building (and will secure such permission for Tenant from other tenants of the building) so that Tenant may perform work therein at any time in connection with its alterations, improvements, or additions in the demised premises. Tenant may, at any time, remove any sign or trade fixtures and also any air conditioning equipment (except ducts and casings) installed by it in the premises.

(16) Pylon sign to be installed and maintained by landlord--advertising shopping center--lighted in evening--tenant names restrictions

Landlord shall furnish and erect within the Shopping Center one large pylon sign advertising the entire Shopping Center. Landlord shall, at its expense, keep the sign in good order and repair and lighted during the evening hours until 10 p.m., during the original or any extended term of this lease. Landlord may not place or permit to be placed on such sign, or on any similar sign, the names of other tenants in the Shopping Center unless Tenant's name is also placed thereon in a position and with lettering at least equal in size, type, and prominence to that of any other tenant.

(17) Tradename of tenant only to be used in its business, signs, and advertising--landlord's consent required for use of another tradename

Tenant shall use only its tradename in conducting its business on the demised premises, including, but not limited to, its signs and advertising. Tenant shall not use any other tradename or style without Landlord's prior written consent, which Landlord shall not unreasonably withhold.

(18) Name of shopping center is property of landlord--tenant has no rights in name--use only with landlord's consent

Landlord shall have and retain all property rights in and rights to the use of the name or designation of the shopping center, and shall have the absolute right to change the name or designation of the shopping center at any one or more times during the term of this lease. Tenant shall not have any property right or interest in any name or distinctive designation which may become associated with Tenant's business to be conducted at the demised premises or the shopping center if such name or designation contains any reference to the name or designation of the shopping center. Tenant shall use the name or designation of the shopping center only with Landlord's consent.

(19) Exterior signs prohibited without landlord's consent--tenant responsible for installation, maintenance, repair and removal of approved signs

Tenant shall not place, erect or maintain or suffer to be placed, erected or maintained on any exterior surface (including both the interior and exterior surfaces of windows and doors) of the Leased Premises, nor anywhere outside of the Leased Premises, any sign, symbol, neon or other light, shade, lettering, decoration, advertising, or any other object or thing visible to public view outside of the Leased Premises, without first obtaining Landlord's approval as to whether the same shall be so installed or placed and, if so, as to the location, number, type and appearance of each thereof. Any sign permitted hereunder shall be erected by Tenant at its own risk and expense and in accordance with all laws, and Tenant agrees to maintain the same in a good state of repair and save the Landlord harmless from any loss, cost or damage as a result of the erection, maintenance, existence or removal of the same, and Tenant shall repair any damage which may have been caused by the erection, existence, maintenance or removal of same. Upon vacating the Leased Premises, the Tenant agrees to remove all signs or such other items and to repair all damage caused by such removal. Such signs or other items shall relate solely to the permitted business of Tenant.

(20) Tenant required to erect and maintain exterior signs in conformance with landlord's standard sign criteria--other signs require landlord approval

Tenant shall, at its sole cost, erect and maintain a sign, advertising Tenant's business, on the exterior front of the Leased Premises and on the pylon sign for the Shopping Center in the space presently displaying "Space for Lease." If required by Landlord, Tenant shall pay for and install an additional sign advertising Tenant's business in the covered walkway adjoining Landlord's Building, if any. Tenant's sign(s) shall conform to Landlord's standard sign criteria. Tenant shall not install any sign(s) facing on the parking areas or elsewhere on the Lease Premises or in the Shopping Center, or place on the roof or any exterior wall (including both the interior and exterior surfaces of windows and doors) of the Leased Premises any sign, symbol, advertisement, neon or other light, shade, or any other object or thing visible to public view outside of the Leased Premises, without first obtaining Landlord's approval as to whether the same shall be so installed or placed and, if so, as to the location, number, type and appearance of each thereof.



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31-23 Current Legal Forms for Real Estate FORM 23.68

AUTHOR: by Thomas G. Belden

FORM 23.68 Real estate broker commissions

COMMENT

A real estate broker or salesperson may be entitled to a commission if a lease is the result of his efforts. Frequently, the obligation to pay the commission is that of the landlord, who engages the broker to find a tenant. Occasionally, a tenant may engage a real estate broker to locate suitable space, in which case the tenant most likely would be obligated to pay any commission due. While the law defining when the broker's commission is earned varies from state to state, it is not uncommon for a commission claim to be based on informal negotiations or dealings. If no broker is involved, the landlord may seek a representation to that effect from the tenant, and indemnification in the event a claim is made. This is frequently based on the economic reality that the amount of rent may reflect whether or not the landlord is to pay a real estate commission.

Tax aspects:

Generally, commissions are deductible as ordinary and necessary business expenses. However, a commission paid to a broker for obtaining a long-term property lease is a capital expenditure which is amortized over the life of the lease. For tax treatment of rental payments generally, see the Tax Background (TB) § 23.02, at the beginning of this chapter. For required amortization of lease acquisition costs, see TB § 23.06.

FORMS

(1) Tenant representation of no broker involved in lease

Tenant represents that it has not had negotiations with or dealt with any broker in connection with the negotiating and execution of this Lease.

(2) Indemnifications of landlord including brokerage commissions due by reason of sublease

Tenant shall indemnify, defend, and hold harmless Landlord against and from any and all loss, liability, damages, costs, and expenses, including reasonable counsel fees, resulting from any claim that may be made against Landlord by any assignee, sublessee or by any broker or other person claiming a commission or similar compensation in connection with any proposed or completed assignment or sublease.

(3) Tenant's representation that no broker instrumental in lease--no prior negotiations with broker--indemnification for commission claims

Lessee covenants, warrants, and represents to Lessor that no broker was instrumental in consummating this Lease and that Lessee had no conversation or prior negotiations with any broker concerning the renting of the Demised Premises. Lessee shall protect, indemnify, save, and keep harmless Lessor against and from all liabilities, claims, losses, costs, damages, and expenses, including attorney's fees, arising out of or from any claims for brokerage commissions and/or finders' fees resulting from any conversation or negotiations by Lessee with any broker or any other person.

(4) Mutual representation that no broker involved in lease except as specified--landlord to pay commissions--mutual indemnification against commission claims

Landlord and Tenant each represent to the other that they have not entered into any agreement or incurred any obligation in connection with this transaction which might result in the obligation to pay a brokerage commission to any other broker than Commercial Real Estate Agency. Landlord shall pay all fees and commissions due to such broker in connection with this transaction. Each party shall indemnify and hold the other party harmless from and against any claim or demand by any broker or other person for bringing about this Lease who claims to have dealt with such indemnifying party, including all expenses incurred in defending any such claim or demand (including reasonable attorney's fees).



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31-23 Current Legal Forms for Real Estate FORM 23.69

AUTHOR: by Thomas G. Belden

FORM 23.69 Defined lease terms--general applicability

COMMENT

A principle purpose of definitions is to provide specificity with a minimum use of words. Definitions are particularly useful as a short reference to specific matters that are frequently used in the agreement, which would result in verbosity if repeated in all of its detail. Although many defined terms are useful only for the specific agreement in which they appear, those which appear below may be of general use to the practitioner.

FORMS

(1) Adjusted gross sales--percentage rent--gross sales less deductions--deductions for refunds, exchanges from other lessee stores, trade fixture sales

"Adjusted Gross Sales," as used herein, shall mean the amount of gross sales, income, receipts, revenues, and charges of, in connection with and for all merchandise, services, or other operations or businesses sold or rendered in, on, about, or from the Demised Premises by Lessee or any subtenants, licensees, or concessionaires, whether for cash or on a charge, credit or time basis, without reserve or deduction for inability or failure to collect. Adjusted Gross Sales include, but are not limited to, such sales and services: (1) where orders originate or are accepted by Lessee in the Demised Premises but their delivery or performance is made from or at any place other than the Demised Premises; (2) pursuant

to mail, telegraph, telephone, or other similar orders received or filled at or in the Demised Premises; (3) by means of mechanical and other vending machines in the Demised Premises; (4) which Lessee in the normal and customary course of business would credit or attribute to its business upon all or any part of the Demised Premises, adjusted by the deduction, if originally included in gross sales or exclusion, as the case may be, from gross sales of the following, if separate records are maintained for such deductions or exclusions: (1) refunds, allowances made on merchandise claimed to be defective or unsatisfactory, or discounts to customers, except that if such refunds, allowances, or discounts are in the form of credits to the customer, such credits shall be included in gross sales when used; (2) exchanges of merchandise between stores of Lessee when such exchanges are made solely for the operation of Lessee's business and not for the purposes of consummating a sale which has been made at, in, on, or from the Demised Premises and/or for the purpose of depriving Lessor of the benefit of such sale which otherwise would have been made at, in, or from the Demised Premises; (3) returns to shippers and manufacturers for credit; (4) sale of trade fixtures or store operating equipment after their use in the conduct of Lessee's business in the Demised Premises; (5) all sums and credits received in settlement of claims for loss or damage to merchandise; and (6) any excise or sales tax levied upon retail sales and payable over to the appropriate governmental authority, if specific record is made at the time of each sale of the amount of sales tax, and such amount is expressly charged to the customer.

(2) Building--building, other structures and facilities

"Building" means that certain building and all other structures and facilities located on the leased premises, which does not constitute personal property or land, and which is intended to be used and occupied by Tenant for the uses specified and allowed in this lease.

(3) Common area--shopping center parking areas, concourses, entrances, etc.

"Common Area" means all areas and improvements located in the Shopping Center that are provided from time to time by Lessor for the general use, in common, of tenants, their officers, agents, employees and customers, including, but not limited to, parking areas, ways, malls concourses approaches, exits, entrances, and roadways.

(4) Floor area--all floors including basement--includes area occupied by columns, stairs, etc.

"Floor Area" means the actual number of square feet of floor space of all floors, basements, and mezzanines of the Demised Premises without deduction or exclusion for any space occupied or used by columns, stairs, or other interior construction or equipment within the exterior faces of exterior walls, except party walls (walls shared by separate tenants), in which case the center of the wall in question shall be used instead of the exterior face thereof.

(5) Gross sales--percentage rent based on gross amount of sales

"Gross sales" as used herein includes the gross amount of all sales of every kind and description made in, upon, or resulting from the conducting of any business or businesses upon the leased premises, less: merchandise shipped by Tenant or any of its subsidiaries to any other location of Tenant, to its parent company or to any of Tenant's subsidiaries or affiliated companies, or back to any of its or their manufacturers or suppliers, credits, allowances; refunds arising by virtue of the return of merchandise by customers; refunds made in the normal course of business; or charges to customers for credit service, extension of credit, deferred payments, or layaways. Proceeds from vending machines shall not be included in gross sales if their use does not exceed the incidental use presently characteristic of a similar store. No deduction from gross sales shall be made due to the sales price of any articles proving to be uncollectible. Gross sales shall not include any taxes whether paid by Tenant or its customers.

(6) "Landlord" includes agents, beneficiaries and employees for purposes of exculpation, indemnity, and insurance

Wherever in the Lease Landlord's liability is limited, modified, or exculpated, or Tenant agrees to indemnify or hold Landlord harmless, or to name Landlord as an additional party insured, the term "Landlord" shall also mean and include the named Landlord and its agents, beneficiaries, and employees.

(7) Landlord--fee owner--release on transfer of title

Whenever the term "Landlord" is used in connection with Landlord's obligations hereunder, the term is limited to include only the then owner or owners of the fee of the Premises. If the title to such fee is transferred, Landlord named herein (and in the case of subsequent transfers or conveyances, the then grantor) shall be automatically released and discharged, from and after the date of such transfer or conveyance, of all personal liability regarding the performance of Landlord's obligations hereunder thereafter to be performed. In such case, however, all funds in which Tenant has an interest that are in the hands of Landlord, or the then grantor at the time of such transfer, shall be transferred to the grantee, in trust, for application under the provisions of this lease, and all amounts then due and payable to Tenant by Landlord or the then grantor under any provision hereof shall be paid to Tenant.

(8) Landlord--owner or ground lessee, subsequent purchaser--release of landlord on transfer--nonrecourse

"Lessor," so far as Lessor's covenants or obligations are concerned, shall be limited to include only the owner (or Lessee of the ground or underlying lease of which this Lease is a sublease) for the time being of the Shopping Center. If the Shopping Center, or the ground or underlying lease, is sold or transferred, the seller (or assignor of the ground or underlying lease of which this Lease is a sublease) shall be automatically and entirely released of all covenants and obligations under this Lease from and after the date of such conveyance or transfer, if the purchaser on such sale (or the sublessee or assignee of the ground or underlying lease as aforesaid) has assumed and agreed to carry out all of Lessor's obligations under this Lease. It is intended that Lessor's obligations hereunder shall be binding upon Lessor and its successors and assigns only during their respective successive periods of ownership. Notwithstanding any provision herein to the contrary, neither Lessor nor its successor shall be personally liable with respect to any provision of this Lease. If Lessor breaches any such provision, Lessee shall look solely to Lessor's interest in the Shopping Center for the satisfaction of each right or remedy.

(9) Landlord--owner or mortgagee in possession--release on transfer of title

The term "Landlord" means only the owner, or the mortgagee in possession for the time being, of the demised premises. If there is any conveyance of the premises Landlord shall be completely released and discharged of all its obligations hereunder, and the purchaser shall be deemed to have assumed such obligations.

(10) Landlord--owner of prime lease

It is understood and agreed that the term "Landlord" whenever used in this lease, shall mean the then owner of the prime lease of the land of which the demised premises form a part at the time with respect to which the use of such term is applicable. Each owner from time to time of the prime lease shall be liable for Landlord's obligations hereunder only for so long as such owner owns the prime lease, and shall not be so liable after any sale or other transfer thereof, except for any liability arising out of any act or omission of Landlord occurring during such ownership.

(11) Lease--lease agreement as amended from time to time

"Lease" means this agreement as amended from time to time according to its terms.

(12) Lease term--duration of the lease

"Lease term" means the duration of the leasehold estate created in this Lease as specified herein.

(13) Lease year--calendar year regardless of commencement date

"Lease Year" means each 12-month period beginning with the first day of the term of this Lease, and each anniversary thereof, if the term commences on January 1. If the term commences on any other day, the first Lease Year shall begin on the first day of January after the term commences. "Partial Lease Year" means any period before the first Lease Year or after the last Lease Year.

(14) Proceeds, net proceeds--insurance or condemnation award less attorneys' fees and collection expenses

"Net Proceeds," when used with respect to any insurance or condemnation award, means the gross proceeds from the insurance or condemnation award with respect to which that term is used remaining after payment of all expenses (including attorneys' fees and all extraordinary expenses) incurred in the collection of such gross proceeds.

(15) Shopping center--as designated by landlord from time to time.

"Shopping Center" means any land, buildings, and other improvements designated by Lessor from time to time to be the Shopping Center.

(16) Taxes--real property taxes--excluding franchise and income taxes

"Real Estate Taxes" mean all taxes and special assessments which Landlord pays or becomes obligated to pay for a calendar year because of, or in connection with, the ownership, leasing, or operating of the building, subject to the following conditions:

1. The special taxes or special assessments to be included shall be limited to the installment (plus any interest other than penalty interest payable thereon) of special tax or special assessment required to be paid during the calendar year in respect of which Ownership Taxes are being determined.
2. Ownership Taxes shall exclude all federal income taxes, federal excess profits taxes, franchise capital stock and federal or state inheritance or estate taxes.

(17) Term--initial term and renewal term

As used in this lease, "term of this lease" or words of similar import mean the initial term and any effective renewal

term.



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Current Legal Forms for Real Estate

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Current Legal Forms for Real Estate
Chapter 23 REAL ESTATE LEASES
Part IV. Forms
B. LEASE CLAUSES

31-23 Current Legal Forms for Real Estate FORM 23.70

AUTHOR: by Thomas G. Belden

FORM 23.70 Provisions for administration and interpretation of lease

COMMENT

Leases, like many other types of contracts, frequently contain clauses which furnish rules to be utilized in the administration and interpretation of the agreement. Since much of the litigation involving leases requires the ascertainment of the parties' intent, contractual provisions which clarify such intent will generally be given effect in the courts unless they contravene positive rules of law or strong public policy.

Law of the situs of the property:

As a general proposition, all matters concerning the title and disposition of real property are governed by the law of the situs. A leasehold is classified as a conveyance of real property and the effectiveness of the instrument to create the intended estate will be governed by the law of the jurisdiction where the premises are located. But a lease is also a contract, and it may be that the contractual--as distinct from the conveyancing--provisions will be governed by some other law. In the absence of an expressed intent to the contrary, the law of the situs will generally control--this for the reason that the contract will be performed in the jurisdiction of the situs and because the probable intent of the parties was to have the agreement enforced in accordance with such law. The law of the situs would therefore appear to have the most meaningful contacts with the lease.

Governing law selection:

The parties may designate the law of a particular jurisdiction as the one that will govern their transaction. Insofar as the law selected is the law of the situs of the real property, a lease provision

to this effect will generally be honored. However, if the law selected by the parties is the law of a jurisdiction other than the *situs*, such a provision may not be given effect with respect to the resolution of property rights. While individuals are free, within limits, to select the law that will govern their contractual obligations, the cautious draftsman is well advised to choose a jurisdiction that has some relationship to the transaction.

Restatements and variations of law:

Sometimes provisions inserted in construction clauses do little more than specify that which would apply in any event. Thus, clauses stating that the singular includes the plural, that the masculine gender includes the feminine or neuter, and that the various forms may be interchanged when necessary, do little more than incorporate well-known principles of construction. However, provisions which specify the nature of the contractual liability, as for example, whether joint, several, or joint and several, may modify otherwise applicable law, and will generally be deemed effective to bind the parties.

Paragraph headings:

Extended leases often contain a table of contents, marginal notes, paragraph headings, and possibly an index designed primarily to expedite the location of appropriate provisions and to aid the reader in comprehending the lease agreement. It is customary to add a provision that such features are not parts of the lease and may not be used to explain, vary, contradict, or interpret the lease or any of its provisions. Such a statement does no harm and it may be helpful in some cases, although probably not absolutely necessary in most. It is conceivable, however, that if given any significance, a paragraph heading, for example, might in a rare instance influence the interpretation of a particularly ambiguous provision.

Incorporation or exclusion by reference:

In addition to excluding certain items from the intended lease terms, it is possible to include other items through the technique of incorporation by reference. The landlord, particularly in multiple housing developments and in office buildings, often maintains a list of rules and regulations which are to be observed by the tenants. The lease may state that such rules and regulations, including subsequent modifications, shall be considered a part of the lease and observed by the tenant in the same manner as if they were actually incorporated in the lease. A copy of the rules and regulations may be annexed to the lease instrument, so there can be no dispute as to the rules themselves, the subject matter covered, and the fact that they are in existence. If there is possible doubt as to the applicability of any item, it is desirable to include provisions which identify the content of the lease by appropriate exclusions and inclusions.

Entire agreement:

As a general rule, parol evidence is not admissible to vary or contradict the terms of a written lease, except that it may be used to show that the writing fails to express the actual intent of the parties because of fraud, accident, or mistake. The rule precluding the admission of parol evidence applies only to those situations in which the parties intend the writing to represent their whole understanding, that is, where the writing integrates their entire agreement. Thus, the parol evidence rule does not apply if the written instrument is incomplete, fragmentary, or silent concerning the matters sought to be proven.

Prior representations; subsequent modification:

When the parties intend that the written lease shall embody their whole agreement, parol evidence is not admissible to show prior or contemporaneous contradictory or additional provisions. The writing represents their final agreement, and preliminary negotiations are irrelevant. The rule forbidding parol evidence of prior agreements, however, has no application to subsequent modifications. As in the case of contracts generally, provisions in a lease may be modified, discharged, or replaced by a subsequent agreement, and the subsequent agreement may be an oral understanding as well as an instrument. Principles of waiver and estoppel may also be applicable in a particular case, so that either the landlord or the tenant may be precluded by his subsequent conduct from asserting a right under a written lease.

Sole or exclusive agreement:

When a lease is negotiated, the parties may attempt to make the written instrument the sole basis for determining their rights, and in this manner circumvent the uncertainties which arise from conflicting oral testimony. The clauses in this section may be used to accomplish such a purpose.

Entire agreement; oral modifications:

A provision that the written lease is the entire agreement between the parties will generally be given effect and enforced. In other words, this recital shows an intent to integrate the entire understanding into an instrument, and parol evidence of prior or contemporaneous agreements will not be admissible. A clause to the effect that the lease cannot be changed or terminated orally, however, is a different matter. This is an attempt to perpetuate an agreement, without the possibility of effecting a change by mutual consent, and is generally ineffective. At best, it shows a present intent that the parties will modify the lease only by a written agreement, but it does not deprive them of the power to discharge or otherwise modify it. Thus, in spite of a provision barring oral modification, the courts will generally permit an amendment in appropriate cases. The chief advantage of including a provision of this kind is apparently psychological, at best.

Severability:

The provision as to severability should cause no difficulty. This clause simply provides that if any part of the lease is declared invalid, the other portions shall continue in full force and effect. The only instances in which a provision of this nature might not be effective is where the instrument is so faulty that it is totally defective, as, for example, where it fails to identify the leased premises.

FORMS*(1) Declaration of governing law*

This lease shall be governed by, construed, and enforced in accordance with the laws of the State of New York.

(2) Governing law for validity, performance, and enforcement of lease--severability of invalid or unenforceable

provision

The laws of the State of California shall govern the validity, performance and enforcement of this lease. The invalidity or unenforceability of any provision hereof shall not affect or impair any other provision.

(3) Plural, singular, gender to be read in context

Any word contained in the text of this Lease shall be read as the singular or the plural and as the masculine, feminine or neuter gender as may be applicable in the particular context.

(4) Grammatical usage

In construing this lease, feminine or neuter pronouns shall be substituted for those masculine in form and vice versa, and plural terms shall be substituted for singular and singular for plural in any place in which the context so requires.

(5) Joint and several obligation of tenant, partners

If there is more than one party tenant, Tenant's covenants shall be the joint and several obligations of each such party. If Tenant is a partnership, Tenant's covenants shall be the joint and several obligations of each of the partners and the obligations of the firm.

(6) Binding effect on parties, representatives, successors, and assigns

The provisions of this lease shall be binding on and inure to the benefit of the parties, their legal representatives, successors, and permitted assigns.

(7) Binding effect of lease on heirs, legal representatives, successors, and assigns

All covenants, promises, representations, and agreements contained in this lease shall be binding upon, apply, and inure to the benefit of Landlord and Tenant in respect of heirs, legal representatives, successors, and assigns.

(8) Binding effect--each tenant obligation construed as independent and a condition--reference to successors not consent to assignment

Except as otherwise expressly provided herein, the terms and provisions of this lease shall be binding upon and inure to the benefit of the parties' respective heirs, executors, administrators, successors, and permitted assigns. Each term and provision hereof to be performed by Lessee shall be construed to be both an independent covenant and a condition. The reference contained to Lessee's successors and assigns is not intended to constitute a consent to assignment by Lessee, but has reference only to those instances in which Lessor may have given written consent to a particular assignment.

(9) Additional instruments to be executed

The parties shall execute and deliver all instruments necessary to carry out any agreement, term, condition, or assurance in this lease whenever necessary and request for such instruments is made.

(10) Relationship of parties not a joint venture or partnership--acceptance of percentage of gross sales is rent

The parties have not created and do not intend to create by this lease a joint venture or partnership relation between them. It is understood and agreed that the provisions of this lease with regard to the payment by Tenant and the acceptance by Landlord of a sum equal to a percentage of gross sales is a reservation of rent.

(11) Parties have relationship of landlord and tenant--not principal-agent, partners, or joint venturers

Nothing contained in this Lease shall be deemed or construed to create the relationship of principal and agent, partnership, joint venture, or any other relationship between Lessor and Lessee, except that of landlord and tenant.

(12) Captions for convenience--not part of lease--not to limit or amplify lease

The captions of this Lease are for convenience only, are not a part of the Lease, and do not in any way limit or amplify its terms and provisions.

(13) Titles of paragraphs for convenience and reference only

The titles of the articles and paragraphs in this Lease are for convenience and reference only, and the words contained therein shall in no way be held to explain, modify, amplify or aid in the interpretation, construction or meaning of the provisions hereof.

(14) Identification of leased premises by annexed plan

The plan attached to and made a part of this lease, except as otherwise specifically provided, is used solely for the purpose of identifying or designating the leased premises. Any marking, measurements, dimensions, or notes of any kind contained therein have no bearing with respect to the terms and conditions of this lease and are not to be considered a part hereof.

(15) No representations by landlord or agent, except as set forth in lease

Tenant acknowledges that, except as expressly set forth herein, Landlord and its agents have made no representations or promises with respect to the Leased Premises or the making or entry into this Lease.

(16) Prior representations incorporated into lease--no representations, warranties, or promises by landlord, agents, or representatives

All negotiations, considerations, representations, and understandings between the parties are incorporated in this lease. Tenant acknowledges that Landlord, its agents and representatives, have made no representations, warranties or promises with respect to the building, the surrounding land, or the demised premises except as expressly set forth

herein.

(17) Entire agreement--modification in writing, signed and delivered by both parties

This Lease contains all of the agreements and representations between the parties. No term of this Lease shall be waived or modified to any extent, except by an instrument signed and delivered by both parties.

(18) Entire agreement--modification in writing signed by party against whom enforcement is sought

This lease contains the entire agreement between the parties. Any subsequent agreement shall be ineffective to change, modify, or discharge it in whole or in part, unless such agreement is in writing and signed by the party against whom enforcement of the change, modification, or discharge is sought.

(19) Entire agreement--earlier statements or writings of no effect--tenant does not rely on representations not contained in lease--modification in writing signed by parties

This Lease constitutes the entire agreement between the parties, and no earlier statements or prior written matter shall have any force or effect. Tenant is not relying on any representations or agreements other than those contained in this Lease. This Lease shall not be modified or cancelled except by instrument subscribed by both parties.

(20) Entire agreement contained in writing--no oral or written modification by agent, salesman, or officer of landlord--written modifications to be signed by both parties

This writing contains the entire agreement between the parties, and no agent, representative, salesman or officer of Lessor has authority to make or has made any oral or written statement, agreement or representation in connection herewith, modifying, adding or changing the terms and conditions set forth herein. No modification of this Lease shall be binding unless it is in writing and signed by the parties. This Lease shall have no force or validity unless it is returned to Lessee duly executed by Lessor.

(21) Modification by writing--signed by party against whom enforcement sought

This lease may not be changed orally, but only by an agreement in writing and signed by the party against whom enforcement of any waiver, change, modification, or discharge is sought.

(22) Severability

If any provision of this lease shall be declared invalid or unenforceable, the remainder of the lease shall continue in full force and effect.

(23) Severability of invalid or unenforceable clause--enforcement when clause not invalid or unenforceable--enforcement of remaining provisions

If any term or provision of this Lease or its application to any person or circumstance is to any extent invalid or

unenforceable, the remainder of this Lease, or the application of such term or provision to persons or circumstances other than those as to which it is held invalid or unenforceable, shall not be affected thereby, and each term and provision shall be valid and enforced to the fullest extent permitted by law.

(24) Severability of invalid or unenforceable clause--remainder of lease enforceable--clause applicable to other persons and circumstances

If any clause, phrase, provision, or portion of this Lease or the application thereof to any person or circumstance is invalid or unenforceable under applicable law, such event shall not affect, impair, or render invalid or unenforceable the remainder of this Lease, nor any other clause, phrase, provision or portion hereof, nor shall it affect the application of any clause, phrase, provision, or portion hereof to other persons or circumstances.

(25) No waivers--waiver not deemed waiver of subsequent breach of default

No delay by Landlord in exercising or failing to exercise any right or power shall impair such right or power, or be construed as a waiver of any breach or default, or as acquiescence thereto. No waiver by Landlord of any covenant, term, or condition of this Lease shall be construed by Tenant as a waiver of a continuing or subsequent breach of the same covenant, provision, or condition. If Landlord's waiver, consent to or approval of any act by Tenant is required, the same shall be valid only if in writing, and such consent or approval shall not be deemed to waive or render unnecessary consent to or approval of any subsequent similar act.

(26) No waiver by landlord's failure to enforce--receipt of rent with knowledge of breach not a waiver--writing required for waiver

Landlord's failure to seek redress for violation of, or to insist upon the strict performance of, any covenant or condition of this lease, or of any rule or regulation, shall not prevent a subsequent act, which would have originally constituted a violation, from having all the force and effect of an original violation. Landlord's receipt of rent with knowledge of the breach of any covenant of this lease shall not be deemed a waiver of such breach. Landlord shall not be deemed to waive any provision of this lease unless the same is in writing and signed by Landlord.

(27) Waiver of one default not waiver of subsequent default--no estoppel against landlord--demands for rent to have same effect as if made when and where rent originally due

No waiver of any covenant or condition or the breach of any covenant or condition of this Lease shall be taken to constitute a waiver of any subsequent breach of such covenant or condition, nor to justify or authorize the nonobservance on any other occasion of the same, or any other covenant or condition hereof, nor shall the acceptance of rent by Landlord at any time when Tenant is in default under any covenant or condition hereof be construed as a waiver of such default, nor shall any waiver or indulgence granted by Landlord to Tenant be taken as an estoppel against Landlord. It is expressly understood that, if at any time, Tenant shall be in default in any of the covenants or conditions hereunder, an acceptance by Landlord of rent during the continuance of such default, or of the failure on the part of Landlord promptly to avail itself of such other rights or remedies as Landlord may have, shall not be construed as a waiver of such default; but Landlord may at any time thereafter, if such default continues, take action it deems necessary on account of such default, in the manner provided in this lease. Every demand for rent due wherever and whenever made, or demand for the performance or observance of any of the other obligations devolving upon Tenant hereunder, shall have the same effect as if made at the time it falls due and at the place of payment; and after the service of any notice of commencement of any suit or final judgment therein, Landlord may receive and collect any rent due,

and such collection or receipt shall not operate as a waiver of nor affect such notice, suit or judgment.

(28) Confidentiality of lease contents--procedure for response to subpoena

Tenant shall keep the contents of the Lease confidential and shall not disclose the contents of the Lease in any manner whatsoever, except that (i) Tenant may make any disclosure of information contained in the Lease to which Landlord gives its prior written consent, and (ii) any information contained in the Lease may be disclosed to Tenant's Representatives who need to know that information for the purpose of assisting Tenant in connection with its business at the Premises and who agree in writing to keep that information confidential. Tenant shall be responsible for any breach of the provisions of this Section by any of its Representatives. The term "Representatives," as used in this Section of the Lease, means Tenant's directors, officers, partners, employees, attorneys, accountants and bankers.

If Tenant or its Representatives receive a request to disclose all or any part of the contents of the Lease under the terms of a subpoena or other order issued by a court of competent jurisdiction or by a government agency, Tenant shall: (i) promptly notify Landlord of the existence, terms and circumstances surrounding such request; (ii) consult with Landlord on the advisability of taking steps to resist or narrow that request; (iii) if disclosure of any portion of the Lease is required, furnish only such portion of the Lease as Tenant is advised by counsel is legally required to be disclosed; and (iv) cooperate with Landlord in its efforts to obtain an order or other reliable assurance that confidential treatment will be accorded to that portion of the Lease that is required to be disclosed.

Tenant agrees to protect, indemnify, defend and hold harmless Landlord from any damages or other adverse consequences that Landlord may incur or suffer as a result of a breach of the covenants contained in this Section. In addition, Tenant understands, acknowledges and agrees that any breach of the provisions of this Section on the part of Tenant or its Representatives shall constitute a default under the Lease. The provisions of this Section shall survive the expiration or earlier termination of the Lease.

(29) Duplicate counterparts deemed originals

This Lease may be executed in one or more counterparts, each of which shall be an original, and all of which shall constitute one and the same instrument.



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B. LEASE CLAUSES

31-23 Current Legal Forms for Real Estate FORM 23.71

AUTHOR: by Thomas G. Belden

FORM 23.71 Rules and regulations

COMMENT

Rules and regulations are frequently written in a separate document, which is included by reference in the lease. Although more general use restrictions are part of most leases, the more specific and detailed rules and regulations are usually not contained in the main body of the lease. Frequently, however, they are attached to the lease and initialed or signed by the tenant.

Flexibility of rules and regulations:

One of the advantages of separately written rules and regulations is the flexibility it affords a landlord to amend the rules as circumstances change. If, for example, local regulations restrict utility use or other services, the regulations could be amended accordingly. It would be much more difficult, from both a practical and a legal perspective, to amend each tenant's lease in such a situation. The tenants' leases would generally provide that the amendment be delivered to the tenants in the form of a notice, or that it be posted in a previously designated area accessible by the tenants.

Corresponding lease provisions:

The lease should contain a clause which relates to the rules and regulations. The nature of the lease provisions would depend on the objectives of the parties. If the landlord seeks flexibility, the lease would specify, in effect, that the tenant's use of the premises is subject to the rules and regulations of the landlord as they exist at the time of signing of the lease, and as subsequently amended.

FORMS*(1) Apartment lease--rules and regulations for tenants***Rules and Regulations**

1. *Obstructions.* The sidewalk, entrance, hall, passages, stairway, or fire escapes shall not be obstructed by Tenants or used by them for any other purposes than those of access to their respective apartments.
2. *Signs.* No signs, advertisements, or notices shall be painted or affixed upon any outside or inside part of the building, and no article, shall be suspended outside the building.
3. *Noise.* No noisy or disorderly conduct or any conduct annoying or disturbing to the occupants of the building, including the playing of a musical instrument, or the operation of a television set, radio, or phonograph in the leased apartment between the hours of 10 p.m. and the following 8 a.m., shall be permitted.
4. *Pets.* No animals or birds of any kind shall be taken into or kept in or about the building, without Landlord's written consent.
5. *Halls.* The halls of the building shall not be used, under any circumstances, as playing grounds for children, and no bicycle or baby carriages shall be stored therein.
6. *Lines.* Nothing shall be hung by Tenants from or placed on the windows, terraces, balconies, fire escapes, or window sills. No mops, towels, tablecloths, or rugs shall be hung or shaken from any window or door.
7. *Employees.* No employee of Landlord shall be sent out of the building by any Tenant at any time for any purpose.
8. *Electric.* No lamp, fixture, or appliance of any sort shall be attached to or connected with the electric fixtures within the leased apartment except those approved by Landlord. No radio or television aerial shall be installed on the roof or exterior walls of the building without Landlord's prior written consent.
9. *Refuse.* All garbage and refuse must be disposed of in such manner and at such times as the superintendent may direct, or disposed of in the incinerator.
10. *Passkeys.* Landlord may retain a passkey to all the premises. No lock shall be changed or a new lock installed without Landlord's prior written consent, and unless an additional key is provided for Landlord's use.
11. *Rules.* Landlord may from time to time make any additional rules it deems necessary.

(2) Commercial lease--rules and regulations for tenants

- (a) *Rules and regulations.* Tenant covenants and agrees with Landlord to obey the following Rules and Regulations:

1. *Loading.* All loading and unloading of goods shall be done only at the times, in the areas, and through the entrances designated for such purposes by Landlord.
2. *Deliveries.* The delivery or shipment of merchandise, supplies, and fixtures to and from the leased property shall be subject to whatever rules and regulations Landlord judges necessary for the proper operation of the building.
3. *Refuse.* All garbage and refuse shall be kept in the kind of container specified by Landlord, and shall be placed outside of the premises prepared for collection in the manner and at the times and places specified by Landlord. Tenant shall use and pay the cost of any service provided or designated by Landlord for picking up refuse and garbage.
4. *T.V., radio.* No radio or television or other similar device shall be installed without, in each instance Landlord's written consent. No aerial shall be erected on the roof or exterior walls of the building in which the leased property is located, or on the grounds, without, in each instance, Landlord's written consent. Any aerial so installed without written consent shall be subject to removal without notice at any time.
5. *Noise.* No loudspeakers, televisions, phonographs, radios, or other devices shall be used in a manner so as to be heard or seen outside of the leased property without Landlord's prior written consent.
6. *Temperature.* Tenant shall keep the leased property at a temperature sufficiently high to prevent freezing of water in pipes and fixtures.
7. *Rubbish.* Tenant shall keep the outside areas immediately adjoining the premises clean and free from dirt and rubbish to the satisfaction of Landlord and Tenant shall not place or permit any obstructions or merchandise in such areas.
8. *Parking.* Tenant and its employees shall park their cars only in those portions of the parking area designated for that purpose by Landlord. Tenant shall furnish Landlord with automobile license numbers assigned to Tenant's car or those of its employees within five days after taking possession of the leased property and shall thereafter notify Landlord of any changes within five days after such changes occur. If Tenant or its employees fail to park their cars in the designated parking areas, Landlord may charge Tenant \$10 per day per car parked in any area other than those designated, as and for liquidated damage.
9. *Plumbing.* The plumbing facilities shall not be used for any other purpose other than that for which they are constructed, and no foreign substance of any kind shall be deposited therein. Tenant shall bear the expense of any breakage, stoppage, or damage resulting from any violation of this provision by Tenant or its employees, agents, or invitees.
10. *Extermination.* Tenant shall use, and pay the cost of, any pest extermination contractor designated by Landlord and at the intervals required by Landlord.
11. *Burning.* Tenant shall not burn any trash or garbage of any kind in or about the building.
12. *Advertising.* Tenant shall insert the address and telephone number of the leased property in any advertising media it may use.
13. *Radius restriction.* Tenant shall not, directly or indirectly, engage in, own, or operate any business similar to that authorized to be conducted hereunder, or use the same or similar trade name within a radius of five miles of the premises during the term and any extension or renewal of this lease.
14. *Surrender.* Upon the expiration or other termination of the term of this lease, Tenant shall quit and surrender to

Landlord the leased property broom clean, in good order and condition, ordinary wear excepted.

15. *Obstructions.* Tenant shall not obstruct, encumber, or use for any purpose the sidewalks, entrances, passages, courts, elevators, vestibules, stairways, corridors, or halls.

(b) *Rule changes.* Landlord may amend, modify, delete, or add new and additional reasonable rules and regulations for the use and care of the leased property, the building of which the leased property is a part, and the common use area.

(c) *Notice.* Tenant shall comply with all such rules and regulations upon receiving a copy thereof from Landlord, or upon their posting in any place designated by Landlord within the building in which the leased property is situated, provided that such rules and regulations apply uniformly to all tenants of the building.

(d) *Maintenance contractors.* Tenant shall use and pay the cost of any window cleaning and store maintenance contractor designated by Landlord.

(3) Store lease--rules and regulations for the tenant

Tenant shall not at any time, without first obtaining Landlord's consent:

(a) *Special sales.* Conduct or permit any fire, bankruptcy, auction, or "going out of business" sale, whether real or fictitious, in the leased property, or utilize any unethical method of business operation.

(b) *Exterior alterations.* Change, whether by alteration, replacement, rebuilding, or otherwise, the exterior color or architectural treatment of any part of the leased property or the building in which it is located.

(c) *Sidewalk sales.* Use, or permit to be used, the sidewalk adjacent to, or any other space outside, the leased property for display, sale, or any other similar undertaking.

(d) *Noise.* Use, or permit to be used, any advertising medium, loudspeaker, sound amplifier, or radio or television broadcast, which may be heard outside the leased property or which does not comply with the existing general policies or rules and regulations. It is understood that breach of the foregoing restriction shall constitute a material breach of this lease by Tenant.

(e) *Plumbing fixtures.* Use the plumbing fixtures for any purpose other than that for which they were constructed, or dispose of any garbage or other foreign substance therein, whether through the utilization of so-called disposal or similar units, or otherwise.

(f) *Liens.* Subject any fixtures, furnishings, or equipment in or on the leased property which are affixed to the realty to any mortgages, liens, conditional sales agreements, security interests, or encumbrances.

(g) *Building.* Perform any act or carry on any practice which may damage, mar, or deface the leased property or the building in which it is located.

(h) *Awnings.* Install any awnings in or on the leased property which are visible to public view outside such property.

(i) *Exterior cleaning.* Permit window cleaning or other exterior maintenance and cleaning services in and for the leased property to be performed except by a person or persons approved by Landlord and during reasonable hours designated for such purposes by Landlord.

(j) *Interior trucks.* Use any forklift truck, two truck, or any other machine for handling freight in the interior delivery system, except the truck passageway portion thereof, or in the leased property, unless the same is powered by electricity.

(k) *Electric equipment.* Install, operate, or maintain in the leased property any electrical equipment which will overload all or any part of the electrical system, beyond its reasonable capacity for proper and safe operation as determined by Landlord.

(1) *Nuisance.* Permit any offensive or obnoxious vibration, noise, odor, or other undesirable effect to emanate from the leased property, or from any machine or other installation, or otherwise permit the same to constitute a nuisance or otherwise unreasonably interfere with the safety, comfort, or convenience of Landlord, any other occupants of the building or their customers, agents, or invitees, or any others lawfully in the building. Upon notice by Landlord to Tenant that any of the above nuisances are occurring, Tenant shall, within five days, remove or control them and, if the condition is not so remedied, Landlord may, either: (1) cure the condition and add any expense incurred by it therefor to the next installment of rental due under this lease and Tenant shall then pay such amount, as additional rent; or (2) treat Tenant's failure to remedy the condition as a material default of the lease by Tenant.

(m) *Compliance.* Use or occupy the leased property or do or permit anything to be done thereon in any manner which results or may result in (1) making it impossible for either party to carry any required or desired insurance, (2) invalidating or increasing the cost of insurance to Landlord, (3) causing structural damage to the building, (4) creating a public or private nuisance, or a violation of any present or future federal, state, or local law, regulation, ordinance, or requirement, whether ordinary or extraordinary, foreseen or unforeseen.

(n) *Floor covering.* Install linoleum or other floor covering in direct contact with the floor of the leased property, but, if any such covering is required by Tenant, an interlining of builder's deadening felt shall be first affixed to the floor with paste or other water-soluble material, the use of cement or other adhesive nonsoluble in water being expressly prohibited.

(4) Shopping center lease--rules and regulations for tenants

Tenant shall at all times during the term of this lease:

1. *Neatness.* Keep the demised premises and all show windows and signs and any loading dock and other areas allocated for Tenant's sole use in good, neat, and clean condition.

2. *Display windows.* Keep its display windows and illuminated signs electrically lighted during the periods of time Landlord requires of substantially all other retail businesses in the shopping center.

3. *Vehicles.* Furnish to Landlord in writing the license numbers of the vehicles of Tenant and its employees.

4. *Hours.* Remain open for business at least during each day and for the same hours of each day that a majority of other nonchain store tenants in the shopping center are open for business.

5. *Deliveries.* Load and unload its merchandise, equipment and supplies, and remove its rubbish only by way of the service road and service doors designated for Tenant's use. All garbage, refuse, and rubbish shall be kept in containers specified by Landlord. Such containers shall be kept closed at all times, be placed outside of the premises prepared for collection, in the manner and at the times and places specified by Landlord, and be removed at Tenant's expense by a contractor approved by Landlord.

6. *Nuisance.* Not: permit any act or practice which may tend to injure the building or its equipment or be a nuisance to other tenants; keep merchandise on or obstruct the sidewalks or areas outside of the demised premises; conduct or permit any fire, bankruptcy, auction, or going-out-of-business sale; burn any rubbish in or about the demised premises; change the exterior color of the demised premises or the color, size, illumination, or location of any sign previously approved by Landlord; or install or employ any exterior lighting, shades, awning, or advertising device.

7. *Tenants' organization.* Maintain membership in any tenants' organization sponsored by Landlord for the tenants of the shopping center, and pay all reasonable dues determined by such members.

8. *Aerials.* Not install radio or television or other similar device without, in each instance, Landlord's prior written consent. No aerial or other device for receiving radio or television programs shall be erected on the roof or exterior walls of the demised premises, or within the shopping center without, in each instance, Landlord's written consent. Any aerial or other device so installed without such consent shall be subject to removal without notice at any time.

9. *Speakers.* Not use loudspeakers, television receivers, phonographs, radios, or other devices in a manner so as to be heard or seen outside of the demised premises.

10. *Temperature.* Keep the premises at a temperature sufficiently high to prevent freezing of water in pipes and fixtures.

11. *Outside areas.* Keep the outside areas immediately adjoining the demised premises clean and free from snow, ice, dirt, and rubbish, and not place or permit any obstructions or merchandise in any of such areas.

12. *Plumbing.* Not use or permit the use of the plumbing facilities for any purpose except that for which they are constructed.

13. *Pest control.* Use, at Tenant's cost, the pest extermination contractor directed by Landlord and at the intervals required by Landlord, if the cost thereof is competitive with like contractors in the area of the shopping center.

14. *Cleaning.* Use, at Tenant's cost, the window cleaning and store maintenance contractor designated by Landlord, provided that the cost thereof is competitive with like contractors in the area of the shopping center.

15. *Use.* Not use or permit the use of any portion of the demised premises as sleeping or living quarters or for the keeping of any live animals, fish, or birds.

(5) Tenant to comply with rules and regulations--including reasonable amendments made from time to time

Tenant shall at all times during the term of this lease comply with all rules and regulations specified in Exhibit A annexed together with all reasonable amendments, modifications, deletions, and other reasonable rules and regulations for the use and occupancy of the premises that Landlord may from time to time promulgate.

(6) Incorporating landlord's rules and regulations by attachment to lease

The attached rules and regulations governing occupancy of the building wherein the leased premises are situated shall be deemed a part of this agreement, with the same effect as though set forth at length herein. Tenant, its agents, servants, employees, and all persons visiting the leased premises or claiming under Tenant, shall faithfully observe such rules and regulations. Landlord may, from time to time, add to, alter, or rescind such rules and regulations. All changes shall take effect immediately after written notice thereof is served by leaving a copy thereof at the leased premises.

[Attach Exhibit A]



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Chapter 23 REAL ESTATE LEASES
Part IV. Forms
B. LEASE CLAUSES

31-23 Current Legal Forms for Real Estate FORM 23.72

AUTHOR: by Thomas G. Belden

FORM 23.72 Rider for residential lease containing lead-based paint disclosures

COMMENT

Disclosure of lead-based paint hazards:

Federal law requires the disclosure of lead-based paint hazards to individuals who are renting, buying or renovating pre-1978 residential housing. See 42 U.S.C. §§ 4851 -4856 ; 40 C.F.R. Part 745 and 24 C.F.R. Part 35, Subpart A. Lead-based paint and paint dust are often found in housing built before 1978. Lead is very dangerous, especially to young children and pregnant women. Sellers of pre-1978 housing must disclose known information on lead-based paint hazards before selling a house, and landlords must disclose such information before leases take effect. Both sales contracts and leases must include a lead warning statement and disclosure information. Renovators must provide information about lead-based paint before starting work.

The landlord is responsible for providing lead-based paint information to the prospective residential tenant. The information required by law includes both specific information about the property being rented and general information about lead-based paint hazards. The landlord must disclose known lead-based paint and lead-based paint hazards and provide available records and reports to the tenant. The landlord also must give the tenant the pamphlet, developed by EPA, HUD, and the Consumer Product Safety Commission (CPSC), titled "Protect Your Family from Lead in Your Home." Finally, the lease must include certain notification and disclosure language.

Note that the law does not require the landlord to test for lead-based paint or to remove such

paint if it is known to exist. The law also does not invalidate a lease that does not include the required disclosure. However, any person who violates the lead disclosure requirements may be subject to civil and criminal penalties, as well as treble damages in a private civil suit.

Lead-based paint testing techniques and remedies:

Lead paint problems can be determined by visual inspection of paint condition and location, surface dust tests, spectrography or chemical tests of samples. Home test kits generally are not considered to be reliable.

Lead paint can be handled in three ways: removal of the surface containing the paint, encapsulation (*i.e.* , by sheetrocking over the surface), or by sanding the surface. Removal is the most permanent and most expensive method, and it causes the least amount of lead dust. Encapsulation may not be permanent and is moderately expensive. As the seams age, lead dust may escape. Encapsulation may not be performed by painting alone. Sanding is not recommended, as it produces high quantities of lead dust; however, sanding is a lower cost alternative and deemed permanent.

FORM

Lead-Based Paint Rider to Lease between _____, as Landlord, and _____, as Tenant.

Property address: _____

☐ Disclosure of Information on Lead-Based Paint and Lead-Based Paint Hazards

Lead Warning Statement: Housing built before 1978 may contain lead-based paint. Lead from paint, paint chips, and dust can pose health hazards if not taken care of properly. Lead exposure is especially harmful to young children and pregnant women. Before renting pre-1978 housing, landlords must disclose the presence of known lead-based paint and lead-based paint hazards in the dwelling. Tenants must also receive a federally approved pamphlet on lead poisoning prevention.

Lessor's Disclosure (initial)

_____ (a) Presence of lead-based paint and/or lead-based paint hazards (check one below):

☐ Known lead-based paint and/or lead-based paint hazards are present in the housing (explain):

☐ Lessor has no knowledge of lead-based paint and/or lead-based paint hazards in the housing.

_____ (b) Records and reports available to the lessor (check one below):

☐ Lessor has provided the lessee with all available records and reports pertaining to lead-based paint and/or lead-based paint hazards in the housing (list documents below):

☐ Lessor has no reports or records pertaining to lead-based paint and/or lead-based paint hazards in the housing.

Lessee's Acknowledgment (initial)

_____ (c) Lessee has received copies of all information listed above.

_____ (d) Lessee has received the pamphlet *Protect Your Family from Lead in Your Home*.

Agent's Acknowledgment (initial)

_____ (e) Agent has informed the lessor of the lessor's obligations under 42 U.S.C. 4582(d) and is aware of his/her responsibility to ensure compliance.

☐ **Exclusion from Disclosure.** Lessor hereby represents that this property is excluded from the legal requirement to disclose the existence of lead-based paint and/or lead-based paint hazards in housing because this housing was constructed after 1978. (Initial

_____)

Certification of Accuracy

The following parties have reviewed the information above and certify, to the best of their knowledge, that the information provided by the signatory is true and accurate.

Lessor _____ Date: _____ Lessor: _____ Date: _____

Less- Date: _____ Less- Date: _____
ee _____ ee: _____

Agent _____ Date: _____ Agent: _____ Date: _____



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31-23 Current Legal Forms for Real Estate FORM 23.73

AUTHOR: by Thomas G. Belden

FORM 23.73 Death or Disability

COMMENT

This clause can be used when representing a Tenant who is operating a business totally dependent on his personal abilities. It gives that person the right to terminate the lease under certain circumstances and conditions. The individual may be a sole proprietor, or the sole shareholder of a corporation or sole member of a limited liability company. For example, a medical doctor might incorporate as a professional corporation and be the sole shareholder of that corporation, or be the sole member of a limited liability company. In such circumstances, the Landlord might be willing to accept a clause in the lease that would allow the Tenant to terminate the lease in the event of the death or disability of the individual Tenant or sole shareholder of the professional corporation or other entity. In this particular instance, the Landlord has agreed to grant a termination right, but subject to certain terms and conditions that are set forth in the clause.

FORM

Death or Disability. In the event of the death of the Tenant, or disability of the Tenant (or its sole shareholder or member) which results in the permanent inability of the Tenant to operate its business at the leased premises as substantiated by a reputable medical doctor reasonably acceptable to Landlord, then Tenant or Tenant's legal representative shall have the right, upon written notice to Landlord, to terminate this lease effective thirty (30) days after receipt of written notice from the Tenant or the Tenant's legal representative by Landlord, subject to the conditions

hereafter set forth. The conditions required to be met are that Tenant pay Landlord (i) an amount equal to two (2) months base rent at the rate of rent then being paid by Tenant, (ii) an amount equal to the unamortized cost of the brokerage commission paid by Landlord pursuant to the terms of the lease, assuming an even amortization of such commission over the term of the lease, and (iii) an amount equal to the unamortized cost of the leasehold improvements paid for by Landlord pursuant to the terms of the lease, as hereafter computed. Upon completion of the leasehold improvements Landlord shall give Tenant evidence of the amount expended. The amount to be paid by Tenant for the unamortized leasehold improvements shall be equal to the present value (assuming a present value discount rate of eight percent (8%) per annum through the end of the term of the lease) of the product obtained by multiplying the monthly payment that would be required to amortize the actual costs paid by Landlord for such leasehold improvements over the 60-month term of the lease at an interest rate of eight percent (8%) per annum, multiplied times the number of months remaining during the term of the lease after the effective date of termination pursuant to this clause. For example, assuming the cost of the leasehold improvements to be amortized equal \$36,000, the monthly amount required to amortize the cost over a 60-month term of the lease at eight percent (8%) per annum would be \$1,128.11. The present value of the product of that monthly amount multiplied by the remaining months for which rent is required to be paid will equal the amount to be reimbursed to Landlord for the leasehold improvements paid for by Landlord.

Upon receipt of the above-described notice by Landlord from Tenant, Landlord shall notify Tenant or Tenant's legal representative, in writing, of the amount owed pursuant to the terms of this clause. The total of such amounts owed shall be due in full within thirty (30) days from receipt by Landlord of such notice from Tenant. If Tenant shall fail to timely pay the aforesaid sum by such date then this lease shall remain in full force and effect and Tenant shall continue to be responsible for all obligations for the remainder of the term of this lease.



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31-23 Current Legal Forms for Real Estate FORM 23.74

AUTHOR: by Thomas G. Belden

FORM 23.74 Rights to Relocate

COMMENT

In a multi-tenant building, in particular in multi-tenant office buildings, a landlord will frequently request the right to relocate smaller tenants located in the building in case a larger tenant needs additional space or a new tenant desires to lease a significant amount of space, and that space can only be found by use of the existing space leased by smaller tenants of the building. This will allow the landlord more flexibility to accommodate its most significant tenants.

From the tenant's point of view, if the tenant cannot avoid such a clause, it is important that at a minimum the tenant provide that the tenant not incur any additional expenses because of such relocation, and that the tenant be given adequate notice before the tenant is required to move.

FORM

Right to Relocate. Landlord shall have the option, upon ninety (90) days' advance written notice to the Tenant, at any time during the term of this lease to relocate the Tenant to other space in the building provided the existing premises leased by Tenant is not in excess of five thousand (5,000) square feet of rentable space. In so doing, Landlord shall pay the cost of moving Tenant's furniture, fixtures and equipment to the new premises, as well as any cost or expense associated with wiring, rewiring and connecting the premises for all of Tenant's telecommunications and computer needs. Landlord agrees to arrange for such move in such a way so that it is accomplished overnight or over a weekend so as to minimize any disruption in Tenant's business, and shall be done on a "turnkey" basis for Tenant. Landlord agrees that the new premises shall not contain any less square footage than is in the existing premises leased by Tenant

and shall be no greater than ten percent (10%) in excess of the rentable square footage of the current premises leased by Tenant, without Tenant's consent. Tenant shall not be required to pay any greater base rent or greater proportion of the increases in real estate taxes, insurance and operating expenses than is required to be paid with respect to the existing space leased by Tenant, unless such new space is greater than ten percent (10%) in excess of the rentable square footage currently leased by Tenant and Tenant agrees to lease such new space as required above.



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Chapter 25 ENVIRONMENTAL CONSIDERATIONS IN REAL ESTATE TRANSACTIONS

33-25 Current Legal Forms for Real Estate 25.syn

§ 25.syn Synopsis to Chapter 25: ENVIRONMENTAL CONSIDERATIONS IN REAL ESTATE TRANSACTIONS

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§ 25.02 Tax and Environmental Issues Raised by Real Estate Transactions

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[a] Capitalized Environmental Cleanup Costs

[b] Election to Treat Environmental Capital Costs as Currently Deductible

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[d] Construction of Clean-up Facilities

[2] Distinguishing Between Repairs and Capital Expenses

[3] If Costs Are Capitalized, Allocation Issues May Be Raised

[4] Timing of Deductions; Cash vs. Accrual Method Taxpayers

§ 25.04 Deductibility of Losses Associated with Environmentally-Contaminated Property

§ 25.05 Taxation of Tort, Contract and Other Recoveries

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[2] Deduction for Payments

[3] Taxation of Certain Settlement Funds

§§ 25.06 through 25.16 [Reserved]

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[2] Overview of Federal Statutory Law

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[c] Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA")

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[2] Legal Theory

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[b] Representations by Seller to Buyer

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[d] Practical Difficulties of Recourse

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FORM 25.07 Limited Warranty Deed

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FORM 25.13 Residential sale agreement--one, two or three family home--sale is contingent upon a general inspection and inspections for radon gas, urea formaldehyde, asbestos and wood boring insects

FORM 25.14 Residential sale agreement--condominium--representation that purchaser shall have use of all waterways located on condominium property--notice of nearby industrial site

FORM 25.15 Residential sale agreement--shares of a cooperative apartment--representation that seller shall provide purchaser with copy of environmental assessment obtained by cooperative board of managers

FORM 25.16 Representation by seller that premises have never been used for storage or disposal of hazardous waste

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FORM 25.32 Purchaser releases seller from liability--clause designed to protect seller

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FORM 25.35 Additional release from environmental liability

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FORM 25.40 Seller will not waive liability for any adverse environmental condition existing on subject premises

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FORM 25.45 Sale is contingent on results of asbestos inspection

FORM 25.46 Sale is contingent on results of inspection for urea formaldehyde insulation

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FORM 25.51 Sale is contingent on results of inspection of septic system--system must be in good working order and meet government standards

FORM 25.52 Sale is contingent upon purchaser's receipt of approval to use public sewer system for premises

FORM 25.53 Sale is contingent on discovery of potable water source on premises

FORM 25.54 Sale is contingent on feasibility of diverting contaminated water from flowing onto subject premises from adjoining parcel of land

FORM 25.55 Sale is contingent on obtaining historic district approval of sale and planned modification to premises

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FORM 25.57 Sale is contingent on obtaining certification that premises are not located in a protected wetland

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FORM 25.66 License agreement for use by seller or purchaser for entry onto property prior to closing

FORM 25.67 Licence Agreement allowing purchaser to enter upon seller's property

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FORM 25.69 Letter from purchaser to seller that results of the environmental inspection have not been approved

FORM 25.70 Notice terminating existing sale agreement due to failure of contingency--agreement contains mutual releases exchanged between parties and confidentiality requirement

FORM 25.71 Amendment to purchase agreement modifying an existing sale agreement following failure of environmental contingency--clauses: allocate responsibility for remediation and cost of remediation; specify scope of work, means of remediation, acceptable contractors for repair, and methods to be used to assure that remediation is complete; allocate liability for injury to person or property during remediation; set forth insurance requirements and allow access to premises

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FORM 25.78 An agreement with company for removal of hazardous condition on subject premises--clauses include licensing requirements, insurance requirements, scope of work, hold harmless provision, certificate of proper disposal

FORM 25.79 Escrow agreement--property to transfer, but funds are to be withheld at closing to cover remediation cost

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FORM 25.88 Environmental covenant--Ohio

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FORM 25.91 Commercial mortgage--office building--environmental indemnification granted by borrower in consideration of lender's waiver of environmental site assessment as a condition for receiving loan

FORM 25.92 Commercial mortgage--borrower's representation that environmental site assessment has been performed

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FORM 25.97 Tenant--Estoppel Certificate for Loan Transaction

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FORM 25.99 Representation by borrower that condition of premises has not changed since first mortgage was executed

FORM 25.100 Representation by borrower that it acknowledges that all inspections made by lender are for lender's sole benefit and may not be relied upon by borrower

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FORM 25.109 Borrower's promise to maintain accurate records regarding toxic substances on site and to provide access to all records when requested by lender

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FORM 25.112 Letter agreement regarding environmental indemnification and hold harmless granted by borrower to lender

FORM 25.113 Environmental indemnification and hold harmless granted by borrower to lender--another form

FORM 25.114 Lender's right to demand substitution of collateral upon occurrence of environmental mishap; borrower's agreement not to encumber substitute collateral during term of mortgage without lender's permission

FORM 25.115 Lender's right to refuse to make further advances of funds to borrower in the event of: (1) environmental mishap on the mortgaged premises; (2) failure to notify lender of an adverse environmental event on the mortgaged premises; (3) failure to rectify an adverse environmental condition on the mortgaged premises; or (4) failure to produce records upon lender's demand

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FORM 25.118 Waiver of environmental covenant granted by lender to borrower

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FORM 25.138 Limitations on tenant's use of hazardous substances on leased premises

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FORM 25.154 Landlord's obligation to correct an adverse environmental condition discovered on the leased premises after execution of the lease, or an environmental mishap caused by another tenant during the lease term

FORM 25.155 Landlord's promise to comply with all environmental laws and orders relating to the leased premises

FORM 25.156 Tenant's promise to return premises to landlord in same condition as existed at commencement of lease term

FORM 25.157 Clause terminating lease following violation of lease's environmental provisions by landlord or tenant

FORM 25.158 Landlord's representation to tenant regarding existence of asbestos

FORM 25.159 Representation by landlord that leased premises contain no asbestos-containing materials

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FORM 25.161 Landlord's promise to remove asbestos

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FORM 25.163 Contingency for obtaining water source on leased premises capable of producing adequate amounts of potable water and adequate amounts of water necessary for industrial use

FORM 25.164 Contingency for asbestos inspection

FORM 25.165 Contingency for environmental assessment

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FORM 25.167 Guaranty--Short Form



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Chapter 25 ENVIRONMENTAL CONSIDERATIONS IN REAL ESTATE TRANSACTIONS

Part I. The Tax Background

33-25 Current Legal Forms for Real Estate § 25.01

§ 25.01 Summary of this Chapter

§ 25.02 Tax and Environmental Issues Raised by Real Estate Transactions. The sale, exchange, lease or gift of real estate may raise issues under both federal environmental law and federal tax law for the parties to the transaction. For example, the Internal Revenue Code determines whether expenses paid or incurred to clean up contaminated real property are currently deductible as trade or business expenses, or whether they must be capitalized.

§ 25.03 Payments Made to Clean Up Contaminated Real Property. Ordinary and necessary expenses incurred by a business taxpayer in cleaning up contaminated real property may be currently deducted under certain circumstances. Otherwise, the expenses must be capitalized as improvements to the property; in such case, the improvements will be eligible for depreciation over a period of years. In recent years, the I.R.S. has been very aggressive in attempting to expand the types of costs which must be capitalized. Capitalized clean-up costs may have to be allocated if more than one parcel of contaminated real property is involved. If clean-up costs are deductible, issues may arise regarding the appropriate timing of deductions.

§ 25.04 Deductibility of Losses Associated with Environmentally-Contaminated Property. Losses resulting from environmentally-contaminated property that are incurred in a trade or business or in a transaction entered into for profit may be deducted in the tax year in which the losses are sustained to the extent they are not compensated for by insurance or otherwise. A taxpayer must establish that the taxpayer realized a loss for income tax purposes. The loss must be evidenced by a closed or completed transaction that is fixed by an identifiable event that produced the loss during that tax year, such as a sale or exchange of contaminated property at a loss.

§ 25.05 Taxation of Tort, Contract and Other Recoveries. Where the owner of real property brings a successful tort or breach of contract action against the party responsible for the environmental contamination of the property, two major tax issues arise: whether the money received in the form of a judgment or settlement is taxable to the plaintiff, and whether the money paid out is deductible by the defendant.

Legal Topics:

For related research and practice materials, see the following legal topics:

Real Property LawEnvironmental RegulationGeneral OverviewReal Property LawEnvironmental RegulationLiabilities
& RisksGeneral OverviewTax LawFederal Income Tax ComputationDeductions for Business ExpensesBusiness,
Entertainment & Trade Expenses (IRC secs. 162, 274)



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Chapter 25 ENVIRONMENTAL CONSIDERATIONS IN REAL ESTATE TRANSACTIONS

Part I. The Tax Background

33-25 Current Legal Forms for Real Estate § 25.02

§ 25.02 Tax and Environmental Issues Raised by Real Estate Transactions

Real estate practitioners should be aware that dispositions of real property (whether by sale, exchange or gift), or even leases of real property, may create both federal environmental law and federal tax law problems for their clients. The reason is that the Comprehensive Environmental Response, Compensation and Liability Act of 1980 ("CERCLA")ⁿ¹ imposes strict liability (i.e., liability regardless of fault) in cases involving the contamination of real property with hazardous substances. For example, CERCLA may, impose liability for clean-up costs not only upon the person who owned or operated a facility at the time hazardous substances were improperly disposed of there, but also, subject to certain defenses, upon the *current* owner or operator of the facility--even if the current owner or operator had no knowledge that the property was contaminated when the property was purchased.ⁿ² Thus, in a real estate sale transaction, either the seller (as the prior owner), the buyer (as the current owner), or both parties--or, in a lease transaction, the lessor or lessee, or both parties--may be held responsible for cleaning up the contaminated property.

In such cases, several tax questions may also arise. These include whether the responsible taxpayer(s) may currently deduct the clean-up costs as trade or business expenses. A further question arises as to whether those costs must be capitalized as improvements to the property, rather than currently deducted as trade or business expenses.

Various other tax questions may arise in transactions involving the disposition, lease or gift of real property. Some of these include:

- (1) the proper timing of the deduction of clean-up expenses;
- (2) the deductibility of losses resulting from owning contaminated real property;
- (3) the tax treatment of money damages won in a tort or contract action brought against the party responsible for the contamination; and
- (4) the deductibility of the money damages paid by the responsible party.

These and related tax questions are considered in the following sections of this Tax Background.

Planning Note

Anticipate tax issues. Real estate and environmental lawyers devote much thought and effort to limiting a real estate client's environmental liability and to negotiating the terms and conditions under which such liability should be shared among the various parties. However, historically, less consideration has been given to the tax ramifications of these negotiations and settlements. Because of the potentially significant tax issues involved, it is important to involve the tax practitioner in negotiations involving the sale, lease or gift of real property where one or more of the parties may be subject to environmental liability. It is also prudent to involve the tax practitioner in negotiations relating to settlement of enforcement actions. In recent years, the I.R.S. has been very aggressive with respect to requiring clean-up costs to be capitalized.

Legal Topics:

For related research and practice materials, see the following legal topics:

Environmental Law Hazardous Wastes & Toxic Substances CERCLA & Superfund Enforcement Cost Recovery Actions General Overview Environmental Law Hazardous Wastes & Toxic Substances CERCLA & Superfund Enforcement Cost Recovery Actions Potentially Responsible Parties General Overview Environmental Law Hazardous Wastes & Toxic Substances Cleanup Tax Law Federal Income Tax Computation Deductions for Business Expenses Business, Entertainment & Trade Expenses (IRC secs. 162, 274) Tax Law Federal Income Tax Computation Deductions for Losses General Overview

FOOTNOTES:

(n1)Footnote 1. 42 U.S.C. § 9601 *et seq.*

(n2)Footnote 2. 42 U.S.C. § 9607(a)(1), (2). *See also U.S. v. Monsanto Co.*, 858 F.2d 160, 167 & n. 11 (4th Cir. 1988) (citing numerous cases). Given the inherent unfairness of holding a landowner strictly liable, the United States Environmental Protective Agency has adopted several defenses known as the "landowner liability protection." Principally, these are known as the "innocent purchaser," "contiguous property owner" and the "bona fide prospective purchase" defenses.



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Chapter 25 ENVIRONMENTAL CONSIDERATIONS IN REAL ESTATE TRANSACTIONS

Part I. The Tax Background

33-25 Current Legal Forms for Real Estate § 25.03

§ 25.03 Payments Made to Clean Up Contaminated Real Property

Ordinary and necessary expenses incurred by business taxpayers to investigate or clean up contaminated real property may generate a current tax deduction in the amount of the expenditures under certain circumstances.ⁿ¹ In other situations, the expenditure must be capitalized--that is, added to the "basis" (or cost) of the property--and gradually written off over many years through depreciation deductions.ⁿ² Depreciation deductions, in turn, reduce the basis of the property for the purpose of determining taxable gain or loss when the property is later sold or otherwise disposed.ⁿ³

[1] Deductibility of Clean-up Expenses; Ordinary and Necessary Expense Requirement

The Internal Revenue Code allows a deduction for the "ordinary and necessary" expenses paid or incurred during the tax year in carrying on a trade or business.ⁿ¹ For this purpose, a necessary expense is one that is appropriate and helpful, and an ordinary expense is one that is not a capital or unusual expenditure.ⁿ² (The deduction of an ordinary and necessary trade or business expense is known as a "Section 162" deduction, a reference to the I.R.C. section permitting the deduction of such expenses.) Environmental clean-up costs should be deductible under Section 162 as long as the requirements discussed above are met (i.e., the costs are ordinary and necessary, and they are paid or incurred in carrying on a trade or business).ⁿ³

[a] Capitalized Environmental Cleanup Costs

The I.R.S. has been aggressively seeking to restrict the ability of a taxpayer to deduct remediation costs under Section 162. Generally the discussion as to whether an expense may be expensed or must be capitalized starts with Plainfield-Union Water Company.ⁿ⁴ After adding a new water source to its existing water distribution system, Plainfield-Union Water Company discovered that a substance had formed on the interior of its pipes which decreased its capacity. In order to prevent the further accumulation, the company cleaned the pipes and lined them with cement. The I.R.S. challenged the Plainfield-Union Water Company's deduction of the expenditures. The tax court held for the Plainfield-Union Water Company by finding the expenditures only restored the pipes to their original capacity and condition. It found that the expenditures did not increase the capacity of the pipes, the value of the pipes or the life of the pipes. Over the years, in connection with environmental remediation expenses, the courts followed the reasoning of the Plainfield-Union Water Company case. That is, if the expenditure did not significantly prolong the useful life of the property, the expense was deductible under Section 162. Unfortunately, the I.R.S. seems to continually argue that

remediation expenses be capitalized. Based upon the holding in *INDOPCO, Inc. v. Commissioner*,ⁿ⁵ the I.R.S. has ruled that costs incurred as part of a general rehabilitation of property with respect to environmental contaminants are not deductible but instead are amortizable over some unspecified time period.ⁿ⁶

Two years after the INDOPCO case, in a Revenue Ruling, the I.R.S. allowed a deduction for clean-up costs associated with the remediation of ground and water contamination. However, in the very same Ruling the I.R.S. required a taxpayer to capitalize the costs associated with the construction of a facility to treat the groundwater contamination.ⁿ⁷ Essentially the I.R.S. took the position that the facility had a useful life in excess of one year and that it enhanced the value of the property.

To further clarify the question, in the *United Dairy Farmer* case,ⁿ⁸ the I.R.S. successfully argued that the expenses associated with the remediation of condition which existed on the property when it was acquired must be amortized. The Court reasoned that the property was not being restored by the taxpayer and that the expenditures enhanced the property. In its holding the Court promulgated a three-part test to determine whether a remediation cost would be deductible as an expense or amortizable as a capital item. If the answer to any of the questions is no, then the cost must be capitalized. The questions are:

1. Did the taxpayer contaminate the property in the ordinary course of its business?
2. Did the taxpayer remediate the property to its original condition?
3. Did the clean-up allow the taxpayer to use the property in a new way?

The *United Dairy Farmers* case put additional restrictions on the deductibility of remediation costs as a necessary and ordinary business expense, but it does provide the practitioner with helpful guidance.

Unfortunately, the I.R.S. did not stop with the *United Dairy Farmers* case. In a recent Revenue Ruling, the I.R.S. applied the inventory capitalization rules of Section 263A in determining the deductibility of remediation costs.ⁿ⁹ Under the inventory capitalization rules of Section 263A, certain costs associated with the production of inventory must be capitalized. In the facts of the Revenue Ruling, the contamination was caused during the taxpayer's manufacturing process. Because the I.R.S. had never taken the position before, it (the I.R.S.) announced in the Ruling that it would not challenge any expense relating to the production of inventory prior to February 7, 2004. It should be expected that the I.R.S. will continue to be aggressive with respect to the capitalization of remediation costs.ⁿ¹⁰

The Tax Court has held that the costs of asbestos removal had to be capitalized when undertaken as part of a general plan of rehabilitation and renovation of a building.ⁿ¹¹ The I.R.S. issued a proposed revenue procedure for issuing letter rulings on the income tax treatment of environmental cleanup costs involving a single environmental cleanup transaction.ⁿ¹² Taxpayers may request a presubmission conference to discuss the procedures for submitting a letter ruling request.ⁿ¹³

Guidance has been provided for the tax treatment of environmental cleanup costs incurred in projects spanning several years.

[b] Election to Treat Environmental Capital Costs as Currently Deductible

For tax years after 2005, taxpayer will no longer be able to deduct "qualified environmental remediation expenditures." Between August 5, 1997 and December 31, 2005, *Section 198 of the I.R.C.* allowed a taxpayer to elect, to treat any "qualified environmental remediation expenditure" as currently deductible, instead of chargeable to a capital account.ⁿ¹⁴ The term "qualified environmental expenditure" included expenses paid or incurred in connection with abatement or control of hazardous substances at a qualified contaminated site other than for expenditures for

depreciable property. A "qualified contaminated site" was any area held for use in a trade or business or for the production of income at or on which there was been a release or threat of release of a hazardous substance, but excluding sites which were on or proposed for the national priorities list under Section 105(a)(8)(B) of CERCLA.ⁿ¹⁵ Also, the taxpayer must have obtained a statement from the appropriate state environmental agency confirming the presence or threat of hazardous substance contamination on the site.ⁿ¹⁶

The cleanup deduction applied to trade or business property, property held for the production of income, and property held as stock in trade or inventory. Section 1245 rules applied on sale of the property as to the expenditure. The election to expense cleanup costs did not apply to costs incurred in the demolition of structures.

[c] Currently Deductible Environmental Cleanup Costs

In situations in which environmental cleanup costs have been held to be currently deductible, the analysis has been very fact-specific, therefore no general guidelines can be readily discerned beyond the basic tests for deductibility. As is noted above, the I.R.S. continues to aggressively argue that remediation costs be capitalized and each expense must be reviewed in the light of *Rev. Rul. 2004-18*, as supplemented by Rev. Rule 2005-42, discussed above 25.03 [a].

Current deductions have been allowed for legal fees, engineering and other costs relating to contesting liability for environmental costs.ⁿ¹⁷

The I.R.S. has ruled that costs incurred to clean up land *contaminated by the taxpayer* and to treat groundwater that has been *contaminated by a business* may be deducted as ordinary and necessary business expenses.ⁿ¹⁸ In the ruling, soil remediation activities included excavating the contaminated soil, transporting the soil to a waste disposal facility and backfilling with uncontaminated soil. Later I.R.S. officials stated the ruling did not necessarily apply to costs to clean up land *acquired in contaminated condition*.ⁿ¹⁹

The cost of encapsulating exposed and damaged asbestos-containing pipe insulation in a warehouse has been deductible as an ordinary and necessary business expense.ⁿ²⁰

The I.R.S. has ruled that the costs incurred by a manufacturer to replace underground storage tanks containing waste byproducts (including the costs of removing, cleaning and disposing of the old tanks and acquiring and installing new tanks) are deductible as ordinary and necessary business expenses.ⁿ²¹

[d] Construction of Clean-up Facilities

If payments are used to construct a plant or other facility to clean up a contaminated site, the Service has argued that the cost of construction should be capitalized, rather than currently deducted as a Section 162 expense.ⁿ²² If the Service asserts that the cost of constructing the clean-up facility must be capitalized, an issue then arises as to the appropriate depreciation period over which the facility may be written off.

If the facility is considered Section 1250 real property, then the modified accelerated cost recovery system ("MACRS") would require depreciation over a period of 39 years.ⁿ²³ However, the party (or parties) paying for the construction of the facility might argue that the facility is Section 1245 property used as an "integral part" of a manufacturing process, such that it may have a shorter useful life. Section 1245(a)(3) includes, in its definition of Section 1245 property, personal property and "other property (not including a building or its structural components)" if such property is used as "an integral part of manufacturing, production, or extraction or of furnishing transportation, communications, electrical energy, gas, water, or sewage disposal services."

Arguably, a facility constructed to clean up contaminated water or other contaminants created by the manufacturing process could be characterized as an integral part of the manufacturing process or of the process of furnishing water or

disposal services to the manufacturing process. Thus, if the facility is characterized as Section 1245 property, the facility might be depreciated over a shorter period of time like tangible personal property. For example, the facility might arguably have a five-year recovery period under MACRS as some kinds of manufacturing equipment or as pollution control equipment certified by the state. On the other hand, it might be considered property with no specified class life, having a seven-year recovery period under MACRS.ⁿ²⁴

[2] Distinguishing Between Repairs and Capital Expenses

If the Service challenges the deductibility of environmental clean-up expenses under *I.R.C. Section 162* and requires the taxpayer to capitalize the expenses instead, the taxpayer should respond that the clean up merely constituted "repair" of the property, because the cost of repairs made by a trade or business are currently deductible under Section 162. The distinction between repairs and capital expenses has a long history. The often quoted *In re Illinois Merchants Trust Company* provides as follows:

In determining whether an expenditure is a capital one or is chargeable against operating income, it is necessary to bear in mind the purpose for which the expenditure was made. To repair is to restore to a sound state or to mend, while a replacement connotes a substitution. A repair is an expenditure for the purpose of keeping the property in an ordinarily efficient operating condition. It does not add to the value of the property, nor does it appreciably prolong its life. It merely keeps the property in an operating condition over its probable useful life for the uses for which it was acquired.ⁿ¹

Treasury Regulations provide some guidance for determining whether an expenditure is deductible as a repair, though the determination remains fact intensive. The Regulations provide that no deductions are allowed for amounts expended to "(1) add to the value, or substantially prolong the useful life, of property by the taxpayer, such as plant or equipment, or (2) adapt property to a new or different use."ⁿ² However, costs of incidental repairs made to keep equipment in "ordinarily efficient operating condition" not in the nature of replacement are deductible.ⁿ³

The test that seems to pose the most difficulty in arguing for a current deduction is the "increase in value" test, given that the clean-up costs may often lead to a significant increase in the market value of the property as compared to the value immediately prior to clean-up. However, as the Tax Court has stated, "the proper test is whether the expenditure materially enhances the value, use, life expectancy, strength, or capacity as compared with the status of the asset prior to the condition necessitating the expenditure."ⁿ⁴ Because the clean-up expenditures do not enhance the utility or value of the property as compared to its value before the contamination took place, this test would not appear to require capitalization.

[3] If Costs Are Capitalized, Allocation Issues May Be Raised

If the clean-up payments are required to be capitalized, and, as is often the case, the clean up enhances the value of more than one parcel of property, an allocation issue arises: how should the clean-up expenses be allocated among the various parcels?

Cost is most often allocated by relative fair market value. When a group of assets is purchased, cost is ordinarily allocated for basis purposes among the assets based on the relative fair market values of such assets, assuming the parties do not specify the allocation to specific assets.

However, there is no well-developed set of rules dealing with this precise issue of how an expense should be allocated among several parcels of land benefited by the expense. It seems clear that use of relative market values is not universally required, since there will always be cases where most or all of the benefit of a particular expense inures to only one parcel. Thus, one might expect the courts to allocate an expense in proportion to the increase in the fair market value of two or more parcels which are benefited by the expense.

Nevertheless, it is clear that the courts do not require such precision. For example, in *Sherwood Memorial Gardens, Inc. v. Commissioner*,ⁿ¹ a taxpayer who divided a cemetery into six areas and developed them sequentially was required to allocate landscaping and road costs *equally* to all plots in the cemetery, on the theory that the improvements enhanced the value of the entire cemetery, even though it was apparent that some of the improvements most directly enhanced the value of the particular portion of the cemetery which was currently being developed for sale.

A similar approach is suggested by cases dealing with the sale of easements. In these cases, the Service asserts the view that a portion of the basis of the entire property should be "equitably" apportioned to the easement, and the transaction should be treated as a currently taxable sale of part of the property.ⁿ² If the taxpayer establishes that it is not "practicable" to allocate basis equitably in this fashion, however, the taxpayer is allowed to simply reduce the basis of the remaining property and is not required to recognize gain.

For example, in *Foster v. Commissioner*,ⁿ³ a landowner sold a power line easement over a small portion of a parcel of land which the landowner intended to develop as a planned community. The landowner took the position that, because the construction of the high voltage transmission line reduced the value of his entire parcel, he was entitled to reduce the basis of the property as a whole by the amount paid for the easement. The Service contended that only the basis of that portion of the parcel most directly affected by the easement should be allocated to the easement, and therefore there was current taxable gain equal to the difference between this basis and the amount paid for the easement. The Tax Court found for the taxpayer, reasoning that even though the easement was physically confined to a small part of the parcel, the damage caused by the easement extended to the entire property. This result was reached notwithstanding the fact that the value of the parcel nearest the high voltage line was obviously affected most by those lines.

Similarly, in *Inaja Land Company v. Commissioner*,ⁿ⁴ a taxpayer sold an easement allowing the Los Angeles Department of Water and Power to release excess water into the taxpayer's stream, potentially flooding parts of the property. The Tax Court rejected the Service's argument that the transaction should be treated as a currently taxable sale. The court reasoned that since the extent of the flooding could not be predicted, it was impossible to determine what portion of the basis of the land should be allocated to the easement, even though it was clear that some of the land would be more affected than would other parts of the land. Apparently, the basis of the entire property was reduced.

From these cases, a general rule can be inferred: *once it is clear that all parts of a piece of land are materially affected by a particular problem (such as contamination with hazardous wastes), then the basis of the entire parcel is reduced by the cash received, or increased by the cost of fixing the problem, even though some portions of the land are more affected than others.*

[4] Timing of Deductions; Cash vs. Accrual Method Taxpayers

Assuming that clean-up expenses are deducted rather than capitalized, issues often arise regarding the appropriate timing of the deductions.

Cash method taxpayers (generally individual taxpayers) may claim a deduction for ordinary and necessary trade or business expenses, including environmental clean-ups costs that are remedial in nature (as opposed to clean-up costs that qualify the property for a new use or substantially extend its useful life, and, hence, must be capitalized), as the payments are made, but not before.ⁿ¹

Most trade or business taxpayers are likely to be on the accrual method, primarily because C corporations generally are prohibited from using the cash method.ⁿ² Unless the payment has to be capitalized, accrual method taxpayers claim deductions when:

- (1) all events have occurred which fix the fact of liability;

(2) the amount of the liability can be determined with reasonable accuracy (the "all events test"); and

(3) economic performance has occurred with respect to the item of deduction.ⁿ³

If the liability of a taxpayer requires a payment or series of payments to another person and arises out of any tort, breach of contract or violation of law, economic performance occurs as payment is made.ⁿ⁴ Thus, for example, if a defendant is sued for contaminating the plaintiff's land, economic performance occurs as the defendant actually pays the judgment or settlement to the plaintiff. Accordingly, an accrual method defendant may not claim an income tax deduction until it pays the judgment or settlement.

A special statutory exception to the accrual test allows deduction of a *contested* liability if the defendant transfers money or other property to the plaintiff, or at least beyond the defendant's control (as by paying the amount in dispute to an independent trustee or escrow agent). The defendant may claim a deduction for the taxable year of transfer if the following four conditions are met:

(1) the defendant contests an asserted liability;

(2) the defendant transfers money or other property to provide for satisfaction of the asserted liability;

(3) the contest with respect to the asserted liability exists after the time of the transfer; and

(4) but for the fact that the asserted liability is contested, a deduction would be allowed for the taxable year of the transfer or for an earlier taxable year.ⁿ⁵

Finally, it should be noted that the economic performance test is met, thus allowing a current deduction, where funds are irrevocably paid into a "designated settlement fund" for the purpose of satisfying a *tort* liability.ⁿ⁶ The term "designated settlement fund" means any fund--

(1) established pursuant to a court order which extinguishes completely the taxpayer's tort liability;

(2) administered by persons, a majority of whom are independent of the taxpayer;

(3) established for the principal purpose of resolving and satisfying present and future claims against the taxpayer arising out of personal injury, death or property damage;

(4) under the terms of which the taxpayer may not hold any beneficial interest in the income or corpus of the fund; and

(5) with respect to which an election is made by the taxpayer.ⁿ⁷

Planning Note

Capital improvement results in additional basis for taxpayer. Note that a capital improvement will result in additional basis for the taxpayer. If, and to the extent that, the additional basis is allocable to depreciable improvements (meaning improvements whose value will gradually be lost by reason of wear, tear, and obsolescence), the taxpayer will be entitled to claim cost recovery (i.e., depreciation) deductions under the Code. In general, improvements to land have a 39-year recovery period, and use the straight-line method of depreciation and a mid-month convention. ⁿ⁸ If, on the other hand, the improvements are not depreciable, the increase in basis will mean a

smaller taxable gain will be realized in the future when the taxpayer eventually sells or otherwise disposes of the property.

Legal Topics:

For related research and practice materials, see the following legal topics:

Environmental Law Hazardous Wastes & Toxic Substances CERCLA & Superfund Enforcement Cleanup Costs Tax Law Federal Income Tax Computation Deductions for Business Expenses Business, Entertainment & Trade Expenses (IRC secs. 162, 274) Tax Law Federal Income Tax Computation Deductions for Business Expenses Capital Expenditures (IRC secs. 263-263A)

FOOTNOTES:

(n1)Footnote 1. *See I.R.C. § 162(a); subsection [1][b], below.*

(n2)Footnote 2. *See I.R.C. §§ 162, 263; subsection [1][a], below.*

(n3)Footnote 3. *See I.R.C. §§ 1001, 1012-1016.*

(n4)Footnote 1. *I.R.C. § 162(a).*

(n5)Footnote 2. *Welch v. Helvering, 290 U.S. 111 (1933)* . In further explication of the current business deduction versus capitalization issue, the Service has ruled that the US Supreme Court's holding in *INDOPCO, Inc. v. Comm'r, 503 U.S. 79 (1992)* , does not require that incidental repairs generally deductible as business expenses must be capitalized, even though they may provide future benefits. INDOPCO clarifies that creation or enhancement of a separate or distinct asset is not a prerequisite to capitalization. The general distinction still applies, however, that a current business deduction is allowed for incidental repairs that keep property in ordinarily efficient operating condition and neither materially add to value nor prolong life, whereas repairs that are replacements and arrest deterioration or appreciably prolong life must be capitalized. *Rev. Rul. 94-12, 1994-8 I.R.B. 5* .

(n6)Footnote 3. *See Cinergy Corp. v. U.S., 55 Fed. Cl. 489 (2003)* .

(n7)Footnote 4. *39 TC 333 (1962)* .

(n8)Footnote 5. *503 U.S. 79 (1992)* .

(n9)Footnote 6. *Ltr. Rul. 9240004* , June 29, 1992 (costs of removing and replacing asbestos insulation); *Ltr. Rul. 9411002* , Nov. 19, 1993 (costs of removing asbestos from building converted to garage and office space; depreciable over 31.5 years under straight line method); *Ltr. Rul. 9315004* , Dec. 17, 1992 (costs of PCB cleanup). *See Dominion Resources, Inc. v. United States, 48 F. Supp.2d 527 (E.D. Va. 1999), aff'd, 219 F.3d 539 (4th Cir. 2000)* (environmental cleanup expenses were capital, not business, expenses; adapted property to new or different use).

(n10)Footnote 7. *Rev. Rul. 94-38*

(n11)Footnote 8. *267 F.3d J10*

(n12)Footnote 9. *Rev. Rul. 2004-18*

(n13)Footnote 10. For example, see *Rev. Rule 2005-42* wherein the I.R.S. supported *Rev. Rul. 2004-18* and discussed five different fact patterns involving a manufacturer's clean-up of environmental conditions. In each instance the I.R.S. concludes that capitalization of the clean-up costs are appropriate.

(n14)Footnote 11. *Norwest Corp. and Subsidiaries v. Comm'r, 108 T.C. 265 (1997)* . *See F.S.A. Ltr. Rul. 200035021, June 1, 2000* (asbestos removed had to be capitalized for electric utility).

(n15)Footnote 12.

Notice 97- 7, 1997-1 CB 359.

(n16)Footnote 13. Ann. 97-22, I.R.B. 1997-12, 47.

(n17)Footnote 14. *I.R.C. § 198*.

(n18)Footnote 15. *I.R.C. § 198(c)*.

(n19)Footnote 16. *Rev. Proc. 98-47*, I.R.B. 1998-37, 8.

(n20)Footnote 17. *See Ltr. Rul. 9315004*, Dec. 12, 1992.

(n21)Footnote 18. *Rev. Rul. 94-38, 1994-1 CB 35*. *See also Ltr. Rul. 9627002*, Jan. 17, 1996 (hazardous waste site assessment costs, legal fees and consulting fees deductible; transfer to subsidiary for \$ 1 disregarded so taxpayer considered to have acquired clean land); *F.S.A. Ltr. Rul. 9942025*, July 27, 1999 (environmental liabilities deductible even though costs were subject to indemnification under stock purchase agreement by other corporations); *Ltr. Rul. 9952075*, Aug. 28, 1999 (environmental cleanup costs for period when taxpayer owned property deductible; expenses for contamination before taxpayer acquired property had to be capitalized).

(n22)Footnote 19. *Ltr. Rul. 200108029*, Nov. 24, 2000.

(n23)Footnote 20. *Ltr. Rul. 9411002*, Nov. 19, 1993.

(n24)Footnote 21. *Rev. Rul. 98-25*, I.R.B. 1998-19, 4; *but see Rev. Rul. 2004-18*, I.R.B. 2004-8, 509 (clarifying that otherwise deductible costs may be included in inventory costs and subject to capitalization under *I.R.C. § 263A*).

(n25)Footnote 22. *Rev. Rul. 94-38, 1994-1 CB 35* (costs attributable to groundwater treatment facilities (wells, pipes, pumps and other equipment to extract, treat and monitor contaminated groundwater) were capital expenditures).

(n26)Footnote 23. *I.R.C. § 168(c)*.

(n27)Footnote 24. *I.R.C. § 168(e)(3)(C)*; *see Ltr. Rul. 200013038*, Dec. 27, 1999 (concluding that waste processing facility was classified as seven-year property and not a building).

(n28)Footnote 1. *4 B.T.A. 103, 106 (1926)*.

(n29)Footnote 2. *Treas. Reg. § 1.263(a)-1(b)*.

(n30)Footnote 3. *Treas. Reg. § 1.162-4*.

(n31)Footnote 4. *Oberman Mfg. Co. v. Comm'r*, 47 T.C. 471, 483 (1967).

(n32)Footnote 1. *42 T.C. 211, 232-34 (1964)*, *aff'd*, 350 F.2d 225 (7th Cir. 1965).

(n33)Footnote 2. *Treas. Reg. § 1.61-6(a)*.

(n34)Footnote 3. *80 T.C. 34 (1983)*, *aff'd in part and vacated in part*, 756 F.2d 1430 (9th Cir. 1985).

(n35)Footnote 4. *9 T.C. 727 (1947)*.

(n36)Footnote 1. *I.R.C. § 162*; *Treas. Reg. §§ 1.263(a)-(1), (2), 1.461-1(a)(1)*.

(n37)Footnote 2. *I.R.C. § 448.*

(n38)Footnote 3. *I.R.C. § 461(h); Treas. Reg. §§ 1.461-1(a)(2), 1.461-4.*

(n39)Footnote 4. *Treas. Reg. § 1.461-4(g)(2).*

(n40)Footnote 5. *I.R.C. § 461(f).*

(n41)Footnote 6. *I.R.C. § 468B(a).*

(n42)Footnote 7. *I.R.C. § 468B(d)(2).*

(n43)Footnote 8. *I.R.C. § 168(a), (b)(3), (c), (d)(2)(A). See also I.R.C. § 1016(a).*



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Chapter 25 ENVIRONMENTAL CONSIDERATIONS IN REAL ESTATE TRANSACTIONS

Part I. The Tax Background

33-25 Current Legal Forms for Real Estate § 25.04

§ 25.04 Deductibility of Losses Associated with Environmentally-Contaminated Property

As a general rule, losses incurred during the tax year in a trade or business or in a transaction entered into for profit may be deducted in that year if the losses are not compensated for by insurance or otherwise.ⁿ¹ For example, losses resulting from environmentally-contaminated real property may qualify for the loss deduction. The taxpayer, however, must show not only that an economic loss has occurred, but also that the taxpayer has realized a loss for federal income tax purposes. The loss must be evidenced by a closed or completed transaction that is fixed by an identifiable event that produced the loss during the tax year.ⁿ²

Typically, the identifiable event is a sale or exchange of the contaminated property at a price that is less than the adjusted basis of the property.ⁿ³ However, abandonment of a business or investment asset (such as a contaminated piece of real estate) also qualifies as an identifiable event and results in a deductible loss equal to the entire adjusted basis of the abandoned property.ⁿ⁴ Abandonment requires the taxpayer to show both intention to abandon the property and a voluntary relinquishment of possession or control, accompanied by some clear and unmistakable affirmative act indicating a purpose to repudiate ownership.ⁿ⁵

A loss deduction can also be taken when the property is accidentally destroyed or damaged (i.e., a "casualty" loss deduction).ⁿ⁶ In such case, the taxpayer must prove that the casualty was caused by a sudden, unexpected and unusual event that was "noticeable," rather than by an event that occurred slowly over a long period of time. For example, a casualty loss was denied where real property damage was caused by the gradual seepage of oil and saltwater into farmlands.ⁿ⁷

A casualty loss deduction can be taken even if the loss was caused by the taxpayer's own negligence. The deduction may be denied, however, if the damage resulted from the taxpayer's willful act or gross negligence.ⁿ⁸

The taxpayer has the burden of proving both the existence and amount of the casualty loss. Proving the amount of the loss may be difficult where the taxpayer is dealing with real property that has been contaminated. In such case, the Service indicates that the best evidence of the amount of the loss may be the cost of remediation of the property.ⁿ⁹

Payments by a taxpayer to a third person for damages to the latter's property are not ordinarily deductible as casualty

losses. If, however, a tenant-taxpayer is required to pay for the remediation of real property contaminated in an event that meets the Code definition of a "casualty" (i.e., sudden, unexpected, etc.), and the tenant-taxpayer does so in order to meet the lease obligation that the property be returned to the landlord in the same condition as existed at the beginning of the lease term, then the payment may qualify as a casualty loss.ⁿ¹⁰

The loss deduction is disallowed to the extent that the taxpayer recoups the loss by insurance or otherwise.ⁿ¹¹ Noting that *I.R.C. Section 165(a)* refers to losses that are "not compensated for," rather than to those that are "not covered," courts have allowed casualty deductions even where an insurance claim is waived.ⁿ¹² However, individuals who suffer casualty or theft losses that do *not* arise out of a business or investment transaction can claim a casualty loss only if they file a timely insurance claim with respect to the loss.ⁿ¹³

If a taxpayer is later reimbursed for a loss that was properly deducted, the tax liability for the loss year is not recomputed. Rather, the recovery must be included in gross income for the tax year when it is received.ⁿ¹⁴ The recovery may be excluded, however, to the extent the prior deduction produced no tax benefit.ⁿ¹⁵

Legal Topics:

For related research and practice materials, see the following legal topics:

Tax Law Federal Income Tax Computation Deductions for Losses General Overview Tax Law Federal Income Tax Computation Deductions for Losses General Losses (IRC sec. 165) General Overview Tax Law Federal Income Tax Computation Deductions for Losses General Losses (IRC sec. 165) Casualty Gains & Losses Tax Law Federal Income Tax Computation Deductions for Losses General Losses (IRC sec. 165) Capital Losses Tax Law Federal Taxpayer Groups Individuals Casualty & Theft Loss Deductions (IRC sec. 165) Amount of Deduction

FOOTNOTES:

(n1)Footnote 1. *I.R.C. § 165(a), (c)*.

(n2)Footnote 2. *Treas. Reg. § 1.165-1(b)*.

(n3)Footnote 3. *See Treas. Reg. § 1.165-1(c)*.

(n4)Footnote 4. *I.R.C. § 165; Treas. Reg. §§ 1.165-2, 1.167(a)-8(a)(4)*.

(n5)Footnote 5. *See, e.g., Middleton v. Comm'r*, 77 T.C. 310 (1981), *aff'd per curiam* 693 F.2d 124 (11th Cir. 1982); *A.J. Indus., Inc. v. U.S.*, 503 F.2d 660 (9th Cir. 1974); *Rhodes v. Comm'r*, 100 F.2d 966 (6th Cir. 1939).

(n6)Footnote 6. *Treas. Reg. § 1.165-1(d)(2)*.

(n7)Footnote 7. *Pugh v. Comm'r*, 17 B.T.A. 429 (1929), *aff'd*, 49 F.2d 76 (5th Cir. 1931). *See also Rev. Rul. 72, 1972-2 CB 101*.

(n8)Footnote 8. *Blackman v. Comm'r*, 88 T.C. 677 (1987); *White v. Comm'r*, 48 T.C. 430 (1967).

(n9)Footnote 9. *See Treas. Reg. § 1.165-7(a)(2)(ii); c.f. Inmar Assocs., Inc. v. Borough of Carlstadt*, 112 N.J. 593, 549 A.2d 38 (1988).

(n10)Footnote 10. *Rev. Rul. 73, 1973-1 CB 74*.

(n11)Footnote 11. *I.R.C. § 165(a)*.

(n12)Footnote 12. *See, e.g., Miller v. Comm'r*, T.C. Memo 1981-431, 42 T.C.M. 665, *aff'd*, 733 F.2d 399 (6th Cir. 1984); *Hills v. Comm'r*, 76 T.C. 484 (1981), *aff'd*, 691 F.2d 997 (11th Cir. 1982).

(n13)Footnote 13. *I.R.C. § 165(h)(4)(E); see I.R.C. § 165(c)(3).*

(n14)Footnote 14. *Treas. Reg. § 1.165-1(d)(2)(iii).*

(n15)Footnote 15. *See I.R.C. § 111.*



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Chapter 25 ENVIRONMENTAL CONSIDERATIONS IN REAL ESTATE TRANSACTIONS

Part I. The Tax Background

33-25 Current Legal Forms for Real Estate § 25.05

§ 25.05 Taxation of Tort, Contract and Other Recoveries

A purchaser of real property who discovers that the land is contaminated by hazardous substances may have a cause of action against the seller or other party responsible for the contamination. For example, if the contract of sale contained the seller's representation that the property being conveyed was free of environmental contamination, then the purchaser could sue for breach of contract and/or initiate a tort action for fraud. Similarly, if the contamination was caused by the release of hazardous substances on an adjacent piece of land, which seeped into the ground and gradually contaminated the soil and water beneath the plaintiff's property, then the plaintiff can sue the owner of the adjacent piece of land in tort for negligence, trespass to land, nuisance, etc.

These scenarios raise two major issues under federal tax law. First, what is the proper tax treatment of the money damages received by the aggrieved landowner? Are they taxable or excludable from gross income? Second, what is the proper tax treatment of the money paid out in the form of settlements and court-awarded judgments? Are these payments deductible by the defendant?

[1] Taxation of Recoveries

With respect to the taxability of tort, contract and other recoveries, there appear to be no rules unique to environmental litigation. The tax treatment of damage payments received generally depends on the nature of the underlying claim, regardless of whether the amount recovered is a court-awarded judgment or a settlement of a claim.ⁿ¹ Because multiple claims and legal theories are often involved in litigation, there may be some difficulty in determining exactly what a particular payment is for.

Recoveries received on account of sickness or personal injury and based on tort or tort-type rights, including amounts received in settlement of a suit, are generally exempt from taxation provided the sickness or injury is physical.ⁿ² In fact, the recovery is nontaxable even if the damages are for lost earnings.ⁿ³ Punitive damages, with one limited exception relating to wrongful death actions arising under particular circumstances, cannot be excluded from gross income.ⁿ⁴

The exclusion from gross income also covers workers' compensation payments made because of job-related sickness, injury or death.ⁿ⁵

Money damages received as compensation for harm to property are nontaxable if they do not exceed the taxpayer's adjusted basis in the property.ⁿ⁶ (The theory here is that the recovery merely replaces the taxpayer's own investment in the property. In other words, the taxpayer is restored to the condition the taxpayer was in before his property suffered harm.) Amounts in excess of the taxpayer's adjusted basis are generally taxable as capital gain.ⁿ⁷

Recoveries are also taxable to the extent that the taxpayer previously deducted property damage as a loss. The loss would be deductible in the year the damage occurred, if there was no reasonable prospect of recovery by insurance or otherwise.ⁿ⁸ If the taxpayer deducted the loss in a prior year and is reimbursed in the present year, the reimbursement is taxable only to the extent that the loss deduction reduced the prior year's federal income tax liability.ⁿ⁹

Recoveries for lost income, other than earnings lost as a result of sickness or injury (and therefore excludable from income),ⁿ¹⁰ are taxable. The rationale for this rule is that recoveries are usually taxable if they compensate for amounts that would have been taxable if received in the usual course of affairs.ⁿ¹¹

Other than in the very limited situation noted above, applicable to wrongful death recoveries, the courts have held that punitive damages are includible in gross income.ⁿ¹²

Legal fees paid to the taxpayer's attorney and withheld from the settlement check are includible in the taxpayer's income.ⁿ¹³

[2] Deduction for Payments

With respect to deductions for payments made in the form of judgments or settlements paid to plaintiffs, the payor generally is allowed to claim a deduction only if the event that caused the injury arose in a business or investment context, and if the underlying transaction was not a capital transaction (for instance, a payment made in connection with the construction of a building). This is known as the "origin of the claim" test. If the origin and nature of the litigation is personal (i.e., it did not arise in a business or investment context), the deduction will be disallowed as a personal expense under *I.R.C. Section 262*. Multiple origins, some business or investment related and others personal, are possible.ⁿ¹

In the usual case, judgments and settlements paid in environmental cases arise in the ordinary course of a trade or business and therefore are deductible as trade or business expenses under *I.R.C. Section 162*.ⁿ²

Similarly, legal fees and litigation expenses incurred in the defense of a lawsuit (or a settlement preceding a threatened lawsuit) are deductible if they arise in the regular course of a trade or business.ⁿ³

A special statutory provision permits a current deduction where funds are irrevocably paid into a "designated settlement fund" for the purpose of satisfying a tort liability.ⁿ⁴ A designated settlement fund is any fund established primarily for resolving and satisfying tort claims against the taxpayer (or a person related to the taxpayer) arising out of personal injury, death, or property damage, and created by court order to completely satisfy such liabilities. In order to qualify for a deduction, payments to such a fund must not give the taxpayer (or a related person) a beneficial interest in the corpus of the fund or in the income generated by it, and the fund must be administered by parties independent of the taxpayer. Payments to such a fund are deductible when paid to the fund.ⁿ⁵

Other questions may arise with respect to "structured settlements." A structured settlement is a settlement arrangement that pays a plaintiff money damages over a period of time. It is usually funded by the defendant through the purchase of an annuity contract issued by an insurance company. A special Code provision contains favorable rules concerning so-called "qualified assignments" of "qualified funding assets" tailored to personal injury actions.ⁿ⁶

A qualified assignment is any assignment of a duty to make periodic payments of damages for personal injury or sickness. Typically, the assignee (for instance, a life insurance company) agrees to make payments for the assignor (the defendant). The payments must be fixed and determinable as to amount and time of payment, and they must not be subject to acceleration, deferral, increase, or decrease by the recipient (that is, the plaintiff-tort victim). The assignee's obligations to the recipient must not be greater than that of the assignor, and the periodic payments must be excludable from the recipient's gross income as damages for personal injury or sickness.ⁿ⁷

A "qualified funding asset" is an annuity issued by a licensed insurance company or a United States government obligation that is bought within 60 days before or after a qualified assignee assumes an obligation to pay the assignor's periodic liabilities for damages for personal injury or sickness. There are further (modest) limitations.ⁿ⁸

The insurance company (or other assignee) can exclude from gross income the amount received from the assignor, up to the cost of the qualified funding asset.ⁿ⁹

[3] Taxation of Certain Settlement Funds

The Tax Increase Prevention and Reconciliation Act of 2005 has amended *Internal Revenue Code Section 468B (g)* to clarify the circumstances as to where funds placed in an escrow account for purposes of environmental clean-up are taxable. *Internal Revenue Code Section 461 (g)(2)* now provides that an escrow account, if established before December 21, 2010, shall be treated as beneficially owned by the United States, and therefore exempt from taxation if the escrow is:

- (I) established pursuant to a consent decree by a judge of the United States District Court;
- (II) is created for the receipt of certain settlement as directed by a government entity for the sole purpose of resolving or satisfying one or more claims under CERCLA;
- (III) the governmental entity has authority and control over the expenditure of funds and any earnings thereon shall inure to the benefit of the governmental entity; and
- (IV) upon termination of the account, the funds will be disbursed to the governmental entity.

Legal Topics:

For related research and practice materials, see the following legal topics:

Tax Law Federal Income Tax Computation Deductions for Business Expenses Business, Entertainment & Trade Expenses (IRC secs. 162, 274) Tax Law Federal Income Tax Computation Deductions for Business Expenses Capital Expenditures (IRC secs. 263-263A) Tax Law Federal Income Tax Computation Deductions for Losses General Losses (IRC sec. 165) General Overview Tax Law Federal Income Tax Computation Deductions for Losses General Losses (IRC sec. 165) Capital Losses Tax Law Federal Income Tax Computation Sales & Exchanges Basis (IRC secs. 1011-1017, 1019, 1021, 1023) Adjustments to Basis Tax Law Federal Income Tax Computation Tax Accounting General Overview Torts Damages General Overview

FOOTNOTES:

(n1)Footnote 1. See, e.g., *Estate of Carter v. Comm'r*, 35 T.C. 326 (1960) , *aff'd*, 298 F.2d 192 (8th Cir. 1962) , *cert. denied*, *Carter's Estate v. Comm'r*, 370 U.S. 910 (1962) .

(n2)Footnote 2. *I.R.C. § 104*.

(n3)Footnote 3. *Comm'r v. Schleier*, 515 U.S. 323 (1995) (finding damages attributable to lost wages were "on account of" personal injury).

(n4)Footnote 4. *See I.R.C. §§ 104(a)(2), 104(c).*

(n5)Footnote 5. *I.R.C. § 104(a)(1).*

(n6)Footnote 6. *See F.S.A. Ltr. Rul. 200228005*, Mar. 29, 2002 (proceeds from settlement of suit over environmental clean-up costs are a non-taxable return of capital to the extent they do not exceed the taxpayer's basis in the real estate).

(n7)Footnote 7. *See, e.g., Raytheon Prod. Corp. v. Comm'r*, 144 F.2d 110 (1st Cir. 1944), *cert. denied*, 323 U.S. 779 (1944); *Every v. United States*, 95-1 U.S.T.C. § 50,229 (9th Cir. 1995) (recovery from oil spill related to business loss, not compensation for personal injuries).

(n8)Footnote 8. *See I.R.C. § 165(a).*

(n9)Footnote 9. *Treas. Reg. § 1.165-1(d)(2)(iii); see I.R.C. § 111.*

(n10)Footnote 10. *I.R.C. § 104(a)(2).*

(n11)Footnote 11. *Raytheon Prod. Corp. v. Comm'r*, 144 F.2d 110 (1st Cir. 1944), *cert. denied*, 323 U.S. 779 (1944).

(n12)Footnote 12. *See Comm'r v. Miller*, 914 F.2d 586 (4th Cir. 1990); *Reese v. United States*, 24 F.3d 228 (Fed. Cir. 1994); *Hawkins v. United States*, 30 F.3d 1077 (9th Cir. 1994); *Moore v. Comm'r*, 53 F.3d 712 (5th Cir. 1995).

(n13)Footnote 13. *Comm'r v. Banks*, 125 S. Ct. 826 (2005) (litigant's income includes the portion of the recovery paid to the attorney as a contingent fee).

(n14)Footnote 1. *See I.R.C. §§ 262, 263, 1016; U.S. v. Hilton Hotels Corp.*, 397 U.S. 580 (1970); *McKeague v. U.S.*, 788 F.2d 755 (Fed. Cir. 1986).

(n15)Footnote 2. *I.R.C. § 162(a); Rev. Rul. 80, 1980-2 CB 57.*

(n16)Footnote 3. *Kornhauser v. U.S.*, 276 U.S. 145 (1928). *See also Treas. Reg. § 1.162-21(b)(2).*

(n17)Footnote 4. *I.R.C. § 468B; see also Treas. Reg. § 1.461-6(b).*

(n18)Footnote 5. *I.R.C. § 468B(d)(2), (3); Treas. Reg. § 1.468B-1; see I.R.C. § 267(b).*

(n19)Footnote 6. *I.R.C. § 130.*

(n20)Footnote 7. *I.R.C. § 130(c); see I.R.C. § 104(a)(2).*

(n21)Footnote 8. *I.R.C. § 130(d).*

(n22)Footnote 9. *I.R.C. § 130(a).*



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Chapter 25 ENVIRONMENTAL CONSIDERATIONS IN REAL ESTATE TRANSACTIONS

Part I. The Tax Background

33-25 Current Legal Forms for Real Estate §§ 25.06 through 25.16

[Reserved]

§§ 25.06 [Reserved]



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Chapter 25 ENVIRONMENTAL CONSIDERATIONS IN REAL ESTATE TRANSACTIONS

Part II. The Practice Background

33-25 Current Legal Forms for Real Estate § 25.17

§ 25.17 Introduction

[1] Scope of Practice Background

The term "environment" is quite broad and includes not only air, water, land and mold, but also natural vegetation, wildlife, wetlands and other natural resources. In virtually every real estate transaction, regardless of how small, the practitioner must address the environmental consideration.

As a result, there are very stringent laws now in force at all levels of government. Federal and state laws regulate the quality of air and water and control the creation, storage, and disposal of solid wastes, as well as toxic and other hazardous substances. Still other federal and state laws regulate the clean up of hazardous waste sites. Additionally, federal and state laws protect wildlife and promote conservation and recreational activities. Typically, local laws regulate the types of activities that may take place in environmentally-sensitive areas. Additionally, if a property contains a cleanup site, the federal or state government may require as a part of the cleanup process a deed restriction. Such a deed restriction is designed to prevent certain types of activities on a site (e.g., mining, residential living, etc.)

The conveyance of an interest in real property -- whether in fee, or by mortgage or lease -- involves many of these laws and a host of environmental considerations for each party. This Practice Background explores those considerations for seller and buyer, lender and borrower, landlord and tenant. This Practice Background identifies the potential environmental problems for each party, how those potential problems can be fully investigated, and, if problems are found to exist, how they can be resolved through the use of appropriate investigations, agreements and other measures.

This Practice Background will examine environmental problems affecting both commercial and residential real property. The problems in the commercial and residential fields will differ due to the variations in use of the properties. However, the attorney's goal will be the same -- to protect his client from liability for the huge expenses involved in repairing an environmental problem. Such problems may range from discovery of mold or termites to discovery of toxic wastes on the premises. Each has the potential of being costly to repair, and some problems have the ability to render the property virtually worthless unless repaired.

[2] Overview of Federal Statutory Law

Federal environmental law is comprised of many different statutes. The most notable are:

- (1) the Asbestos Hazard Emergency Response Act (*15 U.S.C. § 2641, et seq.*);
- (2) the Clean Air Act (*42 U.S.C. § 7401, et seq.*);
- (3) the Clean Water Act (*33 U.S.C. § 1251, et seq.*);
- (4) the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA") (*42 U.S.C. § 9601, et seq.*);
- (5) the Residential Lead Based Hazard Reduction Act (*42 U.S.C. § 4851, et seq.*);
- (6) the Federal Pollution Control Act (*33 U.S.C. § 1215, et seq.*);
- (7) the Resource Conservation and Recovery Act ("RCRA") (*42 U.S.C. § 6901, et seq.*); and
- (8) the Drinking Water Act (*42 U.S.C. 300, et seq.*)

Other miscellaneous environmental statutes are scattered throughout the United States Code and are located in such diverse laws as:

- (9) the Occupational Safety and Health Act (*29 U.S.C. §§ 655 and 657*);
- (10) the Hazardous Materials Transportation Act (*49 U.S.C. § 1802*); and
- (11) the Toxic Substances Control Act (*15 U.S.C. § 2601, et seq.*)

[a] Clean Air Act

The Clean Air Act was enacted in 1955. The principal purpose of the law is to protect and enhance the quality of the nation's air, so as to promote the public health and welfare and the productive capacity of the American people.ⁿ¹ It has been broadly construed.

The Clean Air Act contains standards for emissions, lists of prohibited activities, and enforcement procedures. The federal government may issue an order requiring a party to comply with the standards. If the party fails to do so, the government may commence a civil action seeking injunctive relief and assessing stiff fines and other penalties.ⁿ² Repeated violations of the Act may result in criminal prosecution.

Any attorney whose client intends to enter into a real estate transaction with the owner of a source of emissions should carefully review the Act and theregulations promulgated thereunder or consult with an expert before drafting a contract of sale, a mortgage and related loan documents, or a lease. It is extremely important for the attorney to be fully aware of the standards for emissions when drafting these documents so that his client does not unwittingly purchase or lease a facility that does not meet federal standards, and thereby subject itself to penalties under the Act. The magnitude of such penalties may adversely affect the ability of a borrower to repay a mortgage loan or meet other financial obligations. Typically, the Clean Air Act impacts a real estate transaction that involves an ongoing business. For example, in connection with the purchase of a business which owns real estate, the buyer must investigate the types of air emissions that the business produces and whether such emissions are covered by valid permits.

[b] Clean Water Act

The Clean Water Act was enacted in 1948. The purpose of the Act is to restore and maintain the chemical, physical, and biological integrity of the nation's waters.ⁿ³ The Act seeks to prevent the discharge of pollutants in toxic amounts from being released into the nation's waterways.

Whenever the federal government determines a violation of the Act has occurred, it may issue an order to the offender that it comply with the Act.ⁿ⁴ Alternatively, the government may commence a civil action seeking a temporary or permanent injunction.ⁿ⁵ In addition, the federal government may seek criminal penalties.ⁿ⁶

In any situation where a party is purchasing, leasing or mortgaging a facility that currently discharges any substances into a waterway (e.g., a sewage treatment plant, factory, public utility, etc.), the transaction should be made contingent upon the party's inspection of the records of the owner of the facility, and the records of the U.S. Environmental Protection Agency and the equivalent state environmental agency. In addition, the transaction should be made contingent upon a showing that the facility meets all federal and state standards and is not the subject or threatened subject of an order of compliance, a civil action, or a criminal action. These contingencies will protect the purchaser or tenant from obtaining a facility that may subject him to penalties. It will also protect a borrower's ability to repay a mortgage by eliminating the danger of his liability for costly financial penalties imposed pursuant to the Act, as well as the expense of required modifications of the facility. Similar to the Clean Air Act, the Clean Water Act involves the discharge of pollutants.

The Clean Water Act also regulates the discharge of dredge and filling of the waters of the United States (i.e., wetlands). This of course also includes building in an area designated as wetlands.ⁿ⁷ The Army Corp. of Engineers is the governmental agency primarily responsible for the regulation of wetlands and the issuance of permits which affect wetlands.

[c] Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA")

The Comprehensive Environmental Response, Compensation and Liability Act, commonly known as "CERCLA" or "Superfund" (42 U.S.C. § 9601, *et seq.*), was enacted in 1980. The purpose of CERCLA is to facilitate the clean up of hazardous waste sites and prevent the improper disposal or release of hazardous wastes in the future. This is the Act which most directly impacts real estate transactions. This Act makes the owner/operator of real estate strictly liable for contamination or pollution on real property owned by them, without regard as to whether such owner or operator caused or contributed to the pollution. However, CERCLA does now provide for three separate defenses to the strict liability provisions. These defenses are set forth in the All Appropriate Inquiries rules promulgated by the United States Environmental Protection Agency that go into effect on November 1, 2006. These defenses are known as the Innocent Purchaser, the Continuous Property Owner and the Bona Fide Prospective Purchaser defenses.ⁿ⁸

CERCLA establishes categories of private parties who have responsibility for certain expenses following the release of a hazardous substance into the environment (i.e., Potentially Responsible Parties).ⁿ⁹ These expenses include:

- (1) the cost of remediation;
- (2) any other related costs incurred in responding to the problem;
- (3) money damages for harm to the environment; and
- (4) the cost of studies necessary to gauge the impact of the situation on the public health.

CERCLA also authorizes the imposition of fines and punitive damages.

Those liable under the statute (i.e., Potential Responsible Parties) include:

- (1) the owner and/or operator of a vessel or a facility;
- (2) any person who, at the time of disposal of any hazardous substance, owned or operated any facility at which such hazardous substances were disposed of;
- (3) any person who, by contract, agreement, or otherwise, arranged for disposal or treatment, or arranged with a transporter for transport for disposal or treatment, of hazardous substances owned or possessed by such person, by any other party or entity, at any facility or incineration vessel owned or operated by another party or entity and containing such hazardous substances; and
- (4) any person who accepts or accepted any hazardous substances for transport to disposal or treatment facilities, incineration vessels or sites selected by such person, from which there is a release, or a threatened release that causes the incurrence of response costs, of a hazardous substance.

The United States Supreme Court has recently held that a private party that has not been pursued for cleanup costs by the government may not bring an action for contribution from other liable parties.¹⁰ Under this ruling, a landowner may not be as willing to undertake a private cleanup, and it may be in its best interests to force the government to take an active role. In the Cooper Industries case, the plaintiff did notify the state and federal governments of the hazardous conditions. Neither entity sought judicial or administrative remedies. The plaintiff remedied the hazardous condition anyway, and sought contribution as a potentially responsible party from its predecessor in title and a contributor to the conditions. The Court did require the contributor to pay for its share of the remediation costs.

One provision of CERCLA is of particular interest to anyone who may be involved in a transaction involving the conveyance of real estate:

No indemnification, hold harmless, or similar agreement or conveyance shall be effective to transfer from the owner or operator of any vessel or facility or from any person who may be liable for a release or threat of release under this section, to any other person the liability imposed under this section.

Thus, the boilerplate hold harmless provision that may be included in a lease, mortgage or sales agreement, *while effective as between the parties*, will not protect the beneficiary of such provision from the enforcement activities of the United States Government.

As referred to above, on November 1, 2005 the United States Environmental Protection Agency adopted the All Appropriate Inquires Rules which significantly expanded the circumstances under which a landowner may be able to avoid strict liability for clean-up costs under CERCLA. These rules go into effect on November 1, 2006.

- (1) A purchaser of property may be able to use the "innocent purchaser" defense if the purchaser did not know of the adverse environmental condition and had no reason to know. In order for the purchase to avail itself to the innocent purchaser defense, the purchaser must have undertaken a diligent environmental site assessment of the property (i.e., all appropriate inquiries). The criteria relating to the environmental site assessment are quite technical. Further, the environmental site assessment must be completed by an environmental professional. It is noteworthy that, if the purchaser created new contamination or contributed to the existing contamination, the purchaser may lose its status as an innocent purchaser.
- (2) An owner of property may be able to use the "contiguous property owner" defense if the property owner was unaware of the contamination and did not add new contamination or contribute to the contamination. Under this defense

the contamination must have originated off site. As with the innocent purchase defense, a party which has purchased property that has been contaminated by off site conditions must have made all appropriate inquiries prior to purchase the property.

(3) For the first time in the history of CERCLA, an owner can avoid the strict liability of CERCLA even if the buyer knowingly purchases contaminated property. Essentially, this defense limits the ability of the United States Environmental Protection Agency to pursue a purchaser for known conditions which existed on the property when the purchaser purchased it. The purchaser must demonstrate that the contamination occurred prior to the purchase by making all appropriate inquiries. Typically, this is known as a benchmark assessment. The purchaser identifies all pre-existing conditions and uses it as the benchmark going forward. The purchaser can lose these defenses if it does not undertake various on-going compliance and reporting requirements. The purchaser must also not contribute to the existing condition or create new conditions.

Finally, it should be noted that CERCLA specifically provides that it does not preclude a state from imposing additional liability or requirements with respect to the release of hazardous substances within that state. Thus, when drafting documents of conveyance, the attorney must review carefully the state environmental law as well as the federal environmental law.ⁿ¹¹

[d] Resource Conservation and Recovery Act ("RCRA")

The Resource Conservation and Recovery Act ("RCRA") (42 U.S.C. § 6901, *et seq.*) was enacted in 1965 and completely revised in 1976. Its primary objective is to protect the public health and the environment and to conserve valuable material and energy resources.ⁿ¹² It is often said that RCRA provides a "cradle to grave" approach for the treatment, storage and disposal of hazardous substances.ⁿ¹³

A practitioner must be familiar with the RCRA if he is representing a client who is buying, selling, leasing, or mortgaging any real property that:

- (1) has its own solid waste disposal system (including an incinerator);
- (2) handles toxic or hazardous substances;
- (3) contains underground storage tanks; or
- (4) produces, handles or otherwise has a nexus to medical wastes.

The RCRA provides standards for the use of hazardous substances and the disposal of hazardous waste and solid waste.ⁿ¹⁴ Where the federal government discovers evidence of an imminent and substantial danger to the environment or to the public health, it may bring suit against any person (including any past or present generator, past or present transporter, or past or present owner or operator of a treatment, storage, or disposal facility) who has contributed or who is contributing to such handling, storage, treatment, transportation or disposal to restrain such person from such handling, storage, treatment, transportation or disposal, to order such person to take such other action as may be necessary, or both.ⁿ¹⁵ RCRA also provides that a citizen may bring an action against any person that is in violation of RCRA.ⁿ¹⁶ This provision of the Act has received very little attention. However, the United States Supreme Court has limited the rights of private citizens to pursue potentially responsible parties under CERCLA.ⁿ¹⁷ As a result, the right of private citizens to bring actions under RCRA may have more significance in the future.

Failure to comply with an order imposed by the federal government may result in the imposition of steep fines.ⁿ¹⁸

The RCRA also contains standards to be used for constructing and monitoring underground storage tanks.ⁿ¹⁹ A party

who maintains underground storage tanks may be required to provide the government with evidence he is responsible for taking any necessary corrective action and for compensating others for injury to person and/or property caused by the leakage of his storage tank. In the event of leakage, the costs of remediation are recoverable from the owner or operator of the storage tank. Like CERCLA, the RCRA provides that indemnification and hold harmless clauses do not shield the beneficiaries of such clauses from government action:

No indemnification, hold harmless, or similar agreement or conveyance shall be effective to transfer from the owner or operator of an underground storage tank or from any person who may be liable for a release or threat of release under this subsection, to any other person the liability imposed under this subsection.

Thus, when purchasing or leasing a parcel of real property containing a storage tank, the purchaser or lessee should not rely upon the hold harmless provision inserted by the seller or lessor into the agreement. Instead, he should investigate carefully the condition of the tank. If its condition is not favorable, remedial action should be demanded prior to accepting transfer of title or taking possession.

A violation of the RCRA may result in the imposition of a civil fine. A "knowing" violation may result in criminal prosecution, a fine and imprisonment of up to five years.ⁿ²⁰

Again, the real estate attorney must take great care in advising a purchaser or lessee and in drafting documents. The attorney should order a thorough evaluation of the real property, its waste disposal systems, underground storage tanks, etc. An appropriate contingency contained in the lease or in the contract of sale will give the tenant or the purchaser time to fully investigate and the ability to terminate the agreement if the results of the investigation are not favorable. Alternatively, a modification of the sale contract or lease may be negotiated if remedial efforts can be economically made to repair the violation. For example, if the prospective purchaser agrees to undertake the remedial action, the purchase price may be lowered. Similarly, if the prospective lessee will repair the problem, the rental fee could be reduced by an amount equal to the cost of repair.

[e] Residential Lead Based Paint Hazard Reduction Act of 1992

In an effort to combat one of the leading children's ailments, Congress enacted the Residential Lead-Based Paint Hazard Reduction Act of 1992 (Lead Reduction Act).ⁿ²¹ The Lead Reduction Act was designed to: (a) develop a national strategy to build the infrastructure necessary to eliminate lead-based paint hazards in all housing as expeditiously as possible; (b) revise the national approach to the presence of lead-based paint in housing to implement, on a priority basis, a broad program to evaluate and reduce lead-based paint hazards in the nation's housing; (c) encourage action to prevent childhood lead poisoning by establishing a workable framework for lead-based paint hazard evaluation and reduction and by ending the current confusion over reasonable standards of care; (d) ensure that the existence of lead-based paint hazards is taken into account in the development of governmental housing policies and in the sale, rental, and renovation of homes and apartments; (e) mobilize national resources, through a partnership, at all levels of government and the private sector, to develop cost-effective methods for evaluating and reducing lead-based paint hazards; (f) reduce the threat of childhood lead poisoning in housing owned, assisted, or transferred by the federal government; and (g) educate the public concerning the hazards and sources of lead-based paint poisoning and the steps to reduce and eliminate such hazards.ⁿ²²

The Lead Reduction Act's primary impact on real estate transactions is its provisions relating to disclosure of information in connection with the transfer of property. While the impact of the Lead Reduction Act is on residential housing, it is also applicable to the sale or leasing of apartments. The Lead Reduction Act has almost no applicability to properties which do not contain any dwellings, or which were constructed after 1978.

The Lead Reduction Act requires sellers, landlords, and their brokers/managers to make various disclosures to buyers

and/or tenants when dealing with a dwelling constructed prior to 1978 (a "target property").ⁿ²³ In connection with the sale or lease of a property, sellers, landlords, landlord's brokers and their managers, are required to:

- (a) disclose to buyers and tenants all known information concerning lead-paint hazards at the property;
- (b) supply a disclosure form certifying compliance with the Lead Reduction Act identifying the information or certifying that the seller or landlord has no knowledge of lead-based paint in the target property, and maintain the certificate for a period of at least three years; and
- (c) include the following warning statement in any rental or sale agreement:

Every purchaser of any interest in residential real property on which a residential dwelling was built prior to 1978 is notified that such property may present exposure to lead from lead-based paint that may place young children at risk of developing lead poisoning. Lead poisoning in young children may produce permanent neurological damage, including learning disabilities, reduced intelligence quotient, behavioral problems, and impaired memory. Lead poisoning also poses a particular risk to pregnant women. The seller of any interest in residential real property is required to provide the buyer with any information on lead-based paint hazards from risk assessments or inspections in the seller's possession and notify the buyer of any known lead-based paint hazards. A risk assessment or inspection for possible lead-based paint hazards is recommended prior to purchase.

- (d) with respect to a sale, allow the buyer a ten day period to inspect the target property (unless the parties agree upon a different time) with the right to rescind the agreement if lead-based paint is discovered.ⁿ²⁴

It is noteworthy that the Lead Reduction Act does not place an obligation on a seller or landlord to inspect for lead-based paint. Furthermore, the regulations exempted the following property from the disclosure requirements:

- (a) housing designed specifically for the elderly or the disabled, as long as no child under the age of 6 years old is expected to live there;
- (b) leases of one hundred days or less, provided there is no right to extend the lease after the initial period;
- (c) foreclosure sales; and
- (d) dwellings that do not contain bedrooms (e.g., studios, dormitories).

Failure to comply with the Lead Reduction Act exposes the party to significant civil penalties.ⁿ²⁵ The civil liability under the Lead Reduction Act is significant in that it allows the purchaser or tenant to obtain an amount equal to three times the amount of damages incurred by the individual.ⁿ²⁶

[3] State Law Considerations

It is extremely important for the real estate practitioner to become thoroughly familiar with the environmental laws of the state within which the real property lies or to consult with an expert. Some states have laws that require a review of whether a proposed action--such as obtaining a building permit to enlarge one's home--will have an adverse environmental impact. Only after such a determination is made can a building permit be issued.

Such knowledge of the state's environmental law is vitally important in negotiating contingencies for obtaining necessary governmental approvals. The attorney must know which approvals are required and the length of time generally necessary to obtain such approvals. The seller or landlord will be insistent his property is not taken off the market for too long a period of time while the purchaser or tenant seeks the approvals. The purchaser or tenant, on the other hand, will be concerned he not lose the property due to the seller's or landlord's unwillingness to extend the time period for obtaining the approvals.

The approval processes often require the expenditure of significant sums of money for surveys, engineering studies, architects' fees, environmental studies, legal fees and filing fees. It is important that this investment not be jeopardized because clauses were drafted that provided insufficient time for the party seeking the government approvals.

For similar reasons, the real estate practitioner must become familiar with municipal laws as well. Many municipalities have designated areas as "historic" or "conservation" districts with special requirements for transfers of real property. These municipalities often require the approval of a special commission before alterations can be made to a structure, or before changes in the use of a building or land may occur. Thus, special contingencies will have to be drafted to protect the purchaser or tenant, making the transaction contingent upon receipt of the necessary approvals. The attorney must protect his client from purchasing or leasing a parcel of real property he later discovers cannot be used for the client's intended purpose.ⁿ¹

Legal Topics:

For related research and practice materials, see the following legal topics:

Environmental Law Air Quality General Overview Environmental Law Federal & State Interrelationships General Overview Environmental Law Federal & State Interrelationships Federal Preemption Environmental Law Hazardous Wastes & Toxic Substances Asbestos General Overview Environmental Law Hazardous Wastes & Toxic Substances CERCLA & Superfund General Overview Environmental Law Hazardous Wastes & Toxic Substances Resource Conservation & Recovery Act General Overview Real Property Law Environmental Regulation Indoor Air & Water Quality

FOOTNOTES:

(n1)Footnote 1. 42 U.S.C. § 7413(b)(1).

(n2)Footnote 2. 42 U.S.C. § 7413(a), (b).

(n3)Footnote 3. 33 U.S.C. § 1251(a).

(n4)Footnote 4. 33 U.S.C. § 1319(a)(1).

(n5)Footnote 5. 33 U.S.C. § 1319(b).

(n6)Footnote 6. 33 U.S.C. § 1319(c).

(n7)Footnote 7. 33 U.S.C. § 1251.

(n8)Footnote 8. 42 U.S.C. § 9607(b)(3) and CFR Part 312.

(n9)Footnote 9. 42 U.S.C. § 6901.

(n10)Footnote 10. *Cooper Industries, Inc. v. Aviall Services, Inc.* 543 US 157 (2004) .

(n11)Footnote 11. 40 CFR 312.

(n12)Footnote 12. 42 U.S.C. § 6901.

(n13)Footnote 13. *General Motors Corporation v. Environmental Protection Agency, et al.*, 363 F.3d 442 (2004) .

(n14)Footnote 14. 42 U.S.C. § 6924, *et seq.*

(n15)Footnote 15. 42 U.S.C.A. § 6928(a)(1).

(n16)Footnote 16. 42 U.S.C. § 6972.

(n17)Footnote 17. *Cooper Industries Inc. v. Aviall Services, Inc.*, 125 S.Ct. 577 (2004) .

(n18)Footnote 18. 42 U.S.C. § 6928(a)(3).

(n19)Footnote 19. 42 U.S.C. § 6991.

(n20)Footnote 20. 42 U.S.C. § 6928(d).

(n21)Footnote 21. 42 U.S.C. § 4851, *et seq.*

(n22)Footnote 22. 42 U.S.C. § 4851(a).

(n23)Footnote 23. 42 U.S.C. § 4852(d).

(n24)Footnote 24. 42 U.S.C. § 4852d(a)(a)(c).

(n25)Footnote 25. 42 U.S.C. § 4852d(b)(1), (3).

(n26)Footnote 26. 42 U.S.C. § 4852d(b)(3).

(n27)Footnote 1. 42 U.S.C. § 9601.



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Chapter 25 ENVIRONMENTAL CONSIDERATIONS IN REAL ESTATE TRANSACTIONS

Part II. The Practice Background

33-25 Current Legal Forms for Real Estate § 25.18

§ 25.18 Sales of Real Estate

[1] Introduction

This section will review the environmental concerns of purchaser and seller in both commercial and residential real estate sales.

[2] Legal Theory

[a] Common Law

At common law, upon the seller's delivery of a deed, the contract of sale merged with the deed. The grantee of a deed had to rely primarily on the covenants in his deed for recourse against the seller. Obviously, most deed covenants will not be of any assistance to a purchaser who has accepted title to a parcel of real property that contains an environmental problem. Thus, in most sales, the common law doctrine of *caveat emptor* ("let the buyer beware") applies. However, there are some exceptions to the doctrine of *caveat emptor*. For example, a purchaser of property which contained a latent defect may bring a suit sounding in fraud upon the seller. Generally, a latent defect is a condition which is known by the seller, or should have been known by the seller, which was not disclosed to the buyer and which could not have been disclosed by a reasonable or visual inspection. The most practical application of the theory of latent defects is in a residential setting. As a result, the seller of real property is under no common law duty to reveal an environmental hazard to a prospective purchaser when the parties deal with each other at arm's length. Thus, the purchaser should take steps to actively investigate all potential environmental hazards before accepting title to the property.

[b] Representations by Seller to Buyer

In the course of a purchase, a seller may not make an affirmative misrepresentation regarding the environmental condition of his property or take action to conceal the condition of the property. Such a misrepresentation or action may provide the purchaser with a cause of action against the seller. Additionally, it is very common practice for a purchaser agreement to contain specific written representations and warranties regarding the condition or use of the property. These provisions should specifically survive the closing in order to not be merged into the deed and extinguish. Also, it would not be unusual for a seller to place into a purchase agreement a disclaimer regarding the condition or use of the

property. Such a disclaimer would normally be accompanied by an acknowledgment by the buyer that buyer has had an opportunity to examine the property and the buyer is satisfied with its condition.

[c] Statutory Right of Recourse

The Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA") provides that "[a]ny person may seek contribution from any other person who is liable ..." under the statute.ⁿ¹ The state common law doctrine of *caveat emptor* is preempted by CERCLA. In other words, the Congressional goal of responding to environmental hazards takes precedence over state law.ⁿ² Thus, a purchaser who discovers an environmental hazard created by the seller may seek recovery or contribution from predecessors in title if such recovery or contribution is in connection with a judicial or administrative proceeding being pursued by a lawful governmental entity.ⁿ³

However, it is possible, by contract, for the purchaser to knowingly waive a potential claim against predecessors in title. Clearly, such a waiver or release would normally be heavily negotiated and would be reflected by a reduction in the sale price. Such a waiver or release should not be granted without a thorough environmental assessment by the purchaser.

[d] Practical Difficulties of Recourse

There are many practical difficulties in obtaining recourse against a seller. The first is locating the responsible party. The prior owner, if an individual, may have relocated to another state or country. Even if he can be found, suits across state or national boundaries are often difficult and costly to pursue.

If the seller is a corporation or other business entity, it may have dissolved, reorganized, or merged with another entity. The successors-in-interest will certainly attempt to avoid liability on the grounds of lack of knowledge and/or lack of privity. Even if the responsible party has been located, such party may not have sufficient assets to satisfy the claim.

The purchaser of real property must also accept the fact that litigation is often a lengthy and extremely costly process. In addition, court dockets are so clogged with civil actions that it often takes years to obtain a trial date.

Finally, cases involving claims of misrepresentation will be presented to jurors who will judge the credibility of parties and their witnesses. Jury verdicts are seldom predictable, and case outcomes are often less than just. Thus, attorneys should take every precaution possible to see that their clients are never forced into the position of having to seek recourse through litigation.

[3] Potential Concerns of Purchaser

When considering whether to purchase a parcel of real property, the purchaser should be aware of a great number of environmental matters that might affect the property. These issues should be identified for the purchaser by his attorney. Appropriate contingencies to protect the purchaser should be considered and when appropriate, carefully drafted, and included in the sale-purchase agreement. These contingencies should allow the purchaser to terminate the agreement if a serious environmental problem is discovered.

As a practical matter, many such agreements are terminated and then later revived by means of a modification agreement. The modification agreement generally provides for either a price reduction or other consideration, with the purchaser assuming responsibility for making repairs or for solving the problem. Alternatively, the seller may assume responsibility for repairs or problem solving in exchange for the parties retaining the original purchase price.

The areas of environmental concern to a purchaser can be divided into two general areas: (1) conditions relating to the improvement; and (2) conditions relating to the land. Generally speaking, the internal concerns are easier to detect and less costly to repair than the external concerns.

All concerns should be given serious consideration and appropriate inspections should be undertaken. Otherwise, the purchaser may inadvertently accept title to an environmental disaster area that, at best, will not be worth the consideration paid, and, at worst, may cost the purchaser a fortune to bring into compliance with federal, state and local laws.

[a] Interior Environmental Problems

Improvement concerns generally involve the habitability or operation of the structure. This Practice Background identifies six areas of nearly universal concern. Each poses a potentially serious hazard or liability to the owner. Each can be detected by means of a simple inspection or test.

There may be additional interior environmental concerns that are unique to certain regions of the country. These should also be identified by the attorney for the purchaser's benefit. Specific contingencies should be inserted into the sale-purchase agreement to cover these regional concerns. These contingencies may contain some of the same features set forth in the contingencies discussed below.

[i] Radon

Radon is a radioactive gas that rises naturally from the earth. It is colorless and odorless and produced by the decay of Uranium-238. When inhaled in sufficient quantities over an extended period of time, radon gas can cause serious and permanent lung damage.

Radon appears to be dangerous only in enclosed structures because it remains within the structure without a radon mitigating system. Typically, the greatest risk is a basement where the air is not circulated and doors are not regularly opened. Outdoors it dissipates rapidly, apparently causing no harm. The amount of radon gas that seeps into a particular structure will vary depending on soil type and how the structure is built.

There are three sources of radon:

- (1) radon that seeps in from the soil or rocks under or around the structure;
- (2) radon contained in the water used in the structure (usually, the water is drawn from a well on the premises); and
- (3) radon contained in building materials used in the structure.

The first type is most common.

Most general inspectors will exclude the existence of radon from their inspection. Testing for radon can be accomplished by using the services of a company that performs such tests, or by obtaining a "do-it-yourself" test kit from a store. Depending on the size of the structure, more than one test may be required. Although there is an element of risk involved by being exposed to radon at any level, it is generally believed that only concentrated exposure for a long period of time is harmful.

Remedial action requires some modification of the structure or the addition of a radon mitigating system. There are a variety of methods that may be employed. These include, for example, preventing the entry of radon through the use of insulation in the basement or ground floor of the building, or increasing the ventilation in the basement so as to dissipate the radon. Generally, all of the methods require the services of a contractor who has the necessary knowledge, skill, and experience in controlling radon. After completion of the structural modification, further testing should be performed to

insure the remedial efforts were successful.

The lawyer representing the purchaser should include in the sale-purchase agreement a contingency for radon testing. The contingency should be drafted so as to allow the purchaser to terminate the agreement if radon is discovered in quantities above a particular level. Although it would not be unusual for a seller to negotiate the right to remedy the condition.

The parties should make certain they allow sufficient time for the purchaser to enlist the services of a professional to perform the analysis. To that end, the parties may wish to contact a testing company and obtain an estimate of the time required for the analysis.

The parties should also consider the *type* of test that is acceptable to them. Although test kits may be purchased in stores, some knowledge and experience is required in determining the number of tests necessary to obtain a truly accurate reading and in collecting air samples. An error with respect to either of these factors may produce an erroneous test result. A far more reliable result is usually obtained from a professional.

The parties must also consider who will pay the cost of the tests. Currently, radon testing is not mandatory in most states, but some lending institutions require radon testing as a prerequisite for obtaining a mortgage loan.

If radon is discovered and it is determined to be above an acceptable level, and the purchaser remains interested in buying the property, the parties may negotiate a modification to the contract. The modification agreement typically provides that, prior to closing, the seller will perform the necessary remedial work on the property. In such case, the purchase price remains unchanged. Alternatively, the modification agreement might provide that, in exchange for a reduction in the purchase price, the purchaser will perform the remedial work. The modification agreement should specify:

- (1) the precise remedial work to be performed (e.g., installing a new floor or insulation in the basement, so as to block the seepage of radon gas installing an exhaust fan to circulate the air);
- (2) the company that will perform the work;
- (3) the party that will pay the cost of having the work performed; and
- (4) what will occur if the work fails to solve the radon problem.

If radon is discovered above the acceptable level and purchaser does *not* wish to proceed with the purchase, then a timely notice to terminate the sale-purchase agreement must be delivered in compliance with the customary terms of the contingency.

[ii] Asbestos

Asbestos is a natural substance that can be manufactured into fibers. Asbestos fibers are carcinogenic. Asbestos was used extensively in the past to insulate property and to retard the spread of fire. It is frequently found covering furnaces, wrapped around pipes, and contained in floor and ceiling tiles. Exposure to friable asbestos fibers poses a serious risk to public health and safety because they are ingested into the body.

The risk from asbestos exposure may be reduced by "encapsulation" (i.e., containment) or removal of the asbestos. Handling of asbestos is dangerous and requires extensive training and special equipment. In some states, asbestos abatement projects may only be performed by licensed or certified asbestos handlers. Generally, licensing and certification requirements include both classroom and on-site training. Handling of asbestos requires the use of special

gear, including respirators and protective clothing. Handlers must perform personal decontamination (cleansing) procedures at the end of each work shift to reduce their own risk of exposure. Clearly, asbestos encapsulation or removal projects are not to be performed by the homeowner, but only by experienced professionals.

Areas in which an asbestos encapsulation or removal project occurs should be sealed off from the remainder of the structure. Airtight doors and windows and special ventilation systems are needed to prevent the asbestos fibers from entering other areas of the building.

Encapsulation involves the spray coating of the asbestos-containing material with multiple layers of a substance that will seal the asbestos fibers and thereby prevent their introduction into the air. A number of commercial products are available to encapsulate the asbestos. The product chosen will vary depending on whether the asbestos-containing material was primarily used for insulation or to retard the spread of fire.

Whether the asbestos is encapsulated or removed, air sampling is used to determine the success of the abatement project. Before commencing the abatement project, air samples are taken at the work site, at different locations within the entire structure, and outside the structure. After completion of the project, samples are again taken in the same areas. The project is considered successful if the post-abatement levels of asbestos fibers in the air samples are reduced to either the normal level outside the structure, to state standards, or to industry-recommended levels.

Interior air samples at the work site are taken after first agitating the air with fans or blowers. This will insure that asbestos fibers which may have settled on surfaces will be included in the sampling.

The best approach to discovery of an abatement asbestos is to hire a professional. Most home inspectors have sufficient knowledge of asbestos to discover its presence. In representing a purchaser, a lawyer should carefully review and become familiar with the particular statutes and regulations concerning asbestos in the state where the real property is located. This will assist the lawyer in negotiating and drafting contingencies for asbestos inspections. If asbestos is found, the purchaser should be free to terminate the sale-purchase agreement.

Such familiarity with state law will also be necessary in drafting a modification agreement if the parties still desire to consummate the sale-purchase transaction despite the presence of asbestos on the property. The modification agreement should specify:

- (1) the identity of the company that will perform the asbestos abatement;
- (2) the identity of the laboratory that will perform the pre- and post-abatement analysis of air samples;
- (3) the nature of the abatement process to be used (encapsulation vs. removal of the asbestos);
- (4) the types of tests that will be performed before and after the abatement to ascertain whether the process has been successful;
- (5) the acceptable level of post-abatement asbestos fibers still in the air;
- (6) the identity of the party who will pay for the abatement and the testing;
- (7) the identity of the party who will assume the risk of loss during the abatement procedures;
- (8) whether additional fire and liability insurance should be obtained to cover the abatement period, and, if so, the identity of the party who will pay for it;

(9) the deadline for completion of the abatement process and post-abatement testing.

Finally, if the asbestos was used as insulation, the pipes, furnace or boiler will need to be reinsulated. If the asbestos was located in floor or ceiling tiles, these will need to be replaced. The modification agreement should specify who is responsible for this cost.

[iii] Urea Formaldehyde Insulation

During the energy crisis of the 1970s, homeowners were encouraged by federal energy policy and the availability of tax credits to save energy by reducing heat loss from homes that were not properly insulated. One method of insulating involved injecting insulating substances between the exterior siding of the building and its interior walls. This was accomplished by drilling holes into the exterior siding and blowing in a foam that hardened and formed insulation. The holes in the exterior walls were then plugged.

Much of the foam insulation contained urea formaldehyde. Later, many occupants of such structures suffered health problems resulting from exposure to the substance. Removal of such insulation is difficult; it usually requires the removal of the exterior siding in order to cut out the hardened insulation. Clearly, this involves considerable time and expense.

It may be appropriate for an attorney to consider including in the sale-purchase agreement a contingency for a urea formaldehyde insulation inspection. If such insulation is found, the purchaser should be free to terminate the contract. Alternatively, if the parties so desire, a modification of the contract can be negotiated to provide for either removal of the insulation by the seller, or a reduction in the purchase price if the purchaser is willing to handle the removal.

The modification agreement should set forth:

- (1) the name of the contractor who will remove the urea formaldehyde insulation;
- (2) an explanation of how the removal will be performed;
- (3) the type of replacement insulation to be installed, and by whom;
- (4) the name of the party who will pay for removal of the old insulation and for the installation of the new insulation; and
- (5) the deadline for completion of the work.

[iv] Mold or Other Growths

The growth of fungus or other organisms can create two dangers: it can cause structural damage, and it can pose a health risk.

Many of the load-bearing supports for a structure are located in the basement or sub-basement of the structure. Usually, the basement or sub-basement is below ground level. Thus, the area may be damp due to the seepage of rainwater through walls and floors, because of condensation from pipes, or due to a variety of other reasons. Dampness in these areas promotes the growth of mold, fungus, mildew and other organisms. These organisms gradually destroy the organic matter on which they grow. If the organic matter on which they grow happens to be a wooden beam or a wooden joist, the integrity of the entire structure may be jeopardized.

In addition, many fungi produce spores. The spores of some fungi are harmful to humans and may produce a variety of

ailments, ranging from athlete's foot to respiratory problems. Fungi can be eliminated by the use of certain fungicides. However, some of these chemicals are harmful to humans if they are sprayed in an enclosed area and inhaled. Mold would also be covered by a general inspection and a good inspector should discover the existence of mold. Recently, plaintiff homeowners have received some significant awards for damages relating to mold infestation.ⁿ⁴ While not necessarily applicable to a residential real estate transaction, at least one case has held an employer liable for injuries she suffered for exposure to mold in the workplace.ⁿ⁵ In a somewhat contrary decision, another court has held that an employee's compensation for damages resulting from exposure to toxic mold in the workplace was limited by the state's worker's compensation law.ⁿ⁶ Additionally, at least one court has held that the manufacturing of a prefabricated home is liable for mold related injuries which were caused by faulty windows.ⁿ⁷

Accordingly, a lawyer representing a purchaser may wish to include a contingency in the sale-purchase contract for an inspection for fungal or other growths. If growths are discovered, further analysis should be made to determine whether the growths are harmful and whether any structural damage has already occurred. If damage has occurred, the contingency should allow the purchaser to terminate the agreement.

If removal of the growths and repair of the damage is economically feasible, the parties may wish to negotiate a modification of the contract. A modification agreement should specify:

- (1) the party who will assume the cost of removing the growths and repairing the damage;
- (2) the contractor who will perform the removal of the growths and the contractor who will perform the needed repairs;
- (3) an explanation of the nature and scope of all work to be performed;
- (4) any restrictions the parties may wish to impose on the use of chemicals in removing the growths; and
- (5) the deadline for completion of the work.

[v] Insect Damage

Insect damage to a structure is often found in its wooden members, including beams, joists, etc. Usually, the damage begins wherever untreated wood makes contact with the ground. The two major sources of insect damage to structures are carpenter ants and termites. Many other wood-boring insects, such as powder post beetles, also cause extensive damage.

Carpenter ants damage wood by chewing tunnels in which they establish nesting areas. Carpenter ants reproduce rapidly and have a fairly long life span. Serious damage to the structure can be done very quickly. Signs of infestation include small piles of sawdust-like matter on floors. The integrity of the structure can be seriously jeopardized by the tunnelling activities. By contrast, termites damage wood by actually eating it.

In representing a purchaser, an attorney should insist on including a contingency in the sale-purchase agreement for a wood-boring insect inspection. The cost of such an inspection is quite small and is usually included in a general inspection. If insects and/or evidence of damage to the property is discovered, the agreement should permit the purchaser to terminate the transaction. Alternatively, the agreement may be modified and the costs of extermination and/or repair may be assumed by one or both parties. When extermination is performed, caution should be exercised with regard to the type of chemicals used, since some are known to be harmful to human beings and pets. In addition, the attorney should carefully review the terms of the guarantee provided by the exterminator, since some guarantees extend only for a very brief duration. The new owner should have inspections performed annually thereafter to guard against renewed infestation.

[vi] Lead-Based Paint

Lead is a non-organic element that is not water soluble and can accumulate in the body. Excessive levels of lead can cause serious harm to children, including damage to the brain and central nervous system, mental retardation, impaired hearing, epileptic seizures and death.

The major sources of lead poisoning are lead-based paint and lead-contaminated dust and soils. The dust is inhaled, and small children and pets may eat paint chips containing lead.

The use of lead in interior paint was banned by the Consumer Product Safety Commission in 1978.⁸ However, a danger still exists in those homes because lead-based paint, like all paint, eventually cracks and chips off from interior surfaces; and it also gradually washes off exterior surfaces, thereby contaminating soil and ground water.

The purchaser of any structure built prior to 1978 should request a lead paint contingency be inserted into the sale-purchase agreement. This is especially important if the structure is a residence and the purchaser has small children. Even a commercial property should be tested since the normal aging process of paint will produce lead dust, which is even more dangerous than paint chips. (Lead dust is more dangerous because everyone, young and old alike, breathes it in, whereas paint chips only pose a danger to small children and pets, who frequently eat the chips.) The contingency should allow the purchaser to terminate the agreement if lead-based paint is found within the premises, or if the soil around the premises is found to be contaminated with lead.

The contingency should specify the method of analysis to be used. The purchaser should require the inspector to take multiple paint samples from each room of the structure, as well as soil samples from outdoors. The purchaser should also require that dust samples be analyzed from each room.

If the structure and/or soil surrounding the structure contains lead, the purchaser should be able to terminate the agreement. Alternatively, the purchaser and seller may modify the sale-purchase agreement to provide for abatement of the problem.

Interior lead-based paint may be abated by replacement, encapsulation, or removal. Replacement requires the removal of any object that contains lead paint on its surface. This might include pieces of molding, trim, windows, doors or other surfaces. If the paint is on walls, removal may not be practical, unless the walls themselves are in very poor condition and should be replaced. Replacement has the advantage of being a permanent solution to the problem, since it completely eliminates the lead from the structure. It also facilitates the overall upgrading or remodeling of the premises. On the other hand, replacement is obviously much more costly than the other alternatives.

Encapsulation is accomplished by covering the lead-painted surface with an encapsulating material, such as gypsum wall board. Encapsulation is *not* accomplished by simply repainting over the lead-based paint, or by covering the lead-based paint with wallpaper. (Both wallpaper and the new coat of paint will, in time, wear away, leaving the lead-based paint exposed.) Encapsulation cannot be considered a permanent solution to the problem since it requires periodic inspections to ascertain whether the encapsulation is truly sealing up the lead-based paint.

Removal is accomplished by stripping, sanding or burning off the lead paint and is considered a permanent remedy. Removal is very dangerous due to the high levels of leaded dust produced during the removal process. Accordingly, protective garments and respirators should be used during removal. (Lead-contaminated soil must also be removed; in addition, the source of contamination should be found and eliminated as well.)

If lead is discovered on the premises but the parties agree to abate the problem and proceed with the transaction, a modification agreement should be prepared. The modification agreement should specify:

- (1) the name of the party who will assume the cost of remediation;
- (2) the designation of the contractor who will perform the remedial work;
- (3) the method of remediation--removal, replacement or encapsulation of the lead-based paint;
- (4) the testing method to be used following the remediation to ascertain whether the measures have proven successful; and
- (5) the deadline for completion of the work.

[b] Exterior Environmental Problems

Problems arise when the land being purchased possesses some adverse environmental condition. That adverse condition may take the form of several hundred drums of toxic chemicals located on or beneath the surface of the land being purchased, or it can manifest itself in the form of ground water contaminated by drums of hazardous chemicals that are stored and leaking on an adjoining plot of land. In short, the possibilities are endless.

This adverse condition might make the property unsuitable for the use intended by the purchaser. Even worse, it might cost the unwary purchaser a substantial sum of money to remedy the problem. The cost of cleaning up a Superfund site may run into the billions. Frequently, the purchaser-owner may not have a choice as to whether to correct the problem: federal, state, or local laws may require correction. Failure to correct the problem may result in a governmental agency taking remedial action itself and then requiring reimbursement from the purchaser/owner. Furthermore, heavy penalties, including criminal penalties, may be levied for failure to correct.

The attorney must protect the purchaser by negotiating and carefully drafting contractual provisions that will allow the purchaser to terminate the agreement if any serious exterior environmental problem is discovered. For that reason, the attorney must be thoroughly familiar with the environmental laws that may affect the specific site under consideration. Additionally, there may be "site-specific" laws and regulations that the attorney should also review and consider. For example, if the property to be sold is a petroleum product tank farm, a review of federal and state laws specific to petroleum product storage must be conducted. Site-specific contingencies must also be negotiated and drafted for inclusion in the sale-purchase agreement.

[i] Toxic Wastes

The Comprehensive Environmental Response, Compensation and Liability Act (i.e., "CERCLA," also known as "Superfund") requires that toxic and other hazardous substances must be disposed of in a carefully regulated manner. In addition, all illegal dump sites must be cleaned up to meet very exacting federal standards.⁹ CERCLA imposes strict liability (i.e., liability without regard to fault) for clean up costs on "owners" and "operators" of sites.¹⁰ This includes current owners who were not owners of the subject property at the time the contamination occurred. Thus, before a prospective purchaser becomes an owner, that prospective purchaser must be certain the site has not been used in a manner that would trigger the applicability of CERCLA and require a clean up. In addition to the vast costs associated with complying with CERCLA requirements, the purchaser would be exposing himself, his family, employees and customers to the health hazards posed by whatever substances may be found on the site.

Under CERCLA, the U.S. Environmental Protection Agency was directed to develop a list of sites whose prompt clean up would be a national priority. Sites are set forth on the National Priorities List ("NPL") in order of the seriousness of the environmental threat posed by each. A potential purchaser should review the NPL carefully before purchasing property. In addition, a potential purchaser should review the NPL for contaminated sites located *near* the property he wishes to purchase. Hazardous wastes can be carried by ground and surface water or by wind. A nearby NPL site may

thus affect the subject property. Generally speaking, the majority of the investigation would be undertaken by an environmental consultant. However, as a minimum, the purchaser should make a physical inspection of the property for any obvious defects to the land or adverse environmental conditions.

The offer to purchase should condition the obligation to complete the purchase on the results of an environmental site assessment indicating there is no evidence of hazardous substances in the air, soil, or water located on, beneath or above the premises to be purchased. The contingency may specify:

- (1) the party responsible for the cost of conducting the environmental site assessment;
- (2) the company that will perform the assessment;
- (3) the time frame within which the assessment is to be performed and results delivered;
- (4) the standards to be used to determine whether the contingency has been satisfied; and
- (5) procedures for termination of the agreement.

The seller may want to insert a provision into the sale-purchase agreement imposing a duty of confidentiality on the purchaser regarding the results of the environmental site assessment.

The contingencies are generally structured so that the protections they provide are waived if the agreement is not terminated by the purchaser within a specific time period. Accordingly, before the contingencies are drafted, the purchaser should have a very clear idea of the amount of time necessary to obtain the results of an environmental site assessment.

If evidence of a potential hazard is located, the purchaser should have the right to terminate the agreement. Alternatively, the parties may agree to an extension of the contingency period so that further testing, including water and soil sampling, may be performed in order to determine whether a true hazard does, in fact, exist, the extent of the hazard, and methods and costs of remediation. In extending the contingency period, the parties need to agree on which party will bear the cost of further testing. It should be noted that sampling and analysis can prove very costly.

Once the extra testing is complete, the purchaser must decide whether the severity of the problem is such that he wishes to terminate the agreement. In making that decision, the purchaser must balance the value of the property against the potential cost of remediation.

If, after the testing or investigation, the purchaser still desires to purchase the property, the parties may enter into a modification agreement, whereby the remediation is performed and costs are allocated between the parties.

The party performing the remediation (typically, the seller) should expect to be required to indemnify and hold the other party harmless for any injury to person or property that occurs during remediation, or that arises as a result of incomplete or faulty remediation. Of course, such a hold harmless agreement is *not* effective under CERCLA to prevent the federal government from pursuing a statutorily-liable party, such as the purchaser. Thus, the beneficiary of the hold harmless agreement (typically, the purchaser) may want to assure his ability to recover from the party granting the indemnification through a letter of credit, a bond, an insurance policy, or other collateral, for a reasonable number of years following the purchase of the property.

It is extremely important for the purchaser to take each of the investigatory steps outlined above. Beyond avoiding the purchase of contaminated property, these steps will aid the purchaser in establishing a statutory defense against an action by the United States EPA to recover remediation costs if the property is found to be contaminated after the

purchase is concluded (i.e., "innocent purchaser defense").

Like the purchaser of commercial property, the residential purchaser must be concerned about toxic wastes. Vacant land on which homes are now built may once have been used for agricultural purposes. Such land may be contaminated by agricultural chemicals used as pesticides or fertilizers. Residential sites may also be contaminated by chemical seepage into ground water occurring at other sites.

The purchaser of a residential site should take precautions with respect to toxic wastes similar to those taken by the purchaser of a commercial site. An environmental site assessment should be performed. For most homeowners, their residence is the costliest investment they will ever make. Thus, a purchaser should protect that investment with appropriate testing.

In some states, purchasers of newly-constructed residences may have some protection available to them through the implied warranty of habitability granted by the seller to the purchaser. The implied warranty arises out of the disparity in knowledge and bargaining power between a purchaser and a builder.

[ii] Hazardous Substances and Solid Waste

Regulation of hazardous substances and the disposal of solid waste has been a national priority since the enactment of the Resource Conservation and Recovery Act of 1976 ("RCRA").¹¹ The focus of the RCRA is on the management of hazardous substances and solid waste. RCRA was enacted to provide a cradle to grave approach to hazardous substances and wastes.

RCRA's primary impact on real estate transactions is on the operating and closing of facilities, including manufacturing facilities that handle or dispose of hazardous and solid waste. RCRA is not focused on the remediation of environmental conditions as much as it is on the handling (including transportation and storage) and disposal of wastes. For example, RCRA regulates disposal facilities and prohibits open dumping.

A purchaser should have the property inspected (in many cases, it would also involve the purchase of a related business) to determine if the property contains any storage facilities (including underground storage tanks) or disposal facilities. If the answer is yes, then the purchaser should undertake an investigation as to whether facilities are in compliance with applicable laws or pose any potential environmental hazard. Further, if the business uses "hazardous substances" the purchaser should determine whether the use, storage, disposal and transportation of such substances is being undertaken in accordance with all applicable laws.

For the purchaser of commercial property, the ability to handle hazardous substances and effectively dispose of solid waste may be critical. Such commercial purchasers might include walk-in medical clinics (which, of course, produce medical wastes), tire stores, automobile dealers or automobile repair shops (which use large amounts of grease and petroleum products), supermarkets (empty crates, cartons, food that has perished on the shelf), as well as manufacturers and other industrial businesses.

Any commercial purchaser who has these concerns should have his attorney negotiate and draft a contingency for insertion into the sale-purchase agreement. The contingency should give the purchaser an ample period of time within which to investigate the use and handling of hazardous substances and the disposal of hazardous waste.

If the purchaser is not satisfied, the contingency should allow the purchaser to terminate the sale-purchase agreement.

[iii] Waste Water, Including Storm Water, Leaching Water and Sewage

A purchaser of real estate, whether residential or commercial, should be concerned with three specific types of waste

water. These are:

- (1) sewage;
- (2) storm water; and
- (3) leaching water.

Sewage is produced at any structure that is used by humans and is equipped with lavatory facilities. It can be discharged into a public facility (i.e., a large sewage treatment plant) or into a private facility. The most common form of private facility is a residential septic system, better known as a "septic tank.." Many commercial structures have their own private sewage treatment plants.

A potential purchaser of a structure containing a *private* sewage disposal facility must investigate the system carefully. He should request the following information:

- (1) When was the system constructed?
- (2) What is the design of the system?
- (3) How does it operate?
- (4) Who installed it?
- (5) Where is the system located?
- (6) Are copies of the construction plans available?
- (7) Was a permit obtained when the system was constructed?
- (8) Has the permit been renewed, if required?
- (9) Is the permit currently effective?
- (10) What is the capacity of the system?
- (11) What is the purchaser's expected output of raw sewage?
- (12) What servicing or improvements have been made to the system, if any?
- (13) How effectively is the system handling its current load?
- (14) Does the system comply with current law and regulations?
- (15) Would a change in the use of the property require the system to be upgraded or expanded?
- (16) What would the cost of such an upgrade or expansion be?

To fully investigate the issues above, the potential purchaser will usually need to engage the assistance of an expert in the field.

In negotiating the sale-purchase agreement, the attorney for the purchaser will want to include one or more contingencies regarding the septic system. The residential purchaser will want the contingency to provide that he may cancel the agreement if the capacity of the system is not sufficient for his anticipated needs (i.e., capacity of the system), or if the system is not currently functioning properly. During the winter when the ground is frozen, it may be necessary to engage heavy equipment to break the ground and expose the system for testing; thus, a longer period should be allowed at this time of the year. If either condition is not met, the purchaser may still wish to purchase the property. The parties may opt to modify the agreement by lowering the purchase price and having the purchaser make repairs. Alternatively, the seller can make the changes and thereby still receive the full purchase price.

Commercial and residential purchasers who purchase vacant land with the intention of building a structure will need a contingency for obtaining governmental approval for the installation of a private system, or a contingency for obtaining government approval for attaching new buildings to the existing public system. The latter contingency should contain a limit on how much the purchaser is willing to spend, since the public system may require the purchaser to pay for tie-in fees, mains and lines to connect the system to his structure. In the case of a commercial operation, the purchaser may be asked to construct a pumping station in addition to the mains and lines.

Storm water presents different problems for residential and commercial purchasers. The residential purchaser is most concerned about whether the system for the diversion of run-off water is adequate. Often, flooding problems can be solved with the use of a basement pumping device known as a "sump pump." Typically, the purchaser's inspector will investigate the possibility of water in the basement.

The commercial purchaser should be concerned over whether storm water will pick up and carry off pollutants from the subject premises and onto the property of neighbors. Federal law generally prohibits the discharge of pollutants by storm water.

Leaching water may also pose a concern for residential and commercial purchasers. Leaching water is water that percolates up from below the surface of the earth to above the ground, where it collects in pools. Two examples are natural springs and aquifers. Leaching water, like storm water, can carry pollutants from one site to another.

Commercial purchasers should make themselves aware of nearby National Priority List ("NPL") sites, garbage dumps or other sources of pollution that may be carried by leaching water onto the subject premises. It is also prudent for purchasers to interview the neighbors. In any event, a contingency for an environmental site assessment should be included in the sale-purchase agreement.

[iv] Water Sources (Well or Municipal) and Bacterial and Chemical Contamination

The availability of pure water is a major concern for both residential and commercial purchasers of real estate. The issues relating to water generally concern quality and quantity.

Water quality, to some extent, is a matter of individual taste. Standards have been developed in many parts of the country, setting acceptable levels for many elements and minerals, including iron, sulphur, sodium and potassium. The purchaser should consult the local health department or a water company to obtain specific standards for the applicable area.

In addition to elements and minerals, the purchaser needs to be concerned about the presence of pollutants, such as toxic or hazardous substances. Obviously, the water should not contain any amount of such substances. The purchaser should also be concerned about the presence of various gases in the water supply, such as methane, which can be explosive.

Finally, purchasers should be concerned about the presence of bacteria. Coliform bacteria may appear in the water if the

water system becomes contaminated by a leaking septic tank. Another common form of bacteria found in water systems is E. Coli. Both types can cause illness, but can be destroyed by simply chlorinating the water adequately.

A potential purchaser may want to insert a contingency for water quality into the sale-purchase agreement. This may be most important when a purchaser is moving to a new region of the country or is purchasing a residence that uses a well. The contingency should specify that the water must be free of any toxic or hazardous substances, as well as methane and other dangerous gases. Finally, the contingency should specify that bacteria levels must meet standards set by the state or local health department. The contingency should further specify:

- (1) the time period within which the testing shall be conducted;
- (2) the company that will perform the testing; and
- (3) the party who will be responsible for the cost of testing.

If any of the conditions fail, the purchaser must be entitled to terminate the agreement.

It should be emphasized that certain problems with the water system, such as the presence of bacteria, methane, or certain minerals, usually can be alleviated with fairly simple remedial efforts. These efforts would include chlorination, venting of the water system (to remove methane gas) and water conditioning (to remove excess minerals). Thus, the purchaser and seller may wish to modify the agreement to provide for the cost of installing a system that will eliminate the problem.

Concerns regarding quantity of water differ for residential and commercial purchasers. Residential purchasers generally require volumes of water sufficient for bathing, operation of toilets, washing dishes, washing clothing and yard use. If the water system is a public system, owned either by the municipality or a public utility, quantity of water is usually not an issue, except in times of drought when use restrictions may be established.

If the water source is a well located on the property, quantity is an important issue. Often, lenders who finance residential purchases require proof that a well will produce a specific amount of water for a specific period of time. Prior to negotiating the sale-purchase agreement, counsel must determine whether the lender will set that requirement. In any event, a contingency for a water quantity test should be part of any sale-purchase agreement for a residence served by a well. The contingency should specify:

- (1) the number of gallons per minute that must be produced during a stated period of time;
- (2) the company that will perform the test;
- (3) the party who will pay for the test; and
- (4) the time period in which the testing must be completed.

If the well does not produce the specified output and the purchaser remains interested in buying the property, there are two possible options. A new well may be dug or "hydrofracturing" may be attempted. The parties should agree on who will dig the well, assume the cost, and bear any risk of loss. The purchaser should retain his ability to terminate the agreement if the new well does not produce the desired quantity of water.

Hydrofracturing involves various techniques to break up veins of water located beneath the ground in order to make them accessible to the existing well. Hydrofracturing techniques range from pumping inert gas into the ground to using explosives, depending on the particular geology of the site.

Obviously, hydrofracturing can pose a great risk of injury to person and property if not carefully performed. Thus, if the parties decide to use this method, great care should be exercised in drafting the agreement with the hydrofracturer. The parties should make certain the hydrofracturer possesses adequate insurance to cover an injury to person or property during the procedure. In addition, the allocation of risk of injury should be set forth clearly in the agreement. The qualifications of the person performing the hydrofracturing should be carefully examined. And, of course, the purchaser should retain his ability to terminate the agreement if the water flow is not increased to the specified level following the hydrofracturing.

The commercial purchaser may have very different water quantity requirements than the seller. Some commercial purchasers may need only enough water for sinks and toilets. Other commercial purchasers may need vast quantities of water for industrial purposes, such as for cooling machinery, or for use in the production process, such as a paper mill. The water used in production may not have to be of drinkable quality. Thus, the purchaser may be able to use water from rivers, streams or ponds located on or near the premises. In such case, the purchaser will want to insert a contingency into the sale-purchase agreement that allows him to terminate the agreement if there is insufficient water available to meet his production needs, or if he cannot obtain necessary permits to use such water.

In areas served by a municipal or other public water system, commercial or industrial purchasers will need to obtain the permission of the water authority to use the quantities of water required for production purposes. Such a purchaser would want to negotiate a contingency that allows him to terminate the agreement if he is unable to obtain a commitment from the water authority to supply the volume of water required and within a specified range of prices.

[v] Wetlands

The term "wetlands" commonly includes bogs, swamps, marshes, bayous, estuaries and other areas inundated with water either permanently, periodically, or seasonally. The Army Corp. of Engineers defines wetlands as those areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances support, a prevalence of vegetation typically adopted for life in saturated soil.¹² Wetlands serve many beneficial functions. They store flood waters and release them slowly, reducing the damage neighboring lands would otherwise suffer from floods. Wetlands also help purify water by trapping pollutants found in the water. In addition, microorganisms indigenous to wetlands convert certain pollutants to less harmful matter. Wetlands are also the habitat of many types of migratory waterfowl and game, including many endangered species. Finally, wetlands are important to sport and commercial fishing and hunting.

The laws regulating use of wetlands are primarily federal. The primary federal laws controlling use and development of wetlands are:

- (1) the Clean Water Act (33 U.S.C. § 1251, *et seq.*);
- (2) the Migratory Bird Conservation Act (16 U.S.C. § 715, *et seq.*);
- (3) the Emergency Wetlands Resources Act (16 U.S.C. § 3901, *et seq.*);
- (4) the Food Security Act (16 U.S.C. § 3801, *et seq.*); and
- (5) the Coastal Zone Management Act (16 U.S.C. § 1451, *et seq.*).

The U.S. Environmental Protection Agency (EPA) has primary authority for enforcement of laws pertaining to wetlands. However, the EPA has delegated much of this authority to the U.S. Army Corps of Engineers. Other federal agencies also are involved in the regulation of wetlands, such as the Fish and Wildlife Service, the Soil Conservation

Service, and the National Marine Fisheries Service.

If an area meets the definition of a wetland, it cannot be filled without a permit from the U.S. Army Corps of Engineers. If an area subject to regulation is filled without a required permit, the EPA has jurisdiction to seek redress in the courts. Additionally, there are criminal sanctions which may be used against persons which violate.ⁿ¹³ Also, private citizens may also bring an action against a violator, unless the Army Corp. of Engineers or USEPA have already instituted an action, in which case there can be no private action.ⁿ¹⁴

Several issues are raised for potential purchasers of both residential and commercial properties. First, is the property under consideration part of a wetland, or does it include a wetland? This should be determined by making a complete visual inspection of the entire parcel. In addition, a review of U.S. Geological Service maps for the area should be made. (Remember that, by definition, a wetland need not be flooded during the entire year. Hence, an inspection of the property during the hot summer months, when the land is dry, will not reveal the land's status as a wetland.) Also, a review of any aerial photographs of the site should be made. A review of the Army Corps of Engineers' records should also be conducted. Finally, if the purchaser intends to construct additional improvements on the property (i.e., a development), the purchaser should hire an engineer to conduct a comprehensive wetlands survey. It is noteworthy that wetlands do not need to be adjacent to open waters,ⁿ¹⁵ nor do they need to have a significant hydrological or economical connection.ⁿ¹⁶

If the subject premises does include a wetland, the purchaser will need to determine whether he can use the property for his intended purposes without disturbing or interfering with the wetland. The purchaser should consult with his architect or other design professional in making this determination.

The purchaser should also investigate whether the subject property *formerly* contained a wetland. This can be done by reviewing maps and aerial photographs. The purchaser might also wish to consult with neighboring land owners who might have some recollection about the prior condition of the subject property. A comprehensive study will address this issue.

The purchaser will, of course, want to include a contingency in the sale-purchase agreement that will allow him to terminate the agreement if he is unable to obtain a necessary permit. The purchaser is strongly urged to include, in the contingency, a provision that the permit must be free of conditions. Alternatively, the purchaser may wish to specify those conditions he is willing to accept and those which are unacceptable to him. In addition, the purchaser may wish to set a limit on the dollar amount he is willing to pay to fulfill conditions attached to the permit. If the cost of meeting the conditions exceeds the purchaser's limit, and the purchaser still wishes to buy the property, the parties may modify the agreement, with the seller defraying some or all of the additional costs.

The contingency should also allow sufficient time for preparation and submission of the permit application, as well as for review by the appropriate governmental agencies. The purchaser may wish to contact the agencies to obtain some indication of the length of time required to complete the approval process.

The purchaser may also wish to obtain representations from the seller with regard to any former wetlands sites on the subject premises. Those representations might include the following:

- (1) all prior dredging or filling was performed with a valid permit, or a permit was not required;
- (2) the seller complied with all terms and conditions of the permit;
- (3) the seller has complied, at all times, with all laws, regulations and policies of applicable federal, state and local governments regarding wetlands;

(4) there are no proceedings, lawsuits or other challenges to seller's actions that are currently threatened or pending;

(5) the seller knows of no facts that would give rise to such proceedings, lawsuits or other challenges;

(6) there are no conditions on the property that constitute a violation of any federal, state or local law, regulation or policy.

The purchaser may also wish to obtain an indemnification agreement from the seller. This agreement would require the seller to hold the purchaser harmless for any loss the purchaser might suffer as a result of a breach of any of the above representations, or as a result of any actions which the seller took in connection with the wetlands. Both the representations and the indemnification/hold harmless provisions should state that they do not merge into the deed, and that they are intended to survive the transfer of title and the delivery of the deed to the purchaser.

[vi] Conservation Districts

Conservation districts have been created on the federal, state and local levels to protect certain undeveloped areas that are deemed to be valuable public assets. In some states, these assets may even receive constitutional protection.

Federal conservation districts include national parks, seashores and other designated environmentally-sensitive areas. State districts often include forest preserves, state parks, lake regions, and other areas deemed worthy of protection. Local districts include smaller areas that might encompass a breeding habitat for a rare species of animal or other environmentally-sensitive region.

Each of these conservation districts is overseen by an arm of the government. For instance, federal districts are overseen by the National Park Service, which is part of the U.S. Department of the Interior. Equivalent state agencies monitor state conservation districts. Local districts are largely policed by boards composed of unpaid political appointees, similar to zoning or historic preservation boards. These agencies and boards share a common mission: to protect a valuable natural asset by regulating the development of real property in and around the asset.

The amount of authority exercised by the agencies and boards varies; however, many have the power to take part in making decisions regarding the subdivision of property, construction of buildings, etc. In short, they function as quasi-zoning boards. Indeed, where a conservation district encompasses territory in more than one municipality, the board or agency can be thought of as a "super" zoning board.

In passing judgment on a proposed real estate project, the board or agency determines both the project's environmental impact on the conservation district and the economic benefits to members of the community living in or near the district. The creation of a large, reasonably-priced residential condominium development, for example, might be economically beneficial to those who are searching for needed, affordable housing. On the other hand, such a development might have a detrimental effect on the conservation district because of overuse of recreational facilities, increased sewage, air and noise pollution from extra traffic, etc.

There are checks on the power of government agencies and boards that police conservation districts. First, they cannot exceed the scope of their statutory authority, for example, they cannot regulate the use and development of real property located *outside* the district. Second, as with any governmental agency or board, their decisions must not be arbitrary and capricious. There must be a rational basis, supported by evidence, for their decisions. Finally, the agency or board may not enforce a decision that is so onerous it amounts to a taking of private property in violation of the United States Constitution.

A potential purchaser of real property should determine whether the subject property is located within or immediately

adjacent to a conservation district. This will require a review of federal, state and local designations of conservation districts. The purchaser should never rely on the oral assurances of the seller or of any government official; however, a written statement from the head of an agency or board that the subject property does not fall within a conservation district should be sufficient to protect the purchaser.

If the subject property lies within a conservation district or is subject to the district's jurisdiction because the property is immediately adjacent to the district, a thorough review of all applicable federal, state and local laws will be required to determine whether the intended use of the property, or a modification of the property desired by the purchaser, will require the approval of the board or agency.

If it appears approval will be necessary, the purchaser's attorney may find it helpful to review previous, similar applications to the board or agency in order to get a sense of whether the approval will likely be denied, or whether it will likely be granted subject to certain conditions. The purchaser should seriously consider which of these conditions he would be willing to accept.

After completing this review, the purchaser may negotiate a contingency, thereby making the purchase contingent upon his receiving approval of the board or agency for the intended use of the subject property and/or the intended modifications. The purchaser should specify which conditions to approval, if any, he is willing to accept. If any other conditions are attached to the approval, or if the approval is not received, the purchaser must be entitled to terminate the agreement. The parties should allow a sufficient amount of time for the purchaser to prepare and submit the application and to appear before the agency or board as often as is customary. If the purchaser ultimately receives approval, but it is subject to conditions that are not acceptable due to their high cost, the parties may consider a modification agreement, whereby the seller would assist in defraying some or all of the cost of meeting the conditions.

[vii] Zoning, Neighboring Uses and Pending Sales of Neighboring Parcels

Most communities throughout the nation are governed by some form of zoning laws or other land use rules. The purpose of such laws is to promote the health and general welfare of the community by establishing an orderly pattern for its development and growth through regulation of land use.

A community's land use laws are generally interpreted and enforced by one or more boards, known as "zoning" or "planning" boards. These boards are empowered to review applications for new land uses or changes in existing uses. The applications may range from a request by the owner of a single-family dwelling to build a garage on his property to an entrepreneur seeking permission to construct a shopping mall in a part of town that is not zoned for commercial use. The board may have the ability to waive certain requirements of the zoning laws that, if enforced, would create serious practical problems for the applicant.

The actions of such boards are governed by the standards that govern all administrative decisions. Such decisions must not be arbitrary and capricious. There must be a rational basis for all decisions, based on evidence presented.

Zoning boards cannot prohibit legal activities from occurring within municipal borders. Rather, they may only regulate *where* activities occur. Some boards require a special use permit or "variance" be obtained before parties engage in certain activities that might disturb the peace and tranquility of the community. Conditions imposed by the permit might include limits on noise and the erection of visual "buffering," i.e., concealment of an aesthetically unpleasant sight.

A potential purchaser of real property will need to review the local zoning law in order to determine whether his intended use is a permitted one. If it is not a permitted use, but does not constitute a change from the *current* use of the property, he may be able to claim his proposed use is "grandfathered." In other words, the purchaser's intended use is permitted because the seller put the property to that use before the zoning law was amended to prohibit it. Some zoning laws may impose limits on "grandfathering." For example, grandfathering may be prohibited when a transfer of title

occurs, or within a fixed number of years after the zoning law is amended.

If the use is not permitted or grandfathered, the potential purchaser may be able to obtain a special use permit or variance. Before a variance may be obtained, the purchaser must show, factually, he is unable to realize a reasonable return on his investment in the property under existing permissible uses.

The potential purchaser should also review any applications pending with the municipality for changes in the use of realty located near the property he is thinking of purchasing. Such applications, if granted, may have a detrimental effect on the value of the property which he is thinking of purchasing. In addition, if the purchaser is a commercial operation, he should ascertain whether any proposed change in the use of neighboring property would inhibit his ability to use the subject property for his intended purpose. For example, a purchaser who intends to manufacture fireworks would not want to be located next to a proposed elementary school. His business would become an "attractive nuisance" to the children attending the school. By locating there, he would be setting himself up for personal injury lawsuits.

Finally, it should be noted that while zoning laws are generally creations of municipalities, state or federal laws may come into play where the subject property is immediately adjacent to land owned by the state or federal government.

The purchaser who has concerns regarding his ability to use the property for a particular use should negotiate a contingency in the sale-purchase agreement that allows him to terminate the agreement if he does not receive the necessary approvals of the municipality (and federal or state governments, if applicable). The purchaser should specify the conditions, if any, that are acceptable to him as part of receiving zoning approval. Such conditions may include requirements that the purchaser provide visual buffers, additional parking areas, or modify roadways. Similarly, conditions may affect hours of operation, noise level and other similar items.

If the purchaser of commercial property has special requirements concerning signs, those requirements should be specifically set forth in the contingency. Many communities require a separate procedure for sign approval, with limitations on the number of signs, size, placement, lighting, etc.

The parties should allow sufficient time for preparation and submission of the zoning application, as well as preparation of a site plan, any necessary engineering and traffic studies, etc. Most boards meet only once each month, and applications are often tabled to allow parties to present additional evidence or to allow the municipality to obtain further information. The time factor should be carefully considered when negotiating the contingency. Counsel for the purchaser should err on the side of asking for more time than is usually necessary.

The purchaser should request a provision that requires the seller to cooperate in the purchaser's efforts to obtain zoning board approval by providing information, copies of maps, title searches, and other available documentation. The seller should also be required to attend the zoning board hearing to assist in answering questions and providing information regarding current use, volume of traffic, and other relevant subjects on which he has special knowledge.

Legal Topics:

For related research and practice materials, see the following legal topics:

Environmental Law Hazardous Wastes & Toxic Substances Asbestos General Overview Environmental Law Hazardous Wastes & Toxic Substances CERCLA & Superfund General Overview Real Property Law Environmental Regulation Indoor Air & Water Quality Real Property Law Purchase & Sale Contracts of Sale General Overview Real Property Law Purchase & Sale Contracts of Sale Enforceability Fraud & Misrepresentation Real Property Law Purchase & Sale Remedies Duty to Disclose

FOOTNOTES:

(n1)Footnote 1. 42 U.S.C. 9601.

(n2)Footnote 2. 42 U.S.C. § 9607.

(n3)Footnote 3. *Cooper Industries, Inc. v. Aviall Services, Inc.*, 543 US 157 (2004) .

(n4)Footnote 4. *Allison v. Fire Ins. Exchange*, 98 S.W. 3rd 227 Tex Ct. App. (2002).

(n5)Footnote 5. *State Farm Fire & Casualty Co. v. M.L.T. Constr. Co.*, 849 So. 2d 762 La. Ct. App. (2003).

(n6)Footnote 6. *Jensen v. Amgen, Inc.*, 129 Cal. Rptr. 2d 899 Cal. Ct. App. (2003).

(n7)Footnote 7. *Searles v. Fleetwood Homes of Pennsylvania, Inc.*, 2005 878 A.2d 509 (2005) .

(n8)Footnote 8. 42 U.S.C. § 4851.

(n9)Footnote 9. 42 U.S.C. § 9601.

(n10)Footnote 10. 42 U.S.C. § 9607.

(n11)Footnote 11. 42 U.S.C. § 6901.

(n12)Footnote 12. 33 C.F.R. § 328.3(b).

(n13)Footnote 13. 33 U.S.C. § 1362(5).

(n14)Footnote 14. 33 U.S.C. § 1365(a)(2).

(n15)Footnote 15. *Swank v. United States Army Corp. of Engineers*, 531 US 159 (2001) .

(n16)Footnote 16. *Baccarat Fremond Developers, LLC v. United States Army Corp. of Engineers*, 425 F.3d 1150 (9th Cir. 2005) .



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Chapter 25 ENVIRONMENTAL CONSIDERATIONS IN REAL ESTATE TRANSACTIONS

Part II. The Practice Background

33-25 Current Legal Forms for Real Estate § 25.19

§ 25.19 Solving Concerns Through Environmental Site Assessments

[1] In General

An environmental site assessment is an evaluation of the land, air and water located on, above or below the subject premises, performed by an environmental consultant. The purpose of the evaluation is to determine whether there is any evidence of an adverse environmental condition on the premises. An adverse environmental condition is generally a condition on or about the land or in the air or water that adversely impacts the owner's use or enjoyment of the property.

Environmental site assessments are usually designated as either "Phase I" or "Phase II" assessments. A Phase I assessment is a preliminary environmental investigation of the subject premises. It generally does not include the taking of air, water or soil samples for analysis. Rather, it is primarily an historical analysis of how the property was formerly used. It will include a comprehensive visual investigation of the property. The scope of a Phase II assessment will generally depend on what evidence of possible environmental contamination was uncovered during the Phase I assessment.

Many real estate sale-purchase contracts provide that the contract is contingent upon the purchaser obtaining a Phase I environmental site assessment which concludes there is no evidence of an adverse environmental condition. Most lenders would also require a Phase I. If the conclusion of the environmental consultant is that there is evidence of an adverse condition, then the purchaser typically has to make a choice.

The purchaser may terminate the agreement, with no further rights or responsibilities under it. Second, the purchaser may ask the seller for an extension of the contingency period so that a Phase II assessment may be performed in order to determine the exact nature and scope of the adverse condition. The purchaser may ask the seller to investigate the condition. The purchaser might ignore the condition and purchase without further testing. (Clearly, this last alternative is not a recommended course of action and the purchaser's lender, if any, would refuse to complete the loan.)

If the purchaser chooses to have a Phase II environmental assessment performed, and the Phase II assessment reveals an environmental problem of some kind, the purchaser will again have to consider his options. He may terminate the agreement, or he may proceed to purchase the property. If the purchaser chooses to buy, he can negotiate with the seller

to modify the original agreement to take into account the cost of rectifying the adverse condition. Depending on the nature and scope of the problem, the purchaser may request a reduction in price and perform the remediation himself. Alternatively, the purchaser may request the seller to perform the remediation. Upon completion of the remedial work, the transfer of title would take place.

It is appropriate to include a contingency for a Phase I environmental assessment in every contract for the sale of *commercial* real property. Banks and other mortgage financiers universally require environmental site assessments as a condition for borrowing funds. Since few purchasers are able or willing to pay the full purchase price with their own money, placating banks is necessary.

In negotiating the agreement of sale and purchase, counsel must be extremely cognizant of deadlines. Contingencies may be deemed waived if not acted upon in a timely fashion. If a date is missed, the purchaser may be required to proceed with the purchase at his peril or face an action for breach of contract. If he purchases the property, he may unwittingly be accepting a host of unknown environmental nightmares that are either very costly to remediate or render the premises useless for his purposes. Thus, it is prudent to consult with the environmental consultant who will be preparing the site assessment for guidance on time frames prior to negotiating the dates for contingencies.

In common law, the doctrine of *caveat emptor* ("let the buyer beware") applies to sales of real estate. Obtaining an environmental site assessment fulfills the purchaser's obligation to beware.

In addition, in order to qualify for the "innocent purchaser" defense under the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA"),ⁿ¹ a purchaser (who did not contribute to the condition) must exercise "due care" in ascertaining whether the subject premises he is thinking of buying contains an environmental hazard. The innocent purchaser defense frees the purchaser of responsibility for remediation of the environmental problem. However, the purchaser must prove that, at the time of acquisition, he made all appropriate inquiries about prior owners and uses of the property, consistent with good commercial practice, in an attempt to minimize his liability.ⁿ² In other words, he must have exercised due care at the time of the purchase. A court, in judging the appropriateness of the innocent purchaser defense in a given case, must take into consideration the following factors:

- (1) any specialized knowledge or experience of the purchaser regarding environmental matters;
- (2) the relationship between the purchase price and the value of the property, if uncontaminated (in other words, does the purchase price reflect the fair market value of an uncontaminated piece of property, or has the price been lowered substantially in order to reflect the property's diminished value due to an environmental problem?);
- (3) commonly known or reasonably ascertainable information about the property;
- (4) the obviousness of contamination;
- (5) the ability to detect the contamination by appropriate inspections.

The purchaser has the burden of proving he qualifies as an innocent purchaser.

One final point should be made about the usefulness of environmental site assessments. Before placing an expensive piece of commercial realty on the market, a seller would be well-advised to enlist the services of a reputable environmental consultant to perform a site assessment. The reason is because the property will be far more attractive to potential purchasers if a copy of the assessment can be provided to them at the first showing of the property.

[2] Considerations in Selecting an Environmental Consultant

Performing an environmental site assessment requires the collection of historical information (e.g., who owned the property in the past?; was it used for commercial purposes?; were any toxic or hazardous substances either used or produced on the property?), scientific data, and legal or "title" information. The purchaser of real property and his advocate must become educated consumers before selecting their consultant. Further, if a lender is being used, the lender may want to have the ability to approve the consultant.

[a] Factors to Consider: Experience, Education, Cost, Reputation, Other Clients

The first questions that should be asked of a potential environmental consulting firm concern its level of experience:

- (1) How long has the firm been in existence?
- (2) How long has it been performing environmental site assessments?
- (3) What was the firm engaged in prior to environmental consulting?
- (4) What percentage of the firm's business is devoted to environmental consulting?
- (5) How many Phase I environmental site assessments are performed annually?
- (6) How many Phase II environmental site assessments are performed annually?
- (7) What is the total number of Phase I assessments the firm has performed?
- (8) What is the total number of Phase II assessments the firm has performed?
- (9) Does the firm have errors and omission insurance?

The consumer will find that many environmental consultants are part of engineering, surveying or geology firms, since each of these fields is called upon for assistance in preparing an environmental site assessment.

The consumer should also request a list of references. These references should consist of individuals or firms who have used the consulting firm within the last year for environmental site assessments. Several of the references should be contacted. The following questions should be asked:

- (1) Why did the reference select the consulting firm?
- (2) Has the reference used the consulting firm more than once?
- (3) Would the reference use the consulting firm again if the opportunity arose?
- (4) Did the consulting firm complete the work within the specified time frame?
- (5) Did the consulting firm meet the expectations of the reference?
- (6) What were those expectations?
- (7) What is the nature of the business of the reference?

- (8) Why was the environmental site assessment sought?
- (9) What was the result of the environmental site assessment?
- (10) What action did the reference take as a result of the environmental site assessment?
- (11) What relationship, if any, does the reference have with the consulting firm?

The purchaser should also request information about the consulting firm's regular clientele. Specifically, the purchaser should attempt to ascertain whether the clientele is composed primarily of purchasers of real estate or businesses that produce environmental pollutants. The purchaser may wish to steer clear of a consulting firm that primarily serves polluters since such a firm may have an institutional bias in favor of those clients. As a result, in performing an investigation for the purchaser of real estate, the firm may require more evidence of the existence of an environmental hazard than would a firm that primarily represents real estate purchasers and is more sensitive to their needs.

The purchaser should also inquire as to the reputation of the consulting firm in the business community. He may ask his attorney to check with his local colleges. Also, bankers who are engaged in making real estate loans will certainly be familiar with environmental consulting firms since banks routinely require site assessments as a condition for granting a commercial real estate loan. Such inquiries may prove to be far more valuable than the references supplied by the firm, since a consulting firm would be likely to provide only satisfied customers as references. Finally, the Better Business Bureau can provide information as to whether the consulting firm has been the subject of any complaints.

Based on the responses from the various sources, the purchaser can select an environmental consultant with a good measure of confidence. The purchaser will be aware of any possible areas of difficulty and be prepared to deal with them.

Lastly, the purchaser should obtain a written estimate of the cost for a Phase I environmental site assessment. However, it is unlikely the consultant can give any approximation of the cost of a Phase II environmental site assessment, since that would depend entirely on what was learned during the Phase I assessment.

[b] What to Ask For

The purchaser should request a written proposal from the environmental consultant. The proposal should set forth in detail the work the consulting firm intends to perform during the Phase I assessment.

If the purchaser is obtaining bank or other financing and such financing is contingent upon the results of the environmental site assessment, a copy of the bank's requirements should be provided to the environmental consulting firm so that the firm will perform an assessment that will prove satisfactory to the bank. Similarly, the purchaser should provide the environmental consulting firm with a copy of the sale-purchase agreement containing the contingency for an environmental site assessment.

The proposal by the consulting firm should contain time limits on the performance of the site assessment that are coordinated with the deadline requirements of the sale-purchase agreement. The proposal should also contain an acknowledgment by the consulting firm that time is of the essence with regard to these dates.

The proposal should state that the data gathered during the environmental site assessment, as well as the final assessment itself, will be kept in strictest confidence by the consultant and only revealed to the purchaser and the seller. (This will alleviate the seller's concern that information reflecting negatively on the property might be disseminated to the public and "scare off" other, potential purchasers.)

The proposal should also set forth any limitations on the environmental site assessment. For a Phase I assessment, a typical limitation is that no samples of soil or water will be taken. The proposal should also set forth the warranties that the consulting firm makes to the purchaser, together with any limitations thereon. The proposal should further specify whether any warranties may be passed on to future owners of the property. Lastly, if a lender is involved, the purchaser should request language in the report that allows the lender to rely upon the report in connection with its loan.

[c] What to Expect

The purchaser should expect to receive a written report from the consultant in a timely fashion. That written document, known as a "Phase I environmental site assessment," should identify the subject property in great detail, including its street address, tax map number, and deed reference, and also contain a description of the surrounding properties.

The environmental site assessment should contain a historical summary of the past uses of the subject property and adjacent properties. The sources used to compile the historical summary should be identified. These typically include public and private documents maintained in the ordinary course of business, interviews with public officials, as well as individuals who live or work in the vicinity of the subject premises. (The environmental site assessment should also indicate whether information obtained was independently verified.) The assessment should further include a review of title information, maps, atlases, and aerial photographs of the subject property. Such an exhaustive review will be of great assistance in identifying uses of the subject property and nearby properties.

The environmental site assessment should provide information regarding the geology and vegetation of the subject site, the water courses and wildlife, if any, and other relevant environmental information that is site specific.

The assessment should also specify whether the subject property appears on the federal "Superfund" list, on an equivalent state "Mini-Superfund" list, or on other lists for priority environmental clean up. The assessment should state whether any adjacent or nearby property is so listed, and the effect such listing could be expected to have on the subject premises.

The assessment should set forth any other site-specific findings, such as findings that relate to underground storage tanks, incinerators or other similar, pollution-causing items. The assessment should detail what was found, and its current and future condition on the site. For example, if gasoline storage tanks are leaking, the assessment should make note of this, as well as the amount of leakage, and its current and future condition upon the property.

Finally, the environmental site assessment should reach a conclusion, based on the findings, as to whether there is any evidence of an adverse environmental condition.

[d] Liability of Consultant: Limitations

The purchaser can expect the environmental consulting firm to set a limit on the level of liability it will assume in the event it makes an error in performing the assessment.

The purchaser can expect the environmental consultant will restrict its liability to actual (i.e., compensatory) damages arising from some error committed by the consultant while performing the work expressly called for in its proposal. In some cases, the consultant may have to limit liability to the amount of fees paid. The consultant can also be expected to expressly disclaim liability for any consequential and punitive damages. In addition, the consultant might set forth a standard (i.e., a level of care) by which its work must be judged, such as: "the consultant will use the same degree of skill and care ordinarily exercised by other environmental consultants under similar circumstances."

[3] Preparation of Environmental Site Assessments

The purpose of an environmental site assessment is to determine the current and prior uses of the subject property and neighboring properties. Armed with this information, the environmental consultant can then decide whether any of these uses involved substances that could create an adverse environmental condition on the subject property.

[a] Title Research

The purchaser can expedite the process of preparing the assessment by obtaining certain information and documents from the current owner. Such data would include a title report, survey maps, a detailed description of the current use of the property, and the names, addresses and telephone numbers of all the adjacent landowners and tenants. The environmental consulting firm will then contact the current owners, adjacent owners and tenants to obtain information regarding current and prior uses of the subject property and the adjacent sites, going as far back into the past as possible. Occasionally, long time retired employees, if they can be located, may be interviewed.

Survey maps are useful in that they may indicate underground facilities, such as water mains, sewer lines, storage tanks and gas lines. Older survey maps may also show structures that no longer exist. For example, in years past, businesses that offered delivery service to their customers often maintained their own gasoline pump and underground storage tank. With the passage of time, such tanks often became corroded and began leaking, causing contamination of underground water.

Aerial photographs, taken over a number of years, may show changes in use of the subject property or changes in the uses of property located throughout the entire neighborhood.

[b] Municipal Offices Research

In many communities, any change in the use of real property, as well as even minor construction projects, require the landowner to first obtain a permit. Thus, research of municipal permit applications for the subject premises and neighboring properties may prove useful in determining the past uses of the properties.

Similarly, a review of local health department records may provide relevant information regarding water systems, septic tanks and sewage treatment facilities. Fire and police records may give some insight into violations that occurred on the subject property or neighboring properties. For example, the owners of a factory or warehouse near the subject property might have received citations from fire inspectors for storing barrels of highly flammable substances in violation of the local fire code.

[c] Federal and State "Superfund" Lists

As previously noted, the federal government, under the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA"), maintains the National Priority List. This is a list of sites throughout the nation containing serious environmental problems that require remediation. Most states also maintain their own lists of sites that are to be cleaned up under their own environmental statutes and regulations. These lists must be reviewed by the environmental consulting firm to determine whether the subject premises or any premises in the vicinity are listed. If so, a determination must then be made of the significance of the environmental problem on the subject property.

[d] Conclusions

All of the collected data referred to above will be used by the environmental consulting firm to determine whether any adverse environmental condition has occurred or is presently occurring on or near the subject premises. Usually, the firm's conclusion will be stated in terms of whether evidence was found indicating a significant adverse environmental condition.

[4] Phase II Environmental Site Assessment

If the consulting firm discovers evidence of an adverse environmental condition existing on, below, about or near the subject premises, the purchaser will usually exercise his right to terminate the sale-purchase agreement and begin the process of seeking another property to meet his business needs. However, some purchasers may instead choose to obtain a Phase II environmental site assessment in order to determine the exact nature and scope of the adverse environmental condition, as well as the economic feasibility of restoring the property to its original state.

The reasons why a purchaser in such a situation might go ahead with the transaction are varied. First, the clean up cost might not be excessive. Second, the seller might be willing to undertake the entire expense himself, or, alternatively, reduce the sale price in an amount equal to the cost of clean up. Third, the unique characteristics of the property--its location, for example--might make it such a highly desirable spot for the purchaser to carry on his business that he is willing to buy the property regardless of the environmental problem.

Whatever the reason, if it is not addressed in the purchase agreement, the purchaser should first have his attorney contact the seller and obtain from him permission to conduct a Phase II environmental site assessment, as well as an adequate extension of time. The purpose of the Phase II assessment is to:

- (1) determine the exact nature and scope of the adverse environmental condition existing on the subject premises;
- (2) determine what remediation action will be necessary to completely eliminate the problem; and
- (3) ascertain whether it is economically feasible to go ahead with the purchase of the property, or whether the better course would be for the purchaser to seek an alternate piece of realty.

A Phase II assessment involves the taking of samples of air, soil, and water from the subject premises. These samples are then analyzed by a laboratory that prepares a report of its findings for submission to the environmental consultant. Armed with this report, the consultant can then advise the purchaser regarding the nature and seriousness of the problem, the steps that will be necessary to clean up the site, and the approximate cost of such efforts.

Legal Topics:

For related research and practice materials, see the following legal topics:

Environmental Law
Assessment & Information Access
Audits & Site Assessments
Environmental Law
Hazardous Wastes & Toxic Substances
CERCLA & Superfund
Enforcement
Defenses & Exemptions
Innocent Landowners
Environmental Law
Hazardous Wastes & Toxic Substances
Underground Storage Tanks
Real Property Law
Environmental Regulation
General Overview
Real Property Law
Environmental Regulation
Liabilities & Risks
Innocent Landowner
Defense
Real Property Law
Environmental Regulation
Underground Storage Tanks
Real Property Law
Purchase & Sale
General Overview
Real Property Law
Purchase & Sale
Remedies
Duty to Disclose

FOOTNOTES:

(n1)Footnote 1. 42 U.S.C. § 9607(b).

(n2)Footnote 2. 42 U.S.C. § 9601(35)(B).



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Chapter 25 ENVIRONMENTAL CONSIDERATIONS IN REAL ESTATE TRANSACTIONS

Part II. The Practice Background

33-25 Current Legal Forms for Real Estate § 25.20

§ 25.20 Solving Concerns Through Legal Documents

In drafting documents for the purchase of real estate, counsel must always keep in mind the "what if ...?" factor: what if a serious environmental problem, presently well-concealed and escaping detection, manifests itself after the sale-purchase of the property has transpired? It is counsel's responsibility not only to protect his client from purchasing property with an easily-detectable environmental problem, but also to make certain that if a well-concealed problem manifests itself in the future, the client will be adequately protected from the high cost of correcting that problem. Several types of legal documents and self-protective measures are available to help protect the purchaser. These include:

- (1) contingencies;
- (2) representations and warranties; and
- (3) environmental insurance.

[1] Contingencies

Throughout this chapter, various concerns of a purchaser of realty were identified, ranging from "internal" problems, such as mold, to "external" problems, like the presence of hazardous substances on the property. Generally, a contingency provides a specific period of time within which the purchaser must arrange for a particular inspection or test to determine whether a problem exists. If the inspection or test reveals a problem, the purchaser may terminate the agreement before the expiration of that period of time. If the purchaser fails to timely terminate the agreement, the contingency is waived and the purchaser is obligated to complete the purchase.

Typically, the time period of the contingency is short, so that the property will be kept off the market for a limited period of time. If a particular contingency requires an extensive allotment of time, additional consideration may be demanded by the seller. For example, a seller may require the purchaser to forfeit part of his deposit if the purchaser terminates the agreement.

Even if the inspection or test reveals an environmental problem, the purchaser may still wish to purchase the property. This is normally accomplished by modifying the original sale-purchase agreement to provide for repair or remediation of the problem. Generally, either the seller will effect the repairs at his expense, while maintaining the same purchase price, or the purchaser will effect the repairs, with a reduction in the purchase price equal to his cost for those repairs.

The advantage in using contingencies is they allow the purchaser to protect himself from unknown hazards at a reasonable cost *before* he is obligated to accept title and those hazards. The major disadvantage is the level of protection afforded by contingencies is only as great as the competence and reliability of the inspectors who perform the tests. An added problem is that many inspectors limit their liability to an amount equal to the cost of the inspection, and only warrant the results of the inspection for a brief time, if at all. And many inspectors disclaim liability for consequential and punitive damages.

[2] Representations

The environmental concerns of a potential purchaser can also be relieved by having the seller make certain representations to the purchaser regarding the condition of the premises. In most states, the seller has no legal obligation to make any representations. Whether the seller is willing to make any representations will depend upon the seller's willingness to sell.

The major advantage to having the seller provide representations is that the representations will usually be less costly than the various inspections and testing that would be performed at the purchaser's expense pursuant to a contingency.

The disadvantages are vast. A purchaser cannot always rely on the honesty and integrity of the seller and his agent. Although the purchaser would have recourse in the courts against the seller and his agent for fraud or misrepresentation, such satisfaction is not easily obtained. Litigation is often lengthy and costly, and the results are never certain. Even assuming the purchaser is ultimately victorious in his suit, the seller may not have sufficient assets to satisfy the judgment. For this reason, if the seller is an entity, the purchaser may want to review the seller's financial statement or obtain a personal guaranty from the seller's owners, if the seller is a closely held corporation.

In addition, even if the seller is honest, he may simply not be very knowledgeable about his property. If he has owned the property for a short time, he may know little about the land or its prior uses. Similarly, if the seller is a long-term owner who purchased the land many years ago for investment, he may know little about the prior uses of the property since environmental site reviews were not common when he bought the property. Finally, if the seller inherited the property or is acting in a fiduciary capacity, he may know virtually nothing about prior uses (or, for that matter, even the present condition) of the property.

If the seller is willing and able to make representations, he will surely want to limit those representations. Typically, the representation will only be valid for a fixed number of years. In addition, there may be a caveat attached to the representations, such as "to the best of my knowledge, ..." Although such representations are of limited value, they should still be obtained wherever possible since they may be useful in establishing an "innocent purchaser" defense under the Comprehensive Environmental Response, Compensation and Liability Act.

[3] Warranties

Warranties are similar to representations. Like representations, warranties contain a statement about the current condition of the subject premises. However, warranties go one step further. A warranty is the seller's binding promise to undertake some type of corrective action if the item he warrants does not live up to the representation he made about it. As with representations, a seller is not obligated to give a warranty. Again, it will come down to how motivated is the seller.

Many warranties are coupled with a "hold harmless or indemnity clause," so the seller is required not only to take affirmative action to repair, replace or remediate the property, but also to provide a defense to, and reimburse the purchaser for, any losses the purchaser suffers, including his payment of judgments, settlements, attorneys' fees, court costs, and other expenses.

The purchaser who may need to enforce a warranty will likely have to commence suit against the seller. The purchaser will have to battle his way through expensive, time-consuming and always uncertain court proceedings. When, and if, judgment is finally obtained, the purchaser must hope the seller has sufficient assets with which to satisfy the judgment.

The purchaser can expect warranties to be limited in duration, that is, the seller might warrant that during *his tenure* as owner, no hazardous substances were released or used on the subject premises. The seller might also limit the warranty prospectively. For example, if the seller warrants the premises are free of wood-boring insects because he had the premises treated recently, his warranty will likely be limited to the same period of time covered by the warranty granted to him by the exterminator. The seller may also limit his warranty to exclude liability for consequential damages.

[4] Insurance

As discussed earlier, environmental site assessments have their limitations. Much of the information upon which the consultant's conclusions rest is obtained by review of public records, which may be incomplete, and from information supplied by individuals, which may be inaccurate. Thus, the environmental site assessment is not a foolproof method of guaranteeing the property being purchased is entirely free of environmental problems.

There are several types of insurance policies available. The purpose of the insurance is to protect real estate buyers and lenders from the high cost of cleaning up contaminated real property.

The insurance companies offering such coverage require an environmental site assessment to be performed on the subject premises by an environmental consultant before making a commitment to insure the property. The environmental consultant must be approved by the insurance company. If any contamination is discovered during the course of the environmental site assessment, the cost of correcting such contamination is excluded from coverage when the policy is issued.

The cost of such insurance coverage is quite expensive. The general types of policies are:

- (1) Cleanup Cost "Cap" Policy. This policy is designed to cover the cost of the investigation and/or cleanup of a specific problem. This policy shifts the overruns to the insurance company.
- (2) Pollution Liability Policy. This policy covers claims made by third parties resulting from pollution.
- (3) Secured Party Insurance. This policy is limited to secured lenders. It typically covers a loan default which resulted from the impairment of the collateral and it also covers lender's liability relating to cleanup.

Generally speaking, environmental insurance is expensive and is utilized in large transactions.

Legal Topics:

For related research and practice materials, see the following legal topics:

Insurance LawProperty InsuranceCoverageReal PropertyEnvironmental DamageInsurance LawProperty InsuranceExclusionsPollutionGeneral OverviewInsurance LawProperty InsuranceTitle Insurance ExclusionsReal Property LawEnvironmental RegulationLiabilities & RisksGeneral OverviewReal Property LawPurchase &

SaleGeneral Overview



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Current Legal Forms for Real Estate

Chapter 25 ENVIRONMENTAL CONSIDERATIONS IN REAL ESTATE TRANSACTIONS

Part II. The Practice Background

33-25 Current Legal Forms for Real Estate § 25.21

§ 25.21 Accepting Gifts of Real Property

[1] Background

Charities have been unwitting victims of donors who, either intentionally or innocently, have given gifts of real property plagued with environmental problems. Whether as donees or trustees, these organizations are threatened with multi-million dollar clean-up costs, which far exceed the value of the gift. Given the potential severity of environmental contamination and the liability flowing from it, charitable organizations and other donees should exercise extreme caution before accepting gifts of real property.

[2] Superfund Liability

The courts have almost uniformly interpreted the Superfund statute as imposing strict liability.ⁿ¹ In other words, if a party is listed in the statute among those who are liable for the cost of cleaning up a certain piece of contaminated real property (for example, the purchaser or donee of the property), then it does not matter whether that party took part in contaminating the property, or was even aware of the problem when it took title to the land.

The courts have also established that liability under Superfund is joint and several, unless the defendants can establish that the harm caused to the property is divisible.ⁿ² This means that all the costs of clean up of a designated hazardous waste site can be imposed upon a single charity (or other donee) in the chain of title, even if the donor was entirely responsible for the contamination.

[3] Potentially-Responsible Parties

Because of the statute's broad reach, charities may be exposed to liability in several ways under the Superfund law. The statute imposes liability upon four classes of persons:ⁿ³

- (1) the current owner or operator of the facility;
- (2) the person who owned or operated the facility at the time a hazardous substance was disposed of at that facility;

(3) the person who owned or possessed a hazardous substance and arranged for its disposal or treatment at the facility that now contains the hazardous substance; or

(4) the person who transported a hazardous substance to the facility.

The problem is illustrated by the following hypothetical, but not uncommon, example. A small college is in the final months of a major capital campaign. There is substantial pressure upon the financial development office to meet its goal, and current economic conditions have made the task a difficult one. Late in December, an alumnus, who until recently had limited ties to the institution, calls and proposes to make a gift of some industrial property located in a city far from the school. The donor is ready to have the property appraised immediately and assures the development office that the value will exceed \$1 million. Furthermore, the donor claims that a number of potential purchasers have expressed an interest in the property, although there have (of course) been no agreements reached.

The prospect of a \$1 million gift is an enticing one, especially where the charity's interest in the parcel will only last as long as it takes to sell the property to some third party. The problem is that the term "owner" in the context of the Superfund statute, is intended to cover persons who acquire or hold legal title to the property at the time suit is brought for clean-up costs, *regardless of whether those persons owned the site at the time the hazardous wastes were improperly disposed of, or took any part in the decisions regarding disposal*. For example, a purely passive owner, such as a mortgagee who takes title at a foreclosure sale, may be held liable under the Superfund statute for the cost of hazardous waste clean up.

Thus, by accepting the gift and introducing itself into the chain of title, the college described above has become an owner and exposed itself to perhaps substantial monetary liability. By taking title, *even for just a few days*, to property no one at the institution has ever seen, the college may now be responsible for clean-up costs far in excess of the value of the gift.

[4] Defenses

Various defenses have been asserted by donee-charities to avoid the imposition of Superfund liability. The most common include:

(1) the "fairness" defense;

(2) the "gap owner" defense; and

(3) the "innocent landowner" defense.

The most compelling argument against the imposition of Superfund liability upon a donee-charity would logically be that of fairness, i.e., the charity simply did not commit the acts creating the contamination. It seems unreasonable to expect that a charity, with limited resources dedicated to specific public-service purposes, should be held accountable for the wrongful conduct of a wholly unrelated party.

The "gap owner" defense presents a better defense for charities. Since the Superfund statute does not impose liability on a person which owned property after it became contaminated but before the government's action for clean-up costs was brought, the charity might sell or otherwise dispose of the property rather than retain it. However, this defense is *not* available if the charity itself held the property while contaminants were released upon it, or if the charity sold the property with knowledge of its condition and did not disclose this fact to the purchaser. Also, this defense does not exculpate the charity from liability under state or common law.

Under the "innocent landowner" defense, a party (such as a charity) that would otherwise be liable under the Superfund statute is shielded from liability if it is established by a preponderance of the evidence that:

(1) the contamination was caused by the act of a third person who was not:

(a) the charity's employee or agent, or

(b) involved in a contractual relationship with the charity; and

(2) the charity exercised due care with respect to the hazardous substance concerned, and took precautions against foreseeable acts or omissions of any such third party and the consequences that could foreseeably result from such acts or omissions.ⁿ⁴

For charities receiving gifts of realty, there are two kinds of innocent landowner defenses. The first, concerning the acquisition of land through an *inter vivos* gift, is not specifically provided for by statute. The other defense, arising in the context of a bequest, is a variation of the general innocent landowner defense and is specifically provided for in the Superfund statute.ⁿ⁵

In the *inter vivos* gift situation, the charity must demonstrate that, at the time it took title to the site, it did not know and had no reason to know that any hazardous substances had been disposed of at the site. In order to demonstrate that it had no reason to know of the disposal, the charity must have undertaken, at the time of acquisition, all appropriate inquiry into the previous ownership and uses of the property, consistent with good commercial or customary practice, in an effort to minimize liability.

Case law, relying in large part upon legislative history, indicates that the level of inquiry expected of a charity in the case of a gift is lower than exists in a commercial transaction, such as the purchase of real property. Courts will look to the facts and circumstances of the case to determine whether the donee-charity conducted an adequate inquiry. Charities are cautioned to err on the side of thoroughness in investigating the environmental condition of the realty before accepting it as a gift.

As a general proposition, by commissioning a pre-acquisition environmental site assessment, a charity should be able to escape Superfund liability. It is common practice for the donor to bear the expense of such an assessment, which would generally have to be performed if the land were being sold rather than given away.

According to the legislative history of the Superfund statute, the adequacy of the inquiry is to be determined in light of the customary practices existing at the time of the acquisition. Factors to consider include:ⁿ⁶

(1) the obviousness of the presence or the likely presence of contamination;

(2) any specialized experience or knowledge of the party acquiring the property;

(3) the ability to detect contamination by inspecting the property; and

(4) commonly known or reasonably obtainable information about the property.

The Environmental Protection Agency has suggested that the person acquiring the property be able to produce evidence that includes:

(1) information on the property's condition at the time of the purchase (or gift);

- (2) information on steps taken to determine previous owners and uses;
- (3) documentation and other evidence of any representations made by the seller (or donor) at the time of acquisition;
- (4) information concerning the exercise of due care by the purchaser (or donee); and
- (5) any relevant specialized expertise of the entity acquiring the property.

A charity might also receive real property through a bequest. An important issue in such cases is whether the same inquiry standards apply as with *inter vivos* gifts. Based upon the legislative history of the Superfund statute, it appears that if the property were acquired by bequest, the innocent landowner defense would be available regardless of whether any inquiry was made. The better and more prudent course may be to conduct an environmental site assessment in all cases. Certainly, the charity must exercise due care to prevent any further damage to the property after learning of any contamination.

Planning Note

Establish guidelines for accepting gifts of real estate. In order to prevent Superfund liability problems resulting from receipt of gifts of possibly contaminated real property, charities with active financial development departments should establish guidelines which pertain specifically to gifts of realty. These guidelines should require the charity or the donor to perform an environmental site assessment before the charity will accept the property. In addition, the guidelines should require that the deed of gift contain a provision requiring the donor to either take back or clean up the property if hidden environmental contamination comes to light after the gift is received.

Legal Topics:

For related research and practice materials, see the following legal topics:

Environmental LawHazardous Wastes & Toxic SubstancesCERCLA & SuperfundEnforcementCost Recovery ActionsPotentially Responsible PartiesArrangersEnvironmental LawHazardous Wastes & Toxic SubstancesCERCLA & SuperfundEnforcementCost Recovery ActionsPotentially Responsible PartiesOwners & OperatorsEnvironmental LawHazardous Wastes & Toxic SubstancesCERCLA & SuperfundEnforcementCost Recovery ActionsStrict LiabilityEnvironmental LawHazardous Wastes & Toxic SubstancesCERCLA & SuperfundEnforcementDefenses & ExemptionsInnocent LandownersReal Property LawEnvironmental RegulationLiabilities & RisksGeneral OverviewReal Property LawEnvironmental RegulationLiabilities & RisksCERCLA Response CostsReal Property LawEnvironmental RegulationLiabilities & RisksInnocent Landowner Defense

FOOTNOTES:

(n1)Footnote 1. *See, e.g., U.S. v. Reilly Tar & Chem. Co.*, 546 F. Supp. 1100, 1112 (D. Minn. 1982) .

(n2)Footnote 2. *See New York v. Shore Realty*, 759 F.2d 1032 (2d Cir. 1985) ; *U.S. v. Wade*, 577 F. Supp. 1326 (E.D. Pa. 1983) .

(n3)Footnote 3. 42 U.S.C. § 6907(a).

(n4)Footnote 4. 42 U.S.C. § 9607(b)(3).

(n5)Footnote 5. 42 U.S.C. § 9601(35)(A); *see also* 42 U.S.C. § 9607(b)(3).

(n6)Footnote 6. 42 U.S.C. § 9601(35)(B).



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Chapter 25 ENVIRONMENTAL CONSIDERATIONS IN REAL ESTATE TRANSACTIONS

Part II. The Practice Background

33-25 Current Legal Forms for Real Estate § 25.22

§ 25.22 Real Estate Loans and Lender Liability

[1] Scope of Section

This section considers the various environmental concerns of lenders who collateralize their loans with real property.

Whether the proceeds of the loan is intended to purchase commercial or residential property, the basic transaction remains the same: the lender agrees to lend a specified amount of money to the borrower, and the borrower agrees to execute and deliver a mortgage or deed of trust to the lender on a specified parcel of realty. Additionally, if the loan is a business loan, the lender may also take a security interest in the assets of the borrower. Such mortgage or deed of trust vests the lender with a security interest in the realty; if the purchaser defaults on the loan payments, the lender may foreclose and sell off the property in satisfaction of the debt.

Generally, this agreement to lend starts with a commitment letter. The commitment letter specifies the terms on which the lender will loan the money. For example, the commitment letter may require that various financial conditions be met, such as the commercial borrower providing annual financial statements and copies of its tax returns.

The commitment letter will definitely require that various title conditions are met. These may include the requirement that the borrower obtain a suitable abstract of title or lender's policy of title insurance, a survey, and other pertinent documents.

The commitment letter may also require that various inspections of the real property be performed with certain results. Each of these inspections is critically important because the result affects the value of the real property as security for the loan. These inspections may include tests for radon, asbestos, termite infestation, urea formaldehyde insulation, lead-based paint, water purity, water quantity, the septic system, and an environmental site assessment.

Once the borrower's loan has been approved, the borrower executes and delivers a promissory note to the lender. The note constitutes the borrower's obligation to repay the amount borrowed, plus interest. The borrower also executes and delivers to the lender a mortgage or deed of trust. Under a deed of trust, the lender holds equitable title to the property in order to secure his investment, namely, the loan proceeds. Under a mortgage, the lender has a lien against the property

to protect his investment. The mortgage or deed of trust provides that, in the event any default occurs, the lender may take action on the property. Under a deed of trust, lender takes actual title. Under a mortgage, the property is sold at public auction to the highest bidder. The lender generally bids his costs; it will become the owner if no one bids above his costs.

If the lender becomes the owner, it generally will attempt to sell the property to recover the amount of the loan and any expenses incurred in connection with taking title. The lender may make some improvements to the premises to make it marketable. These improvements may be minor, such as roof repairs, or they may be very costly, such as an environmental project. The greater the expense, the less the likelihood there will be sufficient value left in the property to afford recovery of the losses.

Since there is always a possibility the lender may become the owner of property he uses to secure a loan, the lender must always examine real property as carefully as any potential purchaser would. The lender must fully investigate the same issues any prudent purchaser would investigate.

[2] Potential Concerns of Lender

[a] In General

Before agreeing to lend funds to a potential purchaser of realty, the lender should require its client to have professionals thoroughly inspect the property for environmental problems. The lender's promise to lend should be conditioned on the satisfactory results of these inspections.

The inspections are intended to protect the lender and purchaser alike: if a serious environmental problem is discovered after the real estate closing, the new owner may either be unwilling or financially unable to remedy the situation. After he defaults on the mortgage and abandons the property, the lender will take ownership of a highly unmarketable (or, perhaps, even completely worthless) piece of realty. To make matters worse, the lender might even find itself liable under federal and state law for the cost of correcting the problem.

Normally, in a residential loan transaction, a lender will not complete a comprehensive investigation of the property. Residential lending is very competitive. Both the costs of the inspections and the time involved are prohibitive. However, commercial lending is different. Most commercial lenders will insist that the purchaser engage the services of professionals to inspect for adverse environmental conditions. The lender should also require proof that the purchaser's intended use of the property, as well as any changes to the property he wishes to make, will not violate any applicable use laws.

A commercial lender should also require proof that the property is not part of a wetland, or, if it is part of a wetland, that the intended use will not interfere with the wetland.

Finally, and most importantly, the commercial lender will probably require an environmental site assessment. The assessment will provide the lender with the opinion of an expert as to whether there is any evidence of an adverse environmental condition existing on, about, above or below the property.

The assessment is important for several reasons. First, armed with this information, the lender will be in a better position to evaluate whether to make the loan. If hazardous substances are found, the lender must consider whether their presence affects the value of the property. The lender must also consider whether it would want to own this property if the borrower defaults on the loan; the presence of hazardous substances may make it difficult or impossible to attract bidders to a foreclosure sale.

Second, obtaining an environmental site assessment will aid the borrower in meeting the "due care" standard necessary

to achieve innocent purchaser status under CERCLA.ⁿ¹ An innocent purchaser may be either totally exempt from liability for remediation under CERCLA, or he may be entitled to a settlement agreement with the U.S. Environmental Protection Agency, requiring him to make only a *de minimis* contribution toward the cost of remediation.ⁿ² By reducing or eliminating the borrower's liability for remediation costs, he will be better able to satisfy his obligations under the loan to the lender.

Third, many loans contain provisions regarding the borrower's ongoing handling of hazardous substances and the disposal of hazardous wastes. Failure to properly handle the hazardous substances or properly dispose of hazardous wastes is generally an event that gives rise to a default under the terms of the loan. Also, failure to promptly notify the lender and effect remediation is also an event that triggers a default. Thus, the results of an environmental assessment provide the lender with information that may indicate whether an existing loan is in default.

[b] Special Concerns Under CERCLA (Lender Liability)

The Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA")ⁿ³ holds the "owner" of a facility liable for the costs of cleaning up hazardous substances released at the facility.ⁿ⁴ The CERCLA definition of owner specifically excludes:

a person, who, without participating in the management of a vessel or facility, holds indicia of ownership primarily to protect his security interest in the vessel or facility.ⁿ⁵

Thus, CERCLA protects secured creditors who do not participate in the management of the facility. Unfortunately, CERCLA does not define the phrase "participating in the management of a ... facility... ." The statute, therefore, provides little guidance as to how much control over a facility a secured creditor may exert before it will become potentially liable for an environmental clean up. Several federal courts have addressed the issue, however.

[i] United States v. Fleet Factors Corporation

The threshold case in holding a lender responsible was *United States v. Fleet Factors Corporation*.ⁿ⁶ In the *Fleet Factors* case, the defendant entered into a financing agreement with the owner of a textile facility. Fleet Factors collateralized its loan with a security interest in the borrower's accounts receivable, equipment, inventory, fixtures and textile plant. Subsequently, the borrower went bankrupt, and Fleet Factors foreclosed on its interest in the inventory and equipment, but not the textile plant. Fleet Factors arranged for a liquidator to sell these items.

Several months later, the U.S. Environmental Protection Agency removed 700 drums of toxic chemicals and 44 truckloads of asbestos-contaminated materials at a cost of approximately \$400,000. Three years later, the county took title to the textile plant following the bankrupt owners' failure to pay property taxes. The EPA sued both the bankrupt owners and Fleet Factors for the cost of remediation. The government alleged that Fleet Factors was an "owner" of the facility and was not entitled to the secured lender exception due to its participation in the management of the facility.

The U.S. Court of Appeals for the Eleventh Circuit held that a secured creditor could incur liability for remediation costs:

by participating in the financial management of a facility to a degree indicating a capacity to influence the corporation's treatment of hazardous wastes. It is not necessary for the secured creditor actually to involve itself in the day-to-day operations of the facility in order to be liable--although such conduct will certainly lead to the loss of the protection of the statutory exemption. Nor is it necessary for the secured creditor to participate in management decisions related to hazardous waste. Rather, a secured creditor will be liable if its involvement with the management of the facility is sufficiently broad to support the inference that it could affect hazardous waste disposal decisions if it so chose.ⁿ⁷

The court found that Fleet Factors' involvement in the management of the textile company was substantial: Fleet Factors required the borrower to seek its approval before shipping goods to customers, established the price for excess inventory, dictated when and to whom finished goods would be shipped, determined when employees would be laid off, received and processed the borrower's employment and tax forms, controlled access to the facility, and contracted with a third party to dispose of the fixtures and equipment of the textile company. Accordingly, Fleet Factors was ineligible for the "secured creditor" exemption under CERCLA.ⁿ⁸

The court stated that a prudent lender could protect itself by thoroughly investigating the waste treatment policies of potential borrowers. Lenders were also admonished to monitor their borrowers' compliance with such policies and to make such compliance a condition of a continuing lending relationship. If a lender's business relationship with a borrower becomes sufficiently broad that it jeopardizes the lender's exemption under CERCLA, then the lender will have a strong incentive to address hazardous waste problems at the facility.ⁿ⁹

[ii] Current Status of Lender Liability

In 1996, Congress legislatively overruled the holding in the *Fleet* case by adopting the Asset Conservation, Lender Liability and Deposit Insurance Protection Act of 1986ⁿ¹⁰. The Amendment essentially stated that the applicable standard is actual participation in the management or operational affairs of the facility or vessel.ⁿ¹¹ Accordingly, Congress rejected the "capacity to control" test promulgated by the *Fleet* Court. The Amendment indicates that participation in management does not include "merely having the capacity to influence, or the unexercised right to control" operations of a borrower.

As a result, the 1996 Amendment promulgates a two part test. If either part of the test is met, the lender may have liability.

The first part of the test is whether the lender has exercised decision making control over the facilities environmental compliance in a manner that the lender has assumed responsibility for the handling and disposal of hazardous waste substances.ⁿ¹² The second part of the test is whether the lender exercises control over day-to-day operational functions at the facility.ⁿ¹³

The lender may assume control over financial or administrative functions without losing the secured interest exemption. The actions taken by the lender must be viewed in the light of normal and customary lending practices. Additionally, no action taken by the lender prior to the creation of the security interest will constitute active participation.ⁿ¹⁴ Also, requiring a borrower to remediate adverse environmental conditions will not, without further involvement, subject a lender to liability.ⁿ¹⁵

Additionally, a lender may undertake the cleanup of adverse environmental conditions without incurring lender liability; however, such cleanup must be undertaken and completed in accordance with applicable law.ⁿ¹⁶

Secured lenders that foreclose on a property are now protected under CERCLA if they take commercially reasonable steps to divest itself of the property.ⁿ¹⁷ As a result, a lender may, after foreclosure, operate a property if it is attempting to divest itself of the property in the "earliest practicable, commercially reasonable time, on commercially reasonable terms."ⁿ¹⁸ Lastly, it is notable that CERCLA does not preempt the requirements of state law or the rights of private individuals.

[3] Methods to Avoid Potential Losses

[a] Environmental Site Assessment

As previously noted, an environmental site assessment is a review of the subject premises by an environmental consultant for the purpose of determining whether there is evidence of any adverse environmental conditions at the site. The first step is a Phase I environmental site assessment. Here, the consultant will make a visual inspection of the property, review past and present uses of the site, as well as the uses of nearby sites. He will then review the "Superfund" National Priority List and any similar state list to see if the subject property or any nearby site is contaminated and named on the lists. After gathering all of the data, the consultant will analyze it and make a judgment as to the likelihood of contamination.

If some evidence of contamination does exist, the lender should require a Phase II environmental site assessment be performed. In a Phase II assessment, actual samples of soil, air and water are analyzed in an attempt to verify whether there is contamination. If contamination is found, the Phase II assessment is used to determine the precise nature and extent of the contamination.

[b] Representations and Covenants in Loan Documents

The lender should *never* make a non-recourse loan to any borrower who is, or may reasonably be expected to be, engaged in the use of hazardous substances on the property that secures the loan. A non-recourse loan is one in which the lender may look only to the subject property to satisfy the debt. In other words, the borrower is not personally liable for repayment of the loan. If the property becomes badly contaminated, the lender's expectation of a complete recovery of its investment is greatly diminished since it would have to clean up the environmental contamination before it could sell off the property.

Accordingly, the lender should include certain representations and covenants in the loan documents. In the event any of the covenants is breached, the lender should be able to accelerate repayment of the entire loan, even if the borrower is currently repaying the loan in accordance with the terms of the loan agreement and repayment schedule. This will give the lender an early opportunity to recoup the amount loaned before such funds are dissipated on clean up expenses.

The following types of representations are commonly inserted in loan documents:

- (1) representations regarding the non-use of hazardous substances on the subject premises;
- (2) representations regarding compliance with all laws, regulations and compliance orders;
- (3) representations regarding the prompt giving of notice to the lender and appropriate governmental authorities of the occurrence or discovery of an environmental problem;
- (4) representations regarding remediation of existing adverse environmental condition;
- (5) representations regarding review by the lender of the borrower's books and records, as well as the lender's right to conduct site inspections and other examinations; and
- (6) representations regarding the giving of notice to the lender about any release or any threatened or pending lawsuits or compliance orders.

[c] Ongoing Review of Site and Business During Term of Loan

The lender should reserve the right to review the property that secures the loan, as well as the borrower's records, throughout the term of the loan. These rights to review should be contained in the loan agreement and the mortgage or deed of trust. A refusal to allow the lender to make a review should be deemed an event giving rise to default.

Any prudent lender will maintain regular contact with its borrower during the term of a loan in order to monitor the success of the business. This contact will include annual reviews of financial statements, tax returns and operating reports. These reviews indicate to the lender whether the borrower's business has experienced a decline that may affect its ability to repay the loan. If the lender can anticipate potential financial problems before they occur, it has a much greater chance to avert a default. Similarly, with regard to hazardous substances, the lender should maintain regular contact with the borrower and the ability to conduct additional inspection and reviews. Most loan documents provide the cost of such reviews and any necessary remediation shall be borne entirely by the borrower. The costs are added to the principal of the loan and are secured by the mortgage or deed of trust. By monitoring environmental practices during the term of the loan, the lender is likely to obtain an uncontaminated parcel if he is ever required to take title following foreclosure. However, the lender must take care its monitoring is not construed as "participating in the management" of the facility, since the lender will then lose the secured lender exemption afforded by CERCLA and become potentially liable for the cost of remediation.

[d] Use of Alternative or Additional Collateral

Where the lender is aware the borrower is engaged in the use of hazardous substances on real property that is the primary security for the loan, the lender may wish to obtain "stand-by" security. In other words, in the event an adverse environmental condition arises or is discovered, the borrower agrees to provide substitute collateral of equal or greater value. Such substitute collateral need not be real property; it can just as easily be accounts receivable, inventory, equipment, stocks, bonds or other valuable assets.

There are practical difficulties to such a substitution of collateral. For example, the parties may not agree on the value of the substitute collateral. One way to solve this problem is by assigning to the collateral an agreed-upon value at the time the loan is made. However, since substitute collateral may significantly increase or decrease in value during the life of the loan, the loan agreement may provide for periodic reappraisals of the substitute collateral.

Unfortunately, such reappraisals are both costly and time consuming. However, if the parties decide to use this method, an appraiser acceptable to both parties should be named in the loan documents at the time the loan is made. Generally, the cost of an appraisal is paid by the borrower.

Another practical difficulty in using substitute collateral is that the borrower may not have sufficient unencumbered collateral to use as a substitute. The borrower may be forced to look to his personal assets for substitute collateral. The borrower may even be forced to take on limited partners who have assets that may be substituted, thus costing the borrower some control over his business. If the borrower does not have sufficient personal assets or cannot locate a partner, the lender may not be willing to make the loan.

[e] Personal Liability

If the borrower is a closely held company, the lender may require the owners of the borrower to personally guaranty the obligations of the borrower. Even if the owners are unwilling to personally guaranty the loan, the lender may still require them to indemnify and hold harmless the lender from any losses or damages incurred by lender as a result of an adverse environmental condition.

[f] Indemnification

Where the real property that secures the loan becomes contaminated, the lender is very unlikely to recover its principal, interest, costs of foreclosure and costs of remediation from the sale of the property. The lender, in order to protect itself, may require an indemnification agreement from the borrower as a condition of its commitment to lend.

The indemnification agreement should provide that the lender shall be indemnified and held harmless against any claim

or loss, including, but not limited to, the principal and interest on the loan, the costs of foreclosure, the costs of remediation, and legal fees arising out of, or in any way connected with, the contamination of the property. The lender may wish to collateralize the indemnification with mortgages on the property, or by a security interest in the personal property of the borrower, such as inventory, equipment or accounts receivable. If the lender is able to recover its full costs through the indemnification agreement, it may not need to even take possession of the contaminated premises.

[g] Insurance or Bond Against Environmental Loss

Most insurance policies that borrowers obtain to protect themselves and lenders against casualty losses exclude damage resulting from environmental contamination, unless it is sudden and accidental. The contamination of a site is considered accidental if the conduct resulting in the contamination was unintentional and not the product of negligence.

Such traditional insurance policies will clearly not protect the lender or the borrower from losses resulting from the discovery of contamination on the premises securing a mortgage. However, both parties may seek protection by obtaining a new form of insurance called "property transfer liability insurance." As a prerequisite to obtaining such coverage, underwriters require that a satisfactory environmental site assessment be performed by an environmental consulting firm approved by the underwriters. It should be noted that the cost of cleaning up any contamination found during the site assessment is not covered by the policy. Similarly, the insurance does not cover the cost of cleaning up contamination caused by the borrower. Rather, the insurance will only cover contamination created by a party other than the borrower prior to the transfer of title to the borrower.

If such insurance is unavailable, or if the lender is more concerned about contamination caused by the buyer in the future, the lender may require the borrower to post a bond or letter of credit as security against the cost of remediation. One practical difficulty with this approach is that it is impossible to know in advance the cost of remediation. Thus, the amount of the bond or letter of credit will have to be an arbitrary figure. And, of course, the lender will need to continue performing environmental reviews so that any contamination will be recognized and remediated before the cost exceeds the amount of the bond or letter of credit.

Legal Topics:

For related research and practice materials, see the following legal topics:

Environmental Law Assessment & Information Access Audits & Site Assessments Environmental Law Hazardous Wastes & Toxic Substances CERCLA & Superfund Enforcement Cost Recovery Actions General Overview Environmental Law Hazardous Wastes & Toxic Substances CERCLA & Superfund Enforcement Cost Recovery Actions Potentially Responsible Parties Owners & Operators Real Property Law Environmental Regulation Liabilities & Risks Lender Liabilities Real Property Law Financing Mortgages & Other Security Instruments Mortgagee's Interests

FOOTNOTES:

(n1)Footnote 1. 42 U.S.C. §§ 9601(35)(B), 9607(b)(3).

(n2)Footnote 2. 42 U.S.C. § 9622(g)(1).

(n3)Footnote 3. 42 U.S.C. § 9601 *et seq.*

(n4)Footnote 4. 42 U.S.C. § 9607(a)(1), (2).

(n5)Footnote 5. 42 U.S.C. § 9601(20)(A).

(n6)Footnote 6. 901 F.2d 1550 (11th Cir. 1990) .

(n7)Footnote 7. 901 F.2d at 1557-58 .

(n8)Footnote 8. *901 F.2d at 1559* .

(n9)Footnote 9. *901 F.2d at 1558-59, n 12* .

(n10)Footnote 10. *42 U.S.C. § 9601(20)(E)(6)*.

(n11)Footnote 11. *42 U.S.C. § 9601(20)(F)(i)(II)*.

(n12)Footnote 12. *42 U.S.C. § 9601(20)(F)(ii)(I)*.

(n13)Footnote 13. *42 U.S.C. § 9601(20)(F)(ii)(II)*.

(n14)Footnote 14. *42 U.S.C. § 9601(20)(F)(iii)*.

(n15)Footnote 15. *42 U.S.C. § 9601(20)(F)(iv)(II)*.

(n16)Footnote 16. *42 U.S.C. § 9601(20)(F)(iv)(XI)*.

(n17)Footnote 17. *42 U.S.C. § 9601(20)(G)(iii)*.

(n18)Footnote 18. *42 U.S.C. § 9601(20)(E)(ii)*.



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Current Legal Forms for Real Estate

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Current Legal Forms for Real Estate

Chapter 25 ENVIRONMENTAL CONSIDERATIONS IN REAL ESTATE TRANSACTIONS

Part II. The Practice Background

33-25 Current Legal Forms for Real Estate § 25.23

§ 25.23 Real Estate Leases

[1] Introduction

This section will explore the environmental concerns of a landlord and tenant when executing a lease of real property. The section will examine both residential and commercial lease transactions, however, the primary focus will be on commercial transactions.

The environmental concerns of the parties are similar to those of a seller and purchaser of real property, or of a borrower and the lender who secures the loan with a mortgage on real property. However, since the legal relationship between a landlord and tenant is quite different from the relationship between a purchaser and seller, or a lender and borrower, the environmental concerns will also be different.

For example, the relationship between a purchaser and seller is brief in duration, the seller's interest terminating upon transfer of title. Thereafter, the seller has neither the interest nor the ability to affect the environmental aspects of his former property. And, of course, the seller will not be responsible for environmental problems created after the transfer of title.

While the relationship between lender and borrower is of greater duration, the lender's interest in the environmental aspects of the property only arises where there is a danger of default in repayment of the loan. As long as the borrower continues to pay the loan, as agreed, the lender will not need to take possession and control of the property and will not risk environmental liability.

By contrast, the relationship between a commercial landlord and tenant often extends for many decades. Throughout that long stretch of time, the tenant has possession and control of the property. With that possession and control comes the power to dramatically alter the environmental condition of the property. When the property is eventually returned to the landlord at the end of the lease term, he may discover it has been seriously contaminated by his former tenant and will cost many thousands of dollars to repair. Thus, unlike the seller of real property whose environmental concerns usually *end* when he transfers title to the purchaser, the landlord's environmental concerns *may begin* when he turns the property over to the tenant and continue throughout the life of the lease and thereafter.

The purpose of this section is to identify the unique environmental problems for landlord and tenant and formulate mutually-beneficial resolutions. There will be very little information contained in this section that is not applicable to both residential and commercial transactions.

[2] Potential Areas of Concern to Landlord

The landlord's environmental concerns focus on the tenant's treatment of the leased structures and land. During the term of the lease agreement, the landlord wants the property to be properly maintained; thus, for example, when basic repairs are necessary--such as replacing broken windows, mending worn stairs, repairing broken elevators--the landlord wants to know they will be made. He also wants the property to remain free of environmental contamination and its value undiminished by "waste."

[a] Alterations

During the negotiations between a landlord and a potential tenant, a major portion of the negotiations may focus on necessary alterations to the structure. It is rare for a tenant to locate a building he can move into without any need for alterations. For a commercial tenant, walls almost certainly will have to be removed or erected, new offices built and furnished, modifications made in electrical, plumbing, heating, and ventilation systems, etc. Also, for a commercial or a residential tenant, the premises will generally need to be painted.

The negotiations will focus on what each party perceives as needed alterations, who will be responsible for the making of such alterations, and what the consideration will be. Commercial landlords often grant tenants a "fit-up" allowance to attract prospective tenants by providing funds to make alterations. However, the allowance is rarely sufficient to perform all of the alterations that will be required. Residential landlords rarely offer more than a fresh painting of the premises and possibly some new carpeting. Any other expenses for alterations generally will be the responsibility of the tenant.

The type of alterations that will be required by the tenant should be considered very carefully, taking into account the uses which he intends for the structure. For example, if the tenant will be using the building as a walk-in medical clinic, it is likely that some type of x-ray equipment will be used on the premises. Special protective walls, ceilings, and floors will be required to protect the tenant, its employees, patients, and other tenants in the building from the effects of x-rays.

If the tenant were to use the premises for a restaurant, a special ventilation system and fire proofing would be required to protect other tenants from odors and the danger of fire. If the tenant is a laboratory or research and development enterprise, there may be special requirements for the storage of dangerous chemicals. A manufacturing facility using hazardous substances may require an outside curbed storage facility. The landlord will be as anxious as the tenant to be sure all required modifications are identified during negotiations and properly installed.

The landlord will also want to make certain all modifications are performed in a good and workmanlike manner in full compliance with federal, state and local laws and regulations. Many of these modifications will require one of the parties to obtain building permits, arrange for inspections by municipal authorities, and obtain a certificate of occupancy. Frequently, alterations will involve the removal of dangerous materials, such as asbestos. There is such a great danger of injury during such removal operations that the landlord must require strict compliance with all applicable laws and regulations pertaining to removal of these substances.

The landlord will also want to be sure alterations are performed with adequate professional planning and supervision. A lack of appropriate planning may result in alterations that make the building unusable by future tenants. Accordingly, the landlord must always reserve the right to review and approve the plans and specifications. The landlord should have his own design professional review such plans and specifications with special attention focused on:

- (1) the quality and appropriateness of new materials to be used;
- (2) safety measures to be followed;
- (3) the skill, knowledge and experience of those who will be constructing the improvement; and
- (4) the impact of the alterations on the other tenants' use and enjoyment of their leased premises.

The landlord will want to be certain all debris created by the alterations is removed from the site and is properly transported. This debris may include: asbestos, urea formaldehyde insulation, and lumber containing lead-based paint.

Finally, the landlord should also be concerned at the end of the lease term about the removal of alterations that will be of no use to the new tenant. He will want trade fixtures to be removed, such as a hazardous substance storage facility, or car "lifts" in an auto repair shop. Failure to remove such items will reduce the value of the landlord's building and the amount of rent he can command for the space in the future. It may also cost the landlord money to remove and dispose of the fixture.

Alterations to the *land* may also be part of the negotiations between a landlord and a potential tenant. The tenant may need additional parking facilities, requiring excavation and/or paving. The tenant may also want to utilize natural resources located on the property, either in the ordinary course of business or during the making of alterations to the structure. These resources may include such items as sand, gravel, shale, timber or water. Accordingly, the landlord must consider the depletion of any of the land's natural resources before executing the lease.

In addition, the landlord should also be concerned about the tenant's plans for liquid waste disposal. If the property is served by a septic system, the landlord may wish to regulate the type and volume of waste that is discharged into the system. Similarly, a landlord might allow a commercial tenant to use the existing septic system *only* for discharge of water from sinks and toilets. Consequently, the tenant may need either to expand the existing system or install a new, larger system that will be able to handle an increased amount of liquid wastes and/or different types of liquid wastes generated by the business. In such case, the landlord should make certain that excavation and installation activities are performed properly. In addition, the landlord should make sure the system, as newly-installed or expanded, can handle the types and amounts of liquid wastes that it will now receive, without causing the discharge of pollutants into the earth.

Similarly, the landlord will be concerned about the disposal of *solid* wastes. A commercial tenant may use municipal trash collection services for disposal of *some* of his solid wastes. However, many of his solid wastes may not be acceptable at local landfills. Accordingly, the commercial tenant may seek permission to construct a facility on the subject premises to handle those wastes. This may include an incinerator or trash burial site. Both are subject to federal, state and local regulation, and both can be highly dangerous to operate.

Next, many municipalities have "greenspace" requirements, i.e., a certain percentage of the subject property must be planted with grass, trees, flowers and other natural growth as a means of keeping the property aesthetically pleasing. (This is often a condition for obtaining a building permit or certificate of occupancy.) In such case, the landlord must be sure alterations to the land do not reduce the required percentage of "greenspace."

Finally, the landlord should be concerned about the preservation of any wetlands that exist on his property. If the tenant desires to use part of the wetlands for construction, or plans to use the water contained in the wetlands, a permit from the Army Corps of Engineers will be required. In addition, a permit from state and local governments may be necessary. If a wetlands site is filled or drained without a permit, or the terms of the permit are violated in some other fashion, the property owner may be required to restore the wetlands to their natural state.

In sum, all of the above concerns, if not properly addressed, can result in health and safety hazards, environmental liability, reduced property value, and/or potential expense to the landlord to repair, replace or bring the property into compliance with the law.

[b] Continued Maintenance of Building and Land

The landlord and a potential tenant will have a great deal to negotiate concerning the maintenance of the structure and the surrounding land. The proper upkeep of the structure and land will help maintain its value, attract future tenants, and generally protect the landlord's investment.

The rental fee will be affected greatly by the tenant's level of responsibility for repairs and maintenance: the more the tenant will be required to perform, the lower the rent. Many commercial leases require the tenant to maintain and repair both the structure and the surrounding land. Most residential leases require the landlord to perform all maintenance and repairs, except ordinary cleaning. However, this is not normally required by law, and it is clearly an issue for negotiation between the parties. Most jurisdictions (city and/or state) have extensive laws that apply to residential rentals.

For the purposes of this discussion, the term "interior maintenance" includes painting and repairs to the interior walls, ceilings and floors, ordinary cleaning and janitorial work, and repairs to fixtures and equipment. The term "structure" refers to the exterior walls, joists, beams, foundation, roof, plumbing and heating, ventilation and air conditioning systems ("HVAC"). The term "exterior" refers to parking areas, driveways, sidewalks, lawns, shrubbery, signs, the septic tank and the well.

The landlord should be concerned with how interior maintenance work is performed, what materials are used, how waste materials are disposed of, and the convenience, health and safety of other tenants and their invitees. Poorly-performed interior maintenance work may lead to a rapid deterioration of the property and may also detract from the appearance of the structures. Eventually, the landlord may be required to perform the same maintenance work again, but at a higher cost due to inflation and the necessity of first undoing the tenant's prior efforts.

In addition, the landlord should be aware some insecticides and pesticides used for both interior and exterior maintenance may pose a health hazard to humans. Similarly, certain salts spread on parking lots, sidewalks, and driveways during the winter should not be used near wells or streams from which drinking water is taken. Maintenance equipment, such as ladders or scaffolding, can pose a significant risk to occupants of the building if the areas in which they are used are not roped off from pedestrian traffic. Certain chemicals, such as cleaning agents or drain openers, can be dangerous if used without proper ventilation. And malfunctioning heating systems can release deadly carbon monoxide into buildings.

The landlord will also want to be certain waste materials and debris resulting from maintenance work are properly disposed of. Such items should not be dumped atop or buried on the premises, but carted away and disposed of at a landfill or a waste treatment facility.

In summary, the landlord should take great care in deciding what maintenance work he will assume and what maintenance work will be performed by the tenant. Considerable harm can be done to persons and property if maintenance work on the land and within the building is not done properly. In addition, proper maintenance is vital to retain the value and profitability of the landlord's investment in the premises.

[c] Use of Building and Land During Term of Lease

The use to which a building will be put during the term of the lease is of major concern to the landlord. The landlord

should become familiar not only with the general nature of the tenant's business, but also with the specific activities that will be carried on there. Certain uses may seem innocuous at first blush, but a closer inspection may reveal unexpected risks and dangers. For example, the manufacture and painting of artificial fingernails might seem to be a harmless business pursuit, but it can result in the production of toxic residues that must be disposed of properly. Accordingly, the landlord must always bear in mind the potential liability he may have, as property owner, for an adverse environmental condition on the premises created by a tenant. The following subsections review specific concerns of a landlord related to varying uses of his property by a tenant.

[d] Manufacturing

Many manufacturing concerns neither produce nor use hazardous substances in the course of their manufacturing processes. However, many use solvents, lubricants and other products to maintain the equipment used in the manufacturing processes. Such substances may be hazardous. Many other manufacturing concerns utilize or produce hazardous substances directly, or generate such substances as by-products of the manufacturing process.

Accordingly, a sophisticated and prudent landlord will require a tenant to disclose all hazardous stances and related process used by a tenant. If necessary, the landlord may want to hire a separate environmental consultant to review the tenants and options and processes to determine the potential impact on the property. The landlord may want to obtain an environmental assessment of the property to evidence that the property was clean when the tenant took possession. Lastly, the landlord should review the tenants' financial condition in order to determine the tenants' ability to remediate any contamination caused by that tenant.

If the risks are high, the landlord may want to conduct periodic reviews and assessments. The results obtained in response to the above periodic reviews should adequately protect the landlord by allowing him to learn of potential problems before they become unmanageable. The results should also assist him in determining whether to renew the tenant's lease at the end of the term.

[e] Retail and Service Businesses

Retail and service-oriented tenants are often located in shopping centers or on the ground floor of buildings shared with professional offices. The landlord's concerns include maintaining the health, safety and convenience of other tenants, their employees and customers, as well as the condition of his property. Retail/service tenants are far less likely to use hazardous substances in the ordinary operation of their businesses than are manufacturing tenants. However, businesses such as dry cleaners do use hazardous substances and should be monitored in much the same way as a manufacturing concern.

The landlord should also be concerned about solid waste removal. Retail tenants receive regular shipments of inventory. Discarded packaging alone can create a mountain of solid waste for a shopping center. If the landlord is responsible for solid waste removal, he may want to encourage or require participation in recycling programs to reduce the cost of solid waste removal. (Recyclable materials include paper, plastics, metal and glass.) If the tenants are responsible for solid waste removal, the landlord should be concerned about the temporary storage of wastes and the frequency of their removal from the premises.

[f] Storage

A landlord who leases storage facilities to a tenant should be concerned about the types of substances and materials the tenant intends to store there. If the tenant stores hazardous substances and there is a leak or release of these substances, the landlord, as owner of the property, will be liable for the cost of remediation. Similarly, if, at the end of the lease term, such substances have not been removed by the tenant, then the landlord will be forced to bear the cost of removal. Although the landlord may have a right of recovery against the tenant, there may be practical difficulties in enforcing

that right. For example, the tenant may be financially incapable of paying for the clean up.

Where the material stored includes food, food by-products or cooking ingredients, the landlord should be concerned about the danger of attracting vermin. Accordingly, the landlord should require the tenant to engage the services of a licensed exterminator on a regular basis to spray the storage facilities and the surrounding areas. The landlord should make certain the insecticides and pesticides used are not harmful to human beings and that they are sprayed properly, without contaminating foodstuffs or the premises. It should be remembered that pesticides and insecticides can easily wash into water sources on the property, such as a well, stream or pond, where they can contaminate the water and endanger fish and wildlife.

Cold storage facilities create a further concern for the landlord. In the past, these facilities were often insulated with asbestos. Thus, the tenant and its employees may be subjected to the danger of asbestos exposure if asbestos fibers become airborne. Accordingly, the landlord must be certain to disclose to the tenant the existence of the asbestos insulation and require the tenant to take appropriate steps to protect against exposure, such as using protective gear or having the asbestos insulation removed.

Special concerns also exist where the premises contain underground tanks that are used as a petroleum products storage facility. Such underground tanks are most often found at gasoline stations, trucking companies, bus and taxi depots, car and truck rental firms, and home heating oil suppliers. Under the Resource Conservation and Recovery Act ("RCRA"),ⁿ¹ specific requirements exist for the construction of underground petroleum storage tanks.ⁿ² In addition, the RCRA requires notification by the owner of a designated state or local agency within 30 days of the installation of a new tank, or of the commencement of use of an existing underground storage tank. The notification must specify the age, size, type, location and uses of such tank.ⁿ³ There are also rules concerning the removal of underground storage tanks upon cessation of use. Finally, many storage tanks are prone to leakage after a period of time, and the landlord will be responsible for the cost of remediation under the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA") and the RCRA.

[g] Waste Disposal Facility

A landlord who leases property to a tenant for use as a waste disposal facility has many concerns. Because the potential for damage to the land and liability for remediation is so great, every landlord should be very reluctant to lease his property as a waste disposal facility. However, should a property owner decide to lease his property for such use, his concerns will vary depending on whether the facility is to be used to handle solid waste (i.e., ordinary trash) or hazardous waste.

Under the RCRA, a considerable amount of responsibility for developing and implementing plans for solid waste disposal has been delegated by the federal government to the states.ⁿ⁴ Thus, in addition to being familiar with the provisions of the RCRA and its regulations, the real estate practitioner should be fully familiar with state laws and regulations fulfilling the state's responsibilities under that statute.

The RCRA prohibits the establishment of new open air garbage dumps. Existing open dumps must be either upgraded to sanitary landfills or closed completely.

A landlord should require proof from the tenant of compliance with all laws and regulations on the federal, state and local levels. The landlord should also insist on reviewing and approving all plans and specifications prior to the commencement of construction. In addition, the landlord should reserve the right to monitor ongoing operations once the solid waste disposal facility becomes functional. The landlord should also retain the power to hire an expert to review operations.

In the event the tenant violates any federal or state environmental law, the landlord should have the ability under the

terms of the lease to halt the tenant's operations immediately. It would also be prudent to include a provision in the lease requiring the tenant to purchase the property from the landlord at the expiration of the lease term. Thus, if the property is contaminated at the end of the lease term, the burden of remediation will fall entirely on the new owner, i.e., the tenant. The tenant's awareness of this provision will serve as a powerful inducement for him to abide by all federal and state environmental laws.

The tenant who treats or disposes of *hazardous* wastes creates even more concerns for his landlord. The tenant's improper handling of hazardous wastes, resulting in the contamination of leased property, renders the landlord strictly liable.ⁿ⁵ Thus, the landlord is responsible for the cost of remediation without regard to his personal fault or participation in the activities causing the contamination.

An owner or operator of a facility that treats, stores or disposes of hazardous wastes is required to obtain and maintain a special government permit.ⁿ⁶ The permit application must specify the composition, quantities and concentrations of the hazardous substances to be treated, stored or disposed of. In addition, the application must specify the time, frequency and rate of such treatment, storage or disposal.ⁿ⁷ Permits are granted for a stated period not to exceed ten years.ⁿ⁸ Each permit is reviewed every five years and may be modified in order to make certain the facility meets then-existing standards.ⁿ⁹ Inspections of facilities are conducted at least every two years.ⁿ¹⁰

A violation of the provisions of the permit, or any provision of the law requiring the permit, may result in the issuance of a compliance order, the imposition of a civil penalty, and the suspension or revocation of the permit.ⁿ¹¹ Criminal penalties are also possible against any person who commits certain violations of the law.ⁿ¹²

It should be noted that states have the ability to impose requirements more stringent than those of the federal government.ⁿ¹³ Thus, real estate practitioners should make themselves thoroughly familiar with relevant state laws and regulations as well.

[h] Releases

In the event of a release of a hazardous substance into the air or water or unto the land, the landlord's primary concern is the mitigation of his damages. The landlord must insist on receiving notice of the release immediately. In addition, he must insist that all notices required to be given to federal, state and local authorities are given by the tenant in timely fashion.

Steps necessary to prevent or minimize risk of injury to person and property should be taken immediately. For example, an environmental consultant should be quickly engaged to determine the nature and severity of the release. This will require extensive sampling and analysis of soil, air or water to determine how far the contamination has spread and the impact it has had.

A plan of remediation must then be developed, submitted for approval to federal, state and local authorities, and promptly executed. The tenant will be liable for all of the expenses involved since he is the operator of the facility.ⁿ¹⁴ However, the landlord, as owner, is also liable under the strict liability principles of CERCLA.ⁿ¹⁵ Since an indemnification or hold harmless agreement between the landlord and tenant is not binding on the U.S. Environmental Protection Agency, the EPA can collect all remediation costs from the landlord.ⁿ¹⁶ The landlord may then proceed against the tenant for contribution.ⁿ¹⁷

In addition, the landlord may face a host of private civil actions from individuals and/or businesses whose property was damaged as a result of the release. There may also be personal injury suits brought by those who suffered ill effects from the release.

[3] Potential Areas of Concern to Tenant

The concerns of a prospective tenant are similar to those of a purchaser of real property. Since the tenant will be in possession and control of the property, he and his family or his employees will be subjected to the environmental conditions of the land and buildings on a daily basis. Adverse environmental conditions may affect their health and safety, as well as their ability to use and enjoy the premises. Accordingly, the tenant should make a careful review of the land and buildings prior to entering into a lease.

[a] Prior Use of Land and Buildings

Both the residential and commercial tenant should be concerned about prior uses of the land and buildings. The case that served as the impetus for much of the federal and state environmental legislation enacted to protect Americans from improper disposal of hazardous wastes involved a residential subdivision built in western New York state, known as "Love Canal."¹⁸ For many years the area had been used by various companies for disposal of toxic chemicals and hazardous wastes. Thereafter, the area was filled in and a housing development was built on the site. By the 1970s, the substances had slowly seeped into the basements of homes and into sewers, creeks, ground water, school and park playgrounds, and many other places. The situation was so threatening to the health and welfare of the residents that over 900 families were relocated.¹⁹ Obviously, Love Canal is not the only place where homes have been built on former industrial sites or over landfills. Indeed, many developers are currently renovating former factories and warehouses for residential and office use.

Thus, learning about prior uses of rental property will assist the tenant in making an intelligent, informed decision about whether to lease the subject property in the first place.

A tenant in a multi-unit structure may want to inquire about the prior uses of his particular unit. For example, a residential tenant with severe allergies may be concerned about whether the prior tenant had pets. A commercial tenant may be concerned about chemical residues left behind by a prior tenant. Accordingly, during lease negotiations, the tenant may be able to insist the landlord perform, at his own expense, a thorough decontamination cleaning of the premises.

[b] Present Condition of Land and Buildings

Since the tenant, his family, employees, guests and customers will be affected by the environmental condition of the building and land, the tenant should make a thorough inspection of the property prior to signing the lease. At a minimum, the tenant should fully investigate whether any of the problems discussed below exists. There may also be other region- or site-specific problems that should be investigated as well.

First, the property should be tested to determine the existence and amount, if any, of radon gas. The tenant should not lease any property with radon gas levels exceeding the level deemed safe by government authorities, unless he has received written assurance the landlord will immediately correct the problem at his own expense.

Second, the tenant should ascertain whether asbestos-laden insulation exists anywhere on the subject premises. If it does, he should require the landlord to remove or contain the asbestos as a condition to signing the lease. A commercial tenant can be subjected to a worker's compensation claim if an employee were injured from exposure to the asbestos. And, of course, a residential tenant would not want to expose himself and his family to the dangers of asbestos.

Third, the tenant should not lease any space that contains urea formaldehyde insulation due to the health risks created by this form of insulation. Accordingly, the tenant, before signing the lease, should require the landlord to remove the insulation and reinsulate using a benign form of insulation.

Fourth, the tenant should determine whether lead-based paint was used in the interior of the subject premises. (The use

of lead-based paint has been prohibited in the United States since 1978; however, structures built prior to 1978 frequently contain surfaces covered with such paint.) Lead in paint poses a serious health risk to all people, particularly small children and pregnant woman.

If the tenant discovers the premises contain lead-based paint, before executing the lease, he should require the landlord to either remove the paint by sanding or vaporizing it with a heat gun, or contain the painted area by applying sheet rock or plaster over it. The cost of removal or containment should be borne entirely by the landlord. The landlord should also be expected to cover the cost of repainting any area from which lead-based paint was removed.

Fifth, the prospective tenant should engage the services of a licensed exterminator to search for the presence of, or structural damage caused by, wood-boring insects, such as termites, carpenter ants and powder post beetles. The exterminator should also look for mold or fungus growths that can also cause damage to the structure by gradually weakening wooden supports, such as beams or joists. If the exterminator's inspection reveals the presence of wood-boring insects and/or mold or fungus growths, the prospective tenant should require the landlord to thoroughly resolve this problem at the landlord's expense before signing the lease. Similarly, the landlord should be required to repair any damage caused by the insects and/or the mold or fungus growths.

Sixth, if the property is served by a well, the tenant should be certain the pump is in good working order. In addition, all plumbing, pipes and fixtures should be examined for leaks and wear. Such an examination is not costly; however, any of these items can be very expensive to repair or replace. If the property is served by a septic system, the system should be examined by an expert to make certain it is in good working order.

Lastly, in the event the prospective tenant will be responsible under the lease for performing repairs and maintenance to the premises (e.g., stairwells, elevators, heating and air conditioning systems, etc.), he should carefully examine those items he will be required to maintain and repair. The purpose of the examination is to learn the current condition of the items. If they are not presently in good repair, the tenant should negotiate with the landlord to either lower the rental fee or require the landlord to cover the cost of repairing and maintaining the items.

[c] Waste Disposal

For the residential tenant, solid waste disposal should not prove to be a problem. Usually, the municipality will provide trash removal services for its residents, free of charge. Where the tenant lives in a large residential development, such as an apartment house or condominium or cooperative development, the landlord or the condominium or cooperative association will enter into a contract with a private hauler to remove its solid waste.

A commercial tenant, on the other hand, will want to make certain that, before it signs the lease agreement, it has entered into a binding and affordable waste removal contract for a period of time extending at least as long as the term of the lease. Otherwise, the tenant may find himself bound by a lease of real property that, as a practical matter, he cannot use.

[d] Uses by Other Tenants

Where the tenant is seeking to lease space in a multi-unit office building or shopping plaza, additional concerns are raised regarding the effects of other tenants' uses of their property on the prospective tenant.

The tenant might be concerned about the types of cleaning agents used by the landlord and other tenants. Many industrial cleaning agents have very strong odors and are toxic. The tenant might be concerned about the effect of the odors on his business, and the impact such toxic substances could have on his health and his staffs'. Accordingly, the tenant should obtain from the landlord a list of chemicals regularly used for cleaning in the building before executing the lease. The tenant should also inquire as to whether the list is subject to change without notice to the tenant or

without his approval. In addition, the tenant should learn whether tenants are restricted in their selection of cleaning agents.

The tenant should also be concerned about the substances other tenants use in operating their businesses. The tenant should request that the landlord establish guidelines to which all tenants must adhere. If two or more tenants use the same substance, it may be difficult for the good tenant to prove that it did not contribute to the condition.

Finally, the commercial tenant will need to investigate review any site-specific problems that may exist. These may arise because of the age of the building, its design, the nature of existing tenants' businesses, the location of the building, and the nature of the tenant's business. Again, the parties may want to obtain a bench mark assessment to identify any pre-existing conditions.

[4] Solutions for Landlord's Concerns

This subsection will examine possible solutions for a landlord's concerns about his prospective tenant's use of the leased premises. These measures should be posed to the tenant, whose attorney will negotiate the terms with landlord's counsel. Full agreement on these measures should be reached before the landlord becomes obligated to lease the space to the tenant. With the exception of the penalty measures and the provisions requiring the tenant to purchase the property in the event of an environmental accident, if a prospective tenant is very reluctant to agree to the measures discussed below, the landlord should seriously reconsider whether he wants to risk leasing his property to the tenant in the first place.

[a] Representation by Tenant of Nature and Scope of Business

The first representation a landlord should request from a prospective tenant is regarding the nature of the tenant's business. The landlord should determine, based on information supplied by the tenant, whether the business is primarily retail, service-oriented, manufacturing or some other type. The tenant should fully describe his product and/or service lines, as well as the approximate number of employees, customers and others expected on the premises on a daily basis.

If the business is primarily retail, the tenant should state whether any of the inventory is, or contains, a hazardous substance. Similarly, if the business is primarily service-oriented, the tenant should describe whether any product used in performing the service is, or contains, a hazardous substance. In addition, if the business is primarily manufacturing, the tenant should state whether any hazardous substance is used in, or produced during, the manufacturing process.

If hazardous substances are used or produced, the tenant should specify the substances and the quantity that would probably be on hand at any given time. If revealing such information would result in disclosing a "trade secret," the landlord should agree to maintain the confidentiality of the information, unless required by law to disclose it.

The tenant should also be required to represent that he will not use, store or otherwise handle any hazardous substances whose identity he has not revealed to the landlord, and that before introducing any new hazardous substance unto the property, he will first obtain the express written permission of the landlord. In addition, the tenant should represent that he will not store, use or handle amounts of the named hazardous substances that exceed the amounts for which the landlord has granted approval. The tenant should also be required to obtain the express written approval of the landlord prior to increasing the amount of hazardous substances brought onto the leased premises or produced there.

These representations should be in written form and made part of the lease. The lease should provide that if the tenant violates any of the representations, or if he has made a deliberate material misrepresentation of fact while negotiating the lease, he is in breach of the lease agreement. The lease should allow the landlord to then terminate the agreement, or to seek specific performance of the representation or monetary damages for misrepresentation--all at the landlord's option.

Clearly, the landlord will need to monitor the tenant in order to ascertain whether the tenant has made a misrepresentation during lease negotiations or violated the representations after the lease is executed. The landlord should act quickly if he discovers a misrepresentation or violation of a representation. Enforcement procedures may be lengthy and expensive, particularly where the landlord seeks to evict the tenant. However, the other option--doing nothing in the face of a clear misrepresentation or a violation of a representation--can open the door to tremendous damage to the landlord's property. Thus, swift action must be the rule where misrepresentations or violations of representations are found.

[b] Requirement that Tenant Will Not Cause or Suffer Environmental Damage to Property

Environmental damage in many forms can be caused by a tenant or other occupant of real property. This damage includes both interior and exterior problems.

For example, neglect by the tenant in inspecting the premises regularly can result in wood-boring insects, mold and fungal growths damaging the structures. Repairs and alterations performed by the tenant may result in the disturbance of existing asbestos insulation, thereby creating a health hazard for the tenant, his family or employees, and invitees. Improper trash storage and disposal may lead to cockroaches, rodents and other vermin infesting the premises. Improper storage or use of hazardous substances may cause an accidental release of those substances, requiring prompt and possibly expensive remediation.

Any of the above problems, if left unchecked, will result in damage to the property and diminution of its value. Such damage may require substantial sums of money to repair. In some instances, the value and usefulness of the property may be permanently and irreparably harmed.

Thus, the landlord should require, as part of the written lease agreement, a provision that prohibits the tenant from causing or allowing any type of environmental damage. The exact terms of such a provision will depend, in part, on the nature of the tenant's business, and whether the tenant is responsible for repairs to and maintenance of the premises.

If the tenant breaches the provision, the lease agreement should provide that the landlord, at his option, may require the tenant to repair the damage, or reimburse the landlord for the costs of repair, including any necessary professional services, e.g., attorneys' fees. In addition, the landlord should have the ability to terminate the lease agreement. The tenant, of course, should be responsible for all fines, penalties and liens that may be levied by any governmental agency as a result of the tenant's improper conduct.

The lease should also make clear the tenant is fully responsible for the tortious acts and omissions of his employees, agents, guests, customers, family and invitees.

[c] Alterations and Repairs

To protect a landlord who is concerned about the effect of alterations and repairs to the premises, several provisions should be included in the lease agreement. First, the tenant should be required to obtain plans and specifications for any alterations--including the initial "fit-up" of commercial premises at the time the lease is signed--from a design professional, such as an architect, interior decorator, landscape artist, etc. Second, the alterations must be performed in strict compliance with the plans and specifications. Third, the lease should provide that the landlord is entitled to review and approve the plans and specifications prior to the commencement of work. Fourth, the tenant should be required to obtain all necessary permits from municipal authorities. Fifth, the tenant's choice of contractor should be made subject to approval by the landlord. Sixth, the tenant should be required to use only first-class, new materials.

If making alterations will cause a disturbance of asbestos, the tenant should be required to first notify the proper

governmental authorities. All work should be performed in strict compliance with federal, state and local laws and regulations pertaining to the removal of asbestos. The tenant should be forced to dispose of the asbestos only in a landfill that accepts asbestos-laden materials. Similar provisions should be inserted into the lease if urea formaldehyde insulation or lead-based paint will be disturbed or removed.

Repairs the tenant is required to make during the term of the lease should be handled in a similar manner. The lease should state that the tenant must first obtain the landlord's approval of the methods, materials and contractor, unless the repair constitutes emergency repair work. The landlord should also reserve to himself the right to come upon the leased property and perform the repairs in the event the tenant fails to do so. The landlord may then charge the tenant for the full cost of such repairs, together with interest, until full repayment is made. The tenant should also be required to make repairs promptly in order to prevent deterioration of the property.

In addition, the lease should provide that all repairs and alterations on the premises shall be performed in a manner that will not inconvenience other tenants by creating excessive noise, dust or a lack of access to their leased premises.

In the event the tenant breaches any of the promises regarding alteration and repairs, the lease should provide that the landlord may collect any monetary damages he may have suffered, including reasonable attorneys' fees. The landlord should also reserve the right to terminate the lease in the event of a violation. Finally, the tenant should be responsible for any fines or other penalties for violation of any laws or governmental regulations.

[d] Landlord Reserves Right to Review Tenant's Books and Records

Commercial tenants maintain a variety of books and records. Some are required by law, such as tax records and hazardous waste records. The purpose of any set of records is to provide, in a readily-available format, information that is useful or necessary to the record keeper, his customers, landlord, or the government.

Where the landlord is concerned about the tenant's compliance with the law or the terms of the lease, he should reserve for himself in the lease agreement the right to examine the books and records of the tenant. It is unlikely the tenant will agree to grant access to all of his books and records. However, the landlord should insist on access to any records he reasonably believes are germane to the protection of his property from abuse. These may include, for example, invoices for the purchase or sale of hazardous substances, and bills from waste removal companies. These records will give the landlord an indication of what substances are being brought onto the premises, as well as the amounts of such substances. In addition, the landlord can be sure that waste is being properly removed.

Under the terms of the lease, the landlord should be able to obtain access to books and records of the tenant at any reasonable time and without having to give prior notice to the tenant. Such a provision guarantees the tenant will be less able to falsify or misrepresent the records. The lease agreement should also provide that, in the event the tenant refuses access to the landlord, he may obtain a court order directing immediate access. In addition, the right to review records containing information about events that occurred during the term of the lease should survive even *after* the lease has terminated. (This type of provision may become vitally important in the event the landlord must perform remedial work after the lease term has ended, such as cleaning up a toxic waste dump. The records may help identify the toxic substances and their quantities.) Finally, the landlord should be entitled to terminate the lease if false or misleading records are provided by the tenant at any time.

The above rules should apply to any of the tenant's records that may be useful to the landlord in protecting his property from abuse. For example, in a lease granted by a timber company to a club for hunters and sportsmen, the landlord may want to review records concerning wildlife harvesting. Similarly, in a lease that allows the tenant to extract and sell certain natural resources, such as gas, oil, shale, sand or gravel, the landlord may wish to review the books to be certain he is receiving his fair share of the profits from the tenant's business. In such case, he may also want to reserve the right to have the books audited once each year, at the tenant's expense, by a certified public accountant of the landlord's

choosing. The landlord also may wish to have a penalty provision inserted into the lease in case the audit shows the tenant underpaid by a particular amount or percentage.

[e] Indemnification and Personal Guaranty

When a landlord places possession and control of real property in the hands of a tenant, he generally requires the tenant to indemnify him for any legal claim brought against the landlord and arising due to the tenant's acts or failure to act. The indemnification is based on the theory that the tenant, rather than the landlord, is normally responsible for maintaining the leased premises. In addition, since the tenant determines who enters the property--rather than the landlord--he should be held liable for all injuries occurring on his "watch."

The landlord should be particularly interested in obtaining an indemnification from the tenant relating to environmental matters. Since the tenant is in possession and control of the property, he should be held responsible for remedying any environmental problems he causes.

The indemnification should be contained in the written lease agreement. It should require the tenant to reimburse the landlord for, among other things:

- (1) the cost of clean up or remediation of an adverse environmental condition created by the tenant, his employees, agents or any other party he allows on the premises;
- (2) environmental consultants' fees;
- (3) professional fees, including engineering and attorneys' fees;
- (4) any studies that may be required, such as health impact studies;
- (5) judgments or settlements paid by the landlord for injury or death to persons and damage to property arising from the environmental condition; and
- (6) any other expense that the landlord would not have incurred but for the acts or omissions of the tenant, his agents, employees or invitees, that resulted in the environmental damage.

Again, it should be remembered that under both the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA")ⁿ²⁰ and the Resource Conservation and Recovery Act ("RCRA"),ⁿ²¹ an indemnification agreement is not binding *on the federal government*. Any potentially responsible party, including a landlord, may be required by the government to pay for remediation expenses. However, that party may seek reimbursement from other responsible parties. The issue, then, for the landlord, becomes one of collectibility.

Additionally, an indemnity is only as good as the party that gives it. As a result, if the tenant is not creditworthy, then the landlord may be left holding the bag. As a result, if the tenant is a closely held entity, the landlord may require the owners to personally guaranty the obligations of the tenant under the lease. It may also be important to consider a guaranty in a parent subsidiary relationship.

In either case, the tenant's owners will be in a position to manipulate the finances of the tenant. Therefore, in a closely held situation, the landlord should always review the creditworthiness of the tenant and consider a guaranty of the owners of the tenant.

[f] Representation by Tenant that It Will Obey All Laws

Generally speaking, a land owner is responsible for the tenant's compliance with laws relating to the real estate. Although many leases delegate certain responsibilities created by law to the tenant, the landlord remains primarily liable when these duties go unfulfilled. These duties may include such things as paying real property taxes, obtaining building permits necessary for construction projects or alterations of the leased premises, obtaining zoning variances, etc.

The landlord should require from the tenant a representation that the tenant will obey any and all laws relating to his use and occupancy of the property. The landlord should insert in the representation references to any laws that are a specific concern to him. The lease should make clear that these delineated laws should not be interpreted as exclusive, but instead as illustrations of the types of laws with which the tenant must comply.

In the event the tenant violates any law by act or omission, the landlord should have the following options available to him under the terms of the lease:

- (1) the right to require the tenant's compliance with the law by obtaining an injunction or other order issued by a court of competent jurisdiction;
- (2) the right to bring the property into compliance and receive payment for the cost thereof, including attorneys' fees, from the tenant;
- (3) the right to terminate the lease and evict the tenant from the property;
- (4) the right to collect reimbursement of penalties and fines from the tenant and any other reasonable remedy.

The landlord should strongly consider monitoring compliance with the law by requiring the tenant to provide him with periodic proof of compliance. This would include providing the landlord with receipts for payment of real estate taxes, copies of applications for permits, copies of the actual permits, and copies of permit renewals.

With respect to compliance with specific environmental laws, the landlord may consider accepting an opinion letter from tenant's counsel, stating that the tenant is in full compliance with all environmental laws and regulations--federal, state and local. In this way, the landlord may have recourse against the tenant's counsel for a false or misleading opinion.

The landlord may also consider having his own expert review the tenant's operation from time to time in order to monitor compliance. Who will pay the cost of the expert's services is an issue that should be negotiated between the landlord and tenant and set forth in the lease.

[g] Bond or Insurance to Cover Expenses

Where the landlord expects the tenant to be involved in the handling of hazardous substances, the landlord will want to take precautions to insure that if a release occurs that will require some response or remediation under the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA") or the Resource Conservation and Recovery Act ("RCRA"), a special source of funds will be available to the landlord to cover the cost of that response or remediation. Otherwise, the landlord can be certain that federal and state authorities will seek reimbursement from him.

Most standard casualty insurance policies exclude pollution damage, unless the damage was caused by an event that was "accidental" and "sudden." Such policies may cover a release of hazardous substances which occurs rapidly. However, any slow leakage of such substances would not be covered.

Thus, the landlord should require the tenant to obtain, in addition to normal casualty insurance, a bond, letter of credit, or insurance policy that will provide the landlord with immediate access to funds for remediation in the event of a sudden release of a hazardous substance, slow leakage or other event or series of events which cause environmental damage to the property. This is especially prudent if the tenant does not have strong credit. It is impossible for the author to suggest the appropriate amount of the bond, letter of credit, or insurance coverage because the future cost of remediation will depend on the nature of the substance released, the amount, the location of the mishap, the cost of clean up, and the value of the contaminated property before the mishap. Certain chemicals may be more difficult to clean up than others. Moreover, the geology of the area in which the chemicals are released may affect the ease or difficulty of the remedial efforts. For instance, if there is ground water flowing near the surface, it may carry contaminants a great distance. Conversely, if the subsurface is very rocky and dry, this may slow the penetration of the hazardous substances into the earth.

Thus, the amount of the bond, letter of credit, or insurance coverage should be subject to negotiation by the landlord and tenant prior to the execution of the lease. During negotiations, the parties should take into account the amount of hazardous substances that will be used, produced or stored on the premises, the level of danger posed by each substance, the likelihood of an environmental mishap, the safety procedures that will be in place to prevent or at least mitigate the effects of such mishaps, and similar factors. In short, the greater the risk of a serious environmental mishap, the larger the amount of the bond, letter of credit, or insurance coverage.

The lease should require that the insurance policy, bond or letter of credit be delivered to the landlord before the tenant takes possession of the premises. In addition, the terms of the insurance policy should require the insurance company to provide the landlord with written notice--by certified mail, return receipt requested--at least 30 days prior to cancellation, revocation or expiration of the policy. The lease should further provide that if the policy is cancelled, revoked or if it expires, and the tenant is unable to replace the policy with a substitute policy acceptable to the landlord, the landlord will have the option to obtain a similar policy himself at the tenant's expense. In addition, the landlord should be given the option to simply terminate the lease.

[h] Representation by Tenant Regarding Waste Disposal

In the written lease agreement, the landlord should require the commercial tenant to remove all solid waste from the premises promptly, but, in any event, no less often than once per week. All costs for waste removal activities should be the sole responsibility of the commercial tenant.

The landlord should also require the tenant to obtain a written contract with a hauler of solid waste. That contract should extend for a period of time that is at least as long as the term of the lease, and it should provide that the contract is terminable only for cause. The contract should also contain a provision requiring the hauler to notify the landlord in writing--by certified mail, return receipt requested--at least 30 days before the effective date of termination of the contract.

The lease should further provide that the tenant must exterminate insects, rodents and other vermin, as necessary, in and around the waste storage area and in any other location that may become infested as a result of the tenant's use of the waste storage area. The tenant should also be required to keep all waste storage vessels well-covered and concealed from the view of the general public and other tenants, wherever possible.

In the event the tenant fails to perform any of his obligations, the landlord should have the right under the lease to perform the obligations at the tenant's expense. The tenant should be responsible for any fines, penalties or damage caused by his actions or failure to act. In addition, the landlord should reserve the right to terminate the lease and remove the tenant from the premises for persistent violations of the tenant's duty to properly dispose of waste.

[i] Penalty Provisions

The purpose of penalty provisions is to influence the behavior of the tenant by giving him a disincentive to act in a manner that is violation of lease provisions. The penalties are imposed by the landlord pursuant to the terms of the lease. Such penalties must be negotiated between the landlord and the tenant and inserted into the written lease agreement when the agreement is being drafted. Penalties may also be imposed by a governmental agency pursuant to the terms of a law or regulation.

Landlords generally seek to impose two types of penalties. One is related to the failure of the tenant to perform some obligation imposed under the terms of the lease. For example, the landlord might charge a "late fee" equal to 5 percent of the monthly rent if the tenant fails to pay the rent on time. (This late fee is in addition to any interest that also may be due on the rental payment. The interest covers the loss of profit the landlord suffers from not having immediate use of the rent payment.) The 5 percent penalty covers any additional administrative costs to the landlord due to the tenant's failure to make prompt payment. Both interest and penalty are designed to elicit the desired behavior, that is, payment of rent on time.

The other type of penalty a landlord may seek to impose is a punishment for an affirmative act performed by the tenant which is in violation of the terms of the lease. For example, if the lease prohibits the tenant from harvesting any wildlife on the premises, and the tenant shoots two deer, the landlord may impose a penalty for each deer shot. Since the deer do not have a readily ascertainable "market value"--as compared, for example, to a cubic yard of gravel--the landlord will not be able to recover damages in a court of law. A penalty imposed under the lease terms will help influence the tenant's future behavior.

Penalties can be used by the landlord to shape and induce environmentally-appropriate behavior from the tenant. For example, if the tenant fails to remove solid waste, the landlord can impose a stiff penalty. If the landlord then removes the waste himself, he can charge the cost of removal (plus interest) to the tenant in addition to the penalty.

The penalty imposed by the landlord can be a percentage of the periodic rental amount or a percentage of the tenant's gross or net profits during a specified time period. Alternatively, the penalty can be a fixed dollar amount. In addition, the penalty can escalate each time the reprehensible behavior manifests itself.

Penalties that may be imposed by a governmental agency include monetary fines, incarceration and revocation of permits. The monetary fines and periods of incarceration may increase if the tenant repeats or continues his illegal action.

A permit revocation most frequently occurs when the holder of the permit violates the terms of the permit. For example, if a government permit allows the discharge of a particular amount of waste water, effluent or other substance per day, and the holder discharges more than the specified amount, he may be subjected to revocation of his permit.

In sum, penalties can be a very effective method of shaping appropriate behavior in a tenant. The landlord should be certain such provisions are agreed upon and made a part of the lease before the tenant takes possession of the premises.

[j] Requirement that in Event of Mishap Tenant Will Purchase Realty at Fair Market Value Immediately Prior to Mishap

When an environmental accident occurs, such as a release of hazardous substances, it is inevitable that the property value will decline to some extent. In addition, other tenants may terminate their leases, thereby reducing the rental income from the property. Unwelcome notoriety from the accident may also reduce the likelihood of replacing tenants who flee the property in the wake of the accident. In addition, the landlord may face demands for costly remediation from federal and state environmental protection agencies. Given such a scenario, a landlord would probably be extremely happy to get his money out of the property and run as far away from it as he could go.

A clause in the lease requiring a tenant, who causes or allows an environmental accident to occur, to purchase the property affords two major benefits to the landlord. First, the landlord would immediately receive a valuable asset, cash, instead of owning a polluted (and possibly worthless) liability. Second, there is a strong possibility that authorities charged with overseeing remediation would pursue the former tenant, now the owner of the property, for the cost of remediation since he has become both owner and operator.

However, there are several practical problems to consider. First, the tenant may not have the cash available to purchase the property from the landlord. Second, if there is a mortgage on the landlord's property, it is very unlikely the existing mortgagee would allow an assumption of the mortgage by the tenant. Third, it is even less likely a new mortgagee would be willing to finance the purchase of the contaminated property by the tenant. After all, in the event of a default on the mortgage by the former tenant (i.e., the new owner), the new mortgagee would wind up with title to the property and liability for remediation. Very few lenders would knowingly accept such a risk. Lenders would also be concerned that once an accident has occurred, more accidents may follow; they would also be concerned about the inevitable diminution in the property's value due to the mishap, and the feasibility of completely cleaning up the property and restoring it to its pre-mishap condition. Thus, the tenant would have to have either substantial amounts of his own money with which to buy the property outright, or unencumbered assets sufficient to collateralize the needed loan.

If the landlord and tenant decide to insert into the lease a provision requiring the tenant to buy the property in the event of an environmental mishap, a procedure must be set forth for determining the value of the property immediately before such mishap occurred. Accordingly, the lease should state that if an environmental mishap occurs at some future time, an appraiser who is mutually acceptable to the parties will determine the fair market value of the property immediately before the mishap occurred. If the parties cannot agree on an appraiser at that time, then each party would be free to choose his own appraiser. The two appraisers will then select a third appraiser who will actually perform the appraisal. The value determined by that appraiser would be binding on both parties. Other variations of this procedure are possible as well. The most important thing, however, is that the matter is discussed, agreed upon, and included in the written lease.

It should also be noted that if the tenant is required to purchase the property, the landlord may have tax-related concerns. Upon transfer of the property to the tenant, the landlord will probably realize capital gain, which must be recognized. This may result in a substantial tax liability.

Finally, depending on the severity of the accident and the size of his potential tax liability, the landlord may not wish to sell the property to the tenant following an environmental mishap. Thus, the landlord should insist upon inserting a provision in the lease granting him the option of deciding whether the tenant must purchase the property following an environmental mishap. Alternatively, the landlord may wish to condition the transfer on the cost of remediation. In other words, if the cost of remediation exceeds a fixed dollar amount or a fixed percentage of the property's fair market value, then the tenant would be required to purchase the property. Issues similar to those discussed above regarding land valuation may arise if this approach is used.

[5] Solutions for Tenant's Concerns

The concerns that a residential tenant has basically revolve around health and safety issues. He is naturally concerned that the leased premises will be clean and devoid of any hazards that pose a threat to the health and safety of himself and his family.

The commercial tenant shares all of these concerns as well as financial ones as well. When a commercial tenant selects space, he makes a substantial investment in both "hard" and "soft" costs. The hard costs include "fit-up" expenses (i.e., adapting the space for his particular business needs), the cost of moving his equipment, inventory and staff, the cost of locating necessary services (e.g., telephone, delivery), etc.

The soft costs include loss of production during the packing, moving and unpacking periods and the value of the time spent locating the new space and supervising the activities required to open a business at that new location. Thus, the total cost of relocating a business can be staggering; the cost of moving a *second* time, following an environmental mishap, can destroy the business financially.

This subsection will review ways in which tenants, both commercial and residential, can address these concerns through the terms of the written lease agreement with the landlord. The tenant should always raise his specific concerns with the landlord while negotiating the terms of the lease. The tenant should also make certain the solutions reached are memorialized in written form and inserted into the lease itself.

[a] Representation by Landlord of Condition of Premises

The tenant should require the landlord to make one or more of the following representations regarding the premises to be leased:

- (1) There is no asbestos-containing material in the structures.
- (2) There is no urea formaldehyde insulation contained in the structures.
- (3) There are no hazardous substances used in, stored on, disposed of, or otherwise handled on the premises, and none have ever been stored, disposed of or otherwise handled on the premises.
- (4) Each structure is in good condition and repair, including the roof, the plumbing, and the heating, ventilation and air conditioning systems.
- (5) All of the fixtures and equipment contained in the structures are in good working order.

In the alternative, the tenant may want to conduct a comprehensive inspection and investigation of the property. If any of the problems exist, then, before signing the lease, the prospective tenant should insist the landlord correct the problem at his own expense. Alternatively, the tenant may request a reduction in the rental fee and handle the problem himself. In short, the tenant is well advised not to simply accept the property "as is."

The tenant should also request that the landlord provide him with copies of any documentation that formed the basis for the landlord's representations. Such documentation might include a structural analysis or environmental site assessment of the property. If personal knowledge or belief is the landlord's sole basis for his representations, the tenant should seriously consider having the proper examinations performed himself.

In addition, the tenant should consider negotiating and inserting "escape" provisions into the lease in the event he discovers, after signing the lease, that any of the landlord's representations was incorrect. Such a provision would allow the tenant to terminate the lease and entitle the tenant to recover his fit-up costs, plus interest, from the landlord. If the landlord's erroneous representation was deliberate, the tenant should also be allowed to recover the costs of relocating the business to a new location. The tenant should also consider requesting that a penalty clause be included in the lease, which would be invoked in the event of a deliberate misrepresentation by the tenant. The penalty would take the form of a fine for a fixed amount of money.

[b] Indemnification Granted by Landlord To Tenant

As further protection for the tenant, the lease may include an indemnification clause providing that the landlord will indemnify the tenant against any claim or loss arising from a condition on the property that existed prior to the tenant's

occupancy of the property.

The wording of the indemnification is extremely important. For the tenant's benefit, it should entitle him to recoup the total cost of defending against any action brought against him, including court costs, attorneys' fees and all other litigation expenses. The indemnification should be very broad in scope, covering all types of lawsuits that might be brought against him. In that way, even claims brought against the tenant by his employees for such work-related health problems as cancer or asbestosis will be covered by the indemnification. Even if the claimant does not prevail with his suit, the landlord will be required to pay the tenant's litigation costs. Thus, the indemnification clause acts almost like a private insurance policy between the landlord and the tenant.

[c] Environmental Site Assessment

An environmental site assessment is a valuable tool for the tenant to use in relieving his environmental concerns. An environmental site assessment is generally performed in two phases. A Phase I assessment examines prior uses of the subject property and neighboring properties through various means to determine whether there is any evidence of an adverse environmental condition on the subject property. If there is some evidence of an adverse condition, a Phase II environmental site assessment is performed. In a Phase II assessment, actual samples of soil, air and water are taken and analyzed in an attempt to determine the exact nature and scope of the adverse condition. From the results of the Phase II study, a plan of remediation can be developed and implemented.

An environmental site assessment should be ordered by the tenant whenever the landlord is unwilling or unable to grant an indemnification and/or make representations regarding the environmental condition of the property being leased.

The environmental site assessment will give the tenant some assurance that the health and safety of his family and guests, or employees and customers, are not being placed at risk by his occupancy of the subject premises. In addition, the assessment guarantees that his monetary investment in locating the leased premises and moving his business there is not at risk due to some hidden environmental hazard existing on the property. The cost of an environmental site assessment, although not inconsequential, is significantly less than the cost of locating one's business after an adverse environmental condition is found to exist on the leased premises.

[d] Contingency for Waste Disposal Approval

For most residential tenants, solid waste disposal does not pose a serious issue. Waste disposal services are typically provided by the landlord at no extra cost to the tenant.

A commercial tenant, however, must be certain before signing a lease that he can obtain waste disposal services, that the price of such services will not skyrocket suddenly during the lease term, and that the price is affordable. The tenant should attempt to obtain a written contract with a waste disposal contractor before signing the lease. Such contract, together with guaranteed extension or renewal periods, should run at least as long as the term of the lease. The contract should provide that it may only be terminated for cause, such as non-payment or some other material violation of the contract by the tenant. With such a provision, the contractor could not terminate the agreement and then re-offer his services at a much higher price. If the contract provides for extensions or renewals, the new price for those extension or renewal periods should be specified, or the method for calculating the new price should be set forth. If the contract imposes a limit on the amount of trash to be removed at every collection, the contract should set forth the additional cost for removing the excess refuse. The contract should also specify any types of solid waste the contractor will not accept.

The landlord and tenant should negotiate the terms of the entire lease and make the tenant's obtaining a waste disposal contract a contingency to the lease. The contingency should provide that the tenant may terminate the lease agreement if he is unable to obtain an acceptable waste disposal contract by a particular date. The contingency should specify the term of the waste disposal contract, the maximum price acceptable to the tenant, the requirement that termination of the

waste disposal contract must be for cause, and any other provision the tenant believes is necessary. As for the landlord, he may wish to reserve for himself the right to locate such a contract on the tenant's behalf, in the event the tenant is unable to obtain such a contract.

If a waste disposal contract is obtained in a timely fashion, the lease agreement would then become binding; if not, the tenant would give notice to the landlord to terminate the lease. If a waste disposal contract comes close, but does not meet all of the tenant's demands, the parties may consider making some financial adjustments to the lease in order to compensate the tenant, while preserving the lease itself. Such adjustment should be made in a written modification agreement executed by both parties.

[e] Provision for Termination of Lease Where Another Tenant Causes or Suffers Environmental Mishap

In a multi-unit residential or commercial building, a tenant always has concerns about what is happening in other tenants' units. Some tenants will want to protect themselves by negotiating a provision in the lease that will allow the tenant to terminate his lease in the event another tenant causes or suffers an environmental accident. This right will allow the tenant to protect the health and safety of his family, or of his employees and customers, by removing them from the premises. It will also help the commercial tenant to protect his business. When news of the environmental accident becomes public, the tenant may not be able to attract customers or suppliers to his site. Although moving a business is very costly, at least the tenant will still have a profitable business once he has moved.

The parties will need to consider and negotiate the exact definition of the term "environmental accident." It is possible to leave the matter totally within the tenant's discretion or require that a certain level of danger to humans be reached before the right to terminate may be exercised.

[f] Representation by Landlord that No Other Tenant Is Engaged in Activity which May Result in Mishap

In order to induce a prospective tenant, either residential or commercial, to accept space in a multi-unit building, the landlord may agree to make a representation in the lease agreement that no other tenant is engaged in an activity that could be reasonably expected to cause or result in an environmental mishap. In such case, the landlord will be required to place a provision in all other tenants' leases prohibiting them from using, storing, disposing of, or otherwise handling hazardous substances on the subject property. The landlord will also need to actively monitor all of these tenants for compliance.

The tenant should also negotiate specific default provisions relating to this representation. The landlord will be deemed to have defaulted if he fails to place the provisions in the other tenants' leases regarding hazardous substances. The landlord will also be deemed to have defaulted if other tenants violate the provisions regarding hazardous substances, and he takes no action to stop the violations.

The tenant should also negotiate specific remedies in the event of a default. In such case, the tenant should have the option to rescind the lease. That is, the tenant should be entitled to terminate the lease based on the landlord's acts or omissions. In addition, the tenant should be entitled to reimbursement for the costs of relocation, including moving expenses, and the cost of adapting the new rental space to meet his business needs. In addition, the tenant may also consider negotiating a penalty provision to further encourage the landlord to perform his duties.

Legal Topics:

For related research and practice materials, see the following legal topics:

Environmental Law
Hazardous Wastes & Toxic Substances
CERCLA & Superfund
Enforcement
Cost Recovery
Actions
Potentially Responsible Parties
Owners & Operators
Environmental Law
Hazardous Wastes & Toxic Substances
Resource Conservation & Recovery Act
Enforcement
General Overview
Insurance Law
Property

InsuranceExclusionsPollutionGeneral OverviewReal Property LawEnvironmental RegulationGeneral OverviewReal
 Property LawEnvironmental RegulationIndoor Air & Water QualityReal Property LawEnvironmental
 RegulationLiabilities & RisksCERCLA Response CostsReal Property LawEnvironmental RegulationLiabilities &
 RisksContractual Relationships

FOOTNOTES:

(n1)Footnote 1. 42 U.S.C. § 6901 *et seq.*

(n2)Footnote 2. 42 U.S.C. § 6991b(c), (e).

(n3)Footnote 3. 42 U.S.C. § 6991a(a)(3).

(n4)Footnote 4. 42 U.S.C. §§ 6941-6949.

(n5)Footnote 5. *See New York v. Shore Realty Corp.*, 759 F. Supp. 1031, 1042 (2d Cir. 1985) .

(n6)Footnote 6. 42 U.S.C. § 6925(a).

(n7)Footnote 7. 42 U.S.C. § 6925(b).

(n8)Footnote 8. 42 U.S.C. § 6925(c)(3).

(n9)Footnote 9. 42 U.S.C. § 6925(c)(3).

(n10)Footnote 10. 42 U.S.C. § 6927(e)(1).

(n11)Footnote 11. 42 U.S.C. § 6928(a).

(n12)Footnote 12. 42 U.S.C. § 6928(d).

(n13)Footnote 13. 42 U.S.C. § 6929.

(n14)Footnote 14. 42 U.S.C. § 9607(a).

(n15)Footnote 15. 42 U.S.C. § 9607(a).

(n16)Footnote 16. 42 U.S.C. § 9607(e).

(n17)Footnote 17. 42 U.S.C. § 9607(e).

(n18)Footnote 18. *United States v. Hooker Chemicals & Plastics Corp.*, 680 F. Supp. 546 (WDNY 1988) .

(n19)Footnote 19. *United States v. Hooker Chemicals & Plastics Corp.* at 549 .

(n20)Footnote 20. 42 U.S.C. § 9607(e)(1).

(N21)Footnote 21. 42 U.S.C. § 6991b(h)(6)(C)(i).



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Chapter 25 ENVIRONMENTAL CONSIDERATIONS IN REAL ESTATE TRANSACTIONS

Part II. The Practice Background

33-25 Current Legal Forms for Real Estate §§ 25.24 through 25.34

[Reserved]

§§ 25.24[Reserved]



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Chapter 25 ENVIRONMENTAL CONSIDERATIONS IN REAL ESTATE TRANSACTIONS

Part II. The Practice Background

33-25 Current Legal Forms for Real Estate § 25.35

§ 25.35 Research Checklist

A. Model Acts

- Uniform Environmental Covenants Act (2003) ☐
- Uniform Conservation Easement Act (1981) ☐
- Model Transboundary Pollution Reciprocal Access Act (2002) ☐

B. Annotations

- "Toxic Mold in Residences and Other Buildings: Liability and Other Issues," *114 ALR 5th* 397 (2003) ☐
- "Arranger Liability of Sellers Pursuant to § 107(a)(3) of Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) (42 U.S.C. § 9607(a)(3))," *125 ALR Fed* 315 (1995) ☐
- "Establishing 'Release or Threatened Release' of Hazardous Substance from Facility for Purposes of Liability Pursuant to § 107 of Comprehensive Environmental Response, Compensation, and Liability Act (42 USCA § 9607)," *120 ALR Fed. 1* (1994) ☐
- "Application of Statute of Limitations in Private Tort Actions Based on Injury to

Persons or Property Caused by Underground Flow of Contaminants," *11 ALR 5th 438* (1993) ☐

-- "Common-law Strict Liability in Tort of Prior Landowner or Lessee to Subsequent Owner for Contamination of Land with Hazardous Waste Resulting from Prior Owner's or Lessee's Abnormally Dangerous or Ultrahazardous Activity," *13 ALR 5th 600* (1993) ☐

-- "Vendor's Obligation to Disclose to Purchaser of Land Presence of Contamination from Hazardous Substances or Wastes," *12 ALR 5th 630* (1993) ☐

-- "Homeowners' Liability Insurance Coverage of Injury from Formaldehyde Insulation in Insured Premises," *85 ALR 4th 956* (1991) ☐

-- "Validity, construction, and application of state hazardous waste regulations," *86 ALR 4th 401* (1991) ☐

-- "Property damage insurance: what constitutes 'contamination' within policy clause excluding coverage," *72 ALR 4th 633* (1989) ☐

-- "Real-estate broker's liability to purchaser for misrepresentation or nondisclosure of physical defects in property sold," *46 ALR 4th 546* (1986) ☐

-- "Local use zoning of wetlands or flood plain as taking without compensation," *19 ALR 4th 756* (1983) ☐

-- "Recovery, under strict liability in tort, for injury or damage caused by defects in building or land," *25 ALR 4th 351* (1983) ☐

-- "Landowner's Right to Relief Against Pollution of his Water Supply by Industrial or Commercial Waste," *39 ALR 3d 910* (1971) ☐

C. Law Reviews and Periodicals

-- Bischoff, "Theories of Toxic Mold Liability Facing Arizona Homebuilders," *Arizona State Law Journal*, *34 Ariz. St. L. J. 681* (2002) ☐

-- Bolger, "Creating Economic Incentives to Preserve Unique Ecosystems: Should Wisconsin Adopt a Private Wetlands Mitigation Banking Policy?," *Marquette Law Review*, *83 Marq. L. Rev. 625* (2000) ☐

-- Bross, "The Greening of New Jersey's 'Brownfields' -- As Viewed by the Department of Environmental Protection," *Fordham Environmental Law Journal*, *9 Fordham Envt'l*

Law J. 541 (1998) ☐

-- Cohn, "The Brownfields Revitalization and Environmental Restoration Act: Landmark Reform or a 'Trap for the Unwary?'," *New York University School of Law Environmental Law Journal*, 12 *N.Y.U. Env't'l L. J.* 672 (2003) ☐

-- Efflandt, "When the Tail Wags the Dog: Environmental Considerations and Strategies in Business Acquisitions, Sales and Merger Transactions," *Washburn Law Journal*, 39 *Washburn Law J.* 28 (1999) ☐

-- Geisler, "The Fungusamongus: Sick Building Survival Guide," *St. Thomas Law Review*, 8 *St. Thomas L. Rev.* 511 (1996) ☐

-- Grant, "When Does the Clock Start Ticking?: Applying the Statute of Limitations in Asbestos Property Damage Actions," *Cornell Law Review*, 80 *Cornell L. Rev.* 695 (1995) ☐

-- Heady, "Stuck Inside these Four Walls: Recognition of Sick Building Syndrome Has Laid the Foundation to Raise Toxic Tort Litigation to New Heights," *Texas Tech Law Review*, 26 *Tex. Tech L. Rev.* 1041 (1995) ☐

-- Healey and Hacker, "The Importance of Identifying and Allocating Environmental Liabilities in the Sale or Purchase of Assets," *Villanova Environmental Law Journal*, 10 *Vill. Env't'l L. J.* 91 (1999) ☐

-- Howard and Gerard, "Lender Liability under CERCLA: Sorting out the Mixed Signals," *Southern California Law Review*, 64 *S. Cal. L. Rev.* 1187 (1991) ☐

-- Macher et al, "A Two-Year Study of Microbiological Indoor Air Quality in a New Apartment," *Archives of Environmental Health*, 46 *Archives of Env't'l Health*, 25 (1991) ☐

-- Pfefferle, "A New Green Government Weapon: Shooting Down Regulatory Takings with Estoppel," *Tulane Environmental Law Journal*, 13 *Tul. Env't'l L. J.* 471 (2000) ☐

-- Reitze and Carof, "The Legal Control of Indoor Air Pollution," *Boston College Environmental Affairs Law Review*, 25 *B.C. Env't'l Aff. L. Rev.* 247 (1998) ☐

-- Ruiz-Esquide, "The Uniform Environmental Covenants Act--An Environmental Justice Perspective," *Ecology Law Quarterly*, 31 *Ecology L.Q.* 1007 (2004) ☐

-- Salkin, "Using Smart Growth to Achieve Sustainable Land Use Policies,"
Environmental Law Reporter, 32 ELR 11385 (2002) ☐

-- Schott, "Lender Liability under CERCLA -- Past, Present and Future," UCLA Journal
of Environmental Law & Policy, 11 UCLA J. Env't'l L. & Pol'y 77 (1992)
☐

-- Seymour, "Transfer of Federal Lands: Compliance with Section 120(h) of the
Comprehensive Environmental Response, Compensation, and Liability Act," *Columbia
Journal of Environmental Law*, 27 *Colum. J. Env't'l L.* 173 (2002) ☐

-- Stroud, "Looking Beyond the Title Search: Attorneys Must Consider Environmental
Regulations," North Carolina Law Journal, 25 *N.C. Cent. L. J.* 182 (2003)
☐

-- Swanston, "Brownfields Cleanup Standards: Consistency with the Principles of
Environmental Justice Can Result in Clean Cleanups and Economic Development Too,"
Fordham Environmental Law Journal, 11 *Fordham Env't'l Law J.* 857 (2000)
..... ☐

-- Sweeney and Taddeo, "Addressing Mold in Real Estate Transactions: Don't Let the
Sleeping Dog Lie," The Real Estate Financial Journal, Real Est. Fin. J. Spring 2002, at 73
..... ☐

-- van Hook, "Area-Wide Brownfields Planning, Remediation, and Development,"
Fordham Environmental Law Journal, 11 *Fordham Env't'l Law J.* 743 (2000)
☐

-- van Hook, Shaw and Kloo, "The Challenge of Brownfield Clusters: Implementing a
Multi-Site Approach for Brownfield Remediation and Reuse," *New York University
School of Law Environmental Law Journal*, 12 *N.Y.U. Env't'l L. J.* 111
(2003)..... ☐

-- Weaver and Sayfie, "Environmental and Land Use Law: 1999 Update on the Bert J.
Harris Private Property Rights Protection," The Florida Bar Journal, 73 *Fla. Bar. J.* 49
(1999) ☐

-- Wenzel, "The Model Surface Use and Mineral Development Accommodation Act:
Easy Easements for Mining Interests," American University Law Review, 42 *Am. U. L.
Rev.* 607 (1993) ☐

-- Wolf, "Earning Deference: Reflections on the Merger of Environmental and Land-Use
Law," Environmental Law Reporter, 32 ELR 11190 (2002) ☐

-- Wright and Irby, "The Transactional Challenges Posed by Mold: Risk Management and Allocation Issues," *Arkansas Law Review*, 56 *Ark. L. Rev.* 295 (2003)



Legal Topics:

For related research and practice materials, see the following legal topics:

Environmental LawHazardous Wastes & Toxic SubstancesCERCLA & SuperfundGeneral OverviewEnvironmental LawHazardous Wastes & Toxic SubstancesToxic MoldInsurance LawProperty InsuranceExclusionsPollutionGeneral OverviewReal Property LawEnvironmental RegulationGeneral OverviewReal Property LawEnvironmental RegulationIndoor Air & Water QualityReal Property LawEnvironmental RegulationLiabilities & RisksGeneral OverviewReal Property LawEnvironmental RegulationLiabilities & RisksCERCLA Response CostsReal Property LawPurchase & SaleRemediesDuty to Disclose



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Chapter 25 ENVIRONMENTAL CONSIDERATIONS IN REAL ESTATE TRANSACTIONS

Part III. Drafting Guidelines

33-25 Current Legal Forms for Real Estate § 25.36

§ 25.36 Overview of Drafting Guidelines

Any time that a commercial transaction involves real property, the practitioner must give a considerable amount of thought as to whether there are any environmental considerations which must be addressed. This is true whether the practitioner represents a seller, buyer, landlord, developer, contractor, tenant or lender. Further, in less frequent circumstances, environmental issues may also arise in residential transactions (e.g., asbestos, mold, etc.). Because of the infrequency of an environmental issue arising in connection with the purchase and sale of a residence, these drafting guidelines will focus on commercial transactions.

In connection with the drafting of any legal document, the practitioner must review and become familiar with the applicable laws and practices in the state and local jurisdiction where the project is located. This is especially true in a real estate transactions where local laws and customs vary widely from jurisdiction to jurisdiction. In addition to state and local laws, the federal government has a plethora of laws, rules and regulations relating to environmental conditions. As a result, many attorneys now specialize in environmental law. Furthermore, given the technical and scientific nature of environmental issues, many issues must be addressed using a team approach. That is, the attorney may work closely with an environmental engineer and other significant team members, such as, a lab, an inspector and/or a contractor doing actual clean-up or sample collecting. Analyzing and addressing an environmental condition can be an extremely complicated process. Representing a client in a complicated environmental matter contains many pitfalls and traps for the unwary or unprepared practitioner.

The first agreement analyzed in these drafting guidelines is a very common agreement used by lenders in connection with the mortgaging of real property as collateral for a loan. Most lenders are so concerned about the potential harm that may arise from an adverse environmental condition, the industry has created a special document to deal with the issue (i.e., Environmental Indemnity Agreement). Even with respect to non-recourse loans, many lenders will require the borrower and/or the guarantors to undertake some personal liability with respect to environmental conditions on or about the property. This is true even though most prudent lenders will require an environmental audit of the property before they will make the loan. The first agreement is an agreement whereby the lender is requiring the borrower and the guarantor of the loan to specifically indemnify it for any adverse environmental matters.

The other agreement analyzed in these drafting guidelines relates to the scope of the clean-up of an existing

environmental contamination. Former owners and operators of real property may have liability for environmental conditions which they caused or contributed to while they were the owner or the operator. The liability may include the cost of clean up and any damages that have resulted from the condition. The liability may arise by law or by contract. As discussed above certain federal and state laws impose liability on owners or operators that have caused an adverse environmental condition. Additionally, in connection with the purchase and sale of real property, the seller and buyer may contractually allocate the risk associated with any contamination.

The second agreement, an Agreement and Declaration of Covenants added to it, involves the former owner of a foundry. As a condition of purchasing the property, the buyer required the seller to remain liable for various environmental conditions. Unfortunately for the seller, the United States Environmental Protection Agency investigated the site, and determined that the site was contaminated. The government requested that the seller clean up the property. The parties had considerable negotiation regarding the level of clean up and which standard would be used. The former owner asserted that it was an industrial site, and that it should only be remediated to industrial standards. The current owner did not object to the lower standard because it was going to continue to use the property as a foundry. The government agreed to the lesser standard, however, as part of the settlement, the government required that the property be restricted in perpetuity from certain types of uses and/or certain types of activities being conducted on the property.

In addition to the agreements, there are numerous checklists which the practitioner should utilize as a guideline to help him or her in connection with an engagement. Unfortunately, these should only be used as guidelines, and each matter may present the practitioner with a unique situation which may not be precisely addressed by the checklists. In addition, there are relevant checklists included in Volume 25, Chapter 21 Real Estate Sales and Exchanges, Section 21.44 and Volume 22, Development and Subdivision, Sections 22.56 through 22.59, which the practitioner may find helpful.

[1] Environmental Indemnity Agreement

CONTRACT

ENVIRONMENTAL INDEMNITY AGREEMENT

THIS ENVIRONMENTAL INDEMNITY AGREEMENT ("Indemnity Agreement") is made as of the _____[day] of _____[month], ____[year], by and among, MP, LLC, a(n) _____[state] limited liability company (hereinafter the "Company") and John Smith, as a natural person, in favor of Major Money Bank, NA, ("Lender"). (n1)COMMENT

WITNESSETH:

A. The Company, is, or will be prior to the filing of the Mortgage (hereinafter defined), the owner of a fee simple estate in the real property described as the "Mortgaged Property" as listed and fully described on Exhibit "A" attached hereto and made a part hereof;
(n2)COMMENT

B. Lender is prepared to make a certain loan (the "Loan") pursuant to a certain Mortgage Note dated of even date herewith in the amount of _____ Dollars (\$_____) (the "Note") and secured by, among other things, a certain Open-End Mortgage Deed and Security Agreement in favor of Lender (the "Mortgage") upon the Mortgaged Property therein described (the Note, the Mortgage, and any and all other documents and instruments evidencing, documenting and relating to the Loans are

hereinafter collectively referred to as the "Loan Documents");
(n3)COMMENT

C. As a condition of making the Loan, John Smith has agreed to guarantee the payment of the Loan pursuant to certain Guaranty dated of even date herewith; and,
(n4)COMMENT

D. In order to further induce the Lender to make the Loan, the Company and John Smith (hereinafter "Indemnitors") are willing to enter into this Environmental Indemnity Agreement.
(n5)COMMENT

NOW, THEREFORE, in consideration of the premises expressed above and the promises, covenants and representations contained herein, and other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, Indemnitors, jointly and severally, make the following representations, warranties, covenants and agreements in favor of and for the benefit of Lender:

1. REPRESENTATIONS AND INDEMNITY.

(a) To the best of Indemnitors' knowledge, neither Indemnitors nor any previous owner or user of the Mortgaged Property has used, generated, stored or disposed of any Hazardous Materials (as hereinafter defined) in, on, under, around or above the Mortgaged Property, and the Mortgaged Property is not currently in violation of any Hazardous Materials Laws or Wetlands Laws (as hereinafter defined). (n6)COMMENT

(b) The Company shall, and the Company shall cause all employees, agents, lessees, contractors and subcontractors of Company and any other persons present on or occupying the Mortgaged Property to, keep and maintain the Mortgaged Property, including, without limitation, the soil and ground water thereof, in material compliance with, and not cause or knowingly permit the Mortgaged Property, including the soil and ground water thereof, to be in material violation of, any federal, state or local laws, ordinances or regulations relating to environmental conditions (including but not limited to any Hazardous Material Laws and Wetlands Laws). No Company nor any employee, agent, lessee, contractor or subcontractor of the Company or any other persons occupying or present on the Mortgaged Property shall (i) use, generate, manufacture, store or dispose of on, under or about the Mortgaged Property or transport to or from the Mortgaged Property any flammable explosives, radioactive materials, hazardous wastes, or toxic substances, including, without limitation, any substances defined as or included in the definition of "hazardous substances," "hazardous wastes," "hazardous materials" or "toxic substances" under any Hazardous Materials Laws (collectively referred to hereinafter as "Hazardous Materials"), except in connection with the legally permissible uses of the Mortgaged Property and then only to the extent permitted by law after obtaining all necessary permits and licenses therefore; or (ii) perform, cause to be performed or permit any fill activities or other acts which would in any way destroy, eliminate, alter, obstruct, interfere with, or otherwise affect any Wetlands, as defined in 33 C.F.R. § 328.3 and in any comparable state and local law, statute, ordinance, rule or regulation ("Wetlands"), where such fill activities or other acts would constitute a violation of any federal, state or local laws, status, ordinances, rules or regulations pertaining to such Wetlands ("Wetlands Laws"). (n7)COMMENT

(c) The Company shall immediately advise Lender in writing of: (i) any written notices (whether such notices are received from the Environmental Protection Agency, or any other federal, state or local governmental agency or regional office thereof) of violation(s) or potential violation(s) which are received by the Company of any applicable federal, state or local laws, ordinances, or regulations relating to any Hazardous Materials including but not limited to the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended, the Hazardous Materials Transportation Act, the Resource Conservation and Recovery Act of 1976, and the Hazardous and Solid Waste Amendments Act of 1984 (collectively, "Hazardous Materials Laws") or of any Wetlands Laws; (ii) any and all enforcement, cleanup, removal or other governmental or regulatory actions instituted, completed or threatened in

writing pursuant to any Hazardous Materials Laws or Wetlands Laws; (iii) all claims made or threatened in writing by any third party against the Company or the Mortgaged Property relating to damage, contribution, cost recovery compensation, loss or injury resulting from any Hazardous Materials or Wetlands (the matters set forth in clauses (i), (ii) and (iii), above, are hereinafter referred to as "Hazardous Materials or Wetlands Claims"); and (iv) Indemnitors' discovery of any occurrence or condition on any real property adjoining or in the vicinity of the Mortgaged Property that could cause the Mortgaged Property or any part thereof to be subject to any restrictions on the ownership, occupancy, transferability or use of the Mortgaged Property under any Hazardous Materials Laws or Wetlands Laws. (n8)COMMENT

(d) Lender shall have the right but not the obligation to join and participate in, as a party if it so elects, any legal proceedings or actions initiated in connection with any Hazardous Materials or Wetlands Claims if the same could have an adverse effect on the Company and to have its reasonable attorneys' and consultants' fees in connection therewith paid by the Indemnitors upon demand. (n9)COMMENT

(e) Indemnitors, jointly and severally, shall be responsible for, and shall indemnify, defend and hold harmless Lender, its successors and assigns, and their respective directors, officers, employees, agents, successors and assigns from and against, any loss, damage, cost, claim, suit, chooses in action, expense or liability incurred by Lender directly or indirectly arising out of or attributable to the use, generation, storage, release, threatened release, discharge, disposal, or presence (whether prior to or during the term of the Loan secured by the Mortgage) of Hazardous Materials or destruction of Wetlands on, under or about the Mortgaged Property (whether by the Company or a predecessor in title or any employees, agents, contractors or subcontractors of the Company or any predecessor in title or any third persons at any time occupying or present on the Mortgaged Property), including, without limitation: (a) all foreseeable consequential damages; (b) the cost of any necessary repair, cleanup or detoxification of the Mortgaged Property required by applicable Hazardous Materials Laws or Wetlands Laws, including the soil and ground water thereof, and the preparation and implementation of any closure, remedial or other required plans actually incurred by Lender; (c) damage to any Wetlands or natural resources; and (d) all costs and expenses incurred by Lender in connection with clauses (a), (b), and (c), including but not limited to reasonable attorneys' and consultants' fees; provided, however, that nothing contained in this paragraph shall be deemed to (i) create or to give any rights to any person other than Lender and its successors and assigns, it being intended that there shall be no third party beneficiary of such provisions, or (ii) preclude any Indemnitor from seeking indemnification from, or otherwise proceeding against, any third party including, without limitation, any tenant or predecessor in title to the Mortgaged Property; or (iii) apply to Lender in any capacity other than as a party to the Loan Documents. (n10)COMMENT

(f) Any costs or expenses incurred by Lender for which any Indemnitor is responsible or for which any Indemnitor has indemnified Lender shall be paid to Lender within thirty (30) days of a demand by Lender, and failing payment within such period, shall earn interest at the default rate of interest specified in the Loan Documents until paid in full. (n11)COMMENT

(g) Without Lender's prior written consent, which shall not be unreasonably withheld or delayed, no Indemnitor shall take any remedial action in response to the presence of any Hazardous Materials or destruction of Wetlands on, under, or about the Mortgaged Property nor enter into any settlement agreement, consent decree, or other material compromise in respect to any Hazardous Material or Wetlands Claims, which remedial action, settlement, consent or compromise would impair the value of the Lender's security hereunder; provided, however, that Lender's consent shall not be required (i) in the event that the presence of Hazardous Materials or Wetlands on, under or about the Mortgaged Property either poses an immediate threat to the health, safety or welfare of any individual or is of such a nature that an immediate remedial response is necessary and any Indemnitor shall take such remedial action which is necessary and required by applicable Hazardous Materials Laws or Wetlands Laws; or (ii) if remedial action is ordered by a court of competent jurisdiction or a governmental agency. In the event any Indemnitor establishes to the reasonable satisfaction of Lender that there is no reasonable alternative to such remedial action which would result in less impairment of Lender's security hereunder, Lender shall grant such consent. (n12)COMMENT

(h) In the event of a Hazardous Materials or Wetlands Claim upon Lender's reasonable request, the Indemnitors shall retain, at Indemnitors' sole cost and expense, a licensed geologist, industrial hygienist or an environmental consultant (the "Consultant") mutually acceptable to Lender and the Indemnitors to conduct a baseline investigation of the Mortgaged Property for the presence of Hazardous Materials or Wetlands ("Environmental Audit"), the scope of which investigation shall be mutually agreed on by Lender and each Indemnitor. The Environmental Audit shall be performed in a manner reasonably calculated to discover the presence of Hazardous Materials contamination or Wetlands destruction; provided, however, such investigation shall be of a scope and intensity no greater than a baseline investigation conducted in accordance with the general standards of persons providing such services taking into consideration the known uses of the Mortgaged Property and property in the vicinity of the Mortgaged Property, the specific nature of the Hazardous Materials or Wetlands Claim and any factors unique to the Mortgaged Property. The Consultant shall concurrently deliver the results of its investigation in writing directly to each Indemnitor and Lender. Such results shall be kept confidential by Indemnitors and Lender unless agreed to in writing or unless legally compelled or required to disclose such results or disclosure is reasonably required in order to pursue rights or remedies provided herein or at law. (n13)COMMENT

(i) If any Indemnitor fails to pay for or obtain an Environmental Audit (as specified in paragraph (h) above), Lender may, but shall not be obligated to, obtain the Environmental Audit, and demand reimbursement from the Indemnitors, in which case interest shall accrue on such sum at the default rate of interest specified in the Loan Documents until paid in full.

(j) Each Indemnitor covenants to reasonably cooperate with the Consultant and to allow entry and reasonable access to all portions of the Mortgaged Property for the purpose of the Consultant's investigation. Each Indemnitor covenants to comply, at their sole cost and expense, with all recommendations contained in the Environmental Audit reasonably required to bring the Mortgaged Property into compliance with all Hazardous Materials Laws and Wetlands Laws, including any reasonable recommendation for additional testing and studies to detect the quantity and types of Hazardous Materials or Wetlands present, if Lender requires the implementation of the same. (n14)COMMENT

2. NOTICES. Except for any notice required under applicable law to be given in another manner, any notice, demand, inquiry or other communication which any party hereto may be required to make or desire to give hereunder shall be in writing and shall be deemed to have been properly given (i) if hand delivered or if sent by telecopy, effective upon receipt or (ii) if delivered by overnight courier service, effective on the day following delivery to such courier service, or (iii) if mailed by United States registered or certified mail, postage prepaid, return receipt requested, effective two (2) days after deposit in the United States mail; addressed in each case to the addresses set forth in the Mortgage or at such other address or to such other addressee as the party to be served with notice may have furnished in writing to the party seeking or desiring to serve notice as a place for the service of notice.

3. SURVIVAL. Notwithstanding anything in this Environmental Indemnity Agreement or any of the other Loan Documents to the contrary, the indemnification obligations of each Indemnitor in this Indemnity Agreement contained in Paragraph 1(e) (the "Indemnity") shall survive the expiration or termination of the Loan Documents and the repayment of the debt secured, regardless of the means of such expiration, termination or repayment. No release of the Mortgage or any of the other Loan Documents shall be deemed to effect a release of the Indemnity, but rather, the Indemnity shall be released and canceled only by a separate, specific, written release. (n15)COMMENT

4. SUCCESSORS AND ASSIGNS. The provisions contained herein shall inure to the benefit of Lender and be binding upon the parties hereto and their respective successors and assigns. (n16)COMMENT

5. WAIVER OF JURY TRIAL. INDEMNITORS, JOINTLY AND SEVERALLY, HEREBY WAIVE ANY RIGHT TO A TRIAL BY JURY IN ANY ACTION OR PROCEEDING TO ENFORCE OR DEFEND ANY RIGHTS UNDER THIS ENVIRONMENTAL INDEMNITY AGREEMENT OR RELATING THERETO OR ARISING FROM THE

LENDING RELATIONSHIP WHICH IS THE SUBJECT OF THIS ENVIRONMENTAL INDEMNITY AGREEMENT AND AGREE THAT ANY SUCH ACTION OR PROCEEDING SHALL BE TRIED BEFORE A COURT AND NOT BEFORE A JURY. (n17)COMMENT

IN WITNESS WHEREOF, each Indemnitor has caused this Environmental Indemnity Agreement to be duly executed and delivered as of the date set forth above.

INDEMNITORS: Limited Liability Company

MP, LLC

a(n) _____ [state], LLC

By: _____

Its: _____

John Smith

(n18)COMMENT

[2] Agreement and Declaration of Covenants and Restrictions of Use of Certain Real Estate

CONTRACT

AGREEMENT AND DECLARATION OF COVENANTS AND RESTRICTIONS OF USE OF CERTAIN REAL ESTATE

This Land Use Restriction Agreement to Create an Equitable Servitude, herein called the "Agreement," is made this _____ [day] of _____ [month], _____ [year], by and between the **BB CORP.**, a(n) _____ [state] corporation ("Grantor"), and **EP, LTD.**, a(n) _____ [state] corporation ("Grantee"). (n19)COMMENT

*WITNESSETH:

WHEREAS, the Grantor holds title to the approximately _____ acres of real property located in _____ [county] County, _____ [state], the legal description of which is attached hereto as Exhibit A (the "Site"); and (n20)COMMENT

WHEREAS, the Grantee is the former owner of the Site; and

WHEREAS, the Site has been and is being operated, as of the date of this Agreement, as a brass foundry; and

WHEREAS, the most recent deed of record for the Site is recorded at Volume _____, Page _____ of the real property record for _____ [county] County, _____ [state]; and (n21)COMMENT

WHEREAS, this Agreement will be recorded with the _____ [county] County Recorder's Office for the purpose of protecting the public health, safety and welfare and the environment within ten days of the final signature on this Agreement; and

WHEREAS, the Grantor and the Grantee, entered into an Administrative Order on Consent, attached hereto as Exhibit B ("AOC"), with the United States Environmental Protection Agency ("U.S. EPA"), pursuant to Section 106(a) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended ("CERCLA"), 42 U.S.C. § 9606(a), to conduct certain actions at the Site to abate a possible imminent and substantial endangerment to the public health, welfare or the environment presented by the release or threatened release of hazardous substances at or from the Site; and

WHEREAS, the Grantor and Grantee were required to perform pursuant to the AOC an Engineering Evaluation/Cost Analysis ("EE/CA") to develop removal action alternatives to address the actual or threatened release of hazardous substances at or from the Site, and implement a removal action from the alternatives presented as selected by U.S. EPA; and

WHEREAS, the U.S. EPA subsequently selected a response action for the Site through its Enforcement Action Memorandum dated _____ [month] _____ [day], _____ [year], including the removal of waste and soils contaminated above specified cleanup levels based upon current and reasonably anticipated future land use; and

WHEREAS, the Grantor and Grantee, now wish to restrict the use of the Site and perform certain activities to justify a proposal to limit the scope of the selected response action for certain limited portions of the Site; and

WHEREAS, in order to implement the response action selected for the Site, including operation and maintenance of the remedy, it is necessary for the U.S. EPA, its assigns, successor agencies, representatives and contractors, the Grantee, its representatives, and contractors, to have access to the Site; and

WHEREAS, the Grantor wishes to cooperate fully with the Grantee, and the U.S. EPA in implementing the response action selected by U.S. EPA at the Site, to ensure the protectiveness of the response action, and to protect human health and the environment.

NOW, THEREFORE, intending to be legally bound, the Grantor and Grantee, for and in consideration of the covenants and conditions set forth and for other good and valuable consideration, the receipt and sufficiency of which is acknowledged, do covenant and agree to: (1) grant a permanent right of access to the Site to the Grantee, and its representatives and contractors for purposes of implementing, facilitating, maintaining and monitoring any response actions selected by U.S. EPA; (2) impose on the Site use restrictive covenants and intend to create an equitable servitude that will run with the land for the purpose of protecting human health and the environment; and (3) perform certain maintenance activities to prevent exposure to waste and contaminated soils that will be left in place at the Site.

1. Grant: Grantor, on its own behalf, and the behalf of its successors, assigns and heirs, in consideration of the terms of the AOC, covenant and declare that the Site shall be subject to the restrictions on use set forth below, and quit, grant and convey to the Grantee, and its assigns, the perpetual right to enforce the restrictions, and for the purposes set forth here, with respect to the Site. All rights and obligations of the parties to the AOC are incorporated into this Agreement. (n22)COMMENT

2. Third Party Beneficiaries: Grantor on its own behalf and the behalf of its successors, transferees, assigns and heirs, and the Grantee on its own behalf its successors, transferees, assigns and heirs, in consideration of the terms of the AOC, hereby agree that the U.S. EPA and its assigns, and its successors and assigns shall be the Third Party Beneficiary of all the benefits and rights conveyed to the Grantee under this instrument. The agency having administrative control,

care and custody of actions under this Agreement is the U.S. EPA. (n23)COMMENT

3. Purpose: It is the purpose of this instrument to create equitable servitudes that will run with the land in order to facilitate the completion of work under the AOC and protect human health and the environment by reducing the risk of exposure to contaminants. The equitable servitudes created herein touch and concern the Site in that they are intended to limit the use of the Site, restrict certain activities, and/or require certain operation and/or maintenance activities to occur on the Site. It is the intent of the Grantor that the covenants, terms, conditions, and restrictions of this Agreement operate as servitudes running in perpetuity with the Site. It is also the purpose of this Agreement that the Third Party Beneficiary, the U.S. EPA and its assigns and successor agencies, shall have the right to enforce the terms of this Agreement. (n24)COMMENT

4. Restrictive Covenants: Grantor, for itself and its successors and assigns as owners of fee simple title to the Site, whether through grant, conveyance, foreclosure or judicial process, agrees as follows:

A. Prohibition of Certain Activities. There shall be no excavating, landscaping, grading, filling, drilling, mining, constructing, trenching, driving pilings, livestock grazing, use of explosives or construction, placement, installation or use of any fences, ditches, roads, pipes, wells, buildings or structures of any manner or description, whether permanent, temporary or mobile, specifically including a permanent or mobile residential home, or any other activity which may disturb: (1) the waste or contaminated soil remaining on the Site, (2) any existing or constructed cover over the waste or contaminated soil, or (3) access to those portions of the Site necessary to operate and maintain any Site remedy, including monitoring activities, unless specifically reviewed and not prohibited by U.S. EPA in writing, or approved pursuant to subparagraph E, below.

(n25)COMMENT

B. Non-Residential Use. The Site shall only be used for industrial purposes and shall not be used or operated for any residential use. As used herein, the term "residential use" includes, but is not limited to, single and multiple family dwelling and rental units, day care centers and pre-schools, hotels, motels, educational facilities (except as incident to commercial or industrial activities), long-term facilities, long-term health care, or other similar uses of the Site.

(n26)COMMENT

C. Prohibition Against Extraction and Use of Groundwater and Surface Water. Groundwater use on or from the Site in any manner is prohibited. There shall be no extraction wells constructed, repaired or maintained on the Site. This prohibition does not apply to wells specifically approved by U.S. EPA. Surface waters on the Site shall not be used or permitted to be used for any human, animal or agricultural purposes.

(n27)COMMENT

D. Post Removal Site Control Plan for Site Pavement and the Concrete Floors in Centrifugal Casting Area and Compressor Building. Grantor shall maintain the integrity of the Site pavement and concrete floors in the centrifugal casting area and compressor building, to assure that no exposure to the underlying lead-contaminated soil occurs and that the remedy continues to be protective of human health and safety and the environment. This maintenance shall be performed in accordance with a post removal site control plan approved by U.S. EPA. Grantor and Grantee shall submit the post removal site control plan no later than _____ [month] _____ [day] _____ [year], to U.S. EPA for review and approval or disapproval in whole or in part. Grantee shall pay the costs and expenses incurred by Grantor in performing such maintenance activities as set forth in the Agreement for Design and Construction Services dated _____ [month] _____ [day] _____ [year], by and between Grantor,

Grantee and Civil & Environmental Consultants, Inc., attached hereto as Exhibit C.
(n28)COMMENT

E. Notwithstanding the prohibitions on the construction, placement, installation or use of fences, ditches, roads, pipes, wells, buildings or structures in paragraph 4.A., above, such construction, placement, installation or uses are not prohibited if they are specifically deemed necessary by U.S. EPA in writing for:

i. Protecting human health or the environment, or are constructed by either the United States or the State of _____ [state] or the Grantee for purposes of performing or implementing any activity relating to any response action pursuant to CERCLA;

ii. Verifying any data or information submitted to U.S. EPA or _____ [state] EPA;

iii. Verifying that no action is being taken on the Site in violation of the terms of this Agreement or of any federal or state environmental laws or regulations;

iv. Monitoring response actions on the Site and conducting investigations relating to contamination on or near the Site, including, without limitation, sampling air, water, sediments, soils, and obtaining discrete, split and duplicate samples; and

v. Conducting periodic reviews of any response action, including but not limited to, reviews required by any applicable statutes and/or regulations.

(n29)COMMENT

F. The Site shall not be used in any manner that would interfere with or adversely affect the integrity or protectiveness of any response actions implemented pursuant to the AOC. The Site may be used only in a manner which is consistent with any obligations or restrictions that U.S. EPA determines are necessary to implement, and insures non-interference with or insures protectiveness of any response actions taken pursuant to the AOC.

G. Grantor shall maintain site security (i.e., fencing, locked gates and entry doors, and security guards), and the integrity of all Site pavement and concrete floors in the centrifugal casting area and compressor building to prevent exposure to underlying contaminated soils and waste. Grantor shall promptly seal any cracks in Site pavement and concrete floors in the centrifugal casting area and compressor building.

5. Modification or Rescission: This Agreement shall continue until the Grantee, U.S. EPA and its assigns and successors, agree to approve the modification or rescission of this Agreement. To the extent that these parties approve a modification of this Agreement, all terms not specifically modified shall remain in full force and effect.

(n30)COMMENT

6. Easement for Access and Inspection: The Grantor hereby grants Grantee, their successors, assigns, representatives and agents, a perpetual nonexclusive easement for access to the Site, without cost, to determine compliance with the restrictions set forth in this Agreement and for performing any cure or remediation on the Site deemed necessary or desirable by Grantee. Grantor acknowledges and agrees that Grantee will incur or suffer certain liabilities, damages, fines, fees, costs and expenses if Grantor fails to observe and perform all of the conditions and covenants set forth in this Agreement. Grantor shall indemnify, defend and hold Grantee harmless against and from any and all liabilities,

damages, fines, fees, costs, and expenses arising, directly or indirectly, from Grantor's failure to maintain the integrity of Site pavement and concrete floors in the centrifugal casting area and compressor building, including but not limited to, removal of Site pavement and concrete floors in the centrifugal casting area and compressor building, or structures, equipment or improvements on or about Site pavement and concrete floors in the centrifugal casting area and compressor building, and/or from any act by Grantor or its Permittees which is expressly prohibited under this Agreement, including, without limitation, costs of investigation and remediation, costs of all third-party consultants and professionals, all legal fees and expenses and other costs and expenses incurred by Grantee in defending or processing any legal or administrative proceedings occasioned by such act(s) and in enforcing its rights hereunder. In addition, U.S. EPA and its assigns, as Third Party Beneficiary, shall have all of the rights of access as granted by the Grantor to the Grantee for the purposes listed below:

A. Performing or implementing any activity relating to any response actions selected by U.S. EPA for the Site;

B. Verifying any data or information submitted to U.S. EPA or _____ [state] EPA;

C. Verifying that no action is being taken on the Site in violation of the terms of this Agreement or of any federal or state environmental laws or regulations;

D. Monitoring response actions on the Site and conducting investigations relating to contamination on or near the Site, including, without limitation, sampling of air, water, sediments, soils, and specifically, without limitation, obtaining split or duplicate samples;

E. Conducting periodic reviews of the remedial action, including but not limited to, reviews required by applicable statutes and/or regulations; and

F. Implementing additional or new response actions if U.S. EPA, in its sole discretion, determines that such actions are necessary to protect human health or the environment.

(n31)COMMENT

7. Covenants Run with the Land: Grantor agrees for itself and its successors and assigns that any deed, easement, lease, license, or other grant or conveyance of the Site or any portion thereof or interest therein, which is executed after the date of this Agreement shall include a recital of the restrictive covenants set forth above. The grants, covenants, and other provisions set forth in this Agreement shall run with the land and shall be binding upon all owners and respective successors and assigns, including holders of any leasehold interests in the Site. The terms, covenants, restrictions and conditions shall, in any event, and without regard to technical classification or designation, legal or otherwise, be binding to the fullest extent permitted by law and equity, for the benefit and in favor of the Grantee against the Grantor and its successors in interest to the Site and each part therefor and interest therein, and it shall not be necessary for the enforceability hereof by Grantee, or their respective successors in interest, that the provisions of this Agreement or a recital thereof or thereto be included by the Grantor in any succeeding conveyance of the Site. It is also the purpose of this instrument that the Third Party Beneficiary, U.S. EPA and its assigns and its successor agencies, shall have the right to enforce the terms of this Agreement.

8. Reservation: Nothing in this Agreement shall limit or otherwise affect the U.S. EPA's rights of entry and access or limit the U.S. EPA's authority to take response actions selected by U.S. EPA under CERCLA, the National Contingency Plan, and its successor provisions or other federal or State law. (n32)COMMENT

9. No Public Access and Use: This instrument does not convey any right of access or use by the general public to any portion of the Site.

10. Recordation: The Grantor shall record this Agreement in the Recorder's Office of _____ [county] County, _____ [state] and shall provide Grantee and U.S. EPA a certified copy of the original recorded instrument showing the Recorder's recording stamps. (n33)COMMENT

11. Notice: Grantor shall include in any instrument conveying any interest in any portion of the Site, including but not limited to deeds, leases and mortgages, a notice which is in substantially the following form:

NOTICE:

THE INTEREST CONVEYED HERE IS SUBJECT TO AN AGREEMENT FOR COVENANTS AND RESTRICTIONS TO CREATE AN EQUITABLE SERVITUDE, DATED _____, _____, RECORDED IN THE DEED RECORDS ON _____, _____, IN BOOK _____, PAGE _____ [check with the Recorder's Office re: whether the "book, page" system is correct], IN FAVOR OF, AND ENFORCEABLE BY EP, LTD. AND THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY.

Within 30 days of the date of execution of any such instrument of conveyance, the Grantor shall provide the Grantee and the U.S. EPA with a certified true copy of the instrument and, if it has been recorded in the deed records, its recording reference.

[note: ORC § 317.08: check with Recorder's Office re: whether they maintain "deed" records or "official records"] (n34)COMMENT

12. Inspection and Enforcement: In addition to the access rights set forth in Paragraph 6, above, the U.S. EPA, and its representatives, contractors, assigns and successor agencies, may enter the Site from time to time for the purposes of performing inspections, overseeing remedy implementation or enforcing the covenants and restrictions set forth in Paragraph 4, above. The Grantee and the U.S. EPA, as Third Party Beneficiary, shall be entitled to enforce the terms of this Agreement by resorting to specific performance or legal process. The Grantee acknowledges their affirmative obligation to enforce the Agreement. The covenants and other provisions set forth in this Agreement may be enforced against the Grantor by an action for injunctive relief for any violation or threatened violation thereof brought in a court of competent jurisdiction by Grantee or by the U.S. EPA, as Third Party Beneficiary. The court may award not only injunctive relief, but damages and reasonable attorneys fees. All remedies available here shall be in addition to any other remedies at law or in equity, including CERCLA. Any forbearance, delay or omission to exercise their rights under this Agreement in the event of a breach of any term of this Agreement shall not be deemed a waiver by the Grantee or the U.S. EPA of such terms, or any other term, or any rights of the Grantee or the U.S. EPA under this Agreement. (n35)COMMENT

13. Waiver of Certain Defenses: Grantor waives any defense of laches, estoppel, or prescription.

14. Notices: Any notice, demand, request, consent, approval, or other communication that any Party desires or is required to give to the other shall be in writing and shall either be served personally or sent by first class certified mail, return receipt requested, postage prepaid, or by express mail with delivery confirmation and addressed as follows:

To Grantor: BB Corp.

[address]

[address]
To Grantee: EP, LTD.
_____ [

[address]

To U.S. EPA: _____ [*address*]
 _____ [*address*]

15. General Provisions:

B. Liberal Construction: Any general rule of construction to the contrary notwithstanding, this Agreement shall be liberally construed in favor of the grant to effect the purpose of this Agreement and the policy and purpose of CERCLA. If any provision of this Agreement is found to be ambiguous, an interpretation consistent with the purpose of this Agreement that would render the provision valid shall be favored over any interpretation that would render it invalid.

C. Severability: If any provision of this Agreement, or the application of it to any person or circumstance, is found to be invalid, unenforceable, or not to run with the land, the remainder of the provisions of this Agreement, or the application of such provisions to persons or circumstances other than those to which it is found to be invalid, as the case may be, shall not be affected. In the event that the validity or enforceability of any provision of this Agreement is held to be dependent upon the existence of a specific legal description, Grantor shall promptly cause such legal description to be prepared and recorded.

D. Entire Agreement: This instrument sets forth the entire agreement of the Grantor and Grantee with respect to rights and restrictions created here.

E. No Forfeiture: Nothing contained here will result in a forfeiture or reversion of Grantor's title in any respect.

F. Priority of Agreement: Any lease, license, easement, deed or other transfer, grant or conveyance of the Site or any portion thereof or interest therein which is executed after the date of this Agreement shall be subject and subordinate to the terms and provisions of this Agreement, and the Grantor shall include a recital of this Agreement and the provisions hereof, or shall attach a copy hereof thereto.

G. Successors: The terms of this Agreement shall bind, and inure to the benefit of, the Grantor and Grantee and their respective personal representatives, heirs, successors, and assigns and shall run in perpetuity with the Site. The term "Grantor," wherever used here, and any pronouns used in place thereof, includes persons and/or entities named at the beginning of this document, identified as the "Grantor" and its personal representatives, heirs, successors, and assigns.

The term "Grantee," wherever used here, and any pronouns used in place thereof, includes the persons and/or entities named at the beginning of this document, identified as "Grantee" and their personal representatives, heirs, successors, and assigns. The rights of the Grantee and Grantor under this Agreement are freely assignable, subject to the notice provisions here.

H. Termination of Rights and Obligations: A Party's rights and obligations under this Agreement terminate upon transfer of the Party's interest in the Site, except that liability for acts or omissions occurring prior to transfer shall survive transfer.

I. Reimbursement of Costs: The U.S. EPA, its assigns, representatives and successor agencies will incur costs in overseeing this agreement. The Grantor and Grantee agree that the AOC will remain in full force and effect to, *inter alia*, provide a mechanism for reimbursement of such costs.

J. Time is of the Essence: Time is of the essence as to the performance of the obligations contemplated in this agreement.

TO HAVE AND TO HOLD unto the Grantee and its assigns forever.

IN WITNESS WHEREOF, Grantor has caused this Agreement to be signed in its name.

Executed this _____ [day] day of _____ [month] _____ [year].

Witnesses: GRANTOR:

_____ BB CORP.

_____ Printed Name:

_____ By:

_____ Printed Name:

Printed Name: Title:

Witnesses: GRANTEE:

EP, LTD.

Printed Name:

_____ By:

_____ Printed Name:

Printed Name: Title:

STATE OF _____ [state]

SS:

COUNTY OF _____ [county]

BEFORE ME, a Notary Public in and for said County and State, personally appeared BB CORP., a(n) _____ [state] _____ [entity], by _____ [name], its _____ [title], who acknowledged that _____ [he/she] did sign the foregoing instrument for and on behalf of said corporation, being thereunto duly authorized, and that the same is _____ [his/her] free act and deed individually and as such officers and the free act and deed of said _____ [entity].

IN TESTIMONY WHEREOF, I have hereunto set my hand and official seal at _____ [city], _____ [state], this _____ [day] day of _____ [month], _____ [year].

Notary Public

STATE OF _____ [state]

SS:

COUNTY OF _____ [county]

BEFORE ME, a Notary Public in and for said County and State, personally appeared EP, LTD., a(n) _____ [state] _____ [entity], by _____ [name], its _____ [title], who acknowledged that _____ [he/she] did sign the foregoing instrument for and on behalf of said corporation, being thereunto duly authorized, and that the same is _____ [his/her] free act and deed individually and as such officers and the free act and deed of said _____ [entity].

IN TESTIMONY WHEREOF, I have hereunto set my hand and official seal at _____ [city], _____ [state], this _____ [day] day of _____ [month], _____ [year].

Notary Public

(n36)COMMENT

Legal Topics:

For related research and practice materials, see the following legal topics:

Environmental Law Assessment & Information Access Audits & Site Assessments Real Property Law Environmental Regulation General Overview Real Property Law Environmental Regulation Liabilities & Risks Contractual Relationships Real Property Law Environmental Regulation Liabilities & Risks Lender Liabilities Real Property

LawPurchase & SaleGeneral Overview

FOOTNOTES:

(n1)COMMENT(n1) This is a three party agreement. It involves the borrower, the shareholder/guarantor of borrower, and the lender.

(n2)COMMENT(n2) The borrower is the owner of the real estate being pledged and the legal description is attached for clarity.

(n3)COMMENT(n3) The subject loan is a simple real estate loan and involves no other collateral other than fixtures associated with the real estate.

(n4)COMMENT(n4) The shareholder of the borrower has also agreed to guarantee the borrower's obligation for payment of the loan. Even if the shareholder was not guaranteeing the loan, the lender may require the shareholder to indemnify it for environmental matters.

(n5)COMMENT(n5) In many provisions of this Agreement, borrower and the shareholder will have the same obligation; however, because the Company owns the property there will also be provisions which relate only to the Company which owns and operates the property.

(n6)COMMENT(n6) The Indemnitors must represent to the lender that they are not aware of any environmental conditions on or about the property which violate the law. Many times, the parties will have an assessment undertaken and use the assessment as the basis for knowledge or exclude from the representation anything disclosed in the report.

(n7)COMMENT(n7) In this paragraph, the Company is agreeing to operate the property in accordance with all applicable laws. Because the shareholder does not own the property he is not involved in this provision.

(n8)COMMENT(n8) The Company, as the owner, must immediately notify the lender if it receives notice of a problem. In such event, the lender will want to be aware of the problem so as to manage its risk.

(n9)COMMENT(n9) Again, the lender has researched the report to be involved in any future problems so as to make sure that the problem is resolved to the lender's satisfaction. The lender's primary goal will be to protect the value of its collateral.

(n10)COMMENT(n10) This is the primary obligation of the borrower and the shareholder to the lender. Pursuant to the terms of this provision, the borrower and the shareholder agree to reimburse the lender for all damages incurred by the lender, or claims to which the lender is subject.

(n11)COMMENT(n11) The borrower and the lender agree to reimburse for all costs and expenses incurred by lender and include a default rate of interest if the amounts are not promptly paid.

(n12)COMMENT(n12) This provision prohibits the borrower and the shareholder from undertaking any remediation without the lender's approval. Again, the lender wants to protect the value of the collateral and make sure any remediation is completed to the lender's standard and not the borrower's. The borrower's main goal will be to get the property operating. The lender's goal will be to make sure the property maintains its value in the event that the property has to be sold to a third party in a foreclosure.

(n13)COMMENT(n13) This allows the lender to hire an expert at the cost of the borrower and shareholder to determine the extent of the problem. This provision also requires the parties to treat the results of the report as confidential.

(n14)COMMENT(n14) This provision is the agreement of the borrower and the shareholder to allow the lender's

consultant on the property to conduct the audit.

(n15)COMMENT(n15) This provision is necessary for the indemnity to continue after the repayment of the loan. This could be important if the lender is ever classified as an operator and is subject to liability. In such event, the lender would rely upon this provision to require the borrower and its shareholder to defend it and reimburse it for any costs incurred.

(n16)COMMENT(n16) This clause allows the lender to sell the loan and have the provisions of this agreement benefit its successor. Conversely, this allows the provisions to be binding upon any party to which the property is sold.

(n17)COMMENT(n17) This provision is a waiver of a jury trial. The lender is requiring this because it is concerned that a jury might be swayed against it because it is a large institution and the borrower is small and the shareholder is an individual.

(n18)COMMENT(n18)

(n19)COMMENT(n19) The parties to this Agreement are the current and former owner of the property. The U.S. EPA is not a party. However, pursuant to Paragraph 2., the U.S. EPA is a third-party beneficiary.

(n20)COMMENT(n20) The recitals or "whereas" clauses are designed to provide the reader factual background necessary to interpret and give meaning to the Agreement.

(n21)COMMENT(n21) This provides that the Agreement will be recorded in order to provide for constructive notice of the provision of the Agreement. As a result, all parties dealing with the property are charged with constructive notice of the provisions of this Agreement.

(n22)COMMENT(n22) This is the grantor clause which makes the property subject to the restrictions.

(n23)COMMENT(n23) This clause designates the U.S. EPA as the third-party beneficiary and gives it the benefits and rights of the grantee.

(n24)COMMENT(n24) This Declaration runs with the land in perpetuity and specifically provides that the U.S. EPA may enter this Agreement as though it was a party.

(n25)COMMENT(n25) This restriction is designated to prohibit the activities which may be conducted on or about the property. Further, it prohibits the construction of improvements.

(n26)COMMENT(n26) This provision is an additional restriction on the use of the property. Essentially, it guarantees that the property will in perpetuity remain in industrial site.

(n27)COMMENT(n27) This provision prohibits the use of the groundwater.

(n28)COMMENT(n28) This clause requires the grantor to maintain the existing structure in order to keep the containment effectively concealed. This requirement will be incorporated into the closure report.

(n29)COMMENT(n29) This allows the grantor to conduct certain activities which do not adversely affect the environment and the health and welfare of the public. However, the U.S. EPA's approval must be obtained.

(n30)COMMENT(n30) This provision sets forth how the Agreement may be modified. This is extremely important because of general nature of technology (which changes quickly) the parties may have the need to make changes.

(n31)COMMENT(n31) This gives the grantee (and presumably the U.S. EPA) access to the property for purposes of monitoring the contamination and grantee's compliance with the Agreement. The subparagraphs are very detailed as

the rights of the grantee (and the U.S. EPA).

(n32)COMMENT(n32) This provision indicates that the U.S. EPA is not waiving any rights that it may have under applicable statutes.

(n33)COMMENT(n33) This clause provides that the Agreement will be recorded in the applicable office which has jurisdiction over the property.

(n34)COMMENT(n34) This requires the grantor to put all subsequent parties to the Agreement to which it might convey on actual notice of the terms and conditions of this Agreement. It also requires the grantee to provide proof that this document has been recorded.

(n35)COMMENT(n35) Pursuant to the government's belt and suspender method, the government again requires in the Agreement that it specifically has access to the property and that it is entitled to specific performance.

(n36)COMMENT(n36)



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Current Legal Forms for Real Estate

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Current Legal Forms for Real Estate

Chapter 25 ENVIRONMENTAL CONSIDERATIONS IN REAL ESTATE TRANSACTIONS

Part III. Drafting Guidelines

33-25 Current Legal Forms for Real Estate § 25.37

§ 25.37 Checklist for Sale and Purchase of Real Estate

- A. Contract of sale-purchase ☐
- 1. Identify seller(s) ☐
 - a. Name ☐
 - b. Address ☐
- 2. Capacity of seller(s) ☐
 - a. Individual ☐
 - (1) Meets age of majority ☐
 - (2) Is competent ☐
 - b. Corporation or limited liability company ☐
 - (1) Obtain copy of board of directors' or members' resolution authorizing sale ☐
 - (2) Is approval of court (e.g., bankruptcy court) required? ☐

(3) Is approval of any state or local government agency required? ☐

c. Partnership ☐

(1) Obtain proof from representative of partnership that he has authority to act on behalf of partnership ☐

(2) Obtain copy of partners' decision authorizing sale ☐

(3) Is approval of court (e.g., bankruptcy court) required? ☐

(4) Is approval of any state or local government agency required? ☐

d. Fiduciary ☐

(1) Obtain proof of appointment ☐

(2) Determine source of appointment ☐

(a) By law ☐

(b) By court order ☐

(c) By document (e.g., will or trust agreement) ☐

(3) Determine whether court order is required for sale ☐

3. Identify purchaser(s) ☐

a. Name ☐

b. Address ☐

4. Capacity of purchaser(s) ☐

a. Individual ☐

(1) Meets age of majority ☐

(2) Is competent ☐

b. Corporation or limited liability company ☐

(1) Obtain copy of board of directors' or members' resolution authorizing purchase ☐

(2) Is approval of court (e.g., bankruptcy court) required? ☐

(3) Is approval of any state or local government agency required? ☐

c. Partnership ☐

(1) Obtain copy of partners' decision authorizing purchase ☐

(2) Is approval of court (e.g., bankruptcy court) required? ☐

(3) Is approval of any state or local government agency required? ☐

d. Fiduciary ☐

(1) Obtain proof of appointment ☐

(2) Determine source of appointment ☐

(a) By law ☐

(b) By court order ☐

(c) By document (e.g., will or trust agreement) ☐

(3) Determine whether court order is required for

purchase ☐

5. Identify the subject premises ☐

a. Describe location by county and by municipality ☐

b. Describe location by street address ☐

c. Describe location by lot size ☐

d. Describe location by real estate tax map number ☐

e. Describe location by prior recorded deed(s) ☐

f. Describe location by metes and bounds ☐

g. Describe location by reference to filed map(s) or
subdivision plat(s) ☐

h. Describe by drawings ☐

6. Identify all structures which are located on premises and
use thereof ☐

a. Building(s) ☐

7. Identify fixtures and/or personal property which are
included in sale price ☐

8. Identify fixtures which are excluded from sale ☐

9. Identify personal property excluded from sale ☐

10. Identify fixtures to be transferred at additional cost to
purchaser ☐

a. Which fixtures will be transferred in "as is"
condition? ☐

b. Which fixtures will be transferred in "good

working order"? ☐

c. Which party will bear risk of loss between contract date and transfer of title? ☐

11. Identify personal property to be transferred at additional cost to purchaser ☐

a. Which personalty will be transferred in "as is" condition? ☐

b. Which personalty will be transferred in "good working order"? ☐

c. Which party will bear risk of loss between contract date and transfer of title? ☐

12. Purchase price ☐

a. Total amount ☐

b. Additional cost to purchaser for fixtures listed above ☐

c. Additional cost to purchaser for personal property listed above ☐

d. Deposit ☐

(1) Amount ☐

(2) When due ☐

(3) Form of payment (e.g., cashier's check) ☐

(4) Where held ☐

e. Adjustments to purchase price ☐

(1) Property taxes and assessments ☐

(2) Prepaid services (e.g., trash collection) ☐

(3) Water and sewer assessments ☐

(4) Special assessments ☐

(5) Other ☐

13. Contingencies: specify date by which each contingency must be resolved and standard to be used in determining whether contingency is satisfied ☐

a. General Inspection ☐

b. Inspection for wood-boring insects ☐

c. Test for well water purity (if any) ☐

d. Test for well water quantity (if any) ☐

e. Test for well water quality (if any) ☐

f. Inspection of septic system (if any) ☐

g. Structural and system inspections..... ☐

h. Test for radon gas ☐

i. Inspect for mold ☐

j. Inspection for asbestos insulation ☐

k. Inspection for urea formaldehyde insulation ☐

l. Environmental site assessment ☐

m. Inspect for PCBs ☐

n. Financing ☐

o. Survey ☐

p. Wetland ☐

14. Environmental considerations ☐

a. Site conditions ☐

(1) Warranty by seller that site does not contain
adverse environmental condition or wetland ☐

(2) Disclaimer by seller regarding whether site
contains adverse environmental condition or
wetland ☐

(3) Representations by seller ☐

(a) Present condition of site ☐

(b) Past use of site ☐

(c) Present use of site ☐

(d) Property is in compliance with all environmental
laws and regulations (federal, state and local) ☐

(4) Hold harmless clause ☐

(5) Indemnification clause ☐

b. Special governmental approvals from agencies,
districts or boards ☐

(1) Conservation district ☐

(2) Historic district ☐

(3) Zoning board ☐

(4) Wetlands protection ☐

c. Environmental site assessment ☐

15. Type of deed to be given ☐

a. Warranty ☐

b. Limited Warranty ☐

c. Executor's ☐

d. Administrator's ☐

e. Trustee's ☐

f. Referee's ☐

g. Quitclaim ☐

16. Purchaser will take property subject to the following conditions ☐

a. Zoning laws ☐

b. Building laws ☐

c. Environmental laws ☐

(1) Federal ☐

(2) State ☐

(3) Local ☐

d. Covenants in the deed ☐

e. Any other restrictions ☐

f. Easements ☐

- g. Tenancies ☐
- h. Licenses ☐
- i. Any other condition known to Buyer ☐
17. Title review (abstract or insurance) ☐
- a. Specify who prepares title commitment or abstract ☐
- b. Decide type of policy and required endorsement(s) ☐
- c. Specify who provides title insurance ☐
- d. Specify party responsible for payment ☐
18. Specify which party will provide and pay for the survey ☐
19. Specify date of transfer of title ☐
- a. Whether date is approximate ☐
- b. Time is of the essence ☐
- c. Where transfer will occur ☐
20. Specify when possession will be granted to purchaser ☐
- a. Prior to transfer of title ☐
- (1) Insurance considerations ☐
- (2) Allocation of risk of loss ☐
- (3) Rent owed by purchaser to seller ☐
- b. At transfer of title ☐

c. After transfer of title ☐

(1) Insurance considerations ☐

(2) Allocation of risk of loss ☐

(3) Time of inspection ☐

(4) Amount of purchase price held back to cover
any damages ☐

(5) Rent owed by seller to purchaser ☐

21. Miscellaneous clauses ☐

a. Waiver provision (e.g., "the waiver of any provision of
this agreement shall not be valid unless it is in writing
and signed by the party granting the waiver") ☐

b. This agreement represents entire agreement of the
parties ☐

c. Any modifications of agreement must be in written
form and signed by both parties ☐

d. Agreement is to be construed in accordance with the
laws of the State of ☐

e. Agreement is binding on both parties and their
respective successors and assigns ☐

B. Deed ☐

1. Interest to be transferred ☐

a. Fee title ☐

b. Easement ☐

c. License ☐

d. Life estate ☐

e. Other ☐

2. Specify interest to be retained ☐

a. Easement ☐

b. License ☐

c. Life estate ☐

d. Mineral rights ☐

e. Restrictive Covenants ☐

f. Other ☐

3. Execution ☐

a. Signed by parties or their representatives ☐

b. Dated ☐

c. Witnesses ☐

d. Acknowledged ☐

Legal Topics:

For related research and practice materials, see the following legal topics:

Environmental Law Assessment & Information Access Audits & Site Assessments Real Property
 Law Deeds Types General Overview Real Property Law Environmental Regulation Liabilities & Risks General
 Overview Real Property Law Purchase & Sale Closing & Settlement Real Property Law Purchase & Sale Contracts of
 Sale Formalities



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Chapter 25 ENVIRONMENTAL CONSIDERATIONS IN REAL ESTATE TRANSACTIONS

Part III. Drafting Guidelines

33-25 Current Legal Forms for Real Estate § 25.38

§ 25.38 Short Form Due Diligence Checklist for Purchase of Commercial Property

A. Condition, zoning and parking ☐

1. Condition ☐

a. General property inspection ☐

b. Utilities ☐

c. Environmental ☐

d. Wetlands ☐

2. Zoning and parking ☐

a. Density current ☐

b. Compliance ☐

c. Variances ☐

d. Occupancy permit/conditional use permit ☐

B. Title and survey ☐

1. Title policy and endorsements ☐

2. Survey ☐

C. Financial feasibility analysis ☐

1. Review of leases ☐

a. Review of remaining term ☐

b. Base rent and additional rent ☐

c. Cost recoveries and common area maintenance ☐

d. Security deposits ☐

e. Tenant improvements ☐

f. Insurance, real estate taxes and assessments ☐

g. Use restrictions ☐

h. Exclusives ☐

i. Co-tenancy requirements ☐

j. Option to renew and rent for renewal terms ☐

k. Estoppel certificates ☐

l. Lease summary for each tenant ☐

2. Financial obligations under easements or development
agreement ☐

3. Review of financing documents ☐

Legal Topics:

For related research and practice materials, see the following legal topics:

Environmental LawAssessment & Information AccessAudits & Site AssessmentsEnvironmental LawNatural Resources
& Public LandsWetlands ManagementEnvironmental LawZoning & Land UseGeneral OverviewReal Property
LawEnvironmental RegulationLiabilities & RisksGeneral OverviewReal Property LawPurchase & SaleContracts of
SaleGeneral OverviewReal Property LawPurchase & SaleContracts of SaleFormalitiesReal Property LawPurchase &
SaleRemediesDuty to DiscloseReal Property LawZoning & Land UseGeneral Overview



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Chapter 25 ENVIRONMENTAL CONSIDERATIONS IN REAL ESTATE TRANSACTIONS

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33-25 Current Legal Forms for Real Estate § 25.39

§ 25.39 Checklist for Drafting Documents Necessary for Commercial Mortgage Transaction

- A. Commitment letter ☐
1. Identify ☐
- a. Borrower(s) ☐
- b. Guarantor(s) ☐
- c. Property subject to mortgage ☐
- d. Mortgage amount ☐
2. Conditions ☐
- a. Financial ☐
- (1) Cross-corporate guarantors (i.e., loan is backed by
borrower's parent company and fellow subsidiaries,
or by borrower's subsidiaries) ☐
- (2) Additional collateral required ☐
- (a) Accounts receivable ☐

(b) Fixtures ☐

(c) Equipment ☐

(d) Inventory ☐

(e) Other ☐

(3) Partial or full satisfaction of existing debts ☐

(4) Satisfactory appraisal of property ☐

(5) Payment of commitment fee and closing costs ☐

b. Relating to structures and land ☐

(1) Certificate of occupancy ☐

(2) Opinion of counsel ☐

(3) Casualty insurance ☐

(4) Flood insurance ☐

(5) Fire insurance ☐

(6) Liability insurance ☐

(7) Environmental site assessment ☐

(8) Environmental indemnification and hold harmless
clause in order to protect lender from any liability
arising from environmental mishap ☐

c. Relating to title to real property ☐

(1) Satisfactory title search ☐

(2) Title insurance policy ☐

(3) Satisfactory survey ☐

(4) Proof of compliance with all zoning laws ☐

(5) Proof of compliance with all environmental laws ☐

B. Promissory Note ☐

1. Identify parties ☐

a. Borrower ☐

(1) Name ☐

(2) Address ☐

(3) Capacity ☐

b. Lender ☐

(1) Name ☐

(2) Address ☐

2. Amount of consideration ☐

3. Term ☐

a. Date when note is issued ☐

b. Date when final payment is due ☐

c. Balloon provisions ☐

4. Interest rate ☐

a. Prime rate plus ☐

b. Fixed or frequency of rate adjustments for changes
in the prime rate ☐

c. Maximum rate ☐

d. Minimum rate ☐

5. Prepayment provisions ☐

a. Permitted at any time without penalty ☐

b. Permitted on any payment date without penalty ☐

c. Not permitted during a stated period ☐

d. Permitted on any payment date with penalty ☐

e. Permitted at any time with penalty ☐

6. Payment provisions ☐

a. Frequency of payments ☐

b. Amortizing payments ☐

c. Interest-only payments ☐

d. Interest plus level principal payments ☐

e. Balloon payments ☐

f. Grace period ☐

g. Late charge ☐

h. Where payments are to be made ☐

7. Further provisions ☐

a. Borrower grants waiver of presentment ☐

b. Notices sent between the parties ☐

c. Law governing transaction shall be law of the
State of ☐

8. Execution ☐

a. Signature of borrower as maker of note ☐

b. Proper acknowledgment ☐

c. Delivery of note ☐

C. Mortgage ☐

1. Identify parties ☐

a. Borrower ☐

(1) Name ☐

(2) Address ☐

(3) Capacity ☐

b. Owner of real property, if different from borrower ☐

(1) Name ☐

(2) Address ☐

(3) Capacity ☐

c. Lender ☐

(1) Name ☐

(2) Address ☐

2. Consideration to lender for granting mortgage ☐

3. Borrower grants interest in subject property to lender to
secure mortgage loan ☐

a. Property description ☐

b. Extent of interest ☐

(1) Includes all rights of borrower in the subject
premises ☐

(a) Minerals ☐

(b) Oil ☐

(c) Natural gas ☐

(d) Water ☐

(e) Shale ☐

(f) Coal ☐

(g) Trees ☐

(h) Wildlife (i.e., fish and game) ☐

(i) Inchoate rights ☐

(j) Other ☐

(2) Rents from all tenants ☐

(3) Easements for access to subject property ☐

c. Interest is subject to ☐

- (1) Easement for public utilities ☐
- (2) Enforceable covenants/restrictions ☐
- (3) All laws ☐
- (4) Other ☐

4. Representations and duties of borrower ☐

a. Payment will be made in accordance with the terms set forth in the note ☐

b. Title to the property is clear ☐

c. Borrower will maintain property in good condition ☐

(1) Borrower will allow inspection of property by lender ☐

(2) Borrower will make all necessary repairs promptly and properly ☐

(3) Borrower will make no alterations without permission ☐

d. Borrower will maintain insurance ☐

e. Borrower will make timely real estate tax payments ☐

f. Borrower will provide to lender copies of annual income tax returns (federal, state and local) ☐

g. Borrower will provide to lender copies of audited financial statements of borrower and related entities ☐

h. Borrower will obey all laws and government regulations (federal, state and local) ☐

i. Borrower will keep premises free of any

environmental hazards ☐

5. Rights of lender ☐

a. Foreclosure ☐

(1) For borrower's failure to make mortgage payments
when due ☐

(2) For borrower's failure to maintain insurance ☐

(3) For borrower's failure to pay real estate taxes ☐

(4) For environmental mishap on the mortgaged
property ☐

(5) For borrower's failure to maintain premises in
good repair ☐

(6) For borrower's other violation of terms of
mortgage or note ☐

b. Right to receive rents from tenants ☐

c. Right to secure premises ☐

d. Right to reimbursement for costs of enforcement of
mortgage and note ☐

(1) Foreclosure costs and disbursements ☐

(2) Legal fees ☐

(3) Court costs ☐

(4) Referee's fees ☐

e. Right to sell property after foreclosure ☐

f. Right to inspect premises ☐

g. Right to proceeds of award for eminent domain ☐

h. Right to proceeds of casualty loss insurance
settlement ☐

i. Right to payment in full upon sale or other
transfer of mortgaged property ☐

6. Further provisions ☐

a. Mortgage not assumable without permission of lender ☐

b. Waiver provision (e.g., "the waiver of any provision of
this agreement shall not be valid unless it is in writing
and signed by the party granting the waiver") ☐

c. Any modifications of agreement must be in written
form and signed by both parties ☐

d. Agreement is to be construed in accordance with the
laws of the State of ☐

e. Provision for the giving of notice between the
parties ☐

f. Agreement is binding on both parties and their
successors and assigns ☐

7. Execution ☐

a. Signed by mortgagor ☐

b. Dated ☐

c. Witnessed ☐

d. Acknowledged ☐

e. Recorded ☐

D. Guarantee ☐

1. Identify parties ☐

a. Borrower ☐

(1) Name ☐

(2) Address ☐

(3) Capacity ☐

b. Guarantor ☐

(1) Name ☐

(2) Address ☐

(3) Capacity ☐

(4) Relationship to borrower ☐

(5) Social security number ☐

c. Lender ☐

(1) Name ☐

(2) Address ☐

2. Identify loan or loans to be guaranteed ☐

a. Date ☐

b. Amount ☐

c. Security ☐

3. Identify extent of guarantee ☐

- a. All debts now in existence and hereafter incurred ☐
 - b. A particular debt in its entirety ☐
 - c. Part of a particular debt ☐
 - d. Any debts to a maximum combined amount of money ☐
 - e. Lender's costs of collection, legal fees and court costs ☐
 - f. Other ☐
4. Circumstances under which guarantor must repay debt ☐
- a. Failure of borrower to repay loan ☐
 - b. Notice requirements imposed on lender before it may seek payment from guarantor ☐
 - c. Must lender make recourse to collateral before seeking payment from guarantor? ☐
5. Other provisions ☐
- a. Modification or expansion of debt does not release guarantor of its obligations ☐
 - b. Right of lender to release other parties (e.g., a borrower or other guarantor) ☐
 - c. Course of conduct between lender and borrower does not release guarantor of its obligations ☐
 - d. Waiver provision (e.g., "the waiver of any provision of this agreement shall not be valid unless it is in writing and signed by the party granting the waiver") ☐
 - e. Any modifications of agreement must be in written form and signed by all parties ☐

f. Agreement is to be construed in accordance with the laws of the State ☐

g. Provision for the giving of notice among the parties ☐

h. Agreement is binding on all parties and their respective successors and assigns ☐

6. Execution ☐

a. Signed by parties ☐

b. Dated ☐

c. Witnessed ☐

d. Acknowledged ☐

E. Environmental indemnification granted by borrower to lender ☐

1. Identify parties ☐

a. Borrower ☐

(1) Name ☐

(2) Address ☐

(3) Capacity ☐

b. Lender ☐

(1) Name ☐

(2) Address ☐

2. Amount of consideration ☐

3. Indemnification and hold harmless granted by borrower to lender to protect lender in the event of the following ☐

- a. Use, production and/or storage of hazardous substances on the mortgaged premises ☐
- b. Leakage or other release of such substances onto the premises ☐
- c. Leakage or other release of such substances onto neighbors' property ☐
- d. Other environmental mishap ☐
- e. Failure of borrower to comply with federal, state and local environmental laws and regulations ☐
- f. Indemnification/hold harmless shall extend to the full cost of decontamination of mortgaged premises and any neighboring property ☐
- g. Indemnification/hold harmless shall extend to any lien, claim, judgment or assessment brought against the lender for the costs of remediation of the contaminated property ☐
- h. Indemnification/hold harmless shall extend to the diminution in value of the property ☐
4. Indemnification and hold harmless survives ☐
- a. Sale of property ☐
- b. Satisfaction of loan ☐
5. Further provisions ☐
- a. Waiver provision (e.g., "the waiver of any provision of this agreement shall not be valid unless it is in writing and signed by the party granting the waiver") ☐
- b. Any modifications of agreement must be in written form and signed by both parties ☐

c. Agreement is to be construed in accordance with the laws of the State of ☐

d. Provision for the giving of notice between the parties ☐

e. Agreement is binding on both parties and their respective successors and assigns ☐

6. Execution ☐

a. Signed by parties ☐

b. Dated ☐

c. Witnessed ☐

d. Acknowledged ☐

F. Opinion letter of borrower's counsel ☐

1. All loan documents are valid obligations of borrower and/or guarantor ☐

2. Borrower has legal authority to borrow ☐

3. No misrepresentations on part of borrower are contained in loan documents ☐

4. Borrower has complied with all relevant laws and regulations (federal, state and local) ☐

5. There is no pending litigation concerning the property ☐

6. There are no pending or contemplated condemnation proceedings against the property ☐

7. There are no pending or contemplated environmental enforcement proceedings against the property ☐

G. Miscellaneous documents ☐

1. Assignment of leases and rents ☐

2. Mortgage tax affidavit ☐

3. Settlement statement ☐

Legal Topics:

For related research and practice materials, see the following legal topics:

Insurance LawProperty InsuranceFlood InsuranceReal Property LawFinancingMortgages & Other Security
InstrumentsGeneral OverviewReal Property LawFinancingMortgages & Other Security InstrumentsDefinitions &
InterpretationReal Property LawFinancingMortgages & Other Security InstrumentsForeclosuresGeneral OverviewReal
Property LawFinancingMortgages & Other Security InstrumentsInsuranceReal Property LawFinancingMortgages &
Other Security InstrumentsMortgagee's InterestsReal Property LawFinancingMortgages & Other Security
InstrumentsMortgagor's Interests



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Part III. Drafting Guidelines

33-25 Current Legal Forms for Real Estate § 25.40

§ 25.40 Checklist for Documents for Construction Loan

A. Documents to be prepared by lender/lender's counsel ☐

1. Loan Commitment ☐

a. Draft done ☐

b. Final done ☐

2. Construction Loan and Security Agreement ☐

a. Draft done ☐

b. Final done ☐

3. Mortgage Note for Construction Loan ☐

a. Draft done ☐

b. Final done ☐

4. Open-End Mortgage, Assignment of Rents and Leases, and
Security Agreements ☐

a. Draft done ☐

b. Final done ☐

5. Environmental Representations, Release, Hold Harmless and
Indemnity Agreement ☐

a. Draft done ☐

b. Final done ☐

6. Certificate of Borrower ☐

a. Draft done ☐

b. Final done ☐

7. Automatic Debit Authorization ☐

a. Draft done ☐

b. Final done ☐

8. Financing Statement [UCC-1] for Secretary of State ☐

a. Draft done ☐

b. Final done ☐

9. Financing statement [UCC-1] for County Recorder ☐

a. Draft done ☐

b. Final done ☐

10. Escrow Instruction Letter ☐

a. Draft done ☐

b. Final done ☐

11. FEMA Flood Zone Certifications ☐

12. Borrower's Counsel's legal opinion ☐

a. Received ☐

13. Notice of Commencement ☐

a. Received ☐

14. Lender's internal documents ☐

a. Loan application ☐

b. IRS Form W-9 with Borrower's TIN ☐

c. Credit approvals for loan amount ☐

d. Signature cards ☐

e. Partnership authorization ☐

B. Documents to be prepared/provided by borrower's counsel ☐

1. Plans and specifications for the Project (as approved by
any necessary governmental authorities) ☐

2. Construction Contract ☐

3. Current property location ☐

(a) survey(s) ☐

(b) site plans ☐

(c) Surveyor's Certifications ☐

4. Lot-based maps ☐
5. Phase I environmental assessments ☐
6. Current project appraisal ☐
7. Evidence of proper zoning and availability of required
public utilities for the Project ☐
8. Detailed sources and uses statement demonstrating sufficient
funds are available to complete construction with costs
breakdown, and the evidences of the
following commitments ☐
- (a) State ☐
9. Borrower's Organizational Documents ☐
- (a) Certificate of Partnership ☐
- (b) Shareholder, Operating or Limited Partnership
 Agreement ☐
- (c) Certificate of full force and effect for borrower ☐
- (d) Partnership resolution authorizing borrowing ☐
- (e) Certificate of Borrower ☐
10. ALTA [Form 1990] mortgagee title insurance policy with
standard exceptions deleted equal to full principal amount of
loan(s), including the following endorsements ☐
- (a) Comprehensive endorsement (affirmative
 access insurance) ☐
- (b) Zoning endorsement ☐
- (c) Pending disbursements provision ☐

(d) Variable rate endorsement ☐

(e) Insured Closing Letter ☐

11. Insurance policies and certificates of insurance ☐

(a) Builder's Risk ☐

(b) Property ☐

(c) Liability ☐

12. Copies certified by Borrower of all authorizations, including sewer permits, zoning variances, building and other permits, etc. ☐

C. Miscellaneous ☐

1. UCC-11 Search Results [State] ☐

2. UCC-11 Search Results [County] ☐

3. Title Commitment issued ☐

Legal Topics:

For related research and practice materials, see the following legal topics:

Commercial Law (UCC)Secured Transactions (Article 9)PerfectionMethodsFilingsFinancing StatementsGeneral OverviewInsurance LawProperty InsuranceCoverageReal PropertyBuilder's Risk PoliciesReal Property LawConstruction LawGeneral OverviewReal Property LawConstruction LawContractsReal Property LawEnvironmental RegulationLiabilities & RisksGeneral OverviewReal Property LawFinancingConstruction LoansReal Property LawFinancingMortgages & Other Security InstrumentsGeneral OverviewReal Property LawFinancingMortgages & Other Security InstrumentsMortgagee's InterestsReal Property LawFinancingMortgages & Other Security InstrumentsMortgagor's Interests



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Chapter 25 ENVIRONMENTAL CONSIDERATIONS IN REAL ESTATE TRANSACTIONS

Part III. Drafting Guidelines

33-25 Current Legal Forms for Real Estate § 25.41

§ 25.41 Checklist for Phase I Environmental Site Assessment

A. Identify subject premises ☐

1. Street address ☐

a. Street name and building number ☐

b. State, municipality or other political subdivision ☐

2. Survey map ☐

3. Deed ☐

4. Abstract of title ☐

5. Boundary line definition ☐

6. Tax map ☐

B. Identify all adjoining parcels ☐

1. Names of owners ☐

2. Structures ☐

3. Boundary lines ☐

4. Character and use (both past and present) of
each adjoining parcel ☐

a. Residential ☐

(1) How solid waste is disposed of ☐

(2) How sewage is disposed of ☐

(a) Septic system ☐

(b) Public sewer system ☐

b. Commercial ☐

(1) How solid waste is disposed of ☐

(2) How sewage is disposed of ☐

(a) Septic system ☐

(b) Public sewer system ☐

(3) Use of ground water (i.e., water from wells,
springs, etc.) ☐

(4) Discharge of ground water ☐

(5) Use of surface water (i.e., water from ponds,
streams, marshes, etc.) ☐

(6) Discharge of surface water ☐

(7) Manufacturing ☐

(a) Products produced ☐

(b) Raw materials required (e.g., chemicals, etc.) ☐

(c) Equipment, machinery and tools required ☐

(d) Manufacturing processes used ☐

(e) Storage facilities ☐

(f) Any hazardous substances used, produced,
stored or disposed of on
the property ☐

(8) Services ☐

(a) Services performed ☐

(b) Raw materials required (e.g., chemicals, etc.) ☐

(c) Equipment, machinery and tools required ☐

(d) Processes used ☐

(e) Storage facilities ☐

(f) Any hazardous substances used, produced, stored
or disposed of on the property ☐

(9) Office building ☐

(a) Services performed ☐

(b) Equipment, machinery and tools required ☐

(c) Storage facilities ☐

(d) Any hazardous substances used, produced, stored
or disposed of on the property ☐

(10) Length of time premises were used for these

purposes ☐

C. Identify past and present uses of subject premises ☐

1. Review title records ☐

2. Review historic maps ☐

3. Review aerial photographs for as many years as are
available ☐

4. Interview neighbors ☐

5. Interview police department officials ☐

a. About their personal knowledge concerning use of
subject property ☐

b. Inspect police records for indications of how property was
or is being used (e.g., citations, complaints
from neighbors) ☐

6. Interview fire department officials ☐

a. About their personal knowledge concerning use of
subject property ☐

b. Inspect fire department records for indications of how
property was or is being used (e.g., citations, complaints
from neighbors) ☐

7. Interview public works department officials ☐

a. About their personal knowledge concerning use of
subject property ☐

b. Inspect department records for indications of how
property was or is being used (e.g., complaints
from neighbors) ☐

☐

a. For their personal knowledge regarding possible environmental hazards on property ☐

b. Inspect department records for possible citations issued by department or complaints brought by neighbors and others ☐

9. Review municipal records ☐

a. Applications to zoning and municipal planning boards ☐

(1) Change in use applications ☐

(2) Construction permits ☐

(3) Demolition permits ☐

(4) Maps on file ☐

10. Character and use (both past and present) of subject premises ☐

a. Residential ☐

(1) How solid waste is disposed of ☐

(2) How sewage is disposed of ☐

(a) Septic system ☐

(b) Public sewer system ☐

b. Commercial ☐

(1) How solid waste is disposed of ☐

(2) How sewage is disposed of ☐

(a) Septic system ☐

(b) Public sewer system ☐

(3) Use of ground water (i.e., water from wells, springs, etc.) ☐

(4) Discharge of ground water ☐

(5) Use of surface water (i.e., water from ponds, streams, marshes, etc.) ☐

(6) Discharge of surface water ☐

(7) Manufacturing ☐

(a) Products produced ☐

(b) Raw materials required (e.g., chemicals, etc.) ☐

(c) Equipment, machinery and tools required ☐

(d) Manufacturing processes used ☐

(e) Storage facilities ☐

(f) Any hazardous substances used, produced, stored or disposed of on the property ☐

(8) Services ☐

(a) Services performed ☐

(b) Raw materials required (e.g., chemicals, etc.) ☐

(c) Equipment, machinery and tools required ☐

(d) Processes used ☐

(e) Storage facilities ☐

(f) Any hazardous substances used, produced, stored
or disposed of on the property ☐

(9) Office building ☐

(a) Services performed ☐

(b) Equipment, machinery and tools required ☐

(c) Storage facilities ☐

(d) Any hazardous substances used, produced, stored
or disposed of on property ☐

(10) Length of time premises were used for these
purposes ☐

D. Geography of surrounding area ☐

1. Topography (i.e., elevation and other features of the area) ☐

a. Perform personal inspection of area ☐

b. Check U.S. Geological Service maps ☐

(1) Elevation ☐

(2) Relief features ☐

(a) Hills ☐

(b) Mountains ☐

(c) Valleys ☐

(d) Other ☐

(3) Bodies of water on or near premises ☐

(a) Ponds ☐

(b) Springs ☐

(c) Lakes ☐

(d) Rivers ☐

(e) Streams and brooks ☐

(f) Wetlands and marshes ☐

(g) Other ☐

(4) How well does surface water run off the subject premises? ☐

(5) Natural vegetation ☐

(a) Trees ☐

(b) Shrubby ☐

(c) Other ☐

2. Geological setting ☐

a. General soil type ☐

b. Properties of soil (e.g., sandy, clay-like, dense, rocky) ☐

c. Ground water ☐

(1) Quantity ☐

(2) Quality ☐

(3) Movement of ground water from subject property to adjoining properties and vice versa ☐

3. Man-made features ☐

a. Storm drains and sewers ☐

b. Electrical poles and lines ☐

c. Underground electrical lines ☐

d. Electrical transformers ☐

e. Gas mains ☐

f. Telephone poles and lines ☐

g. Underground telephone lines ☐

h. Storage tanks ☐

(1) Uses for tanks ☐

(2) Present condition of tanks ☐

(3) Location of tanks ☐

i. Water pipes and lines ☐

j. Sewer pipes and lines ☐

k. Roadways ☐

l. Parking lots ☐

m. Buildings and other structures ☐

(1) Age ☐

(2) Construction type (e.g., brick, stone, wood, etc.) ☐

(3) Additions to buildings and other

structures ☐

(4) Blueprints of existing and prior buildings and other
structures ☐

(5) Present condition of buildings and other
structures ☐

(6) Floor drains in buildings and other
structures ☐

(7) Percentage of current occupancy of buildings and
other structures ☐

E. Identify potential environmental hazards on or near
subject premises ☐

1. Review "National Priorities List" (NPL) ☐

a. To see whether subject premises is listed thereon ☐

b. To see whether adjoining parcels are listed thereon ☐

c. To determine location of nearest parcel listed on NPL
in relation to subject premises ☐

2. Review "Comprehensive Environmental Response,
Compensation and Liability Information System"
(CERCLIS) ☐

a. To see whether subject premises is listed therein ☐

b. To see whether adjoining parcels are listed therein ☐

c. To determine location of nearest parcel listed in
CERCLIS in relation to subject premises ☐

3. Review equivalent state environmental agency's list of sites
requiring clean up, if any ☐

☐

b. To see whether adjoining parcels are listed thereon ☐

c. To determine location of nearest parcel listed on list in
relation to subject premises ☐

4. Physically inspect premises ☐

a. For stains on or near utility poles ☐

b. For signs of underground tanks ☐

c. For barrels and cans of liquid substances ☐

d. For signs of buried refuse ☐

e. For pools of oil, chemicals, etc. ☐

f. For mounds of trash ☐

g. For dumpsters and receptacles of refuse ☐

h. For smokestacks ☐

i. For asbestos insulation ☐

(1) In ceiling tiles ☐

(2) In floor tiles ☐

(3) On pipes ☐

(4) On boiler or furnace ☐

j. For urea formaldehyde insulation ☐

k. For surfaces covered with lead-based paint ☐

l. For fungus, mold and other similar growths ☐

m. For evidence of infestation by insects and rodents ☐

n. Other ☐

F. Laboratory analysis of air, water and soil samples (optional) ☐

1. Within structures ☐

a. Air samples ☐

b. Dust samples ☐

c. Paint samples ☐

d. Other ☐

2. External samplings ☐

a. Soil ☐

b. Surface water ☐

c. Ground water ☐

d. Air ☐

G. Analyzing data and drawing conclusions therefrom ☐

1. Specify precisely what was done during environmental
site assessment ☐

2. Specify any potential environmental concerns ☐

3. Determine probability of environmental mishap in the
future ☐

4. Limitations of environmental site assessment conducted ☐

a. No sampling of air, water, soil, etc., for evidence of contamination ☐

b. Reliance on oral statements made by those interviewed ☐

c. Inability to independently verify oral statements ☐

(1) Due to incomplete data ☐

(2) Due to contradictory data ☐

5. Warranties provided by environmental consultant ☐

a. To whom given? ☐

b. Warranties do not extend to other parties not expressly named ☐

c. Other limitations on warranties ☐

d. Disclaimers of liability for erroneous or incomplete information found in report ☐

e. Caveats ☐

6. Review of owner/occupant's compliance with environmental laws and regulations ☐

a. Review not part of scope of work ☐

b. Or: specify laws reviewed ☐

(1) Federal ☐

(2) State ☐

(3) Local ☐

c. Specify any lack of compliance found ☐

d. Specify any limitations on scope of this review ☐

(1) Lack of cooperation from owner/occupant or
others ☐

(2) Necessary reliance on oral statements ☐

(3) Inability to independently verify statements ☐

7. Specify when site assessment was performed ☐

8. Specify standard of care to be used in evaluating the
performance of the environmental consultant ☐

9. Specify qualifications of consultant ☐

Legal Topics:

For related research and practice materials, see the following legal topics:

Environmental LawAssessment & Information AccessAudits & Site AssessmentsEnvironmental LawAssessment &
Information AccessPublic ParticipationEnvironmental LawHazardous Wastes & Toxic SubstancesUnderground Storage
TanksReal Property LawEnvironmental RegulationGeneral OverviewReal Property LawEnvironmental
RegulationLiabilities & RisksGeneral Overview



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Current Legal Forms for Real Estate

Chapter 25 ENVIRONMENTAL CONSIDERATIONS IN REAL ESTATE TRANSACTIONS

Part III. Drafting Guidelines

33-25 Current Legal Forms for Real Estate § 25.42

§ 25.42 Due Diligence Checklist for Lease

A. Name of current landlord and type of entity ☐

B. Lease or sublease ☐

C. Tenant and type of entity ☐

D. Tenant's current use ☐

E. Does use pose any high risk? ☐

1. Fire ☐

2. Mold ☐

3. Environmental impact and use of hazardous substances ☐

4. Underground tanks ☐

F. Notice address for tenants ☐

G. Description of demised premises and/or suite number ☐

H. Initial term ☐

I. Commencement date ☐

J. Termination date ☐

K. Rent for initial term ☐

1. Year ☐

2. Annual base rent for year ☐

3. Square foot amount ☐

4. Monthly base rent ☐

L. Percentage rent ☐

M. Rights to renew ☐

N. Rent for renewal ☐

O. Zoning ☐

P. Is tenant's use in compliance with zoning? ☐

Q. Does tenant have occupancy permit or conditional use permit? ☐

R. Restrictions upon use ☐

S. Exclusivity ☐

T. Responsibility for real estate taxes ☐

U. Responsibility for liability insurance, amount required and name of agent and underwriter ☐

V. Responsibility for casualty insurance, amount required and name

of agent and underwriter ☐

W. Responsibility for maintenance ☐

1. Structural ☐

2. Non-structural ☐

X. Responsibility for replacements ☐

1. Structural ☐

2. Non-structural ☐

Y. Responsibility for utilities ☐

Z. Names and addresses of guarantors (if any) ☐

AA. Amount of security deposit ☐

BB. Late penalty (grace period, rate, etc.) ☐

CC. Default notices and cure periods ☐

DD. Default rate of interest ☐

EE. Expansion options ☐

FF. Option to purchase ☐

GG. Right of first refusal ☐

1. Purchase ☐

2. Lease ☐

Legal Topics:

For related research and practice materials, see the following legal topics:

Contracts LawTypes of ContractsLease AgreementsGeneral OverviewReal Property LawEnvironmental

RegulationGeneral OverviewReal Property LawLandlord & TenantLandlord's Remedies & RightsGeneral
OverviewReal Property LawLandlord & TenantLease AgreementsGeneral OverviewReal Property LawLandlord &
TenantLease AgreementsCommercial LeasesGeneral OverviewReal Property LawLandlord & TenantLease
AgreementsLease ProvisionsReal Property LawLandlord & TenantLease AgreementsSubleases



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Chapter 25 ENVIRONMENTAL CONSIDERATIONS IN REAL ESTATE TRANSACTIONS

Part III. Drafting Guidelines

33-25 Current Legal Forms for Real Estate § 25.43

§ 25.43 Checklist of Documents Necessary for Real Estate Closing and Transfer of Title

A. Documents required to demonstrate that all contingencies in
sale-purchase agreement have been either met or waived ☐

1. General condition report (including PCBs) ☐

2. Radon gas report ☐

3. Asbestos insulation report ☐

4. Urea formaldehyde insulation report ☐

5. Wood-boring insect report ☐

6. Mold and fungal growth report ☐

7. Environmental site assessment or Phase I ☐

8. Environmental indemnification and hold harmless granted by
seller to purchaser ☐

9. Septic system report ☐

10. Well water report ☐
- a. Quality of water's taste and smell ☐
- b. Quantity of water ☐
- c. Biological purity ☐

11. Financing commitment letter ☐

12. Survey ☐

13. Wetlands ☐

B. Municipal and other governmental approvals ☐

1. Zoning board approval or variance ☐

2. Planning board approval ☐

3. Environmental conservation district approval ☐

4. Historic district approval ☐

5. Certificate of occupancy ☐

6. Permission to drain wetland or to use portion of wetland's
water ☐

C. Proof of parties' identity and capacity to act ☐

1. Corporation or limited liability company ☐

a. Certificate of good standing from Department of State
or similar authority ☐

b. Resolution of board of directors or
shareholders/members approving purchase or sale ☐

c. Corporate secretary's certificate certifying that ☐

(1) Resolution was approved ☐

(2) Directors' or Members' meeting was properly
called ☐

(3) A quorum was present to conduct business ☐

(4) Resolution has not been revoked or modified
subsequent to meeting ☐

(5) Individual representing corporation or company in
this sale or purchase has authority to
execute documents ☐

2. Party's representative or fiduciary ☐

a. Executor of estate ☐

(1) Certificate of letters testamentary ☐

(2) Copy of will ☐

b. Administrator ☐

(1) Certificate of letters of administration ☐

c. Trustee ☐

(1) Certificate of letters of trusteeship ☐

(2) Copy of trust instrument ☐

d. Conservator or committee of incompetent ☐

(1) Certified copy of court-issued order of
appointment ☐

(2) Certified court order directing or approving
sale or purchase ☐

e. Attorney-in-fact ☐

(1) Certified copy of power of attorney that has
been recorded, or original power of attorney ☐

(2) Affidavit that principal ☐

(a) Is still alive ☐

(b) Is competent ☐

(c) Has not revoked the power of attorney ☐

3. Partnership ☐

a. Letter of authorization of sale or purchase of
property ☐

(1) Signed by all partners ☐

(2) Specifying authority of partnership's
representative to act ☐

b. Copy of partnership agreement ☐

D. Title insurance or abstract of title ☐

1. Review description of property and compare it against
deed and survey ☐

2. Review restrictions on property, if any ☐

a. Are the restrictions enforceable? ☐

b. Will the restrictions interfere with use of premises by
the purchaser? ☐

3. Review covenants ☐

a. Are the covenants enforceable? ☐

b. Will the covenants interfere with use of premises by the purchaser? ☐

c. Is there any danger of a reversion of the property if a covenant is violated? ☐

4. Easements ☐

a. Exact nature of easement ☐

b. Has public been granted a right-of-way through the premises? ☐

c. Has utility been granted permission to run power lines above or beneath property? ☐

d. Has water or gas company been granted permission to run lines beneath the subject property? ☐

e. Has any party been granted an easement to come upon the property for the purpose of removing some natural resource? ☐

(1) Oil ☐

(2) Natural gas ☐

(3) Coal ☐

(4) Shale ☐

(5) Gravel ☐

(6) Trees ☐

(7) Minerals ☐

(8) Water ☐

(9) Other ☐

- f. Location of easement ☐
- g. Is easement enforceable? ☐
- h. Will easement interfere with use or enjoyment of the premises by purchaser? ☐
- i. Is easement terminable? ☐
5. Liens against property ☐
6. Overdue real estate tax payments ☐
- E. Survey of property for ☐
1. Wetlands, streams, ponds, etc. ☐
2. Structures ☐
3. Evidence of easements ☐
4. Uses of neighboring properties ☐
5. Encroachments upon subject property ☐
- a. Fences, walls, etc. ☐
- b. Structures ☐
- c. Other ☐
6. Is the surveyor's description of the subject property congruent with the deed and title abstract? ☐
- a. Check all filed maps ☐
- b. Metes and bounds ☐

c. Check deed ☐

d. Check title abstract ☐

Legal Topics:

For related research and practice materials, see the following legal topics:

Real Property LawPurchase & SaleGeneral OverviewReal Property LawPurchase & SaleClosing & SettlementReal
Property LawPurchase & SaleContracts of SaleGeneral OverviewReal Property LawPurchase & SaleContracts of
SalePeriod Between Execution & ClosingGeneral Overview



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Chapter 25 ENVIRONMENTAL CONSIDERATIONS IN REAL ESTATE TRANSACTIONS

Part III. Drafting Guidelines

33-25 Current Legal Forms for Real Estate § 25.44

§ 25.44 Detailed Checklist for Drafting Commercial Real Estate Lease

A. Identification of parties ☐

1. Landlord ☐

a. Name ☐

b. Address ☐

2. Capacity of landlord ☐

a. Individual ☐

(1) Meets the age of majority ☐

(2) Competent to act ☐

b. Corporation or limited liability company ☐

(1) Obtain proof of authority to act on behalf of
corporation or company (e.g., secretary's
certificate) ☐

(2) Obtain copy of resolution of board of directors

or members authorizing lease ☐

(3) Is court approval required (e.g.,
bankruptcy court)? ☐

(4) Is approval of any state or local government
agency required? ☐

c. Partnership ☐

(1) Obtain proof from representative of partnership
that he has authority to act on behalf of
partnership ☐

(2) Obtain copy of partners' decision
authorizing lease ☐

(3) Is court approval required
(e.g., bankruptcy court)? ☐

(4) Is approval of any state or local governmental
agency required? ☐

d. Fiduciary ☐

(1) Obtain proof of appointment ☐

(2) Determine source of appointment ☐

(a) By law ☐

(b) By court order ☐

(c) By document (e.g., will or trust agreement) ☐

(3) Determine whether court order is required
for lease ☐

3. Tenant ☐

a. Name ☐

b. Address ☐

4. Capacity of tenant ☐

a. Individual ☐

(1) Meets the age of majority ☐

(2) Competent to act ☐

(3) Financially reliable ☐

(a) Obtain references ☐

(b) Obtain permission for credit report from
tenant ☐

b. Corporation or limited liability company ☐

(1) Obtain proof of authority to act on behalf of
corporation or company (e.g., secretary's
certificate) ☐

(2) Obtain copy of resolution of board of directors or
members authorizing lease ☐

(3) Is court approval required (e.g.,
bankruptcy court)? ☐

(4) Is approval of any state or local governmental
agency required? ☐

c. Partnership ☐

(1) Obtain proof from representative of partnership
that partner has authority to act on behalf
of partnership ☐

(2) Obtain copy of partners' decision
authorizing lease ☐

(3) Is court approval required (e.g.,
bankruptcy court)? ☐

(4) Is approval of any state or local government
agency required? ☐

d. Fiduciary ☐

(1) Obtain proof of appointment ☐

(2) Determine source of appointment ☐

(a) By law ☐

(b) By court order ☐

(c) By document (e.g., will or trust agreement) ☐

(3) Determine whether court order is required
for lease ☐

B. Identification of leased premises ☐

1. Location ☐

a. Describe location by county and by municipality ☐

b. Describe location by street address ☐

c. Describe location by lot size ☐

d. Describe location by unit number, where property is
multi-unit office complex or shopping center ☐

e. Describe by drawing or map ☐

2. Identify all structures which are included in the lease, e.g.,
garage, etc. ☐

3. Identify all appurtenances which are included in the lease,

e.g., common areas, parking facilities, etc. ☐

4. Identify any structures which are excluded from the lease ☐

5. Identify any appurtenances which are excluded from the lease ☐

6. Identify any personal property which is included in the lease (e.g., shelving, desks, office equipment, etc.) ☐

a. Specify whether personal property is leased "as is" or in "good working order" ☐

b. Specify responsibility for costs of repair and replacement during lease term ☐

c. Specify condition in which personal property is to be returned at end of lease ☐

7. Identify fixtures which are included in lease (e.g., HVAC system, lighting fixtures) ☐

a. Specify whether fixtures are leased "as is" or in "good working order" ☐

b. Specify responsibility for costs of repair and replacement during lease term ☐

c. Specify condition in which fixtures are to be returned at end of lease term ☐

8. Identify any personal property which is available to tenant at additional cost ☐

a. Specify cost per unit ☐

b. Specify procedure to obtain items ☐

c. Specify present condition of items ☐

d. Specify repair and replacement responsibilities ☐

e. Specify condition in which items are to be returned at
end of lease term ☐

9. Identify appurtenances which are available to tenant at
additional cost (e.g., garage, storage space, meeting rooms,
vaults, etc.) ☐

a. Specify cost of item ☐

b. Specify procedure to obtain item ☐

c. Specify conditions for use ☐

10. Identify leasehold improvements (i.e., alterations) necessary
to make leased premises suitable for use by tenant ☐

a. Fix up costs to be paid by ☐

(1) Landlord ☐

(2) Tenant ☐

(3) Both landlord and tenant ☐

b. Name of contractor who will perform actual
improvements ☐

c. All plans for improvements must receive prior approval
of landlord ☐

d. All necessary permits to be obtained prior to
commencement of improvements ☐

e. Improvements to be completed by given date ☐

f. Tenant to remove improvements at end of lease term
and restore premises to their original state ☐

C. Rent ☐

1. Specify overall rent for entire term of lease ☐
2. Specify whether fee is to be paid in periodic installments throughout year ☐
 - a. Amount ☐
 - b. When due ☐
 - c. Specify grace period for late payment of rent ☐
 - d. Specify late fee ☐
3. Security deposit ☐
 - a. Specify amount ☐
 - b. Specify when due ☐
 - c. Specify terms for refund ☐
 - d. Specify whether interest will be paid ☐

D. Lease term ☐

1. Commencement date ☐
2. Termination date ☐
3. Lease renewal rights of tenant ☐
 - a. Conditions to be met before tenant is entitled to renewal of lease (e.g., no defaults) ☐
 - b. Notice required to be given to landlord ☐
 - c. Terms for renewal period ☐
 - (1) Increased rental fee ☐

(2) Length of renewal term ☐

(3) Other changes in lease terms ☐

(4) Option to acquire additional space from landlord ☐

4. Option to purchase (not applicable in case of shopping centers, office complexes, etc.) ☐

a. Determination of price ☐

b. When option is exercisable ☐

c. Required notice from tenant of tenant's intention to exercise option ☐

d. Closing date of sale ☐

e. Termination of option by landlord ☐

5. Right of first refusal to purchase property (not applicable in cases where the property is a shopping center, office complex, etc.) ☐

a. Conditions for ☐

b. Determination of price ☐

c. Termination of right ☐

d. Contingencies acceptable to tenant in contract of sale ☐

e. Closing date ☐

f. Notice provisions ☐

E. Other obligations of tenant ☐

1. Condition of premises ☐

a. Maintain premises in good condition ☐

b. Perform minor repairs ☐

(1) To the structures ☐

(2) Non-structural repairs (e.g., outdoor fences, parking lot, etc.) ☐

c. Notice to landlord required if major alterations to property are desired ☐

d. Notice to landlord required if major structural repair is to be undertaken by tenant ☐

2. Insurance ☐

a. Amounts of coverage ☐

b. Types ☐

(1) Liability ☐

(2) Casualty ☐

(3) Fire ☐

c. Notice must be given to landlord prior to cancellation of policy ☐

d. Landlord is to be designated payee of proceeds of policy ☐

e. Tenant must present to landlord proof of coverage ☐

3. Limitations on use of property ☐

a. Commercial purposes only ☐

(1) Specify occupant's business ☐

(2) Will similar businesses be allowed in the same shopping center or office complex? ☐

(3) Will tenant be permitted to conduct a similar business nearby? ☐

b. Limitations on use of hazardous substances ☐

(1) Pesticides ☐

(2) Insecticides ☐

(3) Drain cleaners ☐

(4) Cleaning agents ☐

(5) Limitation on storage, useage, production or disposal of hazardous substances on site ☐

(6) Tenant indemnifies and holds landlord harmless for any environmental mishap caused by tenant ☐

(7) Tenant to maintain records regarding storage, useage, production or disposal of hazardous substances on site ☐

(8) Landlord is entitled to review such records at any time ☐

c. Provisions regarding tenant's use of natural resources ☐

(1) Water sources ☐

(a) Well ☐

(b) Pond ☐

(c) Stream or brook ☐

(d) Marsh ☐

(e) Other ☐

(2) Energy sources ☐

(a) Oil ☐

(b) Coal ☐

(c) Shale ☐

(d) Natural gas ☐

(e) Other ☐

d. Tenant will not use the property for any other purpose
that will necessitate obtaining further insurance
coverage ☐

e. Tenant will not use the property for any illegal
purpose ☐

4. Upon termination of lease ☐

a. Tenant shall return property in "broom clean"
condition ☐

b. Tenant shall remove all personal property on or before
termination of lease ☐

c. Tenant shall return keys to landlord on or before
termination of lease ☐

d. Tenant shall vacate the premises on or before termination
of lease ☐

e. Tenant shall remove trade fixtures and fittings which
it installed before or during lease term ☐

F. Other obligations of landlord ☐

1. Major repairs ☐
2. Janitorial services ☐
3. Window washing ☐
4. Trash removal ☐
5. Provision of utilities ☐
 - a. Heat ☐
 - b. Air Conditioning ☐
 - c. Electricity ☐
 - d. Water ☐
 - e. Gas ☐
 - f. Sewer rents ☐
6. Guarantee the tenant quiet enjoyment of leased property ☐
7. Guarantee the tenant possession of leased property throughout lease term ☐
8. Common area maintenance ☐
 - a. Grass mowing ☐
 - b. Landscaping ☐
 - c. Cleaning ☐
 - d. Repairs and replacements ☐
 - e. Snow plowing ☐

- f. Paving ☐
- g. Heating ☐
- h. Air conditioning ☐
- i. Lighting ☐
- j. Other ☐

9. Real property taxes and assessments ☐

10. Advertising (where leased premises is part of shopping mall) ☐

11. Payments to merchants' association ☐

12. Other obligations ☐

G. Contingencies in lease (i.e., lease does not become binding upon parties unless contingencies are satisfied first) ☐

1. General inspection of improvements and building systems ☐

2. Inspection for asbestos insulation ☐

3. Inspection for urea formaldehyde insulation ☐

4. Test for presence of radon gas ☐

5. Environmental site assessment to determine whether there is any evidence of an adverse environmental condition due to the use, production, storage or release of hazardous substances in, on, or around premises ☐

6. Governmental approvals ☐

a. Zoning board ☐

b. For emission of substances ☐

(1) Into air ☐

(2) Into water ☐

c. Waste disposal ☐

d. Operations permits ☐

H. Other provisions ☐

1. Default by tenant in non-payment of rent or breach of other
terms of lease ☐

a. Notice of default must be given to tenant ☐

b. Opportunity to cure default ☐

c. Right to evict ☐

d. Damages payable to landlord ☐

e. Re-letting of premises following eviction ☐

2. Damage by fire or other casualty ☐

a. Landlord responsible for repairs? ☐

b. Tenant is entitled to terminate lease and vacate
property ☐

c. Notice must be given by tenant to landlord of tenant's
intention to terminate lease ☐

3. Eminent domain ☐

a. Landlord is entitled to proceeds of award ☐

b. Termination of lease ☐

(1) Does the eminent domain constitute an entire taking? ☐

(2) Partial taking? ☐

(3) If partial taking, lease will not terminate if leased premises are unaffected by eminent domain ☐

4. Landlord's right to show space to prospective tenants ☐

5. Hours of business operation by tenant ☐

6. Landlord has right to review accounting books and records where rental fee is based on percentage of tenant's profits ☐

7. Signs on the premises ☐

a. Size limitations ☐

b. Permits required ☐

c. Style limitations ☐

d. Content limitations ☐

e. Party responsible for erection and maintenance of signs ☐

f. Location of signs ☐

8. Miscellaneous clauses ☐

a. Waiver provision (e.g., "the waiver of any provision of this agreement shall not be valid unless it is in writing and signed by the party granting the waiver") ☐

b. Any modifications of agreement must be in written form and signed by both parties ☐

c. Agreement is to be construed in accordance with the

laws of the State of ☐

d. Provision for the giving of notice between the parties ☐

e. Agreement is binding on both parties and their respective successors and assigns ☐

I. Execution ☐

1. Signed by parties ☐

2. Dated ☐

3. Witnessed ☐

4. Acknowledged ☐

Legal Topics:

For related research and practice materials, see the following legal topics:

Real Property LawLandlord & TenantLandlord's Remedies & RightsPower to Reenter & TerminateReal Property LawLandlord & TenantLease AgreementsGeneral OverviewReal Property LawLandlord & TenantLease AgreementsCommercial LeasesGeneral OverviewReal Property LawLandlord & TenantLease AgreementsCommercial LeasesShopping Center LeasesReal Property LawLandlord & TenantLease AgreementsLease ProvisionsReal Property LawPurchase & SaleOption ContractsGeneral Overview



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Part III. Drafting Guidelines

33-25 Current Legal Forms for Real Estate § 25.45

§ 25.45 Environmental Questionnaire to be Completed by Seller or Lessor of Commercial Real Property

A. Location of the site ☐

1. Street address ☐

2. State and city, town or other political subdivision ☐

3. Streets bordering site ☐

4. Streets to which site has access ☐

B. Ownership history ☐

1. If structure(s), date of construction ☐

2. Name and address of builder ☐

3. Name and address of first owner of structure(s) ☐

4. Uses of property by first owner ☐

5. Names and addresses of subsequent owner(s) ☐

6. Uses of property by subsequent owner(s) ☐

7. Name and address of present owner(s) of structure ☐

8. Uses of property by present owner(s) ☐

9. Has survey of site been performed recently, and, if so, is
copy available? ☐

C. Description of site ☐

1. Number of structures ☐

2. Number of floors in each structure ☐

3. Total number of square feet of each structure ☐

4. Total number of square feet covered by entire site ☐

5. Parking lot ☐

a. Total number of spaces ☐

6. Have any improvements, additions, or renovations been
made at the site or are any under consideration? ☐

a. If yes, obtain copies of architects' drawings, and other
relevant, descriptive materials ☐

D. Solid waste disposal ☐

1. Method for disposing of solid waste produced at the site ☐

a. Contract with private hauler ☐

b. Municipal waste removal services ☐

c. Does site contain ☐

(1) An incinerator? ☐

(2) A landfill? ☐

(3) A system for recycling solid waste? ☐

d. Have all required governmental permits (federal, state and local) been obtained to operate the incinerator, landfill and/or recycling system? ☐

E. Waste water disposal ☐

1. Sewage ☐

a. Site connected to municipal sewage system ☐

b. Site served by its own septic system ☐

c. Sewage treated and discharged into waterway ☐

d. Average amount of sewage produced monthly (in gallons) ☐

e. Have all required governmental permits (federal, state and local) been obtained? ☐

2. Waste water produced in the course of industrial operations ☐

a. Types ☐

b. Amounts ☐

c. Where is wastewater discharged? ☐

d. Have all required governmental permits (federal, state and local) been obtained? ☐

3. Runoff of rainwater ☐

a. Where is rainwater discharged? ☐

(1) Into municipal storm drainage system ☐

(2) Into waterway ☐

(3) Into wetland/marsh ☐

(4) Other ☐

b. Have all required governmental permits (federal, state and local) been obtained? ☐

c. Does rainwater carry off any industrial wastewater produced at the site? ☐

d. Location of drainage system, waterway, wetland, etc. ☐

F. Wetlands ☐

1. In the past, has any wetland located on the site been ☐

a. Filled? ☐

b. Drained? ☐

c. Dredged? ☐

2. Has construction occurred within the wetland? If so, explain in detail. ☐

a. When this was done ☐

b. Where it was done ☐

c. How it was done ☐

4. Were all required governmental permits (federal, state and local) obtained? ☐

G. Emissions into the air ☐

1. Specify the source of energy for heating and cooling at the site ☐

2. Is fuel-burning machinery used at the site for industrial purposes? ☐

3. Are smoke, gases, vapors, or other substances emitted into the air? ☐

4. If so, what specific types of emissions are released? ☐

a. Carbon monoxide ☐

b. Sulphur dioxide ☐

c. Nitrogen oxide ☐

d. Ozone ☐

e. Hydrocarbons ☐

f. Organic compounds ☐

g. Vinyl chloride ☐

h. Mercury ☐

i. Asbestos ☐

j. Lead ☐

k. Other ☐

5. In what quantities? ☐

6. Have all required governmental permits (federal, state and local) been obtained? ☐

H. Hazardous substances ☐

1. Have any hazardous substances, whether solid, liquid or gaseous, ever ☐
 - a. Been released into the air?..... ☐
 - b. Leaked? ☐
 - c. Spilled? ☐
 - d. Been discharged? ☐
 - e. Escaped? ☐
 - f. Leached? ☐
2. If so, what type of substance was involved? ☐
3. When did this event occur? ☐
4. How much of the substance was released? ☐
5. What was the cause of the mishap? ☐
6. What was the nature and extent of the damage? ☐
7. What clean up actions were taken? ☐
8. Was any governmental agency (federal, state or local) notified of the mishap? ☐
9. Was an action of any type brought against the property owner by a governmental agency as a result of the environmental mishap? ☐
10. If so, what is the current status of such action? ☐
11. Was an action of any type brought against the property owner by any other party, e.g., a neighbor whose property was contaminated as a result of the mishap? ☐

12. If so, what is the current status of such action? ☐

13. As part of your business activities, is any hazardous substance ☐

a. Brought onto the premises? ☐

b. Used at the premises? ☐

c. Produced on the premises? ☐

d. Treated on the premises? ☐

e. Stored on the premises? ☐

f. Disposed of on the premises? ☐

14. If so, what is the substance? ☐

15. What quantity of the substance is regularly present on the site? ☐

16. Where on the site is the substance located? ☐

17. Has any governmental agency been made aware of the presence of the substance on the site? ☐

I. Hazardous waste ☐

1. As part of your business activities, is any hazardous waste ☐

a. Brought onto the premises? ☐

b. Used at the premises? ☐

c. Produced on the premises? ☐

d. Treated on the premises? ☐

- e. Stored on the premises? ☐
- f. Disposed of on the premises? ☐
2. If so, what type of waste is it? ☐
3. What quantity of waste is regularly present on the site? ☐
4. Where on the site is the waste located? ☐
5. What methods are used to store the waste? ☐
6. How long does the waste remain on the site? ☐
7. Has any governmental agency been made aware of the presence of the waste on the site? ☐
8. Where is the hazardous waste taken to for disposal? ☐
9. What is the name of the company performing the disposal service? ☐

Legal Topics:

For related research and practice materials, see the following legal topics:

Environmental Law Hazardous Wastes & Toxic Substances CERCLA & Superfund Recordkeeping & Reporting Environmental Law Natural Resources & Public Lands Wetlands Management Real Property Law Environmental Regulation General Overview Real Property Law Environmental Regulation Liabilities & Risks General Overview Real Property Law Landlord & Tenant General Overview Real Property Law Purchase & Sale Contracts of Sale General Overview Real Property Law Purchase & Sale Remedies Duty to Disclose



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33-25 Current Legal Forms for Real Estate § 25.46

§ 25.46 Short Form Checklist for Drafting Commercial Real Estate Lease

- A. Demised Premises ☐
- B. Legal Name of Landlord ☐
- C. Legal Name of Tenant ☐
- D. Term ☐
- E. Rent for Initial Term ☐
- F. Commencement Date ☐
- G. Renewals ☐
- H. Rent for Renewals ☐
- I. Security Deposit ☐
- J. Construction (leasehold or complete) ☐
 - 1. Plans and Specifications (status) ☐

2. Permits ☐

K. Representations and Warranties ☐

1. Condition ☐

2. Use ☐

L. Zoning ☐

M. Parking ☐

N. Signs ☐

O. Restrictions upon Use ☐

P. Environmental concerns relating to Tenant's use ☐

Q. Exclusivity ☐

R. Real Estate Taxes (responsibility and prorations) ☐

S. Liability Insurance ☐

T. Casualty Insurance ☐

U. Environmental Insurance ☐

V. Waiver of Subrogation ☐

W. Condemnation ☐

X. Maintenance (structural and non-structural) ☐

Y. Replacements (structural and non-structural) ☐

Z. Utilities (responsibility and access) ☐

AA. Contingencies ☐1. Financing (down payment and other terms) ☐2. Acquisition of Land ☐3. Obtaining Irrevocable Construction Bids ☐4. Obtaining Permits ☐5. Inspections (e.g., structural, HVAC, environmental,
survey and title) ☐BB. Miscellaneous ☐1. Assignment/Subletting ☐2. Entity ☐3. Personal Guarantee ☐4. Construction Warranty ☐5. Late Penalty (grace period, rate, etc.) ☐6. Default Rate of Interest ☐7. Expansion Options ☐8. Option to Purchase ☐9. Right of First Refusal (purchase or lease) ☐10. Broker Commission ☐**Legal Topics:**

For related research and practice materials, see the following legal topics:

Real Property Law
 Landlord & Tenant
 Landlord's Remedies & Rights
 Security Deposits
 Real Property Law
 Landlord & Tenant
 Lease Agreements
 Commercial Leases
 General Overview
 Real Property Law
 Landlord & Tenant
 Lease Agreements
 Lease Provisions
 Real Property Law
 Landlord & Tenant
 Lease Agreements
 Subleases



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Part IV. FORMS

A. ENVIRONMENTAL CONSIDERATIONS IN REAL ESTATE TRANSACTIONS

33-25 Current Legal Forms for Real Estate FORM 25.01

FORM 25.01 Letter of Intent (Short Form)

COMMENT

Many real estate transactions start with a letter of intent. A letter of intent allows the parties to reach a meeting of the minds prior to incurring the time and costs associated with the preparation and execution of a detailed purchase agreement. This letter of intent is not very detailed and is binding only with respect to seller's requirement to negotiate exclusively with the buyer. This is a critical feature for the buyer because it will prevent the seller from using the buyer's offer to shop for a better offer.

This letter of intent requires the seller to provide the buyer with all reports, documents, specifications, and drawings relating to the condition or use of the building. It is helpful to obtain these items early in the process. This allows the buyer to conduct a preliminary feasibility review of the property before investing substantial time and money investigating the property. Of course, if the information provided by the seller is too old, it must be updated.

FORM

_____ [month] _____ [day] _____ [year]

_____ [name]
 _____ [address]
 _____ [address]

Dear Mr./Ms. _____ [name]:

We wish to make an offer to purchase the property known as _____ [address] under the following terms and conditions.

1. Purchase Price. _____ Dollars (\$_____) in cash at closing. This transaction is not contingent upon financing.

2. Closing Date. We agree to proceed in good faith and to use our best efforts to negotiate and execute a mutually acceptable purchase agreement, which will include the customary conditions and contingencies plus such other terms and conditions as we deem necessary within thirty (30) days from the date of your acceptance.

3. Due Diligence. For forty-five (45) days following the execution of the purchase agreement, we will undertake a detailed due diligence inspection of the property. Our inspection may include environmental inspections, surveys, soil borings, title searches and any other investigations which we deem appropriate in order to determine if the property is feasible for our intended purpose. Within five (5) business days of acceptance of this letter, you will provide us with copies of all reports, documents, specifications and drawings which you have regarding the condition or use of the property.

4. Exclusive Dealing. During the 45-day period, you will not negotiate with any other potential purchaser of the property.

This letter of intent is intended to supply only the basic terms of the purchase, and except for the provisions relating to proceeding in good faith, using our best efforts and the exclusivity period, this letter is not intended to be binding upon the parties. We anticipate that the details of the purchase agreement will fall into place, and we look forward to working with you.

If this offer is acceptable, please so indicate by signing and dating a copy of this in the spaces provided below. Your consideration and rapid response to our offer will be greatly appreciated.

Very truly yours,

 _____ [name]

Accepted:

This _____ [day] day of _____ [month], _____ [year].

 _____ [name]

By: _____

[Title]



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A. ENVIRONMENTAL CONSIDERATIONS IN REAL ESTATE TRANSACTIONS

33-25 Current Legal Forms for Real Estate FORM 25.02

FORM 25.02 Letter of Intent--Purchase of Assets

COMMENT

This letter of intent involves the purchase of the assets of a manufacturing division. Included in the assets is a plant. This letter of intent contains a provision that requires the seller to specifically list all known adverse environmental conditions and all emission and discharge permits under which the seller is operating. This is somewhat unusual. The letter of intent also requires that the buyer keep all such information confidential. The confidentiality provision is not very detailed. Depending upon the amount of the disclosures, the seller may want to accompany this letter of intent with a detailed Non-disclosure Agreement. Because this transaction involves the sale of a business, the non-disclosure would also likely extend to other proprietary and confidential information of the seller.

FORM

_____ [month] _____ [day] _____ [year]

PERSONAL AND CONFIDENTIAL

_____ [name]
_____ [address]
_____ [address]

Dear Mr./Mrs. _____ [name]:

This letter is intended to set forth the significant terms and conditions of _____ [name]'s ("Buyer") proposed purchase of _____ [name]'s ("Seller") heat treating division located in _____ [address].

1. Purchase of Assets. Buyer will purchase all of the assets of Seller relating to its heat treating division in _____ [address] (the "Division"). The purchase will include all assets of Seller located at Seller's manufacturing plant, namely, the inventory, work in process, customer lists, leasehold improvements, fixtures, machinery, equipment and the real estate (the "Assets"). Specifically excluded from the purchase will be the cash, cash equivalents, accounts receivable, Seller's name, goodwill, the assets listed on Exhibit A, and any other assets which relate solely to Seller's automotive manufacturing business at the plant. The transaction will not be contingent upon Buyer obtaining financing.

2. Purchase Price. The total purchase price for both the Assets is as follows:

- a. Real Estate \$ _____ [amount]
- b. Equipment \$ _____ [amount]
- c. Inventory will be purchased at Seller's cost

3. Assumption of Liabilities. Buyer will assume the following liabilities relating to the Division, and will indemnify, defend and hold harmless Seller with respect thereto:

- a. Liabilities associated with Seller's pension plans.
- b. Seller's obligations under its collective bargaining agreements.
- c. All real estate taxes and assessments not yet payable.
- d. Transfer and conveyance fees relating to the transfer of the real estate.
- e. Product Liability claims which are asserted after the closing date.
- f. Accrued benefits relating to the employees.
- g. Liabilities with respect to open purchase orders.
- h. Invoices for raw materials purchased prior to the closing date, but not delivered.

4. Agreement Not to Compete. Seller will enter into an agreement not to compete with Buyer in connection with the heat treatment of car parts for a period of three (3) years following the closing.

5. Condition of Assets. The Assets will be purchased in their present "as is" "where is" condition, with all faults. Buyer will have 45 days after the later of: a) _____ [month] _____ [day] _____ [year]; or b) the execution of a final purchase agreement to complete a due diligence investigation and inspection of the Division and the Assets. Such investigation and inspection will be at Buyer's sole cost and expense, and without material interruption to Seller's

business. Upon reasonable prior notice to Seller, Buyer shall have the right to enter upon the real estate to complete its due diligence, provided however, Buyer will indemnify, defend and hold harmless Seller from any damages incurred by Seller or claims asserted against Seller as a result thereof.

6. Records of Seller. All business records of Seller will remain the property of Seller, provided, however Seller will give Buyer reasonable access and copies of such records after the closing, if so requested by Buyer. Further, Seller represents and warrants that Exhibit A accurately sets forth:

- a. all adverse environmental conditions relating to the property (including, without limitation, conditions which contribute a public or private nuisance);
- b. the following is a list of environmental reports which are within Seller's possession or control;
_____ [list reports]; and
- c. the following is a list of emission and/or discharge permits which relate to or affect the operations of the Division.

7. Deposit. Upon acceptance hereof, Buyer will deliver to a mutually agreeable escrow agent a deposit of _____ Dollars (\$_____). The Deposit will be placed in a federally insured interest bearing account and Buyer shall receive credit for the Deposit and accrued interest at closing. In the event that the transaction described herein shall not close through no fault of Seller, the Deposit, together with accrued interest shall be forwarded to Seller as liquidated damages.

8. Non-disclosures and Confidentiality. The parties agree that they will use their best efforts to keep this transaction from being publicly disclosed prior to the consummation hereof. Further, each party agrees that they will keep as confidential and private all of the other party's confidential and proprietary information that they obtain in connection with the transaction contemplated herein, including, without limitation, the information set forth on Exhibit A.

9. Miscellaneous. The parties agree to make all necessary filing and obtain all necessary governmental approvals relating to the transaction, including, without limitation Hart-Scott-Rodino filings, if required. The closing shall take place no later than _____ [month] _____ [day] _____ [year]. Each party will be responsible for their own attorneys' fees and each party will represent that no broker was involved in procuring this transaction. Seller will continue to operate the Division in the ordinary course. Each party agrees to proceed in good faith.

If the terms of this letter are acceptable, please sign the enclosed copy of this letter and return it to us. Upon its receipt, I will instruct my attorneys to prepare the appropriate documentation. Except for the provisions of Paragraphs 7, 8 and 9, this letter is intended to serve as an outline for the transaction and is not intended to bind the parties.

Very truly yours,

_____ [name]

By: _____

_____ [name], _____ [title]

Agreed and accepted this _____ [day] day of _____ [month], _____ [year].

_____ *[name]*

By: _____

_____ *[name]*, _____ *[title]*

[Attach Exhibit A]



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A. ENVIRONMENTAL CONSIDERATIONS IN REAL ESTATE TRANSACTIONS

33-25 Current Legal Forms for Real Estate FORM 25.03

FORM 25.03 Letter of Intent for the purchase of the personal property of a gas station where the seller will lease the improvements

COMMENT

This letter of intent relates to the purchase of the assets of a gas station. The seller will retain the real estate and lease it to the buyer. This letter of intent provides for a bench mark environmental report. This is important, because the seller is responsible for all pre-existing environmental conditions and the buyer will be responsible for all future conditions.

FORM

_____ [month] _____ [day] _____ [year]

PERSONAL AND CONFIDENTIAL

_____ [name]
_____ [address]
_____ [address]

Re: Purchase of Assets of Service Station located at
_____ [address]

Dear Mr./Mrs. _____ [name]:

The purpose of this letter is to express the intent of the undersigned (the "Purchaser") to purchase certain of your personal property located at _____ [address] ("Seller"), and to lease the real property from you. The following sets forth the proposed purchase of the assets as follows:

1. Assets to be Acquired. The Purchaser will acquire all of the personal property of Seller described on Exhibit A and good will of the Seller associated with a certain service station (the "Business") located at _____ [address], (the "Premises") including without limitation, all equipment, fixtures, furniture, certain liquor permit, and the telephone system, if any (collectively, "Assets"). The Assets will be transferred free and clear of all liens, encumbrances, claims by third parties, and security interests.

Notwithstanding the foregoing, all other assets of Seller are excluded.

2. Liabilities. Purchaser will not assume any liabilities of Seller.

3. Purchase Price. The assets shall be purchased for _____ Dollars (\$_____) ("Purchase Price"). The Purchase Price will be paid in cash at the Closing.

4. Due Diligence. Purchaser will have forty-five (45) days from the date of entering into a definitive Purchase Agreement to perform inspections of the Premises, environmental assessments of the Premises, verifying zoning, determine feasibility of obtaining permits and approvals from all applicable governmental authorities and the economic feasibility of the transaction. Seller will, no later than five (5) days after execution of this letter, provide to Purchaser all environmental reports. Due diligence will at be Purchaser's cost.

5. Lease. Seller will lease the Premises to Purchaser on the following terms:

i. Term. Twenty (20) years with ten (10), ten (10)-year renewal options. After the thirtieth (30[th]) year (i.e., expiration of the initial term and the first renewal option), rent will increase based upon increases in inflation using 2005 as the base year.

ii. Construction and Demolition. Purchaser will have the right to demolish the building currently situated on the Premises and construct a convenient store building on the Premises, and to install underground storage tanks. Seller will have the right to approve the plans and specifications of the proposed building, including, without limitation, the aesthetic view of the new building. Seller shall not unreasonably withhold his approval to Purchaser's plans and specifications. At the end of the lease term, title to the building will transfer to Seller.

iii. Use. The Premises will be used as a gas station and convenient store. Purchaser will indemnify and hold harmless the Seller from any environmental conditions arising on or after the commencement date. Purchaser acknowledges that Seller has obtained an environmental assessment of the Premises, and that the report indicates that the Premises does not contain any adverse environmental conditions. Purchaser reserves the right to conduct its own investigation of the Premises. The Lease will provide that Purchaser may assign the Lease or sublet the Premises with the prior written consent of Seller, such consent not to be unreasonably withheld.

iv. Real Estate Taxes and Insurance. Purchaser will pay all real estate taxes and assessments before they become past due, and will provide insurance in such amounts reasonably requested by Seller.

v. Maintenance of Premises. Purchaser will be responsible for maintenance, repair and replacements of the Premises. Purchaser will maintain the Premises in good condition and repair throughout the term of the lease. Subject to the approval of Seller, which approval shall not be unreasonably withheld, Purchaser may replace any improvements on the Premises from time to time, if in the reasonable judgment of Purchaser, such replacements are necessary or appropriate.

During the course of the lease, Purchaser shall comply with all applicable laws regarding the use and operation of the Premises.

vi. Advance. Upon execution hereof, the Purchaser will pay to Seller _____ Dollars (\$ _____), which will be applied to the first two (2) months of rent (the "First Deposit"). In the event that Purchaser shall be unable to obtain a building permit for the construction of a convenient store and service station during the first sixty (60) days following the execution of this letter, than Seller shall refund to Purchaser the sum _____ Dollars (\$ _____) from the First Deposit, the balance of which (i.e., _____ Dollars (\$ _____)) shall be retained by Seller, and this agreement shall be null and void. If, for any reason, the transaction does not go forward other than the failure to obtain the building permit or a breach or default by Seller, the _____ Dollars (\$ _____) will be retained by Seller as liquidated damages and as his sole remedy. The lease will provide for monthly rent of _____ Dollars (\$ _____), and a security deposit of _____ Dollars (\$ _____).

6. Contingencies. This Agreement between the parties will be contingent on the following being satisfied prior to Closing:

(i) The Agreement is subject to Purchaser receiving financing for the construction and development of the Premises in an amount and upon terms satisfactory to Purchaser, in its sole discretion.

(ii) Purchaser will have the right to come upon the Premises to inspect the Premises, and secure such inspection and engineering reports, appraisal report, environmental reports including any soil testing, all of which report results must be acceptable to Purchaser in its sole discretion.

(iii) All real estate taxes, assessments, penalties and interest due and payable as of the Closing are paid in full.

(iv) The liquor license for the sale of beer and wine (including Sunday sales) from the Premises are in good standing and are transferred to Purchaser.

(v) Purchaser is satisfied that it can obtain all governmental consents and approvals on a timely basis.

(vi) The Premises will be conveyed free and clear of all liens, encumbrances, claims by third parties and security interests.

7. Covenant Not to Compete. Seller shall enter into a Covenant Not to Compete. The Covenant Not to Compete shall be for a period of _____ (_____) years commencing with the Closing Date and shall cover a geographical area of a five (5) mile radius from the Premises and shall prohibit such entities and individuals from owning, operating, marketing or consulting to or for any gasoline station or convenient store within such geographical area.

8. Closing. The Closing will occur on or before the _____ (_____) business day after whichever of the following is first to occur: (a) the end of the Due Diligence period; or (b) the day that Purchaser shall notify Seller that it is prepared to proceed with the closing.

9. Standstill. During the thirty (30) day period after the date Seller signs this letter, provided the non-refundable deposit has been paid, Seller will not advertise for sale, lease or transfer nor will it entertain or discuss any offers from any other party regarding the Assets, the Business or negotiate terms of sale, lease, or transfer of the Assets or the Business or enter into any other agreements, leases, options, first right of refusal, first right of offers or other agreements to transfer or gift any interest in the Assets or the Business or give anyone the right to acquire, lease the Assets or the Business. Seller shall instead only negotiate with Purchaser during the thirty (30) day period.

10. Confidentiality. Purchaser and Seller shall not disclose any information or terms of this proposal or a definitive purchase agreement, other than to legal counsel, and accountants, all of who shall agree to maintain such information, terms and conditions confidential.

11. Legal Effect. It is understood and agreed that this is a Letter of Intent and does not contain all matters upon which an agreement must be reached in order for the proposed purchase to be consummated and creates no legally binding rights or obligations in favor of either party whatsoever, except that matters set forth in paragraphs 10 and 11 shall be legally binding upon Seller and Purchaser. This letter is subject to the execution of a definitive purchase agreement containing all customary warranties and indemnifications and execution of a Lease (to be prepared by Seller) within thirty (30) days after Seller signs this Letter. This Letter of Intent supersedes all previous conversations and letters of intent submitted to or on behalf of Purchaser or Seller. Upon execution hereof, the parties and their attorneys will commence preparation of the lease and all other papers necessary to conclude the transaction contemplated by this Letter of Intent.

12. Personal Guaranty. If Purchaser forms an entity to complete the transaction, _____ [name] and any shareholder of such entity will guarantee the lease and the note.

13. Brokerage Commission. Seller and Purchaser warrant and represent that neither has had contact with or has dealt with a broker or anyone else entitled to compensation, remuneration or commission in connection with the transaction contemplated by this letter. Seller and Purchaser shall indemnify and hold the other harmless from any claims for finder's fees or compensation or commission or other remuneration in connection with the sale by Seller and purchase by Purchaser of the Assets and the Lease of the Premises.

This Letter of Intent will be available for acceptance by Seller until 5:00 p.m. eastern time, _____ [month] _____ [day] _____ [year]. If this Letter of Intent is not received fully executed by such date, then the Letter is void.

Sincerely,

_____ [name]

By: _____

_____ [name], _____ [title]

Agreed and accepted this _____ [day] day of _____ [month], _____ [year].

_____ [name]

By: _____

_____ [name], _____ [title]

[Attach Exhibit A]



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Current Legal Forms for Real Estate

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Current Legal Forms for Real Estate

Chapter 25 ENVIRONMENTAL CONSIDERATIONS IN REAL ESTATE TRANSACTIONS

Part IV. FORMS

A. ENVIRONMENTAL CONSIDERATIONS IN REAL ESTATE TRANSACTIONS

33-25 Current Legal Forms for Real Estate FORM 25.04

FORM 25.04 Offer to Purchase a former gas station

COMMENT

This is an Agreement to purchase a former gas station. The property contains several conditions which require remediation and on-going monitoring. The property may not be used as a gas station by the buyer. Forms 25.05 through 25.07 are related. The Addendum set forth in Form 25.05 relates to the seller's right after closing to enter upon the property to monitor the property and to complete any necessary remediation.

The Offer to Purchase also restricts the types of uses for which the property may be utilized. The seller retains the underground storage tanks and all property that contains its intellectual property (i.e, trade and service marks).

The Offer to Purchase and related documents also contain various releases of seller, because the seller is notifying the buyer that the property is polluted and the buyer is making an informal decision with respect to buyer's purchase. Presumably, the price reflects the contamination and the use restrictions.

Lastly, the seller is requesting a special/limited warranty deed. The deed contains various agreements and restrictions and is designed to put subsequent purchasers of the property on constructive notice of the agreements and restrictions.

FORM

OFFER TO PURCHASE

The undersigned, _____ [name], whose address is _____ [address] and telephone number is _____ [telephone number] ("Buyer") hereby offers to purchase from _____ [name], whose address is _____ [address] and telephone number is _____ [telephone number] ("Seller"), at the price and upon the terms and conditions set forth below ("Offer" or upon acceptance "Contract"), that certain real property located at _____ [address], as more particularly described in Exhibit "A," attached hereto and made a part hereof, together with Seller's right, title and interest in and to all buildings, structures and other improvements thereon, excluding all Trade Marks, as defined below, and underground storage tanks and associated product piping systems upon and below the real property, unless otherwise provided herein ("Property").

1. Purchase Price. The purchase price for the Property shall be the sum of _____ Dollars (\$ _____) ("Purchase Price") payable as follows: (a) _____ Dollars (\$ _____) by certified check made payable, at Seller's sole election, to Seller or to a third party, and delivered by Buyer with this Offer to Seller ("Earnest Money"), receipt of which is hereby acknowledged by Seller; (b) _____ Dollars (\$ _____) to be paid by wire transfer at Closing, as defined below. Seller is irrevocably authorized to negotiate or deposit to its account, or any account designated by Seller without interest accruing thereon for the benefit of Buyer, all checks received hereunder immediately upon receipt; however, such negotiation or deposit shall not constitute acceptance of this Offer. This Offer shall remain open for acceptance by Seller for _____ (_____) days after execution by Buyer. This Offer shall not be binding upon Seller unless and until it has been executed by Seller and a copy thereof is given to Buyer in accordance with Section 13 hereof. If this Offer is not accepted by Seller, Seller's sole obligation hereunder shall be to refund the Earnest Money to Buyer.

2. Conveyance. The Property shall be conveyed by Seller and accepted by Buyer by warranty deed in the form attached hereto as Exhibit "B" and made a part hereof ("Deed") wherein Seller warrants title by, through and under it and no further, and subject to: (a) taxes and assessments, both general and special, not then due and payable; (b) building and zoning ordinances, laws, regulations and restrictions by municipal or other governmental authorities; (c) any and all leases, easements, rights-of-way, encumbrances, conditions, covenants, restrictions, reservations and exceptions of record that are approved by Buyer pursuant to Paragraph 8, herein; (d) any state of facts than an accurate survey or independent visual inspection of the Property by Buyer or its agents would disclose; and (e) the restrictions and covenants specified in Paragraphs 3 and 10, hereunder.

3. Restrictions. The Property shall be conveyed by Seller and accepted by Buyer subject to a restriction and covenant set forth in the Deed prohibiting for a period of _____ (_____) years from the date the Deed is recorded the use of the Property, in whole or in part, directly or indirectly, for the sale, offering for sale, storage or distribution of any gasoline, motor vehicle fuels, lubricants, tires, batteries, or other petroleum products. Such restriction and covenant of Buyer shall run with the Property for the benefit and protection of any adjoining property of Seller and/or other property of Seller used and operated by Seller or its representatives for such purposes within a distance of _____ (_____) miles from the Property, whether owned or leased by Seller or its representatives during said _____ (_____) year period. Such restriction and covenant shall not, however, prohibit the storage of motor fuels, lubricants, other petroleum products or convenience store items on the Property solely for the use or consumption by Buyer or other occupants of the Property. This provision shall survive Closing.

4. Escrow. This transaction shall be closed through an escrow with a title company or such other responsible escrow agent approved by Seller ("Escrow Agent"). A copy of this Contract shall be deposited with the Escrow Agent and shall serve as the escrow instructions. The escrow fee shall be borne equally by the parties.

5. Taxes, Rents and Utility Charges. All real estate taxes and assessments, general and special, on the Property shall be

prorated as of the Closing Date, as defined below, using the amount shown on the last available tax bill. Rents, if any, and utility charges shall be prorated between the parties at the earlier of the Closing Date or the date possession of the Property is delivered to Buyer. Seller shall pay the cost of any state documentary stamps, transfer or conveyance fees required on the Deed and Buyer shall pay the cost of recording the Deed, local documentary stamps, transfer or conveyance fees and any financing and other documents required.

6. Possession. Possession of the Property shall be delivered to Buyer upon Closing unless otherwise provided herein.

7. Closing. The transfer of title and full payment of the Purchase Price pursuant to the terms of this Contract ("Closing") shall be completed through an escrow with Escrow Agent within _____ (_____) days from the date of Seller's acceptance of the Offer ("Closing Date").

8. Title. At least _____ (_____) days prior to Closing, Buyer may, at its sole expense, obtain a title commitment or title report with respect to the Property. Buyer may object to any title exception or matter disclosed in the title commitment or title report which materially adversely affects Buyer's Use; as defined below, or in Buyer's opinion marketable title, and which is not specifically excepted in Sections 2(a), (b), (d), and (e) hereof, ("Title Defects") by notifying Seller, in writing, of its objection within _____ (_____) days Buyer receives the title commitment or title report. The standard or general exceptions to title reflected in said title commitment or report shall not constitute Title Defects. If Seller is not so notified in the manner and within the period of time specified above, Buyer shall be deemed to have waived any objections to Title Defects. Seller shall have _____ (_____) days after receipt of any such timely raised written objection to any Title Defect to cure or remove same if Seller so elects, but Seller shall not be obligated to cure or remove such Title Defects and the Purchase Price will not be reduced because of Seller's election not to cure or remove. If such Title Defects are not cured or removed by Seller, Buyer may terminate this Contract by written notice sent by Buyer within _____ (_____) days after Seller's notice of election not to cure or remove, or inability to cure or remove, or within _____ (_____) days after the expiration of the _____ (_____) day cure or removal period, whichever occurs first. Buyer shall be deemed to have waived its right to terminate this Contract because of any defects in title to the Property if Buyer fails to so terminate in the manner and within the time period specified above.

9. Survey, Tests and Reports. Buyer shall have the right to enter the Property prior to Closing for the purposes and subject to the limitations set forth below.

(a) Survey. Within thirty (30) days of Seller's acceptance of this Offer, Buyer may perform a survey of the Property at its sole expense provided that Seller receives at least _____ (_____) hours prior written notice of Buyer's entry onto the Property, notwithstanding Section 13 hereof to the contrary. If the survey reveals a defect not specifically excepted in Sections 2(a), (b), (c) and (e) hereof and which defect materially adversely affects Buyer's intended use of the Property or in Buyer's opinion marketable title ("Survey Defects"). Buyer is purchasing the Property for speculation and intends to lease the Property as a convenient store, car wash, used car lot, video store, fruit/vegetable market, auto repair shop or any other lawful purpose ("Buyer's Use"). If Seller is unable or elects, at its option, not to cure any Survey Defects within _____ (_____) days after Seller's receipt of written notice thereof from Buyer, Buyer may terminate this Contract by written notice sent by Buyer within _____ (_____) days after Seller's notice of election not to cure or inability to cure, or within _____ (_____) days after the expiration of the _____ (_____) day cure period, whichever occurs first. In the event Buyer does not terminate this Contract in the manner and within the time period specified above, Buyer shall be deemed to have waived the right to terminate this Contract for any and all Survey Defects.

b. Tests. Within _____ (_____) days after Seller's acceptance of this Offer, Buyer shall have completed, at its sole expense, any tests and inspections of the Property which it reasonably desires to

perform in accordance with this Section ("Tests"). Buyer shall give written notice to Seller specifying in reasonable detail the Tests which Buyer wishes to perform, which notice Seller must have received at least _____ (_____) business days prior to Buyer's intended entry upon the property, notwithstanding Section 13, hereof to the contrary. Buyer shall provide Seller copies of the results of all Tests within _____ (_____) days after Buyer's receipt of same. Notwithstanding the above, if any Tests will damage or disturb the Property or any use thereof by excavation or otherwise, Seller shall have the right, in its sole and exclusive discretion, to impose reasonable limitations regarding the scope and location of the Tests. If the Tests reveal a defect which materially adversely affects Buyer's Use ("Testing Defect") and Seller is unable or elects, in its sole and exclusive discretion, not to cure such Testing Defect within _____ (_____) days after Seller's receipt of written notice thereof from Buyer, Buyer may terminate this Contract by written notice received by Seller within _____ (_____) days after Seller's notice not to cure or inability to cure, or within _____ (_____) days after the expiration of the _____ (_____) day cure period, whichever occurs first. In the event Buyer does not complete any or all Tests or does not terminate this Contract in the manner or within the time period specified above, Buyer shall be deemed to have waived its right to complete such Tests or to terminate this Contract for any and all Testing Defects.

(c) Reports. Buyer acknowledges the following ("Disclaimer"): that Seller does not guarantee or represent the accuracy or completeness of any environmental information or reports that may have been or will be provided to Buyer; that Buyer has no right to and shall not rely on such information or reports in deciding whether or not to purchase the Property; that Buyer has the right to perform its own Tests in accordance with section (b), above; and that Buyer shall rely only upon Buyer's own Tests in deciding whether to purchase the Property.

Seller has caused to be performed certain environmental tests of the Property ("Seller's Tests"). A final contractor's report of the results of Seller's Tests ("Report") has been received by Seller. Seller shall provide Buyer a copy of the Report. Simultaneously therewith, Seller has provided Buyer a copy of an amendment to this Contract pursuant to which Buyer agrees to provide Seller access to the Property after Closing in exchange for Seller agreeing to remediate at Seller's expense certain environmental conditions ("Remediation Agreement"). The Remediation Agreement may also impose upon Buyer, at Seller's sole and exclusive discretion, condition restricting the assignment of the Remediation Agreement and Buyer's use and development of the Property throughout the duration of the Remediation Agreement.

(d) Liability. The Tests and any other information regarding the Property shall at all times be confidential to Seller, and Buyer shall not disclose or distribute the contents of such Tests or information or copies thereof to any third party without the prior written consent of Seller, which consent Seller may withhold in its sole and exclusive discretion. If this transaction is not closed, Buyer shall restore the Property to the same condition as existed prior to any Tests or other activities taken by Buyer or its agents on the Property. Buyer agrees to indemnify, defend and hold harmless Seller, its directors, officers, employees, agents, successors and assigns from any and all liabilities, liens, claims, causes of action, costs, damages or expenses, including attorneys' fees and court costs, arising from Buyer's or its agents' entry or activities on the Property. This Section 9 shall survive Closing or the termination of this Contract.

10. Representations.

(a) Buyer represents and warrants that it is, or shall become prior to Closing, familiar with the condition of the Property and that, except as may later be set forth in the Remediation Agreement, if any, SELLER HAS NOT MADE AND MAKES NO WARRANTIES OR REPRESENTATIONS REGARDING THE PROPERTY, EXPRESS OF IMPLIED, INCLUDING WITHOUT LIMITATION, ITS HABITABILITY, CONDITION OR FITNESS FOR ANY PARTICULAR USE OR PURPOSE. BUYER AGREES THAT THE PROPERTY SHALL BE CONVEYED BY SELLER AND ACCEPTED BY BUYER IN AN "AS IS," "WHERE IS" CONDITION EXISTING ON THE FIRST TO OCCUR OF THE CLOSING DATE OR THE DATE POSSESSION IS TRANSFERRED TO BUYER. This subsection (a) shall be modified, if at all, only by the Remediation Agreement, if any, and then only to the extent provided therein.

(b) Buyer acknowledges that the Property has been used as a service station or for related purposes for the storage, sale, transfer, and distribution of motor vehicle fuels, petroleum products or derivatives containing hydrocarbons, and that such fuels, products or derivatives may have been spilled, leaked or otherwise discharged onto, into or from the Property.

(c) Buyer hereby agrees to assume and hereby waives, releases, indemnifies, defends and holds harmless Seller and its directors, officers, employees, contractors, agents, representatives, successors and assigns, from and against any and all claims, demands, damages, costs and expenses, including attorneys' fees, court costs, awards, settlements, judgments, penalties, fines, liens or causes of action, at law or in equity, including, without limitation, actions under the Comprehensive Environmental Response, Compensation and Liability Act of 1980, 42 U.S.C. 9601, *et seq.*, as amended, the Resource Conservation and Recovery Act, 42 U.S.C. 6901, *et seq.*, and any other applicable environmental laws, statutes, ordinances, rules, regulations or orders ("Laws"), arising out of or relating to the environmental and/or physical condition of the Property or other Property abandoned thereon by Seller or arising out of or relating to the ownership or use of the Property after Closing. This subsection (c) shall be modified, if at all, only by the Remediation Agreement, if any, and then only to the extent provided therein.

(d) Notwithstanding anything to the contrary contained herein or contained in the Remediation Agreement, if any, in the event that, after Closing, any governmental agency, entity, body, instrumentality, department or representative ("Government") shall notify Seller that Seller must undertake on the Property any testing, investigation or remediation of flammable explosives, hydrocarbons and/or petroleum products or fractions thereof, radioactive materials, hazardous or toxic wastes, substances or materials, including, but not limited to those materials and substances defined as "hazardous substances," "hazardous materials," "hazardous wastes" or "toxic substances" in the Laws ("Hazardous Materials"), Seller shall immediately notify Buyer of same and if such Hazardous Materials are not the responsibility of Seller pursuant to the terms of this Agreement, or the Remediation Agreement, then Buyer shall promptly undertake the same, and Buyer shall immediately notify the Government that Buyer shall respond to such notice in the place of Seller.

Notwithstanding the above, if: (i) Buyer fails to timely or properly undertake and pursue the required testing, investigation or remediation of the Hazardous Materials; or (ii) the Government insists that Seller, not Buyer, undertake or pursue the required testing, investigation or remediation of the Hazardous Materials; then, and only in the event of (i) or (ii), and under no other circumstances, Seller shall have the right and authority, without trespass, to enter the Property and to conduct the required testing, investigation and/or remediation of the Hazardous Materials. Seller's entry on the Property and activities thereon shall not be deemed an admission of liability for such Hazardous Materials. While on the Property, Seller shall have the right to install, maintain, operate, store, use and remove equipment, including, but not limited to, monitoring wells, recovery wells and other assessment or remediation equipment, to remove, remediate, store and test soils and groundwater therefrom and thereon and to otherwise take all actions required to comply with the Laws. Seller shall exercise its rights of entry onto the Property in a manner which does not unreasonably interfere with Buyer's Use and Seller shall provide Buyer, within _____ (_____) days of its written request, copies of all correspondence between Seller and the Government regarding Seller's activities on the Property. Buyer shall not interfere with Seller's right of entry, or actions taken pursuant thereto, and shall cooperate with Seller in obtaining any permits, consents or approvals necessary for Seller's actions taken with respect to the Property.

(e) The provisions of this Section 10 shall survive Closing. Provisions substantially similar to those in this Section 10 shall be incorporated into the Deed and recorded at Closing. For purposes of this Section 10, the term "Buyer" shall refer to Buyer, its heirs, devisees, representatives, successors and assigns.

11. Risk of Loss and Condemnation. Seller shall bear the risk of loss with respect to the Property until the first to occur of the Closing or the transfer of possession to Buyer; provided, however, that Seller shall not be obligated to restore any Property, damaged or destroyed prior to Closing. If, prior to Closing, all or any portion of the Property shall be damaged or destroyed by casualty, or taken in the exercise of the power of eminent domain and such damage, destruction or

taking will materially adversely affect Buyer's Use, Buyer may terminate this Contract by sending written notice thereof to Seller by the earlier of Closing or within _____ (_____) days after Buyer is notified of such damage, destruction, or taking. If Buyer does not so terminate this Contract, this transaction shall proceed to Closing without any reduction in the Purchase Price and Seller shall assign to Buyer at Closing all of Seller's right, title and interest in and to any condemnation award with respect to the Property.

12. Default or Termination. In the event that any representation of Buyer made herein should prove false or in the event of a default by Buyer in the performance of any of the obligations imposed on Buyer hereunder, Seller may terminate this Contract upon written notice to Buyer and Seller may pursue any actions or remedies at law or in equity available for such default; provided, however, that Buyer and Seller hereby agree that the damages to Seller would be extremely difficult and impracticable to ascertain and, therefore, if such default by Buyer occurs, Seller shall be entitled to retain the Earnest Money, not as liquidated damages, a penalty or forfeiture, but as partial compensation for damages suffered by Seller by reason of Buyer's default, including such damages as the costs of negotiating and drafting this Contract, costs of cooperating in satisfying conditions to Closing, costs of seeking another Buyer upon Buyer's default, opportunity costs in keeping the Property out of the market place, and other costs incurred in connection herewith. Should this transaction not be timely closed due to default by Seller, then Buyer may, as its exclusive remedy terminate this Contract. In the event of a proper termination of this Contract by either party in accordance with the terms set forth herein, Buyer shall be entitled to the return of the Earnest Money and thereafter Seller and Buyer shall have no further obligation or liability hereunder, except for those provisions which by their terms survive the expiration or earlier termination of this Contract. Upon termination of this Contract for any reason, any and all instruments delivered to Escrow Agent or Buyer by Seller shall be returned promptly to Seller.

13. Notices. Except as otherwise provided herein, any and all notices provided under this Offer or Contract must be in writing and shall be deemed given when delivered in person or when deposited with Federal Express or other similar overnight service, return receipt requested, or when deposited in the United States mails, postage prepaid for certified mail, return receipt requested, or upon transmission of a facsimile or other similar transmission (provided that a copy of the facsimile is delivered or deposited with twenty-four (24) hours in the manner specified above) properly addressed to Seller as follows:

_____[name]
 _____[address]
 _____[address]

with a copy under separate cover to:

_____[name]
 _____[address]
 _____[address]

and to Buyer at:

_____[name]
 _____[address]
 _____[address]

with a copy under separate cover to:

_____[name]
 _____[address]
 _____[address]

Either party may designate a different address for receiving notices hereunder by giving at least _____
(_____) days written notice thereof to the other party.

14. Entirety of Agreement. Seller and Buyer agree that this Contract, together with any exhibits and addenda attached hereto, and any documents specifically referred to herein, all of which are hereby made a part hereof, constitute the entire understanding between Buyer and Seller with respect to the subject matter hereof and that there are no representations, promises, undertakings or agreements, whether oral or written, between the parties relating to the Property which are not set forth herein and are otherwise superseded and voided by this Contract. Buyer acknowledges that this Offer must be approved by the management of Seller and can only be accepted and executed by an officer or duly authorized representative of Seller. Buyer represents that this Offer has been duly authorized and executed by Buyer. This Contract cannot be amended except by a writing executed by the parties hereto. After Closing, those provisions which by their terms survive Closing, shall so survive and shall be binding upon and inure to the benefit of the parties hereto and their respective heirs, successors and assigns.

15. Real Estate Commission. A finder's fee and/or real estate commission shall be paid by _____
[name] to _____ [name], whose address is _____ [address], in the amount of
_____ Dollars (\$_____) in full payment for services rendered in connection with
this transaction ("Commission"). Such Commission shall be due and payable only upon Closing. The party herein
obligated to pay such Commission shall indemnify, defend and hold harmless the other party from and against any and
all claims, expenses, costs and damages arising from such Commission, including court costs and attorneys' fees. Buyer
warrants and represents to Seller that no broker or finder has been engaged by Buyer in connection with this transaction
except as noted above and that there are no other claims for brokerage commissions or finders' fees. Buyer agrees to
indemnify, defend and hold harmless Seller, its directors, officers, employees, and agents from and against any claims
for such other commissions or finder's fees, including court costs and attorneys' fees. This provisions shall survive
Closing or the termination of this Offer or Contract.

16. Time of Essence. Time is hereby made of the essence of this Contract and of Buyer's performance of its obligations
hereunder.

17. Grantee. The exact name and tax mailing address of Grantee to be showing in the Deed is:

_____ [name]
_____ [address]
_____ [address]

18. Personal Property. Seller shall not transfer or convey to Buyer at Closing by Deed or bill of sale or thereafter by
abandonment of same, any interest in Seller's, or its parent's subsidiaries' or affiliates' advertising, trade names, trade
marks, trade dress, service marks, signs, sign poles, slogans, identifications, copyrights or copyrighted materials ("Trade
Marks"). Title to all trade fixtures, UST's, equipment and other personal property on the Property ("Personal Property"),
if any, together with the full and unrestricted right to enter the Property and to remove same for _____
(_____) days after Closing, is reserved unto Seller. Any Personal Property not removed by Seller
within such _____ (_____) day period shall be deemed abandoned and
automatically conveyed to Buyer hereby. In the event the Purchase Price is to include any Personal Property, these
items of Personal Property shall be specified in the bill of sale, attached hereto as Exhibit "C" and made a part hereof,
and Seller shall transfer same to Buyer and Buyer shall accept same at Closing in accordance with the terms thereof.
This provision shall survive Closing. Seller represents that it has removed all personal property containing its Trade
Marks.

19. Damage. Buyer agrees, at Buyer's sole expense, to alter or remodel the building(s) and improvements on the

Property in such a way that they do not resemble Seller's service stations, convenience stores, car washes, or other business facilities of Seller, past or present (i.e., by painting any such buildings and improvements with paint of a color combination of colors different from those colors or combinations of colors now or previously used to identify Seller's facilities. Time shall be of the essence and Buyer agrees to complete such alterations or remodeling within _____ (_____) days after Closing. The provisions of this paragraph shall survive Closing and shall be enforceable by Seller against Buyer. In the event Buyer does not comply with the provisions of this Section 19 within said _____ (_____) days, Seller shall have the right to pursue any and all actions or remedies at law or in equity to enforce the terms of this Section, all at Buyer's expense. Seller represents that the improvements on the Property have already been altered or remodeled so as to not resemble any of Seller's facilities.

20. Assignment. Before Closing, this Contract shall bind and inure to the benefit of the parties hereto only. This Contract shall not be assigned by Buyer without the prior written consent of Seller or Buyer. This Contract shall become null and void, and the election of Seller, in the event of any attempted assignment by Buyer without Seller's prior written consent and any permitted assignment shall be considered a default of Contract by Buyer. Notwithstanding anything to the contrary herein, Seller shall have the right to assign this Contract, in whole or in part, to a qualified intermediary for purposes of completing a like-kind exchange of properties pursuant to the Internal Revenue Code.

21. Best Efforts. Except as otherwise provided herein, Buyer shall use best efforts, excluding litigation, to satisfy the conditions to and complete the Closing.

22. Waiver. Except as otherwise provided herein, no failure or delay on the part of either party in exercising any of their respective rights hereunder upon any failure by the other party to perform or observe any condition, covenant or provisions herein contained shall operate as a waiver thereof, nor shall any single or partial exercise of any of such rights preclude any or further exercise thereof or the exercise of any other rights hereunder. No waiver or release of any of the terms, conditions or provisions of this Contract shall be valid or asserted or relied upon by either party hereto or offered in any judicial proceeding or otherwise, unless the same is in writing and duly executed by the party against whom such waiver or release is being asserted.

23. Construction. This Offer and Contract shall be governed and performed in accordance with the laws of the State of Ohio.

24. Counterparts. This Contract may be executed in any number of counterparts, which together shall constitute the agreement of the parties hereto.

25. Captions. The captions in this Contract are used for convenience only, and they in no way define, limit or prescribe the scope or intent of this Contract or any provisions thereof.

IN WITNESS WHEREOF, this Offer to Purchase has been duly executed by the undersigned this ____ [day] day of _____ [month], ____ [year], having first read and understood the terms contained herein and the purpose, intent and effects hereof.

Witnesses:

Printed Name: _____

Printed Name: _____

Witnesses:

SELLER:

_____ [name]

By: _____

Printed Name: _____

Title: _____

BUYER:

33-25 Current Legal Forms for Real Estate FORM 25.04

 Printed Name: _____

 By: _____
 Printed Name: _____
 Printed Name: _____ Title: _____

_____)
 STATE OF _____ [state] _____) SS:
 COUNTY OF _____ [county] _____)

BEFORE ME, a Notary Public in and for said County and State, personally appeared _____ [name],
 a(n) _____ [state] _____ [entity], by _____ [name], its
 _____ [title], who acknowledged that _____ [he/she] did sign the foregoing
 instrument for and on behalf of said corporation, being thereunto duly authorized, and that the same is
 _____ [his/her] free act and deed individually and as such officers and the free act and deed of said
 _____ [entity].

IN TESTIMONY WHEREOF, I have hereunto set my hand and official seal at _____ [city],
 _____ [state], this _____ [day] day of _____ [month], _____ [year].

 Notary Public

_____)
 STATE OF _____ [state] _____) SS:
 COUNTY OF _____ [county] _____)

BEFORE ME, a Notary Public in and for said County and State, personally appeared _____ [name],
 a(n) _____ [state] _____ [entity], by _____ [name], its
 _____ [title], who acknowledged that _____ [he/she] did sign the foregoing
 instrument for and on behalf of said corporation, being thereunto duly authorized, and that the same is
 _____ [his/her] free act and deed individually and as such officers and the free act and deed of said
 _____ [entity].

IN TESTIMONY WHEREOF, I have hereunto set my hand and official seal at _____ [city],
 _____ [state], this _____ [day] day of _____ [month], _____ [year].

 Notary Public

[Attach Exhibit A]

[Attach Exhibit B]

[Attach Exhibit C]



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Current Legal Forms for Real Estate

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Chapter 25 ENVIRONMENTAL CONSIDERATIONS IN REAL ESTATE TRANSACTIONS

Part IV. FORMS

A. ENVIRONMENTAL CONSIDERATIONS IN REAL ESTATE TRANSACTIONS

33-25 Current Legal Forms for Real Estate FORM 25.05

FORM 25.05 Addendum Offer to Purchase

COMMENT

This form is an addendum to Form 25.04 relating to the sale of a former gas station site. This addendum is the agreement between seller and buyer that allows seller post-closing access to the property for purposes of remediating existing contamination and/or monitoring it.

FORM

ADDENDUM OFFER TO PURCHASE

(Seller to Remediate Contamination)

The Addendum to Offer to Purchase ("Addendum") is made by and between _____ [name] ("Seller") and _____ [name] ("Buyer"), on the same date and in modification of that certain Offer to Purchase between Buyer and Seller. This Addendum and the Offer to Purchase are sometimes collectively referred to herein as the "Offer." Except as otherwise provided herein, the terms contained herein shall have the same meaning as contained as the Offer to Purchase.

1. Contaminants. The Property has been contaminated with certain substances or Hazardous Materials, some of which are more particularly described on Exhibit "C" attached hereto and made a part hereof (which substances, as identified on Exhibit C, and any hazardous substances currently identified under governmental authority which are directly related to Seller's use of the Property as a service station and which the Government authority requires to be remediated to meet its current requirements, are hereby collectively referred to as the "Contaminants").

2. Access. As of the Closing Date, Buyer hereby permits access and entry upon the Property to Seller and/or Seller's designated representatives and contractors as may be necessary to complete the Work, as defined in Section 3 hereof. Seller shall have the right to reserve access to the Property in the Deed.

3. Work. As used herein, "Work" means the installation, monitoring and maintenance of monitoring wells, recovery wells, assessment, remediation or treatment equipment, and the completion of such additional related activities as may be necessary to test, assess and, if necessary, remediate the contaminants.

4. Seller's Obligations. Except as expressly provided herein, Seller shall perform the Work in accordance with the Laws, in a good and workmanlike manner, and shall obtain all required permits and licenses necessary for the same.

5. Interference. Buyer acknowledges that the Work may interfere with or disrupt business activities on the Property. Seller agrees that it shall exercise its access onto the Property and complete the Work in a manner which, to the extent practicable, minimizes disruption to the use of the Property by Buyer. Buyer agrees that it shall operate and maintain the Property in a manner which does not interfere with the Work and in a manner which shall not impair Seller's eligibility and/or ability to recover funds from any underground storage tank reimbursement program and/or with Seller's ability to comply with the Laws. Buyer agrees that it will cooperate with and assist Seller in obtaining any approvals, consent or permits required for Seller's performance of the Work.

6. Restoration. Seller shall backfill any area which it excavates in the course of the Work to a grade even with the surrounding area and shall restore the surface of the excavated area to a similar condition which existed prior to Seller's excavation. During Seller's performance of the Work, in the event that Buyer or any of its customers, contractors, tenants, employees, licensees, invitees or agent, should damage or destroy any equipment, material or improvements used in the Work, Buyer shall reimburse Seller upon demand for the cost to replace and/or repair the equipment, materials or improvements. Buyer shall not be responsible for damage or destruction caused by trespassers or damage or destruction caused by vandals, nor shall Buyer be required to police such equipment, materials or improvements.

7. Development of the Property. Buyer acknowledges that the work may take at least several years to complete. Buyer further acknowledges that any change in the use of the Property may have an impact upon the Work and may further require the approval of the Government.

While Seller is performing the work, at Seller's sole cost and expense, Buyer, for itself, its successors, assigns, tenants, agents, licensees, invitees and employees, shall not use or develop the Property in such a manner that prevents or hinders the performance of or increases the cost or scope of the Work. Specifically, Buyer has stated that, for an indefinite period of time, Buyer is purchasing the Property for speculation and intends to lease the Property as a convenient store, car wash, used car lot, video store, fruit/vegetable market, auto repair shop or any other lawful purpose ("Buyer's Use"), and Seller in reliance thereon, has undertaken and/or planned and shall continue to undertake and/or plan the Work accordingly.

At such time as Buyer, its tenants, successors, assigns or licensees, contemplates a change in Buyer's Use, Buyer shall submit to Seller _____ (_____) copies of the plans, specifications, drawings and cost estimates ("Plans") for the proposed changes to Buyer's Use. Seller have _____ (_____) days from its receipt of Buyer's Plans to approve, reasonably disapprove or request additional information concerning the Plans. In the event Seller requests additional information, Seller shall have no further obligation regarding the Plans until Buyer submits all requested information to Seller. After receipt of all such additional information from Buyer, Seller shall have _____ (_____) days to approve or reasonably disapprove the Plans. Seller shall be permitted to disapprove the Plans if the cost of the Work would be increased thereby or the scope of the Work would be changed thereby.

In the event Seller approves the Plans, said approval shall not be deemed a guarantee or certification by Seller that the Plans conform to any applicable law and Buyer shall remain liable to ensure that the Plans so conform. Buyer shall strictly adhere to all approved Plans without deviation and shall, at no cost to Seller, obtain all required approvals for the proposed changes from the Government. Buyer hereby agrees to assume and hereby waives, releases, indemnifies, defends and holds harmless Seller, its directors, officers, employees, agents, successors and assigns, from and against any increased, unanticipated or delay costs associated with: (i) the construction as described in the Plans or otherwise; or (ii) the remediation required and the costs associated with any such construction as a result of the existence of the Contaminants or any other Hazardous Materials including, but not limited to, the cost of disposing of or remediation contaminated soils ("Assumption"). The Assumption expressly includes any costs to relocate Seller's equipment or improvements on the Property necessitated by any proposed change in Buyer's Use. If Seller should incur any costs which Buyer has assumed under the Assumption, Buyer shall reimburse Seller upon demand.

8. Additional Contamination. With respect to Hazardous Materials existing or discovered to exist on the Property after Closing, other than the Contaminants, or with respect to Hazardous Materials that are spilled, leaked or discharged into, onto or under the Property after closing (Additional Contamination"), Buyer shall abate same and shall comply with the Laws, all at Buyer's sole cost and expense.

In the event either party shall discover Additional Contamination after Closing, the discovering party shall immediately notify the other by telephone and in writing of such Additional Contamination. For purposes of this Section 8, and in addition to the notice requirements contained in the Offer to Purchase, Buyer shall notify Seller at the following address:

_____ [name]
 _____ [address]
 _____ [address]

Seller shall analyze the impact of the Additional Contamination upon the scope and costs of the Work with respect to the Contaminants. If the cost to remediate the Additional Contamination is less than the cost to complete with Work, Seller shall expand the scope of the Work to include the remediation of the Additional Contamination, in which event the full cost to Seller to remediate the Additional Contamination shall be paid by Buyer in full upon demand by Seller. If the cost to remediate the Additional Contamination is greater than the cost to complete with Work, Seller may turn over to Buyer the obligation and cost of completing the remediation of the Contaminants as well as the Additional Contamination has shall pay Buyer the then-remaining cost to complete with Work, in which event Buyer shall automatically assume the obligation and cost of complying with the Laws and Seller shall automatically be released therefrom without further action by either party.

9. Reports. During the course of the Work, Seller shall provide to Buyer, within _____ (_____) days after Seller's receipt of a written request therefor, a copy of all final reports or notices between Seller and the Government related to the Work. At the same time, in the event that Buyer should receive any notices or correspondence from the Government or any third party relating to the Property, Buyer shall immediately forward a copy of same to Seller. Seller shall have the right to participate with Buyer in negotiations with and submissions of reports and information, including permits, to the Government and shall not submit reports or information regarding the Contaminants to the Government without Seller's prior written consent, which consent may be withheld in Seller's sole and exclusive discretion.

10. Seller's Representations. Except as expressly provided in this Addendum, Seller agrees to indemnify, defend and hold harmless Buyer from and against any and all claims, damage, costs, losses, suits or liabilities ("Loss") for personal injury or property damage caused by Seller's breach of its obligations with respect to the Work. Notwithstanding the foregoing, Seller shall not be liable to Buyer or its successors, assigns, tenants, agents, licensees, invitees or employees, for any diminution in the value of the Property, lost profits or rents, or any other Loss of business damages, nor for any

Loss which Buyer would have suffered notwithstanding the presence of the Contamination on the Property. Moreover, this indemnity does not protect Buyer from any Loss caused by the acts, omissions, negligence or willful misconduct of Buyer or its customers, contractors, employees, agents, licensees, invitees, successors or assigns. Buyer shall not be entitled to make a claim against Seller under this indemnity unless and until: (a) Seller shall be in default hereof; (b) Buyer shall have provided Seller written notice of such default; and (c) Seller shall have failed to cure such default within _____ (_____) days after Seller's receipt of Buyer's notice, or if the default cannot reasonably be cured within such period of time, Seller shall have failed to cure such default within a reasonable period of time.

11. Buyer's Representations. In addition to the indemnities provided in the Offer to Purchase, Buyer shall indemnify, defend and hold harmless Seller, its officers, directors, contractors, agents and employees, from and against any Loss for personal injury or property damages caused by Buyer's breach of its obligations as set forth in this Addendum. This indemnity does not protect Seller from any Loss caused solely by the gross negligence of Seller or its contractor, employees, agents, successors or assigns.

12. Termination. Seller's obligations and liabilities contained herein shall terminate upon the completion of the Work in accordance with the Laws as signified by the earlier to occur of the following ("Terminate Date"): (a) an acknowledgment from the Government that Seller has completed its remedial action plan previously submitted to and approved by the Government; (b) _____ (_____) year(s) following the submission to the Government by Seller of a request for an acknowledgment that Seller has completed its remedial action plan previously submitted to and approved by the Government, provided that the Government has not responded to Seller during that _____ (_____) year(s) period; or (c) the written opinion of an independent environmental consultant retained by Seller, at Seller's sole cost and expense, stating that Seller has completed its remedial action plan previously submitted to and approved by the Government. Within _____ (_____) days after the Termination Date, Seller shall execute a recordable release of its rights under Sections 2 and 13 hereof.

13. Assignment. If, during the course of Seller's remediation of the Contaminants, Buyer shall convey to any third party any interest in the Property or, if Buyer shall be a corporation or partnership, Buyer shall convey any interest in the corporation or partnership, ("Transfer"), then the obligations and liabilities of Seller as set forth in this Addendum shall not extend to such third party unless and until the following shall occur: (a) Buyer has given Seller at least _____ (_____) days prior written notice of its intent to Transfer; (b) the transferee has a creditworthiness equal to or greater than Buyer had as of the date of Seller's acceptance of the Offer to Purchase; (c) the transferee has executed a written agreement agreeing to be bound by the obligations, duties, restrictions and liabilities of Buyer as set forth herein; and (d) the transferee has submitted to Seller a copy of any Plans for the transferee's intended use of or changes to the Property, or in the alternative, the transferee has signed a statement under oath acknowledging that the transferee may not change Buyer's use without Seller's prior written consent to the Plans pursuant to Section 8 hereof. Seller shall have the right to include this restriction in the Deed.

14. Survival. This Addendum shall survive the Closing of the transaction.

15. Conflict. In the event of a conflict between this Addendum and the Offer to Purchase, the terms of this Addendum shall control. Except as modified hereby, the Offer to Purchase shall remain in full force and effect. Nothing in this Addendum shall be deemed to waive Seller's right to terminate the Offer to Purchase in accordance with Section 9(c) thereof.

IN WITNESS WHEREOF, this Addendum has been duly executed by the undersigned this ____ [day] day of _____ [month], ____ [year], having first read and understood the terms contained herein and the purpose, intent and effects hereof.

Witnesses:

SELLER:

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_____ [name]
 Printed Name: _____

 By: _____
 Printed Names: _____
 Printed Name: _____ Title: _____
 Witnesses: BUYER:
 _____ [name]
 Printed Name: _____

 By: _____
 Printed Names: _____
 Printed Name: _____ Title: _____

)
 STATE OF _____ [state]) SS:
 COUNTY OF _____ [county])

BEFORE ME, a Notary Public in and for said County and State, personally appeared _____ [name],
 a(n) _____ [state] _____ [entity], by _____ [name], its
 _____ [title], who acknowledged that _____ [he/she] did sign the foregoing
 instrument for and on behalf of said corporation, being thereunto duly authorized, and that the same is
 _____ [his/her] free act and deed individually and as such officers and the free act and deed of said
 _____ [entity].

IN TESTIMONY WHEREOF, I have hereunto set my hand and official seal at _____ [city],
 _____ [state], this _____ [day] day of _____ [month], _____ [year].

Notary Public

)
 STATE OF _____ [state]) SS:
 COUNTY OF _____ [county])

BEFORE ME, a Notary Public in and for said County and State, personally appeared _____ [name],
 a(n) _____ [state] _____ [entity], by _____ [name], its
 _____ [title], who acknowledged that _____ [he/she] did sign the foregoing
 instrument for and on behalf of said corporation, being thereunto duly authorized, and that the same is
 _____ [his/her] free act and deed individually and as such officers and the free act and deed of said
 _____ [name].

IN TESTIMONY WHEREOF, I have hereunto set my hand and official seal at _____ [city],
 _____ [state], this _____ [day] day of _____ [month], _____ [year].

Notary Public

[Attach Exhibit C]



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Chapter 25 ENVIRONMENTAL CONSIDERATIONS IN REAL ESTATE TRANSACTIONS

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A. ENVIRONMENTAL CONSIDERATIONS IN REAL ESTATE TRANSACTIONS

33-25 Current Legal Forms for Real Estate FORM 25.06

FORM 25.06 Bill of Sale

COMMENT

This form relates to the sale of a former gas station site and forms 25.04 through 25.07. The bill of sale is intended to convey all personal property of seller at the site, except for tanks and property containing seller's service marks, trade marks and/or logos.

FORM

BILL OF SALE

(Excluding Tanks)

In consideration of the covenants and agreements herein contained and in further consideration of _____ Dollars (\$_____) paid to it by _____ [name] with an address of _____ [address] ("Buyer"), the receipt of which is hereby acknowledged, _____ [name], a(n) _____ [state] corporation, having an office at _____ [address] ("Seller"), does hereby transfer and convey to Buyer all of Seller's right, title and interest in and to the personal property described in Schedule 1 attached hereto and made a part hereof ("Property").

TO HAVE TO HOLD unto Buyer and Buyer's representatives, heirs, devisees, successors, and assigns forever.

Buyer acknowledges that Seller is selling only such right, title, or interest in the Property as Seller may have without Seller representing or warranting the extent of Seller's right, title or interest therein.

Buyer shall pay any federal, state or local sales, use or value added tax which may be due as a result of this transfer.

Buyer affirms by acceptance of this Bill of Sale that Buyer has inspected to its full satisfaction all of the Property conveyed pursuant to this Bill of Sale and has full knowledge of its condition and location. This sale is made on an "AS-IS," "WHERE-IS" BASIS WITHOUT REPRESENTATION OR WARRANTY BY SELLER, EXPRESS OF IMPLIED, INCLUDING WITHOUT LIMITATION TO THE HABITABILITY, CONDITION, MERCHANTABILITY OR FITNESS FOR ANY PARTICULAR USE OR PURPOSE of the Property conveyed hereby. This sale does not include any title in, or any right to use, any advertising, trade names, trade marks, trade dress, service marks, signs, sign poles, slogan, identifications, copyrights or copyrighted material of the Seller and its affiliates, parents and subsidiaries.

Buyer hereby agrees to assume and hereby waives, releases, indemnifies, defends and holds harmless Seller and its directors, officers, employees, contractors, agents, representatives successors and assigns, from and against any and all claims, demands, damages, costs and expenses, including attorneys, fees, court costs, awards, settlements, judgments, penalties, fines, liens or causes of action, at law or in equity, including, without limitation, actions under the Comprehensive Environmental Response, Compensation and Liability Act of 1980, 42 U.S.C. 9601, *et seq.*, as amended, the Resource Conservation and Recovery Act, 42 U.S.C. 6901, *et seq.*, and any other applicable environmental laws, statutes, ordinances, rules, regulations or orders ("Laws"), arising out of or relating to the environmental and/or physical condition of the Property or other property abandoned thereon by Seller or arising out of or relating to the ownership or use of the Property after the date hereof.

IN WITNESS WHEREOF, this Bill of Sale has been duly executed by the undersigned this ____ [day] day of _____ [month], ____ [year], having first read and understood the terms contained herein and the purpose, intent and effects hereof.

Witnesses:

_____ [name]

Printed Name: _____

By: _____

Printed Name: _____

Printed Name: _____

Title: _____

STATE OF _____ [state])
COUNTY OF _____ [county]) SS:

BEFORE ME, a Notary Public in and for said County and State, personally appeared _____ [name], a(n) _____ [state] _____ [entity], by _____ [name], its _____ [title], who acknowledged that _____ [he/she] did sign the foregoing instrument for and on behalf of said corporation, being thereunto duly authorized, and that the same is _____ [his/her] free act and deed individually and as such officers and the free act and deed of said _____ [entity].

IN TESTIMONY WHEREOF, I have hereunto set my hand and official seal at _____ [city], _____ [state], this ____ [day] day of _____ [month], ____ [year].

Notary Public



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33-25 Current Legal Forms for Real Estate FORM 25.07

FORM 25.07 Limited Warranty Deed

COMMENT

This form relates to the sale of a former gas station site and forms 25.04 through 25.07. This limited warranty deed will become public record and is intended to put all subsequent owners on constructive notice of the various restrictions and agreements affecting the property.

FORM

LIMITED WARRANTY DEED

KNOW ALL MEN BY THESE PRESENTS:

That _____ [name], a(n) _____ [state] corporation, with its principal office at _____ [address] ("Grantor"), for _____ Dollars (\$_____) and other good and valuable consideration received to its full satisfaction from _____ [name], a(n) _____ [state] corporation, with its principal office at _____ [address] ("Grantee"), does hereby grant, bargain, sell and convey unto Grantee and its heirs, devisees, representatives, successors and assigns that certain real property located at _____ [address] and being a portion of the same real property conveyed to Grantor by deed recorded in Volume _____ [number], Page _____ [number] of the public records of said County, as more fully described in Exhibit "A" attached hereto and made a part hereof, together with Grantor's right, title and interest in and to all buildings, structures and other improvements located thereon, excluding any advertising, trade names, trade marks, trade dress, service marks, signs, sign poles, slogan, identifications, copyrights or copyrighted material of Grantor located thereon ("Property").

TO HAVE AND TO HOLD unto Grantee, and its heirs, devisees, representatives, successors and assigns of Grantee, as the case may be, forever subject, however, to: (a) taxes and assessments, both general and special, not now due and payable; (b) building and zoning ordinances, laws, regulations and restrictions by municipal or other governmental authority (c) any and all leases, easements, rights-of-way, encumbrances, conditions, covenants, restrictions, reservations and exceptions of record; (d) any state of facts that an accurate survey or independent visual inspection of the Property by Grantee or its agents would disclose; and (e) the restrictions, covenants and representations set forth herein.

This conveyance is made by Grantor and accepted by Grantee upon the express condition and subject to the restriction and covenant that the Property shall not be used in whole or in part, directly or indirectly for a period of _____ (_____) years from the date this Deed is recorded, for the sale, offering for sale, storage or distribution of any gasoline, motor vehicle fuels, lubricants, tires, batteries or other petroleum products. Such restriction and covenant of Grantee shall run with the Property for the benefit and protection of any adjoining property of Grantor and/or other property of Grantor used and operated by Grantor or its representatives for such purposes within a distance of _____ (_____) miles from the Property, whether owned or leased by Grantor or its representatives during said _____ (_____) year period. Such restriction and covenant shall not, however, prohibit the storage of motor fuels, lubricants or other petroleum products on the Property solely for the use by Grantee or other occupants of the Property.

Grantee represents and warrants that it is familiar with the condition of the Property and that GRANTOR HAS NOT MADE AND MAKES NO WARRANTIES OR REPRESENTATIONS REGARDING THE PROPERTY, EXPRESS OR IMPLIED, INCLUDING, WITHOUT LIMITATION, ITS HABITABILITY, CONDITION OR FITNESS FOR ANY PARTICULAR USE OR PURPOSE. GRANTEE AGREES THAT THE PROPERTY SHALL BE CONVEYED BY GRANTOR AND ACCEPTED BY GRANTEE IN AN "AS-IS," "WHERE IS" CONDITION, EXCEPT AS EXPRESSLY EXCEPTED IN THE CONTRACT, AS DEFINED BELOW.

Grantee acknowledges that the Property has been used as a service station or for related purposes for the storage, sale, transfer and distribution of motor vehicle fuels, petroleum products or derivatives containing, hydrocarbons, and that such fuels, products or derivatives may have been spilled, leaked or otherwise discharged onto, into or from the Property.

Except as expressly excepted in the Contract, as defined below, as of the Effective Date, as defined below, Grantee agrees to assume and assume and hereby waives, releases, indemnifies, defends and holds harmless Grantor and its directors, officers, employees, contractors, agents, representatives, successors and assigns, from and against any and all claims, demands, damages, costs and expenses, including attorneys' fees, court costs, awards, settlements, judgments, penalties, fines, liens or causes of action, at law or in equity, including, without limitation, actions under the Comprehensive Environmental Response, Compensation and Liability Act of 1980, 42 U.S.C. 9601, *et seq.*, as amended, the Resource Conservation and Recovery Act, 42 U.S.C. 6901, *et seq.*, and any other applicable environmental laws, statutes, ordinances, rules, regulations or orders ("Laws"), arising out of or relating to the environmental and/or physical condition of the Property or other Property abandoned thereon by Grantor or arising out of or relating to the ownership or use of the Property after the date hereof.

Notwithstanding anything to the contrary contained herein, in the event that, after the date hereof, any governmental agency, entity, body, instrumentality, department or representative ("Government") shall notify Grantor that Grantor must undertake on the Property any testing, investigation or remediation of flammable explosives, hydrocarbons and/or petroleum products or fractions thereof, (except as may be expressly provided in the Contract), radioactive materials, hazardous or toxic wastes, substances or materials, including, but not limited to those materials and substances defined as "hazardous substances," "hazardous materials," "hazardous wastes" or "toxic substances" in the Laws ("Hazardous Materials"), Grantor shall immediately notify Grantee of same, and if such Hazardous Materials are not the responsibility of Grantor pursuant to the terms of the Contract, as defined below, then Grantee shall promptly undertake

the same, and Grantee shall immediately notify the Government that Grantee shall respond to such notice in the place of Grantor.

Notwithstanding the above, if: (i) Grantee fails to timely or properly undertake and pursue the required testing, investigation or remediation of the Hazardous Materials; or (ii) the Government insists that Grantor, not Grantee, undertake or pursue the required testing, investigation or remediation of the Hazardous Materials; then, and only in the event of (i) and (ii), and under no other circumstances, Grantor shall have the right and authority, without trespass, to enter the Property and to conduct the required testing, investigation and/or remediation of the Hazardous Materials. Grantor's entry on the Property and activities thereon shall not be deemed an admission of liability for such Hazardous Materials. While on the Property, Grantor shall have the right to install, maintain, operate, store, use and remove equipment, including, but not limited to, monitoring wells, recovery wells and other assessment or remediation equipment, to remove, remediate, store and test soils and groundwater therefrom and thereon and to otherwise take all actions required to comply with the Laws. Grantor shall exercise its rights of entry onto the Property in a manner which does not unreasonably interfere with Grantee's use of the Property as set forth in the Contract, as defined below, and Grantor shall provide Grantee, within _____ (_____) days of its written request, copies of all correspondence between Grantor and the Government regarding Grantor's activities on the Property. Grantee shall not interfere with Grantor's right of entry, or actions taken pursuant thereto, and shall cooperate with Grantor in obtaining any permits, consents or approvals necessary for Grantor's actions taken with respect to the Property.

Grantor has reserved unto itself the right to enter the Property and to conduct certain tests, investigations and remediation thereof ("Access") in accordance with the terms of that certain Offer to Purchase between Grantor and Grantee dated _____ [month] ____ [day] ____ [year], subsequently assigned to Grantee ("Contract"). During Grantor's Access, Grantee shall not be permitted to change the use of the Property unless and until Grantor has approved Grantee's plans, specifications and cost estimates for same, all as more fully set forth in the Contract. Finally, during Grantor's Access, Grantee shall not be permitted to transfer, assign, convey, mortgage, lease hypothecate or pledge any interest in the Property until Grantee has complied with certain conditions specified in the Contract.

The provisions of this Deed shall be deemed effective as of the earlier of the recordation of this Deed or _____ [month] ____ [day] ____ [year] ("Effective Date"). The provisions of this Deed shall run with the land and shall be binding upon and inure to the benefit of the parties hereto and their respective heirs, devisees, successors and assigns and any other person or entity expressly noted herein.

Grantor warrants and will defend its title to the Property against all lawful claims and demands made against said title by all persons claiming by, from, through or under Grantor, except as noted above.

IN WITNESS WHEREOF, Grantor has hereunto set its hand and corporate seal, by its duly authorized officer, this _____ [day] day of _____ [month], ____ [year].

_____ [name]

By: _____

Printed Name: _____

Title: _____

STATE OF _____ [state])
COUNTY OF _____ [county]) SS:

BEFORE ME, a Notary Public in and for said County and State, personally appeared _____ [name],
a(n) _____ [state] _____ [entity], by _____ [name], its
_____ [title], who acknowledged that _____ [he/she] did sign the foregoing
instrument for and on behalf of said corporation, being thereunto duly authorized, and that the same is
_____ [his/her] free act and deed individually and as such officers and the free act and deed of said
_____ [entity].

IN TESTIMONY WHEREOF, I have hereunto set my hand and official seal at _____ [city],
_____ [state], this _____ [day] day of _____ [month], _____ [year].

Notary Public



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33-25 Current Legal Forms for Real Estate FORM 25.08

FORM 25.08 Commercial Real Estate Purchase Agreement--Purchase agreement for property to be redeveloped, with existing environmental reports that have been given to buyer

COMMENT

This Agreement relates to the sale of improved property to a municipality for redevelopment. The city is purchasing the property for resale to a developer. The property has some existing environmental conditions that seller identified prior to the sale. Buyer is taking the property subject to the environmental conditions. The seller represents that it has no knowledge of any other conditions that are not disclosed in the reports.

Because the sale is to a municipality for immediate conveyance to a third party, the City required a release from seller relating to any environmental conditions or required remediation. As a result, if a pre-existing condition is discovered, the seller cannot pursue the City as a potentially responsible party.

The Agreement contains a provision that allows the buyer or its representatives to have access for the property prior to transfer of title.

Also, because the seller's new property may not be completed before the sale is closed, the seller has the ability to lease back the property after closing directly from the developer. The lease will terminate when the seller's new property is completed.

The Agreement also limits the representations and warranties of the seller to its president and chief executive officer. This avoids the risk that a lower level person may have neglected to report relevant information to a superior. As a result, knowledge of such information will not be imputed to the seller.

Also noteworthy is the sale price, which is less than the appraised value. As a result, the seller may take a charitable deduction for the difference between the appraised value and the purchase price.

FORM

COMMERCIAL REAL ESTATE PURCHASE AGREEMENT

1. Recitals. This Commercial Real Estate Purchase Agreement (the "Agreement") is entered into as of this ____ [day] day of ____ [month], ____ [year], by and between ____ [name], a(n) ____ [state] corporation ("Seller"), and the City of ____ [city], ____ [state] ("Buyer"). Seller currently owns the real property, buildings and improvements being identified in this Agreement as the Property, which Property is occupied by Seller. Seller shall sell and convey, and Buyer shall purchase and pay for, upon the terms and subject to the conditions hereinafter set forth, the real property known as ____ [name], located in ____ [city], ____ [state], as more fully described in Exhibit A attached hereto. The parties acknowledge that Buyer is purchasing the Property for public use/public purpose and that such use has been or, prior to Closing, will be submitted for approval by ____ [city] City Council.

2. Property.

Address: ____ [address]

Permanent parcel numbers: ____

Check here ____ if a full legal description is attached hereto as Exhibit A.

The "Property" shall include the land described above, all easements, hereditaments, appurtenances, and all buildings and fixtures in their present condition.

3. Purchase Price. The price shall be ____ Dollars (\$____) (the "Purchase Price"), to be paid upon Closing.

4. Value of Property. The parties agree and acknowledge that Seller is entitled to a charitable deduction for the amount by which the fair market value exceeds the Purchase Price, if any. In order to determine the fair market value of the Property, Seller will hire, at its sole cost and expense, an appraiser to determine the value of the Property. The appraiser shall be subject to the approval of Buyer, such approval not to be unreasonably withheld, conditioned, or delayed. Furthermore, Buyer agrees to cooperate to the extent permissible by law with Seller and the appraiser in connection with the appraisal, and Buyer agrees to execute and deliver all statements and information reasonably required by Seller in order to qualify for the deduction and/or comply with the requirements of the regulation promulgated under The Internal Revenue Code of 1986, including, without limitation, acknowledging the donation on IRS Form 8283 (Rev. 10-98).

5. Condition of the Property: Disclosures.

A. Condition of Property. Seller has provided to Buyer any and all existing information and reports in Seller's possession related to the condition of the Property (collectively, the "Reports") including without limitation: (1) geotechnical, environmental or other engineering reports; (2) any environmental permits and documentation related to such permits; and (3) correspondence from governmental agencies regarding any alleged violation of any law applicable

to the Property. Seller warrants to Buyer that, to the best of Seller's knowledge, the Reports provided are the only such documents that exist related to the condition of the Property and that, to the best of Seller's knowledge, the information contained the Reports represents a true and accurate description of the condition of the Property. Seller acknowledges that Buyer shall be entitled to rely on the Reports and indemnifies Buyer for any costs incurred as a result of conditions which were known to Seller at the time of this Agreement, but were not disclosed in the Reports or otherwise by Seller to Buyer. Except for the representations, warranties and covenants in this Agreement, without accepting any responsibility or liability for any conditions on, under, about or from the Property, the Property is being sold by Seller and purchased by Buyer in its AS-IS condition.

B. Seller's Representations. Seller represents that each of the following is true and correct and shall be true and correct upon Closing:

(1) Seller is a(n) _____ [state] corporation duly formed and validly existing in good standing under the laws of the State of _____ [state] and is authorized to transact business in the State of _____ [state]. All requisite action to approve, execute, deliver and perform this Agreement and each other agreement and document delivered by Seller in connection herewith has been taken by Seller. This Agreement and each other agreement and document delivered by Seller in connection herewith have been duly executed and delivered by Seller and constitute the binding obligations of Seller enforceable in accordance with their respective terms;

(2) to the best of Seller's knowledge, after due inquiry, Seller has timely filed all reports required to be filed, and has (or had at all appropriate times) all certificates, approvals and permits (and has generated and maintained all data, documentation and records) required under all Environment Laws in connection with Seller's ownership and operation of the Property; and

(3) to Seller's best knowledge, there are no existing or continuing violations of Environmental Laws and no actions, orders or pending claims for violation of Environmental Laws relating to the Property or Seller's operations thereon, and to Seller's best knowledge, no such threatened claims or actions, and Seller has received no notice of any such violations, actions, orders or claims.

C. Seller Release and Limited Indemnification.

(1) Subject to the limitations set forth herein, if one or more of the representations and warranties made hereunder by Seller shall prove to be untrue or inaccurate in any material respect, or if Seller shall default in its performance of any provision of this Agreement, Seller shall indemnify and hold harmless Buyer and its successors, assigns, designees, nominees, members, officers, employees, agents and affiliates ("Indemnified Persons") from and against any loss, cost, claim, damage, liability or expense incurred by such persons resulting from any such untruth or inaccuracy or from any such failure of performance, including, without limitation, reasonable attorneys' fees and accountants' fees, third party claims and consequential damages. Buyer shall be entitled to offset amounts due under this Section from the Purchase Price.

(2) Seller, for itself and its successors and assigns, hereby releases and forever discharges Buyer and its officers, representatives, affiliates, employees, successors and assigns from and waives any and all claims, demands, actions, or causes of action which Seller may now have or hereafter have against Buyer and its officers, representatives, affiliates, employees, successors and assigns for claims, damages, actions, causes of action, costs, damages, losses, expenses, injuries, liabilities, penalties, fines or otherwise, of any and every kind whatsoever, with respect to or as a result of: (1) any voluntary or involuntary investigation, monitoring, remediation, response action, voluntary action, corrective action or closure performed by or on behalf of Seller, or any person, party or governmental authority under any Environmental Laws; (2) the presence, use, generation, storage, treatment, disposal, release, threatened release, migration or discharge of Hazardous Substances at, on, under or from the Property; (3) any violations or alleged violations of Environmental Laws; or (4) otherwise arising out of or in connection with any environmental, structural or physical conditions with

respect to the Property. This waiver and release by Seller hereunder shall survive the Closing of the sale of the Property or the termination of this Agreement.

(3) Defined terms used herein above shall have the following meanings:

(a) "Environmental Law" shall mean any federal, state and local laws, statutes, ordinances, rules, regulations and orders, which regulate or pertain to the environment or environmental matters or the protection or preservation of human health, now in effect or as hereinafter may be enacted or amended, including without limitation: the Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C. § 9601 *et seq.*; the Resource Conservation and Recovery Act, 42 U.S.C. § 6901 *et seq.*; the Clean Air Act, 42 U.S.C. § 7401 *et seq.*; the Federal Water Pollution Control Act, 33 U.S.C. § 1251 *et seq.*; the Federal Insecticide, Fungicide and Rodenticide Act, 7 U.S.C. § 136 *et seq.*; the Toxic Substances Control Act, 15 U.S.C. § 2601 *et seq.*; the Safe Drinking Water Act, 42 U.S.C. § 300f *et seq.*; the Emergency Planning and Community Right-to-Know Act of 1986, 42 U.S.C. § 11001, *et seq.*; the Hazardous Materials Transportation Act, 49 U.S.C. § 5101 *et seq.*; and the Occupational Safety and Health Act, 29 U.S.C. § 651 *et seq.*, as amended from time to time, and the regulations and rules now or hereafter promulgated.

(b) "Hazardous Substances" shall mean (1) any substance, chemical, material, organism, or waste that is hazardous, toxic, pathogenic, radioactive, reactive, explosive, flammable, or dangerous, or that is listed, defined, or regulated as such, under Environmental Laws; (2) petroleum or petroleum products, distillates, fractions or wastes; (3) polychlorinated biphenyls (PCB's), asbestos, urea formaldehyde or any material containing the previously mentioned substances; and (4) any substance or material defined as a "pollutant," "contaminant," "hazardous waste," "hazardous substance," "toxic substance" or "solid waste" under Environmental Laws.

(c) Seller's knowledge means the actual knowledge of _____ [name], _____ [title] of Seller, without imputing to him knowledge of any other person.

D. Continuing Access to Property. Buyer or Buyer's representative may inspect the Property (the "Walk-Thru") on the day prior to the Closing Date. If the Walk-Thru evidences that there has been any material adverse change in the physical condition of the Property from the date of publication of the Reports described in Section 5(B), then Buyer may so notify Seller and the Escrow Agent, whereupon the parties shall mutually agree on an amount to be withheld from Seller's proceeds and either credited to Buyer or held in escrow pending correction of the deficiencies. Seller grants to Buyer (and Buyer's agents, employees and consultants) a license to enter upon, occupy, inspect (and erect testing structures upon and within) the Property during all regular business hours and during such other reasonable times as Buyer may require in order to assess the feasibility of the Property for proposed redevelopment of same. Buyer agrees to defend, indemnify and hold harmless Seller from any claims, damages, causes of action, expenses, fees (including reasonable attorneys' fees), or costs relating to Buyer's pre-closing access.

E. Government Requirements. Seller has not received notice from any governmental authorities of any outstanding violations of any statutes, ordinances, rules or regulations affecting the Property as set forth in any notice from any governmental authority. If any governmental notices of violations are received prior to the Closing Date, Seller will immediately advise Buyer. Seller shall have _____ (_____) days to correct such violation. If Seller fails to correct the violation, Buyer may elect to terminate this Agreement by giving written notice to Seller and the Escrow Agent within _____ (_____) days after the expiration of such 14-day period if such violation will or is likely to result in liability or expense to Buyer or will prohibit the intended use of the Property for redevelopment.

F. Seller Cooperation on Rezoning. Seller shall cooperate in any subdivision or split approval proceedings as Buyer may elect in order to cause parcel(s) to be created as separate tax and building lots in furtherance of the intended purpose of redeveloping the Property. Further, Seller shall cooperate in any rezoning proceedings or contests in furtherance of the Property redevelopment as Buyer may elect in order to cause parcel(s) to receive zoning, rezoning,

special use or conditional use permit(s), variance(s) or other zoning actions, certificates of appropriateness, building permit(s), and other governmental permits. Seller's cooperation as stated in the preceding two sentences shall not be defined to include a requirement that Seller incur out-of-pocket costs to third parties. Any such rezoning shall only be effective after the transfer of title of the Property to Buyer.

6. Risk of Loss. Risk of loss to the Property or any part thereof shall remain on Seller until closing. The parties acknowledge, however, that Buyer intends to demolish the improvements on the Property, therefore, this transaction shall not be affected by any pre-closing damage to the Property.

7. Title.

A. Seller shall convey fee simple marketable title to the Property to Buyer, or Buyer's nominee, by limited warranty deed (the "Deed"), free and clear of all liens and encumbrances except: (1) the lien of real estate taxes and assessments, both general and special, which are not yet due and payable; (2) zoning ordinances, building codes, and subdivision regulations; (3) easements, restrictions, conditions, reservations and covenants of record which are not objected to pursuant to Paragraph 7(C) below and any matter disclosed by the Survey referred to in Paragraph 7 (E); and (4) any liens or encumbrances created by the acts of Buyer or waived by Buyer as provided in Section 7(D) (the "Permitted Exceptions").

B. Seller shall furnish Buyer, or its nominee, with an ALTA Owners Policy of Title Insurance (1992 ALTA Form) in the amount of the Purchase Price (the "Title Policy"), with all standard exceptions removed and with extended coverage, an environmental protection lien endorsement, a special tax and assessment search, and an insured closing letter, issued by Chicago Title (the "Title Company") and insuring title to the Property to be good in Buyer, or its nominee, as of the filing of the Deed for record, subject only to the Permitted Exceptions.

C. Seller shall furnish to Buyer a copy of the commitment for the Title Policy (the "Title Commitment"). Any restriction, condition, reservation or easement of record shown in the Title Commitment shall be deemed not to materially and adversely affect the use or value of the Property unless objected to by Buyer in writing within _____ (_____) business days after Buyer received the Title Commitment.

D. If the Title Commitment shall disclose any defect in Seller's title or any lien or encumbrance other than the Permitted Exceptions (the "Title Objections"), then, unless Buyer shall have waived the Title Objections in writing, Seller shall have _____ (_____) days after receipt of the Title Commitment to provide Buyer with evidence to Buyer's satisfaction that the Title Objections have been removed or will be removed at Closing, failing which, Buyer may elect to (1) accept title subject to the Title Objections without reduction in the Purchase Price, or (2) terminate this Agreement by giving written notice to Seller and the Escrow Agent within _____ (_____) days after such _____-day period has expired. If Buyer shall fail to timely elect to terminate, then Buyer shall be deemed to have waived the Title Objections.

E. Promptly after the date of this Agreement, Buyer may cause a registered surveyor to make a survey for the Property. Said survey shall: (1) be certified by the surveyor to the Title Company, Buyer and Buyer's lender; (2) show the dimensions and area of the land and the location of any improvements, easements and setback lines; (3) identify by recording information all easements and setback lines; (4) reflect access between the Property and a dedicated street; (5) be sufficient to enable the Title Company to delete the survey exception; and (6) otherwise conform with the ALTA/ACSM minimum survey standards. If a survey shall disclose any matter which materially and adversely affects the use or value of the Property, then Buyer may so notify Seller and the Escrow Agent in writing no later than _____ (_____) days prior to the Closing Date, in which event such matter shall be deemed to be a Title Objection.

8. Escrow. The Escrow Agent for this transaction shall be the Title Company, but Buyer's lender may be substituted at

its request. Buyer shall deliver to the Escrow Agent a copy of this Agreement which shall serve as its escrow instructions for this transaction. The Escrow Agent may accept this escrow subject to its standard conditions of acceptance of escrow, to the extent they are not inconsistent with this Agreement.

9. Closing and Delivery of Possession. All documents and funds and/or financial institution commitments for funds necessary to complete this transaction shall be placed in escrow in sufficient time to permit transfer of title on the Closing Date (as defined below). The Escrow Agent shall file the Deed for record (the "Closing") and complete this transaction in accordance with the provisions of this Agreement on _____ [month] _____ [day], _____ [year], subject to extension for curing Title Objections, as provided in Section 7(D), or on such other date as Buyer and Seller may agree in writing (the "Closing Date"), provided that the Escrow Agent has received all funds and documents required to be deposited with it for the Closing and the Title Company is in a position to issue the Title Policy. Time is of the essence.

10. Prorations, Charges and Credits.

A. Real estate taxes, assessments (general and special), annual maintenance fees and subdivision charges, if any, shall be prorated as of the Closing Date (charging/crediting items applicable to the Closing Date to Seller), using as the basis for the proration of taxes and assessments the rate and valuation shown for the Property on the tax duplicate requested by the Title Company in preparation for the Closing. The proration of taxes and assessments shall be final. Seller warrants that Seller has received no written notice of any proposed assessment from any governmental authority.

B. Seller shall order final meter readings to be made as of the Closing Date for all utilities serving the Property and Seller shall pay all final bills rendered from such meter readings. It is understood that, as Seller will continue to occupy the Property beyond Closing pursuant to a lease agreement, Seller will continue to be responsible for any and all water, sewer and other utility costs incurred during the period of occupancy beyond Closing and its proportionate share of real estate taxes, if any. Seller agrees to indemnify Buyer for any and all water and sewer costs currently due, past due, or which become due to Cuyahoga County as a result of Seller's continued occupation of the Property.

C. The Escrow Agent shall charge to Seller: (1) the cost for the title search and one-half of the premium for the Title Policy; (2) the conveyance fee and transfer taxes; (3) the cost of removing or discharging any defect, lien or encumbrance required for conveyance of the Property as required by this Agreement; (4) the amount due to Buyer for any prorations or credits under this Agreement; (5) one-half the escrow fee; and (6) any real estate broker's commission required to be paid by Seller.

D. The Escrow Agent shall charge to Buyer: (1) the cost of the Title Commitment; (2) one-half of the premium of the Title Policy; (3) the cost of recording the Deed; (4) any costs incurred in connection with Buyer's financing for this transaction; (5) one-half of the escrow fee; and (6) the survey cost.

11. Notice. All notices given pursuant to this Agreement shall be communicated in writing, by facsimile or electronic mail, and shall be deemed given upon actual receipt.

12. Termination. If a party has performed its obligations under this Agreement and, being entitled to do so, that party has elected to terminate this Agreement, then that party shall give the other party and the Escrow Agent written notice of the termination within _____ (_____) days following the date on which the right to terminate arose (or such other date as specified herein). Except as otherwise specified in Section 13 of this Agreement, upon any such permitted termination, the Escrow Agent shall promptly return the Deposit to Buyer and return all funds and documents to the party which deposited them, whereupon Seller, Buyer and the Escrow Agent shall be relieved of any liability hereunder, except that Seller shall be liable for any title examination charges, if any, incurred prior to the termination.

13. Default; Remedies. Time is of the essence of this Agreement. If Buyer fails to make payment of the Purchase Price promptly when the same shall become due, or defaults in the performance of any covenant or agreement herein contained, and such failure or default continues for _____ (_____) days following written notice from Seller, then Seller may terminate this Agreement. Upon such termination, the Escrow Agent shall deliver the Deposit (after deducting any title charges incurred prior to such termination) to Seller as liquidated damages as Seller's sole remedy for such default. If Seller fails to perform any obligation imposed by this Agreement, and such failure continues for _____ (_____) days following written notice from Buyer, Buyer may elect to terminate this Agreement and/or to pursue any legal or equitable remedy. Upon such termination, Seller shall reimburse Buyer for any costs incurred by Buyer associated with the Purchase of the Property including, but not limited to, costs for escrow fees, title examination and policy and survey.

14. Entire Agreement. This Agreement, including any Addendum Clauses, constitutes the entire agreement between the parties. No other conditions, representations, warranties or agreements, expressed or implied, have been made or relied upon by Buyer or Seller. The representations, warranties and agreements contained in this Agreement shall survive the transfer of title.

15. Parties Bound and Benefits; Assignability. This Agreement shall bind and benefit the parties hereto and their respective heirs, personal representatives, successors and assigns.

16. Real Estate Broker. No real estate broker is owed a commission in connection with the sale of the Property.

17. Like-Kind Exchange. Buyer acknowledges that Seller may undertake a like-kind exchange with respect to the sale of the Property under *Section 1031 of the Internal Revenue Code of 1986*. Seller shall be responsible for all additional costs and expenses associated therewith, and with the identification and purchase of any replacement property. Seller will indemnify, defend and hold harmless Buyer from any extra costs or expense thereof.

18. Lease Back. This Agreement is subject to Seller executing a lease with _____ [name] for a lease back of a portion of the Property. Seller shall use all reasonable efforts to negotiate and enter into such lease with _____ [name] on or before _____ [month] _____ [day] _____ [year].

THIS AGREEMENT IS A LEGALLY BINDING CONTRACT. IF YOU HAVE ANY QUESTIONS OF LAW, CONSULT YOUR ATTORNEY.

BUYER:

_____ [name]

By: _____

Printed Name: _____

Title: _____

SELLER:

_____ [name]

By: _____

Printed Name: _____

Title: _____

ACCEPTANCE BY ESCROW AGENT THIS _____ [day] day of _____ [month] _____ [year].

The Escrow Agent hereby accepts this Agreement in accordance with Paragraph 8 of this Agreement.

_____ [name]

By: _____

Printed Name: _____

Title: _____

[Attach Exhibit A]



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Chapter 25 ENVIRONMENTAL CONSIDERATIONS IN REAL ESTATE TRANSACTIONS

Part IV. FORMS

A. ENVIRONMENTAL CONSIDERATIONS IN REAL ESTATE TRANSACTIONS

33-25 Current Legal Forms for Real Estate FORM 25.09

FORM 25.09 Commercial sale agreement--shopping center--representation by seller that premises were not used for storage or disposal of hazardous substances

COMMENT

This is an agreement for the purchase and sale of a shopping center. As is often the case, this particular shopping center has seen a wide variety of tenants, including a dry cleaning establishment, a pharmacy, and a hair salon. Each of these businesses uses a number of products which contain substances included in the "hazardous" substances list of the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA"). 42 U.S.C.A. § 9601 *seq.* However, the substances--such as nail polish, polish remover and cleaning solvents--were used in such small quantities that the seller can feel comfortable in making the representation that the premises were never used for the storage or disposal of hazardous substances.

This representation is critical to the purchaser. A purchaser's financing is typically contingent upon receiving an environmental site assessment that reveals that no hazardous substances have been disposed of on the property. Clearly, the purchaser's immediate financial interest is served by not having to engage the costly services of a geologist or other environmental site review service. However, in the long term, the seller's representation to the purchaser is only as good as the seller's ability to compensate the purchaser in the event that the seller was mistaken or made a deliberate misrepresentation that causes injury to the purchaser.

Many sellers may have only limited knowledge of how their property was used by prior owners. A purchaser should consider that the cost of an environmental site review may be far less than the loss that may occur if the seller is in error or has misrepresented the prior uses of the property. The purchaser, upon becoming an owner, becomes liable for "clean up" costs.

The results of the environmental site review may also affect the value of the property. If the

purchaser is financing a portion of the purchase price, the lender may require an appraisal. In issuing the appraisal, the appraiser will likely assume that there are no adverse environmental conditions, or insist on reviewing the environmental report before issuing the appraisal to the lender.

FORM

AGREEMENT made this _____ [day] of _____ [month] _____ [year], between _____ [name], residing at _____, hereafter referred to as "Seller," and _____ [name], a corporation organized under the laws of the State of _____ [state], with offices for the transaction of business at _____ [address], hereafter referred to as "Purchaser."

WHEREAS, Seller is the owner of certain real property and premises commonly known as the _____ [name] Shopping Center, located at _____ [address], in the City of _____ [city], State of _____ [state], hereafter referred to as "premises;" and

WHEREAS, Seller desires to sell and Purchaser desires to purchase the premises,

NOW, in consideration of the mutual promises contained herein, it is agreed as follows:

1. Conveyance of property. Purchaser agrees to purchase and Seller agrees to sell the real property commonly know as _____ [name] Shopping Center. Purchaser shall pay to Seller the sum of _____ Dollars (\$ _____) for the purchase of said real property and premises as follows:

- (a) _____ Dollars (\$ _____) deposit upon execution of this Agreement;
- (b) _____ Dollars (\$ _____) at the time of transfer of title; and
- (c) _____ Dollars (\$ _____) in the form of a financing mortgage to the Seller.

The term of said mortgage shall be from a reputable lender and shall be for _____ (_____) years at _____ percent (_____ %) interest per annum. The mortgage shall provide that prepayment of principal and accrued interest may be made without penalty at any time after the passage of _____ (_____) months from the date of transfer of title.

2. Contingencies. This Agreement is subject to the following contingencies:

- (a) That an ALTA survey shows the driveway from _____ [name] Road, the entire parking area and buildings to be entirely within the property liens of the subject premises.
- (b) Buyer approving the results of a general inspection and due diligence investigation of the Property.

3. Deed. The Seller shall convey the premises to the Purchaser by means of a _____ deed _____ [insert type of deed to be used] in proper form for recording. The deed shall be prepared, duly executed, acknowledged and delivered by the Seller to the Purchaser, together with any applicable transfer tax, all at the Seller's expense.

4. Notwithstanding the foregoing, Seller may convey the fee simple ownership interest in the real property subject to all zoning laws, environmental laws, any covenants, conditions, restrictions or easements of record, provided that this does

not render title to the real property unmarketable.

5. "As Is" Clause. The buildings on the premises herein are hereby sold "as is." Seller provides no warranty as to condition, express or implied. Seller hereby represents and warrants that the subject premises have never been used for the storage or disposal of hazardous substances. The term "hazardous substances," as used herein, shall mean substances deemed hazardous pursuant to the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA"), 42 USC § 9601 *et seq.*

Seller has owned the subject premises since ____ [year]. During that period of time, Seller has not become aware of the existence of any condition which would result in an adverse environmental impact. However, Seller has performed no tests or investigations. In the event that Purchaser now or hereafter discovers such a condition, where the genesis of such condition occurred prior to Purchaser's acceptance or occupation of the subject premises, Seller agrees to cooperate in providing any information which he may have which will assist in locating the responsible party.

Seller further represents and warrants to Purchaser that he will not, by any affirmative act or omission, waive or excuse the liability of any other party who may be a "responsible party," as defined by CERCLA, 42 USC § 9601 *et seq.*, or any other federal or state law or regulation, for any cost of remediation of any adverse environmental condition, under any federal or state law or regulation.

In the event Seller has or does waive the liability of any responsible party, Seller will indemnify and hold Purchaser harmless for any loss occasioned by that waiver, including legal fees and consequential damages.

This representation is made to induce Purchaser to enter into this contract for purchase of the subject premises. It is understood by the parties hereto that Purchaser's financing is contingent upon Seller making this representation. It is further understood that Purchaser's loan documents will provide that the loan will be due and payable in full if evidence of hazardous substances is discovered on the subject premises. Seller shall be liable for all damages, including economic and consequential damages in the event that the representations contained in this section are inaccurate.

6. No Real Estate Broker Involved in Sale. The parties hereto agree that no real estate broker was involved in this sale. Brokers' fees and/or commissions are not due to any person.

7. Apportionment of Rental Income, Security Deposits and Taxes. All rentals, security deposits, and taxes shall be apportioned as of the date of transfer of title. If Seller makes, before the time of transfer of title, any payments in advance for taxes or water and sewer rents, or other levies which are a lien against the premises, Purchaser shall reimburse Seller for a prorated share of these payments at the time of transfer of title.

(a) Seller shall provide Purchaser with a copy of all tenants' leases and a complete record of each tenant's rental history, including amount of security deposit, accrued interest thereon, if any, amount of additional rent, if any, and the purpose therefor, and whether tenant is in default in any way, and the nature of such default.

(b) Seller shall also provide Purchaser with a list of all repairs and improvements made by Seller and tenants to each unit. Seller shall also provide Purchaser with a copy of the original plans and specifications for the shopping center, together with all modifications approved for each tenant.

8. Date of Transfer of Title. The transfer of title shall take place on or before ____ [month] ____ [day] ____ [year], at the offices of _____. Time is of the essence.

9. Indemnification and Hold Harmless Clause. The Seller agrees to indemnify and hold the Purchaser harmless for any claim or cause of action (including legal fees) accruing on or before the transfer of title, for any cause whatever relating in any way to those items of real and personal property transferred to the Purchaser under this Agreement.

10. Indemnification and Hold Harmless Clause. The Purchaser agrees to indemnify and hold Seller harmless regarding any cause of action whatever relating in any way to those items of real and personal property transferred to the purchaser under this Agreement.

Any notice required to be given to Purchaser shall be in writing and sent certified mail, return receipt requested, to:

_____ [name]
_____ [address]
_____ [address]

Any notice required to be given to Seller shall be in writing and sent certified mail, return receipt requested, to:

_____ [name]
_____ [address]
_____ [address]

Notice shall be deemed given when received.

11. Document Embodies Complete Agreement. This Agreement contains the entire understanding of the parties; there have been no representations made which are not contained herein.

12. No Oral Modifications. This Agreement may only be modified by a written amendment signed by all parties. An oral modification shall not be binding on any party.

13. Controlling State Law. This Agreement shall be construed in accordance with the laws of the State of _____ [state].

14. Any failure by either party to enforce any right arising hereunder shall not be deemed a waiver of such right.

IN WITNESS WHEREOF, the parties hereto have set their hands and seals the day and year first above written.

PURCHASER:

_____ [name]

By: _____

Printed Name: _____

Title: _____

SELLER:

_____ [name]

By: _____

Printed Name: _____

Title: _____

STATE OF _____ [state])
COUNTY OF _____ [county]) SS:

BEFORE ME, a Notary Public in and for said County and State, personally appeared _____ [name],
a(n) _____ [state] _____ [entity], by _____ [name], its
_____ [title], who acknowledged that _____ [he/she] did sign the foregoing
instrument for and on behalf of said corporation, being thereunto duly authorized, and that the same is
_____ [his/her] free act and deed individually and as such officers and the free act and deed of said
_____ [entity].

IN TESTIMONY WHEREOF, I have hereunto set my hand and official seal at _____ [city],
_____ [state], this _____ [day] day of _____ [month], _____ [year].

Notary Public

STATE OF _____ [state])
COUNTY OF _____ [county]) SS:

BEFORE ME, a Notary Public in and for said County and State, personally appeared _____ [name],
a(n) _____ [state] _____ [entity], by _____ [name], its
_____ [title], who acknowledged that _____ [he/she] did sign the foregoing
instrument for and on behalf of said corporation, being thereunto duly authorized, and that the same is
_____ [his/her] free act and deed individually and as such officers and the free act and deed of said
_____ [entity].

IN TESTIMONY WHEREOF, I have hereunto set my hand and official seal at _____ [city],
_____ [state], this _____ [day] day of _____ [month], _____ [year].

Notary Public



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Chapter 25 ENVIRONMENTAL CONSIDERATIONS IN REAL ESTATE TRANSACTIONS

Part IV. FORMS

A. ENVIRONMENTAL CONSIDERATIONS IN REAL ESTATE TRANSACTIONS

33-25 Current Legal Forms for Real Estate FORM 25.10

FORM 25.10 Commercial sale agreement--office building--sale is contingent on finding that no asbestos-containing material is located within building--representation of condition of premises

COMMENT

This is an agreement for the purchase and sale of an office building. The building was constructed in the late 1930s, when the use of asbestos insulation was quite common. The building was partially remodeled in the late 1950s, when the use of asbestos-containing floor and ceiling tiles was quite common.

Employers and landlords have been named as defendants in lawsuits and workers' compensation claims where the plaintiffs develop lung problems after working in spaces containing asbestos. Obviously, the purchaser does not want to buy into an existing problem.

The determination of whether asbestos is contained within insulation or ceiling or floor materials generally requires laboratory analysis. Thus, it is necessary to take physical samples of the materials. Air sampling and analysis is also helpful to show that because the asbestos was not "friable" (i.e., crumbling and floating through the air), it could not have been a factor contributing to a claimant's or plaintiff's medical condition.

The contingency is designed to allow the purchaser to terminate the agreement if any asbestos is found. Further, the contingency is broad enough that if any other adverse condition is found, the purchaser may terminate the agreement. The purchaser may find that the floor or ceiling tiles contain a small amount of asbestos which is not friable. The purchaser may be willing to accept the building under those conditions. However, in such case, the purchaser will likely insist upon receiving a price reduction approximately equal to the purchaser's cost of removing or containing the asbestos. Of course, this contingency has broad applications and can be used if purchaser discovers any defects on or about the property.

In the alternative, the purchaser may request the seller to remove the asbestos prior to transfer of title. The purchaser's ability to terminate the agreement and walk away from the deal makes both of the alternatives above possible, since the seller will certainly not want to lose an otherwise interested purchaser.

This agreement also contains a representation regarding the condition of the premises. Because this property has been used exclusively as an office building since the structure was built (rather than for manufacturing purposes), the purchaser's major environmental concerns will be with exterior conditions.

FORM

AGREEMENT made this ____ [day] ____ [month] ____ [year], between ____ [name], with offices for the transaction of business at ____ [address] (hereafter referred to as "Seller"), and ____ [name], a corporation existing under the laws of the State of ____ [state], with offices for the transaction of business at ____ [address] (hereafter referred to as "Purchaser").

W I T N E S S E T H:

WHEREAS, Seller is the owner of a certain office building commonly known as the ____ [name] Tower, located at ____ [address] in the City of ____ [city], State of ____ [state] (hereafter referred to as the "real property"); and

WHEREAS, Seller desires to sell and Purchaser desires to purchase the property,

NOW, in consideration of the mutual promises contained herein, it is agreed as follows:

1. Conveyance of Property. Purchaser agrees to purchase and Seller agrees to sell the real property, which is more particularly described in Schedule "A" annexed hereto and made a party hereof. The purchase price is the sum of ____ Dollars (\$ ____). A deposit of ____ Dollars (\$ ____) shall be made upon execution of this Agreement. The balance shall be due upon transfer of title in certified or bank funds, United States dollars.

2. Sale Contingent Upon Obtaining Mortgage Loan. This Agreement is contingent upon Purchaser obtaining a mortgage loan in the amount of ____ Dollars (\$ ____), at an annual interest rate not to exceed the prime rate plus ____ percent (____ %) for a term of at least ____ (____) years. Purchaser shall not be required to accept a mortgage which is conditioned on the personal guaranty of any of its officers, directors, or shareholders, or on any cross corporate guaranty.

This condition shall be deemed waived unless Purchaser shall notify Seller in writing of Purchaser's inability to obtain a mortgage loan on or before ____ [month] ____ [day] ____ [year]. Notice shall be deemed given when received by Seller, in person or by certified mail, return receipt requested. If notice is timely given, Seller may elect to hold the mortgage under the same terms and conditions described above. Purchaser shall be obligated to accept the mortgage should Seller elect to offer it. Any such offer by Seller shall be made in writing and delivered to Purchaser as described above within ____ (____) days of receipt of notice of Purchaser's inability to obtain a mortgage loan. The transfer of title shall take place within ____

(_____) days thereafter.

If Seller does not elect to hold the mortgage, this Agreement shall be deemed canceled. All deposits made pursuant to this agreement shall be returned to the Purchaser immediately.

3. Sale Contingent Upon Inspection for Asbestos. This Agreement is contingent upon the Seller approving the results. The inspection may include, with limitations, inspections for asbestos, mold and structural defects. The inspection(s) shall be performed by qualified inspectors. The inspection and all samples and analysis shall be performed at the expense of _____. A copy of the inspection report shall be provided to both Purchaser and Seller.

Seller consents to the taking of samples of ceiling material, pipe insulation and boiler or furnace insulation. Such samples shall be taken as inconspicuously as possible in the working areas of the structures.

This contingency shall be deemed waived unless Purchaser shall notify Seller that the results of the inspection are unsatisfactory, in writing, on or before _____ [month] _____ [day] _____ [year]. Notice shall be deemed given when received by Seller, in person or by certified mail, return receipt requested. If notice is timely given, this Agreement shall be deemed canceled. All deposits made pursuant to this agreement shall be returned to the Purchaser immediately.

4. Sale Contingent on Letters of Intent from Tenants. This Agreement is contingent upon Seller providing Purchaser with letters of intent from at least _____ percent (_____ %) of the tenants whose leases expire within _____ (_____) months after execution of this Agreement, indicating that the tenants intend to remain as tenants in the building. Seller shall provide these letters of intent to Purchaser on or before _____ [month] _____ [day] _____ [year]. If Seller fails to provide a sufficient number of letters by said date, Purchaser shall have the option to terminate this Agreement by giving notice as set forth in Paragraph 2, above. If notice is given, the deposit shall be returned to Purchaser immediately.

5. Type of Deed. The Seller shall convey the premises by means of a _____ deed _____ [type of deed to be used] in proper form for recording. The deed shall include the covenants required by the lien law of the State of _____ [state]. The deed shall be prepared, duly executed, acknowledged and delivered by the Seller to the Purchaser, together with any applicable transfer tax, at the Seller's expense.

6. Title. Seller shall convey fee simple title free and clear of all liens. Seller may convey the real property subject to all zoning laws, environmental laws, any enforceable covenants, conditions, restrictions or easements of record, provided that this does not render title to the real property unmarketable.

7. Seller's Prior Use of Property. Seller hereby represents that he has been the owner of the real property for _____ (_____) years. Seller was the owner at the time the structures presently existing on the premises were constructed. Seller and his tenants have used the real property solely as an office building since initial construction. Neither Seller nor its tenants use any substance which is deemed "hazardous" under federal or state law or regulation in sufficient quantity to trigger the threshold provisions of any such law. Seller represents that the premises are free of any hazardous wastes. Seller makes this representation knowing Purchaser will rely on it in determining whether to purchase the real property.

Purchase acknowledges that Seller has performed no tests or investigations regarding the condition, use or fitness of the building. In the event that Purchaser now or hereafter discovers such a condition, Seller agrees to cooperate in providing any information which he may have which will assist in locating the responsible party.

Seller further represents and warrants to Purchaser that he will not, by any affirmative act or mission, waive or excuse

the liability of any other party who may be a "responsible party," as defined by the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA"), 42 USC § 9601 *et seq.* or any other federal or state law or regulation, for any cost of remediation of any adverse environmental condition, under any federal or state law or regulation.

In the event Seller waives the liability of any responsible party, Seller will indemnify and hold Purchaser harmless for any loss occasioned by that waiver, including legal fees and consequential damages.

8. Representation of Soundness of Structure. Seller further represents that the structure is structurally sound. The plumbing, heating and electrical systems are in good working order now and shall remain so until transfer of title, reasonable wear and tear excepted. The term "good working order" shall mean that there are no non-functional systems that will cost more than _____ Dollars (\$_____) to repair or combinations of items that will cost more than _____ Dollars (\$_____) to repair in the aggregate. If any systems or items are determined not to be in good working order, Seller shall repair them at its expense prior to transfer of title.

9. Security Deposits, Rents and Tenant Leases. Seller shall transfer all security deposits to Purchaser at the transfer of title. Seller and Purchaser shall send joint notice to all tenants of such transfer. All base rents shall be adjusted as of the date of transfer of title. Seller shall provide Purchaser with copies of all tenant leases, together with a sworn list of any and all defaults by all tenants pursuant to the terms of said leases. Seller shall be entitled to receive any "added rents," as defined in said leases. (These "added rents" are reimbursements paid to the landlord-Seller for prior years' expenses.)

10. Adjustments for Taxes, Water and Sewer Rents. The parties shall adjust taxes, water rents, sewer rents, and other levies which are a lien against the real property as of the date of transfer of title.

11. Acknowledgment of Real Estate Broker and Payment of Commission. The parties acknowledge that _____ [name] acted as real estate broker and brought about this Agreement. Seller agrees to pay said broker the sum of _____ Dollars (\$_____) as a commission, at the time of transfer of title.

12. Time and Place of Transfer of Title. The transfer of title shall take place at the offices of _____ or at such other place as can be mutually agreed upon, on or about _____ [month] _____ [day] _____ [year]. The parties agree that if either party sends notice hereafter that time is of the essence, no less than _____ (_____) weeks' notice shall be given. No such notice may be given until all contingencies contained herein have been satisfied or waived.

Any notice required to be given to Seller shall be in writing and sent certified mail, return receipt requested, to:

[name]

[address]

[address]

Any notice required to be given to Purchaser shall be in writing and sent certified mail, return receipt requested, to:

[name]

[address]

[address]

Notice shall be deemed given when received.

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13. Agreement Contains Entire Understanding. This Agreement contains the entire understanding of the parties; there have been no representations made which are not contained herein.

14. No Oral Modifications. This Agreement may only be modified by a written amendment signed by all parties. An oral modification shall not be binding on any party.

15. Controlling State Law. This Agreement shall be construed in accordance with the laws of the State of _____ [state].

16. Any failure by either party to enforce any right arising hereunder shall not be deemed a waiver of such right.

IN WITNESS WHEREOF, the parties hereto have set their hands and seals the day and year first above written.

PURCHASER:

_____ [name]

By: _____

Printed Name: _____

Title: _____

SELLER:

_____ [name]

By: _____

Printed Name: _____

Title: _____

STATE OF _____ [state])
COUNTY OF _____ [county]) SS:

BEFORE ME, a Notary Public in and for said County and State, personally appeared _____ [name], a(n) _____ [state] _____ [entity], by _____ [name], its _____ [title], who acknowledged that _____ [he/she] did sign the foregoing instrument for and on behalf of said corporation, being thereunto duly authorized, and that the same is _____ [his/her] free act and deed individually and as such officers and the free act and deed of said _____ [entity].

IN TESTIMONY WHEREOF, I have hereunto set my hand and official seal at _____ [city], _____ [state], this _____ [day] day of _____ [month], _____ [year].

Notary Public

BEFORE ME, a Notary Public in and for said County and State, personally appeared _____ [name],
a(n) _____ [state] _____ [entity], by _____ [name], its
_____ [title], who acknowledged that _____ [he/she] did sign the foregoing
instrument for and on behalf of said corporation, being thereunto duly authorized, and that the same is
_____ [his/her] free act and deed individually and as such officers and the free act and deed of said
_____ [entity].

Notary Public



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FORM 25.11 Confidentiality Agreement

COMMENT

In many cases, the seller will be reluctant to allow the buyer to obtain an environmental report on the property. The seller is concerned that the report will disclose a significant problem and that the buyer will disclose it to one or more third parties which may result in an enforcement action or a lawsuit being filed against the seller. For this reason, a prudent seller that is not certain about the condition of the property will require a confidentiality agreement.

Another approach is for the seller to obtain the report. If the report does not disclose major concerns, the seller can provide it to the buyer. If something major is uncovered, the seller can void the purchase agreement.

Additionally, if a major problem is suspected, the seller's attorney may engage a consultant. If the attorney engages a consultant, the report may not be discoverable in litigation because it is attorney work product and/or subject to attorney client privilege. Applicable civil rules will control.

FORM

CONFIDENTIALITY AGREEMENT

THIS CONFIDENTIALITY AGREEMENT is made this ____ [day] day of _____ [month], ____ [year], at _____ [city], _____ [state], by and between _____ [name] ("Company") and _____ [name] ("Recipient").

WHEREAS, Company has or is about to undertake discussions with Recipient regarding the business opportunity described on **Exhibit A** (the "Opportunity"); and

WHEREAS, in connection with the Opportunity, Company will make certain disclosures to Recipient and/or allow the Recipient to gather information about the Opportunity, which information the Company does not want made public;

NOW, THEREFORE, in consideration of the mutual promises and covenants contained herein, the parties agree as follows:

1. Confidentiality. As a condition to Company furnishing to Recipient the proprietary and confidential information of Company and/or information relating to the Opportunity (herein the "Confidential Information"), Recipient agrees to treat all information obtained from Company or obtained during its investigation, as proprietary business property of Company, whether such information is disclosed or furnished before or after the date of this Agreement. The term "Confidential Information" does not include information which becomes generally available to the public other than as a result of a disclosure by Recipient or by disclosure of a party in violation of Company's rights.
2. Restricted Use. Recipient agrees that the Confidential Information will not be used in any way that is detrimental to Company, and will be kept strictly confidential by Recipient and its representatives; provided, however, that any of the Confidential Information may be disclosed to the representatives of Recipient who need to know such information for a business purpose, it being understood and agreed that such representative shall be informed by Recipient of the confidential nature of the Confidential Information and shall be directed by Recipient to treat such information confidentially, within the parameters set forth in this Agreement. Recipient agrees that it will make use of the Confidential Information only for the purpose contemplated by this Agreement, and will not use the Confidential Information for the purpose of competing with Company or otherwise for its benefit at any time in the future. Recipient agrees that it will not knowingly permit or facilitate such use by any other person or entity without the express prior written consent of Company.
3. Representative. For purposes of this Agreement, a representative means an officer or employee of Recipient, parent, brother/sister, or affiliated company, or a law firm, public accounting firm, or other entity or person (and their employees) who, in the good faith judgment of Recipient needs to have access to some or all of the Confidential Information; provided, however, such representative agrees to be bound by the terms and conditions of this Agreement and the representative agrees to be jointly and severally liable with Recipient to Company for any breach thereof.
4. Disclosure of Discussions. Without the prior written consent of Company, Recipient will not, and will direct its representatives not to, disclose to any person or entity the fact that discussions or negotiations may take place or are taking place concerning a possible transaction between Recipient and Company or that it has a business relationship with Company.
5. Employees. For two (2) years following the date that the business relationship between Company and Recipient shall terminate, Recipient will not solicit any employee of Company, or any employee of an affiliate of Company, directly or indirectly, for the purpose of enticing them to leave their employment with Company or such affiliate, nor will Recipient employ any such employee, either as an employee, independent contractor, consultant, or any other similar employment or service arrangement.
6. Return of Confidential Information. At the request of Company, Recipient shall promptly return to Company all written material containing or reflecting any information contained in the Confidential Information (whether prepared by Company, the Critical Business Partners, or otherwise); Recipient, its employees and its representatives, will not retain any copies, extracts, compilations or other representations or reproductions of the Confidential Information, in whole or in part. Recipient shall thereupon promptly deliver to Company or destroy all documents, memoranda, notes or

other writings prepared by or on behalf of Recipient, based on the Confidential Information.

7. Injunctive Relief. Recipient acknowledges that the remedy at law for any breach by it of the terms of this Agreement shall be inadequate and that the damages resulting from such breach are not readily susceptible to being measured in monetary terms. Accordingly, in the event of a breach or threatened breach by Recipient of the terms of this Agreement, Company shall be entitled to immediate injunctive relief and may obtain a temporary order restraining any threatened or further breach. Nothing herein shall be construed as prohibiting Company from pursuing any other remedies available to Company for such breach or threatened breach, including the recovery of damages from Recipient. Recipient further represents that it understands and agrees that the provisions of this Agreement shall be strictly enforced and construed against it. In the event the Recipient violates any legally enforceable provision of this Agreement for which there is a specific time period during which the Recipient is prohibited from taking certain actions or from engaging in certain activities, as set forth in such provision, then, in such event, such violation shall toll the running of such time period from the date of such violation until such violation ceases.

8. Non-Waiver. No failure or delay by Company in exercising any right, power or privilege hereunder will operate as a waiver thereof, nor shall any single or partial exercise thereof preclude any other or further exercise thereof or the exercise of any right, power or privilege hereunder.

9. Production of Confidential Information. In the event that Recipient is required by law to disclose any of the Confidential Information, it is agreed that Recipient will provide Company with prompt notice of such request so that Company may take such action as Company shall deem appropriate, including, without limitation, timely seeking an appropriate protective order and/or waive compliance with the provision of this Agreement.

10. State Law. This Confidentiality Agreement shall be governed by and construed in accordance with the laws of the State of _____ [state].

IN WITNESS WHEREOF, the parties have hereunto executed this Confidentiality Agreement on the day and year first above written.

COMPANY:

_____ [name]

By: _____

Printed Name: _____

Title: _____

RECIPIENT:

_____ [name]

By: _____

Printed Name: _____

Title: _____

[Attach Exhibit A]



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FORM 25.12 Confidentiality Agreement--Short Form Letter Agreement

COMMENT

The following agreement is a short form letter agreement preventing a recipient from disclosing information that it is given or obtained regarding a property.

FORM

_____ [month] _____ [day] _____ [year]

_____ [name]

_____ [address]

_____ [address]

Dear Mr./Mrs. _____ [name]:

The addressee of this letter (hereinafter referred to as "Recipient") and _____ [name] (hereinafter referred to as "Company") are about to, or have undertaken discussions regarding the purchase of the property described in **Exhibit A** (the "Property"). In order to proceed with such discussions, and for Company to investigate and/or inspect the Property, Company is requiring certain agreements from Recipient. Recipient acknowledges that Company would not proceed with such discussions and/or establish a relationship with Recipient without such agreements.

Recipient acknowledges that Recipient will or may have access to, and become knowledgeable about confidential or

secret information of Company and/or the Property, including, without limitation, the information contained in reports provided to Recipient by employees, agents, officers, Directors or customers of Company (hereinafter collectively referred to as "Confidential Information"). Furthermore, the Recipient may conduct various investigations and inspections regarding the Property which results shall be considered Confidential Information. Recipient agrees to keep in strict confidence, to prevent the unauthorized disclosure by any other person, firm, or company and to not directly or indirectly, make known, divulge, reveal, furnish, make available, or use any Confidential Information except as is required for the purposes permitted in writing by Company. Recipient's obligation of confidentiality shall survive any termination of discussions and/or relationship between Company and Recipient.

Recipient shall reimburse Company for all reasonable costs and expenses incurred by Company in enforcing this Agreement, including, without limitation, reasonable attorney's fees. The Recipient agrees that the Company may seek injunctive relief against Recipient in order to stop or prevent acts in violation of this Agreement and/or to enforce this Agreement.

If the scope or duration of any covenant, term, or provision contained in this Agreement is determined to be too broad to permit enforcement of such covenant, term, or provision to its full extent, then such restriction shall be enforced to the maximum extent permitted by law, and Recipient hereby consents and agrees that the scope of such covenant, term, or provision may be judicially modified accordingly in any proceeding brought to enforce such restrictions.

This Agreement shall be construed and given effect in accordance with the laws of the State of _____ [state], United States of America.

If you are in Agreement with the terms of this letter, please sign and date the enclosed copy of this letter and return it to the undersigned.

_____ [name]

By: _____

Printed Name: _____

Title: _____

Accepted and agreed this ____ [day] day of _____ [month], ____ [year].

_____ [name]

By: _____

Printed Name: _____

Title: _____

[Attach Exhibit A]



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FORM 25.13 Residential sale agreement--one, two or three family home--sale is contingent upon a general inspection and inspections for radon gas, urea formaldehyde, asbestos and wood boring insects

COMMENT

This is an agreement for the purchase and sale of a one, two or three-family residence. Environmental site assessments are not commonly required as part of a residential sale transaction, since the cost is prohibitive. However, if the property's use was not always primarily residential, or if the house is located near a landfill or commercial site, an environmental site assessment may be warranted.

In addition to a general inspection (i.e. roof, HVAC, etc.), a residential purchaser's major concerns will be with interior environmental conditions. For example, the presence of radon gas in homes has been associated with lung cancer. (Radon gas is a natural, colorless, odorless vapor which emanates from the earth.) In addition, urea formaldehyde insulation has been associated with a variety of unfavorable health conditions. Finally, asbestos, which was long favored as an insulation material, can crumble with age and become airborne, causing lung irritation. Asbestos has also been associated with lung cancer. Inspections for these items will help to insure that the purchaser is buying a refuge from the world and not a potential health hazard.

The final environmental contingency in this agreement is for wood boring insects. This contingency contemplates inspections for such insects as carpenter ants, termites and power post beetles. Each of these insects is capable of doing tremendous damage to the structural integrity of a building. These insects are often in inaccessible areas, such that paneling, aluminum siding and the like may have to be removed and restored for a complete inspection. The contingencies provide permission for such removal and allocate the cost of removal and restoration.

If any of these problems is found to exist, the cost of remediation and repair may vary widely, depending on the nature and severity of the problem, where it is located, etc. The contingencies are structured to allow the purchaser to cancel the contract if any of these problems is found. The parties may modify the agreement to allow for a reduction in purchase price equivalent to the cost of remediation and repair. In the alternative, the seller may perform the remediation and repair, leaving the purchase price unchanged. The theory is that a property with any of these problems is not as valuable as one without them.

FORM

AGREEMENT made this ____ [day] day of _____ [month], ____ [year], between _____ [name], residing at _____ [address] (hereafter collectively known as "Seller"), and _____ [name], residing at _____ [address] (hereafter collectively known as "Purchaser").

WHEREAS, Seller is the owner of a certain parcel of real property commonly known as _____ (hereafter referred to as "real property"); and

WHEREAS, Seller desires to sell and Purchaser desires to purchase said real property,

NOW, in consideration of the mutual promises contained herein, it is agreed as follows:

1. Conveyance and Description of Property. Seller agrees to sell and Purchaser agrees to purchase the real property. The real property is located in the city/town/village of _____ [city] in _____ [county] County, _____ [state]. The size of the real property is _____ (_____) acres and includes a house and _____ (_____) other structures, as follows:

2. Use of Property Complies with Zoning Laws. Seller represents that the use of the real property as a _____ [insert: one, two or three] family residence is in compliance with local zoning ordinances. Seller also represents that he has no knowledge that the conditions on the real property violate any existing environmental protection law.

3. Property May Be Transferred Subject to Covenants, Restrictions and Easements. Seller shall transfer the property subject to any covenants, restrictions and easements of record, provided that such items do not render the title unmarketable. Seller shall provide an Owner's Policy of Title Insurance in the amount of the purchase price to Purchaser.

4. Inspections of Property. Purchaser shall take the real property subject to any condition or state of facts which any inspection or accurate survey may show. All inspections and surveys shall be performed at Purchaser's expense. Purchaser shall provide Seller with a copy of all written inspection reports and the survey.

Purchaser and Seller agree that the following inspections shall be made. Seller agrees to provide reasonable access to the real property to Purchaser and the inspectors for the purpose of making these inspections. This Agreement is contingent upon each inspection showing that the condition does not exist. However, a contingency shall be waived if

written notice of the existence of the condition is not given to Seller by _____ [month] _____ [day] _____ [year]. Notice shall be deemed given when mailed by certified mail, return receipt requested. If notice is given, the contract shall be canceled and all deposits made pursuant to this agreement shall be returned to Purchasers immediately.

(a) *General inspection*: the inspection shall be made by a party which is an expert in residential structures and systems.

(b) *Wood boring insects*: the inspection shall be made by a certified exterminator. The condition shall be deemed to exist if the exterminator shall find the presence of any wood boring insect or other organism or any damage to the structures on the property caused by wood boring insects or other organisms.

(c) *Radon*: the inspection shall be performed by _____ [month] _____ [day] _____ [year]. The condition shall be deemed to exist if the test reveals a level of radon gas exceeding _____ (_____) pico curies per liter. Seller agrees to comply with all requirements of the company performing the test, provided that there shall be no monetary cost to Seller to comply.

(d) *Asbestos*: the inspection shall be performed by a licensed asbestos handler. The condition shall be deemed to exist if any asbestos containing material shall be located within the structures on the premises. The Seller consents to the taking of samples of ceiling material, pipe insulation, and boiler or furnace insulation. Such samples shall be taken as inconspicuously as possible in the living spaces of the structures.

(e) *Urea Formaldehyde Insulation*: The inspection shall be performed by _____ [month] _____ [day] _____ [year]. The condition shall be deemed to exist if any urea formaldehyde insulation is located in or on the structures. The Seller consents to the temporary removal of exterior siding and interior paneling, as deemed necessary by the inspector, for the purpose of the inspection. All materials removed shall be restored to their prior condition, all at Purchaser's expense, at the conclusion of the inspection.

Except as set forth above, the Purchaser shall accept the structures and any personal property, fixtures or equipment located in or on the structures in "as is" condition on the date of this Agreement, subject to reasonable wear to the date of transfer. Seller shall bear the expense of any other damage which shall occur prior to transfer of title or possession, whichever event shall occur first. Purchaser shall bear the risk thereafter. Purchaser shall be entitled to inspect the premises within _____ hours prior to the transfer of title. If possession is granted to Purchaser prior to transfer of title, then prior to accepting possession, Purchaser shall provide to Seller a certificate of insurance naming Seller as an additional insured in at least the amount of the purchase price.

5. Personal Property/Fixtures Included in Sale. The following items of personal property and/or fixtures are included in this sale: _____ [insert items].

6. Personal Property/Fixtures Excluded from Sale. The following fixtures and/or items of personal property are excluded from this sale: _____ [insert items].

These items shall be removed from the premises prior to the transfer of title. Failure to do so shall waive Seller's right to remove said items.

7. Sale Contingent Upon Purchaser's Obtaining Mortgage. This Agreement shall be contingent upon Purchaser obtaining a commitment to lend from a lender for a _____ (_____) fixed rate mortgage loan in the amount of _____ Dollars (\$_____) for a term of _____ (_____) years at an interest rate of _____ (_____) percent per annum, with no more than _____ (_____) "points." This contingency shall be deemed waived unless Purchaser shall notify Seller in writing, certified mail, return receipt requested, on or before _____ [month] _____ [day] _____ [year], of the inability to obtain a commitment

to lend from a lender for such a mortgage. Purchaser agrees to use best efforts to secure such a commitment to lend within the specified time period. However, if Purchaser so notifies, the contract shall be deemed canceled. All deposits made pursuant to this Agreement shall be returned to Purchaser immediately.

8. Deed. Seller shall provide Purchaser with a _____ [*insert type of deed*] deed. Seller shall provide proof of payment of any transfer tax thereon at the time of transfer of title.

9. Purchase Price. The purchase price is the sum of _____ Dollars (\$_____). Purchaser has given Seller a deposit of _____ Dollars (\$_____), and shall pay the balance at the time of transfer of title. The balance shall be paid in cash or by certified check only. The deposit shall be held by Seller's attorney until transfer of title or cancellation of this Agreement.

10. Any notice required to be given to Purchaser shall be in writing and sent certified mail, return receipt requested, to:

[name]

[address]

[address]

Any notice required to be given to Seller shall be in writing and sent certified mail, return receipt requested, to:

[name]

[address]

[address]

Notice shall be deemed given when received.

11. Agreement Contains Entire Understanding. This Agreement contains the entire understanding of the parties; there have been no representations made which are not contained herein.

12. No Oral Modifications. This Agreement may only be modified by a written amendment signed by all parties. An oral modification shall not be binding on any party.

13. Controlling State Law. This Agreement shall be construed in accordance with the laws of the State of _____ [state].

14. This Agreement shall be binding upon and inure to the benefit of the parties hereto, their heirs, representatives, successors and assigns.

15. Any failure by either party to enforce any right arising hereunder shall not be deemed a waiver of such right.

IN WITNESS WHEREOF, the parties hereto have set their hands and seals the day and year first above written.

PURCHASER:

_____ [name]

By: _____

Printed Name: _____

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Title: _____

SELLER:

_____ [name]

By: _____

Printed Name: _____

Title: _____

STATE OF _____ [state])
COUNTY OF _____ [county]) SS:

BEFORE ME, a Notary Public in and for said County and State, personally appeared _____ [name],
a(n) _____ [state] _____ [entity], by _____ [name], its
_____ [title], who acknowledged that _____ [he/she] did sign the foregoing
instrument for and on behalf of said corporation, being thereunto duly authorized, and that the same is
_____ [his/her] free act and deed individually and as such officers and the free act and deed of said
_____ [entity].

IN TESTIMONY WHEREOF, I have hereunto set my hand and official seal at _____ [city],
_____ [state], this _____ [day] day of _____ [month], _____ [year].

Notary Public

STATE OF _____ [state])
COUNTY OF _____ [county]) SS:

BEFORE ME, a Notary Public in and for said County and State, personally appeared _____ [name],
a(n) _____ [state] _____ [entity], by _____ [name], its
_____ [title], who acknowledged that _____ [he/she] did sign the foregoing
instrument for and on behalf of said corporation, being thereunto duly authorized, and that the same is
_____ [his/her] free act and deed individually and as such officers and the free act and deed of said
_____ [entity].

IN TESTIMONY WHEREOF, I have hereunto set my hand and official seal at _____ [city],
_____ [state], this _____ [day] day of _____ [month], _____ [year].

Notary Public



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FORM 25.14 Residential sale agreement--condominium--representation that purchaser shall have use of all waterways located on condominium property--notice of nearby industrial site

COMMENT

This agreement is for the purchase and sale of a residential condominium unit. It should be remembered that one aspect of condominium ownership is that, in addition to one's own unit, one obtains an undivided interest in "common areas." Such common areas are defined by the condominium declaration and plan. Common areas often include such things as hallways, staircases, yards, basements, parking areas and swimming pools. In this particular form, streams are located on the premises as part of the recreational area. A homeowners' association has been established to maintain access to the area, insure the area, pay taxes and maintain the property. The purchaser is guaranteed access to the recreational area and is required to make payments to support the homeowners' association.

This particular condominium is located near an industrial site. The developer has disclosed this information and the steps taken to insure water purity. The purchaser is on notice of potential problems and must take any steps he deems appropriate to protect his interest. In any event, it is important that the purchaser is making an informed decision.

FORM

AGREEMENT made this ____ [day] day of _____ [month] ____ [year], between _____ [name], a corporation existing under the laws of the State of _____ [state], with offices for the transaction of business at _____ [address] (hereafter referred to as "Seller"), and _____ [name], residing at _____ [address] (hereafter referred to as "Purchaser").

WITNESSETH:

WHEREAS, Seller has constructed _____ [*insert total number of condominium units*] condominium units on the real property and premises commonly known as Number _____ Western Avenue, in the City of _____ [*city*], State of _____ [*state*], more particularly described in Schedule "A" annexed hereto; and

WHEREAS, Seller has delivered to Purchaser a copy of the Plan of Condominium Ownership, the By-Laws, Rules and Regulations, the Condominium Declaration, the Declaration of Restrictions, and the floor plans of the condominium; and

WHEREAS, the originals of said documents set forth above were filed with the _____ [*county*] County Clerk on _____ [*month*] _____ [*day*] _____ [*year*]; and

WHEREAS, Purchaser desires to purchase Unit No. _____ of the condominium,

NOW, in consideration of the mutual promises contained herein, it is agreed as follows:

1. Conveyance of Property. Seller agrees to sell and Purchaser agrees to purchase Unit No. _____ of the condominium, as designated on the floor plans which were duly filed with the _____ [*county*] County Clerk, and also designated as City of _____ [*city*], County of _____ [*county*] tax map number _____, together with an undivided _____ percent (_____ %) interest in the common areas. Said common areas are designated on the floor plans and more particularly described in the Plan of Condominium.

2. Purchase Price. The purchase price is the sum of _____ Dollars (\$_____). The purchase price shall be paid as follows:

(a) _____ Dollars (\$_____) deposit upon execution of this Agreement;

(b) _____ Dollars (\$_____) further deposit upon satisfaction or waiver of all contingencies contained herein;

(c) _____ Dollars (\$_____) further deposit upon selection of all options to be installed;

(d) _____ Dollars (\$_____) upon transfer of title.

All payments shall be made in certified or bank funds.

3. Deposits to be Held in Escrow. All deposits shall be held in an escrow account until transfer of title or termination of this Agreement. The escrow account shall bear interest, which will be credited against the purchase price at the time of transfer of title. The escrow account will be held by _____ [*name*], who shall be entitled to a management fee of _____ (_____ %) of the amount of interest earned by the deposit. Seller shall be entitled to change escrow manager at any time to any unrelated third party. Seller shall provide notice to Purchaser of such change within _____ (_____) days after such change occurs. Any escrow manager engaged by Seller shall be bonded.

4. Common Waterways. The above described condominium property contains areas designated on the filed map as "Common Waterways." These areas are intended for use by the Purchaser herein in common with all other owners of

the condominium property pursuant to the terms of a certain "Declaration of Restrictions," which has been filed in the office of the _____ [county] County Clerk in book _____ of Deeds, at Page _____. Use shall be limited to the Purchaser, his immediate family and guests. The common waterways shall not be available to the general public.

The rights granted herein and pursuant to the above described Declaration of Restrictions shall be appurtenant to the condominium property transferred herein and shall run with the land.

The "Common Waterways" shall be managed by a Homeowners' Association, as described in the Condominium Offering Plan and Declaration of Restrictions. The Homeowners' Association shall be entitled to charge a period fee for use and/or annual fee to cover annual costs of taxes, maintenance, repair, supervision, insurance, and administration. Such fees, when levied, shall become a lien against Purchaser's unit. Failure to pay the fee when due shall entitle the Homeowners' Association to foreclose its lien.

5. Notice of Industrial Complex. Notice is hereby given to the Purchaser that the Condominium Property is adjacent to the _____ [name] Industrial Complex. The wells for the condominium property are located approximately one hundred (100) yards from the boundary with the _____ [name] Industrial Complex. An environmental site review was performed, prior to obtaining site plan approval by the Town of _____ [town]. Said review found no adverse impact on the condominium property at that time. The _____ [state] Public Service Commission permit to operate the wells requires monthly monitoring of water quality so long as the wells are used for drinking water. However, no other environmental testing or monitoring on the condominium property will be undertaken or ongoing.

6. Sale Contingent on Purchaser's Obtaining Mortgage. This Agreement shall be contingent upon Purchaser obtaining a commitment to lend from a lender for a fixed rate mortgage loan in the amount of _____ Dollars (\$_____) for a term of _____ (_____) years and at an interest rate of _____ percent (_____%) per annum, with no more than _____ (_____) "points." This contingency shall be deemed waived unless Purchaser shall notify Seller in writing, certified mail, return receipt requested, on or before _____ [month] _____ [day] _____ [year], of the inability to obtain a commitment to lend from a lender for such a mortgage. Purchaser agrees to use best efforts to secure such a commitment to lend within the specified time period. If Purchaser so notifies, the contract shall be deemed canceled. All deposits made pursuant to this Agreement shall be returned to Purchaser immediately.

7. Deed. Seller shall deliver to Purchaser a Special Warranty Deed. This deed shall convey the condominium unit together with the _____ percent (_____%) interest in the common areas. A copy of the prototype deed is included in the Condominium Plan. The deed shall be properly executed and acknowledged for recording. Purchaser shall pay any documentary stamps or transfer tax required in the State of _____ [state], as set forth in the Condominium Plan. Seller shall provide proof of compliance with the requirements of the real property gains tax laws.

8. Seller to Satisfy All Construction Loan Mortgage Liens. Seller shall cause all construction loan mortgage liens and any other liens to be satisfied or released as to Purchaser's unit, at or prior to the transfer of title. Seller may use funds to be received from Purchaser for such releases or satisfactions, if satisfactory arrangements are made with Purchaser's title insurance company.

9. Seller to Deliver Marketable Title. Seller shall deliver marketable title to Purchaser, subject to the Plan of Condominium Ownership, Condominium Declaration, By-Laws, Rules and Regulations, Floor Plans of the condominium, Declaration of Restrictions, any enforceable covenants, restrictions, easements of record, zoning laws or environmental laws, provided that these do not render title to the unit unmarketable. Purchaser agrees to be bound by the foregoing as recorded in the _____ County Clerk's office.

10. Certificate of Occupancy. Purchaser shall not be required to accept transfer of title until a certificate of occupancy has been issued by the City of _____ [city]. When the certificate of occupancy has been issued, Seller shall give written notice to Purchaser. Purchaser shall be required to accept transfer of title within _____ (_____) days thereafter. If Purchaser fails to accept transfer of title within said period, Purchaser shall pay, per diem, interest on the balance of the purchase price from the date of the issuance of the certificate of occupancy until transfer of title occurs, calculated at an annual interest rate of _____ [name] Bank's prime rate, plus _____ percent (_____%).

11. Title Insurance. Seller currently has title insurance through _____ [name] Title Company. If Purchaser intends to use his own title company, _____ [name] Title Co. will provide owners and lender title insurance to Purchaser at a bulk rate, which may be less than the rate from other title companies.

12. Purchaser to Execute Power of Attorney. At the transfer of title and simultaneously with the delivery to Purchaser of the deed conveying the Condominium Unit, Purchaser shall execute and acknowledge a power of attorney in the form set forth in the Condominium Plan. The Purchaser shall deliver such power of attorney to Seller.

13. Notice. Any notice required to be given to Purchaser shall be in writing and sent certified mail, return receipt requested, to:

_____[name]
 _____[address]
 _____[address]

Any notice required to be given to Seller shall be in writing and sent certified mail, return receipt requested, to:

_____[name]
 _____[address]
 _____[address]

Notice shall be deemed given when received.

14. Agreement Contains Entire Understanding. This Agreement contains the entire understanding of the parties; there have been no representations made which are not contained herein.

15. No Oral Modifications. This Agreement may only be modified by a written amendment signed by all parties. An oral modification shall not be binding on any party.

16. Controlling Law. This Agreement shall be construed in accordance with the laws of the State of _____ [state].

17. Any failure by either party to enforce any right arising hereunder shall not be deemed a waiver of such right.

IN WITNESS WHEREOF, the parties hereto have set their hands and seals the day and year first above written.

PURCHASER:

_____[name]

By: _____

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Printed Name: _____

Title: _____

SELLER:

_____ [name]

By: _____

Printed Name: _____

Title: _____

STATE OF _____ [state])
COUNTY OF _____ [county]) SS:

BEFORE ME, a Notary Public in and for said County and State, personally appeared _____ [name],
a(n) _____ [state] _____ [entity], by _____ [name], its
_____ [title], who acknowledged that _____ [he/she] did sign the foregoing
instrument for and on behalf of said corporation, being thereunto duly authorized, and that the same is
_____ [his/her] free act and deed individually and as such officers and the free act and deed of said
_____ [entity].

IN TESTIMONY WHEREOF, I have hereunto set my hand and official seal at _____ [city],
_____ [state], this _____ [day] day of _____ [month], _____ [year].

Notary Public

STATE OF _____ [state])
COUNTY OF _____ [county]) SS:

BEFORE ME, a Notary Public in and for said County and State, personally appeared _____ [name],
a(n) _____ [state] _____ [entity], by _____ [name], its
_____ [title], who acknowledged that _____ [he/she] did sign the foregoing
instrument for and on behalf of said corporation, being thereunto duly authorized, and that the same is
_____ [his/her] free act and deed individually and as such officers and the free act and deed of said
_____ [entity].

IN TESTIMONY WHEREOF, I have hereunto set my hand and official seal at _____ [city],
_____ [state], this _____ [day] day of _____ [month], _____ [year].

Notary Public

[Attach Schedule A]



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FORM 25.15 Residential sale agreement--shares of a cooperative apartment--representation that seller shall provide purchaser with copy of environmental assessment obtained by cooperative board of managers

COMMENT

This agreement is for the purchase of shares in a cooperative apartment building. The shares are allocated to a specific apartment.

This particular cooperative is located in a renovated warehouse building. The sponsor who converted the warehouse into apartments provided the board of managers of the cooperative with an environmental site assessment. This environmental site assessment was performed before the sponsor purchased and converted the warehouse into apartments.

The purchaser has negotiated a contingency that will allow him to review the environmental site assessment. He may cancel the agreement within ten days thereafter. The purchaser need not give any reason for the cancellation, as long as notice of cancellation is given in a timely manner.

The purchaser does not need to obtain an update of the environmental site assessment because the cooperative plan, by-laws, cooperative rules and regulations permit only residential uses of the property. Hence, other residents of the building have only been using their apartments for residential purposes, not for commercial or industrial reasons that might necessitate an updating of the environmental site assessment.

The purchaser does not need to obtain termite, radon, or other similar inspections because he does not own the building (or, for that matter, his apartment); rather, he owns shares in the entity which owns the building. It is the responsibility of the board of managers to monitor the building for these problems.

FORM

AGREEMENT made this ____ [day] day of _____ [month], ____ [year], between _____ [name], residing at _____ [address] (hereafter referred to as "Seller"), and _____ [name], residing at _____ [address] (hereafter referred to as "Purchaser").

W I T N E S S E T H:

WHEREAS, Seller is the owner of _____ (_____) shares of the _____ [name] Cooperative Apartment, located at _____ [address], which shares are allocated to apartment number _____; and

WHEREAS, Seller is also the tenant of a proprietary lease for said apartment _____, and

WHEREAS, Seller desires to sell and Purchaser desires to purchase said shares,

NOW, in consideration of the mutual promises contained herein, it is agreed as follows:

1. Conveyance of Shares. Seller hereby agrees to sell all _____ (_____) shares of the _____ [name] Cooperative Apartment to Purchaser for the sum of _____ Dollars (\$ _____), to be paid as follows:

(a) _____ Dollars (\$ _____) deposited with Seller upon execution of this Agreement, to be held in escrow until transfer of title;

(b) _____ Dollars (\$ _____) upon transfer of title, in certified or bank funds.

Upon payment in full, Seller shall deliver his/her _____ (_____) shares of the cooperative apartment.

2. Sale Contingent on Approval from Cooperative Board. This Agreement is contingent upon Purchaser receiving approval of the sale from the Cooperative Board of Managers. Purchaser agrees to provide all personal and financial information requested by the Cooperative Board of Managers. Purchaser agrees to meet with the Cooperative Board of Managers if so requested. Purchaser may elect to cancel this agreement if approval is not received on or before _____ [month] ____ [day] ____ [year]. Purchaser shall notify Seller of his/her election to cancel by giving Seller written notice in person or by certified mail, return receipt requested. Upon receipt of notice, Seller shall promptly return the deposit to Purchaser.

3. Environmental Assessment. Seller hereby agrees to provide to Purchaser a copy of the environmental assessment dated _____ [month] ____ [day] ____ [year], which was prepared at the request of the Board of Managers of the _____ [name] Cooperative. The environmental assessment shall be provided to Purchaser on or before _____ [month] ____ [day] ____ [year]. Purchaser shall have _____ (_____) days from receipt of the environmental assessment to cancel this Agreement. Notice of cancellation shall be given to Seller in person or by certified mail, return receipt requested. Notice shall be sent on or before the expiration of the tenth (10th) day. If Purchaser notified Seller of cancellation, Purchaser's deposit shall be refunded immediately, and this Agreement shall be of no further force and effect. If Purchaser does not timely notify Seller, this Agreement shall become binding subject to any other contingencies which may be contained therein.

4. Purchaser Provided with Copies of Cooperative Plan, By-laws, etc. The parties acknowledge that Seller has provided Purchaser with a copy of the Cooperative Plan, By-Laws, and Cooperative Rules and Regulations. Purchaser acknowledges that he/she has had a full and fair opportunity to read the foregoing documents and review them with legal counsel of his/her choice. Purchaser has not relied on any oral representations, warranties or statements of any kind in determining whether to purchase the shares of this cooperative apartment.

5. Residency of Purchaser. Purchaser represents that he/she is a resident of the State of _____ [state].

6. Sale Contingent on Purchaser's Obtaining Mortgage. This Agreement shall be contingent upon Purchaser obtaining a commitment to lend from a lender for a fixed rate mortgage loan in the amount of _____ Dollars (\$_____) for a term of _____ (_____) years and at an interest rate of _____ percent (_____%) per annum, with no more than _____ (_____) "points." This contingency shall be deemed waived unless Purchaser shall notify Seller in writing, certified mail, return receipt requested on, or before _____ [month] _____ [day] _____ [year], of the inability to obtain a commitment to lend from a lender for such a mortgage. Purchaser agrees to use best efforts to secure such a commitment to lend within the specified time period. If Purchaser so notifies, the contract shall be deemed canceled. All deposits made pursuant to this Agreement shall be returned to Purchaser immediately.

7. Notice. Any notice required to be given to Purchaser shall be in writing and sent certified mail, return receipt requested, to:

_____ [name]
 _____ [address]
 _____ [address]

Any notice required to be given to Seller shall be in writing and sent certified mail, return receipt requested, to:

_____ [name]
 _____ [address]
 _____ [address]

Notice shall be deemed given when received.

8. Agreement Contains Entire Understanding. This Agreement contains the entire understanding of the parties; there have been no representations made which are not contained herein.

9. No Oral Modifications. This Agreement may only be modified by a written amendment signed by all parties. An oral modification shall not be binding on any party.

10. Controlling Law. This Agreement shall be construed in accordance with the laws of the State of _____ [state].

11. Any failure by either party to enforce any right arising hereunder shall not be deemed a waiver of such right.

IN WITNESS WHEREOF, the parties hereto have set their hands and seals the day and year first above written.

PURCHASER:

_____ [name]

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By: _____

Printed Name: _____

Title: _____

SELLER:

_____ [name]

By: _____

Printed Name: _____

Title: _____

STATE OF _____ [state])
COUNTY OF _____ [county]) SS:

BEFORE ME, a Notary Public in and for said County and State, personally appeared _____ [name],
a(n) _____ [state] _____ [entity], by _____ [name], its
_____ [title], who acknowledged that _____ [he/she] did sign the foregoing
instrument for and on behalf of said corporation, being thereunto duly authorized, and that the same is
_____ [his/her] free act and deed individually and as such officers and the free act and deed of said
_____ [entity].

IN TESTIMONY WHEREOF, I have hereunto set my hand and official seal at _____ [city],
_____ [state], this _____ [day] day of _____ [month], _____ [year].

Notary Public

STATE OF _____ [state])
COUNTY OF _____ [county]) SS:

BEFORE ME, a Notary Public in and for said County and State, personally appeared _____ [name],
a(n) _____ [state] _____ [entity], by _____ [name], its
_____ [title], who acknowledged that _____ [he/she] did sign the foregoing
instrument for and on behalf of said corporation, being thereunto duly authorized, and that the same is
_____ [his/her] free act and deed individually and as such officers and the free act and deed of said
_____ [entity].

IN TESTIMONY WHEREOF, I have hereunto set my hand and official seal at _____ [city],
_____ [state], this _____ [day] day of _____ [month], _____ [year].

Notary Public



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FORM 25.16 Representation by seller that premises have never been used for storage or disposal of hazardous waste

COMMENT

In this clause, the seller represents that the premises have never been used for storage or disposal of hazardous waste. The seller also agrees to be liable for all damages suffered by the purchaser in the event that this representation is incorrect. The clause should be used in situations where the purchaser, as a prerequisite to obtaining financing, must either provide the lender with an environmental site assessment establishing that the premises are "clean," or with the type of representation found below. Also, the clause states that purchaser's lender is a third party beneficiary of the clause.

It should be remembered that the representation and indemnification are only as good as the financial ability of the seller to reimburse the purchaser for losses which may occur if the seller is either mistaken in his belief that the property is free of hazardous waste, or makes a deliberate misrepresentation. The losses may include such things as clean-up costs under the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA"), 42 USC § 9601 *et seq.*, loss of use of the premises, and damage to person or property.

FORM

Seller hereby represents and warrants, which representations and warranties will survive the transfer of title to Purchaser, that the subject premises have never been used for the storage or disposal of hazardous waste. The term "hazardous waste," as used herein, shall mean substances deemed hazardous pursuant to the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA"), 42 USC § 9601 *et seq.*

This representation is made to induce Purchaser to enter into this contract for purchase of the subject premises. It is understood by the parties hereto that Purchaser's financing is contingent upon Seller making this representation. It is further understood that Purchaser's loan documents will provide that the loan will be due and payable in full if evidence of hazardous waste is discovered on the subject premises. Seller agrees to be liable for all damages, including economic and consequential damages, in the event that the representation and warranty contained in this section are inaccurate. Finally, Seller acknowledges that Purchaser's lender is a third party beneficiary of the foregoing representation and warranty.



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33-25 Current Legal Forms for Real Estate FORM 25.17

FORM 25.17 Representation by seller that hazardous waste has been properly removed

COMMENT

This form should be used when the parties are aware that hazardous waste has been located and removed from the property.

The concerns of the parties are fourfold:

- (1) that the waste has been completely removed;**
- (2) that removal has been performed in compliance with all state and federal laws;**
- (3) that the waste has been properly disposed of; and**
- (4) that all agencies with jurisdiction have been notified and have approved of the proceedings.**

This representation may assist the purchaser to establish an innocent purchaser defense under the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA"), 42 USC § 9601 *et seq.*, if a problem arises later. Furthermore, a prudent purchaser may want to obtain a copy of the closure and/or clean-up report from the contractor that cleaned up the hazardous waste indicating that the property is clean. Also, some states allow for covenants not to sue which are issued by various governmental agencies. Covenants not to sue is the agreement of the government that a condition has been remedied and that it will not pursue any more claims with respect to that condition.

FORM

Seller hereby represents and warrants that the subject premises formerly contained approximately _____ (_____) barrels of _____ [*name*], a substance deemed "hazardous" under various state and federal laws and regulations (the "Hazardous Substance"). Seller further represents and warrants that the Hazardous Substance has been removed from the subject premises. Said Hazardous Substance has been packaged, transported and disposed of in strict compliance with all federal, state and municipal laws, regulations and policies. These representations and warranties will survive the transfer of legal title to the Purchaser.

Seller agrees to provide purchaser with copies of all shipping invoices and uniform hazardous waste manifests evidencing proper transfer of the Hazardous Substance.

Seller agrees to indemnify and hold purchaser harmless for any loss including, but not limited to, damage to person or property or economic loss, including defense costs, and consequential damages arising out of the packaging, transportation and disposal of the Hazardous Substance.



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33-25 Current Legal Forms for Real Estate FORM 25.18

FORM 25.18 Representation by seller that it has complied with all environmental laws--short form

COMMENT

This form should be used in every agreement for the sale of real property. If the seller is unable or unwilling to make such a representation, the purchaser should make a thorough investigation, including an environmental site assessment, before obligating himself to purchase the property. The representation is very limited, because it only relates to the period of seller's ownership.

FORM

Seller hereby represents and warrants that, during its period of ownership, seller, its agents and employees complied with all federal, state and municipal environmental laws, regulations and policies as such relate to the subject premises. The representations and warranties will survive transfer of title from Seller to Purchaser.

Seller agrees to indemnify and hold purchaser harmless for any loss including, but not limited to, damage to person or property or economic loss, including defense costs, arising out of any violation of environmental law which occurred during Seller's ownership of the subject premises, which violation was caused by the act or omission of Seller, its agents or employees.



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FORM 25.19 Representation by seller that it has complied with all federal, state and local environmental laws and regulations--long form

COMMENT

In the following clause, the seller makes a long series of representations for the benefit of the purchaser. These representations include, among others, that the seller has complied with all federal, state and local environmental laws and regulations affecting the subject property. The seller also represents that it is unaware of any legal actions or claims, either threatened or pending, arising out of an environmental mishap on the property or out of a violation of any environmental law or regulation on the property.

FORM

Seller makes the following representations and warranties to Purchaser, which representations and warranties shall survive the transfer of title from Seller to Purchaser:

- (1) Any and all governmental approvals, permits and notifications required by federal, state and local environmental laws relating to the subject property and/or its use have been obtained.
- (2) Seller is unaware of any action, either threatened or commenced, by any governmental agency arising out of an alleged violation of any environmental law or regulation on the subject premises.
- (3) No governmental agency has notified the seller of any violation of any environmental law or regulation on the subject premises.
- (4) Seller is unaware of any civil action, either threatened or commenced, by a party other than a governmental agency

arising out of an alleged environmental mishap occurring on the subject premises.

(5) There has been no environmental mishap with respect to the subject premises.

(6) There are no hazardous waste or hazardous substances on or about the subject property.

(7) The past and present uses to which the seller has put or is putting the subject premises do not violate any relevant federal, state or local environmental laws or regulations.



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33-25 Current Legal Forms for Real Estate FORM 25.20

FORM 25.20 Disclosure by seller of condition of premises--environmental accident previously occurred on premises

COMMENT

This form is designed to be used where an adverse environmental event has already occurred. The seller reveals all the information which he has regarding the nature of the event, the steps taken to remediate the condition, and that notice was given to federal and state authorities.

The seller also disclaims any further knowledge and leaves to the purchaser the responsibility of discovering what remaining damage there may be. Thus, the purchaser should make the sale contingent upon the results of an environmental site assessment. The assessment will allow the purchaser to discover whether any damage still exists and make an informed decision as to whether to proceed with the transfer of title.

FORM

Seller hereby represents and warrants that it has been the owner of the subject premises for _____ (_____) years. Seller was the owner at the time the structures presently existing on the premises were constructed. Seller has used the premises for the manufacture of _____ [name]. During the course of the manufacturing process, _____ [name] was used [or created or emitted]. This substance is considered hazardous under federal and state law. This substance is stored in fifty-five gallon drums which were removed from the premises on a weekly basis. In _____ [month] of _____ [year] _____ (_____) drums were damaged and leaked _____ (_____) gallons of the substance into the soil [or building].

Pursuant to state and federal regulations, the following steps were taken to contain the spill and remediate the damage:

Federal and state authorities were notified pursuant to law and monitored the containment and remediation process. Seller will provide to Purchaser copies of all records maintained by Seller, pursuant to law, regarding the damage containment and remediation process.

Seller believes it possible that traces of the substance may remain in the soil in the area of the leak. Traces of the substance may have reached to other areas as well. Seller has no knowledge of the amount of the substance which may be present or the distance to which it may have reached.

Seller makes this representation knowing Purchaser will rely on it in determining whether to purchase the subject premises. The representations made herein will survive the closing and the transfer of title of the property to Purchaser.



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33-25 Current Legal Forms for Real Estate FORM 25.21

FORM 25.21 Representation by seller of its past and current uses of property--short form--clause designed to protect seller

COMMENT

The following clause is intended for use by a seller who has never used the subject property to produce, treat, store or dispose of hazardous materials. Note that the clause focuses solely on the seller's use of the property; it makes no representations about how the property was used by previous owners.

FORM

Seller represents that _____ [he, she or it] has never used the property being conveyed to the purchaser for the purpose of producing, processing, treating, storing, recycling or disposing of any hazardous substance or materials. This representation shall survive the transfer of title of the property to Purchaser.



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FORM 25.22 Limitation on seller's liability for environmental conditions

COMMENT

This provision can be used in a purchase agreement by a seller to limit the seller's exposure on environmental representations and warranties. Obviously, this provision may also be used to limit a seller's exposure with respect to any representation or warranty. This provision is very detailed and lengthy. In some cases, this limitation or disclaimer may be longer than the actual representations and warranties made by a purchaser.

FORM

Limitations. The representations and warranties of Seller contained in Section _____ are subject to the following limitations:

a. Exclusive Benefit of Buyer. Seller's representations and warranties are for the exclusive benefit of Purchaser and shall not be for the benefit of any other person or entity. Any change in control of Purchaser, including, but not limited to, a sale or transfer of _____ percent (_____ %) or more of Seller's stock or partnership interests shall terminate Seller's liability to Purchaser.

b. Knowledge of Purchaser. Seller shall have no liability to Purchaser for the falsity of any representation or the breach of any warranty to the extent that Purchaser, or any employee, contractor or agent of Purchaser ("Purchaser's Agent"), (i) had knowledge of the falsity of such representation or of the breach of such warranty when made; or (ii) fails to give written notice to Seller of the breach as soon as Purchaser or Purchaser's Agent acquires such knowledge.

c. Limitation on Claims. Purchaser shall not be entitled to make any claim under Section _____ with respect to the breach of any representation or warranty unless and until the amount of such claims is reasonably believed

by Purchaser to be _____ Dollars (\$_____) or more, or the aggregate of all claims for misrepresentation or breach of warranty made by Seller shall exceed _____ Dollars (\$_____). Seller's total obligation to indemnify Purchaser with respect to the breach of any representation or warranty of Seller under Section _____ shall in no event exceed a maximum amount of _____ Dollars (\$_____).

d. Expiration Period of Representations and Warranties. Seller's representations and warranties under Section _____ shall survive for _____ (_____) year(s) after the closing.

e. Limitation on Damages. In no event shall Seller be liable under Section _____ for incidental, special, exemplary or consequential damages, including, but not limited to, loss of profits or revenue, interference with business operations; loss of tenants; lenders; investors or buyers; diminution in value of the Property; or inability to use the Property.

f. Knowledge of Seller. Any representations or warranties made to "the knowledge of Seller" or to the "best of Seller's knowledge" or words of like import shall be deemed to be breached only if the most senior management official assigned full time to Seller's facility at the Property at the date of this Agreement had actual knowledge of the falsity of such representation or of the breach of such warranty.



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FORM 25.23 Disclaimer of warranties by seller of condition of premises

COMMENT

This form is designed to be used in a sale agreement where the seller has taken title to the premises at a foreclosure sale and has no knowledge about the condition of the premises. The purchaser should negotiate a contingency for approving the results of an inspection of the property.

FORM

Seller hereby discloses to Purchaser that Seller owns the subject premises as a result of a foreclosure sale at which Seller was the successful bidder. Since the transfer of title, Seller has not, personally or by an agent or representative, inspected the premises in any manner. Therefore, Seller makes no representation or warranty to Purchaser with regard to the condition of the premises. Further Seller hereby disclaims any knowledge of any substances that may have been stored or used, or the use or fitness of the premises, either written, oral, express or implied.

It shall be the sole and unconditional responsibility of the Purchaser to determine the condition of the premises and its feasibility, suitability and desirability for Purchaser's needs.



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FORM 25.24 Disclaimer of warranties by seller of condition of premises--alternate form

COMMENT

In the clause below, the seller makes no representations to the buyer regarding the present condition of the premises, or regarding past uses of it by the seller or any previous owner or tenant. Thus, it is the purchaser's sole responsibility to inspect the premises to determine their condition before signing the sale-purchase agreement.

FORM

Seller makes no representations or warranties regarding the condition of the premises, past uses of the premises by the seller or by any previous owner, operator or lessee of the premises, or compliance with any federal, state or local environmental law, ordinance or regulation. It is the sole responsibility of Purchaser to inspect the premises in order to determine their present condition. Purchaser fully assumes all responsibility for the condition, use or fitness of the premises, including any existing defects.



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FORM 25.25 Multiple disclaimers by seller

COMMENT

In the following clause, the seller of real property, in an effort to protect itself against future lawsuits by the purchaser, makes a series of disclaimers. First, the seller states that it has no knowledge of the uses to which prior owners put the property, or whether any prior owner brought onto the property or produced there any hazardous substances or wastes. Second, the seller makes no representation to the purchaser regarding the current condition of the premises, or whether the premises are presently in compliance with all federal, state and local environmental laws and regulations. Last, disclaimers in contracts should be as conspicuous as possible so that there can be absolutely no misunderstanding as to the meaning of the provision.

FORM

Seller hereby makes the following disclaimers to purchaser:

- (1) Seller has no knowledge of the uses to which prior owners put the subject premises.
- (2) Seller has no knowledge of whether any prior owner brought upon the subject premises or generated thereon any hazardous substance or hazardous waste.
- (3) Seller has no knowledge of whether any prior owner created any adverse environmental condition upon the subject premises.
- (4) Seller makes no representations or warranties to purchaser regarding the current condition of the subject premises.

(5) Seller makes no representations or warranties to purchaser that the subject premises are in full compliance with all environmental laws and regulations, whether federal, state or local.

(6) Purchaser is not relying upon any information obtained from Seller, either express or implied and Purchaser hereby acknowledges that it has fully investigated the condition, use and fitness of the premises and that it accepts the premises in their "AS IS," "WHERE IS" condition, WITH ALL FAULTS.



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FORM 25.26 Additional disclaimer language

COMMENT

There are many ways to disclaim representations and warranties regarding the condition, fitness or use of a property. The following is another example.

FORM

No representations or warranties have been made by the Seller or anyone on Seller's behalf to the Purchaser as to the condition, fitness or use of the premises of the improvements, and it is understood and agreed that the premises are sold "AS IS," "WHERE IS" WITH ALL FAULTS at the time this Agreement is closed.



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FORM 25.27 Additional disclaimer language

COMMENT

The following is another example of disclaimer language for use by a seller.

FORM

All understandings and agreements heretofore had between the parties are merged in this Agreement, which alone fully and completely expresses their agreement, and the same is entered into after full investigation, neither party relying upon any statement, representation, express or implied warranties, guarantees, promises, statements, "setups," representation, or information, not embodied in this Agreement, made by the other, or by any real estate broker, agent, employee, servant, or other person representing or purporting to represent Seller. Purchaser has inspected the Property and is thoroughly acquainted with its condition and takes same "AS IS," as of the date of this contract, ordinary wear and tear and damage by the elements or casualty excepted. Seller has not made and does not make any representations as to the physical condition, expenses, operating or any other matter or thing affecting or related to the Property, except as specifically set forth in this Agreement, Purchaser acknowledges that all representations which Seller has made, and upon which Purchaser relied in making this Agreement, have been included in this Agreement.



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FORM 25.28 Additional disclaimer language

COMMENT

The following is another example of disclaimer language that seller may want to consider.

FORM

Seller makes no covenant, representation, or warranty as to the suitability of the Property for any purpose whatsoever or as to the physical condition of the Property. Purchaser acknowledges that portions of the Property were, or may have been, used by present or prior owners for the _____ and related products (some of which may be toxic). As a result of such uses and activities and the seepage of materials, physical and other changes may have occurred in the Property, including, without limitation, the deposit of solid and hazardous wastes and hazardous substances. Purchaser acknowledges having inspected the Property, having observed its physical characteristics and existing conditions, and having had the opportunity to conduct such investigation and study on and of said Property as it deems necessary, and hereby waives any and all objections to or complaints about physical characteristics and existing conditions, including, without limitation, subsurface conditions and solid and hazardous wastes and hazardous substances on, under or related to the Property. Purchaser further acknowledges and agrees that the Property is to be sold and conveyed to, and purchased and accepted by Purchaser, in its present condition, "AS IS," and hereby assumes the risk that adverse physical characteristics and existing conditions may not have been revealed by its investigation.



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FORM 25.29 Purchaser has inspected subject premises--clause designed to protect seller

COMMENT

The clause below is designed to protect the seller. In it, the purchaser of real property asserts that he or his agent has already inspected the property, and no evidence has been found of any environmental problem existing anywhere on the premises. The purchaser further assumes full responsibility for all defects, flaws and other conditions on the premises which were not observable during the inspection. The purchaser states that, in buying the property, he has not relied upon any statements made by the seller, or by the seller's agents or employees, concerning the condition of the property. Finally, the provision contains a simple release of seller with respect to any conditions on or about the property.

FORM

Purchaser hereby states that he has personally, or through his agents or employees, inspected the subject premises and has found no evidence whatsoever of the existence of any adverse environmental condition existing on said premises. Purchaser further states that, in purchasing the property, he is in no way relying upon any statements made by the Seller, or by the Seller's agents or employees, regarding the condition of the subject premises. Finally, Purchaser assumes full responsibility for all defects, flaws and conditions existing on the subject premises which were not observable during the aforementioned inspection, and hereby releases Seller from any and all conditions which are on or about the premises.



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FORM 25.30 Disclaimer when buyer is in possession of premises as a tenant

COMMENT

If the purchaser has been a long-standing tenant of the premises, the purchaser may have more information with respect to the premises than the seller. This may be especially true when the seller is simply an investor and has never occupied the premises.

FORM

The parties acknowledge that Buyer is in possession of the Premises under the Lease and that Buyer may have more information regarding the Premises than Seller. Buyer further acknowledges that neither Seller nor its employees, officers, directors, representatives, agents, attorneys, accountants, consultants, successors or assigns (such employees and others being collectively referred to as "Related Parties"), makes any representations, warranties or guaranties, express or implied, oral or written, past, present or future, with respect to the physical condition, including, without limitation, with respect to (i) the structural integrity of any improvements; (ii) the conformity of the improvements to any plans or specifications for the Premises including, but not limited to, any plans and specifications that may have been or which may be provided to Buyer; (iii) the conformity of the Premises to past, current or future applicable zoning or building code requirements; (iv) the existence of soil instability, past soil repairs, soil additions or conditions of soil fill; (v) the sufficiency of any undershoring; (vi) the sufficiency of any drainage; (vii) whether the Premises are located wholly or partially in a flood plane or a flood hazard boundary or similar area; (viii) any other matter affecting the stability or integrity of the land, or any improvements; (ix) the fitness or suitability of the Premises for Buyer's intended use; (x) the ability to operate the Premises for any particular purpose; (xi) revenues or projected revenues from the operation of the Premises; (xii) the potential for further development of the Premises; (xiii) title to or the boundaries of the Premises and the existence of and/or the extent of any liens, encumbrances, easements or leases affecting the Premises; or (xiv) the presence of toxic wastes, hazardous materials or asbestos in, on or about the Premises or in the vicinity of the Premises (collectively, the "Premises Conditions").

Buyer also acknowledges that any information or reports, whether written or oral, pertaining to the Premises, any and all records and other documents pertaining to the use and occupancy of the Premises, the cost and expenses of maintenance thereof, and any and all other matters concerning the Premises Conditions, or other attributes or aspects of the Premises Conditions and improvements that Buyer deems relevant have been examined by Buyer to its satisfaction prior to the execution hereof, and neither Seller, nor any of the Related Parties, has verified the accuracy of any statements or other information therein contained or the qualifications of the persons preparing such information, and they do not warrant the accuracy, completeness or content of any information contained therein, including, without limitation, compliance of the Premises with Environmental Laws (as hereinafter defined) in any way.

Neither Seller nor any of the Related Parties shall be responsible for any failure by Buyer to investigate the Premises.

Buyer shall accept the Premises in an "AS IS," "WHERE IS" condition "WITH ALL FAULTS" as of the date of the execution of this Agreement, subject to reasonable use, wear and tear and natural deterioration between execution of this Agreement and the Closing, and, except as otherwise expressly set forth in this Agreement, without any express or implied warranty as to the physical condition of the Premises or its compliance with applicable laws. Buyer expressly assumes the risk of any such defects within the Premises and its non-compliance with any applicable laws. Buyer further acknowledges that it has made such investigation of the condition of the Premises as Buyer deems necessary or advisable and is relying solely upon its own investigation of such condition and not upon any statement or opinion by Seller or any Related Parties except as specifically set forth in this Agreement.

Seller makes no warranties, either express or implied, as to the environmental condition of the Premises or any environmental matters related in any way to any past or present operations at the Premises including, without limitation, violation of or noncompliance with any law, regulation, rule or requirement of law or regulation (whether now existing or hereafter enacted or adopted) of the United States, any other country or any state, municipality or other subdivision thereof relating to hazardous wastes, hazardous materials or to the pollution or protection of the environment (including, without limitation, ambient air, surface waters, ground water, lands, sub-surface strata and cultural properties) or permits, licenses or registrations issued thereunder ("Environmental Laws").



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FORM 25.31 Environmental Liabilities Agreement related to purchase of stock

COMMENT

The following agreement is an indemnity agreement relating to the purchase of stock in a company. The purchaser is concerned that it will have liability for environmental conditions with respect to a property owned by the operating company. In order to induce the purchaser to make the investment, one of the other existing shareholders is willing to indemnify and hold harmless the purchaser for any pre-existing environmental matter.

The agreement provides a definition of the matters for which purchaser can seek indemnification. It also allows the guarantor the right to replace its indemnity obligation with a bond or insurance.

FORM

ENVIRONMENTAL LIABILITIES AGREEMENT

THIS ENVIRONMENTAL LIABILITY AGREEMENT (the "Agreement") is made and entered into as this ____ [day] day of ____ [month], ____ [year] by and among ____ [name], a(n) ____ [state] corporation ("Guarantor"); ____ [name], a(n) ____ [state] corporation ("Transferee"); and ____ [name], a(n) ____ [state] corporation ("Purchaser;" hereinafter, Transferee and Purchaser, together, the "Indemnified Parties");

WHEREAS, pursuant to that certain Stock Purchase Agreement dated ____ [month] ____ [day] ____ [year] (the "Purchase Agreement") between Guarantor and Purchaser, Guarantor has formed Transferee for the development of that certain real property and improvements in the Town of ____ [town], ____ [state];

county] _____ [state] as shown on Exhibit "A" attached hereto (the "Property");

WHEREAS, pursuant to the Purchase Agreement, Purchaser has agreed to purchase and Guarantor has agreed to transfer a _____ percent (_____ %) interest in Transferee upon the closing of the transactions contemplated by the Purchase Agreement;

NOW, THEREFORE, to induce Purchaser to become a member of Transferee and to consummate the transactions contemplated by the Purchase Agreement, and with knowledge that Purchaser intends to rely upon the certifications and undertakings set forth herein, and for other good and valuable consideration, the sufficiency of which is hereby acknowledged, the parties hereby agree as follows:

1. Capitalized Terms. Capitalized terms used herein and not otherwise defined herein shall have the respective meanings ascribed to such terms in the Operating Agreement of _____ [name] (the "Operating Agreement").

2. Environmental Indemnity. Guarantor hereby agrees to indemnify, defend and hold the Indemnified Parties harmless from any and all liabilities, losses, claims, costs, fines, penalties, costs or charges (including all costs of investigation, monitoring, removal, restoration or permit acquisition) and expenses, including reasonable attorneys' fees, arising from any environmental conditions caused by Hazardous Materials or Wastes existing on or under the Property prior to the date title to the Property was acquired by Transferee on _____ [month] _____ [day] _____ [year].

For purposes hereof, "Hazardous Materials or Wastes" means any hazardous or toxic materials, pollutants, chemicals, petroleum or petroleum products, or contaminants, including, without limitation, asbestos, polychlorinated biphenyls and asbestos or all materials defined as hazardous wastes or substances under any local, state or federal laws, rules or regulations.

3. Scope of Indemnity. It is understood and agreed that the foregoing undertaking of Guarantor to indemnify and hold harmless the Indemnified Parties shall arise only upon the assertion against the Indemnified Parties of any claim relating to the presence of Hazardous Materials or Wastes upon the Property introduced onto or under the Property before title to the Property was acquired by Transferee on _____ [month] _____ [day] _____ [year].

4. Substitute Bond, Insurance or Other Arrangement. At Guarantor's sole cost and expense and with the approval of the Indemnified Parties, which will not be unreasonably withheld or delayed, Guarantor may substitute, for the environmental indemnity provided in this Agreement in Paragraph 2, a bond, insurance policy or similar arrangement for a reputable bonding or insurance company providing comparable coverage to the Indemnified Parties as provided in the environmental indemnity of Paragraph 2 of this Agreement in an amount approved by the Indemnified Parties, which approval shall not be unreasonably withheld or delayed. Such substitute bond, insurance policy or similar arrangement with a reputable bonding or insurance company shall release Guarantor from any and all indemnification obligations accruing after the effective date of the bond or policy provided for in Paragraph 2 of this Agreement.

5. Substitution by Certification. At Guarantor's sole cost and expense, Guarantor or its representatives, on behalf of Transferee, may seek and apply for a certification by the State of _____ [state] that any enforcement action against the Property, any facility on the Property, or any part thereof, shall not be pursued by any governmental authorities with respect to Hazardous Materials or Wastes. Such certification shall release Guarantor from any and all indemnification obligations provided for in this Agreement; provided, however, such release shall be effective (i) solely with respect to the Property or such portion thereof that is the subject of such certification; and (ii) solely with respect to the extent that liability to governmental authorities or other parties is foreclosed by such certification.

6. Cooperation of Purchaser. Purchaser agrees to cooperate fully with Guarantor and Transferee in any environmental clean up or remediation that may be appropriate or required by any governmental authority or as determined by Guarantor, including the provision of any necessary consents for the testing of soil and water on the Property, access to

any records stored on the Property and any other action as may be requested for the maintenance of insurance or any governmental certification necessary or useful for the operation of the Property.

7. Prospective Purchase Agreement. Purchase agrees to fully cooperate in the development of any prospective purchaser agreement, which shall limit the ability of regulatory authorities to pursue Guarantor or Transferee for environmental matters, and which is permissible or may be permissible in the future under the laws of the State of _____ [state]; provided, however, guarantor shall pay any and all costs and expenses associated with said prospective purchaser agreement.

8. Third Party Claims.

(i) Notification and Defense Rights. If the Indemnified Parties receive written notice of the assertion of any claim or of the commencement of any action or proceeding by any entity who is not a party to this Agreement (a "Third Party Claim") against or affecting the Indemnified Parties, if such assertion were presumed to be true (regardless of the actual outcome), for which Guarantor could be obligated to provide indemnification under this Agreement as a result of or in connection with such claim, action or proceeding, the Indemnified Parties will give Guarantor reasonably prompt written notice thereof, but in any event no later than _____ (_____) days after receipt of such written notice of such Third Party Claim; provided, however, that the failure of the Indemnified Parties to give such notice shall only affect the rights of Guarantor under the provisions of this Paragraph 8 to the extent that the Guarantor is actually prejudiced by such failure. Guarantor shall defend such Third Party Claim at Guarantor's sole expense and by Guarantor's own counsel. The Indemnified Parties will have the right to participate in the defense of any Third Party Claim assisted by counsel of its own choosing at the Indemnified Parties' sole expense. Guarantor and the Indemnified Parties will cooperate with each other in good faith in such defense. However, in the event the Indemnified Parties determine to participate in the defense of a claim, Guarantor, or its counsel, shall make all significant decisions relating to the defense, settlement or compromise of any such claim (subject to and in accordance with Paragraph 8(ii)).

(ii) Settlement. In the event there is a dispute between or among Guarantor or any of the Indemnified Parties concerning whether a Third Party Claim should be contested, settled or compromised, it shall be settled, compromised or contested, in accordance with the next succeeding sentences. In the event that Guarantor or the Indemnified parties have reached a good faith, bona fide settlement agreement or compromise, subject only to approval hereunder, with any claimant regarding a matter which may be the subject of indemnification hereunder and desire to settle on the basis of such agreement or compromise, such party who desires to so settle or compromise shall notify the other party in writing of its desire setting forth the terms of such settlement or compromise (the "Notice of Settlement"). The Third Party Claim may be settled or compromised on such basis unless within _____ (_____) days of the receipt of the Notice of Settlement, the party who issued the Notice of Settlement receives a notice from the other party of its desire to continue to contest the matter (the "Notice to Contest") and, in such case:

(x) should the Indemnified Parties deliver a Notice to Contest, the claim shall be so contested and the liability of Guarantor shall be limited as provided in clause (z) below;

(y) If the settlement or compromise could result in a claim for indemnification being made against Guarantor and if Guarantor delivers the Notice to Contest, the Claim shall be so contested and the liability of the Indemnified Parties shall be limited as provided in clause (z) below; and

(z) If a matter is contested as provided in clauses (x) or (y) above and is later adjudicated, settled, compromised or otherwise disposed of and such adjudication, compromise, settlement or disposition results in a liability, loss, damage or injury in excess of the amount for which one party desired previously to settle the matter, then the liability of such party shall be limited to such lesser proposed settlement amount and the party contesting the matter shall be solely responsible for the amount in excess of such lesser proposed settlement amount.

9. Notice of Facts Forming Basis for Claim. A notice of facts that are the basis of an indemnification claim under Paragraphs 8, 9 and 10 shall specify in reasonable detail (a) the nature of the claim, (b) if known, the approximate date of the claim and the amount or an estimate of the amount of the claim, and (c) the basis upon which the claim for indemnification is made. The Indemnified Parties shall undertake in good faith to notify Guarantor within a reasonable time after concluding that they have a basis for an indemnification claim, but failure to give such notice shall not prejudice the Indemnified Parties' rights so long as the notice is given within the time periods specified in Paragraph 8(i), except to the extent that Guarantor is materially prejudiced by such failure.

10. Recovery by the Indemnified Parties. The amount of any indemnified loss hereunder shall be reduced by the amount, if any, of the recovery actually received by the Indemnified Parties with respect to such indemnified loss (net of any out-of-pocket collection costs) under applicable insurance policies or from persons or entities not parties to this Agreement (not including any successor in interest or assign of any party hereto). In the event such recovery is received by either of the Indemnified Parties after it receives payment or other credit under this Agreement with respect to an indemnified loss (an "Indemnity Payment"), then such Indemnified Party shall promptly pay to Guarantor the lesser of (i) the amount of the recovery actually received, less out-of-pocket costs incurred in obtaining such recovery, or (ii) the amount of the Indemnity Payment made by Guarantor to the Indemnified Parties with respect to such Indemnified loss. Subject to the foregoing, in the event that a claim against an insurance carrier or other third party is available in connection with a matter subject to indemnification hereunder, and such claim against the insurance carrier or other third party has not been collected by the Indemnified Parties at the time the Indemnity Payment with respect to the indemnified matter is made, then the Indemnified Parties shall assign such claim to Guarantor (to the extent the Indemnity Payment made by Guarantor to the Indemnified Parties) as a condition to the payment of such indemnity claim by the Indemnified Parties; provided, however, if such claim is not assignable under applicable law or the terms of any insurance policy or other contract, the Indemnified Parties shall attempt in good faith to use its best efforts to collect such claim for the benefit of Guarantor, but at the expense of Guarantor (to the extent of such Indemnity Payment made by Guarantor to the Indemnified Parties). Notwithstanding anything to the contrary, the terms of this Paragraph 10 shall apply to the extent such provisions would operate to invalidate or otherwise prejudice any claim for insurance or against any third party.

11. Change, Waiver, Discharge or Termination. No provision of this Agreement may be changed, waived, discharged or terminated verbally or by any other means except by an instrument in writing signed by the party against whom enforcement of the change, waiver, discharge or termination is sought.

12. Successors and Assigns. Except as herein provided, this Agreement shall be binding upon each of the parties hereto and each of the parties' successors and assigns and shall inure to the benefit of each of the parties hereto and each of the parties' successors and assigns. The indemnity and hold harmless agreement of the Guarantor hereunder shall be binding on all successors in interest of Guarantor.

13. Choice of Law. This Agreement and the rights and obligations of the parties hereunder shall in all respect be governed by, and construed and enforced in accordance with, the laws of the State of _____ [state] and without reference to the choice of law provisions thereof.

IN WITNESS WHEREOF, the undersigned have executed this Agreement as of the ____ [day] day of _____ [month], ____ [year].

GUARANTOR:

_____ [name]

By: _____

Printed Name: _____

Title: _____

TRANSFeree:

_____ [name]

By: _____

Printed Name: _____

Title: _____

PURCHASER:

_____ [name]

By: _____

Printed Name: _____

Title: _____

[Attach Exhibit A]



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FORM 25.32 Purchaser releases seller from liability--clause designed to protect seller

COMMENT

In this clause, the purchaser grants seller, as well as seller's successors and assigns, a full release from any claims which the purchaser could bring against the seller following the purchaser's discovery of an adverse environmental condition. However, the release does not extend to any adverse environmental condition created by the seller and existing prior to the date of closing of the sale of the subject premises to the purchaser.

FORM

Purchaser hereby grants seller, as well as seller's successors and assigns, a full release from any and all claims and actions, whether at law or equity, which it could conceivably bring against the seller following the discovery of an adverse environmental condition. However, the preceding sentence shall not apply to any adverse environmental condition created by the seller and existing prior to the date of closing of the sale of the subject premises to the purchaser.

"Adverse environmental condition" is defined as:

- (1) the contamination of the soil, air or water (whether surface water or ground water) of the subject premises by hazardous substances or hazardous wastes;
- (2) the contamination of the soil, air or water (whether surface water or ground water) of any piece of realty adjoining the subject premises due to a release of hazardous substances or hazardous wastes upon the subject premises; or
- (3) the presence of hazardous substances or hazardous wastes which are stored upon the subject premises.



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FORM 25.33 Purchaser to indemnify and hold seller harmless--clause designed to protect seller

COMMENT

The purchaser agrees to indemnify the seller and hold the seller harmless from any liability resulting from an adverse environmental condition on the subject premises. However, the indemnification and hold harmless do not extend to any adverse environmental condition created by the seller and existing prior to the closing of the sale and purchase of the property. This form contains detailed definitions of the terms "adverse environmental condition" and "liability."

FORM

If, as a result of an adverse environmental condition, seller is subjected to any liability whatsoever, then purchaser will indemnify and hold seller completely harmless against such liability. However, the preceding sentence shall not apply to any adverse environmental condition created by the seller and existing prior to the date of closing of the sale of the subject premises.

"Adverse environmental condition" is defined as:

- (1) the contamination of the soil, air or water (whether surface water or ground water) of the subject premises by hazardous substances or hazardous wastes;
- (2) the contamination of the soil, air or water (whether surface water or ground water) of any piece of realty adjoining the subject premises due to a release of hazardous substances or hazardous wastes upon the subject premises; or
- (3) the presence of hazardous substances or hazardous wastes which are stored upon the subject premises.

"Liability" is defined as any claim or action (whether civil, criminal or administrative, and whether brought by any governmental entity or non-governmental entity or person), judgment, settlement, damages, fine, penalty, loss or expense brought against, imposed upon, suffered by or paid by seller. Liability shall also include seller's attorneys' fees, court costs, consultants' fees, experts' fees, and other litigation-related expenses.

Purchaser expressly guarantees that it will assume all costs, expenses and fees incurred by seller in:

- (1) investigating the nature and severity of the adverse environmental condition;
- (2) conducting studies to determine the impact of the adverse environmental condition upon the public health;
- (3) eliminating the adverse environmental condition;
- (4) conducting tests following the clean up in order to determine whether seller's remedial efforts have been successful;
and
- (5) compensating any person, or the estate, heirs or beneficiaries of such person, who suffered injury or death as a result of the adverse environmental condition.



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FORM 25.34 Release from environmental liability

COMMENT

There are many different approaches and provisions that may be utilized with respect to the release of a seller for environmental matters. However a purchaser should be very careful before it gives such a release. Certainly the purchaser will want to investigate the property and have an idea as to the extent of the problems, if any, associated with the premises. Lastly, it is highly likely that such a release would be the result of the purchaser negotiating a discount with respect to the purchase price.

FORM

Purchaser hereby waives, releases, acquits and forever discharges Seller, its employees or agents or any other person acting on behalf of Seller, of and from any and all claims, actions, causes of action, demands, rights, damages, costs, expenses, or compensation whatsoever, direct or indirect, known or unknown, foreseen or unforeseen, which Purchaser now has or which may arise in the future on account of or in any way growing out of or in connection with any physical characteristics or existing condition including, without limitation, subsurface conditions and solid and hazardous wastes, and hazardous substances, on, under, or related to the real property, or any law or regulation applicable thereto.



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FORM 25.35 Additional release from environmental liability

COMMENT

This is another provision that purchaser may use for release of seller.

FORM

Purchaser hereby releases and discharges Seller from any and all obligation and liability arising in any way out of liability, injuries, costs or damages which may be sustained after the closing to the extent that the contaminants or pollutants causing such liability, injury, cost, or damage were (1) disclosed by Seller to Purchaser prior to closing; or (2) arose after the closing.



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FORM 25.36 Release from environmental liability and covenant not to sue

COMMENT

This release also contains a covenant not to sue.

FORM

Purchaser hereby agrees that Purchaser shall hereafter assert no claim or institute any suit against Seller, and Seller shall have no liability or obligation whatsoever to Purchaser, its successors or assigns, with respect to any and all foreseeable or unforeseeable damage, loss, cost, liability or expense, directly or indirectly, arising from any condition which now exists or may hereafter be found to exist in, on, under or about the Property, or from a determination that the Property, or any portion thereof, violates any applicable law, ordinance, regulation or ruling, including, without limitation, those relating to environmental protection or the presence, use, generation, storage, release, threatened release, containment or disposal of any hazardous or toxic substances or materials, except that, without limiting any defenses that might be available to Seller, Seller shall continue to be liable to third parties to the extent provided by law for any damage, loss, cost, liability or expense arising out of any acts or events relating to the Property and occurring on or prior to the Closing Date or otherwise arising out of the use or operation of the Property on or prior to the Closing Date.



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FORM 25.37 Representation by seller that seller will not waive liability of other responsible parties--clause designed to protect purchaser

COMMENT

The Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA"), 42 USC § 9601 et seq., identifies various classes of individuals and entities who are "responsible parties" and, thus, must assume clean-up costs. In this clause, the seller represents that he knows of no existing adverse environmental conditions, but that if any are discovered, the seller will cooperate with the purchaser to locate the responsible parties. The seller agrees not to waive any liability of potentially-responsible parties. The seller further agrees to hold the purchaser harmless.

FORM

Seller has owned the subject premises since ____ [year]. During that period of time, Seller has not become aware of the existence of any condition on or about the premises which would result in an adverse environmental impact. However, Seller has performed no tests or investigations. In the event that Purchaser now or hereafter discovers such a condition, where the genesis of such condition occurred prior to Purchaser's acceptance or occupation of the subject premises, Seller agrees to cooperate in providing any information which he may have which will assist in locating the responsible party.

Seller further represents and warrants to Purchaser that he will not, by any affirmative act or mission, waive or excuse the liability of any other party who may be a "responsible party", as defined by the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA"), 42 USC § 9601, et seq., or any other federal or state law or regulation, for any cost of remediation of any adverse environmental condition, under any federal or state law or regulation.

In the event Seller waives the liability of any responsible party, Seller will indemnify and hold Purchaser harmless for any loss occasioned by that waiver, including legal fees and consequential damages.



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FORM 25.38 Promise of seller to indemnify and hold purchaser harmless for any existing conditions on premises--clause designed to protect purchaser and requires seller to obtain environmental insurance

COMMENT

This form is designed to protect the purchaser from any adverse environmental conditions which may be discovered on the premises after the sale is completed. Because the form contains a requirement that the seller obtain environmental liability insurance, the hold harmless clause has more strength. The purchaser does not have to rely on the seller's financial ability alone for protection.

The form protects the seller by requiring that the purchaser give prompt notice of any potential claim, and that the purchaser cooperate with the seller.

It should be noted that environmental liability insurance is costly and generally requires some investigation of the property being sold, if not a full environmental site assessment.

FORM

Seller agrees, for a period of _____ (_____) years from the date hereof, to indemnify and hold Purchaser harmless for and against any and all liability, claims and expenses of any kind whatsoever (including reasonable attorneys' fees and other defense costs) for any injury or damage to person or property sustained by anyone on or about the premises, which results from or arises out of any adverse environmental condition existing on the subject premises at or before the transfer of title of the subject premises from Seller to Purchaser.

Seller agrees, for a period of _____ (_____) years, to obtain environmental liability

insurance from an insurance company rated "AA" or better in at least the amount of _____ Dollars (\$_____). Purchaser shall be named as an additional insured or loss payee on said policy. Seller's liability under this agreement shall be limited to the limits of this policy. This agreement is conditioned upon Purchaser approving the policy forms and exclusions on the insurance policy to be purchased by seller.

Purchaser shall give Seller notice of any claim or potential claim within ten (10) days after Purchaser shall received notice or have reason to know that a claim exists. Failure to provide prompt notice will relieve Seller of any liability hereunder.

Purchaser shall give Seller a reasonable opportunity to defend against such claim. Purchaser shall cooperate with Seller in such defense. Purchaser shall not compromise any claim without the consent of Seller. A material violation by Purchaser of any of these provisions shall relieve Seller of any liability hereunder.

Purchaser agrees to cooperate with and comply with all reasonable requests of Seller's insurance carrier. In the event Purchaser fails to do so and the insurance carrier disclaims liability for that reason, Seller shall be relieved of any liability hereunder.



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FORM 25.39 Promise of seller to indemnify and hold purchaser harmless--another form

COMMENT

In this clause, the indemnity specifically states that the indemnity will survive the closing date.

FORM

Purchaser hereby assumes and covenants to undertake and discharge all liabilities and obligations arising (a) from any condition which now exists or may hereafter be found to exist in, on, under or about the premises; or (b) from a determination that the premises, or any portion thereof, violates any applicable law, ordinances, regulation or ruling relating to environmental protection, or the presence, use, generation, storage, release, threatened release, or containment or disposal of any hazardous or toxic substances or materials. Purchaser shall indemnify and hold Seller harmless from and against any and all damage, cost, loss, liability and expense which may be incurred by Seller by reason of, resulting from, in connection with, or arising in any manner whatsoever out of any breach of the covenant of Purchaser contained in this paragraph. The covenants and agreements of Purchaser in this paragraph shall survive the closing and consummation of the transactions contemplated in this Agreement and remain in effect.



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FORM 25.40 Seller will not waive liability for any adverse environmental condition existing on subject premises prior to sale--clause designed to protect purchaser

COMMENT

In the clause that follows, which is designed to protect the interests of the purchaser of real property, the seller agrees not to waive its liability for remediating any adverse environmental condition existing on the premises prior to the sale. However, such adverse environmental condition must be discovered by the purchaser within at least five years after the closing date of the sale and purchase. Otherwise, the seller is not liable.

FORM

Seller agrees that, if any adverse environmental condition is discovered by purchaser within _____ (_____) years of the closing date of the sale of the subject premises, and if it is determined that such adverse environmental condition arose prior to such closing, then seller will not waive its liability, if any, for correcting the adverse environmental condition. Nor will seller waive the liability of any previous owner or tenant of the subject premises who may be legally responsible for correcting the adverse environmental condition.



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FORM 25.41 Seller to indemnify and hold purchaser harmless

COMMENT

In this clause, the seller agrees to indemnify and hold the purchaser harmless if the latter is subjected to "any liability whatsoever" arising out of an "adverse environmental condition" that existed on the premises prior to the sale. The clause contains detailed definitions of "adverse environmental condition" and "liability."

FORM

If, as a result of an adverse environmental condition existing prior to the sale of the subject premises to the Purchaser, Purchaser is subjected to any liability whatsoever, then Seller will indemnify and hold Purchaser completely harmless against such liability.

"Adverse environmental condition" is defined as:

- (1) the contamination of the soil, air or water (whether surface water or ground water) of the subject premises by hazardous substances or hazardous wastes;
- (2) the contamination of the soil, air or water (whether surface water or ground water) of any piece of realty adjoining the subject premises due to a release of hazardous substances or hazardous wastes upon the subject premises; or
- (3) the presence of hazardous substances or hazardous wastes which are stored upon the subject premises.

"Liability" is defined as any claim or action (whether civil, criminal or administrative, and whether brought by any governmental entity or non-governmental entity or person), judgment, settlement, damages, fine, penalty, loss or

expense brought against, imposed upon, suffered by or paid by Purchaser. Liability shall also include Purchaser's attorneys' fees, court costs, consultants' fees, experts' fees, and other litigation-related expenses.

Seller expressly guarantees that it will assume all costs incurred by Purchaser in:

- (1) investigating the nature and severity of the adverse environmental condition;
- (2) conducting studies to determine the impact of the adverse environmental condition upon the public health;
- (3) eliminating the adverse environmental condition;
- (4) conducting tests following the clean up in order to determine whether Purchaser's remedial efforts have been successful; and
- (5) compensating any person, or the estate, heirs or beneficiaries of such person, who suffered injury or death as a result of the adverse environmental condition.



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FORM 25.42 Purchase agreement conditioned upon inspection

COMMENT

This provision provides that the purchaser is not required to purchase the premises unless the premises are free of adverse environmental conditions. This provision allows the seller to engage the environmental consultant. It also provides that if the purchaser rejects the results, then the seller will have additional time to address purchaser's concerns.

Once the report is accepted, this provision requires the seller to remediate the premises. Once the premises are remediated, the seller has no further obligation with respect to environmental matters. If the anticipated remediation costs are too high, seller may cancel the agreement. Lastly, the agreement contains a confidentiality clause.

FORM

A. Seller hereby agrees that it will cause its environmental consultants (or another licensed _____ [state] environmental engineer) to prepare a risk assessment report and remediation plan related to the environmental condition of the Property, which documents shall specify: (a) the standards which will govern the levels to which any environmentally impacted soils and groundwater on the Property will be remediated; and (b) the method and timetable for the remediation and disposal of any contaminants. Upon the completion of the aforementioned document, Seller will present the same to Purchaser for its review. Purchaser will have _____ (_____) days after its receipt of such document to review the same and notify Seller in writing that it either: (i) approves such document as drafted; or (ii) rejects such document for those reasonable, specific reasons delineated in Purchaser's written notice to Seller. If Purchaser rejects such document, then Seller will have an additional reasonable period of time in which it can seek to satisfy all of Purchaser's reasons for rejecting the document; provided, however, that Seller shall have no obligation to do so. If Seller is unable to declines to satisfy the same within such period, or in any event

before the expiration of the Contingency Period as it may be extended for an additional _____ (_____) days, unless otherwise agreed to by the parties, this Agreement will automatically terminate, the Deposit will be returned to Purchaser and, thereafter, neither party will have any further rights, liabilities or obligations hereunder. All references in this Agreement to the "Risk Assessment Report and Remediation Plan" will be deemed to refer to the risk assessment report and remediation plan as approved by Purchaser.

B. Promptly following its receipt of written notice from Purchaser that all of the conditions set forth herein have been satisfied, Seller shall, at its sole cost and expense, commence and at all times thereafter diligently pursue to completion the environmental remediation of the Property in strict accordance with the standards, methods and timetable set forth in the Risk Assessment Report and Remediation Plan (such work being hereinafter referred to as the "Seller's Work"). The Seller's Work shall be the sole responsibility, obligation and liability of Seller and will be effected in accordance with all applicable federal, state and local laws (whether now existing or enacted after the date hereof but prior to closing). Seller shall keep Purchaser fully advised as to its progress on the Seller's Work and shall grant Purchaser and its environmental consultants reasonable access to the Property throughout the remediation process, provided that such access does not interfere with or delay the Seller's Work. Copies of all analytical tests and samples obtained by Seller's environmental consultants during the remediation process shall be delivered to Purchaser for its files. Seller shall also afford Purchaser the opportunity to conduct confirming tests and take split samples at the Property. If at any time during the course of Seller's Work, Seller becomes aware of a condition that was not contemplated or addressed by the Risk Assessment Report and Remediation Plan, Seller may in its sole discretion proceed to correct or remove such condition or discontinue Seller's work, and Seller shall notify Purchaser of such election with _____ (_____) days after Seller has determined the cost of correcting such condition.

When Seller believes that the Seller's Work has been completed in the manner required by the risk Assessment Report and Remediation Plan, and otherwise in accordance with all applicable federal, state and local laws, it shall give written notice to such effect to Purchaser ("Completion Notice"). The Completion Notice shall be accompanied by a certification from Seller or Seller's environmental consultant (or another licensed _____ [state] environmental engineer) that the Seller's Work has been completed. Purchaser shall have a period of _____ (_____) days after its receipt of the Completion Notice (the "Confirmation Period") in which to obtain the confirmation from its environmental consultants, _____ [name], that the Seller's Work has been completed. If Purchaser's environmental consultant reasonably advises Purchaser that the Seller's Work has in some material respect(s) not been completed, then Purchaser shall give written notice to Seller of its specific and itemized objections to the Seller's Work ("Objection Notice"). Seller shall then have a reasonable period of time in which to cure all of the items set forth in the Objection Notice. If Seller fails to cure all such objections by _____ [month] _____ [day] _____ [year], then Purchaser shall have the option of: (a) terminating this Agreement by promptly giving written notice of termination to Seller, in which event the Deposit shall be returned to Purchaser; (b) proceeding to close on the purchase of the Property notwithstanding Seller's failure to satisfy such objections or complete Seller's Work thereby waiving any such objections or conditions; or (c) at Seller's request, extending the outside date for the satisfaction of such condition precedent beyond _____ [month] _____ [day] _____ [year] to a date mutually agreed upon by Purchaser and Seller; and Purchaser's choice of option as set forth above shall be its sole and exclusive remedy. If Seller satisfies in all material respects all of Purchaser's objections set forth in the Objection Notice or if Purchaser accepts (or otherwise fails to respond to) Seller's Completion Notice within the Confirmation Period, then, in either such event, the condition precedent to Purchaser's obligation to purchase the Property as set forth herein shall be deemed to have been satisfied and Purchaser shall proceed to close on its purchase of the Property in the manner and subject to other condition set forth in this Agreement.

C. Purchaser hereby agrees that upon completion of Seller's Work in the manner required by the Risk Assessment Report and Remediation Plan (as approved or waived by Purchaser), Seller shall have no further obligations whatsoever with respect to environmental remediation of the Property, all such obligations being the sole responsibility of Purchaser. Purchaser agrees to indemnify, defend (with counsel reasonably satisfactory to Seller) and hold harmless Seller and Seller's affiliate and each of their directors, officers, shareholders, employees, assigns and successors from

any and all Environmental Claims (hereinafter defined) incurred by or asserted against Seller after closing which relate to the Property (but expressly excluding Environmental Claims relating to neighboring properties). To the extent permitted by law, Purchaser hereby waives all Environmental Claims it may have against Seller which relate to the Property (but expressly excluding Environmental Claims relating to neighboring properties). For purposes of this Agreement "Environmental Claims" means all losses, costs, damages, allegations, demands, claims (including, without limitation, claims for personal injury to real or personal property damage), liabilities, expenses, judgments, and orders or investigations or remediation measures required by the governmental agencies having jurisdiction over the Property (including, but not limited to, the cost of any remedial work performed on the Property) and third-party claims that arise directly or indirectly from or in connection with the operation or condition of the Property, including, but not limited to, the presence or suspected presence, release or suspected release, of any hazardous materials of any kind, whether into the air, soil, groundwater, pavement, structures, fixtures, equipment, tanks, containers or other personalty at the Property or any other real property in which Purchaser has or may acquire an interest.

D. Notwithstanding anything to the contrary contained in this Agreement, Seller shall have no obligation to complete the environmental remediation of the Property or sell the Property to Purchaser, if at any time Seller reasonably determined that the cost of the Seller's Work ("Remediation Costs") would exceed an amount equal to _____ percent (_____ %) of the Purchase Price. If Seller reasonably determines that the Remediation Costs exceed _____ percent (_____ %) of the Purchase Price and if Seller is not willing to incur such costs, then Seller shall give written notice to Purchaser that it is terminating its obligations under this Agreement. Any such written notice of termination shall be delivered to Purchaser upon Seller's reasonable determination as set forth above and shall include Seller's estimates of the amount of the Remediation Costs. Upon Purchaser's receipt of such written notice of termination from Seller, this Agreement shall automatically terminate, the Deposit shall be returned to Purchaser and, thereafter, neither party shall have any further rights, liabilities or obligations under this Agreement.

E. Purchaser agrees: (a) to keep and hold any and all information, documents, tests, samples, and other data that it receives from Seller or its agents or consultants, or that it receives otherwise in connection with this Agreement, including, without limitation, the Risk Assessment Report and Remediation Plan (collectively, the "Information"), in strict confidence; (b) to not disclose, or cause or permit to be disclosed by Purchaser or its agents or consultants, any of the Information, to any person or entity except Purchaser's Environmental consultants, lenders or contractors, or as required by law; and (c) to cause its environmental consultants to agree to keep and hold such information in strict confidence, which agreement shall be evidenced by a letter to that effect from Purchaser's environmental consultants to Seller.



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FORM 25.43 Sale is contingent upon results of inspection for radon gas

COMMENT

Radon gas is a natural, colorless, odorless vapor which emanates from the earth. Radon has a tendency to accumulate in buildings because it can't escape. High levels of radon gas have been associated with lung cancer and other respiratory ailments. This contingency allows the purchaser to cancel the sale agreement if a particular level of radon gas is found. This gives the purchaser the ability to cancel the existing agreement and then negotiate a modification of that agreement if the parties so desire. Such a modification will provide for a reduction of the purchase price in an amount equivalent to the cost of remediation, leaving the purchaser responsible for remediation. In the alternative, the parties can maintain the purchase price while the seller takes the remedial action at his own expense, subject to the purchaser's approval.

FORM

The Agreement is contingent upon the results of an inspection demonstrating that excessive amounts of radon gas do not exist on the premises. The inspection shall be performed by _____ [name]. The inspection shall be performed at the expense of _____.

Excessive amounts of radon gas shall be deemed to exist if the inspection reveals a level of radon gas exceeding _____ pico curies per liter. The inspection report shall indicate the level of accuracy or tolerance of the measurements. A copy of the inspection report shall be provided to both Purchaser and Seller.

Seller agrees to comply with all requirements of the company or individual performing the inspection, provided that there shall be no monetary cost to Seller and no unreasonable effort or act required of Seller to comply.

This contingency shall be deemed waived unless Purchaser shall notify Seller of the existence of radon gas, in writing, on or before _____ [month] _____ [day] _____ [year]. Notice shall be deemed given when received by Seller, in person or by certified mail, return receipt requested. If notice is timely given, this Agreement shall be deemed canceled. All deposits made pursuant to this agreement shall be returned to the Purchaser immediately.



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FORM 25.44 Sale is contingent upon results of inspection for presence of lead-based paint

COMMENT

Lead is a non-organic element which can accumulate in the human body. Excessive levels of lead can cause serious harm to children, including damage to the brain and central nervous system, mental retardation, impaired hearing, epileptic seizures and death. The major source of lead poisoning is lead-based paint which, as it ages, cracks and chips. Those paint chips are often consumed by small children and pets. A second important source is lead dust, which is produced as lead-based paint ages and wears away.

The use of lead in paint was banned by the Consumer Product Safety Commission in 1978. However, a danger still exists in homes built before 1978, since their interior walls and other surfaces might have been painted with lead-based paint.

Accordingly, the purchaser of any structure built prior to 1978 should request that a lead paint contingency be inserted into the sale-purchase agreement. (This is especially important if the structure is a residence, and the purchaser has small children.) Even commercial property should be tested, since the normal aging process of lead-based paint will produce lead dust. Lead dust is especially dangerous because everyone, young and old alike, breathes it in, whereas paint chips only pose a danger to small children and pets, who frequently eat the chips.

If the structure contains lead-based paint, the purchaser should be able to terminate the agreement. Alternatively, if lead-based paint is discovered on the premises and the purchaser still wishes to purchase the premises, the parties may renegotiate the agreement and reduce the purchase price to reflect the cost to the purchaser of removal or containment of the paint. Alternatively, the seller may handle the removal or containment, leaving the purchase price intact.

FORM

This Agreement of sale and purchase is contingent upon the results of an inspection and chemical analysis to be performed by _____[*insert name of inspector and laboratory that will perform the inspection and chemical analysis*], demonstrating that the premises to be transferred hereunder do not contain lead-based paint. The inspection and laboratory analysis shall be performed at the expense of the Purchaser. A copy of the inspection report and laboratory analysis shall be provided to both Purchaser and Seller. Seller consents to the inspector taking paint samples wherever the inspector deems it necessary and appropriate.

This contingency shall be deemed waived unless Purchaser shall notify Seller, in writing, of the existence of lead-based paint on or before ' _____ [*month*] _____ [*day*] _____ [*year*]. Notice shall be deemed given when received by Seller, in person or by certified mail, return receipt requested. If notice is timely given, this Agreement shall be deemed canceled. All deposits made pursuant to this Agreement shall be returned to the Purchaser immediately.



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FORM 25.45 Sale is contingent on results of asbestos inspection

COMMENT

Asbestos was once commonly used as an insulating material on pipes, boilers, furnaces and in ceiling and floor tiles. Asbestos can become "friable," that is, finely crumbled and airborne. Inhaled over an extended period of time, asbestos fibers and particles may lead to a variety of different lung diseases, including cancer.

This form provides the purchaser with the opportunity to cancel from the agreement if any asbestos is discovered on the premises. The form provides two alternative methods to detect asbestos.

If asbestos is discovered, but the purchaser still wants the property, the purchaser can renegotiate the agreement to reduce the purchase price by an amount equivalent to the cost of removal and repair. In this case, the purchaser accepts responsibility for removal and repair. In the alternative, the parties can maintain the purchase price while the seller absorbs the cost, and effects the removal and repair.

FORM

This Agreement is contingent upon the results of an inspection demonstrating that no asbestos exists on the premises. The inspection shall be performed by a licensed asbestos handler. Asbestos shall be deemed to exist if any asbestos-containing material shall be located within the structures on the premises, or, if the asbestos contained in air samples taken within the structures by a certified laboratory is _____ percent (_____ %) above the level of asbestos contained in air samples taken outside of the structures. The inspection and all samples and analysis shall be performed at the expense of _____. A copy of the

inspection report shall be provided to both Purchaser and Seller.

Seller consents to the taking of samples of ceiling material, pipe insulation and boiler or furnace insulation. Such samples shall be taken as inconspicuously as possible in the living areas of the structures.

This contingency shall be deemed waived unless Purchaser shall notify Seller of the existence of asbestos, in writing, on or before _____ [month] ____ [day] ____ [year]. Notice shall be deemed given when received by Seller, in person or by certified mail, return receipt requested. If notice is timely given, this Agreement shall be deemed canceled. All deposits made pursuant to this agreement shall be returned to the Purchaser immediately.



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FORM 25.46 Sale is contingent on results of inspection for urea formaldehyde insulation

COMMENT

During the 1970s urea formaldehyde insulation was used to insulate many existing houses. Frequently, it was blown into houses between the exterior siding and interior walls. Later, urea formaldehyde became associated with a number of health problems.

This contingency is designed to allow the purchaser to cancel from the agreement if any urea formaldehyde insulation is found on the premises. If the purchaser still wishes to purchase the premises, the parties may consider renegotiating the agreement. This may be done by reducing the purchase price by an amount equal to the cost of removal of the insulation. The purchaser would then take responsibility for removal. In the alternative, the seller may take responsibility for the removal while the purchase price remains the same.

This contingency allows the purchaser's agent to remove and replace paneling or other finishing material in order to view the insulation and take samples.

FORM

This Agreement is contingent upon the results of an inspection demonstrating that no urea formaldehyde insulation is located in or on any of the structures on the premises. The inspection shall be performed by _____ [address] at the expense of _____. A copy of the inspection report shall be provided to both Purchaser and Seller.

Seller consents to the temporary removal of exterior siding and interior paneling, as deemed necessary by the inspector, for the purpose of the inspection. All materials removed shall be restored to their prior condition, all at Purchaser's

expense, at the conclusion of the inspection. Seller further consents to the taking of samples of the insulation, if deemed necessary by the inspector.

This contingency shall be deemed waived unless Purchaser shall notify Seller of the existence of urea formaldehyde insulation, in writing, on or before _____ [month] _____ [day] _____ [year]. Notice shall be deemed given when received by Seller, in person or by certified mail, return receipt requested. If notice is timely given, this Agreement shall be deemed canceled. All deposits made pursuant to this agreement shall be returned to the Purchaser immediately.



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33-25 Current Legal Forms for Real Estate FORM 25.47

FORM 25.47 Sale is contingent on results of inspection for presence of, or damaged caused by, wood boring insects

COMMENT

The term "wood boring insects" includes such things as carpenter ants, termites, and powder post beetles. Although other such insects clearly exist, the inspection should cover these at a minimum. Wood boring insects can do tremendous damage in a very short period of time. The effect of the damage can actually undermine the structural integrity of a building. Thus, a purchaser should always obtain his own inspection, even when the premises have been inspected within the previous year. The cost of such an inspection is generally quite modest. The cost of repair can be substantial.

This contingency is designed to allow the purchaser to withdraw from the agreement if any wood boring insects are discovered, or if any damage from wood boring insects is found on the premises. Afterward, if the parties so desire, they may consider renegotiating the agreement. This may be done by reducing the purchase price by an amount equal to the cost of extermination and repair. The purchaser would then take responsibility for removal. In the alternative, the seller may perform the extermination and repair, while the purchase price remains the same.

Since wood boring insects tend to appear in inaccessible spaces, the contingency provides for the removal of walls, flooring, ceiling tile, and the like, in order to facilitate the inspection. Restoration of removed items is at the purchaser's expense.

FORM

This Agreement is contingent upon the results of an inspection demonstrating that no wood boring insects exist within the structures located on the premises and that no damage to the structures has been caused by wood boring insects. The

inspection shall be performed by a licensed exterminator at the expenses of _____. A copy of the inspection report shall be provided to both Purchaser and Seller.

Seller consents to the temporary removal of any wall, floor or ceiling cover in any area deemed inaccessible by the inspector. All items removed shall be restored to their prior condition, all at Purchaser's expense, at the conclusion of the inspection.

This contingency shall be deemed waived unless Purchaser shall notify Seller of the existence of wood boring insects or damage to the structures caused by wood boring insects, in writing, on or before _____ [month] _____ [day] _____ [year]. Notice shall be deemed given when received by Seller, in person or by certified mail, return receipt requested. If notice is timely given, this Agreement shall be deemed canceled. All deposits made pursuant to this agreement shall be returned to the Purchaser immediately.



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33-25 Current Legal Forms for Real Estate FORM 25.48

FORM 25.48 Sale is contingent on results of inspection for mold and fungal growth

COMMENT

Mold and fungal growths tend to form in dark and/or damp spaces within structures, e.g., basements, closets, crawl spaces, etc. These growths can damage and eventually weaken structural supports. They have also been associated with respiratory ailments.

This contingency is designed to allow the purchaser to withdraw from the agreement if any mold or fungal growth is discovered in specified areas. Afterward, if the parties so desire, they may consider renegotiating the agreement. This may be done by reducing the purchase price by an amount equal to the cost of removal and repair. The purchaser would then take responsibility for removal and repair. In the alternative, the seller may perform the removal and repair, while the purchase price remains the same.

In order to facilitate the inspection, the contingency provides for the removal of any material covering framing or "joists" (i.e., horizontal beams set from wall to wall to support the boards of a floor or ceiling). Restoration of removed items is the purchaser's expense.

FORM

This Agreement is contingent upon the results of an inspection demonstrating that no mold or fungal growth exists on the wooden members located at any level of any of the structures which are located on the premises and are wholly or partially beneath ground level. The inspection shall be performed by a mutually agreeable inspector, at the expense of _____. A copy of the inspection report shall be provided to both Purchaser and Seller.

Seller consents to the temporary removal of paneling or any other material covering joists or framing in any area

deemed necessary by the inspector. All materials removed shall be restored to their prior condition, all at Purchaser's expense, at the conclusion of the inspection.

This contingency shall be deemed waived unless Purchaser shall notify Seller, in writing, of the existence of mold or fungal growth on any wooden members, as described above, on or before _____ [month] _____ [day] _____ [year]. Notice shall be deemed given when received by Seller, in person or by certified mail, return receipt requested. If notice is timely given, this Agreement shall be deemed canceled. All deposits made pursuant to this agreement shall be returned to the Purchaser immediately.



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33-25 Current Legal Forms for Real Estate FORM 25.49

FORM 25.49 Sale is contingent on results of environmental site assessment

COMMENT

This contingency provides for an environmental site assessment of the premises. The contingency allows the purchaser to cancel the agreement if the environmental site assessment shows "evidence of significant adverse environmental impact due to past or present use of the premises or releases of hazardous materials on the premises."

If the purchaser still desires to purchase the premises, the parties may renegotiate the agreement. This may be done by reducing the purchase price by an amount equal to the cost of remediating the adverse condition. The purchaser would then bear the expense of remedial action.

In the alternative, the seller may perform the remedial action, while the purchase price remains the same. In this case, the purchaser would want a "hold harmless" provision in the contract in order to protect him in the event that the seller did not perform remediation in a proper or complete manner.

This contingency contains a confidentiality requirement so that, if an adverse condition is discovered, the publicity would not thwart future sales or injure the seller's reputation. If such an adverse condition is found, the seller may have not only a moral obligation to remedy it, but also a legal one under the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA"), 42 USC § 9601 et seq., and various other federal and state laws and regulations.

FORM

This Agreement is contingent upon the results of an environmental site assessment showing no evidence of significant

adverse environmental impact due to past or present use of the premises or releases of hazardous materials on the premises. The environmental site assessment shall be performed by _____ [name] or an environmental engineering firm at the expense of Purchaser. A copy of the assessment shall be provided to both Purchaser and Seller.

Purchaser agrees to maintain absolute confidentiality of the assessment until Purchaser has accepted transfer of title from Seller. Notwithstanding the foregoing, Purchaser may provide a copy of the assessment to Purchaser's lending institution and any party who will be involved in repairing or correcting any adverse environmental impact found. Purchaser, in writing, shall instruct those with whom he provides a copy of the assessment of its confidential nature and of the obligation to maintain confidentiality.

Seller consents to the taking of any samples deemed necessary or appropriate by the testing firm. Interior samples shall be taken as inconspicuously as possible. Areas where exterior samples of soils are taken shall be returned to their prior condition at Purchaser's expense.

This contingency shall be deemed waived unless Purchaser shall notify Seller in writing of the existence of evidence of a significant adverse environmental impact on or before _____ [month] _____ [day] _____ [year]. Notice shall be deemed given when received by Seller, in person or by certified mail, return receipt requested. If notice is timely given, this Agreement shall be deemed canceled. All deposits made pursuant to this agreement shall be returned to the Purchaser immediately.



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33-25 Current Legal Forms for Real Estate FORM 25.50

FORM 25.50 Purchaser's right to conduct environmental examination of subject premises prior to sale--purchaser may terminate contract if examination reveals that property is contaminated--clause designed to protect purchaser

COMMENT

The clause below is designed to protect the purchaser of real property. In it, the seller recognizes the purchaser's right to conduct an environmental examination of the premises prior to sale. If that examination reveals that the property is contaminated with hazardous wastes or hazardous substances, then the purchaser has five days within which to cancel the contract for sale and purchase.

FORM

(a) Purchaser, at its sole cost and expense, shall have the right to perform an environmental inspection and audit of the Property (the "Audit") by an independent environmental consultant (the "Consultant") approved in writing by Seller. If the Audit reveals any items which in Purchaser's opinion should be remedied and Purchaser is unwilling, at its sole cost and expense, to remedy such items, Purchaser may terminate this Agreement within _____ (_____) days after the date of this Agreement by giving Seller written notice of such termination ("Notice of Termination"). Such Notice of Termination must include (i) a copy of the Audit; (ii) the items that Purchaser believes should be remedied; and (iii) Purchaser's estimated cost of such remedy prepared by Consultant. Purchaser's failure to give such notice of Termination within the specified time period shall constitute an irrevocable waiver of Purchaser's right to terminate this Agreement under this section.

(b) Within _____ (_____) days after receipt of the Notice of Termination, Seller may void the Notice of Termination by giving Purchaser written notice that Seller shall, at its sole cost and expense, remedy the items specified in the Notice of Termination in which case this Agreement shall remain in effect. If Seller

does not void the Notice of Termination within such period, this Agreement shall be terminate and Purchaser shall receive a return of this deposit. Upon receipt of such deposit, this Agreement shall be terminate with neither party having any further liability to the other, except as expressly reserved in this Agreement.

(c) To the extent Seller must perform any remedial work under this section after closing, Purchaser shall grant Seller and its contractors and consultants access to the Property, without cost, in order to perform such work.



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33-25 Current Legal Forms for Real Estate FORM 25.51

FORM 25.51 Sale is contingent on results of inspection of septic system--system must be in good working order and meet government standards

COMMENT

This contingency is designed for use in a contract for the purchase and sale of a residence or commercial building served by a septic system, instead of public sewers. The contingency has two goals, to wit: (1) to make certain that the system was built in compliance with all governmental standards then in effect; and (2) to make certain that the system is presently functional.

In satisfying these goals, it is often necessary to actually view the system. This requires excavation of the tank and possibly surrounding areas. This form allows the excavation to be performed and requires restoration of the surrounding grounds, including grading and seeding.

The contingency allows the purchaser to terminate the agreement in the event that either goal is not met. If the purchaser is still interested in purchasing the premises, the parties may renegotiate the agreement. This may be done by reducing the purchase price by an amount equal to the cost of repair. The purchaser would then take the responsibility for repair. In the alternative, the seller may perform the repair while the purchase price remains the same.

It should be noted that many lending institutions require septic system testing as a prerequisite for receiving financing. The purchaser should confer with his lender prior to negotiating the contingency.

FORM

This Agreement is contingent upon the results of an inspection of the septic system located on the subject premises,

showing that the septic system is in good working order and that the septic system meets or exceeds all applicable state and local laws and regulations, including "grandfather" clauses.

The inspection shall be performed by _____ [name] or by the _____ [county] County Health Department at the expense of _____. A copy of the inspection report shall be provided to both Purchaser and Seller.

Seller consents to the excavation of so much of the septic system as is deemed necessary by the inspector, at the expense of Purchaser. The excavated area, if any, shall be graded and seeded as necessary to restore the area to its prior condition upon completion of the testing, all at the expense of Purchaser. Seller further consents to the introduction of non-toxic dye into the drains of the structure, through the sinks and/or toilets in the structure, as part of the testing procedure.

This contingency shall be deemed waived unless Purchaser shall notify Seller in writing that the inspection demonstrated that the septic system is not in good working order or that the septic system does not meet all applicable state and local laws and regulations, on or before _____ [month] _____ [day] _____ [year]. Notice shall be deemed given when received by Seller, in person or by certified mail, return receipt requested. If notice is timely given, this Agreement shall be deemed canceled. All deposits made pursuant to this agreement shall be returned to the Purchaser immediately.



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33-25 Current Legal Forms for Real Estate FORM 25.52

FORM 25.52 Sale is contingent upon purchaser's receipt of approval to use public sewer system for premises

COMMENT

This contingency is useful when the premises to be sold are not currently using a public sewer system. It places a cap on the amount which the purchaser might have to pay in order to construct a "hook up" between the premises and the system. Such a provision is extremely important since it protects the purchaser from buying property and then discovering--when it's already too late--that the cost of a connection to the public sewer system is economically unfeasible.

The contingency allows the purchaser to terminate the agreement if the purchaser cannot obtain the required approval or if the price of the hook up is too high. If the purchaser is still interested in purchasing the premises, he may wish to renegotiate the agreement in order to lower the purchase price, thereby making the cost of connection feasible, or the price more reflective of the value of property which cannot be connected to the public sewer system.

FORM

This Agreement is contingent upon Purchaser receiving approval from the Town _____ [or Village/County/City] of _____ [name] to attach the sewerage system contained on the subject premises to the municipal sewerage system. Such approval may be conditioned upon:

- (1) Purchaser paying the cost of attachment;
- (2) Purchaser paying periodic or usage fees;

(3) the size of the pipes to be used;

(4) the volume of usage; and/or

(5) _____ [*insert other condition(s), if any*].

Notwithstanding the foregoing, nothing shall require Purchaser to connect to the municipal system if the estimated cost of construction to facilitate connection exceeds _____ Dollars (\$ _____).

Purchaser shall use best efforts to obtain such approval. Purchaser, at its sole cost and expense, shall promptly provide the municipality with any review fees, plans, specifications, or reports which may be reasonably requested or required by the municipality as part of the approval process.

This contingency shall be deemed waived unless Purchaser shall notify Seller in writing of Purchaser's inability to obtain the required approval on or before _____ [*month*] _____ [*day*] _____ [*year*]. Notice shall be deemed given when received by Seller, in person or by certified mail, return receipt requested. If notice is timely given, this Agreement shall be deemed canceled. All deposits made pursuant to this agreement shall be returned to the Purchaser immediately.



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33-25 Current Legal Forms for Real Estate FORM 25.53

FORM 25.53 Sale is contingent on discovery of potable water source on premises

COMMENT

This contingency will be useful either to a commercial purchaser who wishes to use water found on the premises for operating purposes and thereby eliminate the expense of purchasing water from a utility, or to a purchaser who wishes to construct a residence which will draw on well water for household uses.

The contingency contains two parts. The first concerns the "viability" of the water source; in other words, the water must be pure, plentiful and available in a continuous supply. The second part requires that the cost of locating and accessing the water not exceed a certain limit set forth in the contingency.

The purchaser may terminate the agreement in the event that either a viable source is unavailable or that the cost estimates for locating and accessing the water exceed the cap. If the purchaser is still interested in purchasing the property, he may consider renegotiating the agreement. The parties may adjust the purchase price in order to make the cost of developing the water source more reasonable, or the purchase price more reflective of the value of property without a viable water source located upon it.

FORM

This Agreement is contingent upon locating a viable potable water source on the subject premises. Potability shall be determined in accordance with standards set by the _____ [county] County Department of Health. The source will be deemed viable if the source will provide a continuous supply of pure water in the amount of _____ (_____) gallons per minute, and the total cost to permanently access the

water shall not exceed the sum of _____ Dollars (\$_____). The determination of whether the source will provide a continuous supply of water shall be made by _____ [name] or other equally qualified geologist. The determinations required by this paragraph shall be made at the expense of Purchaser. All reports and estimates shall be provided to both Purchaser and Seller.

Seller authorizes Purchaser and his agents to dig or drill test holes, as deemed necessary by the geologists, at Purchaser's sole expense. Purchaser shall cause all areas disturbed by test holes to be returned to their prior condition at Purchaser's expense. Nothing contained herein shall require Purchaser to expend more than _____ Dollars (\$_____) for the locating of a water source and for testing required to satisfy this contingency.

This contingency shall be deemed waived unless Purchaser shall notify Seller in writing of Purchaser's inability to locate a viable potable water source, as defined above, or that the cost estimates exceed the sum set forth above, on or before _____ [month] _____ [day] _____ [year]. Notice shall be deemed given when received by Seller, in person or by certified mail, return receipt requested. If notice is timely given, this Agreement shall be deemed canceled. All deposits made pursuant to this agreement shall be returned to the Purchaser immediately.



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33-25 Current Legal Forms for Real Estate FORM 25.54

FORM 25.54 Sale is contingent on feasibility of diverting contaminated water from flowing onto subject premises from adjoining parcel of land

COMMENT

This contingency can be easily modified and used whenever an environmental site assessment has been performed earlier--perhaps in connection with a loan application or a prior unsuccessful attempt to sell the property--and reveals the existence of any adverse environmental condition on the property. The purchaser, aware of the condition, still desires to purchase the property, provided that the condition can be rectified at a reasonable cost.

To illustrate, this contingency involves a prospective purchaser of real estate who discovers that contaminated water is draining onto the subject premises from an adjoining parcel of land which is not owned by the seller of the subject premises. The purchaser is still interested in buying the premises, assuming two conditions are met. First, the seller must obtain from the town and the adjoining landowner all necessary permission to divert the flow of the contaminated water. Second, the purchaser insists that a cap be placed on the total cost of the diversion. (Without this second condition, the purchaser might later discover that the cost of rectifying the problem greatly exceeds the benefits of purchasing the property.)

The form also contains a provision allowing the purchaser to enter upon the land before transfer of title in order to begin the construction necessary to divert the water.

FORM

Seller has provided to Purchaser a copy of an environmental site review of the subject premises. The review shows that an adjoining parcel is the site of an abandoned solid waste dump. The review also shows that the general water flow in

the area is from the parcel containing the abandoned dump toward the subject premises. As a result, waste matter contained in the abandoned dump, which is capable of being borne by water, may leach or drain onto the subject premises.

This Agreement is contingent upon Purchaser being able to prevent or divert the leaching and draining of water from the adjoining parcel containing the abandoned dump. Seller shall obtain any necessary permits from the City of _____ [city], the Army Corp of Engineers and any other required permits or approvals. Seller shall also obtain written permission, in a form satisfactory to Purchaser's attorney, from the adjacent landowner to divert the water. If Seller is unable to obtain either after reasonable efforts, Purchaser may cancel this Agreement by giving Seller written notice in person or by certified mail, return receipt requested, within _____ (_____) days after Seller advises that he will be unable to fulfill his obligations. If Purchaser so notifies, the deposit made pursuant to this agreement shall be returned to the Purchaser immediately.

Purchaser shall obtain estimates for the cost of construction of the diversion. If the total cost of construction on all of the estimates exceeds _____ Dollars (\$ _____), Purchaser may cancel this Agreement using the procedure set forth in the preceding paragraph.

Seller grants Purchaser permission to commence the diversion construction prior to transfer of title. Prior to entering upon the land, Purchaser shall provide Seller with certificates of insurance, providing coverage in at least the amount of _____ Dollars (\$ _____). Said certificates of insurance shall name Seller as an additional insured and shall provide for at least _____ (_____) days' written notice to Seller prior to cancellation.

Purchaser, for himself, his agents, employees and invitees, shall hold Seller harmless for any and all claims for injury to person or property, including, but not limited to, defense costs and consequential damages, arising out of or in any way related to the diversion construction.

All work shall be performed in a workmanlike manner. The site shall be kept clear of debris. Purchaser shall not allow construction to interfere with Seller's ongoing business.

In the event that transfer of title does not occur, but Seller is without fault, Seller shall have no obligation to reimburse Purchaser for any construction and related costs incurred by Purchaser. Purchaser shall be obligated to leave the land in at least as good condition as prior to the commencement of the diversion project, visually and otherwise.

If the transfer of title fails to occur through fault of the Seller, Seller shall reimburse Purchaser for the construction costs incurred to date, up to a maximum of _____ Dollars (\$ _____).



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33-25 Current Legal Forms for Real Estate FORM 25.55

FORM 25.55 Sale is contingent on obtaining historic district approval of sale and planned modification to premises

COMMENT

Some older municipalities have made the preservation of historic structures in certain zones within the community a priority. Although the relevant municipal ordinances differ widely, it is often not possible to make certain changes to a structure located in that zone without the approval of the local historic review commission, or a similar body. The commission functions in a manner similar to a zoning board. Depending on the particular ordinance, changes in a structure's exterior color, windows, porches, trim design, or anything else for that matter, may require commission approval.

The contingency below allows the purchaser to terminate the agreement if the commission insists upon making "substantial" changes to the purchaser's proposed modifications of the property. Since the modifications are deemed essential to the purchaser's desire to purchase, the purchaser alone is entitled to determine whether any change to his proposal, required by the commission, is "substantial."

FORM

The parties hereto agree and acknowledge that the subject premises are located within the historic district of the City of _____ [city]. As a result thereof, the transfer of title is subject to the approval of the _____ [name] Historic Review Commission.

It is further agreed and understood that the ability to make the modifications to the premises which are described in Schedule "A," annexed hereto and made a part hereof, are an essential part of this Agreement and the consideration

therefor. In the event Purchaser is unable to obtain approval for said modifications, Purchaser shall not be required to purchase the Premises.

Purchaser and seller agree to make a joint application to the _____ [name] Historic Review Commission for approval of the sale and the proposed modifications. Such application shall be prepared at Purchaser's expense by _____ [name] _____, Architects, and submitted no later than _____ [month] _____ [day] _____ [year]. Purchaser shall not be required to accept transfer of title unless all proposed modifications to the premises are approved by the _____ [name] Historic Review Commission without substantial changes. The determination as to whether a change required by the _____ [name] Historic Review Commission constitutes a "substantial" change shall be in the sole discretion of Purchaser. Purchaser may elect to cancel this Agreement if approval is not received on or before _____ [month] _____ [day] _____ [year]. This date may be extended by written agreement of the parties. Notice of election to cancel shall be given to Seller, in person or by certified mail, return receipt requested. Upon receipt of notice of election to cancel, Seller shall return the deposit made pursuant to this agreement immediately.

[Attach Schedule A]



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33-25 Current Legal Forms for Real Estate FORM 25.56

FORM 25.56 Sale is contingent on obtaining conservation district approval of sale and planned modification of premises

COMMENT

Many states and municipalities have designated areas as "conservation districts," "forever wild," or some other similar designation. These areas are so designated because they contain something of nature that is worth preserving, such as wooded terrain, a marsh or stream, etc. The laws vary widely among states and municipalities and should be reviewed carefully. These laws often state that proposed modifications to existing structures, or to the use of land located within the conservation district, require review and approval of the proposal by a conservation council or its equivalent. These bodies function much like a zoning board or an arm of the zoning board.

The contingency allows the purchaser to terminate the agreement if the modifications which he wishes to make to the property are not approved without substantial changes. Since the modifications are deemed essential to the purchaser's desire to purchase, the purchaser alone is entitled to determine whether any change in his proposal, required by the conservation district council, is "substantial."

FORM

The parties hereto agree and acknowledge that the subject premises are located within the conservation district of the County of _____ [county]. As a result thereof, the transfer of title is subject to approval of the _____ [name] Conservation Council.

It is further agreed and understood that the ability to make the modifications to the premises which are described in Schedule "A," annexed hereto and made a part hereof, are an essential part of this Agreement and the consideration

therefor. In the event Purchaser is unable to obtain approval for said modifications, Purchaser shall not be required to purchase the Premises.

Purchaser and Seller agree to make a joint application to the _____ [name] Conservation Council for approval of the sale and the proposed modifications. Such application shall be prepared at Purchaser's expense by _____ [name], Architects, and submitted no later than _____ [month] _____ [day] _____ [year]. Purchaser shall not be required to accept transfer of title unless all proposed modifications to the premises are approved by the _____ [name] Conservation Council without substantial changes. The determination as to whether a change required by the _____ Conservation Council constitutes a "substantial" change shall be in the sole discretion of Purchaser.

Purchaser may elect to cancel this Agreement if approval is not received on or before _____ [month] _____ [day] _____ [year]. This date may be extended by written agreement of the parties. Notice of election to cancel shall be given to Seller, in person or by certified mail, return receipt requested. Upon receipt of notice of election to cancel, Seller shall return the deposit made pursuant to this agreement immediately.



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33-25 Current Legal Forms for Real Estate FORM 25.57

FORM 25.57 Sale is contingent on obtaining certification that premises are not located in a protected wetland

COMMENT

Under federal and state law, certain areas are designated as "protected" wetlands. Development in these areas is strictly regulated. Many local governments maintain maps which clearly identify such designated wetlands for the benefit of developers, sellers and purchasers of real estate. Where the parties to a sale agreement are unsure of whether a parcel is part of such a wetland, a "certification contingency" is necessary to protect the purchaser. This is especially important if the purchaser's use of the land will differ from the seller's use.

The contingency places the burden upon the seller to obtain a report indicating that the premises are not located in a protected wetland. Typically, the seller or purchaser would not file any permits with the Army Corp of Engineers unless they have concluded that the property is a wetland.

FORM

The most westerly portion of the premises borders on _____, which is a protected wetland within the meaning of federal and state laws and regulations. These measures would not be appropriate if the westerly portion of the premises are part of the protected wetland as defined by the Clean Water Act. Purchaser's intended use of the premises requires that he be able to prevent the westerly portion of the property is not considered wetlands.

This Agreement shall be contingent upon Seller obtaining written report issued by _____ [state] Department of Environmental Conservation that the subject premises are not a part of a protected wetland. Purchaser shall be entitled to cancel this Agreement if certification is not received on or before _____ [month] _____ [day] _____ [year]. If certification is not received and Purchaser determines to cancel, Purchaser shall give written notice of cancellation to Seller, in person or by certified mail, return receipt requested. Upon receipt of notice of cancellation,

Seller shall return any deposit made pursuant to this agreement to the Purchaser immediately.



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33-25 Current Legal Forms for Real Estate FORM 25.58

FORM 25.58 Sale is contingent on obtaining report that soils are suitable for intended use of real property

COMMENT

This contingency is designed to protect a purchaser who intends to use the subject premises for a certain purpose which will not be feasible on a particular type of soil, e.g., soil that is very sandy or rocky. The contingency allows the purchaser to terminate the agreement if that type of soil is present. In such a case, it is highly unlikely that the purchaser will want to renegotiate the purchase price, since a very substantial (and expensive) physical change of the premises would have to be made in order for the purchaser to use the property for his intended use.

FORM

The parties hereto understand that Purchaser intends to construct _____ on the subject premises. This Agreement is contingent upon Purchaser obtaining a soils report at Purchaser's expense, showing that the premises are suitable for Purchaser's intended use. A copy of the report shall be provided to both Purchaser and Seller.

This contingency shall be deemed waived unless Purchaser shall notify Seller in writing on or before _____ [month] _____ [day] _____ [year], that the report indicates that the soil or other underground conditions are not suitable. Notice shall be deemed given when received by Seller, in person or by certified mail, return receipt requested. If notice is timely given, this Agreement shall be deemed canceled. All deposits made pursuant to this agreement shall be returned to Purchaser immediately.



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FORM 25.59 Model definition of "hazardous substance"

COMMENT

This definition of "hazardous substance" can be used not only in agreements for the sale and purchase of real property, but also in lease agreements, mortgages, real estate-based loan agreements and related documents, etc.

The definition basically relies upon federal, state and local environmental statutes and regulations to specify the precise types of substances that are to be considered hazardous for the purposes of the sale/purchase agreement. However, the clause itself does list certain specific substances which are to be considered hazardous, including, asbestos, polychlorinated biphenyls ("PCBs") and radioactive substances. In addition, any other material or substance which has in the past or could in the future constitute a health, safety or environmental hazard to any person or property is likewise to be considered hazardous for the purposes of the sale/purchase agreement.

FORM

"Hazardous substance" means those substances which are regulated by, or form the basis of liability under, any federal, state or local environmental laws, including, without limitation, asbestos, polychlorinated biphenyls ("PCBs"), and radioactive substances, or any other material or substance which has in the past or could in the future constitute a health, safety or environmental hazard to any person or property.



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33-25 Current Legal Forms for Real Estate FORM 25.60

FORM 25.60 Model definition of "environmental claim"

COMMENT

This definition of "environmental claim" can be used not only in agreements for the sale and purchase of real property, but also in lease agreements, mortgages, real estate-based loan agreements and related documents, etc.

An "environmental claim" is defined as any allegation, notice of violation, legal claim or order issued by any governmental authority, or by any private person, for personal injury, property damage, nuisance, contamination or other adverse effects on the environment, resulting from or based upon: (1) the release or spillage of hazardous substances into the air, water or ground; (2) the transportation, storage, treatment or disposal of hazardous substances; or (3) the violation of any environmental statute, order, regulation or permit.

FORM

"Environmental claim" means any accusation, allegation, notice of violation, claim, demand, abatement, or order of direction (conditional or otherwise) by any governmental authority or any person for personal injury (including sickness, disease or death), tangible or intangible property damage, damage to natural resources, nuisance, pollution, contamination or other adverse effects on the environment, or for fines, penalties, or restrictions, resulting from or based upon:

(1) the existence or release (including, without limitation, sudden or nonsudden, accidental or nonaccidental leaks or spills) of, or exposure to, any hazardous substance, chemical, material, pollutant, contaminant, or audible noise in, into or onto the environment (including, without limitation, the air, ground, water or any surface);

(2) the transportation, storage, treatment or disposal of hazardous substances; or

(3) the violation, or alleged violation, of any statute, ordinance, order, rule, regulation, permit or license of or from any governmental authority, agency or court relating to environmental matters.



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FORM 25.61 Model definition of "environmental law"

COMMENT

The clause below provides a very expansive definition of the term "environmental law." The definition encompasses not only statutes enacted by legislative bodies, but also regulations, ordinances and policies promulgated by any governmental authority (whether federal, state, county or municipal) and pertaining to the environment or to public health or safety.

FORM

"Environmental law" means any applicable foreign, federal, state or local statute, law, ordinance, rule, regulation, or order (whether voluntary or not) relating to the environment, natural resources, or human health and safety, including, without limitation, the Comprehensive Environmental Response, Compensation, and Liability Act, 42 USC § 9601 *et seq.*; the Hazardous Material Transportation Act, 49 USC § 1801 *et seq.*; the Resource Conservation and Recovery Act, 42 USC § 6901, *et seq.*; the Federal Water Pollution Control Act, 33 USC § 1251 *et seq.*; the Clean Air Act, 42 USC § 7401 *et seq.*; the Toxic Substances Control Act, 15 USC § 2601 *et seq.*; and the Occupational Safety and Health Act, 29 USC § 651 *et seq.*, as such laws have been amended or supplemented now or in the future.



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FORM 25.62 Model definition of "environmental liabilities and costs"

COMMENT

This provision provides a very expansive definition of the term "environmental liabilities and costs." It can be used not only in agreements for the sale and purchase of real property, but also in lease agreements, mortgages, real estate-based loan agreements and related documents, etc.

The term refers to any and all liabilities, obligations, losses, damages (including punitive, consequential and treble damages), expenses (e.g., attorneys' and environmental consultants' fees), fines, penalties and interest incurred as a result of a lawsuit based on: (1) an environmental mishap that occurs on the subject property (such as the sudden release or emission of toxic gases or liquids); or (2) the discovery of an adverse environmental condition already existing on the property (such as leaking barrels of hazardous waste buried beneath the ground).

FORM

"Environmental liabilities and costs" means all liabilities, obligations, responsibilities, remedial actions, losses, damages, punitive damages, consequential damages, treble damages, costs and expenses (including, without limitation, all reasonable fees, disbursements and expenses of counsel, expert and consulting fees, and costs of investigation and feasibility studies), fines, penalties, sanctions and interest, incurred as a result of any claim or demand, by any person, whether based in contract, tort, implied or express warranty, strict liability, criminal or civil statute, including any environmental law, permit, order or agreement with a governmental authority or other person, arising from environmental, health or safety conditions, or the release of a contaminant into the environment, resulting from the past, present or future operations of a business entity.



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FORM 25.63 Model definition of "release"

COMMENT

The clause below can be used not only in agreements for the sale and purchase of real property, but also in lease agreements, mortgages, real estate-based loan agreements and related documents, etc. The clause defines the environmental term "release" very broadly as any spill, leak, emission, discharge, disposal or migration of a contaminant into the exterior or interior environment, thereby contaminating the air, water, land or subsoil.

FORM

"Release" means any release, spill, emission, leaking, pumping, injection, deposit, disposal, discharge, dispersal, leaching or migration of a contaminant into the indoor or outdoor environment, including the movement of contaminants through or in the air, soil, surface water, ground water or property.



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FORM 25.64 Model definition of "remedial action"

COMMENT

The clause below defines the environmental term "remedial action." It can be used not only in agreements for the sale and purchase of real property, but also in lease agreements, mortgages, real estate-based loan agreements and related documents, etc.

The clause defines the term as any action taken, whether voluntarily or by government order: (1) to clean up or remove contaminants from the environment; (2) to prevent further contamination of the environment; or (3) to perform pre-remedial or post-remedial studies and investigations to determine either the nature and extent of an environmental problem, or whether remedial efforts already taken have successfully eliminated the problem.

FORM

"Remedial action" means all actions required or voluntarily undertaken to:

- (1) clean up, remove, treat or in any other way address contaminants in the indoor or outdoor environment;
- (2) prevent the release or threat of release or minimize the further release of contaminants so they do not migrate or endanger or threaten to endanger public health or welfare or the indoor or outdoor environment; or
- (3) perform pre-remedial studies and investigations and post-remedial monitoring and care.



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FORM 25.65 Agreement allowing purchaser to enter upon seller's property to perform construction work prior to transfer of title

COMMENT

Frequently, it is necessary for certain construction or remediation work to be completed prior to the transfer of title. For example, construction work might be necessary to remedy some dangerous condition existing on the land or in a structure. Similarly, the mortgage lender might require that the work be completed before releasing funds to the purchaser.

In any event, this agreement presumes that the purchaser will not accept title unless and until the construction work is performed. It also presumes that the purchaser will enter upon the property before the transfer of title and perform the construction work at his own expense. (This is quite common where the seller agrees to modify the original sale agreement and reduce the purchase price in the amount of the construction costs.)

While the agreement allows the purchaser to enter upon the subject premises, it places all risk of injury to person or property upon the purchaser. The agreement also allocates risk of loss for the cost of work completed in the event that transfer of title does not occur.

FORM

AGREEMENT made this ____ [day] _____ [month] ____ [year], between _____ [name], residing at _____ [address], hereafter referred to as "Seller," and _____ [name], a corporation organized under the laws of the State of _____ [state], with offices for the transaction of business at _____ [address], hereafter referred to as "Purchaser."

Seller grants Purchaser permission to enter the subject premises in order to _____ [*describe construction work to be performed*] prior to transfer of title. Prior to entering upon the land, Purchaser shall provide Seller with certificates of insurance in at least the amount of _____ Dollars (\$_____). Said certificates of insurance shall name Seller as an additional insured and shall provide for at least _____ (_____) days' written notice to Seller prior to cancellation.

Purchaser, for himself, his agents, employees and invitees, shall hold Seller harmless for any and all claims for injury to person or property, including, but not limited to, defense costs and consequential damages arising out of or in any way related to the construction.

All work shall be performed in a workmanlike manner. The site shall be kept clear of debris. Purchaser shall not allow construction to interfere with Seller's ongoing business.

In the event that transfer of title does not occur without fault of Seller, Seller shall have no obligation to reimburse Purchaser for any construction and related costs incurred by Purchaser. Purchaser shall be obligated to leave the land in at least as good condition as prior to the commencement of the project, visually and otherwise.

If the transfer of title fails to occur through the fault of the Seller, Seller shall reimburse Purchaser for the construction costs incurred to date, up to a maximum of _____ Dollars (\$_____).

IN WITNESS WHEREOF, the parties hereto have set their hands and seals the day and year first above written.

PURCHASER:

_____ [*name*]

By: _____

Printed Name: _____

Title: _____

SELLER:

_____ [*name*]

By: _____

Printed Name: _____

Title: _____



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FORM 25.66 License agreement for use by seller or purchaser for entry onto property prior to closing

COMMENT

The following agreement is a license agreement which allows the purchaser to enter upon the subject premises for purposes of inspection or testing prior to the transfer of title. Typically, if the results of the inspections and the tests are not acceptable to purchaser, the purchaser may terminate the purchase agreement. This agreement requires the purchaser to carry liability insurance and to obtain any governmental approvals. Further, purchaser must restore the property and agrees to indemnify seller from any damages incurred by seller as a result thereof.

FORM

LICENSE AGREEMENT

THIS LICENSE AGREEMENT is entered into as of the _____ [day] day of _____ [month], _____ [year] between _____ [name] ("Seller") and _____ [name] ("Purchaser").

RECITALS

A. Seller and Purchaser have entered into that certain Sale and Purchase Agreement dated _____ [month] _____ [day] _____ [year] (the "Sale and Purchase Agreement") for the sale to Purchaser of Seller's interests in certain property commonly known as _____ [address], _____ [city], _____ [state] and more particularly described in Schedule A hereto (the "Property"); and

B. In connection with Purchaser's due diligence investigation of the Property, Purchaser would like access to the Property to perform certain inspections and testing thereof.

NOW THEREFORE, in consideration of _____ Dollars (\$_____) and other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, and intending to be legally bound, the parties hereby agree as follows:

1. Seller hereby grants to Purchaser a license to enter upon the Property to conduct inspections and testing thereof (collectively, "Tests"), subject to the terms and conditions of this Agreement.

2. A. Prior to the entry upon the Property by Purchaser or its representatives:

(a) Purchaser shall provide to Seller, for Seller's review and approval, (i) a detailed description of any proposed Test to be conducted by or on behalf of Purchaser, and (ii) the identity of the person or firm proposed to conduct the Test. Purchaser shall provide such additional information with respect thereto as Seller may request.

(b) Purchaser shall obtain from the appropriate governmental authorities any and all approvals which are required in connection with any proposed Test, and shall provide such evidence thereof as Seller may reasonably require.

(c) Purchaser shall obtain and provide evidence of such liability and property insurance, insuring Seller against risks which may arise in connection with the entry upon the Property by Purchaser and/or its representatives and the conduct of any proposed Test, as Seller may request.

Anything herein to the contrary notwithstanding, except as otherwise provided in subparagraph B, below, Purchaser shall not be permitted to conduct any Test affecting the Property unless Seller has confirmed in writing that the foregoing conditions have been satisfied or waived.

B. Seller hereby agrees that any proposed Test which does not involve the physical alteration of the Property may be conducted by Purchaser without further approval of Seller, subject, however, to the provisions of Paragraph 3, below.

3 Purchaser shall provide Seller with reasonable advance notice of the date or dates upon which Purchaser proposes to conduct any proposed Test, which date or dates shall be subject to Seller's reasonable approval. Representatives of Seller shall be permitted to accompany Purchaser and its representatives during the conduct of any Test affecting the Property. If Seller approves a proposed Test subject to conditions, Purchaser shall conduct the Test strictly in accordance with such conditions.

4. If for any reason whatsoever, Purchaser does not acquire the Property pursuant to the Sale and Purchase Agreement, Purchaser shall promptly restore the Property to the condition thereof as existed prior to the conduct of any Test.

5. Purchaser hereby agrees to indemnify, defend and hold Seller harmless from and against any and all claims, demands, liabilities, damages, costs and expenses, including reasonable attorneys' fees and expenses (collectively, "Liabilities") asserted against or incurred by Seller or the Property, arising out of, in connection with or relating to (i) the entry upon the Property by Purchaser or any of its representatives, (ii) the conduct of any Tests affecting the Property by Purchaser or its representatives or (iii) the failure by Purchaser to perform or observe the terms and conditions of this Agreement.

6. The license granted to Purchaser pursuant to this Agreement shall automatically terminate and be revoked upon termination of the Sale and Purchase Agreement for any reason whatsoever.

7. Each party hereby represents and warrants to the other that this Agreement has been duly authorized, executed and delivered by it and constitutes a legal, valid and binding obligation, enforceable against it in accordance with its terms.

(a) This Agreement and all of its terms and provisions shall be binding upon and inure to the benefit of Seller and Purchaser and their respective successors and assigns.

(b) This Agreement may not be modified or amended orally or in any manner other than by an agreement in writing, signed by Seller and Purchaser.

(c) This Agreement may be executed in two or more counterparts and shall be deemed to have become effective when and only when one or more of such counterparts shall have been signed by or on behalf of each of the parties hereto.

(d) This Agreement shall be construed and enforced in accordance with the laws of the State of _____ [state].

EXECUTED by the parties hereto as of the date set forth above.

Purchaser:

_____ [name]

By: _____

Printed Name: _____

Title: _____

SELLER:

_____ [name]

By: _____

Printed Name: _____

Title: _____

[Attach Schedule A]



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FORM 25.67 Licence Agreement allowing purchaser to enter upon seller's property

COMMENT

This is another example of a license agreement whereby the purchaser has the right to enter onto the premises prior to closing in order to undertake certain activities, for example environmental remediation of the construction of an addition. In any event, the purchaser must be satisfied with the scope of remediation or other work as a condition to closing.

The license will expire upon the purchase of the premises or a pre-determined date. Pursuant to this agreement, the purchaser has waived all contingencies except the requirement to obtain permits.

The purchaser must obtain liability insurance with respect to the property. To ensure that seller will not incur damages by allowing purchaser to modify the premises, seller is requiring a deposit. Also, the purchaser must indemnify the seller from any damage which seller may incur by the granting of early access.

FORM

LICENSE AND INDEMNITY AGREEMENT

THIS LICENSE AND INDEMNITY AGREEMENT is made this ____ [day] day of _____ [month] ____ [year] by and between _____ [name] ("Owner") and _____ [name] ("Purchaser").

WHEREAS, Owner is the owner in fee simple of the real estate described on Exhibit A attached hereto (the "Property");

and

WHEREAS, Owner and Purchaser have entered into an Agreement of Sale dated _____ [month] _____ [day] _____ [year] (the "Agreement"), wherein Purchaser has agreed to purchase the Property, subject to the terms and conditions set forth therein; and

WHEREAS, prior to the transfer of legal title of the Property to Purchaser, and without expanding its obligation to purchase the Property (except as is specifically set forth herein), Purchaser desires to commence certain nonstructural modifications to the Property;

NOW, THEREFORE, in consideration of the covenants and agreements hereinafter contained the parties agree as follows:

1. Grant of License. Owner hereby grants to Purchaser, its agents, officers, employees and independent contractors a non-exclusive license on, under and over the Property for the specific purpose set forth herein. This license shall terminate upon the earlier of (i) transfer of legal title of the Property to Purchaser; or (ii) the close of business on _____ [month] _____ [day] _____ [year].

2. Scope of License. During the term of this License, Purchaser shall be entitled to complete, at its own risk, cost and expense, the projects generally described on Exhibit B, attached hereto (the "Work").

3. Restoration of Property. If this License shall expire, and the Agreement shall be terminated, then, unless Owner shall have willfully defaulted (as opposed to an inability to close title) under the Agreement, Purchaser will diligently proceed to restore the Property to substantially the same condition that the Property is in as of the date hereof. Owner's failure to satisfy the requirement of Paragraph 7. of this Agreement shall constitute an inability to close rather than a willful default. In lieu of restoration, the parties may agree to a monetary settlement. In which case, upon payment of such settlement, the parties will execute a mutual release evidencing the termination of the Agreement and the obligations of Purchaser hereunder. In the event that Purchaser shall be required to restore the Property, this License Agreement shall be extended for a reasonable period of time in order to allow Purchaser to complete the restoration.

4. Compliance with Laws. Purchaser shall complete the Work, lien free in compliance with all applicable laws, ordinances, rules, regulations and authorities and shall obtain, if required, all permits, consents and licenses required to complete the Work.

5. Insurance. Prior to the commencement of the Work, Purchaser will obtain a public liability insurance policy with respect to the Work in such amount as is reasonably requested by Owner. Such policy shall name Owner as an additional insured thereunder.

6. Deposit. The parties acknowledge that Purchaser has deposited the sum of _____ Dollars (\$ _____) in escrow with _____ [name] (the "Initial Deposit") pursuant to the terms and conditions set forth in the Agreement. Prior to commencement of the Work, Purchaser agrees that it will deposit an additional _____ Dollars (\$ _____) in escrow with _____ [name] (the "Second Deposit") to be held by _____ [name] in escrow. In the event that the transaction described in the Agreement shall be consummated, then the Initial Deposit and the Second Deposit shall be applied against the cash portion of the purchase price described in Paragraph 3.B.(i) of the Agreement. The balance of the cash purchase price shall be placed in escrow on or before _____ [month] _____ [day] _____ [year] (the "Third Deposit"). In the event that legal title to the Property shall not be transferred to Purchaser, then _____ [name] shall hold the Initial Deposit, the Second Deposit and the Third Deposit in escrow pending a writing signed by both parties to the effect that the Property has been restored or that a satisfactory monetary settlement has been reached, in which case interest shall follow the deposit.

7. Contingencies. Purchaser waives all contingencies set forth in the Agreement, except that the Agreement shall still be contingent upon Purchaser obtaining all necessary approvals, permits, consents and licenses in order to cause the improvements on the Property to reflect a standard Purchaser retail facility except that Purchaser reserves the right to elect not to close based upon a title problem. Owner agrees to obtain releases of items 15, 16, 17 and 18 of the Title Commitment dated _____ [month] _____ [day] _____ [year] issued by _____ [name]. The closing date set forth in the Agreement shall be moved up to _____ [month] _____ [day] _____ [year] and time is of the essence.

8. Prorations. The parties agree that notwithstanding the proration provisions set forth in the Agreement, that upon transfer of legal title of the Property to Purchaser, all items described in Paragraph 5 of the Agreement will be prorated the earlier of the date of (i) the transfer of legal title of the Property to Purchaser; or (ii) _____ [month] _____ [day] _____ [year]. The parties agree that interest on the deferred portion of the purchase price referred to in Paragraph 3.B.(ii) of the Agreement will commence effective the proration date determined by the immediately preceding sentence.

9. Indemnity. Purchaser hereby agrees to indemnify, defend and hold harmless Owner from all reasonable costs, expenses, fees (including reasonable attorneys fees) and damages incurred by Owner with respect to the Work or arising in connection with the Work whether arising from claims of third parties, fines levied by government agencies, loss of rental value or otherwise.

10. Binding Effect. This Agreement shall be binding upon and inure to the benefit of the parties hereto, their successors and assigns.

IN WITNESS WHEREOF, the parties have executed this License and Indemnity Agreement on the date first written, above.

OWNER:

_____ [name]

By: _____

Printed Name: _____

Title: _____

LICENSEE:

_____ [name]

By: _____

Printed Name: _____

Title: _____

STATE OF _____ [state])
COUNTY OF _____ [county]) SS:

BEFORE ME, a Notary Public in and for said County and State, personally appeared _____ [name],
a(n) _____ [state] _____ [entity], by _____ [name], its
_____ [title], who acknowledged that _____ [he/she] did sign the foregoing
instrument for and on behalf of said corporation, being thereunto duly authorized, and that the same is
_____ [his/her] free act and deed individually and as such officers and the free act and deed of said
_____ [entity].

IN TESTIMONY WHEREOF, I have hereunto set my hand and official seal at _____ [city],
_____ [state], this _____ [day] day of _____ [month], _____ [year].

Notary Public

STATE OF _____ [state])
COUNTY OF _____ [county]) SS:

BEFORE ME, a Notary Public in and for said County and State, personally appeared _____ [name],
a(n) _____ [state] _____ [entity], by _____ [name], its
_____ [title], who acknowledged that _____ [he/she] did sign the foregoing
instrument for and on behalf of said corporation, being thereunto duly authorized, and that the same is
_____ [his/her] free act and deed individually and as such officers and the free act and deed of said
_____ [entity].

IN TESTIMONY WHEREOF, I have hereunto set my hand and official seal at _____ [city],
_____ [state], this _____ [day] day of _____ [month], _____ [year].

Notary Public

[Attach Exhibit A]

[Attach Exhibit B]

[Attach Exhibit C]



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FORM 25.68 Form letter ordering an inspection

COMMENT

This form is a letter by which a purchaser requests an inspection company to perform various types of inspections necessary to satisfy the contingencies which may be contained in the real estate sale agreement.

The purchaser must be very careful in setting the dates by which the inspections must be completed and results reported, so as to leave himself sufficient time to deliver notice to the seller if an adverse finding is made. If it appears that the inspections cannot be completed by the inspection company in a timely fashion, the purchaser should request a written extension from the seller immediately.

FORM

_____ [month] _____ [day] _____ [year]

TO: _____ [name]

_____ [address]

_____ [city] _____ [state]

RE: _____ [address of subject premises]

Gentlemen:

I am the contract purchaser of the above described premises by agreement dated _____ [month] _____ [day] _____ [year]. That agreement is contingent upon an inspection for _____. Notice of failure of the contingency must be given to seller on or before _____ [month] _____ [day] _____ [year]. Therefore, your inspection must be complete and the report delivered to me and the seller (at the above address of the subject premises) on or before _____ [month] _____ [year]. Time is of the essence. If you cannot meet these dates, notify me immediately.

You must contact _____ [insert telephone number] to obtain access to the premises.

Please provide me with a copy of your certificate of insurance prior to entering the Seller's premises.

The contract allows you to remove _____ to facilitate your inspection. Removal and replacement are at my expense. The cost should be added to your statement for services. If that cost will exceed _____ Dollars (\$ _____), or if you require an outside contractor to perform the removal and replacement, you must obtain prior approval of the cost by me.

In the event that you locate _____, please include in your report an estimate for the cost of removal, repair or abatement, as the case may be.

Very truly yours,

[signature of purchaser]



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FORM 25.69 Letter from purchaser to seller that results of the environmental inspection have not been approved

COMMENT

This letter is intended to serve as the contractually-required written notice from the purchaser to the seller terminating the sale agreement due to the failure of a contingency.

One of the paragraphs of the form allows the purchaser to protect himself by canceling the agreement, while simultaneously informing the seller that the purchaser may still be willing to purchase the property if the price is reduced or seller agrees to remediate the problem at seller's cost.

FORM

_____ [month] _____ [day] _____ [year]

TO: _____ [name]

_____ [address]

_____ [city] _____ [state]

RE: _____ [address of subject premises]

Gentlemen:

This is to advise you that the inspection report shows the existence of _____ [*insert asbestos/radon gas/wood boring insects, etc.*] on the premises. A copy of the report is enclosed for your convenience.

Pursuant to Paragraph _____ of our contract, dated _____ [*month*] _____ [*day*] _____ [*year*], I hereby elect to cancel the contract on the basis of the inspection report. Please instruct the escrow agent to return my deposit of _____ Dollars (\$_____) immediately.

[*If appropriate: I am still interested in purchasing the property if we can reach a new agreement with a reduction of the purchase price or an arrangement regarding repairs. If you are interested, please contact me by _____ [*month*] _____ [*day*] _____ [*year*]. If I have not heard from you by then, I will expect my deposit to have been returned so that I can seek another property.*]

Very truly yours,

[*signature of purchaser*]

cc: Real Estate Broker
Escrow Agent



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Chapter 25 ENVIRONMENTAL CONSIDERATIONS IN REAL ESTATE TRANSACTIONS

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A. ENVIRONMENTAL CONSIDERATIONS IN REAL ESTATE TRANSACTIONS

33-25 Current Legal Forms for Real Estate FORM 25.70

FORM 25.70 Notice terminating existing sale agreement due to failure of contingency--agreement contains mutual releases exchanged between parties and confidentiality requirement

COMMENT

This form contains two parts. The first part is the purchaser's written notice to the seller that an environmental contingency in the sale agreement has failed and, as a result, the purchaser desires to terminate the agreement. Such formal written notice is normally required by the sale agreement itself.

The second part is an agreement between the seller and purchaser to terminate the sale agreement. When an environmental contingency has failed, one or both parties to the sale agreement may decide not to proceed with alternative measures to complete the sale.

This agreement also provides for the return of the purchaser's deposit. In addition, the agreement also includes mutual releases exchanged between the parties for any further obligations under the sale agreement.

For the protection of the seller, the agreement has a confidentiality clause, that is, the purchaser promises not to disclose to others--especially other potential purchasers--the condition on the premises that led to the failure of the environmental contingency. Indeed, under the terms of the clause, the purchaser is not entitled to reveal *any* information which he learned about the seller or the subject premises during the course of the transaction. This, of course, will help prevent a future purchaser from receiving adverse information about the property that might dissuade him from buying it.

FORM

Notice from Purchaser to Seller

NOTICE IS HEREBY GIVEN of Purchaser's election to cancel the contract for purchase and sale of the real property and premises commonly known as _____ [address], in the City of _____ [city], State of _____ [state].

Notice is given because the results of the inspection report of _____ [name], dated _____ [month] _____ [day] _____ [year], were not approved by purchaser. A copy of the report is annexed hereto [or has been given to Seller]. Please sign the acceptance and receipt set forth below.

[Signature of purchaser]

**BY CERTIFIED MAIL
RETURN RECEIPT REQUESTED**

The undersigned hereby agree to the cancellation of the agreement for purchase and sale dated _____ [month] _____ [day] _____ [year], and release each other from all liability under the said agreement. Purchaser acknowledges receipt of his deposit from Seller. Purchaser agrees not to reveal any information regarding Seller or the real property and premises which are the subject of the contract, which information was learned during the course of the contract negotiations or arose out of the contract, including, but not limited to, the results of inspections, contents of inspection reports and test results.

Dated: _____ [month] _____ [day] _____ [year]

[Signature of seller]

[Signature of purchaser]



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FORM 25.71 Amendment to purchase agreement modifying an existing sale agreement following failure of environmental contingency--clauses: allocate responsibility for remediation and cost of remediation; specify scope of work, means of remediation, acceptable contractors for repair, and methods to be used to assure that remediation is complete; allocate liability for injury to person or property during remediation; set forth insurance requirements and allow access to premises

COMMENT

This amendment is designed for use when a contingency fails and the parties still desire to complete the transaction. Although neither party has any obligations, they chose instead to press on with the purchase of the property by negotiating an amendment to the purchase agreement.

The amendment to the purchase agreement modifies the existing agreement. The amendment designates the party that will take responsibility for making the repairs, removing the asbestos-containing insulation, exterminating the insects, etc. The agreement also specifies the party (or parties) that will pay the cost of remediation and how that cost will be allocated. For example, the amendment might provide that the purchaser will pay a lower purchase price, but assume responsibility for all repairs. In the alternative, the seller might undertake the repairs and require the same purchase price.

The amendment should specify, in detail, the nature and scope of the repair work to be performed, especially if it is to be performed *before* transfer of title. Such specificity is important to the seller because a danger always exists in real estate deals that transfer of title will never take place; in that event, the seller does not want to be left with a repair job that may have satisfied his prospective purchaser, but clearly does not satisfy the seller or a future purchaser.

The parties should take great care in selecting the contractor who will perform the work. If transfer of title does not take place, the seller will become the owner of the contractor's work.

Obviously, if the deal closes, purchaser will own the property and be the beneficiary of the work.

FORM

THIS AMENDMENT is made this ____ [day] day of ____ [month] ____ [year], between
____ [name], residing at ____ [address] (hereafter referred to as "Seller"), and
____ [name], residing at ____ [address] (hereafter referred to as "Purchaser").

WHEREAS, the parties hereto entered into an agreement dated ____ [month] ____ [day] ____ [year], for the purchase and sale of the real property and premises commonly known as ____ [address] (hereafter "property"); and

WHEREAS, the agreement contains a contingency in Paragraph ____ thereof for
____; and

WHEREAS, the inspection report dated ____ [month] ____ [day] ____ [year], shows the presence of
____; and

WHEREAS, Purchaser has the right to cancel the agreement, but instead the parties desire to modify the agreement,

NOW, in consideration of the mutual promises contained herein, it is agreed as follows:

[Alternative One: Purchase Price Reduced; Purchaser to Undertake Repairs After Transfer of Title]

1. The agreement dated ____ [month] ____ [day] ____ [year], shall be modified as follows:

(a) The purchase price, as set forth in Paragraph ____ thereof, shall be reduced by
____ Dollars (\$____) to the sum of ____ Dollars
(\$____). Purchaser shall accept the property in its "AS IS," "WHERE IS" condition WITH ALL
FAULTS. Purchaser shall be responsible for taking whatever actions may be required to repair the conditions set forth
in the inspection report dated ____ [month] ____ [day] ____ [year], after transfer of title.

(b) Purchaser shall indemnify and hold Seller harmless for any and all claims for injury to person or property from the
date of transfer of title onward arising out of or in any way related to the condition, the repair thereof, or the failure to
repair.

2. All other provisions of the said agreement dated ____ [month] ____ [day] ____ [year], shall remain in
effect except as modified herein. In the event of any conflict, the provisions of this modification shall supersede and
take precedence over any provisions contained in the original agreement dated ____ [month] ____ [day] ____
[year].

[Alternative Two: Seller to Undertake Repairs Before Transfer of Title]

1. The Agreement dated ____ [month] ____ [day] ____ [year], shall be modified as follows:

(a) It shall be the responsibility of Seller to eliminate [or reduce or repair] the condition noted in the inspection report
dated ____ [month] ____ [day] ____ [year].

(b) The parties shall obtain an estimate for the work to be performed from a contractor to be agreed upon. If the parties

cannot agree upon a contractor, they shall each obtain a sealed estimate from a reputable contractor. The contractor submitting the lower bid shall be selected. Seller shall enter into an agreement for the work to be performed.

(c) The work to be performed is described in Schedule "A," annexed hereto.

(d) Seller shall pay the cost of work to be performed up to the sum of _____ Dollars (\$_____). Any cost above that shall be the responsibility of the Purchaser [or shall be shared equally by Seller and Purchaser].

(e) The agreement with the contractor shall require that he maintain liability insurance coverage in at least the amount of _____ Dollars (\$_____). That agreement shall further provide that Seller and Purchaser shall be an additional named insured. That agreement shall further contain a hold harmless provision protecting Seller and Purchaser for any liability for injury to person or property arising out of the contractor's work.

(f) Upon completion of the contractor's work and prior to his last payment, an additional inspection shall be performed by the same party who performed the inspection dated _____ [month] _____ [day] _____ [year]. This inspection shall be performed at the expense of _____. If the inspection shows the condition to be eliminated [or repaired or sufficiently reduced], the contractor shall be paid. The parties hereto shall proceed toward transfer of title as set forth in the original agreement.

If the condition is not eliminated [or repaired or sufficiently reduced], the contractor shall be required to continue his performance until he has eliminated [or repaired or sufficiently reduced] the condition or until it is shown that the condition has not been eliminated [or repaired or sufficiently reduced] even though the work in Schedule A has been properly completed. Purchaser [or Seller] shall pay for all inspections required under this paragraph.

In the event that after the work described in Schedule A has been completed and all good faith efforts have been expended, and the condition has not been eliminated [or repaired or sufficiently reduced], Purchaser may elect to cancel this modification and the original agreement. Purchaser shall give notice of election to cancel as specified in the original agreement dated _____ [month] _____ [day] _____ [year]. Purchaser shall nevertheless be obligated to pay any sums due under Paragraph 1(d) hereof.

(g) Seller agrees to provide access to the property to the contractor, the inspector, their agents and employees at reasonable hours.

2. All other provisions of the said agreement dated _____ [month] _____ [day] _____ [year], shall remain in effect except as modified herein. In the event of any conflict, the provisions of this modification shall supersede and take precedence over any provisions contained in the original agreement dated _____ [month] _____ [day] _____ [year].

[Alternative Three: Purchase Price Reduced; Purchaser to Undertake Repairs Before Transfer of Title]

1. The Agreement dated _____ [month] _____ [day] _____ [year], shall be modified as follows:

(a) The purchase price as contained in Paragraph _____ thereof shall be reduced by _____ Dollars (\$_____) to the sum of _____ Dollars (\$_____). Purchaser shall be responsible for elimination [or repair or reduction] of the condition noted in the inspection report dated _____ [month] _____ [day] _____ [year].

(b) Since Purchaser's mortgage lender will not release the mortgage funds until the condition is eliminated [or repaired or sufficiently reduced], the Seller hereby grants Purchaser the right to have the work described in Schedule A

performed prior to transfer of title.

(c) The work shall be performed at Purchaser's sole expense.

(d) Seller shall forthwith provide Purchaser with the names and addresses of at least four contractors whom he deems acceptable. Purchaser may enter into a contract for the work described in Schedule A with any contractor contained on Seller's list. In the event that Purchaser does not find any of these contractors acceptable, or willing to contract, he may propose a list to Seller. In the event Seller does not approve any of Purchaser's proposed contractors, Purchaser may elect to cancel this modification and the original agreement. Purchaser shall give notice of election to cancel as specified in the original agreement dated _____ [month] _____ [day] _____ [year].

(e) If Seller and Purchaser agree upon a contractor, the agreement with the contractor shall contain the following provisions:

(i) the scope of the work, as set forth in Schedule A;

(ii) that contractor will provide a guarantee of the work for a period of at least _____
(_____) years;

(iii) that contractor will provide liability [and casualty] insurance in the amount of at least _____
Dollars (\$_____), naming Seller and Purchaser as additional insureds;

(iv) that contractor will hold Seller and Purchaser harmless for any liability for injury to person or property arising out of the contractor's work. Such hold harmless provision must be in a form that is acceptable to Purchaser's and Seller's attorneys;

(v) that all work shall be performed in a workmanlike manner;

(vi) that the contractor shall be the agent of Purchaser and not Seller.

(f) Purchaser shall indemnify and hold Seller harmless for any claim of liability (including legal fees) for injury to person or property arising out of or in connection with the work to be performed by the contractor. This shall include indemnification for failure to complete the work properly.

(g) Purchaser, at his sole cost and expense, may have additional inspections performed at the completion of contractor's work to insure that the condition has been eliminated [or repaired or sufficiently reduced]. If the condition has not been eliminated [or repaired or sufficiently reduced], Purchaser may elect to cancel the original agreement by giving notice as set forth therein. In the event of cancellation, Purchaser shall not be relieved of the obligation to pay contractor or of the indemnification provisions contained in Paragraph 1, above. Purchaser shall not be entitled to any repayment of any funds expended under this modification agreement, in the event of cancellation.

2. All other provisions of the said agreement dated _____ [month] _____ [day] _____ [year], shall remain in effect as modified herein. In the event of any conflict, the provisions of this modification shall supersede and take precedence over any provisions contained in the original agreement dated _____ [month] _____ [day] _____ [year].

IN WITNESS WHEREOF, the parties hereto have set their hands and seals the day and year first above written.

PURCHASER:

_____ [name]

By: _____

Printed Name: _____

Title: _____

SELLER:

_____ [name]

By: _____

Printed Name: _____

Title: _____

[Attach Schedule A]



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33-25 Current Legal Forms for Real Estate FORM 25.72

FORM 25.72 Amendment allowing for additional time to obtain estimates for cost of remediation and to obtain further technical information

COMMENT

This amendment is designed for use when a contingency has failed, or appears to have failed, and the parties need more time and information in order to determine whether to proceed with the original purchase and sale agreement.

Firstly, the form allocates responsibilities for obtaining the estimates and extra information. In addition, it preserves the purchaser's rights by extending his time limit for terminating the original sale agreement in the event that a mutually-agreeable solution cannot be reached by the parties.

By using the form that follows, the parties need not cancel an otherwise perfectly good sale and purchase agreement due to a lack of time and information.

FORM

THIS AMENDMENT is made this ____ [day] day of _____ [month] ____ [year], between
____ [name], residing at _____ [address] (hereafter referred to as "Seller"), and
____ [name], residing at _____ [address] (hereafter referred to as "Purchaser").

WHEREAS, the parties hereto have entered into an agreement dated ____ [day] day of _____ [month] ____ [year], for the purchase and sale of the real property described therein (the "Agreement"); and

WHEREAS, Paragraph _____ of the Agreement contains an inspection contingency; and

WHEREAS, the inspection report dated _____ [day] day of _____ [month] _____ [year] has not been approved by purchaser; and

WHEREAS, the contingency period is about to expire and the parties hereto do not wish to cancel the agreement at this time;

NOW, in consideration of the mutual promises contained herein, it is agreed as follows:

1. The time in which to satisfy the contingency or timely cancel the agreement for purchase and sale is hereby extended to _____ [day] day of _____ [month] _____ [year].
2. Within _____ (_____) days of this Agreement, Seller shall obtain estimates for remediation and such other relevant and pertinent information from regarding the effects of the condition found and the methods of remediating the condition. Said information shall be provided to Purchaser promptly.
3. The parties agree to use reasonable business efforts to reach a modification to the original agreement so as to remediate the condition and proceed toward transfer of title. However, nothing contained herein shall be construed to prevent Purchaser from canceling the original agreement by giving notice as specified in the original contract on or before the date specified in Paragraph 1 hereof.

IN WITNESS WHEREOF, the parties hereto have set their hands and seals the day and year first above written.

PURCHASER:

_____ [name]

By: _____

Printed Name: _____

Title: _____

SELLER:

_____ [name]

By: _____

Printed Name: _____

Title: _____



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FORM 25.73 Clean up agreement between seller and purchaser--seller assumes financial responsibility for clean up--clean up to occur prior to closing

COMMENT

The agreement below presumes that two parties have already entered into a contract for the sale and purchase of a warehouse. That contract contained a clause making the transaction contingent upon the results of an environmental site assessment performed by the purchaser. The environmental site assessment has now been performed, and it revealed the existence of an adverse environmental condition on the subject premises. Under the terms of the sale-purchase agreement, the purchaser is free to terminate the agreement. However, after negotiations with the seller, he has decided to move ahead with the deal, provided the seller, at his own expense, eliminates the adverse condition prior to closing.

Accordingly, the parties have entered into the agreement set forth below. The seller agrees to hire two environmental consultants--one of the purchaser's choosing and the other of the seller's choosing--who together will formulate a clean-up plan and locate an environmental contractor to implement it. Upon completion of the clean up, the purchaser's environmental consultant shall inspect the premises and determine whether the clean up has been successful. If it has, then the two parties will choose a date for the closing of the sale-purchase. If the clean up has not been successful, then the purchaser is free to terminate the contract of sale and purchase.

FORM

Agreement entered into this day, the ____ [day] day of _____ [month], ____ [year], between
 _____ [name], located at _____ [address], hereafter referred to as "Seller," and
 _____ [name], located at _____ [address], hereafter referred to as "Purchaser."

I. Adverse Environmental Condition

Seller and Purchaser have previously entered into an agreement for the sale and purchase of a warehouse located at _____ [address]. Said agreement, dated _____ [month] _____ [day] _____ [year], made the sale and purchase contingent upon the results of an environmental site assessment conducted by the Purchaser's agents. Such environmental site assessment was conducted on _____ [month] _____ [day] _____ [year], by _____ [name]. The environmental site assessment revealed the presence of _____ [describe condition].

A copy of the environmental site assessment has previously been submitted to the Seller, who does not deny that such drums of hydrochloric acid are, in fact, present on the subject premises. Purchaser hereby states, and Seller agrees, that the foregoing condition on the subject premises constitutes an adverse environmental condition, entitling Purchaser to immediately terminate the agreement of sale and purchase. Nonetheless, Purchaser desires to go forward with the purchase of the subject premises, provided that seller agrees to fulfill the duties set forth below:

II. Seller's Obligation

Seller hereby agrees to promptly enlist the services of an environmental consultant who, together with an environmental consultant designated by the Purchaser, shall devise a plan for the remediation. Such consultants shall also determine the condition of any containers on the premises in order to ascertain whether any drum has leaked, causing contamination of the subject premises. If leakage and contamination of the premises has occurred, the consultants shall determine the exact nature and severity of such contamination and devise a clean up plan to completely eliminate the contamination.

In addition, the consultants shall engage the services of a fully licensed environmental contractor who specializes in cleaning up toxic substances. Such contractor shall remediate the condition, including the soil, storage shed, or part thereof, that has been contaminated by leakage. The consultants shall set forth, in writing, the clean up plan to be followed by the contractor, including standards to be met, instructions to be followed, and an approved method of disposal of the drums (and contaminated soil and debris).

The consultants shall also see to it that any and all requirements imposed by relevant federal, state and local environmental laws and regulations are fully satisfied.

Any and all costs arising from the foregoing activities, including the cost of the services provided by the Purchaser's environmental consultant, shall be the sole responsibility of the Seller.

III. Purchaser's Approval

The clean up plan devised by the two environmental consultants shall be submitted to Purchaser for its approval. If Purchaser approves of the plan, then the Seller shall enter into a contract with the environmental contractor to execute the plan. Any and all costs arising from the execution of the clean up plan by the contractor shall be the sole responsibility of the Seller.

The contract between the Seller and the environmental contractor shall provide that the latter shall obtain liability insurance in an amount designated by the Purchaser, and that such policy shall name the Purchaser among the insureds. In addition, the contract shall provide that the Purchaser and its agents shall reserve the right to observe the clean up efforts as they are occurring.

IV. Closing Date

Upon the completion of the clean up efforts, but under no circumstances more than _____ (_____) days following the execution of this agreement, the Seller shall notify the Purchaser that the clean up efforts have been completed in accordance with all applicable laws. Upon receipt of such notification, the Purchaser shall have _____ (_____) days in which to dispatch its environmental consultant to the subject premises and conduct an examination of said premises to determine whether the clean up plan has been fully and successfully implemented.

If the environmental consultant is satisfied that the clean up work has been fully and successfully implemented, then the Purchaser shall promptly notify the Seller of this fact. Thereupon, Seller and Purchaser shall select a date for the closing of the sale and purchase of the subject premises.

If, on the other hand, the Purchaser's environmental consultant is not satisfied that the clean up work has been fully and successfully implemented, then the Purchaser shall promptly notify the Seller of this fact. Thereupon, the Purchaser shall have the option of terminating the agreement of sale and purchase or, alternatively, of entering into a new agreement with the Seller regarding the clean up of the subject premises.

V. Miscellaneous Provisions

1. Arbitration. Any controversy or claim arising out of or relating to this Agreement, or its breach, shall be settled by arbitration in the City of _____ [city] in accordance with the then-governing rules of the American Arbitration Association. Judgment upon the award rendered may be entered and enforced in any court of competent jurisdiction.

2. Waiver of Breach. A waiver of the breach of any provision of this agreement shall not operate or be construed as a waiver of any subsequent breach. No waiver shall be valid unless it is in writing and signed by the party granting the waiver, or by that party's designated representative.

3. Assignment. Neither party may assign its rights or delegate its duties or obligations under this agreement.

4. Entire Agreement. This agreement contains the entire understanding of the parties regarding the environmental clean up of the subject premises, and shall supersede all other prior written or oral agreements. It may not be changed orally, but only by an instrument signed by the party against whom enforcement of any change, modification, extension, or discharge is sought.

5. Headings. Headings in this agreement are for convenience only and shall not be used to interpret or construe its provisions.

6. Counterparts. This agreement may be executed in two or more counterparts, each of which shall be deemed an original but all of which together shall constitute one and the same instrument.

7. Notices. All notices to be given hereunder shall be addressed to the respective parties at the addresses designated herein on Page 1 of this agreement, and sent by certified mail, return receipt requested. Notice shall be deemed given by mail on the date of mailing hereof.

8. This agreement is made subject to all federal, state and municipal laws or regulations now or hereafter in force and shall be construed in accordance with the laws of the State of _____ [state].

Accepted by:

PURCHASER:

_____ [name]

By: _____

Printed Name: _____

Title: _____

SELLER:

_____ [name]

By: _____

Printed Name: _____

Title: _____



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FORM 25.74 Agreement to perform environmental site assessment

COMMENT

This form is an agreement for an environmental site assessment. It sets forth, in very specific terms, the work to be performed by the environmental engineer (or other environmental consultant) and how it will be performed. The form also sets forth items which are specifically excluded from the scope of the assessment, such as soil testing.

With regard to payment, the form sets out the fee for the engineer's services and states when payment is required. It also provides for a *quantum meruit* payment in the event that the purchaser cancels the agreement after partial performance by the engineer. (Such cancellation might occur if a contingency in the sale and purchase agreement were to fail, e.g., where the purchaser is unable to obtain a mortgage at an acceptable interest rate.)

It is common practice for lenders to require an environmental site assessment as a condition of making a mortgage loan to a purchaser. Such an assessment is also required when the purchaser wants to obtain environmental insurance to protect himself or the lender against the economic consequences of the discovery of an adverse environmental condition on the premises after the transfer of title.

In the event that the environmental site assessment turns up evidence that there *might* be an adverse environmental condition on the premises, this agreement can be modified to have the engineer undertake whatever additional work may be necessary to make a definitive determination. This work might include laboratory testing of ground water or soil samples, or analysis of the composition of material removed from a building, such as insulation. If such work is necessary, the parties would simply execute a written amendment or addendum to this agreement, specifying the scope of the additional work, the added cost and payment terms.

FORM

THIS AGREEMENT made this ____ [day] day of _____ [month] ____ [year], between _____ [name], (hereafter referred to as "Engineer"), and _____ [name], (hereafter referred to as "Purchaser").

WHEREAS, Purchaser is the contract vendee of a certain parcel of real property and premises commonly known as _____ [address] (hereafter referred to as "subject premises");

WHEREAS, Engineer is in the business of performing environmental site assessments;

NOW, in consideration of the mutual promises contained herein, it is agreed as follows:

1. Scope of Work. Engineer will undertake the following tasks to determine whether there is any evidence of significant adverse environmental impact due to past or present practices or releases of hazardous material on the subject premises:

(a) Review of any maps which may be available which show adjacent property. These may include United States Geological Maps, maps filed in the _____ [county] County Clerk's Office, development maps filed with the Planning Office of the City of _____ [city], maps filed with the Department of Environmental Protection of the State of _____ [state], and maps filed with the _____ [county] County Health Department. It is unknown at this time whether any or all of the above maps may be in existence.

(b) Review of the title search of the property to determine the identity of previous owners. This title search will be provided to Engineer by Purchaser at Purchaser's expense.

(c) Personal interviews with:

(i) current owner to determine his use of the premises;

(ii) as many owners as can be reasonably located within a _____ (_____) mile radius from the site or by telephone, to determine past uses of the premises;

(iii) representatives of the police department, fire department, sanitation department, and health department, to determine whether any records exist regarding environmental conditions or incidents existing or occurring on the subject premises or adjacent land;

(iv) occupants of neighboring properties to determine use of premises and neighboring land and whether any significant incidents can be recalled.

(d) Review of state and federal records of hazardous waste sites and other environmentally significant events.

(e) Personal inspection of the subject premises.

It is understood that no soil samples or other testing will be performed as part of this environmental site assessment. If Engineer discovers any piece of information which he reasonably believes warrants further investigation, he shall promptly notify Purchaser. Such further investigation shall be performed as part of an amendment to this Agreement, to be negotiated and executed prior to commencement of the further investigation.

2. Findings. Engineer shall present his findings in written form on or before _____ [month] _____ [day] _____ [year]. Time is of the essence. The findings shall include a statement of whether any evidence of significant adverse environmental impact was discovered. The findings shall also include whether Engineer recommends any additional testing or review. The findings shall also report whether any significant information was unavailable to Engineer and the import of such lack of information.

3. Cost. The total cost of the environmental site assessment to be performed pursuant to the terms of this Agreement is the sum of _____ Dollars (\$ _____), together with costs of disbursements made by Engineer for copies of maps, records, postage, photocopies, mileage, and long distance telephone calls. This sum shall be paid as follows:

(a) The sum of _____ Dollars (\$ _____) upon execution of this Agreement. This sum is non-refundable.

(b) The sum of _____ Dollars (\$ _____) is due upon delivery of the environmental site assessment. Engineer shall be entitled to withhold the assessment until this sum shall be paid in full.

In the event Purchaser cancels this Agreement after performance has begun, Engineer shall be entitled to a fee of _____ Dollars (\$ _____) per hour for time expended to the date of cancellation, together with disbursements, as described above. The non-refundable deposit shall be applied to this amount. The balance, if any, shall be due and payable to Engineer upon his rendering of his statement for services.

4. Confidentiality. Engineer agrees not to discuss his findings or provide copies of his findings to anyone other than Purchaser, without the written authorization of Purchaser. Engineer acknowledges that Purchaser is under a contractual obligation to Seller to maintain confidentiality with regard to anything which he may learn about the subject premises. Engineer, for himself and his employees, agrees to comply with the confidentiality requirements.

Notwithstanding the foregoing, nothing contained herein shall prohibit Engineer from testifying before a duly constituted body of any state or federal government under compulsion of subpoena regarding his work or findings. Engineer shall provide a copy of the environmental site assessment to the owner at the premises address.

5. Representations of Engineer.

(a) Engineer represents that he is qualified to undertake the work contemplated under this Agreement.

(b) The work will be performed in a professional manner, using generally acceptable practices in this field at this time.

(c) No other representations or warranties, express or implied, are made.

(d) Engineer shall be entitled to rely on oral information or representations made during interviews, unless Engineer reasonably believes such information to be of a questionable nature. In such case, Engineer shall report the information and the reason why he reasonably believes the information to be of a questionable nature.

6. Representations of Purchaser. Purchaser will cooperate with Engineer and provide Engineer with all copies of maps and documents in his possession in a timely fashion so as to facilitate the timely completion of the work contemplated under this Agreement.

7. Entire Agreement. This Agreement contains the entire understanding of the parties; there have been no representations made which are not contained herein.

8. Modification. This Agreement may only be modified by a written amendment signed by all parties. An oral modification shall not be binding on any party.

9. Governing Law. This Agreement shall be construed in accordance with the laws of the State of _____ [state].

10. Waiver. Any failure by either party to enforce any right arising hereunder shall not be deemed a waiver of such right.

IN WITNESS WHEREOF, the parties hereto have set their hands and seals the day and year first above written.

PURCHASER:

_____ [name]

By: _____

Printed Name: _____

Title: _____

SELLER:

_____ [name]

By: _____

Printed Name: _____

Title: _____



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FORM 25.75 Proposal to perform Phase I environmental site assessment

COMMENT

The following is a proposal for an environmental consulting firm to conduct a Phase I environmental assessment. A contract will be formed if the proposal is accepted. The project is the renovation and expansion of an existing grocery store. The proposal consists of a cover letter with a very detailed scope of services attached.

FORM

_____ [month] _____ [day] _____ [year]

_____ [name]
_____ [address]
_____ [address]

Subject: Proposal for Limited Phase I Environmental Site Assessment Grocery Store located at _____
[address] (the "Property")

Dear Mr./Mrs. _____ [name]:

_____ [name] (the "Firm") is pleased to submit this proposal to perform a limited Phase I environmental site assessment on the property and the adjacent store area west of the store. This proposal is in response to your letter request for Mr. _____ [name] of the Firm to conduct a Phase I environmental site assessment for the above-referenced property.

PROJECT INFORMATION

The Firm understands that _____ (*name of Owner/Tenant*) hereinafter "Owner") is interested in renovating and expanding its existing food store from the present _____ sq. ft. to a total area of _____ sq. ft. The proposed expansion area is adjacent to and west of the present store. The Firm understands that the expansion area is an existing _____ sq. ft. storeroom area. Some of the storerooms in the expansion area are already occupied.

PROPOSED SCOPE OF WORK

It is the Firm's understanding that Owner would like a limited Phase I environmental site assessment (non-ASTM Standard) conducted on the above-discussed property. This assessment will include interior and exterior inspection of the _____ sq. ft. building, as well as an interior and exterior reconnaissance of the _____ sq. ft. proposed expansion area.

An asbestos assessment of the Owner's retail building and the expansion area will be part of this project, as per Owner's request. The Firm will subcontract the services of a certified asbestos sampling, testing and abatement firm to conduct the asbestos sampling and testing.

Owner has its own specifications for a Phase I Environmental Survey which it prefers to have used when conducting work on its properties. These specifications will be followed to the extent requested by Owner for this particular project. The Firm understands that Owner desires a limited survey excluding the historical and wetlands investigations. Owner also indicated that the local governmental and state EPA file review discussions should be concerned with the subject site and its immediate vicinity only. The Owner assessment specifications, as outlined below (pursuant to the aforementioned telephone discussion with Owner) are similar to the Firm format for limited Phase I assessments (also outlined below). We will use the Owner limited format for this assessment, unless the Firm format provides for additional detail above and beyond what is requested in the Owner format.

The work that is to be completed for this limited Phase I environmental site assessment, based on the modified Owner and the Firm format for this type of project, is outlined in the attached Scope of Services.

COST ESTIMATE

The estimated maximum cost to conduct the limited assessment tasks outlined in the Scope of Services for the Project is _____ Dollars (\$_____). The estimated costs are based on our limited background knowledge of the retail building and property as previously described and on the intended scope of work. Costing for each individual task is also presented in the Scope of Services.

CLOSING

The Firm is prepared to conduct this environmental project in accordance with the accompanying Scope of Services. We have also included two copies of the Firm's Work Authorization Form and copies of the Firm's General Terms and Conditions and a Schedule of Charges. If this Project Agreement is satisfactory to Owner, please sign and date both copies of the Work Authorization Form; keep one copy for your files and return the second copy to the Firm.

We are prepared to begin work on this assessment project upon receipt of written authorization from Owner. We will provide you with a written assessment report within _____ (_____) weeks of the site visit providing we have timely cooperation of state, local and federal agencies.

The Firm will perform this assessment project on a time and materials basis in accordance with the attached Standard Fee Schedule. Our budget will not exceed the above-referenced maximum cost estimate without prior authorization from the Owner.

We appreciate the opportunity to present this proposal and cost estimate and hope that our proposed services are responsive to your needs. Please do not hesitate to contact us should you have any questions concerning this proposal.

Very truly yours,

 _____ [name]

SCOPE OF SERVICES

PROJECT ELEMENT: LIMITED PHASE I ENVIRONMENTAL SITE ASSESSMENT

Objective:

- To perform a limited Phase I environmental site assessment to identify existing and potential environmental liabilities at the Property.

Scope of Services:

The Firm will perform the following services on the Owner's store and adjacent storeroom area in accordance with the limited standardized Owner Phase I Environmental Assessment Specifications:

1. **SITE RECONNAISSANCE** -- A site reconnaissance providing a physical description of the site and relevant environmental characteristics with special attention for signs of mismanagement and/or disposal of hazardous substances (i.e., unusual depressions, ravines, stains on the ground, or dying vegetation). In addition, the ownership and status of on-site power transformers will be identified. An inspection for the current presence of or pre-existence of underground storage tanks (USTs) both on site and on surrounding properties will be performed.

2. **LOCAL AND FEDERAL GOVERNMENT FILE REVIEW** -- Local and state environmental and health agencies will be contacted to review their files concerning the site property and surrounding areas. In addition, the presence of CERCLIS and National Priorities Lists (NPL) sites within a _____ (_____) mile radius of the site. Most of this information will be obtained through services offered by an environmental database records consultant. Our experience has shown that responses to requests in Items 3 and 4 of this Scope of Services commonly are not received by the time the first draft report is presented to the client.

3. STATE EPA FILE REVIEW -- The appropriate regional state environmental protection agency (EPA) office or equivalent, will be contacted to verify whether the site or nearby properties are on any list of known hazardous wastes sites (including landfill, major industries, wetlands, etc.). Again, most of this information will be obtained through an environmental database consultant.

4. ADJOINING PROPERTY SITE RECONNAISSANCE -- The Firm will visually examine adjoining properties to determine current and previous uses and the potential for problems.

5. ASBESTOS ASSESSMENT -- The intent of the asbestos assessment is to determine the presence of asbestos-containing materials (ACM). This study will include destructive sampling; therefore, items such as roofing, ceiling, and floor materials will be collected, if warranted.

The scope of work for the asbestos assessment will include the following:

- A cursory inspection of Owner's store to positively identify ACM which may be present.
- Each such material will be touched to determine its friability. (A material is considered friable if it can be crushed with hand pressure; if it cannot, it is non-friable).
- Identify homogeneous areas of friable and non-friable suspect ACM.
- Collect representative bulk samples of suspect sources of ACM as required to document the presence of asbestos in these materials.
- Analyze the bulk samples by polarized-light microscopy and dispersion staining in accordance with the prescribed EPA analytical protocol at an EPA accredited laboratory.
- Provide for future references a source document of the inspection that identifies and quantifies the asbestos-containing materials located within the store.

The sampling program is based on the assumption that Owner's samples will be collected for analyses. The exact number of samples cannot be determined until all areas have been surveyed and the suspect sources have been identified. If additional samples are necessary to fully document the extent of asbestos usage, Owner will be notified and asked to approve a request to collect and analyze additional samples. If fewer than _____ (_____) bulk samples are collected, Owner will be billed accordingly.

Asphalt floor tile and vinyl flooring may be difficult to analyze by polarized light microscopy because of the matrix in these materials. If these materials prove to be negative in asbestos composition by this testing method, we may recommend that they be analyzed by transmission electron microscopy. This additional analysis will be conducted only upon Owner's consent. This method of treating floor materials has proven to be the most cost effective.

The results of this survey will be incorporated into the assessment report, as discussed below.

6. **ASSESSMENT REPORT** -- An environmental site assessment report will be prepared that will summarize the results of our assessment of the Property and the retail building. This assessment report will detail the findings of the site reconnaissance and the acquired background information as outlined above.

The findings will include all potential problems that were further analyzed through local government and EPA file review, as identified above.

Each potential problem will be dismissed with an appropriate explanation:

(i.e., use of adjacent property as a service station is not a concern because all tanks are currently in compliance, facility is only _____ (_____) years old, no releases have been reported, etc.)

(i.e., previous use of adjacent site as a service station remains a potential problem because business operated prior to UST requirements. No records of tank removal are available nor were neighbors able to recall if tanks were removed, etc.)

As a minimum, the conclusion in the report will assign potential risk for the property based on the following classifications:

- **No Potential Risk:** No potential problems were identified on the site, no potential problems were identified on adjacent sites, no CERCLIS or NPL sites in the immediate area.
- **Low Potential Risk:** Potential problems were identified but dismissed based on further investigation and analysis of available facts and information.
- **High Potential Risk:** Potential problems were not resolved to the point of being dismissed. Further analysis of potential problems is beyond the scope of the Phase I survey. Further investigation (Phase II Environmental Survey) required.

All supporting documents will be included as an addendum to the report, if practical, or referenced as to the source in the text of the report. The Firm will not include the large quantity of computerized data that is usually produced in the standard federal-level data base searches. Only the "negative" data produced in these searches, that document the existence of a potential problem, will be included with the report. The remaining data will be kept on file at the Firm's office, unless the Owner requests the data file.

The complete report will be prepared and submitted to Owner within _____ (_____) weeks following the site reconnaissance. An original and _____ (_____) copies of the final report of the investigation will be issued to Owner as the final work produced for the project.

Firm's Scope of Services:

The scope of services outlined herein represents the minimum program developed in response to your request for services. As results from site reconnaissance, records review and interviews are obtained, changes may be recommended to you for consideration as Additional Services. Due to the elusive nature of hazardous and solid wastes, the services and opinions rendered by the Firm are not guaranteed to be a representation of the actual site conditions, contamination, or costs (including those associated with cleanup efforts (which are subject to change with time as a

result of natural and man-made processes.

Services not expressly set forth herein are excluded from the scope of the Firm's services and The Firm assumes no duty to the Client to perform such services. Unless specifically delineated, this scope excludes testing for the presence of lead, radon, or any other airborne pollutants.

1. A site reconnaissance of the property will be conducted to obtain information indicating the likelihood of Recognized Environmental Conditions at the site. This consists of site visit to visually and physically observe the property and any structure(s) on the property, to the extent they are not obstructed by adjacent buildings, bodies of water, weather conditions, concrete paving/asphalt, or other obstacles.

The Firm's Scope of Services for a Phase I environmental assessment typically includes the following:

- Review available site historical information provided to the Firm by the current owner or others. However, as requested by Owner, an historical investigation of the site will not be conducted at this time.

- Conduct limited interviews, if necessary, with available persons who are knowledgeable about past or present activities at the site.

- Review the property for evidence of spills and leaks, such as discolored soils, barren ground, vegetative stress, unusual odors, disturbed soils, surface debris; and for indications of the presence of underground storage tanks (USTs). Site photographs may be taken to document the condition of the property at the time the investigation was conducted.

- Perform a walk-through of buildings on-site to identify chemical storage areas and waste generation and management areas. This will include an attempt to visually identify where electrical service components (transformers and capacitors) may have been used, for the possible presence of PCBs.

- Review contiguous land uses to visually identify possible sources of contamination, such as drum storage areas, waste handling operations, etc.

- Review the Federal RCRA Generators list to identify if the subject property or its adjoining neighbors are listed. Review the Federal ERWS List to identify if the subject property is listed.

- Review the National Priorities List (NPL) and the Federal RCRA TSD List for listings of sites within _____ (_____) mile(s) of the subject property. The Comprehensive Environmental Response, Compensation, and Liability Index System (CERCLIS) listings for known or suspected contamination sites within _____ (_____) miles of the property.

- Contact appropriate state or local agencies in person, by telephone, or in writing to obtain the following information (if available):

- Correspondence or documents regarding environmental issues at the subject property (enforcement actions, compliance inspections, etc.).

- A list of active and inactive municipal waste landfills within a _____ (_____) mile radius of the property.

- State lists of hazardous waste sites identified for investigation or remediation within

_____ (_____) mile(s) of the property.

-- State registered UST lists (for subject property and neighbors).

-- State leading UST lists (_____) (_____) mile(s)).

- The Firm will issue a report for the site, detailing the results of the Environmental Site Assessment, including recommendations for further investigation (if necessary). The report will also contain (as appendices) copies of pertinent documents regarding the site, and significant photographs taken during the site visit.

The Owner is advised that the Scope of Services described in this proposal is for a limited "Phase I" Environmental Site Assessment, which is a LIMITED INQUIRY into a property's environmental status. An Environmental Site Assessment report will summarize our findings and opinions with respect to the potential for environmental impairment and/or liability which may be associated with Recognized Environmental Conditions at a site. The findings and opinions will be based on information which is available and obtained at the time of the assessment through site reconnaissance, standard investigatory techniques used in the industry at this time, records review and other related activities. It is possible that other information exists or subsequently becomes known which may impact or change the site assessment after observation. Further, the scope of services described in this proposal and the pool of knowledge in the industry at this time may not be sufficient to discover all possible sources of environmental liability. Additional investigation, including invasive testing, can reduce your risks, but no techniques now commonly employed can provide 100% assurance that all contaminants or risks will be identified. Generally speaking, the more extensive the testing, the more likely it is that sources of risk/contamination will be identified, but how much testing must be done is a matter of cost/benefit analysis dependent upon you. For these reasons, the Firm cannot under any circumstances make a statement of warranty or guarantee, express or implied, that the site is free of environmental impairment, hazardous materials or "clean." This statement is not meant to compromise the findings of our report; rather it is meant as a statement of limitations within the intended scope of this assessment.

The Firm will perform the Services in a manner consistent with the level of care and skill ordinarily exercised by members of the profession currently practicing in the same locality under similar conditions. The Firm makes no other representation, expressed or implied, and no warranty or guarantee is included or intended in any report, opinion, or document regarding the results to be achieved upon completion of these services. The Services hereunder will not confirm to ASTM "Standard Practice for Environmental Site Assessments: Transaction Screen Process; Designation E 1528-93" or ASTM "Standard for Environmental Site Assessments: Phase I Environmental Site Assessment Process; Designation E 1527-93" unless so specified in the Scope of Services, in which case the fees for the Services will be increased accordingly. Anything not specifically included in the Scope of Services is excluded.

Cost Estimate:

The estimated maximum cost to complete the Scope of Services outlined above is _____ Dollars (\$_____).

The actual charges will be based on the level of effort required and will be invoiced at the unit rates indicated on the attached Schedule of Charges. The total cost will not exceed _____ Dollars (\$_____), without prior written approval from the Owner.

Basis for Cost Estimate:

• The Firm staff will spend up to _____ (_____) full day(s) in the field to review the site and surrounding area and to visit the local agencies to acquire relevant documents.

■ Owner will again provide the Firm with names and telephone numbers of individuals that The Firm will contact, if necessary, to arrange to have facility personnel who are knowledgeable of past and present operations at the facility available for interview by The Firm personnel at the time of the site visit.

- The visual observation of the contiguous properties will focus on obvious evidence of problems. No detailed investigations of these properties are included.

- No sample collection or analysis for PCBs is included in this proposal.

- The site tenant will allow the Firm personnel to photograph their operations.

• No more than _____ (_____) ACM samples will be analyzed with a standard laboratory turn-around time of _____ (_____) days.

Asbestos: \$ _____ + \$ _____
 _____ /sample (first trip)
 \$ _____ + \$ _____
 _____ /sample (additional trips)

Task 1 -- Site Reconnaissance \$ _____

Task 2 -- Local Government File Review	\$

Task 3 -- State EPA File Review	\$

Task 4 -- Adjoining Property Site Reconnaissance	\$

Task 5 -- Asbestos Assessment	\$

Task 6 -- Report Preparation.....	\$

Total Estimated Costs.....	\$



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Chapter 25 ENVIRONMENTAL CONSIDERATIONS IN REAL ESTATE TRANSACTIONS

Part IV. FORMS

A. ENVIRONMENTAL CONSIDERATIONS IN REAL ESTATE TRANSACTIONS

33-25 Current Legal Forms for Real Estate FORM 25.76

FORM 25.76 Closure Agreement--Oil and Gas Well

COMMENT

The following is an agreement to close an existing oil and gas well. The current owner of the property desires to close the well to develop the property. The oil and gas well is a producing well and the seller must be compensated for the loss of the well and the expenses of closure. The actual closing of the well will be completed by the seller. The seller is required to undertake the closure in compliance with all applicable laws.

FORM

CLOSURE AGREEMENT

THIS CLOSURE AGREEMENT ("Agreement") is made and entered into as of this ____ [day] day of _____ [month], ____ [year] (the "Effective Date"), by and among _____ [name], a[n] _____ [state] (the "Seller"), and _____ [name], a[n] _____ [state] ("Buyer").

RECITALS:

A. Buyer is the owner of certain real property consisting of approximately _____ acres of land located in the City of _____ [city], County of _____ [county], _____ [state] and described on Exhibit A attached hereto and made a part hereof (the "Property").

B. Seller is the current owner of the oil and gas well situated on the Property (the "Well"). The Well has been drilled pursuant to the Oil and Gas Lease between _____ and _____ [name] dated _____ [month] _____ [day] _____ [year] (the "Oil and Gas Lease"), recorded in _____ [county] County, _____ [state] at Volume _____, Page _____ of _____ [county] County records.

C. Buyer desires to purchase the Well for the purpose of plugging and abandoning the Well in order to proceed with an alternate use of the Property, and Seller desires to sell the Well.

NOW, THEREFORE, in consideration of the mutual covenants and provisions herein contained and other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, Seller and Buyer agree as follows:

Section 1. Recitals. The foregoing recitals are incorporated herein by this reference.

Section 2. Purchase Price. Concurrently with the delivery of the written notice referred to in Section 3., below, Buyer shall pay Seller the purchase price of _____ Dollars (\$ _____) (the "Purchase Price") for the Well.

Section 3. Well Closure.

(a) Within _____ (_____) days after receipt of written notice from Buyer, and provided Buyer has paid to Seller the Purchase Price as referred to above, Seller shall complete all action necessary to effectuate the "Well Closure," which for purposes of this Agreement shall include, but not be limited to taking all necessary steps to plug the Well in accordance with all applicable laws. In addition, within _____ (_____) days from receipt of such notice and payment of the Purchase Price, Seller shall execute and deliver to Buyer a Release of Oil and Gas Lease with respect to the Property. Notwithstanding the execution and delivery of the Release of Oil and Gas Lease, Buyer agrees that Seller, its agents, employees and contractors, shall have access to the Property for the purpose of effectuating the Well Closure, until it is completed.

(b) Seller shall be entitled to all oil and gas production prior to Well Closure.

(c) All salvage of casing, tanks and miscellaneous equipment will be for the account of Seller.

Section 4. Transferability. Seller agrees that the rights and obligations granted to Buyer hereunder shall be assignable to any successor owner of the Property, and the terms of this Agreement shall continue to apply to the then owners of such parcels of land.

Section 5. Notices. All notices and other communications hereunder shall be in writing and shall be deemed to have been duly given (a) when delivered personally, (b) on the third business day following mailing by registered or certified mail (return receipt requested), or (c) on the next business day following deposit with an overnight delivery service of national reputation, to the parties at the addresses set forth in the first paragraph of this Agreement (or at such other address for a party as may be specified by live notice).

Section 6. Governing Law. This Agreement shall be construed, and the rights and obligations of Seller and Buyer hereunder shall be determined, in accordance with the laws of the State of _____ [state].

Section 7. Entire Agreement. This Agreement constitutes the entire agreement between the parties hereto and supersedes all prior understandings, if any. This Agreement may be amended, supplemented or modified only in a writing signed by the parties hereto.

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Section 8. Successors And Assigns. All covenants and conditions between the parties hereto shall extend to their heirs, personal representatives, successors and assigns.

Section 9. Counterparts. This Agreement may be executed in any number of counterparts with the same effect as if all such parties executed the same document. All such counterparts constitute one agreement.

The parties have hereunto set their hands as of the Effective Date.

BUYER:

_____ [name]

By: _____

Printed Name: _____

Title: _____

SELLER:

_____ [name]

By: _____

Printed Name: _____

Title: _____

STATE OF _____ [state])
COUNTY OF _____ [county]) SS:

BEFORE ME, a Notary Public in and for said County and State, personally appeared _____ [name], a(n) _____ [state] _____ [entity], by _____ [name], its _____ [title], who acknowledged that _____ [he/she] did sign the foregoing instrument for and on behalf of said corporation, being thereunto duly authorized, and that the same is _____ [his/her] free act and deed individually and as such officers and the free act and deed of said _____ [entity].

IN TESTIMONY WHEREOF, I have hereunto set my hand and official seal at _____ [city], _____ [state], this _____ [day] day of _____ [month], _____ [year].

Notary Public

STATE OF _____ [state])
COUNTY OF _____ [county]) SS:

BEFORE ME, a Notary Public in and for said County and State, personally appeared _____ [name],
a(n) _____ [state] _____ [entity], by _____ [name], its
_____ [title], who acknowledged that _____ [he/she] did sign the foregoing
instrument for and on behalf of said corporation, being thereunto duly authorized, and that the same is
_____ [his/her] free act and deed individually and as such officers and the free act and deed of said
_____ [entity].

IN TESTIMONY WHEREOF, I have hereunto set my hand and official seal at _____ [city],
_____ [state], this _____ [day] day of _____ [month], _____ [year].

Notary Public

[Attach Exhibit A]



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Current Legal Forms for Real Estate

Chapter 25 ENVIRONMENTAL CONSIDERATIONS IN REAL ESTATE TRANSACTIONS

Part IV. FORMS

A. ENVIRONMENTAL CONSIDERATIONS IN REAL ESTATE TRANSACTIONS

33-25 Current Legal Forms for Real Estate FORM 25.77

FORM 25.77 Proposal to Obtain a No Further Action Letter on a Contaminated Property

COMMENT

This proposal involves six separate tasks. It starts with the engineer performing various assessments on or about the property. The next steps are remediation of the property. Last, it involves submitting the property into the state's voluntary action program and obtaining a no further action letter. A no further action letter is a letter from the applicable governmental authority stating that the authority will not take any further action with respect to the condition which was to be remediated and submitted to the authority for approval.

The governmental agency typically will not do any testing, but will rely upon the reports submitted by the engineering firm. Of course, the governmental agency can always conduct an audit or investigation of the reports before it issues the letter. Additionally, the submitting engineer's credentials may need to be approved by the governmental agency in advance of the submission.

FORM

_____ [month] _____ [day] _____ [year]

To: _____ [name]

_____ [address]

_____ [address]

Subject: *[insert description, e.g. Proposed Tasks and Estimated Costs & Timing to Forward the _____ property (the "Property") Through _____ [insert name of state]'s Voluntary Action Program ("VAP")]*

Dear Mr. _____ [name]:

In accordance with our recent discussions with _____ [name], _____ [name of consultant] ("Consultant") is pleased to submit for your consideration this proposal for professional services. We propose to provide these professional services to _____ [name] (the "Client"), in accordance with the provisions outlined below.

BACKGROUND

Earlier this month, Consultant completed a review of certain environmental documents prepared by others relating to the environmental condition of the Property. From this review it would appear:

- Unconsolidated soils in three areas (referred to in this proposal as the "NW Sump Area," the "Chip Hopper Area," and the "Exterior Area East of Machine Shop") contained concentrations of one or more volatile organic compounds (VOCs) in excess of probable "applicable standards" under the VAP.
- Groundwater beneath (and slightly downgradient of) the NW Sump Area contains concentrations of one or more VOCs in excess of VAP Generic Unrestricted Potable Use Standards (GUPUS). Groundwater beneath the Chip Hopper Area and the Exterior Area Estate of Machine Shop has apparently not be impacted (as of yet) by VOCs.
- Concentrations of VOCs are present in sediments in a drainage ditch that (based upon dye testing) received flow from the NW Sump Area. A superficial examination of these sediment data suggests that the detected concentrations would not meet VAP sediment standards; however, an ecological risk assessment would be necessary to make a definitive determination. Another option is outright remediation (i.e., removal) of the affected sediments.
- No surface water sampling of the drainage ditch has been conducted to date.
- There is some uncertainty regarding whether the drainage ditch is located on the Property, or the adjacent property.

Given these background data, the following scope of services is presented for consideration in potentially moving the property forward through the VAP.

SCOPE OF SERVICES

Task 1: VAP Phase I Property Assessment

In order to forward the Property through the VAP, Consultant would first propose that a Phase I Property Assessment, complaint with _____ [name], be completed for the Property. The requirements for a VAP Phase I Property Assessment include:

A. An environmental history analysis, consisting of:

1. A review of any previous environmental assessments, property studies, or geological evaluations of the Property to the extent that such studies are available for review.
2. A diligent inquiry into the previous and current environmental compliance status of the Property, as well as all properties within an approximate minimum search distance of _____ (_____) miles.
3. Interviews with reasonably available key property personnel, residents, or former property personnel who have knowledge relevant to the environmental conditions at the Property.

B. A general historical analysis consisting of:

1. A diligent inquiry into reasonably available historical sources to establish a continuous history of the use of the Property (including significant changes in the use of the Property), to determine what (if any) hazardous substances or petroleum products are or may be present on, beneath, or are emanating from the Property. Information normally relied upon as part of the history analysis includes (but is not limited to):
 - Plax or tax maps
 - Historical survey data (if available)
 - Current and historic topographic maps
 - Current and historic aerial photographs
 - Historic city directories
 - Historic insurance maps
2. A chain of title investigation for the Property to evaluate current and previous ownership and identifiable uses. This chain of title must extend to the point of initial development of the Property (regardless of use).
3. A reasonable attempt to locate and conduct interviews with persons who are or were employed at the Property to determine whether there is any reason to believe that releases of hazardous substances or petroleum products have or may have occurred on, beneath, or are emanating from the property.

C. A physical inspection of the Property to identify:

1. Property usage.
2. Use of adjoining properties.
3. The condition of existing structures.
4. Evidence of past or present releases of hazardous materials or petroleum products on the Property

from USTs, aboveground storage tanks, oil and/or gas wells, cans, boxes, pipes, drums, drains, sewers, electrical equipment, cables, fuel tanks, oil pans, lagoons, stacks, cooling systems, inventory, pits, piles, landfills, waste or process water treatment systems, etc.

5. Evidence of the on-site placement of fill from unknown sources.
6. Potential for contaminated storm water drainage onto the Property from adjoining properties.
7. Evidence of obvious odors, pools of liquid, drums or unidentified containers, stained pavement/soil, or stressed vegetation.
8. Electrical equipment which potentially contain polychlorinated biphenyls (PCBs).
9. The general topography of the Property, particularly in relation to surrounding properties.
10. Identifiable migration conduits or pathways for releases, including basements, drains, tiles, wells, and utility lines.

D. Development of a hazardous substance/waste compliance or release history for the Property and adjoining properties, as appropriate, which identifies (to the extent known) each release, contaminant type, quantity released, date of release, the areas on the property impacted by the release, the media impacted (soil, groundwater, surface water, etc.), and any corrective measures taken to address the release.

E. Identification of all potential source areas on the Property.

F. Preparation of a written Phase I Property Assessment report which is compliant with the VAP requirements.

From Consultant's perspective, the VAP Phase I Property Assessment should seek to answer two questions:

1. Does the regulatory compliance history at the property (and all other information collected) indicate that the site is eligible or ineligible to participate in the VAP? The primary concern is how the VOCs detected in soil and/or groundwater came to be present in these media. If they are present as the result of a release of a listed hazardous waste, a strong argument could be made that the Property is *ineligible* to participate in the VAP, and that the appropriate regulatory framework from which to proceed is the Resource Conservation and Recovery Act (RCRA). A secondary concern is the current or historic hazardous waste generator status of the Client, and whether all areas used to accumulate (legally) hazardous waste have been "closed" (with closure "self-certified," as appropriate) in accordance with RCRA. Large Quantity Generators of hazardous waste are required to close and self-certify closure of all areas used to manage hazardous waste before the facility is eligible to participate in the VAP.
2. Did the previous Phase I ESA correctly call out all "identified areas" as that term is used under the VAP? If not, additional assessment of other potential "source areas" would be required as part of the VAP Phase II Property Assessment.

For the purposes of moving forward with this proposal, Consultant has assumed that any potential eligibility issues associated with the first question are resolved favorable, and that the three areas previously assessed by others are the only areas on the property that would satisfy the VAP definition of "identified areas," eliminating the need to assess as of yet unknown potential source areas. However, if either of these assumptions is later determined to be invalid based upon the VAP Phase I Property Assessment, additional tasks or actions not outlined in the proposal may be necessary at

the Property, regardless of whether the Property is to be forwarded through the VAP.

Task 2: Groundwater Evaluation and Classification

In order to determine whether the VAP provisions related to Protection of Groundwater Meeting Unrestricted Potable Use Standards (POGWMUPS) do not apply at the Property, Consultant would recommend two actions be taken:

A. Determine whether the existing monitoring wells have been appropriately placed at the Property relative to the identified areas specified in the Phase I Property Assessment.

As odd as it may seem, having groundwater that is already contaminated with VOCs in excess of GUPUS is often an advantage from the standpoint of the VAP. If soils in a given area (such as the Chip Hopper Area) contain VOCs in excess of VAP leach-based values (LBSVs) but groundwater beneath that area does not contain VOCs in excess of GUPUS, soil remediation is required under the VAP, thereby driving up costs. If, however, groundwater beneath that area already contains concentrations of VOCs in excess of GUPUS, no soil remediation is necessarily *required* under the VAP, although it remains an option.

Soils in both the Chip Hopper Area and the Exterior Area East of Machine Shop contained concentrations of VOCs in excess of LBSVs, yet groundwater in the few monitoring wells installed in these two areas indicated no exceedance of GUPUS beneath these areas. As part of this task, Consultant would evaluate the positioning of the existing monitoring wells in these two identified areas, and (if warranted) install, survey, and sample up to four additional monitoring wells (two in each area) to determine whether the provisions of POGWMUPUS do or do not apply in these areas.

B. Conduct VAP-compliant sampling of existing monitoring wells in the NW Sump Area to verify that the provisions of POGWMUPUS do not apply in this area.

Soils in the NW Sump Area contain concentrations of VOCs in excess of LBSVs, and groundwater beneath this area contains concentrations of VOCs in excess of GUPUS. On the surface, therefore, it would appear that the provisions of POGWMUPUS do not apply in the NW Sump Area. However, the sampling conducted by an earlier testing did not satisfy the provisions of _____ [name]. This provision of the VAP indicates that to prove that POGWMUPUS requirements do not apply at a property, two groundwater samples must be collected within 15-30 days of each other, and both samples must contain concentrations of VOCs in excess of GUPUS. The prior environmental firms did not collect the requisite two samples within 15-30 days of each other; therefore, this sampling must be re-performed to demonstrate to the state's EPA that the provisions of POGWMUPUS do not apply in the NW Sump Area. Consultant would propose as part of this task to conduct definitive yield testing of monitoring wells on-site to clearly classify groundwater beneath the Property for the purposes of the VAP.

Therefore, in summary, the work to be conducted under this task would include:

- Evaluation of the placement of existing monitoring wells relative to "identified areas," and possible installation, surveying, and sampling of up to four additional groundwater monitoring wells.
- Re-sampling of the existing monitoring wells in the NW Sump Area to comply with the provisions of _____.
- Conducting slug or pump tests to determine definitively the yield of the aquifer beneath the Property for purposes of groundwater classification.

Task 3: Surface Water Sampling in Drainage Ditch and Conducting a Baseline Ecological Risk Assessment Based on Previous Sediment Data

As stated above, no surface water sampling has been conducted in the drainage ditch west of the Property to determine whether VOCs are emanating from the Property. As part of this task, Consultant would collect a maximum of three surface water samples, and submit these samples to a VAP Certified Laboratory for analysis.

Further, the prior environmental report collected and analyzed two sediment samples from the drainage ditch. For the purposes of this proposal, Consultant is assuming that the prior engineer used acceptable protocols in collecting these samples, and that (at least initially) the data compiled as part of their investigation may be relied upon. However, given the phased approach of an ecological risk assessment, re-sampling of sediment at some point in the future may be necessary, due to the state EPA's sensitivity regarding ecological exposure pathways under the VAP.

Using the sediment sampling data compiled by the prior engineer as an initial platform, we will conduct a baseline ecological risk assessment. Completion of an ecological risk assessment in accordance with the VAP, as outlined in _____, would be conducted in the following phases:

Phase I

A. Compare the prior engineer's sediment sampling results to published ecotoxicologic benchmarks, as outlined in written resources specified under the VAP.

If the concentrations of the chemicals of concern do not exceed the appropriate benchmark listed in these resources, then applicable ecological risk standards will have been met, and no further work would be necessary under this task. If, however, the concentrations of chemicals of concern **exceed** the appropriate benchmarks (or benchmarks do not exist for a particular parameter), a sediment bioassay survey of sediments contained in the ditch must be conducted as part of a qualitative ecological risk assessment, as outlined in Phase 2, below.

Phase 2 (if necessary)

Assuming the concentrations of the chemicals of concern exceed the appropriate benchmarks or benchmarks do not exist for a particular parameter, we will conduct a sediment bioassay. As part of the sediment bioassay, we will:

A. Obtain a representative sample of sediment from the ditch for sediment bioassay analysis using a scud organism (*Hyalella azteca*) or midge larva (*Chironomus tentans*) in accordance with the VAP.

B. Conduct a sediment bioassay test determining the chronic or acute toxicity of the chemicals contained in the sediment.

If the sediment bioassay determines that the applicable ecological risk standards have been met (e.g., the absence of toxic effects, as defined in the state's EPA Sediment Toxicity Test and the USEPA Sediment Toxicity Test Manuals), no further work would be necessary under this task. If, however, the sediment bioassay results exceed appropriate benchmarks called out under the VAP, a quantitative ecological risk assessment must be conducted, as outline in Phase 3, below.

As an alternative to proceeding to Phase 3 of this task, Consultant would recommend evaluating the costs associated with delineating the extent of impacted sediments, and outright removal of these sediments. There are permitting considerations, and de-watering considerations, but for planning purposes prospective contractors have advised Consultant to "figure on" _____ Dollars (\$ _____) per ton of sediment removed, assuming no backfill.

Phase 3 (if necessary)

Assuming the chemicals of concern and the sediment bioassay results from the ditch exceed appropriate benchmarks, and a quantitative assessment is necessary, we will conduct an additional biological survey of fish and macroinvertebrates, as required under _____ [name]. As part of the additional biological survey of fish and macroinvertebrates, we will:

- A. Conduct a fish and physical habitat survey to obtain data for calculating the qualitative habitat evaluation index (QHEI), the index of biotic integrity (IBI), and where applicable, a modified index of well-being (MiwB) for the impacted surface water of the ditch.
- B. Conduct a quantitative macroinvertebrate survey to obtain data for calculating the invertebrate community index (ICI) for the impacted surface water.
- C. Compare the findings of the biological survey portion of the ecological risk assessment to applicable standards listed under _____ [name].

If the end result of this task is that an ecological risk exists in excess of applicable VAP standards, the VAP requires that corrective action must be taken to address this ecological risk if a volunteer intends to pursue a Covenant Not to Sue. Corrective actions in the case of the property relative to the ditch would include delineation of the extent of impacted sediments, and outright removal of those sediments that exceed ecotoxicological applicable standards.

Task 4: Management of Potentially Impacted Soils

This task is easily the most difficult to quantify. As stated above, should the provisions of POGWMUPUS apply in the Chip Hopper Area and/or the Exterior Area East of Machine Shop, soil removal would be warranted to protect groundwater from eventual leaching of VOCs from soils. Since the prior engineer has completely defined the extent of soil contamination in either area (instead focusing on the groundwater aspect), there is no way of calculating the total volume of impacted soils in either of these areas. Again, however, the need for removal of these soils could be rendered moot if the outcome of Task 2 is an indication that the provisions of POGWMUPUS do not apply in either area.

Further, while the extent of soils in the NW Sump Area that contain VOCs in excess of LBSVs is better defined, removal of soils is not required under the VAP since the provisions of POGWMUPUS do not apply in this area. VAP Generic Direct Contact Standards (GDSCS) are not exceeded in soils within the 0-2 foot compliance interval (despite the prior engineer's misguided conclusion that GDSCS for TCE and PCE were exceeded in samples collected from 4-5.5 feet below ground surface).

The one conclusion we would agree with is that the liquids in the sump should be pumped out, characterized, and removed from the site for disposal. This should be part of the operational decommissioning of the site that would be conducted as part of routine site closure.

With regard to soil, however, there are several options:

1. Outright removal of all soils which exceed LBSVs, regardless of location (i.e., identified area) or depth. The cost associated with this is difficult to quantify given the fact that the full extent of soil contamination in the Chip Hopper Area and the Exterior Area East of Machine Shop has yet to be defined. But assuming each are averaged 1,600 square feet (40 feet x 40 feet -- a conservatively low area for the NW Sump Area, but perhaps high for the other two areas) and that the depth of excavation in each area averaged 6 feet, the total volume of material to be removed under this scenario would be approximately 1,900 tons. The total estimated cost to excavate and dispose of soils, and backfill the excavations (excluding pavement replacement) would range between _____ Dollars (\$_____) and _____ Dollars (\$_____), depending upon what percentage of the material was characterized as "hazardous waste." It should be noted that this is a rough estimate, based solely upon the data that Consultant has reviewed to date, and is by no means a "guaranteed" figure, either high or low.

2. Removal of only those soils that exceed LBSVs in areas where the provisions of POGWMUPUS apply. For the purposes of this proposal, we have assumed (based upon the available data collected to date) that this would include only the Chip Hopper area and the Exterior Area East of Machine Shop. Using the same assumptions as above in terms of area and depth, the total volume of material to be removed under this scenario would be approximately 1200 tons. The total estimated cost to excavate and dispose of soils, and backfill the excavations (including pavement replacement) would range between _____ and _____, depending again upon what percentage of the material characterized as "hazardous waste." It should be noted that this is a rough estimate, based upon incomplete data, and is by no means a "guaranteed" figure, either high or low.

3. Removal of only those soils generated during demolition and re-development of the property. To date, Consultant has not seen or reviewed potential demolition plans, or re-development plans for the property. However, assuming 1.) that it is ultimately determined that the provisions of POGWMUPUS do not apply in the Chip Hopper Area or Exterior Area East of Machine Shop and 2.) re-development of the property will involve a new building closer to Detroit Avenue with most of the northern portion of property serving as a paved parking area, this option could be the most cost effective with regard to management of contaminated soils. (It should be noted here that if the first assumption is invalid, the _____ to _____ estimated for removal of soils in Option 2 would still need to be expended, in addition to the costs for this option presented below). Assuming that grading, footer removal, slab removal, and site preparation for new construction generated 400 tons of "contaminated" soil, the estimated cost to manage this quantity of material would be approximately _____ to _____. The cost savings realized under this option are related to the fact that one would not need to physically "dig to" these soils, but that they would be generated as part of normal site demolition or preparation work. Further, the cost saving is attributable to the elimination of the need to backfill excavations.

Whatever option is pursued for contaminated soil management, certain monies should be set aside (in addition to the estimates presented above) for confirmation soil sample collection and analysis, on-site representation by someone familiar with the provisions of the VAP, and coordination. These costs will vary depending upon the option selected; however, for planning purposes a cost is presented in the **Fee and Billing** section of this proposal.

Task 5: Groundwater Management

Under the VAP, there are two options for addressing contaminated groundwater: modeling, or remediation. For this site, we would recommend initially evaluating the modeling approach for the primary reason that existing groundwater data indicate limited contaminant migration away from presumed source areas. The modeling approach could take one of two forms, depending upon how much soil was removed as part of Task 4. However, for simplicity's sake, we have assumed that the modeling would consist of the traditional two-step soil-to-groundwater modeling, then modeling whether impacted groundwater reaches the "point of compliance" (the location of which is dependent upon whether Task 2 determines groundwater to be "Class A" or "Class B"). The basis for our assumption is that not all soils that exceed LBSVs will be excavated and removed (i.e., Option 1 for soil removal under Task 4 will not be implemented due to cost and uncertainty factors) from the property. We have had significant experience with this modeling approach in the past, and the EPA is quite familiar and comfortable with the approach.

The second option under groundwater management is remediation. We would urge the Client not to consider remediation as an option unless 1.) groundwater was classified as "Class A," and 2.) modeling indicated that off-site migration of groundwater containing VOCs in excess of GUPUS could occur. Even under this scenario, we would recommend pursuit of an Urban Setting Designation (USD) under the VAP (which changes the point of compliance) rather than outright remediation. Should remediation be considered as an alternative at the property, conventional techniques for remediating contaminated groundwater in the shale bedrock beneath the property include treatment using either a co-metabolic agent or some other form of chemical treatment. Preliminary cost estimates for pursuit of a USD or actual remediation of contaminated groundwater on-site are presented in the **Fee and Billing** section of this proposal.

Task 6: Completion of VAP Phase II Property Assessment Report, No Further Action Letter, and Other VAP Coordination/ Administrative Tasks

As part of this task, we would:

- Assemble a completed VAP Phase II Property Assessment Report in accordance with _____ [name], to include a description and results of all activities associated with implementation of Tasks 2-5 of this proposal.
- Complete the appropriate sections of the No Further Action (NFA) Form, and prepare an NFA Letter (signed and stamped by a VAP certified professional) for submittal to _____ [state] EPA.
- Coordinate and review of the NFA Letter with the _____ [state] EPA.
- Prepare a response to any comments on this initial NFA Letter.
- Coordinate final review of the NFA Letter by the _____ [state] EPA.

INFORMATION/SERVICES PROVIDED BY THE CLIENT

The following information and services shall be provided to Consultant by the Client:

1. Any pertinent background information on the Property for the completion of Tasks 1-6, above.
2. Access to the Property and its structures during normal business hours.

3. Assistance (generally through the Client's legal counsel) in preparation and filing of any declaration of use restrictions or institutional controls necessary for issuance of the NFA letter.

Generally, Consultant recommends that any Volunteer pursuing a Covenant Not to Sue from the EPA retain competent legal counsel throughout the process, in that the Covenant Not to Sue is a legal document that places binding restrictions upon the property and/or the Volunteer.

ESTIMATED COSTS

This section presents the estimated costs for completion of each of the six tasks outlined in this proposal, based upon the assumptions presented for each task. More refined estimates may be provided as the project progresses from stage-to-stage.

Task 1: Phase I Property Assessment

Estimated fee: \$ _____

Task 2: Groundwater Evaluation and Classification

Estimated fee (assuming 4 new groundwater monitoring wells placed) \$ _____

Task 3: Surface Water Sampling/Baseline Ecological Risk Assessment

Surface water sampling: \$ _____

Baseline Ecological Risk Assessment

Phase 1: \$ _____

Phase 2: \$ _____

Phase 3: \$ _____

Sediment removal and disposal (estimated cost, if necessary) \$ _____

Task 4: Soil Management

Estimates of possible excavation, disposal and backfilling costs

Option 1:	\$ _____	\$ _____
	-	-
Option 2:	\$ _____	\$ _____
	-	-
Option 3:	\$ _____	\$ _____

- _____ *

\$ _____ \$

_____- _____

\$ _____ - \$ _____

_____ [name]

By: _____

Printed Name: _____

Title: _____

Agreed to this ____ [day] day of _____ [month] ____ [year].

CLIENT

_____ [name]

By: _____

Printed Name: _____

Title: _____

Attachment 1

STANDARD PROVISIONS

1. **Information Provided by Others.** Client shall provide to _____ ("Consultant") all pertinent background information related to the project. The sources of any such information may include, but are not limited to, Client. Client recognizes that it is impossible for Consultant to assure the sufficiency or accuracy of such information, either because it is impossible to do so, or because of errors or omissions by others which may have occurred in assembling the information. Accordingly, Consultant may rely on all information provided to it, and Client waives any claim against Consultant, and agrees to defend, indemnify and hold Consultant harmless from any claim or liability for injury or loss arising, or allegedly arising, from errors, omissions, or inaccuracies in documents or other information provided to Consultant by sources which may include, but are not limited to, Client, and agrees to compensate Consultant for any time spent or expenses incurred by Consultant in defense of, or otherwise regarding, any such claim.

2. **Buried Utilities.** Client will furnish to Consultant information identifying the type and location of utility lines and other man-made objects beneath the site's surface. Further, Consultant reserves the right to notify local utility protection agencies or services, and to delay project implementation until these agencies or services have identified known utility lines or other subsurface man-made objects. Consultant will take reasonable precautions to avoid damaging any utility lines or other man-made objects identified. Client agrees to waive any claim against Consultant, and to defend, indemnify and hold harmless from any claim or liability for injury or loss arising, or allegedly arising, from Consultant's damaging underground utilities or other man-made objects that were not called to Consultant's attention, which were not properly located on plans furnished to Consultant, or were not identified or properly marked by any utility protection agency or service contacted by Consultant, and agrees to compensate Consultant for any time spent or expenses incurred by Consultant in defense of any such claim in accordance with Consultant's prevailing fee schedule and expense reimbursement policy.

3. **Right of Entry.** Client shall provide or assist Consultant in gaining the right to enter property owned by Client and/or other(s) in order for Consultant to fulfill the scope of services included hereunder.

4. Notification of Hazardous Materials. When wastes, materials and/or substances or other materials or substances hazardous and/or toxic to human health or the environment, whether regulated or unregulated, ("Hazardous Materials") are known, assumed or suspected to exist at a site, Consultant is required to take appropriate precautions to protect the health and safety of its personnel, to comply with applicable laws and regulations, and to follow procedures that Consultant deems prudent to minimize risks to its employees and the public. Should client know of or have any reason to assume or suspect that Hazardous Materials exist at the project site, Client will inform Consultant prior to project initiation, and advise Consultant of such known or suspected Hazardous Materials' type, quantity and/or location.

5. Hazardous Materials. It is understood and agreed that in seeking the professional services of Consultant under this Agreement, Client may request Consultant to undertake obligations involving or related to Hazardous Materials (including, but not limited to, asbestos). Such services shall be performed in accordance with generally accepted professional practice at the time when and at the place where services are rendered. Client agrees to hold harmless, indemnify, and defend Consultant from and against any and all claims, losses, damages, liabilities, and costs arising, or allegedly arising, out of or in any way connected with the presence, discharge, release, or escape of contaminants or Hazardous Materials of any kind, or environmental liability of any nature or in any manner related to services performed by Consultant under this Agreement, including the failure to discover any Hazardous Materials which exist in, on, above, beneath, about or which have migrated onto, or under, the project site. Such indemnification shall not apply to claims, damages, losses or expenses which are finally determined to result from willful or reckless disregard by Consultant of its obligations under this Agreement.

6. Scope of Services.

a. In the event that the Scope of Services for this Agreement was developed by Consultant, Client acknowledges that it was prepared at Client's discretion and without input from Client and/or other professionals retained (directly or indirectly) by Client. Client further acknowledges that, as a result, Consultant has been required to make various assumptions about Client's needs and preferences, as well as Client's ability to obtain certain services from other sources. Accordingly, Client waives any claim against Consultant, and agrees to defend, indemnify and hold harmless from any claim or liability for injury or loss arising, or allegedly arising, from the assumptions made by Consultant in developing the Scope of Services and agrees to compensate Consultant for any time spent or expenses incurred by Consultant in defense of any such assumption in accordance with Consultant's prevailing fee schedule and expense reimbursement policy.

b. In the event that the scope of services for this project was developed by a party other than Consultant, Consultant makes no claims as to its adequacy, since Consultant was not involved in or privy to the information and considerations that it reflects. Accordingly, Client acknowledges that Consultant is forced to assume that the scope of services is fully adequate for Client's purposes. Client also acknowledges and understands that Consultant assumes that Client has an alternative source from which to obtain any needed or desired services not listed. Accordingly, Client waives any claim against Consultant, and agrees to defend, indemnify and hold Consultant harmless from any claim or liability for injury or loss arising, or allegedly arising, from Consultant's failure to perform services limited by or not included in the scope of services, and agrees to compensate Consultant for any time spent or expenses incurred by Consultant in defense of any such claim in accordance with Consultant's prevailing fee schedule and reimbursement policy.

7. Disturbance of Property/Adverse Property Conditions. Client understands that the use of exploration equipment may cause some disturbance to the property, the correction of which is not part of this Agreement. Client also understands that the discovery of certain conditions and/or taking preventive measures relative to these conditions may affect a property's value. Accordingly, Client waives any claim against Consultant, and agrees to defend, indemnify and hold Consultant harmless from any claim or liability for injury or loss arising, or allegedly arising, from said conditions, and agrees to compensate Consultant for any time spent or expenses incurred by

Consultant in defense of any such claim in accordance with Consultant's prevailing fee schedule and expense

reimbursement policy.

8. Drill Cuttings and Fluids. Client recognizes that, when it is known, assumed or suspected that Hazardous Materials exist beneath the surface of the project site, certain waste materials, such as drill cuttings, drilling fluids, or well purge waters, must be treated as if contaminated. Accordingly, if called for elsewhere under this Agreement, Consultant will appropriately contain and label such materials; and will promptly inform client that such containerization and labeling has been performed; and will leave the containers on-site for proper, lawful removal, transport and disposal by Client. Client waives any claim against Consultant, and agrees to defend, indemnify and hold Consultant harmless from any claim or liability for injury or loss which may arise, or which may allegedly arise, as a result of the drill cuttings, drilling fluids or other presumably Hazardous Materials being left on site after their containerization by Consultant. Client also agrees to compensate Consultant for any time spent and expenses incurred by Consultant in defense of, or otherwise regarding, any such claim in accordance with Consultant's prevailing fee schedule and expense reimbursement policy.

9. Disposal of Waste. Soil, rock, water and/or samples obtained from the project site are, and shall remain, the property of the Client. It is Client's responsibility to select and arrange for lawful disposal procedures (which may include removing the media from Consultant's custody), and transporting them, or having them transported, to a disposal site.

10. Job Site Safety. Consultant is responsible for its own employee's activities on the job site. Neither this Agreement, nor the professional activities of Consultant, nor the presence of Consultant or its employees and/or subcontractors shall be construed to imply Consultant has responsibility for the methods of work performance, superintendence, sequencing of construction, or safety of others in, on, or about the job site.

11. Opinions of Cost. Since Consultant has no control over the cost of labor, materials, equipment or services furnished by others or over the methods of determining prices, or over competitive bidding or market conditions, any and all opinions as to the costs of services, construction or materials shall be made on the basis of its experience and qualifications and represent its best judgment; however, Consultant cannot and does not guarantee that bids or actual costs will not vary from opinions of probable cost.

12. Graphic Presentation of Physical Features. Any graphic presentation of sampling locations, boring locations or other physical features on maps or in reports is based upon field measurement techniques (such as compass or distance triangulation, pace-and-compass traverses, etc.) using available physical landmarks, and will be considered approximate unless indicated otherwise.

13. Aquifer Contamination. In the event that Consultant's services hereunder include subsurface sampling or exploration, Client acknowledges and agrees to the following: Unavoidable contamination of soil or groundwater may occur during subsurface exploration, as when drilling or sampling tools are advanced through a contaminated area, linking the contaminated areas to soils, aquifers, and underground streams, or other hydrous bodies not previously contaminated which may be capable of spreading Hazardous Materials off-site. Because nothing can be done to eliminate the risk of such an occurrence, and because subsurface sampling is a necessary aspect of the Consultant's services, Client waives any claim against Consultant, and agrees to defend, indemnify and hold Consultant harmless from any claim or liability for injury or loss which may arise, or which may allegedly arise, as a result of actual or alleged cross-contamination caused by sampling, and agrees to compensate Consultant for any time spent or expenses incurred by Consultant in defense of, or otherwise regarding, any such claim in accordance with Consultant's prevailing fee schedule and expense reimbursement policy.

14. Reuse and/or Revision of Documents. All documents prepared by Consultant pursuant to this Agreement are related exclusively to the services described herein. They are not intended or represented to be suitable for reuse by Client or others on extensions of this project or on any other project. Any reuse without written verification or adaptation by Consultant for the specific purposes intended will be at Client's sole risk and without liability or legal

exposure to Consultant; and Client shall indemnify and hold Consultant harmless from all claims, damages, losses and expenses, including but not limited to attorneys' fees, arising, or allegedly arising, out of resulting therefrom. any revision, verification, or adaptation after Consultant's submission of its final work-product to Client will entitle Consultant to further compensation in accordance with Consultant's prevailing fee schedule and expense reimbursement policy.

15. Standard of Care. In performing its professional services hereunder, Consultant will use that degree of care and skill ordinarily exercised, under similar circumstances, by members of its profession practicing at the same time in the same or similar locality. No other warranty, express or implied, is made or intended by Consultant's undertaking herein or its performance of services hereunder.

16. Maintenance of Professional Standards and Ethics. Client acknowledges that Consultant's services in all cases must be rendered in accordance with prevailing professional standards and ethics, as well as certain laws or regulations that apply to Consultant. Client further acknowledges that the responsibility for making reports or disclosures to any governmental agency or third party are solely those of the Client and/or the owner of the property that is the subject of the services, unless otherwise required by prevailing legal or professional standards.

17. Notice of Deficiency. Client, Client's personnel, contractors and subcontractors shall promptly notify Consultant of any deficiency or suspected deficiency in Consultant's work, in order that Consultant may take prompt, effective measures to address any perceived deficiencies.

18. Invoices. Invoices will be submitted by Consultant to Client monthly for services performed and expenses incurred pursuant to this Agreement. Client recognizes that time is of the essence with respect to payment of Consultant's invoices and that timely payment is a material part of the consideration of this Agreement. Payment of each such invoice will be due within twenty-five (25) days. A service charge will be added to delinquent accounts at the maximum rate allowed by law for each month of delinquency.

19. Non-Contingency. Client acknowledges and agrees that the payment for services rendered and expenses incurred by Consultant pursuant to this Agreement is not subject to any contingency unless expressly set forth in writing in this Agreement.

20. Failure to Pay. If Client fails to make any payment due Consultant for services and expenses within sixty (60) days after Consultant's transmittal of its invoice therefore, Consultant may, after giving seven (7) days' advance written notice to Client, suspend services under this Agreement until it receives payment in full for all amounts due. Consultant may also initiate legal proceedings to collect. In addition to all amounts due and payable pursuant to Consultant's invoices, Consultant may collect accrued interest and its reasonable attorneys' fees and other expenses related to the collection proceeding. Such expenses shall include, but shall not be limited to, the cost of the time devoted by Consultant's officers, directors, employees, and agents devoted to such proceeding and Consultant's related expenses, determined in accordance with Consultant's prevailing fee schedule and expense reimbursement policy.

21. Compensation for Additional Services. The undertaking of Consultant to perform professional services under this Agreement extends only to those services specifically described herein. If Client and Consultant agree that Consultant shall perform additional services ("Additional Services") hereunder, Client shall pay Consultant for the performance of such Additional Services (in addition to all other amounts payable under this Agreement) in accordance with Consultant's prevailing fee schedule and expense reimbursement policy.

22. Changed Conditions. In the event of an occurrence or discovery that was not originally contemplated by or known to Consultant in developing the original scope of services and fees, Consultant, in its sole discretion, may request modification of this Agreement. In the event of such a request, Consultant shall identify to Client the change in conditions which, in Consultant's judgment, make such modification necessary. If a modified Agreement or specific

Additional Services cannot be agreed to, this Agreement may be terminated.

23. Changed Costs. Consultant shall have the right to increase the compensation payable by Client to Consultant for any non-lump sum project in the event that performance of this Agreement extends beyond _____ (the date on which Consultant annually revises its fee and reimbursement schedule) of any calendar year and/or in the event that Consultant must modify services, facilities, or equipment to comply with laws or regulations that become effective after execution of this Agreement, provided that Consultant shall give Client thirty (30) calendar days' prior notice as to the cause for escalation for the additional amounts involved.

24. Indemnification by Consultant. Consultant is protected by Workers' Compensation Insurance and other Insurance, and will furnish certificates of insurance upon request. Consultant agrees to hold Client harmless from loss, damage, injury, or liability arising, or allegedly arising, directly from the negligent acts or omissions of Consultant, its employees, agents, subcontractors, and their employees and agents to the extent that the same is actually covered and paid under the foregoing policies of insurance.

25. Limitation of Liability. To the fullest extent permitted by law, Client will limit any and all liabilities, claims for damages, costs of defense, and/or expenses to be levied against Consultant (whether by client or by any other person or entity) on account of any and all defects, errors, omissions, negligence and other claims and liabilities to the amount actually paid in compensation to Consultant or paid under said insurance policies, whichever is greater. Client shall defend, indemnify and hold Consultant harmless from any claim or liability in excess of this amount. Further, Client agrees to notify any contractor or subcontractor who may perform work in connection with any design, report, or study prepared by Consultant of such limitation on, and indemnification for, claims and liabilities, and require as a condition precedent to its performance of such work an identical limitation on, and indemnification for, claims and liabilities on its part as against Consultant. In the event Client fails to obtain an identical limitation and indemnification provision, Client shall indemnify and hold Consultant harmless for any claims and liabilities in such a manner and to such extent that the aggregate liability of Consultant shall not exceed the aforementioned amount.

26. Environmental Indemnity. To the fullest extent permitted by law, Client agrees to indemnify, defend, and hold harmless Consultant and its subcontractors, consultants, agents, officers, directors and employees of any of them from and against all claims, liabilities, damages, losses and expenses, including but not limited to attorneys fees, arising out of or resulting from any release or threatened release of Hazardous Materials that existed at the project site, prior to or after the commencement of Consultant's work, provided that such release or threatened release is not finally determined to have resulted from the sole negligence of Consultant. Without limiting the generality of the foregoing, the above indemnification extends to claims resulting from:

- a. Client's violation or alleged violation of any federal, state or local statute, regulation or ordinance relating to the disposal of Hazardous Materials;
- b. Client's or Consultant's undertaking of or arrangement for the handling, removal, treatment, storage, transportation or disposal of Hazardous Materials found or identified at the site;
- c. Hazardous Materials introduced at the site by Client or third persons before or after the completion of services herein;
- d. Allegations that Consultant is a generator, operator, treater, storer, transporter, arranger for transport, handler, or disposer under RCRA, the Comprehensive Environmental, Response, Compensation and Liability Act ("CERCLA") or any other federal, state or local law, regulation or ordinance.

27. Consequential Damages. Client shall not be liable to Consultant and Consultant shall not be liable to Client for any

consequential damages incurred by either due to the fault of the other, regardless of the nature of this fault, or whether it was committed by Client or Consultant, their employees, agents, or subcontractors. Consequential damages include, but are not limited to, loss of use and loss of profit.

28. Discovery of Unanticipated Hazardous Materials. Hazardous Materials may exist at a site where there is no reason to believe they could or should be present. The discovery of unanticipated Hazardous Materials shall, at Consultant's discretion, constitute a Changed Condition mandating modifications of this Agreement or termination of services. Client also agrees that the discovery of unanticipated Hazardous Materials may make it necessary for Consultant to take immediate measures to protect human health and safety, and/or the environment. Consultant shall notify Client as soon as practically possible in the event unanticipated Hazardous Materials or suspected Hazardous Materials are encountered. Consultant will take any and all measures that, in Consultant's sole discretion, are justified to preserve and protect the health and safety of Consultant's personnel and the public, and/or the environment, and client agrees to compensate Consultant for the additional cost of such work. In addition, Client waives any claim against Consultant, and agrees to indemnify, defend and hold Consultant harmless from any claim or liability for injury or loss arising, or allegedly arising, from Consultant's encountering of unanticipated Hazardous Materials or suspected Hazardous Materials. Client also agrees to compensate Consultant for any time spent and expenses incurred by Consultant in defense of, or otherwise regarding, any such claim in accordance with Consultant's prevailing fee schedule and expense reimbursement policy.

29. Subsurface Risks. Client acknowledges that special risks arise in the identification of subsurface conditions. Client also acknowledges that even a comprehensive sampling and testing program implemented with the appropriate equipment and experienced personnel under the direction of a trained professional who functions in accordance with a professional standard of care may fail to detect certain conditions, because they are hidden and therefore cannot be considered in development of a subsurface exploration program. Client further acknowledges that actual environmental or geologic conditions that Consultant properly infers to exist between sampling points may differ significantly from those that actually exist. Client waives any claim against Consultant, and agrees to defend, indemnify, and hold Consultant harmless from any claim or liability for injury or loss which may arise, or allegedly arise, from such subsurface risks, and agrees to compensate Consultant for any time spent and expenses incurred by Consultant in defense of any such claim in accordance with Consultant's prevailing fee schedule and expense reimbursement policy.

30. Delays. Consultant's field or technical work may be interrupted due to causes beyond its control. Client shall not hold Consultant responsible for damages or delays in performance caused by Acts of God or other circumstances. For purposes of this Agreement, Acts of God and other circumstances beyond the control of Consultant include, but are not limited to, unusual weather; floods; epidemics; war; riots; strikes; lockouts or other industrial disturbances; protest demonstrations; unanticipated site conditions; denial of or impediment to, site access; insufficient or incomplete delivery of information requested from Client, regulatory agencies or third parties; or inability, despite reasonable diligence, to obtain personnel, equipment or material for the project.

31. Termination. The obligation to provide further services under this Agreement may be terminated by either party upon seven (7) days' written notice in the event of changed conditions or the substantial failure by the other party to perform in accordance with the terms hereof through no fault of the terminating party. In the event of termination by either party, Consultant will be paid for all services rendered to the date of termination, all expenses subject to reimbursement hereunder, and other reasonable expenses incurred by Consultant as a result of such termination. In the event Consultant's compensation under this Agreement is a fixed fee, upon such termination the amount payable to Consultant for services rendered will be determined using a proportional amount of the total fee based on a ratio of the amount of the work done, as reasonably determined by Consultant, to the total amount of work which was to have been performed, less prior partial payments, if any, which have been made.

32. Confidentiality. Consultant agrees to keep confidential and not to disclose to any person or entity, other than Consultant's employees and subcontractors, without the prior consult of Client, all data and information which are

furnished to Consultant by Client and which are marked CONFIDENTIAL; provided, however, that this provision shall not apply to data which are in the public domain, or were generated or previously known to Consultant, or which were acquired by Consultant independently from third parties which have no obligation to Client to keep said data and information confidential. These provisions shall likewise not apply to information, in whatever form, that comes into the public domain through no fault of Consultant. Nor shall these provisions restrict Consultant from disclosing any information or data when ordered by a court, administrative agency or other authority with apparent jurisdiction. Consultant may use client's name and a general description of Consultant's services for Client for marketing purposes.

33. Binding Effect. This Agreement shall bind, and the benefits thereof shall inure to, the respective parties hereto, their legal representatives, executors, administrators, successors, and assigns.

34. Third-Party Exclusion. Nothing under this Agreement shall be construed to give any rights or benefits in this Agreement to anyone other than Client and Consultant, and all duties and responsibilities undertaken pursuant to this Agreement will be for the sole and exclusive benefit of Client and Consultant and not for the benefit of any other party. Client agrees that Client shall not disclose to any third party any data, reports or other information furnished by Consultant to Client under this Agreement without the prior written consent of Consultant, and in the absence of such consent, Consultant shall have no liability to Client for claims resulting from such disclosure. Client further agrees to indemnify, defend and hold Consultant harmless from any claim or liability for injury or loss arising, or allegedly arising, from Client's disclosure to a third party's use of, any data, reports or other information furnished by Consultant.

35. Controlling Law. This Agreement shall be governed by the law of the State of Ohio without regard to its conflict of laws procedures.

36. Location of Litigation. In the event that client wishes to commence litigation against Consultant, Client agrees that it may bring such litigation only in the Court of Common Pleas for _____ County, _____ or in the U.S. District Court of _____, or such other courts which include _____ County, _____ within their territorial jurisdiction.

37. Expenses of Litigation. In the event litigation in any way related to the services performed hereunder is initiated against Consultant by Client, its contractors, or subcontractors, and such litigation concludes with the entry of a final judgment favorable to Consultant, Client shall reimburse Consultant for all of its attorneys' fees and other expenses related to said litigation. Such expenses shall include, but shall not be limited to, the cost to Consultant for any time spent and expenses incurred, in accordance with Consultant's prevailing fee schedule and expense reimbursement policy.

38. Alternative Dispute Resolution. In the event of a dispute between Consultant and Client which is not resolved in good faith negotiation, Client agrees to negotiate in good faith to find or craft an alternative dispute resolution mechanism (*i.e.*, a dispute resolution technique which does not involve a court of law).

39. Time Limit for Claims. Client agrees that it will not pursue claims against Consultant more than two (2) years after Consultant's performance of the work from which the claim arises or to which it relates.

40. Extension of Protections. Client agrees to extend any and all limitations indemnifications and waivers provided by Client to Consultant to those individuals and organizations Consultant retains for proper execution of the work. These include, but are not limited to, Consultant's officers, directors, and employees and their heirs and assigns, as well as Consultant's agents, subconsultants and subcontractors and their officers, directors, employees, and their heirs and assigns.

41. Instruments of Service. All reports, boring logs, field data, field notes, laboratory test data, calculations, estimates and other documents prepared by Consultant are copyrighted instruments of service and, as such, remain the property of

Consultant. These instruments of service will be retained by Consultant for a period of seven (7) years following submission of its final report, during which time they will be made available to Client, upon prior request, for review at reasonable times. Further, the contents of this proposal may not, for any purpose, be copied, or be provided or otherwise communicated, in whole or in part, to any party other than Client or Client's legal counsel.

42. **Photographs.** Photographs of any completed project embodying the services of the Consultant provided hereunder may be made by Consultant and shall be considered as its property and may be used by it for publication, marketing or other promotional purposes.

43. **Severability.** The provisions of this Agreement shall be deemed severable, and the invalidity or unenforceability of any provision shall not affect the validity and enforceability of the other provision hereof. If any provision of this Agreement is unenforceable for any reason whatsoever, such provision shall be appropriately limited and given effect to the extent that it may be enforceable.

44. **Survival.** The above terms and conditions regarding limitation of liability and indemnification shall survive the completion of the services under this Agreement and the termination of this Contract for any cause.

45. **Titles.** The titles used in this Agreement are for general reference and are not part of the Agreement.

46. **Merger.** This Agreement constitutes the entire Agreement between Consultant and Client, and all negotiations and oral understandings between the parties are merged herein. This agreement can be supplemented and/or amended only by a written document executed by both Consultant and Client.

Initial by Client: _____

Initial by Consultant: _____



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33-25 Current Legal Forms for Real Estate FORM 25.78

FORM 25.78 An agreement with company for removal of hazardous condition on subject premises--clauses include licensing requirements, insurance requirements, scope of work, hold harmless provision, certificate of proper disposal

COMMENT

This agreement is used when contracting with a licensed hauler for the removal of hazardous matter located on the subject premises. The owner of the premises should demand copies of the hauler's certificate of insurance and state-issued license prior to providing a deposit to the hauler. The owner should also obtain proof of proper disposal of the hazardous matter before making the final payment required under the agreement. The owner is ultimately responsible for the transportation and disposal of the material.

The form contains provisions which require the hauler to inform his employees and agents of the nature of the substance being removed. In addition, the hauler agrees to provide any special training, protective clothing and other necessary gear for his employees and agents. This provision is designed to help prevent future claims brought against *both* the hauler and the owner of the property by injured workers that with proper training and protective gear could have been avoided. It is also strongly recommended that the agreement include a requirement of worker's compensation insurance.

The removal process can be very dangerous, particularly where the hazardous matter is radioactive or highly flammable, or where it contains extremely carcinogenic chemicals. The owner should examine his own liability insurance coverage prior to the commencement of work. The owner must be certain that he has adequate coverage in the event that the hauler or its insurance company becomes bankrupt or is otherwise unable to meet its obligations to the owner and to anyone else who may be injured during the course of removal.

FORM

AGREEMENT made this _____ [day] day of _____ [month] _____ [year], between _____ [name], a corporation licensed to do business in the State of _____ [state], with offices for the transaction of business at _____ [address] (hereafter referred to as "Company"), and _____ [name], residing at _____ [address] (hereafter referred to as "Owner").

WHEREAS, a hazardous condition has been discovered on certain real property owned by Owner; and

WHEREAS, Company is in the business of correcting such conditions;

NOW, in consideration of the mutual promises contained herein, it is agreed as follows:

1. Scope of Work:

(a) The Company will remove _____ [insert number of drums] fifty-five (55) gallon drums containing _____ [e.g., gasoline] from Owner's property located at _____ [address]. If any drums are not intact, Company will transfer the material to a suitable container and remove the container and damaged drum(s) as well.

(b) If any drums are found to be leaking, Company shall remove the contaminated soil as well. The amount of soil to be removed will be determined by soil samples to be taken by Owner's consultant and at Owner's expense.

(c) Company shall provide Owner with a hazardous materials shipping manifest, as required by state and federal laws and regulations.

(d) Company shall dispose of the items in Paragraphs (a) and (b), above, at an approved site, as required by law. Company shall provide owner with proof of proper disposal within _____ (_____) days after each item is removed from Owner's premises. Owner shall not be obligated to pay Company until such proof is provided in proper form.

2. Cost:

(a) Owner shall pay Company the sum of _____ Dollars (\$_____) per intact drum and _____ Dollars (\$_____) for any drum which requires replacement.

(b) Owner shall pay Company the sum of _____ Dollars (\$_____) per cubic yard of soil which is removed.

(c) Payment shall be made by certified check or bank draft as follows: _____ Dollars (\$_____) deposit shall be made upon execution of this Agreement. Company shall hold this sum in escrow until it has picked up all drums. A payment of _____ Dollars (\$_____) shall be made upon providing Owner with the shipping manifest and proof of proper disposal. The payment for soil removal shall be made in full upon Company providing Owner with proof of proper disposal.

3. Insurance:

(a) Company shall provide Owner with proof of worker's compensation insurance and liability insurance in at least the amount of _____ Dollars (\$_____). Owner shall be named as an additional insured

on the policies.

(b) Company shall hold Owner harmless for any and all claims for injury to person or property arising from the removal and disposal as described in Paragraph 1, above, including, but not limited to, defense costs and consequential damages arising out of, or in any way related to, the _____.

(c) Company covenants that it will provide its employees and agents with appropriate protective clothing and equipment, including, but not limited to, ventilators, protective eyeglasses, coveralls, and gloves. Company also covenants that it will provide its employees and agents with any special training and other information necessary for the successful completion of this contract. Company will use only employees who are fully trained in the proper handling of such substances. Company will disclose to employees the identity and nature of the substance to be removed.

4. Representations:

(a) Company represents that it is licensed by the appropriate federal and state authorities to undertake the work described in Paragraph 1. Company will provide a copy of its licenses to Owner upon execution of this Agreement.

(b) Company represents that it has never been cited, convicted, fined, or the subject of any administrative proceeding for any action in connection with removal, storage or transportation of any hazardous substances.

(c) Owner represents that the only substance contained in the drums is _____.

5. Time:

(a) Company will remove all drums on or before _____ [month] _____ [day] _____ [year].

(b) Company shall remove the contaminated soils, if any, within _____ (_____) days after receipt of the report from Owner's consultant stating the location and amount of soil to be removed.

(c) Company shall be entitled to a reasonable extension of time, not to exceed _____ (_____) days, to compensate for adverse weather conditions.

6. Termination:

(a) Either party may terminate this Agreement prior to performance by Company. Upon such termination, Company shall promptly refund the deposit.

(b) If partial performance has occurred, Company shall be entitled to quantum meruit payment to be applied against the deposit. The balance of the deposit shall be promptly refunded. If the deposit is insufficient, Owner shall promptly remit the balance.

(c) Notice of termination shall be given in writing and delivered as set forth in Paragraph 7 hereof.

7. Notice:

Any notice required to be given to Company shall be in writing and sent certified mail, return receipt requested, to:

_____ [name]
 _____ [address]

_____ [address]

Any notice required to be given to Owner shall be in writing and sent certified mail, return receipt requested, to:

_____ [name]
 _____ [address]
 _____ [address]

Notice shall be deemed given when received.

8. Entire Agreement:

This Agreement contains the entire understanding of the parties; there have been no representations made which are not contained herein.

9. Modification:

This Agreement may only be modified by a written amendment signed by all parties. An oral modification shall not be binding on any party.

10. Governing Law:

This Agreement shall be construed in accordance with the laws of the State of _____ [state].

11. Waiver:

Any failure by either party to enforce any right arising hereunder shall not be deemed a waiver of such right.

IN WITNESS WHEREOF, the parties hereto have set their hands and seals the day and year first above written.

COMPANY:

_____ [name]

By: _____

Printed Name: _____

Title: _____

OWNER:

_____ [name]

By: _____

Printed Name: _____

Title: _____

)

33-25 Current Legal Forms for Real Estate FORM 25.78

STATE OF _____ [state]) SS:
 COUNTY OF _____ [county])

BEFORE ME, a Notary Public in and for said County and State, personally appeared _____ [name],
 a(n) _____ [state] _____ [entity], by _____ [name], its
 _____ [title], who acknowledged that _____ [he/she] did sign the foregoing
 instrument for and on behalf of said corporation, being thereunto duly authorized, and that the same is
 _____ [his/her] free act and deed individually and as such officers and the free act and deed of said
 _____ [entity].

IN TESTIMONY WHEREOF, I have hereunto set my hand and official seal at _____ [city],
 _____ [state], this _____ [day] day of _____ [month], _____ [year].

 Notary Public

STATE OF _____ [state])
 COUNTY OF _____ [county]) SS:

BEFORE ME, a Notary Public in and for said County and State, personally appeared _____ [name],
 a(n) _____ [state] _____ [entity], by _____ [name], its
 _____ [title], who acknowledged that _____ [he/she] did sign the foregoing
 instrument for and on behalf of said corporation, being thereunto duly authorized, and that the same is
 _____ [his/her] free act and deed individually and as such officers and the free act and deed of said
 _____ [entity].

IN TESTIMONY WHEREOF, I have hereunto set my hand and official seal at _____ [city],
 _____ [state], this _____ [day] day of _____ [month], _____ [year].

 Notary Public



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FORM 25.79 Escrow agreement--property to transfer, but funds are to be withheld at closing to cover remediation cost

COMMENT

This escrow agreement involves the purchase and sale of a contaminated property. Initially, the seller had agreed to remediate the contamination and demolish an existing structure. However, the buyer was not happy with the seller's approach and, therefore, elected to proceed with the purchase and to assume the remediation and demolition. The buyer required that at closing, funds must be escrowed in order to assure that seller would still maintain financial responsibility for the cleanup. The seller was unwilling to give buyer a credit at closing for the anticipated cleanup costs because seller did not believe the costs would be as high as buyer's consultant had indicated. As a result, the parties entered into an escrow agreement.

FORM

AGREEMENT made this ____ [day] day of _____ [month] ____ [year], among _____ [name], a(n) _____ [state] corporation (hereafter referred to as "Seller"), _____ [name], a(n) _____ [state] corporation (hereafter referred to as "Buyer"); and _____ [name], a(n) _____ [state] corporation (hereafter referred to as "Escrow Company").

RECITALS

Buyer and Seller have executed a Purchase Agreement dated _____ [month] ____ [day] ____ [year], as amended, for the sale of the Property described on Exhibit A attached hereto (the "Property"), (which Purchase Agreement and Amendments are hereinafter collectively referred to as the "Purchase Agreement").

In accordance with the Purchase Agreement, Seller is responsible for all of the costs associated with remediating the environmental conditions of the Property, not to exceed the sum of _____ Dollars (\$_____) and for all of the costs associated with the demolition of the improvements on the Property. To this end, the parties have agreed that Seller shall place funds in escrow for payment of these costs.

NOW, THEREFORE, in consideration of the mutual covenants herein and other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the parties agree as follows:

■ **Deposit of Funds.** Upon transfer of legal title of the Property to Buyer, the parties shall deposit into escrow the sum of _____ Dollars (\$_____) (the "Deposit") of which _____ Dollars (\$_____) shall be held for the payment of the Remediation Costs (as defined below), and _____ Dollars (\$_____) shall be held for the payment of the Demolition Costs (as defined below). The Deposit shall be held in escrow by the Escrow Company. The Escrow Company will place the Deposit in a federally insured interest bearing account. The interest shall belong to Buyer.

■ **Holding of the Deposit.** The Deposit shall be held by the Escrow Company until the earlier of (i) _____ [month] _____ [day] _____ [year]; or (ii) the remediation and the demolition have been completed to Buyer's reasonable satisfaction.

■ **Conditions for Release of the Deposit.** The Escrow Company shall release from time to time funds from the Deposit at Buyer's written request to pay for and/or reimburse Buyer for the Remediation Costs and the Demolition Costs. Buyer shall submit to the Escrow Company all bills, receipts, affidavits, certificates or other documentation reasonably necessary (the "Receipts") to substantiate the amount of the costs and expenses that have been incurred remediating and demolishing the Property. Buyer shall deliver copies of the Receipts to the Escrow Company and to Seller. The parties acknowledge that the Deposit will be used for all reasonable costs and expenses associated with remediating the environmental conditions on or about the Property, which Buyer, in its sole reasonable discretion, believes must be remediated in order to construct, operate and finance a car dealership on the Property (the "Project"). Remediation Costs may include, without limitation, the costs of environmental consultants, testing, costs of removal, transportation, and disposal of contaminated soil, monitoring of underground water, costs and fees incurred by Buyer to obtain a "No Further Action" letter from the _____ [state] Environmental Protection Agency which Seller acknowledges may be necessary in order for Buyer to obtain financing for the Project. Demolition Costs shall include all costs associated with the demolition, removal, transportation and disposal of all building improvements and materials on or about the Property.

Upon the full completion of the remediation and demolition to the reasonable satisfaction of Buyer, the remaining portion of the Deposit will be released to Seller, or its nominee.

■ **Remedies.** Any controversy or claim arising out of this or relating to this Agreement, or the breach thereof, shall be settled by arbitration administered by the American Arbitration Association in accordance with its Commercial Rules, and judgment on the award rendered by the arbitrator(s) may be entered in any court having jurisdiction thereof.

■ **Entire Agreement.** This Agreement when executed by the parties hereto contains the complete and entire understanding of the parties with respect to the subject matter hereof, and no changes shall be recognized as valid unless they are made in writing and similarly executed. No specific waiver of any of the terms hereof shall be considered as a general waiver.

■ **Successors and Assigns Bound.** This Agreement shall be binding upon and inure to the benefit of the respective successors and assigns of the parties hereto.

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■ **Applicable Law.** This Agreement shall be governed by and construed according to the laws of the State of _____ [state].

■ **Indemnity.** Seller and Buyer hereby indemnify and agree to defend and hold harmless the Escrow Company from all rights, claims, damages and actions which the Escrow Company may incur or become subject to with respect to its duties hereunder. The Escrow Company shall have no duty whatsoever to determine the validity of the expenditures hereunder. The Escrow Company's fees for its services is _____ Dollars (\$ _____), and will be shared equally by the parties. The fee will be paid upon establishment of the account.

IN WITNESS WHEREOF, the undersigned parties have executed this Escrow Agreement to be effective on the date first written above.

SELLER:

_____ [name]

By: _____

Printed Name: _____

Title: _____

BUYER:

_____ [name]

By: _____

Printed Name: _____

Title: _____

ESCROW COMPANY:

_____ [name]

By: _____

Printed Name: _____

Title: _____

STATE OF _____ [state])
COUNTY OF _____ [county]) SS:

BEFORE ME, a Notary Public in and for said County and State, personally appeared _____ [name], a(n) _____ [state] _____ [entity], by _____ [name], its _____ [title], who acknowledged that _____ [he/she] did sign the foregoing instrument for and on behalf of said corporation, being thereunto duly authorized, and that the same is _____ [his/her] free act and deed individually and as such officers and the free act and deed of said

_____ [entity].

IN TESTIMONY WHEREOF, I have hereunto set my hand and official seal at _____ [city],
 _____ [state], this _____ [day] day of _____ [month], _____ [year].

 Notary Public

STATE OF _____ [state])
 COUNTY OF _____ [county]) SS:

BEFORE ME, a Notary Public in and for said County and State, personally appeared _____ [name],
 a(n) _____ [state] _____ [entity], by _____ [name], its
 _____ [title], who acknowledged that _____ [he/she] did sign the foregoing
 instrument for and on behalf of said corporation, being thereunto duly authorized, and that the same is
 _____ [his/her] free act and deed individually and as such officers and the free act and deed of said
 _____ [entity].

IN TESTIMONY WHEREOF, I have hereunto set my hand and official seal at _____ [city],
 _____ [state], this _____ [day] day of _____ [month], _____ [year].

 Notary Public

STATE OF _____ [state])
 COUNTY OF _____ [county]) SS:

BEFORE ME, a Notary Public in and for said County and State, personally appeared _____ [name],
 a(n) _____ [state] _____ [entity], by _____ [name], its
 _____ [title], who acknowledged that _____ [he/she] did sign the foregoing
 instrument for and on behalf of said corporation, being thereunto duly authorized, and that the same is
 _____ [his/her] free act and deed individually and as such officers and the free act and deed of said
 _____ [entity].

IN TESTIMONY WHEREOF, I have hereunto set my hand and official seal at _____ [city],
 _____ [state], this _____ [day] day of _____ [month], _____ [year].

 Notary Public

[Attach Exhibit A]



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FORM 25.80 Letter agreement regarding release of escrowed funds

COMMENT

This letter agreement accompanies the immediately preceding escrow agreement. This letter agreement is intended to modify the terms and conditions of the letter agreement and provide for a release of the funds to various parties.

FORM

_____ [month] _____ [day] _____ [year]

_____ [name]

_____ [address]

_____ [address]

Dear Mr./Ms. _____ [name]:

Reference is made to a certain Escrow Agreement dated _____ [month] _____ [day] _____ [year] (the "Escrow Agreement"). This letter agreement is intended to supplement the terms and conditions of the Escrow Agreement, and to constitute joint disbursement instructions to the Escrow Company (as defined in the Agreement). Pursuant to the Escrow Agreement, a portion of the purchase price paid by _____ [name] ("Buyer") for the subject property was placed into escrow with the Escrow Company. As you know, a portion of the escrowed funds has been disbursed, and a portion of the purchase price is still being held in escrow. The amount of purchase price being held by

the Escrow Company is _____ (\$_____). In connection with the termination of the escrow account, we hereby agree as follows and direct the Escrow Company to distribute the escrow account in accordance with this letter:

1. The sum of _____ (\$_____) will be immediately disbursed to _____ [name] (the "Seller").

2. The sum of _____ (\$_____) will be immediately disbursed to Buyer to compensate Buyer for the anticipated future costs and expenses it will incur to obtain a No Further Action Letter. The Buyer will assume responsibility for the two outstanding invoices from its environmental consultant totaling _____ (\$_____). (Except as is set forth in Paragraph 3 of this letter relating to the removal of the hazardous soil, Buyer shall be solely responsible for all costs, fees and expenses which are necessary in order for Buyer to obtain a "No Further Action Letter").

3. The sum of _____ (\$_____) will be disbursed to _____ [name] to be held by it pending removal of the hazardous soil currently located at the site. _____ [name] will hold the funds pending receipt of an affidavit from the environmental consultant in the form attached to this letter which is incorporated herein by reference. The affidavit is subject to the reasonable approval of Buyer's environmental consultant and will include a statement under penalty of perjury that the hazardous soil has been removed from the site, and that the same have been transported and disposed of in accordance with all applicable laws, rules and regulations. Seller will be listed as the generator and transporter of the hazardous soil.

4. Seller will immediately engage a contractor to remove the hazardous soils from the property. The letter of engagement will include a provision that the contractor agrees to remove the hazardous soils by _____ [month] _____ [day] _____ [year].

5. Buyer and Seller, on behalf of themselves and their respective shareholders, members, managers, directors, officers, employees, agents, successors and assigns, each hereby fully release, acquit and discharge each other and the Escrow Company, and their respective shareholders, members, managers, directors, officers, employees, agents, successors and assigns, from any and all claims, damages, causes of action, liabilities, and expenses (including, without limitation, claims for attorneys fees and expenses) arising out of or relating to (a) the Escrow Agreement, (excluding Paragraph 7 of the Escrow Agreement which will remain in full force and effect); (b) the disbursement of any and all funds under the Escrow Agreement, including, without limitation, all prior disbursements by the Escrow Company for the Remediation Costs and Demolition Costs (as both are defined under the Escrow Agreement); and (c) Paragraph 5(A)(v) of the Purchase Agreement, dated _____ [month] _____ [day] _____ [year], between the Buyer and the Seller (the "Agreement") and Paragraph 2 of the *First Amendment* to the Agreement, dated _____ [month] _____ [day] _____ [year], including, without limitation, claims by Buyer for reimbursement of the costs of remediation of the environmental conditions of the Property (as defined in the Agreement) including the costs of environmental consultants, testing, costs of removal, transportation and disposal of contaminated soil, monitoring of underground water, costs and fees incurred by Buyer to obtain a "No Further Action" letter from the _____ [state] Environmental Protection Agency; provided, however, that the foregoing release shall not release either party or the Escrow Company from their respective obligations under this letter agreement.

If you are in agreement with the terms set forth in this letter agreement, please sign the enclosed copy where we have

indicated and return it to the undersigned.

Very truly yours,

_____ [name]

Accepted:

This _____ [day] day of _____ [month], _____ [year].

_____ [name]

By: _____

[Title]



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FORM 25.81 Indemnity and escrow agreement

COMMENT

This is a form of escrow agreement which provides for funds to be withheld at closing for the removal of underground storage tanks. The agreement, including, the indemnity, eliminates seller's exposure to buyer to the amount of the escrowed funds.

FORM

ENVIRONMENTAL INDEMNITY AND ESCROW AGREEMENT

THIS ENVIRONMENTAL INDEMNITY AND ESCROW AGREEMENT is made this ____ [day] day of ____ [month] ____ [year], among ____ [name], a(n) ____ [state] corporation (hereafter referred to as "Seller"), ____ [name], a(n) ____ [state] corporation (hereafter referred to as "Buyer"); and ____ [name], a(n) ____ [state] corporation (hereafter referred to as "Escrow Agent").

RECITALS

Pursuant to the Purchase Agreement dated ____ [month] ____ [day] ____ [year], ("Purchase Agreement") by and between Buyer and Seller, Buyer has agreed to purchase and Seller has agreed to sell certain real property located in ____ [city], ____ [state], the legal description of which is attached hereto as Exhibit A (the "Property").

Terms used herein, unless otherwise indicated, have the same meaning given to them in the Purchase Agreement.

Subsequent to the execution of the Purchase Agreement, Buyer hired _____ [name] (the "Consultant") to perform a Phase I environmental Assessment of the Property and a Petroleum Underground Storage Tank the ("UST") was discovered.

Notwithstanding the provisions of Paragraph _____ of the Purchase Agreement, permitting Buyer to terminate the Purchase Agreement as a result of the discovery of the UST, Buyer has agreed to consummate the purchase and sale of the Property in consideration for the Agreement of Seller to pay for, and to indemnify and hold Buyer harmless from, all costs, up to the amount of the Escrow Funds (as defined herein), incurred in connection with the removal of the UST, including (i) the remediation of any contamination caused by any release from the UST; and (ii) obtaining a no further action letter from the Ohio Bureau of Underground Storage Tanks ("BUSTR").

The parties have agreed to withhold from the Purchase Price the sum of _____ Dollars (\$_____) as a fund to be used for the purchase of discharging Seller's obligations hereunder.

AGREEMENTS

NOW THEREFORE, in consideration of the foregoing and of the mutual promises contained herein, it is agreed among the parties as follows:

1. Removal of UST. On or before _____ (_____) days after the later of the Closing Date and the date of delivery of possession of the Property to Buyer, Buyer shall, in concert with the Consultant, commence and pursue to completion the process of removing the UST in accordance with all applicable laws and regulations. Such process shall include, but not necessarily be limited to, the following:

- A. Registering the UST;
- B. Entering the UST into the State Financial Assurance Fund;
- C. Securing a permit for removal of the UST;
- D. Notifying all appropriate officiates;
- E. Removing and properly disposing of the UST and any product within the UST;
- F. Remediation of the site, if necessary;
- G. Filing any and all reports, including a closure report with BUSTR; and
- H. Obtaining a no further action letter from BUSTR.

2. Supervision and Control. As between Seller and Buyer, the work to be done pursuant to Section 1 (the "Work") will be supervised and controlled by Buyer. Buyer shall have the exclusive right and prerogative to contact, consult and otherwise deal with contractors and all governmental agencies having jurisdiction in connection with the Work. Buyer will make reasonable efforts to keep Seller informed as the Work progresses and will consider any comments or suggestions that Seller may make.

3. Delivery of Escrow Funds. Seller hereby authorizes Escrow Agent to withhold from the Purchase Price otherwise to

be disbursed to Seller in accordance with the Purchase Agreement on the Closing Date, the sum of _____ Dollars (\$ _____), in immediately available funds (the "Escrow Funds"), to provide a fund for and secure the payment of the Environmental Costs, as defined herein.

4. Term. The Escrow Funds and any interest earned thereon shall be held in escrow for a term beginning with the Closing Date and ending with the earlier of (a) the receipt by Buyer of a no further action letter from BUSTR; and (b) the delivery of all Escrow Funds and any interest earned thereon to Buyer in accordance with the terms of this Agreement.

5. Payment of Environmental Costs. The costs and expenses of the Work shall be paid for and discharged solely from the Escrow Funds held by Escrow Agent from time to time upon submittal to Escrow Agent by Buyer of evidence of such costs. Such costs shall include, in addition to the costs of performing those items set forth in Section 1, above, all environmental consulting fees, engineering fees, costs and testing, sampling and laboratory work, cost of remedial work, legal fees and all other costs associated with the planning and implementation of the work including any fines or penalties which may be imposed by any governmental agencies with respect to the Work.

6. Indemnity. Seller, to the extent of the Escrow Funds, shall pay for, in accordance with the terms of this Agreement, and shall defend, indemnify and hold Buyer, its shareholders, directors employees and agents, harmless from and against any claims, actions, demands, penalties, fines, liabilities, settlements, damages, costs or expenses (including, without limitation, attorney and consultant fees, court costs and litigation expenses) of whatever kind or nature, known or unknown, foreseeable or unforeseeable, contingent or otherwise, including, but not by way of limitations, those described in Section 5, above, arising out of or in any way related to the Work (the "Environmental Costs").

7. Investment of Escrow Funds. Escrow Agent will act as custodian of the Escrow Funds and will invest the Escrow Funds in any of the following:

A. obligations issued or guaranteed by the United States of America having a maturity not to exceed ninety-one (91) days; and

B. certificates of deposit of, or account with, national banks or corporations endowed with trust powers having capital and surplus in excess of One Hundred Million Dollars (\$100,000,000), and a maturity not to exceed ninety-one (91) days.

Escrow Agent shall have the power to sell or liquidate the foregoing investments whenever Escrow Agent is required to release all or any portion of the Escrow Funds pursuant to Section 5. Any interest or other income earned on such investment and reinvestment of the Escrow Funds shall become part of the Escrow Funds. Escrow Agent shall have no liability for any investment losses resulting from the investment, reinvestment, sale or liquidation of the Escrow Funds, except in the case of the gross negligence or willful misconduct of Escrow Agent.

8. Fees and Expenses of Escrow Agent. All costs and expenses of Escrow Agent shall be paid out of the Escrow Funds to the extent available, thereafter borne one-half (1/2) by Buyer and one-half (1/2) by Seller.

9. Acceptance by and Liability of Escrow Agent. Escrow Agency hereby accepts and agrees to perform its obligations hereunder. The duties and obligations of Escrow Agent hereunder shall be determined solely by the provisions of this Agreement and Escrow Agent shall be under no obligation to refer to any other documents between or among the parties, it being specifically understood that the following provisions are accepted by all parties hereto:

A. Escrow Agent will not be liable to anyone by reason of any error of judgment or for any act done or step taken or omitted by it in good faith or for any mistake of fact or law for anything which it may do or refrain from doing in connection herewith unless caused by or arising out of its own gross negligence or

willful misconduct. Seller shall indemnify and hold Escrow Agent harmless from any and all liability and expense which may arise out of any action taken or omitted by it, as Escrow Agent, in accordance with this Agreement, as the same may be amended, modified or supplemented, except such liability and expense as may result from its gross negligence or willful misconduct. Escrow Agent may act upon advice of counsel in reference to any matter connected herewith and shall not be liable for any action taken or omitted in accordance with such advice. Without limiting the foregoing, Escrow Agent shall in no event be liable in connection with its investment or reinvestment of any cash held by it hereunder in good faith, in accordance with the terms hereof, including, without limitation, any liability for any delays (not resulting from its gross negligence or willful misconduct) in the investment or reinvestment of the Escrow Funds, or any loss of interest incident to any such delays.

B. Escrow Agent shall be entitled to treat as genuine, and as the document it purports to be, any invoice or other document furnished to it by Buyer, and believed by it to be genuine and to have been presented by the proper party or parties.

C. Escrow Agent shall not be under any duty to give the Escrow Funds any greater degree of care than it gives its own similar property and will not be required to invest any Escrow Funds held except as directed in this Agreement. Uninvested funds held hereunder will not earn or accrue interest.

D. Escrow Agent does not have any interest in the Escrowed Funds and is serving as escrow agent only, having only possession thereof. Any payment of income from the Escrow Funds shall be subject to withholding regulations then in force with respect to United States taxes. Seller will provide Escrow Agent with appropriate tax information and forms.

E. Escrow Agent (and any successor escrow agent) may at any time resign as such by delivering the Escrow Funds to any successor escrow agent jointly designated by Seller and Buyer in writing, or by any court of competent jurisdiction, whereupon Escrow Agent shall be discharged of and from any and all further obligations arising in connection with this Agreement. The resignation of Escrow Agent will take effect on the earlier of (i) the appointment of a successors (including by a court of competent jurisdiction); or (ii) the day which is _____ (_____) days after the date of delivery of its written notice of resignation to the other parties hereto. If at that time Escrow Agent has not received a designation of a successor escrow agent, Escrow Agent's sole responsibility after that time will be to safekeep the Escrow Funds until receipt of a designation of a successor escrow agent or joint written instructions by the other parties hereto or a final order of a court of competent jurisdiction.

F. This Agreement sets forth all the duties of Escrow Agent with respect to any and all matters pertinent hereto. No implied duties or obligations shall be read into this Agreement against Escrow Agent.

10. Balance of Escrow Funds. Upon the termination of the escrow due to delivery of a no further action letter, as described in Section 4, Escrow Agent shall, upon written confirmation from Buyer that all Environmental Costs have been paid, distribute the remaining Escrow Funds and any interest earned thereon to Seller.

11. Notices. All notices, requests, demands and other communications under this Agreement shall be in writing and shall be deemed given when delivered personally or on the third day after mailing if mailed by certified or registered mail, postage prepaid, addressed as follows (or addressed to such other address as may be requested in writing from time to time by a party desiring to change the address to which such communications are to be delivered or mailed):

It to Seller:

_____ [name]
 _____ [address]
 _____ [address]

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With a copy to: _____ [name]
 _____ [address]
 _____ [address]

It to Buyer: [name]
 _____ [address]
 _____ [address]

With a copy to:

 [name]
 _____ [ad-
 dress]
 _____ [ad-
 dress]

It to Escrow Agent: _____ [name]
 _____ [address]
 _____ [address]

12. Miscellaneous.

A. This Agreement shall be governed by and construed and enforced in accordance with the laws of the State of _____ [state] applicable to agreements made and to be entirely performed within such State.

B. This Agreement sets forth the entire agreement and understanding of the parties in respect to this transaction and supercedes all prior agreements, arrangements and understandings relating to the subject matter hereof.

C. All the terms and conditions of this Agreement shall be binding upon, and inure to the benefit of and be enforceable by, the parties hereto and their respective heirs, personal representatives, successors and assigns.

D. This Agreement may be amended, modified, superseded or cancelled, and any of the terms or conditions hereof may be waived, only by a written instrument executed by each party hereto or, in the case of a waiver, by the party waiving compliance. The failure of any party at any time or times to require performance of any provision hereof will in no manner affect the right at a later time to enforce the same. No waiver by any party of any condition, or of the breach of any term contained in this Agreement, whether by conduct or otherwise, in any one or more instances will be deemed to be or construed as a further or continuing waiver of any such condition or breach or a waiver of any other condition of or the breach of any other term of this Agreement.

E. This Agreement shall be construed as if jointly prepared by Seller and Buyer.

F. This Agreement may be executed simultaneously in two or more counterparts, each of which will be deemed an original, but all of which together shall constitute one and the same instrument.

IN WITNESS WHEREOF, the undersigned parties have executed this Escrow Agreement to be effective on the date first written above.

SELLER:

_____ [name]

By: _____

Printed Name: _____

Title: _____

BUYER:

_____ [name]

By: _____

Printed Name: _____

Title: _____

ESCROW AGENT:

_____ [name]

By: _____

Printed Name: _____

Title: _____

[Attach Exhibit A]



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Chapter 25 ENVIRONMENTAL CONSIDERATIONS IN REAL ESTATE TRANSACTIONS

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A. ENVIRONMENTAL CONSIDERATIONS IN REAL ESTATE TRANSACTIONS

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FORM 25.82 Agreement for gift or donation of real property--hold harmless clause granted by transferor to transferee in the event environmental problems are discovered in future--transferee may reconvey property to transferor if environmental problems are discovered--warranty as to condition of premises

COMMENT

This agreement is designed to be used when an owner wishes to make a charitable donation of real property to a non-profit organization. Here, the tax benefits to the transferor are so great that he is willing to give to the transferee an environmental hold harmless and to agree to accept a reconveyance of the property if an environmental problem is discovered after the gift is made. The transferor is willing to take such a risk only because he had an environmental site assessment performed when he purchased the property. Thus, the transferor is aware that the property was free of any adverse environmental condition when he purchased it, and that no such condition arose during his tenure as owner.

If the transferor does not have this information available, paragraphs 7, 8, 9 and 10 should be omitted, and a disclaimer of warranties should be inserted. In such case, the transferee should strongly consider making the transfer contingent upon the results of an environmental site assessment. It should be remembered that under the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA"), 42 USC § 9601 *et seq.*, the transferee becomes liable for any condition on the property once the transfer of title occurs.

FORM

AGREEMENT made this ____ [day] day of _____ [month] ____ [year], between _____ [name], a corporation existing under the laws of the State of _____ [state], with offices for the transaction of business at _____ [address] (hereafter referred to as "Corporation"), and

_____ [name] Charities, a not-for-profit corporation organized under the laws of the State of _____ [state], with offices for the transaction of business at _____ [address] (hereafter referred to as "Charities").

WHEREAS, Corporation is the owner of certain real property and premises located in the City of _____ [city], State of _____ [state], with a street address of _____ [address] (hereafter referred to as "property"); and

WHEREAS, Corporation no longer has use for said property; and

WHEREAS, Charities is seeking a site on which to house its _____ [name] program;

NOW, in consideration of the mutual promises contained herein, it is agreed as follows:

1. **Transfer of Property.** Corporation hereby agrees to transfer to Charities the property as a charitable donation pursuant to a Quitclaim Deed. The transfer shall take place on or after _____ [month] _____ [day] _____ [year].
2. **Terms and Conditions of Transfer.** Corporation shall provide Charities with a copy of its existing title policy. Charities may obtain a continuation of title insurance at its own cost and expense. Charities shall take title subject to any facts which may be revealed by a survey or personal inspection, any enforceable covenants, easements or restrictions which are of record, and any zoning ordinances in effect. In the event that Charities does not wish to accept title subject to any of the foregoing, the sole remedy shall be to terminate this agreement. Nothing contained herein shall require Corporation to take any steps to clear any title defects.
3. **Removal of all Equipment and Fixtures from Property.** Corporation agrees to remove all equipment and fixtures from the structures located on the property. Corporation shall leave the structures "broom clean." Corporation shall not be required to repair any holes in the floors, walls or ceilings caused by removal of said fixtures as it is the intention of Charities to completely renovate the building into a center for its _____ [name] program.
4. **Value of Property.** The parties agree that the value of the property, including structures, is _____ Dollars (\$_____). The parties have each obtained appraisals to that effect. Charities intends to insure the property for that sum. Corporation intends to use that sum for computation of its donation and tax deduction.
5. **Tax-exempt Status of Donee.** Charities represents that it is a not-for-profit organization and has received certification from the Internal Revenue Service. Charities further represents that it is a § 501(c)(3) charitable corporation under the Internal Revenue Code of 1986, as amended.
6. **Premises Have Never Been Used to Store or Dispose of Hazardous Waste.** Corporation hereby represents and warrants that the subject premises have never been used for the storage or disposal of hazardous waste. The term "hazardous waste," as used herein, shall mean substances deemed hazardous pursuant to the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA"), 42 USC § 9601 et seq. This representation is made to induce Charities to enter into this contract for transfer of the subject premises. Corporation shall be liable for all damages, including economic and consequential damages, in the event that the representations contained in this section are inaccurate.
7. **Compliance with Environmental Laws, Regulations and Policies.** Corporation hereby represents and warrants that, during its period of ownership, Corporation, its agents and employees, complied with all federal, state and municipal environmental laws, regulations and policies as such relate to the subject premises.

Corporation agrees to indemnify and hold Charities harmless for any loss, including, but not limited to, damage to

person or property or economic loss, including defense costs arising out of any violation of environmental law which occurred during Corporation's ownership of the subject premises, which violation was caused by the knowing or purposeful act or omission of Corporation, its agents or employees. The provisions of this Paragraphs shall survive the transfer of title from the Corporation to the Charities.

8. Indemnification and Hold Harmless. Corporation agrees, for a period of _____ (_____) years from the date hereof, to indemnify and hold Charities harmless for and against any and all liability, claims and expenses of any kind whatsoever (including reasonable attorney's fees and other defense costs) for any injury or damage to person or property sustained by anyone on or about the premises, which results from or arises out of any adverse environmental condition existing on the subject premises at or before the transfer of title of the subject premises from Corporation to Charities.

Corporation agrees, for a period of _____ (_____) years, to obtain environmental liability insurance from a company rated "AA" or better in at least the amount of _____ Dollars (\$_____). Charities shall be named as an additional insured or loss payee on said policy. Corporation's liability under this agreement shall be limited to the limits of this policy.

Charities shall give Corporation notice of any claim or potential claim within _____ (_____) days after Charities shall receive notice or have reason to know that a claim exists. Failure to provide prompt notice will relieve Corporation of any liability hereunder.

Charities shall give Corporation a reasonable opportunity to defend against such claim. Charities shall cooperate with Corporation in such defense. Charities shall not compromise any claim without the consent of Corporation. Violation by Charities of any of these provisions shall relieve Corporation of any liability hereunder.

Charities agrees to cooperate with and comply with all reasonable requests of Corporation's insurance carrier. In the event Charities fails to do so and the insurance carrier disclaims liability for that reason, Corporation shall be relieved of any liability hereunder.

9. No Environmental Site Assessment to be Performed. On the basis of the representations made herein by Corporation, Charities will not be undertaking an environmental site assessment. In the event that Charities, during the term of its ownership, discovers any adverse environmental impact caused by use of the property or release of hazardous materials on the property prior to Charities' ownership, in addition to any other rights or remedies which Charities may have, Charities may require Corporation to accept a reconveyance of the property. The benefits contained in this paragraph may not be transferred by Charities to subsequent owners.

10. The provisions of this Agreement shall survive the transfer of title.

11. This agreement may not be assigned by Charities.

12. This Agreement contains the entire understanding of the parties; there have been no representations made which are not contained herein.

13. This Agreement may only be modified by a written amendment signed by all parties. An oral modification shall not be binding on any party.

14. This Agreement shall be construed in accordance with the laws of the State of _____ [state].

15. Any failure by either party to enforce any right arising hereunder shall not be deemed a waiver of such right.

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CORPORATION:

_____ [name]

By: _____

Printed Name: _____

Title: _____

CHARITIES:

_____ [name]

By: _____

Printed Name: _____

Title: _____

STATE OF _____ [state])
COUNTY OF _____ [county]) SS:

BEFORE ME, a Notary Public in and for said County and State, personally appeared _____ [name],
a(n) _____ [state] _____ [entity], by _____ [name], its
_____ [title], who acknowledged that _____ [he/she] did sign the foregoing
instrument for and on behalf of said corporation, being thereunto duly authorized, and that the same is [his/her] free act
and deed individually and as such officers and the free act and deed of said _____ [entity].

IN TESTIMONY WHEREOF, I have hereunto set my hand and official seal at _____ [city],
_____ [state], this _____ [day] day of _____ [month], _____ [year].

Notary Public

STATE OF _____ [state])
COUNTY OF _____ [county]) SS:

BEFORE ME, a Notary Public in and for said County and State, personally appeared _____ [name],
a(n) _____ [state] _____ [entity], by _____ [name], its
_____ [title], who acknowledged that _____ [he/she] did sign the foregoing
instrument for and on behalf of said corporation, being thereunto duly authorized, and that the same is [his/her] free act
and deed individually and as such officers and the free act and deed of said _____ [entity].

IN TESTIMONY WHEREOF, I have hereunto set my hand and official seal at _____ [city],
_____ [state], this _____ [day] day of _____ [month], _____ [year].

Notary Public



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Chapter 25 ENVIRONMENTAL CONSIDERATIONS IN REAL ESTATE TRANSACTIONS

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A. ENVIRONMENTAL CONSIDERATIONS IN REAL ESTATE TRANSACTIONS

33-25 Current Legal Forms for Real Estate FORM 25.83

FORM 25.83 Option agreement to purchase real property--simple form--holder of option to perform environmental tests and inspections before exercising option to purchase--contract of sale and purchase attached

COMMENT

An option is a contract which gives its holder, the optionee, the exclusive right, for a specified period of time, to purchase real property. While the optionor, the owner of the property and its seller, is bound by the option and, under normal circumstances, cannot revoke the option, the optionee is not bound unless he chooses to exercise the option.

The purpose of this particular option is to allow the prospective purchaser the opportunity to perform any and all testing and inspections for environmental problems prior to exercising the option. For example, before deciding whether to exercise the option, the prospective purchaser may wish to conduct examinations of the premises for the presence of structural defects, radon gas, wood-boring insects, asbestos insulation, and other environmental hazards. Also, the parties may use an option if the buyer has to obtain various permits prior to closing. If any of these are found, he may choose to either not exercise the option or renegotiate the terms of the contract of sale and purchase.

Because the option agreement provides the prospective purchaser with time to conduct the environmental tests--as well as the right to "get out of the deal" if environmental problems are found--the attached contract of sale and purchase should not contain any contingencies for environmental testing. In addition, since the environmental tests are conducted before the option is exercised, the closing of the sale can occur very quickly after the option is exercised.

The option price acts as consideration for the property being off the market during the option period. The parties should be sure the option period is sufficiently long to allow all testing desired, and that the option price is sufficient compensation to the seller for that period. In the form that

follows, if the prospective purchaser chooses to exercise the option and buy the property, the option price is credited against the purchase price.

Also, on occasion, an option agreement will be recorded so as to put third parties on notice of the existence of the option. If the option is to be recorded, then the recording requirements for the jurisdiction where the property is located must be followed.

FORM

This option is granted this ____ [day] day of ____ [month] ____ [year], by ____ [name] (hereafter the "Optionor"), residing at ____ [address], in the City of ____ [city] and the State of ____ [state], to ____ [name] (hereafter the "Optionee"), residing at ____ [address], in the City of ____ [city] and the State of ____ [state].

1. Option Granted. Optionor has received this day from Optionee the sum of ____ Dollars (\$ ____). In return for such valuable consideration, the Optionor grants to the Optionee the exclusive option to purchase the premises known as ____ [address], more particularly described in a deed to the Optionor from ____ [name], dated ____ [month] ____ [day] ____ [year], and recorded in the office of the ____ [county] County Clerk on ____ [month] ____ [day] ____ [year], in Book ____ [number] of Deeds, at page ____ [number].

2. Purpose of Option. The purpose of this option is to allow Optionee adequate time in which to examine the subject premises for asbestos insulation, wood-boring insects (including, but not limited to, termites and carpenter ants), lead-based paint, excessive radon gas, and other environmental hazards. The agreement of purchase and sale, a copy of which is annexed hereto as Exhibit A, is free of any contingencies for environmental testing and inspections.

Optionor grants Optionee, his agents, employees and assigns permission to enter onto the premises for the purpose of conducting any and all inspections and tests deemed necessary or appropriate by Optionee. Samples of materials (e.g., paint samples, samples of insulation materials, etc.) may be taken by Optionee. All areas disturbed by sampling shall be returned to as nearly the same condition as existed prior to sampling. A copy of all written test reports shall be provided to Optionor prior to the end of the option period. Optionee, his agents, employees, and assigns shall maintain as confidential any information contained in the test reports until Optionee has accepted the transfer of title from Optionor.

3. Expiration of Option. This option shall expire at ____ o'clock, ____ [a.m./p.m.] on ____ [month] ____ [day] ____ [year].

4. Notice of Exercise. This option may only be exercised by giving written notice, sent by registered or certified mail (return receipt requested), or facsimile transmission, prior to the expiration date, to the Optionor at his address set forth above. Notice shall be deemed given when mailed or transmitted.

5. Purchase Price. The total purchase price shall be ____ Dollars (\$ ____), to be paid by Optionee. The sum paid for this option shall be credited against the purchase price at the time of the closing of the sale and purchase.

6. Failure to Exercise Option. If the Optionee does not timely exercise this option, the sum of ____ Dollars (\$ ____) paid by the Optionee this day shall be retained by the Optionor, free of all claims of the Optionee. Neither party shall have any further rights or claims against the other.

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7. Exercise of Option. If this option is exercised, the Optionor and the Optionee will, respectively, as Seller and Purchaser, execute the annexed agreement of sale and purchase and perform the obligations set forth in said agreement.

8. Assignment. This option and all rights hereunder shall be freely assignable. If assigned by the Optionee, any and all acts performable by him hereunder, including the execution and delivery of the purchase money note and mortgage, may be performed by any assignee, whether the assignment is made before or after the exercise of this option.

IN WITNESS WHEREOF, the parties hereto have set their hands the day and year first above written.

OPTIONOR:

_____ [name]

By: _____

Printed Name: _____

Title: _____

OPTIONEE:

_____ [name]

By: _____

Printed Name: _____

Title: _____

ESCROW COMPANY:

_____ [name]

By: _____

Printed Name: _____

Title: _____

STATE OF _____ [state])
COUNTY OF _____ [county]) SS:

BEFORE ME, a Notary Public in and for said County and State, personally appeared _____ [name], a(n) _____ [state] _____ [entity], by _____ [name], its _____ [title], who acknowledged that _____ [he/she] did sign the foregoing instrument for and on behalf of said corporation, being thereunto duly authorized, and that the same is [his/her] free act and deed individually and as such officers and the free act and deed of said _____ [entity].

IN TESTIMONY WHEREOF, I have hereunto set my hand and official seal at _____ [city], _____ [state], this _____ [day] day of _____ [month], _____ [year].

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Notary Public

STATE OF _____ [state])
COUNTY OF _____ [county]) SS:

BEFORE ME, a Notary Public in and for said County and State, personally appeared _____ [name],
a(n) _____ [state] _____ [entity], by _____ [name], its
_____ [title], who acknowledged that _____ [he/she] did sign the foregoing
instrument for and on behalf of said corporation, being thereunto duly authorized, and that the same is [his/her] free act
and deed individually and as such officers and the free act and deed of said _____ [entity].

IN TESTIMONY WHEREOF, I have hereunto set my hand and official seal at _____ [city],
_____ [state], this _____ [day] day of _____ [month], _____ [year].

Notary Public

STATE OF _____ [state])
COUNTY OF _____ [county]) SS:

BEFORE ME, a Notary Public in and for said County and State, personally appeared _____ [name],
a(n) _____ [state] _____ [entity], by _____ [name], its
_____ [title], who acknowledged that _____ [he/she] did sign the foregoing
instrument for and on behalf of said corporation, being thereunto duly authorized, and that the same is [his/her] free act
and deed individually and as such officers and the free act and deed of said _____ [entity].

IN TESTIMONY WHEREOF, I have hereunto set my hand and official seal at _____ [city],
_____ [state], this _____ [day] day of _____ [month], _____ [year].

Notary Public



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FORM 25.84 Option agreement--commercial property--two option periods to allow purchaser time to obtain approval of conservation district for his proposed use of property

COMMENT

Conservation districts have been created on the federal, state and local levels to protect certain undeveloped areas which are deemed to be valuable public assets. Federal conservation districts include national parks, seashores and other designated environmentally-sensitive areas. State districts often include forest preserves, state parks, lake regions, and other areas deemed worthy of protection. Local districts include smaller areas which might encompass a breeding habitat for a rare species of animal.

The amount of authority exercised by the agencies and boards varies; however, many have the power to take part in making decisions regarding the subdivision of property, construction of buildings, etc. In short, they function as quasi-zoning boards. In passing judgment on a proposed real estate project, the board or agency determines both the project's environmental impact on the conservation district and the economic benefits to members of the community living in or near the district.

The purpose of this option agreement is to allow the prospective purchaser of the subject premises (i.e., the "optionee") adequate time in which to obtain the approval of the conservation district for his proposed use of the premises. Since that is often a lengthy process, two option periods are used. The option expires at the end of the first time period unless an additional payment is made by the optionee. This additional payment will provide the optionee with an extension of the period of time necessary to obtain the approval of the conservation district. The payments function as consideration to the seller for keeping the property off the market during the lengthy approval procedure.

Typically, the option agreement is more advantageous to the seller than a regular contract of sale and purchase where the transaction is made contingent upon the prospective purchaser obtaining the approval of the conservation district. The reason is because, even if the purchaser does not exercise the option and buy the property, the seller will still have received some remuneration for taking the property off the market and for enduring the uncertainty of the outcome of the approval process.

Conversely, the purchaser-optionee will likely prefer to use a standard sale-purchase contract with a contingency clause, since no extra consideration is normally paid by a purchaser to a seller for such a contingency. This option also provides that it will not be recorded.

FORM

OPTION AGREEMENT

THIS OPTION AGREEMENT is made on _____ [month] _____ [day] _____ [year], between _____ [name] (the "Optionor"), residing at _____ [address], and _____ [name] (the "Optionee"), a corporation formed under the laws of the State of _____ [state] and whose headquarters and principal place of business is located at _____ [address].

1. Option. The Optionee has, this day, paid to the Optionor the sum of _____ Dollars (\$_____). In return for this sum, the Optionor hereby irrevocably grants to the Optionee the exclusive option to purchase from the Optionor those lands (the "Lands") located in _____ [county] County, State of _____ [state], which are described in the annexed Exhibit A.

2. Approval of Conservation District. During the term of this Option, it is anticipated that the Optionee shall prepare and submit to the _____ [name] Conservation District an application for use of the subject premises as a light industrial park. The application, together with all supporting data, shall be prepared and submitted by Optionee to the _____ [name] Conservation District at Optionee's sole expense. Optionor shall cooperate with Optionee in providing data regarding the subject premises and the current use thereof. Optionor shall also appear at any hearing which may be held to assist Optionee in its effort to obtain the approval sought. Optionor shall not be required to expend any funds in connection with such hearings other than reasonable travel expenses incurred for such attendance.

3. Length of Option. This option shall take effect upon the signing of this agreement and will continue in effect until 5:00 p.m., Eastern Standard Time on _____ [month] _____ [day] _____ [year]. The option may be exercised, in accordance with its terms, at any time on or before its expiration; provided, however, that this option shall automatically terminate (without any notice from the Optionor to the Optionee) at 5:00 p.m., Eastern Standard time on _____ [month] _____ [day] _____ [year], if the Optionee does not, prior thereto, pay the Optionor, in addition to the option money paid on the execution of this option, the further sum of _____ Dollars (\$_____ ("Additional Option Money"). The exercise of this option must be by written notice sent to the Optionor in the manner prescribed in Paragraph 11. F. prior to the expiration or termination of the option.

4. Failure to Exercise Option. If, prior to 5:00 p.m., Eastern Standard Time on _____ [month] _____ [day] _____ [year], the Optionee does not pay the Additional Option Money, the Optionor shall retain the option money paid on the execution of this option as the consideration for this option during the period extending until 5:00 p.m., Eastern Standard Time on _____ [month] _____ [day] _____ [year]. If, on the other hand, the optionee pays the

Additional Option Money, but does not exercise this option prior to 5:00 p.m., Eastern Standard Time on _____ [month] _____ [day] _____ [year], the Optionor shall retain the original option money and the Additional Option Money as the consideration for this option during the period extending until 5:00 p.m., Eastern Standard Time on _____ [month] _____ [day] _____ [year].

5. Optionee's Exercise. If this option is exercised (in accordance with its terms), the Optionor shall sell and convey, and the Optionee shall purchase and acquire, the Lands, on and subject to the terms and conditions contained in the attached Agreement marked Exhibit B, which is made a part of this option agreement.

6. Purchase Price and Closing. The purchase price for the Lands shall be _____ Dollars (\$_____), payable in installments as provided in Exhibit B. The sum or sums paid for this option shall be credited against the purchase price as provided in Exhibit B. The closing of this transaction shall be at the offices of the Optionor, located at _____ [address], at 5:00 p.m., Eastern Standard Time on _____ [month] _____ [day] _____ [year].

The Optionee may accelerate the closing to an earlier date, as may be specified in a written notice sent to the Optionor at least _____ (_____) days prior to such date; provided that, if such acceleration of closing is set for a date after _____ [month] _____ [day] _____ [year], then the Optionee shall pay the additional option money to the Optionor on or before such accelerated closing date.

7. Optionee's Right to Assign. This option can be assigned by the Optionee only as specified by this Paragraph. This option may be assigned by the Optionee, without the consent of the Optionor; provided that, concurrently with such assignment, the Optionee notifies the Optionor of such assignment, and of the name and address of the assignee, and sends to the Optionor a copy of such assignment and a written agreement by the Assignee to perform all the terms, promises and conditions of this option just as the Optionee would have done had it not assigned the option. Each subsequent assignment of this option must also comply with the preceding requirements.

8. No Broker. The Optionor and Optionee agree that no broker brought about or participated in this option or transaction. The Optionee shall indemnify and hold harmless the Optionor against any and all liabilities and expenses whatever, including, without limitation, reasonable attorneys' fees, arising from any claims for brokerage on this transaction based on any acts of the Optionee. Each and all of the representations, warranties, and agreements contained in this Paragraph shall survive the closing of this transaction or expiration of this option; and the agreement of indemnity contained in this Paragraph shall be binding on the named Optionee irrespective of any future assignment of this option.

9. No Recording of Option. The Optionee shall not record this option among the Public Records of _____ [county] County or elsewhere; and if the Optionee records this option in violation of the preceding clause, the rights, powers, and privileges of the Optionee under this option shall terminate automatically, and the Optionor shall, at its election, retain absolutely all payments made by the Optionee as the consideration for this option for the period from the date of this option to the date of such recordation.

10. Corporate Authority. The Optionee represents and warrants that it is a duly incorporated and validly existing corporation, in good standing under the laws of the State of _____ [state], and that the execution and performance of this option agreement and the attached Agreement have been duly authorized by its board of directors.

11. Miscellaneous Provisions.

A. Arbitration. Any controversy or claim arising out of or relating to this Agreement, or its breach, shall be settled by arbitration in the City of _____ [city] in accordance with the then-governing rules of the American Arbitration Association. Judgment upon the award rendered may be entered and enforced in any court of competent

jurisdiction.

B. Waiver of Breach. A waiver of the breach of any provision of this agreement shall not operate or be construed as a waiver of any subsequent breach. No waiver shall be valid unless it is in writing and signed by the party granting the waiver, or by that party's designated representative.

C. Entire Agreement. This agreement, and the attached Exhibits A and B, contains the entire understanding of the parties and shall supersede all other prior written or oral agreements. It may not be changed orally, but only by an instrument signed by the party against whom enforcement of any change, modification, extension, or discharge is sought.

D. Headings. Headings in this agreement are for convenience only and shall not be used to interpret or construe its provisions.

E. Counterparts. This agreement may be executed in two or more counterparts, each of which shall be deemed an original but all of which together shall constitute one and the same instrument.

F. Notices. All notices to be given hereunder shall be addressed to the respective parties at the following addresses: _____ [address] and _____ [address]. Notice shall be sent by certified mail, return receipt requested. Notice shall be deemed given by mail on the date of mailing hereof.

G. Controlling Law. This agreement is made subject to all federal, state and municipal laws or regulations now or hereafter in force and shall be construed in accordance with the laws of the State of _____ [state].

H. Time is of the Essence. Time is of the essence of this Agreement.

IN WITNESS WHEREOF, the parties hereto have set their hands and seals the day and year first above written.

OPTIONOR:

_____ [name]

By: _____

Printed Name: _____

Title: _____

OPTIONEE:

_____ [name]

By: _____

Printed Name: _____

Title: _____

STATE OF _____ [state])
 COUNTY OF _____ [county]) SS:

BEFORE ME, a Notary Public in and for said County and State, personally appeared _____ [name],
 a(n) _____ [state] _____ [entity], by _____ [name], its
 _____ [title], who acknowledged that _____ [he/she] did sign the foregoing
 instrument for and on behalf of said corporation, being thereunto duly authorized, and that the same is [his/her] free act
 and deed individually and as such officers and the free act and deed of said _____ [entity].

IN TESTIMONY WHEREOF, I have hereunto set my hand and official seal at _____ [city],
 _____ [state], this _____ [day] day of _____ [month], _____ [year].

 Notary Public

STATE OF _____ [state])
 COUNTY OF _____ [county]) SS:

BEFORE ME, a Notary Public in and for said County and State, personally appeared _____ [name],
 a(n) _____ [state] _____ [entity], by _____ [name], its
 _____ [title], who acknowledged that _____ [he/she] did sign the foregoing
 instrument for and on behalf of said corporation, being thereunto duly authorized, and that the same is [his/her] free act
 and deed individually and as such officers and the free act and deed of said _____ [entity].

IN TESTIMONY WHEREOF, I have hereunto set my hand and official seal at _____ [city],
 _____ [state], this _____ [day] day of _____ [month], _____ [year].

 Notary Public

[Attach Exhibit A]

[Attach Exhibit B]



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Chapter 25 ENVIRONMENTAL CONSIDERATIONS IN REAL ESTATE TRANSACTIONS

Part IV. FORMS

A. ENVIRONMENTAL CONSIDERATIONS IN REAL ESTATE TRANSACTIONS

33-25 Current Legal Forms for Real Estate FORM 25.85

FORM 25.85 Listing agreement between broker and seller with provisions for disclosure of known environmental problems existing on the property

COMMENT

A real estate broker has a fiduciary duty to the owner of the real property who hires the broker. However, in many states, that fiduciary duty does not empower the broker to conceal known environmental hazards existing on the premises from unsuspecting purchasers. Indeed, the broker may owe a duty to reveal these hazards to prospective purchasers.

This form is a model listing agreement between a real estate broker and a seller of real property. It contains provisions requiring the disclosure of known environmental problems existing on the property. The purpose of the disclosure provisions is to make it abundantly clear to both owner and broker that: (1) the owner must disclose all known environmental hazards to the broker; and (2) the broker, in turn, must disclose these hazards to potential purchasers. Many regional brokers' associations have their own standard forms. In such case, the provisions regarding disclosure of environmental hazards may be inserted into the standard forms.

The owner agrees to hold the broker harmless for any liability imposed upon the broker due to the owner's failure to disclose to the broker the existence of an environmental hazard. The broker, in turn, agrees to hold the owner harmless for any failure on the part of the broker to disclose to the purchaser the existence of an environmental hazard.

FORM

LISTING AGREEMENT

THIS LISTING AGREEMENT made this ____ [day] day of _____ [month], ____ [year], between _____ [name] (hereafter referred to as "Owner"), residing at _____ [address], and _____ [address] (hereafter referred to as "Broker"), a corporation organized under the laws of the State of _____ [state], with offices for the transaction of business located at _____ [address].

1. The Owner hereby grants to Broker the exclusive right to market and sell the property hereafter described for a period of _____ (_____) months, commencing _____ [month] ____ [day] ____ [year], and ending on _____ [month] ____ [day] ____ [year], both dates inclusive.

2. The property to be sold is commonly known as _____ [address], and is more particularly described by a deed to Owner, as grantee, dated _____ [month] ____ [day] ____ [year], and recorded in the office of the _____ [county] County Clerk on _____ [month] ____ [day] ____ [year], in Book _____ [number] of Deeds, at page _____ [number]. A copy of said deed is annexed hereto as Exhibit A.

3. The property is currently used by Owner as _____ [insert description for use of premises].

4. The property shall be offered at a price of _____ Dollars (\$_____).

5. Any offers shall be subject to any state of facts which, at title search and survey, may show, that the property is subject to zoning and other ordinances, encumbrances, encroachments, easements, covenants and restrictions of record.

6. The broker shall make diligent efforts to affect a sale of the property and shall list and advertise it in such manner as he deems most likely to bring about a sale.

7. Owner represents that he is now the owner, in fee simple absolute, of the property and shall convey it by a warranty deed with full covenants if it is sold by the Broker for the price and on the terms and conditions set forth herein.

8. Broker shall be entitled to a commission of _____ percent (_____) of the selling price. The commission shall be due and payable upon transfer of title. Owner agrees to pay broker directly from the sale proceeds.

9. Broker may place a "For Sale" sign on the premises, and Broker may hold "open houses" at times to be mutually agreed upon with Owner. Owner shall deliver a complete set of keys to Broker for use in showing the premises.

10. Broker acknowledges that he has a fiduciary duty to Owner in obtaining a qualified buyer. *However, both parties acknowledge that Broker has a duty to reveal any known defect to potential purchasers.* To facilitate Broker's completion of that duty, Owner makes the following representations.

10.1 *Well.* If this property is served by a well, the well was last tested for purity and productivity on or about _____ [month] _____ [day] _____ [year]. Said test indicated that the water was safe for drinking. Owner represents that he has always had a sufficient volume of water for his needs.

10.2 *Septic System.* The septic system was last serviced on or about _____ [month] _____ [day] _____ [year]. Owner has had no back-ups or surfacing sewage since that date.

10.3 *Asbestos.* To the best of Owner's knowledge, the property does/does not [circle one] contain asbestos.

10.4 *Urea formaldehyde insulation*. To the best of Owner's knowledge, the property does/does not [*circle one*] contain urea formaldehyde insulation.

10.5 *Lead paint*. To the best of Owner's knowledge, the interior of the structure does/does not [*circle one*] contain lead paint.

10.6 *Lead plumbing pipes*. The property does/does not [*circle one*] contain lead plumbing pipes.

10.7 *Radon gas*. The premises were last tested for radon gas on or about _____ [*month*]
_____ [*day*] _____ [*year*]. The test showed radon levels above/below [*circle one*]
four (4) pico curies per liter [*or*: The property has never been tested for radon gas].

10.8 Owner knows of no structural, plumbing, heating or roof defects [*or*: Owner knows of the following defects:
_____]; *or* Owner makes no representation regarding defects].

10.9 Owner has never stored, used, emitted, leaked, or disposed of any substances deemed hazardous under any federal, state or local law, regulation or policy on the property. To the best of Owner's knowledge, no other party has done so either.

10.10 The property does/does not [*circle one*] lie within a conservation district.

10.11 The property does/does not [*circle one*] lie within an historic preservation district.

10.12 The property does/does not [*circle one*] contain a protected wetland.

11. Owner makes the above representations knowing that Broker will rely thereon in making representations to potential purchasers. Broker affirmatively covenants to supply the above representations to all potential purchasers. Owner agrees to hold Broker harmless for any and all costs, fines, losses, judgments and claims, including reasonable attorneys' fees, arising from a claim made by any party against Broker, which claim is based on the falsity of any representations made by Owner and contained above.

12. Broker agrees to hold Owner harmless from any costs, fines, losses, judgments or claims, including reasonable attorneys' fees, arising from a claim made by any aggrieved party alleging that Broker made a misrepresentation; provided however, that the misrepresentation alleged to have been made by Broker was not based on a representation made by Owner to Broker in this agreement.

13. Each party represents that he will disclose to the other any information which he learns during the term of this Agreement which shall affect any of the above representations.

IN WITNESS WHEREOF, the parties hereto have set their hands the day and year first above written.

OWNER:

_____ [*name*]

By: _____

Printed Name: _____

Title: _____

BROKER:

_____ [*name*]

By: _____

Printed Name: _____

Title: _____

[Attach Exhibit A]



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Chapter 25 ENVIRONMENTAL CONSIDERATIONS IN REAL ESTATE TRANSACTIONS

Part IV. FORMS

A. ENVIRONMENTAL CONSIDERATIONS IN REAL ESTATE TRANSACTIONS

33-25 Current Legal Forms for Real Estate FORM 25.86

FORM 25.86 Listing agreement--environmental provision

COMMENT

The following is an additional provision which could be used in connection with a listing agreement. It contains a disclosure requirement, an indemnity and a recommendation from the broker that an environmental assessment be obtained by the owner.

FORM

Owner/Lessor shall fully disclose in writing to Broker and to each prospective Purchaser/Tenant any and all information known or available to Owner/Lessor regarding the condition of the property, including, but not limited to, copies of all environmental permits, licenses, reports and data, and the presence and location of hazardous or toxic substances, wastes or materials as defined in any environmental law (federal, state or local laws, statutes, ordinances, codes, regulations and policies), including asbestos, PCB's, petroleum, and petroleum products, and of any underground or above-ground tanks.

Owner/Lessor shall indemnify and hold Broker harmless from and against any claims, demands, or causes of action made against Broker regarding the condition of the property, including the cost of defending the Broker.

Broker recommends that Owner/Lessor obtain an environmental assessment of the Property from a qualified expert.



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Chapter 25 ENVIRONMENTAL CONSIDERATIONS IN REAL ESTATE TRANSACTIONS

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A. ENVIRONMENTAL CONSIDERATIONS IN REAL ESTATE TRANSACTIONS

33-25 Current Legal Forms for Real Estate FORM 25.87

FORM 25.87 Agreement and declaration of covenants and restrictions of use of certain real estate

COMMENT

This agreement and declaration relates to a contaminated site. The site is under investigation by the United States Environmental Protection Agency. The prior owner and operator is obligated to remediate the site. The prior owner desires to remediate the site to industrial standards. The United States Environmental Protection Agency has agreed to the lesser standard, however, it wants to restrict the use of the property and the activities which may be conducted on or about the property. This agreement and declaration will be filed with the local county recorder's office to put any parties which subsequently deal with the property on notice as to the restrictions.

Additionally, because this agreement will be recorded, the parties must comply with the local recording requirements.

FORM

**AGREEMENT AND DECLARATION
OF COVENANTS AND RESTRICTIONS OF USE OF CERTAIN REAL ESTATE**

This Land Use Restriction Agreement to Create an Equitable Servitude, herein called the "Agreement," is made this _____ [day] of _____ [month], _____ [year], by and between the _____ [name], a(n) _____ [state] corporation ("Grantor"), and _____ [name], a(n) _____ [state] corporation ("Grantee").

WHEREAS, the Grantor holds title to the approximately _____ acres of real property located in

_____ [county] County, _____ [state], the legal description of which is attached hereto as Exhibit A (the "Site"); and

WHEREAS, the Grantee is the former owner of the Site; and

WHEREAS, the Site has been and is being operated, as of the date of this Agreement, as a foundry; and

WHEREAS, the most recent deed of record for the Site is recorded at Volume _____, Page _____ of the real property record for _____ [county] County, _____ [state]; and

WHEREAS, this Agreement will be recorded with the _____ [county] County Recorder's Office for the purpose of protecting the public health, safety and welfare and the environment within _____ (_____) days of the final signature on this Agreement; and

WHEREAS, the Grantor and the Grantee, entered into an Administrative Order on Consent, attached hereto as Exhibit B ("AOC"), with the United States Environmental Protection Agency ("U.S. EPA"), pursuant to Section 106(a) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended ("CERCLA"), 42 U.S.C. § 9606(a), to conduct certain actions at the Site to abate a possible imminent and substantial endangerment to the public health, welfare or the environment presented by the release or threatened release of hazardous substances at or from the Site; and

WHEREAS, the Grantor and Grantee were required to perform pursuant to the AOC an Engineering Evaluation/Cost Analysis ("EE/CA") to develop removal action alternatives to address the actual or threatened release of hazardous substances at or from the Site, and implement a removal action from the alternatives presented as selected by U.S. EPA; and

WHEREAS, the U.S. EPA subsequently selected a response action for the Site through its Enforcement Action Memorandum dated _____ [month] _____ [day], _____ [year], including the removal of waste and soils contaminated above specified cleanup levels based upon current and reasonably anticipated future land use; and

WHEREAS, the Grantor and Grantee, now wish to restrict the use of the Site and perform certain activities to justify a proposal to limit the scope of the selected response action for certain limited portions of the Site; and

WHEREAS, in order to implement the response action selected for the Site, including operation and maintenance of the remedy, it is necessary for the U.S. EPA, its assigns, successor agencies, representatives and contractors, the Grantee, its representatives, and contractors, to have access to the Site; and

WHEREAS, The Grantor wishes to cooperate fully with the Grantee, and the U.S. EPA in implementing the response action selected by U.S. EPA at the Site, to ensure the protectiveness of the response action, and to protect human health and the environment.

NOW, THEREFORE, intending to be legally bound, the Grantor and Grantee, for and in consideration of the covenants and conditions set forth and for other good and valuable consideration, the receipt and sufficiency of which is acknowledged, do covenant and agree to: (1) grant a permanent right of access to the Site to the Grantee, and its representatives and contractors for purposes of implementing, facilitating, maintaining and monitoring any response actions selected by U.S. EPA; (2) impose on the Site use restrictive covenants and intend to create an equitable servitude that will run with the land for the purpose of protecting human health and the environment; and (3) perform certain maintenance activities to prevent exposure to waste and contaminated soils that will be left in place at the Site.

1. Grant: Grantor, on its own behalf, and the behalf of its successors, assigns and heirs, in consideration of the terms of the AOC, covenant and declare that the Site shall be subject to the restrictions on use set forth below, and quit, grant and convey to the Grantee, and its assigns, the perpetual right to enforce the restrictions, and for the purposes set forth here, with respect to the Site. All rights and obligations of the parties to the AOC are incorporated into this Agreement.

2. Third Party Beneficiaries: Grantor on its own behalf and the behalf of its successors, transferees, assigns and heirs, and the Grantee on its own behalf its successors, transferees, assigns and heirs, in consideration of the terms of the AOC, hereby agree that the U.S. EPA and its assigns, and its successors and assigns shall be the Third Party Beneficiary of all the benefits and rights conveyed to the Grantee under this instrument. The agency having administrative control, care and custody of actions under this Agreement is the U.S. EPA.

3. Purpose: It is the purpose of this instrument to create equitable servitudes that will run with the land in order to facilitate the completion of work under the AOC and protect human health and the environment by reducing the risk of exposure to contaminants. The equitable servitudes created herein touch and concern Site in that they are intended to limit the use of the Site, restrict certain activities, and/or require certain operation and/or maintenance activities to occur on the Site. It is the intent of the Grantor that the covenants, terms, conditions, and restrictions of this Agreement operate as servitudes running in perpetuity with the Site. It is also the purpose of this Agreement that the Third Party Beneficiary, the U.S. EPA and its assigns and successor agencies, shall have the right to enforce the terms of this Agreement.

4. Restrictive Covenants: Grantor, for itself and its successors and assigns as owners of fee simple title to the Site, whether through grant, conveyance, foreclosure or judicial process, agrees as follows:

A. Prohibition of Certain Activities. There shall be no excavating, landscaping, grading, filling, drilling, mining, constructing, trenching, driving pilings, livestock grazing, use of explosives or construction, placement, installation or use of any fences, ditches, roads, pipes, wells, buildings or structures of any manner or description, whether permanent, temporary or mobile, specifically including a permanent or mobile residential home, or any other activity which may disturb: (1) the waste or contaminated soil remaining on the Site, (2) any existing or constructed cover over the waste or contaminated soil, or (3) access to those portions of the Site necessary to operate and maintain any Site remedy, including monitoring activities, unless specifically reviewed and not prohibited by U.S. EPA in writing, or approved pursuant to subparagraph E, below.

B. Non-Residential Use. The Site shall only be used for industrial purposes and shall not be used or operated for any residential use. As used herein, the term "residential use" includes, but is not limited to, single and multiple family dwelling and rental units, day care centers, and pre-schools, hotels, motels, educational facilities (except as incident to commercial or industrial activities), long-term facilities, long-term health care, or other similar uses of the Site.

C. Prohibition Against Extraction and Use of Groundwater and Surface Water. Groundwater use on or from the Site in any manner is prohibited. There shall be no extraction wells constructed, repaired or maintained on the Site. This prohibition does not apply to wells specifically approved by U.S. EPA. Surface waters on the Site shall not be used or permitted to be used for any human, animal or agricultural purposes.

D. Post Removal Site Control Plan for Site Pavement and the Concrete Floors in Centrifugal Casting Area and Compressor Building. Grantor shall maintain the integrity of the Site pavement and concrete floors in the centrifugal casting area and compressor building, to assure that no exposure to the underlying lead-contaminated soil occurs and that the remedy continues to be protective of human health and safety and the environment. This maintenance shall be performed in accordance with a post removal

site control plan approved by U.S. EPA. Grantor and Grantee shall submit the post removal site control plan no later than _____ [month] _____ [day] _____ [year], to U.S. EPA for review and approval or disapproval in whole or in part. Grantee shall pay the costs and expenses incurred by Grantor in performing such maintenance activities as set forth in the Agreement for Design and Construction Services dated _____ [month] _____ [day] _____ [year], by and between Grantor, Grantee and Civil & Environmental Consultants, Inc., attached hereto as Exhibit C.

E. Notwithstanding the prohibitions on the construction, placement, installation or use of fences, ditches, roads, pipes, wells, buildings or structures in paragraph 4.A., above, such construction, placement, installation or uses are not prohibited if they are specifically deemed necessary by U.S. EPA in writing for:

i. Protecting human health or the environment, or are constructed by either the United States or the State of _____ [state] or the Grantee for purposes of performing or implementing any activity relating to any response action pursuant to CERCLA;

ii. Verifying any data or information submitted to U.S. EPA or _____ [state] EPA;

iii. Verifying that no action is being taken on the Site in violation of the terms of this Agreement or of any federal or state environmental laws or regulations;

iv. Monitoring response actions on the Site and conducting investigations relating to contamination on or near the Site, including, without limitation, sampling air, water, sediments, soils, and obtaining discrete, split and duplicate samples; and

v. Conducting periodic reviews of any response action, including but not limited to, reviews required by any applicable statutes and/or regulations.

F. The Site shall not be used in any manner that would interfere with or adversely affect the integrity or protectiveness of any response actions implemented pursuant to the AOC. The Site may be used only in a manner which is consistent with any obligations or restrictions that U.S. EPA determines are necessary to implement, and insures non-interference with or insures protectiveness of any response actions taken pursuant to the AOC.

G. Grantor shall maintain site security (i.e., fencing, locked gates and entry doors, and security guards), and the integrity of all Site pavement and concrete floors in the centrifugal casting area and compressor building to prevent exposure to underlying contaminated soils and waste. Grantor shall promptly seal any cracks in Site pavement and concrete floors in the centrifugal casting area and compressor building.

5. Modification or Rescission: This Agreement shall continue until the Grantee, U.S. EPA and its assigns and successors, agree to approve the modification or rescission of this Agreement. To the extent that these parties approve a modification of this Agreement, all terms not specifically modified shall remain in full force and effect.

6. Easement for Access and Inspection: The Grantor hereby grants Grantee, their successors, assigns, representatives and agents, a perpetual nonexclusive easement for access to the Site, without cost, to determine compliance with the restrictions set forth in this Agreement and for performing any cure or remediation on the Site deemed necessary or desirable by Grantee. Grantor acknowledges and agrees that Grantee will incur or suffer certain liabilities, damages,

finer, fees, costs and expenses if Grantor fails to observe and perform all of the conditions and covenants set forth in this Agreement. Grantor shall indemnify, defend and hold Grantee harmless against and from any and all liabilities, damages, fines, fees, costs, and expenses arising, directly or indirectly, from Grantor's failure to maintain the integrity of Site pavement and concrete floors in the centrifugal casting area and compressor building, including but not limited to, removal of Site pavement and concrete floors in the centrifugal casting area and compressor building, or structures, equipment or improvements on or about Site pavement and concrete floors in the centrifugal casting area and compressor building, and/or from any act by Grantor or its Permittees which is expressly prohibited under this Agreement, including, without limitation, costs of investigation and remediation, costs of all third-party consultants and professionals, all legal fees and expenses and other costs and expenses incurred by Grantee in defending or processing any legal or administrative proceedings occasioned by such act(s) and in enforcing its rights hereunder. In addition, U.S. EPA and its assigns, as Third Party Beneficiary, shall have all of the rights of access as granted by the Grantor to the Grantee for the purposes listed below:

- A. Performing or implementing any activity relating to any response actions selected by U.S. EPA for the Site;
- B. Verifying any data or information submitted to U.S. EPA or _____ [state] EPA;
- C. Verifying that no action is being taken on the Site in violation of the terms of this Agreement or of any federal or state environmental laws or regulations;
- D. Monitoring response actions on the Site and conducting investigations relating to contamination on or near the Site, including, without limitation, sampling of air, water, sediments, soils, and specifically, without limitation, obtaining split or duplicate samples;
- E. Conducting periodic reviews of the remedial action, including but not limited to, reviews required by applicable statutes and/or regulations; and
- F. Implementing additional or new response actions if U.S. EPA, in its sole discretion, determines that such actions are necessary to protect human health or the environment.

7. Covenants Run with the Land: Grantor agrees for itself and its successors and assigns that any deed, easement, lease, license, or other grant or conveyance of the Site or any portion thereof or interest therein, which is executed after the date of this Agreement shall include a recital of the restrictive covenants set forth above. The grants, covenants, and other provisions set for in this Agreement shall run with the land and shall be binding upon all owners and respective successors and assigns, including holders of any leasehold interests in the Site. The terms, covenants, restrictions and conditions shall, in any event, and without regard to technical classification or designation, legal or otherwise, be binding to the fullest extent permitted by law and equity, for the benefit and in favor of the Grantee against the Grantor and its successors in interest to the Site and each part thereof and interest therein, and it shall not be necessary for the enforceability hereof by Grantee, or their respective successors in interest, that the provisions of this Agreement or a recital thereof or thereto be included by the Grantor in any succeeding conveyance of the Site. It is also the purpose of this instrument that the Third Party Beneficiary, U.S. EPA and its assigns and its successor agencies, shall have the right to enforce the terms of this Agreement.

8. Reservation: Nothing in this Agreement shall limit or otherwise affect the U.S. EPA's rights of entry and access or limit the U.S. EPA's authority to take response actions selected by U.S. EPA under CERCLA, the National Contingency Plan, and its successor provisions or other federal or State law.

9. No Public Access and Use: This instrument does not convey any right of access or use by the general public to any portion of the Site.

10. Recordation: The Grantor shall record this Agreement in the Recorder's Office of _____ [county] County, _____ [state] and shall provide Grantee and U.S. EPA a certified copy of the original recorded instrument showing the Recorder's recording stamps.

11. Notice: Grantor shall include in any instrument conveying any interest in any portion of the Site, including but not limited to deeds, leases and mortgages, a notice which is in substantially the following form:

NOTICE:

THE INTEREST CONVEYED HERE IS SUBJECT TO AN AGREEMENT FOR COVENANTS AND RESTRICTIONS TO CREATE AN EQUITABLE SERVITUDE, DATED _____ [month] _____ [day] _____ [year], _____, RECORDED IN THE DEED RECORDS ON _____ [month] _____ [day] _____ [year], IN BOOK _____, PAGE _____, IN FAVOR OF, AND ENFORCEABLE BY GRANTEE AND THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY.

Within _____ (_____) days of the date of execution of any such instrument of conveyance, the Grantor shall provide the Grantee and the U.S. EPA with a certified true copy of the instrument and, if it has been recorded in the deed records, its recording reference.

12. Inspection and Enforcement: In addition to the access rights set forth in Paragraph 6, above, the U.S. EPA, and its representatives, contractors, assigns and successor agencies, may enter the Site from time to time for the purposes of performing inspections, overseeing remedy implementation or enforcing the covenants and restrictions set forth in Paragraph 4, above. The Grantee and the U.S. EPA, as Third Party Beneficiary, shall be entitled to enforce the terms of this Agreement by resorting to specific performance or legal process. The Grantee acknowledges their affirmative obligation to enforce the Agreement. The covenants and other provisions set forth in this Agreement may be enforced against the Grantor by an action for injunctive relief for any violation or threatened violation thereof brought in a court of competent jurisdiction by Grantee or by the U.S. EPA, as Third Party Beneficiary. The court may award not only injunctive relief, but damages and reasonable attorneys fees. All remedies available here shall be in addition to any other remedies at law or in equity, including CERCLA. Any forbearance, delay or omission to exercise their rights under this Agreement in the event of a breach of any term of this Agreement shall not be deemed a waiver by the Grantee or the U.S. EPA of such terms, or any other term, or any rights of the Grantee or the U.S. EPA under this Agreement.

13. Waiver of Certain Defenses: Grantor waives any defense of laches, estoppel, or prescription.

14. Notices: Any notice, demand, request, consent, approval, or other communication that any Party desires or is required to give to the other shall be in writing and shall either be served personally or sent by first class certified mail, return receipt requested, postage prepaid, or by express mail with delivery confirmation and addressed as follows:

To Grantor:	_____ [name]
	_____ [address]
	_____ [address]
To Grantee:	_____ [name]
	_____ [address]
	_____ [address]

Copies of all notices provided pursuant to this paragraph shall also be served personally or sent by first class certified

mail, return receipt requested, postage prepaid, and addressed as follows:

To U.S. EPA: _____ [address]
_____ [address]

Notice shall be deemed given upon receipt or refusal to accept delivery. The parties to this Agreement may change from time to time their respective addresses for notice hereunder by like notice to the other parties.

15. General Provisions:

A. Controlling Law: The interpretation and performance of this Agreement shall be governed by the laws of the United States and the State of _____ [state], as applicable. All remedies available hereunder shall be in addition to any and all other remedies at law or in equity including CERCLA.

B. Liberal Construction: Any general rule of construction to the contrary notwithstanding, this Agreement shall be liberally construed in favor of the grant to effect the purpose of this Agreement and the policy and purpose of CERCLA. If any provision of this Agreement is found to be ambiguous, an interpretation consistent with the purpose of this Agreement that would render the provision valid shall be favored over any interpretation that would render it invalid.

C. Severability: If any provision of this Agreement, or the application of it to any person or circumstance, is found to be invalid, unenforceable, or not to run with the land, the remainder of the provisions of this Agreement, or the application of such provisions to persons or circumstances other than those to which it is found to be invalid, as the case may be, shall not be affected. In the event that the validity or enforceability of any provision of this Agreement is held to be dependent upon the existence of a specific legal description, Grantor shall promptly cause such legal description to be prepared and recorded.

D. Entire Agreement: This instrument sets forth the entire agreement of the Grantor and Grantee with respect to rights and restrictions created here.

E. No Forfeiture: Nothing contained here will result in a forfeiture or reversion of Grantor's title in any respect.

F. Priority of Agreement: Any lease, license, easement, deed or other transfer, grant or conveyance of the Site or any portion thereof or interest therein which is executed after the date of this Agreement shall be subject and subordinate to the terms and provisions of this Agreement, and the Grantor shall include a recital of this Agreement and the provisions hereof, or shall attach a copy hereof thereto.

G. Successors: The terms of this Agreement shall bind, and inure to the benefit of, the Grantor and Grantee and their respective personal representatives, heirs, successors, and assigns and shall run in perpetuity with the Site. The term "Grantor," wherever used here, and any pronouns used in place thereof, includes persons and/or entities named at the beginning of this document, identified as the "Grantor" and its personal representatives, heirs, successors, and assigns. The term "Grantee," wherever used here, and any pronouns used in place thereof, includes the persons and/or entities named at the beginning of this document, identified as "Grantee" and their personal representatives, heirs, successors, and assigns. The rights of the Grantee and Grantor under this Agreement are freely assignable, subject to the notice provisions here.

H. Termination of Rights and Obligations: A Party's rights and obligations under this Agreement terminate upon transfer of the Party's interest in the Site, except that liability for acts or omissions occurring prior to transfer shall survive transfer.

I. Reimbursement of Costs: The U.S. EPA, its assigns, representatives and successor agencies will incur costs in

overseeing this agreement. The Grantor and Grantee agree that the AOC will remain in full force and effect to, *inter alia*, provide a mechanism for reimbursement of such costs.

J. Time is of the Essence: Time is of the essence as to the performance of the obligations contemplated in this agreement.

TO HAVE AND TO HOLD unto the Grantee and its assigns forever.

IN WITNESS WHEREOF, Grantor has caused this Agreement to be signed in its name.

Executed this ____ [day] day of _____ [month] ____ [year].

GRANTOR:

_____ [name]

By: _____

Printed Name: _____

Title: _____

GRANTEE:

_____ [name]

By: _____

Printed Name: _____

Title: _____

[Attach Exhibit A]

[Attach Exhibit B]

[Attach Exhibit C]



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Chapter 25 ENVIRONMENTAL CONSIDERATIONS IN REAL ESTATE TRANSACTIONS

Part IV. FORMS

A. ENVIRONMENTAL CONSIDERATIONS IN REAL ESTATE TRANSACTIONS

33-25 Current Legal Forms for Real Estate FORM 25.88

FORM 25.88 Environmental covenant--Ohio

COMMENT

This form is an example of a covenant promulgated by the Ohio Environmental Protection Agency.

FORM

ENVIRONMENTAL COVENANT

To be recorded with Deed

This Environmental Covenant is entered into by _____ [name] ("Owner") and the Ohio Environmental Protection Agency ("Ohio EPA") pursuant to Ohio Revised Code ("ORC") "5301.80 to 5301.92 for the purpose of subjecting the Property to the activity and use limitations set forth herein.

[Insert appropriate background information here. Describe the "environmental response project," see ORC § 5301.80(E), and identify the name and location of the administrative record for the project. See ORC § 5301.82(A)(8). See also ORC § 5301.82(B)(2) re: description of contamination on or underlying the property and its remedy, including the contaminants of concern, the pathways of exposure, limits on exposure, and the location and extent of the contamination.]

Now therefore, Owner [name all Owners of the Property and add other "Holders," if any] and Ohio EPA agree to the following:

1. Environmental Covenant. This instrument is an environmental covenant developed and executed pursuant to §§ 5301.80 to 5301.92.

2. Property. This Environmental Covenant concerns (an approximately _____ (_____) acre tract of real property; OR real property parcels numbered _____] owned by _____ [name], located at _____ [address] _____ [county] County, Ohio, and more particularly described in Exhibit A attached hereto and hereby incorporated by reference herein ("Property").

3. Owner. _____ [name] ("Owner") [who resides; OR which is located] at _____ [address], is the owner of the Property.

4. Holder[s]. Owner, whose address is listed above, [and _____ [name] who resides; OR which is located at _____ [address] [is/are] the holder[s] of this Environmental Covenant.

5. Activity and Use Limitations. As part of the [closure and hazardous waste management units; corrective action at the Property; remedial action described in the Decision Document; voluntary action described in the NFA Letter; wetlands mitigation project; supplemental environmental project, etc.], Owner hereby imposes and agrees to comply with the following activity and use limitations:

[Insert the limitations appropriate for the Property. Several limitations may be appropriate as part of a remedial action or closure plan where cleanup to an unrestricted land use is not feasible. Each type of limitations must be considered on a site-specific basis to determine which limitation or combination of limitations is suitable for the particular circumstances of the site or facility, based on the nature of contamination, the affected media and the potential exposures. The types of limitations include:

land use limitations (e.g., to limit duration and frequency of human exposure to surficial soils, surface water, or sediments).

ground water limitations (e.g., to prevent exposure to contaminated ground water by prohibiting extraction or use of ground water, except for investigation or remediation thereof).

disturbance limitations (e.g., to protect in-place remedial systems, to prevent exposures caused by any mixing of contaminated subsurface soils with "clean" surface soils, and to prevent contact with subsurface contamination during excavation).

construction limitations (e.g., to prevent exposure to volatile emissions to indoor air from soil or ground water).

resource protection limitations (e.g., to protect certain ecological features associated with the Property ...)

6. Running with the land. This Environmental Covenant shall be binding upon the Owner and all assigns and successors in interest, including any Transferee, and shall run with the land, pursuant to ORC § 5301.85, subject to amendment or termination as set forth herein. The term "Transferee," as used in this Environmental Covenant, shall mean any future owner of any interest in the Property or any portion thereof, including, but not limited to, owners of an interest in fee simple, mortgagees, easement holders, and/or lessees.

7. Compliance Enforcement. ORC § 5301.91 or other applicable law. Failure to timely enforce compliance with this Environmental Covenant or the use limitations contained herein by any party shall not bar subsequent enforcement by such party and shall not be deemed a waiver of the party's right to take action to enforce any non-compliance. Nothing

in this Environmental Covenant shall restrict the Director of the Ohio EPA from exercising any authority under applicable law in order to protect the public health or safety or the environment.

[VAP (If the property is the subject of a VAP no further action letter and request for a covenant not to sue, this language should be added to this paragraph of the Environmental Covenant.) Pursuant to ORC § 3746.05, if the Property or any portion thereof is put to a use that does not comply with this Environmental Covenant, the covenant not to sue issued for the Property by the Director of the Ohio EPA under ORC § 3746.12 is void on and after the date of the commencement of the noncomplying use.]

8. Rights of Access. Owners hereby grants the Ohio EPA, its agents, contractors, and employees *[and any "Holders;" the local government, etc.; see ORC §§ 5301.82(A)(6) and 5301.91(A)]* the right of access to the Property for implementation or enforcement of this Environmental Covenant.

9. Compliance Reporting. Owner and any Transferee shall submit to Ohio EPA *[, the local government and any "Holders"]* on an annual basis written documentation verifying that the activity and use limitations remain in place and are being complied with.

10. Notice upon Conveyance. Each instrument hereafter conveying any interest in the Property or any portion of the Property shall contain a notice of the activity and use limitations set forth in this Environmental Covenant, and provide the recorded location of this Environmental Covenant. The notice shall be substantially in the following form:

THE INTEREST CONVEYED HEREBY IS SUBJECT TO AN ENVIRONMENTAL COVENANT, DATED _____ [month] _____ [day] _____ [year], RECORDED IN THE DEED OR OFFICIAL RECORDS OF THE _____ [county] COUNTY RECORDER ON _____ [month] _____ [day] _____ [year], IN [DOCUMENT or BOOK _____, PAGE _____,]. THE ENVIRONMENTAL COVENANT CONTAINS THE FOLLOWING ACTIVITY AND USE LIMITATIONS: *[Insert the language that describes the activity and use limitations exactly as it appears in the Environmental Covenant.]*

Owner shall notify Ohio EPA *[and any "Holders"]* within _____ (_____) days after each conveyance of an interest in any portion of the property. Owner's notice shall include the name and address of the Transferee.

11. Representations and Warranties. Owner hereby represents and warrants to the other signatories hereto *[select as appropriate]*:

- that the owner is the sole owner of the Property;
- that the owner holds fee simple title to the Property which is free, clear and unencumbered;
- to the extent that other interests in the Property exist, the Owner [or other person that owns the interest] has agreed to subordinate those interests to the Environmental Covenant, pursuant to ORC § 5301.86, and the subordination agreement (attached hereto as Exhibit _____ or recorded at _____);
- that the Owner has the power and authority to enter into this Environmental Covenant, to grant the rights and interests herein provided and to carry out all obligations hereunder;
- that the Owner has identified all other parties that hold any interest (e.g., encumbrance) in the Property and notified such parties of the Owner's intention to enter into this Environmental Covenant;

and

■ that this Environmental Covenant will not materially violate or contravene or constitute a material default under any other agreement, document or instrument which is a party by which Owner may be bound or affected.

12. Amendment or Termination. This Environmental Covenant may be amended or terminated only by consent of all of the following: the Owner or a Transferee; *[other "Holders," if any;]* and the Ohio EPA, (See *ORC § 5301.82(B)(3)*, which allow for "limitations on amendment or termination.") pursuant to *ORC § 5301.90* and other applicable law. Amendment means any changes to the Environmental Covenant, including the activity and use limitations set forth herein, or the elimination of one or more activity and use limitations when there is at least one limitation remaining. Termination means the elimination of all activity and use limitations set forth herein and all other obligations under this Environmental Covenant.

This Environmental Covenant may be amended or terminated only by a written instrument duly executed by the Director of Ohio EPA and the Owner or Transferee *[and other "Holders," if any]* of the Property or portion thereof, as applicable. Within _____ (_____) days of signature by all requisite parties on any amendment or termination of this Environmental Covenant, the Owner or Transferee shall file such instrument for recording with the _____ *[county]* County Recorder's Office, and shall provide a copy of the recorded instrument to Ohio EPA.

13. Severability. If any provision of this Environmental Covenant is found to be unenforceable in any respect, the validity, legality, and enforceability of the remaining provisions shall not in any way be affected or impaired.

14. Governing Law. This Environmental Covenant shall be governed by and interpreted in accordance with the laws of the State of Ohio.

15. Effective Date. The effective date of this Environmental Covenant shall be the date upon which the fully executed Environmental Covenant has been recorded as a deed record for the Property with the _____ *[county]* County Recorder.

16. Distribution of Environmental Covenant. The Owner shall distribute copies of the recorded Environmental Covenant to: Ohio EPA, the *[City, County, Township, Village]* of _____; *[any "Holder," any lessee, each person who signed the Environmental Covenant, each person holding a recorded interest in the Property; and any other person designated by Ohio EPA; see ORC § 5301.83].*

The undersigned *[representative of]* Owner *[and other "Holders," if any]* represent[s] and certif[y/ies] that *[he/she/they]* *[is/are]* authorized to execute this Environmental Covenant.

IT IS SO AGREED:

[NAME OF OWNER]

Signature of Owner

Printed Name and Title

Date

State of _____)
County of _____) ss:

Before me, a notary public, in and for said county and state, personally appeared _____ [name], a duly authorized representative of _____ [name], who acknowledged to me that [he/she] did execute the foregoing instrument on behalf of _____ [name].

IN TESTIMONY WHEREOF, I have subscribed my name and affixed my official seal this _____ [day] day of _____ [month], _____ [year].

Notary Public

OHIO ENVIRONMENTAL PROTECTION AGENCY

[name], Director

Date

State of Ohio
County of Franklin

)
) ss:
)

Before me, a notary public, in and for said county and state, personally appeared _____ [name], the director of Ohio EPA who acknowledged to me that [he/she] did execute the foregoing instrument on behalf of Ohio EPA.

IN TESTIMONY WHEREOF, I have subscribed my name and affixed my official seal this _____ [day] day of _____ [month], _____ [year].

Notary Public

[NAME OF HOLDER]

Signature of Holder

Printed Name and Title

Date

State of _____
County of _____

)
) ss:
)

Before me, a notary public, in and for said county and state, personally appeared _____ [name], a duly authorized representative of _____ [name], who acknowledged to me that [he/she] did execute the

foregoing instrument on behalf of _____ [*name*].

IN TESTIMONY WHEREOF, I have subscribed my name and affixed my official seal this _____ [*day*] day of
_____ [*month*], _____ [*year*].

Notary Public

[Attach Exhibit A]



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Chapter 25 ENVIRONMENTAL CONSIDERATIONS IN REAL ESTATE TRANSACTIONS

Part IV. FORMS

A. ENVIRONMENTAL CONSIDERATIONS IN REAL ESTATE TRANSACTIONS

33-25 Current Legal Forms for Real Estate FORM 25.89

FORM 25.89 Remediation trust fund agreement--agreement to establish funds to pay for remediation costs

COMMENT

This is an agreement whereby funds are placed in trust in order to pay for remediation costs. Typically, a state agency has brought an enforcement action against a land owner and/or operator. This agreement relates to a settlement. A significant part of the settlement requires the operator to remediate certain adverse environmental conditions. The parties have agreed to the scope of the remediation and monitoring. However, the state agency and the land owner want to assure that the operator has adequate resources to complete the remediation and monitoring. As a result, they require the operator to deposit funds in trust. This agreement appoints the trustee and establishes the trust.

FORM

REMEDATION TRUST FUND AGREEMENT

RE: INDUSTRIAL SITE RECOVERY ACT (ISRA)

ISRA CASE # _____

This Remediation Trust Fund Agreement ("Agreement") is entered into as of the _____ [day] day of _____ [month] _____ [year], by and between _____ [name] and _____ [name] (collectively known as "Grantors"), _____ [name] ("Land Owner"), and _____ [name] ("Trustee").

WHEREAS, the Department of Environmental Protection ("DEP"), an agency of the State of _____ [state], has established the ISRA, _____ [cite case], applicable to Land Owner, requiring that certain procedures be followed by industrial establishments to ensure adequate preparation and implementation of acceptable Remedial Action Workplan procedures as a precondition of any sale or transfer of any industrial establishment or as the result of any termination of operations of any industrial establishment in accordance with ISRA.

WHEREAS, Land Owner, as the owner of real property located at _____ [address] (the "Site"), upon which an industrial establishment was situated, has been required by the DEP to prepare and implement a Remedial Action Workplan, which has been approved by the DEP, and Land Owner is further required, within _____ (_____) calendar days of written approval of the Remedial Action Workplan by DEP, to provide a Remediation Trust Fund or other Remediation Funding Source pursuant to _____ [cite case], in an amount equal to or greater than the cost of said approved Remedial Action Workplan;

WHEREAS, the Grantors have entered into a Settlement and Release Agreement with Land Owner, and under that Settlement and Release Agreement, the Grantors, in order to satisfy a contested claim asserting liability arising from the alleged discharge of hazardous substances at the Site, have agreed to pay monies, pursuant to a schedule contained in Section _____ of the Settlement and Release Agreement, into this Remediation Trust Fund, which is intended to function as a Qualified Settlement Fund under Internal Revenue Service regulations;

WHEREAS, Land Owner, acting through its duly authorized officer or management official, has selected the Trustee under this Agreement, and the Trustee is willing to act as Trustee.

NOW, THEREFORE, the Grantors, Land Owner and the Trustee agree as follows:

Section 1. Definitions.

As used in this Agreement:

- (a) The term "Grantors" shall include any successors or assigns of the Grantors.
- (b) The term "Trustee" means the Trustee who enters into the Agreement and any successor Trustee, who has the authority to act as a trustee and whose trust operations are regulated and examined by a federal or state Agency. The name, address and title of the Trustee is:

_____ [name]
 _____ [address]
 _____ [address]

- (c) The term "Land Owner" shall include any successor and assigns of Land Owner.
- (d) The Term "Commissioner" means the Commissioner of the Department of Environmental Protection.
- (e) The term "Beneficiary" means the Department of Environmental Protection.
- (f) The term "DEP" means the Department of Environmental Protection.

Section 2. Identification of Facilities and Cost Estimates.

This Agreement pertains to the Site that is more particularly identified on Schedule "A."

Section 3. Establishment of Fund.

The Grantors and the Trustee hereby establish a trust fund, hereinafter the "Fund," for the benefit of DEP. The Grantors and the Trustee intend that no third party shall have access to the Fund except as herein provided. The Fund is established initially as consisting of the property which is acceptable to the Trustee and DEP, described in Schedule "B," attached hereto. Such property and any other property subsequently transferred to the Trustee is referred to as the Fund, together with all earnings and profit thereon, less any payments or distributions made by the Trustee pursuant to this Agreement. The Fund shall be supplemented by the additional future payments specified under Section _____ of the Settlement and Release Agreement, and the DEP hereby agrees that the funds set forth in Schedule B and the additional payments specified in Section _____ of the Settlement and Release Agreement shall together comprise the Remediation Funding Source for ISRA Case No. _____ pursuant to _____ [cite case]. The Fund shall be held by the Trustee, IN TRUST, as hereinafter provided. The Trustee shall not be responsible nor shall it undertake any responsibility for the amount or adequacy of, nor any duty to collect from the Grantors, any payments necessary to discharge any liabilities of the Grantors or Land Owner established by the DEP.

Section 4. Payment for ISRA Remediation.

The Trustee shall make payment from the Fund as the DEP shall direct, in writing, to provide for the payment of the costs of performing Land Owner's obligations under ISRA Case No. _____ and this Agreement. The Trustee shall reimburse Land Owner or other persons, as specified by the DEP, from the Fund for expenditures in such amounts as the DEP shall direct in writing consistent with _____ [cite case]. In addition, the Trustee shall refund to Land Owner such amounts as the DEP specifies in writing. Upon refund, such funds shall no longer constitute part of the Fund, as defined herein.

Section 5. Payments Comprising the Fund.

Payments made to the Trustee for the Fund shall consist of cash acceptable to the Trustee.

Section 6. Trustee Management.

The Trustee shall invest and reinvest the principal and income of the Fund and keep the Fund invested as a single fund, without distinction between principal and income, in accordance with general investment policies and guidelines subject, however, to the provisions of this Section 6. In investing, reinvesting, exchanging, selling and managing the Fund, the Trustee shall discharge his duties with respect to the Fund solely in the interest of the DEP as the beneficiary and with the care, skill, prudence and diligence under the circumstances then prevailing which persons of prudence, acting in a like capacity and familiar with such matters, would use in the conduct of an enterprise of a like character and with like aims, except that:

- (i) Securities or other obligations of the Grantor, or any owner or operator of the facilities or any of their affiliates, as defined in the Investment Company Act of 1940, as amended, 15 U.S.C. 80a-2(a), shall not be acquired or held, unless they are securities or other obligations of the federal or a state government.
- (ii) The Trustee is authorized to invest the Fund in time or demand deposits of the Trustee; and
- (iii) The Trustee is authorized to hold cash awaiting investment of distribution uninvested for a reasonable time and without liability for the payment of interest thereon.

Section 7. Commingling and Investment.

The Trustee is expressly authorized in its discretion to transfer from time to time any or all of the assets of the Fund to any common, commingled or collective trust fund created by the Trustee in which the Fund is eligible to participate, subject to all of the provisions thereof, to be commingled with the assets of other trusts participating therein.

Section 8. Express Powers of Trustee.

Without in any way limiting the powers and discretion conferred upon the Trustee by the other provisions of this Agreement or by law, the Trustee is expressly authorized and empowered:

- (a) To sell, exchange, convey, transfer or otherwise dispose of any property held by it, by public or private sale. No person dealing with the Trustee shall be bound to see to the application of the purchase money or to inquire into the validity or expedience of any such sale or other disposition;
- (b) To make, execute, acknowledge and deliver any and all documents of transfer and conveyance and any and all other instruments that may be necessary or appropriate to carry out the powers herein granted;
- (c) To deposit any cash in the Fund in interest-bearing accounts maintained or savings certificates issued by the Trustee, in its separate corporate capacity, or in any other banking institution affiliated with the Trustee, to the extent insured by an agency of the federal or state government; and
- (d) To comprise or otherwise adjust all claims in favor of or against the Fund.

Section 9. Taxes and Expenses.

All taxes of any kind that may be assessed or levied against or in respect of the fund and all brokerage commissions incurred by the Fund shall be paid from the Fund. All other expenses incurred by the Trustee in connection with the administration of this Trust, including fees for legal services rendered to the Trustee, the compensation of the Trustee and all other proper charges and disbursements of the Trustee shall be paid from the Fund.

Section 10. Annual Valuation.

The Trustee shall annually, at least _____ (_____) calendar days prior to the anniversary date of establishment of the Fund, furnish to Land Owner and to the DEP a statement confirming the value of the Trust. The failure of Land Owner to object in writing to the Trustee within _____ (_____) calendar days after the statement has been furnished to Land Owner and the DEP shall constitute a conclusively binding assent by Land Owner, barring Land Owner from asserting any claim or liability against the Trustee with respect to matters disclosed in the statement.

Section 11. Advice of Counsel.

The Trustee may, from time to time, consult with counsel, who may be counsel to Land Owner, with respect to any questions arising as to the construction of this Agreement or any action to be taken hereunder. The Trustee shall be fully protected, to the extent permitted by law, in acting upon the advice of counsel.

Section 12. Trustee Compensation.

The Trustee shall be entitled to reasonable compensation, from time to time, for its services, as agreed upon in writing with the Grantors or Land Owner.

Section 13. Successor Trustee.

The Trustee may resign or Land Owner may replace the Trustee, but such resignation or replacement shall not be effective until Land Owner has appointed a successor trustee and this successor accepts the appointment. The successor trustee shall have the same powers and duties as those conferred upon the Trustee hereunder. Upon the successor trustee's acceptance of the appointment, the Trustee shall assign, transfer and pay over to the successor Trustee the funds and properties constituting the Fund. If, for any reason, Land Owner cannot or does not act in the event of the resignation of the Trustee, the Trustee may apply to a court or competent jurisdiction for the appointment of a successor trustee or for instructions. The successor trustee shall specify the date on which it assumes administration of the trust in writing sent to Land Owner, the DEP and the present Trustee by certified mail _____ (_____) days before such change becomes effective. Any expenses incurred by the Trustee as a result of any of the acts contemplated by this Section 13. shall be paid as provided in Section 9.

Section 14. Instructions to the Trustee.

All order, requests and instructions by Land Owner to the Trustee shall be in writing, signed by such persons as are designated in Schedule "C." The Trustee shall be fully protected in acting without inquiry in accordance with all of Land Owner's order, requests and instructions. All orders, requests and instructions by the DEP to the Trustee shall be in writing, signed by the DEP Commissioner or his/her designee and the Trustee shall act and shall be fully protected in acting in accordance with such orders, requests and instructions. The Trustee shall have the right to assume, in the absence of written notice to the contrary, that no event constituting a change or a termination of the authority of any person to act on behalf of Land Owner or the DEP hereunder has occurred. The Trustee shall have no duty to act in the absence of such orders, requests and instructions from Land Owner and/or the DEP, except as provided for herein.

Section 15. Amendment of Agreement.

This Agreement may be amended by an instrument in writing executed jointly by the Grantors, Land Owner (or the Grantors' and Land Owners' principals, successors and assigns if the Grantors and/or the Land Owner have dissolved), the Trustee and the DEP (or by the Trustee, the DEP and any non-dissolved parties if one or both of the Grantors and/or Land Owner ceases to exist and no successors or assigns are named).

Section 16. Irrevocability and Termination.

Subject to the rights of the parties to amend this Agreement, as provided in Section 15. hereof, this Trust shall be irrevocable and shall continue until terminated at the written agreement of Land Owner, the Trustee and the DEP or of the Trustee and the DEP if Land Owner ceases to exist. Upon termination of the Trust, all remaining trust property, less final trust administration expenses, shall be delivered to Land Owner.

Section 17. Immunity and Indemnification.

The Trustee shall not incur personal liability of any nature in connection with any act or omission, made in good faith, in the administration of this Trust or in carrying out any directions by Land Owner or the DEP issued in accordance with the Agreement. The Trustee shall be indemnified and saved harmless by Land Owner or from the Trust Fund, or both, from and against any personal liability to which the Trustee may be subjected by reason of any act or conduct in its official capacity, including all expenses reasonably incurred in its defense in the event Land Owner fails to provide such defense.

Section 18. Choice of Law.

This Agreement shall be administered, construed and enforced according to the laws of the State of _____ [state].

Section 19. Interpretation.

As used in this Agreement, words in the singular include the plural, and words in the plural include the singular.

The descriptive headings for each Section of this Agreement shall not affect the interpretation or the legal efficacy of this Agreement.

GRANTORS:

_____ [name]

By: _____

Printed Name: _____

Title: _____

LAND OWNER:

_____ [name]

By: _____

Printed Name: _____

Title: _____

TRUSTEE:

_____ [name]

By: _____

Printed Name: _____

Title: _____

LANDOWNER:

_____ [name]

By: _____

Printed Name: _____

Title: _____

DEP:

_____ [name]

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By: _____

Printed Name: _____

Title: _____

CERTIFICATION BY LAND OWNER

Specifically, I am aware of Land Owner's responsibilities in the establishment and maintenance of a Remediation Funding Source. Additionally, I acknowledge that this Remediation Funding Source shall be maintained until such time as Land Owner has submitted an alternative Remediation Funding Source to the DEP or Land Owner has been notified by the DEP in writing it is no longer required to maintain a Remediation Funding Source. I am aware that there are significant penalties for knowingly submitting false, inaccurate information and that I am committing a crime of the fourth degree if I make a written statement which I do not believe to be true. I am also aware that if I knowingly direct or authorize the violation of any statute, I am personally liable.

LAND OWNER:

_____ [name]

By: _____

Printed Name: _____

Title: _____

STATE OF _____ [state])
 COUNTY OF _____ [county]) SS:

BEFORE ME, a Notary Public in and for said County and State, personally appeared _____ [name], a(n) _____ [state] _____ [entity], by _____ [name], its _____ [title], who acknowledged that _____ [he/she] did sign the foregoing instrument for and on behalf of said corporation, being thereunto duly authorized, and that the same is [his/her] free act and deed individually and as such officers and the free act and deed of said _____ [entity].

IN TESTIMONY WHEREOF, I have hereunto set my hand and official seal at _____ [city], _____ [state], this _____ [day] day of _____ [month], _____ [year].

 Notary Public

Instructions to Land Owner:

Include here a copy of the Remediation Agreement or Remedial Action Workplan Approval

Schedule B

Instructions to the Grantor:

Include here the initial amount of money to be deposited into the Remediation Trust Fund

Schedule C

Instructions to Land Owner:

Include here the required information of your designee for communications with the Trustee



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Current Legal Forms for Real Estate

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Current Legal Forms for Real Estate

Chapter 25 ENVIRONMENTAL CONSIDERATIONS IN REAL ESTATE TRANSACTIONS

Part IV. FORMS

B. REAL ESTATE LOANS

33-B. Current Legal Forms for Real Estate Scope

Scope

NOTE: For additional commentary and forms related to real estate loans, see Vol. 27, Ch. 22, Development and Subdivision, Part IV., Forms, Section G, *supra*.



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Chapter 25 ENVIRONMENTAL CONSIDERATIONS IN REAL ESTATE TRANSACTIONS

Part IV. FORMS

B. REAL ESTATE LOANS

33-25 Current Legal Forms for Real Estate FORM 25.90

FORM 25.90 Commercial mortgage--shopping center--representation of condition of premises based on findings of environmental site assessment

COMMENT

This form contains a commercial mortgage to be used in the financing of a shopping center. However, the mortgage can be adapted easily for loan transactions involving other types of Development and Subdivision, Part IV., Forms, Section G, *supra*. ommercial property, such as factories, office buildings, etc.

The mortgage also contains a warranty of the condition of the premises that is granted by the borrower to the lender. Specifically, the borrower warrants that he has had an environmental site assessment performed by a reliable environmental consultant and has provided a copy of the assessment to the lender. The borrower further warrants that there is no evidence that toxic or hazardous substances have ever been manufactured, used, stored, handled, released or disposed of on the premises. The borrower also represents that he is not aware of any adverse environmental conditions, except as is set forth in the report. A beach of the warranty constitutes a default under the terms of the note and the mortgage, entitling the lender to accelerate the note and foreclose the mortgage.

FORM

MORTGAGE

THIS MORTGAGE, made the ____ [day] day of _____ [month] ____ [year], between _____ [name], residing at _____ [address] (hereafter known as "Borrower" or "Mortgagor"), and

_____, [name], a banking corporation organized and existing under the laws of the State of _____ [state], having its principal place of business at _____ [address] (hereafter known as "Lender" or "Mortgagee").

WITNESSETH, that to secure the payment of an indebtedness in the sum of _____ Dollars (\$ _____), lawful money of the United States, and also any and all additional advances which may be made by the Lender to the Borrower at any time before the date on which the indebtedness secured by this Mortgage is paid, with interest thereon, all to be paid according to a certain bond or note or obligation, and also any and all further loans or indebtedness owed or to be owed by the Borrower or any subsequent owner of the mortgaged premises, to the Lender, the Borrower hereby mortgages to the Lender.

A CERTAIN PARCEL OF LAND, with the buildings and improvements thereon erected, commonly known as the _____ [name] Shopping Mall, and more particularly described in Schedule "A" annexed hereto and made a part hereof.

TOGETHER with all right, title and interest of the Borrower in and to any land lying in the bed of any street, road or highway, in front of the premises above described;

TOGETHER with all fixtures and articles of personal property, now or hereafter attached to, or used in connection with, the premises, all of which are covered by this Mortgage;

TOGETHER with the appurtenances, and all the estate and rights of the Borrower in and to said premises;

AND the Borrower covenants with the Lender as follows:

1. Promise to Pay Indebtedness. The Borrower will pay the indebtedness as provided in the accompanying bond or note.

2. Insuring the Property:

(a) The Borrower will keep the buildings on the premises, and any other combustible property covered hereby, insured for the benefit of the Lender against loss by fire and such other hazards as may be required by the Mortgagee, by such insurance companies and in such amounts acceptable to the Mortgagee; he will assign and deliver the policies to the Mortgagee; and he will reimburse the Lender for any premiums for insurance paid by the Lender on the Mortgagor's default in so insuring the buildings, or in so assigning and delivering the policies.

(b) Borrower agrees that, if permitted by law, in the event of a loss by fire or other hazard, the proceeds of any insurance policy insuring against said loss shall be under the control of the Lender, and the Lender shall determine on behalf of Borrower how said proceeds shall be paid in the event it is decided to rebuild the damaged or destroyed premises. In the event rebuilding is not commenced within _____ (_____) days of the day the insurance proceeds are received, the Lender may apply the proceeds against the Mortgage indebtedness at its option. The Lender shall not be obligated to pay interest at any time, to anyone, on the insurance proceeds so held.

(c) The buildings and all fixtures, equipment and articles of personal property covered by this Mortgage shall be kept insured against loss by fire for the benefit of the Lender, in an amount not less than the unpaid balance of this Mortgage, and in the case of co-insurance, such amount as will assure full recovery in case of partial or total loss. The property shall also be insured for the benefit of, and in amounts satisfactory to, the Lender against any other insurable hazards as may from time to time be reasonably required by the Lender, all in companies acceptable to it. Public liability insurance and rental value insurance, in amounts approved by the Lender, shall also be carried, evidenced by a certificate or other evidence satisfactory to Lender.

3. Warranty of Title. The Borrower warrants the title to the premises, fixtures and personal property mortgaged hereby and will maintain the lien of this Mortgage as a valid first lien on the premises.

4. Borrower to Maintain Buildings. The Borrower will maintain the buildings on said premises in good repair, and will not alter, demolish or remove any building, fixture or personal property mortgaged hereby without the written consent of the Mortgagee, and will not suffer or permit any other waste, and will comply with all statutes, orders and requirements of the federal, state and municipal governments, or any departments or bureaus thereof, having jurisdiction over the mortgaged premises. The holder of this Mortgage or its agents shall have the right to inspect the mortgaged premises from time to time at any reasonable hour of the day.

5. Default. The whole of said principal sum and interest shall become due at the option of the Mortgagee:

(a) after default for _____ (_____) days in the payment of any installment of principal or of interest;

(b) after default for _____ (_____) days in the payment of any other sum required to be paid by the Borrower to the Lender under the terms of the bond or note secured hereby;

(c) after default in the payment of any tax, water rent or assessment for _____ (_____) days after the same becomes due and payable;

(d) after default following notice and demand either to assign and deliver the policies insuring the buildings against loss by fire, or to reimburse the Lender for premiums paid on such insurance, as herein provided;

(e) after default upon request to furnish a statement of the amount due on the Mortgage and whether any offsets or defenses exist against the Mortgage debt, as hereinafter provided; or

(f) after any other default under the terms, covenants or conditions of this Mortgage, or of the bond or note secured hereby, or upon the commencement of an action or proceeding for the foreclosure or enforcement of any alleged lien upon the mortgaged premises.

6. Appointment of Receiver. The holder of this Mortgage, in any action to foreclose on it, shall be entitled to the appointment of a receiver without notice and without regard to adequacy of any security of the debt.

7. Surrender of Premises Upon Default. After any default hereunder, the Borrower shall, upon demand, surrender possession of the premises to the Mortgagee. After any such default, the Lender may enter upon the premises or any part thereof and collect the rents, income and profits therefrom, which are due or become due, and apply the same, after payment of all charges and expenses, against the indebtedness. The said rents, income and profits and all the leases existing at the time of such default shall, upon such default, be assigned to the Mortgagee as further security for the payment of the indebtedness. No such entry by or on behalf of the Lender shall be deemed to constitute the Lender a "mortgagee in possession." If the Borrower remains in possession thereof after any such default, the possession shall be as a tenant of the Lender, and the Borrower agrees to pay in advance and upon demand of the Lender a reasonable monthly rental for the premises or portion so occupied. The Lender may also dispossess, by summary proceedings or otherwise, any tenant or Borrower, if such party defaults in the payment of any rent to the Lender. This covenant shall, at the option of the Mortgagee, become operative immediately after the happening of any event of default, regardless of whether foreclosure proceedings have been instituted, and without application for the appointment of a receiver. In case of the appointment of a receiver of such rents, income or profits, this covenant shall inure to the benefit of such receiver.

8. Lender's Expenses from Foreclosure or Collection of Indebtedness. If any action or proceeding is commenced by the Lender to foreclose this Mortgage or to collect the indebtedness, the Borrower agrees to pay to the Lender statutory

costs and expenses and reasonable attorneys' fees in connection with such action or proceeding, and these costs, expenses and fees shall be deemed to be secured by this Mortgage and may be collected in such foreclosure or other action or proceeding and shall be a lien on the premises prior to any right or title to, interest in, or claim upon the premises attaching or accruing subsequent to the lien hereof.

9. Sale of Property Following Foreclosure. In the event of the foreclosure of the Mortgage, said premises may be sold in one or more parcels, at the option and discretion of the Mortgagee, any provision of law to the contrary notwithstanding.

10. Lender's Expenses from Foreclosure or Collection of Indebtedness: Proceedings in U.S. Bankruptcy Court. If any action or proceeding is commenced by the Lender to foreclose or to collect the indebtedness, the Borrower agrees to pay to the Lender statutory costs and expenses and reasonable attorneys' fees in connection with such action or proceeding, including any proceedings in U.S. Bankruptcy Court as a result of said foreclosure, and such costs, expenses and fees shall be deemed to be secured by the Mortgage and may be collected in such foreclosure or other action or proceeding and shall be a lien on the premises prior to any right or title to, interest in, or claim upon the premises attaching or accruing subsequent to the lien thereof.

11. Borrower to Pay All Taxes, Assessments or Water Rents. The Borrower will pay all taxes, assessments, or water rents, and if Borrower is in default thereof, the Lender may pay the same.

12. Mortgagor to Furnish Written Statement of Amount Due on Mortgage. The Mortgagor, within _____ (_____) days of receiving a request delivered by hand, or within _____ (_____) days of receiving a request by mail, will furnish a written statement, duly acknowledged, of the amount due on this Mortgage and whether any offsets or defenses exist against the Mortgage debt.

13. Notice and demand or request may be in writing and may be served in person or by mail.

14. Abandonment of Premises by Mortgagor. If the mortgaged premises shall be abandoned or vacated by the Mortgagor or by the then owner thereof, the Lender shall have the right to enter upon and take possession of the premises to protect and conserve its security, with all usual powers of a Lender in possession.

15. No Pledge or Assignment by Borrower of Rents or Profits. There is by Borrower no pledge or assignment of any of the rents, issues or profits of the said mortgaged premises, or any part thereof, outstanding, and no prepayment thereof; the Borrower will not pledge or assign such rents, or any part thereof, during the term of this Mortgage without the written consent of the Mortgagee.

16. Leases. All leases and subleases of space on the mortgaged premises shall be in form and substance satisfactory to the Lender and shall have subordination provisions in form and substance satisfactory to the Lender and its counsel, subordinating the interest of the tenants thereunder to this Mortgage and all renewals, modifications, consolidations, replacements and extensions thereof. No prepayments of rent shall be permitted.

17. Acceleration of Debt Repayment Following Change in Tax Law. In the event of the passage of any law changing in any way the laws for the taxation of mortgages or debts secured by mortgages, the Lender shall have the right to give _____ (_____) days' written notice to the Borrower requiring the payment of the indebtedness. If such notice is given, the indebtedness shall become immediately due and payable at the expiration of said _____ (_____) days.

18. Lender's Failure to Require Performance of Covenant is Not Waiver of Covenant. The failure at any time of the Lender to require strict performance of any of the terms or covenants of this Mortgage shall not constitute a waiver or release of such terms or covenants.

19. Changes in Payment Terms do Not Affect Priority of the Lien of this Mortgage. The terms of payment of the bond or note secured hereby may be modified or altered by the Lender with the consent of the Mortgagor, or the then owner of the mortgaged premises, without impairing or affecting the priority of the lien of this Mortgage with respect to any subsequent lien or encumbrance.

20. Lender's Release of Portion of Mortgaged Premises. The Lender may, at any time, release any portion of the mortgaged premises, or any securities or other personal property pledged or assigned to it as additional security for the payment of the bond or note and indebtedness secured by this Mortgage, and may accept other securities or other personal property in place thereof without being accountable to any other lienor.

21. Acceleration of Debt Repayment Following Sale, Conveyance, Transfer or Lease of Premises Without Lender's Approval. In the event of the sale, conveyance or transfer, by deed, installment contract, or any other voluntary or involuntary act, of the premises covered by this Mortgage or a part thereof, or, if the Borrower is a corporation, any transfer of the capital stock of the Borrower, or the lease of any entire building or buildings or any portion thereof on said premises to a single entity, person or persons, while this Mortgage shall remain a lien thereon, the full balance of the indebtedness then remaining unpaid, with interest, shall, at the option of the Lender or its assigns, be immediately due and payable without notice or demand, unless the prior written consent of the Lender to such sale, conveyance, transfer or lease shall have been obtained. A mortgage of the premises covered by this Mortgage to any Lender other than the Lender herein shall be deemed a conveyance for the purpose of this paragraph. In the event Lender gives its consent, as a condition of such consent, Lender, at its sole discretion, may impose modifications to the note and Mortgage as to interest and/or any other term(s). The Lender may also require payment of a fee. In the event that Borrower is a partnership, any change in Borrower's partnership agreement as it exists on the date of this Mortgage, or any change in the membership of the partnership as it presently exists, without the express written consent of the Lender, may, at the option of the Lender, be considered an event of default hereunder.

22. Borrower to Furnish Financial Records to Lender. The Borrower will furnish to the Lender a copy of its income and expense statement and a copy of its balance sheet in a form satisfactory to the Lender within _____ (_____) days after the close of its fiscal year, or within _____ (_____) days after written request therefor by the Lender. Such statements must be certified by an independent public accountant. The Lender reserves the right to conduct its own independent audit with respect thereto. Borrower agrees to pay a late charge of _____ Dollars (\$_____) per month, or any portion thereof, for failure to supply such financial statement.

23. Consent of Borrower's Shareholders to Mortgage is Unnecessary. If the Borrower is a corporation, neither its certificate of incorporation, any amendment thereto, nor its by-laws requires the consent of shareholders to the execution and delivery of this Mortgage; the execution and delivery of this Mortgage have been duly authorized by its Board of Directors.

24. References to Number of Parties to Mortgage. If more than one person joins in the execution of this Mortgage, the relative words herein shall be read as if written in the plural. If more than one person joins in this Mortgage, all the obligations herein contained shall be construed to be the joint and several obligations of the said persons. If the Borrower is a corporation or a partnership, all relative words shall be read as if written in the neuter gender.

25. Terms, Conditions and Covenants of Note are Part of Mortgage. The terms, conditions and covenants of the bond or note secured hereby are hereby made a part of this Mortgage and are incorporated by reference herein with like legal effect as if herein set forth at length.

26. Maximum Amount Secured by Mortgage. Notwithstanding anything to the contrary above stated, the maximum amount secured by this Mortgage or the maximum amount which, under any contingency, may be secured by this

Mortgage is the amount of this Mortgage as first above stated, to wit, the sum of _____ Dollars (\$_____).

27. Mortgagor to Obtain Flood Insurance. The Mortgagor, its successors and assigns will, if required, keep the mortgaged premises insured against loss by flood under the provisions of the Federal Flood Disaster Protection Act of 1973 for the benefit of Mortgagee, up to the amount of the Mortgage debt or the maximum amount of coverage available. In the event of failure to obtain such insurance, the holder of the Mortgage may, at its option, insure the premises in the above manner and add the premiums therefor to the principal debt secured by this Mortgage.

28. No oral Modifications; Covenants to Run with Land. The terms of this Mortgage may not be changed or terminated orally. The covenants contained in this Mortgage shall run with the land and bind the Mortgagor, the heirs, personal representatives, successors and assigns of the Mortgagor and all subsequent owners, encumbrancers, tenants and subtenants of the premises and shall inure to the benefit of the Mortgagee, the personal representatives, successors and assigns of the Mortgagee and all subsequent holders of this Mortgage.

29. Acceleration of Debt Repayment Upon Bankruptcy, Insolvency, etc., of Borrower. If a petition in bankruptcy, or for a debtor's extension of time, or for corporate reorganization, or for any other relief under the Bankruptcy Act or any other state or federal insolvency law, as now existing or as hereafter amended, is filed by the Borrower; or if a general assignment for the benefit of creditors is made by the Borrower; or if the Borrower shall cease to be authorized to do business in the State of _____ [state], then the entire unpaid principal balance of the indebtedness secured hereby, together with all interest then accrued, shall, at the option of the Lender, be and become due and payable for all purposes.

30. Borrower covenants that it will execute, acknowledge, deliver, file and/or record, or cause to be executed, acknowledged, delivered, filed and/or recorded, every and all such further acts, deeds, conveyances, advances, mortgages, transfers and assurances in law as the Lender shall require for better assuring, conveying, transferring, mortgaging, assigning and confirming unto the Lender all the said premises, estates and property mortgaged or intended so to be.

31. Conflicts Arising Between Terms of Documents to be Settled in Lender's Favor. In the event of a conflict between the terms, covenants, and conditions of the documents evidencing or securing the Mortgage obligation herein, those which shall enlarge the interest of the Lender in the security, and/or assure payment of the note and all indebtedness secured therein in full, shall control.

32. Conflicts Between Typewritten and Printed Portions of Documents to be Settled in Lender's Favor. Wherever there is a conflict between the terms and conditions of the printed portion of this Mortgage and the typewritten portion, the portion of this Mortgage which enlarges the interest of Lender in the security, and/or assures payment of the note and all indebtedness secured thereby in full, shall prevail.

33. Monthly Payment by Borrower of Real Estate Taxes. The Borrower shall deposit with the Lender, commencing with the first month of interest payments due under the terms of the note, and each month thereafter, until the loan is paid in full, one-twelfth (1/12) of the annual taxes assessed against said premises, as estimated by Lender, or such other amounts as may from time to time be estimated by Lender, to be applied by Lender to or towards the payment of such taxes and assessments. In case the aggregate amount so deposited with Lender is, at any time, insufficient to pay in full any tax or assessment which may then become due, Borrower agrees to pay Lender, on demand, the amount of such deficiency. If such deposits by Borrower shall exceed the entire amount of said taxes and assessments payable for any year, the excess will either be credited against such taxes and assessments to be thereafter due on said premises, or returned to Borrower. Such deposits may be mingled with the general funds of Lender, and Lender shall not be liable for interest thereon. In the event of foreclosure of the Mortgage, such deposits may, in the discretion of the Lender, be applied toward the indebtedness to the extent they have not otherwise been used. Payments from such deposits for any

of the aforementioned purposes may be made by Lender, at its sole and absolute discretion, even though subsequent owners of the mortgaged premises may benefit thereby. The Borrower shall make a deposit under this paragraph at closing in an amount to be determined by Lender. The requirements of this paragraph can be waived at the option of Lender.

34. Environmental Site Assessment. Borrower hereby warrants that he has had an environmental site assessment performed by a reliable environmental consultant. Borrower has provided a true, complete and accurate copy of said environmental assessment to Lender. Borrower hereby represents and warrants that there is no evidence that toxic or hazardous substances have ever been manufactured, used, stored, handled, released or disposed of on the premises described in Schedule A annexed hereto. This representation does not include the use of substances commonly sold at retail and used for household purposes, such as cleaning compounds. Borrower also warrants that except as is disclosed in the report, there are no toxic or hazardous substances on or about the property.

Borrower further represents and warrants that there are no lawsuits or enforcement proceedings threatened or pending, relating to the environmental condition of the premises described in Schedule A. Borrower further warrants that there are no unsatisfied decrees or orders issued by any governmental authority with regard to the environmental condition of the premises described in Schedule A.

Borrower makes these representations and warranties knowing that Lender has relied thereon in making its decision to lend the funds evidenced by the note and secured by this Mortgage. A misrepresentation made by Borrower hereunder shall be an event of default under this Mortgage and the note.

IN WITNESS WHEREOF, this Mortgage has been duly signed and executed by the Mortgagor.

MORTGAGOR:

_____ [name]

By: _____

Printed Name: _____

Title: _____

[Attach Schedule A]



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Current Legal Forms for Real Estate

Chapter 25 ENVIRONMENTAL CONSIDERATIONS IN REAL ESTATE TRANSACTIONS

Part IV. FORMS

B. REAL ESTATE LOANS

33-25 Current Legal Forms for Real Estate FORM 25.91

FORM 25.91 Commercial mortgage--office building--environmental indemnification granted by borrower in consideration of lender's waiver of environmental site assessment as a condition for receiving loan

COMMENT

This form includes a mortgage for use in financing an office building, but it can be easily modified for use in the financing of just about any other type of commercial real property, such as a factory, warehouse, etc.

The mortgage provides the lender with an environmental indemnification from the borrower. The indemnification is granted in consideration for the lender waiving a provision in its loan commitment letter requiring an environmental site assessment of the mortgaged property as a condition for receiving the loan.

FORM

MORTGAGE

THIS MORTGAGE, made the ____ [day] day of _____ [month] ____ [year], between _____ [name], residing at _____ [address], the Mortgagor, and the _____ [name], a banking corporation organized and existing under the laws of the State of _____ [state], with its principal place of business located at _____ [address], the Mortgagee:

WITNESSETH, that to secure the payment of an indebtedness in the sum of _____ Dollars (\$_____), lawful money of the United States, with interest thereon at the rate of _____ percent (_____%) per annum, all according to a certain bond, note or

obligation bearing even date herewith, the Mortgagor hereby mortgages to the Mortgagee:

ALL that certain plot, piece or parcel of land, with a six (6) story office building upon it, as well as any other buildings and improvements thereon erected, situated, lying and being in the City of _____ [city], County of _____ [county], State of _____ [state], more particularly bounded and described as Exhibit A.

TOGETHER with all right, title and interest of the Mortgagor in and to the land lying in the streets and roads in front of and adjoining said premises.

TOGETHER with all fixtures, chattels and articles of personal property, now or hereafter attached to or used in connection with said premises, including, but not limited to, furnaces, boilers, oil, burners, radiators and piping, plumbing and restroom fixtures, refrigeration, air conditioning and sprinkler systems, sinks, gas and electric fixtures, awnings, screens, window shades, elevators, dynamos, refrigerators, cabinets, incinerators, plants and shrubbery, and all other equipment and machinery, appliances, fittings and fixtures of every kind, in or used in the operation of the buildings standing on said premises, together with any and all replacements thereof and additions thereto.

TOGETHER with all awards heretofore and hereafter made to the Mortgagor for taking, by eminent domain, the whole or any part of said premises or any easement therein, which said awards are hereby assigned to the Mortgagee, who is hereby authorized to collect and receive the proceeds of such awards and to give proper receipts therefor, and to apply the same toward the payment of the mortgage debt, notwithstanding the fact that the amount owing thereon may not be then due and payable; and the said Mortgagor hereby agrees, upon request, to make, execute and deliver all assignments and other instruments sufficient for the purpose of assigning said awards to the Mortgagee, free, clear and discharged of any encumbrances of any kind or nature whatsoever.

AND the Mortgagor covenants with the Mortgagee as follows:

1. Payment of Debt. The Mortgagor will pay the indebtedness as hereinbefore provided.
2. Insuring the Property. The Mortgagor will keep the buildings on the premises: (A) insured against loss by fire for the benefit of the Mortgagee, and (B) insured against loss by flood if the premises are located in an area identified by any federal, state or local governmental entity having such jurisdiction as an area possessing special flood hazards; that he will assign and deliver the policies to the Mortgagee; and that he will reimburse the Mortgagee for any premiums paid for insurance by the Mortgagee upon the Mortgagor's default in so insuring the buildings or in so assigning and delivering the policies.
3. No Alteration, Removal or Demolition of any Building Without Permission. No building on the premises shall be altered, removed or demolished without the consent of the Mortgagee.
4. Default. The whole of said principal sum and interest shall become due at the option of the Mortgagee: after default in the payment of any installment of principal or of interest for _____ (_____) days; or after default in the payment of any tax, water rate, sewer rent, or assessment for _____ (_____) days after notice and demand; or after default, following notice and demand, either in assigning and delivering the policies insuring the buildings against loss by fire or in reimbursing the Mortgagee for premiums paid on such insurance, as hereinbefore provided; or after default upon request in furnishing a statement of the amount due on the mortgage and whether any offsets or defenses exist against the mortgage debt, as hereinafter provided.
5. Appointment of Receiver. The holder of this mortgage, in any action to foreclose it, shall be entitled to the appointment of a receiver.

6. Payment of Taxes, etc. The Mortgagor will pay all taxes, assessments, sewer rents or water rents, and when the Mortgagor is in default thereof, the mortgagee may pay the same.

7. Mortgagor to Provide Written Statement of Amount Due on Mortgage. The Mortgagor, within _____ (_____) days upon request in person, or within _____ (_____) days upon request by mail, will furnish a written statement, duly acknowledged, of the amount due on this mortgage and whether any offsets or defenses exist against the mortgage debt.

8. Notice and Demand or Request. The notice and demand or request may be in writing and may be served in person or by mail.

9. Warranty of Title. The Mortgagor warrants the title to the premises.

10. Insurance. The fire insurance policies required by Paragraph 2 hereof shall contain the usual extended coverage endorsement; that, in addition thereto, the Mortgagor, within _____ (_____) days after notice and demand, will keep the premises insured against war risk and any other hazard that may reasonably be required by the Mortgagee. All of the provisions of Paragraphs 2 and 4 hereof relating to fire insurance shall apply to the additional insurance required by this Paragraph.

11. Following Foreclosure, Property May be Sold in One or More Parcels. In case of a foreclosure sale, said premises, or so much thereof as may be affected by this mortgage, may be sold in one or more parcels.

12. Mortgagor to Pay Litigation Expenses of Mortgagee. If any action or proceeding be commenced (except an action to foreclose this mortgage or to collect the debt secured thereby), in which action or proceeding the Mortgagee is made a party, or in which action or proceeding it becomes necessary to defend or uphold the lien of this mortgage, all sums paid by the Mortgagee for the expense of any litigation to prosecute or defend the rights and lien created by this mortgage (including reasonable attorneys' fees), shall be paid by the Mortgagor, together with interest thereon at the rate of _____ percent (_____) per annum, and any such sum and the interest thereon shall be a lien on said premises, prior to any right or title to, interest in, or claim upon said premises attaching or accruing subsequent to the lien of this mortgage.

13. Assignment of Rents to Mortgagee. The Mortgagor hereby assigns to the Mortgagee the rents, issues and profits of the premises as further security for the payment of said indebtedness, and the Mortgagor grants to the Mortgagee the right to enter upon and take possession of the premises for the purpose of collecting the same and to let the premises or any part thereof, and to apply the rents, issues and profits, after payment of all necessary charges and expenses, on account of said indebtedness. This assignment and grant shall continue in effect until this mortgage is paid. The Mortgagee hereby waives the right to enter upon and to take possession of said premises for the purpose of collecting said rents, issues and profits, and the Mortgagor shall be entitled to collect and receive said rents, issues and profits until default under any of the covenants, conditions or agreements contained in this mortgage, and agrees to use such rents, issues and profits in payment of principal and interest becoming due on this mortgage and in payment of taxes, assessments, sewer rents, water rates, and carrying charges becoming due against said premises, but such right of the Mortgagor may be revoked by the Mortgagee upon any default, on _____ (_____) days' written notice. The Mortgagor will not, without the written consent of the Mortgagee, receive or collect rent from any tenant of the said premises or any part hereof for a period of more than one month in advance, and in the event of any default under this mortgage will pay monthly in advance to the Mortgagee, or to any receiver appointed to collect said rents, issues and profits, the fair and reasonable rental value for the use and occupation of said premises or such part thereof as may be in the possession of the Mortgagor, and upon default in such payment will vacate and surrender the possession of the said premises to the Mortgagee or to such receiver, and in default thereof may be evicted by summary proceedings.

14. Actions Resulting in an Acceleration of Payment of the Entire Principal Debt, Plus Interest. The whole of said principal sum and the interest shall become due, at the option of the Mortgagee:

(a) after Mortgagor's failure to exhibit to the Mortgagee, within _____ (_____) days after demand, receipts showing payment of all taxes, water rates, sewer rents and assessments;

(b) after the actual or threatened alteration, demolition or removal of any building on the premises without the written consent of the Mortgagee;

(c) after the assignment of the premises or any part thereof without the written consent of the Mortgagee;

(d) if the buildings on said premises are not maintained in reasonably good repair;

(e) after Mortgagor's failure to comply with any requirement, order or notice of violation of law or ordinance, issued by any governmental department claiming jurisdiction over the premises, within _____ (_____) months from the issuance thereof;

(f) if, on application of the Mortgagor, two or more fire insurance companies lawfully doing business in the State of _____ [state] refuse to issue policies insuring the buildings on the premises;

(g) in the event of the removal, demolition or destruction, in whole or in part, of any of the fixtures, chattels or articles of personal property covered hereby, unless the same are promptly replaced by similar fixtures, chattels and articles of personal property that are at least equal in quality and condition to those replaced, free from chattel mortgages or other encumbrances thereon and free from any reservation of title thereto;

(h) after _____ (_____) days' notice to the Mortgagor, in the event of the passage of any law changing in any way the taxation of mortgages or debts secured thereby for state or local purposes; or

(i) if the mortgagor fails to keep, observe and perform any of the other covenants, conditions or agreements contained in this mortgage.

Environmental provisions:

15. Definitions. The term "environmental laws" shall include all laws, statutes, regulations, ordinances, rules, decrees, orders or other requirements of any federal, state or municipal government authority with jurisdiction which relates to the quality of water, land, soils, air, fish, wildlife and other natural resources.

This shall include, but not be limited to, the Comprehensive Environmental Response, Compensation and Liability Act, 42 USC § 9601, *et seq.* ; the Resource Conservation and Recovery Act, 42 USC § 6901, *et seq.* ; the Clean Air Act, 42 USC § 7401, *et seq.* ; the Clean Water Act, 33 USC § 1251, *et seq.* ; the Hazardous Materials Transportation Act, 49 USC § 1801, *et seq.* ; the Toxic Substances Control Act, 15 USC § 2601, *et seq.* ; and _____ [insert here any relevant state environmental laws].

16. Uses of Property. Mortgagor covenants that he has taken all necessary or appropriate steps to review the prior owners and prior uses of the property. Mortgagor warrants that, to the best of his knowledge, the property has never been used for the production, storage, handling, transportation, or disposal of toxic or hazardous substances as defined in the environmental laws described above.

Mortgagor further covenants that, during the term of the loan, he will not allow or suffer any use of the property for the

production, storage, handling, transportation, disposal, or other use involving toxic or hazardous substances as defined above.

As used herein, the terms "toxic substances" or "hazardous substances" shall not include ordinary substances sold at retail for cleaning or other "household" uses.

17. Compliance with laws. Mortgagor covenants that there are no existing violations of environmental laws in, on, or about the subject premises. There are no outstanding orders or decrees of any court or agency regarding any violation of any environmental laws in, on, or about the subject premises. There are no lawsuits or compliance proceedings pending or threatened regarding the subject premises. Mortgagor has obtained all required permits of any nature for the operation of the business located on the subject premises. Mortgagor and the premises are in full compliance with the terms of such permits.

Mortgagor further covenants that he will not allow or suffer any violation of any environmental law as it relates to the premises or the business operated thereon. Mortgagor will keep in full force and effect all required permits and will timely seek extensions or renewals thereof. Mortgagor will maintain the premises and operate the business in full compliance with the terms of such permits during the entire term of this loan.

Mortgagor covenants that he will provide Mortgagee with notice within twenty-four (24) hours of receiving any information which indicates that there is any: (1) violation of any environmental law; (2) a threatened revocation or non-renewal of any permit; (3) an order or decree of violation; (4) a lawsuit threatened or commenced regarding environmental conditions on the premises. Failure to do so will be a violation of this Agreement.

18. Change in Use. Mortgagor covenants that he will not suffer or permit a change in the current use of the property without the permission of Mortgagee. Mortgagee agrees not to unreasonably withhold permission. However, Mortgagee reserves the right to condition such permission on the continued effectiveness of the provisions of this Agreement and on any further assurances which Mortgagee may reasonably require to protect Mortgagee against any potential liability for the occurrence of any adverse environmental event which may jeopardize the viability of Mortgagee's security.

19. Right to Inspect. Mortgagor grants Mortgagee, its agents, employees and officers, permission to enter upon the premises at all reasonable hours for the purpose of inspecting the premises. Mortgagor further grants Mortgagee and its agents permission to perform tests on the premises as deemed necessary or appropriate to ascertain whether Mortgagor is in full compliance with the terms of this Agreement.

20. Indemnification. Mortgagor shall indemnify and hold Mortgagee harmless for any fines, claims, judgments, expenses, costs of remediation, or other liability, including legal fees and other costs of defense, for injury to person or property which results from or arises out of the failure of Mortgagor, any of Mortgagor's predecessors in title, or any tenants or occupants, to fully perform their obligations under any environmental law as defined above.

21. Survival. The provisions of this Agreement shall survive any sale, conveyance, or other transfer of the premises, whether voluntary or involuntary, including a transfer after the foreclosure of the mortgage. The provisions of this Agreement shall be extinguished only upon full payment of the debt secured by the mortgage, which is a lien on Mortgagor's premises, without an event of default having occurred. Under the terms of the said Note and Mortgage, Mortgagee shall provide a release at that time.

22. Disclaimers. Nothing contained herein shall be deemed to render Mortgagee "in control" of the premises as that term is defined in the environmental laws.

23. Environmental Site Assessment. The provisions of this indemnification are in consideration of Mortgagee waiving the requirement contained in its commitment letter for an environmental site assessment.

This mortgage may not be changed or terminated orally. The covenants contained in this mortgage shall run with the land and bind the Mortgagor, the heirs, personal representatives, successors and assigns of the Mortgagor and all subsequent owners, encumbrancers, tenants and subtenants of the premises, and shall inure to the benefit of the Mortgagee, the personal representatives, successors and assigns of the Mortgagee, and all subsequent holders of this mortgage.

IN WITNESS WHEREOF, this Mortgage has been duly signed and executed by the Mortgagor.

MORTGAGOR:

_____ [name]

By: _____

Printed Name: _____

Title: _____

STATE OF _____ [state])
COUNTY OF _____ [county]) SS:

BEFORE ME, a Notary Public in and for said County and State, personally appeared _____ [name], a(n) _____ [state] _____ [entity], by _____ [name], its _____ [title], who acknowledged that _____ [he/she] did sign the foregoing instrument for and on behalf of said corporation, being thereunto duly authorized, and that the same is [his/her] free act and deed individually and as such officers and the free act and deed of said _____ [entity].

IN TESTIMONY WHEREOF, I have hereunto set my hand and official seal at _____ [city], _____ [state], this _____ [day] day of _____ [month], _____ [year].

Notary Public

[Attach Exhibit A]

[Attach Exhibit B]



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B. REAL ESTATE LOANS

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FORM 25.92 Commercial mortgage--borrower's representation that environmental site assessment has been performed

COMMENT

This mortgage is a form which may be used to finance the purchase of commercial property, ranging from an office building or office complex to a factory, warehouse, retail store, etc.

One interesting feature of this mortgage is that it contains a "power of sale" provision. A mortgage may confer a power of sale upon the mortgagee (the lender) or any other person. With such a provision, in the event of a breach of the terms of the note or mortgage by the borrower, the person holding the power of sale can automatically sell the property pledged as security, rather than resorting to a court action for foreclosure of the mortgage.

In this document, the lender not only requires an environmental site assessment as a prerequisite for granting the loan, it also requires representations from the borrower that nothing has occurred since the assessment has been performed which might alter the conclusions of the environmental consultant. Clearly, the existence of an environmental hazard or other problem upon the mortgaged premises would reduce the value of the property. Depending on the nature and severity of the problem, the property may become utterly worthless if clean up costs exceed the fair market value of the property.

The mortgage further provides that the giving of false or misleading representations by the borrower is an event of default under the mortgage, giving rise to all the normal rights which a lender possesses upon the occurrence of any act of default.

FORM

MORTGAGE

THIS MORTGAGE, made this _____ [day] day of _____ [month] _____ [year], between _____ [name] (the "Mortgagor"), whose address is _____ [address], and _____ [name] (the "Mortgagee");

MORTGAGOR HEREBY mortgages to Mortgagee along with the power of sale, all that property located in the City of _____ [city], County of _____ [county], State of _____ [state], described as: _____ [set forth legal description of property] (the "Property"), together with rents, issues, and profits of the Property, subject, however, to the right, power, and authority given to and conferred upon Mortgagee to collect and apply these rents, issues, and profits.

FOR THE PURPOSE OF SECURING:

1. The payment of the indebtedness evidenced by a promissory note of this date, executed by Mortgagor in favor of Mortgagee in the original principal amount of _____ Dollars (\$_____) (the "Note");
2. The payment of any additional sums and interest that may hereafter be loaned to Mortgagor or _____ [his or her] successors or assigns by Mortgagee, when evidenced by another note or notes reciting that it or they are secured by this Mortgage; and
3. The performance of each agreement contained in this Mortgage.

TO PROTECT THE SECURITY OF THIS MORTGAGE, MORTGAGOR AGREES:

1. **Maintenance and Repair.** To keep the Property in good condition and repair; not to remove or demolish any buildings on the Property; to complete or restore promptly and in good and workmanlike manner any building that may be constructed, damaged, or destroyed on the property; to pay when due all claims for labor performed and materials furnished for the Property; to comply with all laws affecting the Property or requiring any alterations or improvements to be made on the Property; not to commit or permit waste of the Property; not commit, suffer, or permit any act upon the Property in violation of law; and to cultivate, irrigate, fertilize, fumigate, prune, and do all other acts that from the character or use of the Property may be reasonably necessary.
2. **Fire Insurance.** To provide, maintain, and deliver to Mortgagee fire insurance satisfactory to, and with loss payable to, Mortgagee. The amount collected under any fire or other insurance policy may be applied by Mortgagee to any indebtedness secured by this Mortgage and in any order determined by Mortgagee, or at the option of Mortgagee the entire amount so collected or any part of that amount may be released to Mortgagor. This application or release shall not cure or waive any default or notice of default under this Mortgage or invalidate any act done pursuant to such a notice.
3. **Defense of Security.** To appear in and defend any action or proceeding purporting to affect the security of this Mortgage or the rights or powers of Mortgagee, and to pay all costs and expenses, including cost of evidence of title and attorneys' fees in a reasonable sum, in any such action or proceeding in which Mortgagee may appear, and in any suit brought by Mortgagee to foreclose this Mortgage.
4. **Payment of Liens and Taxes.** To pay, at least _____ (_____) days before delinquency, all taxes and assessments affecting the Property, including assessments on appurtenant water stock; all encumbrances, charges, and liens, with interest, on the Property or any part of the Property, which appear to be prior or superior to this Mortgage; and all costs, fees, and expenses of this Mortgage.

If Mortgagor fails to make any payment or to do any act as provided in this Mortgage, then Mortgagee may (but is not obligated to) make the payment or do the act in the required manner and to the extent deemed necessary by Mortgagee to protect the security of this Mortgage. The performance by Mortgagee of such an act shall not require notice to or demand upon Mortgagor and shall not release Mortgagor from any obligation under this Mortgage. Mortgagee shall also have the following related rights and powers: to enter upon the Property for the foregoing purposes; to appear in and defend any action or proceeding purporting to affect the security of this Mortgage or the rights or powers of Mortgagee; to pay, purchase, contest, or compromise any encumbrance, charge, or lien that, in the judgment of either, appears to be prior or superior to this Mortgage; to employ counsel; and to pay necessary expenses and costs, including attorneys' fees.

5. Reimbursement of Costs. To pay immediately and without demand all sums so expended by Mortgagee, with interest from date of expenditure at the amount allowed by law in effect at the date of this Mortgage, and to pay any amount demanded by Mortgagee (up to the maximum allowed by law at the time of the demand) for any statement regarding the obligation secured by this Mortgage.

6. Condemnation Award. Any award of damages in connection with any taking or condemnation, or for injury to the Property by reason of public use, or for damages for private trespass or injury to the Property, is hereby assigned and shall be paid to Mortgagee as further security for all obligations secured by this Mortgage. Upon receipt of such proceeds, Mortgagee may hold the proceeds as further security, or apply or release them in the same manner and with same effect as provided in this Mortgage for the disposition of proceeds of fire or other insurance.

7. Waiver of Late Payments. By accepting payment of any sum secured by this Mortgage after its due date, Mortgagee does not waive its right either to require prompt payment when due of all other sums so secured or to declare default for failure to pay any indebtedness secured by this Mortgage.

8. Mortgagee's Powers. At any time and from time to time, Mortgagee may (a) release any part of the Property from this Mortgage; (b) consent to the making of any map or plat of the Property; (c) join in granting any easement on the Property; or (d) join in any extension agreement or any agreement subordinating the lien or charge of this Mortgage. Mortgagee need not provide Mortgagor with notice before taking any of the foregoing actions, and shall not be liable for the proper performance of the act. The exercise by Mortgagee of any of the foregoing powers shall not affect: the personal liability of any person for payment of the indebtedness secured by this Mortgage; or the lien of this Mortgage on the remaining property as security for the repayment of the full amount secured by this Mortgage.

9. Certificate of Discharge. When all sums secured by this Mortgage have been paid in full, the lien created by this Mortgage shall cease and become void, and Mortgagee shall cause a certificate of discharge to be entered of record stating that all sums secured by this Mortgage have been fully paid, satisfied, and discharged, and that the Property has been released from the lien of this Mortgage. At that time, Mortgagee shall also cancel the note secured by this Mortgage and shall return this Mortgage and the Note to Mortgagor.

10. Assignment of Rents. As additional security, Mortgagor hereby gives to and confers upon Mortgagee the right, power, and authority, during the continuance of this Mortgage, to collect the rents, issues, and profits of the Property, but reserves the right, prior to any default by Mortgagor in payment of any indebtedness secured by this Mortgage or in the performance of any agreement under this Mortgage, to collect and retain these rents, issues, and profits as they become due and payable. Upon any such default, Mortgagee may, without notice and without regard to the adequacy of the security for the indebtedness secured by this Mortgage, either personally or by agent or court-appointed receiver, do the following: enter upon and take possession of the Property or any part of the Property; sue for or otherwise collect all rents, issues, and profits, including those past due and unpaid; and apply these rents, issues, and profits, less costs and expenses of operation and collection (including reasonable attorneys' fees), to any indebtedness secured by this Mortgage in any order determined by Mortgagee. The exercise of the foregoing rights by Mortgagee shall not cure or

waive any default or notice of default under this Mortgage or invalidate any act done pursuant to such a notice.

11. Default and Foreclosure. Upon default by Mortgagor in payment of any indebtedness secured by this Mortgage or in the performance of any obligation under this Mortgage, Mortgagee may declare all sums secured by this Mortgage immediately due and payable by instituting legal proceedings for judicial foreclosure of this Mortgage, in which case the net proceeds from the sale, under the direction and decree of a court of competent jurisdiction, shall be applied to the indebtedness secured by this Mortgage.

As an alternative to court foreclosure, upon such a default, Mortgagee may declare all sums secured by this Mortgage immediately due and payable by recording a written notice of default. After the required time period has lapsed following the recordation of the notice of default, and after notice of sale has been given as required by law, Mortgagee, without demand on Mortgagor, shall sell the Property at the time and place specified in the notice of sale, either as a whole or in separate parcels, and in any order determined by Mortgagee, at public auction to the highest bidder for cash in lawful money of the United States, payable at the time of sale. Mortgagee may postpone sale of all or any portion of the Property by public announcement at the time and place of sale, and from time to time thereafter may postpone the sale by public announcement at the time fixed by the preceding postponement. Mortgagee shall deliver to the purchaser at the auction its deed conveying the Property sold, but without any covenant or warranty, express or implied. The recital in the deed of any matter or fact shall be conclusive proof of the truthfulness of the recital. Any person, including Mortgagor or Mortgagee, may purchase at the sale.

After deducting all costs, fees, and expenses of Mortgagee under this paragraph, including costs of procuring evidence of title incurred in connection with the sale, Mortgagee shall apply the proceeds of sale to payment of: all sums expended under the terms of this Mortgage, not then repaid, with accrued interest at the amount allowed by law in effect at the date of this Mortgage; all other sums then secured by this Mortgage; and the remainder, if any, to the person or persons legally entitled to the remaining proceeds.

12. Environmental Provisions. Mortgagor hereby represents that it has caused a phase I environmental site assessment to be performed by _____ [name], which report is dated _____ [month] _____ [day] _____ [year] (the "Report"), that a true and accurate copy of the Report has been delivered to Mortgagee; that Mortgagor is aware of no facts and circumstances which would change the conclusions contained in the Report; that no changes in use of the premises have occurred since the environmental site assessment was performed; that Mortgagor makes these representations to induce Mortgagee to loan the above sum. The Mortgagor acknowledges that any false or misleading representation contained herein shall be deemed an incident of default and shall entitle Mortgagee to exercise its remedies for default hereunder and any other remedies which Mortgagee may have at law or in equity.

13. General Provisions. This Mortgage applies to, inures to the benefit of, and binds all parties to this Mortgage and their heirs, legatees, devisees, administrators, executors, successors and assigns. In this Mortgage, whenever the context so requires, the masculine gender includes the feminine and/or neuter, and the singular number includes the plural.

The undersigned Mortgagor requests that a copy of any notice of default and of any notice of sale under this Mortgage be mailed to Mortgagor at the Mortgagor's address set forth above.

[Add following clause if mortgage is a purchase money mortgage:]

The promissory note secured by this Mortgage is given as a part of the purchase price of the property.

[Insert the following if this mortgage is a junior mortgage (i.e., a second mortgage) on the property:]

14. Request for Notices of Default and Sale. Request is hereby made that a copy of any Notice of Default and a copy of any Notice of Sale under that Mortgage executed by _____ [name], as Mortgagor, and recorded on

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_____ [month] _____ [day] _____ [year], as Instrument No. _____ in Book _____, Page _____, Official Records of _____ [county] County, State of _____ [state], in which _____ [name] is named as Mortgagee, be mailed to:

_____ [name]
 _____ [address]
 _____ [address]

[**NOTICE:** A copy of any notice of default and of any notice of sale will be sent only to the address contained in this recorded request. If your address changes, a new request may be recorded.]

I signed this Mortgage on _____ [month] _____ [day] _____ [year].

MORTGAGOR:

_____ [name]

By: _____

Printed Name: _____

Title: _____

STATE OF _____ [state])
 COUNTY OF _____ [county]) SS:

BEFORE ME, a Notary Public in and for said County and State, personally appeared _____ [name], a(n) _____ [state] _____ [entity], by _____ [name], its _____ [title], who acknowledged that _____ [he/she] did sign the foregoing instrument for and on behalf of said corporation, being thereunto duly authorized, and that the same is [his/her] free act and deed individually and as such officers and the free act and deed of said _____ [entity].

IN TESTIMONY WHEREOF, I have hereunto set my hand and official seal at _____ [city], _____ [state], this _____ [day] day of _____ [month], _____ [year].

 Notary Public



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B. REAL ESTATE LOANS

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FORM 25.93 Residential note and mortgage--single family home

COMMENT

This form is a mortgage for a single-family residence. The document contains all of the standard provisions necessary to protect the lender's rights and investment and to clearly enunciate the borrower's duties. The document can be easily read and understood by members of the general public.

The mortgage imposes various responsibilities upon the borrower. Two of these responsibilities are of special importance. They are: (1) the duty to maintain the well, pump and other facets of the private water system that serves the mortgaged property in good working order; and (2) the duty to maintain the sewer line or septic system that serves the property in good working order.

If a borrower fails to properly maintain the well, pump, tanks and other features of a private water system serving the mortgaged premises, then the system might malfunction, leaving the structure without a source of clean water and, thus, uninhabitable until necessary repairs are completed. In the event of a subsequent foreclosure, the lender would be required to perform what could be extensive and costly repairs in order to make the property saleable. Accordingly, this mortgage requires the borrower to maintain the well, pump, and other features of the water system in good working order. Periodic inspections of the system are mandated, and other related duties are also imposed on the borrower.

Similarly, a private septic system (i.e., a "septic tank") or the sewer line connecting a structure to the municipal sewer pipes must be regularly and properly maintained. If the borrower does not maintain the septic system or the sewer line properly through periodic pumping or snaking, it may malfunction or become clogged, causing the structure to become uninhabitable until repairs are performed. The repair or replacement of a private septic system, or the repair or replacement of a

sewer line connecting the structure to the municipal sewer system, can be a very costly project. Thus, a lender, who might some day have to foreclose on the property and assume ownership and control of it, will want to take appropriate steps to require the borrower to maintain the septic system or the sewer line.

In the mortgage, the borrower covenants to maintain the sewer line or septic system in good working order during the term of the loan. The borrower also agrees to perform periodic inspections of the septic tank and leach fields or the sewer system in order to insure proper functioning. The form also imposes a number of other related responsibilities upon the borrower.

FORM

RESIDENTIAL MORTGAGE

This Mortgage, made this ____ [day] day of _____ [month] ____ [year], between BORROWER, _____ [name], who resides at _____ [address], and LENDER, _____ [name], which has its principal place of business at _____ [address].

1. Loan. Borrower has borrowed the sum of _____ Dollars (\$_____) from Lender today, _____ [month] ____ [day] ____ [year]. Borrower has given Lender a note which requires that sum to be paid in full by _____ [month] ____ [year]. The terms of the note are terms of this Mortgage.

2. Mortgage. Borrower grants to Lender all of the rights given by law to the holders of mortgages. This means that if Borrower fails to make the payments specified in the note, or if Borrower fails to keep any other promise contained in the note or mortgage, Lender can foreclose the mortgage. Foreclosure means that the property can be sold, and Borrower can be removed from the property.

3. Property. The property which Borrower mortgages is located at _____ [address]. The property contains a single-family residence. This property is also described in Schedule "A," which is attached to this Mortgage and is made a part hereof.

4. Other Rights. The rights given by Borrower to Lender include the rights to the building, water rights, gas, oil, and mineral rights, fixtures, and any other rights to which Borrower, as an owner of the property, has.

5. Payments:

A. Borrower promises to pay the amounts provided in the note.

B. Borrower promises to pay all taxes which are levied against the property, including, but not limited to, real property taxes, school taxes, water rents, sewer rents, street improvements, and special district taxes. Borrower, within _____ (_____) days, will provide copies of receipts for such taxes if Lender asks for them.

C. Lender may require that Borrower pay one-twelfth (1/12) of the estimated total annual taxes to Lender each month. Lender will hold those funds in escrow and use those funds to pay taxes as they become due. If Borrower has not paid enough or if the taxes increase, Lender may require an increase in the payments made to escrow.

If Lender advances its own funds to pay taxes, Lender may require Borrower to repay those funds immediately, together

with interest at the note rate.

D. Borrower will obtain homeowners' insurance which protects against loss from fire, flood and other hazards. Lender may require Borrower to pay sums into the escrow account for the insurance premiums.

Borrower will provide a copy of the insurance policy to Lender. The insurance policy will name Lender as "Mortgagee."

E. If any government agency or other entity authorized by law takes a part of the property and pays Borrower for the taking (for example, through an "eminent domain" proceeding), Borrower shall pay those sums to Lender. Lender will reduce the amount owed by those sums.

6. Borrower's Other Promises:

A. Borrower promises to keep the property and building in good condition and repair. Borrower will not demolish, move or change the building without Lender's permission.

B. Borrower will correct any violation on the property within _____ (_____) days after receiving a notice of violation from any governmental authority.

C. Borrower will give a written statement of the amount he owes within _____ (_____) days after receiving a request from Lender. Borrower will also include in the statement a list of any defenses or offsets to payment.

D. Borrower warrants that he owns the property free and clear of the rights of any other person.

E. Borrower will defend Lender's rights in the property.

F. Borrower will reside on the property.

G. Borrower will not collect more than one month's rent in advance of the due date from any tenant of the property.

H. Borrower covenants that it shall comply with and shall cause its agents, employees, tenants, licensees and occupants to comply with all federal, state and municipal laws, orders, ordinances, regulations, and policies as they apply to the premises described in Schedule "A" of this mortgage.

I. Borrower covenants to maintain the sewer system or septic system in good working order during the term of this loan. Borrower shall perform or cause to be performed periodic inspections of the septic tank and leach fields or the sewer system in order to insure proper functioning. Lender reserves the right to request copies of the inspection reports. Lender shall not request such reports more frequently than once per year during the term of this loan.

J. Borrower covenants to maintain the well, pump, and other appurtenances to the water system in good working order during the term of this loan. Borrower shall perform or cause to be performed periodic inspections of the water, well, pump, holding tank and pipes to insure proper water purity and proper functioning. Lender reserves the right to request copies of the inspection reports. Lender shall not request such reports more frequently than once per year during the term of this loan.

K. If Borrower fails to produce a report within _____ (_____) days after receiving a written request therefor, Lender may order such inspection at Borrower's sole expense. Payment for an inspection by Lender shall be due with the next regular monthly mortgage payment after the bill is received by Borrower. Failure of

Borrower to timely produce the inspection report or to reimburse Lender for its costs in obtaining such a report shall be an event of default under the terms of this mortgage. In such case, Lender shall be entitled to all the rights and privileges normally possessed by a Lender upon any act of default.

In the event that the inspection report indicates that repairs are necessary or appropriate, Borrower shall cause such repairs to be completed within _____ (_____) days after receipt of the inspection report. Failure to do so shall be an event of default under the terms of this mortgage. Borrower may request an extension of time of up to _____ (_____) days due to unfavorable weather conditions or ground conditions. Lender shall not unreasonably withhold its consent to such an extension. Upon completion of the repairs, Borrower shall provide Lender with proof thereof. In the event Borrower fails to complete the repairs, Lender may do so at Borrower's expense. Payment for repairs performed by Lender shall be due with the next regular monthly mortgage payment after the bill for repairs is received by Borrower. Failure to timely reimburse Lender shall be an event of default under the terms of this mortgage. In such case, Lender shall be entitled to all the rights and privileges normally possessed by a Lender upon any act of default. Nothing contained herein shall be deemed to require Lender to undertake any repairs or inspections.

Any expenses incurred by Lender under the provisions of this section shall be deemed to be secured by the lien of this mortgage, prior to any right or title to, or interest in, or claim upon, the premises attaching or accruing subsequent to this mortgage lien.

7. Lender's Rights:

A. Lender may inspect the property at any time. Lender will give reasonable notice of inspection to Borrower at the property's address.

B. Lender may require the entire balance of the note, including accrued interest, to be due and payable immediately if Borrower fails to keep any promise contained in the note or mortgage.

C. Lender may foreclose this Mortgage according to the procedures set by law if Borrower fails to keep any promises contained in the note or mortgage. In such case:

(1) The property may be sold in one parcel at the foreclosure sale.

(2) Lender may collect its costs of foreclosure from Borrower, including legal fees and disbursements. These costs shall be secured by the lien of this Mortgage.

(3) Lender may obtain a receiver of rents to collect rents from any occupants of the property, including Borrower. Borrower shall pay a reasonable charge to occupy the property. A receiver may be appointed without notice and without regard to the value of the property. The receiver may be paid a fee from the rents which he collects.

D. Lender may require Borrower to pay immediately all amounts due under the note, if Borrower sells or transfers the property to another person without Lender's written permission.

E. If Lender must defend its rights under the note or mortgage, Borrower will reimburse Lender, upon demand, for all costs and expenses, including legal fees.

F. If any law is changed so that Lender's rights are adversely affected, Lender may demand payment in full.

8. Other Provisions:

A. Any notices to be given to Borrower or Lender shall be in writing and sent to the above addresses. Either party may change the address by giving written notice.

B. This Mortgage may not be changed unless both Lender and Borrower agree to a change in writing.

C. This is [or: is not] a purchase money mortgage.

D. If Lender does not immediately enforce its rights under this Mortgage, Lender is not precluded from enforcing its rights later.

E. This Mortgage is governed by the laws of the State of _____ [state].

By signing this document, Borrower agrees to all of the terms contained in the note and mortgage.

BORROWER:

_____ [name]

By: _____

Printed Name: _____

Title: _____

[Attach Schedule A]



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B. REAL ESTATE LOANS

33-25 Current Legal Forms for Real Estate FORM 25.94

FORM 25.94 Residential assignment of proprietary lease--cooperative apartment--requirement that borrower must give notice to lender in the event of any environmental problem in the building or on the grounds

COMMENT

When one purchases a cooperative apartment or "unit," he does not actually own that unit; rather, he holds stock in the company which owns the property. In addition, he receives a proprietary lease to his unit. This is in contrast to a condominium unit, where the purchaser actually owns his unit and also has an ownership interest in the underlying property and in the common areas of the multi-unit dwelling (e.g., hallways, stairs, etc.).

Due to the unique nature of a cooperative apartment, a purchaser must finance his purchase by means of a note which is secured by the purchaser's assignment to the lender of the proprietary lease and his certificate of shares in the cooperative corporation.

The assignment takes the place of a mortgage in a typical financing transaction for the purchase of a cooperative apartment. The assignment agreement below contains a provision requiring the borrower to notify the lender promptly in the event that any one of a long list of adverse environmental conditions occurs or is discovered anywhere in the building or on the grounds.

FORM

ASSIGNMENT

Borrower, _____ [name], residing at _____ [address], for value received, hereby transfers and assigns to Lender, _____ [name], with its principal place of business at

_____, [address], all of Borrower's right, title and interest in and to a certain proprietary lease between Borrower, as tenant, and _____ [name] Cooperative Apartments, Inc., as Landlord, dated _____ [month] _____ [day] _____ [year].

1. This Assignment is made and delivered by Borrower as collateral security for payment of sums due and to become due under the terms of a certain promissory note in the amount of _____ Dollars (\$ _____), made by Borrower and delivered to Lender on _____ [month] _____ [day] _____ [year], together with interest thereon.

This Assignment shall remain in effect as long as the note shall remain unpaid in whole or in part.

2. Borrower warrants:

(A) that he has not executed any prior assignment of the proprietary lease;

(B) that he has not encumbered his rights under the proprietary lease;

(C) that he is the sole owner of the proprietary lease;

(D) that the proprietary lease is currently in full force and effect; and

(E) that Borrower is not in default under the terms of the proprietary lease.

3. Borrower promises:

(A) to perform all obligations under the proprietary lease promptly;

(B) to keep the property, known as unit number _____ of _____ [name] Cooperative Apartments, Inc., in good condition and repair;

(C) to refrain from further assignment of the proprietary lease while any part of the debt evidenced by the Note is unpaid;

(D) not to do any act which would impair Lender's rights under this Assignment; and

(E) not to voluntarily or involuntarily allow the termination of the proprietary lease.

4. Borrower waives the following:

(A) the right, if any, to direct the application of any security pledged to Lender, until the debt evidenced by the Note shall be paid in full; and

(B) any claims against Lender arising out of the exercise of Lender's rights under this Assignment, except for claims arising from Lender's willful misconduct or bad faith.

5. Borrower covenants that he will provide Lender with immediate notice upon learning of the occurrence or existence of an adverse environmental condition in the building in which Borrower's unit is located, or on the grounds upon which the building stands. An "adverse environmental condition" is defined as the discovery of asbestos, urea formaldehyde insulation, wood-boring insects, hazardous materials, unlawful emissions by the building's incinerator, and failure of the building's water or sewage systems. Borrower further promises to keep Lender informed of any steps taken by or on

behalf of _____ [name] Cooperative Apartments, Inc., to correct the adverse environmental condition.

6. Any notice required to be given to Borrower shall be in writing and sent by certified mail, return receipt requested, to the following address: _____ [address]. Any notice required to be given to Lender shall be in writing and sent by certified mail, return receipt requested, to the following address: _____ [address]. Notice shall be deemed given when received.

7. This Agreement contains the entire understanding of the parties, and there have been no representations made which are not contained herein.

8. This Agreement may only be modified by a written amendment signed by all parties. An oral modification shall not be binding on any party.

9. This Agreement shall be construed in accordance with the laws of the State of _____ [state].

10. Any failure by either party to enforce any right arising hereunder shall not be deemed a waiver of such right.

IN WITNESS WHEREOF, Borrower has executed this Assignment this ____ [day] day of _____ [month] ____ [year].

BORROWER:

_____ [name]

By: _____

Printed Name: _____

Title: _____



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Current Legal Forms for Real Estate

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Current Legal Forms for Real Estate

Chapter 25 ENVIRONMENTAL CONSIDERATIONS IN REAL ESTATE TRANSACTIONS

Part IV. FORMS

B. REAL ESTATE LOANS

33-25 Current Legal Forms for Real Estate FORM 25.95

FORM 25.95 Commercial or residential mortgage--acknowledgment by borrower that all inspections made by lender are for lender's sole benefit and may not be relied upon by borrower

COMMENT

The following mortgage may be used for financing the purchase of either commercial or residential real property.

This mortgage also contains a representation by the borrower acknowledging that all inspections made by the lender are for the lender's sole benefit and may not be relied upon by the borrower. (See Article II, Paragraph 2.10.) This provision is designed to protect the lender from claims by the borrower that the lender knew or should have known some fact about the mortgaged premises--and alerted the borrower of such fact--following the lender's inspection of the premises. Frequently, that "fact" is the existence of a serious environmental problem on the premises which escaped the borrower's notice during its own inspection of the premises. Lenders are often faced with suits by borrowers once the borrowers discover concealed environmental problems on the newly-purchased premises. In these suits, borrowers will claim that, had they been made aware of the problem by the lender, they would never have borrowed the money or purchased the property in the first place.

The types of inspections typically performed by lenders are far less thorough than those which *should* be performed by a purchaser. The reason is because the lender is primarily concerned with the overall value of the property in relation to the size of the requested loan. The borrower, on the other hand, is concerned--or, at least, should be concerned--about the habitability and usefulness of the property.

FORM

MORTGAGE

_____ [name] mortgages and warrants to _____ [name] _____ [describe the premises] to secure the repayment of _____ [recite the sum for which the mortgage is granted, or the notes or other evidence of debt, or a description thereof, sought to be secured, and the date of repayment], the said mortgage, being dated and duly signed, sealed, and acknowledged by the grantor, shall be deemed and held to be good and sufficient mortgage to the grantee, his or her heirs, assigns, executors, and administrators, with warranty from the grantor and his or her legal representatives, or perfect title in the grantor, and against all previous encumbrances.

ARTICLE I RECITALS

1.01 Execution and Delivery of Note. The Borrower has executed and delivered to the Lender a Note ("Note") bearing the same date as this mortgage, promising to pay to the Lender the principal sum of _____ Dollars (\$ _____) in lawful money of the United States of America. This money _____ [was or will be] advanced by the Lender to the Borrower, with interest on the principal sum at the rate of _____ percent (_____ %) per year according to the terms and conditions specified in the Note, any unpaid remaining balance provided for in the Note or in this Mortgage being due and payable on or before _____ [month] _____ [day] _____ [year]. The terms of the Note are incorporated into this Mortgage by this reference.

1.02 Mortgage of Property. In consideration of this loan, and as security for repayment to the Mortgagee of the principal, interest, and any other sums provided for in the Note and the Mortgage according to the terms and conditions of the Note and Mortgage, and as security for performance of the agreements and conditions contained in the Note and the Mortgage, the Borrower mortgages to the Lender the real estate described [as follows: _____ (give correct legal description of the property) or in Exhibit "A," which is attached to this Mortgage and made a part of it by this reference], together with the following:

- (a) All buildings and improvements erected or to be erected on the property;
- (b) All fixtures, appliances, machinery, equipment, and other articles of personal property at any time installed in, attached to, or situated on the real estate or in the buildings and improvements to be erected on the real estate, or used or intended to be used in connection with the real estate, or in the operation of the buildings and improvements, plant, business, or dwelling on the real estate, whether or not the personal property is affixed to the real estate;
- (c) All building materials, fixtures, building machinery, and building equipment delivered on site to the real estate during the course of, or in connection with, construction of the buildings and improvements;
- (d) All streets, alleys, passages, watercourses, easements, and covenants existing or to be created for the benefit of the Borrower or any subsequent owner or tenant of the mortgaged real estate over ground adjoining the mortgaged real estate, and all rights to enforce their maintenance;
- (e) All other rights, privileges, reversions, and remainders, and all the income, rents, and profits arising from them, and all other interests or rights of the Borrower in the real estate; and
- (f) The replacements or proceeds from the sale of any of the above.

All of the above-mentioned real estate, improvements, personal property, and other property and interests will be referred to in this instrument as the "Mortgaged Property."

[Add the following Paragraphs 1.03-1.06 if the mortgage is a junior mortgage:]

1.03 Prior Mortgage. This Mortgage is subject to the lien of a Mortgage between _____ [name] and _____ [name], dated _____ [month] _____ [day] _____ [year] and _____ [recorded or intended to be recorded] in the Office of the Recorder of Deeds of _____ [county] County, in the State of _____ [state], in deed record number _____ [number], page _____ [number], prior to the recording of this mortgage (the "Prior Mortgage").

1.04 Borrower's Obligations Under Prior Mortgage. The Borrower agrees to act as follows as long as the Mortgaged Property or any part of it is subject to the Prior Mortgage:

- (a) The Borrower will pay the principal, interest, and all other sums when due and payable under the Prior Mortgage no later than their due dates, and will comply with all of the other terms, covenants, and conditions of the Prior Mortgage.
- (b) The Borrower will produce for the Lender, on request, receipts or other evidence of payment satisfactory to the Lender with respect to all sums due under the Prior Mortgage.
- (c) The Borrower will not enter into any agreement or arrangement, without the prior written consent of the Lender, pursuant to which the Borrower is granted any forbearance or indulgence (as to time or amount) in the payment of any principal, interest, or other sums due under the Prior Mortgage.

1.05 Default Under Prior Mortgage. Any default by the Borrower under the Prior Mortgage, because of the failure to make a payment or otherwise to comply with the terms of the Prior Mortgage, constitutes a default under this Mortgage. Any failure by the Borrower to produce the receipts concerning the Prior Mortgage also constitutes a default under this Mortgage. It also constitutes a default under this Mortgage if the Borrower enters into an agreement contrary to the provisions of Paragraph 1.04, above. In the case of any default under this Mortgage, the Lender has the right, at its election, to declare the entire indebtedness secured by this Mortgage immediately due and payable, together with interest and other appropriate charges.

The Lender, at its election, and without notice to Borrower, may make any payments the Borrower has failed to make under the Prior Mortgage. The Lender is not obligated to make these payments. The Lender may add the amount of these payments to the principal debt secured by this Mortgage. Any payment by the Lender does not release the Borrower from the Borrower's obligations or constitute a waiver of the Borrower's default under this Mortgage.

1.06 Copies of Required Documents. If the Borrower is required to deliver tax receipts and insurance policies to the holder of the Prior Mortgage, the Borrower may deliver photocopies of those documents to Mortgagee within the times set forth in this Mortgage, although this Mortgage otherwise requires delivery of original documents to the LENDER.

ARTICLE II COVENANTS OF BORROWER

2.01 Warranty of Title. The Borrower has good and marketable fee simple title to the Mortgaged Property, free and clear of all liens, encumbrances, charges, and all other conditions except _____ [those exceptions shown on Lender's policy of title insurance issued with respect to the Mortgage by _____ [name of title insurer] or as shown on Exhibit "B," attached to this Mortgage].

2.02 Payment and Performance. The Borrower will pay to the Lender, in accordance with the terms of the Note and this Mortgage, the principal, interest, and all other sums, and will perform and comply with all the agreements, conditions,

covenants provisions, and stipulations of the Note and _____ [this Mortgage or the Construction Loan Agreement].

2.03 Maintenance of Mortgaged Property. The Borrower will not commit or permit the commission of waste in or about the Mortgaged property. The Borrower will not remove, demolish or structurally alter any building erected at any time on the Mortgaged Property, without the prior written consent of the Lender. The Borrower will not permit the Mortgaged Property to become vacant, deserted, or unguarded, and will maintain the Mortgaged Property in good condition and repair, reasonable wear and tear excepted. The Borrower will make, when necessary, all repairs of every nature.

2.04 Condemnation Awards. All awards made to the owners of the Mortgaged Property by any governmental or other lawful authorities for Mortgaged Property taken or damaged through exercise of eminent domain, or for any easement taken in the property, including any awards for changes of grade of streets, are assigned to the Lender, who is authorized to collect and receive the proceeds from the authorities and to give property receipts for those awards. The Lender will apply these payments (after deduction of attorneys' fees and other costs of collecting the funds) toward the payment of the amount owed on this Mortgage and the accompanying Note, even though the amount owed may not then be due and payable. The Borrower agrees, on request, to make any assignments or other instruments needed to assign the awards to the Lender, free and clear of any encumbrances. The Borrower agrees to give the Lender immediate notice of the actual or threatened commencement of any eminent domain proceedings affecting the Mortgaged Property, and will give the Lender copies of any papers served on the Borrower in connection with those proceedings. The Borrower will not make any settlement for damages sustained without the Lender's prior written approval, which approval will not be unreasonably withheld.

2.05 Insurance.

(a) The Borrower will keep the Mortgaged Property continuously insured, with extended coverage, against loss or damage by fire. The Borrower will also keep the property insured against such other hazards as the Lender may reasonably require.

(b) Without limiting the requirement above, the Borrower will, if requested by the Lender, maintain insurance as follows:

(1) Insurance against loss or damage to the Mortgaged Property by fire and any of the risks covered by insurance of the type now known as "fire and extended coverage." This insurance will be in the original amount of the Note, or in the amount of that percentage of the full replacement cost of all buildings and improvements erected on the property (exclusive of the cost of excavations, foundations, and footings below the lowest basement floor) required to satisfy any applicable coinsurance requirement in any policy, whichever is greater. This insurance will have no more than _____ Dollars (\$_____) deductible from the loss payable for any casualty. The policies of insurance carried in accordance with this Subparagraph will contain the "Replacement Cost Endorsement;"

(2) Comprehensive public liability insurance (including coverage for elevators and escalators, if any, on the Mortgaged Property and, if any construction of new improvements occurs after execution of this Mortgage, completed operations coverage for one year after construction of the improvements has been completed) on an "occurrence basis" against claims for personal injury. This coverage will include, without limitation, bodily injury, death, or property damage occurring on, in, or about the Mortgaged Property and the adjoining streets, sidewalks, and passageways;

(3) Workers' compensation insurance (including employer's liability insurance, if requested by the Lender) for all employees of the Borrower engaged on or with respect to the Mortgaged Property in an amount reasonably satisfactory to the Lender, or, if limits are established by law, in the legal amounts;

(4) During the course of any construction or repair of improvements on the Mortgaged Property, builder's completed value risk insurance against "all risks of physical loss," including collapse and transit coverage, during construction of such improvements, with deductibles not to exceed _____ Dollars (\$_____);

(5) Boiler and machinery insurance covering pressure vessels, air tanks, boilers, machinery, pressure piping, heating, air conditioning, elevator and escalator equipment, provided the Mortgaged property contains equipment of that nature, and insurance against loss of occupancy or use arising from any breakdown, in amounts reasonably satisfactory to the Mortgagee;

[If Mortgaged Property is for business or investment purposes, add the following:]

(6) Business interruption insurance and loss of "rental value" insurance for a period of _____ (_____) months in amounts satisfactory to the Lender;

[Continue with the following:]

(7) Such other insurance as may from time to time be reasonably required by the Lender against the same or other hazards.

(c) All policies of insurance required by the terms of this Paragraph will contain an endorsement or agreement by the insurer that any loss will be payable in accordance with the terms of the policy notwithstanding any act or negligence of the Borrower that might otherwise result in forfeiture of insurance. All policies will also contain an agreement by the insurer waiving all rights of set off, counterclaim, or deductions against the Borrower.

(d) All policies of insurance will be issued by companies and in amounts satisfactory to the Lender. All policies of insurance will contain a mortgagee clause in favor of the Lender, not subject to contribution, and a lender's loss payable endorsement for the benefit of the Lender, all in forms satisfactory to the Lender. The Borrower will furnish the Lender with a signed duplicate original policy with respect to all required insurance coverage. If the Lender consents to provide any of the required insurance through blanket policies carried by the Borrower and covering more than one location, the Borrower will furnish the Lender with a signed certificate of insurance for each policy setting forth the coverage, the limits of liability, the name of the carrier, the policy number, and the expiration date. At least _____ (_____) days prior to the expiration of each policy, the Borrower will furnish the Lender with evidence satisfactory to the Lender of the payment of premium and the reissuance of a policy continuing insurance in force as required by this Mortgage. All policies, including policies for any amounts carried in excess of the required minimum and policies not specifically required by the Lender, will be in a form satisfactory to the Lender, will be maintained in full force and effect, and will be assigned and delivered to the Lender, with premiums prepaid, as collateral security for payment of the indebtedness secured by this Mortgage. All policies will contain a provision that the policies will not be cancelled or materially amended (including any reduction in the scope or limits or coverage), without at least _____ (_____) days prior written notice to the Lender. If all or part of the insurance will expire, be withdrawn, or become void or unsafe by reason of the Borrower's breach of any condition, or become void or unsafe by reason of the value or impairment of the capital of any company in which the insurance may then be carried, or if for any reason whatever the insurance will be unsatisfactory to the Lender, the Borrower will place new insurance on the premises, satisfactory to the Lender.

(e) In the event the Borrower fails to provide, maintain, or deliver and furnish to the Lender the policies of insurance required by this Mortgage, the Lender may procure insurance for the risks, covering the Lender's interest. The Borrower will pay all premiums on insurance procured by the Lender promptly on demand. Until payment is made by the Borrower, the amount of all premiums, together with interest at a rate that will be _____ percent (_____) % per year higher than the rate specified in the Note, will be secured by this Mortgage.

(f) In the event of loss, the Borrower will give immediate notice to the Lender, and the Lender may make proof of loss if not made promptly by the Borrower. Each insurance company is hereby authorized and directed to make payment under the insurance, including return of unearned premiums, directly to the Lender instead of to the Borrower and the Lender jointly, and the Borrower appoints the Lender, irrevocably, as the Borrower's attorney-in-fact, to endorse any insurance draft. The Lender will have the right to retain and apply the proceeds of any insurance, at its election, to reduction of the indebtedness secured by this Mortgage, or to restoration or repair of the property damaged. If the Lender becomes the owner of any part of the Mortgaged Property by foreclosure or otherwise, the policies, including all rights, title, and interest of the Borrower under those policies, will become the absolute property of the Lender.

(g) Notwithstanding the provisions of Paragraph (e), in the event the Mortgaged Property is damaged by fire or other casualty covered by insurance, the Lender will make the insurance proceeds available to the Borrower for repair and reconstruction of the Mortgaged Property on the following terms and conditions:

(1) The work will be performed by a reputable general contractor satisfactory to the Lender pursuant to plans and specifications satisfactory to the Lender, in the exercise of reasonable business judgment.

(2) The insurance proceeds will be held in trust by the Lender (or by an escrow agent satisfactory to the Lender), to be disbursed periodically as the work progresses in amounts not exceeding _____ percent (_____ %) of the value of labor and materials incorporated into the work. The remaining _____ percent (_____ %) will be released to the Borrower on final completion of the work in accordance with the plans and specifications, and upon a receipt of a release of liens from all contractors and subcontractors engaged in the work.

(3) If the entire insurance proceeds are not used for restoration, the excess proceeds will be applied to the mortgage debt. If the cost of the work will exceed the insurance proceeds, the Borrower will deposit the amount of the excess with the Lender (or the escrow agent) to be disbursed prior to disbursement of the insurance proceeds.

(4) If the damage or destruction is such that the buildings on the Mortgaged Property are totally destroyed, this Paragraph (g) will not apply.

2.06 Taxes and Other Charges. The Borrower will pay all taxes, assessments, water and sewer rents, and other charges or claims assessed, levied, or filed against the Borrower, the Mortgaged Property, or the interest of the Lender in the Mortgaged Property, or that, by law, may have priority over the indebtedness secured by this Mortgage. These expenses will be paid when due and payable and before interest or penalties accrue. The Borrower will provide the Lender with receipts for payments of these amounts no later than the payment dates. If the Borrower, in good faith and by appropriate legal action, contests the validity or amount of any item, the Borrower may establish on its books or by deposit of cash with the Lender, as the Lender may elect, a reserve for the payment in an amount required by the Lender. If a reserve is established, the Borrower will not be required to pay the item or to produce the required receipts while the reserve is maintained and so long as the contest that operates to prevent collection has not been terminated or discontinued adversely to the Borrower, and is maintained and prosecuted with diligence.

2.07 Installments for Insurance, Taxes, and Other Charges. On written request by the Lender, the Borrower will include in the monthly payment of principal and interest, an amount equal to one-twelfth of the annual premiums for the fire and extended coverage insurance and the annual real estate taxes, water and sewer rents, special assessments, charges, or claims, and any other item that might become a lien on the Mortgaged Property prior to the lien of this Mortgage. From time to time, the Borrower will pay on demand to the Lender any additional sums necessary to pay taxes and other items, as estimated by the Lender. The amounts paid will be security for payment of taxes and other items and will be used in payment of those items if the Borrower is not otherwise in default under this Mortgage. No amount paid will be deemed to be trust funds but may be commingled with the general funds of the Lender, and no interest will be payable on the amounts. If, pursuant to any provision of this Mortgage, the whole amount of the unpaid principal debt becomes

due and payable, the Lender will have the right, as its election, to apply these funds against the entire indebtedness secured by this Mortgage. At the Lender's option, the Lender may waive, and after any waiver may reinstate, the provisions of this Paragraph requiring the monthly payments.

2.08 Security Agreement. This Mortgage constitutes a security agreement under the Uniform Commercial Code and creates a security interest in the personal property included in the Mortgaged Property. The Borrower will execute and file any financing statements or other security agreements the Lender may require to confirm the lien of this Mortgage with respect to the personal property. The Borrower will pay all costs of filing.

2.09 Compliance with Law and Regulations. The Borrower will comply with all laws, ordinances, regulations, and orders of all federal, state, municipal, and other governmental authorities relating to the Mortgaged Property.

2.10 Inspections. The Borrower acknowledges that Lender, through its officers, agents or employees, has made one or more inspections of the real property and premises which are subject to the lien of this mortgage. Such inspections have included appraisals and other inspections to determine, among other things, the size and condition of the land and structures contained thereon.

The Borrower acknowledges that these inspections were made for the sole benefit of Lender in making business decisions, including, but not limited to, whether to lend to Borrower and, if so, how much to lend. Said inspections were not made for Borrower's benefit. Borrower should not and shall not be entitled to rely on said inspections for its own purposes.

Lender, its officers, agents, and employees shall not be liable to Borrower, its heirs or assigns, for any claim for losses or damages based on any inspections of premises made at Lender's behest.

During the term of the loan, the Lender, and any person authorized by the Lender, will have the right at any time, on reasonable notice to the Borrower, to enter the Mortgaged Property at a reasonable hour to inspect and photograph its condition and state of repair.

2.11 Declaration of No Set-Off. Within _____ (_____) days after a request by the Lender, the Borrower will certify to the Lender, or to any proposed assignee of this Mortgage, in a duly acknowledged writing, the amount of principal, interest and other charges owing on the obligation secured by this Mortgage. The Borrower will also indicate whether there are any set-offs or defenses against the Mortgage.

2.12 Defaults and Right to Remedy. If the Borrower fails to pay taxes, assessments, water and sewer charges, other lienable claims (not including contested claims), or insurance premiums, fails to make necessary repairs, permits waste, or otherwise fails to comply with its obligations under the Mortgage, the Note, or any other document executed in connection with the Mortgage, then the Lender, at its election and without notice to the Borrower, has the right to make any payment or expenditure that the Borrower should have made, or that the Lender deems advisable, to protect the security of this Mortgage or the Mortgaged Property. Any payment by the Lender will not prejudice the Lender's rights or remedies under this Mortgage. All sums, as well as costs, advanced by the Lender pursuant to this Mortgage will be due immediately from the Borrower to the Lender, will be secured by this Mortgage, and will bear interest at _____ percent (_____%) per year in excess of the rate otherwise provided in the Note from the date of payment by the Lender until the date of repayment.

[If desired, add following provision to preclude personal liability of mortgagor:]

2.13 Personal Liability. It is expressly agreed that nothing in this Mortgage or the Note creates any personal liability on the Mortgagor to pay the Note, any interest that may accrue, or any other indebtedness that may arise under this Mortgage. The Mortgagee or any subsequent holders of the Note may look only to the security provided by this

Mortgage to enforce the payment of the indebtedness evidenced by the Note or this Mortgage.

ARTICLE III DEFAULT AND REMEDIES

3.01 Events of Default. Any of the following will constitute an "Event of Default:"

(a) Failure of the Borrower to pay any installment of principal or interest, or any other sum, on the date it is due under the Note or this Mortgage [*if appropriate, add: subject to any applicable grace period provided in the Note or in this Mortgage*];

(b) The Borrower's failure to perform any of the other agreements, conditions, or covenants in the Note, _____ [the Mortgage or the Construction Loan Agreements], or any other document executed in connection with the Mortgage [*add if desired: within _____ (_____) days after notice from the Lender. If the failure to perform cannot reasonably be cured within the _____ -day period, it will not be an Event of Default if the Borrower commences to cure nonperformance or noncompliance within the _____ -day period and diligently pursues performance or compliance to completion*]

(c) The entry of a decree by a court having jurisdiction over the Mortgaged Property with respect to the Borrower in an involuntary case under the federal bankruptcy laws, or any other applicable federal or state bankruptcy, insolvency, or similar laws;

(d) The appointment of a receiver, liquidator, custodian, trustee, (or similar official) for any substantial part of the Borrower's property;

(e) A court-ordered winding-up or liquidation of the Borrower's affairs;

(f) The commencement by the Borrower of a voluntary case under the federal bankruptcy laws or any other applicable federal or state bankruptcy, insolvency, or similar laws;

(g) The consent by the Borrower to the appointment of a receiver, liquidator, trustee, custodian, or similar official for any substantial part of the Borrower's property;

(h) The Borrower's making any assignment for the benefit of creditors, or the failure of the Borrower generally to pay its debts as they become due; or

(i) If a final judgment for the payment of money is rendered against the Borrower in an amount greater than _____ Dollars (\$ _____), and, within _____ (_____) days after the entry, the judgment has not been discharged or execution stayed pending appeal, or if, within _____ (_____) days after the expiration of any stay, the judgment has not been discharged.

[If debt is guaranteed by others, add:]

For purposes of this Paragraph 3.01, "the Borrower" means the party named as the Borrower in this Mortgage and all persons guaranteeing the Borrower's obligations to the Lender.

3.02 Remedies.

(a) If any Event of Default occurs, the entire unpaid balance of principal, accrued interest, and all other sums secured by this Mortgage will become immediately due and payable, _____ [*choose appropriate clause: at the*

option of the Lender on written notice to the Borrower or without further notice or demand].

(b) When the entire indebtedness becomes due and payable, because of maturity or because of any Event of Default, then the Lender may institute an action for mortgage foreclosure, or take any other action at law or in equity for the enforcement of this Mortgage and realization of the mortgage security that the law may allow. The Lender may proceed to final judgment and execution for the entire unpaid balance of the principal debt, with interest at the rate(s) stipulated in the Note, and all other sums due in accordance with the provisions of the Note and this Mortgage. This amount includes all sums that may have been loaned by the Lender to the Borrower after the date of this Mortgage, and all sums that may have been advanced by the Lender for taxes, water or sewer rents, other lienable charges or claims, insurance, repairs, maintenance, and all costs of the suit. The Borrower authorizes the Lender, at its option, to foreclose this Mortgage subject to the rights of any tenants of the Mortgaged Property. The Borrower will not assert the failure to make any tenants parties to the foreclosure proceedings as a defense to any proceedings instituted by the Lender to recover the indebtedness secured by this Mortgage or any deficiency remaining unpaid after the foreclosure sale. The mortgagor is not prevented from asserting in any proceedings disputing the amount of the deficiency or the sufficiency of any bid at the foreclosure sale that any tenants adversely affect the value of the Mortgaged Property.

(c) When the entire indebtedness becomes due and payable, because of maturity or because of any Event of Default, the Lender may enter into possession of the Mortgaged Property, with or without legal action. In the alternative, the Lender will be entitled to appointment of a receiver without regard to the solvency of the Borrower or any other person liable for the debt secured by this Mortgage, and regardless of whether the Lender has an adequate remedy at law. Either the Lender or a receiver may rent the Mortgaged Property for any period and on any terms and conditions that the Lender or receiver may see fit. The Lender or the receiver may collect rents, and, after deducting all costs of collection and administration expense, apply the net rentals to the payment of taxes, water and sewer rents, other lienable charges and claims, and insurance premiums, and to the maintenance, repair, or restoration of the Mortgaged Property, or to the reduction of the principal or interest, as the Lender or the receiver may elect. For that purpose, the Borrower assigns to the Lender all rentals due under any existing or future lease of the Mortgaged Property, as well as all rights and remedies provided in the lease or at law or in equity for the collection of the rentals. Any lease or leases entered into by the Lender or the receiver pursuant to this Paragraph 3.02 will survive foreclosure of the Mortgage and repayment of the debt, unless the lease provides otherwise.

[Add to give mortgagor power of sale:]

(d) When the entire indebtedness becomes due and payable, because of maturity or because of any Event of Default, the Lender has the power to grant, bargain, sell, release, and convey the premises with the appurtenances at public auction and to execute and deliver to the purchaser or purchasers good and sufficient deeds of conveyance as provided by law, and from the proceeds to retain all sums due according to this Mortgage and the Note, including the costs and charges of the sale, and the attorneys' fees provided by law, returning the surplus money, if any, to the Borrower, or the Borrower's successors or assigns.

[Continue with the following:]

(e) With respect to the personal property in which a security interest is granted, the Lender may exercise any of the rights of a secured party under this Mortgage, the Uniform Commercial Code, and any other applicable law. If the Lender is required to provide notice of a public or private sale, lease, or other disposition of the personal property, the notice may be personally delivered to the Borrower or may be deposited in the United States mail with the postage prepaid, at least _____ (_____) business days prior to the proposed action. This notice will constitute reasonable and fair notice to the Borrower of any action.

3.03 Attorneys' Fees. If the Lender becomes a party to any suit or proceeding affecting the Mortgaged Property, the lien created by this Mortgage, or the Lender's interest in the Mortgaged Property, or if the Lender engages counsel to collect

any of the indebtedness or to enforce performance of the agreements or covenants of this Mortgage or the Note, the Lender's costs, expenses, and reasonable attorneys' fees will be paid by the Borrower, on demand, with interest at the rate provided in the Note. Until paid they will be deemed to be part of the indebtedness evidenced by the Note and secured by this Mortgage.

ARTICLE IV ADDITIONAL PROVISIONS

4.01 Satisfaction of Mortgage. If the Borrower pays the Lender the principal sum and all other sums secured by this Mortgage in accordance with the provisions of the Note, then the Lender must provide Borrower with a release of mortgage or other evidence of satisfaction as requested by Borrower.

4.02 Assignment. Except as provided otherwise in this instrument, the Lender may assign this Mortgage, together with any and all notes or bonds representing the obligation of the Borrower to make payments, at any time without the prior consent of the Borrower. However, the Lender must give the Borrower actual notice of any assignment by certified mail, return receipt requested, before the due date of the next installment payment that is to be paid after the effective date of the assignment. *[If Borrower's obligation to make payments is to be evidenced by a negotiable instrument, add: The Lender also agrees to give the Borrower actual notice of any assignment or endorsement of the _____ (bond or note) that is being executed in connection with this Mortgage; the Lender must give this notice by certified mail, return receipt requested, _____ (_____) days before the effective date of the assignment or endorsement.]* Failure to provide the Borrower with any notice as required in this Paragraph 4.02 shall make the assignment *[if appropriate, add: or endorsement]* null, void, and of no legal effect. The Lender further agrees to indemnify and hold the Borrower harmless from any loss to any person incurred because of the Lender's failure to give the notices required by this Paragraph 4.02.

_____ *[If the mortgage is to provide for partial releases of the mortgaged property as the debt is repaid, add:]*

4.03 Partial Release of Property.

(a) The Lender agrees to release portions of the Mortgaged Property from the lien of this Mortgage, provided no Event of Default has occurred, on the following terms and conditions:

(1) The portions to be released will consist of _____ *[individual dwellings and the land on which they are constructed or separate sections of the Mortgaged Property, as identified on Exhibit "A"]*, and will be described in accordance with a recorded subdivision plan that is satisfactory to the Lender.

(2) Releases will only be made in connection with bona fide sales of dwellings to unrelated, individual purchasers.

(3) The Borrower will pay the Lender _____ *[for each dwelling and lot or for each section of the Mortgaged Property]* to be released, the amount set forth in a separate release schedule approved by the Borrower and the Lender, or the balance secured by this Mortgage, whichever is less.

(4) Each request for a release will include a field survey of the area to be released if the Lender so requests, a release instrument in form and substance satisfactory to the Lender, and a check for the appropriate amount.

(5) The Lender will not be obligated to deliver any release unless the real estate remaining subject to the lien of this Mortgage has a right of access to a public highway for vehicles and pedestrians and access to utility and service facilities for providing the whole or any part of the Mortgaged Property with water, sanitary sewer, storm sewer, electricity, gas, and street lighting services; and complies in all respects with applicable zoning and subdivision ordinances and all other requirements of law.

(6) All costs incident to the preparation and recording of release documents will be borne by the Borrower.

(b) The Lender agrees to join in any easement the Borrower may grant across or through any part of the real estate for streets, driveways, water, sewer, gas and electric facilities, storm drainage systems, telephone apparatus, and other public facilities that the Borrower may require in connection with development of the real estate in accordance with plans already submitted by the Borrower to the Lender. The lien of this mortgage will be subordinate to the rights granted pursuant to each easement.

[If financing the construction of dwellings, add:]

(c) As further security for the loan, the Borrower assigns to the Lender all of the Borrower's rights as seller (but none of the Borrower's obligations) under existing and future agreements of sale pertaining to individual dwellings, including deposits made by purchasers. The Lender will not be liable to any person for the proper application of such deposits by reason of the assignment of deposits unless the lender actually receives the deposits. The deposits will be escrowed with the Lender (or an escrow agent approved by the Lender) until settlement with the purchasers. Unless returned to the purchaser pursuant to the terms of the agreement of sale, the deposits will not be used for any purpose except reduction of the indebtedness secured by this Mortgage. The form of the agreements of sale will be subject to the approval of the Lender, and each signed agreement of sale will be accompanied by a minimum deposit of _____ percent (_____ %) of the sale price. The Borrower will not enter into any agreement of sale for dwellings that provides for a sale price less than that set forth in a current schedule of sales prices approved by the Lender. The Borrower will deliver to the Lender monthly statements indicating sales figures and deposits. The Borrower will certify these statements as being complete and correct.

[Select one of the following clauses relating to subsequent encumbrances on the property:]

4.04 Other Financing. The Borrower will not create or permit to exist any other lien on, or security interest in, any portion of the Mortgaged Property (including any furniture, fixtures, machinery, and equipment used in connection with the Mortgaged Property) *[if applicable, add: except the Prior Mortgage]*. The Borrower will not lease any furniture, fixtures, machinery, and equipment and will not incur any indebtedness to purchase any furniture, fixtures, machinery, and equipment, except as contemplated by this Mortgage, without the prior written consent of the Lender.

[OR:]

4.04 Other Financing. Provided that no Events of Default exist under its terms, this Mortgage will be subject to one or more _____ *[specify types of encumbrances, e.g., mortgages]* to be subsequently executed by the Borrower, and to be secured by the Mortgaged Property. This subsequent encumbrance will secure construction loans for the purpose of constructing improvements on the Mortgaged Property, provided:

(a) The total amount of all the construction loans shall not exceed _____ Dollars (\$_____).

(b) Any funds derived from any construction loan placed on any portion of the described property will be used only for the construction of improvements on the portion of the described property that the construction loan encumbers.

(c) No construction loan placed on any portion of the described property shall exceed _____ percent (_____ %) of the anticipated value of the portion of the described property after completion of the improvements that the construction loan was obtained to finance.

(d) No portion of any construction loan shall be used to pay loan fees, interest, or other charges not directly connected with the construction of improvements on the portion of the described property encumbered by the construction loan.

(e) No construction loan shall bear interest, exclusive of late charges, penalties, or fees payable in case of default, greater than _____ percent (_____) % each year.

(f) Each construction loan shall be payable over a period of not less than _____ (_____) months or more than _____ (_____) years.

(g) The total payments due on all construction loans shall not exceed _____ Dollars (\$_____) each month.

(h) Each construction loan shall be made by a bank, life insurance company, correspondent of a life insurance company, building and loan association, savings and loan association, or other institutional lender.

[OR:]

4.04 Other Financing. The Lender agrees that at the request of the Borrower, the Lender will execute an agreement subordinating this Mortgage to _____ [specify type or types of security instruments, e.g., a mortgage securing a construction loan] incurred against the Property, provided that the lien incurred complies with all of the following terms: _____ [specify purpose, principal amount, interest rate, and other important terms of liens that may become superior]. The Lender and the Borrower intend to subordinate this Mortgage when the Borrower incurs a lien that meets the requirements of this Paragraph 4.04, and the Lender will not unreasonably refuse to execute a subordination agreement when requested to do so by the Borrower.

4.05 Due-on-Sale Clause. Without the prior written consent of the Lender, the Borrower will not cause or permit any sale, exchange, transfer, lease, or conveyance ("transfer") of any part of the Mortgaged Property, or any interest in it, voluntarily or by operation of law _____ [other than leases in the ordinary course of the Borrower's business or other than leases of no more than _____ (_____) square feet of space]. If the Borrower is a corporation, any change in the ownership of the corporate stock of the Borrower or the issuance of additional stock that results in the transfer of control and management of the Borrower will be deemed to be a transfer of the Mortgaged Property within the meaning of this Article. If the Borrower is a partnership, any change in the ownership of partnership interests of the Borrower will be deemed to be a transfer of the Mortgaged Property within the meaning of this Article.

4.06 Financial Statements.

(a) As long as the debt secured by this Mortgage remains unpaid, the Borrower agrees to annually provide the lender with _____ [audited] statements prepared by a certified public accountant showing the annual income and expenses relating to the Mortgaged Property and a balance sheet for the Borrower. [Add if desired: Each annual report will be certified by _____ (an officer or a partner) of the Borrower as being true, correct, and complete.] Annual reports will be due on or before _____ [month] _____ [day] of each year, if the Borrower's books are kept on a calendar year basis, or on or before _____ (_____) days following the close of each fiscal year if the Borrower's books are kept on a fiscal year basis.

(b) Any parties guaranteeing the obligation of the Borrower will provide financial statements to the Lender on or before _____ [month] _____ [day] of each year while the guarantee is in effect. Each statement will include a balance sheet and be certified as true and correct by the guarantor.

4.07 Notices. All notices permitted or required under this Mortgage or the Note will be in writing and will be sent by

registered or certified mail, postage prepaid, addressed to the addressee at the address set forth in this Mortgage or in the Note, or at such other address as the addressee may designate in writing from time to time.

4.08 State Law to Apply. This mortgage shall be construed under and in accordance with the laws of the State of _____ [state].

4.09 Amendment. This Mortgage cannot be changed or amended except by agreement in writing signed by the party against whom enforcement of the change is sought.

4.10 Parties Bound. This Mortgage will be binding on and inure to the benefit of the parties and their respective heirs, personal representatives, successors, and assigns.

[If more than one person executes mortgage, add:]

4.11 Joint and Several Liability. All agreements, covenants, and other provisions affecting the Borrower will be joint and several, and will bind and affect all persons who are defined as "the Borrower" as fully as though all of them were specifically named wherever the word "Borrower" is used.

4.12 Interest Rate. Regardless of any provision in this Mortgage or in the Note, the Borrower's liability for interest will not exceed the limits imposed by the then applicable usury law. If any clause in the Note or this Mortgage requires interest payments in excess of the highest rate permitted by the then applicable usury law, the clause in question will be deemed to require payment at the highest interest rate allowed by that law.

4.13 Captions. The captions preceding the text of the paragraphs or subparagraphs of this Mortgage are inserted only for convenience of reference and will not constitute a part of this Mortgage, nor will they in any way affect its meaning, construction, or effect.

[If appropriate, add following paragraph regarding marital status:]

4.14 Marital Status. The marital status of the mortgagors executing this Mortgage is as follows _____
[state whether mortgagors are married or single].

Executed on _____ [month] _____ [day] _____ [year], at _____ [city], _____
[state].

MORTGAGOR:

_____ [name]

By: _____

Printed Name: _____

Title: _____

STATE OF _____ [state])
COUNTY OF _____ [county]) SS:

BEFORE ME, a Notary Public in and for said County and State, personally appeared _____ [name],
a(n) _____ [state] _____ [entity], by _____ [name], its
_____ [title], who acknowledged that _____ [he/she] did sign the foregoing
instrument for and on behalf of said corporation, being thereunto duly authorized, and that the same is [his/her] free act
and deed individually and as such officers and the free act and deed of said _____ [entity].

IN TESTIMONY WHEREOF, I have hereunto set my hand and official seal at _____ [city],
_____ [state], this _____ [day] day of _____ [month], _____ [year].

Notary Public

[Attach Exhibit A]

[Attach Exhibit B]



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Current Legal Forms for Real Estate

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Current Legal Forms for Real Estate

Chapter 25 ENVIRONMENTAL CONSIDERATIONS IN REAL ESTATE TRANSACTIONS

Part IV. FORMS

B. REAL ESTATE LOANS

33-25 Current Legal Forms for Real Estate FORM 25.96

FORM 25.96 Indemnity agreement for benefit of buyer and its lender

COMMENT

The following indemnity agreement relates to the purchase and sale of a division of a company. In order to allow the purchaser to obtain financing, the seller agreed to indemnify the buyer and its lender from all existing environmental conditions, whether known or unknown, at the time of sale. Presumably, without the agreement the purchaser could not have obtained financing and the seller could not have sold its division. The agreement is very broad for the benefit of the purchaser and the lender.

FORM

INDEMNITY AGREEMENT

For Benefit of Buyer and its Lender

This Indemnity Agreement ("Agreement") made as of this ____ [day] day of _____ [month], ____ [year], by and among _____ [name], a(n) _____ [state] corporation having its principal office at _____ [address] (the "Seller"), _____ [name] having its principal office located at _____ [address] (the "Buyer"), _____ [name], a(n) _____ [state] corporation having its principal office at _____ [address] (the "Holding"), _____ [name] (the "Lender"), having its principal office located at _____ [address].

WHEREAS, Buyer, Holding and Seller are entering into a certain asset purchase agreement of even date herewith (the

"Asset Purchase Agreement") wherein Seller desires to sell and Buyer desires to purchase certain assets currently owned by Seller pursuant to the terms of the Asset Purchase Agreement; and

WHEREAS, Lender is entering into a Loan and Security Agreement with the Buyer for the purpose of financing the Asset Purchase Agreement, of even date herewith; and

WHEREAS, as a condition of, and to induce the Buyer and Holding to enter into, the Asset Purchase Agreement, and to induce the Lender to enter into the aforementioned loan agreements (the "Loan Agreements"), the Seller hereby agrees to indemnify the Buyer and the Lender for certain environmental claims which may now exist or arise in the future by virtue of the ownership or operation by Seller or any of Seller's predecessors of the Property transferred or leased to the Buyer as of the date hereof (the "Transfer") or any other property at any time owned, occupied or otherwise utilized by Seller;

NOW THEREFORE, the aforementioned parties hereto agree as follows:

1. In consideration of the payment of _____ Dollars (\$ _____) and other good and valuable consideration, the receipt and sufficiency whereof are hereby acknowledged, the Seller hereby agrees to indemnify, save harmless and reimburse each indemnitee (as defined below), upon demand, from and against any and all losses, liabilities, expenses, disbursements, judgments, and damages (including without limitation, the costs of any response, removal, treatment or other remedial work) and any all actions, suits, proceedings, penalties, assessments and judgments, and any and all costs and expenses relating to the foregoing (including, without limitation, all legal fees and expenses, all fees and expenses of environmental consultants, site surveyors, and chemical analysts), of any and every kind of character, whether known or unknown at the time of the Transfer, suffered or incurred by an indemnitee by reason of, arising out of, or in connection with, any Environmental Claim (as defined below).

2. For purposes of this Agreement, the following terms shall have the meanings respectively ascribed below:

"Disposal" or "disposed" shall have the meaning specified in the Resource Conservation and Recovery Act, as amended, 42 U.S.C. P 6901, et seq. ("RCRA"), and "release" or "released" shall have the meaning specified in the Comprehensive Environmental Response, Compensation and Liability Act of 1980, as amended, 42 U.S.C. P 9601, et seq. ("CERCLA"); provided, in the event either CERCLA or RCRA is amended so as to broaden the meaning of any term defined thereby, such broader meaning shall apply subsequent to the effective date of such amendment and provided further, to the extent that the laws of the states of _____ [state] and _____ [state] establish a meaning which is broader than that specified in either CERCLA or RCRA, such broader meaning shall apply.

"Environmental Claim" shall mean any claim for loss or damage arising from (a) any Hazardous Materials (as defined below) ever owned, handled or ever utilized by Seller prior to the Transfer or any other environmental damage in existence prior to the Transfer (whether known or unknown at such time), or for personal injury, illness or death or damage to property arising out of any such Hazardous Materials, or environmental damage asserted by any person (including, without limitation, any government instrumentality or any corporation, partnership or other business entity, or any individual) relating to the Property or any other property ever owned, occupied or otherwise utilized by Seller; (b) any operation of the Seller (including, without limitation, Seller's operation of the Property or any other property ever owned, occupied or otherwise utilized by Seller) or any predecessor in interest, affiliate or subsidiary of the Seller, or any other person in connection with the business of the Seller, or any predecessor in interest, affiliate or subsidiary of such business or any predecessor in interest with respect to ownership of the Property or any other property ever owned, occupied or otherwise utilized by the Seller; (c) any presence, contamination, release or disposal of Hazardous Materials on, upon, from or onto the Property or any other property ever owned, occupied or otherwise utilized by Seller prior to the Transfer (whether known or unknown at such time); (d) any and all damage to real or personal property or natural resources and/or harm or injury to persons alleged to have resulted from the presence, contamination, release or disposal

of Hazardous Materials on or from the Property or any other property ever owned, occupied or otherwise utilized by Seller prior to the Transfer (whether known or unknown at such time); (e) any expense or cost related to the generation, transportation or disposal of Hazardous Materials on or from the Property or any other property ever owned, occupied or otherwise utilized by Seller prior to the Transfer; or (f) any claim or proceedings asserted by any person (including, without limitation, the U.S. Environmental Protection Agency, environmental protection authorities of the states of _____ [state] or _____ [state], or any other federal, state, local or municipal regulatory or administrative body) under public health, environmental protection or hazardous waste laws, rules, regulations, or ordinances or at common law with respect to Hazardous Materials on or emanating from the Property or any other property owned, occupied or otherwise utilized by Seller prior to the Transfer (whether known or unknown at such time).

"Hazardous materials" shall mean: (a) oil, flammable substances, explosives, radioactive materials, hazardous wastes or substances, toxic wastes or substances or any other materials or pollutants which pose a hazard to the Property or to persons on or about the Property or any other property ever owned, occupied or otherwise utilized by Seller, cause the Property to be in violation of any Law, or are now or hereafter defined as or included in the definition of "hazardous substances," "hazardous wastes," "hazardous materials," or "toxic substances," or words of similar import under any Law, including, but not limited to: (i) CERCLA; (ii) the Hazardous Materials Transportation Act; as amended, 49 U.S.C. P 1801, *et seq.*; (iii) RCRA; (iv) Toxic Substance Control act, as amended, 15 U.S.C. P 2601 *et. seq.*; (v) and any regulations adopted and publications promulgated pursuant to said laws; (b) asbestos in any form which is or could become friable, urea formaldehyde foam insulation, transformers, or other equipment or materials which contain or are contaminated with fluid containing levels of polychlorinated biphenyls equal to or greater than fifty (50) parts per million, and (c) any other chemical, material or substance, exposure to which is now or at any time hereafter prohibited, limited or regulated by any governmental authority.

"Indemnitee" shall mean collectively the Lender, Holding and the Buyer, any respective successor in interest thereto, and any of the Lender's, Holding's, and Buyer's subsidiaries, affiliates, shareholders, debt holders, employees, contractors, officers and agents.

"Law" shall mean any common law, federal statute, state statute, federal regulation, state regulation, federal or state order, or local code, rule or ordinance.

"Property" shall mean collectively (a) the Seller's facilities and property sold or leased to the Buyer and located at: _____ [address]; and (b) any other real or personal property being transferred to the Buyer under the Asset Purchase Agreement.

3. Demand may be made under Section 1 of this Agreement by or on behalf of any indemnitee at any time, and on any number of occasions and as often as the occasion therefore may arise.

4. For purposes of this Agreement, the presence of any Hazardous Materials identified at a site in detectable amounts by _____ [name] in its Pre-Acquisition Environmental Risk Assessment of Seller dated _____ [month] _____ [day] _____ [year] or in its Supplemental Environmental Site Assessment of Seller's dated _____ [month] _____ [day] _____ [year] ("Environmental Reports") in levels statistically equal to or less than those reported for such Hazardous Materials in the Environmental Report shall be conclusively presumed for a period of _____ (_____) years from the date hereof to have been in existence prior to the Transfer, and thereafter, the conclusive presumption shall become a rebuttable presumption. Hazardous Materials identified at a site in levels statistically greater than those reported at such site for such Hazardous Materials in the Environmental Reports shall be rebuttably presumed for a period of _____ (_____) years from the date hereof to have been in existence prior to the Transfer, and thereafter, the rebuttable presumption shall no longer apply. At any time should a Response Action lower the levels of Hazardous Materials identified in the Environmental Reports, the aforementioned conclusive and rebuttable presumptions shall no longer be based upon those

levels of Hazardous Materials identified in those Environmental Reports, but, instead, shall be based upon those levels of Hazardous Materials that result from said Response Action. For purposes of this Agreement, "statistically greater" shall be defined as concentrations greater than the highest concentration reported in the Environmental Reports plus _____ percent (_____ %). "Statistically equal to or less than" shall be defined as equal to or less than the highest concentration reported in the Environmental Reports plus _____ percent (_____ %).

5. Each amount payable by either the Seller or the Buyer hereunder shall (to the extent permitted by applicable law) bear interest from the date which is _____ (_____) days after the date on which such amount shall have been first been suffered or incurred by an Indemnitee or the Seller until the amount due is paid in full to such Indemnitee or to the Seller hereunder at the annual rate equal to the rate of interest announced from time to time by _____ [name] at its principal office located at _____ [address] as its Base Rate, plus _____ percent (_____ %).

6. (a) The Seller and the Buyer shall give each other and each of the other Indemnities prompt written notice of any formal or informal administrative inquiry, review, claim, demand, action or suit threatened or instituted against either the Buyer or the Seller, as the case may be, by reason of or in connection with any Environmental Claim. Buyer shall give notice to Seller and the other Indemnities prior to the commencement of any voluntary response action for which indemnification may be sought by Buyer hereunder.

(b) In addition, upon notice to or from the Indemnitee with respect to an Environmental Claim, the Seller shall:

(i) at the request of any Indemnitee, provide the Indemnitee either (A) security and/or a bond reasonably satisfactory to the Indemnitee or (B) "Financial Assurances" as defined in RCRA, in either case, sufficient to assure payment of any damages which might be suffered by the Indemnitee arising out of such matter (provided that, with respect to the Buyer, such assurances of payment need only be provided for damages in excess of the then outstanding principal amount of the promissory note issued to the Seller at the closing under the Asset Purchase Agreement); and

(ii) promptly notify each Indemnitee if it has retained outside legal counsel in connection with the defense of such Environmental Claim; and

(iii) keep fully informed and consult with all Indemnities in connection with the defense of any such Environmental Claim; and

(iv) pay all reasonable costs and expenses, including any professionals' fees and disbursements, incurred by any Indemnitee to determine whether Seller's financial assurances satisfy Seller's covenants as set forth in Section 6, above.

(c) Notwithstanding the foregoing, the Seller shall have the right, subject to the conditions set forth in Section 8, to direct any Response Action or its defense of any litigation which is the basis of any Environmental Claim brought against Seller, but Seller shall have no authority to settle or compromise any such matter if such settlement or compromise requires an admission of the wrongdoing of any Indemnitee or involves any significant risk of liability not fully indemnified by Seller hereunder, without the prior written consent of such Indemnitee.

7. (a) Each Indemnitee retains the right, which no Indemnitee has the obligation to exercise, to employ its own counsel and to participate in the defense of any Environmental Claim in the event that:

(i) the Seller does not satisfy the covenants set forth in Section 6 above to the reasonable satisfaction of such Indemnitee; or

(ii) such Indemnitee is named as a defendant or is alleged to be liable or potentially liable in connection with any

Environmental Claim.

(b) The Seller shall pay all reasonable costs and expenses (including professionals' fees and disbursements) incurred by any Indemnatee in connection with (a) above.

8. (a) Without in any way limiting the generality of the indemnity contained in Section 1 of this Agreement, to the extent that any event, condition, circumstances, activity, practice, incident, or action which forms the basis of an Environmental Claim hereunder (collectively "Prohibited Conditions") is determined to exist by any regulatory agency or court (the "Agency") and, to the extent a response is required by Law the Seller shall (i) promptly arrange for the repair, clean-up, detoxification or containment, as the case may be, of such Prohibited Condition (collectively, the "Response Actions"), and (ii) diligently pursue appropriate Response Action(s) to completion. Upon Seller's receipt of notice of a Prohibited Condition, Seller shall: (A) promptly arrange financial assurances as required under Section 6 and (B) notify all Indemnitees promptly in writing, but not later than _____ (_____) days after receipt of such notice, of Seller's intention to assume responsibility for a Response Action.

(b) The Seller reserves the right to retain independent legal counsel and to select a qualified professional engineering consulting firm (the "Consultant") as approved by the Indemnitees, such approval not to be unreasonably withheld, to review any Prohibited Condition identified by the Agency and to recommend what, if any, Response Actions are necessary and appropriate to comply with Laws and to provide adequate protection of human health and the environment from any Prohibited Condition. If the recommendation of the Consultant as to such matters differs from the recommendation of the Agency, the Seller may dispute the findings of the Agency, and pursue whatever rights the Seller have under law, provided that such actions will not result in a lien upon the Property or interfere with or have any adverse effect upon Buyer's business operations and plans.

(c) The Seller and the Buyer shall cooperate on the design and implementation of any Response Action; provided however, that the Seller shall control final design of any Response Action, provided that the Response Action:

(i) is agreed to by the Agency involved or, if Agency approval is not required, in the judgment of Indemnitees' consultant, is consistent with all applicable laws; and

(ii) does not unreasonably interfere with or adversely affect the operation of the plant facilities. In the event Agency approval is not required, Seller shall pay the fees and expenses of the Indemnitees' consultant (which shall be a qualified professional engineering firm selected by the Buyer and reasonably satisfactory to the Lenders) in its review of any proposed Response Action.

(d) Seller shall cause any Consultant performing a Response Action to purchase and maintain in force insurance policies which protect Buyer against all liability arising out of the acts or omissions of Consultant and any subcontractor retained to perform the Response Action, to the extent such liability insurance is customarily provided to contractors engaged in similar activities and is obtainable. Such insurance policies shall provide that they may not be modified, cancelled, or terminated without at least _____ (_____) days prior notice to the Buyer.

(e) All activities undertaken by Seller, its Consultant or subcontractors pursuant to this Agreement shall be undertaken in accordance with the requirements of any applicable Law and with the permits and approvals, if any, required for such activities. Buyer agrees to cooperate with Seller and its Consultant or subcontractors in obtaining any necessary permits.

(f) Seller agrees that all Response Actions implemented by it will be conducted in a manner that does not materially interfere with or otherwise adversely affect the Buyer's business operations, unless agreed to in advance and in writing by Buyer. Seller shall take all reasonable precautions necessary to prevent damage to the Property, and improvements and personal property thereon. Furthermore, Seller shall repair or replace all or any portion of assets damaged or

destroyed as a result of or in connection with a Response Action.

(g) In the event that Seller fails to perform or delays in the performance of its obligations hereunder, all costs, liabilities and expenses incurred by the Indemnitees in initiating and carrying out any Response Action shall constitute Environmental Claims to be fully indemnified by Seller hereunder.

9. (a) The Indemnitees acknowledge that an Environmental Claim as defined in this Agreement could be asserted as a result of the actions or failure to act on the part of the Buyer in its prospective compliance with Law. In order to induce the Seller to enter into this Agreement, Buyer hereby covenants it will use best efforts to comply with Laws applicable to the Property. In the event that the officers of the Buyer either knowingly or intentionally, or the Buyer through gross negligence, fails to comply with Laws and such failure results in the assertion of Environmental Claims, the Seller shall continue to remain liable for its indemnity obligations under this Agreement; provided, however, that following payment of Seller's indemnity obligations, Seller shall be entitled to reimbursement from the Buyer for the first _____ Dollars (\$ _____) of such indemnity payment in the case of a knowing and intentional noncompliance by offices of the Buyer or _____ Dollars (\$ _____) in the case of noncompliance resulting from gross negligence by the Buyer (such amounts in the aggregate not to exceed _____ Dollars (\$ _____), whether paid to one or more Indemnitees on one or more occasions) if the Environmental Claims giving rise to such indemnity payments would not have been asserted but for such knowing and intentional or grossly negligent failure to comply with Law. The Buyer and Seller agree that the Buyer's reimbursement obligation hereunder is reasonable in amount and that Buyer's reimbursement obligations shall satisfy Seller's claims against Buyer for such noncompliance of this section in lieu of any other remedies then available, provided however, nothing herein shall limit Seller's right of recovery against Buyer under any Law for any matter not constituting an Environmental Claim. With respect to any successor or assignee of Buyer under this Agreement, other than any Lender taking an interest in Buyer or its assets pursuant to a mortgage or security interest, the maximum amount of reimbursement which Seller may seek under this Section shall increase to _____ Dollars (\$ _____) in the case of knowing and intentional noncompliance by such successor's or assignee's officers, or their equivalent, and _____ Dollars (\$ _____) in the case of gross negligence, with the aggregate not to exceed _____ Dollars (\$ _____) with such limits applicable to any such successor to be based on _____ [year] dollars subject to annual increases for each year thereafter based on the Consumers Price Index for All Items and Major Group Figures for all Urban Consumers as published by the U.S. Department of Labor.

(b) The Buyer further covenants with the Seller as follows:

(i) From time to time (but no more frequently than semiannually except for good cause shown) upon not less than _____ (_____) hours prior notice from the Seller to the indemnitees, the Seller and the consultant shall be provided access to the Property during Buyer's normal business hours for purposes of monitoring the Buyer's compliance with all applicable Laws, including, but not limited to, the right to sample the air, water, soil, manufacturing by-products, waste, and such other materials related to the operation of the Property as may be reasonably appropriate for compliance verification purposes. The results of any such sampling or technical report shall be made available, without any representations or warranties as to their accuracy, to all Indemnitees subject to confidentiality restrictions set forth in Section 15 hereof. Any such action shall be taken at Seller's sole expense and shall be performed in a manner which does not unreasonably interfere with Buyer's operations.

(ii) The Seller and the Consultant shall be given such access to the Property as may be reasonably necessary to allow the Seller to perform Response Actions required under the terms of this Agreement, subject to the conditions specified herein.

10. All notices, requests, demands, and other communications which are required or permitted hereunder shall be delivered by hand or mailed by certified or registered mail or overnight courier to the Indemnitees' respective addresses

as specified below, and any such notice shall be deemed duly given when delivered or mailed in such a manner:

If to Seller, to: _____ [name]
 _____ [address]
 _____ [address]

With a copy sent contemporaneously to _____ [name] at the same address.

If to Buyer or Holding, to: _____ [name]
 _____ [address]
 _____ [address]

With a copy sent contemporaneously to _____ [name] at the same address.

If to Lender, to: _____ [name]
 _____ [address]
 _____ [address]

With a copy sent contemporaneously to _____ [name] at the same address.

11. This Agreement may be executed in several counterparts, each of which shall be deemed an original but all of which together shall constitute one and the same instrument. Any Indemnitee may assign this Agreement to any person, firm or entity which is a successor to any of its interest in the Property or Loan Agreements, and the Buyer may collaterally assign to any Lender a security interest in its rights hereunder, upon notice to, but without the consent of, Seller. This Agreement shall be binding upon and inure to the benefit of the parties hereto and their respective successors in interest and assigns by operation of law and or otherwise. This Agreement shall be deemed to be a contract entered into and made pursuant to the laws of the State of _____ [state] and shall be construed and interpreted in accordance to the laws of the State of _____ [state].

12. The invalidity, irregularity, or unenforceability of all or any part of the obligations hereunder of any security therefore shall not affect, impair, or be a defense to this Agreement or affect in any manner such liability arising hereunder. This Agreement shall be a continuing agreement, and without limiting the above, shall survive satisfaction of the conditions of the Asset Purchase Agreement, payment in full of all of the Buyer's obligations to the Lenders, whether now existing or hereafter incurred, and satisfaction of the conditions of the Loan Agreements entered into by the Buyer with the Lenders. The remedies of the Indemnitees hereunder are not intended to be exclusive of any other right or remedy now or hereafter existing under or existing at law, in equity, or by statute, any of which alone, or together, may be fully exercised by any Indemnitee.

13. Except as expressly provided in Section 14 hereof, no delay on the part of any Indemnitee in exercising any rights hereunder or failure to exercise the same shall operate as a waiver of such right. No notice to or demand on the Seller shall be deemed to be a waiver of any obligation of the Seller or of the right of the Indemnitee to take other or further action without notice or demand as provided herein. In any event, no modification or waiver of the provisions hereof shall be effective unless in writing and signed by the Indemnitee, nor shall any waiver be applicable except in the specific instance or matter for which given.

14. No failure by the Buyer to give any notice or observe any covenant required to be given or observed by it hereunder shall limit or impair the rights of any other Indemnitee against Seller under this Agreement; and such failure shall limit or impair the right of the Buyer hereunder only to the extent provided in Section 9(a) with respect to Buyer's failure to comply with Laws and only to the extent of actual monetary loss to Seller caused solely by Buyer's failure to comply

with any other provisions of this Agreement.

15. In order to ensure protection of confidentiality, the Indemnitees and Seller agree not to disclose to any third party (other than persons employed or retained by any Indemnatee or the Seller who are under a duty of confidentiality to such Indemnatee or the Seller) any information generated or prepared in connection with this Agreement including, but not limited to, reports, documents, records, graphs, charts or test results. Notwithstanding the foregoing, the Indemnitees and the Seller shall not be prohibited from disclosing information as required by Law or in response to any federal, state or local government directive or judicial order, or from using such information in connection with the assertion of or the defense of any litigation. To the extent allowed by Law, the Indemnitees and Seller agree to give notice to all parties under this Agreement of any such requests for disclosure of confidential information prior to submitting said information.

IN WITNESS HEREOF, each of the parties hereto has caused this Indemnity Agreement to be executed on its behalf, by its duly authorized officer, intending it to take effect as an instrument executed under seal, all as of the day and year first above written.

BUYER:

_____ [name]

By: _____

Printed Name: _____

Title: _____

SELLER:

_____ [name]

By: _____

Printed Name: _____

Title: _____

HOLDING:

_____ [name]

By: _____

Printed Name: _____

Title: _____

LENDER:

_____ [name]

By: _____

Printed Name: _____

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Title: _____

STATE OF _____ [state])
COUNTY OF _____ [county]) SS:

BEFORE ME, a Notary Public in and for said County and State, personally appeared _____ [name],
a(n) _____ [state] _____ [entity], by _____ [name], its
_____ [title], who acknowledged that _____ [he/she] did sign the foregoing
instrument for and on behalf of said corporation, being thereunto duly authorized, and that the same is
_____ [his/her] free act and deed individually and as such officers and the free act and deed of said
_____ [entity].

IN TESTIMONY WHEREOF, I have hereunto set my hand and official seal at _____ [city],
_____ [state], this _____ [day] day of _____ [month], _____ [year].

Notary Public

STATE OF _____ [state])
COUNTY OF _____ [county]) SS:

BEFORE ME, a Notary Public in and for said County and State, personally appeared _____ [name],
a(n) _____ [state] _____ [entity], by _____ [name], its
_____ [title], who acknowledged that _____ [he/she] did sign the foregoing
instrument for and on behalf of said corporation, being thereunto duly authorized, and that the same is [his/her] free act
and deed individually and as such officers and the free act and deed of said _____ [entity].

IN TESTIMONY WHEREOF, I have hereunto set my hand and official seal at _____ [city],
_____ [state], this _____ [day] day of _____ [month], _____ [year].

Notary Public

STATE OF _____ [state])
COUNTY OF _____ [county]) SS:

BEFORE ME, a Notary Public in and for said County and State, personally appeared _____ [name],
a(n) _____ [state] _____ [entity], by _____ [name], its
_____ [title], who acknowledged that _____ [he/she] did sign the foregoing
instrument for and on behalf of said corporation, being thereunto duly authorized, and that the same is [his/her] free act
and deed individually and as such officers and the free act and deed of said _____ [entity].

IN TESTIMONY WHEREOF, I have hereunto set my hand and official seal at _____ [city],
 _____ [state], this _____ [day] day of _____ [month], _____ [year].

 Notary Public

STATE OF _____ [state])
 COUNTY OF _____ [county]) SS:

BEFORE ME, a Notary Public in and for said County and State, personally appeared _____ [name],
 a(n) _____ [state] _____ [entity], by _____ [name], its
 _____ [title], who acknowledged that _____ [he/she] did sign the foregoing
 instrument for and on behalf of said corporation, being thereunto duly authorized, and that the same is [his/her] free act
 and deed individually and as such officers and the free act and deed of said _____ [entity].

IN TESTIMONY WHEREOF, I have hereunto set my hand and official seal at _____ [city],
 _____ [state], this _____ [day] day of _____ [month], _____ [year].

 Notary Public



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B. REAL ESTATE LOANS

33-25 Current Legal Forms for Real Estate FORM 25.97

FORM 25.97 Tenant--Estoppel Certificate for Loan Transaction

COMMENT

The attached form is an estoppel certificate which may be required by a lender in order to make a commercial loan. The certificate will provide the lender with assurances on many topics. Paragraph 6 of the certificate requires the tenant to certify that its activities on the property do not raise any environmental flags. Further, it requires the tenant to indemnify the lender for any misstatement. Most tenants would resist such an indemnity and would refuse to provide it unless it is specifically required by the lease.

FORM

TENANT -- ESTOPPEL CERTIFICATE FOR LOAN TRANSACTION

Attn: Mortgage Dept.

Re: Lease dated _____

by and between _____

Landlord and _____

as Tenant.

Premises: Approximately _____ square

feet of space in the buildings
 having an address at _____

Gentlemen:

The undersigned, as Tenant under the above captioned Lease, understands that you are about to make a loan (the "Loan") to the Landlord, to be secured by a mortgage and other instruments upon certain property of which the Premises are a part, and that, in connection with the making of the Loan, tenants of space in the subject property are being requested to certify and represent to you certain acts which are more specifically set forth below. Accordingly, the undersigned hereby certifies, warrants, represents and agrees as follows:

1. A true and complete copy of the captioned lease is attached, and is now in full force and effect, unmodified or altered in any way, except as follows: (NONE, unless otherwise stated) _____.

2. All improvements and space required to be furnished as part of the Premises under the Lease have been completed in accordance with the Lease, and, to the best knowledge of the undersigned, Landlord has fulfilled, and is not now otherwise in breach of, any of its obligations, warranties and representations, given in connection with the Lease.

3. The undersigned is in possession of the Premises, is in occupancy and is currently paying rent at the monthly rate of _____ Dollars (\$ _____), and the annual rate of _____ Dollars (\$ _____), which has been paid in full through _____ [month] _____ [day] _____ [year], only. The current term of the Lease expires on _____ [month] _____ [day] _____ [year]; there are _____ (_____) option(s) to renew for an additional term or term of _____ (_____) year(s) each. Amounts in addition to such rent are also payable under the Lease as provided therein. There are no offsets or credits against the rent payable under the Lease.

4. The undersigned has no notice or knowledge of the exercise of rights by the holder of any prior assignment, hypothecation or pledge of the Lease or the rents and other obligations due thereunder.

5. The undersigned has no notice or knowledge that any petition in bankruptcy has been filed by or against the undersigned, nor that the undersigned has been adjudicated a bankrupt or insolvent, nor that there has been a petition or answer filed by or against the undersigned seeking or acquiescing in any reorganization, arrangement, composition, readjustment, liquidation, dissolution or similar relief under any present federal, state or local law relating to bankruptcy, insolvency or other relief for debtors, nor that there has been a trustee, receiver or liquidator appointed for all or part of the assets and properties of the undersigned.

6. (a) The undersigned (i) is not presently engaged in nor does it presently permit, (ii) has not at any time in the past engaged in nor permitted, and (iii) has no knowledge that any third person or entity has engaged in or permitted, any operations or activities upon, or any use or occupancy of the Premises, or any portion thereof, for the purpose of or in any way involving the handling, manufacturing, treatment, storage, use, transportation, spillage, leakage, dumping, discharge or disposal (whether legal or illegal, accidental or intentional) of any hazardous substances, materials or wastes, or any wastes regulated under any local, state or federal law, except as may be set forth in detail on Exhibit A attached hereto.

(b) The undersigned is in full compliance with all applicable laws governing its operations and its use and occupancy of the Premises, including, without limitation, the handling, manufacturing, treatment, storage, disposal, discharge, use,

and transportation of hazardous or toxic substances, materials or wastes, and any materials or wastes regulated under any local, state or federal law.

(c) The undersigned has obtained, and is in full compliance with the terms and conditions of, all permits and licenses issued to it by any governmental authority on account of any or all of its activities on the Premises, and further, there has been no change in the facts or circumstances reported or assumed in the granting of such permits or licenses, or in the applications for such permits or licenses, and such permits and licenses are currently in full force and effect.

(d) There has not been committed by the undersigned or any other person involved with the undersigned or the Premises any action or omission affording the federal government or any state or local government the right and/or remedy of forfeiture as against the Premises or any part thereof or any monies paid in performance of the undersigned's covenants and agrees not to commit, permit or suffer to exist any act or omission affording such right and/or remedy of forfeiture.

(e) The undersigned hereby indemnifies and agrees to defend and save you harmless from, any and all loss, cost, liability and expense you may incur as a result of any misrepresentation of the facts set forth above in this paragraph 6, or resulting from the activities, fact or other matters, if any, set forth in Exhibit A attached hereto.

7. The undersigned hereby acknowledges your interest in and to the Lease, pursuant to that certain Assignment of Leases and Rents by which the Lessor's interest in and to the Lease was assigned to you. The undersigned agrees that no payment of rent or other sum due under the Lease shall be paid in advance of the due date thereof and that no modification, extension, or other amendment to the Lease shall be binding upon you without your prior consent as and to the extent required by the documents now or hereafter evidencing or securing the Loan Documents by written notice to the undersigned from you, the undersigned shall pay rent and other sums due Lessor under the Lease to or as directed by you as specified in such notice.

The undersigned makes the above certifications, representations, warranties and agreements with the understanding that you will rely thereon in making the Loan to Lessor.

Very truly yours,

LESSE:

_____ [name]

By: _____

Printed Name: _____

Title: _____

Dated: _____ [month] _____ [day] _____ [year]

EXHIBIT A

Hazardous Waste Activities, If Any
(if none, so state)



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33-25 Current Legal Forms for Real Estate FORM 25.98

FORM 25.98 Representation by borrower to lender of condition of premises

COMMENT

This form provides several alternative representations and warranties which may be made by a borrower concerning the condition of the premises that will secure the loan. The appropriate representation should be included in the mortgage document.

In its list of events that will trigger a default by the borrower, the mortgage should include: "any misrepresentation made by the borrower at the time the mortgage terms were negotiated or memorialized in writing, regarding the condition of premises." This provision would allow the lender to accelerate the debt and call the loan due and payable in full upon the lender's discovery of the misrepresentation. In the alternative, the lender could exercise any other options which it might have available to it under the mortgage terms, such as requiring the borrower to proffer substitute collateral or collecting the mortgage debt from guarantors.

FORM

Borrower hereby represents and warrants to Lender that Borrower knows of no state of facts or circumstances which would indicate that any adverse environmental condition exists on or about the premises described in Schedule "A," which is annexed to this mortgage.

"Adverse environmental condition" is defined as:

(1) the contamination of the soil, air or water (whether surface water or ground water) of the subject premises by hazardous substances or hazardous wastes; or

(2) the presence of hazardous substances or hazardous wastes which are stored upon the subject premises.

[Or:]

Borrower represents that he has caused a phase I environmental site assessment to be performed on the subject premises (described in Schedule "A," which is annexed to this mortgage) by a reputable environmental consulting firm. The results of the assessment showed no evidence of any adverse environmental condition on the property.

"Adverse environmental condition" is defined as:

(1) the contamination of the soil, air or water (whether surface water or ground water) of the subject premises by hazardous substances or hazardous wastes; or

(2) the presence of hazardous substances or hazardous wastes which are stored upon the subject premises.

[Or:]

Borrower represents that he has been the owner of the premises described in Schedule "A," annexed to this mortgage, for _____ (_____) years. During that time, no hazardous materials, as defined in the Comprehensive Environmental Response, Compensation and Liability Act, 42 USC § 9601 *et seq.*, the Resource Conservation and Recovery Act, 42 USC § 6901 *et seq.*, the Hazardous Materials Transportation Act, 49 USC § 1801 *et seq.*, or the Toxic Substances Control Act, 15 USC § 2601 *et seq.*, have been used, stored or disposed of on said premises.

[Or:]

Borrower represents that _____ (_____) drums of _____ [name], a substance considered to be hazardous, was stored on the subject premises (described in Schedule "A," which is annexed to this mortgage) for a period of _____ (_____) years. Those drums were intact when removed. The drums have been properly removed and disposed of in strict compliance with all federal, state and municipal laws, regulations and policies. Borrower knows of no other adverse environmental condition affecting the premises.

[Or:]

Borrower represents and warrants to Lender that:

(1) to the best of his knowledge, neither the premises described in Schedule "A," which is annexed to this mortgage, nor any adjacent property is currently being used or has been used for the storage, treatment, generation, transportation, processing, handling, production, or disposal of any hazardous substances as hereafter defined, or as a landfill or other disposal site;

(2) no storage tanks are now or have previously been located on the premises;

(3) all required permits have been obtained and are in full force and effect; and

(4) there are no proceedings, pending or threatened, which could result in damages or an order for remediation for any alleged violation of any environmental law.

As used herein, the term "hazardous substances" shall mean any substance described in the Comprehensive

Environmental Response, Compensation and Liability Act, *42 USC § 9601 et seq.*, the Resource Conservation and Recovery Act, *42 USC § 6901 et seq.*, the Hazardous Materials Transportation Act, *49 USC § 1801 et seq.*, or the Toxic Substances Control Act, *15 USC § 2601 et seq.*

[Whichever of the above representations is used, the following should also be added:]

Borrower makes the representations contained herein as part of the consideration for this loan from Lender. Any misrepresentation made by Borrower shall be an event of default under the terms of this mortgage. In the event Borrower has made a misrepresentation, Lender shall be entitled to enforce all rights and remedies regarding defaults under the terms of this mortgage.

[Attach Schedule A]



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FORM 25.99 Representation by borrower that condition of premises has not changed since first mortgage was executed

COMMENT

This form is intended for use when a second mortgage is executed on the subject premises. Alternatively, it may also be used as part of a refinancing document or loan modification agreement. In this form, the borrower represents to the lender that the condition of the mortgaged premises has not changed since the first mortgage was executed. The form presumes that, before the first mortgage was executed, an environmental site assessment was performed. The purpose of this form is to prevent the borrower from having to incur the large expense of ordering a second environmental site assessment of the subject premises when one has already been performed in the recent past--i.e., at the time the first mortgage was executed.

Before using this form, the lender should inquire about any new uses to which the property has been put since the environmental site assessment was performed. The lender should exercise great care before waiving a second environmental site assessment if it is unfamiliar with these new uses, since some of them may create a significant risk of environmental mishap.

For further comfort, the lender may wish to couple the use of this form with the use of Form 25.89, borrower's promise to remediate any environmental problem immediately.

FORM

Borrower represents to Lender that an environmental site assessment was performed prior to the execution and delivery of the first mortgage. Borrower has heretofore delivered to Lender a true and accurate copy of the results of that environmental site assessment. Borrower hereby represents that it knows of no events or facts which might cause a

change in the conclusions reached in the environmental site assessment.

Borrower further represents that no hazardous substances, as defined or designated by any federal, state or local law, regulation or policy, have been manufactured, used, stored, emitted or disposed of on the premises which are subject to the lien of this mortgage. In addition, Borrower represents that the condition of the premises and the uses to which the Borrower routinely puts the premises have not changed since the first mortgage was executed and delivered.



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33-25 Current Legal Forms for Real Estate FORM 25.100

FORM 25.100 Representation by borrower that it acknowledges that all inspections made by lender are for lender's sole benefit and may not be relied upon by borrower

COMMENT

This form may either be used independently as a separate agreement to be signed by the borrower at a mortgage closing, or it may be incorporated into the body of the mortgage itself.

The form is designed to protect the lender from claims by the borrower that the lender knew or should have known some fact about the mortgaged premises--and alerted the borrower of this fact--following the lender's inspection of the premises. Frequently, that "fact" is the existence of a serious environmental problem on the premises which escaped the borrower's notice during its own inspection of the premises. Lenders are often faced with lawsuits brought by borrowers once the borrowers discover concealed environmental problems on the premises. In these suits, borrowers will claim that, had they been made aware of the problem by the lender, they would never have borrowed the money or purchased the property in the first place.

The types of inspections typically performed by lenders are far less thorough than those which *should* be performed by a purchaser. The reason is because the lender is primarily concerned with determining the overall value of the property in relation to the size of the requested loan. The borrower, on the other hand, is concerned--or, at least, *should* be concerned--about the issues of habitability and use of the property.

For example, in the case of new residential construction, the lender will not be concerned over whether window screens have been installed by the time of the closing; however, the borrower should be concerned about this matter. The lack of screens does not materially affect the ratio of the value of the property to the size of the requested loan, but it will certainly affect the habitability of the building in periods of warm weather.

FORM

Borrower acknowledges that Lender, through its officers, agents or employees, has made one or more inspections of the real property and premises which are subject to the lien of this mortgage. Such inspections have included appraisals and other inspections to determine, among other things, the size and condition of the land and structures contained thereon.

Borrower acknowledges that these inspections were made for the sole benefit of Lender in making business decisions, including, but not limited to, whether to lend to Borrower and, if so, how much to lend. Said inspections were not made for the benefit of Borrower. Borrower should not and shall not be entitled to rely on the results of said inspections for its own purposes. Borrower should engage its own inspectors to determine such issues as whether the property and its current owner are in compliance with environmental laws, the soundness of structures, and the existence of hazardous substances on the property.

Lender, its officers, agents, and employees shall not be liable to Borrower, its heirs or assigns, for any claim for losses or damages based on any inspections of premises made at Lender's behest.



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B. REAL ESTATE LOANS

33-25 Current Legal Forms for Real Estate FORM 25.101

FORM 25.101 Representation by borrower that it has complied with all environmental laws

COMMENT

This form contains a very comprehensive representation by the borrower that he has complied with all laws and regulations--whether federal, state or local--which, in any way, relate to the environment and affect the subject premises. The form provides that a misrepresentation by the borrower on this matter at the time of negotiating the mortgage terms shall constitute an event of default. This will allow the lender to exercise its usual rights in the event of a default, including, for example, acceleration of the full debt, collection of the debt from guarantors, or requiring the borrower to come up with substitute collateral.

FORM

Borrower hereby represents and warrants that he has complied, and will continue to comply, with all federal, state and municipal laws, regulations, codes and policies relating to air, water, land, land surface, land subsurface, fish, wildlife, natural resources, land use, zoning, health, chemical use, safety and sanitation, and with all such laws, regulations, codes, and policies relating to and/or governing the production, processing, storage, treatment, transportation, handling, or disposal of any hazardous substance, as the same may relate to the real property and premises described in Schedule "A," which is annexed to this mortgage.

Borrower further represents and warrants that he has obtained, and will continue to maintain in full force and effect, all necessary or appropriate permits relating to the said premises, and that he will not perform any act or fail to perform any act which could result in the revocation or non-renewal of such permits.

Borrower further represents that there are no actions, suits or proceedings pending, threatened or likely to occur which could result in an award of damages or a court order for remedial action being imposed against Borrower for any

violation of any law by Borrower, or for any condition existing on the premises described in Schedule "A," which is annexed hereto.

Borrower makes the representations contained herein as part of the consideration for this loan from Lender. Any misrepresentation made by Borrower shall be an event of default under the terms of this mortgage. In the event Borrower has made a misrepresentation, Lender shall be entitled to enforce all rights and remedies regarding defaults under the terms of this mortgage.

[Attach Schedule A]



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33-25 Current Legal Forms for Real Estate FORM 25.102

FORM 25.102 Representation by borrower to lender that it has complied with all federal, state and local environmental laws and regulations--another form

COMMENT

In the following clause, which may be inserted into a mortgage or loan agreement, the borrower makes a long series of representations for the benefit of the lender. These representations include, among others, that the borrower has complied with all federal, state and local environmental laws and regulations affecting the subject property. The borrower also represents that it is unaware of any legal actions or claims, either threatened or pending, arising out of an environmental mishap on the property or out of a violation of any environmental law or regulation on the property.

FORM

Borrower makes the following nine representations to lender:

- (1) Borrower or its counsel has carefully reviewed all federal, state and local environmental laws and regulations affecting the subject premises.
- (2) Any and all governmental approvals, permits and notifications required by federal, state and local environmental laws have been obtained.
- (3) Borrower has complied with all federal, state and local environmental laws, regulations, ordinances and policies applicable to the subject premises.
- (4) Borrower is unaware of any action, either threatened or commenced, by any governmental agency arising out of an alleged violation of any environmental law or regulation on the subject premises.

(5) No governmental agency has notified the borrower of any violation of any environmental law or regulation on the subject premises.

(6) Borrower is unaware of any civil action, either threatened or commenced, by a party other than a governmental agency, arising out of an alleged environmental mishap occurring on the subject premises or out of the alleged violation of any environmental law or regulation on the subject premises.

(7) Borrower is unaware of the occurrence of any environmental mishap on the subject premises or of the existence or discovery of an adverse environmental condition on said premises.

(8) Borrower is unaware of the presence on the subject premises of any hazardous waste or hazardous or toxic substances.

(9) The past and present uses to which the borrower has put or is putting the subject premises do not violate any relevant federal, state or local environmental laws or regulations.



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FORM 25.103 Representation by borrower that it will not cause or allow any acts in violation of environmental laws

COMMENT

This form contains alternative representations made by the borrower that neither he nor any other party under his control (i.e., agents, employees, tenants, licensees, and occupants) will violate any environmental law relating to the real property which secures the mortgage loan. The borrower also promises to bring the property into compliance with all environmental laws should a violation be discovered. The violation of any provision of the representation constitutes an event of default allowing the lender to exercise whatever remedies are normally available upon default, e.g., acceleration of payment of the entire debt, substitution of collateral by the borrower, or collection of the debt from guarantors.

FORM

Borrower represents that he will not cause or suffer, by his acts or those of his agents, employees, tenants, licensees, invitees, or occupants, any act or omission which would be in violation of any federal, state, or municipal law, regulation, or policy regarding air, water, land, wildlife, or natural resources that affects the subject premises.

Borrower further represents that he will cause all necessary or appropriate permits in connection with the use of the premises to be obtained and maintained in full force and effect.

In the event Borrower learns of a violation of any environmental law, regulation, or policy, he shall promptly undertake all steps necessary or appropriate to come into compliance with the law, regulation, or policy.

A violation of any provision contained in this section shall constitute an event of default under the terms of this

mortgage. Lender shall be entitled to enforce all rights and remedies available to it upon occurrence of an event of default.



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B. REAL ESTATE LOANS

33-25 Current Legal Forms for Real Estate FORM 25.104

FORM 25.104 Borrower's promise to notify lender of any potential environmental problems on property

COMMENT

This form is a clause to be inserted into a mortgage or a loan agreement. The clause requires the borrower to notify the lender of any information which would indicate that a potential environmental problem exists on the mortgaged property. The borrower then must undertake steps to confirm the existence of the problem and, if a problem does in fact exist, remedy the problem.

The borrower's failure, at any point in the process, to take any required action is an event triggering a default under the terms of the mortgage. In such case, the lender has the right to enforce whatever rights may normally arise upon default. These may include the immediate acceleration of payment of the entire debt, substitution of collateral by the borrower, or collection of the debt from guarantors.

If the lender has required the borrower, as a condition for receiving the loan, to obtain an environmental mishap insurance policy or letter of credit, or to post a bond, then the proceeds will provide a source of funds for any necessary remedial action in the event of an environmental mishap.

FORM

Borrower shall promptly notify Lender of any information of which Borrower becomes aware which would indicate the potential existence of any adverse environmental condition, mishap or impact on the premises described in Schedule "A," which are encumbered by this mortgage. Failure to so notify Lender shall be an event of default under this mortgage.

Borrower shall provide Lender with all information and copies of any and all documents which Borrower receives, including, but not limited to, notices of violations, reports and studies.

Borrower, at his sole cost and expense, shall undertake whatever steps Lender reasonably deems appropriate or necessary to confirm the information. This may include, but shall not be limited to, investigations, studies, sampling and analysis of air, water and/or soils.

In the event the existence of an adverse environmental condition, mishap or impact is confirmed, Borrower, at his sole cost and expense, shall undertake whatever acts are appropriate and/or required by law to completely contain, remove, clean up, and otherwise remediate the adverse environmental condition, mishap or impact.

If, at any time, Borrower fails to act in a prompt manner in carrying out the duties imposed herein, Lender may give notice to Borrower of such failure and demand that certain actions be undertaken. Borrower shall have _____ (_____) days from the receipt of such notice to undertake the acts specified in the notice. In the event Borrower does not comply with the notice, Lender may deem Borrower to be in default under the terms of this mortgage. Thereafter, Lender shall be entitled to enforce all rights and remedies which arise upon the occurrence of any event of default.



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33-25 Current Legal Forms for Real Estate FORM 25.105

FORM 25.105 Borrower's promise to notify lender immediately following an environmental mishap, violation of any environmental law, etc.

COMMENT

In the following form, the borrower makes a number of promises to the lender. First, the borrower promises to immediately notify the lender upon learning of the occurrence of an environmental mishap upon the mortgaged premises, or upon an adjacent piece of property if such mishap contaminates or poses a danger of contamination to the mortgaged premises. Second, the borrower covenants to immediately notify the lender upon learning that:

- (1) an environmental law or regulation affecting the mortgaged premises has been violated;**
- (2) a governmental agency has imposed a fine, order or notice of violation upon the borrower for a violation of an environmental law or regulation affecting the premises;**
- (3) a lawsuit has been filed against the borrower by any person following an environmental mishap on the premises or a violation of an environmental law or regulation.**

FORM

1. Borrower recognizes that it has the duty to immediately notify the lender upon learning of the occurrence of an environmental mishap upon the subject premises. For the purposes of the preceding sentence, an environmental mishap is defined as the unlawful release of hazardous or toxic substances or wastes at the subject premises which contaminates, or may reasonably be expected to contaminate, the land (including subsoil), water (both ground water and surface water) or air on, under, or above the subject premises.

2. Borrower recognizes that it has the duty to immediately notify the lender upon learning of the occurrence of an environmental mishap upon any adjacent property, if such mishap poses a danger of contamination to the subject premises.

3. Borrower recognizes that it has the duty to immediately notify the lender upon learning that:

(A) an environmental law or regulation (whether federal, state or local in origin) affecting the subject premises has been violated;

(B) a governmental agency (whether federal, state or local in origin) has initiated or threatened to initiate a proceeding against the borrower for an alleged violation of an environmental law or regulation (whether federal, state or local in origin) affecting the subject premises;

(C) a governmental agency (whether federal, state or local in origin) has imposed a fine, penalty, order or notice of violation upon the borrower for a violation of an environmental law or regulation (whether federal, state or local in origin) affecting the subject premises; or

(D) a lawsuit or other civil action has been brought against the borrower or has been threatened by any person, persons or governmental agency following an environmental mishap on the subject premises or the alleged violation of an environmental law or regulation (whether federal, state or local in origin).



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33-25 Current Legal Forms for Real Estate FORM 25.106

FORM 25.106 Borrower's promise to remediate any environmental problem immediately

COMMENT

This clause may be inserted into the mortgage or into a loan agreement. It requires the borrower to immediately remediate any adverse environmental mishap or condition which occurs or is discovered during the term of the loan.

The provisions require the borrower to do whatever the lender deems appropriate to ascertain the exact nature and severity of the environmental problem and to remediate it. If the borrower fails to do so, the lender itself may proceed with the remedial action at the borrower's expense. However, a lender must be careful to not become too involved in the borrower's business or any clean up so as to become an operator or incur lender liability.

The lender may also enlist the services of environmental consultants at the borrower's expense. Any expenditures made by the lender are deemed secured by the mortgaged property and are fully recoverable in the event of a foreclosure.

The failure of the borrower to act as required under the terms of this clause may be deemed an event triggering default and will give rise to any rights which the lender normally reserves to itself upon default. These may include the immediate acceleration of payment of the full mortgage debt, the substitution of collateral by the borrower, and/or the collection of the full debt from guarantors.

FORM

If, during the term of the loan, an adverse environmental event occurs or an adverse environmental condition or impact

is discovered on the premises which are subject to this mortgage, then Borrower shall be responsible for immediate remediation. The determination of whether an adverse environmental event has occurred or whether an adverse environmental condition or impact exists shall be within the sole reasonable discretion of Lender. Receipt by Borrower of any notice of violation of any federal, state or local environmental law or regulation from any federal, state, or local governmental authority shall be deemed to be a determination of the occurrence of an adverse environmental event.

Upon such a determination by Lender, Borrower shall undertake such steps as are deemed necessary or appropriate by Lender to determine the exact scope, nature and severity of the problem. Lender shall determine the appropriate method for ascertaining the exact scope, nature and severity of the problem.

Upon completion of these steps, Borrower shall proceed to promptly remediate the problem as required by law.

Borrower shall permit Lender, its agents and employees to enter upon the premises which are subject to this mortgage at any reasonable hour for the purposes of inspecting conditions, taking samples, reviewing progress, and otherwise accomplishing the purposes of this section.

The steps contemplated herein shall be undertaken at Borrower's sole expense. In the event that Borrower fails to undertake the steps deemed necessary or appropriate by Lender, then, at any time, Lender may do so at Borrower's sole expense. Nothing contained herein, however, shall be deemed to require Lender to undertake any acts.

In the event Lender deems it reasonably appropriate to hire an environmental consultant(s) in connection with the provisions of this section, all expenses for such consultant, including, but not limited to, professional fees, sampling costs, and laboratory expenses, shall be paid by Borrower. Such expenses of Borrower--whether for consultants or for steps which Borrower was obligated to perform, but which were performed by Lender--shall be deemed to be secured by this mortgage, and shall be a lien on the premises prior to any right or title to, interest in, or claim upon the premises attaching or accruing subsequent to the lien of this mortgage. Any failure of Borrower to perform any act contemplated under this clause shall be deemed an event of default. In such case, Lender shall be entitled to enforce all rights and remedies which normally arise upon the occurrence of an event of default.



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33-25 Current Legal Forms for Real Estate FORM 25.107

FORM 25.107 Borrower has duty to take action to prevent and rectify environmental mishaps

COMMENT

The following clause imposes upon the borrower the duty to prevent the occurrence of an environmental mishap on the mortgaged property, and to promptly undertake any actions that are reasonably necessary to remediate an environmental mishap once it has occurred or has begun to occur on the property. By way of illustration, the clause lists six actions which the borrower must take to prevent an environmental mishap or to rectify the damage caused by such a mishap.

FORM

Borrower recognizes that it has a duty to take any and all actions reasonably necessary to prevent the occurrence of an environmental mishap on the subject premises. In addition, Borrower recognizes its duty to promptly undertake any and all actions reasonably necessary to rectify an environmental mishap on the subject premises once it has occurred or has begun to occur.

Such actions shall include, but not be limited to:

- (1) investigation of potential causes of environmental mishaps;
- (2) removal of contaminated soil;
- (3) removal of hazardous/toxic substances or wastes;
- (4) purification of contaminated sources of water (whether surface water or ground water);

(5) actions mandated by any environmental law or regulation (whether federal, state or local in origin); and

(6) actions that are necessary in order to prevent the danger of injury to persons or property, or to minimize such injury if it has already begun to occur.

For the purposes of this clause, an environmental mishap is defined as the unlawful release of hazardous or toxic substances or wastes at the subject premises which contaminates, or may reasonably be expected to contaminate, the land (including subsoil), water (both ground water and surface water), or air on, under, or above the subject premises.



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33-25 Current Legal Forms for Real Estate FORM 25.108

FORM 25.108 Lender may take actions to prevent or rectify environmental mishaps if borrower fails to do so

COMMENT

In the immediately preceding form, a duty is imposed upon the borrower to prevent the occurrence of an environmental mishap on the mortgaged property, and to promptly undertake any actions that are reasonably necessary to remediate an environmental mishap once it has occurred or begun to occur on the property. The clause that follows is a companion to the immediately preceding form and should be used along with that form.

The clause provides that if the borrower fails to take appropriate action to prevent or remediate an environmental mishap, then the lender has the right, but not the duty, to take such action. If the lender does so, then the borrower must reimburse the lender for all of the lender's expenses.

FORM

Borrower has previously recognized its duty to take any and all actions reasonably necessary to prevent the occurrence of an environmental mishap on the subject premises and to promptly undertake any and all actions reasonably necessary to rectify an environmental mishap on the subject premises once it has occurred or has begun to occur.

If, however, the borrower refuses or otherwise fails to take such action or actions, then the lender shall have the right, but not the obligation, to undertake any or all such actions if it so desires. In such case, the full cost of such action or actions shall be the sole responsibility of the borrower. Lender shall deliver to borrower an itemized bill listing the specific expenses incurred by lender. Borrower shall be obligated to reimburse lender for these expenses within _____ (_____) days of receipt of such itemized bill. If borrower refuses or otherwise fails to reimburse lender within such time period, then Lender shall be entitled to add the full amount (plus _____ percent [_____] %] interest, compounded annually) to the unpaid principal

amount of borrower's outstanding loan.



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FORM 25.109 Borrower's promise to maintain accurate records regarding toxic substances on site and to provide access to all records when requested by lender

COMMENT

Many borrowers are unable to covenant that they will not allow toxic or hazardous substances onto the mortgaged premises since their businesses depend upon the use of such substances during the manufacturing process. Indeed, some borrowers, such as chemical companies, may be in the business of actually producing such dangerous substances for sale. They, too, will be unable to provide lenders with a covenant that they will not allow such substances onto the mortgaged premises.

Nonetheless, a lender must protect itself against the danger that the real property in which it holds a security interest might become contaminated following an environmental mishap, thereby requiring a costly clean up or rendering the property worthless. Accordingly, the lender must: (1) have access to the borrower's records pertaining to toxic and/or hazardous substances on the mortgaged premises; and (2) actually review the records periodically. Only when armed with such information can the lender protect itself against the danger of the mortgaged property becoming contaminated. Moreover, such information is necessary in order for the lender to make reasoned business decisions about such matters as whether to extend further credit to the borrower where such additional funds are secured by the mortgaged premises. Typically, loan agreements provide that the lender will have reasonable access to all of borrower's books and records, including books and records relating to the property.

As for the borrower, he, too, is entitled to protection. Such protection takes the form of an assurance that the confidential nature of his records will be maintained by the lender. The borrower must be certain that his records will not be shared with competitors or with those who might oppose his business, such as environmental activists.

FORM

It is acknowledged and understood by the parties hereto that Borrower, in the ordinary course of his business, uses substances which are toxic and, in some instances, deemed hazardous under various state and federal laws and regulations. Borrower could not operate his business and produce his products without the use of these substances.

Borrower covenants that he, his employees, agents and contractors will use all toxic and/or hazardous substances in strict compliance with all federal, state and municipal laws, regulations and policies. Borrower will not allow or suffer any deviation from good practice in the use, storage, handling or disposal of such substances. Borrower will obtain and maintain in full force and effect all necessary licenses and permits. Borrower will be sure that his employees, agents and contractors are thoroughly trained and properly supervised in the use, storage, handling and disposal of all such substances.

Borrower further covenants that he will keep accurate records of the purchase, use, storage and disposal of all toxic and/or hazardous substances which are brought onto or created on the subject premises in accordance with all applicable federal and state laws and regulations. Borrower will further maintain a complete and accurate record of any deviations from the law in the use, handling, storage and disposal of any toxic or hazardous substance, as well as a complete and accurate record of any injury to person or property caused by any toxic or hazardous substance. A copy of this record shall be provided to Lender within _____ (_____) days of any such deviation or injury.

Borrower shall provide access to Lender to all records maintained by Borrower with regard to the toxic and/or hazardous substances. Lender may review such records at Borrower's site during regular business hours upon at least _____ (_____) hours' advance notice to Borrower. Borrower shall provide Lender with copies of such records as Lender may reasonably require.

Lender agrees to keep all such records strictly confidential and to use such records only for the purposes of managing the lending relationship between Lender and Borrower. This requirement of confidentiality shall survive the satisfaction of this mortgage and shall bind Lender in perpetuity. Notwithstanding the foregoing, Lender may produce copies of whatever records it may possess pursuant to a duly authorized subpoena of any governmental authority. Lender shall not be required to appeal or challenge such a subpoena on Borrower's behalf.

Failure to maintain the records required hereunder or to provide access to Lender shall be an event of default under the terms of this mortgage. In such case, Borrower shall enjoy all of the normal rights arising in the event of a default.



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FORM 25.110 Lender is entitled to review borrower's environmental records--another form

COMMENT

This is another clause, intended for insertion into a mortgage or other loan document, empowering a lender to review all records maintained by the borrower that are either pertinent to environmental laws and regulations affecting the subject premises, or concern the use, production or presence of hazardous or toxic substances or wastes on the premises. The clause provides that once the lender requests to review these records, both parties will select a mutually agreeable time for the review to take place.

FORM

Borrower recognizes that, at any time during the term of the loan, lender may request to review any and all records maintained by borrower that either: (1) pertain to environmental laws and regulations (whether federal, state or local in origin) affecting the subject premises; or (2) concern the use, production or presence of hazardous/toxic substances and/or hazardous/toxic wastes at said premises. When such a request is made, the borrower shall agree to schedule a time, mutually agreeable to both lender and borrower, for the former to review the relevant records. Such records shall include, but not be limited to, environmental site assessments, laboratory reports, etc.



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FORM 25.111 Environmental indemnification and hold harmless granted by borrower to lender--long form

COMMENT

The form below is known as an "environmental indemnification and hold harmless" provision and is granted by a borrower to its lender. In it, the borrower agrees that if, as a result of an adverse environmental condition that is discovered or occurs during the term of the loan, the lender is subjected to any liability whatsoever, then the borrower will indemnify and hold the lender harmless against such liability. The form includes its own definitions of the terms "liability" and "adverse environmental condition."

FORM

ENVIRONMENTAL REPRESENTATIONS, RELEASE, HOLD HARMLESS AND INDEMNITY AGREEMENT

This Environmental Representations, Release, Hold Harmless and Indemnity Agreement (hereinafter "Environmental Indemnity") is entered into as of the ____ [day] day of ____ [month], ____ [year], by and between ____ [name], a[n] ____ [state] ____ [type of entity] (the "Borrower") and ____ [name], a[n] ____ [state] banking corporation (the "Bank"), contemporaneously with the execution by the parties of: (i) the Construction Loan and Security Agreement, dated of even date herewith and executed by and between Borrower and Bank; (ii) the Mortgage Note, dated of even date herewith, in the principal amount of ____ Dollars (\$____), executed by Borrower and made payable to Bank; (iii) an Open-End Mortgage, Assignment of Rents and Leases and Security Agreement executed by Borrower and dated of even date herewith, encumbering the Real Estate defined below (the "Mortgage") (all of the foregoing along with all documentation executed in connection therewith will be collectively referred to as

the "Loan Documents").

1 . Definitions

1.1 The term "Borrower" shall mean the Borrower named above and any Guarantors identified in the Loan Documents.

1.2 The term "Bank" shall mean the bank referred to above and all affiliates of the Fifth Third Bancorp and shall include all agents, employees, directors, officers, shareholders and insurers thereof.

1.3 The term "Real Estate" shall mean the real estate described on Exhibit A attached hereto.

1.4 The term "Property" shall include all real property which is part of the Real Estate and all surface waters, groundwater, strata, soils, fill, bedrock, sewers, buildings, foundations, piping, and other structures, materials and improvements on, in or under the Real Estate.

1.5 The term "Environmental Laws" shall mean all federal, state and local laws, regulations and ordinances intended to protect or preserve human health, Natural Resources and the Environment.

1.6 The terms "Hazardous Substance," "Release," "Owner," "Operator," "Environment" and "Natural Resources" shall have the same meanings and definitions as set forth in the Comprehensive Environmental Response Compensation and Liability Act as amended, 42 U.S.C. § 9601 *et seq.* and regulations promulgated thereunder (collectively "CERCLA" and any corresponding state or local law or regulations, provided, however, that as used herein the term "Hazardous Substance" shall also include: (i) any Pollutant or Contaminant as defined by CERCLA or by any other Environmental Law; (ii) any solid Waste, Hazardous Constituent or Hazardous Waste as defined by, or as otherwise identified by, the Resource Conservation and Recovery Act as amended 42 U.S.C. § 6901 *et seq.* or regulations promulgated thereunder (collectively "RCRA") or by any other Environmental Law; and (iii) crude oil, petroleum and fractions or distillates thereof; (iv) any other material, substance or chemical defined, characterized or regulated as toxic or hazardous under any applicable law, regulation, ordinance, directive or ruling; and (v) any infectious waste or medical waste as defined by any applicable federal or state laws or regulations.

1.7 The terms "Storage," "Treatment" and Disposal" shall have the same meanings and definitions as set forth in RCRA.

2 . Representations and Warranties

Borrower hereby expressly represents and warrants to the Bank that, the following are true as of the time of the execution of this Agreement and shall be true as of the Closing:

2.1 Except as set forth in the Phase I Environmental Site Assessment prepared by _____ [name], dated _____ [month] _____ [day] _____ [year] (the "Environmental Report"), there has been no Storage, Treatment or Disposal of Hazardous Substances and no Release or threatened Release, transportation, or migration of Hazardous Substances in, on, onto or from the Property.

2.2 Except as set forth in the Environmental Report, there are no and have been no Underground Storage Tanks (including, without limitation, tanks such as those used to contain heating oil that may be exempt from regulation under RCRA or corresponding state laws or regulations) located on the Property.

2.3 There are no asbestos containing materials incorporated into or otherwise on the Property.

2.4 Except as set forth in the Environmental Report, there has been no, nor is there now, any pending, threatened,

ongoing or unresolved administrative or enforcement action, investigation (including, without limitation, information requests pursuant to CERCLA § 103), compliance order, claim, demand or other litigation brought by governmental authorities or other third parties, based on Environmental Laws or otherwise related to Hazardous Substances ever in, on, about or transported from the Property.

2.5 Borrower has at all times operated its business on, and maintained, the Property in full compliance with all applicable laws, regulations and ordinances, including, but not limited to, those pertaining to the protection of human health, welfare and the environment and Borrower has not utilized, accumulated or generated Hazardous Substances on the Property except as permitted, allowed or authorized by such laws, regulations and ordinances.

2.6 There are no wetlands within the meaning of or as defined by the Clean Water Act, 33 U.S.C § 404 and regulations promulgated thereunder or any other applicable federal, state or local law, regulation or guidance, located on the Property.

3 . Covenants

3.1 There shall be no Storage, Treatment or Disposal of Hazardous Substances and no Release, transportation or migration of Hazardous Substances in, on, onto or from the Property.

3.2 There shall be no Underground Storage Tanks located on the Property.

3.3 Borrower shall at all times operate its business on and maintain the Property in full compliance with all applicable laws, regulations and ordinances, including, but not limited to, those pertaining to the protection of human health, welfare and the environment and Borrower shall not utilize, accumulate or generate Hazardous Substances on the Property except as permitted, allowed or authorized by such laws, regulations and ordinances, provided, however, that Borrower shall not engage in or allow the Storage, Treatment or Disposal of Hazardous Substances on the Property irrespective of a governmental permit or authorization therefor.

4 . Release, Hold Harmless, Indemnity

4.1 Borrower agrees and covenants that Bank shall not assume any liability or obligation for loss, damage, fines, claims or duty to clean-up or dispose of Hazardous Substances, wastes or materials on or relating to the Real Estate, regardless of any inspections of the Property made by the Bank or its designees or agents prior to the consummation of this transaction or as a result of any conveyance of title of the Real Estate to the Bank by foreclosure, deed in lieu of foreclosure, or otherwise.

4.2 Borrower agrees to remain fully liable and shall indemnify and hold harmless Bank from any costs, expenses, clean-up costs, Hazardous Substances and other waste disposal costs, litigation costs, fines, penalties, including, without limitation, those costs, expenses, penalties and fines within the meaning of CERCLA, and other related liabilities, upon the occurrence of any environmental-related situation regarding the Property.

4.3 The Borrower hereby agrees to release, hold harmless, defend and indemnify Bank from, for and against all actual or threatened claims, costs (including, but not limited to, the cost of investigation, removal, remediation and other clean up of Hazardous Substances, and reasonable fees of attorneys and other professional, experts and consultants retained by Bank) demands, orders, losses, lawsuits, liabilities, damages and expenses whether brought collectively or individually by Borrower, a governmental authority or any other third party (all the foregoing hereinafter collectively referred to as "Losses") arising from or related to any of the following:

- (a) The past, present or future Release, threatened Release, Storage, Treatment, accumulation, utilization, Disposal, transportation or other handling or migration of any Hazardous Substance on, in, onto or from

the Property.

(b) The violation or alleged violation of Environmental Laws occurring on or related to the Property.

(c) Any action taken by Bank to eliminate, prevent or mitigate the potential adverse impact on the Real Estate or the Bank as a result of or in anticipation of any actual, suspected or threatened violation of Environmental Laws or Release or threatened Release of a Hazardous Substance on, in or from or otherwise affecting the Property; such action may include, but need not be limited to, the disposition, distribution, sale, disclaimer or renunciation of any portion of the Real Estate.

The Clause 4.3 (a), (b) and (c) above being referred to collectively as "Environmental Matters."

4.4 The Borrower hereby agrees that Bank shall be reimbursed directly from the Real Estate or proceeds thereof or from Borrower directly for any Losses suffered or sustained or threatened to be suffered or sustained by Bank as a result of Environmental Matters.

4.5 Nothing contained herein or in the Mortgage, Loan Documents or any other documents or arrangements between the parties hereto shall be deemed to create any right, obligation or authority on the part of the Bank to participate in the management, control, operation or function of Borrower's business, facility or operational affairs, including, without limitation, Borrower's Hazardous Substance handling practices or to otherwise exercise any decision making control over Borrower's environmental compliance or day-to-day operations.

5 . Conflicting Provisions, Controlling Law, Counterparts

5.1 Notwithstanding any contradictory, conflicting or inconsistent provision contained in the Loan Documents, the provisions of this Environmental Indemnity shall be controlling and shall govern the relationship between the parties hereto.

5.2 This Environmental Indemnity shall be interpreted pursuant to the laws of the State of _____ [state]. If any provisions contained herein are ultimately declared or held by a court of law to be in violation of law, the remaining provisions herein not so declared or held shall remain in full force and effect.

5.3 This Environmental Indemnity may be executed in multiple copies and counterparts, which, when taken together shall constitute a completely executed document.

6 . Borrower's Acknowledgment

(a) The Borrower hereby acknowledges that Bank has not and will not create, cause or contribute to the presence, Release or threatened Release of Hazardous Substances on, in or from the Property and further that Bank shall not function as an Owner or Operator or otherwise participate in the management of the Property notwithstanding any conflicting or contradictory provisions contained in this Environmental Indemnity or the Loan Documents. Borrower further acknowledges that the release, hold harmless and indemnity as provided to the Bank herein, are being provided in exchange for good and valuable consideration, including, but not limited to, Bank providing financial accommodations to Borrower. Nothing contained herein or in the Mortgage, Loan Documents or any other documents or arrangements between the parties hereto shall be deemed to create any right, obligation or authority on the part of the Bank to participate in the management, control, operation or function of Borrower's business, facility or operational affairs, including, without limitation, Borrower's Hazardous Substance handling practices or to otherwise exercise any decision making control over Borrower's environmental compliance or day-to-day operations.

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(b) Borrower having carefully read the foregoing hereby acknowledges that it fully understands its meaning and content and signs below voluntarily.

BORROWER:

_____ [name]

By: _____

Printed Name: _____

Title: _____

STATE OF _____ [state])
COUNTY OF _____ [county]) SS:

BEFORE ME, a Notary Public in and for said County and State, personally appeared _____ [name], a(n) _____ [state] _____ [entity], by _____ [name], its _____ [title], who acknowledged that _____ [he/she] did sign the foregoing instrument for and on behalf of said corporation, being thereunto duly authorized, and that the same is [his/her] free act and deed individually and as such officers and the free act and deed of said _____ [entity].

IN TESTIMONY WHEREOF, I have hereunto set my hand and official seal at _____ [city], _____ [state], this _____ [day] day of _____ [month], _____ [year].

Notary Public

[Attach Exhibit A]



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B. REAL ESTATE LOANS

33-25 Current Legal Forms for Real Estate FORM 25.112

FORM 25.112 Letter agreement regarding environmental indemnification and hold harmless granted by borrower to lender

COMMENT

This form is a letter agreement to be executed by a borrower and delivered to the lender at the time the lender grants a mortgage loan. The form consists of an environmental indemnification and hold harmless agreement, whereby the borrower promises the lender that it will indemnify and hold the lender harmless for any losses, fines, damages and expenses incurred by the lender if certain events occur on the mortgaged premises during the term of the loan.

The form provides that the indemnification survives the transfer of the property by whatever means. Thus, if the lender becomes the owner of the property at a foreclosure sale, the borrower still remains obligated to indemnify the lender and hold the lender harmless in accordance with the provisions of this agreement.

FORM

_____ [insert name of lender's loan officer]
_____ [insert name of lender]
_____ [insert lender's street address]
_____ [insert lender's city, state and zip code]
_____ [date]

Dear Mr./Ms. _____ [name]:

To induce _____ [name] ("Lender") to make a mortgage loan (the "Loan") in the total principal amount of _____ Dollars (\$ _____) to the undersigned ("Borrower"), which loan is evidenced and secured by a certain note(s) and mortgage(s) and/or other debt instruments or collateral security agreements of even date herewith (the "Loan Documents"), and in consideration thereof and of any other loans, advances, or other financial accommodations heretofore or hereafter granted by Lender to, or for the account of, Borrower, under or pursuant to the Loan Documents, the Borrower hereby agrees that, with respect to and concerning Borrower's real property and premises located in the City of _____ [city], County of _____ [county], State of _____ [state], a legal description of which is set forth in Schedule "A," which is attached hereto and made a part hereof, and all buildings, improvements or other structures now or hereafter situated or constructed thereon (together hereinafter called the "Property"), Borrower will defend and indemnify Lender and will hold Lender harmless from and against any and all claims, losses, damages, liabilities, fines, penalties, charges, administrative and judicial actions or proceedings, and orders, judgments, settlements, remedial action requirements or enforcement actions of any kind, and all costs and expenses whatsoever incurred in connection therewith--including, but not limited to, attorneys', consultants' and/or engineering fees and expenses--arising, directly or indirectly, in whole or in part, out of, or in connection with:

- (1) the presence of any hazardous waste, hazardous or toxic substance, or the discharge, spillage or other release or filtration of any hazardous waste or hazardous or toxic substance on, in, about or under the Property, or emanating from or otherwise originating at the Property;
- (2) any activity carried on or undertaken at the Property, whether prior to or during the term of the Loan evidenced and secured by the Loan Documents, whether by Borrower or any predecessor in title of, or any employees, agents, contractors or subcontractors of Borrower, or by any third persons or parties at any time occupying or present at or upon the Property, in connection with the handling, treatment, removal, storage, decontamination, clean up, transport or disposal of any hazardous waste or hazardous or toxic substance at any time located or present on, in, about or under the Property;
- (3) any failure by Borrower to comply with the terms of any order or other ruling or decision issued by any federal, state or municipal government department or agency having regulatory authority over environmental matters regarding or concerning the Property or regarding or concerning any activity carried on or undertaken at the Property by Borrower or any predecessor in title of, or any employees, agents, contractors or subcontractors of Borrower, or by any third persons or parties at any time occupying or present at or upon the Property;
- (4) any lien, claim, assessment or other charge imposed upon or against the Property or against Borrower with respect to the Property by any federal, state or municipal government department or agency having regulatory authority over environmental matters pursuant to any statute, regulation or order now in effect or hereafter enacted or promulgated; and
- (5) any diminution in the fair market value of the Property caused by, arising out of, or in any way relating to or connected with any circumstances, occurrence or activity contemplated by Subparagraphs (1) through (4), inclusive hereof.

As used herein, the terms "hazardous waste" and "hazardous or toxic substance" shall have the same meanings as defined and used in any of the following (the "Acts"): the Comprehensive Environmental Response, Compensation and Liability Act, 42 USC § 9601 *et seq.*; the Resource Conservation and Recovery Act, 42 USC § 6901 *et seq.*; the Hazardous Materials Transportation Act, 49 USC § 1801 *et seq.*; the Toxic Substances Control Act, 15 USC § 2601 *et seq.*; and/or the regulations adopted and publications promulgated pursuant to any of the Acts.

It is further expressly agreed by Borrower that this indemnification shall survive and continue to be fully binding upon

Borrower, notwithstanding the occurrence of any of the following events, circumstances or actions:

(1) any transfer or other conveyance of any right, title or interest of Borrower in or to the Property prior to full repayment of the indebtedness evidenced and secured by the Loan Documents;

(2) Lender taking any of the following actions prior to full repayment of the indebtedness evidenced and secured by the Loan Documents:

(a) purchasing the Property or any portion thereof at or upon foreclosure;

(b) taking a deed in lieu of foreclosure; and

(c) operating or otherwise taking possession of the Property.

Dated: _____ [month] _____ [day] _____ [year]

[Borrower's signature]

[Printed name] _____

[Attach Schedule A]



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33-25 Current Legal Forms for Real Estate FORM 25.113

FORM 25.113 Environmental indemnification and hold harmless granted by borrower to lender--another form

COMMENT

This environmental indemnification requires the borrower to indemnify and hold the lender harmless for any loss or expense which the lender might sustain as a result of any action by a governmental authority taken: (1) to require clean up of the mortgaged premises following an environmental mishap or the discovery of an adverse environmental condition upon the premises; or (2) to penalize the borrower for a violation of federal, state or local environmental laws, regulations or policies. This clause may be inserted directly into the mortgage or other loan document, in which case the clause becomes a covenant granted by the borrower to the lender. The indemnification/hold harmless provisions survive any transfer of the mortgaged premises, including a transfer after a foreclosure of the mortgage. The provisions also survive the satisfaction of the mortgage.

FORM

Borrower agrees to indemnify and hold Lender harmless against any and all loss or liability, cost or expense--including, without limitation, reasonable attorneys' fees and disbursements--which Lender may sustain as a result of, or on account of, any claims arising from, or any liens imposed upon, the mortgaged premises by any federal, state or local authority charged with the enforcement of environmental protection laws and regulations, or by reason of Borrower's failure, or the failure of any of Borrower's predecessors in title, or the failure of Borrower's (sub)tenants to perform any of its, or their, obligations pursuant to any federal, state or local environmental protection laws and/or regulations and/or policies. The provisions of this paragraph shall survive any transfer of the mortgaged premises, including a transfer after a foreclosure of the mortgage and delivery of the deed effecting such transfer. The provisions of this paragraph shall also survive the satisfaction of this mortgage.



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33-25 Current Legal Forms for Real Estate FORM 25.114

FORM 25.114 Lender's right to demand substitution of collateral upon occurrence of environmental mishap; borrower's agreement not to encumber substitute collateral during term of mortgage without lender's permission

COMMENT

In the event of an environmental mishap, the real property, which served as the core collateral for the loan, may be seriously reduced in value. In such case, if the borrower were to simply default on the mortgage and abandon the property--rather than undertake the considerable expense of clean up--a purchaser at a foreclosure sale would be required by law to remediate the problem. In all likelihood, that purchaser would be the lender, since the contaminated condition of the property would almost certainly scare away any third party-purchaser. Since the cost of remediation might well exceed the value of the property in its contaminated state, the lender would find itself in a very difficult and unenviable position.

The provisions in this form reduce this potential danger to the lender by requiring the borrower to come up with "substitute collateral" of a specified value in the event of an environmental mishap on the mortgaged property. The collateral may consist of one or more of a wide variety of items, such as:

- (1) cash;
- (2) accounts receivable;
- (3) inventory;
- (4) equipment;

(5) stock and bonds;

(6) patents;

(7) other real property; or

(8) even works of art

Following the environmental mishap, a determination must be made of the value of the substitute collateral proffered by the borrower. The parties may either make this determination on their own, or, alternatively, they may enlist the services of an appraiser.

During the term of the mortgage, the borrower is required to maintain sufficient collateral, free and clear of liens, to satisfy the substitution provisions. However, the lender may waive this provision. It is expected that the lender would only agree to a waiver for relatively short periods of time, such as during periods when the borrower's business is slow because of a regional or national economic downturn. Otherwise, the value of these provisions will be lost.

FORM

It is acknowledged by the parties hereto that Borrower uses substances which are toxic and/or hazardous in the ordinary course of his business, and that Borrower would be unable to operate his business and produce the products he currently produces without the use of such substances.

The parties acknowledge that, in the event that any of these substances were to be released into the air, soil or water, the value of the mortgaged premises would be reduced. As a result thereof, Lender would be under-secured.

In the event of a release of a toxic or hazardous substance, Borrower, upon the demand of Lender, shall provide substitute collateral for the loan evidenced by the note and secured by this mortgage. The collateral will have a total value which exceeds the then-principal balance of the loan by _____ percent (_____%). The value of the substitute collateral shall be agreed upon by the parties or determined by an appraiser acceptable to Lender. Any appraisal costs shall be paid by Borrower. Borrower shall provide Lender with a first lien on each item of collateral.

Borrower agrees that, at all times during the term of this loan, he will maintain unencumbered collateral sufficient to fulfill the requirements of this provision. Lender may, but shall not be required to, waive the provisions of this paragraph, in writing and at the request of Borrower.

Failure to fulfill the covenants to be performed by Borrower hereunder shall constitute an event of default under the terms of this mortgage. In such case, Borrower shall immediately enjoy all the rights and privileges to which he would be entitled upon a default caused by any other reason.



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33-25 Current Legal Forms for Real Estate FORM 25.115

FORM 25.115 Lender's right to refuse to make further advances of funds to borrower in the event of: (1) environmental mishap on the mortgaged premises; (2) failure to notify lender of an adverse environmental event on the mortgaged premises; (3) failure to rectify an adverse environmental condition on the mortgaged premises; or (4) failure to produce records upon lender's demand

COMMENT

This form presumes that the lender has made a loan to the borrower which is secured by the mortgaged premises. It further presumes that, under the terms of the loan, the lender will periodically advance additional funds to the borrower at the borrower's request (i.e., such as a revolving line of credit). (In other words, an ongoing lending relationship is presumed to exist between the parties.)

The provisions in this form are designed to free the lender from having to advance further funds to the borrower after an adverse environmental mishap occurs which may adversely affect the value of the mortgaged property. Such property, of course, forms some or all of the security for the past loan and for the subsequent funds advanced to the borrower. If the property suffers an environmental mishap, it may become significantly less valuable. Accordingly, the lender may not be able to realistically look to the property any longer as security for repayment of the past loan--let alone further advances--since the cost of clean up may greatly exceed the value of the property.

Accordingly, in order to protect the lender, this form recognizes the lender's right to refuse to make further advances of funds to the borrower in the event of:

(1) an environmental mishap on the mortgaged premises;

(2) a failure by the borrower to rectify an adverse environmental condition on the mortgaged

premises; or

(3) a failure by the borrower to produce records upon the lender's demand.

The form also contains a provision which allows the lender, entirely on its own, to make the determination of whether to continue the cash advances. The provision also attempts to eliminate the danger to the lender arising from a possible lawsuit based on its refusal to make further advances.

FORM

This mortgage, by its terms, is security for a note of the same date as the mortgage and for all future advances made under the terms of that note, or any existing note, or any note which may hereafter be executed and delivered to Lender.

Lender reserves the right to refuse to make further advances (including, but not limited to, advances by means of a "line of credit") and to require immediate repayment in full of all previously-loaned funds in the event that any one or more of the following events occurs:

(1) Borrower fails to obtain a required permit;

(2) Borrower fails to renew a required permit;

(3) the governmental agency in question refuses to renew the permit to Borrower;

(4) Borrower, its agents or employees, cause, allow, suffer, or otherwise participate, voluntarily or involuntarily, in the release of toxic or hazardous substances into the air, soils, or water located in, on, above or about the premises subject to the lien of this mortgage. The term "toxic or hazardous substances" shall mean substances defined as such in the Comprehensive Environmental Response, Compensation and Liability Act, *42 USC § 9601 et seq.*, the Resource Conservation and Recovery Act, *42 USC § 6901 et seq.*, the Hazardous Materials Transportation Act, *49 USC § 1801 et seq.*, or the Toxic Substances Control Act, *15 USC § 2601 et seq.*;

(5) Borrower fails to timely comply with any order, decree or direction of any court or governmental agency or authority with jurisdiction regarding the real property and premises which are subject to the lien of this mortgage;

(6) the occurrence of any event or sequence of events in, on, or around the premises subject to the lien of this mortgage which may reasonably be expected to have an adverse environmental impact on the said premises, or which may tend to reduce the fair market value of the said premises by reducing the quality of the air, water, land, or wildlife;

(7) the violation by Borrower, its employees or agents, of any federal, state or municipal law relating to the environment as such law relates to the real property and premises which are subject to the lien of this mortgage;

(8) failure of Borrower to notify lender of the occurrence of an event specified herein within _____
(_____) hours of occurrence;

(9) failure of Borrower to take all steps required by law to contain, control, reduce, and remediate the adverse consequences; or

(10) failure of Borrower to timely produce records, at the request of Lender, regarding the occurrence of an event specified herein.

Lender's determination not to advance further sums shall be in Lender's sole discretion and shall not be subject to judicial review in any manner. Lender shall not be subject to any claims for loss of business, business opportunities, damages, fines, or penalties for refusal to advance further funds.



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33-25 Current Legal Forms for Real Estate FORM 25.116

FORM 25.116 Lender's right to demand an environmental site assessment

COMMENT

This clause, which may be inserted into a mortgage or loan document, gives the lender the right to order an environmental site assessment of the mortgaged premises at any time during the term of the loan. The environmental site assessment is performed by an independent environmental consultant who is acceptable to the lender. Selection and payment of the consultant is the responsibility of the borrower.

FORM

At any time during the term of the loan, the lender may demand that the borrower, at the borrower's sole expense, promptly employ the services of an independent environmental consultant who is acceptable to the lender in order to conduct an environmental site assessment of the subject premises and thoroughly investigate any alleged mishap and/or violation. For the purposes of the preceding sentence, an environmental mishap is defined as the unlawful release of hazardous or toxic substances or wastes at the subject premises which contaminates, or may reasonably be expected to contaminate, the land (including subsoil), water (both ground water and surface water), or air on, under, or above the subject premises.



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33-25 Current Legal Forms for Real Estate FORM 25.117

FORM 25.117 Lender's right to come upon the subject property and conduct periodic inspections

COMMENT

This clause may be inserted into a mortgage or other loan document. It empowers the lender to come upon the mortgaged premises at any time in order to conduct a "surprise" inspection. The purpose of the inspection is to determine whether the borrower is complying with all federal, state and local environmental laws, regulations and permits applicable to the mortgaged premises or to the business activities being conducted there.

FORM

Lender reserves to itself and borrower recognizes the lender's right to come upon the subject premises periodically and at any time for the purpose of conducting an inspection of said property in order to determine whether the borrower is in compliance with all environmental laws, regulations, policies and permits (whether federal, state or local in origin). The cost of such inspection shall be at Borrower's sole cost and expense.



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33-25 Current Legal Forms for Real Estate FORM 25.118

FORM 25.118 Waiver of environmental covenant granted by lender to borrower

COMMENT

This form is designed to make it possible for the lender and borrower to go ahead with the closing of a loan transaction that is already in the works, or to continue an ongoing lending relationship, despite the recent discovery or occurrence of an environmental problem on the mortgaged premises. The form presumes that this discovery or occurrence of an environmental problem is an event triggering a default under the terms of the mortgage. Through this form, the lender agrees to waive the default as long as certain promises are made and kept by the borrower. These promises include, among others, the prompt remediation of the environmental problem by the borrower.

Accordingly, this form may be used either as part of a mortgage or as a separate document executed by the borrower at the mortgage closing. Alternatively, it can be executed by the parties upon the discovery or occurrence of an environmental problem, long after the mortgage is executed and during the course of the lending relationship.

FORM

It is acknowledged by the parties hereto that _____ [*insert description of environmental problem*] has been discovered on the real property and premises which are subject to the lien of this mortgage [*or: which are subject to a certain mortgage dated _____ [month] _____ [day] _____ [year], which secures a note of even date therewith evidencing a debt of _____ Dollars (\$ _____) from Borrower to Lender*]. Nonetheless, the parties hereto wish to close the mortgage loan transaction [*or: wish to continue the lending relationship*]. Because the existence of the problem constitutes a default under the terms of said mortgage, in consideration of the following promises on the part of Borrower, Lender hereby waives the default. The promises are:

(1) Borrower shall notify all federal, state and municipal authorities, as is required by law, of the existence of the environmental problem.

(2) Borrower shall formulate, within _____ (_____) days of the date hereof, a plan to remediate the problem. Said plan shall conform in all aspects to applicable federal, state, and municipal laws, regulations and policies for such plans.

(3) Borrower shall obtain any permits which may be required to effect such plan from any and all governmental authorities with jurisdiction.

(4) Borrower shall promptly commence remediation efforts within _____ (_____) days of the date hereof, unless such date shall be extended or shortened by the directives of a court or other governmental authority with jurisdiction.

(5) Borrower shall continue remediation efforts until all provisions of the plan specified in Subparagraph (2), above, have been completed.

(6) Borrower shall obtain a certificate of compliance or other such document demonstrating that remediation has been completed to the satisfaction of the appropriate governmental authorities. If such documentation is not normally prepared or provided for this type of remediation, Borrower shall obtain comparable proof of complete remediation from an environmental consultant or licensed engineer who has been deemed to be acceptable by the lender.

(7) Borrower hereby agrees to defend, indemnify and hold Lender harmless against any and all claims, demands, penalties, fines, liabilities, settlements, judgments, damages, costs, and/or expenses for injury to person or property (including, but not limited to, attorneys' fees, consultants' fees, court costs, and expenses of removal and/or remediation) which arise out of, or in connection with, the environmental problem and the remedial action contemplated under this provision, including the failure of Borrower to undertake and/or complete the remedial action.

In the event that Borrower fails to perform any of the above actions within a reasonable period of time (or within the time period set forth, if any), Lender shall give Borrower written notice specifying Borrower's failure to perform. Borrower shall then have _____ (_____) days from receipt of such notice to commence performance. If Borrower then commences performance and diligently pursues completion, Lender shall continue its waiver of default so long as pursuit of completion continues in good faith. If Borrower fails to commence performance--or, if Borrower, having commenced performance, fails to diligently pursue completion--then the waiver of default shall be deemed to be revoked without further notice. Lender shall then be entitled to pursue any and all rights and remedies which it may have under the terms of the note and mortgage, including, but not limited to, the right to demand immediate payment in full of the principal amount of the debt.

In the event that the waiver of default shall be deemed to be revoked or, if, at any time, Lender reasonably believes that Borrower has failed to perform any of his obligations under the preceding provisions and does not intend to promptly so perform, Lender shall have no obligation to make further advances to Borrower, including advances by means of Borrower's line of credit or overdraft privileges. Lender shall notify Borrower at least _____ (_____) hours prior to the time at which Lender will no longer honor advances on Borrower's line of credit or Borrower's overdrafts. Such notice may be oral. The rights of Lender contained in the preceding provisions shall be in addition to, and not in place of, all other rights of Lender contained in this document.



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33-25 Current Legal Forms for Real Estate FORM 25.119

FORM 25.119 Borrower required to remove asbestos-laden materials from premises as condition for receiving mortgage loan

COMMENT

Many older buildings, particularly factories and warehouses, contain asbestos-laden insulation materials intended to retard the spread of fire. If a borrower seeks mortgage financing from a lender in order to purchase a building which contains asbestos-laden materials, the lender will frequently require the borrower to make various representations and warranties regarding the asbestos. Sometimes the borrower will be required to remove the asbestos-laden materials in order to obtain the mortgage. A borrower who is unwilling to accept this condition will have to find a different lender.

Of course, there are alternatives to the often costly procedure of removing asbestos insulation. For example, the lender might agree to the borrower developing a plan to contain and control the asbestos-laden materials so that asbestos fibers do not become friable and airborne, thereby endangering the health and safety of those who breathe in the fibers. Such a plan of containment and control will, of course, require the borrower to periodically conduct tests of air samples to ascertain whether asbestos fibers are in fact escaping into the air. In addition, any prudent lender will require the borrower to provide the lender with an "indemnification and hold harmless" agreement to protect the lender from any loss or expense in the event suit is brought for injury arising from asbestos exposure.

That having been said, in the event the lender insists upon the removal of the asbestos-laden materials as a condition for granting the mortgage, the following form may be used and inserted into the mortgage agreement.

FORM

1. In the event that the property subject to this mortgage contains materials laden with asbestos, then the Borrower shall:

(A) promptly remove all such materials in accordance with all applicable federal, state and local environmental laws, regulations and policies; and

(B) restore the property to its original condition.

2. Such removal and restoration work shall be promptly commenced and diligently pursued to completion. In any event, all removal and restoration work must be completed by no later than _____ [month] _____ [day] _____ [year].

3. Borrower promises that it will promptly pay any and all costs and liabilities incurred in connection with the removal/restoration work, including, for example, liability insurance premiums, and all bills for labor and materials used in the removal/restoration efforts.

4. Borrower promises to indemnify and hold Lender harmless for any and all costs, expenses, losses, fines, penalties, claims, judgments, damages and liabilities incurred, sustained, imposed upon, or brought against Lender as a result of the Borrower's removal/restoration efforts.

5. Failure on the part of the borrower to fulfill any of the obligations set forth above shall be treated as an event triggering a default under the terms of this mortgage. In such case, Borrower shall enjoy all of the normal rights arising in the event of a default.



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33-25 Current Legal Forms for Real Estate FORM 25.120

FORM 25.120 Disclosure by borrower to lender of presence of asbestos-laden materials on mortgaged property

COMMENT

This simple clause is intended to protect the borrower by disclosing to the lender at the time the loan transaction is negotiated that asbestos-containing materials are present on the mortgaged premises. If the clause is used, an addendum should also be attached to the mortgage or other loan document, stating clearly where these materials are located and the nature of these materials, for example, "asbestos-containing insulation is located in the basement of the house, surrounding the furnace."

FORM

There are no asbestos-containing materials on, in or at the mortgaged property, except those disclosed on Schedule _____, which is attached hereto and made a part of this mortgage agreement.



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33-25 Current Legal Forms for Real Estate FORM 25.121

FORM 25.121 Covenant made by borrower and given to lender that former will comply with all laws pertaining to asbestos

COMMENT

Regardless of whether the borrower will be having the asbestos-laden materials removed or contained, this clause should be inserted into the mortgage or other loan document. The clause imposes upon the borrower the duty to see to it that the asbestos removal or containment procedures adhere completely to all federal, state and local laws and regulations applicable to asbestos-laden materials.

FORM

Borrower hereby covenants that, during the term of this Agreement, it shall comply with or cause compliance with all present and future laws, rules, regulations and ordinances of all federal, state and local government authorities, including, but not limited to, those relating to or addressing asbestos-containing materials.



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33-25 Current Legal Forms for Real Estate FORM 25.122

FORM 25.122 Indemnification granted by shareholders of closely-held corporation to lender

COMMENT

When a closely-held corporation borrows money from a bank or other lending institution, the principal shareholders will often collateralize the loan using real property which they themselves own, since the corporation itself may not own any assets of sufficient value to secure the note or they are requested to give a personal guaranty. In the form that follows, the two principal shareholders of a closely-held corporation (the "owners") have secured a loan to the corporation with a piece of real estate which they own. The owners now grant an indemnification and hold harmless to the lender for any loss or expense it might suffer if an adverse environmental condition is discovered on the property, if an environmental law is violated, or if an environmental mishap occurs on the property during the term of the loan.

In this form, the owners make joint and several representations about past and present uses of the property. They warrant that, to the best of their knowledge, the property has never been used for the production, storage, handling, treatment, transportation, or disposal of toxic or hazardous substances. The owners also covenant that, during the term of the loan, they will not use the property for such purposes.

In addition, the owners state that all environmental laws--federal, state and local--have been, and will continue to be, obeyed.

The bank or other lending institution is granted the right to conduct periodic inspections and tests of the property to verify the information and representations provided by the owners, all at the owner's cost.

The owners also covenant not to change their current uses of the property without the lender's

permission. This prevents the owners, for example, from building an environmentally-dangerous facility on the premises during the term of the loan--such as an incinerator or an underground storage tank. However, the lender agrees that it will not unreasonably withhold its permission from the owners for a requested change in land use. The lender may condition the granting of its permission upon receipt from the owners of appropriate assurances that the proposed change in use will not pose an environmental risk to the lender's security.

Finally, the provisions of this agreement survive the transfer of the property, including a transfer by foreclosure. In fact, the owners are entitled to a release from the terms of this agreement only if the loan is paid in full without any event of default occurring.

FORM

AGREEMENT made this ____ [day] day of _____ [month] ____ [year], between _____ [name], residing at _____ [address], and _____ [name], residing at _____ [address] (hereafter referred to as "Owners"), and _____ [name] Bank, with its principal place of business located at _____ [address] (hereafter referred to as "Bank").

WHEREAS, _____ [name] Corporation (hereafter referred to as "Borrower"), as Borrower, has obtained a loan from _____ [name] Bank, which loan is secured by a mortgage dated _____ [month] ____ [day] ____ [year], on real property owned by Owners; and

WHEREAS, as further consideration for this loan, Bank has requested an indemnification from Owners with respect to any adverse environmental condition or event which may be discovered upon, or which may occur on, the subject real property;

NOW, in consideration of the loan made by Bank to Borrower, it is agreed as follows:

I. DEFINITIONS

The term "environmental laws" shall include all laws, statutes, regulations, ordinances, rules, decrees, orders, policies or other requirements of any federal, state or municipal government authority with jurisdiction which relates to the quality of water, land, soils, air, fish, wildlife and other natural resources. This shall include, but not be limited to:

- (1) the Clean Air Act (42 USCA § 7401, et seq.);
- (2) the Clean Water Act (33 USCA § 1251, et seq.);
- (3) the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA") (42 USCA § 9601, et seq.);
- (4) the Resource Conservation and Recovery Act ("RCRA") (42 USCA § 6901, et seq.);
- (5) the Hazardous Materials Transportation Act (49 USCA § 1802, et seq.);
- (6) the Toxic Substances Control Act (15 USCA § 2601, et seq.); and
- (7) _____ [insert here any relevant state laws].

II. USES OF PROPERTY

Owners covenant that they have taken all necessary and appropriate steps to ascertain the identities of the prior owners of the property and the prior uses to which the property was placed. Owners warrant that, to the best of their knowledge, the property has never been used for the production, storage, handling, treatment, transportation, or disposal of toxic or hazardous substances as defined in the environmental laws described above.

Owners further covenant that, during the term of the loan, they will not allow or suffer the use of the property for the production, storage, handling, treatment, transportation, or disposal of toxic or hazardous substances as defined above.

As used herein, the terms "toxic substances" or "hazardous substances" shall not include ordinary substances sold at retail for cleaning or other "household" uses.

III. COMPLIANCE WITH LAWS

Owners covenant that there are no existing violations of environmental laws in, on, or about the subject premises. There are no outstanding orders or decrees of any court or agency regarding any violation of any environmental laws in, on, or about the subject premises. There are no lawsuits or compliance proceedings pending or threatened regarding the subject premises. Owners have obtained all required permits for the operation of the business located on the subject premises. Owners and the premises are in full compliance with all of the terms of such permits.

Owners further covenant that they will not allow or suffer any violation of any environmental law as it relates to the premises or the business operated thereon. Owners will keep in full force and effect all required permits and will timely seek extensions or renewals thereof. Owners will maintain the premises and operate the business in full compliance with the terms of such permits during the entire term of this loan.

Owners covenant that they will provide Bank with notice within twenty-four (24) hours of receiving any information which indicates that there is any:

- (1) violation of any environmental law;
- (2) a threatened revocation or non-renewal of any permit;
- (3) an order or decree of violation of any environmental law; and
- (4) a lawsuit threatened or commenced regarding environmental conditions on the premises.

Failure to do so will be a violation of this Agreement.

IV. CHANGE IN USE

Owners covenant that they will not suffer or permit a change in the current use of the property without the permission of Bank. Bank agrees not to unreasonably withhold permission. However, Bank reserves the right to condition such permission on the continued effectiveness of the provisions of this Agreement and on any further assurances which Bank may reasonably require to protect itself against any potential liability for the occurrence of any adverse environmental event which may jeopardize the viability of Bank's security.

V. RIGHT TO INSPECT

Owners grant Bank, its agents, employees, and officers permission to enter upon the premises at all reasonable hours for

the purposes of inspecting the premises. Owners further grant Bank and its agents permission to perform tests on the premises, as deemed necessary or appropriate, to ascertain whether Owners are in full compliance with the terms of this Agreement.

VI. INDEMNIFICATION

Owners shall indemnify and hold Bank harmless for any fines, claims, judgments, expenses, costs of remediation, or other liabilities (including legal fees and other costs of defense) which result from, or arise out of, the failure of Owners, Borrower, any of Owners' predecessors in title, or any tenants or occupants, to fully perform their obligations under any environmental laws as defined above.

Owners shall further indemnify and hold Bank harmless for any fines, claims, judgments, expenses, costs of remediation, or other liabilities (including legal fees and other costs of defense) which result from the occurrence of an environmental mishap on the property during the term of the loan, or from the discovery of an adverse environmental condition existing on the property prior to the making of the loan.

VII. SURVIVAL

The provisions of this Agreement shall survive any sale, conveyance, or other transfer of the premises, whether voluntary or involuntary, including a transfer after the foreclosure of the mortgage. The provisions of this Agreement shall be extinguished only upon payment in full of the debt secured by the mortgage, which is a lien on Owners' premises, without an event of default having occurred. Under the terms of the said Note and Mortgage, Bank shall provide a release at that time.

VIII. DISCLAIMERS

Nothing contained herein shall be deemed to render Bank "in control" of the premises as that term is defined in the environmental laws.

This Agreement may only be modified by a written amendment signed by all parties. An oral modification shall not be binding on any party.

Any failure by any party to enforce any right arising hereunder shall not be deemed a waiver of such right.

The parties hereto have set their hands and seals the day and year first above written.

OWNER:

_____ [name]

By: _____

Printed Name: _____

Title: _____

OWNER:

_____ [name]

By: _____

33-25 Current Legal Forms for Real Estate FORM 25.122

Printed Name: _____

Title: _____

BANK:

_____ [name]

By: _____

Printed Name: _____

Title: _____

STATE OF _____ [state])
COUNTY OF _____ [county]) SS:

BEFORE ME, a Notary Public in and for said County and State, personally appeared _____ [name],
a(n) _____ [state] _____ [entity], by _____ [name], its
_____ [title], who acknowledged that _____ [he/she] did sign the foregoing
instrument for and on behalf of said corporation, being thereunto duly authorized, and that the same is [his/her] free act
and deed individually and as such officers and the free act and deed of said _____ [entity].

IN TESTIMONY WHEREOF, I have hereunto set my hand and official seal at _____ [city],
_____ [state], this _____ [day] day of _____ [month], _____ [year].

Notary Public

STATE OF _____ [state])
COUNTY OF _____ [county]) SS:

BEFORE ME, a Notary Public in and for said County and State, personally appeared _____ [name],
a(n) _____ [state] _____ [entity], by _____ [name], its
_____ [title], who acknowledged that _____ [he/she] did sign the foregoing
instrument for and on behalf of said corporation, being thereunto duly authorized, and that the same is [his/her] free act
and deed individually and as such officers and the free act and deed of said _____ [entity].

IN TESTIMONY WHEREOF, I have hereunto set my hand and official seal at _____ [city],
_____ [state], this _____ [day] day of _____ [month], _____ [year].

Notary Public

33-25 Current Legal Forms for Real Estate FORM 25.122

STATE OF _____)
COUNTY OF _____) SS:

BEFORE ME, a Notary Public in and for said County and State, personally appeared _____ [name],
a(n) _____ [state] _____ [entity], by _____ [name], its
_____ [title], who acknowledged that _____ [he/she] did sign the foregoing
instrument for and on behalf of said corporation, being thereunto duly authorized, and that the same is [his/her] free act
and deed individually and as such officers and the free act and deed of said _____ [entity].

IN TESTIMONY WHEREOF, I have hereunto set my hand and official seal at _____ [city],
_____ [state], this _____ [day] day of _____ [month], _____ [year] .

Notary Public



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B. REAL ESTATE LOANS

33-25 Current Legal Forms for Real Estate FORM 25.123

FORM 25.123 Commitment letter from lender to borrower for loan secured by real property--lender requires environmental site assessment as condition for making loan

COMMENT

This form is a model commitment letter intended for use by a lender who makes a loan to a borrower that is secured by real property. The letter sets forth the terms on which the loan will be made. If the borrower fulfills these conditions in a timely manner, the lender will be obligated to close the loan transaction.

The commitment letter contains both environmental conditions and other, very commonplace conditions that are applicable to most types of real estate-backed loans. The environmental conditions require the borrower:

- (1) to obtain an environmental site assessment of the property that will secure the loan; and
- (2) to provide an opinion-of-counsel letter stating that there has been compliance with all applicable environmental laws affecting the subject property.

If the environmental site assessment reveals the existence of an adverse environmental condition on the subject premises, the lender is not required to close the loan deal.

FORM

_____ [name of borrower]

33-25 Current Legal Forms for Real Estate FORM 25.123

_____ [borrower's street address]
 _____ [borrower's city, state and zip code]

Re: Real Property and Premises Located at _____ [address]

Dear Mr./Ms. _____ [name]:

_____ Bank ("Bank") is pleased to offer you a loan in the amount of _____ Dollars (\$ _____), at an annual interest rate of _____ percent (_____ %), for a term of _____ (_____) years, with amortization over _____ (_____) years.

This commitment to lend shall be withdrawn if not accepted by you within _____ (_____) days of the date of this letter. To accept the commitment to lend, sign the enclosed copy of this letter and return it to the undersigned, along with the non-refundable commitment fee of _____ Dollars (\$ _____). This commitment to lend expires _____ (_____) days from the date hereof, namely, _____ [month] _____ [day] _____ [year].

The terms of this letter shall survive the closing of the loan and may only be amended by a written agreement signed by you and the Bank.

The following conditions must be satisfied at or prior to closing:

A. General Conditions

1. The mortgage shall be a first lien on the real property and premises commonly known as _____ [address of property or other description]. Title to the premises must be deemed marketable in the opinion of the Bank's attorneys.
2. You will grant a first security interest in all equipment, fixtures and personal property which are used in connection with the operation of your business, which items are now or hereafter located on the real property subject to the mortgage.
3. You will assign to the Bank all leases and rents in connection with the real property.
4. You will execute and deliver to the Bank those documents deemed necessary or appropriate by the Bank's attorneys to accomplish Paragraphs 1 through 3, above, including, but not limited to, a promissory note, mortgage, security agreement, UCC-1 financing statements, and written assignments of the leases and rents.
5. You will provide the Bank with an opinion of your attorney or other evidence satisfactory to the Bank regarding your authority to enter into this transaction, and acknowledging your legal title to the property, and such other issues as may be deemed appropriate by the Bank's attorneys.

B. Title Conditions

1. You will provide to the Bank an ALTA survey of the real property, which was prepared and certified by a licensed surveyor within the last _____ (_____) years or after the last improvements were made to the real property, whichever is more recent. This survey shall conform to the American Land Title Association surveyors' standards.

2. You will provide to the Bank a title insurance policy for the real property from a solvent title insurance company, licensed to do business in the State of _____ [state]. This policy shall be free from any exceptions, except those which are acceptable to our attorneys. Title must be unencumbered and marketable. The policy will contain such endorsements as the Bank shall reasonably request.

C. Financial Conditions

1. Each year you must submit to the Bank, within _____ (_____) days after your income tax returns have been filed, a copy of your state and federal income tax returns, your personal financial statement, and an operating statement for the real property.

2. You will submit to the Bank annually copies of receipts for payments you have made for real property and school taxes. These shall be submitted within _____ (_____) days after the last day on which such taxes may be paid without penalty.

3. You will deliver to the Bank an insurance policy, for fire, flood, and liability, from a solvent insurance company in at least the amount of _____ Dollars (\$_____). This or a comparable policy shall be maintained without lapse during the term of the loan.

4. You will pay all expenses in connection with the closing, including, but not limited to, recording fees, mortgage tax, survey costs, title insurance, Bank's attorneys' fees, engineering or consulting fees for the environmental site assessment, and the commitment fee.

D. Miscellaneous Conditions

1. This commitment may not be assigned.

2. You may not obtain secondary financing secured by a mortgage on the real property during the term of this loan without the prior written consent of the Bank.

3. This loan shall be due and payable in full in the event of the sale or other transfer of the property or any part thereof during the term of this loan.

4. The Bank shall not be obligated to close this loan if there is a material change in the condition of the real property or the financial condition of the borrower as of the date of the closing.

E. Environmental Conditions

1. At least _____ (_____) days prior to the closing, you shall provide to the Bank the results of a "Phase I Environmental Site Assessment" prepared by a qualified individual or company engaged in the business of environmental consultations. This assessment shall be in a form acceptable to the Bank. The Bank's obligation to lend to you shall be contingent upon the determination by the consultant that there are no significant environmental problems associated with the real property, and that there is no direct or circumstantial evidence of a significant adverse environmental condition on the real property due to past or present practices or releases of hazardous materials in, on, or about the real property. The Bank reserves the right to have a consultant of its own review the data and site assessment if the Bank deems it appropriate.

2. You will provide the Bank with an environmental indemnification and hold harmless agreement in a form satisfactory to us.

3. You will provide the Bank with satisfactory evidence, such as an opinion-of-counsel letter from your attorney, that the real property may lawfully be occupied for the proposed use, and that it is in compliance with all federal, state, and municipal laws, regulations and restrictions, including, but not limited to, zoning laws and environmental protection laws and regulations.

Sincerely,

_____ [name] Bank

By: _____ [name]

Title: _____

The undersigned hereby agrees to the terms and conditions of this commitment letter.

Dated: _____ [month] _____ [day] _____ [year]

[Borrower's signature]

[Printed name] _____



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B. REAL ESTATE LOANS

33-25 Current Legal Forms for Real Estate FORM 25.124

FORM 25.124 Opinion letter of borrower's counsel

COMMENT

This form is an opinion letter prepared by borrower's counsel and intended for the lender. Such letters are almost always required by lenders as part of a commercial loan transaction. In addition, the attorney normally states in the letter that he has personally reviewed all of the loan documents and that to his knowledge they contain no misrepresentations, and that they constitute valid and binding obligations of the borrower.

In this particular letter, the attorney represents that to his knowledge all environmental laws, ordinances and regulations affecting the mortgaged property have been complied with. In addition, the letter states that, to the best of the attorney's knowledge, there is no action, proceeding or investigation, pending or threatened, in connection with an alleged violation of an environmental law, regulation, policy, or an order or decree of any governmental authority. Similarly, to the best of the attorney's knowledge, no violation of any such environmental law, regulation, etc., has ever occurred on the property.

As a practical matter, the attorney should not unequivocally represent that the property is in compliance with all environmental laws. There are too many laws and the attorney is not qualified to inspect the property or evaluate the substances used.

FORM

_____ [month] _____ [day] _____ [year]

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_____ [name of lender's loan officer]
 _____ [name of lender]
 _____ [lender's street address]
 _____ [lender's city, state and zip code]

Re: Your commitment letter dated _____ [month] _____ [day] _____ [year], to _____ [name],
 Borrower

Dear Mr./Ms. _____ [name]:

I am the attorney for _____ [name] (hereafter "Borrower") in connection with the loan granted to
 Borrower pursuant to your commitment letter mentioned above, which loan is in the principal amount of
 _____ Dollars (\$_____).

As counsel to the Borrower, I have reviewed the commitment letter and the loan documents.

We are of the opinion that all the loan documents are valid obligations of the Borrower in the total sum of
 _____ Dollars (\$_____), and that the same have been duly executed pursuant to
 proper authority and constitute legal, valid and binding obligations of the Borrower enforceable in accordance with the
 terms thereof.

We are also of the opinion that the Borrower has all requisite power and authority to enter into, comply with, and
 perform the terms of the aforementioned loan instruments.

Based upon all of the loan documents and representations made therein, we know of no misrepresentation in the papers.

We are also of the opinion that, to our actual knowledge, without inquiry, all approvals, consents, permits, licenses,
 orders and authorizations of governmental authorities, required in connection with the construction and operation of the
 mortgaged premises, have been properly obtained and that, in particular, to our actual knowledge, without inquiry, the
 zoning, environmental and planning laws, ordinances and regulations affecting the property have been complied with,
 and that all requirements of all state or local agencies, including the County of _____ [county] and the
 City of _____ [city], which have jurisdiction over the subject matter, have been met.

There is, to our knowledge, no action, proceeding or investigation, pending or threatened, which questions the validity
 of the loan instruments, nor are we aware of any condemnation or other taking proceeding having been commenced or
 contemplated.

There is to our knowledge no action, proceeding or investigation pending or threatened in connection with an alleged
 violation of an environmental law, regulation, policy, order or decree of any governmental authority. To the best of our
 knowledge, no such violation has ever occurred.

It is understood that, as to all matters affecting the title to the mortgaged premises, you have relied on a commitment for
 title insurance issued by the _____ [name] Title Company and bearing that company's title no.
 _____. Similarly, we have relied on said title commitment, and we are of the opinion that said
 mortgage is a valid first mortgage lien on the premises described therein, properly securing the total sum of
 _____ Dollars (\$_____).

Very truly yours,

_____ *[name]*

[Typed name]

[Name of law firm]

Borrower's Counsel



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B. REAL ESTATE LOANS

33-25 Current Legal Forms for Real Estate FORM 25.125

FORM 25.125 Another opinion letter--disclaimer of compliance with environmental law

COMMENT

This is another opinion letter given by an attorney in connection with a commercial loan. The loan documents include an Environmental Indemnity Agreement. The opinion does provide that the loan documents are binding upon the borrowers. However, the opinion specifically disclaims any compliance by borrower of any environmental laws. The role of any attorney is not to review the property and borrower's operation to conclude that the borrower is not in violation of any applicable environmental law. Typically, the lender will rely upon an environmental site assessment. The opinion does provide that the attorney is not aware of any violations of law. Lastly, the opinion sets forth a lawsuit involving the borrower of which the attorney is aware.

FORM

_____ [month] _____ [day] _____ [year]

_____ [name of lender's loan officer]

_____ [name of lender]

_____ [lender's street address]

_____ [lender's city, state and zip code]

Re: Loan to _____

Ladies and Gentlemen:

We have acted as special counsel to _____ [name] and _____ [name] (collectively, the "Borrower") in connection with the loan described in _____ [name] Bank's (the "Bank") letter to Borrower dated _____ [month] _____ [day] _____ [year]. This opinion is rendered pursuant to the Bank's request.

In connection with this opinion, we have examined and considered the following:

- (i) the Bank's letter to the Borrower dated _____ [month] _____ [day] _____ [year];
- (ii) the Promissory Note dated _____ [month] _____ [day] _____ [year] executed by the Borrower;
- (iii) the Open-End Mortgage Deed and Security Agreement dated _____ [month] _____ [day] _____ [year] executed by the Borrower;
- (iv) the Assignments of Leases and Rentals dated _____ [month] _____ [day] _____ [year] executed by the Borrower;
- (v) the Environmental Indemnity Agreement dated _____ [month] _____ [day] _____ [year] executed by the Borrower;
- (vi) the Collateral Assignment of Borrowers' Interest in Contract Documents executed dated _____ [month] _____ [day] _____ [year] by the Borrower;
- (vii) the UCC-1 Financing Statements to be filed with the _____ [state] Secretary of State, _____ [county] County Recorder's Office and _____ [county] County Recorder's Office executed by the Borrower.

The documents referred to in subparagraphs (ii) through (vii) shall be collectively referred to as the "Loan Documents."

We have also examined such other documents, papers, statutes and authorities, as deemed necessary to form the basis of the opinions hereinafter expressed. In such examinations, we have assumed the genuineness of signatures other than those of the Borrower, the authenticity of all documents submitted to us as originals and the conformity to original documents of copies of documents supplied to us. As to various questions of fact material to this opinion, we have relied upon the warranties and representations of the Borrower set forth in the Loan Documents and statements, certificates and opinions of the Borrower and others.

The opinions expressed herein are qualified in their entirety as follows:

- (a) The enforceability of the terms and provisions of any instrument or agreement is subject to the application of bankruptcy, insolvency, reorganization, moratorium, liquidation and other similar laws now or hereafter in effect relating to creditors' rights or remedies generally;
- (b) The availability of equitable remedies, including, without limitation, the remedy of specific performance or the appointment of a receiver, is generally discretionary and may, under general principles of equity, not be available with respect to the enforcement of the terms or provisions of any instrument or agreement;

(c) Judicial decisions indicate that public policy may make unenforceable provisions in agreements respecting payment of the costs of administration and enforcement, including, without limitation, attorneys' fees;

(d) The opinions expressed herein are limited to matters of _____ [state] law and the federal law of the United States as in effect on the date hereof, and we express no opinion concerning the law of any other jurisdiction;

(e) The Assignments of Leases and Rentals will not be enforceable unless a foreclosure action is instituted and a receiver is appointed by a competent court having jurisdiction over the Borrower and the property described therein;

(f) The opinions expressed below as to compliance with certain laws and regulations and the obtaining or performing of all consents, approvals, authorizations, and filings required thereby are based upon a review of those laws and regulations which are generally applicable to transactions of the type contemplated by the agreements referred to herein and we expressly disclaim any opinions as to compliance with any environmental laws; and

(g) Whenever we assert below that a matter is "to our knowledge" or "known to us," unless otherwise qualified, our knowledge is limited to the actual knowledge of those attorneys in our office who have directly participated in the representation of the Borrower, or either of them, without inquiry.

No opinion is expressed with respect to the due authorization, execution, validity or enforceability of any instrument or agreement not specifically referred to herein. Further, we specifically express no opinion as to the priority of any liens or security interests given to the Bank pursuant to the Loan Documents.

Based upon our examination of the foregoing and such other matters that we have deemed necessary, we are of the opinion that:

1. The Loan Documents have been duly executed and delivered by the Borrower.
2. Assuming execution and delivery by an authorized representative of the Bank of those Loan Documents to which the Bank is a party, the Loan Documents are valid and enforceable against the Borrower in accordance with their respective terms.
3. The execution, delivery and performance of the Loan Documents shall not violate any applicable laws, governmental rules and regulations applicable to the Borrower, including, without limitation, applicable usury laws.
4. To our knowledge, the Borrowers are not in violation of any applicable laws, there is no material litigation or other proceedings for the collection of money involving the Borrower and to our knowledge, there is no set of circumstances which might give rise to such lawsuit or proceeding. We exclude from this opinion, however, and hereby disclose to the Bank that there is a pending lawsuit against _____ [name] in the Court of Common Pleas, Division of Domestic Relations, Cuyahoga County, Ohio entitled [insert name of case] Case No. _____. Although we have been consulted from time to time by _____ [name] and others, we are not counsel of record and specifically disclaim any opinion as to the status of such proceeding, its outcome or the impact, if any, on _____ [name].

5. To our knowledge, the Loan Documents do not conflict with any other material agreements to which the Borrowers are a party.

The opinions set forth above are intended solely for the benefit of the Bank in connection with the above-described transaction and may not be reproduced, filed publicly or relied upon by any other person or entity for any other purpose.

Very truly yours,

[insert attorney/firm name]



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C. LEASE OF REAL ESTATE

33-C. Current Legal Forms for Real Estate Scope

Scope

NOTE: For additional lease forms, see Volume 31, Chapter 23, Real Estate Leases, *supra*.



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C. LEASE OF REAL ESTATE

33-25 Current Legal Forms for Real Estate FORM 25.126

FORM 25.126 Commercial lease--shopping center--representation by tenant that business does not use or produce hazardous substances--representation by landlord that no other tenants are or will be involved in any business using or producing hazardous substances--representation by landlord of condition of premises

COMMENT

This agreement is for the lease of a unit in a newly-constructed shopping mall. The mall was built on the site of a former gasoline filling station. A phase I environmental site assessment was performed when the landlord obtained his construction loan. On the basis of the results of this assessment, the landlord now makes a representation to the tenant that the premises are free of any adverse environmental conditions or problems. And since the premises are newly-constructed, the landlord also makes a representation to the tenant regarding the good general condition of the premises.

In addition, the tenant and the landlord make mutual covenants regarding the use and storage of hazardous substances on the premises. The landlord covenants that none of the other tenants are or will be allowed to use, store or produce hazardous substances in their units, except for retail type uses such as dry cleaners, hardware stores, etc. (The tenant may terminate the lease if there is a violation of this covenant by the landlord.) The tenant also covenants that it will not use, store or produce hazardous substances in its unit. Also, many of the representations and warranties and other provisions set forth in the forms dealing with the purchase and sale of real estate and the real estate lending have broad applications and may be, with slight modifications, applied to landlord/tenant transactions.

FORM

AGREEMENT made this ____ [day] day of _____ [month] ____ [year], between _____ [

33-25 Current Legal Forms for Real Estate FORM 25.126

name], with its principal place of business at _____ [*address*] (hereafter referred to as "Landlord"), and _____ [*name*], with its principal place of business at _____ [*address*] (hereafter referred to as "Tenant")

WHEREAS, Landlord is the owner of a commercial shopping mall commonly known as _____ [*name*] Plaza/Mall/Shopping Center/Shopping Mall/Village, located in the City of _____ [*city*], State of _____ [*state*] (hereafter referred to as "premises"); and

WHEREAS, Tenant desires to lease Unit number _____ (_____) of said premises;

NOW, in consideration of the mutual promises contained herein, it is agreed as follows:

1. Landlord to Lease Unit to Tenant. Landlord hereby leases to Tenant the following premises at _____ [*name*] Plaza/Mall/Shopping Center/Shopping Mall/Village: _____ (_____) _____ [*number*] square feet of floor space, as shown in the attached drawing and identified thereon as unit number _____ (_____), for a term of _____ (_____) years, to commence on the _____ [*day*] day of _____ [*month*] _____ [*year*], and to end on the _____ [*day*] day of _____ [*month*] _____ [*year*], and to be used and occupied only for a _____ [*insert purpose*].

2. Rent. During the term of this lease, Tenant shall pay a rent of _____ Dollars (\$_____), said rent to be paid _____ [*e.g.*, in equal monthly installments, on the first day of each and every month, in the sum of _____ Dollars (\$_____)], from _____ [*month*] _____ [*day*] _____ [*year*], until _____ [*month*] _____ [*day*] _____ [*year*].

(a) At the expiration of the initial term, if this Lease shall then be in full force and effect and Tenant shall have fully performed all of its terms and conditions, Tenant shall have the option to extend this Lease upon the same terms and conditions, excepting the condition of rent, for an extended term of _____ (_____) years, to commence on the _____ [*day*] day of _____ [*month*], _____ [*year*], and to end on the _____ [*day*] day of _____ [*month*], _____ [*year*].

The option for the extended term shall be exercised by Tenant by giving written notice thereof to Landlord at least _____ (_____) months prior to the expiration of the then-current term. In order to be eligible to extend the term of this Lease, Tenant must have fully performed all of the Lease terms and conditions, and not be in default in any manner at the time notice is given to extend or at the commencement of the extended term.

(b) The extended term shall be upon the same terms and conditions as provided in this Lease for the initial term, except as specifically provided otherwise herein. There shall be no privilege to extend the term of this Lease for any period of time beyond the expiration of the extended term above specified. The fixed annual minimum rent during each year of the extended term shall be the sum equal to the product resulting from multiplying the fixed annual minimum rent for the final full lease year of the initial term by the number--which shall in no event be less than (1)--found by dividing the index (as defined below) for the first full calendar month in which falls the beginning of the extended term for which such fixed annual minimum rent is being computed, by the index for the first month of the initial term of this Lease.

Such index shall be defined as the Consumer Price Index for all urban consumers, published by the United States Department of Labor, Bureau of Labor Statistics (national average).

3. Condition of Premises to be Turned Over to Tenant:

(a) The premises to be leased will be delivered to Tenant in the following manner: the exterior walls will be

sheetrocked, taped and ready for painting, and the following will be fully installed and operational: acoustical tile ceilings; lighting fixtures in ceiling; exit lights and electrical outlets; heating, ventilation and air conditioning systems; separate meters for water, gas and electrical services; restrooms; gas or electric water heater; standard store front with one entrance door; and concrete floor.

(b) All other "fit-up" expenses shall be the sole cost and responsibility of Tenant and shall be completed in a good and workman like manner, in accordance with all applicable laws. Tenant shall have all plans approved, in writing, by Landlord prior to commencement of "fit-up" work. Tenant shall provide to Landlord proof of insurance, provided either by Tenant or its contractor, in the following minimum amounts:

Workers' Compensation: statutory minimum

Liability: _____ Dollars
 (\$ _____) per occurrence

Casualty: _____ Dollars
 (\$ _____) per casualty.

The policy shall provide for the giving of notice of cancellation to Landlord at least _____
 (_____) days prior to the effective date of cancellation.

(c) Tenant shall take good care of the premises and shall, at Tenant's own cost and expense, make all interior repairs, alterations, decorations and improvements to the leased premises during the period covered by this Lease. All repairs, alterations, decorations or improvements made in or to the leased premises by Tenant shall become the property of Landlord and shall be surrendered with the premises at the termination of the Lease. Tenant shall have the right to remove or replace its movable trade fixtures, provided Tenant repairs any damage caused by such removal or replacement. The failure of Tenant to remove its fixtures or any of its property at the termination of the term of this Lease shall be deemed abandonment of such property at the option of Landlord. If Landlord must remove such property, the cost of removal shall be deducted from Tenant's security deposit.

(d) At the expiration or other end of the Lease term or any extensions thereof, Tenant shall deliver up the leased premises in good order and condition, damages by the elements and reasonable wear and tear excepted.

4. Tenant to Comply with All Laws, etc. Tenant shall promptly comply with all statutes, ordinances, rules, orders, regulations and requirements of the federal, state and local governments (and of any and all of their departments and bureaus) applicable to said premises and pertaining to the correction, prevention and abatement of nuisances or other grievances in, upon or connected with said premises during the Lease term and any extensions thereof, at Tenant's own cost and expense. Tenant shall promptly provide Landlord with a copy of any notice received from any such authority.

5. Landlord to Provide Identification Sign for Mall. Landlord will provide an identification sign for _____ [name] Plaza/Mall/Shopping Center/Shopping Mall/Village, which shall also include a smaller sign listing the name of Tenant's business.

Landlord will seek approval from the City of _____ [city] for the signs.

Tenant shall obtain approval of the sign to be placed on the building directly above Tenant's entrance; the size and appearance of that sign must be acceptable to the City of _____ [city], and must also be approved by Landlord. The maximum sign for tenant's premises shall not exceed _____ (_____) feet by _____ (_____) feet. The signs for each tenant in the _____ [name] Plaza/Mall/Shopping Center/Shopping Mall/Village shall be as uniform as practicable. The cost of the sign application to the City of _____ [city] shall be borne by Tenant.

6. Assignment of Lease and Subletting of Premises by Tenant. Tenant and/or his successors shall not assign this Lease, or sublet the premises, or any part thereof, without Landlord's written consent. Such consent shall not be unreasonably withheld, conditioned or delayed.

7. Landlord Represents that Leased Space is New Construction. Landlord hereby represents that the space to be leased to Tenant is new construction and has not been previously leased or otherwise occupied. All plumbing, heating and mechanical systems are in good working order.

8. Previous Use of Leased Premises. Landlord represents that the land on which _____ [name] Plaza/Mall/Shopping Center/Shopping Mall/Village is built was previously occupied by an auto parts and supply store and gasoline filling station. The underground storage tanks were removed prior to construction. A phase I environmental site assessment, which was performed on the premises immediately prior to construction, found no evidence of any adverse environmental impact on the premises due to use or release of hazardous substances.

9. Environmental Covenant by Landlord. Except for tenants such as dry cleaners, hardware stores, and other tenants in which hazardous substances are a part of the normal retail activities of a shopping center, Landlord represents that none of the present tenants in _____ [name] Plaza/Mall/Shopping Center/Shopping Mall/Village use, store or produce any substance in their businesses deemed hazardous under the following statutes and the regulations promulgated thereunder: the Comprehensive Environmental Response, Compensation and Liability Act, 42 USC § 9601 et seq.; the Resource Conservation and Recovery Act, 42 USC § 6901 et seq.; the Hazardous Material Transportation Act, 49 USC § 1801 et seq.; and the Toxic Substances Control Act, 15 USC § 2601 et seq. Landlord agrees, during the term of this lease and any extensions thereof, not to lease any space to any tenant who uses, stores or produces any substance deemed hazardous, as defined above except as set forth above. In the event of a material breach of this covenant, Tenant shall be entitled to terminate this Lease agreement without penalty. Nothing contained herein shall be deemed to render Landlord liable to Tenant for any expenses incurred in termination of the Lease and relocation, including, but not limited to, moving expenses, fit-up costs, loss of business or injury to person or property.

10. Environmental Covenant by Tenant. Tenant represents that Tenant does not use, store or produce hazardous substances in the course of Tenant's business. Tenant agrees not to allow or suffer the use, storage or production of hazardous substances, as defined above, on the leased premises. A breach of this covenant will allow Landlord to terminate this Lease and will render Tenant liable for damages.

11. Tenant to Give Landlord Notice of Fire, Accident, Damage, or Dangerous or Defective Condition. Tenant must give Landlord notice of fire, accident, damage, or dangerous or defective condition on or to the premises. If the leased premises cannot be used because of fire or other casualty, Tenant is not required to pay rent for the time the premises are unusable. Landlord shall have the right to decide whether and which part of the premises is unusable. Landlord need only repair the damaged structural parts of the premises. Landlord shall repair and return the leased premises to the Tenant in the same condition in which Landlord was required to deliver the premises to Tenant at the commencement of this Lease under Paragraph 3. Landlord is not required to repair or replace any equipment, fixtures, furnishings or decorations, unless originally installed by Landlord. Landlord is not responsible for delays due to settling insurance claims, obtaining estimates, labor and supply problems or any other cause not fully under Landlord's control.

If there is substantial damage caused by fire or other casualty, Landlord has the right to demolish or rebuild the building. Landlord may cancel this Lease within _____ (_____) days after a fire or casualty causing substantial damage by giving Tenant written notice of Landlord's intention to demolish or rebuild. This Lease will end upon Landlord's giving the cancellation notice to Tenant. Tenant shall surrender the premises to Landlord immediately. Tenant shall pay all rent due to the date of the fire or casualty. If this Lease is so canceled, Landlord shall have no obligation to repair the premises or building, or re-lease to Tenant should Landlord make such repairs.

12. Landlord May Enter Upon Leased Premises to Conduct Examination or Make Repairs. Tenant shall permit Landlord and Landlord's agents and other representatives to enter into and upon said premises, or any part thereof, at any reasonable hour, for the purpose of examining the same, or making such repairs or alterations therein as may be necessary for the safety and preservation thereof.

Landlord shall bear the entire expense of all repairs, alterations or improvements to the items originally installed or constructed by Landlord. Tenant shall be responsible for any repairs, alterations, decorations and improvements which were not installed or constructed by Landlord. Any such repairs, alterations, or improvements by Landlord or Tenant shall be accomplished promptly with first-class materials, in a good and workmanlike manner, in compliance with all applicable laws of all governmental authorities, and in a style and character conforming to the existing construction. Any delays due to circumstances beyond the control of a party shall be excused.

13. Eviction of Tenant. If the premises are abandoned during the term of this Lease, or if Tenant fails to pay the rent or any part thereof, or if Tenant violates any other provision of this Lease, Landlord or his duly authorized representatives may re-enter the said premises and remove all persons therefrom, without being liable for prosecution. Tenant hereby expressly waives the service of any notice, in writing, of Landlord's intention to re-enter. Tenant shall remain responsible for all rent payments as they become due and payable under the terms of this Lease. Landlord may rent the premises on behalf of Tenant. Without releasing Tenant from any liability, Landlord may rent the premises for a longer period of time than fixed in the original lease, or for a lower annual rental payment. Landlord shall apply any rent collected, first to the expense of obtaining possession, including court costs and reasonable legal fees, second to restoring the premises to a rentable condition, and then to the payment of the rent and any other charges which may be due. Tenant shall remain liable for any deficiency.

14. Lease is Subordinate to Mortgage on Property. This Lease shall be subordinate to any mortgages that are now on, or that hereafter may be placed against, said premises. The recording of such mortgage or mortgages shall be superior to, and prior in line to, this Lease, irrespective of the date of recording. Tenant agrees to execute, without cost, any such instrument which may be deemed necessary or desirable to further effect the subordination of this Lease to any such mortgage or mortgages. A refusal to execute such instrument shall be a violation of this Lease and entitle Landlord to commence proceedings to evict Tenant.

15. Eminent Domain. If the whole or any part of the leased premises shall be taken by eminent domain, the term of this Lease shall terminate from the date title vests in the governmental authority. Tenant shall have no claim against Landlord for the value of any unexpired term of this Lease. No part of any award shall belong to Tenant.

16. Tenant Waives Right to Redeem and Right to Trial by Jury. Tenant waives all rights to redeem under any law of the State of _____ [state]. Tenant waives the right to trial by jury on any cause of action arising out of this Lease.

17. Landlord's Inability to Supply or Delay in Supplying Service or Repair to Tenant. The obligation of Tenant to pay rent hereunder and to perform all other covenants shall not be excused because Landlord is unable to supply, or is delayed in supplying, any service or repair to be supplied by Landlord under the terms of this Lease, when such inability or delay shall be due to accident, or to the extensiveness of the alterations or repairs desirable or necessary to be made, or to Landlord's inability or difficulty in securing supplies or labor for the provision of such service, or to some other cause, rather than gross negligence on the part of Landlord. No diminution or abatement of rent, or other compensation, shall be claimed or allowed for inconvenience or discomfort arising from the making of repairs or improvements to the building. No such interruption or curtailment of any service shall be deemed a constructive eviction.

18. Tenant Responsible for All Utilities. Tenant shall be responsible for all utilities and utility bills arising from the use of utilities on the leased premises, including gas, electricity, water, sewer, and telephones.

19. Landlord to Maintain Common Areas. Landlord shall maintain the common areas at all times. Tenant shall pay its proportionate share of the cost of: (1) all exterior maintenance and grounds keeping; (2) common area maintenance; (3) snow and ice removal from the sidewalks and parking areas of the premises; (4) the collection and disposal of rubbish and other refuse; (5) exterior lighting; and (6) other exterior cleaning and maintenance, taxes, and insurance.

The proportionate share of Tenant shall be determined by the use of the formula: "A" divided by "B" and multiplied by "C" = amount due. "A" equals the amount of floor space rented by Tenant, "B" equals the total amount of floor space available for rent in the shopping mall, and "C" equals the total amount of maintenance and other costs listed in the preceding paragraph. Landlord shall compute the amount due from Tenant pursuant to this paragraph on a monthly basis and give notice to Tenant in writing. The bill shall be paid within _____ (_____) days of the date of delivery of said notice. For purposes of this lease, Tenant's initial proportionate share is _____ percent (_____%).

20. Parking. Tenant and employees of Tenant agree to park their automobiles in the parking area designated by Landlord for employees. Landlord shall be entitled to tow improperly-parked vehicles at Tenant's expense and without notice.

21. Tenant Responsible for Cleaning Unit. Tenant shall be responsible for the cleaning and maintenance of Tenant's own unit.

22. Insurance. Tenant, at its own cost, shall maintain liability and property damage insurance with a liability limit of _____ Dollars (\$_____) per claim, and property damage limit of not less than _____ Dollars (\$_____), insuring against all liability of Tenant and its authorized representatives arising out of and in connection with, Tenant's use or occupancy of the premises.

Tenant, at its own cost, shall maintain full coverage plate glass insurance on the premises. Landlord shall be named as an additional insured on all policies. Landlord shall secure casualty insurance for the entire shopping plaza, and liability insurance and property damage insurance for the common areas.

23. Security Deposit. Tenant shall pay to Landlord a security deposit in the amount of _____ Dollars (\$_____). Said sum shall be returned to Tenant after the expiration of the term of this Lease and any extensions thereof, provided Tenant has fully performed all of the terms, covenants and conditions required hereunder. Additionally, if Landlord is required to use Tenant's security deposit during the term of this lease, Tenant shall immediately, upon written notice from Landlord, restore the security deposit to the amount stated above.

24. Occupancy Date. It is anticipated by Landlord that the building will be ready for occupancy on _____ [month] _____ [day] _____ [year]. Rent will commence on the date the premises are available for possession by Tenant. In the event the available date is other than the first day of a month, the rent for that first partial month shall be pro-rated on a daily basis from the date of availability. In the event that Landlord is unable to obtain all of the necessary governmental approvals by _____ [month] _____ [day] _____ [year], the security deposit paid hereunder shall be refunded by Landlord to Tenant, and there shall be no further liability or responsibility on the part of either party to the other.

25. Arbitration. Any disagreement between the parties with respect to the interpretation or application of this Lease or the obligations of the parties hereunder shall be resolved by arbitration. Such arbitration shall be conducted, upon request of either Landlord or Tenant, before a single arbitrator designated by the American Arbitration Association and in accordance with the rules of that Association. The arbitrator designated and acting under this Lease shall make the award in strict conformity with such rules and shall have no power to depart from or change any of the provisions thereof. The expense of arbitration proceedings conducted hereunder shall be borne equally by the parties. All arbitration proceedings hereunder shall be conducted in the county in which the leased premises are located.

26. Agreement Contains Entire Understanding of Parties. This Agreement contains the entire understanding of the parties; there have been no representations made which are not contained herein.

27. No Oral Modifications. This Agreement may only be modified by a written amendment signed by both parties. An oral modification shall not be binding on either party.

28. Controlling Law. This Agreement shall be construed in accordance with the laws of the State of _____ [state].

29. Waiver. Any failure by either party to enforce any right arising hereunder shall not be deemed a waiver of such right.

IN WITNESS WHEREOF, the parties hereto have set their hands and seals the day and year first above written.

LANDLORD:

_____ [name]

By: _____

Printed Name: _____

Title: _____

TENANT:

_____ [name]

By: _____

Printed Name: _____

Title: _____



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Current Legal Forms for Real Estate

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Current Legal Forms for Real Estate

Chapter 25 ENVIRONMENTAL CONSIDERATIONS IN REAL ESTATE TRANSACTIONS

Part IV. FORMS

C. LEASE OF REAL ESTATE

33-25 Current Legal Forms for Real Estate FORM 25.127

FORM 25.127 Commercial lease--ground lease--vacant land to be used by tenant for construction of building(s)--tenant promises to comply with all environmental laws

COMMENT

This form is a ground lease whereby a tenant leases vacant, undeveloped land from a landlord. The tenant then constructs a building or buildings upon the land. At the end of the term, the building(s) becomes the property of landlord. Of course, in such agreements, the lease term typically runs for decades; otherwise, no tenant would be willing to assume the tremendous costs of new construction.

The lease contains two environmental provisions. One requires the tenant to obey all federal, state and local environmental laws, regulations and policies during excavation, construction and occupancy of the building. The other provides that if the tenant discovers hazardous substances concealed beneath the ground during the course of excavation and construction (e.g., drums of chemicals or toxic wastes), then the tenant may either terminate the lease or require the landlord to remediate the problem.

If the landlord is required to remediate the problem, then the tenant receives a rent abatement and an extension of the lease term for the period of time between discovery of the problem and completion of the remediation process. It should be remembered that, under the Comprehensive Environmental Response, Compensation and Liability Act, 42 USC § 9601, *et seq.*, the landlord may be required by law to correct the environmental problem anyway, regardless of whether he intends to lease the property to another. Hence, the landlord's promise to the tenant to correct the environmental problem may simply be a recognition on the landlord's part of his statutory duty. It may not impose any additional financial burden on the landlord that did not exist already. If the environmental problem is too massive, the landlord reserves the right to terminate the lease. Obviously, the landlord needs this right because significant problems could render the property

worthless. Further, since the landlord is a corporation, in the event of a larger problem, the landlord might elect to walk away from the property or file for bankruptcy.

FORM

AGREEMENT made this ____ [day] day of _____ [month], ____ [year], between _____ [name], a corporation organized and existing under the laws of the State of _____ [state], with offices at _____ [address] (hereafter referred to as "Landlord"), and _____ [name], a corporation organized and existing under the laws of the State of _____ [state], with offices at _____ [address] (hereafter referred to as "Tenant").

WHEREAS, Landlord is the owner of a _____ (_____) acre parcel of land, which parcel of land is zoned for light industrial and commercial/business use; and

WHEREAS, Landlord has received site-plan approval from the Town/City/Municipality of _____ [name] for construction of _____ (_____) commercial-use structures on each of the lots which together form the parcel;

WHEREAS, Tenant wishes to construct and occupy a structure on lot number _____ (_____), as shown on the approved site plan;

NOW, in consideration of the mutual promises contained herein, it is agreed as follows:

1. Leased Premises. Landlord hereby leases to Tenant, and Tenant hereby rents from Landlord, all that portion of vacant land which is shown and designated as lot number _____ (_____) on a map entitled _____ [name], located in the Town/City/Municipality of _____ [name], County of _____ [county], State of _____ [state]. Said map being duly filed with the _____ [county] County Clerk on _____ [month] ____ [day] ____ [year], as map number (_____).

2. Term. The term of this Lease shall be _____ (_____) years, commencing on the date hereof and terminating on _____ [month] ____ [day] ____ [year], both dates inclusive, unless sooner terminated pursuant to the terms of this Agreement.

3. Extended Term. Tenant shall be entitled to extend the term of this lease for _____ (_____) years, provided that the Lease has not been previously terminated and that Tenant is not in default under the terms of this Lease Agreement at the time of each extension.

Tenant shall give written notice of the intent to extend at least _____ (_____) years prior to the expiration of the then-current term.

The terms of this Agreement shall remain, except that the annual rent shall be the sum of _____ Dollars (\$_____), payable in monthly installments of _____ Dollars (\$_____) each on the first day of each month.

Tenant shall have no further right to extend the term of this Lease Agreement beyond the expiration of the extensions provided for above.

4. Rent. Tenant shall pay to Landlord the sum of _____ Dollars (\$_____) during the

initial term of this lease for the use and occupancy of the premises. Tenant may pay the same in monthly installments of _____ Dollars (\$_____) each, which shall be due and payable on the first day of each month.

In the event Tenant fails to make payments on or before the _____ (_____) day of each month, Tenant shall pay a late fee in the amount of _____ Dollars (\$_____) to cover Landlord's additional administrative expenses associated with the late payment.

5. Use of the Premises. It is understood by the parties hereto that Tenant intends to use the premises for the construction and operation of a _____ (_____) office building and adjacent parking area]. Copies of the proposed building plans are annexed hereto as Exhibit "A" and made a part hereof. Any changes to the plans shall require the approval of Landlord. Such approval shall not be unreasonably withheld, conditioned or delayed. However, Landlord shall have the right to refuse to approve any changes which shall reduce the number of usable square feet contained within the structure.

6. Governmental Approvals. Tenant shall be responsible for and shall secure promptly all necessary governmental approvals, including, but not limited to, building permits and certificates of occupancy.

7. Construction, Alterations, Repairs. Tenant shall construct the building shown in Exhibit "A" in a good and workmanlike manner, using first-class materials. Construction shall be commenced within _____ (_____) days after the building permit shall be issued. Tenant shall make application for the building permit within _____ (_____) days after the date hereof.

Construction shall be completed within _____ (_____) months after commencement thereof, with reasonable extensions for inclement weather, labor disputes, strikes, Acts of God and other circumstances beyond the control of Tenant. In any event, the construction shall be complete within _____ (_____) years of the date of commencement.

During the term of this Lease and any renewals or extensions thereof, Tenant shall make all needed alterations and repairs of any nature. Tenant shall maintain the premises in first-class condition at all times during the term of this Lease and any extensions or renewals thereof. In the event Tenant fails to make a necessary repair, Landlord may, but shall not be required to, enter upon the premises and perform the repair. Landlord may charge the cost of the repair to Tenant as additional rent. Such additional rent shall be due and payable on the first day of the month after which the Landlord has paid for the repair.

All structures, improvements and fixtures of any nature constructed or installed by Tenant on the leased premises shall become the property of Landlord and shall not be removed therefrom by Tenant. Notwithstanding the foregoing, removable trade fixtures shall be removed from the premises at the completion of the term of this Lease, including any renewals or extensions thereof. Tenant shall repair any damage caused by the removal. If Tenant fails to remove such trade fixtures, Landlord may deem the trade fixtures part of the leased premises, or may remove and dispose of such fixtures at Tenant's expense, at Landlord's option.

8. Additional Rent. Tenant shall pay all taxes assessed against lot number _____ (_____), including, but not limited to, property taxes, school taxes, sewer rents, water rents and special improvement district levies. In the event Tenant fails to pay such taxes as they become due, Landlord may pay them and charge such expenses to Tenant as additional rent. Such additional rent shall become due and payable on the first day of the month after which the Landlord has paid any such taxes.

Tenant shall provide Landlord with proof of payment of taxes within _____ (_____) days after the last day on which such taxes may be paid without penalty.

9. Insurance. Tenant shall maintain casualty insurance on the structure for the benefit of Landlord and Tenant, in an amount sufficient to reconstruct the premises.

Tenant shall maintain public liability insurance on the leased premises in at least the amount of _____ Dollars (\$_____) per claim. Landlord shall be named as an additional insured.

Tenant shall provide Landlord with certificates of insurance evidencing such coverage, together with proof of premium payment, at least once each year. Tenant shall secure a provision in each policy of insurance requiring that at least _____ (_____) days' written notice be given to Landlord by the insurance carrier prior to cancellation of any policy.

In the event Tenant fails to secure such insurance, Landlord may obtain the same and charge the premiums to Tenant as additional rent, which shall be due and payable on the first day of the month after which Landlord paid such premiums.

Tenant shall require the contractor who performs the construction described in Exhibit "A" to obtain builder's risk insurance in at least the amounts set out above. Landlord and Tenant shall be named as additional insureds.

10. Sublease. Tenant shall be entitled to freely sublease all or part of the property described in Exhibit "A." Tenant shall include the substance of the following clauses in each lease to a subtenant:

- (a) The space will be used for _____ [e.g., offices only].
- (b) No sublease shall extend beyond the term of this Lease.
- (c) Subtenant(s) shall comply with all laws as they relate to the use and occupancy of the building.
- (d) Subtenant shall not, at any time during the term of its lease or any extensions or modifications thereof, use, store, treat, transport, manufacture, handle or produce any hazardous substance (as defined below) on the leased premises.

The term "hazardous substance" shall mean any substance deemed hazardous under any of the following statutes or under any other statute or regulation of any governmental authority: the Comprehensive Environmental Response, Compensation and Liability Act, 42 USC § 9601 *et seq.*; the Resource Conservation and Recovery Act, 42 USC § 6901 *et seq.*; the Hazardous Material Transportation Act, 49 USC § 1801 *et seq.*; or the Toxic Substances Control Act, 15 USC § 2601 *et seq.*

11. Mortgages:

(a) Tenant may grant a mortgage for the financing of the construction described in Exhibit "A" hereto. Such mortgage shall be, at all times, subordinate to the ownership rights of Landlord. Tenant may not grant or suffer any other liens upon the premises without the express written consent of Landlord.

(b) In any mortgage which Landlord may now or hereafter place against the premises, Tenant agrees that his interest shall be subordinate. Tenant shall execute any documents reasonably required by Landlord to evidence such subordination. Tenant shall be required to satisfy any liens not expressly approved by Landlord within _____ (_____) days after receipt of notice of the existence of such liens. Failure to do so shall be an event of default under the terms of this Lease Agreement.

12. Eminent Domain:

(a) If the whole or part of the leased premises shall be acquired or condemned by eminent domain for any public or quasi-public use or purpose, then, in that event, the term of this Lease shall cease, and the Lease shall terminate from the date on which title vests in the applicable governmental authority.

(b) Any award for condemnation shall be paid first to Tenant, to the extent required to satisfy Tenant's construction mortgage and any other liens for which Tenant received express written permission of Landlord to incur. The balance of the award shall belong to Landlord.

13. Destruction by Fire or Other Casualty. In the event that the building described in Exhibit "A" shall be totally destroyed by fire or other casualty, Tenant shall not be required to rebuild. Instead, Tenant may elect, within _____ (_____) days after the date of loss, to terminate this Lease. In that event, Tenant shall use so much of the insurance proceeds as may be required to satisfy the construction mortgage and any other liens which were expressly approved, in writing, by Landlord. The remainder of the proceeds shall belong to Landlord.

If the building is only partially destroyed, Tenant shall promptly reconstruct the building to its condition immediately prior to the fire. Tenant shall obtain all governmental approvals. Reconstruction shall be commenced promptly and be completed within _____ (_____) months of the date of loss.

In the event of a complete loss and termination of the Lease, the rent shall cease to be payable as of the date of loss. Landlord shall not be required to return any rent to Tenant. In the event of a partial loss, the rent shall be reduced by the same percentage as the percentage of the building which is unusable.

14. Indemnification. Tenant does hereby covenant and agree with Landlord that it will indemnify and hold Landlord harmless from and against any and all liability, damages, penalties or judgments arising from injury to person or property sustained by anyone in and about the leased premises due to any act or acts of omission or commission of Tenant, or Tenant's officers, agents, servants, employees, contractors or assignees. Tenant shall, at its own cost and expense, defend against any and all suits or actions (whether just or unjust) which may be brought against Landlord because of any such above-mentioned matter, claim or claims. Landlord shall not be responsible or liable for any damage to any property, fixtures, buildings or other improvements, or for any injury to any person or persons, at any time on the leased premises, including any injury to Tenant or to any of Tenant's officers, agents, servants, employees, contractors, customers or assignees, except as may result from any act or acts of omission or commission of Landlord or Landlord's officers, agents, servants, employees, assignees or contractors.

15. Utilities. Tenant shall pay all fees charged for all utilities utilized in connection with the use and occupancy of the premises, including, but not limited to, gas, oil, electricity and telephone service.

16. Inspection. Landlord shall have the right to enter upon the premises at any reasonable hour to inspect for compliance with the terms of this Lease. Landlord shall provide Tenant with notice of the inspection at least _____ (_____) hours prior to making the inspection.

17. Environmental Provisions:

(a) Tenant shall comply with all environmental laws, orders and regulations of federal, state, county and municipal authorities, and with any directive issued pursuant to law by any public officer thereof, which shall impose any order or duty upon Tenant pertaining to the construction, use or occupancy of the leased premises by Tenant, its assignees or sublessees.

(b) Tenant shall have the right, upon giving written notice to Landlord, to contest any obligations imposed upon Tenant

pursuant to the provisions of this Paragraph and to defer compliance during the pendency of the contesting proceedings, provided that the failure of Tenant to comply will not subject Landlord to civil fine or criminal penalty.

(c) Notwithstanding the foregoing, in the event that Tenant's failure to promptly fulfill the contested obligations would pose an imminent threat to public health, public safety and/or the environment, Tenant shall immediately perform whatever actions may be required to abate the immediate threat. Thereafter, Tenant may contest the obligations and defer further compliance, as set forth above.

(d) Tenant shall provide Landlord with copies of all documents served upon Tenant or his counsel, and served by Tenant or his counsel, upon the governmental authority.

(e) Failure of Tenant to comply with the provisions of this Paragraph shall be an act of default under the terms of this Lease and shall entitle Landlord to pursue all applicable remedies. In addition, Landlord shall be entitled to collect from Tenant any fines, penalties, expenses of defense (including legal fees), expenses of compliance and other damages incurred by Landlord by reason of Tenant's default under this Paragraph.

(f) In the event that Tenant discovers any condition during the course of excavation and construction that would indicate the possible existence of hazardous substances on the premises, Tenant shall immediately notify Landlord. Landlord shall investigate the matter at his sole cost and expense. If the substances are indeed hazardous (as defined above in Paragraph 10), Tenant shall be entitled to terminate this Lease by giving written notice of its election to do so within _____ (_____) days after Landlord advises it that such substances are hazardous.

The obligation to pay rent shall be suspended upon the date of discovery by Tenant of the evidence of hazardous substances or the date that Tenant ceases excavation and construction, whichever is later. If Tenant elects not to terminate, Landlord shall promptly take whatever reasonable actions are required by law to remediate, remove or otherwise clean up the premises as required by the Comprehensive Environmental Response, Compensation and Liability Act, 42 USC § 9601 *et seq.* The obligation to pay rent shall be suspended from the date of discovery of the evidence of hazardous substances until remediation is complete. Tenant shall be entitled to an extension of the term of this Lease for the same period of time. Notwithstanding the foregoing to the contrary, if the remediation exceeds _____ Dollars (\$ _____), then Landlord may, in its sole discretion, terminate this lease. In the event of such termination, Landlord shall reimburse Tenant for all reasonable costs and expenses incurred by Tenant in connection with the project.

18. Trash. Tenant shall store all trash, debris and all other waste materials in a fire-proof container, and normal office waste paper and other normal office trash in waste baskets within the leased premises. In no event shall any trash, debris or waste materials be stored outside of the building.

19. Quiet Enjoyment. Landlord covenants and agrees that Tenant may peaceably and quietly enjoy the leased premises, subject, however, to Tenant's fulfillment of the covenants and agreements contained in this Lease.

20. End of Term. Upon expiration or other termination of this Lease, Tenant shall quit and surrender to Landlord the leased premises, broom clean, in good order and condition, reasonable wear and tear and damage by fire or other casualty excepted.

21. Notices. Any notice required to be given to Landlord shall be in writing and sent certified mail, return receipt requested, to _____ [name] at the following address: _____ [address]. Any notice required to be given to Tenant shall be in writing and sent certified mail, return receipt requested, to _____ [name] at the following address: _____ [address].

22. Waiver. Any failure by either party to enforce any right arising hereunder shall not be deemed a waiver of such right.

23. Amendments. This Agreement may only be modified by a written amendment signed by both parties. An oral modification shall not be binding on either party.

24. Captions. The captions preceding the paragraphs of this Lease are inserted only as a matter of convenience and for reference purposes, and in no way define, limit or describe the scope of this Lease nor the intent of any provision of this Lease.

25. Waiver of Right to Trial by Jury. The parties hereto agree that, for any cause of action or counterclaim arising out of the terms of this Lease, including an action for eviction, the parties waive the right to a trial by jury.

26. Default. The following shall be events of default on the part of Tenant under the terms of this Lease:

- (a) failure to pay rent or added rent when due;
- (b) failure to comply with any law, regulation, policy or order of any lawful governmental authority;
- (c) failure to comply with any other lease provision contained herein;
- (d) vacating or abandoning the premises.

In the event of default, Landlord shall give written notice of default to Tenant, specifying the nature of the default. Tenant shall have _____ (_____) days from the date of notice to cure a default in rent payment. Tenant shall be entitled to _____ (_____) days from the date of notice to cure a non-monetary default. If Tenant fails to cure the default within the specified time, Landlord may terminate this Lease and remove Tenant by summary proceedings or otherwise.

The obligation of Tenant to pay rent for the remainder of the term shall continue after removal. Landlord may re-rent the premises and apply the rents, first to the cost of removing Tenant, including reasonable legal fees and court costs, next to the cost of refurbishing the space, last to the rent due by Tenant. Tenant shall remain liable for any deficiency. Landlord may re-rent the property for a lower rent and/or a longer term without releasing Tenant from its obligation to pay rent as specified herein.

27. Assignment. Tenant shall not assign its rights or obligations under this Lease to any party without the express written consent of Landlord. Landlord will not unreasonably withhold, condition or delay its consent without reason. If Landlord agrees to give its consent to the assignment, it may condition the consent on receiving a satisfactory financial statement from the assignee. Tenant shall provide Landlord with a fully executed copy of the assignment and all ancillary documents pertinent to the transfer. In the event of an assignment, Tenant shall not be released hereunder unless Landlord shall explicitly agree to such a release in writing.

IN WITNESS WHEREOF, the parties hereto have set their hands and seals the day and year first above written.

LANDLORD:

_____ [name]

By: _____

Printed Name: _____

Title: _____

TENANT:

_____ [*name*]

By: _____

Printed Name: _____

Title: _____

[Attach Exhibit A]



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Current Legal Forms for Real Estate

Chapter 25 ENVIRONMENTAL CONSIDERATIONS IN REAL ESTATE TRANSACTIONS

Part IV. FORMS

C. LEASE OF REAL ESTATE

33-25 Current Legal Forms for Real Estate FORM 25.128

FORM 25.128 Commercial lease--factory building--disclaimer of warranties by landlord about condition of building--provision allowing tenant to use stream on premises as a water source for manufacturing purposes--requirement that tenant surrender premises in as good condition as existed at commencement of lease--requirement for environmental bond or insurance policy

COMMENT

This is a lease of a factory building which the landlord acquired at a distress sale. Occasionally, when commercial real estate is put on the auction block pursuant to a sheriff's sale, potential purchasers of the property do not have the time to order a phase I environmental site assessment to ascertain whether the property has some serious environmental problem, such as contamination of its subsoil or ground water. In order to take advantage of the "bargain basement" price which a successful bidder will often receive when buying at a distress sale, he often must forego the type of thorough investigation of the past uses and current condition of the property which any other purchaser would insist upon. Instead, the successful bidder must rely upon a quick visual inspection of the property by an environmental consultant and (perhaps) a representation from the financial institution that the property is free of any serious environmental problems. In such event, the purchaser should purchase the property using a single purpose entity (a/k/a SPE) in order to make an attempt to shield the buyer's personal assets from liabilities associated with the property.

Accordingly, in this lease the landlord disclaims all warranties regarding the environmental state of the premises, the condition of the structure, and its fitness for the use to which the tenant intends to put the structure. If the property is plagued with an environmental problem requiring remediation, the tenant is responsible for all expenses in correcting the problem and making the property comply with all federal, state and local environmental laws.

Needless to say, these provisions are extremely favorable to the landlord and leave the tenant widely exposed to the danger of leasing property that is badly contaminated and very expensive to

repair. Consequently, tenant's counsel should insist that the lease be made contingent upon the results of a phase I environmental site assessment that reveals no evidence of any serious environmental problem on the premises. An assessment may also be helpful to landlord. If the assessment indicates that the property is clear, it may be presumed that any subsequent contaminant discovered was caused by tenant. In addition, tenant's counsel should insist upon a rental fee that is below the market rate, since his client is assuming the danger of incurring potentially enormous remediation expenses if a major environmental problem is discovered during the lease term. Lastly, if the problem is significant, the tenant will want the ability to terminate the lease and walk from the property.

The parties have inserted into the lease a provision that allows the tenant to use the water from a stream on the premises during the manufacturing process. However, the tenant must first obtain any and all governmental permits required for such use. The tenant must also make certain that its use of the water strictly complies at all times with the governmental permits, including discharge permits.

Finally, the tenant is also required to obtain a bond or an "environmental insurance policy" to protect the landlord in the event that some negligent act or omission by the tenant results in the further contamination of the leased property. In such case, the bond or insurance policy provides a source of ready cash with which to finance the tenant's remediation efforts. The protection afforded by the bond or insurance policy is extremely important to the landlord, since without this safeguard the landlord must simply hope that the tenant will have adequate financial resources available in the event of an environmental mishap to cover the cost of remediation. If insurance is obtained, it is almost a certainty that the insurance company will require a comprehensive environmental assessment.

FORM

AGREEMENT made this _____ [day] day of _____ [month], _____ [year], between _____ [name], with a place of business at _____ [address] (hereafter known as "Landlord"), and _____ [name], a corporation existing under the laws of the State of _____ [state], with a place of business at _____ [address] (hereafter referred to as "Tenant").

In consideration of the rents to be paid and the mutual covenants and agreements to be performed by Landlord and Tenant, the parties hereto do agree as follows:

1. Leased Premises. Landlord hereby leases to Tenant, and Tenant does hereby lease and take from Landlord, Landlord's _____ [describe premises to be leased, e.g., three-story factory building] located at _____ [address], to be used for the operation and conduct of Tenant's business of manufacturing _____ [describe type of product(s) made by tenant] products.

2. Lease Term. The term of this Agreement shall be for _____ (_____) years, commencing _____ [month] _____ [day] _____ [year], and ending on _____ [month] _____ [day] _____ [year], unless sooner terminated as set forth herein or extended as set forth herein.

3. Rent. During the term hereof, Tenant shall pay to Landlord rent in the amount of _____ Dollars (\$_____), The rent shall be payable in _____ [e.g., monthly, yearly, bi-monthly, semi-annual, etc.] rent of _____ Dollars (\$_____). Said payment shall be made _____ [e.g., on the first day of each month]. Tenant shall pay a _____ Dollars

(\$ _____) penalty for each day that the rent is overdue.

4. Purchase. Tenant shall have the option to purchase the premises at any time during the term of the lease for a sum of not less than _____ Dollars (\$ _____). Tenant shall give notice to Landlord of intent to purchase. Closing and transfer of title shall occur within _____ (_____) days thereafter. All costs and expenses of closing and transfer of title shall be the responsibility of Tenant.

Notwithstanding the foregoing, in the event Landlord receives a bona fide offer to purchase the property from a third party during the term of the Lease, Landlord shall notify Tenant. Tenant shall have _____ (_____) days from receipt of notice to give notice of its intent to purchase. The purchase price shall be the sum of _____ Dollars (\$ _____), or the amount of the bona fide offer, whichever is higher. The closing and transfer of title shall occur within _____ (_____) days after receipt by Landlord of notice of Tenant's intention to purchase.

If Tenant fails to give notice of intention to purchase within the specified period, Tenant's option shall be terminated and of no further force and effect, and Landlord may sell free and clear of such option.

5. Disclaimer of Warranties. Landlord makes no representations or warranties regarding the condition use or fitness of the premises, either express or implied. Landlord has owned the premises only _____ (_____) months, having purchased the premises at a bankruptcy sale. Landlord has not personally inspected the property. Landlord has no direct knowledge of the prior uses of the premises by any previous occupant. Landlord has no knowledge of the condition of the premises, structures located thereon, or equipment contained therein.

Tenant acknowledges the foregoing and accepts the premises in "AS IS," "WHERE IS" condition WITH ALL FAULTS and subject to all environmental laws, regulations and orders issued by any governmental authority which may affect the premises. Tenant, at its own cost and expense, will undertake whatever efforts may be necessary to bring the premises into strict compliance with all environmental laws and regulations of any governmental authority with jurisdiction over the subject premises. Landlord makes no warranty regarding the suitability or habitability of the leased premises for Tenant's intended uses. Notwithstanding the foregoing to the contrary, if a condition is discovered and in order to remediate such condition, the anticipated costs and expenses will exceed _____ Dollars (\$ _____), then Tenant may immediately terminate this lease.

6. Use of Stream. The leased premises contain a watercourse designated on maps of the _____ [e.g., Department of Environmental Conservation of the State of _____ [state]] as _____ [insert name of watercourse]. Landlord hereby grants Tenant permission to use water from this watercourse in Tenant's manufacturing processes. Tenant agrees to return the water in a purified state and at the same temperature as the water remaining in the stream. Tenant, at its sole cost and expense, shall solely determine whether permits are required from any governmental authority for use of said watercourse. Prior to use, Tenant shall obtain such permits as are required. Tenant shall confine its use of the watercourse to the terms of said permits and comply fully with all applicable laws and regulations of any governmental authority with jurisdiction over the watercourse. Landlord's consent to Tenant's use of the watercourse shall not be construed as a statement by Landlord that such use is lawful.

7. Maintenance and Repair:

(a) Tenant shall take good care of the leased premises and shall, at Tenant's own cost and expense, make all interior repairs, alterations, decorations and improvements to the leased premises during the period covered by this Agreement. All improvements shall become the property of Landlord, except for removable trade fixtures and manufacturing equipment. Tenant shall repair any damage to the structure caused by the removal of trade fixtures and/or manufacturing equipment. Failure to remove such trade fixtures and manufacturing equipment by the end of the term

shall cause said items to become the property of Landlord.

(b) The Landlord shall bear the entire expense of all structural maintenance and repairs (including, but not limited to, repair or replacement of heating and air conditioning equipment) but shall not be responsible for other repairs, alterations, decorations and improvements.

(c) All of the aforesaid repairs, alterations or improvements, whether by Landlord or Tenant, shall be accomplished promptly with first-class materials, in a good and workmanlike manner, in compliance with all applicable laws of all governmental authorities, and in a fashion that conforms to the building and its construction. Any repairs, alterations, decorations or improvements made by the Tenant shall be done only with prior written approval of Landlord, which approval shall not be unreasonably withheld. In the event that Tenant does not purchase the premises, but returns possession at the end of the term of this Lease Agreement, Tenant shall return the premises broom clean and in the same condition that existed at the commencement of this Agreement, reasonable wear and tear excepted.

8. Sublease/Assignment. The Tenant shall not assign this Agreement or sublet the subject premises, or any part thereof, without the Landlord's written consent. The Landlord's consent shall not be unreasonably withheld, conditioned or delayed.

9. Default. If the Tenant abandons or vacates the premises during the term of this Agreement, or if Tenant fails to pay the rent, or if Tenant violates any other provision of this Agreement, the Landlord or his duly-authorized representatives may re-enter the premises by summary proceedings or otherwise and remove all persons therefrom without being liable for prosecution. The Tenant hereby expressly waives its right to service of notice from Landlord of Landlord's intention to re-enter. Tenant shall remain responsible for all rent payments as they become due and payable under the terms of this lease. The Landlord may rent the premises on behalf of the Tenant. Without releasing Tenant from any liability, Landlord may rent the premises for a longer period of time than fixed in the original lease, or for a lower rental amount. Landlord shall apply any rent collected, first to the expense of obtaining possession, including court costs and reasonable legal fees, second to restoring the premises to a rentable condition, and then to the payment of the rent and any other charges which may be due from Tenant. Tenant shall remain liable for any deficiency.

10. Damage to Leased Premises. Tenant shall give Landlord notice of fire or other damage and of any dangerous or defective condition(s) on the leased premises. If the leased premises cannot be used because of fire or other damage, Tenant is not required to pay rent for the time the said premises are unusable. If only part of the leased premises cannot be used because of fire or other damage, Tenant shall pay rent for the usable part thereof. Landlord shall have the sole right to determine whether and which portion of the leased premises is unusable. Landlord shall only repair the damaged portion of the premises. Landlord shall not be required to repair or replace any equipment, fixtures, furnishings or decorations, unless originally installed by the Landlord. Landlord shall not be responsible for delays due to settling insurance claims, obtaining estimates, labor and supply problems, or any other cause not fully under Landlord's control.

If the fire or other damage is caused by an act of or by the neglect of Tenant or Tenant's employees, invitees or agents, then all repairs shall be made at Tenant's expense.

Landlord shall have the right to demolish or rebuild the leased premises if there is substantial damage thereto. Landlord may cancel this Agreement within _____ (_____) days after such substantial damage by giving Tenant notice of Landlord's intention to do so. This Agreement shall end _____ (_____) days after such cancellation notice to Tenant. Landlord shall have the sole right to determine whether substantial damage has occurred.

11. Non-waiver. The failure of the Landlord to insist upon strict performance of any of the terms, conditions and covenants herein shall not be deemed a waiver of any rights or remedies that the Landlord may have hereunder, and

shall not be deemed a waiver of any subsequent breach by Tenant of the terms, conditions and covenants herein contained. This instrument may not be changed, modified, discharged or terminated orally.

12. Tenant's Further Responsibilities. Tenant shall be responsible for, and shall pay the costs and expenses arising from:

- (a) all utilities and utility bills, including gas, telephone service, electricity, water charges, and sewer fees;
- (b) garbage removal;
- (c) snow and ice removal;
- (d) interior cleaning and maintenance; and
- (e) the security system currently installed on the leased premises.

13. Insurance/Taxes:

(a) The Tenant, at its own cost, shall maintain liability and property damage insurance with a liability limit of at least _____ Dollars (\$ _____) per claim, and a property damage limit of not less than _____ Dollars (\$ _____) per claim, insuring against all liability of the Tenant and its authorized representatives arising out of, and in connection with, Tenant's use or occupancy of the premises. Tenant shall maintain replacement cost casualty insurance on the building. The Landlord shall be named as an additional insured. Tenant shall provide Landlord with a certificate of insurance demonstrating the existence of the above-required coverage either prior to, or upon taking possession of, the leased premises. Failure to do so shall constitute a default under this Agreement.

(b) Tenant shall pay all real property and school taxes assessed against the leased premises during the term of this Agreement.

(c) Tenant shall provide to Landlord a bond or certificate of insurance which shall protect Landlord from any loss arising out of any act or omission of Tenant, its agents, employees or invitees, which act or omission causes an adverse environmental impact on the subject premises. The insurance or bond shall be in at least the sum of _____ Dollars (\$ _____). If Tenant obtains an insurance policy, the insurer shall be required, under the terms of said policy, to provide notice to Landlord at least _____ (_____) days prior to cancellation. In the event Tenant is unable to secure such a bond or insurance, Tenant may provide a substitute means of protecting Landlord, which must be acceptable to Landlord.

14. Security Deposit. The Tenant has this day deposited with the Landlord the sum of _____ Dollars (\$ _____) as security for the full performance by Tenant of the obligation to make rental payments under this Agreement. Said sum shall be returned to the Tenant upon the expiration of the term herein, provided the Tenant has fully performed the conditions of this Lease.

15. Miscellaneous:

(a) This Agreement contains the entire understanding of the parties, and there have been no representations made which are not contained herein.

(b) This Agreement may only be modified by a written amendment signed by both parties. An oral modification shall not be binding on either party.

(c) This Agreement shall be construed in accordance with the laws of the State of _____ [state].

(d) Any failure by either party to enforce any right arising hereunder shall not be deemed a waiver of such right.

(e) The Tenant agrees that the Landlord, the Landlord's agents and other representatives shall have the right to enter into and upon the leased premises, or any part thereof, at any reasonable time. Tenant may change the locks on the premises, but must provide Landlord with a key within _____ (_____) hours of changing the locks.

(f) Any notice required to be given to Landlord shall be in writing and sent certified mail, return receipt requested, to _____ [name] at the following address: _____ [address]. Any notice required to be given to Tenant shall be in writing and sent certified mail, return receipt requested, to _____ [name] at the following address: _____ [address]. Notice shall be deemed given when received.

IN WITNESS WHEREOF, the parties hereto have set their hands and seals the day and year first above written.

LANDLORD:

_____ [name]

By: _____

Printed Name: _____

Title: _____

TENANT:

_____ [name]

By: _____

Printed Name: _____

Title: _____



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Chapter 25 ENVIRONMENTAL CONSIDERATIONS IN REAL ESTATE TRANSACTIONS

Part IV. FORMS

C. LEASE OF REAL ESTATE

33-25 Current Legal Forms for Real Estate FORM 25.129

FORM 25.129 Commercial lease--space in office building--tenant is required to comply with environmental laws and orders relating to the leased premises

COMMENT

This is a comprehensive lease for the leasing of space within an office building. It contains many provisions, most of which are not related to any environmental issues. The lease is characterized as a landlord's lease. A sophisticated tenant should request a significant number of changes to the lease. The lease does not require the tenant to comply with all laws affecting the use and occupancy of the leased premises. Specifically, the tenant agrees that it will comply fully and promptly with all environmental laws, regulations, and orders issued by any federal, state, county or local governmental authority.

FORM

1. Parties. This Lease, dated for reference purposes only on _____ [month] _____ [day] _____ [year], is made by and between _____ [name] ("Landlord"), and _____ [name] ("Tenant").

2. Summary of Basic Terms. As used in this Lease, the following terms shall have the meanings set forth below, subject to the qualifications, adjustments and exceptions set forth elsewhere in this Lease:

(a) *Premises*: The space on the _____ [floor number, e.g., tenth (10th)] floor of the Building, designated as _____ [name], and located substantially as shown on the floor plan attached hereto as Exhibit "A."

(b) *Building*: The office building located at _____ [address], including all plazas, lobbies, landscaped areas, office and commercial space and parking garages.

(c) *Land*: The parcel(s) of land upon which the Building is located, which constitute all of Tax Assessor's Parcel No(s).
_____.

(d) *Permitted use*: _____.

(e) *Lease term*: _____.

(f) *Scheduled commencement date*: _____.

(g) *Expiration date*: _____.

(h) *Initial monthly rent*: _____ Dollars (\$_____).

(i) *Rentable area of premises*. _____ (_____) square feet (which number shall be conclusive for all purposes hereunder).

(j) *Base year*: The calendar year during which the Scheduled Commencement Date Occurs.

(k) *Lease year*: Each twelve (12) month period commencing with the Commencement Date.

(l) *Tenant's share*: _____.

(m) *Security deposit*: _____ Dollars (\$_____).

(n) *Tenant's parking*: see Section 26.

(o) *Tenant's guarantor*: _____ [name].

(p) *Landlord's broker*: _____ [name].

(q) *Tenant's broker*: _____ [name].

(r) *Landlord's address for notices*: _____ [address].

(s) *Tenant's address for notices prior to commencement*:
_____ [address].

3. *Demise and Term*. Landlord hereby leases the Premises to Tenant and Tenant hereby leases the Premises from Landlord, subject to all of the terms, covenants and conditions in this Lease. The Premises are leased for the Lease Term, which, subject to Section 4, below, shall commence on the Scheduled Commencement Date and shall expire on the Expiration Date, unless sooner terminated pursuant to the provisions of this Lease.

4. Possession.

4.1 *Delay in Delivery of Possession*. If Landlord cannot deliver possession of the Premises to Tenant on the Scheduled Commencement Date for any reason, this Lease shall not be void or voidable, nor shall Landlord be liable to Tenant for any Liabilities resulting therefrom, and Tenant waives the provisions of any Laws to the contrary. In this case, the Lease Term and the regular installments of Monthly Rent and additional rent payable by Tenant shall not commence until Landlord delivers possession of the premises. If Landlord delivers and Tenant accepts possession of the Premises prior

to the Scheduled Commencement Date, the Lease Term shall commence on the date Tenant accepts possession and all of the terms, covenants and conditions of this Lease, including, without limitations, Tenant's obligations to pay the Monthly Rent and additional rent hereunder, shall commence as of such date. If the Lease Term commences earlier or later than the Scheduled Commencement Date, this Lease shall nevertheless expire on the Expiration Date, unless sooner terminated pursuant to the terms hereof.

4.2 Delays Caused by Tenant. Notwithstanding anything to the contrary in Section 4.1, if Landlord's failure to deliver possession of the premises to Tenant on the Scheduled Commencement Date results from Tenant's (or its agents' or employees') acts or omission, the Monthly Rent and additional rent payable by Tenant shall commence on the date when Landlord would have delivered possession of the Premises but for such acts or omissions.

4.3 Commencement Date. The term "Commencement Date" means the Scheduled Commencement Date or, if different, the date when the Lease Term commences. Upon Landlord's request, Tenant shall confirm the Commencement Date in writing, but Tenant's failure to do so shall not affect the commencement of the Lease Term.

5. Rent.

5.1 Monthly Rent. Tenant shall pay to Landlord as rent for the Premises a monthly rent (the "Monthly Rent") equal to the Initial Monthly Rent, adjusted periodically as set forth in Section 5.2. The Monthly Rent shall be payable in advance on or before the first day of the first full calendar month of the Lease Term (the "First Month") and on or before the first day of each successive calendar month thereafter during the Lease Term, except that the Monthly Rent for the First Month (and for the period [if any] between the Scheduled Commencement Date and the First Month) shall be paid upon the execution of this Lease. The Monthly Rent for any period during the Lease Term which is for less than _____ (_____) month(s) shall be prorated based on a _____ (_____) -day month. The Monthly Rent and all other rent hereunder shall be paid without prior notice or demand, without deduction or offset, in lawful money of the United States of America which shall be legal tender at the time of payment, at the office of the Building or to another person or at another place as Landlord may from time to time designate in writing. The term "additional rent" means all other amounts payable by Tenant hereunder (whether or not designated as additional rent).

5.2 Adjustment of Monthly Rent.

(a) The Monthly Rent shall be increased on the first calendar anniversary of the Commencement Date and on each and every calendar anniversary of the Commencement Date thereafter in proportion to the increase in the Index (as defined below) which has occurred between the month immediately preceding the month in which the Scheduled Commencement Date occurs (the "Base CPI Month") and the month immediately preceding the month in which the Monthly Rent is to be increased (a "Comparison CPI Month"). Landlord shall notify Tenant of each increase by delivering a written statement setting forth the Index for the Base CPI Month, the Index for the applicable Comparison CPI Month, the percentage increase between those two Indices, and the new Monthly Rent payable by Tenant. The Monthly Rent shall not be reduced from the last previous adjusted Monthly Rent by reason of any decrease in the Index. If Landlord's notice is given after the effective date of an increase, Tenant shall nevertheless be obligated to pay the new Monthly Rent from its effective date until the next periodic increase. In such event, within _____ (_____) days of Landlord's notice, Tenant shall pay Landlord the additional Monthly Rent for the period between the effective date of the increase and Landlord's notice, and thereafter shall pay the new Monthly Rent on or before the first day of each month as provided in Section 5.1.

(b) The term "Index" means the United States Department of Labor, Bureau of Labor Statistics, Consumer Price Index for all Urban Consumers (all items for the _____ Statistical Area on the basis of _____ [year] = 100. If the format or components of the Index are materially changed after the execution of this Lease, Landlord shall substitute an index which is published by the Bureau of Labor Statistics or

similar agency and which in Landlord's judgment, is equivalent to the Index in effect on the date of this Lease. Landlord shall notify Tenant of the substituted index, which shall be used to calculate the increase in the Monthly Rent.

6. **Security Deposit.** Upon the execution of this Lease, Tenant shall deposit the Security Deposit with Landlord. The Security Deposit shall be held by Landlord as security for the performance of all of Tenant's obligations during the Lease Term. Each time the Monthly Rent is increased, Tenant shall deposit additional cash with Landlord sufficient to increase the Security Deposit to an amount which bears the same proportion to the increased Monthly Rent as the initial Security Deposit bore to the Initial Monthly Rent. Upon any default by Tenant under this Lease, Landlord may, but shall not be obligated to, use, apply or retain all or any part of the Security Deposit for the payment of any rent in default, or any other Liabilities which Landlord may incur as a result of or in connection with Tenant's default. If any portion of the Security Deposit is so used or applied, Tenant shall, within _____ (_____) days after written demand therefor, deposit cash with Landlord in an amount sufficient to restore the Security Deposit to its previous amount. Landlord shall not be required to keep the Security Deposit separate from its general funds, and Tenant shall not be entitled to receive interest on the Security Deposit. If Tenant complies with all of the provisions of this Lease, the unused portion of the Security Deposit shall be returned to Tenant (or, at Tenant's option, to the last assignee of Tenant's interest hereunder) within _____ (_____) days after the expiration or sooner termination of the Lease Term and the surrender of possession of the Premises to Landlord in the condition required hereby.

7. Operating Expenses.

7.1 **Definitions.** As used in this Lease, the following terms have the meanings set forth below:

(a) *Comparison year.* Each calendar year after the Base Year, all or any portion of which falls within the Lease Term.

(b) *Real property taxes.* Any fee, license fee, license tax, business license fee, commercial rental tax, levy, charge, assessment, penalty or tax imposed by any taxing authority against the Land or the Building; any tax on Landlord's right to receive, or the receipt of, rent or income from the Land or the Building; any tax or charge for fire protection, streets, sidewalks, road maintenance, refuse or other services provided to the Land or the Building; any charge or fee replacing any tax previously included within this definition. Real Property Taxes do not include Landlord's federal or state net income, franchise, inheritance, gift or estate taxes.

(c) *Operating expenses.* All costs and expenses of operating, maintaining and repairing the Building and the Land, including, but not limited to: Real Property Taxes; water and sewer charges; insurance premiums for all insurance policies deemed necessary by Landlord; deductible amounts under insurance policies; janitorial services; wages of Landlord's employees engaged in the operation, maintenance or repair of the Building or the Land, including all customary employee benefits, Worker's Compensation and payroll taxes; management fees, or, if no managing agent is retained for the Building, a sum in lieu thereof which is not in excess of the prevailing rate for management services charged by professional management companies for the operation of similar buildings; legal, accounting and other consulting fees; the cost of air conditioning, heating, ventilation, electricity, water and other services and utilities; elevator maintenance; capital improvements and replacements to all or any portion of the Building and the Land made after completion of the Building, appropriately amortized over the useful life of such improvements; all costs and expenses incurred by Landlord and interest on any funds borrowed to pay the cost of any capital improvements as a result of or in order to comply with any Laws, including, but not limited to, Laws pertaining to energy, natural resources conservation, safety or environmental protection; supplies, materials, equipment and tools; and maintenance and repair of all parking and common areas. Operating Expenses do not include depreciation on the existing Building and improvements or equipment therein, loan payments (except as expressly provided above), executive salaries or real estate brokers' commissions.

7.2 **Payment for Increases in Operating Expenses.** If the Operating Expenses paid or incurred by Landlord in any

Comparison Year increase over the Operating Expenses paid or incurred for the Base Year, Tenant shall pay, as additional rent, Tenant's Share of the increase in the manner set forth in this Section. If, during any period in a Comparison Year, less than 95% of the rentable area of the Building is occupied, the Operating Expenses for that Comparison Year shall be adjusted to what the Operating Expenses would have been if 95% of the rentable area of the Building had been occupied throughout that Comparison Year. Tenant's Share of increases in Operating Expenses shall be prorated for any partial Comparison Year which falls within the Lease Term.

7.3 Manner of Payment. Landlord shall deliver to Tenant a statement showing Landlord's reasonable estimate of the Operating Expenses for each Comparison Year and the amount of Tenant's Share of any increase in Operating Expenses based on such estimate. Commencing as of the first day of each Comparison Year, Tenant shall pay to Landlord, at the times and in the manner provided herein for the payment of Monthly Rent, one-twelfth (1/12) of Tenant's Share of any increases as shown by Landlord's statement. If Landlord's statement is furnished after January 1 of a Comparison Year, then on or before the first day of the first calendar month following Tenant's receipt of Landlord's statement, in addition to the monthly installment of Tenant's Share of any increases due on that date, Tenant shall pay the amount of Tenant's Share of any increases for each calendar month or fraction thereof that has already elapsed in such Comparison Year.

7.4 Final Statements. After the end of each Comparison Year (including the Comparison Year in which the Lease Term terminates), Landlord shall deliver to Tenant a final statement of the actual Operating Expenses for such Comparison Year. Within _____ (_____) days of delivery of each final statement, Tenant shall pay Landlord the amount due for Tenant's Share of any increases in the Operating Expenses. Tenant shall have _____ (_____) days after delivery of Landlord's final statement to object in writing to the accuracy of the statement. If Tenant does not object within such _____ (_____) -day period, Landlord's final statement shall be conclusive and binding on Tenant. Objections by Tenant shall not excuse or abate Tenant's obligation to make the payments required under this Section 7.4 (or under Section 7.3) pending the resolution of Tenant's objection. Any credit due Tenant for overpayment of Tenant's share of any increases in the Operating Expenses shall be credited against the installments of Monthly Rent next coming due. However, overpayments for the Comparison Year in which the Lease Term terminates shall be retained by Landlord to increase the Security Deposit, and shall be refunded, used, applied or retained as set forth in Section 6, above.

8. Use of Premises.

8.1 Permitted Use. Tenant shall use the premises only for Permitted Use and shall not use or permit the Premises to be used for any other purpose.

8.2 Restrictions on Use. Tenant shall not do or permit anything to be done in or about the Premises nor bring or keep anything therein which will: (a) increase the existing rate or, cause the cancellation of or otherwise adversely affect any casualty or other insurance for the Building or any part thereof or any of its contents; (b) impair the proper and economic maintenance, operation and repair of the Building or any portion thereof; (c) obstruct or interfere with the rights of other tenants or occupants of the Building or injure or annoy them; or (d) cause any nuisance in or about the Premises or the Building. Tenant shall not use or allow any part of the Premises to be used for the storage, manufacturing or sale of food or beverages or for the manufacture, retail sale or auction of merchandise, goods or property of any kind, or as a school or classroom, or for any unlawful or objectionable purpose. Tenant shall not commit or allow to be committed any waste to the Premises or the Building.

8.3 Compliance with Laws. Tenant shall not use the premises or permit anything to be done in or about the Premises, the Building or the land which will in any way conflict with any law, statute, ordinance, code, rule, regulation, requirement, license, permit, certificate, judgment, decree, order or direction of any governmental or quasi-governmental authority, agency, department, board, panel or court (singularly and collectively "Laws"). Tenant shall, at its expense, promptly comply with all Laws and with the requirements of any board of fire insurance underwriters or other similar bodies now or hereafter constituted, relating to or affecting the condition, use or occupancy

of the Premises. Tenant shall not be required to make structural changes to the Premises unless they arise or are required because of or in connection with Tenant's specific use of the Premises, or the type of business conducted by Tenant in the Premises, or Tenant's Alterations or Tenant's acts or omissions. Tenant shall obtain and maintain in effect during the Lease Term all licenses and permits required for the proper and lawful conduct of Tenant's business in the Premises, and shall at all times comply with such licenses and permits. The judgment of any court of competent jurisdiction or the admission of Tenant in any action or proceeding (whether Landlord is a party or not) that Tenant has violated any Laws shall be conclusive of that fact as between Landlord and Tenant.

8.4 Compliance with all Environmental Laws, Regulations, Policies, Orders, etc. Tenant agrees that it will comply fully and promptly with any and all environmental laws, regulations, statutes, ordinances, policies and orders issued by any federal, state, county or local governmental authority; that it will obtain, maintain in full force and effect, and strictly comply with any and all governmental permits, approvals and authorizations necessary for the conduct of its business operations; that it will supply Landlord with copies of any such permits, approvals and authorizations; that it will promptly notify Landlord of the expiration or revocation of any such permits, approvals and authorizations; and that it will promptly notify Landlord and supply Landlord with a copy of any notice of violation of any environmental law, regulation, statute, ordinance, policy or order Tenant receives.

9. Alterations and Additions.

9.1 Landlord's Consent.

(a) Tenant shall not make or permit to be made any alterations, additions or improvements (singularly and collectively "Alterations") to or of the Building or the Premises or any part thereof without the prior written consent of Landlord in each instance. However, Landlord's consent shall not be required for minor decorations of the Premises such as wall coverings and wall hangings, built-in cabinetry and movable partitions, nor for the installation of furnishings and, subject to the provisions of Section 11.2, office equipment.

(b) Landlord will not unreasonably withhold its consent to any Alterations provided and upon the condition that all of the following conditions shall be satisfied: (i) the Alterations do not affect the outside appearance of the Building; (ii) the Alterations are nonstructural and do not impair the strength of the Building or any part thereof; (iii) the Alterations are to the interior of the Premises and do not affect any part of the Building outside of the Premises; (iv) the Alterations do not affect the proper functioning of the heating, ventilating and air conditioning ("HVAC"), mechanical, electrical, sanitary or other utilities, systems and services of the Building, or increase the usage thereof by Tenant; (v) Landlord shall have approved the final plans and specifications for the Alterations and all contractors who will perform them; (vi) Tenant pays to Landlord (A) a fee for Landlord's indirect costs, field supervision or coordination in connection with the Alterations equal to _____ percent (_____ %) of the estimated cost of the Alterations, and (B) the reasonable costs and expenses actually incurred by Landlord in reviewing Tenant's plans and specifications and inspecting the Alterations to determine whether they are being performed in accordance with the approved plans and specifications and in compliance with Laws, including, without limitation, the fees of any architect or engineer employed by Landlord for such purpose; (vii) before proceeding with any Alteration which will cost more than _____ Dollars (\$_____) (exclusive of the cost of items constituting Tenant's Property, as defined in Section 9.2), Tenant obtains and delivers to Landlord, at Landlord's option, either: (A) a performance bond and a labor and materials payment bond for the benefit of Landlord, issued by a corporate surety licensed to do business in California, each in an amount equal to _____ percent (_____ %) of the estimated cost of the Alterations and in form satisfactory to Landlord, or (B) such other security as shall be reasonably satisfactory to Landlord. Unless all of the foregoing conditions are satisfied, Landlord shall have the right to withhold its consent to the Alterations in Landlord's sole and absolute discretion.

(c) Not less than _____ (_____) days nor more than _____ (_____) days prior to commencement of any Alterations, Tenant shall notify Landlord of the work

commencement date so that Landlord may post notices of nonresponsibility about the Premises. All Alterations must comply with all Laws, the other terms of this Lease, and the final plans and specifications approved by Landlord, and Tenant shall fully and promptly comply with and observe the rules and regulations of Landlord then in force with respect to the making of Alterations. Landlord's review and approval of Tenant's plans and specifications are solely for Landlord's benefit. Landlord shall have no duty toward Tenant, nor shall Landlord be deemed to have made any representation or warranty to Tenant, with respect to the safety, adequacy, correctness, efficiency or compliance with Laws of the design of the Alterations, the plans and specifications therefor, or any other matter regarding the Alterations. If attached, that certain Agreement for Completion of Premises dated _____ [month] _____ [day] _____ [year], by and between Landlord and Tenant, shall further govern each party's rights and responsibilities regarding Alterations.

9.2 Ownership and Surrender of Alterations. Upon their installation, all Alterations, including, but not limited to, wall covering, paneling and built-in cabinetry, but excluding movable furniture, trade fixtures and office equipment ("Tenant's Property"), shall become a part of the realty and belong to Landlord and shall be surrendered with the Premises. However, upon the expiration or sooner termination of the Lease Term, Tenant shall, upon written demand by Landlord, at Tenant's expense, immediately remove any Alterations made by Tenant which are designated by Landlord to be removed and repair any damage to the Premises caused by such removal.

9.3 Liens. Tenant shall pay when due all claims for labor, materials and services furnished by or at the request of Tenant or Tenant's Affiliates. Tenant shall keep the Premises, the Building and the Land free from all liens, security interests and encumbrances (including, without limitation, all mechanic's liens and stop notices) created as a result of or arising in connection with the Alterations or any other labor, services or materials provided for or at the request of Tenant or Tenant's Affiliates, or any other act or omission of Tenant or Tenant's Affiliates, or persons claiming through or under them. (Such liens, security interests and encumbrances singularly and collectively are herein called "Liens.") Tenant shall not use materials in connection with the Alterations that are subject to any Liens. Tenant shall indemnify Landlord and Landlord's Affiliates for, and hold Landlord and Landlord's Affiliates harmless from and against: (a) all Liens; (b) the removal of all Liens and any actions or proceedings related thereto; and (c) all Liabilities incurred by Landlord or Landlord's Affiliates in connection with the foregoing. If Tenant fails to keep the Premises, the Building and the land free from Liens, then, in addition to any other rights and remedies available to Landlord, Landlord may take any action necessary to discharge such Liens, including, but not limited to, payment to the claimant on whose behalf the Lien was filed. Tenant shall indemnify Landlord for, and hold Landlord harmless from and against, all Liabilities so incurred by Landlord, without regard to any defense or offset that Tenant may have had against the claimant. Neither Landlord's curative action nor the reimbursement of Landlord by Tenant shall cure Tenant's default in failing to keep the Premises, the Building and the Land free from Liens.

9.4 Additional Requirements. Alterations shall comply with all Laws. Tenant, at its expense, shall obtain all necessary permits and certificates for the commencement and performance of Alterations and for final approval thereof upon completion, and shall cause the Alterations to be performed in compliance therewith and with all applicable insurance requirements, and in a good, first-class and workmanlike manner. Tenant, at its expense, shall diligently cause the cancellation or discharge of all notices of violation arising from or otherwise connected with Alterations, or any other work, labor, services or materials done for or supplied to Tenant or Tenant's Affiliates, or by any person claiming through or under Tenant or Tenant's Affiliates. Alterations shall be performed so as not to interfere with any other tenant in the Building, cause labor disharmony therein, or delay or impose any additional expenses on Landlord in the construction, maintenance, repair or operation of the Building. Throughout the performance of the Alterations, Tenant, at its expense, shall carry, or cause to be carried, in addition to the insurance described in Section 13, Workers' Compensation insurance in statutory limits and such other insurance as Landlord may reasonably require, with insurers reasonably satisfactory to Landlord. Tenant shall furnish Landlord with satisfactory evidence that such insurance is in effect at or before the commencement of the Alterations and, upon request, at reasonable intervals thereafter until completion of the Alterations.

10. Repairs.

10.1 Condition of Premises. The premises shall be delivered to Tenant in an "as is" and "all faults" condition and Landlord shall have no obligation whatsoever to alter, remodel, improve, repair, decorate or paint the Premises or any part thereof either prior to or during the Lease Term except to the extent expressly provided herein. By accepting possession of the Premises, Tenant shall be deemed to have acknowledged that the Premises are suitable for its purposes and in good condition and repair. Subject to Section 10.2, Tenant, at its expense, shall keep the Premises and every part thereof in good condition and repair and shall, upon the expiration or sooner termination of the Lease Term, surrender the Premises to Landlord broom clean and in good condition and repair, ordinary wear and tear excepted. Tenant acknowledges and agrees that it has inspected, or prior to the Commencement Date will inspect, the Premises and that Tenant is not relying on any representations or warranties made by Landlord or Landlord's Affiliates regarding the premises, the Building or the Land except as may be expressly set forth herein.

10.2 Landlord's Obligation to Repair. Subject to Section 14, Landlord shall repair and maintain the common areas and the structural portions of the Building, including, but not limited to, the structural portions of the roof, the foundations, exterior loadbearing walls, and the basic HVAC, mechanical, electrical and plumbing systems initially installed by Landlord in the Building. However, if the repair or maintenance is caused in whole or in part by the act, neglect, fault or omission of Tenant or Tenant's Affiliates, or by Tenant's Alterations, Tenant immediately shall pay for such repair or maintenance and shall indemnify Landlord for and hold Landlord harmless from and against all other Liabilities incurred by Landlord in connection therewith. Landlord shall have a reasonable time after written notice from Tenant to perform necessary repairs or maintenance. Tenant waives all rights granted under Law to make repairs at Landlord's expense.

11. Services and Utilities.

11.1 Landlord's Services. Subject to the rules and regulations of the Building, Landlord shall furnish to the Premises electricity for normal office lighting and fractional horsepower office machines, water, plumbing and HVAC required in Landlord's judgment for the comfortable use and occupancy of the Premises, and janitorial services, as hereinafter provided. Landlord shall also maintain and keep lighted the common stairs, entries and restrooms in the Building.

11.2 Restrictions on Use. Without the prior written consent of Landlord in each instance, Tenant shall not use or install any apparatus, device or equipment in the Premises, including, but not limited to, electronic data processing machines, punch card machines and machines which will require a dedicated circuit or which will in any way increase the amount of water, electricity or HVAC normally furnished for similar space in the Building. Landlord may condition its consent on, among other things, the installation of additional risers, feeders and other appropriate equipment as well as meters in the Premises to measure the amount of water and electricity consumed. Tenant shall pay to Landlord on demand the cost of: (a) purchasing, installing, maintaining and repairing such equipment and/or meters and units; (b) all water and electricity consumed as shown by said meters, at the rates charged by the local utility company; and (c) any additional expense incurred in connection with the foregoing. If a separate meter is not installed, the cost for any excess water and electricity will be established by an estimate made by a utility company or electrical engineer selected by Landlord. Tenant shall not connect any apparatus, device or equipment except through existing electrical outlets in the Premises.

11.3 Janitorial Services. The janitorial services to be provided by Landlord to Tenant shall be provided _____ (_____) days a week, Monday through Friday (except for holidays). Janitorial services shall be those customarily furnished for similar buildings in the general vicinity of the Building.

11.4 Hours of Operation. HVAC for the Premises shall be provided five (5) days a week, Monday through Friday, from 8:00 o'clock a.m. to 6:00 o'clock p.m. (except for holidays) and Saturdays from 8:00 o'clock a.m. to 12 noon and shall be available at all other reasonable times to service Tenant's business in the premises.

12. Entry by Landlord.

Landlord shall, at all times, have the right to enter the Premises in order to: inspect the Premises; post notices of nonresponsibility; show the Premises to prospective purchasers, lenders or tenants; perform its obligations and exercise its rights hereunder; and make repairs, improvements, alterations or additions to the Premises or the Building or any portion thereof as Landlord deems necessary or desirable and to do all things necessary in connection therewith, including, but not limited to, erecting scaffolding and other necessary structures. Landlord shall retain (or be given by Tenant) keys to unlock all of the doors to or within the Premises, excluding doors to Tenant's vaults and files. Landlord shall have the right to use any and all means necessary to obtain entry to the Premises in an emergency. Landlord's entry to the Premises shall not, under any circumstances, be deemed to be a forcible or unlawful entry into, or a detainer of, the Premises, or an eviction of Tenant from the Premises or any portion thereof.

13. Tenant's Insurance.

13.1 Casualty Insurance. At all times during the Lease Term, Tenant, at its expense, shall maintain in effect policies of casualty insurance covering: (a) all alterations made by Tenant and all leasehold improvements; and (b) all of Tenant's Property and other personalty from time to time in, on or about the Premises, in an amount not less than their full replacement cost (without deduction for depreciation) from time to time during the term of this Lease. Such policies shall contain clauses providing that the amount of coverage shall be increased automatically by _____ percent (_____ %) at the end of each calendar quarter, which rate of increase may be revised from time to time at Landlord's request. Such policies shall provide for protection against any perils normally included within the classification of "All Risks," and shall contain endorsement covering: demolition and increased cost of construction; water damage, vandalism and malicious mischief; liability for changes in Laws. The proceeds of such insurance shall be used for the repair or replacement of the property so incurred, except that upon termination of this Lease following a casualty as set forth herein, the proceeds applicable to the items described in clause (a), above, shall be paid to Landlord, and the proceeds applicable to the items described in clause (b), above, shall be paid to Tenant.

13.2 Public Liability and Property Damage Insurance. At all times during the Lease Term, Tenant, at its expense, shall maintain Comprehensive General Liability Insurance (including property damage) with respect to the ownership, maintenance, use, operation and condition of the Premises and the business conducted therein. Such insurance shall at all times have limits of not less than _____ Dollars (\$ _____) combined single limit per occurrence for bodily injury, personal injury and property damage liability. At landlord's request, these limits shall be increased from time to time during the Lease Term (but not more often than once every two years) to such higher limits as Landlord or its insurance consultant believe are necessary to protect Landlord. The amount of such insurance shall not limit Tenant's liability nor relieve Tenant of any obligation hereunder. Each policy shall contain cross liability endorsements, if applicable, and shall insure Tenant's performance of the indemnity provisions contained in Section 22.2 and elsewhere in this Lease and any other obligations of Tenant to Landlord hereunder.

13.3 Policy Requirements.

(a) All insurance required to be carried by Tenant hereunder shall be issued by responsible insurance companies, qualified to do business in the State of _____ [state], approved by Landlord and, if required, by Landlord's Mortgagee. Copies of all policies and certificates therefor shall be delivered to Landlord at least _____ (_____) days prior to Tenant's occupancy of the Premises. Each policy shall provide that it may not be cancelled or modified except after _____ (_____) days' prior written notice to Landlord and Landlord's Mortgagee named as an additional insured or loss payee thereunder. Tenant shall furnish Landlord with renewals or "binders" of each policy, together with evidence of payment of the premium therefor, at least _____ (_____) days prior to expiration. Tenant shall have the right to provide insurance coverage pursuant to blanket policies obtained by Tenant if the blanket policies expressly afford coverage as required by this Lease. Each policy shall provide that all losses shall be settled in the name of

Landlord (or, if required, Landlord's Mortgagee) only.

(b) Landlord and, if required, Landlord's Mortgagee shall be named as additional insureds in each insurance policy and, if requested by Landlord, they also shall be named as loss payees. The Comprehensive General Liability Insurance shall: apply severally to Landlord, Landlord's Mortgagee and Tenant; cover each of them as if separate policies had been issued to each of them; not contain provisions affecting any rights which any of them would have had as claimants if not named as insureds; be primary insurance and not considered contributory, with any other valid and collectible insurance available to Landlord and Landlord's Mortgagee constituting excess insurance; and be endorsed as necessary to cover the foregoing requirements.

(c) Each policy of All Risk Coverage which Tenant obtains for the premises, and which Landlord obtains for the Building, shall include a clause or endorsement denying the insurer any right of subrogation against the other party hereto to the extent that rights have been waived by the insured party prior to the occurrence of injury or loss. Landlord and Tenant each waive any rights of recovery against the other for injury or loss due to hazards covered by its own insurance, to the extent of the injury or loss covered thereby.

13.4 Tenant's Failure to Deliver Policies. If Tenant fails to deliver copies of the insurance policies and evidence of payment therefor within the time required pursuant to Section 13.3, Landlord may, but shall not be obligated to, obtain the required insurance, and the cost thereof, together with an administrative fee of _____ Dollars (\$_____), shall be payable by Tenant to Landlord on demand. Nothing in this Section shall be deemed to be a waiver of any rights or remedies available to Landlord under this Lease or at law or in equity if Tenant fails to obtain and deliver the required insurance policies and evidence of payment.

14. Damage or Destruction; Eminent Domain.

14.1 Landlord's Restoration. If the Building or the Premises are partially damaged or totally destroyed by fire or other casualty, and if this Lease is not terminated as provided in this Section, Landlord shall repair the damage and restore or rebuild the Building or the Premises (except for Tenant's Property and leasehold improvements which are above the standard of the Building) after Landlord receives notice of the damage or destruction and Landlord receives substantially all of the insurance proceeds receivable on account of the casualty. However, Landlord shall not be required to spend amounts in excess of the insurance proceeds actually received for such repair, restoration or rebuilding. Subject to Section 22, Landlord shall attempt to make any required repairs or restoration promptly and so as not to interfere unreasonably with Tenant's use and occupancy of the Premises, but Landlord shall not be obligated to perform such work on an overtime or premium-pay basis.

14.2 Rent Abatement. Subject to Section 14.3, if, in Landlord's sole judgment, all or part of the Premises are rendered completely or partially untenantable on account of fire or other casualty, or if damage by fire or other casualty to the Building deprives Tenant of access to the Premises for more than _____ (_____) consecutive days, the Monthly Rent shall be abated in the proportion that the rentable area of the untenantable portion of the premises bears to the total Rentable Area of the Premises. Such abatement shall commence on the date of the damage or destruction and shall continue until the Premises have been substantially repaired and Tenant has reasonable access to the Premises. However, if Tenant reoccupies the damaged portion of the Premises prior to the date that the Premises are substantially repaired, the Monthly Rent allocable to the reoccupied portion shall be payable by Tenant from the date of such occupancy in the proportion that the rentable area of the reoccupied portion of the Premises bears to the total Rentable Area of the Premises.

14.3 Exception to Abatement. Monthly Rent shall not be abated or reduced if: (a) the Premises or a portion thereof are rendered untenantable due to damage or loss of access for a period of _____ (_____) consecutive days or less; or (b) Landlord provides other space in the Building reasonably suited for the temporary conduct of Tenant's business (but Landlord shall have no obligation to provide such other

space); or (c) because of acts or omissions of Tenant or Tenant's Affiliates either (i) Landlord (or any Landlord's Mortgagee) is unable to collect all of the insurance proceeds (including, without limitation, rent insurance proceeds) for damage or destruction of the Premises or the Building, or (ii) the Premises or the Building was damaged or destroyed or rendered completely or partially untenantable. The collection of rent by Landlord under the circumstances described in clause (c), above, shall not preclude Landlord from seeking damages from Tenant or exercising any other rights and remedies if may have under this Lease or at law or in equity.

14.4 Election to Terminate. Landlord may terminate this Lease upon written notice to Tenant if: (a) the Building or the Premises are substantially or totally destroyed or, in Landlord's sole judgment, rendered untenantable by fire or other casualty or any other cause; or (b) the Building is damaged or rendered untenantable (whether or not the Premises are damaged or destroyed or rendered untenantable) so that its repair or restoration requires the expenditure (as estimated by a reputable contractor or architect designated by Landlord) of more than _____ percent (_____ %) of the full insurable value of the Building immediately prior to the casualty; or (c) less than _____ (_____) years remains in the Lease Term at the time of the damage or destruction or events which render the Building or the Premises untenantable and the time necessary to repair or restore the Building or the Premises would exceed _____ (_____) days (as estimated by a reputable contractor or architect designated by Landlord); or (d) Landlord would be required under Section 14.2 to abate or reduce the Monthly Rent for a period in excess of _____ (_____) months if repairs or restoration were undertaken. If Landlord elects to terminate this Lease, its notice of termination shall be given within _____ (_____) days after the date of the damage, destruction or events causing untenantability and this Lease shall terminate on the date specified in such notice.

14.5 Eminent Domain. Landlord may terminate this Lease upon written notice to Tenant if _____ percent (_____ %) or more of either the Premises, the Building or the Land is condemned, taken or appropriated by any public or quasi-public authority under the power of eminent domain, policy power or otherwise (or in the event of a sale in lieu thereof). Whether or not this Lease is so terminated, Landlord shall be entitled to any and all income, rent, award, or interest thereon which may be paid or made in connection with the taking or appropriation, and Tenant shall have no claim against Landlord for the value of any unexpired term of this Lease. If Landlord elects to terminate this Lease, its notice of termination shall be given within _____ (_____) days after the taking or appropriation. If such notice is not given or if Landlord notifies Tenant of Landlord's election not to terminate, this Lease shall continue in full force and effect, except that the Monthly Rent shall be reduced in the proportion that the rentable floor area of the Premises which is taken bears to the total Rentable Area of the Premises. Nothing contained in this Section shall prevent Tenant from bringing a separate action or proceeding for compensation for any of Tenant's Property taken and Tenant's moving expenses.

14.6 Business Interruption. Landlord shall not incur any Liabilities of any type to Tenant or Tenant's Affiliates arising from or in connection with any damage or destruction of the Premises, the Building or the Land, or any taking or appropriation thereof, or any repairs or restoration in connection therewith, nor shall Tenant have any right to terminate this Lease as a result thereof. However, in such event, Monthly Rent shall be abated if and to the extent that abatement is allowed pursuant to this Section.

14.7 Waiver. Tenant waives the application of any Laws which are contrary to the provisions of this Section in connection with any damage, destruction, condemnation, taking or appropriation (or sale in lieu thereof) of all or any portion of the Premises, the Building or the Land.

15. Assignment and Subletting.

15.1 Landlord's Consent Required. Tenant shall not voluntarily, involuntarily or by operation of any Laws sell, convey, mortgage, assign, sublet or otherwise transfer or encumber all or any part of Tenant's interest in this Lease or the Premises without Landlord's prior written consent in each instance which consent may be withheld in Landlord's sole

and absolute discretion except as otherwise provided in this Section, and any attempt to do so without this consent shall be null and void.

15.2 Landlord's Right to Terminate Lease. If Tenant desires to assign its interest in this Lease or to sublease all or any part of the Premises, Tenant shall notify Landlord in writing. This notice shall be accompanied by: (a) a statement setting forth the name and business of the proposed assignee or subtenant; (b) a copy of the proposed assignment or sublease (and any collateral agreements) setting forth all of the terms and the financial details of the sublease or assignment (including, without limitation, the term, the rent and any security deposit, "Key money", and amounts payable for Tenant's Property and the common use of any personnel or equipment); (c) financial statements certified by an independent certified public accountant and other information requested by Landlord relating to the proposed assignee or subtenant; and (d) and other information concerning the proposed assignment or sublease which Landlord may reasonably request. If Tenant proposes to assign this Lease or sublet all or substantially all of the Premises, Landlord shall have the right, in its sole and absolute discretion, to terminate this Lease on written notice to Tenant within _____ (_____) days after receipt of Tenant's notice and the information described above or the receipt of any additional information requested by Landlord. If Landlord elects to terminate this Lease, this Lease shall terminate as of the effective date of the proposed assignment or commencement of the term of the proposed sublease as set forth in Tenant's notice, and Landlord shall have the right (but no obligation) to enter into a direct lease with the proposed assignee or subtenant. Tenant may withdraw its request for Landlord's consent at any time prior to, but not after, Landlord delivers a written notice of termination.

15.3 Consent by Landlord. If Landlord elects not to terminate this Lease pursuant to Section 15.2, or if a proposed sublease is for less than substantially all of the Premises, Landlord shall not unreasonably withhold its consent to an assignment or subletting. (For purposes of this Section, an assignment shall not include an assignment for security purposes, which shall be governed by Section 15.1). Tenant irrevocably agrees that the withholding of Landlord's consent shall be deemed reasonable if all of the following conditions are not satisfied:

(a) The proposed assignee or subtenant shall use the Premises only for the Permitted Use, and the business of the proposed assignee or subtenant is consistent with the other uses and the standards of the Building, in Landlord's reasonable judgment.

(b) The proposed assignee or subtenant is reputable and has a net worth not less than _____ percent (_____%) of the net worth of Tenant on the execution of this Lease, has a credit rating reasonably acceptable to Landlord, and otherwise has sufficient financial capabilities to perform all of its obligations under this Lease or the proposed sublease, in Landlord's reasonable judgment.

(c) Neither the proposed assignee or subtenant nor any person or entity that directly or indirectly controls, is controlled by, or is under common control with the proposed assignee or subtenant is an occupant of any part of the Building or has negotiated for space in the Building within a _____ (_____-)month period prior to the delivery of Tenant's written notice.

(d) Tenant is not in default and has not committed acts or omissions which, with the running of time or the giving of notice or both, would constitute a default under this Lease.

(e) All of the other terms of this Section are complied with. The conditions described above are not exclusive and shall not limit or prevent Landlord from considering additional factors in determining if it should reasonably withhold its consent.

15.4 Corporate and Partnership Transactions. If Tenant is a corporation, a dissolution of the corporation or a transfer (by one or more transactions) of a majority of the voting stock of Tenant shall be deemed to be an assignment of this Lease subject to the provisions of this Section. However, these provisions shall not apply to transactions with a corporation

into or with which Tenant is merged or consolidated or to which substantially all of Tenant's assets are transferred or which controls, is controlled by, or is under common control with, Tenant, if a principal purpose of the merger or transfer is not the assignment of this Lease and Tenant's successor has a net worth not less than the net worth of Tenant on the execution of this Lease. Tenant shall cause reasonably satisfactory proof of such net worth to be delivered at least _____ (_____) days prior to the effective date of the transaction. If Tenant is a partnership, a dissolution of the partnership (including a "technical" dissolution) or a transfer of the controlling interest in the Partnership (including the admission of new partners or the withdrawal of existing partners having a controlling interest) shall be deemed an assignment of this Lease subject to the provisions of this Section, regardless of whether the transfer is made by one or more transactions, or whether one or more persons hold the controlling interest prior to or after the transfer.

15.5 No Release of Tenant. Notwithstanding the granting of Landlord's consent, no sale, conveyance, mortgage, pledge, subletting, assignment or other transfer or encumbrance of this Lease or the Premises shall release or alter Tenant's primary liability to pay rent and perform all of its other obligations hereunder. The acceptance of rent by Landlord from any person other than Tenant shall not be a waiver by Landlord of any provision hereof. Consent to one assignment or subletting shall not be deemed to be consent to any subsequent assignment or subletting. If any assignee or successor of Tenant defaults in the performance of any of the terms hereof, Landlord may proceed directly against Tenant without proceeding against or exhausting its remedies against the assignee or successor. After any assignment, sublease or other transfer or encumbrance, Landlord may consent to subsequent assignments, subleases, transfers or encumbrances, or amendments to this Lease, without notifying Tenant or any other person, without obtaining consent thereto, and without relieving Tenant of liability under this Lease.

15.6 Additional Charges. If Landlord consents to any assignment or sublease, Tenant shall pay the following to Landlord as additional rent:

(a) In the case of an assignment, an amount equal to _____ percent (_____) % of all amounts paid or payable to Tenant by the assignee for or by reason of such assignment (including sums paid or payable for the purchase or rental of all or part of Tenant's Property).

(b) In the case of a sublease, an amount equal to _____ percent (_____) % of the amount by which the sublease rental exceeds the portion of the rent allocable to the subleased space hereunder throughout the sublease term. In computing this amount, the sublease rental shall include all rents, charges and other consideration paid or payable to Tenant under the terms of the sublease and any collateral agreements, and sums paid or payable by the subtenant for the purchase or rental of all or part of Tenant's Property. The rent hereunder allocable to the subleased space for any period shall equal the total rent accruing during such period, multiplied by a fraction, the numerator of which is the rentable area of the subleased space and the denominator of which is the Rentable Area of the Premises.

This additional rent shall be paid by Tenant to Landlord as and when received by Tenant or, at Landlord's option, on written notice to the assignee or subtenant, Landlord may collect all or any portion of this additional rent directly from the assignee or subtenant. Tenant shall receive a credit against this additional rent in an amount equal to the net unamortized or undepreciated cost of any of Tenant's Property that is sold to the assignee or sublessee in connection with such assignment or sublease, determined on the basis of Tenant's federal income tax returns. This credit shall be prorated over the period during which this additional rent is to be paid, in proportion to the amounts received by Tenant. Landlord's acceptance or collection of this additional rent will not be deemed to be a consent to any assignment or subletting or a cure of any default under this Section or the rest of the Lease.

15.7 Additional Terms.

(a) Tenant shall pay the reasonable attorney's fees and other costs and expenses of Landlord in connection with any

request for Landlord's consent to any sale, conveyance, mortgage, pledge, assignment, sublease or other transfer or encumbrance.

(b) A sublease will be null and void unless it complies with the rest of this Lease and provides that: (i) it is subject and subordinate to this Lease and that if there is any conflict or inconsistency between the sublease and this Lease, this Lease will prevail; (ii) Landlord may enforce all the provisions of the sublease, including the collection of rent; (iii) it may not be modified without Landlord's prior written consent and that any modification without this consent shall be null and void; (iv) if this Lease is terminated or Landlord reenters or repossesses the Premises, Landlord may, at its option, take over all of Tenant's right, title and interest as sublessor and, at Landlord's option, the subtenant shall attorn to Landlord, but Landlord shall not be (x) liable for any previous act or omission of Tenant under the sublease, (y) subject to any existing defense or offset against Tenant, or (z) bound by any previous modification of the sublease made without Landlord's prior written consent or by any prepayment of more than one month's rent; and (v) it is ineffective until Landlord gives its written consent thereto.

(c) An assignment will be null and void unless it complies with the rest of this Lease and provides that: (i) the assignee assumes all of Tenant's obligations under this Lease and agrees to be bound by all of the terms of this Lease; and (ii) it is ineffective until Landlord gives its written consent thereto.

(d) The sublease or assignment otherwise must exactly match the proposed sublease or assignment initially submitted by Tenant. A sublease or assignment will not be effective until a fully executed counterpart is delivered to Landlord and Landlord delivers its written consent thereto.

(e) This Section is binding on and shall apply to any purchaser, mortgagee, pledgee, assignee, subtenant or other transferee or encumbrancer, at every level.

(f) Notwithstanding anything to the contrary in this Lease, if Tenant or any proposed transferee of Tenant claims that Landlord has unreasonably withheld or delayed its consent under Section 15.3 or otherwise has breached or acted unreasonably under this Section, their sole remedies shall be a declaratory judgment and an injunction for the relief sought without any monetary damages, and Tenant waives all other remedies on its own behalf and, to the extent permitted under all Laws, on behalf of Tenant's proposed transferee.

16. Quiet Enjoyment. So long as Tenant pays all rent and performs all of its other obligations as required hereunder, Tenant shall quietly enjoy the Premises without hindrance or molestation by Landlord or any person lawfully claiming through or under Landlord, subject to the terms of this Lease and the terms of any Superior Leases and Mortgages, and all other agreements or matters of record to which this Lease is subordinate. As used in this Lease, the term "Superior Leases and Mortgages" means all present and future ground leases, underlying leases, mortgages, deeds of trust or other encumbrances, and all renewals, modifications, consolidations, replacements or extensions thereof or advances made thereunder, affecting all or any portion of the Premises, the Building or the Land.

17. Mortgagee Protection.

17.1 Subordination. This Lease is subordinate to all Superior Leases and Mortgages. This Section shall be self-operative and no further instrument of subordination shall be required. However, in confirmation of such subordination, Tenant shall execute, acknowledge and deliver any instrument that Landlord or the lessor, mortgagee or beneficiary under any of the Superior Leases and Mortgages may request, within _____ (_____) days after request. (Each of these lessors, mortgagees or beneficiaries is called a "Landlord's Mortgagee.") However, if Landlord, Landlord's Mortgagee or any other successor to Landlord elects in writing, this Lease shall be deemed superior to the Superior Leases and Mortgages specified, regardless of the date of recording, and Tenant will execute an agreement confirming this election on request. If Landlord's Mortgagee or its successor or any successor to Landlord succeeds to Landlord's interests under this Lease, whether voluntarily or involuntarily, the Tenant shall attorn to such person and

recognize such person as Landlord under this Lease.

17.2 Mortgagee's Liability. The obligations and liabilities of each of Landlord or Landlord's Mortgagees, or their successors, under this Lease shall exist only if and for so long as each of these respective parties owns fee title to the Land and the Building or is the lessee under a ground lease therefor. No Monthly Rent or additional rent shall be paid more than _____ (_____) days prior to the due date thereof and payments made in violation of this provision shall (except to the extent that such payments are actually received by a Landlord's Mortgagee) be a nullity as against Landlord's Mortgagees or their successors and Tenant shall be liable for the amount of such payments to Landlord's Mortgagees or their successors.

17.3 Mortgagee's Right to Cure. No act or omission by Landlord which would entitle Tenant under the terms of this Lease or any Laws to be relieved of Tenant's obligations hereunder, or to terminate this Lease, shall result in a release or termination of such obligations or this Lease unless: (a) Tenant first shall have given written notice of Landlord's act or omission to Landlord and all Landlord's Mortgagees whose names and addresses shall have been furnished to Tenant; and (b) Landlord's Mortgagees, after receipt of such notice, fail to correct or cure the act or omission within a reasonable time thereafter (but in no event less than _____ (_____) days). However, nothing contained in this Section shall impose any obligation on Landlord's Mortgagees to correct or cure any act or omission.

18. Estoppel Certificates.

Tenant shall from time to time, within _____ (_____) days after request by Landlord, execute and deliver to Landlord or any other person designated by Landlord an estoppel certificate, in form satisfactory to Landlord, which certifies: (a) that this Lease is unmodified and in full force and effect (or, if there have been modifications, describes them); (b) the expiration date of the Lease Term and that there are no agreements with Landlord to extend or renew the Lease Term or to permit any holding over (or if there are any such agreements, describes them and specifies the periods of extension or renewal); (c) the date through which the Monthly Rent and additional rent have been paid; (d) that Landlord is not in default in the performance of any of its obligations under this Lease (or, if there are any such defaults, describes them); (e) that Tenant is not entitled to any credits, offsets, defenses or deductions against payment of the rent hereunder (or, if they exist, describes them); and (f) such other information concerning this Lease or Tenant as Landlord or any other person designated by Landlord reasonably shall request. An estoppel certificate issued by Tenant Pursuant to this Section shall be a representation and warranty by Tenant which may be relied on by Landlord and by others with whom Landlord may be dealing, regardless of independent investigation. If Tenant fails to execute and deliver an estoppel certificate as required hereunder, Landlord's representations concerning the factual matters covered by such estoppel certificate, as described above, shall be conclusively presumed to be correct and binding on Tenant.

19. Default. The occurrence of any one or more of the following events shall be default and breach under this Lease by Tenant:

(a) The vacating or abandonment of the Premises by Tenant.

(b) The failure by Tenant to make any payment of rent or any other payment required to be made by Tenant hereunder for a period of _____ (_____) days after such payment is due.

(c) The failure by Tenant to observe or perform any of the covenants, conditions or provisions of this Lease to be observed or performed by Tenant, other than those described in subparagraphs (b), (d), (e), (f), (g), (h) and (i) of this Section 19, where such failure shall continue for a period of _____ (_____) days after written notice thereof by Landlord to Tenant. However, if the nature of these defaults is such that more than _____ (_____) days are reasonably required to cure, then Tenant shall not be

deemed to be in default if Tenant commences such cure within the _____
 (_____) -day period and thereafter diligently completes the cure within _____
 (_____) days.

(d) The making by Tenant or any guarantor of this Lease of any general assignment or general arrangement for the benefit of creditors; or the filing by or against Tenant or any guarantor of this Lease of a petition or order for relief under any Laws relating to bankruptcy or insolvency (unless, in the case of a petition filed against Tenant or any guarantor of this Lease, the petition is dismissed within _____ (_____) days); or the appointment of a trustee, custodian or receiver to take possession of substantially all of Tenant's assets or the assets of any guarantor of this Lease or of Tenant's interest in this Lease where possession is not restored to Tenant within _____ (_____) days; or the attachment, execution or judicial seizure of substantially all of Tenant's assets or of Tenant's interest in this Lease, unless discharged within _____ (_____) days.

(e) The service by Landlord of a three-day notice under _____ [insert reference to state statute] Code of Civil Procedure Section _____ on _____ (_____) or more occasions if the previous service of the _____ (_____) -day notices did not result in the termination of this Lease.

(f) A sale, conveyance, mortgage, pledge, assignment, sublease or other transfer or encumbrance, or any attempt to do so, in violation of Section 15.

(g) Tenant's failure to deliver the estoppel certificate required under Section 18, or any written instrument required under Section 17 within the time required.

(h) A default under or the repudiation or any guaranty of Tenant's obligations under this Lease.

(i) Tenant's failure to maintain the insurance policies required hereunder.

(j) The death of Tenant or, if Tenant is comprised of more than _____ (_____) individual(s), the death of any of the individuals comprising Tenant.

The defaults specified in subparagraphs (a), (d), (e), (f), (g), (h), (i) and (j), above, shall not be curable by Tenant.

20. Remedies for Default.

20.1 General. In the event of any default or breach by Tenant, Landlord may at any time thereafter, with or without notice or demand:

(a) Terminate Tenant's right to possession of the Premises by any lawful means, in which case this lease shall terminate and Tenant shall immediately surrender possession of the Premises to Landlord. In such event, Landlord shall be entitled to recover from Tenant all Liabilities incurred by Landlord or Landlord's Affiliates by reason of Tenant's default, including, but not limited to: (i) the worth at the time of the award of the unpaid Monthly Rent and additional rent which had been earned or was payable at the time of termination; (ii) the worth at the time of the award of the amount by which the unpaid Monthly Rent and additional rent which would have been earned or payable after termination until the time of the award exceeds the amount of such rental loss that Tenant proves could have been reasonably avoided; (iii) the worth at the time of the award of the amount by which the unpaid Monthly Rent and additional rent which would have been paid for the balance of the term after the time of award exceeds the amount of such rental loss that Tenant proves could have been reasonably avoided; and (iv) any other amount necessary to compensate Landlord for all Liabilities proximately caused by Tenant's failure to perform its obligations under the

Lease or which in the ordinary course of things would be likely to result therefrom, including, but not limited to, any costs or expenses incurred by Landlord in maintaining or preserving the Premises, the Building and the Land after such default, the cost of recovering possession of the Premises, expenses of reletting, including necessary renovation or alteration of the Premises, Landlord's attorneys' fees and costs incurred in connection therewith, and any real estate commissions paid or payable. As used in subparts (i) and (ii), above, the "worth at the time of the award" is computed by allowing interest on unpaid amounts at the rate of _____ percent (_____ %) per annum, or such lesser amount as may then be the maximum lawful rate. As used in subparagraph (iii), above, the "worth at the time of the award" is computed by discounting such amount at the discount rate of the _____ [bank] at the time of the award, plus _____ (_____ %). If Tenant abandons the Premises, Landlord shall have the option of (x) taking possession of the Premises and recovering from Tenant the amount specified in this subparagraph, or (y) proceeding under the provisions of subparagraph (b), below.

(b) Maintain Tenant's right to possession, in which case this Lease shall continue in effect whether or not Tenant shall have abandoned the Premises. In such event, Landlord shall be entitled to enforce all of Landlord's rights and remedies under this Lease and at law or in equity, including the right to recover the rent and other sums and charges as they become due hereunder.

(c) Pursue any other right or remedy now or hereafter available to Landlord hereunder or at law or in equity.

20.2 Redemption. Tenant waives any and all rights of redemption granted by or under any Laws if Tenant is evicted or dispossessed for any cause, or if Landlord obtains possession of the Premises by reason of the violation by Tenant of any of the terms, covenants or conditions of this Lease, or otherwise.

20.3 Performance by Landlord. If Tenant defaults under this Lease, Landlord, without waiving or curing the default, may, but shall not be obligated to, perform Tenant's obligations for the account and at the expense of Tenant. Notwithstanding Section 19(c), in the case of an emergency, Landlord need not give any notice prior to performing Tenant's obligations. Tenant irrevocably appoints Landlord and Landlord's successor and assigns, with full power of substitution, as Tenant's attorney-in-fact, coupled with an interest, to execute, acknowledge and deliver any instruments in connection with Landlord's performance of Tenant's obligations if Tenant is in default, and to take all other acts in connection therewith.

20.4 Post-Judgment Interest. The amount of any judgment obtained by Landlord against Tenant in any legal proceeding arising out of Tenant's default under this Lease shall bear interest until paid at the maximum rate allowed by law, or, if no maximum rate prevails, at the rate of _____ percent (_____ %) per annum. Notwithstanding anything to the contrary contained in any Laws, with respect to any damages that are certain or ascertainable by calculation, interest shall accrue from the day that the right to the damages vests in Landlord, and in the case of any unliquidated claim, interest shall accrue from the day the claim rose.

21. Holding Over. Tenant shall not hold over in the Premises after the expiration or sooner termination of the Lease Term without the express prior written consent of Landlord. Tenant shall indemnify Landlord for, and hold Landlord harmless from and against, any and all Liabilities arising out of or in connection with any delay by Tenant in surrendering and vacating the Premises, including, without limitation, any claims made by any succeeding tenant based on any delay and any liabilities arising out of or in connection with these claims. If possession of the Premises is not surrendered to Landlord on the expiration or sooner termination of the Lease Term, in addition to any other rights and remedies of Landlord hereunder or at law or in equity, Tenant shall pay to Landlord for each month or portion thereof during which Tenant holds over in the Premises a sum equal to _____ (_____) times the then-current Monthly Rent in addition to all other rent payable under this Lease. If any tenancy is created by Tenant's holding over in the Premises, the tenancy shall be on all of the terms and conditions of this Lease, except that rent shall be increased as set forth above and the tenancy shall be a month-to-month tenancy. Nothing in this Section 21 shall be deemed to permit Tenant to retain possession of the Premises after the expiration or sooner termination of the

Lease Term.

22. Indemnification and Exculpation.

22.1 Definitions. As used in this Lease, the following terms have the meanings set forth below:

(a) *Liabilities*. All losses, costs, damages, expenses, claims, injuries, liabilities and judgments, including, but not limited to, attorneys' fees and costs (whether or not suit is commenced or judgment entered).

(b) *Landlord's affiliates and tenant's affiliates*. All affiliates, directors, officers, shareholders, partners, agents, employees, invitees, customers, successors and assigns of Landlord and Tenant, respectively.

22.2 Indemnification. In addition to any other indemnities required of Tenant hereunder, Tenant shall indemnify Landlord and Landlord's Affiliates for, and hold Landlord and Landlord's Affiliates harmless from, any and all Liabilities arising from or in connection with: (a) the use and occupancy of the Premises by Tenant or Tenant's Affiliates; (b) the conduct of Tenant's business; (c) any breach or default under this Lease; (d) claims by any assignee, subtenant, broker or other person if Landlord declines to consent to any assignment, sublease or other transfer or encumbrance or terminates this Lease pursuant to Section 15; and (e) any other acts or omissions of Tenant or Tenant's Affiliates or persons claiming through or under them.

22.3 Damage to Person or Property. Tenant assumes the risk of all Liabilities it may incur, including, but not limited to, damage or injury to person, property and the conduct of Tenant's business (and any loss of revenue therefrom), the loss of use or occupancy of the Premises, and the items enumerated below in this Section, and waives all claims against Landlord and Landlord's Affiliates in connection therewith. Landlord and Landlord's Affiliates shall not be liable for any Liabilities incurred by Tenant or Tenant's Affiliates (including, but not limited to, the Liabilities described above in this Section) arising from or in connection with: (a) acts or omissions of any tenant of the Building or any other persons (including, but not limited to, any parking garage operators or their employees); (b) explosion, fire, steam, electricity, water, gas or rain, pollution or contamination; (c) the breakage, leakage, obstruction or other defects of plumbing, HVAC, electrical, sanitary, safety, elevator or other utilities and systems of the Building or the failure to furnish any of the foregoing; (d) any work, maintenance, repair, rebuilding or improvement performed by or at the request of Landlord or Landlord's Affiliates for the Premises, the Building or the Land; (e) any entry by Landlord or Landlord's Affiliates on the Premises; (f) any defects in the Premises, the Building, the Land or any portions thereof; (g) any interference with light or other incorporeal hereditaments; and (h) any other acts, omissions or causes. Nothing in this Section exempts Landlord for liability caused solely by its gross negligence or willful misconduct, but Landlord shall not be liable under any circumstances for consequential or punitive damages (including, but not limited to, damage or injury to persons, property and the conduct of Tenant's business [and any loss of revenue therefrom]). Tenant immediately shall notify Landlord of any defects in the Premises or the Building or any portion thereof and of any damage or injury thereto or to persons or property in or about the Premises or the Building.

22.4 Satisfaction of Remedies. Landlord and Landlord's Affiliates shall not be personally liable for the performance of Landlord's obligations under this Lease. If Tenant or Tenant's Affiliates acquire any rights or remedies against landlord or Landlord's Affiliates (including, but not limited to, the right to satisfy a judgment), these rights and remedies shall be satisfied solely from Landlord's estate and interest in the Land and the Building (or the proceeds therefrom) and not from any other property or assets of Landlord or Landlord's Affiliates. This Section shall be enforceable by Landlord and Landlord's Affiliates.

23. Rules and Regulations. Tenant shall faithfully observe and comply with the rules and regulations that Landlord shall from time to time promulgate. Landlord reserves the right from time to time in its sole discretion to make all reasonable additions and modifications to the rules and regulations. Any additions and modifications to the rules and regulations shall be binding on Tenant when delivered to Tenant. Landlord shall not incur any Liabilities to Tenant or Tenant's

Affiliates arising from or in connection with the nonperformance of any rules and regulations by any other tenants or occupants of the Building. Landlord's current rules and regulations are attached hereto as Appendix "A."

24. Other Taxes. Tenant shall pay, or cause to be paid, before delinquency, any and all taxes levied or assessed against Tenant's Property and any leasehold improvements in the Premises which were made for Tenant or at its request to the extent they are above the standard of the Building. If any or all of Tenant's Property or any of these leasehold improvements are assessed and taxed with the Building, Tenant shall pay to Landlord its share of such taxes within _____ (_____) days after delivery to Tenant by Landlord of a statement in writing setting forth the amount of such taxes.

25. Brokers. Tenant represents and warrants to Landlord that Tenant has had no dealings with any broker, finder, or similar person who is or might be entitled to a commission or other fee in connection with introducing Tenant to the Building or in connection with this Lease, except for Landlord's Broker and Tenant's Broker. Landlord shall pay the commission due Landlord's Broker pursuant to a separate agreement between Landlord and Landlord's Broker. Tenant shall indemnify Landlord for, and hold Landlord harmless from and against, any and all claims of any person other than Landlord's Broker (including Tenant's Broker) who claims to have introduced Tenant to the Building or dealt with Tenant in connection with this Lease and all Liabilities arising out of or in connection with such claims.

26. Parking. Tenant acknowledges that the parking garage of the Building, which is the only available parking at the Building is leased (or subleased as the case may be) to an independent parking garage operator who controls the amount and availability of parking. Although this lease of the parking garage currently provides that tenants of the building and their employees and invitees will be given certain preferences over the general public with respect to parking, Landlord cannot and does not represent, warrant or covenant, in any way, that: (a) Tenant or Tenant's Affiliates will be able to obtain parking; (b) if parking is provided that it will continue to be provided and will be adequate for Tenant's needs; (c) if parking is provided that it will be fairly allocated among the Tenants of the building or the general public; (d) parking fees will be kept at current levels; or (e) the lease of the parking garage will not be modified in a way that will adversely affect Tenant. Tenant's obligations under this Lease will not be abated or otherwise affected in any way by any matters related to parking. If attached, that certain Parking Agreement dated _____ [month] _____ [day] _____ [year], by and between Landlord and Tenant, shall further govern Tenant's rights with respect to parking.

27. Authority to Enter Into Lease. If Tenant is a corporation, each individual executing this Lease on behalf of the corporation represents and warrants that he is duly authorized to execute and deliver this Lease on behalf of the corporation, in accordance with a duly adopted resolution of the board of directors of said corporation, and that this Lease is binding on the corporation in accordance with its terms. If the Tenant is a partnership, each individual executing this Lease on behalf of the partnership represents and warrants that he is duly authorized to execute and deliver this Lease on behalf of the partnership, in accordance with the partnership agreement and any statements of partnership or certificates of limited partnership of the partnership, and that this Lease is binding on the partnership in accordance with its terms. Tenant shall, within _____ (_____) days of the execution of this Lease, deliver to Landlord: (a) if Tenant is a corporation, a certified copy of a resolution of the board of directors of the corporation; of (b) if Tenant is a partnership, a copy of the Statement of Partnership or Certificate of Limited Partnership of Tenant; and (c) other evidence reasonably satisfactory to Landlord authorizing or ratifying the execution of this Lease.

28. General Provisions.

28.1 Joint Obligation. If Tenant consists of more than one person or entity, the obligations of such persons or entities as Tenant shall be joint and several.

28.2 Marginal Headings. The titles to the Articles and Sections of this Lease are not a part of this Lease and shall have no effect on the construction or interpretation.

28.3 Time. Time is of the essence of this Lease.

28.4 Successors and Assigns. Subject to the restrictions contained in Article 15 above, this Lease binds the heirs, executors, administrators, successors and assigns of the parties hereto.

28.5 Recordation. Tenant shall not record this Lease or a short form memorandum hereof without the prior written consent of Landlord.

28.6 Late Charges. Tenant acknowledges that late payment of rent will cause Landlord to incur costs not contemplated by this Lease, the exact amount of which will be extremely difficult to ascertain. These costs include, but are not limited to, processing and accounting charges, and late charges which may be imposed on Landlord by the terms of any Superior Leases and Mortgages. Accordingly, if any installment of Monthly Rent or payment of additional rent due from Tenant is not received by Landlord or Landlord's designee within _____ (_____) days after the amount is due, Tenant shall pay to Landlord a late charge equal to _____ (%) of the overdue amount. Acceptance of late charges by Landlord shall not constitute a waiver of Tenant's default with respect to the overdue amount, nor prevent Landlord from exercising any of the other rights and remedies granted hereunder or at law or in equity.

28.7 Prior Agreements; Amendment; Waiver. This Lease contains all of the agreements of the parties hereto with respect to any matter covered or mentioned in this Lease, and no prior agreements or understanding pertaining to any such matters shall be effective for any purpose. No provision of this Lease may be amended or added to except by an agreement in writing signed by the parties hereto or their respective successors in interest. All waivers hereunder must be in writing and specify the breach, act, omission, term, covenant or condition waived, and acceptance of rent or other acts or omissions by Landlord shall not be deemed to be a waiver. The waiver by Landlord of any breach, act, omission, term, covenant or condition of this Lease shall not be deemed to be a waiver of any other or subsequent breach, act, omission, term, covenant or condition.

28.8 Inability to Perform. Landlord shall not be in default hereunder nor shall Landlord be liable to Tenant or Tenant's Affiliates for any Liabilities if Landlord is unable to fulfill any of its obligations, or is delayed in doing so, if the inability or delay is caused by reason of accidents, breakage, strike, labor troubles, Acts of God, or any other cause, whether similar or dissimilar, which is beyond the reasonable control of Landlord.

28.9 Legal Proceedings. In any action or proceeding involving or relating in any way to this Lease, the court or other person or entity having jurisdiction in such action or proceeding shall award to the party in whose favor judgment is entered the actual attorneys' fees and costs incurred. The party in whose favor judgment is entered may, at its election, submit proof of fees and costs as an element of damages before entry of judgment or after entry of judgment in a post-judgment cost bill. Tenant also shall indemnify Landlord for, and hold Landlord harmless from and against, all Liabilities incurred by Landlord if Landlord becomes or is made a party to any proceeding or action: (a) instituted by Tenant, or by any third party against Tenant, or by or against any person holding any interest under or using the Premises by license of or agreement with Tenant; (b) otherwise arising out of or resulting from any act or omission of Tenant or such other person; or (c) necessary to protect Landlord's interest under this Lease in a bankruptcy proceeding, or other proceeding under Title 11 of the United States Code, as amended. In any circumstance where Tenant is obligated to indemnify or hold harmless Landlord or Landlord's Affiliates under this Lease, Tenant also shall defend Landlord and Landlord's Affiliates with counsel acceptable to Landlord or, at Landlord's election, Landlord or Landlord's Affiliates may employ their own counsel and Tenant shall pay when due all attorneys' fees and costs therefore.

28.10 Conveyance of Premises. As used herein the term "Landlord" means only the current owner or owners of the fee title to the Building or the lessee under a ground lease of the Land. Upon each conveyance (whether voluntary or

involuntary) of the Building, the conveying party shall be relieved of all liability under any and all of its covenants and obligations contained in or derived from this Lease or arising out of any act, occurrence or omission occurring after the date of such conveyance. Landlord may sell, assign, convey, encumber or otherwise transfer all or any portion of its interests in this Lease, the Premises, the Building or the Land.

28.11 Name. Tenant shall not use the name of the Building or the development in which the Building is situated, if any, for any purpose other than as an address of the business to be conducted by Tenant in the Premises.

28.12 Severability. Any provision of this Lease which shall be held invalid, void or illegal shall in no way affect, impair or invalidate any of the other provisions hereof and such other provisions shall remain in full force and effect.

28.13 Cumulative Remedies. No right, remedy or election hereunder or at law or in equity shall be deemed exclusive but shall, wherever possible, be cumulative with all other rights, remedies or elections.

28.14 Choice of Law. This Lease shall be governed by the laws of the State of _____ [state] applicable to transactions to be performed wholly therein.

28.15 Signs. Tenant shall not place any sign on the premises, the Building or the Land, or which is visible from anywhere outside of the premises, without Landlord's prior written consent.

28.16 Landlord's Consent. Whenever Landlord's consent or approval is required hereunder, Landlord shall not unreasonably delay the granting or withholding of its consent or approval. Except where it is expressly provided that Landlord will not unreasonably withhold its consent or approval, Landlord may withhold its consent or approval arbitrarily and in its sole and absolute discretion.

28.17 Presumptions. This Lease shall be construed without regard to any presumption or other rule requiring construction against the party drafting the document. It shall be construed neither for nor against Landlord or Tenant, but shall be given reasonable interpretation in accordance with the plain meaning of its terms and the intent of the parties.

28.18 Exhibits. All exhibits and any riders annexed to this Lease are incorporated herein by this reference.

28.19 Submission of Lease. The submission of this Lease to Tenant or its broker, agent or attorney for review or signature does not constitute an offer to Tenant to lease the Premises or grant an option to lease the Premises. This document shall not be binding unless and until it is executed and delivered by both Landlord and Tenant.

28.20 Meaning of Terms. Whenever required by the context of this Lease, the singular shall include the plural and the plural shall include the singular, and the masculine, feminine and neuter genders shall each include the others, and the word "person" shall include corporations, partnerships or other entities.

28.21 Notices. All notices, demands or communications required or permitted under this Lease (the "notices") shall be in writing and shall be personally delivered or sent by certified mail, return receipt requested, postage prepaid. Notices to Tenant shall be delivered to the address set forth in Section 2(s), except that when Tenant takes possession of the Premises, the address of the Premises always may be used for the purpose of delivering Notices to Tenant. Notices to Landlord shall be delivered to the address set forth in Section 2(r), or such other address as Landlord may specify in writing to Tenant. Notices shall be effective on the earlier of: delivery; and _____
(_____) days after they are mailed in accordance with this Section.

IN WITNESS WHEREOF, the parties hereto have executed this Lease at the place and on the dates specified below next to their respective signatures.

Executed At:

TENANT:

_____ [city] _____ [state] _____
 _____ [name]
 _____ [month]
 _____ [day]
 _____ [year]

By: _____

Printed Name:

Title:

LANDLORD:

_____ [city] _____ [state] _____
 _____ [name]
 _____ [month]
 _____ [day]
 _____ [year]

By: _____

Printed Name:

Title:

[Attach Exhibit A]

APPENDIX A**RULES AND REGULATIONS WHICH CONSTITUTE A PART OF
THE LEASE**

1. The sidewalks, entrances, passages, courts, elevators, vestibules, stairways, corridors or halls shall not be obstructed or used for any purpose other than ingress and egress.
2. No awnings or other projections shall be attached to the outside walls of the Building. No curtains, blinds, shades or screens shall be attached to or hung in, or used in connection with, any window or door of the Premises other than Landlord's standard drapes. All electric ceiling fixtures hung in offices or spaces along the perimeter of the Building must be fluorescent, of a quality, type, design and bulb color approved by Landlord. Neither the interior nor exterior of any windows shall be coated or otherwise sunscreened without written consent of Landlord.
3. No, sign, advertisement, notice or handbill shall be exhibited, distributed, painted or affixed by any Tenant on any part of the Premises of the Building without the prior written consent of the Landlord. In the event of the violation of the foregoing by any Tenant, Landlord may remove same without any liability, and may charge the expense incurred in such removal to the Tenant violating this rule. Interior signs on doors and directory tables shall be inscribed, painted or affixed for each Tenant by the Landlord at the expense of such Tenant, and shall be of a size, color and style acceptable

to the Landlord. The directory table will be provided exclusively for the display of the name and location of Tenants only and Landlord reserves the right to exclude any other names therefrom. Nothing may be placed on the exterior or corridor walls or corridor doors other than Landlord's standard lettering.

4. The sashes, sash doors, skylights, windows, and doors that reflect or admit light and air into halls, passageways or other public places in the Building shall not be covered or obstructed by any Tenant, nor shall any bottles, parcels or other articles be placed on the windowsills.

5. The water and wash closets and other plumbing fixtures shall not be used for any purpose other than those for which they were constructed, and no sweepings, rubbish, rags, or other substances shall be thrown therein. All damages resulting from any misuse of the fixtures shall be borne by the Tenant who, or whose servants, employees, agents, visitors or licensees, shall have caused the same.

6. No Tenant shall mark, paint, drill into, or in any way deface any part of the Premises or the Building. No boring, cutting or stringing of wires or laying of linoleum or other similar floor coverings shall be permitted, except with the prior written consent of the Landlord and as the Landlord may direct.

7. No bicycles, vehicles, birds or animals of any kind shall be brought into or kept in or about the Premises, and no cooking shall be done or permitted by any Tenant on the Premises, except that the preparation of coffee, tea, hot chocolate and similar items for Tenants and their employees shall be permitted, provided power shall not exceed that amount which can be provided by a 30 amp circuit. No Tenant shall cause or permit any unusual or objectionable odors to be produced or permeate the Premises.

8. The Premises shall not be used for manufacturing or for the storage of merchandise except as such storage may be incidental to the use of the Premises for general office purposes. No Tenant shall occupy or permit any portion of its premises to be occupied as an office for the manufacture or sale of liquor, narcotics, or tobacco in any form, or as a medical office, or as a barber or manicure shop, or as an employment bureau without the express written consent of Landlord. No Tenant shall engage or pay any employees on the Premises except those actually working for such Tenant on the Premises nor advertise for laborers giving an address at the Premises. The Premises shall not be used for lodging or sleeping or for any immoral or illegal purposes.

9. No Tenant shall make, or permit to be made any unseemly or disturbing noises or disturb or interfere with occupants of this or neighboring buildings or premises or those having business with them, whether by the use of any musical instrument, radio, phonograph, unusual noise, or in any other way. No Tenant shall throw anything out of doors, windows or skylights or down the passageways.

10. No Tenant nor any of Tenant's servants, employees, agents, visitors or licensees, shall at any time bring or keep upon the Premises any inflammable, combustible or explosive fluid, chemical or substance.

11. No additional locks or bolts of any kind shall be placed upon any of the doors or windows by any Tenant, nor shall any changes be made in existing locks or the mechanism thereof. Each Tenant must, upon the termination of its tenancy, restore to the Landlord all keys of stores, offices, and toilet rooms, either furnished to, or otherwise procured by, such Tenant, and in the event of the loss of keys so furnished, such Tenant shall pay to the Landlord the costs of replacing the same or of changing the lock or locks opened by such lost key if Landlord shall deem it necessary to make such changes.

12. All removals, or the carrying in or out of any safes, freight, furniture, or bulky matter of any description must take place during the hours which the Landlord may determine from time to time and no removal of said items may take place at times other than during generally accepted business hours without the express written consent of the Landlord. The moving of safes or other fixtures or bulky matter of any kind must be done upon previous notice to the

superintendent of the Building and under his supervision, and the persons employed by any Tenant for such work must be acceptable to the Landlord. The Landlord reserves the right to inspect all safes, freight or other bulky articles to be brought into the Building and to exclude from the Building all safes, freight or other bulky articles which violate any of these Rules and Regulations or the Lease of which these Rules and Regulations are a part. The Landlord reserves the right to prescribe the weight and position of all safes, which must be placed upon supports approved by Landlord to distribute the weight.

13. No Tenant shall purchase spring water, ice, towel, janitorial or maintenance or other like services from any person or persons not approved by the Landlord.

14. Landlord shall have the right to prohibit any advertising by any Tenant which, in Landlord's opinion, tends to impair the reputation of the Building or its desirability as an office building and upon written notice from Landlord, any Tenant shall refrain from or discontinue such advertising.

15. The Landlord reserves the right to exclude from the Building between the hours of 6 P.M. and 8 A.M. and at all hours on Sunday and legal holidays all persons who do not present a pass to the Building signed by the Landlord. The Landlord will furnish passes to persons for whom any Tenant requests the same in writing. Each Tenant shall be responsible for all persons for whom he requests passes and shall be liable to the Landlord for all acts of such persons. Landlord shall in no case be liable for damages for any error with regard to the admission to or exclusion from the Building of any person. In case of an invasion, mob riot, public excitement or other circumstances rendering such action advisable in Landlord's opinion, Landlord reserves the right to prevent access to the Building during the continuance of the same by closing the doors or otherwise, for the safety of the Tenants and the protection of the Building and the property in the Building.

16. Any persons employed by any Tenant to do janitorial work shall, while in the Building and outside of the Premises, be subject to and under the control and direction of the superintendent of the Building (but not as an agent or servant of said superintendent or of the Landlord), and Tenant shall be responsible for all acts of such persons.

17. All doors opening onto public corridors shall be kept closed, except when in use for ingress and egress.

18. The requirements of Tenant will be attended to only upon application to the Office of the Building.

19. Canvassing, soliciting and peddling in the Building are prohibited, and each Tenant shall cooperate to prevent the same.

20. All office equipment of any electrical or mechanical nature shall be placed by Tenant in the Premises in settings approved by Landlord, to absorb or prevent any vibration, noise and annoyance.

21. No air conditioning unit or other similar apparatus shall be installed or used by any Tenant without the written consent of Landlord.

22. There shall not be used in any space, or in the public halls of the Building, either by any Tenant or others, any hand trucks, except those equipped with rubber tires and rubber side guards.

23. Landlord shall have the right, exercisable without notice and without liability to any Tenant, to change the name and address of the Building.

24. No vending machine or machines of any description shall be installed, maintained or operated upon the premises without the written consent of Landlord.

25. The scheduling of Tenant move-ins shall be subject to the reasonable discretion of Landlord.

Tenant's Signature: _____

APPENDIX B PARKING AGREEMENT

For the entire period during which the lease dated _____ [month] _____ [day] _____ [year], between _____ [name] ("Tenant") and _____ [name] ("Landlord"), covering space in the _____ [name] Building, remains in effect, and Tenant is not in default thereunder, and so long as the rules and regulations adopted by Landlord are not violated, Tenant or persons designated by Tenant shall be entitled to rent parking space for up to _____ (_____) automobiles in the _____ [name] Garage at the monthly rental rate from time to time applicable to monthly parking spaces in such garage. Tenant may validate visitor parking by such method or methods as the undersigned may approve, at the validation rate from time to time generally applicable to visitor parking.

A condition of any parking shall be compliance by the parker with garage rules and regulations, including any sticker or other identification system established by Landlord's Parking Operator. The following rules and regulations are currently in effect. Landlord reserves the right to modify and/or adopt such other reasonable and non-discriminatory rules regulations for the garage as it deems necessary for the operation of the garage. Landlord may refuse to permit any person who violates the within rules to park in the building garage, and any violation of the rules shall subject the car to removal from the garage. In either of said events, Landlord shall refund a prorated portion of the current parking rate, and the sticker or any other form of identification supplied by Landlord will be returned to Landlord.

RULES AND REGULATIONS

1. Garage hours shall be 6:00 A.M. to 2:30 A.M.
2. Cars must be parked entirely within the stall lines painted on the floor.
3. All directional signs and arrows must be observed.
4. The speed limit shall be _____ (_____) miles per hour.
5. Parking is prohibited:
 - (a) in areas not striped for parking;
 - (b) in aisles;
 - (c) where "no parking" signs are posted;
 - (d) on ramps;
 - (e) in cross hatched areas;

(f) in such other areas as may be designated by Landlord or Landlord's Parking Operator.

6. Parking stickers or any other device or form of identification supplied by Landlord shall remain the property of Landlord. Such parking identification device must be displayed as requested and may not be mutilated in any manner. The serial number of the parking identification device may not be obliterated. Devices are not transferable, and any device in the possession of an unauthorized holder will be void. There will be a replacement charge to the Tenant or person designated by Tenant of _____ Dollars (\$_____) for loss of any magnetic parking card.

7. The monthly rate for rental of parking space is payable _____ (_____) month in advance and must be paid prior to the first day of each month. Failure to do so will automatically cancel parking privileges, and a charge at the prevailing daily rate will be due. No deductions or allowances from the monthly rate will be made for days customers do not use parking facilities.

8. Garage managers or attendants are not authorized to make or allow any exceptions to these Rules and Regulations.

9. Every parker is required to park and lock his own car. All responsibility for damage to cars is assumed by the parker.

10. Loss or theft of parking identification devices from automobiles must be reported to the garage manager immediately, and a report must be filed by the customer at that time. Any parking identification devices reported lost or stolen and found on any unauthorized car will be confiscated, and the illegal holder will be subject to prosecution.

11. Spaces rented to persons are for the express purpose of parking one automobile per space. Washing, waxing, cleaning or servicing of any vehicle by the customer and/or his agent is prohibited.

12. The garage management reserves the right to refuse the sale of monthly stickers or other parking identification devices to any Tenant or person and/or his agent or representative who willfully refuses to comply with the above Rules and Regulations and all unposted City, State or Federal ordinances, laws or agreements.

13. By signing this Parking Agreement, Tenant agrees to acquaint all persons to whom Tenant assigns parking space of these Rules and Regulations.

TENANT:

_____ [name]

By: _____

Printed Name: _____

Title: _____

LANDLORD:

_____ [name]

By: _____

Printed Name: _____

Title: _____



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Current Legal Forms for Real Estate

Chapter 25 ENVIRONMENTAL CONSIDERATIONS IN REAL ESTATE TRANSACTIONS

Part IV. FORMS

C. LEASE OF REAL ESTATE

33-25 Current Legal Forms for Real Estate FORM 25.130

FORM 25.130 Residential lease--single family home--requirement that all household wastes be disposed of properly and in accordance with law

COMMENT

This agreement is a comprehensive lease for the rental of a single family residence. It can be easily adapted for use where the tenant is leasing a unit in a multiple dwelling. In such case, the parties would simply add extra provisions to the lease recognizing the tenant's right to use common areas located in or near the building--e.g., elevators, the parking lot, laundry room, basement storage bin, recreation room, etc.--and imposing upon the tenant the obligation to respect the rights of other tenants and to treat them with courtesy.

This lease contains provisions regarding the disposal of household wastes and the use of pesticides and fertilizers. For example, the tenant is responsible for the disposal of all household wastes and agrees to dispose of them no less than once a week. In the lease, the tenant is informed of when trash is collected by the municipality, and that trash should be placed for pick up on the curb outside the premises in plastic trash bags.

The tenant is also informed that the municipality has a mandatory recycling program in effect. In keeping with the program, the tenant is required to separate the following items from its household waste:

- (1) glass products (e.g., bottles, jars, etc.);
- (2) plastic products (e.g., bottles, etc.);
- (3) metal containers (e.g., soda cans, etc.); and

(4) newspapers.

Items are not to be disposed of by the tenant with his other household wastes. Rather, they are to be collected, placed in trash cans or milk crates, and left on the curb outside the leased premises on the morning of the day when the municipality collects such items.

A special clause in the lease prohibits the tenant from using fertilizers or pesticides on the leased premises without the prior consent of the landlord. Under the terms of the clause, the landlord may withhold his permission either with or without cause.

This prohibition will serve to protect the landlord who is concerned about the effects of chemicals not only upon the leased premises, but also upon those who reside there. For example, if the leased premises are served by a well located on the property, certain fertilizers or pesticides may gradually seep into and contaminate the ground water, making the water undrinkable and extremely expensive to purify. And certain rodenticides, used inside of a structure or outdoors, may prove dangerous to small children and pets.

It should be noted that the clause restricting the use of fertilizers and pesticides imposes rather severe penalties on the tenant who violates it: cancellation of the lease and/or payment of the cost of remedial action. The experienced landlord will recognize that most renters will not have deep enough pockets to pay for remediation costs, so the cost of remediation will fall squarely on the landlord.

FORM

The Landlord and Tenant agree to lease the premises at the rent and for the period stated in the following terms:

[Insert the information called for below in the blank spaces provided:]

I. LANDLORD'S NAME & ADDRESS: _____

II. TENANT'S NAME & ADDRESS: _____

III. PREMISES: _____

IV. LEASE DATE: _____

V. TERM: _____

VI. COMMENCING ON: _____

VII. TERMINATING ON: _____

VIII. YEARLY RENT: _____

IX. MONTHLY RENT: _____

X. SECURITY: _____

1. *Rent.* The Tenant must make the rent payment for each month on the first day of that month and at the Landlord's address, as set forth above. The Landlord need not notify the Tenant of Tenant's duty to pay the rent, and the rent must be paid in full. No deductions will be allowed from the rent. The first month's rent must be paid at the time of the signing of this Lease Agreement by the Tenant.

2. *Use.* The Tenant agrees to use the premises rented to the Tenant by the Landlord as a residence only.

3. *Tenant's duty to obey laws and regulations pertaining to the leased premises.* Tenant must, at Tenant's expense, promptly and fully comply with all laws, orders, rules, requests and directives pertaining to the leased premises that are issued by governmental authorities, the Landlord's insurers, and similar authorities and agencies. Landlord shall be responsible for any violations that may exist prior to transfer of possession of the leased property to Tenant. Notices received by Tenant from any authority or entity must be promptly delivered to Landlord. Tenant may not do anything which may increase Landlord's insurance premiums. If Tenant's acts or failure to act result in an increase in the Landlord's insurance premiums, then Tenant must pay the increase in premiums as additional rent. Notwithstanding the foregoing, if the Landlord should experience an increase in premiums unrelated to Tenant's conduct, Tenant shall not be deemed responsible for such an increase.

4. *Disposal of wastes; recycling.* Tenant shall be responsible for the disposal of all household wastes. Tenant agrees to promptly dispose of all household waste no less than once per week. Disposal of wastes shall be performed in compliance with all applicable laws, regulations and policies of all governmental authorities having jurisdiction. Tenant is hereby notified that trash is collected on _____ [e.g., *Monday mornings*] by the City/Town/Municipality of _____. Household trash should be placed for pick up on the curb outside the leased premises in plastic trash bags.

Tenant is also informed that the City/Town/Municipality of _____ has a mandatory recycling program currently in effect. In keeping with such program, the Tenant is required to separate the following items from its household waste:

- (1) glass products (e.g., bottles, jars, etc.);
- (2) plastic products (e.g., bottles, etc.);
- (3) metal containers (e.g., soda cans, etc.); and
- (4) newspapers.

The items listed above are not to be disposed of by the Tenant with the Tenant's other household wastes. Rather, they are to be collected, placed in trash cans or milk crates, and put on the curb outside the leased premises on _____ [e.g., *the first and third Mondays of each month*].

5. *Use of pesticides or fertilizers.* Tenant agrees not to use, cause to be used, or suffer the use of pesticides or fertilizers on the leased premises without the prior written approval of Landlord. Landlord reserves the absolute right to refuse to approve the use of any fertilizer and/or pesticide, regardless of the composition thereof. Landlord's decision shall be final and not subject to review.

In the event that fertilizers or pesticides are used on the premises without the consent of Landlord, Landlord shall have the right to terminate this lease immediately pursuant to the provisions of Paragraph 12. Tenant shall be responsible for the cost of any remedial measures which Landlord, in his sole discretion, deems necessary or appropriate to return the

premises to its prior condition. Such costs shall be deemed additional rent, which rent shall be due and payable under the terms and conditions of this Lease when the next regular monthly rent payment is due and payable.

6. *Maintenance.* The Tenant shall mow the lawn, trim the hedges and shovel snow from the driveway and sidewalks, as necessary. If interior painting is required or desired, Tenant may elect to paint, with Landlord's prior permission. Landlord shall supply the materials at Landlord's own expense, and Tenant shall supply the labor at Tenant's own expense.

Tenant, at Tenant's own expense, shall repair any equipment, furniture or fixtures which are damaged by Tenant. This shall not include any item which fails to function due to ordinary wear and tear. If the Tenant fails to make a repair for which Tenant is responsible, then the Landlord may do so and charge the Tenant the full cost of said repair as additional rent, which rent shall be due and payable under the terms and conditions of this Lease when the next regular monthly rental payment is due and payable.

7. *Alterations.* Tenant agrees not to make any alterations or improvements to the leased premises without the Landlord's written permission. Any alterations and improvements made by the Tenant after obtaining the Landlord's written permission shall be the sole expense of the Tenant, shall become the property of the Landlord, and shall be left behind in the leased premises at the end of the term of this Lease Agreement. Any improvements or alterations to the premises made without the consent of the Landlord may be removed by the Landlord, and the premises may be restored to their original state, all at the expense of the Tenant. In such case, the amounts expended by Landlord shall be treated as additional rent and shall be due and payable under the terms and conditions of this Lease when the next regular monthly rental payment is due and payable.

8. *Assignment and sublease.* Tenant must not assign this Lease, sublet all or part of the premises, or permit any other person to use the premises without the prior approval of Landlord. If Tenant violates this provision, Landlord has the right to cancel the Lease Agreement in accordance with Paragraph 12 ("Tenant's Default").

9. *Entry by the landlord.* The Tenant agrees to allow the Landlord to enter the leased premises at any reasonable hour to repair, inspect, install or work upon any fixture or equipment in said leased premises, and to perform such other work that the Landlord may deem necessary. In addition, Tenant agrees to permit Landlord and/or Landlord's Agent to show the premises to persons wishing to rent or purchase the same, during the reasonable hours of any day of the term of this Lease Agreement. Tenant will permit the usual notices of "For Rent" or "For Sale" to be placed upon conspicuous portions of the walls, doors or windows of said premises and remain thereon without hindrance or molestation. Prior to entry, Landlord will give Tenant at least twenty-four (24) hours' prior notice in all non-emergency situations.

10. *Fire, accident, defects and damage.* Tenant must give Landlord prompt notice of fire, accident, damage or the discovery of a dangerous or defective condition on the leased premises. If, in the opinion of Tenant, the premises cannot be used because of fire damage or other casualty, Tenant is not required to pay rent for the time the premises are unusable. Landlord need only repair the damaged structural parts of the premises. Landlord is not required to repair or replace any equipment, fixtures, furnishings or decorations, unless originally installed by Landlord. Landlord is not responsible for delays due to settling insurance claims, obtaining estimates, labor and supply problems, or any other cause not fully under Landlord's control. Either Landlord or Tenant may elect to cancel this Lease Agreement at any time before repairs are completed.

11. *Waivers.* If the Landlord fails to enforce any term of this Lease Agreement, said failure by the Landlord shall not be a waiver of any of the Landlord's rights. If a term in this Lease Agreement is determined to be illegal, then the rest of this Lease Agreement shall remain in full force and effect and shall be binding upon the Landlord and the Tenant.

12. *Tenant's default:*

(a) Landlord shall give _____ (_____) [e.g., ten (10)] days' written notice to Tenant to correct any of the following defaults:

- (1) failure to pay rent or added rent on time;
- (2) failure to dispose of wastes as provided in Paragraph 4 hereof;
- (3) use of pesticides or fertilizers in violation of Paragraph 5 hereof;
- (4) improper assignment of the Lease Agreement;
- (5) improper subletting of all or part of the premises;
- (6) allowing another to use the premises without obtaining Landlord's prior consent;
- (7) unlawful conduct by Tenant or other occupant of the premises;
- (8) failure to fully perform any other term in the Lease Agreement.

(b) If Tenant fails to correct the defaults in Subparagraph (a) within _____ (_____) [e.g., ten (10)] days after receipt of notice, Landlord may cancel the Lease Agreement by giving Tenant a written notice stating the future date on which the Lease term will end. On that date, the Lease term and Tenant's rights in this Lease Agreement automatically end, and Tenant must leave the premises and return the keys to Landlord. However, Tenant continues to be responsible for rent, expenses, damages and losses arising until the original date upon which the Lease was to expire.

(c) If the Lease Agreement is canceled, or rent or added rent is not paid on time, or Tenant vacates the premises, Landlord may, in addition to other remedies, take either of the following steps:

- (1) enter the premises and physically remove Tenant and any person or property; or
- (2) bring an action for eviction or institute some other equivalent legal action designed to take back the premises.

13. *Tenant's additional obligations.* Tenant shall keep the grounds surrounding the leased premises, as well as the leased premises themselves, neat and clean. Tenant agrees not to use any of the equipment, fixtures or plumbing fixtures in the leased premises for any purpose other than that for which said equipment, fixtures or plumbing fixtures were designed. Any damage resulting from the misuse of such equipment, fixtures and plumbing fixtures shall be paid for by the Tenant as additional rent, which additional rent shall be due and payable under the terms and conditions of this Lease when the next regular monthly rental payment is due and payable.

All furniture and other personal belongings, equipment or the like, if any, provided by the Landlord and included within the terms of this Lease Agreement, shall be returned to the Landlord at the end of the term of this Lease Agreement, or any earlier termination, in as good condition as possible, taking into account reasonable wear and tear. If the Tenant vacates the premises or is dispossessed, and fails to remove any of Tenant's furniture, clothing or personal belongings, those items shall be considered abandoned by the Tenant, and the Landlord shall be authorized to dispose of those items as the Landlord sees fit, subject to any restrictions imposed by a court's judgment or warrant of eviction.

14. *Quiet enjoyment.* The Landlord agrees that if the Tenant pays the rent and complies with all of the other terms and conditions of this Lease Agreement, then the Tenant may peaceably and quietly have, hold and enjoy the premises leased hereunder for the term of this Lease Agreement.

15. *Parties upon whom binding.* This Lease Agreement is binding upon the Landlord and the Tenant and their respective heirs, distributees, executors, administrators, successors and lawful assigns.

16. *Utilities and services.* Tenant agrees to pay for all utilities and services provided to the leased premises, with the following exceptions: _____.

17. *Space rented "as is."* Tenant has inspected the premises. Tenant states that the premises are in good order and repair and takes the premises "as is."

18. *Security.* Tenant has given security to Landlord in the amount stated above on the first page of this Lease Agreement. If Tenant fully complies with all the terms of this Lease Agreement, Landlord shall return the security after the term ends. If Tenant does not fully comply with the terms of this Lease Agreement, Landlord may use the security to pay amounts owed by Tenant, including damages. If Landlord sells the premises, Landlord may give the security to the Buyer. In such case, Tenant will look only to the Buyer for the return of the security.

19. *Option to purchase.* Landlord will notify Tenant _____ (_____) [e.g., sixty (60)] days in advance of listing the premises for sale with a real estate agent or broker. During this _____ (_____) [e.g., sixty (60)] day period, Tenant will have the right to make an offer to purchase the premises at its fair market value, which Landlord will accept. Fair market value shall be determined by a letter of value to be supplied by a real estate broker or appraiser to be agreed upon by the parties. If the parties cannot agree, each shall select a broker or appraiser who, in turn, shall select a third broker or appraiser who shall prepare the letter of value. Costs associated with this procedure shall be split equally by the parties.

The offer by Tenant may be made contingent upon the following:

- (a) the results of a structural inspection;
- (b) the results of a termite inspection;
- (c) attorney's approval of the purchase; and
- (d) obtaining a mortgage whose terms are acceptable to Tenant.

The Landlord may continue to solicit offers from third-party purchasers while there exists open contingencies on the Tenant's offer. This right to make an offer is assignable only to _____.

If Tenant fails to make an offer, Tenant shall still retain the right to purchase by matching any bona fide offer received by Landlord. Tenant must agree to match the offer within _____ (_____) _____ [insert number] hours of receipt of notice from Landlord of Landlord's receipt of an offer from a third party.

The parties hereto have set their hands the day and year first above written.

LANDLORD

TENANT



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Current Legal Forms for Real Estate

Chapter 25 ENVIRONMENTAL CONSIDERATIONS IN REAL ESTATE TRANSACTIONS

Part IV. FORMS

C. LEASE OF REAL ESTATE

33-25 Current Legal Forms for Real Estate FORM 25.131

FORM 25.131 Residential lease--condominium unit--landlord's representation of condition of premises--tenant agrees to use watercourse located on common area for recreational purposes only

COMMENT

This is a lease agreement intended for use where the subject premises consist of a residential condominium unit. The unit envisioned in this lease is part of a large, suburban development spanning many acres.

The lease agreement recognizes the tenant's right to use and enjoy all of the common areas within the condominium development which any owner is entitled to use and enjoy, including, for example, the sidewalks, roads, running path, parking lots, clubhouse, exercise room and children's playground. In addition, the tenant is free to use common areas within the building in which his rented unit is located, such as the laundry room, elevators, hallways and staircases, the basement storage bin, etc.

Part of the development is a wooded area through which a watercourse flows. Since this wooded area and the watercourse are part of the "common area" of the condominium development, unit owners and their tenants are permitted to use them for recreational purposes, such as picnicking, swimming, canoeing, etc.

With regard to this watercourse, the tenant covenants to use the water for recreational purposes only, and not for drinking, bathing, or any other reason. The tenant also agrees not to discharge any substance into the waterway and to use the waterway in strict compliance with all condominium rules and regulations.

Finally, this agreement contains a very detailed representation by the landlord of the current condition of the premises. The landlord describes the unit he is renting as being "in excellent

condition and repair." The landlord is able to offer such a positive description of the property because the entire development is newly constructed and because, prior to construction, extensive testing was done to determine whether any environmental problems existed on the undeveloped land, such as excessive radon gas emissions from the earth or the presence of hazardous substances buried beneath the ground.

FORM

AGREEMENT made this _____ day of _____, _____ [insert date], between _____ [insert name of landlord], residing at _____ [insert address] (hereafter referred to as "Landlord"), and _____ [insert name of tenant], residing at _____ [insert address] (hereafter referred to as "Tenant").

WHEREAS, Landlord is the owner of Unit Number _____ (# _____) in a condominium known as _____ [insert name of development] Condominiums, located at _____ Road/Street/Avenue, in the City/Town/Municipality of _____, State of _____ (hereafter referred to as "premises"); and

WHEREAS, Landlord desires to lease the premises to Tenant; and

WHEREAS, Tenant desires to rent the said condominium unit,

NOW, in consideration of the mutual promises contained herein, it is agreed as follows:

1. *Lease.* Landlord hereby leases to Tenant Unit Number _____ (# _____) in a condominium development known as _____ Condominiums, located at _____ Road/Street/Avenue, in the City/Town/Municipality of _____, State of _____, together with all of Landlord's rights in and to the common areas, as described in a deed to Landlord from _____ [insert name of developer that sold unit to landlord], dated _____, _____ [insert date], and recorded in the office of the _____ County Clerk on _____, _____ [insert date], in Book of Deeds Number _____ (_____), at Page _____ (_____). Tenant acknowledges that a copy of the Deed and Condominium Prospectus, dated _____, _____ [insert date], have been provided to Tenant prior to the execution of this Lease.

"Common areas" shall include, but not be limited to, the sidewalks, roads, parking lots, running path, swimming pool, tennis courts, skating rink, picnic grounds, hiking trail, clubhouse, children's playground, and exercise room located on the development, as well as the laundry room, elevators, hallways and staircases, and the basement storage bin located within the building housing Tenant's unit.

2. *Term.* The term of this Lease shall be for _____ (_____) [e.g., one (1)] year(s), commencing _____, _____ [insert date], and terminating on _____, _____ [insert date].

3. *Renewal.* Tenant may renew this Lease for _____ [e.g., two (2) successive one-year periods]. Tenant shall give notice of intent to renew on or before _____.

All terms of this Lease shall remain the same, except for the amount of the annual rent. The annual rent shall be increased by the aggregate increase in cost of the following items over the aggregate amount paid for the same items during the previous lease year:

- (a) real property taxes;
- (b) condominium association fees or dues;
- (c) recreational association fees or dues; and
- (d) homeowners' insurance premiums.

Landlord shall provide proof of increase if requested by Tenant.

4. *Utilities.* Tenant shall pay all costs for water, sewer, telephone, natural gas, electricity, cable television and garbage removal.

5. *Condominium association.* Landlord shall pay all mandatory fees and dues to the condominium homeowners' association and to the condominium recreational association. Tenant shall have the right to use all condominium facilities listed, above, in Paragraph 1. Landlord reserves the right to vote at all meetings of the condominium homeowners' association and the condominium recreational association.

Tenant agrees to abide by all rules, regulations, and policies of the condominium homeowners' association and the condominium recreational association. Tenant shall provide Landlord with a copy of any notice of violation within _____ (_____) _____ [insert number] hours of receipt of such notice. Tenant will immediately take all steps required to cure such violation if such violation has been caused by Tenant's act, neglect or omission.

Tenant acknowledges that he is aware that the various streams, ponds and other watercourses located on the condominium property are for recreational use only. Tenant will not attempt to use said watercourses as sources of potable water or for washing. Tenant will not emit or discharge any substances into said watercourses. Tenant will use such watercourses in strict compliance with condominium rules and with good conservation techniques.

6. *Rent.* The annual rent shall be the sum of \$_____, to be paid in equal monthly installments of \$_____ on the first day of each month during the term of this Lease, commencing _____, _____ [insert date].

7. *Condition of premises.* Landlord hereby represents that the condominium unit to be leased hereunder is in excellent condition and repair. The unit is newly constructed. Landlord represents that the unit contains no asbestos-containing materials or urea formaldehyde insulation. The unit was tested for the presence of radon gas. The test showed less than two (2) pico curies of radon gas per liter of air. The unit has been inspected by the Town/City/Municipality of _____, and a certificate of occupancy was issued. Landlord is aware that a phase I environmental assessment was performed on the site of the condominium development prior to construction. A copy of the assessment is contained in the prospectus. The assessment states: "No evidence of any adverse environmental impact was found."

8. *Maintenance and repairs.* Tenant shall contact Landlord and the condominium homeowners' association in the event any external repairs are required, e.g., repair or replacement of window shutters.

Landlord shall be responsible for all plumbing and heating and air conditioning repairs, provided that such repairs are not occasioned by the act, neglect or omission of Tenant, his family, agents, or invitees. All other repairs shall be made

by Tenant at his own cost and expense. Tenant shall make such repairs promptly and in a workmanlike manner. Tenant shall suffer no liens against the unit for the cost of labor, materials or otherwise in connection with repairs. Tenant shall maintain the premises in good order and repair at all times. Tenant shall return the premises in the same condition as existed at the commencement of this Lease, reasonable wear and tear excepted.

9. *Alterations.* Tenant may paint the premises without approval of the Landlord. Any other alterations shall be made only with the prior written approval of the Landlord. Landlord shall have the right to reject any proposals either with or without cause.

10. *Insurance.* The parties acknowledge that the exterior structure of the unit is covered by the condominium homeowners' association's blanket insurance policy. The interior of the unit, including wall coverings and interior walls, carpeting, cupboards, appliances and personalty must be covered by a homeowner's insurance policy. Tenant shall obtain such a policy at his sole expense. The policy shall name Landlord and Tenant as co-insureds. The policy shall provide for the giving of notice of cancellation to Landlord at least _____ (_____) _____ [insert number] days prior to the effective date of cancellation.

11. *Laws and regulations.* Tenant must, at Tenant's expense, promptly comply with all laws, orders, rules, requests and directives of all governmental authorities, Landlord's insurers, and similar authorities and agencies. Landlord shall be responsible for any violations that may exist prior to transfer of possession of the leased premises to Tenant. Notices received by Tenant from any authority or entity must be promptly delivered to Landlord. Tenant may not do anything on the premises to increase the condominium homeowners' association's insurance premiums. If Tenant violates this provision and such violation results in an increase in the amount of such premiums, Tenant will be liable for the increase in premiums.

12. *Assignment and sublease.* Tenant must not assign this Lease, sublet all or part of the premises, or permit any other person to use the premises without the prior approval of Landlord. If Tenant violates this provision, Landlord has the right to cancel the Lease Agreement pursuant to Paragraph 15 ("Tenant's Default").

13. *Entry by the landlord.* The Tenant agrees to allow the Landlord to enter the leased premises at any reasonable hour to repair, inspect, install or work upon any fixture or equipment in said leased premises and to perform such other work as Landlord may deem necessary. In addition, Tenant agrees to permit Landlord and/or Landlord's Agent to show the premises to persons wishing to rent or purchase the same during the reasonable hours of any day during the term of this Lease Agreement. Tenant will permit the usual notices of "For Rent" or "For Sale" to be placed upon conspicuous portions of the walls, doors or windows of said premises and remain thereon without hindrance or molestation. Prior to entry, Landlord will give Tenant _____ (_____) _____ [insert number] hours' prior notice in all non-emergency situations.

14. *Fire or other casualty.* In the event of damage by fire or other casualty, if the damage is such that, in the opinion of Landlord, the premises are still usable as a residence, this Lease shall remain in effect during repairs.

In the event that the premises are not usable as a residence, either party may cancel this Lease by giving notice to the other party within _____ (_____) _____ [insert number] days after the damage occurs. The Lease shall be deemed terminated as of the date the fire or other casualty occurred. If neither party elects to cancel, the rent shall be waived during the period from the occurrence of the fire or other casualty until repairs are completed. The term of this Lease shall be extended for a like period.

The parties shall cooperate in filing and settling insurance claims and obtaining repairs.

15. *Tenant's default:*

(a) Landlord may give _____ (_____) [e.g., five (5)] days' written notice to Tenant to correct any of the following defaults:

- (1) failure to pay rent or added rent on time;
- (2) improper assignment of the Lease Agreement;
- (3) improper subletting of all or part of the premises;
- (4) allowing another to use the premises without the Landlord's consent;
- (5) unlawful conduct by Tenant or other occupant of the premises;
- (6) failure to fully perform any other term in the Lease Agreement.

(b) If Tenant fails to correct the defaults listed in Subparagraph (a) within _____ (_____) [e.g., five (5)] days of receipt of notice, Landlord may cancel the Lease Agreement by giving Tenant a written notice specifying the date on which the term will end. On that date, the term and Tenant's rights in this Lease Agreement automatically end, and Tenant must leave the premises and return the keys to Landlord. However, Tenant continues to be responsible for rent, expenses, damages and losses until the expiration date of this Lease Agreement.

(c) If the Lease Agreement is canceled, or rent or added rent is not paid on time, or the Tenant vacates the premises, Landlord may, in addition to other remedies, take either of the following steps:

- (1) enter upon the premises and physically remove Tenant and any person or property; or
- (2) bring an action for eviction or institute some other equivalent legal action designed to take back the premises.

16. *Quiet enjoyment.* The Landlord agrees that if the Tenant pays the rent and complies with all of the other terms and conditions of this Lease Agreement, then the Tenant may peaceably and quietly have, hold and enjoy the premises leased hereunder for the term of this Lease Agreement.

17. *Additional obligations of tenant:*

- (a) Tenant agrees not to use any appliances, fixtures, or plumbing facilities in the unit for any purpose other than that for which said items were designed. Any damage resulting from the misuse of such items shall be paid for by Tenant.
- (b) Tenant shall arrange for vermin extermination at Tenant's sole expense, whenever required.

18. *Security.* Tenant has given security to Landlord in the amount of \$ _____. If Tenant fully complies with all the terms of this Lease Agreement, Landlord will return the security after the term ends. If Tenant does not fully comply with the terms of this Lease Agreement, Landlord may use the security to pay amounts owed by Tenant, including damages. If Landlord sells the premises, Landlord may give the security to the Buyer. In such case, Tenant will look only to the Buyer for the return of the security.

19. *Use of premises.* Tenant shall use the unit solely as his residence and for no other purposes.

20. *Pets.* Tenant shall not harbor any animals of any kind on the premises. Tenant shall not allow animals of any kind to visit the premises for any period of time.

21. *Notice.* Any notice required to be given to Landlord shall be in writing and sent certified mail, return receipt requested, to the following address: _____. Any notice required to be given to Tenant shall be in writing and sent certified mail, return receipt requested, to the following address: _____. Notice shall be deemed given when received.

22. *Representations.* This Agreement contains the entire understanding of the parties, and there have been no representations made which are not contained herein.

23. *Modifications.* This Agreement may only be modified by a written amendment signed by all parties. An oral modification shall not be binding on any party.

24. *Governing law.* This Agreement shall be construed in accordance with the laws of the State of _____.

25. *Waiver.* Any failure by either party to enforce any right arising hereunder shall not be deemed a waiver of such right.

26. *Parties upon whom binding.* This Lease Agreement is binding upon the Landlord and the Tenant and their respective heirs, distributees, executors, administrators, successors and lawful assigns.

The parties hereto have set their hands the day and year first above written.

LANDLORD:

TENANT:



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Chapter 25 ENVIRONMENTAL CONSIDERATIONS IN REAL ESTATE TRANSACTIONS

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C. LEASE OF REAL ESTATE

33-25 Current Legal Forms for Real Estate FORM 25.132

FORM 25.132 Cooperative residential lease--disclaimer by landlord of condition of premises--tenant agrees to comply with all environmental laws--tenant agrees to comply with rules of the cooperative board

COMMENT

When one purchases a cooperative apartment or "unit," he does not actually own that unit; rather, he owns stock in the company that owns the multi-unit dwelling that encompasses his unit. Such interest is evidenced by a certificate of shares of stock in the cooperative corporation that actually owns the dwelling. In addition, he receives a "proprietary lease" to his unit. This is in contrast to a condominium unit, where the purchaser actually owns his unit and also has an ownership interest in the underlying land and in the common areas of the multi-unit dwelling (e.g., hallways, stairs, etc.).

The form below is a sublease of a proprietary lease to a cooperative unit. Since such a sublease generally requires the prior approval of the board of directors of the cooperative corporation, this sublease is made contingent upon the receipt of that approval.

The particular building in which the unit is located is quite old, and the parties strongly suspect that there may be asbestos in the ceiling tiles and in the insulation materials that surround the heating pipes. The parties have agreed that the tenant will enlist the services of a licensed asbestos handler, who will remove or contain (i.e., "abate") the asbestos-containing materials.

All expenses will be paid by the tenant. In return, the landlord will give the tenant a credit against the monthly rental fee to help offset the cost of the asbestos abatement. Specifically, the tenant is responsible for the full cost of testing the ceiling tiles and the insulation materials suspected of containing asbestos; containing or removing and properly disposing of the asbestos; and testing the air within the unit after the abatement process to make certain that any airborne particles of asbestos do not pose a health threat to inhabitants.

Under the terms of the lease, the tenant must insure that the abatement is performed in strict compliance with all applicable federal, state and local laws and regulations. In addition, the tenant must make certain that the asbestos handler is fully licensed and that he carries particular types of insurance in adequate amounts. The tenant also agrees to indemnify and hold the landlord harmless for any personal injury or property damage occurring as a result of the asbestos abatement efforts.

Finally, it should be noted that any tenant willing to assume the high cost and the inherent risks of asbestos abatement procedures should be certain that both the unit he is renting and the lease terms justify the expenditure and risks. The monthly rental fee and the length of the lease term should be favorable to the tenant so that he can recoup his investment. In addition, to make the tenant's investment truly worthwhile, he might insist on the insertion into the lease of a clause giving him an option to purchase the apartment at the end of the lease term, or at least a right of first refusal to purchase the stock.

FORM

AGREEMENT made this _____ day of _____, _____ [insert date], between _____ [insert name of landlord], residing at _____ (hereafter referred to as "Landlord"), and _____ [insert name of tenant], residing at _____ (hereafter referred to as "Tenant").

WITNESSETH:

WHEREAS, Landlord is the owner of certain shares in a Cooperative Apartment Building Corporation, together with a proprietary lease for a unit in the corresponding building; and

WHEREAS, Tenant desires to lease Landlord's unit in said building,

NOW, in consideration of the mutual promises contained herein, it is agreed as follows:

1. *Lease.* Landlord hereby leases to Tenant Unit Number _____ (# _____) in the _____ [insert name] Cooperative Apartments, located at _____ Road/Street/Avenue in the City/Town/Municipality of _____, State of _____, together with the use of _____ (_____) _____ [insert number] parking space(s) as designated outside of the building.

2. *Rental fee and lease term.* The annual rental fee shall be the sum of \$ _____, payable in equal monthly installments of \$ _____, payable on the first day of each month, commencing on _____, _____ [insert date]. In addition, Tenant shall pay all assessments charged by the Board of Directors of the _____ [insert name of the cooperative corporation, e.g., Hillcrest Cooperative Apartments, Inc.] (hereafter "Board of Directors" or "Co-op"). These assessments shall include, but not be limited to, taxes, maintenance, landscaping, snow removal and common area charges. The current monthly payment for such charges is the sum of \$ _____. Tenant acknowledges that this amount may increase. Tenant shall pay such charges directly to the Board of Directors. Tenant shall provide proof of payment to Landlord upon request.

The term of this Lease shall be for _____ (_____) [e.g., one (1)] year(s), commencing _____, _____ [insert date] _____, _____ [insert date], and terminating on _____, _____ [insert date].

3. *Utilities.* Tenant shall pay all costs for water, sewer, telephone, natural gas, electricity, cable television and garbage removal.

4. *Renewal.* Tenant may renew this Lease for two (2) successive one-year periods, provided that Tenant is not in default at the time of renewal. The terms of this Lease shall remain in full force and effect for each of the renewal periods, except that the annual rent for the first renewal period shall be \$_____, and the annual rent for the second renewal period shall be \$_____.

Tenant shall give notice of intent to renew at least _____ (_____) [insert number, e.g., two (2)] months prior to the end of the term.

5. *Condition of premises.* The parties acknowledge that the premises to be leased under the terms of this Lease are located in a building that was constructed in 1892. The common areas of the building were renovated when the building was made into a cooperative in _____ [insert year]. However, individual units have only been renovated by their proprietary tenants. Tenant accepts the unit in its "as is" condition.

6. *Asbestos.* The unit to be leased hereunder may possess asbestos-containing material in ceiling tiles and on the exposed heating pipes in the living room and bedrooms, and elsewhere within the unit.

Tenant, at his sole cost and expense, agrees to have appropriate testing performed by a certified laboratory to determine whether asbestos-containing material is located within the unit. In the event that asbestos-containing material is found, Tenant shall have a licensed asbestos handler abate the asbestos by either removing it or containing it, again at Tenant's sole expense.

Prior to the asbestos handler commencing work, Tenant shall obtain Landlord's approval of the asbestos abatement contract between Tenant and the contractor. Tenant shall require that the licensed asbestos contractor maintain:

(1) liability insurance in at least the amount of \$_____ (for each claim of personal injury);

(2) workers' compensation insurance in the minimum amount required by law; and

(3) property damage insurance in the amount of \$_____.

Landlord and Tenant shall be named as additional insureds on the insurance policies. The insurance policies shall contain a provision requiring _____ (_____) _____ [insert number] days' notice to Landlord prior to cancellation of any policy by the insurer.

Tenant shall have air testing performed at the completion of abatement to be sure that the abatement was successful. Levels of airborne asbestos particles within the leased premises after the abatement procedures have been completed must not exceed levels deemed acceptable by state authorities.

Tenant, his agents and employees shall comply with all federal, state and local laws, regulations and policies regarding testing for, and abatement of, asbestos-containing materials.

In the event that Tenant is required to have abatement procedures performed, Landlord shall give Tenant a credit against Tenant's monthly rental fee in the amount of \$_____ per month for a period of _____.

_____ (_____) _____ [insert number] months.

Tenant shall indemnify, defend, and hold Landlord harmless from any costs or other expenses associated with claims arising out of any loss, injury to person, damage to property or violation of law--including judgments, legal fees and fines--due to the testing and abatement of asbestos contemplated by this Paragraph 6.

7. *Contingencies.* The parties hereto acknowledge that the rules of the Co-op prohibit the subleasing or assignment of a proprietary lease without the approval of the Board of Directors. Thus, the effectiveness of this Lease shall be contingent upon Landlord obtaining the approval of the Board of Directors on or before _____, _____ [insert date]. Landlord shall use due diligence in attempting to obtain such approval. Landlord shall provide all information, including, but not limited to, financial information, as the Board of Directors may request. Landlord shall make initial application for approval within _____ (_____) _____ [insert number] days after executing this Lease. In the event Landlord is unable to obtain approval by the date specified above, or if Landlord is rejected, this Lease shall be deemed terminated, and the security deposit shall be returned immediately.

8. *Rules.* Tenant agrees to comply with all rules and regulations of the Co-op now or hereafter in effect. Tenant shall notify Landlord immediately upon receipt of a notice of non-compliance or default from the Co-op. If the notice is a result of an act or omission of Tenant, Tenant shall immediately perform whatever acts may be necessary in order to cure the default. Tenant shall provide proof of the cure to Landlord.

9. *Laws.* Tenant, at his own cost and expense, shall promptly comply with all laws, rules and policies of all governmental authorities as they relate to the condition, use and occupancy of the unit by Tenant. Tenant shall notify Landlord immediately upon receipt of a notice indicating non-compliance. Tenant shall take all steps necessary or appropriate to bring the premises into compliance immediately. Tenant shall provide Landlord with proof of compliance.

10. *Maintenance and repairs.* Tenant shall contact Landlord and the Cooperative Board of Directors in the event any external repairs are required (e.g., replacement or repair of outside window shutters). Landlord shall be responsible for all plumbing and heating repairs, provided that such repairs are not occasioned by the act, neglect or omission of Tenant, his family, agents or invitees. All other repairs shall be made by Tenant at his sole cost and expense. Tenant shall make such repairs promptly and in a workmanlike manner. Tenant shall suffer no liens against the unit for the cost of labor, materials or otherwise in connection with repairs. Tenant shall maintain the premises in good order and repair at all times. Tenant shall return the premises in the same condition as existed at the commencement of this Lease, reasonable wear and tear excepted.

11. *Alterations.* Tenant may paint the premises without approval of the Landlord. Any other alterations shall be made only with the prior written approval of the Landlord. Landlord shall have the right to reject any proposals without cause.

12. *Insurance.* The parties acknowledge that the exterior structure of the unit is covered by the Cooperative's blanket insurance policy. The interior of the unit, including wall coverings and interior walls, carpeting, cupboards, appliances and personalty, must be covered by a homeowner's policy. Tenant shall obtain such a policy at his sole expense. The policy shall name Landlord and Tenant as co-insureds. The policy shall guarantee that Landlord will receive notice of cancellation at least _____ (_____) _____ [insert number] days prior to the effective date of cancellation.

13. *Assignment and sublease.* Tenant must not assign this Lease, sublet all or part of the premises, or permit any other person to use the premises without the prior approval of Landlord. If Tenant violates this provision, Landlord has the right to cancel the Lease Agreement, pursuant to Paragraph 16 ("Tenant's Default").

14. *Entry by the landlord.* The Tenant agrees to allow the Landlord to enter the leased premises at any reasonable hour in order to repair, inspect, install or work upon any fixture or equipment in said leased premises, and to perform such other work as the Landlord may deem necessary. In addition, Tenant agrees to permit Landlord and/or Landlord's Agent to show the premises to persons wishing to rent or purchase the same, during the reasonable hours of any day during the term of this Lease Agreement. Tenant will permit the usual notices of "For Rent" or "For Sale" to be placed upon conspicuous portions of the walls, doors or windows of said premises and remain thereon without hindrance or molestation. Prior to entry, Landlord will give Tenant _____ (_____) _____ [insert number] hours' notice in all non-emergency situations.

15. *Fire or other casualty.* In the event of damage to the leased premises by fire or other casualty, if the damage is such that, in the sole opinion of Landlord, the premises are still usable as a residence, this Lease shall remain in effect during the period when repairs are underway.

In the event that the premises are no longer usable as a residence, either party may cancel this Lease by giving notice to the other party within _____ (_____) _____ [insert number] days after the damage occurs. The Lease shall be deemed terminated as of the date the fire or other casualty occurred. If neither party elects to cancel, the rent shall be waived during the period from the occurrence of the fire or other casualty until repairs are completed. The term of this Lease shall be extended for a like period.

The parties shall cooperate in filing and settling insurance claims and obtaining repairs.

16. *Tenant's default:*

(a) Landlord may give _____ (_____) [e.g., five (5)] days' written notice to Tenant to correct any of the following defaults:

- (1) failure to pay rent or added rent on time;
- (2) improper assignment of the Lease Agreement;
- (3) improper subletting of all or part of the premises;
- (4) allowing another to use the premises without Landlord's prior consent;
- (5) unlawful conduct by Tenant or other occupant of the premises;
- (6) failure to abide by rules and regulations of the Co-op;
- (7) failure to fully perform any other term in the Lease Agreement.

(b) If Tenant fails to correct the default(s) specified in Subparagraph (a) within _____ (_____) [e.g., five (5)] days after receipt of notice, Landlord may cancel the Lease Agreement by giving Tenant a written notice stating the date upon which the lease term will end. On that date, the lease term and Tenant's rights under this Lease Agreement automatically end, and Tenant must leave the premises and return the keys to Landlord. However, Tenant continues to be responsible for rent, expenses, damages and losses up to the final day of the original lease term.

(c) If the Lease Agreement is canceled, or rent or added rent is not paid on time, or Tenant vacates the premises, Landlord may, in addition to other remedies, take either of the following steps:

(1) enter upon the premises and physically remove Tenant and any person or property; or

(2) bring an action for eviction or institute some other equivalent legal action designed to take back the premises.

17. *Quiet enjoyment.* The Landlord agrees that if the Tenant pays the rent and complies with all of the other terms and conditions of this Lease Agreement, then the Tenant may peaceably and quietly have, hold and enjoy the premises leased hereunder for the term of this Lease Agreement.

18. *Additional obligations of tenant:*

(a) Tenant agrees not to use any appliances, fixtures or plumbing facilities in the unit for any purpose other than that for which said items were designed. Any damage resulting from the misuse of such items shall be paid for by Tenant.

(b) Tenant shall arrange for vermin extermination at Tenant's sole expense, whenever required.

19. *Security.* Tenant has given security to Landlord in the amount of \$ _____. If Tenant fully complies with all the terms of this Lease Agreement, Landlord will return the security after the lease term ends. If Tenant does not fully comply with the terms of this Lease Agreement, Landlord may use the security to pay amounts owed by Tenant, including damages. If Landlord sells the premises, Landlord may give the security to the Buyer. In such case, Tenant will look only to the Buyer for the return of the security.

20. *Use of premises.* Tenant shall use the unit solely as a residence and for no other purposes.

21. *Notice.* Any notice required to be given to Landlord shall be in writing and sent by certified mail, return receipt requested, to _____ at the following address: _____. Any notice required to be given to Tenant shall be in writing and sent by certified mail, return receipt requested, to _____ at the following address: _____.

Notice shall be deemed given when received.

22. *Representations.* This Agreement contains the entire understanding of the parties; there have been no representations made which are not contained herein.

23. *Modifications.* This Agreement may only be modified by a written amendment signed by all parties. An oral modification shall not be binding on either party.

24. *Governing law.* This Agreement shall be construed in accordance with the laws of the State of _____.

25. *Waiver.* Any failure by either party to enforce any right arising hereunder shall not be deemed a waiver of such right.

26. *Parties upon whom binding.* This Lease Agreement is binding upon the Landlord and the Tenant and their respective heirs, distributees, executors, administrators, successors and lawful assigns.

The parties hereto have set their hands the day and year first above written.

LANDLORD:

TENANT:



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33-25 Current Legal Forms for Real Estate FORM 25.133

FORM 25.133 "Environmental laws" defined

COMMENT

The clause below provides a very expansive definition of the term "environmental laws." The definition encompasses not only statutes enacted by legislative bodies, but also regulations, ordinances and policies promulgated by any governmental authority (whether federal, state, county or municipal) and pertaining to the environment or to public health.

FORM

For the purposes of this Lease Agreement, the term "environmental laws" shall be defined as any law, rule, statute, regulation, ordinance or policy issued by any governmental authority, whether federal, state, county or local, that pertains to the environment or to public health.



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FORM 25.134 "Hazardous substance" defined

COMMENT

In the clause below, the term "hazardous substance" is defined as any substance deemed hazardous under one of four federal statutes enacted to protect the environment. These statutes, along with their citations to the United States Code, are listed in the clause. In addition, a "hazardous substance" is also defined as any substance deemed hazardous "under any other statute or regulation of any governmental authority ..." Hence, substances recognized as being hazardous under a state regulation would also be considered hazardous for the purposes of this clause.

FORM

For purposes of the lease, the term "hazardous substance" shall mean any substance deemed hazardous under any of the following statutes or under any other statute or regulation of any governmental authority: the Comprehensive Environmental Response, Compensation and Liability Act, *42 USC § 9601 et seq.*; the Resource Conservation and Recovery Act, *42 USC § 6901 et seq.*; the Hazardous Material Transportation Act, *49 USC § 1801 et seq.*; and the Toxic Substances Control Act, *15 USC § 2601 et seq.*



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FORM 25.135 Explanation of tenant's business operations

COMMENT

This form contains three sample descriptions of a tenant's proposed use of the leased property. Each description presumes that the property has been leased and will be used for business purposes.

The first clause envisions a situation where the leased premises will be used for *both* residential and business purposes. This situation arises frequently when the tenant is a professional person--such as a doctor, lawyer or accountant--who wishes to "work out of his home." In the first clause, the tenant is a veterinarian who provides services to her patients via a mobile clinic. The doctor intends to use the leased premises as both her residence and her business office, where she and her staff perform paperwork, keep records, etc. However, she will not treat animals on the leased premises.

The landlord requires assurance that any medical supplies which she stores on the leased premises will not render the property uninhabitable or increase the danger of fire. For example, certain forms of anesthesia can be highly combustible. The landlord also requires assurance that the doctor will not violate local zoning laws which prohibit the treatment of animals in a private residence.

The second clause is for use by a tenant who leases space in an office building or office complex. The tenant asserts that it does not use, in the normal course of its business activities, any substance which is deemed hazardous under federal, state or local environmental laws or regulations. However, the tenant is expressly permitted to use cleaning agents purchased at retail, even though such cleaning agents may contain substances which are toxic. The use of such agents is not considered to be a violation of the terms of the lease.

The final clause is for use where the tenant uses, stores or produces hazardous substances in the ordinary course of its business. (Such a tenant would include, for example, a chemical or pharmaceutical manufacturer.)

In the clause, the tenant agrees to adhere to all federal, state and local environmental laws and regulations and to allow the landlord to monitor the tenant's compliance with such laws and regulations by periodically inspecting the leased premises as well as the tenant's business records. The inspections may be conducted either by the landlord himself or by his agent. (Often, the landlord will hire an environmental consultant to conduct the inspections, since such a person would be more knowledgeable about EPA regulations than the landlord.) A violation of any of these provisions by the tenant constitutes grounds for termination of the lease.

Finally, the landlord should insist upon inserting in the lease an "indemnification and hold harmless" clause, whereby the tenant agrees to indemnify and hold the landlord harmless for the full cost of remediating any environmental mishap on the leased property caused by the tenant, his employees or agents. As added insurance, the landlord can insist upon the tenant coming up with a large security deposit, in cash, or an irrevocable letter of credit, in order to cover the clean up costs which may be incurred in the event that an environmental mishap occurs.

FORM

[Clause A: Combination Residential/Commercial Lease]

It is understood by the parties that Tenant is a doctor of veterinary medicine. It is Tenant's intent to maintain her business office in the leased residential premises. This will include storage of a small amount of supplies and pharmaceuticals, as well as Tenant's business records, such as her general ledger and patient records. Tenant may also have her business telephone and answering machine located within the leased premises. Tenant will not see, treat or harbor veterinary patients on or about the leased premises.

Tenant represents that none of the supplies or pharmaceuticals which she intends to store on the premises are "hazardous" substances, such as would make the premises uninhabitable if spilled or released, or such as would increase the risk of fire on the premises.

[Clause B: Commercial Lease--Office Space]

Tenant is a _____ *[identify tenant's business or profession, e.g., licensed insurance agent]*. Tenant does not use, in the normal course of his business activities, any substance which is deemed hazardous under federal, state, or local environmental laws or regulations.

However, Tenant does intend to use cleaning agents purchased at retail for the ordinary use for which those cleaning agents are intended. The parties recognize that some such agents may contain substances which are hazardous. Use of such agents shall not be a violation of the terms of this Lease.

[Clause C: Commercial Lease--Manufacturing Facility]

Tenant manufactures _____ [*insert name of product(s) manufactured, e.g., artificial fingernails*]. The product is sold at wholesale to distributors, who market and sell it at retail.

As a result of the manufacturing process, two hazardous substances are produced, to wit: (1) _____;
and (2) _____.

Tenant covenants and represents that the above substances will be handled, stored, and disposed of in strict compliance with all federal, state, and local laws, regulations and policies. Tenant shall allow Landlord, or his duly authorized agent, to inspect the premises and the environmental records maintained pursuant to law at any reasonable time during regular business hours in order to verify compliance.

Any violation of any law, regulation, or policy shall be grounds for immediate termination of this lease. Tenant shall be responsible for any costs and expenses incurred by Landlord to bring the premises into compliance with all federal, state, and local laws, regulations and policies, including, without limitation, reasonable attorneys' fees incurred by Landlord in responding to a claim and/or incurred by Landlord in enforcing this lease against Tenant.



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33-25 Current Legal Forms for Real Estate FORM 25.136

FORM 25.136 Tenant's duty to comply with all laws and orders (environmental and otherwise) relating to the leased premises

COMMENT

This form provides alternative clauses for use in commercial leases. The clauses require the tenant to comply with all laws and orders (environmental and otherwise) relating to the use and occupancy of the leased property.

The first clause is for use in a commercial lease. This clause allows the tenant to contest a compliance order issued by a government agency prior to complying with that order, so long as the tenant first notifies the landlord of the tenant's desire to contest, and so long as the failure to comply immediately will not subject the landlord to a criminal or civil penalty. (Such an order, for example, might require the tenant to clean up toxic or hazardous wastes discovered on the leased property. If the wastes were not deposited there by the tenant, he would certainly want to mount a legal challenge to the compliance order.) The purpose of this clause is to protect a tenant who is not legally responsible for complying with the order. In many cases, the landlord, rather than the tenant, may be responsible for compliance.

The second clause is also for use in a commercial lease. It requires the tenant to automatically comply with all requirements and orders imposed by governmental agencies pertaining to the use and occupancy of the leased premises. Unlike the first clause, this clause does not give the tenant the right to contest a compliance order; rather, he must adhere to it immediately.

If the tenant receives notice that the leased premises are in violation of any environmental law or regulation, or if the tenant becomes aware of any event or condition giving rise to a violation, then the tenant must give prompt notice of this fact to the landlord. The tenant must also immediately prepare and implement a plan for the repair, abatement or remediation of the violation. The full

cost of preparing and executing the plan is borne by the tenant.

FORM

[Clause A: Commercial Lease]

Tenant shall comply with all laws, rules, orders and regulations of federal, state, county and municipal authorities, and with any directive issued pursuant to law by any public officer thereof, relating to the use and/or occupancy of the leased premises. In the event that any government agency finds that the Tenant, or its assignee or sublessee, is in violation of any such law, order, regulation or directive, then the following rules shall apply:

1. Tenant shall have the right, upon giving written notice to Landlord, to contest any obligations imposed upon Tenant pursuant to the provisions of this section and to defer compliance during the pendency of the contest proceedings, provided that the failure of Tenant to comply immediately will not subject Landlord to criminal prosecution, civil fine or other penalty.
2. Notwithstanding the foregoing, in the event that the alleged violation poses an imminent threat to public health, human life or the environment, Tenant shall immediately perform whatever actions may be required to abate the immediate threat. Thereafter, Tenant may contest the obligations and defer further compliance, as set forth above.

Tenant shall provide Landlord with copies of all documents served upon Tenant or his counsel, and served by Tenant or his counsel upon any governmental authority.

Failure of Tenant to comply with the provisions of this section shall be a default under the terms of this Lease and shall entitle Landlord to pursue all applicable remedies. In addition, Landlord shall be entitled to collect from Tenant any fines, penalties, expenses of defense (including attorneys' fees), expenses of compliance, and other damages incurred by Landlord by reason of Tenant's default under this section.

[Clause B: Commercial Lease--Another Clause]

Tenant shall, at Tenant's sole cost and expense, comply with all of the requirements and orders now in force, or which may hereafter be imposed, by all federal, state, county, municipal and other applicable governmental authorities, pertaining to Tenant's use and occupancy of the leased premises.

In the event Tenant receives a notice of violation from a governmental authority or becomes aware of an event or condition which would give rise to a violation, Tenant shall give prompt notice thereof to Landlord, including an accurate and complete written report of the event or condition. Tenant shall also provide to Landlord a written plan for the repair, abatement or remediation of the violation, as the case may be, including a timetable for completion of the plan. Tenant shall promptly execute the plan at his sole cost and expense.

In the event Tenant fails to perform any act required under this section, he shall be deemed in default under the terms of this Lease. Landlord shall be entitled to pursue all remedies available to him under section number _____ (_____), pertaining to defaults by the Tenant. In addition, Landlord shall be entitled to collect from Tenant any fines, penalties, expenses of repair, expenses of remediation (including professionals' expenses and consultants' fees), and all other direct and consequential damages incurred as a result of Tenant's default under this section.



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FORM 25.137 Tenant's duty to comply with environmental laws and orders relating to the leased premises--another form

COMMENT

Like the preceding form, the clause below requires the tenant to comply fully and immediately with all environmental laws, regulations, statutes, ordinances, policies and orders issued by any governmental authority. It also imposes a number of other duties upon the tenant. For example, the tenant is required to obtain and keep in full force and effect any business permits or other government approvals mandated by the authorities.

FORM

Tenant agrees that it will comply fully and promptly with any and all environmental laws, regulations, statutes, ordinances, policies and orders issued by any federal, state, county or local governmental authority; that it will obtain, maintain in full force and effect, and strictly comply with any and all governmental permits, approvals and authorizations necessary for the conduct of its business operations; that it will supply Landlord with copies of any such permits, approvals and authorizations; that it will promptly notify Landlord of the expiration or revocation of any such permits, approvals and authorizations; and that it will promptly notify Landlord and supply Landlord with a copy of any notice of violation of any environmental law, regulation, statute, ordinance, policy or order Tenant receives.



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33-25 Current Legal Forms for Real Estate FORM 25.138

FORM 25.138 Limitations on tenant's use of hazardous substances on leased premises

COMMENT

This form provides three alternative clauses regarding the use of hazardous substances on a leased premises.

The first clause is for use in a commercial lease. It flatly prohibits the use of hazardous substances on the leased premises.

The second alternative is for use in a commercial lease where the parties understand that hazardous substances will be used or produced on the leased premises. Such a clause would be necessary, for example, where the leased property is a factory and: (1) the tenant is the manufacturer of a product which can only be produced through the use of hazardous substances; or (2) the tenant is the manufacturer of a product which is itself a hazardous substance. The third clause provides, among other things, that the tenant shall not use, store, treat, transport, manufacture, handle or produce any hazardous substance on the leased premises without first obtaining all necessary approvals and permits and thereafter complying with the terms of those permits and approvals, as well as with the provisions of all relevant environmental laws, regulations, and policies.

FORM

[Clause A: Commercial Lease]

Tenant warrants, represents, covenants and agrees that Tenant shall not, at any time during the term of this Lease or any

extensions or modifications thereof, use, store, treat, transport, manufacture, handle or produce any hazardous substance (as defined below) on the leased premises.

The term "hazardous substance" shall mean any substance deemed hazardous under any of the following statutes, or under any other statute or regulation of any governmental authority: the Comprehensive Environmental Response, Compensation and Liability Act, *42 USC § 9601 et seq.*; the Resource Conservation and Recovery Act, *42 USC § 6901 et seq.*; the Hazardous Material Transportation Act, *49 USC § 1801 et seq.*; and the Toxic Substances Control Act, *15 USC § 2601 et seq.*

[Clause B: Commercial Lease--Another Form]

Tenant represents and agrees that Tenant shall not, at any time during the term of this Lease or any renewals thereof, use, store, treat, transport, manufacture, handle or produce any hazardous substance (as defined below) on the leased premises without first obtaining all necessary governmental approvals and permits and thereafter complying with the terms thereof, as well as with the provisions of all laws, regulations, and policies pertaining thereto which are now or hereafter in effect.

In addition, Tenant shall not use or occupy the leased premises or suffer the use or occupancy of the leased premises in violation of any environmental law (as defined below). Tenant shall not dispose of or allow the disposal of any hazardous substance on the leased premises, or operate a hazardous waste treatment, storage or disposal facility or site. Tenant shall not permit, create, or suffer the existence of any condition which could subject Landlord or Tenant to a "remedial," "removal" or "clean up" action, as those terms may be defined in any environmental law.

The term "hazardous substance" shall mean any substance deemed hazardous under any of the following statutes or under any other statute or regulation of any governmental authority: the Comprehensive Environmental Response, Compensation and Liability Act, *42 USC § 9601 et seq.*; the Resource Conservation and Recovery Act, *42 USC § 6901 et seq.*; the Hazardous Material Transportation Act, *49 USC § 1801 et seq.*; and the Toxic Substances Control Act, *15 USC § 2601 et seq.*

Finally, the term "environmental law" shall mean any federal, state, county or municipal law, rule, ordinance, order or regulation which governs or relates to the environment, land use, zoning, public health, chemical use, public safety, sanitation, water, air, fish, wildlife and natural resources.



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33-25 Current Legal Forms for Real Estate FORM 25.139

FORM 25.139 Tenant must obtain insurance policy, bond or letter of credit--funds to be used to indemnify landlord in the event of adverse environmental occurrence on leased premises

COMMENT

This form is designed to give an extra dose of comfort and peace-of-mind to a landlord whose tenant acknowledges that he will use or produce hazardous substances on the leased property in the ordinary course of his business.

Normally, a commercial lease will contain an "indemnification and hold harmless" provision running from tenant to landlord, whereby the former agrees to indemnify and hold the latter harmless for the full cost of remediating an environmental mishap that occurs on the leased premises during the tenancy, such as the release or spillage of toxic chemicals into the air or ground water. However, despite the existence of such a provision, many landlords remain concerned over whether their tenants will have the financial resources necessary when the time arises to actually cover the cost of remediation and the cost of injury to person or property. These landlords are also aware that, under the Comprehensive Environmental Response, Compensation and Liability Act, 42 USC § 9601 *et seq.*, the federal government is not bound by the provisions of a lease which make the tenant responsible for these costs. Rather, the federal government is free to pursue the landlord and force him to undertake the remediation at his own expense.

Accordingly, the lease clause below requires the tenant to obtain some form of financial security that will provide a source of funds in the event of an adverse environmental occurrence on the leased premises. This security may take the form of an environmental mishap insurance policy, a bond, or a letter of credit. The tenant must provide the landlord with proof of the existence of such security before taking possession of the premises, and the landlord must be the named insured,

beneficiary or payee--as the case may be. The clause also sets forth the exact amount of security which the tenant must obtain.

FORM

The parties hereto recognize that Tenant will be using and/or producing substances which are deemed "hazardous" under certain federal and state laws and regulations. Such use and/or production will be in the ordinary course of Tenant's business and cannot be avoided. There are no substitute substances available which are not "hazardous" substances also.

The parties further recognize that Landlord needs adequate assurances that, in the event of an adverse environmental occurrence, such as a leak during storage, transportation, handling or disposal, or a release of one of these substances, Tenant will have sufficient financial resources to remediate the problem, as required by federal and state law, and to adequately compensate, for injury to person or property, third parties who may be affected by the adverse environmental occurrence.

The parties further recognize that under the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), *42 USC § 9601 et seq.*, the federal authorities are not required to recognize the hold harmless provision contained elsewhere in this Lease Agreement, whereby Tenant agrees to indemnify Landlord for the cost of remediation and injury to persons and property, among other things. The intent of the parties is to provide a source of funds to reimburse Landlord for such remediation costs and damages, should he be deemed liable therefor by any governmental authority or court of law.

Accordingly, Tenant shall obtain an insurance policy, bond or irrevocable letter of credit (hereafter "security"), in at least the amount of _____ Dollars (\$ _____), which shall name Landlord as the insured, beneficiary or payee, as the case may be. The security shall be payable to Landlord in the event that an adverse environmental event occurs on the leased property. The term "an adverse environmental event" shall be defined as a release of a hazardous substance (as defined below) which is either sudden or occurs undetected over a period of time, which release either poses a threat to the quality of air, water, land, fish, wildlife or natural resources, or a threat of damage to persons or property, and which will require remediation under CERCLA.

The term "hazardous substance" shall mean any substance deemed hazardous under any of the following statutes, or under any other statute or regulation of any governmental authority: the Comprehensive Environmental Response, Compensation and Liability Act, *42 USC § 9601 et seq.*; the Resource Conservation and Recovery Act, *42 USC § 6901 et seq.*; the Hazardous Material Transportation Act, *49 USC § 1801 et seq.*; and the Toxic Substances Control Act, *15 USC § 2601 et seq.*, and the regulations promulgated thereunder.

It is the intent of the parties that Tenant be responsible for the expense of any clean up, remediation or damages. The security is to be provided as extra protection against such expenses.

Tenant shall provide proof of the existence of such security to Landlord before taking possession of the premises. Tenant shall also provide to Landlord proof of payment of any premium or fees in connection with the security. If an insurance policy is used, Tenant shall obtain a clause in the policy guaranteeing Landlord _____ (_____) days' notice prior to cancellation of the policy for any reason. In the event Tenant fails to pay a premium or fee when due, Landlord may pay the same and charge the cost thereof back to Tenant as additional rent. Such additional rent shall be due and payable on the first day of the month following the month in which Landlord made payment. Failure to maintain the required security throughout the duration of the Lease term, or to reimburse Landlord for its payment of a premium or fee, shall be an event of default under this Lease.

Tenant shall perform any act or produce any data which may be required by a company which agrees to provide the security. This may include, but shall not be limited to, undertaking an environmental site assessment, allowing periodic review of business records by the company, or releasing financial data and descriptions of business operations.



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33-25 Current Legal Forms for Real Estate FORM 25.140

FORM 25.140 Tenant's duty to give landlord notice of occurrence of environmental mishap on the leased premises and to undertake immediate remediation efforts

COMMENT

This clause, for use in a commercial lease, imposes on the tenant an affirmative duty to promptly notify the landlord in the event of an environmental accident on the leased premises.

The tenant is further required to undertake remediation efforts and to keep the landlord fully informed of the progress of these efforts. Before the remediation process begins, the landlord is entitled to have the tenant's plan of remediation reviewed by the landlord's environmental consultant at the tenant's expense. The tenant also agrees to perform the remediation in accordance with all applicable environmental laws and under the direction of appropriate governmental authorities if required.

Upon completion of the remediation efforts, the tenant must obtain a "sign-off" from the governmental authorities, i.e., a written statement attesting to the fact that the remediation undertaken by the tenant has been completely successful and that the environmental problem no longer exists. If the governmental authorities involved do not normally provide such a "no further action letter," then the tenant must enlist the services of an independent environmental consultant, acceptable to the landlord, who will determine whether the remediation has, indeed, been effective. If it has been effective, then the consultant will provide the landlord with its own "no further action letter," which will be treated by the parties as the functional equivalent of a governmental sign-off statement.

Finally, this clause should be coupled with an "indemnification and hold harmless" clause whereby the tenant agrees to indemnify the landlord and hold him harmless for any fines, penalties, damages or other expenses incurred by the landlord due to an environmental mishap

caused by the tenant.

FORM

Tenant hereby covenants that he will give immediate notice to Landlord in the event of the occurrence of an adverse environmental event (as defined below). In any event, Tenant shall provide notice of such occurrence to Landlord within _____ (_____) hours of occurrence. Such notice may be given orally, by telephone or by facsimile (i.e., "fax") transmission. Thereafter, as is reasonably appropriate or necessary, Tenant shall provide Landlord with further written information as to the scope of the event, damage caused by the event, and remediation, containment and abatement efforts undertaken by Tenant as hereafter required.

The term "adverse environmental event" shall be defined as the release into the air, land or water of a hazardous substance (as defined below), which is either sudden or occurs over a period of time, which release either poses a threat to the quality of air, water, land, fish, wildlife or natural resources, or a threat of damage to person or property, and which will require remediation under the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), *42 USC § 9601, et seq.* .

The term "hazardous substance" shall mean any substance deemed hazardous under any of the following statutes, or under any other statute or regulation of any governmental authority: the Comprehensive Environmental Response, Compensation and Liability Act, *42 USC § 9601 et seq.*; the Resource Conservation and Recovery Act, *42 USC § 6901 et seq.*; the Hazardous Material Transportation Act, *49 USC § 1801 et seq.*; and the Toxic Substances Control Act, *15 USC § 2601 et seq.*, and the regulations promulgated thereunder.

Within the time periods prescribed by law, Tenant will give notice of the occurrence to all federal, state and local authorities. Tenant shall provide Landlord with copies of such notice simultaneously.

Within _____ (_____) days after the occurrence, Tenant shall formulate a plan of remediation. Such plan shall include a schedule for completion. If required by law, Tenant will obtain approval of the plan by the appropriate federal, state or local authorities. Tenant shall also submit the plan to Landlord for his approval. Landlord, at Tenant's expense, may submit the plan to Landlord's environmental consultant for review and comment. Tenant shall incorporate any changes required by the government or said consultant into the plan.

Tenant shall commence execution of the plan within _____ (_____) days after receipt of governmental approval of the plan and receipt of comments from Landlord's consultant. Tenant shall diligently implement and adhere to the plan until completion. If, at any time, Tenant does not appear to be executing the plan in a timely fashion, Landlord shall give notice of such failure. If Tenant fails to act as a result of said notice, Landlord may terminate this Lease and complete the plan at Tenant's expense.

At the completion of the remediation, Tenant shall obtain written confirmation by the appropriate federal, state and local authorities, showing that the remediation is complete and that it was performed in accordance with all applicable laws and regulations. If said authorities do not provide such confirmation in the ordinary course of business, then Tenant shall obtain such confirmation from an environmental consultant acceptable to Landlord. If the remediation is determined not to be complete by the consultant or the governmental authority, Tenant shall continue to remediate until the consultant or governmental authority deems the remediation complete.



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33-25 Current Legal Forms for Real Estate FORM 25.141

FORM 25.141 Tenant's duty to notify landlord in the event of an environmental mishap on leased premises--another form

COMMENT

In the following form, the tenant makes a long series of promises to the landlord. First, the tenant promises to immediately notify the landlord upon learning of the occurrence of an environmental mishap either upon the leased premises, or upon an adjacent piece of property, if such mishap contaminates or poses a danger of contamination to the leased premises. Second, the tenant covenants to immediately notify the landlord upon learning that:

- (1) an environmental law or regulation affecting the leased premises has been violated;**
- (2) a governmental agency has imposed a fine, order or notice of violation upon the tenant for a violation of an environmental law or regulation affecting the premises;**
- (3) a lawsuit has been filed against the tenant by any person following an environmental mishap on the premises or a violation of an environmental law or regulation.**

FORM

1. Tenant recognizes that it has the duty to immediately notify the Landlord upon learning of the occurrence of an environmental mishap upon the subject premises. For the purposes of the preceding sentence, an environmental mishap is defined as the unlawful release of hazardous or toxic substances or wastes at the subject premises which contaminates, or may reasonably be expected to contaminate, the land (including subsoil), water (both ground water and surface water) or air on, under, or above the subject premises.

2. Tenant recognizes that it has the duty to immediately notify the Landlord upon learning of the occurrence of an environmental mishap upon any adjacent property, if such mishap poses a danger of contamination to the subject premises.

3. Tenant recognizes that it has the duty to immediately notify the Landlord upon learning that:

(A) an environmental law or regulation (whether federal, state or local in origin) affecting the subject premises has been violated;

(B) a governmental agency (whether federal, state or local in origin) has initiated or threatened to initiate a proceeding against the Tenant for an alleged violation of an environmental law or regulation (whether federal, state or local in origin) affecting the subject premises;

(C) a governmental agency (whether federal, state or local in origin) has imposed a fine, penalty, order or notice of violation upon the tenant for a violation of an environmental law or regulation (whether federal, state or local in origin) affecting the subject premises; or

(D) a lawsuit or other civil action has been brought against the Tenant, or has been threatened by any person, persons or governmental agency, following an environmental mishap on the subject premises or the alleged violation of an environmental law or regulation (whether federal, state or local in origin).



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33-25 Current Legal Forms for Real Estate FORM 25.142

FORM 25.142 Tenant's duty to maintain accurate and complete records regarding presence of toxic and/or hazardous substances on leased premises and to provide access to all such records when requested by landlord

COMMENT

This clause is to be inserted into a commercial lease where the tenant intends to use, store, handle or manufacture toxic and/or hazardous substances on the leased premises during the term of the lease. The clause imposes upon the tenant a duty to maintain accurate and complete records regarding the presence of such toxic and/or hazardous substances on the premises and to provide access to all such records when requested by the landlord.

Under the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), 42 USC § 9601 et seq., a landlord may be required to remediate an environmental mishap caused by his tenant on the leased premises; accordingly, it is vitally important for the landlord, in some way, to monitor the tenant's activities regarding the use, handling, storage and manufacture of the toxic and/or hazardous substances. By reviewing the tenant's records periodically, the landlord will have some knowledge as to whether the tenant is complying with applicable environmental laws.

FORM

It is acknowledged and understood by the parties hereto that Tenant, in the ordinary course of his business, uses and/or produces substances which are deemed toxic and, in some instances, hazardous, under various state and federal laws and regulations. Tenant could not operate his business and produce his products without the use of these substances.

Tenant covenants that he, his employees, agents and contractors will use all toxic and/or hazardous substances in strict compliance with all federal, state and municipal laws, regulations and policies. Tenant will not allow any deviation from

good practice in the use, storage, handling or disposal of such substances. Tenant will obtain and maintain all necessary licenses and permits. Tenant will be sure that his employees, agents and contractors are thoroughly trained and properly supervised in the use, storage, handling and disposal of all such substances.

Tenant covenants that he will keep complete and accurate records of the purchase, use, storage and disposal of all toxic and/or hazardous substances which are brought onto, or created on, the subject premises in accordance with all applicable federal and state laws and regulations. Tenant will further maintain a complete and accurate record of any deviations from the law in the use, handling, storage and disposal of any toxic or hazardous substance, as well as a complete and accurate record of any injury to person or property caused by any toxic or hazardous substance kept on the leased premises. A copy of this record shall be provided to Landlord within _____
(_____) hours of the occurrence of any deviation or injury.

Tenant shall provide access to Landlord to all records maintained by Tenant with regard to the toxic and/or hazardous substances. Lender may review such records at Tenant's site during regular business hours upon at least _____ (_____) hours' advance notice to Tenant. Tenant shall provide Landlord with copies of such records as Landlord may reasonably require. Landlord agrees to keep all such records strictly confidential and to use such records only for the purposes of managing the business relationship between Landlord and Tenant. This requirement of confidentiality shall survive the expiration of this lease and shall bind Landlord in perpetuity. Notwithstanding the foregoing, Landlord may produce copies of whatever records it may possess pursuant to a duly-authorized subpoena of any governmental authority. Landlord shall not be required to appeal or challenge such a subpoena on Tenant's behalf.

Failure to maintain the records required hereunder or to provide access to Landlord shall be an event of default under the terms of this lease.



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FORM 25.143 Landlord is entitled to review tenant's environmental records--another form

COMMENT

This is another clause, intended for insertion into a lease, empowering a landlord to review all records maintained by the tenant that are either pertinent to environmental laws and regulations affecting the subject premises, or concern the use, production or presence of hazardous or toxic substances or wastes on the premises. The clause provides that once the landlord requests a review of these records, both parties will select a mutually agreeable time for the review to take place.

FORM

Tenant recognizes that, at any time during the term of the Lease, Landlord may request to review any and all records maintained by Tenant that either: (1) pertain to environmental laws and regulations (whether federal, state or local in origin) affecting the subject premises; or (2) concern the use, production or presence of hazardous/toxic substances and/or hazardous/toxic wastes at said premises. When such a request is made, the Tenant shall agree to schedule a time, mutually agreeable to both Landlord and Tenant, for the former to review the relevant records. Such records shall include, but not be limited to, environmental site assessments, laboratory reports, etc.



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FORM 25.144 Tenant's duty to perform environmental site assessment upon request of landlord

COMMENT

This clause should be inserted into a commercial lease whenever the landlord is aware that the tenant will be using or producing hazardous substances in the ordinary course of its business.

The clause states that, in the event the landlord becomes aware of evidence which would indicate that an environmental problem exists on the leased premises, the landlord may require the tenant to obtain an environmental site assessment to determine the exact nature and extent of the problem. In addition, the landlord may require the tenant to perform whatever remedial action is recommended by the consultant who performed the assessment, or whatever remedial action is required by law. The failure of the tenant to perform any of these tasks is considered to be a default under the terms of the lease. Lastly, this form requires the tenant to undertake an environmental assessment at the conclusion of the lease term.

FORM

Tenant has disclosed to Landlord that Tenant, in the ordinary course of his business, uses or produces certain substances that are listed as hazardous substances under federal and/or state laws or regulations. [*Optional: Tenant has not revealed the exact substances and their uses, as Tenant deems those to be trade secrets.*] In order to induce Landlord to lease the property to Tenant, Tenant agrees to perform, at Tenant's own expense, an environmental site assessment at any time upon the request of Landlord. Landlord shall be entitled to make such request annually or at any time that Landlord has any plausible evidence (either written, oral, or visual) that a release of hazardous substances may have occurred, as that term is defined in the Comprehensive Environmental Response, Compensation and Liability Act, 42 USC § 9601, *et seq.* Landlord shall give written notice to Tenant, specifying the evidence of release and demanding an environmental site assessment. Further, upon termination of the lease, Tenant shall cause an environmental site assessment to be

completed.

When required, pursuant to the terms hereof, Tenant, at his expense, will then arrange for an immediate environmental site assessment by an environmental consultant acceptable to Landlord. This assessment shall include whatever investigation, sampling, and laboratory analysis is deemed necessary by the consultant to determine: (1) whether a release has occurred; (2) the exact nature of the problem; (3) the scope of the problem; and (4) the procedures required to eliminate it.

At the demand of the Landlord, Tenant, at his sole cost and expense, shall immediately undertake the procedures specified by the consultant to eliminate the environmental problem, if any. In the event Tenant fails to fulfill any of his obligations under the terms of this section, Landlord shall be entitled to declare Tenant in default under the terms of this Lease and terminate the agreement. In the event Landlord terminates this Lease for such default, Tenant shall remain liable for the unpaid rent due under the Lease, as well as for any damages to the leased premises, including, but not limited to, the costs of remediation, consultants and attorneys' fees, fines, and penalties incurred by Landlord, together with all consequential damages.



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Chapter 25 ENVIRONMENTAL CONSIDERATIONS IN REAL ESTATE TRANSACTIONS

Part IV. FORMS

C. LEASE OF REAL ESTATE

33-25 Current Legal Forms for Real Estate FORM 25.145

FORM 25.145 Tenant's duty to notify landlord of discovery of adverse environmental condition during tenant's excavations on leased premises--tenant agrees to have environmental site assessment performed--tenant has option to remediate adverse condition or to abandon leased property

COMMENT

The following clause, to be used in a commercial ground lease, presumes that the tenant, after the leased is executed, will perform extensive excavations on the leased premises in order to construct one or more buildings for the tenant's own use. The parties realize that, during the course of such excavations, it is possible that the tenant will discover the existence of an adverse environmental condition buried beneath the premises. (This language could also be extended to unforeseen conditions which will make the construction significantly more expensive.) The purpose of this clause is to establish responsibility for remediating such conditions.

It should be noted that any tenant who intends to make the kind of huge financial investment required to build a new structure on leased premises would be prudent to order (at the very least) a phase I environmental site assessment before signing the lease. If a lender is being used, the lender would most certainly require an assessment. A phase I assessment will provide the prospective tenant with historical information regarding past owners and tenants of the leased premises, business uses to which they put the property, etc. From this information, the prospective tenant should be able to glean whether a danger exists that the property may be contaminated. If such a danger exists, then a phase II site assessment--which includes the analysis of soil, water and air samples--should be ordered.

In any event, under the terms of this lease clause, the tenant agrees to promptly notify the landlord following the discovery of a possible adverse environmental condition during the excavations. In such case, the tenant, at his expense, must arrange for an immediate environmental site assessment by an environmental consultant who is acceptable to the landlord. This assessment

will include the investigation, sampling, laboratory analysis, and other efforts deemed necessary by the consultant to determine the nature of the adverse environmental condition, the scope of the problem, and the procedures required to eliminate it.

Thereafter, the tenant, at his sole expense, must undertake all work required to eliminate the adverse environmental condition. If the tenant refuses to do so, then the landlord may terminate the lease agreement. However, the tenant will not be liable for any future rental payments called for by the lease. Nor will the tenant be responsible for the cost of remediating the adverse environmental condition, or for any of the costs incurred by the landlord in re-renting the property. Conversely, the tenant will not be entitled to recover any of the money it lost in the venture.

If, on the other hand, the tenant does undertake remediation efforts, then the tenant will be entitled to a complete abatement of rent from the date of discovery of the condition requiring remediation to the completion of remediation. In addition, the tenant will receive an extension of the lease for the same period of time. The tenant will also be entitled to reduce his future monthly rent payments by 50 percent for three years, or until he has recovered one-half of the cost of remediation, whichever period expires sooner.

FORM

It is the understanding of the parties to this Lease Agreement that, in the course of construction, Tenant may be performing extensive excavation activities. The parties acknowledge that unforeseen adverse environmental conditions may be found during the course of excavation. The purpose of this section is to establish responsibility for remediating those conditions.

Tenant covenants that he will notify Landlord within _____ (_____) hours of discovery of any unforeseen site conditions which may constitute an adverse environmental condition on the premises subject to this Lease.

In such case, Tenant, at his expense, will arrange for an immediate environmental site assessment by an environmental consultant reasonably acceptable to Landlord. This assessment shall include the investigation, sampling, laboratory analysis, and other work deemed necessary by the consultant to determine the nature of the adverse environmental condition, the scope of the environmental condition, and the procedures required to eliminate the adverse environmental condition.

Tenant, at his sole cost and expense, shall undertake all work required to eliminate the adverse environmental condition. Tenant shall undertake all work in strict compliance with all federal, state and local laws, regulations and policies.

The failure of Tenant to perform, as required hereunder, shall be deemed a default under the terms of this Lease. In such case, Landlord shall be entitled to terminate the Lease, as provided in section number _____ (_____) hereof, pertaining to defaults by the tenant. Landlord shall be entitled to exercise any of his rights which arise upon the occurrence of a default. However, Landlord shall not be entitled to recover: (1) any damages from Tenant due to Tenant's failure to perform; or (2) payment of future rent, or Landlord's costs of remediating the adverse environmental condition or re-renting the premises. Conversely, Tenant shall not be entitled to recover any of its loss of investment in the leased property from Landlord.

In the event Tenant does undertake remediation efforts, Tenant shall be entitled to a complete abatement of rent from the date of discovery of the condition requiring remediation to the completion of remediation. In addition, Tenant shall

receive an extension of the Lease for the same period of time. Tenant shall be entitled to reduce his future monthly rent payments by 50 percent (50%) for three (3) years, or until he has recovered one-half of the cost of remediation (including all consulting expenses), whichever period expires sooner.



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FORM 25.146 Prohibition on use of natural resources by tenant

COMMENT

This clause may be inserted into a commercial or residential lease. It presumes that the tenant is leasing a house or other structure located on a large tract of land in some rural area of the country, and that the land contains various valuable natural resources. The purpose of the clause is to prohibit the tenant from harvesting these resources for his own personal consumption or for profit. For example, the tenant is strictly forbidden from harvesting fish, wildlife, timber, or from drilling or mining for water, crude oil, natural gas or shale.

There are two reasons why a landlord would insist on the inclusion of such a provision in a lease. First, he may intend to harvest and sell these natural resources himself. Second, he may have already entered into a contract with a third party, granting the party the right to harvest and sell these resources. (In such case, the landlord would normally receive a percentage of the sales revenue as his compensation.)

When inserting this clause into a lease, it should be placed immediately following the description of the leased premises and clearly identified as a limitation on the tenant's leasehold estate.

FORM

It is expressly understood that the rights of use granted to Tenant herein include the building contained thereon and the ground immediately surrounding said building. The term "immediately surrounding" shall mean the surface area within _____ (_____) feet of the building or of the property line, whichever is the shorter distance.

Tenant shall have no right to enter upon any land which extends beyond the immediate surroundings of the building. Tenant covenants, for himself, his employees, agents, invitees, and subtenants, that no one shall enter said land at any time during the term of this Lease or any extensions thereof. Landlord specifically reserves unto himself all rights of occupancy and use to the area not immediately surrounding the building.

It is further understood and agreed that Tenant, his employees, agents, invitees and subtenants are strictly forbidden from doing any of the following:

- (1) harvesting fish, deer, or other wildlife on the premises;
- (2) harvesting timber, whether standing or fallen, from the premises;
- (3) mining shale or other rock or mineral substances from the premises;
- (4) using or diverting any naturally-occurring water courses existing on or below the premises, including streams, springs or underground sources;
- (5) accessing or using any oil, natural gas or other potential energy sources existing naturally on or under the premises; and
- (6) using or removing any soil, including topsoil or fill on the premises.

In the event that Tenant violates any of the provisions contained in this section, Landlord shall be entitled to declare Tenant in default under the provisions of section number _____ (_____) of this Lease Agreement. In addition to any rights and remedies contained therein, Landlord shall be entitled to recover from Tenant treble damages for any violation which involves the specific prohibitions contained in the immediately preceding paragraph, with a minimum recovery of _____ Dollars (\$_____) per violation. Each improper act of harvesting, mining, using or removing a natural resource shall be deemed a separate and distinct violation for the purposes of this Agreement. Tenant shall be strictly liable for any violation performed by or suffered at the hands of his employees, agents, invitees and subtenants.

The damages provided for in this section shall be separate, distinct and in addition to any damages, fines or penalties, either civil or criminal, imposed by any governmental authority with jurisdiction over the same activities. Dismissal of charges by a governmental authority shall not be dispositive of Landlord's private right of action against Tenant. However, imposition of a penalty or a determination of guilt by a governmental authority for the same action complained of by Landlord shall be *prima facie* proof of a violation in an action by Landlord against Tenant under this section.



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33-25 Current Legal Forms for Real Estate FORM 25.147

FORM 25.147 Permission granted by landlord for tenant's use of natural resources located on leased premises--payment schedule--reforestation requirements--land rehabilitation requirements

COMMENT

The following form may either be inserted into a lease, or it may function as a separate agreement entered into by the landlord and tenant at the time the lease is executed or sometime thereafter. The form allows a tenant to use certain natural resources found on the leased premises. These include:

- (1) water;
- (2) soil;
- (3) shale;
- (4) timber; and
- (5) oil or natural gas.

The form also imposes limitations on the tenant's use of such resources.

Of course, not all of the natural resources listed above will be applicable in every case where a tenant seeks to use natural resources located on the leased premises. Accordingly, counsel for the landlord and tenant should modify the form below to provide for their clients' needs and unique situation.

This form would be used where a tenant seeks to lease the land primarily to harvest the resources

contained there. Alternatively, it may be used where the tenant expects to do a great deal of clearing, excavation and construction, and wishes to offset some of his expenses by selling some of the resources (e.g., soil, timber) he would otherwise have to dispose of at his own cost.

A landlord should grant to his tenant only those rights to use natural resources which will prove financially beneficial to the landlord without being detrimental to the land. The form below includes a payment schedule, providing the landlord with a percentage of the proceeds the tenant receives from the sale of the natural resources to third parties. The form also guarantees the landlord the right to review the tenant's books and records to insure that the tenant is complying with the terms and conditions of the lease.

In addition, the tenant is required to obtain all necessary governmental approvals and permits at his own expense, and to comply at all times with all federal, state and local laws, regulations and policies. Finally, the form provides that, after removing soil, timber, shale, etc., from the leased property, the tenant must restore the property to its original state by grading and seeding the land and replanting trees and shrubbery.

FORM

It is understood and agreed by the parties hereto that, in addition to the use and occupancy of any structures now standing or hereafter to be erected on the leased premises, Tenant shall be entitled to the use of certain natural resources located on the leased premises, subject to the limitations contained herein:

1. Water. "Water" shall include streams, springs and underground water sources. Tenant shall be entitled to use the water in, on and below the leased premises, provided that his use does not permanently reduce the amount of water available in, on and below the land. Prior to commencing use of the water sources, Tenant shall obtain a written opinion from a hydro-engineer, geologist, environmental consultant or other expert acceptable to Landlord, certifying the maximum volume of use by Tenant. The term "maximum volume of use" shall mean that amount which Tenant may use on a daily basis without permanently reducing the availability of a similar daily volume of water in the foreseeable future.

Tenant's use of water shall be restricted to the maximum volume certified by the expert. Any use beyond that amount certified by the expert shall constitute a default under the terms of this Lease. Tenant shall not be required to separately pay Landlord for water, provided that he does not exceed the certified maximum volume. In the event that Tenant uses more than the certified maximum volume, Tenant shall pay Landlord _____ (_____) times the per gallon water rate charged to residential water customers in the Town/City/Municipality of _____ [name], for each gallon of water used by Tenant that exceeds said certified maximum volume.

Tenant, at his own expense, shall attach a meter onto the water system which Tenant installs. Such meter shall measure and record the daily volume of water used. Tenant shall maintain complete and accurate records of such use during the term of this Lease and any extensions thereof. Landlord shall be entitled to review and copy these records at any time. If, at any time, the records indicate water use by Tenant beyond the certified maximum volume, Landlord may require Tenant to install a device which will automatically turn off the flow of water when the certified maximum volume has been reached on any given day.

Landlord may require a new certification to be performed by a hydro-engineer, geologist, environmental consultant or other expert acceptable to Landlord, at Tenant's expense, no more frequently than once in each year. The new certification shall govern until the next certification is performed.

2. Soil. "Soil" shall include sand, topsoil and other soils located on the premises. Tenant may remove and dispose of soils, as required for excavation and construction on the site, if such soils are not to be used on site at the completion of excavation and construction.

In the event Tenant sells such soils, Tenant shall collect and remit any sales or use tax which may be due on such sale. Tenant shall remit to Landlord _____ percent (_____%) of the gross proceeds of such sale. The term "gross proceeds" shall mean total sales price, not including taxes. Tenant shall bear all costs of sale, shipping, excavation and other associated expenses.

Tenant shall maintain complete and accurate records of each such sale. Landlord shall be entitled to review and copy said records at any time. Such records shall include, at a minimum, the date of sale, name, address and tax identification number of purchaser, the number of cubic yards of soil purchased, the purchase price, the amount of tax collected and the date on which the tax was remitted to the appropriate authority. Landlord shall be paid his share of the proceeds within _____ (_____) days after receipt of the sales price by Tenant.

Tenant shall grade and seed the area from which the soil was removed upon completion of construction and excavation, so as to restore the premises to a safe and visually-pleasing condition. If needed, Tenant shall install erosion prevention devices and plantings to insure the stability of the land.

Failure to maintain complete and accurate records, or to otherwise perform the obligations set forth above, shall be an event of default under the terms of this lease agreement.

3. Shale. Tenant may excavate and sell any shale which may be located on the premises [*optional: in order to facilitate the construction on the premises*]. Such shale shall not be sold for less than _____ Dollars (\$_____) per ton. Tenant shall remit to Landlord _____ percent (_____%) of the gross proceeds of each sale. Tenant shall be responsible for all costs of sale, including, but not limited to, excavation and shipping. Tenant shall collect and promptly remit to the appropriate governmental authority any sales or other tax which may be due as a result of the sale. Such tax shall not be considered part of the gross proceeds of sale. Landlord shall be paid his share of the proceeds within _____ (_____) days after receipt of the sale price by Tenant.

Tenant shall maintain complete and accurate records of each such sale. Landlord shall be entitled to review and copy said records at any time. Such records shall include, at a minimum, the date of sale, name, address and tax identification number of purchaser, the number of tons of shale purchased, the purchase price, the amount of tax collected and the date on which the tax was remitted to the appropriate authority.

Tenant shall grade and seed the area from which the shale was removed upon completion of excavation, so as to restore the premises to a safe and visually-pleasing condition. If needed, Tenant shall install erosion-prevention devices and plantings to insure the stability of the land.

Failure to maintain complete and accurate records, or to otherwise perform the obligations set forth above, shall be an event of default under the terms of this lease agreement.

4. Timber. Tenant may harvest or cause to be harvested all merchantable timber situated on the leased premises. Tenant shall not sell said timber for less than _____ Dollars (\$_____) per board foot, or _____ Dollars (\$_____) per standing acre. Tenant shall remit to Landlord _____ percent (_____%) of the gross proceeds of sale. Alternatively, Tenant may deliver, to a location designated by Landlord, _____ percent (_____%) of the hard and soft wood as felled by Tenant. Tenant shall be responsible for all costs of sale, including cutting, hauling, shipping

and stump removal. Upon completion, Tenant shall grade and seed the area or replant the area with trees, using good conservation techniques in order to prevent erosion and top-soil depletion.

Tenant shall collect and promptly remit to the appropriate governmental authority any sales or other tax which may be due as a result of the sale. Such tax shall not be considered part of the gross proceeds of the sale. Landlord shall be paid his share of the proceeds within _____ (_____) days after receipt of the sale price by Tenant.

Tenant shall maintain complete and accurate records of each such sale. Landlord shall be entitled to review and copy said records at any time. Such records shall include, at a minimum, the date of sale, name, address and tax identification number of purchaser, the number of timber acres or board feet purchased, the purchase price, the amount of tax collected, and the date on which the tax was remitted to the appropriate authority.

Failure of Tenant to perform any of the obligations set forth above shall be an event of default under the terms of this lease agreement. In addition, Landlord shall be entitled to treble damages for any tree not accounted for by Tenant in his records.

5. Oil and Natural Gas. Tenant may grant leases for exploration and development of natural gas and oil. The terms of such leases may not exceed the term of this Lease Agreement and may not include any extensions of the said Lease Agreement. The form of such leases must be approved, in writing, by Landlord. Landlord may withhold approval without reason or cause. Said leases must provide that no exploration or construction of wells, pipelines or other facilities shall occur within _____ (_____) feet of any structure on the premises. In addition, the Tenant must place either an artificial barrier or trees and other natural screenings to shield the structures from view of the facilities.

Landlord shall be entitled to _____ percent (_____) of the annual rental fees and _____ percent (_____) of the royalties paid to Tenant, assuming, of course, that oil or gas is extracted. Alternatively, if the leases so provide, Landlord may elect to accept payment in gas or oil.

Tenant shall be responsible for any sales or other tax which may result from the transaction. Tenant shall promptly remit such tax and provide Landlord with proof thereof.

Tenant shall maintain complete and accurate records of the payments received under said leases. Landlord shall be entitled to review and copy such records. Tenant shall return the landscape of the leased premises to its original condition at the termination of such leases, to the satisfaction of Landlord.

(A) *Tenant to obtain all necessary permits.* Tenant shall obtain all necessary permits from all governmental authorities prior to making use of any natural resources. Tenant shall provide Landlord with a copy of the permit application, prior to submission, and the issued permit. Tenant shall maintain such permits in full force and effect throughout the term of this Lease, or for so long as Tenant is utilizing the natural resources.

(B) *Tenant to comply with all laws.* Tenant shall, at all times during the term of this lease and any extensions thereof, comply fully with all laws, regulations and policies of any nature, of the federal, state and municipal governments, as they relate to Tenant's use of the natural resources on the leased premises. Tenant shall promptly notify Landlord in the event Tenant receives any notification that he is in violation of any such law, regulation, or policy. Tenant shall take any and all steps necessary to correct any violations within the time limit set by law or within _____ (_____) days, whichever period shall be shorter.

(C) *Indemnification and hold harmless.* Tenant shall indemnify and hold Landlord harmless against any claim of any nature, including, but not limited to, a claim for fines, penalties and taxes, or injury to person or property, arising out of

or in connection with Tenant's use of the leased property or any natural resource contained thereon.

(D) *Liability insurance.* Tenant shall maintain in full force and effect, in addition to any other insurance required under the terms of this Lease, liability insurance in the amount of _____ Dollars (\$_____) during the period of time in which natural resources are being extracted. If Tenant shall contract for services in the extraction of resources, Tenant shall require the contractor to carry such insurance. On all policies of insurance, Landlord shall be named as an additional insured. Copies of the certificates of insurance shall be provided to Landlord prior to the Tenant commencing work. All policies of insurance shall contain a provision giving Landlord _____ (_____) days' written notice prior to cancellation.

(E) *Default.* In the event that Tenant defaults under the terms of this Lease by violating one or more provisions contained in this section, in addition to the rights and remedies contained in Paragraph number _____ (_____) hereof regarding defaults, Landlord shall be entitled to compensatory damages for any natural resources consumed or removed in violation of this section. Landlord shall be entitled to recover his legal fees expended in any proceeding to enforce his rights under this section.



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FORM 25.148 Tenant's duty to indemnify and hold landlord harmless

COMMENT

This form provides three alternative indemnification and hold harmless provisions, whereby the tenant agrees to indemnify and hold the landlord harmless.

The first is a very general indemnification and hold harmless provision which may be inserted into any lease, whether residential or commercial. It protects the landlord against any claim or expense of any kind arising out of the lease or out of the tenant's use and/or occupation of the premises.

The second alternative is a very lengthy indemnification and hold harmless provision geared towards protecting the landlord from claims and expenses arising out of: (1) an environmental mishap on the leased premises; or (2) a failure by the tenant to comply with the terms of an order or other ruling issued by a government agency with regulatory authority over environmental matters concerning the leased property, or any activity carried on at the property by the tenant.

It should be remembered that the Comprehensive Environmental Response, Compensation and Liability Act-- 42 USC § 9601, *et seq.* --provides that, in imposing liability for clean up costs, the federal government is not required to recognize the effectiveness of any indemnification or hold harmless agreement which shifts or allocates responsibility among statutorily-responsible parties. In other words, if a tenant contaminates the leased property, the federal government is free to seek payment for all or part of the clean up costs from the landlord--even in the presence of an indemnification and hold harmless agreement granted by the tenant and intended to protect the landlord.

FORM

[Alternative A:]

Tenant shall defend, indemnify and hold Landlord harmless from and against any and all claims, demands, penalties, fines, liabilities, settlements, damages, costs and/or expenses of any kind or nature--including legal fees and expenses for expert witnesses and consultants--arising out of, or in any way connected with, this Lease Agreement and/or Tenant's use and/or occupation of the subject premises. This indemnification shall survive the end of the term of this Lease, and any extensions thereof, and shall inure to the benefit of Landlord, his heirs, successors and assigns.

[Alternative B:]

Tenant will defend and indemnify Landlord and will hold Landlord harmless from and against any and all claims, losses, damages, liabilities, fines, penalties, charges, administrative and judicial actions or proceedings, and orders, judgments, remedial action requirements or enforcement actions of any kind, and all costs and expenses whatsoever incurred in connection therewith--including, but not limited to, attorneys', consultants' and/or engineering fees and expenses--arising, directly or indirectly, in whole or in part, out of or in connection with:

(1) the presence of any hazardous or toxic waste, hazardous or toxic substance, or the discharge, spillage or other release or filtration of any hazardous or toxic waste or hazardous or toxic substance on, in, about or under the leased property, or emanating from or otherwise originating at the leased property;

(2) any failure by Tenant to comply with the terms of any order or other ruling or decision issued by any federal, state or municipal government department or agency having regulatory authority over environmental matters regarding the leased property, or regarding any activity carried on or undertaken at the leased property by Tenant or any employees, agents, contractors or subcontractors of Tenant, or by any third persons or parties at any time occupying or present at or upon the leased property;

(3) any lien, claim, assessment or other charge imposed upon or against the leased property, or against Tenant with respect to the leased property, by any federal, state or municipal government department or agency having regulatory authority over environmental matters pursuant to any statute, regulation or order now in effect or hereafter enacted or promulgated;

(4) any diminution in the fair market value of the leased property caused by, arising out of, or in any way relating to or connected with any circumstances, occurrence or activity contemplated by Subparagraphs (1) through (3), above.

As used herein, the terms "hazardous or toxic waste" and "hazardous or toxic substance" shall have the same meanings as defined and used in any of the following (the "Acts"): the Comprehensive Environmental Response, Compensation and Liability Act, *42 USC § 9601 et seq.*; the Resource Conservation and Recovery Act, *42 USC § 6901 et seq.*; the Hazardous Material Transportation Act, *49 USC § 1801 et seq.*; and the Toxic Substances Control Act, *15 USC § 2601 et seq.*, and the regulations promulgated thereunder.

This indemnification and hold harmless provisions shall survive the termination of this Lease for whatever reason and shall inure to the benefit of Landlord, its heirs, successors and assigns.



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FORM 25.149 Landlord's disclaimer regarding condition of leased premises--agreement by tenant to accept premises in "as is" condition

COMMENT

In this form, which may be added to any residential or commercial lease, the landlord refuses to make any representation to the tenant about the condition of the leased premises, and the tenant agrees to accept the leased property "as is."

Accordingly, it is the responsibility of the tenant to inspect for and discover any defects on the premises before executing the lease.

Such a broad disclaimer may be insisted upon by a landlord for a variety of reasons. First, the landlord may be a new owner of the premises who knows little or nothing about its history, prior owners, the uses to which they put the property, or its current state. (This is especially true where the property has passed to the owner by will or through the law of intestate descent.) Second, the landlord may have purchased the property at a foreclosure or tax sale, where he was unable to obtain from the seller the right to perform an environmental site assessment before agreeing to purchase the property. Third, the building being leased may simply be very old and likely to contain some of the defects listed above, such as insect infestation or asbestos insulation.

As for the tenant, he may be willing to accept such a disclaimer in the lease if the rental fee is very low, and he feels that he is getting a good deal. Alternatively, the tenant may be planning to make such drastic structural changes to the leased property that the landlord's disclaimer is unimportant. (For example, perhaps the tenant is planning to completely gut the interior of the leased house, or perhaps demolish the structure altogether and build a new one from scratch.)

Whatever his reasons, the tenant will definitely want to take such a disclaimer into account when

negotiating the amount of rent. Such a disclaimer is a valuable bargaining chip for the tenant and can be cited as a reason to lower the landlord's proposed rental fee by a considerable amount.

The tenant should seriously consider having an environmental site assessment performed prior to executing the lease. Also, the tenant should consider obtaining a structural inspection prior to executing the lease so that he is aware of exactly what he is getting when he agrees to accept the premises "as is."

FORM

It is expressly understood by the parties hereto that Landlord makes no representations or warranties whatsoever as to the condition, fitness or use of the premises leased to Tenant under this Agreement. Landlord specifically disclaims any knowledge of, and liability to Tenant for, any conditions which may exist on the premises, including, but not limited to, toxic or hazardous substances, asbestos, underground storage tanks, radon gas, infestation of wood by insects, or structural deficiencies from whatever source or cause. It shall be the responsibility of Tenant to inspect for and discover any latent or patent defects in the demised premises.

Landlord has no knowledge of the age of the structures contained on the premises. Landlord has no direct knowledge of any prior uses made of the premises by prior owners and their tenants.

Tenant, with full knowledge and understanding of the foregoing, hereby agrees to accept the premises in their "AS IS," "WHERE IS" condition WITH ALL FAULTS. Tenant accepts full responsibility and expense to make all repairs, alterations, and additions to the structures on the leased premises, so as to make the said structures habitable and fit for the purposes for which Tenant intends to use them.

Tenant shall not be entitled to terminate this Lease or free himself of his responsibility to pay rent therefor due to an unforeseen condition, unless said condition shall be the discovery of hazardous or toxic substances which cost in the reasonable opinion of a qualified expert is in excess of _____ Dollars (\$_____) to remove in a manner consistent with all federal, state, and local laws, regulations and policies. Then, in that event, Tenant may give written notice to Landlord of the existence of such substances. This lease agreement shall be deemed terminated upon receipt by Landlord of said notice. Tenant shall have no further obligation to Landlord for rent or otherwise.

In the event that this Lease Agreement is terminated, as described above, Landlord shall have no obligation to reimburse Tenant for any improvements made to the leased premises. All such improvements shall be the property of Landlord, without any claim by Tenant allowed.



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FORM 25.150 Representation by landlord of condition of leased premises

COMMENT

This form consists of two alternative clauses for the reader's use. They are both representations made by a landlord regarding the present condition of leased premises.

The first clause is very specific. It presumes that the leased building(s) sits atop land which was formerly home to a business that utilized underground storage tanks, such as an auto parts and supply store, a gasoline filling station, a bus or taxi depot, or a trucking company. The landlord states in his representation that the underground storage tanks used by the former business were removed prior to construction of the leased building(s). In addition, a phase I environmental site assessment, which was performed on the premises immediately prior to construction of the leased building(s), found no evidence of any adverse environmental condition on the premises arising from the use or release of hazardous substances, such as oil, gasoline or chemicals.

The second clause is much more general in tone, and can be used in both residential and commercial leases. The landlord states, for example, that while there is no *exposed* asbestos in the leased building, he cannot make any representation as to whether ceiling or floor tiles contain asbestos, or whether hidden pipes may be insulated with the substance. The landlord further states that, to the best of his knowledge, no urea formaldehyde insulation is contained in the building. In addition, he states that he is unaware of any former tenants who used, stored, or disposed of hazardous substances on the leased premises as part of the ordinary course of their businesses, and that, to the best of the landlord's knowledge, no hazardous substances have been released onto the premises.

If, during lease negotiations, a landlord is unwilling or reluctant to make the kinds of representations which the prospective tenant feels are necessary for his protection, then the tenant

should insist on making the lease contingent upon the results of tests and inspections designed to uncover such things as asbestos or urea formaldehyde insulation. The contingency should provide that, if such substances are found to exist on the leased premises, then the tenant is free to terminate the lease agreement or to renegotiate the terms of the lease agreement with the landlord. Through renegotiation, the cost of correcting the problem may be assumed by the tenant--who will, of course, receive a reduction in the rental fee sufficient to cover this expense. Alternatively, the parties may decide to keep the rental fee at its current level and simply have the landlord remedy the problem at his own expense.

FORM

[Alternative A:]

Landlord represents that the land upon which the leased building(s) is located was previously occupied by _____ [*insert, for example, an auto parts and supply store, or a gasoline filling station, or a bus or taxi depot, or a trucking company*]. The underground storage tanks used by the former business were removed prior to construction of the leased building(s). A phase I environmental site assessment, which was performed on the premises immediately prior to construction of the leased building(s), found no evidence of any adverse environmental condition on the premises arising from the use or release of hazardous substances.

[Alternative B:]

Landlord hereby represents to Tenant that the premises to be leased to Tenant hereunder have been owned by Landlord for in excess of _____ (_____) years. The premises have been previously used for _____ [*identify past uses, e.g., office space, retail sales, repair work for a wide variety of businesses, etc.*]. All prior lease agreements contained provisions requiring tenants to comply with all laws. However, Landlord did not specifically monitor or investigate whether compliance occurred. Landlord and/or his predecessors did inspect the premises at the end of each lease prior to releasing security deposits to departing tenants. However, Landlord did not inspect the property to determine the composition of materials which may have been used in renovations or repairs made by prior tenants. To the best of Landlord's knowledge, there is no *exposed* asbestos in the premises to be leased to Tenant. However, Landlord does not make any representation as to whether ceiling or floor tiles contain asbestos, or whether hidden pipes may be insulated with asbestos.

During the ownership of the premises by Landlord and his predecessors, Landlord was responsible for all structural repairs, improvements and modifications. The building was insulated with foam board in ____ [year]. On the basis of this experience, Landlord believes that no urea formaldehyde insulation is contained in the building.

Landlord did not permit tenants to use the land surrounding the building. However, Landlord did not monitor the tenants to determine whether they did, in fact, impermissibly use such land. Landlord is not aware of any tenants who used, stored, or disposed of hazardous substances as part of their ordinary course of business, except, perhaps, *de minimis* amounts of cleaning solutions. To the best of Landlord's knowledge, no hazardous substances have been released onto the premises.

Upon request, Landlord shall provide Tenant with a list of former tenants who occupied the premises, together with last known addresses, if available. Landlord shall provide Tenant with a letter of introduction to these former tenants so that Tenant may contact them for further information.

Landlord makes no other or further representations with regard to the condition of the premises. Tenant shall accept possession of the premises in their "AS IS," "WHERE IS" condition WITH ALL FAULTS.

Tenant shall obtain written permission from Landlord prior to making any alterations thereon, which permission Landlord may withhold in his sole reasonable discretion.



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33-25 Current Legal Forms for Real Estate FORM 25.151

FORM 25.151 Representation by landlord to tenant about other tenants' uses of their units within the leased property

COMMENT

Frequently, the tenant in a commercial lease transaction will be leasing a single unit in a multi-tenant facility. Such a tenant may be very concerned about which other tenants in the building use their units.

For example, assume that the ground floor of a four-story office building houses a diner, a hair salon and a printing shop. The upper floors are devoted to professional offices of attorneys, accountants, etc. Assume further that an incoming tenant is a financial investment advisor who wishes to establish his office on the second floor of the building. Clearly, he will be interested in learning about the nature of the businesses directly above and beneath him. A diner and a printing shop, for example, can produce a great deal of noise in the absence of adequate sound-proofing. And odors rising upward from a ground-floor hair salon or diner can be highly inappropriate in a professional setting, such as the office of a financial advisor.

Accordingly, a prospective tenant for a commercial building will frequently insist that the landlord make representations about the types of businesses already being run by other tenants in the building.

The form below consists of two alternative clauses for the reader's use. They are both representations made by a landlord to a prospective tenant regarding the uses to which fellow tenants are putting their units in a commercial building. A landlord should be very careful about the representations which landlord makes about the operations of other tenants. An alternative approach is to state that the landlord has required in each tenant's lease a restriction regarding the use of hazardous materials.

In the first clause, the landlord states that, to the best of his knowledge, none of the present tenants in his building are using their rented space to store, produce or use any substance in their businesses deemed hazardous under federal law. In addition, the landlord agrees that, during the term of the lease, he will not lease any space to any tenant who uses, stores or produces any hazardous substance.

The second clause utilizes an appendix attached to the lease agreement. This appendix lists all of the current tenants, together with a brief description of each tenant's use of its unit. All descriptions have been supplied by the tenants themselves. While the landlord has not verified the tenants' descriptions, the supplying of a false or misleading description to the landlord is a violation of each tenant's lease and grounds for termination of that lease. The landlord also agrees to supply the same information to the tenant regarding new tenants who move into the building in the future.

FORM

[Alternative A:]

Landlord represents that, to the best of his knowledge, none of the present tenants in _____ [name] use, store or produce any substance in their businesses deemed hazardous under: the Comprehensive Environmental Response, Compensation and Liability Act, *42 USC § 9601 et seq.*; the Resource Conservation and Recovery Act, *42 USC § 6901 et seq.*; the Hazardous Material Transportation Act, *49 USC § 1801 et seq.*; and the Toxic Substances Control Act, *15 USC § 2601 et seq.*, and the regulations promulgated thereunder.

Landlord agrees, during the term of this lease and any extensions thereof, not to lease any space to any tenant who uses, stores or produces any substance deemed hazardous, as that term is defined above. In the event of a breach of this covenant, Tenant shall be entitled to terminate this Lease Agreement without penalty. However, nothing contained herein shall be deemed to render Landlord liable to Tenant for any expenses incurred in the relocation of Tenant's business, including, but not limited to, moving expenses, "fit up," loss of business, or injury to person or property.

[Alternative B:]

The parties hereto acknowledge that the premises leased to Tenant are one unit of a _____ (_____) unit structure. Annexed hereto as "Exhibit A" is a list of current tenants, together with a brief description of each tenant's use of its unit. All descriptions have been supplied by the tenants. Landlord has not verified the tenants' descriptions. However, the supplying of a false or misleading description is a violation of each tenant's lease and grounds for termination of that lease. Landlord will supply Tenant with an updated list of tenants and descriptions of their businesses upon written request.

Tenant shall provide Landlord with a detailed description of Tenant's own business activities to be performed on the leased premises, prior to taking possession of the unit. The description shall specify whether the activity will be primarily office use, retail sales, wholesale, manufacturing, repair or other. "Other" shall be fully explained. The description shall specify whether any hazardous substances will be used, stored, manufactured, sold, treated, or disposed of on the premises. (Hazardous substances shall be defined as any substance or material deemed to be hazardous under: the Comprehensive Environmental Response, Compensation and Liability Act, *42 USC § 9601 et seq.*; the Resource Conservation and Recovery Act, *42 USC § 6901 et seq.*; the Hazardous Material Transportation Act, *49 USC § 1801 et*

seq.; or the Toxic Substances Control Act, 15 USC § 2601 *et seq.*, and the regulations promulgated thereunder.)

The description shall contain any other information which would be useful in making the determination of whether a future tenant would be willing to locate his business near the tenant who is preparing the description, including, but not limited to, noise level expected, whether fumes or odors will likely be produced, and business hours to be maintained. Tenant shall update this description upon request and shall provide the same to Landlord before December 1st of each year during the term of this Lease.

Landlord covenants that, to the best of his knowledge, there are no tenants in the building who currently use, store, manufacture, sell or dispose of hazardous substances (as defined above) on the premises. Landlord covenants not to accept future tenants who would use, store, manufacture, sell, or dispose of hazardous substances (as defined above) on the premises. Tenant covenants that it will not use, store, manufacture, sell, or dispose of hazardous substances (as defined above) in the course of its occupancy of the leased premises.

In the event that a tenant does use, store, manufacture, sell, dispose of, or otherwise handle hazardous substances (as defined above) on the premises, Tenant shall notify Landlord immediately. Landlord shall have _____ (_____) days thereafter to investigate and take action. Such action shall include preventing the offending tenant from committing further violations, or commencing eviction proceedings against the offending tenant if prevention is not possible. The actual eviction need not take place within the _____ (_____) day period, but as soon thereafter as is practicable. Landlord shall also commence whatever remedial action may be necessary to prevent harm to the other tenants. Remedial action need not be completed within the _____ (_____) day period, but as soon thereafter as is practicable. If Landlord fails to take the actions described above within the prescribed time limits, Tenant may elect to terminate this Lease by giving Landlord written notice, specifying the default and date of termination of this Lease.

In the event that Tenant terminates this Lease, Landlord shall not be required to refund or otherwise compensate Tenant for its investment in the "fit up" of the premises. Nor shall Landlord be liable for any costs of business relocation or any increased rental fee which Tenant must pay as a result of relocation.

In the event that Tenant violates any of the provisions regarding hazardous substances, Tenant shall cease the violation immediately upon the receipt of notice from Landlord. In the event Tenant does not cease, Tenant shall vacate the premises within _____ (_____) days of receipt of demand from Landlord. Tenant shall be responsible for all costs of remediation and any loss of revenue and/or any other damages suffered by Landlord due to termination of leases by other tenants as a result of Tenant's actions. Tenant shall also be responsible for any legal fees incurred by Landlord in the enforcement of this provision.

[Attach Exhibit A]



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33-25 Current Legal Forms for Real Estate FORM 25.152

FORM 25.152 Termination of lease because of environmental damage caused by other tenant

COMMENT

This lease clause allows a tenant to terminate its lease in the event that serious environmental damage to the property occurs. The clause envisions a situation in which an environmental mishap occurs due to the emission, release, or disposal of hazardous substances.

In addition, the tenant agrees to be liable to the landlord and to all other tenants in the building for any loss which results from the tenant's emission, release, use, storage, manufacture or disposal of hazardous substances on the premises or within the building. Such loss includes, but is not limited to, loss of business revenue, relocation expenses, costs of remediation, and other direct and consequential damages.

The clause further states that, in their leases, the other tenants have similarly agreed to be liable for any loss suffered by other tenants resulting from an act or omission that causes an environmental mishap in the building or on the surrounding grounds. The landlord is relieved from any liability unless it participated in the act or omission which resulted in the environmental mishap.

Although this clause recognizes that each tenant is liable to other tenants for the environmental harm it causes, in reality the offending tenant may have little or no money available with which to compensate his fellow tenants. The reason is because, after the environmental mishap occurs, federal or state agencies will be seeking reimbursement from the offending tenant for the clean up costs incurred by those agencies. Thus, after paying off the government, the offending tenant may have little or no money left to reimburse his fellow tenants for their losses.

Accordingly, every tenant should be extremely cautious in renting space in a building where there

is a possibility that another tenant may cause an environmental problem. The tenant may eventually face, without adequate compensation, the cost of relocating his business if a serious environmental mishap occurs in the building. In that event, the tenant will have to absorb the high cost of moving his business equipment and furniture, installing new telephone and computer lines, notifying his clients or customers, etc. In addition, he may also suffer a loss of business while relocating. Finally, there is also the possibility that the rental fee in his new place of business will be considerably higher than the rent paid in the old building.

FORM

In the event of an emission, release, use, storage, manufacture or disposal of hazardous substances by a third party, including, without limitation another tenant, on or about the leased premises or in the building in which the premises are located, causes an adverse environmental impact, then Tenant shall be entitled to terminate this Lease. Tenant shall notify Landlord of its intention to terminate in writing, specifying the reason for terminating the lease and the date on which the termination shall be effective, which date shall be no more than ninety (90) days in the future.

The term "hazardous substance" shall mean any substance designated as hazardous under any federal, state or local law or regulation, including, but not limited to: the Comprehensive Environmental Response, Compensation and Liability Act, *42 USC § 9601 et seq.*; the Resource Conservation and Recovery Act, *42 USC § 6901 et seq.*; the Hazardous Material Transportation Act, *49 USC § 1801 et seq.*; or the Toxic Substances Control Act, *15 USC § 2601 et seq.*

The term "adverse environmental impact" shall mean any severe diminution in the quality or quantity of the air, water, soil or wildlife, including subsurface, anywhere on the leased premises. Landlord shall not be liable to Tenant for any loss suffered as a result of the acts or omissions of other tenants unless Landlord participated directly in the act or omission which resulted in the adverse environmental impact. Landlord shall not be required to reimburse Tenant for any investments made in Tenant's unit for "fit up" or otherwise.

Tenant acknowledges that all tenants in the building possess the same rights and responsibilities contained in this provision. Tenant agrees to be responsible to Landlord and to all other tenants in the building for any loss which results from Tenant's emission, release, use, storage, manufacture or disposal of hazardous substances on or about the premises or within the building. Such loss shall include, but not be limited to, loss of revenue, relocation expenses, costs of remediation, and other direct and consequential damages.



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FORM 25.153 Landlord will indemnify and hold tenant harmless against environmental damage caused by other tenant and against adverse environmental condition existing on leased premises prior to execution of lease

COMMENT

In the clause below, the landlord agrees to indemnify and hold the tenant harmless for any claim, loss, injury or damage arising out of, or in any way related to, an adverse environmental condition that already existed on the premises at the time the lease was executed, or that is created during the lease term by the landlord or another tenant. The indemnification/hold harmless provision is effective regardless of whether the condition is (or was) created or contributed to by the landlord, his predecessors, agents, employees or invitees, or by another tenant, his agents, employees or invitees.

To obtain such a broad indemnification/hold harmless provision, a prospective tenant must be extremely desirable to the landlord. Alternatively, the landlord must be very confident that the leased premises are free from any environmental problems, and that other tenants in the building pose no real danger of creating an environmental mishap during the lease term.

Finally, a landlord's attorney should be aware that this type of pro-tenant lease clause may obligate his client to assume a myriad of expenses, in addition to environmental clean-up costs. For example, the landlord would be liable for injury to the tenant, his employees and property. In addition, the landlord would have to assume the cost of relocating the commercial tenant and compensating him for any loss of business revenue following a serious environmental mishap that renders the leased premises unusable. Obviously, a landlord should be very reluctant before leaving himself open to such broad liability.

FORM

Landlord shall indemnify and hold Tenant harmless for any claim, loss, injury or damage, whether direct or consequential, arising out of, or in any way related to, any adverse environmental condition now existing or hereafter created or discovered on or about the leased premises, which condition was created or contributed to by Landlord, his predecessors, agents, employees or invitees, or another tenant, his agents, employees or invitees. In the event Tenant has created or contributed to the adverse environmental condition, Landlord shall be relieved of his responsibility to indemnify and hold Tenant harmless.

The term "adverse environmental condition" shall mean any condition on or about the leased premises which materially violates any applicable federal, state or local law relating to the environment.



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33-25 Current Legal Forms for Real Estate FORM 25.154

FORM 25.154 Landlord's obligation to correct an adverse environmental condition discovered on the leased premises after execution of the lease, or an environmental mishap caused by another tenant during the lease term

COMMENT

This clause is to be inserted into a lease where there is a significant danger that: (1) an adverse environmental condition may be discovered upon the premises after the lease is executed; or (2) an environmental mishap, caused by one of the other tenants, may occur during the lease term.

The clause requires the landlord to promptly notify the tenant of the discovery of evidence indicating the existence of an adverse environmental condition or the occurrence of an environmental mishap (such as the sudden release of hazardous substances into the air or water). Next, the landlord promises to immediately undertake an investigation to determine whether an adverse environmental condition does, in fact, exist, and, if so, the nature and extent of the problem. Thereafter, the landlord agrees to formulate and implement a remediation plan designed to eliminate the problem. All expenses of remediation are the responsibility of the landlord unless the tenant contributed to or caused the adverse environmental condition.

In the event that the plan of remediation requires the temporary relocation of the tenant, the landlord agrees to pay all expenses in connection with the relocation. However, in the event that the landlord has available space in another of its buildings, the tenant is obligated to accept such space.

Finally, in the event that the landlord fails to fulfill any of the obligations set forth in the clause in a timely manner, the tenant is then entitled to terminate the lease.

FORM

The parties hereto acknowledge that neither has caused an environmental site assessment to be performed on the subject premises. Landlord is not familiar with the history or use of the premises prior to Landlord's purchase of the premises in ____ [year]. The parties acknowledge that the other tenants in the building were tenants of the prior owner, and that their leases extend back to ____ [year]. Neither Landlord nor Tenant is familiar with the nature of the businesses of the other tenants. Both parties acknowledge that there is a possibility that a presently-concealed adverse environmental condition could be discovered in the building or on the grounds at some point in the future. In addition, some activity carried on by the other tenants might cause an adverse environmental condition.

Landlord covenants that it will notify Tenant immediately in the event that evidence of an adverse environmental condition is discovered, or an event occurs which may result in an adverse environmental condition, including, but not limited to, a release, emission or spill of hazardous substances.

As used herein, the term "hazardous substance" shall mean any substance designated as such by any federal, state or local law or regulation, including, but not limited to: the Comprehensive Environmental Response, Compensation and Liability Act, 42 USC § 9601 *et seq.*; the Resource Conservation and Recovery Act, 42 USC § 6901 *et seq.*; the Hazardous Material Transportation Act, 49 USC § 1801 *et seq.*; or the Toxic Substances Control Act, 15 USC § 2601 *et seq.*

The term "adverse environmental condition" shall mean any condition which has already caused, or can reasonably be expected to cause, a serious diminution in the quality or quantity of the air, water, land (including soil and subsurface), and wildlife located on, above or below the leased premises, including, without limitation, a public or private nuisance.

Upon the discovery of such condition, Landlord shall immediately undertake an investigation to determine whether an adverse environmental condition does exist, and, if so, the nature and extent thereof. Landlord shall engage such experts as may reasonably be required to perform its obligations hereunder. Landlord shall provide to Tenant copies of all information and reports which it receives in connection with the investigation. Tenant shall treat such reports as the confidential and proprietary property of Landlord.

Landlord shall then formulate a plan of remediation. Tenant shall be provided with a copy thereof. Said plan shall comply, in all aspects, with all applicable federal, state and local laws, regulations and policies, and shall have the approval, if required, of all applicable governmental authorities possessing jurisdiction. Tenant shall treat the plans as the confidential and proprietary property of Landlord.

Landlord shall execute the plan of remediation promptly. In the event that the plan of remediation requires the temporary relocation of Tenant, Landlord shall pay all expenses in connection therewith. In the event that Landlord has space in another building owned by Landlord, Tenant shall accept such space.

In the event that Landlord fails to diligently pursue or fulfill any of the obligations set forth herein in a timely manner, Tenant shall be entitled to terminate this Lease. Tenant shall give Landlord notice of termination, specifying the basis for the Landlord's default and setting forth the effective date of termination, which shall not be more than _____ (_____) days following Landlord's receipt of notice. Tenant shall pay rent up to and including the effective date of termination.

All expenses of remediation shall be borne by Landlord unless Tenant contributed to or caused the adverse environmental condition. (In that event, Landlord shall have no obligations under this clause and shall be entitled to collect from Tenant Tenant's reasonable share of the cost of remediation. In addition, Tenant shall not be entitled to terminate this Lease.)

Nothing contained herein shall be deemed to prohibit Landlord from collecting some or all of the costs of remediation from other, potentially responsible parties.



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FORM 25.155 Landlord's promise to comply with all environmental laws and orders relating to the leased premises

COMMENT

The lease clause below requires the landlord to comply with all federal, state and local environmental laws, regulations, policies and judicial or administrative orders during the term of the lease.

The insertion of such a clause into a commercial lease is common practice and should not require any special negotiations between the parties. Here, the landlord's failure to comply with an environmental law, regulation, policy or order provides grounds for the tenant to lawfully terminate the lease.

The clause provides that the landlord will comply "with all laws, regulations, policies, judicial and administrative orders of federal, state, county and municipal authorities, and with any directive issued pursuant to law by any public officer thereof, which shall impose any duty upon Landlord pertaining to the use or occupancy of the premises... ." However, the landlord has the right to contest any orders and other obligations imposed upon it by a governmental authority and to defer compliance during the pendency of any contest proceedings, provided that the landlord's failure to immediately comply does not subject the tenant to a civil fine or criminal penalties.

FORM

Landlord shall comply with all laws, regulations, policies, judicial and administrative orders of federal, state, county and municipal authorities, and with any directive issued pursuant to law by any public officer thereof, which shall impose any duty upon Landlord pertaining to the use or occupancy of the premises by Landlord or Tenant.

However, Landlord shall have the right to contest obligations imposed upon Landlord and defer compliance during the pendency of any legal proceedings, provided that the failure of Landlord to immediately comply shall not subject Tenant to prosecution, resulting in civil fine or criminal penalties.

Notwithstanding the foregoing, in the event that the alleged violation poses an imminent threat to public health, safety, or the environment, Landlord may not contest the obligations and defer further compliance as set forth above.

Failure of Landlord to comply with the provisions of this clause shall entitle Tenant to terminate this Lease. Tenant shall give notice to Landlord of intent to terminate, specifying the act giving rise to Landlord's default and the effective date of termination of the lease, which shall be no less than _____ (_____), nor more than _____ (_____), days following Landlord's receipt of notice of Tenant's intent to terminate the lease. Landlord shall have _____ (_____) days from receipt of notice of intent to terminate to cure the default. If Landlord timely cures the default, the Lease termination shall be voided. If Landlord fails to timely cure the default, this Lease shall be terminated on the date specified by Tenant.



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FORM 25.156 Tenant's promise to return premises to landlord in same condition as existed at commencement of lease term

COMMENT

This form provides several alternative clauses. In all of the clauses, the tenant promises to return the leased premises to the landlord at the end of the lease term in same condition in which he found the premises at the start of the term.

The insertion of such a clause into a lease is a standard part of any real estate leasing transaction. Thus, the parties should not need to engage in any extensive negotiations over this issue. The purpose of the clause is to give each party--and particularly the tenant--a clear understanding of how the premises should appear at the end of the lease term.

FORM

[Alternative A]

Tenant shall take good care of the premises and shall, at Tenant's own cost and expense, make all interior repairs, alterations, decorations, and improvements to the leased premises during the period covered by this Lease. All repairs, alterations, decorations or improvements made in or to the leased premises by Tenant shall become the property of Landlord and shall be surrendered with the premises at the termination of the Lease. Tenant shall have the right to remove or replace its removable trade fixtures, provided Tenant repairs any damage caused by such removal. The failure of Tenant to remove its fixtures or any of its property at the termination of the term of this Lease shall be deemed abandonment of such property. If Landlord must remove such property, the cost of removal shall be deducted from Tenant's security deposit.

At the end or other expiration of the lease term, or any extensions thereof, Tenant shall deliver up the leased premises in good order and condition, damages by the elements and reasonable wear and tear excepted.

[Alternative B]

In the event that Tenant does not purchase the premises, but returns possession at the end of the term of this lease agreement, Tenant shall return the premises broom clean and in the same condition as at the commencement of this Agreement, reasonable wear and tear excepted.

[Alternative C]

Upon expiration or other termination of the term of this Lease, Tenant shall quit and surrender to Landlord the leased premises, broom clean, in good order and condition, reasonable wear and tear and damage by fire or other casualty excepted.

[Alternative D]

Tenant shall, throughout the term of this Lease, take good care of the leased premises, fixtures, services, equipment and appurtenances therein, and, at its sole cost and expense, make all non-structural repairs thereto, as and when needed to preserve them in good working order and condition. Upon expiration of the lease term, Tenant shall deliver up the premises in good order and condition, reasonable wear and tear, obsolescence and damage from the elements excepted. Notwithstanding the foregoing, all damage or injury to the leased premises, its fixtures, services, equipment or appurtenances, that is caused by Tenant, its servants, employees, invitees or licensees and that requires structural repairs, shall be repaired promptly by Tenant at its sole cost and expense.



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FORM 25.157 Clause terminating lease following violation of lease's environmental provisions by landlord or tenant

COMMENT

This form provides several alternative clauses that may be inserted into a residential or commercial real property lease, all of which are designed to empower either the tenant or the landlord to terminate the lease when the other party violates one or more environmental provisions contained elsewhere in the lease. Thus, the "violator" may be either the tenant or landlord, and the "terminator" may likewise be either the tenant or landlord.

In addition to termination of the lease, the clause imposes other, rather harsh, penalties for violation of the environmental provisions. For example, if the tenant is the violator, he is liable for the full cost of repairing any damage caused by his violation of the environmental provisions. However, given the danger of serious injury to person, property and wildlife that may arise when environmental provisions are violated, tough penalties are not at all unreasonable.

FORM

[Violation by Tenant]

In the event that Tenant violates any of the provisions regarding hazardous substances, Tenant shall cease the violation immediately upon receipt of notice from Landlord. In the event Tenant does not cease, Tenant shall vacate the premises within _____ (_____) days of demand by Landlord. Tenant shall be responsible for all costs of remediation, and for any loss of rental income and/or any other damages suffered by Landlord due to termination of leases by other tenants as a result of Tenant's actions. In addition, Tenant shall be responsible for any

legal fees incurred by Landlord in the enforcement of this provision.

[Violation by Landlord]

Failure of Landlord to comply with the environmental requirements contained in Paragraphs _____ --
_____ of this Lease shall entitle Tenant to terminate the Lease. Tenant shall give written notice of
intent to terminate, specifying the Landlord's act of default and the effective date of the lease termination, which shall
be no less than _____ (_____), nor more than _____
(_____), days following Landlord's receipt of the written notice of intent to terminate. Landlord shall
have _____ (_____) days from receipt of notice in order to cure the default. If
Landlord timely cures the default, the termination of the Lease shall be voided. If Landlord fails to timely cure the
default, this Lease shall be terminated on the date specified by the Tenant in his written notice to the Landlord.



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FORM 25.158 Landlord's representation to tenant regarding existence of asbestos

COMMENT

This clause is a disclosure by the landlord that the leased premises contain materials laden with asbestos. In older buildings, asbestos-containing materials are most frequently found in ceiling and floor tiles and surrounding furnaces, boilers, heating pipes, and hot water heaters and hot water pipes.

The clause specifies, to the best of landlord's knowledge, the exact location, age and general condition of the asbestos-containing materials. The clause further specifies that the tenant takes the premises in their present, "as is" condition.

A tenant may wish to negotiate with the landlord over the issue of asbestos abatement. For example, a commercial tenant may be willing to undertake the cost and inconvenience of removing or containing the asbestos himself, in exchange for a reduction in the rental fee equal to the tenant's expense. A tenant is often willing to undertake this type of project if he also intends to perform major renovation work to the leased premises, such as removal of walls and replacement of the ventilation system. In such case, the asbestos removal or containment can be considered both a part of the renovation efforts and a valuable "bargaining chip" available to the tenant in negotiating the rental fee and other lease terms.

Alternatively, the landlord himself might agree to perform the asbestos abatement either before or after the lease term begins. Of course, in such case, there would be no reduction in the rental fee.

In any event, if the tenant decides to undertake the asbestos abatement himself, there are provisions in this clause addressing such a situation. For example, the clause provides that the tenant must make certain that any asbestos abatement program is conducted in strict compliance

with all federal, state and local laws, regulations and policies. The clause also imposes insurance requirements, standards for determining whether the abatement efforts were successful, etc.

FORM

Landlord represents to Tenant that asbestos-containing materials are located on the premises to be leased hereunder. Exhibit A attached hereto sets forth a description of the areas that may contain asbestos.

Tenant acknowledges the foregoing and accepts the premises in their "AS IS," "WHERE IS" condition WITH ALL FAULTS. Tenant agrees to indemnify and hold Landlord harmless for any claim for injury to any person who may be on the leased premises as an agent, employee, contractor, invitee or guest of Tenant, and whose claim of injury arises out of the existence of and exposure to asbestos on or about the premises.

Tenant may remove or contain the asbestos without further consent of Landlord. In such case, Tenant shall insure that any removal or containment is performed in strict compliance with all federal, state and local laws, regulations and policies.

Tenant shall obtain a certificate of insurance for liability, workers' compensation and builders' risk insurance in amounts satisfactory to Landlord. All policies shall name Landlord and Tenant as additional insureds.

Once the asbestos has been removed or contained, Tenant shall provide proof to Landlord of the successful completion of the removal or containment process. Such proof shall be in the form of results of air monitoring tests conducted by a laboratory approved for asbestos handling, showing that the level of asbestos contained in indoor air samples is equal to, or less than, the level considered to be acceptable under applicable state regulations, and a closure report or certification to be given by the contractor that remediates the asbestos.

[Attach Exhibit A]



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33-25 Current Legal Forms for Real Estate FORM 25.159

FORM 25.159 Representation by landlord that leased premises contain no asbestos-containing materials

COMMENT

This clause is the opposite of the preceding clause. Here, the landlord represents that there are no asbestos-containing materials on the leased premises. Such a provision is routinely inserted today into leases of newly-constructed real property, since the use of asbestos insulation in new buildings has been banned for many years. Although the form does not provide for a qualification, the landlord may want to limit the representation to his knowledge. The clause also provides that if, during the lease term, asbestos-containing materials are found in the leased premises, then the tenant may demand that the landlord remove them. If the landlord refuses to do so, then the tenant may terminate the lease or perform the removal himself.

FORM

Landlord represents that there are no asbestos-containing materials in or at the leased premises. If asbestos-containing materials are discovered during the lease term, then Tenant, at its own discretion, may demand its removal, and, if the Landlord refuses to remove the asbestos-containing materials, Tenant may either: (a) terminate the lease, or (b) undertake the removal work itself and recover all of its costs from the landlord.



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33-25 Current Legal Forms for Real Estate FORM 25.160

FORM 25.160 Tenant's promise to remove asbestos

COMMENT

In this clause, the tenant agrees to undertake the steps necessary to determine whether insulation materials laden with asbestos exist on the leased premises, and, if they do, to remove or contain them. The entire cost of investigation and abatement will be handled by the tenant. In return, the landlord agrees to give the tenant a rent reduction to compensate the tenant for the full expense and risks involved. The tenant also agrees to indemnify and hold the landlord harmless for any injury arising out of the investigation and abatement project.

Obviously, such a clause is a great boon for the landlord since his property will be much more safe and marketable after removal of any asbestos presently found there.

FORM

The parties hereto acknowledge that asbestos-containing material may be located in the leased premises. Notwithstanding that fact, Tenant desires the space. A determination of whether asbestos-containing materials are located within the premises shall be made by a licensed asbestos removal contractor. Landlord agrees to allow access to the premises to the asbestos removal contractor at any time. The asbestos removal contractor shall be entitled to take samples of ceiling and floor tiles and other materials, and of insulating materials found on pipes, the boiler or the furnace, the hot water heater, and other objects and surfaces which the asbestos removal contractor believes contain asbestos.

Tenant shall be responsible for the full cost of this process, including sampling and analysis of samples. Tenant shall provide Landlord with a copy of the written report produced by the licensed asbestos removal contractor. Tenant, in behalf of himself, his agents and employees, agrees to maintain absolute confidentiality with regard to the results

contained in the report. The term "confidentiality," as used herein, means that the results contained in the report shall not be revealed to any person without Landlord's prior written consent.

Tenant further agrees that, if asbestos-containing materials are found anywhere on the leased premises, he shall, at his sole cost and expense, undertake a thorough asbestos abatement program. Such program shall be formulated and executed by a licensed asbestos removal contractor and consist either of the complete removal of the materials in question or their permanent containment.

Tenant shall indemnify and hold Landlord harmless for any injury to person or property which occurs during, or arises out of, the investigation and abatement processes, including, but not limited to, the failure to abate properly. This indemnification shall include the Landlord's defense costs and consequential damages.

Tenant shall provide proof to Landlord that the asbestos has been abated. Such proof shall be in the form of results of air monitoring tests conducted by a laboratory approved for asbestos handling, showing that the level of asbestos contained in indoor air samples is equal to, or less than, the level found to be acceptable under applicable state regulations.

Tenant shall be responsible for all costs of abatement, including, but not limited to:

- (1) fees by environmental consultants;
- (2) the cost of obtaining necessary permits and approvals;
- (3) the cost of obtaining any liability or other insurance necessary and appropriate during the abatement process;
- (4) the cost of removing or containing the asbestos-containing materials;
- (5) the cost of disposing of such materials if removal occurs; and
- (6) the cost of post-abatement air testing.

Landlord shall give Tenant a credit in the amount of _____ Dollars (\$_____) against rent due each month, for a total of _____ (_____) months. The total amount of the credit shall _____ Dollars (\$_____) or _____ (_____) of the cost of abatement, whichever is less.



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33-25 Current Legal Forms for Real Estate FORM 25.161

FORM 25.161 Landlord's promise to remove asbestos

COMMENT

In this clause, the landlord agrees to undertake the steps necessary to determine whether insulation materials laden with asbestos exist on the leased premises, and, if they do, to remove or contain them. The entire cost of investigation and abatement will be handled by the landlord. Since the asbestos investigation/abatement will occur after the lease has begun and while the tenant is using the premises, the landlord agrees to indemnify and hold the tenant harmless for any injury arising out of the investigation and abatement project.

FORM

The parties hereto acknowledge that asbestos-containing material may be located in the leased premises. Notwithstanding that fact, Tenant desires the space. A determination of whether asbestos-containing materials are located within the premises shall be made by a licensed asbestos removal contractor at the Landlord's sole cost and expense. The asbestos removal contractor shall take samples of ceiling and floor tiles and other materials, and of insulating materials found on pipes, the boiler or the furnace, the hot water heater, and other objects and surfaces which the asbestos removal contractor believes contain asbestos.

Landlord shall be responsible for the full cost of this process, including sampling and analysis of samples. Landlord shall provide Tenant with a copy of the written report produced by the licensed asbestos removal contractor. Tenant, in behalf of himself, his agents and employees, agrees to maintain absolute confidentiality with regard to the results contained in the report. The term "confidentiality," as used herein, means that the results contained in the report shall not be revealed to any person without Landlord's prior written consent.

Landlord agrees that, if asbestos-containing materials are found anywhere on the leased premises, he shall, at his sole

cost and expense, undertake a thorough asbestos abatement program. Such program shall be formulated and executed by a licensed asbestos removal contractor and consist either of the complete removal of the materials in question or their permanent containment.

Landlord shall indemnify and hold Tenant harmless for any injury to person or property which occurs during, or arises out of, the investigation and abatement processes, including, but not limited to, the failure to abate properly. This indemnification shall include the Tenant's defense costs and consequential damages.

Landlord shall provide proof to Tenant that the asbestos has been abated. Such proof shall be in the form of results of air monitoring tests conducted by a laboratory approved for asbestos handling, showing that the level of asbestos contained in indoor air samples is equal to, or less than, the level found to be acceptable under applicable state regulations.

Landlord shall be responsible for all costs of abatement, including, but not limited to:

- (1) fees by environmental consultants;
- (2) the cost of obtaining necessary permits and approvals;
- (3) the cost of obtaining any liability or other insurance necessary and appropriate during the abatement process;
- (4) the cost of removing or containing the asbestos-containing materials;
- (5) the cost of disposing of such materials if removal occurs; and
- (6) the cost of post-abatement air testing.



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33-25 Current Legal Forms for Real Estate FORM 25.162

FORM 25.162 Clause providing that, in the event of an environmental accident, tenant shall be required to purchase the premises at fair market value immediately prior to the accident

COMMENT

This form provides a creative solution to one of a landlord's greatest problems and worst fears: learning that his tenant has contaminated the leased premises through some environmental mishap, such as the release or emission of one or more hazardous substances. This form envisions a situation where the property is so badly contaminated that remediation would cost as much or more than the fair market value of the property before the accident. The solution: the clause below requires the tenant to purchase the premises at their fair market value immediately prior to the accident. However, because the landlord was the owner of the property he is not relieved of liability for the incident.

Fair market value would be determined by the parties. If they could not agree, they would each select an appraiser. The two appraisers would then select a third, who would actually perform the appraisal. The decision of the third appraiser would be binding upon both parties. All expenses of the appraisal would be paid by the tenant.

The landlord would tender the deed within 30 days thereafter. The tenant would be required to pay the fair market value in cash or a cash equivalent, such as a cashier's check or letter of credit. The landlord would not be required to hold a mortgage.

Of course, for such an arrangement to work, a tenant's assets must be substantial and fairly liquid, or the tenant must own other valuable property which he can use as collateral for a mortgage loan. Accordingly, a landlord should be very familiar with a tenant's financial situation before agreeing to the inclusion of such a provision in any lease. In addition, the lease should require that, during the lease term, the tenant's books will be audited by a certified public

accounting firm and copies of these audits will be supplied to the landlord.

Under the terms of the clause, if the remediation required is less than a certain specified amount, the tenant need only correct the environmental problem promptly; he is under no duty to actually purchase the property. In such case, all costs of remediation, including environmental consultants' fees, are borne by the tenant.

The tenant is also required to indemnify and hold the landlord harmless against any claims brought by occupants and/or owners of neighboring properties adversely affected by the environmental mishap. (It should be remembered, of course, that the Comprehensive Environmental Response, Compensation and Liability Act-- 42 USC § 9601, et seq. --provides that, in imposing liability for clean-up costs, the federal government is not required to recognize the effectiveness of any indemnification or hold harmless agreement which shifts or allocates responsibility among statutorily-responsible parties. In other words, if a tenant contaminates the leased property (or property bordering on the leased property), the federal government is free to seek payment for all or part of the clean-up costs from the landlord--even in the presence of an indemnification and hold harmless agreement granted by the tenant and intended to protect the landlord.)

FORM

It is understood and acknowledged by the parties hereto that Tenant, in the ordinary course of its business, prepares, stores, handles, transports, disposes and otherwise uses substances which are clearly denominated as hazardous under provisions of federal and state laws, regulations, and policies. It is further understood and acknowledged that Tenant could not engage in his business without the use of said hazardous substances.

Tenant agrees to prepare, store, handle, transport, dispose of and use said hazardous substances in strict compliance with all federal, state and local laws, regulations and policies. Tenant shall maintain records of such compliance. All such records shall be available to Landlord at any time during Tenant's regular business hours and without advance notice to Tenant. Such records shall be maintained at the leased premises at all times. Landlord may copy any such compliance records at any time. Landlord agrees, however, to maintain the confidentiality of any such material denominated as "trade secrets" by Tenant.

If any event occurs, whether such event be sudden or whether it occurs slowly over a period of time, which event involves the release or emission of any substance designated as hazardous under the provisions of any federal, state or local law, regulation or policy, Landlord shall be notified of the event by Tenant immediately upon the Tenant's discovery of the occurrence of the event.

Tenant shall take immediate action to stop further releases or emissions of such hazardous substances. Tenant shall further notify all appropriate federal, state and local authorities of the event.

Tenant shall, within _____ (_____) days after the releases or emissions have been stopped, engage an environmental consultant, acceptable to Landlord, to assess the damage to the structures, wildlife, air, water and soils (including subsurface) on the leased premises and on the affected area, if any, surrounding the leased premises. The environmental consultant shall provide a detailed written report, describing the nature and extent of the event, the nature and extent of the adverse consequences to the structures, wildlife, air, water, soils and subsurface, and the nature and extent of the remediation required. In addition, such report shall include an estimate of the cost of the remediation, including a range of possible error in the estimate.

If the estimate of the cost of remediation is less than _____ Dollars (\$ _____), Tenant shall commence remedial action immediately. The remediation shall be pursued vigorously and in accordance with all applicable federal, state and local laws, regulations and policies. If the remediation work is to be performed by an independent contractor, the agreement between Tenant and contractor shall be subject to the approval of Landlord.

If the estimate of the cost of remediation exceeds _____ Dollars (\$ _____), Tenant shall purchase the premises from Landlord. The purchase price shall be the fair market value of the demised premises immediately prior to the occurrence of the event requiring remediation. If the parties cannot agree upon the fair market value, each shall select a commercial real estate appraiser. The two appraisers shall then select a third commercial real estate appraiser who shall prepare a written appraisal of the leased premises, setting forth the fair market value of the property immediately prior to the event. Said appraisal shall be completed within _____ (_____) days after the third appraiser is selected. The appraisal shall be performed at the expense of Tenant, and it shall be final, binding upon the parties and unreviewable.

Landlord shall tender a bargain and sale deed, containing a covenant against the grantor's acts, to Tenant _____ (_____) days after the appraisal is complete. Said deed shall have transfer tax stamps affixed. At that same time, Tenant shall pay the appraised price in cash, or by a certified or bank check payable to Landlord's order.

Tenant shall indemnify and hold Landlord harmless from any and all claims, suits, judgments and costs of defense arising out of or in connection with the release or emission by Tenant, its agents or employees, of any hazardous substance on or about the leased premises, including, but not limited to, claims by occupants and/or owners of adjoining or nearby properties, and by any governmental authority, for the expense of remediation, environmental or public health studies, administrative expenses, fines or penalties, and damages for injury to person or property.



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33-25 Current Legal Forms for Real Estate FORM 25.163

FORM 25.163 Contingency for obtaining water source on leased premises capable of producing adequate amounts of potable water and adequate amounts of water necessary for industrial use

COMMENT

To meet its business needs, a commercial tenant may wish to use well water located beneath the leased premises in order to eliminate the expense of purchasing water from the municipality or the local water company. In addition, in many rural areas of the country, a commercial tenant may be forced to use a water source located on or below the leased premises because there simply is no local water company or other supplier of water available. In these cases, a prospective tenant will want to insert a contingency into the lease agreement, providing that the agreement is not effective unless the tenant is able to locate and develop an adequate source of water on the leased premises.

The volume of water required by a commercial tenant will vary considerably from user to user. Some users may require only enough water for their employees' personal use. Others may need vast quantities in the production of products.

Water which is intended for personal use (e.g., drinking, bathing, etc.) must be of the highest quality and purity in order to prevent illness. However, water which is needed for industrial purposes may not have to be of such a high grade.

Frequently, wells may not produce a sufficient quantity of water. If this occurs, a technique called "hydrofracturing" may be used to increase the quantity. The technique is actually a variety of techniques designed to break up pockets, or veins, of water and thereby create one large, unified water source. Hydrofracturing may entail pumping gas into the ground, or even using explosives. Accordingly, it is very important for the landlord and his counsel to carefully review the tenant's contract with the hydrofracturer in order to ascertain whether the hydrofracturer is fully licensed and adequately insured.

In the event that water of the quantity and/or quality required by the tenant cannot be obtained at or below a certain price specified in the contingency, the tenant may terminate the lease agreement. Alternatively, if the tenant is still interested in leasing the premises, the parties may attempt to renegotiate the lease. The landlord might be willing to pay for part of the high cost of developing the water source, or he might instead be willing to reduce the rental fee in order to help defray the expense.

FORM

This Lease is contingent upon Tenant locating a viable source of potable water and water for industrial use on the premises to be leased hereunder.

Potability shall be determined in accordance with standards set by the _____ [county] County Department of Health _____ [or other governmental agency that sets water standards].

The source will be deemed viable if the source will provide a continuous supply of water in the amount of at least _____ (_____) gallons per minute, and if the total cost to access the water permanently shall not exceed the sum of _____ Dollars (\$_____). The determination of whether the source will provide a continuous supply of water shall be made by _____ [name of geologist] or other equally qualified geologist.

Tenant is hereby authorized by Landlord to dig or drill test holes, as deemed necessary by the geologist. Tenant may also perform or cause to be performed hydrofracturing in order to attempt to increase the water flow, if deemed necessary or appropriate by the geologist. Tenant shall cause all test holes and the surrounding areas to be returned to their prior condition at the completion of testing and hydrofracturing. Tenant shall obtain the written approval of Landlord of the contract with the hydrofracturer. Landlord reserves the right to prohibit the use of explosives. The contract shall require that the hydrofracturer carry insurance in limits to be approved by Landlord, and that Landlord shall be a named insured on the policies of insurance. Tenant shall notify Landlord _____ (_____) hours in advance of when hydrofracturing activities are to occur.

Tenant shall indemnify and hold Landlord harmless for any claim for injury to person or property, including, but not limited to, defense costs and judgments and settlements arising out, or of in any way related to, the hydrofracturing activities.

All testing and hydrofracturing shall be done at Tenant's sole expense. Nothing contained herein shall be deemed to require Tenant to expend more than _____ Dollars (\$_____) in locating water, testing, and developing the water source, including, but not limited to, digging or drilling a well, and hydrofracturing.

This contingency shall be deemed waived unless Tenant shall notify Landlord, in writing, (1) of Tenant's inability to locate a viable, potable water source, as defined above, or (2) that the estimate of the cost of locating, testing, developing, and hydrofracturing exceeds the above sum, on or before _____ [month] _____ [day] _____ [year]. Notice shall be deemed given when received by Landlord, in person or by certified mail, return receipt requested. If notice is timely given, this Agreement shall be deemed terminated.



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FORM 25.164 Contingency for asbestos inspection

COMMENT

This form may be inserted into a lease or into a prospective tenant's letter of intent to enter into a lease. The form provides for an inspection of the subject premises for asbestos before execution of the lease. The full cost of the inspection, including the testing of air samples and insulation materials suspected of containing asbestos, is the responsibility of the prospective tenant.

If asbestos is found, the tenant may cancel the lease by giving timely notice to the landlord. In the alternative, the tenant may decide to accept the premises as is and perform the asbestos "abatement" (i.e., the removal or containment of the asbestos) at his own expense. In such case, the landlord would provide the tenant with a credit toward the rent covering at least part of the abatement cost.

Such an arrangement is a great benefit to the landlord, who may not have sufficient cash available to perform the abatement himself. The tenant's handling of the abatement means that the landlord's property is significantly increased in value with only a small loss of rental money suffered by the landlord.

In this clause, the tenant is required to hold the landlord harmless and indemnify him for any damage or injury which may occur during the abatement process.

The tenant is also required to maintain strict confidentiality with regard to the content of the asbestos inspection report. This requirement survives even if the tenant decides to exercise his right under the contingency clause not to enter into the lease agreement.

Finally, the tenant covenants to perform the asbestos abatement in strict compliance with all

federal, state and local laws, regulations and policies.

FORM

The effectiveness of this lease shall be contingent upon the determination that the leased premises are free of asbestos-containing materials.

The determination shall be made by a qualified asbestos contractor. Landlord agrees to allow access to the premises to the asbestos contractor at any time. The asbestos contractor shall be entitled to take samples of ceiling tiles, floor tiles, as well as insulation materials located on or near pipes, the boiler or furnace, the hot water heater, and any other place where the asbestos contractor believes asbestos insulation may be found.

Tenant shall be responsible for the full cost of the determination, including the taking and sampling of air, ceiling and floor tiles, and insulation materials located on or near pipes, the boiler or furnace, the hot water heater, etc.

Tenant shall provide Landlord with a copy of the asbestos contractor's written report. Tenant, for himself, his agents and employees, agrees to maintain absolute confidentiality with regard to the results contained in the report. The term "confidentiality", as used herein, means that the results contained in the report shall not be revealed to any person without Landlord's prior written consent. This requirement of confidentiality shall survive the termination of this Agreement.

This contingency shall be deemed waived unless Tenant shall notify Landlord that the testing shows the existence of asbestos-containing material on or before _____ [month] _____ [day] _____ [year]. In the event Tenant so notifies Landlord, this lease shall be deemed canceled and all deposits made hereunder shall be returned to Tenant immediately. Landlord shall not be required to remove or contain any asbestos-containing material located on the premises. However, should Tenant elect to accept the leased premises, Landlord agrees to give Tenant a credit against the rent reserved hereunder in the amount of _____ Dollars (\$ _____), or _____ (_____) of the cost of abatement, whichever is less.

If Tenant elects to accept the premises, Tenant shall abate the asbestos by causing its removal or containment in strict compliance with all federal, state and municipal laws, regulations and policies. Tenant shall indemnify and hold Landlord harmless for any injury to person or property which occurs during, or arises out of, the abatement process, including, but not limited to, the failure to abate properly.



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FORM 25.165 Contingency for environmental assessment

COMMENT

In the clause below, execution of the lease is made contingent upon the results of a phase I environmental site assessment. The parties hope that such assessment reveals no evidence of a serious environmental problem on or about the leased premises.

The commercial tenant that negotiates a contingency clause for a phase I environmental site assessment should be one that expects to make a large investment in the premises in terms of length of tenancy or amount of money to be expended on improvements to the leased property. While the cost of a phase I environmental site assessment is significant, it is certainly far less than the cost of relocating one's business after a serious environmental problem is discovered on the premises once the tenancy begins.

The contingency clause allows the tenant to terminate the lease in the event that evidence of a significant "adverse environmental condition" is discovered during the site assessment. If the tenant still desires to lease the premises, the parties may renegotiate the lease agreement. For example, the landlord may agree to reduce the rental fee in an amount equal to the cost of remediation. The tenant would then bear the full expense of remedial action. (In such a situation, the landlord would be wise to seek an indemnification and hold harmless agreement from the tenant in order to protect it from negligent acts of the tenant during remediation.)

Alternatively, the landlord itself may effect the remediation, and the parties would retain the already agreed-upon rental fee.

This contingency imposes a confidentiality requirement upon the tenant and those who work for him. The reason for the requirement is that, if an adverse environmental condition were

discovered and made public, the publicity could thwart the landlord's ability to lease this or other property in the future. It could also injure landlord's reputation and sound the death knell for the landlord's chances of selling the property in the future.

The assessment can also be used as a bench mark. In other words, the assessment should show any existing conditions. As a result, a reasonable conclusion is that any conditions discovered in the future were caused by the tenant.

Finally, it should be noted that if an adverse environmental condition is discovered, the landlord may have a statutory obligation to remediate the problem under the Comprehensive Environmental Response, Compensation and Liability Act, 42 USC § 9601 et seq., and other federal and state laws, regardless of whether the lease is ever executed.

FORM

This Agreement is contingent upon the results of an environmental site assessment demonstrating that no evidence exists of a significant adverse environmental condition on or beneath the leased property, caused by past or present uses of the premises or releases of hazardous substances on the premises.

The environmental site assessment shall be performed by _____ [name] at the sole expense of Tenant. A copy of the assessment shall be provided to both Tenant and Landlord. Tenant agrees to maintain absolute confidentiality with regard to the contents of the assessment until Tenant has accepted possession of the premises from Landlord. Notwithstanding the foregoing, Tenant may provide a copy of the assessment to Tenant's lending institution and any party who will be involved in repairing or correcting any adverse environmental condition found. However, Tenant, in writing, shall instruct those with whom he provides a copy of the assessment of its confidential nature and of the obligation to maintain confidentiality.

Landlord consents to the taking of any samples deemed necessary or appropriate by the testing firm. Interior samples shall be taken with as little disruption or damage to the premises as possible. Exterior areas where samples of soil and/or water are taken shall be returned to their prior condition, at Tenant's expense.

This contingency shall be deemed waived unless Tenant shall notify Landlord, in writing, of the existence of evidence of a significant adverse environmental condition on or before _____ [month] _____ [day] _____ [year]. Notice shall be deemed given when received by Landlord, in person or by certified mail, return receipt requested. If notice is timely given, this Agreement shall be deemed canceled. In such case, all deposits made pursuant to this agreement shall be returned to the Tenant immediately.

As used herein, the term "hazardous substance" shall have the same meaning as defined and used in any of the following: the Comprehensive Environmental Response, Compensation and Liability Act, 42 USC § 9601 et seq.; the Resource Conservation and Recovery Act, 42 USC § 6901 et seq.; the Hazardous Material Transportation Act, 49 USC § 1801 et seq.; and the Toxic Substances Control Act, 15 USC § 2601 et seq., and the regulations promulgated thereunder.

The term "adverse environmental condition" shall mean any severe diminution in the quality or quantity of the air, water, soil or wildlife, including subsurface, anywhere on the leased premises.



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FORM 25.166 Guaranty

COMMENT

Any promises, representations or warranties made by a tenant are only as good as the creditworthiness of the tenant. If the tenant breaches the lease, the landlord will have a claim against the tenant. However, if the tenant is insolvent, the landlord will not be able to recover the damages. As a result, the landlord should inquire as to the financial wherewithal of the tenant.

If the tenant is a closely held company, the landlord may request that the owners of the tenants personally guaranty the obligations of the tenant. A prudent landlord may also require a personal guaranty even if the tenant is financially strong. This is because the finances of a closely held company are subject to manipulation by the owners. Owners can bleed a company by taking out excessive compensation or by paying excessive expenses. Requiring the owners to personally guaranty the obligations of the lease will require the owners to act prudently.

The same situation could arise in a parent-subsidary relationship. The subsidiary may enter into the lease. Again, if the subsidiary is not financially sound, the landlord may have difficulty in obtaining compensation for a breach of the lease. Therefore, a prudent landlord may require the parent company to execute and deliver a guaranty.

FORM

GUARANTY

THIS GUARANTY executed and delivered this ____ [day] day of _____ [month], ____ [year] by

_____ [name] (the "Guarantor") to _____ [name] ("Lessor").

WHEREAS, Lessor has executed a Lease (the "Lease") with _____ [name], a(n) _____ [state] corporation ("Lessee") dated _____ [month] _____ [day] _____ [year] with respect to certain property located at _____ [address]; and

WHEREAS, the Guarantor has agreed to execute and deliver this Guaranty to Lessor in order to induce Lessor to enter into the Lease;

NOW, THEREFORE, in consideration of the premises and other good and valuable consideration, the receipt and sufficiency of which are acknowledged, and to induce Lessor to forebear, and for good and other valuable consideration the receipt and sufficiency of which is hereby acknowledged by the Guarantor, the Guarantor does hereby agree with Lessor as follows:

1. The Guarantor, absolutely and unconditionally, guarantee to Lessor, its successors and assigns, and all subsequent holders of the interest of the Lessor under the Lease, the full and prompt performance of all obligations of Lessee thereunder, including, without limitation the payment of all sums owed to Lessor pursuant to the Lease, including, the rent and all other sums or charges now or hereafter due and payable under the Lease (the obligations guaranteed being hereinafter referred to as the "Obligations"). Upon failure of the Lessee to fulfill the Obligations, including any amounts due and payable under the Lease, when and as the same becomes due and payable and the same is not satisfied by the Lessee within the grace period, if any, provided in the Lease for the payment of the same, Lessor may, at its sole option, pursue the Guarantor for the Obligation not satisfied. Lessor shall not be obligated to proceed against, or exhaust any other remedies it may have under the Lease, or resort to any other security held by Lessor prior to enforcing the obligations of the Guarantor hereunder.

2. The Guarantor agree to promptly notify Lessor of any threatened or pending litigation, the outcome of which could have a material or adverse effect on the finances of the Guarantors.

3. The Guarantor acknowledges that he has an economic investment or interest in the Lessee, as a partner, shareholder, or otherwise, and an interest in the success of the Lessee, that he is making this Guaranty in his individual capacity; and that he shall remain liable hereunder whether or not he retains any financial interest in Lessee.

4. The obligations of the Guarantor under this Guaranty is absolute and unconditional, and shall remain in full force and effect until the Obligations shall have been paid in full. This Guaranty should not be construed to require Lessor to forebear with respect to any future defaults under the Lease.

5. The obligations of the Guarantor under this Guaranty shall not be affected, modified or impaired upon the happening of any event, including, without limitation, any of the following, whether or not with notice to or the consent of the Guarantor:

(a) The waiver, release or termination of any of the covenants, agreements or obligations of the Lessee under the Lease;

(b) The modification or amendment (whether material or otherwise) of any obligation, covenant or agreement as set forth in the Lease;

(c) Any failure, omission, delay or lack on the part of Lessor to enforce, assert or exercise any right, power or remedy conferred upon it in this Guaranty or in the Lease, or any other acts of omissions on the part of Lessor;

(d) The voluntary or involuntary liquidation, dissolution, sale or other disposition of all or substantially all of the assets of the Lessee, however affected, or receivership, insolvency, bankruptcy, assignment for the benefit of creditors,

reorganizations, arrangement, composition with creditors or readjustment or other similar proceedings affecting either the Lessee, the Guarantors, or any of the assets of any of them, or any allegation or contest of the validity of this Guaranty, or the Lease, or the disaffirmance of the Lease in any such proceeding;

(e) The invalidity, illegality or unenforceability of or any provision of the Lease; or

(f) Any other event or action that would, in the absence of this clause, result in the release or discharge by operation at law of the Guarantors or any Guarantor from the performance or observance of any obligation, covenant or agreement contained in this Guaranty.

6. Notwithstanding anything herein to the contrary, this Guaranty shall continue to be effective, or be reinstated, as the case may be, if at any time payment, or any part thereto, of any of the amounts secured hereunder is rescinded or must otherwise be restored or returned by the Lessor upon the insolvency, bankruptcy, dissolution, liquidation or reorganization of the Lessee, or upon or as a result of the appointment of a receiver, intervener or conservator of, or trustee or similar officer for, the Lessee or any substantial part of its property, or otherwise, all as though such payments had not been made. This Guaranty shall not be affected in any way by the transfer or other disposition of the Lease, whether by deed, operation of law or otherwise.

7. No setoff, counterclaim or reduction, no diminution of any obligation, and no defense of any kind or nature that a Guarantor has or may have against the Lessee, Lessor or any other Guarantor shall affect, modify or impair the obligations hereunder of any Guarantor.

8. The Guarantor hereby expressly waives, release and discharge, any and every right of exoneration, subrogation, contribution, reimbursement and indemnity whatsoever, and any and every right of recourse to security for the debts and obligations guaranteed hereby, whether against the Lessee, any other Guarantor or otherwise, and whether or not the Indebtedness has been paid in full. The Guarantor hereby indemnifies Lessor and agrees to defend and hold harmless Lessor from and against the loss, mitigation, subordination or other consequences adverse to Lessor by reason of this Guaranty being challenged as a preference or suffering any other subjugation under any bankruptcy or other law, whether state or federal, affecting debtors, creditors and/or the relationship between and among them. Without limiting the generality of the foregoing, any and all debts and obligations of the Lessee to the Guarantor whether past, present or future are hereby waived, satisfied and discharged.

9. The Guarantor hereby expressly waives notice in writing or otherwise from Lessor of Lessor's acceptance of and reliance on this Guaranty. The Guarantor agrees to pay for all costs, expenses and fees, including all reasonable attorneys' fees, which may be incurred by Lessor in enforcing or attempting to enforce this Guaranty against the Guarantor.

10. This Guaranty shall bind Guarantor, his heirs, executors, administrators, successors and assigns, and shall inure to the benefit of Lessor and its successors and assigns. The Guarantor's liabilities and other obligations under this Guaranty shall survive their death or legal disability.

11. If any clause or provision of this Guaranty is held illegal, invalid or unenforceable by any court, this Guaranty shall be construed and enforced as if such illegal, invalid or unenforceable clause or provision had not been contained herein.

12. This Guaranty is a guaranty of payment and not of collection and shall be deemed to be a Guaranty made under the laws of the State of Ohio and for all purposes shall be governed by and constructed in accordance with the laws of said State.

13. This Guaranty will survive the termination of the Lease and the Guarantor acknowledges that the Guarantor shall remain liable for any claims, damages or expenses incurred by the Landlord relating to Tenant's actions which are

discovered after the termination of the Lease, including, without limitation, any adverse environmental conditions covered by Tenant.

The Guarantor has caused this Guaranty to be executed and delivered to Lessor in _____ [city],
_____ [state], on the date first written above.

_____ [name]

Printed Name: _____

Social Security Number _____



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Current Legal Forms for Real Estate

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Current Legal Forms for Real Estate

Chapter 25 ENVIRONMENTAL CONSIDERATIONS IN REAL ESTATE TRANSACTIONS

Part IV. FORMS

C. LEASE OF REAL ESTATE

33-25 Current Legal Forms for Real Estate FORM 25.167

FORM 25.167 Guaranty--Short Form

COMMENT

The following is another form of guaranty.

FORM

GUARANTY

In consideration of the making of this Lease by the Lessor with the Lessee at the request of the undersigned and in reliance on this Guaranty, the undersigned hereby guarantees the payment of the rent to be paid by the Lessee and the performance by the Lessee of all the terms, conditions, covenants and agreements of the Lease the same as if the undersigned had executed this Lease as the Lessee. The Lessor's consent to any assignment or assignments, and successive assignments by the Lessee and Lessee's assigns, of this Lease, made either with or without notice to the undersigned, or a changed or different use of the Premises, or Lessor's forbearance, delays, extensions of time or any other reason whether similar to or different from the foregoing shall not release the undersigned from liability as a guarantor of this Lease, unless Landlord is released thereunder, in which case the undersigned guarantors shall also be released. This Guaranty will survive termination of the Lease.

Dated: _____ [month] _____ [day] _____ [year]

_____ [name]

Printed Name: _____

Dated: _____ [*month*] _____ [*day*] _____ [*year*]

_____ [*name*]

Printed Name: _____